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L.K. Beale

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CHARTER SCHOOLS, COMMON SCHOOLS, AND THE WASHINGTON STATE CONSTITUTION

L.K. Beale

Abstract: Early American political thinkers deemed universal education essential to the proper functioning of a republican form of government. Accordingly, each state developed a public school system supported by general taxation. The Washington Constitution requires the system to be both "general" and "uniform." Common schools, for which certain school funds are constitutionally reserved, are the most important and only mandatory component of the system. Recent charter school proposals raise questions as to whether such institutions fit within a general and uniform system and whether they are "common schools" entitled to common school funds. In order to provide a framework for such an analysis, this Comment surveys the history and development of common schools in the United States and particularly in Washington State. It then interprets Washington's Education Article in light of the original purposes of state-funded public education and concludes that the concept of independent "charter" schools is inconsistent with the comprehensive constitutional plan.

In November 1996, Washington voters considered an initiative that would have allowed the establishment of privately-run, publicly-funded charter schools.¹ Although the initiative failed, the Washington Legislature revisited the issue in 1997.² Charter schools can take different forms, but usually are operated by private, nonprofit entities, receive public funds, offer a specialized program of study, and are exempt from general school regulations.³ They are intended to increase parental choice in education, increase flexibility and efficiency, and increase accountability by fostering competition between schools.⁴ Charter schools are generally presumed to fit legally within a state's public school system and be entitled to public school funds.⁵ However,

1. Initiative 177 for Independent Public Schools gained 36% of the vote. *Final, Official Election Results*, Seattle Times, Dec. 6, 1996, at A14.

2. See Jennifer McCoy, *Testimony Heard on Two Charter-School Bills*, Seattle Times, Feb. 26, 1997, at B3. President Clinton has also recently endorsed federal funding for charter schools. See John F. Harris & Peter Baker, *Clinton Says He'll Mount Crusade for Education*, Wash. Post, Feb. 5, 1997, at A1.

3. See Diane Ravitch, *Schools That Specialize; Are They Democratic? Do They Work?*, Wash. Post, July 28, 1996, at R1; see also Dick Lilly, *School-Choice Debate Lands on State Ballot*, Seattle Times, Oct. 20, 1996, at A1.

4. See Lilly, *supra* note 3, at A1. A number of Washington districts have "magnet schools" that emphasize specific teaching styles, subjects, or the needs of a particular ethnic group. See Jacqueline Ching, *Federal Money Aids Magnet Program*, Seattle Times, July 29, 1989, at A9. However, these schools, unlike independent charter schools, are under the same supervision and management as other public schools. See *infra* note 232.

5. See, e.g., *Education Alternatives, Inc.: Arizona Grants Charters to Own and Run Schools*, Wall St. J., Jan. 15, 1997, at B4.

many state constitutions, including Washington's, require that the public school system be general and uniform.⁶ The Washington Constitution also restricts certain sources of funding for "common schools."⁷ To pass constitutional scrutiny and qualify for such funds, charter schools in Washington must be "common schools" and fit within a general and uniform system.

Defining "common school" is no simple task. The institution has evolved over centuries, beginning in the middle ages.⁸ The appellation itself is liable to multiple constructions: "common school" originally referred to a vernacular school for "common folk" as opposed to a Latin preparatory school for the upper classes;⁹ it has been used to describe a one-room "common" school house contradistinguished from a "graded" school where students are separated according to their level of learning;¹⁰ most frequently, it refers to a school that is "common" because it is open to all children of the locality.¹¹

To interpret "common school" as used in the Washington Constitution, a historical approach is especially appropriate; the constitutional provisions are best understood in context of the purposes for which public education was originally established.¹² Also, according to the Washington Supreme Court, the state constitution should be construed in the sense in which our Framers understood it when it was

6. See Ariz. Const. art. XI, § 1; Idaho Const. art. IX, § 1; Ind. Const. art. 8, § 1; Minn. Const. art. XIII, § 1; N.C. Const. art. 9, § 2; Or. Const. art. VIII, § 3; S.D. Const. art. VIII, § 1; Wash. Const. art. IX, § 2. Several other state constitutions require that the system be uniform. See Colo. Const. art. IX, § 2; Fla. Const. art. IX, § 1; N.D. Const. art. VIII, § 2; Nev. Const. art. 11, § 2; N.M. Const. art. XII, § 1; Wyo. Const. art. 7, § 1.

7. Wash. Const. art. IX, § 2. Not all states use the term "common school" in their constitutions. See, e.g., N.C. Const. art. 9, § 1 ("free public schools"); S.D. Const. art. VIII, § 1 ("public schools").

8. During the 13th century in Europe, as business and official transactions were increasingly transacted in vernacular languages instead of Latin, a need arose for schools that taught elementary reading and writing in native languages. These schools were intended for "common folk" and are the lineal progenitors of modern elementary schools. See Edward H. Reisner, *The Evolution of the Common School* 7-8 (1930).

9. *Id.* at 1-3.

10. See, e.g., Wash. Const. of 1878, art. XI, § 4 (not enacted), reprinted in *Washington's First Constitution, 1878 and Proceedings of the Convention* 84 (Edmond S. Meany & John T. Condon eds., n.d.) (restricting school fund to support common and graded schools).

11. See, e.g., *People ex rel. Roman Catholic Orphan Asylum Soc'y v. Board of Educ.*, 13 Barb. 400, 410 (N.Y. 1851) (defining "common school" as "public, universal, open to all").

12. See, e.g., *Pollitt v. Lewis*, 108 S.W.2d 671, 673-74 (Ky. 1937) (using historical constitutional analysis, holding that junior college is not "common school").

ratified.¹³ Therefore, this Comment, in undertaking an analysis of the constitutionality of charter schools in Washington, begins in Part I with a survey of the origins of public education in the United States and Washington State. Part II uses that historical background to analyze article IX, sections 1 and 2 of Washington's Constitution, which establish and define the public school system. Part III compares two different charter school models with Washington's constitutional requirements, and Part IV concludes that these models are not compatible with a general and uniform system and are not "common schools."

I. ORIGINS OF PUBLIC EDUCATION

A. *Development of Common Schools in the United States*

1. *Colonial Period: 1750–1830*

Today education through a public school system is taken for granted, but early American colonists had no conception of tax-supported schools.¹⁴ The colonists were, however, quite literate.¹⁵ Protestants, and especially Calvinists, stressed Bible reading and early instruction as preparation for salvation.¹⁶ Early political theorists such as Thomas Jefferson, Benjamin Rush, and Noah Webster also advocated education.¹⁷ Jefferson, in Virginia in 1779, and Rush, in Pennsylvania in 1786, proposed free state school systems based on the republican education theory: that popular education was necessary to prepare men to vote intelligently, to perpetuate a republican government, to produce disciplined citizens, and to unify a diverse population.¹⁸ Rush emphasized a single, uniform system saying, "Our schools of learning, by producing one general, and uniform system of education, will render

13. *Northshore Sch. Dist. No. 417 v. Kinneer*, 84 Wash. 2d 685, 715, 530 P.2d 178, 195 (1974), *overruled on other grounds by Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978). The history of events preceding and contemporary to the adoption of the constitution are pertinent to the analysis. *Id.* at 727, 530 P.2d at 201.

14. In England, literary education had been private, reserved for "gentlemen" and the clergy. The masses were educated mainly through the apprentice system. *See generally* Paul Monroe, *Founding of the American Public School System* 3–52 (1940) (discussing European antecedents of American education).

15. *See* Carl F. Kaestle, *Pillars of the Republic* 3 (Eric Foner consulting ed., 1983).

16. *Id.*

17. *See* Lawrence A. Cremin, *American Education, The National Experience 1783–1876*, at 2–5 (1980).

18. *See* Kaestle, *supra* note 15, at 5–9, 61.

the mass of people more homogeneous, and thereby fit them more easily for uniform and peaceable government."¹⁹ Although these early proposals for state-run education failed to gain support,²⁰ all states eventually established tax-supported public school systems influenced by early Protestant ideals and based upon the republican education theory.²¹

Early education was accomplished through a variety of institutions. In rural areas, district schools, locally organized and controlled, were funded by a combination of property taxes, fuel contributions, tuition, and state aid.²² In urban areas, children could either attend some type of "pay" school²³ or a church charity school.²⁴ By the 1820s, many charity schools received financial assistance from the city and state. Urban educational leaders consolidated charity schools, obtained more government aid, developed procedures for supervision, and attempted to expand the enrollment to include all children instead of just the poor.²⁵ Two major arguments supported the transition of urban charity schools into consolidated common school systems: a single administrative agency would be more efficient, and children from different social classes should go to the same schools.²⁶

2. *Reform Movement: 1830–1860*

From 1830 to 1860 Horace Mann of Massachusetts and Henry Barnard of Connecticut led a movement to improve the common schools, advocating free common schooling dedicated to moral education and good citizenship.²⁷ They placed far more emphasis on character, discipline, virtue, and good habits than skills or general

19. See Cremin, *supra* note 17, at 117.

20. At that time, the predominantly rural population was reluctant to give up local control. See Reisner, *supra* note 8, at 279. Citizens were also skeptical of state taxation and central regulation. See Kaestle, *supra* note 15, at 9.

21. See generally Kaestle, *supra* note 15. By the 1840s and 1850s, a generalized Protestant moral training was an integral part of education. See Cremin, *supra* note 17, at 18, 57; see also *infra* Part I.A.2.

22. See Kaestle, *supra* note 15, at 13.

23. State-chartered academies, funded by a combination of public and private contributions, provided a broad range of education to many students. See Cremin, *supra* note 17, at 165.

24. See *id.* at 50–73 (describing influence on education of intensive revival activity, mainly Protestant in character, beginning in 1790 and continuing through mid-19th century).

25. See Kaestle, *supra* note 15, at 57.

26. *Id.* at 60.

27. *Id.* at 75.

knowledge.²⁸ According to these “reformers,” district school boards were incompetent and indifferent to education. Districts hired the cheapest thus least qualified teachers and were reluctant to tax themselves. This parsimony resulted in dilapidated buildings, inadequate supplies, and a short school term.²⁹ To remedy these problems, the reformers campaigned for centralized supervision, tax support, teacher training, better schoolhouses, and increased attendance.³⁰ Mann called for uniformity of textbooks, curricula, methods, and discipline.³¹ The reformers generally were successful in implementing their agenda. During the late 1830s, most northeastern states approved taxation for common schools and created the office of state superintendent.³² The midwestern states soon followed suit.³³ By the 1860s, most states east of the Mississippi River had established working systems of education and recognized the principle of a free public school system.³⁴

B. *Development of Common Schools in Washington*

1. *Early Influences*

In Washington, development of a common school system was slower than in New England and the Midwest.³⁵ Geographic barriers, Indian wars and the rigors of daily existence,³⁶ and the independent character of the early inhabitants³⁷ hindered growth of a system. School supporters in Washington urged common schools for the same reasons that had been advanced a century earlier in the northeastern states: moral training and

28. *Id.* at 100.

29. One educator, in 1846, called small districts “the paradise of ignorant teachers.” *Id.* at 112 (quoting Vermont’s first State Superintendent, Horace Eaton).

30. *See id.* at 95, 106.

31. *See* Cremin, *supra* note 17, at 155.

32. *Id.* at 104, 150–51.

33. *Id.* at 182.

34. Monroe, *supra* note 14, at 222. Development of school systems in the South was somewhat slower than in the North and Midwest. *See generally* Kaestle, *supra* note 15, at 182–217 (discussing regional differences in common school development).

35. *See* Thomas William Bibb, *History of Early Common School Education in Washington* 75–77 (University of Wash. Publications in Soc. Sciences vol. 6, 1–154, 1929).

36. *See generally* Edmond S. Meany, *History of the State of Washington* (1910) (describing early conditions and settlement of Washington Territory).

37. *See* Office of Wash. State Superintendent of Pub. Instruction, *Washington Schools in the Good Old Days* 9 (Harry Johnson ed., 1969) (quoting D.R. Bigelow, framer of Territory’s first school law: “[A] majority of our citizens . . . have been adventurers . . . and consequently they have not felt that interest in the education of the country . . . as to induce them to make any adequate effort to accomplish it.”).

good citizenship imparted through public schools would guarantee liberty and democracy in the new state.³⁸ An 1877 school law illustrates the point:

It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, truth, justice and patriotism . . . to instruct them in the principles of a free government, and to train them up to a true comprehension of the rights, duties and dignity of American citizenship.³⁹

Education was also advanced for economic reasons: ignorance and its concomitant crimes would be more costly than education.⁴⁰

2. *Movement Toward Centralization*

Early schools in Washington Territory were initiated at the local level. A group of settlers would call a meeting, elect directors, and raise money for a school through taxation or voluntary contributions.⁴¹ Often, a tuition payment was required.⁴² School houses were crude and meagerly supplied; good teachers were scarce.⁴³ In 1854, the first territorial Legislature established a common school system.⁴⁴ This first school law was largely based on that of New England. It provided a permanent school fund, a school tax, certification of teachers, and local

38. See, e.g., 1873 *Wash. Territory Superintendent of Common Schs. Biennial Rep.* 7 (“Learning alone cannot give stability to a State. Education in morals is vital Christian [sic] to a free government.”); see also 9 *Wash. State Superintendent of Pub. Instruction Biennial Rep.* 43 (1889) (stating that State’s purpose in establishing and fostering public school system is to make citizens who will perpetuate liberties secured by government).

39. Act of Nov. 9, 1877, tit. VII, § 50, 1877 *Wash. Terr. Laws* 259, 274. This section has been preserved nearly verbatim in the current school code. See *Wash. Rev. Code* § 28A.405.030 (1996).

40. See *Wash. Council J.* at 20 (1860–1862) (message of Governor L. Jay S. Turney to Legislature, Dec. 19, 1861) (“Experience demonstrates the perfect success of the common school system—that the masses can be educated, and that it is cheaper to educate the people than to punish the vices and crime incident to ignorance.”); see also 1878 *Jefferson County Superintendent of Schs. Ann. Rep.* (“[W]e cannot afford to have an uneducated population . . . [The territory] can not trust the lives and property of its fifty-thousand inhabitants to the brutal passions and prejudices of ignorant people.”), in 3 *Wash. Territory Superintendent of Pub. Instruction Biennial Rep.* 45 (1879) [hereinafter 1879 *Biennial Rep.*].

41. Angie Burt Bowden, *Early Schools of Washington Territory* 12–14 (1935).

42. Bibb, *supra* note 35, at 87–89.

43. So much so, that first in 1861, and then again in 1866, a group of young women was imported from New England to the Puget Sound to relocate in Washington and become school mistresses. Bowden, *supra* note 41, at 190–91.

44. Act of Apr. 12, 1854, ch. I, 1854 *Wash. Terr. Laws* 319.

control through elected district directors.⁴⁵ Because their constituents distrusted central authority, the lawmakers omitted a territorial superintendent and instead placed supervision at the county level.⁴⁶ Management of the schools fell mainly to the district directors, whose duties included purchasing and maintaining school houses and hiring teachers.⁴⁷ County superintendents were elected for three-year terms and needed no qualifications to hold the poorly-compensated office.⁴⁸ Although required by law to visit their schools, keep statistics, and file reports, the superintendents rarely did so.⁴⁹ As a result, the first twenty years of education in Washington Territory has been referred to as the “dark era.”⁵⁰ There are practically no records or statistics existing from this period.⁵¹

Without centralized oversight, growth of a school system was slow.⁵² Finally, in 1871 at the governor’s urging, the Legislature permanently established the Office of Territorial Superintendent of Common Schools.⁵³ The governor called for a superintendent to bring uniformity to the system and was at least partially motivated by the desire to attract immigration to the territory.⁵⁴ In 1889, the Office of State Superintendent of Public Instruction was established in the state

45. See Bibb, *supra* note 35, at 1–3, 72 (tracing history of Washington’s first school law through Oregon, Iowa, Michigan, and New England).

46. See Office of Wash. Superintendent of Pub. Instruction, *supra* note 37, at 9.

47. Act of Apr. 12, 1854, ch. III, § 6, 1854 Wash. Terr. Laws 319, 324.

48. Act of Apr. 12, 1854, ch. II, §§ 1–2, 1854 Wash. Terr. Laws at 320. The House passed a motion reducing the county superintendent’s salary from \$100 to \$25. Bibb, *supra* note 35, at 80.

49. See ch. II, §§ 6–7, 1854 Wash. Terr. Laws at 321; see also Bowden, *supra* note 41, at 8–9.

50. Bibb, *supra* note 35, at 74.

51. See *Sec. of Wash. Territory Rep.*, in 1870 *U.S. Comm’r of Educ. Ann. Rep.* 333.

We have no territorial commissioner or bureau . . . through which . . . statistical information in relation to our schools can be gathered . . . It is hoped by the friends of education in the Territory that this evil will soon be remedied by the creation of a central bureau having a supervision over all our schools, and to which the county superintendents will be required to report.

Id.

52. See Bibb, *supra* note 35, at 75–77.

53. Act of Nov. 29, 1871, ch. 1, 1871 Wash. Terr. Laws 12. The office was first established in 1861, but abolished less than a year later. See Act of Jan. 31, 1861, 1861 Wash. Terr. Laws 29 (establishing office); Act of Jan. 15, 1862, 1862 Wash. Terr. Laws 29 (abolishing office).

54. See Bibb, *supra* note 35, at 75; see also 4 *Wash. Territory Superintendent of Pub. Instruction Biennial Rep.* 2–6 (1881) (crediting good system of district schools with encouraging immigration).

constitution.⁵⁵ Since that time, a superintendent has been elected by the voters to supervise all matters pertaining to public schools.⁵⁶

3. *A Unified System*

In 1876, educators drafted and campaigned for an improved school law.⁵⁷ In response, the Legislature passed an act in 1877, which greatly unified the school system and provided the template for school law in Washington.⁵⁸ The law set forth a basic course of study for the common schools and encouraged uniform teaching.⁵⁹ The most important innovation was the creation of a Territorial Board of Education, empowered to adopt uniform textbooks, promulgate rules and regulations for efficiently governing the schools,⁶⁰ prepare blank forms for the reports of teachers, directors, and county superintendents,⁶¹ and grant territory-wide teaching certificates.⁶² The law also authorized the Board of Education to implement standard examination questions for use in certifying teachers.⁶³ Prior to this, county superintendents issued teaching certificates at their discretion.⁶⁴ In addition to reading, writing, arithmetic, and other basic subjects, the law required “[a]ttention . . . to the cultivation of manners and morals, to the laws of health, physical exercises, ventilation and temperature of the school room.”⁶⁵ The Board of Education’s rules and regulations prescribed specific teaching

55. Wash. Const. art. III, § 22.

56. Wash. Const. art. III, §§ 1, 22.

57. See 1879 *Biennial Rep.*, *supra* note 40, at 3.

58. Act to Provide a System of Common Schools, 1877 Wash. Terr. Laws 259.

59. Tit. IX, §§ 51–56, 1877 Wash. Terr. Laws at 274–75; Tit. II, § 12, 1877 Wash. Terr. Laws at 262.

60. Tit. II, §§ 10–12, 1877 Wash. Terr. Laws at 261–62. The first set of “Rules and Regulations” included the following: “A Teacher’s Duty. . . . To keep your school records, use your blanks, and render your school reports exactly according to instructions. . . . To talk in a natural tone of voice. . . . To teach the virtues of industry, order, system, promptness, punctuality and attention to business.” Pupils were expected to “avoid disturbing teachers and school-mates by unnecessary noise. . . . To be mindful of the rights and feelings of others, and to be kind and polite to all.” 1879 *Biennial Rep.*, *supra* note 40, at 13–16.

61. Tit. II, § 12, 1877 Wash. Terr. Laws at 261–62. Thirteen forms were provided the first year, including notices of meetings and elections, a teachers’ employment contract, a school lease/deed, and forms for reporting statistics. See 1879 *Biennial Rep.*, *supra* note 40, at 51–58.

62. Tit. II, §§ 12–13, 1877 Wash. Terr. Laws at 261–62.

63. Tit. II, § 10, 1877 Wash. Terr. Laws at 261. For the text of the first examination questions so adopted, see 1879 *Biennial Rep.*, *supra* note 40, at 25–28.

64. Act of Apr. 12, 1854, ch. II, § 5, 1854 Wash. Terr. Laws 319, 321.

65. Act of Nov. 9, 1877, tit. IX, § 52, 1877 Wash. Terr. Laws 259, 274.

methods;⁶⁶ each teacher was expected to follow the required method.⁶⁷ Apparently, the Legislature intended to provide only a rudimentary education: an 1881 law forbade teaching of any language other than English and any mathematics higher than arithmetic.⁶⁸

Efforts to make the schools more efficient resulted in the transition from one-room school houses to graded schools. A law passed in 1881 encouraged district consolidation for this purpose.⁶⁹ The territorial teachers' institute promoted this law, endorsing graded schools as a way to save time and expense.⁷⁰ The teachers pointed out that a uniform plan of graded schools throughout the territory would increase efficiency and prevent confusion when a family moved from town to town.⁷¹

4. *History of School Funding*

In 1854, the federal government donated nearly two and a half million acres of land to Washington Territory to be leased or sold for the benefit of common schools.⁷² However, as no authority for the disposal of these lands had been provided,⁷³ little money was generated from this source until 1889, when the territory became a state. During the territorial period, schools were funded partly by a county tax that could only be used to employ teachers.⁷⁴ Districts were expected to tax themselves for school buildings and other expenses.⁷⁵ Though by 1887 most counties were levying the maximum tax and taxpayers felt overburdened, schools

66. For example, the following methods were required for the first grade: "Reading: . . . Teach words, then letters, then the sound of letters. . . . Cultivate a natural manner of speaking. . . . Carefully correct all faulty expressions of pupils." Arithmetic was to be taught by "[c]ounting, reading, and writing numbers up to 100. Addition and subtraction up to 5's. Roman numerals to XXV. Use numeral frame, beans, etc." See 1879 *Biennial Rep.*, *supra* note 40, at 19–23.

67. See *id.* at 7.

68. Act of Dec. 1, 1881, § 1, 1881 Wash. Terr. Laws 27.

69. §§ 1–9, 1881 Wash. Terr. Laws at 27–28. Just over half of the counties had at least one graded school by 1889; the last county to establish one did so in 1905. Frederick E. Bolton & Thomas W. Bibb, *History of Education in Washington* 82–84 (1935).

70. See Bowden, *supra* note 41, at 21–22 (quoting members of territorial teachers' institute in unidentified Walla Walla newspaper article, circa 1882).

71. See *id.*

72. See Act of Mar. 2, 1853, ch. 90, § 20, 10 Stat. 172, 179 (granting two sections of land (one acre each) from each township); Fletcher Harper Swift, *A History of Public Permanent Common School Funds in the United States, 1795–1905*, at 48–49, 58 (1911).

73. See Act of Apr. 12, 1854, 1854 Wash. Terr. Laws 319.

74. See ch. I, § 2, 1854 Wash. Terr. Laws at 319–320.

75. See ch. III, § 6, 1854 Wash. Terr. Laws at 324.

were insufficiently funded.⁷⁶ The permanent common school fund, which would become available to the common schools upon statehood, was expected to relieve this situation.⁷⁷

Federal land grants for education originated in the Northwest Ordinance of 1787, which stated, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."⁷⁸ Many states squandered, wasted, and even embezzled the funds so provided.⁷⁹ In response, more restrictions were placed on educational land grants over the years.⁸⁰ In 1889, Congress passed an act enabling Washington Territory to become a state.⁸¹ The Enabling Act renewed Washington's land grant, with the proviso that the proceeds therefrom be used to create a permanent school fund from which only the interest could be used, solely to support common schools.⁸² These requirements were incorporated into Washington's Constitution, drafted and enacted in 1889.

II. WASHINGTON CONSTITUTION ARTICLE IX

A. *Background*

Washington State's Enabling Act required the state constitution to provide for a system of public schools, open to all, and free from sectarian control.⁸³ Accordingly, the Framers drafted an education article, article IX, incorporating these requirements. The Education Article contains five sections: sections 1 and 2 establish the public school system; section 3 sets up the permanent, irreducible common school fund mandated by the Enabling Act and restricts use of the fund

76. See 7 *Wash. Territory Superintendent of Pub. Instruction Biennial Rep.* 23 (1887) (complaining that only 4.5 month term could be maintained in most districts).

77. *Id.* at 23-24.

78. See Northwest Ordinance of July 13, 1787, reprinted in *Documents of American History* 131 (Henry Steele Commager, ed., 1934).

79. See Swift, *supra* note 72, at 11-12 (estimating that at least \$28 million were lost or diverted in 12 states).

80. See *id.* at 124-28.

81. Act of Feb. 22, 1889, ch. 180, 25 Stat. 676 (1889) [hereinafter "Enabling Act"].

82. Enabling Act, ch. 180, §§ 10-11, 25 Stat. at 679-80 (donating land, setting minimum sale price of \$10 per acre). The Enabling Act also donated five percent of the proceeds from the sale of public lands within the state to the permanent common school fund. Enabling Act, § 13, 25 Stat. at 680.

83. Enabling Act, § 4, 25 Stat. at 676-77.

to common schools;⁸⁴ section 4 prohibits sectarian control or influence;⁸⁵ and section 5 guarantees that the State will make up dissipation of any public educational fund.⁸⁶ An interpretation of sections 1 and 2 is necessary to define “common school” and determine what character of educational institutions the Framers intended to include and exclude from the system.⁸⁷

B. Article IX, Section 1

*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.*⁸⁸

Though for many years section 1 was referred to as a “preamble,”⁸⁹ more than mere rhetoric must have been intended.⁹⁰ This section imposes Washington State’s only constitutional “paramount duty,” and Washington is the only state that uses such exhortatory language in its

84. See Wash. Const. art. IX, §§ 2, 3; Enabling Act, §§ 10–11, 13, 25 Stat. at 679–80. Section 3 of the Washington Constitution restricts the common school fund to the *current use* of the common schools. “Current use” was held not to include buildings. See *Sheldon v. Purdy*, 17 Wash. 135, 140, 49 P. 228, 230 (1897). In 1966, section 3 was amended to create a “common school construction fund” in addition to the “common school fund.” Its use is also restricted to the common schools. Wash. Const. art. IX, § 3.

85. Wash. Const. art. IX, § 4.

86. Wash. Const. art. IX, § 5. This added safeguard was included because the Framers were aware of problems in other states with mismanagement and diversion of school funds. See Theodore J. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 Wash. Hist. Q. 281, 284 (1913) (“[T]he convention was familiar with the history of school funds in the older states, and the attempt was made to avoid the possibility of . . . dissipation and utter loss.”).

87. There are limited relevant records helpful for interpreting the Washington Constitution. Because the stenographers at the convention were never paid, their notes were not transcribed. None of the debates have been officially preserved. Available references include the minutes of the convention, newspaper articles in which the debates and proceedings were reported, and other states’ constitutions that the delegates are thought to have studied. The delegates also consulted Washington’s “first constitution,” framed and ratified in 1878 in an unsuccessful attempt to achieve statehood. See Charles M. Gates, *Foreword to The Journal of the Washington State Constitutional Convention 1889* at v–vii (Beverly Paulik Rosenow ed., 1962). For a discussion of the influences on the first constitution, the text, and the debates and proceedings, see generally Meany & Condon, *supra* note 10.

88. Wash. Const. art. IX, § 1.

89. Since 1897, codifiers have entitled section 1 “Preamble.” It has been argued that section 1 is a nonbinding policy declaration. See, e.g., *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 497–98, 585 P.2d 71, 84–85 (1978).

90. See, e.g., Stiles, *supra* note 86, at 284 (commenting on constitutional convention, one delegate later wrote, “[n]o other state has placed the common school on so high a pedestal”).

education article.⁹¹ By contrast, Washington's 1878 Constitution⁹² required the Legislature to provide a uniform system of schools "as soon as practicable."⁹³ Whatever their original intention, the convention was practically unanimous in approving this section. It passed without objection or modification.⁹⁴

Broken down into component parts, section 1 contains the following elements:

- 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.

1. *Paramount Duty of the State*

"Paramount duty" was eventually interpreted to be a judicially-enforceable, mandatory duty of the State to fund education at the state-level.⁹⁵ Although the constitution had provided for a state school tax,⁹⁶ funding remained at the county and district levels until 1895 when the Governor and State Superintendent succeeded in having passed the "Barefoot Schoolboy Law" of 1895.⁹⁷ This law provided the first significant state support for schools.⁹⁸ Although state-level contribution increased over the years, agitation for more equitable distribution to aid

91. Florida's Constitution of 1868 originally contained similar language, which the Washington Framers appear to have copied. See Fla. Const. of 1868 art. VIII, § 1 (repealed 1887) ("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."). But see N.H. Const. art. 83 (announcing Legislature's duty to "cherish the interest" of literature and sciences).

92. See *supra* note 87.

93. See Meany & Condon, *supra* note 10, at 84 (quoting art. XI, § 2 of unenacted Washington Constitution of 1878).

94. See Quentin Shipley Smith, *Analytical Index to The Journal of the Washington State Constitutional Convention 1889*, *supra* note 87, at 685.

95. See *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1973).

96. Wash. Const. art. IX, § 2.

97. Act of Mar. 14, 1895, ch. LXVIII, § 1, 1895 Wash. Laws 122-24; see Bolton & Bibb, *supra* note 69, at 136-37; see also Wash. House J. 40 (1897) (inaugural address of Governor John R. Rogers, Jan. 13, 1897) (arguing that article IX, section 1 requires state tax to equalize funding).

98. See Washington State Planning Council, *A Survey of the Common School of Washington With Suggested First Steps Toward its Progressive Development and Improvement* 72 (1938).

weaker districts continued.⁹⁹ This issue was finally resolved in a 1978 state supreme court case, *Seattle School District No. 1 v. State*.¹⁰⁰

In the *Seattle School District* case, the district was statutorily required to provide certain educational programs, but was not given adequate state revenue to do so. When two successive special excess levies failed, the district was without sufficient funds to run the schools and sued the State under article IX, section 1, for relief. The Washington Supreme Court held that “paramount duty” should be given its plain meaning.¹⁰¹ It is a judicially-enforceable, affirmative duty on the State, not merely a hortatory preamble.¹⁰² To fulfill the duty, the Legislature must devise a state-wide equitable and reliable funding system.¹⁰³

2. *Ample Provision*

The Washington Supreme Court held that “ample provision” requires the state Legislature to provide sufficient funds derived through dependable and regular tax sources to fund a basic program of education.¹⁰⁴ The ultimate determination of what constitutes “ample provision” was left to the Legislature, subject to the following constitutionally mandated guidelines: “ample” means liberal, unrestrained, fully sufficient; and “provide” means preparation, measures taken beforehand for the supply of wants.¹⁰⁵

3. *Education*

Articulating the definition of “education” also was left to the Legislature, within the constitutional requirement that it embrace “all instruction and discipline intended to enlighten the understanding, correct the temper, and form the manners and habits of youth, and fit them for usefulness in the future.”¹⁰⁶ The Washington Supreme Court

99. See Dennis C. Troth, *History and Development of Common School Legislation in Washington* 94–101 (University of Wash. Publications in the Soc. Sciences vol. 3, No. 2, 1927) (discussing history of state aid for common schools).

100. 90 Wash. 2d 476, 585 P.2d 71 (1978).

101. *Id.* at 498, 585 P.2d at 85. Paramount meaning superior in rank, preeminent, dominant. *Id.* at 511, 585 P.2d at 91.

102. *Id.* at 497–503, 585 P.2d at 84–87.

103. *Id.* at 520, 585 P.2d at 96. The court held that this duty creates a correlative right on behalf of all resident children. *Id.* at 510, 585 P.2d at 90.

104. *Id.*

105. *Id.* at 515–16, 585 P.2d at 93–94.

106. *Id.*

labeled the constitutionally mandated education "Basic Education." It must prepare children to compete in the labor market, the marketplace of ideas, and our open political system.¹⁰⁷ Concurrent with the *Seattle School District* adjudication, the Legislature passed the Basic Education Act of 1977, which mandates specific course offerings for all common schools.¹⁰⁸

4. *Without Distinction*

The Enabling Act of 1889 required Washington to establish a school system open to all children of the state.¹⁰⁹ The Framers went even further, explicitly prohibiting distinction based on race, color, caste, or sex.¹¹⁰ While many states had created racially segregated school systems, the Washington Constitution expressly repudiates such distinctions. The State must both provide universal education and bestow it indiscriminately.

C. *Article IX, Section 2*

*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.*¹¹¹

In a report prepared for and given to the convention delegates, the territorial board of education suggested "a uniform range of education, from the primary grade to the university, and for intermediate and high schools, as necessity requires to preserve unity of the system."¹¹² Except for omitting the university, the Framers appear to have adopted this suggestion.¹¹³ The Framers also consulted the Oregon and California

107. *Id.* at 517-18, 585 P.2d at 94-95.

108. *See* Wash. Rev. Code §§ 28A.150.200-500 (1996).

109. *See* Enabling Act, ch. 180, § 4, 25 Stat. 676, 676-77 (1889).

110. *See* Wash. Const. art. IX, § 1.

111. Wash. Const. art. IX, § 2.

112. J.H. Morgan, Washington Territory Superintendent of Public Instruction et al., *Pertinent Suggestions to the Constitutional Convention by the Board of Education*, Spokane Falls Rev., July 17, 1889, at 3.

113. The university may have been omitted because it was not technically considered a "school." *See* State *ex rel.* City of Seattle v. Seattle Elec. Co., 71 Wash. 213, 128 P. 220 (1912).

constitutions.¹¹⁴ Oregon required the Legislature to provide a uniform and general system of common schools.¹¹⁵ California called for a public school system to include “primary and grammar schools, and such high schools, evening schools, normal schools, and technical schools as may be established.”¹¹⁶ Washington combines these provisions, requiring a general and uniform public school system, naming its components, and then distinguishing a certain class of schools for funding purposes.¹¹⁷

1. *Sentence (1)—A General and Uniform System*

*The Legislature shall provide for a general and uniform system of public schools.*¹¹⁸

This sentence contains the following requirements:

- The Legislature shall provide for
- a general
- and uniform
- system
- of public schools.

a. *The Legislature Shall Provide*

This phrase gives the Legislature plenary power in organizing, administering, and arranging the operational details of the school system.¹¹⁹ Any restraint on this power must be found in the Constitution itself.¹²⁰ In addition to the Office of State Superintendent of Public Instruction, which is established in the constitution,¹²¹ school districts arguably have become part of the constitutional scheme.¹²² They have existed since preterritorial days and are mentioned four times elsewhere

114. See Smith, *supra* note 94, at 686.

115. Or. Const. art. VIII, § 3 (enacted 1859).

116. Cal. Const. art. IX, §§ 5–6 (enacted 1849, amended 1974). This sentence goes on to provide: “[B]ut the entire revenue derived from the State School Fund and the State school tax, shall be applied exclusively to the support of primary and grammar schools.” *Id.*

117. See Wash. Const. art. IX, § 2.

118. Wash. Const. art. IX, § 2.

119. Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 476, 518, 585 P.2d 71, 95 (1978).

120. Wheeler Sch. Dist. v. Hawley, 18 Wash. 2d 37, 45, 137 P.2d 1010, 1014 (1943).

121. Wash. Const. art. III, § 22.

122. See, e.g., Holmes & Bull Furniture Co. v. Hedges, 13 Wash. 696, 700, 43 P. 944, 945 (1896) (“[I]t was not to be supposed by the framers of the constitution that the legislature would fail to make provision for the organization of school districts.”).

in the constitution.¹²³ However, neither the State Board of Education nor county superintendents are constitutionally mandated.¹²⁴ Omission of the state board is notable. It had existed since 1877, and most later states' constitutions included a state school board.¹²⁵ This omission perhaps reflects a compromise between the need for a bureaucracy and the traditional aversion to centralized government exhibited by early Washingtonians.¹²⁶

b. General

"General," in article IX, section 2, carries its plain meaning, which can be construed in two ways: "of, for, or from the whole or all" or "not particular; not local."¹²⁷ In the first sense, a general system should extend to and embrace every portion of the state.¹²⁸ In the second, it should apply indiscriminately everywhere, as opposed to applying specially or locally. The former construction comports with the language of article IX, section 1, which mandates universal, nondiscriminatory education throughout the state.¹²⁹ The latter accords with the Framers' use of the word "general" in other parts of the constitution.

The phrase "general and uniform" appears elsewhere once in the Washington Constitution: county elections must be governed by general and uniform laws.¹³⁰ In other sections where both words appear in the

123. Wash. Const. art. I, § 34 (amended 1912); Wash. Const. art. VII, § 2, *amended by* art. VII, § 1 (1988); Wash. Const. art. VIII, § 1 (amended 1972); Wash. Const. art. VIII, § 6.

124. County Superintendents were eventually replaced with the current system of regional oversight through an Educational Service District Board of Directors and Superintendent. *See* Wash. Rev. Code §§ 28A.310.010–490 (1996).

125. *See* David Tyack et al., *Law and the Shaping of Public Education 1785–1954*, at 56 (1987) (charting state constitutional provisions for education, showing that of 12 constitutions framed between 1870 and 1912, only Washington and North Dakota omitted state board).

126. *See, e.g.*, Louis Lerafo, *Public Schools and the Convention No. 2*, Tacoma Daily Ledger, July 3, 1889, at 3.

Americans have a wholesome objection to the establishment of bureaucracies . . . they dread the dangers of centralizing their schools under a uniform state authority. But better to have our whole school system operated by a state commission . . . than by local bodies if the bureaucratic system gives us schools vastly superior.

Id.

127. *Webster's New Universal Unabridged Dictionary* 762 (2d ed. 1983).

128. *See, e.g.*, *Cory v. Carter*, 48 Ind. 327 (1874) (interpreting "general" in Indiana Constitution, article 8, section 1, as carrying this meaning).

129. Wash. Const. art. IX, § 1.

130. Wash. Const. art. XI, § 5.

same sentence, “general” also modifies “laws.”¹³¹ “General,” in that context, is used in contradistinction to “special” or “private” laws. A special law is one that relates to particular persons or things, whereas a general law applies to all persons or things of a class.¹³² The Framers specified that certain laws be general to guard against public extravagance and special interests.¹³³ Throughout the constitution, the Framers took particular care to safeguard school funds.¹³⁴ In the context of these various expressions and concerns, “general” should be read to require one system of schools throughout the state, operating under and managed by general laws.

c. *Uniform*

“Uniform” as traditionally used in the context of Washington schools carries its plain meaning: “always the same; conforming to a given standard.”¹³⁵ During the territorial period, the Legislature developed a system whereby the Territorial Board of Education selected a common course of study for each grade to be taught in all common schools.¹³⁶ The board of education promulgated uniform rules and regulations for governance of the common schools.¹³⁷ The board distributed identical blank forms to each county and district for use in making their reports.¹³⁸ All teachers were expected to use uniform methods of instruction and were required to pass a standardized examination.¹³⁹ In summarizing the uniformity requirement, the Washington Supreme Court has said that

131. See Wash Const. art. VII, § 2 (uniform rate of taxation, valuation by general laws); art. XI, § 4 (uniform system of county government throughout state, organized under general laws); art. XII, § 19 (telegraph and telephone companies to be regulated by general laws of uniform operation).

132. See *Young Men’s Christian Ass’n v. Parish*, 89 Wash. 495, 497–98, 154 P. 785, 785–86 (1916).

133. See *Gates*, *supra* note 87, at vi.

134. See, e.g., Wash. Const. art. IX, § 4 (guaranteeing that State will make up dissipation of any public educational fund); Wash. Const. art. II, § 28, cls. 7, 15 (prohibiting Legislature from enacting private or special law pertaining to management of common schools or apportionment of school funds); Wash. Const. art. XVI, § 5 (amended 1965) (prohibiting loans from school fund to private persons or corporations).

135. *Webster’s New Universal Unabridged Dictionary*, *supra* note 127, at 1998.

136. See *supra* notes 59, 66–67 and accompanying text.

137. See *supra* note 61 and accompanying text.

138. See *supra* note 62 and accompanying text.

139. See *supra* note 64 and accompanying text.

every child should have the same advantages and be subject to the same discipline as every other child.¹⁴⁰

d. System

“System” also should be given its plain meaning in article IX, section 2.¹⁴¹ Though not in the context of schools, the Washington Supreme Court has adopted a plain meaning definition of “system” that also aptly illustrates the concept of a school system: “[D]ivers units so combined . . . as to form an integral whole, and to function, operate, or move in unison, and often in obedience to some form of control.”¹⁴² Here, common schools are the basic units, within which each progressive grade level functions in unison to create an organic whole. Common schools, in turn, form part of a unitary public school system, wherein the lower branches coordinate with and complement the higher. The whole functions under one centralized bureaucracy.

Inherent in the definition of “system” is that it be efficient.¹⁴³ In fact, the Washington Supreme Court has described article IX, section 2 as requiring an efficient system of public schools.¹⁴⁴ The court has stated that a student should be able to transfer from one district to another within the same grade without substantial loss of credit or standing.¹⁴⁵ Such a system maximizes the state’s investment in education. As stated by the educator largely responsible for framing the seminal 1877 school law, “In legislating upon this subject [schools] we should always remember that here the greatest good should be bestowed upon the greatest number.”¹⁴⁶

140. See *School Dist. No. 20 v. Bryan*, 51 Wash. 498, 502, 99 P. 28, 29 (1909).

141. See 40A *Words & Phrases* 638 (1964) (annotating state court decision giving “system” its plain meaning in context of common school systems).

142. *Elliot v. City of Leavenworth*, 197 Wash. 427, 433, 85 P.2d 1053, 1056 (1938) (citing *Webster’s New International Dictionary*, second edition, in defining “systems of sewerage”).

143. Many state constitutions call for an “efficient” system of schools. See Ark. Const. art. 14, § 1; Del. Const. art. X, § 1; Ill. Const. art. 10, § 1; Ky. Const. § 183; Ohio Const. art. VI, § 2; Tex. Const. art. VII, § 1.

144. See *Newman v. Schlarb*, 184 Wash. 147, 153, 50 P.2d 36, 39 (1935) (quoting *State ex rel. School Dist. No. 37 v. Clark County*, 177 Wash. 314, 321, 31 P.2d 897, 899 (1934)).

145. See *Northshore Sch. Dist. No. 417 v. Kinnear*, 84 Wash. 2d 685, 729, 530 P.2d 178, 202 (1974), *overruled on other grounds* by *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); see also *supra* note 70 and accompanying text.

146. 1879 *Biennial Rep.*, *supra* note 40, at 3.

e. Public School System

Though the wording of sentence (1) indicates that “general and uniform” modifies “public school system,” it should also be construed as requiring the common school system to be general and uniform. According to the constitution, the public school system could consist solely of common schools, and, in fact, prior to and for several years after the constitution was enacted, only a common school system existed.¹⁴⁷ Normal and technical schools were established in 1890, but were treated as separate entities rather than part of a system.¹⁴⁸ In 1894, the state superintendent called for a commission empowered to articulate a course of study, from the primary grades to the university, with the purpose of preventing duplicative work, thus saving time, energy, and expense.¹⁴⁹ Finally, in 1897, the school law was recodified as a “Code of Public Instruction,” which combined all of the statutory provisions for common schools, technical schools, normal schools, and the university.¹⁵⁰

2. Sentence (2)—The Public School System

*The public school system shall include common schools, and such high schools, normal schools and technical schools as may hereafter be established.*¹⁵¹

Broken down further, sentence (2) contains the following elements:

- the public school system shall include common schools
- and may include
 - high schools
 - normal schools
 - technical schools.

147. See, e.g., An Act Establishing a Common School System, ch. 1, 1854 Wash. Terr. Laws 319; An Act to Establish a General Uniform System of Common Schools, ch. XII, 1889–1890 Wash. Laws 348.

148. See *infra* Parts II.C.2(b)(2)–(3).

149. 12 Wash. State Superintendent of Pub. Instruction Biennial Rep. 57–58 (1894).

150. See Act to Establish a General, Uniform System of Public Schools, ch. CXVIII, 1897 Wash. Laws 356.

151. Wash. Const. art. IX, § 2.

a. *Common Schools*

To define "common school" for constitutional purposes, it is necessary first to consider whether that term had a fixed meaning when the constitution was adopted. On one hand, the state supreme court has said that the constitution must be interpreted in accordance with the demands of modern society, lest it become atrophied.¹⁵² On the other hand, the Framers were careful to emphasize the importance and distinct character of common schools and took particular pains to secure exclusively unto them certain funds.¹⁵³ If the definition of common schools were inherently flexible, the constitutional funding restrictions could be circumvented by the Legislature.¹⁵⁴ In a 1909 Washington case that required a definition of "common school," respondents argued that the term had acquired a technical meaning prior to the framing of the constitution.¹⁵⁵ The court said that the term cannot be arbitrarily defined, but rather must be considered in connection with the general scheme of education outlined by the constitution, from which a *certain meaning* emerges.¹⁵⁶

In *School District No. 20 v. Bryan*,¹⁵⁷ the district brought a lawsuit challenging the constitutionality, under article IX, section 2,¹⁵⁸ of a law that allocated common school funds to the "model training department" of a state normal school.¹⁵⁹ Under this law, certain children of the district would attend the training department instead of their local common school. The purpose of the training department was to allow students at the normal school to practice teaching.¹⁶⁰ The State argued that the training department was a "common school," entitled to common school funds. The definition they urged was that common schools are

152. *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 516, 585 P.2d 71, 94 (1978).

153. See *infra* Part III.C.3.

154. See *School Dist. No. 20 v. Bryan*, 51 Wash. 498, 504, 99 P. 28, 30 (1909) ("To say that the Legislature can determine what institutions shall receive the proceeds of the school fund; and that whatever they determine to be entitled thereto, becomes *ipso facto* a common school, is begging the whole question, and annulling the constitutional restriction.") (quoting *People v. Board of Educ.*, 13 Barb. 400 (N.Y. 1851)).

155. Respondent's Brief at 15, *Bryan* (No. 7685) (citing *Board of Educ. v. Dick*, 78 P. 812 (Kan. 1904) (holding that "common school," as used in constitution, had technical meaning)).

156. *Bryan*, 51 Wash. at 502-04, 99 P. at 29-30.

157. 51 Wash. 498, 99 P. 28.

158. The challenge also relied upon article IX, section 3, which states that the common school fund "shall be exclusively applied to the current use of the common schools." Wash. Const. art. IX, § 3 (amended 1966).

159. *Bryan*, 51 Wash. at 500, 99 P. at 28.

160. *Id.*

maintained at public expense and provide elementary education for all children.¹⁶¹ They also argued that the training department students would probably receive better instruction than common school students.¹⁶² The court rejected both arguments and instead adopted the school district's definition, accepted by most authorities at the time, that a common school is open "to all children . . . free, and subject to, and under the control of, the qualified voters of the school district."¹⁶³ Complete control by the voters was held to be a most important feature, carrying with it the right of the voters, through their chosen agents, to select qualified teachers, with the power to discharge them if they be incompetent.¹⁶⁴ The normal school principal was answerable to an appointed board of trustees, not the elected district directors.¹⁶⁵ The court thus held that the training department was not a common school, and that the Legislature could not, "by any contrivance, designation, or definition" make it so within the meaning of the constitution.¹⁶⁶

b. High Schools, Normal Schools, and Technical Schools

A literal reading of this sentence indicates that the public school system can include only common schools, high schools, normal schools, and technical schools. A question arises as to whether the Legislature is limited in the type of educational institutions it can create. This issue has not been squarely addressed in Washington, but other state courts have held that a constitutional mandate for the existence of schools of a certain character is not exclusive and does not preclude the Legislature from establishing schools of another character.¹⁶⁷ The Washington Legislature seemingly has adopted this interpretation. It has several

161. *Id.* at 502, 99 P. at 29.

162. *Id.* at 503, 99 P. at 29.

163. *Id.* at 504, 99 P. at 30; *see also* Respondent's Brief at 14, *Bryan* (No. 7685) (citing authorities). This interpretation agrees with that provided in the first school law enacted after statehood. *See* Act of Mar. 27, 1890, ch. XII, tit. IX, § 44, 1889–1890 Wash. Laws 371.

164. *Bryan*, 51 Wash. at 504, 99 P. at 30.

165. *Id.* at 503, 99 P. at 29.

166. *Id.* at 504, 99 P. at 30; *accord* *Halbert v. Sparks*, 72 Ky. (1 Bush) 259 (1872) (holding that academy run by trustees, though open to all, not common school); *Hall's Free Sch. Trustees v. Home*, 80 Va. 470 (1885) (holding that privately-endowed "free" school run by incorporated trustees not common and not uniform).

167. *See, e.g., In re Kindergarten Sch.* 32 P. 422 (Colo. 1893) (holding that article IX, section 2 of Colorado's Constitution requiring Legislature to provide free schools for educating children between ages of six and 21 is requirement, not prohibition, therefore does not preclude Legislature from establishing public kindergartens for children under age six); *see also* 24 Ruling Case L. 561 (1919); 56 C.J. *Schools and School Districts* § 29 n.26 (1932).

times added to the list in sentence (2). For example, in 1897, the public school system was statutorily defined as consisting of “common schools (in which all high schools shall be included), normal schools, technical schools, the university of Washington, school for defective youth, and such other educational institutions as may be established and maintained by public expense.”¹⁶⁸ By 1912, the public school system was defined as including “common schools (including high and elementary schools, schools for special help and discipline, schools or departments for special instruction), technical schools, the University of Washington, the State College of Washington, state normal schools, state training schools, schools for defective youth, and such other educational institutions as may be established by law and maintained at public expense.”¹⁶⁹

1) *High Schools*

Most states have included high schools within their constitutional definition of “common school,” though the two institutions were originally distinct.¹⁷⁰ In Washington, common schools initially were intended to offer only primary instruction.¹⁷¹ In the 1830s, when high schools were first being established, there was much taxpayer opposition.¹⁷² A lively newspaper debate ensued.¹⁷³ One opponent opined:

[H]igh school results in an overplus of young men and women with no knowledge of labor, with no room in the world's life for employment of their education, and who consequently become drones and triflers, many of them worse [T]housands are left to become lightening-rod agents, corn doctors, book canvassers, and corset peddlers¹⁷⁴

168. Act to Establish a General, Uniform System of Public Schools, ch. CXVIII, § 1, 1897 Wash. Laws 356.

169. Pierce's Wash. Code, tit. 413, § 1, at 1676 (1912).

170. See, e.g., 56 C.J. *Schools and School Districts* § 7 (1932) (defining high school as school in which higher branches of learning are taught than in common schools).

171. See *supra* note 68 and accompanying text.

172. See Bibb, *supra* note 35, at 105.

173. Bowden, *supra* note 41, at 23.

174. *Id.* at 24 (quoting N. Pac. Coast (New Tacoma, Wash.), Mar. 15, 1880).

This debate also was carried out on the national level.¹⁷⁵ Nonetheless, at least six public high schools existed by the time Washington became a state.¹⁷⁶

The wording of sentence (2) allows high schools to be established, but does not entitle them to common school funds. Initially, the Legislature adopted this interpretation.¹⁷⁷ Later, the Legislature “changed” the definition of common school to include high schools and allow them an apportionment of common school funds.¹⁷⁸ The constitutionality of this practice has not been challenged, and high schools have long been treated as part of the common schools in Washington.

2) Normal Schools

The Enabling Act donated one hundred thousand acres of land to the state to support normal schools.¹⁷⁹ Normal schools were intended to train teachers “in the art of instructing and governing in the public schools.”¹⁸⁰ Washington established two normal schools in 1890 under separate, dissimilar laws.¹⁸¹ In 1892, the state superintendent urged that they be

175. An article appearing in the *Educational Review* opposed public funding of high school:

[I]t obliges a whole community to pay for what only a limited number can enjoy . . . it robs the lower schools of funds . . . [and] it offers . . . a temptation to exchange the actual benefits of remunerative work at fifteen . . . for the doubtful advantage of a training that can have no direct bearing upon their life work.

James P. Monroe, *Free High Schools Unwise*, reprinted in 2 *U.S. Comm’r of Educ. Ann. Rep.* 1176 (1889–1990).

176. Bowden, *supra* note 41, at 23.

177. In 1897, within a two-month period, three school bills were introduced in the House of Representatives: one to create high schools, and two to create kindergartens. Both kindergarten bills declared kindergartens to be common schools entitled to common school funds and were referred to the Committee on Education. H.R. 85, 5th Reg. Sess. (Wash. 1897); H.R. 166, 5th Reg. Sess. (Wash. 1897). The high school bill sanctioned free high schools and created a high school board to manage them and distribute funding. This bill was referred to the Committee on Appropriations and indefinitely postponed. H.R. 323, 5th Reg. Sess. (Wash. 1897).

178. See Act of Mar. 21, 1895, ch. CL, § 1, 1895 Wash. Laws 375; Act to Establish a General, Uniform System of Public Schools, ch. CXVIII, § 1, 1897 Wash. Laws 356.

179. Enabling Act, § 17, 25 Stat. 681 (1889). A normal school is a school for training chiefly elementary schoolteachers, usually state-supported. The term came from the French, *école normale*, so named because the schools were intended to serve as models for other teacher training schools. *Webster’s Third New International Dictionary* 1540 (3d ed. 1967).

180. See Act of Mar. 28, 1890, § 1, 1889–1890 Wash. Laws 278.

181. These schools were located at Cheney and Ellensburg. Two more schools were later established, in 1897 and 1913. See Bolton & Bibb, *supra* note 69, at 279.

uniform in their course of training and general management.¹⁸² These suggestions were incorporated in the law of 1893.¹⁸³ Normal schools were governed by a board of trustees appointed by the governor.¹⁸⁴

3) *Technical Schools*

The Washington Legislature never created a “technical school” denominated as such. Probably, the Framers envisioned what became in 1890 the State Agricultural College and School of Science (now Washington State University).¹⁸⁵ The Enabling Act donated lands for a technical and scientific school.¹⁸⁶ Washington had statutorily established an agricultural college in 1865, but it was not developed until 1890.¹⁸⁷ Technical and agricultural training was considered especially important because mining, husbandry, forestry, and farming were to provide prosperity for the new state.¹⁸⁸ The technical school (college) was run by commissioners appointed by the governor.¹⁸⁹

3. *Article IX, Section 2, Sentence (3)—Funding restrictions*

*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.*¹⁹⁰

182. 11 *Wash. State Superintendent of Pub. Instruction Biennial Rep.* 64–65, 289 (1892).

183. Act of Mar. 10, 1893, ch. CVII, §§ 1–23, 1893 *Wash. Laws* 254–63 (creating uniform entrance requirements, curricula, diplomas, certificates, and general management).

184. See Act of Mar. 28, 1890, § 4, 1889–1890 *Wash. Laws* 278; Act of Mar. 22, 1890, §§ 2–3, 1889–1890 *Wash. Laws* 282.

185. The bill introduced to create the college was called “An Act to Create a Commission of Technical Instruction, and to Establish A State School of Science . . .” H.R. 90, 1st Sess. (Wash. 1889). However, the bill was amended to substitute “State agricultural college and school of science” for “State school of science” and to replace the word “school” with “college.” Report of the Committee on Agriculture, H.R. 133, 1st Sess., app. (Wash. 1890). The committee created to locate and manage the college was called the Commission of Technical Instruction. Act of Mar. 28, 1890, § 1, 1889–1890 *Wash. Laws* 260.

186. Enabling Act, §§ 16–17, 25 *Stat.* 681 (1889) (providing 90,000 acres of land for agricultural college, 100,000 acres for scientific school).

187. See Act of Jan. 14, 1865, §§ 1–2, 1864–1865 *Wash. Terr. Laws* 36.

188. See, e.g., Louis Lerafo, *Public Schools and the Convention, No. 2*, Tacoma Daily Ledger, July 3, 1889, at 3 (“We are going to have one of the mining countries of the world . . . and it is absolutely essential that our rising generation should be instructed in inorganic chemistry and physics . . .”).

189. Act of Mar. 28, 1890, § 1, 1889–1890 *Wash. Laws* 261.

190. *Wash. Const.* art. IX, § 2.

The great care taken by the Framers in drafting this sentence illustrates the preeminence of common schools in the public school system. The originally proposed language read: “[T]he entire revenue derived from the state school fund, and the state school tax shall be exclusively applied to the support of the common schools.”¹⁹¹ A motion to strike the entire sentence lost.¹⁹² More importantly, a motion to strike “common” and insert “public” before “schools” lost.¹⁹³ A motion to change to the present language, inserting “common” before school fund and after school tax, carried.¹⁹⁴

Although only two sources of funding, the common school fund and state tax for common schools, are here mentioned, these two sources were meant to comprise most of the necessary school funding. The common school fund is a permanent, irreducible fund derived from federal land grants and other named sources.¹⁹⁵ One of the enumerated sources is appropriations by the State. The Washington Supreme Court has therefore held that funds, from whatever source, once appropriated by the Legislature to support common schools become a component of the common school fund and cannot be diverted to any other use.¹⁹⁶ The entire assessed value of all taxable property within the state is subject to the state tax for common schools.¹⁹⁷ No property taxes can be diverted to other public uses until the proportional amount of common school funds are allocated.¹⁹⁸ The overall intention of this section, to protect common school funding against encroachment even by other public schools, is clear.

191. See Smith, *supra* note 94, at 686.

192. See *The Journal of the Washington State Constitutional Convention 1889*, *supra* note 87, at 328.

193. See *id.*

194. See *id.* A similar change was made to article IX, section 3, which defines and enumerates sources for the permanent common school fund. The last sentence was changed so that use of the fund was restricted to “common schools” instead of “educational institutions.” *Id.* at 329.

195. Wash. Const. art. IX, § 3; see *supra* notes 82, 84 and accompanying text.

196. *State ex rel. State Bd. for Vocational Educ. v. Yelle*, 199 Wash. 312, 91 P.2d 573 (1939) (holding that excise tax receipts allocated to current school fund are appropriation by state to common school fund pursuant to article IX, section 3, and that insofar as excise tax revenues had been allocated to support common schools, they constituted state tax for common schools and could not be given to state board for vocational education).

197. The state tax for common schools is currently \$3.60 per \$1000 of adjusted assessed value. Wash. Rev. Code § 82.52.065 (1996).

198. See *Leonard v. City of Spokane*, 127 Wash. 2d 194, 198–99, 897 P.2d 358, 360–61 (1995) (holding that Community Redevelopment Financing Act, which allowed cities to draw on property tax revenue generated by increase in property values due to public improvements under Act, unconstitutionally diverts funds from common schools in violation of article IX, section 2).

III. CHARTER SCHOOL ANALYSIS

Before examining in detail potential constitutional deficiencies of charter schools, it is important to note that their inherent ideology conflicts with that upon which tax-supported public education was founded. In Washington, public education is a state purpose, ultimately intended to protect the safety and welfare of the government and community.¹⁹⁹ Children do not have a vested right to attend any particular public school.²⁰⁰ Charter schools are based on the notion of education as an entitlement; they are intended to increase parental choice and offer specialized programs of study not necessarily calculated to serve the state's interests.²⁰¹ But because public education is funded by the entire community, all taxpayers, not just parents, have a common right to determine what type of public education children receive. Taxpayers are compelled to pay school taxes upon the implied condition that they will be benefited by living in a better, safer society.²⁰² Merely paying taxes does not entitle a parent to choose their child's public education. Parents who want a choice have the traditional option of private schools, but are nonetheless benefited themselves in the greater security afforded their lives and property by living among an educated, republican populace.

To determine which particular characteristics of charter schools might deviate from Washington's plan of public education, two different charter school models are examined using the constitutional framework outlined above. The first model is based on Washington's Initiative 177, which would have allowed charter schools ("independent public schools") to be run by private, nonprofit corporations licensed by a

199. See *Newman v. Schlarb*, 184 Wash. 147, 152, 50 P.2d 36, 39 (1935). The court held that establishing and maintaining public schools throughout the state is primarily a state purpose:

[A]t the very inception of our state government, the framers of the Constitution recognized what all the states of the union have recognized, namely, that the promotion of the general intelligence of the people constituting the body politic is the most effective way of increasing the usefulness and efficiency of its citizens, upon which the safety and welfare of the government depends.

Id.

200. See, e.g., *Ramsdell v. North River Sch. Dist. No. 200*, 104 Wash. 2d 264, 704 P.2d 606 (1985) (holding constitutional right to "ample education" not violated by refusal of superintendent to transfer children to district where parents alleged they will receive better education); *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash. 2d 445, 453, 495 P.2d 657, 663 (1972) (finding no authority for proposition that parents have vested right to send their children to any particular public school).

201. See *supra* notes 3-4.

202. 10 Wash. State Superintendent of Pub. Instruction Biennial Rep. 48 (1890).

school district.²⁰³ Such schools would receive a pro rata share of common school funds, but would be exempt from all of Washington's school laws except those that apply to private schools.²⁰⁴ This model provides minimal state oversight of charter schools. The second model is taken from Michigan's charter school law, which allows nonprofit entities to run charter schools ("public school academies"), but requires that the schools remain under the direct supervision of the public school authorities and state board of education.²⁰⁵ The Michigan-model charter schools are authorized by and run pursuant to a contract with a school district, intermediate school board, community college, or state university.²⁰⁶ They are entitled to the same funding as other public schools.²⁰⁷

A. Article IX, Section 1: Paramount Duty of the State

1. Ample Provision

Because both the Washington and Michigan-model charter schools are intended to draw enrollment and funds from existing public schools, they would interfere with the Legislature's ability to anticipate the needs of and provide reliable funding for common schools as required by article IX, section 1. Both models would allow an indeterminate number of charter schools to be created in an indefinite time period,²⁰⁸ with no way of knowing how many students would enroll or transfer. Although the Michigan law allows an authorizing body to consider available resources and needs in deciding whether to issue a charter, there is no requirement that it do so.²⁰⁹ Under the Washington model, charter

203. Wash. Initiative 177, § 4(1), 6(1), (6) (1996).

204. Private schools are subject only to the minimum state controls necessary to insure the health and safety of the students and that they meet the Board of Education's graduation requirements. They can use non-certificated instructors in some situations. *See* Wash. Rev. Code §§ 28A.195.010–.060 (1996).

205. Mich. Comp. Laws Ann. §§ 380.501–.502 (West Supp. 1996).

206. Mich. Comp. Laws Ann. §§ 380.502–.503(1)–(5) (West Supp. 1996). The Michigan law is used here as a model, solely for purposes of affording a contrast with the Washington proposal. A detailed analysis of the law and how it coordinates with the supervision and regulation of the Michigan State Board of Education has not been undertaken.

207. Mich. Comp. Laws Ann. § 380.503a (West Supp. 1996).

208. The Michigan law limits the total number of charter schools that can be authorized by universities to 85 in 1996, 100 in 1997, and 150 thereafter. Mich. Comp. Laws Ann. § 380.502(2)(d).

209. *See* Mich. Comp. Laws Ann. § 380.503(1). The law also allows entities denied a contract by a school board to appeal to the district voters. A majority vote secures the contract. Mich. Comp. Laws Ann. § 380.503(2).

schools could apply for a license until the first of August to operate that school year,²¹⁰ and children could transfer to a charter school midterm.²¹¹ For any number of reasons a charter school could close its doors at any time. The traditional common schools would have to take in those students regardless of whether sufficient funds remained to adequately provide for their education.

Currently, the Washington Superintendent of Public Instruction must submit a biennial budget to the governor.²¹² The Governor must in turn submit a budget to the Legislature before the twentieth of December of the year preceding commencement of the biennium.²¹³ Although both charter models require annual financial disclosure, this would be done only for the preceding year.²¹⁴ Neither model provides any mechanism by which the Legislature could consider the current and future needs and economic welfare of the school system as a whole, making an accurate budget difficult to forecast.

2. *Education*

Charter schools, under the two models here considered, would not provide the constitutionally-mandated education outlined by the Washington Supreme Court and defined by the Legislature. In Washington, a uniform program of instruction is taught in all common schools.²¹⁵ In addition to academics, physiology and hygiene, alcohol and drug education, cultivation of manners and good principles, physical exercise, flag exercises, and good citizenship are taught.²¹⁶ Washington-model charter schools would be exempt from Washington's Basic Education Act.²¹⁷ Instead, the schools would create their own academic programs.²¹⁸ They would be required only to meet the ultimate

210. Wash. Initiative 177, § 4(1) (1996).

211. Wash. Initiative 177, § 4(4)(a) (1996).

212. See Wash. Rev. Code § 28A.300.170 (1996).

213. See Wash. Rev. Code §§ 43.88.060-.080 (1996).

214. See Wash. Initiative 177, § 10(6) (1996); Mich. Comp. Laws Ann. § 380.503(5)(h).

215. See Wash. Rev. Code §§ 28A.150.200-.500 (1996) (Basic Education Act), §§ 28A.230.010-.260 (1996) (Compulsory Coursework and Activities).

216. See Wash. Rev. Code §§ 28A.230.010-.170 (1996).

217. See Wash. Initiative 177, § 6(5) (1996). The Basic Education Act, Wash. Rev. Code §§ 28A.150.200-.500, was passed in response to the trial court's decision in *Seattle School Dist. No. 1 v. State*. See *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 519 n.14, 585 P.2d 71, 95 n.14 (1978).

218. See Wash. Initiative 177, § 6(6)(a)(ii) (1996).

graduation requirements of the State Board of Education.²¹⁹ Under the Michigan model, although charter schools are generally under the supervision of the State Board of Education, they are permitted to devise a curriculum to suit their own educational goals.²²⁰ If approved, these goals become part of the authorizing contract.²²¹ This scheme could potentially pass scrutiny if the constitutionally required curricula were incorporated into the contract. Otherwise, neither model would provide “education” as defined in the Washington Constitution.²²²

B. Article IX, Section 2: The Public School System

1. A General and Uniform System

a. General

Charter schools do not meet the requirements under article IX, section 2 because they would be neither generally available nor under the same general laws and management as other common schools. Under both the Washington and Michigan charter school plans, establishment of the schools depends on private initiative. It is likely that charter schools would proliferate in large urban areas where they would be most economically viable. At best, there would be no way of predicting or controlling whether charter schools would be available to all children throughout the state.

Both the Washington and Michigan models would allow charter schools to be exempt from most school laws and under independent management, thus creating a separate system than that under which other common schools are operated. This would violate Washington’s constitutional requirement of one general school system.²²³ Also, a charter school law, because it would apply only to privately-managed public schools, might be considered a special, rather than a general law.²²⁴ The test of whether a law is special is whether any appropriate

219. See Wash. Initiative 177, § 6(4) (1996) (requiring independent public schools to comply with private school laws).

220. Mich. Comp. Laws Ann. § 380.502(3)(e)(ii) (West Supp. 1996).

221. Mich. Comp. Laws Ann. § 380.503(5)(a) (West Supp. 1996).

222. See *supra* Part II.B.3.

223. See *supra* Part II.C.1(b).

224. In addition to requiring that the school system be general, the Washington Constitution expressly prohibits, in article II, section 28, any special laws providing for the management of common schools or apportionment of school funds. Wash. Const. art. II, § 28, cls. 7, 15. A detailed analysis of this provision is beyond the scope of this Comment.

object is excluded from its operation.²²⁵ Here, common schools would be excluded. If the law's limitation is based on a legitimate classification, the law is considered general.²²⁶ Under the Washington and Michigan models, the classification is based on whether the schools are under public or private management.²²⁷ The Framers' intent to protect school funds and keep such funds out of private hands appears throughout the constitution.²²⁸ Therefore a law that classifies schools based upon how they are managed, with the purpose of allowing special exemptions from the law to schools under private management while allowing them public funds, should not be considered legitimate. Also, to argue that charter schools should be in a separate class from other common schools is to concede that they are not, in fact, common schools.

b. Uniform

Both the Washington and Michigan models contravene the constitutional uniformity requirement of providing the same advantages and discipline as other common schools.²²⁹ Washington's current school code mandates a program of basic education throughout the state²³⁰ and requires all common schools to observe the rules and regulations promulgated by the Board of Education.²³¹ Although some local variations are permissible, all schools must comply with certain minimum standards.²³² Both the Washington and Michigan charter school plans permit the schools to devise their own curricula.²³³ The Washington model exempts charter schools from the board of education's rules and regulations, and instead allows them to draft their

225. *Aetna Life v. Washington Life*, 83 Wash. 2d 523, 537, 520 P.2d 162, 171 (1974).

226. *Id.*

227. Mich. Comp. Laws Ann. § 380.501 (West Supp. 1996); Wash. Initiative 177, § 3(7) (1996).

228. See *supra* notes 134–135; *supra* Part II.C.3.

229. See *supra* note 140 and accompanying text.

230. See *supra* note 215.

231. Wash. Rev. Code § 28A.305.130(8) (1996).

232. Districts and individual schools can apply for waivers from the specific course-work hours mandated by the Basic Education Act. However, they must submit plans to the Board of Education detailing an enhanced program and still must comply with minimum standard course offerings. Wash. Rev. Code § 28A.305.140 (1996). School districts can also establish schools or programs with special standards such as dress codes, required parental involvement, and more stringent discipline, which allow parents the option of enrolling their children therein. Wash. Rev. Code § 28A.320.140 (1996). These programs might not meet the uniformity requirement of article IX, section 2.

233. See *supra* notes 218, 220–221, and accompanying text.

own governance codes.²³⁴ The Washington model, because it is exempt from the centralized state supervision through which unity is imparted, would not meet the requirement of section 2. The Michigan model, because it places charter schools under the supervision of the State Board of Education, might pass the uniform discipline requirement. But neither model would provide the same course offerings as required in other common schools.

c. System

The extra expense required to offer certain children special benefits through a separate charter schools system contravenes the constitutional concept of a single, efficient “system.” Within the system, each child in each grade should receive substantially the same education, thus allowing a student to transfer between districts without significant loss of standing.²³⁵ Because charter schools, under both the Washington and Michigan models, could construct a unique program of instruction, it is not likely that their students could easily transfer other public schools. If a charter school student were removed to a new school and needed remedial work in some areas, the State would, in effect, be paying for the same education twice.

2. Definition of Common School

Charter schools under both the Washington and Michigan models are not “common schools” because the most important definitional requirement, that the schools be under local, district control, is absent. The Washington model requires a district school board to license a charter school if the school met minimal criteria.²³⁶ The license could only be revoked for substantial violation of the minimal requirements.²³⁷ A licensed charter school would have complete discretion in hiring and firing its employees, including the principal.²³⁸ There is no voter accountability in this scheme. The Michigan model allows charter schools to be authorized at the discretion of a school district,

234. Wash. Initiative 177, § 7(2) (1996).

235. See *supra* note 145 and accompanying text.

236. Wash. Initiative 177, § 6 (1996).

237. Wash. Initiative 177, § 6(1), (6) (requiring that independent public schools be nonprofit, prepare achievement plan for each child, employ certified teachers insofar as required of public schools, meet all private school requirements, and obtain an annual license).

238. Wash. Initiative 177, §§ 7(1), 8 (1996).

intermediate school board, community college, or state university and run pursuant to a contract with the authorizing agency.²³⁹ The contract cannot be revoked as long as the school complies with its terms.²⁴⁰ Though the schools are under the supervision of the state board, they are not under the control of local voters and thus do not fit the Washington definition of “common school.”

3. *Funding Restrictions*

Because charter schools under neither the Washington nor Michigan models meet the constitutional definition of “common school,” they would not be entitled to any common school funds, including the permanent common school fund, the common school construction fund,²⁴¹ the state tax for common schools, and the biennial apportionment by the Legislature from the general fund to support common schools.

IV. CONCLUSION

The Framers of the Washington Constitution designed a general and uniform system of tax-supported common schools, under one central administration, wherein each child in each grade would receive substantially the same basic education. Independent charter schools, whether licensed by the State, as in the Washington model, or authorized by a contract, as in the Michigan model, lack the public characteristics that define common schools and would not be entitled to common school funds. Because they would be privately controlled and exempt from state regulations, these charter schools would contravene both the “general” and “uniform” requirements of the Washington Constitution. Moreover, they would interfere with the Legislature’s ability to adequately fund the school system and would not provide an education intended to serve the state’s goals. The character and ideology of these charter schools runs completely counter to the comprehensive general and uniform system outlined in the Washington Constitution. Charter school proponents must either propose a model that meets every constitutional requirement, in which case there would be little to differentiate charter schools from common schools, or seek to amend the constitution.

239. Mich. Comp. Laws Ann. §§ 380.502 to .503(1)–(5) (West Supp. 1996).

240. Mich. Comp. Laws Ann. § 380.507(1)–(2) (West Supp. 1996).

241. This was constitutionally created in 1965 by separating certain sources from the permanent school fund to create a fund dedicated solely to construction and maintenance. Wash. Const. art. IX, § 3.