THE EDUCATION POWER

*Derek W. Black**

Public officials are increasingly warring over the power to set fundamental education policies. A decade ago, disputes over Common Core Curriculum and school choice programs produced a level of acrimony between policymakers not seen since school desegregation. Recent fights over critical race theory and COVID-19 policies are even worse. The disputes are so intense that some officials assert power that they do not possess—power that state constitutions often reserve exclusively for state superintendents and boards of education.

Political polarization contributes to the problem, but the issue runs deeper. Judicial precedent regarding education powers is so grossly underdeveloped and contradictory that it invites conflict. This Article identifies two steps for bringing substantive coherence to the field. First, courts should apply the principles that they have already articulated in the school funding context when adjudicating questions of education power. School funding precedent sets forth constitutional duties in education, which necessarily alter certain aspects of education powers analysis. Second, courts should recognize that the constitutional offices of state superintendents and boards of education entail inherent powers that constrain legislatures' and governors' authority in education.

Building on this analysis, this Article offers the first comprehensive framework for analyzing the constitutional balance of power in education. It surveys existing precedent and constitutional text, identifies the key principles for analyzing education powers, articulates the scope of those powers, and applies them to recent controversies. This analysis will be an essential resource for courts and policymakers as they navigate current and future disputes.

* Professor of Law, Ernest F. Hollings Chair in Constitutional Law, and Director of the Constitutional Law Center, University of South Carolina School of Law.

INTRODUCTION

Over the last decade, public education has increasingly taken center stage in culture wars and partisan ideology. Not since *Brown v. Board of Education*[1] has education policy been as polemic. The battles are so intense that, like southern resistance to *Brown*, political actors are willing to overreach their legal authority and seize power from others.[2] State

[1] 347 U.S. 483 (1954).

[2] The first direct divestment of State Executive Officer power was in *P.J. Willis & Bro. v. Owen*, 43 Tex. 41, 55–56 (1875). The most notable power grabs, however, followed *Brown v. Board of Education*, 347 U.S. 483 (1954), when legislatures seized power over assigning students to schools, displacing local authorities' powers. See, e.g., Griffin v. Cnty. Sch. Bd.,

constitutions provide structural firewalls that should ward off some of this behavior,[3] but they are failing. Politics and expediency are, quite simply, overtaking poorly understood constitutional principles.

Most state constitutions vest substantial public education authority in state superintendents and state boards of education—hereinafter "state executive officers" ("SEOs").[4] In states with constitutional SEOs, governors typically have very little, if any, direct authority over education.[5] Legislatures, by contrast, have important exclusive powers in this area—such as school funding—but those powers do not extend to all aspects of education.[6] Federal officials have no constitutional authority over public education.[7] Yet federal officials, governors, and legislatures are asserting unilateral power over everything from school curricula to daily operations.

Educational power disputes lie at the heart of nearly all of the last decade's major controversies. Beginning in 2011, the U.S. Secretary of Education demanded that states immediately adopt college- and career-ready standards—the Common Core Curriculum.[8] The Secretary persisted even when state officials indicated that state officials lacked the unilateral power to change academic standards.[9] At the same time that

377 U.S. 218, 221–22 (1964) (summarizing Virginia's constitutional changes and legislative action to subvert school desegregation); Cooper v. Aaron, 358 U.S. 1, 17 (1958) (striking down the Arkansas governor and legislature's attempts to prevent local district from complying with school desegregation order).

[3] See, e.g., Mich. Const. art. VIII, § 3 (vesting "[l]eadership and general supervision over all public education" in a state board of education). See generally Powers v. State, 318 P.3d 300, 323 (Wyo. 2014) (holding that the legislature cannot eliminate or transfer the inherent powers of the state superintendent).

[4] See infra notes 33–41.

[5] Governors appoint SEOs in several states, but those officers do not necessarily report to the governor. Moreover, in many states, the governor lacks appointment power of the board, the superintendent, or both. See Vincent Scudella, State Education Governance Models, Educ. Comm'n of the States 2–3 (2013), https://www.ecs.org/clearinghouse/01/08/70/10870.pdf [https://perma.cc/KR4L-7ZZA] (charting different models, though not distinguishing between constitutional and statutory systems).

[6] See, e.g., Ohio Const. art. VI, § 2 (directing the legislature to tax for the support of education); Mich. Const. art. 8, § 2 (directing the legislature to maintain and support schools).

[7] See United States v. Lopez, 514 U.S. 549, 567–68 (1995) (holding that Congress's attempt to regulate schools pursuant to the Commerce Clause was unconstitutional).

[8] See Derek W. Black, Federalizing Education by Waiver?, 68 Vand. L. Rev. 607, 652–59 (2015) (detailing federal administrative attempts to force states to adopt policy positions that had previously failed in Congress).

[9] See, e.g., Miker Wiser, Feds Deny Iowa No Child Left Behind Waiver, Waterloo-Cedar Falls Courier (June 21, 2012), http://wcfcourier.com/news/local/govt-and-politics/feds-deny-iowa-no-child-left-behind-waiver/article_ee035d3a-bc09-11e1-9db6-0019bb2963f4.html

federal officials were forcing curriculum on schools, some governors were attacking public education itself, pursuing privatization and antiteacher agendas.[10] One of the strategies for achieving their goals was to strip state superintendents of their authority.[11]

The COVID-19 pandemic has brought additional fights. In 2020, President Trump and the U.S. Secretary of Education sought to force schools to resume in-person instruction.[12] When their lack of authority quickly became obvious,[13] governors intervened and attempted to force schools to reopen.[14] Yet governors' power to reopen schools was

[https://perma.cc/AKB6-XXJX]. Legislatures and governors later attempted to reverse this coerced adoption of Common Core. See, e.g., Brandi M. Haskins, State Discretion Over Subject Matter Standards: The Rise and Fall of Common Core in Oklahoma, 39 Okla. City U. L. Rev. 441, 460–61 (2014); Andrew Ujifusa, S.C. Governor Signs Bill Requiring State to Replace Common Core, Educ. Week (June 4, 2014), https://www.edweek.org/policy-politics/s-c-governor-signs-bill-requiring-state-to-replace-common-core/2014/06 [https://perma.cc/C94A-GS3V]. Congress mooted such disputes when it passed legislation that effectively rescinded and precluded the Secretary's actions. See Derek W. Black, Abandoning the Federal Role in Education: The Every Student Succeeds Act, 105 Calif. L. Rev. 1309, 1311–13, 1336–38 (2017).

[10] See Derek W. Black, Schoolhouse Burning: Public Education and the Assault on American Democracy 19, 43–44 (2020) (discussing gubernatorial efforts to undermine public education in Arizona, Wisconsin, and New Jersey).

[11] See, e.g., Coyne v. Walker, 879 N.W.2d 520, 525–27 (Wis. 2016) (discussing 2011 legislation that gave the governor the ability to veto SEO's rulemaking); Pence Signs Bill Stripping Ritz of Education Authority, Indy Star (May 7, 2015, 5:30 PM), https://www.indystar.com/story/news/politics/2015/05/07/pence-signs-bill-stripping-ritz-education-authority/70966236/ [https://perma.cc/49CJ-6PSZ] (discussing governor's attempt to take power from superintendent); Deborah Yetter & Mandy McLaren, Kentucky Education Board Members Voted to Oust Commissioner, but Few Willing to Explain, Courier J. (Apr. 19, 2018, 6:22 AM), https://www.courier-journal.com/story/news/2018/04/18/kentucky-education-board-stephen-pruitt-ouster-explained-matt-bevin/528536002/ [https://perma.cc/36QZ-HS78] (discussing how the governor orchestrated the removal of the education commissioner).

[12] See, e.g., Peter Baker, Erica L. Green & Noah Weiland, Trump Threatens to Cut Funding If Schools Do Not Fully Reopen, N.Y. Times (July 24, 2020), https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html [https://perma.cc/Q2VS-8BRJ].

[13] See, e.g., Edwin Rios, Trump and DeVos Say They'll Withhold Money From Schools For Not Reopening. Can They?, Mother Jones (July 8, 2020), https://www.motherjones.com/politics/2020/07/trump-devos-schools-reopening/ [https://perma.cc/K9LX-JWSV]; Libby Cathey, Education Secretary Faces Backlash After Demanding Schools Reopen Full-Time Amid Pandemic, ABC News (July 13, 2020, 2:00 PM), https://abcnews.go.com/Politics/education-secretary-faces-backlash-demanding-schools-reopen-full/story?id=71752468 [https://perma.cc/TW7G-7W53] (noting that DeVos did not cite authority for her plan).

[14] See, e.g., Ariel Gilreath, SC Superintendent and Teachers Push Back on Governor's Direction for In-Person Classes, Greenville News (July 15, 2020, 4:14 PM), https://www.greenvilleonline.com/story/news/2020/07/15/sc-education-superintendent-pushes-back-governors-direction/5442495002/ [https://perma.cc/V48P-EJ9Z] (describing how governor instructed superintendent of education to reject school plans that did not include physical

uncertain as well.[15] The power struggle did not end there. A year after the school reopening debacle, governors and legislatures sought to eliminate mask mandates.[16] Following that, the claim that schools were teaching critical race theory triggered multiple controversies.[17] Virginia's governor, for instance, purported to ban critical race theory on his first day in office.[18] Similarly, Florida's governor has played a major, if not the lead, role in purging the state's curriculum of materials he deems objectionable, including rejecting an Advanced Placement course on African American studies in January 2023.[19]

reopening); Mary Ellen Klas, Gov. Ron DeSantis Doubles Down on Schools Reopening Full Time in August, Tampa Bay Times (July 9, 2020), https://www.tampabay.com/florida-politics/buzz/2020/07/09/gov-ron-desantis-doubles-down-on-schools-reopening-full-time-in-august/ [https://perma.cc/53L5-7YAD] (reporting on executive order to reopen schools).

[15] See, e.g., Alexa Lardieri, Florida Teachers Union Sues DeSantis Over Order to Reopen Schools, U.S. News (July 20, 2020), https://www.usnews.com/news/education-news/articles/2020-07-20/florida-education-association-sues-gov-ron-desantis-over-order-to-reopen-schools [https://perma.cc/Q5U7-AMVX]; Andy Brack, Brack: Don't Use Pandemic, Schools for Foghorn-Leghorning, Statehouse Rep. (July 17, 2020, 10:42 AM), https://www.statehousereport.com/2020/07/17/foghorn-leghorn/ [https://perma.cc/ZH5P-33FH] (explaining the possibility of a constitutional crisis with competing positions on school reopening).

[16] See Katie Reilly, As Some Governors Forbid Mask Mandates, Schools Are Pushing Back, Time (Aug. 11, 2021, 5:07 PM), https://time.com/6089640/schools-masks-covid-19/ [https://perma.cc/DWP6-ZDHT]. South Carolina's Superintendent resisted the usurpation of her office. Jamie Lovegrove, SC Superintendent Disagrees With Governor, Says Schools Should Be Able to Mandate Masks, Post & Courier (Aug. 17, 2021), https://www.postandcourier.com/politics/sc-superintendent-disagrees-with-governor-says-schools-should-be-able-to-mandate-masks/article_b82556c6-ff72-11eb-bb82-ffc3f4d5c826.html [https://perma.cc/23E5-M9EZ]. After making a forceful show of power, Florida's governor later appeared to reverse course. Jeffrey S. Solochek, DeSantis Overrules Lawmakers, Rejects Penalties for School Mask Mandates, Tampa Bay Times (June 2, 2022), https://www.tampabay.com/news/education/2022/06/02/desantis-overrules-lawmakers-rejects-penalties-for-school-mask-mandates/ [https://perma.cc/S6U2-AZEA].

[17] Because legislatures, governors, and SEOs have often aligned on the issue of critical race theory, the more salient issue has been whether the bans violate students' and teachers' constitutional rights. See Jennifer Schuessler, Bans on Critical Race Theory Threaten Free Speech, Advocacy Group Says, N.Y. Times (Nov. 9, 2021), https://www.nytimes.com/2021/11/08/arts/critical-race-theory-bans.html [https://perma.cc/BN3H-4B3D].

[18] Oliver Laughland, Glenn Youngkin Attempts to Ban Critical Race Theory on Day One as Virginia Governor, Guardian (Jan. 16, 2022, 12:59 PM), https://www.theguardian.com/us-news/2022/jan/16/virginia-governor-glenn-youngkin-sworn-into-office-critical-race-theory [https://perma.cc/Z7EB-VZ9U].

[19] Aaron Navarro, DeSantis Defends Rejecting AP African American Studies Course, Says It's "Indoctrination," CBS News (Jan. 23, 2023, 2:36 PM), https://www.cbsnews.com/news/ron-desantis-ap-african-american-history-florida-press-conference-today-2023-01-23/ [https://perma.cc/63RV-EC7Z].

The immediacy of these controversies is overshadowing the dangerous long-term implications of invading the authority of constitutional education officers. Exercising illegitimate or uncertain power erodes the rule of law, provokes confrontations between constitutional branches of government, and undermines predictability.[20] Political power grabs are particularly corrosive in public education. Public education has long stood as a foundational pillar of the nation's republican form of government that,[21] like the judiciary, should stand outside the normal political process. For that reason, all state constitutions guarantee public education,[22] and most attempt to insulate education from political pressure through various nuanced proscriptions and power structures.[23] Nonetheless, political contests and breaches of education power are becoming the rule rather than the exception.

Eroding norms and polarized politics surely contribute to the trend,[24] but they do not fully explain it. Case law, which would normally clarify

[20] See Steven Levitsky & Daniel Ziblatt, How Democracies Die 8–9 (2018) (arguing that executive power must be exercised with restraint to maintain healthy democracy); Joseph Fishkin & David E. Pozen, Essay, Asymmetric Constitutional Hardball, 118 Colum. L. Rev. 915, 927 (2018) ("[C]onstitutional hardball lends itself to retaliation and escalation.").

[21] See, e.g., George Washington, Eighth Annual Message to Congress (Dec. 7, 1796), *in* Presidential Speeches, Univ. of Va. Miller Ctr., https://millercenter.org/the-presidency/presidential-speeches/december-7-1796-eighth-annual-message-congress [https://perma.cc/N9GV-3UKK] (last visited Feb. 4, 2024); Kara A. Millonzi, Education as a Right of National Citizenship Under the Privileges or Immunities Clause of the Fourteenth Amendment, 81 N.C. L. Rev. 1286, 1286 (2003); Ross J. Pudaloff, Education and the Constitution: Instituting American Culture, *in* Laws of Our Fathers: Popular Culture and the U.S. Constitution 23, 26–27 (Ray B. Browne & Glenn J. Browne eds., 1986) ("By a necessary definition, a republican education was a mass education."); Proceedings of the Constitutional Convention of South Carolina 692, 696 (J. Woodruff ed., 1868) (emphasizing education's necessity in a republican form of government); see also Derek W. Black, The Fundamental Right to Education, 94 Notre Dame L. Rev. 1059, 1097–99 (2019) (explaining the early connection between a republican form of government and public education).

[22] Derek W. Black, Reforming School Discipline, 111 Nw. U. L. Rev. 1, 10 (2016).

[23] See, e.g., 2 Debates of the Convention to Amend the Constitution of Pennsylvania 388 (1873) [hereinafter Pennsylvania Debates] (emphasizing the superintendent should be free "from all the contaminating influences of political manipulation and management"); Derek W. Black, The Constitutional Compromise to Guarantee Education, 70 Stan. L. Rev. 735, 808–16 (2018) (detailing southern constitutional conventions' mechanisms to shield education from manipulation and politics); Colo. Const. art. IX, § 1 (providing for the appointment of the superintendent by the state board, which is elected, rather than by the governor).

[24] See, e.g., Daphna Renan, Presidential Norms and Article II, 131 Harv. L. Rev. 2187, 2189–90 (2018) (emphasizing the important role that norms play in shaping presidential power); Clare Foran, An Erosion of Democratic Norms in America, Atlantic (Nov. 22, 2016), https://www.theatlantic.com/politics/archive/2016/11/donald-trump-democratic-norms/508

the lines of power in these struggles, has created a vacuum. The jurisprudence on education powers is so grossly underdeveloped that it invites conflict and power grabs. As a practical matter, governmental actors simply cannot be certain who holds power because few state supreme courts have given education powers the serious analysis they deserve.[25] The precedent that exists is often thin and contradictory, regularly ignoring or misunderstanding the constitutional dimensions of education power.[26] For instance, even when education agencies are creatures of constitutional text rather than statutes, courts tend to treat them no differently than any other executive agency.[27] The result is a constitutionally suspect body of law.

Poor timing is also to blame. The specific constitutional provision that establishes an SEO's office is the starting point for any analysis, but those provisions must be read in conjunction with the larger education articles and clauses that require states to ensure a system of education that delivers adequate and equal educational opportunities.[28] Most state supreme courts, however, did not fully elucidate those Education Clauses until the late 1980s and 1990s.[29] Three-quarters of SEO litigation preceded that era.[30] As a result, SEO precedent rests on premises that no longer hold

469/ [https://perma.cc/QW6C-C6QJ] (discussing the erosion of presidential norms in the face of political polarization).

[25] This uncertainty is, in part, belied by the abundance of requested opinions of state attorneys general. This Article identifies seventeen relevant attorney general opinions, ten of which were issued between 1963 and 1978. See infra Table 1.

[26] See, e.g., Pack v. State, 330 P.3d 1216 (Okla. 2014) (per curiam) (two paragraph decision); Becker v. Bd. of Educ., 138 N.W.2d 909, 912 (Iowa 1965) (presuming the constitutionality of the statute); State ex rel. Bd. of Educ. of Whitehall City Sch. Dist. v. Bd. of Educ. of Columbus City Sch. Dist., 179 N.E.2d 347, 349 (Ohio 1961) (distinguishing precedent on constitutional issues); see also G. Alan Tarr, Of Time, Place, and the Alaska Constitution, 35 Alaska L. Rev. 155, 155 (2018) (suggesting that "knowing when and where a state constitution originated" is necessary for interpretation).

[27] See, e.g., Koschkee v. Taylor, 929 N.W.2d 600, 605–06 (Wis. 2019) (applying general administrative agency rules); Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 59 v. Ill. State Bd. of Educ., 740 N.E.2d 428, 432 (Ill. App. Ct. 2000) (treating state board the same as other administrative agencies that "possess no inherent or common law powers").

[28] See infra notes 64–72 and accompanying text.

[29] See generally Joshua E. Weishart, Transcending Equality *Versus* Adequacy, 66 Stan. L. Rev. 477, 499–507 (2014) (surveying school funding cases).

[30] See Derek W. Black, Database on School Education Officer Precedent (Apr. 21, 2022) [hereinafter Database I] (on file with author).

true—most notably the notion that legislatures possess full, unfettered discretion in education policy.[31]

This Article is the first to provide a comprehensive framework for analyzing the constitutional balance of power in education.[32] This framework brings much-needed coherence to the field and offers crucial guideposts for state supreme courts, state superintendents of education, state boards of education, and legislatures as they navigate future disputes. First, this Article identifies the powers of state superintendents and state boards of education as they currently exist in constitutional text and precedent. Second, drawing on additional sources, this Article theorizes the principles for identifying SEOs' core constitutional powers. Third, those principles provide the basis to articulate the full scope of SEOs' explicit power of supervision, inherent powers (including rulemaking), and shared powers with the legislature. This Article concludes by applying this framework to recent controversies regarding mask mandates and critical race theory, paving the way for similar future analyses regarding school accountability, student discipline, campus safety, and more.

Two general caveats should be noted. First, this Article addresses only those states that have constitutionalized either a state board or state superintendent. When state constitutions do not establish one of those

[31] See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (explaining constitutional limits on legislature); Pauley v. Kelly, 255 S.E.2d 859, 874 (W. Va. 1979) (rejecting unbounded legislative discretion). But see Comm. for Educ. Rts. v. Edgar, 672 N.E.2d 1178, 1185 (Ill. 1996) (noting that framers "did not intend to otherwise limit legislative discretion").

[32] Education law handbooks devote some attention to state officials' power, but their treatment is relatively cursory. See James A. Rapp, Education Law § 3.02[4], LEXIS (database updated Sept. 2023); Kern Alexander & M. David Alexander, American Public School Law 103–05 (6th ed. 2005); 78 C.J.S. Schools and School Districts § 107 (2023). These works also unfortunately collapse statutory and constitutional authority of SEOs. The only scholarly articles on education power address individual states or cases. See, e.g., Andrew Owens, North Carolina's Superintendent of Public Instruction: Defining a Constitutional Office, 4 Charlotte L. Rev. 103, 129, 138–39 (2013) (describing North Carolina's approach); Jonathan Zasloff, Taking Politics Seriously: A Theory of California's Separation of Powers, 51 UCLA L. Rev. 1079, 1136 n.258 (2004) (analyzing an SEO separation of powers case); Miriam Seifter, Understanding State Agency Independence, 117 Mich. L. Rev. 1537, 1574 n.232 (2019) (citing cases where courts refused to allow the legislature to eliminate the core functions of a constitutional office); Michele L. Harrington, Note, *State v. Whittle Communications*: Allowing Local School Boards to Turn On "Channel One," 70 N.C. L. Rev. 1929, 1929–30 (1992) (summarizing case where the North Carolina State Board of Education passed a rule preventing local school boards from subscribing to a commercially sponsored video news program).

offices, the analysis is simple: virtually all power rests with the legislature. Second, because the most important line of contested power is between the legislature or governor and SEOs, this Article does not analyze potential disputes between superintendents and boards of education.

This Article proceeds in five Parts. Part I focuses on constitutional text, identifying the thirty-five state constitutions that refer to an SEO, the explicit powers that the constitutions extend to the SEO, and the larger constitutional contexts in which SEO power rests. Part I also traces the genealogy of SEO provisions from 1835 to today. Part II provides an analysis of nearly two hundred final court opinions regarding SEO powers, systematically evaluating them based on eras, outcomes, analytical depth, and reoccurring doctrinal approaches. It finds an overall lack of depth and consistency.

Part III aims to fill existing precedential gaps and resolve contradictions by identifying the key principles necessary for analyzing SEO powers: the adequacy and equity mandate in Education Clauses; the constitutional independence of SEOs; the intersection of SEO independence and legislative prerogative; the inherent powers of constitutional officers; and the unique separation of powers context in which SEOs operate.

Based on that framework, Part IV details the full scope and limits of SEOs' constitutional powers. First, it analyzes SEOs' explicit and exclusive power to supervise public education and all its logical components, including rulemaking and other discrete powers. Second, it demonstrates how the nature of the office creates a vast area of shared power with the legislature. Third, it articulates legislatures' exclusive powers in education as a limiting principle for SEO power.

Part V applies this Article's theory of constitutional education powers to recent and ongoing controversies, examining mask mandates and critical race theory disputes as illustrative examples. It demonstrates that the precise manner in which a legislature or an SEO exercises power is important, as their primary areas of power are distinct yet overlap in certain respects. Part V also briefly explains the federal constitutional and statutory provisions that place limits on both legislative and SEO action regarding masks and the curriculum.

I. THE STATUS QUO: UNDERDEVELOPED CONSTITUTIONAL TEXT AND PRECEDENT

The constitutional text that creates and empowers SEOs varies to some extent by state, but a few aspects are relatively constant: constitutional text that vests supervisory power in a state superintendent or state board of education, and constitutional text that directs the legislature to flesh out or add to that power. Additional sources provide crucial context for interpreting those powers. First, the genealogy of SEO clauses reveals a common heritage and set of motivations. Second, SEO provisions rest in or supplement larger education articles in state constitutions. Those education articles require the state to establish a system of public schools and typically include language that suggests a qualitative component too.

Section I.A surveys the basic constitutional texts and differences among SEO provisions. Section I.B traces the genealogy of these provisions to demonstrate their common heritage. Section I.C situates SEO provisions within the larger context of Education Clauses. Section I.D provides an overview of the motivations that prompted the constitutionalization of education and its officers.

A. State Education Officer Clauses

Today, thirty-five state constitutions establish a state-level education entity—either a state superintendent or state board of education.[33] Twenty-four states mandate both a state superintendent and board.[34] State boards and superintendents still exist in states without a constitutional provision, but they are purely statutory creations.[35] State constitutions most commonly articulate SEOs as having the power of "supervision"

[33] See Derek W. Black, Database on Constitutional School Education Officers by State (Apr. 21, 2022) [hereinafter Database II] (on file with author); see also Nat'l Ass'n of State Bds. of Educ., State Education Governance Matrix (2022), https://nasbe.nyc3.digitaloceanspaces.com/2022/11/Governance-matrix-December-2022.pdf [https://perma.cc/8KHJ-N7CM] (listing all state boards of education and whether their existence arises from statutory or constitutional provisions). Kentucky's constitution specifically names the Board of Education as the recipient of certain school funds, but it does not include language that creates the Board or defines its powers. Ky. Const. § 184. Thus, it was not included among those constitutions that establish a state-level education entity.

[34] See Database II, supra note 33. Importantly, some states (e.g., Florida and Hawaii) provide for chief state officers ("CSOs") within their state board of education ("SBE") provision rather than by separate provision. See id.

[35] See National Association of State Boards of Education, supra note 33.

over the school system.[36] That power, however, vests in different officers across states. Some constitutions assign supervisory power to the state board of education while others assign it to the state superintendent.[37]

State constitutions also vary in whether they characterize or qualify this supervisory power. Some state constitutions do not qualify or characterize the supervision power at all but simply indicate that it vests in the state board or superintendent.[38] Others characterize the power as a "general" supervisory power,[39] while a few specify the power as including "control" over education.[40] An even smaller group articulates narrow powers beyond or within supervision pertaining to textbook selection, rulemaking, and higher education.[41]

Regardless of how a state constitution modifies or describes this supervision power, most indicate that the power is subject to further explication by the legislature. Colorado's constitution, for instance, indicates that the board of education shall have the power of general supervision in education but further specifies that the "powers and duties shall be . . . prescribed by law."[42] Twenty state constitutions contain this type of qualification, with four of those states placing the limitation on both the board and the superintendent or department of education.[43]

[36] Ala. Const. art. XIV, § 262(1)–(2); Ariz. Const. art. XI, §§ 2–4; Colo. Const. art. IX, § 1(1)–(3); Fla. Const. art. IX, § 2; Idaho Const. art. IX, § 2; Kan. Const. art. VI, §§ 2(a), 4; La. Const. art. VIII, §§ 2-3(A); Mich. Const. art. VIII, § 3; Mo. Const. art. IX, § 2(a)–(b); Mont. Const. art. X, § 9(3)(a); N.C. Const. art. IX, §§ 4-5; Okla. Const. art. XIII, § 5; Utah Const. art. X, § 3; Va. Const. art. VIII, §§ 4–5; Wash. Const. art. III, §§ 1, 22; W. Va. Const. art. XII, § 2; Wis. Const. art. X, § 1; Wyo. Const. art. VII, § 14.

[37] Compare Wash. Const. art. III, § 22 (vesting supervision power in superintendent), with Fla. Const. art. IX, § 2 (vesting supervisory power in board of education).

[38] See, e.g., Fla. Const. art. IX, § 2; Mo. Const. art. IX, § 2(a)–(b).

[39] See, e.g., Kan. Const. art. VI, § 2(a); Idaho Const. art. IX, § 2; W. Va. Const. art. XII, § 2.

[40] See, e.g., Kan. Const. art. VI, § 2(b); Utah Const. art. X, § 3.

[41] See, e.g., Cal. Const. art. IX, § 7.5 (adoption of textbooks); N.C. Const. art. IX, §§ 4, 5 (grant of rulemaking power); Evans v. Andrus, 855 P.2d 467, 470–71 (Idaho 1993) (per curiam) (quoting Idaho Const. art. IX, § 2 and holding that it extends to higher education).

[42] Colo. Const. art. IX, § 1. A few constitutions do not articulate any SEO powers, but simply name the state board or superintendent and direct the legislature to specify their duties and powers. See, e.g., Ohio Const. art. VI, § 4.

[43] See Ala. Const. art. XIV, § 262(2); Colo. Const. art. IX, § 1(3); Ga. Const. art. VIII, § II, ¶ I(b); Idaho Const. art. IX, § 2; Ind. Const. art. VIII, § 8; Mich. Const. art. VIII, § 3; Mo. Const. art. IX, § 2(a)–(b); Mont. Const. art. X, § 9(3)(a); Neb. Const. art. VII, §§ 2–4; Nev. Const. art. XI, § 1; N.M. Const. art. XII, § 6(d); N.C. Const. art. IX, § 5; N.D. Const. art. VIII, § 6(6)(a); Ohio Const. art. VI, § 4; Okla. Const. art. XIII, § 5; Or. Const. art. VIII, § 1; S.C. Const. art. XI, § 1; Tex. Const. art. VII, § 8; Va. Const. art. VIII, § 6; W. Va. Const. art. XII, § 2.

State constitutions also vary in how they fill the SEO's position. Some state constitutions provide for the election of the superintendent or state board members.[44] Other states provide for the appointment of SEOs, though the appointment process varies. In some states, the governor appoints the state superintendent with the consent of the Senate,[45] while the state board of education appoints the superintendent in others.[46]

B. Genealogy and Historical Evolution

Most SEO clauses originated in the mid-nineteenth century or at the point of statehood.[47] These clauses, however, have changed in certain respects across time.[48] Michigan's 1835 constitution was the first to provide for an SEO, establishing a superintendent of public instruction to "supervise not only the primary schools," but also higher education.[49] The Wisconsin constitution followed in 1848, providing for a state superintendent "and such other officers as the legislature shall direct."[50] Wisconsin's constitutional convention explained the rationale for constitutionalizing the office: only a statewide constitutional officer would maintain "constant and vigilant watch . . . over [the] public schools," whereas the legislature might grow lax over time.[51]

Wisconsin's constitution became a model for several other states. In the 1850s, Michigan and Kansas largely copied Wisconsin's state superintendent provision.[52] In 1865, Missouri also copied Wisconsin's

[44] See, e.g., La. Const. art. VIII, § 2; Or. Const. art. VIII, § 1; S.C. Const. art. VI, § 7.

[45] Pa. Const. art. IV, § 8.

[46] Colo. Const. art. IX, § 1.

[47] W.S. Deffenbaugh & Ward W. Keesecker, State Boards of Education and Chief State School Officers: Their Status and Legal Powers, Stud. State Dep'ts Educ., 1940, no. 6, at 23–27, https://files.eric.ed.gov/fulltext/ED543914.pdf [https://perma.cc/4EKZ-BG2Y]. Statutory SEOs sometimes preceded constitutional ones in certain states. See, e.g., Act of May 31, 1838, ch. 52, 1838 Conn. Pub. Acts 45; see also Revised Statutes of Pa. 197 (David Derickson & W.M. Hall eds., 1871) (establishing a state superintendent of public instruction).

[48] See, e.g., Pa. Const. of 1873, art. IV, § 20 (repealed 1967).

[49] Willis F. Dunbar, The Michigan Record in Higher Education 55 (1963).

[50] Wis. Const. of 1848, art. X, § 1. For discussion, see Frederick L. Holmes, First Constitutional Convention in Wisconsin, 1846, at 241 (1906); The Columbian History of Education in Wisconsin 51 (John William Stearns ed., 1893).

[51] The Convention of 1846, at 538, 568–71 (Milo M. Quaife ed., 1919) [hereinafter 1846 Wis. Convention]; see also William C. Whitford, Historical Sketch of Education in Wisconsin 40–41 (1876).

[52] See Mich. Const. of 1850, art. XIII, § 1 ("The Superintendent of Public Instruction shall have the general supervision of public instruction, and his duties shall be prescribed by law."); Kan. Const. of 1859, art. VI, § 1 ("The State Superintendent of Public Instruction shall have

SEO clause but added an important twist.[53] Missouri's convention revised the superintendent clause to vest "supervision" in "a board of education" rather than a superintendent.[54] Colorado and Idaho then replicated that twist.[55]

During Reconstruction, a separate wave of SEO clauses spread across the South. As a condition of readmission to the Union, Congress required Confederate states to rewrite their state constitutions to conform to a republican form of government.[56] That triggered the nation's most prolific period of constitutionalizing education.[57] All but one southern state rewrote its constitution to guarantee public education.[58] State education officers were part of this constitutional transformation.

Prior to the Civil War, only two southern states referenced a chief education officer, or state superintendent, in their constitution.[59] Nationally, only one-quarter of state constitutions provided for a superintendent.[60] But by 1870, eighty percent of the readmitted southern states included a state superintendent in their constitution.[61] And while nonexistent prior to the Civil War, eight of eleven readmitted states provided for a state board of education in their constitutions.[62] These

the general supervision of the common school funds and educational interest of the State, and perform such other duties as may be prescribed by law.").

[53] Journal of the Missouri State Convention 197, 199, 229 (1865).

[54] Mo. Const. of 1865, art. IX, § 3.

[55] See Richard B. Collins & Dale A. Oesterle, The Colorado State Constitution 4 (2d ed. 2020) (indicating Colorado relied on Missouri's 1875 constitution); 1 Proceedings and Debates of the Constitutional Convention of Idaho 1889, at 638 & n.1 (I.W. Hart ed., 1912) (indicating Idaho borrowed from Colorado). Colorado also reintroduced the phrase "general supervision," which had been used in Michigan's and Kansas's constitutions, but not Missouri's. Compare Colo. Const. of 1876, art. IX, § 1, with Mo. Const. of 1875, art. XI, § 4.

[56] Black, supra note 23, at 778–81.

[57] Id. at 790–92.

[58] Id. at 789 n.287.

[59] John Mathiason Matzen, State Constitutional Provisions for Education: Fundamental Attitude of the American People Regarding Education as Revealed by State Constitutional Provisions, 1776–1929, at 36–51 (1931).

[60] Id.

[61] Id. "Readmitted" states, as used here, means those states that formally reentered the union pursuant to the Reconstruction Act.

[62] Id. at 4–14. Alabama, however, discontinued its board shortly thereafter in 1875. Id. at 4 n.4.

trends also extended northward after the war, with several northern states adding Education Clauses and SEOs to their constitutions.[63]

C. Constitutional Context: The Education Article

SEO clauses, read alone, are relatively short expressions of power with no guiding principles.[64] Those clauses, however, are typically surrounded by broader, substantive, and more transcendent provisions.[65] Most important among them is the "Education Clause."[66] These Education Clauses and state constitutions' overall structure for meeting their mandates are key to fully understanding SEO provisions.

Every state constitution includes a clause or provision that mandates that the state establish and maintain a system of public schools.[67] Most state constitutions include a substantive component, requiring that the education be "high quality," "efficient," "thorough," "uniform," or "equal."[68] The point was to require more than just school buildings with

[63] Black, supra note 23, at 790–92. Pennsylvania's 1873 constitutional convention, for instance, produced the state's first constitutional education mandate. Pa. Const of 1874, art. X, § 1. It also mandated a state superintendent's office. Id. art. IV, § 20.

[64] See, e.g., Utah Const. art. X, § 3 ("The general control and supervision of the public education system shall be vested in a State Board of Education. The membership of the board shall be established and elected as provided by statute. The State Board of Education shall appoint a State Superintendent of Public Instruction who shall be the executive officer of the board."); Colo. Const. art. IX, § 1 ("The general supervision of the public schools of the state shall be vested in a board of education whose powers and duties shall be as now or hereafter prescribed by law.").

[65] See, e.g., N.C. Const. art. IX, § 1 ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged."); Fla. Const. art. IX (containing eight sections, including the articulation of education as "a fundamental value of the people of the State" and "a paramount duty of the state to make adequate provision for"). Some constitutions explain that the purpose of the Education Clause is the preservation of liberty and republican form of government. See, e.g., Minn. Const. art. XIII, § 1.

[66] See, e.g., Fla. Const. art. IX, § 1 (declaring education a "fundamental value"); Ga. Const. art. VIII, § 1, ¶ I ("[P]ublic education for the citizens shall be a primary obligation of the State of Georgia.").

[67] Black, supra note 22, at 10.

[68] See William E. Thro, Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 Va. L. Rev. 1639, 1661–68 (1989) (detailing Education Clauses in state constitutions); Michael A. Rebell, Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts, 85 N.C. L. Rev. 1467, 1500–05 (2007) (discussing the results in state cases and the substantive meaning of the constitutional right to education); N.C. Const. art. IX, § 2.

teachers inside; states were to ensure educational opportunities that were sufficient to meet larger societal and individual ends.[69]

In most state constitutions, detailed subsections follow the Education Clause, outlining rules, proscriptions, and structures for implementing the Education Clause's mandate.[70] For instance, most state constitutions specify various aspects of school funding. They reserve particular state revenues for public schools, prohibit funding for private schools, and dictate procedural aspects of education appropriation bills.[71] Most also dictate a governance structure for public education, creating SEOs and delineating the lines of power and responsibilities of the relevant state actors.[72] In short, SEO clauses do not operate in a silo but are part of a larger constitutional education structure and history.

D. The Motivation to Create Constitutional Education Officers

The initial creation and proliferation of state constitutional education officers, in conjunction with a public education mandate, reflected several concerns and goals. First, constitutional delegates firmly understood education to be a pillar of republican government.[73] As such, it deserved its own constitutional officer. Second, they saw this pillar as apolitical. Much like the judiciary, they did not want public education sullied by the political process.[74] Fully disentangling public education from the legislature is nearly impossible, but constitutional SEOs provided an important means by which to create boundaries between education on the

[69] See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205–06 (Ky. 1989) (discussing constitutional debates); Leandro v. State, 488 S.E.2d 249, 253–54 (N.C. 1997) (discussing the Framers' original intent).

[70] See, e.g., N.C. Const. art. IX (containing ten subsections); Colo. Const. art. IX (containing seventeen subsections); Ohio Const. art. VI (containing six subsections).

[71] See, e.g., S.C. Const. art. XI, § 4 (prohibiting public funds for private schools); Ala. Const. art. XIV, § 257 (preserving funds derived from the sale of public property for public education purposes); Pa. Const. art. III, § 11 (requiring the public education appropriation to be in the general appropriation for the three branches of government); Nev. Const. art. XI, § 6 (specifying various details regarding the annual education appropriation, including its priority).

[72] See, e.g., Nev. Const. art. XI, § 1 (providing for a superintendent of education); Nev. Const. art. XI, § 4 (providing for a board of regents for higher education); Ala. Const. art. XIV, §§ 256, 262 (providing for the duty of the legislature and the office of the state superintendent).

[73] Black, supra note 23, at 743.

[74] See, e.g., Pennsylvania Debates, supra note 23, at 385–91 (emphasizing the superintendent should be free "from all the contaminating influences of political manipulation and management"); Black, supra note 23, at 808–16 (detailing the ways southern constitutional conventions shielded education from manipulation and politics).

one hand and the political process and geographic loyalties on the other.[75] As constitutional officers, SEOs would remain independent from governors and legislatures, rather than serving as their delegates.[76]

Third, constitutional convention delegates wanted to ensure the permanence of a person with the knowledge to understand the job and the political independence to do it. SEOs would be educational professionals rather than politicians—even if they were elected.[77] Such a leadership structure would promote stability across time and result in policies and practices that political actors could not so easily reverse or manipulate.[78] Finally, states believed that education would not flourish of its own accord.[79] If public education was to expand to meet the states' needs and those of all their people, someone had to be in charge of growing, coordinating, and managing the education systems on a statewide basis.[80] The legislature might fund such a system, but it could not run or micromanage it.

As these goals suggest, state constitutional conventions were often skeptical of legislatures' willingness to do the people's work, particularly

[75] See Pennsylvania Debates, supra note 23, at 388 (emphasizing the need for the superintendent to meet the entire state's needs); Black, supra note 23, at 812–13 (discussing the benefit of statewide rather than local decision-making).

[76] See, e.g., Pennsylvania Debates, supra note 23, at 392 (discussing the independence of the superintendent); 1 The Debates and Proceedings of the Constitutional Convention of the State of Michigan 351 (1867) (demonstrating a desire to protect the superintendent of public instruction from removal by governor); 2 Report of the Proceedings and Debates of the Constitutional Convention State of Virginia, at 1831 (1906) (discussing the need to prevent legislative meddling in education matters); Thompson v. Craney, 546 N.W.2d 123, 130–31 (Wis. 1996) (noting that the constitutional delegates argued against making the superintendent an appointed position and wanted it to be distinct from all other offices).

[77] 1846 Wis. Convention, supra note 51, at 571 (stating that the superintendent should be a person of "eminent learning and ability"); Journal of the Convention to Form a Constitution for the State of Wisconsin 327 (1848) (arguing the superintendent should be like a "professor" and knowledgeable of what has been done in other states); Pennsylvania Debates, supra note 23, at 386 (stressing the need for independence from the executive branch).

[78] See, e.g., 1846 Wis. Convention, supra note 51, at 568–71 (wanting to preserve superintendent office across time); Whitford, supra note 51, at 40–41 (same).

[79] See Black, supra note 21, at 1097–99 (detailing the motivation to secure a republican form of government through education); Black, supra note 23, at 783–89 (recounting constitutional convention delegates' emphasis on a republican form of government); Minn. Const. art. XIII, § 1 (mandating education to preserve republican government).

[80] See, e.g., Whitford, supra note 51, at 40–41 (discussing the imperative of a statewide constitutional officer for education); Koschkee v. Taylor, 929 N.W.2d 600, 608 (Wis. 2019) (stating that superintendent should "travel over the state, organize the system, and awaken people to the importance of [public education]" (alteration in original) (quoting 1846 Wis. Convention, supra note 51, at 569)).

during the late 1800s.[81] Thus, they sought constitutional structures that would ensure that the state honored the people's commitment to public education.[82] Pennsylvania's 1872–1873 convention, for instance, constitutionalized the superintendent out of distrust of the legislature and concerns about the corrupting influences of politics.[83] The convention also mandated a specific level of public education funding so that the superintendent would not have to grovel before the legislature or make hard choices about which school districts to support.[84] Some states, however, were also wary of centralizing too much unilateral power and gravitated toward placing more power in the hands of multimember state education boards rather than individual superintendents.[85]

The generalized distrust of legislatures receded in the twentieth century,[86] leading to amendments that afforded legislatures more power.[87] This shift, however, did not necessarily extend to education. While some states tweaked SEO clauses and a few eliminated them,[88] states generally continued to resist too much legislative control over education. Education

[81] See Tarr, supra note 26, at 170; G. Alan Tarr, Understanding State Constitutions 160 (1998) (indicating that constitutional conventions "did not trust state legislatures to represent the interests of the people" in late nineteenth century); David Tyack, Thomas James & Aaron Benavot, Law and the Shaping of Public Education, 1785–1954, at 45–55, 58–59 (1987) (noting that framers in the late nineteenth century increasingly gave governors veto power over legislatures and that education provisions became more detailed and bureaucratic).

[82] See, e.g., Pennsylvania Debates, supra note 23, at 436 (setting a minimum public education appropriation); Steven K. Green, The Insignificance of the Blaine Amendment, 2008 BYU L. Rev. 295, 310–18 (explaining common-school-era effort to ensure public funds were preserved for public schools).

[83] Pennsylvania Debates, supra note 23, at 385–91 (arguing education was a non-political common ground and that the superintendent would further that).

[84] See, e.g., id. at 436 (requiring a minimum of one-million-dollar public education reserve because delegates did not trust legislature to properly fund education).

[85] See, e.g., Journal of the Missouri State Convention of 1865, at 197, 199 (1865) (opting to place power in a three-person board rather than single superintendent); 1 Proceedings and Debates of the Constitutional Convention of Idaho 1889, at 644–45 (I.W. Hart ed., 1912) (arguing against leaving education power to one person).

[86] Tarr, supra note 81, at 138, 170–71.

[87] Id. at 153–57, 170.

[88] See, e.g., Frank A. Sinon et al., Report of Committee No. 5 on the Executive (Assignment: Article IV of the Constitution), 34 Pa. Bar Ass'n Q. 271, 272 (1962–63) (discussing changes to constitutional officers, but the superintendent position survived); Pa. Const. art. IV, § 8(a) (amended 1975) (altering the superintendent appointment process); N.C. State Dep't of Pub. Instruction, The History of Education in North Carolina 15 (1993), https://files.eric.ed.gov/fulltext/ED369713.pdf [https://perma.cc/R85V-PVTQ] (discussing a constitutional amendment that restructured the state board of education in 1942); Thompson v. Craney, 546 N.W.2d 123, 127 (Wis. 1996) (discussing amendments to SEO provision).

retained its unique status. SEOs and the central premises that called them into existence in the nineteenth century survived. More importantly, as the prior section explains, those SEO clauses, then and now, rested alongside the state's affirmative constitutional obligations in education. Yet, as Part II reveals, courts have yet to fully account for the larger constitutional structure and motivations surrounding SEOs.

II. UNDERDEVELOPED AND CONFLICTING PRECEDENT

Relatively few courts have given serious attention to the overall constitutional history and structure in SEO cases. As a result, SEO precedent is regularly underdeveloped, contradictory, and generally unhelpful in resolving the serious struggles over education power that increasingly plague the system. This Article identified 198 state supreme and appellate court opinions involving constitutional SEOs.[89] The vast majority of those cases ignore and minimize the constitutional dimensions of education power.[90] Among the small group that directly confronts difficult questions regarding the core constitutional powers of SEOs and their relationship to the legislature, many still produce logically incoherent results. The following sections systematically examine all these cases. Section II.A summarizes the raw data and substantive results of the cases. Section II.B identifies reoccurring methodological flaws. Section II.C explains why the period in which courts decided most SEO cases precluded certain key analysis.

A. The Results

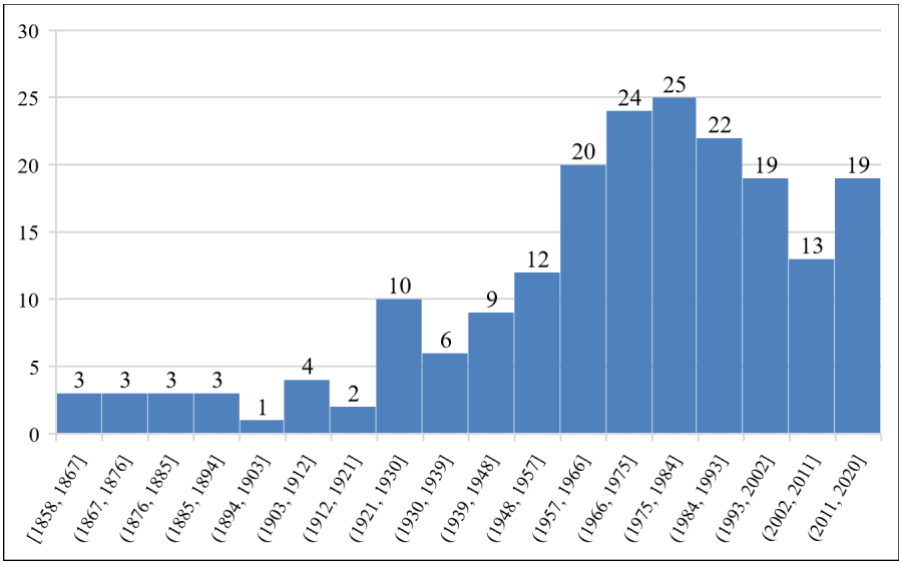
This Article studied 198 final decisions regarding SEO powers.[91] State supreme courts decided three-quarters of those cases. The cases involve matters as weighty as eliminating a constitutional officer's powers to matters as mundane as determining bus driver requirements.[92] The first reported case was in 1858.[93] The most recent case was in 2020.[94]

[89] See Database I, supra note 30.
[90] Id.
[91] Id.
[92] Powers v. State, 318 P.3d 300, 313 (Wyo. 2014) (superintendent contested elimination of her power by the legislature); Yeoman v. Dep't of Motor Vehicles, 273 Cal. App. 2d 71, 79–83 (1969) (considering bus driver certification set by the state board of education).
[93] Dist. Twp. of Dubuque v. City of Dubuque, 7 Iowa 262, 285–86 (1858).
[94] See Ybarra v. Legislature, 466 P.3d 421, 426–32 (Idaho 2020).

However, as Figure 1 demonstrates, the distribution of cases across time is uneven.

Most states reported no cases involving SEO powers until the mid-twentieth century. All states together only produced one decision every three or four years. Immediately following *Brown v. Board of Education* and during periods of aggressive desegregation, the number of decisions dramatically increased. But education powers decisions tapered off at the end of the century, returning to near pre-*Brown* levels in the 2000s. Then, in the 2010s, nationalized education policy fights regarding charter schools and the federal role in public education coincided with a new spike in education power cases.[95]

Figure 1. Number of SEO Cases by Year



The depth and quality of constitutional analysis in these cases varies wildly. Thirty-nine opinions involve no meaningful analysis or commentary.[96] Seventy-one offer only perfunctory analysis.[97] Only forty-

[95] See Black, supra note 9, at 1328–31 (providing overview of policy fights between U.S. Department of Education and the states as a backdrop for the Every Student Succeeds Act).

[96] See Database I, supra note 30.

[97] Id.

seven include insightful or serious analysis.[98] But even within this group of forty-seven, outcomes are often inexplicably contradictory. The strength or weakness of the constitutional text, for instance, has relatively little impact on outcomes. Courts have denied power to SEOs notwithstanding strong SEO constitutional provisions, whereas other courts have upheld SEO power notwithstanding weak constitutional provisions.

For instance, Utah, Louisiana, and Washington courts permitted legislatures to divest SEOs of control over matters directly, and sometimes explicitly, within their constitutionally proscribed "supervision" or "control" powers.[99] Yet, on weaker textual grounds, West Virginia and North Carolina's supreme courts upheld SEO power over school district consolidation, teachers' professional development requirements, and independent rulemaking.[100] Even more troubling, courts examining nearly identical constitutional text or structure reach entirely different conclusions regarding its meaning.[101] If any pattern exists, it might be courts' tendency to treat SEOs as regular executive agencies rather than constitutionally grounded ones.[102] Misunderstood as such, courts run the risk of incorrectly rejecting SEOs' exercise of power.

[98] See infra Tables 2a, 2b.

[99] State Bd. of Educ. v. State Bd. of Higher Educ., 505 P.2d 1193, 1195–96 (Utah 1973) (permitting transfer of power over higher education even though constitution includes higher education within board's power); Rankins v. La. State Bd. of Elementary & Secondary Educ., 637 So. 2d 548, 552, 555 (La. Ct. App. 1994) (upholding legislature's authority to establish graduation exam even though constitution vests "control" of schools with board); El Centro de la Raza v. State, 428 P.3d 1143, 1151 (Wash. 2018) (permitting legislature to deprive superintendent of supervision of charter schools even though constitution provides that superintendent "shall have supervision over all matters pertaining to public schools" (quoting Wash. Const. art. III, § 22)); id. at 1153–54.

[100] W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 147–48 (W. Va. 2017); Guthrie v. Taylor, 185 S.E.2d 193, 198–200 (N.C. 1971); W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 841–42 (W. Va. 1988) (upholding Board's rule governing the "design and operation of school buses").

[101] Compare Powers v. State, 318 P.3d 300, 323 (Wyo. 2014) (finding that the "prescribed by law" provision did not give legislature authority to reassign superintendent's power (quoting Wyo. Const. art. VII, § 14)), with N.C. State Bd. of Educ. v. State, 814 S.E.2d 54, 65 (N.C. 2018) (finding similar provision allowed legislature to transfer state board's power over rulemaking to a Rules Review Commission (citing N.C. Const. art. IX, § 5)).

[102] See, e.g., Koschkee v. Taylor, 929 N.W.2d 600, 605–06 (Wis. 2019) (applying general administrative agency rules); Bd. of Educ. v. Waihee, 768 P.2d 1279, 1289 (Haw. 1989) (upholding requirement of gubernatorial approval for SEO rules); Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 59 v. Ill. State Bd. of Educ., 740 N.E.2d 428, 432 (Ill. App. Ct. 2000) (treating state board the same as other administrative agencies that "possess no inherent or common law powers").

Interestingly, in lower-stakes and thinly analyzed cases, courts validated SEO power more than half of the time.[103] But in higher-stakes cases in which courts engaged in longer analysis, courts tended to reject SEO power, ruling in SEOs' favor only thirty-four percent of the time.[104] These validations of SEO power, however, may speak more to the egregious facts than anything. Many of those cases involve relatively brazen legislative attempts to neuter the SEO or clear technical violations of the constitution.[105] While such circumstances by no means ensure validation of SEO power,[106] egregious facts may make validation more likely. In fact, courts often read legislation charitably so as to find no actual divestment of constitutional power.[107]

[103] See Database II, supra note 30.

[104] The wins were *Powers v. State*, 318 P.3d 300, 323 (Wyo. 2014), *Utah School Boards Ass'n v. Utah State Board of Education*, 17 P.3d 1125, 1131 (Utah 2001), *Board of Education of School District No. 1 v. Booth*, 984 P.2d 639, 656 (Colo. 1999), *Thompson v. Craney*, 546 N.W.2d 123, 134–35 (Wis. 1996), *Rankins v. Louisiana State Board of Elementary & Secondary Education*, 637 So. 2d 548, 555 (La. Ct. App. 1994), *Evans v. Andrus*, 855 P.2d 467, 472 (Idaho 1993) (per curiam), *Board of Education v. West Virginia Board of Education*, 399 S.E.2d 31, 36 (W. Va. 1990), *West Virginia Board of Education v. Hechler*, 376 S.E.2d 839, 843 (W. Va. 1988), *Bailey v. Truby*, 321 S.E.2d 302, 319 (W. Va. 1984), *State* ex rel. *Miller v. Board of Education of Unified School District No. 398, Marion County*, 511 P.2d 705, 713–14 (Kan. 1973), *Guthrie v. Taylor*, 185 S.E.2d 193, 202 (N.C. 1971), *Welling v. Board of Education for the Livonia School District*, 171 N.W.2d 545, 547 (Mich. 1969) (Black, J., concurring), *School District No. 8 v. State Board of Education*, 127 N.W.2d 458, 462–63 (Neb. 1964) (upholding the delegation of legislative power to SEO, while recognizing other limits), *State Board of Education v. Levit*, 343 P.2d 8, 22 (Cal. 1959), *School District No. 3 v. Callahan*, 297 N.W. 407, 417 (Wis. 1941), and *P.J. Willis & Bro. v. Owen*, 43 Tex. 41, 54–55 (1875) (indicating that the legislature cannot take away the state superintendent's constitutional power or require that the power be shared with another officer).

[105] See, e.g., *Powers*, 318 P.3d at 300 (creating new position that would usurp the responsibilities of the superintendent); *P.J. Willis & Bro.*, 43 Tex. at 62–63 (discussing how the legislature had directed the board to create school districts when the constitution explicitly placed that responsibility on the legislature itself); *Evans*, 855 P.2d at 472 (attempting to create more than one board of education).

[106] See, e.g., State Bd. of Educ. v. State Bd. of Higher Educ., 505 P.2d 1193, 1195–96 (Utah 1973) (allowing a transfer of power seemingly prohibited by explicit constitutional text).

[107] El Centro de la Raza v. State, 428 P.3d 1143, 1154–55 (Wash. 2018) (upholding legislation rather than reading key phrases differently); W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 147–48 (W. Va. 2017) (treating the conflict between the legislature and state board as "artificial"); Straus v. Governor, 592 N.W.2d 53, 59, 61 (Mich. 1999) (per curiam) (holding that, despite legislation transferring many of its powers, the SBE retained "ultimate control" over public education).

B. Courts' Methodological Problems

These foregoing results do not alone demonstrate a fundamental problem. Constitutional text, legislative history, and facts might explain some of the results. The fundamental problem is methodological and conceptual. First, courts have been grossly inattentive to the legislative history of SEO constitutional provisions. Undefined constitutional terms like "supervision" and "control" require contextual interpretation. Constitutional convention debates are the starting point for this analysis, but courts routinely decide SEO cases without engaging them.[108] This alone calls into question many education powers cases.

Second, those courts that consult legislative history do so narrowly. They almost uniformly fail to consider SEO clauses in the context of the overall Education Clause in which they rest.[109] As suggested above, SEO supervisory powers exist to serve an education article's goals, not the legislature or the SEO office itself.[110] Third, ignoring this structural constitutional context, courts often analyze the issues based on general assumptions about administrative agencies and legislative discretion.[111] SEO agencies, however, are entirely dissimilar from other government agencies because they flow from constitutional mandates, rather than legislative prerogative.[112] This distinction alters everything from

[108] See, e.g., Bd. of Educ. of Cmty. Consol. Sch. Dist. No. 59 v. Ill. State Bd. of Educ., 740 N.E.2d 428 (Ill. App. Ct. 2000) (deciding case without mentioning debates from constitutional convention); Class B. Sch. Dist. No. 421 v. Brown, 292 P.2d 769, 770–72 (Idaho 1955) (deciding case summarily based solely on text of constitution). Litigants have, at times, inexplicably failed to raise the constitutional origin of SEO power. See Chavez v. Bd. of Educ. of Tularosa Mun. Schs., No. 05-cv-00380, 2008 WL 6049933 (D.N.M. Oct. 20, 2008) (analyzing the text of the Constitution but not constitutional convention debates).

[109] See, e.g., N.C. State Bd. of Educ. v. State, 814 S.E.2d 54, 61–64 (N.C. 2018) (looking extensively at the constitutional history of the board but not the overall education article); *Thompson*, 546 N.W.2d at 130–32 (narrowly examining the constitutional history of the superintendent).

[110] A few courts have either explicitly or implicitly acknowledged this connection. Bd. of Educ. v. W. Va. Bd. of Educ. (*Kanawha*), 399 S.E.2d 31, 33 (W. Va. 1990) (connecting board's powers to the constitution's general education mandates); In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 753 A.2d 687, 697 (N.J. 2000) ("The obligation to supervise the provision of a thorough and efficient system of education in all public schools is omnipresent for the Commissioner.").

[111] See, e.g., Koschkee v. Taylor, 929 N.W.2d 600, 605–06 (Wis. 2019); Bd. of Educ. v. Waihee, 768 P.2d 1279, 1286 (Haw. 1989); *Cmty. Consol. Sch. Dist. No. 59*, 740 N.E.2d at 432.

[112] See, e.g., *Thompson*, 546 N.W.2d at 129 (indicating constitutional framers "considered and rejected the very framework proposed by" current legislation because a state superintendent is "a necessary position, separate and distinct from the 'other officers'

separation of powers analysis to limits on legislative discretion regarding SEOs. Overlooking the distinction allows the legislature to aggrandize SEOs' constitutional authority.

Fourth, while some courts acknowledge that SEO disputes raise questions of inherent power,[113] the possibility appears lost on most.[114] Inherent powers attach to an office by virtue of its nature and existence in a constitutional scheme.[115] Inherent powers are not the exclusive province of presidents and governors. They can attach to any officer whose power derives from broad constitutional principles rather than narrow statutory proscriptions.[116] In short, courts too often adjudicate education powers in a vacuum, looking solely at a statutory provision, SEO provision, administrative process, or narrow policy dispute and ignoring the larger universe of education articles, constitutional history, and education goals. As a result, they miss key information regarding *why* a constitution did or did not afford particular powers to an SEO and what danger lurks behind stripping an SEO of power.

mentioned"); *Kanawha*, 399 S.E.2d at 33 (holding that, unlike other agencies, state board of education "need not rely entirely on statutory authority"); Engelmann v. State Bd. of Educ., 2 Cal. App. 4th 47, 47–48 (1991) (noting the board's constitutional source of authority in absence of legislation).

[113] See, e.g., State ex rel. Langer v. Totten, 175 N.W. 563, 566–67 (N.D. 1919) (discussing how the superintendent "possesses the power to prescribe courses of study for the common schools of the state" unless the "board of administration has the specific power named"); Ybarra v. Legislature, 466 P.3d 421, 428 (Idaho 2020); Powers v. State, 318 P.3d 300, 310 (Wyo. 2014).

[114] See generally Class B. Sch. Dist. No. 421 v. Brown, 292 P.2d 769 (Idaho 1955) (acknowledging argument regarding "broad" constitutional power and speaking of "general" constitutional power but summarily deciding the case based upon the legislature's view of the board's power, without any inquiry into inherent constitutional power); Jackson v. Coxe, 23 So. 2d 312, 320 (La. 1945) (noting the possibility of "complete power of supervision" but treating it as irrelevant because the legislature can "prescribe 'the duties of said board and define its powers'" (quoting La. Const. of 1921 art. XII, § 4)).

[115] See generally United States v. Nixon, 418 U.S. 683, 711 (1974) (noting that the Constitution lacks "any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based").

[116] See id. at 705 ("Certain powers and privileges flow from the nature of enumerated powers."); Andrew W. Yates, Using Inherent Judicial Power in a State-Level Budget Dispute, 62 Duke L.J. 1463, 1465–66 (2013) ("Inherent powers are those not specifically enumerated in the governing constitution, but which each branch of government must possess to maintain the ability to execute its duties.").

C. Courts' Timing Problems

These precedential failures are, in part, a function of timing. The first full explications of Education Clauses did not occur until plaintiffs began filing school funding cases in the 1970s.[117] Even then, only a few states experienced litigation.[118] Most states did not develop their understanding of their Education Clauses until the 1990s and 2000s.[119] Yet, courts decided roughly half of their SEO cases before the early 1970s and three-quarters before the all-important wave of school funding litigation in the 1990s.[120] This incongruence, moreover, still persists in some states. For instance, as of 2012, the Iowa Supreme Court had not decided a school funding or quality case but decided another SEO case that year.[121] Similarly, Utah's Supreme Court has decided five SEO cases—most recently in 2006—but has yet to fully explicate its Education Clause.[122] Courts in this position have incentives to decide SEO cases narrowly rather than consider broader principles.

[117] See, e.g., Serrano v. Priest (*Serrano II*), 557 P.2d 929, 951 (Cal. 1976) (en banc), *modified on denial of reh'g*, 569 P.2d 1303 (Cal. 1977) (en banc); Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973); Horton v. Meskill, 376 A.2d 359, 361 (Conn. 1977) (per curiam); Bd. of Educ. v. Walter, 390 N.E.2d 813, 817 (Ohio 1979); see also Julie K. Underwood, School Finance Adequacy as Vertical Equity, 28 U. Mich. J.L. Reform 493, 498–500 (1995) (discussing first and second waves of litigation in the 1970s).

[118] Those states included California, New Jersey, West Virginia, Connecticut, Ohio, and Wyoming. Underwood, supra note 117, at 499–500. Another wave of cases followed, but those cases were often simplistic or dismissive in their analysis. A number of these cases rejected claims or rendered relatively simplistic decisions. See generally Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005 (Colo. 1982) (en banc) (rejecting both federal and state constitutional challenges to the state's financing of public elementary and secondary education on rational basis grounds); Hornbeck v. Somerset Cnty. Bd. of Educ., 458 A.2d 758 (Md. 1983) (same); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982) (same).

[119] See Rebell, supra note 68, at 1500–05 (discussing a turning point in the litigation toward adequacy litigation and the substance of the issues in those cases).

[120] See supra Figure 1.

[121] Historical Background, Iowa, Schoolfunding.info, https://www.schoolfunding.info/litigation-map/iowa/#1484020700975-05e7ddf5-a54f [https://perma.cc/AZK9-HN7J] (last visited Dec. 17, 2023) (explaining that plaintiffs challenged Iowa's school funding statute in 2002 but later withdrew the complaint with prejudice after reaching a settlement with the state); King v. State, 818 N.W.2d 1, 12–13 (Iowa 2012) (examining whether plaintiffs' claim that the education clause imposes judicially enforceable obligations on various state actors, including the Department of Education and its director, was justiciable).

[122] See State Bd. of Educ. v. Comm'n of Fin., 247 P.2d 435 (Utah 1952); Bateman v. Bd. of Exam'rs, 322 P.2d 381 (Utah 1958); State Bd. of Educ. v. State Bd. of Higher Educ., 505 P.2d 1193 (Utah 1973); Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 17 P.3d 1125 (Utah 2001); Univ. of Utah v. Shurtleff, 144 P.3d 1109 (Utah 2006).

The high court in all but a few states, however, has now issued one or more major opinions interpreting its Education Clause.[123] The New Jersey Supreme Court, for instance, has issued more than twenty opinions dealing with the Education Clause.[124] No other state comes close to that number, but single decisions routinely range from around fifty to well over one hundred pages in length.[125] Part III uses these cases to fill in analytical gaps in SEO precedent, offering a framework to integrate SEO provisions with Education Clauses and constitutional history.

III. A FRAMEWORK FOR EDUCATION POWER

While SEO precedent and analysis is relatively thin, a robust body of law has emerged around state constitutions' Education Clauses over the last half decade.[126] That precedent establishes baseline principles regarding states' constitutional education obligations that add essential context to SEO provisions. First, state Education Clauses establish absolute mandates regarding equity and quality that extend to all state actors.[127] SEOs necessarily fall within this mandate. Second, while legislatures exercise extensive discretion in carrying out this mandate, the constitutional mandate places limits on their discretion.[128] The same logic follows with their actions toward SEOs. Third, the fact that state constitutions create independent constitutional officers to administer the education system is significant in itself. It creates another officer whose

[123] See The States, Educ. L. Ctr., https://edlawcenter.org/litigation/states/ [https://perma.cc/2D7H-GVMH] (last visited Dec. 17, 2023) (providing profiles for each state's litigation).

[124] Abbott v. Burke, 20 A.3d 1018, 1027 (N.J. 2011) (referring to its twentieth decision, which it decided two years earlier).

[125] See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 472–520 (Ark. 2002) (49-page opinion); Washakie Cnty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 310–40 (Wyo. 1980) (31 pages); Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 206–326 (Conn. 2010) (121 pages); William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 414–94 (Pa. 2017) (81 pages).

[126] For an overview of the litigation, its premises, relevant doctrines, and evidentiary requirements, see Derek W. Black, The Constitutional Challenge to Teacher Tenure, 104 Calif. L. Rev. 75, 109–23 (2016).

[127] Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1381 (N.H. 1993) (discussing "[t]he right to an adequate education mandated by the constitution"); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 205 (Ky. 1989) (noting that the General Assembly had an "obligation . . . to provide for a system of common schools"); Ga. Const. art. VIII, § I, ¶ I ("The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia."); *Huckabee*, 91 S.W.3d at 495 (holding that the constitution "imposes upon the State an absolute constitutional duty to educate our children").

[128] See infra notes 129–54 and accompanying text.

purpose is to reinforce the Education Clause's goals and places yet another limit on the legislature.

Tension, however, remains between SEO power and legislative discretion. Education Clause mandates and inherent SEO powers offer guideposts for navigating this tension. Constitutional text and history also reveal a unique governance structure in which legislatures share certain education powers with SEOs. The following sections address each of these points in turn. Section III.A identifies relevant Education Clause doctrines. Section III.B explains the constitutional significance of SEOs within that doctrine and overall education structure. Sections III.C and III.D align legislative discretion with SEO independence and inherent power. Section III.E then explores the unique separation of powers context in which education authority operates.

A. The Education Clause Mandate

In 1973, just weeks after the U.S. Supreme Court rejected a federal right to education,[129] the New Jersey Supreme Court held that its state constitution protects a right to education.[130] That case, and another in California in 1976,[131] triggered a decade of cases premised on the notion that Education Clauses in state constitutions guarantee the right to equal education.[132] In the 1980s, litigation began focusing on the right to an adequate, rather than equal, education.[133] Rich language in state constitutions that spoke to the quality of education made that shift natural.[134]

Constitutional phrases such as "efficient," "thorough," and "general and uniform" education provide the basis for requiring states to provide a

[129] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 36–37 (1973) (decided on March 21, 1973).

[130] Robinson v. Cahill, 303 A.2d 273, 277 (N.J.) (decided April 3, 1973), *modified on reargument*, 306 A.2d 65 (N.J. 1973), *modified on reh'g*, 351 A.2d 713 (N.J. 1975).

[131] Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (clarifying and reaffirming its pre-*Rodriguez* holding that education is a fundamental right in light of California's state constitutional provisions).

[132] See DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90, 93 (Ark. 1983); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 95 (Wash. 1978); Washakie Cnty. Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 333 (Wyo. 1980).

[133] Paul A. Minorini & Stephen D. Sugarman, School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future, *in* Equity and Adequacy in Education Finance: Issues and Perspectives 34, 53–56 (Helen F. Ladd, Rosemary Chalk & Janet S. Hansen eds., 1999).

[134] Id.

baseline level of quality education to all students.[135] The Supreme Court of Kentucky, in *Rose v. Council for Better Education, Inc.*, offered the fullest articulation of that qualitative right in 1989, requiring the state to ensure a specific set of skills and outcomes in major curricular content areas.[136] Following *Rose*, adequacy became the dominant constitutional theory.[137]

By 2022, all but three states had adjudicated some type of an equity or adequacy case.[138] Thirty-two have recognized that the state constitution mandates the provision of an adequate or equal education,[139] and the number continues to grow.[140] Each case has its nuances, but the core judicial doctrines and principles driving the field are straightforward. First, Education Clauses create enforceable rights or duties against the state.[141] Even when courts refuse to enforce an Education Clause, they do not suggest the state is free to breach its mandate,[142] but rather separation of powers principles preclude the judiciary from second-guessing how the legislature discharges its education duty.[143] In short, all state constitutions

[135] Id. at 52; Leandro v. State, 488 S.E.2d 249, 254 (N.C. 1997).

[136] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212–13 (Ky. 1989).

[137] Weishart, supra note 29, at 482; see, e.g., Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 485–495 (Ark. 2002) (raising a claim that the state school system was not constitutionally adequate); McDuffy v. Sec'y of the Exec. Off. of Educ., 615 N.E.2d 516, 554 (Mass. 1993) (citing the *Rose* factors to describe a constitutionally adequate education); Leandro v. State, 488 S.E.2d 249, 255 (N.C. 1997); Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999).

[138] See SchoolFunding.Info: A Project of the Center for Educational Equity at Teachers College, https://www.schoolfunding.info [https://perma.cc/JF7Z-GF3W] (last visited Dec. 17, 2023) (mapping litigation and showing that Utah, Iowa, and Hawaii have not decided a case).

[139] Id.

[140] William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 464 (Pa. 2017) (reversing the court's prior stance, which refused to adjudicate Education Clause); see Julia A. Simon-Kerr & Robynn K. Sturm, Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education, 6 Stan. J. C.R. & C.L. 83, 89–95 (2010) (surveying outcomes in the three waves of school finance litigation).

[141] Black, supra note 126, at 114–17 (reviewing cases that enforce a duty or right against the state). Whether this duty actually entails an individual right, however, has been the source of some debate. See Scott R. Bauries, Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions, 61 Ala. L. Rev. 701, 752 (2010); Joshua E. Weishart, Reconstituting the Right to Education, 67 Ala. L. Rev. 915, 936–50 (2016) (arguing that the state's constitutional education duties does include a claim-right for children).

[142] Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1137 (Mass. 2005) (Marshall, C.J., concurring); Ex parte James, 836 So. 2d 813, 815 (Ala. 2002).

[143] See Bauries, supra note 141, at 714–15 (discussing judicial outcomes and finding that one-third of school finance cases are dismissed based on separation of powers concerns).

establish education duties and rights. Courts just vary in how they enforce them.

Second, while the cases typically involve school funding, the fundamental issue is whether a state's policies and practices provide students with equal and adequate educational opportunities.[144] Any educational policy that significantly affects educational opportunity is subject to challenge.[145] Thus, Education Clause litigation has encompassed things that money can buy—quality teachers, buildings, and supplemental education programs[146]—and things that have very little, if anything, to do with money but substantively impact educational opportunity—school segregation, school discipline, and teacher tenure.[147]

Third, the ultimate responsibility for educational opportunity rests with the state.[148] Consequently, the state has the responsibility to monitor educational opportunity at the state and local level and ensure the delivery of equal or quality education.[149] If local districts lack sufficient funding, deliver ineffective instruction, or simply waste the resources they have, the state has the duty to correct the problem.[150] The state—or, more specifically, the legislature—cannot hide behind notions of legislative discretion or point the finger at local government.[151] It must build and

[144] See Derek W. Black, Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access, 53 B.C. L. Rev. 373, 390 (2012) (explaining that courts assess educational opportunity rather than money).

[145] Id. at 390–403 (discussing the potential breadth of constitutional rights to education).

[146] Abbeville Cnty. Sch. Dist. v. State, 767 S.E.2d 157, 169–73 (S.C. 2014) (examining transportation, teachers, and district size); Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 333–36 (N.Y. 2003) (evaluating teachers, facilities, and the instrumentalities of learning).

[147] See generally Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996) (segregation); Vergara v. State, 246 Cal. App. 4th 619 (2016) (teacher tenure); Phillip Leon M. v. Greenbrier Cnty. Bd. of Educ., 484 S.E.2d 909 (W. Va. 1996) (student expulsion); Cruz-Guzman v. State, 916 N.W.2d 1 (Minn. 2018) (segregation).

[148] See, e.g., Rose v. Council for Better Educ. Inc., 790 S.W.2d 186, 216 (Ky. 1989) ("[T]he sole responsibility for providing the system of common schools lies with the General Assembly."); Opinion of the Justices (Reformed Pub. Sch. Fin. Sys.), 765 A.2d 673, 676 (N.H. 2000) ("The State may not shift any of this constitutional responsibility to local communities.").

[149] *Rose*, 790 S.W.2d at 211.

[150] Abbott v. Burke (*Abbott II*), 575 A.2d 359, 408–10 (N.J. 1990); Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 53, 59–61 (N.Y. 2006) (evaluating the state's new funding plan after a prior finding of liability); Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979) (requiring "careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency"); *Rose*, 790 S.W.2d at 193 (same).

[151] *CFE II*, 801 N.E.2d at 344 (rejecting the state's arguments that the cause of inadequacy was local personnel management failures because the duty rests with state).

maintain a system with sufficient resources, accountability, and governance structures to ensure the delivery of a constitutional education.[152]

These principles shift the analysis away from the notion that education must be left to the political process or that legislators are the ultimate arbiters of education quality, sufficient education resources, or preferred educational governance and responsibility. Rather, legislators are servants to the constitutional education mandate. So too are courts.[153] Courts would dishonor state constitutions if they allowed legislators to run roughshod over education mandates.[154]

B. Constitutionally Independent State Education Officers

SEOs exist to serve the goals embedded in Education Clauses, not to further administrative bureaucracy or legislative discretion.[155] The notion that legislatures can contract or shape SEO power as they see fit would render SEO clauses pointless. Legislative power to create administrative education officers exists without an SEO clause.[156] In fact, some statutory state superintendents preceded constitutional ones.[157] The affirmative decision to, nonetheless, constitutionalize an educational officer signals that an SEO clause serves independent purposes, regardless of the specific text of the clause.

SEO clauses create a structurally independent constitutional officer who is not directly accountable to the legislature or governor, but rather the constitution.[158] State constitutions that provide for the election of

[152] *Rose*, 790 S.W.2d at 193, 216.

[153] William Penn Sch. Dist. v. Pa. Dep't of Educ., 170 A.3d 414, 463 (Pa. 2017) (finding "clear majority" of courts hold it is "their judicial duty" to apply Education Clause to "ensure legislative compliance").

[154] *Rose*, 790 S.W.2d at 209 ("To avoid deciding the case because of 'legislative discretion,' 'legislative function,' etc., would be a denigration of our own constitutional duty."); *William Penn*, 170 A.3d at 464 (indicating that the court owes it to the people to "police [the legislature's] fulfillment of its constitutional mandate").

[155] See generally Pennsylvania Debates, supra note 23, at 385–91 (discussing the role of the state superintendent in advancing the constitution's education mandate).

[156] See Dist. Twp. of Dubuque v. City of Dubuque, 7 Iowa 262, 277 (1858) (pointing out that the SEO clause would have solved no "mischief" if its only effect was to confer legislative power that already existed).

[157] See, e.g., Act of May 31, 1838, ch. 52, 1838 Conn. Pub. Acts 45; Act of June 27, 1845, §§ 1, 3, 1845 R.I. Pub. Laws 1, 1–2.

[158] See, e.g., Hudson v. Kelly, 263 P.2d 362, 369 (Ariz. 1953) (holding that "[a] constitutional office cannot be destroyed nor an incumbent legislated out of it," nor can a legislature do this indirectly (citing State ex rel. Gaston v. Black, 74 So. 387, 388 (Ala.

SEOs demonstrate this point clearly.[159] No other state official or body controls the SEO's decision-making. Even in states where SEOs are appointed, the appointment process acts to insulate the superintendent from undue political influence.[160] The appointment process is intended to remove superintendents from the pressure of elections and encourage competent individuals to seek the position,[161] not render them subservient to other state actors.[162] And regardless of how SEOs attain their office, they retain special standing as constitutional officers that renders them more like judicial officers than executive agency administrators.[163] While Congress can, for instance, set certain aspects of the U.S. Supreme Court's jurisdiction, it cannot interfere with or direct the Court as to how to decide a case or interpret the Constitution.[164] Similar logic follows with constitutionally independent SEOs. Legislatures may specify certain aspects of SEOs' powers or jurisdiction, but SEOs' structural independence carves out space and constitutional authority that legislators and governors cannot invade, shrink, or transfer.[165]

1917))); Pennsylvania Debates, supra note 23, at 386 (rejecting stylistic drafting changes that might imply the superintendent was a member of the executive branch and under the governor).

[159] See, e.g., La. Const. art. VIII, § 2; Or. Const. art. VIII, § 1; S.C. Const. art. VI, § 7.

[160] See, e.g., Colo. Const. art. IX, § 1 (providing for the appointment of the superintendent by the state board, which is elected, rather than the governor).

[161] See, e.g., Pa. Const. art. IV, § 8; Larry Wood, Amendment 1 Would Allow S.C. Voters to Decide How State Superintendent of Ed Is Chosen, Aiken Standard (Nov. 3, 2018) https://www.postandcourier.com/aikenstandard/education/amendment-1-would-allow-s-c-voters-to-decide-how-state-superintendent-of-ed-is/article_f64aa339-fae3-58ec-a646-8cf917f54ec2.html [https://perma.cc/PE6B-H7Q8] (quoting previously elected superintendent as saying that elections discouraged qualified candidates from seeking the position).

[162] Wood, supra note 161.

[163] See generally Powers v. State, 318 P.3d 300 (Wyo. 2014) (holding that a legislature cannot pass laws that interfere with constitutional or inherent authority of constitutional education officers); State ex rel. Horton v. Brechler, 202 N.W. 144, 147 (Wis. 1925) (characterizing the SEO's power as "quasi judicial").

[164] U.S. Const. art. III, §§ 1–2 (specifying the Court's original jurisdiction but allowing Congress to make "exceptions" to the Court's jurisdiction in other cases); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147–48 (1803) (discussing the Court's jurisdiction and Congress's role in setting it); id. at 177 (writing that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997) (emphasizing the need for each branch of government to "respect[] both the Constitution and the proper actions and determinations of other branches" and striking down Congress's attempt to override the Court's interpretation of the constitution).

[165] See, e.g., *Powers*, 318 P.3d at 308 (finding that a "majority of courts" conclude that "the phrase 'as prescribed by law' does not" give the legislature the authority to shrink or eliminate the "inherent powers of a constitutionally created office"); P.J. Willis & Bro. v. Owen, 43 Tex. 41, 55 (1875) (invalidating the transfer of the state superintendent's powers notwithstanding

C. Aligning SEOs' Constitutional Independence With Legislative Prerogative

The difficult practical question is not whether SEOs are independent but instead how to draw the line that delineates SEOs' power from legislatures' power. The answer lies in examining legislatures' role in further specifying SEOs' duties. Constitutional provisions regularly stipulate that SEO powers are "subject to law" or "prescribed by law."[166] These stipulations, however, do not mean that SEO powers are at the complete discretion of the legislature.

Similar language in Education Clauses is instructive. Most state constitutions indicate that the legislature "shall provide" for a system of education.[167] Vesting power in the legislature implies discretion, and some clauses contain explicit language to that effect, indicating that the legislature shall "implement" the constitutional promise of free, public education "by appropriate legislation"[168] or "organiz[e] and chang[e education] in such manner as may be provided by law."[169] Courts, however, emphasize that while these provisions afford the legislature discretion, the constitution's education mandate, along with other provisions, constrains that discretion.[170] In other words, legislative discretion only exists within the range of policies that produce the constitutionally required education opportunities.[171]

Against this background, SEO clauses must be understood as additional mechanisms for implementing Education Clauses. As such, the same logic applies to legislative discretion regarding SEOs. The purpose of assigning a legislature to further specify SEO powers is to direct the legislature to further the Education Clause's goals in a very specific way:

---

an as provided clause); Evans v. Andrus, 855 P.2d 467, 471 (Idaho 1993); W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 145 (W. Va. 2017).

[166] Eleven constitutions apply this limit to the power of supervision. Ariz. Const. art. XI, § 4; Colo. Const. art. IX, § 1; Fla. Const. art. IX, § 2; Haw. Const. art. X, §§ 2, 3; Idaho Const. art. IX, § 2; Ill. Const. art. X, § 2(a); La. Const. art. VIII, §§ 2, 3(A); N.C. Const. art. IX, § 5; Okla. Const. art. XIII, § 5; Wis. Const. art. X, § 1; Wyo. Const. art. VII, § 14.

[167] S.C. Const. art. XI, § 3; Ky. Const. § 183; N.C. Const. art. IX, § 2(1).

[168] Conn. Const. art. VIII, § 1.

[169] Kan. Const. art. VI, § 1.

[170] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (Ky. 1989) (explaining the constitutional limits on legislature); Pauley v. Kelly, 255 S.E.2d 859, 874 (W. Va. 1979) (rejecting unbounded legislative discretion).

[171] See *Rose*, 790 S.W.2d at 216 (requiring the legislature to ensure that delegated constitutional duties are performed efficiently); Leandro v. State, 488 S.E.2d 249, 261 (N.C. 1997) (supporting deference for legislative action regarding providing basic education).

empowering an SEO. While the legislature can exercise discretion in that task, the legislature cannot wield that discretion in ways that are contrary to the constitutional design for delivering education, which includes an independent SEO. Just as with the Education Clause, the constitution constrains legislative discretion regarding SEOs.[172] To afford the legislature more discretion regarding SEO powers than the Education Clause would invert the constitutional structure in which the right and duty of education reigns supreme to one in which the legislature has the power to minimize or manipulate education. The point of a constitutionally grounded and independent zone of SEO authority is to check legislative manipulation.[173]

D. Inherent SEO Power

While the principle of independent SEO power is obvious, the ambiguity of its contours muddles SEO precedent. The contours emerge, however, from three sources: the Education Clause, the core power of supervision, and the implied or inherent powers attendant to an SEO's position. As indicated above, legislatures must afford SEOs the powers necessary to deliver a constitutionally sufficient education. But even in the absence of legislation, an Education Clause's qualitative parameters bind the SEO in his discharge of duties.[174] Likewise, constitutions explicitly articulate SEOs' core power of "supervision," but that power exists to empower the SEO to carry out the Education Clause's mandate.

By virtue of that explicit power and being the chief constitutional education officer, SEOs also presumably possess some inherent power.[175] Cases involving exercises of presidential and federal judicial power have generated the deepest analysis of inherent power.[176] The U.S. Supreme

[172] Powers v. State, 318 P.3d 300, 304–06, 308 (Wyo. 2014) (indicating most courts reject legislative discretion to eliminate or shrink SEO powers).

[173] See, e.g., Pennsylvania Debates, supra note 23, at 385, 387–91 (arguing for an independent superintendent).

[174] See, e.g., Bd. of Educ. v. W. Va. Bd. of Educ. (*Kanawha*), 399 S.E.2d 31, 33–35 (W. Va. 1990) (board has power to take "whatever steps are necessary" to comply with constitutional mandates for education).

[175] See, e.g., *Powers*, 318 P.3d at 308 (discussing "the inherent powers"); W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 145 (W. Va. 2017) (same).

[176] See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645–47 (1952) (Jackson, J., concurring); United States v. Nixon, 418 U.S. 683, 705–06 (1974) (powers flow from the nature of the office); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (discussing presidential power

Court has explained that inherent executive powers are "constitutionally based" even though "[n]owhere in the Constitution . . . is there any explicit reference to" them.[177] They rest on a combination of factors: the nature of the executive office, the effective discharge of its duties, domestic versus international contexts, the structural relationship between the branches of government, and whether one branch is aggrandizing another.[178] Based on these factors, the Court has recognized everything from a presidential power to unilaterally remove executive officers to the power to formally recognize foreign sovereigns.[179]

Several state courts have also recognized the notion that state constitutional officers possess inherent powers. The Arizona Supreme Court, for instance, held that the legislature's power to proscribe the state auditor's duties did not mean the legislature could strip the auditor of "its inherent powers and duties."[180] Otherwise, the legislature could turn the office into "an empty shell."[181] Other courts have uniformly denounced similar legislative efforts.[182] As early as 1910, the Supreme Court of Nevada wrote that it was "well settled" that "the [l]egislature, in the absence of special authorization in the Constitution, is without power to abolish a constitutional office or to change, alter, or modify its constitutional powers and functions."[183] "As provided by law" clauses did not change that thinking. State appellate and supreme courts continued to

in international relations as that which "does not require as a basis for its exercise an act of Congress").

[177] *Nixon*, 418 U.S. at 711.

[178] Id. at 705 (nature of office and discharge of duties); *Curtiss-Wright*, 299 U.S. at 319 (emphasizing international context as basis for presidential power); Zivotofsky v. Kerry, 576 U.S. 1, 10, 13–17 (2015) (quoting precedent regarding the structural relationship between Congress and the executive and then further analyzing the "structure" in the context of the current controversy); Trump v. Mazars, 140 S. Ct. 2019, 2034 (2020) (expressing concern that Congress might " 'exert an imperious control' over the Executive Branch and aggrandize itself at the President's expense" (quoting The Federalist No. 71, at 484 (Alexander Hamilton) (Jacob E. Cooke ed., 1961))).

[179] See Saikrishna Bangalore Prakash, A Taxonomy of Presidential Powers, 88 B.U. L. Rev. 327, 329–31 (2008) (developing a taxonomy of inherent powers).

[180] Hudson v. Kelly, 263 P.2d 362, 368 (Ariz. 1953).

[181] Id.

[182] See State ex rel. Josephs v. Douglas, 110 P. 177, 180 (Nev. 1910); State ex rel. Kennedy v. Brunst, 26 Wis. 412, 414–15 (1870); Warner v. The People ex rel. Conner, 2 Denio 272, 274–275 (N.Y. 1845); State ex rel. Gatson v. Black, 74 So. 387, 389 (Ala. 1917).

[183] *Douglas*, 110 P. at 180.

hold that state legislatures cannot "transfer inherent or core functions of executive officers to appointed officials."[184]

While the logic of this precedent applies directly to SEOs, very few courts have acknowledged it. To be clear, they do not reject the logic but simply fail to recognize SEO disputes as implicating issues of inherent power. The few courts that have recognized the issue typically affirm the concept of inherent SEO power.[185] The Supreme Court of Wyoming offered the most extensive analysis when its legislature displaced the superintendent of public instruction as head of the state department of education.[186] Drawing from a Minnesota Supreme Court case, the Wyoming court similarly concluded that its constitution

> prevent[s] the legislature from abolishing all of the independent functions inherent in an executive office. To allow the legislature to abolish all such functions of an executive office is to allow it to do violence to the title the drafters afforded the office and the core functions necessarily implied therefrom.[187]

The State had argued that only common law officers—which does not include superintendents—possess inherent powers, reasoning that common law history is the only context from which to infer those powers.[188] The Supreme Court of Wyoming disagreed. The constitution's express entrustment of "the power of 'general supervision of the public schools' to the Superintendent" provides an explicit basis from which to infer power.[189] Those inherent powers limit the legislature's power to proscribe the superintendent's duties.[190] The legislature cannot "interfere" with, "abolish or transfer, either directly or indirectly, the inherent powers of [the] constitutionally created office" of the superintendent.[191] The

[184] State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 780 (Minn. 1986) (summarizing precedent).

[185] Powers v. State, 318 P.3d 300, 308–09 (Wyo. 2014) (holding that the legislature could not strip the board of its "independent core functions"); W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 145 (W. Va. 2017) (finding that the board's general powers necessarily require some rule-making capacity); see also State ex rel. Langer v. Totten, 175 N.W. 563, 566 (N.D. 1919) (acknowledging the concept of inherent powers but holding it did not extend to the curriculum because that power was vested in the legislature).

[186] *Powers*, 318 P.3d at 302–03 (discussing the change in SEO power).

[187] Id. at 309 (quoting *Mattson*, 391 N.W.2d at 782).

[188] Id. at 310.

[189] Id. (quoting Wyo. Const. art. VII, § 14).

[190] Id.

[191] Id. at 307–08.

Supreme Court of Idaho was more succinct but equally forceful, writing that the "inherent characteristic duties and powers" of the state superintendent "carr[ied] over from Idaho's territorial days" and that these "characteristic duties belonging to a constitutional officer—those never repealed or expounded on by the Constitution—cannot be taken away by the Legislature."[192]

A few other courts implicitly acknowledge the concept of inherent powers but characterize them as implied powers.[193] The Supreme Court of Appeals of West Virginia, for instance, has reasoned that "any statutory provision that interferes" with the powers implied by the explicit grant of supervisory power is "void."[194] Elsewhere, it reasoned that the legislature cannot interfere with the state board's power "to take whatever steps are necessary to fulfill its obligation to achieve 'the constitutionally mandated educational goals of quality and equality.'"[195] This precedent, limited though it may be, confirms that SEOs, like other constitutional officers, possess the inherent power not just to supervise the school system but to ensure its compliance with the education article. As the next Section reveals, SEOs also stand in a unique position to share power with the legislature.

E. A Separation of Powers Exception

SEOs' special constitutional status and inherent powers alter the breadth of powers that a court might permit SEOs to exercise. Separation of powers jurisprudence typically rests on the premise of three distinct branches of government, none of which can exercise the power of

[192] Ybarra v. Legislature, 466 P.3d 421, 430 (Idaho 2020). The superintendent in North Dakota claimed an inherent power to decide the course of study in public schools, reasoning that such a power had been exercised since statehood. State ex rel. Langer v. Totten, 175 N.W. 563, 566 (N.D. 1919). The court implicitly acknowledged the legitimacy of the concept but rejected his specific claim. Id.

[193] In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Robert Jackson emphasized that inherent powers travel under different terms: "Loose and irresponsible use of adjectives colors all non-legal and much legal discussion of presidential powers. 'Inherent' powers, 'implied' powers, 'incidental' powers, 'plenary' powers, 'war' powers and 'emergency' powers are used, often interchangeably and without fixed or ascertainable meanings." 343 U.S. 579, 646–47 (1952) (Jackson, J., concurring).

[194] W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 842 (W. Va. 1988) (quoting Bailey v. Truby, 321 S.E.2d 302, 312 (W. Va. 1984)).

[195] Bd. of Educ. v. W. Va. Bd. of Educ. (*Kanawha*), 399 S.E.2d 31, 35 (W. Va. 1990) (quoting *Bailey*, 321 S.E.2d at 310).

another.[196] Absolute separation of powers rules, however, do not necessarily apply at the state level. While thirty-five state constitutions contain a "strict" provision that "divides power between the various branches" and "instructs that one branch is not to exercise the powers of any of the others," other state constitutions contain only a "weak" provision that divides powers among the branches but does not prohibit one branch from exercising the powers of another.[197] Some state constitutions contain no provision at all.[198]

These differing textual categories, moreover, do not directly translate into particular separation of powers doctrines. State courts, applying the same or nearly the same constitutional text, take multiple different approaches to the delegation of legislative power.[199] The largest group takes a moderate approach, varying the degree to which they tolerate delegation "depending on the subject matter of the statute or the scope of the statutory directive."[200] Also important is the fact that some state constitutional provisions specifically permit exceptions to general separation of powers principles.[201]

SEOs are the perfect example of why and how separation of powers diverge from a strict three-branch model at the state level and require exceptions. First, pursuant to constitutional text, SEOs have long exercised powers that fall under both the legislative and executive branches.[202] Second, when constitutions assign executive or legislative

[196] See, e.g., Koschkee v. Taylor, 929 N.W.2d 600, 608 (Wis. 2019) (focusing on rigid distinction between executive and legislative functions); State ex rel. Donaldson v. Hines, 182 P.2d 865, 868 (Kan. 1947) (analyzing legislative function that SEO could not exercise); see also Zivotofsky v. Kerry, 576 U.S. 1, 17 (2015) (drawing sharp, exclusive lines of power between branches).

[197] Jim Rossi, Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States, 52 Vand. L. Rev. 1167, 1190–91 (1999).

[198] Id. at 1191.

[199] Id.

[200] Id. at 1198.

[201] See, e.g., Fla. Const. art. II, § 3 (allowing one branch to exercise another's powers if "expressly provided herein"). For a general discussion of how state constitutions distribute powers among the branches and how they contrast with the federal Constitution in their explicit attention to separation of powers, see Robert F. Williams, The Law of American State Constitutions 235–45 (2009).

[202] See, e.g., State ex rel. Sch. Dist. No. 29 v. Cooney, 59 P.2d 48, 51 (Mont. 1936) (emphasizing executive functions); N.C. Const. of 1868, art. IX, § 10 (granting state board of education "full power to legislate" with restrictions); State ex rel. Dix v. Bd. of Educ., 527 P.2d 952, 955 (Kan. 1974) (noting that "[t]he establishment or creation of school districts is a function which is legislative").

functions to SEOs, they are stripping power from the legislative or executive branch.[203] Third, SEO functions do not often neatly fit within a single branch. In short, the "functions of [SEOs] are difficult to compartmentalize."[204] Thus, one court remarked that SEOs more closely resemble a fourth branch of the government.[205]

Consider, for instance, that state boards of education routinely carry out functions that, on their face, appear legislative. The Virginia constitution directs the Board to "prescrib[e]" the "[s]tandards of quality for the several school divisions"[206] and "divide the Commonwealth into school divisions of such geographical area and school-age population as will promote" those standards.[207] It adds that the Board "shall have primary responsibility and authority for effectuating the educational policy set forth in" the education article.[208] Yet, the state board is not a subdivision of the legislature or a committee.[209]

State courts' decisions similarly demonstrate the ambiguity of SEO functions. Kansas courts have repeatedly upheld and acknowledged SEOs' power over what it deems legislative activity: school district

[203] See W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 843 (W. Va. 1988) (any statutory interference with the board's "rule-making is unconstitutional"); W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 148 (W. Va. 2017) (noting that legislation "itself appear[ed] to acknowledge and pay deference to the [state board]'s expansive rule-making authority in exercise of its supervisory powers").

[204] Alexander & Alexander, supra note 32, at 112 (suggesting, nevertheless, that "it is possible to identify certain ones that may be more readily described as executive rather than legislative or judicial"). This is, in part, because "the definition of what is 'executive' or 'legislative' is [not necessarily] the same at the state level as at the national level, or even stable from state to state." G. Alan Tarr, Interpreting the Separation of Powers in State Constitutions, 59 N.Y.U. Ann. Surv. Am. L. 329, 338 (2003); see also Rossi, supra note 197, at 1189 (state and federal approach contrast "starkly").

[205] Dist. Twp. of Dubuque v. City of Dubuque, 7 Iowa 262, 275 (1858) (creation of the board of education introduced "what is termed a fourth power in the government" and further characterizing it as "a new and unusual body" with constitutional power). But see Straus v. Governor, 592 N.W.2d 53, 58 (Mich. 1999) (writing that SEO "is not a fourth branch of government").

[206] Va. Const. art. VIII, § 2.

[207] Id. § 5.

[208] Id. Such power was not uncommon in SEO provisions from the mid-nineteenth century. See, e.g., N.C. Const. of 1868, art. IX, § 10 (granting SBE "full power to legislate"); Ala. Const. of 1868, art. XI, § 5 (granting SBE "full legislative powers"); Iowa Const. of 1857, art. IX, § 8 (granting SBE "full power and authority to legislate").

[209] Pennsylvania Debates, supra note 23, at 386 (refusing to allow the superintendent clause to be in executive article).

creation.[210] Conversely, Wisconsin courts treat district creation as a quasi-judicial or administrative power and, thus, a power SEOs can exercise.[211] Courts have similarly struggled with the nature of SEO rulemaking, treating it as a delegated legislative power in Wisconsin,[212] a legislative and executive power in Michigan,[213] and simply a supervisory power requiring no categorization in West Virginia.[214]

SEOs' unique, constitutionally ordained, branch-blurring functions make separation of powers doctrines like the nondelegation doctrine inapplicable. State constitutions, by their explicit text, vest powers in SEOs that nondelegation doctrines might otherwise preclude.[215] Thus, while the legislature cannot simply tell the executive branch to "make the environment cleaner" without providing some standard to guide the executive,[216] it could presumptively task an SEO to improve the

[210] See, e.g., State ex rel. Dix v. Bd. of Educ., 527 P.2d 952, 955–56 (Kan. 1974); Tecumseh Sch. Dist. No. 7 v. Throckmorton, 403 P.2d 102, 104 (Kan. 1965); State ex rel. Donaldson v. Hines, 182 P.2d 865, 868 (Kan. 1947); State ex rel. Rosenstahl v. Storey, 58 P.2d 1051, 1054 (Kan. 1936).

[211] State ex rel. Horton v. Brechler, 202 N.W. 144, 146–47 (Wis. 1925) (holding that authority over district creation by CSO was quasi-judicial rather than legislative); State ex rel. Moreland v. Whitford, 11 N.W. 424, 424–25 (Wis. 1882) (characterizing the power as judicial in nature); Village of West Milwaukee v. Area Bd. of Vocational, Tech. & Adult Educ., 187 N.W.2d 387, 394 (Wis. 1971) (treating district creation as "an administrative function, not a legislative function"). But see Sch. Dist. No. 3 v. Callahan, 297 N.W. 407, 413 (Wis. 1941) (suggesting that school district formation and consolidation were legislative but can be delegated to CSO).

[212] Koschkee v. Taylor, 929 N.W.2d 600, 611 (Wis. 2019) ("Rulemaking is a legislative power that does not fall within the [superintendents]'s supervisory constitutional authority . . . .").

[213] Welling v. Bd. of Educ. for the Livonia Sch. Dist., 171 N.W.2d 545, 546 (Mich. 1969) (per curiam) (suggesting constitutional duty to "promulgate regulations specifying the number of hours necessary to constitute a school day . . . to determine the curricula and, in general, to exercise leadership and supervision over the public school system"); Straus v. Governor, 592 N.W.2d 53, 59–60, 60 n.9 (Mich. 1999) (per curiam) (suggesting the SBE's "rule making powers" were a function of statutory power, not constitutional power).

[214] W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 843 (W. Va. 1988) (rulemaking falls within "general supervision" and thus cannot be restricted).

[215] Compare Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (explaining that Congress "must 'lay down by legislative act an intelligible principle'" (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928))), with High Sch. of Clayton Cnty. v. County of Clayton, 9 Iowa 175, 175–76 (1859) (noting that the constitution confides "the educational interests of the State" to the Board, "which shall have full power and authority to legislate and make all needful rules and regulations in relation to common schools[] and other educational institutions").

[216] See *Whitman*, 531 U.S. at 473 (finding that Congress had set standards for air quality).

curriculum.[217] State constitutional structures already contemplate SEOs operating as the sole and final word on such matters, so long as those matters fall within the scope of their supervision power, as defined by the constitution and supplemented by statutes.[218]

In sum, SEOs fill a unique constitutional role that imbues them with implied or inherent powers within their sphere of influence. Though legislatures may add to or flesh out SEOs' core powers, those powers are not subject to unfettered legislative discretion.[219] The SEOs' ultimate duty is to implement the Education Clause, including its substantive components.[220] The legislature must assist and further empower the SEO in doing so, not impede the SEO. Part IV translates these broad principles and spheres of influence into specific powers.

IV. DEFINING SEO POWERS AND THEIR SCOPE

SEOs' most important power is their explicit power of supervision. Courts have tended to define that power too narrowly. This power potentially gives SEOs extensive and exclusive jurisdiction over certain aspects of education, including managing day-to-day school operations, taking corrective action against schools and inferior officers, and setting statewide policy on matters of great import. Absent constitutional text to the contrary, SEOs also possess the specific power of rulemaking. Within supervision and rulemaking, any number of more discrete powers may also exist, such as closing schools, setting the school day and year, and managing school personnel.

---

[217] See, e.g., State ex rel. Rosenstahl v. Storey, 58 P.2d 1051, 1054 (Kan. 1936) (finding that superintendent's constitutional authority over the educational interests of the state allows legislature to delegate duties that normally "would be regarded as legislative in character"); Sch. Dist. No. 3 v. Callahan, 297 N.W. 407, 413 (Wis. 1941) (stating that legislative function could be delegated to CSO); State ex rel. Reorganized Sch. Dist. No. 4 v. Holmes, 231 S.W.2d 185, 190 (Mo. 1950) (en banc) (stating that, given the constitutional structure, "it follows that the state legislature can confer on that board duties that are legislative in character as distinguished from those classified as executive or administrative only"); Ewing v. Scotts Bluff Cnty. Bd. of Equalization, 420 N.W.2d 685, 692 (Neb. 1988) ("Legislature may delegate legislative powers to the State Department of Education.").

[218] See, e.g., Bridgehampton Sch. Dist. No. 2 v. Superintendent of Pub. Instruction, 36 N.W.2d 166, 169 (Mich. 1949) ("[T]he superintendent of public instruction is a constitutional officer" and the legislature can afford her "final" authority.); State ex rel. Moreland v. Whitford, 11 N.W. 424, 425 (Wis. 1882) (asserting that superintendent decision on school district boundaries is final).

[219] See infra Section IV.C.

[220] W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 842 (W. Va. 1988) (suggesting the board has power to take steps necessary to comply with Education Clause's mandates).

With that said, SEOs share a vast amount of power with legislatures because their jurisdictions overlap in many respects. This shared power, however, is better understood as a vast potential store of power. Whereas separation of powers would normally preclude a legislature from deferring major issues of school funding or curriculum to another branch, nothing precludes legislatures from charging SEOs with making these types of decisions. Moreover, when legislatures fail to act on crucial education issues, SEOs can often fill the gap. In fact, the area of exclusive legislative power in education that cannot be shared with SEOs is relatively small. The following Sections detail each of these zones of power, beginning with sections on SEOs' powers of supervision, rulemaking, and discrete matters and ending with sections on shared power and exclusive legislative power.

A. Supervision

Exclusive and inherent SEO power rests in the constitutional terms "supervision" and "control." When states enacted their first SEO provisions, dictionaries defined "supervise" as "[t]o oversee; to superintend; to inspect," and to "direct or watch with authority [over] the work or proceedings or progress," which would entail the power to "press for correction."[221] A "superintendent" was "[o]ne who has the oversight and charge of something, with the power of direction"[222] or "management" and "arrange[ment]."[223] More contemporary dictionaries add "to be responsible for the good performance of an activity or job, or for the correct behavior or safety of a person."[224]

Applied most narrowly to SEOs, supervision could be little more than a mechanical task. The legislature creates an education system, provides for teachers, and sets standards for schools. The SEO simply monitors and directs that system to ensure its compliance with the legislature's vision. In this narrow version, the SEO is the equivalent of an on-site construction

[221] 2 Noah Webster, An American Dictionary of the English Language 86 (1828); The Concise Oxford Dictionary of Current English 883 (Henry W. Fowler & Francis G. Fowler eds., 1919) [hereinafter Oxford Dictionary of 1919].

[222] Webster, supra note 221, at 85.

[223] Oxford Dictionary of 1919, supra note 221, at 882.

[224] Supervise, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/supervise [https://perma.cc/UK28-4BUZ] (last visited Dec. 17, 2023); see also Supervise, Collins Dictionary, https://www.collinsdictionary.com/us/dictionary/english/supervise [https://perma.cc/9CJT-V64X] (last visited Dec. 17, 2023) (defining "supervise" as to "make sure that the activity is done correctly or that the person is doing a task or behaving correctly").

foreman who builds a structure according to the specifications handed to her.

This narrow interpretation is inconsistent with the constitutionalization of SEOs. An officer with such narrow power requires no constitutional grounding. That officer could, and did, exist as a statutory creature prior to constitutionalization.[225] By constitutionalizing SEOs, states elevated SEOs to a level on par with the other branches of government.[226] Legislatures, of course, play a role in defining SEOs' duties, but as demonstrated earlier, SEOs are not merely the legislature's subservient delegates.

Several courts have confirmed the logic of a broader interpretation of SEOs' supervision power. Moving beyond the simplistic synonyms like oversight, inspection, and direction, the Supreme Court of Appeals of West Virginia emphasized that "'[g]eneral supervision' is not an axiomatic blend of words designed to fill the pages of our State *Constitution*, but it is a meaningful concept to the governance of schools and education in this state."[227] Vesting such power in an SEO serves a larger purpose: to ensure that "[d]ecisions that pertain to education [are made] by those who possess expertise in the educational area."[228]

Similarly conceptualizing broad power, the Wyoming Supreme Court cautioned against technical or circumstantial interpretations of supervision that might shrink an SEO's power. It emphasized that an SEO's powers and duties must be understood "collectively."[229] While some legislative incursions into an SEO's powers might appear insignificant or mundane, small incursions can render an SEO's powers "piecemeal" rather than "general."[230] In other words, adding the modifier

[225] See supra note 157.

[226] Alabama's constitution initially placed the superintendent's election on par with the governor and assigned him an office in the capital. Ala. Const. of 1868, art. XI, § 2. It also indicated the Board would meet at the capital during the same session as the legislature and receive the same pay. Id. § 9.

[227] W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 842 (W. Va. 1988).

[228] Id.

[229] Powers v. State, 318 P.3d 300, 321 (Wyo. 2014).

[230] Id. at 320–21; see also Authority of the Legislature to Define Powers and Duties of the Superintendent of Public Instruction, Wash. AGO 1998 no. 6 (Wash. Att'y Gen. Mar. 9, 1998), https://www.atg.wa.gov/ago-opinions/authority-legislature-define-powers-and-duties-superintendent-public-instruction [https://perma.cc/L76R-HY5Q] (stating that if the policy "shifts so many responsibilities to other officers or agencies that the [CSO] no longer 'supervises' the public school system, the proposal is probably unconstitutional").

"general" intentionally broadens the scope of supervision.[231] Yet, other courts have reached similarly broad interpretations, focusing on SEOs' unique "mission" as an important factor in interpreting the structure and scope of their supervisory powers.[232] Or, as the Supreme Court of Appeals of West Virginia has emphasized, the SEO's supervisory power is shaped by the "duty to ensure that the constitutionally mandated educational goals of quality and equality are achieved."[233]

Consistent with this logic, some courts have generated specific articulations of SEOs' supervision power. A few have reasoned that "the term 'general supervision' means something more than to advise and confer with[,] but something less than to control."[234] Yet, "the line of demarcation . . . between advice and control" cannot be set "with fine precision."[235] The Supreme Court of Washington, however, reasoned that supervision entails two concrete aspects: (1) the "power to take corrective action" and (2) authority that is not subordinate to another entity.[236] And as other courts reason, these supervisory powers must include both the power to set policy at the state level that applies to all schools and the power to act at the local level in regard to individual schools.[237]

[231] *Powers*, 318 P.3d at 320–21; see also Bd. of Educ. of Sch. Dist. No. 1 v. Booth, 984 P.2d 639, 646–47 (Colo. 1999) (en banc) (discussing significance of "general" supervision).

[232] Nat'l Educ. Ass'n—Fort Scott v. Bd. of Educ., Unified Sch. Dist. No. 234, 592 P.2d 463, 465–66 (Kan. 1979); cf. Unified Sch. Dist. No. 279 v. Sec'y of the Kan. Dep't of Hum. Res., 802 P.2d 516, 527 (Kan. 1990) (holding that a state official's exercise of quasi-judicial authority in select conflicts did not impermissibly interfere with SEO's "basic mission").

[233] W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 144 (W. Va. 2017) (quoting Bailey v. Truby, 321 S.E.2d 302, 310 (W. Va. 1984)).

[234] State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398, 511 P.2d 705, 707 (Kan. 1973); Unified Sch. Dist. No. 380 v. McMillen, 845 P.2d 676, 683 (Kan. 1993); see also *Nat'l Educ. Ass'n—Fort Scott*, 592 P.2d at 465; *Bailey*, 321 S.E.2d at 309–10 (finding *Miller*'s reasoning "persuasive"); El Centro de la Raza v. State, 428 P.3d 1143, 1152 (Wash. 2018) (emphasizing that supervision is "more than the power merely to confer with and advise" (quoting State ex rel. Sch. Dist. No. 301 v. Preston, 146 P. 175, 178 (Wash. 1915))).

[235] *Miller*, 511 P.2d at 713.

[236] *El Centro de la Raza*, 428 P.3d at 1153.

[237] Powers v. State, 318 P.3d 300, 314 (Wyo. 2014) (seemingly accepting notion that general supervision "entails supervision at a high level over such issues as apply to all schools" but rejecting notion that it is limited to that (emphasis omitted) (internal quotation marks omitted)); Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 17 P.3d 1125, 1129–30 (Utah 2001) (rejecting claim that "general control and supervision" permitted the SBE to manage overall system but not school-specific decisions); Bd. of Educ. of Sch. Dist. No. 1 v. Booth, 984 P.2d 639, 647 (Colo. 1999) (en banc) (presuming that framers intended supervision of the "whole" school system with a "statewide perspective").

The foregoing suggests two principles and a core list of supervisory powers. First, SEOs have their own jurisdiction. While their powers may overlap with and intermingle with the legislature, the supervision of schools, and all that it entails, is uniquely theirs. Second, within that jurisdiction, an SEO is the supreme educational authority in the state. They are not subservient to the legislature any more than courts are subservient to those who appoint them. Third, while the precise scope and definition vary with specific constitutional text or legislative history, this supervisory power presumptively includes the power to set educational policies on matters within the SEO's jurisdiction, enforce the legislature's educational policy, take corrective action against local schools, hire and fire certain personnel, structure SEO offices as necessary to carry out supervision, contest or resist legislative or other action that is contrary to any constitutional mandate of educational equality or adequacy, and be free of legislative or executive action that would deprive the SEOs of such powers.[238]

B. Legislative and Rulemaking Power

The power to set education policy on matters within an SEO's supervisory jurisdiction entails, as a practical matter, legislative or rulemaking power. Formal legislative SEO power may appear counterintuitive on its face, but in the nineteenth century, some state constitutions explicitly granted SEOs legislative authority.[239] Today, however, none do.[240] If formal legislative power exists today, it arises as an implied or inherent power of SEO "supervision" over the school system.[241] But insofar as supervision power is "subject to law" or intrudes into the legislature's exclusive power (as discussed later in Section E), there is no reason to believe any formal legislative power extends to SEOs.

[238] Ironically, legislatures have at times suggested such broad interpretations themselves. See, e.g., Koschkee v. Taylor, 929 N.W.2d 600, 609 (Wis. 2019) (discussing 1848 law giving superintendent power "to adjust and decide all controversies and disputes arising under the school lands" (quoting Thompson v. Craney, 546 N.W.2d 123, 133 (Wis. 1996))).

[239] See, e.g., N.C. Const. of 1868, art. IX, §§ 9–10; Ala. Const. of 1868, art. XI, § 5; Iowa Const. of 1857, art. IX, § 8.

[240] The California constitution, however, gives the state board exclusive control over textbook adoption, thereby reserving an aspect of education for the board that would otherwise be the subject of legislation. Cal. Const. art. IX, § 7.5.

[241] See supra note 214 for a list of the provisions granting the power of supervision.

Rulemaking, however, requires different analysis. As a practical matter, rulemaking is little more than giving those whom you supervise advance notice of how you will supervise. So long as the rules address matters within an SEO's area of supervision, the rules should be within core SEO power. Consistent with this logic, several courts have held that rulemaking is inherent in supervision.[242] Constitutional text or history could negate this general presumption in a specific state, but otherwise the power to supervise necessarily entails the power to promulgate rules. But rather than leave the matter to logic, some constitutions have explicitly extended this power to an SEO.[243] The North Carolina constitution, for instance, provides that the State Board of Education "shall make all needed rules and regulations" for the supervision and management of schools.[244]

The more important question is not whether SEOs have rulemaking power as a general principle, but whether a particular rule addresses a matter beyond supervision. This division, unsurprisingly, marks the line between constitutional and unconstitutional rulemaking in a few cases.[245] Additional issues may arise when a constitutionally valid SEO rule conflicts with generally valid exercises of legislative power. The conflict arises most clearly regarding whether SEO rulemaking must comply with a state's administrative procedures act. The constitutional implications of this issue, however, have tended to elude courts, which have repeatedly

[242] W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 843 (W. Va. 1988) (holding that legislature cannot interfere with state board's rulemaking because it "is within the meaning of 'general supervision' "); Welling v. Bd. of Educ. for the Livonia Sch. Dist., 171 N.W.2d 545, 546 (Mich. 1969) (per curiam) (asserting that part of the constitutional office's responsibility is "to promulgate regulations"); Engelmann v. State Bd. of Educ., 3 Cal. Rptr. 2d 264, 269 (Cal. Ct. App. 1991) (acknowledging that some rulemaking power has a source in the constitution); State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398, 511 P.2d 705, 711 (Kan. 1973) (asserting that the "authority to supervise the public schools" includes the authority "to adopt regulations"); Bailey v. Truby, 321 S.E.2d 302, 313 (W. Va. 1984) (holding that the "promulgation of a rule requiring students to maintain" a minimum grade point average "is a legitimate exercise" of the state board's supervision power). But see Straus v. Governor, 592 N.W.2d 53, 59–60, 60 n.9 (Mich. 1999) (recognizing that the source of the school board's rulemaking power is statutory); *Koschkee*, 929 N.W.2d at 610 (overturning a prior opinion that had validated independent SEO rulemaking and instead subjecting it to gubernatorial oversight).

[243] N.C. Const. art. IX, § 5; Iowa Const. of 1857, art. IX, §§ 1, 8.

[244] N.C. Const. art. IX, § 5.

[245] Compare Yeoman v. Dep't of Motor Vehicles, 78 Cal. Rptr. 251, 257–60 (Cal. Ct. App. 1969) (discussing dispute over SEO and DMV rules regarding certificates for school bus drivers), with *Bailey*, 321 S.E.2d at 312 (discussing the rule regarding grade point averages to participate in extracurricular activities).

upheld legislation or executive action that subjects SEOs' rulemaking to outside authority and processes.[246] These courts fail to distinguish between rulemaking that is a function of purely statutory authority and rulemaking based on constitutional authority.[247] Statutory rulemaking is, without question, subject to administrative procedure acts, but the logic does not hold with constitutional rulemaking or procedures that invade SEOs' core supervision powers. At least two courts have recognized this crucial distinction.

The Supreme Court of Appeals of West Virginia found that administrative procedure act requirements are unconstitutional when they prohibit or delay the state board from taking action on rules pertaining to its supervisory function.[248] Though less forceful, the Supreme Court of North Carolina recognized this distinction but managed it differently. It stressed that North Carolina's administrative oversight of SEO rules did not involve a substantive review but was purely "procedural in nature."[249] On that basis, the court reasoned it did not raise constitutional concerns.[250]

In sum, rulemaking is inherent in SEOs' supervisory power. The scope of supervisory power will determine the scope of rulemaking power. Thus, while SEOs have general rulemaking power in education, the subject matter of those rules has limits. The precise matter on which an SEO issues a rule will dictate its constitutionality, not a general rule upholding or rejecting rulemaking. Moreover, when a rule addresses matters within the scope of supervision, SEO rules should be exempt from any general statewide administrative procedures that substantively—and maybe even procedurally—interfere with the SEO's power.[251]

---

[246] See, e.g., *Koschkee*, 929 N.W.2d at 610.

[247] See generally 78 C.J.S. Schools and School Districts § 111 (2023) (failing to distinguish between different types of rulemaking); id. § 112 (indicating rules that do not comply with procedure acts are invalid); see also 1 Rapp, supra note 32, § 3.02[6][a] (2005) (indicating SEO regulatory power is "relative to the statutes they are bound to administer" and must comply with administrative procedure acts).

[248] W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 843 (W. Va. 1988).

[249] N.C. State Bd. of Educ. v. State, 814 S.E.2d 54, 63 (N.C. 2018). But see id. at 66 (Martin, C.J., dissenting) ("[T]he phrase 'subject to laws enacted by the General Assembly' does not mean—and cannot mean—'subject to determinations by the Rules Review Commission.'").

[250] Id. at 63 (majority opinion).

[251] This Article's logic would indicate that the Wisconsin Supreme Court correctly declared unconstitutional a statute subordinating the superintendent of public instruction's rulemaking to the governor's authority in *Coyne v. Walker*, 879 N.W.2d 520, 525 (Wis. 2016), and incorrectly reversed that decision in *Koschkee v. Taylor*, 929 N.W.2d 600, 600 (Wis. 2019).

C. Discrete Powers

Courts have recognized other discrete contexts in which SEOs' broad supervisory and rulemaking powers operate. For instance, the Supreme Court of Appeals of West Virginia indicated supervision includes power over actual school administration, which the SEO could control by promulgating rules "integral to the day-to-day operation of schools."[252] Consistent with that notion, the Michigan courts have held that the power to set the length of the school day and the school year rested with the SEO, not the legislature.[253] West Virginia's highest court went even further, holding that school closures and consolidation plans also fall under the purview of the SEO's supervision power.[254]

Other courts, however, have rejected SEO power regarding curricular decisions, teacher terminations, and more.[255] In certain instances, courts' logic is flawed, but insofar as some of the cases involve contexts beyond core supervision powers, they involve areas of shared power with the legislature. Thus, some courts have upheld SEO exercises of powers not as purely constitutional powers, but as appropriate exercises of power in conjunction with legislative grants.[256] This area of conjunction may be the most important and interesting area of SEO power.

D. Shared Power

SEOs and state legislatures potentially share a unique vast area of power. As discussed in Section III.D, while courts often conceptualize power as resting exclusively within one branch, this paradigm does not fit the constitutional reality of SEOs. Whatever general rules might apply to

[252] *Hechler*, 376 S.E.2d at 842.

[253] See State Bd. of Educ. v. Houghton Lake Cmty. Schs., 403 N.W.2d 561, 563 (Mich. Ct. App. 1987); Welling v. Bd. of Educ. for the Livonia Sch. Dist., 171 N.W.2d 545, 546 (Mich. 1969) (per curiam).

[254] Bd. of Educ. v. W. Va. Bd. of Educ. (*Kanawha*), 399 S.E.2d 31, 33–35 (W. Va. 1990); W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136, 150–51 (W. Va. 2017). But see Class B. Sch. Dist. No. 421 v. Brown, 292 P.2d 769, 771–72 (Idaho 1955) (recognizing no state board power over school districting).

[255] See, e.g., Citizens for Objective Pub. Educ., Inc. v. Kan. State Bd. of Educ., 71 F.Supp.3d 1233, 1245 (D. Kan. 2014) (no curriculum power); Aguillard v. Treen, 440 So. 2d 704, 710 (La. 1983) (no curriculum power); Unified Sch. Dist. No. 380 v. McMillen, 845 P.2d 676, 683 (Kan. 1993) (no power to hire and fire teachers). But see State ex rel. Landis v. Blake, 148 So. 566, 567 (Fla. 1933) (per curiam) (power to remove subordinate school officer).

[256] See Sch. Comm'rs v. State Bd. of Educ., 26 Md. 505, 519–21 (1867) (acknowledging constitutional power but relying primarily upon legislation granting SBE authority over textbooks).

other state agencies, the fact that constitutions explicitly direct legislatures to imbue SEOs (who already possess their own inherent and textual powers) with further powers means that SEOs hold a latent legislative power. More simply, constitutional SEOs are capable of legislation if given that power by the legislature.[257]

Several courts adopt this logic.[258] The Supreme Court of Kansas, for example, held that a constitutional provision granting the Kansas SEO "general supervision" and "other duties as may be prescribed by law" effectively "authorized [the SEO] to perform any duties pertaining to the educational interests of the state which the Legislature deems wise and prudent to impose."[259] Those duties, moreover, are not limited to executive functions. The legislature can "authorize the [SEO] to perform duties, or determine questions, with respect to the educational interests of the state which, in the general classification of powers of government, would be regarded as legislative in character."[260] The Supreme Court of Wisconsin similarly held that an SEO's supervision power combined with the legislature's authority to further prescribe the SEO's duties enabled the legislature to delegate power "without any standard whatsoever to guide in the exercise of the power delegated."[261]

In other words, state constitutions contemplate SEO powers that would normally be prohibited if delegated to other branches of government, state actors, or agencies. Because these powers require legislative action and

[257] State ex rel. Reorganized Sch. Dist. No. 4 v. Holmes, 231 S.W.2d 185, 190 (Mo. 1950) (en banc) (concluding that the "state legislature can confer on [state] board duties that are legislative in character"); see also Ewing v. Scotts Bluff Cnty. Bd. of Equalization, 420 N.W.2d 685, 692–93 (Neb. 1988) (asserting that "the Legislature may delegate legislative powers to the State Department of Education" but clarifying that the legislature "must set out guidelines"); Tecumseh Sch. Dist. No. 7 v. Throckmorton, 403 P.2d 102, 104–05 (Kan. 1965); Sch. Dist. No. 8 v. State Bd. of Educ., 127 N.W.2d 458, 461–62 (Neb. 1964) (collecting cases); see also Alexander & Alexander, supra note 32, at 109 (discussing *School District No. 3 v. Callahan*, 297 N.W. 407 (Wis. 1941), and suggesting that SEOs "may have broad latitude in dealing with regulation of purely educational matters").

[258] *Callahan*, 297 N.W. at 411 (holding that, in Wisconsin, school district formation and consolidation are not "exclusive legislative function[s] as may not be delegated to the" CSO); State ex rel. Rosenstahl v. Storey, 58 P.2d 1051, 1054 (Kan. 1936); see also Bridgehampton Sch. Dist. No. 2 v. Superintendent of Pub. Instruction, 36 N.W.2d 166, 169 (Mich. 1949) (explaining that "the legislature has the power to vest" substantial authority regarding needs and means in the CSO and "[h]is action in the matter shall be final" (internal quotation marks omitted)).

[259] *Rosenstahl*, 58 P.2d at 1054 (quoting Kan. Const. of 1859, art. VI, § 1); id.

[260] Id. The Supreme Court of Kansas later distinguished invalid from valid legislative delegations of authority. See State ex rel. Dix v. Bd. of Educ., 527 P.2d 952, 956 (Kan. 1974).

[261] *Callahan*, 297 N.W. at 411–13.

acquiescence, however, these powers are best understood as shared powers that depend on the legislature. For instance, the power to establish the state curriculum may not fall within the inherent or core power of an SEO,[262] but a state legislature could delegate that power to an SEO.[263] Moreover, the legislature could do so without any meaningful guidance.[264] In contrast, leaving the curriculum entirely to a governor would raise separation of powers and nondelegation concerns.

School funding provides an even clearer example of how broad and significant an SEO's ability to receive power could be. A legislature could theoretically allocate hundreds of millions of dollars a year to an SEO with no instructions other than for the SEO to determine how best to distribute it to schools.[265] Those decisions would easily fall within the scope of the constitutionally vested authority to supervise or control schools.[266] In fact, some state constitutions explicitly grant the board of education a role in funding decisions.[267] For instance, the North Carolina constitution provides that "[t]he State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support."[268] But again, if a legislature delegated authority

[262] See, e.g., Citizens for Objective Pub. Educ., Inc. v. Kan. State Bd. of Educ., 71 F. Supp. 3d 1233, 1245–46 (D. Kan. 2014); Aguillard v. Treen, 440 So. 2d 704, 709 (La. 1983) (upholding legislation requiring creation-science curriculum because "as provided by law" clause left SBE's supervision and control "subject to the direction of the legislature" (internal quotation marks omitted)).

[263] See, e.g., Medeiros v. Kiyosaki, 478 P.2d 314, 319–20 (Haw. 1970); Sch. Comm'rs v. State Bd. of Educ., 26 Md. 505, 519–21 (1867).

[264] See, e.g., *Callahan*, 297 N.W. at 411 (upholding standardless delegation).

[265] Id.; Ewing v. Scotts Bluff Cnty. Bd. of Equalization, 420 N.W.2d 685, 692–93 (Neb. 1988) (explaining that "the Legislature may delegate legislative powers to the State Department of Education" but clarifying that the legislature "must set out guidelines"); see also Council of Orgs. & Others for Educ. About Parochiaid, Inc. v. Engler, 566 N.W.2d 208, 221 (Mich. 1997) (recognizing board's power to deny funding); Tarr, supra note 204, at 338–39 (explaining how constitutions "have transformed control over spending from a solely legislative power into a shared power"—a phenomenon "rais[ing] questions about whether these changes are . . . changing the states' understanding of which powers are 'legislative,' 'executive,' or 'judicial' ").

[266] See *Callahan*, 297 N.W. at 411–12 (recognizing that the power to determine district alteration and consolidation can be delegated to the superintendent without any standard).

[267] La. Const. art. VIII, §§ 2, 3(A) (supervision, control, and budgetary responsibility over public elementary and secondary schools and special schools under its jurisdiction as provided by law); N.C. Const. art. IX, § 5.

[268] N.C. Const. art. IX, § 5.

over school funding to a governor, it would almost surely be unconstitutional.[269]

When legislatures assign such responsibilities to SEOs, they are merely assigning education tasks to the very officer the constitution identifies as a repository of education authority. By their structure and text, state constitutions contemplate the concentration or comingling of education power in SEOs.[270] Constitutional delegates saw this as allowing education policy and practice to be based on professional, rather than political, judgment.[271] But in the context of shared power, SEO judgments remain subject to legislative rearticulation or elimination.[272]

Whereas the foregoing shared powers involve those that an SEO might receive from the legislature, SEOs also share power with the legislature in areas in which the legislature and SEOs might both act. Consider, for instance, a state that articulates minimum education standards for academic offerings but does not articulate the remedy or course of action for breaches of those standards. An SEO's supervisory power presumptively includes the power to take corrective action in such schools.[273] In this respect, the SEO and legislature share power. Yet, even in the absence of minimum education standards, an SEO should possess power to take corrective action (and articulate relevant standards of its

[269] Probably because of the egregious nature of such a delegation, no analogous state law exists, but one federal case regarding the delegation of funding decisions to the president is instructive. See Clinton v. City of New York, 524 U.S. 417, 448–49 (1998) (finding that Congress could not give the president the power to cancel line items of funding from legislation).

[270] See *Callahan*, 297 N.W. at 411–13 (finding that the SEO's constitutional supervision power meant that the legislature could delegate powers to the SEO that would otherwise be reserved to the legislature); State ex rel. Rosenstahl v. Storey, 58 P.2d 1051, 1054 (Kan. 1936) (finding no constitutional violation in the delegation of both administrative and legislative power to SEO).

[271] See supra note 77.

[272] See, e.g., State ex rel. Langer v. Totten, 175 N.W. 563, 566 (N.D. 1919) (upholding legislation transferring powers that had previously been assigned to SEO); State ex rel. Wolfe v. Bronson, 21 S.W. 1125, 1127 (Mo. 1893) (upholding legislation transferring the power to select textbooks away from SEO); Nat'l Educ. Ass'n—Fort Scott v. Bd. of Educ., Unified Sch. Dist. No. 234, 592 P.2d 463, 466–67 (Kan. 1979) (upholding legislation transferring significant power over teacher negotiations).

[273] El Centro de la Raza v. State, 428 P.3d 1143, 1153 (Wash. 2018) (articulating line of constitutionality as whether there is interference with "the superintendent's power to take corrective action"); see also Section IV.A (discussing definition of supervision and the power to take corrective action).

own) for perceived deficiencies.[274] That the legislature can fill that space simply signals that they share the power.

Shared power should likewise exist regarding educational staff. As the ultimate constitutional supervisor of the educational system, an SEO should have power to set certification and competency standards for educational personnel.[275] Legislation need not precede the exercise of such power.[276] Otherwise, the SEO would lack the capacity to ensure the most basic form of quality control (which constitutional adequacy standards could require). Yet, the legislature, pursuant to its constitutional duty to ensure an equal and/or adequate education, would also have the authority to set certification and competency standards.[277] In short, where a legislative vacuum exists, SEOs should generally have the authority to act, but SEO action does not preclude later legislative action.

The difficulty arises when the legislature and SEO conflict. Constitutional text, convention debates, or inherent power analysis might provide the basis for identifying an exclusive power that allows a court to conclude one branch's action prevails. But if the subject matter involves shared powers, a binary analysis that seeks to declare a clear winner may misframe the issue. Some powers are so overlapping that they are, in most circumstances, shared and the tension unresolvable.

At the federal level, war powers provide an instructive example of the problem. Constitutional text provides that the president is the commander

[274] *El Centro de la Raza*, 428 P.3d at 1153–54; see Section IV.B (discussing power of rulemaking).

[275] See Section IV.A (defining supervision and control as the duty to be responsible for the good performance of a person); Guthrie v. Taylor, 185 S.E.2d 193, 198 (N.C. 1971) (upholding authority to require teacher certification); see also W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 843 (W. Va. 1988) (upholding authority to set standards for buses); Yeoman v. Dep't of Motor Vehicles, 273 Cal. App. 2d 71, 79–83 (1969) (upholding authority over bus driver certificates). The issue is not often litigated because, in many states, legislatures have extended superintendents' power regarding teacher terminations and qualifications. See, e.g., 105 Ill. Comp. Stat. 5/21B-75(b) (2011). Some courts, however, have been reluctant to recognize inherent power over personnel. See, e.g., Unified Sch. Dist. No. 380 v. McMillen, 845 P.2d 676, 683–85 (Kan. 1993); Foster v. Bd. of Elementary & Secondary Educ., 479 So. 2d 489, 492–94 (La. Ct. App. 1985); Bourne v. Bd. of Educ., 128 P.2d 733, 736 (N.M. 1942).

[276] See State ex rel. Miller v. Bd. of Educ. Unified Sch. Dist. No. 398, 511 P.2d 705, 710 (Kan. 1973) (finding board of education's powers self-executing and thus not requiring further legislation).

[277] See generally Vergara v. State, 209 Cal. Rptr. 3d 532, 538 (Cal. Ct. App. 2016) (upholding legislature's tenure and seniority rules for teachers); State v. Project Principle, Inc., 724 S.W.2d 387, 389 (Tex. 1987) (upholding new teacher testing and certification regime).

in chief of the armed forces, but only Congress can declare war, fund war, and raise an army to fight it.[278] The discrete powers of each branch are so interconnected that neither can act without the other.[279] Legislatures' and SEOs' powers regarding teachers are potentially similarly intertwined. Like Congress funding and raising an army, state legislatures are responsible for funding teaching staff and setting various employment policies and benefits, but legislatures' unilateral power in those respects need not preclude SEOs from exercising supervisory power to impose additional policies and requirements on those staff.[280] Likewise, a law establishing a minimum teacher-student ratio need not preclude an SEO from further shrinking class sizes. One might conceptualize SEOs as filling space that the legislatures leave open, rather than contradicting the legislature.

If, however, an SEO directly contradicts the legislature in an area of shared power, hard-and-fast rules are difficult to articulate. Like the famous line from *Youngstown Sheet & Tube Co.*, the correct result will most likely depend on "imponderable[]" circumstances "rather than on abstract theories of law" or predetermined rules.[281] This may explain why courts force certain cases into an exclusive powers analysis, even when the powers are better understood as overlapping and shared. And when they are so unavoidably shared to evade that forced analysis, courts refuse to decide the case on the merits, leaving future actors with no guiding doctrine.[282]

A set of key factors, nonetheless, should guide any analysis of disputes in areas of shared education power: whether a branch is seeking to aggrandize another, whether exigencies demand that one of the branches

[278] U.S. Const. art. II, § 2 (presidential commander-in-chief powers); id. art. I, § 8 (congressional powers).

[279] See generally Kazi S. Ahmed, Comment, The President vs. Some Old Goat: The Justiciability of War-Powers, 123 Penn St. L. Rev. 191, 196–98 (2018) (discussing the division of war powers to prevent unilateral action).

[280] See generally King v. State, 818 N.W.2d 1, 13–14 (Iowa 2012) (finding a "dichotomy between education policy" entrusted to the state board and education funding entrusted to the legislature); Montoy v. State, No. 99-cv-01738, 2003 WL 22902963, at *23–24 (D. Kan. Dec. 2, 2003) (finding the legislature has constitutional duty to develop school funding method and the Board has the constitutional duty "to supervise local school boards to ensure [that] the educational interests of the state are being met").

[281] 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[282] See, e.g., Campbell v. Clinton, 52 F. Supp. 2d 34, 45 (D.D.C. 1999) (treating war powers disputes as non-justiciable due to lack of standing); Doe v. Bush, 323 F.3d 133, 135 (1st Cir. 2003) (same due to lack of ripeness).

act, the extent to which the action involves matters more closely resembling the core function or power of one of the branches, and the extent to which one or either of the competing actions would appear reasonably calculated to ensure compliance with the Education Clause's mandates.[283] That last factor is particularly important. Courts' rigid procedural conceptions of separation of powers often treat separation of powers, rather than some other substantive value, as the end in itself.[284] But the substantive values and goals embedded in the Education Clause offer principles by which to evaluate disputes over shared power between SEOs and legislatures. That factor, moreover, may help move analysis away from abstract notions of the dangers of interbranch encroachments toward the overarching question of fidelity to the Education Clause's mandates.

E. Exclusive Legislative Power

Rather than a separate clause, the legislature's primary power—or, more accurately, duty—in education rests in the Education Clause itself. The most obvious, explicit, and consistent legislative duties in those Clauses are the power of the purse and the power of creation. State constitutions frequently indicate that "[t]he general assembly shall . . . provide" for a system of public schools.[285] Some specifically command the general assembly to provide, "by taxation, or otherwise" for education,[286] while others use the more general, yet substantively similar,

[283] See, e.g., Bd. of Educ. v. W. Va. Bd. of Educ. (*Kanawha*), 399 S.E.2d 31, 34 (W. Va. 1990) (recognizing SEO's power to enforce "the constitutionally mandated educational goals of quality and equality" (internal quotation marks omitted)); In re Grant of the Charter Sch. Application of Englewood on the Palisades Charter Sch., 753 A.2d 687, 697 (N.J. 2000) (finding the constitutional mandate of "a thorough and efficient system of education" is "omnipresent" for the SEO); King v. State, 818 N.W.2d 1, 13–14 (Iowa 2012) (distinguishing between the education powers vested in SEO and legislature); *Youngstown Sheet & Tube Co.*, 343 U.S. at 650 (Jackson, J., concurring) (identifying usurpation of another branch as a salient issue); State Bd. of Educ. v. Levit, 343 P.2d 8, 22 (Cal. 1959) (striking down legislation that "interfere[d] with the ultimate" decision by state board); State ex rel. Donaldson v. Hines, 182 P.2d 865, 868 (Kan. 1947) (examining the nature of the legislative function in question); Morrison v. Olson, 487 U.S. 654, 675–76 (1988) (preventing one branch from "impair[ing] the constitutional functions assigned to one of the branches").

[284] See, e.g., Clinton v. City of New York, 524 U.S. 417, 436–38 (1998) (striking down line-item veto even though Congress had extended the authority and retained an automatic check on its exercise).

[285] Colo. Const. art. IX, § 2; Ky. Const. § 183.

[286] Ohio Const. art. VI, § 2.

language of "maintain and support" public schools.[287] In addition, separate clauses place limits on how legislatures can use school funds, reserving particular sources of funding exclusively for public schools,[288] precluding expenditures on private schools,[289] and sometimes mandating the specific level and timing of public school appropriations.[290]

Many state constitutions speak not just to the funding of schools but to their creation. Oklahoma's constitution commands the legislature to "establish . . . a system of free public schools."[291] Wyoming's constitution commands the legislature to "create" the system.[292] Signaling that the state is in an initial building phase, some state constitutions add that the legislature shall create these schools "as soon as practicable."[293]

The legislature's power could be read narrowly as only including these textual powers to establish, structure, and fund schools. The SEO's job would be to take over where the legislature left off by supervising and managing those schools. Though this conceptualization would offer bright lines for resolving constitutional conflicts, it would incorrectly do so at the expense of shared powers and the legislature's broader responsibility.

Legislative responsibility necessarily extends beyond funding and creation. First, ongoing responsibility is inherent in the phrase "maintain," which often follows the phrase "establish" or "support."[294] Second, many state constitutions command the legislature to fund and maintain a particular type of school system: "thorough and uniform,"[295] "general and

[287] Mich. Const. art. VIII, § 2; Tex. Const. art. VII, § 1.

[288] See, e.g., Ala. Const. of 1868, art. XI, § 10 (reserving proceeds from new and old state lands for public schools and nothing else); Fla. Const. of 1868, art. VIII, § 4 (establishing a mandatory common school fund).

[289] See, e.g., S.C. Const. art. XI, § 4 (prohibiting public funding of private schools); see also Green, supra note 82, at 312–15 (surveying no aid clauses by era, some of which prohibited funding for all private schools whereas others prohibited funding for religious schools).

[290] Pa. Const. art. III, § 11 (requiring the public education appropriation to be in the general appropriation for executive, legislative, and judicial branches); Nev. Const. art. XI, § 6 (specifying various details regarding the annual education appropriation, including its priority); Colo. Const. art. IX, § 17 (dictating an annual minimum rate of growth in funding for schools).

[291] Okla. Const. art. XIII, § 1; see also Ariz. Const. art. XI, § 1 (calling for the "establishment" of a public school system).

[292] Wyo. Const. art. VII, § 9.

[293] Colo. Const. art. IX, § 2.

[294] Okla. Const. art. XIII, § 1; Ariz. Const. art. XI, § 1; Colo. Const. art. IX, § 2.

[295] Colo. Const. art. IX, § 2.

uniform,"[296] or "efficient"[297] education. These phrases impose a qualitative responsibility on legislatures.[298] While that duty could theoretically be confined to providing the resources necessary for quality education, determining what quality education entails is a predicate to funding it. That task, at least at its most practical level, falls to the legislature or its delegates.[299] Third, the constitutional mandate for legislatures to provide for education is often accompanied by terms like "by appropriate legislation,"[300] by "all suitable means,"[301] or by "all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education."[302]

Cases like *Rose v. Council for Better Education* make this logic clear. After declaring the entire public education system unconstitutional, the court emphasized that the General Assembly had an absolute duty "to re-create [and] re-establish a new system of common schools."[303] In addition to funding, that duty included devising a system of academic standards, educational organization, and oversight sufficient to ensure that students in all districts receive an adequate education.[304] Though less effusive, numerous other courts reach the same conclusion.[305]

In short, state constitutions make it relatively clear that the power to raise taxes, create schools, fund schools, and set qualitative standards all vest exclusively in the legislature. The power to standardize those schools, improve them, make them more efficient, and ultimately dissolve and restructure them implicitly vests in the legislature as well.[306] One major point distinguishes legislatures' core powers from those of SEOs.

[296] Ariz. Const. art. XI, § 1; Ind. Const. art. VIII, § 1.

[297] Ark. Const. art. XIV, § 1; Ky. Const. § 183; Tex. Const. art. VII, § 1.

[298] Rebell, supra note 68, at 1501–03.

[299] Recognizing as much, courts in school funding opinions have used state statutes to define and measure quality education. See, e.g., Abbott v. Burke, 693 A.2d 417, 427 (N.J. 1997); Hoke Cnty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *82–83 (N.C. Super. Ct. Oct. 12, 2000) (relying on state standards and tests to define the meaning of a constitutionally adequate education); Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 730 (Tex. 1995).

[300] Conn. Const. art. VIII, § 1; Ky. Const. § 183.

[301] Ind. Const. art. VIII, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 1.

[302] R.I. Const. art. XII, § 1.

[303] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 215 (Ky. 1989).

[304] Id. at 208, 215–16.

[305] See Rebell, supra note 68, at 1500–05.

[306] *Rose*, 790 S.W.2d at 215–16.

While an SEO cannot share its power with the legislature, the legislature can share its powers with an SEO.[307]

V. EDUCATION POWER IN CONTEXT

Each education crisis involves its own constitutional and statutory nuances. No framework can provide simple answers for all states and crises. Constitutional variations and particular facts will always weigh heavily. But Part IV's framework fills the intellectual void and substantial uncertainties that perpetually beleaguer crises. Consider, for instance, recent masking and critical race theory ("CRT") controversies. Each has involved fights between the legislature, state education officials, and local districts over who has the power to decide these issues.[308] Too often, politics overtakes the conversation before any clear constitutional analysis can surface. The following sections offer a starting point for what that analysis should entail.

A. School Masks

The intersection of masking policies with federal disability law only complicated the controversy, sometimes overshadowing the education power issues.[309] For this Article's purposes, it suffices to say that when federal disability law requires masking under a particular set of circumstances, the issue of education power is moot because all branches of government must act in accordance with that requirement.[310] This follows not because federal actors have inherent or superior power in education, but because when states and schools accept federal funds, they agree to comply with federal antidiscrimination laws.[311]

[307] Sch. Dist. No. 3 v. Callahan, 297 N.W. 407, 413 (Wis. 1941) (permitting delegation of legislative function to SEO); State ex rel. Rosenstahl v. Storey, 58 P.2d 1051, 1054 (Kan. 1936) (finding that the constitution authorizes the legislature to delegate administrative and legislative authority to SEO).

[308] See supra notes 16–17.

[309] Mary Anne Pazanowski, Students with Disabilities Get Mixed Results on Mask Mandates, Bloomberg L. (Jan. 25, 2022, 5:09 PM), https://news.bloomberglaw.com/litigation/students-with-disabilities-get-mixed-results-on-mask-mandates [https://perma.cc/YV4F-R6N3] (surveying federal mask litigation).

[310] See, e.g., Disability Rts. S.C. v. McMaster, 564 F. Supp. 3d 413, 423–25 (D.S.C. 2021), *vacated in part*, 24 F.4th 893 (4th Cir. 2022) (rejecting state and governor's position on mask mandates in schools).

[311] Id. at 422.

If federal law does not require masking, the answer to who holds education power depends on the precise manner in which state actors attempt to address the issue. Basic safety and health protocols inside school buildings would logically fall within the purview of the SEO. SEOs' supervisory power generally includes decision-making pertaining to issues related to facilities, safety, and staff.[312] Masking fits in all three of these categories. A decision requiring personnel to wear masks, for instance, bears little difference from the authority to set bus driver qualifications, which a court appropriately upheld as within SEO power.[313] Moreover, because such power appears inherent to SEOs' supervision and management of schools, a legislative attempt to preclude an SEO from exercising power in this area would raise constitutional concerns of improper interference.[314] A legislature would struggle to provide a legitimate reason for precluding the SEO from exercising professional judgment on the matter. In short, an SEO's core powers presumptively include the power to direct all employees and students to wear masks—a power that should remain free of undue legislative interference.

That is not to say, however, that legislatures are without any power in this arena, only that legislative power has its limits. Legislative power regarding masking could derive from two sources. The first is a legislature's general power over health, safety, and welfare.[315] Pursuant to this power, a legislature clearly holds the power to enact generally applicable rules regarding public masking.[316] Those rules could apply in schools the same as in any other venue.

The second source of power is the legislature's duty to ensure constitutionally adequate education.[317] An adequate education includes a safe environment and, thus, legislatures can and must ensure the health

[312] See, e.g., W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 842 (W. Va. 1988) (recognizing that the board's supervision includes the ability to promulgate rules "integral to the day-to-day operation of schools").

[313] Yeoman v. Dep't of Motor Vehicles, 273 Cal. App. 2d 71, 82–83 (1969).

[314] See La. Op. Att'y Gen. No. 21-0103 (Aug. 6, 2021) (concluding masking fell within state board's general supervisory power).

[315] See, e.g., State ex rel. W. Va. Div. of Nat. Res. v. Cline, 488 S.E.2d 376, 380 (W. Va. 1997) (the power to "promote the welfare of its citizens" is inherent in sovereigns (quoting State ex rel. City of Princeton v. Buckner, 377 S.E.2d 139, 146 (W. Va. 1988))).

[316] See generally Jacobson v. Massachusetts, 197 U.S. 11 (1905) (holding the state can require vaccinations, against the wishes of individual citizens, under its police power to promote the common welfare).

[317] See supra Section III.A.

and safety of students.[318] Appropriate mask policies would fall within that duty. These sources of power suggest that neither legislatures nor SEOs possess exclusive power regarding masking but that they have shared or overlapping powers. In this context, a legislature could presumptively set minimum masking standards and the SEO should retain the power to require more rigorous safety practices if necessary.

If, however, the legislature and SEO took unreconcilable positions on masking, their particular means of action and positions would weigh heavily. Pursuant to its basic spending power, for instance, a legislature could presumptively preclude state expenditures on masks.[319] Any challenge to such legislation would likely depend on whether the deprivation of these resources denied students a constitutionally sufficient education.[320] Sustaining such a claim, however, would be difficult.[321] Even in the context of inadequate funding claims, courts emphasize the legislature's discretion regarding particular school funding strategies.[322]

The state might argue that limiting state funds for masks is a fiscal judgment that state funds should support other education needs, and local districts or students could use their own resources to purchase masks.[323] The analysis would then be whether the policy's practical effect was to deny students a constitutionally sufficient education—a factually intense inquiry involving the science of masks and health risks, the substantiality of the educational injury, whether the injury is systematic, and a causal

[318] Abbeville Cnty. Sch. Dist. v. State, 515 S.E.2d 535, 540 (S.C. 1999) (defining the state Education Clause to require "adequate and safe facilities"); Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661, 666 (N.Y. 1995) (requiring "adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn").

[319] See, e.g., Wilson ex rel. State v. City of Columbia, 863 S.E.2d 456, 460–62 (S.C. 2021). But see Disability Rts. S.C. v. McMaster, 564 F. Supp. 3d 413, 423–25 (D.S.C. 2021), *vacated in part*, 24 F.4th 893 (4th Cir. 2022).

[320] Black, supra note 126, at 117–18 (discussing the evidence required to show a deprivation of the right to education under state constitutions).

[321] In the context of assignments to alternative schools, this type of requirement has effectively precluded plaintiffs from challenging their school assignments. See Black, supra note 22, at 39; Dean Hill Rivkin, Legal Advocacy and Education Reform: Litigating School Exclusion, 75 Tenn. L. Rev. 265, 284 (2008) (reasoning that challenges based on adequacy of education in alternative schools will fail).

[322] See, e.g., Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 58 (N.Y. 2006) (extending deference to the "Legislature's education financing plans"); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 214 (Ky. 1989) (leaving specifics to the "wisdom of the General Assembly").

[323] See *Wilson*, 863 S.E.2d at 461 (leaving open the possibility that local jurisdictions could impose a mask mandate without violating the legislature's spending proviso).

connection to the state's funding policy.[324] The possibility of injury to a small or amorphous group of students might not be sufficient to establish an injury.[325] Even if so, plaintiffs would need to demonstrate that the state's funding proviso was the actual cause of insufficient masks.[326]

Legislation that precluded masks altogether, denied the SEO power to impose mask mandates, or gave individual students the right to opt out of a mask mandate would involve a different analysis.[327] An attempt to preclude masks altogether or bar an SEO from imposing mask requirements would, on its face, seem entirely unrelated to ensuring an adequate education.[328] Instead, it would resemble an attempt to strip the SEO of supervisory power, particularly the ability to make quick judgments based on evolving facts on the ground—the essence of supervisory power.[329] As such, the legislation should be unconstitutional.

Legislation giving students the right to opt out of mask mandates—and conflicting with an SEO's direction to the contrary—would be more

[324] See Black, supra note 126, at 114–23.

[325] See, e.g., Vergara v. State, 209 Cal. Rptr. 3d 532, 553–54 (Cal. Ct. App. 2016); *Campaign for Fiscal Equity*, 861 N.E.2d at 53 (relying on evidence of systemic failure in school completion rates and test results to demonstrate a constitutional violation); Hoke Cnty. Bd. of Educ. v. State, 599 S.E.2d 365, 386–89 (N.C. 2004) (focusing on systematic poor performance as evidence of a constitutional violation rather than isolated incidents).

[326] Black, supra note 126, at 118–21.

[327] Some state actors took steps to preclude mask mandates, reasoning that they invaded individual rights of privacy and freedom to not wear them. Scott Bomboy, The Constitutional Issues Related to Covid-19 Mask Mandates, Nat'l Const. Ctr. (Aug. 13, 2021), https://constitutioncenter.org/blog/the-constitutional-issues-related-to-covid-19-mask-mandates [https://perma.cc/39U6-J9HK].

[328] Some did argue, however, that "masking children may lead to negative health and societal ramifications." Fla. Exec. Order No. 21-175 (July 30, 2021), https://www.flgov.com/2021/07/30/governor-desantis-issues-an-executive-order-ensuring-parents-freedom-to-choose/ [https://perma.cc/5EZA-32N3]. Evidence to support that position, however, appeared speculative. Social Media Claims That Masks Delay Children's Speech Development Are Missing Context, Reuters (Jan. 26, 2022, 2:33 PM), https://www.reuters.com/article/factcheck-masks-child-speech-development/fact-check-social-media-claims-that-masks-delay-childrens-speech-development-are-missing-context-idUSL1N2U62CO [https://perma.cc/B3QW-ZUHL] (indicating experts "say there is yet no concrete evidence to support claims that masks cause delays in speech and development in children"). But see Julia Schwarz, Face Masks Affect How Children Understand Speech Differently from Adults—New Research, Conversation (July 19, 2022, 9:17 AM), https://theconversation.com/face-masks-affect-how-children-understand-speech-differently-from-adults-new-research-185979 [https://perma.cc/5Z5Z-WYE8] (noting that later studies indicate that masks could have a negative effect for a subset of students).

[329] See, e.g., W. Va. Bd. of Educ. v. Hechler, 376 S.E.2d 839, 842 (W. Va. 1988) (holding that SEO has the authority to address "day-to-day operation of schools").

complicated.[330] If mask mandates implicated some liberty right under the state constitution, the legislature could enforce that right through legislation.[331] But that enforcement would still need to be reasonably tailored to the precise right, and it is not clear that any such right currently exists under state constitutions.[332]

Legislation that declared a purely statutory opt-out right (or protected interests broader than the constitutional right) would trigger two additional factual inquiries, both of which weigh against upholding legislative power. First, is the opt-out right so broad that it precludes the SEO's supervisory power and duty to keep schools safe? On one level, masks involve a very narrow aspect of education operations and do not represent huge incursions into SEOs' supervisory powers. But SEOs' supervisory power is holistic, and even minor incursions should not be tolerated lest they render SEO power piecemeal.[333]

Second, does the opt-out right vindicate some important individual health or educational interest, even if that interest lacks constitutional

[330] A few courts have attempted to carefully thread those needles by, on the one hand, narrowly reading statutes that limit masking and, on the other, recognizing exceptions to mask mandates and guidance. See, e.g., Wilson ex rel. State v. City of Columbia, 863 S.E.2d 456, 458 (S.C. 2021) (distinguishing a nuanced higher education provision regarding mask mandates from the blunt one in K–12); Disability Rts. S.C. v. McMaster, 564 F. Supp. 3d 413, 424 (D.S.C. 2021), *vacated in part*, 24 F.4th 893 (4th Cir. 2022) (emphasizing that "[e]ven the CDC's own guidance says that a 'person with a disability who cannot wear a mask, or cannot safely wear a mask, for reasons related to the disability' should not be required to wear a mask" (alteration in original) (citation omitted)).

[331] The notion here is that legislative action to enforce one aspect of the state constitution would require a court to balance the efficacy of that enforcement against the constitutional authority of the SEO. Clear analogs of this sort at the state level are thin, but at the federal level, the Court justifies the invasion of state rights with the evidence of a constitutional violation that Congress seeks to remedy, requiring that the remedy be proportionate and congruent to the evidence. See City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[332] Governor DeSantis's executive order explicitly referenced the parental right to direct the upbringing and education of their children, which Florida had codified in its Parents' Bill of Rights. 2021 Fla. Laws ch. 2021-199 (H.B. 241). The constitutional source for such a right is presumably the federal Constitution, not the state constitution. See Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925). That constitutional right, however, is relatively narrow and does not include several aspects found in Florida's bill. Compare Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1200 (9th Cir. 2005) (rejecting claim that sex education violated parents' rights), with Parents' Bill of Rights, 2021 Fla. Laws ch. 2021-199 (H.B. 241) (broadly articulating parental rights to control the education of children, often with no explicit limitation on the scope of the right, and, for instance, granting parents the right to opt their children out of certain instruction in public schools).

[333] See Powers v. State, 318 P.3d 300, 321 (Wyo. 2014) (cautioning against allowing collective power to be undermined through piecemeal incursions).

grounding? If so, it may be an interest that the SEO should already be balancing and, thus, legislation protecting it appears less of an incursion. But if no legitimate interest exists, the law resembles a political effort to supplant the SEO's constitutional role in making education decisions, rather than sharpen it.[334] The precise facts and answers to these questions would shape the final constitutional analysis, but a carefully crafted opt-out right based on actual facts and legitimate interests could likely withstand claims of interbranch interference, whereas a broader opt-out right, or one not based in facts and legitimate interests, likely could not.

B. Racial Curriculum

As a general principle, the power to preclude or require the teaching of certain aspects of history rests primarily with the legislature.[335] Matters of curriculum involve the legislature's duty to ensure quality, uniform, or efficient education.[336] When the state's curriculum standards are broad, an SEO may exercise power in the space left open. But the first and final stabs at curriculum—absent some contrary constitutional text—generally remain with the legislature.[337] Constitutional language that assigns or implies some curricular role for an SEO can alter this presumption,[338] but most constitutions lack such language.[339] Thus, state legislatures

[334] Along those lines, one governor explicitly premised his executive order on stopping "governments [from] dictating when and where South Carolinians are required to wear a mask." Gov. McMaster Issues Order Empowering Parents to Decide on Masks in Schools, Restricts Local Mask Mandates, and Prohibits Vaccine Passports, S.C. Off. of the Governor (May 11, 2021), https://governor.sc.gov/news/2021-05/gov-mcmaster-issues-order-empowering-parents-decide-masks-schools-restricts-local-mask [https://perma.cc/W4CK-2WDJ].

[335] See, e.g., Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 779, 787 (Tex. 2005) (acknowledging legislature's authority over curriculum); Cal. Tchrs. Ass'n v. Bd. of Trs., 146 Cal. Rptr. 850, 854 (Cal. Ct. App. 1978) ("[C]urriculum and the courses of study . . . are details left to the discretion of the Legislature.").

[336] See, e.g., *Neeley*, 176 S.W.3d at 787.

[337] See, e.g., State ex rel. Wolfe v. Bronson, 21 S.W. 1125, 1126–27 (Mo. 1893) (upholding legislation transferring the power over textbooks); Aguillard v. Treen, 440 So. 2d 704, 709 (La. 1983) (concluding that the board's supervision and control of curriculum is "subject to the direction of the legislature"); State ex rel. Langer v. Totten, 175 N.W. 563, 566 (N.D. 1919) (upholding legislation's transfer of powers over courses of study from SEO to statutory officer).

[338] See, e.g., Cal. Const. art. IX, §§ 2.1, 7, 7.5.

[339] Colorado's constitution, interestingly, explicitly denies both the legislature and board of education the power to select textbooks. Colo. Const. art. IX, § 16; see also Wyo. Const. art. VII, § 11 (denying legislature and superintendent textbook selection power).

presumptively possess the power to set the curriculum, which would include the power to exclude some topics such as critical race theory.

This power, however, is subject to substantive limits. These limits relate to how the legislature wields its power, rather than whether power exists. The most important limits are students' constitutional right to an adequate education, federal antidiscrimination rights, and free speech. Clear indications that the legislature crossed these lines might also justify an SEO taking action to avoid constitutional violations.

Just as state Education Clauses guaranteeing an adequate education grant power over the curriculum to legislatures, those Clauses also represent curricular guardrails for the exercise of that power. States must ensure access to a curriculum that is consistent with adequate outcomes as defined by courts and the Education Clause's mandates.[340] Legislation that denies students access to the knowledge or skills essential to an adequate education violates the Education Clause. The question, then, is whether access to certain race-related material is essential to an adequate education.

Though much of the content requirements that courts have emphasized address core academic outcomes related to math, science, and reading, courts find that an adequate education requires more than that. As one seminal case explained, a constitutionally adequate education "develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship."[341] Requirements that the curriculum meet citizenship and social morality ends could easily entail race-related curriculum.

Making this connection, however, would be very factually intensive and contested. Courts often rely on state statutes as a measure of a constitutionally adequate education.[342] This allows courts to hold legislatures to their own words rather than mediate academic disputes over the nuances of what should be taught. But given that anti-CRT legislation sets a new curricular standard, holding a legislature to its word would require a court to compare a state's previous education standards to its new anti-CRT bill to reveal an internal conflict in the state's

[340] See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 197–98 (Ky. 1989) (examining difference in curricular quality).

[341] Pauley v. Kelly, 255 S.E.2d 859, 877 (W. Va. 1979).

[342] See supra note 299.

standards.[343] Or a court might examine the extent to which an anti-CRT bill conflicts with other broader curriculum standards, such as Florida's prohibition on teachers "suppress[ing] or distort[ing] significant historical events."[344]

Courts have also relied on expert witnesses in defining an adequate education.[345] In recent years, the academic community has consistently identified diverse curricula and intergroup exposure as core components of an adequate education.[346] Equally important, several state supreme court holdings are consistent with the premise that their constitution requires a curriculum that exposes students to diverse ideas, perspectives, and our full national history.[347]

To be clear, the likelihood of a student plaintiff successfully challenging legislation on these grounds remains low. But this evidence could offer a basis upon which an SEO might refuse to enforce an anti-CRT law. Moreover, the professional judgment of an independent constitutional officer could force a court to seriously entertain the notion that the legislature had misused its curricular discretion and violated the Education Clause. Of course, this would also depend on a court's willingness to seriously consider those constitutional SEO powers outlined in Part IV.

[343] Other states' statutes might suggest that the state in question was an outlier in its particular approach to teaching history or race-related issues. Given the number of states recently restricting race-related subjects, however, this approach might prove difficult.

[344] Fla. Admin. Code Ann. r. 6A-1.094124 § 3(b) (2023).

[345] See, e.g., *Rose*, 790 S.W.2d at 210–11.

[346] See, e.g., Robert A. Garda, Jr., The White Interest in School Integration, 63 Fla. L. Rev. 599, 603 (2011); Derek Black, The Case for the New Compelling Government Interest: Improving Educational Outcomes, 80 N.C. L. Rev. 923, 953 (2002); James A. Banks, Cultural Diversity and Education: Foundations, Curriculum, and Teaching 85, 161 (6th ed. 2016); Amy Stuart Wells, Lauren Fox & Diana Cordova-Cobo, Century Found., How Racially Diverse Schools and Classrooms Can Benefit All Students 1, 15–18 (2016), https://production-tcf.imgix.net/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf [https://perma.cc/E6TY-JRXL].

[347] See also Cruz-Guzman v. State, 916 N.W.2d 1, 10 (Minn. 2018) (holding that plaintiffs' claim that school segregation denied students access to an adequate education was justiciable under the Education Clause); Booker v. Bd. of Educ., 212 A.2d 1, 6 (N.J. 1965) (emphasizing the need to learn and respect multi-culturalism during "formative school years" because it lays "firm foundations" for citizenship); Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (finding the skills necessary to function in society "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints"); Brief of Amici Curiae Education Law Center and the Constitutional and Education Law Scholars in Support of Plaintiffs-Petitioners at 25, *Cruz-Guzman*, 916 N.W.2d 1 (No. A16-1265), 2017 WL 7550720 (arguing that an "adequate education is one that prepares students for our increasingly diverse world").

The simpler and more obvious route—as with mask mandates—involves federal law. CRT and related bans raise several federal constitutional and statutory concerns, including free speech, due process for teachers, students' right to access information, antidiscrimination laws, and equal protection.[348] Evidence that the law was motivated by racial bias, created a racially discriminatory learning environment, imposed a pall of orthodoxy, excluded materials for no objectively reasonable basis, or chilled free speech would all render the law unconstitutional or illegal.[349] But again, such evidence does not negate the legislature's general power over curriculum; it only establishes that the legislature misused its power.

CONCLUSION

Education powers are vastly unappreciated in constitutional precedent. Times of crisis can highlight their significance, but the salience of underlying policy disputes often overshadows the question of who possesses authority. In any event, careful reasoning is particularly difficult during crisis. The passage of time should ease those pressures, but once the crisis passes, so too may the interest in further considering the issue of education power. Post-crisis, government actors are more likely to resolve issues through mutual agreement and advice from attorneys general.

[348] See, e.g., Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967) (holding that the First Amendment prohibits laws that "cast a pall of orthodoxy over the classroom"); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (holding that the First Amendment protects "the right to receive information and ideas"); Bd. of Educ., Isl. Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866–68, 870 (1982) (plurality opinion) (declaring unconstitutional the removal of library books for partisan reasons); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (requiring that restrictions on student speech are based on pedagogical reasons); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (generally precluding "[a]ny system of prior restraints of expression"); Loewen v. Turnipseed, 488 F. Supp. 1138, 1155 (N.D. Miss. 1980) (finding race was a motivating factor in rejecting a textbook). Plaintiffs have challenged state restrictions on the teaching of racial history and concepts, relying on this precedent and more. See, e.g., Bryan Pietsch, ACLU Sues Oklahoma, Saying Law Restricting Teaching of Gender and Race Theories Is Unconstitutional, Wash. Post (Oct. 20, 2021, 10:22 AM), https://www.washingtonpost.com/politics/2021/10/20/oklahoma-critical-race-theory-ban-aclu/ [https://perma.cc/QX2V-Y6L3]; Divya Kumar, Judge Stops Enforcement of Stop WOKE Act at Florida Colleges, Universities, Tampa Bay Times (Nov. 17, 2022), https://www.tampabay.com/news/education/2022/11/17/judge-stops-enforcement-stop-woke-act-florida-colleges-universities [https://perma.cc/RB75-PZT5].

[349] See supra note 348.

This current era of increased perpetual controversy demands a new approach. Power disputes are undermining public schools' missions, threatening the rule of law, and injecting uncertainty into a pillar of democracy. The first steps to addressing the problem involve focusing on constitutional history and text and reassessing old assumptions in light of new doctrinal insights. By accident of history and insufficient attention, courts have too often treated SEOs like any other agency. But constitutions are clear: SEOs are constitutional officers. And with their constitutional offices come a host of powers—explicit and implicit—that other state actors, including courts, are bound to respect. These powers exist for a reason—to help shield public education from the political storms that inevitably come and to ensure careful decision-making persists as to our most vital public resource.

APPENDIX

The following are opinions issued by state attorneys general on SEO clauses:

Table 1. State Attorney General Opinions on SEO Clauses, by Year

State	Year	Citation
Iowa	1957	Letter from Leonard C. Abels, Assistant Att'y Gen., Iowa, to J.C. Wright, State Superintendent of Pub. Instruction, Iowa (Sept. 3, 1957), https://www.legis.iowa.gov/docs/publications/AGO/1043248.pdf [https://perma.cc/CS6C-V6PW] (informal opinion)
South Carolina	1963	Letter from Daniel R. McLeod, Att'y Gen., S.C., to Harold D. Breazeale, Chairman, Educ. & Pub. Works Comm. (May 20, 1963), 1963 WL 11235 (informal opinion)
Oregon	1964	32 Or. Op. Att'y Gen. 82 (1964), 1964 WL 76259
South Carolina	1966	1966 S.C. Op. Att'y Gen. 129 (1966), 1966 WL 8516
West Virginia	1966	51 W. Va. Op. Att'y Gen. 852 (1966), 1966 WL 87489
Oregon	1967	33 Or. Op. Att'y Gen. 197 (1967), 1967 WL 98092
Iowa	1969	Iowa Op. Att'y Gen. No. 69-12-6 (Dec. 5, 1969), 1969 WL 181697
Washington	1974	Wash. AGO 1974 no. 4 (Wash. Att'y Gen. Jan. 31, 1974), 1974 WL 168738
Washington	1975	Wash. AGO 1975 no. 1 (Wash. Att'y Gen. Jan. 8, 1975), 1975 WL 165890
Michigan	1977	1977–1978 Mich. Op. Att'y Gen. 190 (1977), 1977 WL 32807
New Jersey	1977	N.J. Formal Op. No. 26 (N.J. Att'y Gen. Dec. 23, 1977), 1977 WL 36186
North Dakota	1983	N.D. Op. Att'y Gen. No. 83-3 (Jan. 21, 1983), 1983 WL 180535
New Mexico	1984	1984 N.M. Op. Att'y Gen. 233 (1984), 1984 WL 182988
Texas	1996	Tex. Att'y Gen. Op. DM-424 (Nov. 21, 1996), 1996 WL 675100
Alabama	1997	247 Ala. Op. Att'y Gen. 44 (1997), 1997 WL 1054016

South Carolina	1998	Letter from Charles M. Condon, Att'y Gen., S.C., to Mike Fair, Sen., S.C. (June 22, 1998), https://www.scag.gov/wp-content/uploads/2013/11/98june22fair.pdf [https://perma.cc/W54V-4HHR] (informal opinion)
Washington	1998	Wash. AGO 1998 no. 6 (Wash. Att'y Gen. Mar. 9, 1998), 1998 WL 127341

The following are cases that this Author believes offer insightful analysis of the constitutionality of the powers of state education officers:

Table 2a. Cases in Which Courts Failed to Substantively Enforce SEO Clause

Case Name	State	Year Decided
Dist. Twp. of Dubuque v. City of Dubuque, 7 Iowa 262 (1858)	Iowa	1858
High Sch. of Clayton Cnty. v. County of Clayton, 9 Iowa 175 (1859)	Iowa	1859
Mobile Sch. Comm'rs v. Putnam, 44 Ala. 506 (1870)	Alabama	1870
State ex rel. Wolfe v. Bronson, 21 S.W. 1125 (Mo. 1893)	Missouri	1893
State ex rel. Moodie v. Bryan, 39 So. 929 (Fla. 1905)	Florida	1905
State ex rel. Langer v. Totten, 175 N.W. 563 (N.D. 1919)	North Dakota	1919
State ex rel. Hannah v. Armijo, 24 P.2d 274 (N.M. 1933)	New Mexico	1933
Bourne v. Bd. of Educ., 128 P.2d 733 (N.M. 1942)	New Mexico	1942
Jackson v. Coxe, 23 So. 2d 312 (La. 1945)	Louisiana	1945
Class B. Sch. Dist. No. 421 v. Brown, 292 P.2d 769 (Idaho 1955)	Idaho	1955
Bateman v. Bd. of Exam'rs, 322 P.2d 381 (Utah 1958)	Utah	1958
State Bd. of Educ. v. Fasold, 445 P.2d 489 (Or. 1968) (en banc)	Oregon	1968
Yeoman v. Dep't of Motor Vehicles, 273 Cal. App. 2d 71 (1969)	California	1969
State Bd. of Educ. v. State Bd. of Higher Educ., 505 P.2d 1193 (Utah 1973)	Utah	1973
Bd. of Elementary & Secondary Educ. v. Nix, 347 So. 2d 147 (La. 1977)	Louisiana	1977
Nat'l Educ. Ass'n—Fort Scott v. Bd. of Educ., Unified Sch. Dist. No. 234, 592 P.2d 463 (Kan. 1979)	Kansas	1979
Aguillard v. Treen, 440 So. 2d 704 (La. 1983)	Louisiana	1983
State Bd. of Educ. v. Houghton Lake Cmty. Schs., 403 N.W.2d 561 (Mich. Ct. App. 1987), *aff'd on other grounds*, 425 N.W.2d 80 (Mich. 1988)	Michigan	1987

Bd. of Educ. v. Waihee, 768 P.2d 1279 (Haw. 1989)	Hawaii	1989
Unified Sch. Dist. No. 279 v. Sec'y of the Kan. Dep't of Hum. Res., 802 P.2d 516 (Kan. 1990)	Kansas	1990
Engelmann v. State Bd. of Educ., 2 Cal. App. 4th 47 (1991)	California	1991
State v. Whittle Commc'ns, 402 S.E.2d 556 (N.C. 1991)	North Carolina	1991
Unified Sch. Dist. No. 380 v. McMillen, 845 P.2d 676 (Kan. 1993)	Kansas	1993
State Bd. of Educ. v. Honig, 13 Cal. App. 4th 720 (1993)	California	1993
Straus v. Governor, 592 N.W.2d 53 (Mich. 1999) (per curiam) (affirming and adopting opinion of *Straus v. Governor*, 583 N.W.2d 520 (Mich. Ct. App. 1998))	Michigan	1999
W. Va. Bd. of Educ. v. Bd. of Educ. (*Nicholas*), 806 S.E.2d 136 (W. Va. 2017)	West Virginia	2017
N.C. State Bd. of Educ. v. State, 814 S.E.2d 67 (N.C. 2018), *aff'g* N.C. State Bd. of Educ. v. State, 805 S.E.2d 518 (N.C. Ct. App. 2017)	North Carolina	2018
El Centro de la Raza v. State, 428 P.3d 1143 (Wash. 2018)	Washington	2018
Koschkee v. Taylor, 929 N.W.2d 600 (Wis. 2019), *overruling* Coyne v. Walker, 879 N.W.2d 520 (Wis. 2016)	Wisconsin	2019
Ybarra v. Legislature, 466 P.3d 421 (Idaho 2020)	Idaho	2020

Table 2b. Cases in Which State High Court Validated SEO Clause

Case Name	State	Year Decided
P.J. Willis & Bro. v. Owen, 43 Tex. 41 (1875)	Texas	1875
Sch. Dist. No. 3 v. Callahan, 297 N.W. 407 (Wis. 1941)	Wisconsin	1941
State Bd. of Educ. v. Levit, 343 P.2d 8 (Cal. 1959) (en banc)	California	1959
Sch. Dist. No. 8 v. State Bd. of Educ., 127 N.W.2d 458 (Neb. 1964)	Nebraska	1964
Welling v. Bd. of Educ. for the Livonia Sch. Dist., 171 N.W.2d 545 (Mich. 1969) (per curiam)	Michigan	1969
Guthrie v. Taylor, 185 S.E.2d 193 (N.C. 1971), *cert. denied*, 406 U.S. 920 (1972)	North Carolina	1971
State ex rel. Miller v. Bd. of Educ. of Unified Sch. Dist. No. 398, 511 P.2d 705 (Kan. 1973)	Kansas	1973
Bailey v. Truby, 321 S.E.2d 302 (W. Va. 1984)	West Virginia	1984
W. Va. Bd. Educ. v. Hechler, 376 S.E.2d 839 (W. Va. 1988)	West Virginia	1988
Bd. of Educ. v. W. Va. Bd. of Educ. (*Kanawha*), 399 S.E.2d 31 (W. Va. 1990)	West Virginia	1990
Evans v. Andrus, 855 P.2d 467 (Idaho 1993) (per curiam)	Idaho	1993
Rankins v. La. State Bd. of Elementary & Secondary Educ., 637 So. 2d 548 (La. Ct. App. 1994), *cert. denied*, 635 So. 2d 250 (La. 1994) (mem.)	Louisiana	1994
Thompson v. Craney, 546 N.W.2d 123 (Wis. 1996), *limited by* Coyne v. Walker, 879 N.W.2d 520 (Wis. 2016), *but approved by* Koschkee v. Taylor, 929 N.W.2d 600 (Wis. 2019) (overruling *Coyne*, 879 N.W.2d 520)	Wisconsin	1996
Bd. of Educ. of Sch. Dist. No. 1 v. Booth, 984 P.2d 639 (Colo. 1999) (en banc)	Colorado	1999
Utah Sch. Bds. Ass'n v. Utah State Bd. of Educ., 17 P.3d 1125 (Utah 2001)	Utah	2001
Powers v. State, 318 P.3d 300 (Wyo. 2014)	Wyoming	2014