uniformity requirements have been modified with provisions for classification and exemptions, thereby shifting questions of tax preferences and tax policy back to the political process. Uniformity of taxation, subject to some form of classification, seems to be a well-accepted constitutional norm.

Limitations

The tax limitation provisions are more controversial. Tax limits, like debt limits, suppose that the level of taxation is a constitutional matter, rather than one for resolution by current elected officials. But whereas the long-term consequences of debt obligations provide some support for treating debt as a quasi-constitutional matter, tax rates may easily be changed, and politicians who enact high taxes may be punished by the voters in the next election. Certainly as the last two decades have demonstrated, antitax forces are well represented in the political process. It is not clear why further constitutional protection needs to be superimposed on the protections provided by the ability of the voters to vote out of office elected officials who raise taxes.

State constitutional limitations on local taxation seem particularly inappropriate. Local government actions may be more transparent than state decisions and many local governments are subject to effect monitoring, participation, and political control by grassroots taxpayers. Local taxation is further constrained by the vigorous interlocal competition for mobile taxpayers. Given the existence of both significant exit and significant voice opportunities it is unclear what constitutional need state tax limits on localities serve. Moreover, substantive constitutional limits on local taxation seem in tension with local autonomy since they preclude localities where the people are willing to support tax increases from taking such action. Holding all local governments to the same limit seems inconsistent with the recognition of interlocal variation and diversity that animates home rule.

Whatever the theoretical difficulties with constitutional limitations on state and local taxation they are widespread and appear to enjoy considerable popular support. Indeed, whereas the public purpose requirements and debt restrictions largely date back to the nineteenth century—with some twentieth century revisions—many of the tax and expenditure limitations, including some of the most rigorous provisions, are recent developments. Tax limitations are here to stay.

If we are to have tax limitations, are some constitutional provisions preferable to others? As noted, there is considerable variety in the type of tax limitation, including rate caps, levy caps, levy increase caps, and caps on increases in individual taxpayer liabilities. And, of course, within each category, there is interstate and intrastate variation in the number or percentage of the cap.

There is certainly something to be said for limits that aim at protecting taxpayers from sharp swings in their liabilities—swings that result from appreciations

in the unrealized value of their homes but not from increases in their current incomes. This is the focus of California's Proposition 13. On the other hand, limiting tax liability increases can result in two different owners of properties of similar values paying very different amounts of tax.

Limitations on tax rates or on the aggregate levy as a percentage of local wealth are more widespread and seem to reflect a desire to impose a constitutional norm of financially limited government. This is a substantive value choice of a state's votes. Levy limits would be more effective in attaining their end, however, if they were targeted not solely on the property tax—as many of them are—but on all revenue sources, or at least on all own-source revenues (not counting intergovernmental assistance). Localities derive a large and growing share of their revenues from taxes other than the property tax and especially from nontax revenue sources like fees and assessments. Indeed, the current tax limitations may very well be at least partially responsible for that fiscal shift. Limitations would be more effective in attaining the goal of limiting the share of local wealth devoted to government and in avoiding the distortions caused by the desire to evade the "tax" label if the limits were more encompassing.

On the other hand, as with debt, one reason for the widespread shift to revenue sources that evade the limitations is the recognition that the programs today's state and local governments maintain require more revenue than the constitutionally limited taxes allow. If tax limits were made more encompassing, the limits as a percentage of local wealth would have to be raised. Perhaps, as with the proposal for debt limits, the best approach would be to take current revenue levels, including revenues from fees and assessments as a baseline and cap increases from that level by requiring that they be tied to factors that drive up the costs of government, such as population, the rate of inflation, or changes in personal income

Voter Approval

The most recent trend in the state constitutional treatment of taxation is the requirement of voter approval for new taxes or tax increases. Voter approval may be a more flexible means of controlling taxes than a specific limit carved into the constitution. Particularly for state constitutional limits on local taxes, voter approval rather than a substantive limitation is preferable—assuming there is to be some limit—since with voter approval the locality at least as some possibility of lifting the limit if local voters so choose. A move from substantive limits to voter approval would be a move in the direction of home rule.

State voter approval requirements are more problematic. These appear to reflect the view that taxation is a fundamental decision and therefore should have direct popular consent. Yet, unlike debt, tax levels have no long-term binding consequences. A tax raised in one year can be lowered in the next. Certainly, given the political salience of tax decisions and the ability of voters to oversee—

and eject—elected officials who vote for tax increases, a voter approval requirement cannot be grounded in the theory that is needed to correct for structural defects in the ordinary political process that would support. Moreover, to the extent that the referendum electorate is smaller than and demographically different from the general electorate, adding a voter approval requirement could make the final result less democratic, not more so.

Ultimately, voter approval rules, like substantive limits on taxation, are based not on the role on the constitution in correcting political process failures but on a substantive commitment to making it difficult to impose or increase taxes. Although procedural in form, the voter approval requirements are substantive in effect. As a result, the decision whether to have such a requirement will reflect the substantive views of the state community on taxation rather than on any theory of the appropriate balance of responsibilities between a state constitution and state and local governments.

Notes

1. U.S. Const., art. I, § 8.

2. U.S. Const., art. I, § 7.

3. U.S. Const., art. I, § 9.

4. U.S. Const., art. I, § 8.

5. U.S. Const., art. I, § 9.

6. Ibid.

7. Dale F. Rubin, "Constitutional Aid Limitation Provisions and the Public Purpose Doctrine," 12 *St. Louis U. Pub. L. Rev.* 143, 143 n. 1 (1993).

8. N.Y. Const., art. VII, § 8.

9. N.Y. Const., art. VIII, § 1.

10. *See,* for example, Colo. Const., art. XI, §§ 1, 2; N.Y. Const., art. VII, § 8, art. VIII, § 1.

11. 21 Pa. 147 (1853).

12. *See,* for example, *Allen v. Inhabitants of Jay,* 60 Me. 124 (1872) (invalidating aid to factories); *Lowell v. Boston,* 111 Mass. 454 (1873) (financial assistance to private residential housing development violated public purpose requirement); Opinion of the Justices, 291 Mass. 567 (1935) (use of tax revenues to insure banks against loss on home mortgages not within "public purpose" limitation).

13. *Albritton v. City of Winona,* 178 So. 799, app. dis. 303 U.S. 627 (1938).

14. *See,* for example, *Basehore v. Hampden Industrial Devel. Auth.,* 248 A.2d 212 (Pa., 1968).

15. *See,* for example, *State ex rel Beck v. City of York,* 82 N.W.2d 269 (Neb., 1957).

16. *See,* for example, *Village of Moyie Springs v. Aurora Mfg Co.,* 353 P.2d 767 (Idaho, 1960); *Mitchell v. North Carolina Indus. Devel. Fin. Auth.,* 159 S.E.2d 745 (N.C., 1968).

17. *See,* for example, *WDW Properties, Inc. v. City of Sumter,* 535 S.E.2d 631, 635–36 (S.C., 2000); *Delogu v. State,* 720 A.2d 1153 (Me., 1998); *Maready v. City of Winston-Salem,* 467 S.E.2d 615 (N.C., 1996); *Libertarian Party of Wisconsin v. State,* 546 N.W.2d 424 (Wis., 1996).

18. *See,* for example, *WDW Properties, Inc. v. City of Sumter,* 535 S.E.2d 631, 635–36 (S.C., 2000); *King County v. Taxpayers of King County,* 949 P.2d 1260, 1266 (Wash., 1997).

19. 455 A.2d 1 (Me., 1983).

20. 731 S.W.2d 797 (Ky., 1987).

21. *See,* for example, *Holding's Little America v. Board of County Comm'rs,* 712 P.2d 331 (Wyo., 1985); *Purvis v. City of Little Rock,* 67 S.W.2d 936 (Ark., 1984). But *see Hucks v. Riley,* 357 S.E.2d 458 (S.C., 1987) (public interest in tourism development provides public purpose for use of state funds to finance privately owned and operated lodging and restaurant facilities).

22. *Delogu v. State,* 720 A.2d 1153, 1155 (Me., 1998).

23. *Jackson v. Benson,* 578 N.W.2d 602, 628 (Wis., 1998).

24. *See Maready v. City of Winston-Salem,* supra.

25. *See,* for example, Alaska Const., art. IX, § 6; Ill. Const., art. VIII, § 1.

26. *See* also *Brower v. State of Washington,* 969 P.2d 42 (Wash., 1998) (lending of credit restriction does not apply if loan advances a "fundamental purpose" of government).

27. *See,* for example, *Barnhart v. City of Fayetteville,* 900 S.W.2d 539 (Ark., 1995).

28. *See,* for example, *Washington Higher Educ. Facilities v. Gardner,* 699 P.2d 1240 (Wash., 1985).

29. *See,* for example, *State of Florida v. Inland Protection Financing Corp.,* 699 So.2d 1352 (Fla., 1997).

30. *See,* for example, *Utah Technology Finance Corp. v. Wilkinson,* 723 P.2d 406 (Utah, 1986). *See also West Virginia Trust Fund, Inc. v. Bailey,* 485 S.E.2d 407 (W.Va., 1997).

31. *See,* for example, Ind. Const., art. X, § 5 (prohibiting state debt except "to meet casual deficits in revenue," repel invasion, suppress insurrection or provide for state defense); W. Va. Const., art. X, § 4 (same).

32. *See,* for example, Ariz. Const., art. IX, § 5 (total state debt limited to $350,000); Ky. Const., § 49 (state debt limited to $500,000); Ohio Const., art. VIII, § 1 (state debt limit of $750,000); R.I. Const., art. VI, § 16 (total state debt limited to $50,000).

33. *See,* for example, Ga. Const., art. VII, § IV, par. II (debt service on state debt limited to 10% state revenue); Hawaii Const., art. VII, § 13 (debt service on state debt limited to 18½% of the average state general fund revenues in the three prior fiscal years; local government debts limited to 15% of total assessed value of real property in each political subdivision); Nev. Const., art. IX, § 3 (aggregate state debt limited to 2% of assessed valuation of property in state); Wash. Const., art. VIII, § 1 (debt service on aggregate state debt limited to 9% of average of state revenues over the three prior fiscal years).

34. *See,* for example, Ind. Const., art. XIII, § 1 (municipal debt capped at 2% of assessed valuation); Ky. Const., § 158 (permissible local government debt set at between 2% and 10% of local assessed valuation, with debt limit varying according to population of city; county and taxing district limits set at 2% of assessed valuation); Mich. Const., art. VII, § 11 (county debt limit set at 10% of assessed valuation); Nev. Const., art. IX, § 23 (state debt capped at 2% of assessed valuation); N.Y. Const., art VIII, § 2-a (debt limits for New York City and Nassau County set at 10% of assessed valuation; debt limit for other large cities is 9% of assessed valuation; debt limit for other cities and counties, and for towns and villages is 7% of assessed valuation).

35. *See,* for example, Cal. Const., art XVI, § 18 (local government debts require approval of two-thirds of local electorate); Mich. Const., art. IX, § 15 (state long-term debt requires approval of two-thirds of members of each house of the legislature and a majority of state voters in referendum); S.C. Const., art. X, § 13 (new state general obligation debt requires approval of either two-thirds of each legislative house or popular referendum).

36. *See,* for example, Ga. Const., art. X, § V, par. 1 (county and municipal debt limited to 10% of assessed valuation; voter approval required); Wash. Const., art. VIII, § 1 (state debt service limited to 9% of average of state revenues for past three years; three-fifths majority vote in each house of the legislature required before debt may be incurred).

37. *See* William H. Stewart, *The Alabama Constitution: A Reference Guide* 115–16 (1994).

38. *See,* for example, In re Oklahoma Capitol Improvement Authority, 958 P.2d 759 (Okla., 1998).

39. *See,* for example, *Convention Center Authority v. Anzai,* 890 P.2d 1197 (Hawaii, 1995).

40. *See,* for example, *Eakin v. State ex rel Capital Improvement Board of Marion County,* 474 N.E.2d 62 (Ind., 1985) (holding bond used to finance a convention center and backed by taxes on hotels, motels, and retail food business is "debt" within meaning of debt limit).

41. The special fund exemption may not be available if the state is dedicating a preexisting revenue source to pay off a bond, rather than creating a new tax or increasing the amount to be paid under an existing tax. *See,* for example, Opinion of the Justices, 665 So.2d 1357, 1362–63 (Ala., 1995); *State of West Virginia ex rel Marockie v. Wagoner,* 438 S.E.2d 810 (W.Va., 1993).

42. *See,* for example, *Bulman v. McCrane,* 312 A.2d 857 (N.J., 1973); *Department of Ecology v. State Finance Committee,* 804 P.2d 1241 (Wash., 1991); *Dieck v. Unified Schl. Dist. of Antigo,* 477 N.W.2d 613 (Wis., 1991). *Contra Montano v. Gabaldon,* 766 P.2d 1328 (N.M., 1989).

43. *See,* for example, *Carr-Gottstein Properties v. State,* 899 P.2d 136 (Ak., 1995); In re Anzai, 936 P.2d 637 (Hawaii, 1997); *Wilson v. Kentucky Transp. Cabinet,* 884 S.W.2d 641 (Ky., 1994); *Employers Insurance Co. of Nevada v. State Bd. of Examiners,* 21 P.3d 628 (Nev., 2001); *Fent v. Oklahoma Capitol Improvement Authority,* 984 P.2d 200 (Okla., 1999); *Dykes v. Northern Virginia Transportation District Comm'n,* 411 S.E.2d 1 (Va., 1991); *Schulz v. State of New York,* 639 N.E.2d 1140 (N.Y., 1994).

44. *See,* for example, *Steup v. Indiana Housing Finance Authority,* 402 N.E.2d 1215 (Ind., 1980); *Utah Housing Finance Agency v. Smart,* 561 P.2d 1052 (Utah, 1977); *State ex rel Warren v. Nusbaum,* 208 N.W.2d 780 (Wisc., 1973).

45. Richard J. Marino and Colleen Waddell, "Revised Lease and Appropriation-Backed Debt Rating Criteria," Standard & Poor's Rating Services, June 13, 2001.

46. *Rider v. City of San Diego,* 959 P.2d at 358.

47. *See,* for example, *Employers Insurance Co. of Nevada v. State Bd. of Examiners,* 21 P.3d 628, 632 (Nev., 2001) (expressly rejecting argument from "realism"); *Wilson v. Kentucky Transp. Cabinet,* 884 S.W.2d at 644 ("Practical, moral or righteous claims do not pass the test of contract or constitutional law").

48. *See,* for example, *Wilson v. Kentucky Transp. Cabinet,* 884 S.W.2d at 644 (appropriation bonds "do not create the evil which the constitutional provision was designed to prevent"); *Department of Ecology v. State Finance Committee,* 804 P.2d 1241, 1246 (Wash., 1991); *Aneroid v. New Jersey Bldg. Auth.,* 448 A.2d 449, 456 (N.J., 1982).

49. *See Wilson v. Kentucky Transp. Cabinet,* supra; *Fent v. Oklahoma Capitol Improvement Auth.*, supra; *Department of Ecology v. State Finance Comm.,* supra.

50. 809 A.2d 91 (N.J., 2002).

51. Ibid. at 104.

52. *See* Ibid. at 105.

53. Ibid. at 104–07.

54. *See* Ibid. at 109.

55. *See,* for example, *Albuquerque Metropolitan Arroyo Flood Control Auth. v. Swinburne,* 394 P.2d 998 (N.M., 1964); *Rider v. City of San Diego,* 959 P.2d 347 (Cal., 1998); *Ragsdale v. City of Memphis,* 70 S.W.2d 56, 68 (Tenn. Ct. App., 2001).

56. *See,* for example, *Rider v. City of San Diego,* 959 P.2d 347 (Cal., 1998); *Fent v. Oklahoma Capitol Improvement Auth.*, 984 P.2d 200 (Okla., 1999); *Dykes v. Northern Va. Transp. Dist. Comm's,* 411 S.E.2d 1 (Va., 1991); *Schulz v. State of New York,* 639 N.E.2d 1140 (N.Y., 1994).

57. *See,* for example, J. R. Hellerstein and W. Hellerstein, *State and Local Taxation: Cases and Materials* 34 (6th ed. 1997).

58. *See,* for example, Ga. Const., art. VII, § 1 ("all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax,"); N.H. Const., pt. I, art. 5 ("all taxes [shall] be proportionate and reasonable, . . . equal in valuation and uniform in rate, and just").

59. *See,* for example, Ind Const., art. X, § 1 ("uniform and equal rate of property assessment and taxation"); Me. Const., art. IX, § 8 ("all taxes upon real and personal estate . . . shall be apportioned and assessed equally").

60. Hellerstein and Hellerstein, supra, at 36.

61. M. David Gelfand, Joel A. Mintz, and Peter A. Salsich, Jr., *State and Local Taxation and Finance* 38 (2d ed., 2000).

62. Proposition 2½ is a statutory initiative, not a constitutional amendment.

63. *See,* for example, N.Y. Const., art. VIII, § 10.

64. *See* Kirk J. Stark, "The Right to Vote on Taxes," 96 *Nw. L. Rev.* xxx (2001).

65. Ibid.

66. Mo. Const., art. X, § 22(a).

67. *See Beatty v. Metropolitan St. Louis Sewer Dist.,* 867 S.W.2d 217 (Mo., 1993).

68. Cal. Const., art. XIIIA, § 3.

69. W. Valente, D. McCarthy, R. Briffault, et al., *State and Local Government Law* 536 (5th ed., 2001).

70. Ibid. at 537.

71. Mich. Const., art. IX, § 26.

72. Ibid.

73. Mich. Const., art. IX, § 27.

74. *See* Mo. Const., art. X, §§ 16–18. The Colorado Constitution takes a slightly different approach. Pursuant to a voter initiative adopted in 1992, it sets a "maximum annual percentage change in state fiscal year spending" equal to "inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991," Colo. Const., art. X, § 20(7).

75. *See* Terri A. Sexton, Steven M. Sheffrin, and Arthur O'Sullivan, Proposition 13: Unintended Effects and Feasible Reforms, 52 *Nat'l. Tax J.* 99 (1999).

76. *See* Valente, McCarthy, and Briffault, supra 537.

77. Ibid. at 560.

78. *See,* for example, *Trent Meredith, Inc. v. City of Oxnard,* 170 Cal. Rptr. 685 (Cal. App., 1981).

79. *See,* for example, *County of Fresno v. Malmstrom,* 156 Cal. Rptr. 777 (Cal. App., 1979) (special assessment not subject to Proposition 13); *Zahner v. City of Perryville,* 813 S.W.2d 855 (Mo., 1991) (Missouri constitution's requirement of voter approval for tax increases does not apply to assessments).

80. *See,* for example, *Sinclair Paint Co. v. State Board of Equalization,* 937 P.2d 1350 (Cal., 1997); *Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Bd.,* 656 N.E.2d 563 (Mass., 1995). *See also City of Huntington v. Bacon,* 473 S.W.2d 743 (W.Va., 1996) (sustaining a municipal fee imposed on all building owners to cover costs of fire and flood protection services).

81. *See,* for example, 2nd *ROC-Jersey Associates v. Town of Morristown,* 731 A.2d 1 (N.J., 1999); *City of Boca Raton v. State,* 595 So.2d 25 (Fla. 1992); *Knox v. City of Orland,* 841 P.2d 144 (Cal., 1992); *Grais v. City of Chicago,* 601 N.E.2d 745 (Ill., 1992).

82. *See,* for example, *Home Builders Ass'n of Dayton v. City of Beavercreek,* 729 N.E.2d 349 (Ohio, 2000); *Home Builders Ass'n of Central Arizona v. City of Scottsdale,* 930 P.2d 993 (Az., 1997); *St. Johns County v. Northeast Florida Builders Ass;'n Inc.,* 583 So.2d 635 (Fla., 1991); *Holmdel Builders Ass'n v. Township of Holmdel,* 583 A.2d 277 (N.J., 1990).

83. *See,* for example, *Bolt v. City of Lansing,* 587 N.W.2d 264 (Mich., 1998); *Emerson College v. City of Boston,* 462 N.E.2d 1098 (Mass., 1984).

84. *See,*, for example, Mo. Const., art. X, § 22(a); Cal. Const., art. XIII D.

85. *See,* for example, *Los Angeles Co. Transp. Comm. v. Richmond,* 643 P.2d 941 (Cal., 1982). But *cf. Rider v. County of San Diego,* 820 P.2d 1000 (Cal., 1991).

86. Ibid. at 537–38.

87. *See* John Kirlin, "The Impact of Fiscal Limits on Governance," 25 *Hastings Const. L.Q.* 197, 200 (1998).

88. *See,* for example, *New Jersey Sports & Exposition Auth. v. McCrane,* 292 A.2d 545 (N.J., 1972); *Dieck v. Unified School Dist. of Antigo,* 477 N.W.2d 613, 619–20 (Wisc., 1991).

89. New Jersey Sports Auth., supra 292 A.2d at 557, 559.

90. *Compare Rider v. County of San Diego,* 820 P.2d 1000 (Cal., 1991) (cracking down on the ability of California counties to evade Proposition 13 by creating special districts) with *Rider v. City of San Diego,* 959 P.2d 347 (Cal., 1998) (upholding use of special districts to avoid debt limits).

91. *See,* for example, Peter K. Eisinger, *The Rise of the Entrepreneurial State: State and Local Economic Development Policy in the United States* 200–24 (1988).

92. *See,* for example, *Charter Township of Ypsilanti v. General Motors Corp.,* 506 N.W.2d 556 (Mich. Ct. App., 1993).

93. *See,* for example, Hawaii Const., art. VII, § 13 (debt service on state debt limited to 18½% of the average state general fund revenues in three prior fiscal years); Wash. Const., art. VIII, § 1 (debt service on state debt limited to 9% of average of state revenues over three prior fiscal years).

Chapter Nine

Education

Paul L. Tractenberg*

Introduction

Education is undeniably one of our most important public functions. Indeed, it is widely considered to be the most important function of state governments, which have primary responsibility for it. In a July 2002 statewide public opinion survey conducted in Florida, respondents were asked to identify the most important issue facing their state. Thirty-seven percent identified the education system; the next highest issues—the environment and terrorism—were identified by 6 percent each.[1] This is hardly a new perception. From the earliest days of the republic, some state constitutions singled out education, sometimes alone among the many important public services provided by state government, as worthy of special recognition. During the nineteenth and early twentieth centuries, as additional states entered the union, this trend accelerated. Today, every state constitution contains an education provision (and that has been true for some time).[2] For at least the past thirty years, these education clauses have been at the heart of enormously important and controversial litigation in the courts of most states aimed at ensuring funding equity and educational adequacy for all students, especially those in poor urban and rural school districts. At the same time as this litigation underscores the centrality of current clauses to twentieth-century education reform, it also raises questions about their sufficiency to provide for education in the twenty-first century.

This chapter will draw on that long and important history, and the pervasiveness of education provisions in state constitutions, to explore:

- How these provisions have evolved overtime
- The extent to which they seem adequate or appropriate to meet current needs

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- Whether there are recognized "best practices" in existing state constitutional education provisions or in the literature
- How one might approach the task of developing "model" education provisions for a state constitution

A HISTORICAL OVERVIEW

The evolution of education provisions in state constitutions has not proceeded in a precise stage-by-stage sequence, each separate and clearly identifiable. Rather, the evolutionary landscape is chaotic, characterized by overlapping developments among, and even within, the states. Partly this is because, although states have sometimes mimicked one another's constitutional provisions,[3] important differences in history, demographics, geography, and political and social orientation have tended to rise to the surface and limit such similarities. One of the most telling differences is the time at which, and the circumstances under which, a state entered the union. As a consequence, important differences persist in state education provisions regarding such central matters as the nature and extent of the commitment to education, state-local relationships, the structure of state education systems and bureaucracies, and funding mechanisms.

Nonetheless, it may be useful to sketch four broad stages through which education provisions have passed, and a rough approximation of the time period occupied by each of those stages.

The introductory stage (1776–1834) reflected a substantial degree of uncertainty about constitutionalization of education with states dividing relatively evenly between those with education clauses and those without them. The initial state constitutional provisions tended to recognize the importance to society of an educated citizenry, either by exhortations about the virtues of learning and knowledge or by charges to state legislatures to establish schools. During the latter part of this introductory period, a number of state constitutional provisions began to impose a more specific obligation on state legislatures—to provide for a general system of free public education, equally open to all.

The second, or foundational, stage (1835–1912) as a period during which the number of states doubled, and most of those entering the union had constitutions with education clauses. Additionally, most of the other states without education provisions in their constitutions added them. This period, clearly the most active one for state education provisions, was dominated by provisions that placed far more explicit responsibility on states and their legislatures regarding the establishment, funding, and administration of free common school systems.

The third stage (1913 and extending to the middle of the twentieth century) was a period of relative quiescence with only limited, sporadic constitutional activity. Mainly, this involved elaboration of the fiscal and administrative

structures put in place during the prior stage. Finally, the fourth stage (from the mid-twentieth century to the present) is more notable for its responses to legal or other advocacy efforts of the period, beginning with the desegregation efforts of *Brown v. Board of Education*[4] and extending to the funding equity and educational adequacy litigation of the past thirty years. Many of the education provisions of this period reflect acceptance of the premise that state education clauses afford students enforceable rights and seek to define, or to extend or narrow, those rights.

Stage 1 (1776–1834)—Introduction and Uncertainty

The period between 1776 and 1834 was a period of educational uncertainty.[5] Of the twenty-four states, eleven had no education clauses in their state constitutions;[6] the other thirteen either entered the Union with a constitutional education provision, or included one in a subsequently adopted constitution. The education provisions of that period were generally of two types: hortatory clauses exalting the virtues of learning and knowledge; and obligatory clauses requiring state legislatures to establish schools.[7] This pattern may have reflected uncertainty about the state's role regarding education.

As an example of the hortatory approach, the Massachusetts Constitution of 1780 provided: "Wisdom and knowledge, as well as virtue, . . . being necessary for the preservation of [the people's] rights and liberties . . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences."[8] The Massachusetts Supreme Court interpreted this provision to give "the legislature discretion to act as it saw fit," rather than to confer a right to education.[9] A number of later state constitutions followed the Massachusetts language; for example, the 1802 Ohio Constitution set forth in its Bill of Rights: "religion, morality and knowledge being essentially necessary to good government and the happiness of mankind, schools and the means of instructions shall forever be encouraged by legislative provision."[10]

The obligatory provisions, by contrast, more specifically mandated legislatures to establish schools. For example, the 1776 Pennsylvania Constitution required that: "A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices."[11] Similarly, the Georgia Constitution of 1777 provided that "[s]chools shall be erected in each county and supported at the general expense of the State, as the legislature shall hereafter point out."[12] The 1786 Constitution of Vermont even more specifically provided that: "a competent number of schools ought to be maintained in each town for the convenient instruction of youth; and one or more grammar schools be incorporated, and properly supported in each county."[13]