

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 lxxvii, 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

were a violation of state equal protection); *McDaniel v. Thomas*, 285 S.E.2d 421 (Ga., 1981) (rejecting claim that funding system violated equal protection clause); *Board of Education of the City School District of Cincinnati v. Walter*, 390 N.E.2d 813 (Ohio), *cert. denied*, 444 U.S. 1015 (1979).

153. Dietz, *supra* note cxlix, at 1200.

154. *Ibid.*

155. Thro, *supra* note cxlvii, at 603.

156. Dietz, *supra* note cxlix, at 1201.

157. *See Abbott v. Burke II*, 575 A.2d 359 (N.J. 1990).

158. *Abbott v. Burke II*, 119 N.J. 287, 575 A.2d 359 (1990); *Abbott v. Burke III*, 136 N.J. 444, 643 A.2d 575 (1994), *Abbott v. Burke IV*, 149 N.J. 145, 693 A.2d 417 (1997); *Abbott v. Burke V*, 153 N.J. 480, 710 A.2d 450 (1998); *Abbott v. Burke VI*, 163 N.J. 95, 748 A.2d 82 (2000); *Abbott v. Burke VII*, 164 N.J. 84, 751 A.2d 1032 (2000); *Abbott v. Burke VIII*, 170 N.J. 537, 790 A.2d 842 (2002); *Abbott v. Burke IX*, 172 N.J. 294, 798 A.2d 602 (2002).

159. "About *Abbott v. Burke*," Education Law Center, at <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AboutAbbott.htm> (citing various *Abbott* decisions).

160. *See Abbott v. Burke I*, 495 A.2d 376, 382 (1985) (quoting *Robinson v. Cahill*, 62 N.J. 473, 515 [1973]).

161. *See*, for example, Md. Const., art. VIII, § 1; Minn. Const., art. XIII, § 1; N.J. Const., art. VIII, § 4, para. 1; Ohio Const., art. VI, § 2; Pa. Const., art. III, § 14; W.Va. Const., art. XII, § 1.

162. *See Pauley v. Kelly*, 255 S.E.2d 859 (W.Va., 1979).

163. In *DeRolph IV*, the Ohio Supreme Court held that the state school finance system was unconstitutional, and directed the state legislature to enact a thorough and efficient school financing system, as the court had set forth in its prior opinions. *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E.2d 529 (2002). *See DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) ("DeRolph I"), *DeRolph v. State*, 89 Ohio St.3d 1, 728 N.E.2d 993 (2000) ("DeRolph II"). Plaintiffs then moved for a compliance conference "to ensure that the State initiates, without further delay, the process of formulating a school funding system that satisfies the mandates of the [state] Supreme Court." *State ex rel. State v. Lewis*, 99 Ohio St.3d 97, 2003-Ohio-2476 (May 16, 2003). The State responded by filing for a writ of prohibition to prevent the common pleas court and the trial judge from exercising further jurisdiction in *DeRolph*. The Ohio Supreme Court granted the writ, holding that "the exercise of further jurisdiction in this litigation would violate [its] *DeRolph IV* mandate." The court specifically ended any further litigation in *DeRolph*, emphasizing that "[t]he duty now lies with the General Assembly to remedy an educational system that has been found . . . to still be unconstitutional."

164. Over half of state constitutional education clauses have quality standards, most of them of Thro's Category II, or relatively weak, variety. *See* Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. *Educ.*

and *L.J.* 1, 4–5. These include: “general and efficient”—*see*, for example, *Del. Const.*, art. X, § 1; “general and uniform”—*see*, for example, *Ariz. Const.*, art. XI, § 1; *Ind. Const.*, art. VIII, § 1; *Minn. Const.*, art. XIII, § 1; *N.C. Const.*, art. IX, § 2; *Ore. Const.*, art. VIII, § 3; *S.D. Const.*, art. VIII, § 1; *Wash. Const.*, art. IX, 2; “thorough and uniform”—*see*, for example, *Colo. Const.*, art. IX, § 2; “general, uniform, and thorough”—*see*, for example, *Idaho Const.*, art. IX, § 1; “complete and uniform”—*see*, for example, *Wyo. Const.*, art. VII, § 1; “liberal”—*see*, for example, *Ala. Const.*, art. XIV, § 256; “basic”—*see*, for example, *Mont. Const.*, art. X, § 1; “competent”—*see*, for example, *Vt. Const.* ch. 2, § 68; and “suitable”—*see*, for example, *Me. Const.*, art. VIII, 1.

165. *See Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky., 1989).

166. Building on this framework, Kentucky has devised a new educational system that, in many ways, is a national model. “Kentucky is best known for blazing a new frontier in the movement to set standards and hold schools accountable for results.” “Quality Counts 2002: Kentucky,” *Education Week*, at <http://edweek.org/sreports/qc02/templates/state.cfm?slug=17ky.h21> (last visited Mar. 6, 2003). *See* Kentucky Education Reform Act of 1990, 1990 *Ky. Rev. Stat. & R. Serv.* 476 (codified as amended in scattered sections of *Ky. Rev. Stat. Ann.* [Baldwin 2002]) [Reform Act]. *Ky. Rev. Stat. Ann.* § 157.310 (2002) declares: “It is the intention of the General Assembly to assure substantially equal public school educational opportunities for those in attendance in the public schools of the Commonwealth, but not to limit nor to prevent any school district from providing educational services and facilities beyond those assured by the state supported program. The program shall provide for an efficient system of public schools throughout the Commonwealth, as prescribed by Section 183 of the Constitution of Kentucky, and for the manner of distribution of the public school fund among the districts and its use for public school purposes, as prescribed by Section 186 of the Constitution.” The standards established by the Kentucky court have been adopted and followed by other state courts. *See*, for example, *Leandro v. State*, 488 S.E.2d 249 (N.C., 1997). One commentator explained, “[I]n short, the Reform Act embraces a substantial number of provisions intended to enhance quality of schooling” and “presents an extraordinarily thorough reform plan” that resulted from successful school finance litigation. Benson, *supra* note lxxiv, at 420–21. “For a useful discussion of the provisions and implementation of [the Reform Act],” *see* Jacob E. Adams, Jr., *School Finance Policy and Students’ Opportunities to Learn: Kentucky’s Experience, The Future of Children*, Winter 1997, cited in James E. Ryan, “The Influence of Race in School Finance Reform,” 98 *Mich. L. Rev.* 432, 466 n. 177 (1999).

167. *Campaign for Fiscal Equity, Inc. v. State of New York*, 801 N.E.2d 326 (N.Y., 2003). A lower court in Kansas, another Thro Category I state, even more recently struck down that state’s school funding system. *See Montoy v. State of Kansas*, 62 P.3d 228 (Dist. Ct. Shawnee Co., Kan., 2003).

168. *See* <http://www.accessednetwork.org> (last visited Jan. 13, 2004).

169. *See*, for example, *Va. Const.*, art. VIII, § 1 (“high quality”); *Ill. Const.*, art. X, § 1 (“efficient system of high quality”). In *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va., 1994), the Virginia Supreme Court held that while education is a fundamental right under the state constitution, “nowhere does the Constitution require equal, or

substantially equal, funding or programs among and within the Commonwealth's school divisions." The court found that the language in the education clause ("shall seek to ensure that an educational program of high quality is established and continually maintained") is "merely aspirational," and not mandatory. *Ibid.* In *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1189, 1193 (1996), the Illinois Supreme Court found, first, "that disparities in educational funding resulting from differences in local property wealth do not offend section 1's efficiency requirement," and second, "that the question of whether the educational institutions and services in Illinois are 'high quality' is outside the sphere of the judicial function." Thus, the court dismissed plaintiffs' complaint challenging the state's school funding system. *Ibid.* at 1197. The Illinois Supreme Court affirmed this holding in *Lewis E. v. Spagnolo*, 710 N.E.2d 798 (1999).

170. Thro is not alone, incidentally, in believing that strong educational quality language should lead to strong judicial action. *See*, for example, Jensen, *supra* note clxvii, at 4-5 ("The most effective language of state constitutions found in the efforts advancing and protecting the educational offering will inevitably be that which prescribes a high level of educational quality."). However, a relatively clear consensus has emerged, even including Thro himself, that the litigation experience of the past ten years has undermined any argument that education clause language alone has significant predictive value.

171. *See* Mills and McLendon, *supra* note lx, at 368-77.

172. *See* Thro, *supra* note cxlvii; Dietz, *supra* note cxlix; Michael Heise, "State Constitutions, School Finance Litigation, and the 'Third Wave': From Equity to Adequacy," 68 *Temple L. Rev.* 1151 (1995).

173. *See*, for example, *Serrano v. Priest*, 557 P.2d 929 (Cal., 1976); *Van Duzart v. Hatfield*, 334 F.Supp. 870 (Minn., 1971); *Milliken v. Green*, 203 N.W.2d 457 (Mich., 1972), *vacated and overruled by* 212 N.W.2d 711 (Mich., 1973). For a discussion of the arguable advantages of education adequacy litigation, *see* Heise, *supra* note clxxiv. Mills and McLendon, *supra* note lxvii, at 368-77.

174. 63 N.J. 196, 306 A.2d 65 (1973).

175. *See*, for example, Ore. Const., art. VII, § 8 ("The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals. Consistent with such legal obligation as it may have to maintain substantial equity in state funding, the Legislative Assembly shall establish a system of Equalization Grants to eligible districts for each year in which the voters of such districts approve local option taxes."); Mo. Const., art. IX, § 3(b) ("In the event the public school fund provided and set apart by law for the support of free public schools, shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart less than 25 percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools."); and N.M. Const., art. XII, § 7 ("The annual distributions from the fund shall be one hundred two percent of the

amount distributed in the immediately preceding fiscal year until the annual distributions equal four and seven-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years. Thereafter, the amount of the annual distributions shall be four and seven-tenths percent of the average of the year-end market values of the fund for the immediately preceding five calendar years.”).

176. See, for example, Fla. Const., art. IX, § 1 (“It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.”); 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. The State shall provide for an efficient system of high quality public educational institutions and services.”); R.I. Const., art. XII, § 1 (“It shall be the duty of the general assembly . . . to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education.”); Ark. Const., art. 14, § 1 (“The State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education.”); and 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. Equality of educational opportunity is guaranteed to each person of the State.”).

177. See, for example, *Serrano v. Priest*, 557 P.2d 929 (Cal., 1976); *Campbell County School District v. State*, 907 P.2d 1238 (Wyo., 1995) (discussing its prior decision in *Washakie County School District No. One v. Herschler*, 606 P.2d 310 (Wyo., 1980), where the court “struck down the then-existing school finance system,” acknowledging “the post-*Washakie* reform [input] measures,” and emphasizing that “lack of financial resources will not be an acceptable reason for failure to provide the best educational system”); *Brigham v. State*, 692 A.2d 384 (Vt., 1997) (determining “that the current system for funding public education in Vermont, with its substantial dependence on local property taxes and resultant wide disparities in revenues available to local school districts, deprives children of an equal educational opportunity in violation of the Vermont Constitution,” and that while “[e]qual opportunity does not necessarily require precisely equal per-capita expenditures . . . it does not allow a system in which educational opportunity is necessarily a function of district wealth. However, in *Leandro v. State*, 488 S.E.2d 249, 260 (N.C., 1997), the North Carolina court, while acknowledging that “the level of the state’s general educational expenditures and per-pupil expenditures” is a factor when evaluating whether the state is meeting its constitutional duty to provide a sound basic education, it alone is not dispositive. Other factors such as “the level of performance of the children . . . on standard achievement tests,” as well as legislative “[e]ducational goals and standards,” are also to be considered. *Ibid.* at 259–60.

178. See, for example, *Rose v. Council for Better Education*, 790 S.W.2d 186 (1989); *Claremont School District v. Governor*, 794 A.2d 744 (N.H., 2002). For a current constitutional provision that specifies an educational opportunity measure, see Mont.

Const., art. X, § 1(1) (“It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the State.”).

179. See *Robinson v. Cabill*, 62 N.J. 473, 515 (1973). In *Abbott v. Burke II*, 575 A.2d 359, 397 (1990), the New Jersey Supreme Court explained “thorough and efficient” as “mean[ing] the ability to participate fully in society, in the life of one’s community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends.” The court aptly stated, “If absolute equality were the constitutional mandate, and “basic skills” sufficient to achieve that mandate, there would be little short of a revolution in the suburban districts when parents learned that basic skills is what their children were entitled to, limited to, and no more.” *Ibid.* at 397–98. In *Abbott v. Burke IV*, 693 A.2d 417, 427–28 (1997), the New Jersey Supreme Court once again emphasized that “[a]t its core, a constitutionally adequate education has been defined as an education that will prepare public school children for a meaningful role in society, one that will enable them to compete effectively in the economy and to contribute and to participate as citizens and members of their communities.” In a subsequent opinion and in furtherance of providing a constitutionally adequate education, the court mandated specific remedial relief, including whole-school reform and early childhood education for three- and four-year-olds. *Abbott v. Burke V*, 710 A.2d 450, 473–74 (1998). See generally Julie Zwibelman, Note, “Broadening the Scope of School Finance and Resource Comparability Litigation,” 36 *Harv. C.R.-C.L. L. Rev.* 527 (2001), for a discussion of state cases that have reached beyond input measures and demonstrate a more complete approach to remedying educational inequality.

180. See N.C. Const., art. IX, § 2(1) (“The General Assembly shall provide . . . for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students.”); Mont. Const., art. X, § 1(1): “Equality of educational opportunity is guaranteed to each person of the State.”

181. See, for example, N.J. Const., art. I, par. 5 (“No person shall . . . be segregated . . . in the public schools, because of religious principles, race, color, ancestry or national origin.”); Conn. Const., art. I, § 20 (“No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin.”).

182. See, for example, Ind. Const., art. VIII, § 1 (“[I]t shall be the duty of the General Assembly . . . to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all”); see also La. Const., art. VIII, pmb1.; N.D. Const., art. VIII, § 1 (“open to all children”); S.D. Const., art. VIII, § 1 (“equally open to all”).

183. See Ariz. Const., art. XI, § 6 (ensuring that state educational institutions will be open to both sexes); Ky. Const. § 187 (race or color not to affect distribution of school fund); Mich. Const., art. VIII, § 2 (“without discrimination as to religion, creed, race, color or national origin”); Mont. Const., art. X, § 7 (prohibiting refusal of admission based on “sex, race, creed, religion, political beliefs or national origin”); Wash. Const., art. IX, § 1 preamble (“without distinction or preference on account of race,

color, caste, or sex”); and Wyo. Const., art. VII, § 10 (no discrimination between pupils “on account of sex, race or color”).

184. *See* Mo. Const., art. IX, § 3(c) (requires state to withhold funding for schools discriminating against teachers); Mont. Const., art. X § 7 (prohibits “religious or partisan test[s] or qualification[s]” of teachers or students); Neb. Const., art. VII, § 11 (prohibits religious testing or qualifications of students or teachers).

185. *See*, for example, N.J. Const., art. VIII, § IV, par. 1.

186. *See* Minn. Const., art. XIII, § 1 (“The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public education throughout the state.”); Ohio Const., art. VI, § 2 (“The general assembly shall make such provisions . . . as . . . will secure a thorough and efficient system of common schools throughout the state . . .”); 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. . . .); Wyo. Const., art. VII, § 9 (“The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools.”). For a different formulation, using the phrase “by all suitable means.” see Ind. Const., art. VIII, § 1; Iowa Const., art. IX, § 3; Nev. Const., art. XI, § 1; S.D. Const., art. VIII, § 1. *See also* R.I. Const., art. XII, § 1 (“all means which [the legislature] may deem necessary”).

187. *See* Colo. Const., art. IX, § 17 (for the fiscal years 2001–02 through 2010–11, state funding for “all categorical programs shall grow annually at least by the rate of inflation plus an additional one percentage point.” From 2011–12 on, the funding shall be increased at least at the rate of inflation); *see also* Okla. Const., art. XIII, § 1(a) (regarding appropriation and allocation of funds for support of common schools, \$42.00 per capita shall be raised and appropriated by the legislature for schools, to be distributed by an agency “designated by the Legislature”); Ore. Const., art. VIII, § 8(1) (legislature appropriates “in each biennium a sum of money sufficient to ensure that the state’s system of public education meets quality goals established by law, and publish[es] a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency”).

188. *See* Mont. Const., art. X, § 1(3) (The legislature “shall fund and distribute in an equitable manner to the school districts . . .”); Ore. Const., art. VIII, § 8 (“Consistent with such legal obligation as it may have to maintain substantial equity in state funding, the Legislative Assembly shall establish a system of Equalization Grants to eligible districts for each year in which the voters of such districts approve local option taxes.”).

189. *See* La. Const., art. VIII, § 13(B) (assures legislative appropriation of funding to assure a minimum foundation program of education in all public schools through a formula developed and adopted by the state board of education).

190. *See* Ore. Const., art. VIII, § 4 (income from the school fund shall be distributed among the counties proportionally to the number of children ages 4 to 24); S.D. Const., art. VIII, § 3 (fund income apportioned among schools in proportion to number of school-age children; revenue from fines for state law violations are distributed to public schools within the county in which the fine was imposed).

191. While historically, public schools have been funded mostly by local property taxes, the “general trend [now] has been toward a larger portion of state funding and control.” *School Finance Overview, EdSource Online*, at [http://www.edsource.org/edu\\_fin.cfm](http://www.edsource.org/edu_fin.cfm) (Sept. 2002). In 1919–20, local funds comprised 83.2 percent of total revenue nationwide for public elementary and secondary schools, while the state provided 16.5 percent of total funds. Table 157, Revenues for public elementary and secondary schools, by source of funds: 1919–20 to 1998–99, National Center for Education Statistics, *Digest of Education Statistics*, 2001, available at <http://nces.ed.gov/pubs2002/digest2001/tables/dt157.asp>. However, by 1965–66, local funds made up 53 percent of the total revenue, state funds 39.1 percent, and the contribution of federal funds increased to 7.9 percent (from 0.3% in 1919–20). *Ibid.* In 1998–99, the percentages were: 44.2 percent local funds, 48.7 percent state funds, and 7.1 percent federal funds. *Ibid.* These statistics are nationwide. On an individual state basis, “proportions and funding structures vary.” “School Finance Overview,” *EdSource Online*, at [http://www.edsource.org/edu\\_fin.cfm](http://www.edsource.org/edu_fin.cfm) (Sept. 2002). States such as “California and Michigan . . . have state-controlled school finance systems,” while other states such as Illinois and New Jersey depend on some state funds, “but still rely most heavily on local property taxes.” *Ibid.* Federal funding provides for less than 10 percent of public school education throughout the nation. *Ibid.* Therefore, in California, state funds provided for about 60 percent of the total public school budget in 2001–02, and local funds for about 30 percent. “Proportions of Funding Structures,” *EdSource Online*, at [http://www.edsource.org/sch\\_revsrc.cfm](http://www.edsource.org/sch_revsrc.cfm) (Aug. 2002). Federal funds made up the remaining 10 percent. *Ibid.* In Michigan, state funds accounted for over 70 percent of total revenue, local funds for a little over 20 percent, and federal funds made up the rest. *Ibid.* However, in Illinois, state funds provided only about 30 percent of the total budget, with local funds providing over 60 percent, and federal funds making up the difference. *Ibid.* In New Jersey, local funds made up 60 percent of total revenue and state funds about 35 percent. *Ibid.* To illustrate the divergence and variability of funding, in 1997–98, the state share of revenue in Vermont was less than 30 percent. George A. Clowes, “Just the Facts: Sources and Uses of Public Education Dollars,” *The Heartland Institute*, available at <http://www.heartland.org/Article.cfm?artId=10763> (Dec. 1, 2002). In 1999–2000, that number jumped to 73.6 percent. *Ibid.* For state data tables providing total revenues for public schools, grades K–12, from state and local governments, per state, for 2001–02 and 2000–01, *see* *Rankings & Estimates Update*, available at <http://www.nea.org/edstats/reupdate02.html#TABLE> (Fall 2002).

192. *See* S.D. Const., art. VIII, § 15 (“The Legislature shall make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state . . . Taxes shall be uniform on all property in the same class.”)

193. *See*, for example, N.C. Const., art. IX, § 2(1) (“The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools.”).

194. *See*, for example, N.J. Const., art. VIII, § IV, par. 2 (school fund shall be perpetual and “securely invested;” income shall be appropriated for public school support



“for the equal benefit of all the people of the State;” legislature may not use fund for any other purpose; and fund may invest in bonds of any school district); S.D. Const., art. VIII, § 11 (permanent school fund to be invested by “state investment council . . . as provided by law”), § 2 (principal of perpetual trust fund for maintenance of public schools inviolate; trust fund cannot be used for any other purpose).

195. *See*, for example, Colo. Const., art. IX, § 5 (inviolable school fund consists of proceeds from land granted to state for educational purposes, all estates that escheat to state, and grants to state for education); Mont. Const., art. X, § 2 (detailed list of sources of funding, including escheats, grants and unclaimed shares and dividends of corporations), § 5 (revenue from school fund to be apportioned with 95% going to public schools and 5% being reinvested); *see also* Neb. Const., art. VII, § 5 (money from fines, penalties and license money goes to support of public schools in the areas they accrue, except fines for overloading vehicles; proceeds from sale of “conveyances” seized in drug busts goes exclusively to support of public schools); N.C. Const., art. IX, § 6 (detailed list of sources of funds, including sales of state-owned swamp land); S.D. Const., art. VIII, § 2 (sources of school fund, including “proceeds of the sale of public lands that have heretofore been or may hereafter be given by the United States for the use of public schools in the state” and escheated property); Utah Const., art. X, § 5 (established permanent public school fund and lists sources of revenue, including “all revenues derived from the use of school trust lands” and 5 percent of net proceeds from sales of U.S. public lands in Utah; unused balance at end of each year becomes part of permanent school fund).

196. *See*, for example, Ky. Const. § 184 (protecting school fund and requiring that raising funds for public schools be submitted to voters); R.I. Const., art. XII, § 2 (perpetual school fund “shall be securely invested and remain a perpetual fund” for the support of public schools; S.D. Const., art. VIII, § 3 (principal shall be increased by at least the rate of inflation before interest and income is apportioned).

197. *See*, for example, Ind. Const., art. VIII, § 3 (fund may be increased but never diminished and cannot be used for any purpose but support of public schools); Fla. Const., art. IX, § 6 (income from state school fund may be appropriated only for “support and maintenance of free public schools”); Wash. Const., art. IX, § 2 (“the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools”).

198. *See* S.D. Const., art. VIII, § 13 (any loss occurring through an unconstitutional act shall be remedied through a special appropriation); Wash. Const., art. IX, § 5 (any losses from the permanent fund become state debt).

199. *See Robinson v. Cabill*, 118 N.J. Super. 223 (Law Div. 1972), *overruled in relevant part* by 62 N.J. 473 (1973).

200. *See*, for example, *Buse v. Smith*, 247 N.W.2d 141 (Wis., 1976) (concluding that Wisconsin’s power equalization legislation, under which certain school districts would not receive any state aid but rather would “be required to pay a portion of their property tax revenues into the general state fund to ultimately be redistributed to other school districts in the state,” violated the uniform taxation clause in the Wisconsin

Constitution); cf. *Richland County v. Campbell*, 346 S.E.2d 470 (S.C., 1988) (upholding state funding plan that “provides for shared funding of a minimum program of public education by the state and local school districts,” by which “school districts which lack a sufficient tax base receive proportionally more state funds and are required to pay proportionately less local revenue for public school operation” and concluding that the plan “is a rational and constitutional means by which to equalize the educational standards of the public school system and the educational opportunities of all students”).

201. See, for example, N.C. Const., art. IX, § 10 (proceeds from escheats go to aid “worthy and needy students” who are state residents enrolled in state institutions of higher learning).

202. See, for example, Ala. Const., art. XIV, § 263 (“No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.”); Alaska Const., art. VII, § 1 (no money shall go to the “direct benefit” of private or religious institutions); Idaho Const., art. IX, § 5 (sectarian appropriations prohibited—no appropriation may ever be made nor any public funds distributed to aid any “church or sectarian or religious society, or for any sectarian or religious purpose”); Minn. Const., art. XIII, § 2 (prohibition against aiding sectarian school); N.D. Const., art. VIII, § 1 (“free from sectarian control”); Utah Const., art. X, § 1 (“free from sectarian control”); Wis. Const., art. X, § 3 (“no sectarian instruction,” but students may be allowed to leave during school hours for religious reasons).

203. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

204. See, for example, Gary J. Simson, “School Vouchers and the Constitution—Permissible, Impermissible, or Required?” 11 *Cornell J.L. & Pub. Pol’y* 553 (2002); Jason S. Marks, “What Wall? School Vouchers and Church-State Separation after *Zelman v. Simmons-Harris*,” 58 *J. Mo. B.* 354 (2002). For an examination of “the more restrictive stance taken by many state courts interpreting state establishment clauses,” see Linda S. Wendtland, “Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions,” 71 *Va. L. Rev.* 625 (1985). A few state courts already have weighed in with decisions about voucher and tax credit programs. Compare *Colorado Congress of Parents v. Owens*, No. 03-3734 (Colo. Dist. Ct., Dec. 3, 2003) (invalidating pilot private school voucher program on basis of state constitution’s local control in education provision) with *Kotterman v. Killian*, 972 P.2d 606 (Ariz., 1999) (upholding constitutionality of tax credit for contributions to “school tuition organizations”). The Colorado decision has been appealed to the state supreme court and oral argument is expected to be held in March 2004.

205. See Cal. Const., art. IX, § 7.5 (authorizing free textbooks for grades one through eight); S.D. Const., art. VIII, § 20 (authorizing free textbooks).

206. Compare Okla. Const., art. XIII, § 6 (official textbook list created by committee of experts from which districts select textbooks) with Colo. Const., art. IX, § 16 (“Neither the general assembly nor the state board of education shall have power to prescribe textbooks to be used in the public schools.”); Wyo. Const., art. VII (legislature and superintendent may not prescribe textbooks to be used).

207. *See*, for example, Fla. Const., art. IX, § 1 (“It is . . . a paramount duty of the state to make adequate provision for the education of all children residing within its borders.”). *See also* Ark. Const., art. XIV, § 1; Ga. Const., art. VIII, § 1; Haw. Const., art. X, § 1; Ill. Const., art. X, § 1; N.M. Const., art. XII, § 3.

208. *See*, for example, Ala. Const., art. XIV, § 256 (“The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state. . . .”). *See also* Alaska Const., art. VII, § 1; Ariz. Const., art. XI, § 1; Cal. Const., art. IX, § 1; Colo. Const., art. IX, § 1; Conn. Const., art. VIII, § 1; Del. Const., art. X, § 1; Idaho Const., art. IX, § 1; Ind. Const., art. VIII, § 1; Iowa Const., art. IX, § 3; Kan. Const., art. VI, § 1; Ky. Const., § 183; La. Const., art. VIII, § 1; Me. Const., art. VIII, pt. 1, § 1; Md. Const., art. VIII, § 1; Mass. Const., pt. 2, C.V., § II; Mich. Const., art. VIII, § 2; Minn. Const., art. XIII, § 1; Miss. Const., art. VIII, § 201; Mo. Const., art. IX, § 1(a); Mont. Const., art. X, § 1(3); Neb. Const., art. VII, § 1; Nev. Const., art. XI, §§ 1–2; N.H. Const., pt. 2, art. 83; N.J. Const., art. VIII, § IV, par. 1; N.Y. Const., art. XI, § 1; N.C. Const., art. IX, § 2(1); N.D. Const., art. VIII, § 1; Ohio Const., art. VI, § 2; Okla. Const., art. XIII, § 1; Ore. Const., art. VIII, § 1; Pa. Const., art. III, § 14; R.I. Const., art. XII, § 1; S.C. Const., art. XI, § 1; S.D. Const., art. VIII, § 1; Tenn. Const., art. XI, § 12; Tex. Const., art. VII, § 1; Utah Const., art. X, § 1; Vt. Const., § 68; Va. Const., art. VIII, § 1; Wash. Const., art. IX, § 1; W. Va. Const., art. XII, § 1; Wis. Const., art. X, § 3; Wyo. Const., art. VII, § 1.

209. *See*, for example, Ill. Const., art. X, § 2 (creating state board of education to be “elected or selected on a regional basis” and establishing board’s duties, while providing that these may be limited by law); Mo. Const., art. IX, § 2(a) (providing for state board of education; number, appointment, term and political affiliation of its members; and their reimbursement for expenses and per diem compensation); Neb. Const., art. VII, § 3 (eight members, elected from eight districts of roughly equal population; four-year terms; no compensation but reimbursement for expenses; nonpartisan ballot; members cannot be “actively engaged in the educational profession”). *See also* Okla. Const., art. XIII, §§ 5, 8 to XIII-B, § 4 (establishing and explaining in detail structure of state board of education and of system of higher education and board of regents). But *see* Idaho Const., art. IX, § 2 (very general, indicating only that board’s powers and duties will be prescribed by law).

210. *See*, for example, Kan. Const., art. VI, §§ 2–5 (creating state board of education to oversee educational interests of the state and board of regents to oversee higher education).

211. *See*, for example, Miss. Const., art. VIII, § 202 (state superintendent is elected in same time and manner as governor for four-year term).

212. *See*, for example, Cal. Const., art. IX, § 3.3 (permitting county charters to provide for the election, qualifications and terms of members of county board of education); N.C. Const., art. IX, § 2 (2) (allowing general assembly to assign responsibility for support of public schools to local governing entities “as it may deem appropriate”).

213. *See*, for example, Ga. Const., art. VIII, § 5 (“Each school system shall be under the management and control of a board of education”); Kan. Const., art. VI, § 5 (“Local public schools . . . shall be maintained, developed and operated by locally