

Higher Education Needs Constitutional Guarantees

A Brief Series Examining State Higher Education Financing from a K–12 Perspective

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The U.S. Constitution is the most well-known governing document in the country—studied by students, endlessly interpreted and reinterpreted by judges and political pundits, and placed in the category of near-religious reverence by many Americans. In the last 50 years it has been amended exactly once, in a ratification process that took over 200 years and was initiated by Founding Father James Madison himself.^[1] The principles of the document are core to our system of government and thus exceptionally difficult to change. The possibility of fully replacing the Constitution calls to mind nothing short of the collapse of the nation itself.

Yet since 1970, nine different states have done exactly this with their own constitutions, with Alabama the most recent, in 2022. In fact, only 20 states still have their original charter of governance in place. Nineteen have replaced theirs at least four separate times. Texas is one of those states currently on its fourth constitution—a document it has amended 528 times since 1876.

The differences between what we learn about the U.S. Constitution and the realities of state governance have led many to reasonable but faulty assumptions about what is possible in American politics, especially in higher education. State constitutional amendments could be used to provide more accessible, affordable, high-quality college options when federal efforts fall short. Indeed, this kind of effort might prop the door open for the states. For example, the Supreme Court rejected a federal right to K–12 education in *San Antonio Independent School District v. Rodriguez* (1973), but this landmark case set off a cascade of state-level lawsuits that would establish that same right, one by one, in all 50 states. This was possible because education-related language is stronger and more explicit in state constitutions than it is at the federal level.

Higher education, on the other hand, has very little in the way of constitutional guarantees, at either the federal or state level. There is some sense to this, as postsecondary education has historically been viewed as a nice-to-have, an extra layer for the most academically gifted and economic elites, but unnecessary for a well-paying, middle-class job. Widespread enrollment in higher education came several generations after the push for free, universal primary and secondary education, and this historical context shaped the language that was originally crafted when framing citizens’ rights to education in state constitutions.

That historical context is no longer operative. Unlike when these provisions were written, some education beyond high school—whether that be a bachelor’s degree, associate’s degree, trade certification, or other training—is nearly compulsory to thrive in the modern American economy.[2] And as we demand a more inclusive society, where economic mobility and opportunity are made available to all regardless of race, sex, or a family’s socioeconomic status, higher education has become increasingly important as both a stepping stone and roadblock to achieving these goals.

In response to the increasing need for postsecondary education, state constitutions should be amended to bring its treatment in line with the significance originally directed toward K–12 schooling. Primary and secondary education benefits from a half century or more of legal precedent, with a very active set of constitutional debates regarding what equitable and adequate resourcing looks like for schools. Every state is responsible for providing a system of schools and, therefore, is also responsible for ensuring that those schools meet the needs of students. Appropriate resources are a foundational part of that charge. To ensure these resources, state funding needs to be:

1. Distributed equitably based on the varying needs of students and their communities; and
2. Sufficient such that every school has the resources it needs to provide a quality education.

When either of these two requirements is not met, public school advocates are able to lean on the argument that students are not being provided their constitutionally defined right to an education. This is a powerful tool during both budget negotiations and demands for revisions to the formulas used to distribute state resources.

Higher education, with its far more limited constitutional language to rely upon, has had to primarily focus on “government relations”—that is, lobbying—to achieve change. The result has been, predictably, a concentration of resources in the hands of those that can afford to pay full-time lobbyists and that otherwise bring prestige to the state, whether through academics, athletics, or research. Flagship public universities, with students who are mostly white and mostly wealthy, and which often boast deep alumni networks working in statehouses, receive almost 40 percent more state funding per student than other public four-year institutions.[3] Only a tiny portion of the lowest-income students in our country attend these universities; most attend non-selective, open-access institutions, creating a massive and systemic gap in student need and institutional resources. The situation is somewhat better for community colleges, with a larger number of states using actual formulas to

allocate dollars, but funding is still all too often based on prior-year appropriations rather than the actual need of the communities and students that they serve.[4]

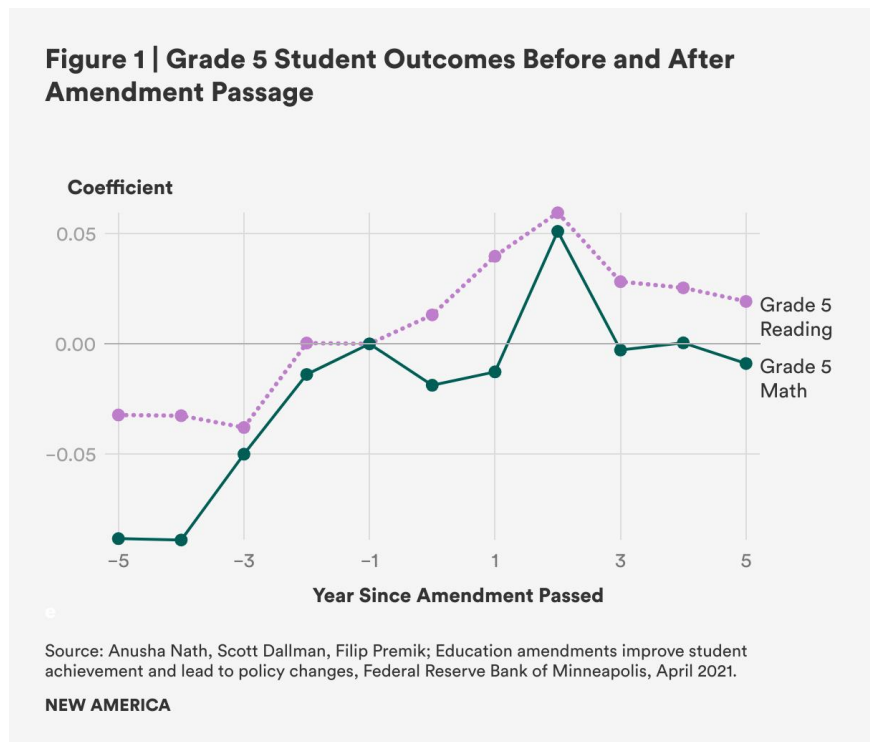
Given the current political landscape and relative political power of those institutions most benefitting from the current system, it is excruciatingly difficult to make major changes to the status quo laid out above. But the incentives do not need to remain static, since we know that constitutional language is both pliable and impactful on legislative decision-making. The rest of this brief will make the case that state constitutions make a difference, and passing an amendment is not as difficult as it would be on the federal level. It can be done.

Constitutions Matter and Amendments Make a Difference

While every state in the United States has baseline language guaranteeing a child’s right to a K-12 education, many go well beyond that.[5] These education clauses have had a profound effect on legislative decision-making, with the threat of a lawsuit hanging over the heads of policymakers as they make regulatory and budgetary decisions each year. Legislators take this threat seriously because it is not idle: Over the last 50 years, school finance has been litigated in 48 states,[6] with an average of four cases filed per state during that period.[7] Plaintiffs have won about half of those, making them a serious issue.

Amendments tend to have two major impacts:

1. They increase political leverage for education advocates, improving their position during annual budget negotiations and when pushing for reforms to the education finance system; and
2. They drive meaningful policy change, measured by the number of education-related bills passed in the year following ratification, which, in turn, improves student outcomes (see Figure 1).



While nearly every state has faced litigation, the passage of amendments themselves does not immediately increase the number of cases filed. It seems that in the years following passage, the threat of endless court battles does move legislatures to enact reforms that are seen as sufficient to meet the requirements of the new language. The average time for a case to be resolved is three and a half years,[8] and in each where the plaintiff was successful, the legislature must then interpret the ruling and respond with corresponding legislation—a lengthy process, at best. The resulting pressure on legislators to fix problems without involving the courts results in far faster remedies for students and schools.

This impact is seen in higher education as well, though to a more limited degree because of the lack of existing language in state constitutions (as discussed in the next section). Only three states in the country—Arizona, North Carolina, and Wyoming—have constitutional language that requires the legislature to keep tuition in check and offer higher education for as close to free as possible. Of those, North Carolina and Arizona[9] are two of the four least-expensive states for average tuition cost at public two-year institutions, and North Carolina and Wyoming are two of the three least-expensive for tuition cost at four-year schools (see Figure 2).[10]

Figure 2 | Average Published Tuition and Fees at Public Institutions, 2023–24

Least to Most Expensive	Public Two Year (In District)	Public Four Year (In State)
1	California (\$1,436)	Florida (\$6,364)
2	New Mexico (\$2,134)	Wyoming (\$6,698)
3	North Carolina (\$2,526)	North Carolina (\$7,437)
4	Arizona (\$2,882)	Utah (\$7,720)
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47	New Hampshire (\$7,096)	New Jersey (\$16,261)
48	South Dakota (\$7,291)	Connecticut (\$16,403)
49	Vermont (\$8,660)	New Hampshire (\$17,171)
50	*	Vermont (\$17,183)

*Alaska does not have any public two-year institutions recognized by Collegeboard.

Source: Table CP-5 in "Trends in College Pricing 2023: Data in Excel," College Board, 2023.

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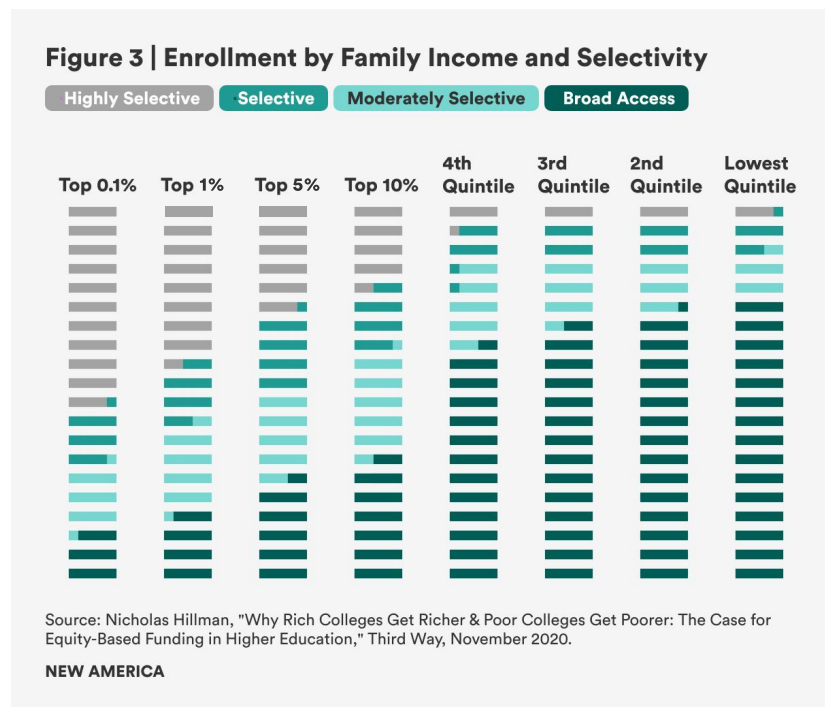
It may seem obvious, but constitutional language does impact lawmakers' decision-making. The threat of legal action is taken seriously. And perhaps more importantly, it drives positive change that does not usually require litigation. The threat is there, but the real day-to-day benefits come from both advocates and lawmakers themselves having more leverage to argue for the importance of higher education issues.

The Problem: Lack of Access, Inequitable Funding, and an Absence of Constitutional Language

Unlike elementary and secondary schooling, most states do not have any constitutional language describing their obligation to support public colleges and universities. Only 16 have any funding requirements at all, and, as mentioned, only three explicitly obligate themselves to keep student costs to the minimum level possible. None mention resourcing institutions equitably nor do any bestow a right to higher education in the same way that they do for K–12.[11]

This leaves us with two, interwoven problems. The first is a lack of access to the most selective universities for students from disadvantaged backgrounds and communities. In Mississippi’s 2019 high school graduating class, 48 percent of graduates were Black, yet Black students made up only 9 percent of incoming freshmen at the state’s flagship university, the University of Mississippi.[12] This is not an issue confined to the Deep South: In the same year in Maryland, Black students made up 34 percent of the high school graduating class but only 10 percent of incoming students at the University of Maryland. This pattern is replicated across every state with a graduating class of at least 10 percent Black students.[13]

Access is not only limited by race. Low-income students are very unlikely to attend highly selective schools, public or private, as seen in Figure 3. On the other hand, those in the top 0.1 percent of income are unlikely to attend any institution that is not selective.



These access gaps might not be an area of concern if institutions had equal outcomes or were, at a bare minimum, resourced equitably. But this leads us to our second problem: they are not. Flagship universities receive significantly more state funding per full-time undergraduate student compared to other public four-year institutions.[14] Accounting for all education and education-related expenditures, a highly selective, public research university spends on average \$32,000 a year per student; meanwhile, a broad access college with an education focus spends \$14,000 per year.[15] As these are education-related expenditures, they do not include research or public service money—a common argument made against these comparisons. These resources are spent on education and support services for the benefit of students.

Historically Black colleges and universities (HBCUs) and predominantly Latino institutions (PLIs)[16] also face systemic gaps in spending and revenue. Public four-year PLIs, on average, receive more than \$4,000 less per student than comparable schools in the same state. HBCUs and predominantly Black institutions have seen such significant funding cuts and revenue shortfalls that between 2006 and 2018 per-student tuition was increased by 65 percent—more than double the rate of inflation. [17]

The interaction of these two problems means that students coming from low-income backgrounds or those facing racial discrimination are pushed into schools with fewer resources, fewer student supports, and worse outcomes. Research has shown repeatedly that more institutional funding improves graduation and persistence rates,[18] yet we send our students with the greatest challenges to the schools provided the fewest resources, adding to the pile of inequities they already face.

Advocates for these students and the institutions they attend must deal with a difficult political environment, however, with very few constitutional protections available to them to use as leverage with legislators.

As seen in the interactive maps (Figures 4 and 5), only 17 states have language explicitly stating that they must provide ongoing funding or “maintain” state colleges or universities. More than half of states’ constitutions establish governance for a public system of higher education, but unlike K–12 schools where this implies a significant level of financial responsibility because they are provided free of cost, higher education must contend with the issue of tuition. Because tuition can be increased or decreased based on available funding, it acts as a release valve, and greatly obfuscates the financial responsibilities of the government. Even when state support is required, it is difficult to apply legal pressure on decision makers without a clear directive on what that funding should aim to achieve. As shown in the previous section, specific language makes a difference, while vague requirements leave judges little to work with when legal challenges are raised.

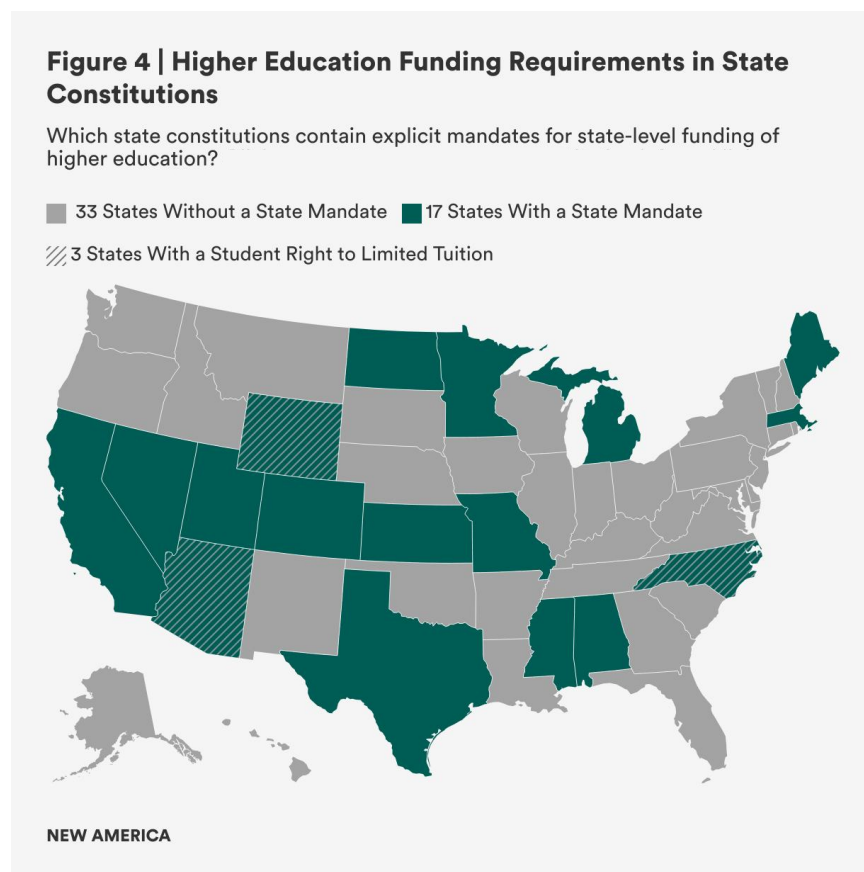
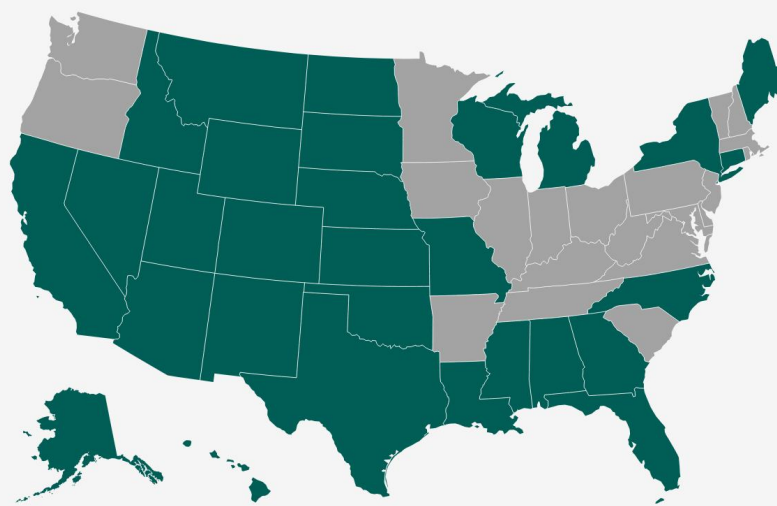


Figure 5 | Higher Education Governance Language in State Constitutions

Which state constitutions contain language establishing a public system of higher education?

■ 21 States With Higher Education Governance Language ■ 29 States Without Higher Education Governance Language



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Yet, while it is clear that strong legislative language has a real impact on students in both K-12 and higher education, even the best examples in the postsecondary domain focus almost exclusively on keeping tuition low and pay no attention at all to institutional equity or a student’s right to attend a high-quality school. These issues go hand in hand, as inequitable resourcing means that the highly selective, flagship schools absorb the lion’s share of dollars. Limited budgets lead to open-access institutions starved of funding, the same ones that disadvantaged students attend disproportionately because they are denied entry into (or never apply for) the most selective schools. It is a merry-go-round of systemic inequity that is pervasive across the country, at least in part because no state has constitutional requirements demanding the problem be solved, which leaves advocates with no legal recourse to press for change.

Affordable tuition *is* important. But ensuring a fair distribution of funding across institutions is also of paramount importance, because not every student can attend a flagship school. Resources do not guarantee quality, but they certainly make the job of staff and instructors far easier. The specific amendment language and theory of action used in each state may vary considerably, but there is no doubt that there is a serious need for action of some sort if we hope to improve the gross institutional and student inequities entrenched in our systems.

The Opportunity: Pass Constitutional Amendments

K-12 advocates have demonstrated that constitutional language matters, as it can move legislators in a way that little else can. And the good news is that passing amendments to state constitutions is doable. It is often expensive and time consuming depending on the state’s rules, but it can be—and is frequently—done.

Between 2006 and 2023, 1,171 amendments were placed before voters across the United States. Of those put forward, 846 were approved, a 72 percent passage rate.[19] On the extreme end, Alabama replaced its entire constitution in 2022. But it's not alone. Louisiana is currently in the process of attempting the same, with the goal of simplifying a document that has been amended 90 times since just 2006.[20] These documents, while hugely important and significantly more difficult to change than a typical law, are far from written in stone.

Process does have an impact on feasibility, however, and the major differentiator between states is whether the constitution allows citizen-initiated ballot measures. Eighteen states (shown in Figure 6) grant residents the power to propose an amendment for a statewide vote without prior legislative approval,[21] meaning that a well-organized signature campaign can get an amendment on the ballot and in front of voters. This is an expensive route to take but is likely the best one available when facing a hostile legislature, as abortion-rights advocates have demonstrated in recent years. Since 2022, of the 10 states where advocates have successfully had pro-choice amendments put on the ballot, six have been citizen initiated, including amendments that passed in Ohio and Michigan. Colorado, Florida, Nevada, and South Dakota are up this year.

Figure 6 | States That Allow Citizen-Initiated Ballot Measures As of 2024

Arizona	Massachusetts	Nevada
Arkansas	Michigan	North Dakota
California	Mississippi	Ohio
Colorado	Missouri	Oklahoma
Florida	Montana	Oregon
Illinois	Nebraska	South Dakota

Source: Ballotpedia, "Initiated Constitutional Amendment," accessed September 11, 2024.

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While not every state allows for citizen-initiated measures, all have a legislative process available. In nearly all cases, this means approval by the legislature followed by a statewide vote.[22] In supportive legislatures, this is by far the easiest and cheapest route, and indeed, there are 74 legislatively referred measures on the ballot this year, compared to only 14 citizen-initiated ones.[23] The proposed changes range from removing a constitutional ban on same-sex marriage (Colorado), and providing a right to hunt and fish (Florida) to a citizenship requirement for voting in elections (Iowa).

Whether initiated by the people or state legislature, changes to state constitutions happen by the dozen every year. Between 1990 and 2018, there were 193 amendments put on state ballots and passed on the topic of education alone.[24] Of those, 79 were directly related to funding, whether creating dedicated funds, requiring equitable distribution of dollars, or generally increasing revenue. However, the vast majority of all education-related amendments were directed at K-12 schools. Higher education advocates and their funders would benefit greatly from being more involved in these campaigns.

The existence of these opportunities does not imply an easy process, however. Convincing a legislature to initiate an amendment process is a heavy lift, especially when it comes to budgetary issues. Organizing a citizen-led initiative is likewise a difficult task, as these are expensive to organize and can require hundreds of volunteers. But we know it can be done because it is done, and we also know that both the public and lawmakers recognize the importance of education beyond high school. [25] Even with the rising costs and politicization of higher education today, 78 percent of Americans would recommend pursuing a bachelor’s degree to a close friend or relative, with 86 percent saying that trade school is an equally good option (or better). [26] Improving access to higher education is not a niche issue or one that applies to just one demographic group. It concerns anyone with a child, anyone interested in attending college, or anyone interested in the future welfare of their state’s economy and the social good.

Use the Language That Is Already There

Constitutional language is only as good as the lawyers who use it. In no place does this lesson play out more clearly than in Arizona, where Article 11, Section 6 clearly states: “The university and all other state educational institutions shall be open to students of both sexes, and the instruction furnished shall be as nearly free as possible.” This is some of the strongest language anywhere in the nation, with only Wyoming and North Carolina coming close to it. Yet while these other two states have among the lowest university tuition rates in the country—they are ranked number two and three, respectively—Arizona is ranked 34th. [27]

One might argue that significant financial aid investments would meet the compliance requirements, yet on state expenditures for student aid (per student) Arizona ranks 46th. [28] In fact, a report from Arizona State University found that, adjusted for the cost of living, state and local appropriations for higher education were almost 40 percent below the national average and ranked the state 49th out of 50. [29]

Community colleges, where Arizona’s tuition rates are some of the lowest in the country, received \$141 million from the state in FY 2022. Local support totaled \$960 million—680 percent higher than state support. If communities were to slash their property tax rates tomorrow, the state’s funding formula has no mechanism to adjust. This means that the state is relying on local communities to voluntarily tax themselves to keep tuition rates low. The Arizona legislature seems on shaky constitutional footing.

While few states face as clear a conflict as the one described above, postsecondary advocates do not require language specifically referencing higher education in order to apply pressure. Many states have their own versions of an equal protections clause. Others have broad definitions of education that could be interpreted more generously than they have been in the past, given the increasing need for some type of postsecondary education to find a well-paying job. If modifying constitutional language is off the table, take a look at what is already written, since there may be new opportunities thanks to rapid changes in our economic and social contexts.

A Caveat: Free College for All

As free college for all programs sweep across the country—over half of U.S. states have some form of free-college tuition program in place today^[30]—the question is raised how a campaign to require more equitable and adequate resourcing of institutions might interact with this idea. The short answer is that funding only becomes more important when students are no longer paying tuition directly. Since tuition is currently used as a release valve during difficult budget years, and state schools with less funding are often forced to raise it to maintain operations, the distribution of government funding becomes essential—especially for students attending less-wealthy colleges—in the absence of tuition to fall back on.

In fact, it would be a very good idea to prioritize any constitutional guarantees for equitable funding and student access to high-quality institutions before any free college policies are passed, to ensure that current inequities are not then permanently baked into the system. The fewer revenue sources institutions have in the future, the more reluctant the “winning” institutions will be to make changes to what they do have.

Any free-college campaign must have this issue on its radar and a plan to tackle it. Otherwise, we will undoubtedly see a mirroring in higher education of the inequalities that existed in K-12 before decades of litigation began to improve the situation. But in this case, higher education will not have the constitutional language to fall back on as a potential remedy.

Conclusion

We know that amendments work, and we know that they are a legitimate, plausible option for improving our systems of higher education. Yet we are still left with the question of what an amendment should look like, exactly.

The truth is, it will vary based on each state’s political and legal context. But even as the legal language shifts to accommodate local needs, we might propose a couple of high-level ideas—currently missing from every state constitution—that would make a difference for students.

1. Every high-school graduate, regardless of race, sex, or economic status, should be granted the right to attend an affordable, high-quality, public postsecondary institution.
2. State and local funding for postsecondary institutions should be sufficient and distributed equitably, based on the relative resource needs of students attending each institution.

If advocates and politicians introduced either of these ideas into their state constitutions, we would undoubtedly be in a better place than we are today. Tailored to the legal and political context within each state, they are not controversial principles. They could, however, have a massive impact on the political and legal environment that institutions of higher education operate in, if implemented. One that is positive, not just for the institutions themselves, but the students they serve.

Acknowledgements

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Notes

[1] The 27th Amendment was ratified in 1992 but initially introduced by James Madison in 1789. When originally proposed it did not receive enough state support to come into force, however there is no limit on how long an amendment process might take, and in 1982 the language resurfaced and a national campaign was launched to finish the job started over two centuries prior.

[2] Anthony P. Carnevale, Nicole Smith, Martin Van Der Werf, and Michael C. Quinn, [*After Everything: Projections of Jobs, Education, and Training Requirements through 2031*](#) (Washington, DC: Georgetown University Center on Education and the Workforce, 2023), 2.

[3] Konrad Mugglestone, Kim Dancy, and Mamie Voight, [*Opportunity Lost: Net Price and Equity at Public Flagship Institutions*](#) (Washington, DC: Institute for Higher Education Policy, September 2019), 4.

[4] Mitchell Lingo, Robert Kelchen, Dominique Baker, Kelly Rosinger, Justin Ortagus, and Jiayao Wu, [*The Landscape of State Funding Formulas for Public Colleges and Universities*](#) (InformEd States, December 2021), Table 1 (appendix).

[5] Scott Dallman and Anusha Nath, [*Education Clauses in State Constitutions Across the United States*](#) (Minneapolis, MN: Minneapolis Federal Reserve, January 8, 2020), 2.

[6] Hawaii and Utah are the only two states to avoid litigation.

[7] Eric A. Hanushek and Matthew Joyce-Wirtz, Working Paper 31271: [*Incidence and Outcomes of School Finance Litigation: 1968-2021*](#) (Cambridge, MA: National Bureau of Economic Research, May 2023), Figure 3.

[8] Hanushek and Joyce-Wirtz, 14.

[9] As discussed in sidebar Use the Language That is Already There, Arizona's overall funding scheme is on shaky ground constitutionally.

[10] Table CP-5 in "[Trends in College Pricing 2023: Data in Excel](#)," College Board, 2023.

[11] Author gathered and calculated data.

[12] Lauren Lumpkin, Meredith Kolodner, and Nick Anderson, "[Black Student Enrollment Lags at Many Flagship Universities](#)," *Washington Post*, April 18, 2021.

[13] Lumpkin, Kolodner, and Anderson.

[14] Mugglestone, Dancy, and Voight, 4.

[15] Nicholas Hillman, [*Why Rich Colleges Get Richer & Poor Colleges Get Poorer: The Case for Equity-Based Funding in Higher Education*](#) (Denver, CO: Third Way, November 20, 2020).

[16] A subset of Hispanic-serving institutions.

[17] J. Oliver Schak, *Dismantling Dire Disparities: A Closer Look at Racially Inequitable Funding at Public Four-Year Colleges and Universities* (Washington, DC: The Institute for College Access & Success, August 25, 2021), 14.

[18] David J. Deming and Christopher R. Walters, *The Impact of Price Caps and Spending Cuts on U.S. Postsecondary Attainment* (Cambridge, MA: Harvard University, August 2017); Douglas A. Webber and Ronald G. Ehrenberg, “[Do Expenditures Other Than Instructional Expenditures Affect Graduation and Persistence Rates in American Higher Education?](#)” *Economics of Education Review* 29, no. 6 (December 2010); and John Bound, Michael F. Lovenheim, and Sarah Turner, “[Why Have College Completion Rates Declined? An Analysis of Changing Student Preparation and Collegiate Resources,](#)” author manuscript, National Library of Medicine, July 1, 2010.

[19] Ballotpedia, “[Constitutional Amendments from 2006 through 2023,](#)” accessed September 11, 2024.

[20] Julie O’Donoghue, “[Jeff Landry Wants State Constitutional Overhaul on the November Ballot,](#)” *Louisiana Illuminator*, March 8, 2024.

[21] However, in Massachusetts, at least 25 percent of the legislature, in two joint sessions, must approve the petition after signatures are collected for the measure to be sent to the ballot.

[22] Delaware is the only state that does not require voter approval after passage through the legislature.

[23] Ballotpedia, “[2024 Ballot Measures,](#)” accessed September 11, 2024.

[24] Dallman and Nath, 5.

[25] Eric Kelderman, “[What the Public Really Thinks About Higher Education,](#)” *Chronicle of Higher Education*, September 5, 2023.

[26] Kelderman.

[27] College Board, Table CP-5.

[28] National Center for Science and Engineering Statistics, “[State Expenditures on Student Aid per Undergraduate Student,](#)” Science & Engineering State Indicators, display year 2021.

[29] Dennis Hoffman and Tom Rex, *The Financing of Public Higher Education in Arizona* (Tempe, AZ: Arizona State University, July 2023), 1.

[30] Campaign for Free College Tuition, “[Our Momentum,](#)” accessed September 11, 2024.