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Democratic Education and Local School Governance

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DEMOCRATIC EDUCATION AND LOCAL SCHOOL GOVERNANCE

JUSTIN R. LONG*

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I. INTRODUCTION

Imaginary lines in space decide many of the rights and obligations of American life. These lines have powerful effects on our sense of who we are and to whom we feel connected.¹ More than just emotional and psychological consequences flow from our political geography, however. These lines are about power. On one side of a line, we elect two United States Senators for 700,000 people.² Across a different line, 700,000 people are not enough to elect even a municipal chief executive.³ But of the many different ways that political power is dispersed unevenly across geography, perhaps none is more influential than the variation in public education across local school districts.⁴ The consequences of this variation affect how children

1. See generally ANITA HILL, REIMAGING EQUALITY: STORIES OF GENDER, RACE, AND FINDING HOME (2011) (describing the connection between sense of place and sense of identity).

2. State and County QuickFacts, United States Census Bureau, <http://quickfacts.census.gov/qfd/states/38000.html> (last visited June 8, 2014) (listing the population of North Dakota as almost 700,000 people).

3. Bill Vlasic, *Lawyer Outlines Challenges in New Job Fixing Detroit*, N.Y. TIMES, Mar. 26, 2013, <http://www.nytimes.com/2013/03/26/us/detroits-emergency-outlines-challenges.html>.

4. See *Sheff v. O'Neill*, 678 A.2d 1267, 1274 (Conn.1996) (holding that state statutes defining school districts as coterminous with town lines, and assigning students to school districts based on their residence, together were the primary cause of racial and economic isolation in the state's schools).

learn the skills and virtues necessary to govern as citizens in our democracy. In some districts, they do not.

The mythologized history of localism in American public school governance has created a widespread view that the status quo is fully justified, even without any overt public examination of those potential justifications.

Yet a democracy founded on the equal dignity of every citizen⁵ rejects the ancient view that political power should rest on accidents of parentage or geography. Responding to this tension, scholars and judges have written reams of literature on inequity in schooling across race and class lines, with a wide variety of competing prescriptions.⁶ In the “worst” school districts, whether rural or urban, high concentrations of poverty and intense racial isolation combine to create schools of near-complete dysfunction.⁷ The adults educated in these systems face violence, unemployment, and illness out of proportion to the American median. Meanwhile, just a few blocks away from these failed systems, other local school districts find themselves well-funded and successful by all standard indices.⁸ The graduates of these institutions go on to empowered lives of economic and political self-determination.

The consequences of this gap extend beyond moral failure. The injustice of consigning Americans to one system of education or the other according to accident of birth speaks for itself. The disparate effects of this system, which include the denigration of human dignity and the fostering of caste and hereditary privileges, stands out as profoundly contrary to our professed American values. But the need for change does not flow merely from a protectionist impulse toward discrete and insular minorities.

5. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“all men are created equal”).

6. See generally ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010) (describing the philosophical, moral necessity of race-based integration, including in schools); see also ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* 188–92 (1997) (describing housing integration and economic advances for “Afro-Americans” as a higher social priority than school integration).

7. See, e.g., DATA DRIVEN DETROIT, *STATE OF THE DETROIT CHILD: 2012 REPORT*, THE SKILLMAN FOUNDATION 15–22 (2012), available at http://www.skillman.org/content/download/2702/24140/file/2012_Detroit_Child_report.pdf (describing the abysmal educational outcomes of Detroit children).

8. See, e.g., *Grosse Pointe South High School Test Scores*, U.S. NEWS & WORLD REPORT, <http://www.usnews.com/education/best-high-schools/michigan/districts/grosse-pointe-public-schools/grosse-pointe-south-high-school-10176/test-scores> (last visited June 16, 2014).

The striking inequity across localized school systems deprives all of us of the immense human resources latent in distressed communities. Even if Derrick Bell's classic explanation of "convergence theory"—the lamentable but insurmountable reality that America will grant civil rights to African-Americans only when it is also in the interest of white Americans to do so—is correct with respect to public education,⁹ the American public ought to deplore the state of urban schooling. To the extent that natural ability is distributed randomly across the population, we are collectively wasting opportunities for amazing advances in all fields of endeavor. Both culturally and economically, we simply are not making use of the full value of our population. If Mozart were born in contemporary America, he might well never sit at his first piano. A modern Curie (depending on where she was born) might never see her first chemistry set. As international tests demonstrate the insecurity and contestability of America's place atop the global education hierarchy,¹⁰ the time is ripe for a comprehensive and contextualized re-examination of how we structure the governance of public education.

Grossly inequitable public education is more than a moral disaster. It is more than an economic waste. In a nation self-conceived as democratic, the unfair distribution of quality schooling is a catastrophe of deep political values. Income inequality continues to grow, and with it the influence of the wealthy and powerful over our government.¹¹ But all of the power derived from money spent on political campaigns still depends on influencing the ordinary voter. The only antidote I can foresee to this threat to democracy is an educated electorate, inculcated with the virtues of citizenship and trained in the practices of self-governance. When public schools offer these political capacities to some Americans but not others, depending on narrowly defined geographic limits designed to retain educational resources in small communities of power, we cannot reach the American dream of real democracy.

9. See generally Derrick A. Bell, Jr., *Brown v. Bd. of Edu. and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1979).

10. See Motoko Rich, *American 15-Year-Olds Lag, Mainly in Math, on International Standardized Tests*, N.Y. TIMES, Dec. 3, 2013, http://www.nytimes.com/2013/12/03/education/american-15-year-olds-lag-mainly-in-math-on-international-standardized-tests.html?_r=0.

11. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014); *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010).

Other scholars have offered defenses and critiques of localism, and still others have described the philosophical underpinnings of democratic education. In this Article, I bring together these two strands of thought. I offer a new analysis of how local control of public schools affects democratic education and begin to sketch an alternative vision of school governance. In Part I, I review some of the primary purposes of public education in this country. In Part II, I move to a description of the leading arguments, contemporary and historical, in favor of localized control over public schools. I include critiques that these localist arguments engender. In Part III, I describe Amy Gutmann's argument for democratic education founded on local control. I challenge the underlying idea that local government maximizes democratic control of education. As an analytical framework, I use Steven Winter's conception of civic republicanism. His description of democracy defines citizens' mutual recognition and respect as the essence of collective autonomy. Finally, in Part IV, I conclude with a new vision for republican education, with the control of public schooling fixed at the state level.

II. PURPOSES OF PUBLIC EDUCATION

Before engaging with analysis of the forms of governmental control over public schools, I discuss the primary purposes for public education. These purposes sometimes conflict with each other and sometimes complement each other. At different times and in different places, some purposes have taken priority over the others. And the different purposes appeal to or repel different political factions. Together, our collective pursuit of these purposes has brought American public schools to their current condition. While all of the purposes below provide context for my discussion of school governance, this Article focuses on the last-described purpose, the role of public schools in raising self-governing citizens—what Amy Gutmann calls “democratic education.”

A. To Train Workers and Consumers

Public education has economic consequences. An individual's lack of education carries negative externalities for her community; she lacks the skills or character traits to participate fully in the market. For elites, education for economic purposes may be about innovation

or management.¹² But for everyone else, public education contributes most to our capitalist economy by developing productive, content workers and enthusiastic consumers. Businesses need large numbers of workers with both the knowledge and inclination to read and write, calculate, operate computers, and learn and process information.¹³ The nation needs workers to make income that can be taxed to support public functions. These workers, to maximize productivity, must also have soft skills like the ability and temperament to work in teams, to take direction from managers, to communicate effectively with customers, and to consistently apply full effort to their tasks. Owners of capital rationally support public schools to the degree that they produce workers with these profitable traits.

Education also trains consumers. Core skills like numeracy permit educated consumers to assess relative prices, to plan needed quantities, to compare interest rates on loans, and to budget for large purchases. Education also helps to develop the character traits necessary for a consumer economy. Contemporary consumers must be more than acquisitive. Consumers must: have an appetite for risk to sustain heavy household debt; have a low tolerance for aged or partially broken objects so that they feel compelled to buy new ones; view material goods as linked to competitive social status; relish new technology so that buying new, highly-complex phones, computers, or cars appears exciting rather than intimidating. These attitudes are certainly fostered by many sources in our culture, but public schools play their part. If our country's public education system fails to develop both these skills and attitudes in our young, we deprive the economy of its most powerful engine.

B. To Raise Happy, Healthy Human Beings

Anne Dailey has written eloquently about the importance of public schools to the development of psychologically healthy and fulfilled adults.¹⁴ Dailey describes school as a place that reinforces

12. See, e.g., Brief for Amici Curiae 65, *Leading American Businesses in Support of Respondents, Grutter v. Bollinger* (2003) (Nos. 02-241, 02-516), 2003 WL 399056 (arguing for the importance of diversity in public tertiary education to train business leaders).

13. See, e.g., Robert J. Gordon, *The Great Divide: The Great Stagnation of American Education*, N.Y. TIMES (Sept. 7, 2013), <http://opinionator.blogs.nytimes.com/2013/09/07/the-great-stagnation-of-american-education/#more-148833> (noting the link between high-quality education and worker productivity).

14. See Anne Dailey, *Developing Citizens*, 91 IOWA L. REV. 431 (2006).

caregivers' love for their children by teaching children that they have inherent dignity, are worthy of respect and attention, and must treat their fellows with the same regard.¹⁵ But the notion that education is integrally related to what we might now call "self-actualization" long predates the American experience. The liberal arts that formed the backbone of classical education were believed to imbue educated people with a view of the world that was rich, nuanced, and empowering.¹⁶ In our colonial experience, the close connection between early public education and the training of ministers reflected a view that academic and spiritual growth were inexorably linked. Public support for education deliberately rested on and was justified by this connection.¹⁷

Today, the popularity of arts and music education in public schools, even in the face of financial desperation,¹⁸ confirms the relationship between mass education and the development of holistically fulfilled adults. A populace with a widespread appreciation of artistic beauty, of imagination, of human triumph, a sense of historical connectedness, and of the power of human relationships constitutes a nation of well-adjusted citizens. As the education philosopher Mortimer Adler observed, people spend many hours in "leisure" and the quality of that leisure depends on the nuance, complexity, and joy they have been taught to seek.¹⁹

C. *To Make Soldiers*

While a miniscule percentage of Americans now serve in the military, the nation's security in the face of remote but possible risks remains dependent on the population's capacity to provide large numbers of recruits.²⁰ By investing in public schools, we can train

15. *Id.* at 459.

16. *See, e.g.*, Plato, *Apology of Socrates*, in Charles Eliot, ed., 2 HARVARD CLASSICS 3 (1909).

17. *See, e.g.*, *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 531–32 (Mass. 1993) (describing early history of Harvard College).

18. *See, e.g.*, Ann Zaniewski, *Yo-Yo Ma, other artists bring music to Detroit's Spain Elementary*, DETROIT FREE PRESS, Apr. 11, 2014 ("Over the years, budget cuts decimated some elementary and middle school arts, music and athletics programs in DPSfalse32 elementary and middle schools didn't offer art or music"), *available at* Westlaw, 2014 WLNR 9764029.

19. *See* Mortimer J. Adler, *Labor, Leisure, and Liberal Education*, 6 J. GEN. EDUC. 35 (1951).

20. *See, e.g.*, Selective Service Act, Pub. L. No. 65-12, 40 Stat. 76 (1917).

enough people with the increasingly demanding technical skills necessary to provide effective military service. In addition, public schools participate in national security preparedness through the fostering of appropriate attitudes, as with the other purposes described in this Part.²¹ Learning to stand in line, to recite the Pledge of Allegiance in unison, to salute the flag, to follow directions, to attend to the social hierarchy of grades and the power hierarchy of administrators and teachers, to move through the day according to rigid time intervals marked by bells, and other widespread pedagogical practices train children to be comfortable with the kind of loyalty and obedience that mark successful armed forces. Public schools in rural and urban impoverished districts tend to embrace this mission with particular vigor, as marked by their participation in explicitly military programs like the Junior Reserve Officers' Training Corps.

D. To Perpetuate Social Relations and Power Structures

One romantic view of education generally, and particularly public schools, is that it creates a new generation with the tools and insights to react against and reform the status quo. On the opposite side, Pink Floyd sang to teachers that they were "just another brick in the Wall;" just one more oppressive component in the social machine forcing children to adopt conformity and economic complacency over individual creativity and revolt.²²

A deeper view suggests that schools inherently replicate and reinforce the power structures of the societies in which they operate. This might feel oppressive or not, depending on the society's own principles. As John Dewey wrote, societies could not exist if they did not use education to imbue the next generation with the values, skills, attitudes, and tastes that define their social group.²³ This transmission can be direct or indirect, consciously specified for the needs of children or unconsciously modeled by adult behavior.²⁴

A less rosy purpose of public education, more in keeping with Pink Floyd's view (among others), is to protect the property and power of dominant groups and to pass that class hierarchy on through the

21. *Cf.* Consolidated Brief of T. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondent 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003).

22. PINK FLOYD, *JUST ANOTHER BRICK IN THE WALL* (Harvest Records 1979).

23. *See* JOHN DEWEY, *DEMOCRACY AND EDUCATION* 6 (2011) (1916) ("Society exists through a process of transmission quite as much as biological life.").

24. *See id.* at 10.

next generation. In part, this process is inevitable because the generation that establishes public schools cannot escape its own examined or unexamined social practices. Even a collective reaction against previously dominant social values, such as during a revolutionary generation, must reflect those rejected practices, just as a teenager is formed by what she rebels against.

Consider, for example, the case of Irish mailboxes. Before the Republic of Ireland obtained independence, the British Post placed metal mailboxes throughout the country. Sometimes, British practice was to place these boxes in the walls of buildings rather than in free-standing form on street corners. The boxes were painted the distinctive red widely recognized as characteristic of the British Post, and beneath the mail slots the metal was stamped with the abbreviation for the monarch during whose reign the box was placed. E VII R, for Edward the Seventh Rex, marked boxes built in 1905, while G V R, for George the Fifth Rex, gleams from the surface of a box built in 1915. Upon establishment of the Irish state, these highly visible symbols of British colonial authority were left intact. But the brand color of the new Irish postal service, green, was layered over the British red. Today, older mailboxes throughout Ireland still show bas-relief reminders of the British monarchs beneath their green-washed surfaces.²⁵ Even as the newly formed nation sought to assert its autonomy, it confirmed its bond with the target of its revolution. Societies that consciously seek to obliterate the values of a prior culture find the task impossible, and both revolutionary values and those of the *ancien regime* carry forward, reverberating against each other.

Schooling policy, particularly, carries the imprint of each past generation. While revolutionary generations pass on previous hierarchies unconsciously and unwillingly, imperial generations consciously seek to impose new hierarchies on subjugated cultures. Schools provide an essential medium for these conscious acts of social replication. In Ireland, British educators accomplished this through devices like the banning of the Irish language in schools (which, in a classic reactionary gesture, the new Irish state made mandatory where it had once been prohibited). In this country, American imperialists estab-

25. See generally The post box, AN POST.COM. available at <http://www.anpost.ie/AnPost/History+and+Heritage/History/The+Postal+Service+in+Ireland/The+post+box/> (last visited May 1, 2014).

lished residential “Indian schools” to compel captured Native American children to adopt “American” folkways.²⁶

Of course, most societies are not undergoing drastic revolution, as did Ireland, or subjugation, as did the Native American nations. In these stable societies, schools transmit existing hierarchies of power and class even more efficiently (and often less consciously). The self-perpetuating influence of the existing social structure appears in schools in the forms one might expect, such as in textbooks, curriculum, or public ceremonies. But it also finds expression in less overt forms, such as classroom and school architecture, the language of instruction, the characteristics of teachers, the nature of sports and games, the status of support workers, and a myriad other aspects of culture that surround the child at school.

Importantly, education as replicator of existing social and power structures can be normatively neutral. Brutal, autocratic societies use education to perpetuate their values, as with the preeminence of the Hitler Youth in Nazi German schools, just as peaceful societies use education to perpetuate their values, as with the Amish insistence on teaching children the virtues of farm life.²⁷ The federal Supreme Court has expressly and repeatedly acknowledged the primacy of public schools in perpetuating American values in cases like *Brown v. Board of Education* (describing education as essential for political citizenship),²⁸ *Barnette v. West Virginia* (acknowledging the necessity of permitting some freedom of expression to schoolchildren to avoid training them in totalitarianism) and *Plyler v. Doe* (asserting the importance of education for all participants in the national society), as necessary to preserve the American way of life.

Of course, not all of the schools’ recapitulations of American values (however proudly recited by courts) have been widely accepted; not all have been evenly available; and not all of them are praiseworthy. Just as in any other important public space in American life, public schools are a forum for contesting what values shall prevail as

26. See Allison M. Dussias, *Let No Native American Child Be Left Behind: Re-envisioning Native American Education for the Twenty-First Century*, 43 ARIZ. L. REV. 819, 829–33 (2001).

27. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

28. See *Brown v. Bd. of Ed.*, 349 U.S. 294 (1953); see also Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 340, 344 (2007) (describing the federal Supreme Court’s acknowledgment of the connection between education and the preservation of democracy).

we collectively and recursively negotiate our way toward construction of our national community. But the presence in public schools of competing values, unevenly applied values, or poor delivery of values does not negate the role of schools as conservators and transmitters of existing social structures. To the contrary, the hodge-podge, highly contested approaches to values in American public schools is *itself* a transmission of American political ideals. The diversity of political ideas prioritized in public schools teaches children that they live in a pluralist, liberal society with freedom to pursue a wide array of deeply held principles.

E. To Develop Self-Governing Citizens

Public schools are simultaneously the product and the producer of American democracy.²⁹ This connection, famously associated with John Dewey³⁰ and rigorously developed in contemporary form by Amy Gutmann (as I examine more closely in Part IV),³¹ means that fundamental questions of communal self-governance necessarily center on education. Even more importantly than with respect to the previously discussed purposes, education for democratic citizenship requires training in both cognitive skills and character traits.³² Conventional discussion of education for citizenship often focuses on developing the ability to participate adequately in discrete tasks of collective self-governance. These tasks are primarily voting and serving on a jury; some commentators add the ability to answer a military draft.

Both voting and jury service break down into conceptual challenges that educated citizens must meet. Voting at its most basic requires the ability to understand the calendar sufficiently to go to the polls on the right day, the ability to navigate local geography sufficiently to travel to the polls, and once inside, the ability to understand and complete the ballot. A person without these capacities simply will not be able to accomplish the mechanical act of voting. For the act of voting to be meaningful, however, more is necessary. The vot-

29. See Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1647–54 (1986) (describing how educating children to be democratic citizens requires students in public schools to get practice in democracy by exercising rights like free speech).

30. See DEWEY, *supra* note 23.

31. See AMY GUTMANN, *DEMOCRATIC EDUCATION* (1999).

32. See Dailey, *supra* note 14, at 103.

er must be sufficiently attentive to the news media to hold at least an elementary grasp of the problems facing political leaders and what the different candidates have proposed as solutions. The voter must have at least a simple understanding of the different political offices and their power to affect policy. Finally, the voter must have the self-awareness to determine her own best interest and the critical thinking skills necessary to evaluate competing claims from candidates and interest groups. To propagate these skills at a level sufficient for voting to function as self-expression, schools must teach reading, basic math, social studies, and critical thinking. The New York Court of Appeals has held that a traditional high school education is enough to teach these basic skills;³³ whether or not that is the right line to draw, it seems uncontroversial that would-be voters must have access to at least that much education to exercise their suffrage effectively as full participants in self-governance.³⁴

Similarly, basic skills for adequate service as a juror include the ability to listen quietly for extended time, the ability to understand and follow directions from the court, the ability to understand the language (translated or not) of the witnesses and lawyers, the analytical ability to follow an argument or testimony, and the ability to communicate effectively with other jurors. More richly, a juror must have the critical thinking skills to weigh the reliability of competing evidence, to persuade others of her views, and to see through irrational arguments presented by lawyers. These skills necessitate a rudimentary education in grammar, narrative, and language arts; basic math; critical thinking; and a rough understanding of social studies, including civics and household economics.

But the raw cognitive abilities described above for both voting and jury service are useless without complementary character traits and accompanying psychological inclinations.³⁵ A partial list of the virtues necessary for meaningful citizenship include the following: an inclination to check one's own prejudices in the face of new information, or, in other words, a temperament capable of persuasion; a belief that common problems can be solved collectively; confidence that the citizen's own voice matters to the outcome; and a preference

33. See *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 331–32 (N.Y. 2003).

34. Nothing in this argument suggests that voting should be limited to those who can establish they have, in fact, acquired these skills. A poll test is wrong regardless of whether the would-be voter was educated sufficiently to pass it.

35. See GUTMANN, *supra* note 31, at 50–51; see Dailey, *supra* note 14.

for resolving common disputes politically rather than violently. These traits are fostered in children by many influences, including caregivers and popular culture. But public education also has an indispensable role in building these virtues. Whether the schools accomplish this by conscious instruction or by unconscious modeling, children learn what values society rewards from their schools. Where schools teach these virtues well, they will train an educated citizenry not merely capable of performing the functions of self-governance but actively inclined to do so.

III. ARGUMENTS FOR LOCAL CONTROL OF SCHOOLS

Americans tend to venerate local districts as the most democratic form of school governance. Scholars, judges, and citizens have argued over nearly every detail, profound and profane, of public education.³⁶ But the closest thing these varied actors have to a consensus rests on their shared belief in the democracy-enhancing effects of local school governance. This shared belief is founded on a variety of theoretical approaches, which Aaron Saiger categorizes loosely into instrumentalist concerns and deontological concerns.³⁷ Some of these approaches focus on the virtue of local control as a teaching tool, while others perceive it as a democracy-maximizing device. In this Part, I focus on the arguments for localism, and its critiques, within the frame of assuming that localism is more democratic. In the next part, I challenge this foundational assumption.

A. *Utilitarian localism*

1. A Diverse Marketplace of Services

Some proponents of localism, like Charles Tiebout and his intellectual heirs, support local districts for utilitarian purposes. These proponents argue that citizens are “consumers” of public goods, including public education.³⁸ A free market of such goods would offer these “citizen-consumers” choices among different sets of public

36. See, e.g., *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011) (specifying the exact funding system and statutory remedy necessary for the constitutional support of public schools).

37. See Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 523 (2010).

38. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–17 (1956); see also Richard Schragger, Book Review, *Consuming Government*, 101 MICH. L. REV. 1824, 1825 (2003).

goods.³⁹ A wide variety of local districts make it possible for citizens to vote with their feet, and thereby, like Goldilocks, to find from among the smorgasbord of governance options the one that fits their own set of preferences “just right.” Parents seeking a strong arts curriculum, for example, might choose to buy a home in a school district that funded arts education. Those preferring small classes, or a Montessori program, or any other educational focus, could achieve their goal by moving into a district where most of their neighbors shared their tastes.

A more centralized governance structure would necessarily gravitate toward some suboptimal homogenized mean, forcing the Montessori-seeker and the arts-lover alike to abide a standardized system of instruction that fulfills neither preference. Those with outlier preferences would be unable to find some haven of their own, pressed instead toward a grey, conformist middle ground. In this view, the absence of variety in schooling, just as in the marketplace, causes dead weight loss: inefficiency that decreases the total amount of welfare in the system. Ultimately, this vision of local school governance imagines geographically bounded communities loosely linked by homogeneous educational priorities (loosely, because other factors affecting residential desirability will also influence choice of residence, even if public schools constitute a significant or even primary driver of housing choices). The finer and more granular the gradations are across these communities, the more precisely calibrated each town will be to any given resident’s ideal system.

Democratic education requires both a democratic pedagogy and democratic school governance. Democratic pedagogy trains democracy-minded citizens for their civic responsibility; practical features might include protecting a student newspaper’s right to publish controversial material so that students learn the democratic value of a free press or training students to listen respectfully to opposing views in class so that as adults they are prepared to participate in political debate. Democratic governance has some effect on democratic pedagogy, because students watch adults and learn from the model of control they see applied to their schools. But governance and pedagogy are not always perfectly aligned. Tiebout’s approach prioritizes the autonomy of parents and the utility they gain through fulfillment of

39. *See id.*

their private preferences over collective aims.⁴⁰ This autonomy, in turn, privileges the “democratic” control of education—popular decision-making about the characteristics of public schools—above the use of public schools to teach democratic values. Civics and citizenship development, after all, are just one kind of educational priority. Other pedagogical themes might well be preferred by local democratic majorities, and local autonomy would permit them to adopt their local preferences. More importantly, to the extent that early education in diversity promotes democratic citizenship, Tieboutian focus on like-minded communities makes local majorities happy but undercuts the larger society’s need for the inculcation of democratic virtue.

Even within the Tieboutian perspective, a consumerist approach to governance emphasizes the ability of citizens to vote with their feet to live near others like themselves. But as advocates of school “choice” or voucher programs⁴¹ emphasize in their opposition to neighborhood-based schooling, poor and otherwise disadvantaged parents are unable to participate in this efficient sorting of preferences. So long as local school districts have residence in the town as the price of admission, some parents will not be able to find their educational niche.⁴² No matter how much they agree with other would-be residents that art education is essential, if they cannot afford to move to (or are red-lined out of) a town with the resources necessary to sustain an arts program, they will be trapped in the standardized-testing driven world of the “pedagogy of poverty.”⁴³ For disfavored minorities and the poor, the homogeneity they share with their neighbors is merely their socioeconomic status, not common values and common dreams of what they want from their children’s schools.

40. *See id.* at 419.

41. *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

42. I note that the trend of racial minorities moving to suburbs has been underway for decades and will likely continue, with complex effects exceeding the simplified story of black, poor cities and white, wealthy suburbs. *See* SUSAN WELCH ET AL., *RACE & PLACE: RACE RELATIONS IN AN AMERICAN CITY* (2001). The impact of primarily white rural poverty and its stifling grip is also frequently ignored in discussions of localism. *But see* Symposium, *Under Pressure: Fiscal and Regional Difficulties Facing Local Governments*, 50 WILLAMETTE L. REV. 401 (2014). Nevertheless, concentrated poverty and racial segregation in inner-city public schools remains a sadly severe phenomenon. *See* ELIZABETH ANDERSON, *THE IMPERATIVE OF EDUCATION* 24–27 (2010).

43. Martin Haberman, *The Pedagogy of Poverty versus Good Teaching*, reprinted in *CITY KIDS, CITY TEACHERS: REPORTS FROM THE FRONT ROW* 118–30 (William Ayers & Patricia Ford eds., 2008) (describing the pedagogy of poverty as driven by discipline, direct instruction, conformity, and testing).

Indeed, while housing choices of the poor are especially constrained, everyone makes housing decisions on a wide variety of factors, with the local education options being only one (albeit an important factor for most parents). Some parents will choose a house closer to their work, or with more square feet for the cost, and accept trade-offs in their public schools as a result. A little-observed consequence of this economic and racial exclusion is that even those citizens who could afford and whose racial and social identity would permit entry to a particular community also suffer the loss of Tiebout's supposed maximally-efficient allocation of government services. If some parents in a particular school district want bilingual education in Spanish, for example, but cannot convince the local majority to agree, these parents are deprived of the additional votes and political support that indigent fellow supporters of Spanish instruction might have brought to the locale if they could have obtained local residence. In essence, the sorting by geography that Tiebout envisioned only works to provide narrowly-tailored government services to those citizens who can obtain support for their preferences without the political assistance of the economically and socially disadvantaged sectors. The distinctive preferences of both those sectors and their advantaged allies are abandoned as irrelevant or impossible.

So far, this critique has assumed, as Tiebout did, that there is a meaningful variety in citizens' preferences for government services. But that assumption remains unproven and seems implausible upon further reflection. Without a doubt, some local school districts (and their constituents) care more about basketball than swimming, while others reverse their priority. That kind of variation seems like a trivial basis to support the division of society into the homogeneous clusters envisioned by localists. Where it really counts, there is a surprising degree of agreement about what makes for good schools among both scholars and citizens: passionate, well-trained, and experienced teachers; supportive, inspiring, and demanding administrators; adequate resources (including enough teachers to permit reasonably small class sizes); individualized instruction; and a modest amount of diversity among students across different axes of identity. These characteristics are advertised by elite private boarding schools⁴⁴ and the

44. See Why Choate, CHOATE ROSEMARY HALL, <http://www.choate.edu/page.cfm?p=5> 29 (last visited Aug. 31, 2014).

hardest-working public schools⁴⁵ alike to attract discerning parents. The assumption that parents would sort themselves residentially to find communities that value similar educational priorities breaks down if nearly everyone prefers the same things. Instead, the geographic sorting becomes merely a proxy for wealth and wealthy citizens' desire to preserve their assets for their own children.

2. Protection from Corrupt Government

A second rationale for educational localism, somewhat at odds with the Tieboutian argument (and directly contrary to James Madison's position),⁴⁶ is that central government is more susceptible to "capture" by narrow interests than local government. David Barron attributes this view to Justice Cooley, the intellectual father of localism.⁴⁷ Cooley believed in the inherent autonomy of localities derived from the old English chartered towns that developed even before the nation-state.⁴⁸ But he bolstered this principled position with the pragmatic view that local voters could keep a closer eye on local officials, and therefore greater political power vested in municipalities could be kept cleaner and safer than in central authority.⁴⁹ Cooley was inexact about the mechanics of how citizens exercised firmer control more locally, and his claim rested on deduction rather than evidence. But the basic tenet he taught remains widely accepted in contemporary popular rhetoric, where capitals are metonyms for remote, unaccountable, anti-populist control; commentators deplore the "Washington establishment"⁵⁰ or a "directive from Lansing."⁵¹

45. See *Promise Academy*, HARLEM CHILDREN'S ZONE, <http://hcz.org/our-programs/promise-academy-charter-schools/> (last visited Aug. 30, 2014).

46. See THE FEDERALIST NO. 10 (James Madison).

47. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 546 (1999).

48. See THOMAS MCINTYRE COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWERS OF THE STATES OF THE AMERICAN UNION 189 (1868) ("The system [of local governance] is one which almost seems a part of the very nature of the race to which we belong. A similar subdivision of the realm for the purposes of municipal government has existed in England from the earliest ages").

49. *Id.*

50. See, e.g., Trip Gabriel, *Cantor Forgot Virginia Roots, Voters Contend*, N.Y. TIMES, June 11, 2014, <http://www.nytimes.com/2014/06/12/us/cantor-forgot-virginia-roots-voters-contend.html>.

51. Brian Palmer, *Will a state-mandated high school curriculum of 18 credits ensure better-prepared students in the 21st Century? No*, MACKINAC CTR. FOR PUB. POLICY (Mar. 7, 2006), <http://www.mackinac.org/7636>.

Barron recalls that Chief Justice John Marshall and Judge Dillon, often perceived as the polar opposites of Thomas Cooley in their attitude toward localism, viewed local government as *too* influenced by local majorities. Local governments, in their view, were prone toward inappropriate invasion of private property rights, requiring the cooler heads of centralized federal and state officials to protect the private sphere.⁵² To protect rights holders from populist oppression, they reasoned that local government is and ought to be nothing more than a tool of the central state, an administrative convenience.⁵³ Under this view, municipalities are and should be only permitted whatever authority is convenient or efficient to carry out the central state's governmental program. From the perspective of these early thinkers, allowing private interests concentrated in local areas to thwart the more disinterested and rights-protective concerns of the central state would diminish citizens' liberty rather than enhance it. For James Madison, who advocated for the Senate as a bulwark against majoritarian oppression, the protection of property rights formed a central concern.⁵⁴ Local officials posed the risk of succumbing to the demands of the redistributionist hoi-polloi. Today, we might be more skeptical than Madison was that welfarist policy is so dangerous to the Republic, and that majorities should be so calculatedly thwarted in the area of economic regulation. But Americans generally retain a sense that even minorities should retain some rights that are largely unabridgeable by ordinary politics. Local governments, which represent only a self-selected majority that might well have views significantly at odds with the larger society, still present a risk of oppressing citizens they perceive as marginal.⁵⁵

3. Promotion of Political Support for Material Resources

Some utilitarian localists, like Chief Justice Burger writing for the Court in *Milliken v. Bradley*,⁵⁶ viewed local governance as the most effective—if not the only—way to gain political support for the

52. Barron, *supra* note 47, at 554.

53. Although Cooley is often positioned as the extreme advocate of localism, he actually acknowledged that local school districts in particular exist purely for the administrative advantage of the state. See COOLEY, *supra* note 48, at 241.

54. THE FEDERALIST NO. 10 (James Madison).

55. See, e.g., *Town of Greece v. Calloway* 134 S. Ct. 1811 (2014) (describing a town government that saw no problem with opening public meetings with explicitly Christian prayer, despite the objections of a small number of non-Christian residents).

56. *Milliken v. Bradley*, 418 U.S. 717 (1974).

public schools. Parents, the Court suggested, would feel less attached to a centralized education system, and therefore less likely to advocate for the taxation necessary to maintain it.⁵⁷ Parts of Burger's opinion seem nearly agnostic about any underlying philosophical principles associated with local control. Instead, these sections seem to assume that the most important prerequisite for high-quality schools is material support, which can only be obtained through the feeling of ownership parents get from local control.⁵⁸ If it were politically possible to win better financing for public schools through more centralized control, it appears that followers of the Burger model might accept that. This rationale exemplifies the close connection between the forms of governance and of schooling that Dewey described; we run schools in a certain way so that the political system will continue to run them that way. We employ local control over schools so that citizens will continue to support local schools.⁵⁹

Local school boards, this argument goes, are more easily influenced by parents than are more centralized layers of government. In exchange for this greater control, parents actively engage with support for the local schools. Parents are often already organized around their school community through private associations and informal networks formed around school parent-teacher organizations, sports teams, after-school clubs, play groups, or neighborhoods. Parent-teacher conferences, school assemblies, permission-slip forms sent home in backpacks, and even parking-lot chatter all help to keep parents informed about issues at school, even in the absence of news media coverage. This combination of relatively high levels of social organization and high levels of information forms a strong basis for political activism centered on local schools. Furthermore, because parents have more reason to be concerned with their children's education than anyone else,⁶⁰ it seems to follow that a level of government responsive to parents will allocate resources and adopt policies in line with the best interests of children. Funding schools below appropriate levels would immediately provoke these well-organized networks of highly motivated citizens into political action.

57. *Id.* at 741–42.

58. *Id.* at 742. *But see* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

59. *See* Saiger, *supra* note 37, at 522.

60. *See* Dailey, *supra* note 14, at 439–40; *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

However, Chief Justice Burger's conviction, expressed in *Milliken*, that parents would be more likely to approve the taxation necessary to support public schools if those schools were locally governed flows from a highly privileged perspective on how school communities work.⁶¹ Ultimately, the conviction falls apart when the full socioeconomic range of caregivers and schools are added to the picture. If we imagine a town with active parent involvement and a high level of democratic control over the school budget—such as through campaigns and subsequent referenda on supporting school bond issues or school-targeted property tax increases—then Burger's vision intuitively makes sense. In these localities, how much to support local schools is a *choice* and that choice is substantially, if not entirely, determined by politically active parents. In this paradigm, parents learn of the schools' need first, directly from school officials through notices emailed straight from the teachers, parent-teacher nights, or school assemblies. The need might be a new football field, a new science lab, or a renovated auditorium.

The parents are well-situated to judge for themselves whether the need is genuine because of their regular presence at the school and their active relationship with school officials. Having decided to support the new project, parents organize, including through school-based networks like PTAs and other associations rich in social capital, to encourage voters to approve the schools' request at a local referendum. The campaign likely would include bumper stickers and lawn signs, but also more effective tactics like parents speaking directly to their own neighbors through door-knocking efforts or informal encounters at well-attended local events like neighborhood barbecues or high school sports games. These parents use their networks of social capital to convince the electorate (of which they form a major part) to pass the bond issue or raise the millage rate. In our example, the locality's tax rate could grow without driving away major taxpayers; the pre-increase rate is low enough for taxpayers still to be relatively tolerant of moderate increases. In a town that has invested wisely, the additional financial burden on the community is then offset by the value of the improved schools, because the better education system makes the town more attractive to families, raising property values, and consequently property tax revenues.

61. *Milliken*, 418 U.S. at 742.

This rosy scenario that Burger might have had in mind simply does not match the modern urban school district. First, financially burdened cities typically maintain very high property tax rates already, making the city's revenue curve closer to the peak beyond which any increase is more likely to drive taxpayers away, causing a net decrease in revenue even as the rates go up.⁶² Even so, in many states, cities are prohibited from raising their tax rates above a state-imposed ceiling.⁶³ As Richard Briffault explains, there is a sharp difference in the financial capacity of residential suburbs compared to core cities. Briffault identifies three major causes for the disproportionate financial advantage of suburban municipalities: (1) zoning prevents high concentrations of poverty; (2) resource-draining and non-taxpaying institutions like hospitals, government offices, and social service facilities are located elsewhere; and (3) taxable property is primarily residential, which has relatively high value per acre.⁶⁴ The situation where property taxes are low enough such that a rate increase would produce a net gain in revenue (rather than a net loss caused by too many taxpayers' leaving the locality) is more likely in municipalities where Briffault's conditions of suburban advantage exist. Even beyond these structural factors, suburban districts with relatively wealthy parents can apply substantial unofficial resources, like revenue from silent auctions, fees paid for extracurricular activities, etc.⁶⁵ Cities, by contrast, must spend resources addressing the particular problems associated with high concentrations of poverty, particularly the pernicious effects on education; must offer high-cost policing, sewer, sanitation, roads, water, fire protection, and other municipal services to heavy-use institutions because of the concentration of these regional service-providers in urban centers; and must seek tax revenue from property that is old, poorly maintained, or tax-exempt. When it comes to bond issues, cities that must maintain capi-

62. See generally Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118 (2014) (describing the impossibility of raising revenue by raising tax rates in municipalities where higher taxes will drive too many taxpayers out of the municipality).

63. See, e.g., MICH. CONST., art IX, § 3.

64. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 13 (1990); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1116 (1996).

65. See, e.g., Greg Winter, *The Nation: Public Schools Look Beyond the Bake Sale*, N.Y. TIMES, Oct. 6, 2002, <http://www.nytimes.com/2002/10/06/weekinreview/the-nation-public-schools-look-beyond-the-bake-sale.html> (reporting that cuts in public support for schools have led wealthy districts to raise increasing amounts from private donors, including parents but also powerful foundations and corporations).

tal-intensive public works like a dense network of surface streets, public lighting, and heavily used subterranean pipe systems are likely to have already borrowed significantly from the bond markets, thereby raising the interest rates investors demand as the city's indebtedness-to-taxable-property ratio increases.

4. Promotion of Policy Innovation through Diverse Experimentation

A fourth significant consequentialist rationale for local control of public schools is the "laboratories of democracy" idea.⁶⁶ This concept differs from the diversity of schooling options advocated by Tieboutian localists because it emphasizes the gain to the larger society that comes from experimentation.⁶⁷ Crucially, the foundation of the "laboratories" idea is that school districts are similar enough among each other for a successful policy innovation in one district to be applicable to many other districts. Proponents argue that because the "best" methods of education remain highly contested, wide discretion for local choices permits the development of new solutions to common, trans-district problems.⁶⁸ These innovations can be tested on a scale that poses no threat to the nation's education system, because failed innovations will simply not be adopted outside of their localized origin.

Forced conformity to centralized curricula or techniques would squelch this pedagogical creativity. There would be no room for a unique or novel program to exist in opposition to the conventional methods. This rationale for local control, unlike the prior theories, understands local districts in context, as part of a dynamic relationship with other districts and central authorities. It presumes that local school districts will attend to innovations developed elsewhere, presumably in response to local parental pressure to maximize student achievement, and then adopt or adapt those innovations to the peculiar features of the new locale. This rationale values local governance, but treats each local district not as an island but as part of a broader system of public education. That broader system, at least for the sake of benefitting from laboratories of education, does not necessarily

66. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 302-03 (1932) (Brandeis, J., dissenting).

67. See Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 *FORDHAM L. REV.* 345, 356-60 (1994).

68. See *id.* at 369.

represent a geographically bounded legal jurisdiction like a state or nation; proponents presume that local districts can learn from innovation anywhere.

If there were centralized control, however, there would not be enough diversity to produce breakthroughs in education. Perhaps the central authority would stumble across a reasonable solution to a vexing problem. It would then impose that solution on its component schools—and presumably stop searching for other solutions. But, localists argue, by maintaining multiple small districts, some might not discover the central solution, and some might—and still others could discover an even better solution. Achieving the objectively optimal outcome depends on technocrats' attention to multiple voices.

As Ed Rubin and Malcolm Feeley point out in their provocative analysis of American federalism,⁶⁹ people often conflate two different ways of pushing power down to smaller units. First, the form that Rubin and Feeley consider true "federalism" permits subnational units the degree of sovereignty necessary to pursue different *goals* from the national government, even if those goals conflict with national aims.⁷⁰ For example, they point to Quebec, a Canadian province that pursues French language and values even though those aims are not shared with the rest of Canada and, in some circumstances, conflict with national goals. The second form they describe as "decentralization."⁷¹ Decentralization permits subnational units to exercise their own choices in how they pursue their goals, but leaves the determination of those goals to the higher-level authority.⁷² Rubin and Feeley consider the Israel Defense Forces' command structure as a model of decentralization, because front-line commanders are given wide discretion to determine how to achieve their objectives, but their mission goals are still strictly determined by their superiors.⁷³ Rubin and Feeley lament the first type, the true federalism, because it indicates to them a society that cannot cohere around shared values.⁷⁴ In such a dysfunctional union, federalism is an unstable, second-best arrangement necessary to stave off short-term disintegration.

69. EDWARD RUBIN & MALCOLM FEELEY, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (Univ. of Mich. Press, 2008).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

This distinction, between subordinate units' pursuit of competing goals versus subordinate units' pursuit of a unified goal by competing means, helps to understand local education governance. The purposes of public education described in Part I, and how to balance them, have effects well beyond local districts. Notably, none of those purposes were geographically limited to particular localities. John F. Kennedy promoted math and science education because he believed that the nation as a whole needed enough engineers to beat the Soviet Union in the space race. Today, national policymakers fight inadequate education for English Language Learners not merely for the sake of justice but because the nation needs workers with strong English skills and national cohesion, which is weakened by pockets of citizens who do not speak the dominant language. Public-school graduates enter the economy, the polity, and the culture unbounded by the narrow geography of their early education. The externalities that flow from public schools' pursuit of these purposes create a legitimate rationale for centralized decision-making about these goals; just as managing air pollution efficiently requires a supra-local regulatory regime. For this reason, American public education is best viewed as a "decentralized" system rather than a system analogous to federalism.

Even if localists accept that school districts should not have discretion to choose educational goals at odds with the values of the larger society, they often argue that localism permits educational innovation. But as James Gardner has explained, thinking seriously about the "laboratories" image can lead to an entirely different result from its conventional rhetorical purpose.⁷⁵ To learn effectively from localized innovation, there must be two features that do not exist without a strong central authority and a broad consensus about values. First—keeping with the laboratories metaphor—there must be a control group. To learn whether a particular pedagogical innovation is effective, its effects must be compared to something else, the old way of doing things. But it is not enough to compare the results from school districts that use two different methods of instruction. Any differences might be explained by variation in student demographics, in district resources, in teacher quality, or any number of other factors. So the best analysis of the new method requires comparison between two *very similar* districts. Of course, the more local districts

75. See James A. Gardner, *The "States-as-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U. L. REV. 475, 476 (1996).

are permitted or encouraged to deviate from each other along their own idiosyncratic paths, the less likely administrators in one district will find relevant the reforms adopted in a different district. Conversely, the more similar two districts are (and therefore the more persuasive the success of a reform in one would be to the other), the less likely they are to innovate differently from each other on important matters.

This is not to say that the scientific study of education is impossible. Careful scholars in the field create constructive control groups through statistical filters that account for known variations among factors other than the variable under study.⁷⁶ But this brings us to the second requirement for the “laboratories” metaphor to fit. There must be a scientist. In a biology lab, a scientist might monitor the progress of bacterial colonies in two different petri dishes, checking for the same factor across both samples (perhaps the production of a specified protein). But with complex social organizations like school systems, any choice about what factor to look for is inherently value-laden. The more localized school governance becomes, the more room there is for the prioritization of competing goals. In other words, the closer school governance becomes to the “federalism” model that Rubin and Feeley describe as “tragic.” For one district to learn from another, they must measure themselves against a common metric. And the learning district requires the institutional capacity to gather and assess the data from the innovating district (and as many others as might be necessary to assure the results flow from the innovation rather than accident). The metaphorical scientist must be able to see, measure, and understand both petri dishes.

In practice, the state and federal departments of education are the only institutions (with the arguable exception of certain state-sized local districts like the New York City Department of Education) capable of gathering, evaluating, and dispersing the data required to understand educational innovation’s effects. To innovate requires the possibility of local variation. But to *learn* from innovation requires a scientist: a centralized observer with the power to measure the variation, to analyze it, then to disseminate the results, and to do so according to the scientist’s own specified parameters and values (which might well differ from the values consciously pursued by the innova-

76. See, e.g., SCHOOL CHOICE AND DIVERSITY: WHAT THE EVIDENCE SAYS (Janelle T. Scott ed., 2005) (collecting various education studies with statistical controls).

tors). For localized innovation to improve education generally in a rational way, local school districts must either have the capacity and the will to accept centralized agencies' advice derived from other districts or they must be compelled to adopt centralized directives: soft power or hard, but centralization either way.

Even if localized districts could gather and assess the latest research on educational innovations from suitably comparable districts, those most in need would be unable to implement it, as Peter Hammer shows.⁷⁷ The reason impoverished school districts like Detroit Public Schools do not implement small class sizes is not because administrators there do not believe the research demonstrating their efficacy. They simply lack the funds. The best funded schools, on the other hand, are able not only to devote administrative staff to studying the most up-to-date research compiled by central government agencies and scholars, but then also implementing the innovations. This use of localism furthers the gap between high-poverty schools (which tend also to be racially isolated) and their wealthy peers. As with Tiebout sorting, the "laboratories" argument for localism ignores the disparate effects of stark resource inequalities across school districts.⁷⁸

5. Path Dependence

Finally, path-dependence is a persistent instrumentalist rationale for educational localism. Path-dependence is the idea that however irrational a given institutional arrangement may seem at present, it follows from historically rational choices and the current cost of changing the arrangement to a more "rational" one would exceed the benefits of the new structure. The paradigmatic example is a highway with curves that make no sense in light of current population patterns. If the highway was built on an older road, which in turn was built on an ancient trail that contained curves to avoid long-gone obstacles, its path can be explained as a series of rational choices that result in a seemingly irrational outcome. Despite the arbitrary result, to straighten the highway would cost more than any benefit derived from saving drivers a few extra minutes of travel time.⁷⁹

77. See Peter J. Hammer, *The Fate of the Detroit Public Schools: Governance, Finance and Competition*, 13 J.L. SOC'Y 111 (2012).

78. See generally JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* (2011) (detailing the consequences of inter-district inequality).

79. See Lawrence Friedman, *Path-Dependence and the External Constraints on Inde-*

In the context of school governance, the historical development of localized education may have been optimal at the time. In the original colonies, local towns were obligated to pay for the primary education of poor children within their borders because towns were the only level of government that administered public welfare.⁸⁰ Advanced university schooling, such as in preparation for ministry or other professions, which required more resources to provide adequate instruction, needed and received support directly from the colonial legislature.⁸¹ Later, in the late 1700s and early 1800s, local school governance remained common practice, particularly in rural areas.

Only later, as the 20th Century demand for higher academic standards spread even to sparsely populated areas, did massive decentralization through consolidation of school districts occur. As William Fischel has demonstrated,⁸² this push toward regionalization, and the consequent steep decline in the overall number of school districts, was directly related to the need for better financing and support for a more intensive public education. In particular, consolidation permitted larger high schools serving broad regional districts, which created the economies of scale necessary for better facilities, more advanced courses, greater specialization, and a better faculty. Even so, the historical practice of local governance remained culturally dominant; instead of shifting toward an explicit appreciation for centralization, people's notion of "local" changed to a more expansive scope. By the 1960s, when central authorities in the state and federal governments started to become more active in education administration, local school governance was firmly ensconced in politics and popular belief even as bureaucratic centralization continued. The path-dependence rationale for local school governance suggests that, whether or not localism is currently the best way to administer public schools as an original matter, to change from the structure in place for

pendent State Constitutionalism, 115 PENN. ST. L. REV. 783, 799 (2011).

80. See, e.g., OLD DELUDER SATAN LAW (1647), reprinted in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY COLONY 203 (Nathaniel B. Shurtleff ed., 1853).

81. See Justin R. Long, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. PA. L. REV. 277, 281 (2002).

82. William A. Fischel, *Neither "Creatures of the State" nor "Accidents of Geography": The Creation of the American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177 (2010) (finding that between 1910 and 1970, massive consolidation of school districts occurred across the country, particularly as rural one-room schoolhouses joined together to better prepare students for the increasing rigors of high school).

the last 300 years would be too costly to be worthwhile. These costs would include not only the administrative burden of shifting local school bureaucracies to a central administration (minus any efficiencies gained from scaling up), but also the social or political distress that parents and children would experience from having to adjust to the new way of doing things. Indeed, for a variety of reasons (including race-based fear), the political opposition to any effort to explicitly centralize public education governance seems nearly insurmountable.⁸³

Despite this line of argument and the Supreme Court's rosy rhetoric about the tradition of localism in American public education,⁸⁴ the historical reality tells a different story. Fischel described rural consolidation into regional districts.⁸⁵ In the second half of the 20th Century, education policy centralized even further. The national government's interest in public education began a rapid expansion. In special education, preschool education, girls' education, English language learners' education, and poor children's education, the federal government linked massive new appropriations to demanding educational standards.⁸⁶ These investments were followed by even more federal oversight of local education exemplified by the No Child Left Behind Act of 2001. Fundamental governance questions like how to evaluate and manage school staff are now driven primarily by federal officials, as we see in the U.S. Department of Education's recent rejection of Washington State's request for a waiver from federal rules requiring students' test scores to be included in teacher evaluations.⁸⁷ Localists lament this creeping nationalism. But where school governance has been getting increasingly centralized consistently for nearly the last two hundred years, and now sets policy for curriculum, hiring

83. See, e.g., *6 Memphis Suburbs Approve School Districts*, ASSOCIATED PRESS, July 16, 2013, available at <http://bigstory.ap.org/article/6-memphis-suburbs-approve-school-districts> (describing how small municipalities outside of Memphis formed their own local school districts to avoid a planned merger with the Memphis City school system).

84. See, e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974).

85. William A. Fischel, *Neither "Creatures of the State" nor "Accidents of Geography": The Creation of the American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177, 194–98 (2010).

86. See, e.g., The Education for All Handicapped Children Act, the Elementary & Secondary Education Act, Title I, Title VII, and Title IX.

87. See Niraj Chokshi, *Washington Becomes First State To Lose Its Waiver From No Child Left Behind*, WASH. POST, Apr. 24, 2014, <http://www.washingtonpost.com/blogs/govbe-at/wp/2014/04/24/washington-becomes-first-state-to-lose-its-waiver-from-no-child-left-behind/email/>.

and firing of teachers, and even student testing, the argument that *path dependence* promotes localism seems more like fantasy than the pragmatism it purports to be.

B. Non-consequentialist localism

1. Inherent Historical Priority and Natural Law

Non-consequentialist localists support small, geographically bounded school districts without regard to whether such districts improve education or politics. Aaron Saiger, following Richard Thompson Ford, calls this view of local districts “pregovernmentalist.”⁸⁸ Like Thomas Cooley, pregovernmentalists point to the historic development of cities as preexisting centralized authority.⁸⁹ In ancient times, large-scale governments drew their power from successful cities like Babylon and Rome, not the other way around. Greek cities developed democracy before they developed a federation, both chronologically and conceptually. In the Anglo-American legal tradition, the shift of power from King John to the barons represented by the Magna Carta was actually a recapturing of local political authority that had been in place before the monarchy centralized its control. In the United States, colonists first established towns and only later developed the infrastructure to support central administration over the outer bounds of their geographic charters. Even in the American West, cities as varied as Detroit, St. Louis, Santa Fe, and San Francisco all predate the broader geographic jurisdiction in which they now find themselves, sometimes by hundreds of years. Localists who extend the tradition of Thomas Cooley rely on this history to justify localism as an innate feature of civilization. Chronological priority equates to moral priority. In this view, legal structures in contravention of the social reality of localism are at odds with human nature.

Thomas Cooley spoke in natural-law terms about the historical and moral priority of local governance, as noted in Part I. With respect to education, the romantic attraction of localism is even stronger. The notion that children are raised first by their families and then by their local communities, and that that incrementally expanding cir-

88. Saiger, *supra* note 37, at 507.

89. See COOLEY, *supra* note 48, at 197 (1868) (describing how, even in the absence of parliamentary authorization, municipalities in England could exercise corporate power by “prescription,” and noting that recognition of this inherent authority carried forward in the United States).

cle flows inevitably from nature, has substantial intuitive appeal. Communitarians like Michael Sandel argue that human identity is formed by ever-expanding circles of intimacy and obligation that become less influential as they extend beyond a person's direct acquaintances.⁹⁰ Religious scholars like Richard Garnett argue that parents, and by extension their chosen associations, have not just a legal but a moral claim, above the centralized state's, to direct their children's education.⁹¹ One might read these philosophies as a basis for doubt about the legitimacy of the central state or "law" as an appropriate decision-maker for normative educational priorities. For those committed to a family-centered view of public education, local governance may be no more than a compromise solution that affords parents maximal control (while assuring greater educational opportunity than home-schooling could provide).

But the exercise of parental "choice" always takes place in the context of the legal structures surrounding education. A parent who "chooses" a private school does so because we have collectively authorized that choice under the Constitution,⁹² bolstered the school's attractiveness by tax law,⁹³ and weakened the attractiveness of public alternatives by appropriations law. A different parent who "chooses" a small public school in a wealthy suburb is responding to the laws establishing local school districts that make sure the suburb's education resources are not diverted to urban or rural schools. The parents' choices are not "natural" at all; these choices are the product of a complex set of responses to an all-pervasive legal regime that creates the baseline incentives against which the choices play out. Few courts have better expressed this understanding of the *constructedness* of school choice than the Connecticut Supreme Court in *Sheff v. O'Neill*.⁹⁴ There, the court determined that the state constitution re-

90. See MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 201–08 (1996). But see BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* (rev'd ed. 2006) (seeking to explain the strong affective attachment people exhibit for nation-states, well beyond their intimate circles).

91. See Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 113–14 (2000).

92. See *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

93. See IRS statutes authorizing tax deductions for contributions to non-profit educational institutions and those institutions' exemption from corporate taxation. 26 U.S.C. § 170(c)(4) (2012); *id.* § 501(c)(3).

94. *Sheff v. O'Neill*, 678 A.2d 1267 (1996).

quired the state to correct racially segregated schools, even where the segregation had arisen *de facto* rather than *de jure*.⁹⁵ But the court insisted that, as with any tort, the plaintiffs still had the duty to establish the state's role in causation. The court held that the state, not mysterious "private" choices exercised in isolation, had caused segregated schools:

[Even though there had never been *de jure* segregation in Connecticut schools, t]he state has nonetheless played a significant role in the present concentration of racial and ethnic minorities in the Hartford public school system. Although intended to improve the quality of education and not racially or ethnically motivated, the districting statute that the legislature enacted in 1909, now codified at § 10-240, is the single most important factor contributing to the present concentration of racial and ethnic minorities in the Hartford public school system. The districting statute and the resultant school district boundaries have remained virtually unchanged since 1909. The districting statute is of critical importance because it establishes town boundaries as the dividing line between all school districts in the state.⁹⁶

The decision to move to a white suburb certainly must have felt like a private, even intimate, choice to each of the families that fled inner-city Hartford schools. But the *Sheff* Court understood that those repeated parental choices about what was best for their children only made sense against the pre-existing legal background that established the school district lines that offered a refuge from the urban system. This legal background is, itself, not natural. It is the manifestation of codified statutes, passed by human legislators, and implemented by human agencies and courts. The background is, in other words, a matter of democratic decision-making. Parents will always try to make the best choices for their children. But they will always make those choices from the fixed array predetermined by legal arrangements. And those arrangements could be structured differently.

95. *Id.*

96. *Id.*

2. Property

In some ways, the Supreme Court's decisions in *San Antonio*,⁹⁷ *Milliken*,⁹⁸ and *Missouri v. Jenkins*⁹⁹ also express a second non-consequentialist view of the right of parents to make educational decisions without regard to the welfare of the commonwealth.¹⁰⁰ In those cases, the Court suggests that local school governance deserves protection as a kind of quasi-Constitutional property right of the local residents. Property rights can be thought of as merely tools toward economic efficiency,¹⁰¹ but not necessarily. Localism as property is non-consequentialist because the right to security in one's property is closely linked to a person's own dignity, and so is an end-value of its own.¹⁰²

The Supreme Court's description of locally controlled schooling demonstrates several sticks of the property "bundle."¹⁰³ Because centering school governance on residence in small geographic areas means that control over public schools tracks private housing patterns, such control shares many characteristics of real property. In particular, as I describe below, Supreme Court doctrine establishes local governance of public schools as excludable, alienable, heritable, and ordinarily protected from central-government impairment. To the extent that the public perceives local school governance as a kind of property right,¹⁰⁴ losing that property would count as a cost attached to any shift away from localism.

97. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

98. *Milliken v. Bradley*, 418 U.S. 717 (1974).

99. *Missouri v. Jenkins*, 515 U.S. 70 (1995).

100. This line of thinking has antecedents in cases like *Pierce v. Soc'y of Sisters* and *Meyer v. Nebraska*, which suggested that parents hold a constitutional right to exercise at least some control over the contents of their children's education even against a democratic conclusion that the parentally preferred content would conflict with the public good.

101. Cf. Guido Calabresi, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (describing property rules as a societal choice to allocate valuation of the right to the market).

102. Cf. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, 39 TULSA L. REV. 663, 689 (2004) (arguing that private property is not justified merely by economic efficiency).

103. See Aaron Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 93 (2009) ("By purchasing or renting a home, one also purchases or rents a basket of local public goods.").

104. See e.g., *Milliken v. Bradley*, 418 U.S. 717 (1974) (extending concept of right of exclusion).

Local governance is excludable, in the rhetoric of the Court, because citizens have a protected right to keep out students and their families from beyond the geographic borders of their district. Consider the *Milliken* Court's holding: "To approve the [interdistrict desegregation] remedy ordered by the [trial] court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court."¹⁰⁵ The verbs "impose" and "committed" in this sentence reveal the Court's view that desegregation is a deprivation of some right. It withdraws from the (white) residents of suburban school districts something that is rightfully theirs—the power to exclude non-resident children from their schools. We get a sense in parts of *Milliken*—such as in the Court's remark that "a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education in Michigan"—that desegregation across local boundaries deprives suburban parents of their settled expectations, a concept central to property law.¹⁰⁶ Those expectations are to exclude "outsiders" from the benefit of their locally controlled schools.

The collective right to exclude is so strong that sending a child to the "wrong" district can, in some states, be prosecuted as the crime of "larceny," as one Connecticut grandparent learned the hard way.¹⁰⁷ But beyond exclusion of the public service of education to outsiders, local school districts may also exclude outsiders from exercising control over that education. The *Milliken I* Court said it plainly, even if unfounded on historical evidence:

Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is

105. *Id.* at 744.

106. *Id.* at 742–43.

107. See Kathleen Megan, *Federal Judge Rules Against Grandmother Seeking Damages in School Residency Case*, HARTFORD COURANT, July 24, 2013, http://articles.courant.com/2013-07-24/news/hc-district-court-school-residency-0725-20130724_1_federal-judge-rules-first-case-voccio (reporting the lack of any federal remedy for a grandmother who was convicted of larceny after sending her custodial grandchildren to school in a different district from where they lived).

more deeply rooted than local control over the operation of schools. . . .¹⁰⁸

The first question the *Milliken* Court expressed as a reason to doubt the permissibility of a court-created metropolitan school district was “What would be the status and authority of the present popularly elected school boards?”¹⁰⁹ The question went unanswered. In context, the Court used this question as a kind of *reductio ad absurdum*, suggesting that anything that might confuse—let alone destroy—local school board authority would be impermissible bordering on inconceivable.

Control over local schools is also alienable because the local districts can expand or contract their borders (albeit typically requiring state permission) to include or exclude land and populations deemed materially desirable or pernicious.¹¹⁰ These shifting borders extend the benefits of control over certain local schools to previously external groups, presumably because those groups bring advantages to the local district. Alternatively, if a district majority wishes to reject some part of the local population from school governance, it can retract the geographic borders to exclude the undesirable neighborhoods. These shifting geo-political borders mimic the purchase or sale of governance rights; for the right exchange of resources, local school districts can extend a vested interest in the district (including governance).

The alienability of local school governance appears more tangibly when considered in connection with real estate. Where school attendance is linked to home ownership,¹¹¹ the property values of real estate incorporate the perceived quality of the local schools, which in turn rests at least in part on the ability of the school district to exclude undesirable outsiders from both attendance and governance. In this light, even an heir to or purchaser of the real property who has no children gains the value of local control over schools in the price of her house. Of course, an heir with children inherits both the elevated

108. *Milliken*, 418 U.S. at 742.

109. *Id.* at 743.

110. See generally Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 933 (2010) (describing how local borders can shift in space to protect resources for elites and to exclude politically undesirable citizens).

111. See, e.g., *Sheff v. O’Neill*, 678 A.2d 1267, 1273 (Conn. 1996) (noting that state statutes compel Connecticut children to attend the school district “in which they reside”).

property value and the right to use the local schools. For elite families, the right to attend well-supported schools in wealthy localities, with their children's fellow students limited to others from economically privileged families, offers those children greater access to the educational opportunities necessary to succeed as adults. For children confined to poor local districts with little material or social support for schooling, their restricted access to educational opportunity perpetuates the educational and economic disadvantage of their families. In this way, the privilege of local school governance assures its own perpetuation through the generations, mimicking the property-law concept of heritability.

The idea of public schooling as private property seems antithetical to democratic education. Regardless of what understanding of democracy, *de jure*, one holds, the idea that morally innocent children are deliberately extended citizenship development (and therefore political power as adults) in varying quality depending on their parents' wealth cannot be squared with a government founded on the notion that "all men are created equal." We might observe differential development of political power as a consequence of wealth, and we might allow it as an exercise of economic freedom. But for courts and political institutions to consciously structure schools to promote these inequities is the definition of plutocracy, not democracy.

Nevertheless, even if we accept the idea of public education as a private property right, the rhetoric adopted by the Supreme Court in defense of localist perquisites against the state simply does not comport with contemporary property law. The Supreme Court has repeatedly held that property rights remain subject to law, including future changes in the law.¹¹² A departure from local school governance would not rise to a Constitutional violation, even under the recent precedents of the current highly property-protective Court. And it remains federal doctrine, as it always has, that states have near-complete discretion to structure their internal government as they prefer.¹¹³ From a federal perspective, localities truly are administrative conveniences of the states. So background principles of state law that

112. See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005) (reaffirming that mere adjustment in regulation of property rights does not constitute a taking requiring compensation).

113. See generally G. Alan Tarr, *Explaining Sub-national Constitutional Space*, 115 PENN. ST. L. REV. 1133, 1135–36 (2011).

authorize state intervention in public education, even education conceived as property, cannot offend federal law.

3. Parental Rights and Pluralist Protection of Illiberal Enclaves

Also non-consequentially, many advocates support localism as a basic right of parents (or other custodial caregivers) to direct their children's education, regardless of any ensuing social welfare gains or losses.¹¹⁴ Advocates of strong caregiver control like Anne Dailey view decisions about schooling as an essential right of parents to raise their children. Because parents who love their children and who know their children intimately are best suited to reach decisions that will fit the children's educational needs, school governance should be tailored to maximize this control.¹¹⁵ From this view, to the extent that local control of schools gives parents more power in educational decision-making, localism is the best protector of this right. Support for this approach appears not only in scholarship,¹¹⁶ but also in court decisions like *Pierce v. Society of Sisters* and *Meyer v. Nebraska*. In *Pierce*, the Supreme Court invalidated a state statute requiring all children to attend public (rather than private) school as an infringement of parents' right to raise their children.¹¹⁷ In *Meyer*, the Court upheld the right of a teacher to teach German, as locally desired, despite a state statutory prohibition on instruction in that language.¹¹⁸ Part of the Court's rationale again rested on the right of parents to make substantive decisions about their children's education. In essence, both decisions infer Constitutional limits on the power of democratic government to interfere with parental control of children's education. Although these limits are not based in Constitutional text any more than the right to education itself is, the Supreme Court spoke enthusiastically about the importance of parents' freedom to select schools that would satisfy their private preferences, regardless of

114. Cf. Richard W. Garnett, *The Right Questions About School Choice: Education, Religious Freedom, And The Common Good*, 23 CARDOZO L. REV. 1281, 1282 (2002) (arguing that school choice through vouchers gives poor parents the "moral" right to select their children's education that wealthy parents obtain through buying into privileged local school districts).

115. See Dailey, *supra* note 14.

116. See, e.g., Roderick M. Hills, Jr., *The Case For Educational Federalism: Protecting Educational Policy From The National Government's Diseconomies Of Scale*, 87 NOTRE DAME L. REV. 1941, 1942 (2012).

117. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

118. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

whether such preferences are democratically preferred as good for the state or public generally. Local districts help to accomplish this protection for parental privilege.

At a broader scale, placing family at the center of educational decisions, and carrying out that family-centered approach through multiple small geographically-bounded school districts, creates space for pluralism. The power parents feel over their localized school authorities holds special relevance for communities that do not share foundational normative commitments with the broader society. Localities like Kiryas Joel, New York, where an illiberal minority has succeeded at creating an enclave of surprising autonomy,¹¹⁹ offer parents the possibility of protection from cultural subordination by the larger majority. Particularly for communities that reject the liberalism that dominates the contemporary American system of government, local borders create literal space for insiders to create a community of their own. Because American municipalities give life to cultural, racial, and class borders in real space, legalized local borders spare residents the friction of negotiating across those literal and metaphorical borders. In these enclaves, the Satmars need not reach political compromise with the secularists in the communities surrounding them.

For many scholars, localism's capacity to create and protect normatively-divergent enclaves is an impressive virtue.¹²⁰ These havens, the argument goes, simultaneously grant illiberal minorities legal space to carry out their communal identities while limiting their motivation and ability to undermine the larger liberal regime. In the absence of localized spaces of legal significance—and particularly with respect to schools, given their role in social reproduction—illiberal minorities would find even elementary fulfillment of their social values impossible. Dispersed across political units dominated by majoritarian liberalism, members of these communities would lose every vote on every issue they held most dear. They would confront the Scylla of assimilation and the Charybdis of isolation, lacking enough group coherence to prevail upon internal dissidents, while also lacking enough numbers to prevail upon the external majority.

Because members of these groups can experience the absence of a space to live in community together as an assault on central aspects

119. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

120. See, e.g., Richard W. Garnett, *Judicial Review, Local Values, and Pluralism*, 32 HARV. J.L. & PUB. POL'Y 5, 5–6 (2009).

of their identity, they would have strong incentives to engage with and undermine the broader liberal regime if the enclaves lacked sufficient autonomy.¹²¹ Private schools can and do relieve some of this pressure. Early 20th Century Roman Catholics would likely have gone to great lengths politically to infuse Catholic values in at least some public schools if *Pierce v. Society of Sisters*¹²² had not Constitutionally protected their right to establish and maintain parochial schools. But private schools are only a partial escape valve for the pressure from illiberal communities to build an educational system in accord with their values. American Creationists, for example, have not felt content with the widely-available alternatives to public schools offered by home schooling or private religious academies. Instead, they have consistently sought and won elected office with power over public schools at both the local and state levels.¹²³

Religion forms an especially central aspect of its adherents' identities, and so religious communities have special reason to seek homogeneous control over schools. But even communities far less distinctive than the ultra-orthodox Jews of Kiryas Joel or the polygamous Mormon fundamentalists of Colorado City, Arizona can protect communal norms through local control of public schools. As Richard Schragger aptly puts it, "The boundary problem in local government law thus is the problem of pluralism."¹²⁴ Localized districts permit schools in some places to prioritize German in the curriculum where other places teach Spanish, or to assign *The Color Purple* in lieu of *Atlas Shrugged*, or to train a hockey team instead of a football team. To the extent that these variations reflect communal values, the more homogeneous the community is the less difficult it will be for parent-activists to obtain a localized consensus on these educational choices. Locating control over public schools at the local level puts this sort of homogeneity within reach for some communities.

121. Cf. Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of Hosanna-Tabor*, 108 NW. U. L. REV. (forthcoming 2014) (arguing that communities of religious believers require certain immunities from generally applicable secular law to maintain their autonomy and to continue defining their own communal borders).

122. See *Pierce*, 268 U.S. 510.

123. See, e.g., Dan Harris, *Small Group Wields Major Influence in Intelligent Design Debate*, ABC NEWS, Nov. 9, 2005, <http://abcnews.go.com/WNT/story?id=1297170> (describing creationists on the Kansas Board of Education).

124. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 374 (2001).

True local control of public schools does permit pluralist variation, including space for illiberal communities to pursue their own policy preferences through geographic concentration.¹²⁵ Already existing levels of centralization, such as the federal government's insistence on frequent standardized testing, weaken this pluralism. The remaining room for the pursuit of minority values in public education may give an outlet to communities that would otherwise isolate themselves even further from the national polity, but whether that function would be better served by private schools remains debatable. The declining fortunes of parochial schools across the country may indicate a crowding-out effect: as parents find public schools (including charter schools) that foster the values they prefer, the parochial schools may be losing some comparative advantage. Ultimately, a pluralist system that permits illiberal groups to retreat from the broader society might be worth preserving. But devising nominally public schools to provide these havens is undemocratic. Instead of inviting these citizens to learn the social and intellectual skills they need to engage their fellows in politics, the pluralist approach fosters an isolationism that yields little more than an agreement to disagree. No mutual self-governance with the larger society is possible for such a fragmented polity.

IV. PRACTICAL CHALLENGES TO LOCALISM AS DEMOCRATIC CONTROL

A. *Localism Is Conflated with Greater Democratic Engagement*

All of the rationales described above, of both utilitarian and non-consequentialist types, take as given the increased democratic accountability of local government. By electing local school boards, convention suggests that voters maximize their control over the public schools and the sense of accountability to the local public experienced by school officials. Finely-tuned local values get expressed in a way that would be impossible at a larger scale because of more tenuous democratic accountability.

As I explain in Part III. C. below, Amy Gutmann¹²⁶ shares this assumption, querying only the extent to which local control should give way to central protection of the fundamental norms of non-

125. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (affirming the Amish right to withdraw their teenagers from public schools in favor of their own non-academic education).

126. See GUTMANN, *supra* note 31.

discrimination. Gutmann describes the conflict of democratic school governance as a choice between a less-democratic but more liberal-egalitarian central state and a more-democratic but more inequitable local authority.¹²⁷ Gutmann, and her philosophical predecessor John Dewey, are primarily motivated by the capacity of public schools to inculcate or at least develop the attributes of a democratic citizen in their students. From their perspective, the increased democratic *governance* available through local control translates to increased democratic *education* for the children subject to that governance. In essence, to learn to be democrats children must see their parents practicing democracy, which requires at least some matters of importance to be removed from the control of experts or remote authorities and left to popular will. In other words, as Aaron Saiger has adroitly put it, “We do democracy in order to teach democracy, and teach democracy in order to do democracy.”¹²⁸

Even the leading objection to localism also starts from the premise of equating local control with greater democratic accountability. The typical objection of this sort only asserts that the increased cost in inequality—and particularly racial inequality—outweighs the advantages of parents’ increased democratic control over schools.¹²⁹ The state and federal courts have routinely confronted disputes centered explicitly along this axis. For example, in *San Antonio*, the Supreme Court rejected an equal protection challenge to the wildly disparate public-school financing in Texas in part based on the importance of protecting local control from interference by the federal courts.¹³⁰ In that case, “local” control meant both the state, whose statute dictated the inequitable financing scheme, and municipalities, which could differentiate their schools from other localities’ by applying different levels of material support. In fact, many Texas municipalities would have preferred to spend even more of their meager resources on schools, but were barred from doing so by state law.¹³¹ Nevertheless, at both the state and municipal levels, the Court per-

127. *Id.*

128. Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 522 (2010).

129. See, e.g., Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 630 (2011).

130. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

131. *Id.* at 69 (White, J., dissenting).

ceived preserving democratic control to be more important than assuring equitable resource distribution. Similarly, in *Milliken*, the Court faced a choice between two competing values: racial integration and local democratic control. All parties agreed that local majorities opposed the lower court's integration plan; the choice for the Court was how to weigh that democratic preference with the demands of equal protection.

In older cases where advocates for greater school equality won, like *Washington v. Seattle School Dist. No. 1*,¹³² where the Court upheld a local school board's intradistrict busing policy against a state statute barring the local policy, the Court described the dispute as essentially about empowering local democracy. At the state level, the New Jersey Supreme Court has engaged in a decades-long balancing of local democratic control against principles of equality and educational adequacy.¹³³ While at one level these cases indicate a conflict between the *state* legislature and *state* judiciary, observers and participants alike understand that state legislators who have resisted the *Abbott* rulings over the last decades are representing the interests of local suburban districts. Voters in these districts would like the freedom to allocate their tax resources to their "own" schools rather than see redistribution to impoverished districts.

The Supreme Court's more recent intervention in public school desegregation, *Parents Involved in Community Schools*, might seem at first glance to stand as an exception to the polar division between equal protection and local democracy, with the Court rejecting a democratically elected local school board's policy that would have advanced desegregation.¹³⁴ From the Court's perspective, however, the conflict was still between local democracy and centrally-imposed equality norms. Justice Kennedy's concurring opinion for the Court acknowledged the value of democratic accountability obtainable through local school governance, but held that equal protection demanded color-blind school assignment.¹³⁵ This perspective led the Court to impose what it perceived as national values protecting the individual "choice" of white parents to pick schools by moving to their associated geographic district against the local community's ex-

132. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

133. *See Abbott v. Burke*, 495 A.2d 376 (N.J. 1985).

134. *Parents Involved in Cmty. Sch. v. Seattle*, 551 U.S. 701 (2007) (disapproving a local school board's desegregation plan on equal protection grounds).

135. *See id.* at 786–87 (Kennedy, J., concurring).

pressed need for integrated schools. Deracinated individuals, stripped of their social and racial context, formed the object of attention in Chief Justice Roberts's opinion for the Court.¹³⁶ The Court exercised its national authority to trump local democracy that the Court perceived to have been captured by special interests.¹³⁷

There are some sound reasons for Gutmann and other localists to believe that locally elected school officials are more accountable to politically active citizens. Localists would likely concede that parent activism directed at school districts is not the same as parent activism directed at individual schools. School principals are generally not directly accountable to voters. On the contrary, school administrators usually belong to unions of their own and are protected by collective bargaining agreements from excessive interference by politicians or the voters who elect them. Widespread norms against school boards' micro-managing individual schools and in favor of day-to-day deference to expert top-level administrators like district superintendents further dilute the formal accountability of individual school officials to parent-voters. Instead, some parents exercise "soft power" over school officials, by meeting with teachers or administrators, discussing homework assignments or curriculum, or granting or withholding volunteer support for school activities.

Still, American school boards are typically elected. Parents concerned about district-wide policies can leverage their existing school-based associations and experience with activism to form district-wide coalitions for democratic advocacy, even if those coalitions remain temporary, contingent, and fluid in their aims and membership. As described above, the smaller (and more homogeneous) the district, the easier it will be for activist parents to form social networks across neighborhood-school communities. Fewer social "nodes" will be necessary to reach an influential number of activists, fewer cultural gaps will mar or block efforts at communication, and fewer resources will be required to span the physical geography of the district. Highly localized and homogeneous districts, then, maximize the potential for this sort of activism. Once formed, these local coalitions have practical tools for influencing district policy. Elected school boards commonly hold public-comment sessions at which parents can voice their

136. *See id.* at 730 n.14.

137. *See* Steven L. Winter, *John Roberts's Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 558 (2009) (arguing that the Roberts opinion perceived the Seattle school board as having fallen prey to political correctness and racial interest groups).

views. Public rallies can draw attention to education issues from a broader range of voters. Parents' filling an otherwise sparsely-occupied hearing room, even without speaking directly, can convey a powerful message to board members. Crowds gather in the galleries of state and national legislatures, but the task of organizing activists across geographic, cultural, racial, and class lines at the broader levels of government becomes increasingly more complex and the challenges can be too much for some kinds of activists.

A gap remains between parental influence on board members in the course of policy-making and the board members' real or perceived risk of losing office at the ballot box. Local coalitions that form around specific educational issues may not last through election season. But advocates for localism extol the relatively small number of votes necessary to seat or unseat a local school board member, in contrast to the daunting numbers necessary in larger-scale races. Parents may feel more empowered where elections turn on a few hundred votes. Perhaps, even more importantly than electing board members, voting for school budgets and bond issues may give parents a sense of democratic control over their local schools. Many local districts require popular approval of school budgets. Politically, these campaigns tend to set senior citizens opposed to higher taxes against parents pursuing better schools. But the campaign to approve school budgets itself frequently brings parents together to protect their interests, strengthening local networks and imbuing ordinary voters with an earned feeling of empowerment. The organizing process may bring otherwise-apolitical parents to unexpected leadership roles, and the local nature of the campaign often leads to community forums or public discussions where the supporters of public schools can concretely articulate the benefits they seek. When a school budget wins electoral approval, voters feel the satisfaction of immediate gratification as they see the school district build new facilities, fund new teams, or hire new staff.

B. Practical Political Realities Decouple Localism and Accountability

Despite the widespread faith that local government is the most accountable to the citizens, even among critics of localism, the reality of that claim is weakly established at best. The conflation of localism with accountability ignores several practical flaws with political prac-

tice in municipalities. In this section, I describe some of the reasons to doubt the accountability of local school officials.

1. Rational low-information voters

David Schleicher argues, counter-intuitively, that local voters simply know much less about local elected candidates and officials than they do about national or even state politicians.¹³⁸ Particularly in large cities, but also in many rural and suburban towns, the two-party system that contends for national offices simply does not function. Instead, one party typically has such control of local government that the primary is the only potentially meaningful vote citizens can exercise. In those situations, the voters' normally dominant indicator of which candidate's views comport with their own—party affiliation—serves no function. Even where local elections are contested between the two national parties, there is little natural correlation between a party's national platform on social or economic issues and its platform on street-sweeping or downtown development.¹³⁹ Media coverage exacerbates the information gap between national or state campaigns and local campaigns; the former get much more coverage, which permits even casually interested voters easier access to the information they need for a meaningful choice. This problem gets continually worse as local papers slash their staff and replace their content with AP reports or other nation-focused filler.¹⁴⁰ As a result, voters who are busy with their own lives and cannot afford painstaking research to identify the candidate closest to their own views struggle to find meaning in their local suffrage. Schleicher argues that this disillusion may partly explain low voter turn-out in municipal primaries and elections, especially when we would expect voting levels to be highest at the local level if that were truly the most accountable layer of government (as popular rhetoric suggests).¹⁴¹ In school board elections, the difficulties of democracy Schleicher associates with localism are even worse. There is little to no media coverage of

138. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007).

139. *See id.* at 425.

140. *See* Ashley Parker & Jonathan Martin, *Population Shifts Turning All Politics National*, N.Y. TIMES, June 15, 2014, http://www.nytimes.com/2014/06/16/us/population-shifts-turning-all-politics-national.html?_r=0 (describing the increasing ignorance of voters about local politics as news media become increasingly nationalized).

141. *See* Schleicher, *supra* note 138, at 425.

the candidates; party affiliation is either politically irrelevant (because one party dominates) or offers no perceptible signal about the candidate's future performance in office; the power is typically distributed over a board, permitting incumbents to obscure blame for collective failures; and the board's actual authority to promote policy remains opaque, leaving voters without a clear sense of what issues they should hold board members accountable for. The result is a system that *appears* highly accountable, in that relatively few voters could change an election outcome with relatively little effort, but in fact is almost completely unaccountable because all but the most active and informed voters lack sufficient information to make rational decisions about school officials' potential or actual performance.

The difficulty for even the most interested and best-educated voters in learning adequate information about local school-board politics in order to represent a meaningful vote is sharply exacerbated for voters who lack adequate training in citizenship. Historical and contemporary pervasive inequity across local school districts has left many citizens with dismal public educations. Poor education often leaves these adults trapped economically and socially in the same kind of low-resource local-government district that they were raised in.¹⁴² Consequently, the very skills most needed to win more resources through democratic activism are in short supply in these districts.¹⁴³ The virtues and competencies of democratic citizenship that Dewey,¹⁴⁴ Dailey,¹⁴⁵ and Guttman¹⁴⁶ advocate as vital for public schools to develop (as I describe above) are left raw and untapped in high-concentration poverty school districts. Voters in these districts lack the education they would otherwise use to read candidates' policy proposals; to critically evaluate competing claims; and to understand complex factual claims predicated on background knowledge of science, economics, or other fields. Of course, none of this is to say that these citizens lack intelligence, good will, or an authentic understanding of what their children need from schools. But education ac-

142. See SUSAN EATON & GINA CHIRICHIGNO, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE & JUSTICE, *THE IMPACT OF RACIALLY DIVERSE SCHOOLS IN A DEMOCRATIC SOCIETY* 3–4 (2010), available at <http://prrac.org/pdf/DiversityResearchBriefNo3.pdf>.

143. Wilbur C. Rich, *Putting Black Kids into a Trick Bag: Anatomizing the Innerscity Public School Reform*, 8 MICH. J. RACE & L. 159, 168–90 (2002).

144. See DEWEY, *supra* note 23.

145. See Dailey, *supra* note 14.

146. See GUTTMANN, *supra* note 31.

tually matters. Uneducated, and therefore politically unsophisticated, voters are easy to mislead. If these citizens even choose to vote, they are unlikely to be able to hold elected school officials rationally accountable for their policy choices.

2. Racial isolation and racism

Opportunities for full participation in democratic life vary widely and unfairly across localities. The concentration of racial minorities and poor people in cities means that those residents are subject to state authority more intensively than residents of more financially autonomous suburban localities.¹⁴⁷ The effects of racial segregation in schools linger for generations,¹⁴⁸ leaving graduates less comfortable in integrated housing and in integrated workplaces. This not only helps to perpetuate racial segregation, it weakens the social ties crossing town lines. Citizens who should be acting together in the broader political sphere to carry out collective self-governance lack the shared world views necessary to exercise an empathetic imagination. As I discuss below, in Part IV, the legal philosopher Steven Winter argues that the mutual recognition and respect that flows from empathy is an essential characteristic of democracy.¹⁴⁹ Without mutual recognition and respect, citizens divide into constituencies of competing special interests, each locality out for itself.¹⁵⁰ Race and racial isolation stand powerfully as obstacles to this mutual engagement.

Localities divided by race have inequitable effects on the education of children. First, the continuing relevance of racism, and race's correlation with economic class, reduces the purported virtue of localism that allows voting with one's feet. The value of leaving an uncongenial locality can be less for race and class minorities than for white, economically-secure residents. For some students, the move from a poor minority school district to a wealthier, whiter district is

147. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 803-06 (1992).

148. Cf. AMY WELLS ET AL., BOTH SIDES NOW: THE STORY OF SCHOOL DESEGREGATION'S GRADUATES (Univ. of Cal. Press, 2009) (describing the increased mobility and socio-economic opportunity available to graduates of integrated schools).

149. See discussion *infra* Part V.B.

150. See, e.g., MYRON ORFIELD, THOMAS LUCE, & AMEREGIS, DETROIT METRO-PATTERNS: A REGIONAL AGENDA FOR COMMUNITY AND PROSPERITY IN DETROIT 2-3 (2008), available at http://www.law.umn.edu/uploads/99/41/99413c1fc53095e4382976e4bd63a38f/38_Detroit_Metropatterns.pdf.

often accompanied by deep psychological challenges.¹⁵¹ For example, most suburban schools in the early stages of integration lacked any deliberate program to teach students about healthy race relations. The absence of such a curriculum itself implicitly conveys important messages to students: racial tension is a taboo topic unworthy of open discussion, and that there is nothing distinctive or noteworthy about diverse racial backgrounds, such that minorities must assimilate into the existing school culture to succeed. Adults, moreover, tend to be no better than adolescents at avoiding racial tension, so can offer no better strategies than the law of the schoolyard.¹⁵² In this environment, it should come as no surprise that racial minorities typically self-segregate in the lunchrooms of integrated schools.

Academic differences between schools dominated by children whose parents went to college, have books at home, are economically secure, or benefit from white privilege, and schools of concentrated poverty and racial isolation also taint the transition of students moving from an urban school to a more conventionally successful school somewhere else. The sharp differences in curriculum, discipline standards, college-bound expectations, and teacher qualifications between poor urban schools and wealthier suburban schools combine to create obstacles in the new school even for poor and minority students who were doing well in their previous school. These differences might be enough on their own to create a performance gap, but the gap is worsened by the psychological effect of minority students who know that they are expected to do worse—the self-defeating cognitive bias called “stereotype threat.”¹⁵³

Where town lines correspond with racial lines, the possibility of genuine mutual engagement in republican politics becomes even more elusive. Political leaders and citizens educated in racially isolated school districts have not been trained in the civic virtues democratic theorists describe. Speech patterns, hairstyles, musical tastes, and fashion are merely the outward signifiers of cultural differences that make cross-racial communication in America challenging at the best of times. How can I take you seriously when the waist of your jeans is below your hips? *How can I take you seriously when the waist of your jeans is above your navel?* Where this miscommunication finds

151. See WELLS, *supra* note 148, at 6.

152. See *id.*

153. See generally L. Song Richardson & Phillip Atiba Goff, *From Interraciality To Racial Realism*, 92 TEX. L. REV. 669 (2014) (book review) (describing stereotype threat).

expression as a political debate over resource allocation to racially identifiable localities, the heightened stakes promote even more friction and misunderstanding. In this political context, tying schools to the political structures of the towns helps to cement the town-as-interest-group mentality.

3. Formal and informal control of seemingly local structures

Even to the extent that voters exert disproportionate influence on local school boards, the space for genuine policy-making discretion in those boards is much less than is widely believed. Already existing state and federal control over public education is so pervasive that it undermines the claim that citizens can hold education officials accountable through local elections.¹⁵⁴ The Supreme Court itself, in the same *Milliken* case that so extravagantly extolled the democratic priority of local school governance, acknowledged the complete control of education by layers of government above the local level.¹⁵⁵ This understanding of school districts as entirely under state control is carried to its limit by the State of Michigan's current relationship with the Detroit public school system, which is ruled single-handedly by a gubernatorial appointee dubbed an "Emergency Manager."¹⁵⁶ While state management of Detroit schools is extraordinary, the Home Rule clause in Michigan's constitution that purports to protect local government is not.¹⁵⁷

The federal government, too, already has far greater control over public schools than traditional localist rhetoric reveals. Congressional

154. *Cf.* *New York v. United States* 505 U.S. 144 (1992) and *Printz v. United States* 521 U.S. 898 (1997) (expressing concern that federal officials not evade democratic accountability for their policy choices by making state officials appear responsible).

155. *Milliken v. Bradley*, 418 US 717, 726 n.5 (1974). School districts in the State of Michigan are instrumentalities of the State and subordinate to its State Board of Education and legislature. The Constitution of the State of Michigan, Art. VII, § 2, provides in relevant part: "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." Similarly, the Michigan Supreme Court has stated: "The school district is a State agency. Moreover, it is of legislative creation . . .". *Attorney General ex rel. Kies v. Lowrey*, 92 N.W. 289, 290 (Mich. 1902). "Education in Michigan belongs to the State. It is no part of the local self-government inherent in the township or municipality, except so far as the Legislature may choose to make it such. The Constitution has turned the whole subject over to the Legislature . . .". *Attorney General ex rel. Zacharias v. Detroit Bd of Edu.*, 590, 118 N.W. 606, 609 (Mich. 1908).

156. *See* Detroit Public Schools, *Office of the Emergency Manager*, http://detroitk12.org/admin/emergency_manager/ (last accessed June 10, 2014).

157. *See* MICH. CONST. art. VII, § 22.

interventions like the No Child Left Behind Act¹⁵⁸ link federal funding to schools' adherence to federal curricular priorities. By establishing vast testing requirements—even if states are permitted some discretion to choose those tests—the federal government effectively dictates local schools' curriculum. Failure to teach to the federally-required standardized tests results in such severe penalties for individual teachers, schools, and school districts that local school boards have no functional choice to establish alternative pedagogical priorities. This effect is naturally exaggerated in impoverished localities where school districts are most heavily dependent on resource support from more centralized layers of government, as I mention above in the discussion of Richard Briffault's work.

As political process theory suggests, the misalignment of democratic control and policy-making powers can permit institutions to evade political accountability. The Supreme Court's anti-commandeering doctrine, exemplified by *New York v. United States*, developed with this concern in mind: federal power to compel state legislatures to adopt certain policies would confuse voters into blaming state officials for laws imposed from above. In the context of public school governance, we see an analogous effect.¹⁵⁹ Voters believe they have power over local officials, but in practice those officials must carry out a wide range of educational policies imposed by state and national governments. The result is a practical deficiency in true democratic control.

While one solution to this deficiency might be to restore true policy-setting power to local school boards, there seems to be little political appetite for a full-scale retreat from the modern nation-centered approach to education policy. Even school administrators who chafe under the restrictions imposed by centralized authorities acknowledge the necessity of the vast infusion of resources made possible by the dedication of those central governments to public schooling. In any event, the current arrangement in some ways satisfies the public appetite for local control through misdirection; even if voters don't really realize how little authority their "accountable" local officers actually exercise, voters feel comfortable that their schools are protected by "local" control.

158. No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

159. *New York v. United States*, 505 U.S. 144 (1992). See Mathew D. Adler, *State Sovereignty and the Anti-Commandeering Principle*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 158 (2001).

4. Autonomy of hyperlocalized charter schools

The school-choice movement has grown to dominate discussions of educational reform in high-need areas like New Orleans, Detroit, and elsewhere. Sometimes charter schools are portrayed as a breed of localism, and therefore as a democratic method of governing schools. Charter schools frequently tout their parent engagement¹⁶⁰ and obsess over accountability.¹⁶¹ But whether operated as stand-alone enterprises or as component schools in larger networks, charter schools are not governed by voters. On the contrary, their entire existence is premised on insulation from the rules and procedures imposed by democratically elected school boards and the administrators and staff who report to them. Parents who find themselves dissatisfied with a charter school have few options to advocate for change and may find themselves encouraged to leave the school “community” if they are not perceived to fit in.

Formal statutory law treats charter schools as mini-districts, as if they were hyper-local but still governed by the processes normally associated with elected school boards. This is a false equivalency. Charter schools remove the democratic control over schools and, instead, yield to the authority of experts. Those experts, the charter-school’s board members, might be trained educators—but they are often for-profit managers, foundation executives, or financiers who hold power in the place of local voters. Greater centralization of governance at these schools would mean returning them to the control of democratic institutions.

V. PHILOSOPHICAL OBJECTIONS TO LOCALISM AS DEMOCRATIC CONTROL

Robert Post defined democratic government as the making of laws by “the same people to whom they apply.”¹⁶² This definition is of little aid in considering at what level to set school governance, because it begs the question: exactly what constitutes “the same people”? What people are subject to public education, and what people

160. See, e.g., Harlem Children’s Zone, Our Programs, <http://hcz.org/our-programs/#family> (last visited June 10, 2014) (describing the centrality of family engagement to the charter schools’ educational program).

161. See, e.g., KIPP Results (2014), <http://www.kipp.org/results> (last visited June 10, 2014) (displaying multiple standards by which KIPP charter schools measure and publicly report their own performance).

162. Robert C. Post, *Democracy and Equality*, 1 YALE J. L. & HUMAN. 142, 143 (2005).

set its regulations? Where do we draw the circles to include or exclude fellow citizens? Children educated in Detroit Public Schools grow up to vote in Presidential elections, subjecting the rest of the nation to whatever manner of political judgment the students learned in local schools. Conversely, the decisions made in suburban and rural school districts affect inner-city kids and their communities. The containment of suburban tax revenue in suburban schools, combined with suburban voters' support for state legislative appropriations that shortchange urban and rural schools, reduce educational opportunity in urban cores and rural peripheries, regardless of how the political boundaries are demarcated.

To help sort through these questions, in this Part, I evaluate whether local school districts serve the purposes of democratic-citizen development in public education that I described in Part I above. I begin with a description of Amy Gutmann's argument for localism in public education governance. I then consider Gutmann's position in light of democratic theorist Steven Winter's distinction between a consumerist model of democracy and the requirements of civic republicanism.

A. Gutmann on Local School Governance

In Amy Gutmann's widely influential book, *Democratic Education*, she argues that the principles of "nonrepression" and "nondiscrimination" provide the prerequisites for and limits of democratic control of public education.¹⁶³ For Gutmann, non-repression means that education cannot, consistently with democratic principles, prevent children from learning to rationally consider alternatives to existing social structures.¹⁶⁴ As she puts it, "[a]dults must. . . be prevented from using their present deliberative freedom to undermine the future deliberative freedom of children."¹⁶⁵ Repression, if allowed in public schools, would make children incapable of moving society in new directions, because they would not be free to initiate rational critiques of existing social practices. This would preclude them from using the tools of democracy to enact new policies.

163. See GUTMANN, *supra* note 31, at 44–46.

164. See *id.* at 44.

165. *Id.* at 45.

Nondiscrimination, as Gutmann applies it to democratic schooling, means that “all educable children must be educated.”¹⁶⁶ The current society cannot exclude education from a social group so as to prevent that group from taking its full measure of participation in the democracy.¹⁶⁷ By denying educational entitlements otherwise held in common to certain children for reasons not related to pedagogy, a current majority could cripple the current minority’s children in a way that would prevent them from using superficially democratic processes to prevail—even if the current minority were to become a majority in the next generation.¹⁶⁸

For Gutmann, the dual principles of nonrepression and nondiscrimination justify constraints on democratic majorities.¹⁶⁹ In practice, Gutman notes that these constraints are ordinarily enforced by the courts, through cases like *Brown v. Board of Ed.*¹⁷⁰ Gutmann elaborates her understanding that democratic control must suffer some constraints because temporary majorities might otherwise adopt policies that exclude minority groups from democratic participation or that diminish the possibility of democracy in the future.¹⁷¹ In schools, impermissible policies would include banning books, teaching creationism, or teaching sexist gender roles, among other vices.¹⁷² Affirmatively, democratically constrained public schools would be obliged to teach literacy, numeracy, critical thinking, and toleration, among other virtues.¹⁷³ Political bodies should not violate these constraints, in Gutmann’s view, and if necessary, non-democratic institutions like courts should enforce these limits to protect democracy from itself.¹⁷⁴

Legislatively, Gutmann argues that more centralized layers of authority, like the state and federal governments, may be better situated to identify and maintain the minimum standards of democratic ed-

166. *Id.* at 46.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

171. *Cf. Schuette v. Mich. Coalition to Defend Affirmative Action*, No. 12-682, ___ U.S. ___, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014) (rejecting a claim that a state constitutional ban on affirmative action unfairly impaired racial minorities’ political-process rights to change public university admissions standards).

172. *See* GUTMANN, *supra* note 31, at 95–96.

173. *Id.*

174. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

education.¹⁷⁵ Gutmann specifically argues that funding for special education should come from the federal government because of its especially high cost and importance, while state governments should both fund and establish minimum curricular requirements.¹⁷⁶ These more centralized governments, Gutmann acknowledges, are more likely to include diverse populations that would reject anti-democratic repression or discrimination.¹⁷⁷

But, Gutmann argues, nonrepression and nondiscrimination are the only valid reasons to restrain popular will with respect to public education.¹⁷⁸ Democratic institutions should have broad discretion over educational policy choices beyond the minimum necessary to support and perpetuate democracy. So long as the minimum standards necessary to train democratic citizens are satisfied in all schools, inequalities in the provision of education above that floor do not offend democratic education. On the contrary, Gutmann maintains that creating political space for the expression of particularist values above the democratic floor is essential both substantively to give effect to democratic preferences and procedurally to engage citizens in the practice of democratic control.¹⁷⁹ This is a central point for Gutmann's description of democratic education: given that society must replicate itself through education, we must permit democratic control over that replication or else lose self-governance where it counts the most.¹⁸⁰ To be participants in democracy, citizens must be able to make meaningful choices about collective values and policies that are binding because they derive from legitimate democratic devices.¹⁸¹ Citizens must also feel themselves capable of using those devices, a habit of mind that comes from the actual repeated practice of meaningful collective self-governance.¹⁸² If courts, or education experts, or other non-democratic institutions were able to set policies for the public schools against this popular will, there could be no real democracy.¹⁸³ To give life to this vision of democratic control over public schools, Gutmann imagines a world where small, face-to-face com-

175. See GUTMANN, *supra* note 31, at 71–74.

176. *Id.* at 158–59.

177. *Id.*

178. See *id.* at 72.

179. *Id.* at 71–77.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

munities can express these above-standard values through democratic engagement.¹⁸⁴

Gutmann's commitment to local school governance is qualified. She acknowledges, for example, that local districts will be largely unable to balance competing priorities—more public transit versus better schools—if they lack the capacity (legally, politically, or economically) to make these choices.¹⁸⁵ Given that very few localities will maintain local control over a broad enough array of issues to make balancing policies possible, localities considering changes to school funding will essentially choose between higher taxes for better schools or lower taxes for worse schools instead of choosing between allocating an existing tax level away from highways, for example, toward schools. This partly explains Gutmann's support for placing responsibility on school financing, but not governance, primarily at the state level. Gutmann also acknowledges the importance of professional educators as, at least superficially, a potential restraint on democratic control by virtue of their expertise.¹⁸⁶ But Gutmann does urge the many important non-fiscal choices affecting public schools to be decided by small, local electorates.¹⁸⁷ There she believes democratic accountability is at its maximum.¹⁸⁸

For Gutmann, this engagement is most likely to take place in local school districts.¹⁸⁹ Local districts, she argues, are easier for citizens to influence beyond mere voting.¹⁹⁰ The relative homogeneity of local districts makes democratic control easier to carry out because people from the same place share a variety of experiences that make public deliberation richer, just as civic republicans advocate.¹⁹¹ With daily life for most people dominated by local concerns, democratic engagement in local politics presumably places citizens in conversation with others who share many of their ordinary experiences and political priorities. Citizens who have previously engaged with each other on support for the town pool, the public library's expansion of its computer section, or the heavy traffic accompanying a new big-

184. *Id.*

185. *Id.*

186. *Id.* at 75–89.

187. *Id.*

188. *Id.* at 71–77.

189. *Id.*

190. *Id.*

191. *Id.*

box store may recognize a pattern of discourse that smoothes political communication over schooling.

By limiting the relevant decision-making community to a small place where people share local values, local districts make space for pluralism. Localities with minority values that would get swept away by more commonly-held normative commitments in larger-scale politics may attain local majorities. This permits these local communities to see their policy preferences take effect, advancing both the perception and reality of democratic government.

B. Winter on Civic Republicanism

Because I test Gutmann's argument for local control over public schools against the civic republican model of democracy, I review below this model, as articulated by the legal philosopher (and my colleague) Steve Winter. While my summary of Winter's argument is necessarily partial and simplified, it suffices to stand as a yardstick by which to measure the democracy-building success or failure of public school localism.

Winter has argued that any claim that a policy prescription would advance "democracy" must identify the concept of democracy that the policy furthers.¹⁹² Winter has identified three broad strands of contemporary theories of democracy: a competition of policy elites for the approval of the scarcely-attentive masses; a competition through elections to identify which of the pluralistic interest groups in a liberal society is predominant; and the civic republican notion of government through mutual recognition and respect.¹⁹³ Winter most powerfully rejects the first two pluralist and consumerist models, which mimic the "free" market.¹⁹⁴ In the market, the "best" brand of toothpaste is ascertained by popular will: whichever brand most people buy is called "number one," and the market serves merely to aggregate these idiosyncratic preferences. True democracy, Winter urges, cannot be operated this way, with voting nothing more than an aggregation of individual or coalition preferences where the participants have no capacity or incentive to engage with each other about their common choice.¹⁹⁵

192. See Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133 (2011).

193. *Id.*

194. *Id.* at 1142–45.

195. Steven L. Winter, *Down Freedom's Main Line*, 41 NETH. J. OF LEGAL PHIL. 202

Instead, Winter describes an anthropologically thick requirement of recognition and respect, one that far surpasses the mere acquaintance necessary to aggregate preferences in the market or liberal democracy.¹⁹⁶ Mutual recognition and respect in a democracy flow from the parallel prerequisites of community and imagination. Community, the shared understanding of meaningful symbols and experiences, permits the dialogue that forms the core of republican democracy. Without community as the basis for government, Winter argues, neither law as prescription¹⁹⁷ nor law as persuasion can function.¹⁹⁸ Only in an atmosphere of mutual recognition and respect can citizens in the minority participate, subjectively and objectively, in their own governance.

For Winter, this collective autonomy is not a philosophical abstraction, but a practical political necessity. Only a system in which everyone's contribution is valued equally can command the legitimacy necessary to persuade political minorities to accept the will of the prevailing majority. By contrast, consider the current American political climate in which attacking partisan enemies as illegitimate is more important than any potential policy compromises.¹⁹⁹ Still, it is only the heightened sense of belonging derived from mutual recognition that provides the brass-tacks power of legal norms to bring a car to a halt in the middle of the night merely by the flash of a colored light.²⁰⁰ Community is a necessary precondition to the exercise of this collective autonomy because without the shared understandings that make communication possible, there can be no internalization of the norms expressed by law—no understanding of those norms as self-generated.²⁰¹ Nor can there be effective communal command to the individual, because the individual will not share the mental schema necessary to interpret the prescriptions.²⁰² The greater the level

(2012), available at http://www.elevenjournals.com/tijdschrift/rechtsfilosofieentheorie/2012/3/NJLP_2213-0713_2012_041_003_002.pdf.

196. *Id.*; Steven L. Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 989–90 (1991) [hereinafter *Contingency and Community*].

197. See generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

198. *Contingency and Community*, *supra* note 196, at 969–70.

199. See, e.g., Russell Goldman, *Donald Trump Offers \$5 Million for Obama Records*, ABC NEWS, Oct. 24, 2012, <http://abcnews.go.com/Politics/OTUS/donald-trump-fails-drop-bo-mbshell-offers-cash-obama/story?id=17553670>.

200. *Contingency and Community*, *supra* note 196, at 968.

201. *Id.*

202. *Id.*

of empathy and mutual recognition in any community, the more effective the law will operate, even on norm violators.

Winter's concept of community is anthropologically "thick"²⁰³ because it examines how the shared understandings that make collective self-governance possible also make possible the self's own sense of identity.²⁰⁴ The individual declines to breach the communal norm because to do so would immediately create cognitive dissonance reflecting the potential breach's effect as a decomposition of the self's membership in the community that defines it. For example, people who feel strongly identified by their vocation—as a lawyer, say—feel profound unease at departing from the values that define membership in that vocation. The person for whom being a lawyer is a defining characteristic²⁰⁵ would cast herself adrift from her own identity by rejecting a core principle of the legal community, such as by publicly disclosing her client's secrets. She would toss and turn at night, sleepless from feelings of not being true to her own self and community. For such a lawyer, the requirement of client confidentiality *feels* persuasive and self-imposed, making possible the lawyer's sense of participation in collective self-governance.

For Winter, the necessity for community in the establishment of democracy shares its place with imagination.²⁰⁶ The democratic citizen, whose very self is formed by the community lending legitimacy to the institutions of government, must hold the capacity to imagine the undesirable consequences of non-compliance. The citizen driven by fear of sanction must be able to imagine the law's enforcement to avoid its violation; the citizen driven by internalization of communal norms will still fall into lawlessness without the ability to imagine the deterioration of identity that would result from violation.²⁰⁷ Returning to the example of the secret-spilling attorney, if she could not imagine in advance how disrupted she would feel if she betrayed her client, she might well do so even without intending to be a rule-breaker.

203. See CLIFFORD GEERTZ, *THICK DESCRIPTION: TOWARD AN INTERPRETIVE THEORY OF CULTURE* (1973).

204. *Contingency and Community*, *supra* note 196, at 969.

205. *Id.* at 973 (citing Meir Dan-Cohen, *Law, Community, and Communication*, 1989 DUKE L.J. 1654 (1989)) (rejecting Dan-Cohen's framework that described this closely-held identifying characteristic as a "non-detached role.").

206. *Id.* at 992–95.

207. *Id.* at 963.

C. Does localism maximize democratic education?

Gutmann presents an idealized vision of citizens in close geographical proximity engaging face-to-face with elected officials on a scale small enough for the voters and politicians not to be overwhelmed by the expertise of educational professionals.²⁰⁸ One challenge to Gutmann's prescription for schools' development of self-identified citizens, however, is her implicit (and therefore inadequately contested) rejection of alternative concepts of community in lieu of the local model. Just as with personal identity, community exists along multiple axes.²⁰⁹ Situating the relevant school-governing community along the axis of residential geographic proximity is but one of many possible relationship networks that could plausibly take responsibility for public schools.

In fact, if we take seriously Winter's demand that democratic governance must be founded on mutual recognition and respect, mere localism does not seem the most likely axis of identity to create these conditions. The kind of rich face-to-face interaction Gutmann attributes to localism currently happens, if at all, in only certain narrow types of geographically-bounded local communities: those with a small voting population; well-educated, politically confident parents; the local resources necessary to make meaningful choices; and enough racial and cultural homogeneity to make the political conversation devoid of alienation and mutual distrust. In other words, the same conditions that make feasible the sort of interaction Gutmann proposes are the same conditions that model a lack of genuine diversity of values and of identity for students in that school system. Instead, for a community to govern itself with members who truly see each other's equality and dignity in a deep way, education must offer a broader exposure to difference.²¹⁰ Understanding the equal dignity of other citizens in a democracy depends crucially on understanding that the other differs from the self (but is nevertheless worthy of re-

208. GUTMANN, *supra* note 31, at 74.

209. See DEWEY, *supra* note 23, at 15–16 (“A clique, a club, a gang, a Fagin’s household of thieves, the prisoners in a jail, provide educative environments for those who enter into their collective or conjoint activities, as truly as a church, a labor union, a business partnership, or a political party. Each of them is a mode of associated or community life, quite as much as is a family, a town, or a state.”); GUTMANN, *supra* note 31, at 72.

210. See Steven L. Winter, *Reclaiming Equality*, SELECTEDWORKS (2012), available at http://works.bepress.com/steven_winter/2 (recounting Charles Sumner’s advocacy for diverse education in 1849).

spect). Otherwise, we have mere solipsism, a consumerist politics where we can only succeed in partnering with our fellow citizens to the extent they match ourselves.

As Emerson lamented, we can never fully know another person.²¹¹ It follows that we can never be fully persuaded of someone else's sameness to ourselves. A form of democratic governance that depended on this impossibility would be doomed to fail. Instead, building the prerequisites for democratic education requires establishing the governance of public schools at a level broad enough to compel citizens to form coalitions with strangers. These coalitions, to succeed, depend on the participants' ability to imagine who else in the society might share their goals and to communicate that common interest in a way that leaves the invited allies feeling understood and respected. Those activists best able to convey mutual recognition and respect across race and class lines would be most effective in persuading public officials to adopt policies favorable to public education. Every American state contains internal demographic diversity beyond the capability of its local components. This suggests states, not localities, as the appropriate level for democratic school governance.

Gutmann objects to states as the appropriate locus of power because she fears that the scope and complexity of politics at that scale inhibits both the voters' control over their representatives and their representatives' control over education bureaucrats.²¹² Gutmann acknowledges the need for state and federal regulation of education for resource support and for preservation of the nondiscrimination and nonrepression values that local majorities might find tempting to breach.²¹³ But she insists that these centralized governments willfully restrain themselves to leave space for local polities to exercise discretion over non-trivial policy areas.²¹⁴ This vision seems analogous to the kabbalistic concept of "tzimtzum"—the contraction of the omnipotent divine being at the moment of universal creation to permit room for human growth.²¹⁵

But in practice, as we have seen above, only certain localities can fully take advantage of this contraction. Only certain localities

211. See Ralph Waldo Emerson, *Experience*, in *ESSAYS: SECOND SERIES* (1844).

212. Gutmann, *supra* note 31, at 71–75

213. *Id.*

214. *Id.*

215. See Eugene Borowitz, *Tzimtzum: A Mystic Model for Contemporary Leadership*, 69 *RELIGIOUS EDUC.* 6 (1974).

have the social and political resources necessary to engage in this kind of small-scale self-governance. For those localities where the centralized governments have not contracted—and where local school officials would desperately like greater centralized support and involvement—the key democratic question is how much influence localities can exert over those centralized governments. The tradition of localism, supplemented in many states by strong suburban control over state legislatures relative to urban delegations, has distinctive effects on how parents and education advocates pursue their political agenda. So long as localism permits small, wealthy districts to retain the fruits of their own tax bases, those parents' incentive will be to ignore state-level education politics if it stays out of their way (maximizing home rule) or to actively oppose redistributionist state-level policies that threaten to remove resources from their local districts. Localism makes centralized politics a contest of district against district, wealthy and white versus poor and of color. This contest looks increasingly like the consumerist and pluralist models that Winter rejects: everyone out for themselves, and “democracy” merely counting noses to award the spoils. None need empathize; none need compromise for the commonwealth. Instead, the political incentives reward those who do *not* recognize and respect their competitors from other districts.

The vast disparity in social capital between suburban and urban advocates determines who will win this fight. As a thought experiment, picture two hypothetical citizen-activists testifying at a state legislative hearing on school appropriations. The first is an African-American grandmother, forty-five years old, raising her grandchildren as their legal foster-parent in inner-city public schools. She never graduated high school and survives below the poverty line. She speaks in an urban dialect that the listening legislators don't recognize as one of their own; they associate her speech pattern with ignorance and failure. Her hairstyle and clothes seem strange to the legislators. In a rambling way, alternately angry and self-doubting, she asks for the state to provide money for music education so her grandchildren can learn to play instruments. She is told that, as Gutmann prefers, her local school district is responsible for those policies that do not either discriminate or repress; because the choice of how much to prioritize music education does not implicate these core principles, she should direct her complaint to her local board.

The second advocate is a white mother, forty-five years old, raising two children with her husband on two professional-class incomes.

She holds a law degree, wears a suit, and speaks confidently in an educated dialect that sounds familiar to listening legislators. Some of them remember her from their time together in law school; others have seen her before at political-party fundraisers. They associate her vocabulary, speech patterns, and demeanor with intelligence and power. In a logically structured and practiced presentation, she tells the committee that she represents a large network of suburban parents who have been organizing around the issue of preserving high-quality schools. On behalf of her association, she asks the legislators to promote local school governance by making it easier for school districts to reject students from outside the district, who drain local resources and consequently place her district's prize-winning music program in jeopardy. In accord with Gutmann, she is told that so long as all students across the state benefit from the legislature's baseline per-student appropriation, the state should contract itself to give space for local school boards to establish their own fiscal priorities with their own funds. So long as her local board's decisions do not impair minorities' access to the basic education they need for citizenship, they should be free to restrict their resources to their own local citizens. Others who agree with her community's educational priorities should feel free to move into town if they want to participate in the local schools.

I intend this hypothetical comparison to illustrate the importance of social capital to political power and how localism exacerbates the effect of differences in social capital. To maximize mutual recognition and respect along the lines outlined by Winter, the political might of citizens rich in social capital must be linked to the fortunes of those without elite social capital. Political boundaries that encourage citizens to divide into factions of "us" and "them" promote the thinking that "we" should use our political advantage to preserve resources for "our" kids. These boundaries are especially pernicious if they fall along fault lines of race and class, as local governments do. Race and class differences make it easier for citizens to dissociate from each other, to perceive their interests as antagonistic or at least detached rather than unified.

Where citizens could truly come together to embody the civic republican principles Winter describes would be at a level of government that best links those education advocates who have social capital and political influence with those who do not. The circle of "us" should be drawn just broadly enough to include the weakest segments of society. In the same way that a middle-class parent who persuades

a classroom teacher to adopt a more appealing English textbook wins that better text for the whole class, including children without parents able to advocate for them, education governance should be constructed so that poor rural and urban parents who need increased support for public schools benefit from the savvy advocacy of suburban parents with influence in state legislatures.

If local school districts were abolished in favor of unitary state-wide districts, the rational self-interest of suburban parents would be yoked to the fate of poor students. Instead of undemocratically isolating these students in schools politically cut off from their neighbors, governance structures would encourage the most influential citizens to use their political power for the common good. This would create incentives for broad alliances across race and class lines, and across the rural, suburban, and urban divides. As Madison argued at the founding of our nation, political domination by narrow factions becomes easier as districts become smaller. Larger districts force disparate groups to come together, necessarily moderating the most extreme elements in their cohorts.²¹⁶

The Supreme Court's concern that localism promotes political support for public schools would be answered with greater equity by putting to use the political support suburban parents can exercise for the benefit of all students. Statewide school districts, instead of localism, would yield positive practical and political effects. In material terms, support for local property taxes to fund local schools might decrease, but active and educated parents would not let their children's public schools fall below their expectations. Instead, they would redirect their advocacy to the state level and would promote increased investment there rather than a hands-off approach. By doing so, they would increase resources for all children in the state, which in turn would promote the development of citizenship skills in communities that currently cannot afford that kind of education.

Innovation in education would increase, as centralized state-level officials could run true experiments with closely-monitored pilot programs in statistically similar schools across the state. Centralization, after all, does not require senseless uniformity: the Department of Defense is the epitome of a centralized hierarchical organization but still manages to issue warm white parkas to troops in Alaska and desert camouflage to troops in Qatar. More directly on point, the nation's

216. THE FEDERALIST NO. 10 (James Madison).

only state that has implemented a single statewide school district, Hawai'i, still offers varied programs across its different community schools.²¹⁷

Pluralism would also be preserved, if not promoted. Affective communities that organize along axes other than geography would find it easier to share information and resources as components of state-wide schools. These normative minorities would not have to sort themselves into municipal concentrations, Tiebout-style, in order to reap the benefits of common schooling. For example, serious proponents of arts education would be better able to win support for performing-arts magnet schools, which could be positioned geographically to best take advantage of regional interest without regard for town lines. These proponents could draw on political support from all of their like-minded citizens in the state rather than depending on the existence in their small town of enough ardent supporters to accomplish their goals. The smaller the number of citizens committed to a particular educational priority, the more likely citizens would be to amass a politically capable population at a state rather than local level. Centralization of governance would encourage this sort of coming-together.

Citizens would find a state-wide school district to be easier to monitor, because it would receive greater media scrutiny than small local districts, so voters' information-gathering would come at a lower cost. And political accountability would be better matched to officials' actual authority if state politicians had to explain their educational policy choices to voters instead of passing the electoral buck to local officials who lack real discretion.

VI. CONCLUSION

Americans often assume that local school governance maximizes democratic control of education (and therefore models democracy most effectively for students). Even astute and profound philosophers of education like Amy Gutmann imagine local government as the layer of legal authority most accountable to the average voter. In this article, I have offered reasons to doubt this common story. The assumptions underlying localism-as-democracy depend on a narrow set of social circumstances. Instead, localism in the public education

217. See Haw. State Dep't of Educ., <http://www.hawaiipublicschools.org/ConnectWithUs/Pages/Home.aspx> (last visited June 26, 2014).

context broadly exacerbates existing social inequities and diminishes democratic accountability. Following Steve Winter's account of civic republicanism founded on mutual recognition and respect, I argue that state-wide school districts, not local boards, would better promote citizens' political cooperation and civic empathy. State-wide districts would also harness the political capacity of the most powerful schooling advocates for the benefit of all schoolchildren, including those from the least-advantaged communities. Political responsibility would match political accountability, and public school parents would come to understand better the importance of developing citizens regardless of geographic borders. For the sake of our common democratic heritage, local school governance should be abandoned.