87. *See* Cal. Const., art. I, § 31 (1996).

88. *See* Ky. Const., § 187 (1996) ("In distributing the school fund no distinction shall be made on account of race or color."); § 180 (1996).

89. *See* Ala. Const., amend. 670 (2000) (details composition of the Board of Trustees of Auburn University); Okla. Const., art. X, § 23 (2000) (allows state colleges and universities to make contracts with presidents for more than one year, but not more than three years); Haw. Const., art. X, § 6 (2000) (grants the University of Hawaii authority and power of self-governance in matters involving only internal structure and operation of the university); Fla. Const., art. IX, § 7 (2002) (creates "a single state university system comprised of all public universities" as well as a "board of trustees [to] administer each public university and a board of governors [to] govern the state university system.").

90. *See* Fla. Const., art. IX, § 1 (1998) (declaring public education to be a "fundamental value" and making it "a paramount duty of the state to make adequate provision for the education of all children residing within its borders"; mandating "[a]dequate provision . . . for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education"); Fla. Const., art. IX, § 2 (1998) (providing for membership, appointment and term of state board of education, and its authority to appoint commissioner of education); Fla. Const., art. IX, § 4 (1998) (specifying that electors of each school district shall vote for its local school board "in a nonpartisan election"); Fla. Const., art. IX, § 5 (1998) (amending language to delete the gender-specific pronoun "he" in referring to school superintendent position); Fla. Const., art. IX, § 1 (2002) (providing for "[e]very four-year old child . . . a high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program which shall be voluntary, high quality, free, and delivered according to professionally accepted standards," to be "implemented no later than the beginning of the 2005 school year through funds generated in addition to those used for existing education, health, and development programs"); Fla. Const., art. IX, § 1 (2002) (mandating reduced class size).

91. *See* Louisiana, Constitutional Amendment 8 (2002), available at http://www.sec.state.la.us/elections/2002-ca.htm (proposed to authorize institutions of higher education or their management boards to invest in stocks up to 50% of certain funds received from gifts, grants, endowments and other funds); Nevada, Question 7 (2002), available at http://sos.state.nv.us/nvelection/2002_bq/bq7.htm (proposed to extend the debt limit for the purposes of school construction or improvements); Oklahoma, State Question 684 (2000) (proposed to change how the state may use the permanent school fund); California, Proposition 26 (2000), available at http://primary2000. ss.ca.gov/VoterGuide/Propositions/26text.htm (proposed to lower the voting requirement for passage of local school bonds); California, Proposition 38 (2000), available at http://vote2000.ss.ca.gov/VoterGuide/text/text_title_summ_38.htm (proposed to authorize annual state payments of at least $4,000 per pupil for private and religious schools phased in over four years); Michigan, Proposal 00-1 (2000), available at http://www.michigan.gov/sos/0,1607,7-127-1633_8722_14689-31515—,00.html (proposed to eliminate the ban on direct support of students attending nonpublic schools through tuition vouchers, credits, tax benefits, exemptions or deductions,

subsidies, grants or loans of public monies or property, and to require teacher testing on academic subjects in pubic schools and nonpublic schools redeeming tuition vouchers); Colorado, Amendment 17 (1998), available at http://www.state.co.us/gov_dir/leg_dir/lcsstaff/ballot/text-17.htm (proposed to create a state income tax credit for parents of students in private and public schools, and students educated at home, and to prohibit the state from using the measure to increase regulations on private schools); South Dakota, Constitutional Amendment A (1998) (proposed to prohibit using property taxes for public school purposes); South Dakota, Constitutional Amendment F (1998) (proposed to permit an unlimited number of classes of agricultural property for school taxation purposes); Oregon, Measure 59 (1998) (proposed to prohibit using "public funds" to collect or assist in collecting "political funds"); Arkansas, Amendment 7 (1996) (proposed to allow for the creation of a state-run lottery and to establish the Arkansas Education Trust Fund, to be funded with some gaming proceeds); Nebraska, Measure 412 (1996) (proposed to allow limits on property-tax rates).

92. *See* Colorado, Amendment 17 (2002), available at http://www.state.co.us/gov_dir/leg_dir/96bp/amd17.html (proposed to amend art. II, § 3 of the Colorado Constitution to include as an inalienable right the right of parents to direct and control the upbringing, education, values, and discipline of their children."); Colorado, Amendment 31, available at http://www.rmpbs.org/campaign2002/i_a31.html (proposed to require that all public school students be taught in English); Oregon, Measure 95 (2000) (proposed to add a provision to change the method by which all public school teachers, whether or not in a collective bargaining unit, are paid and laid off, and to define job performance as the degree to which the appropriate knowledge of the teacher's students increased while under that teacher's instruction); North Dakota, Constitutional Measure 1 (1998) (proposed to remove references to the names, locations, and missions of the institutions of higher education); Nebraska, Measure 411 (1996) (proposed to make "quality education" a fundamental right and the "thorough and efficient" education promised in the state constitution the paramount duty of the state); Montana, Amendment 30 (1996) (proposed to replace the state board of education, board of regents and commission of higher education with one state education dept and a single education commissioner).

93. All of South Dakota's amendments, four adopted and two rejected, were fiscal in nature. Two were of some note, one successful—requiring a two-thirds legislative vote to increase taxes—and one unsuccessful—seeking to prohibit the use of property taxes for education. *See* notes lxxxviii and xciii supra.

94. Two of Colorado's five proposed amendments, both fiscal in nature, were adopted, and one was of note, requiring a minimum increase in educational funding. The three amendments rejected suggest an interesting educational perspective since they proposed English-only instruction, an inalienable parental right to educate, and a tax credit for education that could not be used to increase state authority over private schools. *See* notes lxxxviii and xciv supra.

95. Four out of five proposed amendments in Oklahoma passed. They related to higher education administration and to fiscal matters, and one was noteworthy, allowing individual school districts to eliminate annual votes on school levies with approval from local voters. The failed amendment also was fiscal in nature. *See* notes lxxxviii, xci and xciii supra.

96. Three of five proposed amendments in Oregon passed. They were all fiscal in nature, and one was especially noteworthy, requiring the legislature to provide enough school funding to meet state education quality goals, or to publish a report explaining why it was unable to do so. One of the failed amendments also was of special interest; it would have changed the method by which public school teachers are paid and laid off—to have student learning determine teacher pay and to have teacher qualifications, not seniority, determine retention. *See* notes lxxxviii, xciii, and xciv supra.

97. Two out of four proposals in California passed. One successful amendment was fiscal and the other barred most affirmative action programs. Both failed measures also were fiscal, one relating to school vouchers and state funding of private schools. *See* notes lxxxviii, lxxxix, and xciii supra.

98. All three of Hawaii's proposed amendments passed. Two were fiscal, one relating to issuance of bonds to provide financial assistance to private schools, and the third related to higher education governance. *See* notes lxxxviii and xci supra. Nebraska and Arkansas, with two proposals each, were the only other states with more than a single proposed amendment. Both of Nebraska's proposed amendments in 1996 failed, and both were interesting, if inconsistent, responses to equity/adequacy litigation. Measure 411, like Florida's 1998 amendments, would have made "quality education" a fundamental right, and the constitutionally required "thorough and efficient" education a paramount duty of the state. Measure 412, like California's infamous Proposition 13, would have allowed limits on property tax rates. *See* notes xciii and xciv supra. Ironically, Arkansas voters passed a proposal, which was the converse of Nebraska's failed Measure 412, to establish a uniform *minimum* property tax rate to benefit schools. Its other proposed amendment, seeking to create a state-run lottery and establish the Arkansas Education Trust Fund, to be funded with gaming proceeds, was judicially excluded from the ballot. *See* notes lxxxviii and xciii supra.

99. As the state-by-state breakdown suggests, some states with a substantial number of proposed amendments included little of note. In some cases, proposals within a single state were inconsistent with one another, suggesting they may have been responses to diverse political pressures, rather than a reflection of educational best practices.

100. Fla. Const., art. IX, §§ 2 (changed appointive procedures for state board of education), 4 (specified nonpartisan election for local school boards), and 5 (made references to superintendent of schools gender neutral).

101. Fla. Const., art. IX, § 1 (1998).

102. *See,* for example, Daniel Gordon, "Failing the State Constitutional Education Grade: Constitutional Revision Weakening Children and Human Rights," 29 *Stetson L. Rev.* 271 (1999).

103. Fla. Const., art. IX, § 1(a) (setting maximum class size for prekindergarten through grade 3 at 18 students, for grades 4 through 8 at 22 students, and for grades 9 through 12 at 25 students, "[t]o assure that children attending public schools obtain a high quality education").

104. *See* Goodnough, "Florida Board Backs Retreat on Class Size," *New York Times,* Aug. 20, 2003. Interestingly, all the Board's members were appointed by Gov. Jeb Bush, who opposed the original constitutional amendment.

105. Fla. Const., art. IX, § 1(b) ("Every four-year old child in Florida shall be provided by the State a high quality pre-kindergarten learning opportunity in the form of an early childhood development and education program.").

106. The word *model* is placed in parentheses advisedly because the thrust of this chapter, indeed of the entire volume of which it is a part, is not really to produce a "model," in the usual sense of the word. Webster's dictionary defines a "model" as a "pattern, or standard of excellence." *Webster's New World Dictionary* 913 (2d ed., 1978). The Oxford dictionary defines it as a "thing regarded as excellent of his/its kind and worth imitating" or as "one that has been specially designed to be very efficient." *Oxford Advanced Learner's Dictionary* 797 (4th ed., 1989). These definitions suggest that drafting a "model" state constitutional education provision to serve as a "standard of excellence" and efficiency, to be "worth imitating," would be laudable. Yet, as a practical matter, seeking to produce a single model that could be adopted in each of the fifty states is impossible. To be a meaningful model, such a provision would have to consider and account for an extraordinarily complex and variable set of circumstances in each state derived, among others, from history, custom, politics, intergovernmental relations, state judicial traditions and state constitutional interpretation. The risk is that a "model," seeking to be sensitive to such complexity and variability, would wind up being either too detailed and unwieldy, or too general and unresponsive. Therefore, this chapter's focus is on the range of issues that must be considered in evaluating the effectiveness of state constitutional education provisions to respond to current needs, and the range of alternative approaches.

107. For some interesting musings on this subject, *see,* for example, National Municipal League, *Model State Constitution,* vii–viii (sixth ed., 1963; rev'd 1968).

108. An additional threshold question might be whether or not there should even be an education clause, but given the importance ascribed to education and the pervasiveness of education provisions in existing state constitutions, that question hardly seems to merit more than this brief note.

109. "The oldest constitutions are generally the shortest and the least amended. All those now effective that date from before 1850 are substantially shorter than the average length of all state documents. The most recently written state constitutions are usually far shorter than the average. All state documents formulated and adopted within the last two decades [of 1969] have fewer than 20,000 words, and most of them contain less than 15,000." Albert L. Sturm, *Thirty Years of State Constitution-Making: 1938–1968* 15 (1970). So, as of 1969, Alabama's constitution, adopted in 1901, had a total of 284 amendments, with an estimated length of 95,000 words. Ibid. at 7. Similarly, the notorious Louisiana constitution, adopted in 1921, had 530 amendments and an estimated word length of 253,800 by 1969. Ibid. at 8. In 1974, following a constitutional convention, Louisiana adopted its present constitution, with an estimated length of 51,448 words. Janice C. May, "State Constitutions and Constitutional Revision 1992–93," in *The Book of the States 1994–95* 19 (1995). On the other hand, Alaska's constitution, adopted in 1956, had two amendments as of 1969, and an estimated length of 12,000 words. Ibid. at 7. Connecticut is another example. Its constitution, adopted in 1965, by 1969 not surprisingly had zero amendments and an estimated length of 7,960 words. Ibid.

110. *See* California, Secretary of State, "A History of California Initiatives" (Dec. 2002), available at http://www.ss.ca.gov/elections/init_history.pdf_, for an explanation of California's initiative process, which began in 1911, and a partial list of proposals relating to education. Since 1960, "initiative measures have appeared on primary, general, and special election ballots." Ibid. at 2. Voters have approved a constitutional amendment regarding the school system (1920), funds for elementary schools (1944), public school funds (1952), property tax limitation (1978), prohibition of affirmative action programs by public entities (1996), English language instruction (1998), school facilities (2000). In the context of school finance measures, California voters have approved constitutional amendments in 1978, 1979, 1988, and 1990, engaging in a dance with the legislature and *court*. "School Finance Overview," available at http://nov2002.sanmateo.org/background.htm (Sept. 2002) (summarizing briefly, and chronologically, actions taken by the California legislature, court and voters since 1972, changing that state's school finance system). In 1978, voters passed Proposition 13, limiting property tax rates; in 1979, Proposition 4, limiting government spending at every level, including school districts; in 1988, Proposition 98, "guarantee[ing] a minimum funding level from state and property taxes for K–14 public schools in a complex formula based on state tax revenues"; and in 1990, Proposition 111, which effectively raised the limit established by Proposition 4. Ibid. There has been substantial criticism of California's initiative and referendum system, precisely because of the ease with which it allows constitutional amendments. *See,* for example, Kevin M. Mulcahy, Comment, "Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn," 40 *Santa Clara L. Rev.* 863 (2000).

111. Fla. Const., art. XI, § 2.

112. Little, supra note lxviii, at 485.

113. Ibid.

114. *See,* for example, Paul G. Kauper, Citizens Research Council of Michigan, *The State Constitution: Its Nature and Purpose* 10 (1961); A. E. Dick Howard, "The Indeterminacy of Constitutions," 31 *Wake Forest L. Rev.* 383, 393 (1996) (averring that "American state constitutions offer vivid examples of the vices of excessive length and detail" and that "[r]ather than produce a constitution that looks like the state's code, drafters may prefer general propositions, even if that means a heightened need for interpretation."); Lawrence Schlam, "State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation," 43 *DePaul L. Rev.* 269, 277–81, 278 n 18 (1994) (noting that the ease with which state constitutions can be amended has resulted in lengthy and detailed state constitutions, such that "almost all state constitutions contain extraordinary amounts of detail which seem absurd or superfluous" and that such detail inhibits effective state governance"). But *see* Christopher W. Hammons, "State Constitutional Reform: Is It Necessary?," 64 *Alb. L. Rev.* 1327, 1341 (2001) (suggesting that "the greater length and detail of modern state constitutions allow states to tailor constitutions to meet their specific needs."); G. Alan Tarr, "Understanding State Constitutions," 65 *Temple L. Rev.* 1169, 1182–83 (1992) (explaining that while "virtually all state constitutions contain numerous provisions that, in their detail and specificity, can only be called 'statutory,'" this phenomenon partly

"reflects the efforts of political majorities to write their policies into the fundamental law in order to shield those policies, insofar as possible, from change by future majorities," and that rather than look down on the so-called statutory provisions, perhaps "the dual character of state constitutions would seem to require a dual approach to their interpretation.") Interestingly, the New York Court of Appeals pointed to the detailed nature of the state constitution as reason for minimizing the import of its education clause, explaining that "the document concededly contains references to matters which could as well have been left to statutory articulation." *Board of Education v. Nyquist,* 439 N.E.2d 359, 366 n.5 (N.Y., 1982.) *See also* Robert A. Schapiro, "Identity and Interpretation in State Constitutional Law," 84 *Va. L. Rev.* 389 (1998).

115. *See,* for example, *Cal. Const.,* art. 1, § 31 ((a) "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting . . . (h) This section shall be self-executing."); and N. Car. Const., art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.").

116. *Compare,* for example, *Helena Elementary Sch. Dist. No. 1 v. State,* 769 P.2d 684, 690 (Mont., 1989) ("specifically conclud[ing] that the guarantee of equality of educational opportunity applies to each person of the State of Montana, and is binding upon all branches of government whether at the state, local, or school district level.") *with City of Pawtucket v. Sundlun,* 662 A.2d 40, 47–48 (R.I., 1995) (rejecting the lower court's finding "'that there is a fundamental and constitutional right for each child to an opportunity to receive an education,'" and instead declaring that "[t]he education clause confers no such right, nor does it guarantee an 'equal, adequate, and meaningful education.'"). *See* supra note lxxiv, regarding the stance taken by the New Jersey Supreme Court and the Rhode Island high court's colorful criticism of it.

117. For example, in *Bennett v. City School District of New Rochelle,* 114 A.D.2d 58, 61–62 (N.Y.A.D., 1985), a New York appellate court considered whether the state could be compelled to admit petitioner into the state's full-time program for gifted elementary students, after she was found eligible but then failed to gain a spot after the lottery was drawn. The court upheld the lottery system and found that the "sound basic education" that the Court of Appeals had connoted "education" in the state constitution to mean "was never intended to impose a duty flowing directly from a local school district to individual pupils to ensure that each pupil receives a minimum level of education, the breach of which duty would entitle a pupil to compensatory damages." Ibid. at 67. Similarly, in *Agostine v. School District of Philadelphia,* 527 A.2d 193, 195 (Pa. Commonw. Ct., 1987), the court found that petitioner failed to state a cause of action when she "alleged that the District negligently diagnosed her," and sought damages. The court found that the education provision of the state constitution "does not confer an individual right upon each student to a particular level or quality of education but, instead, imposes a duty upon the *legislature* to provide for the maintenance of a thorough and efficient system of public school throughout the Commonwealth." Ibid. at 195. In *Pierce v. Board of Education of City of Chicago,* 370 N.E.2d 535, 536 (Ill., 1977), the plaintiff sued for damages after "he suffered severe and permanent emotional injury requiring hospitalization and medical treatment"

when the board "refused to place the plaintiff in a special education class," despite diagnosis of a learning disability. In declining to find a cause of action, the court held that the education clause is not self-executing and "does not impose a duty on boards of education to place students in special education classes." Ibid. In *Simmons v. Sowela Technical Institute,* 470 So.2d 913, 916 (La. Ct. App., 1985), the court rejected plaintiff's suit challenging her dismissal from a practical nursing program based on unethical conduct. In doing so, the court found that "the constitutional mandate to educate the people of the State . . . is a moral or imperfect obligation; rather than a natural obligation." Ibid. at 920. In contrast, courts have generally found their education provisions to be self-executing and enforceable when faced with challenges to school finance, requiring systemic reform.

118. *See,* for example, *Alabama Coalition for Equity, Inc. v. Hunt,* 624 So.2d 107 (Ala., 1993) (affirming "that Alabama schoolchildren have an enforceable constitutional right to an education," and requiring the legislature to follow the trial court's order for remedial action); *Tennessee Small School Systems v. McWherter,* 851 S.W.2d 139 (Tenn., 1993) (finding that the education clause of the state constitution "is an enforceable standard for assessing the educational opportunities provided in the several districts throughout the state."); *Abbeville County School District v. State,* 515 S.E.2d 535 (S.C., 1999) (holding that the education provision, which employs the term "shall," is mandatory and "requires the General Assembly to provide the opportunity for each child to receive a minimally adequate education."); *Spackman v. Board of Education of Box Elder County School District,* 16 P.3d 533 (Utah, 2000) (holding that "the Open Education Clause [which] requires that the public education system 'shall be open to all children of the state' . . . is self-executing" and allowing for damage awards in certain circumstances). But *see Lewis E. v. Spagnolo,* 710 N.E.2d 798 (Ill., 1999) (rejecting plaintiffs' argument that the education clause "grants them the right to a 'minimally adequate education,'" and barring them from "su[ing] state and local officials directly under this article for deprivation of that right").

119. This is, of course, a positively stated version of the prohibition against segregation or other discrimination, which appears subsequently.

120. Rights or interests characterized as "fundamental" are accorded the greatest protection under both the federal constitution and many state constitutions. In devising its 1998 education clause proposal, Florida's Charter Revision Panel used the word "fundamental," but imbedded it in the phrase "fundamental value" rather than "fundamental right." Tony Doris, "Little-Noted Lawsuit Says State Fails to Meet Constitutional Duty to Provide High-Quality Education," 48 *Miami Daily Bus. Rev.* No. 243 (May 24, 2002). This reportedly was done out of concern that using the "fundamental right" formulation could impose "too severe of a burden on school districts and the state, [because it] might ultimately make their actions subject to strict judicial scrutiny with regard to litigation by individuals." Ibid. By contrast, "fundamental value" was thought to focus more generally, and less actionably, on the education system and its adequacy. Mills and McLendon, supra note lxvii, at 365 (quoting *Abbott v. Burke,* 575 A.2d 359, 369 [N.J., 1990]).

121. *See,* for example, Wash. Const., art. IX, § 1 ("paramount duty"); Fla. Const., art. IX, § 1 ("fundamental value"); Ga. Const., art. VIII, § 1 ("primary obligation").

122. *See,* for example, La. Const., art. VIII, preamble ("The goal of the public educational system is to provide learning environments and experiences, at all stages of human development, that are humane, just, and designed to promote excellence in order that every individual may be afforded an equal opportunity to develop to his full potential"); Fla. Const., art. IX, § 1 ("The education of children is a fundamental value . . . It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders."); Geo. Const., art. VIII, § I, par. I ("The provision of an adequate public education for the citizens shall be a primary obligation of the State"); Ill. Const., art. X, § 1 ("A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities."); Kan. Const., art. 6, § 1 ("The legislature shall provide for intellectual, educational, vocational and scientific improvement"); Md. Const., art. VIII, § 1 ("The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools"); Minn. Const., art. XIII, § 1 ("it is the duty of the legislature to establish a general and uniform system of public schools. The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."); Mont. Const., art. X, § 1 ("It is the goal of the people to establish a system of education which will develop the full educational potential of each person."); N.J. Const., art. VIII, § IV, par. 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools."); Pa. Const., art. III, § 14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education.").

123. For example, in New Jersey, a concurrent resolution was introduced seeking to amend the constitution to prohibit the State from regionalizing school districts to meet the goals of the education clause. "Education for All—Facing the Challenges of New Jersey's Public School System," at http://www.princeton.edu/~lawjourn/Fall97/II1morley.html (last visited Apr. 14, 2003). For a brief survey of discussed and proposed constitutional amendments relating to education and the school finance system in New Jersey, see Tractenberg, supra note lxxiv, at 938–40.

124. *See,* for example, Ala. Const., art. XIV, § 256 (ages 7 to 21); Ariz. Const., art. XI, § 6 (ages 6 to 21); Ark. Const., art. XIV, § 1 (ages 6 to 21, with authorization for legislature to expand); Colo. Const., art. IX, § 2 (ages 6 to 21); Idaho Const., art. IX, § 9 (ages 6 to 18); Neb. Const., art. VII, § 1 (ages 5 to 21); N.J. Const., art. VIII, § IV, par. 1 (ages 5 to 18); N.M. Const., art. XII, § 1 ("all the children of school age"); Va. Const., art. VIII, § 1 ("all children of school age"); Wis. Const., art. X, § 3 (ages 4 to 20); Wyo. Const., art. VII, § 9 (ages 6 to 21, also includes specified educational range in Wyo. Const., art. VII, § 1).

125. *See* Ga. Const., art. VIII, § 1, par. 1 ("Public education for the citizens prior to college . . . shall be free."); Ill. Const., art. X, § 1 ("Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law"); Mich. Const., art. VIII, § 2 ("free public elementary and secondary schools as defined by law"); Mont. Const., art. X, § 1 (elementary and secondary); N.D. Const., art. VIII, § 2 (providing for free public schools "beginning with the primary and extending through all grades up to and including schools of higher education," but authorizing tuition and other charges for higher education); Wyo. Const., art. VII, § 1 ("free elementary schools of every needed kind and grade").

126. Some states provide that the university system should be as close to free as possible. *See,* for example, Ariz. Const., art. XI, § 6 (ensuring that, in state educational institutions, "instruction furnished shall be as nearly free as possible"); N.C. Const., art. IX, § 9 (benefits of public institutions of higher education shall be extended to state residents "free of expense" to the extent practicable); Wyo. Const., art. VII, § 16. Other states authorize the legislature to determine whether higher education should be free. *See* N.D. Const., art. VIII, § 2 (providing for free public schools "beginning with the primary and extending through all grades up to and including schools of higher education," but authorizing tuition and other charges for higher education); Wyo. Const., art. VII, § 1 (providing for "establishment and maintenance" of "a university with such technical and professional departments as the public good may require and the means of the state allow"). Still other states provide for loan guarantees. *See,* for example, Ohio Const., art. VI, § 5 (state may "guarantee the repayment of loans made to residents . . . to assist them in meeting the expenses of attending an institution of higher education" to "increase opportunities to the residents of this state for higher education.").

127. Currently, most states address early childhood education by statute or regulation. *See,* for example, N.J.S.A. 18A:7F-16 (creating early childhood program for low-income areas); N.H. R.S.A. 186:6-a (limiting state board of education's authority to kindergarten through twelfth grade but authorizing board to "accept, distribute and supervise funds for pre-kindergarten programs"); N.Y. C.L.S. Educ. § 3602-e (universal prekindergarten); N.C. Gen. Stat. § 143B-168.10 (parents have primary duty to educate preschoolers, but state may help); O.R.C. Ann. 3313.646 (allowing districts to establish a preschool program if there is a demonstrated need). A few states already have constitutional provisions that might authorize early childhood education, however. *See* Mo. Const., art. IX, § 1(a) ("general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law"); Wis. Const., art. X, § 3 (education provided beginning at age four).

128. *Abbott v. Burke,* 153 N.J. 480, 508 (1998) (Abbott V). The New Jersey Supreme Court reiterated its mandate in *Abbott v. Burke,* 163 N.J. 95 (2000) (Abbott VI). There, the court found "that the manner in which the Department of Education . . . has carried out the preschool mandate of Abbott IV [was] not consistent with the Commissioner's representations to the remand court in that case." Ibid. at 101. The New Jersey Supreme Court issued its early childhood mandates even though the state education clause guarantees a free public education to students "between the ages of five and eighteen years." *See* N.J. Const., art. VIII, § 4, par. 1. Its reasoning was twofold: that some students could not receive the constitutionally guaranteed education starting at age five unless they had been provided access to effective early childhood education; and, in any event, the legislature had adopted a policy in favor of such education, especially for disadvantaged students. *Abbott V,* at 507.

129. *See,* for example, Okla. Const., art. XIII, § 4 (all children between 8 and 16, "who are sound in mind and body," compelled to attend school, unless otherwise educated, for at least 3 months per year); N.C. Const., art. IX, § 3 ("every child of appropriate age . . . shall attend the public schools, unless educated by other means"); Okla. Const., art. XIII, § 4 (all children ages 8 to 16 must attend school for at least 3 months per year); Va. Const., art. VIII, § 3 (compulsory attendance for "every child of appropriate age").

130. *See,* for example, Colo. Const., art. IX, § 11 (general assembly may require that children ages 6 to 18 attend public school, but provides in § 2 for free education for children ages 6 to 21); Del. Const., art. X, § 1 ("The General Assembly . . . may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means."); Idaho Const., art. IX, § 9 (legislature may require children ages 6 to 18 to attend school); Nv. Const., art. XI, § 2 ("legislature may pass such laws as will tend to secure a general attendance of the children").

131. *See* William E. Thro, "The Role of Language of the State Education Clauses in School Finance Litigation," 79 *Ed. Law Rep.* 19 (1993). Thro's categorization actually was derived from two much earlier articles, and especially the one by Gershon Ratner. *See* Norton Grubb, "Breaking the Language Barrier: The Right to Bilingual Education," 9 *Harv.C.R.-C.L.L. Rev.* 52, 66–70 (1974; Gershon Ratner, "A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills," 63 *Tex. L. Rev.* 777, 814–16, n. 143–46 (1985).

132. Ibid. at 23. Thro cites Tennessee as a typical Category I clause: "The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools." Tenn. Const., art. 11, § 12. Other examples include Ariz. Const., art. 11, § 1 ("The legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system"); Neb. Const., art. VII, § 1 ("The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years."); N.Y. Const., art. 11, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.").

133. Thro, supra note cxxxiv, at 23–24. Pennsylvania's provision is typical: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." Pa. Const., art. III, § 14. *See also* Colo. Const., art. 9, § 2 ("The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state."); Ky. Const. § 183 ("The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State."); W. Va. Const., art. 12, § 1 ("The legislature shall provide, by general law, for a thorough and efficient system of free schools.").

134. Thro, supra note cxxxiv, at 24. Examples include Cal. Const., art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."); R.I. Const., art. XII, § 1 ("The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools . . . , and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education.").

135. Thro, supra note cxxxiv, at 25. Examples include Wash. Const., art. IX, § 1 ("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."); Ga. Const., art. VIII, § 1 ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia.").

136. *See* Enrich, supra note lxxviii (discussing the relationship between local control and equality in public school funding).

137. Thro's treatment of the relationship among plain meaning, legislative history and judicial tradition is confusing. Although he gives lip service to the latter two elements, indeed suggests contrary to classic construction techniques that they should be consulted first, he seems to wind up giving exclusive weight to plain meaning in his categorization of the education clauses. Other commentators consider the role of legislative history and judicial tradition to be of crucial importance in the interpretation of state education clauses because some courts that have struck down school finance systems as unconstitutional and mandated sweeping reforms "have risen to the challenge of articulating a substantive content for the sparse language of the constitutional clauses." Enrich, supra note lxxvii, at 175. Such bold, or activist, judicial behavior "to define the contours of educational adequacy" also is partly a function of the political or social climate in a particular state. Ibid. Under such circumstances, disembodied parsing of constitutional terminology may be of limited or no value.

138. *See* Thro, supra note cxxxiv, at 22–23.

139. William J. Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harv. L. Rev.* 489, 491 (1977).

140. *See* Mills and McLendon, supra note lxvii, at app. II, at 402–09.

141. Molly McUsic, "The Use of Education Clauses in School Finance Reform Litigation," 28 *Harv. J. on Legis.* 307 (1991).

142. Ibid. at 315.

143. *See* Banks, supra note lxx, at 153–54 (finding a lack of any discernible relationship between the strength of constitutional commitment to education and the success of school finance challenges).

144. *See* William E. Thro, "Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model," 35 *B.C. L. Rev.* 597 (1994).

145. 487 P.2d 1241 (Cal. 1971).

146. William F. Dietz, "Manageable Adequacy Standards in Education Reform Litigation," 72 *Wash. U. L.Q.* 1193, 1195 (1996).

147. Ibid. at 1197 (discussing *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 [1973]).

148. McUsic, supra note cxliv, at 308.

149. Dietz, supra note cxlix, at 1198.

150. 303 A.2d 273 (N.J., 1973).

151. Thro, supra note cxxxiv, at 19.

152. *See,* for example, *Lujan v. Colorado State Board of Education,* 649 P.2d 1005 (Colo., 1982) (reversing trial court decision that disparities in wealth among districts