The Local School District in American Law

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I. INTRODUCTION

The legal status of American school districts is shaped by the fundamental and longstanding tension between their formal subservience to the states and their de facto autonomy. School districts are political subdivisions of their states, entirely subordinate to the states and without constitutional rights of their own. Yet, in practice, in most states local school boards enjoy considerable power over the day-to-day operation and management of their schools, and this local school district autonomy has at times been recognized, and rewarded, by state and federal courts. The United States Supreme Court, in particular, has spoken frequently of the value of “local control” in the governance of American schools and has relied on the concept of local control in resolving constitutional questions involving the schools.

This paper examines the tension between the “black letter” rule of local school district subordination and the practice, and occasional legal recognition, of local school district autonomy. Part I provides a brief overview of the number and variety of school districts and their place in the American federal structure. Part II considers the formal legal status of school districts as political subdivisions of their states, and, especially, as agents of their states for the local provision of a critical state program – elementary and secondary education. Part III then examines instances in which school district autonomy has received legal recognition. Part IV concludes with an attempt to reconcile these conflicting approaches, and to consider the implications of recent developments for the legal status of school districts.
II. LOCAL SCHOOL DISTRICTS AND SCHOOL BOARDS IN THE AMERICAN FEDERAL SYSTEM

A school **district** is a territorial unit within a state that has responsibility for the provision of public education within its borders. A school district is a **corporate** body, that is, it exists as a legal entity separate and apart from its governing board and from the people who live within the district and utilize its programs. Like most corporate bodies, the school district can sue and be sued; acquire, hold and dispose of real property; make and enforce contracts; hire employees; and adopt rules to govern its own operations.¹

A school district is also a **public** body, that is, a government. The typical school district enjoys some of the perquisites of governments, such as the power to take property by eminent domain, and to issue tax-exempt bonds. More importantly, school districts are subject to the constitutional constraints that apply to governmental bodies -- and only governmental bodies -- such as the protection of freedom of speech and of religion, the prohibition against unreasonable searches and seizures, and the requirements of due process and equal protection of the laws.²

Finally, a school district is a **local** government. This has both territorial and political significance. Territorially, the school district has authority over only the geographically defined portion of the state that falls within its boundaries. Politically, the district is created by state government and can wield only those powers conferred upon it by the state. The nature of the school district as a local government will be examined more fully in Part II, infra.

The school **board** is the governing body of the district. It is the body that exercises the district’s corporate powers and carries out its public responsibilities. It, too, is a
creature of state law, which determines the size of the board, the terms of board members, how board members are selected, and whether and how they may be removed.\textsuperscript{3}

There are approximately 15,000 local school districts in the United States, accounting for more than one-sixth of all American local governments.\textsuperscript{4} These school districts vary tremendously in territorial size, enrollments, organization, legal powers and status, and even name. A recent survey by the Education Commission of the States found 54 legally distinct types of school districts within the United States.\textsuperscript{5} Part of this variation reflects the central role of state law in establishing and empowering school districts. With 49 different states providing for local school districts -- Hawaii breaks the pattern by operating a single statewide school system -- some interstate differentiation is inevitable. Moreover, there is often considerable variation in the types of school districts within a state. The ECS study found that in fourteen states there were four or more four different types of districts within the state; three states had as many as six types of districts; and only fifteen states had just one type of district.\textsuperscript{6} Some of these variations may just be matters of terminology, with different states using different terms -- local district, city or municipal district, town district -- to mean essentially the same thing. Others, particularly the intrastate variations, reflect differences in school district location (urban versus rural), territorial scope (running the gamut from neighborhood to metropolitan area), grade coverage (K-6, K-8, 9-12, K-12), and relationship to other local governments.

The vast majority of school districts -- 90% according to the Census Bureau -- are legally and politically independent of general purpose local governments, that is, counties or municipalities.\textsuperscript{7} Indeed, the boundaries of almost 80% of all school districts are not coterminous with the boundaries of other general purpose local governments, so that the
districts either overlap more than one municipality or county or constitute only a subpart of their county.\textsuperscript{8} Even most coterminous districts – and some states promote coterminality through the use of county or municipal school districts, or by providing that a change in municipal boundaries also effects a change in school district boundaries – are legally independent of their matching local government.

The meaning of school district independence is not always clear. It certainly involves separate legal existence.\textsuperscript{9} Moreover, the vast majority of school boards have been made politically independent of other local governments by state laws providing for the election of school board members by school district voters, not appointment by a municipal mayor, or county governing board. In 31 states, all school districts are governed by independently elected governing boards; in another 12 states, nearly all the school districts are governed by elected boards.\textsuperscript{10} An important departure recent development, however, discussed in more detail below, is the transformation of some large urban school boards into appointive bodies. Fiscal independence varies somewhat more. In some states, local school boards have the power, pursuant to state law and subject to state substantive and procedural limitations, to levy and collect taxes, usually the ad valorem tax on real property. In other states, school boards are fiscally dependent on other local governments. The board can frame the school district’s budget, but must turn to a county or municipal government to actually levy and collect the taxes needed to finance the school district’s program.\textsuperscript{11}

Given the enormous interstate and intrastate variations in laws dealing with school district organization, powers and responsibilities, broad generalizations about the status of school boards must be hedged by some acknowledgement of exceptions and departures
from the norm. The legal status of any particular school district will turn on the laws of its state, which may include idiosyncratic provisions for that district. Still, painting with the broad brush inevitable for a brief paper, the next two sections will lay out the two competing perspectives that have shaped the legal status of school districts – the formal, and dominant, approach of treating school boards as legally subordinate arms of their states, and the intermittent legal recognition of the de facto autonomy enjoyed by many local school districts.

III. LOCAL SCHOOL DISTRICTS AS ARMS OF THEIR STATES

The legal status of school districts and school boards flows from two key factors. First, school districts are local governments, and, thus, like all other local governments, they are subordinate to their states. Second, unlike general purpose local governments (counties and municipalities), school districts have a single function – the provision of public elementary and secondary education – which is, as a matter of state law, considered to be a state and not a local responsibility. As a result, school districts enjoy less formal autonomy and are subject to far more state mandates and oversight than other local governments. Indeed, for some purposes they are treated as not simply as legally subordinate to the states but as essentially no more than agencies or arms of the state, rather than as independent governments.

School Districts as Local Governments

The formal status of a local government in relation to its state is summarized by the three concepts of “creature,” “delegate” and “agent.”12 As a local government, a school district is a creature of the state. It exists only by an act of the state, and the state, as its creator, has plenary power to alter, expand, contract or abolish it at will. The school
district is a delegate of the state, possessing only those powers that the state has chosen to confer upon it. Absent any specific limitation in the state’s constitution, the state can amend, abridge or retract any power it has delegated, much as it can impose new duties or take away old privileges. The school district is also an agent of the state, exercising powers at the local level on behalf of the state in order to implement state-determined policies.\textsuperscript{13}

As a matter of federal constitutional law, local government boundaries, structures, rights and powers are entirely for the states. The United States Constitution recognizes only the federal government and the states. It is entirely silent concerning local governments. For American federalism, then, issues of local government power and organization are questions of state law. As a matter of federal constitutional law, local residents have no right to local self-government and certainly no right to be in any particular local government or to have a local government with any particular powers or independence from its state.\textsuperscript{14}

Thus, a school district’s residents have no constitutional claim if the state redraws the district’s boundaries to shift them from one district to another. Nor can a district challenge the loss of its property to another district as an unconstitutional taking.\textsuperscript{15}

To be sure, state governments do not have unlimited authority to redraw school district boundaries or revise school district powers. The Supreme Court has held, for example, that New York State’s creation of a school district for the specific benefit of the devoutly religious Satmar Hasidic Jewish community residing in the village of Kiryas Joel violated the Establishment Clause of the First Amendment.\textsuperscript{16} Similarly, the Supreme Court held that a Washington state statute the prohibited local school boards from busing
children to promote desegregation – but not busing for other purposes – was a racially charged action that violated the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{17} Similarly the provisions of the Voting Rights Act apply to the redistricting of elected school boards, much as they apply to other local governments.

In other words, federal constitutional norms and statutory requirements that generally constrain state government actions continue to apply when the state is dealing with local school districts. But school boards do not have federal constitutional rights against their states and school district residents do not have any constitutionally protected interest in having a school district with particular boundaries and powers. As a result, it is a universally accepted legal maxim that state governments have broad authority to create, alter, abolish, or destroy school districts, revise their powers, and restructure of even eliminate their boards.\textsuperscript{18} Indeed, some courts have found that school districts do not even have the legal capacity to file lawsuits challenging state actions that would change their borders or dissolve them.\textsuperscript{19}

**The Special State Interest in Education**

Federal constitutional law does not distinguish between school districts and other localities, but at the state level, the legal status of school districts is typically weaker than that of counties, cities, towns, and townships. The position of school districts as disfavored local governments is a consequence of the fact that school districts are functionally specialized and their one activity – the local provision of public elementary and secondary education – is everywhere considered to be a state responsibility.

Virtually every state constitution contains a provision requiring the state legislature to provide for a system of free, nonsectarian public education. The existence of such a
mandate is an unusual departure in American constitutionalism – which has traditionally been far more focused on limiting government power and protecting people from government that creating affirmative obligations to provide a public service – and is a tribute to the central role of public education in American culture. As a matter of state constitutional law, courts have consistently held that due to the education mandate, public education is a matter of important state concern and a critical state responsibility. This has reinforced the subordinate position of school districts in the state-local hierarchy. It is not simply that school districts are of “lower rank” that their states. As units specializing in public education, they are often seen as agencies of the state -- some times, rhetorically, “arms of the state” -- for the implementation of the state’s education mandate locally. This is nicely illustrated by several state cases dealing with state laws transferring land or buildings from one school district to another. The courts have generally agreed that even if the losing district has formal legal title to the affected school building, the “beneficial interest” in the property is really in the state itself – or in the people of the state – with the school district little more than agency or “trustee” of the state, so that the losing district can have no claim for compensation. 20

The special state interest in education significantly affects the powers and status of local school boards. First, there is far greater state administrative oversight of school boards compared to other local governments. Many state constitutions specifically address the administration of the educational system by providing for a state board of education with general supervisory authority over public education and/or a chief state education officer, such as a superintendent of public instruction or commissioner of education. Even when these state boards or officers are not provided for in the state’s
constitution they are created by statute; all states have a state board of education, a chief education officer, or both. Moreover, in twenty-three states, the constitution provides that either the board or the superintendent is elected, providing these state officials with greater political clout and legitimacy. These state administrators often have considerable supervisory authority with respect to local school districts and may promulgate extensive rules and 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.

Beyond state administrative rules, the special state interest in education is typically manifested in extensive state legislative regulation of local schools, school districts, and school boards. State laws and administrative regulations deal with school district organization, elections, and governance; educational programs, instructional materials, and proficiency testing; attendance rules; the length of the school day and school year; teacher credentialing, certification, 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. The California Supreme Court recently referred to the “voluminous regulations administered by the State’s Department of Education and the Superintendent of Public Instruction.” In another recent case, the Louisiana Supreme Court found that the two volumes of the Louisiana Code devoted to the public schools “evince[e] that public education in Louisiana is highly regulated by state law.” And Louisiana’s laws concerning education are paltry compared with some other states. By my count, fourteen volumes of the California legislative code deal with education.
Finally, the strong state interest in education means that local school boards tend to have relatively limited powers to initiate policies of their own. Traditionally all local governments had limited policy-making powers. Under the legal norm known as Dillon’s Rule – named after the nineteenth century Iowa judge who first crystallized it – local governments may exercise only those powers expressly granted by the legislature, necessarily implied in the legislative grant, or essential to the accomplishment of the purposes of the locality. Dillon’s Rule assumes that even when a state creates a local government and gives it powers, the locality still has very limited authority to act. All local actions have to be grounded in a specific grant of authority; if it is unclear whether the locality was granted a certain power, then the power was not granted.\textsuperscript{27} Today, virtually all states have abandoned Dillon’s Rule for at least some localities – particularly municipalities -- and have, instead, provided them with some Home Rule authority. Although the forms of home rule vary from state to state – and among different types of localities within a state – it almost always provides localities with broader power to undertake new programs and initiate new policies with respect to “local” or “municipal” matters than would be permitted by Dillon’s Rule. A few go further and provide that local action with respect to local or municipal matters is immune from state legislative displacement.

Due to the strong state interest in education, however, school districts have not been given Home Rule authority. Typically, the state constitutional provision for home rule refers only to municipalities or cities; some expressly disclaim any application to school districts. Thus, the Illinois constitution’s home rule article expressly provides that the term “units of local government” “does not include school districts;”\textsuperscript{28} other language
providing that school districts “shall have only those powers granted by law” confirms that school districts continue to be subject to Dillon’s Rule even though other local governments are not. Similarly, the New York constitution’s home rule article defines “local government” to mean “a county, city, town, or village,” and then adds that nothing in the provision of home “shall restrict or impair any power of the legislature concerning the maintenance, support or administration of the public school system.” Similarly, statutory grants of power to “municipalities” typically do not apply to school districts.

Without home rule, school boards may have to go to the legislature time and time again to obtain specific authority to undertake specific actions. One recent study of school districts 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, and obtain boiler, fire, auto, health or student insurance. To be sure, other commentators 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 limitations of school board powers would suggest, including the ability to add to the state-prescribed curriculum and supplement state-mandated materials. Still, even though the scope of school board initiative may be broader in practice than it is in theory, school boards appear to enjoy less autonomy than other local governments.
The State Agency Model in Operation

School Board Restructurings and State Takeovers

One of the clearest illustrations of the state agency model is the freedom the states enjoy to restructure or displace locally elected school boards. New York State’s reorganization of the New York City Board of Education in 1961 nicely demonstrates the judicial treatment of such a restructuring as something akin to an internal reorganization of a branch of state government, rather than an infringement of local autonomy. The legislature, at the request of the mayor, eliminated the then-existing board of education, thereby ousting incumbents in the middle of their terms of service, and authorized the mayor to appoint a new board from a list of nominees prepared by a legislatively designated committee. The New York Court of Appeals – the state’s highest court – sustained the action in the face of a claim by the ousted members that the legislature’s action violated home rule principles. The Court noted “it has long been settled that the administration of public education is a state function to be kept separate and apart from all other local or municipal functions.” Although the New York City Board of Education was connected to the city’s municipal government – and New York law gave the City fiscal control over the Board – 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.” Even giving the mayor a central role in appointing the board did not change the board’s legal status for home rule purposes: “The Mayor is acting by legislative direction as a State officer in support of the State system of education.”
More recently, courts have upheld state laws eliminating the elected school boards in Cleveland and Detroit and giving each city’s mayor the power to appoint all (Cleveland) or most (Detroit) of the restructured board’s members. When challenged as a violation of home rule and other provisions of state constitutions that limit a legislature’s ability to target a single local government, the courts have determined that those limitations on state legislative power do not apply because of the special state concern with education.³⁶

To be sure, these restructurings were typically initiated by other local officials – usually, the mayor -- and resulted in the transfer of power to those local officials. But state courts have been just as deferential to state laws displacing local school board governance in favor of state appointees. An important recent development in state-school district relations has been the widespread enactment of state laws enabling the state board of education, or the state superintendent of public instruction, to take over the administration of local school districts. 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 school district in cases of protracted and severe problems with academic performance, fiscal mismanagement, or corruption. Although in some states, the enabling legislation has authorized such a takeover only in a named school district, in many others, state law provides general authority for a state takeover on a finding that the statutory criteria have been met. The Education Commission of the States found that since the late 1980s there have been nearly fifty school district takeovers (some involving multiple state interventions in the same district) in nineteen states.³⁷ In fifteen states, state law permits a state agency to takeover an individual school based on academic problems within the school.³⁸
While takeover laws differ from state to state, one recent study found that most follow the pattern set by the “pioneering” New Jersey law: “Upon a determination that a district is inadequate, the chief state education officer appoints a district superintendent, responsible to the state education department, who replaces (or at least exercises the powers of) the local superintendent and elected school board. Other states give their education officials the discretion to decide whether to take over or dissolve stubbornly deficient districts, with their territory, schools, students and teachers absorbed by neighboring districts.”

Courts that have assessed state takeover laws or considered challenges to state education departments assertions of tighter control over local school systems have been deferential to the states, and have found the laws or actions to be well within the state’s plenary authority over education. They have held that local board challenges may be limited only to requiring that the state comply with those procedures and criteria spelled out in the takeover law; and they have found that school boards do not have broader rights to resist state displacement or close state monitoring.

Local School Councils and Charter Schools

State laws shifting power from school district boards to individual schools within the district, either through site-based decision-making laws or by the authorization of charter schools further reflect and reinforce the subordinate position of local school districts in the public school system.

The Kentucky Educational Reform Act (KERA) dramatically illustrates the potential impact of state-authorized school-based councils to weaken the legal position of school boards. KERA requires that each local board of education “adopt a policy for
implementing school-based decision making” by a school council composed of teachers, parents and an administrator. The council “has the responsibility to set school policy consistent with district board which shall provide an environment to enhance the students’ achievement and help the school meet” the curricular and other goals set by the state board of education. As one observer noted, such a school council has “far-reaching policy-making authority” for its school.

One Kentucky county school board sought to constrain the school councils within its jurisdiction by requiring each council annually to submit to the school board for the board’s review and approval the council’s goals and objectives for the year; its implementation plan, and its method of evaluating the effectiveness of its implementation plan. When a council challenged this prior approval requirement, the Kentucky Supreme Court, in an opinion that laid out its understanding of the legislature’s provision of a three-tiered (state-district-school council) governance structure for the state’s schools agreed that the school board had gone too far. The court found that “decentralization” below the level of the school district was a “primary objective of KERA” and confirmed that the councils have broad authority over “site based issues, including but not limited to, determining curriculum, planning instructional practices, selecting and implementing discipline techniques, determining the composition of staff at the school, and choosing textbooks and instructional materials.” The requirement that council decisions be “consistent with district board policy” did not give the district board advance review and veto authority over council actions. Rather, all that requirement was intended to assure was that the council acted within the available resources determined by district policy, since the district board was charged with managing school funds, property, and
personnel for the district as a whole, including fixing the compensation for employees. Within the funds available to the district “the local board is directed to allocate funds that will enable the school to provide the materials and services determined necessary by the council. The primary limitation on the council’s ability to determine what is to be acquired is the availability of resources. The resources that are available would be determined by district policy.”

Not only did the Kentucky Supreme Court confirm that KERA had worked a considerable shift in power away from the local school board, but the court found that presented little difficulty as a matter of state law in light of the state legislature’s ultimate responsibility and “accountability for the overall success” of the state school system. Indeed, the court took a nice slap at the school boards, noting that “improper activities by the local boards occurring in some school districts” – including “problems associated with nepotism, favoritism, and misallocation of school funds” – had contributed to the need for the fundamental reforms contained in KERA.

The rise of charter schools also reflects the subordinate position of local school districts and, to some extent, further weakens their position. In many states both the creation and the ongoing operations of a charter school challenge a school district’s control over the public schools within its borders. Thus, just 12 states provide that only a local school district has the authority to approve a charter school. By contrast, in 23 states, there are multiple processes for approving charter schools, including such actors as the state board of education, a specially designated state board for charter schools, or named universities, in addition to local school districts. In 26 states (including ten of the twelve states that vest power to authorize a charter school solely in a local board of education),
an initial decision by a local school board denying the approval of a charter school may be appealed to the state board of education or another institution, thus curbing school district control over the approval of charters even where school districts are given a role. Similarly, charter schools are considered to be part of the local school district in just 20 states, while in 11 states they are legally independent and in another 8 states their legal status depends on how they were chartered, negotiations between the school and the district, or the decision of the school or its sponsoring organization.

Relying on the plenary state power over public schools, state courts have rejected challenges to state charter schools enabling legislation. In California, the court of appeal found that charter schools easily fell within the legislature’s “sweeping and comprehensive powers in relation to our public schools” and that the state’s Charter Schools Act “represents a valid exercise of legislative discretion aimed at furthering the purposes of public education.” Although not under the control of local school districts, charter schools were found to be a part of the public school system. 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 a claim brought by the state school boards association that the statute authorizing the state board of education to authorize and supervise charter schools unconstitutionally expanded the state board’s into the area of local schools. The state constitution’s grant of “plenary authority” to the legislature “to create laws that provide for the establishment and maintenance of the Utah public school system” included the authority to enable the state board to supervise the charter school program.
Courts have also been reluctant to entertain suits by school boards to decisions by chartering authorities granting particular charter school applications. A Pennsylvania court held that a school district lacked standing to challenge 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.  

State laws and court decisions involving school councils and charter schools demonstrate the power of state governments to create local school entities that operate with some independence of local school districts, and, thus both illustrate and contribute to the limited legal status of local school boards.

**Exemption from Municipal Regulation**

Not all examples of the subordinate legal status of local school boards involve limitations on their power. Some times local school districts can benefit from being mere arms of the state. A nice example of this is the freedom of local school boards from municipal regulation. State courts have held that school districts are not subject to a variety of municipal laws, ranging from building codes to election procedures, in the absence of state laws expressly authorizing municipal regulation.

As the California Supreme Court once explained, “the public schools of this state are a matter of statewide rather than local or municipal concern.” School districts are agencies of the state for the local operation of the state school system. As a result, they are not subject to local regulations when engaged in “such sovereign activities as constructing and maintaining buildings.” Home rule does not empower municipalities to regulate the schools within local borders. So, too, the Maine Supreme Court found that the municipal home rule power to regulate local election procedures did not extend to
school board elections because of “the principle that local school boards are state agents or officers.”

Although state legislatures sometimes waive the immunity of their local school districts from some forms of local regulation, in the absence of such a waiver the presumption is that the school district, as an arm of the state, is exempt from municipal regulation.

**State Financial Responsibility**

Finally, one corollary of plenary state legal authority over local public education can be state financial responsibility for local schools. This has often benefited individual school districts, even in the face of intense state opposition. Probably the most significant instance of a state court holding that state constitutional power also entails state fiscal responsibility to a particular district is the 1992 decision in *Butt v State of California* in which the California Supreme Court held that the state was constitutionally required to bail out a local school district which, due to acute financial difficulties, decided that it would end the school year six weeks earlier than planned.

The state had resisted the bailout, claiming the district had been provided with an appropriate level of state support under California’s equalized school funding system, so that the district’s problems were the result of its own financial mismanagement. The state contended that requiring additional state financial support would effectively enable a local district to “indulge in fiscal irresponsibility without penalty.” Moreover, the state contended that the bailout would be inconsistent with the value of local control.

The California Supreme Court sharply disagreed, finding, first that the state had long previously departed from local control by giving the state an enormous role in school
governance and decision making, including standards for and oversight of local school district budgets. Nor would a bailout create a moral hazard 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.”

States have also been able to rely on their special responsibility for education to take unusual steps that benefit local school districts financially. Thus, during the New York City fiscal crisis in the mid-1970s, the state legislature, concerned that the City would trim its support for schools, voted to bar the City from reducing the share of the City budget devoted to the public schools. The New York Court of Appeals held that this did not violate the City’s home rule since education is a matter of state responsibility – which the state could fulfill in part by requiring City financial assistance. Similarly, the New Jersey Supreme Court found that the state’s Commissioner of Education could order a school board to issue the bonds necessary to fund an essential school building project even though local voters had refused to provide the referendum approval that state law mandated as a prerequisite for the issuance of a school district’s bonds. The Court found that the state constitution’s education mandate fell on the legislature, which, in turn had delegated responsibility to a combination of state and local entities, including the State Department of Education as well as local school boards. The state agency had been given authority by law to veto local capital projects. The court then found that the agency had
authority under the state constitution to determine a capital project was essential to the educational mission of the local school district and to order the district to proceed with the necessary bond issue, the absence of local voter approval notwithstanding. 67

Finally, the state constitutional provision of state responsibility for the education provided within local school districts provides the legal foundation for the repeated waves of court-ordered school funding equalization reforms over the last three decades. The topic of school finance reform litigation -- including the varying litigation theories reformers have advanced and the interstate differences in results – is far too broad and intricate to be discussed in this paper. But it is appropriate to note that underlying nearly all the state court decisions that have ordered some form of funding reform is the finding that, under the state’s constitution, the responsibility for securing the state’s educational requirement is borne by the state. Whether the court has determined that the state constitution requires equal educational opportunities for pupils throughout the state, or only an adequate basic education within each district, the burden for providing the necessary funding and administrative oversight for assuring that the constitution’s goals are met is the state’s. 68 This may benefit some districts by requiring the state to provide more aid; hurt more affluent districts where school reform is required in the name of equalizing educational opportunities; or burden all districts in a state where the court’s approach emphasizes the state’s obligation to set standards, measure outcomes, and take steps to assure the state’s educational goals are met throughout the state. But the legal theory of school finance reform is predicated to a significant degree on state responsibility for public education and on the vision of local school districts as essentially agencies of the states for providing the education mandated by the state’s constitution.
IV. SCHOOL DISTRICT AUTONOMY AND THE VALUE OF “LOCAL CONTROL”

Although local school districts are nominally creatures and agents of the states, in practice local districts have traditionally enjoyed far more autonomy than the formal model would suggest. In some older states, many local school bodies were created locally, predating the formal establishment of a statewide system of school districts.69 Even when state constitutions made education a matter of state concern, “[t]he actual governance of public schools in 19th century America . . . was a grassroots affair conducted by locally elected trustees, who had extensive powers and duties. They established curriculum, employed staff, chose textbooks, decided how many grades of school were to be offered, built the necessary schools, awarded diplomas and established the administrative structure needed to operate the schools.”70 State education establishments grew in the twentieth century, and state governments asserted far more regulatory authority over local school districts. But even in the mid-twentieth century “the local school districts, through delegated powers from the state legislature, carr[ied] the major responsibility for day-to-day operations” so that “state control in most school matters” was considered “remote” in practice.71

The tradition of de facto local autonomy has had an impact on legal analysis, too. Moreover, in some cases courts, particularly the United States Supreme Court, have gone further and found significant normative value in entrusting some measure of control over public education to local school boards. These decisions have not always benefited local school boards nor have they undermined the state’s ultimate legal control. But, along with some recent statutory developments at the state level, they complicate the assessment of the legal status of local school districts and school boards. .
Federal Constitutional Law

School Finance Reform

The Supreme Court’s 1972 decision in *San Antonio Independent School District v Rodriguez* illustrates the power and significance of the Court’s recognition of the value of local control in public education. In *Rodriguez*, the Court to a considerable degree accepted plaintiffs’ contentions that significant spending, taxing and educational quality differences resulted from the state’s delegation of a substantial portion of the responsibility of funding public schools to school districts of unequal wealth, and that the state had failed to provide revenues adequate to compensate for interlocal wealth differences. Nevertheless, the Court sustained the state’s school financing system because it grew out of and supported a system of local control. The Court noted the many powers enjoyed by local school districts in Texas, including the power to take property by eminent domain; the power to hire and fire teachers and other personnel; the power to maintain order and discipline students; the power to decide whether to offer certain programs, such as kindergarten or vocational education; and the power to decide (within limits) hours of attendance, grading, promotion, recreational, and athletic policies. As a result, it “cannot be seriously doubted that in Texas education remains largely a local function, and that the preponderating bulk of all decisions affecting the schools is made and executed at the local level.”

Local control is valuable, said the Court, because it facilitates “the greatest participation by those most directly concerned” with school decision-making, and because it builds public support for public schools, enables those communities that want “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 reasoned that requiring greater school funding equalization could undermine local control by increasing the state’s power over school spending: “The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.” The Court determined that was a reasonable fear, and that local-based financing was constitutionally justified, notwithstanding the resulting inequalities, because the state could reasonably decide to promote local control in public education.

To be sure, the Court did nothing to suggest that local districts were entitled to local control or that there was any basis for federal constitutional intervention if the state sought to reduce local autonomy. Rather, local control was the result of state decision-making. Nevertheless, in a case in which the state was not itself challenging local control but rather was relying on it, the Court was gave the normative value of local control great weight in resolving the meaning of equal protection in the school funding context.

**School Desegregation**

Perhaps an even more powerful departure from the “school-district-as-state-agency” model is *Milliken v Bradley*, in which the Supreme Court rejected a lower court’s order requiring interdistrict busing as a remedy for unconstitutional segregation in the Detroit school district. The lower court had found that racial segregation in the Detroit schools was irremediable unless suburban school districts from the Detroit metropolitan area were included in the busing program. The lower court also took seriously the Michigan
Constitution’s statement that public education is a state responsibility as well as the Michigan case law’s treatment of school districts as creatures and agents of the state. Accordingly, in the lower court’s view Detroit and the suburban districts were merely different components of a single Michigan state school system, so that district boundaries could be ignored in developing an effective remedy for segregation.

The Supreme Court, however, sharply disagreed with both the result and the underlying analysis. The Court began by rejecting the district court’s determination that the school district boundaries “are no more than arbitrary lines on a map.” Rather, the Court asserted, “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 school district lines marked out distinct, independent local school systems. Extending the busing remedy beyond the Detroit system would undermine the autonomy of the suburban school districts.

Returning to the theme previously sounded in Rodriguez, the Court found that “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for schools and to the quality of the educational process.” Moreover, as in Texas, the Court found “[t]he Michigan educational structure . . . in common with most states, provides for a large measure of local control.” This would be disrupted by massive interdistrict busing, which would “require, in effect, consolidation of 54 independent school districts historically administered as separate units into a vast new super school district,” which the Court considered to be utterly inconsistent with local control.
Building from the practice (and the value) of local control by an “autonomous political body corporate, operating through a Board of Education popularly elected” over “the day-to-day affairs of the school district,” the Court held that the state and its school districts stood on independent legal footings despite the formal subordination of the districts to the state under Michigan law. The actions of the Detroit school board that had caused segregation within the Detroit school district meant that the Detroit district had violated the constitution and would have to implement a remedy. But there had been no lower court finding that any actions of the suburban school districts, or of the state in drawing school district lines, had contributed to segregation within Detroit. As a result there was no basis for extending the desegregation remedy beyond the boundaries of the Detroit district into other “separate and autonomous 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 eliminated more than half the school districts, cutting the number from 1438 to 608. The prevailing view of the majority, however, was that the state’s formal authority to consolidate school districts was irrelevant. Unless and until a state consolidation occurred, 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 an effective remedy for school segregation in the metropolitan area impossible.
**One Person, One Vote**

In considering the value of local control, the Court in both *Rodriguez* and *Milliken* gave great weight to the opportunity for popular participation in school district governance that local school district autonomy provided. The *Milliken* opinion specifically noted that Michigan school boards were popularly elected. In *Kramer v Union Free School District No. 15*, the Court held that when a state provides for the election of a local school board, those elections must comply with the constitutionally required norms for federal, state, and general purpose local government elections – universal adult resident citizen suffrage, and one person, one vote. *Kramer* invalidated a New York law that limited the vote in school board elections to taxpayers and parents. To be sure, a state is under no obligation to make a school board elective. But when it does so, the broad, community-wide interest in “the quality and structure of public education” requires that all persons eligible to vote in general elections must also be allowed to vote in school district elections. School districts, thus, differ from the many other special purpose districts – like water storage or irrigation districts – in which the Court has held that the franchise may be limited to those persons “disproportionately affected” by the district, such as landowners. Instead, school districts are, for purposes of the right to vote, treated as akin to cities and counties. Due to their significant governing responsibilities, the highest constitutional protection for participation in their electoral processes applies.

Paradoxically, *Kramer*’s protection of the school district franchise subsequently operated to limit a state’s experimentation with school-based governance. In *Fumarolo v Chicago Board of Education*, the Illinois Supreme Court held that Kramer required it to
invalidate the franchise and representation provisions of the 1988 Chicago School Reform Act, which provided for the creation of local school councils for each of Chicago’s schools. These councils were given powers over the hiring of the principal, the recommendation of textbooks, disciplinary and attendance policies, and the review of the principal’s expenditure plan. Each council was to consist of ten members, with six elected by parents, two elected by the school’s teachers, and two elected by community residents. The Illinois Supreme Court found that given a council’s broad powers over education in its school, the one person, one vote norm applied. Due to the exclusion of nonparent residents from voting for most of a council’s seats, the Act was unconstitutional.

In response to Fumarolo, the Illinois legislature in 1991 revised the law to enable all residents to vote for all members of a council, although it reserved six seats on the board (out of eight) for parents. When this plan, too, was challenged, the federal appellate court that heard the case saved the councils by determining that their powers were sufficiently limited -- they did not, for example, include the power to tax or even to set the size of the school’s budget --- that they did not trigger the full force of the one person, one vote doctrine. According to the court, the councils did not really “govern” their schools: “The governing body of the public schools of Chicago is the Board of Education of the City of Chicago, not these local councils. Vital public education may be, but these councils, unlike the boards in Kramer . . . do not control it.” In distinguishing Kramer and rejecting Fumarolo, the Seventh Circuit Court of Appeals also voiced its sympathy for the underlying purposes of the statute: “There is a nationwide movement toward the decentralization and privatization of governmental functions, and the parent-centered
local school councils are one manifestation of that movement. They are an experiment . . .
We will never be able to evaluate its success if we invalidate the law."93

The one person, one vote cases have three implications for thinking about the legal position of school boards. First, the decision whether or not to have an elective school is entirely a matter for the state. This is consistent with the state agency model. Second, having decided to make a school board elective, the state cannot determine who can vote in that election. Rather, because of the governing authority local school boards have over public education, the school board election is a sufficiently important one that the constitutional requirements of universal suffrage and one person, one vote apply. Third, this complicates efforts at further decentralizing school governance to school-based councils controlled by parents and teachers. If the council is considered a governing body, the one person, one vote rule continues to apply and all members of the community are entitled to vote and to equal representation on the board. However, if a court can be persuaded that the council has limited authority and that governance is still vested in the school district – with power over taxation and budgets a critical indicator of governance - - then a parent-controlled council will be upheld (especially if the court is sympathetic to the experiment).

**Sovereign Immunity under the Eleventh Amendment**

One area in which the Supreme Court’s assumption of local school district autonomy has actually hurt districts involves liability to teachers and students for violations of federal rights. The Supreme Court has interpreted the Eleventh Amendment to bar federal courts from hearing damages actions against states and state agencies. However, the Court long ago concluded that local governments like cities and counties are
sufficiently distinct from their states that they are not shielded by the Eleventh Amendment. In *Mount Healthy City School District v. Doyle*, the Court held that an Ohio school district is “more like a county or city than it is an arm of the State” and thus enjoys no Eleventh Amendment immunity. In reaching that conclusion, the Court focused on Ohio law. The Court acknowledged that under Ohio law school districts are “subject to some guidance” by the State Board of Education and receive a significant amount of their funding from the state, but the Court also found that Ohio school boards have extensive authority to issue bonds and levy taxes within the restrictions of state law.

It is not clear whether *Mount Healthy* determined that all school districts are outside the Eleventh Amendment or only those in Ohio. On the one hand, in a later case from Missouri, the Court observed in passing that the Eleventh Amendment “does not afford local school boards like the Kansas City Missouri School District immunity from suit” without any analysis of Missouri law dealing with school boards. On the other hand, the many lower courts that have considered the issue have engaged in a close critique of the laws of the state of the defendant school board in order to resolve the immunity question. With two exceptions, however, all of the many federal appellate and state courts that have considered the issue have concluded that a local school district is not an “arm of the state” for Eleventh Amendment purposes and, thus, can be sued for damages for violating federal law.

In so doing, these courts have looked at such factors as the source of school district funding – which is particularly important in the Eleventh Amendment context since the purpose of the Amendment is to protect state treasuries; the scope of school board autonomy; and the degree to which state law treats a school district as a distinct
legal actor. Two cases are illustrative of the general approach. The United States Court of Appeals for the Second Circuit held that the Bridgeport, Connecticut school board was not immune to a civil rights claim for damages growing out of a student’s suspension because of the locally elected “board’s authority and discretion” under state law concerning the “actual implementation of the goals and maintenance of the public schools,” and because much of the district’s funding came from local, not state, taxes. Similarly, the United States Court of Appeals for the Fourth Circuit recently held that a North Carolina school board was not immune from a damages action under the Fair Labor Standards Act because the state was not obligated to pay any judgments obtained against a school board, the locally elected board was a legally distinct entity under state law – with the powers to sue and be sued, buy insurance and retain counsel, and purchase, hold and sell property -- and because the board enjoyed considerable autonomy with respect to the “general control and supervision of all matters pertaining to the public schools in their respective administrative units.” Although “education is a statewide concern” and the board must comply with state rules concerning such matters as teacher certification and curriculum, the board had its own “prerogatives” in “administration and employee relations.” In short, “North Carolina law establishes local school boards with a sufficient degree of autonomy and independence that any judgment reached against a local school board would not in our judgment affect the dignity of the state.”

The two departures from this general approach have involved the school districts of New Mexico and California. In a 1984 decision, the United States Court of Appeals for the Tenth Circuit ruled that local school boards were mere arms of the state because the state constitution gave the state board of education broad powers of “control,
management, and direction of all public schools,” with authority over curriculum and teacher qualifications and certification. Moreover, the state provided the vast majority of school district funds. According to the court, although local boards “do perform significant functions” they were for Eleventh Amendment purposes no more than arms of the state.100 A decade later the New Mexico Supreme Court determined that the federal appellate court had underestimated the independent status of local school districts under New Mexico law. The state supreme court found that state law defined the school boards as distinct “local public bodies;” and that the locally elected school boards had significant autonomy concerning the control and supervision of their schools, including spending priorities. The state board’s power consisted “only in the form of guidance by regulation, not by actual physical control,” and the state was not formally responsible for the school district’s debts.101 Two years later the Tenth Circuit reversed itself, and concluded that given the state supreme court’s reading of New Mexico law, New Mexico school districts, despite their heavy dependence on state revenues for funding, were not arms of the state under the Eleventh Amendment.102

The most significant departure from the usual rule that school districts are independent, and, thus, suable local governments, is California, where the United States Court of Appeals for the Ninth Circuit held that the public schools are arms of the state for Eleventh Amendment purposes. The court acknowledged that school districts had formal independent existence, e.g., that they can sue and be sued, hold property in their own name, and enjoy legally distinct corporate status. But the court emphasized that under California law public schooling is a state function, and that, due to California’s school finance reforms plus the tight controls on local taxation following Proposition 13,
the state tightly controls district revenues and budgets, so that the state would ultimately be paying for any judgment against the school board. Moreover, the court cited numerous California state court decisions that treated local school districts as agencies of the state for the purpose of discharging the state’s education responsibilities locally. This approach has been followed subsequently by both federal and state courts in California. As one state court observed, although local school districts are often treated by California law as like other local governments, “the state’s pervasive involvement in school affairs makes its relationship with school districts qualitatively different from its relationship with entities such as cities and counties.” Another federal appellate decision, finding “the state so entangled with the operations of California’s local school districts” described “the relationship between the State of California and California’s local school districts [a]s analogous to the relationship between a corporate parent and its wholly owned subsidiaries.”

California, distinctly and importantly to the contrary notwithstanding, the general rule has been that school districts, like cities and counties, are not state agencies for Eleventh Amendment purposes. This is due, in part, to their formally separate legal existence; to their de facto discretion over a range of school functions, particularly personnel decisions and student discipline, which have triggered many of the lawsuits that gave rise to the Eleventh Amendment analysis; and to their partial fiscal autonomy.

**State Law**

**School Finance Reform**

Although the state legislature’s responsibility, under its state constitution, for public education has played a critical role in providing state courts with the legal underpinning
for mandating school finance reform, the theme of local control has been significant at the state as well as at the federal level. First, eight state supreme courts have agreed with the United States Supreme Court that the value of local control justifies reliance on the local property tax based system of school financing, notwithstanding the resulting interdistrict spending inequalities.\textsuperscript{106}

Second, even many of the state courts that have held that their state constitution requires the schools to meet a standard of educational adequacy, statewide, that the state legislature had failed to achieve, have also ruled that individual local districts are free to raise and spend above the basic level.\textsuperscript{107} As the Arizona Supreme Court observed, in the course of finding that state’s school financing system failed to comply with the “general and uniform public school system requirement” of the Arizona constitution,

“[a]s long as the statewide system provides an adequate education . . . local political subdivisions can go above and beyond the statewide 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.”\textsuperscript{108}

Indeed, the general shift by state courts from state equal protection requirements to state education articles, with their “general and uniform” or other similar language, may have been intended to permit greater local control, defined as greater power for local districts to go above the statewide minimum.

Finally, one state supreme court has looked to school district autonomy to invalidate a state plan that would have redistributed locally raised funds from affluent districts to poorer districts. The Wisconsin Supreme Court in \textit{Buse v Smith}\textsuperscript{109} found that
the provision of the state’s constitution mandating the “establishment of district schools”
created a constitutional foundation for a measure of local school district autonomy:

“The power possessed by local districts to determine what educational subjects it
will offer over and above those required by the state, and to raise funds therefor,
is not merely a delegated power. Rather, the state-local control dichotomy in that
regard is part and parcel of the constitution.”

As a result, the recapture provision of the Wisconsin school finance reform, which would
have capped local district spending and redirected excess local revenues to other school
districts, was held to violate the state constitution.

**State Constitutions and Charter Schools**

*Buse v Smith* is the rare case that finds recognition of, and protection for, local
school districts in the state constitution. Although virtually all state constitutions require
the state legislature to provide for a public school system and many directly establish a
state board of education or create the position of state superintendent of public instruction,
only a relative handful expressly provide for local school districts or directly grant local
school boards powers over local schools; even many of these also indicate that the state
has authority over the powers and boundaries of such districts. The only state case, in
addition to *Buse* in which a constitutional reference to school districts led a state supreme
court to recognize local school board as well as state interests in an important education
policy conflict is the 1999 decision by the Colorado Supreme Court in *Board of
Education No. 1 in the City and County of Denver v Booth*, which dealt with the
process of approving charter schools.

The Colorado Charter Schools Act gives local school boards the authority to
approve or disapprove a charter proposal. If the local board disapproves, the applicant
may appeal to the State Board of Education which may reverse and remand to the district
board for reconsideration. 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.” The Denver school board challenged the statute, asserting that it gave the State Board more powers than the Colorado Constitution permitted while infringing on the state constitution’s provision that the local school board “shall have control of instruction.” 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 instruction that students will receive at the district’s expense.”

The Colorado Supreme Court struck a compromise that it thought would hold together the state board’s general supervisory authority and 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 the all the terms of the charter applicant’s proposal. Rather, the state board’s order is merely 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. This would be “consistent” with the state board’s “general supervisory authority regarding knowledge and dissemination of desirable improvements for the public education system” while
assuring that the local board’s concerns would be “taken into account in final contract negotiations.”

**School District Home Rule**

Local school districts, unlike cities and counties, have not traditionally enjoyed home rule. In recent years, a number of states have acted to give their school boards greater autonomy, including the adoption of school board home rule laws and laws enabling local boards to obtain waivers of state requirements, and have eliminated some of the burdens in state education codes. Some state courts have also recognized that local boards may have greater authority to initiate new actions, including the contracting out of certain school operations, even if not specifically authorized by state law. To be sure, it is far from clear just how much real independence these state home rule or waiver measures have given their local school boards, and even in a state where a court has suggested that school districts may have broader discretion when acting to advance their educational mission, other courts have continued to adhere to a more Dillon’s Rule-like approach of limiting school districts to those powers expressly granted, or necessarily implied in the express legislative grants. It is, thus, uncertain how much these recent developments have challenged the general subordinate status of local school boards.

**V. CONCLUSION**

The conflict between the state power and local autonomy models is not as great as the divergent assertions of school districts as “arms of the state” versus the value of “local control” might suggest. Most of the cases in which the rhetoric of local control has been invoked involved suits by individuals (parents or students) or some school boards against a state to force it to take on new and costly responsibilities, including the imposition of
new restrictions on other school boards. 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, or by those school districts that benefit from the
status quo to resist the claims of other school districts seeking redistributive changes. To
the extent that courts have accepted the local control argument, it has functioned as a
shield to sustain state policy, not a sword to alter policy in a more pro-local direction.

So, too, judicial recognition of school district autonomy in the Eleventh Amendment cases has exposed the districts to liabilities to third party plaintiffs (usually students or teachers); it has certainly not strengthened them relative to their states. Moreover, autonomy in these cases has meant only that districts in practice enjoy a
measure of discretion over matters within their jurisdiction and operate relatively
separately from their states; the districts, however, are still considered legally subordinate
to their states. Similarly, the school district voting rights cases reflect the fact that the
states have chosen to give their school boards considerable responsibilities with respect to
a significant public service, but they do not constrain the states from curtailing local
board powers or eliminating local boards altogether.

Local control is, thus, significant primarily as a manifestation of state policy
rather than as a federal or state constitutional constraint on the states. Although many
states have delegated significant powers to their local school districts, this is not
constitutionally compelled, and the states remain relatively free to restructure local
school governance as they please. The extent of local autonomy, the powers of local
boards, the scope of school district boundaries, the manner of selection of school board
members, are all matters for state determination even in states that have provided for
local control. Judicial discussions of local control reflect an effort to integrate the state practice of local autonomy into the interpretation of contested state constitutional and statutory provisions, not the recognition of an independent, grass-roots-based legal limitation on state power.

To be sure, some cases like the Wisconsin Buse decision or the Colorado charter schools case have used the concept of local control against the state legislatures. But these instances are rare. At the other extreme, perhaps because of the great role state regulation and financing play in the California schools, the California courts appear to give no weight to the concept of local school autonomy at all, and treat local districts not merely as subordinates but as legally tantamount to state agencies. Most states lie somewhere between Wisconsin/Colorado and California -- probably closer to California on the question of school district legal subordination to the state, but with greater de facto autonomy provided to school boards.

Several recent developments have further challenged local control and the status of local school boards. The most obvious set of changes has involved the assertion of greater power by, or the imposition of greater responsibility for education on, the states. Court-ordered school finance reforms – as well as financing reforms undertaken to forestall litigation – have increased the state 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 to affect school policies. Moreover, some judicial reform efforts – such as those in New Jersey, West Virginia, and Kentucky – have sought not simply to increase state aid to poorer school districts, but to require state legislative or education board efforts 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 educational goals.

Beyond the results of court-ordered school finance reforms, the states in the two decades since the publication of *A Nation At Risk* have moved across the board to set new content and performance standards for teachers and students. Through a greater insistence on testing, the states have become more involved in shaping the curriculum, and have also raised high school graduation requirements, and set higher teacher certification or minimum competency requirements. Some have extended the school day or the school year or even set minimum homework requirements.\(^{119}\) And, as already discussed, many states have adopted takeover laws, enabling state boards of education to take direct control over troubled school districts or schools.

The new federal No Child Left Behind Act reinforces the modern trend toward greater state specification and enforcement of the content of the education actually delivered at the local level. The NCLB Act, among other things, requires states to develop statewide standards for and assessments of local school districts. To be sure, the NCLB burdens the states as well as local districts, imposing obligations to develop academic standards, hire “highly qualified” teachers in core subjects, test all students annually in grades three through eight, and reconstitute persistently failing schools. Moreover, the Act “imposes a slew of reporting requirements upon both state and local education agencies and contains literally hundreds of specific directives that states and localities must follow.”\(^{120}\) Although this paper has focused almost exclusively on state-local relations in considering the legal status of local school districts, it was worth noting that federal laws such as the Elementary and Secondary Education Act, the Individuals
with Disabilities Education Act, and, now the NCLB Act also constrain local school districts and affect school board powers. The NCLB suggests that the federal role may grow, with implications for both local school boards and the states.

To be sure, greater state standard-setting, oversight, and interventions in cases of poor local performance have been accompanied in some states with measures giving local school boards greater operational discretion in achieving state educational goals. States may conclude that their purposes may be better attained by a degree of school district home rule rather than by state-directed micro-management of school operations. Yet, this is consistent with plenary state authority and not a challenge to it.

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 states, governance of the largest urban school districts has been shifted from an elected board to one appointed by the mayor, or the mayor and the governor. More dramatically, New York State recently abolished the New York City Board of Education altogether, vesting responsibility for the city’s schools in the mayor and his city commissioner of education. Some states, like Kentucky, have adopted site-based management programs that transfer power from school districts to individual school councils. So, too, many states have provided for charter schools, which operate with considerable independence from – and often in conflict with – local school districts. Although the actual role of both school councils and charter schools has been relatively limited to date, their emergence could change the nature of local-level control over schools. Certainly, the handful of cases involving contests between school
districts and school councils or charter schools indicate that school districts may have to give way to these new local educational institutions.

These decentralizing moves may be as great a challenge to school boards as centralization. Not only do they create competing local school authorities, they 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, the recent centralizing and decentralizing developments may operate to reduce the independent powers of school districts. As a matter of legal theory, they do not change the status of local school boards. Rather, they illustrate the formal view that this is an area of virtually plenary state power (although now subject to greater federal intervention) which can be reshaped by state legislatures in either a centralizing direction, a decentralizing direction, or in both directions simultaneously. But without changing the theory of state-local relations concerning schools they 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 bringing the practice in greater conformity with the legal theory of state power.
NOTES


3 Bolmeier, supra, at 146-49.


5 Education Commission of the States, State Notes, Local School Boards: Types, Elected vs. Appointed and Number, May 2002.

6 Id.

7 According to the 2002 Census of Governments, of the 15,014 school systems in the United States in 2002, 13,506 were independent school district government, while 1,506 were dependent systems. Of the 1506 dependent systems, 178 (including Hawaii’s statewide school system) were categorized as state-dependent. The remainder were dependent on local governments. 2002 Census of Governments, supra, at 17 (table 12).

8 See 2002 Census of Governments, supra, at 21, Table 15. According to the Census Bureau, 2,712 school districts have the same boundaries as a county, municipality, town or township; 5,722 are located within one county but are not coterminous with the county or any subdivision within the county; 4,329 districts overlap two or more counties; and 2,251 did not report boundary data. Of the reporting districts, then, only 21% were coterminous with a general purpose local government.

9 See, e.g., Rollins v Wilson County Government, 967 F. Supp. 990, 996 (M.D. Tenn. 1997) (plaintiff’s periods working for the county government and the county school board could not be aggregated for purposes of establishing coverage under the Family and Medical Leave Act because “a county board of education is a separate and distinct governmental entity from that county’s government”); Lanza v Wagner, 11 N.Y.2d 317 (N.Y. 1962) (although New York City’s Board of Education is connected to the City’s government, board members are “officers of an independent corporation separate and distinct from the city”). See generally E. Edmund Reutter, The Law of Public Education 155 (4th ed. 1994) (“It is essential . . . to stress the basic separateness of [school district and general local governments]. Even where boundaries of a municipal unit and a school district are coterminous, there is no merger of city affairs and school district affairs”).

10 See ECS, State Notes, supra. The ECS reports that in 31 states all school board members are elected. In another 7 states, the members of all but one school board are elected; in five more states, the members of all but two to five school boards are elected. Only six states – Alabama, Indiana, Maryland, New Jersey, South Carolina, Virginia – are more than a minimal number of school boards composed of appointed rather than elected officials.


13 See, e.g., William R. Hazard, Education and the Law: Cases and Materials on Public Schools 3 (Free Press 1971) (“Legally, school boards act as agents of the state legislature”); Bolmeier, supra, at 129 (“Local school districts are incorporated as agencies of the state for purposes of executing the state’s educational policy”).

14 Hunter v City of Pittsburgh, 207 U.S. 161 (1907).

15 See, e.g., Attorney General of Michigan ex rel Kies v Lowrey, 199 U.S, 233 (1905). See also Rousselle v Plaquemines Parish School Board, 633 So.2d 1235, 1241 (La. 1994) (school board cannot claim that an amendment to the Louisiana Teacher Tenure Law that strengthened the rights of a teacher under an existing contract violations the Contracts Clause because as a state agency the board “is not protected by the constitutional prohibition against the legislature enacting laws which impair the obligation of contracts”).


18 Reutter, supra, at 104; Valente, supra, at 17.
19 See, e.g., Minnesota Ass’n of Public Schools v Hansen, 178 N.W.2d 846 (Minn. 1970). See also Unified School Dist, No. 335 v State of Kansas, 478 P.2d 201 (Kan. 1970) (one school district cannot sue to challenge the boundaries or validity of another district).
20 See, e.g., Pass School District of Los Angeles County v Hollywood City School District of Los Angeles County, 105 P. 122 (Cal. 1909) (“the beneficial owner of the fee is the state itself”; school districts “are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs”); City of Baker School Board v East Baton Rouge Parish School Board, 754 So.2d 291, 293 (La. App. 2000) (“The ownership, management, and control of property within a school board’s district is vested in the district, in the manner of a statutory trustee”).
21 Reutter, supra, at 113.
22 The superintendent of public instruction, or commissioner of education, is elected in 14 states – Arizona, California, Georgia, Idaho, Indiana, Montana, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, Washington, Wisconsin, and Wyoming. Members of the state board of education are elected in Colorado, Kansas, Louisiana, Michigan, Nebraska, New Mexico, Ohio, South Dakota, and Texas.
23 Reutter, supra, at 115-32.
25 Id.
27 See Briffault, Our Localism, supra, at 8.
28 Ill. Const., Art VII, Sec. 1.
29 Ill. Const., Art. VII, Sec. 8.
30 N.Y. Const., Art. IX, Sec. 3
31 See, e.g., Gibson County Special School Dist. V Palmer, 691 S.W.2d 544, 550 (Tenn. 1985).
33 See Reutter, supra, at 154.
34 See Valente, supra, at 60-61.
38 See id.
41 Kentucky Rev. Stat. 160.345
42 Id.
44 Board of Education of Boone County v Bushee, 889 S.W.2d 809 (Ky. 1994).
45 Id. at 814.
46 Id. at 816.
47 Id.
48 Id.
49 These states include Connecticut, Delaware, Florida, Illinois, Michigan, Missouri, New Hampshire, New Jersey, New York, Ohio, and Tennessee. See id.
50 See id.
51 See id.
53 Id. at 756.
56 See, e.g., Hall v City of Taft, 302 P.2d 574 (Cal. 1956).
57 See, e.g., School Committee of Town of Winslow v Inhabitants of Town of Winslow, 404 A.2d 988 (Me. 1979). See also Macauley v Hildebrand, 491 P.2d 120 (Alaska 1971) (local school board operating a district coterminus with a municipality cannot be forced into the municipality’s accounting system).
58 Hall, supra, 302 P.2d at 576.
59 Id. at 577.
60 Id. at 578.
61 Winslow, supra, 404 A.2d at 992.
63 Id. at 1255.
64 Id.
65 Id. at 1256.
69 Carl H. Griffey, The History of Local School Control in the State of New York (Teachers College 1936) at 16-17 (the local school district of the late eighteenth and early nineteenth centuries was “a voluntary group” – “the direct offspring of the private school” – formed locally to receive state education appropriations).
73 Id. at 53 n.108.
74 Id.
75 Id.
76 Id. at 49-50.
77 Id. at 51-53.
78 Id. at 53 n. 109.
80 Id. at 741.
81 Id. at 741-42.
82 Id. at 742-43.
83 Id. at 742 n. 20
84 Id. at 744.
85 Id. at 796.
87 Id. at 630.
89 142 N.E.2d 54, 566 N.E.2d 1283 (Ill. 1990).
90 566 N.E.2d at 1295.
91 Pittman v Chicago Board of Education, 64 F.3d 1098 (7th Cir. 1995).
92 Id. at 1103.
93 Id.
95 Id. at 280.
99 Id. at 226.
100 Martinez v Board of Education of Taos Municipal School Dist., 748 F.2d 1393 (10th Cir. 1984).
102 Duke v Grady Municipal Schools, 127 F.3d 972 (10th Cir. 1997).
103 Belanger v Madera Unified School Dist., 963 F.2d 248 (9th Cir. 1992).
105 Ass’n of Mexican-American Educators v State, 231 D.3d 572, 582 (9th Cir. 2000).
108 Roosevelt Elementary School Dist., supra, 877 P.2d at 815.
110 Id. at 151.
111 These states include Colorado, see Colo. Const. Art. XX, §§ 2, 15 (school district boards of education to “have control of instruction in the public schools of their respective districts”); Florida, see Fla. Const. Art. IX, Sec. 4 (providing for county school districts and school boards that “shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limit prescribed herein”); Georgia, see Ga. Const. Art VIII, §5, ¶ 1 (“authority is granted to county and area boards of education to establish and maintain public schools within their limits” but the General Assembly may provide for the consolidation or combination of school districts); Kansas, see Kans. Const., Art VI. § 5 (“local public schools under the general supervision of the state board of education shall be maintained, developed and operated by locally elected boards”); Louisiana, see La. Const., Art. VIII, § 9 (the legislature shall provide for parish school boards and provide for the election of their members); Montana, see Mont. Const. Art X., § 8 (the supervision and control of schools in each school district shall be vested in a board of trustees to be elected as provided by law); and Virginia, see Va. Const. Art. VIII, § 7 (“The supervision of schools in each school division shall be vested in a school board, to be composed of members selected on the manner, for the term, and possessing the qualifications and in the number provided by law”).
112 984 P.2d 639 (Colo. 1999).
113 Id. at 646, 648.
114 Id. at 654.
117 See Goldman, supra; Hosea et al, supra.