PRACTICABLE AND JUSTICIABLE: WHY NORTH CAROLINA'S CONSTITUTIONAL VISION OF HIGHER EDUCATION IS JUDICIALLY ENFORCEABLE

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ABSTRACT

Two hundred and twenty-five years ago, North Carolina established the nation's oldest public university, choosing as its home a particularly inviting poplar tree in present-day Chapel Hill. Today, UNC-Chapel Hill is part of a sixteen-campus university system known nationwide for its commitment to ensuring that public universities remain financially accessible to the citizens who support them.

That commitment is codified in Article IX, Section 9 of the North Carolina Constitution, which requires that tuition at the State's public universities be "as far as practicable . . . free of expense." That clause was first introduced in North Carolina's 1868 Constitution, nearly eighty years after UNC-Chapel Hill opened its doors. Before its imposition, higher education in North Carolina was anything but affordable. After ratification of the 1868 Constitution, tuition at the State's public universities not only decreased, but remained at a steady, low-price for more than a century: $1450 in 2017 dollars, except for years when inflation spiked.

This Note argues that Article IX, Section 9 requires the General Assembly to fund higher education such that tuition does not exceed this amount, adjusted for inflation—a standard leaders in Raleigh have failed to meet for nearly two decades.

Should legislators fail to heed this constitutional mandate, students could successfully challenge the legislature's refusal to adequately fund higher education.

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"The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense." – N.C. CONST. art. IX, § 9

INTRODUCTION

North Carolina's constitutional commitment to accessible higher education began not in 1868, when the above-quoted text first appeared in the State's constitution,[1] but rather in 1776, when the State became the second former colony to call for support for a public university, and the first to call for the founding of one, in its constitution.[2] In the 242 years since, the State has taken its constitutional obligation to provide affordable higher education seriously. When the University of North Carolina at Chapel Hill ("UNC-Chapel Hill") reopened in 1875, amid Reconstruction and after the ratification of the 1868 Constitution, tuition was $60,[3] or $1374.50 in 2017 dollars.[4] Between 1916 and 1995, tuition never exceeded $1450 in today's dollars.[5] Even during the deflation of the 1890s and early 1900s,[6] the highest cost of tuition adjusted to today's

1. *See* N.C. CONST. of 1868, art. IX, § 6, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2743, 2817 (Francis Newton Thorpe ed., 1909) [hereinafter THORPE] ("The general assembly shall provide that the benefits of the university, as far as practicable, be extended to the youth of the State free of expense for tuition . . . .").

2. *See* N.C. CONST. of 1776, art. XLI, *in* 5 THORPE, *supra* note 1, at 2794 ("[A]ll useful learning shall be duly encouraged, and promoted, in one or more universities.").

3. UNIV. OF N.C., CATALOGUE OF THE TRUSTEES, FACULTY AND STUDENTS OF THE UNIV. OF N.C., 1875-'76, at 13 (1876).

4. Inflation adjustments for years prior to 1913 are based on a conversion tool produced by the Official Data Foundation, *Inflation Calculator*, OFFICIAL DATA FOUND., http://www.in2013dollars.com [https://perma.cc/PDZ9-8W6G], which is based from a historical study by Professor Robert Sahr. *Id.*

5. A spreadsheet listing each year's tuition price—in that year's dollars as well as in 2017 dollars—based on the author's independent research analyzing each year's student handbook, university catalogue, or each year's Statistical Abstract of Higher Education in North Carolina, is on file with *Duke Law Journal* and is available for reference upon request. Inflation adjustments for years after 1913 are based on the U.S. Bureau of Labor Statistic's Consumer Price Index. *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/data/inflation_calculator.htm [http://perma.cc/SRG5-AJKZ].

6. *See* Christopher J. Neely, *U.S. Historical Experience with Deflation*, FED. RES. BANK OF ST. LOUIS: ECONOMIC SYNOPSES 1 (Oct. 19, 2010), https://files.stlouisfed.org/files/htdocs/

dollars would only be $1771,[7] significantly less than the more than $7000 charged today.[8]

Today, state leaders speak openly of North Carolina's constitutional obligation to make college education accessible. Governor Roy Cooper campaigned on ensuring that the State fulfills its constitutional promise by increasing funding for universities and community colleges.[9] Former University of North Carolina System ("UNC System") President C.D. Spangler describes the provision as requiring that "[n]o one in our state [be] denied a college education because of lack of money."[10] Even John Hood, chairman of the fiscally conservative John Locke Foundation, views the clause as an obligation that the state legislature fund "a large majority of public college and university expenses."[11]

North Carolina has been rewarded for its commitment to accessible higher education. The State proudly claims to be home to the nation's oldest public university,[12] the nation's first public university for Native Americans,[13] and more of the nation's four-year public historically black colleges and universities than any other state.[14]

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publications/es/10/ES1030.pdf [https://perma.cc/PJ48-VKU8] (illustrating the deflationary episodes in 1890, 1893, and 1907).

7. Between 1890 and 1916, the highest amount of tuition charged, measured in 2017 dollars according to *Inflation Calculator*, OFFICIAL DATA FOUND., *supra* note 4, was $1771. *See* UNIV. OF N.C., UNIV. OF N.C. CATALOGUE 1897-98, at 59 (1897) (listing tuition per semester as $30 for a total of $60 per academic year).

8. *See infra* note 24 and accompanying text.

9. *See Prioritizing Our State's Future*, ROY COOPER FOR NORTH CAROLINA, https://www.roycooper.com/education [https://perma.cc/QKR2-FPKD] (promising to "push to reverse this economically disastrous trend [of cutting funding for public universities] and rebalance our state's priorities," and averring that "North Carolina must uphold its constitutional commitment guaranteeing post-secondary education is 'free as far as practical'").

10. Margaret Spellings, *Margaret Spellings: Higher Education Is a New Civil Right*, NEWS & REC. (Oct. 23, 2016), http://www.greensboro.com/opinion/columns/margaret-spellings-higher-education-is-a-new-civil-right/article_12223df6-8ecb-5d8d-aba7-95ff140990fd.html [https://perma.cc/B6JG-5DYX].

11. John Hood, Opinion, *Practicable Policy on UNC Tuition*, CAROLINA J. (Feb. 15, 2011, 12:00 AM), https://www.carolinajournal.com/opinion-article/practicable-policy-on-unc-tuition [https://perma.cc/2THQ-KKSN].

12. WILLIAM D. SNIDER, LIGHT ON THE HILL: A HISTORY OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL 3 (1992).

13. *History*, UNIV. OF N.C. AT PEMBROKE, http://www.uncp.edu/about-uncp/history [https://perma.cc/85BG-7NJ7].

14. *See College Navigator*, NAT'L CTR. FOR EDU. STATISTICS, https://nces.ed.gov/COLLEGENAVIGATOR (last visited Sept. 16, 2018) [select "Public" and "4-year" for "Institution Type" and "Historically Black College or University" for "Specialized Mission," then

The benefits extend beyond pride; support for affordable higher education has paid enormous dividends for the State's economy. Two of its public universities, UNC-Chapel Hill and North Carolina State University ("NC State"), are two of three universities whose research prowess attracted pharmaceutical companies to the famed Research Triangle Park.[15] The Research Triangle Park transformed North Carolina, once one of the country's poorest states, into the envy of the American South by attracting 250 technological and pharmaceutical companies, not to mention 50,000 jobs, to the State's Piedmont region.[16]

Then came the Great Recession of 2008, which decimated state revenue. Forced to balance its budget, the General Assembly made drastic cuts to appropriations for higher education. Since 2007, per pupil funding has decreased by 20 percent when adjusted for inflation.[17] To account for lost revenue, state universities have raised tuition costs. While tuition at North Carolina's public universities remains low relative to other states,[18] it has still increased nearly 75 percent in the past decade,[19] or roughly 38 percent adjusted for inflation—a larger increase than was seen in thirty-seven other states.[20] In 2007–2008,

follow "Search"] (showing that North Carolina has five Historically Black Colleges or Universities, the highest among all states).

15. *Research Triangle Park*, DURHAM CONVENTION & VISITORS BUREAU, https://www.durham-nc.com/maps-info/districts/research-triangle-park [https://perma.cc/8RL7-MLX3].

16. *About Us*, RESEARCH TRIANGLE PARK, https://www.rtp.org/about-us [https://perma.cc/V9LT-5TWY].

17. Michael Mitchell, Michael Leachman & Kathleen Masterson, *Funding Down, Tuition Up: State Cuts to Higher Education Threaten Quality and Affordability at Public Colleges*, CTR. ON BUDGET & POL'Y PRIORITIES (Aug. 15, 2016), https://www.cbpp.org/research/state-budget-and-tax/funding-down-tuition-up [https://perma.cc/QNV2-4NK5].

18. Jason Debruyn, *Incoming UNC Students Likely to See Tuition Increase*, WUNC (Jan. 13, 2017), http://wunc.org/post/incoming-unc-students-likely-see-tuition-increase#stream/0 [https://perma.cc/6R4R-QYCC].

19. *Id.*

20. Mitchell, Leachman & Masterson, *supra* note 17.

average in-state tuition at UNC System[21] institutions was $2393,[22] while in 2017–2018 it was $4352.[23] Yearly tuition at UNC-Chapel Hill is currently $7018—nearly three thousand dollars more than the System average.[24] In 2014, the cost of sending a child to one of the State's four-year public universities amounted to between 21 and 25.7 percent of the average North Carolina family's annual income.[25]

Of course, North Carolina was far from the only state to impose cuts on state support for public higher education during the Great Recession of 2008. Drastic increases in the cost of tuition at public universities nationwide have pushed college affordability to the fore of public attention. Adjusted for inflation, average state spending per student is down 18 percent from a decade ago.[26] That has likely led to commensurate increases in tuition.[27] While Americans may have become accustomed to hefty price tags at private universities or out-

21. What constitutes the University of North Carolina has changed over time. What is presently UNC-Chapel Hill was founded in 1789. *220 Years of History*, U. OF N.C. SYS., https://www.northcarolina.edu/about-our-system/220-years-history [https://perma.cc/8TVX-DM2Y]. In 1933, the legislature brought UNC-Chapel Hill, the Women's College, and North Carolina State University under the umbrella of UNC. *Id.* By the late 1960s, three more state funded universities joined the system. *Id.* Finally, in 1971 the remaining ten public universities joined what is now known as the UNC System. *Id.* References to the "University" before 1933 thus refer to UNC-Chapel Hill. After 1933, references to the "University" refer to the UNC System.

22. UNIV. OF N.C., TUITION & FEES APPLICABLE TO ALL REGULAR FULL-TIME UNDERGRADUATE STUDENTS 2007-08, http://www.ncga.state.nc.us/fiscalresearch/Statistics_and_Data/statistics_and_data_pdfs/education/2007-08%20Undergraduate%20and%20Graduate%20tuition.pdf [https://perma.cc/PT2G-B3FD].

23. UNIV. OF N.C., TUITION & FEES APPLICABLE TO ALL REGULAR FULL-TIME UNDERGRADUATE STUDENTS 2017-18, https://www.northcarolina.edu/sites/default/files/2017-18_ug_tuition_and_fees.pdf [https://perma.cc/3KWG-YBAW].

24. UNIV. OF N.C. AT CHAPEL HILL, TUITION & FEES ACADEMIC YEAR 2017-2018, https://cashier.unc.edu/files/2017/07/17_18YR.pdf [https://perma.cc/HXB5-B2UH] (noting that the tuition for full-time students who are NC residents was $3509.50).

25. S. REG'L EDUC. BD., NORTH CAROLINA COLLEGE AFFORDABILITY PROFILE 2017, at 1 (2017), https://www.sreb.org/sites/main/files/file-attachments/nc_2017_afford_profile.pdf.pdf [https://perma.cc/YP9Z-4SJ8].

26. Mitchell, Leachman & Masterson, *supra* note 17.

27. *See* Doug Webber, *Fancy Dorms Aren't the Main Reason Tuition is Skyrocketing*, FIVETHIRTYEIGHT (Sept. 13, 2016, 11:03 AM), https://fivethirtyeight.com/features/fancy-dorms-arent-the-main-reason-tuition-is-skyrocketing [https://perma.cc/9MY4-LAWP] (noting that "by far the single biggest driver of rising tuitions for public colleges has been declining state funding for higher education"). *But see* Jason Delisle, *The Disinvestment Hypothesis: Don't Blame State Budget Cuts for Rising Tuition at Public Universities*, BROOKINGS INST. (June 1, 2017), https://www.brookings.edu/research/the-disinvestment-hypothesis-dont-blame-state-budget-cuts-for-rising-tuition-at-public-universities [https://perma.cc/JU7J-7NUX] (presenting a rebuke of this theory and other theories for the rise in tuition at public universities).

of-state institutions, the average in-state tuition at public universities now exceeds $10,000,[28] a 33 percent increase from a decade ago, when adjusted for inflation.[29] In light of the increasing cost of higher education, both nationwide and in North Carolina, greater attention has been paid to the requirement in Article IX, Section 9 of the North Carolina Constitution that a university education be provided as free as practicable. In fact, in 2014, an advocacy group, named Higher Education Works, was founded in North Carolina with the explicit purpose of educating legislators and the public about Article IX, Section 9.[30]

Adherence to a clause requires understanding its meaning. Article IX, Section 9 has never been the subject of litigation, so courts have never had the opportunity to explain what, if any, legal obligations the clause imposes. Arizona's constitution contains a substantially similar clause requiring the State to provide citizens with a university education for "as nearly free as possible."[31] However, in *Kromko v. Arizona Board of Regents*, the Arizona Supreme Court, borrowing the logic underlying the federal political questions doctrine, ruled that the clause contained no "judicially discoverable and manageable standards" and thus presented the court with a non-justiciable political question.[32]

But, in North Carolina, the historical, and therefore legal, landscape is different. North Carolina's constitutional history demonstrates an intent to maintain low tuition prices by imposing constitutional constraints on the General Assembly's ability to shift

28. Briana Boyington, *See 20 Years of Tuition Growth at National Universities*, U.S. NEWS & WORLD REP. (Sept. 20, 2017, 9:00 AM), https://www.usnews.com/education/best-colleges/paying-for-college/articles/2017-09-20/see-20-years-of-tuition-growth-at-national-universities [https://perma.cc/H9LL-XZYT].

29. Mitchell, Leachman & Masterson, *supra* note 17.

30. *See About*, HIGHER EDUC. WORKS, http://www.highereducationworks.org/about [https://perma.cc/MMM8-87BF] ("We advocate for investment in North Carolina's public universities and community colleges by building support among citizens and engaging leaders.").

31. ARIZ. CONST., art. XI, § 6.

32. Kromko v. Ariz. Bd. of Regents, 165 P.3d 168, 172 (Ariz. 2007). The court explained its use of the federal political question doctrine, saying, "[t]he federal political question doctrine flows from the [same] basic principle of separation of powers . . . [as] [o]ur state Constitution." *Id.* at 170–71. For reasons that are not always clear, many states employ the federal political question doctrine, at least in addressing challenges to the adequacy of funding for education under their state constitutions. *See, e.g.*, *id.*; Nelson v. Hawaiian Homes Comm'n, 277 P.3d 279, 288 (Haw. 2012) (addressing some of the factors from the Supreme Court's explanation of the federal political question doctrine in *Baker v. Carr*, 369 U.S. 186 (1962)); Leandro v. State, 488 S.E.2d 249, 253 (N.C. 1997) (same).

funding away from higher education. Specifically, the constitutional history reveals that tuition of roughly $1450 per year, in 2017 dollars, constitutes the tuition "as free as far as practicable" envisioned by Article IX, Section 9.

After North Carolina ratified a new constitution in 1868, a constitution that significantly limited the legislature's discretion in regards to funding for higher education, the cost of tuition did not rise significantly for more than 100 years. Yearly tuition at UNC-Chapel Hill largely remained below $1450 in present dollars until 1995. That amount represents a judicially discoverable and manageable standard—we can judge future tuition increases against the consistently low tuition of the first 100+ years after ratification.

Part I traces the history of public funding of higher education in North Carolina both before and after the ratification of the 1868 Constitution. This Part also highlights concerns about university funding that the drafters of the 1868 Constitution sought to address while also briefly discussing efforts by the federal government to encourage states to support public education from 1787–1892. Part II analyzes possible roadblocks to litigation over the meaning of Article IX, Section 9—specifically standing and the related political question doctrine. Part III then draws upon the text of Article IX, Section 9, as well as North Carolina's unique history of support for public higher education, to determine that the provision imposes a constitutional obligation to keep tuition "free, as far as practicable." And, finally, Part IV discusses three possible remedies a court could employ to address the General Assembly's neglect of its constitutional obligation: judicially mandating a change, placing a renewed burden upon the legislature, or procedurally altering the funding process.

I. PUBLIC EDUCATION FUNDING AND THE NORTH CAROLINA CONSTITUTION

The language of Article IX, Section 9 first appeared in North Carolina's 1868 Constitution. The drafters of that Constitution included it, as well as a number of other provisions, in an attempt to compel the legislature to properly fund the University, something the legislature had failed to do under the far more vague 1776 Constitution.[33] Article IX, Section 9 thus must be understood in light

33. *See* SNIDER, *supra* note 12, at 57 ("Except for an early $10,000 loan [from the legislature] later converted into a gift, the campus had survived on funds from escheated lands and arrearages, private benefactions, two lotteries, and tuition fees.").

of the flaws of the State's first constitution and the ways in which its second attempted to correct for them. The first and second Sections of this Part discuss that history. Because two of the provisions added to the Education section of North Carolina's 1868 Constitution draw upon national trends in education, the second Section of this Part also briefly describes the history of federal support for public education—both K–12 and higher education—in the eighteenth and nineteenth centuries. Of course, North Carolina has since ratified a third constitution, this one drafted in 1971 with the intent largely to preserve the rights guaranteed by the 1868 Constitution.[34] The final Section of this Part discusses this constitution and the understanding of state funding for higher education its drafters sought to preserve.

A. The Constitution of 1776

North Carolina's commitment to providing its citizens with affordable public higher education began in 1776, when it included in its constitution a call to establish a public university in the State: "a school or schools [shall] be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities."[35]

The legislature, recognizing the urgency of the constitution's language, acted quickly after the end of the American Revolution to establish and fund the University of North Carolina, which would later become the University of North Carolina at Chapel Hill. Accordingly, in 1789, the legislature passed a bill establishing a university, writing in the bill's preamble that "an [sic] University supported by permanent funds and well-endowed would have the most direct tendency to" ensure its graduates are fit for "honourable discharge of the social duties of life."[36] Eleven days later, the legislature fulfilled the preamble's promise of a "well-endowed" University by passing what is

34. *See* John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1790 (1992) ("[The 1971 constitution] was instead a good-government measure, long-matured and carefully crafted by the state's leading lawyers and politicians, designed to consolidate and conserve the best features of the past, not to break with it.").

35. N.C. CONST. of 1776, art. XLI, *in* 5 THORPE, *supra* note 1, at 2794.

36. William R. Davie's Bill to Establish the University of North Carolina (Nov. 12, 1789), *in* 1 A DOCUMENTARY HISTORY OF THE UNIVERSITY OF NORTH CAROLINA 1776-1799, at 23 (R.D.W. Connor, Louis R. Wilson & Hugh T. Lefler eds., Univ. N.C. Press 1953).

popularly known as the Escheats Act.[37] The act awarded to the University "all the property that has heretofore or shall hereafter escheat to the state."[38]

Not long after its founding, however, the State stopped providing sufficient funds to the University. In 1796, the legislature attempted to reclaim the escheats granted in 1789, an action the North Carolina Supreme Court deemed unconstitutional.[39] The legislature was only briefly thwarted. While the University retained the prior escheats, the legislature did not appropriate any other funds for the University until after the Civil War.[40] Multiple University presidents tried—and failed—to obtain additional funds from the legislature, despite consistent increases in enrollment.[41]

The lack of funding hampered the University, and its quality suffered. So desperate was the University that it took students in need of "remedial instruction."[42] The campus was in disrepair, requiring then University President Joseph Caldwell to travel the State in 1814 begging for money just to complete the roof of the campus's main building.[43] Occasionally, the University even had to borrow money to pay faculty salaries.[44] In addition, it was perceived by at least some as accessible only to North Carolina's elite.[45] By 1833, tuition had risen to

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37. SNIDER, *supra* note 12, at 11.

38. AN ACT FOR THE ENDOWMENT OF THE UNIVERSITY, *in* A DOCUMENTARY HISTORY OF THE UNIVERSITY OF NORTH CAROLINA 1776-1799, *supra* note 36, at 45.

39. *See* REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 138 (1968) [hereinafter CONSTITUTION STUDY COMMISSION] (noting that the North Carolina Supreme Court invalidated the legislature's attempt to repeal the escheats statute of 1789 "on the ground that it constituted a taking of vested property other than by the law of the land, in violation of the constitution").

40. *See* SNIDER, *supra* note 12, at 57 ("Except for an early $10,000 loan [from the legislature] later converted into a gift, the campus had survived on funds from escheated lands and arrearages, private benefactions, two lotteries, and tuition fees."), 59 ("The student body grew from about 89 at the time of [UNC President Swain's] arrival to over 450 by the opening of the Civil War. . . . However, Swain failed to obtain support from the General Assembly, no matter how hard he tried.").

41. *See id.* at 29 ("[I]n July 1795 . . . the enrollment had risen to forty-one . . . ."), 59 ("The student body grew from about 89 at the time of [UNC President Swain's] arrival to over 450 by the opening of the Civil War.").

42. *Id.* at 29; *see id.* at 59 ("Scholastic standards were low and seemed to be kept that way as 'if in appeal for more students.'").

43. *Id.* at 43.

44. *Id.* at 51.

45. *Id.* at 81 (citing a contemporary newspaper report describing pre-Civil War perceptions of the University as catering only to landed elites).

$30.[46] Five years later it jumped to $50.[47] By the end of the Civil War, it was $100.[48] These compounding financial woes and lack of support from the legislature ultimately led David Swain, who served as University President from 1835 to 1868, to conclude that the University must survive "on its own."[49]

B. The 1868 Constitution

The University was not left on its own for long. In the late 1860s, the United States required the defeated states of the Confederacy to draft new state constitutions.[50] Drafters of North Carolina's Reconstruction-era constitution took this opportunity to correct for the harm caused by the legislature's failure to fund the University. They accomplished this through the addition of an entire article devoted to "Education," which included a number of provisions designed to constrain the legislature's discretion in funding higher education.[51]

One goal behind imposing these new constraints was to change the perception of some that higher education was only meant for elites. For example, the drafters declared that the State must provide a university education to its citizens free of expense, "as far as practicable."[52] Because of its high tuition prices, some viewed attendance at the

46. UNIV. OF N.C., CATALOGUE OF THE UNIVERSITY OF NORTH CAROLINA 1833-34, at 10 (1832) (listing tuition "per session," comparable to a semester, as $15).

47. UNIV. OF N.C., CATALOGUE OF THE TRUSTEES, FACULTY AND STUDENTS OF THE UNIVERSITY OF NORTH CAROLINA 1838-39, at 14 (1838).

48. UNIV. OF N.C., CATALOGUE OF THE UNIVERSITY OF NORTH CAROLINA 1864-66, at 30 (1866).

49. *See* SNIDER, *supra* note 12, at 59 ("However, Swain failed to obtain support from the General Assembly, no matter how hard he tried. The university, he soon learned, must live 'on its own,' as it had from its birth.").

50. Reconstruction Acts of 1867-68, ch. 153, 14 Stat. 428, ch. 6, 15 Stat. 2 (1867).

51. *See* N.C. CONST. of 1868, art. IX, § 5, in 5 THORPE, *supra* note 1, at 2817–18 ("The University of North Carolina . . . shall be held to an inseparable connection with the free public-school system of the State."); *id.* art. IX, § 6 ("[A]ll the property which has heretofore accrued to the State, or shall hereafter accrue, from escheats, unclaimed dividends, or distributive shares of the estates of deceased persons, shall be appropriated to the use of the university."); *id.* art. IX, § 16 ("As soon as practicable after the adoption of this constitution, the general assembly shall establish and maintain, in connection with the university, a department of agriculture, of mechanics, of mining, and of normal instruction."); *see also infra* notes 75–76 and accompanying text (explaining that instructing the General Assembly to establish a department of agriculture, mechanics, mining, and normal instruction was tantamount to a directive to ensure the State qualified for funds under the Morrill Act of 1868).

52. N.C. CONST. of 1868, art. IX, § 6, *in* 5 THORPE, *supra* note 1, at 2817.

University as accessible only to the State's wealthy citizens.[53] This provision reaffirmed the State's intention to ensure the University was accessible to all.

Other changes directly addressed the failings of the 1776 Constitution. The second clause of the newly added article on Education required that the State continue to give the University the escheats that the state legislature had attempted, but failed, to take back, guaranteeing that "all property which has heretofore accrued to the State, or shall hereafter accrue from escheats . . . shall be appropriated to the use of the University."[54] By enshrining this reversal in the State's constitution, the drafters ensured that, absent a constitutional amendment, the University could never be deprived of the State's escheats.

Some of the constraints stemmed from the federal government's efforts to encourage state support for public education. Article IX, Section 5 declared, "[t]he University of North Carolina . . . shall be held to an inseparable connection with the free public school system of the State."[55] That clause might seem merely aspirational today, but it signified a very specific meaning to those who wrote it. Over the course of the late eighteenth and nineteenth centuries, the federal government used land grants to encourage states to establish comprehensive systems of public education, including universities.[56] This effort resulted in states inserting into their constitutions commitments to comprehensive systems of public education.[57] It began with the Northwest Ordinance of 1787, which provided that, in the new U.S. territories, "schools and the means of education shall forever be encouraged."[58] The federal government succeeded in instilling a commitment to state-supported education in these territories—every

53. *See supra* note 45 and accompanying text.

54. N.C. CONST. of 1868, art. IX, § 6, *in* 5 THORPE, *supra* note 1, at 2817.

55. *Id.* art. IX, § 5, *in* 5 THORPE, *supra* note 1, at 2817.

56. *See* Adam Sherman & Hugh Spitzer, *Washington State's Mandate: The Constitutional Obligation to Fund Post-Secondary Education*, 89 WASH. L. REV. ONLINE 15, 18–20 (2014) (explaining how sale of land allocated to each state's congressional delegation funded the "creation of land-grant colleges").

57. *See id.* at 20 ("[B]etween 1860 and 1889, every state . . . except West Virginia, referenced colleges or universities in their founding constitutions. . . . Perhaps nothing illustrates the growing national call for institutions of higher education more than the Morrill Act of 1862[,] . . . [which] spurred state after state to enter the higher education field.").

58. Northwest Ordinance of 1789, Ch. 8, 1 Stat. 50, 52 (1789) (reenacting the Northwest Ordinance of 1787).

state created by the Northwest Ordinance included a section about supporting public education in its constitution.[59]

In the years following that success, the federal government attempted to do the same with higher education, granting anywhere from 40,000 to 100,000 acres of land each to seventeen territories-turned-states before the outbreak of the Civil War.[60] Fifteen of the seventeen mentioned higher education in their founding constitution.[61] Some state constitutions, like Alabama's 1819 Constitution, even called for additional state support of the universities founded through federal land grants.[62]

The Morrill Land Grant Act of 1862,[63] which gave states western lands to be sold to fund agricultural and mechanical education, was the

59. *See generally* IND. CONST. of 1851, art. VIII, § 1, *in* 2 THORPE, *supra* note 1, at 1086 ("[I]t shall be the duty of the General Assembly . . . to provide by law for a general and uniform system of common schools, wherein tuition shall be without charge, and equally open to all."); MICH. CONST. of 1850, art. XIII, § 1, *in* 4 THORPE, *supra* note 1, at 1961 ("The superintendent of public instruction shall have the general supervision of public instruction, and his duties shall be prescribed by law."); OHIO CONST. of 1851, art. VI, § 2, *in* 5 THORPE, *supra* note 1, at 2925 ("The General Assembly shall make such provisions . . . [that] will secure a thorough and efficient system of common schools throughout the state . . . ."); WIS. CONST. of 1848, art. X, § 1, *in* 7 THORPE, *supra* note 1, at 4103 ("The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct . . . .").

60. JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 75–76 (2d ed. 2011).

61. *See generally* ALA. CONST. of 1875, art. XII, § 9, *in* 1 THORPE, *supra* note 1, at 177 ("the State University and the Agricultural and Mechanical College"); ARK. CONST. of 1874, art. XIV, § 2, *in* 1 THORPE, *supra* note 1, at 358 ("schools or universities"); CAL. CONST. of 1879, art. IX, § 9, *in* 1 THORPE, *supra* note 1, at 432 ("the University of California"); FLA. CONST. of 1885, art. XII, § 14, *in* 2 THORPE, *supra* note 1, at 754 (permitting the establishment of two "normal schools," which were institutions of higher education focused on training primary school teachers); ILL. CONST. of 1870, art. VIII, § 2, *in* 2 THORPE, *supra* note 1, at 1035 ("college, seminary, or university purposes"); IOWA CONST. of 1857, art. IX, § 11, *in* 2 THORPE, *supra* note 1, at 1151 ("[t]he State University"); LA. CONST. of 1879, art. 230, *in* 3 THORPE, *supra* note 1, at 1509 ("[t]he University of Louisiana"); MICH. CONST. of 1850, art. XIII, § 7, *in* 4 THORPE, *supra* note 1, at 1961 ("the University of Michigan"); MINN. CONST. of 1857, art. VIII, § 4, *in* 4 THORPE, *supra* note 1, at 2009 ("the University of Minnesota"); MISS. CONST. of 1868, art. VIII, § 8, *in* 4 THORPE, *supra* note 1, at 2081 ("an agricultural college or colleges"); MO. CONST. of 1875, art. XI, § 5, *in* 4 THORPE, *supra* note 1, at 2263 ("the State University"); OR. CONST. of 1857, art. VIII, § 5, *in* 5 THORPE, *supra* note 1, at 3011 ("university lands" and "university funds"); TENN. CONST. of 1870, art. XI, § 12, *in* 6 THORPE, *supra* note 1, at 3469 ("The above provisions shall not prevent the Legislature from carrying into effect any laws that have been passed in favor of the colleges, universities, or academies . . . ."); WIS. CONST. of 1848, art. X, § 6, *in* 7 THORPE, *supra* note 1, at 4092 ("a state university").

62. *See* ALA. CONST. of 1819, art. VI, *in* 1 THORPE, *supra* note 1, at 110 ("The general assembly shall . . . [use money raised from federally granted lands] for the exclusive support of a State University.").

63. Land-Grant Agricultural and Mechanical College (Morrill) Act of 1862, Pub. L. No. 37-130, 12 Stat. 503 (codified at 7 U.S.C §§ 301–308 (2012)).

federal government's most ambitious attempt to encourage support for higher education. The act doled out 30,000 acres per representative in Congress[64]—over 17,400,000 acres, worth more than $7.5 million in 1862 dollars.[65] The Morrill Land Grant Act, like the Northwest Ordinance and the individual land grants before it, influenced state constitutions. In the three decades between the first and second Morrill Land Grand Acts,[66] all but one state constitution drafted and ratified included a provision related to higher education.[67]

Thus, by the end of the nineteenth century, language tying together public universities and the public K–12 education system was common. Though their constitutions were drafted after North Carolina's, Colorado and Washington's inclusion of universities and normal schools[68] within their visions for comprehensive systems of public education is indicative of the fact that drafters of state constitutions during this time understood systems of public education to include higher education. Article IX of Colorado's constitution calls for maintenance of a "thorough and uniform" public education system.[69] Meanwhile, in Article VIII, the drafters included three colleges among the educational institutions that must be "supported by

64. *Id.* § 1, 12 Stat. at 503

65. MICHAEL L. WHALEN, A LAND-GRANT UNIVERSITY 7 (2002), *reprinted from* CORNELL UNIVERSITY 2001-02 FINANCIAL PLAN (2001).

66. The second Morrill Act focused on promoting agricultural and mechanical education for African Americans. *See* Agricultural College (Morrill) Act of 1890, Pub. L. No. 51-841, 26 Stat. 417 (codified as amended at 7 U.S.C. §§ 321–328 (2012)) (requiring states that benefited from the Morrill Act of 1862 that also have segregated colleges to divide funds from the Act evenly between "one college for white students and one institution for colored students").

67. *See generally* COLO. CONST. of 1876, art. IX, § 12, *in* 1 THORPE, *supra* note 1, at 496 ("the University of Colorado"); KAN. CONST. of 1858, art. VII, § 7, *in* 2 THORPE, *supra* note 1, at 1232 ("a complete system of public instruction, embracing . . . collegiate and university departments"); MONT. CONST. of 1889, art. XI, § 11, *in* 4 THORPE, *supra* note 1, at 2324 ("the State University"); NEB. CONST. of 1866–67, art. II §§ 1–2, *in* 4 THORPE, *supra* note 1, at 2358 (dictating the minimum price at which "university lands" may be sold); NEV. CONST. of 1864, art. XI, § 4, *in* 4 THORPE, *supra* note 1, at 2419 ("a State University"); N.D. CONST. of 1889, art. 8, § 148, *in* 5 THORPE, *supra* note 1, at 2872 ("a uniform system for free public schools . . . including the normal and collegiate course"); S.D. CONST. of 1889, art. VIII, § 7, *in* 6 THORPE, *supra* note 1, at 3374 ("[resources] from the United States or any other source for a university").

68. Normal schools were institutions of higher education focused on the training of primary school teachers. *See supra* note 61 and accompanying text.

69. COLO. CONST. of 1876, art. IX, § 2, *in* 1 THORPE, *supra* note 1, at 494.

the State."[70] Washington's constitution uses similar language.[71] This language was not only commonplace, but also held real implications for the funding of public universities. For nearly two decades after the drafting of its constitution, Washington's universities were tuition-free[72] and legislation "lumped" the University of Washington's funding in with the "general and uniform system of public schools," which included "common schools, high schools, normal schools, and technical schools."[73]

Thus, when drafters of North Carolina's 1868 Constitution announced their intent to hold the University "to an inseparable connection with the free public-school system of the State,"[74] they intended to constitutionalize a commitment to affordable education at every level, including universities. The final provision the drafters added in relation to higher education flows directly from the first Morrill Land Grant Act. Section 16 instructed that "[a]s soon as practicable after the adoption of this Constitution, the general assembly shall establish and maintain, in connection with the university, a department of agriculture, of mechanics, of mining and of normal instruction."[75] This clause made the State eligible for funds from the Morrill Act.[76] The General Assembly took the "as soon as practicable" language here seriously; it made the reopening of the University in 1875 contingent upon its ability to provide agricultural and mechanical education.[77]

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70. *Id.* art. VIII, § 1, *in* 1 THORPE, *supra* note 1, at 493; *see also id.* art. VIII, § 5, *in* 1 THORPE, *supra* note 1, at 494 ("The University at Boulder [and other institutions] . . . [are] subject to the control of the State.").

71. *See* WASH. CONST. of 1889, art. XIII, *in* 7 THORPE, *supra* note 1, at 3998 (listing educational institutions that "shall be fostered and supported by the state"); *see also* Sherman & Spitzer, *supra* note 56, at 28–29 (reciting the language of Article XIII, Section 1 of the Washington State Constitution).

72. Sherman & Spitzer, *supra* note 56, at 35.

73. *Id.* at 27–28.

74. N.C. CONST. of 1868, art. IX, § 5, *in* 5 THORPE, *supra* note 1, at 2817.

75. *Id.* art. IX, § 16, *in* 5 THORPE, *supra* note 1, at 2818.

76. The language of Section 16 requires the teaching of "agriculture" and "mechanics." *Id.* The Morrill Act of 1862 required states "to teach such branches of learning as are related to agriculture and the mechanic arts" in order to receive the lands. Land-Grant Agricultural and Mechanical College (Morrill) Act of 1862, Pub. L. No. 37-130, § 4, 12 Stat. 503, 504 (codified at 7 U.S.C § 304 (2012)).

77. William D. Snider documented the incidents surrounding the reopening of the University:

> After prolonged study the trustees saw their only hope in persuading the General Assembly to revalidate the agricultural and mechanical college Land Scrip Fund, obtained by Governor Swain from the federal government in 1867 under the Morrill

The drafters succeeded in making higher education more affordable. In 1869, the Governor declared at commencement, in remarks reproduced in the *North Carolina Standard*, that, pre-1868 the University "practically excluded . . . the children of the great body of people."[78] However, with the ratification of the State's Reconstruction constitution, he declared the University to be "a popular institution . . . . It is now the people's University."[79] The state legislature appropriated $7500 annually to the University in addition to the escheats.[80] When the University reopened in 1875, tuition dropped from the $100 charged in 1868[81] or the $80 charged just before the University's brief closure in 1870[82] to $60.[83] In 1924, tuition was $80.[84] Even at the height of the Great Depression, tuition was only $75.[85]

C. The Constitution of 1971

North Carolina's current constitution was drafted in 1968 by a study commission appointed by the North Carolina Bar Association and North Carolina State Bar.[86] It was, as one commentator put it, "a good-government measure, long-matured and carefully crafted by the state's leading lawyers and politicians, designed to consolidate and

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> Act. [Due to the Board of Trustees having lost that money in a bond scandal t]he state remained responsible to the federal government for restoring the principal, but in a closely contested fight the General Assembly authorized the state to pay an annual sum of $7500 to the university as interest on the money, *provided the university offered agricultural and mechanical instruction*.

SNIDER, *supra* note 12, at 89–90 (emphasis added). UNC-Chapel Hill's use of Morrill Act funds would remain a controversy until those irked by UNC-Chapel Hill's perceived lack of commitment to agricultural education persuaded the legislature to launch a university focused specifically on agricultural and mechanical instruction. SCOTT M. GELBER, THE UNIVERSITY AND THE PEOPLE: ENVISIONING AMERICAN HIGHER EDUCATION IN AN ERA OF POPULIST PROTEST 37 (2011). That university became what is presently North Carolina State University. *Id.*

78. *The University Commencement*, N.C. STANDARD 2 (June 12, 1869).

79. *Id.*

80. SNIDER, *supra* note 12, at 90.

81. UNIV. OF N.C., CATALOGUE OF THE TRUSTEES, FACULTY AND STUDENTS OF THE UNIV. OF N.C. 1867-'68, at 24 (1870).

82. UNIV. OF N.C., CATALOGUE OF THE TRUSTEES, FACULTY AND STUDENTS OF THE UNIV. OF N.C. 1869-'70, at 15 (1870).

83. UNIV. OF N.C., CATALOGUE OF THE TRUSTEES, FACULTY AND STUDENTS OF THE UNIV. OF N.C., 1875-'76, at 13 (1876).

84. UNIV. OF N.C., THE CATALOGUE 1923-1924, at 61 (1924) (showing an annual tuition in 1924 of $20 per quarter, for a total of $80 per year).

85. UNIV. OF N.C., CATALOGUE ISSUE 1933-1934, at 29, 44 (1934) (listing tuition as $25 per quarter, comprising one third of the academic year).

86. CONSTITUTION STUDY COMMISSION, *supra* note 39, at i.

conserve the best features of the past, not to break with it."[87] The Commission itself explained that "none [of the changes are] calculated to impair any present right of the individual citizen or to bring about any fundamental change in the power of state and local government or the distribution of that power."[88]

Changes to Article IX were limited and mostly served to constitutionalize contemporary practices. The Commission's commentary on Article IX provides just one mention of higher education, explaining that wording changes to what is currently Section 9 exist only "to take account of the duty of the State to maintain institutions of higher education in addition to the University of North Carolina."[89] In 1868, North Carolina had just one university; drafters of the 1971 Constitution were merely noting that it was now home to sixteen.[90] Otherwise, the Commission saw no need to change the constitution's requirement that the General Assembly provide citizens with a university education as free as practicable.

Perhaps that was because the clause was working. At the time the State's constitution was being redrafted and ratified, tuition prices were, adjusted for inflation, remarkably similar to prices when the University reopened in 1875. At $225 per year when the constitution was ratified in 1971,[91] the cost was only eleven dollars more than the inflation-adjusted cost in 1875.[92]

The Commission also eliminated clauses that were no longer needed. Gone was the requirement that the legislature work with the University to create a program of agricultural and mechanical instruction;[93] the clause was no longer necessary because, by 1971,

87. Orth, *supra* note 34, at 1790.

88. CONSTITUTION STUDY COMMISSION, *supra* note 39, at 10.

89. *Id.* at 88.

90. *See id.* ("Proposed Sec. 8 extends present Sec. 6 (which deals only with the University) to take account of the duty of the State to maintain institutions of higher education in addition to the University of North Carolina."). By 1968, North Carolina had sixteen public universities; three were joined to create the University of North Carolina in 1931, three more joined the University by the late 1960s, and the remaining ten public universities joined the University in 1971. *220 Years of History*, *supra* note 21.

91. UNIV. OF N.C. AT CHAPEL HILL, THE UNDERGRADUATE BULLETIN 132 (1970).

92. An amount of $60 in 1875 would be worth $214.40 in 1971, adjusted for inflation using information provided in *supra* note 4.

93. *Compare* N.C. CONST. of 1868, art. IX, § 16, *in* 5 THORPE, *supra* note 1, at 2818 ("As soon as practicable after the adoption of this constitution, the general assembly shall establish and maintain, in connection with the university, a department of agriculture, of mechanics, of mining, and of normal instruction."), *with* N.C. CONST. art. IX (omitting such references to agriculture and mechanics).

North Carolina was home to not one, but two, specialized institutions devoted to mechanical and agricultural education.[94]

The Commission also acknowledged that UNC-Chapel Hill had changed how it used escheats. Because of generous funding from the State, the Trustees of UNC-Chapel Hill, in 1946, had ceased to draw upon the principal of escheats. Instead, the Trustees began to use funding from escheat interest only to provide scholarships to low-income students, and not to fund the University's operations.[95] The Commission, therefore, recommended that the State be granted any escheats after 1970, with the condition that the escheats be used to provide need-based scholarships to low-income North Carolina students attending one of the State's public universities.[96] North Carolina's citizens ratified the recommendations via referendum on Election Day 1970.[97]

D. Increases in Tuition in the Present Day

In the late 1990s, tuition at UNC-Chapel Hill began to rise more rapidly. In 1996, tuition first broke the $1000 mark.[98] While tuition in 1994–1995, $874,[99] was slightly less than double the amount from ten

94. *See* Jimmy Ryals, *Land-Grant Legacy*, N.C. ST. NEWS (July 2, 2012), https://news.ncsu.edu/2012/07/land-grant-legacy [https://perma.cc/WN9J-KWKM] ("The Morrill Act universities were established to teach agricultural and mechanical arts . . . . In North Carolina, the law birthed the North Carolina College of Agriculture and Mechanic Arts (now NC State). A second Morrill Act in 1890 led to the establishment of North Carolina Agricultural and Technical State University.").

95. *See* CONSTITUTION STUDY COMMISSION, *supra* note 39, at 138–39 ("Until 1946, both the principal and interest of the escheats were used for any purpose by the University Trustees. In [1946], however, the Trustees determined that the principal of the escheats fund should be kept intact, that the net income should be distributed among the three . . . campuses of The University in proportion to enrollment, and that it should be used only for scholarships to needy North Carolina residents . . . .").

96. *Id.* at 137, 139 ("We believe that equity requires that the benefits of the escheats, being derived from property owners throughout the entire State, be made available to any needy and worthy North Carolinian who is enrolled in any public institution of higher education in this State.").

97. The North Carolina Constitution was presented to voters and approved in 1970. Orth, *supra* note 34, at 1760.

98. UNIV. OF N.C., UNIV. OF N.C. AT CHAPEL HILL TUITION AND FEES 1996-1997 (1996) https://cashier.unc.edu/files/2016/05/AY-1996-97-and-summer-1997.pdf [https://perma.cc/2B6Z-FL7W] (showing tuition per semester for a full load as $693, for a total of $1386).

99. UNIV. OF N.C., UNIV. OF N.C. AT CHAPEL HILL TUITION AND FEES 1994-1995 (1994) https://cashier.unc.edu/files/2016/05/AY-1994-95-and-summer-1995.pdf [https://perma.cc/6RWZ-WQMC] (showing tuition per semester for a full load as $437, for a total of $874).

years prior,[100] tuition in 2005, $3205, was nearly four times as much as it had been a decade earlier.[101]

The Great Recession of 2008 exacerbated this problem. In its wake, the General Assembly reduced funding for higher education, leading the UNC System to impose tuition increases.[102] Whereas in 2008, a North Carolina family would need to devote 15 percent of its income to sending a child to a four-year public university, by 2014, the number was 25.7 percent.[103] The increases led some to ask whether "working families [can] still afford UNC?"[104]

II. PROCEDURAL IMPEDIMENTS TO BRINGING AN ARTICLE IX, SECTION 9 CHALLENGE

This Part explains why two common procedural impediments do not bar a challenge alleging that the North Carolina State Legislature has failed to adhere to Article IX, Section 9.

First, this Part quickly disposes of concerns that students—the most obvious plaintiffs in hypothetical litigation regarding Article IX, Section 9—might lack standing. It then demonstrates how an Article IX, Section 9 challenge can survive the political question doctrine. Because North Carolina's courts have historically played an important role in expounding on the meaning of the State's constitution and because there is sufficient historical evidence to identify judicially discoverable and manageable standards within the clause, a challenge under Article IX, Section 9 likely succeeds where the *Kromko* litigation in Arizona failed.

100. UNIV. OF N.C., UNIV. OF N.C. AT CHAPEL HILL TUITION AND FEES 1984-1985 (1984) https://cashier.unc.edu/files/2016/05/AY-1984-85-and-summer-1985.pdf [https://perma.cc/B7MA-XFLA] (showing tuition per semester for a full load as $240, for a total of $480).

101. UNIV. OF N.C., UNIV. OF N.C. AT CHAPEL HILL TUITION AND FEES 2004-2005 (2004) https://cashier.unc.edu/files/2016/05/AY-2004-05-and-summer-2005-includes-important-dates.pdf [https://perma.cc/3VA8-6TT3] (showing tuition per semester for a full load as $1602.50, for a total of $3205).

102. *See* Rob Christensen, *Can Working Families Still Afford UNC?*, NEWS & OBSERVER (Mar. 10, 2015) https://www.newsobserver.com/news/politics-government/politics-columns-blogs/rob-christensen/article13229168.html [https://perma.cc/CEF3-X4NP] ("The tuition increases are a means of compensating for declining state funding and rising costs. State appropriations to the UNC system have declined since 2008-2009 . . . .").

103. S. REG'L EDUC. BD., *supra* note 25, at 1.

104. Christensen, *supra* note 102.

A. Standing

Standing to seek declaratory or injunctive relief would not pose a significant impediment to students looking to challenge the legislature's adherence to Article IX, Section 9. The North Carolina Uniform Declaratory Judgment Act provides that "the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied."[105] State courts have ruled that this Act permits the use of declaratory judgment as a means of determining the validity of legislative action.[106]

It is possible that students could also bring a suit for an injunction or even damages. In *Craig* ex rel. *Craig v. New Hanover County Board of Education*,[107] the North Carolina Supreme Court held that when a challenge is made under the state constitution, sovereign immunity cannot act as a bar to the claim.[108] North Carolina's constitutional "Declaration of Rights" guarantees that all citizens "have a right to the privilege of education" and promises that "it is the duty of the State to guard and maintain that right."[109] Thus, if a hypothetical plaintiff fashioned the claim as one under the "Declaration of Rights," damages or injunctive relief would be available as potential remedies.

Moreover, were a student to bring a lawsuit alleging that the State has violated Article IX, Section 9, the challenge would likely resemble K–12 education funding cases in North Carolina, where parents have successfully challenged the State's funding scheme for public-schools seeking additional funding.[110] Like those parents, students would be unlikely to face a serious standing challenge because North Carolina recognizes taxpayer standing.[111] This does not mean that North Carolina's citizens can challenge policies they "merely disagree

105. Teer v. Jordan, 59 S.E.2d 359, 362 (N.C. 1950).

106. *See* Town of Emerald Isle v. State, 360 S.E.2d 756, 760 (N.C. 1987) ("A declaratory judgment may be used to determine the construction and validity of a statute." (citation omitted)).

107. Craig *ex rel.* Craig v. New Hanover Cty. Bd. of Educ., 678 S.E.2d 351 (N.C. 2009).

108. *Id.* at 354. That case relied on *Corum v. University of North Carolina*, where the North Carolina Supreme Court held that claims alleging violation by the state of rights contained in the state constitution's "Declaration of Rights," could not be barred by sovereign immunity. Corum v. Univ. of N.C., 413 S.E.2d 276, 290 (N.C. 1992).

109. N.C. CONST. art. I, § 15.

110. *See, e.g.*, Leandro v. State, 488 S.E.2d 249, 252 (N.C. 1997) (noting that plaintiffs challenging "the current school funding system" are "students and their parents or guardians from . . . relatively poor school systems").

111. *See* Goldston v. State, 637 S.E.2d 876, 881 (N.C. 2006) ("[O]ur cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds.").

with."[112] Still, "the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied."[113]

B. Political Question Doctrine

The political question doctrine is invoked when, "[d]espite the presence of all of the other elements of an Article III case or controversy, the Court forbears on the ground that something about the subject matter of the case makes it inappropriate for judicial resolution."[114] The doctrine has played an outsized role in education litigation. In the last twenty years, a number of states have ruled that constitutional challenges to the adequacy of funding of K–12 education presented non-justiciable political questions.[115] Most directly on point, in *Kromko*,[116] Arizona's Supreme Court held that the political question doctrine barred a lawsuit alleging that the State had failed to adhere to a provision of the State's constitution that, similar to North Carolina's Article IX, Section 9, mandates that higher education be offered for "as nearly free as possible."[117]

One might wonder why a component of the federal courts' justiciability doctrine would play any role in adjudicating claims brought under state constitutions. States employ the federal political question doctrine almost without variation.[118] This is, as the *Kromko* court explained, because "[t]he federal political question doctrine flows from the basic principle of separation of powers and recognizes that some decisions are entrusted under the federal constitution to

112. *Id.*

113. Teer v. Jordan, 59 S.E.2d 359, 362 (N.C. 1950).

114. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 237 (7th ed. 2015).

115. *See* Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 84 (2010) ("[S]tate courts have delivered a string of disappointing decisions to adequacy plaintiffs. While those courts have articulated a variety of state-specific rationales for rejecting adequacy claims, their opinions reveal a common concern with the boundaries between their judicial role and the prerogatives of the legislature.").

116. Kromko v. Ariz. Bd. of Regents, 165 P.3d 168 (Ariz. 2007).

117. *Id.* at 172.

118. *See, e.g.*, *id.* at 170 (employing the federal political question doctrine); Nelson v. Hawaiian Homes Comm'n, 277 P.3d 279, 288 (Haw. 2012) (same).

branches of government other than the judiciary. . . . [State] courts refrain from addressing political questions for the same reasons."[119]

The political question doctrine is derived from the principle of separation of powers; a duty—or desire—of the courts not to interfere with the responsibilities of other branches.[120] That concept is a double-edged sword. Under the separation of powers, it is the responsibility of courts to determine "whether a matter has . . . been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed."[121] Thus, the fact that a suit involves political matters is not enough to warrant dismissal.[122]

On the federal level, in *Baker v. Carr*,[123] the Supreme Court laid out the factors it looks to in determining whether a dispute presents a political question.[124] And while *Baker* laid out six factors,[125] later cases have emphasized the importance of two: "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[126]

Neither of the central factors of the political question doctrine bar consideration of Article IX, Section 9.[127] Because the North Carolina Supreme Court has historically played a larger role in expounding upon the meaning of the State's constitution, it is unlikely that Article

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119. *Kromko*, 165 P.3d at 170 (citation omitted).

120. Baker v. Carr, 369 U.S. 186, 210 (1962).

121. *Id.* at 211.

122. *See id.* ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.").

123. 369 U.S. 186 (1962).

124. *Id.* at 217.

125. *Id.* (listing the six factors).

126. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189, 195 (2012) (quoting Nixon v. United States, 506 U.S. 224, 228 (1993)).

127. Nor do any of the remaining factors. Those other factors include:

> the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. In addition to directing courts' attention only to the first two factors, Justice Sotomayor's concurrence in *Zivotofsky* noted that courts ordinarily will not find the final three factors present, especially in cases not dealing with foreign affairs. *See Zivotofsky*, 566 U.S. at 204–06 (Sotomayor, J., concurring) (explaining how the final three *Baker* factors are rarely implicated, but noting cases, mainly in the area of foreign affairs, where they have been relevant).

IX, Section 9 exudes a textually demonstrable constitutional commitment of the issue to a coordinate political department. In fact, the North Carolina Supreme Court rejected that very argument in a challenge to the legislature's funding of K–12 education.[128] Meanwhile, evidence of the clause's meaning to those who drafted it and, later, to those who ensured it was carried forward into the State's latest constitution, provides judicially manageable standards.

1. *Textually Demonstrable Constitutional Commitment to a Coordinate Branch.* One potential hurdle to a legal challenge involving Article IX, Section 9 is that the State could argue Article IX, Section 9 commits funding of higher education to the discretion of the legislature. That argument is unlikely to succeed.

First, North Carolina's courts specifically have been reluctant to accept that they lack jurisdiction over challenges involving the meaning of constitutional text.[129]

In part because their justices and judges are elected,[130] North Carolina's courts play a larger role in shaping state policy, at least to the extent that it involves the state constitution, than do federal courts in shaping national policy.[131] North Carolina courts have historically helped other branches understand the State's constitution. Some state constitutions permit their courts to issue advisory opinions to the legislature or governor.[132] The North Carolina Supreme Court has

128. *See* Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997) ("Therefore, it is the duty of this Court to address plaintiff-parties' constitutional challenge to the state's public education system. Defendants' argument is without merit.").

129. *See id.* at 253–54 (citing cases wherein North Carolina courts have assumed the duty to interpret the constitution, including when government action is challenged as unconstitutional).

130. N.C. CONST. art. IV, § 16.

131. *Cf.* John V. Orth, *The Role of the Judiciary in Making Public Policy*, *in* NORTH CAROLINA FOCUS: AN ANTHOLOGY ON STATE GOVERNMENT, POLITICS, AND POLICY 339, 341 (Mebane Rash Whitman & Ran Coble eds., N.C. Ctr. for Pub. Pol'y Res. 1989) (highlighting the role of North Carolina judges in making public policy choices by noting the failed movement to replace common law with statutory law to constrain judicial discretion and the movement towards having an elected judiciary, as opposed to an appointed judiciary as in the federal courts, to ensure judges' accountability as policy-makers).

132. *See, e.g.*, COLO. CONST. art. VI, § 3 ("The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives . . . ."); ME. CONST. art. VI, § 3 ("[T]he Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate or House of Representatives."); N.H. CONST. pt. 2, art. 74 ("Each branch of the legislature as well as the governor and council shall have authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.").

simply issued advisory opinions upon request even absent explicit constitutional authorization.[133]

It is therefore unlikely that a court would find Article IX, Section 9 non-justiciable on the grounds that it had been textually committed to another branch. In fact, the State has already rejected that argument in a challenge to the legislature's funding decisions based on a similar clause also found in Article IX, Section 2. In *Leandro v. State*,[134] plaintiffs challenged the adequacy of funding for the State's K–12 education system, alleging that it failed to satisfy Article IX, Section 2's command that "[t]he General Assembly shall provide . . . for a general and uniform system of free public schools, . . . wherein equal opportunities shall be provided for all students."[135] The State argued that the political question doctrine barred the court from proceeding.[136] The North Carolina Supreme Court declared that argument meritless, explaining "[i]t has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution."[137]

An argument that Article IX, Section 9 is textually committed to the legislature will likely meet the same fate. Two differences distinguish Section 2 from Section 9, and neither bears on whether the matter has been committed to another branch. First, Section 2 governs primary and secondary education,[138] while Section 9 governs higher education.[139] And second, Section 9 does qualify that higher education must be free "as far as practicable,"[140] while Section 2 contains no such qualification.[141] "As far as practicable" is language that must be interpreted, but as the North Carolina Supreme Court already explained, "it is the duty of the courts to determine the meaning of the requirements of our Constitution."[142] Because North Carolina courts play a significant role in giving meaning to the State's constitution, and

133. Katherine White, *Advisory Opinions: The "Ghosts That Slay," in* NORTH CAROLINA FOCUS, *supra* note 131, at 329.

134. Leandro v. State, 488 S.E.2d 249 (N.C. 1997).

135. *Id.* at 256.

136. *Id.* at 253–54.

137. *Id.* at 253.

138. *See* N.C. CONST. art. IX, § 2 (relating to the establishment for a "[u]niform system of schools").

139. *See id*. art. IX, § 9 (relating to "[t]he University of North Carolina and other public institutions of higher education").

140. *Id.*

141. *See id.* art. IX, § 2 (failing to include the "as far as practicable" qualification).

142. *Leandro*, 488 S.E.2d at 253.

have already asserted their authority to give meaning to clauses similar in substance and form to Section 9, a court should not find a question arising under the clause to be non-justiciable on the grounds that it has been textually committed to a coordinate branch.

Second, as explained later in this Note, constitutional provisions imposed contemporaneously with Article IX, Section 9's antecedent limited the General Assembly's discretion.[143] It is unlikely that the drafters would textually commit higher education funding to the legislature's discretion while simultaneously limiting the General Assembly's discretion about how to fund higher education.

2. *Judicially Discoverable and Manageable Standards.* Another hurdle would be the charge that Article IX, Section 9 lacks judicially discoverable and manageable standards. That very argument convinced the Arizona Supreme Court that a challenge to higher education funding based on Arizona's constitution was not viable.[144]

While the Supreme Court has held that "a lack of judicially discoverable and manageable standards for resolving [a controversy]" makes it non-justiciable,[145] the Court has not extensively elucidated what it means by "judicially discoverable and manageable standards." It has suggested, though not held, that the inquiry is guided by the belief that the absence of such standards in a text is evidence that its drafters did not intend for judicial interference.[146] In *Vieth v. Jubelirer*,[147] a plurality suggested that sufficiently determinate language may be necessary.[148] In that case, Justice Scalia, writing for himself and three other justices, dismissed a challenge to partisan gerrymandering, declaring that "'[f]airness' does not seem to us a judicially manageable

143. *See infra* notes 218–22 and accompanying text (explaining how Sections 5, 15, and 16 of Article IX of the North Carolina Constitution of 1868 impose additional constraints by, respectively, requiring the University be held as one with the public common schools, requiring the General Assembly to appropriate escheats to the University, and requiring the General Assembly to provide for agriculture and mechanical instruction at the University).

144. *See* Kromko v. Ariz. Bd. of Regents, 165 P.3d 168, 172 (Ariz. 2007) ("We can conceive of no judicially discoverable and manageable standards . . . by which we could decide such issues, either individually or in the aggregate.").

145. Nixon v. United States, 506 U.S. 224, 228 (1993).

146. *Id.* at 228–29 ("[T]he lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.").

147. Vieth v. Jubelirer, 541 U.S. 267 (2004).

148. *See id.* at 293 (explaining that "[s]ome criterion more solid and more demonstrably met" than "fairness" is "necessary . . . to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking").

standard."[149] For two reasons, this prong of the political question doctrine does not preclude suit here.

First, the Supreme Court's ruling in *Zivotofsky v. Clinton*,[150] a case concerning the relative powers of Congress and the President in foreign relations decided after *Kromko*,[151] calls into question the relevance of this prong of the political question doctrine in this case. *Zivotofsky I* explained that, at least in the federal context, concerns about a lack of judicially manageable standards "dissipate . . . when the issue is recognized to be the more focused one of the constitutionality of [a statute]."[152] In analyzing the constitutionality of the statute at issue, the Court relied on historical evidence like the minutes of George Washington's meetings with his cabinet, the Federalist Papers, and messages from Andrew Jackson to Congress.[153] Similar historical evidence can be marshalled by a court analyzing the constitutionality of a statute appropriating funds to the State's university in relation to Article IX, Section 9.

Second, *Zivotofsky I* aside, an exploration of the history of Article IX, Section 9's command reveals that the clause does, in fact, contain judicially discoverable and manageable standards. In the *Kromko* litigation, Arizona's intermediate appellate court noted a lack of such historical evidence in relation to Title XI, § 6,[154] suggesting it could have given meaning to the clause's "as nearly free as possible" language if provided with evidence as to what the clause's drafters intended.

A case from Hawaii offers useful parallels. In *Nelson v. Hawaiian Homes Commission*,[155] the Hawaii Supreme Court used historical evidence to find judicially manageable standards in the somewhat obscure language of a provision of the State's constitution that required the legislature to appropriate "sufficient sums" to the

149. *Id.* at 291.

150. Zivotofsky *ex rel.* Zivotofsky v. Clinton, 566 U.S. 189 (2012).

151. *Id.* at 196 (noting that the case "involves deciding whether the statute impermissibly intrudes upon Presidential powers under the Constitution").

152. *Id.* at 197.

153. *Id.* at 197–201.

154. Kromko v. Ariz. Bd. of Regents, 146 P.3d 1016, 1020 (Ariz. Ct. App. 2006) *aff'd in part, vacated in part*, 165 P.3d 168 (Ariz. 2007) ("[Article 11, Section 6 and Article 11, Section 10] provoked negligible attention during the adoption of the Arizona Constitution. There is no historical record of the intent of the framers beyond the words of the constitutional provisions.").

155. Nelson v. Hawaiian Homes Comm'n, 277 P.3d 279 (Haw. 2012).

Department of Hawaiian Home Lands ("DHHL").[156] There, the Hawaii Supreme Court rejected the State's contention that the clause lacked judicially manageable standards and was therefore non-justiciable, explaining that "the history of the times and the state of being when the constitutional provision was adopted"[157] provided those standards. The history of DHHL's role in Hawaii's constitution mirrors that of the University of North Carolina. The department, which was tasked with distributing over 200,000 acres of land that the federal government had granted the State specifically for use by descendants of native Hawaiians, historically struggled to fund its operations.[158] Hawaii's first constitution established the agency, but left funding of it to the discretion of the legislature.[159] The legislature barely funded the agency, leaving DHHL to lease some of the 200,000 acres it was granted in order to pay its operational costs.[160] Leasing those lands, of course, meant there was less land for the agency to disperse.[161]

The justices explored this history, seeking to understand the dilemma faced by the drafters of Hawaii's 1978 Constitution.[162] Their analysis includes numerous block quotes from debates of Hawaii's first constitution, documents pertaining to the administration of DHHL prior to the 1978 Constitution, and in some instances unabridged debates from the drafting of the 1978 Constitution.[163] The court began by acknowledging the relevance of "the history of the times and the state of being when the constitutional provision was adopted."[164] It then summarized the conundrum posed by DHHL's lack of funding, writing: "In short, in 1978, it was apparent that DHHL was swept up in a vicious cycle: . . . in order to raise money for administrative and operating expenses, the department had to lease the vast majority of its lands that otherwise would have been used for homestead lots."[165]

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156. *Id.* at 291–92.

157. *Id.* at 292 (quoting State v. Kahlbaun, 638 P.2d 309, 315 (Haw. 1981)).

158. *See infra* note 165 and accompanying text.

159. *Nelson*, 277 P.3d at 292.

160. *Id.* at 283–84.

161. *Id.* at 284.

162. *See id.* at 292 ("In order to give effect to the intention of the framers and the people adopting a constitutional provision, an examination of the debates, proceedings and committee reports is useful." (quoting *Kahlbaun*, 638 P.2d at 316)).

163. *See id.* at 292–97 (quoting in large portions Debates in the Committee of the Whole on Hawaiian Affairs Comm. Prop. No. 11, 1 Proceedings of the Constitutional Convention of Hawaii of 1978 ("1 Proceedings") (1980)).

164. *Id.* at 292 (quoting *Kahlbaun*, 638 P.2d at 315).

165. *Id.* at 294.

Next, the court analyzed the provision and its history in light of the specific problem the drafters were trying to solve.[166] Before analyzing the record of a debate between two delegates about the meaning of "sufficient," the court announced its understanding that "[t]he constitutional convention delegates focused on providing sufficient sums to DHHL *for its administrative and operating expenses in particular*."[167]

The court's understanding that the drafters were attempting to draft a constitution that resolved a specific problem—insufficient funding for DHHL, which caused the agency to lease the very land it was tasked with dispersing—enabled it to bypass much of the fatal indeterminacy of funding provisions in constitutions. Hawaii argued that the court could not possibly determine an amount of funding "sufficient" to operate DHHL without first determining "how many lots, loans, and rehabilitation projects . . . DHHL must provide."[168] But the court responded that "[i]t is clear that the constitutional delegates intended to require appropriation of 'sufficient sums' to relieve DHHL of the burden of general leasing its lands to generate administrative and operating funds, and to that end, they identified the minimum funding necessary for such expenses."[169] With its understanding of the drafters' intent in mandating a "sufficient sum," for "administrative and operational costs," the court needed only to mine the record of debate of the 1978 Constitution for what the drafters deemed "sufficient" to operate DHHL.[170] It proved easy to discover, as three delegates to the 1978 constitutional convention discussed how DHHL needed from "$1.3 to $1.6 million" to operate.[171]

The course charted by the Hawaii Supreme Court in *Nelson* can guide a court's effort to find judicially discoverable and manageable standards in Article IX, Section 9 of North Carolina's constitution. As the court in *Nelson* stated, constitutional provisions should be interpreted in light of "the history of the times and the state of being when the constitutional provision was adopted."[172] This historical inquiry should begin with the 1868 Constitution both because North

166. *Id.* at 295–97.
167. *Id.* at 295 (emphasis added).
168. *Id.* at 297.
169. *Id.*
170. *Id.* at 296.
171. *Id.*
172. *Id.* at 292 (quoting State v. Kahlbaun, 638 P.2d 309, 315 (Haw. 1981)).

Carolina's present constitution, ratified in 1971, was not intended to change the substantive rights of citizens or obligations of the government contained in the State's 1868 Constitution,[173] and because the language in Article IX, Section 9 first appeared in the 1868 Constitution.[174]

Like DHHL, the University of North Carolina was established, but not guaranteed funding, by its State's first constitution.[175] The drafters of the 1868 Constitution recognized that legislative discretion in funding the University hindered an attempt to educate the people of the State,[176] just as legislative discretion in Hawaii's first constitution inhibited the agency's efforts to disperse land to descendants of native Hawaiians.[177] Most importantly, drafters of the 1868 Constitution took steps to remove from the legislature discretion to properly fund—or, not fund—the University.[178] The *Nelson* court also looked to evidence of what amount the drafters would have understood as sufficient to operate the agency at the time of ratification.[179] Similarly, a court in North Carolina could look to what tuition prices the drafters thought were as free as practicable when they redrafted the State's constitution in 1971. With regard to Article IX, Section 9, historical evidence is an effective means of establishing judicially manageable standards.

III. TEXTUAL AND HISTORICAL ANALYSIS OF ARTICLE IX, SECTION 9

That Article IX, Section 9 is justiciable says nothing about the legal obligation the clause imposes on the state legislature. This Part aims to elucidate the substance of that obligation. Because much of the

173. *See supra* Part I.C (explaining that the drafters of the 1971 Constitution did not intend changing any of the substantive rights guaranteed by the previous constitution).

174. *See* N.C. CONST. of 1868, art. IX, § 6, *in* 5 THORPE, *supra* note 1, at 2817 ("The general assembly shall provide that the benefits of the university, as far as practicable, be extended to the youth of the State free of expense for tuition . . . .").

175. *See* N.C. CONST. of 1776, art. XLI, *in* 5 THORPE, *supra* note 1, at 2794 (declaring that the school will be established "with such salaries to the masters, paid by the public, as may enable them to instruct at low prices").

176. *See supra* note 42 and accompanying text (explaining that the University maintained low academic standards to attract more students).

177. *See supra* notes 158–61 and accompanying text.

178. *See supra* Part I.B (detailing how provisions of the 1868 Constitution limited the legislature's discretion to defund higher education).

179. *See* Nelson v. Hawaiian Homes Comm'n, 277 P.3d 279, 296 (Haw. 2012) (relying on evidence in the record regarding debate over the new constitution that DHHL required "$1.3 to $1.6 million" to operate).

clause's meaning can be gleaned from its text alone, this Part begins with a textual analysis of Article IX, Section 9. However, to fully glean the clause's meaning, the text alone is insufficient. Thus, this Part supplements textual analysis with an exploration of the intent of the drafters the clause's antecedent in 1868 and the understanding of the clause's meaning held by those who carried it over into the State's present constitution. This analysis is supported by historical evidence of the drafters' conception of the University and its affordability at the time they wrote the 1868 and 1971 Constitutions.

A. The Text of Article IX, Section 9

North Carolina courts begin any constitutional inquiry with an analysis of the plain meaning of the text.[180] Here, the plain meaning of Article IX, Section 9 illuminates whom the clause binds, which universities are included in the promise, what benefits are to be provided, and what expense is to be free, as far as practicable. Unfortunately, the text alone cannot give meaning to "as far as practicable." Article IX, Section 9 reads: "The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense."[181] The word "shall," makes the language imperative upon the General Assembly, as "the ordinary meaning of 'shall' is 'must.'"[182] That is, the command to ensure higher education remains accessible is plainly addressed to the General Assembly. Thus, it is the legislature who is ultimately responsible for ensuring tuition at the State's public universities remains affordable. Quite simply, the General Assembly cannot escape Article IX, Section 9's mandate.

A less obvious point is that the "benefits" of the University refer to the educational instruction it offers. The clause's predecessor in the 1868 Constitution was clearer on this point because it linked the "benefits" with "tuition," reading that the benefits must be offered, "as far as practicable, free of expense of *tuition*."[183] That linking is key. Because the benefits are to be offered without their expense, qualifying

180. Town of Boone v. State, 794 S.E.2d 710, 715 (N.C. 2016) ("We look to the plain meaning of the [constitutional] phrase to ascertain its intent.").

181. N.C. CONST. art. IX, § 9.

182. Cook v. FDA, 733 F.3d 1, 7 (D.C. Cir. 2013); *see also* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (noting that "the mandatory 'shall'" "normally creates an obligation impervious to judicial discretion" (citation omitted)).

183. N.C. CONST. of 1868, art. IX, § 6, *in* 5 THORPE, *supra* note 1, at 2817 (emphasis added).

expense with tuition also helps to define the benefits. Tuition is defined as "[t]he action or business of teaching a pupil or pupils."[184] Accordingly, the 1868 Constitution makes plain that it is the educational instruction that the General Assembly is to subsidize.

The present incarnation omits the word "tuition"[185]—an omission the drafters neglected to explain.[186] However, because the drafters of the 1971 Constitution emphasized their intent not to substantively change the obligations of North Carolina's constitution,[187] the most logical interpretation of the present clause is that the "benefits" it refers to remain educational instruction. By extension, the expense that must be free, as far as practicable, is the expense of instruction. Or, as the 1868 Constitution described it, "tuition."[188] That revelation is responsive to those who argue that the cost of college has risen because of an increase in fees associated with room, board, and facilities like student centers or gyms. Those commentators have a point; the addition of new—and the increase of existing—fees is, arguably, responsible for at least some of the increase in the real cost of attendance.[189] That proposition is contested; others suggest that cost of attendance has risen as a result of tuition increases sparked by a reduction in state support for public universities.[190] Regardless, fees cannot explain why *tuition* has risen, as the two are separate expenses.[191]

The benefits must come from "[t]he University of North Carolina and other public institutions of higher education."[192] The latter half of the phrase is redundant because, importantly, all sixteen of the State's public universities constitute The University of North Carolina.[193] The

184. *Tuition*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

185. N.C. CONST. art. IX, § 9.

186. CONSTITUTION STUDY COMMISSION, *supra* note 39, at 86–88 (discussing the provision without explaining the omission).

187. *See supra* note 88 and accompanying text.

188. N.C. CONST. of 1868, art. IX, § 6, *in* 5 THORPE, *supra* note 1, at 2817.

189. *See, e.g.*, Jeffrey J. Selingo, *The Hidden Cost of College: Rising Student Fees*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/08/24/the-hidden-cost-of-college-rising-student-fees/?noredirect=on&utm_term=.af015277a6dc [https://perma.cc/SAL8-8VLM] (explaining that increased student fees and increased costs in room and board are responsible for the increased costs of higher education).

190. Webber, *supra* note 27.

191. *See* UNIV. OF N.C. AT CHAPEL HILL, TUITION & FEES ACADEMIC YEAR 2017-2018, *supra* note 24 (listing "tuition" and "fees" separately and combining the two to produce a "total").

192. N.C. CONST. art. IX, § 9.

193. *220 Years of History*, *supra* note 21.

"other public institutions of higher education" language is the product of a historical anachronism. At the time of the 1971 Constitution's drafting, the State's public universities operated separately.[194] The drafters were merely attempting to recognize that, since the drafting of the 1868 Constitution, the State had established additional public universities.[195] A year after the adoption of the present constitution, the legislature placed all of the public universities within one "University of North Carolina,"[196] rendering language about other public universities redundant.

"[P]eople of the state," refers to the citizens of North Carolina. For this text of the clause alone, extensive statutory language exists. The legislature requires one not only to have been domiciled in the State for twelve or more months, but also to have been domiciled "for purposes of maintaining a bona fide domicile rather than of maintaining a mere temporary residence or abode incident to enrollment in an institution of higher education."[197]

Finally, "as far as practicable." The definition of "practicable"—"able to be done or put into practice successfully"[198]—is far from clarifying. And looking elsewhere in the constitution's text is hardly helpful. The phrase does appear one other place, in Article III, Section 11 where the legislature is directed to, no later than 1975, have grouped "all administrative departments, agencies, and offices of the State," into "principal administrative departments so as to group them *as far as practicable* according to major purposes."[199] The drafters made no attempt to explain the meaning of this clause in their commentary.[200]

Nor is the text of the clause's historical antecedent in the 1868 Constitution illuminating. While the phrase "as far as practicable," and similar iterations like "as soon as practicable," appear multiple times

194. *See id.* ("In 1971 legislation was passed bringing into the University of North Carolina the state's ten remaining public senior institutions, each of which had until then been legally separate . . . .").

195. *See supra* note 90 and accompanying text.

196. The North Carolina Constitution was presented to voters and approved in 1970. Orth, *supra* note 34, at 1760. The universities were combined into one system in 1971. *220 Years of History*, *supra* note 21.

197. N.C. GEN. STAT. § 116-143.1(c) (2014).

198. *Practicable*, OXFORD ENGLISH DICTIONARY (2d ed.1989).

199. N.C. CONST. art. III, § 11 (emphasis added).

200. *See* CONSTITUTION STUDY COMMISSION, *supra* note 39, at 77–78 (omitting discussion of the clause in the discussion of Article III).

in the record of debates at the constitutional convention, the drafters declined to explain its meaning.[201]

While there is little that can be gleaned about the clause's meaning from its use in those instances, this analysis does reveal that the language was not understood to detract from the forcefulness of the command to the legislature. For example, the convention passed a resolution calling for North Carolina to be reunited with the federal government—the paramount concern for Reconstructionist governments in the South—"at the earliest day practicable."[202] Elsewhere, the convention passed a resolution calling for a committee report on the establishment of a government in North Carolina to be submitted "as soon as practicable."[203] The entire convention lasted only from January 14, 1868 to March 17, 1868.[204] Thus, "as soon as practicable" was not understood to allow for some delay. Yet the phrase did not just relate to temporal urgency. In adopting the rules of procedure for the convention, it was resolved that the "Rules of Order of the Convention of this State for 1865–66 . . . be adopted . . . so far as practicable."[205] There is no subsequent mention of the substitution of another code of procedure because those rules of orders were impracticable.

Language similar to "as far as practicable" was even used in relation to higher education. Article IX, Section 16 requires that "[a]s soon as practicable after the adoption of this constitution the general assembly shall establish and maintain, in connection with the university, a department of agriculture, of mechanics, of mining and of normal instruction."[206] Here, the General Assembly did not view the "as soon as practicable" language as detracting from the mandate—it conditioned reopening the University in 1875 on developing a program in agriculture and mechanics.[207]

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201. *See generally* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA (1868) [hereinafter JOURNAL OF THE CONSTITUTIONAL CONVENTION] (demonstrating that the phrases came up in multiple iterations during the debates).

202. *Id.* at 32–33.

203. *Id.* at 30–31.

204. *Id.* at 4, 481.

205. *Id.* at 12.

206. N.C. CONST. of 1868, art. IX, § 16, *in* 5 THORPE, *supra* note 1, at 2818.

207. As William D. Snider's historical account of the University of North Carolina explains:

> After prolonged study the trustees saw their only hope in persuading the General Assembly to revalidate the agricultural and mechanical college Land Scrip Fund, obtained by Governor Swain from the federal government in 1867 under the Morrill Act. [Due to the Board of Trustees having lost that money in a bond scandal, t]he state remained responsible to the federal government for restoring the principal, but in a

While textual analysis of "as far as practicable" illuminates the drafters' intent to require the founders to provide adequate funding for higher education, we must look elsewhere to discover what the founders deemed adequate.

B. Original Meaning

The same historical evidence that provided judicially manageable standards also lends support to the conclusion that a tuition of roughly $1450 is as free as practicable. Historical evidence is often used to give meaning to constitutional text.[208] This is particularly true where the intent of the drafters can clarify a clause's meaning.[209] For example, in *Heller v. District of Columbia*,[210] the Supreme Court employed historical context to give meaning to the grammatical ambiguity in the text of the Second Amendment.[211] And, in *Nelson*, the Hawaii Supreme Court not only relied on historical evidence to find a challenge to the adequacy of funding of the Hawaiian Homes Commission justiciable, but also to arrive at a precise dollar amount the legislature was required to appropriate.[212]

When expounding upon the meaning of its constitution, North Carolina courts must "interpret the organic law in accordance with the intent of its framers and the citizens who adopted it."[213] Because of the similar constitutional histories of DHHL and the University of North Carolina,[214] to resolve the meaning of "as far as practicable," a court examining the North Carolina Constitution should, like the *Nelson*

> closely contested fight the General Assembly authorized the state to pay an annual sum of $7500 to the university as interest on the money, *provided the university offered agricultural and mechanical instruction*.

SNIDER, *supra* note 12, at 89–90 (emphasis added).

208. Emil A. Kleinhaus, Note, *History as Precedent: The Post-Originalist Problem in Constitutional Law*, 110 YALE L.J. 121, 121 (2000).

209. *See id.* at 122 ("In order to elucidate the original meaning of the vague terms that pervade the Constitution, Justices often either delve into primary sources or rely on historians to explain those sources.").

210. Heller v. District of Columbia, 554 U.S. 570 (2008).

211. *See* Kerr v. Hickenlooper, 744 F.3d 1156, 1178 (10th Cir. 2014) ("There is no evidence that the Court in *Heller* even considered the possibility that the [historical] sources available to it could be insufficient for developing judicially discoverable and manageable standards."), *vacated and remanded on other grounds*, 135 S. Ct. 2927 (2015).

212. Nelson v. Hawaiian Homes Comm'n, 277 P.3d 279, 297 (Haw. 2012).

213. Sneed v. Greensboro City Bd. of Educ., 264 S.E.2d 106, 110 (N.C. 1980).

214. *See supra* Part II.B.2 (explaining the parallel histories of DHHL and UNC. Both were established in their state's first constitution but failed to receive adequate funding in the years following the ratification of those constitutions. Only after subsequent constitutions required the legislature to provide financial support did both flourish financially).

court, look to the history of the problem that the drafters were attempting to resolve. In *Nelson*, the court understood that the drafters were attempting to prevent the legislature from severely underfunding DHHL so as to cause the agency to have to lease some of its land to cover its operating costs.[215] This understanding informed the court's examination of the historical record as a standard for "sufficient sum," namely, whatever the operating costs were for DHHL.[216] Similarly, when the drafters of North Carolina's 1868 Constitution wrote that higher education should be as free as practicable, they were seeking to alleviate the crippling financial burden the University was saddled with after the legislature took from it the proceeds of the State's escheats.[217] Thus, a court need only look for evidence of what the drafters of the 1868 Constitution thought would be necessary to ensure the legislature could not underfund the university.

As in *Nelson*, there is little difficulty in finding that evidence in the historical record surrounding the Education section of North Carolina's constitution. While the *Nelson* court had to mine convention debates to find a standard, the drafters of North Carolina's 1868 Constitution put the standards in its text. Because the drafters chose to remove from the legislature's powers even the ability to reclaim the escheats by granting the escheats to the University in the constitution,[218] it seems safe to assume that one source of funding they thought necessary to ensure the University's fiscal health was the very escheats the legislature had first appropriated to the University in 1789 before attempting to retake them. So essential to the University were escheats, the drafters believed, that they reversed the legislature's actions and preserved the reversal in Article IX, Section 15.[219]

Moreover, in Article IX, Section 16, the drafters required the legislature to work with the University to provide "agricultural and

215. *Nelson*, 277 P.3d at 294–95.

216. *Id.* at 297.

217. *See supra* Part I.B (explaining how the drafters of the 1868 Constitution imposed limits on the legislature's discretion with regard to funding as a response to the years of underfunding).

218. N.C. CONST. of 1868, art. IX, § 15, *in* 5 THORPE, *supra* note 1, at 2818.

219. In 1800, the legislature passed a measure removing escheats as a source of funding for the University, but the North Carolina Supreme Court invalidated that law. *See* CONSTITUTION STUDY COMMISSION, *supra* note 39, at 138 (noting that the North Carolina Supreme Court invalidated the legislature's attempt to repeal the escheats statute of 1789 "on the ground that it constituted a taking of vested property other than by the law of the land, in violation of the constitution"). The 1868 Constitution required escheats to be awarded to the University, denying the legislature the opportunity to take back the escheats by statute as it tried to do in 1800. N.C. CONST. of 1868, art. IX, § 15, *in* 5 THORPE, *supra* note 1, at 2818.

mechanical education"[220]—an implicit command that the legislature work to ensure eligibility for Morrill Act land grants.[221] Thus, funds from the proceeds of lands granted to the State through the Morrill Act were also thought to be required to make tuition as free as possible. And, in Section 5, the drafters declared that the University was to be "held to an inseparable connection with the free public-school system of the State,"[222] evincing a commitment by the State to ensure that higher education was similarly, if not precisely, as affordable as the free K–12 system. Thus, "as free as practicable" encompassed efforts to ensure the University's accessibility approached that of the free public-school system.

Unlike in *Nelson*, the recorded debates of the drafting of North Carolina's 1868 Constitution do not specify an amount the drafters thought was appropriate for tuition.[223] However, the actions taken by the drafters led to a substantial decrease in tuition, down to $60[224] from $80[225] when the University reopened in 1875. Tuition remained at $60—with brief exception in the 1880s—until 1924.[226]

Had no developments in North Carolina's constitutional history occurred since the 1868 Constitution, this evidence might not be sufficient to find judicially discoverable standards. The price of tuition in response to the 1868 Constitution is persuasive evidence of the price the drafters envisioned, but not nearly as dispositive as drafters specifying a requisite amount in debates, as was the case in *Nelson*. But the citizens of North Carolina reaffirmed that commitment by ratifying the constitution of 1971, which did not "impair any present right of the individual citizen" nor "bring about any fundamental change in the power of state . . . government or the distribution of that power."[227] At the time the constitution was being redrafted and ratified, tuition prices

220. *Id.* art. IX, § 16, *in* 5 THORPE, *supra* note 1, at 2818.

221. *See supra* notes 75–77 and accompanying text.

222. N.C. CONST. of 1868, art. IX, § 5, *in* 5 THORPE, *supra* note 1, at 2817.

223. *Compare* Nelson v. Hawaiian Homes Comm'n, 277 P.3d 279, 296 (Haw. 2012) (quoting a delegate to Hawaii's constitutional convention as saying DHHL needed "$1.3 to $1.6 million" to operate), *with* JOURNAL OF THE CONSTITUTIONAL CONVENTION, *supra* note 201 (lacking a reference to dollar amount that would suffice a tuition that is free, as far as practicable).

224. UNIV. OF N.C., CATALOGUE OF THE TRUSTEES, FACULTY AND STUDENTS OF THE UNIV. OF N.C. 1869-'70, at 15 (1870).

225. UNIV. OF N.C., CATALOGUE OF THE TRUSTEES, FACULTY AND STUDENTS OF THE UNIV. OF N.C., 1875-'76, at 13 (1876).

226. *See* UNIV. OF N.C., THE CATALOGUE 1923-24, at 61 (1924) (showing a tuition in 1924 of $20 per quarter, for a total of $80 per year).

227. CONSTITUTION STUDY COMMISSION, *supra* note 39, at 10.

were, adjusted for inflation, remarkably similar to prices when the University first reopened under the 1868 Constitution. Moreover, in the century that had passed since North Carolina ratified the 1868 Constitution, tuition prices had, adjusted for inflation, remained remarkably stable.[228]

Article IX, Section 9 in the 1971 Constitution should be viewed as constitutionalizing this stable tuition price—around $1450 in 2017 dollars—for three reasons.[229]

First, though the record is sparse, it is likely that the drafters of the 1971 Constitution were aware of the tuition prices of the day. It is evident that they were generally aware of the state of public higher education in North Carolina, as they made technical corrections to the wording of some provisions, including to Article IX, Section 9, to account for changes that had occurred since the 1868 Constitution.[230] Many of the drafters attended the University,[231] so they must have been aware of the low cost of tuition, at least when they attended. North Carolina courts have recognized that some background knowledge may be imputed to lawmakers,[232] and should impute to the drafters a general understanding of the state of higher education.

Second, the drafters constitutionalized other contemporary practices in higher education. Their treatment of escheats is illustrative. One of the few changes the drafters of the 1971 Constitution did make to the Education section of the constitution was to the escheats provision. Instead of committing the escheats to the University to use for any purpose, as the 1868 Constitution had done, the drafters

228. *See supra* notes 4–5 and accompanying text.

229. An amount of $60 in 1875 would be worth $1,337.02 in 2017, adjusted for inflation as calculated and discussed in *supra* note 4.

230. *See* CONSTITUTION STUDY COMMISSION, *supra* note 39, at 88 ("Proposed Sec. 8 extends present Sec. 6 (which deals only with the University [of North Carolina at Chapel Hill]) to take account of the duty of the State to maintain institutions of higher education in addition to the University of North Carolina [at Chapel Hill].").

231. For just a couple of examples, Chairman of the Drafting Committee Emery B. Denny attended UNC Law School. N.C. SUP. CT. HIST. SOC., EMERY B. DENNY, https://ncschs.net/justices-portraits/denny-emery-b [https://perma.cc/R36M-8A6L] (last visited Sept. 1, 2018). Vice Chairman Archie Davis attended UNC Chapel Hill. *See* Scott Huler, *The Man and Plan Behind Research Triangle Park*, OUR STATE (Aug. 25, 2014), https://www.ourstate.com/research-triangle-park [https://perma.cc/J6ZR-PGGY].

232. *See* Kornegay Family Farms LLC v. Cross Creek Seed, Inc., 803 S.E.2d 377, 382 (N.C. 2017) ("[T]he legislature is always presumed to act with full knowledge of prior and existing law . . . ." (quoting Polaroid Corp. v. Offerman, 507 S.E.2d 284, 294 (N.C. 1998))).

required that proceeds from the interest of the State's escheats be used to provide scholarships for low-income students in the State.[233]

In their notes, drafters explain that this change was actually just a preservation of the status quo.[234] As explained above, in 1946 UNC-Chapel Hill felt its state funding was sufficient to allow the University to cease drawing from the principle of the escheats.[235] Moreover, because of generous state funding through regular appropriations, the Board of Trustees no longer felt the need to use escheats to cover operational costs and instead began using escheats exclusively to fund scholarships for low-income students.[236]

The drafters' treatment of escheats only makes sense if one accepts that they viewed the tuition prices of the day as satisfying Article IX, Section 9's language. In 1868, granting the University escheats to use as a means of covering operational costs was the primary way that the drafters ensured that the General Assembly fulfilled its obligation to ensure that higher education was "as far as practicable, free of expense."[237] If the drafters of the 1971 Constitution did not believe that the State was meeting the obligation to ensure that higher education remained affordable by funding higher education through other avenues, then it would make little sense for them to have precluded the universities from using the escheats to cover operational costs, keeping tuition prices low for everyone. Viewed this way, North Carolina's century-long experience with low and stable tuition prices is analogous to, if not a one-for-one substitution for, the record of DHHL's operation costs included in debates during the drafting of Hawaii's 1978 Constitution. Just as the *Nelson* court identified those records as a judicially discoverable standard,[238] a court in North Carolina could identify the low and stable tuition prices with which the drafters of the 1971 Constitution were familiar as a judicially discoverable standard contained within Article IX, Section 9.

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233. *See* N.C. CONST. art. IX, § 10(2) ("All property . . . from escheats, unclaimed dividends, or distributive shares of the estate of deceased persons shall be used to aid worthy and needy students who are residents of the State and are enrolled in public institutions of higher education in this State.").

234. CONSTITUTION STUDY COMMISSION, *supra* note 39, at 138–39 (noting that Amendment No. 10 to the 1971 constitution preserves the practice of distributing escheats among "needy North Carolina residents" with modifications to accommodate the expanding university system).

235. *Id.*

236. *Id.*

237. *See supra* Part I.B.

238. Nelson v. Hawaiian Homes Comm'n, 277 P.3d 279, 297 (Haw. 2012).

IV. POSSIBLE REMEDIES REQUIRED BY AN ARTICLE IX, SECTION 9 CHALLENGE

While the focus of this Note was to discern the meaning of Article IX, Section 9, the clause's meaning is of little value if the rights it grants cannot be vindicated. There exist three possible remedies that courts may grant in the event of a suit by students. The first, judicial imposition of roughly $1450 as the cost of tuition at state universities, is the one that most logically follows from the above analysis, but may prove to be most problematic. The second remedy, a remand to the General Assembly to appropriate sufficient funds, is one that most states' courts—including those of North Carolina—have been most comfortable imposing in education funding cases, but which often results in decades of litigation producing few results. The third and final remedy would involve the court requiring the legislature to consider certain relevant data about the cost of higher education, drawing inspiration from the Wyoming Supreme Court's response to the failures of the remand described above.

A. Inflation-Adjusted Pricing

Article IX, Section 9's command that higher education be "as far as practical, free of expense,"[239] represents the constitutionalization of a particular price for tuition at the State's universities, namely around $1450 per year when adjusted for inflation.[240] The most logical remedy, therefore, would be for a court to mandate that the legislature set the price of tuition at $1450 and allow it to be increased only in response to inflation.

Mechanically, a judicial mandate of educational funding would not be difficult to accomplish. While the legislature has generally delegated responsibility for setting the cost of tuition at the State's universities to the UNC Board of Governors,[241] it has set tuition prices at some of the State's universities by statute.[242] Nothing would prevent the legislature from amending the statutes to require tuition be set at $1450 if so mandated by a court. However, because this remedy does not necessarily require the legislature to actually provide funding necessary to lower tuition, it could do little to lower the cost of

239. N.C. CONST. art. IX, § 9.

240. *See supra* note 5 and accompanying text.

241. N.C. GEN. STAT. § 116-143(a) (2014).

242. *See id.* § 116-143.11(a) (setting tuition at Elizabeth City State University, the University of North Carolina at Pembroke, and Western Carolina University at $500 per semester).

attendance at the State's public universities. The legislature could pass a statute setting tuition at $1450 but appropriate no additional funds, leaving universities with a significant revenue gap.

Most likely, making up the gap becomes an exercise in relabeling costs. In addition to tuition, which is addressed by the State's constitution, colleges charge fees, which were not mentioned by Article IX, Section 9's antecedent in the 1868 Constitution.[243] These fees relate to everything from room, board, and library usage to recreational facilities and athletics.[244] Fees could easily be increased to offset the lost revenue. In fact, some argue that the somewhat recent explosion in fees charged by colleges is an attempt to do just that.[245]

This would be antithetical to the purpose of Article IX, Section 9 and the intent of the drafters of the clause's historical antecedent in the Constitution of 1868. As explained above, the clause was meant to ensure that the expenses associated with educational instruction were subsidized by the State.[246] The State cannot satisfy its constitutional mandate merely by relabeling the costs it assigns to students.

When the drafters of North Carolina's 1868 Constitution first declared that the State must offer higher education as free as practicable, they took steps to ensure that the General Assembly kept tuition low by robustly funding the University.[247] The same must be true of any court's attempt to ensure that the legislature is satisfying the constitutional mandate today.

A court could itself determine an acceptable amount and order the General Assembly to pay it, but that outcome is almost impossible to imagine. North Carolina's Supreme Court has explained that "appellate courts have tempered language about broad inherent power endemic to the status of the judiciary as a co-equal branch of government with self-restraint regarding the reach into the public fisc."[248] Other courts, faced with a similar question in regard to the

243. N.C. CONST. of 1868, art. IX, § 6, *in* 5 THORPE, *supra* note 1, at 2817.

244. *See* STUDENT FEES, UNIV. OF N.C. AT CHAPEL HILL, https://cashier.unc.edu/tuition-fees/student-fees [https://perma.cc/YFM3-DVM4] (last visited Nov. 23, 2017) (listing, among others, fees for athletics, student organizations, the student endowed library fund, and campus recreation).

245. Selingo, *supra* note 189.

246. *See supra* Part I.B.

247. *Id.*

248. *In re* Alamance Cty. Court Facilities, 405 S.E.2d 125, 132 (N.C. 1991).

adequacy of funding for K–12 education have refused to order a specific dollar amount in deference to separation of powers.[249]

B. "Remand" to the General Assembly

Another potential remedy is for a court to direct the General Assembly to pass new legislation regarding higher education funding after considering the meaning given to Article IX, Section 9 by the court. This remedy is common in challenges to the adequacy of K–12 education funding under a state constitution.[250] Unfortunately, most often this remedy results in years' worth of litigation, as cases ping-pong between the legislature, trial courts, and the state supreme court.[251]

North Carolina's *Leandro v. State*, a challenge to the adequacy of the State's funding of public K–12 education that first began in 1996,[252] is emblematic of this approach and its flaws. In that case, students from poor, rural school districts in the northeastern corner of the State alleged that funding for K–12 education was insufficient to "meet the minimal standard for a constitutionally adequate education."[253] Specifically, plaintiffs alleged that, due to a lack of funding, they had "inadequate school facilities"; "sparse and outdated book collections" and technology; difficulty "compet[ing] for high quality teachers"; unwieldy class sizes; and low test scores.[254] The plaintiffs argued that these conditions showed that the State was failing its constitutional

249. *See* Gannon v. State, 402 P.3d 513, 552 (Kan. 2017) ("Consistent with our practice in this case, we decline to provide a specific minimal amount to reach constitutional adequacy.").

250. *See, e.g.*, *id.* at 553 (declining "to provide a specific minimal amount [of funding] to reach constitutional adequacy" and directing the legislature to conduct further evaluation); Hoke Cty. Bd. of Educ. v. State, 599 S.E.2d 365, 393 (N.C. 2004) (noting that "when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied" and, if the government fails to do so, "impos[e] a specific remedy and instruct[]the recalcitrant actors to implement it"); Abbeville Cty. Sch. Dist. v. State, 780 S.E.2d 609, 610 (S.C. 2015) (mem.) (ordering the legislature to "[w]ithin one week of the conclusion of the 2016 legislative session . . . submit a written summary to the Court detailing their efforts to implement a constitutionally compliant education system, including all proposed, pending, or enacted legislation").

251. *See, e.g.*, *Gannon*, 402 P.3d at 517–18 (noting that the opinion was the fifth in a series of school finance decisions that involved "[a] series of other panel decisions, legislative enactments, and four [Kansas Supreme Court] decisions"); Hoke Cty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *1 (N.C. Super. Ct. Oct. 12, 2000), *aff'd in part as modified and rev'd in part*, 358 N.C. 605 (N.C. 2004) (noting that the case had originated six years prior in 1994); *Abbeville Cty. Sch. Dist.*, 780 S.E.2d at 609–10 (listing the procedural history of the case involving state governor and legislature).

252. Leandro v. State, 488 S.E.2d 249, 251–52 (N.C. 1997).

253. *Id.* at 252.

254. *Id.*

duty to provide "for a general and uniform system of free public schools . . . wherein equal opportunities shall be provided for all students."[255] The court agreed, holding that the State's constitution required the General Assembly to provide students a "sound basic education," which the court defined by listing the skills such an education would impart to students.[256]

Though the North Carolina Supreme Court ultimately remanded the case to the trial court, it stated its belief that the legislature, with some guidance, was best positioned to remedy the failure.[257] In that vein, the court wrote "the legislative process provides a better forum than the courts for discussing and determining what educational programs and resources are most likely to ensure that each child of the state receives a sound basic education."[258] The trial court took the North Carolina Supreme Court's hint, directing the legislature to craft legislation remedying any deficiencies it identified and retaining jurisdiction of the case until it was satisfied by the legislature's response.[259] For example, after finding that students in low-income areas were entering kindergarten less prepared than their counterparts in wealthier school districts, the court directed the legislature to design and fund a system of early childhood education for certain low-income counties.[260]

The problem with this approach is that it inevitably results in remarkably lengthy litigation. In fact, as recently as 2013, more than seventeen years after the initial suit was filed in *Leandro*, the North Carolina Supreme Court was hearing arguments about the sufficiency of the early childhood education system the legislature had created after the trial court's directive in 2000.[261] And while North Carolina's litigation led to some concrete results, including the creation of a statewide early childhood education system,[262] other states have

255. *Id.* at 254 (quoting N.C. CONST. art IX, § 2(1)).

256. *Id.* at 255.

257. *Id.* at 259.

258. *Id.*

259. Hoke Cty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *11, *113 (N.C. Super. Ct. Oct. 12, 2000), *aff'd in part as modified and rev'd in part*, 599 S.E.2d 365 (N.C. 2004).

260. *Id.* at *112–14.

261. *See* Brief for Appellee at 2–4, Hoke County Bd. of Educ. v. State, 752 S.E.2d 501 (N.C. 2013) (No. 5PA12-2) (summarizing the procedural history and demonstrating that the litigation remains ongoing).

262. *See* Christina Samuels, *N.C. Supreme Court to Decide on Pre-K Funding*, EDUC. WEEK (Oct. 29, 2013), https://www.edweek.org/ew/articles/2013/10/30/10preschool.h33.html [https://perma.cc/48YS-222D] (noting the 2001 launching of More At Four, a "state-funded preschool

experienced similarly lengthy litigation without the results. Since the case's filing in 2010, the Kansas Supreme Court has issued six opinions in *Gannon v. State*,[263] a state constitutional challenge to the legislature's funding of K–12 education, with its most recent opinions being handed down in October 2017 and June 2018.[264] Each time, it has found the legislature to have failed to satisfy its commands.[265] As recently as 2015, South Carolina was still holding proceedings related to *Abbeville County School District v. State*,[266] a 1999 challenge to the adequacy of funding for K–12 education under the state constitution.[267]

Regardless of whether the litigation has been effective, it appears state courts nationwide are growing weary.[268] In an expansive survey of litigation challenging the adequacy of funding for K–12 education, Julia Simon-Kerr and Robynn Sturm list examples from, among other states, South Carolina, Massachusetts, and Texas where courts that once eagerly engaged with adequacy litigation now appear to be

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program" that "became one of the best-regarded state-funded preschool programs in the country").

263. Gannon v. State, 402 P.3d 513 (Kan. 2017).

264. *See id.* at 517 ("This is the fifth school finance decision involving these parties and Article 6 of the Kansas Constitution, which imposes a duty on the legislature to 'make suitable provision for finance of the educational interests of the state.'" (citation omitted)); Gannon v. State, 420 P.3d 477, 480 (Kan. 2018) (noting that *Gannon* stayed the issuance of the mandate to "g[i]ve the State ample time to . . . [bring] the K–12 public education financing system into constitutional compliance").

265. *Gannon*, 402 P.3d at 521–23.

266. Abbeville Cty. Sch. Dist. v. State, 780 S.E.2d 609 (S.C. 2015).

267. *See id.* at 610–11 (reviewing the legislature's plan for complying with the South Carolina Constitution's education mandate and retaining jurisdiction over the matter to review that plan).

268. Julia A. Simon-Kerr and Robynn K. Sturm aptly summarize this trend, explaining:

> A close reading of recent opinions reveals three primary ways in which the changing education landscape has heightened separation of powers concerns for courts adjudicating second-generation cases. First, courts are troubled by the increasingly intrusive remedial role seemingly demanded in order to improve school systems that have already undergone significant reforms. This failure to perceive an acceptable remedial role can lead courts to abdicate their function entirely in adequacy adjudication, essentially, if not overtly, reversing any positive precedent. Second, signs of renewed political engagement and progress (however minimal) may cause courts to question the very legitimacy of judicial intervention. Over the years, a powerful strain of argument has developed maintaining that the judiciary should only engage in structural reform litigation in the face of egregious political neglect. In courts that subscribe to this view, plaintiffs will struggle to convince judges that anything more than perfunctory oversight on their part is constitutionally permitted, let alone necessary, when the legislature is also actively involved. Finally, improved schools further blur the already uncertain line delineating breach. Where ambiguous constitutional standards and steadily improving conditions pose tricky line-drawing problems, courts are much more likely to defer to the judgment of the legislature.

Simon-Kerr & Sturm, *supra* note 115, at 97–98.

seeking an exit.[269] Because these remedies have resulted in prolonged litigation, Simon-Kerr and Sturm have advocated abandoning them altogether.[270]

C. Procedural Remedies

A third potential remedy would have the court act not through directives to the legislature, but rather as a backstop to it. This method would ensure compliance with the state constitution by examining whether the legislature undertook constitutionally relevant considerations in appropriating funds to the university system. The Supreme Court has employed this technique in determining whether Congress abrogated state sovereign immunity. For example, in *Board of Trustees of the University of Alabama v. Garrett*,[271] the Supreme Court held that Congress had improperly abrogated state sovereign immunity in Title I of the Americans with Disabilities Act because, though it made findings that "historically, society has tended to isolate and segregate individuals with disabilities,"[272] it failed to make the necessary finding that state action historically caused the isolation and segregation.[273]

The Wyoming Supreme Court employed a similar technique after becoming frustrated with the ineffectiveness of its initial directive to the State legislature in a K–12 funding case.[274] Rather than issue another directive its elected representatives might ignore, the court opted to search the record of debate of school funding legislation for evidence that elected officials had considered relevant factors.[275]

The Wyoming court's approach to adjudicating the adequacy of funding for at-risk students is illustrative. Previously, the court had ruled that the State's funding for at-risk students was insufficient and "not based upon actual costs of the necessary programs" and directed

269. *Id.* at 121 (recommending that education advocates challenging the adequacy of funding "must find a way to recharacterize both the right and the remedy so that they cannot be boiled down to a demand for increased funding").

270. *Id.* at 121–23. The authors recommend moving beyond remedies involving money, highlighting a South Carolina case where the trial judge ordered the creation of a statewide preschool program and a Wyoming case where the court looked at the factors considered by the court in developing a funding formula for schools with large "at-risk" student populations. *Id.*

271. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

272. 42 U.S.C. § 12101(a)(2) (2012).

273. *Garrett*, 531 U.S. at 368–69.

274. Simon-Kerr & Sturm, *supra* note 115, at 122 n.184.

275. *Id.*

the State to provide more funds.[276] Yet the issue returned to Wyoming's highest court when a suit was filed alleging that the legislature had failed to heed the court's directive. The justices declined to again attempt to determine if the funding was sufficient.[277] Instead, they asked if, since the court's last decision, the State had improved its process for determining funding for at-risk students.[278]

First, the court described the State's old method, which used participation in free or reduced cost lunch programs as a proxy for at-risk status and thus based funding off of that number alone.[279] Next, the court described how the State had engaged a consultant to craft a better mechanism for determining at-risk status.[280] Under the new method, the State looked not at participation in the free or reduced lunch program, but in eligibility for it, recognizing that some parents might elect not to have their children participate, but that the parent's election not to participate did not preclude the student from being "at-risk."[281] Moreover, the State considered additional factors that might make one "at-risk," like English Language Proficiency and whether one has frequently changed schools.[282] This inquiry satisfied the court, which deemed the State's plan constitutional, writing "[t]here is little question that the state exerted significant effort to develop a fair and accurate method of estimating the additional cost of addressing at-risk students."[283]

This framework tracks the least with the intent of the drafters of Article IX, Section 9 and its historical antecedent. As explained above, the drafters of the 1971 Constitution had in mind a particular price they had identified as satisfying Article IX, Section 9's mandate that higher education in the State be as free as practicable.[284] By contrast, this remedy would merely ask if the legislature had considered factors relevant to affordability in appropriating funds.

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276. Campbell Cty. Sch. Dist. v. State, 181 P.3d 43, 57–58 (Wyo. 2008).

277. *See id.* at 59 (affirming lower court's finding that the legislature responded property to the court's directive even though its funding calculation does not capture "all of the possible at-risk students or all of the possible costs necessary to address their particular problems" because "[t]here are too many variables involved in the at-risk issue to expect precision in estimating the costs of educating these students").

278. *Id.* at 58–59.

279. *Id.* at 58.

280. *Id.*

281. *Id.* at 58–59.

282. *Id.*

283. *Id.* at 59.

284. *See supra* notes 229–38 and accompanying text.

It also raises separation of powers issues. The North Carolina Supreme Court has explained that the legislature is better equipped to make decisions regarding education funding because its members are "popularly elected," and "it can hear and consider the views of the general public as well as educational experts."[285] At the same time, "the judicial branch has its duty under the North Carolina Constitution" and must "issue . . . relief as needed to correct [a constitutional] wrong."[286]

Still, this remedy has its advantages. For one thing, it is conscious of the complexity of funding education in the twenty-first century. Those complexities are extensive in higher education, even if one focuses only on tuition. Some courses of study are more expensive than others.[287] The market for faculty at doctoral or master's degree-granting universities may involve higher salaries.[288] By policing the process of appropriating funds to ensure affordability is considered, a court need not worry that the tuition price it mandates is unworkably low at some universities, while a windfall for others. This was not a problem faced by the drafters of the 1868 Constitution, who knew of only one state-supported university.

Moreover, speaking realistically, North Carolina's legislature could benefit from outside policing of how it appropriates funds. The legislature is part-time.[289] Legislators are paid around $14,000 in base pay a year, meaning most are occupied by another full-time job.[290] It is not difficult to imagine that North Carolina's legislators lack sufficient indicia of affordability in a way analogous to how the Wyoming Legislature lacked sufficient indicia of what constituted an "at-risk" student.

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285. Leandro v. State, 488 S.E.2d 249, 259 (N.C. 1997).

286. *Id.* at 261.

287. Scott Jaschik, *Study Finds Variation in Costs by Different Majors*, INSIDE HIGHER ED (Jan. 9, 2017), https://www.insidehighered.com/quicktakes/2017/01/09/study-finds-variation-costs-different-majors [https://perma.cc/J42B-97GX].

288. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, VISUALIZING CHANGE: THE ANNUAL REPORT ON THE ECONOMIC STATUS OF THE PROFESSION, 2016-17, at 14 (2017), https://www.aaup.org/file/FCS_2016-17.pdf [https://perma.cc/M66H-8WFV] (reporting average salaries for professors at doctorate granting institutions in 2016-17 was $132,741, while average pay for professors at Master's and Baccalaureate granting institutions was $94,950 and $90,368 respectively).

289. Patrick Gannon, *Here's What NC Legislators Took Home in State Pay in 2015*, NEWS & OBSERVER (Feb. 27, 2016, 7:18 PM), http://www.newsobserver.com/news/politics-government/state-politics/article62863302.html [https://perma.cc/NTY7-YFG9].

290. *Id.*

CONCLUSION

In 1776, the drafters of North Carolina's constitution promised its citizens an unparalleled public university. Ninety years later, the drafters of North Carolina's 1868 constitution strengthened that promise by guaranteeing that higher education would be accessible to all, a promise backed up by provisions requiring the General Assembly to supply financial support necessary to ensure the University was affordable. In 1971, as the fruits of that promise cemented the State's legacy as a leader of the American South, it reaffirmed that guarantee once more. Today, the UNC System has blossomed to include sixteen universities, and UNC-Chapel Hill stands as the nation's oldest public institution of higher education. But the financial vagaries of the Great Recession tested the State's commitment to that promise and, while college tuition remains lower in North Carolina than many states, some early evidence suggests North Carolina is beginning to falter on its constitutional obligation. Article IX, Section 9 requires the General Assembly to provide to the State's citizens higher education at a cost of no more than $1450 per year, adjusted for inflation. Should the General Assembly fail to adhere to this constitutional imperative, citizens should turn to the State's courts to vindicate their rights. And, in those courts, they should prevail.