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WASHINGTON STATE'S MANDATE: THE CONSTITUTIONAL OBLIGATION TO FUND POST-SECONDARY EDUCATION

Adam Sherman* & Hugh Spitzer**

Abstract: This essay focuses on the provisions of the Washington State Constitution that address post-secondary education. It argues that, understood in the historical context in which those sections were drafted, Washington has a constitutional obligation to support and fund its institutions of higher learning. The essay describes the historical development of education systems in the United States, with particular attention paid to the funding of those systems. It then shows that (1) the language of Articles IX and XIII of Washington's constitution are closely related, (2) Article IX's "general and uniform system of public schools" was meant to include both normal schools (teacher training colleges) and technical schools, and (3) Article XIII's mandate that the state "foster and support" educational institutions referred to the University of Washington, among others. It concludes that while the precise level of required state support for the regional and research universities is not clear, the continued reduction of state funding may soon reach a constitutionally unacceptable level.

INTRODUCTION

State funding for Washington's public colleges and universities has declined since the 1960s, as measured on a per-student basis and adjusted for inflation.¹ In today's dollars, the legislature appropriated total amounts equivalent to \$11,574 per full time equivalent ("FTE") student in the 1959–1961 biennium for Washington's research universities and three regional state colleges. The appropriation dropped to \$7,122 per FTE student in the 2009–2011 state budget and further

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1. See Table 1 *infra* and accompanying notes 114–23.

dropped to \$5,000 per FTE student in the 2011–13 state budget.² Washington depends on a technology-intensive economy, and a relatively high portion of the state’s residents have post-secondary degrees.³ However, many of those educated Washingtonians are high-tech “immigrants,” meaning that they came from other states.⁴ A national study observed that Washington has fallen short in its own production of educated graduates due in large part to a lack of political commitment to higher education funding.⁵

Publically-funded education is a hallmark of American society. Today, it is taken for granted that states will provide for a system of public education. In Washington, the legislature, the courts, and the general population have focused mainly on the state’s obligation to adequately fund a Kindergarten through Twelfth Grade (“K-12”) system that meets societal and economic needs. There are many reasons for this, not the least of which is the fact that in 1889 the framers of Washington’s constitution expressly made childhood education the state’s “paramount duty.”⁶ The Washington State Supreme Court has robustly applied that provision,⁷ and its enforcement has put significant

2. See Table 1 *infra* and accompanying notes 114–23. Washington’s state universities (also known as “research universities”) are the University of Washington in Seattle and Washington State University in Pullman. WASH. REV. CODE § 28B.10.016(1) (2012). In 1959, the “regional state colleges” were Western Washington State College in Bellingham, Eastern Washington State College in Cheney, and Central Washington State College in Ellensburg—now Western Washington University, Eastern Washington University, and Central Washington University, respectively. WASH. REV. CODE § 28B.10.016(2) (2012). The only current “state college,” The Evergreen State College in Olympia, is not included in the historical funding analysis in this essay because it was founded in 1967 while the others either existed in 1889 or were established immediately thereafter. See Act of March 21, 1967, ch. 47, 1967 Wash. Sess. Laws 221.

3. LAURA PERNA, JONI FINNEY & PATRICK CALLAN, INST. FOR RESEARCH ON HIGHER EDUC., STATE POLICY LEADERSHIP VACUUM: PERFORMANCE AND POLICY IN WASHINGTON HIGHER EDUCATION 1, (Jan. 2012), available at http://www.gse.upenn.edu/pdf/irhe/State_Policy_Leadership_Vacuum_Washington.pdf.

4. *Id.*

5. *Id.*

6. WASH. CONST. art. IX, § 1 provides: “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.”

7. See, e.g., Seattle Sch. Dist. No. 1 of King Cnty. v. State, 90 Wash. 2d 476, 522, 585 P.2d 71, 97 (1978) (“[C]ompliance with Const. art. 9, §§ 1 and 2 can be achieved only if sufficient funds are derived, through dependable and regular tax sources, to permit school districts to provide ‘basic education’ through a basic program of education in a ‘general and uniform system of public schools.’” (emphasis in original)); McCleary v. State, 173 Wash. 2d 477, 519, 269 P.3d 227, 248 (2012) (“[C]ases under article IX, section 1 have always proved difficult. If nothing else, they test the limits of judicial restraint and discretion by requiring the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty.”).

pressure on the legislature—engendering resistance from some lawmakers.⁸

Much less attention has been paid to the fact that those same constitutional framers imposed a related obligation on the state to “foster and support” post-secondary education institutions. However, Article XIII, Section 1, the principal section outlining Washington’s obligation to fund post-secondary education,⁹ is less clear and less well known than the provision mandating adequate K-12 funding. In addition, less attention has been paid to the fact that the state’s obligation to provide for a general and uniform system of public schools, described in Article IX, Section 2, extends beyond the K-12 system to post-secondary teacher training and technical training.

This essay takes a close look at the provisions of the Washington State Constitution that deal with post-secondary education, namely Article IX, Sections 1 and 2, and Article XIII, Section 1. It concludes that the plain language of these provisions, understood in the historical context in which they were drafted, establish that Washington State has an obligation to support and fund its institutions of higher education. Part I provides an overview of the historical development of education systems in the United States, with particular attention paid to the funding of those systems. Part II uses this historical backdrop to explain how Article IX’s requirement of a “general and uniform system of public schools” funded by the state was meant to include post-secondary educational institutions, namely normal schools (teacher training colleges) and technical schools. It then elaborates on Article XIII’s

8. Jordan Schrader, *Lawmakers Turn in Their Homework to Court on McCleary School-Funding Case*, THE OLYMPIAN (Apr. 29, 2014), <http://www.theolympian.com/2014/04/29/3109056/lawmakers-turn-in-their-homework.html>; Jerry Cornfield, *Recalcitrant Lawmakers Ignore the Justices over School Funding*, RENTON REP. (May 14, 2014, 10:00 AM), <http://www.rentonreporter.com/opinion/257737551.html>.

9. WASH. CONST. art. XIII, § 1 provides: “Educational, reformatory, and penal institutions; those for the benefit of youth who are blind or deaf or otherwise disabled; for persons who are mentally ill or developmentally disabled; and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing at the time of the adoption of this Constitution, and of such as shall thereafter be established by law, shall be appointed by the governor, by and with the advice and consent of the senate.” The existing language represents a 1988 modernization of the terms used a century before. WASH. CONST. amend. 83 (1988). The 1889 version provided: “Educational, reformatory and penal institutions; those for the benefit of blind, deaf, dumb, or otherwise defective youth; for the insane or idiotic; and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing at the time of the adoption of this Constitution, and of such as shall thereafter be established by law, shall be appointed by the governor, by and with the advice and consent of the senate.” WASH. CONST. of 1889, art. XIII, § 1.

related mandate that the state must “foster and support” its institutions of higher education at a reasonable level. The primary goal of this essay is to point out the constitutional obligation, but it also raises the question: How much funding is enough? The answer is that the state must fund its institutions of higher learning to allow them to successfully grow and develop.

I. HISTORY OF FUNDING IN PUBLIC HIGHER EDUCATION

A. *Higher Education Funding in America: 1750–1860*

Much of what we take for granted about the American university today can be tied directly to colonial-era England. The architecture and the pedagogical philosophies of Oxford and Cambridge served in part as models for early American universities.¹⁰ However, American universities enjoyed significantly fewer financial resources at their inception than their English counterparts, which had the generous support of wealthy founders. The founding donations in America were comparatively modest.¹¹ The sources of funding were also quite different. While English universities relied heavily on private philanthropy from wealthy benefactors, American institutions relied on a wide array of public sources, including tolls, lottery proceeds, gifts of land, fees, and taxes.¹² In other words, pre-Revolution colleges were funded by a patchwork of primarily public sources.¹³

The decades following the Revolution witnessed an explosion of higher education in America. Only thirty-seven of today’s colleges and universities were founded prior to 1800.¹⁴ Between 1800 and 1860, an additional 343 of America’s existing colleges and universities were founded.¹⁵

Post-Revolution Americans were deeply distrustful of a strong and visible national government.¹⁶ Like most other institutions depending on governmental support, many American colleges and universities emerged after the Civil War as creatures of the states, and the core

10. See JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 7–11 (2004).

11. *Id.* at 9.

12. *Id.* at 12–13.

13. *Id.* Early American colleges also depended on tuition and donations.

14. U.S. DEPT. OF EDUC., OFFICE OF EDUC. RESEARCH & IMPROVEMENT, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 63 (Thomas D. Snyder ed., 1993).

15. *Id.*

16. BRIAN BALOGH, A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA 379 (2009).

financial support (both capital and operating) for these public higher education institutions came from states.¹⁷

B. *Expanding Higher Education: 1860–1889*

During and after the Civil War, public support and financing for education became more robust. At the same time, the American population expanded westward, and new states joined the Union. Political leaders of these new states wrote constitutions reflecting this new level of support for public education.

In the 1770s, only five states mentioned schools in their founding constitutions¹⁸ and only four mentioned colleges or universities.¹⁹ By 1820, twelve of the twenty-three existing state constitutions provided for schools in some fashion.²⁰ Nine of the twenty-three provided for colleges or universities.²¹ However, by the time Washington became a state in 1889, each of the existing forty-one states provided for schools in their constitutions,²² with thirty-one of the forty-one providing for colleges or

17. Thelin, *supra* note 10 at 74–79, 135, 142.

18. CONN. CONST. of 1818, art. VIII, § 2; GA. CONST. of 1777, art. LIV; MASS. CONST. of 1780, ch. V, § 2; N.C. CONST. of 1776, art. XLI; PA. CONST. of 1776, § 44.

19. CONN. CONST. of 1818, art. VIII, § 1; MASS. CONST. of 1780, ch. V, § 1; N.C. CONST. of 1776, art. XLI; PA. CONST. of 1776, § 44.

20. *See* ALA. CONST. of 1819, art. VI; CONN. CONST. of 1818, art. VIII, § 2; DEL. CONST. of 1792, art. VIII, § 12; IND. CONST. of 1816, art. IX, § 2; ME. CONST. of 1819, art. VIII; MASS. CONST. of 1780, ch. V, § 2; MISS. CONST. of 1817, art. VI, § 20; N.H. CONST. of 1792, art. LXXXIII; N.C. CONST. of 1776, art. XLI; OHIO CONST. of 1802, art. VIII, § 25; PA. CONST. of 1790, art. VII, § 1; VT. CONST. of 1793, ch. II, § 41.

21. *See* ALA. CONST. of 1819, art. VI; CONN. CONST. of 1818, art. VIII, § 1; GA. CONST. of 1798, art. IV, § 13; IND. CONST. of 1816, art. IX, § 2; ME. CONST. of 1819, art. VIII; MASS. CONST. of 1780, ch. V, § 1; N.H. CONST. of 1792, art. LXXXIII; N.C. CONST. of 1776, art. XLI; OHIO CONST. of 1802, art. VIII, § 25.

22. *See* ALA. CONST. of 1875, art. XII, § 1; ARK. CONST. of 1874, art. XIV, § 1; CAL. CONST. of 1879, art. IX, § 1; COLO. CONST. of 1876, art. IX, § 1; CONN. CONST. of 1818, art. VIII, § 2; DEL. CONST. of 1831, art. VII, § 11; FLA. CONST. of 1885, art. XII, § 1; GA. CONST. of 1877, art. VIII, § 1; ILL. CONST. of 1870, art. VIII, § 1; IND. CONST. of 1851, art. VIII, § 1; IOWA CONST. of 1857, art. IX, § 1; KAN. CONST. of 1859, art. 6, § 2; KY. CONST. of 1850, art. XI, § 1; LA. CONST. of 1879, art. 208; ME. CONST. of 1819, art. VIII; MD. CONST. of 1867, art. VIII, § 1; MASS. CONST. of 1780, ch. V, § 2; MICH. CONST. of 1850, art. XIII, § 1; MINN. CONST. of 1857, art. VIII, § 1; MISS. CONST. of 1868, art. VIII, § 1; MO. CONST. of 1875, art. XI, § 1; MONT. CONST. of 1889, art. XI, § 1; NEB. CONST. of 1875, art. VIII, § 1; NEV. CONST. of 1864, art. XI, § 1; N.H. CONST. of 1792, art. LXXXIII; N.J. CONST. of 1844, art. IV, § 7; N.Y. CONST. of 1846, art. IX, § 1; N.C. CONST. of 1876, art. IX, § 1; N.D. CONST. of 1889, art. 8, § 147; OHIO CONST. of 1851, art. VI, § 2; OR. CONST. of 1857, art. VIII, § 1; PA. CONST. of 1873, art. X, § 1; R.I. CONST. of 1842, art. XII, § 1; S.C. CONST. of 1868, art. X, § 3; S.D. CONST. of 1889, art. VIII, § 1; TENN. CONST. of 1870, art. X, § 12; TEX. CONST. of 1876, art. VII, § 1; VA. CONST. of 1870, art. VII; VT. CONST. of 1793, ch. II, § 41; W.VA. CONST. of 1872, art. XII, § 1; WIS. CONST. of 1848, art. X, § 1.

universities.²³ In fact, between 1860 and 1889, every state admitted to the United States, except West Virginia, referenced colleges or universities in their founding constitutions.²⁴ Although the drafters of state constitutions from 1860 to 1890 rarely provided for institutions of higher education as thoroughly as they did for common school systems, higher education nevertheless was a distinct component of state constitutions during the post-Civil War era.

Perhaps nothing illustrates the growing national call for institutions of higher education more than the Morrill Act of 1862.²⁵ That federal statute allocated to each eligible state 30,000 acres of land per member of that state's Congressional delegation.²⁶ The land, or the proceeds from the sale or resale of that land, was to be used by the states exclusively for the creation of land-grant colleges focused on agriculture and the mechanical arts.²⁷ This federal land was transferred to the states in their role as the primary stewards of higher education.²⁸ The Morrill Act spurred state after state to enter the higher education field.²⁹

Washington would not achieve statehood until the Morrill Act had been in place for over twenty-five years, but the increased interest in states providing for and supporting higher education institutions would not have escaped the attention of the drafters of Washington's 1889 Constitution.

23. ALA. CONST. of 1875, art. XII, § 9; ARK. CONST. of 1874, art. XIV, § 2; CAL. CONST. of 1879, art. IX, § 9; COLO. CONST. of 1876, art. IX, § 12; CONN. CONST. of 1818, art. VIII, § 1; FLA. CONST. of 1885, art. XII, § 14; GA. CONST. of 1877, art. VIII, § 6; ILL. CONST. of 1870, art. VIII, § 2; IOWA CONST. of 1857, art. IX, § 11; KAN. CONST. of 1859, art. 6, § 7; LA. CONST. of 1879, art. 230; ME. CONST. of 1819, art. VIII; MASS. CONST. of 1780, ch. V, § 1; MICH. CONST. of 1850, art. XIII, § 7; MINN. CONST. of 1857, art. VIII, § 4; MISS. CONST. of 1868, art. VIII, § 8; MO. CONST. of 1875, art. XI, § 5; MONT. CONST. of 1889, art. XI, § 11; NEB. CONST. of 1875, art. VIII, § 10; NEV. CONST. of 1864, art. XI, § 4; N.H. CONST. of 1792, art. LXXXIII; N.C. CONST. of 1876, art. IX, § 6; N.D. CONST. of 1889, art. 8, § 148; OR. CONST. of 1857, art. VIII, § 5; PA. CONST. of 1873, art. III, § 17; R.I. CONST. of 1842, art. XII, § 3; S.C. CONST. of 1868, art. X, § 9; S.D. CONST. of 1889, art. VIII, § 7; TENN. CONST. of 1870, art. X, § 12; TEX. CONST. of 1876, art. VII, § 10; WIS. CONST. of 1848, art. X, § 6.

24. See COLO. CONST. of 1876, art. IX, § 12; KAN. CONST. of 1859, art. 6, § 7; MONT. CONST. of 1889, art. XI, § 11; NEB. CONST. of 1866–1867, art. II, EDUCATION, § 2; NEV. CONST. of 1864, art. XI, § 4; N.D. CONST. of 1889, art. 8, § 148; S.D. CONST. of 1889, art. VIII, § 7.

25. Morrill Act, ch. 130, § 1, 12 Stat. 503 (1862) (current version at 7 U.S.C. § 301 (2006)).

26. *Id.*

27. *Id.*

28. *Id.*

29. Thelin, *supra* note 10, at 75–79, 135–41.

II. WASHINGTON'S CONSTITUTIONAL OBLIGATION TO FUND PUBLIC HIGHER EDUCATION

This part traces the development of Washington's constitutional provisions on education, and shows how the Article IX mandate for the ample funding of common schools relates to the Article XIII requirement that the state "foster and support" various public institutions, including those for higher education.

A. *Before Statehood: Trends and Related Constitutions*

From the 1830s to the 1880s, including the decades leading up to the establishment of the Washington Territory, the collective vision for the state's role in advancing public welfare evolved. Horace Mann of Massachusetts and a number of other reformers were dramatically influencing the form and substance of America's public institutions intended to improve society and humanity.³⁰ These institutions included mental hospitals;³¹ schools for the blind, deaf, and developmentally disabled;³² and reformatories.³³ Common schools (today's grades one through eight), high schools, normal schools (teacher training colleges), and technical schools were each prominent parts of an education system that experienced significant changes during this period.

The 1853 Organic Act establishing the Territory of Washington made scant mention of education, merely calling for land to be set aside for the "purpose of being applied to common schools."³⁴ The territorial legislature provided for common schools in 1854,³⁵ which were free for all children between the ages of four and twenty-four.³⁶

At the time that Washington was admitted to the Union, provision for a system of public schools was elevated above all other necessary state

30. ALBERT DEUTSCH, *THE MENTALLY ILL IN AMERICA: A HISTORY OF THEIR CARE AND TREATMENT FROM COLONIAL TIMES* 137–38 (1937).

31. *Id.*; DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 130–31 (rev. ed. 1990).

32. Horace Mann served as a trustee for the New England Institution for the Education of the Blind. JONATHAN MESSERLI, *HORACE MANN: A BIOGRAPHY* 182 (1972).

33. MARK COLVIN, *PENITENTIARIES, REFORMATORIES, AND CHAIN GANGS: SOCIAL THEORY AND THE HISTORY OF PUNISHMENT IN NINETEENTH-CENTURY AMERICA* 165–67 (1997); Mark Groen, *The Whig Party and the Rise of Common Schools, 1837–1854: Party and Policy Reexamined*, 35 *Am. Educ. Hist. J.* 251, 253 (2008).

34. Act of March 2, 1853, ch. 90, 10 Stat. 172.

35. An Act Establishing a Common School System for the Territory of Washington, 1854 Wash. Terr. Sess. Laws 319.

36. *Id.* at 328.

functions. This was reflected in a growing national trend of states establishing public support for educational institutions as a fundamental function of state government. Significantly, this support went beyond the common school system. A commentator on the constitutions of Idaho, Montana, North Dakota, South Dakota, Washington, and Wyoming, all admitted into the Union in 1889 or 1890, observed that the states formed around the time of Washington's statehood contained education provisions that "illustrate[d] exceptionally well how vitally education connects itself in the public mind with good government," and that "[e]ach state generously cared for a university as the apex of its educational system."³⁷

B. After Statehood: Robust Support for Institutions of Higher Learning

Article IX of the new state's constitution included the bold declaration that Washington's "paramount duty" was "to make ample provision for the education of all children residing within its borders."³⁸ The framers of the Washington State Constitution intended for the state to provide not only for a common school system but also for a complete system of education enabling its citizens to become full participants in the economy of the day. At that time, agriculture, lumber, and mining were the most prominent features of the state's economy,³⁹ and state support for an agricultural college reflected that economic reality. The University of Washington had already been created three decades before.⁴⁰ But upon statehood, the first state legislature established the "State Agricultural College and School of Science."⁴¹ The Agricultural College, a Morrill Act land grant institution,⁴² was later renamed Washington State College and is now known as Washington State University. The legislature required the College to provide instruction in certain subjects, including physics, chemistry, plant morphology and physiology, livestock, farm produce, and mining.⁴³ To support this

37. John D. Hicks, *The Constitution of the Northwest States*, 23 U. STUD. 76 (1923).

38. WASH. CONST. art. IX, § 1.

39. DOROTHY O. JOHANSEN & CHARLES M. GATES, *EMPIRE OF THE COLUMBIA: A HISTORY OF THE PACIFIC NORTHWEST* 316–28 (2d. ed. 1967).

40. Act of January 24, 1862, 1861–62 Wash. Terr. Sess. Laws 43.

41. Act of March 28, 1890, § 4, 1889–90 Wash. Sess. Laws 260, 262.

42. Act of March 19, 1897, ch. 118, §199, 1897 Wash. Sess. Laws 356, 434–35.

43. Act of March 28, 1890, § 4, 1889–90 Wash. Sess. Laws 260, 263.

endeavor, the legislature appropriated \$5,000 in 1889.⁴⁴

In addition to the Agricultural College and School of Science, the State Legislature also funded three normal schools: the Ellensburg Normal School⁴⁵ and the Cheney Normal School in 1890,⁴⁶ and the Bellingham Normal School in 1893.⁴⁷ These schools eventually became Central Washington University, Eastern Washington University, and Western Washington University, respectively. In total, the state appropriated \$33,298 to these normal schools during the second biennium.⁴⁸

The state's support went beyond the Agricultural College and the normal schools. During the 1889–90 legislative session, the legislature enacted laws creating “a general uniform system of Common Schools,”⁴⁹ establishing a system to govern schools in large cities,⁵⁰ and reenacting the Territorial Legislature's earlier formation of the University of Washington.⁵¹ In the latter act, the legislature declared: “The objects of the University of Washington shall be to provide the best and most efficient means of imparting to young men and women on equal terms a liberal education and thorough knowledge of the different branches of literature[,] the arts[,] and sciences with their varied applications.”⁵²

In support of this effort, the state legislature provided that the University would be funded from the sale of federally-granted lands, admission and tuition fees, “and such appropriations as the legislature may make.”⁵³ That statute appropriated \$10,000.⁵⁴ The initial statutes authorizing common schools, normal schools, the university, the agricultural college, and a school in Vancouver for deaf, blind, and

44. Act of March 28, 1890, §15, 1889–90 Wash. Sess. Laws 260, 265–66.

45. Act of March 28, 1890, 1889–90 Wash. Sess. Laws 278; *see generally* SAMUEL R. MOHLER, *THE FIRST SEVENTY-FIVE YEARS: A HISTORY OF CENTRAL WASHINGTON STATE COLLEGE, 1891–1966* (1967).

46. Act of March 22, 1890, 1889–90 Wash. Sess. Laws 281; *see generally* J. ORIN OLIPHANT, *HISTORY OF THE STATE NORMAL SCHOOL AT CHENEY, WASHINGTON* (1924).

47. Act of February 24, 1893, ch. 33, 1893 Wash. Sess. Laws 50; *see generally* PHOEBE GOODELL JUDSON, *A PIONEER'S SEARCH FOR AN IDEAL HOME: A BOOK OF PERSONAL MEMOIRS* 289 (1984).

48. DEP'T OF EFFICIENCY, *FINANCIAL HISTORY OF THE STATE OF WASHINGTON BY THE DEPARTMENT OF EFFICIENCY FOR THE PERIOD STATEHOOD TO MARCH 31, 1923*, 328 (1923).

49. Act of March 27, 1890, ch. 12, 1889–90 Wash. Sess. Laws 348.

50. Act of March 26, 1890, 1889–90 Wash. Sess. Laws 386.

51. Act of March 27, 1890, 1889–90 Wash. Sess. Laws 395.

52. *Id.* at § 2.

53. *Id.* at § 15, 1889–90 Wash. Sess. Laws 398.

54. *Id.* at § 21, 1889–90 Wash. Sess. Laws 399. That amount appears to have been later increased to at least \$12,050. DEP'T OF EFFICIENCY, *supra* note 48, at 420.

developmentally disabled young people were all replaced in 1897 by a comprehensive “Code of Public Instruction.”⁵⁵ That code, in Section 1, provided:

A general and uniform system of public schools shall be maintained throughout the State of Washington, and shall consist of common schools (in which all high schools shall be included), normal schools, technical schools, university of Washington, school for defective youth and such other educational institutions as may be established and maintained by public expense.⁵⁶

The fact that the early legislatures conceptually grouped together the common schools, the normal schools, the universities, and the special institutions is not surprising. It reflected the new state’s commitment to supporting an education system that included primary, secondary, and post-secondary learning. It also directly reflected the intent of the constitution’s drafters, who, as we next see, devoted all of Article IX and part of Article XIII to educational institutions.

C. *Article IX, Sections 1 and 2*

Article IX of Washington’s 1889 constitution declares, in relevant part:

SECTION 1 PREAMBLE. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

SECTION 2 PUBLIC SCHOOL SYSTEM. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, *normal schools, and technical schools* as may hereafter be established. But 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. (Emphasis added).

Section 1 of Article IX makes it clear that providing for the education of young people is the state’s first and most important obligation.⁵⁷ Section 2 defines the scope of that obligation by describing the various

55. Act of March 19, 1897, ch. 118, 1897 Wash. Sess. Laws 356.

56. *Id.* at 356.

57. *See* Seattle Sch. Dist. No. 1 of King Cnty. v. State, 90 Wash. 2d 476, 510, 585 P.2d 71, 91 (1978).

components of the public school system and outlining the components entitled to receive money from the common school fund and from state taxes for the common schools.

The original constitutional connection among common schools, high schools, and higher levels of education is suggested both by early drafts of the education provision and by at least two other aspects of the language of Article IX, Section 2. The first version of the education article, prepared by W. Lair Hill,⁵⁸ included a requirement that provision be made for the education of the blind and deaf, as well as reform schools for “children who are . . . growing up in idleness and vice.”⁵⁹ The convention’s Committee on Education and Educational Institutions reported out a different education version along the lines of today’s Article IX.⁶⁰ Interestingly, one change to that committee’s proposal adjusted Article IX, Section 5—which deals with how losses to state educational funds are handled—so that instead of mentioning fraud-related losses to the permanent common school or “any state college or university fund,” the final provision more broadly referenced losses to the permanent common school or “any other state educational fund.”⁶¹ This reference, which includes higher education, remains in that section of Article IX and demonstrates the founders’ holistic and integrated financial approach to public education.

Another proposal on the floor of the convention would have added a Section 6 to Article IX, providing that the University of Washington would be “independent and free from all partisan and sectarian influence in the appointment of its regents, the administration of its affairs and the instruction of its students.”⁶² The proposal then stated that the university would “embrace all the public schools . . . other than the common schools,” but allow for separate management of “normal schools and schools for blind, deaf, dumb or otherwise defective youth.”⁶³ This proposed Section 6 reflects the close interplay between the developing Article IX and what became a separate Article XIII on “Institutions,” discussed below.

Another example in Article IX, Section 2 of the tie between pre-

58. See W. Lair Hill, *Washington: A Constitution Adapted to the Coming State*, THE MORNING OREGONIAN, July 4, 1889, at 9–11.

59. *Id.*

60. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889 WITH ANALYTICAL INDEX 331 (Beverly Paulik Rosenow ed., 1999) [hereinafter JOURNAL].

61. *Id.* at 689–90.

62. *Id.* at 330.

63. *Id.*

college schooling and institutions of higher education relates to the enumerated components of the “general and uniform system of public schools.” The adopted version of that section states that in addition to the common schools, the legislature shall provide for high schools and at least two post-secondary institutions: normal schools and technical schools. That section limits the state’s authority to spend revenue derived from the common school fund and the state tax for the *common schools*. On its face, the constitution’s language allocates money from those sources to common schools alone and not for high schools, normal schools, or technical schools—the provision’s language treats the latter institutions as different from “common schools.” This may be because, at the time of statehood, some Washingtonians stressed the overriding importance of primary education, even to the point of questioning the usefulness of high schools and higher education.⁶⁴ Nevertheless, Section 2 of Article IX affirmatively imposes a state obligation to “provide for” high schools, normal schools, and technical schools.

Under Article IX, Section 2, common schools, high schools, normal schools, and technical schools might have separate meanings, but they have a shared purpose. That constitutional purpose is to provide for a comprehensive “general and uniform system of public schools.” One commentator has observed that the common schools are “the basic units” of a unitary schools system,⁶⁵ and suggested that “the public school system could consist solely of common schools.”⁶⁶ While the first legislatures dealt with normal schools and technical schools (*e.g.*, the state agricultural college) through separate statutes, the lawmakers in 1897 explicitly consolidated all primary, secondary, and post-secondary educational institutions through the Act to Establish a General, Uniform System of Public Schools.⁶⁷ While the state’s system of public schools is not required to include high schools, normal schools, or technical schools, once the legislature established them, they became part of the “general and uniform” system of public schools under Article IX, Section 2. The integration of normal schools into the broader “uniform system of public schools” is highlighted by the fact that in their early years the normal schools included elementary and high school students who were provided a basic education, while college-age teachers-in-

64. ROBERT E. FICKEN, *WASHINGTON STATE: THE INAUGURAL DECADE, 1889–1899*, 91–92 (2007).

65. L.K. Beale, *Charter Schools, Common Schools, and the Washington State Constitution*, 72 *WASH. L. REV.* 535, 552 (1997).

66. *Id.* at 553.

67. *Id.*; Act of March 19, 1897, ch. 118, 1897 Wash. Sess. Laws 356.

training could hone their instructional skills.⁶⁸

In 1969, as part of an overall recodification of the Washington statutes apparently intended to make the Revised Code of Washington easier to understand, the legislature relocated K-12 education laws to a new Title 28A of Washington's revised code. Regional universities (the former normal schools), research universities (including the University of Washington and Washington State University), and certain other higher education institutions were codified in Title 28B.⁶⁹ The first section of Title 28A provides: "Public schools means the common schools as referred to in Article IX of the state Constitution . . . and those schools and institutions of learning having a curriculum *below the college or university level* as now or may be established by law and maintained at public expense."⁷⁰ While this statutory provision appears straightforward, it is inconsistent with Article IX, Section 2's express description of the public school system as a combination of common schools and any high schools, *normal schools*, and *technical schools* that the state establishes.

Normal schools are by their design post-secondary in character; they are schools created to train high school graduates in the art of instructing in and governing public schools. Western Washington University, Central Washington University, and Eastern Washington University were founded as normal schools and still maintain strong programs for training teachers.⁷¹ Successful completion of one of the academic programs maintained by the regional universities or an equivalent program from another university is required for a teacher to be legally authorized to teach in Washington State.⁷² Constitutionally, Washington State's normal schools (*i.e.*, the regional universities) and the original "technical school" (now Washington State University) are part of the "general and uniform system of public schools." It should also be emphasized that the early statutes lumped the University of Washington

68. It should be pointed out that while the legislature provided financial support to the normal schools, including the grade school and high school components used for teacher training, the Washington State Supreme Court in 1909 barred money in the state Common School Fund from being used to subsidize pre-college education within the normal schools because those programs were not under the control of locally-elected school boards and therefore were not "common schools." See *School District No. 20 v. Bryan*, 51 Wash. 498, 99 P. 28 (1909).

69. Act of May 8, 1969, ch. 223, 1969 Wash. Sess. Laws 1669.

70. WASH. REV. CODE § 28A.150.010 (2012) (emphasis added).

71. The University of Washington also maintains a strong teacher-training program. For a description of the University of Washington's College of Education, see UNIV. OF WASH. COLL. OF EDUC. PROGRAMS, PROGRAMS, *available at* <https://education.uw.edu/programs>.

72. WASH. REV. CODE § 28A.410.025 (2012).

into the general and uniform system of public schools,⁷³ which is not surprising given that the lawmakers mandated that the state's flagship university then (as now) have a strong teacher training program to train both elementary and high school educators.⁷⁴

Although common schools, high schools, normal schools, and technical schools are treated as distinct entities under the constitution, they are constitutionally part of a single "general and uniform system of public schools." Article IX, Section 2 restricts the use of the common school fund and the state tax for the common schools to pre-college (perhaps only pre-high school) education. Under Article IX, Section 2, the state nevertheless must "provide for" a system that includes high schools, the regional universities as normal schools, and Washington State University as one of the technical schools contemplated by the constitution's drafters. It is unclear whether and how the state may provide for the discrete components of this system differently. However, the emphasis in Article IX is on providing for the system as a whole, rather than the components of the system individually. This suggests that the obligation applies to the system and that each component of the system should be entitled to state support commensurate with the function it serves within that system.

D. Article XIII, Section 1

Article XIII, Section 1 of the Washington State Constitution provides:

73. See *supra* notes 49–56 and accompanying text.

74. CHARLES M. GATES, *THE FIRST CENTURY AT THE UNIVERSITY OF WASHINGTON, 1861–1961*, 75–76 (1961) ("The University's interest in teacher training dated back many years and was considered to be an integral part of its program. Now, however, it was only one of several training institutions, the capstone of an educational system which had been greatly rounded out. It was part of wisdom to adjust the university program to make it supplement rather than duplicate the work done by the other schools. 'I am quite in accord with you in your effort to bring about a more perfect union in the State educational system,' [President Frank P.] Graves wrote W.E. Wilson at Ellensburg. 'Our School of Pedagogy will have no reason to exist now that we have three flourishing normal schools and no one will be admitted to it after September 1900.' The result was not quite as far reaching as his letter suggested, for students might still elect a major in education within the College of Liberal Arts, and could earn a normal diploma which entitled them to become teachers in the public schools. Such a course was no longer and more thorough, however, and did not compete directly."). The University of Washington continues to have a vibrant College of Education, with a total 2013 enrollment of 1,154 students, seventy-five percent of whom are in graduate and professional programs. See UNIV. OF WASH. COLL. OF EDUC., *Student Enrollment & Demographics: Fall 2013*, <https://education.uw.edu/mycoe/oir/enrollment/2013> (last visited Nov. 24, 2014). In 2014, the College's graduate program was rated seventh in the nation by U.S. News & World Report. *Best Education Schools*, U.S. NEWS & WORLD REPORT, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-education-schools/edu-rankings> (last visited Nov. 24, 2014).

Educational, reformatory, and penal institutions; those for the benefit of youth who are blind or deaf or otherwise disabled; for persons who are mentally ill or developmentally disabled; and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing at the time of the adoption of this Constitution, and of such as shall thereafter be established by law, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by ayes and noes, and entered upon the journal. (Emphasis added).

Article XIII requires the state to adequately fund public institutions of higher education as part of its obligation to “foster and support” educational institutions. Textual analysis, including a comparison of Article XIII to similar provisions in other state constitutions, as well as analysis of Washington State Supreme Court cases, support this claim.

1. *Textual Analysis*

At first glance, it is not entirely clear what Article XIII, Section 1 references when it mentions “educational institutions,” “regents,” and “foster and support.” When a statute or constitutional provision is ambiguous, it is appropriate to construe it so as to effectuate the legislative intent.⁷⁵ Further, language should be “interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”⁷⁶ Given these canons of construction, textual analysis is necessary.

a. *“Educational Institutions”*

Washington’s original Article XIII, Section 1 appears to be based on the 1876 Colorado Constitution and the 1851 Ohio Constitution.⁷⁷ The framers of the Washington State Constitution appear to have relied primarily on Colorado’s constitution when they decided to include “educational institutions” within the article covering state institutions.

75. *Whatcom Cnty. v. City of Bellingham*, 128 Wash. 2d 537, 545–46, 909 P.2d 1303, 1308 (1996).

76. *Id.*

77. Arthur S. Beardsley, *Sources of the Washington State Constitution* (1939), in *STATE OF WASH., 2011–2012 Legislative Manual* at 417.

This reliance is evidenced by the fact that the provision dealing with state institutions in Colorado's constitution contains language nearly identical to that ultimately used in Washington's constitutional article concerning state institutions. Article VIII, Section 1 of the 1876 Colorado constitution provided that "[e]ducational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and mute, and such other institutions as the public good may require, shall be established and supported by the State, in such manner as may be prescribed by law."⁷⁸ Section 5 of that same article clarified that the educational institutions to which Section 1 referred were "[t]he University at Boulder; the Agricultural College at Fort Collins; the School of Mines at Golden; [and] the Institute for the Education of Mutes at Colorado Springs."⁷⁹

The framers of Idaho's constitution, working during the same summer as the framers of Washington's constitution were crafting Article XIII, also embraced language virtually identical to Colorado's. Idaho's 1889 constitution declared in Article X: "Educational, reformatory and penal institutions, and those for the benefit of the blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported by the state in such a manner as may be prescribed by law."⁸⁰ Idaho's first legislature relied on Article X in creating "all the institutions envisaged" under this section,⁸¹ including Idaho State University.⁸²

In sum, the phrase "educational institutions" was used to refer to higher education institutions by the framers of both Colorado's and Idaho's constitutions. The fact that Washington's own state institutions provision uses language almost identical to Colorado's and Idaho's makes it difficult to imagine that the framers of Washington's constitution could have been referring to anything but higher education institutions in Article XIII.

b. "Regents"

The word "regents" in the second sentence of Article XIII, Section 1 provides further support that this provision of the Washington State

78. COLO. CONST. of 1876, art. VIII, § 1.

79. *Id.* at § 5.

80. IDAHO CONST. of 1890, art. X, § 1.

81. DONALD CROWLEY & FLORENCE HEFFRON, THE IDAHO STATE CONSTITUTION: A REFERENCE GUIDE 205 (1994).

82. IDAHO CODE ANN. § 33-3001 (1963).

Constitution was intended to cover higher education institutions. The constitutional convention record, early legislation, and evidence from other late nineteenth century constitutions all support the proposition that the term “regents” in Article XIII must have referred to the governing bodies of Washington’s higher education institutions.

A floor proposal at Washington’s constitutional convention, mentioned above, emphasizes the tie between the word “regents” and universities. The proposal would have added a section to Article IX mandating that the University of Washington must “forever be independent and free from all partisan and sectarian influence in the appointment of its *regents*.”⁸³ Immediately after statehood, the first legislature reenacted the statutory basis for the University of Washington, providing that: “The government of the university of Washington shall vest in the board of regents. . . . The members of the board of regents shall be appointed by the governor of the state, by and with the advice and consent of the senate.”⁸⁴ There is no documentary evidence that during the legislature’s first session the word “regents” was used anywhere outside the context of the University of Washington’s establishing act.

The context in which the Washington State Constitution was drafted also indicates that the term “regents” refers to higher education. As suggested above in the brief overview of the history of education, framers of state constitutions were well aware of the developing practices of other states.⁸⁵ In 1889, when Article XIII was drafted, the word “regents” had been used in eight state constitutions. Among those eight, it was used exclusively to refer to the governing bodies of higher education institutions.⁸⁶

Of the eight states that used the word “regents,” Colorado and Idaho are particularly instructive given their nearly identical treatment of state institutions within their constitutions. While the word “regents” was not used within either Colorado’s or Idaho’s constitutional provisions pertaining to state institutions, the framers of those constitutions used the word “regents” in other sections exclusively in the context of higher education. Sections 12 through 14 of Article IX of Colorado’s 1876

83. See *supra* note 62 and accompanying text (emphasis added).

84. Act of March 7, 1890, 1889–90 Wash. Sess. Laws 396.

85. See *supra* notes 22–24 and accompanying text.

86. ALA. CONST. of 1867, art. XI, § 8; CAL. CONST. of 1879, art. IX, § 9; COLO. CONST. of 1876, art. IX, §§ 12–14; IDAHO CONST. of 1890, art. IX, § 10; MICH. CONST. of 1850, art. XIII, §§ 6–8; NEB. CONST. of 1875, art. VIII, § 10; NEV. CONST. of 1864, art. XI, § 4; S.D. CONST. of 1889, art. XIV, §§ 3–4.

constitution detail the powers and obligations of the “regents of the university.”⁸⁷ Article IX, Section 10 of Idaho’s 1889 constitution declared that the “regents shall have the general supervision of the university.”⁸⁸

The “institutions” provisions of the Colorado and Idaho constitutions also support for this interpretation of “regents.” Despite the fact that they did not use the word “regents,” Colorado and Idaho both relied on these provisions to establish higher education institutions. This suggests that the word “regents” is not necessary to, but rather provides additional support for, the conclusion that Article XIII’s “educational institutions” language was intended to apply to higher education.

c. “Fostered and Supported by the State”

“Foster” and “support” are both words that direct Washington to provide resources to help sustain and expand its public universities. One way in which the language of Idaho’s and Colorado’s provisions dealing with “educational institutions” differs from Washington’s is that those states’ constitutions called for such institutions to be “*established and supported by the state.*”⁸⁹ Washington’s Article XIII declares that the state’s educational institutions “shall be *fostered and supported by the state.*” Given the degree of similarity among the provisions of the three state constitutions, it follows that the drafters of Article XIII consciously chose the word “fostered” rather than “established.” That language was proposed by the convention’s Committee on State Institutions and Public Buildings on August 6, 1889, and overwhelmingly approved two days later.⁹⁰

Clearly, the two words “establish” and “foster” have somewhat different meanings, and the framers appear to have more closely followed Ohio’s institutions provision. Article VII, Section 1 of Ohio’s 1851 constitution declares that its public institutions “shall always be fostered and supported by the state.”⁹¹ An 1892 dictionary defined “establish” to mean “to found; to institute;—as a colony, state, &c.”⁹² In that same dictionary, “foster” meant “to cherish; to forward; to promote

87. COLO. CONST. of 1876, art. IX, §§ 12–14.

88. IDAHO CONST. of 1890, art. IX, § 10.

89. COLO. CONST. of 1876, art. VIII, §1; IDAHO CONST. of 1889, art. X, §1 (emphasis added).

90. JOURNAL, *supra* note 60, at 774.

91. OHIO CONST. of 1851, art. VII, § 1.

92. N. WEBSTER, A DICTIONARY OF THE ENGLISH LANGUAGE 255 (1892).

the growth of; to encourage; to stimulate.”⁹³ It is one thing to set up or “found” an educational institution and quite another to “forward” or “promote the growth of” that institution. “Support”—the word used in all four of these constitutions (Colorado, Idaho, Ohio, and Washington)—meant “to furnish with the means of sustenance, or livelihood.”⁹⁴ The fact that Article XIII contains stronger language than the language used in Colorado’s and Idaho’s constitutions—language requiring Washington’s legislature to promote the growth of its higher education institutions rather than just to found them and furnish them with the means of sustenance—suggests that Washington’s framers meant to underscore the state’s important role in funding its educational institutions.

2. *Case Analysis*

Case law supports the claim that the Washington State Constitution imposes an obligation on the state to adequately fund its higher education institutions. In 1917, the Washington State Supreme Court addressed the “fostered and supported” language in *State v. Pierce County*,⁹⁵ a case involving care for the mentally ill in state mental institutions, which were among the institutions to be “fostered and supported” under Article XIII.⁹⁶ The Court held that the legislature could limit its direct obligation to fund care for mentally ill persons, and could redirect a portion of that obligation both to financially-able families and to counties. The Court characterized counties as political subdivisions “existing only for public purposes connected with the administration of a state government.”⁹⁷ The Court’s rationale was that the “foster and support” language could be limited by the clause immediately following it stating that such support is “subject to such regulations as may be provided by law.”⁹⁸

In *State v. Pierce County*, the Court suggested that the state had an obligation to provide for institutions for the mentally ill. But it also held that the legislature had the flexibility to delegate part of the cost to the counties.⁹⁹ In a short opinion holding that the state could distinguish

93. *Id.* at 297.

94. *Id.* at 722.

95. 132 Wash. 155, 231 P. 801 (1925).

96. *Id.*

97. *Id.* at 165, 231 P. at 804.

98. *Id.* at 157, 231 P. at 802.

99. *Id.* at 157–158, 231 P. at 802.

among various categories of disabled persons in determining funding sources and levels, the Court reaffirmed in 1978 that “this constitutional provision is not to be construed to require that all funds supporting such institutions come from the state.”¹⁰⁰ Again, the Court did not suggest that the state was not obligated to foster and support institutions for the disabled, but rather that the government did not have to provide one-size-fits-all funding.

The Washington State Supreme Court’s willingness to allow the legislature to identify an array of funding sources (both public and private) for the support of educational and social institutions does not mean that the Court would permit lawmakers to altogether ignore the state’s Article XIII obligations. The 1978 *Seattle School District* case made it clear that the Washington State Supreme Court takes the obligations of Article I, Section 29 seriously.¹⁰¹ This section states that the “provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.”¹⁰² In *Seattle School District*, the Court held that Article I, Section 29 made the common school funding provisions of Article IX, Section 1 of the state constitution mandatory and judicially enforceable upon the legislature. Similarly, the Article XIII “foster and support” language should be treated as equally mandatory. A subsequent clause granting discretion to the legislature as to how it will meet its obligation does not change the fundamentally mandatory nature of its obligation to promote the growth of the state’s higher education institutions.

While Article XIII creates some type of constitutionally-mandated obligation to fund (*i.e.*, “support”) Washington’s higher education institutions, no judicial decision has indicated what level of support is sufficient to fulfill this obligation. This is similar to the challenge the Washington State Supreme Court faced in *McCleary v. State*,¹⁰³ where it held that the legislature had allowed the state to shirk its “paramount duty” under Article IX, Section 1 “to make ample provision for the education of all children residing within its borders.” The *McCleary* Court had to determine what obligation the phrase “make ample provision for” imposes on the legislature to fund our state’s public schools. It found that the word “ample” in Article IX, Section 1 “provides a broad constitutional guideline meaning fully, sufficient, and

100. *Duffy v. Dep’t of Soc. and Health Serv.*, 90 Wash. 2d 673, 677, 585 P.2d 470, 473 (1978).

101. *See Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *McCleary v. State*, 173 Wash. 2d 477, 269 P.3d 227 (2012).

102. *Seattle Sch. Dist. No. 1*, 90 Wash. 2d at 500, 585 P.2d at 85.

103. *McCleary*, 173 Wash. 2d at 477, 269 P.3d at 227.

considerably more than just adequate.”¹⁰⁴ It also found that ample funding for basic education must be accomplished by means of dependable and regular taxes.¹⁰⁵

The obligation “to make ample provision for the education of all children” may be different from the obligation of the state to “foster and support” institutions for higher education, the mentally and developmentally disabled, and penal institutions. However, the state has an obligation to adequately support Article XIII institutions, and that obligation must be to provide a sufficient level of funding for post-secondary educational institutions (among other institutions) so as to promote their successful growth and development.

Historical records of state appropriations to higher education institutions provide evidence that the framers’ notion of the appropriate level of institutional support was higher than what we see today. In 1889, the state legislature appropriated \$12,050 to the University of Washington and \$5,000 to the Agricultural College and School of Science (Washington State University).¹⁰⁶ During the state’s first twenty years, appropriations dedicated to the state’s post-secondary institutions grew from \$17,050 in 1889 to \$1,551,550 in 1909, and grew as a percentage of the state’s total budget from two percent in 1889 to eighteen percent in 1909.¹⁰⁷ This record of support from the state during its first two decades is perhaps the best indicator of what the framers of the Washington State Constitution intended when they declared that the state’s educational institutions shall be fostered and supported by the state.

From the late nineteenth to the early twentieth century, Washington resident students themselves bore a relatively small share of the cost of higher education, usually that portion associated with summer school, laboratory fees, and room and board.¹⁰⁸ In 1897, the legislature insisted that the normal schools be tuition-free.¹⁰⁹ Undergraduate tuition for in-state residents was also free at the University of Washington and the State College of Washington (now Washington State University) at least until 1915, when the legislature imposed \$10 tuition on University of Washington students to help pay for major capital construction

104. *Id.* at 484, 269 P.3d at 231.

105. *Id.*

106. DEP’T OF EFFICIENCY, *supra* note 48, at 420, 432.

107. *Id.*

108. *See, e.g.*, UNIV. OF WASH., CATALOGUE OF THE UNIVERSITY OF WASHINGTON FOR 1913-1914 AND ANNOUNCEMENTS FOR 1914-1915, 68 (1914).

109. Act of March 19, 1897, ch. 118, § 221, 1897 Wash. Sess. Laws 440-41.

projects.¹¹⁰ During the state's first two decades, it sustained its higher education institutions with resources sufficient to promote their growth and to keep them free to all Washington residents.

The state continued to promote the growth of its higher education institutions through the first half of the twentieth century, after which appropriations began to falter. In 2014 dollars, the state appropriated \$3,964 per FTE student in the 1909–1911 biennium.¹¹¹ By 1959, fifty years later, the biennial budget had increased state support per FTE to \$11,574.¹¹² But the appropriations then gradually declined, so that by the 2009–2011 biennium the state appropriation to Washington's research universities and three regional universities was \$7,122 per FTE and only \$5,000 per FTE by the 2011–2013 biennium.¹¹³ The following tables depict the rise and fall of state budgeted funding for Washington's regional and major research universities at fifty-year intervals, beginning in the 1909–1911 biennium, as well as the most recent completed biennium. State appropriations per FTE is not the only indicator of state support for public higher education institutions, but it is an important one because it provides a reasonable approach for comparing state support over time despite changes in student populations.

110. Gates observed that at times, tuition was a controversial issue because “it ran counter to the principle of free public education.” CHARLES M. GATES, *THE FIRST CENTURY AT THE UNIVERSITY OF WASHINGTON: 1861–1961*, 143 (1961); *See also* 1915 Wash. Sess. Laws 239, § 2.

111. *See* Table 1 *infra* and accompanying notes 114–21.

112. *Id.*

113. *Id.*

TABLE 1
State Appropriations for Research and Regional Universities

Biennial Appropriations in Current \$\$¹¹⁴	UW	WSU	EWU	CWU	WWU	Total
1909–1911¹¹⁵	\$652,322	\$554,536	\$111,308	\$101,251	\$132,133	\$1,551,550
1959–1961¹¹⁶	\$45,540,861	\$26,773,183	\$3,619,817	\$3,811,374	\$4,304,174	\$84,049,409
2009–2011¹¹⁷	\$608,936,000	\$382,180,000	\$87,396,000	\$83,104,000	\$104,454,000	\$1,266,070,000
2011–2013¹¹⁸	\$436,536,000	\$301,211,000	\$68,085,000	\$65,058,000	\$79,715,000	\$950,605,000
Biennial Appropriations in 2014 \$\$¹¹⁹	UW	WSU	EWU	CWU	WWU	Total
1909–1911	\$16,497,223	\$14,024,215	\$2,814,972	\$2,560,637	\$3,341,654	\$39,238,701
1959–1961	\$372,524,243	\$219,004,637	\$29,610,103	\$31,177,039	\$35,208,143	\$687,524,166
2009–2011	\$675,918,960	\$424,219,800	\$97,009,560	\$92,245,440	\$115,943,940	\$1,405,337,700
2011–2013	\$462,728,160	\$319,283,660	\$72,170,100	\$68,961,480	\$84,497,900	\$1,007,641,300

114. All appropriations have been rounded to the nearest dollar. Appropriations only include appropriations labeled as operating appropriations; capital appropriations and non-state appropriations are not included. The abbreviated names of institutions are as follows: “UW” stands for the University of Washington; “WSU” stands for Washington State University (originally the Agricultural College and School of Science); “EWU” stands for Eastern Washington University (originally Cheney Normal School); “CWU” stands for Central Washington University (originally Ellensburg Normal School); and “WWU” stands for Western Washington University (originally Bellingham Normal School).

115. DEP’T OF EFFICIENCY, *supra* note 48, at 322, 333, 425, 442 (1923).

116. GOVERNOR’S OFFICE, STATE OF WASHINGTON PROPOSED GOVERNOR’S BUDGET FOR THE 1963–1965 FISCAL BIENNIUM 445, 482, 508, 525, 539 (1963) [hereinafter GOVERNOR’S BUDGET 1963–1965]. Appropriations only include “General Fund” appropriations for all institutions as well as Motor Vehicle Excise Funds for the University of Washington. The University of Washington appropriations do not include funds appropriated to the “Teaching Hospital.”

117. Act of May 5, 2010, ch. 37, §§ 604-609, 2010 Wash. Sess. Laws. 3048–55. University of Washington and Washington State University appropriations do not include Federal Stimulus appropriations.

118. Act of May 2, 2012, ch. 7, §§ 602–607, 2012 Wash. Sess. Laws 2366–75.

119. Inflation adjustments are based on the Consumer Price Index (CPI) as published by the U.S. Department of Labor. Robert C. Sahr, *Consumer Price Index (CPI) Conversion Factors 1774 to Estimated 2024 to Convert to Dollars of 2010*, OR. ST. U., <http://liberalarts.oregonstate.edu/files/polisci/faculty-research/sahr/inflation-conversion/pdf/cv2010.pdf> (last revised Apr. 10, 2014).

Academic Year Enrollment (FTE students)	UW	WSU	EWU	CWU	WWU	Total
1910–1911 ¹²⁰	2,200	1,371	650	281	447	4,949
1960–1961 ¹²¹	15,644	6,785	2,014	2,298	2,959	29,700
2010–2011 ¹²²	42,303	24,233	9,640	9,832	12,647	98,655
2012–2013 ¹²³	43,487	25,189	10,170	9,397	12,516	100,759
Average Annual Appropriations per FTE student in 2014 \$\$	UW	WSU	EWU	CWU	WWU	Average
1909–1911	\$3,749	\$5,115	\$2,165	\$4,556	\$3,738	\$3,964
1959–1961	\$11,906	\$16,139	\$7,351	\$6,784	\$5,949	\$11,574
2009–2011	\$7,989	\$8,753	\$5,032	\$4,691	\$4,584	\$7,122
2011–2013	\$5,320	\$6,338	\$3,548	\$3,669	\$3,376	\$5,000

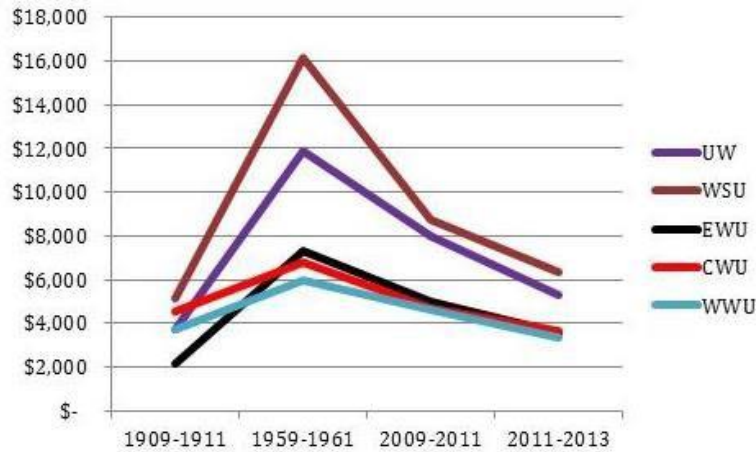
120. OFFICE OF THE REGISTRAR, CATALOGUE FOR 1909–10 AND ANNOUNCEMENTS FOR 1910–11 OF THE UNIVERSITY OF WASHINGTON 390 (1910); OFFICE OF THE REGISTRAR, NINETEENTH ANNUAL CATALOGUE OF THE STATE COLLEGE OF WASHINGTON 286 (1910); OFFICE OF THE REGISTRAR, CHENEY NORMAL SCH., THE NORMAL SEMINAR FOR 1910–1911 AT 65–73 (1910); OFFICE OF THE REGISTRAR, ELLENSBURG NORMAL SCH., WASHINGTON STATE NORMAL SCHOOL CATALOGUE 65 (1910); REGULAR MEETING OF 24 OCT 1911, BOARD OF TRUSTEES, W. WASH. UNIV. ARCHIVES (1911). Enrollment does not include those students classified as summer, special, other, counted twice, or unclassified.

121. GOVERNOR'S BUDGET 1963–1965, *supra* note 116, at 461, 494, 507, 524, 539. University of Washington enrollment includes medical and dental students.

122. LEGISLATIVE EVALUATION & ACCOUNTABILITY PROGRAM COMM., WASHINGTON STATE LEGISLATIVE BUDGET NOTES 216, *available at* <http://leap.leg.wa.gov/leap/budget/lbns/2012he.pdf> (2012).

123. LEGISLATIVE EVALUATION & ACCOUNTABILITY PROGRAM COMM., WASHINGTON STATE LEGISLATIVE BUDGET NOTES 0-201, *available at* <http://leap.leg.wa.gov/leap/budget/lbns/2014Operating.pdf> (2014).

TABLE 2
Average Annual Appropriations per Full Time Equivalent Student



Decreases in state appropriations per FTE student over the last fifty years are not the only evidence that the state has been failing to meet its constitutional obligation to promote the growth of its higher education institutions. The recent “Great Recession” created significant fiscal challenges for the state, and higher education institutions bore the brunt of the legislature’s attempt to balance the budget. State appropriations to the University of Washington were cut nearly in half from \$819,988,000 during the first legislative session of the 2007–2009 biennium¹²⁴ to \$436,536,000 during the 2011–2013 biennium.¹²⁵ State appropriations to Washington State University suffered a similar fate, falling from \$508,614,000 during the first legislative session of the 2007–2008 biennium¹²⁶ to \$301,211,00 during the 2011–2013 biennium¹²⁷—a reduction of over forty percent. The regional universities all saw similar reductions during this time.¹²⁸ Further, the state legislature mandated a

124. Act of May 16, 2007, ch. 522, § 604, 2007 Wash. Sess. Laws 2918–19.

125. Act of May 2, 2012, ch. 7, § 602, 2012 Wash. Sess. Laws 2366–67.

126. Act of May 16, 2007, ch. 522, § 605, 2007 Wash. Sess. Laws 2923.

127. Act of May 2, 2012, ch. 7, § 603, 2012 Wash. Sess. Laws 2368–69.

128. Eastern Washington University’s operating budget was reduced from \$119,154,000 during the 2007–2009 biennium to \$68,085,000 during the 2011–2013 biennium. Act of May 16, 2007, ch.

freeze in state-supported salary bases for all non-unionized university employees at least as early as 2009,¹²⁹ and required a three percent reduction in state-supported salary bases from 2011–2013.¹³⁰ One of the consequences of reduced appropriations and mandated reductions of salary bases was a significant reduction in faculty and staff positions at most four-year institutions. Between 2008 and 2012, the University of Washington eliminated over 1,000 positions and reduced use of overtime.¹³¹ Between 2008 and 2011, Washington State University phased out sixteen degrees or programs, eliminated 1,080 courses,¹³² and eliminated 581 paid positions.¹³³ Despite these reductions, the state's universities were still forced to raise tuition at unprecedented rates during this time period,¹³⁴ shifting a disproportionate share of the cost of public higher education from the state to students and their families.

It is possible that the discretion granted to the legislature in fulfilling its obligation, as discussed above, would allow it to marginally reduce appropriations in any given year, depending on the fiscal climate and other constitutional obligations and priorities. However, systematic reductions in state appropriations to its higher education institutions over extended periods of time that threaten their growth and development are inconsistent with the state's constitutional obligation to those institutions. As demonstrated above, the state has reduced its support for its public higher education institutions, and those reductions have not only prevented the state's higher education institutions from growing

522, § 606, 2007 Wash. Sess. Laws 2925–26; Act of May 2, 2012, ch. 7, § 604, 2012 Wash. Sess. Laws 2369. Western Washington University's operating budget was reduced from \$148,478,000 during the 2007–2009 biennium to \$79,715,000 during the 2011–2013 biennium. Act of May 16, 2007, ch. 522, § 609, 2007 Wash. Sess. Laws 2930–31; Act of May 2, 2012, ch. 7, § 607, 2012 Wash. Sess. Laws 2375. Finally, Central Washington University's operating budget was reduced from \$117,414,000 during the 2007–2009 biennium to \$65,058,000 during the 2011–2013 biennium. Act of May 16, 2007, ch. 522, § 607, 2007 Wash. Sess. Laws 2927; Act of May 2, 2012, ch. 7, § 605, 2012 Wash. Sess. Laws 2370.

129. Act of Feb. 16, 2010, ch. 1, § 1(3), 2010 Wash. Sess. Laws 3–4.

130. Act of June 15, 2011, ch. 39, § 1, 2011 Wash. Sess. Laws 3448. This bill allowed the three percent salary reduction to be achieved either through reductions in FTE or in salary rates. Most institutions accomplished this through reductions in FTE positions.

131. E-mail from Becka Johnson, Higher Educ. Policy Analyst, Univ. of Wash. Office of Planning and Budgeting, to Adam Sherman (June 9, 2014, 3:18PM PDT) (on file with authors).

132. WASH. STATE UNIV., BUDGET REDUCTION AND EFFICIENCY ACTIONS 2008–2011, *available at* <http://budget.wsu.edu/budget-reduction-efficiency-actions/index.html> (last visited July 11, 2014).

133. E-mail from Kelley Westhoff, Operating Budget Dir., Wash. State Univ. Budget Office, to Adam Sherman (July 1, 2014, 4:40PM PDT) (on file with authors).

134. *See* Donna Gordon Blankinship, *Washington Tuition Among Fastest Growing in Nation*, CBS LOCAL SEATTLE (May 4, 2014, 2:25 PM), <http://seattle.cbslocal.com/2014/05/05/washington-tuition-among-fastest-growing-in-nation/>.

and developing, but have also caused measurable harm to those institutions. Given these facts, the state appears to be failing its constitutional obligation to “foster and support” its higher education institutions.

CONCLUSION: HOW MUCH IS ENOUGH?

Article IX, Section 1 imposes on the state legislature an obligation to provide ample funding for an education system. Article IX, Section 2 requires the state to “provide for a general and uniform system of public schools” that includes not only K-12 education, but also normal schools, (*i.e.*, the regional universities) or at least those institutions’ programs devoted to teacher training. Article IX, Section 2 also imposes on the state a responsibility to fund “technical schools.” When Washington’s first legislature established an “Agricultural College and School of Science,” that institution was one of the “technical schools” envisioned in Article IX.

Under Article IX, there is no constitutional basis for distinguishing, for funding purposes, between high schools and that portion of the system associated with normal schools and technical schools. Only “common schools” are granted access to the common school fund and the state tax for common schools.¹³⁵ But if high schools and certain locally-based vocational schools are given access to the state tax for the common schools, then Washington State University and other descendants of the 1889 “technical schools” (perhaps community colleges) have an equal legal right to access that source of revenue.

Regardless of Article IX, Article XIII requires that “educational institutions” be “fostered and supported” by the state. Those educational institutions include, at a minimum, the University of Washington and the portions of the regional universities and Washington State University that are not entitled to state support under Article IX’s mandate.

How much financial “support” is required by Article XIII? We know from *State v. Pierce County*¹³⁶ and *Duffy v. State*¹³⁷ that the legislature has some degree of flexibility in identifying the revenue sources for funding the educational and other institutions named in Article XIII. But one can reasonably infer from the language and history of Article XIII that the legislature has a duty to ensure that the higher education institutions are funded at a level sufficient to sustain their ability to

135. WASH. CONST. art. IX, § 2 (1889).

136. *See supra* Part II.D.2.

137. *Id.*

provide high-quality education in a globally competitive environment, and, in the case of Washington's two research universities, to maintain their national and international standing. This will be impossible without a return to historical levels of state financial support. The systematic reductions in appropriations over an extended period of time prevent the maintenance and development of Washington's universities and are inconsistent with the state's constitutional obligations to higher education. The sharp reductions in state spending on higher education hardly constitute "fostering" and "supporting" these institutions.

The fact that the Washington State Supreme Court is fully engaged in K-12 funding issues suggests that the Court is taking seriously the constitutional mandate to fund education. To underscore its commitment to holding the State responsible for its K-12 funding obligations, the Court retained oversight of the legislature's progress in complying with its holding in *McCleary* and recently found the State in contempt for its inaction.¹³⁸ An appropriate case may well put the Court in a similar position to define a minimum level of constitutionally-mandated "support" for higher education under Article XIII. A continuation of the recent trend of legislative cuts to higher education might invite such a case.

138. *McCleary v. State*, No. 84362-7, 2014 BL 312024, at *3 (Wash. Sept. 11, 2014).

APPENDIX

Below is a list of key provisions containing the word “regents” from eight state constitutions that were either already established or were being drafted at the time Washington was drafting its own constitution. No states outside of these eight mentioned the word “regents” in their constitutions at the time the framers of Washington’s constitution were drafting Article XIII.

Alabama – 1867 Constitution

Sec. 8. The Board of education shall be a body politic and corporate, by the name and style of “The Board of Education of the State of Alabama.” Said Board shall also be a Board of Regents of the State University, and when sitting as a Board of Regents of the University shall have power to appoint the president and the faculties thereof. The President of the University shall be, *ex officio*, a member of the board of regents, but shall have not vote in its proceedings.

California – 1879 Constitution

Sec. 9. The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic Act creating the same, passed March twenty-third, eighteen hundred and sixty-eight (and the several Acts amendatory thereof), subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments and the proper investment and security of its funds. It shall be entirely independent of all political or sectarian influence, and kept free therefrom in the appointment of its Regents, and in the administration of its affairs; provided, that all the moneys derived from the sale of the public lands donated to this State by Act of Congress, approved July second, eighteen hundred and sixty-two (and the several Acts amendatory thereof), shall be invested as provided by said Acts of Congress, and the interest of said moneys shall be inviolably appropriated to the endowment, support, and maintenance of at least one College of Agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and the mechanic arts, in accordance with the requirements and conditions of said Acts of Congress; and the Legislature shall provide that if, through neglect, misappropriation, or any other contingency, any portion of the funds so set apart shall be diminished or lost, the State shall replace such portion so lost or misappropriated, so that the principal thereof shall remain forever

undiminished. No person shall be debarred admission to any of the collegiate departments of the University on account of sex.

Colorado – 1876 Constitution

Sec. 12. There shall be elected by the qualified electors of the State, at the first general election under this constitution, six regents of the university, who shall, immediately after their election, be so classified, by lot, that two shall hold their office for the term of two years, two for four years, and two for six years; and every two years after the first election there shall be elected two regents of the university, whose term of office shall be six years. The regents thus elected, and their successors, shall constitute a body-corporate, to be known by the name and style of “The Regents of the University of Colorado.”

Sec. 13. The regents of the university shall, at their first meeting, or as soon thereafter as practicable, elect a president of the university, who shall hold his office until removed by the board of regents for cause; he shall be ex officio a member of the board, with the privilege of speaking, but not of voting, except in case of a tie; he shall preside at the meetings of the board. and be the principal executive officer of the university, and a member of the faculty thereof.

Sec. 14. The board of regents shall have the general supervision of the university, and the exclusive control and direction of all the funds of and appropriations to, the university.

Idaho – 1890 Constitution¹³⁹

Sec. 10. The location of the university of Idaho, as established by existing laws is hereby confirmed. All the rights, immunities, franchises, and endowments heretofore granted thereto by the Territory of Idaho are hereby perpetuated unto the said university. The Regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law. No university lands shall be sold for less than ten dollars per acre, and in subdivisions not to exceed one hundred and sixty acres, to anyone person, company or corporation.

Michigan – 1850 Constitution

Sec. 6. There shall be elected in the year eighteen hundred and sixty-three, at the time of the election of a justice of the supreme court, eight

139. Idaho’s 1890 Constitution was drafted in July of 1889, almost exactly when Washington State’s constitution was being drafted. See CROWLEY & HEFFRON, *supra* note 81, at 5.

regents of the university, two of whom shall hold their office for two years, two for four years, two for six years, and two for eight years. They shall enter upon the duties of their office on the first of January next succeeding their election. At every regular election of a justice of the supreme court thereafter there shall be elected two regents whose term of office shall be eight years. When a vacancy shall occur in the office of regent, it shall be filled by appointment of the governor. The regents thus elected shall constitute the board of regents of the university of Michigan.

Sec. 7. The regents of the university and their successors in office shall continue to constitute the body corporate, known by the name and title of "The Regents of the University of Michigan."

Sec. 8. The regents of the university shall, at their first annual meeting, or as soon thereafter as may be, elect a president of the university, who shall be *ex officio* a member of their board with the privilege of speaking but not of voting. He shall preside at the meeting of the regents and be the principal executive officer of the university. The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund.

Nevada – 1864 Constitution

Sec. 4. The Legislature shall provide for the establishment of a State University, which shall embrace departments for agriculture, mechanic arts and mining, to be controlled by a Board of Regents, whose duties shall be prescribed by law.

Sec. 7. The Governor, Secretary of State, and Superintendent of Public Instruction shall, for the first four years, and until their successors are elected and qualified, constitute a Board of Regents, to control and manage the affairs of the University and the funds of the same, under such regulations as may be provided by law. But the Legislature shall at its regular session next preceding the expiration of the term of office of said Board or Regents, provide for the election of a new Board of Regents, and define their duties.

Sec. 8. The Board of Regents shall, from the interest accruing from the first funds which come under their control, immediately organize and maintain the said mining department in such manner as to make it most effective and useful; provided, that all the proceeds of the public lands donated by Act of Congress approved July second, A. D. eighteen hundred and sixty-two, for a college for the benefit of agriculture, the mechanic arts, and including military tactics, shall be invested by the said Board of Regents in a separate fund, to be appropriated exclusively

for the benefit of the first named departments to the University, as set forth in section four above; and the Legislature shall provide that if, through neglect or any other contingency, any portion of the fund so set apart shall be lost or misappropriated, the State of Nevada shall replace said amounts so lost or misappropriated in said fund, so that the principal of said fund shall remain forever undiminished.

Nebraska – 1867 Constitution

Sec. 10. The general government of the University of Nebraska shall, under the direction of the legislature, be vested in a board of six regents, to be styled the board of regents of the University of Nebraska, who shall be elected by the electors of the State at large, and their term of office, except those chosen at the first election, as hereinafter provided, shall be six years. Their duties and powers shall be prescribed by law; and they shall receive no compensation, but may be re-imbursed their actual expenses incurred in the discharge of their duties.

South Dakota – 1889 Constitution

Sec. 3. The state university, the agricultural college, the normal schools and all other educational institutions that may be sustained either wholly or in part by the state shall be under the control of a board of nine members, appointed by the governor and confirmed by the senate, to be designated the regents of education. They shall hold their office for six years, three retiring every second year.

The regents in connection with the faculty of each institution shall fix the course of study in the same.

The compensation of the regents shall be fixed by the legislature.

Sec. 4. The regents shall appoint a board of five members for each institution under their control, to be designated the board of trustees. They shall hold office for five years, one member retiring annually. The trustees of each institution shall appoint the faculty of the same and shall provide for the current management of the institution, but all appointments and removals must have the approval of the regents to be valid. The trustees of the several institutions shall receive no compensation for their services, but they shall be reimbursed for all expenses incurred in the discharge of their duties, upon presenting an itemized account of the same to the proper officer. Each board of trustees at its first meeting shall decide by lot the order in which its members shall retire from office.