North Carolina’s Superintendent of Public Instruction: Defining a Constitutional Office

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ABSTRACT

In 2009 a superior court case determined the fate of the Governor’s initiative to streamline education leadership by promoting a State Board of Education member while greatly reducing the Superintendent of Public Instruction’s powers. The judge’s decision in favor of Superintendent Atkinson turned on “the inherent constitutional authority” of her office; yet no one really knows what authority is inherent to the office, where that authority derives, or how to go about analyzing the office’s constitutional role. In short: what does it mean to be the Superintendent of Public Instruction?

This paper explains the origins and meaning of the Superintendent as a constitutional office. North Carolina’s 1868 Constitution, the basis of the state’s present constitution, gave the Superintendent of Public Instruction a constitutional status. The discussion of the relevant constitutional provisions is reviewed in the context of the administrative history leading up to 1868 and the administrative developments during the remainder of the nineteenth century. This administrative trajectory shaped the meager constitutional provisions and now provides a foundation for further analysis on the Superintendent’s “inherent constitutional authority.”
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Introduction

“Is the office of Superintendent Public Instruction a sinecure, if not, why not?”

That question appeared on an examination given to North Carolina teachers in 1899. Writers in the nineteenth century used the word “sinecure” to derisively describe government offices that had little influence or responsibility. A group of government officials led by the Superintendent of Public Instruction wrote the question, so one might imagine it was penned somewhat defensively.

It has in fact remained a question whether the office of Superintendent is a sinecure, or whether the Superintendent can be made a sinecure by the General Assembly, Governor, or State Board of Education. What are the nature and extent of the Superintendent’s powers? As the office is included in the Constitution, are there elements to the Superintendent that cannot be altered without a constitutional amendment?

These are not idle questions, as Atkinson v. North Carolina illustrates. Atkinson arose after the State Board of Education created a Chief Executive Officer to manage the Department of Public Instruction.
Instruction without any interference from the Superintendent. Superintendent June Atkinson sued, arguing that the new official usurped her constitutionally inherent responsibilities, “including executing educational policy, hiring and supervising employees of [the Department of Public Instruction], and generally [serving] as chief administrative officer over other functions of the public school system.”

Ruling in Atkinson’s favor, Judge Hobgood repeatedly invoked the “inherent constitutional authority and power of the duly elected Superintendent of Public Instruction as the chief administrative officer of the State Board of Education.” He ruled that the General Assembly or State Board cannot “limit” that power, “deprive” it, or “confer” it upon another without a constitutional amendment.

However, the Constitution enumerates no specific powers of the Superintendent of Public Instruction and offers few clues as to whether or not any inherent powers really exist. The Constitution provides that the Superintendent is the “secretary and chief administrative officer of the State Board of Education.” It places the office within the executive branch, provides that it is filled by popular election, and makes its holder a member of the Council of State. As with other officials on North Carolina’s long ballot, the constitution allows the General Assembly to prescribe its duties. The name given by the constitution suggests that the official is to superintend either the state’s system of public instruction or the Department of Public Instruction, but that is not explicitly defined. Judge Hobgood offered no explanation as to how or why those factors confer an inherent power on the Superintendent. No one appealed the case, and Judge Hobgood’s short order left in its wake a want of analysis of the Superintendent’s constitutional role.

A century and a half of recurrent controversy indicates that future Governors, Superintendents, State Board members, legislators, and judges will again need to confront the scope of the Superintendent’s constitutional authority. When they do so, some background beyond bare assumption about the scope of the office is needed. This article provides the beginning of that analysis. It presents a legal history explaining how a popularly elected Superintendent came to be included in the constitution, what that office meant to the framers, and what roles became manifest in the office as its first occupants began the work of governing the public schools. This review of the origins and early history of the office is important in understanding and resolving the Superintendent’s constitutional authority.

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6 Id., (Pl. Compl. at 15).
7 Hobgood used that exact phrase once, Atkinson, at 1; twice he used “inherent power[s] ...”, Atkinson at 1 and 2; and twice he used “inherent constitutional authority of...”, Atkinson at 2 and 3.
8 Atkinson, 1-2. Specifically, the power consists of the “duties and responsibilities for administering and managing the North Carolina Department of Public instruction and administering the North Carolina public school system as directed by the State Board of Education ....” Id., at 2.
The article’s scope is the nineteenth century. The 1868 Constitution lifted the Superintendent from the statutory to the constitutional realm. The Superintendent was the sole, elected state-level official charged exclusively to administer the state education system, as opposed to the ex officio members of the Board of Education. During the last three decades of the nineteenth Century, several normative developments in public administration and educational governance materialized that significantly shaped the Superintendent’s role.

In Part I the development of the state’s public education system from the perspective of state-level administration will show why legislators concluded that the system needed a superintendent, and how they created the office by statute. Part II describes the incorporation of the office into the 1968 Constitution and how the meaning of the office was informed by both North Carolina’s antebellum education system and the subsequent statutory provisions dealing with educational governance. The ambiguous constitutional language regarding the Superintendent left open a space in which administrative practice could help define the office. Part III explores how post-war developments shaped the meaning of the Superintendent and its constitutional role.

The history of education governance in North Carolina shows that the office was not a novel invention of the 1868 Constitution. The framers of that constitution carried the antebellum office into the post-war state government with the expectation that the Superintendent bore primary responsibility to administer the state’s school policy, even when legislation was directed to the State Board of Education. Through the remainder of the nineteenth century, the office absorbed new responsibilities as superintendents pursued work prescribed by statute and work undertaken in response to funding opportunities and exigencies of the moment. It is clear that by 1899 the Superintendent of Public Instruction was not a sinecure, but a vital office directing state-level public school administration.

I. Educational Governance in Antebellum North Carolina

In the earliest years of statehood, there was no state-level educational governance because there was no public school system. North Carolina’s 1776 Constitution required “a school or schools shall be established by the legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and, all usefull learning shall be duly encouraged and promoted in one or more universities.” The General Assembly met that last mandate relatively quickly by chartering a University in 1789 and naming trustees to govern the school. But, it took several more decades for the General Assembly to address the requirement as to public schools.

The vague constitutional language provides some excuse for the legislators’ delay. The passage mirrored a provision in Pennsylvania’s constitution, except that the Pennsylvania provision

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13 State-level school administration in North Carolina began before there was a settled body of administrative law or much dedicated study to the field of public administration. Professor Jerry Mashaw’s series of articles on early administrative developments at the federal level is helpful here—initial approaches to administration were, he wrote, “wonderfully various, innovative, and experimental ….” Jerry Mashaw, Recovering American Administrative Law: Federalist Foundations, 1787-1801, 115 Yale L.J. 1256, 1343-1344 (2006).

14 N.C. CONST. of 1776, § 41.

15 See 1 Kemp Battle, History of the University of North Carolina, 6 (1907), available at http://docsouth.unc.edu/nc/battle1/battle1.html.
required that “a school or schools shall be established in each county ...”\textsuperscript{16} Without that final qualifier, North Carolina’s constitutional requirement is confusing. The purported choice between a “school or schools” would allow the Legislature to establish one school, hardly providing “convenient instruction” for youths scattered across the state. It is not clear whether chartering private schools, which the General Assembly frequently did, sufficiently “established” schools.\textsuperscript{17} Nor is it clear what level of state support was required by the phrase “paid by the public.”\textsuperscript{18}

The real impediment to a system of public education, though, was money. State-subsidized education was a lofty ideal with no politically realistic source of revenue. It would take an unexpected windfall from the federal government in the 1830s to catalyze the now-familiar scheme of a state-supported and state-regulated system of locally operated schools.\textsuperscript{19}

By the time the legislature created the state system of education, several plans for such a system had been presented to the General Assembly incorporating various ideas on how to administer the system and who shall do the administering. The first school law created no new state official dedicated to education. In the early-1850s, though, North Carolina would have its first State Superintendent of Common Schools.

**Early Plans for State-Supported Education**

North Carolinians in the early nineteenth century did not especially want public schools, particularly if that would result in new taxation.\textsuperscript{20} Still, various advocates pressed the cause.\textsuperscript{21} In his message to the 1815 Legislature, Governor William Miller argued that accessible education was not possible without state support:

> The progress which has been made of late in the establishment of seminaries for the education of youth evinces a spirit and genius in the people of this State for literary acquirements. But so long as these establishments are left to depend for support upon individual exertion their beneficial effects must necessarily be partial. It is under the fostering hand of legislative patronage alone that the temple of science can be thrown open to all.\textsuperscript{22}

\begin{footnotes}
\footnotetext{17}{See Weeks, supra note 17, at 1389–1392.}
\footnotetext{19}{See infra, at _.}
\footnotetext{21}{See id., at 260; see also Weeks, supra note _, at 1399 – 1400.}
\footnotetext{22}{1 Coon, *The Beginnings of Public Education in North Carolina: A Documentary History* xxvi, 100 (1908) available at http://www.archive.org/details/beginningsofpubl01coon. Miller was the first governor to have attended the University; but, because he left before graduating, he was also the first University dropout to have become governor.}
\end{footnotes}
The moment is notable because after similar gubernatorial remarks the following year, the state Senate and House formed the Legislature’s first education committees.23 Both committees produced reports in December, 1816.24

The House committee worried that North Carolinians might migrate to other states with equally fertile lands and better education systems.25 Rather than creating a public school system, it proposed a scheme to increase the supply of affordable teachers. A new “board of literature” would identify young men who would receive state-funded education in return for their promise to teach at a low cost for three years.26

Archibald Murphey, a State Senator from Alamance County, wrote the Senate committee’s report and recommended that the legislature establish public schools, in which students could advance by stages from primary schools, to academies, to the University.27 He emphasized the importance of the primary grade:

It is to the first schools in this gradation, that your committee beg leave to draw the attention of the legislature at this time, because in them will be taught the learning indispensable to all, Reading Writing, and Arithmetic. These Schools must be scattered over every section of the state, for in them education must be commenced, and in them it will terminate as to more than one half of the community. These Schools will be the most difficult in their organization, and the most expensive to the state; but they will be the most useful, in as much as all the children of the state will be taught in them, and many of these children are destined never to be taught in any other.28

During the next session (1817) Murphey produced a plan.29 County officials would designate two or more townships, with at least one primary school in each township. County courts would elect five county-level trustees to determine the schools’ locations, establish rules for their governance, appoint school-level trustees, and hire teachers. They would also select children to receive a state-funded education. Teachers could then “receive as many other Scholars, and at the rates, which the Trustees of the school … establish[ed] …”30

Murphey proposed that all state-level administration be in the charge of a “Board of Public Instruction.” That Board would manage and distribute an education fund, oversee the academies, set the course of study for all state schools, and establish a mode for students to advance from primary schools to academies. The Board would also set rules and regulations pertinent to

23 See id., xxvi, 101, 103, 104. Miller was not advocating universal education. He said, “Men intended for slaves the more ignorant the better. But, if for freedom, they ought, of course, to be enlightened.” Id., 103.
24 See Weeks, supra note 17, at 1400 – 1405 and Coon, supra note 21, at 103-111. Coon referred only to the Senate report; however, according to Weeks, Walker’s report from the House committee was the first such legislative report on education produced in North Carolina, and had, until Weeks resurrected it, escaped the attention of educational historians. Weeks summarized the report from a copy he owned personally.
25 See Weeks, supra note _, at 1401 – 1402.
26 See id.
27 See Coon, supra note _, at 106-108.
28 Coon, supra note _, at 105 – 110.
29 According to historian Stephen Beauregard Weeks, the plan “marked the beginning of a new educational era in North Carolina, and was the basis of the common school system of the State until the end of the civil war.” Weeks, supra note _, at 1405.
30 Coon, supra note _, at 128-134.
administering the overall school system. In order “to give more weight and respectability to their deliberations and resolves,” the governor would serve as *ex officio* president of the board. The General Assembly would elect six additional board members, who would then appoint a secretary “and such other officers as may be necessary for conducting their business ….”

Murphey’s proposal was not run-of-the-mill. Historian Guion Griffis Johnson wrote that Murphey “constantly astonished conservative senators with his revolutionary views.” He supported public programs such as building roads, canals, and schools, funded by increased taxation, as ways to stimulate the state’s general economy. In his 1817 report, though, Murphey set aside the problem of funding the school system. The General Assembly took up Murphey’s proposal, but failed to pass legislation putting it into effect.

As one historian wrote, it “undertook too much; it proposed not only to educate, but also to maintain the children of the poor.” North Carolinians at the time viewed education as a “public benevolence” not sufficiently necessary to “the machinery of government” to warrant taxation. Professor David Lawrence has written that many states responded to that sentiment by funding education with income from endowment funds rather than direct taxes, and that is the path North Carolina took.

In 1825 the General Assembly created a Literary Fund for “the instruction of such children as it may hereafter be deemed expedient by the legislature to instruct in the common principles of reading, writing, and arithmetic.” A Literary Board, with *ex officio* members consisting of the governor, the chief justice of the Supreme Court, the speakers of the senate and house, and the treasurer, were to manage the fund, which received revenue from state-owned stock dividends, liquor taxes, agricultural fund surpluses, and fees for entries of vacant lands. The law required the board to report annually to the legislature with information and recommendations on the fund’s status and applications. The legislature was left to determine when sufficient money had accumulated to be distributed to the counties.

The new Literary Fund did not catalyze a public school system, however, largely because the fund sat idle and the Legislature used the money for other state expenses. Several years after the fund’s inception, the “aversion to taxation beyond the bare necessities of government and the

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31 *See* Coon, *supra* note __, at 125-128.
32 Coon, *supra* note __, at 125.
33 Coon, *supra* note __, at 125-126.
34 Johnson, *supra* note __, at 268.
35 Johnson, *supra* note __, at 268-269; *Weeks, supra* note __, at 1402.
36 Coon, *supra* note __, at 124.
37 *Weeks, supra* note __, at 1414.
38 *Weeks, supra* note __, at 1415.
41 *Id.*, §§ 1, 3.
42 *Id.*, § 2.
43 *Id.*, § 4.
44 *See* Coon, *supra* note __, at xxxix - xli; *see also* Lawrence, *supra* note __, at 53.
public tranquility” was still, according to the University’s president at the time, the primary impediment to a public system of education.45

**Increasing Momentum for a School System**

Eastern plantation owners, who held most of the population’s wealth, feared that increased state spending would result in their paying a lopsided share of the necessary taxes.46 Already in control of state government, they also had reason to resist public programs that might produce socioeconomic changes.47 They generally voted with the Democratic Party.

Whigs, conversely, supported a more energetic government that would subsidize internal improvements and public schools.48 “Always implicit and often explicit in the attitude of Whigs,” described Marc Kruman, “were the virtues of a capitalist market economy.”49 Whig support germinated in North Carolina among the small farmers in the west and northeast.50 The population in the western part of the state grew significantly after 1810, creating a sizable base for the party.51

In 1832, the General Assembly for the first time elected a Whig governor, David Swain.52 Hoping to dismantle Democratic institutional control of the General Assembly, Whigs called for constitutional reforms. In 1835, the state convention made the first significant changes to North Carolina’s Constitution.53

The 1835 constitutional amendments made the governorship an elected, rather than appointed, office. The elected governor had no more power, but the parties fought to win the office, and the statewide campaigns provided the parties an opportunity to present their platforms.54 The effect was to cement a two-party system, presenting voters a tangible choice between Whigs and Democrats.55 Throughout the remaining antebellum years, the parties remained in tight competition with neither holding sufficient majorities to institute overtly partisan programs.56

The convention made no changes to the Constitution’s education provisions; but, during its next session the General Assembly enabled the Literary Board to more actively manage swamp lands

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45 See Weeks, supra note 17, 1416-1417.
47 See id., 7.
49 Kruman, supra note __, at 5.
50 See Powell, supra note __, at 115.
51 See Kruman, supra note __, at 11.
52 See Powell, supra note __, 116.
53 The 1776 Constitution allotted to each county one senator and two representatives to the House. Voters for the Senate were required to own 50 acres; voters for the House were required to be taxpayers. N.C. Const. of 1776, §§ 7, 8. Free black citizens were allowed to vote, but were disenfranchised by the 1835 Constitution. N.C. Const. of 1776, amend. of 1835, art. I, § 3. Representation purely by county favored the east, where counties were more numerous. After the 1835 amendments, taxes paid per county determined Senate representation, and population according to the federal census determined representation in the House. The change still somewhat favored plantation owners because the census counted slaves as three-fifths of a person. Still, the new scheme significantly boosted the western counties’ representation in the House.
54 See Kruman, supra note __, at 12, 20.
55 See Kruman, supra note __, at 20
56 See Kruman, supra note __, at xiii-xiv.
and restructured the board to consist of the Governor and three members that he would appoint. Prior to that, in 1833, the Literary Board asked the Legislature for clarification on the construction of its incorporating statute—did the legislation transfer the actual swamp lands for the Literary Board’s disposal, or just the money derived from them? The Senate Committee on Education responded with a resolution clarifying that the “vacant and unappropriated marsh and swamp lands …were … actually transferred, and do now belong to the Literary Fund ….” Still, the Literary Board complained that it was unable to do what was needed to make money off of the land.

It was in the context of selling swamp lands that the General Assembly changed the Literary Board in 1837 from a fully ex officio body to a board consisting of the Governor as ex officio president and three appointed members. The “Act to drain the swamp lands of this State, and to create a fund for Common Schools” recreated the Literary Board and described its composition in its first two sections. Eleven of the law’s fourteen sections provided to the board powers needed to survey and reclaim the swamplands. A few days later, the Legislature provided the Literary Board members with the same salary as that paid to members of the Board of Internal Improvements ($3 per day plus traveling expenses).

Just after the 1835 convention, the state received an unexpected windfall. In the mid-1830s, the Jackson administration paid off the national debt, brought in money from public land sales, and held a surplus in the federal treasury. Congress passed the surplus funds to the states. The General Assembly created a “Committee on Surplus Revenue” that immediately identified schools and internal improvements as “first in importance among all the objects which now claim patronage of the public.” Ultimately the State added over $1,700,000 to the Literary Fund’s 57 See Coon, supra note 21, at xv and xliii; An Act to drain the swamp lands of this State, and to create a fund for Common Schools, Ch. 23, 1836-37 N.C. Sess. Laws 131.
59 Id., at 654.
60 Id., 720
62 Act of January 23, 1837, Ch. 24, § 2, 1836-37 N.C. Sess. Laws 135, available at http://www.archive.org/stream/lawsofstateofnor183637nort#page/134/mode/2up. The newly structured board became patently more active than the ex officio board; but rather than with education policy, the activity was directed to the newly authorized work regarding swamp lands. See Coon, supra note 60, 757-759. Some controversy arose over whether the governor was a member of the Board and subject to payment. In a message on the subject, Governor Morehead provided some useful insights on contemporary views of the work as an executive or legislative task. He argued that duties of the Literary Board were outside his role in the executive branch, and thus something he could ignore: “The act of 1836 … making the Governor ex officio President of the Literary and Internal Improvement Boards, assign duties to the Governor as a member of those Boards, which are wholly disconnected with his executive duties and which he cannot be required to perform, if he choose not to do so.” Message from Governor Morehead, Documents printed by order of the General Assembly of North Carolina at its session of 1846-47, No. 56, available at http://www.archive.org/stream/documentsprinted184445nort#page/n325/mode/2up
63 The surplus lasted one year, after which the land bubble burst and the economy entered 6 year depression.
65 Before the committee produced its report, a Whig Senator from Richmond County, Alfred Dockery, introduced a resolution. Evoking the constitutional requirement that the state establish schools and the fact that North Carolina was “about to receive a large amount of money from the Government of the United States,” Dockery resolved that the Committee inquire into injecting money into the Literary fund and
With sufficient funds available to distribute, resolutions passed in the House and Senate to have the Literary Board present a plan for common schools, which it submitted on December 5, 1838.

In its report, the Literary Board proposed measures that were “well tried and found eminently useful elsewhere.” The initial steps would be to divide the state into school districts, erect school houses, and produce quality teachers with teacher-training courses at the University. The annual revenue from the Literary Fund was still insufficient to maintain a statewide school system, so the Literary Board recommended that each county hold a referendum to determine whether it would participate in the state’s system of education; if so, the county would levy taxes for twice the amount to be appropriated from the Literary Fund.

As for state-level administration, the Literary Board complained in the report that the lack of educational data made planning and administration imprecise:

There is no publication extant, no individual in existence, that can afford any satisfactory information with respect to the number of Common Schools in the State, much less the number of pupils, the mode of instruction, the condition of school houses, the character and qualifications of the instructors. Indeed it is doubted whether there is any one competent to meet these inquiries with regard to a single county, certainly there is none without the legislative body, and yet all this and much more is not merely desirable and necessary, but indispensable to the great purposes contemplated by the Resolution requiring this Report.

The Literary Board proposed that a new official, the Superintendent of Common Schools, help to correct the problem of insufficient data and analysis. The Superintendent would create forms to be submitted annually by instructors, containing information “with respect to the condition, government and police of the school and to prepare a systematic digest of the whole to be submitted to the General Assembly.”

The Superintendent was the only state-level office for which the Literary Board proposed administrative functions. Along with devising and receiving reports, the Superintendent would travel the state to standardize the school districts, create an examination for teachers, and select text books. Such an official would also be charged with institutional leadership, such as advising individual teachers and quelling “causeless prejudices and jealousies.” Generally, the

“distributing the interest of said fund among the several counties of this State, in proportion to their federal population ….” Id., 743-744.

66 Lawrence, supra note _, at 54.

67 Coon, supra note _, at 744. Representative Robert Gilliam resolved in early 1837, that “the Committee on Education be instructed to enquire into the expediency of establishing a general system of Free Schools throughout the State.” The Senate, in turn, resolved that “the President and Directors of the Literary Fund of North Carolina be instructed to digest a plan for Common Schools, suited to the condition and resources of this State, and report the same to the next General Assembly.” For the Literary Board’s report, see id., 827. The Raleigh Register editors surmised that the first Whig governor, and then-UNC President, David Swain wrote the report. Id., at 850.

68 Id., at 839.

69 Id., at 839-845.

70 Id., at 845.

71 Id., at 831.

72 Id., at 847.

73 Id.
Superintendent would “direct and control the whole of [the] complicated, but not inharmonious [public school system].”

The First Public School System

The General Assembly received the Literary Board’s report and started work on what editors at the Raleigh Register called the “entering edge” towards a public school system. Senator William Cherry introduced a bill “to divide the Counties into School Districts and for other purposes.” In the House Frederick J. Hill introduced a similar bill. Unlike the Senate’s legislation, the bill approved by the House took up the Literary Board’s suggestion to create a Superintendent of Public Instruction. That provision, though, did not survive the conference committee’s edits in the final legislation.

The 1839 legislation directed the voters in the counties to write “School” or “No School” on their tickets during the upcoming election. The courts in participating counties levied a tax of $20 per school district, and each district received $40 from the Literary Fund. County Courts appointed five to ten county superintendents who would meet, choose a chair, and divide the county into school districts. The superintendents, in turn, appointed three to six district committeemen to help establish each district’s schools.

The Act also created a structure for reporting information up to the state. County superintendents reported the number of school districts to the governor, as president of the Literary Board. The Act provided some discretion to the governor regarding how to collect information and what information to collect. He could use federal census workers, or “such other person or persons as he may deem proper,” to deliver relevant census data and “any other information which he may deem important to the establishment of a just and equal system of Common Schools throughout the State.”

As the August 1839 elections approached, the editors at the Rutherfordton Gazette were “glad to see that the subject of ‘Common Schools’ [was] exciting so much interest throughout the State.”

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74 Id.
75 Id., at 824.
76 Id., at 866.
77 Id., at 873-876.
79 § 1.
80 §§ 8 and 9. Note that this provision inverted the Literary Board’s recommendation of having counties levy twice the amount distributed by the state.
81 §§ 2, 3, 4.
82 § 5.
83 § 7. The law created no new state offices to administer the schools; rather, it relied on the existing Literary Board. The law alternated between referring to the governor as the President of the “Literary Board” and the President of the “Board of Common Schools.” See, e.g., §§ 6,7 (referring to the “president and Directors of the Literary Fund’) and §§11, 12 (referring to the “Board of Common Schools”). A draft of the House bill used the latter phrase and the conference committee producing the final legislation conflated the two phrases. See Coon, supra note __, at 889-90.
84 § 11.
85 See Coon, supra note __, at 898-99.
Whig editors urged voters to approve the school system in their respective counties.86 According to one writer, a school system would have been “in effectual operation years ago, had the Whigs of the State had the ascendancy.”87 Opponents, as before, argued the system was an unnecessary government program resulting in higher taxes. Editors at the Carolina Watchman offered the pragmatic retort that current county taxes went mainly to punishing crime while the school tax would prevent children from “becoming such guilty vagabonds.”88 In August, all but seven counties out of sixty-eight voted in favor of common schools.89 Within a few years, every county joined the system and public schools began to open across North Carolina.90

The politics surrounding the school system did not cease during the next decade and many were still simply apathetic towards common schools.91 The existing private schools naturally resisted their new, state-subsidized competition.92 Still, the question of whether or not to have a school system at all became less of a political issue through the 1840s and 50s.93 Rather, the political debate shifted to the details of the system.

Now that money was distributed to counties, the basis for that distribution became an issue. The General Assembly quickly dropped the mandatory local taxes, so state appropriations became the sole source of education funds.94 Rather than continuing to distribute equal funds to each county,

See Kruman, supra note __, at 42. Whigs edited most of the state’s newspapers, “twenty-nine to the Democrats’ ten, [so] they were able to send their message into more homes throughout the state.” Id.

Coon, supra note 57, at 898-99.

Id., at 895-896. Two legislators in Davidson County similarly argued that the local taxes for schools was itself small, and would reduce the overall cost of maintaining the justice system. See id., at 902-906.

Those voting against the system were: Edgecombe, Wayne, Columbus, Rowan, Lincoln, Yancey, and Davidson. See Johnson, supra note __, at 272.

See Kruman, supra note __, at 59. See also Message of Governor Morehead, 1844 (remarking that all but two counties had joined the system by late 1844, and foreshadowing the calls for a single official to administer the public schools), available at http://www.archive.org/stream/documentsprinted184445nort#page/n15/mode/2up. The first free, public school in the state opened in Rockingham County on January 20, 1840. See HUGH TALMAGE LEFLER & ALBERT RAY NEWSOME, NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE 368 (1973).

See Johnson, supra note __, at 276 – 277.

See Johnson, supra note __, at 277.

See Johnson, supra note __, at 260; see also Kruman, supra note __, at 55.

The initial school law made it “the duty” of county courts to levy $20 per school district. 1838-39 N.C. Sess. Laws 12, § 8. Legislation in 1841 “authorized and empowered” the county courts to levy a tax of half the county’s Literary Fund share. An Act for the Establishment and Better Regulation of Common Schools, Ch. 7, § 6, 1840-41 N.C. Sess. Laws 11. And in 1844, legislation provided that county courts “may in their discretion” levy such a tax. An Act to Consolidate and Amend the Acts Heretofore Passed on the Subject of Common Schools, Ch. 36, § 6, 1844-45 N.C. Sess. Laws 49. In late 1840, the Joint Committee on Education argued against the slackening tax requirement: “[w]hen a man feels that he is paying something to defray the expenses of a school, he will be inclined to get the benefit of it by sending his children to it. The fund is not large enough to keep the schools for a sufficient length of time, if the counties do not impose a tax in aid of it.” DOCUMENTS PRINTED BY ORDER OF THE GENERAL ASSEMBLY OF NORTH CAROLINA AT ITS SESSION OF 1840-41, No. 20, 2. available at http://www.archive.org/stream/documentsprinted184041nort#page/n351/mode/2up. The Literary Board expressed alarm that several county officials interpreted the provisions as not requiring direct taxation. (“But this Board cannot but express their deep regret to learn that in some counties, the Justices fail to lay any tax whatever for Common Schools, alleging that the law does not impose it as a peremptory duty upon them to do so, but leaves it to their discretion.”) Report of the President and Directors of the Literary Fund of North Carolina, in DOCUMENTS PRINTED BY ORDER OF THE GENERAL ASSEMBLY OF NORTH CAROLINA AT ITS SESSION OF 1844, No. 15, 5, available at http://www.archive.org/stream/documentsprinted184445nort#page/n461/mode/2up.
legislation in 1841 made federal population the basis for distributions. Counties with fewer slaves, and thus a lower federal population, opposed the change, and the issue resurfaced continually.

The method for choosing district committeemen changed throughout the 1840s, an issue that affected local politics and the balance of power between the state and localities. Under the 1776 Constitution, the General Assembly selected the counties’ justices of peace, which were the only constitutionally required local officials. That provided the General Assembly a direct line of influence from the county courts, to the county superintendents appointed by the courts, and to the district committeemen appointed by superintendents. Under the 1839 school law, county superintendents appointed district committeemen. Legislation in 1841 allowed eligible district voters to elect the committeemen. In 1849, the General Assembly gave the choice to county superintendent, only to shift it to the voters again in 1851. The shifts to elected district committeemen provided fodder for local politicking, but also some district-level autonomy.

**Centralized Administration and the First Superintendent**

The school system, as might be expected, experienced growing pains at the state and local level. The state’s sole school-related function prior to 1839 was managing the Literary Fund’s investments and reclaiming swamplands. The distribution of state money to school districts required calculating the counties’ appropriations, getting the money to the right person, and verifying that the districts spent the money appropriately.

The school law of 1839 created no new state-level administrative officials. Murphey’s report in 1817 suggested that the state-level “Board of Public Instruction” hire a secretary. As early as 1834, the Literary Board appointed a secretary. The secretary’s duties, though, were simply to “record the acts of the Board, and, in relation to the loans made by it, to keep the requisite accounts of them, like other acts of the Board.” As such, the board in its 1838 plan for a public school system still urged the General Assembly to create a Superintendent. But, the 1839 law and

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96 See Johnson, supra note _, at 276-277. Governor Manly said in his message to the Legislature in 1850: “. . . those counties in the State containing a sparse white population, and but few white children to educate, yet containing many slaves and free negroes, receive the larger proportion of this public bounty; while those counties having a large white population and many children to educate, yet having few slaves and free negroes, receive the smaller share. This arrangement I hold to be wrong.” 1 Executive Documents Printed for the General Assembly of North Carolina at the Session of 1850-51, Messages, 18 (1851).
97 N.C. CONST. of 1776, § 33.
100 See II Coon, supra note _, at 688 (providing a copy of the Literary Board’s proceedings on January 13, 1834, during which Chief Justice Ruffin made a motion to appoint William Hill as secretary).
101 The description of duties is from an 1845 case, and was written by Chief Justice Ruffin. Ruffin, interestingly, while a member of the Literary Board in 1834 had made the motion to hire a secretary. The 1845 case arose when the secretary, Christopher C. Battle, sued for payment due, against the Literary Board’s argument that payment was only due for days in which the Board was in session. Chief Justice Ruffin ruled in favor of the Literary Board. Battle v. Literary Board, 28 N.C. 203, 205 (6 Ired.) (1845).
subsequent adjustments set aside no dedicated education staff. The law relied entirely on Literary Board members to handle administrative affairs.102

At the local level, people with no prior familiarity with, nor experience organizing, public schools undertook the effort to establish schools. They suddenly became county superintendents or district committeemen charged with building school houses, finding teachers, and accounting for young students.103 While the districts slowly built new schoolhouses, counties had no clear top-down directive on how to use the state funds.104 And a lack of bottom-up accountability fostered the counties’ flexibility in using or misusing school funds. Throughout the school system’s first decade, counties only sporadically filed reports to the Literary Board. While some districts directed state money to new schoolhouses, other districts distributed the money to existing private schools, and some county superintendents simply kept the money.105

Teacher quality standards, when introduced, were locally controlled and sporadic. An amendment to the school law in 1846 directed county superintendents to appoint a committee to “examine into the qualifications, both mental and moral, of all such persons as may apply for employment as teachers in any of the common schools in their respective counties.”106 As gatekeepers for teaching jobs, these local examiners retained a significant position in education governance that tilted education policy toward the local, rather than state, sphere.107

The General Assembly gradually began to address some of the structural problems that became evident in educational administration. School legislation in 1840 allowed county officials “to make such other regulations relating to the Schools of their County, not inconsistent with the provisions of this Act, as they may deem necessary to the usefulness of said Schools.”108 In 1843 the Legislature made it a misdemeanor to apply school funds “to purposes unconnected with Common Schools…”109 At the end of the 1840s the General Assembly authorized county courts to levy up to $250 to employ a person to annually examine “each and every” school, suggesting the need for oversight, but also a desire (or predisposition) to keep that work at the local level.110

The 1840 law also improved data collection. School committees reported annually to the county superintendents the number of students, the length of the school year, and “such other facts in the

102 See Kruman, supra note __, at 58-59 (discussing Whig support and Democratic opposition to creating a superintendent).
104 See Weeks, supra note __, at 1425.
105 See Johnson, supra note __, at 272-273.
108 An Act for the Establishment and Better Regulation of Common Schools, Ch. 7, § 17, 1840-1841 N.C. Sess. Laws 11, available at http://www.archive.org/stream/lawsofstateofnor184041nort#page/14/mode/2up
110 An Act to Amend the Acts Now in Force on the Subject of Common Schools, Ch. 95, § 4, 1848-49 N.C. Sess. Laws 216.
relation to their Schools as they may deem expedient." The county superintendents, in turn, reported to the Literary Board the same information, as well as the amount of money received and to whom it was paid. The Literary Board was to “prepare proper forms” on which the county and district officials would report all the information required by the act; money from the Literary Fund covered the cost of printing and distributing the forms.

Despite these adjustments, “the evils of the system,” summarized historian Stephen Beauregard Weeks in 1898, “were perhaps larger than the good results.” The overwhelming problem according to Weeks, and most subsequent historians writing about education in antebellum North Carolina, was the system’s lack of a central, administrative official:

Until 1853 the Literary Board was the chief executive head of the system. This was an awkward arrangement, and the board urged on the legislature the more simple and efficient plan of a single executive chief or superintendent. The biennial reports of the board were mostly confined to this one object, and hence for twelve years friends of the schools labored in darkness. As it was, the system could not be managed as a whole, and was left largely to local officers and to a public wholly unused to such cares.

During the 1840s, Whigs urged the creation of a state-level superintendent, against Democratic opposition. However, that opposition waned as the decade advanced. By the 1850s, as power swayed to the Democrats, some in the party accepted an increased role for state government and adopted some Whig policies.

William Woods Holden was one such Democrat. His willingness to take up policies from different political parties corresponded with his having been a member of different political parties. Formerly a Whig, he joined the Democrats in 1843 when he became editor of the North Carolina Standard. Holden wrote editorials favoring an energetic program of internal improvements. He supported the Democratic candidate for governor, David Reid, in 1851. Reid had helped create the school system as a senator in 1839, and as a gubernatorial candidate

111 Ch. 7, § 18, 1840-1841 N.C. Sess. Laws 11
112 Id., § 19.
113 Id., § 25.
114 Weeks, supra note _, at 1425.
115 Weeks, supra note _, at 1425. This passage is lifted, almost exactly, from Calvin Wiley’s first report as Superintendent. See infra, note _. The Literary Board’s reports were not, in fact, “mostly confined” to this topic; mostly, the reports described the status of the Literary Fund. The Board did, though, recommend that the General Assembly designate an official to administer the school laws. See 1844 N.C. LITERARY BD. BIENNIAL REPORT, 6, available at http://www.archive.org/stream/documentsprinted184445nort#page/n463/mode/2up; 1846 N.C. LITERARY BD. BIENNIAL REPORT, 12-13, available at http://www.archive.org/stream/documentsprinted184647nort#page/332/mode/2up.
117 See Kruman, supra note _, at 63.
118 Holden would be elected Governor as a Republican in 1868, during the same elections in which voters ratified a new Constitution. And in response to his vigorous enforcement of federal civil rights laws, a Democratic legislature impeached him in late 1870.
119 See Kruman, supra note _, at 65
120 5 Powell, DICTIONARY OF NORTH CAROLINA BIOGRAPHY, 192.
continued to support the system along with “responsible” internal improvements. As Governor, Reid argued, as had Whig governors preceding him, that a Superintendent would “tend to improve Common Schools, and to advance the cause of Education.”

During the first legislative session of the 1850s, a representative from Guilford County introduced a bill to create the office of Superintendent. The legislator, Calvin H. Wiley, had previously worked as a lawyer, editor, and novelist. He entered politics as a Whig, and quickly became interested in education policy. His bill failed after western legislators amended it to make white population the basis for Literary Fund disbursements.

In 1852, though, a similar bill succeeded, and the General Assembly appointed Wiley to be North Carolina’s first state-level superintendent for public schools. The 1852 “Act to Provide for the Appointment of a Superintendent of Common Schools, and for Other Purposes” gave the Superintendent two general functions: to collect and digest information regarding the state’s schools and to generally superintend the system.

The major product of the first function would be an annual report to the governor, on which the General Assembly could rely while revising the school law. Thus, the Superintendent would obtain and analyze the type of information that the Literary Board found so lacking in its 1838 plans for the school system.

To carry out the second function, the statute authorized the Superintendent to collect and publish the various education laws, “call on” local officials who failed to submit data, seek legal actions against officials that misapplied funds, and “look after” escheated property by hiring lawyers in the counties to liquidate the property and recover the funds. The cost to the state for adding the new office was an annual salary of $1,500.

Wiley aggressively took up his official duties, playing a critical role in establishing the role and responsibilities of the Superintendent. He drafted and distributed materials such as a pamphlet of collected school laws with an index and summary; a teacher certification form; and a circular with guidance for the teacher examination committees. Wiley referred to his office as the

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121 Id. Although the cited passage refers to Reid serving on the “Education and Liberty Fund Committee,” it appears that the committee was on “Education and Literary Fund.” See Coon, supra not (for 2 Coon), at 679, 828, and 865 (referring to documentation regarding the Committee on “Education and Literary Fund”).

122 1852 N.C. Gov. Biennial Message, 5-6; see also Weeks, supra note __, at 1430.


125 See Jeffrey, supra note __, at 34.

126 See Kruman, supra note __, at 83.

127 The General Assembly appointed the Superintendent every two years. An Act to Provide for the Appointment of a Superintendent of Common Schools, and for Other Purposes, Ch. 18, §§ 6, 7, 1852-1853 N.C. Sess. Laws 59.

128 §§ 1,6.

129 §§ 7 and 10. For a short time, the money from escheat property went to the common schools. The constitutionality of that provision was contested by the University’s Board of Trustees in the case of University v. Josiah Maultsby et al. (8 Iredell Eq. 231). The University lost the case, but subsequently convinced the General Assembly to return the revenue to the University. Dr. Blackwell P. Robinson, The History of Escheats, 22-23 (1955), available at http://docsouth.unc.edu/unc/uncbk1012/uncbk1012.html


“Chief Executive Head,” a title not used in the statute, and he emphasized his general duty to oversee and advise the school system. He also took on some tasks without any statutory authorization, such as negotiating with textbook publishers and attempting to make uniform the selected texts throughout the state.

In his third report, Wiley complained that his speeches in each county and his distribution of the school law were ineffective at reaching the various parts of the school system. He proposed sending a free periodical to the school districts containing explanations of the school laws, blank forms for required reports, and “short editorials … on the subject of education, sketches of common schools in other States and countries, facts and incidents in our own experience, … instructions of the general superintendent” and relevant notices regarding particular schools. Wiley assured the legislators that he could publish a journal “without asking the aid of the State or taxing individual liberality.” He arranged for two publishers to take up the costs of publication in exchange for his recommending their books and providing them exclusive advertising space in the journal. Wiley began distributing quarterly issues of the North Carolina Common School Journal in September 1856, but the publishers withdrew their investment after two issues, leaving Wiley to publish the year’s final two issues at his own expense.

Around the same time, Wiley helped establish the Educational Association of North Carolina. Members of the association noted that the organization of such a group was Wiley’s “long cherished scheme.” The group met again the next year to adopt a constitution and the formal name of Educational Association of North Carolina. The Legislature in 1861 allowed the Superintendent to send the county superintendents, committees of examination, and school districts with the costs paid from the literary fund.

Influences are now at work to break up the apparently selfish isolation of the educators of the State—the inefficient guerilla system of warfare is giving way to more enlarged, and useful organization—and the champions of the cause are waking up to a more just and expanded sense of their situation and responsibility.

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132 Id., at 5-6. Wiley wrote: “The presence of the Superintendent, in one sense, ought to be felt immediately in every section; questions, coming up from every quarter, ought to be promptly answered, while constant and proper attention ought to be given to the preparation of judicious general instructions and advice, modifications of Forms, explanations and enforcement of the law, especially in certain essential particulars, the settlement of difficulties constantly arising, the forming of regulations to give more efficiency and uniformity to the system, and to the study of other systems, and an examination of the experience of other States.”

133 Id., at 10, 12.

134 See Weeks, supra note __, at 1448.


They are beginning to feel that they are, each one, parts of one great system, and that their duty to the same lays them under obligations to find out consult with and endeavor to labor in concert with all who enlisted in it.\textsuperscript{140}

The journal lasted into the Civil War, with articles on teaching methods and general educational interests.\textsuperscript{141} Wiley contributed articles under a section called “Common School Department,” providing guidance various issues like forming local educational associations, complying with the school law, and examining teachers.\textsuperscript{142}

Wiley worked with legislators to implement a major structural change to the school system—to introduce grades of study as opposed to the single, common school. He helped craft a bill that passed through the education committee and was, in his words, “before our Legislature when this Revolution commenced.”\textsuperscript{143} A few years into the war, Wiley complained that the “great defect of our Common School system is the fact that it is a horizontal one, furnishing one kind of education for children of all ages, and of every degree of advancement.”\textsuperscript{144} He continued to present draft bills to the Legislature, and in 1864 the General Assembly passed an act allowing districts, after collecting sufficient private funds, to establish graded schools containing primary and high school grades.\textsuperscript{145} Also on Wiley’s recommendation, the statute replaced the traditional moniker of “common schools” with “public schools.”\textsuperscript{146}

While Wiley focused on the structure of the school system, the Literary Board saw the funds under its watch shrinking as the war continued. In 1863, the Literary Board sent a memorial to the General Assembly urging that the board be authorized to appoint a “Treasurer of the Literary Fund.”\textsuperscript{147} With no funds for a new office, the board simply made its secretary, R. H. Battle, the fund’s treasurer.\textsuperscript{148} That December, the General Assembly directed the treasurer of the Literary Board to “perform all other duties and be subject to all the liabilities … imposed on the public treasurer as the treasurer of said fund.”\textsuperscript{149} As the Civil War continued, however, individual schools closed down as localities diverted money from education to war and basic services.\textsuperscript{150}

\begin{footnotesize}
\begin{enumerate}
\item[140] 1 N.C. J. OF EDUC. 3 (1858) (emphasis in original).
\item[141] It lasted until March 1864, when the printing office of its publisher was destroyed by fire. R. D. W. CONNER, ANTEBELLUM BUILDERS OF NORTH CAROLINA, 106 (1914), available at http://www.archive.org/stream/antebellumbuilde00conn#page/106/mode/2up.
\item[142] See 1 N.C. J. OF EDUC. 27, 59, 154 (1858).
\item[144] Id., at 7.
\item[145] An Act to Grade the Common Schools and to Increase Their Usefulness, Ch. 4, § 3,9,10, 1864-65 N.C. Sess. Laws 5, available at http://www.archive.org/stream/publiclawsofstat186465nor#page/4/mode/2up.
\item[146] Id., § 1. Under the new name, wrote Wiley, “Primary or Common and the Graded Schools are so blended together as mutually to promote each other’s usefulness.” 1863 N.C. Superintendent of Pub. Instruction Ann. Report, 17.
\item[150] See Weeks, supra note _, at 1456.
\end{enumerate}
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The Legacy of Calvin Wiley

The statutes creating the system of education and the superintendent prescribed the actions necessary for state and local officials. Rather than taking those statutes as a literal prescription of his duties, Wiley regarded them as boundaries to broader, discretionary powers. Nothing in the statutes, for instance, required the Superintendent to establish an educational association and journal; but, nothing prevented those actions. Thus by practice rather than by law, Wiley made his office one with significant administrative power.

As important as Wiley’s actual work is the popular perception he helped create of the Superintendent as a state official. Wiley’s contemporaries did not universally approve of his work, or of the necessity of a Superintendent. Historians, though, have credited Wiley with a prominent role in establishing the state’s system of public schools. One history of education written in 1898 was tellingly titled “The Beginnings of the Common School System in the South; or, Calvin Henderson Wiley and the Organization of the Common Schools of North Carolina.” And Wiley’s role remained crucial in William Powell’s history of the state, published in 1977:

Since local boards managed the schools, the system was far from uniform, but with the creation of a state superintendent of public schools in 1852, conditions began to improve. As superintendent, Calvin H. Wiley almost single-handedly developed the system of public schools in the state into the best in the nation before the Civil War. The Boston Post of May 1, 1856, commented favorably on Wiley’s annual report for 1855 mentioning particularly the superintendent’s “largeness of views,” and his zeal and energy in his accomplishments.

The source for many glowing accounts of Wiley’s tenure is Wiley’s own writing. Charles Smith submitted a history of education in North Carolina for a federal Bureau of Education publication in 1888, and acknowledged his reliance on Wiley’s work. Weeks’ 1898 account of antebellum education, also for the Bureau of Education, copied nearly verbatim Wiley’s description of the disorganized system before the Superintendent.

For the present purpose of examining the beginnings of North Carolina’s educational governance, though, the accuracy of Wiley’s causal role in establishing the school system is less important than the perception of his legacy as the first state-level Superintendent. If historians have relied on an exaggerated account of Wiley and the importance of the office, it remains true that the perception stuck. Thus, subsequent policymakers, and the framers of North Carolina’s new

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151 In 1854, the Democrats won control of both houses of the General Assembly and “conservatives within the party made a strenuous effort to repeal the act of 1852.” Correspondence between Wiley, a Whig, and prominent Democrat John W. Cuningham, who had been friends since their days as roommates at the University of North Carolina, suggests that Wiley ghost wrote Cuningham’s addresses that helped save Wiley’s office. See Jeffrey, supra note __, at 36-38.

152 Weeks, supra note __; Edgar Wallace Knight, in 1913, wrote that the “history of the schools in North Carolina from 1852 until 1866 is little less than a history of the work of Superintendent Wiley.” Edgar Wallace Knight, The influence of reconstruction on education in the South, 13 (1913); Guion Griffis Johnson continued the theme in 1937, describing Judge Murphey as the “father of public education” and Wiley as “the savior.” Johnson, supra note __, at 278-279.

153 Powell, supra note __, at 120-121.


155 Compare Weeks, supra note 17, at 1425 to Wiley, supra note __[first report], at 12.
II. Reconstruction and the 1868 Constitution

North Carolinians adopted a new constitution in 1868 that established the Superintendent of Public Instruction as a constitutional officer and the position has thereafter remained in the state’s constitution.\textsuperscript{156} The 1868 Constitution was a sufficiently new document to mark, as Professor Orth summarized, “a break as sharp, if not more so, than that marked by the Independence constitution [of 1776] itself.”\textsuperscript{157} But much of the language was not entirely original; the constitution contained provisions borrowed from other Reconstruction-era constitutions and ideas recycled from North Carolina’s antebellum past.

Apart from textual considerations, North Carolinians ratified the new constitution and the Legislature passed new education laws in a state facing profound challenges. Most significant for education governance, the funds to support state-level school administration and local school assistance were depleted.\textsuperscript{158} More generally, the uncertain status of North Carolina’s reentry into the union created confusion as to who actually held power. Nonetheless, it was during Reconstruction that a variety of leaders, with various motivations, put in place the basic, constitutional structure of education governance that remained unchanged until the mid-twentieth century.

\textit{Retreat from State-Level Educational Administration}

A little more than one month after Lincoln’s assassination, President Andrew Johnson appointed William Holden as North Carolina’s provisional governor with instructions to hold a convention to replace the antebellum constitution.\textsuperscript{159} The ensuing convention began on October 2, 1865, with a delegation largely consisting of former Whigs.\textsuperscript{160} In opening remarks Holden said North Carolina “entered the rebellion a slaveholding State, and she emerged from it a non-slaveholding State.” But, “so far as her existence as a State and her rights as a State are concerned, she [underwent] no change.”\textsuperscript{161} The convention resulted in a document that outlawed slavery, repudiated the war debt, declared ordinances of secession null and void, and was otherwise a

\textsuperscript{156} Two conventions occurred during Reconstruction, in 1866 and 1868, with the latter becoming what is still the state’s foundational document.


\textsuperscript{158} See Lawrence, \textit{supra} note \_, at 54.

\textsuperscript{159} Superintendent Wiley sent Holden a report for use at the convention; but, the provisional governor responded to inform Wiley that he would be unable to pass it along. President Johnson granted a general amnesty to residents of the former Confederacy, but officials like Wiley required a special appeal from provision governors for the President’s pardon. Expressing some regret that Wiley may have felt treated “coolly or discourteously,” Holden informed Wiley of his disqualification from office. Holden received more than 1,200 petitions for a Presidential pardon, and rejected only four; either Wiley had not asked for a pardon or Holden had ignored the request. Letter from Governor William Holden to Calvin Wiley (September 18, 1865), available at \url{http://www.constitutionaltales.net/docs.htm}; EDGAR E. FOLK & BYNUM W. SHAW, W. W. HOLDEN A POLITICAL BIOGRAPHY 200 (1982). Holden might have felt some bitterness toward Wiley. Holden was one of the Democrats who supported Wiley during the 1850s, but Wiley supported Zebulon Vance over Holden in the 1864 gubernatorial elections. Wiley subsequently supported Worth over Holden in the 1866 elections. See Jeffrey, \textit{supra} note \_, at 36 n. 23, 48 n. 59, 49 n. 71.


\textsuperscript{161} Journal of the Convention of the State of North Carolina at its Session of 1865 (Raleigh, 1865), 11.
continuation of the 1776 Constitution as amended in 1835.162 Existing laws remained valid if consistent with the Federal and State constitutions and elections for state offices would be held in November.163

Jonathan Worth, running as the Conservative Party candidate, prevailed against Holden for governor in the 1865 election, and the conservatives as a whole did well.164 They held power tenuously, though, as President Johnson’s vision of Reconstruction would give way to Congressional Reconstruction.165 In Raleigh, the legislators did little, and adjourned with plans to reconvene in early 1866.166

Early in its next session, the General Assembly abolished the offices of Superintendent of Common Schools and Treasurer of the Literary Fund.167 Writing in the early 20th Century, Edgar Wallace Knight explained that Wiley, although he no longer held the office, had angered some legislators with accusations of mismanaged swamplands that could have supported the depleted Literary Fund.168 Knight also wrote that some still saw the office as an unnecessary state expense:

The remarks of one member were particularly bitter; the office of state superintendent was, in his opinion, an unnecessary expense; a salary of $1500 had been paid that officer for years and he had been of no use on “God Almighty's earth and the state was unable to pay a salary to a man who merely wrote long essays and drew interminable bills.”169

Apart from small government ideology and personal animosity, racism swayed legislators away from supporting public schools. The legislators had recently ratified the 13th Amendment, a ramification of which was the possibility that a public school might be racially integrated.170

162 See Orth, supra note __, 1775-1776; see also, CONSTITUTION OF NORTH CAROLINA WITH AMENDMENTS, AND ORDINANCES AND RESOLUTIONS PASSED BY THE CONVENTION, SESSION, 1865 (Raleigh, 1866), available at http://www.archive.org/stream/executivedocument00carogoog#page/n204/mode/2up.
163 See Raper, supra note __, at 77; CONSTITUTION OF NORTH CAROLINA WITH AMENDMENTS, AND ORDINANCES AND RESOLUTIONS PASSED BY THE CONVENTION, SESSION, 1865, Ordinance of October 10, 1865. The 1865 Constitution itself was submitted to, and rejected by, the state’s voters in August 1866. See infra, p. __.
165 On December 9, 1865 the legislators noted that President Johnson seemed to have “been misinformed as to the views and sentiments of the people of North Carolina, and especially as regards the issues involved in the late elections of this State.” In response, the legislators resolved that “the people of North Carolina have accepted the terms offered them by the President of the United States, and have complied with all the conditions laid down by him as necessary to restore [their] constitutional relations with the other States of the Union; and they have done so in good faith, and with the intention and determination to preserve and maintain them.” Resolutions Declaring the Loyalty of the People of North Carolina, Resolutions Adopting the Constitutional Amendment Abolishing Slavery Within the United States, 1865-1866 N.C. Sess. Laws 10, available at http://www.archive.org/stream/publiclawsosstat186566nor#page/n15/mode/2up.
166 See Raper, supra note __, at 84; see also EDGAR WALLACE KNIGHT, THE INFLUENCE OF RECONSTRUCTION ON EDUCATION IN THE SOUTH 18 (1913). The legislators did ratify the 13th Amendment on December 4, 1865, 1865-1866 N.C. Sess. Laws 9 available at http://www.archive.org/stream/publiclawsosstat186566nor#page/n13/mode/2up.
168 Knight, supra note __, at 18-20.
169 Knight, supra note [reconstruct], at 18-20.
170 Raper, 117.
Governor Worth, who helped create the antebellum public school system, urged the system’s destruction because the state would “be required to educate the negroes in like manner.”

The 1866 act that abolished the Superintendent also eliminated the requirement that county courts appoint five superintendents—they would need to appoint only one—and left the governance of schools to local officials, taking the state largely out of school administration. The counties could levy taxes for schools if they so desired, but state aid would not likely be available. The legislation allowed “any portion” of the Literary Fund to be loaned to the Public Treasurer “for the use of the State.”

**1866 Elections: The Rejected Constitution and Congressional Reconstruction**

In June 1866 Zebulon Vance delivered a speech at the University titled, “The Duties of Defeat.” Vance urged the students to take up a “cheerful and loyal submission to the powers and events established by [the Confederacy’s] defeat, and a ready obedience to the Constitution and laws of our country.” Vance acknowledged that the balance of federalism was forever shifted. But, if the country could not be governed as the university audience wished, “it must yet be governed some other way” and it remained their “duty to labor for its prosperity and glory, with ardor and sincerity.” As such, Vance urged upon the students “the strictest conformity … to what the government actually is, not what [they] may think it ought to be.”

Later that summer Congress proposed the 14th Amendment and the ensuing elections became a referendum on the amendment and on the policy of federal civil rights enforcement. Nationally, the Republicans achieved a sufficient majority to override Johnson’s Reconstruction policies and mire the President in impeachment proceedings. The voters in North Carolina, meanwhile, did not adopt the conformity that Vance urged earlier that summer. In the August elections, voters rejected the revised state Constitution, and that December the General Assembly rejected the Fourteenth Amendment.

The following February, Conservatives in the General Assembly responded to calls to revive the state’s education system, and passed a new school bill largely recreating the prior system, but without the state superintendent. The reestablished education system was short lived, though,

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171 See Foner, supra note _, at 208.
175 Id., at 11.
176 Id., at 18.
177 Id.
178 See Foner, supra note _, at 267.
179 See Raper, supra note _, at 89.
180 See Raper, supra note _, at 88-90; see also Orth, supra note _, at 1776.
181 As before the war, county courts would appoint local superintendents that would, in turn, appoint committeemen for individual districts; the officers were to “be the successors of those of the same kind in existence in April 1865.” Reports were “to be made to the Literary Board, instead of the State Superintendent of Common Schools, and the said Board [was] vested with all the powers of the said State
as Congressional Republicans soon took charge of Reconstruction efforts. Only days after the 
General Assembly passed the education law, Congress passed, over President Johnson’s veto, the 
first Reconstruction Act.\textsuperscript{182} It divided the former Confederate states into five military districts, 
declared all existing governments therein to be provisional only, required the ratification of the 
Fourteenth Amendment, and mandated new state constitutions as conditions for representation in 
Congress.\textsuperscript{183}

Congress later passed, again over a veto, a supplement to the Reconstruction Act setting out 
details to organize the conventions and disenfranchising former Confederates.\textsuperscript{184} The 
commanding generals in each district were to oversee a registration of voters, and eligibility to 
register relied on taking an oath of having had no “participation in any rebellion or civil war 
against the United States.”\textsuperscript{185} In North Carolina, General Canby ordered that elections be held in 
November to elect delegates to the constitutional convention.\textsuperscript{186}

**The 1868 Constitution: New Provisions and Existing Institutions**

Of the 120 seats at the convention, the Republican Party held 107. Of those Republicans, 
seventy-four were native whites, fifteen were black, and eighteen were northern transplants, some 
of whom were particularly influential.\textsuperscript{187} Albion Tourgée, from Ohio, was one of the youngest 
and one of the most influential members at the convention.\textsuperscript{188} “When the drafting of the 
constitution was finally complete,” wrote his recent biographer, “the document bore the marks of 
Tourgée’s influence in nearly every article.”\textsuperscript{189}

Tourgée moved to Greensboro in 1865, after growing up in Ohio and serving in the Union army. 
He sought a racially equal society, but was guarded against obtuse initiatives that might reverse 
progress—in the 1870s, for instance, he blasted Senator Sumner for attempting to force through 
school integration, correctly predicting that a racist backlash would set back Reconstruction 
efforts.\textsuperscript{190} Nevertheless, he was the antithesis to Conservatives, and aimed to restructure, rather 
than reestablish, North Carolina’s government.\textsuperscript{191}

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\textsuperscript{182} An Act to provide for the more efficient Government of the Rebel States, 14 Stat. 428

\textsuperscript{183} Id., §§ 1, 5, 6.

\textsuperscript{184} Act of Mar. 23, 1867, 15 Stat. 2.

\textsuperscript{185} Id., § 1.

\textsuperscript{186} See Raper, supra note __, at 97-98.

\textsuperscript{187} See Elliot, supra note __, at 127.

\textsuperscript{188} See Folk & Shaw, supra note __, at 205.

\textsuperscript{189} See Elliot, supra note __, at 131.

\textsuperscript{190} WARD M. MCAFEE, RACE, RELIGION, AND RECONSTRUCTION: THE PUBLIC SCHOOL IN THE POLITICS OF 

\textsuperscript{191} Tourgée once criticized the word “reconstruction” and the impeding effect the word had on changes 
needed in the former Confederate states:

> The word itself was one of ill-omen, in that it rushed back into the past for the type and 
model of what was to be in the future. By its very force it accustomed the people to the 
idea that the work which was to be done was but the patching up of an old garment; that 
it was an act of restoration rather than one of creation.

ALBION TOURGÉE, ROOT, HOG, OR DIE 58 (1876).
The convention offered Tourgée that opportunity. The 1868 Constitution altered the nature of, and relationship between, local and state government in North Carolina. As noted above, the General Assembly previously appointed officials to the county courts, an important link providing control over local government. The new constitution eliminated that link, and created several elected county officials, modeling local government on the township system of Tourgée’s home state, Ohio.

In a major departure from prior practice, the 1868 Constitution placed several executive officers—the governor, lieutenant-governor, secretary of state, auditor, treasurer, superintendent of public works, superintendent of public instruction, and attorney-general—on the ballot for popular election with terms of four years. Most of these elected officials composed the Council of State, a body retained from the 1776 Constitution charged with advising the Governor.

**Education Provisions in the 1868 Constitution**

The education-related provisions of the 1868 Constitution exemplify John Sanders’s description of the 1868 Constitution as “an amalgam of provisions copied or adapted from the Declaration of Rights of 1776, the Constitution of 1776 and its amendments, the proposed Constitution of 1866, and the Constitutions of other states, together with some new and original provisions.”

The convention’s committee on education produced its report, signed by all except its two conservative members, on February 18, 1868. While the committee’s proceedings are unavailable, the delegates as a whole debated only one issue regarding the committee’s proposed provisions: interracial schools. The majority defeated two attempts from conservative delegates to introduce racial segregation into constitutional text.

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192 See Elliott, supra note __, at 111-115.
193 See Orth, supra note __, at 1779.
194 N.C. CONST. of 1868, art. III, § 1.
195 The original council of state consisted of seven people who had no other duty, chosen jointly by the house and senate. N.C. Const. 1776, Clause 16. The new council consisted of all the officials on the long ballot except the governor, lieutenant governor, and attorney general. N.C. CONST. of 1868, art. III, § 14.
197 The two conservatives were J. W. Graham and I. R. Ellis. See Knight, supra note __, at 21-22. The delegates had convened on Tuesday, January 14. On Friday, January 17, the committee charged with prescribing a method for drafting the constitution recommended that substantive areas be dealt with in committees, one of which would be the committee “On Education, Common Schools, University and the means of their support.” And on the following Monday, the convention’s president announced that Samuel Ashley would chair the Committee on Education. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA, AT ITS SESSION 1868 29 (1868), available at http://docsouth.unc.edu/ncl/conv1868/conv1868.html.
199 Plato Durham proposed a provision stating that, “The General Assembly shall provide separate [sic] and distinct schools, for the black children of the State, from those provided for white children.” The chairman of the education committee, Samuel Ashley, offered to amend Durham’s section, with the following: It being understood that this section is not offered in sincerity, or because there is any necessity [sic] for it, and that it is proposed for the sole purpose of breeding prejudice and bring-about a political re-enslavement of the colored race. The delegates accepted Ashley’s addition and voted 86 to 11 against Durham’s proposed section.
New constitutional provisions for financial support bound the state more rigorously to providing public education.\textsuperscript{200} While previously the General Assembly freely borrowed from the Literary Fund, the new Constitution created an “irreducible educational fund” with several sources of revenue such as proceeds from the fines, forfeitures, and penalties collected by the state.\textsuperscript{201} Professor Lawrence wrote that the fund “both continued and changed existing state policy”:

The new educational fund was in one sense an expanded version of the 1825 Literary Fund. However, a statute had established the Literary Fund; the Constitution established the new educational fund. In addition, the Literary Fund had derived most of its principal from extraordinary revenues, while the new fund relied, in part, on the recurring revenue source of fines, penalties, and forfeitures. The revenues from fines, penalties, and forfeitures were a source that had not heretofore been earmarked for education. Why, it must be asked, were the changes made?\textsuperscript{202}

In lieu of a record of debate on the subject, Professor Lawrence suggested that the “constitutionalization of the endowment fund” was primarily an attempt, made also in several other states at the time, to insulate the fund from diversion, a problem that consistently eroded the antebellum Literary Fund.\textsuperscript{203} Noting the similarity in the relevant provisions, Lawrence concluded that the North Carolina delegates modeled the language for the irreducible fund on Missouri’s 1865 Constitution, and that “perhaps an informal network linked Republican party members in different states.”\textsuperscript{204}

The school fund was not the only shared feature among Reconstruction-era constitutions. The language used to create state superintendents, for instance, is sufficiently similar to suggest that most of the state conventions borrowed some language from available sources.\textsuperscript{205}

Later, delegate Graham, one of the conservatives in the education committee, tried again, with an amendment adding “separate and distinct schools and Colleges for the white and colored races.” Twelve delegates ultimately voted against the educational provisions, perhaps because of the failure to constitutionalize segregation. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH-CAROLINA, AT ITS SESSION 1868 338-344. During the second attempt, Tourgée offered a substitute that would have allowed “separate and distinct schools” if the facilities and districts were equal. Tourgée’s proposal is historically ironic because he would later represent Homer Plessy in Plessy v. Ferguson, 163 U.S. 537 (1896).

\textsuperscript{200} See Raper, supra note _, at 118-119.
\textsuperscript{201} N.C. CONST. of 1868, art. IX, § 4.
\textsuperscript{202} See Lawrence, supra note _, at 55.
\textsuperscript{203} See id., at 55-56. The framers directed fines, penalties, and forfeitures to the fund to increase the fund’s assets and thus its useable interest.
\textsuperscript{204} See id., at 57. In fact, several other state constitutions that were adopted in the 1850s and 1860s contain similar language to create permanent school funds. The provisions tend to direct proceeds from certain land sales to the fund, and to specify that the money be “inviolably” appropriated to educational purposes. See ALA. CONST. of 1867, art. XI, § 10; ARK. CONST. of 1868, art. IX, § 4; FLA. CONST. of 1868, art. VIII, § 4; KAN. CONST. of 1859, art. VI, § 3; LA. CONST. of 1868, art. VII, § 139; MISS. CONST. of 1868, art. VIII, § 6; and S.C. CONST. of 1868, art X, § 11. The constitutional text is available at http://www.stateconstitutions.umd.edu/Search/Search.aspx.
\textsuperscript{205} See:

- ALA. CONST. of 1867, art. XI, § 2: “The Superintendent of Public Instruction shall be President of the Board of Education and have the casting vote in case of a tie; he shall have the supervision of the public schools of the State, and perform such other duties as may be imposed upon him by the Board and the laws of the State.”
Some common themes are evident. In most provisions the delegates provided for a superintendent with duties prescribed by law. The constitutional provisions usually declared that the superintendent would supervise the school system. Some states, such as Missouri, vested the supervision in a board of education, and made the superintendent the president of that board.

North Carolina’s Constitution set out the structure for state-level administration in three sections of Article IX:

Sec. 7. The Governor, Lieutenant-Governor, Secretary of State, Treasurer, Auditor, Superintendent of Public Works, Superintendent of Public Instruction and Attorney General, shall constitute a State Board of Education.

Sec. 8. The Governor shall be President, and the Superintendent of Public Instruction shall be Secretary of the Board of Education.

- ARK. CONST of 1868, art. IX, § 2: “The supervision of public schools shall be vested in a superintendent of public instruction, and such other officers as the general assembly shall provide. The superintendent of public instruction shall receive such salary and perform such duties as shall be prescribed by law.”
- FLA. CONST. of 1868, art. VIII, § 3: “There shall be a Superintendent of Public Instruction, whose term of office shall be four years, and until the appointment and qualification of his successor. He shall have general supervision of the Educational interest of the State. His duties shall be prescribed by law.”
- GA. CONST. of 1868 art. VI, § 2 : “The office of State school commissioner is hereby created. He shall be appointed by the governor with the consent of the senate, and shall hold his office for the same term as the governor.”
- KAN. CONST. of 1859, art. VI, § 1: “The State Superintendent of Public Instruction shall have the general supervision of common-school funds and educational interests of the State, and perform such other duties as may be prescribed by law.”
- LA. CONST. of 1868, art. VII, § § 137: “There shall be elected by the qualified voters of this State a superintendent of public education, who shall hold his office for four years. His duties shall be prescribed by law, and he shall have the supervision and the general control of all public schools throughout the State.”
- MISS. CONST. of 1868, art. VIII, § 2: “There shall be a Superintendent of Public Education elected at the same time and in the same manner as the Governor, …whose duties shall be the general supervision of the common schools and the educational interests of the State, and who shall perform such other duties pertaining to his office, and receive such compensation as shall be prescribed by law ….”
- MO. CONST. of 1865, art. IX, § 3: “The supervision of public instruction shall be vested in a board of education, whose powers and duties shall be prescribed by law. A superintendent of public schools, who shall be the president of the board, shall be elected by the qualified voters of the state. He shall possess the qualifications of a state senator and hold his office for the term of four years, and shall perform such duties and receive such compensation as may be prescribed by law.”
- S.C. CONST. of 1868, art X, § 1: “The supervision of public instruction shall be vested in a State Superintendent of Education, who shall be elected by the qualified electors of the State in such manner and at such time as the other State officers are elected; his powers, duties, term of office and compensation shall be defined by the General Assembly.”
- W. VA. CONST. of 1863, art. X, § 3: “Provision may be made by law for the election and prescribing the powers, duties, and compensation of a general superintendent of free schools for the State ….”
Sec. 9. The Board of Education shall succeed to all the powers and trusts of the President and Directors 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, they shall not be re-enacted by the Board. 206

Unlike many other states’ constitutions, North Carolina’s contained no description of the Superintendent’s duties in its article on education, other than that the official would serve as Secretary of the Board of Education. The only other description of the Superintendent was contained in Article III, in which it was made a popularly elected office in the State’s executive branch. Article III, § 13 provided that the Superintendent, along with other members of the Council of State, would perform duties “as prescribed by law.” 207

The provisions for educational governance in North Carolina’s 1868 Constitution, then, did not mirror other Reconstruction constitutions; but, neither did the provisions simply constitutionalize the antebellum structure. Before the Civil War, legislation provided for a superintendent to oversee the school system, while the President and Directors of the Literary Fund tended to the investments and general finances of the school fund. The Superintendent was not a member of the Literary Board. The 1868 Constitution, on the other hand, and similar to Missouri’s constitution, granted administrative power of the school system to the State Board of Education. The governor, as was the case with the antebellum Literary Board, would be President of the new Board. The Superintendent would now be secretary of the Board. However, the Constitution did not articulate what it meant to be the “secretary.”

The framers and those who ratified the 1868 Constitution most likely intended the Superintendent to assume a role much like that which Wiley played before the Civil War. Before presenting the new constitution for a ratification vote, the delegates adopted an address to describe the new Constitution to the state’s citizens. 208 In it, they downplayed the Constitution’s changes to the structure of the state’s executive branch:

In the EXECUTIVE DEPARTMENT the changes appear to be much greater than they really are. The names of some officers have been changed, and instead of being elected by the General Assembly as heretofore, the choice of these high agents of the people’s will is giving [sic] directly to the people. This is in conformity with the acknowledged principles of Republican government. But two new officers have been created. First, Lieutenant-Governor. The necessity for this officer to supply the place of the Governor, in case of a vacancy in his office, was so apparent that it was provided for in the proposed Constitution of 1865. No additional expense is incurred, as he will receive no pay, except while acting as Governor or presiding over the Senate. Second, A Superintendent of Public Works. 209

206 N.C. CONST. of 1868, art. IX, §§ 7-9.
209 Id., at 483.
Notably absent in that description of “new” officers was the Superintendent of Public Instruction. The Superintendent was one of the offices that merely shifted from being “elected by the General Assembly” to being popularly elected. Otherwise the office was, according to the framers’ description, a continuation of the antebellum office.

The framers’ address further suggests that they intended to carry forward the antebellum structure for state-level educational administration. Their description of the Constitution’s education provisions did not mention any new state government apparatus:

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 the 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 to 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.\(^{210}\)

Using language shared among Reconstruction-era framers across southern states, the drafters of the 1868 Constitution’s education provisions meant to establish something similar to the educational governance in place before the Civil War. When they met, the office of Superintendent had been abolished by statute for about two years, but the Literary Board remained. The delegates in 1868 formed the State Board, conforming to similar provisions across the Reconstruction states. Concurrently, the delegates nullified the General Assembly’s 1866 effort to abolish the Superintendent, and restored the office to its prior administrative perch.

**Prescribing the Superintendent’s Duties under the New Constitution**

The constitutional provisions regarding the Superintendent did not change during the remainder of the nineteenth century and legislation prescribing the Superintendent’s duties remained remarkably similar, except for a nine-year period of a condensed description of duties.

The first elected Superintendent under the new Constitution, Samuel Ashley, had been chair of the convention’s committee on education, and helped draft the first school law passed after ratification.\(^{211}\) Seven sections in the law detailed administrative duties for the Superintendent. The Superintendent was to maintain an office at the seat of government; provide a seal; sign all requisitions for school funds out of the treasury; send an annual report to the governor with relevant statistics; apportion the school fund to the counties; prepare reporting forms for local officials; and provide those officials with publications of the school laws, the required course of study, and suggestions on schoolhouse architecture.\(^{212}\) The statute also clarified that the Superintendent was the state’s leading education administrator—the Superintendent was to “direct the operations of the system of public schools and enforce the regulations and laws in relation thereto.”\(^{213}\)

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\(^{210}\) Id., at 486-487.

\(^{211}\) An Act to Provide for a System of Public Instruction, ch. 184, §§ 63-69, 1868-69 N.C. Sess. Laws 458. On Ashley drafting the legislation, see Prince, supra note _, at 59.


\(^{213}\) Id., § 65.
During the same session, the General Assembly passed separate legislation to prescribe duties to executive officers. If the provisions in the education statute contained duties of an administrative nature, the provisions here contained duties more in line with the Superintendent as a popularly elected state official. Several sections mirrored provisions in the general school statute; but, the statute contained unique prescriptions for the Superintendent to correspond with out-of-state educators and to “render the results of educational efforts and experiences, available for the information and aid of the Legislature and Board of Education.” He was also to “acquaint himself with the peculiar educational wants of each section of the State” and meet those needs by visiting the districts, counseling county officials, and lecturing before teachers.

In 1872, with legislation initially drafted by Superintendent McIver, the General Assembly consolidated the school laws and condensed the language prescribing the Superintendent’s duties into one section. The legislation dropped the language from the original school legislation assigning to the Superintendent the general duty to “direct the operations of the public schools and enforce the [relevant] regulations and laws,” and it dropped the language from the original executive officers legislation. The Superintendent was still to publish the school laws, distribute forms, sign requisitions, and submit a report with statistics and recommendations; but, his duties were otherwise much more meagerly to “look after the school interests of the state at large ….”

That language remained in place until 1881 when the General Assembly passed a new school law with three sections dedicated to the Superintendent’s duties. The first was substantively equal to what had been in place over the previous nine years. The two additional sections resurrected language from the 1869 statutes. The legislation renewed the statutory authorization for the Superintendent’s leadership role, to “direct the operations of the system of public schools and enforce the laws and regulations in relation thereto.” The office was again given the duties from the original executive officers statute—to study outside educational systems and “render the results of educational efforts and experiences available” to the legislature and State Board; and to “acquaint himself” with local problems, counsel county officials, lecture to teachers, and give public addresses. In that same legislation, the General Assembly for the first time authorized

214 An Act Concerning the Powers and Duties of State Officers, Ch. 270, 1868-69 N.C. Sess. Laws 615. This was the only session in which the legislature passed a separate statute directed to the duties of all executive officers.
217 Compare An Act to Consolidate the School Laws and to Provide for a System of Public Instruction, Ch. 189, § 35, 1871-1872 N.C. Sess. Laws 308, with 1868-69 N.C. Sess. Laws 458, § 65, and 1868-89 N.C. Sess. Laws 615, §§ 90-91. See also, 1872 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REPORT 7, available at http://www.archive.org/stream/executivelegisla187273nort#page/n379/mode/2up (Regarding the Superintendent writing the initial draft legislation. In his report, McIver was primarily concerned with financing the schools and made no mention of editing the Superintendent’s duties. Either he did not intend to create a substantive change in the Superintendent’s duties or the legislature made the changes after McIver submitted his draft.)
219 An Act to Revise and Consolidate the Public School Law and to Make More Efficient the System of Public Instruction in this State, Laws Ch. 200, § 10 1881 N.C. Sess. Laws 371 (substantively equivalent to 1871-72 N.C. Sess. Laws Ch. 189, § 35.)
220 An Act to Revise and Consolidate the Public School Law and to Make More Efficient the System of Public Instruction in this State, Ch. 200, § 11, 1881 N.C. Sess. Laws 371
221 Id., § 12.
the Superintendent to hire a clerk.222 For the remainder of the century, legislation concerning the Superintendent’s duties remained basically unchanged.223

III. Nineteenth Century Administrative Developments

Administrative developments in school governance after the Civil War occurred largely outside what is evidenced by statute. At the end of the nineteenth Century, the Department of Public Instruction consisted of the Superintendent and a clerk. By 1925 the Department had eleven divisions staffed by about 58 state employees.224 The budding of those offices is a twentieth century story. But, the problems that that motivated the bureaucratic expansion took seed in the nineteenth century. That is when state officials experimented with administrative practices that set a precedent for the later system. Those administrative developments also help us understand the constitution under which they progressed.225

Two major developments were an increase in state control and an emphasis on professionalism. At this point, it was an open question whether local or state officials would dominate education policy. During the 1880s and 90s, though, the state gained control. Sometimes this happened by default—state officials were simply in the best position, for instance, to work with out-of-state actors. In other instances it happened by assertion.

A pervasive issue of the period was professionalism, and in education policy the need for professional qualifications was two-pronged. Those concerned with education policy have always stressed the importance of effective, well-qualified teachers; as the education system matured, though, policy-makers increasingly valued well-qualified administrators.

The Problem of Education Finances

The 1869 “Act to Provide for a System of Public Instruction” created an administrative structure similar to that of the antebellum system, with elected county commissioners taking the place of the appointed county superintendents.226 The basic structural differences between the ante- and

222 1881 N.C. Sess. Laws 371, § 64.
223 A law in 1883 switched the Superintendent’s reporting frequency from annual to biennial. Act of March 12, 1883, Ch. 121, § 1, 1883 N.C. Sess. Laws 177. In 1885, the general assembly increased the money allotted for the Superintendent’s traveling expenses, only to reduce it again in 1889. Act of March 11, 1885, Ch. 174, § 2, 1885 N.C. Sess. Laws 206 (increasing traveling expenses from $500 annually to $750); An Act to Amend the Public School Law, Ch. 199, § 46, 1889 N.C. Sess. Laws 163 (striking the changes made in 1885, and returning the limit of travelling expenses to $500). As discussed below, legislation in 1897 authorized the Superintendent to report ineffective county officials to the county board of education. A consolidation of the school law in 1899 placed that section and a section authorizing the Superintendent to hire a clerk adjacent to the other sections describing the Superintendent’s duties. An Act to Revise and Consolidate the Public School Law, Ch. 732, §§ 8-12, 1899 N.C. Sess. Laws 903.
225 Early efforts to implement constitutional provisions became, as Jerry Mashaw wrote, “in some sense a continuation of the Constitutional Convention.” Mashaw, supra note __, at 1266. Borrowing the title from John Rohr’s book, Mashaw described initial attempts at administration as learning how to “run a constitution.” Rohr got the phrase, in turn, from Woodrow Wilson. Id., at 1337-1338; JOHN A. ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE, 66 (1986).
226 Superintendent Ashley in his first report noted that the Board of Education, “by circular, ordered that the Commissioners of each County assume the duties of Superintendents of Common Schools ….” 1869 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP., 2 (1869), available at http://docsouth.unc.edu/nc/report1869/report1869.html.
post-bellum school laws resulted mainly from the new township system and the elimination of county courts of pleas and quarter sessions. The 1869 law shifted much of the administrative work to elected, three-member school committees in each township. The school committees established schools, employed teachers, dismissed students, and assured the use of the texts and courses of studies adopted by the State Board.\textsuperscript{227} County commissioners appointed a county examiner to examine applicants for teaching positions, with rules for examinations prescribed by the Superintendent and Board of Education.\textsuperscript{228}

Superintendent Ashley assembled “Instructions, Forms and Plans of School Houses,” and “placed [them] as rapidly as possible in the hands of School Officers throughout the State.”\textsuperscript{229} He planned to distribute $165,290.50 among counties with elected officials, with which they could “proceed forthwith to establish as many schools as their funds [would] permit.”\textsuperscript{230} Yet, a functioning system of new, public schools did not come to fruition.\textsuperscript{231} The state was unable to meet its appropriation and the county officials were unwilling to levy or collect direct taxes to cover school expenses.\textsuperscript{232}

The 1868 Constitution specifically gave the General Assembly, rather than the counties, the power to provide for those schools “by taxation or otherwise.”\textsuperscript{233} But, the Constitution required county commissioners, on fear of indictment, to maintain at least one public school in each district for four months.\textsuperscript{234} The 1869 education law required district committees to report any projected shortfalls to the county commissioners, after which the commissioners were to levy on the township a tax sufficient to cover the shortfall.\textsuperscript{235} The lack of state funds made shortfalls a frequent occurrence; but, county citizens were unaccustomed to direct school taxes, which during most of the antebellum period were not required.\textsuperscript{236}

Further complicating the issue, the Constitution prohibited local governments from levying a tax without a prior vote of approval, except for necessary expenses.\textsuperscript{237} When Craven County commissioners complied with the school law by levying a tax to cover a shortfall, citizens brought suit arguing that the tax had not been approved by vote and that the schools were an unnecessary expense. The State Supreme Court agreed, ruling in 	extit{Lane v. Stanly} that the 1869 law, so far as it provided for local taxes for education without voter approval, was unconstitutional and could not be enforced.\textsuperscript{238} The Court’s declaration that education was not a necessary expense created a conundrum: county commissioners were constitutionally required to maintain schools for four months a year, but were constitutionally prohibited from raising sufficient revenue, in the manner prescribed by statute, to do so.

\begin{thebibliography}{9}
\bibitem{227} An Act to Provide for a System of Public Instruction, Chapter 184, §§ 15 and 18, 1868-1869 N.C. Sess. Laws 458.
\bibitem{228} 1868-1869 N.C. Sess. Laws 458, §§ 33, 35.
\bibitem{229} 1869 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP., 2; see also, SCHOOL LAWS OF NORTH CAROLINA 45-83 (1869), available at, http://www.archive.org/stream/schoollawsfnort00nort#page/n5/mode/2up.
\bibitem{230} 1869 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP., 3.
\bibitem{231} See Raper, supra note __, at 119.
\bibitem{232} See id., at 119; see also Knight, supra note __[Public School Education in North Carolina], at 245.
\bibitem{233} N.C. CONST. of 1868. art. 9, § 2.
\bibitem{234} N.C. CONST. of 1868, art. 9, § 3.
\bibitem{235} 1868-1869 N.C. Sess. Laws, Ch. 184, § 25.
\bibitem{237} N.C. CONST. of 1868. art. 7, § 7.
\bibitem{238} 65 N.C. 153 (1871).
\end{thebibliography}
The result of Lane was that as long as the state lacked money to disburse, the existence of public schools would largely be a local decision based on payment of direct taxes. With little tradition of paying such taxes, local taxes were seldom approved and the education system languished.

Before the Court decided Lane, the General Assembly in early 1870 made some effort to increase education funds with a special tax of one-twelfth of one percent of its valuation on all taxable property, “for the support of public schools of the state” and, more specifically, to pay the $100,000 appropriation the General Assembly made in the previous session. The tax set a precedent for the state’s later scheme for financing education, but did little at the time due to a lack of enforcement. Moreover, Democrats returned to power and, during the next session, diverted the special tax from education to meeting “an existing deficiency in the treasury.”

**Racism, Holden’s Impeachment, and Reining in State Government**

Racism and the fear of potential socioeconomic change that might be initiated by northern transplants created more barriers to progress in the education system. Edgar Wallace Knight, writing in 1916, betrayed those sentiments in his description of Superintendent Ashley:

> Though an earnest man and of some ability, he was narrow and possessed of pronounced prejudices which made him imprudent and reckless. His interest in a system of mixed schools which he wished to see established in the South, and his tendency to habits of his kind, together with the fact that he was said to be of negro descent, made him “one of the most unpleasant carpetbaggers in the State.”

Knight applied a similarly rancorous description to Rev. J. W. Hood, who like Ashley served as a delegate in the committee on schools during the 1868 constitutional convention, and who the

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239 Superintendent McIver wrote that the decision’s effect was “to annul the school system of 1868–69.” 1873 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP., 6, available at http://www.archive.org/stream/executivelegisl187273nort#page/n379/mode/2up.

240 See McAfee, supra note _, at 99 (citing Daniel Jay Whitener, Public Education in North Carolina During Reconstruction, 1865 1876, in ESSAYS IN SOUTHERN HISTORY 67, 71, 75, 77, 88-90 (Fletcher Melvin Green ed., 949); CHARLES WILLIAM DABNEY, 1 UNIVERSAL EDUCATION IN THE SOUTH 174 176 (1936); M. C. S. NOBLE, A HISTORY OF THE PUBLIC SCHOOLS OF NORTH CAROLINA 354 (1930).


242 See Raper, supra note _, at 119; see also Knight, supra note _[ Public School Education in North Carolina], at 246.


244 During the 1868 campaign, the conservatives argued that “The great paramount issue is: shall negroes or whites rule North Carolina? All other issues are secondary and subordinate, and should be kept so. Shall white children be compelled to go to the same schools with negroes?” See Raper, supra note _, at 100. As Marc Elliot explained, “[r]acial integration of public schools and miscegenation were inextricably linked,” and several newspapers expressed fear of integrated adolescents becoming romantically involved during school hours. Elliott, supra note _, 112. Ward McAfee wrote that “[b]efore the Civil War, North Carolina had developed the closest model that the South then had of a meaningful public education system. But after the war, the urge to revive it was dead. Fear the emancipation would inevitably lead to mixed schools in any public school system was the cause of the change.” McAfee, supra note _, at 99.

245 Knight, supra note _[Public School Education in North Carolina], at 239 (source of quote not provided).
State Board appointed as an “Agent of the Board” to establish black schools and investigate their needs.\textsuperscript{246} Without citation or explanation, Knight described Hood as “a negro carpetbagger of rather unsavory reputation ….”\textsuperscript{247}

These were the times in which Ku Klux Klan affiliates became, as Eric Foner described, “a military force serving the interest of the Democratic party, the planter class, and all those who desired the restoration of white supremacy.”\textsuperscript{248} Governor Holden’s use of the militia to arrest Klan organizers helped spur a Democratic backlash resulting in conservatives returning to power in the General Assembly.\textsuperscript{249} The new Democratic legislature sought to wipe away what Republicans accomplished during the previous two years. At the end of 1870, the House of Representatives adopted resolutions to impeach Governor Holden and to create a committee for revising the constitution.\textsuperscript{250}

During the same month that it resolved to impeach Governor Holden, the House hunted for “improper expenditures of the public money,” purporting that it was “commonly charged” that Holden used state funds to spy on citizens.\textsuperscript{251} It was fantastical politics, but it represented the broader, ideological sentiment against government spending. Thomas Jarvis, the new Speaker of the House, consistently pressed for reductions in taxes and public debt.\textsuperscript{252} Asserting another “common charge,” the House worried “that there [had] been an extravagant and useless employing of men, professedly in the public service, whereby the public money [was] wastefully expended.” Accordingly, the House required the governor and heads of departments to provide

\textsuperscript{247} Knight, supra note _, [Public School Education in North Carolina], at 244.
\textsuperscript{248} Foner, supra note _, at 425. An early goal of the Ku Klux Klan was to disrupt affiliations of the Union League, which, as Foner described, “emerged as the political voice of impoverished freedmen.” Id., at 283. The Union League began as a northern organization, supporting the Union; but, in the South local Union League branches became an avenue for black political participation. It was not solely a black institution in the South, though. As Foner described: “Many local leagues, however, achieved a remarkable degree of interracial harmony. In North Carolina, one racially mixed league composed of freedmen, white Unionists, and Confederate Army deserters, met ‘in old fields, or in some out of the way house, and elect candidates to be received into their body.’” Id.
\textsuperscript{249} See Folk & Shaw, supra note _, at 218-221. Holden was responding terrorists indicated in letters he received. One, for instance, read: “The ku klux klan is shooting our families and beating them notoriously …. We do not know what to do.” See Foner, supra note _, at 438. In January 1870, the General Assembly passed an act authorizing the governor to declare counties in insurrection and call out the militia to suppress the violence. An Act to Secure the Better Protection of Life and Property, Ch. 27, 1869-70 N.C. Sess. Laws 64, available at http://www.tracey.archive.org/stream/publiclawsofstat186970norn#page/64/. The next month, Klan members in Alamance hanged the leader of the local Union League, Wyatt Outlaw. Subsequently, Holden sent militia troops to Alamance and Caswell to arrest, without recognizing habeas corpus, suspected leaders of Klan organizations. See Folk & Shaw, supra note _, at 213-218.
\textsuperscript{251} House Resolution of Inquiry Concerning Alleged Improper Expenditures of the Public Money, 1870-1871 N.C. Sess. Laws 461.
“a list of the spies or detectives, clerks, messengers, pages, waiters, laborers and all other officers and employees who have been in the pay of the state.”

Superintendent Ashley responded with a letter to Speaker Jarvis listing three positions within the Department of Public Instruction: one permanent clerk earning $1,000 annually, one temporary clerk earning $78 monthly, and Rev. J. W. Hood, earning $1,500 as a special agent of the State Board. While he could cite legislative authority for the two clerkships, Ashley proffered no such authority for Hood’s office, noting instead that the salary came from the State Board’s treasury rather than the State’s. “Saving the above,” wrote Ashley with a hint of exasperation, the Department had hired “no ‘spies or detectives, clerks, messengers, pages, waiters, laborers’ or other ‘officers or employees.’”

Meager though the Department of Public Instruction’s resources were, they were soon reduced further. The General Assembly slashed the Superintendent’s annual salary from $2,400 to $1,500, revoking any funding for traveling expenses, and prohibiting the appointment of any assistant. In light of Ashley’s point of nuance regarding the source of Hood’s salary, the legislators clarified that no “other person” could “make any such appointment” regardless of whether the person was paid through the “treasury or educational fund.” Further, the legislature passed another act “for the better protection of the literary fund” prohibiting the State Board from loaning or expending “for any purpose whatever” any sum of the funds under the Board’s control “except by direction of the legislature.” Superintendent Ashley, his salary and assistance greatly reduced, resigned in September 1871.

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255 Id.; see also An Act Relating to Salaries and Fees, Ch. 46, § 3, 1868 N.C. Sess. Laws 64, available at http://www.archive.org/stream/publiclawsofstat1868nort#page/64/mode/2up (authorizing a permanent clerk); General Provisions Concerning the Superintendent of Public Instruction, Ch. 270, § 86, 1869 Sess. Laws 635, available at http://www.archive.org/stream/publiclawsofstat186869nor#page/634/mode/2up (authorizing “clerical aid as shall be necessary for the efficient discharge of the duties of his office, at the expense of the State.”).
256 EXECUTIVE AND LEGISLATIVE DOCUMENTS LAID BEFORE THE GENERAL ASSEMBLY OF NORTH CAROLINA SESSION 1870-71, No. 11.
257 An Act in Relation to Salaries and Fees of State Officers, Ch. 81, § 6, 1870-1871 N.C. Sess. Laws 143, available at http://www.archive.org/stream/publiclawsofstat187071nor#page/144/mode/2up; Knight, supra note __, at 249.
259 An Act for the Better Protection of the Literary Fund, Ch. 279, § 1, 1870-1871 N.C. Sess. Laws 444. During the same session, the General Assembly weakened the State Board’s power by changing the wording of the Board’s duties regarding the schools’ course of study from “shall prescribe” to “may recommend.” Act of April 5, 1871, Ch. 237, 1870-1871 N.C. Sess. Laws 387.
260 See Knight, supra note __. 251. Governor Caldwell’s vacancy appointment, Alexander McIver, lost in the next election to James Reid. Reid, however, died before taking office. Governor Caldwell appointed Kemp Battle to fill the position, but McIver refused to cede the office. The turn of events led to North Carolina’s first case under the 1868 Constitution involving the governor’s appointment powers regarding popularly elected executive officials. The Court ruled for McIver; concluding that the governor’s appointment power applied only to vacancies. No successor to the office had legally qualified as Reid died before taking office, and no one else was duly elected; so, there was no vacancy. Battle v. McIver, 68 N.C. 467 (1873).
Reactions to Federal Educational Policies and the End of Reconstruction

During Reconstruction the federal government expanded its role in facilitating educational aid for former slaves. Congress also considered, but ultimately did not adopt, proposals to regulate public schools. Still, the prospect of federal involvement in education policy played a significant role in state politics.

Before the Civil War ended, Congress created the Freedmen’s Bureau to provide material aid to former slaves. In the summer of 1866, Congress extended for two years the work of the Bureau and expanded its work into education. Specifically, the Bureau worked with and helped obtain facilities for “private benevolent associations,” helped provide teachers, and “furnish[ed] such protection as might be required for the safe conduct of such schools.” Two years later, Congress again continued the Bureau’s work and expanded the commissioner’s discretion to spend any leftover balances on “the education of freedmen and refugees …” The Freedmen’s Bureau helped build schools, maintain facilities, pay for teachers, and establish high schools and teacher-training schools.

In 1870, the House Committee on Education and Labor reported legislation to transfer the Freedmen’s Bureau education powers to the existing education division within the Department of Interior, and to rename that division the Bureau of Education. The mixture of federal control over education policy and race relations sparked a new threat to Democrats. In debate over the bill, Representative Thompson McNeely objected that the Freedman’s Bureau had run its course, and noted that the Bureau’s authorization to “furnish such protection as might be required for the safe conduct” of schools was “the first law passed by Congress giving any Federal officer any control over the subject of education within the States.”

The House never voted on the bill, but during the 1872 session Representative Legrand Perce introduced legislation allowing federal funds to go to states with “meaningful public school systems,” a status to be determined by the United State Commissioner of Education. “Meaningful” might mean systems with racially integrated or equal schools. Against objections citing state autonomy, Senator Hoar argued that localities could not or would not equally protect schools for both races:

[The] Democracy clamors that they should be left to the states; when proposed to the states, it clamors that they should be left to counties or localities. In the

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262 An act to continue in force and to amend ‘An act to establish a bureau for the relief of freedmen and refugees,’ and for other purposes , 14 Stat. 173 (1866).
263 Ch. 200, § 13, 14 Stat. 173.
264 Ch. 135, § 3, 15 Stat. 83.
266 H.R. 1486, 41st Cong. (1870), available at http://international.loc.gov/cgi-bin/amap?collId=llhb&fileName=041/llhb041.db&recNum=5072; CONGRESSIONAL GLOBE, 41st Cong., 2nd Sess. 2318-19 (1870), available at http://memory.loc.gov/cgi-bin/amap?collId=llcg&fileName=091/llcg091.db&recNum=433; see also McAfee, supra note __, at 106.
268 See McAfee, supra note __, at 114.
county or locality, they are left by that party to the Ku Klux Klan, who burn the
school house and murder or whip the teacher.\footnote{Id., at 116 (citing Cong. Globe, 42nd Cong., 2nd Sess., pp. 592, 792).}

The Perce bill passed the House and went to the Senate with an amendment attached allowing segregated schools to receive the federal funds.\footnote{Id., at 118.} However, the bill, like its predecessor, never came up for a final vote.\footnote{Id., at 121.}

Meanwhile, Massachusetts Senator Charles Sumner pressed for a Supplementary Civil Rights Bill that would guarantee for all “citizens and persons” the “full and equal enjoyment of the advantages of the common schools and other institutions of learning and benevolence without distinction of race, color, or previous condition of servitude.”\footnote{Id., at 123-124.} Sumner died on March 11, 1874, and the emotional response spurred his colleagues to pass his Supplemental Civil Rights Bill on May 23.\footnote{Id., at 138-148.} The House, though, postponed its vote until after the 1874 midterm elections, placing the issue conspicuously within that year’s electoral politics.\footnote{Id., 149; see also Elliott, supra note \_\_ at 168.}

In North Carolina, Superintendent McIver reported that opposition to the integrated schools required by Sumner’s bill was “so strong that if the people are free to choose between mixed schools and no schools, they will prefer the latter.”\footnote{1874 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 64 (1874), available at http://www.archive.org/stream/executivelegisla187475nort#page/n469/mode/2up.} Albion Tourgée predicted that Sumner’s bill would create a backlash in North Carolina, setting back “rehabilitation of the South ten or twenty years.”\footnote{See McAfee, supra note \_\_ at 127; see also Elliott, supra note \_\_, at 167-168. McAfee notes, later, that debate on the bill focused just as much on northern states as on southern. Sumner’s intent, wrote McAfee, was to bring the intent of the 14th Amendment to public education. McAfee, supra note \_\_, at 130-131.} Indeed, Democrats won resoundingly in the 1874 elections, gaining majorities in both of North Carolina’s legislative chambers.\footnote{WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, 222 (1982).} The office of Superintendent was also up for decision, and McIver lost to Stephen Pool, a Democratic editor and educator from Elizabeth City.\footnote{Pool was a Whig before becoming an officer in the Confederacy. After the war, though, he joined the Democrats. WILLIAM S. POWELL, 5 DICTIONARY OF NORTH CAROLINA, BIOGRAPHY, 120-121.} In Washington, Congress removed the school provisions from the Civil Rights Bill.\footnote{Gillette, supra note \_\_, at 228; see also Elliott, supra note \_\_, at 168.}

**Constitutional Convention of 1875**

Upon returning to power, the Democrats adopted legislation for a constitutional convention “for the purpose of considering and adopting such amendments” as deemed necessary.\footnote{Ch. 222, 1874-1875 N.C. Sess. Laws 303, available at http://www.archive.org/stream/lawsresolutionso187475nor#page/302/mode/2up.} One
successful amendment at the constitutional convention required racially segregated schools, reflecting the backlash against the prospect of federally-imposed integration, and fulfilling the conservatives’ desire, expressed during the 1868 convention, for such a constitutional provision.281

The 1875 constitutional amendments increased the General Assembly’s power, particularly over counties and townships. A small change to the Article on local government amounted to a major shift in power. The 1776 Constitution allowed the legislature to structure county government entirely by statute. The 1868 Constitution, conversely, contained an entire Article setting out county and township government. The amendments in 1875 gave the General Assembly “full power by statute to modify, change or abrogate any and all of the provisions of” that Article. 282 Thus, the General Assembly would paradoxically have constitutional authority to statutorily override constitutional provisions relating to local government.283 That change returned to the General Assembly a control over local government similar to that held by the antebellum government.

The 1875 amendments also changed the constitution’s scheme for education finances. The Supreme Court’s decision in Lane v. Stanly made it difficult for counties to raise revenue for schools. Also, in its few years of existence, the “irreducible” state school fund had in fact been used for other purposes, leaving the delegates in 1875 with little optimism for such a fund.284 So, the delegates eliminated the irreducible education fund, and directed its streams of revenue to the general treasury from which the funds would be appropriated to the school system.285 The amendments created a new county school fund, to which the proceeds from fines, penalties, and forfeitures collected in the county would be paid directly.286 Professor Lawrence noted that this was the first time the state’s constitution “allocated certain moneys for public education directly to local government” rather than having to “pass through the State treasury.”287

### Educational Governance and the Developing Paradigm of Professional Civil Service

While state leaders during the final quarter of the century were hardly politically homogeneous, they were generally, as Professor James Leloudis has described, growing detached from their...
antebellum forebears as they embraced a “New South” connected to commerce and competition. Those changes in worldview bled into educational governance. A profession in education, rather than politics, proved an increasingly attractive alternative for the ambitious leaders because it was a relatively immature field in which graduates could quickly distinguish themselves. The young leaders brought with them zeal for reform. Indeed, wrote Leloudis, during the last quarter of the nineteenth and the first quarter of the twentieth centuries, “North Carolina led the way in building thousands of new schoolhouses, professionalizing teacher training, and developing an elaborate bureaucracy to administer the instruction of youth.”

**Federal and Philanthropic Information Collection**

While discussing federal government’s increasing role in education policy, Ward McAfee wrote that during the 1870s, “Americans wrestled with two social models, one encouraged by Bismarck’s Germany and one solely from the American past that had been partially discredited in the war to save the Union. The issue was whether locally controlled public institutions were better than those controlled from the national center.” Senator Henry Wilson penned an article at the time in the *Atlantic Monthly* supporting federal educational policy-making and urging Republicans to define the party on a platform of free public schools. As Professor Jurgen Herbst described, Wilson wrote approvingly of Prussia’s compulsory system of education and “left no doubt that [Republicans] were determined to shift the controlling powers over America’s public schools from local and district officials to professionals in state and, eventually, national offices.”

Opponents to an increased federal role in education policy saw no value in the Prussian model. In a typical exchange over the initial bill to provide for a federal education agency, Democratic Senator Thomas Hendricks argued that a “supervising control in the city of Washington over the State institutions and State systems” would do nothing but “furnish some offices for some men.” It would, he continued, “result in the end in a very large expenditure of the public money … without an adequate return.” Nevada Republican William Stewart replied that the bill’s object was “not to exercise control over the States, but to collect information as to the very good systems of the States, and lay it before the whole country, so as to enable the States that have not perfected their systems, the new States and those that have not good systems of education, to know what is being done in other parts of the country.”

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289 Id., at 71. Shortly before the Civil War, 38% of UNC graduates went on to read law and 11% became teachers; toward the end of the century, 19% read law and 37% became teachers. Id. Reading law, wrote Leloudis, “bore the taint of the Old South,” in which “slavemaster-statemen” wielded power but produced no progress. Id., at 70.
290 See Leloudis, *supra* note __, at xii.
296 Id.
297 Id.
The controversy had not abated several years later when the U.S. Commissioner of Education, John Eaton, defended the Bureau’s information collection in his 1874 report:

Can it reasonably be charged that the gathering and distribution of such information tends to the concentration of power? Is it not rather the very opposite? It puts into possession of every one who has intelligence to comprehend the given case all any officer can know, all that the nation can know. The principle is a grand equalizer, and is essential to the universal application of the primary ideas of republican as distinguished from other forms of government.298

The federal government was not alone in influencing education policy. In 1867 George Peabody, a northern philanthropist, created a fund to promote public education in the South. The Peabody Fund’s trustees agreed to judicious terms for disbursement and favored working through the machinery of existing state systems of school governance.299 They appointed Rev. Dr. Barnas Sears as General Agent to administer the fund’s distribution.300 From his headquarters in Staunton, Virginia, Sears exercised significant control over how school officials applied for aid, as evidenced in his instructions to the North Carolina Superintendent:

In your directions to subordinate school officers, you are requested to say that all applications for aid, and all letters and papers relating to the subject, are to be addressed to you, or through you to me; that the blank forms prepared by you for this purpose, and containing our rules, must be used in all such applications; that these must be endorsed by you, and accepted by me, in writing, before you are authorized to promote any aid; and that finally a certificate, for which you are to furnish a blank form, must be given near the close of the school year, stating that the conditions of the engagement have been fulfilled. On receipt of this certificate, approved by you, payment will be made.301

Sears complained to Superintendent John Pool in 1876 of the “irregularity and unsystematic mode” of applications from North Carolina schools, and threatened to withhold any further aid. In response, Pool prepared uniform blank forms for applications.302 On his first day in office in January 1877, Superintendent Scarborough found Sears’ instructions, but saw that Pool had sent no applications for Peabody assistance. “Under [those] discouraging circumstances,” wrote Scarborough, “Dr. Sears did not feel very hopeful for any immediate results from his efforts to encourage public schools in North Carolina.” After communicating with Sears and local officials, the Superintendent facilitated aid for about a dozen schools over the next two years.303

The federal Bureau of Education and organizations like Peabody Education Fund created new roles for the Superintendent as a mediator between local officials and out-of-state actors. Just as the Superintendent collected information from counties and districts, he now submitted

298 BUREAU OF EDUCATION, 1874 REPORT OF THE COMMISSIONER OF EDUCATION v (1875).
300 Id., at 106.
information upward for analysis at the federal level. More pressing, during the years following the Civil War, the Superintendent was responsible for facilitating financial aid. Such outside funding became crucial after the court, in *Lane*, declared education an unnecessary expense ineligible for taxation without voter approval.

**Civil Service Reform**

The late-nineteenth century witnessed a national movement for professionalism in government service. At the federal level, this manifested in a new regulatory body overseeing bureaucratic abilities. In North Carolina, political rhetoric reflected the trend; and, Superintendents increasingly advocated that professional standards apply to teachers and local school officials.

The skepticism against bureaucratic expansion during the development of a federal education agency evoked a broader sentiment against unqualified government office-holders—a reverberation of the patronage debates during the Jacksonian era. That perception spurred, during President Grant’s administration, a civil service reform movement that was, as Professor Jerry Mashaw described, “as much a moral crusade as a battle for technocratic competence.”

After a “disappointed office-seeker” shot President Garfield in 1881, Congress passed legislation that, as its title described, aimed to “Regulate and Improve the Civil Service of the United States.” The Act required that appointments be based on merit and created the Civil Service Commission to administer the law by, among other things, examining potential appointees.

North Carolinian politicians readily adopted the anti-corruption theme of civil service reform. Democrats emphasized government corruption during the 1874 campaign, when Stephen Pool overtook McIver for the office of Superintendent. Hoisted somewhat on his Party’s petard, Pool soon resigned after being accused of using Peabody money for personal use, and he was replaced with Republican John Pool. John Pool served only briefly before Democrat John Scarborough won the next election for Superintendent. During his reelection campaign, the Democrats continued to emphasize civil service reform, their platform being “in favor of an honest administration of the Government ….”

Woodrow Wilson would have observed the civil service reforms as a student of law, politics, and history. While it was important to assure the qualifications of government workers, Wilson saw a broader need for a systematic study of governance. To that end, Wilson wrote his landmark article, “The Study of Administration,” aiming to improve the “organization and methods” of government work. Wilson proposed that Americans learn from the prevailing model, Prussia,

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305 Popularly known as the Pendleton Act, 47 Cong. Ch. 27, 22 Stat. 403 (1883); *see* Mashaw, supra note 304, at 1389.

306 *Id.*, § 2.

307 *See* Knight, supra note 306, at 261.

308 John Pool, like his predecessor, hailed from Elizabeth City. He helped establish the Republican Party in North Carolina. *Powell, supra note 306 (dictionary), at 118 - 121; see also* Knight, supra note 306, at 260-261.


311 *Id.*, 197. According to Professor Jerry Mashaw, Wilson’s article invented the field of public administration. *See* Mashaw, supra note 304, at 12.
where, according to Wilson, “administration ha[d] been most studied and most nearly perfected.”312 The model could then be conform[ed] to American democracy.313

A crucial problem that Wilson hoped administrative studies could address was the interplay of expertise, accountability, and politics in bureaucratic administration.314 Government workers can benefit from being insulated from politics and focused on a particular expertise; but, government work can benefit from being exposed to politics and the subsequent accountability. Wilson wrote:

To whom is the official trustworthiness to be disclosed, and by whom is it to be rewarded? Is the official to look to the public for his need of praise and his push of promotion, or only to his superior in office? Are the people to be called in to settle administrative discipline as they are called in to settle constitutional principles? These questions evidently find their root in what is undoubtedly the fundamental problem of this whole study. That problem is: What part shall public opinion take in the conduct of administration?315

A government’s constitution, Wilson concluded, helps resolve that problem. While constitutions do not generally address the details of administration, they can create a government structure that fosters accountability and expertise.316

Wilson’s suggestion to consider administrative effectiveness while framing the underlying constitution came, of course, several years after North Carolina’s 1868 Constitution and 1875 amendments.317 His article nonetheless indicates a paradigm shift, occurring during the late nineteenth Century, during which people started taking bureaucratic competency seriously. Early school leaders tended to be generalists and charismatic statesmen.318 By the end of the nineteenth century, though, educational governance “had gravitated,” as education historians Elizabeth Hansot and David Tyack described, “from the locally based and part-time evangelists for the

312 See Wilson, supra note __, at 204
313 Id., at 218.
314 Id., at 210.
315 Id., at 214.
316 See id., at 212 – 213. Wilson wrote:
There is, indeed, one point at which administrative studies trench on constitutional ground—or at least upon what seems constitutional ground. The study of administration, philosophically viewed, is closely connected with the study of the power distribution of constitutional authority. To be efficient it must discover the simplest arrangements by which responsibility can be unmistakably fixed upon officials; the best way of dividing authority without hampering it, and responsibility without obscuring it. And this question of the distribution of authority, when taken into the sphere of the higher, the originating functions of government, is obviously a central constitutional question.

317 Still, the article provided a vocabulary for contemporaries and those thereafter to apply to the growing administrative state. To wit, along with the history behind the language creating a Superintendent and Board of Education, participants in educational governance in the late nineteenth century might have superimposed a structural purpose to those provisions.

318 Elizabeth Hansot and David Tyack described early school leaders. They “worked sometimes as lawyers, became newspaper editors, and then went to state legislatures or superintendencies. … [T]hese local notables looked on themselves not as professional educators, not as people whose authority lay in specialized knowledge, but as leaders able to articulate and represent shared values. They were, in short, aristocrats of character, not bureaucratic experts.” Elisabeth Hansot & David Tyack, A Usable Past: Using History in Educational Policy, in 81 POLICY MAKING IN EDUCATION 4 (Ann Lieberman & Milbrey McLaughlin ED., 1982).
common school to a new breed of experts and professional managers, people who made education a lifelong career, created new fields of specialization, and sought to reshape the schools according to the canons of educational science and business efficiency."  

While John Pool was in office, Trinity College president Dr. Braxton Craven wrote a memorial to the General Assembly criticizing the public schools’ condition. In a departure from familiar grievances, though, Craven charged that the problems arose not from insufficient funding, but from ineffective administration. Craven complained that the schools had “no common standard; no established relation and succession of studies; no uniformity in books; no tests of efficiency and no form of control competent and able either to discover defects or to correct abuses.” Rather than a want of money, Craven concluded that “these defects seem[ed] to result more from want of organization, insufficient administration, and the entire absence of special superintendence than from all other causes combined.”

The *ex officio* composition of the State Board of Education made movement toward expertise in that Board impossible. State Superintendents, though, began emphasizing the imperative that professional educators serve as county- and district-level school leaders, and that teachers receive adequate training and certification.

**Professionalism by Association**

In early 1873, the State Board adopted resolutions calling for a convention in Raleigh “for the purpose of considering and recommending such measures as might be deemed advisable for the promotion of education in the State.” During a three-day meeting in the Capitol, attendees discussed the University of North Carolina, the public schools, teacher-training, and compulsory education, sharing a general sense that the “educational institutions … immediately under the charge of the State, [were] languishing and depressed.”

Toward the end of the convention, Dr. Craven called for a “permanent educational association” to “unite all citizens, and excite them to vigorous, effective action in the great work of educating the people.” Forty-four attendees enrolled in the new group, to be called the State Educational Association. They adopted a constitution, and opened membership to any North Carolina resident upon the fee of one dollar. The group also voted to start a new North Carolina Journal of Education. The journal failed to materialize, though, because the publishers refused to begin printing until promised a sufficient base of subscribers. That base of subscribers, in turn, failed to materialize as the new Association did not hold consistent meetings over the next decade.

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319 *Id.*, at 5.
320 BUREAU OF EDUCATION, 1876 REPORT OF THE COMMISSIONER OF EDUCATION 299 (1877).
321 *Id.*
322 See infra text accompanying notes _._
323 1873 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 42. http://www.archive.org/stream/executivelegisla187374nort#page/n415/mode/2up
324 *Id.*, at 42 – 49. The quote is from the opening address of the convention’s president, William Horn Battle. The University was closed at the time.
325 *Id.*, at 49.
326 *Id.*
327 *Id.* This is the same name as the journal published during Superintendent Wiley’s tenure.
328 *Id.*, at 51. Superintendent McIver asked the General Assembly subsidize the new journal as it had for Wiley’s journal. *Id.*, at 52; see also An Act Concerning Common Schools in North Carolina, Ch. 19, § 6, 1860-61 Sess. Laws 31. In 1875, the House and Senate resolved to allow Superintendent Stephen Pool to draw $700 from the treasury to pay for publication of the Journal of Education, if the publishers agreed to
In 1883 a publisher named Eugene Harrell started an independent journal called the *North Carolina Teacher*, and in its initial publications organized a meeting for educators at the Haywood Springs Hotel in the mountains near Waynesville, to be modeled after the Chautauqua Lake Sunday School Assembly. The following June, a train travelled from Goldsboro to the resort, picking up over 300 teachers along the route. The meeting went well—Harrell immodestly described it as “a complete success in every particular, and [one that was] conceded to have been the grandest and most important educational meeting ever held in the South”—and the attendees formed a permanent group called the North Carolina Teachers’ Assembly, adopting the *North Carolina Teacher* as its official organ. In 1891 with more than four thousand members, the Assembly built a permanent meeting facility near Morehead City.

North Carolina’s Superintendents celebrated the organization as a unifying force. For Superintendent McIver the Teachers’ Assembly was more than a forum for improving teacher quality. In his address to the group in 1884 he lauded the potential for groups of teachers to

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330 One reason for the diminished interest in the Association is likely the reopening of the University in 1875, its closure having been a primary provocation for the group’s initial meeting. That is not to say there were no attempts at maintaining educational organizations; the teachers at the summer normal school at UNC during 1878, for instance, organized a “North Carolina Teachers’ Association,” see 1878 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 9, available at http://www.archive.org/stream/northcarolinatea1884rale#page/n31/mode/2up; also see 1880 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 35-37 (a memorial from the Teacher’s Association to the General Assembly) available at, http://www.archive.org/stream/northcarolinae1881nort/page/n647/mode/2up; also see Knight, supra note __, at 364, n.1.


332 See Leloudis, supra note __, at 89. Harrell had urged in his editorials that the Teachers’ Assembly establish a permanent headquarters. 2 THE N.C. TEACHER, No. 2, 89, available at http://www.archive.org/stream/northcarolinae1884rale#page/n97/mode/2up/. Several other associations formed with more specific foci in education work. When Knight described the state of public education in 1916, the group was met in Raleigh, in conjunction with associations such as “the Association of Kindergarten Teachers, the Association of Primary Teachers, the Association of Grammar Grade Teachers, the Association of County Superintendents, the Association of City School Superintendents and Principals, the Association of Music Teachers, and the Association of High School Teachers and Principals.” See Knight, supra note __, at 362.

333 Writing for the Federal Bureau of Education in an 1888 circular, Charles Smith could identify “no one force more powerful for good than the North Carolina Teachers’ Assembly,” and wrote that the Superintendent believed the institution was “doing more to further the educational advancement of the State than all other agencies combined.” Smith, supra note __, at 177, available at http://docsouth.unc.edu/true/smith/smith.html#p173.
persuade legislators and the public. The new Teachers’ Assembly, he concluded, could be a beneficial force affecting the public school system. Indeed, the group’s subsequent trajectory followed a route of both professionalizing teachers and lobbying the state. The Teachers’ Assembly became the North Carolina Education Association in 1922. It would later be called the North Carolina Education Association and, after merging with the North Carolina Teachers Association in 1970, it became what it is today: the North Carolina Association of Educators.

**Professionalism by Training**

The state’s role in teacher training significantly increased in the last two decades of the nineteenth century. Using state and foundation funding, the state gradually but substantially increased its role in training public school teachers. The Superintendent’s role in organizing and supervising these programs laid the foundation in defining the practical duties of the position.

The 1868 Constitution required the General Assembly to establish in the university a department of “normal instruction,” the phrase then used for teacher-training. Superintendent Ashley invoked that constitutional requirement in his first annual report, but conceded that the “condition of the University” at the time—it was in financial decline, and would be closed between 1871 and 1875—hindered implementation. Rather than working through the university, Ashley proposed that the State Board administer teacher-training and certification. In his third report Ashley, still urging state supported teacher-training, argued that teaching was a profession that, like other professions, required specialized training. “Prussia,” he wrote, “with the best system of Public Instruction, maintains professional training schools, so do nearly all the old States of this Union.” Bypassing the connection of normal schools to the university, Ashley wrote that the constitution contemplated [ed] the establishment of Normal, or training schools, as *part of the system.*

After the University reopened, the Central North Carolina Teachers’ Association, Superintendent Scarborough, and University President Kemp Battle pressed the General Assembly to meet the constitutional requirement to train teachers, lamenting that the “public schools generally do very little more than prevent the establishment of good private schools.” The legislature finally appropriated $2,000 to establish a normal school at the University for young white men and another $2,000 to establish, wherever the State Board deemed suitable, a normal school for young

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335 Id., at 80-81.
337 N.C. CONST, of 1868 art. IX, § 16 (1868). The idea was not new; proposals for a centralized teacher-education school reach back to 1832 when the Senate resolved to have the Committee on Education and the Literary Fund “inquire into the expediency of establishing by law a central school … for the purpose of educating and preparing instructors of elementary schools for their profession ….” See Coon, *supra* note _, at 534.
black men.\textsuperscript{341} Students of both races would be required to teach within North Carolina for three years.\textsuperscript{342}

The State Board decided to admit women into both normal schools, using Peabody funds to provide financial aid for the female students.\textsuperscript{343} President Battle administered the school at the University, which met for six weeks during each summer.\textsuperscript{344} The State Board established a permanent normal school for black teachers in Fayetteville, which consisted of a three year program of four-month terms under the leadership of a principle and a three-member board of managers.\textsuperscript{345}

According to Superintendent Scarborough the teacher-training schools were not enough, as they failed to reach most teachers.\textsuperscript{346} In 1881 the General Assembly adopted his proposals, with legislation he drafted, to increase the number of normal schools and to establish teacher institutes in each county to reach existing teachers. The county superintendents were to oversee mandatory institutes in which all the teachers certified in a county would receive a few days of instruction on teaching methods.\textsuperscript{347} “No appropriation of funds,” wrote Scarborough, “[had] ever paid our school system so much in good results returned as this appropriation for teachers’ institutes in connection with the work of the county Superintendents.”\textsuperscript{348}

Scarborough’s program of county institutes was short lived. The legislature in 1883 cut the salaries for county superintendents, which, according to Scarborough, reduced the number of county institutes and “materially lessened” the “efficiency of those” that remained.\textsuperscript{349} Perhaps

\textsuperscript{341} An Act to Establish Normal Schools, Ch. 234, §§ 1, 2, 1876-77 N.C. Sess. Laws 437, available at \url{http://www.archive.org/stream/lawsresolutionso187677nor#page/436/mode/2up}.
\textsuperscript{342} Id., §3; see also, Leloudis, supra note \_\_ at 70.
\textsuperscript{343} Kemp Plummer Battle, History of the University of North Carolina: From 1868 to 1912, 143 (1912); see also 1878 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 41, available at \url{http://www.archive.org/stream/publicdocumentso1879nort#page/n719/mode/2up}.
\textsuperscript{344} See Battle, supra note \_\_ at 142-143.
\textsuperscript{345} 1878 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 39, 46-47, available at \url{http://www.archive.org/stream/publicdocumentso1879nort#page/n719/mode/2up}.
\textsuperscript{346} 1883 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 19, available at \url{http://www.archive.org/stream/executivelegisla1883nort#page/n745/mode/2up}.
\textsuperscript{348} 1882 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 19. The 1881 law also re instituted county superintendents, as discussed below.
\textsuperscript{349} 1884 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 2.
because he knew it would be his last report, Scarborough was unusually critical of the Legislature, accusing it of having “cut the life and energy out of the [school] system.” 350

The next Superintendent, Sidney Finger, continued recommending county institutes throughout the 1880s and suggested that the summer normal schools for white teachers be abolished in favor of the county institutes and a single college dedicated to training teachers. 351 The 1889 Legislature partially obliged by repealing the existing summer normal schools for white teachers, and appropriating the money instead to county institutes, which would be under the direction of the State Board of Education. 352

“Instead of the old plan of County Institute work,” wrote Superintendent Finger in his next report, “the State Board of Education decided to select two competent men as Institute Conductors, and make this Institute work their regular work under the supervision of the State Superintendent.” 353 Peabody funds allowed the State Board to hire three more during 1889, one of whom was future Superintendent James Joyner. And Peabody provided more money the following year allowing for another three conductors. 354

Superintendent Finger facilitated the conductors’ trips to the various counties; and the conductors, once there, worked with county superintendents to conduct the institutes. 355 Before sending the conductors out, Finger “printed for their guidance and for distribution in the counties” a pamphlet titled “What are we to aim at in the Institute work?” with detailed suggestions for fulfilling the Superintendent’s goals for the program. 356 Edgar Wallace Knight in 1916 described the work of the first two institute conductors, Charles McIver and Edwin Alderman: “For two years they went up and down the State teaching teachers, organizing educational associations, holding mass meetings, and preaching the gospel of universal education, free and open alike to all classes.” 357

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350 Scarborough included a farewell to his colleagues in the report. Id., at 44.
351 Finger recommended the “establishment of a thorough system of County Institutes and examination of teachers, and that all teachers be required to attend the Institutes.” 1887–1888 N.C. SUPERINTENDENT OF PUB. INSTRUCTION BIENNIAL REP. xii (1888), available at http://www.archive.org/stream/biennialreportofspi1889nort#page/n53/mode/2up.
352 An Act to Abolish the White Normal Schools of the State, and to Provide for holding County Institutes throughout the State, Ch. 200, 1889 N.C. Sess. Laws 171, available at http://www.archive.org/stream/stream/publicdocumentso1889nort#page/n81/mode/2up.
354 1889-1890 N.C. SUPERINTENDENT OF PUB. INSTRUCTION BIENNIAL REP. xlii.
355 Id., at lvii-lviii.
356 Id., at l-li. For example, he asked the conductors to “teach the teachers how to govern their pupils by inspiring them with a thorough interest in their studies, and by showing such zeal for their progress and welfare in every way as to command obedience by respect and love, rather than by fear.”
357 Knight, supra note _, at 322.
Meanwhile Superintendent Finger, Governor Fowle, and interested organizations continued pressing the need for a central teacher-training college to the 1891 Legislature. The Governor pragmatically argued that, if the specter of taxes prevented a school for both genders, the state could create a centralized normal school for women, “because the indications are that it will be from that sex that the large majority of our teachers will come in the near future.” The increasingly powerful Farmers’ Alliance called for women’s higher education and the King’s Daughters called for women’s industrial education. The result was 1891 legislation creating a “Normal and Industrial School” for white women, to be governed by a board of directors. Each graduate received a certificate enabling her to teach anywhere in the state.

The school has remained where it was established, and is now the University of North Carolina at Greensboro. The General Assembly also passed a much less detailed bill to establish a school to train black teachers. That school also remained where it was established, and is now Elizabeth City State University.

Teacher Certification

Teacher certification existed in North Carolina since 1847, but was initially a matter of local control. County superintendents appointed committees to examine into and certify teachers with sufficient “mental and moral” qualifications. The first legislation under the 1868 Constitution created a “county examiner,” to be selected by the county board of education, who certified teachers according to rules prescribed by the Superintendent and State Board. Legislation in 1873 created grades of certification. Applicants “qualified to teach classes in the higher branches of English” received first grade certificates, those qualified for ordinary branches of English

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received second grade certificates, and those qualified to teach only primary classes received third grade certificates.\footnote{367}{Act of February 26, 1873, ch. 90, §§ 13, 14, 1872-1873 N.C. Sess. Laws 119, available at http://www.archive.org/stream/publiclawsresolu187273nor#page/122/mode/2up. The General Assembly in 1881 replaced the county examiner with the office of county superintendent, a move that Superintendent Scarborough advocated. The statute also revised the standards for respective grades of certification. Applicants had to earn “fifty per centum” in every branch to be taught; an average 90% merited first grade certification, 80% merited second grade, and 70% merited third. The statute did not specify of what the per centum was from. An Act to Revise and Consolidate the Public School Law and to Make More Efficient the System of Public Instruction in this State, ch. 200, § 38, 1881 N.C. Sess. Laws 371, available at http://www.archive.org/stream/lawsresolutionso1881nort#page/382/mode/2up. In 1895, the General Assembly abolished the county superintendent, and required the clerks of the superior court to appoint re-established county examiners. An Act to Amend the General School Law of North Carolina, ch. 439, 1895 N.C. Sess. Laws 465.}

The 1873 law did not specify, as its predecessor had, that the State Board and Superintendent would prescribe rules for the issuance of certificates.\footnote{368}{Compare Ch. 184, § 36(1), 1868-69 N.C. Sess. Laws 438, and Ch. 90, § 14, 1872-1873 N.C. Sess. Laws 119.} Nonetheless, “[f]or the purpose of bringing teachers of the public school to a higher standard,” Superintendent McIver issued a circular to the boards of examiners with guidance for certifying teachers in the new grades.\footnote{369}{1873 N.C. SUPERINTENDENT OF PUB. INSTRUCTION ANN. REP. 14, available at http://www.archive.org/stream/executivelegisla187374nort#page/n387/mode/2up. The Superintendent’s guidance specified fields that applicants for teachers should master; for instance, along with mastering the subjects specified for the third and second grades, applicants for a first grade certificate should have mastered “drawing, book-keeping, the rudiments of Natural Philosophy, Chemistry, Botany and Astronomy.” Id., at 15.} The summer normal schools of the 1880s became the first state-level entities authorized to certify teachers to teach in any county of the state without further examination.\footnote{370}{An Act to Establish a Normal School at Trinity College, Davidson College and Wake Forest College, ch. 226, § 2, 1879 N.C. Sess. Laws 385, available at http://www.archive.org/stream/lawsresolutionso1879nor#page/386/mode/2up.} Still, the State Board in subsequent regulations preserved a role for the county examiner to sign off on the moral character of normal school graduates before they could receive final certification. The county officials could then revoke the certificate of a teacher guilty of “disrespectable conduct, or [being] negligent in the discharge of his or her duties ….”\footnote{371}{An Act to Abolish the White Normal Schools of the State, and to Provide for Holding County Institutes throughout the State, ch. 200, §§ 5, 6, 1889 Laws 171, available at http://www.archive.org/stream/lawsresolutionso1889nort#page/172/mode/2up. Superintendent Finger submitted the model examination that he distributed in his next report. 1889-1890 N.C. SUPERINTENDENT OF PUB. INSTRUCTION BIENNIAL REP. XXIX-XXXV, available at http://www.archive.org/stream/biennialreportofspi1889nort#page/n33/mode/2up.}

Superintendent Finger’s county institutes brought further state-level influence on certification. As the institute conductors began their work in 1889, the General Assembly provided that they, “in conjunction with the county superintendent,” would hold exams and issue certificates. For certifications issued outside the institutes, the law allowed the State Superintendent to prepare and send out questions that county superintendents would be required to use in their regular examinations.\footnote{372}{An Act to Amend the General School Law of North Carolina, ch. 439, 1895 N.C. Sess. Laws 465.}
The statute creating the Normal and Industrial College allowed the instructors to issue certificates entitling graduates to teach in any state school. It also allowed county institute conductors to issue first grade certificates. By the 1890s, then, the school laws regarding teacher certification had shifted from fully local control to almost fully state control.

**The New Paradigm of Administration**

The last superintendent of the nineteenth century, Charles Mebane, sought to bring the teacher examination process even more completely within state control with a new State Board of Examiners. Mebane won the 1896 election for Superintendent as a Fusionist, during the brief period that populists and Republicans joined forces sufficiently to interrupt Democratic rule. Mebane’s brief tenure at the end of the nineteenth century provides a useful insight into the foundation laid by developments in educational governance up to that point.

During his first year in office, Mebane won support in the legislature for a revised school law. The legislation reflected the trajectory of administration in the late nineteenth century. It further centralized education policy in state government and professionalized the bureaucratic apparatus. A long-time impediment to effective civil service was, according to Mebane, local politics:

> Why have not the men best qualified to fill these positions been elected in every county in North Carolina ever since we had the office of County Superintendent, of County Examiner, and of County Supervisor? I am sorry to tell those of you why, who do not already know, but I will do it. Politics was the cause, and is the cause to-day.

*The public schools have been in the galling grasp of the court-house politicians for twenty years in some of the counties.*

In a recommendation not adopted by the General Assembly, Mebane proposed that teachers choose the head school official in each county. The official would thus be “elected for his educational power and influence, instead of for his political power, as

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374 See infra, at _.
375 Leloudis described Mebane as having abandoned his “Democratic roots,” out of political expediency, to join the Fusionists. Out of spite, Leloudis argued, Knight omitted Mebane from any mention in his history of public education in the state. He was selected at the populist convention by members that resisted a more forceful fusion with Republicans. See Hamilton, * supra* note _, at 260.
376 During his tenure the Red Shirt paramilitary groups violently intimidated voters and fueled racial animosity. After gaining ground in the 1898 elections, the Democrats sent Josephus Daniels, editor of Raleigh’s *News and Observer*, to study methods to do with law what they had done previously by violence. Leloudis, 136. The result was a constitutional amendment aimed at disenfranchising African Americans, inspired by the approach taken in Louisiana. The amendment required a literacy test for eligible voters, paired with a grandfather clause relieving from the test any male (and his lineal descendants) who could vote on January 1, 1867. See Hamilton, * supra* note _, at 300. Superintendent Mebane supported the amendment, and was one of many Populists that broke from the Fusionists. See id., at 307.
378 1896-1898 N.C. SUPERINTENDENT OF PUB. INSTRUCTION BIENNIAL REPORT, 9 (emphasis in original).
379 1896-1898 N.C. SUPERINTENDENT OF PUB. INSTRUCTION BIENNIAL REPORT, 10.
[was] often the case under the present law." While the General Assembly did not accept that recommendation, the new school law indirectly reduced the clamor of local politics by reducing the number of political venues available. The 1897 law required the county boards to divide the county into only so many districts as there were townships in the county, aggregating the balkanized districts into more manageable clusters. The board would select five school committee members charged with locating schools and assuring that each school contained, on average, at least 65 students. The use of townships reduced the number of local officials and the corresponding political bickering.

The statutory structure of local education governance had shifted throughout the late nineteenth century, with titles changing frequently and county officials serving double duty as school officials. Under the 1897 law, the school board became distinct from the county commissioners, who were instructed to elect three board members “of good business qualifications and known to be in favor of public education ....” The county board would then select a “practical school teacher” to serve as its secretary and county supervisor. In an address at the annual meeting of the Teachers’ Assembly, Mebane praised the requirement that county supervisors have teaching experience, as opposed to the “lawyers, preachers’ doctors, merchants, and others” that took positions as school officials merely to “supplement their salaries or other business in which they were engaged.”

Mebane also believed that the Superintendent of Public Instruction should be removed from partisan politics. Rather than seeking structural changes in the Constitution, though, Superintendent Mebane tried to establish a social expectation against the Superintendent’s politicking. In a section of his report titled “Relation of the Office to Party Politics,” Mebane wrote that North Carolinians might soon “see to it that the Superintendent of Public Instruction, whoever he may be, will not only not be expected to take an active part in political campaigns, but that public opinion may be so strong against such actions that he will not dare to do so.”

As had prior Superintendents, Mebane advised local officials on implementing the law. For instance, with some ambiguity seeping through the passive voice, the law provided that the county supervisor “shall be required to visit the public schools in his county, while in session, but

380 1896-1898 N.C. SUPERINTENDENT OF PUB. INSTRUCTION BIENNIAL REPORT, 11 (emphasis in original).
382 See Leloudis, supra note _, at 127.
383 The 1869 school law created a county examiner, appointed by county commissioners. The examiner became a board of examiners that began issuing graded certificates in 1873, and the position switched again to a single examiner in 1877. In 1881, the legislature replaced the county examiner with a county superintendent, which was in turn replaced with a county examiner in 1895. County commissioners also served as county boards of education through the 1870s and 1880s, but the 1895 Legislature abolished the county boards of education in favor of referring solely to county commissioners. See 1868-69 N.C. Sess. Laws 458, §§ 33, 35; 1872-1873 N.C. Sess. Laws 119, §§ 13, 14; 1876-1877 N.C. Sess. Laws 323, § 14; 1881 N.C. Sess. Laws 371, §§ 18, 38; 1895 N.C. Sess. Laws 465, §§ 2, 10.
384 1897 N.C. Sess. Laws 149, § 6. The clerk of the county’s Superior Court and the register of deeds joined the county commissioners in selecting the board of education.
385 1897 N.C. Sess. Laws 149, §§ 5, 7, 18. The statute was altered slightly in 1899. The county boards of education became boards of school directors to be selected by the General Assembly rather than county commissioners. An Act to Revise and Consolidate the Public School Law, Ch. 732, § 13, 1899 N.C. Sess. Laws 903. The office of county supervisor became a county superintendent. § 15.
386 Superintendent Mebane’s Address to the Teachers Assembly, 1897, http://www.archive.org/stream/biennialreportofspi1896nort#page/n121/mode/2up
under the direction of the County Board of Education ….” In some counties, the boards of education interpreted the provision to allow them to prevent supervisors from visiting schools at all. In response, Superintendent Mebane sent out a circular warning that such an interpretation was “contrary to the law,” and offering his own guidance on the law’s intent:

The provision, “but under the direction of the county Board of Education,” is a wise one. Under the old County Superintendent system, I heard of one county Superintendent who visited schools the greater part of the year. He would only visit one school a day, no matter how near by another school was. He managed to have some schools taught during the summer, and some during the autumn and winters in his county, so that he could find visiting to be done the greater part of the year. Thus, you see the need of a check for such characters. It is the duty of the County Board of Education to see that no useless time is charged against the School fund by the County Supervisor.

…If the Supervisor is not capable of discharging his whole duty the County Board of Education is responsible for it, and if he is capable of discharging his duty I beg you not to tie his hands, but send him out among the schools and among the people. We must just pound it into many of our people, how great is their responsibility to their own children and their neighbor’s children—and our county Supervisors should do a large share of this pounding.

Although Mebane stressed the county’s role in watching over the supervisor, the new school law allowed the State Superintendent, for the first time, to take direct action against ineffective local officials. The supervisor visited schools, advised teachers on “the best methods of instruction and school government,” and had the authority to suspend inadequate teachers. The State Superintendent, in turn, could report any inadequate supervisor or member of the county school board to the county board, which would hold a hearing on the matter. Either party could then appeal to the State Board of Education, which made the final decision on whether to remove the supervisor.

The 1897 legislation furthered the state’s control over teacher-quality with the creation of an entirely new state government body, the State Board of Examiners, consisting of “three professional teachers” selected by the State Board of Education, and chaired by the State Superintendent. For current teachers the Board prepared and distributed professional development materials, thus granting to a state body the central role of maintaining teacher quality. The law also authorized the State Board of Examiners to prepare examinations for “first grade life certificates” that could be used to teach in any county.

389 Id., §§ 21.
390 Prior school laws allowed local citizens and officials to take action against school officials. See Laws 1840, Ch. 7, §§ 26, 27 (allowing citizens to file suit against local officials); Laws 1842-43, Ch. 58, § 5 (making it a misdemeanor to misappropriate school money); Laws 1844-45, Ch. 35, § 8 (citizens “aggrieved by” district-level school official can appeal to county school board to remove the district official).
392 Id., §§ 5, 6, 7, 24.
393 Id., §§ 1, 5.
394 Id., § 2.
395 Id., § 3.
Mebane began his 1898 biennial report with a recommendation that the Board of Examiners’ power be increased to prepare uniform examinations for all white public school teachers in the state, the course of studies for the black normal schools, and the course of studies for county institutes for both races. His recommendation eventually, but after his tenure, became law. The Democrats who came to power at the turn of the Century retained, in their consolidation of the school laws in 1901, much of the administrative structure that had been built during the prior decades. They did not keep the Board of Examiners, but the General Assembly revived the body in 1917 with the State Board of Examiners and Institute Conductors.

Conclusion

The archives do not contain an answer key to the Board of Examiners’ 1899 certification exam, but the correct answer to the question of whether or not the Superintendent held a sinecure would have been “no.” To be sure, that is partially a result of the decision made in 1868 to place the Superintendent into the constitution as a popularly elected executive official, serving as secretary on the Board of Education. But that answer may not have satisfied the Board of Examiners in 1899. Superintendent Mebane, in his biennial report, provided a clue. In the same section in which he worried that people viewed his office as “a kind of sinecure,” he thanked the “press of [the] State” for printing his official circulars, thus making more widely known the activities of the office. The correct answer to the latter portion of Mebane’s question for teachers seeking a license in 1899—Is the office of Superintendent Public Instruction a sinecure, if not, why not?— would have contained a summary of the work performed by those in that office and the responsibilities undertaken.

Apart from appeasing a defensive state official, though, such a summary helps us understand the office’s constitutional nature. Constitutional and statutory texts clearly affect the organization and functioning of state agencies. A reverse influence, though, exists. Agency practice affects constitutional meaning because it informs how framers, ratifiers, and subsequent legislators comprehend the underlying meaning of relevant constitutional provisions. Administrative history, as well as the constitutional language of 1868, must be considered to fully understand the Superintendent’s role in North Carolina’s government.

Prior to the adoption of the 1868 Constitution, the Literary Board exercised oversight of the state finances connected to the education system and set some statewide education policy, while the Superintendent did what the Literary Board first proposed in 1838 that such an official do—to “direct and control [the] complicated, but not inharmonious” school system. After ratification of the 1868 Constitution, the State Board of Education and Superintendent of Public Instruction carried on the previous functions of the Literary Board and Superintendent of Common Schools. During the concluding three decades of the nineteenth century, statutory and normative developments gradually shifted control over teacher quality to the state level, often resulting in the Superintendent exercising greater power. It was an era of administrative experimentation with few settled rules, and active Superintendents such as Ashley, Scarborough, Finger, and Mebane established roles for their office, roles that gradually became accepted by the office holders, the Legislature, and the public as inherently connected with that of the Superintendent of Public Instruction.

399 See 2 Coon, supra note _, at 847.
Statutory developments in the latter part of the century reflected the Superintendent’s increasing control over the public school system. Except for the bulk of the 1870s, during which the Superintendent was to “look after the school interests of the state at large,” the statutes directed the Superintendent to “direct the operations of the system of public schools and enforce the regulations and laws in relation thereto.”

In 1883, the school law charged the county boards of education “with the general management of the public schools” and directed them to “decide all controversies and questions … which may arise upon the construction of the school law, and [to] see that the school law is enforced.” The General Assembly amended that section in 1885 by adding that “the county board shall obey the instructions of the State Superintendent and accept his construction of the school law.”

The statutes also allowed the Superintendent to assert control over the quality of administrators and teachers. The Superintendent controlled the county institute conductors who provided teachers professional development and carried the Superintendent’s message throughout the state. The same 1889 statute providing for county institutes allowed the Superintendent to send out questions for teacher examinations, and less than a decade later the Superintendent became the ex officio chair of the Board of Examinations. By the end of the century, the public school law allowed the Superintendent to identify ineffective local administrators for removal from office.

The system of public schools consisted of more than that created by state statutes. The new federal education bureau and the Peabody Fund required the Superintendent to send information outside the state and act as an intermediary between local and out-of-state actors. Associations like the Teachers’ Assembly formed independently from statutory directive and offered professional development and guidance to teachers. No statutory provisions dictated the Superintendent’s relationship to these groups, yet the Superintendent was the state official who maintained contact with out-of-state groups and harnessed the potential for professionalism presented by the teacher associations.

Those developments had a structural impact on the Superintendent’s role. The antebellum Superintendent could be understood as the single head of several local districts. He helped steer county officials toward adherence to state laws and standards and served as a single receiving

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402 N.C. GEN. STAT. § 2546 (1883), available at http://www.archive.org/stream/codeofnorthcarol02nort#page/n5/mode/2up. The same section required county board to settle disputes “relating to the boundaries of the school districts and to the location of school houses ….”
403 An Act to Amend the Public School Law, Chapter Fifteen of the Code, ch. 174, § 3, 1885 N.C. Sess. Laws 266. That provision remained throughout the century, and in 1895 Superintendent Scarborough provided guidance in his publication of the school laws, urging the local officials to “exercise … the highest wisdom, that the interest of the public schools may not suffer by reason of neighborhood quarrels, which always result in harm to all public interests, especially to those of the schools.” SUPERINTENDENT OF PUBLIC INSTRUCTION, PUBLIC SCHOOL LAWS OF NORTH CAROLINA § 2546 (1895), available at http://www.archive.org/stream/publicschoollawso00norrich#page/10/mode/2up.
404 The statute directed the State Board to control the institutes. 1889 N.C. Sess. Laws 171, § 2. The State Board in turn placed the conductors under the Superintendent’s control. 1890 N.C. SUPERINTENDENT OF PUB. INSTRUCTION BIENNIAL REPORT xlix – lvii.
source of educational information from which he could provide the legislature an accurate summary of public education in the state. Superintendent Wiley was the pinnacle in a pyramid structure of administration. However, the pyramid analogy fails for describing the post-1868 system, in which the Superintendent became more of a hub among the state, federal, and nongovernment influences on education.

No nineteenth century North Carolina court addressed the question of whether the General Assembly, State Board, or Governor could constitutionally make a sinecure of the office of Superintendent. One can imagine, though, the arguments had Mebane’s question gone before a court in 1899. Lawyers arguing for the General Assembly’s ability to fully diminish the Superintendent’s power would have cited the lack of any clear constitutional promulgation of power and the conversely clear directive that the General Assembly define the Superintendent’s duties. Those arguing for the Superintendent’s constitutionally inherent power would have urged that the framers intended to constitutionalize the antebellum practice of having a single official to control the education system.

It could also be argued that the new provision making the Superintendent a popularly elected executive official was a crucial constitutional change adding an inherent power to the Superintendent’s capacity. As noted above, the Superintendent’s work as a liaison to out-of-state actors and as the state representative to the teacher organizations was not directed by statute, and it is in that extra-statutory role that the Superintendent’s popular election was most warranted. Had the work of the Superintendent through the nineteenth century been purely a bureaucratic exercise of statutory implementation, the legislature would have had complete control over the nature of the Superintendent, in that the office was bound to the statutory sphere. The history makes clear that this was not the case; the Superintendent’s being secretary of the State Board and performing duties prescribed by statute do not easily translate into the Superintendent’s work to assure that more Peabody funds entered the state or his work to help the Teachers’ Assembly create a summertime learning retreat. Being a popularly elected executive official, though, provides some constitutional basis to engage in that work.

Without the clarity that might have resulted from an early challenge in court, though, the 1868 Constitution left a legacy of confusing constitutional language setting out state educational bureaucracy. Despite having carried forward rather than having invented state education offices, the language of the 1868 Constitution created a new relationship and power-sharing structure between the State Board and Superintendent. The 1852 statute that first created the Superintendent did not structurally connect the office to the Literary Board. The Superintendent independently performed his primary functions of collecting information, reporting that information, superintending the school system, and enforcing relevant laws.407 Only once, in its prescription to “look after escheated property,” did the statute categorize the Superintendent as being “under the direction of the literary board.”408

The 1868 framers adopted the common practice of placing the Superintendent on the Board of Education, but did nothing to clarify whether or how the constitutional language was to affect administrative practice. Most likely, the framers expected the Superintendent as secretary of the

408 1852-1853 N.C. Sess. Laws 59, § 7. The statute connected the Superintendent to the Literary Board in two other instances: § 13 made the Literary Fund the body responsible for removing a Superintendent who “willfully and habitually neglect[ed] his official position for the purpose of propagating sectarian or political party doctrines.” 1852-1853 N.C. Sess. Laws 59 § 14 allowed the Literary Board to require the Superintendent to attend its meetings.
Board to have the same relationship to the State Board as the antebellum Superintendent had with the Literary Board. Generally, the Superintendent would work independently to supervise the school system and to enforce the General Assembly’s laws and State Board’s regulations, while some subject matter areas such as finances and the Board’s educational policies would fall under the more direct control of the State Board.

The constitutional foundation for educational governance is confusing, creating ambiguity leaving lingering uncertainty. The history of Superintendency during the nineteenth century, however, strongly suggests that an administrative leadership role is inherent to the office.