Revisiting the “Tradition of Local Control” in Public Education

Carter Brace
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Education Law Commons, and the Supreme Court of the United States Commons

Recommended Citation
Carter Brace, Revisiting the “Tradition of Local Control” in Public Education, 122 Mich. L. Rev. 97 (2023). Available at: https://repository.law.umich.edu/mlr/vol122/iss1/4

https://doi.org/10.36644/mlr.122.1.revisiting
NOTE

REVISITING THE “TRADITION OF LOCAL CONTROL” IN PUBLIC EDUCATION

Carter Brace*

In Milliken v. Bradley, the Supreme Court declared “local control” the single most important tradition of public education. Milliken and other related cases developed this notion of a tradition, which has frustrated attempts to achieve equitable school funding and desegregation through federal courts. However, despite its significant impact on American education, most scholars have treated the “tradition of local control” as doctrinally insignificant. These scholars depict the tradition either as a policy preference with no formal legal meaning or as one principle among many that courts may use to determine equitable remedies. This Note argues that the Supreme Court conceived of the tradition not merely as good policy or remedial law but as a principle that was supported by multiple freestanding constitutional provisions. It shows how the policy and remedial law explanations for the tradition do not fully explain the Court’s reasoning. It then demonstrates that the Court located the tradition in the federal Constitution’s guarantees of substantive due process, the right to vote, federalism, and the separation of powers.

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................ 98

I. THE ORIGINS AND IMPACT OF THE TRADITION OF LOCAL CONTROL ................................................................. 100

A. The Context and Reasoning of Milliken v. Bradley .............. 100

* J.D. Candidate, May 2024, University of Michigan Law School. A special thank you to Professor Michelle Adams, whose expertise, guidance, and mentorship were essential to my project. Thank you as well to Professors Don Herzog and Noah Kazis, and to Annie Schuver, for helping me develop this Note. And thank you to Aviva Diamond—I could have only written this with your love and support. Finally, thank you to all the editors of the Michigan Law Review who edited my work: Halle Alitz, Delaney Battle, Meg Beyer, Kathryn Buggs, Robert Brewer, Levi Brown, Aaron Cox, Aviva Diamond, Rita Elfarissi, John Grosboll, Will Hanna, Noah Harrison, Ethan Haughe, Graham Heise, David Holmes, Lauren Jung, Maggie Larin, Carlos Larrauri, Margot Libertini, Grayson Metzger, Hank Minor, Libby Munoz-Smith, Adina Nadler, Madeleine Nagle, Alex Noronha, Ross Pollack, Lara Ryan, Frank Schulze, Annie Schuver, Brandon Splitter, Max Totksy, Brittany Warren, Pete Wojtal, and Derek Zeigler. All errors that remain are my own.
**INTRODUCTION**

*Brown v. Board of Education* declared that segregated schools were “inherently unequal.”¹ Brown’s holding was clear: segregation is unconstitutional. But desegregation could not be accomplished with a single decision. From *Brown* in 1954 into the early 1970s, the Supreme Court enforced desegregation in numerous cases—including eighteen unanimous opinions—where state and local governments had dragged their feet or outright refused to desegregate.² The Court struck down different strategies that state and local governments used to frustrate desegregation: “freedom of choice” plans;³ new school districts carved out from larger districts;⁴ outright closures of public school districts;⁵ and anti-busing statutes.⁶

In addition, the Supreme Court granted federal district courts substantial powers to remedy segregation. A year after *Brown*, the Court in *Brown II* instructed federal courts to desegregate school districts with “all deliberate

---

3. E.g., Green v. Cnty. Sch. Bd., 391 U.S. 430, 441–42 (1968) (holding that a school district’s “freedom of choice” plan, under which no White children had applied for admission to the all-Black school in the school district, was insufficient to desegregate schools); Raney v. Bd. of Educ., 391 U.S. 443, 446 (1968) (same).
speed.” 7 Fifteen years later, frustrated with delays in integration, 8 the Court went further and held that so-called “dual” school systems with separate Black and White schools should be terminated “at once.” 9 The Court also held that the remedial powers of a federal court to desegregate schools were broad and flexible. 10

The Court’s zeal faded in 1974, when it decided Milliken v. Bradley. 11 In that case, the Court rejected an ambitious desegregation remedy covering dozens of school districts in the Detroit metropolitan area. 12 A federal district court in Michigan, affirmed by the Sixth Circuit, had previously found that such an “interdistrict remedy” was needed to address the stark racial segregation in a metropolitan area consisting of a predominantly Black city surrounded by overwhelmingly White suburbs. 13 In reversing the circuit court, the Supreme Court relied heavily on the “tradition of local control” over public education. 14 The Court declared that the tradition was so important that it would only allow interdistrict remedies if those remedies passed a stringent test. 15

For decades, scholars have argued that Milliken worsened educational inequality and racial segregation by curtailing the power of federal courts to integrate schools. 16 Despite the attention paid to that case, the local control tradition has long been misunderstood and some of its most significant implications ignored. 17

This Note demonstrates that existing analyses of the tradition of local control are inadequate, and that the Supreme Court conceived of this tradition as a principle grounded in multiple freestanding constitutional provisions. Part I explains the Milliken decision and its impact on American education. Part II analyzes the conventional explanations for the tradition and concludes that those explanations do not fully capture the Court’s reasoning. Part III shows

---

8. Liu, supra note 2, at 716 (noting “the Court’s frustration with the late start” to integration after Brown).
15. Id. at 741–45 (“Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district.”).
17. See infra Part III.
that the Court viewed the tradition as grounded in substantive due process, federalism, and even a concept of democratic decisionmaking derivative of voting rights. In effect, the Court began to develop multiple major doctrines through its treatment of the tradition of local control.

I. The Origins and Impact of the Tradition of Local Control

This Part explains the context, reasoning, and continuing influence of *Milliken* on school segregation and inequality. In particular, it reveals how *Milliken* drew on other cases that addressed local control and became a crucial precedent. It then looks at the impact of *Milliken* and the tradition on American education and society.

A. The Context and Reasoning of *Milliken* v. Bradley

In the early 1970s, the Supreme Court began to review challenges to school segregation in the North and West, beyond the state-mandated school segregation of the South.\(^\text{18}\) During this era, a group of parents and students in Detroit sued state and local officials in Michigan, arguing that they had created and perpetuated segregation in metropolitan Detroit’s public schools.\(^\text{19}\) The United States District Court for the Eastern District of Michigan found that the State of Michigan and the Detroit Board of Education had created and maintained de jure segregation in Detroit’s public schools in violation of the Fourteenth Amendment.\(^\text{20}\)

The district court found that the government officials used a variety of techniques to segregate schools in Detroit. Many of these methods were intended to preserve the “neighborhood school” model, where public schools drew their student body from a small local area around the school building.\(^\text{21}\) This technique might have appeared race-neutral, but decades of public and private discrimination in housing meant that schools remained racially homogenous.\(^\text{22}\) The “neighborhood school” model was widespread among school systems in the northern and western United States.\(^\text{23}\) For its part, the Detroit Board of Education drew school attendance zones in a way that conformed to patterns of racial segregation in housing.\(^\text{24}\) The Board also built and


\(^{20}\) Id. at 592–93.


\(^{22}\) *Milliken*, 338 F. Supp. at 587.


\(^{24}\) *Milliken*, 338 F. Supp. at 592–93.
refurbished public schools in areas that were racially homogenous knowing that the populations of those schools would be similarly monoracial. And the State of Michigan was found responsible for approving those school construction projects.

Officials in Michigan strayed from the “neighborhood school” model, however, when doing so helped maintain segregation. For instance, the Detroit Board of Education designated some areas of Detroit as optional attendance zones so that White students could avoid going to school with Black students. The Board even bused Black students past closer, predominantly White schools to distant Black schools to create and maintain segregation. Act 48 of the Michigan Legislature further obstructed desegregation in Detroit by suspending a voluntary desegregation plan put forward by the Detroit Board of Education. But because all school districts in Michigan were created by the state government, the State of Michigan was ultimately responsible for school segregation, regardless of the legislature’s specific acts.

Once the district court found de jure segregation, it contemplated a remedy for that segregation. The court concluded that a desegregation plan stretching beyond the artificial boundaries of the Detroit school district and into the suburbs of metropolitan Detroit was necessary to achieve meaningful desegregation. If a desegregation plan only applied to Detroit proper, there would be little desegregation in practice. In effect, an overwhelmingly Black, inner-city school district would be surrounded by a ring of overwhelmingly White, suburban school districts.

The district court laid out three reasons why a metropolitan desegregation plan was warranted. First, courts could disregard the artificial boundaries of local school districts because school districts were mere “creatures” of the State of Michigan. Second, the State of Michigan was directly liable for segregation because it enacted Act 48. Third, federal courts had broad equitable powers to ensure the maximum amount of actual desegregation took place.

---

25. *Id.* at 589.
28. *Id.* at 593.
29. *Id.* at 584, 589.
32. *Milliken*, 484 F.2d at 249.
33. *Id.*
34. *Id.* at 247.
Sixth Circuit upheld both the district court’s finding of segregation and the proposed desegregation plan, and emphatically rejected any notion that school district lines were sacrosanct. Such a rigid conception of school districts would nullify Brown and restore the “separate but equal” jurisprudence of Plessy v. Ferguson. The State of Michigan petitioned the Supreme Court to grant certiorari and the Court agreed to hear the case.

The Supreme Court upheld the finding of de jure desegregation but rejected the metropolitan desegregation plan. Writing for a five-justice majority, Chief Justice Warren Burger ostensibly agreed with the lower courts that school district boundaries were not sacrosanct and that the federal judiciary had a duty to remedy Fourteenth Amendment violations. But the Court announced a new rule for desegregation remedies: an interdistrict remedy required an interdistrict violation and effect. This rule meant that a federal court could only include a school district in a desegregation plan in two circumstances: (1) if the court found de jure segregation in that district, or (2) if another school district’s de jure segregation had caused a significant amount of segregation in the first district. The Court did not present this interdistrict remedies rule as novel. Instead, Milliken portrayed it as the logical consequence of the principles stated in an earlier school desegregation case, Swann v. Charlotte-Mecklenburg Board of Education, which held that the scope of the remedy was determined by the nature and extent of the constitutional violation.

This new rule was hard to justify solely based on the Court’s desegregation precedents for several reasons. First, in Swann, the Court had declared that the equitable powers of federal courts were broad and flexible, which would seem to be a point in favor of permitting an expansive interdistrict remedy. Second, as Justice Thurgood Marshall pointed out in his Milliken dissent, the Swann principle—that the scope of the remedy should be determined by the nature and extent of the constitutional violation—meant that a remedy had to be sufficient to cure the violation at issue. The Swann principle established only a minimum requirement, not a maximum limit like the one inferred by Milliken. Because only an interdistrict remedy could cure desegregation in

37. Milliken, 484 F.2d at 258.
38. Id. at 250.
39. Id. at 249.
41. Id. at 744.
42. Id. at 745.
43. Id. at 744.
44. Id. at 744–45.
45. Id. at 744 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).
46. Swann, 402 U.S. at 15.
Detroit's public schools, that remedy was required under the Swann principle, not prohibited by it.\textsuperscript{48}

\textit{Milliken} based its rejection of an interdistrict remedy on the notion of a tradition of local control in public education. The Court indicated that it would take school district lines seriously because “[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 public schools and to quality of the educational process.”\textsuperscript{49} The tradition meant that any desegregation plan which crossed school district lines would only be allowed where there was a constitutional violation in one district that caused segregation in another district.\textsuperscript{50} Because the lower courts had only found de jure segregation in Detroit itself, an interdistrict remedy including dozens of Detroit suburbs was impermissible.\textsuperscript{51} In essence, the specific \textit{Milliken} rule that only an interdistrict violation and effect could permit an interdistrict remedy was not just the logical conclusion of the broader \textit{Swann} principle that the scope of the remedy had to match the scope of the violation. It was instead the outgrowth of the Court’s deference to a tradition of local control in public education.

\section*{B. Why Milliken and the Tradition of Local Control Mattered}

The tradition of local control was essential not only in \textit{Milliken}, but in later cases that further limited the available judicial remedies for school desegregation. After \textit{Milliken}, the Supreme Court remanded the case, and the lower courts proceeded to formulate a far more modest desegregation remedy limited to Detroit’s public schools.\textsuperscript{52} The Supreme Court approved this “intra-city” remedy in \textit{Milliken II} in 1977, emphasizing that federal courts had to take state and local interests into account when crafting remedies.\textsuperscript{53}

In the same year, the Supreme Court decided \textit{Dayton Board of Education v. Brinkman}. There, the Court cited the first \textit{Milliken} decision in declaring “that local autonomy of school districts is a vital national tradition.”\textsuperscript{54} As a result, any showing of school segregation which necessitated a desegregation remedy that disempowered local authorities had to meet a heightened evidentiary standard.\textsuperscript{55} The desegregation remedy at issue in \textit{Brinkman} failed to meet

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{48} Id. at 741–42 (citing Wright v. Council of Emporia, 407 U.S. 451, 469 (1972)).
\item \textsuperscript{49} Id. at 741, 745.
\item \textsuperscript{50} Id. at 745.
\item \textsuperscript{51} Id. at 745.
\item \textsuperscript{52} Milliken v. Bradley (\textit{Milliken II}), 433 U.S. 267, 271–79 (1977).
\item \textsuperscript{53} Id. at 280–81.
\item \textsuperscript{55} See id. ("[T]he case for displacement of the local authorities by a federal court in a school desegregation case must be satisfactorily established by factual proof and justified by a reasoned statement of legal principles.").
\end{itemize}
\end{footnotesize}
that standard in part because it was unclear if patterns of racial segregation were caused by the invidious discrimination of local officials.\textsuperscript{56}

In 1991, the Court in \textit{Board of Education v. Dowell} cited \textit{Milliken} for the notion that local control allowed for innovation and more democratic decisionmaking.\textsuperscript{57} In \textit{Dowell}, a "necessary concern" in favor of local control in public education dictated that federal judicial control of school districts could not last longer than the time needed to remedy past intentional discrimination.\textsuperscript{58} In part because of that consideration, the Court held that an injunction from the federal judiciary aimed at achieving desegregation could be dissolved merely upon a showing that the school district had tried to desegregate the schools at issue, even if they had failed to actually do so.\textsuperscript{59} A year after \textit{Dowell}, the Court declared in \textit{Freeman v. Pitts} that the ultimate objective of court-ordered desegregation was not just remedying the constitutional violation of segregated public schools, but also restoring state and local control of public schools.\textsuperscript{60}

Numerous legal scholars have criticized \textit{Milliken} and its progeny for entrenching inequality and segregation in American life.\textsuperscript{61} \textit{Milliken}'s critics claim the Supreme Court created a policy of judicial tolerance for severe educational inequality and segregation between neighboring school districts.\textsuperscript{62} They argue that, after \textit{Milliken}, the combination of inequality and segregation in schools and housing ensured that many suburbs were disproportionately White and middle class, with only their White, middle-class population enjoying access to well-funded schools.\textsuperscript{63} That state of affairs has shifted somewhat as the non-White population of American suburbs has grown considerably in the twenty-first century.\textsuperscript{64} Nonetheless, there are still educational disparities between cities and suburbs, as the average student in a suburban school district almost invariably has higher standardized test scores than their counterpart in the

\begin{itemize}
\item \textsuperscript{56} Id. at 414.
\item \textsuperscript{58} Id. (quoting Spangler v. Pasadena City Bd. of Educ., 611 F.2d 1239, 1245 n.5 (9th Cir. 1979) (Kennedy, J., concurring)) (citing \textit{Milliken II}, 433 U.S. at 280–82).
\item \textsuperscript{59} Id. at 249–50.
\item \textsuperscript{61} Eg., Kimberly Jenkins Robinson, \textit{Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools}, 88 N.C. L. REV. 787, 818 (2010).
\end{itemize}
city. Other scholars have noted how Milliken further incentivized White flight by assuring White residents that they would be unaffected by busing plans if they moved to largely white suburbs.

In particular, Milliken put meaningful integration of metropolitan areas across district lines beyond the reach of federal courts. After Milliken demanded proof of an interdistrict effect and violation, lower courts have only ordered interdistrict busing plans in four metropolitan areas throughout the entire country since the case was decided in 1974. From 1970 to 2000, the degree of racial segregation within school districts declined on average, but the degree of segregation between school districts in a metropolitan area—the kind of segregation which Milliken made harder to remedy—increased across almost all regions of the United States. From 1930 to 1970, a trend towards greater district consolidation, whereby suburbs and inner cities would merge into one metropolitan school district, had led to a 90% reduction in the number of school districts in America. In the 1970s, that trend quickly petered out, with the number of school districts in the United States holding steady into the twenty-first century.

Of course, educational trends are not monocausal. Some scholars have stressed that it is hard to tell how much Milliken caused increased educational inequality and segregation. As much as Milliken restricted judicial remedies, there was a simultaneous lack of political will in other government branches for extensive desegregation efforts. Nonetheless, Milliken’s restrictions on desegregation are still good law even while school segregation persists in many parts of America. A third of American students attend a school where 75% or

---

66. Saiger, supra note 63, at 504–05.
68. See supra text accompanying notes 31, 42–44.
69. RYAN, supra note 67, at 105.
71. Christopher R. Berry & Martin R. West, Growing Pains: The School Consolidation Movement and Student Outcomes, 26 J.L. ECONS. & ORG. 1, 1 (2010).
72. Id. at 4.
73. See e.g., JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 181–82 (2001).
74. See id.
more of the student body is of one race or ethnicity, and 14% of students attend a school where 90% or more of students share the same race.\textsuperscript{75}

\textit{Milliken} is undoubtedly important in understanding American public education. And yet, legal scholars have analyzed the tradition of local control concept—which plays such a large role in the Court’s reasoning—in frequently and in ways that minimize its importance. The next Part of this Note scrutinizes the scholarly literature around the tradition of local control and evaluates the two conventional explanations for its role in \textit{Milliken} and related cases.

\textbf{II. EVALUATING THE CONVENTIONAL EXPLANATIONS FOR THE TRADITION OF LOCAL CONTROL}

This Part criticizes two conventional explanations for the doctrinal significance of the tradition of local control. One interpretation is that the tradition simply expresses policy preferences, not legal jurisprudence, on the part of the \textit{Milliken} majority. An alternative theory depicts the tradition merely as the outgrowth of existing remedial principles. This Note contends that both these theories of the tradition are, at best, incomplete explanations of the Court’s reasoning. The Court was more ambitious in developing doctrinal justifications for the tradition than has been generally understood. The basis for important modern-day constitutional doctrine comes from the Court’s consideration of local control.

In evaluating these explanations of the tradition, it is important to note that the judicial writings that constitute the “tradition” are not confined to \textit{Milliken} itself. Instead, \textit{Milliken} is the central case in a cluster of opinions that create the notion of the tradition and which this Note refers to as the “local control cases.” These include the majority opinions in \textit{Wright v. Council of the City of Emporia} and \textit{San Antonio Independent School District v. Rodriguez}—the only two cases \textit{Milliken} cited as precedent for the tradition.\textsuperscript{76}

In \textit{Emporia}, the Court held that a city’s plan to create a school district separate from the county school system it had belonged to would violate the Equal Protection Clause.\textsuperscript{77} The Court reasoned that the plan was unconstitutional because it impeded efforts to eliminate “all vestiges of enforced racial segregation” in a county with a history of school segregation.\textsuperscript{78} Specifically, it would have created a much whiter school system in the city and a much blacker school system in the rest of the county.\textsuperscript{79} Even as the Court affirmed

\begin{itemize}
\item \textsuperscript{75} \textit{U.S. Gov’t Accountability Off., GAO-22-104737, K-12 Education: Student Population Has Significantly Diversified, but Many Schools Remain Divided Along Racial, Ethnic, and Economic Lines} (2022).
\item \textsuperscript{78} \textit{Id.} at 463.
\item \textsuperscript{79} \textit{Id.}
the power of federal district courts to block the educational decisions of local governments, it acknowledged that direct control over decisions in public schools was “a need that [was] strongly felt in our society.”

In *Rodriguez*, the Court upheld Texas’s system of funding its schools in large part through property taxes, even though the scheme led to large funding disparities between school districts. The Court found that these wealth inequalities did not trigger strict scrutiny. As a result, Texas’s system only had to pass a lenient “rational basis” test. The Court found that the system was rational because it fostered local control of public schools, which in turn facilitated civic participation in school decisions, ensured that schools met local needs, and encouraged “experimentation, innovation, and a healthy competition for educational excellence.”

In addition to those these majority decisions, two other Court opinions are especially relevant in forming the tradition. First, Chief Justice Burger’s dissent in *Emporia* is significant because it was his first sustained writing on the benefits of local control—and he ultimately articulated the tradition concept in the *Milliken* majority opinion. The dissent was in conversation with the *Emporia* majority opinion as well, which Chief Justice Burger directly cited for the tradition.

Second, Justice Lewis Powell’s opinion in *Keyes v. School District No. 1* is significant because it marks the most extensive writing on local control in public education by any justice during the two-year period from *Emporia* to *Milliken*, when the Court identified the tradition. Justice Powell’s opinion in *Keyes*—where he concurred in part and dissented in part—provides further insight into his thoughts about local control during the same court term when he also wrote the majority opinion in *Rodriguez*. Furthermore, the political context of *Keyes* is similar to the context of *Milliken*, as both cases were some of the Court’s first forays into non-Southern school segregation. Finally, both Chief Justice Burger’s *Emporia* dissent and Justice Powell’s *Keyes* opinion were cited prominently by the petitioners in *Milliken* as part of their ultimately successful advocacy for the importance of local control.

80.  *Id.* at 469.
82.  *Id.* at 27–28.
83.  *Id.* at 40 (declaring that the Court would apply “the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes”).
84.  *Id.* at 50.
A. Not Just a Nonlegal Policy Preference

The tradition of local control is often criticized on the grounds that it is a political and policy stance where one should find a legal principle. This line of reasoning assumes, based on a surface reading of Supreme Court cases, that the tradition is neither grounded in any constitutional right nor based on any solid precedent. This critique of the tradition as a political and nonlegal decision is not without force. But the idea that the “tradition” is purely political ignores the way the justices themselves thought about it as principled legal reasoning grounded in the Constitution.

Judge Nathaniel R. Jones, who represented the parents and children in Milliken when he was general counsel of the NAACP, spoke for many when he said there was little precedent, reason, or logic animating the Milliken decision. Likewise, then-Professor Goodwin Liu summarily dismissed the tradition as an inexplicable departure from precedent and an invention of the Court in the course of two years between Rodriguez, Emporia, and Milliken. This theory is strong. Chief Justice Burger only directly cited Emporia, which was decided just two years before Milliken, for his assertion that local control was “more deeply rooted” than any other “tradition in public education.”

Emporia contained no discussion of history or traditions in education per se—instead, merely a reference to a contemporary, “strongly felt” desire for “[d]irect control” over education. Chief Justice Burger also supported his statement about the existence of a tradition with a reference to Rodriguez, which had been decided the year before. Like Emporia, Rodriguez made no reference to the tradition or history of local control over education. Instead, the Court cited Rodriguez merely for statements finding a variety of purported present-day benefits of local control. Rodriguez looked like an inapposite precedent because its defense of local control did not address whether local control would be important enough to block a desegregation remedy that was otherwise required under the Equal Protection Clause. The Texas school

89. E.g., Jones, supra note 21, at 50.
90. E.g., Liu, supra note 2, at 718.
92. Emporia, 407 U.S. at 469.
94. Id.
95. See Rodriguez, 411 U.S. at 17 (noting that the issues in the case were whether strict scrutiny applied and, if strict scrutiny did not apply, whether the school funding scheme passed rational basis review).
funding scheme in Rodriguez did not violate the Equal Protection Clause, unlike the actions of Michigan’s educational authorities in Milliken.96

Critics labeled Milliken as a politically motivated decision that ignored settled law to reach its preferred conclusion. For instance, Professor Myron Orfield depicts the tradition as a naked policy preference that overpowered the legal doctrine that should have won the day.97 Professor Mark Rahdert notes that the Court ignored legal doctrine by deferring to local school districts when the State of Michigan had ultimate control over public education and had the legal authority to change district boundaries at will.98 And the criticism that the “tradition” is a mere policy preference even appears in Justice Marshall’s Milliken dissent. He worried that Milliken was “more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution’s guarantee of equal justice than it is the product of neutral principles of law.”99

The concern that politics were affecting legal decisionmaking in desegregation cases was not an outlandish one. Political opposition to integration efforts in northern cities had been building for more than a decade, often clothed in superficially nonracist rhetoric in favor of “neighborhood schools” and against “busing.”100 The five-justice majority in Milliken consisted of four justices appointed by President Richard Nixon, who publicly declared a preference for “strict constructionist” justices that would restrain the excesses of the Warren Court.101 Some of those new justices had approved of segregation in their careers before they were appointed to the Court. Justice Powell had spoken approvingly of “States’ Rights” as practiced by Virginia “and other states” while he served as chairman of the Richmond School Board in the wake of Brown.102 Segregation in Richmond’s schools remained virtually intact during his time as chair.103 He decried integration as an “unwelcome social change.”104 Justice William Rehnquist wrote a bench memo urging that Plessy

96. Id. at 55.
104. Id. at 155.
v. Ferguson be upheld while he was clerking for Justice Robert Jackson during the term in which Brown was decided. Justice Rehnquist would, after Milliken, also be accused of having personally challenged minority voters at polling places in Arizona in the 1960s. Of course, the policy leanings of justices or their career experiences do not necessarily mean that they abandoned any pretense of legal reasoning in pushing back against desegregation efforts.

Even still, the opinions that frame the tradition contain several raw policy judgments that cannot obviously be tied to legal principles or precedents. The justices thought that local control was beneficial because it improved efficiency, offered more opportunities for experimentation, facilitated better and more participatory decisionmaking, preserved the salubrious effects of neighborhood schools, and reflected public sentiment.

The Court in its local control cases placed special emphasis on the empirical claim that local public schools are better at providing an education than federal judges or consolidated districts spanning a metropolitan area. In his Emporia dissent, Chief Justice Burger stated that “[l]ocal control . . . is of overriding importance from an educational standpoint.” He followed this assertion by saying that many small but significant policy issues—such as “[c]urricular decisions, the structuring of grade levels, and the planning of extracurricular activities”—were beyond the competence of a judge to factor into a desegregation plan.

Justice Powell echoed this sentiment about the relevant competence of school districts in his Keyes opinion. He observed that neighborhood schools provide “greater ease of parental and student access and convenience, as well as greater economy of public administration.” And writing for the majority


111. Id.

112. Id.

113. Keyes, 413 U.S. at 246 (Powell, J., concurring in part and dissenting in part).
in *Rodriguez*, Justice Powell proclaimed that local control was beneficial because it more closely tailored schooling to local needs.\(^{114}\) He additionally praised local control on the grounds that the existence of many small districts facilitated “a multiplicity of viewpoints” and a “diversity of approaches” in public education, which fostered “experimentation, innovation, and a healthy competition for educational excellence.”\(^{115}\) Justice Powell’s statements in *Rodriguez* about tailoring to local needs and fostering innovation and competition are reproduced in *Milliken* as support for Chief Justice Burger’s claim about the tradition.\(^{116}\)

The justices who created the tradition sometimes strayed beyond their competence by discussing specific areas of educational policy, whether it was “curricular decisions” or “economy of public administration.” This is especially clear because the justices’ conclusions about educational policy were not indisputable or obvious. For instance, some education researchers have found that small school districts are less efficient than consolidated districts because they have higher overhead costs and allocate resources less efficiently.\(^{117}\) Justice Powell and Chief Justice Burger nonetheless treated the practical benefits of local control as self-evident. The justices even made conclusions about local control that seemed to presume almost unknowable knowledge about American public attitudes. Justice Powell’s *Keyes* opinion, for instance, claimed that public schools gain their strength in part because they are identified “with the personal features of the surrounding neighborhood.”\(^{118}\) He suggested that local control is a way to resist the “decline in the unity and communal spirit of our people.”\(^{119}\) It is hard to see how a judge is qualified to opine on which, if any, policy levers best support such amorphous values as “unity and communal spirit.”

But these justices did not rely solely on the practical benefits of local schools in reasoning that there was a tradition of local control in public education. Chief Justice Burger’s statements about local control are not just a paean to neighborhood schools but an expression of concern about the proper role of the judiciary in desegregation cases where complex remedies often required close judicial supervision of school districts.\(^{120}\) In his *Emporia* dissent, Chief Justice Burger discussed educational minutiae such as the planning of extracurricular activities and the structure of grade levels because they were

---

115. *Id.* at 50.
118. *Keyes*, 413 U.S. at 246 (Powell, J., concurring in part and dissenting in part).
119. *Id.*
examples of areas of educational policy “beyond the competence and power of the courts.” Chief Justice Burger mentioned these hyperspecific areas of education policy not because he claimed to have a well-formed opinion on how they were best addressed, but because he thought they were just the kind of policy issues a judge should avoid. Chief Justice Burger’s inclination towards judicial restraint was still, from one angle, a policy judgment, but his position implicated legal doctrine around remedial law and federal intervention in state functions, which is described later in this Note.

Justice Powell, for his part, was clear in his *Keyes* opinion that the practical benefits of neighborhood schools were not the foundation for protecting local control in federal courts. In Justice Powell’s view, the ease and economy of local control had “obvious and distinct advantages, but the legitimacy of the neighborhood concept rests on more basic grounds.” Those “more basic” justifications had something to do with the interests of parents and local communities—interests that Justice Powell even grounded in constitutional precedents concerned with substantive due process.

Still, the doctrinal conclusions above do not explain away all of the policy-oriented arguments the Court made in the local control cases. For instance, the Court asserted that public support for local schools was vitally important for public education. *Milliken* itself stated that local control “has long been thought essential both to the maintenance of community concern and support for public schools.” This statement cited a passage of *Emporia* contending that direct control by citizens over public education was “a need that [was] strongly felt in our society.” Chief Justice Burger in his own *Emporia* dissent agreed with the majority on this issue, stating that “[l]ocal control is . . . vital to continued public support of the schools.” Justice Powell expressed a similar sentiment in *Keyes*, describing how “[c]ommunity support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern.” Even Justice Thurgood Marshall’s otherwise vociferous dissent in *Rodriguez* conceded to “inherent benefits” from “community support for public education.”

However, the importance of public support for education does not appear to drive the outcomes of the local control cases. For one thing, the Court had been emphatic since early in its desegregation cases that public sentiment was...
not a legitimate reason to maintain segregation, even if that sentiment was strong enough to cause violence or disorder.\footnote{130} Moreover, the tradition, as articulated in \textit{Milliken}, is a historical claim, not an observation about current public opinion. While \textit{Milliken} referenced \textit{Emporia}'s conclusion that local control was important for public support and educational quality, \textit{Milliken} went further and emphasized the “deeply rooted” character of local control, implying that the traditional character of local control matters at least as much as the present-day educational benefits of small districts and neighborhood schools.\footnote{131}

\textbf{B. Not Just a Remedial Principle}

\textit{Milliken} held that the tradition was just part of the balance of equitable remedies and nothing more.\footnote{132} Many scholars agree with this proposition, even where they dispute the accuracy of the Court’s remedial law.\footnote{133} This theory—that the tradition is relevant solely for remedial issues—is how the Court itself presented the principle in \textit{Milliken}. In that case, the tradition was relevant because it made clear that the boundaries of school districts were not mere matters of convenience.\footnote{134} As a result, the metropolitan Detroit school districts at issue were “separate and autonomous.”\footnote{135} Therefore, those school district boundaries could only be set aside by courts where a constitutional violation in one district had the effect of producing segregation in another district.\footnote{136} The Court then proceeded to define a “segregative” effect narrowly, such that only evidence that Detroit’s school board caused segregation in metropolitan Detroit’s suburban school districts would warrant an interdistrict remedy.\footnote{137} The Court depicted this demanding standard of interdistrict violation and effect as the outgrowth of previous cases concerning segregation remedies, which confined the scope of a given court-ordered desegregation plan to a single school system.\footnote{138} As a result, desegregation remedies were only “firmly established” within a single school system.\footnote{139} In summary, the remedial

\begin{thebibliography}{99}
\footnotesize
\bibitem{130} Cooper v. Aaron, 358 U.S. 1, 12, 15–16 (1958).
\bibitem{132} See \textit{id.} at 744–45.
\bibitem{134} \textit{Milliken I}, 418 U.S. at 741.
\bibitem{135} \textit{id.} at 744.
\bibitem{136} \textit{id.} at 744–45.
\bibitem{137} \textit{id.} at 745 (“\textit{W}ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy. The record before us, voluminous as it is, contains evidence of de jure segregated conditions only in the Detroit schools . . . .”).
\bibitem{138} \textit{id.} at 746.
\bibitem{139} \textit{id.}
\end{thebibliography}
explanation states that the tradition is a remedial principle in the Court’s desegregation precedents, meaning local school districts cannot be held accountable for the segregation of other public educational entities.

There are two reasons why the tradition cannot be narrowly interpreted as a remedial principle. First, the Supreme Court’s precedents in remedial law did not provide sufficient support for *Milliken*. The Court cited *Brown II, Green v. County School Board, Swann, United States v. Scotland Neck City Board of Education*, and *Emporia* for the notion that federal remedial power is only well-established within individual school districts.\(^\text{140}\) But those cases did not state any limit on interdistrict remedies. Instead, they either simply did not address the issue of interdistrict remedies or they made plain that district boundaries can be altered by federal courts. *Green* did not address interdistrict remedies at all—the case is limited to a review of a policy in one school district.\(^\text{141}\) The only remedial limit *Swann* stated was that there is no right of action for de facto segregation.\(^\text{142}\) That rule was irrelevant to *Milliken*, where the lower courts found de jure segregation.\(^\text{143}\)

*Brown II* even allowed changes to school district lines that cut against the tradition in *Milliken*. *Brown II* authorized federal courts to consider the “revision of school districts . . . into compact units to achieve a system of determining admission to the public schools on a nonracial basis.”\(^\text{144}\) That grant of power contravened *Milliken*’s notion that the boundaries of school districts must be respected even where there is segregation between predominantly Black and predominantly White school districts. *Scotland Neck* and *Emporia* clarified that district courts have remedial discretion to stop the creation of new school districts by state and local authorities if those new districts would hinder desegregation.\(^\text{145}\) *Brown II, Scotland Neck*, and *Emporia* stood for the proposition that school district boundaries cannot be an obstacle to an otherwise appropriate desegregation remedy—a direct contradiction of *Milliken*’s position.

In addition, *Milliken*’s notion that federal authority to provide a remedy must be “firmly established” cannot be controlling because that would mean virtually no desegregation remedies would ever have been allowed. Desegregation remedies often take the form of extensive injunctions designed to reform the constitutional or statutory defects of school systems.\(^\text{146}\) The modern


\(^{141}\) *See Green*, 391 U.S. at 431–32.

\(^{142}\) *Swann*, 402 U.S. at 17–18.


\(^{144}\) *Brown II*, 349 U.S. at 300–01.

\(^{145}\) *Scotland Neck*, 407 U.S. at 489; *Emporia*, 407 U.S. at 459.

history of these injunctions only begins with Brown II. Moreover, these “public law” injunctions are different in character from traditional injunctions. Public law injunctions may be highly complex and ongoing, necessitating a judge’s close and continued supervision of a public institution, in contrast to the simple, one-time remedies traditionally used for disputes between private parties. The Supreme Court in Milliken cited Brown II—a case where the Court granted novel remedial powers to the federal judiciary—as good law. The same Court cannot have intended that the “firmly established” principle of remedies be a dispositive rule in Milliken.

Second, the Court’s thinking in Milliken can only be fully explained with reference to constitutional doctrine, as the Court understood it then. In particular, remedial principles alone do not justify the Court’s starkly different treatment of interdistrict remedies versus single-district remedies. The Court in Milliken declined to authorize an interdistrict remedy, partially out of fear that consolidating fifty-four independent school districts under the metropolitan remedy would create a wide array of issues—covering everything from the status of school district bonds to the need to purchase school equipment—that judges were not qualified to supervise. Of course, this concern is not compelling in light of the clear precedent that judges authorizing institutional reform often need to become intimately involved in school administration. Brown II listed a whole array of administrative minutiae that courts could consider—including some of the very areas of concern raised in Milliken, such as school transportation, attendance zones, and the condition of physical school buildings. Interdistrict remedies may have posed a different challenge from previous desegregation remedies, but it was merely a difference of degree.

Instead, Milliken’s concerns about judicial involvement in interdistrict restructuring speak to deeper constitutional concerns about fundamental rights, federalism, and the separation of powers. Milliken’s objection to judicial involvement in public schools was not just a practical objection to federal courts as it

147. Id. at 788 n.9.
148. DOBBS & ROBERTS, supra note 120, at 663.
151. Id. at 743–44.
152. DOBBS & ROBERTS, supra note 120, at 663.
153. Compare Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300–01 (1955) (“[T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.”), with Milliken I, 418 U.S. at 743 (“Entirely apart from the logistical and other serious problems attending large-scale transportation of students, the consolidation would give rise to an array of other problems in financing and operating this new school system. Some of the more obvious questions would be: . . . Who would establish attendance zones, purchase school equipment, locate and construct new schools, and indeed attend to all the myriad day-to-day decisions that are necessary to school operation . . . .”).
overextending themselves. *Milliken*’s list of issues that would have to be resol-
ved by judicial supervision started with concerns about the effects on pop-
ularly elected school boards and parental control of schools.\footnote{154} Moreover, in
criticizing the viability of an interdistrict remedy, Chief Justice Burger imme-
diately followed his assertion that judges are not qualified for the task with the
statement that judicial supervision “would deprive the people of control of
schools.”\footnote{155} His implication that democratic rights are at stake when it comes
to local control was most explicit when he cited recent precedent finding a
fundamental right to vote in local elections as potentially relevant to *Milli-
ken*\footnote{156} As for the separation of powers, Chief Justice Burger specifically ex-
pressed a concern that the interdistrict remedy would force the district court
to become “a de facto ‘legislative authority.’”\footnote{157}

The central role of *Rodriguez* in the local control cases is one final reason
to think the tradition is not primarily a matter of remedial law. *Rodriguez* had
nothing to do with remedies. It was a case about substantive law, specifically
the scope of the Equal Protection Clause.\footnote{158} Other nonremedial cases since the
1970s have discussed the tradition as well, lending further credence to the no-
tion that the tradition is independent of remedial doctrine.\footnote{159}

In essence, while the cases that created the tradition were mostly cases
about remedies, the tradition is not merely a remedial principle. It exists in
cases that do not mention remedies. When the cases did involve remedies, the
tradition produced outcomes that are not explained by the existing law on de-
segregation remedies. And the Court, in discussing the tradition, justified the
concept with reference to constitutional law. The next Part of this Note argues
that the Court made constitutional assertions for the tradition that are neces-
sary to understand in order to accurately grasp the Supreme Court’s jurispru-
dence on local control of public education. Perhaps more importantly, the way
the justices thought about constitutional law in the local control cases has had
a significant influence on the shape of constitutional doctrine well beyond the
confines of education law.

III. THE FREESTANDING CONSTITUTIONAL RATIONALES BEHIND THE
TRADITION OF LOCAL CONTROL

This Part lays out three freestanding constitutional rationales hiding in
plain sight that the Supreme Court has made for the tradition. First, these

\footnote{154. *Milliken* I, 418 U.S. at 743 ("What would be the status and authority of the present popularly elected school boards? Would the children of Detroit be within the jurisdiction and operating control of a school board elected by the parents and residents of other districts?").}

\footnote{155. *Id.* at 744.}

\footnote{156. *Id.* at 746 n.21.}

\footnote{157. *Id.* at 743–44.}


cases grounded the tradition in the substantive due process right of parents to direct their children’s education. Second, they further justified the tradition with the right of citizens to take part in the decisionmaking of their local school district, a right which may be based in the Equal Protection Clause. Third, they viewed the tradition as restricting federal courts from interfering with powers traditionally reserved to the states, especially state legislative functions.

A. A Substantive Due Process Right

A careful reading of the local control jurisprudence shows that local control is significant in part because it includes a substantive due process right for parents to control the education of their children. The Rodriguez majority put this point most clearly when it declared that “[i]n part, local control means . . . the freedom to devote more money to the education of one’s children.” Justice Powell, who wrote the Rodriguez majority opinion, expanded on his substantive due process theory in his Keyes opinion in the same term. There, he concluded that turning busing into a constitutional requirement would infringe on “personal rights” and the “legitimate and recognizable interests” of parents and children. These alleged rights and interests included the interest of residents to enjoy the benefits of neighborhood schools. This discussion of neighborhood schools is a policy justification for neighborhood education much like the policy rationales described in Section II.A.

However, Justice Powell connected this policy advocacy in favor of neighborhood schools with the substantive due process right of parents “to nurture, support, and provide for the welfare of children, including their education.” He quoted Pierce v. Society of Sisters, a canonical substantive due process case, for this proposition. Pierce reiterated the right of parents to direct the upbringing and education of their children. Pierce is often cited for the particular holding that states cannot force students to attend public schools, because in that case, the Court struck down a statute mandating public school attendance. Justice Powell, nonetheless, reasoned that if Pierce recognized a more general parental right, that right should not be limited to a parent’s choice between public school and private school because not all parents could afford a private education. In Justice Powell’s view, those parents who send their

162. See supra Section II.A.
164. Id. at 247 (quoting Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925)).
165. Pierce, 268 U.S. at 534–35 (citing Meyer v. Nebraska, 262 U.S. 390 (1923)).
167. Keyes, 413 U.S. at 247 (Powell, J., concurring in part and dissenting in part).
children to public schools should not lose all interest or voice in their children’s schooling. Justice Powell thus concluded that neighborhood schooling—with its superior ability to facilitate parental voice—should not be “suppressed by force of law.”

Crucially, Justice Powell’s reasoning in Keyes was a precursor to an increasingly prominent branch of the current Court’s substantive due process jurisprudence, which recognizes only those rights “deeply rooted” in history. Justice Powell’s opinion in Keyes mentioned neighborhood public schools as a traditional source of strength to the nation, much like Rodriguez and Milliken explicitly used the word “tradition” in defending local control. This invocation of tradition ultimately resulted in a substantive due process argument for parental rights.

The connection between tradition and substantive due process is not a one-off. Just four years later, Justice Powell cited the same substantive due process cases he cited in Keyes—Pierce, Meyer, and Griswold v. Connecticut—in the plurality opinion for Moore v. City of East Cleveland. In Moore, the plurality extended the constitutional protection in Keyes to grandparents and other relatives, in addition to parents. In his Moore plurality opinion, Justice Powell held that the institution of family deserved constitutional protection because it was “deeply rooted in this Nation’s history and tradition.” The “deeply rooted” standard has become the basis for one of the strands of the modern-day Court’s substantive due process doctrine. In 1997, Washington v. Glucksberg adopted Moore’s language in declaring that the Due Process Clause “specially protects” those rights which were “deeply rooted.” In turn, landmark substantive due process cases of the twenty-first century—decisions

168. Id.
169. Id.
174. Moore, 431 U.S. at 505 (Powell, J., plurality opinion).
175. Id. at 503.
that advance conservative policy goals such as the restriction of abortion rights and the expansion of gun rights—have oriented their reasoning around Glucksberg’s “deeply rooted” test.\textsuperscript{178}

Although Moore is the first case cited by the contemporary “history and tradition” branch of substantive due process law for the language of “deeply rooted” rights,\textsuperscript{179} it was not actually the first case describing traditions as “deeply rooted.” Milliken itself used such language when it states that “[n]o single tradition in public education is more deeply rooted than local control.”\textsuperscript{180} Moore used the same “deeply rooted” language as Milliken, and Justice Powell’s reasoning in Moore closely paralleled his earlier reasoning in Keyes. The language of these two local control cases—Milliken and Keyes—contained an embryonic form of a modern substantive due process doctrine that would more clearly emerge with Moore.

Admittedly, Supreme Court cases before Keyes and Milliken have mentioned “deeply rooted” rights, but those precedents concerned procedural, not substantive, due process. The 1934 case of Snyder v. Massachusetts said that a state may not offend principles of justice “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”\textsuperscript{181} But Snyder was a procedural due process case concerning the right of the accused to be present at their own trial.\textsuperscript{182} Likewise, the 1948 case Haley v. Ohio mentioned the “deeply rooted feelings of the community” as an important factor in adjudicating the Due Process Clause, but only to say that criminal procedure cannot conflict with those deeply rooted feelings.\textsuperscript{183}

The theory that the local control cases play a role in developing the notion of “deeply rooted” rights in modern substantive due process law appears, at first glance, to be in tension with existing narratives. Many scholars claim that the branch of substantive due process law that looks to tradition has its modern origin before Keyes and Milliken, in Justice John Marshall Harlan II’s 1961 dissent in Poe v. Ullman and his 1965 concurrence in Griswold.\textsuperscript{184} Justice Har-
lan’s opinions are undoubtedly important in developing substantive due process law, but they were more equivocal about the authoritative character of tradition in constitutional interpretation than Justice Powell’s Keyes opinion and Milliken. Justice Harlan’s Poe dissent asserted that due process rights are the result of the “balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”\(^\text{185}\) That statement implies that traditions sometimes indicate what courts should avoid—“the traditions from which it broke”—as much as they signal what courts should follow.\(^\text{186}\) In addition, Justice Harlan’s dissent averred that “tradition is a living thing,” implying that due process rights based in tradition may evolve.\(^\text{187}\) Milliken and Justice Powell’s Keyes opinion lacked this ambivalence about tradition, a single-mindedness they share with some of the Court’s recent substantive due process cases that have presented the “deeply rooted” test as the sole criterion for a substantive due process right.\(^\text{188}\)

The local control cases reasoned that the substantive due process right of parents to control their children’s education entitled them to some form of participation in a locally controlled public education system. However, the substantive due process justification is not the only constitutional rationale the Court made for democratic participation in the local control cases.

B. A Right to Democratic Participation

The local control cases also indicated that the tradition is supported by a right to democratic participation, which is derivative of constitutional voting rights and independent of parental rights. The local control cases frequently spoke to the virtues, and even necessity, of democratic participation in a system of local schools. For example, in supporting its central contention about the tradition, Milliken cited Rodriguez for the subsidiary point that local control over public education “affords citizens an opportunity to participate in decision making.”\(^\text{189}\)


\(^{186}\) Id.

\(^{187}\) Id.; see also Conkle, supra note 176, at 124.


\(^{189}\) Milliken I, 418 U.S. at 742 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).
In the local control cases, this right to democratic participation was not just the byproduct of parental rights but was often phrased in terms of the broader interest of citizens or a community. *Milliken* cited *Rodriguez* for the rights of “citizens,” not the rights of parents.¹⁹⁰ Fifteen years after *Milliken*, *Freeman v. Pitts* held that it was essential to return schools to local control to restore “true accountability,” starting with accountability “to the citizenry.”¹⁹¹ And although Justice Powell’s *Keyes* opinion talked about parental rights in detail, it discussed additional community interests as distinct from parental interests. In that case, Justice Powell was careful to speak about “legitimate community and individual interests,” which implies that community members have an interest in local public schools distinct from the interest of parents and students.¹⁹² Justice Powell specifically mentioned the decision of a “community,” as opposed to a group of parents, whose decision to forgo busing of elementary school students should be constitutionally respected.¹⁹³

*Milliken* ultimately connected this treatment of democratic and community-based decisionmaking to Supreme Court precedent on constitutional voting rights. It is worth noting that the constitutional basis of voting rights is shifting and often disputed. The Supreme Court has contradicted itself when answering questions as simple as whether there is a right to vote.¹⁹⁴ Nonetheless, *Milliken* explicitly connected the right of local control to *Kramer v. Union Free School District*, a decision that protected the right to vote in the context of school district elections.¹⁹⁵ *Milliken* reasoned that, if *Kramer* stood for the “fundamental right” of school district residents to vote in district elections, it would be “incongruous” to dismiss the importance of school districts in the context of determining desegregation remedies.¹⁹⁶ *Kramer* itself held that a state statute limiting voting in school district elections to property owners and parents of children attending public school was a violation of the Equal Protection Clause.¹⁹⁷ But *Kramer* did not quite find a “fundamental right” to vote in school district elections in the way *Milliken* claimed it did.¹⁹⁸ In fact, *Kramer* was clear

---

¹⁹⁰ Id.
¹⁹² Keyes, 413 U.S. at 253 (Powell, J., concurring in part and dissenting in part) (emphasis added).
¹⁹³ Id. at 248.
¹⁹⁵ Milliken I, 418 U.S. at 746 n.21.
¹⁹⁶ Id.
¹⁹⁸ Compare Milliken I, 418 U.S. at 746 n.21 (citing Kramer, 395 U.S. at 625) (characterizing Kramer as holding “that a resident of a school district has a fundamental right protected by the Federal Constitution to vote in a district election”), with Kramer, 395 U.S. at 629 (citing Sailors v. Bd. of Educ., 387 U.S. 105, 108 (1967)) (“In fact, we have held that where a county school board is an administrative, not legislative body, its members need not be elected.”).
that states were allowed to have systems of wholly unelected school boards. But, according to Kramer, once the franchise was granted to citizens in local elections, it had to be granted in accordance with the Equal Protection Clause. It may be the case that Milliken simply mischaracterized the right to vote in local school district elections stated by Kramer as an absolute right rather than a relative one. Even if this were true, it does not affect the descriptive argument that the Court thought a voting rights precedent supported the tradition.

Alternatively, Milliken may have correctly understood Kramer as stating a relative right. Milliken may stand for the proposition that an interdistrict remedy is an Equal Protection Clause violation once a certain amount of local control over public education has been granted to school districts, similar to how Kramer said the denial of voting rights is an equal protection violation once “the franchise is granted.” Milliken did not demand that all school systems in the country must include forms of local democracy, but rather it recognized that Michigan’s school system specifically “provide[d] for a large measure of local control.” In addition, Milliken’s reference to Kramer appeared in the midst of a discussion about whether suburban school districts should be affected by an interdistrict remedy when de jure segregation was only found in Detroit’s public schools. Milliken seemed to find something fundamentally unfair about outlying districts losing local control when they had not done anything wrong and were promised local control by the State of Michigan.

The local control cases tried to solidify notions about the tradition into constitutional law. One approach attempted to develop a substantive due process right to local control. Another approach tried to create a constitutional protection for local school districts grounded in voting rights precedent. But a third strand of reasoning under the tradition focused less on local democratic life and more on the relationship of federal courts to state governments.

C. A Federalism and Separation of Powers Provision

The local control cases asserted that the tradition is a provision grounded, at least in part, in federalism and the separation of powers. Although at least some scholars have noted the federalism implications of the local control

201. Id. (quoting Harper, 383 U.S. at 665).
203. Id. at 746.
204. See id. ("Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system.").
cases, they have treated the tradition itself as separate from federalism concerns.\textsuperscript{205} And more importantly, separation of powers issues in the local control cases have not been afforded the same analysis.

The federalism argument for the tradition arose in the 1970s—the same decade the Court added real heft to its Tenth Amendment jurisprudence. The Tenth Amendment declares that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”\textsuperscript{206} In the decades prior to the 1970s, that Amendment had been treated dismissively as a purely declaratory provision that does not alter the relationship between federal and state governments.\textsuperscript{207} The Court replaced that established understanding in 1976 with \textit{National League of Cities v. Usery}.\textsuperscript{208} There, the Court interpreted the Tenth Amendment to mean that congressional legislation could not “directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.”\textsuperscript{209}

\textit{Usery} closely paralleled the reasoning of the majorities in \textit{Milliken} and \textit{Rodriguez} when it came to the relationship between federal and state power. Both \textit{Usery} and those local control cases used notions of tradition to determine when the federal government may interfere with how states structure their local governments. In \textit{Usery}, the Court struck down federal congressional wage provisions that otherwise fell under Congress’ power to regulate interstate commerce because those provisions displaced state decisions in a way that substantially restructured traditional arrangements of local governments.\textsuperscript{210} Similarly, \textit{Milliken} greatly restricted the federal judiciary’s power to impose interdistrict remedies in light of a “tradition of local control,” which encompassed the ways states customarily structured their local governments. Specifically, \textit{Milliken} observed that Michigan’s “educational structure . . . , in common with most States,” provided a large measure of local control.\textsuperscript{211} Thus, \textit{Milliken} expressed concern that an interdistrict remedy would “disrupt and alter the structure of public education in Michigan.”\textsuperscript{212}

Likewise, \textit{Rodriguez} asserted that a traditional limitation of the Supreme Court’s power was the principle that fundamental reforms of state taxation

\textsuperscript{206} U.S. CONST. amend. X.
\textsuperscript{207} E.g., United States v. Darby, 312 U.S. 100, 124 (1941) (“The [Tenth] [A]mendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments . . . .”).
\textsuperscript{209} \textit{Id.} at 852.
\textsuperscript{210} \textit{Id.} at 849–52.
\textsuperscript{212} \textit{Id.} at 742–43.
and education were reserved to state legislatures.\textsuperscript{213} Applying that “tradition,” \textit{Rodriguez} upheld Texas’s inequitable school funding system—which determined that local school districts would be funded in large part from their own local property taxes—against an equal protection challenge.\textsuperscript{214}

That \textit{Usery}, \textit{Milliken}, and \textit{Rodriguez} regarded federalism issues so similarly is perhaps unsurprising. The majorities in all three cases consisted of the same five justices, four of whom had been nominated by President Nixon.\textsuperscript{215} With that in mind, it makes sense to see \textit{Usery}, \textit{Milliken}, and \textit{Rodriguez} as part of the same judicial movement. In all three cases, the majorities sought to articulate new limits on powers that the federal government had used to support progressive causes with comparatively little resistance for decades. Whether it was against the Commerce Clause in \textit{Usery}, the Equal Protection Clause in \textit{Rodriguez}, or federal desegregation remedies in \textit{Milliken}, the Tenth Amendment provided a new defense of state and local prerogatives.\textsuperscript{216} And although \textit{Usery} was overruled nine years after it was decided,\textsuperscript{217} subsequent cases have continued the project of creating a robust federalism doctrine to restrict the federal government’s power to act against the states.\textsuperscript{218}

Notions of federalism in the local control cases are often closely tied to discussions of the separation of powers. Justice Powell mentioned “federalism and separation of powers” as animating concerns in \textit{Rodriguez}.\textsuperscript{219} Both \textit{Rodriguez} and \textit{Milliken} were worried by the prospect of judicial interference with legislative functions. \textit{Rodriguez} declared that certain education decisions were the province of state legislatures.\textsuperscript{220} \textit{Milliken}, for its part, criticized the inter-

\begin{itemize}
\item \textsuperscript{214} Id. at 9 n.21, 54–55.
\item \textsuperscript{215} See \textit{Usery}, 426 U.S. at 856, 880 (noting the dissenting Justices); \textit{Milliken I}, 418 U.S. at 762 (same); \textit{Rodriguez}, 411 U.S. at 62–63, 70 (same). See generally \textit{Supreme Court Nominations (1789-Present)}, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [perma.cc/Z7TJ-F3R4] (showing that President Nixon nominated Chief Justice Burger, along with Justices Blackmun, Powell, and Rehnquist).
\item \textsuperscript{217} Garcia v. \textit{San Antonio Metro. Transit Auth.}, 469 U.S. 528, 557 (1985) (overruling \textit{Usery}).
\item \textsuperscript{218} New York v. \textit{United States}, 505 U.S. 144 (1992) (invalidating a federal provision which mandated that states either take ownership of their nuclear waste or regulate such waste according to congressional instructions); \textit{Printz v. United States}, 521 U.S. 898 (1997) (invalidating provisions of a federal law which required state executive officers to carry out federal law).
\item \textsuperscript{219} \textit{Rodriguez}, 411 U.S. at 58.
\item \textsuperscript{220} Id.
\end{itemize}
district remedy because it would turn federal courts into de facto legislatures.\textsuperscript{221} Drawing on both the federalism and separation of powers concerns, the local control cases wanted to restrain the federal judiciary to its purported constitutional role, preventing undue interference in state governments or in other branches of government.

To claim the Court believed the tradition of local control was grounded in freestanding constitutional rights is to make a descriptive statement, not a normative argument that the tradition should be seen as a historical reality indisputably supported by the Constitution. The very constitutional doctrines that the Supreme Court connected with the tradition are themselves deeply disputed. For instance, \textit{Usery}, an essential case for understanding the Court’s federalism doctrine in the 1970s, was overruled in the 1980s.\textsuperscript{222} And the “deeply rooted” standard for substantive due process rights is not the only live theory of substantive due process;\textsuperscript{223} it is the subject of one of the most high-profile and bitter debates in constitutional law.\textsuperscript{224}

\textbf{Conclusion}

Commentators have described the local control cases as either making legally irrelevant policy arguments or establishing narrow precedents confined to remedial law. But this Note contends that the Supreme Court actually understood itself to be developing constitutional doctrine. If we want to understand the shape of present-day constitutional law in areas like substantive due process and federalism, we would do well to recognize how the Court engaged with early versions of current legal doctrine in the local control cases. The tradition of local control concept has stymied attempts to achieve more equitable and integrated public schools. Once we acknowledge the profound impact of the local control cases on American education, it is worth our time to more closely scrutinize the arguments of the justices who wrote them. Those arguments reveal that the way the Court thinks about education affects the way it thinks about America as a whole.

\textsuperscript{221} \textit{Milliken I}, 418 U.S. at 743–44.
\textsuperscript{222} \textit{Garcia}, 469 U.S. at 557.
\textsuperscript{223} \textit{E.g.}, \textit{Lawrence v. Texas}, 539 U.S. 558, 577–78 (2003) (quoting \textit{Bowers v. Hardwick}, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), overruled by \textit{Lawrence}, 539 U.S. 558) (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.”).