Response
An Economic Analysis of Subject Matter Jurisdiction Waiver: A Response to Professor Buehler
November 12, 2014 | 89 Wash. L. Rev. Online 1
Daniel Klerman

Essay
Washington State's Mandate: The Constitutional Obligation to Fund Post-Secondary Education
November 28, 2014 | 89 Wash. L. Rev. Online 15
Adam Sherman & Hugh Spitzer
AN ECONOMIC ANALYSIS OF SUBJECT MATTER JURISDICTION WAIVER: A RESPONSE TO PROFESSOR BUEHLER

Daniel Klerman*

INTRODUCTION

For nearly a century, black letter law has dictated that subject matter jurisdiction is non-waivable. Both litigants and judges can raise subject matter jurisdiction defects at any time, even on appeal. Current doctrine indicates that the parties’ consent to federal jurisdiction, whether explicit or tacit, is insufficient, because subject matter jurisdiction involves federalism. It is not the prerogative of the parties to derogate from state court jurisdiction. Rather, it is the constitutional obligation of federal judges to self-police the line between federal and state courts.

Despite its solid basis in precedent, a parade of commentators has attacked the rigidity of current law as wasteful. Commentators argue that cases dismissed for jurisdictional reasons after trial or on appeal are often followed by costly duplicative litigation in state court. In addition, critics assert that the non-waivability of subject matter jurisdiction encourages inefficient strategic behavior. For example, if a defendant has information unknown to the plaintiff that would defeat subject matter jurisdiction, the defendant can wait to raise the jurisdictional defect until it feels threatened by an adverse judgment. This gives the defendant an option to relitigate the case in state court. Plaintiffs can also engage in the same strategic, yet inefficient, behavior, and wait to raise jurisdictional defects. Therefore, these commentators have called upon the federal courts to give up their jurisdictional “fetish” and treat

* Charles L. and Ramona I. Hilliard Professor of Law and History, USC Gould School of Law. The author can be reached at dklerman@law.usc.edu and www.klerman.com. The author would like to thank Scott Altman, Jennifer Bryan, Dustin Buehler, Jeffrey Gilbert, Jamie Heine, William Hubbard, and Dan Nabel for helpful comments and suggestions.

subject matter jurisdiction like personal jurisdiction: if neither the parties nor the court raises the jurisdictional problem early in the proceedings, these critics argue, the objection should be waived and therefore cannot be raised later.5

Dustin Buehler’s article, Solving Jurisdiction’s Social Cost,3 makes a worthy contribution to this debate. He steers a middle course between current law (non-waivability) and proposals that would allow federal courts to continue adjudicating cases with jurisdictional defects as long as neither party objected in a timely fashion. He proposes a rule requiring federal district court judges to issue a “jurisdictional certification order,” including findings of fact and conclusions of law, at the close of pleadings.4 To facilitate preparation of such orders, parties would have to plead jurisdictional facts with particularity.5 A party could immediately appeal a jurisdictional order. However, if a party failed to appeal, it would lose the ability to challenge subject matter jurisdiction later.6

In addition, on a theoretical level, Professor Buehler criticizes prior reform proposals as “monistic,” because they consider only efficiency values, without taking into account structural values such as federalism.7 Instead, he argues that efficiency and structural values are incommensurable and must be brought into “equilibrium.”8

While I share Professor Buehler’s view that reforms must take into account both litigation costs and federalism, I disagree with his analysis and proposed solution. In Part I, I contend that jurisdictional certification, although typically a simple task, would be too costly, because it would need to be performed in all of the more than 250,000 civil cases filed in federal court every year.9 I also disagree that

4. Id. at 694–97.
5. Id. at 698.
6. Id. at 703–05.
7. Id. at 663.
8. Id. at 668.
efficiency and structural values are incommensurable. In Part II, I point out that efficiency considerations encompass more than litigation costs and include the benefits of the decentralized decision-making fostered by federalism. In Part III, I propose that federalism concerns could be more efficiently handled by giving federal judges discretion to retain or dismiss cases in which jurisdictional defects are belatedly discovered, depending on whether the case implicates significant federalism concerns. In order to identify cases in which such concerns are important, federal judges could be empowered and encouraged to call for the views of the relevant state attorney general. Finally, in Part IV, I note that, before making any changes to jurisdictional procedures, it is important to recognize the ways in which the current rules may encourage early and thorough investigation of subject matter jurisdiction by both parties and judges.

I. THE COST OF JURISDICTIONAL CERTIFICATION, HEIGHTENED PLEADING, AND INTERLOCUTORY APPEALS

There are seven reasons that the costs of Professor Buehler’s proposal may outweigh its benefits. First, although the proposed certification would usually be easy to prepare, it would have to be issued in all of the more than 250,000 civil cases filed in federal court each year. In contrast, Professor Buehler estimates that only about 500 cases are belatedly dismissed on jurisdictional grounds each year. This estimate indicates that for every relitigation avoided, district courts would have to produce 500 certification orders. It seems likely that the aggregate time required to prepare jurisdictional certification in all cases would far exceed the time saved by avoiding relitigation in the roughly 0.2 percent of cases that might require relitigation. The high settlement rate reinforces the idea that certification would probably be unnecessarily costly. Certification orders would be required even in the majority of cases in federal court that would likely settle before courts expend

10. Id.
12. The reasoning here is similar to the analysis of ex ante regulation versus ex post liability. Buehler’s solution is similar to regulation (requiring parties and judges to incur the cost of jurisdictional certification in every case), whereas the current rule is like liability (imposing costs on the parties only when jurisdictional mistakes actually occur). See Steven Shavell, Liability for Harm Versus Regulation of Safety, 13 J. LEGAL STUD. 357, 364 (1984) (arguing that “there seems to be an underlying advantage in favor of liability, for most of its administrative costs are incurred only if harm occurs. As this will usually be infrequent, administrative costs will be low.”).
significant resources.\textsuperscript{13}

Second, many of the cases belatedly dismissed for jurisdictional defects would probably settle before relitigation in state court, meaning that the post-dismissal costs in those cases are likely to be small. Uncertainty and mutual optimism are the key impediments to settlement.\textsuperscript{14} Litigation in federal court provides the parties with information, such as how well witnesses would testify and a judicial view of contested legal issues. That information reduces uncertainty and optimism and thus increases the likelihood of settlement after dismissal.

Third, the costs of the proposed jurisdictional certification would be high due to the difficulty of determining jurisdiction in some cases. That is, while certification will be relatively easy in most cases, some would require resolution of intricate factual or legal issues. For example, deciding where an individual is domiciled or a corporation is headquartered may involve challenging factual inquiries. Similarly, supplemental jurisdiction under 28 U.S.C. \textsection 1367 can require both intricate legal analysis and the exercise of judicial discretion. Since most cases settle, deferring resolution of jurisdictional issues in such cases can save both judges and parties considerable time and money. To streamline adjudication, Professor Buehler proposes that judges rely on pleadings and affidavits rather than live testimony.\textsuperscript{15} Even if it were possible to resolve difficult jurisdictional issues with only pleadings and affidavits, the costs are likely to be large when multiplied by the thousands of cases each year in which difficult jurisdictional issues probably arise.

Fourth, most judges already check subject matter jurisdiction at the outset of all cases. In many chambers, that task is delegated to law clerks,\textsuperscript{16} while in others the task is performed by interns or the judge herself. Nevertheless, judges do not ordinarily write up their findings or have their staff do so. Rather the clerks or interns just check off a box on a form or checklist. While it is true that judges are likely to be more careful if they have to issue an order explaining their reasoning, they would likely find only a small number of additional jurisdictional

\textsuperscript{13} About two-thirds of cases in federal court settle. Theodore Eisenberg & Charlotte Lanvers, \textit{What is the Settlement Rate and Why Should We Care?}, 6 \textit{J. EMPIRICAL LEGAL STUD.} 111, 115 (2009). Nevertheless, it is not known how many of these cases settle after significant judicial resources are incurred in resolving pre-answer motions, discovery disputes, or summary judgment motions.


\textsuperscript{15} Buehler, \textit{supra} note 3, at 699–700.

defects. Judges (and clerks) already have a significant incentive to find jurisdictional defects, because doing so reduces their caseload and thus increases their leisure and/or the quality of work they can perform on their remaining cases. The additional time required to write the jurisdictional orders should not be underestimated. The average federal district court judge has more than 400 civil case filings per year. Even if each jurisdictional certification order took only fifteen minutes to prepare, that is still more than 100 hours per year, or roughly two weeks of work.

Fifth, in addition to the costs placed on the courts, Professor Buehler’s proposals would also require increased effort by lawyers. The lawyers would likely then pass the costs along to their clients. Buehler proposes a requirement that parties plead subject matter jurisdiction with specificity in order to facilitate jurisdictional certification. Although lawyers can probably prepare such pleadings without much difficulty, a small amount of time and effort per case translates into a large aggregate cost when multiplied by the more than 250,000 civil cases filed in federal court each year. Even if complying with the heightened pleading standard took only ten extra minutes per case, that would translate into more than 20,000 extra hours of work per year.

Sixth, the cost of interlocutory appeals of subject matter rulings must be considered. Although appeals will probably be infrequent, they demand substantial time and effort for both litigants and judges. In addition, parties may appeal for strategic reasons, such as delay. Such strategic appeals could prolong litigation and strain plaintiffs’ lawyers’ resources, which are often scarce.

Finally, the cost of relitigation may not be as high as commentators suggest. When a case is dismissed, the time spent in federal court does not amount to time wasted. The most expensive part of litigation is discovery, and nothing ordinarily prevents parties from reusing, in state court, the depositions, documents, and other materials gathered and generated in federal court. Similarly, much of the legal research (except research about federal procedure) will remain relevant in state court. In general, parties can reuse the work performed by experts, except trial testimony, with only minor editing and reformatting. This is not, of course, to assert that relitigating a case in state court is not

19. See, e.g., WILLIAM W. SCHWARZER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL ch. 2D-11b (National ed. 2014) (“Discovery obtained while the case was [in federal court] is certainly admissible in the state court proceedings.”).
expensive, but only that the costs will not equal those of bringing a new lawsuit.

II. THE COMMENSURABILITY OF EFFICIENCY AND STRUCTURAL VALUES, AND THE BENEFITS OF FEDERALISM

In order to determine whether subject matter jurisdiction should be waivable, Professor Buehler and most commentators would require consideration of both litigation costs and federalism. For example, a belated dismissal on jurisdictional grounds increases litigation costs (by requiring relitigation), but enhances federalism (by sending appropriate cases to state court). Professor Buehler asserts that these two values are incommensurable. At the outset, it is not clear why this matters. Even if litigation costs and federalism are incommensurable, judges and other policymakers must make trade-offs. No one claims that federalism is so important that it would justify extremely large litigation expenditures, such as allowing collateral attacks on subject matter jurisdiction grounds or requiring state representatives to monitor federal courts to ensure that they stay within statutory and constitutional grounds. Conversely, no one claims that litigation costs are so much more important than federalism that subject matter jurisdiction should just be ignored in order to save costs. The question is how to reach the appropriate balance or trade-off between litigation costs and federalism. Professor Buehler calls the appropriate balance “equilibrium,” a term not clearly defined in his article. His idea of equilibrium does not seem related to the more rigorous concepts of equilibrium that one finds in game theory or elsewhere.

Incommensurability is usually an issue when one is dealing with fundamental values, such as autonomy, equality, or dignity. Federalism is not such a value. It is not a value in itself, but rather is instrumental towards other values, such as responsiveness to local concerns and the prevention of tyranny.

One of the major achievements of the pioneers of law and economics, most importantly Gary Becker and Richard Posner, was the insight that efficiency means much more than minimizing costs easily or ordinarily

measured in dollars and cents. For example, criminal justice policy does not involve consideration of incommensurable values simply because it involves both costs (such as the cost of policing) and public safety. Rather, public safety itself can be expressed in monetary terms. People prefer not to be assaulted or robbed, and their preferences can be expressed in monetary terms and measured by looking at how much they actually pay to avoid such risks (such as by living in a safer neighborhood or hiring private security). Similarly, environmental policy requires consideration of both cost and environmental quality. However, that does not mean that it requires consideration of incommensurable values, because the value of environmental quality can be measured by surveys of willingness to pay (or accept) or by looking at actual decision-making (such as how much people are willing to pay to live in less polluted places).

The fundamental insights of the economic analysis of procedure are that most procedural issues involve trade-offs between litigation costs and accuracy, and that accuracy has a monetary value. Wrongly decided cases provide suboptimal incentives for later behavior. That is, parties, anticipating a certain rate of court error, may take less (or more) than optimal precautions against tort injuries. Alternatively, they may breach (or perform) inefficiently or otherwise behave in ways that impose excessive costs on others (or themselves). The more accurate the adjudication, the more people have incentives to conform their actions to law. As long as the law is efficient or has other goals that can be measured in economic terms, one can therefore sensibly think about procedures that increase or decrease accuracy in monetary terms, because one can evaluate the monetary impact of more or less compliance with the relevant substantive law. As a result, one can make trade-offs between litigation costs and accuracy, because both can be measured in monetary terms. Like criminal justice, environmental regulation, and procedure generally, subject matter jurisdiction can be subjected to economic analysis in a way that takes into account values, such as litigation costs and federalism, which might initially seem to be incommensurable.

What is the value of the proper allocation of cases between federal and state court? What are the benefits of state-court adjudication of cases not within federal subject matter jurisdiction? Examination of those


25. See POSNER, supra note 14, at 773–74.
benefits helps determine whether the benefits of dismissing cases with belatedly-discovered jurisdictional defects outweigh the costs discussed in Part I.26

First, state court judges may be in the best position to accurately adjudicate cases that do not fall under federal jurisdiction. Such cases likely involve state law, an area with which state court judges are more familiar than their federal counterparts. The very independence of federal judges may mean that they are not influenced by local values in the way that state legislators and common law judges intended. Federal judges may therefore reach decisions not in accord with the preferences of the state residents who elected the legislators and, directly or indirectly, the judges. Nevertheless, although federal judges are not experts in state law, they are generally very competent, and probably, on average, of higher quality than state court judges.27 In addition, local values likely influence federal district court judges, too, as they generally live and formerly practiced in the state where they sit. Thus, the extent to which federal adjudication is less accurate or less in tune with state values is likely to be small. Furthermore, if different outcomes resulted from a case being adjudicated in federal and state courts, such differences would likely have benefited one of the parties. The cases in which neither party objects to subject matter jurisdiction are likely to be the cases in which neither party anticipated that federal judges would decide the case much differently than state court judges. Thus, it is likely that the benefits of relitigation in state court in terms of increased accuracy would be very small, if they exist at all.

Second, even if one were skeptical that state judges were more accurate, state procedures and funding levels reflect the views of state legislators and judges about the optimal balance between cost and accuracy for cases within state court jurisdiction. Most, if not all, state courts receive less funding per case than federal courts, reflecting an assessment that accuracy is less valuable in state court cases. When a case is improperly adjudicated in federal court, the additional litigation costs incurred as a result of having litigated in federal courts may not be justified by the increase, if any, in accuracy. Nevertheless, when jurisdictional mistakes are caught late in the litigation process, the higher costs of federal adjudication are sunk costs. Requiring relitigation in


state court only increases litigation costs. Relitigation in state court, therefore, provides no benefit in terms of achieving the optimal balance between accuracy and cost.

Third, when federal judges adjudicate cases that should be heard in state court, they have less time to hear cases properly in their jurisdiction. This could result in less accurate adjudication of the cases properly in federal court. Of course, that reduction in accuracy could be mitigated by hiring more federal judges. Nevertheless, that would probably reduce the average quality of federal judges or require higher pay. In addition, when jurisdictional mistakes are discovered at trial or on appeal, federal judges and their staff have already invested considerable time. Sending the case to state court to be adjudicated again does not allow federal judges to recoup the time already spent and so does not improve the accuracy of adjudication in federal court. In addition, the federal adjudicatory time saved by dismissal pales in comparison to the additional state court time that relitigation requires. Furthermore, the additional state court time spent on relitigated cases reduces time spent on other cases, thus lowering overall state court accuracy.

Fourth, a case improperly adjudicated in federal court causes precedent in that area of law to develop more slowly in state court. That increases uncertainty and, in turn, reduces settlement. It also delays the adoption of what state court judges consider to be the most appropriate law. Clarification of the law could, of course, come from legislation, but that is also costly. Nevertheless, as previously mentioned, jurisdictional defects are belatedly discovered in only about 500 cases per year. That is, on average, ten cases per state per year. Given that state courts hear millions of cases per year, the impact on the development of state law is trivial. The impact is also very small in comparison to the real degradation of state capacity to develop precedent that comes from the fact that federal courts often decide state law issues. For example, in certain areas, such as mass tort law, many, if not most, cases are properly heard in federal court (because of diversity) even though state law governs.

Fifth, if federal courts usurped most, or all, state court cases, states would lose much of their ability to shape state law. To the extent that conditions are different from state to state, and state legislators and judges are best able to formulate law appropriate to state conditions, federalization of the law may result in less efficient law. If federal courts

routinely made mistakes, that would cripple state lawmaking and invoke the sorts of concerns about federal tyranny that concerned antifederalists in the founding era and that animate Tea Party activists today. Nevertheless, the rate of federal court jurisdictional error is so low as to make this concern irrelevant. In fact, far from usurping state court jurisdiction, federal judges seem to go out of their way to avoid cases that arguably are within their jurisdiction. For example, federal courts created the complete diversity requirement, the well-pleaded complaint rule, and the exemption of family law cases from diversity jurisdiction, even though neither Article III of the Constitution nor the text of the relevant jurisdictional statutes require these limitations. In addition, if one were suspicious that federal judges would usurp state judicial power, it would be odd to remedy that problem by requiring those same federal judges to dismiss cases for jurisdictional reasons. Rather, if one were concerned about federal judicial tyranny, one would want to design a mechanism in which a state official had the power to intervene to protect state court jurisdiction.

The five costs discussed above show that it is possible to analyze federalism and related structural values in a way that is commensurable with litigation costs. Although federalism is not usually analyzed in this way, benefits one, two, four, and five can be seen as economic interpretations of the responsiveness to the local concern aspect of federalism. Similarly, the fifth benefit relates to the concerns about the prevention of tyranny that are also an important strand of federalism. Nevertheless, by analyzing federalism as a set of particular concerns rather than a single “value,” one can more easily appreciate whether federalism is truly threatened by occasional federal court mistakes relating to subject matter jurisdiction. This analysis suggests that the cost of jurisdictional mistakes (or at least those currently caught by federal judges) is far lower than the cost of sending those cases back to state court for relitigation. While federalism costs are commensurable with litigation costs in that one could, in theory, put a dollar amount on them, they are certainly hard to measure with any precision. Nevertheless, the sort of common-sense reasoning used above shows that one can make rough comparisons. This analysis suggests that both prior commentators and Professor Buehler are probably correct to limit the time in which jurisdictional objections can be raised so as to avoid the cost of relitigation in state court. That is, the federalism benefits of relitigation are smaller than the additional litigation costs of doing so.

III. INVOLVING STATE ATTORNEY GENERALS

The economic analysis above suggests that the current practice of
allowing subject matter defects to be raised at any time is not justified by cost-benefit analysis or efficiency, even when such analysis takes into account both federalism concerns and litigation costs. Part I, however, argued that Professor Buehler’s solution was likely to be even more costly than the status quo. Nevertheless, as suggested in Part II, Professor Buehler may be correct that other proposals, which would cut off jurisdictional objections without adding additional safeguards, may be insufficiently attentive to federalism concerns. This section suggests an alternative that might better protect state court prerogatives without adding significant extra costs.

One of the reasons that subject matter jurisdiction is non-waivable and can be raised *sua sponte* by federal judges is that it affects interests not directly represented in the litigation. Most importantly, as discussed in the prior section, jurisdictional mistakes affect the capacity of state courts to develop precedents and of states more generally to develop their own law. The parties to litigation do not ordinarily take those concerns into account, so their consent to jurisdiction or failure to object is rightly considered not to be determinative. Nevertheless, as I also discussed in Part II, the impact of occasional judicial mistakes on these federalism concerns is minimal. Thus, routinely dismissing such cases is unnecessary. An optimal solution would identify the cases for which the impact on state precedent and lawmaking were large enough to justify the cost of relitigation. Dismissal would then only be appropriate in such cases.

It might be sufficient to give federal judges discretion to retain cases in which jurisdictional defects are discovered late, with the expectation that they would dismiss only cases involving significant issues of state law. In these situations, the benefits of relitigation in state court would be high. In making that decision, it might be wise to allow federal judges to consult persons with interests in state lawmaking capacity, such as the appropriate state attorney general. Just as the United States Supreme Court can call for the views of the Solicitor General when deciding whether to grant certiorari in cases that affect the federal government,29 so might federal judges call for the views of the relevant state attorney general when deciding whether to dismiss a case in which a jurisdictional defect has been found late in the proceedings.

I suspect that state attorneys general would generally respond (if at

---

all) that they do not think relitigation in state court would be appropriate. State courts tend to be overcrowded, so any benefit to state lawmaking capacity would usually be outweighed by further burdens on the state court system. Nevertheless, if a state attorney general asserted a significant state interest in having a case relitigated in state court, that would be a signal to the federal judge that the case is one in which the benefits of relitigation may outweigh the costs.

IV. POSSIBLE BENEFITS OF THE CURRENT RULE

Before concluding, it is important to consider whether the current practice of allowing jurisdictional objections to be raised at any time has benefits that might justify its costs. One possible benefit is that it may encourage litigants and judges to be more careful about jurisdiction at the outset. If judges know that their hard work will be for naught in cases in which jurisdictional defects are later found, they may try harder to find jurisdictional defects early. In fact, this concern may motivate the current practice employed by many district court judges—having their clerks check jurisdiction soon after filing. If a plaintiff knows that a judge or defendant may raise jurisdictional objections late in the case and force expensive relitigation, it makes sense for the plaintiff to research jurisdiction more carefully before filing suit. Similarly, defendants, who often prefer to be in federal court, may be incentivized to raise jurisdictional problems if they know that the consequence of not doing so early on is that they may incur significant litigation expense only to have the case ultimately dismissed. These considerations paradoxically suggest that a rule allowing later challenges to subject matter jurisdiction may be a good way of incentivizing early and thorough investigation of subject matter jurisdiction.

Although the arguments in the prior paragraph are plausible, offsetting considerations exist. District court judges may be less diligent about subject matter jurisdiction early in a case if they know that they can correct jurisdictional defects later. Similarly, if one party has private information undermining jurisdiction, it may strategically conceal that information and then reveal it later only if the federal litigation is going badly and relitigation in state court offers a welcome “second bite at the apple.”

The current regime is also beneficial in situations where jurisdictional issues are closely connected to the merits of the case. In such situations,
it is very difficult, if not impossible, to ascertain jurisdiction early in the case, and it makes sense to defer consideration until the relevant facts have been investigated through discovery and possibly even until they are resolved at trial.

CONCLUSION

Professor Buehler correctly points out potential problems with the current jurisdictional regime. The issue certainly requires further examination. Nevertheless, his analysis in terms of incommensurable efficiency and structural values does not take into account modern economic analysis. In addition, his proposal to require district court judges to issue jurisdictional certification orders in all cases would likely impose higher costs in the aggregate than relitigating the estimated 0.2 percent of cases in which jurisdictional defects are belatedly found. A more efficient solution might be to give discretion to district court judges to retain or dismiss such cases, perhaps after calling for the views of the relevant state attorney general. In addition, before changing the current regime, it is also important to recognize the ways in which allowing later challenges to subject matter jurisdiction may, paradoxically, incentivize more thorough, early investigation into subject matter jurisdiction.
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

---

* Director of Policy Analysis and Assessment, Daniel J. Evans School of Public Affairs, University of Washington; Board Member, Graduate Washington; M.P.A., University of Washington, 2010; J.D., University of Washington, 2013. The views expressed in this essay are solely those of the authors and do not reflect the positions or policies of the University of Washington. The authors wish to thank Stan Barer for his inspiration and critical review of this article, and Brett Jette and Cheryl Nyberg for their research and editing.

** Acting Professor of Law, University of Washington School of Law; J.D., University of Washington, 1974; LL.M., University of California at Berkeley, 1982.

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.\(^5\)

Publicly-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.


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

---


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. 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. 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. In other words, pre-Revolution colleges were funded by a patchwork of primarily public sources.

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. Between 1800 and 1860, an additional 343 of America’s existing colleges and universities were founded.

Post-Revolution Americans were deeply distrustful of a strong and visible national government. 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

11. Id. at 9.
12. Id. at 12–13.
13. Id. Early American colleges also depended on tuition and donations.
15. Id.
financial support (both capital and operating) for these public higher education institutions came from states.\textsuperscript{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 constitutions\textsuperscript{18} and only four mentioned colleges or universities.\textsuperscript{19} By 1820, twelve of the twenty-three existing state constitutions provided for schools in some fashion.\textsuperscript{20} Nine of the twenty-three provided for colleges or universities.\textsuperscript{21} However, by the time Washington became a state in 1889, each of the existing forty-one states provided for schools in their constitutions,\textsuperscript{22} with thirty-one of the forty-one providing for colleges or

\begin{itemize}
\item \textsuperscript{17} Thelin, supra note 10 at 74–79, 135, 142.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{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; Va. Const. of 1793, ch. II, § 41; W.Va. Const. of 1872, art. XII, § 1; Wis. Const. of 1848, art. X, § 1.
\end{itemize}
universities. In fact, between 1860 and 1889, every state admitted to the United States, except West Virginia, referenced colleges or universities in their founding constitutions. 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. That federal statute allocated to each eligible state 30,000 acres of land per member of that state’s Congressional delegation. 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. This federal land was transferred to the states in their role as the primary stewards of higher education. The Morrill Act spurred state after state to enter the higher education field.

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.


26. Id.

27. Id.

28. Id.

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. These institutions included mental hospitals, schools for the blind, deaf, and developmentally disabled; and reformatories. 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.” The territorial legislature provided for common schools in 1854, which were free for all children between the ages of four and twenty-four.

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

32. Horace Mann served as a trustee for the New England Institution for the Education of the Blind.
38. 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.”

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.” 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, and state support for an agricultural college reflected that economic reality. The University of Washington had already been created three decades before. But upon statehood, the first state legislature established the “State Agricultural College and School of Science.” The Agricultural College, a Morrill Act land grant institution, 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. To support this

38. WASH. CONST. art. IX, § 1.
endeavor, the legislature appropriated $5,000 in 1889. In addition to the Agricultural College and School of Science, the State Legislature also funded three normal schools: the Ellensburg Normal School and the Cheney Normal School in 1890, and the Bellingham Normal School in 1893. 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.

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,” establishing a system to govern schools in large cities, and reenacting the Territorial Legislature’s earlier formation of the University of Washington. 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.”

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.” That statute appropriated $10,000. The initial statutes authorizing common schools, normal schools, the university, the agricultural college, and a school in Vancouver for deaf, blind, and

52. Id. at § 2.
54. Id. at § 21, 1889–90 Wash. Sess. Laws 399. That amount appears to have been later increased to at least $12,050. DEPT’ 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

56. Id. at 356.
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, 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.” The convention’s Committee on Education and Educational Institutions reported out a different education version along the lines of today’s Article IX. 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.” 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.” 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.” 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-

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-

66. Id. at 553.
training could hone their instructional skills.\textsuperscript{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.\textsuperscript{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 \textit{below the college or university level} as now or may be established by law and maintained at public expense.”\textsuperscript{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, \textit{normal schools}, and \textit{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.\textsuperscript{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.\textsuperscript{72} Constitutionally, Washington State’s normal schools (\textit{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

\textsuperscript{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.” \textit{See School District No. 20 v. Bryan}, 51 Wash. 498, 99 P. 28 (1909).

\textsuperscript{69} \textit{Act of May 8, 1969, ch. 223, 1969 Wash. Sess. Laws 1669.}

\textsuperscript{70} \textit{WASH. REV. CODE} § 28A.150.010 (2012) (emphasis added).

\textsuperscript{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 \textit{UNIV. OF WASH. COLL. OF EDUC. PROGRAMS}, \textit{PROGRAMS, available at} \url{https://education.uw.edu/programs}.

\textsuperscript{72} \textit{WASH. REV. CODE} § 28A.410.025 (2012).
into the general and uniform system of public schools,\textsuperscript{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.\textsuperscript{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.

\textbf{D. Article XIII, Section 1}

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{73} See supra notes 49–56 and accompanying text.
\item \textsuperscript{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).
\end{itemize}
\end{footnotesize}
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. Further, language should be “interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” 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. 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.

76. Id.
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.
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.” 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.”

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. 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.

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).
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.” Article IX, Section 10 of Idaho’s 1889 constitution declared that the “regents shall have the general supervision of the university.”

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.” 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.

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.” An 1892 dictionary defined “establish” to mean “to found; to institute;—as a colony, state, &c.” 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.”

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.” 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, 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. 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.” 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.”

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. 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

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. DEPT OF EFFICIENCY, supra note 48, at 420, 432.
107. Id.
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.\textsuperscript{111} By 1959, fifty years later, the biennial budget had increased state support per FTE to $11,574.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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); \textit{See also} 1915 Wash. Sess. Laws 239, § 2.

\textsuperscript{111} \textit{See} Table 1 \textit{infra} and accompanying notes 114–21.

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.}
TABLE 1
State Appropriations for Research and Regional Universities

<table>
<thead>
<tr>
<th>Biennial Appropriations in Current $$</th>
<th>UW</th>
<th>WSU</th>
<th>EWU</th>
<th>CWU</th>
<th>WWU</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1909–1911</td>
<td>$652,322</td>
<td>$554,536</td>
<td>$111,308</td>
<td>$101,251</td>
<td>$132,133</td>
<td>$1,551,550</td>
</tr>
<tr>
<td>2009–2011</td>
<td>$608,936,000</td>
<td>$26,773,183</td>
<td>$87,396,000</td>
<td>$83,104,000</td>
<td>$104,454,000</td>
<td>$1,266,070,000</td>
</tr>
<tr>
<td>2011–2013</td>
<td>$436,536,000</td>
<td>$301,211,000</td>
<td>$68,085,000</td>
<td>$65,058,000</td>
<td>$79,715,000</td>
<td>$950,605,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Biennial Appropriations in 2014 $$</th>
<th>UW</th>
<th>WSU</th>
<th>EWU</th>
<th>CWU</th>
<th>WWU</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1909–1911</td>
<td>$16,497,223</td>
<td>$14,024,215</td>
<td>$2,814,972</td>
<td>$2,560,637</td>
<td>$3,341,654</td>
<td>$39,238,701</td>
</tr>
<tr>
<td>1959–1961</td>
<td>$372,524,243</td>
<td>$219,004,637</td>
<td>$29,610,103</td>
<td>$31,177,039</td>
<td>$35,208,143</td>
<td>$687,524,166</td>
</tr>
<tr>
<td>2009–2011</td>
<td>$675,918,960</td>
<td>$424,219,800</td>
<td>$97,009,560</td>
<td>$92,245,440</td>
<td>$115,943,940</td>
<td>$1,405,337,700</td>
</tr>
<tr>
<td>2011–2013</td>
<td>$462,728,160</td>
<td>$319,283,660</td>
<td>$72,170,100</td>
<td>$68,961,480</td>
<td>$84,497,900</td>
<td>$1,007,641,300</td>
</tr>
</tbody>
</table>

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).


116. GOVERNOR’S OFFICE, STATE OF WASHINGTON PROPOSED GOVERNOR’S BUDGET FOR THE 1963–1965 FISCAL BIENN IUM 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.”


<table>
<thead>
<tr>
<th>Academic Year Enrollment (FTE students)</th>
<th>UW</th>
<th>WSU</th>
<th>EWU</th>
<th>CWU</th>
<th>WWU</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910–1911</td>
<td>2,200</td>
<td>1,371</td>
<td>650</td>
<td>281</td>
<td>447</td>
<td>4,949</td>
</tr>
<tr>
<td>1960–1961</td>
<td>15,644</td>
<td>6,785</td>
<td>2,014</td>
<td>2,298</td>
<td>2,959</td>
<td>29,700</td>
</tr>
<tr>
<td>2010–2011</td>
<td>42,303</td>
<td>24,233</td>
<td>9,640</td>
<td>9,832</td>
<td>12,647</td>
<td>98,655</td>
</tr>
<tr>
<td>2012–2013</td>
<td>43,487</td>
<td>25,189</td>
<td>10,170</td>
<td>9,832</td>
<td>12,647</td>
<td>100,759</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Average Annual Appropriations per FTE student in 2014 $$</th>
<th>UW</th>
<th>WSU</th>
<th>EWU</th>
<th>CWU</th>
<th>WWU</th>
<th>Average</th>
</tr>
</thead>
<tbody>
<tr>
<td>1909–1911</td>
<td>$3,749</td>
<td>$5,115</td>
<td>$2,165</td>
<td>$4,556</td>
<td>$3,738</td>
<td>$3,964</td>
</tr>
<tr>
<td>1959–1961</td>
<td>$11,906</td>
<td>$16,139</td>
<td>$7,351</td>
<td>$6,784</td>
<td>$5,949</td>
<td>$11,574</td>
</tr>
<tr>
<td>2009–2011</td>
<td>$7,989</td>
<td>$8,753</td>
<td>$5,032</td>
<td>$4,691</td>
<td>$4,584</td>
<td>$7,122</td>
</tr>
<tr>
<td>2011–2013</td>
<td>$5,320</td>
<td>$6,338</td>
<td>$3,548</td>
<td>$3,669</td>
<td>$3,376</td>
<td>$5,000</td>
</tr>
</tbody>
</table>

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.


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 biennium\textsuperscript{124} to $436,536,000 during the 2011–2013 biennium.\textsuperscript{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 biennium\textsuperscript{126} to $301,211,00 during the 2011–2013 biennium\textsuperscript{127}—a reduction of over forty percent. The regional universities all saw similar reductions during this time.\textsuperscript{128} Further, the state legislature mandated a

\begin{table}
\centering
\caption{Average Annual Appropriations per Full Time Equivalent Student}
\begin{tabular}{|c|c|c|c|c|}
\hline
Year & UW & WSU & EWU & CWU & WWU \\
\hline
1900-1911 & $8,000 & $6,000 & $4,000 & $2,000 & $1,000 \\
1950-1961 & $10,000 & $8,000 & $6,000 & $4,000 & $2,000 \\
2000-2011 & $12,000 & $10,000 & $8,000 & $6,000 & $4,000 \\
2011-2013 & $14,000 & $12,000 & $10,000 & $8,000 & $6,000 \\
\hline
\end{tabular}
\end{table}

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, and required a three percent reduction in state-supported salary bases from 2011–2013. 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. Between 2008 and 2011, Washington State University phased out sixteen degrees or programs, eliminated 1,080 courses, and eliminated 581 paid positions. Despite these reductions, the state’s universities were still forced to raise tuition at unprecedented rates during this time period, 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...
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. 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 and Duffy v. State 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.

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 Constitution**¹³⁹

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, form 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.