which they might constitute best practices is best considered, however, in a broader context.

Recent efforts of states, including Florida, to amend their education provisions can provide important insights about emerging best practice possibilities. This is especially the case because in recent years there have been great public turmoil about, and interest in, schooling. Since 1996, fifty-four proposed amendments to state education provisions have appeared on ballots in twenty-four states.[85] Of those, by far the greatest number—thirty-six, or 66.7%—have related to fiscal matters, some quite technical, others far-reaching. Other topics have included higher education governance (five, or 9.4%), elementary and secondary education governance (four, or 7.5%), teaching and instruction (four, or 7.5%), educational quality (two, or 3.8%), race (two, or 3.8%), and parental authority over their children's education (one, or 1.9%).

Of the fifty-four amendments proposed, thirty-six (66.7%), in eighteen states, were successful. Twenty-four of those successful amendments (66.7%) dealt with fiscal issues, many in a relatively technical manner.[86] However, some interesting best practices directions emerged. Arkansas and Colorado required minimum tax levies for education; conversely, Missouri and South Dakota capped, or made it more difficult to increase, tax rates. Four states allocated funds from other sources to education—Oklahoma from a tobacco settlement fund, and Georgia, South Carolina, and Virginia from state lotteries. Hawaii took a different fiscal direction, authorizing state bonding to assist not-for-profit private schools and universities. Of even greater contemporary relevance, Louisiana authorized the State Board of Elementary and Secondary Education to oversee and even manage an elementary or high school determined to be failing, and to use available state and local funds. Finally, and perhaps most interestingly, Oregon required the legislature to provide sufficient funding to meet state education quality goals and to report publicly whether or not it had been able to do so.

Two successful amendments dealt with racial issues—California's Proposition 209 barring most affirmative action programs[87] and Kentucky's egregiously overdue repeal of a provision requiring segregated schools and permitting poll taxes.[88] Four dealt with university governance issues.[89] The other six amendments dealt with educational quality and K–12 program or administrative issues, and all were adopted in Florida.[90]

On the negative side of the constitutional ledger, also since 1996, eighteen amendments of education provisions, in eleven states, five of them states that also had successful amendments, failed. Twelve of the failed proposals (66.7%) related to fiscal matters, but these tended to be somewhat more substantive and less technical than the successful fiscal amendments.[91] Of note, three of the unsuccessful proposals sought to assist nonpublic schools directly by voucher-style payments (California and Michigan) or indirectly by tax credits (Colorado). A fourth sought to prohibit using property taxes to support public schools (South Dakota).

The other six unsuccessful amendments related, one each, to English language instruction, educational quality, educational administration, institutions of higher education, teacher pay and retention, and parental authority over their children's education.[92] Three of these failed proposals also are of note. A Colorado proposal provided for the inalienable right of parents to direct and control the upbringing, education, values, and discipline of their children. A Nebraska proposal, predating Florida's 1998 amendments, sought to make each of a "quality education," a "fundamental right," and a "thorough and efficient education" a "paramount duty" of the state. An Oregon proposal would have measured a teacher's job performance partly on the extent to which his or her students' appropriate knowledge increased.

Looking at this recent amendatory history on a state-by-state basis, immediately suggests that the activity is not widely and evenly spread across the country. Although almost half the states had ballot proposals, two-thirds of the proposals came from seven states, an average of five per state. Thus, Florida had seven proposed education amendments, South Dakota six,[93] Colorado,[94] Oklahoma,[95] and Oregon[96] five each, California four,[97] and Hawaii three.[98]

The extent of amendatory activity in these states might signal that they were loci for education clause best practices, but there also could be quite different explanations.[99] At least as to Florida, though, as indicated, the number of successful amendments does justify its status as a best practice state.

Florida's recent amendatory activity clearly is the nation's most distinctive. Twice in the past five years, Florida has considered a number of major amendments to its state constitutional education provisions and has adopted all of them, although not always in the form proposed or favored by education advocates.

Of Florida's four 1998 amendments, three are not serious candidates for "best practices,"[100] but the fourth is. Prior to the 1998 amendment, section 1 of Florida's education provision was limited and similar to many nineteenth-century education clauses, committing the state to make "[a]dequate provision . . . for a uniform system of free public schools." The amendment added several important, and seemingly ambitious, elements. First, it added two sentences at the beginning of the section that read as follows:

> The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders.

Second, it added to the required attributes of the public education system that it be "efficient, safe, secure and high quality." Finally, it added that such a system should "allow . . . students to obtain a high quality education."[101]

Without doubt, these modifications of Florida's core education provision make it a strong best practice candidate. That is true even though some Florida advocates have expressed keen disappointment at some watering down of their proposals.[102] Another possible concern is that the Florida education clause, as amended in 1998, also bears some similarity to one of the model constitutions in that it combines two qualitative standards—in Florida's case, "adequate" and "high quality"—thereby potentially creating confusion about the precise extent of the constitutional goal or mandate. On the other hand, the 1998 amendments make very clear the primacy of education to Florida.

Two of Florida's three 2002 amendments also are noteworthy. Both add text to the core education provision whose 1998 amendment has just been discussed. One explicitly does so in response to the broad educational mandate of the 1998 amendment to section 1, and the other may implicitly do so. The first requires the legislature to make "adequate provision" for (that is to say, fund) reduced class sizes, to be phased in between the 2003 and 2010 school years. The stated purpose is "[t]o assure that children attending public schools obtain a high quality education."[103] This amendment was hotly debated and divided the electorate. It was adopted by a 52.9 percent to 47.1 percent vote, easily the most closely contested of the three 2002 education amendments. Many major educational and public interest groups opposed the amendment because of concerns about its fiscal impact, the uncertain availability of sufficient numbers of qualified teachers, and of most relevance to this chapter, the inappropriateness of imbedding in a constitution detailed class size requirements. Indeed, within a year, the Florida State Board of Education voted unanimously to support a constitutional amendment that would sharply scale back the class size mandates.[104]

The other noteworthy 2002 amendment requires the state to provide free, high-quality prekindergarten learning opportunities for all four-year-olds, to be in place by the 2005 school year and to be funded by "new" money.[105] Although this amendment also has substantial cost and instructional capacity implications, it passed easily (apparently because of widespread public outrage over the legislature's prior repeal of the statutory authority for prekindergarten instructional opportunities). It also raised fewer concerns about incorporating inappropriate detail into the constitution.

Developing "Model" Education Provisions for a State Constitution

In considering the development of "model" education provisions,[106] this chapter makes two assumptions: first, that the constitutional drafters have the advantage of the accumulated history and experience recounted earlier; and second, that

the drafters are unfettered by the particular political and fiscal constraints of any given state. At least the second assumption might be criticized for divorcing this chapter from reality, but that seems an inevitable attribute of any effort to produce a "model," especially one designed to be of use throughout the country.[107]

This section, then, focuses on two kinds of issues regarding the drafting of state constitutional education provisions. First, there is a set of broad, threshold considerations, followed by a much longer and more detailed set of substantive inquiries. In connection with both, models drawn largely from existing state constitutional provisions are cited. The end result is not a single recommended model education clause or set of education provisions; rather, this chapter seeks to offer a series of informed choices about various education elements that might be incorporated into a state constitution by a thoughtful drafter sensitive to local needs and desires.

There are six threshold issues that tend to subdivide into two categories, one relating to the comprehensiveness and specificity of an education clause, and the other to its enforceability.[108] As to the former category, constitutions often are said to be "written for the ages." Accordingly, their provisions should be relatively general and open-ended, rather than detailed and prescriptive. Details and prescriptions, under that model, are left to statutes and regulations. However, the easier it is to amend a particular constitution, the more feasible (or, at least, the more tempting) it may become to incorporate greater detail into the constitution itself. Thus, this first category contains three interrelated issues—the ease of amendment, comprehensiveness, and degree of detail or specificity.

The second category—relating to enforceability—also raises three interrelated issues: is the clause intended to be mandatory or hortatory, is it intended to be self-executing or does it require legislative or executive action, and does it create individual rights or merely vest the state with an obligation or discretion.

Beyond these threshold issues, the chapter reviews a comprehensive list of substantive issues to be considered in drafting education provisions (or evaluating existing ones). The list is culled from state constitutions, current and historical, and from secondary sources, as are the illustrative provisions set out for many of the issues. The list is designed to be an inclusive checklist, not a recommendation of what should be included in an education clause. As indicated, the illustrative provisions set out are designed as options for a drafter, not definitive recommendations. Although some issues are treated in greater detail than others, this should not be understood to mean that the former are necessarily more important than the latter in any individual state.

Comprehensiveness and Specificity

As indicated previously, there has been a historical trend toward more detailed education provisions in state constitutions, but this has hardly affected every

state. A review of current constitutions reveals strikingly different approaches. To some degree, the trend toward greater detail in education clauses is mirrored in state constitutions generally. It seems that states that have engaged in piecemeal amendment from time to time, rather than substantially revising their constitutions at one time, have lengthier documents. Moreover, the time at which the constitution was adopted makes a big difference. The oldest and newest constitutions tend to be the shortest and the ones in between, perhaps reflecting Victorian prolixity, are the longest.[109]

One variable that may help to explain these differences is the ease of constitutional amendment. California has become notorious in that regard because of its liberal approach to initiative and referendum.[110] Florida, on the other hand, presents a mixed picture. It has both initiative and referendum and a Constitution Revision Commission, appointed by the governor, speaker of the house and president of the senate, whose proposed constitutional changes are placed directly on the ballot for public acceptance.[111] The Commission only convenes every twenty years, however. Although its proposals led to the major 1998 education clause amendments discussed previously, it has not been a vehicle for frequent constitutional amendment in years past. Indeed, its proposed Revision 8 in 1978 was rejected by Florida's voters. That revision "would have added [a] statement of purpose to the existing guarantee of a uniform system of free public schools: 'to develop the ability of each student to read, communicate and compute and to provide an opportunity for vocational training.'"[112] It also "proposed to strip the governor and cabinet of the collegial power to act as the 'state board of education' and to transfer the function and name to a nine person board appointed by the governor and confirmed by the senate . . . [and] to elevate the state university system to constitutional status and to provide it with a nine person governing board whose members would have been appointed by the governor and confirmed by the senate."[113]

The bottom line about comprehensiveness and specificity, supported by the substantial weight of expert opinion, however, is that less is more—relatively concise education provisions are preferable to elaborately detailed ones.[114]

Enforceability

Sometimes as a result of their own terms[115] and sometimes as a result of judicial construction,[116] sharp differences have emerged regarding the enforceability of state education provisions. To some extent, the differences turn on whether the constitutional claim is being advanced by an individual student, parent, teacher or other arguably affected person, or by a large class or an educational entity; to some extent, they turn on the nature of relief sought.[117] A review of the school funding/educational adequacy litigation of the past thirty years, by far the most comprehensive body of state constitutional education litigation,

suggests that in most states courts have found that, at least in appropriate cases, their education provisions are mandatory, self-executing, and enforceable by citizens or their representatives.[118]

Possible Elements of a "Model" State Education Clause

This section will first provide a comprehensive list, without discussion, of possible elements that might be included in a state's constitutional education provisions and then a relatively brief discussion of some of those elements. For the most part, examples and references will be left for the endnotes. Since there are ten categories of elements and more than forty specific items grouped under those categories, an education clause that incorporated a substantial portion would be long and detailed. Whether that should be the case, obviously, is a threshold question for any drafter.

The Comprehensive List

1. Statement of the state's educational purpose or commitment.
2. Scope of the provisions' coverage in terms of:
    a. age;
    b. educational levels (e.g., early childhood education or higher education);
    c. response to educational disadvantage (e.g., disability, socioeconomic status, or upbringing);
    d. extent to which education is provided "free";
    e. provision for compulsory attendance;
    f. provision for the length of the school day and school year; and
    g. provision for class size limits.
3. Specification of an educational quality standard in terms of:
    a. quantum or level provided for or required; and
    b. whether it is defined by input, process/opportunity or outcome measures.
4. Specification of an educational equality standard in terms of:
    a. freedom from segregation or other discrimination based on race, ethnicity and religion, and possibly, gender, socioeconomic status, disability, and native language;[119]
    b. guarantee of diversity, or racial or other balance;
    c. guarantee of access to comparable schools, programs, and funding; and
    d. whether it is defined by input, process/opportunity or outcome measures.

5. Funding assurances in terms of:
    a. guaranteed sources of state funding (generally or for specific, categorical programs/needs);
    b. relative priority among state services;
    c. extent of reliance on local funding;
    d. state's role in assuring equality or adequacy of total funding;
    e. taxpayer equality;
    f. limitations or caps on taxing or spending levels; and
    g. state support of higher education, including scholarship funding.
6. Prohibitions or limits in terms of:
    a. segregation or other discrimination in the public schools;
    b. sectarian instruction;
    c. sectarian or private school funding;
    d. funding level for public schools;
    e. tax rate; and
    f. judicial role.
7. Provision for specific services and materials in terms of:
    a. pupil transportation;
    b. textbooks; and
    c. teachers.
8. Specification of the locus and form of governmental responsibility for education in terms of:
    a. the "state";
    b. the legislature;
    c. state education officials, and whether they are to be appointed or elected;
    d. state education agency;
    e. county or regional superintendents;
    f. local school districts; and
    g. constitutional or statutory status of items c through f above.
9. Specification of the role of parents and families in terms of:
    a. school choice;
    b. home schooling; and
    c. funding and taxation issues relating to non–public school education.
10. Provision for enforceability in terms of:
    a. creation of individual rights; and
    b. role of courts.

Discussing Some Key Elements

1. *The state's purpose or commitment.* This chapter's description of the historical evolution of state constitutional education provisions clearly suggests that the broad statement of the state's purpose or commitment regarding education has reflected several predominant patterns. Initially, most clauses either were hortatory, exalting the virtues of learning and knowledge, or obligatory, requiring state legislatures to establish schools. Over time, some states combined the two elements into a single clause. Beginning in the latter half of the nineteenth-century, many states added a qualitative standard to their education clauses, often some variation on the "thorough and efficient" theme. Much more recently, especially in reaction to the expansive school funding and educational quality litigation of the past thirty years, some states have begun to consider and adopt more individualized, and sometimes more definitive, qualitative standards. Of course, given the impetus for these recent amendments, the legislative and public debate has focused on the legal, as well as educational and fiscal, implications of various formulations.

   This has led to serious consideration of a number of interrelated issues. First, what terminology should the state use to define its educational undertaking? Should it adopt a qualitative term with clear legal implications, such as "fundamental?"[120] Should it link education to specific outcome indicators, such as effective citizenship, ability to compete in and contribute to the economy, or other societal values? Should it describe education as a "paramount" right or duty, thereby quite possibly suggesting the primacy of education over other public services?[121] How clearly and definitively should the constitutional drafters indicate whether the educational undertaking is a goal or a mandate of the state?[122]

   Of course, especially during a time of fiscal constraints, these sorts of questions could be answered in a manner that would narrow rather than enlarge the commitment and consequent obligations of the state, and the concomitant rights of its citizens. In fact, for many years narrowing amendments have been proposed periodically, often in direct response to expansive court decisions.[123] Seldom, however, have such narrowing amendments been adopted.

2. *Scope of coverage.* The extent of the state's commitment and its citizens' correlative rights has a variety of other, even more specific dimensions. One of those is the scope of the education provisions' coverage. In the main, this involves two interrelated aspects—the age of students afforded education and the education levels to be

provided. As to both, many, but not nearly all, state constitutions make provision, and their treatments are quite different.

Regarding age, six is the most common entry level, but that is likely to change in light of the substantial emerging evidence of early childhood education's benefits, especially for disadvantaged students, and twenty-one is the most common exit age.[124]

Regarding educational levels, a significant difference among the states relates to whether or not higher education is covered by the constitutional education clauses. The most common approach is to require that education be provided through secondary school, but some states authorize or even require it to be provided beyond.[125] In those states that make constitutional provision for higher education, a related question is the extent to which it should be provided free of charge, and the approaches vary.[126]

As suggested above, pressure is likely to build to amend state education provisions to include early childhood education beginning at age four, or even at age three.[127] This is partly because of the success of state court litigation, mainly New Jersey's *Abbott v. Burke,* which has resulted in a mandate that well-planned, high-quality early childhood education be made available to all three- and four-year-old children in the state's thirty poor urban school districts.[128]

Another kind of scope-of-education provision has made its way into a few state constitutions, but is dealt with primarily by statute. That is the matter of compulsory education—the flip side of educational entitlement. A few state education provisions directly compel attendance;[129] a somewhat larger number authorize legislative action.[130]

3. *Educational quality standards.* This element was touched on preliminarily in the discussion of the state's commitment to education. It certainly is true that qualitative statements usually appear in the first section of a state's education provisions as part of the foundational statement. But a separate discussion is warranted by the centrality of educational quality standards to the school funding and educational adequacy litigation movement.

Increasingly, as equal protection doctrine has receded and education clauses have come to the forefront, school funding/education adequacy litigation is premised on a provable gap between what those clauses require of the state and what, in reality, the state education system affords its students. In one form or another, the law suits seek to close or eliminate that gap.

Although the educational quality standards embedded in state constitutions fall into several general categories, they vary considerably from state to state. Moreover, state courts have construed similar, or even virtually identical, clauses quite differently. Several leading commentators have written detailed articles cataloging and evaluating state education clauses, focusing on them mainly from the perspective of their education quality standards.

One commentator, in particular, has focused on the "strength" of education clauses, primarily evaluated through the lens of their qualitative standards.[131] William Thro identified four categories:

- Category I (the weakest) includes eighteen state education clauses that "merely mandate a system of free public schools" without imposing any quality standard;[132]
- Category II (somewhat stronger, but still relatively weak) includes twenty-one state education clauses that "impose some minimum standard of quality, usually thorough and/or efficient, that the statewide system of public schools must reach;"[133]
- Category III (substantially stronger) includes six state education clauses that have a "'stronger and more specific educational mandate' such as 'all means,' and a 'purposive preamble;'"[134] and
- Category IV (the strongest) includes five state education clauses that "make education an important, if not the most important duty of the state."[135]

Tempting as it is to engage in this sort of categorization, Thro's effort has proven to be of limited value. Partially, that may be a result of his approach. Thro's strong-to-weak continuum ignores many, more subtle, and at least equally important, dimensions of constitutional education provisions, such as their treatment of the state-local relationship.[136] Additionally, even with regard to his strong-to-weak continuum, contrary to some statements in his article, Thro seemed to base his categorization entirely on the plain language of the education clauses.[137]

Despite the fact that Thro's linguistic distinctions have not been significant in school finance litigation thus far, Thro suggests that the language of state education clauses should and will be decisive in the future.[138] Categorization aside, though, there is absolutely no question that state constitutional education clauses have come to play a hugely important role during the past thirty years.

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