

# The misguided **quest** for a constitutional right to education



To improve education, empower families and communities, not federal judges.

**By Nicholas Tampio**

In Michigan, Connecticut, and Rhode Island, students have been arguing in courtrooms that their constitutional right to an education has been violated because their local schools have not prepared them to become citizens. Deteriorating buildings, inadequate curricular materials, unqualified teachers, a cap on charter schools, and a lack of attention to civics education are among the obstacles that have prevented them from receiving the education that they believe the U.S. Constitution guarantees (Khadaroo, 2019; Lambeck, 2018; Peak & Hanford, 2020). When one listens to the students' stories, one can appreciate their grievances and applaud their courage in seeking remedy in federal courts. One can also understand the argument that as our country becomes more interdependent, all Americans have a responsibility to ensure that every young person has an equitable and adequate education (Underwood, 2019).

However, it may be difficult to convince the Supreme Court that there is a constitutional right to education (Testani, 2020). And even if lawyers

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and the courts do find a textual basis for this claim, it may be unwise to give federal judges the authority to decide what it means for schools to meet students' basic needs. The history of federal education policy since 1965 has shown that federal guardrails often make education follow a narrow track that dissatisfies many educators and families (Tampio, 2018). Furthermore, many parents and communities — including communities of color that have long sought greater decision-making power in K-12 education — make a reasonable claim that they ought to play a strong role in defining the aims of their schools. If we as a country want to nurture democratic habits and improve public education, then local residents, not federal judges, should take the lead.

### The constitutional impasse

The major roadblock to a constitutional right to education is the Supreme Court case of *San Antonio v. Rodriguez* (1973). In his majority opinion, Justice Lewis F. Powell Jr. explained that the Constitution does not authorize federal judges to intrude in an area properly controlled and funded by the legislature. Judges would be stepping outside of their realm of “authority and competence” if they specified the conditions under which citizens are adequately educated to vote, serve on juries, or serve in the armed forces. Even if communities differ in their property tax revenue, the tradition of local control “affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.”

Writing in dissent, however, Justice Thurgood Marshall argued that *Rodriguez* signaled a “retreat from our historic commitment to equality of educational opportunity” and acceptance of an unjust “system which deprives children in their earliest years of the chance to reach their full potential as citizens.” According to Marshall, if the Constitution guarantees a right, then it must closely protect the related interests. The 14th Amendment’s Equal Protection Clause demands that the state treat people in similar circumstances alike. If public schools in a state do not provide students with equal educational facilities, then the state is discriminating against those children because of something they cannot control: the wealth of their geographic location.

### A constitutional compromise?

For the past half century, many lawyers and activists have been looking for a way to justify a

constitutional right to education. Perhaps most notably, University of South Carolina law professor Derek W. Black (2018) has taken the baton from Thurgood Marshall and identified a constitutional right to education in the 14th Amendment. Unlike Marshall, however, Black has turned to the Citizenship Clause to make his argument.

As he points out, the 14th Amendment begins: “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.” To understand what this clause means for education, Black invites us to consider the context under which the 14th Amendment was ratified. After the Civil War, the Southern states required congressional approval to be readmitted to the Union. Congress expected states to adopt a republican form of government, as specified in Article IV of the Constitution, and that government must guarantee public education in its state constitution. As evidence of this claim, Black notes that Congress demanded that Mississippi, Texas, and Virginia include in their state constitutions the equal provision of education to their citizens.

The “Constitutional compromise,” according to Black, is that states will take charge of most aspects of education, but federal courts will act as a backstop if those states fail to live up to their responsibilities. Congress could also pass legislation to ensure that states do not run afoul of the courts, including prohibiting excessive funding gaps between school districts in a state or large funding dips in any given year.

### The good of local control

Judges can find, if they wish, a constitutional right to education in the 14th Amendment’s Citizenship Clause, Privileges and Immunities Clause, Due Process Clause, Equal Protection Clause, or maybe from “the penumbras” (*Griswold v. Connecticut*, 1965) emanating from all of them. However, I believe that positing a constitutional right to education will do more harm than good.

In the past, efforts to assert local control over education have attracted diverse groups of supporters, sometimes in pursuit of noble goals and sometimes not. For instance, in *The Fight for Local Control*, Campbell Scribner (2016) explains that

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residents of rural areas have often appealed to the tradition of local control to resist district consolidation and defend community schools, and suburban residents have invoked local control to protect local tax revenues and resist racial integration. But there are numerous examples of minority communities clamoring for local control as well.

In *A Political Education: Black Politics and Education Reform in Chicago Since the 1960s*, Elizabeth Todd-Breland (2018) notes that many Black Americans in Chicago in the 1960s opposed desegregation, at least in the short term, and embraced the notion of community control. Advocates of Black power rejected the notion that Black children's supposed "academic deficits" could only be remedied by sending them to school with middle-class white children (as suggested by the 1966 Coleman Report). Such an idea was not only condescending, they argued, but it ignored the legitimate claims of Black self-determination. As M. Lee Montgomery, a cofounder of the National Association of African-American educators put it, in 1968 (quoted in Todd-Breland, 2018):

In Philadelphia, Pittsburgh, Chicago, and New York, students, teachers, and parents are in open rebellion. We want to control our schools, say the parents. We want to decide what kind of curriculum will be in our schools, say the students. It's our right, it's our responsibility.

In *We are an African People*, Russell Rickford (2016) shares a similar story of Black Americans in Harlem who, in the 1960s and '70s, "sought educational dignity and the right to define themselves within and beyond the classroom" by abandoning the goal of integrating with white middle-class norms and institutions and instead seeking to build their own independent schools. One could argue that this movement for Black educational autonomy persists in homeschooling families in Baltimore and elsewhere that aim to provide an education that is "more personal, more engaging, and more anchored in Black self-discovery" (Anderson, 2018).

In *Takeover: Race, Education, and American Democracy*, the political scientist Domingo Morel (2018) describes how Black Americans in Newark, New Jersey, have advocated community control of the schools since the late 1960s. For these Americans, locally elected school boards serve many political and educational functions, including the maintenance of a public sphere where Black and Latinx parents can participate in their children's education by expressing their views about the curriculum and district priorities.

Further, school boards are often composed of people with the political savvy to fight systematic racial oppression, and these people often use the skills and visibility they gain on the school board to run for higher office, making school board service an especially important role for minority politicians. When states take over so-called failing districts in places like Newark, Black families and community members get the message that they can no longer be trusted with real power over public education.

And in *Divided We Fail: The Story of an African-American Community That Ended the Era of School Desegregation*, Sarah Garland (2013) explains why Black families in Louisville, Kentucky, precipitated a 2007 Supreme Court case that reversed part of the legacy of *Brown* by holding that race could no longer be used to assign students to schools. Why did these families oppose racial quotas and thus undermine one of the greatest legal victories of the civil rights movement? Because, for them, federally mandated desegregation did not produce the desired results. To comply with the ruling, school districts closed traditionally Black schools, fired Black teachers, bused Black students from the city to majority-white suburban schools, and failed to close racial achievement gaps. In short, these families "wanted equal outcomes for Black children and they also wanted equal power over the schools and over the content and trajectory of their children's education" (Garland, 2013).

To be sure, many people are still committed to the ideal of integration and point to its successes in raising test scores, improving access to advanced courses, and putting more high school graduates on the path to college (Hannah-Jones, 2015). However, many Black people in Chicago, Newark, Harlem, Baltimore, and Louisville tell another side of the story, arguing that desegregation competes with the public good represented by Black parents having a meaningful voice in their local schools.

### The risk of a constitutional right to education

One could argue that there is no necessary conflict between federal judicial oversight and local control. Local communities need resources to make meaningful decisions about curriculum, class size, extracurriculars, support services, and so forth. If a stronger federal judicial policy ensures access to those resources, then won't that strengthen the hand of local education actors who will now be able to do things they have wanted to do but couldn't (Marsh & Wohlstetter, 2013)? One could point to other federal interventions in education — say, civil



rights enforcement — and argue that federal judges should be able to step in if a state fails to provide all students with adequate teachers, facilities, books, materials, and educational outcomes.

However, the recent history of American education suggests that increasing federal influence over education has significant risks, as well. Consider how federal involvement in public schooling has played out over the last several decades. The Elementary and Secondary Education Act of 1965 (ESEA) more than doubled federal expenditures on K-12 education, while also prohibiting the government from exercising control over the curriculum (Rhodes, 2014). But for education reformers, including many civil rights leaders, ESEA did too little to confront persistent inequities that have long festered in school systems across the country. Thus, the No Child Left Behind Act of 2001 required states to adopt “challenging” academic standards and adhere to a rigid testing schedule, as a condition for receiving funds to educate children from low-income families. Federal influence expanded still more in 2009, when the Race to the Top program incentivized states to adopt education standards in reading, writing, and mathematics that were widely understood to mean adoption of the Common Core (Layton, 2014). And while the Every Student Succeeds Act of 2015 ostensibly signaled a return to local control, the law still requires states “to establish challenging standards, develop aligned assessments, and build accountability systems for districts and schools that are based on educational results” (U.S. Department of Education, 2019).

In the name of educational equity and excellence, then, the federal government has put such emphasis on high-stakes standardized testing that non-tested subjects and activities have been removed from the curriculum (Heilig, Cole, & Aguilar, 2010). In the words of one of my students, federal education policy was once something done *for* students but is now done *to* students.

With this background in mind, we may anticipate what will happen if federal judges acquire the power to determine whether states are teaching all students “the basic skills needed for our children to participate as members of American society and democracy” (*Gary B. v. Whitmer*, 2020). For instance, one of the indications that Detroit’s schools were failing, according to the plaintiffs in *Gary B. v. Whitmer*, was that the schools “ranked last in reading and math-proficiency among all big-city school districts,” effectively denying many students the opportunity to develop the basic skills of citizenship, literacy, and numeracy. For the Sixth Circuit U.S. Court of Appeals, “performance

outcome data provides some insight into access to education.” Federal judges, like federal lawmakers, rely on standardized testing as a way to monitor and regulate the education system.

One could reply that federal judges will merely identify a floor of basic skills, which local communities would certainly expect their schools to surpass. In other words, the country will still entrust states and localities with running the schools, as long as they teach students certain minimal skills necessary to fulfill their civic roles. But the problem, as many critics of education reform have noted, is that high-stakes testing narrows and distorts the curriculum (Onosko, 2011). If schools need to demonstrate student proficiency or growth on standardized tests for administrators and teachers to keep their jobs, then schools will focus on tested skills. In this system, schools emphasize test preparation and deemphasize things such as art classes, field trips, student newspapers, learning about local history, and hands-on activities. What gets tested gets taught, to the exclusion of anything else that students, families, teachers, and citizens may want to see in the local schools.

One of the main arguments for a constitutional right to education is to that it would force states to “ensure stable funding streams for their education systems” (Black, 2018). It is worth noting, however, that courts cannot raise taxes, and well-intentioned rulings could backfire. In Washington State, for example, legislatures have not complied with judicial rulings that require equitable school funding (Morton & Bazzaz, 2019). And in California, the state Supreme Court case *Serrano v. Priest* (1971) limited the amount wealthy school districts could spend on their schools, which arguably led to public support for Proposition 13, which capped the state’s property tax (Fischel, 1989). It’s reasonable to ask, then, as Robert Kim (2020) did in a recent *Kappan* column, “If a federal right to an education were established, would this actually lead to higher school funding levels across the country?” I think that it wouldn’t: If citizens do not have a say in the funding and direction of the local schools, then they may choose to exit the public school system and act to limit its funding.

### **Power to the parents and communities**

In 1947, Thurgood Marshall told the President’s Committee on Civil Rights that Black people depend on the federal government for basic protections (Dodd, 2010). Yet, one ought to distinguish the ends (the protection of basic civil rights) from

the means (the federal government's exercise of power). For instance, that's why the scholar W.E.B. Du Bois (1918/1987) supported federal intervention to educate formerly enslaved people after the end of the Civil War, but also warned that "diversity and even a certain chaos would be better than unity under a wrong idea." Given that federal policies "have squeezed the joy out of education" (Ravitch, 2020), it may be time to take a gamble with the chaos of meaningful local control.

That is not to say that federal involvement in education is always detrimental or that local control is an absolute good. One only has to think of the 101st Airborne desegregating the schools in Little Rock, Arkansas, in 1957 to be aware of the dangers of local control and the virtues of federal intervention in racist school districts.

Times have changed, however, and federal and state control over education can just as easily serve to thwart democracy as protect it. In 2014, for instance, the state of Arkansas took over the Little Rock school district because of low student test scores. Since then, local community members have demanded more of a voice in how the schools are run, and they've had some success. In fall 2020, they had their first school board election since the state takeover, although the board still does not have the power to select a superintendent. Ali Noland, a parent and school board member in the district, explains, "Little Rock cares a great deal about the future of our public schools . . . Now it is time to focus on working together and giving our community a meaningful voice in decisions that will affect our kids" (Howell, 2020).

If parents and students in Detroit, Providence, Baltimore, or Little Rock are distraught about the quality of education in the local schools, then they ought to have the power to change things. We should assume that most families care deeply about the education of their children and want to help make important decisions about the local schools. The way to empower communities, including communities of color, is to give them real power and not subject them to the tutelage of federal judges. ■

### References

Anderson, M.D. (2018, May 17). The radical self-reliance of Black homeschooling. *The Atlantic*.

Black, D.W. (2018). The constitutional compromise to guarantee education. *The Stanford Law Review*, 70.

Dodd, L.G. (2010). Presidential leadership and civil rights lawyering in the era before *Brown*. *Indiana Law Journal*, 85 (4).

Du Bois, W.E.B. (1918/1987). Negro education. In W.E.B. Du Bois: *Writings* (pp. 868–878). New York, NY: Library of America.

Fischel, W.A. (1989). Did "Serrano" cause Proposition 13? *National Tax Journal*, 42 (4), 465–473.

Garland, S. (2013). *Divided we fail: The story of an African American community that ended the era of school desegregation*. Boston, MA: Beacon Press.

Hannah-Jones, N. (2015, July 31). The problem we all live with. *This American Life*.

Heilig, J.V., Cole, H., & Aguilar, A. (2010). From Dewey to No Child Left Behind: The evolution and devolution of public arts education. *Arts Education Policy Review*, 111 (4), 136–145.

Howell, C. (2020, November 4). In first Little Rock School Board election since 2014, 7 slots filled, 2 run-offs set. *Arkansas Democrat-Gazette*.

Khadaroo, S.T. (2019, December 12). Rhode Island lawsuit: Students sue for the right to learn civics. *Christian Science Monitor*.

Kim, R. (2020, August 25). Gary B., Espinoza, and the fight for school funding. *Phi Delta Kappan*.

Lambeck, L.C. (2018, October 9). Feds toss out challenge of Connecticut choice law. *Connecticut Post*.

Layton, L. (2014, June 7). How Bill Gates pulled off the Common Core revolution. *Washington Post*.

Marsh J.A. & Wohlstetter, P. (2013) Recent trends in intergovernmental relations: The resurgence of local actors in education policy. *Educational Researcher*, 42 (5), 276–283.

Morel, D. (2018). *Takeover: Race, education, and American Democracy*. New York, NY: Oxford University Press.

Morton, N. & Bazzaz, D. (2019, February 27). Legislature's solution to McCleary school-funding case leaves most state districts projecting budget shortfalls. *The Seattle Times*.

Onosko, J. (2011). Race to the Top leaves children and future citizens behind: The devastating effects of centralization, standardization, and high stakes accountability. *Democracy and Education*, 19 (2), Article 1.

Peak, C. & Hanford, E. (2020, April 30). Gary B. v. Snyder: For children a chance at literacy is a constitutional right. *The Hechinger Report*.

Ravitch, D. (2020, December 22). Biden picks Connecticut Commissioner Miguel Cardona as secretary of education. *Diane Ravitch's Blog*.

Rhodes, J.H. (2014). *An education in politics: The origins and evolution of No Child Left Behind*. Ithaca, NY: Cornell University Press.

Rickford, R. (2016). *We are an African people: Independent education, Black power, and the radical imagination*. New York, NY: Oxford University Press.

Scribner, C.F. (2016). *The fight for local control: Schools, suburbs, and American Democracy*. Ithaca, NY: Cornell University Press.

Tampio, N. (2018) *Common Core: Democracy and national education standards*. Baltimore, MD: Johns Hopkins University Press.

Testani, R.E. (2020, May 21). A short-lived constitutional right to education. *Education Next*.

Todd-Breland, E. (2018). *A political education: Black politics and education reform in Chicago since the 1960s*. Chapel Hill, NC: University of North Carolina Press.

Underwood, J. (2019, April 29). Weighing responsibility for providing equitable and adequate education. *Phi Delta Kappan*.

U.S. Department of Education. (2019, October 29). Standards, Assessments and Accountability. <https://www2.ed.gov/admins/lead/account/saa.html?exp=5>

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