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]

Some states eventually combined the hortatory and obligatory language in their state constitutions. For example, the Indiana Constitution of 1816 prefaced the legislative duty to provide a general education system and maintain public school lands with the recognition that "[k]knowledge and learning generally diffused, through a community, [is] essential to the preservation of a free Government, and spreading the opportunities, and advantages of education through the various parts of the Country [is] highly conducive to this end."[14]

Regardless of their precise content, the earliest education provisions tended to emphasize the importance of schooling and education, but to leave unaddressed more specific educational matters, such as the ages or other characteristics of students to be educated, the types of schools to be established, the means by which those schools would be funded, and the entities that would be responsible for administering the schools and overseeing the educational system. Thus, while these state constitutions did recognize the value of education to the citizenry and to the state itself, they did not reflect a concrete vision of the state's role in education.

Some of the nineteenth-century education clauses did, however, begin to reflect several more specific educational values: first, that "[t]he purpose of public education was to train upright citizens by inculcating a common denominator of non-sectarian morality and non-partisan civic instruction," and, second, that "[t]he common school should be free, open to all children and public in support and control."[15] The idea of a "common school . . . is a manifestation of the social contract."[16] Education provisions, thus, began quite early to include equality provisions, and broad statements about those who must receive the benefits of public schools. Some of the equality provisions foreshadowed the funding equity litigation of the 1970s since they provided for equitable distribution of funding within districts and from district to district. Of course, these provisions often were honored in the breach. The Ohio Constitution of 1802, for example, contained an explicit equality provision with respect to participation by the poor in schools supported by federal funds.[17] The 1818 Connecticut Constitution also provided that the interest of the school fund "shall be inviolably appropriated . . . for the equal benefit of all the people."[18] In 1816, Indiana mandated that its education system be "equally open to all."[19]

This emerging state constitutional tendency to require legislatures to provide for a general system of free public education, equally open to all, formed the basis of the next evolutionary stage.

Stage 2 (1835–1912)—Clarification and Stabilization

The period between 1835 and 1912 was a period of clarification and stabilization[20] in the evolution of state constitutional education clauses. Indeed, it is eas-

ily the period of the most concentrated constitutional activity. Twenty-four new states entered the Union, most with education provisions. Although states rarely have identical provisions, as this large number of new states entered the Union, doubling its size, substantial similarities in constitutional language emerged.[21] During this lengthy period, there also was evolution from relatively simple to much lengthier and more detailed education provisions, roughly corresponding to the pre– and post–Civil War and Reconstruction Period. Hence, "[w]hereas the eight new state constitutions written between 1841–60 contained an average of 6.3 educational provisions, the seven approved by Congress between 1881–1900 had an average of 14.0."[22] This increased detail reflected an effort to clarify the states' educational role as they gradually enlarged their authority and control.[23] The increase in bureaucratic detail also significantly, but not entirely, supplanted "republican rhetoric."[24] Some education clauses of this period still began with hortatory, or purposive, language, harking back to the earliest state constitutions, stressing that an educated citizenry was necessary for a stable republican government. Typical of such provisions was the Mississippi Constitution, which stated that "the stability of a republican form of government depends mainly upon the intelligence and virtue of the people,"[25] and the Arkansas Constitution, which referred to "[i]ntelligence and virtue being the safeguards of liberty and the bulwark of a free and good government."[26] These statements of purpose in education clauses, however, no longer stood alone. They were buttressed by provisions clarifying the state's role regarding education and educational institutions, and stabilizing the structure of state school systems.[27]

This second evolutionary stage saw the emergence of provisions assigning responsibility, usually to the legislature, for establishing and maintaining schools within the state,[28] creating specific state agencies or officers to administer common school funds and to supervise schools on a state level,[29] and creating regional or local agencies or officers to supervise their schools.[30] In fact, by the 1880s, practically all states provided by constitutional provision or legislation for at least some of the following: a state board of education, a state superintendent, a common school fund, school taxes, teacher credentials and a school age range.[31] Yet state control was not unfettered, as local entities, sometimes themselves creatures of state education clauses, consistently resisted its growth.[32] Ultimately, despite any surface similarities, vast differences in the composition of the states, demographically and politically, led to variations in the implementation and specifics of education provisions, such as the level of local control and whether state education officials would be elected or appointed.[33]

Despite these variations in detail and specificity, however, most state constitutional education provisions increasingly assured a state system of free common or public schools,[34] and sought to clarify what state provision of education entailed; in other words, how this system of free public schools was to work.

As this period of "clarification and stabilization" proceeded, education provisions relating to centralization and structuring became "more detailed and bureaucratic," incorporating more specific requirements regarding the administration and oversight of public education.[35] The increased inclusion of bureaucratic detail in state constitutions "suggest[s] that as schooling became more institutionalized, structure became more urgent than philosophy."[36] This trend toward increased bureaucratic detail has continued throughout much of the ensuing history of education clauses.

Furthermore, education clauses of this period explicitly stated who was to benefit from public schools, and who was not. For example, beyond equal access mandates, some state constitutions specified the age range of students.[37] Many states prohibited both the use of state funds for religious or sectarian schools and sectarian instruction in public schools.[38] Provisions both mandating segregated schools and prohibiting discrimination in public schools also appeared during this period.[39]

Another important clarification in state constitutional education provisions was the specification of the kind or quantum of education to be offered by the state. Representative of the language used, many clauses provided for a "general and uniform" system of education,[40] or a "thorough and efficient" free public school system.[41] Washington declared it "the paramount duty of the state to make ample provision for the education of all children residing within its borders."[42]

More specifically, there were provisions requiring minimum school terms,[43] dealing with whether or not mandatory attendance laws could be enacted,[44] specifying what levels of education,[45] and even what specialized kinds of education,[46] were to be provided. Some education clauses included provisions regarding textbooks[47] and teachers.[48]

The stabilization of education as a state function also was reflected by the inclusion of provisions relating to funding and investment of funds, including the establishment of "inviolate" common school funds,[49] local taxation to support public schools,[50]and federally granted school lands.[51] A few education clauses of this era even contained enforcement or accountability provisions, under which a school district would lose funding if it failed to maintain a school as required. For example, the California Constitution provided that a "school [shall] be kept up and supported in each district at least three months in every year," to be enforced by depriving "any school [district] neglecting to keep and support such a school . . . of its proportion of the interest of the public fund during such neglect."[52]

Detailed education provisions of these sorts reflected the entrenchment of public education as a primary function and responsibility of the states, and provided mechanisms by which state governments would fulfill that role. Although states continued to alter or refine details about the supervision, administration and funding of public schools throughout the twentieth cen-

tury,[53] the mid-nineteenth-century through early twentieth-century period could be seen as the time during which the foundations for today's education provisions and systems were laid.

Stage 3 (1913–1954)—Quiescence and Preoccupation

Although there were some modest and intermittent efforts to build on the clarification and stabilization of the prior stage, especially the centralization and bureaucratization that dominated its later years,[54] for the most part the third stage was characterized by quiescence and preoccupation. After all, it was a time in which the nation had to deal with two World Wars, the Great Depression and the aftermaths of all three. There could hardly have been time, attention or resources to invest in serious state constitutional activity regarding education.

Stage 4 (1954 to the present)—Educational Rights and Entitlements

The effort to find more efficient and effective ways of governing state public school systems resumed in this last evolutionary stage and continues to the present,[55] but it was joined by a new emphasis on educational rights and entitlements. This has involved both an effort to define, or to expand or limit, already recognized rights, and to accommodate newly emerging rights. To a great degree, these emerging rights resulted from advocacy efforts through the courts, a phenomenon of this period.

The United States Supreme Court's decision in *Brown v. Board Education*[56] was an educational and social policy landmark that led to fundamental changes in the way we think about and provide education, as well as other public services. Directly and indirectly it has had profound effects on state, as well as federal, constitutional law. Obviously, any state education clauses that authorized or required segregated schools had to fall before *Brown*. Interestingly, though, *Brown* did not lead to the wholesale adoption of state education provisions that embraced or extended its teachings. Less than one-third of all state constitutions have provisions expressly barring segregation or other forms of discrimination in the schools, and some of those provisions predated *Brown* and others were adopted substantially after *Brown*. For example, New Jersey's antisegregation provision dated from 1947 and Michigan's antidiscrimination provision was adopted in 1963.[57] Much later, in 1996, California amended its constitution to address race and other factors, but in order to preclude affirmative action.[58]

The *Brown* decision may have had a more substantial indirect effect on state constitutions, however. Many commentators believe that it paved the way

for the funding equity and educational adequacy litigation of the past three decades, and these issues have increasingly found their way into state constitutional amendments. Indeed, by the middle of the twentieth century, a variety of school finance issues, including voter approval of tax increases and educational assistance to students and parents in the form of guaranteed loans or tuition credits, as well as adequate and equitable funding, had begun to be a focus of state constitutional amendments.

Illustrative of state constitutional provisions relating to school funding were those amendments mandating minimum expenditures on public education. For example, a Colorado amendment requires that public school spending increase "at least by the rate of inflation plus an additional one percentage point."[59] An Oregon amendment requires not only legislative appropriation of "money sufficient to ensure that the state's system of public education meets quality goals established by law," but also that the legislature "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."[60] The Oregon Constitution also was amended to recognize any "legal obligation it [the Legislative Assembly] may have to maintain substantial equity in state funding, . . . establish[ing] a system of Equalization Grants to eligible districts for each year in which the voters of such districts approve local option taxes."[61] Ohio and Georgia amended their constitutions to provide parents and students with direct educational funding assistance.[62]

By contrast, several major states adopted constitutional amendments during this period that effectively limited educational funding, typically by capping property tax rates. The most prominent of these is California's Proposition 13, adopted in 1978.[63]

State constitutional amendments during this period also related to other heavily litigated and highly charged issues, such as affirmative action, state aid to religious schools, and school safety.[64] Most recently, state constitutional amendments are reflecting growing public concern about educational quality, probably best exemplified by Florida's recent activity.

In 1998 and 2002, Florida adopted seven constitutional amendments, most of which relate to educational quality issues.[65] The 1998 amendments involved a large-scale overhaul of Florida's education provision.[66] They declared education a "fundamental value,"[67] characterized the state's duty to provide education as "paramount"[68] and defined an adequate education as being all of the following: (1) uniform; (2) efficient; (3) safe; (4) secure; and (5) high quality.[69] Key 2002 amendments required reduced class size[70] and provided for voluntary universal prekindergarten to every four-year-old.[71]

These Florida amendments have not yet been reflected in a more expansive trend, however, somewhat surprising given the degree of educational fer-

ment that has been precipitated largely by state court litigation during the past three decades. The Florida amendments may signify, though, that the confluence of the following will lead inevitably to much wider state constitutional activity in this area: continuously expanding judicially imposed or inspired educational mandates; increased political implications of educational policy decisions, partly at least due to the enormous state and local costs of education; more effective targeted lobbying; and an ever-growing public perception about the importance of quality education.

Adequacy or Appropriateness of Education Provisions to Meet Current Needs

To try to provide a definitive assessment of whether education provisions of state constitutions, generally or in individual cases, adequately and appropriately meet current needs is beyond the scope of this chapter. It implicates fundamental questions of constitutionalism and one's view of the proper role of the various branches of government. It also is confounded by the extent to which education provisions can fairly be given credit for educational success or blame for educational failure in a particular state or locale.

Depending on one's view, the extraordinary body of state court litigation over the past thirty years, still developing at a substantial pace, that deals with interacting issues of educational equity, access and quality, is either a sign that state education provisions are admirably serving their purposes, or that they have led us badly astray. What is indisputable, though, is that the education funding systems, and perhaps also the education structures, of the nineteenth and early twentieth centuries are inadequate to meet late twentieth- and early twenty-first-century educational needs and expectations.

Consequently, this chapter would not be complete without some discussion of this issue, and the extensive litigation over whether education financing and delivery systems violate state education or equal protection provisions provides important insights because it has raised fundamental questions about the role of state education provisions. In these cases, waged in forty-five states during the past thirty years, courts have been divided over whether the judiciary should or could invalidate legislative structures for funding and managing the public schools, with about 58 percent of the courts sustaining constitutional challenges.[72] Virtually every court that has had to confront this question, however, regardless of its final decision, has found that the way states finance and provide education is deeply flawed. Depending on how they view their proper role in the resolution of this problem, state courts have either ordered, and perhaps insisted upon and even supervised,[73] changes by the other branches or simply implored those other branches to act.

Whichever judicial role one prefers, presumably if there were state education provisions that led courts to regularly assume that role, those provisions would be deemed more "adequate" or "appropriate." The problem is that the commentators' analyses of state education provisions do not strongly suggest that typology predicts judicial result. In particular, "strong" education clauses have not necessarily led to strong judicial action, any more than they necessarily have led to strong public schools. A substantial discussion of this issue appears later in the chapter.

IDENTIFYING "BEST PRACTICES" IN EXISTING STATE EDUCATION PROVISIONS OR THE LITERATURE

Because education has been so consistently rated the most important public service provided by state governments, it is tempting to conclude that "best practices" would be represented by the "strongest" education provisions, as identified by the commentators. However, that assumption is questionable, largely because there is growing agreement that the categorization has failed to meet a basic pragmatic test—strong provisions have not correlated with strong public education systems or with strong judicial rulings in support of educational rights. Therefore, "strong" education clauses are not necessarily better, let alone representative of "best practices."

That does not mean, however, that the large and growing body of education clause litigation is devoid of "best practices" lessons. As with all best practices, though, the lesson to be learned is closely related to the constitutional drafter's goals. If, for example, a goal is to minimize the prospects of lengthy, contentious and costly litigation, certain judicial interpretations of state education clauses will be the focus. If, conversely, the goal is to assure that a particular kind or quality of education is provided, or a particular set of educational outcomes is achieved, then other judicial decisions may provide the "best practices."

Of course, litigation about the meaning of educational quality standards is hardly the only source of "best practices." Another approach would be to establish a much broader set of criteria and to apply them systematically to all extant education provisions. In a sense, the next section of this chapter, by identifying a broad array of issues to be considered in the drafting of "model" education provisions and providing examples for each drawn from existing provisions, may be a major step in that direction. By itself, however, it stops short of being a statement of "best practices."

Another, quite self-evident way is to consider the efforts made over the years to develop model state constitutions, which sometimes include education provisions.[74] The best known is the National Municipal League's *Model State Constitution*, first published in 1921 and last revised in 1968.[75] Its public edu-

cation provision is hardly path-breaking, however.[76] Drawing heavily on existing state constitutional provisions, the model clause requires the legislature to "provide for the maintenance and support of a system of free public schools open to all children in the state," and authorizes, but does not require, the legislature to "establish, organize and support such other public educational institutions, including public institutions of higher learning, as may be desirable."

A more recent model state constitution includes, under an article dealing with "Miscellaneous Subjects," a more expansive education clause.[77] It adds a hortatory preamble, two qualitative descriptors of the state's "system of public schools" ("general and uniform," and "thorough and efficient"), and requires that the legislature make provision "by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state."

This model clause is also derived from existing constitutional provisions, but it seems a considerable hodgepodge. Viewed through the prism of equity/adequacy litigation, it is hard to know how a court might construe its two sets of qualitative descriptors, in terms of their meanings or their relationship to one another. A legislature seeking to implement this clause might have similar problems.

Even more recently, two surveys of state education clauses included useful checklists for a model state constitutional framework, although neither purported to be a statement of best practices. In conjunction with the Hamilton Fish Institute's *Review of State Constitutions: Education Clauses*, its special counsel identified the following possible elements of a model provision:

- Preamble & Statement of Purpose.
- Guarantee of free and public schools: types of schools, scope of education, age requirements.
- Reference to funding, including requirements related to uniformity, equity, and source.
- Statement of non-sectarian control.
- Definition of requirements of local agencies, if any.
- Establish right to education and right to safe and secure educational environment.
- Compulsory attendance provision.
- Statement of non-discrimination.[78]

In its updated survey of State Constitutions and Public Education Governance, the Education Commission of the States listed four common elements that appear in state education provisions: "1) Establishing and maintaining a free system of public schools open to all children of the state; 2) Financing schools (in varying degrees of detail); 3) Separating church and state, often in at least one of the following two ways: forbidding any public funds to be appropriated

or used for the support of any sectarian school, and requiring public schools to be free from sectarian control; 4) Creating certain decision-making entities (e.g., state board of education, state superintendent of education, local board of education, local superintendent of education); although most state constitutions require at least some of these entities to be in place, they usually do not specify their qualifications, powers and duties."[79]

Still other possible sources of "best practices" include what the states say about their education provisions or their constitutions generally (admittedly a rather self-serving source), and what the states' most recent practices have been regarding constitutional amendments. A number of states routinely claim that their constitutions, but not necessarily their education provisions, are models, sometimes because they are based on the National Municipal League's model and sometimes for other reasons. Prominent among them are Alaska, Montana, and Florida.

Alaska's claim is rooted in the fact that its constitution is relatively recent, and, therefore, was drafted in light of the experience of other states.[80] Whatever one might say about the rest of its constitution, though, the education clause is hardly distinctive. Like the National Municipal League model, it obliges the legislature to establish and maintain, by general law, "a system of public schools open to all children of the State," and authorizes, but does not require, the legislature to provide for "other public educational institutions." It adds provisions assuring no sectarian control of public schools and no public funding of private schools, religious or otherwise, as well as regarding establishment and operation of a state university.

Montana's constitution actually is more recent than Alaska's, having been adopted by a constitutional convention and ratified by the people in 1972. Its education provisions are substantially more expansive than Alaska's, occupying ten sections of an article entitled "Education and Public Lands." The first and main section, entitled "Educational goals and duties," has a few elements reminiscent of other state constitutions, but a number of unique attributes.[81] It begins with an unusually ambitious goal—"to establish a system of education which will develop the full educational potential of each person"—and adds for each person a guarantee of equality of educational opportunity.[82] However, in the more operational third paragraph of this section, the scope of the state's educational mission seems to have been curtailed, or at least made more ambiguous. The legislature is required to "provide a **basic** system of free **quality** public elementary and secondary schools," and is authorized to provide other educational institutions and programs.[83] The legislature also is required to "fund and distribute in an **equitable** manner to the school districts the state's share of the cost of the **basic** elementary and secondary school system."[84]

Florida's claim to being a "best practices" state is based on its seven recent education amendments. As indicated previously, four were adopted in 1998 as a result of a constitutional convention; three were adopted last year as a result of initiative petitions. The purport of these amendments and the extent to

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).