

## Who’s in Charge?: The Constitutional Confusion Challenging North Carolina’s Public School System\*

*For decades, North Carolina’s public schools have grappled with a foundational question—who’s in charge? North Carolina’s state constitution provides for an elected state superintendent of public instruction and an appointed state board of education. The constitution clearly places the board in a superior policymaking role, but its text offers vague, confusing, and contradictory language on the division of administrative power between the two. While superintendents and boards have historically worked collaboratively to avoid conflict over administrative matters, like hiring and firing state-level public school employees, recent high-profile conflicts between the board and several superintendents suggest an increasingly combative relationship that threatens the governance of the state’s public school system. Extraconstitutional efforts to clarify the board’s and superintendent’s roles have failed, and the courts have at best left the confusion just as confounding as they found it.*

*This Comment asserts that a thoughtful review of the historical development of the board and superintendent offers insight into the purposes of the framers that should guide the Supreme Court of North Carolina when it inevitably examines the issue again. Backed by history, the court should recognize the board’s superior administrative authority over the public schools. By answering “who’s in charge,” the court can implement the stable, nonpartisan leadership that formed the vision of the framers for the governance of the state’s most consequential public function.*

INTRODUCTION.....	518
I. HOW CONSTITUTIONAL CONFUSION IMPACTS NORTH CAROLINA’S PUBLIC SCHOOL SYSTEM .....	522
A. <i>The Facially Confusing Roles of the State Board of Education and State Superintendent of Public Instruction</i> .....	522
B. <i>Extraconstitutional Efforts To Define the Powers of the Superintendent and Board</i> .....	527
C. <i>The Hidden but Real Impact of Constitutional Confusion on North Carolina’s Public Schools</i> .....	529
II. HISTORICAL BACKGROUND ON THE STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION .....	531
A. <i>Early Development</i> .....	532

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518	<i>NORTH CAROLINA LAW REVIEW</i>	[Vol. 101]
	B. <i>1868 Constitution: Reconstruction Constitution Leads to Elected Superintendent</i> .....	535
	C. <i>1942 Constitutional Amendments: Creating a More Stable, Less Political Board</i> .....	539
	D. <i>1971 Constitutional Amendments: The Current Constitution</i> ....	541
	E. <i>Major Principles from the Constitutional Development of the State Board and State Superintendent</i> .....	544
III.	THE COURTS' FAILURE TO PROVIDE CLARITY .....	546
	A. <i>Atkinson v. State: 'Both' the Board and Superintendent Are in Charge?</i> .....	547
	B. <i>North Carolina State Board of Education v. State: 'Day-to-Day' vs. General Administration?</i> .....	551
IV.	APPLYING NEUTRAL PRINCIPLES, THE BOARD HAS SUPREME CONSTITUTIONAL AUTHORITY OVER THE ADMINISTRATION OF THE STATE-LEVEL PUBLIC SCHOOL SYSTEM .....	557
	CONCLUSION .....	563

## INTRODUCTION

In a rare bit of common ground, virtually everyone with experience in or around North Carolina's state-level system of public education agrees that "[w]e have an education governance problem in North Carolina."<sup>1</sup> State superintendents of public instruction,<sup>2</sup> chairmen of the state board of

1. Kari Travis, *Johnson: Lawsuit Needed To Bring Accountability to School Governance*, CAROLINA J. (Aug. 10, 2017), <https://www.carolinajournal.com/news-article/johnson-n-c-school-governance-convoluted-lacks-accountability/> [<https://perma.cc/BDH2-ESN2>] (quoting former state Superintendent Mark Johnson).

2. *See, e.g., id.*; LEG. RSCH. COMM'N, SUPERINTENDENT OF PUBLIC INSTRUCTION AND THE STATE BOARD OF EDUCATION: REPORT TO THE 1987 GENERAL ASSEMBLY OF NORTH CAROLINA, app. N, at N-9, N-11 (1986) [hereinafter 1986 REPORT], <https://www.ncleg.gov/Files/Library/studies/1987/st10279.pdf> [<https://perma.cc/23XD-H2JE>] (quoting former state Superintendent of Public Instruction A. Craig Phillips, who discussed the "major problems of governance in elementary-secondary education" in North Carolina and "weaknesses in its governing structure").

education,<sup>3</sup> governors,<sup>4</sup> and legislators<sup>5</sup> have been sounding the alarm for over 100 years.<sup>6</sup>

The current system has been described as a “disheveled,”<sup>7</sup> “dysfunctional,”<sup>8</sup> “confusing”<sup>9</sup> “leadership void”<sup>10</sup> that leads to a “political tug of war”<sup>11</sup> over who is in charge of North Carolina’s public schools: the state

3. See, e.g., Jack Betts, *The Superintendent of Public Instruction: Should North Carolina’s Chief Public School Officer Be Appointed or Elected?*, N.C. INSIGHT, Sept. 1990, at 2, 3. David Bruton, former chairman of the N.C. State Board of Education, said, “I am certain that our present system of governance is failing. We currently have no person or agency with the responsibility and authority to effect the change required [in public schools].” *Id.*

4. See, e.g., Liz Bell, *Who’s Making State-Level Education Decisions?*, EDNC (Feb. 1, 2019), <https://www.ednc.org/whos-making-state-level-education-decisions/> [https://perma.cc/A6WZ-DSPD] (quoting Governor Roy Cooper, “[w]e have a system of governance in education in our state that doesn’t work too well”); Press Release, State of N.C. Office of the Governor, Gov. Perdue Makes Significant Education Leadership Changes (Jan. 28, 2009), <https://digital.ncdcr.gov/digital/collection/p16062coll5/id/16740> [https://perma.cc/5J3V-Z3SU (staff-uploaded archive)] (expressing concern with the structure, former Governor Bev Perdue highlighted the absence of “clearly defined leadership” in the system); Terry Stoops, *Election 2020 North Carolina: State Superintendent of Public Instruction Matchup*, JOHN LOCKE FOUND. (Mar. 4, 2020), <https://www.johnlocke.org/update/state-superintendent-matchup-will-be-one-to-watch/> [https://perma.cc/NTW4-8KW8] (quoting former Governor James Hunt, “the big problem in education and state government today is that the buck doesn’t stop anywhere”); Betts, *supra* note 3, at 3–4 (quoting former Governor Bob Scott, who said that among the “babble of voices” in North Carolina’s system of public education governance, “the answer to ‘Who’s On First?’ is ‘No One!’”).

5. See, e.g., *Atkinson Says She Wants State’s School System Fixed*, WRAL, <https://www.wral.com/news/state/story/4470591/> [https://perma.cc/CF9N-KQ5G] (last updated Feb. 5, 2009, 7:32 AM) (quoting former North Carolina Senate Majority Leader Tony Rand, “it’s a dysfunctional scenario and has been for a long time”); J. Richard Conder, *North Carolina Should Keep Its Elected Superintendent of Public Instruction*, N.C. INSIGHT, Sept. 1990, at 15, 16–17 (conceding issues with the current system while arguing for the continued election of the Superintendent, former State Senator and Chair of the Senate Education Committee J. Richard Conder wrote that “[i]t is *not* a good structure”).

6. See GEN. EDUC. BD., PUBLIC EDUCATION IN NORTH CAROLINA 86 (1921) [hereinafter 1921 REPORT] (lamenting that due to the “variable policy” caused by the legislature’s involvement in the affairs of the State Board of Education (as it existed in 1921), “our schools have never felt the unifying and directive influence of a determined, progressive board at their head”).

7. Lindsay Marchello, *Bad Blood: The Sometimes Rocky Relationship Between the N.C. State Board of Education and Superintendent Mark Johnson*, CAROLINA J. (May 7, 2020), <https://www.carolinajournal.com/news-article/bad-blood-the-relationship-between-the-n-c-state-board-of-education-and-state-superintendent-mark-johnson-can-be-described-as-rocky/> [https://perma.cc/89QB-NV7H].

8. *Atkinson Says She Wants State’s School System Fixed*, *supra* note 5.

9. EVERGREEN SOLS., A STUDY OF STRUCTURE AND ORGANIZATION OF THE STATE BOARD OF EDUCATION, STATE SUPERINTENDENT OF INSTRUCTION, AND DEPARTMENT OF PUBLIC INSTRUCTION, at iii (2009) [hereinafter EVERGREEN REPORT], <https://digital.ncdcr.gov/digital/collection/p249901coll22/id/131428> [https://perma.cc/AP8P-UKHS (staff-uploaded archive)].

10. Bruce Mildwurf & Bryan Mims, *New CEO To Fill Leadership Void for N.C. Schools*, WRAL NEWS, <https://www.wral.com/news/local/story/4410777/> [https://perma.cc/4ZLH-3KTY] (last updated Mar. 9, 2009, 5:12 PM).

11. *Id.*

board of education (“Board”) or the superintendent of public instruction (“Superintendent”).

The lack of clarity surrounding public education governance has a hidden but real impact on the education that students receive in North Carolina public schools.<sup>12</sup> Uncertainty and conflict over who makes decisions, rather than what decisions should be made, affects every stage of the policymaking process, from the formation of ideas to their implementation.<sup>13</sup> The danger that partisan political actors will exploit these weaknesses to politicize education policy has increased as state and local school boards across the nation have become battlegrounds for America’s increasingly intense culture wars.<sup>14</sup> While the system has “worked well when the Superintendent and Board work together as a team,”<sup>15</sup> that is not always the case, as high-profile conflicts within the last few years illustrate.<sup>16</sup>

12. See *infra* Section I.C (discussing consequences of the constitutional confusion).

13. See, e.g., *infra* Section I.C; 1986 REPORT, *supra* note 2, at H-8 (noting legislative committee deliberations found that “the lack of clarity” in state education governance “is an impediment to educational policy in North Carolina”).

14. Since the COVID-19 pandemic and divisive 2020 U.S. presidential election, state and local boards of education across America, once home to less charged discussions of education policy and local school governance, have been at the forefront of partisan battles over critical race theory, mask mandates, book bans, and transgender students’ involvement in sports. See, e.g., Maya Yang, *North Carolina School Board Bans Critical Race Theory from Its Classrooms*, GUARDIAN (Oct. 5, 2021, 1:36 PM), <https://www.theguardian.com/world/2021/oct/05/north-carolina-school-board-bans-critical-race-theory-from-its-classrooms> [<https://perma.cc/W392-PV3B>] (discussing one school board’s decision to ban critical race theory after the county threatened to withhold funding); Julie Havlak, *Republicans Slam Proposed Social Studies Standards*, CAROLINA J. (Jan. 28, 2021), <https://www.carolinajournal.com/republicans-slam-proposed-social-studies-standards/> [<https://perma.cc/C2MA-HX4Z>] (detailing a contentious Board discussion of social studies standards alleged to advance critical race theory); Charles Duncan, *Debate Over Masks in Schools Divides North Carolina*, SPECTRUM NEWS1 (July 29, 2021, 10:15 AM), <https://spectrumlocalnews.com/nc/charlotte/news/2021/07/28/debate-over-masks-in-schools-divides-north-carolina> [<https://perma.cc/E9DF-3BTV>] (comparing differing local board decisions across the state regarding mask requirements); Greg Childress, *Book Banning Battles Hit North Carolina Schools*, N.C. POL. WATCH (Feb. 10, 2022), <https://ncpolicywatch.com/2022/02/10/book-banning-battles-hit-north-carolina-schools/> [<https://perma.cc/S39R-CZRP>] (detailing debates over removing books discussing race and segregation from curriculum); Greg Childress, *Superintendent Catherine Truitt Contends Transgender Swimmer Had Unfair Advantage*, N.C. POL. WATCH: THE PULSE (Mar. 22, 2022), <https://pulse.ncpolicywatch.org/2022/03/22/superintendent-catherine-truitt-contends-transgender-swimmer-had-unfair-advantage/#sthash.3z6E3vFr.ffQ0rDbD.dpbs> [<https://perma.cc/G2NP-LQVN>] (outlining the state Superintendent’s comments regarding female transgender athletes’ participation in sports).

15. Cole del Charco, *Officials Spar Over Limits of State Superintendent of Education’s Power*, WUNC (Feb. 4, 2020, 6:26 AM), <https://www.wunc.org/news/2020-02-04/officials-spar-over-limits-of-state-superintendent-of-educations-power> [<https://perma.cc/CU64-TLUH>] (quoting Eric C. Davis, chair of the State Board of Education).

16. Consider, as the most apparent examples of this conflict, litigation over the relative powers of the Board and Superintendent. See, e.g., N.C. State Bd. of Educ. v. State, 371 N.C. 170, 814 S.E.2d 67 (2018) (litigation between Board and Superintendent); *Atkinson v. State*, No. 09 CVS 006655, 2009

The problem is constitutional. Textually, the provisions of the North Carolina State Constitution that allocate the administrative power (as opposed to policymaking power<sup>17</sup>) to govern the state's public school system are facially vague and confusing.<sup>18</sup> Structurally, the system the constitution creates—an elected superintendent charged with executing the policies of an appointed board<sup>19</sup>—expresses conflicting views on the value of direct public input on these often nuanced and complex policy and administrative issues.

On two occasions, North Carolina courts have been asked to offer clarity, but they have failed to do so. In the absence of clarity, public education stakeholders<sup>20</sup>—particularly the employees of the state agency responsible for state-level education governance, the Department of Public Instruction (“DPI”)—are left to cope with political jockeying over who is in charge of the state's public schools.

The framers of the state constitution did not intend to leave one of the most consequential responsibilities of the state government to a system that is fundamentally defective. This Comment argues that even if the text is facially confusing and contradictory, it is the judiciary's role to resolve these contradictions. Where the text is not helpful, a historical review reveals that not only did the framers intend for the Board to have the final word over administrative matters, but also that the framers' purposes are best served by recognizing that the Board has constitutionally superior administrative authority over the Superintendent. When applied to the most common point of contention—the hiring and firing of DPI employees—the Board, as the

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WL 8597173 (N.C. Super. Ct. July 17, 2009) (same); Complaint, N.C. State Bd. of Educ. v. Etheridge, 92-CVS-08138 (N.C. Super. Ct. July 29, 1992) (on file with the North Carolina Law Review) (same); Complaint for Declaratory Judgment and Injunctive Relief, Etheridge v. Martin, 91-CVS-13046 (N.C. Super. Ct. Dec. 9, 1991) (on file with the North Carolina Law Review) (same). This litigation has certainly affected the working relationship between the Board and Superintendent. See, e.g., Kelly Hinchcliffe, *Board Chair 'Baffled,' 'Shocked' by NC Superintendent's Actions in Ongoing Legal Battle*, WRAL, <https://www.wral.com/board-chair-baffled-shocked-by-nc-superintendent-s-actions-in-ongoing-legal-battle/16644155/> [<https://perma.cc/NB7A-F4SY>] (last updated Apr. 14, 2017, 3:17 PM) (describing Board chair's comments about pending litigation that point to a strained working relationship).

17. The constitution is clear that the Board has superior policymaking power to the Superintendent, while the General Assembly has superior policymaking power to the Board. See N.C. CONST. art. IX, § 5 (“The State Board of Education . . . shall make all needed rules and regulations in relation [to the state's public schools], subject to laws enacted by the General Assembly.”); cf. Guthrie v. Taylor, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971) (“Art. IX, § 9 . . . was designed to make, and did make, the powers so conferred upon the State Board of Education subject to limitation and revision by acts of the General Assembly.”).

18. See *infra* Section I.A (arguing that the constitution is facially confusing as to the Board and Superintendent's powers).

19. N.C. CONST. art. III, § 7, cl. 1 (provisions for the election of the State Superintendent); *id.* art. IX, § 4 (provisions for the appointment of members of the State Board of Education).

20. These stakeholders include students, parents, public school employees at the local and state level, business leaders, and community members, among others.

supreme policymaking (other than the legislature)<sup>21</sup> and administrative authority over the public school system, has the constitutional authority to make these decisions over the Superintendent's objections.

This Comment will proceed in four parts. Part I introduces the roles of major players in North Carolina public school governance, describes how constitutional confusion impacts North Carolina's public school system, and explains that extraconstitutional efforts to define the relative administrative powers of the Board and Superintendent have been unsuccessful. Part II examines the historical development of the Board and Superintendent and presents four principles that drove the development of each through history. Part III explores *Atkinson v. State*<sup>22</sup> and *North Carolina State Board of Education v. State*,<sup>23</sup> the only two cases where North Carolina courts have directly addressed the relative administrative powers of the Board and Superintendent. Part IV argues that neutral principles rooted in the text, history, and structure of the constitution point to the Board as the constitutional administrative head of the state's public schools, and that necessarily, this limits the power of the legislature to alter the division of administrative power over public education by statute.

#### I. HOW CONSTITUTIONAL CONFUSION IMPACTS NORTH CAROLINA'S PUBLIC SCHOOL SYSTEM

Every child in North Carolina has a state constitutional right to a "sound basic education."<sup>24</sup> The state constitution sets forth several entities with roles in the administration and policymaking that guides the state's public schools, including the Board, Superintendent, governor, and General Assembly. This part explains the constitutional confusion surrounding the roles of the Board and Superintendent and its impact and examines the efficacy of extraconstitutional efforts to clarify these issues.

##### A. *The Facially Confusing Roles of the State Board of Education and State Superintendent of Public Instruction*

The North Carolina State Constitution provides for two institutions with specific power over the administration of North Carolina's public school

21. The Board's policymaking authority is second to laws passed by the General Assembly. *See supra* note 17.

22. No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009).

23. 371 N.C. 170, 814 S.E.2d 67 (2018).

24. *Leandro v. State*, 346 N.C. 336, 347, 488 S.E.2d 249, 255 (1997); *see also* N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.").

system: the Board and Superintendent.<sup>25</sup> The constitution does not facially provide any clarity as to the division of administrative power between these two entities.<sup>26</sup>

The methods for selection and term length for both the Board and Superintendent are clear. Currently, the Board is made up of thirteen members, including the elected lieutenant governor, elected state treasurer, and eleven members appointed by the governor and confirmed by the General Assembly.<sup>27</sup> Eight of the appointed members are each appointed from one of eight educational districts divided by the General Assembly, while three are appointed at large.<sup>28</sup> Appointed members serve overlapping terms of eight years, while the lieutenant governor and state treasurer serve as members so long as they remain in office.<sup>29</sup> While some have occasionally said that the actions of board members are driven by loyalty to the governor that appointed them,<sup>30</sup> they are neither appointed on a partisan basis nor convey official partisan identities.<sup>31</sup> Meanwhile, the Superintendent is elected in a statewide partisan election every four years<sup>32</sup> and is not a member of the Board.<sup>33</sup>

The administrative powers of the Board and Superintendent, particularly as they relate to each other, are not immediately clear from the text of the state constitution. The constitution states that the Board “shall supervise and administer the free public school system and the educational funds provided for its support, except [funds raised by local governments to supplement state funds], and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.”<sup>34</sup>

25. N.C. CONST. art. IX, § 4, cl. 1; *id.* art IX, § 5 (providing for the State Board of Education and its powers); *id.* art. III § 7, cl. 1 (providing for a Superintendent of Public Instruction); *id.* art. IX, § 4, cl. 2 (describing the role of Superintendent).

26. *See supra* notes 1–11 and accompanying text (detailing the widely held belief that the governance structure of North Carolina public schools is confusing).

27. N.C. CONST. art. IX, § 4, cl. 1.

28. *Id.*

29. *Id.*; *id.* art. III, § 2, cl. 1 (providing for the election of the lieutenant governor every four years); *id.* art. III, § 7, cl. 1 (providing for the election of the state treasurer every four years).

30. *See, e.g.*, EVERGREEN REPORT, *supra* note 9, at 3–4 (describing one stakeholder’s characterization that “the Governor controls the State Board of Education” and “runs the show”).

31. *See About Us, Board of Education*, N.C. STATE BD. EDUC., <https://simbli.eboardsolutions.com/AboutUs/AboutUs.aspx?S=10399&TID=1> [<https://perma.cc/EW89-XRMU>] (lacking any partisan identifiers among Board members on the Board website).

32. N.C. CONST. art. III, § 7, cl. 1 (providing for the election of the Superintendent); N.C. GEN. STAT. § 163-1 (LEXIS through Sess. Laws 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.) (same).

33. The Superintendent was a member of the Board at one point, however. *See infra* text accompanying note 178.

34. N.C. CONST. art. IX, § 5.

At least on its face, the Board has policymaking power in its express authority to “make . . . rules and regulations.”<sup>35</sup> Additionally, the Supreme Court of North Carolina has held that the constitution grants the Board the authority to promulgate enforceable rules even in the absence of statutory authority to do so.<sup>36</sup> But the text also describes its power to “supervise and administer” as well, pointing to an administrative role.<sup>37</sup>

Similarly, the constitution offers little to explain the powers of the Superintendent: “[t]he Superintendent of Public Instruction shall be the secretary and chief administrative officer of the State Board of Education.”<sup>38</sup> Further, like all members of North Carolina’s Council of State (a group of elected executive officers set forth in the state constitution) other than the governor and lieutenant governor, the Superintendent’s “duties shall be prescribed by law.”<sup>39</sup> The plain language of the constitution fails to clarify the administrative powers of the Board and Superintendent in three key ways.

First, the constitution facially appears to give *both* the Superintendent and Board administrative power but does not clearly define whether the Superintendent has any administrative powers outside of the Board’s control or supervision. In other words, the constitution does not facially answer whether the Board could, consistent with the constitution, regulate the Superintendent’s administrative powers (e.g., hiring and firing DPI employees) by Board policies. It is a mistake, then, to imagine that the Board and Superintendent present a type of policy-administration dichotomy, where the Board sets policy that the Superintendent administers, because the plain language may be read to suggest that *both* entities have some constitutional power to administer the school system.<sup>40</sup> As described in Part III,<sup>41</sup> a North Carolina trial court has even accepted the notion that somehow *both* the Board and Superintendent have

35. *Id.* The Board has clearly claimed this power in its own policies since 1976. N.C. STATE BD. OF EDUC., BOARD POLICY MANUAL: POLICY SBOP-005: ESTABLISHMENT OF POLICY BY THE STATE BOARD OF EDUCATION (MAY 6, 1976), <https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=10399&revid=b5pFvsXc7TvBIB548plu sqXQQ=&ptid=amIgtZiB9plushNjl6WXhfiOQ==&secid=jRplusjfUEzWym56R8uvAslshryw==&PG=6&IRP=0> [https://perma.cc/4V25-UAY6].

36. *See Guthrie v. Taylor*, 279 N.C. 703, 711, 185 S.E.2d 193, 199 (1971) (holding that the constitution grants the Board authority to regulate teacher licensure even in the absence of statutory authority from the General Assembly).

37. N.C. CONST. art. IX, § 5.

38. *Id.* § 4, cl. 2.

39. *See id.* art. III, § 7, cl. 1 (providing for a number of executive officials elected on a statewide basis); *id.* § 7, cl. 2 (providing that their “respective duties shall be prescribed by law”); *id.* § 2 (providing for a governor and lieutenant governor); *id.* § 8 (providing for a “Council of State” made up of all officers established by Article III).

40. *Compare* N.C. CONST. art. IX, § 5 (stating that the Board shall “supervise and administer” the public schools), *with id.* § 4, cl. 2 (stating that the Superintendent is the Board’s “chief administrative officer”).

41. *See infra* Part III.



administrative control, also without defining whose authority is superior.<sup>42</sup> As a result, important questions are largely unanswered.<sup>43</sup>

Second, the constitution does not clearly explain on its face the extent to which the legislature's power to alter or transfer the authority to make *administrative* decisions is limited by these provisions. Clearly, the "rules and regulations" that the Board adopts under its explicit constitutional authority can be superseded by the legislature as they relate to *policy*.<sup>44</sup> Thus, as an example, if the legislature passed a law mandating that cursive writing be taught to third graders, the Board would not have the authority to pass a rule or policy that mandates the opposite. However, at least facially, the constitution does not directly and clearly answer whether the legislature could pass a law that vests the power to determine whether cursive writing should be taught in a separate board independent from the State Board of Education or allows the Superintendent to decide the matter. The clause "subject to laws enacted by the General Assembly" comes directly after a clause allowing the Board to "make all needed rules and regulations in relation" to the public schools.<sup>45</sup> However, whether the Board's authority to "supervise and *administer*" is also "subject to laws enacted by the General Assembly" is unclear from the plain text.<sup>46</sup> At least from the text, stakeholders cannot know whether the constitution would allow the General Assembly to make decisions about the *administration* of public schools, including by vesting all or some of the current powers of the Board in a separate board or boards of its own choosing or the Superintendent.

Third, and perhaps most importantly, the elective nature of the Superintendent and the appointive nature of the Board present conflicting ideas about the value of public input in these areas. Individuals in a democratic society have an instinct to lend credibility to elective offices, which is often called on by opponents of the Board's power.<sup>47</sup> It is natural to let those instincts

42. See *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009) ("Any employee of the North Carolina Department of [Public] Instruction must be accountable and responsible to the State Superintendent of Public Instruction, *as well as* the State Board of Education." (emphasis added)).

43. Part III, *infra*, details two cases where courts have been asked to speak on the inherent administrative powers of the Board and Superintendent.

44. "[T]he General Assembly has the authority to make ultimate educational policy determinations." N.C. State Bd. of Educ. v. State, 371 N.C. 170, 181, 814 S.E.2d 67, 75 (2018); see *State v. Whittle Commc'ns*, 328 N.C. 456, 464–65, 468, 471, 402 S.E.2d 556, 558, 560–61, 565 (1991) (holding that the Board did not have authority to promulgate a rule contradicting a statute that directly spoke on the matter).

45. N.C. CONST. art. IX, § 5.

46. *Id.*

47. Legislators have stressed the elective nature of the office of the Superintendent when opposing the Board's power. See, e.g., Rep. David Lewis, *House Bill 17 Floor Debate Comments*, N.C. GEN. ASSEMB., at 41:35–42:32, <https://www.ncleg.gov/Documents/9/1539> [<https://perma.cc/5KVN-3RVS>] (speaking on the floor of the North Carolina House of Representatives, David Lewis, former

inform our opinion by resolving questions about the relative powers of a statewide elected officer and an appointed board in favor of the elected officer, the Superintendent. The text of the constitution does not satisfy this instinct. As mentioned before, looking only at the text, the constitution may be read to suggest that *both* the elected officer and appointed board have administrative authority.<sup>48</sup> Further, structurally, the Superintendent is subordinate to the Board in at least some areas—the Superintendent is the Board’s “secretary,” for example.<sup>49</sup> This runs contrary to our instincts about the value of democracy and leads to further confusion when stakeholders (and Superintendents!) assume that the Superintendent has power simply because of the elective status of the office.<sup>50</sup>

In short, the state constitution facially provides little to no clarity on fundamental questions surrounding the power of the Board and Superintendent. The courts have similarly provided no clarity in the few cases that presented these fundamental questions. In the absence of guiding

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North Carolina representative, promoted a bill to transfer authority to the Superintendent by stressing that “the superintendent of public instruction . . . is elected by the people of the state of North Carolina,” and that the bill would “transfer[]” power “to that elected individual”); del Charco, *supra* note 15 (quoting Chuck Edwards, a North Carolina senator, who described the Board as “a bureaucracy that . . . get[s] in the way of an elected official”). Superintendents have appealed to their elective status in court filings when their power was at issue. *See, e.g.*, Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson ¶¶ 2–3, 24, N.C. State Bd. of Educ. v. State, 16CVS15607 (N.C. Super. Ct. Apr. 12, 2017) (on file with the North Carolina Law Review) (stressing that he was elected to bring change, former Superintendent Mark Johnson argued that the Board’s limits on the Superintendent’s authority had the “end-result . . . that the voters’ intent . . . ha[d] been blocked” and highlighted that “none of the voters in North Carolina voted for 11 of the 13 voting members of the State Board”); Answer ¶ 13, N.C. State Bd. of Educ. v. Etheridge, No. 92CVS08138 (N.C. Super. Ct. Sept. 29, 1992) (on file with the North Carolina Law Review) (opposing Board actions in court, former Superintendent Bob Etheridge alleged that the Board had “treat[ed] him as a mere agent or puppet of the Board, rather than as an elected constitutional officer”). Recently, one committee of the North Carolina House of Representatives justified their recommendation to “grant greater authority to the Superintendent” by referring to “public comment stating that the greater authority should be placed with the official directly elected by the people of the State, instead of an appointed body.” HOUSE SELECT COMM. ON AN EDUC. SYS. FOR N.C.’S FUTURE, DRAFT REPORT TO THE NORTH CAROLINA HOUSE OF REPRESENTATIVES 25 (2022), <https://webservices.ncleg.gov/ViewDocSiteFile/72551> [<https://perma.cc/R78D-ANQJ>].

48. The constitution states that the Board “shall supervise and *administer* the free public school system” and that the Superintendent “shall be the secretary and chief *administrative* officer” of the Board. N.C. CONST. art. IX, § 4, cl. 2 (emphasis added); *id.* art. IX, § 5 (emphasis added).

49. *Id.* art. IX, § 4, cl. 2.

50. The wisdom of having an appointed Board and an elected Superintendent has been the subject of considerable debate and legislative proposals for decades. *See generally, e.g.*, Conder, *supra* note 5 (arguing that the Superintendent should remain an elective office); William S. Lee, *North Carolina Needs an Appointed Superintendent of Public Instruction*, N.C. INSIGHT, Sept. 1990 (arguing that the Superintendent should be appointed); 1986 REPORT, *supra* note 2, at 17–18 (outlining legislative commission’s recommendation that the Superintendent should be made an appointive office). However, the wisdom of the current framework is beyond the scope of this Comment, which seeks to work within the bounds of the existing constitution to find clarity.

constitutional text and case law, stakeholders have naturally looked for other ways to define and clarify the roles of the Superintendent and Board.

B. *Extraconstitutional Efforts To Define the Powers of the Superintendent and Board*

In the absence of clear constitutional text or case law to inform stakeholders of the roles and relative powers of the two entities that lead North Carolina's public schools, efforts have been made to clarify these roles elsewhere—in statutes enacted by the legislature, policies adopted by the Board, and opinions from the attorney general of North Carolina. While a full history of these efforts is beyond the scope of this Comment,<sup>51</sup> their existence and failure illustrate the need for the courts, rather than other entities in government, to lay down the law and offer clarity.

For decades, the General Assembly has expounded the powers and duties of the Superintendent and Board in statute. Some of the language of these statutes is congruent with language in the constitution,<sup>52</sup> while much of the current statutes provide more detail.<sup>53</sup> In 1971, the Supreme Court of North Carolina recognized that the Board's powers come from both the constitution and state statutes.<sup>54</sup>

Insofar as these statutes seek to divide power between the Board and Superintendent, they have been an unstable source of clarity. Frustrating one of the central purposes of having an appointive Board, insulation from volatile partisan political forces,<sup>55</sup> the General Assembly has based decisions to alter the relative administrative powers of the Board and Superintendent on partisan political considerations.<sup>56</sup> This leaves questions of the administrative structure (as distinct from questions of policy) of the school system subject to volatile changes in the political makeup of the legislature.

Surprisingly, for decades, these statutes were not the subject of litigation. Before more recent changes that gave rise to litigation, the General Assembly

51. For a more detailed summary of this recent history, see EVERGREEN REPORT, *supra* note 9, at 3-6 to 3-17.

52. Compare N.C. GEN. STAT. §§ 115C-12, 115C-19 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.) (defining the statutory powers of the Board and Superintendent, respectively), with N.C. CONST. art. IX, § 4 (similar constitutional provision).

53. See N.C. GEN. STAT. §§ 115C-12, 115C-19 (LEXIS) (outlining general statutory powers of the Board and Superintendent). These statutes do not include numerous other specific grants of power that are tied to more specific programs and roles. See generally *id.* § 115C (LEXIS) (providing for the Superintendent's further involvement in specific programs).

54. *Guthrie v. Taylor*, 279 N.C. 703, 713, 185 S.E.2d 193, 200 (1971) (“The State Board of Education derives powers both from the Constitution . . . and from acts of the General Assembly.”).

55. See *infra* text accompanying notes 191–95 (concluding that the framers intended to insulate the administration of the state public school system from everchanging partisan political forces).

56. See *infra* text accompanying notes 234–42 for a discussion of House Bill 17, an example of this partisan influence.

subjected virtually *every* statutory duty and responsibility of the Superintendent to the “direction, control, and approval of the State Board of Education.”<sup>57</sup> When this language was first adopted, the attorney general of North Carolina advised then-Superintendent Bob Etheridge that the statutes were constitutional.<sup>58</sup> Pursuant to the attorney general’s 1995 opinion on the matter, the statutes, and its own constitutional authority, the Board began to regulate the powers of the Superintendent by Board policy.<sup>59</sup>

The most important development in the Board’s policies was the rise of the power, independence, and importance of the deputy superintendent, which began in earnest in 1995.<sup>60</sup> In 2007, the Board amended its policies to make the deputy superintendent solely accountable to the Board.<sup>61</sup> Under this policy, the deputy, not the Superintendent, had the “power and duty . . . [t]o manage the Department of Public Instruction.”<sup>62</sup> Until this Board policy was repealed by legislation that was upheld in *North Carolina State Board of Education v. State*,<sup>63</sup> the Superintendent was not truly in administrative control of the state public school system. The Superintendent’s role in hiring and firing, for example, was limited to a “professional courtesy” extended informally.<sup>64</sup> While these policies provided de jure clarity as to who had final administrative control over the state public school system (the Board), in the absence of clear constitutional text or any case law, they still did not bring de facto clarity.

A 2009 study, conducted before the existence of case law on point, found that “[f]ew [stakeholders] anchored their perceptions” of the authority of leaders in the state public school system “to the language of the Constitution, enacted statutes . . . or Attorney General opinions.”<sup>65</sup> Instead, stakeholders based their impressions of the authority of these entities on their own “biases”

57. See EVERGREEN REPORT, *supra* note 9, at 3-9 (first quoting N.C. GEN. STAT. § 115C-19 (2009), and then quoting N.C. GEN. STAT. § 115C-21 (2009)) (discussing the former statutes); *id.* at 3-7 (reprinting former N.C. GEN. STAT. §§ 115C-19, 115C-21, former statutes regarding the powers and duties of the Superintendent).

58. Opinion Letter from Andrew A. Vanore, Chief Deputy Att’y Gen. of N.C., on Duties of the State Superintendent of Public Instruction (Dec. 14, 1995), <https://ncdoj.gov/opinions/duties-of-the-state-superintendent-of-public-instruction/> [<https://perma.cc/A3JT-3CA7>].

59. EVERGREEN REPORT, *supra* note 9, at 3-12 to 3-13; *see also id.* at 3-14 to 3-15 (reprinting a 2004 Board policy delegating certain authorities to the Superintendent).

60. *Id.* at 3-13.

61. *Id. Compare id.* at 3-15 (reprinting a 2004 Board policy, which states that the deputy superintendent “reports solely and directly” to the Superintendent), *with id.* at 3-17 (reprinting a 2007 Board policy, which states that “[t]he Deputy shall report to the State Board”).

62. *Id.* at 3-17.

63. 371 N.C. 170, 814 S.E.2d 67 (2018); *see also infra* Part IV (discussing this case).

64. EVERGREEN REPORT, *supra* note 9, at 3-13.

65. *See id.* at 3-2 (detailing results of interviews with stakeholders); *see also id.* at 1-3 (detailing interview methodology and types of stakeholders interviewed). The report also found that stakeholders did not base their view on case law, but again, there was no on point case law at the time, so this is not surprising. *Id.* at 3-2.

and “personal observations” of how they work together.<sup>66</sup> Certainly, “biases” and “personal observations” cannot provide a grounded, stable source of clarity; extraconstitutional efforts to resolve these issues have categorically failed.

C. *The Hidden but Real Impact of Constitutional Confusion on North Carolina's Public Schools*

Without clear guidance from the constitution and courts as to who is in charge, the efficacy of the Department of Public Instruction is beholden in large part to the politics behind the electorate's choice for Superintendent.

Sometimes, the stars align: the Board willingly collaborates with the elected Superintendent to share authority. If the Superintendent enters with a similarly collaborative mindset and a realistic idea of the limitations on the powers of that office, the system mostly works. The Board and Superintendent build trust and share administrative authority.

However, when the stars do not align in this manner, the day-to-day operations of employees of the state education agency are akin to surviving in the Wild West. Without collaboration between the Board and Superintendent, conflict ensues. Top state public school employees must tiptoe around the charged relationship in a way that is surely detrimental to their work life and the efficacy of the DPI's work for the public schools.<sup>67</sup> This leads to turnover within DPI, leaving the state without experienced talent to perform the complex tasks associated with running a large state public school system.<sup>68</sup>

With confusion as to who is in true administrative control of DPI, stakeholders receive conflicting visions for the administration of DPI and the public schools.<sup>69</sup> This is most destructive when legislators receive conflicting

66. *Id.* at 3-2.

67. *See, e.g.*, ERNST & YOUNG LLP, NC DPI ORGANIZATIONAL ASSESSMENT 27 (2018), <https://webservices.ncleg.gov/ViewDocSiteFile/17082> [<https://perma.cc/3GR4-S75E>] (finding that “[s]ignificant organizational change, budget cuts, and lack of clarity on a path forward have had an adverse impact on morale” during the rocky tenure of the Superintendent Mark Johnson).

68. While this is hard to quantify, given the politically charged nature of the issue, consider the major departures of top-level DPI staff when Superintendent Mark Johnson took office in 2017. Billy Ball, *As New Superintendent Settles in, Major Departures in North Carolina's Public Schools Office*, N.C. POL. WATCH: THE PULSE (Feb. 2, 2017), <https://pulse.ncpolicywatch.org/2017/02/02/new-superintendent-settles-major-departures-north-carolinas-public-schools-office/#sthash.k2gk2U5s.dpbs> [<https://perma.cc/NWW7-7WCV>]. At the time, the Superintendent had already signaled his intention to (for better or worse) battle with the Board over administrative issues, departing substantially from prior Superintendents who came with a more collaborative approach. *See id.*

69. PUB. SCH. F. OF N.C., WE MUST CHART A NEW COURSE FOR SCHOOLS. AT STAKE IS NOTHING LESS THAN THE FUTURE OF OUR STATE 9-10 (1992) (“A dysfunctional school governance system and an increasingly partisan environment make it almost impossible for any one vision or goal to be broadly embraced. As a result, reform is subject to take wide swings and different roads every two to four years.”). The existence of an elected Superintendent and appointed Board necessarily contemplates that having multiple voices speak on educational issues is preferable when decision-

views from the Superintendent and Board. Any ideas or objections from the Superintendent or Board can be (and often are) opposed by the other.

As a case study, consider the tenure of Superintendent Mark Johnson. Johnson came to DPI with the opinion that the Department was a “deep state . . . bureaucratic fiefdom[]”<sup>70</sup> made up of the worst sort of government bureaucrats. When the General Assembly cut DPI’s budget by millions in 2017, a move that the Board opposed,<sup>71</sup> Johnson declined to join the Board’s position.<sup>72</sup> One education leader in the General Assembly told a member of the Board that the cuts could have been avoided if both the Superintendent and Board opposed them.<sup>73</sup> Notwithstanding the merits of the cuts, it can be observed that the overall funding level of DPI is mostly an administrative decision, and the dual voices in this area made a huge substantive impact on public education in the state.

Superintendent Johnson’s tenure also involved some significant contracting issues which highlight the practical impact of this administrative confusion. In a budget signed into law in 2017, the legislature provided for a request for proposal (“RFP”) to continue the state’s Read to Achieve testing program, either by finding a new testing vendor or using the incumbent vendor.<sup>74</sup> In a confusing mess, Superintendent Johnson signed a contract with a new vendor, Istation, even after some RFP committee members claimed that Johnson’s selection of Istation was contrary to the committee’s preference for

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makers consider changes to policy. However, the unclear division of administrative power often leaves decision-makers with multiple and differing views on administrative matters from two different entities in charge of administering the public schools, which is not necessarily contemplated by the inclusion of the elected Superintendent in the constitution.

70. Greg Childress, *Mark Johnson Pledges To Fight North Carolina’s Complacent ‘Deep State’ if Elected Lieutenant Governor*, N.C. POL. WATCH: THE PULSE (Dec. 19, 2019), <https://pulse.ncpolicywatch.org/2019/12/19/mark-johnson-pledges-to-fight-north-carolinas-complacent-deep-state-if-elected-lieutenant-governor/#sthash.Ua7Q8JTg.dpbs> [https://perma.cc/NWW7-7WCV]. Describing his tenure as State Superintendent, Johnson said, “I have been in the bureaucracy the past three years fighting, quite frankly, the North Carolina deep state. . . . It’s real and they want to tell you [how] to educate your children and they also want to have their bureaucratic fiefdoms in Raleigh.” *Id.*

71. Kelly Hinchcliffe, *State Board of Education: Budget Cuts ‘Will Adversely Impact Our Students,’* WRAL, <https://www.wral.com/state-board-of-education-approves-2-5m-in-budget-cuts-/16840289/> [https://perma.cc/SM9E-G82V] (last updated July 25, 2017, 6:41 PM).

72. Kelly Hinchcliffe, *NC Superintendent Slams ‘Disturbing’ Spending at State Education Agency*, WRAL, <https://www.wral.com/nc-superintendent-slams-disturbing-spending-at-state-education-agency/17089497/> [https://perma.cc/3MLG-AWZP] (last updated November 6, 2017, 1:05 AM) (recounting Johnson’s objections to “disturbing” duplicate SurveyMonkey accounts used by various groups within DPI. His staff later provided a more comprehensive list of wasteful spending to WRAL).

73. *Id.*

74. Current Operations Appropriations Act of 2017, ch. 57, § 7.2(b)–(c), 2017 N.C. Sess. Laws 248, 329–30 (codified as amended at N.C. GEN. STAT. § 115C-105.25(b) (2018)).

remaining with the current vendor.<sup>75</sup> Johnson signed the contract without securing permission from the Board, while claiming the authority on an emergency basis.<sup>76</sup> Board members were not able to get a copy of the Istation contract until a public records request was made to DPI, and Superintendent Johnson did not share the contract with the Board until after he signed it.<sup>77</sup> Johnson signed the contract as Superintendent and as “Secretary of the Board,” despite the lack of the Board’s involvement in the matter.<sup>78</sup> Ultimately, the RFP faced a formal protest from the incumbent vendor and overall confusion while legal challenges to the sloppy RFP process played out.<sup>79</sup> Later, Johnson claimed that the Board violated contract procedures in a separate matter.<sup>80</sup> Johnson also faced criticism over his unilateral decision to purchase and distribute iPads to local education agencies through unclear or even nonexistent criteria as to which schools would receive iPads or how they could apply.<sup>81</sup> Each of these examples illustrate exactly what can be expected from a nebulous, uncertain administrative framework.

Since the system *sometimes* works, the obviously confusing and ineffective constitutional language has resisted meaningful change for so many decades—by the time momentum starts to build around a solution, the problem temporarily subsides and the legislature’s attention is focused elsewhere.

## II. HISTORICAL BACKGROUND ON THE STATE BOARD OF EDUCATION AND SUPERINTENDENT OF PUBLIC INSTRUCTION

As Justice Oliver Wendell Holmes once wrote, “a page of history is worth a volume of logic.”<sup>82</sup> Studying the development of the constitutional provisions that outline the system of state-level education governance in North Carolina

75. Liz Bell, *DPI Documents Reveal Confusion over Narrative Surrounding Istation Decision*, EDNC (July 16, 2019), <https://www.ednc.org/dpi-documents-reveal-confusion-over-narrative-surrounding-istation-decision/> [https://perma.cc/3G3T-85XS].

76. See *January 2019 SBE Meeting: Johnson and State Discuss Istation Contract*, EDUC. N.C., at 00:35–00:58, 09:44–13:40, <https://soundcloud.com/educationnc/january-2019-sbe-meeting-johnson-and-state-board-discuss-istation-emergency-purchase#t=0:00> [https://perma.cc/F65K-BYUE] (recording a discussion between Board members and Superintendent Johnson at a Board meeting).

77. See *id.* at 09:44–13:40.

78. *Id.*

79. See Liz Bell, *Protest Filed Over State Superintendent’s Istation Pick*, EDNC (June 25, 2019), <https://www.ednc.org/protest-filed-over-state-superintendents-istation-pick/> [https://perma.cc/58F7-BBMR].

80. Greg Childress, *Superintendent Johnson Picks a New Fight with the State Board of Education*, N.C. POL’Y WATCH (Mar. 5, 2020), <https://ncpolicywatch.com/2020/03/05/superintendent-mark-johnson-picks-a-new-fight-with-the-state-board-of-education/> [https://perma.cc/R7XJ-2Z5M].

81. See Alex Granados, *State Budget Office Challenges Superintendent Mark Johnson’s iPad Purchases*, WRAL (Dec. 13, 2019, 5:20 PM), <https://www.wral.com/state-budget-office-challenges-superintendent-mark-johnson-s-ipad-purchases/18832023/> [https://perma.cc/88UK-5XN4].

82. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

is crucial to understanding how a system that is contradictory, vague, and confusing on paper was intended to work in practice.

By examining the history of these constitutional provisions, including their amendments, a proper and workable interpretation of the powers of the Superintendent and Board can be found, effectuating the framers' purposes behind each change to these entities.<sup>83</sup> This historical review reveals that while the Superintendent is elected to encourage public involvement and concern with statewide education issues, the Board is intended to have final administrative authority when conflicts arise. This historical approach is consistent with the approach in North Carolina case law on state constitutional interpretation.<sup>84</sup>

#### A. *Early Development*

Public education has been a constitutional matter in North Carolina since the first state constitution in 1776.<sup>85</sup>

From the earliest days, lawmakers contemplated that a board of individuals would lead the school system. The first legislative proposal for a statewide school system,<sup>86</sup> which was presented to the legislature in 1817, recommended that “the execution of the general plan” for the statewide system “be committed to the care and direction of a board.”<sup>87</sup> If passed into law, the board would have been led by the governor and consisted of six members chosen by the General Assembly.<sup>88</sup> The proposal would have given the board sweeping authority over the state's new school system.<sup>89</sup> Perhaps foreshadowing issues that would materialize in earnest almost 200 years later, the proposal was

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83. For a more detailed history of the development of the office of Superintendent through the nineteenth century, see Andrew Owens, *North Carolina's Superintendent of Public Instruction: Defining a Constitutional Office*, 4 CHARLOTTE L. REV. 103 (2013).

84. See, e.g., *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980).

Where the construction of a constitutional provision is at issue . . . it is incumbent upon this Court to interpret the organic law in accordance with the intent of its framers and the citizens who adopted it. Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation.

*Id.*

85. N.C. CONST. of 1776 art. II, § XLI.

86. 1 CHARLES L. COON, *THE BEGINNINGS OF PUBLIC EDUCATION IN NORTH CAROLINA* xxvii (1908) [hereinafter 1 COON].

87. *Id.* at 124.

88. *Id.* at 125.

89. Under the proposal, the “Board of Public Instruction” would “manage and apply” the fund set aside for public education, execute “different parts of the plan of public education,” “superintend” the new state school system, and “prescribe general rules and regulations for the discipline and government of the schools.” *Id.*



unclear as to who would manage the day-to-day operations of the state's schools. The proposal granted the board the authority to "superintend"<sup>90</sup> the school system and would have permitted the Board to "appoint a secretary and . . . other officers."<sup>91</sup> A bill implementing the proposal was introduced but never passed into law.<sup>92</sup>

In 1825, the legislature passed the first state law involving the state government in public education.<sup>93</sup> The law established a "Literary Fund" to manage the collection of funds that the legislature could later appropriate to public education.<sup>94</sup> The fund was administered by the "President and Directors of the Literary Fund," a board of the most senior government officials from all branches of state government and an early ancestor of the current Board.<sup>95</sup> In the following years, a number of proposals to fulfill the fund's purpose were raised and rejected, leaving the state without public schools.<sup>96</sup>

Real momentum toward establishing public schools did not start until 1836, when Congress distributed surplus revenue to the states, sparking an effort to appropriate the funds to a new public school system.<sup>97</sup> In response, the legislature passed a resolution instructing the Board of the Literary Fund to develop a plan for a new school system.<sup>98</sup>

At the beginning of the General Assembly's 1838–39 session, Governor Edward Bishop Dudley addressed the need to establish a public school system, adding that "[t]he employment of a permanent Commissioner to superintend" the public schools "will probably be necessary."<sup>99</sup>

In November 1838, the Board of the Literary Fund answered the legislature's 1836 command to create a plan for a new school system.<sup>100</sup> The Board's report made recommendations to the General Assembly based on a

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90. *Id.*

91. *Id.* at 126.

92. *Id.* at xxvii.

93. *Id.* at xxxiv.

94. Act of Nov. 21, 1825, ch. 1, §§ 1–2, 1825 N.C. Sess. Laws 3, 3–4 (creating a "fund for the establishment of Common Schools").

95. *Id.*

96. 1 COON, *supra* note 86, at xxxvii to xlv.

97. *Id.* at xlii.

98. J. OF THE S. & H. OF COMMONS OF THE GEN. ASSEMB. OF THE STATE OF N.C., 61st Gen. Assemb., 1st Sess. 229, 500 (1837).

99. J. OF THE H. OF COMMONS, 62d Gen. Assemb., 1st Sess. 296 (N.C. 1838).

100. See LITERARY FUND OF N.C., A REPORT OF THE PRESIDENT AND DIRECTORS OF THE LITERARY FUND OF NORTH CAROLINA ON THE SUBJECT OF COMMON SCHOOLS (1838), *reprinted in* 2 CHARLES L. COON, THE BEGINNINGS OF PUBLIC EDUCATION IN NORTH CAROLINA 826, 826 (1908) [hereinafter 2 COON].

comprehensive study into how other states were approaching the issue of public education.<sup>101</sup>

While most of the report was concerned with how to fund a new school system,<sup>102</sup> the board's plan included the appointment of a "Superintendent of Common Schools" "[t]o superintend, direct and control the whole of th[e] complicated but not inharmonious" system that was proposed.<sup>103</sup> Notably, the Board did not propose that the superintendent be an elected officer.<sup>104</sup> Instead, the board showed a special concern that the position called for the highest qualifications and skill.<sup>105</sup> The board wrote that "these qualifications may not and probably will not be found united in any individual, but proper pains should be taken to secure the nearest approximation practicable."<sup>106</sup> The board proposed a number of administrative duties for the Superintendent.<sup>107</sup>

For the next two years, bills were raised to implement in part the board's recommendations.<sup>108</sup> The bill that was eventually passed into law did not include any officer analogous to a state superintendent.<sup>109</sup>

In 1839, the legislature passed a law establishing North Carolina's first system of public schools,<sup>110</sup> retaining the Board of the Literary Fund without any change to its structure or powers,<sup>111</sup> and by 1845 all counties had voted to establish public schools in their county.<sup>112</sup>

Even from these early days in North Carolina's public school system, the mechanics of the state's involvement posed problems. The Board of the Literary Fund, made up of senior government officials in charge of other parts of state

101. N.C. DEP'T OF PUB. INSTRUCTION, THE HISTORY OF EDUCATION IN NORTH CAROLINA 8; see LITERARY FUND OF N.C., *supra* note 100, at 833–42 (mentioning other states' practices throughout report).

102. See LITERARY FUND OF N.C., *supra* note 100, at 834–42.

103. *Id.* at 847.

104. *Id.*

105. *Id.* ("Perhaps there is no office in the State so difficult to fill well, as there is certainly none of such incalculable importance.")

106. *Id.*

107. The Superintendent's duties would include "direct[ing]" the "Normal Schools," visiting and examining schools across the state, devising a plan to divide the state into school districts, establishing a model design for school buildings, determining how teachers should be examined and licensed, selecting textbooks, ensuring that these textbooks are used in every school, and formulating reports from every teacher on their school, which would be furnished back to the Superintendent. *Id.*

108. 1 COON, *supra* note 86, at xliii to xliv.

109. See 2 COON, *supra* note 100, at 878–81 (reprinting text of House bill passed out of Committee of the Whole without the amendment); *id.* at 882–83 (describing Senate's initial rejection and the bill's consideration by a Conference Committee); *id.* at 884–85 (reprinting text of the bill as agreed to by the Conference Committee); *id.* at 886–90 (reprinting text of final law).

110. 1 COON, *supra* note 86, at xliv.

111. See generally Act of Jan. 8, 1839, ch. 8, 1838–1839, N.C. Sess. Laws 12 (leaving intact the Board of the Literary Fund's powers and structure).

112. EDGAR WALLACE KNIGHT, PUBLIC SCHOOL EDUCATION IN NORTH CAROLINA 148 (1916).

government,<sup>113</sup> served as “chief executive of the schools,” but given Board members’ other roles, there was a “lack of any efficient central supervision.”<sup>114</sup> The “[l]ack of central supervision accounted for the chief weaknesses of the *ante-bellum* school system in North Carolina.”<sup>115</sup>

In response to these issues, in 1850, Governor Charles Manly implored the General Assembly to appoint a central officer in charge of the public schools.<sup>116</sup>

In 1852, the General Assembly answered his call to remedy the lack of central supervision and created the office of state superintendent of public instruction by statute.<sup>117</sup> The new Superintendent was not a member of the Board of the Literary Fund and was appointed by the legislature.<sup>118</sup>

#### B. 1868 Constitution: Reconstruction Constitution Leads to Elected Superintendent

In the aftermath of the Civil War, North Carolina, like all former Confederate states, adopted a new constitution. The new constitution provided for an executive branch made up of an elected Council of State, which included changing the superintendent of public instruction from an appointed<sup>119</sup> to an elected office.<sup>120</sup>

The new constitution replaced the old Board of the Literary Fund with the current State Board of Education.<sup>121</sup> The new Board “succeed[ed] to all the powers and trusts of” the Literary Fund and was granted “full power to legislate and make all needful rules and regulations in relation to Free Public Schools.”<sup>122</sup> The legislature could, however, amend or repeal the Board’s regulations.<sup>123</sup>

The Board’s membership, like that of the Board of the Literary Fund, was made up entirely of elected executive officers, including the governor, lieutenant governor, secretary of state, treasurer, auditor, superintendent of

113. Act of Nov. 21, 1825, ch. 1, § 2, 1825 N.C. Sess. Laws 3, 3–4; *see supra* text accompanying notes 94–95. At this point in time, the Board was entirely *ex officio*. *See supra* note 111; *supra* text accompanying notes 94–95.

114. KNIGHT, *supra* note 112, at 148. The problems with the system included “irregular and incomplete” reporting from the counties with school systems, unwillingness for counties to raise the appropriate funding for their schools by taxation, uneducated and uncommitted teachers, “primitive” pedagogy, and noncompliance of county education officials with the law. *Id.* at 148–53.

115. *Id.* at 155.

116. Charles Manly, Governor, N.C., Governor Manly’s Message to the Honorable, the General Assembly of the State of North Carolina (1850), in J. OF THE S. AND H. OF COMMONS OF THE GEN. ASSEMB. OF THE STATE OF N.C., 1850–51 Sess., at 461, 480–81 (1851).

117. KNIGHT, *supra* note 112, at 155–56.

118. *Id.*

119. *See id.*

120. N.C. CONST. of 1868 art. III, § 1.

121. *Id.* art. IX, § 9.

122. *Id.*

123. *Id.*

public works, superintendent of public instruction, and attorney general.<sup>124</sup> The governor served as the Board's president, while as today the Superintendent served as the Board's secretary.<sup>125</sup> The constitution did not provide any further description of the powers or duties of the new elected Superintendent.<sup>126</sup>

Including the State Board of Education in the constitution reflects a judgment that the legislature's power should be limited in this area. As Kemp Battle, then-President of the University of North Carolina, observed in 1889:

“[t]he Constitution of 1776 . . . was founded on the assumption that the agents of the people, the General Assembly, . . . could be intrusted with powers almost unlimited. . . . They had . . . vast powers in the control of the other departments of government.”<sup>127</sup>

The 1868 constitution, in contrast, “is founded on the assumption that the representatives may be untrustworthy. Hence, the executive and judicial departments are made really independent of the legislat[ure].”<sup>128</sup> Even after amendments in intervening years, these principles continue to underscore parts of the current constitution.<sup>129</sup>

In 1921, the General Education Board, a philanthropic organization, submitted a report to a State Educational Commission created by the General Assembly.<sup>130</sup> The report was perhaps the greatest single influence in the structure and administrative powers of the State Board of Education as it exists today.

The General Education Board was principally concerned that the General Assembly's involvement in the administrative structure of the public schools since 1868 was causing more harm than good.<sup>131</sup> The General Education Board noted that the legislature did not have “due regard for what . . . would seem to be the [B]oard's constitutional rights in the management of educational affairs.”<sup>132</sup> The authors were mostly concerned that “[n]ew administrative officers and boards are created, [some] independent of, [some] subordinate to,

124. *Id.* art. IX, § 7.

125. *Id.* art. IX, § 8.

126. *See generally id.* art. IX (lacking a description of the powers and duties of the new elected Superintendent).

127. Kemp P. Battle, President, Univ. of N.C., An Address on the History of the Supreme Court Delivered in the Hall of the House of Representatives (Feb. 4, 1889), in 103 N.C. 339, at 366 (1889).

128. *Id.*

129. *See* JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 23 (1995) (describing the continued effect of the antilegislativ attitudes of the 1868 constitution, Orth writes that “[p]atterns established more than a century ago continue to be discernible in the 1971 Constitution”).

130. *See* An Act to Create a State Educational Commission, ch. 197, 1917 N.C. Sess. Laws 347; GEN. EDUC. BD., PUBLIC EDUCATION IN NORTH CAROLINA: A REPORT TO THE PUBLIC SCHOOL COMMISSION OF NORTH CAROLINA (1921) [hereinafter 1921 REPORT].

131. 1921 REPORT, *supra* note 130, at 83–85.

132. *Id.* at 85.

the state board.”<sup>133</sup> Among examples of these boards, the report offered the “state board of vocational education,” a board created by the legislature that was “independent” of the State Board of Education but “exercis[ed] large powers.”<sup>134</sup>

The General Education Board lamented the “variable policy” that this kind of legislative involvement created, writing that “it has prevented the development in the [S]tate [B]oard of [E]ducation of a strong sense of stewardship and a keen sense of responsibility for the schools.”<sup>135</sup> The report also emphasized that these problems extended to the practical administration of the schools, lamenting that the confusion caused by volatility in the legislature’s desired administrative policies went beyond mere feelings of disunity.<sup>136</sup> In short, the report found that the legislature’s involvement in the administration of the public schools, and the ensuing volatility, frustrated the de jure and de facto unity that the Board’s existence was supposed to bring to the public schools. The report highlighted several sources of these problems.

First, the report took issue with the political structure of the Board.<sup>137</sup> The report identified two major problems with that system—its political influence and lack of stability. The report noted that the statewide elected officials that then made up the Board were “elected on a party platform, and committed to an administration program,” leaving them less able to “give the needed . . . thought to the solution of the intricate problems involved in the . . . general management of a comprehensive state school system.”<sup>138</sup> Essentially, a board made up entirely of elected officials made education administration subject to everchanging political upheavals.<sup>139</sup> The General Education Board suggested that the constitution be amended to resolve these issues.<sup>140</sup>

Second, the report also saw issues with the office of the State Superintendent. Primarily, the General Education Board took issue with the election of the State Superintendent.<sup>141</sup> The board recommended that in light of “the increasing complexity of public education, its increasing cost, the growing amount of technical experience and knowledge required for scientific

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133. *Id.*

134. *Id.*

135. *Id.* at 86.

136. *Id.* at 87. The General Education Board added that the volatility of the legislature’s policies “resulted in such a confusion of unrelated activities and boards as to render effective administration extremely difficult.” *Id.*

137. *Id.* at 86. At the time of the report, the State Board of Education was entirely made up of a number of state executive officers, with only one, the Superintendent, devoted to public education. N.C. CONST. of 1868 art. IX, § 7.

138. 1921 REPORT, *supra* note 130, at 86.

139. *Id.* at 86–87.

140. *Id.* at 87.

141. *Id.* at 89.

administration” of the public schools, and issues with “party politics,” the State Superintendent should be an appointive office.<sup>142</sup>

Considering these issues, the report concluded that the Superintendent and Board should no longer be constitutional institutions.<sup>143</sup> Instead, the report recommended that the General Assembly be given the power to define these offices by statute.<sup>144</sup> If the General Assembly declined to define the offices by statute, the report suggested that “[e]ven as the [state] constitution stands, the [S]tate [B]oard of [E]ducation can . . . be made the real head of the public school system.”<sup>145</sup> This Comment operates on the same thesis.

In 1931, the General Assembly created a North Carolina Constitutional Commission (“1931 Commission”) to examine the state constitution and recommend changes, and a year later the Commission submitted a report.<sup>146</sup>

The 1931 Commission recommended a rewrite of the existing article covering education, which would place the State Board of Education over “the general supervision and administration of the free public school system,” with the Superintendent as the Board’s “chairman and chief executive officer.”<sup>147</sup> The Superintendent would be a member of the Board, which would be made up entirely of gubernatorial appointees rather than the then-existing membership of other elected principal executive state officers.<sup>148</sup> Such a change would answer the concerns raised by this *ex officio* makeup in the 1921 Report.<sup>149</sup> The 1931 Commission recommended changing the office of Superintendent (as well as other state officers) to an appointed position.<sup>150</sup> The Commission did not provide much rationale for its recommendations, but perhaps the rationale was obvious from the 1921 Report.

The 1931 Commission’s recommendations to vest the Board with “general” supervision over the public schools and to change the Board to an appointed board, rather than *ex officio* board, are telling. They show that concerns associated with the instability caused by the legislature’s creation of statutory boards and the inherently political nature of the *ex officio* Board of elected executive officers continued to be top of mind. Unfortunately, the 1931

142. *Id.* at 88–89.

143. *Id.* at 90–91.

144. *Id.*

145. *Id.* at 91.

146. N.C. CONST. COMM’N, THE REPORT OF THE NORTH CAROLINA CONSTITUTIONAL COMMISSION 3 (1932) [hereinafter 1932 REPORT].

147. *Id.* at 32–33.

148. *Id.* at 33.

149. 1921 REPORT, *supra* note 130, at 86–87 (detailing concerns with *ex officio* Board).

150. 1932 REPORT, *supra* note 146, at 39.

Commission's draft constitution never made it to the voters because of a technicality.<sup>151</sup>

In 1937, the General Assembly again created a commission to study issues affecting public schools, including issues with the statewide administration of the school system, which released a report the following year.<sup>152</sup> Echoing the concerns of the 1921 Report, the 1937 Commission stressed the need for "immediate relief from scattered administration" caused by the General Assembly's creation of other boards with responsibility over specific pieces of the public school system.<sup>153</sup> The 1937 Commission proposed constitutional amendments which closely tracked those in the 1932 Report, with the retention of three *ex officio* members of the Board: the Superintendent, lieutenant governor, and state treasurer.<sup>154</sup>

C. *1942 Constitutional Amendments: Creating a More Stable, Less Political Board*

In 1942, the voters of North Carolina adopted a constitutional amendment that incorporated the 1921 Report's principal recommendations, as echoed in the 1938 Report, using much of the same language as recommended in the 1931 and 1938 Reports.<sup>155</sup>

The amendments took steps toward distancing the Board from politics both by addressing its makeup and the legislature's creation of other boards that supplanted the Board's authority. The membership of the Board was changed from an entirely *ex officio* board of elected executive officers to a board of gubernatorial appointees while retaining the lieutenant governor, state treasurer, and the Superintendent as *ex officio* members.<sup>156</sup> Further, all other education boards created by the legislature were implicitly abolished, investing a single board with authority over the state's public schools.<sup>157</sup>

151. JOHN V. ORTH & PAUL MARTIN NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 32 (2d ed. 2013).

152. GOVERNOR'S COMM'N ON EDUC., *REPORT AND RECOMMENDATIONS OF THE GOVERNOR'S COMMISSION ON EDUCATION* 7 (1938) [hereinafter 1938 REPORT].

153. *Id.* at 30–31 ("There seems to be much duplication and some dual control in the workings of these various boards and unnecessary duplication in the work of school administrators."); *see also id.* at 28–30 (detailing statutory boards in existence at the time and their roles).

154. *Id.* at 31.

155. N.C. SEC'Y OF STATE, *NORTH CAROLINA MANUAL OF 1943*, at 239–40 (1943) [hereinafter N.C. MANUAL OF 1943] (official account of 1942 constitutional amendments). *Compare id.* (text of 1942 amendments), *with* 1932 REPORT, *supra* note 146, at 32–33 (text of similar recommended constitutional amendments), *and* 1938 REPORT, *supra* note 152, at 30–31 (recommending constitutional amendments similar to those in the 1932 Report).

156. 1938 REPORT, *supra* note 152, at 31.

157. *See* Act of March 9, 1943, ch. 721, 1943 N.C. Sess. Laws 856 (abolishing the State School Commission, State Textbook Commission, State Board for Vocational Education, and State Board of Vocational Education); N.C. MANUAL OF 1943, *supra* note 155, at 239–40 (1942 constitutional amendments); *A Survey of Statutory Changes in North Carolina in 1941*, 19 N.C. L. REV. 435, 465 (1941)

The amended provisions also offered new descriptions of the powers and duties of the Superintendent and Board. “The general supervision and administration of the free public school system, and of the educational funds provided for the support thereof” were vested in the Board, while the Superintendent was charged with the “general supervision of the public schools” and remained “secretary of the board.”<sup>158</sup>

The constitutional description of the Board’s powers continued to grant the same powers as those vested with the old Board of the Literary Fund, but the Board’s previous powers to “legislate” were replaced with a specific list of powers.<sup>159</sup> The exercise of these powers was made “subject to such laws as may be enacted from time to time by the General Assembly.”<sup>160</sup>

Many contemporaries believed that the 1942 amendments would create a system with no, or at least fewer, administrative handicaps. The North Carolina Education Association believed that the new amendments would bring an end to the “conflicts of authority” that had plagued the system<sup>161</sup> and the Superintendent at the time, Clyde Erwin, touted “the definite fixing of all responsibility upon a single board.”<sup>162</sup>

In contrast, the *North Carolina Law Review* correctly predicted uncertainty about the powers and functions of the Board under the changes.<sup>163</sup> The *Law Review* explained that under the new provisions, the Board “is charged, in the opening sentence, with the ‘general supervision and administration’ of the school system; but the language inserted by the amendment provides that the Superintendent of Public Instruction ‘shall have general supervision of the public schools.’”<sup>164</sup> However, the *Law Review* (in hindsight, wrongfully) concluded that the “similarity of phrase” likely would “not interfere seriously with the realization of the intent which is almost necessarily implied from the inherent nature of the two; *i.e.*, the intent that the [B]oard . . . is to be the policy

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(explaining that the provisions do not expressly abolish the previous statutory boards, but were clearly passed in response to concerns with the statutory boards and granted constitutional powers to the State Board which were inconsistent with the continued existence of the statutory boards). See also *infra* text accompanying note 162, for then-Superintendent Clyde Erwin’s comments to this effect.

158. N.C. MANUAL OF 1943, *supra* note 155, at 239.

159. *Id.* at 240 (“The State Board of Education shall have power to divide the State into a convenient number of school districts; to regulate the grade, salary and qualifications of teachers; to provide for the selection and adoption of the textbooks to be used in the public schools; [and] to apportion and equalize the public school funds over the State.”).

160. *Id.*

161. N.C. EDUC. ASS’N, THE CONSTITUTIONAL AMENDMENT FOR A STATE BOARD OF EDUCATION 3, 5 (1942).

162. *Id.* at 5.

163. *A Survey of Statutory Changes in North Carolina in 1941*, *supra* note 157, at 465.

164. *Id.*



forming or legislative group, while the individual [S]uperintendent is to be the full-time executive.”<sup>165</sup>

In 1944, a constitutional amendment was adopted which removed a prior position of controller created two years prior, removed previous qualifications that applied to a majority of the Board, and removed provisions that tied eight appointive members of the Board to congressional districts, instead allowing the General Assembly to draw educational districts for this purpose while leaving two at-large appointive Board positions.<sup>166</sup> The position of controller is not particularly relevant to the question explored in this Comment.

In 1948, yet another state commission released a report on education in North Carolina.<sup>167</sup> It provided some analysis and recommendations on the governance of the state education administration at that time.<sup>168</sup> It noted many of the concerns raised in earlier reports,<sup>169</sup> but also recommended that the Superintendent be removed as a member of the Board, given the Superintendent’s duty to execute the policies of the Board.<sup>170</sup>

In 1959, another constitutional commission presented recommended changes to the state constitution.<sup>171</sup> It recommended removing language that prescribed specific powers of the Board, instead leaving general language that would allow the General Assembly to define the Board’s policy powers.<sup>172</sup> The commission also recommended changing the Superintendent’s role from “administrative head of the public school system” to “chief administrative officer” of the Board so that the Superintendent is clearly placed under the Board rather than as some separate administrative authority.<sup>173</sup>

#### D. 1971 Constitutional Amendments: The Current Constitution

In 1967, the General Assembly began the process of a large-scale rewrite of the state constitution. The Commission to Study the State Constitution

165. *Id.*

166. Compare N.C. SEC’Y OF STATE, NORTH CAROLINA MANUAL OF 1945, at 233 (1945), with N.C. MANUAL OF 1943, *supra* note 155, at 239–40.

167. See generally STATE EDUC. COMM’N, EDUCATION IN NORTH CAROLINA: TODAY AND TOMORROW (1948) (analyzing the state of education administration in North Carolina and providing recommendations).

168. *Id.* at 366–77.

169. *Id.* at 372 (noting these concerns).

170. *Id.*

171. See generally N.C. CONST. COMM’N, REPORT OF THE NORTH CAROLINA CONSTITUTIONAL COMMISSION TO THE GOVERNOR AND MEMBERS OF THE GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA (1959) (on file with the North Carolina Law Review; this document can be found among the commission’s papers at the North Carolina Legislative Library, part of the North Carolina General Assembly’s offices in Raleigh, North Carolina) (recommending changes to the state constitution).

172. *Id.* at 77–78.

173. *Id.*

published a report in 1968 with recommended changes. Most of the suggested changes were adopted by the electorate in 1971.<sup>174</sup>

The commission organized its changes into two sets of recommendations—a broad overhaul of the constitution, which was generally meant to leave the organization and powers of the state government as they were, and a set of amendments which would make more substantive changes.<sup>175</sup>

Among the Commission's more substantive amendments was a proposal to make the Superintendent an appointive office, appointed by the Board.<sup>176</sup> This proposal did not survive the legislature, however, and the voters of North Carolina did not have the opportunity to approve any changes to the method of selection for the Superintendent.<sup>177</sup>

However, after the smoke cleared, the (mostly) nonsubstantive changes proposed by the Commission were adopted, including changes to the provisions of the constitution related to the Superintendent and Board.<sup>178</sup> Under the adopted changes, the State Superintendent, a member of the State Board of Education since 1868, was eliminated as a voting member of the Board.<sup>179</sup> The Superintendent was retained, however, as the Board's "secretary and chief administrative officer."<sup>180</sup>

While this language would prove confusing to successive stakeholders, the commission did not believe that they were creating any issues as to who, between the Board and the Superintendent, would have final administrative authority—they believed that their provisions made clear that the Superintendent was subordinate to the Board. In its report, the commission

174. N.C. SEC'Y OF STATE, NORTH CAROLINA MANUAL OF 1971, at 357–58 (1971) [hereinafter N.C. MANUAL OF 1971].

175. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 5–11, *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009), 2009 WL 8600384. *See generally* N.C. STATE CONST. STUDY COMM'N, REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION (1968) [hereinafter 1968 REPORT], <https://www.ncleg.gov/Files/Library/studies/1968/st12308.pdf> [https://perma.cc/Z3B6-2A8N] (recommending changes to the state constitution).

176. *Id.* at 117; *see also id.* at 119–20 (listing the Commission's reasoning for the proposal, including concerns with electing an officer that requires a high level of expertise, a desire to make the office less susceptible to political pressures, and the Commission's assessment that the "present duties" of the Superintendent made it necessary to elect that officer).

177. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *supra* note 175, at 11.

178. N.C. MANUAL OF 1971, *supra* note 174, at 357.

179. *See* 1968 REPORT, *supra* note 175, at 87 (stating the framers' intent to remove the Superintendent as a member of the Board). *Compare* N.C. CONST. of 1971 art. IX, § 4, c.1 (excluding the Superintendent from the list of members of the Board), *with* 1968 REPORT, *supra* note 175 (reprinting text of prior constitution, which listed the Superintendent as a Board member). *But see* Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, *supra* note 175, at 10 (arguing that the 1971 amendments did not actually remove the Superintendent's membership on the Board).

180. N.C. CONST. of 1971 art. IX, § 4, cl. 2.

explicitly revealed its intentions: “A potential conflict of authority between the Superintendent and the Board is eliminated by making clear that he is the administrative officer of the Board (Sec. 4[2]), which is to administer the public schools (Sec. 5).”<sup>181</sup> A memo delivered to the committee responsible for recommending changes to the education provisions also shows that this was the commission’s intent.<sup>182</sup> John L. Sanders, who served as staff director to the commission, later confirmed that the changes were meant to “make it clear that the Board administers the schools and the Superintendent works for the Board.”<sup>183</sup> According to Sanders, the constitution of 1971 “diminished the Superintendent’s powers” and “made the Superintendent’s position expressly subordinate to the Board.”<sup>184</sup>

The 1971 amendments also simplified the description of the powers of the Board by removing the list of enumerated powers from the 1943 amendments, “without any intention that its authority be reduced.”<sup>185</sup> Under the new text, “[t]he State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support . . . and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.”<sup>186</sup> On its face, this formulation of the Board’s role

181. 1968 REPORT, *supra* note 175, at 87.

182. See Memorandum from Robert E. Phay, Inst. of Gov’t at the Univ. of N.C. at Chapel Hill to Members of the Educ., Welfare, and Crim. Just. Comm. of the N.C. Const. Study Comm’n (June 12, 1968) (on file with the North Carolina Law Review; this document can be found among the commission’s papers at the North Carolina Legislative Library, part of the North Carolina General Assembly’s offices in Raleigh, North Carolina) (“Section 8 [of the 1942 Constitution, then in effect,] provides for the State Superintendent and makes him the administrative head of the school system and thus independent of the Board. Should he instead be under the Board as its chief administrative officer as he is in most states?”).

183. Affidavit of John L. Sanders ¶¶ 25, 37, *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009) (on file with the North Carolina Law Review).

184. *Id.* ¶ 38.

185. 1968 REPORT, *supra* note 175, at 87. It is unclear whether this means that the Board retains any special authority as to the formerly enumerated powers. The Supreme Court of North Carolina, considering both versions of the constitution, held that because the regulation of teacher licensure (an enumerated power under the old constitution) was “needed for the effective supervision and administration” of the public schools, the Board had the same authority to enact rules relating to teacher licensure under both the prior constitution and 1971 constitution. *Guthrie v. Taylor*, 279 N.C. 703, 710, 185 S.E.2d 193, 199 (1971). This leaves unanswered the question of whether the Board has constitutional authority to adopt rules in the silence of the legislature only if they were previously enumerated, or if the Board has this authority for anything that is “needed for the effective supervision and administration” of the public schools. The court has not directly approached this issue since. In a later case, the court determined that it did not have to decide whether the Board could adopt a policy regarding local boards’ power to select supplemental education materials in the silence of the legislature, because in that case the legislature had already directly spoken on the issue. *State v. Whittle Commc’ns*, 328 N.C. 456, 464, 402 S.E.2d 556, 560 (1991).

186. N.C. CONST. art. IX, § 5.

places the Board in a prominent place at the head of the state's public school system—the Board “supervise[s]” and “administer[s].”<sup>187</sup>

The 1971 amendments also changed the description of the Superintendent's role. The 1943 amendments listed the Superintendent as the Board's “secretary” and charged the Superintendent with the “general supervision of the public schools.”<sup>188</sup> The 1971 amendments simply described the Superintendent's role as “secretary and chief administrative officer of the State Board of Education.”<sup>189</sup> The Commission believed that the term “chief administrative officer” *of the Board* placed the Superintendent in a position subservient to the Board,<sup>190</sup> instead of the prior wording, which placed the Superintendent as the “administrative head” of the *public schools*.<sup>191</sup> The latter formulation suggested that the Superintendent had some administrative authority outside of the Board's control.

The provisions concerning the Superintendent and Board have not been changed since 1971.

E. *Major Principles from the Constitutional Development of the State Board and State Superintendent*

The foregoing historical record reveals four main principles that have guided the evolution of the Board and Superintendent into their current form and explains the seemingly haphazard assembly of these entities in the constitution. These principles should guide the courts' approach to resolving questions of authority in this area.

First, the framers sought to insulate the state's education policy and administration from political motivations and instability by creating an appointed Board with terms that ensure only gradual change in the leadership of the state public school system.<sup>192</sup> This intent extends to limited legislative involvement in changing the structure of the state's public school administration, as the continued inclusion of the Board in the constitution illustrates. Notable evidence of this intent includes the General Education

187. *Id.*

188. N.C. MANUAL OF 1943, *supra* note 155, at 239.

189. N.C. CONST. art. IX, § 4, cl. 2.

190. *See supra* notes 181–84 (noting evidence of this belief of the Commission).

191. Affidavit of John L. Sanders, *supra* note 183, ¶ 37.

192. Consider the successive reports to the General Assembly that raised these concerns, which drove the enactment of the current constitutional provisions. *See supra* Sections I.B–C. These concerns included issues with the General Assembly's tinkering with the administrative structure of the school system, *see supra* text accompanying notes 131–36, 147, 153, 161–62, and concerns with having a Board made up entirely of elected officials, *supra* text accompanying notes 137–40, 156. The existence of the Board in the constitution points to an intent to isolate its structure to some degree from the legislature's will. The fact that State Board members serve “overlapping terms of eight years” points to a desire for more gradual change. *See* N.C. CONST. art. IX, § 4, cl. 1.

Board's concerns with political influence<sup>193</sup> and the “variable policy” that was caused by the legislature's involvement in the governance structure of the state public schools.<sup>194</sup> These concerns were echoed in later reports to the General Assembly, which show that these concerns clearly were prominent in the minds of the framers and public at large at the critical time that successive amendments were passed.<sup>195</sup> The voters responded to these concerns by adopting amendments that abolished the statutory boards that the legislature had created, which had taken power away from the Board.<sup>196</sup> The record shows, then, that the legislature's power to alter the governance structure of the state public education system was intended to be limited to some degree by the constitution, all in an effort to bring nonpartisan stability to the administration of the public schools.

Second, the historical record reveals a longstanding preference for the school system to be placed under a *board* of individuals dedicated to its administration, rather than a single person. The preference for a board has been present since the first legislative proposals for a statewide school system.<sup>197</sup> Accordingly, the governance of North Carolina's public schools has always been under the leadership of a board. When this structure was last examined in 1971, the framers of the current constitution believed that they were making the Superintendent subordinate to the Board.<sup>198</sup> There are several advantages of placing a Board at the head of such a consequential role of state government. At a minimum, it removes to a degree more granular<sup>199</sup> education *policy* decisions, particularly those that require expertise and experience in pedagogy, from a purely political branch while allowing the legislature to speak on these issues when the voters have a strong enough opinion.<sup>200</sup> As to *administrative* decisions, the developmental history of the Board and Superintendent is littered with concerns that the administration of a state public school system is a particularly complex endeavor best performed by experts. In this way, the Board is somewhat of a constitutionally defined and independent administrative

193. See *supra* notes 138–40 and accompanying text.

194. See *supra* text accompanying note 135.

195. See *supra* text accompanying notes 131–40, 147, 153, 156–57, 161–62.

196. See *supra* note 157 and accompanying text.

197. See *supra* text accompanying notes 86–87.

198. See *supra* text accompanying notes 181–84, 190–91.

199. “Granular” because the legislature can always override the Board's policy decisions, *supra* note 17, but the legislature is likely to exercise this power only when a policy matter is so important that it garners widespread public concern.

200. See N.C. GEN. STAT. §§ 115C-81.5 to -81.85 (LEXIS through Session Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.) (outlining statutory course of study requirements which mandate that, among other subjects, North Carolina history, North Carolina geography, and multiplication tables be taught in the public schools).

agency.<sup>201</sup> Further, the structure of the Board, particularly its predominant composition of members with staggered, eight-year terms “establishes stability and continuity in the governance of public education in North Carolina.”<sup>202</sup>

Third, the framers also believed it was desirable to place a single individual in a full-time role to administer the public schools despite the established preference for the leadership of a Board. This belief has existed from the earliest days of the formation of the current system.<sup>203</sup> The existence of the Superintendent can be tied to two main concerns: (1) the need for a full-time individual to head the public schools, which was certainly not served when the state school’s leadership was solely in the hands of a board made up of executive officers in charge of other areas of state government, and (2) the need for a person with particularly high skills and qualifications, a true professional, to administer the public schools.<sup>204</sup>

Finally, the constitution’s general preference for divided executive power and concern for accountability to the people has, in some respects, overcome the very serious issues with subjecting the state’s public schools to the variable and politically motivated democratic process. To this end, while the Board has considerable power, the exercise of its specific powers is to some degree subject to laws enacted by the legislature.<sup>205</sup> Further, the Superintendent is an elective office like other principal executive offices in the state.<sup>206</sup> This gives the people the power to place in that office a person with the public prominence to speak on education issues affecting the entire state.

While this history reveals the purposes of the framers, the courts have failed to leverage neutral history to further these purposes.

### III. THE COURTS’ FAILURE TO PROVIDE CLARITY

This part details the two cases<sup>207</sup> in which courts have had the opportunity to explore the relative administrative powers of the Board and Superintendent. Neither decision provides a workable solution to the constitutional confusion that plagues the public schools.

201. N.C. CONST. art. IX, § 5 (providing that the Board “shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto”).

202. EVERGREEN REPORT, *supra* note 9, at 3-22.

203. *See supra* text accompanying notes 99, 103, 105–07, 116–17.

204. *See, e.g., supra* notes 105, 114, 116 and accompanying text.

205. N.C. CONST. art. IX, § 5 (“subject[ing]” the Board’s powers “to laws enacted by the General Assembly”).

206. *Id.* art. III, § 7, cl. 1.

207. Two prior cases on this topic were filed but later voluntarily dismissed before any decision was rendered. Complaint, *supra* note 16, at 5; Notice of Dismissal Without Prejudice at 1, N.C. State Bd. of Educ. v. Etheridge, 92-CVS-08138 (N.C. Super. Ct. July 29, 1992) (on file with the North Carolina Law Review); Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 16, at 10; Plaintiff Superintendent of Public Instruction’s Notice of Voluntary Dismissal at 1, Etheridge v. Martin, 91-CVS-13046 (N.C. Super. Ct. Feb. 3, 1993) (on file with the North Carolina Law Review).

A. *Atkinson v. State: 'Both' the Board and Superintendent Are in Charge?*

In *Atkinson v. State*, a North Carolina trial court became the first court to directly consider the inherent constitutional power of the Superintendent.<sup>208</sup> However, the court left the issue just as doctrinally convoluted (if not more) than before. Because the decision was not appealed, appellate courts had no occasion to create binding law on the matter or offer any clarity.

In November 2008, Bev Perdue was elected governor.<sup>209</sup> Eighteen days after she was sworn in, Perdue announced an ambitious education reform measure.<sup>210</sup> Perdue's plan sought to implement a recommendation from a consulting group (Evergreen Solutions LLC) that was commissioned by the General Assembly to study North Carolina public education governance.<sup>211</sup> This consulting group's report, released only twenty-two days prior to the governor's announcement, suggested mending the state's broken system of public education governance without a constitutional amendment. Specifically, the report suggested fixing the authority to run the DPI in an individual accountable only to the Board, a "Chief Executive Officer," and making that person the chair of the Board.<sup>212</sup> According to the consulting group, the Board could use its existing constitutional and statutory authorities to adopt rules that vest final administrative authority in its chairman as CEO of DPI.<sup>213</sup>

Perdue asked the Board to implement this proposal, appointed Dr. Bill Harrison to the Board, and asked the Board to make this new member chair and CEO under the Evergreen plan.<sup>214</sup> The Board implemented the plan by

208. *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173, at \*1 (N.C. Super. Ct. July 17, 2009).

209. *Perdue Becomes N.C.'s First Female Governor*, WRAL, <https://www.wral.com/perdue-becomes-n-c-s-first-female-governor/3886614/> [<https://perma.cc/R2Q9-SFX7>] (last updated Nov. 5, 2008, 4:47 PM).

210. See generally Press Release, State of N.C. Office of the Governor, *supra* note 4 (introducing then-Governor Perdue's plan to effect a "major restructuring in education leadership," which included the creation of a "Chief Executive Officer" position).

211. EVERGREEN REPORT, *supra* note 9, at i.

212. *Id.* at 3-18. This solution had been floated by some since at least 1990. John Alexander, *State Auditor Adds His Voice to the School Reform Chorus*, GREENSBORO NEWS & RECORD, [https://greensboro.com/state-auditor-adds-his-voice-to-the-school-reform-chorus/article\\_5cb78da9-84a4-5133-a618-aab704c2e492.html](https://greensboro.com/state-auditor-adds-his-voice-to-the-school-reform-chorus/article_5cb78da9-84a4-5133-a618-aab704c2e492.html) [<https://perma.cc/WW36-N8RG>] (last updated Jan. 24, 2015) (mentioning then-state auditor's proposal to do the same without a constitutional amendment).

213. EVERGREEN REPORT, *supra* note 9, at 3-18.

214. Press Release, State of N.C. Office of the Governor, *supra* note 4.

appointing Bill Harrison as its chair<sup>215</sup> and adopting policies that moved authority to a new CEO.<sup>216</sup>

Superintendent of Public Instruction June Atkinson sued to ask the courts for clarity on her inherent constitutional powers—specifically, whether this initiative violated her inherent powers as Superintendent.<sup>217</sup> Atkinson argued that it did.<sup>218</sup>

Experts on the constitutional development of the Board and Superintendent presented historical evidence that could support either side—that the Superintendent was intended to have inherent administrative powers outside of the Board’s control<sup>219</sup> and, on the other side, that the Superintendent was intended to simply “work[] for the Board.”<sup>220</sup>

Evidence favoring the Superintendent’s position was primarily grounded in the argument that the 1971 amendments changing the education provisions of the state constitution were intended to be nonsubstantive changes.<sup>221</sup> There is certainly confusion surrounding this proposition. The framers of the 1971 constitution split their recommendations into two categories—a single conglomeration of changes to the entire constitution which the framers characterized as making no substantive changes, and a few amendments which the framers characterized as substantive and thus should be voted on separately by the legislature and voters.<sup>222</sup> The voters did not have the chance to consider these substantive education amendments.<sup>223</sup>

However, even if there are statements to suggest that the Commission considered these changes to be nonsubstantive, the weight of the evidence suggests either (1) that the Commission believed they were making no changes but the status quo placed the Superintendent under the Board, or (2) while the framers considered the broad nonsubstantive amendment to be generally nonsubstantive, the framers nonetheless considered their changes to the

215. The Board appointed Harrison as its chair because only the Board (not the governor) has the power to do so. Affidavit of William C. Harrison ¶ 2, *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009) (on file with the North Carolina Law Review).

216. Affidavit of Betsy West at Exs. A–B, *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009) (on file with the North Carolina Law Review) (reprinting these policies).

217. *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009).

218. See generally Complaint and Petition for Declaratory Judgment, *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009) (on file with the North Carolina Law Review) (alleging that the creation of the CEO violated the Superintendent’s inherent powers).

219. See generally Affidavit of Ann McColl, *Atkinson v. State*, No. 09 CVS 006655 (N.C. Super. Ct. July 17, 2009) (on file with the North Carolina Law Review) (contending that the Superintendent was intended to have inherent administrative power outside of the Board’s control).

220. Affidavit of John L. Sanders, *supra* note 183, ¶ 37.

221. See Affidavit of Ann McColl, *supra* note 219, ¶¶ 17–18.

222. See *supra* text accompanying note 175.

223. See generally N.C. MANUAL OF 1971, *supra* note 174 (listing amendments presented to voters).



description of the Superintendent's role to be substantive.<sup>224</sup> Other historical evidence submitted to support the Superintendent's position was unpersuasive.<sup>225</sup>

The trial court evidently did not find the Board's historical evidence persuasive, as it held the Board policy unconstitutional in a three-page order.<sup>226</sup> The court reasoned that the provisions of the Board policy, stating that the new CEO was "solely" responsible to the Board, unconstitutionally "limit[ed] the

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224. To support that the Commission could have believed that the status quo placed the Superintendent under the Board, consider that at least some contemporaries believed that it was possible the existing constitution considered the Superintendent to be the "administrative agent of the Board." John L. Sanders, *The Proposed Constitution of North Carolina: An Analysis*, POPULAR GOV'T, Feb. 1959, at 1, 26–27, [https://archive.org/details/sim\\_popular-government\\_1959-02\\_25\\_5/mode/2up](https://archive.org/details/sim_popular-government_1959-02_25_5/mode/2up) [<https://perma.cc/C4FZ-G28K>] (examining a congruent recommendation of a prior constitutional commission). Sanders explained, "to make clear *what may now be the case*—that the Superintendent is supposed to be the administrative agent of the Board—the Commission [of 1959] recommends revisi[ng] the constitutional statement of the Superintendent's duties" to describe the Superintendent as the "chief administrative officer of the Board." *Id.* (emphasis added). The Commission itself noted that some of the changes in its omnibus collection of generally nonsubstantive amendments made substantive changes that were not so fundamental as to deserve a separate vote. *See* 1968 REPORT, *supra* note 175, at 10 (describing the generally nonsubstantive omnibus amendment, the Commission recognized that "[s]ome of the changes are substantive, but none is calculated to impair any present right of the individual citizen or to bring about any *fundamental* change in the power of state and local government or the distribution of that power" (emphasis added)). Further, the Supreme Court of North Carolina has approached this issue by asking whether *specific provisions* changed by the omnibus amendment constitute substantive changes, rather than assuming that all changes within that amendment were technical. *See* N.C. State Bar v. DuMont, 304 N.C. 627, 634–37, 286 S.E.2d 89, 94–95 (1982). By this exercise, the court implicitly recognizes that it would be an error to assume that the entirety of the omnibus amendment was technical in nature. The court also explicitly contemplated that some of the changes in the omnibus amendment are insignificant but substantive revisions to the prior constitution. *See id.* at 637, 286 S.E.2d at 95 ("Important and *significant* substantive changes were not included in the [omnibus amendment], but were dealt with in amendments separately submitted to the people of North Carolina for their approval." (emphasis added)).

225. For instance, the Superintendent's expert, Ann McColl, quotes from a report from the 1948 State Education Commission in which she claims that the Commission "recommended '[t]he assignment to the board of *exclusive responsibility for policy making functions* and to the superintendent of *exclusive responsibility for executive functions*.'" Affidavit of Ann McColl, *supra* note 219, ¶ 16 (citing STATE EDUC. COMM'N, *supra* note 167, at 376). McColl fails to mention or recognize that the quote was not a recommendation of the State Education Commission at all—the commission was merely observing that such an assignment of authority should not necessarily prevent the Board and Superintendent from working together. STATE EDUC. COMM'N, *supra* note 167, at 376 ("The assignment to the board of *exclusive responsibility for policy making functions* and to the superintendent of *exclusive responsibility for executive functions* should of course not prevent the board and the superintendent from seeking advice from each other about the discharge of their responsibilities."). Further, the quote is from a section wherein the State Education Commission discusses the division of power between the (now defunct) comptroller and Superintendent, *not* the Superintendent and Board. *Id.* at 375–77. In fact, in the same section, the Commission favorably reprints another group's recommended structure which places the Superintendent under the Board. *Id.* at 376 ("The chief state school officer should serve as Secretary and Executive Officer of the State Board of Education."). The Commission's actual recommendations show a strong desire to place the Superintendent under the Board. *See id.* at 380–81.

226. *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009).

inherent constitutional authority of the duly elected State Superintendent . . . as Chief Administrative Officer of the State Board of Education.”<sup>227</sup>

The court held that the General Assembly could

establish[] a position that has the authority and power to administer the day to day operations of [DPI] as designated by the . . . Board . . . so long as such legislation requires that such responsibilities be exercised *through the Superintendent . . . or under her supervision*.<sup>228</sup>

The court also expanded this principle further, holding that “[a]ny employee” of the . . . [DPI] must be accountable and responsible to the State Superintendent of Public Instruction, *as well as* the State Board of Education.”<sup>229</sup>

Thus, in the court’s view, *both* the Superintendent and Board are in charge of the administration of the state’s public schools. The court’s ruling did not provide any detail as to how the legislature and Board could satisfy the constitutional requirement that every DPI employee be “under the supervision” of the Superintendent or a more confusing proposition, how DPI employees can be accountable to both the Board and Superintendent.<sup>230</sup> Among the key questions that the court left unanswered: Does hiring or firing a DPI employee require the consent of both the Board and Superintendent? If a DPI employee received conflicting commands from both entities, which demand should the employee fulfill? Without answers to these questions, the confusion affecting the state’s public schools continued.

It is difficult to criticize the legal reasoning of the court’s decision given the general absence of a clear rationale in its brief order. It is enough to say, though, that the framers did not contemplate a system so devoid of clarity.<sup>231</sup>

After the court’s order invalidated the Board’s policy (and thus Perdue’s plan), the new Board chair and “Chief Executive Officer” retired.<sup>232</sup> The Board (and Perdue) let the matter lie until a new Superintendent’s tenure provided another occasion to ask the courts to clarify the Board’s and Superintendent’s inherent constitutional administrative powers.

227. *Id.*

228. *Id.* (emphasis added).

229. *Id.*

230. See *infra* Part IV for further discussion on why both the Board and Superintendent cannot be in final administrative control over the state public school system.

231. See, e.g., *supra* text accompanying notes 161–62 (quoting contemporaries from when constitutional amendments were considered pointing to their impression that the language was clear).

232. *Harrison Steps Down as School CEO*, ABC11 (July 22, 2009), <https://abc11.com/archive/6927834/> [<https://perma.cc/8CRV-QG8D>].

B. North Carolina State Board of Education v. State: 'Day-to-Day' vs. 'General' Administration?

In 2018, an exercise of raw partisanship gave the Supreme Court of North Carolina its first opportunity to speak directly on the administrative powers of the Board and Superintendent.<sup>233</sup>

After the 2016 election, Superintendent June Atkinson, a Democrat, had lost her seat to Mark Johnson, a Republican.<sup>234</sup> Superintendent Johnson was the first Republican Superintendent in 100 years.<sup>235</sup> Governor Pat McCrory, a Republican, had lost his seat to Roy Cooper, a Democrat.<sup>236</sup> In response to a request from Superintendent-elect Johnson,<sup>237</sup> the Republican General Assembly passed House Bill 17 in a special session held five weeks after the election, and Governor McCrory signed it into law shortly before leaving office.<sup>238</sup>

The primary goal of the education-related portions of the bill was to move most hiring and firing authority over the DPI from the Board and deputy superintendent, who had been solely accountable to the Board since 2007, to the new Republican Superintendent.<sup>239</sup> The Board's hiring and firing authority was reduced to only four positions: two attorneys, a paralegal, and an

233. Previous decisions of the court instead involved challenges to the Board's *policymaking* authority. *See supra* notes 17, 36, 44, 185 (discussing this case law).

234. Daarel Burnette II, *Nation's Longest-Serving Superintendent, June Atkinson, Loses Office in N.C.*, EDUCATIONWEEK (Nov. 9, 2016), <https://www.edweek.org/education/nations-longest-serving-superintendent-june-atkinson-loses-office-in-n-c/2016/11> [<https://perma.cc/63CG-UZAG>].

235. T. Keung Hui, *State School Board, Superintendent Spar*, FAYETTEVILLE OBSERVER (July 4, 2018, 7:33 AM), <https://www.fayobserver.com/story/news/state/2018/07/04/state-school-board-superintendent-spar/11600137007/> [<https://perma.cc/R4W3-MHL6>].

236. Natalie Matthews, *Despite Tight Race, Cooper Declares Victory Over McCrory*, WRAL, <https://www.wral.com/despite-tight-race-cooper-declares-victory-over-mccrory/16210222/> [<https://perma.cc/D7YA-L3CS>] (last updated July 13, 2018, 1:44 PM).

237. Liz Bell, *Amid Protests, NC Legislature Passes Bill Strengthening State Superintendent Power*, EDNC (Dec. 16, 2016), <https://www.ednc.org/amid-protests-nc-legislature-passes-bill-strengthening-state-superintendent-power/> [<https://perma.cc/KA6B-YMUF>].

238. House Bill 17, ch. 126, 2017 N.C. Sess. Laws 39 (2016) (codified as amended in scattered sections of 115C, 116, 126, 143, 143A, and 143B N.C. GEN. STAT.).

239. Bill sponsor David Lewis, former North Carolina representative, explained the purpose of this portion of the bill on the House floor:

House Bill 17 clarifies that the superintendent of public instruction, who is elected by the people of the state of North Carolina, is the administrative head of the Department of Public Instruction. There have been in the past, mainly since 1995, instances in which another executive [, the deputy superintendent,] would make appointments within the education administration. This clarifies that the superintendent of public instruction is the head of that department and transfers those appointments to that elected individual.

Rep. David Lewis, *supra* note 47, at 41:35–42:32. *See generally supra* notes 60–62 (discussing deputy superintendent).

administrative assistant.<sup>240</sup> Except for those four positions, the law placed “all matters relating to the provision of staff services” under the Superintendent’s sole “direction and control.”<sup>241</sup> Most importantly, in contrast to most other statutory descriptions of the Superintendent’s powers, the law had no language making the Superintendent’s new hiring and firing powers “subject to the direction, control, and approval” of the Board.<sup>242</sup>

The Board sued, asking the court to hold the power transfer unconstitutional, and the Superintendent intervened to defend the law alongside the state.<sup>243</sup>

The Superintendent’s principal argument was one of legislative power. In the Superintendent’s view, the Board and Superintendent are both “wholly subservient and auxiliary to the General Assembly.”<sup>244</sup> The Board disagreed, arguing that this would render the inclusion of these offices in the constitution meaningless.<sup>245</sup>

The court did not think it was necessary to articulate a precise definition of the General Assembly’s power to alter the relative administrative powers of the Board and Superintendent.<sup>246</sup> Instead, relying on a “plain meaning” construction of the constitution, the court held that “the Superintendent has the constitutionally based responsibility for directly administering the operations of the public school system,” while the Board has “responsibility for the general supervision and administration of the public school system.”<sup>247</sup> The court was satisfied that the law did not violate these principles, because the Board maintained the power to “establish all needed rules and regulations for the system of free public schools.”<sup>248</sup> Under the court’s understanding, the law “subject[s] the Superintendent’s authority to directly supervise and administer the public schools to the Board’s more general oversight and control.”<sup>249</sup> In short, the court held that the Board has the constitutional authority over the administration of the state public school system, but the constitution only requires that the Board have *general*, rather than day-to-day, authority. On the other hand, the Superintendent has constitutional authority over direct, day-to-day administrative matters.

240. House Bill 17, § 1, 2017 N.C. Sess. Laws at 40 (codified as amended at N.C. GEN. STAT. § 126-5(a) (2017)).

241. *Id.* § 4.

242. *See id.* § 4 (outlining new hiring and firing powers). *See generally id.* (leaving other powers subject to the Board’s authority).

243. N.C. State Bd. of Educ. v. State, 371 N.C. 170, 171–72, 814 S.E.2d 67, 69 (2018).

244. *Id.* at 177, 814 S.E.2d at 73.

245. *Id.* at 176, 814 S.E.2d at 72.

246. *Id.* at 173, 814 S.E.2d at 70.

247. *Id.* at 181, 814 S.E.2d at 75.

248. *Id.* at 185, 814 S.E.2d at 77.

249. *Id.*

The court also held that the General Assembly has a role in outlining the administration of the public schools beyond its “authority to make ultimate educational policy determinations,”<sup>250</sup> which the court had recognized before.<sup>251</sup> According to the court,

the General Assembly has the authority . . . to enact legislation providing for the management and operation of the public school system, so long as that legislation does not deprive the Board of responsibility for the general supervision and administration of the public school system or deprive the Superintendent of the responsibility for directly administering the operations of that system.<sup>252</sup>

Thus, there is a pocket of administrative authority that is not constitutionally vested with the Board or Superintendent, which is within the General Assembly’s control. Figure 1, *infra*, provides a visual means to conceptualize this confusing division of administrative power. The court did not attempt to define the limits of this pocket of legislative authority; it merely noted its existence. It also did not reveal whether the administrative authorities at issue in that case fell within this zone of legislative control or were constitutionally required to be vested with the Superintendent at the outset. The court simply noted that this authority was not within the Board’s constitutional authority.<sup>253</sup> The court did not tie any of these conclusions to any historical background; it purported to extract this complex relationship from the “plain meaning” of the constitution without further explanation.<sup>254</sup>

While the court’s holding contemplates that the Board will retain this “more general oversight” under the law at issue, the plain text of the law shows that this is untrue.<sup>255</sup> Except for four positions accountable only to the Board, House Bill 17 left the hiring and firing of all employees of the DPI to the sole discretion of the Superintendent, with no role for the Board.<sup>256</sup> The law did not include language subjecting the Superintendent’s hiring and firing authority to the Board’s will. Contrary to the court’s characterization, the Board is left with

250. *Id.* at 170, 814 S.E.2d at 75.

251. *See State v. Whittle Commc’ns*, 328 N.C. 456, 464–71, 402 S.E.2d 556, 560–65 (1991) (holding that the Board did not have authority to promulgate a rule contradicting a statute that directly addressed the matter).

252. *N.C. State Bd. of Educ.*, 371 N.C. at 170, 814 S.E.2d at 75.

253. *Id.* at 185, 814 S.E.2d at 77 (“The General Assembly’s decision to assign additional responsibilities to the Superintendent does not interfere with the Board’s constitutional authority to generally supervise and administer the public school system.”).

254. *Id.* at 181, 814 S.E.2d at 75.

255. N.C. CONST. art. IX, § 5 (providing that the Board “shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto”).

256. Act of Dec. 19, 2016, § 4, 2017 N.C. Sess. Laws 39, 41 (codified at N.C. GEN. STAT. § 115C-21(a)(1)); *see also* N.C. Gen. Stat. § 115C-11(j) (LEXIS through Sess. Laws 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb.) (designating the four positions that the Board controls as two attorneys, one paralegal, and one administrative assistant).

no “general oversight and control” over state-level public school employees.<sup>257</sup> The law precludes the Board from adopting any policies that would give itself administrative power over the employees of the Department, other than those few employees that the General Assembly placed with the Board. Without hiring and firing authority, the entire DPI (other than four employees) is subject to replacement every time a new Superintendent is elected. Surely this injection of political volatility runs afoul of the framers’ purpose to create a system where the administration of the public schools is immune from such forces.<sup>258</sup> Further, the Board must now rely on staff solely accountable to the Superintendent for advice and research to fulfill its constitutional policymaking role, a role the court did not claim to upend.<sup>259</sup> The Superintendent may have very different ideas about the best policy direction for the Board and may use their authority over the staff to improperly influence the Board’s constitutionally independent policymaking functions.

The court’s ruling also left plenty of room for future conflict over hiring and firing decisions. Bob Orr, former associate justice of the Supreme Court of North Carolina and attorney for the Board in this lawsuit, said that the opinion did not resolve what happens if the Board does not approve of the Superintendent’s hiring and firing decisions.<sup>260</sup> Further, how does the Board exercise “general oversight and control” over employees appointed by and accountable to the Superintendent?

The court asserted that its opinion was consistent with the trial court’s order in *Atkinson v. State*.<sup>261</sup> This is not the case. For a visual representation of the different ways the *Atkinson* and *North Carolina State Board of Education* courts conceptualized the Board’s inherent powers, see Figure 1, *infra*. While *Atkinson* recognized some nebulous role for both the Board and Superintendent in the administration of the public school system, *North Carolina State Board of Education* limits the Board’s inherent constitutional administrative authority to “general” rather than “day-to-day” administrative powers.<sup>262</sup> Because the Board did not have inherent constitutional authority over day-to-day administrative

257. *N.C. State Bd. of Educ.*, 371 N.C. at 185, 814 S.E.2d at 77 (arguing that the statute subjects Superintendent’s powers to Board’s general oversight and control).

258. See *supra* text accompanying notes 192–96 (discussing operational mechanisms that, to an extent, keep the administration of public schools politically insulated).

259. See *infra* note 288 and accompanying text (illustrating that the Board relies on staff to fulfill its policymaking duties).

260. Jennifer Fernandez, *Who’s Really in Charge of N.C.’s Public Schools? State Board and Superintendent Spar.*, WINSTON-SALEM J. (July 3, 2018), [https://journalnow.com/whos-really-in-charge-of-n-c-s-public-schools-state-board-and-superintendent-spar/article\\_28bf9dfe-e902-59ce-8209-1d6583e7a7ce.html](https://journalnow.com/whos-really-in-charge-of-n-c-s-public-schools-state-board-and-superintendent-spar/article_28bf9dfe-e902-59ce-8209-1d6583e7a7ce.html) [https://perma.cc/B3VH-MUFJ] (dark archive)].

261. *N.C. State Bd. of Educ.*, 371 N.C. at 185 n.1, 814 S.E.2d at 77 n.1.

262. *Id.* at 185–86, 814 S.E.2d at 77–78 (“The General Assembly’s decision to assign additional responsibilities to the Superintendent does not interfere with the Board’s constitutional authority to generally supervise and administer the public school system.”).

matters, and House Bill 17 either only affected day-to-day administrative decisions or fit into the legislature's authority to assign administrative power that is not constitutionally granted to either the Board or Superintendent, the law could stand.<sup>263</sup> In this way, *North Carolina State Board of Education v. State* imposes a more restrictive view of the Board's powers and a more expansive view of the Superintendent's and General Assembly's power—unlike in *Atkinson*, *North Carolina State Board of Education* preserves no constitutional role for the Board in day-to-day administrative matters.

Taken together or separately, *Atkinson* and *North Carolina State Board of Education* leave stakeholders with a myriad of unanswered questions as to the relative powers of the Board and Superintendent. By permitting the General Assembly to substantially alter the administrative structure of the public schools, *North Carolina State Board of Education* directly frustrates the purpose of the framers to create a system of gradual administrative change protected from volatile political forces. Since the Board must now rely on the Superintendent's staff for policy guidance, the Board's independent policy role is now made practically subordinate to the Superintendent.

Days after the court's decision, the General Assembly passed a law over a gubernatorial veto repealing some of the Board's policies that had until then defined the contours of the Superintendent's administrative powers under the Board.<sup>264</sup> Superintendent Johnson exercised his new authority to overhaul the organization of the DPI under the Superintendent.<sup>265</sup> Under the new organizational chart, four deputy superintendents were appointed, all of whom were solely accountable to the Superintendent.<sup>266</sup> Johnson sent a letter to DPI staff who were “dual reports”—reporting to both the Superintendent and Board—notifying them that they would now report solely to the Superintendent.<sup>267</sup>

Shortly after the court's decision, the Board changed its own governance policies, which reflect its interpretation of the outcome of the case.<sup>268</sup> Citing language in the court's decision, the Board explicitly lists policies that it

263. *Id.* at 185, 814 S.E.2d at 77–78.

264. Act to Provide Further Regulatory Relief to the Citizens of North Carolina, ch. 114, § 27(a), 2018 N.C. Sess. Laws 739, 754.

265. Alex Granados, *New Leadership on the State Board, Reorganization at DPI, and More*, EDNC (Aug. 3, 2018), <https://www.ednc.org/new-leadership-on-the-state-board-reorganization-at-dpi-and-more/> [<https://perma.cc/EF3L-EG69>].

266. *Id.*

267. Letter from Mark Johnson, Superintendent of Public Instruction, to “Dual Report” Staff at the Department of Public Instruction (July 2, 2018), <https://www.slideshare.net/educationnc/johnson-letter-on-dual-reports> [<https://perma.cc/X37A-NZ43> (staff-uploaded)].

268. N.C. STATE BD. OF EDUC., BOARD POLICY MANUAL (2022) [hereinafter BOARD, POLICY MANUAL], <https://simbli.eboardsolutions.com/Policy/PolicyListing.aspx?S=10399> [<https://perma.cc/9FRV-9S6L>] (listing Board policies related to the governance of DPI, showing many revisions in the wake of the court's 2018 decision).

considers to be consistent with the court’s characterizations of the Board’s policymaking power over the relationship between the Board and Superintendent.<sup>269</sup> The Board restates its constitutional authority to make policy for the department, with the caveat that this power extends to making “rules related to the internal operations and governance” of DPI—a subtle assertion of the Board’s power to make administrative changes to DPI by Board policy in the future.<sup>270</sup> The policy concedes that the Superintendent has the power to “[o]rganize and manage the Department,” but narrows the scope of this power to the organization and management “on a day-to-day basis subject to needed rules and regulations adopted by the State Board,”<sup>271</sup> which is language taken directly from *North Carolina State Board of Education v. State*.<sup>272</sup> Perhaps most telling, the Board says that the Superintendent has the power to “[m]ake recommendations to the State Board regarding the organizational chart or structure of the Department,”<sup>273</sup> and outlines a procedure for making these recommendations.<sup>274</sup> Whether making these changes—as opposed to only making recommendations—is a day-to-day power that the Supreme Court of North Carolina left for the Superintendent or legislature to vest with the Superintendent under the court’s decision is unclear. One could reasonably argue that reporting schemes are day-to-day and thus beyond the scope of the Board’s constitutional authority. The Board clearly asserts here that it is not.

The Board also adopted a policy “expressly reserv[ing]” its constitutional powers and making clear that any delegation of that authority does not constitute a waiver of the power.<sup>275</sup> Since 2020, the Board also explicitly asserts the authority to review, amend, and approve the Superintendent’s budget

269. N.C. STATE BD. OF EDUC., BOARD POLICY MANUAL: POLICY GOVR-002: DESIGNATION OF RULES (Sept. 6, 2018) [hereinafter BOARD, POLICY GOVR-002], <https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=10399&revid=QZia0slshSpZWX3mhEdslshWc1WQ==&ptid=amIgTZiB9plushNjl6WXhfiOQ==&secid=hSGrPqF4gplus5plusZ62PcQufA==&PG=6&IRP=0> [https://perma.cc/AFZ3-86RR].

270. N.C. STATE BD. OF EDUC., BOARD POLICY MANUAL: POLICY GOVR-004: DEPARTMENT OF PUBLIC INSTRUCTION ORGANIZATIONAL STRUCTURE (Sept. 6, 2018) [hereinafter BOARD, POLICY GOVR-004], <https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=10399&revid=iYFOuyu4mskjiHOuVyr75g==&ptid=muNUIKiR2jsXcslsh28JpBkiw==&secid=&PG=6&IRP=0> [https://perma.cc/2JV8-F962].

271. *Id.*

272. N.C. State Bd. of Educ. v. State, 371 N.C. 170, 186, 814 S.E.2d 67, 78 (2018).

273. BOARD, POLICY GOVR-004, *supra* note 270 (emphasis added).

274. *Id.*

275. N.C. STATE BD. OF EDUC., BOARD POLICY MANUAL: POLICY GOVR-001: RESERVATION OF AUTHORITY (Sept. 6, 2018) [hereinafter BOARD, POLICY GOVR-001], <https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=10399&revid=w5niX9ciZfk7d5BqZk1HIw==&ptid=amIgTZiB9plushNjl6WXhfiOQ==&PG=6> [https://perma.cc/L7WQ-YP7P].



proposals.<sup>276</sup> Clearly, the Board's policies contemplate future litigation over the very issues litigated in *North Carolina State Board of Education*, and illustrate that the court's decision has led to nothing more than a temporary cease-fire.

With a new Superintendent, Catherine Truitt, the organizational chart has changed. The October 2022 organizational chart retains two "dual-reports" (roles reporting to both the Superintendent and Board), an internal auditor and the "Director of Board Operations and Policy."<sup>277</sup> The chart also lists the general counsel as reporting directly to the Superintendent, but with "open lines of communication."<sup>278</sup>

#### IV. APPLYING NEUTRAL PRINCIPLES, THE BOARD HAS SUPREME CONSTITUTIONAL AUTHORITY OVER THE ADMINISTRATION OF THE STATE-LEVEL PUBLIC SCHOOL SYSTEM

The preceding parts have explained how the constitutional development of the Board and Superintendent left the state with an explanation of their constitutional power that is facially vague, confusing, and contradictory. In the past thirty years, this has led to major conflicts between the two that have occasionally made their way through the courts. When the Supreme Court of North Carolina had the opportunity to resolve these disputes by laying down a constitutional principle, it offered a solution that left more questions than answers.

This part will apply the text, structure, and historical principles identified in Part II to conclude that constitutionally, the Board has the exclusive authority to administer the public schools. While the Board's policymaking authority is constitutionally subordinate to laws passed by the General Assembly,<sup>279</sup> this part concludes that because the administration of the schools is the exclusive power of the Board's, vesting this power in another entity (like the Superintendent) is beyond the power of the General Assembly. Necessarily, this conclusion demands that *North Carolina State Board of Education v. State* be overruled.

276. N.C. STATE BD. OF EDUC., BOARD POLICY MANUAL: POLICY GOVR-007: SUPERVISION AND ADMINISTRATION OF STATE AND FEDERAL EDUCATION FUNDS TO SUPPORT NORTH CAROLINA'S GENERAL AND UNIFORM SYSTEM OF FREE PUBLIC SCHOOLS (May 7, 2020) [hereinafter BOARD, POLICY GOVR-007], <https://simbli.eboardsolutions.com/Policy/ViewPolicy.aspx?S=10399&revid=Gfx4spY2pCn7TBGishp9oA==&ptid=amIgtZiB9plushNjl6WXhfiOQ==&secid=hSGrPqF4gplus5plusbZ62PcQufA==&PG=6&IRP=0> [<https://perma.cc/8HST-J5AD>].

277. N.C. DEPT. PUB. INSTRUCTION, *North Carolina Department of Public Instruction* (Oct. 24, 2022), <https://www.dpi.nc.gov/media/8891/open> [<https://perma.cc/ZE6V-SMNL>].

278. *Id.*

279. *See State v. Whittle Commc'ns*, 328 N.C. 456, 464–71, 402 S.E.2d 556, 560–65 (1991) (holding that the Board did not have authority to promulgate a rule contradicting a statute that directly addressed the matter).

There is ample historical evidence of the framers' intent to make the Superintendent subordinate to the Board. The framers of the current constitution said this explicitly: "A potential conflict of authority between the Superintendent and the Board is eliminated by making clear that [the Superintendent is] the administrative officer of the Board (Sec. 4[2]), which is to administer the public schools (Sec. 5)."<sup>280</sup> This is also implicit in the text and history of the constitution. Since the office was first made elective in 1868, the Superintendent has always served as the Board's secretary, a servant to the Board.<sup>281</sup> A principal concern that inspired the 1942 amendments was the legislature's diffusion of power away from the Board into other entities, which caused instability, and diffusion of power to the Superintendent has done just that.<sup>282</sup> While it may cut against engrained democratic instincts to resolve this question in favor of an appointed Board and away from an elected official, doing so has the blessing of history and serves the purposes of the framers.

This reading does not render meaningless the clause in the constitution describing the Superintendent as the "chief administrative officer" of the Board.<sup>283</sup> As the nominal "chief," the Superintendent would remain the face of public education in North Carolina. The Superintendent would maintain a high-profile role in shaping education policy and administration through their ability to speak for the public at large on education issues. As the Board's "secretary," the Superintendent would be arguably constitutionally entitled to attend regular meetings of the Board to voice those concerns to the Board to the same degree as appointed Board members.<sup>284</sup> Further, the Board would

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280. 1968 REPORT, *supra* note 175, at 87.

281. *See supra* text accompanying note 125 (noting that under the 1868 constitution, the Superintendent was the secretary to the Board); N.C. MANUAL OF 1943, *supra* note 155, at 239 (noting the Superintendent remained the Board's secretary after the 1942 amendments); *supra* text accompanying notes 179–80 (noting the Superintendent remained the Board's secretary through the 1971 amendments).

282. *See supra* text accompanying notes 131–36, 147, 153, 157, 162 (summarizing concerns in reports to the General Assembly leading up to the adoption of the 1942 amendments and the comments of contemporaries, which show that resolving this diffusion of power was a central purpose behind the adoption of the 1942 amendments).

283. N.C. CONST. art. IX, § 4, cl. 2.

284. *See id.* While this issue has never been litigated before, it is natural that an officer of the Board, its secretary and chief administrative officer, would be entitled to attend meetings to fulfill that role. However, there are practical limitations to holding that the state constitution guarantees an absolute right of the Superintendent to attend Board meetings. For example, the Board may need to meet without the Superintendent when discussing litigation against the Superintendent. The Superintendent could also abuse information gleaned from attending meetings in closed session to severely undermine the Board's authority. The most natural reading of the constitution, then, would hold that the Superintendent may attend Board meetings to the same extent as any other Board member—that is, the procedures for compelling the absence of a member of the Board must apply equally to the Superintendent. There is little in the historical record on how this issue has been handled since the Superintendent was removed as a voting member of the Board in 1971. *See supra* note 180 and

likely continue to delegate to the Superintendent the duties tied to the nominal head of the DPI, including executing contracts, granting applications, and supervising financial transactions on behalf of the department.<sup>285</sup> The Superintendent would remain the “chief administrative officer” to the extent that the history, text, and structure contemplates the meaning of that term, as the figurehead of public education in North Carolina. Practically, if the Board finds it necessary to delegate *none* of its constitutional authority to administer the school system, including the power to hire and fire state-level public school employees, the DPI will nevertheless be able to operate efficiently. To illustrate, in 2005, when a contested election for Superintendent left the school system without a Superintendent for months, the lack of Superintendent had “no effect” on the administration of the public schools.<sup>286</sup>

Even if one buys into the errant idea of the existence of some sort of policy-administration dichotomy between the Board and Superintendent,<sup>287</sup> this false dichotomy still does not present a principled answer as to who has final administrative authority. For example, consider the hiring and firing of state-level public school employees. Even if the Superintendent has the constitutional authority to *administer* while the Board has constitutional authority to make *policy*, such a framework does not offer any answer on who has the power to hire and fire because the hiring and firing of most state-level

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accompanying text. During the period after the DPI CEO was installed and before the position was held unconstitutional, *supra* text accompanying notes 214–16, 226–27, Superintendent June Atkinson simply respected the Board chairman’s requests not to attend certain Board meetings held in closed session, Affidavit of Dr. June St. Clair Atkinson ¶ 18, *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009) (on file with the North Carolina Law Review). State statutes impose a duty on the Superintendent to attend all meetings of the Board. N.C. GEN. STAT. § 115C-21(b)(8) (2022) (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.).

285. The Superintendent maintained these roles (and others) when the Board first moved all hiring and firing authority to the Deputy Superintendent, when the Board had the authority to do so, pre-*Atkinson v. State*. EVERGREEN REPORT, *supra* note 9, at 3-14 to 3-17. The Superintendent also maintained these de jure roles after the creation of the DPI CEO in 2009. See generally Affidavit of Dr. June St. Clair Atkinson Ex. F, *Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. 2009) (on file with the North Carolina Law Review) (discussing documents showing that the Board and CEO wanted the Superintendent to, among other roles, “approve [with the CEO] all documents sent to the US Department of Education” and sign contracts with the approval of the CEO).

286. John N. Dornan, then executive director of the Public School Forum of North Carolina, said: “Frankly, the lack of a superintendent is having no effect . . . Life is going on, the department is functioning well, and the state board and deputy superintendent are doing just fine.” Kathleen Kennedy Manzo, *Disputed N.C. Education Post Still Unfilled*, EDUCATIONWEEK (Mar. 22, 2005), <https://www.edweek.org/leadership/disputed-n-c-education-post-still-unfilled/2005/03> [<https://perma.cc/3YSN-DLXF> (dark archive)].

287. As a reminder, the principal textual reason that the existence of such a dichotomy (where the Superintendent is the administrative officer charged with executing the Board’s policies) is wrong is that the text of the constitution gives the Board the power to “administer” the public schools. On its face, the text uses terms that reference “administration” to describe *both* the Board’s and Superintendent’s roles. N.C. CONST. art. IX, § 4, cl. 2, 5.

public school employees is a *policy* task as much as it is an *administrative* one. No one seriously doubts that the Board has a central policymaking role, the constitution is at least clear on this point. To adequately perform that role, especially in an area as complex as public education policy, the Board must have administrative control over the experts that advise the Board on these matters, because in practice, most of the policy agenda of the Board is raised by staff within the DPI, not members of the Board.<sup>288</sup> The Board scrutinizes staff recommendations and proposals. If the Superintendent has the final say over the hiring and firing of these employees, the Superintendent will have a *formal* policy role that exceeds the *informal* policy role<sup>289</sup> that the constitution contemplates for that office. For example, suppose a future Superintendent forbid staff from responding to policy questions posed by Board members about a policy with which the Superintendent did not agree. In this way, the Superintendent would significantly undermine the Board's policymaking function—the Board would be beholden to the Superintendent's policy views.<sup>290</sup>

288. See ERNST & YOUNG LLP, *supra* note 67, app. 6 (illustrating the policy process at DPI in a chart, which shows that policy proposals are generally made by DPI staff and thoroughly researched before they are brought to the Board); Affidavit of William W. Cobey Jr. at 2–3, N.C. State Bd. of Educ. v. State, 16 CVS 15607 (N.C. Super. Ct., July 6, 2017) (on file with the North Carolina Law Review) (stressing the consequences of removing the Board's hiring and firing power, by stating that “the Board will be unable to exercise [its policymaking role] if it has no authority whatsoever over the hiring, firing, and supervision[] of these senior policymaking decisions”); Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson at 1–2, N.C. State Bd. of Educ., 16 CVS 15607 (on file with the North Carolina Law Review); Jess Clark, *Fight For Control over NC Public Schools Pits Republican Against Republican*, WUNC (May 5, 2017, 10:09 AM), <https://www.wunc.org/education/2017-05-15/fight-for-control-over-nc-public-schools-pits-republican-against-republican> [<https://perma.cc/5SG5-NG7A>] (noting then chairman Bill Cobey's belief that the Board likes to have hiring and firing authority over top employees, because they work on policy matters, which are the central responsibility of the Board); Affidavit of Dr. June St. Clair Atkinson at 4, *Atkinson*, No. 09 CVS 006655, 2009 WL 8597173 (on file with the North Carolina Law Review) (explaining, as a former longtime DPI employee and then Superintendent, that “[h]istorically, the State Board of Education has set policy . . . with recommendations emanating from the Superintendent and staff”); EVERGREEN REPORT, *supra* note 9, at 4-14 (“Once the goals and objectives of the state are adopted by the Board, it is the responsibility of the Superintendent (or, in the case of North Carolina, the Deputy Superintendent) and staff to recommend policies and establish procedures to achieve these end results.”). A North Carolina Association of Educators lobbyist's testimony said that “the State Board is currently functioning as little more than an adjunct to DPI” and that Department staff “in effect, control[] policy recommendations.” 1986 REPORT, *supra* note 2, app. Q, at Q-3.

289. For example, the history and structure of the constitution contemplates that the Superintendent will be a major force in speaking on policy and shaping policy decisions, but does not contemplate (since the Superintendent was removed as a member of the Board in 1971) that the Superintendent will have a formal vote in shaping policy.

290. This concern is not unfounded, as similar circumstances have played out before. In a 1992 lawsuit against then-Superintendent Bob Etheridge, the Board alleged, among other things, that Etheridge “discouraged Department of Public Education employees from supporting the Board” and “stifled free and open communication between the Board and Department of Public Education employees by directing those employees to communicate with Board members only through his office.”

Under a framework that considers hiring and firing decisions to be administrative decisions vested with the Superintendent, this would be perfectly constitutional. In short, the pervasiveness of the policy-administration dichotomy in our federal and state systems provides a compelling temptation to fit our interpretation of the Board's and Superintendent's roles into these norms. However, doing so would be an attempt to fit a round peg in a square hole. In the North Carolina state public school system, even the seemingly administrative task of hiring and firing state-level public school employees is fraught with policy implications, so the policy-administration dichotomy provides no meaningful answer. Not only is this policy-administration dichotomy theoretically unfounded; it is practically unworkable.

The general/day-to-day dichotomy, which the Supreme Court of North Carolina has even found persuasive,<sup>291</sup> also does not provide a better answer to who has the constitutional authority to administer the state public school system. Under this argument, which is somewhat different from the policy/administration dichotomy because it recognizes *some* administrative role for the Board, the Superintendent has the constitutional authority over the administration of direct, day-to-day issues, while the State Board's exclusive constitutional administrative authority is limited to more "big picture" issues. One could find a textual basis for this conclusion—the constitution states, without omission, that the Board "shall supervise and administer the free public school system" and that the Superintendent "shall be the secretary and chief administrative officer" of the Board.<sup>292</sup> While there is no language in the current constitution describing the powers of either entity as being more general or direct, perhaps this sentiment is implicit in the term "chief administrative officer," which might tend to describe an officer with the power to make day-to-day administrative decisions. However, squeezing this meaning from the text is not supported by the historical record and is not at all administrable. Prior versions of the constitution used the term "general" to describe the powers of *both* the Superintendent and Board.<sup>293</sup> It is more likely that the term "general" then referred to the Board and Superintendent's authority over *statewide* education matters to separate the Board's and Superintendent's authority from the statutory authority of local boards of education, rather than delineating

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Complaint at 5, *N.C. State Bd. of Educ. v. Etheridge*, 92-CVS-08138 (N.C. Super. Ct. July 29, 1992) (on file with the North Carolina Law Review). The suit was voluntarily dismissed, but it proves that the governance of North Carolina's public schools is on shaky grounds. Notice of Dismissal Without Prejudice at 1, *Etheridge*, 92-CVS-08138 (Feb. 15, 1993) (on file with the North Carolina Law Review).

291. *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 181, 814 S.E.2d 67, 75 (2018).

292. N.C. CONST. art. IX, § 4, cl. 2, § 5.

293. *See supra* text accompanying note 158.

power between the Board and Superintendent.<sup>294</sup> The framers of the current language believed that “chief administrative officer” was *limiting* language that made clear that the Superintendent was subordinate to the Board’s will.<sup>295</sup> If the historical record does not doom this “day-to-day” versus “general” idea, then administrability concerns should. It would be impossible for a court, Board member, legislator, or Superintendent to meaningfully separate administrative tasks into “general” and “day-to-day” tasks, and the Supreme Court of North Carolina did not attempt to articulate any test to this end. For one, even seemingly day-to-day administrative tasks are inextricably tied to more general policy responsibilities. While the hiring and firing of low-level ministerial employees might be considered a “day-to-day” task and the hiring and firing of top-level staff considered a “general” task reserved to the Board, what about mid-level staff? In sum, while an argument can be made that the text of the constitution supports a theory that the Board and Superintendent have responsibility for “general” and “day-to-day” tasks, respectively, this idea as a constitutional principle should be rejected in light of the historical record and unworkability of such a system.

It is also no answer to simply read the text of the constitution and determine that *both* the Superintendent *and* Board have a constitutional role in day-to-day administrative matters, like hiring and firing state public school employees, as the trial court did in *Atkinson v. State*.<sup>296</sup> The relevant constitutional history does not support this conclusion. Even if the text is somehow read to support this conclusion, it provides no real answers. The text, history, and structure are devoid of any guidance as to the mechanics of such a system. For example, if state-level public school employees are accountable to both, then how should an employee respond to conflicting orders from the Board and Superintendent? Would the constitution require that both the Board and Superintendent approve hiring decisions? What about firing decisions? The constitution provides no answers to these questions. Thus, the thought that somehow the constitution demands that both the Board and Superintendent be

294. In another section of the constitution, the word “general” is used to describe the education that the General Assembly must provide, which offers further evidence that “general” is intended to delineate between state versus local education, not the Superintendent’s versus the Board’s power. *See* N.C. CONST. of 1868 art. IX, § 2 (“The General Assembly . . . shall provide by taxation and otherwise for a general and uniform system of Public Schools.”); *see also* N.C. CONST. of 1971, art. IX, § 2, cl. 1 (parallel current provision); *cf.* *City of Greensboro v. Hodgin*, 106 N.C. 182, 186, 11 S.E. 586, 587 (1890) (considering this clause, the court assumed that “general” described the statewide system; the court noted that the constitution requires the legislature to establish a public education system which “must be general—not local—not limited to one or more places or localities in the state”).

295. *See supra* text accompanying notes 181–84; 190–91.

296. *See Atkinson v. State*, No. 09 CVS 006655, 2009 WL 8597173 (N.C. Super. Ct. July 17, 2009) (“Any employee of the North Carolina Department of Instruction must be accountable and responsible to the State Superintendent of Public Instruction, as well as the State Board of Education, until such time as the duly qualified voters specify otherwise by a constitutional amendment.”).

involved in day-to-day administrative matters is not administrable and is unfounded in the text, structure, and history of the constitution and should be rejected.

If the Supreme Court of North Carolina corrects its error by recognizing that the Board has supreme policymaking and administrative authority (over both general and day-to-day administrative matters), this does not prevent the Board from delegating important administrative powers, including hiring and firing authority, to the Superintendent. We can expect such delegation to be the norm. For example, when Board policy has not given the Superintendent any formal power to make employment decisions, the Board has nonetheless involved the Superintendent in these decisions as a “professional courtesy.”<sup>297</sup> It has an incentive to do so—the Superintendent, as the only elected office solely devoted to state education issues, maintains considerable influence through the Superintendent’s “soft power” to change education policy. The Superintendent travels the state, representing, in one person, the state public school system at large. The Superintendent regularly speaks to stakeholders and experts, solicits ideas, and is asked to speak on statewide education policy issues. The Board is incentivized to meaningfully involve the Superintendent in administrative and policy matters to further its own goals. This tracks with history as well: the Board has delegated more of its authority to Superintendents in times when they had a good working relationship.<sup>298</sup>

#### CONCLUSION

North Carolina’s system of state-level public education governance is failing. The state constitution provides for a state board of education and superintendent of public instruction, but provides facially vague, confusing, and contradictory provisions to explain their relative powers. Without clarity, the efficient administration of the public school system depends largely on whether the electorate chooses a Superintendent that is aware of the limitations of the office and is willing to collaboratively work with the Board. When we are not so lucky, stakeholders must cope with the power battles that ensue. The judiciary has failed to clarify who is in charge and extraconstitutional efforts have similarly failed.

Together, the constitutional development of the Board and Superintendent shows an intent to create an administrative structure insulated from volatile political forces. The present lack of clarity has frustrated this central purpose—partisan political actors have effected education policy changes not by traditional policymaking tools but by changing the administrative structure to ensure that people aligned with their party are

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297. EVERGREEN REPORT, *supra* note 9, at 3-13.

298. *See id.* (detailing a period when the Board delegated more authority to the Superintendent).

making the decisions.<sup>299</sup> As our national culture wars increasingly pervade school boards (state and local),<sup>300</sup> the need for implementing the stable, nonpartisan leadership that the founders intended to lead North Carolina's public schools has become more urgent.

After *North Carolina State Board of Education v. State*, the legislature received the tacit blessing of the judiciary to continue this politically motivated administrative tinkering. The General Assembly now has some undefined level of power to decide who has power over administrative decisions not constitutionally vested with the Superintendent or Board, and it can upend this administrative structure any time fleeing partisan political considerations would be served by doing so.

In November 2020, Catherine Truitt was elected superintendent of public instruction.<sup>301</sup> By all accounts, Superintendent Truitt intends to develop a good working relationship with the Board, something her predecessor did not seem to seek.<sup>302</sup> Importantly, Superintendent Truitt came to the office aware that grappling with the current system would be tough,<sup>303</sup> while her predecessor did

299. See *supra* text accompanying notes 237–42 (detailing House Bill 17, which was adopted by a Republican legislature to move power to a newly elected Republican Superintendent). Most recently, when a majority of the nonpartisan Board, see *supra* text accompanying note 31, became appointees of Democratic governors, Republican members of the General Assembly filed a bill to amend the constitution to change the board to an elected one. H.B. 1173, Gen. Assemb., 2021 Sess. (N.C. 2022); see also Greg Childress, *NC Legislative Proposal Would Dramatically Overhaul How North Carolina Governs Its Public Schools*, N.C. POL'Y WATCH (July 20, 2022, 12:56 PM), <https://ncpolicywatch.com/2022/07/20/nc-legislative-proposal-would-dramatically-overhaul-how-north-carolina-governs-its-public-schools/> [<https://perma.cc/6ZJJ-MPWD>] (providing additional information on the bill). One Republican legislator supporting the bill expressed his view that the appointment of many of the Democratic board members amounted to “political payoff,” a comment which suggests that altering the makeup of the Board is best seen as part of a political tit-for-tat than a good faith policy proposal. See David N. Bass, *N.C. House To Consider Making School Superintendent the Chair of the State Board of Education*, CAROLINA J. (June 30, 2022), <https://www.carolinajournal.com/house-to-consider-making-school-superintendent-the-chair-of-state-board-of-education/> [<https://perma.cc/F3EA-F8JE>]. While constitutional amendments are not unconstitutional, because a constitution cannot violate itself, we should be troubled that these efforts illustrate the critical need for a stable, constitutionally guaranteed nonpartisan structure at a time when this structure is particularly vulnerable to administrative upheaval based on little more than partisan political considerations.

300. *Supra* note 14 and accompanying text.

301. Ann Doss Helms, *Republican Catherine Truitt Elected Superintendent of North Carolina's Public Schools*, WFAE (Nov. 3, 2020, 11:44 PM), <https://www.wfae.org/politics/2020-11-03/republican-catherine-truitt-elected-superintendent-of-north-carolinas-public-schools> [<https://perma.cc/K5CK-R52L>].

302. Greg Childress, *State Superintendent-Elect Catherine Truitt: Where She Stands on Charters, the Board and the NCAE*, N.C. POL'Y WATCH (Nov. 19, 2020, 6:00 AM), <https://ncpolicywatch.com/2020/11/19/state-superintendent-elect-catherine-truitt-where-she-stands-on-charters-the-board-and-the-nae/> [<https://perma.cc/U5B7-2W8Y>].

303. Bass, *supra* note 299. Superintendent Truitt: “I jumped into the [Superintendent] race fully understanding the complexity of the K-12 governance structure as laid out in our state's constitution.” *Id.*



not.<sup>304</sup> This is laudable, but the effective governance of North Carolina's public schools should not depend on whether the electorate happens to choose a Superintendent with the right intentions, background knowledge, or leadership style. While the framers envisioned arguments about policy, the framers intended to avoid constant arguments about administration (including who is entitled to make these decisions) by enshrining a stable administrative structure within the constitution.

In December 2022, a select committee of the North Carolina House of Representatives, organized to study and recommend improvements to the state's education system, released a draft report recommending the adoption of a constitutional amendment to "grant greater authority to the Superintendent."<sup>305</sup> Stakeholders should be encouraged to see that the legislature once again seems to be seriously concerned with "strife" over the "current division of authority."<sup>306</sup> But it is doubtful that the committee can author an amendment that brings any clarity to the division of power between the two, unless the amendment simply vests the final say over all matters—policy and administrative, day-to-day and general—with one entity. History has demonstrated that attempts to divide power between an elected Superintendent and appointed Board are unlikely to succeed because it is difficult to define the division of power in a way that is workable in practice. We can only hope that before enacting such permanent changes to our state's governing order, legislators will engage in a solemn, serious inquiry into the reasons that inspired the adoption of the existing system and persuasively justify departures from it. In these discussions, the long-term success of the public school system should be the goal; passing political expediences, including the party affiliation of the Superintendent and perceived partisan lean of the Board, should be ignored.

As it stands today, the constitution provides the problems, but also the solutions. History illuminates the purposes of the framers and provides a neutral source for answers. When the Supreme Court of North Carolina inevitably speaks on this issue again, it should apply these principles, lay down the law, and advance the intent of the framers to create a system that works in

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304. Former Superintendent Johnson admitted that he did not learn about limits on the Superintendent's authority imposed by statute and Board policy until after he became Superintendent. Affidavit of North Carolina Superintendent of Public Instruction Mark Johnson ¶ 3, N.C. State Bd. of Educ. v. State, 16 CVS 15607 (N.C. Super. Ct. July 6, 2017) (on file with the North Carolina Law Review) ("I took the oath of office and arrived in Raleigh on January 2, 2017, . . . [u]nfortunately, I have learned that the authority of the Superintendent of Public Instruction is severely limited by the past statutory provisions and by the policies and procedures of the North Carolina State Board of Education . . .").

305. HOUSE SELECT COMM. ON AN EDUC. SYS. FOR N.C.'S FUTURE, *supra* note 47, at 25, 30.

306. *Id.* at 25.

practice. The people and public school students of North Carolina deserve no less.

**Figure 1: How the Courts Have Divided Power Between the Board and Superintendent**

		Day-to-Day	General		
-----Administrative Matters-----	Superintendent's constitutional authority	Subject to laws passed by the General Assembly	Board's constitutional authority		<i>N.C. State Bd. of Educ. v. State</i>
	Board's and Superintendent's constitutional authority				<i>Atkinson v. State</i>
	Board's delegable constitutional authority				Proposed Interpretation
Policy Matters	Board's constitutional authority, subject to laws passed by the General Assembly				

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