Charter Schools in Georgia: An Uncertain Future

Matthew Littlefield*

Many social and economic policies are ostensibly rested upon the idea that the current generation should take best efforts to pave a workable future for the next generation. Some policies may truly achieve the noble goal, but unfortunately the purpose is often lost. One repeated example, where good intentions give way to partisan politics, is education policy. Throughout most of our country’s history, by both custom and code, maintaining K-12 education has been a local matter. Local boards of education rely on local taxes to support the school districts, but since some counties are wealthier than others, some school districts naturally have better funding. As a result, a student’s level of education can widely vary depending on the means and needs of a particular area. As our society has become more globalized, education policymakers have been attempting to keep pace. Post-secondary education is now within reach for many more students, but national uniformity in education is no reality. In Georgia, public K-12 education consistently ranks below the national averages in math, science, and reading.¹

In response to subpar performance, a variety of solutions have been proposed. Some groups see their existing system as functional and simply in need of greater funding,² while others propose to have tax money “follow the child” and create a voucher

---

* J.D. Candidate, 2013, Georgia State University College of Law. Special thanks to Professor Bross for his valuable feedback and to the Center for the Comparative Study of Metropolitan Growth for the opportunity to write for the Urban Fellows Program.


2 The widespread support for higher taxes by teachers unions is beyond the scope of this Paper, especially since they are not legal in Georgia, but teachers unions can play a large part in getting education funding reform passed in other states. For a few examples, see below:

Pennsylvania:  http://eelementary.newsvine.com/_news/2012/03/14/10682849-pa-teachers-union-demands-higher-taxes-to-fund-schools

system of state-run private schools. One alternative that has gained steam is the use of Charter Schools.

Rather than being required to adhere to the same inflexible standards of local schools, charter schools are allowed, and even encouraged, to change the education recipe and put a different flavor on the old method. By placing school-based decisions in the hands of school leaders and local educators who best know their students, charter schools place student needs at the center of the model. “The charter model is purposefully prescriptive on outcomes, but flexible on means, allowing school leadership to determine how to meet the needs of students directly.” While local governments can enact legislation enabling the creation of charter schools, local politics usually stands in the way. Local school boards, understandably, are reluctant to see funding move away from their current systems. To eliminate the issue, a handful of states, including Missouri, California, and Colorado, create state-commissioned charter schools that are funded by the state rather than the local school districts.

---

3 Louisiana Governor Bobby Jindal recently signed into law two bills that will create a state-run private-school voucher program where tax money paid by parents will support the school chosen rather than going to schools that happen to be in the district where the family lives. See “http://www.edweek.org/ew/articles/2012/04/13/28louisiana.h31.html?tkn=OTQFX2fZr2SAP9WM4Nww5uZQ”

4 Gwinnett County Sch. Dist. v. Cox, Brief of Appellees., 2010 WL 4955486 (Ga.), 14

5 The Missouri Supreme Court upheld a provision of the Missouri Charter Schools Act that authorizes a reduction of state funds to the Kansas City School District in an amount equal to the local funds that would have been spent on charter school students had they remained in a traditional Kansas City public school. See School Dist. of Kansas City v. Missouri, 317 S.W.3d 599 (Mo. Aug. 3, 2010) (en banc)

6 California allows all-charter districts that are not funded through the state’s charter school block grant to receive declining enrollment funding from local public schools for average daily attendance (ADA) generated by students who reside in the district. See Cal. Educ. Code § 46201.1

7 The Colorado Department of Education funds state charter schools based on the number of students in attendance, using state funding that would otherwise go to local school districts as “equalization payments” if those students were attending a public school in the local school district where the institute charter school is physically located. See C.R.S.A. § 22-30.5-513(4)(a)(1)
In Georgia, the State legislature has taken steps to make charter schools a more viable option for Georgia families, who are unhappy with the K-12 status quo. The Georgia General Assembly (“General Assembly”), by Constitutional grant, is empowered to oversee and attend to K-12 education. In 1998 the General Assembly enacted the Charter Schools Act of 1998 (the “1998 Act”). The charter schools created under the 1998 Act were approved and funded by local school boards, or, in the alternative, were approved by the local school board but funded by the state. Experience under the 1998 Act led to concerns that local school boards would be reluctant to approve charter schools and that funding was too limited.

In 2008 the General Assembly decided to take a different approach. After extensive hearings, floor debate, and amendments, the Georgia Charter Schools Commission Act (the “2008 Act”) passed by a vote of 114–40 in the State House of Representatives and 30–21 in the State Senate. The Georgia Charter Schools Commission, an arm of the General Assembly, was given the power to approve petitions for charter schools without the need of local school board approval. Additionally, the charter schools created by the 2008 Act were funded with tax dollars that essentially followed the student. When a child was enrolled at a state-commissioned charter school, the state allocation of funding that would have gone to the child’s local school

8 Article VIII, Section I, Paragraph I of the Georgia Constitution states, “The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia. Public education for the citizens prior to the college or postsecondary level shall be free and shall be provided for by taxation. The expense of other public education shall be provided for in such manner and in such amount as may be provided by law.”
9 See O.C.G.A. §20-2-2060
10 Id.
12 Id. at 50–67.
13 See O.C.G.A. §20-2-2083
14 See O.C.G.A. §20-2-2090
was instead given the charter school.\textsuperscript{15} A charter school created by the 2008 Act was defined as “a charter school authorized . . . as a special school pursuant to Article VIII, Section V, Paragraph VII of the Constitution,” which states “the General Assembly may provide by law for the creation of special schools.”\textsuperscript{16} That one phrase, “Special Schools,” has led to a flurry of political controversy, court battles, and, most recently, a move to amend the Georgia Constitution.

**Leading up to the Litigation**

Following the passage of the 2008 Act, Georgia’s charter laws received a fanfare of praise for being a workable and successful statutory structure. Georgia was ranked nationally as having the fourth best set of Charter Laws.\textsuperscript{17} Additionally, after an unsuccessful first attempt, Georgia received $400 million in federal “Race to the Top” education grants due in large part to the 2008 Act.\textsuperscript{18} For a time it seemed the charter school model was gaining traction in Georgia. Though state-commissioned charter schools, as of 2010, accounted for less than 1% of the state’s 1.7 million schools,\textsuperscript{19} opponents to the idea began to grow in number.

Unsurprisingly, the opposition did not agree with the funding structure of state-commissioned charter schools created under the 2008 Act. Local school boards are primarily funded by local property taxes, but many are heavily reliant on state money to

\textsuperscript{15} Id.

\textsuperscript{16} O.C.G.A. § 20-2-2081(2)

\textsuperscript{17} States having more than one method for approving charter schools, usually in the form of both local and state provisions, are ranked higher than those having a single authorizer. See “http://www.gacharters.org/charters-in-the-news/gcsa-comments-on-georgias-drop-to-14-in-state-charter-law-rankings/”


\textsuperscript{19} See “http://app3.doe.k12.ga.us/owsbin/owa/fte_pack_enrollgrade/display_proc; http://app3.doe.k12.ga.us/ows-bin/owa/fte_pack_school_count.display_count”
ensure the local systems can operate.\textsuperscript{20} The State's funding to local school systems is provided through the Quality Basic Education (“QBE”) Act.\textsuperscript{21} Under the QBE funding formula, the local property tax base, millage rate, and student population in the district determine the amount of state money paid to local districts.\textsuperscript{22} State money for local education is a highly contentious subject.\textsuperscript{23} Local school boards are quick to reject any policy that threatens to lower the state QBE equalization payments. The last of the three QBE elements, student population, represented the crux of the state-commissioned charter school debate following the passage of the 2008 Act.

Under the 2008 Act, the amount of state money paid to local school districts via the QBE Act decreased for every student who was attending a state-commissioned charter school rather than a local public school.\textsuperscript{24} The logic was that the cost to operate the local schools should be less for fewer students. While cost per student is likely not an exact calculation for total cost of operation, it represents an easily quantifiable unit of cost measurement. The General Assembly’s usage of QBE formulas in the 2008 Act, according to supporters, was rationally related to calculating the amount of state money that would follow the child to the charter school.\textsuperscript{25}

\textsuperscript{20} The statewide ratio of state-to-local funding in 2010 was 52.6\% state to 47.4\% local. This number varies according to the relative wealth of a particular school district. For example, in Atlanta, the state portion was only 19.4 percent, compared to 80.6 percent local. See Gwinnett County School District, et al, Appellants, v. Kathy COX, et al, Brief of Appellees., 2010 WL 3779065 (Ga.), 5
\textsuperscript{21} O.C.G.A. §§ 20-2-130 et seq.
\textsuperscript{22} Id.
\textsuperscript{23} Indeed, the amount of money at issue in education expenditures has led to judicial scrutiny of state funding structures in a number of cases. As an example, in Serrano v. Priest, 487 P.2d1241 (1971), the California Supreme Court invalidated the state’s funding system on equal protection grounds, since the disparities between school districts led to education quality being contingent upon the relative wealth of a student’s district. Georgia’s QBE funding system was modeled to avoid a Serrano-like invalidation after McDaniel v. Thomas, 248 Ga. 632 (1981), where the Georgia Supreme Court acknowledged the large disparities in educational spending across school districts but nevertheless upheld the constitutionality of the challenged funding system.
\textsuperscript{24} Gwinnett County Sch. Dist. v. Cox, Brief of Appellees., 2010 WL 4090280 (Ga.), 5
\textsuperscript{25} Id.
**The Litigation Begins**

In September 2009, the opposition reacted and filed suit against the Georgia Department of Education and the Georgia Charter Schools Commission. Among the opponents were the schools systems of Gwinnett County, DeKalb County, Candler County, and Atlanta (collectively, will be referred to as the “Opponents”). The three charter schools involved were Ivy Preparatory Academy (“Ivy Prep”), Charter Conservatory for Liberal Arts and Technology (“CCAT”), and Heron Bay Academy—the first three state-commissioned charter schools approved in Georgia under the 2008 Act.26

Ivy Prep, a socioeconomically and ethnically diverse all-girls school, was approved by the Georgia Charter School Commission in June 2009. In its first year, the school saw more than 90% of its students meet or exceed state standards in language arts, math, and reading,27 establishing it in Year One as one of the highest performing middle schools in the state.28 Located in Gwinnett County, Ivy Prep received $850,000 of state funds, which represented only 0.0013% of the greater than $650 million Gwinnett County received for education from the State in 2009.29

In relation to the entire amount of state education funds received by Gwinnett County, the amount in controversy was miniscule and insignificant, but Gwinnett County and the others saw expansion of state-commissioned charter schools as a threat to their local control. To be sure, the education of our children is inherently divisive and contentious. The Opponents were right to be alarmed when they saw state-commissioned

---

27 According to data from 2010, Ivy Prep students outperformed their Gwinnett County peers in all English Language Arts and Reading tests in all grades tested and in 7 out of 10 content areas across both grade levels tested. See “http://ivyprep.hcgserve.com/159”
29 *Id.*
charter schools outperform their own. Moreover, the funding mechanism within the 2008 Act struck right at the heart of the debate: Money. The older charter school act from 1998, which lacked the controversial funding mechanism, was never challenged.\textsuperscript{30} It was not until the purse strings were pulled that local school boards took issue with charter schools.

\textit{Gwinnett County School District v. Cox}

In 2009, the Opponents filed a complaint alleging that the Georgia Charter Schools Commission was illegally opening and funding charter schools with local money.\textsuperscript{31} In its complaint, the Opponents claimed, among other things, that the funding mechanism in the 2008 Act violated the state Constitution and that state-commissioned charter schools were not Special Schools.\textsuperscript{32} Following the discovery phase, the parties agreed that there were no issues of material fact and proceeded to summary judgment motions. The trial court issued an order on May 21, 2010, which granted summary judgment to the State and dismissed the other claims. The trial court found that the charter schools were Special Schools under the state constitution and the funding formula was appropriate.\textsuperscript{33}

On appeal to the Supreme Court of Georgia, the principal brief by Gwinnett County focused primarily on the issue of whether or not the state-commissioned charter schools were in fact “special schools,” devoting fourteen pages of their brief to the issue.\textsuperscript{34} The Opponents claimed that “special schools,” as they related to Georgia’s

\begin{itemize}
\item \textsuperscript{30} Gwinnett County Sch. Dist. v. Cox, 289 Ga. 265, 289, 710 S.E.2d 773, 791 (2011), reconsideration denied (June 13, 2011)
\item \textsuperscript{31} See “http://www.ajc.com/news/georgia-charter-school-ruling-879811.html”
\item \textsuperscript{32} See “http://scogblog.com/2011/05/16/analysis-of-charter-schools-decision/”
\item \textsuperscript{33} Id.
\item \textsuperscript{34} Gwinnett County Sch. Dist. v. Cox, Brief of Appellees, 2010 WL 3779065 (Ga.), 4
\end{itemize}
Constitution, only included schools for the handicapped or for vocational studies. Surprisingly, the Opponents collectively spent only seven pages addressing the constitutionality of the funding mechanism, arguing that local money had been seized by the State and the withheld funds were essentially private school vouchers.

The briefs for the State argued that charter schools were indeed Special Schools. In support, the State asserted that the General Assembly had a rational basis for finding charter schools to be Special Schools within the meaning of the Constitution, based on two advisory opinions from the prior Attorney General and the plain dictionary definition of “special.” Additionally, the State noted that the General Assembly has broad power, which is constrained only by the Constitution, and that it did not exceed its power in concluding that charter schools were Special Schools. Regarding the challenge to the funding mechanism, the State argued that the Opponents were seeking a windfall because they sought to receive funding for students they were not educating while simultaneously denying those funds to the charter schools within their respective districts.

**The Majority Opinion**

Ultimately, in a 4-3 split, the Supreme Court of Georgia held that the 2008 Act was unconstitutional. Chief Justice Hunstein wrote the Majority opinion, which began by focusing on the historical relationship between local school boards and the State.

---

35 Id. at 22.
36 Id.
37 Id at 3.
38 Id at 4.
39 Id at 5-6.
40 Gwinnett County Sch. Dist. v. Cox, Brief of Appellees., 2010 WL 4090280 (Ga.), 22
41 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 775.
regarding K-12 education, and then later interpreted charter schools as not being within the guise of the Special Schools provision in the Georgia Constitution.\textsuperscript{42}

The Majority’s historical argument began by examining the 1877 Georgia Constitution. According to the Majority,\textsuperscript{43} Georgia’s 1877 Constitution started a long precedential relationship whereby local school boards were given “exclusive authority to fulfill one of the “primary obligation[s] of the State of Georgia,” namely, “[t]he provision of an adequate public education for the citizens.” Art. VIII, Sec. I, Par. I.”\textsuperscript{44} In the Majority’s view, the charter schools enrolled the same types of K–12 students who attended locally controlled schools and taught them the curriculum that may be taught at locally controlled schools. Therefore, the Majority concluded that the Georgia Charter Schools Commission necessarily operated schools in direct competition with the local school boards.\textsuperscript{45}

Regarding the Special Schools provision of the Constitution, the Majority noted that in 1966 the Georgia Constitution was amended to add the Special Schools provision in order to give local school boards the authority to establish “special schools such as vocational trade schools, schools for exceptional children, and schools for adult education.”\textsuperscript{46} The 1966 amendment enumerated the types of Special Schools that the General Assembly could create, but the current Constitution, adopted in 1983, does not include the same language. The Majority argued that while the current Constitution does

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 776.
\textsuperscript{44} Interestingly, however, the majority did not quote the next line from the 1877 Georgia Constitution, which stated “separate schools shall be provided for the white and colored races.”
\textsuperscript{45} Id at 777. (emphasis added)
\textsuperscript{46} Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 776 (2011).
not enumerate the types of “special schools,” the deletion of the types neither changed the provision’s meaning nor expanded its scope.\textsuperscript{47}

“Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption.”\textsuperscript{48} The Majority cited this standard and used it to support the assertion that Special Schools should be interpreted as meaning only “vocational trade schools, schools for exceptional children, and schools for adult education,” because those types of Special Schools did not compete with locally controlled K-12 schools when the current Constitution was drafted in 1983.\textsuperscript{49} Additionally, the Majority looked to the intent of the drafters, who removed the list of “special school” types. The Majority pointed to legislative transcripts and findings and asserted that the removal was simply an editorial revision\textsuperscript{50} rather than an expansion of authority.\textsuperscript{51}

The opinion then analyzed the meaning of the word “special” as it relates to the Constitution. “[W]hen interpreting words used in the Constitution, the presumption is that they were used according to their ‘natural and ordinary meaning.’”\textsuperscript{52} The Majority concluded that “special” must be interpreted in way that is constitutionally significant because to interpret it otherwise would eliminate its purpose in the constitution and the exclusive grant of authority to local school boards over general K–12 schools would be

\textsuperscript{47} Id.
\textsuperscript{48} Clarke v. Johnson, 199 Ga. 163, 166, 33 S.E.2d 425 (1945).
\textsuperscript{49} Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 777.
\textsuperscript{50} This analysis is questionable, as will be discussed below in the Dissenting sections.
\textsuperscript{51} Id at 778.
rendered meaningless.\textsuperscript{53} This argument is only sound, however, if the previous conclusion of local school boards having exclusive control is true.\textsuperscript{54}

In giving “special” a constitutionally significant meaning, the Majority noted that “the constitutionally significant matters that make a school “special” include, but are not limited to, matters directly related to the school itself, i.e., its student body and its curriculum.”\textsuperscript{55} But, rather than defining what \emph{are} constitutionally significant matters, the definition of the converse is made and the Majority seemed to apply a definition to “special” that served only to invalidate the 2008 Act. The Majority opinion did not analyze the student bodies the charter schools, which were comprised of children who were not excelling or flourishing in the standard K-12 schools.\textsuperscript{56} Additionally, it did not examine the curriculum of the charter schools, which may have been the same in substance but certainly not in form. The conclusion was simply that schools that “exist as a public school within the [S]tate as a component of the delivery of public education within Georgia's K–12 education system,” and provide “public education to all students,” do not qualify as Special Schools.\textsuperscript{57}

The opinion then determined that a clear and palpable conflict existed between the Special Schools provision of the Constitution and the 2008 Act, thus making the 2008 Act unconstitutional, for two reasons. First, the Majority noted that Special Schools is a constitutional phrase rather than a statutory phrase, so the General Assembly’s rational

\begin{footnotesize}
\begin{enumerate}
\item Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 779.
\item The Constitution gives an \emph{actual and express} exclusive grant to the \emph{General Assembly} to maintain “adequate public education.” Local school boards are not expressly given similar power by the Constitution. The Majority bases its conclusion, that local boards have exclusive control, not on words, but on tradition and custom.
\item Id.
\item Though the argument was not made, it seems likely that certain charter schools enrolling only exceptional students would fall within the guise of special schools, since the original enumerated types of special schools included those for the “exceptional.”
\item Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 779
\end{enumerate}
\end{footnotesize}
basis conclusion that charter schools are Special Schools was not controlling,\(^58\) because construing the Constitution is solely a function of the judiciary. Second, the Majority reiterated that the deletion of the enumerated types of Special Schools from the Constitution did not empower the General Assembly with any ability to create schools that were not “special.”\(^59\)

The Majority concluded that the charter schools created under the 2008 Act were not “special” despite their having different education policies than traditional K-12 schools, their creation by the state commission, and their funding structure. Regarding the educational policies of charter schools, the Majority reasoned that because every K-12 public school has an educational philosophy, the charter schools’ performance-based contracts and other distinguishing policy features were not sufficient to make the schools “special.”\(^60\) Additionally, the creation of charter schools by the state commission was not enough to make charter schools “special” because, as the Majority saw it, the state commission was not accountable to the taxpayers like a local school board, and the state commission’s creation of the charter schools did not change the curricula taught or the students enrolled.\(^61\) Regarding the funding structure of the state-commissioned charter schools, the Majority noted that tax dollars given to state-commissioned charter schools were no more “special” than local tax dollars funding local schools. Therefore, the funding structure of state charter schools was not constitutionally significant\(^62\) insofar as

\(^{58}\) Id.

\(^{59}\) Id.

\(^{60}\) Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 780.

\(^{61}\) Id.

\(^{62}\) Noteworthy, however, is the Court’s decision not to decide whether the funding structure was constitutional. The opposition’s argument against its constitutionality may very well be heard another day if the proposed constitutional amendment is ratified.
rendering the charter schools “special.”

Last, the Majority addressed the State’s claim that state-commissioned charter schools were special because they were labeled as such:

Labeling a commission charter school as “special” does not make it so when the students who attend locally-controlled schools are no less special than those enrolled in commission charter schools and the subjects taught at commission charter schools are no more special than the subjects that may be available at locally-controlled schools.

According to the Majority, for a school to be considered a Special School, the school must have both a distinctive student body and a distinctive curriculum. In their view, no school created under the 2008 Act could have met the standard; therefore, the Court held that it was facially unconstitutional.

The dissenting Justices believed the Court should have considered constitutional applications of the 2008 Act rather than striking the entire Act as facially unconstitutional. The Majority declined an as-applied challenge for two reasons. First, because even under a liberal application the Court’s inherent authority to “judicially rewrite” the statute so that it may exist under constitutional applications, the 2008 Act contained no safeguards to prevent the creation of non-special schools. And, secondly, because the unconstitutional part of the 2008 Act defining charter schools as Special Schools was so connected with the general scope of the statute that striking it out would remove the legislative intent of the statute and therefore give the Act no effect.

The rationale of the Majority opinion hinged on the single conclusion that state-commissioned charter schools were not “special.” As the dissenting opinions show, infra, the logic is at the very least questionable. Some hold the view, including Justice

---

63 Id.
64 Id at 781.
65 Id.
66 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 781-82.
67 Id.
Nahmias, that the Majority tailored its analysis to achieve a desired result, rather than allowing the analysis to inform the conclusion.\textsuperscript{68} The Majority failed to consider two aspects that may make charter schools different, i.e. “special,” in relation to traditional K-12 schools. First, the Majority did not fully analyze the student bodies of the charter schools, which consist of students who did not do well in the traditional K-12 setting. That distinction alone may have been sufficient to label the student body, and therefore the entire school, as “special.” Second, the Majority did not delineate between the \textit{substance} of the courses taught at charter schools from their \textit{form}. The primary aspect of charter schools that make them desirable for students and parents is the delivery method. While it is true that traditional schools are free to implement new and innovative methodology, charter schools are \textit{built} upon that premise. The Majority’s conclusion that the enactment of the 2008 Act plainly and palpably conflicted with the Constitution left little room for the Department of Education to support the charter model outside amending the Constitution.\textsuperscript{69}

\textbf{Justice Melton’s Dissent}

Both Justices Melton and Nahmias wrote dissenting opinions, which were joined by Justice Carley. Justice Melton wrote separately to highlight two issues he found to be

\begin{footnotes}
\footnote{68 An analysis not performed by any member of the Court considers the relationship between the Special Schools provision and the Constitutional guarantee of an adequate public education. Special Schools are but one method of delivering public education to Georgians. The drafters gave the General Assembly the power to create “special schools,” whatever they may be, in order to alleviate the cost burden imposed upon local municipalities to educate certain types of students. As mentioned in the opinion, Special Schools have historically included vocational schools and school for the blind, deaf, and disabled. All of those schools operate to guarantee adequate public education to the applicable students. Therefore, if the General Assembly found that local K-12 schools were not providing adequate public education to certain students, then it would seem both logical and rational that the State create alternative forms and access to public education as part of its constitutional mandate.}

\footnote{69 Discussion of the Amendment is below.}
\end{footnotes}
“bedrock rules of statutory construction.” First, Justice Melton noted that when the Court is analyzing statutes for constitutionality it should presume statutes are, and were intended to be, constitutional. In his view, the 2008 Act passed the constitutional test even under the Majority’s definition of “special.” Part of the 2008 Act, O.C.G.A. § 20–2–2083(b)(12), gave the commission the power to provide the highest level of public education to students such as “low-income, low-performing, gifted, and underserved student populations and to students with special needs.” Therefore, he posited, the provisions in the Act unequivocally supported a conclusion that the Act was not unconstitutional, even under the Majority's definition of “special schools,” because some of the schools “enroll[ed] only students with certain special needs or taught only certain special subjects.”

The second bedrock rule of statutory interpretation Justice Melton put forth was that “in the absence of a First Amendment overbreadth claim, the Act [should have been] struck down unless it [was] unconstitutional in all of its applications or lack[ed] a plainly legitimate sweep.” Justice Melton found a constitutional application of the 2008 Act in one of the parties to the case, Ivy Prep. He explained that the existence of Ivy Prep proved that the Act met the Majority's constitutional test because Ivy Prep is a “girls-only” school. Therefore, he would have upheld the constitutionality of the 2008 Act

70 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 783.
71 Id.
72 Id.
74 Id.
because he felt it should have been presumed constitutional and had a legitimate constitutional application.\textsuperscript{75}

\textbf{Justice Nahmias’ Dissent}

Justice Nahmias wrote a blistering dissent spanning over seventy-five pages. After a lengthy discussion about the creation and growth of public education in Georgia, he began his dissection of the Majority opinion. Unlike the Majority’s belief that history shows a long tradition of exclusive local control of K-12 education, Justice Nahmias explained how history actually shows a shared authority between the State and local school boards.\textsuperscript{76} He noted that local boards of education were not even mentioned in the Constitution until 1945, and they have never had exclusive control over general K–12 public education. He believes this is so because control has always been shared with and regulated by the General Assembly, along with the State Board of Education and the State School Superintendent as of 1877.\textsuperscript{77}

Regarding the General Assembly’s conclusion that state-commissioned charter schools are “special schools,” Justice Nahmias pointed to several failures within the Majority opinion. In his view, the Majority should have considered differently both the 1998 Act and the former Georgia Attorney General’s advisory opinions. Under the 1998 Act, a “state chartered special school” was defined as a “charter school created as a special school that is operating under the terms of a charter between the charter petitioner

\textsuperscript{75} As both dissenting Justices note, the majority did not consider “as-applied” challenges to the 2008 Act and instead struck it down as invalid on its face because it could not, in their view, have any constitutional applications. The U.S. Supreme Court, in Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008), stated that facial challenges are disfavored for several reasons, including that such challenges often rest on speculation and that they also run contrary to the fundamental principle of judicial restraint. Considering the 2008 Act had already been applied, the majority could have analyzed whether the three schools at issue where constitutional applications. This would have allowed the Court to articulate a constitutional application while preserving the 2008 Act.

\textsuperscript{76} Id. at 784

\textsuperscript{77} Id.
and the state board." He explained how the 1998 Act specifically invoked the current Constitution's Special Schools provision, which defines a “special school” as “a school whose creation is authorized pursuant to [the Special Schools provision of the Constitution].” Moreover, in two advisory opinions, the former Georgia Attorney General concluded that the General Assembly has expansive power under the Constitution to create “special schools,” including state-commissioned charter schools pursuant to the 1998 Act. Justice Nahmias highlighted the fact that despite the similar usage of the Special Schools provision in both the 1998 Act and the 2008 Act, the 1998 Charter Act was never challenged for constitutionality.

Justice Nahmias reconciled the disparity of treatment by pointing out the true root of the issue: Money. He explained how the funding mechanism for state-commissioned charter schools set forth in the 2008 Act was much less favorable for local school systems than the funding mechanism under the 1998 Act. Under the 2008 Act, the local systems received reduced state and federal funding in proportion to the number of students residing in their districts that choose to attend commission charter schools. And, since the constitutional argument of utilizing the Special Schools provision could have been made against the 1998 Act, though it never was, he found it apparent that the funding difference motivated the current lawsuit.

---

78 OCGA § 20–2–2062 (16); (emphasis added)
79 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 790; citing O.C.G.A. § 20–2–2062(13)
81 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 791.
82 Id.
83 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 792.
84 Id.
In determining the definition of “special,” Justice Nahmias utilized the standard of “natural and ordinary meaning.” He explained that “where a word has a technical as well as a popular meaning, courts will generally accord to it its popular signification, unless the nature of the subject indicates or the context suggests that it is used in a technical sense.”

He then quoted from the dictionary, as the trial court did in this case, to define “special” as being “of a kind different from others,” followed by similar definitions that give the term a broad meaning juxtaposed to antonyms like “common,” “general,” or “ordinary.”

Justice Nahmias, rather than taking the Majority’s route of defining what “special” is not, instead gave several ways in which state-commissioned charter schools are different from “common,” “general,” or “ordinary” public K-12 schools. As a threshold matter, he noted that the Georgia Charter Schools Commission, exercising authority delegated by the General Assembly, individually created each charter school. Additionally, those schools existed outside the realm of the local school district, pursuant to an individualized, performance-based contract, and the schools were not required to follow all of the statutes and regulations that govern traditional K-12 schools. Lastly, he noted that charter schools are also different from ordinary public schools in the way they are managed, overseen, and funded.

The Majority, he stated, carefully avoided reference to any natural and ordinary understanding of “special,” and instead the Majority contended that “special” meant “special student body” or “special curriculum,” which are only two of many

---

86 Id. at 795
87 Id.
88 Id.
characteristics to consider. The Majority created a standard, in his view, that is unworkable because it requires that a “special school” have both a distinctive student body and a distinctive curriculum. Indeed, even a vocational school, a type of school originally enumerated in prior Constitutions, would not meet the Majority’s test because it may have an “unusual curriculum” but only ordinary students. The same could be said for schools for exceptional students; the students themselves are “unusual,” but the curriculum is standard.

Justice Nahmias continued his criticism of the Majority’s logic by describing how interpretation of constitutional words is not limited to circumstances at the time ratification. To that end, he pointed out that the term “special” had been used in Georgia’s Constitutions to simply mean “not common” or “different from the regular.” As an example of constitutional words applying outside circumstances existing at their time of ratification, he pointed to the First Amendment to the United States Constitution, which was ratified in 1791 and now applies to “speech” communicated electronically or digitally. The same could be said for the Special Schools provision being applied to charter schools, which did not exist when the Constitution containing the provision was ratified. Moreover, the current Georgia Constitution uses the word “special” nineteen times. In every usage of the word it is used with its ordinary meaning of simply different from the regular or general thing to which the “special” thing is being compared. Additionally, the meaning of “special schools” as being simply “not common” was indicated as far back as the 1877 Constitution, which used the term “not common

89 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 796.
89 Id.
89 Id.
92 Id. at 797
93 Id.
schools” to refer to schools the General Assembly created outside of the local school system.94

Justice Nahmias’ believed that the drafters intended to broaden the meaning of “special schools” in the 1983 Constitution.95 He found the Majority’s use of legislative transcripts from the drafters to be unpersuasive and incomplete regarding the drafters’ intent with the Special Schools provision.96 Instead, he found that the transcripts revealed a consensus that a removal of the enumerated types of schools indicated that the Special Schools provision was being broadened and that the General Assembly was being granted authority to create such schools without local involvement.97

As an example, his opinion cited the Assistant Executive Director of the Select Committee on Constitutional Revision, who explained that he did not include a list of the types of Special Schools in the new draft “because [he] thought that a definition of special schools should be provided by [statutory] law.”98 Additionally, when committee members were asked if they would like to “specify the kinds of special schools [they] [had] in mind,” one member responded, “I think it's better not to name them at all, let the laws provide [the definition].”99 The Chairman of the Committee, Donald Thornhill, responded that he wanted to ensure the term was broad, stating that “[i]f you name one or two, that limits it to them.”100 The Majority did not cite to or even address these parts of the transcripts. Unfortunately, the actual intent of the drafters at that time is largely elusive. It would seem, however, that there being evidence of two separate but equally

94 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 799.
95 Id.
96 Id. at 802
97 Id.
99 Id. at 55
100 Id.
logical conclusions of the drafters’ intent is reason enough to defer to the General Assembly’s definition in the 2008 Act.

The broad control given to the General Assembly regarding the Special Schools provision in the 1983 Constitution, according to Justice Nahmias, is just another example showing that exclusive control by local school boards is not an historical or textual constitutional grant.\(^{101}\) The Majority's argument that exclusive control began with the 1877 Constitution was not accurate, his dissent stated, because local school boards were not even mentioned until the 1945 Constitution.\(^{102}\) Moreover, in his view, states have always been a part of public education because local municipalities often create bad social policy in education that ignores the concerns of local taxpayers and parents of schoolchildren. As an example, he noted it took state-level reform\(^{103}\) to improve public education for African–American children, and no one had suggested, even then, that those reforms were unconstitutional due to the local districts having “exclusive control” over public education.\(^{104}\)

Toward the end of his dissent, Justice Nahmias echoed the same concern held by Justice Melton. He felt the Majority should not have considered the facial constitutionality of the 2008 Act because the Act had permissible applications, even under the Majority’s strict standard.\(^{105}\) Instead, the Majority ultimately concluded that a Special School's student body or curriculum must be not just reasonably or even substantially different from any local school's; rather it must “enroll students

\(^{101}\) Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 800.
\(^{102}\) Id.
\(^{103}\) This argument proffered by Justice Nahmias may be less sound, since state-level reforms are often compulsory due to federal requirements. Still, the fact that federal compulsion results in the change of local school policies shows that local control of education is not an absolute.
\(^{104}\) Id.
\(^{105}\) Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 803.
categorically different from those at locally controlled schools or teach subjects wholly unlike those that may be taught in locally controlled schools.”

Justice Nahmias admitted that if the Majority’s standard was correct, then the 2008 Act was rightfully stricken down on its face, because no state-commissioned charter school could ever meet that demanding test. But, since he found the Majority’s holding to be illogical, he explained its wider impact:

[N]o “special school” of any kind could withstand such scrutiny, which renders [the Special Schools Provision of the] Constitution a dead letter. This exposes another fundamental defect in the Majority's interpretation, because as the Majority recognize[d], “[e]stablished rules of constitutional construction prohibit us from any interpretation that would render a word superfluous or meaningless.” That rule applies with even more force to the Majority's relegation into oblivion of an entire paragraph of the Constitution.

The General Assembly’s passage of the 2008 Act was, in his view, a vehicle for improving public education. Therefore, the Majority’s ruling effectively overruled precedent cases that mandated the State to provide an “adequate public education.”

One case in particular, McDaniel v. Thomas, which was not mentioned by the Majority, held that the Georgia constitution contains very specific provisions relating to the obligation of a duty on the State and General Assembly to provide its citizens an “adequate education.” Nevertheless, as Justice Nahmias stated, the Majority failed to mention McDaniel. Their contrary holding, to him, was “truly stunning,” because it

---

106 Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 805. (emphasis added)
107 Id.
108 Id.
109 Id.
111 Worth mentioning is the fact that McDaniel and other Georgia cases have noted that under the equal protection clause, although education is a primary obligation of the state, it is not a fundamental right under the constitution, and therefore equality of result is not mandated. Though the debate of equal protection’s application to education is beyond the scope of this paper, the Georgia Supreme Court’s precedent on a
entirely ignored consideration of precedent and also because of the potential implications for both the State and local school districts.\textsuperscript{112}

The Impact of the Court’s Decision

The dissenting Justices meticulously picked apart the Majority’s rationale. Both dissenting opinions unveiled the Majority’s weak hand, and they based their criticisms on legal precedent rather than an incomplete view of tradition and history. History can be a useful tool in determining a statute’s constitutionality. But in this case history was misinterpreted, and it led to judicial invalidation of democratically created educational reform. Following the decision in Cox, Georgia’s charter law ranking dropped from 4\textsuperscript{th} place all the way down to 14\textsuperscript{th}.\textsuperscript{113} Todd Ziebarth, Vice President of state advocacy and support for the National Alliance for Public Charter Schools stated that “Georgia dropped . . . primarily as a result [the Georgia Supreme Court’s decision].”\textsuperscript{114} Gov. Nathan Deal, in his State of the State address, announced that to “spur innovation” he had budgeted $8.7 million in supplemental grants to assist state-commissioned charter schools affected by the Court’s decision. Governor Deal has also expressed his desire to work with the General Assembly to ensure that charter schools can thrive in Georgia.\textsuperscript{115}

The local boards of education, on the other hand, do not share the Governor’s sentiment. One charter school leader, on an education weblog, described the local boards of education as “defenders of the status quo,” and recounted an occasion where a local

\textsuperscript{112} Gwinnett County Sch. Dist. v. Cox, 710 S.E.2d at 807.
\textsuperscript{114} Id.
board lied about particular rules and procedures regarding its charter school approval
process. In another case, in Cherokee County, an attorney for a charter school board
made an Open Records request for documents that pertained to the proposed Cherokee
Charter Academy, but the local school district responded that it would need $324,608 in
advance to begin the process and it would take 463 days to satisfy the request.
Apparently, the school district intended to spend effectively 6,185 hours to recover the
information, which would be equivalent to seven employees each working 110 eight-hour
days. The stonewalling of charter school development by local school boards is
inarguably present. To combat the local school boards’ attempts to stagnate progress and
the Court’s invalidation of the 2008 Act, the General Assembly has taken steps to amend
the Georgia Constitution.

**Constitutional Amendment Efforts**

Even before the amendment process began in Atlanta, widespread public support
was present. A survey conducted by McLaughlin & Associates showed that Georgia
voters strongly support charter schools and largely favor an amendment to allow charter
schools to develop statewide. The survey found that 62% would support an
amendment and would vote “yes” if the election were held that day, and support was
consistent across both political parties, with Republicans voting yes at 66%, Democrats at
58%, and independent voters at 62%. Moreover, 86% strongly believe that local

---

117 Id.
118 Id.
120 Id.
boards of education should not have exclusive control over education.\textsuperscript{121} And, most relevant to the members of the General Assembly, 56\% stated that they would be more likely to vote for a legislator who supports the amendment.\textsuperscript{122}

The strongest opposition, unsurprisingly, comes from rural areas where state QBE money plays a greater role in local school districts than those in more urban areas. State Rep. Jason Spencer, R-Woodbine, wrote a letter to his constituency describing his disdain for the proposed amendment, because it was simply a “conduit to receive federal dollars which will continue to erode local control.”\textsuperscript{123} What the opposition fails to recognize, however, is the unbecoming state of Georgia’s public education system. Children here consistently perform lower than national averages, and the recent testing scandal in Atlanta only bolsters the argument for progression and reform.

The proposed amendment, H.R. 1162, would strengthen the General Assembly’s ability to provide “adequate public education.” The amendment would affect three paragraphs of the constitution.\textsuperscript{124} Article VIII, Section I, Paragraph I would have an additional line added to give the General Assembly the authority to make educational policies.\textsuperscript{125} The second paragraph, Article VIII, Section V, Paragraph I, would be amended to ensure the General Assembly retains its authority to establish Special Schools.\textsuperscript{126} Most important, Article VIII, Section V, Paragraph VII would define charter schools as being a type of “special school,” subject to certain limitations including that

\begin{itemize}
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} See “http://blogs.ajc.com/get-schooled-blog/2012/02/07/rural-lawmakers-charter-school-amendment-is-atlanta-battle-we-dont-want-to-get-caught-in-crossfire/
  \item \textsuperscript{125} The additional line would read: “. . . the General Assembly may by general law provide for the establishment of education policies for such public education.” Id.
  \item \textsuperscript{126} The additional line would read: “. . . the authority provided for in this paragraph shall not diminish any authority of the General Assembly otherwise granted under this article, including the authority to establish special schools as provided for in Article VIII, Section V, Paragraph VII.” Id.
\end{itemize}
charter schools cannot be for-profit. The amendment would also satisfy a fear held by those who opposed the 2008 Act, because the amendment ensures that local schools would not be faced with losing state money for each student enrolled in a charter school rather than a local school. The original House version of the amendment did not include this funding proviso, but the Senate added the language in an effort to gather the necessary votes to pass the resolution by the required two-thirds majority.

Another concern surrounding state-commissioned charter schools relates to their operation. A failed attempt was made to add a line to the amendment to ensure that no special school chartered by the state be owned or managed by a for-profit company. Though the measure lost by an 18 to 38 vote, the concern is legitimate. The language of the amendment would not allow special schools themselves to be for-profit, but the charter school’s operating company could very well be a for-profit firm. For-profit institutions at the college and graduate levels have come under growing scrutiny in recent years due to the abysmal job prospects and crushing student loan debt for graduates.

Though the same issues at the K-12 level are non-existent, the profit element is nevertheless an undesired element. The CEO of the Georgia Charter Schools Association, Tony Roberts, defended for-profit management companies of charter schools. He noted that the for-profit management companies who operated charter schools created under the 2008 Act did not abandon the schools following the Court’s invalidation of the 2008 Act. Additionally, he pointed out that for-profit management

127 Id.
128 Id.
129 Id.
130 See “http://onlineathens.com/opinion/2012-03-14/roberts-no-private-charter-schools-georgia”
companies also help shield taxpayers from unsuccessful capital expenditures.\textsuperscript{131}

Opponents, however, go so far as to call the General Assembly’s passage of the amendment an exercise in “corruption” and that it shows “the State Capitol is for sale.”\textsuperscript{132} They point out that lobbyists supporting charter schools spent thousands of dollars on state legislators during the amendment debates.\textsuperscript{133} Moreover, many of those lobbying firms are connected with for-profit management companies.\textsuperscript{134} While corruption may not be afoot, it is certainly an unfortunate potential considering the amount of money at stake.

In the end, despite pushback from the opponents, the General Assembly was successful in getting the amendment on the ballot this November. After initially failing to gather a two-thirds majority, H.R. 1162 eventually passed the State House by 114 to 49 and it passed the State Senate with two votes to spare at 40 to 16.\textsuperscript{135} The measure only needed two Senate Democrats to vote for it, but it received four. After the vote, one of the four crossover democrats, Senator Steve Thompson, stated that "[he’s] not going to try to keep [the General Assembly] from doing something innovative," and that he could not be against letting something positive happen in public education.\textsuperscript{136}

**Conclusion**

Investment in public education is arguably the most important function of government, second only to defense. A well-educated population tends to be more successful, and more success means more tax revenue for the State. With such an

\textsuperscript{131} Id.

\textsuperscript{132} Id.

\textsuperscript{133} See "http://www.realclearpolitics.com/news/ap/politics/2012/Mar/10/lobbyists_spend_thousands_in_charter_school_debate.html"

\textsuperscript{134} Id.


\textsuperscript{136} See “http://www.times-herald.com/Local/Charter-school-bill-passes-Ga--Senate—2135347”
incentive for policymakers and society in general, it is difficult to see why education takes a back seat so often to other agendas. Local boards of education are right to desire control over their schools, but the State also has a legitimate interest in maintaining an adequate public education system.

Charter schools are not a wholesale solution, but both sides can certainly agree that keeping the status quo should not be an option. In an age where technology improves exponentially, one would hope that education is keeping pace. But that simply and obviously is not the case. This November, Georgians will have an opportunity to amend the Constitution and enable our leaders to bring real and positive change to education. Perhaps some will vote in favor because they support “school choice.” Others may vote in favor because their local schools leave much to be desired. Whatever the reasoning or rationale may be, we should remember that we are doing it for the kids.

---

137 A Georgia Department of Education study found that Georgia charter schools had an 82% graduation rate in 2010-11, and the state average that year was 80.9%. See “http://blogs.ajc.com/get-schooled-blog/2012/03/19/senate-passes-charter-school-amendment-now-voters-will-decide”