

The notion of “local control” has an enduring resonance in American education, yet the law gives state officials the upper hand by RICHARD BRIFFAULT

In a December 2003 decision, a Colorado trial court judge invalidated the state’s new school voucher program. The decision was unusual in that the court relied not on traditional separation-of-church-and-state concerns, but instead on a provision of the Colorado state constitution that vests control over public education in local school boards. The court held that by failing to give local school boards any “input whatsoever into the instruction to be offered by the private schools” that accepted voucher students, the state had violated the constitutional provision that grants local boards “control of instruction in the public schools of their respective districts.”

The ruling in *Colorado Congress of Parents v. Owens*, which has already been appealed, illustrates the longstanding tension in American education law between two competing models of the relationship between states and local school boards. The dominant approach has treated school boards as legally subordinate to their states, recognizing that most state constitutions explicitly assign responsibility for and authority over public education to the state government. While the states’ nearly unlimited authority has been repeatedly affirmed by the courts, there has been intermittent legal recognition of the de facto autonomy enjoyed by local school boards in the day-to-day operation and management of their schools. Moreover, as the Colorado decision indicates, courts have occasionally recognized—and even celebrated—the powerful tradition of local control in American education.

ILLUSTRATIONS BY CORBIS

# With strings Attached



However, the Colorado case is the rare example of local control's successfully trumping state action. Overall, the tradition of local control has not constrained the states' role in education. On the contrary, local-control arguments have been most successful in court when the states themselves have wielded them as a means of resisting new obligations, such as equalizing spending between wealthy and poor districts. In other words, local control is primarily a matter of state policy rather than a constraint imposed by federal or state constitutional law on the states' role in education. States assert the principle of local control when it is convenient for them to do so, without yielding much authority to local school boards.

### "Arms of the State"

The roughly 15,000 local school districts in the United States account for more than one-sixth of all American local governments. Of these districts, more than 90 percent are legally and politically independent of their surrounding counties or municipalities; the vast majority are governed by elected boards. (However, a number of states have recently authorized the mayors of big cities, such as Cleveland and Detroit, to appoint some or all of the members of their school boards, while New York gave the mayor of New York City the power to appoint a commissioner of education to run the city's schools.) In some states, local school boards also enjoy fiscal independence, including the power to levy taxes. In most states, however, school boards are fiscally dependent on other local governments.

The legal status of school boards flows from two key factors. First, school districts are local governments and thus, like all other local governments, are subordinate to their states. Second, unlike counties and municipalities, school districts have a single function—the provision of public education—that is considered a state responsibility. Virtually every state constitution requires the state legislature to provide for a system of free public education. The existence of such a mandate is an unusual departure in

American constitutionalism—which has traditionally been focused on limiting government power, not creating obligations to provide a public service—and is a tribute to the central role of public education in American culture. Thus, as units specializing in public education, school districts are often seen as *agencies* of the state—sometimes, rhetorically, “arms of the state”—for the implementation of the state's education mandate.

The state interest in education affects the powers of local school boards significantly. First, there is far greater state oversight of school boards than of other local governments. State boards of education and state education agencies promulgate extensive regulations governing school board behavior and school district operations. There is no comparable state administrative officer or body—other than the legislature itself—with similar powers over counties, cities, or other localities. State legislatures also heavily regulate the school system, through laws dealing with school district organization, elections, and governance; education programs, instructional materials, and proficiency testing; attendance rules; the length of the school day and school year; teacher credentialing, tenure, and pensions; the construction and maintenance of school buildings; school district finances and budgets; school safety; parents' and students' rights and responsibilities; and virtually every other aspect of school operations and policy. By my count, 14 volumes of the California legislative code concern education.

Finally, the strong state interest in education means that local school boards tend to have relatively limited powers to initiate policies on their own. One recent study in Kansas found that school districts had to obtain express statutory authority to hire lobbyists; operate alternative schools; share guidance programs; enter into interdistrict agreements to share personnel or computer systems; pay dues to the Kansas

Association of School Boards; educate military dependents; or obtain boiler, fire, auto, health, or student insurance. To be sure, other studies have found that courts have construed the implied powers of school districts broadly, particularly in recent years, permitting greater “freedom and experimentation” than the formal

**States assert the principle of local control when it is convenient for them to do so, without yielding much authority to local school boards.**

limitations of school board powers would suggest, including the ability to add to the state-prescribed curriculum and to supplement state-mandated materials. Yet while school boards' capacity to innovate may be greater in practice than it is in theory, they enjoy less autonomy than other local governments.

### Hostile Takeovers

One of the clearest illustrations of states' power relative to school districts is the freedom they enjoy to restructure or displace locally elected school boards. For instance, the judiciary treated New York State's 1961 reorganization of the New York City Board of Education as akin to an internal restructuring of a branch of state government rather than an infringement on local autonomy. The legislature, at the request of the city's mayor, eliminated the board of education and authorized the mayor to appoint a new board from a list of nominees prepared by the legislature. When the ousted board members filed suit, claiming that the state's action violated the principle of home rule, the New York Court of Appeals—the state's highest court—sided with the state. The court argued that board of education members were “officers of an independent corporation separate and distinct from the city, created by the State for the purpose of carrying out a purely State function and are not city officers within the compass of the constitution's home rule provision.” More recently, courts have upheld state laws ousting the independently elected school boards in Cleveland, Detroit, and Harrisburg, giving each city's mayor the power to appoint all or most of the new board's members.

These high-profile restructurings were initiated by local officials or resulted in the transfer of power to those local officials. To that extent, they may bolster local control even if they involve a loss of school board autonomy. But state courts have been just as deferential to state laws allowing the takeover of local districts by state appointees. As of 2002, a total of 24 states had adopted laws authorizing a state education agency to displace a school board and take over the operation of a school district in cases of protracted problems with academic performance, fiscal mismanagement, or corruption. In 15 states, state law permits a state agency to take over an individual school. The Education Commission of the States found that

## The rise of charter schools reflects the subordinate position of local school districts vis-à-vis state governments.

since the late 1980s there have been nearly 50 school district takeovers (some involving multiple state interventions in the same district) in 19 states. Courts have found these measures to be well within the state's prerogatives.

### Diluted Local Authority

The rise of charter schools also reflects the subordinate position of local school districts and to some extent further weakens their position. In most states the creation of a charter school challenges a school district's control over the public schools within its borders. Just 12 states vest the authority to grant charter school applications solely in school districts. By

contrast, in 23 states, many institutions can approve charter schools, such as the state board of education, universities, a specially designated state board for charter schools, or local school districts. In 26 states (including 10 of the 12 states above), the initial decision by a local school board to deny a charter school application may be appealed to the state board of education or another institution, thus curbing school districts' control over the approval of charters even where school districts are given a role.

State courts have uniformly rejected challenges to charter school-enabling legislation, relying on the plenary state power over public schools. In California an appellate court found that charter schools easily fell within the legislature's “sweeping and comprehensive powers in relation to our public schools.” The charter schools were, like the school districts and county boards of education challenging their charters, creatures of the state “authorized to maintain” public schools. Similarly, the Utah Supreme Court rejected the claim brought by the state school boards association that the statute authorizing the state board of education to approve and supervise charter schools represented an unconstitutional expansion of the state board's authority into the area of local schools.

Courts have also been reluctant to entertain suits by school boards challenging decisions to grant particular charter school applications. A Pennsylvania court held that a school district lacked standing to contest the grant of a charter application, even though the school district had alleged that the new school would draw students (and thus state funds) away from the district.

## Great Power, Great Responsibility

Sometimes school boards can benefit from being subordinate to their states in the sense that states can be held responsible for the fiscal health of school districts. For instance, in the 1992 *Butt v. State of California* decision, the California Supreme Court held that the state was constitutionally required to bail out a local school district that decided to end the school year six weeks earlier than planned because of acute financial difficulties.

The state had resisted the bailout, claiming the district had received enough state support under California's equalized school funding system. The state contended that requiring additional state financial support would enable a local district to "indulge in fiscal irresponsibility without penalty." Moreover, the state argued that the bailout would be inconsistent with the principle of local control.

The California Supreme Court disagreed sharply. It found that the state had long departed from local control by taking an enormous role in school governance and decisionmaking, including setting standards for and overseeing local school district budgets. Nor would a bailout make fiscal mismanagement more likely since the state has authority to "further tighten budgetary oversight, impose prudent, nondiscriminatory conditions on emergency State aid, and authorize intervention by State education officials to stabilize the management of local districts whose imprudent policies have threatened their fiscal integrity." In any event, the state's "ultimate responsibility for equal operation of the common school system" meant that the "State is obliged to intervene when a local district's fiscal problems would otherwise deny its students basic educational equality."

The education clauses of state constitutions have also provided the legal foundation for the wave of court-ordered school funding equalization reforms over the past three decades. State courts have repeatedly held states responsible for ensuring that all students receive at least an adequate, though not necessarily equal, education. Such decisions have forced many states to take a stronger role in the funding and regulation of local schools. The legal the-

ory underlying school finance reform is predicated to a significant degree on the principle that local school districts are essentially agencies of the states, charged with providing the education mandated by the state's constitution.

## The Value of "Local Control"

While demonstrating the states' legal responsibility for public education, the school finance cases also illustrate the resonance of the local control principle. First, eight state supreme courts have cited the value of local control in upholding the states' reliance on local property taxes to fund the schools, notwithstanding the resulting inequalities in spending among districts. Second, even in the many cases where courts have sided with the plaintiffs and demanded financing reforms, the courts have typically ruled that individual local districts are free to raise and spend above the level they deem "adequate." As the Arizona Supreme Court observed, in the course of striking down the state's school financing system:

Local control in these matters is an important part of our culture. Thus, school houses, school districts, and counties will not always be the same because some districts may either attach greater importance to education or have more wherewithal to fund it. Nothing in our constitution prohibits this. . . . Indeed, if citizens were not free to go above and beyond the state financed system to produce a school system that meets their needs, public education statewide would suffer.

The principle of local control has also played a pivotal role in the U.S. Supreme Court's jurisprudence regarding school finance reform. In the 1972 decision in *San Antonio Independent School District v. Rodriguez*, the Court accepted to a considerable degree the argument that the funding of

schools primarily through local property taxes resulted in significant differences in school spending and quality from district to district. Nevertheless, the Court upheld Texas's school financing system because it grew out of and supported a system of local control.

**While demonstrating the states' legal responsibility for public education, the school finance movement also illustrates the resonance of local control.**



Local control is valuable, said the Court, because it facilitates “the greatest participation by those most directly concerned” with school decisionmaking. It also, the Court wrote, builds support for public schools, enables those communities that wish “to devote more money to the education” of their children to do so, and provides “opportunity for experimentation, innovation, and a healthy competition for educational excellence.” The Court determined that local-based financing was constitutionally justified, notwithstanding the resulting inequalities, because the state could reasonably decide to promote local control in public education. Indeed, the state was not challenging local control but instead relied on it to deflect a constitutional claim.

The Supreme Court made an even more powerful departure from the “school-district-as-arm-of-the-state” model in *Milliken v. Bradley*. In that case, the Court rejected a lower court’s order requiring interdistrict busing as a remedy for segregation in Detroit. The lower court had found that segregation in the Detroit schools could not be remedied without including suburban school districts in the busing program. In the lower court’s view, Detroit and the suburban districts were merely different components of a single Michigan school system, so district boundaries could be ignored in developing a remedy.

The Supreme Court rejected the district court’s assertion that the school district boundaries “are no more than arbitrary lines on a map.” Instead, the Court argued, “the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country.” The Court found that extending the busing remedy beyond the Detroit system would undermine the autonomy of the suburban school districts.

The four dissenting justices pointed to the considerable authority the state enjoyed over school districts, including the “wide-ranging powers to consolidate and merge school districts, even without the consent of the districts themselves or of the local citizenry.” Indeed, as the dissenters noted, between 1964 and 1972 Michigan had winnowed the number of school districts statewide from 1,438 to 608. The prevailing view of the majority, however, was that the state’s formal authority to consolidate school districts was irrelevant.

Unless the state itself ordered a consolidation, the suburban school districts could rely on their independent existence to insulate themselves from Detroit’s problems. The federal courts had to respect the existing school district boundary lines, even if that made impossible an effective remedy for segregation in the metropolitan area.

### State Intervention, Local Opposition

State governments are typically successful in exercising the authority their state constitutions give them over public education. However, as the school finance cases demonstrate, states are perfectly willing to raise the principle of local control when it suits their interests. In these cases, local

control has been asserted by the state defensively to relieve it from having to increase its school spending or take on unsought oversight responsibilities. In short, the local control argument functioned as a shield to sustain state policy, not as a sword to alter policy in the direction of more local control.

Only in a handful of cases have local school districts successfully used the idea of local control to resist state actions. Not coincidentally, these cases arose in Colorado and Wisconsin, two of the relative handful of states where the state constitution directly grants power over local schools to local school boards. The overwhelming majority of state constitutions make no mention whatsoever of school districts or local school boards.

For instance, in *Board of Education No. 1 in the City and County of Denver v. Booth*, the Denver school board challenged Colorado's Charter Schools Act, which grants local school boards the authority to approve or disapprove a charter application. The board asserted that the statute gives the state board of education more powers than the Colorado state constitution permits and infringes on the state constitution's provision that the local school board "shall have control of instruction in the public schools of their respective districts."

The Colorado charter statute enables aspirants whose applications are denied by local school boards to appeal to the state board of education. The state board can then force the district board to reconsider. If the district board again denies the application, the charter applicant may again appeal to the state board. If on the second appeal the state board finds that granting the charter is in the public interest, it may reverse and remand to the district board "with instructions to approve the charter applicant."

In the 1999 *Booth* decision, the Colorado Supreme Court rejected the Denver board's position, finding that the constitution's grant of "general supervision" over public education to the state board was broad enough to encompass the power to approve local charter schools. However, the local board's authority could not be entirely displaced. Rather, "as long as a school district exists, the local school board has undeniable constitutional authority," including "substantial discretion regarding the character of instruc-

tion that students will receive at the district's expense."

The Colorado court struck a compromise that would affirm the state board's authority as well as the local board's interest "in controlling instruction." The state board could order the local board to approve a charter application, but it could not require the local board to actually open a school or agree to all the terms of the charter applicant's proposal. Rather, the state board's order was treated merely as a directive to the local board to negotiate with the applicant concerning the "issues necessary to permit the applicant to open a charter school," including, in the Denver case, questions of the site of the school and per-pupil funding.

In the recent *Colorado Congress of Parents* decision, a Colorado district court took the legal protection of local school autonomy even further. The Colorado Opportunity Contract Pilot Program, enacted in 2003, established a voucher program for a limited number of low-income, low-achieving students who had attended schools in any of 11 poorly

performing school districts. During the 2003–04 school year, enrollment in the voucher program was capped at 1 percent of the students in those school districts, rising to 6 percent in 2006–07. The program allowed parents to place their children in private schools at the district's expense.

Here the Colorado district court relied on the local control provision of the state constitution to strike down the voucher program altogether. The court emphasized the unusual nature of this provision and the role of local control in Colorado jurisprudence, noting that the Colorado Supreme Court's 1982 *Lujan* decision, rejecting a challenge to the state's school finance system, had relied on the value of local control. Unlike the Charter Schools Act upheld in

*Booth*, which provided for a mix of state and local powers, the voucher program gave the local school board, in the court's words, "no substantial discretion over the educational program embodied in the voucher program," thus violating the state constitution.

It remains to be seen how this ruling will fare on appeal. One could reasonably argue that requiring school districts to provide some financial support to students attending private school does not directly interfere with the state constitution's mandate that local school boards have control over "instruction in the public schools" (emphasis added). But

**Only in a handful of cases have local school districts successfully used the idea of local control to resist state actions.**

however the case is resolved, it serves as an important reminder of the importance of state-specific constitutional language and precedents, the considerable degree of variation in legal rules in our 50-state federal system, and the continuing power of the local control idea in education law.

### Conclusion

Several recent developments have raised new questions about both the status of local school boards and the legal significance of the local control principle. For instance, court-ordered school finance reforms—as well as financing reforms undertaken to forestall litigation—have increased the state's share of education funding in many states. Such reforms have often been accompanied by greater state control over the distribution of financial resources and the use of state dollars. Moreover, courts in some states—such as those in New Jersey, West Virginia, and Kentucky—have required those states not only to increase aid to poorer school districts, but also to spell out the content of the education required by the state's constitution, to better monitor local school district performance, and to intervene when local school districts have failed to attain state education goals.

States have also become more involved in shaping the curriculum and in setting standards for graduation and teacher certification through the standards and accountability movement. Some have extended the school day or the school year or even set minimum homework requirements. The federal No Child Left Behind Act accelerates these trends by exerting a strong degree of federal authority over public education. The act burdens the states as well as local districts, imposing obligations to develop academic standards, test all students annually in grades 3 through 8, hire “highly qualified” teachers in core subjects, and reconstitute persistently failing schools in order to remain eligible for federal aid.

Indeed, other changes have involved shifts in power at the local level or even decentralization below the school district level, rather than greater control by the state (or the federal government). As noted, in a number of large cities, the mayor has effectively displaced the independent school board. Some states, like Kentucky, have adopted site-based management programs that transfer power

## The Colorado district court relied on the local control provision of the state constitution to strike down the voucher program altogether.

from school districts to individual school councils. In addition, many states have provided for charter schools, which operate with considerable independence from—and often in conflict with—local school districts. These developments reflect the continuing power of the local control idea even as they undermine the position of independent school boards. Indeed, these decentralizing moves may be as great a challenge to school boards as centralization. Not only do they create competing local school authorities, but they also open alternative opportunities for the participation in school governance that the courts have proclaimed to be the normative value at the core of local autonomy.

Taken together, these recent developments confirm that public education is an area of virtually complete state power (although now subject to greater federal intervention) that can be reshaped by state legislatures in either a centralizing or decentralizing direction or in both directions at once. But without changing the theory of state-local relations in education, these developments may be altering the practice. If so, this could resolve some of the tension between the formal law of state control and the de facto autonomy of local school districts by aligning practice with the formal legal theory of state power.

Yet it is unlikely that the political and legal debate over local control will end any time soon. The call for local control reflects many deep-seated concerns—the public's desire to participate in and influence decisions on a vital public matter; the role of local tax dollars in financing public education; the impact of local schools on local communities; the interest in taking diverse local preferences and circumstances into account in educational programs; and the possibilities for experimentation and innovation, to name a few. Even as the state- and federal-led accountability movement presents new challenges to local control, the political, economic, and educational arguments for local control are also likely to continue to enjoy support. As a result, the legal significance of the local control idea, much like the legal status of school boards themselves, is likely to be contested for some time to come.

—Richard Briffault is vice dean and professor of legislation at the Columbia University School of Law.