Thro was hardly the first to predict an important role for state constitutional provisions, however. Much earlier, Justice Brennan had suggested that state constitutions can be a "font of individual liberties,"[139] and this may be particularly true in the realm of education.

Since 1971, plaintiffs in forty-five states[140] have challenged the constitutionality of their states' public school finance systems, arguing violations of the Fourteenth Amendment of the U.S. Constitution, the "equal opportunity clause" of their state constitution or the state constitution's education provision.[141] However, given the differences among them,[142] there is little uniformity in how courts interpret state education provisions.[143]

In addition to the linguistic categorization of education clauses, some commentators, Thro included, have sought to divide these school finance reform challenges into a sequential "three wave model."[144] During the first "wave," which is said to have begun with the California Supreme Court decision in *Serrano v. Priest*[145] in 1971, plaintiffs argued that wide disparities in educational funding were a denial of equal protection under the Fourteenth Amendment.[146] However, in 1973, the United States Supreme Court effectively ended this wave with its 5–4 decision in *San Antonio Independent School District v. Rodriguez.*[147] As a result, the most successful challenges have been based on state constitutional provisions, which some commentators have divided into two categories: "equity claims" and "minimum standards claims."[148]

Like the first wave, the second wave of school finance reform litigation focused on equity claims, but under state constitutional theories.[149] In 1973, in *Robinson v. Cahill,*[150] the New Jersey Supreme Court first gave major significance to a state education clause, declaring the state school finance system unconstitutional solely because it violated New Jersey's education provision.[151] Like many other second wave cases, *Robinson* had included state equal protection claims, which were relied on by the trial court but ultimately rejected by the state supreme court,[152] as the courts often denied claims that districts were constitutionally entitled to equal spending.[153] Since then, according to proponents of the "wave theory," there has been a gradual shift from "equality suits" to "quality suits," leading to the so-called third wave.[154] Third wave suits rely on the premise that children are constitutionally entitled "to an education of at least a certain quality."[155] This wave was said to have commenced in 1989 with successful suits in Kentucky, Montana, and Texas,[156] and has continued in New Jersey with *Abbott v. Burke.*[157] In truth, though, both educational adequacy and funding equity issues

have been integral components of litigation challenges styled as second or third wave cases, so both elements must be considered in drafting a constitutional education clause.

From the perspective of this huge body of state court litigation, time clearly has not been kind to Thro's 1993 categorization, at least if "strong" education provisions should lead to strong judicial and other constructions of those provisions, entitling students to high-quality education. In fact, there almost seems to be an inverse correlation—the weak and relatively weak provisions have led to more expansive interpretations than the relatively strong and strong provisions. A common Category II education quality standard—"thorough and efficient"—has led to a series of court decisions and educational mandates in New Jersey that many consider the most ambitious in the country. Since its 1990 decision in *Abbott v. Burke,* the New Jersey Supreme Court has successively ratcheted up the comprehensiveness and specificity of its orders in response to the failures of the other branches of state government to respond effectively.[158] According to the Education Law Center, legal representative of the 350,000 student plaintiffs, the *Abbott* legal framework includes:

- standards-based education driven by state content standards and supported by per-pupil funding equal to spending in successful suburban schools;
- education program comparability with suburban schools to emulate their "recipe for success";
- required and needed supplemental ("at-risk") programs "to wipe out student disadvantages," including well-planned, high quality preschool education for all three- and four-year-olds;
- comprehensive educational improvement to deliver the *Abbott* programs and reforms at the school site;
- new and rehabilitated facilities to adequately house all programs, relieve overcrowding, and eliminate health and safety violations; and
- state assurance of adequate funding and full, effective and timely implementation in districts and schools.[159]

This comprehensive framework evolved from the New Jersey Supreme Court's initial determination that "thorough and efficient" education requires "'a certain level of educational opportunity, a minimum level that will equip the student to become a

citizen and . . . a competitor in the labor market.'"[160] Of other states with a "thorough and efficient" education standard,[161] West Virginia had a major, expansive court decision[162] and Ohio's case invalidated the state's school finance law and initially resulted in a strong judicial enforcement order, from which the state supreme court recently retreated.[163]

Another weak standard—"efficient" education[164]—resulted in a Kentucky Supreme Court decision that, in a way, was even more ambitious than New Jersey's. The court basically invalidated Kentucky's entire education code and required the legislature to start over.[165] In doing so, the court ruled that an "efficient" education required students to possess at least seven capabilities:

- sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- sufficient knowledge of economic, social, and political systems to enable students to make informed choices;
- sufficient understanding of governmental processes to enable students to understand the issues, which affect their communities, state, or nation;
- sufficient self-knowledge and knowledge of their mental and physical wellness;
- sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each student to choose and pursue like work intelligently; and
- sufficient level of academic and vocational skills to enable public school students to compete on favorable terms with their counterparts in surrounding states, in academics or in the job market.[166]

Most recently, in New York a clause that Thro ranked in his weakest category led to a strong plaintiffs' victory in the state's highest court.[167] Without an explicit educational quality standard, the court still found that New York City students were entitled to a meaningful high school education, one that would equip them with the skills to be capable civic participants and productive workers in the twenty-first-century economy. According to the website of the Campaign for

Fiscal Equity, the nominal plaintiff, the state was given until July 30, 2004, to reform the current state funding system under a three-part remedial directive that requires the state to:

- ascertain the actual cost of providing a sound basic education in New York City;
- ensure that every school has the resources necessary for providing the opportunity for a sound basic education; and
- ensure a system of accountability to measure whether the reforms actually provide the opportunity for a sound basic education.[168]

By contrast with New Jersey, Kentucky, and New York, several states with "strong" educational quality standards, at least in the sense that they incorporate explicitly ambitious language, have not had successful litigation mandating improved education.[169] This is not because the other branches of government in those states had implemented substantial educational reforms without judicial goading. Florida's relatively recent addition of strong education clause language may provide an interesting new test of whether or not there is evidence of any significant positive linkage between strong educational quality standards and strong education reforms, whether court inspired or otherwise.[170] Beyond that, Florida's amended education provisions have been touted as a model. By declaring education a "fundamental value," characterizing the duty of providing it as "paramount," and defining it to include uniformity, efficiency, safety, security, and high quality,[171] Florida's constitutional amendment process considered and resolved many of the issues contemplated by this section, but not necessarily as others would do.

Of course, those who have identified a "new" wave of education litigation focusing on educational adequacy and based on state education clauses[172] are not completely wrong. Litigation emphasizing educational adequacy and education clauses has largely supplanted the much earlier litigation emphasizing equitable funding and equal protection doctrine.[173] They are wrong, however, in two respects—the degree to which they slough off very early cases, such as *Robinson v. Cahill,*[174] which were decided solely on the basis of state education clauses, and the degree to which they seek to bifurcate educational equity, or funding, and educational adequacy. All the successful cases have combined both aspects, although their emphases and legal theories may have been different.

This body of state education litigation has important implications for constitutional drafters. Although state courts hardly have been uniform in their interpretative approaches, and although decisions in one state lack authoritative precedential value in other states, still the accumulating body of case law provides a resource to drafters. In considering a particular qualitative standard, drafters must be aware and mindful of the judicial interpretations of that standard. If the interpretations, more often than not, have produced results that the drafters desire, then that constitutional formulation may be promising. Of course, the drafters can always incorporate language whose purpose is to assure a specific interpretation or mode of implementation by legislators and judges, but one lesson from Thro's experience may be that there are no guarantees how even the most directive language ultimately will be construed.

A final question to be dealt with in connection with an educational quality standard is whether the provision itself should specify how constitutional compliance would be determined. In other words, once a quality standard is identified, should compliance be measured by inputs, opportunity or outcomes. Most existing constitutional education provisions do not specify how compliance is to be measured. However, some contain fiscal, or input, mandates that occasionally are very specific.[175] Others focus on equality of educational opportunity, an opportunity or process approach.[176]

Where state educational clauses leave compliance unaddressed, state legislatures, departments of education and, ultimately, courts have been left with a substantial measure of discretion in that regard. Their responses, predictably, have varied. Some, especially those focusing on fiscal equity, have tended to emphasize an input-oriented approach, with dollar input or fiscal capacity as the prime criteria.[177] Others have emphasized educational opportunities, sometimes defining those in programmatic terms.[178] A few have opted for outcome measures. New Jersey may provide the best example. Even during the earliest stages of its litigation, when fiscal equity was still a dominant theme, the state courts were indicating that the measure of compliance with the "thorough and efficient" clause was whether students were receiving an education that would equip them to be effective citizens and competitors in the contemporary labor market—outcome standards.[179]

4. *Educational equality standard.* As with the educational **quality** standard, there is an issue about how educational **equality** should be measured and whether the constitutional provision itself should

specify. The most common approach, adopted by several state education provisions, is to opt for an opportunity measure.[180]

A set of other, interrelated issues relate to the content and coverage of the equality standard. Does it stress freedom from discrimination, equal access to schools and programs, or both? Does it protect specific categories of students from specified inequalities or is it more open-ended? Does it extend its protections beyond students?

In spite of the United States' history of de jure school segregation, only a surprisingly small number of state constitutions expressly bar segregation in the schools, typically as part of broader antidiscrimination provisions rather than education provisions.[181] A number of other state constitutions do provide in their education provisions that the schools will be "open to all."[182] Still others prohibit discrimination or guarantee access to students without regard to one or more of the following characteristics: race, color, caste, creed, religion, national origin, sex, or political beliefs.[183]

A number of state constitutions expressly extend their equality protections beyond students to teachers.[184]

5. *Educational funding.* From the earliest days of state constitutional education clauses, public funding of the schools has been a major focus. The funding provisions raise a number of different types of issues, including: the degree to which they should expressly dovetail with, or implement, the educational quality or equality standards; the extent to which the locus of revenue-raising responsibility should be state or local; whether equality of tax burdens should be assured; and whether provision should be made for scholarships or other higher education assistance.

As to the relationship between funding and educational quality or equality provisions, in a number of state constitutions the education clauses actually are placed in the finance articles, suggesting a substantial interrelationship.[185] Some education clauses set forth the relationship or the funding level in general terms;[186] others are quite specific.[187] There also are a number of provisions that deal with the equitable nature of school funding,[188] minimum funding levels,[189] and proportional distribution of funding.[190]

As to the locus of fund-raising responsibility, only Hawaii can claim to be a full-state-funded jurisdiction; the rest rely on a combination of state and local revenue, although the respective proportions differ greatly.[191] A few state constitutions make the shared responsibility explicit;[192] most do not.[193] Many state constitutions provide for the establishment and perpetuation of permanent, protected endowments or trust funds for public schools,

either at the state or local level or both,[194] often accompanied by specifications regarding funding sources,[195] investments,[196] and use.[197] If the fund is depleted, especially by an unconstitutional act, the provision may require that the legislature approve a special appropriation or assume the amount deducted as a debt to be paid back into the fund.[198]

As to equality of tax burdens, despite the virtually universal acceptance of the proposition that education is a state function and the existence of tax uniformity provisions in many state constitutions, taxpayer complaints about unequal tax burdens from district to district have usually fallen on deaf judicial ears. Illustratively, in New Jersey's first school funding decision, an early trial court opinion, the finance system was found to be in violation of the state's tax uniformity provision, but the state supreme court quickly overruled.[199] Interestingly, in several states local taxpayers did succeed in challenging school funding equalization efforts that included state recapture of some locally raised school tax revenue.[200]

As to higher education financial assistance, a number of state constitutions make some provision.[201]

6. *Educational prohibitions/limits.* One relatively common prohibition has already been discussed—the prohibition against segregation or other invidious discrimination in the public schools. A second one, far more common, is the prohibition against sectarian instruction in the public schools, the use of public funds for sectarian purposes, or both. Nearly every state constitution contains such a prohibition, either as part of its education provisions or elsewhere.[202]

   Because of the age and pervasiveness of these provisions, until recently they were seldom challenged or seriously at issue. However, that has begun to change as a result of the United States Supreme Court's recent decision in the *Zelman* case.[203] With some commentators interpreting *Zelman* as a broad validation of education vouchers under the federal constitution, the focus is shifting to state constitutions and their prohibitions of public funding of private and sectarian schools.[204] Some have argued that state prohibitions might even run afoul of the newly articulated federal doctrine. Obviously, this issue is closely related to another issue—the scope of parental and student rights to educational choice—still to be discussed.

7. *Provision of ancillary educational services, materials, and teachers.* The most common state constitutional clauses in this area involve textbooks. Some simply authorize the provision of free textbooks.[205] Others either provide for, or proscribe, state-created textbook lists.[206]

8. *Locus of responsibility for education.* In every state, education ultimately is a state function and responsibility. Therefore, education provisions typically repose constitutional power and duty in either the "state"[207] or its legislature.[208] Beyond such threshold provisions, however, some state constitutions deal with the administration of public education, both at the state and local levels. At the state level, a significant number of constitutions provide for the election or appointment and membership of a state board of education,[209] and for its powers and duties.[210] A much smaller number of states make constitutional provision for a state superintendent of education or public instruction.[211]

   Some states also give constitutional status to local school districts and boards of education. They do so in several different ways, however. Some authorize, but do not require, the establishment of county or local boards.[212] Others mandate the establishment of local districts and boards, but do not specify their powers and duties.[213] Still others both mandate the establishment and specify the powers and duties of county or local boards.[214] A few even provide for the appointment of county or local superintendents.[215]

   A final issue regarding the locus of educational responsibility has not yet found its way directly into state education provisions,[216] but must now be considered. It has to do with the role of parents and families in the education of their children. Under the federal constitution, parents have long been accorded the right to choose to educate their children outside of the public schools, despite compulsory education statutes.[217] As previously indicated, the *Zelman* decision has further expanded parental rights, albeit in a specialized context.[218] Similarly, the federal No Child Left Behind Act has endorsed parental choice, primarily in the public schools.[219]

   In some quarters, momentum surely is building for even more expansive parental choice in education, and state constitutional amendments are one vehicle for accomplishing that. The effort might involve repeal or judicial invalidation of long-standing state constitutional prohibitions against public funding of private or sectarian schools. It might alternatively or additionally focus on the adoption of amendments expressly recognizing parental choice in education. In states such as New Jersey, the picture is complicated by strong judicial pronouncements about the constitutional inviolability of urban education reform mandates.[220] If expanded school choice were determined to be incompatible with thoroughgoing reform of urban schools, a clear constitutional tension would be created.

9. *Enforceability of education rights.* In the spirit of constitutions being written for the ages, most state education provisions do not specify whether they are intended to accord students or others with positive rights to a certain quantum of education that can be enforced through the courts. This fundamental interpretive question, therefore, has been left to the courts, and, from state to state, the answer has differed both about judicial enforceability itself and about the quantum. In a few cases, when the courts' answer aroused sufficient opposition, and the constitutional amendment process was relatively easy, changes were effected, usually to limit the judicial role or authority.[221] Interestingly, there has been no broad-based effort to overturn by constitutional amendment court decisions finding no judicially enforceable educational rights. Florida's 1998 educational amendments may constitute an exception, though, since they were, at least in part, a response to a judicial decision that the state's constitution did not specify an educational quality standard. Additionally, after an Illinois court rejected challenges to that state's school finance system, the Governor's Commission on Education Funding presented a plan for education funding reform, which included "a proposal to amend [the Illinois] constitution by setting an education funding foundation level and mandating that the state pay 50 percent of this amount."[222] The entire report was rejected almost immediately by the state legislature.[223]

The drafter of any education clause will have to decide whether the current state of affairs in this regard, with its attendant uncertainty and unpredictability,[224] is preferable to imbedding in the state constitution express language designed to answer difficult and controversial questions such as the following:

- Should an enforceable right to a certain level of education or educational funding be created?
- If so, for whom should such a right be created?
  - Parents?
  - Students?
  - Taxpayers?
- How should such a right be enforced?
  - What role, if any, should the judiciary play in enforcement?
  - How much deference should be shown to the legislature's judgment of adequacy or constitutional compliance?
  - What remedy should be available to successful litigants?

CONCLUSION

It is tempting to say that a major problem of the past thirty years is that state governments overwhelmingly have sought to use ninetheenth-century education clauses to deal with twentieth- and twenty-first-century education problems, and that it would be preferable to have more current and more responsive provisions available. That presupposes, of course, that clauses work better if they are specifically devised to address contemporary education issues. It exalts specificity over the "constitution for the ages" ideology. It assumes that state constitutions can and will be amended, as necessary, to address new issues or new variations of old issues. It assumes that we have the ability to embody in a constitutional clause workable solutions to complex, multifaceted educational, and often social, problems. It assumes that those responsible for implementing such constitutional clauses do so fully and effectively, or can be forced to do so if they fail to act of their own volition.

The risks of such an approach are plentiful, however. Constitutions can become cluttered with solutions de jour, and prove more resistant to change than expected. Perhaps we will need to develop the constitutional equivalent of software designed to purge your computer of outmoded old programs. Or, we might discover that specificity is more appealing in principle than in practice, and that specific "solutions" turn out to create more problems than they solve.

Perhaps, after we have gone through the process outlined in this chapter of identifying, consulting and applying education clause "best practices," we can decide with some confidence how best to proceed. Of two things, however, we can be certain—the future will hold no fewer challenges than the past 200 years and the importance of providing American students with high-quality education will continue to be of paramount concern to state and national governments, whether or not they incorporate those words into their state constitutions.

NOTES

1. Herbert, Adam W., "The 2002 Florida Elections: Implications for Public Education" 1, ECS Governance Notes (Jan. 2003), available at http://www.ecs.org/clearinghouse/42/10/4210.htm. An even more recent survey canvassed respondents about national priorities, and education topped the list with 55 percent, almost double the percentage of "terrorism and security." Public Education Network and Education Week, "Demanding Quality Public Education in Tough Economic Times: What Voters Want from Elected Leaders" 3 (2003).

2. In addition, for the sixteen newest states, education provisions were mandated for entrance into the Union. Matthew H. Bosworth, *Courts as Catalysts: State Supreme Courts and Public School Finance Equity* 34 (2001).

3. David Tyack, Thomas James, and Aaron Benavot, *Law and the Shaping of Public Education, 1785–1954,* 55 (1987).

4. 347 U.S. 483 (1954).

5. *See* Frank S. White, *Constitutional Provisions for Differentiated Education* 9–27 (1950).

6. The eleven states were South Carolina, Virginia, Maryland, New York, Kentucky, Tennessee, Louisiana, Illinois, Virginia, Rhode Island, and New Jersey.

7. *See* John C. Eastman, "When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900," 42 *Am. J. Legal Hist.* 1, 3 (1998). However, during this early period, no state legislature actually established common schools in accordance with its constitution. Ibid. at 8. Beginning early in the nineteenth century, two other types of education provisions began to appear in state constitutions: federal land grant provisions and provisions establishing state public school funds.

8. Mass. Const. of 1780, chap. V, § 2. *See also* N.H. Const. of 1784, art. 83.

9. Eastman, supra note vii, at 6–7 (citing *Roberts v. The City of Boston,* 59 Mass. (5 Cush.) 198 (1849)).

10. Ohio Const. of 1802, art. VIII, § 3. *See also* Miss. Const. of 1817, art. VI, § 16 ("Religion, morality and knowledge being necessary to good government, the preservation of liberty, and the happiness of mankind, schools, and the means of education, shall forever be encouraged. in this state.")

11. Pa. Const. of 1776, § 44.

12. Ga. Const. of 1777, art. LIV.

13. Vt. Const. of 1786, art. XXXVII.

14. Ind. Const. of 1816, art. IX, § 1. *See also* Cal. Const. of 1849, art. IX, §§ 1–4.

15. Education Commission of the States, "The Invisible Hand of Ideology" 4 (1999), available at http://www.ecs.org/ecsmain.asp?page=/search/default.asp.

16. Kern Alexander, "The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case," 28 *Harv. J. on Legis.* 341, 356 (1991).

17. Ohio Const. of 1802, art. VIII, § 25 ("That no law shall be passed to prevent the poor in the several counties and townships, within this State, from an equal participation in the schools, academies, colleges and universities within this State, which are endowed, in whole or in part, from the revenue arising from donations made by the United States, for the support of schools, academies and universities, shall be open for the reception of scholars and students and teachers, of every grade, without any distinction or preference whatever, contrary to the intent for which said donations were made.").

18. Conn. Const. of 1818, art. VIII, § 2. Substantially later in the nineteenth century, this theme was embraced by a number of other states. For example, the Nebraska Constitution of 1875 stated that "[p]rovisions shall be made by general law for an equitable distribution of the income of the fund set apart for the support of the common