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

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

Yet a democracy founded on the equal dignity of every citizen<sup>5</sup> rejects the ancient view that political power should rest on accidents of parentage or geography. Responding to this tension, scholars and judges have written reams of literature on inequity in schooling across race and class lines, with a wide variety of competing prescriptions.<sup>6</sup> In the “worst” school districts, whether rural or urban, high concentrations of poverty and intense racial isolation combine to create schools of near-complete dysfunction.<sup>7</sup> The adults educated in these systems face violence, unemployment, and illness out of proportion to the American median. Meanwhile, just a few blocks away from these failed systems, other local school districts find themselves well-funded and successful by all standard indices.<sup>8</sup> The graduates of these institutions go on to empowered lives of economic and political self-determination.

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

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

6. *See generally* ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRITY 3-0.2N

The striking inequity across localized school systems deprives all of us of the immense human resources latent in distressed communities. Even if Derrick Bell's classic explanation of "convergence theo-

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

## II. PURPOSES OF PUBLIC EDUCATION

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

### *A. To Train Workers and Consumers*

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



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

Today, the popularity of arts and music education in public schools, even in the face of financial desperation,<sup>18</sup> confirms the relationship between mass education and the development of holistically





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

Consider, for example, the case of Irish mailboxes. Before the Republic of Ireland obtained independence, the British Post placed metal mailboxes throughout the country. Sometimes, British practice was to place these boxes in the walls of buildings rather than in free-standing form on street corners. The boxes were painted the distinctive red widely recognized as characteristic of the British Post, and beneath the mail slots the metal was stamped wiy25.9()-2.3( thabba rmp)12.iaviimp f3(



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

*E. To Develop Self-Governing Citizens*

Public schools are simultaneously the product and the producer of American democracy.<sup>29</sup> This connection, famously associated with John Dewey<sup>30</sup> and rigorously developed in contemporary form by Amy Gutmann (as I examine more closely in Part IV),<sup>31</sup> means that fundamental questions of communal self-governance necessarily center on education. Even more importantly than with respect to the previously discussed purposes, education for democratic citizenship requires training in both cognitive skills and character traits.<sup>32</sup> Conventional discussion of education for citizenship often focuses on developing the ability to participate adequately in discrete tasks of collective self-governance. These tasks are primarily voting and serving on a jury; some commentators add the ability to answer a military draft.

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

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

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

### III. ARGUMENTS FOR LOCAL CONTROL OF SCHOOLS

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

#### A. *Utilitarian localism*

##### 1. A Diverse Marketplace of Services

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

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

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

38. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. E

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

A more centralized governance structure would necessarily gravitate toward some suboptimal homogenized mean, forcing the Montessori-seeker and the arts-lover alike to abide a standardized system of instruction that fulfills neither preference. Those withew4hrndard.4(a)8..ove



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

So far, this critique has assumed, as Tiebout did, that there is a meaningful variety in citizens' preferences for government services. But that assumption remains unproven and seems implausible upon further reflection. Without a doubt, some local school districts (and their constituents) care more about basketball than swimming, while others reverse their priority. That kind of variation seems like a trivial basis to support the division of society into the homogeneous clusters envisioned by localists. Where it really counts, there is a surprising degree of agreement about what makes for good schools among both scholars and citizens: passionate, well-trained, and experienced teachers; supportive, inspiring, and demanding administrators; adequate resources (including enough teachers to permit reasonably small class sizes); individualized instruction; and a modest amount of diversity among students across different axes of identity. These characteristics are advertised by elite private boarding schools<sup>44</sup> and the

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44. See Why Choate, CHOATE ROSEMARY HALL, <http://www.choate.edu/page.cfm?p=529> (last visited Aug. 31, 2014).





Barron recalls that Chief Justice John Marshall and Judge Dillon, often perceived as the polar opposites of Thomas Cooley in their attitude toward localism, viewed local government as *too* influenced by local majorities. Local governments, in their view, were prone toward inappropriate invasion of private property rights, requiring the cooler heads of centralized federal and state officials to protect the private sphere.<sup>52</sup> To protect rights holders from populist oppression, they reasoned that local government is and ought to be nothing more than a tool of the central state, an administrative convenience.<sup>53</sup> Under this view, municipalities are







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

#### 4. Promotion of Policy Innovation through Diverse Experimentation

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

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

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

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

68. See *id.* at 369.

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

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

As Ed Rubin and Malcolm Feeley point out in their provocative analysis of American federalism,<sup>69</sup> people often conflate two different ways of pushing power down to smaller units. First, the form that Rubin and Feeley consider true “federalism” is one in which the





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

This is not to say that the scientific study of education is impossible. Careful scholars in the field create constructive control groups through statistical filters that account for known variations among factors other than the variable under study.<sup>76</sup> But this brings us to the

tors). For localized innovation to improve education generally in a

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

Only later, as the 20th Century demand for higher academic standards spread even to sparsely populated areas, did massive de-localization through consolidation of school districts occur. As Wil-

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

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

*B. Non-consequentialist localism*

1. Inherent Historical Priority and Natural Law

Non-consequentialist localists support small, geographically bounded school districts without regard to whether such districts improve education or politics. Aaron Saiger, following Richard Thompson Ford, calls this view of local districts “pregovernmentalist.”<sup>88</sup> Like Thomas Cooley, pregovernmentalists point to the historic development of cities as preexisting centralized authority.<sup>89</sup> In ancient times, large-scale governments drew their power from successful cities like Babylon and Rome, not the other way around. Greek cities developed democracy before they developed a federation, both

cle flows inevitably from nature, has substantial intuitive appeal. Communitarians like Michael Sandel argue that human identity is formed by ever-expanding circles of intimacy and obligation that become less influential as they extend beyond a person's direct acquaintances.<sup>90</sup> Religious scholars like Richard Garnett argue that parents, and by extension their chosen associations, have not just a legal but a moral claim, above the centralized state's, to direct their children's education.<sup>91</sup> One might read these philosophies as a basis for doubt about the legitimacy of the central state or "law" as an appropriate decision-maker for normative educational priorities. For

quired the state to correct racially segregated schools, even where the segregation had arisen *de facto* rather than *de jure*.<sup>95</sup>









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

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

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

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

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

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

### 3. Parental Rights and Pluralist Protection of Illiberal Enclaves

Also non-consequentially, many advocates support localism as a basic right of parents (or other custodial caregivers) to direct their children's education, regardless of any ensuing social welfare gains or losses.<sup>114</sup> Advocates of strong caregiver control like Anne Dailey view decisions about schooling as an essential right of parents to raise their children. Because parents who love their children and who know their children intimately are best suited to reach decisions that will fit the children's educational needs, school governance should be tailored to maximize this control.<sup>115</sup> From this view, to the extent that local control of schools gives parents more power in educational decision-making, localism is the best protector of this right. Support for this approach appears not only in scholarship,<sup>116</sup> but also in court decisions like *Pierce v. Society of Sisters* and *Meyer v. Nebraska*. In *Pierce*, the Supreme Court invalidated a state statute requiring all children to attend public (rather than private) school as an infringement of parents' right to raise their children.

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

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

For many scholars, localism's capacity to create and protect normatively-divergent enclaves is an impressive virtue.<sup>120</sup> These havens, the argument goes, simultaneously grant illiberal minorities legal space to carry out their communal identities while limiting their

of their identity, they would have strong incentives to engage with and undermine the broader liberal regime if the enclaves lacked sufficient autonomy.<sup>121</sup> Private schools can and do relieve some of this pressure. Early 20th Century Roman Catholics would likely have gone to great lengths politically to infuse Catholic values in at least some public schools if *Pierce v. Society of Sisters*<sup>122</sup> had not Constitutionally protected their right to establish and maintain parochial schools. But private schools are only a partial escape valve for the

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

#### IV. PRACTICAL CHALLENGES TO LOCALISM AS DEMOCRATIC CONTROL

##### *A. Localism Is Conflated with Greater Democratic Engagement*

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

As I explain in Part III. *C.* below, Amy Gutmann<sup>126</sup>

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



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

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

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

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

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

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

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

pressed need for integrated schools. Deracinated individuals, stripped of their social and racial context, formed the object of attention in Chief Justice Roberts's opinion for the Court.<sup>136</sup> The Court exercised



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

1. Rational low-information voters

David Schleicher argues, counter-intuitively, that local voters simply know much less about local elected candidates and officials than they do about national or even state politicians.<sup>138</sup> Particularly in large cities, but also in many rural and suburban towns, the two-party system that contends for nation3 Tw -abo-s not .130 5.unc13 Tc 0.0712 Tw 14.5286 -1.135 T

the candidates; party affiliation is either politically irrelevant (because one party dominates) or offers no perceptible signal about the candidate's future performance in office; the power is typically distributed over a board, permiter ,cumed

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

## 2. Racial isolation and racism

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

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

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

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

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

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

often accompanied by deep psychological challenges.<sup>151</sup> For example, most suburban schools in the early stages of integration lacked









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

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

#### A. Gutmann on Local School Governance

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

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

164. See *id.* at 44.

165. *Id.* at 45.

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

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

But, Gutmann argues, nonrepression and nondiscrimination are the only valid reasons to restrain popular will with respect to public education.<sup>178</sup>



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

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

*B. Winter on Civic Republicanism*

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

Winter has argued that any claim that a policy prescription would advance "democracy" must identify the concept of democracy that the policy furthers.<sup>192</sup> Winter has identified three broad strands of contemporary theories of democracy: a competition of policy elites

Instead, Winter describes an anthropologically thick requirement of recognition and respect, one that far surpasses the mere acquaintance necessary to aggregate preferences in the market or liberal democracy.<sup>196</sup> Mutual recognition and respect in a democracy flow from the parallel prerequisites of community and imagination. Community, the shared understanding of meaningful symbols and experiences, permits the dialogue that forms the core of republican democracy. Without community as the basis for government, Winter argues, neither law as prescription<sup>197</sup> nor law as persuasion can function.<sup>198</sup> Only in an atmosphere of mutual recognition and respect can citizens in the minority participate, subjectively and objectively, in their own governance.

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

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(2012), available at [http://www.elevenjournals.com/tijdschrift/rechtsfilosofieentheorie/2012/3/NJLP\\_2213-0713\\_2012\\_041\\_003\\_002.pdf](http://www.elevenjournals.com/tijdschrift/rechtsfilosofieentheorie/2012/3/NJLP_2213-0713_2012_041_003_002.pdf).

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

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

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

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

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

201. *Id.*

202. *Id.*





*C. Does localism maximize democratic education?*

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

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

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

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

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

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

As Emerson lamented, we can never fully know another person.<sup>211</sup> It follows that we can never be fully persuaded of someone else's sameness to ourselves. A form of democratic governance that depended on this impossibility would be doomed to fail. Instead, building the prerequisites for democratic education requires establishing the governance of public schools at a level broad enough to compel citizens to form coalitions with strangers. These coalitions, to succeed, depend on the participants' ability to imagine who else in the

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

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

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

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

a classroom teacher to adopt a more appealing English textbook wins  
that better text for the whole class, including children without pare7a66 0 Td[(oe, inc)7.AME0.0401

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

Pluralism would also be preserved, if not promoted. Affective communities that organize along axes other than geography would find it easier to share information and resources as components of state-wide schools. These normative minorities would not have to sort themselves into municipal concentrations, Tiebout-style, in order to reap the benefits of common schooling. For example, serious proponents of arts education would be better able to win support for per-

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