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## Education Reform and Detroit's Right to Literacy Litigation

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# Education Reform and Detroit’s Right to Literacy Litigation

Kristine L. Bowman\*

## *Abstract*

*Ongoing education reform litigation arising out of Detroit, Michigan presents an innovative claim: Children have an unenumerated federal constitutional right of access to literacy. On June 29, 2018, the district court granted defendants’ motion to dismiss. The case is now on appeal to the Sixth Circuit and is expected to be argued in the first half of 2019. This litigation has already broken new ground and, regardless of the ultimate outcome, it is valuable because it invites us to revisit fundamental questions about rights, remedies, and the role of courts in education reform.*

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## *I. Introduction*

In 2016, attorneys representing children in some of Detroit, Michigan’s lowest-performing school districts filed a claim in federal court alleging the state denied their federal constitutional right of access to literacy.<sup>1</sup> The conditions in which these children

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were expected to learn were heartbreaking: The complaint described buildings so cold in the winter that students sometimes could see their own breath and wore coats to class, and so warm during other seasons that students and teachers vomited or fainted. The first thing some teachers did when arriving in their classrooms in the morning was to sweep up rodent feces because buildings were infested with vermin. Students suffered from an incredible shortage of books and many of the books that did exist were decades old. In addition to this qualitative description of the learning conditions, the complaint also presented quantitative disparities: In the five schools the plaintiff children attended, students' literacy proficiency rates were in single digits.<sup>2</sup> Clearly, something was wrong, but what to do about this was a difficult question.

The innovative claim the plaintiffs' attorneys advanced in response to this situation—that the students' unenumerated federal constitutional right of access to literacy is violated—was dismissed by the district court, even though the district court *did* hold that the state was a proper defendant in the suit. The case, *Gary B. v. Snyder*,<sup>3</sup> is currently on appeal to the Sixth Circuit. Already groundbreaking, it is reminiscent of education rights battles that have been fought for decades. Regardless of the ultimate outcome of the litigation, we can learn a great deal from *Gary B.* because its arguments invite us to revisit fundamental questions about rights, remedies, and the role of courts in education reform.

## *II. Holding the State Responsible: Rights and Remedies*

As I detailed in *The Failure of Education Federalism*, education advocates in Michigan have been unsuccessful when

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Arkansas and I am grateful to colleagues and to students for their input in those fora, and to Alexa Shockley and others at *Washington and Lee Law Review* for their thoughtful editing. Additionally, it is appropriate to note that in partnership with other scholars, I filed an amicus brief in the *Gary B.* case in the Eastern District of Michigan and also in the Sixth Circuit.

1. Class Action Complaint at 1–3, *Gary B. v. Snyder*, No. 2:16-CV-13292 (E.D. Mich. Sept. 13, 2016), 2016 WL 4775474.

2. *Id.* at 4–5.

3. *Gary B. v. Snyder*, 329 F. Supp. 3d 344 (E.D. Mich. 2018).

pursuing education reform litigation in Michigan state courts, despite moderately strong language in Michigan’s constitution regarding education.<sup>4</sup> Thus, the only remaining judicial avenue for addressing for the situation in some of Detroit’s worst public schools runs through federal court. This is why *Gary B.* focuses on a small and incredibly important gap in Supreme Court doctrine: The question of whether there is a federal constitutional floor regarding educational quality.<sup>5</sup> Rights and remedies go hand in hand,<sup>6</sup> and so plaintiffs also contend that the state is an appropriate defendant in this case. This section discusses both issues, in turn.

Let us begin with the doctrinal lacuna. When the Supreme Court decided *San Antonio Independent School District v. Rodriguez*<sup>7</sup> in 1973, it did not engage the question of whether there was a federal right to an education of a certain minimum level of quality<sup>8</sup>—and that is the essence of plaintiffs’ claim in *Gary B.*, that there is a substantive floor.<sup>9</sup> Specifically, plaintiffs assert that the opportunity to become functionally literate is a fundamental, unenumerated, federal constitutional right.<sup>10</sup> The education provided in the schools plaintiffs attend, the *Gary B.* plaintiffs

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4. Kristi L. Bowman, *The Failure of Education Federalism*, 51 U. MICH. J. L. REFORM 1, 26–30 (2017).

5. *Gary B.*, 329 F. Supp. 3d at 363 (“The Court is left to conclude that the Supreme Court has neither confirmed nor denied that access to literacy is a fundamental right.”).

6. Joshua E. Wieshart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 917, 936 (2016).

7. 411 U.S. 1 (1973).

8. *Id.* at 35.

9. See Class Action Complaint, *supra* note 1, at 77–108.

10. Class Action Complaint, *supra* note 1, at 24–42; see generally Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. (forthcoming 2019) (arguing that the Framers would have expected the U.S. Supreme Court to recognize a fundamental right to education). A similar lawsuit was filed in Rhode Island at the very end of November 2018, though its focus is squarely on civics education and citizenship. Alia Wong, *The Students Suing for a Constitutional Right to Education*, THE ATLANTIC (Nov. 28, 2018), <https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901/> (last visited Dec. 4, 2018) (on file with the Washington and Lee Law Review); Dana Goldstein, *Are Civics Lessons a Constitutional Right? This Student Is Suing for Them*, N.Y. TIMES (Nov. 28, 2018), <https://www.nytimes.com/2018/11/28/us/civics-rhode-island-schools.html> (last visited Dec. 5, 2018) (on file with the Washington and Lee Law Review).

allege, is of such poor quality that many of the children who attend these schools are functionally illiterate, and so as adults they will be effectively denied their right to free speech, their right to vote, and other enumerated constitutional rights.<sup>11</sup> Thus, plaintiffs contend, the state has violated students' rights under the Due Process Clause and the Equal Protection Clause. This theory builds on the Court's 1984 decision in *Plyler v. Doe*,<sup>12</sup> in which the Court held that the school district could not exclude undocumented immigrant students because to do so would deny those children "the means and skills" necessary to become productive members of society and thus create a "permanent underclass."<sup>13</sup> Constitutional harm is often abstract, yet as presented in *Gary B.*, it has a heartbreakingly concrete manifestation.

Two years have passed since plaintiffs filed their complaint in fall 2016. During that time, the state's motion to dismiss was filed, briefed, and argued; the district court dismissed the case; and plaintiffs appealed. In its decision on the motion to dismiss, the district court acknowledged that the fundamental right plaintiffs invoked is an open question, and thus the district court engaged in an extensive analysis. Specifically, it noted, "a case like this one could be argued on either positive- or negative- right theories"<sup>14</sup> and "the allegations state the violation of a negative right." However, the district court found more important that "a violation of negative rights is not what the Complaint truly seems to argue."<sup>15</sup> Thus, the district court joined other "federal courts [in their] . . . reticence to find positive rights to unquestionably important necessities of life" and drew from the historical record to demonstrate that state-sponsored education was not necessary for liberty or justice.<sup>16</sup> The district court also found significant that the courts which most frequently determine the contours of a right

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11. See Class Action Complaint, *supra* note 1, at 24–42. See also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006) (arguing that the Fourteenth Amendment obligates Congress to ensure a meaningful floor of educational opportunities through the guarantee of national citizenship and the Equal Protection Clause).

12. 457 U.S. 202 (1982).

13. *Id.* at 221–223.

14. *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 364 (E.D. Mich. 2018).

15. *Id.*

16. *Id.* at 365.

to education—state courts—do so by looking to state constitutional language, not to the fundamental importance of education.<sup>17</sup> As a result, plaintiffs’ claim for a violation of the Due Process Clause failed, and plaintiffs’ claim of an Equal Protection Clause violation was not far behind.

Before reaching the “fundamental right” question, however, the district court concluded that the state officials were proper defendants.<sup>18</sup> In particular, the district court focused on the unusual degree of control the state exercised over Detroit’s public schools through a series of emergency managers appointed by the Governor with input from the state board of education and other defendants.<sup>19</sup> Furthermore, the district court observed that state statutes creating the emergency manager framework initially gave each emergency manager broad financial authority over a local school district or municipality, and then, as state law changed over time, granted emergency managers authority over school districts’ academic matters as well.<sup>20</sup> The district court also noted that various state and federal courts had upheld the emergency manager legislation and the acts of individual emergency managers. Thus, the district court concluded, the state had exercised significant control over Detroit’s public schools through emergency management and other similar actions. The district court then sought to align the state’s responsibility accordingly, concluding that state officials were proper defendants in the case. This holding was groundbreaking, even though the district court did not go as far as plaintiffs had asked; plaintiffs had tried to hold the state responsible for the natural results of the larger system it created across the state, rather than hanging their hat on the emergency manager legislation—and Detroit—alone.<sup>21</sup>

As colleagues and I discussed in an amicus brief submitted to the district court in *Gary B.*, the education policies the state of Michigan has created over time work together in such a way that many of our poorest school districts, like Detroit, are burdened

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17. *Id.* at 356.

18. *Id.* at 54.

19. *Id.* at 353–54.

20. *Id.* at 350–51.

21. *Id.* at 352.

very heavily.<sup>22</sup> Thus, it should not be a surprise that these districts provide educational environments and resources so inadequate that only a very small percentage of students manage to become proficient in reading, much less demonstrate mastery.<sup>23</sup>

To explain further: Each state has a web of policies that create and shape the system of public education, though of course the contours of the web vary from one state to another, sometimes significantly.<sup>24</sup> The cornerstone of each system is the state finance regime. In Michigan, according to one recent costing-out study, schools receive about 75% of the per-pupil allocation necessary to provide a basic education.<sup>25</sup> According to a subsequent study by the same consultants, large school districts like Detroit receive about 77% of the necessary base per-pupil allocation.<sup>26</sup> So, education in that state is under-funded to begin with. Relatedly, Michigan's school finance system is unusually centralized and its school choice policies are particularly permissive; as a result, some districts' enrollment fluctuates significantly from one year to the next, with wild swings in revenue paired with an inability to cut costs to keep up with the decline in revenue.<sup>27</sup> Detroit is, unfortunately, a poster child in this regard: District enrollment shrank by 71% between 2002 and 2016.<sup>28</sup>

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22. Brief for Michigan Education Law and Policy Professors as Amici Curiae in Opposition to Defendants' Motion to Dismiss, Gary B. v. Snyder, No. 16-CV-13292 (E.D. Mich. Feb. 2, 2017), 2017 WL 2492166. See David Arsen & Mary Mason, *Which Districts Get into Trouble and Why: Michigan's Story*, 42 J. EDUC. FIN. 100 (2016).

23. Brief for Michigan Education Law and Policy Professors as Amici Curiae in Opposition to Defendants' Motion to Dismiss, *supra* note 22.

24. Bowman, *supra* note 4.

25. *Id.* at 30.

26. AUGENBLICK, PALAICH AND ASSOCIATES & PICUS, ODDEN AND ASSOCIATES, *COSTING OUT THE RESOURCES NEEDED TO MEET MICHIGAN'S STANDARDS AND REQUIREMENTS*, viii (2018).

27. Bowman, *supra* note 4, at 26–29.

28. Lori Higgins, *Rapper Big Sean Commits to Helping Detroit Schools' Enrollment Push*, DETROIT FREE PRESS (June 5, 2018, 11:09 AM), <https://www.freep.com/story/news/education/2018/06/05/big-sean-detroit-schools-enrollment/672350002/> (last visited Dec. 5, 2018) (on file with the Washington and Lee Law Review). In fall 2017, the district grew 2% compared to the year before. Sam Park & Amanda Rahn, *It's Official: Detroit's Enrollment Grew For the First Time in Over A Decade, Even After Adding the State-Run District*, CHALKBEAT (Apr. 2, 2018), <https://chalkbeat.org/posts/detroit/2018/04/02/its-official-detroits-enrollment-grew-for-the-first-time-in-over-a-decade-even-after->

Other aspects of Michigan's system strain districts' resources even further. Like many other states, Michigan's teacher pension system is severely underfunded, and the state has sought to remedy this by increasing school districts' required pension contributions from roughly 13% of employee salaries in 2004 to 25% as recently as 2012.<sup>29</sup> In FY 2019, local districts' required contributions reduced the number of dollars that reached the classroom by more than \$1300 per student.<sup>30</sup> And, Michigan is one of fourteen states in which the state does not provide school districts any funding for capital improvements,<sup>31</sup> so if local taxpayers cannot or will not approve a referendum, or if the local tax base is so depressed that even a high rate of taxation produces relatively little in the way of revenue, a district must euphemistically "defer maintenance," leading to situations such as the conditions in Detroit described earlier. The district court appeared uninterested in engaging this context, though.

To be fair, the district court's approach was not unique. As state-level policies like the ones just discussed have been adopted and interpreted, they have been viewed in isolation by multiple branches of government. Debates about charter schools are seen as separate from debates about underfunded pensions, and both are seen as unrelated to costs of capital improvements or emergency managers. That is a mistake on the part of the legislators and governors who have enacted these policies and courts who are asked to review them.

In an amicus brief recently filed in the Sixth Circuit in *Gary B.*, colleagues and I reiterated the importance of a systems-thinking approach.<sup>32</sup> We contended that the state of Michigan is a proper defendant given the interactions among the generally-applicable laws and resulting impact on Detroit's public schools,

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adding-the-state-run-district/ (last visited Nov. 30, 2018) (on file with the Washington and Lee Law Review).

29. Bowman, *supra* note 4, at 29–30.

30. *Governor Snyder's FY2019 Budget Proposal*, CITIZENS RESEARCH COUNCIL OF MICHIGAN, 23 (Feb. 13, 2018), [https://crcmich.org/presentations/2010s/2018/webinar\\_exec\\_budget-021518.pdf](https://crcmich.org/presentations/2010s/2018/webinar_exec_budget-021518.pdf).

31. Bowman, *supra* note 4, at 30.

32. Brief for Michigan Education Law and Policy and Civil Rights Professors as Amici Curiae in Opposition to Defendants' Motion to Dismiss, *Gary B. v. Snyder*, No. 18-1855/18-1871 (6th Cir. Nov. 26, 2018).



and the extensive control the state has exercised for the past twenty years in Detroit.<sup>33</sup> Over a dozen other amicus briefs were filed in support of plaintiffs-appellants, including those by the Detroit Public Schools Community District and the City of Detroit, teachers' unions and other educational advocacy organizations, and prominent scholars from education, law, economics, and other disciplines.<sup>34</sup>

If the Sixth Circuit only upholds the district court's conclusion regarding liability in Detroit based on the emergency managers' authority and similar actions by the state and couples this with a recognition of any degree of unconstitutional action, such a holding could be helpful to Detroit's children, but less so to other potential plaintiffs because of the high and narrow standard for state liability. In mid-2018, Michigan announced that the last school district under emergency management had been released from that level of oversight.<sup>35</sup> It is unlikely that Michigan will see emergency managers of school districts in the near future; even proponents of the emergency manager idea agree that it has not been effective in the educational context. Furthermore, state takeover of local school districts similar to what has occurred in Michigan is highly unusual in the national context. For these reasons, a broader holding could have a much greater impact on the widespread illiteracy in Detroit's public schools and in other litigation that seeks to rely on *Gary B.*

### *III. The Role of Courts in Education Reform*

Each time courts define the contours of rights and the scope of remedies, they answer specific questions and also participate in a larger debate about the proper role of courts in education reform. In structural reform litigation where the alleged constitutional

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33. *Id.*

34. To read these other briefs, see *The Lawsuit*, RIGHT TO LITERACY DETROIT, <https://www.detroit-accesstoliteracy.org> (last visited Dec. 5, 2018) (on file with the Washington and Lee Law Review).

35. Jonathan Oosting, *Michigan: No Emergency Managers for First Time Since '00*, DETROIT NEWS (June 27, 2018, 3:02 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/06/27/michigan-no-emergency-managers-first-time-since-2000/737947002/> (last visited Nov. 30, 2018) (on file with the Washington and Lee Law Review).

harm would be a newly-articulated one, as in *Gary B.*, it is reasonable to assume that the contours of both the violation and the remedy would become more nuanced over time. However, *Gary B.* may not be as much of a unicorn as it first appears. Existing, nuanced concepts of federalism as well as prior education reform litigation already provide a basis for thinking through the larger questions the case presents about the role of courts in education reform.

At the most general level, *Gary B.* is an intra-state dispute that is playing out via basic federalism concepts: Should there be a federal floor of educational quality? Don't—shouldn't—states take care of this? When framed this way, *Gary B.* joins many other cases that have engaged similar disputes, including two of the Court's most significant school decisions—*San Antonio Independent School District v. Rodriguez*<sup>36</sup> and *Milliken v. Bradley*.<sup>37</sup> Interestingly, as Professor Kimberly Jenkin Robinson identified, the type of federalism employed in the education context—dual federalism—is defined by a strongly state and local role and a weak federal one.<sup>38</sup> It also is outdated. In other highly-regulated areas of social policy, including environment and health, the concept of cooperative federalism is dominant.<sup>39</sup> Cooperative federalism is based on creating a partnership between state and federal governments to solve problems where the governments' interests are aligned. It also is premised on limited federal involvement, though more than is customary under dual federalism.<sup>40</sup> Thus, cooperative federalism could conceptually ground, and, importantly, still limit a federal right of access to literacy. If framed in this way, the right would take the form of a floor (and a low one at that) which in many states might not add any substantive rights beyond those recognized in an individual state's school finance litigation. It also would position federal courts as an option of last resort. In states like Michigan and

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36. 411 U.S. 1 (1973).

37. 418 U.S. 717 (1974); Rick Su, *Intrastate Federalism*, 19 J. CONST. L. 191, 241–43 (2016).

38. Bowman, *supra* note 4, at 5.

39. *Id.* at 6–7. See also Su, *supra* note 37, at 221–26; Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959 (2015); Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287, 292 (2013).

40. Bowman, *supra* note 4, at 6.

districts like Detroit, however, a right configured in this manner could do a lot to improve the educational opportunities available to students.

A right of access to literacy framed as part of cooperative federalism also would be consistent with federal courts' limited appetite for overseeing education reform litigation. Consider the arc of school desegregation, the most significant systemic education reform litigation effort federal courts have seen. Prior to *Brown v. Board of Education*<sup>41</sup> in 1954, state and local laws prohibited children of different races from attending school together because of the color of their skin.<sup>42</sup> Although the *Brown* court struck down segregational laws as unconstitutional, little changed in most schools for at least a decade; even though schools were no longer segregated by law, social resistance had entrenched those practices.<sup>43</sup> When it became apparent that educational access had not changed much at all in reality, the Court eventually expanded the constitutional harm by defining unconstitutional segregation as *de jure* segregation—intentional practices that entrenched a system of segregation and unequal opportunities, whether or not they took the form of statutes.<sup>44</sup> In the context of school desegregation remedies, “the elimination of segregation ‘root and branch’”<sup>45</sup> was a strong mandate, yet after decades of extensive and expensive court-ordered remedies failed to close achievement gaps, the Court seemed to lose its appetite for pursuing racial and ethnic equality in education. Ultimately, the Court defined unitary status in such a way that made it easier and easier for school districts to wind up school desegregation’s remedial phase even as disparities persisted.<sup>46</sup> This is not unrelated to the fact that a majority of the Court never wanted to touch the connection between housing segregation and school

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41. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

42. *Id.* at 487–88.

43. Gary Orfield, *Education and Civil Rights: Lessons of Six Decades and Challenges of a Changed Society*, in *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS: MENDEZ, BROWN, AND BEYOND* 405–30 (Kristi L. Bowman ed., 2014).

44. *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 213–14 (1973).

45. *Id.* at 222 (Powell, J., concurring in part and dissenting in part).

46. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991).

segregation<sup>47</sup> or to define harm as based on students' lived experience in the absence of school districts' intent.<sup>48</sup>

Taken together, the Court's school desegregation decisions first expanded and then contracted the role of federal courts in education reform, but they have never eliminated it entirely. "But those were Fourteenth Amendment anti-discrimination cases, and that's not what we have here," a clever reader is thinking. That may or may not be the case; plaintiffs present an Equal Protection Clause argument that Detroit students are denied access to literacy as compared to other students across Michigan, and the amicus brief by Harvard law professor Martha Minor explains why *Brown v. Board of Education*<sup>49</sup> is the conceptual grandparent of *Gary B.*<sup>50</sup> Regardless, if we agree with plaintiffs' claim that a right of access to literacy is a necessary prerequisite for individuals to realize explicit fundamental rights, then access to literacy is also fundamental, and thus a proper subject of federal courts' attention—though not necessarily a subject of unlimited attention.

One last concept related to the role of courts in education reform is thornier, though it is not one related to federalism. In a nutshell, systemic reforms have the advantage of achieving broad change, yet they also, by their definition, subordinate the interests of any one individual to those of the group and thus can lead to individual inequities even within an equitable system. In school desegregation litigation, for example, courts overseeing remedies regularly allow 15% leeway on either side of an enrollment demographic target when asking whether individual schools in a district reflect the population of the school district as a whole.<sup>51</sup>

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47. *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974); see generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (detailing how state action at the local, state, and federal level created and perpetuated segregated neighborhoods).

48. *Keyes*, 413 U.S. at 208–09; *Keyes*, 413 U.S. at 214–17 (Douglas, J., concurring); *Keyes*, 413 U.S. at 218–35 (Powell, J., concurring in part and dissenting in part).

49. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

50. Brief for Martha Minow as Amicus Curiae in Support of Plaintiffs-Appellants, *Gary B. v. Snyder*, No. 18-1855/18-1871 (6th Cir. Nov. 26, 2018).

51. See, e.g., *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 377–78 (4th Cir. 2001) (discussing the “plus 15 percent” average); *Stell v. Bd. of Pub. Educ.*, 860 F. Supp. 1563, 1583–84 (S.D. Ga. 1994) (discussing the 15 percent variance permitted by other courts).

Although this flexibility may seem limited, it can lead to significant variation among schools.<sup>52</sup> Student discipline and other policies also can produce racially/ethnically disproportionate results that turn out to be constitutionally permissible even while a district is under court supervision. Similarly, the focus in school finance litigation is not on whether individual students actually are provided a constitutionally adequate education; rather, it is on creating and funding a state system that should be able to produce certain opportunities for all students. This is something advocates must accept if they pursue a systemic remedy, particularly one tied to a right focused on access, not outcomes. Judicial involvement in systemic reform is not, and never will be, a panacea.

Issues of educational (in)equality and (in)equity are difficult and complex. In our country, state legislatures have primary responsibility for maintaining a system of laws that both support and constrain our school districts, and even with slightly greater federal involvement, this can continue to be the case. Courts operate as a check on school districts and state legislatures, and in my view going to court, especially to federal court, in an effort to achieve education reform should be a last resort. In Michigan, however, state courts are not determining the contours of a violation or remedy—they have insisted that it is not their role to do so, and they do not conceptualize the problem as a one of a broken system, much less a broken system the state has responsibility to fix.<sup>53</sup> Although the federal district court in *Gary B.* took a different view when concluding that the state was a proper defendant, its rationale was exceedingly narrow and it rejected the right on which plaintiffs based their claim. Thus, the district court repeated some mistakes of the past. Within a framework of cooperative federalism, the Sixth Circuit has an opportunity to do otherwise.

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52. If a court divides students into two groups for demographic purposes (i.e. white and non-white), and the district is multi-racial/ethnic, it can lead to schools that do not remotely reflect the demographics of a district.

53. Bowman, *supra* note 4, 16–25.

#### IV. Conclusion

The conceptual and practical challenges to a right of access to literacy may seem overwhelming, and understandably this is part of why some people, including some judges, think courts do not belong in the business of systemic education reform. In my view, the legislative and executive branch are the best places to create and refine education policy that serves all of our children in a way that respects each one's potential. However, when the result of state legislative, executive, and judicial action is a system in which the only option for many families is a school with single-digit literacy proficiency and appalling physical conditions, a dispute about jurisdiction seems academic in the worst possible way.

The Supreme Court has hinted that there might be a federal constitutional floor, albeit a low one, that guarantees a minimum quality of education. The district court in *Gary B.* was not unsympathetic to the reasons why; in its words, “[t]he conditions and outcomes of Plaintiffs’ schools, as alleged, are nothing short of devastating. When a child who could be taught to read goes untaught, the child suffers a lasting injury—and so does society.”<sup>54</sup> The Sixth Circuit should take up the challenge to navigate the uncharted territory presented by *Gary B.*, consistent with the principles of cooperative federalism. In a country that is a global leader in the twenty-first century, it should not be too much to expect that our public schools provide all of our children an opportunity to become functionally literate, and thus exercise the fundamental rights of citizenship and realize the promise of the Fourteenth Amendment.

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54. *Gary B. v. Snyder*, 329 F. Supp. 3d 344, 366 (E.D. Mich. 2018).