

TAKING EDUCATION “OUT OF POLITICS”:
THE RISE OF NONPARTISAN STATE EDUCATION
GOVERNANCE

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INTRODUCTION

Education is likely the most democratized area of policymaking in the United States. Of the approximately 13,500 public school districts in the United States,¹ the vast majority are elected²—and “school board member” is one of the most common elected offices in the country. At the state level,³ twenty-two states, two territories, and the District of Columbia have elected education officials.⁴ The exposure of public-school governance to direct democratic input has, in recent years, created an opening for outside forces to spend

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¹ *Digest of Education Statistics: Number of Public School Districts and Public and Private Elementary and Secondary Schools: Selected Years, 1869-70 Through 2021-22*, NAT’L CTR. FOR EDUC. STAT. tbl. 214.10 (2022), https://nces.ed.gov/programs/digest/d22/tables/dt22_214.10.asp (estimating 13,318 public school districts in the United States as of 2022).

² JENNIFER L. LAWLESS, BECOMING A CANDIDATE: POLITICAL AMBITION AND THE DECISION TO RUN FOR OFFICE 33 (2012) (estimating 13,506 elected school district boards).

³ Of course, when I say “state level,” I am also including territories (as in the cases of the Northern Mariana Islands and the U.S. Virgin Islands) and the District of Columbia. For ease of reference, throughout this Article, I will generally use “state” as an adjective rather than the far-bulkier “state, territory, and District of Columbia.”

⁴ Quinn Yeargain, *Democracy and State Education Governance*, 11 BELMONT L. REV. (forthcoming 2024).

money and support candidates—which has included charter-school advocates⁵ and those opposed to “Critical Race Theory.”⁶

But in most jurisdictions, local school board elections are formally nonpartisan—a design meant to take them “out of politics” and keep them at an arm’s length from partisan influences—and off-cycle from presidential and gubernatorial elections.⁷ The introduction of nonpartisan, off-cycle local elections was an innovation of Progressive Era reformers and has extended to most municipal elections in the country.⁸

Considerably less attention has focused on *statewide* nonpartisan elections for education officials. Nearly half of the states in the United States that have an elected state superintendent or board of education use nonpartisan elections.⁹ The shifts from partisan to nonpartisan elections were motivated by the same desire to take state education governance “out of politics” that brought

⁵ Sarah Reckhow, Jeffrey R. Henig, Rebecca Jacobsen & Jamie Alter Litt, “*Outsiders with Deep Pockets*”: The Nationalization of Local School Board Elections, 53 URB. AFFAIRS REV. 783, 803–05 (2017); see also Matt Barnum, Political Arm of Charter-Friendly Group The City Fund Has \$15 Million—And Is Now Spending on School Board Races, CHALKBEAT (Oct. 24, 2019), <https://www.chalkbeat.org/2019/10/24/21121844/political-arm-of-charter-friendly-group-the-city-fund-has-15-million-and-is-now-spending-on-school-b/>; Denise-Marie Ordway, Outside Money Targets School Board Elections, JOURNALIST’S RES. (Nov. 3, 2017), <https://journalistsresource.org/politics-and-government/school-board-elections-campaign-money-research/>.

⁶ Collin Binkley & Julie Carr Smyth, Conservative PACs Inject Millions into Local School Races, ASSOCIATED PRESS (Oct. 11, 2022), <https://apnews.com/article/entertainment-elections-education-school-boards-teaching-059f2465829ab009394469b95c8cc94a>; Andrew Atterbury, DeSantis, Conservatives Score More Florida School Board Wins, POLITICO (Nov. 8, 2022), <https://apnews.com/article/entertainment-elections-education-school-boards-teaching-059f2465829ab009394469b95c8cc94a>.

⁷ Frederick M. Hess & David L. Leal, *School House Politics: Expenditures, Interests, and Competition in School Board Elections*, in BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS 228, 247 (William G. Howell ed., 2005).

⁸ Charles R. Adrian, *Some General Characteristics of Nonpartisan Elections*, 46 AM. POL. SCI. REV. 766, 766–67 (1952); Carol A. Cassel, *Social Background Characteristics of Nonpartisan City Council Members*, 38 W. POL. Q. 495, 496–97 (1985).

⁹ *Infra* PART II.

about similar changes at the local level¹⁰ and occurred in the same period of time that states also started to adopt nonpartisan judicial elections.¹¹

Surveying statewide nonpartisan education elections presents a revealing case study of comparative institutional development. Despite the tendency among states to borrow constitutional provisions and structural setups from each other,¹² there is little evidence that this occurred in this context. Instead, over a fifty-year period, a discrete minority of states separately adopted nonpartisan elections for their statewide education officials. In some states, this change was accomplished statutorily;¹³ in others, by a constitutional amendment;¹⁴ and in one, by a voter-initiated ballot measure.¹⁵ These changes were largely seen as noncontroversial when they occurred, attracting comparatively little attention in news coverage,¹⁶ but as nonpartisan elections were conducted, flaws in their design were noticed and fixed by legislators.¹⁷

Today, nonpartisan education governance faces an existential threat. Though education has always been an important issue for

¹⁰ *Infra* PART II.

¹¹ *Infra* PART II.

¹² See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 50–55 (1998) (describing interstate influences on state constitutional development).

¹³ Act of Apr. 7, 1911, ch. 398, 1911 Cal. Laws 769; H.B. No. 23, ch. 37, 35th Legis. Assemb., Reg. Sess., 1917 Neb. Laws 112; Act of Mar. 22, 1917, ch. 148, 28th Legis. Assemb., Reg. Sess., 1917 Nev. Laws 249; H.B. No. 111, ch. 153, 13th Legis. Assemb., Reg. Sess., 1913 N.D. Laws 202; S.B. No. 62, ch. 351, 40th Legis. Assemb., Reg. Sess., 1939 Or. Laws 655; H.B. No. 9, ch. 16, 29th Leg., 1st Spec. Sess., 1951 Utah Laws 23.

¹⁴ HAW. CONST. art. X, § 1 (amended 1978); Am. S.J.R. No. 30, 100th Gen. Assemb., Reg. Sess., 1953–54 Ohio Laws 1088, *amending* OHIO CONST. art. VI, § 4 (amended 1953); H.J.R. No. 4, ch. 137, 24th Leg. Assemb., Reg. Sess., 1935 S.D. Laws 212, *amending* S.D. Const. art. IV, sec. 12 (amended 1936); Act of May 2, 1901, ch. 258, 45th Legis., Reg. Sess., 1901 Wis. Laws 352, *amending* Wis. Const. art. X, sec. 1 (amended 1902).

¹⁵ BELLE REEVES, WASH. SEC'Y OF STATE, A PAMPHLET CONTAINING CONSTITUTIONAL AMENDMENT, INITIATIVE MEASURE NO. 126, INITIATIVE MEASURE NO. 129, INITIATIVE MEASURE NO. 130 5 (1938) [hereinafter 1938 WASHINGTON VOTER PAMPHLET] (Initiative Measure No. 126); Initiative Measure No. 126, ch. 1, 26th Leg., Reg. Sess., 1939 Wash. Laws 3.

¹⁶ *Infra* PART II.A.

¹⁷ *Infra* PART II.B.

voters,¹⁸ its salience has increased in recent years as it becomes a prism through which social and cultural issues are litigated.¹⁹ The heightened interest in education—by the public and politicians alike—has prompted a re-examination of how education officials should be selected and what independence they should have from other state officials. The range of reforms is broad. Some politicians have moved to treat education like any other area of policymaking, centralizing its administration by the state's executive branch,²⁰ making local school board elections partisan,²¹ and subjecting school board members to term limits.²² Politicians

¹⁸ E.g., Karen M. Kaufmann, *Disaggregating and Reexamining Issue Ownership and Voter Choice*, 36 POLITY 283, 288–89 (2004); Fritz Edelstein, *The Evolving Political Role of Urban Mayors in Education*, in HANDBOOK OF EDUC. POL. & POL'Y. 179, 181 (Bruce S. Cooper, James G. Cibulka & Lance D. Fusarelli eds., 2008).

¹⁹ To some extent, this has always been the case. In a study of voter interest in higher-education ballot measures, Michael K. McLendon and Stuart Eddings concluded that “voters have not exhibited great interest in campus governance issues, except as they intersect larger societal questions of race, gender, and sexuality.” Michael K. McLendon & Stuart Eddings, *Direct Democracy and Higher Education: The State Ballot as an Instrument of Higher Education Policy Making*, 16 EDUC. POL'Y. 193, 211 (2002).

²⁰ Sarah Szilagy, *Ohio Board of Education Loses Most of Its Powers in State Budget*, NBC 4 NEWS (July 13, 2023), <https://www.nbc4i.com/news/politics/ohio-board-of-education-loses-most-of-its-powers-in-state-budget/>.

²¹ See Marta W. Aldrich, *Would Partisan School Board Races Shift Education? Tennessee Lawmaker Thinks It's Time*, CHALKBEAT TENN. (Oct. 27, 2021, 9:16 AM), <https://tn.chalkbeat.org/2021/10/26/22747700/partisan-school-board-elections-tennessee-legislature-cepicky-bill>. In Florida, Governor Ron DeSantis made this point quite clearly: “You’ll have . . . counties . . . in . . . Southwest Florida who voted for me by like 40 points, and yet they’re electing people to school board who are . . . totally the opposite philosophy.”; Evie Blad, *More States Consider Partisan School Board Races as Education Debates Intensify*, EDUC. WEEK (Apr. 27, 2023), <https://www.edweek.org/policy-politics/more-states-consider-partisan-school-board-races-as-education-debates-intensify/2023/04>.

²² Diane Rado, *Change up for Term Limits for Local School Board Members, But Why so Fast?*, FLA. PHOENIX (May 1, 2023), <https://floridaphoenix.com/2023/05/01/change-up-for-term-limits-for-local-school-board-members-but-why-so-fast/>; Danielle J. Brown, *FL Legislature Imposes 12-Year Term Limits for School Board Members*, FLA. PHOENIX (Mar.

have articulated different impulses on *what* should be elected too. At one end, legislators in some states have proposed abolishing elected state boards of education or superintendents,²³ at the other, Donald Trump has proposed making school principals popularly elected.²⁴

My contribution to these broader discussions about the proper way to organize education administration is to consider the history, role, and use of nonpartisan elections in state elections. In this Article, I explore the legal history of nonpartisan elections for state education officials. I begin in Part I by outlining the development of elected state superintendents and boards of education, beginning in the mid-nineteenth century, and discussing some of the pressures that motivated the switch to nonpartisan elections. Then, in Part II, I catalog the introduction of nonpartisan elections. Drawing from state legislative journals, voter pamphlets, and contemporaneous newspaper coverage, I reconstruct the legislative history of these changes for the first time. I then cover the implementation of nonpartisan elections, including how policymakers responded to some of the initial hiccups.

I close in Part III by considering nonpartisan education governance in today's highly charged political climate. With nonpartisan elections—and administrators elected in such elections—facing institutional threats, are nonpartisan elections themselves worth saving? In answering this question, I review some of the political-science literature on nonpartisan elections and recent voting trends in states around the country. I conclude that, whatever

10, 2022), <https://floridaphoenix.com/2022/03/10/fl-legislature-imposes-12-year-term-limits-for-school-board-members/>.

²³ Martha Stoddard, *Measure to Eliminate Nebraska's State Ed Board Draws Opponents, No Supporters*, LINCOLN J. STAR (Mar. 7, 2023), https://journalstar.com/news/local/education/measure-to-eliminate-nebraskas-state-ed-board-draws-opponents-no-supporters/article_f9892d34-dc51-5a87-a90f-dd34d2724d9b.html.

²⁴ Meredith McGraw, *Trump Unveils New Education Policy Loaded with Culture War Proposals*, POLITICO (Jan. 26, 2023), <https://www.politico.com/news/2023/01/26/trump-unveils-education-policy-culture-war-00079784>; Ali Swenson & Jill Colvin, *Trump and DeSantis Court Moms for Liberty in a Sign of the Group's Rising Influence over the GOP*, ASSOCIATED PRESS (June 30, 2023), <https://apnews.com/article/moms-for-liberty-trump-desantis-2024-republicans-8e17f7587bba9cf6dd316c3ef2eb6a19>.

can be said of nonpartisan elections on the merits, the conduct of nonpartisan elections in most states exacerbates the flaws of nonpartisan elections. Accordingly, I suggest several reforms that could be used to improve the performance and democratic legitimacy of nonpartisan elections in this context.

I. EARLY EDUCATION GOVERNANCE AND DEMOCRACY IN THE UNITED STATES

The relationship between democracy and state education governance has ebbed and flowed over time. Voters, politicians, and policymakers alike have preferred different forms of state education administration at different points in time—and have constantly tinkered with these systems. Since the mid-nineteenth century, state education administrators have been popularly elected in most states.²⁵ But what has appeared on voters' ballots has changed over time. In the nineteenth century, most voters elected superintendents of public instruction.²⁶ Beginning in the early twentieth century, reformers began pushing for bigger changes to education administration, including taking education "out of politics" and adopting more rigorous qualifications for state superintendents.²⁷

In this Part, I briefly summarize the creation of elected education administrators in the states and discuss the pressures to reform state education systems in the beginning of the twentieth century. Section A starts with the former, discussing the constitutional and statutory changes that centralized state education administration in the mid-nineteenth century and the democratic pressures that shaped what that administration looked like. Then, in Section B, I document the growing dissatisfaction with state education systems governed by partisan politicians, which led to a variety of reform proposals that included nonpartisan elections.

²⁵ *Infra* PART I.A.

²⁶ *Id.*

²⁷ *Infra* PART I.B.

A. *The Creation of the First State Education Departments*

State governments in the earliest days of the United States would be virtually unrecognizable today. The average voter was guaranteed to elect just two members of their state government—a state senator and representative—and, depending on the state, might elect a very weak governor.²⁸ States had extremely limited administrative capacities, as well. They were poorly equipped (and largely powerless) to regulate the economy, and there were generally few institutions of any sort to manage.²⁹

This was especially true in education. For the most part, education was originally managed at the local level. But beginning in the mid-nineteenth century, advocates of universal public education began to push for state standardization, which included the creation of state education administrators.³⁰ Expanding the state's capacity to administer social programs like education occurred as democratic reformers were also seeking to make state governments more directly accountable to the public.³¹ State constitutions adopted in the 1840s and 1850s dramatically expanded the number of state officials who were popularly elected³²—and many states opted to put control of their new education departments in the hands of elected superintendents.

In 1846, residents of the Iowa Territory ratified the constitution proposed to them by their constitutional convention and, when it came into effect, Iowa became the first state to provide for a popularly elected Superintendent of Public Instruction.³³ Several

²⁸ Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 884–87 (2021); Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 62–65 (1982).

²⁹ Quinn Yeargain, *Administrative Capacity in Direct Democracy*, U.C. DAVIS L. REV. 1347, 1355–58 (2023) (summarizing lack of administrative capacity in early state governments).

³⁰ CARL F. KEASTLE, *PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780–1860* 113–14 (1983).

³¹ Bulman-Pozen & Seifter, *supra* note 28, at 884–87.

³² Bulman-Pozen & Seifter, *supra* note 28, at 884–87.

³³ IOWA CONST. of 1846, art. IX, § 1. The road to an elected Superintendent of Public Instruction in Iowa was more complicated than simply including it in the state's constitution, however. The 1846 Constitution required the legislature

other states in the Midwest quickly followed suit, including Illinois (1856),³⁴ Indiana (1853),³⁵ Michigan (1851),³⁶ Missouri (1855),³⁷ Ohio (1854),³⁸ and Wisconsin (1849).³⁹ In many of these states, teachers' organizations and common-school advocates pushed for a state superintendent as part of an effort to centralize school administration.⁴⁰ Though not all teachers' groups favored an elected superintendent,⁴¹ the democratizing pressures of the mid-nineteenth century generally pushed constitutional convention delegates and state legislators to favor election as the method of selection for many key state posts.⁴²

As new states were admitted to the Union, having an elected superintendent was almost a default presumption. Between 1850 and 1912, eighteen new states were formed—and all but two created elected superintendents in their constitutions or statutes.⁴³ (And one

to “provide for the election, by the people, of a Superintendent of Public Instruction,” *id.*, which they did shortly after statehood, Act of Jan. 24, 1847, ch. 99, 1846 Iowa Acts 110 (1847). After the 1847 election, in which a Superintendent was elected, the Iowa Supreme Court struck the law down for failing to meet the constitution’s publication requirements. *Calkin v. State*, 1 *Greene* 68, 74 (Iowa 1847). The legislature re-enacted the statute in 1849. Act of Jan. 15, 1849, ch. 80, 1848 Iowa Acts 95 (1849).

³⁴ Act of Feb. 18, 1854, 1854 Ill. Laws 13.

³⁵ IND. CONST. of 1851, art. VIII, § 8.

³⁶ MICH. CONST. of 1850, art. VIII, § 1.

³⁷ Act of Feb. 24, 1853, 17th Legis. Assemb., 2d Sess., 1852–53 Mo. Laws 148.

³⁸ Act of Mar. 14, 1853, 1852 Ohio Laws 429 (1852).

³⁹ WIS. CONST. of 1848 art. X, § 1; Act of Aug. 16, 1848, 1848 Wis. Laws 127; Act of Aug. 24, 1848, 1848 Wis. Sess. Laws 192.

⁴⁰ ARNOLD F. SHOBER, *SPLINTERED ACCOUNTABILITY: STATE GOVERNANCE AND EDUCATION REFORM* 58–75 (Anne L. Schneider & Helen M. Ingram eds., 2010) (describing the creation of superintendents in Georgia, Ohio, and Wisconsin); *see also* Robert Gehlmann Bone, *Education in Illinois Before 1857*, 50 J. ILL. ST. HIST. SOC’Y 119, 133–34 (1957) (describing the creation of the Illinois Superintendent of Public Instruction).

⁴¹ *See* SHOBER, *supra* note 40, at 68 (noting that the Ohio Teachers’ Association “was dismayed by the elective nature of the post” because “[i]t had argued that only an appointed chief would be above politics”).

⁴² Sturm, *supra* note 28, at 62–64.

⁴³ ARIZ. CONST. of 1910, art. V, § 1; Act of Apr. 11, 1850, ch. 85, 1850 Cal. Stat. 205; CAL. CONST. of 1849, art. IX, § 1 (amended 1862); COLO. CONST. of

of the two outliers, West Virginia, established an elected Superintendent of Common Schools in its 1872 Constitution.⁴⁴) Similarly, though most antebellum constitutions in southern states did not create elected superintendents, much less any state-level education administration, most of them added more substantial education provisions during Reconstruction.⁴⁵ In several states, these changes created elected state superintendents.⁴⁶ Given that many of the delegates at these constitutional conventions were from northern or border states,⁴⁷ it is unsurprising that some of the constitutional provisions creating elected superintendents were textually similar to analogous provisions in northern constitutions.⁴⁸

In a handful of states—Alabama, Iowa, and Michigan—elected state boards of education were created in the nineteenth century. In Iowa, the creation of the State Board of Education was in lieu of a

1876 art. IV, § 1; IDAHO CONST. of 1889, art. IV, § 1; KAN. CONST. of 1859, art. I, § 1; MONT. CONST. of 1889, art. VII, § 1; Act of Feb. 15, 1869, 1869 Neb. Laws 115; NEB. CONST. of 1875, art. V, § 1; NEV. CONST. of 1864, art. XI, § 1; N.D. CONST. of 1889, art. III, § 82; OKLA. CONST. of 1907, art. VI, §§ 1, 4; OR. CONST. of 1857, art. VIII, § 1; Act of Oct. 29, 1872, 1872 Or. Laws 146; S.D. CONST. of 1889, art. IV, § 12; UTAH CONST. of 1895, art. VII, § 1; WASH. CONST. of 1889, art. III, §§ 1, 3; WYO. CONST. of 1889, art. IV, § 11.

⁴⁴ W. VA. CONST. of 1872, art. VII, §§ 1–2 (creating Superintendent of Free Schools).

⁴⁵ David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. EDUC. 236, 245–47 (1986); see also PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION, AND REDEMPTION, 1860–1902 202–09 (2017).

⁴⁶ ALA. CONST. of 1867, art. XI, § 1; ARK. CONST. of 1868, art. VI, § 1; N.C. CONST. of 1868, art. III, § 1; S.C. CONST. of 1868, art. X, § 1; Act of Mar. 5, 1867, ch. 27, 1867–1868 Tenn. Laws 33; TEX. CONST. of 1869, art. IX, § 2.

⁴⁷ HERRON, *supra* note 45, at 173–76; see generally RICHARD L. HUME & JERRY B. GOUGH, BLACKS, CARPETBAGGERS, AND SCALAWAGS: THE CONSTITUTIONAL CONVENTIONS OF RADICAL RECONSTRUCTION 11–33, 308 (2008) (providing detailed information about the state citizenship of convention delegates).

⁴⁸ Compare, e.g., ARK. CONST. of 1868, art. IX, §§ 1–9, with MO. CONST. of 1865, art. IX, §§ 1–9, and S.C. CONST. of 1868, art. X, § 1, with WIS. CONST. of 1848, art. X, § 1.

superintendent,⁴⁹ but in Alabama and Michigan, the Superintendent of Public Instruction *and* the State Board of Education were both elected offices that served in interlocking roles with each other.⁵⁰

But *creating* an office, even an elected one, does not automatically confer its occupant with meaningful political power. Prior to the early twentieth century, most state education administrators had comparatively few powers, and might be characterized as facilitators and statistics-gatherers, not managers.⁵¹ Nonetheless, some policymakers were concerned about state superintendents establishing personal brands and holding onto power indefinitely—and in a minority of states, held superintendents to the same term limits that were applicable to other state officials. John Tincher, a delegate to the 1870 Illinois Constitutional Convention,⁵² made an argument in favor of term limits for the state superintendent that was fairly typical of the logic used:

⁴⁹ IOWA CONST. of 1857, art. IX, pt. 1, § 1. Under Iowa's 1846 Constitution, a Superintendent of Public Instruction was created. IOWA CONST. of 1846, art. IX, § 1. But following allegations of financial mismanagement by one of the elected superintendents, as well as a general desire to reform the state's education laws, ROBERT ERVIE McCONNELL, 6 A HISTORY OF THE DEVELOPMENT OF THE DEPARTMENT OF PUBLIC INSTRUCTION IN IOWA 34–43 (Charles L. Robbins ed., 1930); 1 CLARENCE RAY AURNER, HISTORY OF EDUCATION IN IOWA 29–48 (1914), the 1857 Constitution abolished the office, instead creating a State Board of Education that was empowered to rewrite the state's education laws, IOWA CONST. of 1857, art. IX, pt. 1, § 8. The existence of the Board was mandated until 1863, at which point an optional sunset provision came into effect that enabled the legislature to abolish the office. *Id.* § 15. It did so in 1864, resurrecting the elected Superintendent. Act of Mar. 19, 1864, ch. 52, 1864 Iowa Acts 53.

⁵⁰ ALA. CONST. of 1867, art. XI, §§ 1–3 (creating State Board of Education with two members elected from each congressional district); *id.* § 2 (creating elected Superintendent of Public Instruction); MICH. CONST. of 1850, art. VIII, § 1 (creating elected Superintendent of Public Instruction); *id.* art. XIII, § 9 (creating statewide elected State Board of Education).

⁵¹ SHOBER, *supra* note 40, at 64–75 (surveying education departments and superintendents in Georgia, Ohio, and Wisconsin).

⁵² FRANK CICERO JR., CREATING THE LAND OF LINCOLN: THE HISTORY AND THE CONSTITUTIONS OF ILLINOIS, 1778–1870, at 192 (2018) (noting that Delegate John Tincher “spoke frequently and often sarcastically in the convention”).

[T]here is not an officer in the State, against whose re-election more reasons could have been given, than that of the Superintendent of Public Instruction. We find that he has allies all over the State, in the Superintendents of every single county in the State, and that they have their great head-centre at the city of Springfield, in the person of the State Superintendent of Public Instruction here.⁵³

Tincher's argument did not carry the day in Illinois,⁵⁴ nor in most other states, which generally did not extend term limits beyond governors, treasurers, and auditors.⁵⁵

Whatever can be said for the limited power of elected state superintendents, the same does not necessarily apply to the elected state boards. Indeed, while the Michigan State Board of Education had a relatively minor role—managing the State Normal School⁵⁶—the boards of education in Alabama and Iowa were delegated a substantial amount of legislative power. In Alabama, the Board was expressly granted “full legislative powers” over the state’s educational institutions and was placed in an analogous position as the state legislature—in that it could propose “acts” of legislation, submit them to the governor for his approval or rejection, and override his veto with a supermajority vote.⁵⁷ Likewise, in Iowa,

⁵³ Ill. Const. Convention, 1 Debates and Proceedings of the Constitutional Convention of the State of Illinois, Convened at the City of Springfield, Tuesday, December 13, 1869, at 766 (1870) (remarks of Delegate Tincher).

⁵⁴ See generally ILL. CONST. of 1870, art. V (imposing no term limits for state officers other than the State Treasurer, *see id.* § 2).

⁵⁵ However, the constitutions adopted in Alabama, Kentucky, and New Mexico did extend term limits to superintendents. ALA. CONST. of 1901, art. V, § 116; KY. CONST. of 1890, § 93; N.M. CONST. of 1911, art. V, § 1 (setting four-year terms and limiting statewide officials to one consecutive term); J. Res. 15, 1st Leg., 2d Reg. Sess., 1913 N.M. Laws 175, *amending* N.M. CONST. art. V, § 1 (amended 1914) (setting two-year terms and limiting statewide officials to two consecutive terms).

⁵⁶ MICH. COMP. LAWS. ch. LXXVI (Cooley 1857).

⁵⁷ ALA. CONST. of 1867, art. XI, § 5 (“The Board of Education shall exercise full legislative powers in reference to the public educational institutions of the

the Board was granted “full power and authority to legislate and make all needful rules and regulations in relation to Common Schools,” subject to the alteration, amendment, or repeal by the state legislature.⁵⁸ The Supreme Court of Alabama construed this power narrowly, while the Supreme Court of Iowa construed it so broadly that the State Board of Education was analogized to a “fourth power in the government.”⁵⁹

State superintendents and boards, once created, generally lasted through the end of the nineteenth century. Though there are some notable exceptions,⁶⁰ most offices, once created, had staying power

State, and its acts, when approved by the governor, or when re-enacted by two-thirds of the Board, in case of his disapproval, shall have the force and effect of law, unless repealed by the General Assembly.”).

⁵⁸ IOWA CONST. of 1857, art. IX, pt. 1, § 8 (repealed 1864).

⁵⁹ *Compare* Mobile Sch. Comm’rs v. Putnam, 44 Ala. 506, 516–17 (1870) (holding that “the phrase ‘full legislative powers’ . . . must be construed to mean no more than such ‘full legislative powers’ as may be necessary and proper to secure to the board of education merely ‘the management’ of the educational institutions ‘of the State’”) *with* Dubuque v. Dubuque, 7 Iowa 262, 284–85 (1858) (holding that the state legislature had no power to pass common school legislation until the Board had done so first).

⁶⁰ Alabama’s Board of Education was abolished by its 1875 Constitution, *see generally* ALA. CONST. of 1875, art. XIII, § 7 (vesting the Superintendent of Education with “[t]he supervision of the public schools”); Arkansas’s Superintendent of Public Instruction was created in its 1868 Constitution, ARK. CONST. of 1868, art. VI, § 1, abolished in its 1874 Constitution, ARK. CONST. of 1874, art. VI, § 21, and resurrected statutorily in 1875, Act of Dec. 7, 1875, 1875 Ark. Acts 54; Iowa’s Superintendent was created in its 1846 Constitution, IOWA CONST. of 1846, art. IX, § 1, abolished in its 1857 Constitution, which created the State Board of Education, IOWA CONST. of 1857, art. IX, pt. 1, § 1, but allowed the legislature to abolish the Board in 1863, *id.* § 15, which it did in 1864, resurrecting the Superintendent, Act of Mar. 19, 1864, ch. 52, 1864 Iowa Acts 53; Missouri’s Superintendent of Common Schools was created statutorily in 1853, Act of Feb. 24, 1853, 1852–53 Mo. Laws 147, abolished in 1861, Ordinance of Oct. 16, 1861, 1863 Mo. Laws 676, and resurrected in its 1865 Constitution, MO. CONST. of 1865, art. IX, § 3 (recreating same); Act of Mar. 29, 1866, 1866 Mo. Laws 170; Tennessee created its Superintendent of Public Instruction in 1867, Act of Mar. 5, 1867, ch. 27, 1867–68 Tenn. Pub. Acts 33, and permanently abolished it in 1871, Act of Feb. 3, 1871, ch. 107, 1870–71 Tenn. Pub. Acts 127; and Texas created its Superintendent of Public Instruction in its 1869 Constitution, TEX. CONST. of 1869, art. IX, § 2, abolished it in its 1876 Constitution, TEX. CONST. of 1876, art. VII, § 8, and resurrected it statutorily in 1884, S.S.B. 32 & 44, ch. 25, 18th Leg., Spec. Sess., 1884 Tex. Gen. Laws 38.

through the remainder of the century. As a result, in 1912, 73% of states had popularly elected superintendents.⁶¹

B. The Growing Pressure to Depoliticize and Professionalize

By the end of the nineteenth century, and the beginning of the twentieth, some warning signs started to emerge for partisan education governance. One of the earliest—and most striking—examples occurred in Colorado. The state constitution ratified in 1876 provided for the election of six regents of the University of Colorado, who would serve staggered, six-year terms.⁶² At the 1876 election, six regents were to be elected, and to ensure that their elections would be staggered in the future, they were to “be so classified, by lot, that two shall hold their office, for the term of two years, two for four years, and two for six years[.]”⁶³

In the leadup to the general election, the state Republican Convention initially planned to nominate six candidates for regent. Instead, it opted to only nominate three, adopting a resolution reading, in part:

WHEREAS, It is the sense of this convention that educational affairs should be kept outside of party politics; therefore,

Resolved, That the republican party present the names of only three candidates for regents of our State University, and that the central committee report that fact to the democratic convention or its central committee, with a request that they pursue a similar course, this convention pledging its support to the six gentlemen so nominated.⁶⁴

⁶¹ Yeargain, *supra* note 4.

⁶² COLO. CONST. of 1876, art. IX, § 12.

⁶³ *Id.*

⁶⁴ *Convention Echoes: The Pueblo Convention Finally Adjourns*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Aug. 26, 1876, at 4, <https://www.coloradohistoricnewspapers.org/?a=d&d=RMD18760826-01.2.44&srpos=64&e=01-08-1876-31-12-1876--en-20--61-byDA-img-txIN%7ctxCO%7ctxTA-----0----->.

A week later, the state Democratic Convention voted to concur in the Republicans' proposal.⁶⁵ The agreement of the two parties—mutual disarmament in what would become one of the most polarizing election years in American history⁶⁶—was all the more striking given that the Republican Party had proposed the disarmament shortly *before* adopting a platform declaring that electing Democrats to power represented an existential threat to American democracy.⁶⁷

The power-sharing agreement between Democrats and Republicans on the Board of University Regents continued in the 1878 election too, when only two regents were up for election. The Democratic Convention, which was held earlier, nominated just one candidate, and sent a letter to the Republican Convention advising that the Democratic Party “was constrained to take this course for the purpose of keeping out of politics the great educational interests of this State as far as possible.”⁶⁸ One Republican delegate nonetheless proposed nominating two candidates and was nearly shouted down on the convention floor. A supporter of the proposal argued that nominating just one candidate was nevertheless wrong in principle. A nomination of this kind, and under such circumstances, was equivalent to an election, and this practically

⁶⁵ *Democratic State Convention: First Day—Tuesday, COLO. SPRINGS GAZETTE*, Sept. 2, 1876, at 3, https://www.coloradohistoricnewspapers.org/?a=d&d=CSG18760902.2.64&srp_os=79&e=01-08-1876-31-12-1876--en-20--61-byDA-img-txIN%7ctxCO%7ctxTA-----0-----.

⁶⁶ EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* 117–49 (2016) (describing the 1876 presidential election).

⁶⁷ *Convention Echoes: The Pueblo Convention Finally Adjourns*, *supra* note 64, at 4 (“That as the preservation of our nation from destruction by a democratic rebellion was by the republican party, so we believe that its perpetuation as a nation, and the maintenance of our civil liberties depend upon the continuance in power of the republican party.”).

⁶⁸ *Finis: The Republican State Convention Concludes Its Labors*, *DENVER DAILY TRIB.*, Aug. 9, 1878, at 4, <http://www.coloradohistoricnewspapers.org/?a=d&d=DDT18780809.2.105.1&e=-----en-20--1--txt-txIN-----0----->.

took the matter out of the hands of the people, who wanted to vote for party men for this office as much as for any other.⁶⁹

The proposal was overwhelmingly rejected, and the convention nominated a single candidate.⁷⁰ A similar letter was sent in 1880 from the Democrats to the Republicans, and likewise was accepted.⁷¹

In 1882, however, the Republican Convention voted to nominate two regents. Delegate J. A. Elliott moved to make a second nomination, to which Delegate C.M. Campbell argued "that better men would be secured if both parties selected their best men and put them forward."⁷² The motion was agreed to, and two nominations were made.⁷³ At their own convention a week later, Democrats condemned the move—but ultimately declined to deviate from the agreement. Delegate Charles Hall moved to nominate two regents, but, arguing against Hall's motion, Delegate Harley Morse said, "if the Republicans had done a wrong the Democrats ought not to emulate their bad example."⁷⁴ In that year's election, the two Republican candidates for regent won,⁷⁵ and in

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Republican State Convention*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Aug. 28, 1880, at 1, <https://www.coloradohistoricnewspapers.org/?a=d&d=RMD18800828-01.2.3&srpos=1&e=-08-1880--10-1880--en-20--1--img-txIN%7ctxCO%7ctxTA-----0----->.

⁷² *Chaffee Controls: The Republican Party of Colorado Once More*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Sept. 16, 1882, at 1, <https://www.coloradohistoricnewspapers.org/?a=d&d=RMD18820916-01.2.3&srpos=7&e=-08-1882--10-1882--en-20--1--img-txIN%7ctxCO%7ctxT-----0----->.

⁷³ *Id.*

⁷⁴ *Good for Grant: A Splendid Ticket Nominated by Acclamation*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Sept. 23, 1882, at 1, <https://www.coloradohistoricnewspapers.org/?a=d&d=RMD18820923-01.2.3&srpos=24&e=-08-1882--10-1882--en-20--21-byDA-img-txIN%7ctxCO%7ctxTA-----0----->.

⁷⁵ *The Canvass: The Official Vote of the State so Far as Canvassed*, LEADVILLE DAILY HERALD, Dec. 5, 1882, at 3, <https://www.coloradohistoricnewspapers.org/?a=d&d=LDH18821205.2.12&srpos=48&e=-11-1882-31-12-1882--en-20--41-byDA-img-txIN%7ctxCO%7ctxTA-----0----->.

1884, there was no reported discussion at the Democratic Convention of honoring the discarded agreement.⁷⁶

Parties in a handful of states—namely, some of those that eventually adopted nonpartisan elections—took a similar action and instead opted to cross-nominate popular incumbent superintendents. Most of these joint nominations took place in the early twentieth century, though Superintendent Robert Graham was nominated for re-election in Wisconsin in 1881 by the Democratic, Republican, and Prohibition Parties.⁷⁷ In Oregon, Republican Superintendent Julius Churchill was nominated for re-election in 1914, 1918, and 1922 by both the Democratic and Republican Parties.⁷⁸

In Utah, the Democratic Party moved for a bipartisan endorsement of an incumbent superintendent several times but succeeded only twice. In 1912, when Republican Superintendent Andrew C. Nelson ran for re-election, he was named by the Democratic Convention as their nominee, too.⁷⁹ He was overwhelmingly re-elected in the general election against Socialist Party nominee H. F. Ramsey. In 1913, when Nelson died in office, Republican A. C. Matheson was named as his replacement.⁸⁰

⁷⁶ *Delighted Democrats: The Most Harmonious Convention Ever Held in Colorado Closes Its Sessions Yesterday*, ROCKY MOUNTAIN NEWS (Denver, Colo.), Sept. 26, 1884, at 8, <https://www.coloradohistoricnewspapers.org/?a=d&d=RMD18840926-01.2.118&e=24-09-1884--10-1884--en-20--1-byDA-img-txIN%7ctxCO%7ctxTA-----0----->.

⁷⁷ J. E. HEG UNDER THE DIRECTION OF ERNST G. TIMME, WIS. SEC'Y OF STATE, THE BLUE BOOK OF THE STATE OF WISCONSIN 472 (1883).

⁷⁸ BEN W. OLcott, OR. SEC'Y OF STATE, BLUE BOOK AND OFFICIAL DIRECTORY 1915–1916, at 139 (1915); BEN W. OLcott, OR. SEC'Y OF STATE, BLUE BOOK AND OFFICIAL DIRECTORY 1919–1920, at 155 (1919); SAM A. KOZER, OR. SEC'Y OF STATE, BLUE BOOK AND OFFICIAL DIRECTORY 1923–1924, at 169 (1923). See also *Official Count of Primary Vote is Announced*, CORVALLIS GAZETTE-TIMES, June 17, 1918, at 1, <https://www.newspapers.com/image/383432975/>; *Democratic Voters Name Republicans*, ALBANY DEMOCRAT-HERALD, May 27, 1922, at 1, <https://www.newspapers.com/image/565686271/>.

⁷⁹ *Dark Horse the Winner: J. F. Tolton of Beaver Lands Democratic Nomination for Governor*, DESERET EVENING NEWS (Salt Lake City, Utah), Aug. 30, 1912, at 1, <https://www.newspapers.com/image/593591943/>.

⁸⁰ *Death Calls A. C. Nelson Head of State Schools*, DESERET EVENING NEWS (Salt Lake City, Utah), Dec. 26, 1913, at 1, <https://www.newspapers.com/image/593641001/>.

In the leadup to the special election held in 1914 to fill the remaining two years in Nelson's term, a committee of state educators convened to support a nonpartisan candidate for Superintendent,⁸¹ and representatives from the Democratic and Progressive Parties indicated that they would be willing to take the committee's recommendation under advisement.⁸² Several members of the committee suggested that Republican E. G. Gowans, the Superintendent of the State Industrial School, be supported, prompting a small controversy as to whether they were acting on behalf of the whole committee.⁸³ Gowans was subsequently endorsed by the Democratic and Progressive Parties, but the Republican Party opted to renominate Matheson.⁸⁴ Though there was some speculation that Gowans would end his campaign, he opted to continue, campaigning as a "nonpartisan" candidate,⁸⁵ and narrowly unseated Matheson.⁸⁶ When Gowans ran for re-election in 1916, he was nominated by the Democratic and Republican Parties without much controversy.⁸⁷

⁸¹ *Educators Meet to Discuss Matter of Head in State: Name Committee to See State Committees of Various Parties and Advocate Joint Action*, SALT LAKE HERALD-REPUBLICAN, May 30, 1914, at 3. <https://www.newspapers.com/article/the-salt-lake-herald-republican/135693295/>.

⁸² *Educators' Committee Explains Position in Gowans' Indorsement: Declare That Action Was Simply in Form of Suggestion to Various Parties*, SALT LAKE HERALD-REPUBLICAN, June 28, 1914, at 14, <https://www.newspapers.com/image/896680856/>.

⁸³ *Compare id. with Nonpartisan as Superintendent*, OGDEN STANDARD, June 25, 1914, at 5, <https://www.newspapers.com/image/83580805/> ("The school men present, in convention assembled, did not name one [a candidate]. In fact, they studiously avoided taking it upon themselves to name or recommend a candidate. Neither did they delegate to any 'educational committee,' as the resolutions will show, the authority or power to name a man for them.").

⁸⁴ *Senator Smoot, Judge McCarty, Superintendent Matheson Named*, SALT LAKE HERALD-REPUBLICAN, Sept. 2, 1914, at 1, <https://www.newspapers.com/image/896673209/>.

⁸⁵ *Dr. E. G. Gowans is to Remain on the Ticket*, OGDEN STANDARD, Sept. 2, 1914, at 7, <https://www.newspapers.com/image/467013952/>.

⁸⁶ *Smoot Wins State over J. H. Moyle by 3053*, THE SALT LAKE TELEGRAM (Salt Lake City, Utah), Nov. 24, 1914, at 11, <https://www.newspapers.com/image/289788028/>.

⁸⁷ *State Superintendent of Schools Candidate on Both Tickets*, SALT LAKE TELEGRAM, Oct. 15, 1916, at 6, <https://www.newspapers.com/image/288153399/>.

Efforts to nominate bipartisan candidates in subsequent elections ultimately failed. Talks commenced in 1920 between Democratic and Republican representatives about jointly nominating a candidate, but these efforts ultimately fell through.⁸⁸ When the winning candidate in the 1920 election, Republican George Thomas, resigned in 1921, a replacement—Republican C. N. Jensen—was appointed, and a special election was held in 1922.⁸⁹ Democrats nominated D. C. Jensen as their candidate for superintendent, but debated withdrawing his nomination in favor of nominating C. N. Jensen, whom the Republicans had nominated for re-election. The state Democratic Party chairman opposed the idea, noting that,

For twenty years we have been playing the nonpartisan game in the office of state superintendent of public instruction. The Democratic party has repeatedly placed the name of a Republican upon its ticket for this office. But the Republicans have always failed to reciprocate. . . . I will oppose the foisting of any more Republicans on the Democrats of this state under the onesided [sic] ploy of nonpartisanship.⁹⁰

In 1925, the legislature permanently ended the debates over cross-nomination by enacting a statutory amendment to the state's

⁸⁸ *School Office Parley is Ended: Selection of State Superintendent Will Be Made by Usual Political Process*, SALT LAKE TRIB., Aug. 25, 1920, at 7, <https://www.newspapers.com/image/541491758/>.

⁸⁹ *State Republican Committee Starts Campaign Program: Meeting Expected to Set Date for Convention – Reorganization Likely – Names Mentioned*, DESERET NEWS (Salt Lake City, Utah), May 20, 1922, at 6, <https://www.newspapers.com/image/594345139/>.

⁹⁰ *Democrats Will Insist Upon Nominee: D. C. Jensen, Named for Public Instruction Berth, Will Decide Shortly*, SALT LAKE TELEGRAM, Sept. 5, 1922, at 2, <https://www.newspapers.com/image/288398644/>.

election law, over the governor's veto, that barred political parties from jointly nominating candidates for office.⁹¹

The dissatisfaction that politicians and electorates had with partisan education governance was also emblematic of broader political currents. In the early twentieth century, many civic reformers were moving to radically reshape how governments functioned. Advocates of the so-called "Short Ballot" Movement were pushing to convert many of the existing elected offices into appointed offices, which was intended to focus voter attention on the most salient elections.⁹² Many prominent progressives embraced the goals of the Short Ballot Movement, and urged the consolidation of administrative agencies and departments under state governors, hoping to achieve "greater effectiveness and efficiency in government . . . through a stronger chief executive."⁹³

The calls to economize government, many of which emphasized the importance of "business principles and scientific management techniques,"⁹⁴ extended to public education, too. Progressive reformers advocated for education to be standardized, centralized, and depoliticized.⁹⁵ In the first half of the twentieth century, many governors and state legislatures established commissions to study the operation of their governments and recommend improvements,⁹⁶ some of which were specific to the

⁹¹ H.B. 37, 16th Leg., Reg. Sess., 1925 Utah Laws 108; *see also Governor Axes Election Bill: Socalled Political Measure Fails to Secure Chief Executive's Favor*, SALT LAKE TRIB., Mar. 11, 1925, at 8, <https://www.newspapers.com/image/542119901/>.

⁹² RICHARD S. CHILDS, SHORT-BALLOT PRINCIPLES 24–25 (1911); Richard S. Childs, *The Short Ballot Movement and Simplified Politics*, 64 ANNALS AMER. ACAD. OF POL. & SOC. SCI. 168, 168–69 (1916).

⁹³ Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 496–97 (2017).

⁹⁴ STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 177 (1982).

⁹⁵ MORTON KELLER, REGULATING A NEW SOCIETY: PUBLIC POLICY AND SOCIAL CHANGE IN AMERICA, 1900–1933, at 46–51 (1994).

⁹⁶ E.g., RAYMOND MOLEY, THE STATE MOVEMENT FOR EFFICIENCY AND ECONOMY 129–47 (1918) (reviewing study commissions in Alabama, Colorado, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Jersey, Pennsylvania,

field of education.⁹⁷ While the details of these recommendations varied, the big picture was the same: States needed to adopt professional bureaucracies, led by competent (and *appointed*) technocrats, to manage education.⁹⁸ If anyone was to be elected, it should be a state board of education—and the elections should be nonpartisan.⁹⁹

During the twentieth century, many states took these recommendations to heart, and modified their systems of education governance to comply with them. Mostly, anyway. While a good number of states embraced the idea of taking education “out of politics,” they differed quite substantially over what this meant.

II. NONPARTISAN ELECTIONS FOR STATE EDUCATION ADMINISTRATORS

Beginning in the early twentieth century, legislators (and sometimes voters) in states across the country began using nonpartisan elections to select state and local officials. Most of the scholarship in law and political science that has contemplated nonpartisan elections has done so in the specific contexts of local and judicial elections, as well as in state legislative elections in Minnesota and Nebraska.¹⁰⁰ But nonpartisan elections have been

West Virginia, and Wisconsin); Michael B. Berkman & Christopher Reenock, *Incremental Consolidation and Comprehensive Reorganization of American State Executive Branches*, 48 AM. J. POL. SCI. 796, 797–99 (2004); *see also* Seifter, *supra* note 93, at 496–97.

⁹⁷ *E.g.*, WASHINGTON STATE PLANNING COUNCIL, A SURVEY OF THE COMMON SCHOOL SYSTEM OF WASHINGTON WITH PROPOSALS FOR FURTHER DEVELOPMENT AND IMPROVEMENT 64–65 (1938) [hereinafter WASHINGTON 1938 PLANNING COUNCIL SURVEY].

⁹⁸ INST. FOR GOV’T RES., BROOKINGS INST., 1 REPORT ON A SURVEY OF THE ORGANIZATION AND ADMINISTRATION OF THE STATE AND COUNTY GOVERNMENTS OF ALABAMA 325–332 (1932); INST. FOR GOV’T RES., BROOKINGS INST., REPORT ON A SURVEY OF ADMINISTRATION IN IOWA 165–69 (1933); INST. FOR GOV’T RES., BROOKINGS INST., REPORT ON A SURVEY OF ORGANIZATION AND ADMINISTRATION OF OKLAHOMA 36–42 (1935).

⁹⁹ WASHINGTON 1938 PLANNING COUNCIL SURVEY, *supra* note 97, at 64–65.

¹⁰⁰ See Gerald C. Wright, *Charles Adrian and the Study of Nonpartisan Elections*, 61 POL. RSCH. Q. 13, 13–15 (2008) (conducting literature review); *see*

used for a variety of other offices, including for state superintendents and state boards of education.¹⁰¹

also, e.g., Charles R. Adrian, *A Typology for Nonpartisan Elections*, 12 W. POL. Q. 449, 451 (1959); Brian F. Schaffner, Matthew Streb & Gerald Wright, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RSCH. Q. 7, 7–8 (2001); ROBERT C. WIGTON, *THE PARTIES IN COURT: AMERICAN POLITICAL PARTIES UNDER THE CONSTITUTION* 189–92 (2014); Nancy Northrup, Note, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 COLUM. L. REV. 1677, 1682–84 (1987). *But see* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1552 (2020) (discussing nonpartisan elections in the context of prosecutorial elections); Aaron C. Weinschenk, *The Nationalization of School Superintendent Elections*, 103 SOC. SCI. Q. 597, 600–04 (2022) (discussing nonpartisan elections in the context of state superintendent elections).

¹⁰¹ Other offices include the Arizona Tax Commission from 1912 to 1971, Act of May 9, 1912, ch. 23, 1912 Ariz. Sess. Laws 45; H.B. 4, 29th Leg., 2d Reg. Sess., 1970 Ariz. Sess. Laws 533; the Office of Hawaiian Affairs Trustee, H.B. 890, 10th Leg., Reg. Sess., 1979 Haw. Sess. Laws 398; the Nebraska Board of University Regents from 1919 to the present, H. Roll 23, 35th Leg., Reg. Sess., 1917 Neb. Laws 112; the Nevada State Board of Regents from 1919 to the present, Act of Mar. 22, 1917, ch. 148, 1917 Nev. Stat. 249; the Nevada State Board of Fish and Game Commissioners, Assemb. B. 64, 43d Leg., Reg. Sess., 1947 Nev. Stat. 349; Assemb. B. 128, 44th Leg., Reg. Sess., 1949 Nev. Stat. 292; the North Dakota Tax Commissioner from 1941 to 1989, art. 52, § 82, 26th Legis. Assemb., Reg. Sess., 1939 N.D. Laws 497; S.Con. Res. 4022, 49th Legis. Assemb., Reg. Sess., 1985 N.D. Laws 2322, *amending* N.D. CONST. art. V, §§ 1, 12 (amended 1986); the North Dakota Commissioner of Labor, S.Con. Res. A, 36th Legis. Assemb., Reg. Sess., 1959 N.D. Laws 853, *amending* N.D. CONST. of 1889, art. III, § 82 (amended 1960); H.B. 753, 39th Legis. Assemb., Reg. Sess., 1965 N.D. Laws 455; the Oregon Commissioner of the Bureau of Labor and Industries from 1999 to the present, S.B. 1130, 68th Legis. Assemb., Reg. Sess., 1995 Or. Laws 383; the Northern Mariana Islands Attorney General; H. Legis. Initiative 17-2, 17th Leg., 5th Reg. Sess., *amending* N. MAR. I. CONST. art. III, § 11(d) (amended 2012). Additionally, special congressional elections in Mississippi are formally conducted as nonpartisan affairs, *see* MISS. CODE ANN. §§ 23-15-853, -855; Geoff Pender & Luke Ramseth, *Espy, Hyde-Smith Headed to Runoff in U.S. Senate After McDaniel Concedes*, MISS. CLARION LEDGER (Jackson, Miss.) (Nov. 6, 2018), <https://www.clarionledger.com/story/news/politics/2018/11/06/election-results-ms-sen-race-between-hyde-smith-espy-mcdaniel/1673151002/>, and special congressional elections in Georgia were formally nonpartisan until 2005, *see* H.B. 244, Gen. Assemb., Extraordinary Sess., 2005 Ga. Laws 253; *see also* Kathey Pruitt, *Senate Race Starting Slowly*, ATLANTA J.-CONST., Sept. 12, 2000, at C3, <https://www.newspapers.com/image/403905491/> (noting that the 2000 U.S. Senate special election was a “nonpartisan election”).

Having considered, in Part I, the initial creation of elected education administrators in the nineteenth century, as well as some of the pressures to professionalize and depoliticize education administration, in this Part, I discuss the establishment of nonpartisan elections for superintendent and school board elections. I begin in Section A by charting the history of how nonpartisan elections were created; then, in Section B, I explain the technical aspects of how, in the years after the first statewide nonpartisan elections, legislators frequently tweaked their conduct. At the outset, I note that the path to nonpartisan elections, and in refining how they are conducted, has been circuitous.

A. *The Adoption of Nonpartisan Elections*

Today, most states elect their superintendents and boards of education in partisan—and increasingly polarized¹⁰²—elections.¹⁰³ Historically, all statewide elections in the United States were partisan affairs, but depending on the period in American history and the idiosyncrasies of each state, statewide elections may have played out in practice as intra-partisan or nonpartisan contests.¹⁰⁴ The introduction, then, of *formally* nonpartisan elections in the contexts of school and judicial elections in the early twentieth century represented a totally new way of conducting elections.

¹⁰² E.g., Weinschenk, *supra* note 100, at 600–04.

¹⁰³ COUNCIL OF STATE GOVERNMENTS, 53 THE BOOK OF THE STATES 217–18 (2021).

¹⁰⁴ For much of Texas’s early political history, for example, the Democratic Party dominated state government—but was poorly organized, and it was not uncommon for a single election to have multiple Democratic candidates running simultaneously because nominating conventions were not organized. *See, e.g.*, BULL. OF THE UNIV. OF TEX., PLATFORMS OF POLITICAL PARTIES IN TEXAS 17–23 (Ernest William Winkler ed., 1916). Sometimes, *de facto* nonpartisan elections would occur because write-in candidates would frequently print stickers for their supports to affix to their ballots rather than having voters guess at spelling their names. *See, e.g.*, CHARLES H. SHELDON, A CENTURY OF JUDGING: A POLITICAL HISTORY OF THE WASHINGTON SUPREME COURT 58–59 (1988) (describing a “sticker” election for a 1912 Supreme Court of Washington election). As noted in the previous part, some candidates received endorsements from multiple parties, which might functionally be described as a *de facto* “nonpartisan” election. *Supra* PART I.B.

Wisconsin was the first state to adopt nonpartisan elections for its elected school administrator, the Superintendent of Public Instruction. In 1899 and 1901, the Wisconsin Legislature advanced a constitutional amendment, which was ratified by voters in 1902, that moved the superintendent "out of politics." The amendment required that the superintendent, to that point a partisan office, be elected in tandem with the state judiciary in April elections held in every fourth odd-numbered year, beginning in 1905.¹⁰⁵ As a practical matter, this converted the office into a nonpartisan office starting with the 1905 election.¹⁰⁶

¹⁰⁵ Act of May 2, 1901, ch. 258, 1901 Wis. Sess. Laws 352, *amending* WIS. CONST. art. X, § 1 (amended 1902).

¹⁰⁶ At the risk of being overly nitpicky, the 1902 amendment did not *actually require* that the Superintendent, much less the judiciary, be elected in nonpartisan elections. The amendment merely required that the Superintendent "be chosen . . . at the same time and in the same manner as members of the supreme court[.]" *Id.* At the time, the Supreme Court of Wisconsin elections were *functionally*, though not *officially*, nonpartisan contests. Prior to 1903, candidates were nominated for office in Wisconsin by party nominations, not partisan primaries. However, for much of the late nineteenth century, party conventions were not held to nominate judicial candidates. Instead, in lieu of filing as a member of a political party, candidates filed under some label that indicated their support for a nonpartisan judiciary—like "A Nonpartisan Judiciary." *See, e.g., The County Judgeship: George L. Blum Becomes a Candidate on Principle of "A Non Partisan Judiciary,"* WEEKLY TELEGRAM (Eau Claire, Wis.), Mar. 14, 1901, at 4, <https://www.newspapers.com/image/239438071/>. By its own text, the 1903 primary election law did not apply to "the office of state superintendent . . . nor to judicial officers." Act of May 23, 1903, ch. 451, 1903 Wis. Sess. Laws 754. However, though state law provided that "[n]o party designation *need* be placed upon the ballots for school or judicial officer[s]," WIS. STAT. ch. 5, § 38 (Supp. 1905) (emphasis added), and precluded the use of a straight-ticket voting option in judicial and school elections, *id.* § 52, it did not foreclose the possibility of a candidate nonetheless filing *with* such a designation. Not until 1911 was it made clear that "[n]o candidate for any judicial or school office shall be nominated or elected upon any party ticket, nor shall any designation of party or principles represented be used in the nomination or election of any such candidate." Act of June 14, 1911, ch. 333, 1911 Wis. Sess. Laws 350. (And, judging from newspaper coverage, it seems that the legislature was unaware that its 1911 statutory amendment closed this loophole! *See, e.g., Roycraft's Success: Through His Efforts the Non-Partisan Measure Becomes a Law,* CHIPPEWA HERALD-TRIB., July 2, 1911, at 1, <https://www.newspapers.com/image/417125241/>.) Accordingly, the first

Other states quickly followed suit. In 1911, the California Legislature approved legislation converting many of the elections held for local offices, as well as for Superintendent of Public Instruction, to nonpartisan.¹⁰⁷ Though Governor Hiram Johnson, a staunch advocate of the Short Ballot Movement,¹⁰⁸ had called for the superintendent to be removed from the ballot altogether in his message to the legislature,¹⁰⁹ he nonetheless signed the legislation converting the office to nonpartisan election.¹¹⁰ In 1913, to little fanfare,¹¹¹ North Dakota accomplished a similar transition,¹¹² and in 1917, Nevada converted a host of offices—including its Superintendent of Public Instruction, University Regents, judges, and county officers—to nonpartisan election.¹¹³ When Nevada created an elected State Board of Education in 1931, it was elected in nonpartisan elections, too.¹¹⁴

In Nebraska, the effort to take school offices “out of politics” attracted more attention. In 1913, the state had adopted a “non-

functionally nonpartisan elections for Superintendent took place in 1905 and 1909, the first *formally* nonpartisan election for Superintendent did not take place until 1913.

¹⁰⁷ Act of Apr. 7, 1911, ch. 398, 1911 Cal. Stat. 769.

¹⁰⁸ DAVID R. BERMAN, GOVERNORS AND THE PROGRESSIVE MOVEMENT 206 (2019); BERNARD HISCHHORN, DEMOCRACY REFORMED: RICHARD SPENCER CHILDS AND HIS FIGHT FOR BETTER GOVERNMENT 53–54 (1997).

¹⁰⁹ Hiram Johnson, Governor of Cal., Inaugural Address, in S. JOURNAL, 39th Legis. Assemb., Reg. Sess. 66 (Cal. 1911).

¹¹⁰ *Governor Johnson Signs Bill Doing Away with the Party Column on Ballot*, SANTA CRUZ MORNING SENTINEL, Mar. 21, 1911, at 1, <https://www.newspapers.com/image/53957701/>.

¹¹¹ *Both Branches of Legislature Breaking Records to Dispose of Numerous Bills*, BISMARCK DAILY TRIB., Mar. 6, 1913, at 1, <https://www.newspapers.com/image/71258661/>.

¹¹² H.B. 111, 13th Legis. Assemb., Reg. Sess., 1913 N.D. Laws 202.

¹¹³ Act of Mar. 22, 1917, ch. 148, 1917 Nev. Stat. 249; *see also* Huskey's *Proposed Election Law Makes Many Offices Non-Partisan*, RENO GAZETTE, Jan. 17, 1917, at 2, <https://www.newspapers.com/image/147943154/>; *New Primary Election Law Has Many Features of 1913 Statute*, RENO GAZETTE, Mar. 24, 1917, at 2, <https://www.newspapers.com/image/148129522/>.

¹¹⁴ S.B. 73, 35th Leg. Assemb., 1931 Nev. Stat. 362. For two decades, the Superintendent of Public Instruction and the State Board of Education were elected and served side by side, but the state legislature ended elections for Superintendent in 1955.

partisan judiciary law,”¹¹⁵ which made it among the first states to establish nonpartisan judicial elections.¹¹⁶ Two separate governors, Democrats John H. Morehead and Keith Neville, hailed the success of the 1913 law and urged its expansion to school offices.¹¹⁷ In 1917, the legislature did so.¹¹⁸

From there, progress stalled until the 1930s. In 1935, the South Dakota Legislature advanced a constitutional amendment that converted its state Superintendent of Public Instruction, as well as county superintendents, to nonpartisan election.¹¹⁹ Both the Democratic and Republican Parties endorsed the measure in their platforms,¹²⁰ and the South Dakota Education Association, the South Dakota Department of Education, and the South Dakota State Grange all endorsed it, too.¹²¹ Amendment B ended up easily passing in the 1936 general election.¹²²

In 1938, Washington Governor Clarence Martin requested that the State Planning Council conduct a survey of the state education

¹¹⁵ S. File 352, 33d Leg., Reg. Sess., 1913 Neb. Laws 247.

¹¹⁶ See R. Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907–1998*, 26 OKLA. CITY UNIV. L. REV. 519, 524 (2001).

¹¹⁷ John H. Morehead, Governor of Neb., Message to the Legislature, *in* S. JOURNAL, 34th Leg., Reg. Sess. 13 (Neb. 1915); John H. Morehead, Governor of Neb., Message to the Legislature, *in* S. JOURNAL, 35th Leg., Reg. Sess. 92 (Neb. 1917); Keith Neville, Governor of Neb., Message to the Legislature, *in* S. JOURNAL, 35th Leg., Reg. Sess. 102–03 (Neb. 1917).

¹¹⁸ H. Roll 23, 35th Leg., Reg. Sess., 1917 Neb. Laws 112.

¹¹⁹ H.R.J. Res. 4, 24th Leg., Spec. Sess., 1935 S.D. Sess. Laws 212, amending S.D. CONST. art. IV, § 12 (amended 1936).

¹²⁰ Republicans S.D. Line up Campaign: Harvey Jewett Succeeds Way as National Committeeman, WEEKLY PIONEER-TIMES (Deadwood, S.D.), June 4, 1936, at 1, <https://www.newspapers.com/image/95219031/>; Fights Mark Demo Nominations: Religion Made Issue as Democrats Ballot for Party Nominees, RAPID CITY DAILY J., July 15, 1936, at 1, <https://www.newspapers.com/image/350607104/>.

¹²¹ Linn Advocates New School Laws: Urges Passage of Constitution Amendments, RAPID CITY DAILY J., Apr. 14, 1936, at 10, <https://www.newspapers.com/image/350583433/>; Grange Seeks Lower Interest Rates: Resolutions Adopted Announced Today, RAPID CITY DAILY J., June 15, 1936, at 1, <https://www.newspapers.com/image/350599135/>.

¹²² GEORGE W. WRIGHT, S.D. SEC'Y OF FIN., SOUTH DAKOTA LEGISLATIVE MANUAL 1937, at 401 (1937) (listed as Amendment B).

system and propose a set of recommendations.¹²³ The Council suggested a variety of ambitious reforms, including the creation of a state department of education.¹²⁴ It also recommended that the state Superintendent of Public Instruction and county superintendents be elected in nonpartisan elections.¹²⁵ The Council's recommendations dovetailed with the placement of Initiative 126 on the ballot, which accomplished exactly that. Earlier in the year, the Washington State League of Women Voters sponsored the measure and gathered enough signatures to place it on the ballot,¹²⁶ where it passed overwhelmingly. The next year, the Oregon Legislature approved a statutory modification to similar effect.¹²⁷

Another decade elapsed. In 1949, the Utah Legislature approved a constitutional amendment that proposed the removal of the state Superintendent of Public Instruction from the ballot and the election of a State Board of Education instead—under a scheme to be determined by the legislature.¹²⁸ The measure passed, and in 1951, Governor J. Bracken Lee recommended that legislature create a board elected in nonpartisan elections.¹²⁹ Though the legislature considered setting a separate election date for board elections, Lee

¹²³ *State Education Department Urged by Planning Council After Survey*, BELLINGHAM HERALD, Sept. 21, 1938, at 5, <https://www.newspapers.com/image/768852396/>.

¹²⁴ *Id.*

¹²⁵ WASHINGTON 1938 PLANNING COUNCIL SURVEY, *supra* note 97, at 64–65.

¹²⁶ 1938 WASHINGTON VOTER PAMPHLET, *supra* note 15, at 5; *Non-Partisan School Ballot is Sought*, SEATTLE STAR, Mar. 3, 1938, at 5, <https://www.newspapers.com/image/773679628/>.

¹²⁷ S.B. 62, 40th Legis. Assemb., Reg. Sess., 1939 Or. Laws 655; *Non-Partisan Vote on School Superintendent Proposed: Position Held Too Important for Politics*, LA GRANDE EVENING OBSERVER, Jan. 17, 1939, at 1, <https://www.newspapers.com/image/134106517/>; *Senate Approves Non-Partisan Bill*, OR. STATESMAN, Feb. 3, 1939, at 2, <https://www.newspapers.com/image/79925380/>.

¹²⁸ H.R.J. Res. 5, 28th Leg., Reg. Sess., 1949 Utah Laws 296, amending UTAH CONST. art. X, § 8 (amended 1950).

¹²⁹ J. Bracken Lee, Governor of Utah, Message to the Legislature, *in* S. J., 29th Leg., Reg. Sess. 39–40 (Utah 1951); *Gov. Lee Seeks Non-Partisan School Official: Maintains Political Appointment Would Cause Strife*, SALT LAKE TRIB., June 20, 1951, at 13, <https://www.newspapers.com/image/598736570/>.

urged the scheduling of the elections on the same cycle as the state's general elections,¹³⁰ which the legislature did.¹³¹

In 1953, the Ohio Legislature referred a constitutional amendment to the ballot that proposed the creation of a State Board of Education.¹³² The measure did not specify how the Board would be elected, and instead just established that the Board would be responsible for appointing the Superintendent of Public Instruction.¹³³ After the amendment passed, different proposals emerged for how the Board should be constituted. Governor Frank J. Lausche argued that the Board should be appointed by the governor.¹³⁴ The Ohio School Survey Committee, on the other hand, published a report to the Governor and Legislature that recommended electing the Board "on a non-partisan ballot so that the members will be direct representatives of the people," though it acknowledged that "[t]here seems no one acceptable method of selecting a state board."¹³⁵ The legislature ultimately opted for the Committee's approach.¹³⁶

A handful of jurisdictions round out the survey. The U.S. Virgin Islands Legislature created a territory-wide elected Board of Education in 1968,¹³⁷ likely following up on Congress's passage of the Virgin Islands Elective Governor Act earlier that year.¹³⁸ Though the Board was originally elected in partisan elections,¹³⁹ that

¹³⁰ Letter from J. Bracken Lee, Governor of Utah, to Clinton G. M. Kerr, Speaker of the Utah H.R. (June 6, 1951), *in* H. JOURNAL, 29th Leg., 1st Spec. Sess. 24 (Utah 1951).

¹³¹ H.B. 9, 29th Leg., 1st Spec. Sess., 1951 Utah Laws 23.

¹³² Amended S.J. Res. 30, 100th Gen. Assemb., Reg. Sess., 1953–54 Ohio Laws 1088, *amending* OHIO CONST. art. VI, § 4 (amended 1953).

¹³³ *Id.*

¹³⁴ Frank J. Lausche, Governor of Ohio, Message to the Legislature, *in* H. JOURNAL, 101st Gen. Assemb., Reg. Sess. appx. 1946 (Ohio 1955).

¹³⁵ OHIO SCH. SURVEY COMM., REPORT OF THE OHIO SCHOOL SURVEY COMMITTEE TO THE GOVERNOR AND THE GENERAL ASSEMBLY 187 (1955).

¹³⁶ Amended H.B. 212, 101st Gen. Assemb., Reg. Sess., 1955–56 Ohio Laws 655, 694.

¹³⁷ B. 3712, 7th Leg., 8th Spec. Sess., 1968 V.I. Sess. Laws 66.

¹³⁸ Virgin Islands Elective Governor Act, Pub. L. No. 90-496, § 4, 82 Stat. 837, 837 (1968) (codified as amended at 48 U.S.C. § 1591); *see also* T. Quinn Yeargain, *Democratizing Gubernatorial Selection*, 14 NE. UNIV. L. REV. 1, 29–32 (2022) (noting the evolution of territorial democracy beginning in the 1960s).

¹³⁹ B. 3712, 7th Leg., 8th Spec. Sess., 1968 V.I. Sess. Laws 66.

procedure did not last long. In 1972, the Legislature converted the Board to nonpartisan elections.¹⁴⁰ In 1978, the Hawaii Constitutional Convention proposed a series of constitutional revisions that included nonpartisan Board of Education elections,¹⁴¹ which voters approved.¹⁴² And in 1985, the Northern Mariana Islands Constitutional Convention proposed an amendment to the territorial constitution's education article that created an elected, nonpartisan board of education¹⁴³—which voters also ratified.¹⁴⁴

B. Tweaking Nonpartisan Elections

Despite the significance of the shift to nonpartisan elections, most policymakers left many details unanswered. Nonpartisan elections differ from partisan elections in many ways. Today, the conduct of partisan elections is (mostly) consistent across the states. In most states, for most offices, candidates are nominated in partisan primary elections and then compete with each other in general

¹⁴⁰ B. 5483, 9th Leg., Reg. Sess., 1972 V.I. Sess. Laws 174.

¹⁴¹ LOLAN HO-WONG & MURIEL M. TAIRA, HAW. LEGIS. REF. BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES, 1978: ARTICLE IX: EDUCATION 32–33 (Richard F. Kahle, Jr. ed., 1978), https://lrb.hawaii.gov/wp-content/uploads/1978ConConStudies_ArticleIX_Education.pdf; HAW. CONST. CONVENTION, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 588 (1978) (“The members of your Committee agree that members of the board of education should be elected on a nonpartisan basis.”).

¹⁴² NELSON K. DOI, HAW. LT. GOV., RESULT OF VOTES CAST, GENERAL ELECTION, TUESDAY, NOVEMBER 7, 1978, STATE OF HAWAII 115 (1978) (listed as Amendment 19).

¹⁴³ N. Mar. I. Const. Convention, Proposed Constitutional Amendments Adopted by the Second Northern Mariana Islands Constitutional Convention 38 (1985), https://www.nmhcouncil.org/nmhc_archives/NMI%20Constitutional%20Conventions/2nd%20NMI%20Constitutional%20Convention%201985/1985%2007%2022%20Constitutional%20Amendments%20as%20Adopted.pdf; N. MAR. I. CONST. art. XV, § 1(c) (amended 1986).

¹⁴⁴ See *Amendments Gain Nod*, MARIANAS VARIETY NEWS & VIEWS (Saipan, N. Mar. I.), Nov. 8, 1985, at 8, <https://evols.library.manoa.hawaii.edu/server/api/core/bitstreams/055c3a8b-8655-48f3-b359-907678248a3e/content> (“Initial tabulation results show that all the 44 proposed amendments to the CNMI Constitution, with the exception of two, may be ratified.”).

elections, where the candidate with the most votes wins.¹⁴⁵ A handful of states do things a bit differently: Alaska, California, Louisiana, and Washington use all-party primaries with different rules for runoffs;¹⁴⁶ Maine uses ranked-choice voting in many (though not all) of its primary and general elections;¹⁴⁷ and Georgia, Mississippi, and most U.S. territories schedule runoff elections if no candidate receives a majority of the vote in the general election.¹⁴⁸ But these jurisdictions aside, the process is largely uniform.

Yet with nonpartisan elections, many of these details remain unaddressed. When is the election held? Must the winner merely receive the *most* votes, or must they receive a *majority* of the votes? If the latter, when is a runoff election held? Many of the early laws establishing nonpartisan elections either did not answer these questions or produced unsatisfying answers, thus prompting subsequent reforms.

Wisconsin, the first state to adopt nonpartisan elections for its superintendent, at first only required that the winning candidate receive the most votes.¹⁴⁹ Given that the state's superintendent elections were usually quiet affairs,¹⁵⁰ the obvious flaws of this

¹⁴⁵ See, e.g., Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CAL. L. REV. 1773, 1788–89 (2021); Yeargain, *supra* note 138, at 35.

¹⁴⁶ ALASKA STAT. § 15.25.010 (2020); CAL. CONST. art. II, § 5; LA. STAT. ANN. § 18:401 (2010); WASH. REV. CODE § 29A.36.170 (2013).

¹⁴⁷ ME. STAT. tit. 21-A, § 1(27-C) (2021).

¹⁴⁸ Yeargain, *supra* note 138, at 24–32.

¹⁴⁹ WIS. STAT. ch. 5, § 94a(6) (1911) (“[The board of state canvassers] shall . . . determine what persons have been, by the greatest number of votes, duly elected to such offices”); *see also* Act of June 16, 1909, ch.483, 1909 Wis. Sess. Laws 605.

¹⁵⁰ For the first half-century in which nonpartisan elections were in use, there were very few open elections, incumbents almost always won, and races were regularly uncontested. Between 1905 and 1949, of the twelve elections that took place, six saw only two candidates on the ballot, and three saw only one candidate on the ballot. Incumbent Superintendent Charles Preston Cary, who was elected as a Republican in the 1902 election (before the switch to nonpartisan elections took place), was re-elected in 1909, 1913, and 1917 before narrowly losing re-election to John Callahan in 1921. Callahan, in turn, was re-elected in 1925, 1929, 1933, 1937, 1941, and 1945. As such, there was no open seat until the 1949 election, and incumbents won eleven of the twelve elections.

approach were not revealed for several decades. But in 1949 when both Superintendent John Callahan—who had served in office for 28 years—and Chief Justice Marvin Rosenberry of the Supreme Court of Wisconsin—who had served for 34 years—declined to seek re-election, the legislature anticipated that the contest to replace them would be crowded.¹⁵¹ Accordingly, it adopted a majority-vote requirement, and provided for a runoff election to be scheduled if no candidate received a majority of the vote.¹⁵² However, the legislation creating the runoff election was only adopted on *March 15*, just several weeks before the April 5, 1949 election, and after candidates had already filed for office.¹⁵³ Both races were, indeed, crowded, and no candidate in either race won even a *quarter* of the vote, so runoff elections were scheduled.¹⁵⁴ A voter challenged the constitutionality of the law, and the runoff election,¹⁵⁵ but the Supreme Court of Wisconsin unanimously rejected the challenge.¹⁵⁶ Today, however, the situation is flipped. Rather than scheduling an April election with the possibility of a runoff election if no candidate receives a majority,¹⁵⁷ the April election serves as the general

See generally Cary, Charles Preston 1856 – 1943, Wis. HIST. SOC’Y, <https://www.wisconsinhistory.org/Records/Article/CS6130> (last visited Sept. 5, 2023); Callahan, John 1865 – 1956, Wis. HIST. SOC’Y, <https://www.wisconsinhistory.org/Records/Article/CS6029> (last visited Sept. 5, 2023).

¹⁵¹ *Runoff Election Measure Signed*, KENOSHA EVENING NEWS, Mar. 16, 1949, at 8, <https://www.newspapers.com/image/596127931/> (“The runoff bill was pushed through the legislature because of the unusual number of candidates who jumped into the races when Chief Justice Marvin Rosenberry and veteran State Superintendent John Callahan announced that they are retiring.”).

¹⁵² Act of March 15, 1949, ch. 15, 1949 Wis. Sess. Laws 16.

¹⁵³ *Taxpayer Suit to Challenge Run-Off*, CAP. TIMES (Madison, Wis.), Apr. 8, 1949, at 1, <https://www.newspapers.com/image/517907460/>.

¹⁵⁴ In the Superintendent race, the first-place candidate, George Watson, received just 21.7% of the vote, and the second-place finisher, Quincy V. Doudna, received just 17.8%. WIS. LEGIS. REFERENCE LIBR., THE WISCONSIN BLUE BOOK 1950, at 770 (2d ed. 1950). In the Supreme Court race, Edward Gehl took first place with just 20.3% of the vote, and Elmer Goodland placed second with 15.6%. *Id.* at 765.

¹⁵⁵ *Taxpayer Suit to Challenge Run-Off*, *supra* note 153, at 1, 10.

¹⁵⁶ State *ex rel.* Frederick v. Zimmerman, 37 N.W.2d 473, 481–82 (Wis. 1949).

¹⁵⁷ Act of March 15, 1949, ch. 15 1949 Wis. Sess. Laws 16.

election, a February primary election is only scheduled if more than two candidates file for a single seat,¹⁵⁸ and the two candidates with the most votes proceed to the April election—even if one of them receives a majority.¹⁵⁹

Most states opted for a simpler, if more laborious, process at first. In Nebraska, Nevada, and North Dakota, all candidates appeared on the primary election ballot and the top two candidates advanced to the general election—regardless of whether one of the candidates won a majority.¹⁶⁰ In California, Oregon, and Washington, all candidates ran in the primary, and either the top two candidates advanced to the general election or, if one candidate received a majority, that candidate became “the” nominee for the office in the general election and appeared on the ballot alone.¹⁶¹ And in Hawaii, the Northern Mariana Islands, Ohio, Utah, and the U.S. Virgin Islands, there was no primary election at all. Instead, candidates appeared on the same ballot in the general election, and the candidate with the most votes won.¹⁶²

In several of these states, dissatisfaction with these processes prompted quick statutory responses. In Nebraska, the practical effect of its law meant that candidates who received a handful of write-in votes could secure a spot in the general election, if they wanted it.¹⁶³ While this requirement had fortuitous effects

¹⁵⁸ WIS. STAT. § 8.11(3) (2011).

¹⁵⁹ *Id.* § 5.58(3).

¹⁶⁰ H. Roll 23, 35th Leg., Reg. Sess., 1917 Neb. Laws 112; Act of Mar. 22, 1917, ch. 148, 1917 Nev. Stat. 249; H.B. 111, 13th Legis. Assemb., Reg. Sess., 1913 N.D. Laws 202.

¹⁶¹ Act of Apr. 7, 1911, ch. 398, 1911 Cal. Stat. 769; S.B. 62, 40th Legis. Assemb., Reg. Sess., 1939 Or. Laws 655; Initiative Measure 126, 26th Leg., Reg. Sess., 1939 Wash. Sess. Laws 3.

¹⁶² H.B. 38, 10th Leg., Reg. Sess., 1979 Haw. Sess. Laws 287; Act effective Oc. 25, 1988, Pub. L. No. 6-10, 6th Legis., 1st Reg. Sess. (N. Mar. I. 1988); 1 N. MAR. I. CODE § 6524(c) (2010); Amended H.B. 212, 101st Gen. Assemb., Reg. Sess., 1955–56 Ohio Laws 655; H.B. 9, 29th Leg., 1st Spec. Sess., 1951 Utah Laws 23; B. 5483, 9th Leg., Reg. Sess., 1972 V.I. Sess. Laws 174.

¹⁶³ E.g., *Omaha Man Accepts Place as Nominee for Judge*, OMAHA SUNDAY BEE, July 18, 1920, at 3, <https://www.newspapers.com/image/741740691/> (“Mr. Fitch received nine votes written in on the ballot, and as the law permits twice as many candidates as the number elected, his name can be placed on the ballot. Others who received more than one vote were Joe Berger, 3; John L. Grossman, 3, and C. C. Sheppard, 2”).

sometimes—for example, in 1920, an incumbent judge unopposed for re-election died between the primary and general elections, and the Governor’s replacement appointee happened to receive enough write-in votes to qualify for the general election¹⁶⁴—it was more disruptive than helpful. Accordingly, in 1921, the legislature imposed a new requirement: the two candidates who received the most votes would advance to the general election, but only if they received a number of votes equal to “at least ten per cent of the total vote cast for governor in said county at the preceding general election.”¹⁶⁵ In Nevada, the legislature amended its law in 1923 to provide that, if a candidate received a majority of the vote, they would be the only nominee in the general election.¹⁶⁶ In 1925, another amendment cancelled the primary election if only two candidates filed.¹⁶⁷

In California, the legislature proposed a constitutional amendment establishing that “[a]ny candidate for a judicial, school, county, township, or other nonpartisan office who at a primary election shall receive votes on a majority of all the ballots cast . . . shall be elected to such office.”¹⁶⁸ That rule remains in the California Constitution today—though it’s now Section 6(a) of Article II instead of the oddly numbered Section 2 ¾.¹⁶⁹

The special rules used for nonpartisan statewide elections in California and Washington interact strangely with the state’s other election procedures. Both states utilize top-two primaries instead of closed partisan primaries, in which all candidates of all parties

¹⁶⁴ *Clements a Candidate for District Judge: Is Eminently Qualified and Laccial Man for Place, Has Strong Bar Endorsement*, ORD QUIZ, June 10, 1920, at 1, <https://www.newspapers.com/image/742252807/> (“In case the appointment is made we don’t know whether Mr. Clements can file and go before the voters this fall or not. We have been told that his name was written on enough ballots at the late primary so that he can accept the filing and go on the ballot.”).

¹⁶⁵ H. Roll 126, 40th Leg., Reg. Sess., 1921 Neb. Laws 315.

¹⁶⁶ S.B. 56, 31st Leg., Reg. Sess., 1923 Nev. Stat. 49.

¹⁶⁷ Assemb. B. 50, 32d Leg., Reg. Sess., 1925 Nev. Stat. 258; *see also* NEV. REV. STAT. § 293.260 (2019).

¹⁶⁸ S. Const. Amend. 20, 46th Leg., Reg. Sess., 1925 Cal. Stat. 1401, *amending* CAL. CONST. art. II, § 2 ¾ (amended 1926).

¹⁶⁹ CAL. CONST. art. II, § 6(a).

appear on the same ballot in the primary election.¹⁷⁰ The two candidates who received the most and second-most votes advance to the general election, regardless of their party affiliation or whether one of them received a majority.¹⁷¹ In California, the majority-vote exception for nonpartisan elections means that the Superintendent of Public Instruction is the only statewide elected office where a candidate can win the race outright in the June primary.¹⁷² It also means that, with respect to key local offices like mayor, district attorney, and sheriff, the real question is whether the race will be continued to the general election or whether the first-place candidate will win a majority in the June primary and clinch the race.¹⁷³ The rule has a similar effect in Washington, but judicial and superintendent candidates who won majorities in the primary still must play out the *pro forma* exercise of winning the most votes in the general election as the only candidate on the ballot.¹⁷⁴

And finally, changes made to State Board of Education elections in Utah have been among the strangest—and possibly the most undemocratic. Originally, regional conventions held in each

¹⁷⁰ Yeargain, *supra* note 138, at 32–34 (discussing adoption of top-two primaries); Chenwei Zhang, Note, *Towards a More Perfect Union: Improving the Top-Two Primary for Congressional and State Races*, 73 OHIO ST. L.J. 615, 624–33 (2012).

¹⁷¹ CAL. CONST. art. II, § 5(a); WASH. REV. CODE § 29A.36.170(1) (2013).

¹⁷² Mackenzie Mays, *California's Schools Chief Could Cruise to a Second Term, Despite Criticism*, L.A. TIMES (May 22, 2022), <https://www.latimes.com/california/story/2022-05-22/challengers-face-long-odds-in-the-race-for-california-schools-chief> (“Unlike other state offices, a candidate for superintendent can win the job in the primary, without an election in November, by getting a majority of the vote.”).

¹⁷³ E.g., Eliyahu Kamisher, *The D.A. Primary in Los Angeles Narrowly Went to a Runoff. Now that the Election Is Here, the Stakes Are Even Higher*, APPEAL (Oct. 7, 2020), <https://theappeal.org/politicalreport/los-angeles-district-attorney-election-lacey-gascon/>; *Your Local Guide to Criminal Justice in California Primaries*, BOLTS MAG. (June 7, 2022), <https://boltsmag.org/criminal-justice-in-2022-california-primaries/>.

¹⁷⁴ WASH. REV. CODE § 29A.36.170(2) (2013) (“For the office of justice of the supreme court, judge of the court of appeals, judge of the superior court, judge of the district court, or state superintendent of public instruction, if a candidate in a contested primary receives a majority of all the votes cast for that office or position, only the name of that candidate may be printed for that position on the ballot at the general election.”).

of the districts nominated candidates for the general election without direct voter input.¹⁷⁵ A 1965 statutory change maintained nominations by convention, but also added primary elections. Under the new law, the conventions would nominate candidates for spots on the primary-election ballot, and at the primary election, voters would winnow the field to just two candidates.¹⁷⁶ In 1972, the conventions were totally scrapped in favor of nomination by primary election,¹⁷⁷ bringing Utah into line with the procedures in most other states.

But in 1991, the legislature replaced the primary election with a process managed by a nominating commission and the governor. Beginning in the 1992 election, a nominating committee was convened in each district and screened the candidates who filed for office.¹⁷⁸ It then selected between three and five candidates to recommend to the governor, who then picked two.¹⁷⁹ The two gubernatorial nominees would then run in the general election, and the candidate who received the most votes would win.¹⁸⁰ If only two candidates filed for office, however, the nominating committee would not convene, and the candidates would automatically earn a place on the ballot.¹⁸¹

In 2014, the constitutionality of the nominating process was challenged in federal court by several unsuccessful candidates—each of whom had filed nominating papers, but whose names were not advanced to the Governor by the nominating committee.¹⁸² England argued that the process violated his free speech rights under the First Amendment, pointing to the fact that the selection process necessarily conditions ballot access on the subjective approval of the nominating committee and the governor.¹⁸³ The court agreed that

¹⁷⁵ H.B. 9, 29th Leg., 1st Spec. Sess., 1951 Utah Laws 23.

¹⁷⁶ S.B. 92, 36th Leg., Reg. Sess., 1965 Utah Laws 255; *see also* Duston Harvey, *\$25 Million School Hike OK'd 66-3*, DAILY HERALD (Provo, Utah), Feb. 26, 1965, at 1, <https://www.newspapers.com/image/468405378/>.

¹⁷⁷ S.B. 1, 39th Leg., Budget & 2nd Spec. Sess., 1972 Utah Laws 47.

¹⁷⁸ S.B. 18, 49th Legis., Reg. Sess., 1991 Utah Laws 178.

¹⁷⁹ *Id.* at 179.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² England v. Hatch, 43 F. Supp. 3d 1233, 1237 (D. Utah 2014).

¹⁸³ *Id.* at 1239-240.

the process was unconstitutional¹⁸⁴ and issued a preliminary injunction requiring the state to place the plaintiffs' names on the ballot.¹⁸⁵ In 2016, the legislature considered a variety of options to remedy the constitutional violation,¹⁸⁶ but ultimately opted to provide for partisan elections.¹⁸⁷ The constitutionality of using partisan elections for the Board was challenged in state court, but the Supreme Court of Utah ultimately concluded that it was permissible.¹⁸⁸

III. NONPARTISAN ELECTIONS IN PARTISAN TIMES

In an era of extreme partisan and ideological polarization, nonpartisan elections might seem like a panacea. Removing party labels from the ballot and allowing voters to vote based on the issues, not the party, could cool partisan tempers and allow for better outcomes in contested elections. The push, then, by many legislators to abolish nonpartisan elections or reduce the powers of boards elected in such elections, could be understood as a democratically illegitimate effort by partisan politicians to prevent voters from having an opportunity to express their beliefs.

But there are plenty of flaws with nonpartisan elections. Despite the intent of Progressive reformers to take education "out of politics," nonpartisan superintendent races are still fundamentally partisan races. As the *Grand Rapids Tribune* presciently observed in the leadup to Wisconsin's first nonpartisan race in 1905, "Though the office of state superintendent is 'out of politics,' politics will not be entirely out of the office when the spring election rolls around."¹⁸⁹ The parties' institutional power may be weakened,¹⁹⁰

¹⁸⁴ *Id.* at 1242.

¹⁸⁵ Order Granting Preliminary Injunction, *England v. Hatch*, 43 F. Supp. 3d 1233 (D. Utah 2014) (Civil No. 01:14-cv-00079), at 3.

¹⁸⁶ Evan Vickers, Opinion, *State School Board Elections*, SPECTRUM & DAILY NEWS (St. George, Utah), Feb. 15, 2015, at A6, <https://www.newspapers.com/image/115725079/>.

¹⁸⁷ S.B. 78, 61st Leg., Gen. Sess., 2016 Utah Laws 147.

¹⁸⁸ *Richards v. Cox*, 450 P.3d 1074, 1085 (Utah 2019).

¹⁸⁹ GRAND RAPIDS TRIB., Feb. 1, 1905, at 4, <https://www.newspapers.com/image/243214223/>.

¹⁹⁰ See Adrian, *supra* note 8, at 767–69.

and outcomes of these races may produce outcomes that are asymmetric with a state’s usual voting patterns,¹⁹¹ but the election results are still correlated with partisan races—like presidential elections.¹⁹² At the same time, without the benefit of party labels, many voters are less certain how to vote.¹⁹³ In some races, this causes voters to either not vote at all or to revert to other considerations—like voting for “the name you know,”¹⁹⁴ either vis-à-vis incumbency¹⁹⁵ or assumptions about “gender, race, and ethnicity” from candidates’ names.¹⁹⁶

The design of nonpartisan elections amplifies these flaws. In most states with nonpartisan elections, primary elections—which see far lower turnout than general elections—are frequently outcome-determinative. Already low-profile races, which suffer from sizable voter drop-off, risk being decided by an even narrower slice of the electorate.

The confluence of these realities—the arguable merit of nonpartisan elections in the first place and their poor execution—makes it all the more understandable that nonpartisan education governance is facing a set of existential threats. Politicians across the country have proposed changes that would convert elections from nonpartisan to partisan or that would strip nonpartisan education administrators of their powers. And the last decade is replete with examples of voters rejecting attempts to alter the

¹⁹¹ *Infra* PART III.B.

¹⁹² Weinschenk, *supra* note 100, at 600–04.

¹⁹³ Peverill Squire & Eric R. A. N. Smith, *The Effect of Partisan Information on Voters in Nonpartisan Elections*, 50 J. POL. 169, 171–77 (1988); Schaffner, Streb & Wright, *supra* note 100, at 25–27; Brian F. Schaffner & Matthew J. Streb, *The Partisan Heuristic in Low-Information Elections*, 66 PUB. OP. Q. 559, 575 (2002) (concluding that “fewer respondents are likely to state a preference [in an election survey] in the absence of partisan information”).

¹⁹⁴ THE DISTINGUISHED GENTLEMAN (Hollywood Pictures 1992) (“Cast your vote for Jeff Johnson. Good old Jeff. The name that you can trust. The name that you know. Jeff Johnson.”).

¹⁹⁵ Schaffner & Streb, *supra* note 193, at 577–78.

¹⁹⁶ Patricia A. Kirkland & Alexander Coppock, *Candidate Choice Without Party Labels: New Insights from Conjoint Survey Experiments*, 40 POL. BEHAV. 571, 574 (2018); see also Melody Crowder-Meyer, Shana Kushner Gadarian & Jessica Trounstine, *Ranking Candidates in Local Elections: Neither Panacea nor Catastrophe for Candidates of Color*, J. EXPERIMENTAL POL. SCI. 1 at 3 (2023).

balance of power in their state governments. It is difficult to expect voters to vigorously defend nonpartisan education governance when nonpartisan elections are of such low salience. Perhaps, then, nonpartisan elections should be considered anew.

In this Part, I consider the efficacy of both nonpartisan elections and the efforts to change them. In Section A, I summarize the recent proposals to neutralize nonpartisan elections, whether through conversion to partisan elections or weakening the powers of state officials elected in nonpartisan elections. Then, in Section B, I review some of the political science literature on nonpartisan elections and compare and contrast the outcomes of elections for education administrators in several states.

My goal in evaluating these proposals and considering the efficacy of nonpartisan elections is not to condemn them as wrong on the merits—though their partisan motivations *are* condemnable. Instead, I argue that the tension between contemporary polarization and nonpartisan elections suggests a need to re-evaluate the purpose of *both* nonpartisan elections *and* elections for education administrators generally.

In Section C, I suggest a narrow set of reforms that could be used to strengthen the democratic legitimacy of nonpartisan elections. I argue that, given their low and unrepresentative turnout, primaries should have a limited use in nonpartisan elections, if any at all. Where the state constitution permits it, nonpartisan elections should be conducted using ranked-choice voting or a similar alternative. But where there are constitutional or other institutional barriers, primaries could be used to winnow the field to just two candidates.

A. *The Threats to Nonpartisan Education Governance*

Most states have plural executive branches—that is, they elect statewide executive officials other than the governor, each of whom has an independent source of power.¹⁹⁷ While the most prominent and well-known examples are figures like attorneys general or secretaries of state, lower-profile examples include state

¹⁹⁷ Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 UNIV. CHI. L. REV. 1385, 1399–1401 (2008).

superintendents and boards of education. Regardless of the specific position and its role, however, governors and legislatures have increasingly moved to strip disfavored officials (usually members of the opposing party) of their powers.¹⁹⁸

Nonpartisan elected officials have experienced these “power plays,” too, but the context for them is a bit different. True enough, superintendents and boards of education elected in nonpartisan elections face similar threats to their institutional independence,¹⁹⁹ their basic powers,²⁰⁰ and even their existence,²⁰¹ but their method of election is also under attack. While most local school board elections are nonpartisan,²⁰² lawmakers in Tennessee have converted these elections into partisan elections,²⁰³ and legislators have proposed a constitutional amendment making a similar change in Florida.²⁰⁴

Somewhat surprisingly, proposals to end nonpartisan *statewide* races have been somewhat uncommon. Utah converted its Board of Education from nonpartisan to partisan elections in 2016,²⁰⁵ a move that the Supreme Court of Utah upheld in the face of a constitutional challenge.²⁰⁶ And similar legislation is pending in the Ohio

¹⁹⁸ Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1223–24 (2019).

¹⁹⁹ See, e.g., S.B. 15, 103d Leg., Reg. Sess., 2017 Wis. Sess. Laws 98 (requiring that, before the Superintendent of Public Instruction promulgate a rule, they receive approval from the Governor); Koschke v. Taylor, 929 N.W.2d 600, 611 (Wis. 2019) (upholding the law’s constitutionality).

²⁰⁰ Sarah Szilagy, *Ohio Board of Education Loses Most of Its Powers in State Budget*, NBC 4 NEWS (July 13, 2023, 12:17 PM), <https://www.nbc4i.com/news/politics/ohio-board-of-education-loses-most-of-its-powers-in-state-budget/>.

²⁰¹ Stoddard, *supra* note 23.

²⁰² Hess & Leal, *supra* note 7, at 247.

²⁰³ Aldrich, *supra* note 21; Blad, *supra* note 21.

²⁰⁴ Ryan Dailey, *Partisan School Board Elections Will Go on the Florida Ballot in 2024*, WUSF PUB. MEDIA (Apr. 20, 2023, 11:36 AM), <https://wusfnews.wusf.usf.edu/education/2023-04-20/partisan-school-board-elections-florida-ballot-2024>.

²⁰⁵ S.B. 78, 61st Legis., Gen. Sess., 2016 Utah Laws 147.

²⁰⁶ Richards v. Cox, 450 P.3d 1074, 1085 (Utah 2019).

legislature.²⁰⁷ However, despite the occasional asymmetry between a state's usual voting patterns and outcomes in education races, these proposals seem relatively isolated. It does seem likely, however, that if voters continue to elect superintendents or boards who are disfavored by the state legislature, such proposals might emerge. And if they do, should nonpartisan education governance be defended?

B. The Virtues and Vices of Nonpartisan Elections

"Political scientists do not know a great deal about individual voting behavior in nonpartisan elections," Peverill Squire observed in 1988.²⁰⁸ But in the decades since, political scientists have picked up on Squire's call for additional research and have published studies on nonpartisan elections in the contexts of judicial, legislative, and local elections. The findings of these studies are relatively consistent.²⁰⁹ In some ways, the goal of nonpartisan elections has been met.²¹⁰ Voters in nonpartisan races are deprived of a heuristic that they have available in most elections: the parties of the candidates. In the absence of this information, voters are forced to consider other factors.²¹¹

So far, so good. But it is difficult for voters to objectively weigh candidates' positions on the issues. In some nonpartisan races, candidates may have an incentive to articulate positions on highly salient issues—if they believe that a majority of the electorate agrees with them, the benefits of motivating ideologically sympathetic voters to support them may outweigh the costs of motivating ideologically *unsympathetic* voters to oppose them.²¹² But on the

²⁰⁷ Susan Tebben, *Bill to Reduce Ohio's State Board of Education to Elected-Only Positions Introduced*, OHIO CAP. J. (July 7, 2023, 4:50 AM), <https://ohiocapitaljournal.com/2023/07/07/bill-to-reduce-ohios-state-board-of-education-to-elected-only-positions-introduced/>.

²⁰⁸ Squire & Smith, *supra* note 193, at 169.

²⁰⁹ Wright, *supra* note 100, at 13–15 (summarizing literature).

²¹⁰ See Schaffner, Streb & Wright, *supra* note 100, at 25–27.

²¹¹ *Id.*

²¹² See Schaffner & Streb, *supra* note 193, at 568 (noting that, in the 1998 nonpartisan race for Superintendent of Public Instruction in California, both of "the candidates . . . distinguished themselves by taking opposing partisan

other hand, candidates in nonpartisan races have a possible incentive to be cagey about their issue positions. If they articulate a position on an issue where the opinions of the electorate are polarized, they risk alienating many of the voters that they need to win.²¹³

And in races where candidates are non-specific on the issues, voters are left grasping for whatever information is available. In many races, voters are able to infer the *de facto* “party” of the candidates, which can inform their votes.²¹⁴ To that end, Aaron Weinschenk has found that, while nonpartisan superintendent election results are less correlated with presidential election results than *partisan* superintendent races, they are still fairly correlated.²¹⁵ In other races, voters rely on less desirable proxies, like incumbency and name recognition,²¹⁶ or their perceptions of a candidate’s gender, race, or nationality.²¹⁷ And many voters do not vote at all.²¹⁸

positions on controversial issues”). For a more modern example, the 2023 election for Supreme Court of Wisconsin seems apropos, in which the *de facto* Democratic candidate, Janet Protasiewicz, expressed—in acceptably vague terms—her support for abortion rights and her opposition to the gerrymandered state legislative maps. *E.g.*, Ed Kilgore, *Democrat-Backed Judge Wins Big in Wisconsin on Abortion Message*, N.Y. MAG. (Apr. 5, 2023), <https://nymag.com/intelligencer/2023/04/wisconsin-supreme-court-race-results-protasiewicz-wins-big.html>.

²¹³ See Adrian, *supra* note 8, at 773 n.21; Michael Tomz & Robert P. Van Houweling, *The Electoral Implications of Candidate Ambiguity*, 103 AM. POL. SCI. REV. 83, 96–97 (2009).

²¹⁴ Chris W. Bonneau & Damon M. Cann, *Party Identification and Vote Choice in Partisan and Nonpartisan Elections*, 37 POL. BEHAV. 43, 61–62 (2015) (concluding that “voters are able to identify the partisan identification of candidates from ideological and issue-based cues even when candidates’ explicit partisanship is omitted from the ballot”); Kirkland & Coppock, *supra* note 196, at 573.

²¹⁵ Weinschenk, *supra* note 100, at 600–04.

²¹⁶ Schaffner & Streb, *supra* note 193, at 577–79.

²¹⁷ Kirkland & Coppock, *supra* note 196, at 572–73; Crowder-Meyer, Gadarian & Trounstine, *supra* note 196, at 3.

²¹⁸ Bonneau & Cann, *supra* note 214, at 62 (concluding that nonpartisan elections “involve a smaller portion of the electorate (higher ballot roll-off)”); Megan L. Remmel & Chera A. LaForge, *Don’t You Forget About Me: Straight-Ticket Voting and Voter Roll-Off in Partisan and Nonpartisan Elections*, 20 ELECTION L.J. 395, 401–02 (2021) (concluding that voter roll-off is higher in nonpartisan elections in which voters can vote a straight-party ticket, but that there is still significant roll-off in nonpartisan elections under any circumstances).

This information is difficult to weigh. On one hand, perhaps the investigations by voters to ascertain partisan information undermines the purpose of nonpartisan elections.²¹⁹ But on the other, we should certainly expect that voters' views on education will at least partially align with their broader ideology. Though education is far less polarized as an issue than many others, it is still polarized.²²⁰ If nonpartisan superintendent races weren't correlated at all with votes in partisan elections, that might suggest that the less desirable proxies (incumbency and immutable characteristics) were driving voters' decisions—or that voters were casting ballots randomly.

Indeed, none of the examples in which voters elected ideologically distinct candidates stand out as aberrations. Progressive-aligned candidates for Superintendent of Public Instruction have consistently won nonpartisan elections in Wisconsin by decisive margins for decades,²²¹ even as the state voted for Republicans in gubernatorial elections in 2010 and 2014 and in the 2016 presidential election. Democrats won a majority on the Ohio State Board of Education in the 2022 elections, even as they were losing every other statewide race,²²² and even in light of the unconstitutionally gerrymandered maps used in the State Board

²¹⁹ See Bonneau & Cann, *supra* note 214, at 61–62.

²²⁰ See, e.g., David M. Houston, *Polarization, Partisan Sorting, and the Politics of Education* X–X (EdWorkingPaper No. 22-690, 2022), <https://www.edworkingpapers.com/sites/default/files/ai22-690.pdf> (noting that “partisan gaps are widening on many long-standing education debates”). But see Jacob M. Grumbach, *From Backwaters to Major Policymakers: Policy Polarization in the States, 1970–2014*, 16 PERSPECTIVES ON POL. 416, 426 (2018) (noting that “education and criminal justice policies are—uniquely—non-polarized”).

²²¹ Scott Bauer, *The Race for Wisconsin Schools Superintendent*, NBC 26 NEWS (Mar. 29, 2021, 10:10 AM), <https://www.nbc26.com/news/state/the-race-for-wisconsin-schools-superintendent> (noting that “[f]or the past 20 years, the conservative candidate in the race has been beaten by double digits.”).

²²² Conor Morris, *Political Differences Define the New Ohio Board of Education*, IDEASTREAM PUB. MEDIA (Nov. 23, 2022, 6:05 AM), <https://www.ideastream.org/news/education/2022-11-23/political-differences-define-the-new-ohio-board-of-education>.

of Education elections.²²³ And in Nebraska, even though conservative-affiliated candidates gained seats on the State Board of Education in the 2022 elections, a win by a liberal candidate in a suburban Omaha-based seat prevented a total takeover of the Board.²²⁴

At the same time, however, voters have shown a willingness to elect candidates of the minority party in superintendent races in *partisan* elections, too.²²⁵ In 2012, Indiana voters elected Republicans in every statewide race *except* the election for Superintendent of Public Instruction. There, following incumbent Republican Tony Bennett's tumultuous and controversial term in office, voters elected Democrat Glenda Ritz instead.²²⁶ In Idaho, Democrat Marilyn Howard twice won elections to serve as the state's superintendent in 1998 and 2002, even as Republicans were sweeping every other race.²²⁷ Though Howard was succeeded by Republican Tom Luna in the 2006 election, Luna faced an extremely

²²³ Quinn Yeargain, *Shadow Districts*, 45 CARDOZO L. REV. (forthcoming 2024) (manuscript at 5–6) (describing the adoption of State Board of Education districts in 2022).

²²⁴ Zach Hammack, *Two Conservatives Will Join Penner on State Ed Board, But Neary's Narrow Win Will Likely Prevent Gridlock*, LINCOLN J. STAR (Nov. 9, 2022), https://journalstar.com/news/local/govt-and-politics/elections/two-conservatives-will-join-penner-on-state-ed-board-but-nearys-narrow-win-will-likely/article_1435c3c2-45c7-570e-9219-6abeb739a43a.html; Aaron Bonderson, *Nebraskans Elect 3 Conservatives to the State Board of Education in Midterms*, NEB. PUB. MEDIA (Nov. 9, 2022, 12:00 AM), <https://nebraskapublicmedia.org/en/news/news-articles/nebraskans-elect-3-conservatives-to-the-state-board-of-education-in-midterms/>.

²²⁵ See, e.g., James S. Liebman, Elizabeth Cruikshank & Christina Ma, *Governance of Steel and Kryptonite Politics in Contemporary Public Education Reform*, 69 FLA. L. REV. 365, 440–41 (2017) (noting that opposition to controversial education reforms has “driv[en] reform mayors, district superintendents, and state education commissioners out of office and trigger[ed] the defeat of reform referenda” in many states and jurisdictions).

²²⁶ E.g., DANIEL L. DUKE, THE CHILDREN LEFT BEHIND: AMERICA'S STRUGGLE TO IMPROVE ITS LOWEST PERFORMING SCHOOLS 49–50 (2016).

²²⁷ Bill Roberts, *Howard Easily Beats Luna for Another 4-Year Term*, IDAHO STATESMAN, Nov. 6, 2002, at 6, <https://www.newspapers.com/image/917949086/>; Bob Fick, *Idaho GOP Claims Strength Seldom Seen Since 1950s*, S. IDAHO PRESS, Nov. 7, 2002, at A3, <https://www.newspapers.com/image/568008082/>.

close election against Democrat Jana Jones that year²²⁸—and his successor, Sherri Ybarra, faced close elections in 2014 and 2018 herself.²²⁹ The close races in Idaho were likely prompted by the controversial education reform laws passed by the state legislature—colloquially known as “Luna laws” given Luna’s advocacy for them—which were ultimately repealed by voters in three referenda in 2012.²³⁰ Likewise, in Wyoming, though no Democrat has been elected as superintendent since 1986,²³¹ Democratic nominees have performed better in superintendent races than they have in most other statewide races, owing in large part to a controversial series of Republican superintendents.²³²

The willingness of voters to split their tickets when it comes to education races suggests that voters may already perceive these races as implicating issues on which they feel free to deviate from their normal party orthodoxy. It may be difficult to grasp the stakes in an election for, say, state treasurer or auditor, in which case a voter may simply revert to their normal partisan voting behavior.²³³

²²⁸ Anne Wallace Allen & Bill Roberts, *Defeat of Proposition 1 a Boon for Luna*, IDAHO STATESMAN, Nov. 9, 2006, at 4, <https://www.newspapers.com/image/919015046/>.

²²⁹ Bill Roberts, *A GOP Sweek? Only Race for Superintendent Close*, IDAHO STATESMAN, Nov. 5, 2014, at A7 <https://www.newspapers.com/image/692139973/>; Audrey Dutton, *Ybarra Narrowly Holds Seat in Superintendent Race*, IDAHO STATESMAN, Nov. 8, 2018, at 4A, <https://www.newspapers.com/image/692804029>.

²³⁰ JASPER M. LiCALZI, IDAHO POLITICS AND GOVERNMENT: CULTURE CLASH AND CONFLICTING VALUES IN THE GEM STATE 62 (Daniel J. Elazar ed. 2019); Peter Piazza, *The Ballot Initiative and Other Modern Threats to public Engagement in Educational Policymaking*, 6 BERKELEY REV. EDUC. 173, 175 (2017).

²³¹ Larry Hubbell & Paul Weaver, *Defying the Odds: How Democrats Can Be Elected Statewide in Wyoming*, 80 WYO. HIST. J. 23 (2008).

²³² E.g., Ruffin Prevost, *In Wyoming, a Bare-Knuckle Fight for Control of Education*, REUTERS (Feb. 24, 2013), <https://www.reuters.com/article/us-usa-education-wyoming/in-wyoming-a-bare-knuckle-fight-for-control-of-education-idUSBRE91N0BZ20130224>; see also Powers v. State, 318 P.3d 300, 323 (Wyo. 2014) (striking down law removing controversial Superintendent Cindy Hill of most of her powers).

²³³ Richard S. Childs, one of the leading advocates behind the Short Ballot Movement of the early twentieth century, anticipated this exact concern in

But a race for Superintendent of Public Instruction has stakes that may be more easily understood. As such, perhaps it makes more sense for these elections to be nonpartisan.

C. Redesigning Nonpartisan Elections

If we are to keep nonpartisan elections, they certainly ought to be reformed to maximize voter engagement. Many of the possible reforms begin and end with changes to the usage, conduct, and outcomes of primary elections. The nine jurisdictions that currently use nonpartisan elections in statewide education races employ different approaches for determining the winners. In three states—California, Nevada, and Washington—if a candidate wins a majority of the vote, they win the entire election.²³⁴ (In Washington, the majority-vote winner nonetheless appears again on the general election ballot, but as the *only* candidate.²³⁵) Three other states—Nebraska, North Dakota, and Wisconsin—use primary elections to winnow the field, but attach no significance to winning a *majority* as opposed to a plurality. In Nebraska and North Dakota, the general election might be a rerun of the primary election if there are only two candidates,²³⁶ but in Wisconsin, only two candidates for superintendent cancels the primary.²³⁷ In the remaining jurisdictions—the Northern Mariana Islands, Ohio, and the U.S. Virgin Islands—there is no primary election, and the plurality-vote winner of the general election is declared elected.²³⁸

Let's start with the first six states, in which primary elections are used to either determine the winner or to narrow the field.

advocating for fewer elected positions. “Ask Mr. Average Citizen as he emerges from the polling booth whom he voted for state treasurer, and he will not have the slightest idea. He voted for the Republican, whoever that was.” Childs, *supra* note 92, at 168.

²³⁴ CAL. CONST. art. II, § 6(a); CAL. ELEC. CODE § 8140 (Deering 1994); NEV. REV. STAT. § 293.260 (2019); WASH. REV. CODE § 29A.36.170(2) (2013).

²³⁵ WASH. REV. CODE § 29A.36.170(2) (2013).

²³⁶ NEB. REV. STAT. § 32-814 (1997); N.D. CENT. CODE § 16.1-11-37 (2021).

²³⁷ WIS. STAT. § 8.11(3) (2011).

²³⁸ OHIO REV. CODE ANN. §§ 3505.04 (LexisNexis 2021), 3505.38 (LexisNexis 2022); 1 N. MAR. I. CODE § 6524(c) (2010); V.I. CODE ANN. tit. 3, § 97(c) (2012).

Across the board, fewer voters cast ballots in primary elections than in general elections.²³⁹ The electorates casting ballots in primary and general elections are also materially different. Those participating in primary elections are generally older, whiter, and more conservative.²⁴⁰ Voters who are not registered with either of the two major political parties are less likely to participate in primary elections, especially in states with “closed” primaries, even if nonpartisan races are also on the ballot.²⁴¹

Given the turnout differential—both in terms of lower turnout in the aggregate and material changes in the composition of the electorate—the stakes of primary elections should not be so high for nonpartisan races. At the least, it should not be possible for a candidate to avoid facing a meaningful competition in the general election by winning a majority of the votes in a lower-turnout primary election. And while it is more defensible to use primaries to winnow the field, the stakes are high here, too. In an especially crowded race, the two candidates advancing to the general election may not have combined for a majority of the vote.²⁴² While having the voters participating in the general election helps settle the race and legitimize the process, the two candidates that the electorate must choose between might be the two least palatable choices.²⁴³

²³⁹ THOMAS E. PATTERSON, THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY 137 (2002). Historically, this was not true in Southern states during Jim Crow, when turnout in Democratic primaries “frequently exceeded general election turnout.” DARON R. SHAW & JOHN R. PETROCIK, THE TURNOUT MYTH: VOTING RATES AND PARTISAN OUTCOMES IN AMERICAN NATIONAL ELECTIONS 23 (2020).

²⁴⁰ *E.g.*, ERIC MCGHEE, PUB. POL’Y INST. OF CAL., VOTER TURNOUT IN PRIMARY ELECTIONS 16 (May 2014), <https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=e6716115cc564d2d0f1de32b2ee55a6941e80633>.

²⁴¹ *Id.* at 9–10; *see generally* Malcolm E. Jewell, *Voting Turnout in State Gubernatorial Primaries*, 30 W. POL. Q. 236, 237 (1977).

²⁴² *Supra* notes 150–153 (noting this exact scenario developing in the 1949 elections for Wisconsin Superintendent of Public Instruction and Supreme Court of Wisconsin).

²⁴³ Generally, runoff elections make it likelier that the most agreeable candidate—or, in the parlance of political science, the “Condorcet candidate,” the candidate who would beat all other candidates—ends up winning, but they certainly do not guarantee that outcome, especially in the absence of strategic

On the flip side, the three jurisdictions that do not use primary elections at all suffer from the opposite problem. By having only one round of an election in which multiple candidates could be running, merely requiring that winning candidates receive a plurality of the vote is unlikely to produce an agreeable candidate with a strong claim to democratic legitimacy.

The best option, therefore, might be a ranked-choice voting system. While such a change might require a constitutional amendment in some states,²⁴⁴ and would obviously impose an administrative burden on election officials, placing all candidates on a single ballot and allowing voters to rank them in their order of preference would maximize voter input. On the other hand, given the low salience of nonpartisan elections in the first place, voters may well find ranking a nearly indistinguishable set of candidates an overwhelming task. Perhaps primaries that winnow the field of candidates actually maximize voter input, even if they run the risk of advancing unrepresentative candidates, by presenting voters with a more manageable choice in a race in which they may know very little.

Most of these questions are empirical in nature, and therefore would benefit from greater study by political scientists. But they also go to the nature of our democracy, and prompt important questions about how we want to allocate power—which are philosophical questions. An electoral system that works perfectly in theory may lack legitimacy in practice if it is too complicated, or if the administrative rollout is executed poorly. In any event, the conduct of nonpartisan elections deserves careful consideration if the elections themselves are to continue.

voting. *See, e.g.*, Emerson M. S. Niou, *Strategic Voting under Plurality and Runoff Rules*, 13 J. THEORETICAL POL. 209, 225–26 (2001); Stephen G. Wright & William H. Riker, *Plurality and Runoff Systems and Numbers of Candidates*, 60 PUB. CHOICE 155, 170–71 (1989).

²⁴⁴ *See, e.g.*, *In re Op. of the Justs.*, 162 A.3d 188, 209–11 (Me. 2017) (issuing advisory opinion that initiated statute providing for ranked-choice voting could not be constitutionally used for all elections in the state). *But see* Pildes & Parsons, *supra* note 145, at 1777–78 (noting that “no legal conflict exists between . . . plurality vote provisions and [ranked-choice voting] or between majority threshold provisions and RCV”).

CONCLUSION

Education has long been an important issue to voters—but debates in the past have largely centered around cross-partisan questions like the adequacy of funding, school vouchers, measuring teacher performance, and the role of standardized testing. Today, however, the modern voter concerned about “education” may instead be using the term as a proxy for bigger cultural debates over race, sexual orientation and gender identity, and censorship. Regardless of what “education” means, however, voters have plenty of opportunities to express their opinions about it—and are making their voices heard.²⁴⁵

But *how* the opportunities for public participation in education governance should be structured has produced a variety of different answers. Most states and municipalities have historically agreed on the broad strokes—for example, providing for an education administrator elected in a partisan, statewide election, and having popularly elected local school boards. Beginning in the early twentieth century, a desire to professionalize and depoliticize the management of public schools pushed many states away from this uniformity. Though local school board elections remain the norm, how education is administered at the *state* level has shifted dramatically. The most common reform has been to swap out the elected state superintendent for a state board of education—and while most states that have made this change have opted for *elected* boards, not all have.

A far less common reform, however, but one that may have unique resonance in a highly polarized era, has been the use of nonpartisan elections for state education administrators. In this Article, I trace the development of nonpartisan elections in the context of statewide education governance, beginning with Wisconsin in the early twentieth century. I then explore the

²⁴⁵ Brooke Schultz & Geoff Mulvihill, *Liberal and Moderate Candidates Take Control of School Boards in Contentious Races Across US*, ASSOCIATED PRESS (Nov. 8, 2023), <https://apnews.com/article/school-board-elections-moms-liberty-progressives-1e439de49b0e8498537484fb031f66a6>; Dana Goldstein, *In School Board Elections, Parental Rights Movement Is Dealt Setbacks*, N.Y. TIMES (Nov. 8, 2023), <https://www.nytimes.com/2023/11/08/us/parental-rights-school-board-elections.html> (discussing outcome of 2023 school board elections).

mechanics of how these elections were conducted. Because most state elections in the United States are partisan, the structure of elections relies heavily on partisan processes—in which candidates are usually nominated by parties in primaries and then elected in general elections. But because nonpartisan elections challenge this normal process, they present policymakers with challenging questions to answer. Should nonpartisan candidates participate in the state’s primary election? If so, what is the purpose of the primary—to determine a winner or to narrow the field? States have answered these questions differently over time and have tinkered with the structures of their elections to respond to logistical challenges.

Today, nonpartisan education governance faces an existential threat. To consolidate partisan control over state and local education administration, governors and legislatures across the country are moving to convert school elections from nonpartisan to partisan, and to strip nonpartisan administrators of their powers. These efforts should be roundly condemned as partisan overreach—but they also need to be evaluated in the context of the specific changes that they propose. What do nonpartisan elections accomplish? The adoption of nonpartisan elections, and their operation over the last century, allows us to consider the proper role of nonpartisan elections in state education administration.

The mere act of making school administrators reliant on voter support for their positions does not automatically make education governance democratic. Likewise, merely making these elections nonpartisan does not automatically make education governance apolitical. Given the electorate’s engagement with, and interest in, education, as well as the sheer volume of popularly elected education officials in the United States, the need for democratic legitimacy in these elections is paramount.