

SCHOOL GOVERNANCE AND PUBLIC CHOICE THEORY:
A STUDY OF THE DECISION-MAKING AUTHORITY IN SCHOOL SYSTEMS

By

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To my mom who supported me through it all

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Abstract of Dissertation Presented to the Graduate School
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School governance is based on the decisions and actions that people take as it relates to the education of students. School governance occurs on many different levels including the individual taxpayer, parent, local school district, state, and federal. There are times when these entities come into conflict when decisions are made. Some scholars have attempted to debate which governance structure provides the optimal framework for the governance of education. However, very little literature exists on this topic. This study aims to address that gap with a study of current scholarship on school governance, including the examination of state constitutional clauses, statutory language, and case law.

Public choice theory is used as the theoretical framework for this study as it aims to explain how conflicting individual interests are reconciled in the collective choice domain. Public choice theory is based on the market theory approach of economics. The state of Florida is used as an example of school governance structure to illustrate the effects of decision-making at various levels, particularly as it pertains to charter schools. After review of the existing governance structures in the United States, and the

pros and cons of governance on the various levels, application and recommendations are made for a system of inclusive and varying authority and accountability.

CHAPTER 1 INTRODUCTION TO THE STUDY

Introduction

Education is not expressly addressed in the Constitution of the United States of America. Therefore, per the 10th amendment of the Constitution,¹ it is the responsibility of each state to determine if education should be a function of state government,² and then it must legislate, fund, and create the constructs that govern education codified in its constitution. Most state legislatures grant local control of educational decision-making and administration of school districts to local school boards who are appointed by government leaders or elected by citizens residing within the districts' borders.³ There are approximately 15,000 local school boards that account for more than one-sixth of all American local governments.⁴ State legislatures typically delegate power to school boards for efficiency purposes and localized decision making. The powers that are delegated are legislative, executive, and quasi-judicial.⁵ As an "arm" of local government, under the oversight of the state, school boards are sometimes limited in the power they have over local education.⁶

The purpose of this study was intended to examine the governance structures between states and local school boards. This examination aimed to review the responsibility of these authorities through analysis of State constitutions, statutory

¹ U.S. Const. amend. 10. Powers that are not addressed or delegated to the Constitution, and not prohibited by it to the states, are therefore reserved to the states or citizens.

² All state constitutions explicitly include educational provisions. See Molly Hunter, *State Constitution Education Clause Language*, Education Law Center, Newark, NJ. (2011).

³ Kent Weeks, *Responsibilities, Duties, Decision-Making, and Legal Basis for School Board Powers*, Education Encyclopedia, (2008). Retrieved from <http://education.stateuniversity.com/pages/2391/School-Boards.html>.

⁴ Executive Summary: *School Boards and the Power of the Public*, Center for Public Education.

⁵ Weeks at 2.

⁶ *Id.*

language, litigation, and secondary resources regarding the conflicts that arise between the powers. Through the lens of public choice theory,⁷ within the specific context of school choice,⁸ the goal was to offer an applicable analysis of policy in relation to where the power and authority for educational administration begins and ends between state boards of education and local school boards.

Need for the Study

Through review of the applicable and available sources, evaluation of 'educational authority' is significantly limited. As primary sources, there was very little case law available. This is likely due to the quasi-judicial, legislative, and executive nature of boards of education, as many issues that arise are dealt with through procedures, which are typically promulgated by a state board of education, before reaching the judiciary. There were a few secondary resources that consider the conflict between local and state control of education. These ideas were typically relayed in blog posts,⁹ law review articles,¹⁰ or in law reporters.¹¹ Blog posts seldom contain case law and focus more on the conflict that arises in a single issue.¹² While law review articles and law reporters tend to contain more legally based content, these resources are more

⁷ James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press, Ann Arbor, MI (1962).

⁸ US Department of Education, *School Choice for Parents*. (2009). Retrieved from <http://www2.ed.gov/parents/schools/choice/definitions.html>.

⁹ E.g., Local Control, *The Glossary of Education Reform: For Journalists, parents, and community members*, (2014). Retrieved from <http://edglossary.org/local-control/>.

¹⁰ Preston C. Green III, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 Emory L.J. 303 (2013).

¹¹ *Charter Schools*, 8 Geo. J. on Poverty L. & Pol'y 505 (2001); 8 A.L.R.5th 533 (Originally published in 2000); Frank R. Kemerer & Catherine Maloney, *The Legal Framework for Educational Privatization and Accountability*, 150 Ed. Law Rep. 589 (2001).

¹² Kathleen McGrory, *Scott Signs Florida Testing Bill*, Tampa Bay Times (2015). Retrieved from <http://www.tampabay.com/blogs/gradebook/scott-signs-florida-testing-bill/2225421>.

readily accessible by researchers in the legal profession, rather than an education professional.

Therefore, this research aimed to bridge this gap of incomplete research, while also viewing the issue through the perspective of public choice theory, which is rarely espoused in education research. Public choice theory was originally introduced through the works of Buchanan and Tullock, in *The Calculus of Consent: Logical Foundations of Constitutional Democracy*.¹³ Through this economic and political lens of education, this research makes the topic of 'educational authority' accessible to a wide array of audiences- from the practitioner, to the legislature, and researcher- desiring to understand the struggle between the powers vested in education at the state and local level, filtered through the lens of public choice as it relates to the expenditure of taxpayer dollars and the will of the public.

Research Questions

This study was aimed at providing stakeholders with a better understanding of power and how it affects education policy. This study systematically addresses the following questions:

1. What are the enumerated powers of local school boards and state boards of education?
2. What are the effects of the delegated decision-making authority between these bodies?
3. What factors are used to determine the balance between where state power ends and local power begins?
4. What impact does public choice have on decision-making power in education?

¹³ James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI. (1962).

The goal in addressing these questions was to develop a comprehensive theoretical, legal, and practicable analysis of decision-making power in the educational context.

Scope of the Study

The scope of this study was a review of the authority granted to states and the responsibilities delegated to local school boards. Examination of constitutional power and statutory authority were used to identify conflict between these entities. While the case law cannot be fully exhaustive, the most recent court decisions were used to form the foundation of judicial interpretation of power delegation. More deference was given to state constitutional provisions, and then to statutory allocation of authority. Similarly, judicial decisions were given weight based on hierarchy of the court, from the Supreme Court down to trial court decisions, and even administrative decisions made at the State Board level.

Florida was used as an exemplar in this examination of the lines between educational entities on the state level. The broader idea of education authority is further examined in the context of school choice; particularly, the application process for charter schools in Florida, where most of the case law that was researched was derived. Public choice theory was the framework from which the charter school application process was examined and the struggle of power was viewed in regard to the economic power of the citizenry.

Limitations of the Study

This study was limited to educational authority, specifically as it relates to the charter school application process. The constitutional and statutory authority of education entities is examined in relation to case law. The charter school application

process was used to provide specific context to the conflict as an example. This analysis was limited to the application process, and does not include the renewal and closing process of charter schools, due to the varying factors that must be considered in each of these circumstances and the very limited case law on these issues. The application process was selected as it is the access point for charter schools to enter the education system and where the original decision is made as to the utility, viability, and necessity of a charter school within a community.

This examination summarizes the issue of state and local influence in a broad national context, using the educational structure of Florida as an example. This analysis was limited to Florida as the conflict varies per state based on the wording of each state constitution and statutes. The charter school application process is implemented differently across various states and is used in juxtaposition to the specific Florida process. Florida is an excellent model to examine state and local control, as constitutional authority is delegated to both state and local entities.¹⁴ Furthermore, Florida statutes outline a local-based decision-making structure that arguably, eventually becomes state based.¹⁵ Florida case law highlights the struggle that the judiciary has had with determining with whom the power actually resides.¹⁶

Another limitation is the framework in which this analysis was conducted. Public choice theory, based on taxation and public spending, is used to underpin the self-interest (community-based interest) that is a part of the decision-making process at the state and local level. This framework was used to offer understanding as to how

¹⁴ Art IX, § 2; § 4, Fla. Const.

¹⁵ §1002.33(3), Fla. Stat. (1998).

¹⁶ See e.g., *School Board of Polk County v. Renaissance Charter School, Inc.*, 147 So. 3d 1026 (Fla. 2d DCA 2014).

decisions are made. An examination of the tax structure for funding education, local millage rates, and state and local allocation of tax monies in education adds to the context provided through the legal sources.

Methods and Materials

This analysis focuses primarily on state constitution, statute, and case law as primary sources of law. Secondary resources were also used to provide additional information and context to the issue. General sources, not specifically related to education decision-making, such as books and articles on public choice theory and decision making authority in public entities, were consulted to provide background information on the subject.

Various investigative tools were used and resources consulted to conduct this study. The Westlaw and LexisNexis systems were used to find primary and secondary resources. Using search strings such as “educational authority” and “charter school application process,” secondary sources were reviewed, including law journals and encyclopedias such as American Jurisprudence and Florida Jurisprudence. From review of these sources, references were extrapolated to locate additional secondary resources, as well as primary resources that were cited within the sources. From these citations, sources were examined in original form through Westlaw or LexisNexis. Original texts were studied, such as *Education and Public Choice*¹⁷ and the *Calculus of*

¹⁷ Nesta Devine, *Education and Public Choice: A Critical Account of the Invisible Hand in Education*, Praeger Publishers, Westport, CT (2004).

Consent,¹⁸ as well as legal cases.¹⁹ A search for similarly situated dissertations was conducted and returned zero results.

Organization of the Remainder of the Study

The purpose of this study was to survey the legal decision-making authority on the state and local level through an economic theoretical perspective. Chapter 1 provided an overview of the evaluation and the research methods used to conduct the study. Chapter 2 provided a discussion of public choice theory and its development as an economic and political theory. Chapter 3 covered the historical and contemporary progress and purposes of charter schools. Chapter 4 reviewed case law relating to charter schools and the application process. Chapter 5 addressed the conflicts between Choice Theory and applicable laws, offering recommendations for constitutional and statutory revisions.

¹⁸ See note 7, *supra*.

¹⁹ See e.g., *Imnotep-Nguzo Saba Charter School v. Department of Education and Palm Beach County School Board*, 947 So.2d 1279, (Fla. 4th DCA 2007); *Spiral Tech Elementary Charter School v. School Board of Miami-Dade County*, 994 So.2d 455, (Fla. 3d DCA 2008); *School Board of Volusia County v. Academies of Excellence, Inc.*, 974 So.2d 1186 (Fla. 5th DCA 2008); *Duval County School Board v. State Board of Education*, 998 So.2d 641 (Fla. 1st DCA 2008).

CHAPTER 2 THEORETICAL FRAMEWORK: PUBLIC CHOICE THEORY

Introduction

Why Governance Matters

There are mixed reviews in literature on education governance in the United States regarding its structure and efficiency.¹ Education governance has been defined as the entities that have authority to make and implement education policies and the processes through which that authority is granted and exercised.² The topic of school governance is important to analyze in order to address conflicts that may arise when determining who should have decision-making power and to help state and local leaders to understand why they may confront obstacles when trying to develop education policy.³ Education governance is also important to research as differences in education governance may be linked to student achievement and outcomes as leadership variances may have positive and negative effects on organization, efficiency, workplace conditions, and more.⁴

Researchers have attempted to classify school governance based on varying criteria in order to examine the amount of decision-making authority retained at local and state governmental levels. For example, Manna used the categories of ‘centralized’

¹ See Paul Manna & Peter McGuinn, *Education Governance in America: Who Leads When Everyone is in Charge?*, Education Governance for the Twenty-First Century: Overcoming the Structural Barriers to School Reform, Washington, D.C.: Brookings Institution Press, (2013) (arguing that various educational institutions with overlapping authority stifle innovative education reforms); See also Mary Roza, *How Current Education Governance Distorts Financial Decision-Making*, Education Governance for the Twenty-First Century: Overcoming the Structural Barriers to School Reform, Washington, D.C.: Brookings Institution Press, (2013) (arguing that federal and state funding constrains the decision-making ability of local entities).

² Dara Zeelandelaar & David Griffith, *Schools of Thought: A Taxonomy of American Education Governance*. Thomas Fordham Institute (Washington, D.C., 2015) at 12.

³ Id at 10.

⁴ Id at 14. Only a few scholars have attempted to link governance with student outcomes. See e.g. Kenneth Wong, *The Education Mayor: Improving America's Schools* Washington, D.C.: Georgetown University Press, (2007).

and 'decentralized' in the areas of political, administrative, and fiscal management to create a taxonomy of school governance.⁵ According to Manna, states that are politically centralized leave decision-making to governors who typically appoint State Boards of Education (SBE) and Chief State School Officers (CSSO), whereas decentralized states leave decision-making to voters. Centralized states typically have a few, large school districts and decentralized states have more districts and that are smaller in size. Manna also noted that centralized states fund education mostly on the state level, while decentralized states rely heavily on local revenue.⁶ Regenstein looked at governance from a framework of early childhood education and the agencies with authority over its implementation.⁷ Regenstein identified three major systems of governance and the underlying goal of each, including coordination, consolidation, and creation. Within this framework, agencies can either work collaboratively (coordination), authority is given to one agency over another (consolidation), or a new agency is created (creation).⁸ Regenstein explained that state leaders change systems based on goals and offered suggestions on principles that should be taken into consideration when identifying a model that will work for a state in the early childhood domain.⁹ Zeehandelaar and Griffith yield that the study of education governance is limited due to difficulties in classification based on nebulous and ill-defined characteristics of education.¹⁰ Based on the works of researchers such as Manna and Regenstein,

⁵ Id at 10. (Manna, chapter 1).

⁶ Id at 11.

⁷ Elliot Regenstein, *Glancing at Governance: The Contemporary Landscape*, in Sharon Kagan & Rebecca Gomez (Eds.), *Early Childhood Governance: Choices and Consequences*, New York, NY: Teachers College Press, (2015), Chapter 2.

⁸ Id.

⁹ Id.

¹⁰ Zeehandelaar and Griffith at 14.

Zeehandelaar and Griffith also constructed a governance taxonomy delving beyond the parameters of past research, offering a more comprehensive approach to education governance in the United States based on multiple factors and decision-making points of interest.¹¹ Decision-making authority and collective choice, as explained in public choice theory constitute the theoretical framework on which this study was based.

Public Economic Theory

Public choice theory is a concept that emerged to explain political behavior from an economic standpoint and has been applied in different political domains. Education governance is one such area. Public choice theory is based on what economist term market theory. Market theory's explanative and predictive value is based on the individual who is guided by pure economic purposes and gain. Therefore, some economists use market theory to explain and predict the behaviors of people centered on the principle that individuals make decisions based on what will lead to their personal benefit.¹² Public choice theory explains social choice, when individuals decide to act collectively.¹³ There are many economist and researchers who study market theory and public choice.¹⁴ Stiglitz and Rosengard are highlighted for their integration and application of market theory and social choice. Buchanan and Tullock are reviewed for their seminal work in public choice theory, from which other researchers have based their studies.

¹¹ Id.

¹² James Buchanan & Gordon Tullock, *The Calculus of Consent*, University of Michigan Press. Ann Arbor, MI. (1962), 13.

¹³ Id at 16.

¹⁴See e.g., William Eskridge, *Politics Without Romance: Implications of Public choice theory for Statutory Interpretation*, 74 Vir. L. Rev. 275 (1988); Jon Elster & Aunund Hylland, *Foundations of Social Choice Theory*, Cambridge University Press, Cambridge, NY (1989); Thomas Merrill, *Does Public choice theory Justify Judicial Activism After all?*, 21 Harv. J. L. & Pub. Pol'y 219 (1998).

Market Theory Generally

Market theory is based on the premise that there are scarce goods that are rationed through markets.¹⁵ This market typically deals with the private exchange of goods and services of the individual. Producers compete in the market and individual selection of goods determine which producers are able to stay as viable options and which ones are out competed.¹⁶ In the market, consumer demand for a good declines as the price increases. The producers typically supply more of a good when prices increase. When producers are free to sell their goods in a market, the supply of goods will increase until the cost of making the good equals the return, or the profit from the sale of that good. When the cost of producing the good matches the selling point and no additional benefits for the consumer can be gained at a price the consumer is willing to pay, the market has reached equilibrium. This equilibrium is necessary for market efficiency.¹⁷ There are typically many producers or firms in a market that compete to sell their product to the consumer or buyer. A tenet of the market approach is that a competitive market should be 'Pareto efficient' - having the property that one more person could not be made better off without someone being made worse off.¹⁸ Pareto efficiency, a change that makes some individuals better off without hurting others, is a desired state in market economics.¹⁹ A second tenet is that in order to reach a Pareto efficient resource allocation through a competitive market, an initial redistribution of

¹⁵ Id at 17.

¹⁶ Paul Stephan, *Barbarians Inside the Gate: Public choice theory and International Economic Law*. 10 Am. U. J. Int'l L. & Pol'y 745, 746.

¹⁷ Id.

¹⁸ Joseph Stiglitz & Jay Rosengard, *Economics of the Public Sector*. W.W. Norton Company, Inc. New York, (2015): 66.

¹⁹ Id at 79. However, Stiglitz and Rosengard note that with most public policy choices, there are trade-offs where some individuals are benefitted and others are harmed.

wealth must occur.²⁰ This redistribution typically happens on the local level through producers and consumers, but can also happen in a centralized format as evidenced in communist countries.²¹

When a Pareto improvement can be made, goods are added to the market to benefit individuals without harming others. When Pareto improvements cannot be made and the additional benefit to an individual comes at the cost to another individual, trade-offs must be considered and taken into account. Therefore, based on market demands and the desire for Pareto efficiency, society must take into account the trade-offs that occur between efficiency and equity in markets. Equity versus efficiency are examples of market trade-offs. In attempts to make markets Pareto efficient, redistribution or allocation may lead to more equitable circumstances for individuals but efficiency may be lost. When examining trade-offs, society must consider how much inequality it is willing to accept in exchange for an increase in efficiency.²² When making social choices, the individuals who are worse and better off and the gains and losses of each group should be identified and accounted for when individual decisions and decisions in the aggregate are made.²³

Market Failure and Government Intervention

The market may be broadened when the private market has spillover effects to the public sector through market failure. A market reaches 'perfect competition' when there are sufficiently enough producers in the market that do not have an effect on

²⁰ Id at 66-67.

²¹ Id.

²² Id at 186.

²³ Id at 187.

prices.²⁴ However, it is when the market experiences imperfect competition that the government has been involved or will likely become involved in the market.²⁵ One way imperfect competition arises is when a monopoly is formed, either naturally or strategically. Sometimes, it is more cost efficient for a single firm to be a producer of a product or a larger firm takes over the production of a smaller firm. Monopolies may also be formed by producers who attempt to discourage competition by threatening to lower prices if rivals enter the market or through the granting of patents by the government.²⁶ Either way a monopoly is formed, the government become involved to protect individuals from improper actions of the monopolistic entity.

Incomplete markets lead to market failure because the market does not adequately provide for desired private goods and services. Government will typically fill this gap of desired private goods by producing the good for private consumption. Student loans are an example of this gap filling in that private banks are more hesitant to offer school loans as it is a risky investment on whether the financing will be paid back; thus, the government steps in by offering government issued private loans.²⁷

Imperfect information on the part of consumers is another reason for market failure. When consumers are unable to make informed decisions it is believed that the market suffers.²⁸ Government may become involved in order to regulate the type and amount of information that must be made available to the public, or it might go as far as to create conditions for the production of new information through research and

²⁴ Id at 83.

²⁵ Id.

²⁶ Id at 84.

²⁷ Id at 89.

²⁸ Id at 92.

development. The government will typically set regulations for industries to provide information to the public or offer grants for the production of new information.

Unemployment, inflation, and disequilibrium also lead to market failure or are symptoms of market failure that the government tries to address through government programs and subsidies.²⁹

Externalities are another form of market failure in which the actions of an individual or firm have an effect on others.³⁰ This effect can be a cost that an individual imposes, but does not have to fully pay, such as a company causing water pollution but not having to pay to clean the water. Or the effect can be a benefit that an individual causes for others but the individual does not fully reap the benefit, such as renovating a house that increases the property value of the houses around it. The theorem thus follows that due to the fact that individuals do not bear the full cost of their actions, they are more likely to engage in more negative consequence actions. Similarly, because an individual does not reap the full benefit of an action, he or she will engage in less positive actions. Therefore, when this type of external market failure occurs, government typically steps in to make up for a market that is not efficient in this manner.³¹

Another area that typically warrants government involvement is the production of public goods. Public goods are categorized as goods that incur no additional cost for an additional individual to enjoy the benefit of them and it is difficult or impossible to exclude an individual from enjoying the good. The market reaches disequilibrium when

²⁹ Id at 93.

³⁰ Id at 86.

³¹ Id at 87.

the market either will not supply public goods or not enough quantity will be supplied.³² In this situation, the government will either produce the good itself or fill the gap in production from the private sector.

When examining the role of government in the private and public market, correcting for market failure is one responsibility that the government fills. Another role of government is to intervene when individuals do not or will not act in their best interests, such as mandates to wear seatbelts or helmets for safety. The government will compel individuals to participate in the market and consume 'merit goods,' such as compulsory education.³³ This paternalistic view of government is contrasted with the view that government should act based on consumer preference and guard against special interest groups using the government to further the desires of special interest group benefactors. However, when it comes to children, it is widely held that either parents or the state must make paternalistic decisions for children and when parents cannot or will not act in the best interest of their child, the state must step in to do so.³⁴

Government Production in the Market

While market failure provides a rationale for government intervention, it does not necessarily provide a basis for government production of goods and services. Government production typically becomes prevalent when competition in the market is not viable. When there is a threat that one or a few producers will exploit consumers, governments will either nationalize production- taking over the industry directly, or heavily regulate private firms.³⁵ Another reason for government production is that public

³² Id.

³³ Id at 95.

³⁴ Id at 96.

³⁵ Id at 200.

interests may be multifaceted. To put this idea in context, education is believed to serve many functions in addition to conveying knowledge and teaching skills. For example, education and school settings are also used to transmit national and citizenship values that some may be concerned cannot effectively be advanced in the private sector. Therefore, with different perspectives regarding the purpose and goals of education, government may intervene to ensure that those goals are met.

Conversely, while there may be arguments for governmental production, there are also arguments against it, including the fact that governments tend to be inefficient producers.³⁶ These inefficiencies surface when publically provided goods must be rationed amongst the population. If the government charges a fee for consumption, the beneficiary bears the cost of the good; however, this typically leads to under consumption of the good and additional transactional costs from the development of a pricing system. Another rationing method is to have consumers wait in line for a good, which allows for even distribution that is not based on factors such as wealth; however, time tends to be wasted while people wait on their portion of a good. Finally, the uniform provision of a goods saves in transaction costs as each individual gets the same share, but leads to overconsumption or under consumption of goods based on the value an individual places on a good.³⁷ In these cases, the governmental provision of goods is less able to account for individual preferences in the private market and are thereby less efficient. Therefore, Stiglitz and Rosengard argue that “identifying when government should engage in production and when it should use private firms involves balance.”³⁸

³⁶ Id at 201.

³⁷ Id at 114.

³⁸ Id at 210.

Government intervention and production are not free from failures and is why some critics believe that government should be stopped from intervening in markets. Government failures can occur from government having limited information about a certain area. For example, when promulgating regulations for disabled persons, lack of information may make it difficult to distinguish between those who are pretending to be disabled and those who truly are.³⁹ Governments' limited control over private market responses can also make it difficult for governments in that the government can heavily regulate an industry; however, it still may not be able to control all variables of a given industry. Limited control over bureaucracy can lead to government failure as politicians and bureaucrats come with their own agendas and experiences that inform their decisions. Finally, government failure may come from limitations imposed by political processes such as the revolving door of leadership in government due to election cycles.⁴⁰

Public Choice Theory

Public Choice Theory Generally

Public choice theory is a theory of collective choice that is made up of individual actions. It applies the principles of private economic behavior or market based theory to collective action, particularly governmental actions, and the issues that arise from public decision-making.⁴¹ Buchanan and Tullock, the seminal developers of public choice theory, examined political engagement and collective action from the perspective of the decision-making individual who participates in the political process in which group

³⁹ Id at 212.

⁴⁰ Id.

⁴¹ Stephan at 746.

choices are made.⁴² Therefore, unlike the analysis of private goods that are determined by the price system in the market, the political process determines expenditures on public goods.⁴³ Buchanan and Tullock viewed political theory as economic in that it looks at individuals as separate actors who have different aims, intentions, and purposes for the results of collective action just as individuals act in their personal interest in the private sector.⁴⁴ Thus, public choice theory aims to explain how conflicting individual interests are reconciled in the collective choice domain. In this regard, there is an interdependence of the actions of individuals in collective choice, which may not be purely economic.⁴⁵ In their research, Buchanan and Tullock aim to answer questions of collective choice, such as:

- What is the line between collective action and private action?
- What is the ultimate decision making authority?
- Is a simple majority controlling? Must full consensus be attained? Is there a ruling class?
- How is the decision making authority chosen?
- When is it desirable to move human activity from private to social choice?⁴⁶

Assumptions

There are some basic assumptions that underlie the principles of public choice theory. The first is, public choice theory seeks to explain collective action, however it is still based on the individual who seeks to maximize his or her well-being. Maximization of one's well-being comes from the accumulation of material benefit. Natural selection or the effects of demand in the market place discourage goods that fail to serve the

⁴² Buchanan and Tullock at 3.

⁴³ Stiglitz at 230.

⁴⁴ Buchanan and Tullock at 3.

⁴⁵ Id at 5. Buchanan and Tullock concede that while man's interests are not always economic, as long as those interests do not interfere with their economic interests, market theory still applies. The authors use the example that some sellers accept lower prices than buyers are willing to pay, and some buyers deliberately pay sellers higher prices than is necessary to secure the product or service, (pg. 17).

⁴⁶ Id at chapter 5.

purpose of maximizing the well-being, as those goods will not fair well in the market due to diminished demand. Simply, individuals' desire to meet their needs and the demand of resources drive the supply of them. However, it may be advantageous for the individual to agree to certain things, even to his or her disadvantage, when the benefits are expected to exceed the costs of the disadvantage.⁴⁷

As another assumption, Buchannan and Tullock offer points of what 'state' or government action in public choice theory is not. It is not an organic conception. According to the theory of organic conception, the collective becomes an individual and one need only look to what motivates independent state action to understand why decisions are made. However, Buchanan and Tullock opine that general will, independent of the decision-making process of individuals, does not offer the entire picture of social choice.⁴⁸ The government is also not the ruling class, as Buchanan and Tullock do not consider the political process as a means for the dominant class to establish and preserve power. Thus, it is assumed that society is composed of free individuals, although they do identify that some members of society are able to use the structure to obtain differential advantage, which leads them to advocate for restrictions on the use of the political process.⁴⁹

Based on these assumptions, collective action is defined as the "action of individuals when they choose to accomplish purposes collectively rather than individually, and the government is seen as nothing more than the set of processes, the machine, which allows such collective action to take place."⁵⁰ Both market theory and public choice

⁴⁷ Buchanan and Tullock at 6.

⁴⁸ Buchanan and Tullock at 12.

⁴⁹ Id at 13.

⁵⁰ Id.

theory require cooperation from two or more people and the market and state are devices through which cooperation is organized. In the market relationship, one furthers his or her interest by offering goods or services for the benefit of another individual in the market. In the social choice relationship, individuals join together for mutually advantageous purposes in effort to accomplish a common goal. Thus, individuals exchange inputs in the securing of the commonly shared output.⁵¹ The authors offer the example of a fisherman and a coconut tree climber who find it mutually advantageous to specialize and enter the market for the exchange of goods to fulfill their interests. The individuals also recognize the advantage in constructing a fortress and that one fortress is sufficient for both of them. Therefore, they will find it mutually advantageous to enter into a political “exchange” and pool resources for the common good. This is the nexus of economic and public choice theory. Buchanan and Tullock conclude that the same individual, who operates in the private sector, operates in the social sector and that does not necessarily mean that the motive of private gain is set aside for the social good, it simply means that the individual chooses to operate in the public sector for the attainment of a common good.⁵²

Collective action is derived from the results of individual decisions that are combined through a decision-making process.⁵³ Buchanan and Tullock caution, however, on assigning individual choice constraints in the collective. They point out that it is rare that the decision-making processes that occur when collective action is made, will lead all members in society to a freely chosen equilibrium in the market.⁵⁴ Therefore, the

⁵¹ Buchanan and Tullock at 18.

⁵² Id at 32.

⁵³ Id at 34.

⁵⁴ Id.

authors state, “The areas of human activity that the reasonably intelligent individual will choose to place in the realm of collective choice will depend to a large extent on how he expects the choice process to operate.”⁵⁵ From this standpoint, Buchanan and Tullock suggest that public choice theory offers insight as to whether modifications to the decision-making process and subsequent constraints, such as the government, will lead to a better or worse state.⁵⁶

Decision-making

When deciding when to enter the public arena, “The individual will find it profitable to explore the possibility of organizing an activity collectively when he expects that he may increase his utility.”⁵⁷ There are different reasons an individual may consider public alternatives. Collective action may eliminate external costs- the price an individual pays imposed by private actions of others, such as the employment of a city policeman to protect individuals from crime. Collective action may also be needed for external benefit that cannot be secured through purely private behavior. For example, individual protection from fire is not profitable; therefore fire protection is typically collectivized. In a rational market that includes public and private goods, the individual ranks the alternative choices of the collective and the choices in the private market, and then chooses between the results of collective action and the benefit of goods from the private sector.⁵⁸ The individual tends to choose public goods when the price is lowered. For example, an individual will vote for more collective activity when the taxes or costs

⁵⁵ Id at 7.

⁵⁶ Id.

⁵⁷ Id at 41.

⁵⁸ Id at 33.

are reduced for that activity. If the tax rate is increased, the individual will likely select a lower level of collective activity.⁵⁹

However, Buchanan and Tullock note that there are limitations on individual rationality.⁶⁰ In market theory, there is an assumption of one-to-one correspondence between individual action and results. A consumer knows that if he or she chooses to enter the market and purchase a good, he or she will receive the good. In this way, the consumer expresses desirability of one private good versus another. Conversely, there is no way for the individual to express their desirability of one public good over another. As Stiglitz notes, the election of public officials conveys limited information regarding voter attitudes toward a specific public good and unless people are faced with trade-offs for their decisions, they are less likely to deliberate on the decisions they make.⁶¹ Additionally, in collective action, certainty cannot be assumed, as the individual has no way of knowing what the final outcome of a social action will be before he or she must contribute to that choice. This may lead the individual to act irrationally in the collective. Another reason for irrationality may be that an individual feels less responsible for the final decision in social choice. In this way, the individual knows that a decision will be made in the collective regardless, thus, the individual may choose to abstain from making a choice or may not take the time to consider the alternatives carefully.⁶²

Due to the irrationalities of individuals in collective action, processes are put in place to circumvent irrationality and to organize collective action. When making the decision to operate in the collective, the individual must balance the direct gains and costs of

⁵⁹ Id at 20.

⁶⁰ Id at 35.

⁶¹ Stiglitz at 232.

⁶² Buchanan and Tullock at 37.

collective action with the costs of organization itself. In public choice theory, the cost of public organization includes decision-making costs and external costs. Decision-making costs are the costs of participating in the process where two or more individuals are required to reach agreement- the cost of compromise. External costs are the costs that private behavior imposes on the individual decision-maker. The sum of decision-making costs and external costs, equal the costs of social interdependence.⁶³ According to Buchanan and Tullock, individuals should try to reduce or minimize these interdependence costs to the lowest possible extent in order to make the market more palatable, recognizing that the costs will never reach zero for all members of society, as for example, decision-making costs increase when external costs are decreased.⁶⁴

Figure 2-1 shows the relationship of the costs of decision making.



Figure 2-1 Cost of Social Interdependence Equation

Reducing Costs

The researchers also note that the cost of reaching an agreement in collective action is wasteful as collective decision-making may cause too many resources to be allocated to the public sector. A way of reducing the costs of decision-making and to

⁶³ Id at 41-43.

⁶⁴ Id at 44.

reduce costs according to public choice theory is to organize collective decision-making in the smallest units possible. In other words, the group should be as large as possible, as long as the expected benefit of the exclusion of other units exceeds the expected incremental cost of decision-making resulting from adding the excluded units.⁶⁵ A comparison between the additional decision-making costs involved in moving from a smaller to a larger unit and the spillover costs that remain from retaining the activity at the smaller level should also be taken into consideration. Figure 2-2 illustrates the movement from small to large-units of collective activity. In the example offered by Buchanan and Tullock, at the smallest unit is the family in which private actions most directly affect. The decisions of the family influence members of the local community. There are costs for the larger county or municipal areas when decisions are made. Going farther, there are external costs for those living in the state when collective decisions are made, as well as across state lines.⁶⁶

⁶⁵ Id at 108.

⁶⁶ Id at 109.

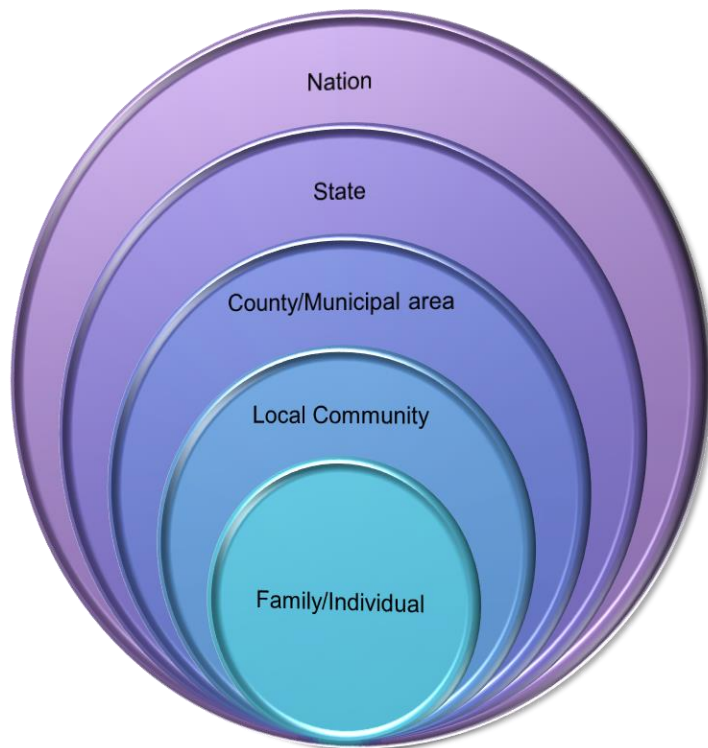


Figure 2-2 Units and Decision-Making Costs

Source: Adapted from Joseph Stiglitz & Jay Rosengard, *Economics of the Public Sector*. W.W. Norton Company, Inc. New York, (2015).

Buchanan and Tullock offer ways that social interdependence costs can be minimized. Decentralization is one way of creating a market-like system in the political process, in which consensus of large bodies is not a factor. When the individual is not forced to “suffer unduly large and continuing capital losses from adverse collective decisions” by being able to move freely to other units, a more market-like structure is created and the costs are reduced as opposed to when government steps in and more inefficiencies are projected to be created.⁶⁷ Additionally, decision-making costs are

⁶⁷ Id at 110.

lower in communities with homogenous populations. The costs of decision-making are greater in communities that lack basic consensus among its members. Thus, grouping people based on similar interests should lessen the range of collective activity in heterogeneous populations.⁶⁸

Public Choice Theory and Governments

As with market theory, when market failures occur governments will typically become involved in the market either through regulation of the private sector, gap filling for underproduction, or the full production of public and private goods. When the government is established as the market, demand is the individual taxpayer who has preferences that are represented by government. Politicians and bureaucrats, through legislation and governmental programs, provide the supply. The governmental market place is complicated by the fact that the taxpayer is both the owner and client, as the taxpayer is entitled to efficient use of tax money for services that are provided to him or her.⁶⁹ Public choice theory dictates that society decides the processes by which governments make decisions and social interdependence costs vary amongst these processes. According to public choice theory, when it comes to governmental intervention and decision-making, rather than focusing on all possible areas of concern in a community, the government should focus on only the areas that are absolutely barred from correction or intervention by the private sector or when the collective has difficulty coming to a consensus. In this way, interdependence costs may be reduced.

Another means of reducing interdependence costs is through representative government. Decisions regarding how resources will be allocated in the public sector

⁶⁸ Id at 111.

⁶⁹ Stiglitz at 213.

are made through the election of representatives who are supposed to represent their constituents through their individual vote or the appointment of others to administrative agencies.⁷⁰ There is much variation in representative government, ranging from individuals directly participating in collective choice to one representative for all members. When considering representative government, an optimal degree of representation is desired. Four questions must be answered when moving along the spectrum of representative government:⁷¹

- What are the rules for collective action?
- What are the rules for choosing representation?
- What is the degree of the representation?
- What is the selection of the basis of representation?

The degree of representation deals with the proportion of the total population to be elected to represent the assembly. When a fraction of a group represents a larger group, as opposed to a smaller group, costs are minimized. Thus, Buchanan and Tullock conclude, the larger the size of the group, the less activities should be undertaken collectively because the total costs of decision-making rise when the group is larger.⁷²

The selection of the basis of representation is the process by which representatives are selected among the whole population. There are three conventional formats that this process takes place, including: randomization, functional basis, and geographical representation. Randomized representation scatters the population and

⁷⁰ Id at 231.

⁷¹ Buchanan and Tullock at 205.

⁷² Id at 111.

randomly assigns individuals to groups. With randomization, the external costs of collective action are lower and there is greater protection against deliberate exploitation of minority interests due to varying interests across a population, however, decision-making costs are greater because there is little consensus in the group. The functional basis for representation assembles individuals into interest groups and each definable interested group in the population is allowed to select a representative or representatives of the legislative assembly. Here, the decision-making costs are lower as most individuals in the group agree; however, external costs are higher due to issues of minority and majority interest representation, coercion, and special interest lobbying. Geographical representation falls between these two extremes in which individuals are grouped based on their geographical location where there may be a wide range of voter interests, but individuals may coalesce around political issues that involve differing geographical impacts.⁷³

Markets and Education

Education in the United States is by and large a function of government as compulsory education is mandated and the government produces education. Debates regarding education typically center on how to administer a high-quality education that

⁷³ Id at 210.

is equitable and adequate.⁷⁴ Adding to this debate is the desire to create the most efficient system of education and is where the theory of markets is typically applied.⁷⁵

The universal improvement in human capital and the positive impact of an educated citizenry are major arguments for a robust education system. For example, citizens' reading ability assists in the smooth functioning of society as a whole in that literate citizens are able to participate in the democratic process and be productive in society. Other externalities include advancements in science and technology and the shaping of society through education.⁷⁶ However, education is not a pure public good as the marginal cost of educating an additional child is more than zero.⁷⁷ Additionally, not only does society benefit from individuals' ability to read, people benefit personally from being able to read. It is thus believed that even in the absence of government intervention, some individuals would learn to read and acquire other basic skills needed for personal everyday functioning.

Even with positive externalities and expected outcomes of obtaining an education, there are reasons that individuals do not invest in education. This non-investment could be equated to market failure. One reason for market failure in education is attributed to a lack of ability to finance one's own education, which typically leaves poor individuals without access to education unless the government intervenes.

⁷⁴ Stiglitz at 396. See also R. Craig Wood, *Justiciability, Adequacy, Advocacy, and the "American Dream"*, 98 Ky. L.J. 739 (2010); Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. Tol. L. Rev. 545 (2010); Deborah A. Verstegen, *Towards A Theory of Adequacy: The Continuing Saga of Equal Educational Opportunity in the Context of State Constitutional Challenges to School Finance Systems*, 23 St. Louis U. Pub. L. Rev. 499 (2004); R. Craig Wood & Bruce D. Baker, *An Examination and Analysis of the Equity and Adequacy Concepts of Constitutional Challenges to State Education Finance Distribution Formulas*, 27 U. Ark. Little Rock L. Rev. 125 (2004).

⁷⁵ Stiglitz at 396.

⁷⁶ *Id.* at 402.

⁷⁷ *Id.* at 401. Based on the definition of a public good.

Another market failure arises from the fact that investing in education is considered to be very risky and lenders are less willing to assist people with paying for school.⁷⁸ Underinvestment in education also occurs because some parents may not find it important to invest in the education of their children, or may not have the funds to invest.⁷⁹ While the foregoing arguments may explain why the government should fund education, it does not necessarily justify governmental production of education in the public market.

The externalities that are associated with having an educated citizenry are used to justify governmental production of education. One major argument for governmental production of education is the seemingly inherent equity that is derived from government control of the education market as governments are able to redistribute resources to increase access to education. As a compulsory public good, government is able to regulate and set standards for the administration of education to all citizens. Furthermore, government production of education restricts the potential waste derived from private competition of consumers and producers.⁸⁰ Proponents of governmental production of education argue that the degree of waste that is produced in the private sector in an effort for entities to win the competition in a market diminishes the return on competition and does not contribute to the achievement of “equilibrium in the market.”⁸¹ Waste creeps in through advertisements, suppression of new methods (patents), and profit-conservation to the detriment of children/parents.⁸² Thus, through continuous and

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ James M. Poterba, *Government Intervention in the Markets for Education and Health Care: How and Why?*, University of Chicago Press (1996) 277, 292.

⁸¹ Stiglitz at 401.

⁸² Id at 404.

“cut-throat” competition, the waste that is produced through the struggles of competing may come at high costs and no longer guarantee full engagement of all members of society or maximum output is stifled due to profit-conserving strategies and attempts at efficient productivity that yields the highest profit.⁸³ For example, a private market would likely be less equipped and willing to deal with a disruptive student who imposes negative externalities on other students, which could possibly lead to the exclusion of the student from access to school or charging a premium for the student to attend school.⁸⁴ Furthermore, profit seeking private entities may place their desired profit margins and “bottom lines” before the appropriateness of services.⁸⁵ Additionally, proponents of governmental production of education argue that competition in the traditional market functions differently than the market in education and school choice.⁸⁶ One example is the uninformed parent who must make the decision of where to send his or her child to school or what educational services are appropriate to meet the needs of her or his child, and is ill prepared to judge the effectiveness of educational options. Furthermore, educational options, whether through vouchers to private schools or charter schools, tend to be limited; therefore selection of schools may be based on proximity and convenience rather than academic excellence.⁸⁷ As Devine points out, pseudo-markets are sometimes formed where people do not have actual choice or control, but are still given the title of consumer in a market economy as if they have the ability to operate as a typical consumer in the market.⁸⁸ This idea is exemplified in the

⁸³ *Id.*

⁸⁴ Poterba at 292. Noting that this circumstance is considered unacceptable to notions of justice and equal opportunity, thus necessitating governmental control in the production of education.

⁸⁵ *Id.*

⁸⁶ Stiglitz at 409.

⁸⁷ *Id.* at 410.

⁸⁸ Devine at 164.

distinction between poor and wealthy districts and the question of whether choice and options actually exists for children from poor or rural districts, where the community has less resources and less ability to create alternatives in the market.

Conversely, some theorists believe that government is less efficient in its production of education and should therefore not be involved in the production or regulation of education.⁸⁹ Studies, by Vining and Boardman for example, have concluded that government production is less efficient than private production due to the fact that decision makers are faced with less discipline than that of a competitive market, leading to inefficient decisions in regard to inputs and outputs of governmental production.⁹⁰ Opponents of governmental intervention view it as a monopoly in the market of education that produces waste. Critics of governmental production look to the tenets of choice and competition to drive down the cost of education and increase the quality, as the best options would theoretically be selected for in the market and private firms would be forced to respond to the market (collective demands), use resources wisely, and be innovative to raise productivity.⁹¹ The absence of an objective standard for the provision of services is another critique of governmental production.⁹² For profit-maximizing private firms, the generation of profits provides the standard and desired outcomes of the market as firms will not be successful at making profit if they do not

⁸⁹ Stiglitz at 407.

⁹⁰ Poterba at 293.

⁹¹ Nesta Devine. *Education and Public Choice: A Critical Account of the Invisible Hand in Education*. Praeger Publishers. Westport, CT (2004): 161.

⁹² Poterba at 293.

meet the demand of the consumer. However, tax-supported public entities, such as the government, do not have to operate by such constraints or guidelines.⁹³

Public Choice Theory and Education

Proponents for limited government in education believe that people are coerced into forms of education they do not desire or forced to pay for the education of others when the government is a producer or too involved in education, through monopoly.⁹⁴ Limited government supporters also argue that increasing accountability and support structures drive up costs and genuine private enterprise is driven out of the field, stifling innovation and progress, when the government is too involved. Opponents of limited government cite that increased discretion at the local level leads to increased inequality, intra- and inter-district, as local authorities are so narrowly focused on local demand that varying standards are developed across boundaries.⁹⁵ Wealth and opportunity disparities also become factors when geographic challenges and resources are taken into account.

With polarizing debate of whether the government should be a producer of education or intervene at all, those who agree with the tenets of public choice advocate for limited government intervention in education production to the greatest extent possible, the decentralization of decision making that leads to the creation of markets, the grouping of individuals in the smallest units possible and based on similar interests/demands on the market in order to reduce interdependence costs. Therefore,

⁹³ Arguably, however, constraints are put on the government by decisions made by voters at the ballot box. Theoretically, if the government is not producing as the public desires, individuals are able to make their demands clear through who is granted decision-making authority.

⁹⁴ Devine at 160.

⁹⁵ Stiglitz at 414.

the government should only focus on areas that are barred from natural correction or intervention in the market. In the private sector market, individual decision-making only has an effect on the buyer and possibly the seller; however, decisions in education affect not only the individual, but also the country as a whole. Just as the Figure 2-2 depicts,⁹⁶ a private decision made by a family for where a child attends school may be based on proximity and cost of attendance. That family may move to another location for access to better schools or may choose to enroll the child in a private school. That decision has a potential effect on local property taxes and the allocation of funds for the education of that child. The state is affected by the decisions of many families and individual taxpayers as sales and income taxes attribute to some of the costs of education in the state and the benefit conferred to the state through the public good of an educated and skilled workforce. Finally, the decisions of taxpayers, families, communities at large, and state legislatures have an effect on the nation as ideals are passed from one generation to the next and the nation competes with other nations in talent and knowledge. Taking into account these and other social interdependence costs of education, public choice theorists offer ways to minimize costs and maximize the utility and function of goods in the market, as applied to education.

Decentralization is one way of enhancing the efficiency of education by shifting the authority of education to local communities, districts, schools, and principals.⁹⁷ Proponents argue that this creates a stronger commitment of parents and the local community to education as decision-making is more sensitive to local needs. In a decentralized setting taxpayers, parents, and interested parties are able to voice their

⁹⁶ Supra note 66.

⁹⁷ Buchannon and Tullock at 110.

concerns at school district meetings and directly to authorities on the school level. Access to government officials on the state and federal level tend not to be as easily accessible due to the magnitude of their constituencies and distance from the nucleus of a community. Furthermore, decentralization of authority furthers the tenets of public choice theory in that proponents argue that governmental responsibility should occur in the smallest units possible, and decentralization allows education decision making to occur at the local level.⁹⁸ Local communities tend to coalesce around common characteristics, which can be beneficial in reducing interdependence costs in educational decision-making as it costs less to compromise in homogenous groupings. Moreover, the decentralization of authority creates more varied markets between school districts and schools, creating a more market-based economy from which consumer parents and students have to choose.

Critics of public choice Theory applied to education argue that it only functions with the self-interested subject and does not take into account other variables, such as the individual as an altruist who is not only focused on self gain. Additionally, opponents of public choice theory as applied to education propose that the education system should be viewed less from an economic standpoint and more as a complex system based on cultural formations and societal demands.⁹⁹ This idea is evidence in Devine's critique of education from the perspective of the market or public choice standpoint, as she states, "For, saddest of all, it is the market itself, in a world focused on norms and

⁹⁸ Stiglitz at 420.

⁹⁹ Devine at 165.

efficiency, that poses the biggest threat to the ability of teachers to “deliver the curriculum”- that is, to conform and perform.”¹⁰⁰

Summary

Examining the structures of school governance that vary across the country, one is able to analyze, explain, and predict the results of decision-making based on the theoretical constructs for why governance structures exist and the arguments for or against them. Public choice theory is one that attempts to explain decision-making framework and where authority is concentrated. Public choice theory emerged as a way to explain political behavior based on market theory concepts.¹⁰¹ Market theory is the economic concept that there are scarce goods that are rationed through markets. Consumer demand for those goods factor into the market based on the idea that as price increases, demand tends to decrease. Producers are free to enter the market to supply consumers with what they demand. However, increased supply leads to a decrease in price. Perfect competition is reached when there are enough producers in the market that price is not affected. Theoretically, perfect competition is when a consumer has multiple options of producers for his or her demand. Competition in the market improves the good or service provided and drives down the price based on producers vying for the consumer to choose their product.¹⁰²

When the market experiences imperfect competition, the government has either been involved or will become involved in the market. Monopolies, insufficient

¹⁰⁰ Id at 166.

¹⁰¹ James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI. (1962), 13.

¹⁰² Joseph Stiglitz & Jay Rosengard, *Economics of the Public Sector*. W.W. Norton Company, Inc. (New York, 2015) 14.

production of goods and services, and imperfect information are examples of imperfect competition and market failures. Externalities are another cause for government intervention, due to the fact that when people do not experience the full effect of their positive or negative behaviors, they will either continue to engage in them to the detriment of others or choose not to engage in positive actions that might help others. In order to address this type of market failure, the government will typically fill the gap.¹⁰³

With the aim of the government to address market failures, there are differing perspectives on the government's place in the market. While market failure provides a rationale for government intervention, it does not necessarily provide a basis for government production of goods and services. The Government will take over production at times when competition in the market is not viable, when there is a threat that one or a few producers will exploit consumers, or when the public interests of a good or service are multifaceted. Conversely, there are arguments against the intervention of government as a producer as it can be inefficient and is not free from its own failures. Government may have limited information in a certain area, limited control over private markets, limited control over bureaucracy, and the political process itself.¹⁰⁴

From market theory, public choice theory attempts to explain the political process and the collective choice of individual actions. Viewing people individually, public choice theory explains how conflicting individual interests are reconciled in collective choice. In examination of political structures through public choice theory, one may be able to determine whether modifications to constraints or the government will lead to a better or worse state. When determining if collective action was necessary, the

¹⁰³ Id.

¹⁰⁴ Id.

cost of decision-making and external costs must be considered. Decision-making costs are the costs of participating in decisions where two or more people must come to an agreement. External costs are costs that private behavior imposes on the decision-maker. The sum of decision-making costs and external costs equal the costs of social interdependence and should be reduced or minimized to the lowest possible figure in a market system.¹⁰⁵

Buchanan and Tullock advocate that one way of reducing decision-making costs is by organizing collective activity to the smallest units possible, i.e. decision-making at the local or family level, recognizing that decisions at these levels have effects at higher levels. Another way is through decentralization allowing the individual to move freely between alternatives. Representative government is another way to reduce interdependence costs. When moving through the spectrum of representative government of individual participation to one representative for all, one should consider the rules for collective action, the rules for choosing representation, the degree of representation, and the selection basis for representation.¹⁰⁶

According to public choice theory, decision-making in education should occur at the smallest unit possible, the parent. Education should be decentralized and allow for local decision-making to limit decision-making and external costs. Public choice theorists criticize the monopoly governments have on education arguing that innovation and progress are stifled in the market. However, opponents of this view cite “pseudo markets” where individuals are not really faced with choice but are labeled as

¹⁰⁵ James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI. (1962).

¹⁰⁶ Id.

consumers in the market. Additionally, critics highlight the fact that in a private market, an individual's decision only affects that individual; however, a decision in the public market reverberates broadly. Competition amongst schools is also seen to produce waste as efforts are focused more on winning the competition and profit-conservation, than on student achievement.¹⁰⁷

¹⁰⁷ James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI. (1962); See also Nesta Devine, *Education and Public Choice: A Critical Account of the Invisible Hand in Education*. Praeger Publishers. Westport, CT (2004).

CHAPTER 3 SCHOOL GOVERNANCE AND CHARTER SCHOOLS

Introduction

The delivery of education has grown to include a variety of services and programs with a focus on individualized instruction and supports for children.¹ With this attention on catering education to individual needs, debate regarding the governance and decision-making authority of education centers on whom can best provide those services and who is responsible for funding them. Proponents of the free market and public choice argue that market demands should drive who is responsible for providing for and funding education, while opponents argue that government intervention and production of education is necessary for equity and access. Historically and currently, the structure of education hinges on governmental decision-making authority, and as some would deem, governmental monopoly in the education market.² Overtime, there has been a major push for decision-making authority to be based on free market forces, with less governmental control and the ability for decisions regarding education to be made by smaller units. This perspective has driven the school choice movement and led to conflicts amongst educational experts.

The Current State of Education Governance

The Constitution of the United States does not address the topic of education. Therefore, the Tenth Amendment dictates that any power that is not given to the federal

¹ The idea of the “common school,” as influenced by Horace Mann, was meant to develop a “community with a uniform body of knowledge, values, and attitudes” that would come through a common, uniform educational experience. This idea led to a “one best” method to educate children that has over time diminished, leading to a more contemporary method of offering a myriad of programs. See 30 Ariz. St. L.J. at 1055.

² Brittany Larkin, *The Effects of Autonomy on Florida Public Schools: A Disaggregated Comparison of Charter Schools and Traditional Schools*, PhD diss., University of Florida, 2014, 30.

government through enumeration in the Constitution is given to the states or the people.³ Even with this principle, the federal government has retained some authority in education, in addition to state and local entities that have decision-making authority. The United States Department of Education (USDOE), has published that it intends to operate as an “emergency response system” that fills gaps in “state and local support for education when critical national needs arise.”⁴ State Boards of Education are intended to set policy and govern school systems within a state, deriving authority from state constitutions and statutes. Local school districts are intended to address needs and operate local schools within its borders deriving authority from delegated power from the state, typically codified in state statute and constitutions.⁵

Federal Authority

Although education is not captured in the Constitution, there are federal protections for educational actors including students, teachers, administrators, and families. Educational actors are protected against discrimination based on race, ethnicity, gender, religion, or disability, as well as through rights that are afforded to ordinary citizens that are codified in the Constitution, generally.⁶ These protections are

³ U.S. Const. amend. 10.

⁴ US Department of Education website. *The Federal Role in Education*. Retrieved from <http://www2.ed.gov/about/overview/fed/role.html>.

⁵ FindLaw. *The Roles of Federal and State Governments in Education*. Retrieved from <http://education.findlaw.com/curriculum-standards-school-funding/the-roles-of-federal-and-state-governments-in-education.html>.

⁶ The Fifth and Fourteenth Amendments protect against discrimination and afford due process rights. Amendment V reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV reads:

regulated through the judiciary when cases are brought before the court and other entities, such as complaints that are filed with the Office of Civil Rights, housed in the United States Department of Education (USDOE). The protections transcend one's role in education, whether as a student, teacher, parent, and so on; and level of education, whether at the national, state, or local level. Through these protections, the federal government is able to monitor and have some ability to offer 'suggestions' in regard to education policy. For example, in 2016 President Obama, in conjunction with the United States Justice Department and the USDOE, issued a directive for every public school to allow transgender students to use restrooms that match their gender identity.⁷ The basis of this declaration was in Title IX of the Education Amendments of 1972, sex discrimination laws and the federal government's interpretation of it.⁸ The purpose of this statute was to prohibit discrimination on the basis of sex in federally funded education programs and activities. While the directive did not carry the 'force of law,' it did implicitly mandate that schools obey the directive or risk loss of federal aid or lawsuits.⁹ This policy issue illustrated the presumed authority of the federal government to make decisions and was a highly contentious topic as either side of the argument

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Additionally, students and educational personnel are afforded other, arguably diminished, Constitutional rights in the educational setting. See Amendment I- Freedom of Religion and Speech. See *also*, Amendment IV- Search and Seizure.

⁷ U.S. Department of Justice and U.S. Department of Education, Dear Colleague Letter: Transgender Students, May 13, 2016. Retrieved from <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

⁸ Title IX, 34 C.F.R. § 106.1; 20 U.S.C. § 1681 reads:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

⁹ Dear Colleague Letter: Transgender Students at 2.

debated the reach, or overreach, of the federal government.¹⁰ This debate is further evidenced by the withdrawal of the “statements of policy and guidance” contained in the directive by the Departments of Education and Justice under the administration of newly elected President Trump, at the start of his term.¹¹

Another way that the Federal Government maintains some authority in educational decision-making is through its spending power. Arguably, the amount of money spent on the federal level mirrors the level of its involvement and its authority based on accountability for funds that are allocated to states for educational purposes. In order to receive federal funds, states and schools must adhere to the laws, rules, and regulations enacted by Congress and/or promulgated by the USDOE. In 1972 Congress established the Department of Education with the expressed purpose to promote the general welfare of the United States- to “help ensure that education issues receive proper treatment at the Federal level” and “enable the Federal Government to coordinate its education activities more effectively.”¹² Congress further outlined that the USDOE was meant to:

- (1) To strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual;
- (2) To supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education;
- (3) To encourage the increased involvement of the public, parents, and students in Federal education programs;
- (4) To promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information;

¹⁰ See e.g., *Texas v. United States*, WL 7852330 (N.D. Tex. Aug. 21, 2016).

¹¹ U.S. Department of Justice and U.S. Department of Education, *Dear Colleague Letter*, February 22, 2017. Retrieved from <http://i2.cdn.turner.com/cnn/2017/images/02/23/1atransletterpdf022317.pdf>.

¹² 20 U.S.C.A. § 3402 (West). (Pub.L. 96-88, Title I, § 102, Oct. 17, 1979, 93 Stat. 670).

- (5) To improve the coordination of Federal education programs;
- (6) To improve the management and efficiency of Federal education activities, especially with respect to the process, procedures, and administrative structures for the dispersal of Federal funds, as well as the reduction of unnecessary and duplicative burdens and constraints, including unnecessary paperwork, on the recipients of Federal funds; and
- (7) To increase the accountability of Federal education programs to the President, the Congress, and the public.¹³

Through these functions and purposes of the USDOE, the federal government maintains involvement in educational governance, particularly through the development, maintenance, and accountability of Federal Education Programs (FEP).

Congress typically receives guidance from the USDOE, education advocates, and state and local education agencies when deliberating to enact education law and policy. Congress passes policy through Congressional Acts that are regulated through the USDOE and passed to states and local school districts to implement. The federal government did not start issuing education policy until the late 1950s and 1960s under the Johnson administration in the “Great Society Program.”¹⁴ In response to growing national concerns regarding literacy rates, global competitiveness with the Soviet Union in the Space Race, and education inequality, the role of the federal government and its involvement in education increased. In 1957 Congress passed the National Defense Education Act,¹⁵ aimed at improving US competitiveness in math, science, and foreign language learning. In 1965, the Elementary and Secondary Education Act (ESEA)¹⁶ was

¹³ *Id.*

¹⁴ The Great Society Program was considered one of the largest reform agendas since Roosevelt’s New Deal, which encompassed many initiatives to address Johnson’s declaration of a “War on Poverty”. Acts such as the Wilderness Protection Act, the Voting Rights Act, Immigration Act, and most notably the Elementary and Secondary Education Act was passed.

¹⁵ United States. National Defense Education Act of 1958, Pub L 85-864, as Amended by the 88th Congress (1964).

¹⁶ Elementary and Secondary Education Act of 1965, Pub L. No. 89-10, 79 Stat. 27 (1965).

passed with the intention of addressing unequal educational opportunities for the nation's children. The ESEA was the first federal education policy to use federal spending power, tying federal funds to special need areas such as low income and low achieving students. With federal "strings attached" schools benefiting from the funds had to follow the decisions and guidance issued by the federal government.

Since its initial use of spending power that circumnavigated the Tenth Amendment, Congress has passed numerous acts that impose regulations for access to federal funds, which continues to place some decision-making authority in the role of the federal government. For example, after the federal government released *A Nation at Risk: The Imperative for Educational Reform*¹⁷ in 1983, many state legislatures were pressured to increase standards and enact state policies that were more top-down and restrictive of local decision-making authority.¹⁸ The 1994 enactment of the Improving America's Schools Act codified a trend toward standards-based reform and simultaneous objection to the expanding role of the federal government in education.¹⁹ However, in arguably the most prevalent example of federal involvement in public schools, the No Child Left Behind Act (NCLB) of 2001 was passed.²⁰ In 2009, the American Reinvestment and Recovery Act (ARRA) provided federal aid in more than \$90 billion to education, which went to local school districts to prevent layoffs and the

¹⁷ *A Nation at Risk: The Imperative for Educational Reform*, National Comm'n on Excellence in Education (April 1983), retrieved from <http://www2.ed.gov/pubs/NatAtRisk/index.html>.

¹⁸ See Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 Vill. L. Rev. 297, 306 (2008).

¹⁹ *School Governance and Democracy* at 306. See Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994).

²⁰ *Id.* The Act requires schools to test students annually in core subjects. Through this act, students that perform below their state's standards for two years must be offered tutoring, after school programs, or the opportunity to move to another higher performing school, at no cost to the student. Furthermore, schools that do not meet standards may be required to replace teachers who are not performing up to par, modify the curriculum, or restructure the school.

modernization of schools, but also dictated the reforms states needed to initiate in order to receive the funds.²¹ The Race to the Top grant, under the ARRA, required states to enact policy and reforms in four areas in order to receive federal grant money. The four areas included:

- Adopting standards and assessments that prepare students to succeed in college and the workplace and to compete in the global economy;
- Building data systems that measure student growth and success, and inform teachers and principals about how they can improve instruction;
- Recruiting, developing, rewarding, and retaining effective teachers and principals, especially where they are needed most; and
- Turning around our lowest-achieving schools.²²

After years of growing dissatisfaction with the standardization of education, Congress passed the Every Student Succeeds Act (ESSA), replacing NCLB and reportedly allowing more state control of schools.²³ A hallmark of the act was student performance targets and accountability measures that are now state driven and developed.²⁴ While the federal government is not technically able to legally force state legislatures to submit to the previous acts, all fifty state legislatures and state education agencies cooperate with the federal government in order to continue receiving federal education funding, allowing the federal government to continue to play a vital role in education governance.

²¹ *Id.* This Act was enacted as a response to the “Great Recession” as a means to stimulate the economy and improve education across the nation. In response to the funds that were made available, the USDOE developed the Race to the Top Initiative and led to the development of 21 recovery programs that address areas ranging from data systems, to innovation, teacher quality, and special education.

²² US Department of Education. *Race to the Top Fund*. Retrieved at <http://www2.ed.gov/programs/racetothetop/index.html>.

²³ See Every Student Succeeds Act (ESSA), Pub Law 114-95, 129 Stat. 1802. See also Dept. of Education, <http://www.ed.gov/essa>. Other priorities of this Act include College-and –Career Readiness standards, annual assessments of all students’ learning, innovation, teacher reward systems, Pre-K education, and replication of high-quality charter schools.

²⁴ *Id.*

State Authority

State authority and governance over education has developed and been clarified over time. In 1973, *San Antonio Independent School District v. Rodriguez* distinguished the role of federal and state government in education.²⁵ A constitutional challenge to the State of Texas school finance system led the court to opine that the burden of education rested on states rather than the federal government, deciding that “no other state function is so uniformly recognized as an essential element of our society’s well-being.”²⁶ In *Rodriguez*, the Court focused less on the authority of the legislature to develop a school-funding scheme, offering the Court’s interpretation of the state’s constitutional provision as a mandate to provide for the state’s education system.²⁷ Following *Rodriguez*, the 1979 Congress made clear that the USDOE was meant to protect the rights of state and local governments, as well as public and private educational institutions in regard to education policies. In its establishment of the USDOE, Congress outlined the governance authority of state and local entities by stating,

It is the intention of the Congress in the establishment of the Department to protect the rights of State and local governments and public and private educational institutions in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments and institutions over their own educational programs and policies. The establishment of the Department of Education shall not increase the authority of the Federal Government over education or diminish the responsibility for education, which is reserved, to the States and the local school systems and other instrumentalities of the States.²⁸

²⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

²⁶ *Id* at 112.

²⁷ Kent Weeks. (2008). *Responsibilities, Duties, Decision-Making, and Legal Basis for School Board Powers*. Education Encyclopedia. Retrieved from <http://education.stateuniversity.com/pages/2391/School-Boards.html>.

²⁸ 20 U.S.C.A. § 3403(a) Rights of local governments and educational institutions- contained in the enabling statute for the establishment of the USDOE.

Congress recognized the importance of state and local level governance, reserving the responsibility of education to the state and local level.

State constitutions include provisions for education that establish the education governance structure within each state.²⁹ These provisions typically grant authority to establish state departments of education and pass laws regarding how schools operate. The role of state departments of education have developed and increased over time. During America's earliest history, education was not of major importance as settlers were more concerned about surviving and developing a way of life rather than setting up a governance structure.³⁰ Even though parents and the church were primarily responsible for education, state legislatures did show concern regarding education as evidenced by the Massachusetts legislature passing the first school law in 1642, requiring towns to determine if children were taught to read in order to understand religion and learn a trade.³¹ As the colonies became more populated, formal attention to education increased and state legislatures in Connecticut, Maine, New Hampshire, and Vermont passed laws requiring compulsory education for morality purposes.³² The time around the 1776 War of Independence inspired the desire for an "enlightened government to secure the freedoms for which Americans fought."³³ During this time, Thomas Jefferson advocated for education as a way to end ignorance for common people, as he felt that citizens should have the ability to elect good leaders through

²⁹ http://cpjustice.org/public/page/content/cie_faq_levels_of_government

³⁰ Faith Crampton, R. Craig Wood & David Thompson, *Money and Schools 6th ed.*, Rutledge, NY, 2015, 36.

³¹ *Id.*

³² *Id.*

³³ *Id.*

education.³⁴ The desire for vocational schooling then developed based on the increase in immigrants and rise of industry necessitating skilled labor. Some industrialists saw education as a means for developing these skills in workers. As immigrant numbers continued to increase and Americans in rural areas migrated to industrial centers, social problems developed and leaders such as Horace Mann and Henry Barnard argued that education was an economic need to address these issues.³⁵ Overtime and based on national perspectives, education evolved to meet societal needs for reform and social justice due to child labor issues and massive immigration. Retaining the vestiges of school purpose, education in the United States is based on morality, democracy, economics, and equality and has had an impact on the structure of school governance.³⁶

Thompson, Crampton, and Wood note that people have a tendency to cluster on the basis of personal characteristics, such as religion, politics, or ethnic heritage.³⁷ Based on this grouping phenomenon and the purposes for which schools were deemed, the governance structure across the United States is and was varied. Colonizers settled in America with varying beliefs about education and how it should be governed. For example, New England was colonized as a religious state with strong regulation and taxation for schools. Whereas, colonies such as Maryland, New Jersey, and Pennsylvania settled based on religious values and less state control. Other colonies saw public schools as charity and did not offer tax support or governance. Westward expansion led to many other varying governance structures and the proliferation of

³⁴ Id.

³⁵ Id at 37.

³⁶ Id at 38.

³⁷ Id.

schools across the nation.³⁸ However, in 1870 there were a total of 116,312 schools, which dropped overtime to 98,706 in 2009. Similarly, the number of school districts decreased from 117,108 in 1940 to 13,809 in 2009.³⁹ The drop in these numbers likely signifies the increase in state control.⁴⁰ While the number of schools has decreased in the United States, education is still highly state specific and there are organizational differences between and within states.

Although highly state specific, the historical development of state control of education can be traced. The years between 1918 and 1932 saw a strengthening of state departments of education when compulsory attendance laws became universal because it became apparent that local education varied greatly within states, leading to inequities in education. These inequities led to stronger state education agencies that could determine minimum standards and programs across states.⁴¹ 1932 to 1953 was a time of increased demand for equal education, which led to the expansion of services and supports of state departments of education to address the needs of rural schools, as many communities could not rely on local taxes to pay for schools.⁴² State financing of education also became a focus as a means to provide a minimum educational program to all children. State financing increased from 20 percent in 1930 to 40 percent in 1950, as state oversight and involvement in education increased.⁴³ During the years between 1953 and 1983 the federal influence in education rose significantly. In

³⁸ Id.

³⁹ Id at 40-41.

⁴⁰ Id at 39. The authors submit that a decrease in the amount of school districts demonstrates increased state control through the consolidation of districts under the purview of the state.

⁴¹ William Roe & Carolyn Herrington. *State Departments of Education- Role and Function*, StateUniversity. Retrieved from <http://education.stateuniversity.com/pages/2447/State-Departments-Education.html>.

⁴² Id.

⁴³ Id.

response, much of the functioning of state departments turned to the administration of federal programs. Due to insistent demands on educational leaders and a perceived lack of capacity, Title V of the Elementary and Secondary Education Act of 1965⁴⁴ included grants for the development of programs to strengthen the capacity of state departments of education. Currently, state departments of education have four major functions: regulation, operation, administration of special services, and leadership of state programs.⁴⁵

Due to federal and local push for school reform, citizen input and mounting litigation regarding the finance and governance structure of education, state legislatures were led to incorporate changes that have increased centralization in education governance. Based on stakeholder input and political pressures, each of the fifty state legislatures has adopted some form of acknowledgement of its responsibility, codified in state constitutions and statutes. As evidenced in various state constitutions and statutes, states vary in the governance structure of education. Generally, states have a state-level policy board, which is often referred to as the state Board of Education (SBE). The function of this entity is to develop and approve policies for state education systems. Each state also typically has a chief state school officer (CSSO), identified as the superintendent of schools or commissioner of education, who is responsible for carrying out policies and directs the work of the state Department of Education. The filling of these positions commonly occurs in four different ways: the governor of a state appoints members of the SBE and the board chooses the CSSO; the governor appoints

⁴⁴ 20 U.S.C. 70.

⁴⁵ William Roe & Carolyn Herrington. *State Departments of Education- Role and Function, StateUniversity*. Retrieved from <http://education.stateuniversity.com/pages/2447/State-Departments-Education.html>.

the SBE and the CSSO is elected by the citizens of the state; the governor appoints the SBE and the CSSO; or the citizens of the state elect the SBE and the board appoints the CSSO.⁴⁶

State education agency governance discussions focus on state accountability with the establishment of standards and the development of assessments. These tools are typically used by state legislatures to hold school districts accountable and determine which schools are doing well and which schools are in need of intervention. One example of state educational oversight and governance is the development of the Common Core State Standards (CCSS) of 2010. While some view the development of CCSS as a response to state legislatures' desires to receive federal Race to the Top grant funds, state governors worked together with state-level education departments and experts to derive the CCSS in effort to ensure consistent educational standards across states and focus on post-secondary college or vocational tracks.⁴⁷ A joint project between the National Governors Association and the Council of Chief State School Officers, the standards focused on English language arts and math. At its inception, forty-four state legislatures chose to participate in the CCSS; however, many opted out of participation when its implementation was met with disdain in various states.⁴⁸

Local Authority

It is the responsibility of each state legislature to enact laws, fund, and create the constructs that govern education. Even though power officially resides with the states

⁴⁶ Asenith Dixon, *Focus on Governance in K-12 Education: State-Level Models*, Southern Regional Education Board (2008). Retrieved from http://www.sreb.org/sites/main/files/file-attachments/08s10_focus_governance.pdf. 40 states use one of these models.

⁴⁷ *Id.*

⁴⁸ *Id.*

per the US Constitution, concerns about efficiency and local involvement are addressed through the delegation of authority from the executive and legislative branches to local school districts. Although the authority of local boards may vary by state, all fifty states except Hawaii have a two-tiered governance structure between the state and local powers.⁴⁹ Education local control has been defined as:

(1) (T)he governing and management of public schools by elected or appointed representatives serving on governing bodies, such as school boards or school committees, that are located in the communities served by the schools, and (2) the degree to which local leaders, institutions, and governing bodies can make independent or autonomous decisions about the governance and operation of public schools.⁵⁰

The Supreme Court in *Rodriguez* is an example of the Court showing favoritism for local control.⁵¹ While *Rodriguez* placed the responsibility of education with the state, the Court also highlighted local control when it wrote that local control “facilitates the greatest participation by those most directly concerned, enables communities that wish to devote more money to the education of their children to do so, and provides opportunity for experimentation, innovation, and healthy competition for education excellence.”⁵²

Other education scholars have argued that school board authority is derived from the doctrine of “in loco parentis,” meaning that school board power is derived from parental authority as the school acts as the parent while the child is in school.⁵³ In

⁴⁹ Local Control (2014). *The Glossary of Education Reform: For Journalists, parents, and community members*. Retrieved from <http://edglossary.org/local-control/>.

⁵⁰ *Id.*

⁵¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

⁵² *Id.* at 47.

⁵³ Stephen Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373 (1969).

Richardson v. Braham, the Supreme Court of Nebraska upheld the idea of in loco parentis by stating:

During school hours ... general education and the control of pupils who attend public schools are in the hands of school boards, superintendents, principals and teachers. This control extends to health, proper surroundings, necessary discipline, promotion of morality and other wholesome influences, while parental authority is temporarily superseded.⁵⁴

While the concept of 'in loco parentis' still has its influence in regard to student discipline and first amendment issues, modern school boards are not typically considered private actors that work on behalf of parents, but as public actors operating under delegated authority.⁵⁵

State legislatures typically delegate responsibility for the operation of schools to local entities. States create local school districts that are governed by local school boards responsible for local educational decision-making and administration.⁵⁶ There are approximately 15,000 local school boards that account for more than one-sixth of all American local governments.⁵⁷ State legislatures delegate power to school boards for efficiency purposes and localized decision making. The powers that are delegated are legislative as they set local school board policies, executive as they provide oversight and are ultimately accountable for the school district operations, and quasi-judicial in

⁵⁴ *Richardson v. Braham* 125 Neb. 142, 249 N.W. 557, 559 (1933).

⁵⁵ Stephen at 385. See e.g., *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

⁵⁶ *Id.* According to CP Justice, 96% of school boards are elected by popular vote.

⁵⁷ Executive Summary: School Boards and the Power of the Public. Center for Public Education.

making personnel, student, and other decisions.⁵⁸ Overall, the board is supposed to represent the interests of the local community as it relates to education issues.

Many state constitutions provide for school district authority and further delineate responsibilities by statute.⁵⁹ Local school boards are tasked with establishing curricula, hiring personnel, and deciding when a school should be closed, consolidated, or constructed. Another function of local school boards is to make policies for the sound operation of a school district. This includes setting long and short-term goals, determining pupil assessment systems, choosing curricula, and developing budgets from revenues based on the assessment of local property taxes and state appropriations.⁶⁰ Administratively, local school boards provide operational oversight, adopt and execute standards, and assess and report progress to stakeholders.⁶¹ Local school boards are also a forum for citizen input as well as a body that advocates on behalf of the School District in local government and at the state level.⁶²

Other scholars have noted that local control should include and be based on parental control of education.⁶³ Viewing school board elections and the concept of boards making decisions based on “constituent desires” as passive representation, active representation is lauded as a way to increase the value of education in the United

⁵⁸ Kent Weeks. (2008). *Responsibilities, Duties, Decision-Making, and Legal Basis for School Board Powers*. Education Encyclopedia. Retrieved from <http://education.stateuniversity.com/pages/2391/School-Boards.html>.

⁵⁹ *Id.*

⁶⁰ *Id.* at 248.

⁶¹ *Id.*

⁶² *Id.*

⁶³ John Evans, *Let Our Parents Run: Removing the Judicial Barriers for Parental Governance of Local Schools*, 19 Hastings Const. L.Q. 963 (1992). Parental decision making power is distinguished from community-at large power to make decisions as the author notes that some communities include non-parental voters (such as senior citizens) who may not have the same stake in the decisions that are made as a parent would.

States.⁶⁴ The courts have also recognized parental interest in educational authority under the Fourteenth Amendment's Due Process Clause, which protects parent's liberty to control their children's education, and the First Amendment freedom of religion clause.⁶⁵ Under the Due Process Clause, *Meyer v. Nebraska* found a state law prohibiting foreign language instruction unconstitutional stating "corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."⁶⁶ In *Pierce v. Society of Sisters* the Court decided that it was unconstitutional for the state to require children to attend public schools versus private or parochial schools.⁶⁷ The Court based their decision on the "liberty of parents and guardians to direct the upbringing and education of children under their control."⁶⁸ Another example of the Courts perspective of parental control is in parents' constitutional interests that outweigh the state's interest in compelling children to attend school, particularly when those interests conflict with religious and fundamental beliefs.⁶⁹ Proponents of increased parental control look to voucher systems and school boards that are run or selected by parents as means to better local decision-making. According to the National Conference of State Legislatures, voucher systems are state-funded scholarships that allow students to attend private or other public schools versus their assigned public schools.⁷⁰ Thirteen states and the District of Columbia have voucher programs, commonly available to students with disabilities, students from low-

⁶⁴ Id at 970.

⁶⁵ U.S. Const. amend. I and XIV

⁶⁶ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁶⁷ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁶⁸ Id.

⁶⁹ *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

⁷⁰ *School Choice: Vouchers. National Conference of State Legislatures*. Retrieved from <http://www.ncsl.org/research/education/school-choice-vouchers.aspx>.

socioeconomic households, and students who attend poor performing schools.⁷¹ Voucher system proponents argue for parents' ability to make decisions for their children and for public funds to follow children.⁷² Opponents of increased parental control view education as a wider societal concern, particularly as tax money is used to fund voucher programs that incorporate money from all tax contributors, not just parents.⁷³

Charter Schools

The School Choice Movement provides a point of access for the nexus of authority and governance between various decision-making entities as scholars debate whether choice should be an option and if it is an option, whom has the authority to decide which choice options will enter the education market. According to the Friedman Foundation, "school choice allows public education funds to follow students to the schools or services that best fit their needs—whether that's to a public school, private school, charter school, home school or any other learning environment parents choose for their kids."⁷⁴ Charter schools are one form of school choice available to children and families in the United States. While charter schools were initially developed to be laboratories of innovation options for children and their families, the evolution of charter schools and the school choice movement in general have changed to a focus on markets, efficiency, and competition. Minnesota enacted the first charter school laws in

⁷¹ See e.g., Fla. Stat. § 1002.39, John McKay Scholarships for Students with Disabilities Program (2001); O.C.G.A. Title 20 Chapter 2 Article 33, Georgia Special Needs Scholarship Program (2007); IC 20-51-4, Indiana Choice Scholarship Program (2011).

⁷² *School Choice: Vouchers*. National Conference of State Legislatures, retrieved from <http://www.ncsl.org/research/education/school-choice-vouchers.aspx>.

⁷³ *Id.*

⁷⁴ EdChoice, *What is School Choice?*, retrieved from <https://www.edchoice.org/school-choice/what-is-school-choice/>.

1991.⁷⁵ Since then there has been a proliferation of charter schools that have been authorized across the nation. As of 2017, forty-three states and the District of Columbia have passed charter school legislation in varying formats.⁷⁶

Charter schools are public schools that are created by contract and enjoy more autonomy than traditional public schools. The Consortium for Policy Research in Education, under commission of the United States Department of Education, published a report that identified five of the predicted beneficial charter school outcomes when charter schools were first conceptualized.⁷⁷ Similar to widely held belief, the enactment of charter school law across the nation was intended to lead to the creation of new schools that would expand the number and variety of public schools available to parents, impacting the education market economy. Charter schools were to have more autonomy and flexibility than district-operated public schools based on waivers from state and local laws and regulations. Additionally, due to this autonomy, charter schools were meant to be innovative and high quality in regard to curriculum, school organization and governance. By virtue of autonomy and the effects of supply and demand, charter schools were supposed to be held more accountable than district-run schools through meeting the demands of parents and students and performance contracts that charter schools entered into. Finally, the mix of autonomy, innovation, and accountability was to lead to “improved student achievement, high parental and student satisfaction, high teacher/employee satisfaction and empowerment, positive effects on

⁷⁵ Minn. Stat. Ann. §124D.10.

⁷⁶ The Center for Education Reform, *Choice & Charter Schools* (2017), retrieved from <https://www.edreform.com/issues/choice-charter-schools/laws-legislation>.

⁷⁷ Katrina Bulkley & Jennifer Fisler, *A Decade of Charter Schools: From Theory to Practice*, Consortium for Policy Research in Education Policy Briefs, University of Pennsylvania.

the broader system of public education, and positive or neutral effects on educational equity, including better services for at-risk students.”⁷⁸ There is widespread debate regarding whether charter schools have met these objectives over the past twenty-five years.

Historical Development of Charter Schools

Milton Friedman’s concepts of capitalism and free enterprise systems for the betterment of society have been noted in the school choice movement. In his 1955 writing he stated, “(S)o that the record of history is absolutely crystal clear, that there is no alternative way so far discovered of improving the lot of the ordinary people that can hold a candle to the productive activities that are unleashed by the free-enterprise system.”⁷⁹ Free enterprise is defined as the “freedom of private business to organize and operate for profit in a competitive system without interference by government beyond regulation necessary to protect public interest and keep the national economy in balance.”⁸⁰ Applied to school choice, free enterprise allows the market to determine which schools meet the needs of the consumer, who is ultimately the student. Retrospectively however, the establishment of charter schools was a means to find different ways of educating children and fulfill a need to bridge gaps in education.

As one of the types of school choice, the first idea regarding charter schools came about when Ray Budde, an educator from New England, suggested that teachers be granted contracts by their local school boards in order to explore different and new

⁷⁸ Id.

⁷⁹ EdChoice, *What is School Choice?*, retrieved from <https://www.edchoice.org/school-choice/what-is-school-choice/>.

⁸⁰ Merriam-Webster online, retrieved from <https://www.merriam-webster.com/dictionary/free%20enterprise>.

approaches to educating children in the 1970s.⁸¹ He captured this idea in his paper, *Education by Charter*.⁸² While Budde's ideas did not receive much traction in the education reform world due to perceived infeasibility of his ideas, the restructuring of schools began to seem more feasible after the publication of *A Nation at Risk* and the urgent need to address education deficiencies.⁸³ Teacher-led laboratories began to dominate reform discussions in the 1980s, based on the idea that these labs would experiment with new instructional practice, be rigorously evaluated, with the successful lab schools serving as models for other public schools. Reviving the ideas of Budde, Albert Shanker, then president of the American Federation of Teachers, proposed this idea of autonomous schools led by teachers. After Minnesota passed the first charter school legislation in 1991, California followed suit in 1992 with its version of charter school law, while the first charter school, City Academy Charter School, opened its doors in Minnesota.⁸⁴ From 1991 to 2014, more than 6,500 charter schools have opened their doors to students.⁸⁵

Recent developments in charter schools include the sub-contracting of Charter Management Organizations (CMO), nonprofit companies that manage two or more charter schools and Education Management Organizations (EMO), for-profit

⁸¹ Illinois Network of Charter Schools, *History of Charter Schools*, retrieved from <https://www.incschools.org/about-charters/history-of-charter-schools/>.

⁸² Ray Budde, *Education by Charter: Restructuring School Districts*, Regional Laboratory for Educational Improvement of the Northeast & Islands, Andover, MA. (1974).

⁸³ National Commission on Excellence in Education. *A Nation At Risk: The Imperative for Educational Reform* (1983).

⁸⁴ Claudio Sanchez, *From A Single Charter School, A Movement Grows*. Around the Nation. (2012). Retrieved from <http://www.npr.org/2012/09/02/160409742/from-a-single-charter-school-a-movement-grows>.

⁸⁵ U.S. Department of Education, National Center for Education Statistics. (2016). *The Condition of Education 2016* (NCES 2016–144), Charter School Enrollment. This number represents the total number of charter schools open during the 2013-2014 school year. It does not capture the number of charter schools that have opened and subsequently closed between 1991 – 2014.

organizations that manage charter schools. Examples of CMOs include KIPP, Uncommon Schools and Achievement First, whereas entities such as Charter Schools USA and Imagine Schools are EMOs. In 2011, Congress proposed legislation for the replication and expansion of quality charter schools such as the All Students Achieving through Reform Act and the Empowering Parents Through Quality Charter Schools Act.⁸⁶ According to the National Alliance for Public Charter Schools, these entities play an important role in the replication and scalability of the charter school movement as they create economies of scale and encourage collaboration between schools that build the necessary support structures for schools.⁸⁷ CMOs and EMOs are products of the free market economy of school choice as they are based on an entrepreneurial business model. Texas and California had the most CMOs, while Florida and Michigan had the most EMOs in 2010.⁸⁸

Charter School Debate

The establishment of charter schools has garnered much debate and polarizing perspectives. Some see school choice as a way for parents to choose the best options for their children whereas some view choice as a drain on the traditional public school system.⁸⁹ Charter schools have been a highly discussed topic in the school choice debate. Empirical research is conflicting on the performance of charter schools and researchers have found that charter schools tend to perform no better or worse than

⁸⁶ National Alliance for Public Charter Schools. *CMO and EMO Public Charter Schools: A Growing Phenomenon in the Charter School Sector*, Public Charter Schools Dashboard Data from 2007-08, 2008-09, and 2009-10. Retrieved from <http://www.publiccharters.org/wp-content/uploads/2014/01/.pdf>.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Preston C. Green III, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 Emory L.J. 303 (2013).

traditional public schools.⁹⁰ Just as in the traditional system, some schools do well and others do not meet the needs of children.

Supporters of charter schools argue for the desired outcomes that flow from autonomy, competition, and choice. Advocates applaud the innovation that charter school autonomy allows, which should arguably increase productivity and efficiency in the operation of schools, resulting in increased achievement across the board. Ensuring that charter schools do not have to spend time cutting through the red tape of bureaucracies and rules that traditional schools must, supporters see charter schools as having the freedom to educate children more freely.⁹¹ In this debate, there is support for the concept of less control from the government but the same or more accountability for charter schools that have more flexibility to implement educational systems and ideas that are individualized to student needs and missions.⁹²

Proponents also view the competitive environment charter schools create with traditional schools as a desired outcome of the proliferation of charter schools. From this perspective, charter schools are intended to encourage traditional schools to be responsive to parents and the public in the educational marketplace. Proponents of modern day charter schools tend to be free market supporters and argue that educational tax-payer based funds should follow the student wherever the child goes, creating a system that rewards entities (including charter schools) for providing the services desired by the market and forcing others to improve in order to stay viable

⁹⁰ *Charter Schools*, 8 Geo. J. on Poverty L. & Pol'y 505 (2001); 8 A.L.R.5th 533 (Originally published in 2000); Frank R. Kemerer & Catherine Maloney, *The Legal Framework for Educational Privatization and Accountability*, 150 Ed. Law Rep. 589 (2001).

⁹¹ 30 Ariz. St. L.J. at 1057.

⁹² *Id.*

options.⁹³ Parental or individual choice is also touted as a benefit of charter schools, in that given a list of options parents are able to choose what is best for their children and their needs. This choice allows the market to drive productivity and efficiency.⁹⁴

Conversely, some critics negatively view the charter school movement as a progression toward the privatization of public education. The privatization of education through charter school development has been argued to be a negative consequence of more choice in education that conflicts with the common goal of education as a tool of unification in society.⁹⁵ Opponents of charter schools view the system as detrimental to traditional public schools as charter schools are public schools that receive per pupil funding that arguably divert public funds away from traditional schools.⁹⁶ Additionally, constitutional challenges, typically on the state level, have been raised regarding charter schools. Various state constitutions require a “general” and “uniform” system of public education that is available to all children.⁹⁷ Cases have challenged the uniformity of charter schools, as well as the language of charter school statutes that displace local school board decision-making authority with other entities.⁹⁸ The argument of uniformity becomes an issue as within a school district students could receive varying types of

⁹³ Leonard Billet, *The Free Market Approach To Educational Reform*, The Rand Corporation (1978).

⁹⁴ *Id.*

⁹⁵ William Haft, *Charter Schools and the Nineteenth Century Corporation: A Match Made in the Public Interest*, 30 *Ariz. St. L.J.* 1023, 1025 (1998).

⁹⁶ Raymond, M. (2014). *A Critical Look at the Charter School Debate*. Education Week. Phi Delta Kappa International.

⁹⁷ See e.g., *Ariz. Const. art. XI, § 1; Idaho Const. art. IX, § 1; Ind. Const. art. 8, § 1; Minn. Const. art. XIII, § 1; N.C. Const. art. 9, §2; Or. Const. art. VIII, § 3; S.D. Const. art. VIII, § 1; Wash. Const. art. IX, § 2.* Several other state constitutions require that the system be uniform. See *Colo. Const. art. IX, § 2; Fla. Const. art. IX, § 1; Nev. Const. art. 11, § 2; N.M. Const. art. XII, §1; N.D. Const. art. VIII, § 2; Wyo. Const. art. 7, § 1;*

⁹⁸ See e.g., *Boulder Valley School District RE-2 v. Colorado State Board of Education* 217 P.3d 918, 925 (Colo. App. 2009); *Wilson v. State Bd. of Educ.*, 89 Cal. Rptr. 2d 745, 752–53 (Ct. App. 1999). See also Molly A. Hunter, *Education Finance Adequacy Lawsuits: Trends and Rulings*, *Sch. Bus. Aff.*, Dec. 2004, 24-25.

education depending on whether they attend a traditional or charter school.⁹⁹ As a counterargument to Friedman’s theory of free enterprise as it relates to education, Fiala and Owens argue that this application threatens “the fundamental notion of public education and America’s commitment to providing universal, free public education in order to improve the lives of millions of Americans.”¹⁰⁰ Adding to this sentiment, Ravitch stated:

It is unlikely that the United States would have emerged as a world leader had it left the development of education to the whim and will of the free market. But the market, with its great strengths, is not the appropriate mechanism to supply services that should be distributed equally to people in every neighborhood in every city and town in the nation without regard to their ability or political power. The market is not the right mechanism to supply police protection or fire protection, nor is it the right mechanism to supply public education.¹⁰¹

Charter schools have also been viewed negatively as they tend to have low enrollment rates of students with disabilities. However, charter school administrators have argued that they would enroll more students with disabilities if the state funded the required testing and provisions that come along with these students.¹⁰² Criticisms of parental choice also abound in that opponents of charter schools are concerned that parents may make decisions based on factors such as location and demographic breakdown of schools including race, gender, wealth, and so on, rather than the quality

⁹⁹ *Id.*

¹⁰⁰ Thomas J. Fiala and Deborah Duncan Owens, *Education Policy and “Friedmanomics”: Free Market Ideology and Its Impact on School Reform*, Education Resources Information Center (ERIC), ED510611 (2010), 25.

¹⁰¹ Diane Ravitch, *The Death and Life of the Great American School System: How Testing and Choice Are Undermining Education*, Basic Books, (2011), 241.

¹⁰² *Id.*

of services offered.¹⁰³ These factors of choice create an 'imperfect competition' that is argued to result in a decline in the quality of education offered.¹⁰⁴

Charter School Outcomes

Advocates of school choice and the free market maintain the perspective that the efficiency and productivity derived from school options will increase achievement in all schools. Proponents argue that by allowing varying alternatives in education competition increases, thereby driving up innovation and lowering costs. Opponents of school choice note the imperfect competition and failures of education markets in arguments against school choice and charter schools. Depending on one's perspective, due to imperfect competition in the education market, it is difficult to determine whether the existence of charter schools is a help or a hindrance in education as market forces are not able to purely operate. Therefore, the effectiveness of charter schools has been studied as a means to measure charter school impact. However, the results of such studies have not been conclusive, which likely bolsters the opposing viewpoints of school choice.¹⁰⁵

The National Charter School Resource Center published a report, under contract with the United States Department of Education, summarizing the conclusions of five studies that looked at charter school performance.¹⁰⁶ Two of the studies were national, two were based in New York, and one in Boston using mixed methodologies including

¹⁰³ Kern Alexander, *Asymmetric Information, Parental Choice, Vouchers, Charter Schools and Stiglitz*, *Journal of Education Finance*, 38, 2 (2012) 170-176.

¹⁰⁴ *Id.*

¹⁰⁵ Brittany Larkin, *The Effects of Autonomy on Florida Public Schools: A Disaggregated Comparison of Charter Schools and Traditional Schools*, PhD diss., University of Florida, 2014, 36.

¹⁰⁶ Leona Christy, Marina Walne, Mukta Pandit, Bryan Hassel, Juli Kim & Elaine Hargrave, *Student Achievement in Charter Schools: What the Research Shows*, National Charter School Research Center. Safal Partners. (2015).

matched comparison, lottery-based, and regression analysis. The authors reported that four of the five studies found that charter students perform better in math and reading, charter students with low prior achievement performed better in two of three studies, and there was no impact on student behavior in two studies.¹⁰⁷ A criticism of these studies is that many of them do not take into account the closing of charter schools that underperform and the absorption of students back into the traditional public school setting from year to year. Additionally, results tend to vary from state to state due to differing compositions of charter schools and legislation regarding state charter schools. The Center for Research on Education Outcomes (CREDO) conducted a twenty-seven state survey of charter schools and found that charter schools have made gains over the past five years citing an increase in high-performing charters and the closure of underperforming charter schools.¹⁰⁸ The report notes success in charter schools was typically seen in reading at the elementary school level and in math and reading at the middle school level. The report also found that there was no net gain for students in high school and that “multi-level” (K-8 or 7-12) charter school students underperformed compared to the students’ peers at traditional public schools in math and reading. The CREDO report demonstrates that some charter schools tend to perform better than traditional public schools; however, the majority of charter schools do the same or worse.¹⁰⁹

¹⁰⁷ Id at 9.

¹⁰⁸ The Center for Research on Education Outcomes. *Charter Schools Make Gains, According to 26-State Study*. 2013 National Charter School Study. Stanford University.

¹⁰⁹ Id at 1. Stating that, “Across the charter schools in the 26 states studied, 25 percent have significantly stronger learning gains in reading than their traditional school counterparts, while 56 percent showed no significant difference and 19 percent of charter schools have significantly weaker learning gains. In mathematics, 29 percent of charter schools showed student learning gains that were significantly stronger than their traditional public school peers’, while 40 percent were not significantly different and 31 percent were significantly weaker.”

In 2009, CREDO released a report on charter school performance, specifically in Florida.¹¹⁰ In the report, researchers noted that charter school students learn less than their peers at traditional public schools.¹¹¹ The results of the study found that the only metric in which charter school students perform better than peers in traditional public schools is after three years of charter school enrollment. Otherwise, all other metrics including enrollment for 1, 2, and 4 years; race, and prior performance were either significantly worse or there was no difference.¹¹² Subsequently, in 2014, the Florida Department of Education released a report on Florida Charter School Performance as required by Florida statutes¹¹³ that requires an annual report with a comparison of charter school performance compared to traditional public school students.¹¹⁴ Proficiency, achievement gaps, and learning gains were measured based on 177 comparisons overall and sub-groups, such as race, gender, and special categories (Free and Reduced Price Lunch, English Language Learners, and Students with Disabilities). The report noted that of sixty-three comparisons, fifty-three show charter schools demonstrating higher proficiency rates. Of the eighteen comparisons of achievement gaps, the achievement gap was lower for sixteen of the comparisons in charter schools. In the learning gains section, ninety-six comparisons were made and the percentage of students making learning gains was higher in eighty-six of the comparisons for charter schools.¹¹⁵

¹¹⁰ *Charter School Performance in Florida*. CREDO. June 2009.

¹¹¹ *Id* at 2.

¹¹² *Id* at 12.

¹¹³ § 1002.33(23), F.S.

¹¹⁴ Florida Department of Education. *Student Achievement in Florida's Charter Schools: A Comparison of the Performance of Charter School Students to Traditional Public School Students*. Bureau of Accountability Reporting and Office of K-12 School Choice.

¹¹⁵ *Id* at V.

In addition to national studies, state studies have been conducted, largely due to the variations of charter school infrastructures by state. In a study conducted on the Ohio public school system, DeLuca and Wood examined the achievement of students and the per pupil instructional expenditures of charter schools compared to traditional schools.¹¹⁶ The comparison consisted of traditional and charter schools with similar minority populations with the same statewide regulatory system of instructional expenditures. The researchers found that for at least the “large urban communities in a Midwestern state that charter schools at the elementary level generally produced higher achievement score results while spending less money on direct instruction.”¹¹⁷ A longitudinal study in Utah between 2004-2009 found that students in charter schools were performing worse than students in traditional schools.¹¹⁸ In a study of Florida’s public school system, Sass reported that the performance of charter school students was worse than traditional public school students in the first five years, and only performed as well as traditional schools after the first five years.¹¹⁹

School Governance and Finance

As noted previously, the financing of education also has a role in the governance of education. The decision-making process to determine how school funds are spent and what entity is responsible for providing those funds has an impact on fiscal

¹¹⁶ Barbara De Luca & R. Craig Wood, *The Charter School Movement in the United States: Financial and Achievement Evidence from Ohio*, 41 *Journal of Education Finance* 4, 438 (2016).

¹¹⁷ *Id.* at 448.

¹¹⁸ Yongmei Ni and Andrea K. Rorrer, *Twice Considered: Charter Schools and Student Achievement in Utah*, *Economics and Education Review* 31, no. 5 (2012): 835-849.

¹¹⁹ Tim R. Sass, *Charter Schools and Student Achievement in Florida*, *Education Finance and Policy*, (2006) 91-122.

accountability, and thereby, how schools are governed.¹²⁰ Fiscal accountability refers to the concept that “those responsible for an activity involving money must provide evidence of appropriate care as conservators, which includes the wise use of all resources.”¹²¹ Thus, the manner in which decisions are made and outcomes are linked to expenditures plays a part in the fiduciary responsibilities of the entity providing and managing educational funding.¹²² As Thompson, Crampton, and Wood noted, the fiduciary responsibilities of those entrusted with decision-making in schools include “the power and obligation to act for another [often called the beneficiary] under circumstances which require total trust, good faith, and honesty.”¹²³ Therefore, explanation of the funding structures in education may be used to operationalize the decision-making authority and governance structure in education.

According to the United States Department of Education, approximately 9 percent of the money that is spent on education comes from the federal government. While varying across state and local school districts, in the 2012 – 2013 fiscal year 45 percent and 46 percent of educational spending was allocated, respectively. It has been argued that the ratio of money spent on the federal, state, and local level parallels the involvement and authority of each entity based on responsibility and accountability.¹²⁴ It is also important to note that the funding formulas between states vary widely with different percentages of financial contributions. For example, in 2013 the federal level of

¹²⁰ Faith Crampton, R. Craig Wood, & David Thompson, *Money and Schools 6th ed.*, Rutledge, NY, 2015; 46 (stating that “how schools are funded today is a direct function of how federal, state, and local policymakers have accepted (or denied) responsibility for education).

¹²¹ Faith Crampton, R. Craig Wood, & David Thompson, *Money and Schools 6th ed.*, Rutledge, NY, 2015; 111.

¹²² *Id.*

¹²³ *Id.* at 112.

¹²⁴ Nesta Devine. *Education and Public Choice: A Critical Account of the Invisible Hand in Education*. Praeger Publishers. Westport, CT (2004).

financial funding ranged from 7.3 percent in Wyoming to 22.1 percent in North Dakota. State funding distribution ranged from the highest in Hawaii and Vermont at 81.6 percent to 28.4 percent in Illinois. The local share of school funding revenue ranged from 3.5 percent in Hawaii to 59.2 percent in Illinois.¹²⁵ Figure 3-1 shows the average percent share of each funding source over time.

Percent Share of Public Elementary and Secondary School Revenue

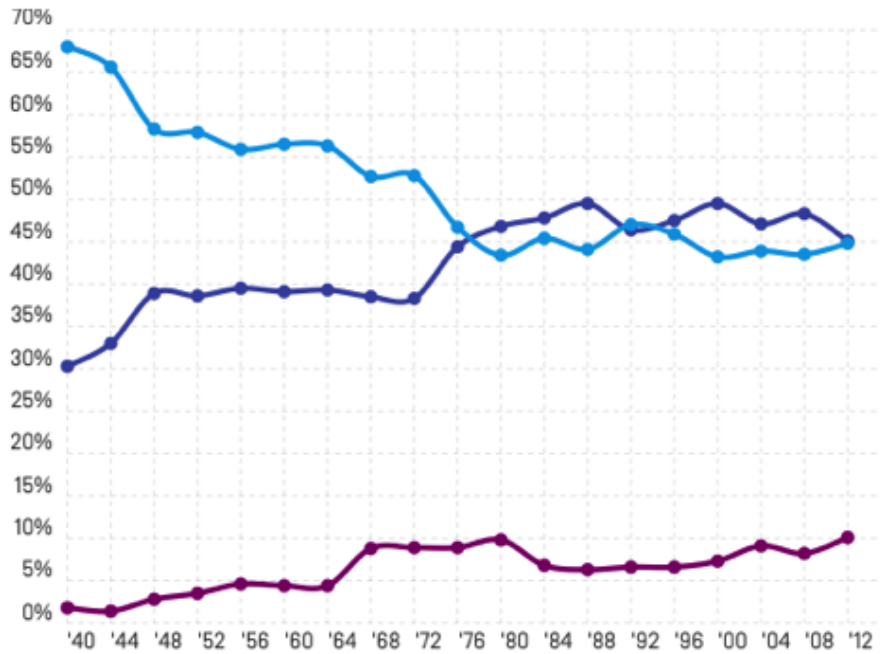


Figure 3-1 Percent Share of School Revenue Overtime
 Source: U.S. Department of Education, National Center for Education Statistics, Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2009-20.

School funding is largely based on the United States tax system. Federal income taxes are allocated to support federal programs such as grants provided under the

¹²⁵ U.S. Department of Education, National Center for Education Statistics, *Revenues and Expenditures for Public Elementary and Secondary Education: School Year 2009-2010* (Fiscal Year 2010), Table 1. 2012. Available at <http://nces.ed.gov/pubs2013/2013305.pdf>.

Individuals with Disabilities Education Act and Race to the Top.¹²⁶ Revenue for schools on the local level is mainly based on real property taxes.¹²⁷ However, due to variations in the size of local property tax bases within states and the disparities that are created based on a school district's ability to pay, state aid formulas have been proposed and calculated, to include state income and sales taxes, in order to address wealth disparities in educational opportunity.¹²⁸ National growth in the number of schools and increased recognition of state responsibility of schools led to increased interest in some state provision of aid to schools, overtime.¹²⁹ Theoretical arguments for state aid transformed based on the concept of equalization, from reward for tax effort and minimum educational opportunity to uniform tax effort that led states to develop foundation programs where states guaranteed a fiscal foundation that districts could build from in funding local education.¹³⁰ An extension of these arguments included the concept of weighted pupil funding from the state that argued that different programs will have different costs in order to reach equality, and should be funded as such.¹³¹ Henry Morrison even went as far as to suggest that local school districts should be abolished and that states should completely take over control of education due to the fact that states have the duty to control education and that fiscal inequality could not be resolved without state stabilization.¹³²

¹²⁶ U.S. Department of Education, retrieved from <https://www.ed.gov/programs-search/state-education-agencies>.

¹²⁷ Crampton, Wood, & Thompson at 86.

¹²⁸ *Id.*

¹²⁹ *Id.* at 88.

¹³⁰ *Id.* at 88. Reward for tax effort awarded districts more state aid for taxing districts higher.

¹³¹ *Id.*

¹³² *Id.* at 89.

Based on these theoretical concepts and the desire to make education equal, state legislatures endeavored to build school aid formulas. States legislatures with a more aggressive view of state responsibility for education designed systems where the state funds a substantial portion of education, versus states supporting local control that created aid plans that leave control to local entities to exceed the educational minimums set by the state.¹³³ The differing state aid plans include flat grants, equalization grants, multitier grants, and full state funding grants, which are devised by states based on the idea of who should have control over decision-making as one factor.

Flat grants are distributionally neutral and provide a uniform grant of money without consideration of local ability to raise revenue; however, due impart to school finance litigation, no state uses flat grants as its sole funding structure.¹³⁴ Equalization grants are meant to supply financial aid inverse to local school districts' ability to fund education.¹³⁵ Equalization grants, such as foundation plans, require minimum local effort in the levying of taxes and school expenditures, while other types, such as resource accessibility plans, seek to empower local districts to make their own fiscal and programmatic decisions that are not limited by wealth.¹³⁶ Multitier grants combine parts of different plans to determine state aid, typically including base aid and other aid formula due to political motivations.¹³⁷ In addition to basic aid formulas that provide horizontal equity in education funding,¹³⁸ vertical equity in funding formulas is provided by the state to address variable needs and costs of additional resources to schools.¹³⁹

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id at 93.

¹³⁶ Id.

¹³⁷ Id at 94.

¹³⁸ Id at 98. Horizontal equity is defined as "the equal treatment of equals."

¹³⁹ Id. Vertical equity is the "necessary unequal treatment of unequals."

As a complex system of financing and even with the previously noted funding constructs in place, “public schools are increasingly called upon to embrace competition and to maximize the efficiency with which they deploy tax revenues.”¹⁴⁰ Outside of the education system, public schools also compete with other government funded services for scarce tax revenues. While within the system, public schools compete for funding with for-profit and non-profit education companies that operate charter schools and vouchers for non-public schools. However, as Crampton, Wood, and Thompson compare the private sector to school funding, “unlike the private sector, the goal of government is to provide for the public good rather than to pursue profit.”¹⁴¹ This point continues to undergird the arguments for who is responsible for decision-making and funding schools.

Charter Schools and School Funding

As a component of the free market system advocated in education, charter schools are considered public schools and are thereby entitled to public funding allocations. However, much debate has ensued regarding how much tax-payer funds should be allocated to charter schools that enjoy less regulation than traditional public schools. Due to public schools falling under the purview of state legislatures, the purpose, organization, and funding structures of charter schools are very different between states.¹⁴² Typically, charter schools are funded similarly to and receive approximately the same amount of base funding allocations as traditional public schools via the revenues from taxes; however, capital outlay and auxiliary program funding is

¹⁴⁰ Crampton, Wood, & Thompson at 76.

¹⁴¹ Id.

¹⁴² Barbara De Luca & R. Craig Wood, *The Charter School Movement in the United States: Financial and Achievement Evidence from Ohio*, 41 *Journal of Education Finance* 4, 438 (2016).

dependent on individual state statute.¹⁴³ Similar to the debate regarding governance in traditional public schools in who has the responsibility and who should fund them, there is debate over the funding of charter schools in the educational market. Critics of charter schools argue that charter schools have a negative impact on the traditional public school system as funds are diverted away while the administrative costs of operating a charter school infrastructure remain in a district.¹⁴⁴ Additionally, opponents cite the failure rates and closings of charter schools that may fiscally drain district coffers.¹⁴⁵ Proponents of charter schools argue that additional funds should be allocated to charter schools for capital outlay and educational programs in order to balance the market and encourage true competition.¹⁴⁶ These advocates argue that all dollars should follow students, rather than be kept at the district level in potential surplus.¹⁴⁷

The debate over the funding of charter schools is based in the context that there are finite resources available in the educational market. Therefore, the authority to make decisions and decide how funding is allocated affects the educational market and the viability of schools, whether charter or traditional. Charter school opponents note that the transfer of money from traditional schools has a downward spiraling effect in which revenues decrease faster than costs due to the divergence of funds, traditional schools are forced to cut programs, which triggers the further loss of students and resources.¹⁴⁸ Thus, creating an arguably unfair competition in the market place. Conversely, charter school proponents point out that even with the divergence of funding from traditional

¹⁴³ Crampton, Wood, & Thompson at 39.

¹⁴⁴ Leah Rupp Smith, *Crossing the Line in Tight Budget Times: The State Constitutional Implications of Diverting Limited Public Funds to Charter Schools in Kentucky*, 51 U. Louisville L. Rev. 125, 126 (2012).

¹⁴⁵ Id.

¹⁴⁶ Id at 128.

¹⁴⁷ Id.

¹⁴⁸ Id at 146.

schools, charter schools remain underfunded as data collected has shown a \$2,247 per student average disparity between per pupil funding for traditional public schools and charter schools in twenty-four states.¹⁴⁹ Thus, charter school advocates argue that neither vertical nor horizontal equity are accomplished in current funding schemes for charter schools.

These claims for and against disparate funding of charter schools have also been litigated in the courts. In *J.D. ex rel. Scipio-Derrick v. Davy*,¹⁵⁰ charter school students brought a suit against New Jersey, stating that the per pupil funding structure of the charter school provisions in the state denied students of charter schools the right to equal per pupil and capital outlay funding, violating equal protection rights. The court made it very clear that based on the legislative intent of the charter school acts, the plaintiffs were not entitled to relief.¹⁵¹ While holding that the plaintiffs' argument was better suited for a petition to the legislature rather than the judiciary, the New Jersey Supreme Court offered policy arguments for its decision to dismiss the lawsuit for failure to state a claim.¹⁵² The court found that the New Jersey law applied equally to all students, therefore, it did not violate the plaintiffs' equal protection rights as they chose to attend charter schools.¹⁵³ Furthermore, the court found that the students' enrollment in charter schools was completely voluntary and could enroll in a traditional public school, receiving the full allotment of funding, at any time.¹⁵⁴ The court found that the

¹⁴⁹ Id at 147. Citing fiscal year 2007 data from Meagan Batdorff, Larry Maloney & Jay May, Ball State Univ., *Charter School Funding: Inequity Persists* (2010), available at <https://cms.bsu.edu/-/media/WWW/DepartmentalContent/Teachers/PDFs/charterschfunding051710.pdf>.

¹⁵⁰ *J.D. ex rel. Scipio-Derrick v. Davy*, 2 A.3d 387, 401 (N.J. Super. Ct. App. Div. 2010).

¹⁵¹ Id at 387-391.

¹⁵² Id at 392.

¹⁵³ Id at 401.

¹⁵⁴ Id at 391. See *In re 1999–2000 Abbott v. Burke Implementing Regulations*, 348 N.J. Super. 382, 441, 792 A.2d 412 (App.Div.2002) The Scipio-Derrick court noted the rejection of a “constitutional challenge to

constitutional mandate of a thorough and efficient education requires an equal education “opportunity,” therefore the plaintiffs claim of unequal treatment in funding was invalid because they had the opportunity to attend traditional schools.¹⁵⁵ The court also recognized the need to allocate limited resources amongst traditional and charter schools and that traditional public schools were first in line to receive these funds.¹⁵⁶ The court noted the public need to reduce the diversion of funds so that the state would be able to continue to provide a thorough and efficient education with out a corresponding decrease in costs.¹⁵⁷ Furthermore, the court cited the transitory nature of charter schools and the long-term existence of traditional schools as a reason traditional schools should receive funds first.¹⁵⁸

Conversely, some courts have found that disparities in the funding of charter schools are improper. In *Sugar Creek Charter School, Inc. v. Charlotte-Mecklenburg Board of Education*,¹⁵⁹ the plaintiffs alleged that the funding structure of the Board of Education denied them their share of allocated monies, per North Carolina statute.¹⁶⁰ The court in this case reviewed the language of the state’s charter laws and concluded that the legislature intended that charter schools, “have access to the same level of funding as children attending the regular public schools of the state.”¹⁶¹ The court went

regulations for excluding charter schools from the definition of “Abbott districts” because a charter school is an “optional program ... [and] students may, at any time, exercise the option of withdrawing from the charter school if they wish to benefit from the Abbott remedial measures.”

¹⁵⁵ Id at 397.

¹⁵⁶ Id at 393-394.

¹⁵⁷ Id.

¹⁵⁸ Id at 395. Conversely, charter school advocates would likely claim that this reasoning leads to the transitory nature of charter schools and inability to sustain due to poor funding.

¹⁵⁹ *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 673 S.E.2d 667, 669 (N.C. Ct. App. 2009)

¹⁶⁰ Id.

¹⁶¹ Id at 673.

further stating that the language regarding the “local current expense fund” meant that charter schools should have equal access to all the money in the expense fund.¹⁶² Similarly, in *Baltimore City Board of School Commissioners v. City Neighbors Charter School*,¹⁶³ the court concluded that the state charter school law allowed and required equal funding between traditional public and charter schools.¹⁶⁴ The plaintiff schools were denied funding disbursement and were either offered services or no funding at all.¹⁶⁵ The court found that the charter schools were entitled to disbursements, per pupil funding had to be provided equal to average funding to traditional schools, and only a 2-percent deduction from the funds provided to charter schools could be made to cover the administrative costs at the district level.¹⁶⁶ The court based its conclusion on the legislative history finding that the legislature intended charter school funding be based on a per pupil standard.¹⁶⁷

While there is much debate surrounding the funding of charter schools and a difference in the opinion of the courts, it seems that if a legislature provides a clear intent or uses unambiguous language in statute the court tends to cede much deference to the intent of the legislature.

Summary

While the federal government is not granted enumerated authority in the Constitution, it does retain some governance power in education. One such way is through the protection of citizens and their constitutional rights as they make contact

¹⁶² *Id.*

¹⁶³ *Balt. City Bd. of Sch. Comm'rs v. City Neighbors Charter Sch.*, 929 A.2d 113, 131-32 (Md. 2007) (a culmination of three appeals for charter school applications).

¹⁶⁴ *Id.* at 115.

¹⁶⁵ *Id.* at 118.

¹⁶⁶ *Id.* at 132.

¹⁶⁷ *Id.* at 127-31.

with the education system. Through its spending power and federally funded education programs, the federal government is able to direct parts of education that benefit from federal funding.¹⁶⁸ The federal government, through the United States Department of Education, regulates and manages federal education programs, as well as promotes accountability and efficiency across the Nation.¹⁶⁹

The 1973 Supreme Court case, *San Antonio Independent School District v. Rodriguez*,¹⁷⁰ drew a clear line between the roles of federal and state governments in education, concluding that authority and responsibility over education was primarily of state and local concern. The role of state governance has changed and increased over time. Each of the fifty states and the District of Columbia contain constitutional provisions for the responsibility of education on the state level. From the authority vested in state constitutions, state governance typically focuses on setting standards and accountability in education.

The operation and management of schools is typically delegated to local school boards and districts. Scholars have offered that school districts are automatically granted authority through the doctrine of “in loco parentis” as schools act as parents while children are in their care during the school day. Others look to the delegated authority in state constitutions for the conditions of local school board authority; typically providing for the supervision, administrative oversight, and execution of standards of local schools. There is also a faction of local school authority advocates who argue for the control of schools by parents. This is control comes from the local election of school

¹⁶⁸ Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004)

¹⁶⁹ 20 U.S.C.A. § 3402 (West). (Pub.L. 96-88, Title I, § 102, Oct. 17, 1979, 93 Stat. 670).

¹⁷⁰ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

boards and school choice, in which parents have the opportunity to choose who represents them in the school board or where their children attend school between traditional public schools, charter schools, virtual schools, or private schools through voucher programs.

School Choice initiatives, such as voucher programs and charter schools, allow for the financing options for schools and services for students that best meet their needs. The school choice movement has grown over the past few decades. Charter Schools are one form of choice that are still considered public schools, but enjoy more autonomy for the innovation and specialization of education. While many charter schools have been established, debate continues regarding their permanence and utility in education. Proponents of charter schools tout the ability of charter school operators to innovate and fill niche areas of needs for children. Critics view charter schools as having a negative relationship with traditional schools as they divert funds and have been argued not to meet the thorough and adequate provision in some state constitutions and statutes. Additionally, there are mixed reviews regarding the success of charter schools in their ability to increase achievement of students.¹⁷¹

A relationship between school funding and school governance has been drawn. Scholars have argued that the proportion of funding at the federal, state, and local level mirrors the amount of governance authority each entity entertains. Based on the funding structure, all taxpayers provide for the financing of education in some way. The federal government uses its financial contribution to support federal programs. State funds are

¹⁷¹ See *Charter Schools*, 8 Geo. J. on Poverty L. & Pol'y 505 (2001); 8 A.L.R.5th 533 (Originally published in 2000); See also Frank R. Kemerer & Catherine Maloney, *The Legal Framework for Educational Privatization and Accountability*, 150 Ed. Law Rep. 589 (2001).

typically allocated to cover basic education expenses such as teacher salaries, textbooks, and capital outlay funding. Additionally, some state legislatures provide categorical and weighted funds for specific purposes. Local funds are typically derived from local property taxes. Through the provision of funds, Federal, State and Local entities are able to set policy and support initiatives deemed important.

While one government aim is to address failures in a market, its production of education creates a host of controversies in the governance of education. The decision making authority between federal, state, and local entities is further complicated by free market concepts like school choice and charter schools. The funding of education is another source of contention, as the responsibility and subsequent provision of revenue has a role in governance authority. These factors, and the efficiency of the educational market have led to much debate.

CHAPTER 4 JUDICIAL REVIEW AND CHARTER SCHOOLS

Introduction

With the debate regarding school governance and the perceived existence of a market economy in education, the charter school movement provides a lens into how the market and the judiciary treat governance issues. Based on varying perspectives on how education should be governed, proponents and opponents tend to turn to the judicial system when conflict arises regarding constitutional and statutory obligations and duties under the law. This chapter offers a synopsis of judicial review and its constitutional and statutory application to decision making in education. The impact of judicial review was then examined through the lens of charter school litigation, particularly the charter school application process in Florida. Followed by an analysis of the impacts of judicial decision-making and public choice.

Judicial Review

Judicial review is the process by which the court examines the conclusions made by a lower court or an administrative body and interprets the law.¹ It is the ability of the court to invalidate a law that it deems contrary to the provisions of a state or federal constitution or statute.² Judicial review was established in *Marbury v. Madison*, where Chief Justice Marshall penned,

It is emphatically the province and duty of the Judicial Department to say what the law is...If two laws conflict with each other, the Courts must decide on the operation of each. So, if a law be in opposition to the

¹ Black's Law Dictionary defines Judicial Review as, 1. One court's review of another court's proceedings and judgments). Typically, a higher court review of a lower court. Can also be a review of an administrative body's factual or legal findings. The reviewing court can even award damages as well as uphold or reverse any order reviewed. 2. Supreme Court authority to decide constitutionality of a law. Until the constitution itself is amended to accommodate them, all unconstitutional laws are de facto null and void.

² Id.

Constitution... the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.³

The Supreme Court has the ability to review laws that contradict the U.S. Constitution, and similarly, state courts have the power to review laws that go against state constitutions. Therefore, legislative actions, executive orders, regulations issued by agencies, and local laws are available for review by the court acting as a balance to the other branches of government.⁴

Thro offers a salient explanation of judicial review as the “power to nullify the results of the democratic process.”⁵ In his example he writes:

The elected members of the legislature, thinking that that they are acting in accordance with the federal and state Constitutions, pass a law that has the overwhelming support of the People. The elected executive, thinking that the bill presented is constitutional, signs the proposal into law. Yet, despite the measure’s popularity and despite the fact that the elected legislature and the elected executive think that the new statute is both wise policy and constitutional, the judiciary, which is the least democratic branch, invalidates the law simply because it interprets the state and/or federal constitutions differently. Thus, the will of the People, as expressed through their elected leaders is thwarted by a simple majority of judges.⁶

Thus, judicial review equates to the judiciary’s potential ability to usurp the choice of the public as promulgated through the legislative and executive branches. Therefore, with this power or decision-making authority, the judiciary must be careful in its review of the law as it has the ability to alter “America from a democratic republic into a society

³ 5 U.S. 137 (1803) (forming the basis of judicial review under Article III of the U.S. Constitution).

⁴ Doctrine whereby the powers and responsibilities of the government are divided amongst the judicial, executive, and legislative branches in order to prevent abuses of power.

⁵ William Thro, *An Essay: The School Finance Paradox: How The Constitutional Values of Decentralization and Judicial Restraint Inhibit The Achievement of Quality Education*, 197 Ed. Law Rep. 477, 478 (2005).

⁶ Id.

ruled by ‘bevy of platonic guardians.’”⁷ To avoid this type of rule, the judiciary has embraced judicial restraint, intervening only when necessary to protect the Constitution or state constitutions. Nevertheless, some courts have remained judicially active in promoting personal interests or have judicially abdicated the authority of the court by rendering decisions based on procedural issues declining to address certain issues or offering great deference to the law as enacted rather than substantive findings.

Judicial Restraint

When examining the decisions of the court there exists a continuum of judicial review, ranging from activism to abdication. Judicial restraint calls for the court to limit legal decision-making that rescinds laws unless the issue is against the constitution.⁸ Judicial activism describes the court going beyond the text of the constitution or precedent when interpreting law and rendering its decision based on politics, special interests, or “progressive and new social policies that are not always consistent with restraint expected of appellate judges.”⁹ Judicial abdication occurs when courts refuse to enforce limitations on governmental power. This occurs through the avoidance of the court in deciding a case substantively contrary to either side or not accounting for other factors in its findings.¹⁰

An example of judicial activism by the court is the decision rendered in the Connecticut case, *Horton v. Meskill*.¹¹ In the instant case, the plaintiff brought a state constitutional challenge on the system of financing public elementary and secondary

⁷ Id.

⁸ Blacks Legal Dictionary, “judicial restraint”. A well recognized and accepted concept in effort to limit the over reach of the judiciary into the area of policymaking.

⁹ Blacks Legal Dictionary, “Judicial Activism”.

¹⁰ See Jason Adkins, *Judicial Abdication, Not Activism, is the Real Problem in the Courts*, (2011) retrieved from <https://townhall.com/columnists/jasonadkins/2011/02/24/>.

¹¹ 376 A.2d 359 (1977).

education. Even though the court recognized the judicial restraint concept that, “when the constitutionality of legislation is in question, it is the duty of the court to sustain it unless its invalidity is beyond a reasonable doubt,”¹² the court still found the funding formula violated the state constitution which entitled students in public schools to “equal enjoyment of the right to elementary and secondary education.”¹³ The state constitution at the time read, “There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”¹⁴ The court was judicially active in this case as the court found a fundamental entitlement and quality of schooling provided by the constitutional educational clause that simply provided for the establishment of free public schools. In similarly situated cases, the court has substituted its own values of the importance of education over those expressed in the text of the constitution. *McDaniel v. Thomas*¹⁵ is an example of judicial abdication in which the court concluded that the Georgia constitution did not require the equalization of educational opportunities between districts, even though the constitution explicitly stated the provision of an adequate education for citizens was the state’s primary obligation.¹⁶ The plaintiffs argued that the inequitable school finance system deprived children of an adequate education.¹⁷ Seemingly deferring to the plain language of the text of the state constitution, as it did not include “equalization” as a necessary provision, the court found that the adequacy provision did not require the state to equalize educational opportunities between

¹² Id at 650.

¹³ Id.

¹⁴ Conn. Const. Art. VIII §1 (1976).

¹⁵ 285 S.E.2nd 156 (Ga. 1981).

¹⁶ Id at 164.

¹⁷ Id at 158.

districts, and thus did not find a violation.¹⁸ This approach is considered an abdication as the court refused to take into account factors such as equalization of funding as an aspect of adequacy.

With the understanding of judicial restraint and its extremes- activism and abdication, one may review the implications of judicial review on educational challenges with the understanding that the judiciary plays an important role in determining governance of education and resolving conflict.

Constitutional Analysis and Judicial Review

While the provision of education is established in each state constitution, the level of duty and responsibility of states to provide for that education varies by state as evidenced in the variance of language contained in each state's constitutional education clause. Thro offers four categories of "strength" of the fiduciary responsibility that a constitution may impose on legislatures to provide for public schools.¹⁹ Category I includes sixteen states that "merely mandate a system of free public schools". Category II states, including eighteen states, "mandat[ing] that the system of public schools meet a certain minimum standard of quality, such as 'thorough and efficient'."²⁰ Category III states, including eight states, are "distinguished from category I and II clauses by both a 'stronger and more specific education mandate' and 'positive preambles'."²¹ Category IV

¹⁸ Id.

¹⁹ Thro's taxonomy is based on the works of Grubb and Gershon. See Erica Black Grubb, *Breaking The Language Barrier: The Right To Bilingual Education*, 9 Harv. C.R.-C.L.L. Rev. 52, 66-70 (1974); Gershon M. Ratner, *A New Legal Duty For Urban Public Schools: Effective Education In Basic Skills*, 63 Tex. L. Rev. 777, 814 n.n.143-46 (1985).

²⁰ See William E. Thro, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. Rev. 1639, 1661-69 (1989).

²¹ Id.

states, including eight states, “Impose the greatest obligation on the state legislature...; they provide that education is ‘fundamental,’ ‘primary,’ or ‘paramount.’”²²

Thro and Wood broaden the fiduciary responsibility taxonomy based on the level of duty each constitutional text imposes.²³ On the spectrum of duty the authors classify twenty-one constitutions as “establishment provisions” that simply mandate no more than the establishment of a free public education system. An example of this type of provision is the language of Michigan’s constitution that reads, “The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.”²⁴ The authors find that eighteen state constitutions contain clauses that specify a particular quality of education be provided.²⁵ For example, Texas’ education provision reads

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.²⁶

The Texas constitution calls for an efficient system of public free schools, requiring the government to not only establish a system of schools, but to also ensure that it is efficient. The third classification includes six educational mandates that are considered “strong” because they require a level of quality and include a strong directive to achieve that quality. For example, Rhode Island’s constitution requires:

The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty

²² Id.

²³William E. Thro & R. Craig Wood, *The Constitutional Text Matters: Reflections on Recent School Finance Cases*, 251 Ed. Law Rep. 510, 532 (2010).

²⁴ MI Const. Art. 8, §2.

²⁵ Thro & Wood at 530.

²⁶ Tex. Const. art. VII, §1.

of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.²⁷

The directive contained in this provision is to “adopt all means necessary and proper to secure...,” being very clear that the general assembly must fulfill this mandate by all means to achieve the goal of offering advantages and opportunities of education. The “high duty provision” classification is the final mandate of six states that seemingly place education above other governmental priorities.²⁸ The Illinois educational clause, for example, reads

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.²⁹

Using language such as “fundamental goal” elevate the priority of education in Illinois and similarly situated states almost to making education a right provided by the state constitution.

Examining these and similar taxonomy’s of state constitutional education clauses one might hypothesize that there is a relationship between the language of a state’s constitution and the judicial review of education constitutional challenges as established in decisions rendered by the court. As such, researchers have postulated that the strength of a state’s education clause has a relationship to the outcome of litigation.³⁰

²⁷ RI Cont. Art. 12, § 1.

²⁸ Thro & Wood at 530.

²⁹ Ill. Const. art. X, § 1

³⁰ Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 Ala. L. Rev. 701, 713 (2010). Bauries identifies scholars

Theoretically, less controversy should arise in states with “weaker” constitutional language, as legislatures should have less difficulty meeting the requirements of educational clauses that are less demanding.³¹ However, researchers have determined that this theory does not necessarily hold true due to issues of judicial restraint and external forces that affect decision-making.³² Notably, after examining the separation of powers doctrine and the textual differences contained in state educational constitutional clauses, Bauries concluded that “state courts’ varying conceptions of the nature of education rights” is associated with state judicial determinations in education litigation.³³ He found that the predictive nature of constitutional language is not associated with case outcomes and researchers should look to the courts’ interpretation of duties and rights that are derived from the clauses instead.³⁴ Moving from textual application, as stipulated by Thro in his earlier scholarship, to the courts’ interpretation of duties has an impact on the role of the judiciary regarding constitutional and statutory challenges. Particularly as the constant varies between judicial activism and abdication in the courts’ interpretation of the law render the decision making process unpredictable and undermine the legitimacy of the court.³⁵

who have classified state education clauses based on the strength of its text. See Erica Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 Harv.-C.R.-C.L.L. Rev. 52, 66-70 (1974); See also Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 Tex. L. Rev. 777, 814-16 (1985); Bauries names Thro as the authority on constitutional typology. See William Thro, *The Role of Language of the State Education Clause in School Finance Litigation*, 79 Educ. L. Rep. 19, 23-25 (1993).

³¹ Bauries at 714 (offering a critique of the work of Bill Swinford who found a positive relationship between educational constitutional text and case outcomes, as well as Paula Lundberg who proposed that there was a relationship between the strength of education clause language and case outcomes).

³² *Id.* (juxtaposing previous scholarship with others who found no relationship between text and case outcomes).

³³ *Id.* at 759.

³⁴ *Id.* at 761.

³⁵ William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 528 (1998).

Charter Schools and Judicial Review

Examination of judicial review and the judiciary's intervention in conflicts pertaining to charter schools, beyond a summary of litigation, is very limited, likely for several reasons. One reason is that with the relatively novel concept of charter schools, there is only a twenty-six year history of litigation to draw from with much of the first commentaries written as predictors of future charter school challenges.³⁶ Additionally, many charter school challenges do not reach the level of judicial review as they are either handled by administrative agency processes or dealt with on the local level, particularly if they are statutory in nature. Finally, judicial review may be limited as it pertains to charter schools, as courts tend to defer to other branches of government in statutory interpretation.

Some of the issues that have arisen regarding charter school litigation include state constitutional challenges based on accountability, control, and method of funding. For example, in *Council of Organizations and Others for Education About Parochial v. Governor*,³⁷ the plaintiffs alleged that the charter school enabling act was unconstitutional because it did not place charter schools in state control enough. The court decided that the act as amended offered sufficient public accountability through the approval and monitoring process. Other state constitutional challenges have included the expenditure of funds to charter schools under a state's constitutional prohibition of public money going to a school not in the exclusive control of the public

³⁶ Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 Penn St. L. Rev. 43, 47 (2004).

³⁷ *Council of Organizations and Others for Education About Parochial v. Governor*, 566 N.W. 2d 208 (Mich. 1997)

school system;³⁸ whether the existence of charter schools created a potential conflict of interest for the Commissioner of Education;³⁹ and whether charter schools were in violation of the state's Through and Efficient Clause.⁴⁰ Issues regarding the interpretation of state charter enabling acts have also come under judicial review. Many of these cases have turned on the application approval or operation of individual charter schools, as challenges to charter school appeal boards.⁴¹ Other issues have included student recruitment and enrollment,⁴² the makeup of the founding board membership,⁴³ and renewal of charter schools.⁴⁴ In general, state court decisions across the nation have tended to uphold the decisions of prior courts or state boards of education and have upheld state charter school enabling acts.⁴⁵ This form of judicial restraint, abdication, has led to the apparent approval and success of the expansion of charter schools over the past two decades despite the continuous debate centered on charter schools, as discussed in chapter 3.

Charter School Application Process

With the myriad of issues that have been brought before the court, some cases have centered on the charter school application process as a means to challenge the decision-making entity's authority. While processes may vary from state to state, in

³⁸ See Robert J. Martin, *Charting the Court Challenges to Charter Schools*, 109 Penn St. L. Rev. 43, 69 (2004) (concluding that charter schools were exclusively under the public school system control, thus taxpayer funding was allowed).

³⁹ See *In re Patrick Douglas Charter Sch.*, No. A-4713-97T1 (N.J. App. Div. 1999); *In re Red Bank Charter Sch.*, No. A-4725-97T1 (N.J. App. Div. 1999) (holding there was no conflict of interest).

⁴⁰ See *In re Englewood*, 727 A.2d 15, 33 (N.J. Super. Ct. App. Div. 1999) (holding that a lack of specific programs did not violate the constitution because parents had the option to take appropriate action if the school did not meet the students' needs).

⁴¹ Martin at 74. See e.g., *Bd. of Educ. of Consol. Sch. Dist., No. 59 v. Ill. State Bd. of Educ.* 740 N.E.2d 428 (Ill. App. Ct. 2000).

⁴² See *In re Brunswick Charter Sch.*, No. A-4557-97T1F (N.J. Super. Ct. App. Div. 1999).

⁴³ See *In re Englewood*, 727 A.2d 15 (N.J. Super. Ct. App. Div. 1999).

⁴⁴ See *Orange Ave. Charter Sch. v. St. Lucie County Sch. Bd.*, 763 So. 2d 531 (Fla. Dist. Ct. App. 2001).

⁴⁵ Martin at 102.

general, the charter school application process typically starts with the submission of a completed application from a nonprofit board. A charter granting entity reviews the application and makes a decision of whether to approve or deny an application. If approved, the applicant and charter granting body negotiate a charter for the eventual establishment of the charter school. If denied, there is typically an appeals process where the decision of another authority affirms the lower decision, usurps the original decision, or recommends a different course of action.

Once administrative appeals have been exhausted, the judiciary may sometimes become involved in the process if not resolved. When reviewing cases brought before the court, the court has the power to examine the decision of the lower tribunal and may employ varying levels of deference based on state statute.⁴⁶ The court may also review whether the lower tribunal abused its discretion when deciding a case.⁴⁷ Through the process of charter school application and establishment the original gatekeepers are the local school boards and then state level boards of education. However, once these steps are exhausted, the judiciary becomes a gatekeeper, which subjects the system to the consequences, albeit unintended, of judicial review.

⁴⁶ De novo review is a decision of law when there are no factual resolutions that need to be made and puts the appellate court in the same position as the lower level tribunal, as if no prior decision had been rendered. With the standard of competent substantial evidence the court must resolve conflicting facts and determine whether the record contains evidence to support the order or decision under review.

⁴⁷ The clearly erroneous standard is based on whether there is a definite and firm conviction that a mistake was committed in the lower tribunal. The arbitrary and capricious standard of review looks at whether there is a rational connection between the facts found and conclusions made. This is typically the standard of review used for agency determinations and the court can only reverse when an agency relied on impermissible factors, failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence, or is implausible it could be ascribed to a difference in view or to agency expertise.

Judicial Review and Public Choice

The variance of judicial restraint and its unpredictability reveals that there exists a deeper issue relating to the preservation of the democratic process, particularly as it pertains to public choice. There exist two competing values that the court must balance when it encounters state constitutional challenges regarding public schools.⁴⁸ One side of the scale includes the democratic process that leads to the election of governmental officials who make educational decisions. The other side of the scale is judicial review where the court has the ability to examine the results of the political process, and thereby, public choice. Leaving the determination to mere interpretation,⁴⁹ subject to judicial activism, restraint, or abdication leads to unpredictability and the chance that the public will is not served.

There are pros and cons to the exercise or lack thereof of judicial restraint. Judicial restraint provides a self-induced restraint on the judiciary to strictly interpret the law when conflict arises. Through his analysis of school finance litigation, Thro examines judicial review and identifies three ways that judicial restraint limits state courts' ability to interpret the law.⁵⁰ First, judicial restraint stops the court from creating rights that are not expressed in a state's constitution. Second, judicial restraint leads to hesitation by the courts in defining and enforcing constitutional standards. As noted in *People Who Care v. Rockford Board of Education*,⁵¹ the courts are not "omnicompetent".⁵² Therefore, the court should not micromanage governmental

⁴⁸ William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525 (1998).

⁴⁹ As proposed by Bauries, *Is there an Elephant* at 714.

⁵⁰ Thro at 482.

⁵¹ 111 F.3d 528, (7th Cir. 1997).

⁵² *Id* at 536. The court stated, "Tracking is a controversial educational policy, although just grouping students by age, something no one questions, is a form of "tracking." Lawyers and judges are not

departments. This lack of competence in all subjects causes the court to defer to the legislative and executive intent of laws and rules. Finally, judicial restraint causes the courts to offer limited remedies.⁵³ Therefore, if unpredictable judicial interpretation is limited by judicial restraint, the judiciary's ability to administer sound judgment in constitutional challenges is hindered. Thro summarizes

On the one hand, the state judiciary has ignored the principle of judicial review by blindly deferring to the judgment of the other branches and refusing to give substance to the clear commands of the state constitutions. On the other hand, the state courts have abandoned judicial restraint by disregarding the clear text of the state constitutions and substituting their personal choices for the policy judgments of the other branches.⁵⁴

Due to the delicate position placed on decision making by the judicial review and restraint conundrum, the judiciary is prone to criticism as the forum to decide educational constitutional challenges. One reason for this critique is that unlike the legislative and executive branches that are mainly elected positions, the judiciary is made up of judges who are selected in various ways. The five primary methods are gubernatorial appointment, gubernatorial appointment with retention election, legislative election, partisan election and nonpartisan election.⁵⁵ While the people may have the ability to express their dissatisfaction with the state judiciary through some elections and retention votes, accountability by the people falls short of direct elections and equal representation. Another reason is that judicial decisions differ from legislative decisions in that judicial decisions are void of compromise and offer little opportunity to engage in

competent to resolve the controversy. The conceit that they are belongs to a myth of the legal profession's omniscience that was exploded long ago."

⁵³ Thro at 484.

⁵⁴ William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & Pol. 525, 552–53 (1998).

⁵⁵ See Hon. Daniel R. Deja, *How Judges Are Selected: A Survey of the Judicial Selection Process in the United States*, Mich. B.J., (1996).

dialogue of choice and the will of the people.⁵⁶ Furthermore, the role of the judiciary has been characterized as the responsibility to unblock “stoppages in the democratic process” and to “secure the democratic conditions necessary for a democracy to exist.”⁵⁷ Thus, some view the function of the judiciary as a protection of the political process, as evidenced by Justice Souter who opined that “[n]ot all interference is inappropriate or disrespectful . . . and application of the doctrine ultimately turns, as Learned Hand put it, ‘on how importunately the occasion demands an answer.’”⁵⁸ However, as aptly offered by Wood, the difficulty of this type of involvement of the court is that judicial decisions are subject to the political-social-economic filter of the court and outside of the confines of the state constitution or the people represented by the state legislature.⁵⁹

Charter school constitutional challenges are likely more susceptible, over charter school statutory challenges, to judicial review that must pass through the political-social-economic filter of the court when decisions reach beyond the courts application of laws and the constitution, to judicial activism and special interest. Charter school litigation that is based on challenges to state statutory language, on the other-hand, is fraught with deferential treatment in cases in controversy brought before the court and is more susceptible to judicial abdication. Unless clearly and substantially contrary to state constitutional provisions, courts tend to defer to its interpretation of the legislative intent of the law and/or to the administrative agency tasked with interpreting the law. In a state

⁵⁶ Id.

⁵⁷ R. Craig Wood, *Justiciability, Adequacy, Advocacy, and the "American Dream"*, 98 Ky. L.J. 739, 776 (2010) (citing John Hart Ealy and Ronald Dworkin).

⁵⁸ Id at 777-78 (citing *Nixon v. United States*, 506 U.S. 224, 253 (1993)).

⁵⁹ Id.

such as Florida, where the legislature and executive have been amenable to the establishment of charter schools, it is not clear whether the deferential treatment of the court is due to political and personal pressures or to deference for deference sake of judicial review. One could argue that while not overt activism by the court, the same result is met through abdication of judicial responsibility. For example, the mere exclamation of the court that the charter school application process “frustrates appellate review”⁶⁰ without declaring the statute unconstitutional,⁶¹ renders the same impact as if the court had decided that whatever the state board decides is correct in the furtherance of charter school establishment.⁶²

Application of Judicial Review in One State

Due to the variance in charter enabling statutes and the constitutional provisions for education across states, Florida charter school statute was examined as a singular point of reference for the impact of charter school challenges and judicial review.

A Brief Overview of Florida Charter Schools

In Florida, there are over 650 charter schools in forty-six out of sixty-seven school districts that serve over 270,000 students.⁶³ Charter schools were first established in Florida in 1996.⁶⁴ Many of Florida’s charter schools have diverse missions as some schools focus on arts, sciences, and technologies, while others are chartered to meet the needs of special populations such as at-risk students and

⁶⁰ See *School Board of Polk County v. Renaissance Charter School, Inc.*, 147 So. 3d 1026 (Fla. 2d DCA 2014).

⁶¹ An example of judicial abdication.

⁶² An example of judicial activism.

⁶³ See Florida Department of Education Charter School, *FAQs*, October 2016, retrieved from http://www.fldoe.org/core/fileparse.php/18353/urlt/Charter_Oct_2016.pdf. All charts and graphs in this section are from this FAQ report.

⁶⁴ *Id.*

students with disabilities.⁶⁵ Charter schools have steadily increased enrollment of students over the past ten years and serve varying racial and ethnic populations across the state. Figure 4-1 depicts student enrollment in Florida Charter Schools from 2006 to 2016 and Figure 4-2 represents the 2015-16 student demographics of students enrolled in Florida’s charter schools.

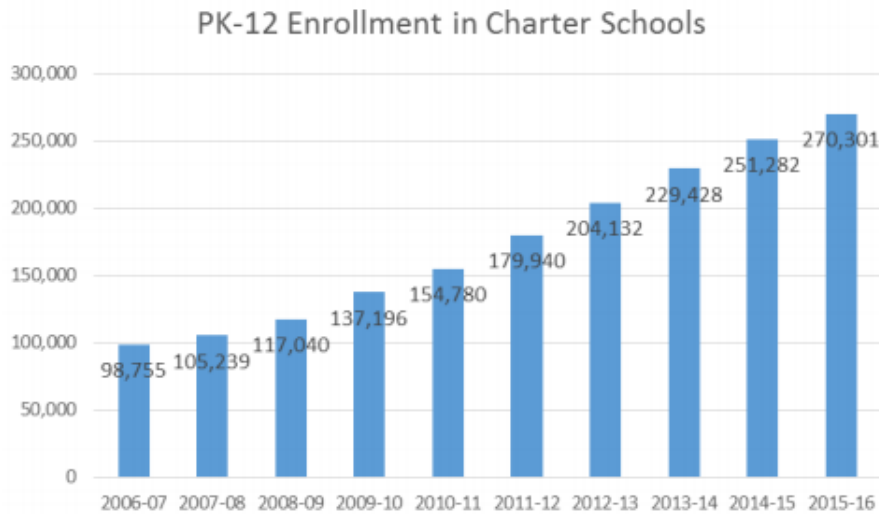


Figure 4-2 P-12 Charter School Enrollment in Florida
Source: Florida Department of Education Charter School, FAQs, October 2016.

⁶⁵ *Id.*

Charter Student Demographics

Race/Gender	Students	Percent
White	89,727	33.1%
Black	57,088	21.1%
Hispanic	108,495	40.0%
Other	15,609	5.8%
Total Enrollment	270,920	100.0%

Special Categories		
FRPL*	133,112	49.1%
ELL**	25,236	9.3%
SWD***	25,366	9.4%

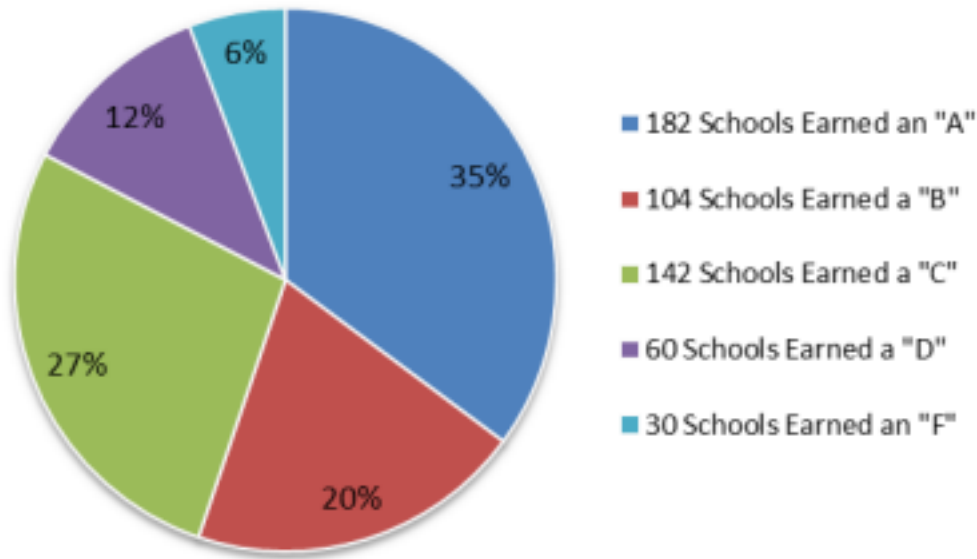
- * FRPL: Free and Reduced Priced Lunch
- ** ELL: English Language Learners
- *** SWD: Students with Disabilities

Figure 4-3 2015-16 Charter School Demographics in Florida
Source: Florida Department of Education Charter School, FAQs, October 2016

Of the 650 charter schools there are 185 high-performing charter schools that receive this distinction by receiving at least two grades of “A” and no school grade lower than “B” in the last three years, receive an unqualified opinion on every annual audit in the three most recent years, and received a financial audit with no emergency conditions. At the end of the 2015-2016 school year, of the 518 charter schools that were eligible to receive school grades, 55% received an “A” or “B” school performance rating.⁶⁶ Figure 4-3 shows the breakdown of charter school grades, representing student performance, for the 2015-2016 school year.

⁶⁶ Id.

2016 Charter School Grades



185 high-performing charter schools as of 10/27/2016

Figure 4-4 2016 Florida Charter School Grades

Source: Florida Department of Education Charter School, FAQs, October 2016.

Florida has codified the importance and purpose of charter schools in statute.⁶⁷ The statute very clearly states that charter schools are public schools and a part of the state's program of public education. Charter schools can be formed by creating new schools, converting existing public schools, and by operating virtual schools; which may lead to various governance structures depending on means of creation. The statute outlines that charter schools should be guided by these principles:

1. Meet high standards of student achievement while providing parents flexibility to choose among diverse educational opportunities within the state's public school system.
2. Promote enhanced academic success and financial efficiency by aligning responsibility with accountability.

⁶⁷ 1002.33, F.S.

3. Provide parents with sufficient information on whether their child is reading at grade level and whether the child gains at least a year's worth of learning for every year spent in the charter school.⁶⁸

The statute also mandates that the purposes of charter schools in Florida include:

1. Improve student learning and academic achievement.
2. Increase learning opportunities for all students, with special emphasis on low-performing students and reading.
3. Encourage the use of innovative learning methods.
4. Require the measurement of learning outcomes.⁶⁹

Additionally, the statute makes it optional that charter schools may,

1. Create innovative measurement tools.
2. Provide rigorous competition within the public school district to stimulate continual improvement in all public schools.
3. Expand the capacity of the public school system.
4. Mitigate the educational impact created by the development of new residential dwelling units.
5. Create new professional opportunities for teachers, including ownership of the learning program at the school site.⁷⁰

Based on state statute, the Florida Department of Education (FDOE) has also developed guidance on the application process through its Office of Independent Education and Parental Choice.⁷¹ Figure 4-4 depicts the number of charter school applications submitted and application approval rates in Florida overtime.⁷²

⁶⁸ Id at 1002.33(2)(a)

⁶⁹ Id at 1002.33(2)(b).

⁷⁰ Id at 1002.33(2)(c).

⁷¹ Office of Independent Education and Parental Choice, *Improving K-12 Educational Choice Options*. Retrieved from <http://www.fldoe.org/core/fileparse.php/7703/urlt/starting-a-charter.pdf>.

⁷² See Florida Department of Education Charter School, *FAQs*, October 2016. Retrieved from http://www.fldoe.org/core/fileparse.php/18353/urlt/Charter_Oct_2016.pdf. All charts and graphs in this section are from this FAQ report.

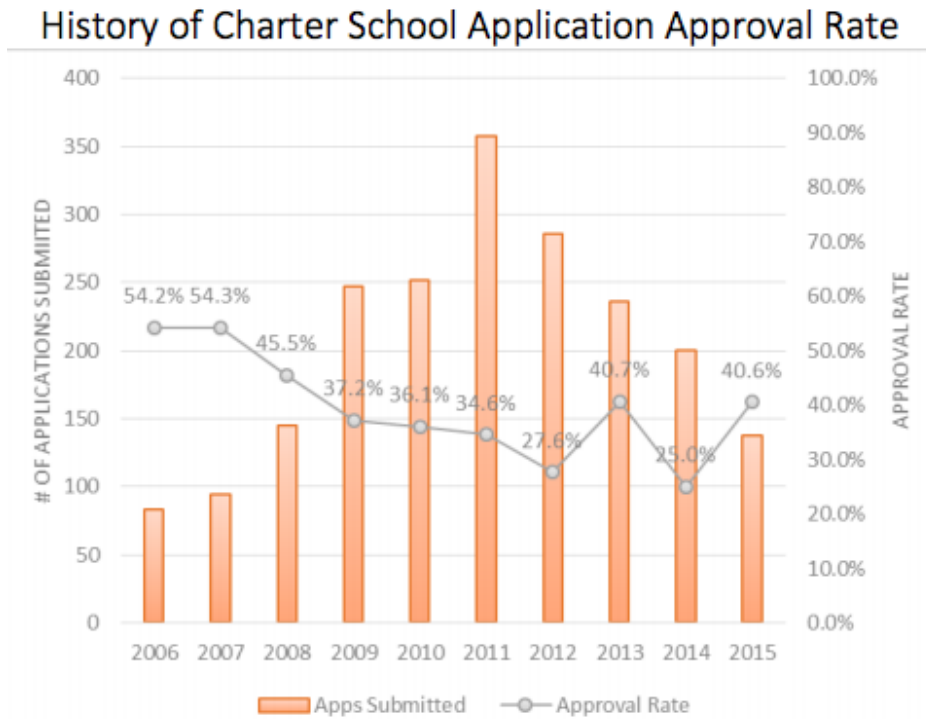


Figure 4-5 Historical Charter School Application Approval Rates in Florida
 Source: Florida Department of Education Charter School, FAQs, October 2016.

Florida’s Charter School Application Process

As stipulated in Florida Statute, an individual, teachers, parents, a group of individuals, a municipality, or a legal entity may submit an application for a new charter.⁷³ The process for entering a charter agreement begins with the charter school making a proposal to the local school board through a complete charter school application using the FDOE Model Charter School Application.⁷⁴ Using the FDOE evaluation instrument,⁷⁵ the school board must review the application. The school board

⁷³ 1002.33(3)(a), Fla. Stat.

⁷⁴ Office of Independent Education and Parental Choice. *Improving K-12 Educational Choice Options*. Florida Model Charter School Application. <http://www.fdoe.org/core/fileparse.php/13170/urll/m1.pdf>.

⁷⁵ Office of Independent Education and Parental Choice. *Improving K-12 Educational Choice Options*. Florida Charter School Application Evaluation Instrument. Retrieved from http://www.oneclay.net/uploads/3/8/0/5/38058641/florida_charter_school_application_evaluation_instrument_2016.pdf.

must accept, conditionally accept with requested changes, or deny a charter school application within sixty days of receipt, unless both parties agree upon another date. If the school board denies an application, it must provide reasons, based upon good cause, for denial in writing within ten calendar days of its decision. For charter schools that have received the designation of ‘high performing,’ the school board must demonstrate clear and convincing evidence that the applicant did not meet the requirements set forth in the statute.⁷⁶ The charter school applicant then has thirty calendar days to make an appeal to the State Board of Education.⁷⁷ The Charter School Commission is then convened to review the appeal and all related documents in order to make a recommendation to the State Board of Education.⁷⁸ While the State Board of Education is not bound by this recommendation, the commission must thoroughly review materials presented and provide a fact-based justification for its recommendation.⁷⁹ The State Board of Education also reviews the record and makes a final decision as to whether it will uphold or reject the decision of the local school board. The decision of the State Board of Education is final.⁸⁰ It has been argued that in this process, the school board does not have an opportunity to make a case for the denial of a charter past the reasons provided in the original record and does not have a enough say in the final decision that effects local school districts.⁸¹ This action has been argued to challenge the autonomy of the school board, limiting its due process rights, and can

⁷⁶ 1002.33(6)(b)(3b), F.S.

⁷⁷ 1002.33(6)(b)(3)(c)1, F.S.

⁷⁸ According to section 1002.33(6)(e)(1), F.S. members of the Charter School Appeal Commission are appointed by the Commissioner of Education in order to offer the State Board of Education a fair and impartial review of appeals culminating in a written recommendation to the State Board of Education on how they should rule.

⁷⁹ Id at 5.

⁸⁰ Id.

⁸¹ Id.

lead to tensions between the charter school and the local school board.⁸² Conversely, this process has been deemed administratively necessary for consistency across the state when it comes to charter schools and the governance function of the State Board of Education.⁸³

After exhausting the administrative process, there have been a few cases that have risen for judicial review regarding the denial of charter school applicants in Florida. Due to the nature of the appeals process, arguments regarding the distinctive power of the State Board of Education and local school boards to make decisions have been made. The courts have been faced with the decision of which entity should have the final decision making power. While Florida Supreme Court holdings are binding, many of the challenges to charter school applicant approvals have been made to district courts of appeal, where the decisions of another appellate court are persuasive, not binding.⁸⁴

Florida Court Challenges in the Charter School Application Process

The 4th District Court found that school boards are given the ability to set criteria for the approval and denial of charter school applicants as long as the criteria meet statutory guidelines and legislative intent.⁸⁵ The denied applicant in this case argued that the policy that required it to be in compliance with its existing charter- fulfill the

⁸² Sch. Bd. of Palm Beach County v. Florida Charter Educ. Foundation Inc., 4D15-2032, 2017 WL 192032, at *2 (Fla. 4th DCA Jan. 18, 2017).

⁸³ Id.

⁸⁴ The persuasive, non-binding nature of the courts has the potential to lead to varying holdings across jurisdictions.

⁸⁵ Imhotep-Nguzo Saba Charter Sch. v. Department of Educ., 947 So. 2d 1279 (Fla. 4th Dist. App. 2007) (where the School Board of Palm Beach County denied charter applications on the basis of Section 2.56 of the Palm Beach County School Board Policy that required applicants with existing charter schools demonstrate “exemplary operation” of the school in the past two years (Palm Beach Co. Sch. Bd. Policy (Fla.) §2.56(3)(d)(2005)). The State Board of Education upheld the School Board’s decision and the court affirmed.).

statutory purpose of charter schools and achieve at least a B for its state performance grade- were different than what was required in Section 1002.33(5)(b) of the Florida Statutes. The court rejected this assertion, stating that the Florida Legislature intended for charter-school sponsors to retain primary decision making authority concerning the establishment, renewal, and termination of charter schools.⁸⁶ The applicants also argued that the school board overstepped the constitutional separation of powers and the non-delegation doctrine by adopting the policy as a means to determine “good cause” as outlined in the statute at the time and that the mandatory elements of a charter application should be what were used to define “good cause.” The non-delegation doctrine has its origin in administrative law, whereby Congress cannot delegate its legislative powers to executive agencies unless Congress gives clear and adequate standards in guiding the agency in making a policy.⁸⁷ The court found that contrary to the applicants’ argument, the legislatively mandatory elements of the charter application - when read in conjunction with the Guiding Principles in Section 1002.33(6) of the Florida Statutes- provided sufficient legislative guidance for the development of the policy, which followed the legislative intent of the statute.⁸⁸ In this instance, the court recognized the authority of the local school board, supported by the State Board of Education, to make regulatory decisions as long as sufficient legislative guidance was given.

⁸⁶ *Id.* at 1282.

⁸⁷ U.S. Const. art. I, §1. See *Touby v. United States*, 500 U.S. 160, 165 (1991) (where the Supreme Court found that Congress may not constitutionally delegate its legislative power to another branch of government, deriving the nondelegation doctrine). See also *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409 (allowing Congress to delegate some authority by stating “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [administer a statutory scheme] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”).

⁸⁸ *Imhotep-Nguzo Saba Charter Sch.* at 1284.

The Florida courts have also made the distinction that the statutory authority allowing the State Board of Education to approve or deny charter school application appeals does not violate the Florida Constitutional provision that grants county school boards the power to operate and control public schools.⁸⁹ Florida's Constitution states that the state board of education has supervision over the system of free public education in the state.⁹⁰ Whereas, school boards are mandated to operate, control, and supervise public schools.⁹¹ In *School Board of Volusia County v. Academies of Excellence, Inc.* the school board argued that the State Board's statutory authority to review the school board's denial of the charter application conflicted with the school board's constitutional authority to operate and control public schools.⁹² The court found that even though Section 1002.33(6)(c) of the Florida Statute allowed the State Board to approve or deny a charter application appeal, the approval of this application only begins the process of opening a charter school and the "actual" operation and contract development was left to the local school board as the school board and charter applicant must come to agreement on the charter's provisions.⁹³ Additionally, the court found the School Board's ability to revoke or not to renew a charter as sufficient control over the operation of schools.⁹⁴ Finally, the court found that granting a charter application is not the same as opening a public school.⁹⁵

⁸⁹ *School Board of Volusia County v. Academies of Excellence, Inc.* 974 So. 2d 1186 (Fla. 5th Dist. App. 2008)(where the court found that a charter school application that contains typographical errors are not good cause for denial if the applicant is willing to explain and correct errors).

⁹⁰ Art. IX, §2 Fla. Const.

⁹¹ Art. IX, §4(b) Fla. Const.

⁹² *School Board of Volusia County* at 1190.

⁹³ *Id.*

⁹⁴ *Id.* at 1192.

⁹⁵ *Id.* at 1193.

In almost direct contrast to the Fifth District Court of Appeal decision in the *Academies* case, the First District Court of Appeal found that a 2006 Florida statute that established the “Florida Schools of Excellence Commission” (FSEC) was unconstitutional.⁹⁶ The court stated that the FSEC created a “parallel system of free public education escaping the operation and control of local elected school boards.”⁹⁷ As codified in section 1002.335 of the 2006 Florida Statute the Legislature found that charter schools were a “critical component in the state’s efforts to provide efficient and high-quality schools” and that “Charter schools provide valuable educational options and innovative learning opportunities while expanding the capacity of the state’s system of public education and empowering parents with the ability to make choices that best fit the individual needs of their children.”⁹⁸ The court cited a seminal Florida school choice case, *Bush v. Holmes*, which struck down Florida’s school voucher system as evidence as to why the FSEC was unconstitutional.⁹⁹ In *Bush*, the court held that the provision of the Florida constitution stating that the state must provide a “uniform, high quality education” was violated by a voucher system that used “public monies to fund private alternatives to the public school system.”¹⁰⁰

In *School Board of Osceola County v. UCP of Central Florida*, the school board appealed a decision of the State Board of Education that reversed the school board’s original denial of application for the establishment of a charter school.¹⁰¹ The school board argued that inadequate charter school capital funding met the good cause reason

⁹⁶ Duval County School Board v. State Board of Education, 998 So.2d 641 (Fla. 1st DCA 2008).

⁹⁷ Id at 643.

⁹⁸ Id at 644.

⁹⁹ Bush v. Holmes, 919 So. 2d 392 (Fla. 2006).

¹⁰⁰ Id at 408.

¹⁰¹ School Board of Osceola County v. UCP of Central Florida, 905 So.2d 909 (Fla. 5th DCA 2005).

for the denial of the application.¹⁰² Conversely, the State Board of Education found that the applicant had met all of the statutory requirements for approval as established by section 1002.33(6) and therefore, the school board did not have good cause to reject the application.¹⁰³ The court sided with the State Board of Education when it found that good cause did not exist for the school board to deny the charter school application. The court cited *Orange Avenue Charter School v. St. Lucie County School Board*¹⁰⁴ as an example of a school board having good cause for the denial of a charter school renewal application.¹⁰⁵ Even though the State Board of Education disagreed with the denial, the court found that the evidence presented that the renewal of the school's charter would be contrary to the best interest of students established good cause for the denial.

While some courts have drawn seemingly definitive lines between the authority granted to local school boards and the State Board of Education, other courts have found the statutory charter school application process to be confusing and the final orders of the State Board of Education to "frustrate appellate review."¹⁰⁶ In *School Board of Polk County v. Renaissance Charter School, Inc.*, the School Board sought review of the State Board of Education's decision to approve a charter school application.¹⁰⁷ The court found that clear and convincing evidence supported the school board's decision that the educational program did not comply with statutory requirements. The Second District Court of Appeals took issue with the charter school

¹⁰² Id at 912.

¹⁰³ Id at 913.

¹⁰⁴ 764 So. 2d 531 (2000).

¹⁰⁵ Id at 532.

¹⁰⁶ See e.g., *School Board of Polk County v. Renaissance Charter School, Inc.*, 147 So. 3d 1026 (Fla. 2d DCA 2014).

¹⁰⁷ Id.

application process on two parts. First, the court found that the statute did not stipulate what forum or at what point the sponsor or School board was supposed to present “clear and convincing evidence” that would be sufficient to deny the charter school application; nor did the statute provide for an evidentiary hearing or review in which evidence could be presented.¹⁰⁸ Secondly, the court found that the “brevity of the State Board’s final order frustrates appellate review,”¹⁰⁹ but also noted that the statute did not expressly require the State Board to “provide findings of fact and conclusions of law.”¹¹⁰ The Fifth District Court of Appeals in *School Board of Seminole County v. Renaissance Charter School, Inc.* seconded the sentiments of the Second District Court of Appeals in *Polk County*.¹¹¹ In *Seminole County* the court noted the deficiencies in the statute regarding the forum to present clear and convincing evidence as well as the standard of review that the court is supposed to use. The court also noted that in similar cases, such as *Spiral Tech*,¹¹² the court typically reviews the State Board of Education’s decision based on whether its decision is supported by competent, substantial evidence and/or whether it erroneously interpreted the law.

It is important to note that each of these cases have been decided at the District Court of Appeals level in Florida. Therefore, the decisions of the courts are simply persuasive and not binding on any of the courts. However, a theme that the courts have seemingly agreed on is the deference owed to agencies interpreting state statute. The courts in *Seminole County* and *Imhotep-Nguzo Saba* have both highlighted the fact that

¹⁰⁸ Id at 1028.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ *School Board of Seminole County v. Renaissance Charter School, Inc.*, 113 So. 3d 72, 76 (Fla. 5th DCA 2013).

¹¹² *Spiral Tech Elementary Charter Sch. v. Sch. Bd. of Miami-Dade County*, 994 So. 2d 455 (Fla. 3d DCA 2008).

the State Board's interpretation of a statute should receive great deference and that the court is required to defer to the State Board's interpretation unless it is clearly erroneous. These courts cited *Verizon Florida, Inc. v. Jacobs* where the court noted that an agency's interpretation of the statute it is charged with enforcing is entitled to deference.¹¹³ Furthermore, the court refused to depart from an agency's interpretation of the statute unless the construction was "clearly erroneous."¹¹⁴ Therefore, courts rely on the standard of review for charter school appeals that offer the greatest amount of deference to the agency interpreting the statute. Conversely, an argument in opposition to the State Board of Education receiving deferential treatment is that the local school board may also be owed some form of deferential treatment as it is afforded some authority per the Florida Constitution and also has the responsibility to interpret state statute when making decisions about charter school authorization.

Summary

Proposed Solutions to Judicial Review and Challenges

Judicial review of the law has challenges to overcome and inconsistency and unpredictability thwart decision-making in school systems, particularly when the judiciary is overly active or abdicates its responsibility. One way of addressing issues of judicial review is through constitutional amendment. Although admittedly more difficult than other options, amending the constitution to more clearly outline the will of the people would lead to less ability of judicial policy making and intervention. For example, the 1997-98 Constitutional Revision Commission in Florida addressed apparent

¹¹³ See Florida Interexchange Carriers Ass'n, 678 So.2d at 1270 (finding that [agency] "orders come to this Court with a presumption of validity" and that the party challenging the [agency] "order bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law")

¹¹⁴ Id.

deficiencies in the state constitution in standards for education. Prior to 1998, the state constitution required that “adequate provision shall be made by law” for public schools.¹¹⁵ *Coalition for Adequacy and Fairness in School Funding v. Chiles*,¹¹⁶ made it very clear that the Court was not willing to read into the constitution standards of adequacy not present in the state constitution.¹¹⁷ Therefore, the Constitution Revision Commission addressed concerns of the public by proposing an amendment to the state constitution that changed the language to read that education was a paramount duty of the state and provide a definition for ‘adequate’ that the court would deem justiciable.¹¹⁸ The amendment defined the qualities of education in Florida to include a “uniform, efficient, safe, secure, and high quality system.”¹¹⁹ The amendment was later placed on the ballot and ratified by the public in 2018. While this address the concerns of public input and choice, the availability for constitutional revision in Florida only occurs every twenty years. The consequences of deferring to this remedy is a span of two decades, the amount of time a citizen would spend in the PK-20 education system, without change or addressing conflict in the law.

Thro offers a solution to the issue of judicial overreach in that constitutional analysis should be predicated on Originalism where the words of constitutions are interpreted based on the meaning they had at the time of enactment.¹²⁰ Thro distinguishes analysis based on Originalism that focuses on the objective meaning that the public or “reasonable listener” would hold for text versus “original intent” where the

¹¹⁵ Fla. Const. Art. IX, §1.

¹¹⁶ 680 So. 2d 400 (Fla. 1996).

¹¹⁷ Id at 408.

¹¹⁸ Jon Mills & Timothy McLendon, *Strengthening the Duty to Provide Public Education*, Fla. B.J., (1998), at 28, 33. Relating to the intent of the Constitution Revision Commission as stipulated in meeting minutes.

¹¹⁹ Fla. Const. Art. IX. § 1.

¹²⁰ William E. Thro, *Originalism and School Finance Litigation*, 335 Ed. Law Rep. 538, 546 (2016).

meaning is derived from the intention of lawmakers at the time.¹²¹ This subtle, but important distinction marries well with the basis of public choice and democratic government in that the focus of analysis relies on the law that was promulgated for the people rather than by what the lawmaker meant.¹²² Thro furthers his proposition of using originalism to interpret constitutional obligations by stating that in the absence of such “original public meaning” the court must create a constitutional construction that is consistent with the original public meaning based on the text.¹²³ However, this solution assumes that the judiciary is still the best entity to make decisions of public choice, will, and importance absent absolute violation of a constitution, or clear constitutional construction.

In cases where the court defers to the legislative intent of a law, the choice of the public may be more protected than in strict deferential treatment to agency interpretation due to the election of representative government in the legislature, specifically in reference to Florida. As the Honorable Clifford Taylor points out, the broadening of judicial review has led to increasing areas of American life that are no longer under the control of the people through the election of representative government, but are controlled by judges through the judicial policy making of judicial activism.¹²⁴ He cites Judge Kleinfeld of the United States Court of Appeals for the Ninth Circuit in his dissent for a “right to die” case, where he stated, “That a question is important does not imply that it is constitutional. The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia,

¹²¹ Id.

¹²² Id.

¹²³ Id at 553.

¹²⁴ Clifford Taylor, Who is in Charge Here? Some Thoughts on Judicial Review, Mich. B.J., 32, 34 (1998).

while all great questions would be decided by the judiciary.”¹²⁵ Thus, with the risk of judicial review and intervention leading to erroneous interpretations and applications of the law, it is arguable that the better forum for changes in charter school challenges and exercise of public choice be conducted through the Legislature, ultimately responsible for the promulgation of laws, rather than the judiciary. This idea is further substantiated by Wood’s proposition that state charters are only aspirational and do not impose substantive standards that are judicially enforceable.¹²⁶ More broadly, the decision for who has the authority to make educational decisions should be left to the people to decide through the legislature, where the public has the ability to makes changes with more haste and legislatures are held accountable at the ballot box.

¹²⁵ Id at 33.

¹²⁶ Wood, *American Dream*, at 778.

CHAPTER 5 EDUCATIONAL GOVERNANCE

Introduction

As Chapter 4 demonstrated, when issues regarding decision-making and the educational market place arise, individuals tend to turn to the judiciary to resolve conflicts. However, the judiciary may not always be the best venue to address concerns regarding what entity should retain authority in the educational market place. Due to separation of powers and judicial restraint, it is not the role of the judiciary to make policy as the court is simply applying the law promulgated by the legislature, which is supposed to more closely represent the will of the people. Therefore, if public choice theory applies, the best way to address issues of educational governance and decision-making that represents the desires of the public is to look to the smallest units of decision-making, unencumbered by governmental involvement. However, if public choice theory does not apply, it is up to the legislature to address policy, which should also technically encompass the will of the people and potentially correct for failures in the market.

There are two approaches to the analysis of the role of government in the market place according to economic market theory.¹ Normative analysis is largely based on what the government 'ought to do' and requires that there is some way of government intervention in the market that makes an individual better off without making someone else worse off- Pareto efficiency.² From this perspective, the political process and bureaucratic structure of a 'democratic society' must be capable of correcting the

¹ Joseph Stiglitz and Jay Rosengard, *Economics of the Public Sector*. W.W. Norton Company, Inc. (New York, 2015): 95.

² *Id* at 96.

market failures that will inevitably exist.³ Positive analysis focuses less on the stated objectives of programs and legislation and describes the consequences of government intervention. Economists who subscribe to this view argue that explanations of political forces may be better gained by looking at the design and implementation of governmental programs, as well as the nature of the political process, than by the stated intentions of it.⁴ As Stiglitz and Rosengard conclude, "... an analysis of institutional arrangements by which public decisions get made may lead to designs that enhance the likelihood that the public decisions will reflect a broader set of public interests, not just special interests."⁵ Therefore, this chapter aimed to summarize and provide final analysis of the forgoing chapters with the purpose of examining the delineation of authority between State and local school boards. This examination aimed to review the decision-making responsibility of these authorities through analysis of state constitution, statutory language, case law, and secondary resources regarding the conflicts that arise between the powers. Through the lens of public choice theory,⁶ within the specific context of school choice,⁷ the goal was to offer an applicable analysis of policy in relation to where the power and authority for educational administration has historically been situated and where it currently begins and ends between State Boards of Education and Local School Boards. The historical and current evaluation of education governance, particularly from an economic standpoint as a means to explain and predict behavior, is very limited and necessitated a study such as this, to synthesize theoretical

³ Id.

⁴ Id.

⁵ Id at 98.

⁶ Buchanan, J. & Tullock, G. (1962). *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI.

⁷ US Department of Education. (2009). *School Choice for Parents*. Retrieved from <http://www2.ed.gov/parents/schools/choice/definitions.html>.

and legal discourse. Thus, this study aimed at providing answers to the following questions:

1. What are the enumerated powers of local school boards and state boards of education?
2. What are the effects of the delegated decision-making authority between these bodies?
3. What factors are used to determine the balance between where state power ends and local power begins?
4. What impact does public choice have on decision-making power in education?

Research Questions

1. What are the enumerated powers of local school boards and state boards of education?

While the Federal Government is not granted enumerated authority in the Constitution, the federal government does retain some governance power in education. One such way is through the protection of citizens and their constitutional rights as they make contact with the education system, such as with First Amendment freedoms.⁸ Through its spending power and federally funded education programs, the federal government is able to direct parts of education that benefit from federal funding, i.e. special education through the allocation of funds for the Individuals with Disabilities Education Act (IDEA).⁹ The most recent federal legislation passed in Congress that affects education was the reauthorization of the 1965 Elementary and Secondary Education Act as the Every Student Succeeds Act in 2015.¹⁰ The federal government, through the United States Department of Education, regulates and manages federal

⁸ U.S. Const. amend. I.

⁹ Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2004)

¹⁰ Elementary and Secondary Education Act of 1965, Pub L. No. 89-10, 79 Stat. 27 (1965).

education programs, as well as promotes accountability and efficiency across the Nation, as mandated by Congress in 1972.¹¹

San Antonio Independent School District v. Rodriguez,¹² drew a clear line between the roles of federal and state governments in education, concluding that authority and responsibility over education was primarily of state and local concern. The role of state governance has changed and increased over time. Each of the fifty state constitutions contain provisions for the responsibility of education on the state level. From the authority vested in state constitutions, state governance typically focuses on setting standards and accountability in education.

The operation and management of schools are typically delegated to local school boards and districts. All states have a two-tiered system of governance between the state and local school boards, except Hawaii, which is a single school district. Scholars have offered that school districts are automatically granted authority through the doctrine of “in loco parentis” as school officials act as parents while children are in their care during the school day. Others look to the delegated authority in state constitutions for the conditions of local school board authority- providing for the supervision, administrative oversight, and execution of standards of local schools. There is also a faction of local school authority advocates who argue for the control of schools by parents. This control comes from the local election of school boards and school choice, in which parents have the opportunity to choose who represents them in the school board or where their children attend school between traditional public schools, charter schools, virtual schools, or private schools through voucher programs.

¹¹ 20 U.S.C.A. § 3402 (West). (Pub.L. 96-88, Title I, § 102, Oct. 17, 1979, 93 Stat. 670).

¹² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

2. What are the effects of the delegated decision-making authority between these bodies?

Decision making authority has led to much debate and conflict over how the education market should operate and who should determine what is in the best interests of children. From this divergence of opinion for less or more governmental involvement in the educational market, the school choice movement has been spurred. School choice initiatives, such as voucher programs and charter schools, allow for the financing of schools and services for students that best meet their needs. The school choice movement has grown over the past few decades. Charter Schools are one form of choice that are still considered public schools, but enjoy more autonomy at the school level in exchange for innovation, accountability, and competition in the education market. The first charter school statute was enacted in 1991 in Minnesota.¹³ Since then a proliferation of charter school laws have been enacted in forty-three states, leading to the opening of over 6,000 charter schools across the nation.¹⁴

While many charter schools have been established, debate continues regarding their permanence and utility in education. Proponents of charter schools tout the ability of charter schools to innovate and fill niche areas of need for children. Critics view charter schools as having a negative relationship with traditional schools as they divert funds and have been argued not to meet the uniformity provision in some state constitutions and statutes. Additionally, there are mixed reviews regarding the success of charter schools in the ability to increase achievement of students. Some studies have

¹³ Minn. Stat. 124E. Charter Schools.

¹⁴ USDOE, retrieved from <https://www2.ed.gov/about/offices/list/oii/csp/index.html?exp=7>.

shown gains in the test scores of some students, while others have concluded that there is little to no difference between the success of traditional schools and charter schools.¹⁵

The charter school application process is a point at which school governance and the charter school debate converge. With so much debate on whether charter schools should be an option and who should have the decision-making authority in education, the application process is the gateway for the vetting and establishment of charter schools and sponsors of charter schools- local school boards, universities, state departments- to act as the gatekeeper into the educational market. While varying across states, the application process begins with the submission of an application by charter school applicants that details the intended design of the school. A sponsor reviews the application and makes a decision whether to grant or deny the application. If an application was granted, the sponsor and applicant move into the charter contract development phase in which the two entities negotiate terms of the contract for the formation of the charter school. If the sponsor denies the application, some state legislatures have implemented an appeals process. Some appellate procedures include petitioning a different charter granting entity, state review of applications with remand to the original sponsor, or judicial review.¹⁶

3. What factors are used to determine the balance between where state power ends and local power begins?

¹⁵ *Charter Schools*, 8 Geo. J. on Poverty L. & Pol'y 505 (2001); 8 A.L.R.5th 533 (Originally published in 2000); Frank R. Kemerer & Catherine Maloney, *The Legal Framework for Educational Privatization and Accountability*, 150 Ed. Law Rep. 589 (2001).

¹⁶ Stephen D. Sugarman & Emlei Kuboyama. *Approving Charter Schools: The Gate-Keeper Function*. 53 Admin. L. Rev. 869.

Due to the debate regarding what the educational market should look like, conflicts over governance authority and decision-making continue to permeate educational conversations. Various courts have rendered decisions regarding the approval or rejection of charter school applications, ranging from finding that charter school applicants do not have property interests in receiving an approval even if it meets all of the state requirements, to ordering sponsors to document findings of fact so that the court can adequately review the reasonability of a decision.¹⁷ There are times when the court has been very judicially active, or the other extreme, abdicated its authority in deference to existing law. This has led to the unpredictability of the court and stagnation of educational issues related to charter schools, and governance issues generally.

Thus, if the judiciary was not the best venue to determine governance authority in education, other factors must be considered. Public choice theory is one theory that attempts to explain governance structures and where power lies. Public choice theory emerged as a way to explain political behavior based on market theory concepts.¹⁸ Market theory is based on the concept that there are scarce goods that are rationed through markets. Consumer demand for those goods factor into the market based on the theory that as price increases, demand tends to decrease. Producers are free to enter to the market to supply consumers with what they demand. In a market economy, there are many producers or firms that compete to sell products that affect supply and

¹⁷ See e.g., *West Chester Area School District v. Collegium Charter School*, 760 A.2d 452, 460 (Pa. Commw. Ct. 2000); See e.g., *Village Charter Sch. v. Chester Upland Sch. Dist.*, 813 A.2d 20, 24 (Pa. Commw. Ct. 2001).

¹⁸ James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI. (1962), 13.

demand. Theoretically, perfect competition is when a consumer has multiple options of producers for his or her demand. Competition in the market improves the good or service provided and drives down the price based on producers vying for the consumer to choose their product.¹⁹

When the market experiences imperfect competition, the government has either been involved or will become involved in the market. Monopoly is one form of imperfect competition. Monopolies are formed because it is more cost efficient for a single firm to be a producer or producers discourage competition of others, an example of which is the granting of patents by the government. Government typically becomes involved when the market will not or cannot supply enough public goods. Externalities are another cause for government intervention, due to the fact that when people do not experience the full effect of their positive or negative behaviors, they will either continue to engage in them to the detriment of others or choose not to engage in positive actions that might help others. In order to address this type of market failure, the government will typically take steps to fill this gap. Imperfect information also leads to government intervention as the type and amount of information offered to consumers may need to be regulated or the conditions created for the production of new information through research and development.

While the government aims to address market failures, there are differing perspectives on the government's place in the market. While market failure provides a rationale for government intervention, it does not necessarily provide a basis for government production of goods and services. Government will take over production at

¹⁹ Joseph Stiglitz & Jay Rosengard, *Economics of the Public Sector*. W.W. Norton Company, Inc. (New York, 2015).

times when competition in the market is not viable, when there is a threat that one or a few producers will exploit consumers, or when the public interests of a good or service are multifaceted. For example, education serves many functions in society, in addition to being a means to convey knowledge and teach skills. Education is also used to transmit national and citizenship values that run the risk of being overlooked if left to the private sector. On the other hand, there are arguments against the intervention of government as a producer as it can be inefficient and is not free from its own failures. Government may have limited information in a certain area, limited control over private markets, limited control over bureaucracy, and the political process itself.²⁰

From market theory, public choice theory attempts to explain the political process and the collective choice of individual actions. Viewing people individually, public choice theory explains how conflicting individual interests are reconciled in collective choice. In examination of political structures through public choice theory, one may be able to determine whether modifications to constraints or the government will lead to a better or worse state. When determining the necessity of collective action, the cost of decision-making and external costs must be considered. Decision-making costs are the costs of participating in decisions where two or more people must come to an agreement. External costs are costs that private behavior imposes on the decision-maker. The sum of decision-making costs and external costs equal the costs of social interdependence and should be reduced or minimized to the lowest possible figure in a market system.²¹ Buchanan and Tullock advocate that one way of reducing decision-making costs is by

²⁰ Id.

²¹ James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI. (1962).

organizing collective activity to the smallest units possible, i.e. decision-making at the local or family level, recognizing that decisions at these levels have effects at higher levels. Another way is through decentralization allowing the individual to move freely between alternatives. Representative government is another way to reduce interdependence costs. When moving through the spectrum of representative government of individual participation to one representative for all, one should consider the rules for collective action, the rules for choosing representation, the degree of representation, and the selection basis for representation.²²

According to public choice theory, decision-making in education should occur at the smallest unit possible, arguably, the parent. Education should be decentralized and allow for local decision-making to limit decision-making and external costs. Public choice theorists criticize the monopoly governments have on education arguing that innovation and progress are stifled in the market. However, opponents of this view cite “pseudo markets” where individuals are not really faced with choice but are labeled as consumers in the market. Additionally, critics highlight the fact that in a private market, an individual’s decision only affects that individual; however, a decision in the public market reverberates broadly. Competition amongst schools is also seen to produce waste as efforts are focused more on winning the competition and profit-conservation, than on student achievement.²³

With various structures and approaches to school governance across states, researchers have attempted to classify governance based on different criteria, including

²² Id.

James Buchanan & Gordon Tullock, *The Calculus of Consent*. University of Michigan Press. Ann Arbor, MI. (1962); See also Nesta Devine, *Education and Public Choice: A Critical Account of the Invisible Hand in Education*. Praeger Publishers. Westport, CT (2004).

centralization, administrative procedures, and fiscal concerns. The Fordham Institute published a taxonomy of governance that categorized state governance structures across the nation based on the level that decision-making control was concentrated, how authority was distributed in each state, and the degree to which the public was encouraged to participate in governance processes.²⁴

According to the study, the trend in the results showed that more states followed the ‘American tradition’ of local control in certain decisions. The ‘Level of control’ metric was defined as the degree to which education decision-making authority lies at the state versus the local level. These decisions included the opening and closing of schools, teacher evaluation, curriculum and textbooks, teacher retention, and fiscal management including taxation, and per pupil funding. Figure 5-1 shows the variation of control among states:

²⁴ Dara Zeelandelaar & David Griffith. *Schools of Thought: A Taxonomy of American Education Governance*. Thomas B. Fordham Institute. August 2015.

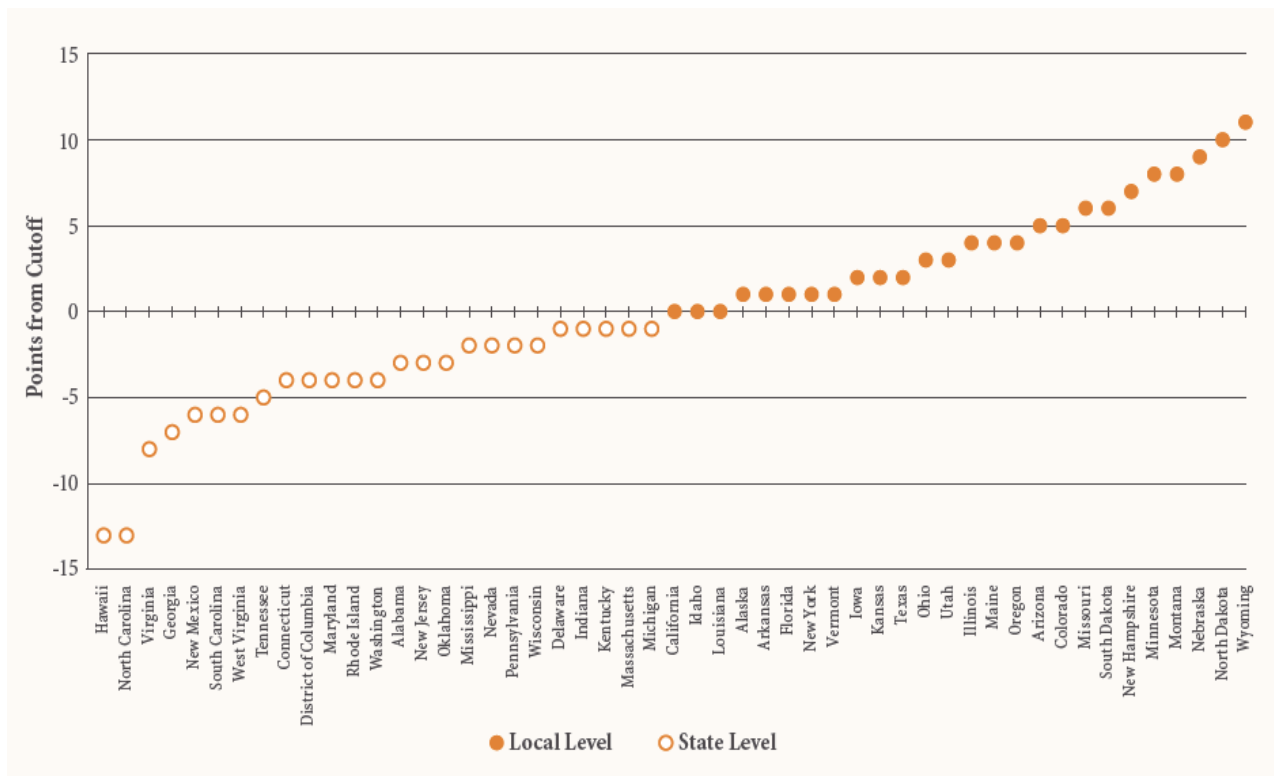


Figure 5-6 Level of Control Across States

Source: Dara Zeehandelaar & David Griffith. *Schools of Thought: A Taxonomy of American Education Governance*. Thomas B. Fordham Institute. August 2015.

Forty-two states and the District of Columbia partially or fully left the design of teacher evaluations to local school districts. Likewise, only eighteen states mandated that school districts choose textbooks from an approved list of books.²⁵ Conversely, the majority of states could take over low-performing schools and districts (including thirty-nine states and D.C.); mandated that districts include student achievement in teacher evaluations (including forty-two states and D.C.); and did not let districts decide if collective bargaining was allowed (including thirty-five states).²⁶

According to public choice theory, the results captured in the ‘level of control domain’ fit with control in small units, the local level. By local entities retaining the ability

²⁵ Id at 30.

²⁶ Id at 31.

to make curricular and textbook decisions, decision-making costs are minimized, as local bodies are better able to make decisions based on local demographics and needs. The fact that many more state legislatures were able to take over low-performing schools across the United States, illustrates government's self assigned role of 'correcting for the market' and filling the gap where that the local market was not able to produce. The majority of states were centered around the cutoff point; demonstrating that many states have mixed characteristics and degrees of local and state control, which is likely due to some inefficiencies of state control that local entities are able to correct through mitigated decision-making costs. Likewise, equity deficiencies of local control, where decisions made about collective bargaining or how student scores are used in teacher evaluations could lead to inconsistencies for teachers in different parts of a state, state government maintains the ability to make decisions in these areas.

There was a lot of variance among states in regard to the distribution of authority, whether power was concentrated in a few institutions or spread across many. Distribution of authority was based on the degree to which education decision-making authority was consolidated in a few institutions versus being dispersed among many institutions such as a state board of education, state board of higher education, board of regents, state charter school board, state early childhood education office, and other similarly situated institutions.

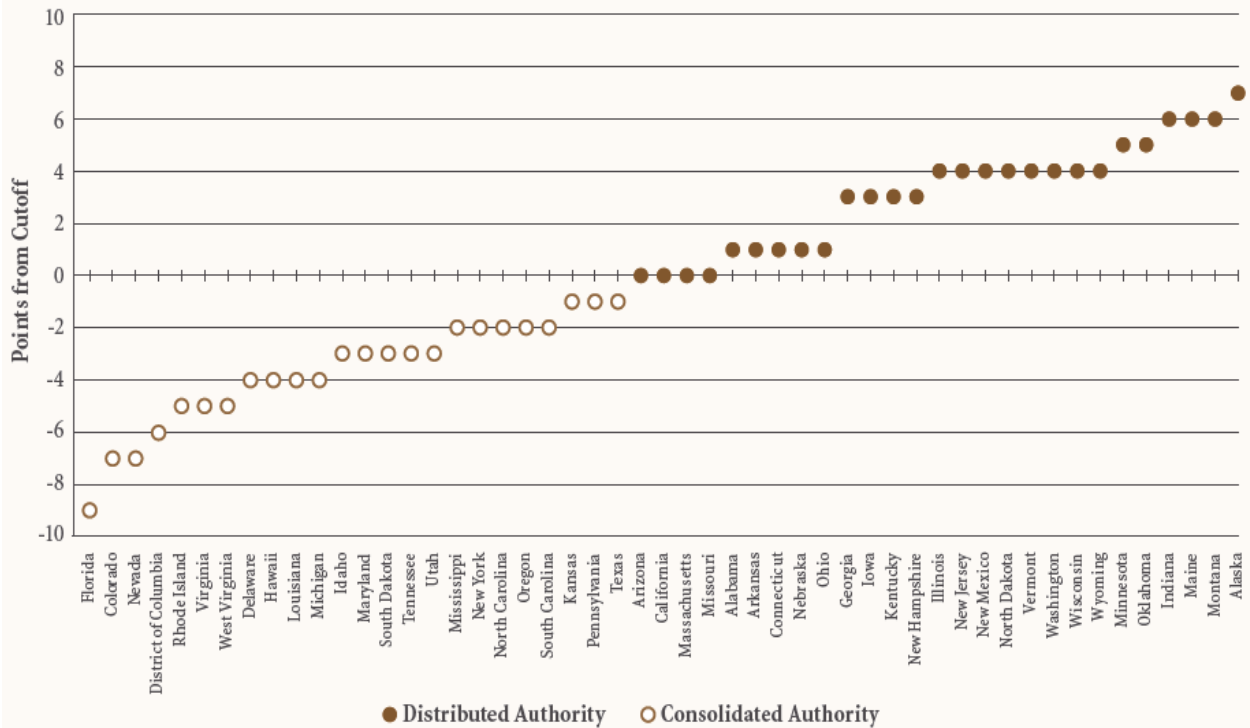


Figure 5-7 Distribution of Authority
 Source: Dara Zeehandelaar & David Griffith. *Schools of Thought: A Taxonomy of American Education Governance*. Thomas B. Fordham Institute. August 2015.

Researchers determined that there was much variance among states in regards to authority over education policy and its distribution among state and local institutions. According to the metrics, the state of Florida had the most consolidated system of education governance where the state board of education retained most control over P-20 education in the state. Conversely, Alaska had the most distributed system of governance where various departments retain authority over higher education (Board of Regents), vocational education (Commission on Postsecondary Education), and adult education (Department of Labor and Workforce Development).²⁷ The distribution of authority relates to the amount of people who are able to make decisions, or individual representation at the various levels when making decisions. Dispersed authority

²⁷ Id at 35.

provides the market with more variation, whereas, consolidated authority is more monopolistic in nature. Diffused or distributed power may lead to the ability of interested parties having more avenues to affect decisions, where as centralized power gives individuals one opportunity to choose representation in a body and must entrust that body to make decisions in their favor.

In terms of public participation, the researchers concluded that the majority of state legislatures had a combination of participatory and restrictive policies relating to voting procedures. The researchers defined the ‘degree of participation’ metric as the degree to which the public had the ability to participate in the education policymaking process. Public participation took into consideration whether state and local leaders were appointed or elected, when those elections occurred, and the requirements to serve on a board. The participation spectrum ranged from ‘participatory’ to ‘restrictive.’ Leaders in participatory states were typically elected with mandates for partisan, gender, or other characteristic balance. Restrictive states had more appointed leaders, no representation requirements, and may have had a chief state school officer who sat on the state board of education.²⁸ Figure 5-3. shows the disbursement of approaches across the states.

²⁸ Id at 16-21.

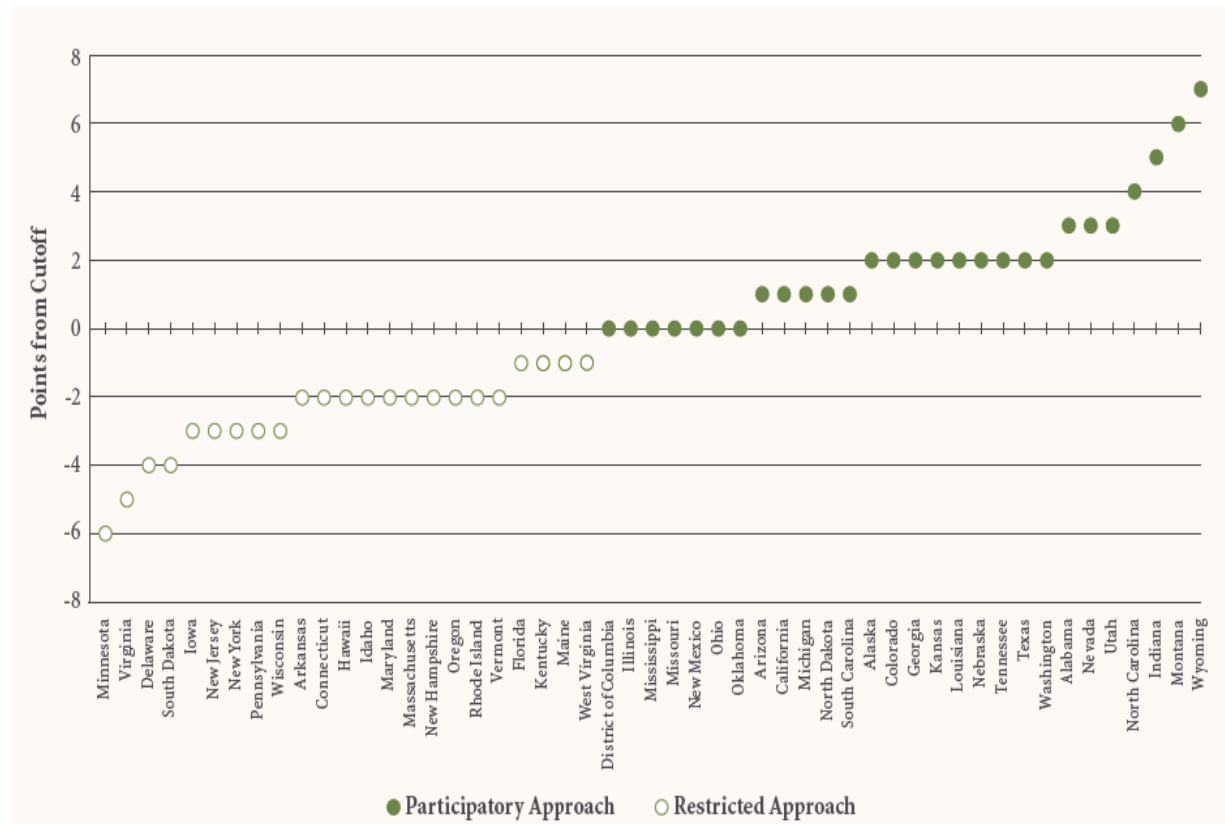


Figure 5-8 Degree of Participation

Source: Dara Zeehandelaar & David Griffith. *Schools of Thought: A Taxonomy of American Education Governance*. Thomas B. Fordham Institute. August 2015.

Minnesota adopted only one of the sixteen possible elements, electing local school boards, which promoted public participation. Conversely, states such as Wyoming, Montana, and Indiana encouraged participation through adopting more elements, such as an elected chief state school officer, timing of local elections consistent with national elections when more people are likely to vote, and the appointment of representative board members. Here, the researchers noted that while the spectrum runs from one end to the other, the majority of states had a combination of participatory and restrictive policies.²⁹ This category of governance is based on the

²⁹ Id at 39. Florida was classified as a restrictive state based on its total score of 7: regional representation (0- no regional representation requirement); partisan representation (0- no partisan representation requirement); external representation (0- no outside organizations must be representation on the state board); gender representation (0- no gender requirement); student representation (0- no

democratic governance of local and state entities in public choice theory. The degree of participation category is at the crux of public choice theory, in so far as it illustrates the various processes that states have developed to organize public choice. When deciding if and how to participate in the democratic process of school governance, the individual endeavors to convey his or her interests and must weigh the trade-offs of participation. Once in place, through appointment or election, those entrusted to make decisions in education must consider the costs of their decisions, but may be affected by special interests and personal biases.

Once states were scored based on the elements of the governance structures the researchers combined and analyzed the elements to demonstrate how these elements interact with each other on the state level. From this, the researchers derived eight classes of governance, named after famous political leaders and thinkers, such as Jefferson, Hamilton, Lincoln, Locke, etc., and categorized each state based on its philosophy on the intervention of government in the education market and the implementation of a governance structure that supports that philosophy.

While the researchers noted that their study was largely descriptive and subjective in nature and did not offer suggestions as to which governance structure is

student representative requirement); presence of chief state school officer (2- chief state school officer (CSSO) is not a member of the board)*; selection process of CSSO (0- appointed); election cycle for CSSO (0- Chief State School Officer is not elected); partisan election of CSSO (0- chief state school officer is not elected); selection process of the board (0- most or all members of the state board are appointed); election cycle of the board (0- state board is not elected); partisan election of the board (0- state board is not elected); selection process of local superintendents (2- all or most local superintendents are elected); selection process of local school boards (2- all or most local boards are elected); election cycle of local school boards (1- elections are on the national general election cycle); partisan election (0- elections use a nonpartisan ballot).

“best” for educating children, the taxonomy allows one to view the perspective of a state and its priorities in governing education on a continuum of structural designs.³⁰

The researchers recognize that every governance structure has its strengths and weakness and no governance structure has been deemed the “best” for students. This is evidenced in the myriad of governance structures presented by the researchers. Local level governance allows districts and individuals the freedom to oversee their systems and allows them to make decisions taking the local context into consideration, which typically leads to increased public buy-in. However, local control can also lead to less accountability that may lead some education officials to make decisions that may not be in the best interest of students because of the ability of special interests to factor in, or to make decisions that are based on experience rather than evidence. The advantages for consolidating authority in a few institutions include streamlined oversight, operation, and management of education in a state that leads to efficiency and the ability of leaders to respond to issues and strategically implement new initiatives while looking at the bigger picture of the state. However, a disadvantage of consolidated authority is that it can lead to bureaucratic red tape or the inability of the institution to respond to the needs of single populations within the system. These are the decision-making costs that must be factored in. Greater public participation promotes democratic accountability and community engagement in education. On the other hand, democratically electing school officials may leave to chance the election of those who are less qualified or those with singular interests when running for a position.

³⁰ Id.

4. What impact does public choice have on decision-making power in education?

Due to the many variations amongst states, this study focused on the education system in Florida because of its diversity of population and education structures, as well as its implementation of school choice initiatives. The constitution of the state of Florida states that the “supervision of the system of free education” is the responsibility of the Florida State Board of Education, whose membership is appointed by the governor of Florida.³¹ Florida’s constitution also assigns the duties of operating, controlling, and supervising all free public schools to local school boards that are elected by citizens within school districts. The 1998 revision to the Florida Constitution, making education a “fundamental value” and a “paramount duty of the state to make adequate provision for the education of all children” strengthened the mandate for state provision of education.³² Florida courts have upheld this mandate in various cases, showing deference to the state legislature and executive agencies, as well as holding it accountable for educational outcomes.³³ While the Florida state constitution provides a basis for state control of education, argument for local control has also been offered. The state allows for some local school board autonomy and delegates responsibilities over areas such as teacher evaluations and arguably, the establishment of charter schools.

³¹ Art IX, Fla. Const.

³² Art IX, § 2; § 4, Fla. Const.

³³ See e.g. *Imnotep-Nguzo Saba Charter School v. Department of Education and Palm Beach County School Board*, 947 So.2d 1279, (Fla. 4th DCA 2007); *Spiral Tech Elementary Charter School v. School Board of Miami-Dade County*, 994 So.2d 455, (Fla. 3d DCA 2008); *School Board of Volusia County v. Academies of Excellence, Inc.*, 974 So.2d 1186 (Fla. 5th DCA 2008); *Duval County School Board v. State, Board of Education*, 998 So.2d 641 (Fla. 1st DCA 2008).

There are over 650 charter schools serving over 270,000 of Florida's students.³⁴ Over the past ten years, charter school enrollment has steadily increased. Florida statute outlines the process for the establishment of charter schools starting at the local level.³⁵ Local school boards serve the gatekeeper function in Florida as they review charter applications and decide whether to approve or deny applicants. Upon approval, local school boards negotiate charter contracts. If a school board denies an applicant, based on good cause, the applicant has an opportunity to appeal the decision to the State Board of Education. The Charter School Appeal Commission, made of Commissioner of Education appointees representing established charter schools and local school districts, is convened to make a recommendation to the State Board of Education after review of the charter appeal record. While the decision of the Commission is not binding, the State Board must consider the "fact based justification" for the Commission's recommendation when making its decision.³⁶ The State Board of Education reviews the record and makes a final decision whether to uphold or reject the decision of the Local School Board. The decision of the State Board of Education is final; however, either party to a case may appeal the State Board's decision to the judiciary.³⁷

Florida courts have heard cases regarding the charter school application process and have showed great deference to the State Board of Education, while limiting overreach by the state to usurp local school districts in created state established charter

³⁴ See Florida Department of Education Charter School FAQs October 2016. Retrieved from http://www.fldoe.org/core/fileparse.php/18353/urlt/Charter_Oct_2016.pdf. All charts and graphs in this section are from this FAQ report.

³⁵ 1002.33(3)(a), Fla. Stat.

³⁶ *Id.*

³⁷ 1002.33, Fla. Stat.

schools. The charter school application statutes have also met criticism by the judiciary as they “frustrate appellate review” due to a lack of a clear standard of review in the statute and the absence of what forum a school board is supposed to present clear and convincing evidence to deny an application.³⁸

According to the Fordham Institute’s taxonomy of school governance, Florida was classified as a local-centric state with the most consolidated authority and a restrictive approach to public participation in the process.³⁹ Thus, Florida aligned with states considered to be Platonist who believed that power should be left to those who are deemed fit to govern. According to public choice theory, Florida would likely be considered a state that stifles market based collective action due to consolidated authority at the state and the limitation of public participation, a hallmark of public choice. However, Florida’s representative political processes in education may correct for social interdependence costs and inequities from decisions made in smaller units. It is interesting to note that market-based education reform has been pushed in Florida through initiatives such as vouchers and charter schools even though the state is based less on market principles.

As noted in the broader context, the judiciary may not always be the best place to determine state governance authority, whether based on charter school and educational market challenges or conflicts that arise based on decision-making authority in Florida. Therefore, as discussed in the recommendations of this chapter, one should turn to the legislative process to carry out the will of the public. If a more representative educational

³⁸ See e.g. *School Board of Polk County v. Renaissance Charter School, Inc.*, 147 So. 3d 1026 (Fla. 2d DCA 2014).

³⁹ Dara Zeehandelaar and David Griffith. *Schools of Thought: A Taxonomy of American Education Governance*. Thomas B. Fordham Institute. August 2015.

governance structure is desired, one place to amend would be the charter school application process.

Conclusion

As education in the United States has developed, the need or desire for government involvement has seemingly increased. In the beginning, Government intervened to standardize education and ensure that all children received adequate education; particularly as school attendance became compulsory. With the increase of standards and accountability, so came further investment in education and vicariously more involvement in educational affairs by the government. Market failure or lack of market like circumstances led to more government involvement and the development of a governmental monopoly in education. The uniqueness of the system of education, in that the taxpayer is both owner and client- producer and consumer, lends itself to governmental assistance or intrusion depending on one's perspective. Also situated in the topic of school governance is the question of how much governance and from what authority? These questions lead to discussion regarding federal, state, and local control of education and how the officials or representatives at those levels are chosen to make decisions. Thus, there are factions of people for and against local control.

Proponents of local control, small government, and “governance closer to the people” cite local control as a way for citizens to use their voice and “feet” to vote in effort to find and construct the type of governance structure that best suits their desires and preferences.⁴⁰ Theoretically, if a citizen desires a different structure than what is being presented in their local community, he or she has the option to move to a

⁴⁰ Joseph Stiglitz & Jay Rosengard, *Economics of the Public Sector*. W.W. Norton Company, Inc. (New York, 2015).

neighboring location or make his or her preferences known in the ballot box or at local meetings. Supporting this concept is the idea that centralized governance tends to move to a median point across a state or a nation in order to sustain order. This median point makes the desires of the local citizen difficult to conform to. Whereas local governance, such as the local school board, can respond to the immediate concerns of citizens by means of regularly scheduled school board meetings that only have to take the local district into consideration. Advocates for local school governance also argue that large centralized governance structures are more susceptible to “capture” of politicians by special interest groups. It is seemingly easier for a local citizen to be a watchdog of local decision-making than to watch over and hold accountable state level government leaders in a distant place. Argument for local control also sees the involvement of parents and local citizens as a way for investment of the public. If local citizens feel they have a say in local school governance, they are more likely to meet the needs of schools and pay attention to what is going on at the local level.⁴¹ The thought process is that in exchange for greater control, citizens will support local schools. Scholars have made arguments for local control arguing that researchers are still trying to determine what the ‘best’ methods for educating children are, in order to come to a conclusion schools must be supported as “laboratories of democracy” that allows for the development of innovative and new solutions. The way to foster this environment is through permitting discretion for local choices in which producers must compete for viability rather than centralized conformity.

⁴¹ Id.

This view that local citizens have more say in their local education system either by moving or by voting in representatives that align with beliefs assumes that citizens have the means and desire to do so. Citizens from a wealth-poor district or area may not have the means to travel or move in order to choose a school or school district that better meets their needs. Even more acutely, these citizens may not have the time or ability to attend school board meetings and local elections to voice concerns due to the same circumstances that lead to poverty in the first place. Negative experiences in school leads some adults to completely disengage from education once they become adults and are not forced to attend school. Therefore, even with control of schools in citizens' hands, the citizen without time to attend to school concerns and the citizen who has disengaged may not exercise their control. Responses to local control also include the argument that parental control is still not full parent control, short of home schooling children, as parents only have the options that are allowed by people who were chosen in the democratic decision-making process. Thus, parents are still controlled by the pre-determined arrangements of others.⁴² Furthermore, innovation and the transmission of 'best practices' require the capital for scientific transfer of methods that are found to be beneficial in one school setting to another. Additionally, the application of innovative practices from one school district setting to another necessitates similar characteristics from one to another. Another criticism for local control is the argument that local voters tend to know less about local election candidates than they do about nation and state politicians. Citizens tend to be even less informed when it comes to school board

⁴² Nesta Devine. *Education and Public Choice: A Critical Account of the Invisible Hand in Education*. Praeger Publishers. Westport, CT (2004).

elections due to limited media coverage and irrelevant political party affiliations that do not necessarily indicate how a candidate may vote.⁴³

Implications

Due to the complexity of American society, based on democracy, the protection of individual rights, and a quasi-free market society, it is difficult to affirmatively determine whether the education system should be built on parental, local, state, or federal control. There are pros and cons for each level, as well as arguments for and against a market type education system or more government intervention. A truly market based governance system could lead to more disparities in education, whereas governmental monopoly tends to stifle innovation.

As this study demonstrates, much deference is given to state governance due to constitutional mandates and a state legislature's ability to hold schools and districts accountable for the education of students within its borders. However, this deference has not stopped courts from nurturing the power of local control and parents to direct education. Public choice theory purports that control in small units fosters market type actions and leads to democratic engagement and efficiency. However, creating a system that is focused on market action in collective choice must be cautiously undertaken as market failure in the private market has the potential to negatively affect an individual or a small group of individuals. However, market failure in the education arena has deleterious effects on not only children but on society as a whole. Failing to educate a child limits the ability of an individual to progress in society and is difficult to justify, as failure negatively affects not a product, but human capital. When the market

⁴³ Id.

fails, local communities spend tax money on inefficient education, as does the state legislature that is also investing for an educated workforce to sustain and progress the mission of the state. The nation also has a stake in education as it attempts to compete globally. With so much at stake, the involvement of government seems inherently necessary, thus, the next question is to what extent the government should be involved. Should the government regulate, fill the gap, or produce education? In order to answer this question, one may turn to the court to resolve the conflict or to the legislature to address the will of the people.

The fact that compulsory school attendance for children exists warrants some accountability as students and parents are forced to participate in the educational market and taxpayers are forced to fund education as an institution. Cautiously staying true to collective choice and necessary accountability, an argument could be made for the development of a system that is more a mixture of processes on multiple levels, as a check and balance for authority.

Recommendations

Florida's governance structure includes both state and local decision-making, with varying degrees of power depending on the issue at hand. Using the state of Florida's charter school application as an example and based on judicial decisions one can see the difficulty in governance. Theoretically, written into the statute is local control by school boards who vet applications and can initially deny or approve an application. If approved, local control works as local citizens, parents, and taxpayers have their say through representation by a democratically elected school board that negotiates the

contract.⁴⁴ However, upon denial, the system becomes more complex as a Charter School Appeal Commission, whose membership is appointed by the Commissioner of Education, makes a recommendation to another board that is comprised of members appointed by Florida's elected governor. Thus, Floridians have a voice in the Office of the Governor and have placed the responsibility in him or her to appoint representatives who govern education, rather than having a direct say in those who are appointed and decisions those members make. In order to increase the public voice in the collective choice process and include decision-making representing all levels, a revision to Florida's charter school statute and application process is recommended.

Section 1002.33, Florida Statute is Florida's charter school statute, which encompasses multi-level governance in determining the amount of market-style constructs, in the form of school choice, will exist in Florida. One recommendation would be a change in subsection (2)(b), by inserting "Implement innovative learning methods for the administration of educating students" and striking (2)(c)(1) that reads, "Create innovative measurement tools." The reason for this change would be to strengthen the language of innovation, which is one of the desired outcomes of charter schools and more choice in education. Making this change moves innovation from a purpose that "may" be fulfilled to one that "shall" be fulfilled. Another change would be recommended for (2)(c)(2) to read, "In collaboration with local school districts, share the results of successful, evidence based practices," in effort to foster a more collaborative approach between local school boards and charter schools, moving away from an adversarial relationship to one in which best practices and cooperation are fostered for the benefit of all children. In this way, locally elected school officials and individually selected charter school educators are able to progress education for that local district in a positive way. Furthermore, subsection (3)(a) should be amended to read that "at least one individual with a local connection in the sponsor school district" in terms of who is able to submit an application for a charter school. The purpose for this amendment is to tie a potentially new charter school to the local community and whose governance would consist of at least one individual who understands the needs of the local area. Subsection (6) of the statute outlines the application process and review. In order to place the burden of proof on the charter school applicant a suggested change would be to (6)(b)3.b. to read that "An application submitted by a high-

⁴⁴ 1002.33, F.S.

performing charter school identified pursuant to s. 1002.331 may not be denied by the sponsor only if the Charter School Applicant demonstrates by clear and convincing evidence that..." Shifting the burden to the charter school applicant holds it more accountable and works more as a check on a school entering the market, especially when it has already demonstrated that it is high performing. Addressing concerns iterated by the judiciary, (6)(c)1 should be amended to include the point that a sponsor responds to an appeal by a charter school application, in order to make a good cause justification for its reason to deny the applicant. Furthermore, (6)(c)3.a. should be amended to include the abuse of discretion standard of review when the State Board of Education is considering an appeal. The addition of this standard provides another check on the State Board of Education's power, forcing it to determine that a sponsor abused its discretion when denying an application, and recognizing that the school board does have a modicum of discretion when it comes to the establishment of charter schools in its borders. Finally, section (6)(c)3e3 should be amended so that the Charter School Appeal Commission is more representative of the individuals who will be affected by the final decision that is made. The new Charter School Appeal Commission would be made of two parent representatives, two teachers, two representatives of currently operating charter schools, two representatives from sponsors and one person from the private sector. Also as a separation of power, the appointed Commissioner of Education would not sit on both the Charter School Appeal Commission and the State Board of Education. The full text of changes is below:

Section 1. Subsection (2) of 1002.33, Florida Statutes, is amended to read:

1002.33 Charter schools.—

(2) GUIDING PRINCIPLES; PURPOSE.—

(a) Charter schools in Florida shall be guided by the following principles:

1. Meet high standards of student achievement while providing parents flexibility to choose among diverse educational opportunities within the state's public school system.

2. Promote enhanced academic success and financial efficiency by aligning responsibility with accountability.

3. Provide parents with sufficient information on whether their child is reading at grade level and whether the child gains at least a year's worth of learning for every year spent in the charter school.

(b) Charter schools shall fulfill the following purposes:

1. Improve student learning and academic achievement.
2. Increase learning opportunities for all students, with special emphasis on low-performing students and reading.
3. Encourage the use of innovative learning methods.
4. Require the measurement of learning outcomes.
5. Implement innovative learning methods for the administration of educating of students.

(c) Charter schools may fulfill the following purposes:

1. Create innovative measurement tools.
2. In collaboration with local school districts, share the results of successful, evidence based practices. Provide rigorous competition within the public school district to stimulate continual improvement in all public schools.
3. Expand the capacity of the public school system.
4. Mitigate the educational impact created by the development of new residential dwelling units.
5. Create new professional opportunities for teachers, including ownership of the learning program at the school site.

Section 2. Subsection (3) of 1002.33, Florida Statutes, is amended to read:

(3) APPLICATION FOR CHARTER STATUS.—

(a) An application for a new charter school may be made by an individual, teachers, parents, a group of individuals, a municipality, or a legal entity organized under the laws of this state, with at least one individual with a local connection in the sponsor school district.

(c)1. An applicant may appeal any denial of that applicant's application or failure to act on an application to the State Board of Education no later than 30 calendar days after receipt of the sponsor's decision or failure to act and shall notify the sponsor of its appeal. The Any response of the sponsor shall be submitted to the State Board of Education within 30 calendar days after notification of the appeal and shall contain evidence of a good cause justification for its decision. Upon receipt of notification from the State Board of Education that a charter school applicant is filing an appeal, the Commissioner of Education shall convene a meeting of the

Charter School Appeal Commission to study and make recommendations to the State Board of Education regarding its pending decision about the appeal. The commission shall forward its recommendation to the state board at least 7 calendar days before the date on which the appeal is to be heard. An appeal regarding the denial of an application submitted by a high-performing charter school pursuant to s. 1002.331 shall be conducted by the State Board of Education in accordance with this paragraph, except that the commission shall not convene to make recommendations regarding the appeal. However, the Commissioner of Education shall review the appeal and make a recommendation to the state board.

2. The Charter School Appeal Commission or, in the case of an appeal regarding an application submitted by a high-performing charter school, the State Board of Education may reject an appeal submission for failure to comply with procedural rules governing the appeals process. The rejection shall describe the submission errors. The appellant shall have 15 calendar days after notice of rejection in which to resubmit an appeal that meets the requirements set forth in State Board of Education rule. An appeal submitted subsequent to such rejection is considered timely if the original appeal was filed within 30 calendar days after receipt of notice of the specific reasons for the sponsor's denial of the charter application.

3.a. The State Board of Education shall by majority vote accept or reject the decision of the sponsor no later than 90 calendar days after an appeal is filed in accordance with State Board of Education rule based on an abuse of discretion standard. The State Board of Education shall remand the application to the sponsor with its written decision that the sponsor approve or deny the application. The sponsor shall implement the decision of the State Board of Education. The decision of the State Board of Education is not subject to the provisions of the Administrative Procedure Act, chapter 120.

b. If an appeal concerns an application submitted by a high-performing charter school identified pursuant to s. 1002.331, the State Board of Education shall determine whether the charter school applicant sponsor has shown, by clear and convincing evidence, that:

3. The commissioner shall appoint a number of members to the Charter School Appeal Commission sufficient to ensure that no potential conflict of interest exists for any commission appeal decision. Members shall serve without compensation but may be reimbursed for travel and per diem expenses in conjunction with their service. Of the members hearing the appeal, two must represent parents, two must represent teachers, two must represent currently operating charter schools, two must represent Sponsors, one must represent the private sector. one-half must represent currently operating charter schools and one-half must represent sponsors.

One of the members shall be elected as chair of the The commissioner or a named designee shall chair the Charter School Appeal Commission.

4. The chair shall convene meetings of the commission and shall ensure that the written recommendations are completed and forwarded in a timely manner. In cases where the commission cannot reach a decision, the chair shall make the written recommendation with justification, noting that the decision was rendered by the chair.

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BIOGRAPHICAL SKETCH

Jolande Morgan graduated from the University of Florida ProTeach Program, earning her Bachelor in Elementary Education in 2007 and her Master in Special Education in 2008. While in the ProTeach program she received the Undergraduate Leadership Award. Her master's thesis was a study of Teacher-Student Relationships and the effect on Students with Social Emotional Behavior Disorders. She taught in Palm Beach County in a Title 1 school as a Math Resource Teacher, Response to Intervention Facilitator, and Fourth Grade Math and Science Teacher. During her tenure as a teacher she serviced students who scored in the lowest 25 percentile on the state assessment, was the Student Advisory Council Co-Chair, the Weekend and Summer Enrichment School Coordinator, and fulfilled various other leadership roles within her school site and district.

In 2012 she returned to the University of Florida to earn a doctorate degree in Education Administration and Policy, as well as a joint juris doctorate with a focus in public interest law. In 2014 she had the opportunity to study abroad in South Africa, studying comparative constitutional law and international business transactions. She has interned in the General Counsel Office of the Palm Beach County School Board, as well as the Alachua County School District Office of the Superintendent. Under the supervision of Dr. R. Craig Wood, she has been the administrative assistant for the National Education Finance Conference, presented at the conference, and published State of the States reports in the *Journal of Education Finance*. In the 2016 – 2017 academic year, she participated in the Florida Gubernatorial Fellowship program

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