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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 25-642 – *State of West Virginia ex rel. West Virginia Board of Education and Michelle Blatt, State Superintendent of Schools v. Kris Warner, Secretary of State*

TRUMP, Justice, dissenting:

I respectfully dissent from the majority's opinion. House Bill 2755 (2025) is not an unconstitutional encroachment by the Legislature into the State Board of Education's constitutional authority over general supervision of the public schools. Rather, it establishes procedures governing the exercise of the rulemaking authority that has been delegated to the Board by the Legislature in statute. The Legislature possesses the sole constitutional authority to prescribe those procedures. By holding otherwise, *West Virginia Board of Education v. Hechler*, 180 W. Va. 451, 376 S.E.2d 839 (1988), erroneously transformed a statutory grant of rulemaking authority into a constitutional exemption from legislative oversight, an error that the majority perpetuates here. Because that interpretation cannot be reconciled with the text and history of article XII, sections 1 and 2, or with article VI, section 1, of the West Virginia Constitution, I would overrule *Hechler* to the extent that it prohibits the Legislature from establishing by general law the procedures governing the adoption and effectiveness of rules promulgated by the Board, and I would refuse to issue the writ requested by the Board.

The question before the Court is not whether legislative review represents sound educational policy or whether a different rulemaking arrangement would better serve the State's public schools. Those are policy questions for the Legislature. Instead, this

Court's responsibility is to determine whether the challenged amendments to the Administrative Procedures Act violate the West Virginia Constitution. Rather than continue to perpetuate *Hechler's* flawed constitutional premise, I would find that they do not.

I. The Constitution Assigns the Legislature and the Board Distinct, Complementary Responsibilities.

Article XII, section 1 of the West Virginia Constitution specifies: "The Legislature shall provide, by general law, for a thorough and efficient system of free schools." Article XII, section 2 provides that "[t]he general supervision of the free schools of the State shall be vested in the West Virginia board of education which shall perform such duties as may be prescribed by law." Article VI, section 1 provides that "[t]he legislative power shall be vested in a Senate and House of Delegates." These provisions must all be read together. Article XII, section 1 assigns the Legislature responsibility for establishing the State's public school system by general law; section 2 vests the Board with general supervision of that system. Article VI, section 1 confers the power to make law on the West Virginia Legislature. No provision displaces the others, and nothing in article XII, section 2 grants the Board authority to make law governing public education.

This conclusion is consistent with a fundamental principle of our constitutional structure:

> The Legislature of this State, unlike the Congress of the United States, under the Federal Constitution, does not depend for its authority upon the express grant of legislative power. The Federal Constitution is a grant of power; a State Constitution

> is a restriction of power. The Constitution of a State is examined to ascertain the restraints, if any, which the people have imposed upon the Legislature, not to determine the powers they have conferred. The Legislature of this State possesses the sole power to make laws and it is necessarily invested with all the sovereign power of the people within its sphere.

Harbert v. Harrison County Court, 129 W. Va. 54, 66-67, 39 S.E.2d 177, 187 (1946) (citing *Booten v. Pinson*, 77 W. Va. 412, 89 S.E. 985 (1915)). *See also* Syl. Pt. 2, *State Road Commission v. Kanawha County Court*, 112 W. Va. 98, 163 S.E. 815 (1932) (holding that "[t]he general powers of the Legislature are almost plenary. It can legislate on every subject not interdicted by the Constitution itself."). We must therefore identify the constitutional restraints, if any, the people have imposed upon the Legislature's authority to establish procedures governing rulemaking by the Board. As explained below, the restraint is considerably narrower than that which was first articulated in *Hechler* and reaffirmed by the majority here.

Article XII does not vest the Board with any rulemaking authority, nor does the constitution anywhere mention agency rulemaking or educational policy. Instead, article XII, section 2 expressly provides that the Board "shall perform such duties as may be prescribed by law." That language recognizes the Legislature's authority to prescribe the Board's duties by statute. *See Lawson v. Kanawha County Court*, 80 W. Va. 612, 92 S.E. 786, 787 (1917) (explaining that the phrases "prescribed by law" and "provided by law," when used in constitutions, generally refer to prescription or provision by statute); *State ex rel. Discover Financial Services, Inc. v. Nibert*, 231 W. Va. 227, 243, 744 S.E.2d

625, 641 (2013) (recognizing that the constitutional requirement that the Attorney General perform duties "as may be prescribed by law" expressly authorizes the Legislature to establish those duties).

The relevant question, therefore, is not whether the Legislature may prescribe duties relating to public education. The constitutional text plainly requires it to do so. The question is whether the Legislature may establish procedures governing the Board's exercise of rulemaking authority that has been delegated to the Board by the Legislature without impermissibly displacing the Board's general supervisory function. The history both of Article XII and of the State's rulemaking system[1] confirms that the Legislature possesses that authority.

A. The Board's exemption from the rulemaking process was historically statutory, not constitutional.

The history of the rulemaking process, both before and following enactment of the Administrative Procedures Act, demonstrates that the Board's exemption from generally applicable rulemaking procedures developed through legislation, not from any

[1] West Virginia is among a small minority of states that subject agency rules to legislative approval as part of the rulemaking process, a distinction that is important when considering decisions from other jurisdictions, the rulemaking frameworks of which differ materially from our own.

established understanding that the constitution conferred rulemaking authority upon the Board or placed the Board's rules beyond legislative review.[2]

Prior to the enactment of the Administrative Procedures Act in 1964, the Legislature generally delegated rulemaking authority to executive branch agencies, including the Board, and left the promulgation, amendment, modification, and repeal of those rules to those agencies. Nonetheless, the law was clear that agency rulemaking was a delegation by the Legislature of its constitutional power to make the laws of this State. *See* Section II, *infra*. The 1964 Act required agencies to provide notice of proposed rules and amendments to existing rules to those persons requesting such notice and afforded such interested persons other opportunities to participate in the rulemaking process. *See* W. Va. Code §§ 29A-3-2 and -3 (1964). It did not establish a formal process for legislative review and approval. The validity of a rule instead could be tested only through a declaratory judgment action in the Circuit Court of Kanawha County. W. Va. Code § 29A-4-2 (1964).

The original Act exempted the Board from nearly all of its provisions, except those requiring the filing with the Secretary of State of existing rules and subsequent amendments or repeals thereof. W. Va. Code § 29A-1-2 (1964). That exemption was not included in the original versions of the bill passed by either chamber; it was added by the

[2] Indeed, *Hechler* noted that the Board itself sought a declaration from this Court that only "portions of the newly [re]enacted Administrative Procedures Act [were] unconstitutional, namely, W. Va. Code, 29A-3A-12 and -13 [1988]." 180 W. Va. at 453, 376 S.E.2d at 841.

conference committee and prompted objections during consideration of the conference report. *See* S. Journal, 56th Leg., Reg. Sess. 583–87 (1964). The legislative record does not explain the reason for the exemption or suggest that Article XII required it. However, it is fair to say that the Legislature, which crafted both the 1958 constitutional amendment and the 1964 Act, understood that the Board's authority to make rules was derived from statutes enacted by the Legislature—which by 1964 had been enacting statutes authorizing the Board to make rules for almost a half-century.

The Legislature later established a formal process for reviewing agency rules. In 1976, it created the legislative rule-making review committee and provided that no agency rule could become effective until the committee approved it. W. Va. Code § 29A-3-11 (1976). The committee could approve, partially approve, or disapprove a proposed rule. *Id.* at (b). If the committee approved an agency's adoption, amendment, or repeal of a rule, such action became final thirty days after the committee's approval. *Id.* If the committee disapproved, in whole or in part, an agency proposal, "no agency shall thereafter issue any regulation or directive or take other action to implement such disapproved rule or regulation" unless the Legislature reversed the committee's decision through the process provided by the statute, *id.*, which allowed the Legislature to "either sustain or reverse, in whole or in part, the action of the legislative rule-making review committee" by concurrent resolution. W. Va. Code § 29A-3-12 (1976).[3] The Board remained exempt from this process

[3] This Court declared unconstitutional these sections 11 and 12 of the Administrative Procedures Act in *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981).

because the Legislature did not amend the statutory provision governing the Board's exemption. W. Va. Code § 29A-1-2 (1976).

In 1982, the Legislature substantially revised the rulemaking system and established a more structured process for reviewing agency rules having the force and effect of law, known as "legislative rules." *See generally* W. Va. Code §§ 29A-3-1 through -17 (1982). The Legislature expressly recognized that the delegation of its rulemaking power to executive branch agencies required review "in a manner properly respectful of the separation of powers but in keeping with the legislative force and effect of such rules and regulations." W. Va. Code § 29A-1-1 (1982). The Board remained exempt from most of the Act, although it was still subject to certain filing requirements. W. Va. Code § 29A-1-3(b) (1982).

This history establishes that the Board's rulemaking authority was always statutory in its genesis and that its exemption from parts of the processes was a statutory creation maintained by the Legislature as the Legislature developed and modified the rulemaking system. The Board's exemption was not constitutionally required, and the Legislature's decision to exempt the Board from a statutory process was no more than a delegation of its own constitutional authority to make the law governing public education. The legal consequence of that distinction is important because the source of the exemption determines whether it remains subject to legislative revision. A statutory exemption may be amended or repealed by subsequent legislation; a constitutional exemption cannot.

Hechler erroneously converted the former into the latter, thereby restricting the Legislature's authority on a ground that neither the statutory history nor the constitutional text supports. The majority now gives this flawed constitutional analysis renewed force.

The history preceding the 1958 amendment is also instructive. Long before the Constitution expressly recognized a state board of education, the Legislature had created the Board by statute and subsequently conferred upon it substantial rulemaking authority. *See* 1908 W. Va. Acts 165-168 (creating the State Board of Education and prescribing its duties); 1919 W. Va. Acts 41, 48-49 (restructuring the Board, providing for gubernatorial rather than Superintendent appointments, and authorizing it to "determine the educational policies of the state and [to] make rules for carrying into effect the laws and policies of the state relating to education," including on several specified subjects); 1947 W. Va. Acts 278-80 (increasing the Board's membership and narrowing its rulemaking authority by exempting West Virginia University and the Potomac State School from its reach). Notwithstanding the Superintendent's constitutional authority for general supervision of the State's public schools, the Legislature had enacted statutes conferring rulemaking authority upon the statutorily created Board even while the constitution assigned general supervision to a different constitutional officer. The 1958 amendment transferred that supervisory responsibility to the Board; it did not originate the Board's rulemaking authority.

B. The 1958 constitutional amendment did not negate or transfer to the Board the Legislature's lawmaking authority.

The constitutional history reinforces that conclusion. West Virginia's original constitution assigned to the Legislature the responsibility for establishing a system of free schools and prescribing by law the powers and duties of the Superintendent, whose duties and responsibilities were not therein established. W. Va. Const. art. X, §§ 2-3 (1863). The 1872 constitution retained the Legislature's responsibility to "provide, by general law, for a thorough and efficient system of free schools[,]" while affording to the Superintendent the authority to exercise "a general supervision" of the schools and to perform other duties relating thereto as prescribed by law. W. Va. Const. art. XII, §§ 1-2 (1872). The Legislature thereafter developed the State's educational administration by statute. In 1908, the Legislature created district boards of education and vested them with "general control and supervision of the schools and school interests of their districts[,]" while the Superintendent was charged with supervision of the local superintendents and the responsibility of "see[ing] that the school system is carried into effect." The Legislature also established the State Board of Education, to be appointed by the Superintendent, and assigned to it responsibilities relating to courses of study and teacher certification. In 1919, the Legislature reconstituted the Board and substantially expanded its role, vesting it with authority to determine educational policy, adopt rules implementing the school laws and those policies, and establish standards governing public education. It reiterated that the Superintendent had general supervision of the free schools, as provided by the constitution, demonstrating that the Superintendent's constitutional authority for "general supervision"

did not include rulemaking authority, which the Legislature had delegated to the Board that it had created.

These statutory developments preceded the 1958 constitutional amendment discussed in *Hechler*. That amendment transferred general supervision of the public schools from the Superintendent to the Board and changed the method of selecting the Superintendent. It did not amend article XII, section 1 or otherwise alter the Legislature's responsibility to provide for the public school system by general law, nor did it constitutionalize the Board's existing statutory rulemaking powers. Indeed, there is nothing in the legislative history of the resolution to amend the constitution that was ratified in 1958 that suggests any purpose of transferring any portion of the Legislature's lawmaking power under article VI, section 1 of the West Virginia Constitution to the executive branch of government, or to the Board in particular, an entity within the executive branch. Rather, the history makes clear that the fundamental purposes of the amendment were to: (1) dilute the executive power wielded by the Superintendent, who was elected on a statewide partisan ballot, and (2) transfer the Superintendent's power of general supervision to the Board, which was required to have balanced partisan composition and to have staggered and fixed terms of office for its members, so as to enhance its independence and stability.[4] The historical record thus demonstrates that the 1958 amendment was designed and ratified to diminish the influence of partisan politics in the administration of public education

[4] This amendment was essentially identical to one which had been proposed, but failed in its ratification vote, in 1946.

within the executive branch, not to transfer lawmaking power from the Legislature to the Board, an entity within the executive branch of West Virginia's government.

The significance of the amendment lies not only in the change it effected, but also in the constitutional provisions it left undisturbed. The Legislature already had delegated substantial educational policymaking and rulemaking authority to the Board by statute. The constitutional amendment only transferred general supervision of the public schools from the Superintendent to the Board; it did not transfer the Legislature's general lawmaking power to the Board. The amended article XII, section 2 continued to provide that both the Board and the Superintendent perform duties "as may be prescribed by law." The distinction between these grants of authority is essential. The Constitution vested the Board with supervisory authority. The Legislature supplied the statutory framework within which the Board exercised that function and delegated specific rulemaking authority to it. Nothing in the text of the 1958 amendment suggests that it was transferring the Legislature's authority to control by general law the procedures governing the Board's exercise of rulemaking authority that the Legislature had, by statute, delegated to the Board.

The historical context also undermines any suggestion that the amendment constitutionalized "rulemaking" as a specific authority reposed in the Board. The Legislature did not establish its modern system of rulemaking review until 1976. It substantially revised that system again in 1982 and, as to the Board, in 1988—three decades

after the 1958 amendment. It is thus impossible to find in the 1958 amendment an intention to prohibit a form of legislative review and approval or rejection of agency rules that had not yet been established and that the Constitution nowhere addressed. The amendment merely transferred general supervision from the Superintendent to the Board while leaving intact the Legislature's constitutional responsibility to provide for the public school system by general law. The Board's supervisory authority and the Legislature's lawmaking authority are therefore distinct, and the 1958 amendment addressed only the former.

II. *Hechler* Conflated General Supervision With Rulemaking Authority.

Against this constitutional and historical background, *Hechler* cannot be sustained in its present breadth. There, this Court held: "Rule-making by the State Board of Education is within the meaning of 'general supervision' of state schools pursuant to art. XII, § 2 of the West Virginia Constitution, and any statutory provision that interferes with such rule-making is unconstitutional." Syl. Pt. 2, *Hechler*, 180 W. Va. at 452, 376 S.E.2d at 839. The Court further held that the Board's rule then at issue fell within the constitutional meaning of general supervision, and that W. Va. Code §§ 29A-3A-12 and -13 (1988) impermissibly interfered with that authority and were thus unconstitutional. *Id.* at syl. pt. 3. This was clearly wrong, and the majority commits the same error by reaffirming *Hechler's* fundamental misinterpretation of the constitutional allocation of authority. *Ante* at syllabus point 4 (restating syllabus point 3 of *Hechler* and declaring unconstitutional the amendments to the Administrative Procedures Act enacted in House Bill 2755 (2025)). *Hecher's* holdings were not, and the majority's are not, supported by

any text within the constitution, and, as noted above, are inconsistent with the actual text of the constitution, specifically article VI, section 1, and sections 1 and 2 of article XII.

Article XII, section 2 does not confer legislative power upon the Board; it confers the power of general supervision. The nature of that function suggests an executive or administrative responsibility, not an independent grant of legislative power. *See National Education Association-Fort Scott v. Board of Education*, 592 P.2d 463, 465 (Kan. 1979) ("As found and employed both in the constitution and in the statutes of this state, the term 'general supervision' means something more than to advise and confer with but something less than to control.") (citation omitted); *Board of Education of School District No. 1 v. Booth*, 984 P.2 639, 648 (Colo. 1999) (concluding that "the constitutional framers contemplated general supervision to include direction, inspection, and critical evaluation of" the public schools while leaving to the legislature the authority to delegate to the State Board "'powers and duties' consistent with this intent."); *Powers v. State*, 318 P.3d 300, 314 (Wyo. 2014) (holding that "the framers' intention was that the superintendent would be the executive officer in 'charge' of the state public school system with broad authority to oversee, direct, and administer."). None of these cases hold that general supervision includes rulemaking authority. In making these determinations, the courts utilized dictionary definitions of terms including "general," "supervision," and "superintendent." *See Booth*, 984 P.2d at 647; *Powers*, 318 P.3d at 313. Doing so provides further support that the ordinary meaning of those terms had (and still has) nothing to do with the power to make laws. Around the time of the 1958 constitutional amendment, Black's Law

Dictionary defined "supervision" as "an act of occupation of supervising; inspection[;]" "supervise" as "to have general oversight over, to superintend or to inspect[;]: "superintend" as including "to have charge and direction of; to direct the course and oversee the details; to manage[;]" and "superintendent" as "one who superintends or has the oversight and charge of something with the power of direction; a manager." *Blacks Law Dictionary* (4th ed. 1951) (citations modified). It defined "manage" as "to control and direct, to administer, to take charge of[;]" and "administer" as "to manage or conduct; to discharge the duties of an office." *Id.* Similarly, it defined "administration" as:

> managing or conducting of an office or employment; the performance of the executive duties of an institution, business, or the like. . . . In public law, *the administration of government means the practical management and direction of the executive department*, or of the public machinery or functions, or of the operations of the various organs of the sovereign.

Id. (emphasis added). These definitions consistently describe a function of oversight, direction, and administration—not the exercise of legislative power. The ordinary meaning of "general supervision" therefore supports the conclusion that Article XII, section 2 assigns the Board an executive or administrative responsibility, not an independent power to make law.

We have long recognized that agency rulemaking is a delegation of legislative power. *See* Syl. Pt. 8, *Chapman v. Huntington Housing Authority*, 121 W. Va. 319, 3 S.E.2d 502 (1939) (holding that "[t]he delegation by the Legislature of broad discretionary powers to an administrative body, accompanied by fitting standards for their

exercise, is not of itself unconstitutional."); Syl. Pt. 1, *State ex rel. West Virginia Housing Development Fund v. Copenhaver*, 153 W. Va. 636, 171 S.E.2d 545 (1969) (same); *Barker*, 167 W. Va. at 168, 279 S.E.2d at 63 (observing that the Legislature "may delegate to the Executive, within certain limits, its power to enact rules and regulations."). The Legislature may confer authority on an executive branch agency to adopt rules, and the agency exercises that authority pursuant to the Legislature's delegation. *Simpson v. West Virginia Office of Insurance Commissioner*, 223 W. Va. 495, 505, 678 S.E.2d 1, 11 (2009). *See also* Syl. Pt. 4, *State ex rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Commission*, 213 W. Va. 255, 580 S.E.2d 869 (2003) (holding that "in delegating discretionary power to an administrative agency, such as a board or a commission, [the Legislature] must prescribe adequate standards expressed in the statute or inherent in its subject matter and such standards must be sufficient to guide such agency in the exercise of the power conferred upon it.") (citation omitted); Syl. Pt. 3, *State ex rel. Callaghan v. West Virginia Civil Service Commission*, 166 W. Va. 117, 273 S.E.2d 72 (1980) (holding that "[l]egislative power may be constitutionally delegated to an administrative agency to promulgate rules and regulations necessary and proper for the enforcement of a statute. W. Va. Const. art. VI, § 1; art. V, § 1."). Such a delegation does not transfer to the agency the Legislature's constitutional power to make laws or constitute an abdication by the Legislature of its lawmaking authority. The executive branch

agencies—including the Board—exercise rulemaking authority pursuant to the Legislature's delegation and within the limits established by law.[5]

The majority here, as did the *Hechler* Court, fails to account for that distinction. Even if the rulemaking authority that the Legislature has delegated to the Board serves the Board's constitutional authority for general supervision of the schools, it does not follow that the Legislature is constitutionally barred from regulating the process by which the Board exercises that authority. The question is not simply whether rulemaking relates to general supervision, but whether House Bill 2755 impermissibly intrudes upon the Board's constitutionally assigned exercise of general supervision. I would find that it does not.

"General supervision" and "rulemaking" are neither synonyms nor interchangeable powers, and neither the majority nor the Board identifies any authority other than *Hechler* equating the two.[6] It is axiomatic that "[w]ords used in a state

[5] Indeed, the Board conceded at oral argument that it is within the power of the Legislature to enact a statute that contravenes a Board rule and that in such circumstance, it is the statute, and not the Board's rule, which is the controlling and operative law.

[6] While relied upon by the *Hechler* Court, *State ex rel. Miller v. Board of Education*, 511 P.2d 705 (Kan. 1973), is distinguishable. There, the Kansas Supreme Court addressed a conflict between the constitutional responsibilities of the state and local boards of education, holding that the state board's general supervisory authority encompassed a regulation requiring local boards to adopt rules governing student, teacher, and employee conduct. The dispute thus concerned the respective spheres of authority constitutionally assigned to two levels of school governance—not, as in *Hechler*, whether the Legislature could subject the Board's exercise of statutory rulemaking authority to legislative review and approval. Moreover, *Miller* did not address a rulemaking process that involved

constitution, as distinguished from any other written law, should be taken in their general and ordinary sense." Syl. Pt. 6, *State ex rel. Trent v. Sims*, 138 W. Va. 244, 77 S.E.2d 122 (1953). As quoted in part in *Trent*:

> Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades or meaning, or for the exercise of philosophical acuteness, or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them; the people adopt them; the people must be supposed to read them, with the help of common sense; and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss.

Id. at 268, 77 S.E.2d at 137 (quoting 1 Jospeh Story, *Commentaries on the Constitution of the United States* § 451 (1833)). Further, "[w]here a provision of a constitution is clear in its terms and of plain interpretation to any ordinary and reasonable mind, it should be applied and not construed." Syl. Pt. 3, *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965). Our Code defines "rulemaking" as "the process for the formulation, amendment or repeal of a rule as provided in this chapter." W. Va. Code § 29A-1-2 (2015). While not defined in Code in the context of education, this Court cited with approval the definition of "general supervision" adopted by the Kansas Supreme Court, which is "the power to inspect, to superintend, to evaluate, to oversee for direction. . . . [It] means something more than to advise and confer with but something less than to control." *Bailey*

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legislative authorization or the relationship between a state board's supervisory authority and the legislature's authority to prescribe that process. Kansas's and West Virginia's rulemaking procedures are materially different. *See* note 1, *supra*.

v. Truby, 174 W. Va. 8, 16, 321 S.E.2d 302, 310 (1984) (*citing* Syl. Pts. 9 and 10, *Miller*, 511 P.2d at 707). These are clearly two distinct powers.[7] If the power of "general supervision" included the power to make rules, there would have been no need for the separate delegation of each power.[8] General supervision describes the Board's

[7] Indeed, the *Miller* formulation is difficult to reconcile with *Hechler's* categorical treatment of rulemaking as constitutionally beyond the reach of the Legislature.

[8] The Code of West Virginia of 1955 (the most recent version prior to the 1958 constitutional amendment) is replete with examples of the legislative understanding of general supervision and rulemaking authority as two separate functions. *See, e.g.*, W. Va. Code § 5-5-9(1) ("The director [of the budget office], under the immediate direction and supervision of the governor, shall have the power and duty to[] [e]xercise general supervision of, and make rules and regulations for, the government of his department."); W. Va. Code § 9-3-6(1) ("The director [of public assistance] shall be the executive and administrative head of the department, and as such shall have the power and duty to[] [e]xercise general supervision of, and make and revise rules and regulations for the government of the department."); W. Va. Code § 9A-1-4 ("It shall be the duty and functions [sic] of the veterans' council to determine the general administrative policies of the department [of veterans' affairs], . . . to promulgate such rules and regulations as may be necessary, . . . [and] to exercise general supervision over the operations of the department[.]"); W. Va. Code § 16-1-3 ("The state board of health shall have supervision and control of the business, fiscal, administrative and medical affairs of the department of health. . . . The state board shall have the power and authority to make and promulgate, and from time to time amend such rules and regulations as it may deem necessary and advisable to properly put into effect the public health laws of this State, and for the administration of the powers granted to it by this article."); W. Va. Code § 17-2A-9(1) and (2) ("The [state road] commissioner, in addition to the other powers granted by this chapter shall have the sole authority to[] [e]xercise general supervision over the state road program and the construction and maintenance of the state roads; [and] make rules and regulations for the government of his department[.]"); W. Va. Code § 20-1A-7(1) ("The director [of conservation], in addition to the other powers granted by this chapter, shall have the sole authority to[] [e]xercise general supervision of, and make rules and regulations for the government of [the conservation] commission or department[.]"); W. Va. Code § 21A-2-6(1) ("The director [of employment security] shall be the executive and administrative head of the department [of employment security] and shall have the power and duty to[] [e]xercise general supervision of and make regulations for the government of the department."). These enactments inform the Court's interpretation of the Legislature's understanding of these two terms at the time it crafted the 1958 constitutional amendment. *See State ex rel. Forbes v. Caperton*, 198 W. Va. 474, 481, 481 S.E.2d 780, 787 (1996) (this

constitutional authority to oversee the public school system. Rulemaking is a legislative power not encompassed as a component of "general supervision" when the power of general supervision is conferred upon an executive branch agency like the Board. Were it otherwise, and were rulemaking authority embraced and included within a power of "general supervision," the Legislature would have had no need ever to make separate and distinct grants of each. *See* footnote 8, *supra*. The exercise of rulemaking authority conferred by statute does not change its legal character as an exercise of delegated legislative power. The Legislature may authorize the Board to adopt rules within the boundaries established by law, as it has now for over a century, without surrendering its own constitutional authority to make the law.

Hechler inverted that relationship, and the majority continues that error. They treat a statutory grant of rulemaking power as a constitutional restriction on the Legislature's ability to regulate the exercise of that power. Under *Hechler's* and the majority's formulation, virtually any statute affecting rulemaking by the Board could be deemed to be an unconstitutional interference with general supervision. That conclusion finds no support in Article XII, cannot be reconciled with the Legislature's express

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Court examined a Virginia statute enacted in 1852, just one year after the 1851 constitutional amendment, as evidence of the General Assembly's understanding of the Governor's power to commute sentences).

responsibility under article XII, section 1, and directly contravenes the clear text of Article VI, section 1.[9]

The Legislature cannot fulfill its constitutional obligation to provide a public school system by general law if the Board's rules are categorically insulated from legislative authority over the legal framework governing that system. The Constitution does not establish the Board as an independent lawmaking body, nor does it authorize the Board to exercise a form of legislative power independent of the Legislature that possesses that power in the first instance. This does not diminish the Board's constitutional role. The Board remains responsible for general supervision and retains the authority granted to it by the constitution and assigned to it in statutes. But the Legislature's authority to establish the legal framework for public education does not disappear merely because the Board exercises general supervisory authority within that framework.

Our decisions outside *Hechler* reinforce this conclusion. In *State ex rel. West Virginia Board of Education v. Gainer*, 192 W. Va. 417, 452 S.E.2d 733 (1994), this Court rejected the proposition that the Board's constitutional status displaced the Legislature's

[9] The majority's reliance on *State ex rel. Board of Education v. Rockefeller*, 167 W. Va. 72, 281 S.E.2d 131 (1981) is therefore misplaced. *Rockefeller* addressed the relationship between article XII, section 1 and article X, section 5, which provides that the Legislature's power to tax extends to the support of public schools. Moreover, the Court's holding that public education enjoys a "constitutionally preferred status" was expressly limited to "expenditures for public education." *Id.* at Syl. Pt. 2. *Rockefeller* did not address the Board's rulemaking authority or the scope of its constitutional "general supervision" over the public schools.

authority to determine the Superintendent's salary. This Court examined the statutory history and explained that the Legislature had established the salary by statute before delegating that authority to the Board; the delegation did not arise from a constitutional constraint on the Legislature's power. As *Gainer* explained:

> When the Constitution was amended in 1958 to eliminate the elective office of State Superintendent and transform it to an appointed office, *the Legislature did not then abdicate its authority* to set the State Superintendent's salary. From the time, then, that the State Superintendent became an appointed official in 1958 until 1970, the Legislature set the State Superintendent's salary in the Code section that now appears as W. Va. Code, 18-3-1. Thus, not until 1970 did the Legislature see fit, even temporarily, to delegate the Legislature's constitutional authority to set the State Superintendent's salary. And even when the Code section was amended in 1970 to vest in the State Board the statutory authority to set the State Superintendent's salary, *the Legislature was not acting because of any constitutional constraint on its authority*. Indeed, if the Legislature had perceived that it were not constitutionally authorized to set the State Superintendent's salary, it would simply have repealed the statutory provision pertaining to the salary of the State Superintendent in order to acknowledge the new constitutional authority of the State Board. Instead, however, it specifically delegated its authority as it continues to do with respect to county superintendents. *See* W. Va. Code, 18-4-4 (1991); W. Va. Code, 18-5-33 (1933). As we often have held, "legislative and contemporaneous constructions [of constitutional provisions] are very persuasive, if not binding." *Simms v. County Court,* 134 W.Va. 867, 874, 61 S.E.2d 849, 853 (1950).

Id. at 419-20, 452 S.E.2d at 735-36 (emphasis added). The same distinction applies here. The Legislature's delegation of rulemaking authority to the Board does not establish a constitutional limitation on the Legislature's own lawmaking power. *West Virginia Board of Education v. Board of Education of the County of Nicholas*, 239 W. Va. 705, 806 S.E.2d

136 (2017) does not require a different result. That case reaffirmed that the Board's constitutional authority to exercise general supervision includes reviewing a decision made by a local board of education; it in no way dealt with the Board's authority to promulgate rules. Accordingly, *Gainer* and *Nicholas County* need not be disturbed. Their recognition of the Board's constitutional status and constitutionally-derived supervisory authority over the State's public schools is entirely consistent with the conclusion that the Legislature retains its lawmaking power. To the extent those cases repeat or rely upon *Hechler*'s broader and erroneous formulation, however, that formulation should not be extended beyond the questions actually decided.

III. House Bill 2755 (2025) Does Not Violate the Separation of Powers.

Article V, section 1 of the West Virginia Constitution prohibits any branch of our government from exercising the powers of another. As this Court has emphasized, that limitation is a fundamental part of our constitutional structure. Syl. Pt. 1, *Barker*, 167 W. Va. at 155-56, 279 S.E.2d at 624 (holding that "Article V, section 1 of the Constitution of West Virginia[,] which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed."); *State v. Huber*, 129 W. Va. 198, 209, 40 S.E.2d 11, 18 (1946) (observing that "[t]he separation of these powers; the independence of one from the other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental in our system of government, State and Federal. Each acts, and is intended to act, as a check upon

the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed."). But separation of powers cannot be applied in the abstract. The analysis must begin with the Constitution's allocation of the particular powers at issue. Here, Article XII assigns the Legislature responsibility for providing "a thorough and efficient system of free schools" by general law and assigns the Board general supervisory authority over that system. It does not grant the Board exclusive or concurrent lawmaking power over public education.

House Bill 2755 falls within the Legislature's constitutional lawmaking authority to establish the legal framework governing public education and the exercise of delegated rulemaking power. The amendments to the Act challenged here require the Board to submit proposed rules to the Legislature for consideration and permit legislative action on those rules. Under article XII, section 1 of the constitution, the Legislature retains authority to impose statutory safeguards governing the Board's exercise of the rulemaking authority that the Legislature has delegated to it. This does not undermine the Board's general supervision of public education or otherwise interfere with the Board's constitutional responsibility and authority in that regard.

The Legislature's role in reviewing and acting on proposed rules is also consistent with its authority to oversee the exercise of delegated legislative power. Under our constitution, the Executive Department has "no inherent constitutional authority to make rules, and their rulemaking powers can be repealed by the Legislature." *Koschkee v.*

Taylor, 929 N.W.2d 600, 606 (Wis. 2019) (citation modified). Agency rules may have the force and effect of law, but they derive that force from the authority conferred by the Legislature and the governing legal framework. *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W. Va. 573, 583, 466 S.E.2d 424, 434 (1995). The contrary conclusion creates a constitutional anomaly: the Board exercises delegated legislative power, yet the Legislature is prohibited from regulating the process by which that power is exercised. Nothing in the Constitution supports that result.

Our standard for reviewing the constitutionality of legislative enactments is firmly established in our law, and it stands against invalidating House Bill 2755.

> """In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. . . .' Syllabus Point 1, *Appalachian Power Co. v. Gainer,* 149 W. Va. 740, 143 S.E.2d 351 (1965).' Syl. Pt. 2, in part, *Hartley Hill Hunt Club v. County Commission of Ritchie County,* 220 W. Va. 382, 647 S.E.2d 818 (2007)."

Syl. Pt. 7, *Kanawha County Public Library Board v. Board of Education of County of Kanawha*, 231 W. Va. 386, 745 S.E.2d 424 (2013). This Court must exercise restraint, resolve reasonable doubts in favor of constitutionality, and sustain a statute whenever a reasonable construction permits us to do so. Syl. Pt. 1, *West Virginia Trust Fund, Inc. v. Bailey*, 199 W. Va. 463, 485 S.E.2d 407 (1997). The Legislature's general lawmaking

powers are almost plenary, and the negation of legislative power must appear beyond reasonable doubt. Syl. Pt. 2, *State Road Commission v. Kanawha County Court*, 112 W. Va. 98, 163 S.E. 815 (1932).[10] The constitutional text relevant to this case does not establish the sweeping and exclusive authority that *Hechler* transferred to the Board and that the majority reaffirms in its opinion here. At a minimum, the Legislature's authority to prescribe the legal framework governing agency rulemaking is a reasonable construction of article XII, sections 1 and 2, and it is consistent with article VI, section 1. House Bill 2755 should therefore be sustained as a valid exercise the Legislature's constitutional lawmaking authority.

IV. Stare Decisis Does Not Require This Court to Preserve *Hechler's* Erroneous Constitutional Rule

I do not discount the significance or importance of stare decisis. *Hechler*, wrong as it surely is, has stood for nearly four decades, and this Court has cited it in subsequent cases discussing the Board's constitutional authority. Stability in the law matters, particularly when public institutions have ordered their conduct around established precedent. But, as the majority recognizes, our prior decisions are not sacrosanct; stare

[10] None of these authorities permits this Court to look beyond the constitutional text to consider extraneous matters, such as prior unsuccessful attempts to amend the constitution, when determining the constitutionality of a subsequent legislative enactment addressing the same subject. Rather, we have expressly explained that, in making such a determination, "[t]he Court can *only* measure the language of [a statute] against the language of the West Virginia Constitution." *Hartley Hill*, 220 W. Va. at 387, 647 S.E.2d at 823 (emphasis added).

decisis does not require this Court to perpetuate a constitutional interpretation that cannot be reconciled with the constitutional text.[11] The Legislature can amend a statute if it disagrees with this Court's interpretation of it; it cannot correct an erroneous constitutional interpretation through ordinary legislation. *See Haney v. County Commission of Preston County*, 212 W. Va. 824, 828, 575 S.E.2d 434, 438 (2002). Thus, as evidenced here, the judicial construction itself restricts the Legislature's future exercise of its constitutional lawmaking authority. That consequence makes careful constitutional review especially important. The fact that *Hechler* has been repeated does not confirm that its original reasoning was sound, nor does the passage of time supply a constitutional imprimatur that was absent from the decision's rendering. *See Adkins v. St. Francis Hospital of Charleston*, W. Va., 149 W. Va. 705, 718, 143 S.E.2d 154, 162 (1965) (instructing that "a rule or principle of law should not be adhered to if the only reason therefor is that it has been sanctified by age.").

Moreover, the breadth of *Hechler's* holding was unnecessary to resolve the dispute before the Court in 1988 and is likewise unwarranted here. The principles recognized in *Barker* supported invalidation of the particular statutory provisions at issue in *Hechler* without going so far as to declare unconstitutional "any" statutory enactment that "interferes" with rulemaking by the Board. *Barker* established that the Legislature

[11] To that end, the majority's reliance on syllabus point 2 of *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974) is misplaced because *Hechler* was not recently decided. But even if it were, *Dailey* also holds that stare decisis does not require this Court to perpetuate "serious judicial error in interpretation[.]" *Id.*

could not veto a validly promulgated agency rule through inaction and that the entire Legislature, not just one of its committees, had to act to approve or reject an agency promulgation. 167 W. Va. at 155, 279 S.E.2d at 624 at syl. pts. 2 and 3. Substantially similar provisions were also at issue in *Hechler*. Yet unlike *Hechler*, *Barker* did not hold that the Legislature was powerless to regulate agency rulemaking. This Court should have reached the same result in *Hechler* and invalidated only the two sections of Code then questioned by the Board.

The fundamental flaw in *Hechler*, given continued effect by the majority, is that it treated the Board's statutory rulemaking authority as though it were constitutional power. In doing so, it both failed to give effect to article XII, section 1 and the express requirement in article XII, section 2 that the Board perform duties as prescribed by law and also failed to consider the requirement of article VI, section 1 that the legislative power of the State is vested in the Senate and the House of Delegates. *Hechler* and the majority failed to respect this distinction. This Court can correct that error without diminishing the Board's legitimate constitutional role and power of general supervision. I would hold that the Board's authority to exercise general supervision does not render its statutory rulemaking authority removed from legislative oversight or review. The Legislature may establish by general law the procedures governing the promulgation of the Board's rules, including procedures for legislative review, approval, amendment, or rejection.[12] That

[12] Subject, of course, to this Court's power of review as exercised in, *inter alia*, *Barker*, *Simpson*, and *Callaghan*, *supra*.

holding would restore the constitutional balance between the Legislature's responsibility to provide for "a thorough and efficient system of free schools" by general law and the Board's authority to supervise that system and respects both the broader constitutional authority of the Legislature to make the laws and the unique position of the Board as an executive branch agency with constitutionally derived supervisory authority. At the very least, this Court should have narrowed *Hechler* here to permit that result. The Board's constitutional grant of the power of general supervision does not prohibit the Legislature from exercising its constitutional lawmaking authority. House Bill 2755 leaves the Board responsible for developing and proposing rules without affecting its supervisory authority; it simply subjects those rules to the legislative process in a way that is consistent with the requirements of the West Virginia Constitution.

The wisdom of the Legislature's policy choices is not a justiciable question. Our inquiry is limited to whether the Legislature possessed the constitutional authority to make the specific policy choice reflected in House Bill 2755 (2025). Because it did, I respectfully dissent.