Public Education as Public Space: Some Reflections on the Unfinished Work of Marc Feldman

Richard C. Boldt

Articles

PUBLIC EDUCATION AS PUBLIC SPACE: SOME REFLECTIONS ON THE UNFINISHED WORK OF MARC FELDMAN

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"STRANGER, if you passing meet me and desire to speak to
      me,
why should you not speak to me?
And why should I not speak to you?"[1]

INTRODUCTION

In the spring of 1996, my friend and colleague, Marc Feldman,
wrote to several dozen leading education theorists and reformers
around the country. At the time, Marc was planning a sabbatical from
his faculty position at the University of Maryland School of Law for the
following year. The letters were intended to solicit help from Marc's
carefully selected correspondents in locating "very good urban public
school[s]" where he might spend the next academic year.[2] Each letter
acknowledged that his was "a somewhat unusual request,"[3] given that
Marc—a lawyer and law professor—was not particularly interested in
serving in a narrow legal capacity. As he put it:

> The motivation . . . for my sabbatical is an interest in educa-
> tion. While I am willing to assume legal responsibilities as

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1. Walt Whitman, *To You, in* LEAVES OF GRASS 10 (Bantam Classic ed., Bantam Books
1983) (1892).

2. *See, e.g.,* Letter from Marc Feldman, Professor of Law, University of Maryland
School of Law, to Deborah Meier, President, Center for Collaborative Education 1 (Feb. 8,
1996) (on file with author).

3. *Id.*

part of a "sabbatical bargain," I hope to limit my role as law-
yer. I fully realize that my lack of specific expertise and skill
adds to the difficulty of my request. The best I can offer is an
abiding interest, a willingness to make a serious commit-
ment, and two decades of at least generally relevant exper-
iences. . . . I think/hope I would have something to offer a
school in exchange for its rather considerable contribution
to me.[4]

Marc's letters were characteristically detailed and deliberate. He
explained that he was "most interested in understanding the possibili-
ties of systematic reform—the reform of school systems or districts,
not just single classrooms or schools."[5] He also made clear that he
wished to be involved with public school teachers, administrators, and
students as an active participant, not simply as an observer or visitor.[6]
He wrote:

I can imagine spending time in classrooms working directly
with students and teachers. Alternatively, I can imagine
shadowing and assisting a very capable principal of such a
school. If there were a school administrator or foundation
officer with a highly developed educational vision and suffi-
cient clout to implement that vision in more than an incre-
mental way, assisting him or her would also be a possibility.[7]

In the end, however, Marc allowed that he was "open-minded"
about "other settings and situations, not immediately apparent . . . ,
that would be well worth considering."[8] The one requirement about
which he said he was "inflexible" was that, by the end of his sabbatical,

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4. Letter from Marc Feldman, Professor of Law, University of Maryland School of
Law, to Lee Frissell, Director of Field Projects, New York University 2 (Mar. 12, 1996) (on
file with author).

5. *Id.* at 1.

6. *Id.* In this regard, Marc was sensitive to the concern raised by one educator that
"those who study schools (be they from universities, think tanks, or school bureaucracies)
prefer to keep their distance from the schools they study." Ann Cook, *Whose Story Gets
Told? Rethinking Research on Schools,* EDUC. WK., Jan. 19, 1994, at 48. He recognized that
teachers and education researchers often have conflicting agendas. "Practitioners . . . are
consumed by the day-to-dayness of school: of finding ways to meet the challenges from
one's students, the needs of one's colleagues, the demands of one's supervisors. Research-
ers are out to prove a point, validate their point of view, formulate a theory, emphasize the
esoteric." *Id.* As a consequence, Marc quite consciously sought "a new research model
based on inquiry-based collaboration in which researchers and school communities to-
gether explore issues of mutual interest and acknowledged value." *Id.* at 35.

7. Letter from Marc Feldman to Deborah Meier, *supra* note 2, at 1.

8. *Id.* at 2.

it was essential that he have had "a deep and comprehensive look at efforts to create effective schools."[9]

The notion that a law professor might wish to devote his research leave to learning about public schools does not seem like a very great stretch, given legal issues current within the field of education. Lawyers and legal academics rightly continue to worry over the resegregation of public schools,[10] efforts to establish school voucher programs and other "parent choice" initiatives designed to move public education dollars to private (sometimes religious) schools,[11] and the diminishing ability of some local communities—particularly African American and Latino communities—to play a meaningful role in matters of school governance.[12] Indeed, each of these areas was of intense interest to Marc.

More fundamentally, though, his choice to spend a year actively involved in the daily workings of several public schools was part of a larger undertaking, in which he was seeking to explore the political potential of public institutions of many sorts. Marc, along with several other recent commentators, had begun to focus his work on the politics of "public space."[13] In this respect, his concern over the vitality of public schools was related directly to his interest in a wide variety of public institutions, including the design, regulation and use of munic-

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9. Letter from Marc Feldman to Lee Frissell, *supra* note 4, at 1.

10. *See, e.g.,* DAVID ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995) (exploring the causes, development, and solutions to the school desegregation problem through consideration of judicial, social science, educational, and ideological viewpoints); john a. powell, *Living and Learning: Linking Housing and Education,* 80 MINN. L. REV. 749 (1996) (discussing the problem of racial segregation in public schools and arguing that desegregation is necessary to build a true democracy).

11. *See, e.g.,* JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990) (contending that the education problem in America can be attributed to political institutions that foster excessive bureaucracy, and arguing in favor of a new system of public education that would rely on markets and parental choice); James S. Liebman, *Voice, Not Choice,* 101 YALE L.J. 259 (1991) (reviewing CHUBB & MOE, *supra*) (criticizing Chubb and Moe's interpretation of their data and the reasoning behind their arguments, and offering a proposal for greater parental participation in public schools).

12. *See* James Dao, *Albany in Schools Accord to Give Chancellor Power and Weaken Local Boards,* N.Y. TIMES, Dec. 18, 1996, at A1 (discussing the New York State legislature's decision to centralize hiring authority for New York City public schools in the school's chancellor).

13. *See, e.g.,* Jerry Frug, *The Geography of Community,* 48 STAN. L. REV. 1047 (1996) (criticizing the current "urban policy" of the government for nurturing suburban autonomy while simultaneously isolating the poor and racial minorities, and suggesting a new urban policy designed to promote "community building"); *see also* John O. Calmore, *A Call To Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty,* 67 FORDHAM L. REV. 1927 (1999) (examining "cause lawyering" on behalf of the inner-city poor, specifically in light of the "spatial and geographic marginalization that deepens their . . . racist and economic subordination").

ipal parks, and questions of city planning and urban land use policy
more generally.[14] In Marc's conception, the public institutions impli-
cated in these areas, together with labor and professional associations,
the mass media, and other civic organizations, play a key role in help-
ing to shape individual identities and larger societal norms. His con-
viction was that particular questions related to the operation of these
institutions, including many that are framed as legal questions, bear
directly upon their ability to support progressive political outcomes.[15]
This conviction, in turn, was of central importance to Marc, whose
professional life was devoted to progressive social change.

　　In his last major article, *Political Lessons: Legal Services For The
Poor*,[16] Marc took up a different but related topic. As part of his explo-
ration of the history and current functioning of legal services pro-
grams around the country, Marc identified some of the features of
contemporary Western culture that he believed undermine the ability
of advocates for the poor to wage effective legal advocacy.[17] While he
painted with a broad brush, several of his claims provide insight into
his thinking about public institutions, public space, and civic life.[18]
Marc's key assertion was that an ongoing "privatization of social life"
has fundamentally changed "social meaning" within American soci-
ety.[19] Relatedly, he claimed that a growing "radical individualism"[20]
has "sedated us from the realities of power . . . ."[21] Marc linked the

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　　14. This claim, and much of my description of Marc's thinking in the pages that follow,
is based upon extensive conversations we had before, during, and after his sabbatical year.

　　15. Robin West's definition of "progressive constitutionalism" comes very close to cap-
turing the sort of progressive politics referred to in this text. While West's attention is on
constitutionalism, her more general notion is that individual citizens should be entitled
not only to governmental protection against danger but also to the "'positive liberties' of
civic participation, meaningful work, and unthreatened intimacy." ROBIN WEST, PROGRES-
SIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 2-3 (1994).

　　16. Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529 (1995).

　　17. *Id.* at 1599-1621.

　　18. Marc's immediate concern in his *Legal Services* article was with the ways in which
these features of contemporary culture lead legal services lawyers to play a "remissive" role
in "sublimating conflict and politics." *Id.* at 1618. Notwithstanding the specificity of his
analysis in this regard, it is clear that this cultural critique was part of a much larger project.

　　19. *Id.* at 1599.

　　20. As Marc explained:

　　　We have become radical individualists. We behave as if there are no limits to the
　　　attention we should pay, the importance we should accord, or the fulfillment we
　　　can achieve for ourselves. We characterize and criticize the larger world as imper-
　　　sonal, alienating, and unfeeling. In contrast, our emotions are immediate and
　　　engaging.

Id. at 1599 n.202.

　　21. *Id.* at 1611. In addition, Marc argued that power itself, in the form of state author-
ity, has been reconfigured in recent years, so that it no longer resides exclusively in govern-
mental institutions. He claimed that much state power has been privatized or transferred

growth of radical individualism to mainstream liberal theory more generally, which he believed "contributes to the dissolution of social ties and relationships and, simultaneously, the promotion of social conformity."[22]

Marc's account of this privatization of social life is worth quoting at length.

> As there has been a privatization of state power, so too there has been a privatization of social life, although with very different meaning as to the accumulation and exercise of power. We have constructed and pursued individual lives that are increasingly psychomorphic. We seek psychic absorption, not social participation; we find social meaning in individual human feelings, not in collective civil activity.
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> Our psychic absorption is pervasive, and we are ill-served by such a commitment. Intimate society is ruled by personality; social meaning is accorded by reference to feeling. . . . Even explanations about one's place in the world have yielded to understanding via personality and feeling. We have abandoned class as a meaningful construct, despite systematic inequalities of wealth and power. Rather, with Enlightenment sensibilities, we proclaim that each of us has equal potential and equal opportunity. In this way, what we accomplish (or fail to accomplish) and the inequalities some of us experience are the result of personal effort and ambition. Not class nor race nor gender, but individual character. Dignity for those who succeed, guilt for those who do not, and social isolation for all.[23]

This social isolation concerned Marc not only because he believed it diminishes the accomplishments of which each of us is capable, but also because he believed it diminishes—indeed, makes impossible—democratic civil society. His position was that "a vision of life that values the private over the public, the personal over the social, and the affective more than the cognitive" is importantly to

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to "nominally private entities," and that this shift has yielded centers of authority in which power is "more concentrated," "more remote," and "less publicly accountable." *Id.* at 1599. He further asserted that "[t]he privatization of state power has decentralized state power." *Id.* at 1599 n.201. Marc quoted Sheldon Wolin on this point: "'What in fact occurs through privatization is not the elimination of power but the elimination of politics, that is, the public discussion and argument over how power is to be used, for what ends, and who is responsible.'" *Id.* (quoting SHELDON S. WOLIN, THE PRESENCE OF THE PAST: ESSAYS ON THE STATE AND THE CONSTITUTION 182 (1989)).

22. Feldman, *supra* note 16, at 1600 n.203.

23. *Id.* at 1599-1600 (footnotes omitted).

blame for the absence of a progressive politics.[24] Such a retreat from public life, and the corresponding abandonment of public discourse, facilitates the marginalization of low income groups and communities of color, and prevents the formation of effective social movements.[25] Thus, for Marc, a practice designed to foster the development of public institutions, including public schools, and to strengthen their capacity to support civic life was itself an affirmative political project.

This project, in turn, was informed by the pragmatist philosophy of John Dewey.[26] On one hand, Marc's choice to immerse himself in pragmatist theory while pursuing a practice focused on public education makes perfect sense, given that Dewey's work has dominated American education theory for most of the past century.[27] On the other hand, Marc was generally attracted to pragmatism as a philosophy, and to a pragmatist methodology that embeds theory within concrete practice.[28] He was also taken with the antiformalism of the legal

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24. *Id.* at 1601-02.

25. *See id.* at 1599-1602. In addition, Marc believed that a restructuring of social, political, and economic power is impossible without the mediating influence of conflict. In his account, the very same cultural features that disrupt the development of collective consciousness—the retreat from public life and abandonment of public discourse—also are the source of what he regarded as a disabling contemporary abhorrence of conflict. *Id.* at 1603 n.212.

26. In a memo seeking a summer research grant to begin work on an article that subsequently would become his sabbatical project, Marc had the following to say about public education and John Dewey:

> There is hardly a more pressing contemporary issue than that of public education. While questions of funding, academic organization, and performance measures abound, the real questions we must confront are those relating to educational excellence and equality of achievement. These were familiar concerns to [John] Dewey and [Robert Maynard] Hutchins. . . . [P]regnant within the educational discussion are ideas and struggles about our conceptions of community, politics, and personality. In my article about Legal Services, I made an initial foray into these subjects. With this article, I continue my consideration . . . .
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> To my mind, John Dewey is best characterized as a "minority, not a majority, spokesman . . . whose democratic vision failed to find an important place in liberal ideology. . . ." He was a "more radical voice" for "participatory democracy." He believed in a notion of individual development through political, social, and cultural participation. He rejected a narrower notion of democracy as an "ex post facto check on the power of elites" in favor of something more positive and substantive. At its most general, Dewey's thought revealed the tension between liberalism and democracy. . . . [T]his is the topic I continue to explore in this article.

Memo from Marc Feldman, Professor of Law, University of Maryland School of Law, to Donald Gifford, Dean, University of Maryland School of Law 8-9 (Mar. 17, 1994) (quoting ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY, at xiv-xv (1991)) (on file with author).

27. *See* RICHARD J. BERNSTEIN, JOHN DEWEY 1 (1966) ("John Dewey is known as America's most influential philosopher and educator.").

28. Marc's commitment to pursuing theoretical work within the context of concrete practice is well illustrated by his unusual decision to obtain his basic legal training by read-

realists who owed much to Dewey, William James, Charles Sanders Peirce, and the other pragmatists.[29]

Marc knew that his decision to adopt a pragmatist theoretical perspective carried considerable intellectual baggage. Indeed, pragmatism is hedged in by a combination of both longstanding and contemporary criticisms that are relevant to Marc's particular project. The long-standing critique was offered most forcefully by Robert Maynard Hutchins in the 1930s.[30] The more contemporary concerns have been set out with particular clarity by David Luban.[31] Marc believed that these two related critiques constituted genuine challenges to his desire to employ pragmatist thinking within the context of his progressive politics. Much of this Article is directed toward thinking through that problem.

Marc appreciated the power of Hutchins's critique of Dewey, and of the parallel critique of legal realism offered by its critics in the 1930s and beyond.[32] Marc was sensitive to the charge that pragmatism as a political philosophy and legal realism as a jurisprudence, because of their foundations in empiricism, could be understood as entirely positivist, utilitarian systems of thought.[33] Marc's concern, and the concern of others who have looked at this problem, was that these theories could lead to a kind of pure instrumentalism, inconsistent

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ing law in a law office instead of attending law school. His subsequent efforts designing and implementing the Legal Theory and Practice curriculum at the University of Maryland School of Law provide further evidence of his career-long attachment to this way of working. For a fuller discussion of Marc's understanding of the proper relationship between legal theory and practice, see Richard C. Boldt & Marc Feldman, *The Faces of Law In Theory and Practice: Doctrine, Rhetoric, and Social Context*, 43 HASTINGS L.J. 1111 (1992).

29. *See, e.g.*, WILLIAM JAMES, *The Pragmatic Method, in* ESSAYS IN PHILOSOPHY 123 (1978); Charles Sanders Peirce, *How to Make Our Ideas Clear, in* PRAGMATISM 26 (Louis Menand ed., 1997). On the rise of legal realism and the role played by pragmatism in its development, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY 74-94 (1973).

30. Robert M. Hutchins, *Grammar, Rhetoric, and Mr. Dewey*, SOC. FRONTIER, Feb. 1937, at 137 [hereinafter Hutchins, *Grammar*].

31. DAVID LUBAN, LEGAL MODERNISM 125-78 (1994).

32. For a representative listing of the group of scholars who comprised the initial legal realist movement, see Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226 n.18 (1931). For a good example of the criticism leveled against the realists, see Mortimer J. Adler, *Legal Certainty*, 31 COLUM. L. REV. 91 (1931) (reviewing JEROME FRANK, LAW AND THE MODERN MIND (1930)); Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 353 (1931).

33. *See, e.g.*, BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 61 (1994).

with the normative or political commitments that were essential to his project.[34]

In addition, Marc was mindful of a related set of limitations that some have attributed to the pragmatist alternative. Luban, in particular, has argued that pragmatism—or more precisely neopragmatism—is not well suited to an activist politics aimed at fundamentally restructuring society because its reliance on contextual analysis is inherently protective of the status quo.[35] Suzanna Sherry has made a similar point in arguing that a central characteristic of legal pragmatism is its incrementalism.[36] "Instead of abstract, unitary, foundational principles, legal pragmatists rely on a web of 'coherence with existing beliefs as the basis for decisions [and] those beliefs limit the possibility of radical improvement.'"[37]

Marc knew as well that a parallel assessment of the limited potential of postmodern political/legal theory to support a progressive political practice also has been put forward in recent years. In this account, offered most particularly by Joel Handler, many of the features that postmodern theory shares with pragmatism, including its antiessentialism, antifoundationalism, and conventionalism,[38] are identified as precisely the basis for its inability to animate a radical politics.[39] In fact, Marc was concerned that an unreconstructed postmodernism that permits no "grand narrative" might be incapable of generating the sort of class and race-conscious politics to which he was committed. The question he wished to address through his sabbatical work was whether the insights of Dewey and his intellectual

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34. Marc's practice as a poverty lawyer and his commitment to work in collaboration with disempowered communities is described in his scholarship. *See* Boldt & Feldman, *supra* note 28.

35. *See* LUBAN, *supra* note 31, at 126-27 ("[P]ragmatism—notwithstanding its seeming radicalism—requires us to treat our concepts conservatively.").

36. *See* Suzanna Sherry, *Progressive Regression*, 47 STAN. L. REV. 1097 (1995) (reviewing ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994)).

37. *Id.* at 1111 (quoting Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 170).

38. For a thorough discussion of these characteristics, see LUBAN, *supra* note 31, at 133-41. *See also infra* text accompanying notes 220-249. In a telling footnote in his 1992 article on postmodern theory in the *Law & Society Review*, Michael W. McCann observes that he "often confound[s] graduate students by challenging them to distinguish post-modernism from the pluralism of 1950s social science, or Dewey's older liberal pragmatism. Differences exist, but the similarities are also striking." Michael W. McCann, *Resistance, Reconstruction, and Romance in Legal Scholarship*, 26 LAW & SOC'Y REV. 733, 736 n.5 (1992).

39. *See* Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

heirs with respect to the inter-subjective nature of identity[40] and the constitutive power of civic life[41] could be made coherent with a progressive political practice.

In the early part of the twentieth century, some "objectivist" or "naturalist" social scientists and philosophers allied with Dewey had indeed asserted that because "value systems could only be the products of social, economic, and psychological pressures operating on individuals and groups . . . no values could be called 'higher' in any meaningful sense. Some obviously had greater social support, but none had any greater 'validity.'"[42] In Marc's view Dewey had rejected this conclusion, and had attempted to develop a "convincing naturalistic method of value criticism and justification."[43] He believed that Dewey should be understood as a radical democratic theorist.[44] He regretted that Dewey has come to be read as a mainstream liberal legal and political thinker, and he wished to reclaim Dewey's pragmatist legacy, which he feared has been limited by a too constrained reading of his work on the cultural grounding of ethics.[45]

In order to accomplish this work, Marc understood that he would have to follow Dewey's injunction to collapse the dichotomy between

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40. *See* john a. powell, *The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity*, 81 MINN. L. REV. 1481 (1997) (suggesting that the "self" is fragmented, and that the idea of the "multiple self" has significant legal implications).

41. *See* Frug, *supra* note 13, at 1075-81 (describing the important role cities play in community building).

42. PURCELL, *supra* note 29, at 42.

43. *Id.* Further,

   Dewey seized on the idea of culture as a way around the theoretical problem. Whatever one thought about the foundations of morality, he reasoned, strong individual and communal values in fact existed. Modern anthropology demonstrated that such values arose out of a general cultural matrix which characterized every society. The crucial practical problem confronting democracy, then, was the discovery of what kind of culture produced democratic institutions.

Id. at 211.

44. *See* Memo from Marc Feldman to Donald Gifford, Mar. 17, 1994, *supra* note 26, at 9 (stating "[t]o my mind, John Dewey . . . was a . . . radical voice for participatory democracy"). Robert Westbrook takes the same position in his intellectual history of John Dewey. WESTBROOK, *supra* note 26.

45. In the early 1990s, a diverse group of academics seized upon pragmatism as a source of authority, or at least inspiration. *See* Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990) (including articles and comments from such luminaries of the legal academy as Martha Minow, Richard Posner, Margaret Radin, Frank Michelman, and Mari Matsuda, as well as other allied scholars such as Cornel West, Richard Rorty, and Hilary Putnum). The readings of Dewey and his intellectual legacy presented in the symposium are as disparate in content as their authors are diverse in political and philosophical orientation. Notwithstanding these various depictions, Marc believed that Dewey's work is best characterized as setting out a radical democratic political and moral philosophy.

theory and practice.[46] Marc thus sought out examples of vibrant ur-
ban public schools, making clear that he wished to enter their milieu
not as an observer but as a full participant in their collective en-
deavor.[47] In essence, his decision to "practice" in these public institu-
tions, to move within the public space demarcated by their activities,
was motivated by a hope that his daily interactions with students,
teachers, parents, local school board members, and others would pro-
vide him with the basis for effecting a reconciliation of his pragmatist
thinking and his political commitments.

    Although I have described the Hutchins and Luban/Handler cri-
tiques of pragmatism as "intellectual baggage," the challenges
presented by these critiques stood potentially as practical barriers to
Marc's work as well. Both pragmatist theory and a radical vision of
society deeply resonated for him, and, I believe, the complex relation-
ship between pragmatism and radical democratic politics created a
motivating tension that informed his research. In the remainder of
this Article, I seek to work out a response to each of the two critiques
that Marc perceived as impinging upon his project.[48] The first section
takes up the Dewey-Hutchins debate, as a means of framing the argu-
ment that Deweyan pragmatism is devoid of any necessary substantive
political/normative commitments. I conclude in this section that

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    46. An essential feature of Dewey's work was its rejection of the theory-practice distinc-
tion, as well as many other dichotomies familiar in Western thought. *See* Abraham Kaplan,
Introduction to 10 JOHN DEWEY, THE LATER WORKS: 1925-1953, at xii (Jo Ann Boydston ed.,
1989).
    47. *See supra* note 6 and accompanying text.
    48. Several colleagues who provided comments on earlier drafts of this Article sug-
gested either that the piece did not provide sufficient description of Marc Feldman's life
and work, or that the discussion failed to signal adequately when it was speaking in Marc's
voice and when in mine. Given these entirely reasonable complaints, I wish to make clear
that the fundamental questions I address in this Article were framed entirely by Marc, both
in his published and unpublished work. The effort to think through these questions, on
the other hand, is largely my own understanding. Indeed, my conversations with Marc
about his research and my review of his notes and papers make me confident that Marc
had not yet come to firm conclusions regarding these matters when he was forced to sus-
pend work on account of illness. I have been guided in my efforts to work out an analysis
of these issues by a wealth of material that Marc had gathered in advance of and during his
sabbatical. A great majority of the citations in this Article, including most of the footnote
references to theoretical material, newspaper accounts, essays on education, and the like,
were contained in "banker's boxes" that Marc employed as a sort of working library. At
best, my own conclusions regarding the Dewey-Hutchins debate and the Luban/Handler
critique of neo-pragmatism should be read as tentative. My attempts to apply Deweyan
theory to several contemporary education issues in which Marc was involved represent per-
haps the closest this Article comes to co-authorship. For those readers who wish to learn
more about Marc's life and work, I recommend the memorial essays that were published in
the *Maryland Law Review* shortly after his death. *See In Memoriam: Marc Feldman*, 58 MD. L.
REV. 325 (1999).

Dewey's brand of pragmatist philosophy and education theory can be read to contain a particular political ethics that is consistent with Marc's aspirations, notwithstanding its general rejection of a priori reasoning. In the second section, I consider the related argument that pragmatism (and its first cousin, postmodernism) are inherently conservative theoretical perspectives. Here again, albeit in a somewhat tentative fashion, I conclude that Marc's brand of progressive democracy can be undertaken without jettisoning his theoretical attachment to Dewey and his postmodern fellow travelers. I thus end up endorsing the position of Allan Hutchinson that there "is no necessary contradiction between a continuing loyalty to a [pragmatist or] postmodern perspective and the practical implementation of a radical political agenda."[49] In the third and final section of this Article, I draw upon the work of several legal scholars who have written about the importance of urban public space, including public schools.[50] When read together with Marc's notes and the other materials he compiled, this work begins to suggest a perspective on current issues within the field of public education that honors both Marc's pragmatism and his commitment to a progressive democratic politics.

Sadly, Marc died before he was able to put into writing the lessons he took from this set of experiences. As a consequence, this Article does not provide complete answers to the questions that led Marc to the Manhattan Village Academy, the Central Park East Secondary School, and the Julia Richman Education Complex—the central-city public schools where he taught and studied. It does, however, suggest the direction in which his thinking was headed, and it begins to demonstrate the potential he hoped to discover in these public spaces.

I. PRAGMATIC ETHICS

In late 1936, Robert Maynard Hutchins, early in his tenure as president of the University of Chicago and formerly the dean of the Yale Law School, published *The Higher Learning in America.*[51] John Dewey, pragmatist and progressive, then at Columbia University, responded critically to Hutchins's educational ideas and rationalist metaphysics. In a series of articles and talks by both participants and

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49. Allan C. Hutchinson, *Doing The Right Thing? Toward a Postmodern Politics*, 26 LAW & SOC'Y REV. 773, 774 (1992).

50. *See generally* Frug, *supra* note 13; powell, *supra* note 10, at 749.

51. ROBERT M. HUTCHINS, THE HIGHER LEARNING IN AMERICA (1936) [hereinafter THE HIGHER LEARNING IN AMERICA].

various supporters, the debate was joined.[52] As compared to Dewey's intellectual combat with Walter Lippmann and Reinhold Niebuhr,[53] this exchange has not been extensively examined.[54]

On one level, the Dewey-Hutchins exchange was a debate about the form and content of education—specifically higher education, but also education in society more generally. Both Dewey and Hutchins were educational theorists and both played a part in building alternative educational institutions, most prominently Dewey's leadership in developing the Chicago Lab School and Hutchins's pivotal role in the founding of St. John's College.[55]

But the debate had significance beyond educational theory. It was also an important event in the emergence of legal realism.[56] In fact, this early dialogue signaled intellectual cross-currents that have swirled within the legal academy for over five decades.[57] The debate, which took place against the backdrop of the rise of political authoritarianism in Europe, was fundamentally about the nature and justification of democratic society.[58] Within that tumultuous context, the positions staked out by Dewey and Hutchins served to define educational and philosophical battle lines that continue to shape public discourse and the development of public policy today.[59]

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52. Hutchins first addressed Dewey explicitly in a speech he delivered in early 1934. ROBERT M. HUTCHINS, NO FRIENDLY VOICE 33-40 (1936) [hereinafter NO FRIENDLY VOICE]. Dewey took up the debate by publishing two reviews of *The Higher Learning*. John Dewey, *President Hutchins' Proposals to Remake Higher Education*, SOC. FRONTIER, Jan. 1937, at 103 [hereinafter Dewey, *Proposals to Remake Higher Education*]; John Dewey, *Rationality in Education*, SOC. FRONTIER, Dec. 1936, at 71 [hereinafter Dewey, *Rationality*]. Hutchins's response came almost immediately. Hutchins, *Grammar, supra* note 30. Dewey then provided a rejoinder the next month. John Dewey, *The Higher Learning in America*, SOC. FRONTIER, Mar. 1937, at 167 [hereinafter Dewey, *The Higher Learning in America*]. Others who continued the debate included Mortimer Adler and Sidney Hook. *See* Mortimer J. Adler, *The Crisis in Contemporary Education*, SOC. FRONTIER, Feb. 1939, at 140; Sidney Hook, *Metaphysics and Social Attitudes: A Reply*, SOC. FRONTIER, Feb. 1938, at 153.

53. *See* PURCELL, *supra* note 29, at 152-56.

54. *But see* William P. Martin, The Dewey-Hutchins Debate On General Education, 1929 to 1945: A Case of Progressive Historical Bias (1991) (unpublished Ph.D. dissertation, Temple University) (on file with the Temple University Library); Rene Vincente Arcilla, *Metaphysics in Education after Hutchins and Dewey*, 93 TCHRS. C. REC. 281 (1991).

55. *See* Martin, *supra* note 54, at 71, 119.

56. *See* PURCELL, *supra* note 29, at 74-94 (describing the rise of legal realism); RICHARD A. POSNER, OVERCOMING LAW 387 (1995) ("In a nutshell: The pragmatic movement gave legal realism such intellectual shape and content as it had.").

57. *See* PURCELL, *supra* note 29, at 74-94.

58. Memo from Marc Feldman to Donald Gifford, Mar. 17, 1994, *supra* note 26, at 7.

59. This debate between proponents of the pragmatic naturalism of Dewey and the rationalist idealism of Hutchins centered upon the nature of truth and the role of education in a democratic society. *See* Arcilla, *supra* note 54, at 282 (examining the divergent viewpoints of Hutchins and Dewey on the role of metaphysics in education). Dewey sought

A.   The Dewey-Hutchins Exchange

When John Dewey assumed the chair of the philosophy depart-
ment at the then recently founded University of Chicago in 1894, he
moved quickly to gather together the principal players who would
soon become a new school of American philosophy. In rapid succes-
sion, he secured faculty appointments for George Herbert Mead,
James Rowland Angell, A.W. Moore, and Edward Scribner Ames. Col-
lectively, these pragmatist thinkers and others who joined them over
time became known as the Chicago School of American philosophy.[60]

Several key features distinguished the pragmatist philosophy of
Dewey and his colleagues. The first was an abiding intellectual com-
mitment to Charles Darwin's evolutionary naturalism. Dewey and his
followers regarded humans as part of a larger natural environment
that included all of the other animals, and that was characterized by a

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to define truth in relativistic and inductive terms, starting with empirical particulars as the
foundation for constructing abstract categories of meaning, while Hutchins argued for a
deductive approach founded upon a priori commitments rooted in an explicit metaphys-
ics. *See infra* Part I.A. These competing positions, in turn, framed a spirited political de-
bate between the two camps, with Dewey and his supporters asserting that Hutchins's
philosophical and educational approach would lead inevitably to authoritarian outcomes,
while Hutchins and his colleagues charged that Dewey's relativism and empiricism were
likely to produce totalitarian political consequences. *See* Martin, *supra* note 54, at 169-203.

   This grand struggle has been taken up in recent years by Richard Rorty and other so
called "neopragmatists" on one side, *see, e.g.,* Richard Rorty, *That Old Time Philosophy,* NEW
REPUBLIC, Mar. 21, 1988, at 28, and the intellectual heirs of Hutchins, including Allan
Bloom and Jacques Barzun, on the other. *See, e.g.,* ALLAN BLOOM, THE CLOSING OF THE
AMERICAN MIND (1987); JACQUES BARZUN, BEGIN HERE: THE FORGOTTEN CONDITIONS OF
TEACHING AND LEARNING (Morris H. Philipson ed., 1991). Followers of Dewey have also
appeared within the legal academy, although it is probably an overstatement to claim that
most legal scholars identified with the neopragmatist movement systematically employ a
pragmatist methodology throughout their work. *See The Renaissance of Pragmatism in Ameri-
can Legal Thought, supra* note 45. Notwithstanding this renewed interest in Dewey, *see, e.g.,*
CORNEL WEST, THE AMERICAN EVASION OF PHILOSOPHY (1989); WESTBROOK, *supra* note 26,
and the somewhat less intensive discussion of Hutchins's writing, few contemporary legal
scholars have placed the Dewey-Hutchins debate at the center of their own work. One
notable exception was Marc Feldman, who believed that the questions framed by Dewey
and Hutchins, and the answers each provided, continue to exert a powerful influence on
the fundamental shape of discourse within moral and political philosophy and law. *See*
Memo from Marc Feldman to Donald Gifford, Mar. 17, 1994, *supra* note 26, at 7.

   60. *See* Martin, *supra* note 54, at 49-51. At the time, William James wrote:
   Chicago has a School of Thought!—a school of thought which, it is safe to pre-
   dict, will figure in literature as the School of Chicago for twenty-five years to
   come. . . . Professor John Dewey, and at least ten of his disciples, have collectively
   put into the world a statement, homogeneous in spite of so many cooperating
   minds, of a view of the world, both theoretical and practical, which is so simple,
   massive, and positive that, in spite of the fact that many parts of it still need to be
   worked out, it deserves the title of a new system of philosophy.
WILLIAM JAMES, WRITINGS 1902-1910, at 1136 (Bruce Kuklick ed., 1987).

continuous process of evolution. In this respect, they believed that all human activity, including cognition, had to be understood in dynamic terms. Human psychology, in this account, was always changing, constantly adjusting to the forces of an environment that itself was the site of flux and change.[61]

Dewey's belief in this scientific naturalism had two corollaries. Given his conception of men and women as permanently in a state of development and adjustment to the larger environment, Dewey also held that human nature was essentially "plastic" and amenable to productive change through education.[62] Further, he and his colleagues argued that humans were intrinsically social, so that the evolutionary process of human development they described necessarily involved communication and other forms of collective activity.[63]

This evolutionary naturalism, in turn, drove adherents of the Chicago School to adopt a distinctive methodology. Dewey, in particular, was deeply attracted to monist thought.[64] His methodological monism was opposed to a whole host of pairings familiar to traditional Western thought, including practice versus theory, subjectivity versus the objective depiction of fact, utility versus aestheticism, and means versus ends.[65]

In the pragmatist philosophy, the tendency to collapse these various dualisms was linked to their adoption of a relativistic definition of truth and an equally relativistic conception of morality. With respect to the former, they held that the truth of a proposition was determined not by its correspondence to objective reality, but according to its ability to solve problems.[66] With respect to the latter, the pragmatists argued against any notion of an essential and static natural law, of a higher order of right and wrong against which all human behavior should be judged. Instead of employing a priori ethical prin-

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61. *See* Martin, *supra* note 54, at 51-53.

62. *Id.* at 52.

63. *Id.*

64. For example, Dewey believed that the division of "experience into two realms, a higher one of changeless values and a lower one of everyday experience," led philosophy to "a vain search for ultimate and permanent principles." *Id.* at 56.

65. *Id.* at 51. "Over and over he formulates his problem as being posed by a dualism; he deals with the problem by showing that the duality can be reduced to something unitary." Kaplan, *supra* note 46, at xii.

66. WESTBROOK, *supra* note 26, at 130. As one commentator has stated:
    Dewey came to consider an idea not as a picture of reality, but as a plan of action, which may turn out to be either true or false depending upon the success of the plan. Accordingly, Dewey considered truth to be a relative condition because the consequences of a given action were subject to change.
Martin, *supra* note 54, at 54.

ciples or precepts to evaluate human behavior, they urged ethical eval-uation based upon experience and utility.[67]

Taken together, these philosophical premises played an impor-tant part in shaping Dewey's understanding of democracy. Counter-posed against a traditional liberal view of democracy as conferring upon discrete individuals a core set of negative rights to be free from untoward interference by the state and other social collectivities, Dewey defined democracy in affirmative terms as that set of societal processes by which individuals are empowered to construct meaning-ful lives.[68] In this affirmative sense, Dewey understood democracy as "a mode of associated living, of conjoint communicated experience."[69]

His conception of democracy was at once profoundly procedural and deeply experiential. Dewey was committed to the "egalitarian dis-tribution of knowledge," and the values of "free inquiry, free discus-sion, and free expression."[70] The goal of free inquiry and discussion was not the negotiation of private concerns held by autonomous indi-vidual actors, but rather a collective search for common understand-ings and common solutions to societal problems. In Thomas Grey's words: "Above all, the object of faith [in democratic practice] was 'in-telligence,' conceived not in individual or narrowly cognitive terms, but as the passionate, yet critical, cooperative quest for a common human life that maximized human potential."[71]

This democratic politics was fundamentally experiential because it described democratic practice in terms of a community of people working together scientifically; that is, adjusting through a collective evolutionary process to an ever-changing context, an environment in flux.[72] In this way, Dewey's democracy assumed "the primary place of

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67. Martin, *supra* note 54, at 54 (citing 6 JOHN DEWEY, *The Problem of Truth, in* THE MIDDLE WORKS, 1899-1924, at 31 (Jo Ann Boydston ed., 1976)); PURCELL, *supra* note 29, at 47. Embedded in the pragmatists' conception of truth and morality was a thoroughgoing empiricism. Their conviction that ethical evaluations turn upon experience and judg-ments with respect to utility necessarily required that they treat the concrete data derived from practice as the foundation for further theorizing.

68. *See* WESTBROOK, *supra* note 26, at 435.

69. JOHN DEWEY, DEMOCRACY AND EDUCATION 87 (1966) [hereinafter DEMOCRACY AND EDUCATION].

70. WESTBROOK, *supra* note 26, at 436.

71. Thomas C. Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and Amer-ican Culture: Holmes, Pragmatism, and Democracy,* 71 OR. L. REV. 521, 540 (1992).

72. "For Dewey, the use of the critical intelligence meant applying the scientific method to all of life's problems in a uniquely human effort to build a better world." Tony W. Johnson, *Classicists Versus Experimentalists: Reexamining The Great Debate,* 36 J. GEN. ED. 270, 276 (1985).

experience, experimental method, and integral connection with practice in [the] determination of knowledge . . . ."[73]

Dewey's notion of democracy was also inherently egalitarian. His political theory posited the universal membership of all within society.[74] From this perspective, the responsibility of educators in public schools and of political actors generally was to insure the maintenance of those conditions necessary for the active participation of all members of the community in the collective enterprise of building knowledge and understanding.[75]

Finally, the pragmatist philosophy and egalitarian political theory of Dewey and his allies generated a particular set of ideas about the nature and role of public education in a democratic society. Dewey and the other progressive educational theorists were strongly critical of the classical tradition in education. Counterposed against the classical tradition's tendency toward "escape from the tasks and duties which the world of change sets before us, and withdrawal into the undisturbed peace of a life of contemplation,"[76] the pragmatists' philosophy of education stressed collective and engaged social action. Once again rejecting an individualistic escape into the private sphere, they urged instead a process of "learning by doing"[77] designed to "instill a sense of collective social responsibility."[78] In so defining effective educational practice, Dewey and his colleagues directly repudiated a long-standing distinction between liberal and vocational education. In part this was the result of their view of education, and indeed of the pursuit of knowledge more generally, as experiential and procedural. In addition, however, the collapse of the formerly distinct categories of thinking and doing was driven by the

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73. Dewey, *The Higher Learning in America, supra* note 52, at 167.

74. "Dewey disputed the claim that liberty and equality were incompatible values. Equality was simply the demand for a distribution of liberty (power) which was conducive to the full development of the individuality of everyone in a society." WESTBROOK, *supra* note 26, at 436; *see also infra* text accompanying notes 125-129 (describing Dewey's conception of the relationship of the individual to society).

75. *See* Clinton Collins, Should Mortimer Adler's *Paideia Proposal* Have Been Dedicated to John Dewey? 13 (Apr. 5, 1998) (unpublished manuscript, on file with the Educational Resources Information Center) ("Deweyan progressivism . . . begins with the assumption of universal membership on the part of all willing to participate in the activities of the school . . . ."). This was to be an inclusive process in which "free social inquiry is indissolubly wedded to the art of full and moving communication." JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 184 (1954) [hereinafter THE PUBLIC AND ITS PROBLEMS].

76. Folke Leander, *John Dewey and the Classical Tradition,* 8 AM. REV. 504, 505 (1936).

77. Martin, *supra* note 54, at 60.

78. *Id.* at 63.

pragmatists' belief that traditional liberal education was class-based, anti-democratic, and exclusionary.[79]

Dewey's writing about education was explicitly political. In *The Educational Frontier,* he wrote that "education must operate in view of a deliberately preferred social order."[80] Dewey meant by this that public education, if it were truly inclusive and participatory, had the potential to overcome the limitations of class and could serve to counteract the effects of economic inequalities.[81] Above all, he urged a form of public education that "takes account of social relationships," and places study in "a social context."[82]

Dewey's faith in the plasticity of human nature and commitment to a conception of knowledge as relative and practical led him to conceptualize education as a dynamic collective process by which students were helped—and were encouraged to help one another—to continually adjust to the social environment and, in the process, to effect and revise the shape of that very social order itself. As he wrote in *Democracy and Education*: "Our net conclusion is that life is development, and that developing, growing, is life. Translated into its educational equivalents, that means (*i*) that the educational process has no end beyond itself; it is its own end; and that (*ii*) the educational process is one of continual reorganizing, reconstructing, transforming."[83]

Dewey's theory of education, and the pragmatist philosophy and politics that supported it, came under direct attack in Robert Hutchins's 1936 book, *The Higher Learning in America*.[84] In this lengthy essay, Hutchins argued that an excessive vocationalism and an anti-intellectualism grounded in mindless empiricism had perverted higher education.[85] He expressed deep concern that American university curricula had become disorganized and chaotic, and he suggested that the pragmatists' preoccupation with fact gathering and the scien-

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79. The notion here was that, in the rigid class-based societies in which classical educational practice had originated, only the aristocracy was afforded the opportunity to pursue the pure study of ideas. The laboring classes, by contrast, were excluded from institutions of classical study, and were relegated to vocational training, if they received any structured education at all. *See id.* at 65-67.

80. John A. Dewey, *The Underlying Philosophy of Education, in* THE EDUCATIONAL FRONTIER 287, 291 (William H. Kilpatrick ed., 1933).

81. *See* Martin, *supra* note 54, at 63.

82. DEMOCRACY AND EDUCATION, *supra* note 69, at 67. Dewey opposed the "[i]solation of subject matter from a social context," and supported the integration of "technical subject matters" with "human activities having social breadth." His definition of "general education" was an education both broad and flexible. *Id.*

83. *Id.* at 49-50.

84. THE HIGHER LEARNING IN AMERICA, *supra* note 51.

85. *See id.* at 26-27, 38-43.

tific method had undermined the basic academic mission because this empirical work had ceased to be directed by any sort of theoretical perspective.[86]

At its core, Hutchins's critique centered on the scientific naturalism that characterized the thinking of Dewey and his allies. He argued that the relativism, contextualism, and experientialism at the heart of pragmatic thought rendered it incapable of ordering a sensible process of education.[87] In their place, Hutchins urged a return to an Aristotelian metaphysics of first principles and a priori truths. In this fashion, he argued, the acquisition of all knowledge would be grounded and guided.[88]

Hutchins's embrace of Aristotelian metaphysics led him to the conclusion that human intellect—the power of rational thought—is the single most important attribute possessed by men and women. Thus, he believed that humans are distinguishable from the other animals principally on the basis of their capacity to reason. People, he insisted, are capable of more than simple evolutionary adaption to the

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86. *See id.* at 65; *see also* PURCELL, *supra* note 29, at 147-48.

87. My colleague, Deborah Hellman, has pointed out that empiricism and relativism are not necessarily linked. A person might argue for the necessity of clear a priori moral principles *and* for an empirical approach to finding out how these principles can best be implemented. Such an approach would not be inconsistent with Hutchins's position that empirical study should be grounded and guided by a foundational metaphysics. Dewey, on the other hand, by virtue of his conviction that standards of moral and ethical judgment must be derived from experience, endorsed both empiricism and a relativistic conception of truth and justice.

88. *See generally* THE HIGHER LEARNING IN AMERICA, *supra* note 51. "Real unity can be achieved only by a hierarchy of truths which shows us which are fundamental and which subsidiary, which significant and which not." *Id.* at 95.

Hutchins's *Higher Learning* was remarkable in a number of respects, not the least of which was the profound shift it signaled in the intellectual stance of this still youthful thinker. Hutchins had started his academic career as a faculty member at the Yale Law School, where he was squarely ensconced in the legal realist camp closely associated with Dewey's pragmatism. "Indeed, Hutchins' mentor, Charles Clark, to whom Hutchins dedicated *The Higher Learning in America*, described Hutchins as 'the most eloquent leader' of the movement which marched under the banner of functionalism, behaviorism, legal realism and science." Martin, *supra* note 54, at 91-92. Over time, Hutchins had become disillusioned with realism and its emphasis on empirical study and the social sciences, most particularly behavioralist psychology. His shift in emphasis from the hard social sciences to Aristotelian philosophy was driven by a conviction that law and legal study had to be anchored in an abiding system of ethics. He

> believed that it was necessary to preserve a more traditional, architectonic role for
> philosophy, if only to enable the progressive reformer to recognize what a socio-
> political problem was. Underlying the diagnosis of every social ill . . . were stan-
> dards of truth, justice and goodness; that is, the ends to which social change
> should aspire.

Id. at 101.

environment.[89] The ability to think, to exercise a rational intellect, marks human beings as uniquely capable of "moral, spiritual, and political growth."[90]

Given this rationalist humanism, Hutchins was drawn to the conclusion that the pursuit of a liberal education should be understood as intrinsically valuable without regard to any assessment of mere utilitarian ends.[91] He also believed that human nature is neither plastic, as Dewey had taught, nor entirely subject to the constructive force of social context and culture.[92] As Hutchins put the point: "The nature of man, which is the same everywhere, is obscured but not obliterated by the differing conventions of different cultures."[93] Given his notion of human permanence, and of a stable identity of principle across historical time and cultural space, Hutchins's educational philosophy called for an emphasis upon the transmission of a common body of thought, a canon of great ideas forming the framework for the evaluation of ongoing intellectual work.[94] Thus was born, in collaboration with his close friend Mortimer Adler, the "great books" curriculum that shaped St. John's College and that continues to inform educational and cultural debates today.[95]

With respect to the pragmatists' relativistic notions of truth and ethics, Hutchins distinguished between what he termed "speculative" and "practical" judgments.[96] Speculative matters, he asserted, are either objectively true or false, depending upon a conclusion's consistency with universal fact.[97] Thus, he explained: "Two + 2 = 4 [must be true] in ancient Athens, medieval Paris, and modern Chicago . . . ."[98] In this respect, Hutchins famously stated that "[t]he truth is everywhere the same."[99]

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89. Robert M. Hutchins, *Toward A Durable Society*, FORTUNE, June 1943, at 159 [hereinafter Hutchins, *Toward a Durable Society*].

90. MICHAEL R. HARRIS, FIVE COUNTERREVOLUTIONISTS IN HIGHER EDUCATION 137 (1970).

91. *See* Martin, *supra* note 54, at 106.

92. *See id.* at 109.

93. Hutchins, *Toward A Durable Society*, *supra* note 89, at 159.

94. Martin, *supra* note 54, at 109-10.

95. *See id.* at 128-30 (discussing the "great books" curriculum).

96. Robert M. Hutchins, *Civilization and Politics*, U. CHI. MAG., Apr. 1939, at 8 [hereinafter Hutchins, *Civilization and Politics*].

97. *See* Martin, *supra* note 54, at 111. "In speculative matters both the principles and the conclusions are true for everybody if they are true at all." Hutchins, *Civilization and Politics*, *supra* note 96, at 8.

98. Hutchins, *Civilization and Politics*, *supra* note 96, at 8.

99. THE HIGHER LEARNING IN AMERICA, *supra* note 51, at 66.

Similarly, Hutchins's notion of practical judgments was that they necessarily involved questions of morality, again figured objectively and not relativistically. In a direct assault upon the pragmatic conception of ethics, he wrote:

> Unless we have the right end before us the means we choose, the acts we perform, cannot be right. We do not praise ingenious murderers or clever thieves. The means they employ to reach their end may be admirably adapted to their purposes; but this is the only way in which they are admirable.[100]

Hutchins thus argued that a proposition was subject to moral evaluation not in the least because of its likely success in practice, but solely in terms of its conformity with transcendent principles of right and wrong.[101]

In light of Hutchins's repudiation of existential and moral relativism, his conclusions regarding the purposes of a liberal education and of the role of educational institutions in democratic society could not have been more divergent from those of Dewey and the pragmatists. Essentially, his position was that liberal education was a necessary precondition for the exercise by citizens of the practical judgment required in a democracy. Although pursuit of education was intrinsically valuable, without regard to other useful consequences that might derive from the acquisition of knowledge, Hutchins nonetheless argued that engagement with the great first principles of our intellectual tradition was necessary to lay the foundation for individuals to be able to discern the nature of a just society.[102] Thus, unlike the pragmatists, Hutchins treated questions relating to the content of higher education as much more important than those respecting the process by which students engaged one another or through which educational institutions were governed.[103]

Hutchins's *Higher Learning* caused a great stir among educators and within the popular press. Among those who responded was Dewey, who offered his critical assessment in a series of articles in the

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100. Hutchins, *Civilization and Politics, supra* note 96, at 8.

101. *See* Martin, *supra* note 54, at 112.

102. *See id.* at 132. Hutchins's position in *The Higher Learning* was that the purposes of education are fundamentally apolitical. However, as his debate with the pragmatists unfolded against the backdrop of a growing totalitarianism across Europe, he increasingly moved toward the view that a liberal education of the sort he proposed was essential to a functioning democracy. *Id.* at 184.

103. *See id.* at 181-82 (noting Hutchins's emphasis "not [on] the supposed disciplinary value of subjects, [sic] but [on] the need for the student to understand the tradition and intellectual culture in which [he] lives").

magazine *The Social Frontier*.[104] Dewey pointed out Hutchins's embrace of Plato, Aristotle, and St. Thomas Aquinas, his rejection of "the unmitigated empiricism [of the pragmatist project] which is a great curse of modern life,"[105] and his assertion that "the elements of human nature are fixed and constant . . . [and] are the same in any time and place."[106] Given these commitments, he argued that Hutchins's prescriptions for educational reform were elitist and authoritarian because they required the adoption of a guiding metaphysics made up of static and eternal first principles.[107] In Dewey's critique, these Aristotelian principles were not self evident, but were necessarily selected by Hutchins in lieu of some other set of philosophical premises. As such, he argued, they represented the imposition of one particular point of view, to the exclusion of other competing first principles also available in a pluralist society. As Dewey explained:

> There is implicit in every assertion of fixed and eternal first truths the necessity for some *human* authority to decide, in this world of conflicts, just what these truths are and how they shall be taught. This problem is conveniently ignored. Doubtless much may be said for selecting Aristotle and St. Thomas as competent promulgators of first truths. But it took the authority of a powerful ecclesiastic organization to secure their wide recognition. Others may prefer Hegel, or Karl Marx, or even Mussolini as the seers of first truths; and there are those who prefer Nazism. As far as I can see, President Hutchins has completely evaded the problem of who is to determine the definite truths that constitute the hierarchy.[108]

Hutchins promptly responded to Dewey's attack in his own piece in *The Social Frontier*.[109] Addressing particularly the question of fixed first principles and the potential authoritarian consequences Dewey understood to be attendant upon the requirement that some authority would be required to select the metaphysics governing all academic activity, Hutchins suggested that the philosophical principles around which his proposed university would organize its curriculum would themselves be the subject of "development, elaboration, and refinement" by all proper members of the academic community.[110] "As a

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104. *See supra* note 52 (listing Dewey's articles in response to Hutchins).
105. Dewey, *Rationality, supra* note 52, at 71.
106. *Id.*
107. Dewey, *Proposals to Remake Higher Education, supra* note 52, at 104.
108. *Id.*
109. Hutchins, *Grammar, supra* note 30.
110. *Id.* at 138.

matter of fact," he wrote, "fascism is a consequence of the absence of philosophy. It is possible only in the context of the disorganization of analysis and the disruption of the intellectual tradition and intellectual discipline through the pressure of immediate practical concerns."[111]

The debate thus framed by Dewey and Hutchins continued to rage through the late 1930s and into the 1940s, with a widening circle of supporters from each side taking it up.[112] The fundamental point of difference between the two camps centered on the question of whether moral judgments are relative and contingent, as the pragmatists asserted, or subject to fixed evaluation according to first principles, as Hutchins believed. "'What ought we to do?' is not a scientific question," he said. "Science can give us the automobile, the radio, and the airplane. It cannot tell us how many we ought to have, who ought to have them, or how they ought to be used."[113] Moreover, argued Hutchins, a resort to philosophy was the only avenue for addressing the fundamental political questions necessarily raised by the spread of totalitarian movements in Europe and Asia. If a democratic social order was worth fighting a war to preserve, then Americans needed a way to assess the value of, and society's progress toward, "law, equality, and justice."[114] These aspirations, he said, were incompatible with the pragmatists' relativistic notion of truth.

> [I]n order to believe in these principles at all we must believe that there is such a thing as truth and that in these matters we can discover it. . . . [T]here can be no experimental verification of the proposition that law, equality, and justice are the essentials of a good state.
>
>   . . . .
>
>   In order to believe in democracy, then, we must believe that there is a difference between truth and falsity, good and bad, right and wrong, and that truth, goodness, and rights are objective standards even though they cannot be experimentally verified.[115]

Dewey, by contrast, continued to fight for a pluralist conception, in which "all truths would be considered tentative and open to change,"

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111. *Id.* at 138-39.

112. This widening controversy is well described by Edward Purcell. *See* PURCELL, *supra* note 29, at 152-58 (describing specifically the involvement of Lippmann and Niebuhr).

113. Robert M. Hutchins & Oliver Cromwell Carmichael, *What is an Education? Two Views of the Question,* U. CHI. MAG., May 1938, at 9.

114. Robert M. Hutchins, *What Shall We Defend?,* VITAL SPEECHES, July 1, 1940, at 546.

115. *Id.* at 548.

and "no particular group's ideas would be imposed upon everyone else."[116]

The contest between Dewey's and Hutchins's visions could not finally be resolved because it turned on such divergent assumptions with respect to the definition of truth and the nature of morality. To conclude that the conceptual gap between Dewey's pragmatism and Hutchins's rationalist thought ultimately was irreconcilable, however, does not mean that their exchange cannot be studied closely and pressed into sharper focus. In the discussion that follows, I attempt such an examination, in order to demonstrate that, notwithstanding Hutchins's critique of pragmatism, Deweyan theory does permit moral and political judgments to be made with respect to identified social practices.

B. Politics, Ethics, and Community

In order to gain some clarity on the Dewey-Hutchins exchange, it is helpful to begin with the observation that Dewey's version of pragmatism was deeply communitarian. As an aid in exploring the significance of this feature of Deweyan thought, the following discussion makes extensive use of work by Stephen Gardbaum on the role of communitarian theory within moral and political philosophy.[117] Professor Gardbaum's analysis of communitarian thought offers a useful roadmap for sorting out what Dewey and his colleagues were and were not claiming with respect to the normative foundations of democratic society. Such a sorting out, in turn, forms the basis for assessing whether Deweyan pragmatism can be harmonized with Marc Feldman's vision of public education and the politics of public space.

The essential insight offered by Professor Gardbaum is that there exist within the universe of communitarian thought three distinct and individually identifiable debates. Gardbaum calls these debates the "agency debate," the "metaethical debate," and the "political debate."[118] From a methodological point of view, working within this typology has the advantage of permitting a reader to discern with some clarity the claims that a particular theorist makes with respect to each of these debates.

Gardbaum describes the agency debate as concerning "the ontological relationship of the individual to his or her community."[119]

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116. Martin, *supra* note 54, at 191.
117. Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992).
118. *Id.* at 692-95.
119. *Id.* at 692.

The communitarian position with respect to this question is that each individual's identity is contingent upon his or her group membership. From this perspective, the community (or communities) to which an individual belongs is (or are) constitutive of his or her individual identity.[120] Postmodern theorists often capture this position within the agency debate by asserting that identity is socially constructed, and therefore claim that no essential self exists apart from or prior to embedded social practice.[121] Similar claims can be found within legal scholarship, especially among some associated with critical legal studies and other critical theories. These writers frequently emphasize that legal institutions not only reflect social practice, but also are constitutive of individual consciousness and social relationships.[122]

On the other side of the agency debate are social contractarians, libertarians, and other liberal theorists who view individual identity as presocial and independent of social process.[123] "This is the idea that we are, or are usefully conceptualized as, fully formed and self-sufficient individuals outside of society who assume social and political relationships and obligations only in order to further our own predetermined (exogenous) interests and values."[124]

Dewey made clear his position on the question of individual agency in his 1935 essay, *The Future of Liberalism*.[125] In this piece, he

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120. *Id.*; *see also* JOSEPH RAZ, THE MORALITY OF FREEDOM 390-95 (1986) (describing the way society affects individual autonomy); powell, *supra* note 40 (addressing contemporary criticism of the unitary and static self).

121. *See* Handler, *supra* note 39, at 700; *see also infra* text accompanying notes 450-456 (describing the postmodern conception of the self).

122. *See, e.g.*, J. M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133 (1991) (reviewing ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990)) (describing how social structures affect an individual's experience of legal norms); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (summarizing the various contemporaneous debates among critical legal writers surrounding theory and socio-legal history).

123. *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (arguing for a minimal state).

124. Gardbaum, *supra* note 117, at 692. Gardbaum argues that each of these positions is a purely descriptive claim and that the communitarian stance with respect to the constitution of individual identity need not be read as inconsistent with traditional liberalism. *Id.* at 689, 704-05. While this may be true from a formal theoretical point of view, most mainstream liberal theory does appear to presume the existence of presocial individual actors, especially given the prescriptive argument for strong boundaries between autonomous private individuals and public life generally found within liberalism. *See* Richard C. Boldt, *A Study in Regulatory Method, Local Political Cultures, and Jurisprudential Voice: The Application of Federal Confidentiality Law to Project Head Start*, 93 MICH. L. REV. 2325, 2358-59 (1995). In any case, the important point for present purposes is that Deweyan pragmatism strongly endorses the communitarian position with respect to both the descriptive and prescriptive questions.

125. 11 JOHN DEWEY, *The Future of Liberalism*, *in* THE LATER WORKS, 1935-1937, at 289 (Jo Ann Boydston ed., 1987).

explained that two key elements of liberal political theory, the notions of liberty and individuality, ought to be understood as historically contingent, carrying meanings that reflect the political economy and historical circumstances of the period in which liberalism was established.[126] He argued that treating liberty and individuality as "immutable absolute truths" renders a set of practical meanings in the twentieth century more closely associated with "the negative liberty of laissez-faire capitalism."[127] As a consequence, he explained, such a misreading "transform[s] liberalism into a conservative ideology."[128] By contrast, Dewey argued that individuality is not intrinsic, but is the product of one human being's experiences in association with others within the context of a social environment. He wrote: "Individuals will always be the centre and the consummation of experience, but what the individual actually *is* in his life-experience depends upon the nature and movement of associated life."[129]

In light of Dewey's position within the agency debate, it should come as no surprise that he adopted a very different understanding of liberty from that commonly associated with traditional liberalism. In Dewey's usage, liberty is not defined by reference to a set of negative rights that autonomous rights-holders possess in order to be left alone to pursue their private self interest. Deweyan liberty is more affirmative; it is defined as the "effective power"[130] of individuals to realize their full potential through active participation in public life.[131] Given this reformulation, true liberal society for Dewey requires a system of social institutions that support the "creative realization of human individuality."[132]

Dewey's reconceptualization of liberty as effective social power implicates the second of Gardbaum's three debates within communi-

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126. *Id.* at 290-92.

127. WESTBROOK, *supra* note 26, at 432.

128. *Id.*

129. 14 JOHN DEWEY, *I Believe, in* THE LATER WORKS, 1939-1941, at 91 (Jo Ann Boydston ed., 1988) [hereinafter *I Believe*].

130. 11 JOHN DEWEY, *Liberty and Social Control, in* THE LATER WORKS, 1935-1937, at 360 (Jo Ann Boydston ed., 1987) [hereinafter *Liberty and Social Control*].

131. WESTBROOK, *supra* note 26, at xv.

132. BERNSTEIN, *supra* note 27, at 140.

> Freedom is based on the possibility of human choice, but it involves more than this possibility. Freedom requires the effective power to *act* in accord with choice. . . . This intimate connection between freedom as choice and freedom as the power to act in accord with choice requires the deliberate development of those institutions that will make choice intelligent and action effective.

Id.

tarian theory. This metaethical debate is framed by second-order claims with respect to the source of values.

> It concerns the nature, source, and scope of value and of normative structures generally, and seeks to answer such typical questions as: What is the most valid form of argument concerning moral and political values? Do such values express anything more than personal preferences? Do we choose which values bind us?[133]

Gardbaum identifies three competing positions within this debate. First is "subjectivism," which locates the source of values in individual choice or preference. The second is "universalism," which holds that binding norms exist prior to the establishment of any given community and apply universally across different cultures and social circumstances. The third position is "communitarianism," which asserts that values are local, contextual, and particularistic.[134] The typical communitarian claim within the metaethical debate is both anti-universalist and anti-subjectivist. Communitarians do believe that binding norms exist outside of individual preference, but locate the source of those norms in social practice.[135]

Because the metaethical debate is characterized as addressing a second-order question, Gardbaum claims that political and moral theorists who adopt the communitarian position with respect to the source of values have said nothing necessary or conclusive with respect to the content of those norms.[136] Indeed, the question of which substantive values ought to govern social practice forms the third and final debate identified by Gardbaum, which he terms the political debate.[137] His position is that a metaethical communitarian can—in fact, must—endorse noncommunitarian or individualistic values, if that is what a given community (or community tradition) determines its governing norms should be.[138]

In forging such a strong separation between the origins and substance of political and moral values—by distinguishing between a second-order metaethical debate and a first-order substantive debate over the content of values—Gardbaum's analysis refines the terms of the exchange between Dewey and Hutchins. Some of Hutchins's allies in the 1930s and 1940s characterized the pragmatist position as subjectiv-

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133. Gardbaum, *supra* note 117, at 693.
134. *Id.* at 705-06.
135. *Id.*
136. *Id.* at 698-99.
137. *Id.* at 695.
138. *Id.*

ist, and it was on this basis particularly that the charge was leveled that Dewey and his colleagues were propounding a purely instrumental theory.[139] The fairer critique, however, was that the pragmatists, while

139. *See, e.g.*, ALLEN TATE, *The Present Function of Criticism, in* REASON IN MADNESS 3-8 (1941); Lewis Mumford, *The Corruption of Liberalism*, NEW REPUBLIC, Apr. 29, 1940, at 568; *see also* PURCELL, *supra* note 29, at 221-23 (summarizing the views of Tate, Mumford, and others attacking pragmatism and relativism). Similar charges were directed against the legal realists. Given their deep commitment to empiricism, their enthusiasm for the social sciences and a naturalistic understanding of social phenomena, and their unwillingness to anchor thinking about law through the use of abstract principles or a priori ethical precepts, it is not surprising that the realists quickly came under attack on the grounds that their jurisprudence was dangerously instrumental and morally relativistic. Indeed, as Purcell has pointed out, it was inevitable that the law would become an active battleground in the ongoing struggle between the pragmatist thought of Dewey and the rationalist humanism of Hutchins. After all, "[i]t was a field of the greatest social importance, and at the same time one that had always dealt with broad philosophical questions. More than any other practical profession, the law was specially concerned with problems of ethics and of values." PURCELL, *supra* note 29, at 159.

Although the realism of Karl Llewellyn and Jerome Frank sought to refocus the thinking of legal scholars and others on law as it operated in fact, as opposed to the formalists' sterile account of law as a rational system driven by clear and stable principles, their opponents tended to treat the realists and their colleagues as simple legal positivists who defined legality to be coextensive with the actions of government officials. *See id.* at 161. To be sure, the realists did question the capacity of the traditionalists to articulate coherent ethical norms in the abstract, but, like Dewey, many of them also believed that governing moral values could be identified "out of concrete situations," and could be made "intelligible only in that context." *Id.* at 160. Against the backdrop of a growing European totalitarianism, however, the realists' relative preoccupation with the critical portion of their intellectual program—their critique of formalism and depiction of the legal system in operation—and their concomitant disinterest in the question of how to articulate affirmative ethical norms in a pragmatic jurisprudence, led many of their opponents to the conclusion that realism was dangerous and misguided. *Id.* at 161. In an initial round of criticism, Dean Roscoe Pound, in a turn that foreshadowed the arguments of Robert Hutchins against Dewey, questioned whether the realists' faith in empiricism and their dismissal of the importance of legal doctrine and a priori principle were leading legal thought into an unworkable nihilism. *See* Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931). Morris Cohen criticized the realists for "do[ing] away altogether with the normative point of view in law" and suggested that their project could undermine the ethical basis for democratic practice. Cohen, *supra* note 32, at 357. Natural law theorist Lon Fuller argued that the realists' "rigorous separation of [the] *is* and [the] *ought*" had caused them to obsess over relatively unimportant matters of judicial psychology and useless statistics at the expense of what he called moral facts. LON L. FULLER, THE LAW IN QUEST OF ITSELF 60 (1940). The consequence, claimed Fuller and others, was that the realists' jurisprudence was incapable of addressing fundamental questions with respect to the moral legitimacy of law. If objective notions of truth and morality are impossible, they argued, if law is identified simply as that which government chooses to do, then the fundamental prerequisites for the rule of law within a democracy are impossible as well. *See* PURCELL, *supra* note 29, at 163.

The charges of moral relativism and instrumentalism brought a variety of responses from the realists. In 1940, Llewellyn wrote that empirical practice designed to predict the actual decisions of actors within the legal system, while important, was not the only task of law study. Llewellyn's primary concern was with finding rational ways to guide judges when "justice" and a rule of law conflicted in a particular case. Karl N. Llewellyn, *On Reading and*

not pure subjectivists, still had little that was constraining to say about the substantive first-order ethical questions that so roiled the United States and Western Europe during and after the Second World War. Speaking within the terminology of Professor Gardbaum's typography, we can say that Hutchins's concern with pragmatism was that he understood it to be limited to second-order metaethical questions—or questions of process—and therefore that it was ungrounded when it came to the substantive moral and political challenges of contemporary Western society.

While Professor Gardbaum's analysis is fairly elaborate, one useful distinction he draws is between the thinking of liberal communitarians, including Michael Walzer and Richard Rorty, and "strong communitarian[s]," such as Hannah Arendt and Alasdair MacIntyre. Gardbaum explores at some length the important differences between each of these figures.[140] But the feature that maintains this essential distinction is that liberal communitarians tend to adopt a communitarian position with respect to the metaethical debate without also endorsing the substantive view that communal forms of political association are intrinsically better than liberal political norms. Strong communitarians, on the other hand, do take a communitarian position within the political debate, "employing a substantive concept of community as an alternative to liberal society . . . ."[141]

In his book *Interpretation and Social Criticism*,[142] Walzer argues that the answer to the question "What is the right thing . . . to do?" can only be pursued "within a tradition of moral discourse."[143] By this he means that questions of moral philosophy must be resolved by reference to "a community of experience," so that moral reasoning is best understood as the proper interpretation of a community's commonly

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Using the Newer Jurisprudence, 40 COLUM. L. REV. 593, 613-14 (1940). Other realists acknowledged the significance of basic notions of justice within law, but objected to any characterization of these concepts as objective, "eternal or unchanging." PURCELL, *supra* note 29, at 174 (quoting Max Radin, *The Education of a Lawyer*, 25 CAL. L. REV. 676, 688 (1937)). Rather, adhering to their basic empiricism, these realists argued that the normative basis for democratic practice and the rule of law could be found in inherited social practices defining the culture within which individual judges operate. *See, e.g.*, Radin, *supra*. These various responses failed to bridge the conceptual gap that separated the realists from their critics, just as Dewey's responses to Hutchins failed to provide a basis for integrating pragmatist and rationalist thought.

140. Gardbaum, *supra* note 117, at 696-97. For example, Gardbaum further divides liberal communitarians into those who adopt a postmodern epistemology, such as Rorty, and those who "express[ ] a much older tradition," such as Walzer. *Id.* at 694.

141. *Id.* at 689.

142. MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM (1987).

143. *Id.* at 23.

developed meanings, language, and culture.[144] But Walzer is not a universalist with respect to first-order questions of ethics. His position is that the pursuit of universal norms, including substantive communitarian values, would "have the effect of enforcing a singular over a pluralist truth, . . . of reiterating the structure of the ideal commonwealth in every previously particularist community."[145]

Walzer's rejection of universal substantive moral and political norms distinguishes his form of communitarian theory from that of strong communitarians such as Hannah Arendt.[146] Arendt and other more recent proponents of strong communitarianism, who often call their position republicanism or civic republicanism,[147] adopt a substantive claim that the highest human good is "active citizenship in a virtuous political community."[148] This is, by definition, a universalist claim, as it applies with equal force to all societies from contemporary Western society to the Ancients.[149]

Arendt's position, that the substance of the good life is civic practice in public spaces, is incompatible with traditional liberal theory because it rejects the impulse to treat politics as merely ancillary to private endeavor.[150] In contrast to mainstream liberal thought, Arendt argued that meaningful individual lives cannot be constructed out of the pursuit of private self-interest. She believed "that human beings lack moral self-sufficiency outside the confines of a political community, and that citizenship and civic virtue are at least necessary conditions of the good life."[151] In order for political discourse to have

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144. *Id.* at 30 n.21.

145. Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 393 (1981). Walzer's position within the metaethical debate enables him to be both a liberal political theorist and a critic of traditional liberalism. At least within Gardbaum's account, Walzer endorses the broadly individualistic content of liberal society, including its protection of individual autonomy and voluntary association and its separation of the public from the private spheres, precisely because he understands these norms to be the product of the Western political tradition. *See* Gardbaum, *supra* note 117, at 698. At the same time, Walzer's view is that "liberal *theory* misrepresents the extent of our communal experience in liberal *society* and thereby forces us to misunderstand our personhood. Stripped of its superficial atomistic ideology, liberal society is seen to be constituted by deeply held shared values and commitments that define our specific tradition." *Id.* at 697-98.

146. *See* HANNAH ARENDT, THE HUMAN CONDITION (1958).

147. *See, e.g.,* ALASDAIR MacINTYRE, AFTER VIRTUE (1981); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

148. Gardbaum, *supra* note 117, at 725.

149. *See id.* at 724, 729-30; *see also* MacINTYRE, *supra* note 147, at 141 (discussing the Aristotelian theory of the virtues).

150. *See* Gardbaum, *supra* note 117, at 724-75.

151. *Id.* at 749. The strong communitarian position is inconsistent with traditional liberal thought in a second, related way. Because it is a first-order theory, republicanism is incompatible with traditional liberalism's neutrality toward questions of ethics. One simply

this sort of moral function, Arendt explained, it is necessary that public life be insulated from the distortions caused by inequalities of power and access that characterize the "sphere of mundane, everyday necessity."[152] While she believed that such a separation of political discourse from the mundane world of private self-interest was possible, Arendt argued that the failure of Western society to maintain this boundary has yielded a politics concerned primarily with the "administration of things" rather than with the practice of civic virtue.[153]

Mapping John Dewey's moral and political philosophy onto Professor Gardbaum's typography is no easy task. While Hutchins criticized Dewey for propounding a moral and political philosophy that was limited to the metaethical debate, a close reading of Dewey suggests that his position in fact reached beyond the metaethical communitarianism of Walzer and the other liberal communitarian thinkers, in that it did attribute first-order normative significance to collective life.[154] At the same time, Dewey's response to Hutchins's reliance on a priori reasoning makes clear that he rejected the sort of universalist ethics associated with the strong communitarianism of MacIntyre and Arendt.[155] Most importantly, Dewey rejected Arendt's notion that public discourse could be insulated from the private sphere of everyday necessity and her related belief that the mundane and the practical sully politics.[156]

In some respects the contemporary communitarian writer who comes closest to Dewey's position on these questions is Jurgen Habermas. In Professor Gardbaum's typography, Habermas is described as a metaethical communitarian because he rejects a universalist position with respect to substantive questions of ethics.[157] Norms must be understood within the situated context of everyday social

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cannot adopt the view that individuals ought to be able to pursue their own conception of the good life free from unwarranted public interference and simultaneously hold that the human good is fixed and immutable. On traditional liberalism's neutrality toward questions of ethics, see WESTBROOK, *supra* note 26, at xv. *Cf.* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 139 (1995) (discussing the conflict in neo-republican thought between liberals' preference for "government neutrality" and traditional republicans' preference for "normative government decision making" based upon "objectively correct moral values").

152. Gardbaum, *supra* note 117, at 716.

153. HANNAH ARENDT, ON REVOLUTION 273 (1963).

154. *See* WESTBROOK, *supra* note 26, at xvi.

155. *See id.* at 410-11; *see also supra* notes 66-67 and accompanying text (discussing Dewey's rejection of a priori reasoning).

156. Westbrook reads Dewey as urging the "democratization of *all* social institutions . . . 'in which [individuals] physically participate.'" WESTBROOK, *supra* note 26, at 434-35 (emphasis added).

157. Gardbaum, *supra* note 117, at 712-13.

practice and cannot be identified or validated on the basis of abstract principles or a priori truths.[158] Unlike other metaethical communitarians, however, Habermas offers an account in which the validity of norms turns on more than simply recognizing their source in community practice and tradition. For Habermas, according ethical significance to a "local truth" merely because it is the product of collective social practice is to make the mistake of confusing "a validity claim and a power claim."[159]

Habermas's way out of this dilemma, framed by his rejection both of universalism and of metaethical communitarianism *simpliciter*, is to suggest that the validity of moral claims must turn on what he calls "communicative reason."[160] That is, norms are to be judged valid if, and only if, they have achieved "a rational consensus in a context of undistorted communication . . . ."[161] Much of Habermas's work, in turn, is devoted to setting out the conditions under which communicative reason can be said to obtain. These conditions, which yield what Habermas calls an "ideal speech situation," require a kind of "'deliberative politics'" in which there is broad and relatively unconstrained access to the public debate, and in which "a high premium [is placed] on reason-giving in the public domain."[162]

In Gardbaum's account, Habermas is treated as both a procedural universalist (within the metaethical debate) and a substantive particularist (within the political debate).[163] The requirements of communicative reason upon which the validity of a moral claim turns are presumably uniform across time and place even though the content of a valid ethical stance may vary considerably from one community to another.[164] As Habermas puts it: "The validity claimed for propositions and norms transcends spaces and times, '*blots out*' *space and time*, but the claim is always raised *here and now*, in specific contexts, and is either accepted or rejected with factual consequences for action."[165]

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158. *Id.* "Like the other metaethical communitarian thinkers . . . Habermas believes there is a meaningful sense in which 'all truths are local'; there are no disembodied truths or universals as traditionally understood." *Id.* at 712.

159. *Id.* at 713.

160. *Id.*

161. *Id.* at 714.

162. Cass R. Sunstein, *Democracy Isn't What You Think*, N.Y. TIMES, Aug. 18, 1996, at 29 (reviewing JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996)).

163. *See* Gardbaum, *supra* note 117, at 714.

164. *See id.*

165. JURGEN HABERMAS, THE PHILOSOPHICAL DISCOURSE OF MODERNITY 323 (Frederick Lawrence trans., 1987).

Alternatively, Habermas, like Dewey, can be read as a theorist whose work throws into question the very distinction between first-order and second-order ethical questions upon which Gardbaum's typography rests.[166] From this perspective, while Professor Gardbaum's analysis helps to press focus on the Dewey-Hutchins exchange, it does so by forcing the reader to consider the possibility that Dewey's thinking elides entirely the process-substance dualism inherent in distinguishing first-order questions of ethics from second-order questions of metaethics. In this respect, it is worth remembering that Dewey rejected most analytic dichotomies, favoring instead an approach founded upon monist thought.[167] Gardbaum himself hints at a similar elision in Habermas's project, stating:

> The characteristic problem of modernity for Habermas (showing his newly acquired respect for Max Weber) is the necessity of "creat[ing] its normativity out of itself," of providing its own grounding. His solution to the dilemma of "either universal truths or mere power" is to describe a concept of rationality "that falls prey neither to historicism . . . [nor] stands abstractly over against history and the complex of social life," a concept that transcends the traditional dichotomy by abandoning the Kantian, subject-centered idea of reason shared by both camps.[168]

There is no doubt that Dewey's moral philosophy was antiessentialist and deeply contextual.[169] In his work on ethics, he neither endorsed particular "ends-in-themselves," nor held open the possibility that such transcendent ends exist.[170] Moreover, Dewey consistently argued that the correct answer to any question of ethics necessarily depends upon the unique circumstances under which the question arises. "The business of reflection in determining the true good cannot be done once for all . . . . It needs to be done, and done over and over and over again, in terms of the conditions of concrete situations as they arise."[171] This fundamental posture exposed Dewey to criticism by Hutchins and others that "[h]e had strong views about how one should form values, but little to say about which values one should

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166. *See* Gardbaum, *supra* note 117, at 712-17 (describing Habermas's brand of metaethical community).

167. *See supra* note 64 and accompanying text.

168. Gardbaum, *supra* note 117, at 713 (footnotes omitted).

169. *See infra* text accompanying notes 244-246 (discussing Dewey's antiessentialism).

170. WESTBROOK, *supra* note 26, at 417.

171. 7 JOHN DEWEY, *Ethics, in* THE LATER WORKS, 1932, at 212 (Jo Ann Boydston ed., 1985) [hereinafter *Ethics*].

form."[172] In fact, while much of Dewey's writing about moral judg-
ment was directed to questions of process, of developing a methodol-
ogy for making sound judgments, he consciously embedded
substantive ethical prescriptions within his discussions of
methodology.[173]

Like Habermas, Dewey sought to steer a path between the horns
of universalist thought on the one hand and positivism on the
other.[174] In response to logical positivists such as A.J. Ayer, Dewey
argued that subjectivism is unacceptable because it makes questions of
ethics turn entirely on "the vagaries of power."[175] Dewey believed that
valid ethical judgments necessarily require "intellectual adjudica-
tion,"[176] but, at the same time, he was unwilling to ground such a
reasoning process in a priori ultimate ends.[177]

In the place of ends-in-themselves, Dewey urged a process of
moral judgment in which action is guided in any given circumstance
by an "end-in-view."[178] By this Dewey meant to collapse the distinction
between means and ends, so that the end-in-view identified in a partic-
ular problematic situation functions as the basis of a plan by which
that problem is to be resolved. Once such a resolution has been ac-
complished according to the plan defined by the end-in-view, Dewey
explained, effective moral judgment requires that the consequences
of pursuing that end-in-view be subject to evaluation and assessment
in order to form the basis for the next set of judgments to be made.[179]

Notwithstanding his rejection of ends-in-themselves, Dewey did
acknowledge that the process of evaluation and assessment he urged
as a critical component of moral judgment requires the application of
"generalized ideas," or standards of judgment.[180] Importantly, within
Dewey's moral philosophy these generalized standards are at once

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172. WESTBROOK, *supra* note 26, at 402.

173. *See id.* at 402-03.

174. "[Dewey] had spilled a great deal of ink challenging both absolutist claims to a
higher Reason than could judge the truth and falsity of ethical judgments and utilitarian
formulations of a hedonistic calculus which offered a false promise of moral certainty to
ordinary intelligence." *Id.* at 405.

175. *Id.* Ayer and other logical positivists believed that "[s]tatements of ethical value"
are not "statements of empirical fact, but rather simple expressions of emotion and hence
could not be judged scientifically to be true or false." *Id.* at 404.

176. *Id.* at 405 (quoting 15 JOHN DEWEY, *Introduction: The Problems of Men and the Present
State of Philosophy, in* THE LATER WORKS, 1942-1948, at 159 (Jo Ann Boydston ed., 1989)).

177. *See id.* at 405-06.

178. 13 JOHN DEWEY, *Theory of Valuation, in* THE LATER WORKS, 1938-1939, at 220 (Jo Ann
Boydston ed., 1988) [hereinafter *Theory of Valuation*].

179. *See* WESTBROOK, *supra* note 26, at 408-09.

180. *Id.* at 411 (setting out health, justice, happiness, and freedom as such standards).

both empirical and abstract. They are empirical because they are derived not from a priori absolutes, but from prior experience. They are abstract because they are not the product of any single act of problem solving, but instead are the residual insights of a number of past actions.[181]

As Dewey explained it, these general principles function "as intellectual instrumentalities in judgment of particular cases as the latter arise; they are, in effect, tools that direct and facilitate examination of things in the concrete while they are also developed and tested by the results of their application in these cases."[182]

In his early writing on ethics, and later in response to the criticism of Hutchins and others that his identification of generalized standards was insufficient to anchor moral judgment, Dewey stressed that the application of such principles to a concrete instance of moral decision-making requires an agent possessed of sympathetic character.[183] In so arguing, Dewey did not have in mind an impulse to feel pity or sympathy for another, which he regarded as "sentimental twaddle."[184] Rather, he meant something akin to what some contemporary writers call empathy;[185] the ability to put one's self in the place of another, to appreciate another's perspective and experience.[186]

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181. *Id.* at 412.

182. *Theory of Valuation, supra* note 178, at 230. Dewey applied this set of ideas to law through his use of a river metaphor:

> Human beings form habits as surely as they perform special deeds, and habits, when embodied in interactivities, are customs. These customs are, upon the view here taken, the *source* of law. We may use the analogy, or if one prefers, the metaphor, of a river valley, a stream, and banks. The valley in its relation to surrounding country, or as the 'lie of the land', is the primary fact. The stream may be compared to the social process, and its various waves, wavelets, eddies, etc., to the special acts which make up a social process. The banks are stable, enduring conditions, which limit and also direct the course taken by the stream, comparable to customs. But the permanence and fixity of the banks, as compared with the elements of the passing stream, is relative, not absolute. Given the lie of the land, the stream is an energy which carves its way from higher to lower levels and thereby, when viewed as a long run (in time as well as in space) process, it forms and reforms its own banks.

John Dewey, *in* MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 71, 78-79 (Julius Rosenthal Foundation ed., 1941).

183. *See Ethics, supra* note 171, at 249-52.

184. *Id.* at 251.

185. *See* john a. powell, *As Justice Requires/Permits: The Delimitation of Harmful Speech in a Democratic Society*, 16 LAW & INEQ. 97, 111 (1998) (referring to empathy as "an experientially defined emotional response to the situation of another"); *see also* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1574-75 (1987) (criticizing legal decisions and lawmaking as frequently not having anything to do with understanding "human experiences, affect, suffering—how people *do* live").

186. *See* WESTBROOK, *supra* note 26, at 413-14.

Putting these elements together, Dewey explained that a sound moral judgment is one in which the likely consequence of a given course of conduct as defined by a chosen end-in-view is the "well-being of all concerned."[187] In urging that sympathetic character govern the process by which ethical questions are adjudicated, Dewey was not suggesting that individuals place the well-being of others ahead of their own self-interest. He viewed one's own interest and the interests of others with whom one is associated as reciprocal. Indeed, he rejected altogether the distinction between self-interest and the well-being of others, pointing out that such a distinction itself is rooted in traditional liberal notions of individuality.[188]

Dewey eschewed the idea that individuals possess an autonomous identity outside of community. In place of such a notion, he argued that the identity and capacity of individual actors always depend upon their ongoing interaction with others and upon the nature of the social institutions within which that interaction takes place.[189] Further, Dewey was convinced that true happiness is "a *kind* of happiness which is harmonious with the happiness of others."[190] In this fashion, Dewey's communitarian position within the agency debate was linked conceptually to his conviction that "social life ha[s] intrinsic moral significance," because it is only within the context of healthy social institutions that sympathetic character can develop and the well-being of all can be pursued.[191]

> Only when individuals have initiative, independence of judgment, flexibility, fullness of experience, can they act so as to enrich the lives of others and only in this way can a truly common welfare be built up. The other side of this statement, and of the moral criterion, is that individuals are free to develop, to contribute and to share, only as social conditions break down walls of privilege and of monopolistic possession.[192]

Intelligent sympathy widens and deepens concerns for consequences. To put ourselves in the place of another, to see things from the standpoint of his aims and values, to humble our estimate of our own pretensions to the level they assume in the eyes of an impartial observer, is the surest way to appreciate what justice demands in concrete cases.

Ethics, supra note 171, at 251.

187. WESTBROOK, *supra* note 26, at 413.

188. *Id.* at 414-15. The traditional liberal position with respect to individuality plays out both within the agency debate and the political debate.

189. *Id.* at 433; *see also I Believe, supra* note 129, at 91.

190. *Ethics, supra* note 171, at 248.

191. WESTBROOK, *supra* note 26, at 415.

192. *Ethics, supra* note 171, at 348.

In important respects, Dewey's notion that the development of individual capacity depends upon the nature of social life places his work in harmony with Arendt's brand of republicanism.[193] At a deeper level, though, Dewey rejected Arendt's call for a separation of public life from the world of the mundane and the ordinary. He believed that the development of morally sufficient individuals requires the democratization of all social institutions where citizens encounter one another, including schools, factories, and the like.[194]

Robert Westbrook, the noted Dewey scholar, has argued that Dewey's approach to social institutions represents an attempt to reconcile liberalism and radical democratic political theory by redefining the meaning of liberty.[195] As explained earlier, Dewey equated liberty with power, the "effective power to do specific things."[196] Understanding liberty in this new affirmative way permitted Dewey to argue that it is not in tension with the principle of equality, as many traditional liberal theorists have argued.[197] Equality in Dewey's reconceptualized political philosophy means simply that each person in society must have a sufficient measure of power to insure his or her full development as a creative and productive member of the community.[198] Moreover, if equality is "a democratic distribution of [affirmative] liberties,"[199] then the role of a democratic politics is to see to it that social institutions are in place to nurture the development of individual capacities, and to facilitate the desire of individuals to participate

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193. *See supra* text accompanying notes 146-153 (describing Hannah Arendt's view of republicanism).

194. *See* WESTBROOK, *supra* note 26, at 433-39.

195. *Id.* at 438. "A liberalism true to these ideals 'must now become radical, meaning by "radical" perception of the necessity of thoroughgoing changes in the set-up of institutions and corresponding activity to bring [them] to pass.'" *Id.* (quoting 11 JOHN DEWEY, *Liberalism and Social Action, in* THE LATER WORKS, 1935-1937, at 45 (Jo Ann Boydston ed., 1987) [hereinafter *Liberalism and Social Action*]).

196. *Liberty and Social Control, supra* note 130, at 360.

197. WESTBROOK, *supra* note 26, at 436. Westbrook argues persuasively that Richard Rorty has misread Dewey on this point:

> For Rorty, liberal-democratic politics involves little more than making sure that individuals hurt one another as little as possible and interfere minimally in the private life of each. There is little in his social or political vision of the communitarian side of Dewey's thinking, nothing of Dewey's veneration of *shared* experience. . . . It is simply dead wrong to read Dewey's liberalism, as Rorty has done, as celebrating a politics centered on "our ability to leave people alone."

Id. at 541-42.

198. To Dewey: "Equality was simply the demand for a distribution of liberty (power) which was conducive to the full development of the individuality of everyone in a society." *Id.* at 436.

199. *Id.*

in the governance of the very institutions within which they lead their lives.[200]

Of course, Dewey did not employ the language of participatory democracy we have come to associate with Habermas.[201] But his insistence on understanding liberty as the effective power to participate fully in the management of social institutions, and his further claim that liberty so redefined is entirely compatible with equality in the distribution of social power, do begin to suggest a not dissimilar politics.[202] Dewey's more explicit political writings clearly set out a critique of industrial capitalism that was based upon his theory of institutions.[203] Like Habermas, who has also chided contemporary Western society for its failure to maintain effective public spaces within which public discourse can take place,[204] Dewey argued that "the exploitative possessive individualism fostered by capitalism inhibit[s] the formation of the participatory communities of democratic action essential to self-development and social welfare."[205] Dewey's prescription for this state of affairs was a radical democratic practice in which social institutions would be reconfigured to reflect the principles of liberty and equality he espoused.[206]

Dewey's notion of radical democracy has especially important implications for those who live on the margins of society. In contrast to Arendt's position that "the [political] predicament of the poor" is that "their lives are without consequence . . . [because] they remain excluded from the light of the public realm where excellence can shine,"[207] Dewey believed that a weakness of industrial capitalism was its failure to allocate social power equally in *all* of the institutions comprising associated life, not simply in the sphere of formal political

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200. *See id.* at 438. As Dewey wrote:

    [A]ll those who are affected by social institutions must have a share in producing and managing them. The two facts that each one is influenced in what he does and enjoys and in what he becomes by the institutions under which he lives, and that therefore he shall have, in a democracy, a voice in shaping them, are the passive and active sides of the same fact.

11 JOHN DEWEY, *Democracy and Educational Administration, in* THE LATER WORKS, 1935-1937, at 218 (Jo Ann Boydston ed., 1987).

201. *See supra* text accompanying notes 160-162; *see, e.g.,* JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984).

202. *See* WESTBROOK, *supra* note 26, at 434-35.

203. *See, e.g., I Believe, supra* note 129; *Liberalism and Social Action, supra* note 195.

204. *See* Gardbaum, *supra* note 117, at 716-17.

205. WESTBROOK, *supra* note 26, at 434.

206. Dewey himself described his democratic project as "radical." *Liberalism and Social Action, supra* note 195, at 45.

207. ARENDT, *supra* note 153, at 63.

practice.[208] Functionally, this meant that Dewey concerned himself
with proposing specific alterations in the way particular institutions
were structured and managed, in order to demonstrate how a true
participatory democracy could operate to empower the dispossessed.
The public education system was perhaps the social institution about
which Dewey had the most to say. Here, as elsewhere, he argued that
an egalitarian distribution of material resources was not sufficient.
Real democracy in the field of education required, in addition, an
egalitarian distribution of access to knowledge and an openness to
democratic planning. "It is useless to talk about the failure of democ-
racy until the source of its failure has been grasped and steps are
taken to bring about that type of social organization that will en-
courage the socialized extension of intelligence."[209]

In important respects, this call for a greater measure of equality
in access to and participation in the field of public education, and
indeed in public life generally, is remarkably consistent with Iris
Marion Young's recent work on the nature of oppression in Western
society.[210] Young has argued that oppression has a number of "faces,"
which she identifies as "exploitation," "marginalization," "powerless-
ness," "cultural imperialism," and "violence."[211] Similarly, Dewey
wrote explicitly about the corrosive consequences of exploitation
within industrial capitalism.[212] Moreover, much of his work in the
field of education was directed toward diminishing cultural imperial-
ism, which Young has helpfully described as the "universalization of
one group's experience and culture and its establishment as the
norm."[213] Nevertheless, it is with respect to the dynamics of marginal-
ization that Dewey's thinking is most closely tracked by Young's work.
For civic republicans like Hannah Arendt, the value of participation in
public matters inheres in the notion that the practice of civic virtue is
itself constitutive of the human good.[214] In contrast, Dewey believed
that an egalitarian distribution of effective power throughout all of
the institutions comprising a community's collective life is necessary

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208. *See* WESTBROOK, *supra* note 26, at 434 (stating that according to Dewey, "[i]n capi-
talist society, . . . associated life and participatory democracy were stunted and underdevel-
oped, and as a consequence this society produced stunted, underdeveloped, 'lost'
individuals").

209. *Liberalism and Social Action, supra* note 195, at 39.

210. Iris Marion Young, *Five Faces of Oppression, in* POWER, PRIVILEGE AND LAW: A CIVIL
RIGHTS READER 66, 69-79 (Leslie Bender & Daan Braveman eds., 1995).

211. *Id.* at 69-79.

212. *See* WESTBROOK, *supra* note 26, at 434.

213. Young, *supra* note 210, at 77.

214. *See supra* notes 147-149 and accompanying text.

to insure that each member of the community becomes all that he or she is capable of becoming.[215] Young's argument against marginalization is not limited to the exclusion of some from the practice of politics. In accord with Dewey, her point relates to the inclusiveness of the whole society: "Most of this society's productive and recognized activities take place in contexts of organized social cooperation, and social structures and processes that close persons out of participation in such social cooperation are unjust."[216]

With this framework in mind, it is possible to draw some conclusions regarding the suitability of Deweyan pragmatism as a theoretical perspective to ground progressive political practice. Speaking in the more contemporary language offered by Iris Young, it is fair to say that Dewey's political writings offer an account by which the oppression of marginalized people might be overcome. At the center of this work is Dewey's call for a fundamental restructuring of those social institutions within which individuals work, play, and learn together, in order to insure an egalitarian distribution of effective power.[217] While these principles of liberty and equality may not have been a priori axioms in Dewey's moral and political philosophy, they did serve an urgent function as necessary corollaries of the positions he took within the agency debate and the metaethical debate. Like other generalized standards of moral judgment endorsed by Dewey, his conception of liberty and equality was both empirical and abstract. Given their empirical foundations, these political commitments were always subject to revision and refinement in the light of subsequent experience; but they functioned as first-order normative commitments all the same. For this reason, Deweyan pragmatism, properly understood, should be read as reaching beyond a merely instrumental concern with the process by which communities undertake to make moral judgments. In fact, by moving beyond the process-substance distinction inherent in Robert Hutchins's critique and described in Gardbaum's work on communitarian theory, Dewey and his colleagues set out a framework of analysis that I believe is consistent with the kind of progressive democratic practice to which Marc Feldman was committed.

In summary, although Deweyan pragmatism rejects moral reasoning from a priori absolutes, it does offer a method of ethical evaluation that is grounded in standards of judgment that are more than

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215. *See* WESTBROOK, *supra* note 26, at 434.

216. Young, *supra* note 210, at 74.

217. *See supra* notes 198-209 and accompanying text.

merely instrumental.[218] These standards may not be permanent or fixed, as Hutchins demanded, because they are themselves the product of ongoing community experience. They are, however, sufficiently stable relative to the shifting sets of circumstances within which they are employed to provide a reliable basis for evaluating the consequences of a given social practice.[219] To conclude in this fashion that pragmatism does have normative content, however, does not resolve the further question of whether its methodology is consistent with a radical democratic politics. It is to this question that I now turn.

II.   OVERCOMING CONCEPTUAL CONSERVATISM

In writing about contemporary pragmatists, David Luban has offered a helpful summary of some of the core premises that link together the various heirs of John Dewey's intellectual legacy.[220] Fundamentally, they tend to share a commitment to antifoundational-

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218. This conclusion is intended primarily as a descriptive claim. The force of Hutchins's critique of pragmatism—that its lack of a priori principles made it incapable of responding to evils such as fascism—simply cannot be met unless the reader accepts Dewey's foundational assumptions with respect to pluralist democracy. For Dewey, Nazi Germany was an example of the failure of democracy and of the dangers of moral absolutes. For Hutchins, Hitler's success was evidence of the dangers of a relativistic ethics. In the end, I think it unlikely that either position can "prevail," if the goal is to find arguments in logic and reason that exclude the alternative point of view. The best that we can do is to understand how each position operates within its own terms. In the case of Nazi Germany, Dewey's response was that

> Hitler had "inverted democracy" by brutally imposing social unity from above, a method that stood in dramatic contrast to the methods of democratic consenses building from below. . . . Americans who . . . sought to fight Hitler by grounding democracy in a competing set of moral absolutes were playing Hitler's game and could only hope their battalions were stronger.

WESTBROOK, *supra* note 26, at 522-23 (footnotes omitted).

219. As Dewey put it:

> [I]t is argued, the fact that such and such customs and laws have grown up is no sign that they *should* exist; it furnishes no test for their value. In short, we come here upon the large problem of 'value in relation to fact', and upon the conclusion, held by many that they are so separate that standards for judging the value of what exists must have *their* source as standards outside of any possible empirical field.
>   With reference to this issue, recognition of the ongoing character of social facts as continuing activities is of fundamental importance. If what are taken to be social facts are chopped off by being regarded as closed and completely ended, then there is much to be said on theoretical grounds for the view that the standard for evaluating them must lie outside the field of actual existences. But if they are ongoing, they have consequences; and consideration of consequences may provide ground upon which it is decided whether they be maintained intact or be changed.

Dewey, *supra* note 182, at 83.

220. *See* LUBAN, *supra* note 31, at 133-40.

ism, contextualism, antiessentialism, and conventionalism.[221] By antifoundationalism, Luban means a systematic rejection of foundationalism, or "the idea that claims of a certain category—knowledge claims, moral claims, political claims—rest on or require foundations that must be unearthed by philosophical inquiry."[222] Antifoundationalists, by contrast, deny that moral judgments, political commitments, or ascriptions of responsibility require philosophical foundations.[223] Instead, they adopt what Luban terms a "contextual" approach to questions of morality, politics, and the like, in which the analysis of these matters is understood to be local as opposed to general, particularistic as opposed to abstract.[224]

Necessarily, the pragmatists also question essentialist approaches to legal, political, and philosophical questions. Given their skepticism that stable philosophical foundations undergird rational human thought, and given their conviction that analytic categories are contingent upon context and circumstance, they assert that essential a priori truths are illusory, and that knowledge—and indeed the language through which ideas are conveyed—can exist only by virtue of a process of social construction.[225]

A.   The Problem of Conceptual Conservatism

Contemporary pragmatists and others who share a commitment to antifoundationalism, contextualism, antiessentialism, and conventionalism also share a tendency to be vulnerable to the charge that their theoretical perspective is inherently conservative. Professor Luban argues that a rejection of foundationalism in favor of contextual approaches to assessment and justification necessarily causes a "conceptual conservatism."[226] This is so, he explains, precisely because contextualism requires an inquiry that is both local and particu-

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221. *Id.* at 134.

222. *Id.* Thus, a foundationalist would be likely to assert that a judgment about some matter of ethics requires a prior identification of a theory of human nature, or that an ascription of responsibility requires a prior working out of the theory of free will. *Id.* at 134-35. Note the affinity between this way of thinking and the rational humanism of Hutchins described earlier in this Article. *See supra* text accompanying notes 89-95.

223. *See* LUBAN, *supra* note 31, at 136.

224. *See id.* at 136-37. "For the contextualist, justifying all our beliefs is simply not something that we ever need to do. Justification, like inquiry, is local and not global. It depends on the context." *Id.* at 137.

225. *Id.* at 139-40. In Luban's account: "This is the suggestion that what seem to be necessary truths about the world, truths that provide foundations for our social practices, are in reality epiphenomena of those practices. Since nothing metaphysical or foundational lies underneath our practices, the practices themselves are decisive." *Id.*

226. *Id.* at 137.

laristic. By definition, localized analysis implies that "[a]t any time we must withhold the overwhelming preponderance of our beliefs and concepts from critical scrutiny; and whenever we revise our beliefs, we must revise them minimally."[227] Luban's point is that if pragmatism necessarily involves a contextual approach to reasoning about problems, then the pragmatist thinker must hold context constant and cannot include it—or at least not very much of it—in his or her critical analysis.[228] Luban concludes that this aspect of pragmatism is "inhospitable to radical social thought" precisely because radical theorists want to be able to argue that much or all of culture, which is the very source of "context," has been constructed in order to serve the interests of those in positions of power.[229] Thus, an agenda of anti-subordination which seeks a "massive conceptual revision" of the dominant ideology is, by definition, incompatible with a methodology that requires the avoidance of any such broad-scale project.[230]

Joel Handler put forward a related argument in his 1992 Presidential Address to the Law & Society Association.[231] Although nominally an assessment of the political consequences of postmodernism, Handler's analysis applies in important respects to the new pragmatists and others who are heir to the Deweyan tradition.[232] Handler's argument proceeds in several steps. First, he explains that postmodern theory is centered on a process of deconstruction, which takes as its starting point the notion that there is no necessary fixed relationship between language and that which it "purports to describe."[233] Given this problematic relationship between language signs and the objects and ideas they seek to signify, "it follows that there is no self-authenticating truth or method or reason that is independent of language."[234] Moreover, because for the postmodernist words have no necessary fixed relationship to objects or ideas, the identification of a meaning, by definition, requires the suppression of alternative possible definitions. "Thus, all meaning has a 'surplus,'

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227. *Id.* at 138.
228. Luban quotes Otto Neurath to press home this point: "We are like sailors who must rebuild their ship on the open sea, never able to dismantle it in dry-dock and to reconstruct it there out of the best materials." *Id.* at 137 (quoting Otto Neurath, *Protocol Sentences, in* LOGICAL POSITIVISM 199, 201 (A.J. Ayer ed., 1959)).
229. *Id.* at 138.
230. *Id.*
231. Handler, *supra* note 39.
232. *Id.* at 702.
233. *Id.* at 699.
234. *Id.* Although framed in terms of language theory, this set of analytic moves is analogous in important respects to the antiformalist argument of the pragmatists that truth is always contingent upon context and culture. *See supra* text accompanying notes 222-224.

that which is repressed along with that which is articulated."[235]
Deconstruction, then, is the process of recovering suppressed mean-
ings, with the idea that their very uncovering works to subvert the
forces that made them otherwise invisible.[236]

The second step in Handler's account involves the application of
these postmodern theories of deconstruction and surplus meaning to
the problem of the subject. Given that the act of naming anything is
inherently an assertion of power, Handler explains, postmodern the-
ory necessarily regards the assigning of social identities as itself a con-
tingent ideological process.[237] Neither race nor class nor gender nor
sexual orientation can be regarded as an essential category because
each apparent unity suppresses as much meaning as it conveys.[238] In
Handler's words: "There is no unified essence. Rather, the
postmodern subject is a plurality of contingent social, political, and
epistemic relations. Moreover, these relations are constantly subject
to rearticulation. Because there are no a priori relations based on
hegemonic practices, agents are only contingently allied in more or
less stable arrangements."[239]

The third step of Handler's account places this idea of the
"decentered subject"[240] at the heart of postmodern politics. He points
out that, without a conception of the self as unitary and essential,
there is little possibility of developing a "common or totalizing dis-
course," such as class or race consciousness, around which to organize
a politics of anti-subordination.[241] Consequently, he concludes that
postmodernist politics is "disabling," in that it undermines the "com-
monality of struggle and social vision" required for effective social
change movements.[242]

It is at this point in Handler's discussion that familiar themes
enter, especially the claim that postmodernism's antifoundationalism
and antiessentialism render moral judgments impossible and lead to
"unbridled relativism."[243] An important strategy employed by
postmodernists for avoiding this pure instrumentalism, he explains,
has been to "embrac[e] the American pragmatism of James and

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235. Handler, *supra* note 39, at 699.
236. *Id.*
237. *See id.* at 700.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.* at 701.
242. *Id.* at 698.
243. *Id.* at 702.

Dewey."[244]   The fit is a happy one because pragmatism shares postmodernism's antipathy toward foundationalism and essentialism. In addition, the pragmatist tradition brings an empirical experimentalism to the equation, which, it is claimed, permits the postmodern pragmatist to move beyond instrumentalism and moral relativism. As Handler puts it: "Postmodernists use pragmatism to deny that contingency is the equivalent of indeterminacy."[245]   Indeed, Handler quotes a leading contemporary pragmatist who explains: "All the major pragmatist figures accepted and asserted the importance of general principles and systematic thought; they insisted only that the test of abstractions must be their usefulness for action and concrete inquiry."[246]

In the end, however, Handler reaches a conclusion not unlike Luban's. The antifoundationalism and antiessentialism of postmodern pragmatism so undermine the integrity of categories such as class, race, and gender that it simply is impossible to develop a "Grand Narrative," which he believes is essential for a transformative politics of the left.[247]   To be sure, pursuing the deconstructive project does have the potential to uncover "previously unnoticed implications of culture that impute a false necessity to the social order and, particularly, the legal order."[248]   But, in Handler's view, this approach does not offer as well a "positive theory of institutions," which means that it "cannot come to grips with institutionally based power," and cannot serve as the basis for collective action in any concrete manner.[249]

B.   Contextual Thinking And Progressive Politics

Given that both pragmatist theory and postmodern theory are characterized by antifoundationalism and antiessentialism, and given

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244. *Id.*

245. *Id.* at 704.

246. *Id.* at 703 (quoting Thomas Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 824 (1989)).

247. *Id.* at 726. "[T]he opposition is not playing that game . . . everyone else is operating *as if* there were Grand Narratives." *Id.* Moreover, "the individualistic Grand Narrative of liberal capitalism continues to mask the institutionalized basis of racism." *Id.* at 727.

248. Frank Munger, *From The Editor*, 26 LAW & SOC'Y REV. 693, 694 (1992).

249. Handler, *supra* note 39, at 724.

> The contemporary stories are about *individuals*, in the most marginalized spaces, engaging in very small acts of defiance, and, for the most part, very little if anything happens. The authors, at best, are extremely reluctant to draw common connections, to talk about the possibilities of collective action in any concrete manner, or even to suggest middle-level reforms, let alone reforms at a more societal level.

Id.

that both are deeply contextual, the observations of Luban and Handler that neither is capable of serving as the theoretical basis for a broadly transformative social movement appear well founded. In Handler's analysis, the most that postmodern political theorists have to offer as an alternative to large-scale political movements driven by grand narratives of class solidarity is the possibility of local acts of resistance and subversion that hold little potential to transform fundamentally the status quo allocation of resources and power.[250] In Luban's account, as well, it appears that those seeking to build a progressive left politics on the basis of pragmatist theory are doomed to accomplish only incremental reforms in the narrow spaces opened up by the contingent, particularistic methodology envisioned by Dewey and his contemporary followers.[251]

This gloomy assessment may only be half right. Even if traditional structuralist theories and the grand political struggles they envision are inconsistent with pragmatism and postmodern thought, it may be a mistake to suggest that limited, largely dispirited, acts of local resistance are the only possible alternatives.[252] As Michael McCann has argued, relatively small-scale acts of opposition to entrenched power often serve as the first steps toward larger social change movements.[253] Indeed, a number of contemporary pragmatists and postmodern theorists have argued that a significant transformative potential inheres in a post-structuralist politics that is located in the "public spaces" where individuals, including those with relatively little social and political power, engage in the process of con-

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250. *See id.* at 712-15 (noting that post-modern protest is more likely to be at the level of a "social work" encounter than a result of "organized political forces"). Characteristic of this assertion is Professor Lucie White's story of the welfare recipient, Mrs. G. *See* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

251. *See* LUBAN, *supra* note 31, at 138 (concluding that "pragmatic philosophy" is "inhospitable to radical social thought").

252. *See* McCann, *supra* note 38, at 740-41 (disputing the accuracy of Handler's characterization of pragmatist approaches to reform, and arguing that the new modes of "local resistance" can have merit).

253. *Id.* at 741. McCann bases this conclusion, in part, on the work of James Scott. He describes Scott's work as follows:

> Ongoing rituals of resistance thus are not simply a resigned alternative to transformative politics. Rather, they often provide rehearsals of opposition that prepare the way for bolder challenges—what he calls 'political breakthroughs'—in more propitious moments. At such times, 'hidden transcripts' developed quietly and privately over long periods are unveiled as potentially unifying visions of collective action.

Id. (discussing JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE 203-23 (1990)).

structing social identities.[254] In these accounts, because social identity is constantly in the process of being constructed and revised through ongoing interaction, the possibility of contesting dominant categories of meaning is always present. "People are never merely passively subordinated, never totally manipulated. Opposition is always possible within alternative practices, structures, and spaces."[255]

Some of these new pragmatist theorists, most prominently Cornell West, have argued that the possibility of a radical, pluralist democratic practice, centered on a discourse of shared experience within invigorated public spaces, was identified in Dewey's original work on democratic theory and public education.[256] Others, associated with feminist theory, have described a connection between Dewey's work and contemporary efforts at consciousness raising, which they define as the "concrete methodology" by which shared meanings and shared experiences are communicated within public spaces.[257]

In order to assess the general argument that pragmatistism and/or postmodernism are incapable of grounding an effective transformative left politics, it is necessary to investigate two subsidiary claims that are embedded within this larger conclusion. The first claim is that the provisional and contextual theorizing characteristic of pragmatism and postmodernism typically fails to provide a meaningful account of the institutional structures that operate to manage the allocation of power in society.[258] The second is that an antiessentialist understanding of social identity makes impossible the formation of social movements structured along the lines of class, race, gender, and the like.[259]

With respect to the first of these claims, it certainly appears to be the case that pragmatist and postmodern thought is inconsistent with a vision of institutions as "top-down, state-centered command structures."[260] However, to say that pragmatism and postmodernism reject

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254. *See* Handler, *supra* note 39, at 701; *see also* Stanley Aronowitz, *Postmodernism and Politics, in* UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM 55-62 (Andrew Ross ed., 1988).

255. Handler, *supra* note 39, at 700.

256. *See* WEST, *supra* note 59, at 103.

257. Handler, *supra* note 39, at 706 (quoting Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1708 (1991)). In addition, some feminists have developed an approach called "standpoint" theory, which envisions transformative political movements "in terms of potential alliances constructed through interaction among differently situated citizens rather than through the acceptance of an overriding meta-narrative and singular identity." McCann, *supra* note 38, at 746-47.

258. *See* Handler, *supra* note 39, at 719-20.

259. *See id.* at 722-23.

260. McCann, *supra* note 38, at 734.

this traditional structuralist account of institutions is different than suggesting that they permit no analysis of social institutions whatsoever. As discussed in the preceding section, Dewey's political philosophy was deeply concerned with the role that a wide range of institutions play in shaping the lives of individuals in everyday practice.[261] Moreover, a number of postmodern theorists have offered an analysis of institutions, described as "complex webs of relational practices" rather than as rigid fully formed social structures.[262] In the best of these accounts, postmodern writers have attended to the social and historical frameworks within which particular claims arise, treating these institutional features as essential elements of their theorizing.[263] Postmodernism may reject grand narratives or totalizing discourse, but that does not mean that it rejects altogether the value of institutional analysis.[264]

With respect to the limitations imposed by an antiessentialist understanding of identity, Handler's critique may be overstated as well. Taking to heart the injunction to treat analytic categories as provisional and subject to revision, it is still possible to employ traditional notions of class, race, gender, and sexual orientation within an effective critical analysis. Simply because one rejects the possibility of a totalizing discourse—the insistence that "all forms of domination are entirely reducible to class conflict"[265]—does not mean that one is prevented from seeking to understand the ways in which power and privilege operate pursuant to identifiable patterns within the context of a given culture.[266]

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261. *See supra* text accompanying notes 189-200.

262. McCann, *supra* note 38, at 734. To be fair, while defending postmodern theory against Handler's critique, Professor McCann does acknowledge that too many postmodern scholars fail to include a well-thought-out institutional analysis and thereby "provide an inadequate mapping of the broader relational environment in which resistance is embedded." *Id.* at 743.

263. As Allan Hutchinson has explained: "As all claims are located within a dynamic set of social practices, postmodernism insists that all theorizing pay attention to the structural circumstances of that social milieu . . . ." Hutchinson, *supra* note 49, at 779.

264. Hutchinson further asserts, "Provided that it is suitably provisional, revisable, and contextual, such theorizing is at the heart of a transformative political praxis." *Id.*

265. *Id.* at 784.

266. In Hutchinson's words:

> Totalizing politics are unrealistic and unrealizable. Grass-roots engagement is better able to grasp and transform the complex and diverse intersecting forms of oppression. *Sexism and racism might be global in existence and sweep, but their dynamism is local in operation and effect. Oppression is universal, but its modalities are particular.*

Id. (emphasis added).

Antiessentialist analyses must come to terms with the impact of socially constructed identities if such analyses are to be useful in helping to direct an effective program of reform. Individuals and groups occupy cognizable social positions that require systematic study, even if these features are more dynamic than traditional political theory suggests. This lesson has been an important feature of critical race theory for some time, and its importance more generally should not be overlooked.[267]

Attention to context—"to the local circumstances of disputes, to the situated places in which people exist"[268]—need not lead to an undue regard for the status quo, as Luban suggests. It may be that pragmatism "values existing tradition as one component of the web of coherent beliefs and activities that comprise our culture,"[269] but the pluralist impulse of John Dewey's work also reminds us that Western society is made up of many different traditions, each of which is entitled to be heard in the process by which social meaning is created.[270] If Iris Young is correct that two of the principle features of oppression are marginalization and cultural imperialism,[271] then a politics directed toward diminishing those processes ought to be regarded as a coherent pragmatist practice. That politics would still seek to "create new and better stories that fit safely within the system of prior narratives,"[272] but the range of eligible narratives would be expanded dramatically to include many stories that are not currently a part of the governing discourse.

III. PUBLIC EDUCATION AS PUBLIC SPACE

In the preceding two sections of this Article I have attempted to explore each of the critiques that necessarily confronted Marc Feldman in his efforts to apply pragmatist theory to a progressive political/legal practice. In this section, I return to Marc's specific project with respect to public education. The discussion that follows is in

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267. *See, e.g.*, Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1384-87 (1988); Jayne Chong-Soon Lee, *Navigating the Topology of Race, in* CRITICAL RACE THEORY 441 (Kimberlé Crenshaw et al. eds., 1995).

268. Hutchinson, *supra* note 49, at 785.

269. Sherry, *supra* note 36, at 1112.

270. *Cf.* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) (arguing that norms, including legal norms, are made coherent within a shared narrative tradition, but that, because multiple interpretive communities often exist within a single political jurisdiction, the legal system must sometimes rely on coercive force).

271. *See supra* text accompanying note 211.

272. William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 643 (1994).

three parts. First, I describe why Marc directed his attention generally to city life, and why he sought to work in urban public schools. Then, I discuss the shifting societal function that public schools have played over time and the institutional features that best match their current role, giving special attention to the characteristics of the schools within which Marc worked during his sabbatical. Finally, I take up two specific disputes that currently are at play within public education. Each of these disputes has been framed, at least in part, as a legal question. Drawing upon the insights provided in the two preceding sections of this Article, I conclude by offering some tentative suggestions about these questions rooted in the notion that public education, particularly in cities, is crucial public space.

A. Cities And Public Space

Marc Feldman's concern over what he perceived to be a retreat from civic life was especially focused on cities. He believed that urban environments hold a special potential for fostering authentic discourse between individuals and groups who share little except a common physical space. At the same time, Marc understood that a powerful set of contrary instincts pushing toward social isolation often find expression in urban planning and design decisions. In an unpublished paper, he wrote:

> In bounding, marking, and fixing space, we exercise authority and possibly control; in turn, we feel comfortable and safe. This is a world into which others do not intrude unless invited. But, in separating to create order and to gain control, we lose connection. In our flight from otherness, that is difference, we have achieved neither community nor intimacy; instead, we have added to our isolation.[273]

Marc's work in this area drew heavily upon the writing of social psychologist, Richard Sennett.[274] Marc argued that the diminution of public space and the avoidance of civic life both are driven by an inherent anxiety over the prospect of encountering others who are strangers. In Marc's account:

> We experience difference as painful, not stimulating. We experience difference as weakness and dysfunction and as something to be overcome. When we are in a crowd or

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273. Marc Feldman, Untitled Working Paper 9 (1995) (unpublished manuscript, on file with author).
274. RICHARD SENNETT, THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES (1990).

walking along a city street, we are defensive and on guard.
We are constantly "humbled." We perform a kind of pedes-
trian ballet. We avert our eyes from making contact with the
eyes of others; as strangers we have no right to talk to each
other. We are in the presence of others but we are alone
and isolated.

　　The materials, bounds, and functions of the urban land-
scape, like social relations, have become increasingly rigid.
The "atomizing of the city" means that there is less and less
of the once-characteristic mix of functions and activities
within the same geographic area. Instead, there is increasing
division, separation, and isolation. Lost is the 18th century
ideal of "Bildung"—"an ideal in which the life of an individ-
ual became psychologically complete through the same acts
that integrated the individual into society." Instead, in our
flight from difference and conflict, we have taken refuge and
sought meaning in increasingly local and interior ways.[275]

　　The impulse to seek refuge from strangers, and the impact of this
impulse on land use planning and urban design decisions, is the sub-
ject of important work by Jerry Frug.[276] In a recent article entitled *The
Geography of Community*, Frug argues that current governmental poli-
cies promote the division of American metropolitan areas "into dis-
tricts that are so different from each other they seem to be different
worlds."[277] In Frug's view, these divisions along lines of race, class,
and ethnicity diminish the potential of cities to be places where "the
being together of strangers" can take place.[278] For Frug, as for Marc
Feldman, this process of separation and homogenization permits res-
idents "to avoid dealing with each other."[279] Employing the language
of Sennett, Frug argues that such avoidance is adolescent because, like
adolescents who "fear being overwhelmed by life's painful uncertain-
ties and complexities," it permits people to "organize their lives to pre-
clude exposure to the unknown or the bewildering."[280]

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　　275. Feldman, *supra* note 273, at 11-13 (footnotes omitted) (quoting SENNETT, *supra*
note 274, at 148).
　　276. Frug, *supra* note 13.
　　277. *Id.* at 1047.
　　278. *Id.* at 1048 (quoting IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE
237 (1990)).
　　279. *Id.* at 1052.
　　280. *Id.*
　　　　Sennett's work is a sustained critique of this psychological and social phe-
　　nomenon. He finds it manifested not only in the defense of homogeneous sub-
　　urbs but also in the revolutionary's (and the reactionary's) intolerance for
　　dissent, the history of city planning, the increasing intensity of family life, and the
　　aesthetics of the modernist city. The more widespread the phenomenon, how-

By contrast, Frug proposes a vision of urban life that exploits the full potential of cities.[281] In this conception, the city is defined as "the locus of a peculiar social situation: the people to be found within its boundaries at any given moment know nothing personally about the vast majority of others with whom they share this space."[282] Rather than regarding this "world of strangers"[283] as problematic, Frug suggests that it is well suited to serving the values he terms "variety, eroticism, and publicity."[284] Frug further explains:

> Social differentiation without exclusion means the formation of a multiplicity of group affinities—ethnic, gay and lesbian, religious, and so forth—in an atmosphere that promotes their intermingling. Variety adds to this mix a diversity of activities within each city neighborhood and a differentiation between neighborhoods, thereby producing a distinct sense of place when traveling from one location to another. Eroticism stresses the pleasure and excitement derived from the unusual, the strange, the surprising; it includes not only the stimulation of people-watching but also of architectural and commercial variety. Publicity refers to the feelings generated when entering a public space—a space that, because it is open to anyone whatsoever, provides exposure to opinions and cultures very different from one's own.[285]

Frug urges a policy of "community building" that rejects the impulse to seek relationships only with others who are like us.[286] In these terms, community building "requires not cultivating a feeling of oneness with others but fostering a recognition that one has to share one's life with strangers . . . ."[287] The experience of sharing one's place with others who are different may produce anxiety, but it also holds the promise of stimulating the development of social identities that recognize the claims of "others" to the shared physical and cul-

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ever, the more insistent the question becomes: What's wrong with these purified forms of identity? Sennett's response is that they create "a state of absolute bondage to the status quo" and, as a result, limit people's lives. A reliance on stability, coherence, and order inhibits openness to experience: It undermines one's ability even to absorb, let alone enjoy, the flux and variety the world has to offer. *Id.* at 1053 (footnotes omitted).

281. *Id.* at 1049-51, 1077-81 (discussing the role of the city in community building and the values associated with city life).

282. *Id.* at 1049 (quoting LYN H. LOFLAND, A WORLD OF STRANGERS: ORDER AND ACTION IN URBAN PUBLIC SPACE 3 (1973)).

283. *Id.* (quoting LOFLAND, *supra* note 282, at 3).

284. *Id.* at 1051.

285. *Id.*

286. *Id.* at 1049.

287. *Id.*

tural resources that comprise the community.[288] As Iris Young has put it: "City dwelling situates one's own identity and activity in relation to a horizon of a vast variety of other activity, and the awareness that this unknown, unfamiliar activity affects the conditions of one's own."[289]

If we accept John Dewey's fundamental premise, that democratic practice is essentially the resolution of social disputes by "free intercourse and communication of experience,"[290] then it follows that this politics depends upon the existence of a vibrant civic life, which in turn requires public spaces within which the constructive work of social discourse can take place.

In Marc's view, some of the most fertile social spaces available for fostering such a discourse are marked out by the institution of public education, particularly in large urban areas.[291] The remainder of this Article offers some observations about this conception of public education.

B.   The American Common School And Uncommon Alternatives

In his seminal 1951 study of public education in the United States, *The American Common School*, Lawrence A. Cremin traces the history of the common school against the backdrop of American democratic principles and political institutions.[292] Cremin argues that American public schools were understood in their inception as "common" not because they were intended for common people or "the masses," but because they were designed for everyone without regard to economic class or social station.[293]

Within this rhetorical account of the American tradition of the common school, there are at least two fundamentally divergent ways in which to view the political function of public educational institutions. The first perspective, which evokes some of the thinking of Robert Hutchins, proposes that public schools exist primarily as a ve-

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288. YOUNG, *supra* note 278, at 238-39 (discussing the possibility of "social differentiation without exclusion" in urban life).

289. *Id.* at 237-38.

290. DEMOCRACY AND EDUCATION, *supra* note 69, at 99.

291. john powell made a similar observation in his work on the connection between segregated housing and segregated education in the United States. *See* powell, *supra* note 10, at 792-93.

292. LAWRENCE A. CREMIN, THE AMERICAN COMMON SCHOOL: AN HISTORIC CONCEPTION (1951).

293. George A. Counts, *Foreword* to CREMIN, *supra* note 292, at viii. It is important to temper Cremin's enthusiasm for the democratic tradition of public education in the United States with a reminder of the practice of racial segregation that marked, and continues to mark, public schools in many American communities. *See generally* ARMOR, *supra* note 10 (discussing public school desegregation).

hicle by which certain skills, information, and ways of thinking can be inculcated uniformly across the citizenry of the United States.[294] The alternative perspective, which its proponents often identify with the educational theory of John Dewey, describes public schools as public spaces in which "children of different backgrounds and experiences come together."[295] In this alternative account, although the formal transmittal of information and skills is seen as important, the negotiation of multiple perspectives and conflicting claims is held out as the primary work to be accomplished.[296] Employing the dynamic conception of public education proposed by Dewey, advocates of this perspective assert that well-functioning public schools permit "the views and experiences of both the dominant group and minority groups to meet, informing and transforming each other."[297]

In a series of essays published in the 1960s and '70s, education theorist Joseph Featherstone provided a useful summary of the growth of public education in the United States and parts of Western Europe.[298] Featherstone reported that the widespread development of schools as formal institutions of mass learning took place in the nineteenth century, at a time when children were ceasing to be an integral part of the broader economy.[299] As these new schools supplemented other educative elements in the community, including the family, the village community, and religious institutions, an older view of education as something that occurs in many places over a lifetime was replaced by the notion that education mostly occurs during childhood and mostly takes place within the setting of formal educational institutions.[300] Featherstone concludes that this shift led schools to become "age ghettos," with the consequence that few adults were engaged in

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294. *See, e.g.*, Sherry, *supra* note 151, at 156-82.

295. powell, *supra* note 10, at 792-93.

296. *See id.* at 782-85 (arguing for the integration rather than the desegregation of public schools).

297. *Id.* at 785.

298. Marc Feldman was particularly taken with the work of Featherstone, an essayist and education theorist of the first order. In reviewing Marc's papers after his death, I discovered an extensive file containing dozens of articles and book reviews written by Featherstone during the 1960s and '70s. In one of his last planning memos, Marc indicated that he expected to begin the process of sorting out his sabbatical experiences by writing some short essays modeled on Featherstone's approach to education scholarship. Memo from Marc Feldman, Professor of Law, University of Maryland School of Law, to Donald Gifford, Dean, University of Maryland School of Law (Mar. 7, 1997) (on file with author).

299. Joseph Featherstone, *Youth Deferred*, NEW REPUBLIC, Aug. 24, 1974, at 23 [hereinafter Featherstone, *Youth Deferred*].

300. *Id.*

educating children and few children were exposed to adults other than their teachers and immediate family members.[301]

In the early twentieth century, another shift took place, especially in the design and conception of secondary schools. Featherstone explains that the progressive movement in politics and educational thought was undertaken against the backdrop of a profound change in the function of American secondary schools.[302] Schools were changing from "elite preparatory institutions to mass terminal institutions."[303] With this development, the segregation of young people was extended to older children, and an internal system of age grouping functioned to deny students "valuable contacts with people of other ages."[304] In the 1950s, the role of secondary education evolved further, with many high schools beginning to function as "mass college preparatory institutions," rather than as terminal educational institutions.[305]

The 1950s and '60s also was the period in which a grudging implementation of *Brown v. Board of Education*'s desegregation principle took place.[306] That process of dismantling an elaborate system of racially segregated public schooling was never fully accomplished, in important respects because of the Supreme Court's refusal to permit inter-district remedies.[307] More recently, education in the United States has become even more segregated by race and by class, due to large-scale patterns of residential segregation, "white flight" from many urban public schools, and the diminishing resolve of federal courts to implement *Brown*.[308] The result of this resegregation has been that many of the secondary schools that serve racial minorities and persons in poverty have continued to function as terminal institutions, while those serving white, more affluent children seek to prepare students for college.[309] As Featherstone wrote in 1974:

301. *Id.*

302. Joseph Featherstone, *Teaching Children to Think*, NEW REPUBLIC, Sept. 9, 1967, at 16 [hereinafter Featherstone, *Teaching Children to Think*].

303. *Id.*

304. Featherstone, *Youth Deferred, supra* note 299, at 23.

305. Featherstone, *Teaching Children to Think, supra* note 302, at 16.

306. 347 U.S. 483 (1954).

307. *See* Missouri v. Jenkins, 515 U.S. 70 (1995) (finding that a District Court's remedial plan, which attempted to attract non-minority students to a minority school district, exceeded the District Court's discretion because it was an interdistrict remedy to an intradistrict violation); Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (prohibiting a District Court from imposing a multi-district, area-wide remedy for single-district racial segregation).

308. *See* powell, *supra* note 10, at 752-61.

309. Joseph Featherstone, *Youth Deferred—II*, NEW REPUBLIC, Aug. 31, 1974, at 25 [hereinafter Featherstone, *Youth Deferred—II*].

> [S]chools do many things: they baby-sit, teach knowledge, skills and work habits, give jobs to grownups, introduce the young to their peers, and provide them with the wherewithal to break free of family and locale. They also accredit one pool of students for elite careers and assign another pool to less august futures.[310]

The reality of this dual-track system has colored debates between academic traditionalists and reformers at least since the start of the twentieth century. Featherstone argues that the best of the "community-centered" private schools influenced by John Dewey's progressive education theory succeeded in breaking down barriers dividing one subject of study from another and making the larger community a part of the curriculum.[311] By contrast, he explains, the progressive movement in public education was "deeply conservative,"[312] in that its most significant effects were the adoption of scientific management systems for school administration and "life adjustment" curricula for those students tracked separately from the college bound.[313] While "shattered fragments of John Dewey's dream did enter the [public school] curriculum, (for better or worse) . . . what we call progressive education was never [really] tried."[314]

In light of this history, in which efforts to make public education more practical and relevant too often yielded separate tracks for the underprivileged,[315] Featherstone approached new reform proposals offered in the mid-1970s with considerable caution. Recognizing that "it is unhealthy to cluster the young for so long in the bureaucratic institutions called schools,"[316] these reformers called for a variety of measures designed to help students learn to take responsibility for the welfare of themselves and others, to learn through action and experience, and to spend more time with children of different ages and with adults.[317] In general these reform proposals provided for more student choice, flexibility and informality in schooling, including more

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310. *Id.*

311. Featherstone, *Teaching Children to Think, supra* note 302, at 16.

312. *Id.* at 17.

313. Featherstone, *Youth Deferred, supra* note 299, at 25.

314. Featherstone, *Teaching Children to Think, supra* note 302, at 17.

315. Featherstone, *Youth Deferred, supra* note 299, at 25; *see also* Featherstone, *Teaching Children to Think, supra* note 302, at 18 (noting that "tracking" results in social inequalities in England and segregation in America).

316. Featherstone, *Youth Deferred, supra* note 299, at 23.

317. *See generally* JAMES S. COLEMAN ET AL., PRESIDENT'S SCIENCE ADVISORY COMMITTEE, YOUTH: TRANSITION TO ADULTHOOD 1-7 (1974) (examining the process of "transforming children into adults," and suggesting "alternative environments" for educating youth).

work-study, and other initiatives designed to reduce the separation between school and the outside world.[318]

Featherstone's response to these proposals nearly thirty years ago rings with authentic insight today. While endorsing the reformers' call for smaller, less bureaucratic schools, and for finding more opportunities for older students to help teach younger children, he expressed the concern of a good Deweyan pragmatist that many of the proposals failed to attend to context; that is, the considerable variations in structure and local culture that characterize individual schools and school systems.[319] "The real issue," he wrote in 1974, "is whether we can replace the swollen and pathological institution we have with something humane, voluntaristic and pluralistic."[320]

Marc Feldman took up this call to context in the way he arranged his sabbatical project. After working through the many responses he received to his initial written inquiries to leading education reformers and thinkers,[321] Marc decided to spend his time working in the New York City public school system. Although the New York City public schools comprise a vast and complicated bureaucracy, Marc had been told by a number of his contacts that public education is "'on the table' [in New York City] as part of the political discourse in a way that it is not in most other cities."[322] At the time Marc chose this site for his work, a new schools chancellor, Rudolph Crew, had recently been appointed to replace an equally high visibility leader, Raymond Cortines.[323] To Marc's mind, this shift "represented a fundamental change in educational philosophy, leadership and governance" of the school system, as well as a profound change in the "political access and influence" of the chancellor.[324]

Marc arranged to teach at two "new" high schools.[325] These schools are deliberate alternatives within the larger New York City school system. Instead of enrollments of 3000 to 4000 students, they have fewer than 400 students.[326] They had been founded through the initiative of parents, community leaders, and teachers, yet their under-

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318. *Id.* at 145-75 (describing proposals for reform).
319. Featherstone, *Youth Deferred—II, supra* note 309, at 24.
320. *Id.*
321. *See supra* text accompanying notes 2-9 (describing the content of these inquiries).
322. Memo from Marc Feldman, Professor of Law, University of Maryland School of Law, to Donald Gifford, Dean, University of Maryland School of Law 2 (Jan. 31, 1997) (on file with author).
323. Anthony M. DeSafano & Rose Kim, *A System Beset By Problems,* NEWSDAY, Oct. 9, 1995, at A7.
324. Memo from Marc Feldman to Donald Gifford, Jan. 31, 1997, *supra* note 322, at 2.
325. *Id.*
326. *Id.*

lying philosophies are "radically different one from the other."[327] For half of the school day, Marc taught at Manhattan Village Academy, a school begun largely under the leadership of its principal, Mary Butz. Marc described Ms. Butz as "the iron-handed leader of the school. Her 'picture' of a fine school resembles that of a good parochial school."[328] Central Park East Secondary School, where Marc taught the other half of the day, is "dramatically different."[329] While Manhattan Village Academy graduated its first class during the year of Marc's involvement there, Central Park East had been one of the very first alternative public schools in New York.[330] These "beacon schools" were the result of an effort to create as many as fifty innovative schools in the City. They are characterized by radical decentralization, high levels of parent involvement, and teaching that connects learning to real world activities.[331]

In a number of conversations I had with Marc during and after his sabbatical, I urged him to write a comparative account of the two schools in which he taught. Although Marc never wrote such an article, I am pretty sure that he would have avoided declaring a "winner" between the two and would have refused to take the position that one approach is superior to the other. We will never know, precisely, what Marc made of his teaching experiences in these two schools.[332] What I do know is that the particulars of the two methodologies pursued in these schools, one relatively traditional, and the other an evolved form of the progressive model of education, proved to be less important to Marc than the features the two schools shared.

Consistent with John Dewey's theory of institutions, these features all relate to the ability of the schools in question to maximize the effective power of each individual participant (students and teachers alike), to insure his or her full development as a creative and produc-

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327. *Id.*
328. *Id.* at 2 n.2.
329. *Id.*
330. *Id.*
331. *See generally* DAVID BENSMAN, QUALITY EDUCATION IN THE INNER CITY: THE STORY OF THE CENTRAL PARK EAST SCHOOLS (1987) (tracing the application of "progressive educational theories" to the Central Park East Schools).
332. In the course of reviewing Marc's papers following his death, I found numerous files containing the concrete data of those experiences. Included were his daily teaching plans and notes, memoranda to students and co-teachers, narrative evaluations of his students, and a variety of other documents accumulated in the normal course of teaching high school classes of the sort Marc offered at Central Park East and Manhattan Village Academy. While these materials would have been central to Marc's efforts to write about his sabbatical experiences, there is no way that I or anyone else can possibly capture the daily texture of his enterprise, or reconstruct it from the cold record he left behind. That simply is not the point of this Article.

tive member of the community, and to facilitate each participant's voice in shaping and managing the collective enterprise.[333]

The story of the Julia Richman Education Complex, within which Marc also worked during his sabbatical, makes concrete and operational this vision of a public educational institution as effective public space.[334] Julia Richman represents a particular (and quite literal) example of how to implement Joseph Featherstone's injunction that "swollen and pathological" schools ought to be replaced with "something humane, voluntaristic and pluralistic."[335]

The story involves the transformation of an all-too-typical large central-city high school, riven by high drop-out rates, widespread violence, and vandalism, into a thriving education complex and resource center for committed teachers. The transformation was begun in the mid-1990s, when a group of school reformers in New York City, building upon the observation that small free-standing schools serve students more effectively than do large traditional institutions, decided to seek funding and school board approval for a plan to select, and then close, a large failing public high school.[336] The plan called for the building to be transformed into a complex that would include a number of smaller schools and other facilities, directed toward serving the same population of students.[337] With support from private foundations and the teachers' union, the board agreed to the proposal. Julia Richman High in Manhattan was selected as the site for this experiment in renewal.[338]

An unpublished manuscript written by one of the leaders of this project, found in Marc Feldman's files, describes Julia Richman prior to its transformation:

> Opened in 1913, as a commercial school for girls, Julia Richman was a school with a long tradition. . . . [B]y 1928, Julia Richman High School was regarded as one of the City's

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333. *See* BENSMAN, *supra* note 331, at 8-9 (noting that the founders of the Central Park East Schools drew on Dewey's educational philosophy).

334. Although Marc did not teach courses at Julia Richman, he spent considerable time in the spring of his sabbatical year helping to design a library for the school and assisting in the development of educational materials, including undertaking an arduous process of selecting books that were to be purchased for the students' use.

335. Featherstone, *Youth Deferred—II, supra* note 309, at 24.

336. *See* Ann Cross, Unpublished Manuscript 3 (May 1977) (on file with author). This project was undertaken by the Center for Collaborative Education, which is part of the National Coalition of Essential Schools. It built upon the experience of the more than 125 small, free-standing schools that already operated under the umbrella of the New York Networks For School Renewal. *Id.* at 2-3.

337. *Id.* at 3.

338. *Id.*

premier academic high schools for girls. By the late 60s, like many other New York City single-sex schools, it had became co-educational [sic].

While the school had many illustrious years, it began, following the massive budget cuts in the mid 1970's what can now be seen as an almost inevitable slide downward: patterns of chronic absenteeism and cutting developed. As the school's performance decline [sic], its graduating classes came to represent less than a third of those who had entered as freshmen. Failure rates skyrocketed; violent attacks became frequent. To insure safety, scanners were installed. Yet, despite their presence, and the extra security personnel who accompany the scanners, incidents within the school and the surrounding neighborhood increased. Physically, the building's once glamorous appearance rapidly declined. Badly in need of maintenance for years, lack of funding prevented even the most basic repair. . . .

. . . .

Despite repeated attempts to reassert the schools' educational mission, its reputation and performance continued to decline; discipline became a top priority. At the end of the large room housing the vice principal's office, a wire mesh cage served to separate adversaries or hold unruly students until the arrival of a police officer.[339]

The manuscript further recounts the efforts undertaken in the early 1990s to save this "failing" school.[340] First, the school system directed that Julia Richman adopt a "curriculum concentration" strategy, in which special programs and enriched curricula were developed in order to "attract and hold on to the more determined students."[341] The strategy did not succeed in stemming the school's decline, in part because it resulted in the creation of a cluster of "haves" within the special programs who were resented by, and segregated from, the "have nots" assigned to the regular curriculum.[342] Next, the school adopted a "house plan," in which the building was divided into smaller units, in the hope of reducing the anonymity resulting from its large size.[343] Once again, the idea failed to stabilize the school, probably because "the idea was introduced and administered in the traditionally top down fashion: principals were *told* to cre-

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339. *Id.* at 4-5.
340. *Id.* at 5-7.
341. *Id.* at 5.
342. *Id.* at 6.
343. *Id.*

ate houses and they, in turn, *told* their faculties. As a result, little planning and discussion occurred among those responsible for spreading the idea."[344]

On the heels of these failures, the proposal to close Julia Richman and reopen it as a reconfigured educational campus largely has been successful. After being selected for the project, Julia Richman's then existing high school program was phased out over several years as students graduated or left.[345] In the interim, several new, much smaller, schools were designed and opened in temporary space away from the Julia Richman building.[346] By 1997, the plan was almost fully implemented, with the newly configured Julia Richman Complex comprised of five distinct schools and several other programs.[347] Included were the Urban Academy, a small progressive school founded in the late 1980s as a member of the Center for Collaborative Education, the Manhattan International High School, the Vanguard High School, Talent Unlimited, a professional arts program that had become an autonomous school in 1994, and the Ella Baker Elementary School.[348] In addition, the campus contained an infant and toddler center and daycare program, a vocational training program, an institute for high school seniors seeking to make the transition to college, a professional development institute providing resources and training programs for teachers, and a student health center operated in cooperation with Mt. Sinai Hospital.[349]

The success of this experiment is reflected in a number of objective measures. Attendance and graduation rates are up, and the Urban Academy, the anchor school within the complex, has maintained a record of sending more than ninety percent of its graduates to college.[350] The physical condition of the building has improved, there has been a dramatic reduction in the number of violent incidents and acts of vandalism, and "[t]hroughout the building, the focus has shifted from concerns about security to an emphasis on education."[351]

Several features of the design of the new complex stand out as especially significant in contributing to these improvements. First is the conscious decision of the planners to insure that students at the various Julia Richman schools would not find themselves in age ghet-

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344. *Id.* at 6-7.
345. *Id.* at 8.
346. *Id.*
347. *Id.* at 9.
348. *Id.* at 9-10.
349. *Id.*
350. *Id.* at 16-17.
351. *Id.* at 17.

tos.[352] A critical element in the redesigned campus was the inclusion of an infant/toddler and early childhood program together with an elementary school. This decision has fostered the development of a sense of community, in which "[c]hildren entering the infant toddler center would be able to remain in the building throughout their entire public school experience. Such children would be well known to adults who could follow their progress and plan for continued growth."[353] In addition, the infant and toddler facility is made available to parents who attend one of the other schools at Julia Richman, thus making it possible for young parents to complete their high school education while also insuring that their children are well cared for.[354] Finally, the age mix built into the campus provides older students with opportunities to work with younger students while simultaneously providing younger children with older role models and mentors.[355] The power of this design element is well captured by the following vignette:

> A fire in an old electrical panel located in the school's auditorium caused a smoke condition which resulted in the evacuation of the building. As schools were leaving the building in haste, the high school students who work in [the elementary school's] after school program, grabbed their coats and immediately reported to the elementary school classrooms where they assisted in evacuating the youngest children out of the building. No one said a word to them; they simply knew to go where they were needed. The principal of [the elementary school] reported later that the presence of these students had an immediately calming effect on the young children who assumed that now that all the familiar adults were present, everything was [sic] would be all right.[356]

A second critical step in the redesign of Julia Richman involved a set of decisions that were made early on with respect to building security. From its inception, the enterprise was founded upon the idea that replacing one large bureaucratic institution with a number of smaller more manageable schools would result in the creation of an "atmosphere in which students and staff c[ould] resolve potential conflicts through dialogue and negotiation."[357] The notion here was that,

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352. *Id.* at 10-11.
353. *Id.* at 10.
354. *Id.*
355. *Id.* at 11.
356. *Id.* at 17.
357. *Id.* at 11.

within the reasonable boundaries of each individual school, a set of genuine relationships based upon trust and respect could be encouraged and nurtured. To accomplish this goal, care was taken to mark out each school's physical space within the larger complex, so that students and teachers would be familiar with all those who moved within their designated area.[358]

In addition, this approach to "creating safe spaces for each school," framed a complex-wide discussion about the continued use of weapons scanners at entrances to the building through which all Julia Richman students had in the past been required to pass.[359] The issue was taken up by a "Building Council," comprised of representatives from each of the constituent schools. After discussion, there was broad support for removing the scanners. Notwithstanding a clear recognition that this decision "represented a calculated risk," students, staff, and parents all agreed to the scanners' removal.[360] The change was made, in part, in recognition that the former approach to security had created a "siege mentality" within the school, giving the "impression that the building was on the edge of losing control, that its student body couldn't be trusted . . . ."[361] Equally important, because the removal of the scanners "represented the unanimous judgment of those in the building,"[362] the decision signaled a shift in the ethos of the institution, in which the participants in this collective enterprise were now made responsible for fundamentally managing its basic governance. Thus, not only was security in the new complex linked explicitly to notions of trust and community, the institution itself, in the way it dealt with this sensitive issue, had adjusted expectations about the role that individuals should expect to play in its ongoing administration.[363]

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358. *Id.* While at first this approach might appear to be at odds with Professor Frug's call for the development of urban environments in which individuals are encouraged to interact with "strangers," at a deeper level, it is consistent with Frug's notion of "community building" as a process that promotes the intermingling of people and groups across the lines of class, race, sexual orientation, and the like. *See* Frug, *supra* note 13, at 1049. In theory and in practice, each of the individual schools comprising the Julia Richman complex seeks a high degree of "social differentiation" among those who make up its community. In addition, the multiplicity of functions built into the public space defined by the Julia Richman campus is precisely the sort of "variety" Frug seems to have in mind. *See id.* at 1051 (describing "variety" as a normative value of city life, which "adds . . . a diversity of activities within each city neighborhood and a differentiation between neighborhoods, thereby producing a distinct sense of place when traveling from one location to another").

359. Cross, *supra* note 336, at 11.

360. *Id.* at 12.

361. *Id.*

362. *Id.*

363. *See id.*

This example is entirely consistent with John Dewey's educational theory, and with his notion that attending to the equitable distribution of effective power within those institutions in which people spend their daily lives is a critical element of democratic reform.[364] The planners of the Julia Richman experiment recognized this insight, which was derived from the experience of others who had worked with small, alternative public schools, and from a growing body of research on the characteristics of successful schools. It was summed up in their own words as follows: "[Q]uality education is best fostered when schools are able to create communities in which participants feel a sense of ownership. Establishing a sense of ownership depends upon creating an entrepeneurial [sic], not hierarchical or bureaucratic, model in which participants have control over their working environment."[365]

If not in all of the particulars, then at least in the animating spirit of this enterprise, and in the efforts that Marc Feldman joined at the Manhattan Village Academy and the Central Park East Secondary School, the insights of John Dewey with respect to the role of public institutions in a democratic society are well represented. While a variety of approaches to curriculum, evaluation, and staffing characterize these different schools, they all share an essential commitment to providing students with a nonbureaucratic learning environment in which each young person's capacity to develop and mature is taken seriously. Marc did not have the chance to write about the details of these experiences. In the concluding portion of this Article, however, I seek to apply Marc's perspective on public education to several issues that he was following, in order to suggest how he might have analyzed them consistent with his experiences in New York.

C. Application to Ongoing Issues Within the Field of Education

As noted in the introduction to this Article, Marc Feldman was intensely interested in the ongoing legal and political issues that dominate discussion within the field of public education. Whether the topic was community participation in matters of school governance, school vouchers, single-sex schools, school finance litigation, or race and class segregation in public education, Marc read and studied everything he could. Of course, his perspective was shaped by the notion, described in the preceding discussion, that each of these questions has to be resolved in a way that treats public educational

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364. *See supra* notes 195-200 and accompanying text.
365. Cross, *supra* note 336, at 8.

institutions as valuable public space.[366] With that premise in mind, I conclude this Article with a brief look at two of the controversies that Marc was following during his sabbatical.

    1. Community Participation in School Governance.—In addition to his teaching at Manhattan Village Academy and Central Park East Secondary School and his consulting at the Julia Richman complex, a final component of Marc's sabbatical experience was his work with an independent school district in New York City. At the time, the New York public schools were arranged in an elaborate bureaucratic organization. Elementary and middle schools fell within the jurisdiction of thirty-two independent school districts, all governed by community boards of education and headed by district superintendents.[367] Marc concluded that among the most articulate, thoughtful, and innovative of the district superintendents was the superintendent of District Two, Anthony Alverado.[368] Consequently, he arranged to work with him and others in District Two.[369] During his involvement with them, a highly publicized battle was waged by Schools Chancellor Rudolph Crew and Mayor Rudolph Guiliani to withdraw substantial power from all of the local school boards in New York City.[370] Marc observed this struggle first hand, and he believed that it symbolized the larger problem of diminishing community participation in public education elsewhere in the country.

    Once again the essays of Joseph Featherstone provide important historical context for understanding this issue. In a series of articles published in 1968 and 1969, Featherstone reported on a serious effort by a broad coalition of politicians, community activists, and education experts to create a system of community involvement in the public school system in New York.[371] To a significant extent, this work grew out of frustration with the slow progress of desegregation that had

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    366. *See supra* notes 273-291 and accompanying text.

    367. *See generally* Joseph Berger, *Scandals at the School Boards Led to Loss of Their Powers*, N.Y. TIMES, Dec. 18, 1996, at A1 (surveying efforts to centralize power in New York City schools).

    368. *See* Memo from Marc Feldman to Donald Gifford, Jan. 31, 1997, *supra* note 322, at 1 (describing Alverado as a "visionary superintendent").

    369. *Id.*

    370. *See, e.g.,* Melody Petersen, *Schools Chief Vows to Press Battle on Troubled Districts*, N.Y. TIMES, Nov. 18, 1996, at B3.

    371. Joseph Featherstone, *The Albany Stranglers: Choking Off Community Schools*, NEW REPUBLIC, July 19, 1969, at 16 [hereinafter Featherstone, *Albany Stranglers*]; Joseph Featherstone, *Community Control: Down But Not Out*, NEW REPUBLIC, Aug. 16, 1969, at 11 [hereinafter Featherstone, *Down But Not Out*]; Joseph Featherstone, *Community Control of Our Schools*, NEW REPUBLIC, Jan. 13, 1968, at 16 [hereinafter Featherstone, *Community Control*].

occurred in New York's schools. The first essay in Featherstone's series describes a report issued by an advisory committee chaired by McGeorge Bundy, then at the Ford Foundation.[372] The Committee, appointed by Mayor John Lindsay, called for all of the City's schools to be divided into a number of autonomous school districts. As envisioned by the Bundy panel, each district would be run by a local school board made up of six members elected by parents of schoolchildren and five members from the community appointed by the mayor.[373] The boards were to have the authority to hire and fire teachers and administrators, including superintendents, to set curricula, and to determine district budgets.[374] Featherstone states that the proposals were supported by "an alliance of discontented ghetto leaders and parents, some white civic groups, university and foundation men, and Mayor Lindsay . . . ."[375] They were opposed primarily by the United Federation of Teachers and the City Board of Education, both of whom stood to lose considerable power if the report's recommendations were adopted.[376]

In a follow-up article some months later, Featherstone reported that the Bundy Committee's recommendations had been severely watered down in a bill that had passed the New York State legislature.[377] "The first thing to understand," wrote Featherstone, "is the magnitude of the rout of forces advocating community control."[378] The legislature had essentially adopted a hybrid system, in which more than thirty local school districts were created, but in which each district's local school board would exercise "extremely limited powers."[379] Featherstone remarked that

> the local boards are not boards at all; they are simply subdivisions of the central educational agency. The loyalty of all employees is to the central agency; they are all, with the exception of the district superintendent, appointed by the Chancellor. Local boards can pick their superintendents. Textbooks are chosen from a centrally approved list, examinations are centrally prepared and evaluated, and the school bureaucracy can change any program in a district at any time. It can adjust local boundaries, remove personnel, and

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372. Featherstone, *Community Control, supra* note 371, at 16.
373. *Id.*
374. *Id.*
375. *Id.* at 17.
376. *Id.*
377. Featherstone, *Albany Stranglers, supra* note 371, at 16.
378. *Id.*
379. *Id.*

even eliminate the local school boards. The central board, of course, will retain control of the city's high schools.[380]

In a final essay in this series,[381] Featherstone reviewed the events of the preceding two years, and concluded that the local boards would be "virtually powerless," and that the "bizarre procedures for electing" boards were "designed to make it hard for parents, especially black and Puerto Rican parents, to organize school reform slates."[382] While Featherstone was correct that the enacted system was a far cry from the sort of community involvement the Bundy panel had had in mind, it turned out that his pessimistic assessment that local communities of color would gain little or no voice in school policy was not completely on the mark. In the years between 1969 and 1996, some local school boards did pursue reform agendas and some did assume a not inconsiderable influence over education policy.[383] In addition, African American and Latino communities obtained significant representation on some local boards.[384] In general, however, the quality of public school education in New York did not improve.

In 1996, not long after assuming his position, Chancellor Crew suspended two local school boards in the Bronx and barred fourteen school board members in Brooklyn from serving in their elected posts.[385] One of the Bronx suspensions was challenged in state court. It emerged during that litigation that Chancellor Crew had based his decision to take over the board of Community School District Seven largely on allegations of corruption that had been aired on local television.[386] In addition to this ultimately unsuccessful litigation, the Civil Rights Division of the Department of Justice also reviewed the suspensions, on claims that they violated the federal Voting Rights

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380. *Id.*

381. Featherstone, *Down But Not Out, supra* note 371.

382. *Id.* at 11.

383. *See, e.g.*, BENSMAN, *supra* note 331, at 7-10; *see also* MARY ANN RAYWID, CENTER FOR EDUCATIONAL INNOVATION AT THE MANHATTAN INSTITUTE, THE CHOICE SYSTEM OF COMMUNITY SCHOOL DISTRICT 3: A REPORT (1996) (examining a middle school choice arrangement in the district, under which youngsters and their families choose the school they will attend).

384. *See* BENSMAN, *supra* note 331, at 7.

385. *See* Pam Belluck, *Ousted School Officials Return, But Crew Digging in, Bars Them,* N.Y. TIMES, Nov. 19, 1996, at A1, B5.

386. *See* Jacques Steinberg, *Crew's Big Test: Defending Board Suspensions,* N.Y. TIMES, Mar. 17, 1996, at 37. In addition to allegations contained in the television accounts, Dr. Crew's attorneys subsequently submitted a transcript of hearings held by a Bronx commission on school corruption in which it was alleged that school board members had spent thousands of dollars to attend conferences in Hawaii and the Virgin Islands. Dr. Crew also submitted an affidavit in which he cited low reading scores at the district's elementary schools. *Id.*

Act.[387] The Justice Department concluded that the initial round of suspensions did not violate the rights of voters in the predominately African American and Latino districts.[388] A subsequent board suspension in the South Bronx announced several months later by Dr. Crew, however, was found to violate the federal voting law.[389] Unlike the earlier suspensions, which were based on allegations of corruption, the suspension of this local school board in District Twelve, and the replacement of elected board members with temporary trustees, grew out of a disagreement between the local board members and the Chancellor over the board's selection of a new superintendent.[390] Stating that there was no evidence that the board made any procedural errors in its selection process, Assistant Attorney General Deval Patrick announced that the replacement of the board members with trustees amounted to an unlawful shift of authority from the elected officials in the District to the central administration.[391]

In fact, Dr. Crew's actions with respect to District Twelve were part of a larger effort on his part to gain greater control over the selection of superintendents, who in turn exercised substantial power over local school policy. Virtually from the moment he took office, Dr. Crew pursued legislation taking the authority to select superintendents away from local boards and giving it to the Chancellor.[392] Even in the absence of such legislation, Crew announced that he expected to use his power of suspension to exert greater control. He said: "I want a right of refusal. . . . I need to be able to weigh in and have a voice in the selection."[393]

In the days following the Justice Department's decision with respect to District Twelve, a strange story unfolded. Notwithstanding the Civil Rights Division's finding that the board's suspension constituted a voting rights violation, Dr. Crew refused to allow board members to enter the school district offices.[394] The excluded board members conferred with their lawyers and held press conferences in front of the building, while public school security officers insured that they would not have access to their offices.[395] This stand-off was played out in the front pages of the local newspapers and on the

387. Belluck, *supra* note 385.
388. *Id.*
389. *Id.*
390. *Id.*
391. *See id.*
392. *Id.*
393. *Id.*
394. *Id.*
395. *Id.*

nightly news.[396] It was not resolved until a month later, when the New York State legislature essentially ended the conflict by enacting a thorough overhaul of the system that had been in place since the 1960s.[397]

With the passage of this new legislation, the "rout of forces advocating community control," about which Joseph Featherstone had written many years earlier, was complete.[398] Instead of each local elected school board picking its own superintendent and elementary and junior high school principals, the new law provided for the Chancellor to hire superintendents from lists forwarded by the school board.[399] If the Chancellor did not like the recommendations, the law permitted him to send the matter back to the board for additional names.[400] The superintendents, in turn, would now select principals, and the control of budgets would be shifted so that the Chancellor would exercise much greater authority in allocating money.[401] The *New York Times* summed up the changes by reporting that "[t]he new legislation gives school board members little more power than P.T.A. presidents."[402] Once again, the matter was referred to the Justice Department for a review of the new law's compliance with the Voting Rights Act. Four months later, Attorney General Janet Reno announced that the Justice Department would not "interpose any objection," and the new provisions went into effect.[403]

From a Deweyan perspective, the new provisions represent bad public policy. The Bundy Committee's proposals that had begun New York City's experiment in decentralized public school governance resonated with Dewey's notion that people whose lives are effected by public institutions ought to have a significant voice in their management.[404] The plan as originally conceived treated schools as important public assets within the local communities in which they were located and recognized that members of those communities were im-

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396. *Id.*

397. *See* N.Y. EDUC. LAW §§ 2590-a to 2950-s (McKinney 1996).

398. Featherstone, *Albany Stranglers*, *supra* note 371, at 16. One academic expert in public school governance quoted in the *New York Times* remarked that the law represented "the effective end of the New York City decentralization experiment." Berger, *supra* note 367 (quoting Robert Berne, Vice President For Academic Development, New York University).

399. N.Y. EDUC. LAW § 2590-f.

400. *Id.*

401. *Id.* § 2950-q.

402. Berger, *supra* note 367.

403. Jacques Steinberg, *Power Shift In the Schools Gets Approval*, N.Y. TIMES, Apr. 2, 1997, at B1.

404. *See supra* notes 194-206 and accompanying text (describing Dewey's theory of democratic institutions) and 372-376 and accompanying text (describing the Bundy Committee's proposal).

portant stakeholders in those institutions.[405] Advocates of local control necessarily worried over the capacity of individual schools to transmit basic information and teach critical skills, the essential elements of a traditional vision of public education. But they emphasized even more the potential of public schools to be places where "the views and experiences of both the dominant group and minority groups [could] meet, informing and transforming each other."[406] In short, they recognized the public nature of public schools.

This original vision, of public schools as extensions of the larger communities in which they were situated, while never fully implemented in practice, did find expression in some of the reform efforts that had been undertaken over the years. Many of the small-scale experimental schools that cropped up around New York had been nurtured and supported by local school boards.[407] While the process had been anything but uniform, some variation was inherent precisely because each board was local in nature. With the legislative overhaul that went into effect in 1997, this experiment in local control had ended.

Even before the adoption of the new law, however, Chancellor Crew had begun to move away from an approach that sought innovation within the context of local communities. As early as February of 1996, for example, Crew had proposed that a special new school district be created under the direct control of the Chancellor.[408] Importantly, this new "Chancellor's District" would contain not only failing schools, but also alternative and experimental schools that had previously been administered within their local school districts.[409] Thus, by moving innovative schools into a centralized administrative structure, by suspending a number of local school boards, and, ultimately, by lobbying for and obtaining a legislative transfer of authority from local school districts to the central schools administration, Chancellor Crew and Mayor Giuliani had succeeded in implementing a new policy that effectively diminished local community involvement in public education. As Kathleen Stassen Berger, the board president of District Two, summed up the situation: "[T]he people who know the community best, and who are the parents of the children in the schools, are dis-

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405. *See supra* notes 372-376 and accompanying text (describing the Bundy Committee's proposal).

406. powell, *supra* note 10, at 785.

407. *See, e.g.,* BENSMAN, *supra* note 331, at 7-10.

408. Sarah Kershaw, *Board of Education Approves District for Troubled Schools,* N.Y. TIMES, Mar. 21, 1996, at B6.

409. *Id.*

tanced by the Chancellor's policies . . . . It is too distant from local control."[410]

Supporters of the new law argued, by contrast, that even if community control was a good idea in principle, it had not been successful in operation. They pointed out that since its adoption, the system of local school board control had been dominated in many districts by politicians seeking to use local board positions as a stepping stone to higher offices such as the City Council or the State legislature, and not by parents or their representatives.[411] In addition, they asserted, the new law recognized the legitimate interests of parents by requiring each school principal to consult periodically with a management team comprised of parents, teachers, and other school staff members.[412]

The statutory requirement of periodic consultation[413] does not honor John Dewey's fundamental principle that democratic practice requires effective power to be equitably distributed. The plain fact is that these management teams were not given any real appointive or policy-making power under the statute and were relegated to making nonbinding recommendations.[414] More importantly, the legislature's decision to drain power from the local school boards short-circuited a more promising approach to improving the system. In the election cycle immediately preceding the statutory overhaul, a concerted effort had been made to recruit and support parents and other reform candidates for school board positions.[415] Dozens of community organizations, church groups, and parents associations had worked to find and train a new cadre of leadership for the community school board system.[416] In addition, local organizations had undertaken voter registration drives and sponsored candidate forums. In District Nine, one of the first to be taken over by Chancellor Crew, these activities led to the registration of some 4000 new voters.[417] These efforts were unlikely to yield conclusive results in a single election. However, instead of rendering them essentially moot, as the new law did, a better approach to public education reform would have been to support the opening up of the local school boards through local political activity.

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410. Steinberg, *supra* note 403 (quoting Kathleen Stassen Berger, President of Local School Board, District Two and President of School Boards for Equity, Accountability and Community).

411. Maria Newman, *Joining A School Board To Change It*, N.Y. TIMES, Mar. 21, 1996, at B3.

412. Dao, *supra* note 12.

413. N.Y. EDUC. LAW § 2590-h(15) (McKinney 1996).

414. *See id.*; *see also* Berger, *supra* note 367.

415. Newman, *supra* note 411.

416. *See id.*

417. *See id.*

Some years ago, Joseph Featherstone observed:

One reason schools are traditionally a focus of attack is that historic outsiders in our culture—minorities and the poor—know that it is sometimes easier to get concessions in education than elsewhere. Getting a form of community control in Bedford-Stuyvesant—however compromised and inadequate as a solution to the problems of educating poor children—is easier than getting your hands on the Chase Manhattan Bank. Just as politics, for all its corruption by disparate economic power, offers underdogs an occasional lever to pull, so education, for all its rigidities, offers them some purchase on the rest of the social order.[418]

Progressives need not limit their vision of political reform to large-scale social movements based solely upon class, race, and other essentialist categories. Neither should they retreat into believing that disconnected individual acts of resistance are the only possible alternatives. Grassroots political campaigns directed toward opening up public institutions, like the efforts of reformers in New York City prior to the enactment of the new education law in 1996, provide a better model. It is sobering to observe how fragile this kind of political practice is, given the premature conclusion effected by the New York State legislature in this instance. But one could regard this set of events as a source of new insight and inspiration, and not as confirmation that such political activism should be abandoned. In New York City and Baltimore, Maryland and elsewhere, public education is likely to continue to serve as a battleground in the long-term struggle to define the nature of our communities. From this perspective, Marc Feldman's vision of public schools as institutional spaces in which democratic society enacts its best, and sometimes its worst, impulses, is a powerful vision.

2. *Vouchers.*—Although market alternatives to the public school system have been debated for a long time,[419] school voucher programs have gained considerable popularity in recent years.[420] The various proposals that have been put forward vary to some degree, but they all tend to call for a portion of a jurisdiction's public education

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418. Featherstone, *Youth Deferred—II,* supra note 309, at 25.

419. Liebman, *supra* note 11, at 277-78.

420. *See* Sherry, *supra* note 151, at 200; *see also* Abby Goodnough, *Mayor and School Board Study Milwaukee Vouchers,* N.Y. TIMES, May 15, 2001, at B3 (describing Mayor Giuliani's attempt to start voucher programs in New York City).

budget to be allocated to paying private and parochial school expenses.[421]

Proponents have argued that private schools are more effective than public schools at providing a sound education, and that instituting government supported choice will bring to poor and middle class parents the kind of educational options that have long been available to wealthy families.[422] Opponents have argued that "such a system would increase racial and economic segregation, and that it would benefit only the wealthy, leaving the poorest students in public schools that deteriorate even further as those with greater choice abandon them."[423] Whatever the merits of these competing arguments, it seems apparent that removing resources from public schools and placing them in private institutions is inconsistent with a perspective in which the health of public spaces is held out as a prerequisite for the proper functioning of democratic society.[424]

Given this observation, perhaps the most interesting argument in favor of vouchers has been put forward by Professor Suzanna Sherry in her 1995 article, *Responsible Republicanism: Educating for Citizenship.*[425] Sherry's analysis builds upon an overarching commitment to hold children and their families accountable for their individual shortcomings or successes in school.[426] She distills this principle of individual responsibility from the particular brand of civic republicanism that she has described in a number of her published articles.[427] Sherry summarizes her position on vouchers in the following terms:

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421. Sherry, *supra* note 151, at 200.

422. *See id.* at 201, 205.

423. *Id.* at 202 (footnote omitted).

424. To be sure, it is not too difficult to call into question the very distinction between public and private activities upon which this conclusion rests. Without going too far down that road, it should suffice to point out that, unless the size of vouchers is sufficiently large to allow families, including poor families, to select from among a full range of school options, the consequence of placing government generated dollars into a private education market is likely to be a diminution of the degree to which people from different walks of life are educated together. *See* Liebman, *supra* note 11, at 284-86.

425. Sherry, *supra* note 151. An examination of Professor Sherry's discussion of vouchers is especially appropriate in the context of this Article because she employs what she regards as a pragmatist approach throughout her analysis. *Id.* at 164-65. The following should not be taken as an attempt at a full consideration of the question of vouchers and school choice. It is, instead, framed in response to Sherry's approach, in order to demonstrate what a Deweyan position on this question might look like.

426. *Id.* at 184.

427. *Id.* at 133 n.5; *see also* Suzanna Sherry, *"Without Virtue There Can Be No Liberty,"* 78 MINN. L. REV. 61, 68-75 (1993); Suzanna Sherry, *Republican Citizenship In A Democratic Society,* 66 TEX. L. REV. 1229, 1242-46 (1988) (reviewing AMY GUTMANN, DEMOCRATIC EDUCATION (1987)).

> The uniquely republican advantage to a choice system
> . . . is that it rewards and encourages individual responsibil-
> ity. Families who are forced into unresponsive public schools
> by economic circumstances, and commentators who bemoan
> those schools' dismal statistics, will inevitably tend to blame
> the schools when students do not do well. Indeed, the stu-
> dents' failure may be due in part to poor schools which have
> little or no incentive to improve and in part to the lack of
> choice itself. Removing the compulsion removes the crutch
> that allows individuals and families to claim this type of vic-
> tim status. A well-designed choice plan tells families that
> they are responsible for their children's education, and that
> even the very poor will be rewarded—with superior school-
> ing and the subsequent economic and social advantages it
> confers—if they act responsibly.[428]

In assessing this argument, it is important to understand Sherry's
conception of public education, which she says is to "prepare children
to become *responsible* and *deliberative* citizens in a *diverse* republic of
rights."[429] She argues that successful republican democracy requires
citizens who have received an education that teaches "cultural liter-
acy," "critical thinking," and "moral character."[430] With respect to
cultural literacy, Sherry asserts that Americans need to share a com-
mon culture in order to exercise republican citizenship in an ethni-
cally and religiously diverse society. The alternative, she claims, is "an
America that consists of separate and individual cultures with no com-
mon bond, [in which] citizens will have no reason to act on behalf of
either the common good or members of other groups."[431]

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428. Sherry, *supra* note 151, at 201-02.

429. *Id.* at 157.

430. *Id.*

431. *Id. at* 165. Sherry acknowledges that traditional liberal theory presses toward value
neutrality in public education, but she concludes that the inculcation of values is inevitable
in any educational practice, so that the real question is not whether, but which values will
be taught. *Id.* at 158-59; *see also* Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented
Legal Theory and the Moral Foundation of Deliberative Democracy,* 82 CAL. L. REV. 329, 383-384
(1994). Sherry's proposal is that public educators seek an inclusive "multi-ethnic" set of
cultural values. Sherry, *supra* note 151, at 166. Ironically, she adopts what she claims to be
a pragmatic approach to formulating this common set of values. In her version of pragma-
tism, tradition plays a leading role in marking out the foundations of the common culture
to be transmitted in public education. *Id.* at 165. Further elaborating upon this notion of
cultural literacy, Sherry endorses what she terms a "pluralist multiculturalism," in which a
broad array of cultures are included in a common pedagogical canon, rather than a "par-
ticularistic multiculturalism," in which the very possibility (or desirability) of a common
culture is rejected. *Id.* at 167. Sherry's preference for an inclusive variety of multicultural-
ism is grounded upon her conclusion that the particularistic approach is part of a larger,
postmodern philosophical stance. That stance, in turn, is unacceptable to Sherry because

The potential problem here is that a system of school vouchers could be seen as likely to undermine the very transmission of a common culture that Sherry holds out as so central to republican democracy.[432] She quotes one education policy expert who predicts that vouchers would encourage "separation and stratification of students according to parental commitments and orientations,"[433] but Sherry rejects this conclusion for two reasons. First, she points out that wealthy families already send their children disproportionately to private schools. Thus, she argues, "[t]he 'cultural transmission' critics must either concede that private schools are also transmitting a common culture . . . or be willing to abandon the children of the wealthy to educational failure."[434] Second, Sherry argues that a system of publicly supported private schools "need not entail abandonment of state involvement in the curriculum."[435]

Both of Professor Sherry's responses on this point are problematic. With respect to the first, it may be that private schools for the wealthy do not uniformly teach "cultural literacy," if by this phrase we have in mind a common culture that includes minority group traditions often excluded in elite institutions. At the same time, a position in opposition to vouchers does not necessarily mean that the children of the wealthy must be doomed "to educational failure."[436] Instead, if such a position were linked to a serious policy of improving public schools, of reinvigorating those public spaces, then it might be possi-

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its antiessentialism and antifoundationalism create a moral and epistemological relativism which she regards as inconsistent with republican thought. *Id.* Importantly, this thinking leads Sherry to criticize the use of an Afrocentric curriculum for African-American students as well as other ethnocentric curricula for other students, on the theory that such a particularistic approach to multiculturalism is likely to "degenerat[e] into a war of all against all." *Id.* at 168. Sherry is especially critical of moral (and cultural) relativism, given her conviction that "certain ways of behaving or believing are irresponsible and unvirtuous and ought to be discouraged or prohibited." *Id.* at 159.

432. Significantly, in elaborating upon her notion of cultural literacy, Sherry suggests that the success of African-American children depends upon their proximity to a white, middle-class cultural standard. Sherry, *supra* note 151, at 169. Instead of conceptualizing public education as a process by which children from different backgrounds and different circumstances are brought together to participate in the ethically rich work of encountering one another's experiences and perspectives, her conclusion is that "[d]epriving black children of the norms and knowledge of the culture in which they will live thus condemns them to a life of marginality and segregation." *Id.* On the importance of distinguishing between "assimilation" and "integration," see powell, *supra* note 10, at 774-78.

433. Sherry, *supra* note 151, at 205-06 (quoting HENRY M. LEVIN, INSTITUTE FOR RESEARCH ON EDUCATIONAL FINANCE AND GOVERNANCE, EDUCATIONAL VOUCHERS AND SOCIAL POLICY 16 (1979)).

434. *Id.* at 206 (footnote omitted).

435. *Id.*

436. *Id.*

ble to attract some number of private school students into the public school system.[437]

Sherry's second point, that a voucher system is not inconsistent with the public regulation of private school curricula, fails to take seriously Dewey's notion of a strong connection between the content of a community's norms and the institutional contexts in which those norms are created *and* implemented. According to Dewey, the substantive ethical content that characterizes a community's life together must be understood as inseparable from the interactions that take place within the public institutions, including educational institutions, that make up that community.[438] By contrast, Sherry seems to be suggesting that the broad outlines of a common culture can be generated through formal political deliberations and then transferred largely undisturbed to educational settings, public or private, for subsequent transmission to students.[439]

Sherry describes her proposal as falling midway between "minimal and pervasive regulation," in that it envisions a strong governmental role in determining "what, generally, must be taught," while reserving considerable discretion in private schools to decide "how it is to be taught and how the schools are to be run."[440] She argues that, because it is "unlikely that all parents will ever agree on educational strategy," the best solution is to permit individual choice rather than requiring parents to "settle their differences."[441]

Sherry's vision fails to embrace fully the deep connection between the *what* and the *how* of educational practice. Her plan facilitates the privatization of educational practice all the while maintaining that public discourse can still shape the requirements of

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437. *Cf.* powell, *supra* note 10, at 791-93 (arguing that racial integration in schools is not enough, rather *all* important institutions need to be integrated to "strengthen communities").

438. *See supra* text accompanying notes 74-75, 131-132.

439. Implied in Sherry's approach is a distinction, not unlike that drawn by Hannah Arendt, between the practice of political discourse on the one hand, and the "administration of things" on the other. *See* ARENDT, *supra* note 153, at 278. As noted earlier, Arendt's position was that public deliberations should be insulated from the distorting influence of the world of "everyday necessity." *See supra* text accompanying note 152. John Dewey's approach, by contrast, was to treat the social aspects of everyday life as an inherent element of a community's politics. *See* WESTBROOK, *supra* note 26, at 246-47. From a Deweyan perspective, then, Sherry's proposal to treat decisions about how schools are run and how content is taught as matters of mundane administration separate and distinct from the public question of what should be taught fails to appreciate that daily interactions among parents, students, teachers, and school administrators over the implementation of an educational program is itself public discourse of great potential normative significance.

440. Sherry, *supra* note 151, at 207.

441. *Id.*

a basic education for all. But a policy of avoiding disagreements over questions of implementation,[442] by permitting exit from—indeed, providing public financial support for the exit from—public educational institutions, would be likely to influence profoundly the ongoing public deliberations over content.

Moreover, even if parents in a polyglot culture are unlikely to "settle their differences" over questions of educational approach once and for all, removing the discourse over those disagreements from the very institutional context in which it most matters can only have the effect of insuring that the resulting public debate over education will remain impoverished and unresponsive to the needs of all children. Such an approach undermines the very process of community building that Marc Feldman, Jerry Frug and others have called for. Like land use and zoning policies that encourage housing patterns segregated by class and race, a school voucher policy that indulges the desire of parents holding conflicting perspectives "to avoid dealing with each other" perpetuates the fantasy that people can build "purified communit[ies]."[443] As Professor Frug points out, however, this fantasy has a number of negative consequences:

> What's wrong with these purified forms of identity? [Richard] Sennett's response is that they create "a state of absolute bondage to the status quo" and, as a result, limit people's lives. A reliance on stability, coherence, and order inhibits openness to experience: It undermines one's ability even to absorb, let alone enjoy, the flux and variety the world has to offer.[444]

The second and third components of a republican education cited by Sherry are critical thinking and moral character.[445] With respect to these components, Sherry urges that responsible citizenship requires a predisposition "to act responsibly and in accord with community norms,"[446] except in those cases where a departure from those norms is supported by a "deliberative, reasoned" decision-making process.[447] This notion, that public education for moral character should be directed toward encouraging compliance with community norms, is meant to draw upon and reinforce Sherry's call for cultural literacy.

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442. *Id.*

443. Frug, *supra* note 13, at 1052.

444. *Id.* at 1053 (footnote omitted) (quoting RICHARD SENNETT, THE USES OF DISORDER: PERSONAL IDENTITY & CITY LIFE 134 (1970)).

445. Sherry, *supra* note 151, at 157.

446. *Id.* at 177.

447. *Id.* at 174.

Perhaps sensing that the combination of these proposals could be read to suggest the imposition of majority norms upon individuals with minority group affiliations, she proceeds to explain that she is "talking about only the most basic sorts of cultural norms, which are . . . relatively uncontested (although not always emphasized): individual responsibility, honesty, hard work, tolerance, and so on."[448]

Sherry argues that a rejection of any of these core norms on the grounds that they are "Eurocentric" or are inhospitable to one or another subculture within the United States is to "retreat into a relativism that approaches nihilism."[449] This conclusion is plainly inconsistent with the view that even norms such as individual responsibility and tolerance are socially contingent, and, necessarily, therefore, always in contest. As discussed earlier, some postmodern legal scholars have challenged the Enlightenment conception of the self as autonomous and stable, which, in turn, they see as a predicate for the sort of individual responsibility posited by liberal theory.[450] Their ar-

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448. *Id.* at 177.

449. *Id.* at 171.

450. *See* powell, *supra* note 40, at 1496-97. A similar critique is available with respect to Sherry's unproblematic treatment of tolerance as a core community value. A good example can be found in the academic literature on free speech, one area in which the notion of tolerance has played a leading role in liberal legal thought. *See, e.g.,* LEE C. BOLLINGER, THE TOLERANT SOCIETY 57 (1986); Lee C. Bollinger, *The Tolerant Society: A Response to Critics,* 90 COLUM. L. REV. 979 (1990). The work of john powell once again is instructive in understanding the progressive alternative to the mainstream liberal approach. In a recent article on hate speech, powell explains that the traditional narrative of the First Amendment, in which "more speech serves as a panacea for any injury stemming from harmful expression," fails to capture the important ways in which racial epithets and other similar expressions of hate materially impact the social and political participation of minority members of society. powell, *supra* note 185, at 103. The starting point for powell's analysis is the classic liberal image informing free speech jurisprudence, Justice Holmes's famous "marketplace of ideas" formulation in his dissent in *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). powell argues that this image is fundamentally flawed because it fails to take into account the ways in which that market is impaired by "disparities of power based on race, class, and gender." powell, *supra* note 185, at 106. With respect to disparities of power, powell points out that traditional free speech jurisprudence "analyzes each individual act of expression independently, with little regard for how that expression fits into the complex web of social discourse." *Id.* at 109. As a consequence, he asserts, the marketplace of ideas paradigm fails to insure meaningful participation for all, and fails to acknowledge the impact that hate speech has upon the construction of identity among targeted minorities. *Id.* Employing the work of Stanley Fish, powell explains that speech acts not only have positive communicative attributes—they not only express the views and perspectives of the speaker—they also are capable of restricting the expressive capacity of others. *Id.* at 98. This is true, he explains, because all assertions necessarily negate alternative possible articulations. Thus, when the social power of one group of speakers is markedly superior to that of another, the negating quality of the former group's speech may overcome the competing expressions of the latter group. *Id.* at 98. This interplay between speech and power is especially important when the articulations are about race. In powell's analysis, race is a social construct, and it is language in particular

gument that individual identities are formed through a process of social interaction and are "inscribed in a multiplicity of social relations,"[451] unsettles the conventional notions of individual agency by which the ascription of individual responsibility ordinarily is accomplished.[452] To be sure, the premise that individuals necessarily occupy "many subject positions"[453] need not necessarily lead to a radically determinist view of human choice, but it does suggest that agency "might be situated in the individual, in the intersubjective community, and in the structure of our society."[454] The practice of locating moral agency exclusively in individual actors, by contrast, may have the effect of marginalizing those cultural traditions in which individualism is muted, thereby disempowering particular groups in society.[455] As john powell has explained: "By construing the essence of the human self as individual and autonomous, European thinkers deliberately excluded from selfhood members of non-White societies that were organized around non-individualistic norms."[456]

Given this critique of individual responsibility, John Dewey's notion of sympathetic character[457] may serve as a better foundation upon which to analyze questions of public policy, including the question of school choice. Instead of treating each family as "responsible for their children's education" alone,[458] this approach would encourage each family to act to further the "well-being of all concerned."[459] It would recognize that the interests of one's own

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that "materializes racial constructions." *Id.* In these terms, racial epithets work a direct harm on their subjects because they contribute to a larger web of discourse that situates people of color on the margins of society. *Id.* A First Amendment jurisprudence centered on tolerating racial epithets in the name of protecting the liberty and autonomy of the speaker, and by extension the liberty and autonomy of everyone in society, then, has concrete costs when examined from the perspective of those whose autonomy and access to the democratic process is undermined by the very same expressive acts.

451. Robert S. Chang, Essay, *The End of Innocence or Politics After the Fall of the Essentialist Subject,* 45 AM. U. L. REV. 687, 690 (1996) (quoting Chantal Mouffe, *Hegemony and New Political Subjects: Towards a New Concept of Democracy, in* MARXISM AND THE INTERPRETATION OF CULTURE 89-90 (Gary Nelson & Lawrence Grossberg eds., 1988)).

452. *See generally* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law,* 140 U. PA. L. REV. 2245 (1992) (arguing that the legal system creates and maintains the idea that human activity is the product of individual free will).

453. Chang, *supra* note 451, at 691 (quoting Mouffe, *supra* note 451, at 89-90).

454. powell, *supra* note 40, at 1514.

455. *See generally* DAVID T. GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING 15-40 (1993) (discussing how Western cultures have assigned racial categories moral meanings).

456. powell, *supra* note 40, at 1490.

457. *See supra* notes 183-186 and accompanying text.

458. Sherry, *supra* note 151, at 202.

459. WESTBROOK, *supra* note 26, at 413.

children and the interests of others are reciprocal, and that the educa-
tional experience of each child is tied up with the experience of other
young people in the community.

This reciprocity was inherent in Dewey's conception of educa-
tion. "Dewey always stressed the broad social function of education,
and considered the 'formation of social disposition' much more im-
portant than the 'acquisition of literacy.'"[460] Dewey recognized that
the interactions students have with others whom they encounter in
school constitute a central component of the educative process.[461] He
further recognized that effective educational practice in a democracy
depends upon "[t]he intermingling in the school of youth of different
races, differing religions, and unlike customs,"[462] in order to over-
come the tendency to treat "[w]hat is strange or foreign" as "morally
forbidden and intellectually suspect."[463] Once again, understanding
public education as public space presses into focus the fundamental
idea that learning to live *with* others who are different, and learning
from our encounters with those who hold different beliefs, perspec-
tives, and backgrounds is an essential part of forming our own identi-
ties. It recognizes that "[w]e are not hopelessly constrained by our
perspectives—rather through engagement and vulnerability we can be
influenced in a way that incrementally transforms our character."[464]

Professor Sherry surely is correct in criticizing "unresponsive pub-
lic schools" into which too many children are shunted by virtue of
"economic circumstances."[465] The question, however, is whether pub-
lic resources should be directed toward arming those children's fami-
lies to seek a narrowly self-interested solution to this problem. Marc
Feldman thought not. He warned against a growing tendency toward
the "privatization of social life,"[466] and the "dissolution of social ties
and relationships."[467] In their place, he urged a practice of building
public spaces, including public schools, that would be responsive to
the needs of all, including those on the margins of society. He was
unwilling to give up on the progressive project marked out by John
Dewey, and on the basic pragmatist insight that "social life ha[s] in-

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460. Martin, *supra* note 54, at 61 (quoting DEMOCRACY AND EDUCATION, *supra* note 69, at 9).

461. *See* DEMOCRACY AND EDUCATION, *supra* note 69, at 16-17.

462. *Id.* at 21.

463. *Id.* at 17.

464. powell, *supra* note 185, at 118.

465. Sherry, *supra* note 151, at 201.

466. Feldman, *supra* note 16, at 1599.

467. *Id.* at 1600 n.203.

trinsic moral significance."[468] Far from treating this as merely an abstract aspiration, however, he sought out those whose work demonstrates that there may be hope yet for a truly radical reconstruction of public schools as an essential component of democratic society.

CONCLUSION

In an especially moving passage in one of his recent articles, john powell has described John Dewey's notion of sympathetic character as a kind of empathy that is an "experientially defined emotional response to the situation of another, the capacity to dance lightly in another's reality."[469] Elsewhere, in terms that evoke the work of Marc Feldman, powell has suggested that empathic practice involves a willingness to "let our guard down, and to adopt vulnerability and openness" toward strangers.[470] The essential openness he has in mind requires that one's encounters with others be undertaken with a genuine intention to revise one's perspective, indeed one's sense of self, in light of the experience of the encounter.[471]

Such a conception of empathic participation is at the core of Dewey's pragmatist theory of democracy. Dewey believed that "[s]ociety not only continues to exist by transmission, by communication, but it may fairly be said to exist in transmission, in communication."[472] As applied to public education, this pragmatist theory suggests that the formal content of any public school setting, its curriculum and the like, is far less important than the ways in which participants engage one another. For Dewey, communication was not only the substance of democracy, but also the substance of educational practice. In his terms, genuine communication demands that participants draw upon experience. To speak from experience, however, "requires getting outside of it, seeing it as another would see it, considering what points of contact it has with the life of another so

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468. WESTBROOK, *supra* note 26, at 415.

469. powell, *supra* note 185, at 111.

470. *Id.* at 116.

471. powell explains:
   This suggestion to let our guard down, and to adopt vulnerability and openness as an orientation toward experimentation, is voiced by Roberto Unger. Unger asserts that because the "gesture of self-exposure lacks a predetermined outcome"—a situation in stark contrast to the range of possibilities yielded by the shared claims of pre-existing communities—it emphasizes the power inherent in the individual to treat character as open and revisable.
Id. (footnote omitted) (quoting ROBERTO M. UNGER, PASSION: AN ESSAY ON PERSONALITY 98 (1984)).

472. DEMOCRACY AND EDUCATION, *supra* note 69, at 4 (emphasis omitted).

that it may be got into such form that he can appreciate its meaning."[473] In this sense, the pragmatist educational philosophy of John Dewey was more than merely instrumental. It turned upon the ethical significance of experience, the fact that learning requires both an act and a conscious appreciation of the consequences of that act for one's self and for others. In Dewey's account, "[w]hen an activity is continued into the undergoing of consequences, when the change made by action is reflected back into a change made in us, the mere flux is loaded with significance. We learn something."[474]

Marc Feldman's work embodied this understanding of the central role that empathetic participation plays in effective educational practice and in effective democratic practice. During his sabbatical, he surely "learn[ed] something" in a way that few of us do in our formal research. He took seriously his own previously stated imperative not to shrink from engagement with others whose lives would otherwise have been far removed from his own. In so doing, I am sure he had a great impact on those he encountered in the public spaces he occupied. I am also sure that he was profoundly changed by many of those same encounters.

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473. *Id.* at 5-6.
474. *Id.* at 139 (emphasis omitted).