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PUBLIC SCHOOL GOVERNANCE AND DEMOCRACY:
DOES PUBLIC PARTICIPATION MATTER?

NATALIE GOMEZ-VELEZ*

I. INTRODUCTION

THE headlines read: “*Promote Vote Stacked: Mike Jury-Rigs Win, Protest Roar Erupts*,”¹ “*Mike and Pals ‘Fire’ Away to End Free Pass for Schoolkids*,”² and “*Bloomberg Wins on School Tests After Firing Foes*.”³ The subject was New York City Mayor Michael Bloomberg’s removal of three members of the newly configured Board of Education or Panel for Educational Policy of the City of New York.⁴ He based his removal on their anticipated vote against his proposal to hold back third grade students based on a single standardized test.

As the Bronx representative to the Panel, and as one of the members opposing the third grade retention proposal who was not removed, I was surprised by the Mayor’s abrupt removal of three panel members simply to win a vote on that proposal. I remember responding to press inquiries by asking “what are we teaching our children about democracy?”⁵ This arti-

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1. Celeste Katz, Joe Williams & David Saltonstall, *Promote Vote Stacked: Mike Jury-Rigs Win, Protest Roar Erupts*, N.Y. DAILY NEWS, Mar. 16, 2004, at 5.

2. Carl Campanile & David Seifman, *Mike and Pals ‘Fire’ Away to End Free Pass for Schoolkids*, N.Y. POST, Mar. 16, 2004, at 2.

3. David M. Herszenhorn, *Bloomberg Wins on School Tests After Firing Foes*, N.Y. TIMES, Mar. 16, 2004, at A1; see also Michael Winerip, *On Education: Checks, Balances and Rubber Stamps*, N.Y. TIMES, Mar. 17, 2004, at B10 (discussing Bloomberg’s tactics with school board).

4. Although the legislation granting mayoral control retained the “Board of Education” denomination, Mayor Michael Bloomberg and Chancellor Joel Klein unilaterally renamed the body the “Panel for Educational Policy”: a name many people had trouble remembering, and that was confused with the Educational Priorities Panel and other organizations. See N.Y. Educ. Law § 2590 (McKinney 2006) (continuing Board of Education but changing its functions); see also Minutes of Sept. 23, 2002 Public Meeting of the Panel for Educational Policy, <http://schools.nyc.gov/NR/rdonlyres/A1692877-F716D-48AF-8436-7D9A793F62DA/1088/MinutesofAction92302.pdf> (first meeting of reconstituted Board).

5. Many in New York’s educational community expressed outrage at the Mayor’s perceived “panel-packing” to ensure that his proposal would pass regardless of opposition or open questions. Soon after the great uproar regarding the

cle addresses the question of democratic participation in public school governance more broadly. It considers what examples of public participation in public school governance can teach us about the theory and practice of democracy, and also what theories of democratic participation can teach us about public school governance. Should a governance structure of centralized mayoral control exclude input from parents and the public on grounds that the mayor is the representative authorized to make decisions? Further, should the only recourse for those who disagree with his choices be at the ballot box? Or should public school governance involve an ongoing deliberative process inclusive of public voices? Who ought to be considered “the public” for purposes of input and involvement in policymaking, and what structures and processes best allow for meaningful public input while maintaining the accountability and standards sought through mayoral control?

Public participation in public school governance is an especially pertinent issue in light of recent trends appearing in several large cities. Those trends tend to favor centralized mayoral control of schools. They also highlight the changing roles of local, state and federal governments as well as public and private actors, in developing and driving educational policy and practice. This article will examine the question of public participation in public school governance from the perspective of theories of democratic participation, as related to practical realities of public school governance. These realities reflect an urgent need to strengthen and improve public education as a public responsibility.

Part II will examine various models of public school governance. It will explore historical trends, from local to centralized control and back again. It places these models in the context of the kind and degree of public participation sought under the various models, and examines the purposes public participation is meant to serve.

Part III will focus on the current example of New York City and other cities that have recently moved to centralized mayoral control of public schools. It will examine the centralized governance structures that have been established, with a focus on the respective roles of the centralized governing authority, public school parents, other community members and the public at large. It will consider more closely how the governance structure works “on the ground,” with particular emphasis on the role that parents and public participants play in the development and implementation of public school policy.

Mayor’s stacked vote, however, the newspapers began noting a boost in the Mayor’s poll numbers, indicating popular approval of his elimination of the scourge of so-called “social promotion” in public schools. See Elissa Gootman, *Changing the Schools: Reaction, Praise and Anger Over Mayor’s Do-It-My-Way Decision*, N.Y. TIMES, Mar. 17, 2004, at B8; David M. Herszenhorn, *Changing the Schools: The Debate; Keeping Pupils in Third Grade, but Then What?* N.Y. TIMES, Mar. 17, 2007, at A1.

Part IV will provide a brief overview of theories of democratic participation, each calling for different degrees of public involvement. Involvement ranges from a minimalist model of representative democracy where the public's role begins and ends in the voting booth, authorizing the selected leader to take action on behalf of the populace; to a deliberative form of democracy that assumes ongoing public involvement and regular public deliberation regarding issues of public concern as key to democratic legitimacy. Part IV will also consider the unique relationship between public education and democracy. It contemplates the degree to which the idea that public education is designed to groom effective democratic participation influences public school governance.

Part V will propose that in establishing public school governance structures, strong consideration should be given to hybrid governance models. The structures should be consistent with principles of democratic education while addressing concerns about standards and accountability. A successful hybrid model would combine opportunities for robust local decision-making and the inclusion of public voices with centralized accountability mechanisms based on high standards.

II. MODELS OF PUBLIC SCHOOL GOVERNANCE

The structure of public school governance relates very closely to community and societal understandings of the role of public schools in a democratic society, and the roles that parents, communities, political leaders, elites and educational experts ought to play in determining school policy. While some argue that governance does not significantly affect public school outcomes, it is clear that governance choices establish greater or lesser opportunities for public involvement and substantive success in school reform.⁶ Governance determinations can also actualize a vision of democratic education that is designed to do more than ensure the adequate acquisition of literacy and math skills.

Public school governance choices help to determine the expectations and requirements for public schools, and the scope and limits of public schools' authority in particular areas. Governance is the force that determines the degree to which procedures are in place to include and empower parents, communities and the public to support informed, deliberative decision-making and to prepare stakeholders for broader democratic participation. School governance presents an important example of democracy at work. The structure of public school governance illuminates the vision of democratic participation that is in play, whether it is a minimalist vision that would leave most or all decision-making to a few powerful government officials, elites and technocrats, or a more inclusive

6. See, e.g., Kavitha Mediratta & Norman Fruchter, *From Governance to Accountability: Building Relationships That Make Schools Work*, DRUM MAJOR INSTITUTE POLICY REPORT (Jan. 2003) at 9 (arguing that governance alone does not achieve better school outcomes).

vision that values, encourages and fosters broader, ongoing public involvement as part of public education's mission to prepare citizens for robust and effective democratic participation. These questions in turn implicate broader issues about the legitimacy of competing models of democratic participation.

The shifts in school governance over time reflect a pendulum swing across various forms of democratic education. Methods vary, from a locally controlled community endeavor, to an enterprise designed not only to educate substantively, but to prepare students and communities for democratic citizenship, to a centrally controlled, technocratic process designed to prepare workers and ensure the United States' ability to compete in a global marketplace. These shifts reflect more or less inclusive visions of participation, as well as procedural and substantive efforts to remedy perceived failures and shortcomings of the public school system.⁷

The recent change in New York City from a decentralized system of public school governance largely under local control, to a centralized system under mayoral control, is part of a trend taking place in several large cities across the United States.⁸ Although school governance continues to be primarily a local affair, the trend toward centralization in urban school districts is related to a trend toward increased federal and state involvement in public education policymaking. The shift is driven by a quest for greater accountability and improved achievements, particularly among lower income students and students of color. As Kenneth Wong has observed, "[m]ayoral control with a focus on performance-based accountability has already occurred in New York, Chicago, Boston, Baltimore, Providence, Cleveland, Harrisburg, and Philadelphia (joint mayoral and gubernatorial control), and Los Angeles may soon follow."⁹ The District of Columbia is also in the process of shifting to mayoral control.¹⁰ The move toward centralized, accountability-based mayoral control is occurring primarily in large cities with large and diverse student populations and not in suburban areas. This trend stands in contrast to and conflicts with the traditional hesitation and resistance by mayors to take control of schools from local boards.¹¹

7. See generally Susan Fuhrman & Marvin Lazerson, *Introduction to THE PUBLIC SCHOOLS XXIII, XXXI-XXXVI* (Susan Fuhrman & Marvin Lazerson eds., Oxford Univ. Press 2005) (introducing collection of articles on public schools and democracy); DIANE RAVITCH, *THE GREAT SCHOOL WARS* 401 (Johns Hopkins Univ. Press 2000) (suggesting centralization and local control each have advantages, but neither is perfect solution to public school woes); Kenneth K. Wong, *The Political Dynamics of Mayoral Engagement in Public Education*, HARV. EDUC. REV., Summer 2006, at 164 (advocating for shift toward mayoral control of public schooling).

8. See Wong, *supra* note 7, at 165 (discussing growing trend toward mayoral involvement in public education).

9. *Id.* at 165.

10. See *id.* at 167 (highlighting "mayor-led" school board in Washington, D.C.).

11. See *id.* at 164-65 (indicating mayors typically not involved in management of public schools).

The urban trend in public school governance should be viewed in light of the broader history of such governance as sharing similarities with past governance changes and as embodying some notable differences from past governance efforts. An overview of the history of public education in the United States demonstrates the central and ever-evolving role that governance has played, not only in establishing and maintaining public schools, but in managing the multiple roles and constituencies they are asked to serve.

A. *A Brief History of Public School Governance and the Rationales for Centralized and Local Control*¹²

Public schools began as local enterprises. The tradition of local control over public schools dates back to the founding of the United States.¹³ Based in part on a certain distrust of centralized government and in part on practical realities, schooling was established as a local endeavor. In addition, governance structures for schools were established separate and apart from the structures for all other governmental entities as early as 1826.¹⁴ Education in the early agricultural United States tended to have a religious bent and was not designed to be universal or truly “public.”¹⁵ It was not until the common schools movement of the 1830s and 1840s that the notion of public schools designed to provide universal education and

12. This section provides only a broad overview. It is not meant to provide an exhaustive history of school governance, but merely seeks to sketch in broad outline the history of public school governance in the United States. It illustrates the more recent trends in centralized and local control of schools and examines the rationales given, comparing them to the actual function of public participation in public school governance. For a more complete history of public school governance, see generally RAVITCH, *supra* note 7 (exploring public school governance from nineteenth century to present); FREDERICK M. WIRT & MICHAEL W. KIRST, *THE POLITICAL DYNAMICS OF AMERICAN EDUCATION* (McCutcheon Publishing Corp. 2005) (exploring historical and current perspectives on public school governance at local, state and federal levels).

13. See Michael Kirst, *Turning Points: A History of American School Governance, in WHO'S IN CHARGE HERE?* 14, 16 (Noel Epstein ed., Brookings Inst. Press 2004) (describing local control of schools based on distrust of federal government); see also Julie A. Reuben, *Patriotic Purposes: Public Schools and the Education of Citizens, in THE PUBLIC SCHOOLS* 1, 2-3 (Susan Fuhrman & Marvin Lazerson eds., Oxford Univ. Press 2005) (noting government interest and involvement in education from founding of United States, and that schooling began as local endeavor in home and church during early colonial period).

14. The establishment of separate school governance structures dates back to Massachusetts's decision to create a school committee separate from the general government, a practice adopted throughout the nation. See Kirst, *supra* note 13, at 16 (describing origins of “two-government tradition”). In New York State, for example, responsibility for state-wide school governance rests not with the Governor but with the New York State Board of Regents, which was established in 1784 to have responsibility for all of the schools in the state, among other things. N.Y. CONST. art. XI, § 2.

15. See Kirst, *supra* note 13, at 17 (discussing evolution of schooling in America).

to serve broad social purposes, like preparation for citizenship, moral education and cultural unity began to take hold. As advocated by Horace Mann in Massachusetts, Henry Barnard in Connecticut and John Pierce in Michigan, among others, common schools were imbued with egalitarian and majoritarian values. Designed to produce literate, numerate and moral citizens from children of all classes, sects and ethnic groups, they were to be Horace Mann's "great equalizer."¹⁶

Despite the stated goals of equality, morality and education, and the notion of common schools as designed to bring society together,¹⁷ the reality of the common schools was one that established and reinforced stereotypes based on race, class, gender and national origin.¹⁸ For example, assigned books assumed white superiority "and presented Africans as degraded and Native Americans as noble but cruel and backward. . . . African Americans were largely considered to be outside the body politic and their children were generally excluded from public schools."¹⁹ At the same time, southern states resisted efforts to establish common public schools.²⁰ Resistance was based on fears of a class of educated blacks and white laborers, in addition to economic difficulties and the practical problems of providing rural education.²¹ Nonetheless, the common schools succeeded in establishing the idea of a "common education" and in articulating an aspirational goal of developing literate, numerate citizens who could participate in society on an equal basis.

Over time, the system of common schools expanded and became the model of education in the United States, but the governance structures for these schools were by no means uniform. As a general matter, the common schools were financed by public taxes and controlled by local trustees, but their local organizational structures varied widely among the states.²² By the turn of the twentieth century, municipal corruption scandals spurred a wave of reforms that placed schools under stronger local

16. *See id.*

17. *See generally*, Thomas Corcoran & Margaret Goertz, *The Governance of Public Education*, in *THE PUBLIC SCHOOLS* 25, 28-29 (Susan Fuhrman & Marvin Lazerson eds., Oxford Univ. Press 2005) (discussing policy conflict fueled by differing cultural values).

18. *See* Reuben, *supra* note 13, at 7-8 (describing subjects taught in nineteenth century public schools).

19. *Id.* at 8-9.

20. *See id.* (noting resistance to efforts to establish public schools in 1830's South).

21. *See id.* (signaling difficulty experienced in expanding national public school system to 1830's South).

22. *See* Kirst, *supra* note 13, at 18 (discussing evolution of schooling in America). The common school reformers had also established state education departments, but in the 1890s these entities were nowhere near the size, scope or influence of current state education departments. *See id.* (discussing early role of state education departments). The federal government initially played no role in public education aside from providing financing through early land sales. *See id.* (discussing early role of federal government in public education).

community control. This, in turn, led to corruption on the local level through local ward politics, involving patronage jobs and deals with contractors and others.

Reformers contended that, among other things, board members elected by wards advanced their own parochial and special interests at the expense of the school district as a whole. What was needed to counter this, they believed, was election at large, or citywide, without subdistrict electoral boundaries. Much of the early experience in local control of schools bears striking similarity to more recent complaints about the infusion of politics and corruption into local—and municipal—school governance.²³ The responses by reformers, then and now, are also strikingly similar, pitting educational elites and professionals against lay people and local stakeholders who are charged with rendering school governance unprofessional and “too political.”²⁴

1. *Centralization*

In response to concerns about local corruption and the politicization of public schools, progressive educational elites introduced reforms that would replace “political” education with “professional” education. The Progressive Era reforms focused on centralization, efficiency, professionalism, expertise and nonpolitical control. The reformers looked to state legislatures and state-wide education departments to standardize education and consolidate schools. The reformers consisted primarily of financial and professional leaders who appeared as offended by the “politics and inefficiency” of the local school structures, as by the fact that the structure “empowered members of the lower and lower-middle classes, many of whom were recent immigrants.”²⁵ The common schools movement introduced uniformity; the Progressive Era reforms introduced “the growth of professional standards for administration, teaching, curriculum, testing,

23. See, e.g., RAVITCH, *supra* note 7, at 263. (highlighting corruption scandals involving 1960's New York City school board).

24. See Kirst, *supra* note 13, at 19-20. Kirst notes:

By 1910, a conventional educational wisdom had evolved among the ‘school folk’ and the leading business and professional men who had spearheaded these Progressive Era reforms. They sought to use state legislatures and departments of education to standardize public education and consolidate one-room schools into larger township or regional schools. Essentially, they aimed to ‘take education out of politics’—often meaning taking it away from decentralized control by certain lay people—and to turn ‘political’ issues into matters for administrative discretion by professional educators. In some cases small groups of patricians secured new charters from state legislatures and thereby reorganized urban schools without any popular vote. The watchwords of reform were efficiency, expertise, professionalism, centralization and nonpolitical control. Taken together, reformers thought, these ideals would inspire ‘one best system.’ The most attractive models for this new governance structure were the industrial bureaucracies rapidly emerging during this era.

Id.

25. *Id.* at 20.

and other elements essential to the system.”²⁶ The Progressive Era reforms also ushered in a more centralized, professionally-based structure for school governance and administration.

As time went on, a number of societal and political changes impacted the public schools. The economic expansion, the baby boom and social change that followed World War II all had various effects on public schools.²⁷ Larger school enrollments, combined with a greater interest in egalitarianism and opportunity—ideas in tension with the elitism associated with the professionalization and centralization of school governance—began to change the dynamics of school governance.²⁸ Centralization had also widened the gap between school policymakers and their constituents. Also, “[p]arent participation had little effect on school policymaking” at that time.²⁹

During the 1950s, confidence in local school boards and administrators in the centralized public school system began to erode for a number of reasons. Fears of a communist threat led to concerns about the nature of “civic education,” and concerns in some quarters about whether communist sympathizers were teaching in the public schools.³⁰ The Supreme Court’s 1954 decision in *Brown v. Board of Education*³¹ called attention to the dismal failure of public school systems in the South, and elsewhere, to educate African American students.³² The bestselling book, *Why Johnny Can’t Read*,³³ called attention to falling literacy rates. Fears of losing ground in global competitiveness were driven by competition with the Soviet Union in the space race in the Cold War era, as they were later by Japan’s perceived technological superiority in the 1980s.³⁴

This period ushered in a greater federal role in education, from the federal courts’ involvement in school desegregation following *Brown*, to the federal government’s passage of educational reform legislation. For example, Congress also passed the 1957 National Defense Education Act, designed to improve competitiveness in math, science and foreign lan-

26. *Id.* As Kirst goes on to note, the concerns of the time were similar to many of those faced now: global competition, worker training, the assimilation of immigrants, concern about children being taught in their native languages and the need for educators to provide health and social services for poor and immigrant students. See *id.* at 21.

27. See *id.* at 21 (discussing adaptation of curriculums after World War II).

28. See *id.* (noting changes in schooling after World War II).

29. *Id.*

30. See Fuhrman & Lazerson, *supra* note 7, at XXVI (discussing 1950s citizenship questions).

31. 347 U.S. 483 (1954).

32. See Fuhrman & Lazerson, *supra* note 7, at XXVI (referencing *Brown*’s desegregation holding); Kirst, *supra* note 13, at 22 (discussing weakening confidence in local school boards and administrations in 1950s).

33. RUDOLPH FLESCHE, *WHY JOHNNY CAN’T READ: AND WHAT YOU CAN DO ABOUT IT* (Harper Collins 1955).

34. See Kirst, *supra* note 13, at 22 (describing fear of global competition in 1950s and 1980s).

guage learning, and the 1965 Elementary and Secondary Education Act (“ESEA”), aimed at addressing unequal educational opportunity.³⁵ The federal government, which had largely stayed out of public education³⁶ on the understanding that the Tenth Amendment had left public school control to the states,³⁷ began to use its spending power to play an increased role in substantive educational policy.³⁸ For example, in enacting the ESEA,³⁹ President Lyndon B. Johnson tied education money to special needs categories addressing low income and low achieving students.⁴⁰ President Johnson was responding not only to the perceived educational crisis but also to the civil rights movement, which highlighted gross inequities in race and class impacting every aspect of society.⁴¹ These inequities were found particularly egregious in the context of public schooling.⁴² Other federal initiatives addressing public schools included the federal school lunch program and the provision of impact aid, which, by providing federal funding for programs with certain strings attached, imposed federal requirements on schools.⁴³

35. *See id.* (noting federal government’s increasing involvement in education in response to fears of losing ground to Soviet Union); Reuben, *supra* note 13, at 18-20 (explaining post-New Deal education legislation).

36. *But see* Charles F. Faber, *Is Local Control of Schools Still a Viable Option?*, 14 HARV. J.L. & PUB. POL’Y 447, 453 (1991) (noting some measure of federal involvement in education). Faber writes:

Despite the United States Constitution’s reservation of education as a state responsibility, the federal government has always had some involvement in and influence upon the educational affairs of the nation. The federal government’s early participation in education ranged from land grants and distribution of surplus funds for the establishment of common schools to special purpose grants for the establishment of land grant colleges in the 1800s. In the early 1900s, federal funds were provided for vocational education.

Id.

37. *See* U.S. CONST. amend. X; *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47, 557 (1985) (overruling *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976)) (rejecting previous holding that Tenth Amendment prohibited Congress from interfering with “traditional” state activities); *see also* Faber, *supra* note 36, at 453 (noting reservation of education regulation to states).

38. *See* Corcoran & Goertz, *supra* note 17, at 33-36 (discussing modern expansion of federal role in education policy).

39. Elementary and Secondary Education Act of 1965, Pub L. No. 89-10, 79 Stat. 27 (1965). The ESEA was enacted as part of President Johnson’s “Great Society” or “War on Poverty” agenda. *See* ELIZABETH H. DEBRAY, *POLITICS IDEOLOGY & EDUCATION* 5 (Teachers College Press 2006). ESEA was presented as a “special purpose” bill designed to provide for the education of the children of needy families and children living in areas of high unemployment. *See id.*

40. *See id.* (describing President Johnson’s broader plan to fight poverty through education and other avenues).

41. *See id.* at 5-6 (noting connection between race and poverty).

42. *See id.* (discussing racial component in debate on poverty and education).

43. *See* Corcoran & Goertz, *supra* note 17, at 34-35 (explaining increased federal aid and involvement in public schools in 1960s); Kirst, *supra* note 13, at 23 (noting largely political motivations behind funding and equality programs implemented at this time).

The federal government's 1983 release of *A Nation At Risk: The Imperative for Educational Reform*⁴⁴ ushered in a new wave of national attention to the need for education reform. "A Nation At Risk unleashed a more than two-decades-long upsurge in attention to educational quality. Education boosters in the Reagan Administration used the bully pulpit to press states to raise standards."⁴⁵ New state education policies tended to be "top down," and increasingly restrictive of local decision-making.⁴⁶ This spawned "[a] countermovement, called the 'restructuring' movement, which focused on giving individual schools more autonomy, encouraging parent and community participation on school councils and making more space for teacher decision-making in school schedules."⁴⁷ During the Clinton Administration, the impetus toward standards-based reform continued, and was further codified in the 1994 passage of the Improving America's Schools Act⁴⁸ and the Goals 2000: Educate America Act.⁴⁹ The trend toward increased federal involvement in directing school policy also prompted objections to the expanding federal role and an effort to restrict the role of the federal government in education.⁵⁰ However, George W. Bush's education agenda, far from seeking to restrict the federal role in education, continued and expanded federal involvement in the standards and accountability movement with the passage of the No Child Left Behind Act ("NCLB"), perhaps the most pervasive example of federal involvement in the public schools to date.

Enacted as amendments to the ESEA, NCLB imposes unprecedented federal statutory requirements and levels of scrutiny on public schools as a prerequisite to receiving federal funding. The NCLB targets schools with the highest proportions of low income families. The Act requires states to set standards for academic content and student achievement that define an adequate education for all schools and students in the state.⁵¹ States

44. *A Nation at Risk: The Imperative for Educational Reform*, National Comm'n on Excellence in Education (April 1983), available at <http://www.ed.gov/pubs/NatAtRisk/index.html>.

45. Fuhrman & Lazerson, *supra* note 7, at XXVII.

46. *See id.* (discussing *A Nation at Risk* reforms).

47. *Id.*

48. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended primarily in scattered sections of Title 20 of United States Code).

49. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994) (codified as amended in scattered sections of Title 20 of United States Code).

50. For example, in 1995 a coalition of newly elected Republican House members sought to abolish the federal Department of Education and to reduce the federal role in supporting public education. *See* DEBRAY, *supra* note 39, at 1, 33. Also at play were differing federalism-based conceptions of the respective roles of the federal and local governments in education policy. *See id.* at 33 (noting efforts to "dismantle the traditional role of the federal government in education").

51. *See* NCLB, Title 1, Part A § 1114, Pub. L. No. 107-110, 115 Stat. 1425, 1471-75 (codified at 20 U.S.C. § 6314) (detailing schoolwide programs under Act).

must create annual standardized tests aligned with those standards in literacy and math, and now science, in grades three to twelve.⁵² Additionally, states are required to report the results of performance on these tests, identifying subgroups of students based on race, ethnicity, gender, disability and English language capacity, among other factors. The determination of adequate yearly progress must be shown with respect to each subgroup, as well as the school as a whole, to be deemed acceptable. When schools fail to make adequate yearly progress for four consecutive years, NCLB requires states to take corrective action that generally involves restructuring of the schools through the replacement of staff and curriculum. NCLB also provides that school districts must permit students in low performing schools the option to transfer out of those schools into higher performing schools, and must provide transportation to do so, or provide access to supplemental educational services such as tutoring, paid for through NCLB and school district funds.⁵³ Further, the NCLB also requires that all teachers be designated “highly qualified” in that they must hold a bachelor’s degree, demonstrate subject matter competency and have state certification in the subjects taught.

The specificity of requirements with respect to state testing, accountability requirements, teacher preparedness and provision of detailed options for tutoring and transportation have serious implications for federal and state involvement in educational governance. NCLB represents the greatest degree of federal involvement in public schools to date. NCLB has had an enormous impact on state and local school decision-making in areas ranging from governance to curriculum to transportation. Its implementation has raised serious concerns about the emphasis on high stakes testing and punishment, as well as a range of unintended consequences flowing from such sweeping and detailed federal involvement in public schooling.

2. *Public Schools and the Courts*

In addition to increased federal involvement in schools, through legislation tied to funding and other initiatives, the Supreme Court has shaped the legal landscape involving the scope and limits of school authority. The proper scope of this authority has been shaped over time through decisions addressing the rights of parents and students, and the boundaries of public schools’ ability to inculcate values to their pupils.⁵⁴

52. See *id.* §§ 1111(b)(1), (2) and (3) (describing NCLB’s state plan requirements).

53. See *id.* §§ 1116(b)(1)(E), (b)(10). These provisions have been criticized as diverting funds away from core instruction to transportation and mostly private sector tutoring companies. See, e.g., Wendy Beetlestone & Owen F. Lipsett, *No Child Left Behind’s Accountability and Access Provisions: An Inherent Tension Within Supplemental Educational Services Programs*, 216 EDUC. L. REP. 807, 813-14 (2007) (discussing concerns over diversion of funds through NCLB).

54. Early cases established parents’ liberty interest in raising their children, as well as teachers’ substantive due process liberty interest in practicing their profes-

Much federal constitutional jurisprudence addresses public education in the contexts of equal protection,⁵⁵ the separation of church and state,⁵⁶ and the protection of liberty interests of parents in controlling the upbringing of their children.⁵⁷ Additionally, questions regarding teachers' role in practicing their profession and of students' rights to free expression and access to education have also been addressed.⁵⁸

The case law addressing public education reflects ongoing tensions in balancing individual rights against collective or community rights, individ-

sion. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Supreme Court invalidated a state law making it a criminal offense to teach students who had not completed eighth grade in a language other than English. See *id.* at 403. Although *Meyer* most squarely articulated the substantive due process right of teachers to pursue their profession, the Court also identified parents' liberty interest to "establish a home and bring up children." See *id.* at 399. The Court returned to the substantive due process liberty interest of parents in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), a case striking down a state law prohibiting parents from sending children to non-public schools. See *id.* at 534-35. In reemphasizing the rights of parents to choose their children's schools, as well as the rights of students to participate in that choice and the rights of teachers to practice their profession, the Court noted that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. Later in 1972, in *Wisconsin v. Yoder*, 406 U.S. 205, the Court reaffirmed parents' liberty interest in the upbringing of their children, this time in the context of protection of religious belief. See *id.* at 219. *Yoder* involved a challenge by Amish parents to a state law requiring that all children under the age of sixteen attend public or private school. See *id.* at 208-09. The Amish parents expressed concern that a high school education would inculcate values in their children antithetical to their own. See *id.* at 209. Recognizing the importance of traditional values to the Amish faith, the Court found the law directly infringed upon the freedom of the parents to exercise their religion. See *id.* at 218-19; see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-76 (1988) (holding First Amendment permits educators to exercise editorial control over content of school newspaper); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685-86 (1986) (permitting school to limit obscene and vulgar speech within school setting in accordance with First Amendment); *Bd. of Educ. v. Pico*, 457 U.S. 853, 870-72 (1982) (recognizing constitutional limit on board's removal of books from school library, and balancing students' rights with effective school governance); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding black arm bands worn to school to protest Vietnam War were protected as freedom of expression); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 591-93, 604 (1967) (finding requirement that state plan to keep communists and subversives out of state employment was unconstitutional limit on First Amendment rights); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (rejecting West Virginia law which required school students participate in pledge to United States flag).

55. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (holding school segregation deprives students of equal opportunities).

56. See, e.g., *Yoder*, 406 U.S. at 218-19 (recognizing parents' right to direct religious education of children).

57. See, e.g., *Meyer*, 262 U.S. at 399 (affirming parents' substantive liberty right to raise their children).

58. See *id.* at 400 (recognizing teachers' due process right to pursue their profession).

ual freedoms versus societal equality.⁵⁹ With respect to inequality of resources and student achievement gaps, public education litigation has evolved from the desegregation model set forth in *Brown* and its progeny, to an emphasis on educational equity and the adequacy of school funding based in state constitutional law.⁶⁰

As federal courts took increasingly restrictive views of desegregation remedies,⁶¹ litigants turned to state courts to find public school equity relief.⁶² These suits, based on state constitutional requirements of educational equity and adequacy, sought to address, through judicial remedies, longstanding educational inequality wrought by segregation and concentrated poverty.⁶³ A common state judicial remedy required states to equalize per pupil expenditures across districts or, at least, ensure the provision of an “adequate” education in every district and school.⁶⁴

Some of the state school finance equity and adequacy litigation has resulted in greater equality of per pupil spending across districts, coupled

59. Given the role of education in preparing citizens for democracy, some scholars argue that students’ equality interests should be given precedence over individual liberty interests to better serve the broader goals of public education. See, e.g., Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 448 (1999) (suggesting equality is best road to effective public education). Morgan argues:

[P]rivileging the equality interests of K-12 students over their liberty interests best allows the public education system to further democracy. Because public schools can shape the self-images, preferences, and abilities of future generations, they are uniquely suited to break the traditions and to reorder the hierarchies of the past. As long as that potential is harnessed to enhance the equality of the citizenry . . . those schools will promote democratic self-government.

Id.

60. See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211 (Ky. 1989) (requiring equal opportunity to adequate education for all children within state); *Campaign for Fiscal Equity v. New York*, 861 N.E.2d 50, 61 (N.Y. 2006) (affirming legislative grant of funds to New York schools and finding accounting mechanisms adequate); see also James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 201-02 (2003) (discussing state’s seeking equality in education through equal funding).

61. See Liebman & Sabel, *supra* note 60, at 200. (stating “the upshot was to limit intervention to cases where officials publicly proclaimed their desire to discriminate and publicly exhibited their segregative successes”). Recently, the Supreme Court has gone even further to eviscerate desegregation remedies, turning the federal equal protection clause on its head to prohibit school districts from voluntarily engaging in efforts to integrate schools. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2767-68 (2007) (rejecting Seattle voluntary plan of race-based integration of schools).

62. See Liebman & Sabel, *supra* note 60, at 201 (noting that state courts were primary venue for equity relief).

63. See *id.* at 201-05 (describing suits in state courts).

64. See *id.* at 202-05 (providing examples of remedies available in state court suits).

with increased funding in some poorly financed districts.⁶⁵ These cases yielded an increase in the state's contribution to public school funding, often accompanied by a concomitant reduction in a locality's share.⁶⁶ Many cases, however, did not create overall increases in expenditures in subject states.⁶⁷ Moreover, even in those school districts where lawsuits increased per pupil spending requirements, significant educational improvement did not take place.⁶⁸

In many instances, litigation seeking greater equity in public schools sprang from, and reinforced broader movements for, civil rights and social justice.⁶⁹ Increased parent and public attention to school governance arose from the general concern for civil rights, spurring challenges to segregationist and exclusionary control of public schools, and providing impetus for the call to decentralize school governance and increase local control.⁷⁰ In addition, this concern over the role and operation of public schools manifested during the civil rights era gave rise to new movements seeking to address a range of subjects such as women's issues, the rights of ethnic and linguistic minorities,⁷¹ special education issues and students'

65. *See id.* (stating result of state lawsuits).

66. *See id.* (same).

67. *See id.* (same).

68. *See id.* at 203-04 (same); *see also* Maurice Dyson, *Playing Games with Equality: A Game Theoretic Critique of Educational Sanctions, Remedies, and Strategic Noncompliance*, 77 TEMP. L. REV. 577, 632-33 (2004) (noting educational improvements on whole did not result from suits). *But see* Eliot Spitzer, *A Contract for Excellence*, U.S. STATE NEWS, 2007 WLNR 13126831 (seeking to improve New York public education); *Ambitious Legislative Agendas Move Ahead*, 26 EDUC. WEEK 32, Apr. 11, 2007, at 20 (discussing former New York Governor Eliot Spitzer's revamping of school funding formula and provision of additional funding through Contracts for Excellence following *Campaign for Fiscal Equity* case). The degree to which these additional expenditures will improve student outcomes remains to be seen. *See id.*

69. *See generally* Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1375-92 (2005) (describing circumstances surrounding drive for equality in public schools); Gail Robinson, *New York Schools: Fifty Years After Brown*, GOTHAM GAZETTE (May 17, 2004), <http://gothamgazette.com/article/20040517/200/981> (last visited Jan. 21, 2008) (noting role of *Campaign for Fiscal Equity* lawsuit in New York in mobilizing communities to support adequate education for black and Latino students segregated in substandard New York City public schools).

70. *See generally* James W. Lowe, Note, *Examination of Governmental Decentralization in New York City and a New Model for Implementation*, 27 HARV. J. ON LEGIS. 173, 205 (1990) (describing community dissatisfaction with school system operation and public reaction).

71. *See* *Aspira of N.Y., Inc. v. Bd. of Educ. of N.Y.*, 423 F. Supp. 647, 648 (S.D.N.Y. 1976) (determining public school students of Hispanic origin are entitled to bilingual education program under consent decree); *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding school system's failure to provide English language instruction effectively denied children of Chinese ancestry opportunity to participate in public educational program).

rights.⁷² Together, these movements resulted in a push for increased local and community control of schools. Proponents believed that such local control would increase parental involvement, community participation and improve the representation of a broad array of groups in educational governance.⁷³ Additionally, they believed such changes would aid in combating the elitism, exclusion and inequality that many argued had been fostered by centralization.⁷⁴

3. *Decentralization*

In New York City, these forces converged to support a movement seeking to decentralize the school system and permit greater parent and community involvement in school policymaking. As a result,

On April 30, 1969 after much debate, the [New York] State Legislature passed the legislation which . . . established an interim board of five members each of whom was appointed by one of the five borough presidents. This was the first time the borough presidents were given the authority to appoint members to the city board since 1902. Although the interim board was originally supposed to be replaced in a year by an elected board, the election was never held because it violated the principle of one person, one vote. In 1973 the Legislature made the interim board permanent and gave the mayor the power to appoint two additional members. The City Board of Education was authorized to appoint a Chancellor in place of a superintendent of schools.

The interim board was directed to divide the city into 30 to 33 community school districts, each to contain an average of 20,000 students.⁷⁵ Community school boards to be elected by proportional representation were granted substantial operating powers over all education in their districts except high schools, subject to the ultimate authority of the Chancellor and the city Board.⁷⁶

72. For further discussion of issues regarding public school operation that were spurred by civil rights era, see Reuben, *supra* note 13, at 19; Kirst, *supra* note 13, at 23.

73. See Kirst, *supra* note 13, at 23 (noting push for change resulting from civil rights era).

74. See *id.* at 24 (noting rise of educational interest groups seeking to address issues of equality and inclusion such as challenges to use of IQ tests and tracking to detriment of students of color); see also Lowe, *supra* note 70, at 204 ("According to its critics, the Board of Education was inefficient, unresponsive, uninnovative, and out of touch with the needs of its pupils, particularly minorities and immigrants.").

75. In 1973 the number was reduced to 15,000.

76. New York State Senate Majority Task Force on NYC School Governance, *NYC School Governance: Crossroads to the Future*, Leg. 941.8-4 NYCSG 204.4266 C2 at 1-2 (2002) [hereinafter Padavan Report] (describing current framework for school governance in NYC).

The central board was charged with selecting the schools' Chancellor and making citywide school policy decisions.⁷⁷ The board then worked in conjunction with local community school boards.⁷⁸ The local boards were elected according to school district boundaries, and were responsible for selecting community superintendents and district personnel, as well as setting local school policy.⁷⁹

The decentralized school governance system received mixed reviews, and was ultimately deemed unsuccessful by a majority of observers.⁸⁰ While decentralization allowed for the potential of robust input and community involvement in school decision-making, the system often suffered from a lack of interest and involvement by parents and communities. The decentralized structure was subject to pressure by local political and special interests and suffered from a lack of clear accountability. Often, there was no particular person or entity within the structure clearly responsible for particular policy decisions. The central board also became known for the contentiousness and politicization of its meetings.⁸¹

While some local boards managed to operate in a relatively effective, inclusive and productive manner, many, and perhaps most, did not.⁸² Instead, a majority of local boards lacked the capacity or expertise to govern effectively, which when combined with inequalities of power and the insinuation of political patronage and other corrupt practices, meant that often the public schools were treated as job programs and school boards were seen as platforms for launching political careers.⁸³ Perhaps the biggest complaint about the decentralized system was the lack of accountability.⁸⁴ Parents and the public became increasingly frustrated with the inability to identify who was responsible for the persistent shortcomings in public schools.⁸⁵ Teachers and local boards would blame the central administration, while central board members would place blame locally or point fingers at each other, the mayor and state representatives.⁸⁶

Despite these issues and an original intent for the system to merely serve as an interim one, the decentralized Citywide Board of Education and Community School Boards in New York remained in place for more than twenty years. The sheer length of time it took to revisit New York City's governance structure evidenced the difficulty legislative leaders en-

77. *See id.* at 8-9 (describing role of central board).

78. *See id.* (same).

79. *See id.* (same).

80. *See id.* at 19 (describing reasons decentralized model was considered unsuccessful).

81. *See generally* Abby Goodnough, *A New Sort of School Board, Bland and Calm*, N.Y. TIMES, Sept. 24, 2002, at A1 (referencing contentiousness of Board of Education prior to New York's shift to mayoral control).

82. *See* Padavan Report, *supra* note 76.

83. *See id.* at 2 (noting how complexity was ineffective).

84. *See id.*

85. *See id.*

86. *See id.*

countered in agreeing upon both an appropriate governance model and effective practical improvements to the existing system.⁸⁷

B. *The Push for Re-Centralization and Mayoral Control*

Over the past several years, a trend toward centralized mayoral control has taken hold in large urban school districts across the country.⁸⁸ The rationales for a move to centralized control include the lack of focus and accountability in decentralized governance systems, as well as a lack of progress in improving achievement levels, graduation rates, physical plants and resource allocation in urban public schools.⁸⁹ Perhaps most interesting about this move toward centralization is the emphasis placed on the mayor as the centralizing force. Although structural issues vary from city to city, many of the arguments for mayoral control are similar. They include desires to improve fiscal efficiency and coordination of services, strengthen accountability, support the city's investment in its economic future, enhance public confidence and increase parental engagement in public schools.⁹⁰

Increased federal and state control also serves as an impetus towards centralization and mayoral control. Some critics of centralization argue it is motivated by a class- and race-based effort to consolidate control of schools in the hands of elitist white power brokers, while marginalizing parents and local participants, who tend to be people of color.⁹¹ Supporters, however, argue that the increased accountability that comes with centralization is necessary to achieve substantive improvement in schools, particularly urban schools serving primarily students of color.⁹² Mayoral

87. See *id.* (noting trouble faced by leaders in agreeing on governance model and practical improvements).

88. See generally Wong, *supra* note 7, at 165 (noting trend toward mayoral control); *Mayors Increasingly Seek to Take Charge of Schools*, USA TODAY, Jan. 7, 2007, http://www.usatoday.com/news/education/2007-01-07-mayors-schools_x.htm (last visited Jan. 21, 2008) (same). But see Wong, *supra* note 7, at 167 (noting, however, that vast majority of public school systems, particularly suburban school districts, remain under local control).

89. See Wong, *supra* note 7, at 165-66 (stating rationales for centralized control); see also Padavan Report, *supra* note 76, at 2 (noting that "mix between centralization and decentralization [is described] as the worst of both worlds"); Martha T. Moore, *More Mayors Move to Take Over Schools*, USA TODAY, March 20, 2007, http://www.usatoday.com/news/education/2007-03-20-cover-mayor-schools_N.htm (last visited Jan. 21, 2008) (stating "[t]he push for mayoral control reflects rising frustration and desperation over poor student achievement, crumbling buildings, bureaucratic wrangling among school officials, and revolving-door superintendents").

90. 91. See Wong, *supra* note 7, at 165-66 (listing proponents' arguments for mayoral control).

91. See *id.* at 166 (noting "[t]here are also concerns about the extent to which minority communities can be marginalized in a seemingly recentralized authority system").

92. See, e.g., Dyson, *supra* note 68, at 582 (arguing in favor of more robust accountability mechanisms).

control in many cities has also been associated with market-based school reforms centered on notions of school choice and competition.⁹³ It also tends to be related to rhetoric about the need for school reform based primarily on the relationship drawn between effective education and the economy.⁹⁴

The structural models establishing mayoral control in large cities vary depending on the existing public education governance structures, and the respective roles of city and state actors. As Kenneth Wong notes:

Mayor-appointed school boards are typically established through one of the three legislative processes. First, the state legislature can grant authority to the mayor to replace an elected board with an appointed board, as seen in Chicago. Second, the legislature can call for a citywide referendum on whether to grant the mayor the authority to appoint the school board, as was done in Boston and Cleveland. Finally, voters can approve changes in the city charter to allow the mayor to appoint school board members.⁹⁵

As a general matter, the change to centralized control seeks to replace systems in which mayors have little direct control and school governance responsibility is diffuse, with systems containing clearer lines of accountability.⁹⁶ For example, Washington, D.C. Mayor Adrian Fenty recently stated that his proposal to provide for mayoral control of public schools will streamline responsibility by placing decision-making authority squarely with the Mayor and allow coordination of educational initiatives

93. For an interesting critique of school choice reforms, see Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 257-58 (1999) (stating “society has had far more success generating individual schools of higher quality rather than widespread high quality schooling”); see also Maurice Dyson, *Putting Quality Back into Equality: Rethinking the Constitutionality of Charter School Enabling Legislation & Centric School Choice in a Post-Grutter Era*, 36 *RUTGERS L.J.* 1, 3 (2004) (noting difficulties in reforming schools).

94. See generally National Center on Education and the Economy, *TOUGH CHOICES FOR TOUGH TIMES: THE REPORT OF THE NEW COMMISSION ON THE SKILLS OF THE AMERICAN WORKFORCE* (Jossey-Bass 2007); see also Wendy D. Puriefoy, *The Education of Democratic Citizens: Citizen Mobilization*, in *THE PUBLIC SCHOOLS*, *supra* note 17, at 237, 237 (“By the turn of the twenty-first century, however, it is economics rather than democracy that has the strongest impact on the form and level of public engagement in the United States.”). As a general matter, we need to ask ourselves as a society whether the fundamental purpose of education is to serve the economy or whether the broader purpose of developing human potential and supporting human dignity is and ought to remain the primary goal.

95. Wong, *supra* note 7, at 166-67.

96. See Mayor’s Education Proposal, Education Reform Snapshot, District of Columbia Mayor’s Office, <http://ec.rrc.dc.gov/ec/cwp/view.asp?a=3&q=582913> [hereinafter Task Force on School Governance Reform] (describing mayor’s role under previous structure and noting State Education Office administers federal child nutrition programs, verifies school enrollment, develops residency verification rules, administers state scholarship grants and oversees office of public charter school financing and support).

from pre-kindergarten through the college level with adult education programs.⁹⁷ Centralized mayoral control, according to Mayor Fenty, will facilitate controlled spending by consolidating functions and coordinating services with other city agencies, allowing quicker renovation of schools and the engagement of other city agencies' support for schools.⁹⁸ The city's current Board of Education oversees both local and state functions under the State Education Agency and the Local Education Agency, a structure that presents regulatory conflict between the Board's state and local role.⁹⁹ Under the mayoral control proposal, the existing Board will be replaced with an entirely elected Board, whose responsibilities will be limited to overseeing state-level education decisions in the district, and approving state education standards and the district's accountability plan under NCLB.¹⁰⁰ The bulk of administrative, curricular and governance responsibility will rest with the mayor. Thus, the mayor will be primarily, and prominently, accountable for the public schools.¹⁰¹

III. NEW YORK CITY: A CASE STUDY IN MAYORAL CONTROL OF THE PUBLIC SCHOOLS

As with other urban school districts, the move to re-centralize New York City's schools through mayoral control was preceded by an ongoing sense of crisis dating back several years. In addition, support for mayoral control was garnered by continued concern about inequality of educational opportunity, lack of achievement and the impact of educational mediocrity on global competitiveness, combined with dissatisfaction with the inefficiency and lack of accountability of the decentralized public school structure.¹⁰² The problems stemming from locally controlled school boards also increased support for mayoral control.¹⁰³ Stories of ineffective and sometimes corrupt local school boards coupled with the low salience of school board elections, in which few people voted and even fewer people sought election, provided scant support for retaining the local elective school board structure.¹⁰⁴

The first attempts at school governance change since the decentralization of the New York City school system took place in the late 1990s and

97. *See id.* (describing mayoral control proposal).

98. *See id.* (setting forth benefits to centralized control).

99. *See id.* (detailing role of Board of Education).

100. *See id.* (stating board make-up under Mayor's proposal).

101. *See id.* (describing Mayor's role in proposed structure).

102. *See, e.g.*, Final Report of the Task Force on Community School District Governance Reform § 2 (Feb. 15, 2003), <http://assembly.state.ny.us/comm/NYCSchGov/20030219/> (last visited Jan. 21, 2008) (noting concerns leading to increased support for mayoral control).

103. *See id.* (same).

104. *See* Lydia Segal, *Corruption Moves to the Center: An Analysis of New York's 1996 School Governance Law*, 36 HARV. J. ON LEGIS. 323, 329-32 (1999) (describing litany of problems with local structure and calls for reform that followed).

2000.¹⁰⁵ These first attempts included reforms aimed at school custodians in response to incidents of abuse, corruption and negligence.¹⁰⁶ Even broader governance changes took place in 1996 under the New York City School Governance Reform Act.¹⁰⁷ The 1996 governance change was designed “to promote greater accountability by establishing clearer lines of authority and responsibility, enhancing parental and staff involvement in local decision making, providing for a process of school-based budgeting and expenditure reporting, and modifying the existing school district election provisions.”¹⁰⁸

The 1996 legislation broadened the powers of the Chancellor, limited the powers of the City Board of Education to policymaking activities and eliminated the executive and administrative powers of community school boards. Further, the legislation specified the principal as the administrative and instructional leader of the school, subject to Chancellor’s regulations and collective bargaining agreements.¹⁰⁹

The 1996 governance legislation also contained provisions designed to increase parental, staff and community involvement in the schools. This increased involvement included directives to ensure compliance with “[s]tate and federal law and regulations regarding school-based management and shared decision making, in a manner that balances participation by parents with participation by school personnel in advising in the decisions devolved to schools.”¹¹⁰ The 1996 law also changed the procedures for school board elections by transferring control from the City Board of Education to the City Board of Elections.¹¹¹

Additional legislative changes in the year 2000 eliminated lifetime tenure for principals, established performance and discipline standards for principals and supervisors and created a teacher recruitment and retention program entitled “Teachers of Tomorrow.”¹¹² Nonetheless, the

105. See Padavan Report, *supra* note 76, at 1-2 (detailing early attempts at school governance change).

106. See *id.* (same).

107. See N.Y. Educ. Law § 2590 (McKinney 2007) (setting forth broader governance changes); see also Segal, *supra* note 104, at 333-35 (1999) (describing events leading up to resulting legislative changes).

108. See Padavan Report, *supra* note 76, at 4 (describing purpose of governance changes).

109. See *id.* at 4-10 (describing scope of 1996 legislation).

110. *Id.* at 13 (same).

111. See *id.* at 14 (further detailing 1996 legislation).

112. See *id.* at 17 (describing “Teachers of Tomorrow” program). During the same period, some non-governance changes were also made in the New York City School System. See *id.* at 17 (detailing other changes). For example, in 1999 the Board of Education established a policy prohibiting “social promotion.” Chancellor’s Regulation A-501, issued October 14, 1999, designates the criteria necessary for promotion to the next grade level and supersedes all other regulation governing student promotion. See *id.* (same). The regulation clearly states the requirements necessary for a seventh grader to be promoted to the eighth grade. See *id.* (same). Promotion is based on an assessment of whether the student: (1) meets New York City Performance Standards in Language Arts and Mathematics as evi-

push for mayoral control continued. The rationales given in support of mayoral control in New York City echoed many of those provided in other urban school districts.¹¹³ The perception of a lack of accountability, combined with the sense of crisis created by low student achievement levels, public dissatisfaction on issues ranging from curriculum to violence and concerns over corruption and crumbling infrastructure built support for centralized control.

When Michael Bloomberg became New York City Mayor in 2002, he made public education a signature issue. He was determined to move beyond the governance changes already made, and sought more direct control of public education than even that provided under the revised governance structure.¹¹⁴ Pushing hard with the idea that he was willing to be held accountable for the public schools, Bloomberg secured mayoral control of the schools with a few caveats and compromises.¹¹⁵ In granting mayoral control, however, the New York State legislature seemed intent on

denced by student work, teacher evaluation and grades; (2) achieves at or above Proficiency Level Two on the Citywide CTB-Reading Assessment; (3) achieves at or above Proficiency Level Two on the Citywide CTB-Mathematics; (4) attains ninety percent attendance. According to the regulation, “[d]ecisions regarding promotion will consider *all* the stated criteria for each grade. The decision to promote or retain may not be based on consideration of a sole criterion.” *Id.* (emphasis added). Like the governance changes that preceded the 2002 shift to mayoral control, comparatively little attention was given to standards changes made in the late 1990s and prior to the 2002 governance change. *See id.* (describing governance changes).

113. For further discussion of rationales supporting mayoral control, see *supra* notes 83 through 96 and accompanying text.

114. *See* Task Force Report on School Governance Reform, *supra* note 97; *see also* Padavan Report, *supra* note 76, at 19 (describing Mayor’s responsibility).

[The Mayor] exercise[d] great control with respect to the school budget, and defacto but not direct control over the School’s Chancellor. . . . What the Mayor has always lacked is ‘direct accountability’ for the schools and school performance. Mayors have been able to reduce school funding, while the instructional and operational interaction between the Chancellor, Central Board, and Community School Boards has captured the public’s attention and scorn for system failings and underperformance. By granting the Mayor direct accountability through the appointment of a Chancellor coupled with his budgetary powers, the executive branch will have for the first time since decentralization, responsibility for schools and student performance. Having that locus of administrative and budgeting power in the executive branch will require great rectitude by those present and future occupants of City Hall, and continuous scrutiny by the New York City Council through the checks and balances of City budget negotiations.

Id.

115. *See, e.g., Bloomberg Takes Control as Schools Debate Continues*, N.Y. AMSTERDAM NEWS, June 13, 2002, at 1-2, *available at* 2002 WLNR 11700338 (noting exceptions to mayoral control of schools). As noted below, the legislation granting mayoral control in New York City is scheduled to sunset in 2009. *See infra* note 139 and accompanying text.

assuring accountability while also maintaining mechanisms for public input and parental participation.¹¹⁶

A. *The Statutory Structure of New York City Public School Governance Under Mayoral Control*

State legislation gave New York City's Mayor clear control through the power to appoint and remove the Chancellor, thus making the Department of Education a mayoral agency,¹¹⁷ while still retaining elements of parental and public participation at the citywide and local, district and school levels.¹¹⁸ The City Board of Education was reconfigured to comprise thirteen members: one appointed by each of the five borough presidents, seven appointed by the Mayor, and the Chancellor as Chair.¹¹⁹ All of the members serve at the pleasure of their appointing authority, and none may simultaneously serve in any capacity as an employee of the City of New York, a subdivision thereof or the City Board.¹²⁰ The borough presidents' appointees must be parents of students currently enrolled in New York City public schools.¹²¹ The members of the Board receive no compensation and have no staff, offices or vehicles.¹²² They are reimbursed for reasonable and necessary expenditures made in connection with their duties.¹²³ The newly configured Board was given primarily advisory functions; however, it retained the power to vote on matters of educational policy.¹²⁴

The Community District Education Councils, "CDECs," established as part of the mayoral control legislation, retained none of the powers to

116. See *infra* notes 119-39 and accompanying text.

117. See N.Y. Educ. Law § 2590-b (McKinney 2007) (outlining new mayoral powers).

118. See *id.* (setting forth New York City's mayoral control legislation).

119. See *id.* § 2590-b(1)(a) (describing structure of City Board of Education).

120. See *id.* (stating qualifications for board members).

121. See *id.* (same).

122. See *id.* § 2590-b(1)(a) (placing limitations on compensation of board members); see also Joe Williams, *Gone With the Board of Ed: No Pricey Perks for New School Panelists*, N.Y. DAILY NEWS, Sept. 29, 2002, at 1 (noting that prior incarnation of Board of Education was criticized for misuse of vehicles, offices and other "perks"); Abby Goodnough, *A New Sort of School Board, Bland and Calm*, N.Y. TIMES, Sept. 24, 2002, at A1 (stating that "the new law bars panel members from having offices and other city-financed perks").

123. See N.Y. Educ. Law § 2590-b(1)(a) (McKinney 2007) (setting forth appropriate reimbursements for board members).

124. See *id.* § 2590g(1) (stating that board is to have no executive or administrative functions, but is policymaking entity).

The board shall have the power and duty to (a) approve standards, policies, objectives, and regulations proposed by the chancellor directly related to educational achievement and student performance, and (b) consider and approve any other standards, policies, objectives, and regulations as specifically authorized or required by state or federal regulation[.]

Id.

appoint superintendents or principals that had been previously held by Community School Boards.¹²⁵ They were, however, co-extensive with the old school district lines and were intended to play an advisory and consultative role with respect to educational policy and budget issues in their districts.¹²⁶ The CDECs are composed primarily of parents of children enrolled in the public schools in the district.¹²⁷ CDECs were given the responsibility to “[r]eview the districts’ educational programs and assess their effect on student achievement,”¹²⁸ prepare district report cards¹²⁹ and hold public meetings at least every month with the superintendent to give parents and community members a voice.¹³⁰ Additionally, CDECs were charged with submitting an annual evaluation of the superintendent,¹³¹ holding a public hearing on the district’s annual capacity plan, approving and submitting such plan to the Chancellor and the city board for approval and implementation¹³² and providing input to the Chancellor and the city board on matters of concern, among other things.¹³³ The legislation also provided for training of CDEC members in performing their duties.¹³⁴

Thus, the legislation, while giving the Mayor significant control and accountability, retained a role for parents and members of the public to provide oversight, input and policy direction on certain educational policy and budgetary decisions. It also included requirements for the provision of information by the City’s education department to the Panel and

125. *See id.* § 2590-b(2) (setting forth role of CDECs).

126. *See id.* (establishing community councils for each community district). With respect to the Community District Education Councils, the law provides that the Chancellor “shall consult with the affected community district education council before substantially expanding or reducing an existing school or program or instituting any new program,” and that the Chancellor “shall annually advise the CDECs regarding the form and content of budget requests.” *Id.*

127. *See id.* § 2590-c (1) (a) (McKinney 2007) (stating that nine of eleven voting members of each council must be parents whose children attend school in district). The remaining two voting members are appointed by the borough president for the district and must be residents or business owners/operators within the district who have extensive business, trade or education experience. *See id.* § 2590-c (1)(b) (setting forth makeup of boards). In addition there is one non-voting member who is a high school senior residing in the district. *See id.* § 2590-c(1)(c) (same). The non-parent voting members serve for two-year terms that are renewable for no more than one additional two-year term. *See id.* § 2590-c(1)(a),(b) (same).

128. *See id.* § 2590-e(13).

129. *See id.* § 2590-e(8) (setting forth CDECs’ responsibilities).

130. *See id.* § 2590-e(14) (same).

131. *See id.* § 2590-e(15) (same).

132. *See id.* § 2590-e(17) (same).

133. *See id.* § 2590-e(18) (same).

134. *See id.* § 2590-e(1)-(6)(same).

CDECs¹³⁵ and retained state oversight.¹³⁶ Importantly, the mayoral control legislation was enacted for a limited period of time only: it is set to expire in 2009.¹³⁷

B. *The Practice of Governance and Public Participation Under Mayoral Control in New York City*

Despite the legislature's continuation of a re-configured Board of Education and establishment of Community District Education Councils, it became clear early on that the Mayor and the Schools Chancellor had very little interest in the Boards or the CDECs. The early meetings of the Board of Education, dubbed the "Panel for Educational Policy" by the Chancellor and the Mayor, were largely ministerial.¹³⁸ Many of the matters brought before the Panel were presented with little, if any, information prior to meetings, and thus virtually no opportunity to engage in meaningful discussion. Policy and structural changes were presented for a vote with the expectation that the panel would simply approve them *pro forma*.

To address concerns about the lack of information provided and lack of opportunity for deliberation prior to issues being presented for a vote, several Panel members requested a series of meetings and briefings with the Schools Chancellor and his staff. The Panel also set about reviewing and revising its bylaws to clarify its role and responsibilities, and to set forth minimum requirements for notice and information about issues to be put on the Panel's agenda.¹³⁹ This process led to an increased provision of information prior to meetings. Additionally, it allowed items to be scheduled for a vote and led to useful, substantive discussions among Panel members, the Chancellor, Department staff, parents and community members. In this process, Panel members had the opportunity to alert the Chancellor to issues that would prove problematic on the local level. Panel members were also able to engage in dialogue about alternative ways of handling proposed structural and policy changes.

Over the first several months, the Panel and the Chancellor appeared to be working together. Panel members would be provided relevant information in advance of the announcement of policy initiatives and in turn, participated in guiding policy development and alerting the Department

135. See *id.* § 2590-d(2)(b) (requiring provision of "full factual information pertaining to matters of pupil achievement").

136. See *id.* § 2564(3) (McKinney 2007) (noting requirement of approval of Regents before delegating power to local boards).

137. See *id.* § 2590 (McKinney 2007) (pointing out expiration date of mayoral control).

138. See Goodnough, *A New Sort of School Board, Bland and Calm*, *supra* note 124 (noting unanimous adoption of four agenda items in forty-five minute meeting).

139. See PANEL FOR EDUC. POL'Y OF THE DEP'T OF EDUC. OF THE CITY SCH. DIST. OF N.Y., BY-LAWS 10 (Feb. 10, 2004), http://schools.nyc.gov/NR/rdonlyres/FC481D23-6161-4BCA-A8BF-E0E4F569D9AA/1076/By_Laws.pdf (last visited Jan. 21, 2008) (detailing role of panel).

of Education to perceived benefits and drawbacks of their proposals. Ironically, this participatory process was at its most active, and seemingly most productive, just prior to consideration of the Mayor's third grade retention policy. For example, during the winter of 2003-2004, the Chancellor held a series of briefings during which Panel members were informed that the Department of Education would be implementing a process of low-stakes assessments to help teachers determine students' progress and respond to their needs on an ongoing basis during the school year. Panel members responded positively to this plan, which would not only provide ongoing support tailored to student needs, but also further professional development training. The plan also had support in the education research and local school communities.

Before details about the low-stakes assessment plan were finalized, however, the Mayor and Chancellor suddenly announced a third grade retention plan. Under that plan, students would be held back if they failed a single standardized test given at the end of the school year. The plan was presented as part of an effort to "end social promotion," citing the fact that struggling students were routinely passed from grade to grade without having mastered the necessary skills. Ultimately, these students either dropped out of school or graduated without the appropriate academic preparation.¹⁴⁰ Unlike the low-stakes assessment plan, there was little, if any, support in educational research for this retention plan. In fact, the overwhelming evidence presented to the Panel indicated that high-stakes testing does not further student achievement, it increases future dropout rates and even constitutes an improper use of standardized tests.¹⁴¹ The introduction of this proposal prompted a great deal of discussion and requests for research support. Additionally, the high-stakes plan set off a public furor, with many parents and education advocates strongly opposed to the idea of using a single standardized test as the basis for retaining third graders. While many agreed that students should not simply be passed along without having mastered the material for a particular grade, the propriety of using a single standardized test as the basis for retention was questioned.

The issue received significant press attention and spurred campaigns both for and against the proposal. Panel members were contacted by both telephone and e-mail, and educational advocacy organizations sent reports of research findings to Panel members and to the Department of Education.¹⁴² The vote on the third grade retention plan, or the plan to "end

140. For a discussion of how no reference was made to the fact that there already existed a policy to end social promotion enacted in 1999, see *supra* note 113 and accompanying text.

141. See generally FIRST DO NO HARM: A RESPONSE TO THE PROPOSED NEW YORK CITY THIRD GRADE RETENTION POLICY (Mar. 2004), http://www.ncscatfordham.org/binarydata/files/First_Do_No_Harm.pdf (last visited Jan. 21, 2008) (evaluating retention policy).

142. See Elissa Gootman, *Test Policy for 3rd Graders is Met by More Resistance*, N.Y. TIMES, Feb. 11, 2004, at B2 (describing retention plan discussions); David M. Her-

social promotion” as the Mayor referred to it, was scheduled for March 15, 2004. In the weeks and days before the meeting, Panel members met and discussed the plan with the Chancellor and representatives of the Department of Education. Some progress was made in establishing an appeals process for students and parents who could demonstrate the standardized test did not reflect the individual student’s level of achievement.¹⁴³ Agreement on added instructional support for students and a more detailed plan for summer school to provide students with an opportunity to advance to the next grade was also reached.¹⁴⁴ This process embodied deliberative democracy at its best. It involved a robust, inclusive and substantive discussion of a pending policy initiative by various stakeholders and decision-makers. Still, there was concern about opposition to inappropriate use of a single test to determine retention. Discussions regarding the possibility of requiring an additional indicator prior to holding back a student continued up until the day before the meeting.

On the day of the meeting, some Panel members reported having received telephone calls from the Mayor’s office regarding their planned vote on the “social promotion” proposal. Later in the afternoon, less than two hours before the scheduled public meeting, Panel members began to hear that certain other members had been “fired.” These included two mayoral appointees, Susana Torruella Leval and Ramona Hernandez, and one borough appointee, Joan McKeever Thomas of Staten Island. By the time of the scheduled meeting, the day’s activities were evident. The Mayor had summarily removed three of the eight members who planned to vote against his “social promotion” plan. The result of these removals was that instead of a vote of eight to five against the proposal, he would garner a vote of eight to five in its favor. Three new panel members appeared in place of those who had just been removed. Upon learning of the removals and replacements, many in the public audience expressed outrage, creating an uproar at the meeting.

When the “social promotion” proposal came up for a vote, I made a motion to table the matter¹⁴⁵ because the three new Panel members had not had any opportunity to consider it. Further, I thought an opportunity still remained for finding a consensus on using an additional indicator to determine retention. That motion, initially ignored by the Chancellor, was later voted down, and, as anticipated after the removal of Panel members, the “social promotion” plan succeeded by a vote of eight to five.¹⁴⁶

szenhorn, *Chancellor Pushes Mayor’s School Promotion Policy as Crucial Vote Nears*, N.Y. TIMES, Mar. 14, 2004, at N37 (same).

143. See Elissa Gootman, *Appeals Process for 3rd Graders Explained*, N.Y. TIMES, Feb. 27, 2004, at B6 (detailing parental efforts to change retention plan).

144. See Elissa Gootman & Mike McIntire, *Klein Is Said to Oppose Delay in 3rd Grade Retention Plan*, N.Y. TIMES, Mar. 15, 2004, at B3 (same).

145. See Winerip, *supra* note 3 (describing motion made to panel).

146. See *id.* (providing vote outcome).

In the immediate wake of the March 15 meeting, many in the press and the public expressed extreme disappointment and disbelief about the way in which Panel members were removed in order to obtain a particular vote. In the days and weeks that followed, however, many in the popular press applauded the Mayor for taking control of the situation and forcing the vote to end “social promotion.” This move had significant political support outside of educational circles, which presumably was based on its commonsense appeal. Following this highly contentious meeting, little attention was given to the meetings of the Panel, other than one or two sessions working towards providing additional support for schools most impacted by the retention policy. Early criticisms that the reconfigured Board of Education was nothing more than a “paper tiger” appeared to have been confirmed by the events of the March 15 meeting. Indeed, the level of public interest in the meetings of, and agenda before, the Panel has declined steadily over the past three years.¹⁴⁷

Similarly, the Community District Education Councils have played, at most, a very minor role in educational governance.¹⁴⁸ Since their inception, lack of interest among parents in serving on the councils has been raised. This lack of interest is evidenced by the *de minimis* participation of parents and community members at council meetings, the lack of training and the failure of the Department of Education to provide timely information necessary to the effective functioning of the councils. In fact, a report assessing CDECs in the borough of Manhattan found that the vast majority of council members surveyed had not been trained in one or more of the CDEC state-mandated functions. Furthermore, a majority of council members stated that their respective council was not able to fulfill one or more of its responsibilities mandated under the law. The report also confirmed concerns about low participation in the councils, noting that a large percentage of council members had resigned, many councils failed to make quorum at least once and most monthly council meetings were attended by twenty-five or fewer members of the public. The report further noted that the Department of Education’s oversight of councils had shifted in 2006 from the Deputy Chancellor for Teaching and Learning, responsible for instructional policy and parent engagement, to the Senior Counselor for Public and Community Affairs, presumably responsible for public relations.

Indeed, since the implementation of mayoral control, parents and members of the public have cited a lack of inclusion and responsiveness by

147. See, e.g., Diane Ravitch & Randi Weingarten, *Public Schools, Minus the Public*, N.Y. TIMES, Mar. 18, 2004, at A33 (assessing importance of Panel in wake of March 15 meeting); Ellen Yan, *The Parent Trap: Moms, Dads Say City Schools Reorganization Hasn’t Given Them Any More Say*, N.Y. NEWSDAY, Oct. 29, 2005, at A14 (same).

148. See generally Scott Stringer, PARENTS DISMISSED: AN ANALYSIS OF MANHATTAN’S COMMUNITY EDUCATION COUNCILS AND THE DEPARTMENT OF EDUCATION’S ROLE IN ENGAGING PARENT LEADERS (June 2006), <http://www.mbpo.org/uploads/PARENTS%20DISMISSED.pdf> (last visited Jan. 21, 2008) (evaluating New York public school system).

the Department of Education to educational policy concerns.¹⁴⁹ In the years following the “social promotion” vote, notwithstanding some limited indications of success under mayoral control,¹⁵⁰ there has been ongoing concern about the lack of inclusion of parental and public voices. These concerns have led to public outcry at times. One such instance occurred when the Chancellor, without prior notice or discussion, made an abrupt, mid-year shift in school bus routes during the winter of 2007, and another when he instituted a policy banning the use of cell phones in public schools.¹⁵¹ Both changes sparked strong vocal objections by parents and other observers. This contentious opposition may have been avoided had there been greater transparency and opportunity for comment, as well as policy modification. In addition, the Department is undergoing its third school re-structuring in the last six years. This move has drawn intense criticism from parents and the public, as such community members fear the continual changes in school administration and staff impede communication and the ability to obtain information and assistance.

Efforts to push the Mayor and Chancellor to include parental and public input into the policymaking process have continued unabated since the implementation of mayoral control. Recently, the Mayor and Chancellor sought to respond to concerns raised by parents and community members about their exclusion from policymaking, and the lack of transparency in public school decision-making. For example, in early 2007, the Mayor and Chancellor announced the appointment of a Chief Family Engagement Officer. This appointment came in response to parental concerns about their lack of essential information and inability to participate in the school decision-making process.¹⁵²

149. For example, the Department of Education’s perceived lack of response to calls for class size reduction prompted an attempt in 2003 to pass a referendum requiring class size reduction in city schools. The Mayor and the Chancellor blocked the referendum and succeeded in fending off a court challenge to the City Clerk’s denial of a petition to place the class size reduction referendum on the ballot. See *Pena v. Robles*, Index No. 111177/05, slip op. (N.Y. Sup. Ct. May 19, 2006) (providing rationale for preventing referendum).

150. The Department of Education has touted modest increases in state-wide test scores in some grades and a slight decline in dropout rates, results that should be applauded but are not yet sufficiently longstanding to qualify as evidence of sustainable improvement. See, e.g., N.Y. City Dep’t of Educ., *Schools Chancellor Klein Announces Gains by New York City Eighth Grade Students on State English Language Arts Exam*, U.S. STATE NEWS, Sept. 21, 2006, available at 2006 WLNR 23354926 (providing statistical figures).

151. See Elissa Gootman, *A Week After Bus Changes, Parents’ Complaints Continue*, N.Y. TIMES, Feb. 6, 2007, at B2 (describing public reaction to Chancellor’s actions); Elissa Gootman, *September in January: School Bus Changes Sow Confusion*, N.Y. TIMES, Jan. 30, 2007, at B1 (same).

152. See Elissa Gootman, *Hoping to Quiet Critics, Bloomberg Picks A Parent in Chief for City’s Schools*, N.Y. TIMES, Mar. 1, 2007, at B3 (describing appointment). The Department of Education also issued a parent survey, seeking the views of parents regarding the functioning of the public schools. See *Mayor Bloomberg, Chancellor Klein Unveil First-Ever Citywide Survey to Learn About Public Schools*, U.S. STATE NEWS, Apr. 30, 2007, available at 2007 WLNR 8201344 (detailing survey).

Thus, it appears as though the Mayor and Chancellor are beginning to heed the call for greater transparency and inclusion of parental and public input in school governance and policymaking. Whether these attempts will result in significant improvement in parental and public participation remains to be seen. It is clear, however, that there is a need to address the shortcomings of the Panel for Educational Policy and the CDECs in the context of mayoral control. These structures, which were designed to include parental and public input, have become all but moribund. Their ability to be revived should be a key consideration in determining whether the current mayoral control structure ought to be retained.

Part of the problem with the range of reforms and differences in views about the proper scope and limits of the powers, duties and appropriate roles of the respective participants in school governance lies in the failure to identify the theory or theories of democratic participation under which the school governance structure is operating. For example, school governance reform measures granting mayoral control generally have not been designed to give hierarchical or absolute authority to the Mayor. In most instances, they contemplate something quite different. Though certainly designed to give the Mayor greater power and to provide for clearer lines of accountability, most of the urban governance structures that have shifted to mayoral control place it within a system of citywide, district and school-based governance structures. These structures contemplate ongoing involvement by many different stakeholders, and implicitly invoke a theory of democratic participation that reflects a more deliberative approach. It appears, however, that in practice the various actors in the system are operating under different theories of democratic participation. The failure to name and address the appropriate democratic theory threatens the proper functioning of the components of school governance. This omission also greatly harms the perceived and actual legitimacy and sustainability of the reforms put in place under mayoral control.

IV. THE OPERATION OF THEORIES OF DEMOCRATIC PARTICIPATION IN PUBLIC SCHOOL GOVERNANCE

At the heart of the differences between the practice of public school governance by New York City's Mayor and Chancellor and the expectations of many community members lies a significant difference in the theories of democratic participation at play. The Mayor and Chancellor, for example, appear to take a minimalist view that mayoral control means just that: unilateral decision-making authority by the Mayor, legitimated by the fact of his popular election. Others view public school governance, even under mayoral control, under a more deliberative and discursive model, as requiring ongoing information-sharing, dialogue and deliberation, prior to the implementation of policy changes affecting schools, students, parents, communities and the city as a whole.

A. *Overview of Theories of Democratic Participation*¹⁵³

As a general matter, some theorists view democratic participation as requiring active, ongoing inclusion of the public in the process of collectively exercising power.¹⁵⁴ This view of democracy posits that to be legitimate, democratic institutions and processes must be structured so that decisions concerning the common interest result from “processes of collective deliberation conducted rationally and fairly among free and equal individuals.”¹⁵⁵

Others view the legitimizing power of democracy more narrowly, as stemming from the act of selecting democratic representatives, who are then authorized to establish the rules necessary to the common endeavor. Jürgen Habermas identifies this notion as the liberal view that “democratic will-formation has the exclusive function of legitimating the exercise of political power. Election results are the license to assume governmental power, whereas government must justify the use of power to the public.”¹⁵⁶ He contrasts this with the republican view, under which “democratic will-formation has the significantly stronger function of constituting society as a political community,” in which the “government is not only empowered to exercise a largely open mandate but also programmatically committed to carry out certain policies. It remains bound to a self-governing political community.”¹⁵⁷ He goes on to note that discourse theory adds a third idea that “the procedures and communicative presuppositions of democratic opinion- and will-formation function as the most important sources for the discursive rationalization of the decisions of an administration constrained by law and statute.”¹⁵⁸

Habermas’s discourse theory provides perhaps the most complete and overarching argument in favor of deliberative democracy. For Habermas, the communicative action that precedes and provides the con-

153. This section references in broad outline the basic theories and structures of democracy and democratic process. It is intended to provide a basic framework rather than an exhaustive consideration of the myriad issues surrounding each aspect and form of democracy. Thus, the discussion that follows may be placed within that broader framework.

154. For example, Seyla Benhabib defines democracy as: a model for organizing the collective and public exercise of power in major institutions of a society on the basis of the principle that decisions affecting the well-being of a collectivity can be viewed as the outcome of a procedure of free and reasoned deliberation among individuals considered moral and political equals.

Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 68 (Seyla Benhabib ed., Princeton Univ. Press 1996) (providing opinion on democratic process).

155. *See id.* at 69 (same).

156. Jürgen Habermas, *Three Normative Models of Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 28, *supra* note 154.

157. *Id.*

158. *Id.*

text for the exercise of popular sovereignty is the legitimating force behind democracy. Habermas does not separate democracy from human rights, nor does he separate democratic discourse from higher moral or “natural law” norms. Rather, Habermas takes the view that rational democratic discourse must permit legal consociates “to test whether a contested norm can or could obtain to acquiescence of all those who might be affected.”¹⁵⁹

Thus, while there is a shared, very general understanding of democracy as “rule by the people” within the context of decision-making by majority vote, there are various theories about the degree of authority granted to elected representatives, and the degree to which public input and deliberation are required to legitimate the exercise of governmental power. In structuring democratic processes and institutions, the difficulty lies in satisfying the criteria for democracy under the operating theory, while addressing its limitations and providing for a practical, functional form of governance. To make sense of any democratic structure, it is necessary to understand the underlying theory and ideals it seeks to achieve. Indeed, much of the work in structuring democratic institutions is aimed at bridging the gap between ideal democracy and political and social realities, while retaining the core objective of rule by the people.¹⁶⁰

Representative democracy, as understood today,¹⁶¹ is designed to address the difficulty in managing majority rule in large-scale societies.¹⁶² Because the kind of “primary” democracy practiced in ancient Greece on the city-state level is too cumbersome in large-scale democracies with large numbers of people dispersed geographically, representative democracy

159. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 134 (William Rehg trans., MIT Press 1998) [hereinafter HABERMAS, *BETWEEN FACTS AND NORMS*]. He goes on to note: “Thus, the desired internal connection between popular sovereignty and human rights consists in the fact that the system of rights represents precisely those conditions under which communication forms that are necessary for politically autonomous legislation can, in turn, be institutionalized.” *Id.*; see also Angel R. Oquendo, *Deliberative Democracy in Habermas and Nino*, 22 OXFORD J. LEGAL STUD. 189, 196 (2002).

160. Perhaps the most difficult task in approaching the democratic ideal involves the need to address social inequality and oppression by moving from a false notion of interest group struggle that assumes equality and ignores subordination and inequality based on race, sex, ethnicity and class. It is a particularly difficult project today, when the influence of wealthy corporate interests combine with rising consumerism and the continuing marginalization, subordination and exploitation of the poor and people of color. See generally CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* (Penguin Press 2004) (outlining and assessing possible pitfalls of democratic process).

161. It is important to note the view that “representative government originated not as a democratic practice but as a device by which nondemocratic governments—monarchs mainly—could lay their hands on precious revenues and resources they wanted, particularly for fighting wars.” ROBERT A. DAHL, *ON DEMOCRACY* 103 (Yale Univ. Press 1998).

162. See *id.* at 90 (describing modern, large scale, representative democratic government as “polyarchal democracy”).

has developed as the most common governmental form today.¹⁶³ In the United States, for example, the democratic constitutional design balances majority rule with protections for minority and fundamental rights, and avoids excessive concentration of power.¹⁶⁴

Thus, democracy is subject to a variety of interpretations within the constitutional framework.¹⁶⁵ First, the republican form of government, consisting of several branches that check and balance each other to preserve minority rights, guards against corruption and tyranny.¹⁶⁶ The Framers designed each branch of government—executive, legislative and judicial—to function distinctly in preserving fundamental rights and a balance of power among majority and minority interests.¹⁶⁷ Second, federalism represents the interests of municipalities, counties, states and the nation as a whole, and incorporates competing ideas of democracy into a workable governance structure.¹⁶⁸ Federalism also features separated powers, checks and balances with varying degrees of representation and public input among the branches to accommodate basic democratic notions of majority rule.¹⁶⁹ Thus, republican government provides a practical application of majority rule in a large, complex society while

163. See generally John Stuart Mill, REPRESENTATIVE GOVERNMENT (1972), reprinted in THE DEMOCRACY SOURCEBOOK 312-14 (Robert Dahl et al. eds. 2003) (professing virtues of broad-based representative government); James Mill, ESSAY ON GOVERNMENT (1819-1823), reprinted in DEMOCRACY: A READER 153-56 (Ricardo Blaug & John Schwarzmantel eds. 2000).

164. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 276 (1998) (stating Madisonian ideal of limited, divided government within United States constitutional framework).

165. See *id.* at 274-76 (discussing deliberative versus “calculative” understandings of democracy within relationship to American constitutional design). Dorf & Sabel note that:

For Madison, the rivalries and conflicts resulting from a division of powers between the states and the federal government, among the judicial, executive, and legislative branches, and within the legislature, between the more deliberative Senate and the more calculative House of Representatives, would disorient and disorganize factional interests. This result, in turn, would reduce the chance that majorities could entrench themselves at the expense of minorities so that any branch or level of government could usurp the powers of others or the rights of citizens. . . . Constitutional review by a Supreme Court, still further removed from the politics of *do ut des*, would defend the ideal of a deliberative republic in those seldom instances where faction managed to rally itself despite the impediments of constitutional design.

Id. at 276. (explaining how Madisonian ideal of divided government was first to synthesize these views within United States constitutionalism).

166. See THE FEDERALIST NO. 47 (James Madison) (arguing against aggregation of powers in single governmental branch); see also Robert A. Dahl, *Madisonian Democracy*, A PREFACE TO DEMOCRATIC THEORY (1956), reprinted in THE DEMOCRACY SOURCEBOOK 207-16 (Robert Dahl et al. eds., 2003).

167. See THE FEDERALIST NO. 47 (James Madison), *supra* note 166 (arguing for separation of powers).

168. See THE FEDERALIST NO. 10 (James Madison) (outlining federalism and separation of powers in United States Constitution).

169. As Michael Dorf & Charles Sabel observed:

maintaining mechanisms for both local control and the protection of fundamental and minority rights.¹⁷⁰

All of democracy's structures operate within an economic class system that dictates the degree of participation by particular individuals and groups.¹⁷¹ Divisions along the lines of race, ethnicity and gender also impact the degree and effectiveness of democratic participation.¹⁷² These issues are relevant concerning the selection of governing leaders and determining who is qualified to participate in the electoral and deliberative processes.¹⁷³

When considering democracy, even in its most basic forms, it is important to remember that participation in a democracy has historically

The genius of American constitutionalism has been its ability to synthesize and resynthesize, as circumstance demanded, two contrary understandings of democracy articulated at the time of the French and American Revolutions. The first understanding is deliberative and aimed at the good of all in abstraction from the diversity of everyday affairs. The second is calculative, aimed at the good of each as measured by success in the most diverse practical activities. The current impasse in constitutional design derives from the limits of these underlying, mutually defining conceptions, not a misstep of synthesis; a fresh advance, correspondingly, will depend on reconceptualizing deliberative democratic choice in relation to modern practical affairs.

Dorf & Sabel, *supra* note 164, at 274-75.

170. In Habermas's view, "the organization of the constitutional state is ultimately supposed to serve the politically autonomous self-organization of a community that has constituted itself with the system of rights as an association of free and equal consociates under law." HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 159, at 176 (articulating vision for principles of constitutional state).

171. For a discussion of "economic inequality" and the role of relative wealth in allowing or impeding meaningful democratic participation, see JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY, AND DEMOCRACY* 124-26 (MIT Press 1996). As Robert Dahl notes:

[W]e know that political activity, at least in the United States, is positively associated to a significant extent with such variables as income, socio-economic status, and education. . . . We now know that members of the ignorant and unpropertied masses which Madison and his colleagues so much feared are considerably less active politically than the educated and well-to-do. By their propensity for political passivity the poor and uneducated disenfranchise themselves. [Because] they also have less access than the wealthy to the organizational, financial, and propaganda resources that weigh so heavily in campaigns, elections, legislative, and executive decisions, anything like equal control over government policy is triply barred to the members of Madison's unpropertied masses.

ROBERT A. DAHL, *Polyarchal Democracy*, A PREFACE TO DEMOCRATIC THEORY (1956), *reprinted in* THE DEMOCRACY SOURCEBOOK 52-53, *supra* note 166. Note the interrelation between impoverished citizens' exclusion from political participation attributed to their passivity at the same time that structural barriers preventing their participation in political processes are acknowledged. *See id.*

172. *See, e.g.*, IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 204-11 (Will Kymlicka et al. eds., Oxford Univ. Press 2000) (arguing that racial and class segregation generate structural inequalities resulting in democratic exclusion).

173. *See, e.g.*, Anne Phillips, *The Politics of Presence* (1995), *reprinted in* DEMOCRACY: A READER 161-64 (Ricardo Blaug & John Schwartzmantel eds., 2000).

been limited to those members of the society deemed eligible and “qualified” to participate.¹⁷⁴ The determination of who is qualified to govern and who is qualified to participate in selecting governing representatives is a persistent question that arises in various contexts concerning democratic governance.¹⁷⁵ Concerns and disputes over qualifications to govern date to Plato’s critique of democracy, which argued that societies would be best governed by “platonic guardians” or expert philosophical rulers.¹⁷⁶ Whether characterized as tension between “elites” and the masses, or simply framed as incompetence to participate, no democracy may be said to have achieved the ideal goal of rule by the people.

As noted above, the practice of excluding certain groups from voting, or any meaningful democratic participation, applied until very recently to women, African Americans, Asians and others.¹⁷⁷ The exclusion of such groups from governance and decision-making persists today, and it often continues to be cast in terms of qualification to govern or to participate.¹⁷⁸ Exclusion also concerns the increasing role of wealth as a pre-qualification to compete and participate meaningfully in the electoral process.¹⁷⁹ The notion of “qualified participation” in the democratic pro-

174. As Robert Dahl starkly put it:

[I]n all democracies and republics throughout twenty-five centuries the rights to engage fully in political life were restricted to a minority of adults. “Democratic” government was government by males only—and not all of them. It was not until the twentieth century that in both theory and practice democracy came to require that the rights to engage fully in political life must be extended, with very few if any exceptions, to the entire population of adults permanently residing in a country.

DAHL, ON DEMOCRACY *supra* note 161, at 89-90 (chronicling history of underinclusive democracy).

175. See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 119-31 (Yale Univ. Press 1989) (setting forth examples of problems encountered in applying either requirement that all those governed be authorized to participate in democratic process as well as problems associated with determining who is or is not qualified to participate).

176. See PLATO, THE REPUBLIC, Book VI (G.P. Goold ed., Paul Shorey trans., Harv. Univ. Press 1970) (noting “whichever [of the philosophers and nonphilosophers] appear competent to guard the laws and pursuits of society, these we should establish as guardians”). This is similar to John Stuart Mill’s description of the “good despot.” See Mill, *supra* note 163, at 312 (“The supposition is, that absolute power, in the hands of an eminent individual, would ensure a virtuous and intelligent performance of all the duties of government.”).

177. See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (holding that women’s right to vote was not guaranteed by Fourteenth Amendment Privileges and Immunities Clause, despite women’s constitutional status as “equal citizens” with men).

178. See Fuhman & Lazerson, *supra* note 7 (discussing association of citizenship with public education as complicated by controversy over those eligible to be citizens).

179. Indeed, the centrality of wealth in determining electoral outcomes presents a serious threat to American democracy. See generally WEST, *supra* note 160.

cess often informs the preferred theory and structure of democratic participation across the spectrum: from deliberative to minimalist.

B. *Deliberative Democracy*

Much current discussion of democracy focuses on deliberative democracy,¹⁸⁰ or a more participatory form of democracy, and the procedures, institutions and structures necessary to maximize citizen participation in democratic decision-making.¹⁸¹ Jürgen Habermas's discourse theory argued that democratic legitimacy depends not simply upon majority rule, but rather the nature of the communicative action that precedes decision-making by a majority vote of free and equal consociates. Habermas explains that:

[T]he democratic procedure is institutionalized in discourses and bargaining processes by employing forms of communication that promise that all outcomes reached in conformity with the procedure are reasonable. No one has worked out this view more energetically than John Dewey: "Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. . . . The means by which a majority comes to be a majority is the more important thing: antecedent debates, modification of views to meet the opinions of minorities. . . . The essential need, in other words, is the improvement of the conditions of debate, discussion, and persuasion." Delib-

180. Adam Przeworski defines "deliberation" as, [A] form of discussion intended to change the preferences on the bases of which people decide how to act. Deliberation is "political" when it leads to a decision binding on a community. . . . "[D]emocratic political deliberation" occurs when discussion leads to a decision by voting. If a dictator listens to a discussion and then makes a decision, deliberation is political but not democratic.

Adam Przeworski, *Deliberation and Ideological Domination*, in DELIBERATIVE DEMOCRACY 140 (Jon Elster ed., Cambridge Univ. Press 1998) (discussing ways in which deliberation may be used to persuade people to vote against their own interests); see also John D. Fearon, *Deliberation as Discussion*, in DELIBERATIVE DEMOCRACY 44, *supra* at 63 (framing deliberative democracy as form of public discussion). Przeworski noted that deliberation could be used to persuade people to vote against their best interests. *Id.* at 141.

181. See, e.g., Tali Mendelberg, *The Deliberative Citizen: Theory and Evidence*, in POLITICAL DECISION MAKING, DELIBERATION AND PARTICIPATION 153 (Michael X. Delli Carpini et al. eds., 2002), available at http://www.princeton.edu/~uchv/delib/Mendelberg_Deliberative_Citizen.pdf. Mendelberg notes that there is:

no single definition on which all theorists of deliberation agree. . . . Many theorists emphasize that during true deliberation, people rely on reasons that speak to the needs or principles of everyone affected by the matter at hand. The promise of deliberation is the ability to foster the egalitarian, reciprocal, reasonable, and open-minded exchange of language. The consequences, according to these theories, are a more empathic view of the other.

Id. (illustrating variety of theories that support deliberative democracy).

erative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable *quality*. Hence, the discursive level of public debates constitutes the most important variable.¹⁸²

Jon Elster argues that deliberative democracy contemplates “collective decision making with the participation of all who will be affected by the decision of their representatives . . . the democratic part” and “decision making by means of arguments offered by and to participants who are committed to the values of rationality and impartiality . . . the deliberative part.”¹⁸³ Within the concept of deliberative democracy lies a range of views about the degree of deliberation and appropriate mechanisms for inclusion necessary to legitimize democratic governance.¹⁸⁴ For example, various observers define deliberation by its outcome, or the change of preferences as a result of deliberation;¹⁸⁵ others focus on the features of the deliberative process, from public discussion¹⁸⁶ to a more involved form of public “free reasoning among equals.”¹⁸⁷

Moreover, some scholars address the need to include historically silenced or marginalized individuals and groups and represent differences in democratic discourse and decision-making.¹⁸⁸ Several theorists argue that effective participation depends upon social equality more than political or governance structures, or constitutional design, on either the centralized or local level.¹⁸⁹ Thus, equality and efficacy of participation

182. See HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 159, at 304 (professing importance of democratic processes in democratic decision-making).

183. See, e.g., Jon Elster, *Introduction to DELIBERATIVE DEMOCRACY* 8 (Jon Elster ed., 1998) (noting overlap among various definitions of deliberative democracy concerning collective decision-making by those affected by decision or their representatives).

184. See *id.* (noting widely divergent definitions of deliberative democracy among scholars).

185. See, e.g., Susan C. Stokes, *Pathologies of Deliberation*, in *DELIBERATIVE DEMOCRACY* 123-24 (Jon Elster ed., 1998) (focusing on outcomes of deliberation in United States and noting instances where “deliberation induces preferences that appear to be more in line with the interests of the communicator than with those of recipients of the messages communicated”).

186. See, e.g., Fearon, *supra* note 180, at 63 (describing deliberation either as type of discussion or interior process to weigh reasons concerning action).

187. Joshua Cohen, *Democracy and Liberty*, in *DELIBERATIVE DEMOCRACY* 185, 193 (Jon Elster ed., 1998) (arguing that deliberative interpretation of democracy links exercise of power with “free reasoning among equals”).

188. See, e.g., Carol Gould, *Diversity and Democracy: Representing Differences*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 171 (Seyla Benhabib ed., 1996) (arguing for greater participation in decision-making process); Iris Marion Young, *Justice and the Politics of Difference* (1990), *reprinted in DEMOCRACY: A READER*, *supra* note 173, at 165-68.

189. See, e.g., Bohman, *supra* note 171, at 111 (arguing that political inequality in deliberation affects democratic legitimacy).

depend upon the existence of certain minimal social and economic prerequisites.

Critiques by socialist and communist theorists, who identified capitalism and its socioeconomic exclusion of the masses as antithetical to democracy, identified such deliberative deficiencies.¹⁹⁰ Indeed, among the critiques of deliberative democracy is the claim that the existence of social inequality makes true deliberation impossible and that the false promise of deliberation on unequal terms serves to mask and reinforce inequality.¹⁹¹ To work, these theorists argue, a deliberative democracy must address social inequalities and power dynamics that impede equal participation in deliberation.¹⁹²

Critical race and LatCrit theorists emphasize two relevant ideals.¹⁹³ First, they advocate incorporating anti-subordination principles into democratic practice and confronting the impact of inequality based upon race, sex, class and other categories of historic oppression and political and social exclusion.¹⁹⁴ Second, they support the incorporation of anti-subordination principles into democratic practice.¹⁹⁵ Under this view, “[d]emocracy is the anti-subordination perspective.”¹⁹⁶ Inclusive and meaningful deliberative democracy is only truly possible when society realizes equality among participants by eliminating structures and practices of subordination.

Whether broadly or narrowly defined, or primarily focused on outcomes, process or equality of participation, deliberative democracy generally contemplates the ongoing substantive involvement of the governed in the decision-making process by elected leaders.¹⁹⁷ Promoters of deliberative democracy view the public as more engaged, and qualified to engage,

190. See, e.g., Karl Marx, *The Civil War in France*, reprinted in *DEMOCRACY: A READER* at 242-43; Vladimir Ilich Lenin, *The State and Revolution* (1917), reprinted in *DEMOCRACY: A READER*, *supra* note 173, at 244-47.

191. See, e.g., Mendelberg, *supra* note 181, at 165-67 (giving examples of deliberative democratic situations with pervasive inequality).

192. See, e.g., YOUNG, *INCLUSION AND DEMOCRACY*, *supra* note 172, at 53-54 (identifying external and internal exclusion concerns confronting modern democracies).

193. See Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 336-38 (2006) (explaining Critical Race Theory's goal of liberating minorities and socially subordinated groups, and LatCrit's conscious articulation of antisubordination against all forms of oppression).

194. See *id.* (same).

195. See *id.* (same).

196. See Max J. Castro, *Democracy in Anti-Subordination Perspective: Local/Global Intersections: An Introduction*, 53 *U. MIAMI L. REV.* 863, 863 (1999) (“[D]emocracy is a horizon not yet reached anywhere and a powerful idea to be deployed in the anti-subordination struggles of the coming century.”).

197. See generally HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 159 and accompanying text.

in voting, lawmaking and policy development.¹⁹⁸ Habermas's discourse theory goes even further, linking the very legitimacy of democratic institutions with the meaningful inclusion of the governed in the process of making laws.¹⁹⁹

C. *The Minimalist View: Authority of the Elected Representative*

Against this more inclusive, and arguably more idealized, version of democracy, some theorists focus on the need for limits on the permissible degree of deliberation in order to facilitate more efficient decision-making.²⁰⁰ For example, Jane Mansfield argues that in any well-functioning democracy, "coercion must play a large, valuable, and relatively legitimate role."²⁰¹ Such coercion, in her view, ensures the resolution of matters over which there are differences of opinion and avoids having governance remain mired in the status quo based upon a failure to achieve consensus.²⁰² She notes many instances in which the power of the state is exercised with something less than full deliberation, and consensus and acceptance by the citizenry almost as a cost of doing business.²⁰³ There is a realization that many issues cannot, and will not, be resolved through deliberation. When "conflict remains after good deliberation, a democracy has two choices—to remain at the status quo, or to act, by coercing some to go along with others."²⁰⁴ While observing the existence, utility and even legitimacy of the use of coercion in democracies, Mansfield emphasizes that a robust means of combating coercion is just as necessary to effective democracy as the use of coercion.²⁰⁵ She states that the public must maintain a balance between letting "reasonably just coercion do its good work of helping organize social arrangements" while retaining the

198. See Gould, *supra* note 188, at 171 (describing, then critiquing, Habermas's public sphere discourse); Benhabib, *supra* note 154, at 68 (advancing "free and reasoned deliberation among individuals" who are "political equals" as basis for functioning democracy); Mendelberg, *supra* note 181, at 151-52 (noting that scholars and practitioners are calling for more public participation in bureaucratic governance and greater civility in political discussions).

199. See HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 159, at 307 (articulating informal processes of opinion-formation).

200. See, e.g., Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *THE DEMOCRACY SOURCEBOOK* 15-16 (Robert Dahl et al. eds., 2003) (advocating benefits of even minimalist conception of democracy in resolving conflicting political forces through voting rather than by violence).

201. See Jane Mansfield, *Using Power/Fighting Power: The Polity*, in *DEMOCRACY AND DIFFERENCE* 46, *supra* note 154 (explaining that democracies need coercion in addition to deliberation).

202. See *id.* at 47 (noting that democracies need coercion to avoid being stuck in status quo).

203. See *id.* at 56 (noting inherent inequalities that produce coercive decisions).

204. *Id.* at 47 (discussing need for coercion in democracies).

205. See *id.* at 56 (noting that democracies can fight coercion and use it at same time).

ability to effectively critique such coercion and to act against it when it becomes intolerably unfair and unjust.²⁰⁶

Other theorists go well beyond Mansfield's observation of the role coercion plays in a democracy, and argue in favor of an authoritarian form of democracy where participation by the masses is limited to selecting qualified leaders who are authorized to rule on behalf of the populace.²⁰⁷ On this view, only very few people are and should be qualified to make decisions and to rule in a democracy.²⁰⁸ Such a view eschews the notion of deliberative democracy or consensus building to serve the common good or the will of the people.²⁰⁹ Instead, it posits that the democratic process begins and ends with the selection of a leader or leaders who are given the authority and legitimacy to make decisions on behalf of the people.²¹⁰

For example, Joseph Schumpeter views democracy simply as a competition for political leadership.²¹¹ He critiques the classical theory of democracy's focus on the will of the people as disconnected from the true experience of democratic governance.²¹² In his view, there is no "common good" or "common will" of the people.²¹³ Therefore, it is up to political leadership to make decisions in a roughly representative way on matters about which there will likely be disagreement.²¹⁴ Schumpeter has argued that the typical citizen has neither the interest nor knowledge to participate effectively in government affairs.²¹⁵ He considers the idea that ordinary citizens have the wherewithal to participate effectively to be a

206. *See id.* (discussing good and bad deriving from coercion).

207. *See, e.g.,* PLATO, *supra* note 176 (discussing belief that only select few are fit to rule); Roger Scruton, *The Meaning of Conservatism* (1984), reprinted in DEMOCRACY: A READER 274-77 (Ricardo Blaug & John Schwarzmantel eds., 2000) (discussing small group of established candidates from which voters choose); *see also* Roger Soder, *Democracy, Do We Really Want It?*, in THE PUBLIC PURPOSE OF PUBLIC EDUCATION AND SCHOOLING 89 (John I. Goodlad & Timothy J. McMannon eds., 1997) (discussing view of many "academicians, politicians, foundation people, and power brokers throughout the country who do not have, at heart, very much faith at all in the notion that 'the people shall judge'").

208. *See, e.g.,* Scruton, *supra* note 207, at 276 (discussing paradox between accepting as legitimate government composed of democratically elected representatives, and electing representatives to serve in government from parties established independently of the electorate).

209. *See id.* (same).

210. *See id.* at 276 (arguing that representation of constituents ceases upon election into legislative body).

211. *See generally* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 3 (Harper Perennial 1950) (dismissing popular but unrealistic ideas of democracy).

212. *See id.* at 253, 263 (arguing that individual rational will is unrealistic because political process actually manufactures public's will).

213. *See id.* at 251-52 (stating that common good means different things to different groups and this prevents common will from forming).

214. *See id.* at 252 (arguing that common will does not exist).

215. *See id.* at 260-61 (explaining that reduced sense of responsibility and lack of long-term interest leads to irrational political choices).

myth.²¹⁶ This is because most citizens are primarily concerned with their own immediate affairs and do not feel a sense of responsibility for what are perceived to be more distant affairs of government.²¹⁷ This disconnectedness, in his view, becomes more pronounced as governance moves away from local politics having more meaningful effects on citizens' lives.²¹⁸ Because most people do not feel responsibility for broader affairs of government, Schumpeter questions their ability to participate in such governance, because "without the initiative that comes from immediate responsibility, ignorance will persist in the face of masses of information however complete and correct."²¹⁹

D. *Centralized Control Versus "All Politics Is Local"*

As noted above, an important consideration in theories about structures for appropriate democratic participation is whether governance is operating centrally in a manner affecting a large population, or if it is operating more locally with respect to a smaller "polis." There is generally a greater opportunity for meaningful public participation in small local entities versus large centralized government structures.

Notions of degrees of public participation in democracy must take into account the various structures of government. For example, the minimalist view of an elected leader authorized to make decisions unilaterally

216. *See id.* (stating that classic ideas of public participation in democracy fall apart once issues become complex).

217. *See id.* at 261 (explaining that voters show interest only in issues that directly affect them).

218. *See id.* at 260-61 (discussing loss of interest as political topics have more indirect effect on citizens).

219. *Id.* *See id.* at 262 (stating that impatience and lack of interest prevents attempts to grasp difficult political information). Of course, the most extreme version of the authoritarian view of government makes the direct argument that the masses cannot effectively govern, not even by majority vote. This is not democracy, but fascism. Mussolini's fascist critique of democracy states this premise head on:

Fascism denies that the majority, through the mere fact of being a majority, can rule human societies; it denies that this majority can govern by means of periodical consultation; it affirms the irremediable, fruitful and beneficent inequality of men, who cannot be leveled by such a mechanical and extrinsic fact as universal suffrage. By democratic regimes we mean those in which from time to time the people is given the illusion of being sovereign, while true effective sovereignty lies in other, perhaps irresponsible and secret, forces.

Benito Mussolini, *The Doctrine of Fascism*, in *DEMOCRACY, A READER*, *supra* note 173, at 278. Mussolini goes on to argue that, were it to give the lie to its pretensions of egalitarianism, "Fascism could be defined as an 'organized, centralized, authoritarian democracy.'" *Id.* at 279 (discussing conceptions of fascism). While Mussolini's characterization ought to be, and generally is, rejected out of hand, it can be instructive by providing a clear benchmark of what democracy is not. It can also help identify the places on the spectrum of thought about the degree to which collective deliberation and inclusion are necessary and central to a meaningful definition of participatory democracy. This is particularly true with respect to more authoritarian or minimalist views of democracy.

fits most squarely with the role of the executive: the president, governor or mayor. The legislative structure, by contrast, appears to be designed with a more deliberative process in mind.²²⁰ While there is an argument that either a minimalist or deliberative view of democracy vis-à-vis the general public may be applied to all elective institutions of government, the existence of a mixed structure, designed to represent majorities and minorities in configurations both large and small, may be viewed as an attempt to balance the benefits and drawbacks of each model, and to encourage deliberation by requiring dialogue among disparate branches and levels of government.²²¹

Within the mixed structure of government we see different preferences for a strong executive or a strong legislature, as well as much discussion about the appropriate role of the courts.²²² Recent trends appear to have moved in the direction of a strong executive. On the federal level, the presidency of George W. Bush has pushed the notion of executive power and the unitary executive to an extreme rarely seen before.²²³ On the state and local levels, increased executive power also appears to be in ascendance.²²⁴ Centralized control of public schools may be viewed as part of this trend. A preference for a strong executive often relates to notions of expertise, efficiency and accountability, and to the idea that democracy and governance are messy, unwieldy and best left in the hands of chosen experts.

220. Although some argue that the legislative process, particularly in the House or the Assembly, involves more "horse trading" than deliberation, and leaves little room for substantive input.

221. See THE FEDERALIST NOS. 10, 51 (James Madison) (addressing mixed structural design of government); see also CASS SUNSTEIN, THE PARTIAL CONSTITUTION 23 (Harvard Univ. Press 1993) (discussing Framers' view of deliberative government as one limited by checks and balances that forced discussions). Indeed, the Madisonian vision of divided government was designed to diminish the role of factionalism and self-interest to allow room for substantive deliberation. *Id.* at 22; see also Dorf & Sabel, *supra* note 164, at 276 (suggesting democratic model with decentralized power that will maximize information sharing through regional and national coordinating organizations).

222. See, e.g., Michael P. Allen, *George W. Bush and the Nature of Executive Authority: The Role of Courts in a Time of Constitutional Change*, 72 BROOK. L. REV. 871 (2007) (identifying and examining traits of new Bushian Presidency). Indeed, the Bush II Administration demonstrates a presidential term that began with efforts to extend presidential power in unprecedented ways. These attempts were met with an electoral defeat of the Republican Party during the 2006 mid-term elections and ongoing congressional opposition, particularly as relates to the administration's conduct of the Iraq War. See *id.* at 874 (noting that current presidency is more powerful than any recent presidency).

223. See, e.g., Melissa K. Matthews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL'Y 455 (2002) (discussing separation of powers debate with regard to unilateral action president may take and effect of new presidential emergency powers).

224. See generally David J. Barron, *The Most Dangerous Branch? Mayors, Governors, Presidents, and the Rule of Law*, 115 YALE L.J. 215 (2006) (discussing cities' ability to challenge laws as unconstitutional to preserve and expand local policymaking power).

The degree of participation in a democracy is related to the particular democratic structure, such as representative, direct or constitutional.²²⁵ Participation also depends on the theory of democracy employed.²²⁶ Popular theories range from the minimalist notion of the democratic election of a leader who is then given authority to make decisions on behalf of the populace, to theories of deliberative democracy that envision active ongoing public involvement in policymaking, and various degrees of participation in between.²²⁷

Critics of the contemporary minimalist view note the educative and positive functions of participatory democracy, as well as its greater efficacy in smaller, more local populations.²²⁸ This is a particularly pertinent question in the context of school governance, which in the United States began as an essentially local enterprise,²²⁹ but has increasingly become a matter of centralized city,²³⁰ state²³¹ and even federal²³² control. Even as oversight and control of public schools occurs to a greater extent on the federal and state levels, there remains a potent tradition of local involvement. Indeed, a key question in determining the degree of public participation in public school governance has to do with the relative degrees of decision-making taking place on the local, state and federal levels.²³³ Overall, the public school system is designed as a mixed system, in part as

225. See Ilya Somin, "Active Liberty" and Judicial Power: What Should Courts Do To Promote Democracy?, 100 Nw. U. L. REV. 1827 (2006) (detailing democratic structures and their respective impact on political participation).

226. See *id.* at 1833 (discussing contested nature of democratic participation).

227. See *id.* at 1834 (noting range of competing theories of participation).

228. See Carole Pateman, *Participation and Democratic Theory*, in THE DEMOCRACY SOURCEBOOK, *supra* note 166 at 41-47 (advancing idea that participatory democracy functions to educate and integrate populace into politics).

229. See *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to [the] quality of the educational process."); see also Jaroslav Pelikan, *General Introduction: The Public Schools as an Institution of American Democracy*, in THE PUBLIC SCHOOLS XV (Susan Fuhrman & Marvin Lazerson eds., Oxford Univ. Press 2005) ("[T]he mysterious process between child and teacher remains a prime documentation of the frequently quoted maxim of the former House Speaker Thomas P. ('Tip') O'Neill that 'all politics is local'—and, one could add, so is public education.").

230. For a discussion of city control of school governance, see *supra* notes 7-9 and 71 and accompanying text.

231. See *Kirst*, *supra* note 13, at 27 (noting that greater federal involvement in education resulted in expansion of state education agencies and their capacity to intervene in local school affairs).

232. For a discussion of the federal No Child Left Behind Act's imposition of specific requirements on states, and thus local school districts, with little opportunity for input from local communities, reflecting an unprecedented degree of federal involvement in public school policymaking, see *supra* notes 47-49 and accompanying text.

233. For a discussion of increasing federal and state roles in public school governance and policy setting, see *supra* notes 22-49 and accompanying text.

a consequence of a history of local, state and federal involvement in various configurations, and in part presumably with the hope of including the benefits of both centralized control and local deliberation.²³⁴ In the school governance context, the tradition has been toward local control.²³⁵

The increasing role of federal and state governments as opposed to local school boards in setting educational policy and driving education governance is partly responsible for increased concern about the role of public input and public participation in education discourse, particularly, though not exclusively, on the local level.²³⁶ As acknowledged by the saying “all politics is local,” the place for the greatest degree of participation, input and democratic deliberation is generally at the local level. It is important to ask what we seek from a public school governance structure, whether local or centralized, and what we hope to achieve through public participation in public school governance.

Habermas’s discourse theory of democracy draws a connection between legal institutions and the lifeworld, and demonstrates not only the possibility, but the necessity, of inclusive communicative action to support democratic legitimacy. For Habermas, democratic legitimacy stems from rational discourse among free and equal legal consociates.²³⁷ That discourse takes place within the context of the lifeworld.²³⁸ “[T]he lifeworld, of which institutions form a part, comes into view as a complex of interpenetrating cultural traditions, social orders, and personal identities.”²³⁹ The experience of the lifeworld thus includes the local everyday experience of members of the society together with broader, overarching social norms and customs. Habermas notes that the lifeworld begins as “background,” but must be foregrounded if communicative action and rational discourse are to be more effective.²⁴⁰ This concept of identifying and

234. For a discussion of the history of state and federal involvement in public school configurations, see *supra* notes 7-9 and accompanying text.

235. For a discussion regarding the trend toward local school governance, see *supra* notes 7, 11 and 71 and accompanying text.

236. For a discussion of federal and state involvement in setting education policy, see *supra* notes 22-49 and accompanying text.

237. See HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* note 159, at 176 (describing source of democratic legitimacy).

238. See *id.* at 22 (detailing arena in which rational discourse between legal consociates takes place).

239. See *id.* at 23 (describing nature of lifeworld).

240. See *id.* at 22-23 (describing optimal function of lifeworld). As Habermas puts it:

As we engage in communicative action, the lifeworld embraces us as an unmediated certainty, out of whose immediate proximity we live and speak. This all-penetrating, yet latent and unnoticed presence of the background of communicative actions can be described as a more intense yet deficient form of knowledge and ability. To begin with, we make use of this knowledge involuntarily, without reflectively knowing *that* we possess it at all. What enables . . . and even augments its epistemic quality from a subjective standpoint, is precisely the property that robs it of a constitutive feature of knowledge: we make use of such knowledge with-

foregrounding lifeworld experience as a necessary component of effective communicative action has particular salience in the context of public school governance. In this context, given social and economic disparities among those affected by school governance policy, as well as the relationship between education and understanding of the lifeworld, the placement of communicative action in the context of the lifeworld promotes the legitimacy of governance and decision-making.

E. *Public Participation in Public School Governance as Connecting Law and Policy to Lifeworld?*

Much of the discussion of public schooling as a local endeavor responsive to particular community needs, as well as the necessity of public education to maintain a locally distinct common culture, resonates with Habermas's notion of lifeworld and its connection to legitimate democratic discourse and action. From this perspective, a central purpose of public participation in public education is the connection of public schools to the lifeworld, thus ensuring effective communicative action that legitimizes public school policy.

A relationship is often drawn between the purpose of public education to ensure informed participation in the democratic process, and the importance of community involvement in public education policymaking. For example, as the Supreme Court noted in *Grutter v. Bollinger*:

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. This Court has long recognized that "education . . . is the very foundation of good citizenship."²⁴¹

out the awareness that it *could* be false. Insofar as all knowledge is fallible and is known to be such, background knowledge does not represent knowledge at all, in a strict sense. As background knowledge, it lacks the possibility of being challenged, that is, of being raised to the level of criticizable validity claims. One can do this only by converting it from a resource into a topic of discussion, at which point—just when it is thematized—it no longer functions as a lifeworld background but rather *disintegrates* in its background modality.

Id. (describing interaction between communicative action and lifeworld); see also Hugh Baxter, *System and Lifeworld in Habermas's Theory of Law*, 23 CARDOZO L. REV. 473, 507-18 (2002) (for description and critique of Habermas's conception and treatment of lifeworld in context of his communicative action theory).

241. See *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (internal citations omitted) (quoting opinion of Court); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the

Thus, there is a notion that public education as an enterprise is closely related to the development of citizens prepared to participate in democratic society. Such a notion lends itself to the idea that the public as a whole has an interest in determining the course of public education.²⁴² Discussions of democratic education tend to focus on deliberative democracy. The idea that a major goal of public education is to prepare young people to participate actively as informed citizens contemplates a form of democracy that involves affirmative, substantive and ongoing citizen participation.²⁴³

But there is also a general view that more specific decisions about curriculum, pedagogy and school administration should be made by education experts, and not through a broader deliberative process. The function of public participation in school governance is therefore often viewed as necessarily limited. It is not intended to determine particular curricular or administrative choices, but rather to set the broad outline of educational policy in a manner that is acceptable to parents and to the public at large. As Amy Guttmann puts it:

armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. (quoting opinion of Court).

242. See JOHN DEWEY, *DEMOCRACY AND EDUCATION* 87 (Free Press 1944): The devotion of democracy to education is a familiar fact. The superficial explanation is that a government resting upon popular suffrage cannot be successful unless those who elect and who obey their governors are educated. Since a democratic society repudiates the principle of external authority, it must find a substitute in voluntary disposition and interest; these can be created only by education. But there is a deeper explanation. A democracy is more than a form of government; it is primarily a mode of associated living, of conjoint communicated experience. The extension in space of the number of individuals who participate in an interest so that each has to refer his own action to that of others, and to consider the action of others to given point and direction to his own, is equivalent to the breaking down of those barriers of class, race, and national territory which kept men from perceiving the full import of their activity.

Id. (describing role of education in democracy); see also Martha Minow, *Reforming School Reform*, 68 *FORDHAM L. REV.* 257, 270 (1999) (“[A] basic statement of public school purposes would include forging commonality, promoting civic engagement in a diverse and democratic nation, and offering quality opportunities on an equal basis.”).

243. See AMY GUTTMAN, *DEMOCRATIC EDUCATION* 11 (Princeton Univ. Press 1999) (discussing democratic deliberations by citizens as integral to democratic education); Donna H. Kerr, *Toward a Democratic Rhetoric of Schooling*, in *THE PUBLIC PURPOSES OF EDUCATION AND SCHOOLING* 82 (John I. Goodlad & Timothy J. McMannon eds., Jossey-Bass 1997) (concluding that schools have chance to foster substance of democracy if adults become more involved in developing student character and soul).

The primary aim of a democratic theory of education is not to offer solutions to all the problems plaguing our educational institutions, but to consider ways of resolving those problems that are compatible with a commitment to democratic values. A democratic theory of education provides principles that, in the face of our social disagreements, help us judge (a) who should have the authority to make decisions about education, and (b) what the moral boundaries of that authority are.²⁴⁴

Even within the context of an admittedly deliberative process, there are different views regarding the role that public participation should play in shaping and legitimizing democratic decision-making. Some view public participation in school governance as involving an educative and advisory role but no real decision-making role. On this view, public participation is primarily for the purpose of obtaining information and providing commentary that may be accepted or ignored by the leadership. It may take the form of a town hall meeting or advisory board.

Others view meaningful public participation as requiring some form of decision-making authority, whether it is the requirement of an approval before a policy may be adopted, or the ability to vote for a particular course of action.²⁴⁵ Still others view public participation more broadly as intended to foster community-based strategies for school improvement, to focus attention on particular issues facing community schools and to advocate for solutions to those problems. These ideas resonate with Habermas's notion of the necessity of foregrounding and connecting communicative action and democratic discourse to the lifeworld, to support the legitimacy of decisions about the substantive values and procedural processes governing public education. Viewed under Habermas's idea of democratic legitimacy, and for purposes of building citizen capacity, public discourse and deliberation ought to play a key role in determining the broad contours of each of these kinds of decisions.

Another question that arises is whether there is an important public role in broader educational policymaking or whether public participation should be limited to the very local level, such as parent associations, school leadership teams and local school boards. The history of public education has long involved a tug-of-war between the tradition of local control of schools, which involved greater participation by local "lay" people, versus a more centralized apparatus governed by powerful elites or technocrats.²⁴⁶ Throughout, questions regarding who should be involved in and control decisions ranging from curriculum to standards to procedures for policymaking repeatedly arise. The response to these questions involves an

244. *Id.*

245. For a discussion of public participation in democratic decision-making, see *supra* notes 142-149 and accompanying text.

246. See, e.g., GUTTMAN, *supra* note 243, at 73 (discussing extremes of full local school board control of education and centralized national control).

identification of the various “publics” that are assembled or structured in school governance and an articulation of the respective roles these “publics” are meant to play.²⁴⁷

While the possibilities for, and degrees of, public participation tend to diminish the further decision-making strays from the local level, there exists a role for deliberation and for public participation at every level. As noted below, public school governance and policymaking take place on the federal and state as well as the local level, and public education policy is increasingly being driven by federal and state policy, and left to be implemented on the local level. Assuming there is a role for public participation at every level of public education policymaking, what mechanisms for structuring that participation will best serve the interests in having all relevant voices heard, while also permitting the appropriate use of expertise and allowing for the efficient implementation of education policy? Various models of public school governance have been established and have evolved over time, contributing to the current multi-layered structure of public education.

F. *Devolved Centralization or “Coordinated Decentralization”: Models of Empowered Participatory Governance and a New Accountability*

Perhaps the framing of school governance as either centralized or decentralized, or as all-minimalist or all-deliberative misses the point. It may be that governance should be viewed as taking elements of both models and structuring various “publics” to achieve the appropriate balance in terms of deliberative discourse, decision-making authority and substantive accountability.

Given the history of school governance, shifting from local to centralized control and back again, the tendency has been to think of governance structures as either centrally or locally focused. Some forms of governance however, are developing in cities under mayoral control that include elements of centralized control as well as mechanisms for local involvement and innovation. Emerging from the perceived shortcomings of both is a view of participatory governance that, while privileging local involvement and deliberation, retains some of the benefits of centralized oversight and accountability.

Archon Fung and Eric Olin Wright have explored both the theory and practical application of what they call “empowered participatory democracy” on the local level in a variety of settings. Such include school governance in Chicago under a mixed centralized and localized governance structure.²⁴⁸ Fung and Wright describe empowered participatory de-

247. See, e.g., Liebman & Sabel, *supra* note 60, at 272 (discussing formation of “new publics” participating in school governance and benefits and drawbacks of different configurations of these “publics” for ensuring meaningful and fruitful engagement in public school governance).

248. See Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in *DEEPENING DEMOCRACY* 35, 7-9 (Verso 2003) (describing

mocracy as an empirical response to the “erosion of democratic vitality” that is “an inevitable result of complexity and size.”²⁴⁹ This response seeks to “develop transformative democratic strategies that can advance our traditional values—egalitarian social justice, individual liberty combined with popular control over collective decisions, community and solidarity, and the flourishing of individuals in ways which enable them to realize their potentials.”²⁵⁰ Fung and Wright’s conception of empowered participatory governance involves reforms that are designed “to [press] the values of participation, deliberation, and empowerment to the apparent limits of prudence and feasibility.”²⁵¹ The reforms are “participatory because they rely upon the commitment and capacities of ordinary people to make sensible decisions through reasoned deliberation and empowered because they attempt to tie action to discussion.”²⁵²

change in Chicago schools from “top-heavy, hierarchical” system to decentralized system that “shifted power and control from centralized city-wide headquarters to the individual schools themselves”). Fung & Wright also note however that the shift evolved to include mechanisms for capacity building on local level and accountability provisions that included centralized supervision. *Id.*; see also Archon Fung, *Deliberative Democracy, Chicago Style: Grass-roots Governance in Policing and Public Education*, in DEEPENING DEMOCRACY 111, 119-20 (discussing decentralization reforms). It is important to note that “decentralization” has different meanings: decentralization of oversight and policymaking versus administrative decentralization of schools. Several mayoral control structures combine centralized policymaking and oversight with administrative decentralization, placing day-to-day operations decisions at the school level. See, e.g., Deborah M. McGriff, *Decentralization: Why, How, and Toward What Ends?*, NCREL POLICY BRIEFS (1993), <http://www.ncrel.org/sdrs/areas/issues/envrnmnt/go/93-1mcgr.htm> (discussing evolution of decentralization in Detroit public schools and continuing controversy). Administrative decentralization appears to be what is contemplated by the New York City Chancellor’s third reorganization of the schools since mayoral control. See David M. Herszenhorn, *Klein Specifies Restructuring of City Schools*, N.Y. TIMES, Apr. 17, 2007, available at http://www.nytimes.com/2007/04/17/nyregion/17schools.html?_r=1&scp=128&sq=%22david+m.+herszenhorn&st=nyt&oref=slogin (discussing Bloomberg administration’s restructuring of city schools). That reorganization seeks to provide for “bottom up” versus “top down” administration of schools. *Id.* (describing plan for restructuring).

249. See Fung & Wright, *supra* note 248, at 4 (discussing need for transformative democratic strategies).

250. See *id.* (discussing possible solution to erosion of democratic vitality).

251. See *id.* at 5 (discussing concepts in empowered participatory governance).

252. See *id.* (describing how participatory democracy can deepen average citizen’s influence in politics). Chicago schools added additional reform in 1995, imposed over the 1988 legislation. The 1995 reforms established a corporate-style management system directly under the mayor’s authority. The goals of the reform were: (1) to relegitimize the public schools by creating a system of accountability in which the mayor became ultimately responsible for the schools; (2) to attract middle class families back into the city to expand the city’s economic base by improving the schools; and (3) to improve outcomes through a standardized student accountability process. The 1995 reform eliminated the central school board and the superintendent positions, and placed the school management under the authority of the Reform Board of Trustees appointed by the mayor.

This approach resonates with a Habermasian notion of discourse theory of law and democracy and his idea of communicative action connecting law to the lifeworld. The elements of empowered participatory democracy include (1) placement of these ideas in a practical setting that tests both possibilities and limitations of the approach on specific tangible problems; (2) involvement of ordinary people affected by these problems; and (3) deliberative solution generation.²⁵³ These forms of empowered participatory governance may take place in connection with centralized accountability.

In another example of a mixed governance structure that seeks to incorporate both robust participation and clear accountability, Leibman and Sabel describe a form of “new accountability” in public school governance as designed based on a similar model of devolved responsibility and autonomy coupled with the imposition of centralized standards and accountability measures.²⁵⁴ In this structure, standards and accountability are set centrally by state and federal actors, yet are defined broadly enough to allow room for experimentation and innovation at the local level.²⁵⁵ This top down policy and standard setting structure is coupled with a bottom-up structure. Such coupling allows for reforms and innovations that give teachers the discretion to implement effective learning approaches. It also allows for the formation of learning communities with their colleagues in which novice teachers learn from more experienced teachers, and students are engaged in instruction that is tailored to their needs.²⁵⁶ Liebman and Sabel discuss the school district as an “accountable learning community.” They cite Anthony Alvarado’s model of “a collegium of like-minded principals, each accountable for improving instruction in his or her own school and able to guide and learn from the others. The goal became to create ‘a learning community’ that connected, and thus opened up to each other, the classroom, the school, and the district.”²⁵⁷

Liebman and Sabel also consider the role of organizing and collective action in supporting structural reforms that allow for both centralized ac-

253. *See id.* at 15 (sketching out three general principles of empowered participatory governance).

254. *See* Liebman & Sabel, *supra* note 60, at 207 (describing accountability system that compares teacher’s clinical practice with peer performance).

255. *See id.* (discussing state and national educational reform movements).

256. *See id.* at 214 (discussing professional educator reform movement).

257. *See id.* at 217 (quoting Alvarado’s explanation of his model). This is a model that the New York State Board of Regents is moving toward; trying to maintain gains achieved through standards and accountability measures while allowing local innovation within an accountability scheme focused on outcomes rather than centralized mandates. *See* New York State Board of Regents, P-16 EDUCATION: A PLAN FOR ACTION (2006), available at <http://usny.nysed.gov/summit/p-16ed.htm> (discussing educational challenges facing New York and laying out goals for future).

countability and local innovation.²⁵⁸ In that context, they address the role that “new publics,” formed by coalitions of stakeholders from disparate quarters who are disaffected by entrenched failures in public schooling, play in fostering new governance structures. They address both top down and bottom up changes necessary to ensure standards and accountability, while allowing for tailoring and innovation.²⁵⁹ These new publics, many of which formed as a result of organizing around school funding litigation, create allies from among system insiders frustrated with failure, advocacy organizations and local parent groups concerned with improving educational quality.²⁶⁰ These coalitions show promise in effectuating needed reform, because they understand the need to respond to both “public” and “expert” opinion in fashioning solutions.²⁶¹ In other words, they recognize the need to meet both substantive and democratic legitimacy in shaping and implementing school reform at both the central policy level and at the local implementation level.

The “new accountability” discussed by Liebman and Sabel envisions a centralized system of standards and accountability general enough to allow for robust local innovation and improvement.²⁶² In this model, they recognize the need to ensure robust participation on the local level: “[p]arents and others must have the political capacity, rooted in and responsive to the needs of their communities, to challenge attempts at recentralization or power grabs by professionals or resurgent local oligarchs.”²⁶³

While Liebman and Sabel acknowledge the need to include parents and local community members in local reform coalitions, they seem to underestimate the need to ensure sufficient capacity building to permit sustained and effective participation by parents and community members. They also gloss over the problematic power dynamics that exist in local communities, particularly those engaged in school governance, including the role of race and class in amplifying some voices while silencing others. As many theorists of deliberative democracy have observed, the quality of deliberation depends not only on the inclusion of all stakeholders among participants, but also the ability of all stakeholders to participate on an equal and effective basis. Fung and Wright place great emphasis on the need to build and sustain capacity and inclusion in the deliberative and decision-making functions.²⁶⁴

258. See Liebman & Sabel, *supra* note 60, at 269 (noting local innovation that leads to new collective action).

259. See *id.* at 266-67 (discussing actions of minority groups and grass-roots movements to advance own reforms).

260. See *id.* at 214 (noting that bottom-up reform started when educators were forced to learn from each others' failures and mistakes).

261. See *id.* at 229-31 (discussing necessities of school reform).

262. See *id.* (discussing “new accountability” system).

263. See *id.* at 272 (describing dangers of new decentralization).

264. See Fung & Wright, *supra* note 248, at 5 (noting that participatory democracy relies on commitment and capabilities of ordinary people).

Fung and Wright's model of empowered participatory democracy provides a way to bridge the gap between the overly centralized model imposed under some mayoral control regimes, and the lack of accountability or meaningful participation in autonomously decentralized schools. This approach provides a structure that takes elements of both the standard-setting and accountability requirements of a centralized governance structure, with local structures that are supported such that they have the capacity to engage in meaningful local decision-making. In doing so, the model avoids many of the shortcomings encountered with either a minimalist conception of centralized control, or overly autonomous and unaccountable forms of decentralized governance.

The application of this mixed model requires consideration of the deliberative process and the nature of discourse at every level. Because different "publics" are involved at different levels of decision-making and action, governance structures should clearly articulate the role of the broader policy setting organizations, as compared with the involvement of local stakeholders in supporting local innovation that is responsive to particular community school needs. Thus, the structures for public deliberation and decision-making should be designed with the various "publics" in mind. The design should allow for meaningful participation, as well as efficient and accountable decision-making.

Applied to New York City, the "empowered participatory democracy" and "new accountability" models offer useful templates for governance at the Panel, CDEC and school levels. Notably, the New York State legislation creating the Panel and CDECs can be read to contemplate this form of governance, particularly given its emphasis on transparency, training and ongoing involvement in decision-making at both the citywide and local levels. As noted earlier, the Panel and CDECs were intended to play an advisory and consultative function and to have meaningful involvement in citywide and district-level planning, policymaking and evaluation. The legislation's provisions for training acknowledge the need for capacity building in order that the members of the CDECs may participate meaningfully. In establishing the CDECs, the legislature apparently had a more robust deliberative process in mind. This process would have local parents and community leaders contribute in meaningful ways to the development and implementation of policies responsive to the needs of their school districts.

The failure of the CDECs to meet expectations of contribution to school governance and policymaking appear to be due to the disjunction between the theory of participation contemplated by the Mayor and Chancellor, and the theories under which the legislature, parents and communities sought to operate.

Even beyond the local structures, a model of empowered participatory governance could be designed to strengthen the ties between the local governance entities and the citywide policymaking structure. For

example, in New York City, the Board of Education was structured by the legislature to include the participation of parents and residents representing various city constituencies. Though perhaps not explicitly structured as such, the Panel represents a hybrid model of citizen and expert participation in citywide school policymaking.²⁶⁵ The legislative design of the Panel contemplates the involvement of parents and a range of stakeholders in educational policymaking. The Panel, like the CDECs, could operate in a more meaningful way if given the power and capacity to do so.

V. CLARIFYING THE ROLE OF PUBLIC PARTICIPATION IN PUBLIC SCHOOL GOVERNANCE: MERGING THEORY AND PRACTICE
IN THE NEW YORK CITY EXAMPLE

As the New York City case study demonstrates, parent and public participation in educational governance and policymaking are issues of significant public concern. The experience of mayoral control, however, in New York City and elsewhere, thus far has resulted in mixed messages about whether a centralized, versus a more localized and participatory structure of school governance, is intended.

A. *Empowered Participation, Democracy and New Accountability in New York City Under Mayoral Control*

From the perspective of the theories of democratic participation identified earlier, the mayoral control structures in New York City appear either to take elements of both a minimalist and a deliberative approach, or attempt to dress up an authoritarian approach to school governance as if it retained elements of deliberative democracy, when in fact it does not.²⁶⁶ Indeed, part of the difficulty seems to be that policymakers have not clearly identified or articulated the degree to which mayoral control must include public participation to be effective yet responsive to reasonable practical concerns. Further confusion seems to arise due to the conflation of “accountability” with a minimalist, authoritarian view of governance. In New York City, for example, the mayor appears to take the view that because he is accountable, he is empowered to make decisions unilaterally under a minimalist conception of democratic legitimacy. The design of New York’s mayoral control legislation, and the dominant understanding of many stakeholders, contemplates a more deliberative theory of democratic legitimacy that requires robust inclusion and deliberation in school governance. While the mayor remains the decision-maker and the accountable authority, for his decisions to be legitimate, they must include

265. Many of the original and current appointees to the Panel brought professional and technical expertise to their work. Panel members have included educational and cultural experts, financial experts, attorneys and community organizers, among others.

266. For a discussion of arguments professing that the way democracies regularly function is as authoritative entities pretending to involve and include public discussion and deliberation, see *supra* notes 166-73 and accompanying text.

and be responsive to meaningful public deliberation. Viewed in this way, it is possible to bridge the perceived gap between deliberation and accountability, and clarify the executive and public roles in governance and decision-making.

In the case of New York City's social promotion debate, the Panel members were operating under a deliberative model with the understanding that mayoral decision-making and accountability should be informed and guided by their input. The members of the Panel for Educational Policy sought out information from both experts and the public about the relative benefits and drawbacks of the Mayor's proposal and set about making an informed decision. The Mayor, however, operating under a minimalist model, unilaterally imposed a decision by fiat because he could remove Panel members at will. As a result, the structure for public participation was revealed to be very weak indeed.

From the minimalist perspective of democracy as a process of selecting authorized leaders, the social promotion vote was of little import because the Mayor was subsequently re-elected by a significant margin. Indeed, from that perspective, the Mayor and Chancellor were operating just as they should be. As the elected leaders, they were given the authority to proceed with their plans for educational reform. The Mayor's electoral victory satisfies the requirements of democracy, and the Mayor should be given the authority to lead as he sees fit. Any disagreement with his policies should be addressed in the next mayoral election.

From the perspective of deliberative democracy, however, the social promotion vote was not a legitimate exercise of authority. The refusal to consider the informed, reasonable and meaningful input of statutorily authorized stakeholders and the summary imposition of a decision contrary to evidence presented lacked democratic legitimacy. It also represented an enormous betrayal of the letter and spirit of public participation underlying the continued existence of the Board of Education in the mayoral control legislation. Indeed, as many observed, if there is no role for the Panel for Educational Policy and the Community District Education Councils to play in informing and setting policy, then what is their purpose?

Those who take the minimalist view of mayoral control may do so in the interests of establishing accountability and addressing school failure at any cost. In their view, efforts at decentralized school governance and community control have yielded chaos, inefficiency, low standards and lack of accountability. Many argue that if mayoral control brings accountability that will evidence results in public schools, it may be worth giving up opportunities for public input. What is lost in this argument is that decentralization came as a response to similar charges leveled at the prior centralized system in New York City.²⁶⁷ Also absent from the minimalist

267. For a discussion of the charges leveled at the centralized system in New York City, see *supra* note 59 and accompanying text.

view is the evidence that meaningful community involvement in public schools is regularly associated with better school and student outcomes.²⁶⁸

In addition to the practical reality that a minimalist approach to school governance excluding community participation results only in quicker policy decisions, and not better ones, there is a more fundamental reason for establishing structures for public participation in educational decision-making, particularly in large urban school districts. In urban school districts those most affected by school decision-making have the most limited opportunities to participate, thus every effort must be made to provide structural support for their involvement as parents and community members. Such urban settings show that capacity building for school governance purposes also supports capacity building for greater citizen participation generally.

More broadly, Habermas's discourse theory of democracy provides a persuasive argument that a discursive approach is necessary for democratic legitimacy, both procedurally and substantively, through meaningful involvement of the governed, and by connecting law to the lifeworld through communicative action. As Habermas notes, the legitimacy of a democracy depends on the degree to which the members of the society, as free and equal consociates, are able to participate in establishing its governing structures. A democratic legitimacy grounded in the participation of a free and equal people, requires the ability to engage in communicative action that shapes democratic opinion- and will-formation. For purposes of democratic education then, the opportunity for meaningful deliberation is key to the development of legitimate school governance.

A fundamental notion in our system believes that part of the goal of public education is to prepare young people to become full participants in our democracy. Therefore, to shut out public participation in public school governance sends a message at odds with one of the core purposes of our public education system and our democracy. Public education policy must include a meaningful role for parents and the public, not only in terms of day-to-day involvement in the schooling of one's own children, but also in the broader enterprise of setting public education policy. For this process to be meaningful, there must be opportunities for the community to be educated about the benefits and drawbacks of different policy approaches. There must also be recognition of the limits of that participation, from the perspective of public resources and from an administrative perspective.

B. *Recommendations for Encouraging Meaningful Participation Under Mayoral Control*

If education truly is important to democracy, there is an obligation to ensure that structures exist to serve the inclusive, educative and substan-

268. See, e.g., Liebman & Sabel, *supra* note 60, at 267 (explaining that grassroots coalitions form new collective actions that advance educational reform).

tive values of participation. Claims of inefficiency are not enough to trump the value added by informed, substantive public participation. Nor can low levels of actual participation serve as an excuse for dismantling structures for participation. To the contrary, efforts must be made to enhance those structures so that they enable and encourage more meaningful participation.

At the same time, it is important to clarify the scope and limits of public participation in public education. The appropriate balance must be struck between public input and participation, and the ability of teachers and school administrators to effectively educate children based on professional, well-established educational models. Such clarification is also necessary for purposes of transparency: so that parents and the public know the scope and limits of their involvement.

Even within the context of a more centralized and directly accountable system, there can exist meaningful avenues for parent and public participation. The structures the New York State legislature put in place for purposes of community involvement must be adhered to, so that they may operate as a meaningful counterweight to centralized control. The ongoing criticism of New York City's Mayor and Schools Chancellor for failing to meaningfully involve the public will have implications for the mayoral control legislation that is scheduled to sunset in 2009.

Based on the experience with the Panel for Educational Policy and the CDECs, any legislative extension of New York City mayoral control should examine this question closely. If the Panel and CDECs were meant to play a deliberative and substantive role, any legislation continuing the current mayoral control structure should include clear mechanisms for training and capacity building that are supported and enforced. Such legislation also should include provisions that Panel members serve for terms, rather than at the pleasure of the appointing authority. Further, it should require that a portion of the mayoral appointees include parents of students currently enrolled in the public schools. In addition, the duties and responsibilities of the Panel should be clarified, particularly as they relate to the meaning of the Panel's vote on policies affecting public schools. The legislation regarding the CDECs should clarify their role at the local level and should include mechanisms to ensure that training and capacity building requirements are carried through. Such changes are necessary if the Panel and the CDECs are to have a meaningful role in governance. To the extent that the existence of these bodies represents a decision by the legislature that there should exist a deliberative process as relates to public school policy on the citywide and school district levels, these bodies must be given the ability to perform their duties in an informed manner.

Finally, there is a need for greater clarity regarding the role public participation in governance is meant to play in improving school quality and student achievement. Some observers take the view that governance changes, particularly those at the citywide, state and federal levels, are far

removed from local schools, and do not have an impact on school quality and student achievement.²⁶⁹ School governance changes at every level should set forth the goals of their structures and powers for improving student achievement, and should engage in ongoing efforts to build capacity, provide support and reduce burdens at the local level, where education actually happens.

VI. CONCLUSION

Public participation is essential to well-functioning school governance and to legitimate democracy. Under a discourse theory of democracy, the ongoing procedural and substantive involvement of members of the public is necessary to establish and sustain democratic legitimacy, to strengthen democratic participation generally, and to improve school outcomes. For mayoral control to work in a manner that improves substantive outcomes and public acceptability, there must be transparency, oversight and meaningful accountability. This requires that the public, including parents, be aware of and involved in key decisions about education. Additionally, for important policy decisions regarding testing and retention, and even bus route changes, the governance structure must be subject to public notice. This notice of adequate prior information facilitates deliberation that ensures meaningful input that will improve outcomes while enhancing civic involvement and teaching children what citizenship and democratic education ought to mean.

269. See Larry Cuban, *A Solution That Lost Its Problem: Centralized Policymaking and Classroom Gains*, in *WHO'S IN CHARGE HERE?* 124 (Noel Epstein ed., Brookings Inst. Press 2004) (criticizing governance changes at city, state and federal levels).