

# NEVADA PUBLIC POLICY AND HIGHER EDUCATION: THE ROLES OF THE LEGISLATURE AND THE BOARD OF REGENTS UNDER THE NEVADA CONSTITUTION

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In June of 1864, Nevada elected delegates to its second constitutional convention in two years. In September of that same year, the state's constitution was ratified by the people and, by the end of October, President Lincoln issued a proclamation making Nevada the thirty-sixth state in the Union.<sup>1</sup> Nevada made the transition from territory to statehood more rapidly than any of its western counterparts.<sup>2</sup> The adopted state constitution placed almost unique emphasis on, and provided an entire article of the constitution governing, the subject of education.<sup>3</sup> Education was bound to be a central area of attention, given the enactment of the Morrill Act of 1862, which required specific areas of instruction in public universities if states were to qualify for federal financial assistance.<sup>4</sup> Since the constitution thus required the establishment of a state University governed by a Board of Regents, it has been suggested that it forbids legislative creation of any other tax-supported schools of higher education that are not governed by the same Board of Regents. Indeed, it has even been contended that it perhaps forbids legislative creation of any schools of higher education without the consent of the University Board of Regents. It is the purpose of this article to provide a critique of these conclusions and to contend, instead, that the state's legislature holds the power to establish additional schools of higher education in the state, as well as the authority to establish and set forth how such schools will be governed.

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<sup>1</sup> See MICHAEL W. BOWERS, THE NEVADA STATE CONSTITUTION 16 (2011); ELEANORE BUSHNELL, THE NEVADA CONSTITUTION: ORIGIN AND GROWTH 57 (rev. ed. 1968).

<sup>2</sup> BUSHNELL, *supra* note 1, at 19. Nevada had been made a territory just three years earlier. *Id.*

<sup>3</sup> See NEV. CONST. art. XI.

<sup>4</sup> BUSHNELL, *supra* note 1, at 45; DON W. DRIGGS, THE CONSTITUTION OF THE STATE OF NEVADA: A COMMENTARY 60 (1961) (observing that the constitution named as fields of study the very ones that the Morrill Act required for eligibility for federal benefits).

I. THE IMPORTANCE OF THE PRESUMPTION IN FAVOR OF  
LEGISLATIVE POWER

A. *A Time-Honored Principle*

It is crucial to underline the general understanding that the legislatures of the states are, unlike Congress, bodies that hold “general” or “plenary” powers. This has been true from the beginning. The drafters of the early state constitutions “assumed that government had all power except for specific prohibitions contained in a bill of rights.”<sup>5</sup> Down to the present, state courts consistently reaffirm this principle. A “state constitution’s provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its Legislature.”<sup>6</sup> Hence the legislatures “may enact any legislation that the state constitution does not prohibit.”<sup>7</sup> It is thus plain that the Nevada state legislature holds “broad inherent powers beyond those specifically delegated by the state’s constitution.”<sup>8</sup>

So all state legislatures have “plenary power excepting what the people chose to withhold.”<sup>9</sup> This “virtual omnipotence stemmed from the operation of popular sovereignty at the state level,” since as “the creature of the supreme power—the people,” the legislature “must [only] be limited by the [state’s] Constitution.”<sup>10</sup> Some state courts, including the Supreme Court of Nevada, have gone so far as to say that the Legislature possesses power that is “unlimited except by the Federal Constitution, and such restrictions as are *expressly placed upon it* by the fundamental law of the State.”<sup>11</sup> On other occasions, the Nevada Supreme Court has stated the basic point more mildly: “the legislature is supreme in its field of making the law so long as it does not contravene some expressed *or necessarily implied* limitation appearing in the constitution itself.”<sup>12</sup> In a commentary within an annotated Nevada constitution, Don W.

<sup>5</sup> DONALD S. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 60 (1980).

<sup>6</sup> Bd. of Dir. of the La. Recovery Dist. v. All Taxpayers of La., 529 So. 2d 384, 387 (La. 1988).

<sup>7</sup> *Id.* See also State *ex rel.* Schneider v. Kennedy, 587 P.2d 844, 850 (Kan. 1978) (“Where the constitutionality of a statute is involved, the question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby.”).

<sup>8</sup> BOWERS, *supra* note 1, at 59.

<sup>9</sup> Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 965 (1994) (internal quotations omitted). Accord BOWERS, *supra* note 1, at 59 (the only limits to the legislature’s “plenary power” are “those specified by the constitution”).

<sup>10</sup> Fritz, *supra* note 9. The Nevada Supreme Court has thus stated that the legislative “power is indeed very broad, and, except where limited by Federal or State Constitutional provisions, that power is practically absolute.” Galloway v. Truesdell, 422 P.2d 237, 242 (Nev. 1967).

<sup>11</sup> Gibson v. Mason, 5 Nev. 283, 292 (Nev. 1869) (emphasis added). See David E. Bernstein, *Lochner Era Revisionism, Revisited: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 32 (2003) (some courts have said that legislatures can “only be restrained by express constitutional provisions”).

<sup>12</sup> King v. Bd. of Regents of Univ. of Nev., 200 P.2d 221, 225 (Nev. 1948). Elsewhere the court has concurred that language carrying a clear limiting principle can suffice to restrict legislative power. Galloway, 422 P.2d at 242 (“Unless there are *specific constitutional limi-*

Driggs underscored that “Nevada courts have ruled that the Legislature has unlimited law-making authority within its jurisdiction, except when powers are specifically denied it by the Federal Constitution or the State Constitution.”<sup>13</sup>

### B. *The Principle Applied to Nevada Education*

The Nevada Constitution confirms in various ways that the Legislature, as the basic policy-making entity in the state, was intended to be in charge of the growth and development of education in the state, including higher education.<sup>14</sup> In Section 1 of the Constitution’s education article, Article 11, it explicitly states that the “legislature *shall encourage by all suitable means* the promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and moral improvements . . . .”<sup>15</sup> The provision’s premise is that the named “improvements” will be the yield of the Legislature’s establishment of public policies in favor of education in these areas. This injunction to “encourage” and “promote” education specifically extends to education in the areas of, *inter alia*, “[a]griculture, [m]echanic[al] [arts], and [m]ining,” each a department to be included in the State University mandated in Section 4.<sup>16</sup> An implication of this injunction to use “all suitable means” to promote these ends is that the Legislature is empowered in general to determine the higher educational matters that are most crucial: the institutions required, the essential management programs and policies, and the financial support essential to pursuing the state’s educational mission.<sup>17</sup>

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tations to the contrary, statutes are to be construed in favor of the legislative power.”) (emphasis added).

<sup>13</sup> DRIGGS, *supra* note 4, at 31. See *Gibson*, 5 Nev. at 291–94.

<sup>14</sup> See NEV. CONST. art. XI.

<sup>15</sup> *Id.* at art. XI, § 1 (emphasis added). There is also every reason to believe that the convention that brought us the Nevada constitution would have understood, and acted on the assumption, that the legislature holds plenary powers. There were eleven lawyers who were delegates to the convention, and the convention president was J. Neeley Johnson, a former governor of California and later a member of the Nevada Supreme Court. Patricia D. Cafferata, *Back Story: Second Constitutional Convention - Part One*, NEV. LAW., Feb. 2013, at 54, 54, available at <http://nvbar.org/articles/content/back-story-second-constitutional-convention-part-one>. This is a group that would have understood that if the Nevada constitution was to limit legislative power, it would need to be clearly manifested.

<sup>16</sup> NEV. CONST. art. XI, § 4 states: “The Legislature shall provide for the establishment of a State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by law.”

<sup>17</sup> And, indeed, Article XI mandates the public funding of both the university and common schools established in the state. *Id.* at art. XI, § 3. The legislature, moreover, can rely not only on the presumption in favor of legislative power, but also on “the duty of courts to uphold statutes passed by the legislature, unless their unconstitutionality clearly appears . . . .” *State ex rel. Perry v. Arrington*, 4 P. 735, 737 (Nev. 1884). See, e.g., *King*, 200 P.2d at 225 (“[E]very presumption is in favor of [a statute’s] constitutionality and every doubt must be resolved in its favor.”); *State ex rel. York v. Turpen*, 681 P.2d 763, 766 (Okla. 1984) (stating that “it will not be presumed that the members of [the legislature] . . . will enact or attempt to enact legislative measures that they know are violative of the state Constitution or of the federal Constitution”; a law is “clothed with the presumption that it is a valid enactment and with its validity the executive and judicial departments have nothing to do, until it becomes the duty of these respective departments to participate in the construction or enforcement of such statute”).

As already noted, the Nevada Constitution itself does not merely empower the Legislature to create a university or universities; instead, the Legislature is commanded to establish (“*shall provide for*”) a “State University.”<sup>18</sup> And this duty, imposed in Section 4 of Article 11, indicates that there is a clearly established, if implicit, limitation on discretionary legislative power. The Legislature must, as a constitutional matter, establish a State University, and so lacks the legal discretion to choose against such an establishment. Similarly, the same section (§ 4) requires the establishment of a Board of Regents, and specifies that it will “[control]” the University, consistent with the duties that “shall be prescribed by [l]aw.”<sup>19</sup> Since the Constitution requires the Legislature to establish the Board to control the University, that body lacks discretion to establish an alternative method of governing the University.<sup>20</sup> Even then, of course, the Legislature retains authority to enact rules and regulations prescribing the Board of Regents’s duties.<sup>21</sup> The Nevada Constitution goes even further, by specifying that the University is to include three identified departments—to teach agriculture, mechanic arts, and mining.<sup>22</sup>

The well-known history indicates that “[t]he fields of study mentioned in this section are the ones which the states were specifically instructed to include in state college curricula in order to be eligible for federal benefits under the Morrill Act passed by Congress in 1862.”<sup>23</sup> The federal law was enacted just two years prior to ratification of the Nevada Constitution.<sup>24</sup> A central purpose of Article 11, then, was to establish a State University that met the legal requirements to qualify for federal funds. Given the centrality of this fairly limited reason for quite literally *requiring* the Legislature to “establish” a State University—and in light of the presumption in favor of legislative power—it follows that the Legislature is the supreme policy-maker with respect to state education. Thus, the same section that requires the establishment of a State University that is “to be controlled by a Board of Regents,” also states that the Board’s “duties shall be prescribed by law.”<sup>25</sup>

The Nevada Constitution, moreover, does not in any way empower the Board of Regents to determine what institutions of higher education, in addition to the State University, if any, will be established or funded by the Legislature. Nothing in the constitution states or implies that the Legislature’s general power to establish educational policy, or to determine the extent of the state’s

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<sup>18</sup> NEV. CONST. art. XI, § 4. The attorney general’s office actually claimed that the “Constitution of the State of Nevada *created* a tax-supported State University in order to provide for the need of higher education in this State.” University of Nevada, Board of Regents; Responsibility for Tax-Supported Higher Education, 1968 Op. Att’y Gen. 479 (1968) (emphasis added) [hereinafter AG on Board of Regents]. But there is a chasm between *constitutionally* establishing an institution and merely providing that a government entity was required to establish it.

<sup>19</sup> NEV. CONST. art. XI, § 4.

<sup>20</sup> For some of the limits this imposes on legislative power, see *infra* notes 78–88 and accompanying text.

<sup>21</sup> See NEV. CONST. art. XI, § 4 & 7.

<sup>22</sup> *Id.* at art. XI, § 4.

<sup>23</sup> DRIGGS, *supra* note 4. See also BUSHNELL, *supra* note 1, at 45.

<sup>24</sup> See NEV. CONST. art. XI, § 8 (providing that “all the proceeds of the public lands” made available by the 1862 act should be spent “for the benefit” of the three named departments).

<sup>25</sup> NEV. CONST. art. XI, § 4.

commitment to higher education (including establishing higher education institutions), is in any way restricted beyond requiring the creation of a State University. Moreover, the authority of the Regents is restricted by its obligation to comply with the duties set forth in legislation, and its power to “control” the State University clearly does not extend to deciding or controlling either the higher education policy or funding of the state, nor even to determining whether additional institutions of higher education should be established by the Legislature.

## II. THE PLAIN MEANING OF THE NEVADA CONSTITUTION EMPOWERS THE LEGISLATURE TO ESTABLISH INSTITUTIONS OF HIGHER EDUCATION AND TO DETERMINE THEIR GOVERNANCE

Another key to accurately construing the Nevada Constitution’s provisions relating to education is set forth in the Sutherland treatise on statutory interpretation:

A basic insight about the process of communication was given classic expression by the Supreme Court of the United States when it declared that “the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.” This generally means when the language of the statute is clear and not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning.<sup>26</sup>

Nevada embraces this predominant plain meaning principle: Its highest court has stated that “[w]hen statutory language is clear and unambiguous, we do not look beyond its plain meaning, and we give effect to its apparent intent from the words used, unless that meaning was clearly not intended.”<sup>27</sup> In practice, courts thus strive to read a statute’s language “in a way that would not render words or phrases superfluous or make a provision nugatory.”<sup>28</sup> Nevada courts thus state with pride that, “we have ‘consistently upheld the plain meaning of the statutory scheme.’ ”<sup>29</sup>

### A. *Applying the Plain Meaning Principle*

Applying the plain meaning principle, it is clear that the Nevada constitution creates a legislative duty to establish a State University, but it does not include an express or implied prohibition on establishing additional institutions of higher education, nor prescribe any particular method for controlling or governing such institutions. The text and history, as we have seen, supports the plenary power of the Legislature over state education.<sup>30</sup> Moreover, from Sec-

<sup>26</sup> 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:1, at 137–41 (7th ed. 2007).

<sup>27</sup> *Seput v. Lacayo*, 134 P.3d 733, 735 (Nev. 2006). *See also* *Pasillas v. HSBC Bank USA*, 255 P.3d 1281, 1285 (Nev. 2011) (“When the language in a provision is clear and unambiguous, this court gives ‘effect to that meaning and will not consider outside sources beyond that statute.’”) (quoting *City of Reno v. Citizens for Cold Springs*, 236 P.3d 10, 16 (Nev. 2010)).

<sup>28</sup> *Arguello v. Sunset Station, Inc.*, 252 P.3d 206, 209 (Nev. 2011).

<sup>29</sup> *City of Las Vegas v. Evans*, 301 P.3d 844, 846 (Nev. 2013).

<sup>30</sup> *See supra* notes 14–17 and accompanying text. While the state university, widely called the University of Nevada, was established in 1874, in Elko, it was moved to Reno in 1885—

tion 3 through Section 8 of Article 11 of the Constitution, the State University is referred to eight times, always in the singular and typically with the words “State” and “University” written with initial capital letters. A clear implication is that it is the State University that must be established by the Legislature, and the University must be governed by a Board of Regents. The constitution does not address in any way whether additional institutions of higher education, such as the College of Southern Nevada (CSN), might be established, or how such schools must be governed if established by the Legislature.

As already noted, the constitution does not clearly deny—either explicitly or implicitly—the Legislature’s normal powers to establish public policy for the state, including authority to establish additional institutions of higher education. Indeed, as we have seen, Section 1 of the Education Article calls for the Legislature to use “all suitable means” to promote various types of education at all levels.<sup>31</sup> Section 9 reinforces this conclusion and confirms the Legislature’s possession of its standard powers. Section 9 provides that sectarian instruction shall not be “imparted or tolerated in any school or university that may be established under this Constitution.”<sup>32</sup> Absent this prohibition, it would be the Legislature with power to determine whether higher education instruction could or could not include sectarian instruction—whatever preliminary decision might be made by the Regents under their authority to “control” the University of Nevada.<sup>33</sup>

#### B. Plain Meaning and Legislative Power Brought Together

Both the plain meaning rule and the presumption in favor of legislative power are powerfully illustrated in contrasting cases where the legislature did, and did not, invade another institution’s constitutional authority. In *King v. Board of Regents*, the Nevada Supreme Court held that the state legislature invaded the authority granted by the constitution to the Board of Regents when it created an advisory Board of Regents that would be nominated by the Board of Regents specified in the constitution and approved by the Legislature.<sup>34</sup> It thus ruled that the trial court had erred in refusing to grant an injunction prohibiting the Regents from nominating the advisory board as provided in the act.<sup>35</sup> The court reasoned that positive constitutional directions contain an implication

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a decision made by the state legislature. See Melanie Robbins, *Campus Experiences Burst of Rapid, Transformational Growth*, NEV.: SILVER & BLUE, Fall 2010, at 2, 2, available at [http://www.unr.edu/silverandblue/archive/2010/fall/NSB\\_Fall\\_2010\\_ONLINE.pdf](http://www.unr.edu/silverandblue/archive/2010/fall/NSB_Fall_2010_ONLINE.pdf).

<sup>31</sup> See *supra* note 15 and accompanying text.

<sup>32</sup> NEV. CONST. art XI, § 9.

<sup>33</sup> Section 9, moreover, clearly assumes, by referring to “any school or university” that the University of Nevada might not be the only “university,” or even the only school of higher education, in Nevada. Indeed, this language strongly implies that more higher education institutions “may be established” under the Constitution by the authority of the legislature. Yet despite this clear implication, nothing in Section 9, or elsewhere, states or implies how any other schools or universities will be governed or controlled. Especially given that Section 4 only requires a particular form of management for a single entity—the State University—the authority to establish additional institutions was clearly intended to include authority to set up their governance. *Id.* (emphasis added).

<sup>34</sup> *King v. Bd. of Regents of Univ. of Nev.*, 200 P.2d 221, 227 (Nev. 1948).

<sup>35</sup> *Id.* at 223.

against things contrary to them, or which would frustrate or disappoint the purpose of the directions. Here the “advisory” board would perform virtually all of the functions of the constitutional board, with only a legislative proviso that the “advisory” board’s determinations would not be controlling.<sup>36</sup> The challenged law had the prohibited effect of adding new duties foreign to the office—nominating an advisory board—and otherwise changing, modifying, or altering constitutional powers and functions.<sup>37</sup>

Contrast *King* with the court’s 1981 decision in *Board of Regents v. Oakley*.<sup>38</sup> There, the Nevada Board of Regents maintained that the constitution had granted it “virtual autonomy” in operating the system of higher education, with the consequence that the Board could apply its own longstanding mandatory retirement age policy that contradicted a more recent state law that prohibited age discrimination in hiring and retention employment practices in state agencies. The issue presented required the Nevada Supreme Court to determine the scope of the executive-administrative duties and powers of the Board of Regents and the scope of the Legislature’s powers as the chief legal policymaker in the state. The opinion in *Oakley* clarified that the “autonomy” of the Board of Regents was limited to administering the university system and had no bearing on the legislative authority to establish and implement a binding statewide principle of employment non-discrimination.<sup>39</sup>

The court reasoned that states may impose on state governing boards the same duties they impose on county or municipal boards, which could include the same obligations to make hiring and retention decisions on the basis of merit and fitness rather than on immaterial factors such as race, sex, creed, national origin, or age.<sup>40</sup> *King* thus did not mean that the Board of Regents is “free from all legislative regulation,” but only that the legislature could not directly interfere “with essential functions of the University.”<sup>41</sup> When issues of public policy go well beyond the management of the State University required to be created by Article 11, Section 4 of the constitution, and extend to broader questions of the higher education policies and needs of the state, they are matters to be resolved by the state legislature.

### C. Countering an Alternative Construction

At least one published commentary, written as a state attorney general opinion, has suggested that Article 11, Section 5, supplies an implied prohibition on legislative power that forbids the legislature to establish schools of higher education beyond the State University, or at least to create tax-supported

<sup>36</sup> *Id.* at 225.

<sup>37</sup> *Id.* at 226–27.

<sup>38</sup> Bd. of Regents of Univ. of Nev. Sys. v. Oakley, 637 P.2d 1199, 1201 (Nev. 1981).

<sup>39</sup> *Id.* at 1200. One might wonder if the Board’s “virtual autonomy” rationale stemmed in part from the 1968 attorney general opinion’s misattribution to the *King* decision that the state constitution made the Board “a ruler of an independent province beyond the law-making authority of the Legislature.” AG on Board of Regents, *supra* note 18 (misquoting *King*). See *infra* notes 72–73 (describing misattribution).

<sup>40</sup> *Oakley*, 637 P.2d at 1200.

<sup>41</sup> *Id.*

schools of higher education that are not governed by the State Board of Regents.<sup>42</sup> Section 5 reads:

The Legislature shall have power to establish Normal schools, and such different grades of schools, from the primary department to the University, as in their discretion they may deem necessary, and all Professors in said University, or Teachers in said Schools of whatever grade, shall be required to take and subscribe to the oath as prescribed in Article Fifteenth of this Constitution.<sup>43</sup>

This grant of power, clarifying legislative authority to establish both “normal schools” and other grades of schools up to the University, does not purport to prohibit the establishment of additional schools. Yet this same commentator<sup>44</sup> asserted that the section’s “restrictive import” is “obvious,”<sup>45</sup> concluding that the Legislature “does not have the authority to establish grades or institutions on a university level.”<sup>46</sup> Rather than prohibiting the establishment of additional schools, Section 5 simply confirms that the Legislature holds an expansive authority—consistent with its general policy-making role—to establish any schools and grades from primary school to the University that it “may deem necessary.”<sup>47</sup> There is, however, no prohibition, express or implied, on the establishment of additional college-level schools. There was no need for one.

The framers of the state constitution referenced “the University,” as previously noted, mainly to ensure eligibility for federal benefits under the Morrill Act by requiring the creation of the University of Nevada.<sup>48</sup> Those framers *only* referenced the University, no doubt, because it was the only higher education school before them, and Section 5 was simply added to clarify that the constitutionally required educational system did not foreclose establishing additional normal schools or “grades” of schools. This specific grant of authority to establish additional schools in no way suggests the lack of such authority as to others, and the referenced commentary does not offer any reason—beyond labeling its conclusion “obvious”—that makes such a construction plausible.

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<sup>42</sup> The attorney general opinion concluded that the legislature “is precluded” from establishing “tax-supported college-level institutions governed by a body other than the Board of Regents of the University of Nevada.” AG on Board of Regents, *supra* note 18. Even more broadly, this opinion at one point asserted that “the authority to establish a technical institute program offering courses primarily on a college level was in the Board of Regents of the University of Nevada.” *Id.* The attorney general’s office, then, at one point asserted that it is only the Board of Regents that can “establish” new and additional institutions of higher education in the state. *Id.*

<sup>43</sup> NEV. CONST. art. XI, § 5.

<sup>44</sup> This state attorney general opinion is referred to as the work of a “commentator” inasmuch as such opinions are not considered to be legal precedent. *See infra* notes 60–62 and accompanying text.

<sup>45</sup> AG on Board of Regents, *supra* note 18.

<sup>46</sup> *Id.* Given this claim, it is compelling that, as we will see, the Legislature has in fact established other higher education institutions—not merely new portions of a single State University—and that these steps have received no objection. This probably explains why it is that advocates of an implied limitation on the legislature power as to higher education refer equivocally to its content, sometimes suggesting that it only prohibits state funding of institutions not controlled by the State Board of Regents and sometimes suggesting that the legislature cannot independently decide that the state needs an additional institution to the State University. *See infra* notes 51, 53–54 and accompanying text.

<sup>47</sup> NEV. CONST. art. XI, § 5.

<sup>48</sup> *See supra* notes 23–24 and accompanying text.



The referenced commentary, moreover, simply ignores what was just shown, that Section 9 prohibits sectarian instruction in “any school or University” that “*may be established under this Constitution.*”<sup>49</sup> In contrast to the pervasive references to “*the University,*” here the constitution itself refers to the potential for additional universities to be established. Little wonder, then, that when the Nevada Legislature established the College of Southern Nevada (CSN), to use one example, no one objected that the Legislature lacked the authority to create that institution of higher education.<sup>50</sup> To read Section 5 as an implied prohibition of alternatively governed schools of higher education, based on the requirement that the University be “controlled” by a Board of Regents, makes no more sense than inferring from the constitutional requirement of establishing a State University an implied prohibition on establishing any additional schools of higher education at all—at least not without the clear consent of the State University. In fact, all too often, the first contention leads to the quite implausible second.

This would mean that the Nevada Constitution would be read as forbidding the legislative establishment of CSN and the rest of the community and/or public junior colleges, absent the concurrence of the University of Nevada and its Regents. And, indeed, this same commentator asserts, based supposedly on the language of Section 5, that the Legislature “does not have the authority to establish grades or institutions on a university level.”<sup>51</sup> The reasoning is that the specifications in Section 5, and its reference to establishing schools and “different grades of schools from the primary department to the University” means that the Legislature lacks the power to create schools at the university level.<sup>52</sup> This commentator sometimes appears only to assert that the Legislature cannot establish “tax-supported college-level institutions *governed by a body other than the Board of Regents of the University of Nevada.*”<sup>53</sup> But sometimes it offers the much broader assertion that tax supported schools of higher education must be “*established and controlled by the Board of Regents.*”<sup>54</sup>

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<sup>49</sup> See *supra* notes 32–33.

<sup>50</sup> CSN has operated under three names since its founding in 1971—Clark County Community College, Community College of Southern Nevada, and its current CSN—and it is one of several two-year higher education institutions that combine with Nevada’s three four-year schools. See *Alumni Relations*, CSN, <https://www.csn.edu/pages/708.asp> (last visited Apr. 22, 2014); *NHSE Institutions*, NSHE, <http://system.nevada.edu/Nshe/index.cfm/nshe-institutions> (last visited Apr. 22, 2014). Similarly, the Desert Research Institute, established in 1959, provides opportunities for post-graduate work and functions within the state’s University System. BUSHNELL, *supra* note 1, at 16. It has operated as a “multiple-purpose research organization with a statewide operation.” *Id.* It again defies the assertion that the legislature lacks authority to establish additional institutions of higher education.

<sup>51</sup> AG on Board of Regents, *supra* note 18.

<sup>52</sup> *Id.* In the same memorandum, this commentator actually asserts that “the authority to establish a technical institute program offering courses primarily on a college level was in the Board of Regents of the University of Nevada . . . .” *Id.* (emphasis added).

<sup>53</sup> *Id.* (emphasis added).

<sup>54</sup> *Id.* (emphasis added). See also *supra* note 46 and accompanying text. The idea that only the Board of Regents of the University holds power to “establish” a program of higher education is preposterous.

III. WHEN CONSTITUTIONAL TEXT IS READ IN LIGHT OF THE PURPOSES REVEALED IN ITS HISTORY, IT BECOMES CLEAR THAT THE LEGISLATURE WAS GRANTED POWER OVER HIGHER EDUCATION

A. *A State Attorney General Opinion Does not Create Legal Precedent That Binds Courts or Public Officials*

Bushnell recounted that when a community college was established in Elko in 1967, which was to have its own governing board, an issue raised was whether a tax-supported institution of higher education could be established by the legislature and governed by another entity than the University Board of Regents.<sup>55</sup> The issue did not trouble the legislature, which considered in a special session whether to appropriate money for the Elko College; it declined, however, to make the appropriation at that time.<sup>56</sup> It was in this setting that the Attorney General's office, based on a request by the University Board of Regents, issued an opinion stating "[i]f college level courses are taught, the school is functioning on a university level and, if tax supported, should be established and controlled by the Board of Regents through the University facilities."<sup>57</sup> While it has become commonplace for commentators to cite this opinion as though it stated the established law,<sup>58</sup> Professor Bushnell noted that the Attorney General Opinion (AGO) itself had "differed from one advanced earlier by the Legislative Counsel Bureau, which averred that community colleges could be established by the Legislature and controlled by the State Board of Education."<sup>59</sup>

It is well established that state attorney general opinions are not binding law that control later decisions by courts or compel compliance by state officials. Such opinions are given weight by courts only when it is determined that they correctly construe and apply governing law, whether enacted or court-created.<sup>60</sup> If an attorney general opinion states that an act is unconstitutional, it is advisory only, and thus is not binding on state officers until such a holding is

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<sup>55</sup> BUSHNELL, *supra* note 1, at 17.

<sup>56</sup> *Id.*

<sup>57</sup> AG on Board of Regents, *supra* note 18.

<sup>58</sup> See, e.g., BOWERS, *supra* note 1, at 131 (stating that community colleges are administered by the Board of Regents because "the legislature is prohibited by this section [§4] from creating a separate body for that purpose," and citing the 1968 AG Opinion).

<sup>59</sup> BUSHNELL, *supra* note 1, at 17. The attorney general opinion itself acknowledged as much, noting that this contrasting view was "issued" to "the Governor's Committee on Education and the Superintendent of Public Instruction." AG on Board of Regents, *supra* note 18. In addition, the attorney general opinion not only rejected those opinions as "legally unsound," but also objected that the Legislative Counsel Bureau "is acting outside the scope of its authority in giving legal advice to the executive branch of the government." *Id.* It may well be that the attorney general's office is the typical body to give "legal advice to the executive branch," but any implication that the Legislative Counsel Bureau acted improperly in stating its construction of state law is indefensible, and the analysis in this article explains why it is the attorney general's view that is "legally unsound." Since the Legislative Counsel Bureau opinions are not published, this memorandum will be limited to analyzing the attorney general's critique of the bureau's legal reasoning.

<sup>60</sup> Coffin v. Alcoholic Beverage Control Appeals Bd., 43 Cal. Rptr. 3d 420, 425 (Cal. Dist. Ct. App. 2006).

confirmed in court.<sup>61</sup> Nevada follows this general rule, plainly holding that “[o]pinions of the Attorney General are not binding legal authority or precedent.”<sup>62</sup> Even so, it will be useful to analyze the AGO to determine whether it reaches sound conclusions in construing the Nevada Constitution.

*B. When the Text is Read in Light of Historical Purpose, it Clearly Does not Restrict The Legislature’s Presumptive Policymaking Role on Higher Education nor Grant Conflicting Power to the University’s Board of Regents*

As we have seen, courts in general, including those here in Nevada, often state that they follow the plain meaning rule. They almost equally often distinguish between being bound by a text’s plain meaning and being beholden to an unduly literal reading of text—especially when it produces an absurd result. In a well-known formulation, the Supreme Court said that the rule should be applied when the “definite meaning” it reveals “involves no absurdity, nor any contradiction of other parts of the instrument.”<sup>63</sup> So in performing statutory construction, courts sometimes necessarily elaborate more completely, and even qualify, the plain meaning rule. In the classic restatement of the plain meaning rule, found in Sutherland Statutes and Statutory Construction, which was quoted earlier in this article<sup>64</sup>—it states that the rule governs construction of text when “the statute is clear and not unreasonable or illogical in its operation.”<sup>65</sup> So in the real world, courts will often take the position stated by the Nevada Supreme Court when it said that the “words in a statute should be given their plain meaning unless this violates the spirit of the act.”<sup>66</sup>

When students of a legal enactment confront text that points away from their preferred policy position, a common strategy is to contend that the historical evidence concerning legislative purpose or intent shows that the apparent textual meaning should be abandoned in favor of a conclusion that serves a preferred outcome. The classic formulation of this principle, validly applied, is found in Lord Coke’s analysis in *Heydon’s Case*.<sup>67</sup> There the famous common law judge offered the view that the greatest help for statutory construction is to determine the “defect” or “mischief” found in the prior state of the law, the “remedy” sought in the new enactment, and then to construe the language, if possible, to suppress the mischief and advance the remedy.<sup>68</sup> The Nevada

<sup>61</sup> State *ex rel.* York v. Turpen, 681 P.2d 763, 767 (Okla. 1984).

<sup>62</sup> Blackjack Bonding v. City of Las Vegas Mun. Court, 14 P.3d 1275, 1279 (Nev. 2000). *Accord* Goldman v. Bryan, 787 P.2d 372, 380 (Nev. 1990) (“[O]pinions of the attorney general do not constitute binding legal authority or precedent.”).

<sup>63</sup> Lake Cnty. v. Rollins, 130 U.S. 662, 670 (1889). When this is the case, of course, then “neither the courts nor the legislature have the right to add to it or take from it.” *Id.*

<sup>64</sup> See *supra* note 26 and accompanying text.

<sup>65</sup> SINGER & SINGER, *supra* note 26.

<sup>66</sup> Redl v. Secretary of State, 85 P.3d 797, 799 (Nev. 2004) (internal quotations omitted).

<sup>67</sup> Heydon’s Case, (1584) 3 Co. Rep. 7 a, 637.

<sup>68</sup> *Id.* at 638–39. Sometimes referred to as a “purposive” interpretive method, explication and defense of this sort of approach can be found at some length in modern works by Professors Hart and Sacks and Reed Dickerson. See generally HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William Eskridge, Jr. & Philip P. Frickey eds., 1994).

Supreme Court has basically endorsed this interpretive approach when the situation warrants it. Stating the principle in the very spirit of *Heydon's Case*, the Nevada court has reasoned that "courts may determine legislative intent by looking at the entire act and construing the statute in light of purposes underlying the act."<sup>69</sup>

This article has argued in favor of the view that the plain meaning of Nevada's constitutional text supports the Legislature's authority to determine the appropriate institutions of higher education needed in the State of Nevada, as well as to determine how such institutions should be governed. Although some public voices have offered a different reading of the Nevada constitutional system, in this section we will reaffirm that plain meaning argument and analyze arguments attempting to rely on historical evidence alleged to support a construction presuming a far lesser legislative role and a more pronounced role for the Board of Regents.

As previously noted, the State's University was established by Section 4 of the Nevada Constitution's Article 11, to provide the course work required by the federal Morrill Act.<sup>70</sup> The University of Nevada could easily be established, and be governed by the State Board of Regents, without placing the entire State system of higher education under the exclusive control of the Board. Nothing in the Nevada Constitution grants the Board such exclusive control. To the extent that the AGO suggested a power greater than the authority to administer the University, consistent with the rules and policies established by the Legislature, it is clearly wrong. Article 11, Section 4 specifically provides that the Board's "duties shall be prescribed by law." That law would be enacted by the State's Legislature, in accordance with its conception of sound public policy in regulating the State's schools. This is the same Legislature that in Sections 5 and 9 is recognized as also having the discretion to establish schools, including universities, and which in general is the central policy-making body in the State.<sup>71</sup>

The 1968 AGO basically ignored the presumption in favor of legislative power, while insisting that the constitutional convention had the purpose of empowering the Board of Regents while constricting the Legislature. It is significant by itself that one can read the AGO, which is six printed pages, and never even encounter the idea that appropriate analysis of state constitutions always begins with the presumption in favor of legislative power.<sup>72</sup> The AGO

<sup>69</sup> *Goldman v. Bryan*, 787 P.2d 372, 382 (1990) (citing *Colello v. Adm'r Real Estate Div.*, 683 P.2d 15 (1984)).

<sup>70</sup> See *supra* note 4.

<sup>71</sup> This is the reason it borders on the preposterous to suggest it is the Board of Regents, rather than the State legislature, that is empowered to "establish" institutions of higher education in Nevada. On the binding nature of plain meaning, see *supra* notes 26–29 and accompanying text.

<sup>72</sup> One might logically assume that a state's attorney general's office might frequently have a preference for upholding and extending executive power. This assumption fits nicely here inasmuch as the presumption in favor of legislative power is simply bypassed in the AGO. It may also be relevant that the author of the AGO in this case, Daniel R. Walsh, also served at this time, and for seven years, as the legal counsel for the University of Nevada System. If one were a member of the Board of Regents that made this inquiry at the attorney general's office, it is hard to imagine someone he or she would prefer to write the proffered legal opinion for that office. But students and commentators would not reasonably perceive this as the most objective source for such an opinion.

asserted at one point, moreover, that the mere absence of a specific grant of power raises a reasonable inference that the exercise of such power is precluded. It observed that Nevada constitution's Sec. 6 of Article 11 requires the Legislature to support the "said university and common schools" by means of "direct legislative appropriation from the general fund . . . ." <sup>73</sup> And from this, it derives the supposition that "[t]he specific inclusion of common schools and universities for this type of support might very well imply the exclusion of all other educational institutions. If the Legislature could otherwise make direct appropriations, there may have been no need to make this provision in the Constitution." <sup>74</sup>

The opinion supplied no factual or policy basis that would justify reading the establishment of a duty to "support and maintain" the university and common schools as a ground for prohibiting the support of other institutions of higher education. Indeed, it virtually rests on the assumption that the absence of a grant of power amounts to a prohibition on its exercise, which starts at almost the opposite place from the general presumption in favor of legislative power. The AGO makes a similar move to deny legislative power in virtually assuming that the Board of Regents was to have the central role in establishing policy concerning the State University.

The AGO underscored that only a limited number of state constitutions provide for the state's university to be "controlled" by a Board of Regents, and then asserted that the Nevada Board is "constitutionally endowed with a sphere of independence from the legislature in governing higher education." <sup>75</sup> In turn, relying on earlier Nevada precedent, the opinion contended that "the Board is a ruler of an independent province beyond the law-making authority of the Legislature." <sup>76</sup> Without question, the Board of Regents was constitutionally charged with "controlling" the State University, and this does implicitly limit the Legislature's discretion beyond the decision whether to have a Board of Regents to administer the University. Even so, the AGO's last assertion was based on a misreading (or at least an overreading)—as well as a misquoting—of the Nevada Supreme Court decision in *King v. Board of Regents*. <sup>77</sup>

In *King*, the Nevada Supreme Court held that the state Legislature violated an implied prohibition when it created an "advisory board of regents," <sup>78</sup> on the grounds that such a legislative measure acted to "change, alter, or modify" the constitutional powers and functions of the Board of Regents. <sup>79</sup> The court reasoned that a "positive delegation of power to one officer or department implies a negation of its exercise by any other officer, department, or person." <sup>80</sup> In

<sup>73</sup> NEV. CONST. art. XI, § 6.

<sup>74</sup> AG on Board of Regents, *supra* note 18.

<sup>75</sup> AG on Board of Regents, *supra* note 18. The opinion virtually ignores that the same section that says that university is "to be controlled by a Board of Regents" equally provides that the Board's "duties shall be prescribed by [l]aw," referring to statutes adopted by the state legislature. NEV. CONST. art. XI, § 4.

<sup>76</sup> AG on Board of Regents, *supra* note 18 (misquoting *King v. Board of Regents*, 200 P.2d 221 (Nev. 1948)).

<sup>77</sup> *King v. Bd. of Regents*, 200 P.2d 221 (Nev. 1948).

<sup>78</sup> *Id.* at 227.

<sup>79</sup> *Id.* at 229.

<sup>80</sup> *Id.* at 232.

turn, “the whole executive power of the University having been put in the regents by the people, no part of it can be exercised or put elsewhere by the Legislature.”<sup>81</sup> The court reasoned further that the state’s people, “speaking through their Constitution, have invested the regents with a power of management of which no Legislature may deprive them.”<sup>82</sup>

Even though the legislature had attempted to make the alternate board merely advisory, and did not grant its members the power to issue binding votes, the court reasoned that having a prescribed shadow “adviser” included too much potential for interference. The advisory board held all the “rights and privileges of the elected board except the right to a determining vote.”<sup>83</sup>

So here the right of the regents to control the university, in their constitutional executive and administrative capacity, is exclusive of such right in any other department of the government save only the right of the legislature to prescribe duties and other well recognized legislative rights not here in question.<sup>84</sup>

Consequently, the appointed advisory board did “change, alter or modify the constitutional powers and functions of the elected board.”<sup>85</sup> While the AGO read the opinion in *King* as saying that the state constitution made the Board “a ruler of an independent province beyond the law-making authority of the Legislature,”<sup>86</sup> the Opinion actually said that the court was “*not saying* that [the Regents] are the rulers of an independent province or beyond the lawmaking power of the Legislature.”<sup>87</sup> Even so, of course, the court did hold that, with the “whole executive power of the University having been put in the regents by the people, no part of it can be exercised or put elsewhere by the Legislature.”<sup>88</sup> In short, *King* should be read narrowly enough for it to fit together with the court’s decision in *Oakley*—recognizing that the power to administer the State University does not amount to a delegation of authority over higher education policy for Nevada.<sup>89</sup>

### C. *The Pattern of Allocating Power as to Higher Education in Other States Confirms That the Nevada Legislature Was Intended to Hold Plenary Powers Over Educational Policy*

The state constitutions in the United States rest on similar assumptions and principles. Thus, as we have noted, the presumption in favor of legislative power is a principle of universal application. An interpretive challenge in construing the Nevada constitution is precisely that, as noted in the AGO, there are relatively few states with constitutionally required state universities, let alone

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 235.

<sup>84</sup> *Id.* at 236.

<sup>85</sup> *Id.* at 229 (internal quotations omitted).

<sup>86</sup> AG on Board of Regents, *supra* note 18 (misquoting *King*, 200 P.2d at 232).

<sup>87</sup> *King*, 200 P.2d at 232 (emphasis added).

<sup>88</sup> *Id.*

<sup>89</sup> *King* and *Oakley* can readily be brought together so that the legislature’s broad policy-making role is recognized as consistent with the Board of Regents’ power to administer the State University. See *supra* Part II.B.

constitutional requirements as to the management of the state's university.<sup>90</sup> Of the constitutions that established state universities, we can learn much from comparing the Nevada Constitution with the constitutions of Hawaii and Colorado.

The Hawaii constitution was adopted in 1950, but still contains comparable provisions. As in the Nevada constitution, the University of Hawaii is "established as the state university,"<sup>91</sup> and there is a constitutional provision, as in Nevada, requiring the creation of a Board of Regents that will hold "jurisdiction over the internal structure, management, and operation of the university."<sup>92</sup> We can learn much, however, from a somewhat distinctive feature of the historical development of the Hawaii constitution:

One of the suggestions considered at Hawaii's 1950 Constitutional Convention was that the board of regents be constitutionally delegated the right to control all publicly supported higher education in Hawaii,—i.e., the power of statewide coordination. At the time, such a provision was felt unnecessary as community colleges were only envisioned and the University of Hawaii itself had only begun its growth. The possibility of statewide control over all public higher education by the board of regents was left for future legislation.<sup>93</sup>

Even in 1964, when a system of community colleges was established, it was placed under the administration of the University of Hawaii's Board of Regents by statute rather than by using the constitution.<sup>94</sup> Without a constitutional provision delegating control of all publicly supported higher education to the Board of Regents, it was presumed that the decision to create community colleges, and to determine their governance, were legislative decisions. When the Hawaii Legislature turned to making that decision, it followed the same tracks that the Nevada Legislature has followed to date—it placed the community colleges within the existing system of higher education and under the control of the state's Board of Regents. Similarly, to date, the Nevada Legislature has determined, as a matter of policy, to create the NSHE (Nevada System of Higher Education), and has chosen to place all the state's universities and colleges under that system.

Under Hawaii's Constitution, one might well have reasoned all the way to the opposite conclusion—the university was established by the constitution, and a Board of Regents was required as well. It could have been contended that the constitutional creation of the university and governing board precluded new

<sup>90</sup> AG on Board of Regents, *supra* note 18 (recognizing eight "constitutionally endowed" boards of regents in American state constitutions).

<sup>91</sup> HAW. CONST. art. X, § 5. Hawaii's constitutional establishment of the state university is even stronger than Nevada's. In Nevada the constitution says that "[t]he Legislature *shall provide for the establishment of a State University . . .*" NEV. CONST. art. XI, § 4 (emphasis added). In Hawaii, the constitution says: "The University of Hawaii *is hereby established as the state university. . .*" HAW. CONST. art. X, § 5 (emphasis added).

<sup>92</sup> HAW. CONST. art. X, § 6.

<sup>93</sup> Muriel M. Taira, *Part II: Higher Education, in HAWAII CONSTITUTIONAL CONVENTION STUDIES 1978-99*, 118 (Richard F. Kahle, Jr. ed., 1978), available at <http://lrbhawaii.org/concon78/art9.pdf>.

<sup>94</sup> 1964 Haw. Sess. Laws 39–40. Note as well that, even though the legislature determined to put the administration of the community colleges under the state's Board of Regents, those colleges were established by legislation and no one objected that the legislature lacked authority to establish them.

institutions of higher education from being governed in any other way. But no such contention was ever offered, so the issue never even arose. That the community colleges *were* placed under the Board of Regents by state statute merely underscores that the pattern of other states is to leave to the legislature the flexibility to adjust to changing conditions as needed, or to stay with the tried and true. The Hawaii Constitution is thus analogous to Nevada's, but stated even more emphatically that its creating the university and providing for its administration "shall not limit the power of the legislature to enact laws of statewide concern."<sup>95</sup> In both states, the constitution not only ensured that there would be a state university, but also provided that it would be governed and administered by a statewide Board of Regents—but without robbing the legislature of its plenary policy-making function.<sup>96</sup>

The experience in Colorado is equally instructive. Colorado's Constitution was originally adopted in 1876, but of course has been amended. The original Article 8, Section 5 of the state's constitution created four institutions, including one college and a university at Boulder; and Article 9, Section 12 of the constitution called for the election of a board of regents for the university. Then, in Article 9, Section 14, the constitution stated that the Board of Regents "shall have the general supervision of the University, and the exclusive control and direction of all funds of and appropriations to, the University."<sup>97</sup>

In 1984, the Colorado Attorney General issued an opinion to address several questions raised by the state's constitution. That opinion stated that, notwithstanding the constitutional creation of the board of regents, it was clear that the legislature could create other boards and institutions beyond what is expressly stated in the constitution.<sup>98</sup> That opinion also addressed the question of whether the general assembly of Colorado could, despite the control granted the board over the University of Colorado, still "reorganize higher education" in the state.<sup>99</sup> The opinion's analysis concluded that, although "the board of regents itself may not be tampered with without amending the constitution"—and hence the legislature could not "make locational decisions, and expressly circumscribe the supervisory powers" of the board of regents—Article 9 still posed "no identifiable impediments to legislative reorganization of the governance system of higher education."<sup>100</sup>

Similarly, in *Colorado Civil Rights Commission v. The Regents of the University of Colorado*,<sup>101</sup> the Colorado Supreme Court held that the state's civil rights commission had jurisdiction to hear a complaint of racial discrimination in a tenure decision at the University of Colorado. The Regents had filed a motion to dismiss the complaint because the commission lacked jurisdiction, and a hearing officer granted the motion based on the view that Article 8, Section 5 "grants the Regents general supervisory authority over the University of

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<sup>95</sup> HAW. CONST. art. X, § 6.

<sup>96</sup> See Taira, *supra* note 93, at 103.

<sup>97</sup> COLO. CONST. art. IX, § 14 (repealed 1972).

<sup>98</sup> See 84 Op. Att'y Gen 22 (Colo. 1984), available at [http://www.coloradoattorneygeneral.gov/ag\\_opinions/1984/no\\_84\\_22\\_ag\\_alpha\\_no\\_le\\_hr\\_aganq\\_november\\_28\\_1984](http://www.coloradoattorneygeneral.gov/ag_opinions/1984/no_84_22_ag_alpha_no_le_hr_aganq_november_28_1984).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Colo. Civil Rights Comm'n v. Regents of the Univ. of Colo., 759 P.2d 726 (Colo. 1988).



Colorado.”<sup>102</sup> The Commission itself, however, ruled that it did have jurisdiction, reasoning that the Board of Regents was “not granted unfettered authority to operate the university,” but the constitution subjects “the university to the laws and regulations of the state.”<sup>103</sup> After a state trial judge reversed the commission, concluding that state legislation must at least make clear that state law is seeking to regulate the actions of the constitutionally created Regents,<sup>104</sup> the state supreme court agreed with the civil rights commission that a statutory scheme was “directed against employment discrimination,” and gave the commission power to investigate and adjudicate discrimination claims, and thus supported its jurisdiction over the Regents.<sup>105</sup> It is noteworthy that the Colorado Board of Regents tracked the reasoning of the Nevada board in *Board of Regents v. Oakley*.<sup>106</sup> In each case, the Board mistakenly construed the constitutionally granted executive power to administer a state institution as granting the constitutional power to override broad, legislative policymaking to implement fundamental societal values. As in Colorado, the Nevada legislature retains the authority to legislate on the fundamental questions of educational policy in Nevada.

The flexibility that constitutions presumptively grant state legislatures is nicely illustrated in the 1965 Wyoming case of *Goshen County Community College District v. School District No. 2*.<sup>107</sup> There the court held that, under the language of the state constitution, “the legislature has blanket authority and unlimited constitutional power to provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing ‘such other institutions’ as may be necessary.”<sup>108</sup> The Nevada Constitution’s grant of power to the legislature to create, maintain, and support the “said university and common schools,”<sup>109</sup> and its command to “encourage by all suitable means” the educational “improvements” in enumerated categories of learning,<sup>110</sup> is the equivalent grant of “blanket authority and unlimited constitutional power to provide for the establishment and maintenance of a complete and uniform system of public instruction.”<sup>111</sup>

#### IV. CONCLUSION

Nevada is one of two states where community colleges, four year colleges, and universities are governed, administered, and funded in the same manner; a structure that Dr. David F. Damore of Brookings Mountain West has said “hinders the community colleges’ ability to partner with local industries, compete for workforce training grants, and respond to Nevada’s diverse demographic

<sup>102</sup> *Id.* at 729.

<sup>103</sup> *Id.* (citation omitted).

<sup>104</sup> *Id.* at 730.

<sup>105</sup> *Id.*

<sup>106</sup> *Bd. of Regents v. Oakley*, 637 P.2d 1199 (Nev. 1981).

<sup>107</sup> *Goshen Cnty. Cmty. Coll. Dist. v. Sch. Dist. No. 2*, 399 P.2d 64 (Wyo. 1965).

<sup>108</sup> *Id.* at 66.

<sup>109</sup> NEV. CONST. art. XI, § 6.

<sup>110</sup> NEV. CONST. art. XI, § 1.

<sup>111</sup> *Goshen Cnty. Cmty. Coll. Dist.*, 399 P.2d at 66.

and economic needs.”<sup>112</sup> During the 2013 session of the Nevada Legislature, Senate Bill 391 passed into law, creating an interim committee to study reforms to the governance and financing of the state’s community colleges. The original intention of this bill was to look at restructuring higher education in Nevada to separate community colleges from the University system.<sup>113</sup>

As previously noted, it has become commonplace for legal commentators to cite to a Nevada Attorney General’s opinion<sup>114</sup> as though it were established law,<sup>115</sup> even though it erroneously takes the position that schools teaching courses at the “university level” may not be constitutionally established outside of the control of the Board of Regents, even by the Legislature. As future bills are considered that would propose changing the structure of higher education in Nevada, there should be no question about the legal authority of the Legislature to establish institutions of higher education and governing boards outside of the control of the University Board of Regents.

Education in Nevada has such broad reaching consequences for the state—especially the economy—that little else receives as much attention from the State Legislature.<sup>116</sup> That is precisely why the structure of higher education, like all broad questions of public policy, was established to be determined by the Nevada Legislature. Indeed, the general mandate in Article 11, Section 1 of the Nevada Constitution explicitly states that the “legislature shall encourage *by all suitable means* the promotion of intellectual, literary, scientific, mining, agricultural, and moral improvements . . . .”<sup>117</sup> If creating a separate community college system is a *suitable means* to accomplish these goals, the legislative mandate is clear.

Indeed, the Legislature was constitutionally mandated to “provide for the establishment of a State University which shall embrace departments for Agriculture, Mechanic Arts, and Mining to be controlled by a Board of Regents whose duties shall be prescribed by Law.”<sup>118</sup> This specific requirement to create a Board of Regents to control the University no more restricts the Legislature from creating other universities and boards than the specific requirement that the University include “[a]griculture, [m]echanic [a]rts, and [m]ining” in its curriculum prohibits it from also including political science, foreign languages or any other areas of study it sees fit.

Though the Nevada Constitution does not need to expressly grant any specific power to the Legislature for anything—because the Legislature has plenary powers<sup>119</sup>—the Constitution still expressly grants that the Legislature “shall have power to [establish] [n]ormal schools, and such different grades of schools, from the primary department to the University, as in their discretion

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<sup>112</sup> DAVID F. DAMORE, ADVANCING SOUTHERN NEVADA’S REGIONAL PRIORITIES: OVERVIEW OF THE 77TH SESSION OF THE NEVADA LEGISLATURE 4 (2013), available at <http://www.unlv.edu/sites/default/files/24/BrookingsReport-NVLegislature-Damore-Revised.pdf>.

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* Part III.A.

<sup>115</sup> See *supra* Part III.A.

<sup>116</sup> DAMORE, *supra* note 112, at 3–4 (“Perhaps no policy area received more attention during the 2013 session than education.”).

<sup>117</sup> NEV. CONST. art. XI, § 1 (emphasis added).

<sup>118</sup> NEV. CONST. art. XI, § 4.

<sup>119</sup> See *supra* Part I.A.

they may deem necessary.”<sup>120</sup> The presence of phrases like “as in their discretion” and “all suitable means” in the provisions of the Nevada Constitution’s section on education, Section 11, was by no means accidental. Emphasizing the Legislature’s discretion would help ensure that more specific provisions were not construed to deny generally open-ended powers intended for the Legislature. In the final analysis, the primary power of the Nevada Legislature is their discretion in all things “except when powers are specifically denied it by the Federal Constitution or the State Constitution.”<sup>121</sup>

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<sup>120</sup> NEV. CONST., art. XI, § 5.

<sup>121</sup> DRIGGS, *supra* note 4, at 31. As this article was being prepared to go to print, the authors became aware of a legal memorandum, prepared by the Legislative Counsel Bureau (LCB) for the benefit of the committee appointed by the legislature to study relevant issues and make recommendations. The memorandum, written by legal counsel for the LCB, analyzes the same basic materials and reaches similar conclusions on constitutional issues as those set forth in this article. *See generally* Memorandum from Kevin C. Powers, Chief Litig. Counsel, Legislative Counsel Bureau, to Debbie Smith, U.S. Senator, on State Constitutional Matters Relating to Community Colleges and Higher Education (Mar. 11, 2014) (on file with the author).