

Historical, Political, and Legal Assessment of the State Board of Education's Relation to the General Assembly

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The political and legal history of the North Carolina Constitution in terms of education begins in 1868, where in article IX the governing document set out the parameters of education in the state. It created a State Board of Education, defined its membership and powers. Technically, there have only been three constitutions of North Carolina: 1776, 1868, and 1971. However, before 1971, there were numerous revisions, and amendments. It is our purpose here to trace not only the meaning of the state constitution, but to fix an understanding of the authority of the General Assembly in relation to the State Board of Education (SBE).

Education was not mentioned in the constitution of 1776. When a board of education was created in the Constitution of 1868, it consisted of the council of state: Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction, and Attorney General. The Governor served as “president” of the board, the Supt. of Public Instruction was its “secretary.”

In relation to the powers and authority of the board, the 1868 Constitution stated that,

*The Board of Education shall succeed to all the powers and trusts of the President and directs of the Literary Fund of North Carolina and shall have full power to legislate and make all needful rules and regulations in relation to Free Public Schools, and the Educational fund of the state; but all acts, rules and regulations of said Board may be altered, amended, or repealed by the General Assembly, and when so altered, amended or repealed by the General Assembly, they shall not be reenacted by the Board.*¹

The passage initially delegated to what is now the SBE, powers to “legislate” in regard to the free public school system. We should note, however, the power of the board was not plenary, and the General Assembly retained the lion share of the authority. They could modify or repeal,

¹ Art. IX §9. Emphasis Added.

any rule or regulation passed by the board. The ultimate authority was laid upon the General Assembly, not the SBE. The reason the convention carved out a larger constitutional place for education in the state was described thusly:

The Constitution framed by our ancestors in 1776, recognized the value of education. It provided for a University. This Constitution provides for a University *and for free public schools for all children of the State*. All may see the difference between the success in life of the educated and uneducated man, yet as often as not, the uneducated man has been gifted with the greater degree of intellectual power; the cause of his ill success is that it has not been developed. We propose to ‘level upwards,’ to give every child, as far as the State can, an opportunity to develop to the fullest extent, all his intellectual gifts. So noble an effort needs no vindication.²

The development of the elementary school system was not created in 1776. It was not until 1839 that the state’s General Assembly formally created a “common school” system for elementary education.³ The 1868 constitution formally created the board of education that was established by the 1839 act as the Board of Common Schools. In the 1875 Constitutional Convention, the delegates made an attempt to clean up the language and apparent contradictions of the 1868 constitution, especially those that related to meetings and investments of public school funds.⁴

The state constitution was amended several times before the 1930s, but none addressed the section of the constitution dealing with education. In 1932, the governor established by act of the General Assembly, a constitutional commission to recommend changes. The commission concluded,

The thought revealed that the chief need is to relax many of the existing restrictions on the powers of the General Assembly, so as to allow more elasticity in shaping governmental

² *Journal of the Constitutional Convention of the State of North Carolina at its Session 1868* (Raleigh: Joseph W. Holden, 1868), 486-487.

³ *Laws of the State of North Carolina Passed by the General Assembly at the Session of 1838- '39* (Raleigh: J. Gales and Son, 1839), 12-16. The text of the act is in Chapter VIII on “Common Schools.”

⁴ *Journal of the Constitutional Convention of the State of North Carolina Held in 1875* (Raleigh: Josiah Turner, 1875), 77 and 105.

policies, not only in respect to present conditions, but also in regard to future needed adjustments...⁵

The commission's task was meant to clear up any doubt that the driving force for policy in the state was seated in the legislature. As a result, the intent was to remove any language that might cause confusion in the authority of the legislature to direct policy in the state. As it pertained to education, the commission recommended changes that would make the SBE an all appointed board by the governor, with the Superintendent of Public Schools servicing as its officer and chair.⁶ It was the first mention of changing the membership of the board consisting of the council of state.

The education article (Article VII) eliminated "legislate" from its powers and duties of the board. Nevertheless, the proposed amendment to the section read that the SBE was to,

generally supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this Section shall be exercised in conformity with this Constitution and subject to such laws as may be conducted from time to time by the General Assembly.⁷

If the intent of the commission was to clean up some language and make the authority of the legislature more clear in terms of language, it could not be more evident that it was the intent to make sure the legislature had the authority and the final say on the acts emanating from the SBE. The elimination of the board's ability "to legislate" can be seen as a primary example of that effort. In a review of the proposed constitution, *Popular Government* commented that, "the proposal is not a new Constitution, but a revised, modernized edition of the present

⁵ "The Report of the North Carolina Constitutional Commission," *North Carolina Law Review* 1, no. 1 (1932), 5.

⁶ *Ibid.*, 9.

⁷ *Ibid.*, 33.

Constitution.”⁸ Therefore, because the 1932 constitution was a modernization and clarification, we must conclude that, like the 1868 constitution, the legislature could nullify and change any act approved by the SBE. The General Assembly retained its sole responsibility to “legislate,” and be the ultimate and final legislative body. Section six empowered, “the Board to make rules and regulations (subject to change by the General Assembly), but proposed s. 6 empowers the General Assembly more specifically.”⁹ Even the State Educational Commission noted as much when reflecting on the 1868 constitution:

For the board is vested with ‘full power to legislate and make all needful rules and regulations in relation to free public schools and the educational fund of the state.’ At the same time, the board is limited in the exercise of its ‘full power,’ because it is made responsible and subordinate to the general assembly...Accordingly, the general assembly has never hesitated to add to or subtract from the powers actually exercised by the state board of education.¹⁰

Though the understanding of the 1868 constitution and the more modernized 1932 constitution were understood similarly, due to a legal technicality, this constitution never made it before the voters.¹¹

In 1941, the legislature sent to the voters a revision that passed 148,517 to 109,798. This amendment was the first formal change to the powers of the board. The relevant part to the 1971 constitution are thus:

⁸ “The Proposed Constitution for North Carolina: A Comparative Study,” *Popular Government* 1, no. 1 (June 1934), xiv.

⁹ *Ibid.*, 89.

¹⁰ *Public Education in North Carolina*, State Educational Commission (Raleigh: Edwards & Broughton Printing Co., 1920), 84. None of this suggests that there were not criticisms of the legislature’s use of their power to act, but suffice to say, it was always considered as a fact that the legislature had this authority constitutionally granted. Astonishingly, the State Education Commission argued that the SBE be completely removed from the state constitution and all power placed in the hands of the legislature with conditions. See pp. 86-91.

¹¹ 207 N.C. 879-880. Essentially, the amended constitution was not placed before the voters in November 1933 because it was not consider a “general election.” The State Supreme Court thought otherwise in an advisory opinion at the request of the governor. So the constitution was not placed before the voters in November of 1934.

and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.¹²

The intent of the amendment was “modeled after the recommendations off the Constitutional Revision Commission of 1931.”¹³ The commentary on the proposed amendment noted that in the past some people misinterpreted the administrative board as possessing power above the legislature, but the commission cautioned that the legislature did not have power above the constitution. Therefore, the legislature was subject to the state constitution, but the SBE is subject to both. The General Assembly thus has supervisory authority.¹⁴ In accordance with the last sentence, “All the powers enumerated in this section shall be ...subject to such laws as may be enacted from time to time by the General Assembly.”

The state made another attempt at revision in 1957 at the request of the governor. The legislature provided for a commission be created to recommend changes to the constitution and be submitted to the voters. The commission did a “careful job of editorial pruning” which included “clarification and modernization” of the language.¹⁵ Several of the proposed changes were substantial. Most notably, the commission concluded that, “the requirement that the public schools constitute a ‘general and uniform system’ would have been eliminated and the constitutional authority of the State Board of Education reduced.”¹⁶ The commission’s report of

¹² *Public Laws and Resolutions Passed by the General Assembly at its Session of 1941* (Charlotte: Observer Printing House, 1941), 241. Noted in charter 151, or Senate Bill 107.

¹³ “Legislation Affecting Education,” *Popular Government* 7, no. 3 (May 1941), 34.

¹⁴ “A Survey of Statutory Changes in North Carolina in 1941,” *North Carolina Law Review* 19, no. 4 (June 1941), 465-466.

¹⁵ John L. Sanders, “A Brief History of the Constitutions of North Carolina,” in *North Carolina Government: 1585-1979*, ed. John L. Cheney (Raleigh: North Carolina Department of the Secretary of State, 1981), 799.

¹⁶ *Ibid.*, 799-800.

1959 stated that, “the changes made in many instances were adopted in order to express more clearly the understandings concerning provisions of the Constitution which have developed over the years through experience.”¹⁷ This intent should not suggest that the commission made wholesale changes for they stated unequivocally that, “great care has been taken to avoid changes in style which might affect the judicial construction of provisions which were not intended to be altered.”¹⁸ The commission added that no changes were made to the constitution that changed its meaning.¹⁹ The board thus aimed—as it pertains to our focus here—to clarify the role of the legislature. In terms of education they meant:

One recommendation of the Commission deletes the present provision granting to the State Board of Education broad, general supervisory and administrative powers over the public schools, over and above the specific powers granted to the Board in the Constitution. The deleted provisions are replaced by a clause authorizing the General Assembly to prescribe the powers of the Board in so far as they are not constitutionally defined. This insures the General Assembly a voice in the decision of questions of great public importance, without restricting its authority to grant to the Board such powers of control as it may deem advisable. For similar reasons, the State Superintendent of Public Instruction is made ‘the chief administrative officer’ of the Board, rather than the ‘administrative head of the school system’ as is in the present Constitution.²⁰

The proposed original language of the constitution thus read:

...and generally to supervise and administer the free public school system of the State and make all needful rules and regulations in relation thereto. All the powers enumerated in this section shall be exercised in conformity with this Constitution and subject to the laws as may be enacted from time to time by the General Assembly.²¹

The proposed text read thus:

...and exercise such powers and perform such duties as the General Assembly may from time to time prescribe. All the powers enumerated in this section shall be exercised in

¹⁷ “Report of the North Carolina Constitutional Commission” (Raleigh: np, 1959), ii.

¹⁸ *Ibid.*, x.

¹⁹ *Ibid.*, xi.

²⁰ *Ibid.*, xv.

²¹ *Ibid.*, 130.

conformity with this Constitution and subject to such laws as may be enacted from time to time by the General Assembly.

The intent could not be more clear. The legislature had overwhelming authority over the SBE.

Once again, this constitution failed to make it to the voters, not because of any controversy over the changes to the education articles. The sticking point in the legislature was over changes made to the judiciary. Hence, the constitution was never submitted to a vote.

The commission that was constituted to revise what would become our present constitution was commissioned in 1968. The purpose of the commission was stated thusly, in part, “to protect the rights of the individual from encroachment by the State.”²² As a result, the power of the protection resided in the people: *“thus when a question arises as to whether or not the General Assembly possesses the power to enact a proposed measure, the presumption is that it does have the power unless in the state constitution itself or in the federal constitution some denial of that power can be found.”*²³ Like the commissions in the 1930s and 1959, this commission sought to make the constitution more clear. While stating that the Superintendent of Public Instruction is the clear head of the SBE, the commission concluded as it pertains to the powers of the board that it “restates, in much abbreviated form, the duties of the State Board of Education, but without any intention that its authority be reduced.”²⁴

Keeping in context the over 100 years of commentary and intent by the state and its commissions, this phrasing does not mean that the SBE was granted more authority. It means to communicate that the SBE was intended to be subject to the legislature of the state and that its powers were not reduced in the general construction of over 100 years of constitutional

²² “Report of the North Carolina State Constitution Study Commission,” North Carolina State Bar and North Carolina Bar Association (Raleigh: North Carolina State Bar, 1968), 1.

²³ Ibid., 2. Emphasis Added

²⁴ Ibid., 87.

understanding. It certainly did not mean that the General Assembly had its authority over the board curtailed. The present wording thus reads,

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.²⁵

Building off the intent of the past, the legislature and its commission of 1968 clarified the text of the state constitution to instill the proper authority of the legislature in relation to the SBE, which is, and always has been, subject to the General Assembly.

While the commission stated that it did not enlarge the powers of the legislature, it noted that, “some 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.”²⁶ As John L. Sanders concluded,

The Constitution has allowed the General Assembly wide latitude for decision [sic] on public affairs, and legislators have been willing to accept responsibility for and act on matters within their authority instead of passing on responsibility for difficult decisions on to the voters in the form of constitutional amendments.²⁷

The Constitution has not delineated, unlike in other states, specific details of the workings of government. This leaves to the people and its legislature the ability to freely change policy in the state insofar as the constitution allows. The General Assembly has broad authority in the state except for those expressly denied to them and under the authority of other entities or agencies. Therefore, the legislature in the state has broad authority to change policy and pass laws that

²⁵ North Carolina General Assembly, *Session Laws and Resolutions Passed by the General Assembly at the Regular Session* (Raleigh: np, 1969), 1480.

²⁶ *Ibid.*, 2 and 10.

²⁷ John L. Sanders, “A Brief History of the Constitutions of North Carolina,” in *North Carolina Government: 1585-1979*, ed. John L. Cheney (Raleigh: North Carolina Department of the Secretary of State, 1981), 807.

enact a change in direction. This intent is why the SBE is subject to the laws passed by the legislature.

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Some grammar pedantry:

Sec. 5. Powers and duties of Board.

The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and shall make all needed rules and regulations in relation thereto, ***subject to laws enacted by the General Assembly.***

Participles modifying the subject may be placed at the beginning (P, S V) of a sentence, between the subject and verb (S, P, V) of a sentence, or at the end of a sentence (S V, P). *It is always set off by one or two commas.*

[The intent of amending the constitution in 1971 by adding this participle phrase was to place the SBE under the GA. The phrase could have been placed in any of the three positions without changing the intent.]

Non-restrictive phrases are also set off with commas, but the rule is that non-restrictive phrases can be removed entirely without changing the meaning. Because all words in a constitution must be construed to have meaning, it doesn't follow that the phrase was intended to be non-restrictive and thus could be removed. If the intent was to only modify the last verb phrase, then the *comma would have been omitted* making it a restrictive phrase modifying only the last verb phrase.

Examples:

1a. John shoveled the walk and made a snowman accompanied by his son. [restrictive phrase modifying last verb – no comma] Means that son only helped with the snowman.

2a. John shoveled the walk and made a snowman, accompanied by his son. [S V, P.] Means that son did both.

2b. John, accompanied by his son, shoveled the walk and made a snowman. [S, P, V.] Means that son did both.

2c. Accompanied by his son, John shoveled the walk and made a snowman. [P, S V.] Means that son did both.

1a. The directors must oversee the company and devise policies subject to current market conditions. [restrictive phrase modifying last verb – no comma] Means that only the devised policies must be subject to the market conditions.

2a. The directors must oversee the company and devise policies, subject to current market conditions. [S V, P.] Means that directors must observe the market in both overseeing and in policy making.

2b. The directors, subject to current market conditions, must oversee the company and devise policies. [S, P, V.] ditto

2c. Subject to current market conditions, the directors must oversee the company and devise policies. [P, S V.] ditto

