

*Memorandum*

**To:** Robert LeFevre  
**From:** Peter B. Ruddell  
**Re:** Constitutionality of SB 1055  
**Date:** September 14, 2020

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**I. Introduction**

Michigan Independent Colleges and Universities (“MICU”) asked us to analyze whether: (1) a community college that is governed by a locally elected board of trustees may grant four-year bachelor of science degrees under the Michigan Constitution of 1963 (the “Constitution”), and (2) a community college that grants four-year bachelor of science degrees may levy local taxes under MCL 389.144. This memo concludes that it would be inconsistent with the text, structure, and history of the Constitution for a community college governed by a locally elected board of trustees to issue four-year Bachelor of Science degrees. A community college may only constitutionally grant Bachelor of Science degrees if it is governed by a governor-appointed board, and such institutions may not levy local taxes under MCL 389.144.

**II. Community Colleges Governed by Locally Elected Boards Cannot Constitutionally Grant Baccalaureate<sup>1</sup> Degrees.**

Article VIII of the Constitution governs education in the State of Michigan. In construing constitutional provision like Article VIII, Michigan courts “examin[e] the text, structure, and history of the Constitution.” See *Citizens Protecting Michigan’s Constitution v Sec’y of State*, 503 Mich 42, 54; 921 NW2d 247 (2018). Each of these factors indicate that community colleges governed by locally elected boards may not grant baccalaureate degrees.

**A. Text and Structure**

Four sections of Article VIII bear on the governance and structure of Michigan’s higher-education institutions:

- Section 3 provides: “Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board

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<sup>1</sup>Although the Michigan Constitution uses the word “baccalaureate” rather than “bachelor,” “baccalaureate” means “the degree of bachelor conferred by universities and colleges.” <https://www.merriam-webster.com/dictionary/baccalaureate>.

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of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith. . . . The power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section." 1963 Const, Art 8, § 3.

- Section 5 provides: "The regents of the University of Michigan and their successors in office shall constitute a body corporate known as the Regents of the University of Michigan; the trustees of Michigan State University and their successors in office shall constitute a body corporate known as the Board of Trustees of Michigan State University; the governors of Wayne State University and their successors in office shall constitute a body corporate known as the Board of Governors of Wayne State University. Each board shall have general supervision of its institution and the control and direction of all expenditures from the institution's funds. . . . The board of each institution shall consist of eight members who shall hold office for terms of eight years and who shall be elected as provided by law." 1963 Const, Art 8, § 5.
- Section 6 provides: "Other institutions of higher education established by law having authority to grant baccalaureate degrees shall each be governed by a board of control which shall be a body corporate. The board shall have general supervision of the institution and the control and direction of all expenditures from the institution's funds. . . . Each board of control shall consist of eight members who shall hold office for terms of eight years, not more than two of which shall expire in the same year, and who shall be appointed by the governor by and with the advice and consent of the senate." 1963 Const, Art 8, § 6.
- Section 7 provides: "The legislature shall provide by law for the establishment and financial support of public community and junior colleges which shall be supervised and controlled by locally elected boards. The legislature shall provide by law for a state board for public community and junior colleges which shall advise the state board of education concerning general supervision and planning for such colleges and requests for annual appropriations for their support. The board shall consist of eight members who shall hold office for terms of eight years, not more than two of which shall expire in the same year, and who shall be appointed by the state board of education." 1963 Const, Art 8, § 7.

These provisions clearly distinguish between § 5 institutions (the University of Michigan, Michigan State University, and Wayne State University); § 6 institutions ("[o]ther institutions of higher education established by law having authority to grant baccalaureate degrees"); and § 7 institutions (public community and junior colleges). The fact that the framers separated community colleges from "[o]ther institutions . . . having the authority to grant baccalaureate

degrees” and discussed community colleges in a separate section of the Constitution indicates that the framers did not contemplate that community colleges would have the authority to grant baccalaureate degrees. This is consistent with the common meaning of the term “community college.” See *Gravlin v. Mich. Dep’t of State Police*, 87 Mich App 217, 224; 274 NW2d 21 (1978) (“Community colleges do not grant a bachelor’s degree.”).

The Constitution further requires distinct forms of governance for each type of institution: § 5 institutions are governed by state-wide elected boards; § 6 institutions are governed by governor-appointed boards; and § 7 institutions are governed by locally elected boards. Aside from the three § 5 institutions, the Constitution requires that all “[o]ther institutions of higher education established by law having authority to grant baccalaureate degrees *shall* each be governed by a board of control . . . consist[ing] of eight members . . . who *shall* be appointed by the governor by and with the advice and consent of the senate.” 1963 Const, art 8, § 6 (emphasis added). Michigan courts have repeatedly stated that “‘shall’ indicates a *mandatory* directive.” See *People v. Lockridge*, 498 Mich 358, 387; 870 NW2d 502 (2015). The Constitution thus requires all baccalaureate-granting institutions to satisfy the governance requirements of either § 5 or § 6. Institutions that satisfy neither section’s governance requirements may not constitutionally grant baccalaureate degrees.

Community colleges governed by a locally elected board of trustees do not satisfy the mandatory governance requirements of § 5 or § 6. They are not governed by a state-wide elected board as § 5 requires, or an eight-member, governor-appointed board of control as § 6 requires. Instead, they fall under § 7, which provides that public community and junior colleges without the authority to grant baccalaureate degrees “shall be supervised and controlled by locally elected boards.” Under Michigan law, these boards consist of seven members, not eight. See MCL 389.14.

Because the Constitution only permits institutions that comply with the mandatory governance requirements of § 5 or § 6 to grant baccalaureate degrees, and community colleges governed by locally elected boards do not satisfy either section’s requirements, the text and structure of the Constitution indicate that such institutions may not grant baccalaureate degrees.

**B. History**

The history of community colleges in Michigan and the drafting of Article VIII support this interpretation. The first junior and community colleges in Michigan were part of the local public school system and offered two years of collegiate coursework. They granted associate degrees, but not baccalaureate degrees, and were governed by local boards of education. See Citizens Research Council of Michigan, *Grand Rapids Junior College: Prospects and Alternatives* (Jan 1967), p 8; *Shaw v Macomb Cty Cmty Coll*, 389 Mich 69, 75–77; 204 NW2d 129 (1973). Consistent with this Michigan practice, the delegates at the Constitutional Convention consistently referred to community colleges as two-year colleges and distinguished them from four-year institutions granting baccalaureate degrees. See 2 Official Record, Constitutional Convention

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1963 (“Record”), pp 1143, 1172, 1177, 1179, 1182, 1190. The delegates also emphasized that community colleges are “locally oriented institutions” subject to local control and financing. *See id.* at 1181.

The delegates repeatedly relied on a report generated during a legislatively authorized investigation into higher education. *See* Martorana, S.V., *The Community College in Michigan*, in Russell, J.D., *The Survey of Higher Education in Michigan* (June 1957) (the “Russell Report”). Among other things, the Russell Report examined “the distinct functions of the community college,” which it noted “are not entirely like those usually attached to the high-school level of the educational system on the one hand, nor like those of the advanced colleges on the other.” *Id.* at 55–56. The distinct functions of a community college include “(1) the provision of courses for students *who plan to go on to further collegiate study and a baccalaureate degree*; (2) the offering of courses of a terminal-occupational nature for persons seeking employment in business, industry, or some other fields immediately after leaving the community college; and (3) the provision of a broad and flexible program of continuing and adult education for out-of-school youth and adults in the community.” *Id.* at 23 (emphasis added). The Russell Report rejected the view that “the services usually rendered to a locality by a community college can be equally effectively rendered by a four-year degree-granting institution.” *Id.* at 125. Instead, it concluded that “a more effective total plan for higher education results when the functions of a community college are distinguished from those of a baccalaureate degree-granting institution.” *Id.* at 126. The delegates at the Constitutional Convention repeatedly expressed their intent to adopt this tripartite structure, with high schools, two-year community colleges, and four-year universities each serving a distinct function and being treated separately. *See* Record, pp 1178–79.

This history sheds light on the Constitution’s text and structure. The historical evidence indicates that the framers conceived of the community and junior colleges discussed in § 7 as two-year colleges that served local communities, were subject to local control, and did not grant baccalaureate degrees. It would be inconsistent with the text and structure of Article VIII, as well as this historical understanding, for these institutions to grant baccalaureate degrees.

**III. Consistent with the Constitution, the Community College Act of 1966 Applied Only to Non-Baccalaureate-Granting Institutions. Subsequent Amendments to the Act Must Be Consistent with the Constitution.**

Three years after the Constitution was adopted, the legislature enacted the Community College Act of 1966 (the “Act”) “for the purpose of implementing section 7 of article 8 of the state constitution.” *See* MCL 389.191. Consistent with the text, structure, and history of § 7, the Act defined “[c]ommunity college” as:

an educational institution providing primarily for all persons above the twelfth grade age level and primarily for those within commuting distance, collegiate and noncollegiate level education including area vocational technical education

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programs *which may result in the granting of diplomas and certificates including those known as associate degrees but not including baccalaureate or higher degrees.*

See MCL 389.105(c), as enacted by 1966 PA 331 (emphasis added).

The Act implements § 7 by providing that “[a] community college district is directed and governed by a board of trustees, consisting of 7 members, elected at large in the territory of the district or proposed district on a nonpartisan basis.” MCL 389.14. The Act confers on boards of trustees general powers to operate the community college district, including the ability to levy local property taxes for its general fund. See MCL 389.144.

SB 1055 seeks to modify the Act’s definition of “[c]ommunity college” to provide that “[t]he term does not include an educational institution or program that grants baccalaureate or higher degrees *other than a bachelor of science in nursing.*”<sup>2</sup> (emphasis added). SB 1055 would also authorize community colleges to “[e]stablish a nursing education program that grants Bachelor of Science in nursing degrees,” and impose conditions for “the establishment and operation of a bachelor of science in nursing degree” under the amended Act.

SB 1055 thus contemplates that community colleges governed by locally elected, seven-member boards of trustees would have the authority to grant Bachelor of Science degrees. However, as explained above, the text, structure, and history of the Constitution demonstrate that § 7 is limited to non-baccalaureate-granting community colleges. Any “institutions of higher education established by law having authority to grant baccalaureate degrees” must comply with the mandatory governance requirements of § 5 or § 6. By authorizing § 7 institutions to grant Bachelor of Science degrees without satisfying these requirements, SB 1055 would exceed the legislature’s authority to implement § 7 of Article VIII and contravene a mandatory constitutional directive. See *AFSME Council 25 v State Emps Retirement Sys*, 294 Mich App 1, 15; 818 NW2d 337 (2011) (“The Legislature and the appellate courts have no right to amend or change a provision contained in the state constitution. Consequently, when a statute contravenes the provisions of the state constitution it is unconstitutional and void.” (citation omitted)).

A community college that issued Bachelor of Science degrees pursuant to a legislative act would be an “institution[] of higher education established by law having authority to grant baccalaureate degrees” within the meaning of § 6 of Article VIII. Accordingly, the Constitution

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<sup>2</sup>The Act was similarly amended in 2012 to provide that “[t]he term does not include an educational institution or program that grants baccalaureate or higher degrees *other than a baccalaureate degree in cement technology, maritime technology, energy production technology, or culinary arts.*” MCL 389.105(c), as amended by 2012 PA 495 (emphasis added). An analysis of the 2012 amendment is beyond the scope of this memo.

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would require that its governing body be reconstituted as an eight-member, governor-appointed local board of control. The legislature has given various powers to the eight-member, governor-appointed boards of control that govern § 6 institutions, including the power to grant baccalaureate degrees. *See* MCL 390.554; 390.154; 390.352; 390.715; 390.803; 390.843. However, the legislature has not given § 6 institutions the power to levy local taxes for their general funds. Instead, the legislature has reserved that power for locally oriented community colleges governed by locally elected, seven-member boards of trustees. *See* MCL 389.14; 389.191. Therefore, a community college that was properly reconstituted to grant baccalaureate degrees in accordance with the Constitution's mandatory requirements would not have the power to levy local property taxes for its general fund under Michigan law.

#### **IV. Conclusion**

In sum, the text, structure, and history of the Constitution demonstrate that a community college governed by a locally elected board of trustees may not constitutionally issue four-year Bachelor of Science degrees. A community college may only grant Bachelor of Science degrees if it is governed by an eight-member, governor-appointed board, and such institutions may not levy local taxes under MCL 389.144.