

AN AMERICAN ODDITY: THE LAW, HISTORY, AND TOLL OF THE SCHOOL DISTRICT

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ABSTRACT—The school district is a staple of American law. As the local government tasked with controlling our public schools, the school district is so well-entrenched that lawmakers and commentators ignore its uniqueness as a legal institution. The school district is peculiar to American law, and it is a peculiarity within American law. General purpose governments—cities and counties—are the local governments controlling schools outside the United States. In the United States itself, these governments control almost all other major local functions. But they do not control education here. Why? Why does American law rely on a separate local government for the provision of education? This Article tackles this fundamental—yet heretofore largely neglected—historical and normative question. It offers a legal history of the school district, tracing its roots to colonial Massachusetts and chronicling its consolidation and spread through successive centuries. This exploration demonstrates that the school district was adopted as an expedient solution to varied practical problems presented by the unique patterns of early settlement that prevailed in different places and times in American history. Yet the historical investigation additionally shows that at distinct periods lawmakers, commentators, and activists also asserted substantive arguments, of potentially enduring relevance, for the school district’s embrace. These actors ascribed to the school district a capacity to outperform other, general purpose, local governments in promoting certain core values. Those normative values included citizen participation, community building, school improvement through expert management, and stable school funding. Unfortunately, due to modern legal, economic, and social developments, the current school district fails to serve any of these values that were at times attributed to its antecedents; worse, the contemporary school district often undermines them. Accordingly, the Article concludes that state lawmakers should consider abolishing the school district and bestowing control over schools on general governments.

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In the first place God made idiots. This was for practice. Then he made school boards.

—Mark Twain, *Following the Equator: A Journey Around the World* (1897)

INTRODUCTION

An hour's drive north of New York City, a public school system is in dire straits. In 2013–2014, 46% of the students in the East Ramapo system, located in suburban Rockland County, New York, were “well below proficient” in English, and a whopping 55% attained that distinction in math.¹ The students' academic performance could not have been aided by the system's constant elimination of teacher positions and closing of schools.² A state report thus characterized the system as “in crisis.” It singled out the cause: East Ramapo's uniquely generous funding of private schools. The local public school system serves 9,000 students, while the area's remaining 24,000 school-aged children attend private schools. Students in the public schools are 91% African-American, Latino, or of Haitian descent, and 78% of them are poor.³ The students in the private schools, on the other hand, are all white Hasidim (i.e., members of an ultra-orthodox Jewish sect).⁴ For years, the elected entity running the East Ramapo school system has been diverting resources towards these latter students in the private schools,⁵ thereby establishing a public school system cash-starved by design.

¹ HENRY M. GREENBERG, N.Y. STATE EDUC. DEP'T, EAST RAMAPO: A SCHOOL DISTRICT IN CRISIS 7–8 (2014) (citing data from New York State school report cards).

² *Id.* at 29–32. Another report highlights the board's failure to address disadvantaged students' academic needs. N.Y. STATE EDUC. DEP'T, OFFICE OF BILINGUAL EDUCATION AND WORLD LANGUAGES MONITORING REPORT (2015), <https://assets.documentcloud.org/documents/2109116/states-east-ramapo-ell-report.pdf> [<https://perma.cc/QP9A-RS6S>].

³ GREENBERG, *supra* note 1, at 6.

⁴ *Id.*

⁵ A vast, growing, and grossly out of line with the state average portion of the district's budget is dedicated to funding transportation and special education at private schools. *Id.* at 12, 15–17. In an extraordinary move, the state education commissioner rescinded her approval for the district's 2017–2018 budget, since it included increased funding for private school transportation (on days public schools are not open) despite cuts elsewhere. Letter from MaryEllen Elia, Comm'r, N.Y. State Educ. Dep't, to Yehuda Weissmandl, President, Bd. of Educ., E. Ramapo Cent. Sch. Dist. (Apr. 21, 2017), http://www.ercsd.org/files/_bVDyC_/5f88d30a41a6a3d33745a49013852ec4/Elia_to_Weissmandl_re_budget_-_04-21-17.pdf [<https://perma.cc/VJT4-WQY8>]. Earlier, the federal Department of Education's Office for Civil Rights considered NAACP complaints about racial and religious discrimination and began monitoring the district's procedures for placement of special education students in out-of-district schools (procedures which favored white children). Letter from Timothy Blanchard, Dir., N.Y. Office, to Willie Trotman, President, Spring Valley NAACP (Oct. 27, 2015), <https://poweroften.us/wp-content/uploads/2015/11/Determination-Letter-Spring-Valley-NAACP-East-Ramapo-CSD-02-11-1091-and-02-15-1140.pdf> [<https://perma.cc/Y8QY-DYH8>]. Both students and taxpayers have challenged the school board's diversion of funds as a breach of the First Amendment's Establishment Clause. Recently, the

An hour's drive west of New York City, public schools are also foundering. From 1950 to 2010, the population of Newark, New Jersey's largest city, plummeted from 440,000 to 275,000, as employers and affluent residents decamped to the suburbs.⁶ The city's student body became almost exclusively disadvantaged: of its 35,000 students, 16,500 are African-American, 15,700 are Hispanic,⁷ and 15,000 (44%) live below the poverty line.⁸ Drawing on dwindling property tax revenues to serve this impoverished population, for years the system's performance was, state officials concluded, "abysmal."⁹ But in 2010 the system struck gold. Flanked by New Jersey's governor and Newark's mayor, Facebook founder Mark Zuckerberg pledged one hundred million dollars to the system—a sum other donors then matched.¹⁰ For Newark schools, money was no longer a problem. Still, five years following that historic announcement, with all the money spent, administered tests indicated that proficiency throughout the system in literacy and math had declined in every tested grade.¹¹ The most thorough study of the grant assessed its effect as, at best, "a wash."¹² The study singled out the cause. The governor controlled the entity running the school system,¹³ and hence that entity could not

students' lawsuit was dismissed by the Second Circuit for lack of standing. *Montesa v. Schwartz*, 836 F.3d 176, 201 (2d Cir. 2016). The taxpayers' lawsuit is still ongoing in the district court.

⁶ U.S. CENSUS BUREAU, NEW JERSEY: 2010, SUMMARY POPULATION AND HOUSING CHARACTERISTICS 14 (2012), <https://www.census.gov/prod/cen2010/cph-1-32.pdf> [<https://perma.cc/F6BR-NAZT>]; U.S. CENSUS BUREAU, 1950 CENSUS 30-9 (1952).

⁷ NEWARK PUBLIC SCHOOLS, DISTRICT INFORMATION, <http://www.nps.k12.nj.us/info/> [<https://perma.cc/XNS3-SJMS>].

⁸ Dale Russakoff, *Schooled*, NEW YORKER, May 19, 2014.

⁹ *Contini v. Bd. of Educ.*, 668 A.2d 434, 438 (N.J. Super. Ct. App. Div. 1995). The judge also noted "the low level of school attendance in Newark, the high level of students who 'drop out' after eighth grade[,] . . . the 'deplorable condition of some of the physical facilities,' the unavailability of textbooks, workbooks and other vital instructional materials in many schools" and cited the state education commissioner's conclusion that "pupil performance data indicates . . . an utter failure by the [schools] to prepare [their] students to function as citizens and workers in society." *Id.*

¹⁰ Richard Pérez-Peña, *Facebook Founder to Donate \$100 Million to Help Remake Newark's Schools*, N.Y. TIMES (Sept. 22, 2010), <http://www.nytimes.com/2010/09/23/education/23newark.html> [<https://perma.cc/TE5F-UNF9>]; Ruth Marcus, *How Newark Schools Partially Squandered Mark Zuckerberg's \$100 Million Donation*, WASH. POST (Oct. 20, 2015), https://www.washingtonpost.com/opinions/how-newark-schools-partially-squandered-a-great-prize/2015/10/20/fff660c-7743-11e5-a958-d889faf561dc_story.html?utm_term=.89709d20f20f [<https://perma.cc/3MTM-MBTK>].

¹¹ DALE RUSSAKOFF, THE PRIZE 204 (2015).

¹² Tom Moran, Opinion, *Newark Students Are Better Off, Despite the Political Noise*, NEWARK STAR-LEDGER, Sept. 6, 2015.

¹³ *Contini*, 668 A.2d at 437 (approving the takeover).

effectively engage the local community and the teachers' union in the implementation of an improvement plan.¹⁴

Two geographically proximate school systems. Both failing—though not due to the traditional culprit for the struggles of postwar American public schools: outsiders' apathy.¹⁵ In East Ramapo, the majority of the public school system's own residents, ultra-orthodox Jews who do not rely on public schools, elected officials intent on defunding schools serving others—the system's minority residents.¹⁶ In Newark, the majority of the school system's residents were excluded from its management and consequently would not cooperate with efforts to effectively employ funds outsiders had dedicated to the system. A similar, and noteworthy, fate was reached by both systems, through two different paths. While East Ramapo's schools were saddled with an overinclusive electorate, Newark's schools contended with an underinclusive one.

These two seemingly disparate predicaments share more than the common unfortunate outcome each has bred, however. They are both symptoms of one common ailment: the curious legal entity running both school systems. The East Ramapo schools probably would not have been underfunded by locals had they been controlled by the Villages of Spring Valley and Chestnut Ridge, the Town of Haverstraw, and the other communities whose residents actually send their children to East Ramapo's public schools. The Newark schools' plans would not have been so forcefully resisted by locals as external dictates had the schools been controlled by the City of Newark, which answers to Newark's residents. But in neither case were the schools managed by the traditional local government entities: the town, village, or city. Rather, the schools were managed by another, separate entity: the East Ramapo Central *School District* (that, unlike the villages and towns where the schools' users reside, answers also to non-school users) and the Newark *School District* (that,

¹⁴ David Kirp, *How to Fix the Country's Failing Schools. And How Not To.*, N.Y. TIMES (Jan. 9, 2016), <https://www.nytimes.com/2016/01/10/opinion/sunday/how-to-fix-the-countrys-failing-schools-and-how-not-to.html> [<https://perma.cc/F4D3-C624>]; James Piereson & Naomi Schaefer Riley, Opinion, *Zuckerberg's \$100 Million Lesson*, WALL ST. J. (Oct. 5, 2015, 7:17 PM), <https://www.wsj.com/articles/zuckerbergs-100-million-lesson-1444087064> [<https://perma.cc/YH5N-K65C>].

¹⁵ Under federal law, Americans need not contribute to the funding of schools serving other locales. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973). This decision “may be the most significant decision regarding public schools since *Brown*.” John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning the War?*, 57 VAND. L. REV. 2351, 2352 (2004). On the ruling's effects, see, for example, James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 258–60 (1999).

¹⁶ GREENBERG, *supra* note 1, at 10 (noting that since 2005, a majority of the board has been comprised of members of the Hasidic community, which today holds seven of the nine seats on the board).

unlike the city, can be subjected to gubernatorial control).¹⁷ But what is this curious entity—this “school district”?

The entity’s contours and governance scheme do not correspond to existing, and primary, local political communities: in East Ramapo it encompasses multiple such communities, while in Newark it is managed by outsiders. Yet this entity still runs the schools. Why? Does this legal entity provide East Ramapo and Newark tangible benefits justifying the pathologies of representation it generates?

These questions are important. For this legal entity—the school district—is not peculiar to East Ramapo and Newark. The school district is the basic building block of the public schooling system throughout the nation, an inexorable component of the legal architecture of governance in America.¹⁸ Why has American law created the entity known as the school district? Why, that is, has it established a special, independent local government entity to run the schools? What are the expected advantages of this autonomous entity, and can they offset its potential costs—some of them showcased in East Ramapo and Newark?

This Article will tackle these questions, which heretofore have been largely left unaddressed—indeed, unasked. Although the school district is a reality of extraordinary consequence, as an institution, the district has remained mostly invisible to legal scholars.¹⁹ While prominent recent works have explored the legal standing of different local government entities—city,²⁰ county,²¹ special district,²² unincorporated urban area,²³

¹⁷ School districts can be placed under state control. N.J. STAT. ANN. § 18A:7A-15.1 (West 2013). A city can be placed under “supervision,” but its political leadership cannot be removed. *Id.* § 52:27BB-56.

¹⁸ All states other than Hawaii rely on school districts. *See infra* Section I.A.1.

¹⁹ Writers have addressed school districts’ distributive effects. *E.g.*, Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1874–77 (1994); Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787 (2010). These works do not address the district’s institutional uniqueness. Quite the opposite: they aim to show that school districts exhibit the general problem presented by local government boundaries. *See* Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1132–41 (1996). The key exception that does address the district as a special institution is another important essay by Richard Briffault: Richard Briffault, *The Local School District in American Law*, in *BESIEGED* 24 (William Howell ed., 2005). That essay’s focus is mostly the district–state interface, not the district’s relationships with, and standing among, other local governments.

²⁰ *See, e.g.*, Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

²¹ Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010).

²² Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971 (2013).

²³ Michelle Wilde Anderson, *Cities Inside Out*, 55 UCLA L. REV. 1095 (2008).

extraterritorial zone,²⁴ neighborhood²⁵—the school district still awaits thorough analysis.

This academic neglect is particularly striking since the school district’s peculiarity cries out for an explanation. Education is one of the key powers reserved to local governments,²⁶ and it garners nearly 40% of local budgets nationwide.²⁷ Yet education is the sole major local function whose administration has been consistently withdrawn from the purview of primary local governments—cities and counties—and entrusted to separate, and special, governments.²⁸

Furthermore, the school district is not only peerless in American law: it also lacks an equivalent elsewhere. Foreign legal systems that opt to preserve a role for localities in governing schools²⁹ rely on existing local governments: cities and counties.³⁰ They do not consistently rely on a

²⁴ Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, *supra* note 19.

²⁵ Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014).

²⁶ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

²⁷ See TAX FOUND., FACTS AND FIGURES ON GOVERNMENT FINANCE 263 tbl.F-5 (2004), <https://files.taxfoundation.org/legacy/docs/7ca0eadb3813bc30417c0a3533491263.pdf> [<https://perma.cc/STT6-ENB8>] (indicating that 38% of municipal spending in 2002 was on education).

²⁸ In American law, special districts are service-oriented bodies assigned humble, non-politically-charged tasks, e.g., mosquito abatement and sewage. Shoked, *supra* note 22, at 1973.

²⁹ Most systems centralize powers on the national or state level instead. *E.g.*, NANCY WALSER, THE ESSENTIAL SCHOOL BOARD BOOK xi–xii (2009) (discussing Australia); OECD, EDUCATION POLICY OUTLOOK: NEW ZEALAND 15 (2013), http://www.oecd.org/education/EDUCATION%20POLICY%20OUTLOOK%20NEW%20ZEALAND_EN.pdf [<https://perma.cc/4U9V-2A83>]; CODE DE L’ÉDUCATION [C. ÉD.] [EDUCATION CODE] art. L211-1 (Fr.), <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006071191&idArticle=LEGIARTI000006524493> [<https://perma.cc/MWL8-XSG6>] (“[E]ducation is a national service, whose organization and functioning are assured by the state . . .”).

³⁰ See, e.g., Education Act 1902, 2 Edw. 7 c. 42, § 1 (Eng. & Wales) (“[T]he council of every county and of every county borough shall be the local education authority.”); Education Act 1945, 8 & 9 Geo. 6 c. 67 (Scot.) (same); Compulsory Education Law, 5709–1949, § 1 (Isr.) (same); BRIGITTE LOHMAR & THOMAS ECKHARDT, THE EDUCATION SYSTEM IN THE FEDERAL REPUBLIC OF GERMANY 2013/2014, at 54 (2015), http://www.istp2016.org/fileadmin/Redaktion/Dokumente/documentation/dossier_en_ebook.pdf [<https://perma.cc/YLV9-ZPDT>] (explaining that while the state is responsible for “internal school matters”—curriculum and teachers—“the school-maintaining bodies” for “external school matters”—e.g., school building and shutting down—are local authorities: towns and cities). Canadian provinces seemingly follow the American example and recognize school districts, but their goal is to accommodate disparate linguistic (and sometimes religious) communities cohabitating in the same locality. The federal charter mandates that parents be able to draw on schools of their language (French or English). Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, § 23 (UK). Furthermore, for some provinces, the federal constitution requires “separate” school boards for the local minority religious group (Catholic or Protestant). Constitution Act, 1867, 30 & 31 Vict., c 3, § 93(2) (UK). Consequently, the same area may be covered by four school boards—English Protestant (often referred to as English-language “public”), English Catholic (often referred to as English-language “separate”), French Protestant (often referred to as French-language “public”), and French Catholic (often referred to as French-language “separate”)—each board elected only by its supporters.

separate local entity to govern educational matters.³¹ The school district is thus a quintessentially American invention.

This Article recounts the legal tale of this unique piece of Americana. That tale is doctrinal and normative, but also historical. The school district emerged early on, during colonial times, and to understand its current legal role, benefits, and costs, the forgotten process by which it was initially created back in colonial Massachusetts—and by which American law has been recreating it ever since—must be unearthed.

As that process unfolded over the centuries, desires to assure efficient education, to promote democracy, and to advance social cohesion, all swirled around the school district.³² The district's supporters offered it as an institution better equipped, as compared to existing local governments, to serve these goals. This multiplicity of goals explains the school district's stranglehold on American normative imaginations. Inevitable tensions exist between these diverse values—for example, between democratic school governance and expertise-driven school management. At times these tensions bubbled over.³³ Detractors would denounce the law's embrace of the school district as doing little to advance the value they cherished most. Still, since the entity's separate legal standing could always be credited with serving some values—even if at others' expense—it maintained backers.³⁴ Furthermore, since in some way the school district's separate standing was associated with all pertinent values, detractors advocated adjustments to the district so that it could better promote the value they prioritized, rather than called for its outright abolition.³⁵

The school district has endured thanks to this pliability. The school district is as much a staple of American law in 2017 as it was in 1717, since it has been associated with a plethora of normative values. Indeed, with all the values typically attributed to local governments—citizen participation, efficient provision of public services, and community building.³⁶ But the

³¹ England experimented with school boards upon the introduction of its public schools in 1870. Elementary Education Act 1870, 33 & 34 Vict c. 75 (Eng. & Wales). But that system was abolished by the 1902 Act. Education Act 1902, 2 Edw. 7 c. 42, § 5 (Eng. & Wales). Scotland's boards were similarly abolished in 1929. Local Government (Scotland) Act 1929, 19 & 20 Geo. 5 ch. 25, § 3 (UK). In 1986, the London Education Authority was made independent again, Local Government Act 1985, c. 51, § 18 (UK), but it was eliminated in 1990. Education Reform Act 1988, c. 40, § 162 (UK) (decreeing that the London Education Authority shall cease to exist on April 1, 1990).

³² See *infra* Section II.D.

³³ See *infra* Sections II.B–C.

³⁴ See, e.g., *infra* Section II.C.

³⁵ E.g., JESSE H. NEWLON, EDUCATIONAL ADMINISTRATION AS SOCIAL POLICY 230 (1934).

³⁶ On the competing normative values assigned to local power, see, for example, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 392–403 (1990).

misfortune today—a misfortune to which East Ramapo and Newark are sad testaments—is that the school district can no longer serve any of those vaunted values. A slew of twentieth-century court decisions and laws, political patterns, demographic shifts, and economic trends have conspired to cripple the school district’s ability to deliver on any of its normative promises. Thus, for example, the separately elected school district’s promise of securing the citizenry’s role in running the schools has been undermined by the advent of modern interest group dynamics.³⁷ The separately governed school district’s promise of assuring stable school funding has been defeated by novel municipal tax laws that transformed school districts’ autonomy into a tool for funneling funds away from schools.³⁸ Other historic justifications for the separate school district have similarly crumbled.

Today’s school district not only fails to serve the justifications it was previously set to promote; more often than not, it actively subverts them. Accordingly, this Article’s centuries-long story of the school district concludes with a call for abandoning this American oddity. Normalcy—local government law’s usual principles—should reign in the education field. The power to govern schools should be transferred to existing, general purpose local governments—the governments responsible for almost all other major services. These governments now benefit from their modern remodeling through innovations such as civil service laws, and draw on novel legal tools such as interlocal contracts. Consequently, unlike in the past, they can effectively manage schools and promote the normative values once associated with the school district.³⁹

This proposal to eradicate school districts is radical but not unrealistic. Alerted by public education’s sad state, which is now conceived as a national crisis,⁴⁰ some lawmakers have begun to examine the role school districts play.⁴¹ Several states have even begun altering existing regimes.⁴² But in the absence of a full appreciation of the legal problem the school

³⁷ See *infra* Section III.A.

³⁸ See *infra* Section III.D.

³⁹ See *infra* Part IV.

⁴⁰ NAT’L COMM’N ON EXCELLENCE IN EDUCATION, A NATION AT RISK (1983), <https://www2.ed.gov/pubs/NatAtRisk/risk.html> [<https://perma.cc/NT3V-M8KE>] (famously warning that “a rising tide of mediocrity” in schools is weakening the country in a competitive global economy).

⁴¹ The title picked for a recent book about boards expresses this attitude: besieged. See *supra* note 19. For a summary of criticisms, see MICHAEL W. KIRST & FREDERICK M. WIRT, THE POLITICAL DYNAMICS OF AMERICAN EDUCATION 131 (4th ed. 2009).

⁴² See *infra* Part IV.

district presents, such reforms are prone to be partial.⁴³ They may even compound the problem, as they have in Newark, where the governor was awarded control over the school district.⁴⁴ As exemplified by that case, tinkering with the district is not enough.

To reach this conclusion, the Article proceeds as follows. Part I draws the landscape of education's governance. It offers a comprehensive portrayal of the legal relationship between the school district and other local governments. This review demonstrates the school district's central role and its uniqueness in American law. Part II chronicles the emergence and evolution of this unique component of our governmental system. Tracing the school district's development from colonial times to the twentieth century, it offers the first legal history of the school district.⁴⁵ This exercise shows that the school district was a creature of particular historical circumstances—notably, the dearth of local government bodies when public education was first introduced in disparate places. But the account also synthesizes principled grounds intermittently—but repeatedly—employed to fortify the detachment of schools' governance from the governance of other local affairs. Part III then explains why these diverse normative reasons are no longer valid today. It reviews the detrimental effects of legal, economic, social, and political transformations on the school district's capacity to promote the normative goals identified in Part II. In light of the discouraging findings respecting the school district's current normative worth, Part IV turns to the district's alternative: general local governments, highlighting attributes rendering them the better option for running schools today. It situates the Article's suggestion among other reform efforts—most notably, mayoral takeovers of school districts. Such reforms' animating principles, as well as shortcomings, strengthen the conclusion: the school district is a legal institution whose time has come and gone.

⁴³ Reforms aim at “reorganizing” school districts, rather than rethinking them. *E.g.*, IND. CODE § 20-23-4-1 (2016).

⁴⁴ *See supra* notes 13–14 and accompanying text.

⁴⁵ Scholars have authored histories of education, *e.g.*, DIANE RAVITCH, *THE GREAT SCHOOL WARS* (1974); LAWRENCE A. CREMIN, *AMERICAN EDUCATION: THE NATIONAL EXPERIENCE 1783–1876* (1980), but not of the school district. One economist claiming to tackle the problem merely explains the consolidation of one-room schools into bigger schools in the early twentieth century. William A. Fischel, *Neither “Creatures of the State” Nor “Accidents of Geography”*: *The Creation of American Public School Districts in the Twentieth Century*, 77 U. CHI. L. REV. 177, 177–78 (2010).

I. THE LAW OF THE SCHOOL DISTRICT

In *Brown v. Board of Education*, the Supreme Court proclaimed education “the most important function of state and local governments.”⁴⁶ However, as the identity of the defendant in that seminal case indicated, this most important function is not performed by the state itself or by its primary local governments. Rather, it is entrusted to a special government: the board of education, also referred to as the school board or district. This introductory Part sketches the school board’s institutional architecture. This exercise is important even independent of the ensuing Parts’ analysis, as education governance’s complicated legal structure has engendered some misunderstandings.⁴⁷ This Part will sort out confusions by defining the district’s place in American law: first surveying the distribution of educational powers among the different layers of government (federal, state, and local); then detailing the school district’s nature as the local layer of government responsible for education; and finally clarifying the legal ramifications of the school district’s interactions with other local layer governments. From this analysis, the school district will appear as an important local government—the government awarded the legal responsibility for school management in America. Furthermore, it will emerge as a local government different in its legal standing from other special local governments similarly tasked with the provision of one specific service, and as a government that is also, almost always, politically independent from general local governments.

A. *The State and Education*

In the federal constitutional scheme, education is a power reserved to the states.⁴⁸ For their part, all state constitutions decree that the state provide education.⁴⁹ To implement this mandate, the states install a chief state school officer, and forty-seven states also empower a state board of education.⁵⁰ The chief school officer and state board members are appointed by the governor or elected by the citizens.⁵¹ The powers and

⁴⁶ 347 U.S. 483, 493 (1954).

⁴⁷ See *infra* Section I.C.

⁴⁸ On limited federal involvement, see GENE MAEROFF, *SCHOOL BOARDS IN AMERICA* 101–05 (2010).

⁴⁹ See Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. LEGIS. 307, 311 (1991).

⁵⁰ Mary Fulton, *State Education Governance Models*, STATENOTES (2011), <http://www.ecs.org/clearinghouse/77/78/7778.pdf> [<https://perma.cc/AWL4-2PYQ>].

⁵¹ A breakdown by state is available at: VINCENT SCUDELLA, *EDUC. COMM’N OF THE STATES, STATE EDUCATION GOVERNANCE MODELS* (2013), <http://www.ecs.org/clearinghouse/01/08/70/10870.pdf> [<https://perma.cc/DGE2-NZT2>].

duties of these state-level officials typically include certifying teachers,⁵² establishing school building codes,⁵³ dispersing federal funds,⁵⁴ calculating state aid,⁵⁵ collecting student and instructional data,⁵⁶ and setting instructional standards.⁵⁷

All these tasks are supervisory: the state bodies monitor the public schools.⁵⁸ Other than in Hawaii,⁵⁹ state bodies leave actual management of schools to local entities: school boards.⁶⁰ School boards govern geographical subdivisions of the state, often called school districts.⁶¹ As of 2012, 12,880 districts existed nationwide (as compared to 19,519 cities and villages).⁶²

Like all other local governments, school districts are formally creatures of the state.⁶³ Lacking inherent powers, they are political subdivisions established, maintained, and potentially abolished by the state.⁶⁴ They hold only the powers state laws grant them, which are invariably subject to change.⁶⁵ State laws commonly grant school districts powers to appoint teachers and prescribe salaries,⁶⁶ select courses and

⁵² Illinois provides a typical example. *See, e.g.*, 105 ILL. COMP. STAT. 5/2-3.9 (2012).

⁵³ *See, e.g., id.* at 5/2-3.12.

⁵⁴ *See, e.g., id.* at 5/2-3.26.

⁵⁵ *See, e.g., id.* at 5/2-3.84.

⁵⁶ *See, e.g., id.* at 5/2-3.31.

⁵⁷ *See, e.g., id.* at 5/27-1.

⁵⁸ *See, e.g., id.* at 5/2-3.3.

⁵⁹ HAW. REV. STAT. § 302A-1128 (2010) (granting the state board control over all schools).

⁶⁰ 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1968, at 430 (1973) (explaining that Hawaii's system is unique). In several states, constitutions establish districts. *See, e.g.*, COLO. CONST. art. IX, § 15; FLA. CONST. art. IX, § 4; VA. CONST. art. VIII, § 7.

⁶¹ 1-3 JAMES RAPP, EDUCATION LAW § 303(2) (last updated 2016).

⁶² U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS: 2012, at viii-x (2013), <https://www2.census.gov/govs/cog/2012isd.pdf> [<https://perma.cc/T6J9-Q2U8>].

⁶³ *Hunter v. Pittsburgh*, 207 U.S. 161, 178-79 (1907) (“The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme . . .”).

⁶⁴ *Fruit v. Metro. Sch. Dist.*, 172 N.E.2d 864, 866 (Ind. 1961) (“It is for the legislature to determine whether the administration of school systems shall be exercised by a state board or distributed to local school corporations.”); *Tecumseh Sch. Dist. v. Throckmorton*, 403 P.2d 102, 104 (Kan. 1965) (“[S]chool districts are purely creatures of the legislature and subject not only to its power to create but its power to modify or dissolve.”); *see also* KY. REV. STAT. ANN. § 160.020 (2015) (setting circumstances wherein a school district dissolves).

⁶⁵ *Sch. Dist. of Lansing v. State Bd. of Educ.*, 116 N.W.2d 866, 869 (Mich. 1962) (“[E]ducation is not inherently a part of the local self-government of a municipality except insofar as the legislature may choose to make it such.”).

⁶⁶ *See, e.g.*, 105 ILL. COMP. STAT. 5/10-20.7 (2012).

textbooks,⁶⁷ and assign students to specific schools.⁶⁸ School districts are also tasked with establishing schools: they open schools,⁶⁹ replace sites,⁷⁰ and close schools.⁷¹

B. The School District as a Special Local Government

The school district is thus the local government responsible for the individual schools located within a defined area. American law recognizes many forms of local governments, and a local government's standing differs with its form. Therefore, to grasp the school district's nature, its specific status among local governments' different forms must be pinpointed.

Local government law distinguishes “general purpose” governments from “special purpose” governments.⁷² General purpose governments are subject to a plethora of rules concerning elections, financing, and administration.⁷³ Special purpose governments, also known as special districts, are excused from many of these rules.⁷⁴ The characteristics rendering a local government “special” and thus exempt from such regulation are contested.⁷⁵ Traditional categorizations focus on special districts' limited powers.⁷⁶ Thus, governments exercising powers in multiple fields are deemed general, whereas governments whose authority is confined to a single field are considered special. Accordingly, for example, counties and cities are general governments, whereas water districts and housing authorities are special governments.

Seeing that its functions are limited to a single purpose,⁷⁷ the school district resembles the special government or district, and state laws often list the two side-by-side.⁷⁸ Still, and as Justice Potter Stewart once noted, a school district “has a more pervasive influence in the community than do most other such special purpose authorities.”⁷⁹ The reason is the enhanced social import of the service the school district provides—education—as

⁶⁷ See, e.g., *id.* at 5/10-20.8.

⁶⁸ See, e.g., *id.* at 5/10-21.3.

⁶⁹ See, e.g., *id.* at 5/10-22.36.

⁷⁰ See, e.g., *id.* at 5/10-22.13.

⁷¹ See, e.g., *id.* at 5/10-22.22b.

⁷² LYNN BAKER ET AL., LOCAL GOVERNMENT LAW 53 (5th ed. 2015).

⁷³ Shoked, *supra* note 22, at 1987–90.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1991–99.

⁷⁶ *Id.*

⁷⁷ See, e.g., 105 ILL. COMP. STAT. 5/10-20 (2012).

⁷⁸ E.g., ILL. CONST. art. VII, § 8.

⁷⁹ *Kramer v. Union Sch. Dist.*, 395 U.S. 621, 640 n.9 (1969) (Stewart, J., dissenting).

compared to those delivered by other special districts (such as water districts and housing authorities).⁸⁰ This is perhaps a “difference in degree,” yet courts have found it meaningful.⁸¹ Education’s public significance has led courts to subject school districts to regulations from which other special districts are spared, such as constitutional rules of citizen representation.⁸² Consequently, the U.S. Census separates school districts from other special districts.⁸³

C. *The School District and General Local Governments*

Since it discharges the “most important function of local government,”⁸⁴ the school district is a “special” special purpose local government. Still, it remains a special purpose local government: it is not the primary local government serving an area. That primary government, commonly viewed by residents as their politically constitutive community, is the presiding general purpose government.⁸⁵

The degree to which the school district is interlaced with this primary government defines the district’s role in residents’ lives and its status in American law. Two variables shape the relationship between the school district and the general government: degree of physical likeness and extent of political dependence. Each must be inspected separately.

1. *School District Boundaries.*—As a local government existing in forty-nine states, the school district exerts power over a defined substate area. The state delineates the boundaries of that area, as the school district is a state creature.⁸⁶ In twenty-three states those boundaries do not correspond to the boundaries of general governments.⁸⁷ That is, the area an individual school district covers may straddle more than one city or county, and the area covered by a city or county may be split between more than one school district. An example of such an arrangement is the Houston Independent School District, which does not cover the whole city of Houston while concurrently covering other area municipalities in whole or in part.

⁸⁰ Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 356 (1993).

⁸¹ *Kramer*, 395 U.S. at 640 n.9 (Stewart, J., dissenting).

⁸² *Id.*

⁸³ See U.S. CENSUS BUREAU, *supra* note 62, at v.

⁸⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

⁸⁵ BAKER ET AL., *supra* note 72, at 53–56.

⁸⁶ *E.g.*, IOWA CODE § 275.1(2) (2017) (mandating reorganization and attachment of school districts in certain situations); *id.* § 275.3 (setting minimum size).

⁸⁷ Data collected from state maps and regulations, on file with author.

In the remaining twenty-six states, school district boundaries follow general governments' boundaries.⁸⁸ Variation exists among these states, however, since American law recognizes more than one general government whose boundaries can serve as template for an overlapping school district. Almost all states carve their territory into counties and then establish at least one more layer of general government below the county: the city, town, township, or village, presiding over county subareas.⁸⁹ Given that multiple general governments could therefore reign over one area, school district boundaries designed to follow general government boundaries may take three different forms.⁹⁰ In eight states school district lines correspond to county lines.⁹¹ In nine they correspond to sub-county general governments' lines.⁹² The final nine states create school districts whose borders follow both county and subcounty lines: a school district exists tracing each county's boundaries, while subareas within the county incorporated as cities are excluded from the countywide school district, each recognized as a separate school district whose boundaries trace the city's.⁹³

2. *School District Governance.*—Geographical overlap between the school district and a general government, found in some form in twenty-six states, means that the school district serves the same population that the overlapping general government (i.e., county or city) serves. It need not mean that the school district serves that general government. The latter type of relationship, which can be titled political overlap, implies that one body rules both the general government and the school district.⁹⁴ A school district politically overlaps a general government if its governing board is appointed by the general government, rather than elected separately by residents.⁹⁵ If such political overlap prevails, the general purpose local government is the entity actually administering the schools, and the

⁸⁸ Data collected from state maps and regulations, on file with author.

⁸⁹ BAKER ET AL., *supra* note 72, at 54–55.

⁹⁰ Data collected from state maps and regulations, on file with author.

⁹¹ Colorado, Delaware, Florida, Kentucky, Louisiana, South Carolina, Virginia, and West Virginia.

⁹² California, Connecticut, Maine, Maryland, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont.

⁹³ Alabama, Alaska, Georgia, Mississippi, Nebraska, Nevada, New Hampshire, North Carolina, and Tennessee.

⁹⁴ Briffault, *The Local School District in American Law*, in BESIEGED, *supra* note 19, at 26–27.

⁹⁵ This binary distinction is somewhat misleading. In actuality, and perhaps inevitably, the district's independence is a matter of degree. The separately elected district's level of independence depends on its powers. The more powerful the district, the more meaningful its political independence. Most importantly, states differ in the extent of fiscal independence they award districts. The limits some of them impose (for example, requiring the submission of the district's budget to the general government) are discussed *infra* notes 472–74 and accompanying text.

overlapping school district is not a government, but rather a branch or agency of that general government (the equivalent, for example, of the general government's sanitation department).⁹⁶ If, on the other hand, the school district is politically separate from the general government, then it is an independent, and thus meaningful, government.⁹⁷

This form of independent governance is the clear majority rule.⁹⁸ The almost uniform practice in America is to politically detach the board managing the school district from the area's general governments.⁹⁹ In thirty-one states, members of all local school boards are elected separately by residents.¹⁰⁰ In eighteen states, members of some boards are appointed: by mayors¹⁰¹ or governors.¹⁰² But even within this minority of states that establish some appointed boards, there are many other school boards that are independently elected—indeed, the vast majority of local boards in

⁹⁶ See U.S. CENSUS BUREAU, LISTS & STRUCTURES OF GOVERNMENTS: DEFINITIONS, <https://www.census.gov/govs/go/definitions.html> [<https://perma.cc/NW5Z-48CB>].

⁹⁷ The Census, thus, only counts as governments those school districts categorized as “independent,” classifying the other, “dependent,” school systems as mere government “agencies.” U.S. CENSUS BUREAU, *supra* note 62, at x. It finds 1,298 dependent school systems. U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012, <https://www.census.gov/content/dam/Census/library/publications/2013/econ/g12-cg-org.pdf> [<https://perma.cc/M8BU-8J4C>]. The test the Census employs to separate dependent from independent school districts is opaque, however, Briffault, *The Local School District in American Law*, in BESIEGED, *supra* note 19, at 26, and its results—somewhat questionable. The Census singles out four states as containing no independent school districts: Hawaii—which, as already noted, has no school districts—Alaska, Maryland, and North Carolina. U.S. CENSUS BUREAU, *supra* note 62, at x. Yet, a review of the laws of these other three states reveals that they all insist on designating school districts as independent entities. See, e.g., *Tunley v. Anchorage Sch. Dist.*, 631 P.2d 67, 75 (Alaska 1980) (“While the school board is elected by the same voters as is the municipal assembly . . . it is a legislative body with legal responsibilities which in important respects are distinct from those exercised by the assembly.”). Maryland does empower the governor to appoint boards, MD. CODE ANN., EDUC. § 3-108 (LexisNexis 2014), but eighteen districts—of the state's twenty-four—elect independent boards, *id.* § 3-114. In North Carolina, some boards are city-appointed, e.g., ASHEVILLE CITY SCHOOLS, N.C., POLICY CODE: 2110 (Feb. 2, 1998), http://www.ashevillecityschools.net/files/_xNKf7_/f07179dc6c6be12d3745a49013852ec4/2110.pdf [<https://perma.cc/2WEG-4MQW>], but others are elected, e.g., CHAPEL HILL CARRBORO CITY SCHOOLS, N.C., POLICY CODE: 2110 (Apr. 23, 1998), <https://boardpolicyonline.com/bl/?b=chaphill#&&hs=142497> [<https://perma.cc/VPP5-QRR2>]. The North Carolina Supreme Court characterized the school district as “a governmental agency separate and distinct from the [c]ity.” *State v. Cooke*, 103 S.E.2d 846, 850 (N.C. 1958).

⁹⁸ MAEROFF, *supra* note 48, at 190 (“[F]ewer than 10 percent of the nation's school board members” are appointed.).

⁹⁹ Briffault, *The Local School District in American Law*, in BESIEGED, *supra* note 19, at 27.

¹⁰⁰ *50-State Comparison: Local School Boards*, EDUC. COMM'N OF THE STATES (2017), <http://ecs.force.com/mbdata/mbquestRT?rep=K12G713> [<https://perma.cc/6NHB-AR3C>].

¹⁰¹ *Id.*; see, e.g., N.Y. EDUC. LAW § 2590-b(1)(a) (McKinney 2017) (describing New York City); 105 ILL. COMP. STAT. 5/34-3(b) (2016) (describing Chicago).

¹⁰² *Local School Boards*, *supra* note 100; see, e.g., *supra* note 17 (discussing New Jersey's laws allowing for state takeover of school districts and their use in Newark).

those states are elected.¹⁰³ Often an appointed board only reigns in the state's major city or cities.¹⁰⁴ Importantly, even when the school board is politically dependent on the general government, as it is in those few places, it remains a separate legal entity.¹⁰⁵ Hence, for example, an appointed school district retains its separate financial standing¹⁰⁶ and is sued and sues discretely,¹⁰⁷ while city bodies cannot interfere with its decisions.¹⁰⁸

School districts that are politically dependent on a general government are thus atypical. Even in the few occasions where the district is politically dependent on the general government, that government does not normally control, nor is it liable for, the district's acts. In American law, in sum, the school district is almost always starkly dissimilar from city agencies—such as police or licensing departments—which politically and legally are city organs.

D. Summary: The School District's Unique Legal Position

American law treats education's provision and management in a unique fashion. The law's approach stands out not because it entrusts the task to local governments: many functions are similarly delegated to local governments. Rather, the attitude towards education is striking due to the identity of the local government picked. In contrast to its practice

¹⁰³ For example, in South Carolina, only four of the eighty-one school districts are appointed. S.C. SCHOOL BOARD ASS'N, BOARD MEMBER SELECTION AND MEETINGS (2016), http://scsba.org/general/aboutus_schoolboardfacts_bdmembersselection.pdf [<https://perma.cc/N886-TV3A>]; see S.C. CODE ANN. § 59-19-40 (2016) (enabling variation between districts). Most often, only the largest city's board is appointed. See *Local School Boards*, *supra* note 100; see, e.g., *supra* note 101 (New York and Chicago); 1991 MASS. ACTS 222–26 (Boston); 24 PA. CONS. STAT. § 6-696 (2013) (Philadelphia). The Pennsylvania provision, § 6-696, applies to districts of the “first class” and a separate state law provision, 53 PA. STAT. ANN. § 101, defines cities of the first class as those containing a population of over one million—i.e., only Philadelphia.

¹⁰⁴ See *Local School Boards*, *supra* note 100; see, e.g., *supra* note 101 (New York and Chicago); 1991 Mass. Acts 222–26 (Boston); 24 Pa. Cons. Stat. § 6-696 (2013) (Philadelphia). The Pennsylvania provision, § 6-696, applies to districts of the “first class” and a separate state law provision, 53 Pa. Stat. Ann. § 101, defines cities of the first class as those containing a population of over one million—i.e., only Philadelphia.

¹⁰⁵ E. EDMUND REUTTER, JR., *THE LAW OF PUBLIC EDUCATION* 155 (4th ed. 1994) (“It is essential . . . to stress here the basic separateness of [school district and general local governments].”).

¹⁰⁶ See, e.g., *Divisich v. Marshall*, 22 N.E.2d 327, 328–29 (N.Y. 1939). Thus, they remain separate borrowers and a city is not liable for district debt. See, e.g., Fran Spielman & Lauren FitzPatrick, *Rahm Likely Will Have to Rescue CPS, No Matter How Judge Rules*, CHI. SUN-TIMES (Apr. 27, 2017, 6:24 PM), <http://chicago.suntimes.com/news/rahm-likely-will-have-to-rescue-cps-no-matter-how-judge-rules/> [<https://perma.cc/2MUT-KQ2W>] (reporting on Chicago mayor's lack of formal obligation—and potential voluntary choice—to finance the school district's debt, despite his control of the district).

¹⁰⁷ See, e.g., S.C. CODE ANN. § 59-17-10; *Divisich*, 22 N.E.2d at 328.

¹⁰⁸ See, e.g., *Divisich*, 22 N.E.2d at 328.

respecting other vital local functions, the law refrains from empowering general local governments to supply and manage educational services. Instead, laws establish special local governments—school districts—for this purpose. These districts geographically overlap with general governments in slightly more than half the states, yet they remain politically and legally distinct from those governments nearly everywhere.

To underscore this peculiar legal nature, consider the resulting reality prevalent in the twenty-six states mandating correlation between the district's geographical boundaries and those of a general government. While the school district and the general government consequently serve the same population in these states, state laws insist on preserving the district's political and legal detachment. Geography thus cannot be held responsible for school governance's separation from governance over other local concerns—at least in these states. Law alone isolates it. The law assures that in America, education is a local function administered like no other. Detecting and assessing the motivations behind this strategy is the ensuing discussion's assignment.

II. THE HISTORY OF THE SCHOOL DISTRICT

The school district, as Part I demonstrated, occupies a special place in current American law. Why does the law rely on this peculiar institution? What normative values sustain it? An effective way to understand the rationales for the district's existence is by tracing its evolution. This Part presents the school district's legal history. The discussion unfolds chronologically, identifying transformative moments in the law's approach to public education's management.

This Part's story of the institution tasked with governing public education thus commences in Section II.A with a discussion of colonial Massachusetts: the birthplace, in America, of public schools, and, soon thereafter, of the school district. The school district then came of age as post-Independence America gradually grew into a democratic, capitalist, and continental republic. Section II.B accordingly presents the transmutations the school district underwent during the nineteenth century, which catapulted it into a government staple throughout the land. As that century neared conclusion, however, all established government precepts and institutions were strained and questioned, and so was the school district. Hence Section II.C focuses on the Progressive Era, when mass industrialization and immigration, alongside an accompanying reformist drive, reshaped the school district. The school district that emerged from those tumultuous decades of the late nineteenth and early twentieth

centuries is the institution we know today, as described in Part I.¹⁰⁹ Therefore, after reviewing that portion of its history, this Part concludes with a summary of the normative justifications that sustained the school district throughout the different stages of its history, as discerned in the Part's three Sections.

*A. The Nascent School District: Public Education
in Colonial Massachusetts*

1. The Original Legal Obligation to Provide Education: Satan and Local Power.—The starting point for a history of public education in America must be colonial Massachusetts. From its beginning, the Massachusetts Bay Colony was destined to blaze the trail for public education in the New World. The settlement of other early colonies was animated by material concerns;¹¹⁰ Massachusetts was different. It was established in 1629 with the aim of creating a perfect society. Its Puritan founders envisioned it “as a city upon a hill.”¹¹¹ The biblical metaphor embodied an aspiration that the new outpost prove to those left behind in Europe that a community could be organized around Calvinist tenets.¹¹² Such a utopian ideal of society mandated a commitment to the education of the young.¹¹³ That commitment led, almost as a matter of course, to the establishment of the first public school system in America. It also led, as a matter of almost complete happenstance, to the establishment of the first school districts in the English-speaking world.

Public education arrived on the colony's shores early. In 1647, less than two decades following colonization, the Massachusetts Bay Colony's legislature passed an act decreeing the creation of schools.¹¹⁴ The first

¹⁰⁹ Kenneth K. Wong & Emily Farris, *Governance in Urban School Systems: Redrawing Institutional Boundaries*, in SHAPING EDUCATION POLICY: POWER AND PROCESS 216 (Douglas E. Mitchell et al. eds., 2011) (explaining that though their number changed significantly over the years, districts' design remained stable).

¹¹⁰ See EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 45 (1975). Thus, throughout the colonial period, Virginia, for example, made no provision for public education. CORNELIUS J. HEATWOLE, *A HISTORY OF EDUCATION IN VIRGINIA* 58 (1916) (explaining that the only colonial laws in Virginia pertaining to the training of the young were regulations limited to orphans and poor children).

¹¹¹ GOVERNOR JOHN WINTHROP, *A MODEL OF CHRISTIAN CHARITY* (1630).

¹¹² See PERRY MILLER, *ERRAND INTO THE WILDERNESS* 11–12 (1956).

¹¹³ CAROLINE BENN & CLYDE CHITTY, *THIRTY YEARS ON: IS COMPREHENSIVE EDUCATION ALIVE AND WELL OR STRUGGLING TO SURVIVE* 1 (1996) (explaining that the modern concept of common education emerged following the Reformation).

¹¹⁴ *The Colony Records, 1642–1649*, in 2 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND 203 (Nathaniel B. Shurtleff ed., Boston, William White Press 1853) [hereinafter RECORDS OF MASSACHUSETTS BAY].

public education law in the world,¹¹⁵ its preamble gave voice to its Puritan underpinnings as it explained the law's rationale: "It being one chief project of [the] ould deluder, Satan, to keep men from the knowledge of [the] Scriptures, . . . and to the end that learning may not be buried in [the] grave of our forefathers. . . ." ¹¹⁶ The law proceeded to oblige smaller towns to appoint a teacher, and towns numbering a hundred families or more to operate a "gram[m]ar school[]." ¹¹⁷ Towns in breach were assessed annual fines. ¹¹⁸

The "ould deluder Satan" act is widely recognized as a landmark moment for American law: it inaugurated the public duty of providing schooling. ¹¹⁹ It is also historic, however, for rendering this duty a local—rather than colonial—obligation. It thereby set the blueprint for future American lawmakers. Yet, unlike modern lawmakers, the specific local entity the Act singled out was not a special purpose, new government. Rather, the onus was placed on existing, general governments—the towns themselves—to fulfill schooling obligations.

2. *School Governance Through Independence: The Town Displaced.*—The obligation to maintain the schools under the "ould deluder Satan" act shifted away from the general governments that were its original repository and onto new and separate governments in a gradual process that unfolded throughout the colonial era. This shift,

¹¹⁵ In Europe, at the time of the American Constitutional Convention, states did not meaningfully provide education. In the Catholic countries, "education as an affair of the State had not been thought of." ELLWOOD P. CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES* 85 (1934). During the Reformation, Martin Luther called for adoption of mandatory education laws and maintenance of schools. MARTIN LUTHER, *Letter to the Councilmen of All Cities in Germany That They Establish and Maintain Christian Schools* (1524), in 45 LUTHER'S WORKS 347 (Walther I. Brandt ed., 1962). Reformed states sometimes followed the call, yet the schools were to be run by the church, not the state. Thus, for example, as a result of the Scottish Reformation, the Scottish Privy Council adopted in 1616 a law mandating the creation of public schools that were to be supervised by the Episcopal Church. The School Establishment Act 1616, in 1 MISCELLANY OF THE MAITLAND CLUB: CONSISTING OF ORIGINAL PAPERS AND OTHER DOCUMENTS ILLUSTRATIVE OF THE HISTORY AND LITERATURE OF SCOTLAND 22–23 (1740).

¹¹⁶ RECORDS OF MASSACHUSETTS BAY, *supra* note 114, at 203 (revised from original old English).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Connecticut adopted an almost identical act in 1650. Code of Laws, Established by the General Court, May, 1650, in PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 554–55 (J. Hammond Trumbull ed., Hartford, Brown & Parsons 1850). New Hampshire, when it was separated from Massachusetts in 1679, first adopted a law requiring towns to respect their current obligations towards, among others, schoolmasters. Bounds & Powers of Towns, &c., June 1686, in 1 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD 115 (Albert Stillman Batchellor ed., 1904). It then adopted an act replicating the Massachusetts one. An Act for the Settlement & Support of Grammar Schools, May 1719, in 2 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD: 1702–1745, at 336 (Albert Stillman Batchellor ed., 1913). Throughout colonial times, these were the lone states providing public schooling.

completed by Independence, was precipitated by a confluence of two distinct efforts to address two separate challenges, both generated by the peculiar social circumstances and legal conditions of colonial Massachusetts. One challenge afflicted school management in the colony's urban center, Boston. The other beset school management in the colony's rural communities. Boston's predicament led to the stripping of management responsibility from the general government, marking the demise of the political overlap between the town government and the entity governing the schools. The rural quandary was responsible for the erosion of the geographical overlap between town boundaries and those of the entity governing the schools.

a. School governance in colonial Boston: the school committee's emergence.—In 1647, the year of the “ould deluder Satan” law’s adoption, Boston appeared well-situated to implement the Act’s edicts through its existing town government: Boston had already established a public school, the continent’s first, more than a decade earlier.¹²⁰ But Boston’s governance structure would prove unfit to manage schools, necessitating a new governance form—the school committee.

Boston faced problems in managing schools due to its unique status in the era’s law. The common law of the seventeenth century established and governed cities as royally chartered corporations.¹²¹ Several major colonial cities assumed this guise.¹²² Boston’s residents, however, refused to incorporate.¹²³ Instead, Boston became a “*quasi* corporation”: it functioned as a body politic and exercised corporate powers, but it lacked a charter.¹²⁴ The adamant opposition to incorporation stemmed from colonists’ abhorrence—grounded in their Puritan, communitarian faith—of government by a select few.¹²⁵ The corporate form separates ownership from management.¹²⁶ Like the business corporation governed by a handful of directors, a chartered English municipality was governed by a handful of councilors. Such a form of government, the Bostonians asserted,

¹²⁰ See *infra* note 129.

¹²¹ Frug, *supra* note 20, at 1090–91.

¹²² Howard Lee McBain, *The Legal Status of the American Colonial City*, 40 POL. SCI. Q. 177, 186 (1925).

¹²³ JOSIAH QUINCY, A MUNICIPAL HISTORY OF THE TOWN AND CITY OF BOSTON 22–33, 40 (Charles C. Little & James Brown eds., 1852).

¹²⁴ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 419–21 (John M. Gould ed., 1896).

¹²⁵ See Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 61–62 (1993).

¹²⁶ ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 66–68, 112–13, 196–97 (Transaction Publishers 1991) (1932).

“destroy[s] that equality which ought to subsist in all republic[is].”¹²⁷ Bostonians insisted on preserving the town’s existing form of government: government through town meetings, where all freemen voted.¹²⁸

Seeing that the town meeting was therefore the town’s sole legislative body, it was such a meeting that decided, in 1635, to establish America’s first public school—the Latin School.¹²⁹ It was also through such town-wide direct democracy that this school and others were managed. Town meetings made major, school-related “policy” decisions—such as taxation.¹³⁰ They also settled minor daily management issues¹³¹: the schoolmaster was appointed by a town meeting vote,¹³² and teachers’ salaries and supplies were also sorted out there.¹³³

Such heightened direct democracy was, however, unsustainable in the long run. It was impractical to call a town meeting to discuss each minor school-related issue whenever it arose. Thus, gradually, the town meeting delegated daily management duties to the town’s selectmen: the town’s executive committee.¹³⁴ Between 1644 and 1689, almost all records of school management in Boston are references to the selectmen’s acts or instructions addressed at them.¹³⁵ The selectmen assumed the task of hiring teachers and of transacting in school lands.¹³⁶ Over time, the practice was codified: a 1654 Massachusetts act commended to the selectmen teacher supervision and removal,¹³⁷ and a 1693 act held them responsible, alongside

¹²⁷ *Incorporation, pro and con.*, MASS. CENTINEL, Nov. 9, 1785.

¹²⁸ *See Boston*, MASS. CENTINEL, May 15, 1784.

¹²⁹ *See Boston Town Records, 1635*, in SECOND REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 4–5 (2d ed. 1881); *Boston Latin School*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Boston-Latin-School> [<https://perma.cc/4TD9-QRRU>].

¹³⁰ *See, e.g., Boston Town Records, 1645*, in SECOND REPORT, *supra* note 129, at 86 (discussing a tax set at a 1645 meeting).

¹³¹ HENRY SUZZALLO, *THE RISE OF LOCAL SCHOOL SUPERVISION IN MASSACHUSETTS* 5–8 (1906).

¹³² *Id.* at 5.

¹³³ EDWARD M. HARTWELL ET AL., *BOSTON AND ITS STORY* 162 (1916).

¹³⁴ A 1641 act empowered towns to choose “a convenient number of fitt men to order the planting or prudentiall occasions of that Town, according to Instructions given to them in writeing.” MASS. BODY OF LIBERTIES § 74. That same year Boston named individuals as “chosen to order the Town’s occasions.” *Boston Town Records, 1641*, in SECOND REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 61 (1877). They are first alluded to as “selectmen” in 1642. *Id.* at 72.

¹³⁵ SUZZALLO, *supra* note 131, at 14–15.

¹³⁶ *Boston Town Records, 1655*, in SECOND REPORT, *supra* note 134, at 129; *Boston Town Records, 1657*, in SECOND REPORT, *supra* note 134, at 140; *Boston Town Records, 1711*, in 8 REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 76 (1883); *Boston Town Records, 1714*, in 8 REPORT, *supra*, at 103.

¹³⁷ 3 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY 343–44 (Nathaniel B. Shurtleff ed., 1854).

the town meeting, for teachers' maintenance.¹³⁸ A 1711 act then placed the power to certify teachers with the selectmen.¹³⁹

But the degree to which the selectmen could improve on the town meeting's shortcomings in school management was checked. Selectmen were limited in time, powers, and ability to acquire experience.¹⁴⁰ They lacked legislative capacities,¹⁴¹ and as executives their effectiveness was curbed by the need to constantly stand for reelection: terms originally stood at six months, and later at one year.¹⁴² The town's scheme for school governance needed further adjustment.¹⁴³

That adjustment begot the first step towards the separate school board. Beginning in the early eighteenth century, a mechanism was devised to aid the selectmen in their challenge of supervising schools: periodically appointed "visitation committees."¹⁴⁴ The first such committee was appointed in 1709 on an ad hoc basis to seemingly treat a specific matter: the Latin School master's salary.¹⁴⁵ But that committee exceeded its mandate and advocated a permanent arrangement for effective school supervision through appointing "inspectors of the school."¹⁴⁶ The town meeting abided, first intermittently,¹⁴⁷ then, starting in 1720, consistently.¹⁴⁸ The town meeting initially assigned the visitation committee the task of

¹³⁸ 1 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 63 (Ellis Ames et al. eds., 1869).

¹³⁹ *Id.* at 681–82.

¹⁴⁰ SUZZALLO, *supra* note 131, at 61.

¹⁴¹ For example, selectmen could not set teachers' pay. *Id.* at 28–30.

¹⁴² DARRETT B. RUTMAN, WINTHROP'S BOSTON: PORTRAIT OF A PURITAN TOWN 1630–1649, at 224 (1965).

¹⁴³ The first reaction to the selectmen's deficiencies was a short-lived resolution to "restore [the] former Custome & practice in managing the affaires of the free schools." *Boston Town Records, 1689, in 7 REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 197 (1881).*

¹⁴⁴ Often the town meeting instructed the selectmen to select people to join them in a visitation committee. *E.g., Boston Town Records, 1721, in 8 REPORT, supra* note 136, at 163.

¹⁴⁵ The original town meeting establishing the committee did not refer to it as a visitation committee—but rather as a "committee to consider the affairs relating to the free grammar school." *Boston Town Records, 1709, in 8 REPORT, supra* note 136, at 63. An earlier committee had already once made recommendations respecting schooling affairs. An ad hoc committee constituted to treat a non-school-related matter—a transaction with town-owned land in Braintree—recommended that proceeds be used for school purposes. *Boston Town Records, 1708, in 8 REPORT, supra* note 136, at 56.

¹⁴⁶ *Boston Town Records, 1709-1710, in 8 REPORT, supra* note 136, at 65–66.

¹⁴⁷ For example, in 1712 an ad hoc committee was elected to report on the advisability of establishing a writing school in the North End; "Inspectors of the Grammar Schools for the year ensuing" were elected in 1718. HARTWELL ET AL., *supra* note 133, at 162–63.

¹⁴⁸ *E.g., Boston Town Records, 1720, in 8 REPORT, supra* note 136, at 151; *Boston Town Records, 1721, in 8 REPORT, supra* note 136, at 162; *Boston Town Records, 1722, in 8 REPORT, supra* note 136, at 171.

visiting the schools and inspecting their performance. Later, the committee began recommending teacher dismissals¹⁴⁹ and instructing teachers.¹⁵⁰

Throughout the closing decades of the colonial era, the visitation committee established its presence within Boston's governance scheme.¹⁵¹ Like committees in other fields, its creation owed to the town meeting's inability to provide specialized and ongoing administration.¹⁵² This need delineated the committee's role, including its close ties to the general town government. The town meeting remained the legislative body governing the schools,¹⁵³ appointing, at its pleasure, the advisory visitation committee—whose advice it always then followed.¹⁵⁴

This informal, officially dependent committee, a creature of the colonial era, was transformed into a formal school committee with separate and established powers—into, that is, a “school board”—at the end of the colonial era. In the Revolution's aftermath, the town meeting appointed a committee to draft a new school system.¹⁵⁵ The 1789 drafting committee had to settle a raging debate: in a free society, how *public* should public schools be in ethos, constituency, and governance? Some prominent Bostonians, like John Adams, fearing popular mobs unleashed by old constraints' collapse, believed that only the elite should participate in government, and that high-level education should be its lot alone.¹⁵⁶ Others, led by Samuel Adams, condemned, as a threat to democracy, public schools' drift towards the model of exclusivity set by private schools.¹⁵⁷

Through testimonials, the appointed drafting committee learned that most Bostonians shared this second view.¹⁵⁸ Residents desired public schools that would instill, in a diverse student body, the values of the entire community.¹⁵⁹ Such schools, the committee reckoned, could not be maintained through the existing governance system: visitation committees consisted of notables, often appointed by the selectmen rather than the

¹⁴⁹ *Boston Town Records, 1721*, in 8 REPORT, *supra* note 136, at 164.

¹⁵⁰ *Boston Town Records of 1724*, in 13 REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON 134, 153, 165 (1885).

¹⁵¹ The earliest existing records of a school committee are from Salem, dating to 1712. GEORGE H. MARTIN, THE EVOLUTION OF THE MASSACHUSETTS PUBLIC SCHOOL SYSTEM 150–51 (1898).

¹⁵² STANLEY K. SCHULTZ, THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789–1860, at 6 (1973).

¹⁵³ Thus, for example, the town meeting still voted on appropriations. *Id.* at 7.

¹⁵⁴ SUZZALLO, *supra* note 131, at 107.

¹⁵⁵ *Boston Town Records, 1726*, in 13 REPORT, *supra* note 150, at 153.

¹⁵⁶ SCHULTZ, *supra* note 152, at 12.

¹⁵⁷ *Id.* at 12–13.

¹⁵⁸ *Id.* at 13–14.

¹⁵⁹ *Id.*

town people. A more representative body was desired.¹⁶⁰ Yet, colonial experience had taught that the town's sole existing popular body—the town meeting—was inadequate for the task.

Guided by the committee's report, the town meeting proceeded to solve this conundrum by erecting a new, popularly elected body to control schools. An ordinance, "The System of Public Education," was adopted.¹⁶¹ This ordinance lay, as one historian observed, "the foundation of the first comprehensive system of public schools in any American city."¹⁶² The ordinance detailed the number of schools to exist in different neighborhoods, students' ages, and curriculum.¹⁶³ Most importantly for our purposes, it entrusted the schools' management into the hands of a new body: the "school committee." This committee was to consist of twelve members elected by residents. Its duties included regularly inspecting the schools, devising rules for the schools' management, setting school days and hours, and determining instruction methods.¹⁶⁴

This new school committee was the first continuous, politically separate government controlling schools in history.¹⁶⁵ Its genesis, as this Section illustrated, can be attributed to early Boston's peculiar quandaries: an emerging metropolis whose population was dedicated to democratic values yet lacked representative bodies.¹⁶⁶ These unique local foundations notwithstanding, the school committee model was—eventually—to spread well beyond Boston.

b. School governance in rural colonial Massachusetts: the school district's emergence.—While the crumbling of the political overlap between school and general governance—the emergence of the school committee—was the child of the colony's urban center, the breakdown of the geographical overlap between the school government's boundaries and the general government's—the emergence of the school

¹⁶⁰ *Id.* at 19.

¹⁶¹ Boston, Mass., Ordinance, The System of Public Education (Oct. 15, 1789).

¹⁶² SCHULTZ, *supra* note 152, at 14.

¹⁶³ Boston, Mass., Ordinance, The System of Public Education.

¹⁶⁴ Within a month, the committee picked books to be used in schools, settled on a curriculum for arithmetic, determined eligibility criteria for students, and divided schools into classes. *Id.* at 3. Less than three months later, the town meeting voted to make the committee's powers general. *Boston Town Records, 1790*, 31 VOLUME OF RECORDS RELATING TO THE EARLY HISTORY OF BOSTON 215 (1903).

¹⁶⁵ It was preceded by a much earlier scheme adopted by Dorchester in 1645, whereby schools were to be controlled by three Wardens chosen for life. Ironically, the scheme was short-lived. HARTWELL ET AL., *supra* note 133, at 81–82. One commentator doubts it was ever implemented. SUZZALLO, *supra* note 131, at 70.

¹⁶⁶ A few other towns had already relied sporadically on temporary committees. SUZZALLO, *supra* note 131, at 63–67.

district—finds its origins in Massachusetts’s more rural areas. Originally, like Boston, Massachusetts’s smaller communities governed schools through town meetings.¹⁶⁷ Unlike in Boston, direct control through town meetings was sustainable as populations remained relatively small. The problem these communities encountered in due course was different: the spatial spread of their small populations rendered the town school itself unsustainable.

At the outset of colonial settlement, all residences in a New England town were located in vicinity to the town center, the site of its civic institutions: town hall, church, and school.¹⁶⁸ Puritan leanings mandated closeness.¹⁶⁹ But by the eighteenth century, religious commandments’ hold lessened, while the allure of uncultivated land in town outskirts grew.¹⁷⁰ As a result, residents began migrating from the center.¹⁷¹ Such dispersal complicated the town’s religious and civic life. Towns began subdividing themselves into church parishes with their own ministers, to road districts maintaining their own roads, and then into separate districts for militia recruitment and tax collection.¹⁷² Such parishes and districts, though set for specific goals, became the sites of political demands for new subtown facilities, among them schools.¹⁷³

The problem presented by the existing schooling system, revolving around the town school, was apparent. As towns’ populations scattered, fewer children could conveniently attend the town school.¹⁷⁴ Parents hardly relying on the school would only grudgingly commit taxes to fund it.¹⁷⁵ Consequently, in the eighteenth century’s opening decades a growing number of towns were fined for breaching their obligations under the “ould

¹⁶⁷ *Id.* at 7–8.

¹⁶⁸ SUMNER CHILTON POWELL, *PURITAN VILLAGE: THE FORMATION OF A NEW ENGLAND TOWN* 7–8 (1963).

¹⁶⁹ RICHARD E. FOGLESONG, *PLANNING THE CAPITALIST CITY: THE COLONIAL ERA TO THE 1920S* 36 (1986).

¹⁷⁰ The disappearance of Indian threats following Queen Anne’s War further lessened incentives to congregate. MARTIN, *supra* note 151, at 74.

¹⁷¹ MACY CAMPBELL, *RURAL LIFE AT THE CROSSROADS* 281 (1927).

¹⁷² CUBBERLEY, *supra* note 115, at 69–72.

¹⁷³ *Id.* at 72.

¹⁷⁴ *Id.* at 69–72.

¹⁷⁵ See GEORGE WINGATE CHASE, *HISTORY OF HAVERHILL, MASSACHUSETTS, FROM ITS FIRST SETTLEMENT, IN 1640, TO THE YEAR 1860*, at 237 (1861) (reporting on petitions by residents of Haverhill in 1712 for exemption from school tax due to the town school’s remoteness).

deluder Satan” law.¹⁷⁶ A disapproving colonial legislature increased the fines in 1702 and 1718.¹⁷⁷

To avoid this increasingly costly liability, towns had to persuade remote districts’ and parishes’ residents to pay taxes. After attempts at moving the town school between districts¹⁷⁸ were derailed by practical hurdles,¹⁷⁹ towns abandoned the idea of the town school altogether. They succumbed to pressure from the parishes and districts and began operating multiple schools—assigning a school to each district.¹⁸⁰ Furthermore, the town meeting ceded to each district’s residents control over their district’s school.¹⁸¹ Local residents would not only pick their school’s site, but also appoint teachers.¹⁸² In 1768 the colonial legislature endorsed the trend: acknowledging the difficulty in providing schooling in towns’ remote “precincts,” it empowered individual precincts to raise funds for their own schools.¹⁸³ Next came the landmark step—the legislature fully formalized such precincts’ position.

3. *The 1789 Act: The School Board and District Legislated.*—In 1789, the newly independent state of Massachusetts updated its colonial educational system via a new statute.¹⁸⁴ In its school governance provisions, this 1789 Act instituted both of the developments discussed in the preceding Section: Boston’s development of the politically distinct school committee, and the smaller communities’ establishment of geographically distinct school districts. On the former front, the Act consistently listed among the bodies responsible for a town’s schooling obligations the school “committee.”¹⁸⁵ Furthermore, by expanding towns’ educational duties,

¹⁷⁶ MARTIN, *supra* note 151, at 69–70.

¹⁷⁷ Act of June 28, 1701, ch. 10, § 1, 1701 Mass. Acts 470, 470; Act of June 17, 1718, ch. 2, 1718 Mass. Acts 100.

¹⁷⁸ Under the “moving school” scheme, the town school stayed in each parish for a time period proportional to the education taxes paid by each. CUBBERLEY, *supra* note 115, at 72. Haverhill adopted this scheme in 1711. CHASE, *supra* note 175, at 237.

¹⁷⁹ Not too surprisingly, records indicate that towns encountered difficulty in hiring teachers willing to constantly move. *Id.* at 236.

¹⁸⁰ For example, in 1711, petitions for separate schools in parts of Haverhill were accepted by the town meeting, and in 1714, another such petition was rejected. *Id.* at 237–39.

¹⁸¹ *Id.* at 457; WILLIAM J. REESE, *THE ORIGINS OF THE AMERICAN HIGH SCHOOL* 25 (1995).

¹⁸² CUBBERLEY, *supra* note 115, at 72–73, 72 n.1.

¹⁸³ Act of Feb. 26, 1768, ch. 16, 1768 Mass. Acts 988. Two years earlier, Connecticut provided that “each Town . . . shall have full Power and Authority to divide themselves into proper and necessary Districts for keeping their Schools.” Act of Oct. 9, 1766, 1766 Conn. Pub. Acts 327. New Hampshire was the first state to approve the practice in 1716. Act of May 18, 1716, 1716 N.H. Laws 203.

¹⁸⁴ Act of June 25, 1789, ch. 19, 1789 Mass. Acts 416.

¹⁸⁵ *Id.*

saddling their existing governments with new and complex obligations,¹⁸⁶ the Act generated everywhere the conditions that had already pressed Boston's town government to create a separate school committee.¹⁸⁷ On the district front, the 1789 Act consistently listed not just towns, but also "districts," as holders of duties and powers.¹⁸⁸ Indeed, it noted no difference between the two entities—so much so that districts, like towns, were authorized to subdivide themselves into districts.

While formally the state legislature in this 1789 law did not combine the two ideas—the separate school committee and the individual school district—towns proceeded to do so.¹⁸⁹ Several towns created multiple district committees.¹⁹⁰ One even forsook for a while a town-wide school committee, maintaining only separately elected district committees.¹⁹¹

Massachusetts thus exited its colonial journey with a school governance scheme very different from the one it had when embarking on that journey. The initial principle of reliance on local governments was never abandoned, but the identity of the local government relied upon was altered. The shift away from general governments—towns—was not, despite later commentators' claims,¹⁹² primarily the result of principled institutional design choices. Rather, it was first and foremost generated by the era's special exigencies. The school committee, as a separate political body, was the fruit of an unyielding desire among Bostonians to retain democratic control over schools when the town's legal regime, inspired by Puritan ideals, offered no forum for effective democratic control. Similarly, the school district, as a geographical subdivision, was a product of unique patterns of Puritan settlement (i.e., the concentration of residents' lives around one center) and its unraveling. The need to accommodate new realities within old ideological precepts is to be credited for the first appearance in statute of the term "district" in the educational context, and for the legislative recognition of a politically separate local body managing

¹⁸⁶ For example, the Act required an inspection of all schools every six months, regulation of student attendance, and certification of all schools. *Id.*

¹⁸⁷ See SUZZALLO, *supra* note 131, at 105. Thus, for example, Haverhill immediately established a committee. CHASE, *supra* note 175, at 441.

¹⁸⁸ See Act of June 25, 1789, 1789 Mass. Acts 416. Citing the 1789 Act, Haverhill divided itself into districts in 1791. CHASE, *supra* note 175, at 457.

¹⁸⁹ For example, Haverhill empowered districts to erect and manage their own schools, and further subdivide themselves. *Id.*

¹⁹⁰ *E.g.*, WILLIAM A. EMERSON, HISTORY OF THE TOWN OF DOUGLAS 90–91 (Boston, Frank W. Bird 1879).

¹⁹¹ J.H. TEMPLE, HISTORY OF NORTH BROOKFIELD, MASSACHUSETTS 256 (1887).

¹⁹² See SCHULTZ, *supra* note 152, at 20; SUZZALLO, *supra* note 131, at 3–4.

schools.¹⁹³ In the following century this legislative recognition would evolve into legislative decree, in Massachusetts—and elsewhere.

B. The Ascendant School District: Nineteenth-Century Expansion

The school district was invented in colonial times, but it became America's default school government during the republic's first century. At Independence, the school district and committee were recognized as potential forms of school governance in New England.¹⁹⁴ By the nineteenth century's second half, the institution's grip over educational matters was absolute and its reach continental. The century thus witnessed the culmination of two processes. First, the district and board were consolidated as the sole body governing schools, rather than one of several optional bodies. Second, the scheme spread beyond New England to other areas which did not face the peculiar colonial conditions that had engendered it. The study of these twin processes yields further insights into the motivations for American law's embrace of the school district.

1. Consolidating the School District in Nineteenth-Century Massachusetts.—Although the importance of colonial Massachusetts to the school district's emergence cannot be exaggerated, the importance of the school district as an institution at that time can easily be exaggerated. The school committees and districts of the 1789 Act were tentative institutions. The Massachusetts law recognized them as options: towns could create committees and could subdivide into districts. These options accompanied, rather than replaced, the other bodies empowered to run the schools: selectmen or town meetings.¹⁹⁵ In other words, the school district was a government for educational affairs in Massachusetts, but it was not *the* government for educational affairs in Massachusetts. To assume that status, the school district had to become mandatory—which it did by the 1820s—and then had to displace all other local governments from the field of education—which it did by the Civil War.

a. The school district made mandatory.—As seen in the preceding Section, in 1789 the state legislature adopted a permissive approach towards the school district. Almost immediately thereafter,

¹⁹³ Connecticut followed suit in 1798 with an act empowering "School Societies" to elect "Committees" and subdivide into school "districts." Act of May 10, 1798, 1798 Conn. Spec. Acts 481, 491.

¹⁹⁴ This was only true in Puritan New England: the colonies of Massachusetts, Connecticut, and New Hampshire. Non-Puritan Rhode Island did not have a public schools law.

¹⁹⁵ Thus, for years Haverhill's school committee submitted its regulations to the town meeting for approval. CHASE, *supra* note 175, at 441, 455–57.

however, it found that approach unsatisfactory, probably due to disappointment with towns' failings to meet schooling obligations. Educational conditions only worsened after the 1789 law's new mandates were adopted. The post-revolutionary decades were years of decline for Massachusetts's schools.¹⁹⁶ Post-war rebuilding struck taxpayers as more pressing.¹⁹⁷ The reluctance to pay for schools was exacerbated by populations' continued, war-induced dispersal away from centrally located schools. Most towns thus failed to comply with state-ordered obligations to operate schools.¹⁹⁸

Since fault was ascribable to towns' funding priorities, the state legislature reacted by shifting some of the financial decisionmaking to school districts. An 1800 act empowered "School Districts" to raise funds, by taxation, for a school's construction and maintenance.¹⁹⁹ The Act gave the town no power to block such initiatives or to access funds raised for funding schools. This Act is exceptionally important to the school district's legal history. Due to a desire to assure separate and protected revenue for schools, school district finances were, for the first time, isolated from town finances and governments. The state legislature would formalize the school districts' separate standing—in all pertinent issues—in an 1817 act announcing school districts to be separate bodies politic, empowered to sue and be sued.²⁰⁰

In the following decade, the legislature did even more to entrench the politically separate school government. In 1822, it incorporated the City of Boston.²⁰¹ Now that Boston had a separate representative government—an elected mayor and council—the original impetus for the school committee's establishment disappeared. Thereupon or soon thereafter, other colonial committees set to address specific tasks—fire, health, etc.—would accordingly be subsumed into the new city administration.²⁰² The new representative city government was, after all, put in place precisely to fill the gaps in town meeting management that these committees had bridged before.

¹⁹⁶ LAWRENCE KOTIN & WILLIAM F. AIKMAN, LEGAL FOUNDATIONS OF COMPULSORY SCHOOL ATTENDANCE 20–24 (1980); SCHULTZ, *supra* note 152, at 8. This lack of interest in education prevailed throughout the nation. CUBBERLEY, *supra* note 115, at 110–11.

¹⁹⁷ SCHULTZ, *supra* note 152, at 8.

¹⁹⁸ *Id.*

¹⁹⁹ Act of Feb. 28, 1800, ch. 66, 1799 Mass. Acts 455.

²⁰⁰ Act of June 13, 1817, ch. 14, 1817 Mass. Acts 397.

²⁰¹ Act of Feb. 23, 1822, ch. 110, 1822 Mass. Acts 734.

²⁰² HARTWELL ET AL., *supra* note 133, at 195–96. The Overseers of the Poor were transformed into appointed city officials somewhat later, in 1864.

In stark contrast, however, the law chartering Boston insisted that the separate school committee be maintained.²⁰³ In 1827 that command was expanded beyond Boston: the legislature mandated that all towns establish a separately elected school committee.²⁰⁴ Furthermore, towns containing several school districts were obliged to keep separate “prudential committees” for each to oversee that district’s school and hire teachers.²⁰⁵

This 1827 law transformed the school committee from an optional governing body into a mandatory one. The immediate reason, as seen here, was to assure funding. The move was also permeated, however, by those original values spawning Boston’s committee, which made the committee’s abolition upon cityhood unthinkable: principles of citizen representation. Commenting on the 1827 law decades later, one writer described it as “mark[ing] the utmost limit to the subdivision of American sovereignty—the high-water mark of modern democracy.”²⁰⁶

b. The school district made supreme.—For practical funding concerns and ideological democratic commitments, the 1827 Act institutionalized the school district we know today—a separate political entity. One legal attribute of the modern school district was still missing though: exclusivity. All other local governments were yet to be stripped of their concurrent powers in the education field. This feat was accomplished in the ensuing turbulent decades of the Jacksonian Era, when social shifts gave rise to modern ideas about public schooling’s role, and with them, a new idea about its governance’s desired nature.

The school scheme enacted in 1827 was applied to a state that was very different, economically and socially, from the state the earlier 1789 Act had confronted. Manufacturing and commerce had begun their unstoppable ascent, and cities were exploding.²⁰⁷ Boston’s population almost doubled between 1800 and 1820; then, between 1820 and 1860, it quadrupled.²⁰⁸ Many new residents were immigrants: by 1860, a third of the

²⁰³ Act of Feb. 23, 1822, § 19, 1822 Mass. Acts 746.

²⁰⁴ Act of Mar. 10, 1827, ch. 143, 1827 Mass. Acts 557, 560.

²⁰⁵ Haverhill immediately abided. CHASE, *supra* note 175, at 497.

²⁰⁶ MARTIN, *supra* note 151, at 92.

²⁰⁷ Edward L. Glaeser, *Reinventing Boston: 1630–2003*, 5 J. ECON. GEOGRAPHY 119, 120–22 (2005).

²⁰⁸ Richard C. Wade, Foreword, in SCHULTZ, *supra* note 152, at vii. In 1800, Boston boasted 24,937 residents; in 1820, 43,298; and in 1860, 177,840.

city's residents were foreign.²⁰⁹ Newcomers were mostly poor and working class—products of the new manufacturing-based economy.²¹⁰

The city's elite perceived this new populace as a threat, but believed it redeemable.²¹¹ Boston's Brahmins saw the school as a tool that could tackle the challenge. Horace Mann, the common school's founder, proclaimed in 1841, "the Common School is the greatest discovery ever made Other social organizations are curative and remedial; this is a preventive and an antidote" ²¹² A public school system offered great promise in troubling social times. Unfortunately, the existing system Mann and others originally encountered in Boston could not have struck them as capable of living up to this promise.²¹³ The system was exceptionally disorganized. Specifically, it was incapable of assigning students to schools or supervising attendance,²¹⁴ served only a small fraction of the population,²¹⁵ and left teachers with little guidance while instilling outdated skills.²¹⁶

To fulfill their envisioned promise in exacting times, the schools had to be fixed.²¹⁷ The fix, reformers reckoned, should derive from the same forces generating the new challenges.²¹⁸ The industrial order had replaced home-based, small manufacturing with large, planned, and hierarchical factories. The values that had revolutionized industry should, reformers believed, be employed to revolutionize antiquated schooling as well.²¹⁹

²⁰⁹ *Id.*

²¹⁰ Josiah Quincy, *Social Life in Boston*, in 4 THE MEMORIAL HISTORY OF BOSTON 13–14 (Justin Winsor ed., 1881).

²¹¹ SCHULTZ, *supra* note 152, at 25.

²¹² Horace Mann, *Introduction*, 3 COMMON SCHOOL J. 1, 15 (1841).

²¹³ The same was true outside of Boston, as reports received by Mann indicated. Jonathan C. Messerli, *Localism and State Control in Horace Mann's Reform of the Common School*, 17 AM. Q. 104, 112–13 (1965).

²¹⁴ SCHULTZ, *supra* note 152, at 105–06.

²¹⁵ JOSEPH M. WIGHTMAN, ANNALS OF THE BOSTON PRIMARY SCHOOL COMMITTEE 91 (1860).

²¹⁶ JAMES CARTER, LETTERS TO THE HON. WILLIAM PRESCOTT, LL.D., ON THE FREE SCHOOLS OF NEW ENGLAND, WITH REMARKS UPON THE PRINCIPLES OF INSTRUCTION 55 (1824).

²¹⁷ Mann's educational worldview drew on his general faith, characteristic of the Whig movement of which he formed part, that the rise of technology was not a harbinger of social evils, but that it required action by the superior power of the state to supplant the apparent abdication of traditional responsibilities by smaller units of authority within the state. Messerli, *supra* note 213, at 106, 117 n.46.

²¹⁸ SCHULTZ, *supra* note 152, at 106, 116. Their agitation also followed students' disastrous performance in centrally administered tests in May 1845. *Id.* at 128.

²¹⁹ NATHAN BISHOP, FIRST SEMI-ANNUAL REPORT OF THE SUPERINTENDENT OF PUBLIC SCHOOLS OF THE CITY OF BOSTON 6 (1852) ("[I]n organizing a system of popular education, the same practical judgment is to be exercised in making special adaptations of means to ends, as in any manufacturing or other business enterprise.").

Planning, order, hierarchy—in one word, centralization—were seen as imperative for public schooling’s success.²²⁰

These ideas required abandoning the haphazard way services were provided within existing schools, and thus, for example, reformers imported the Prussian grade system for dividing children into age-based classes.²²¹ But more importantly, the new organizational ideas from manufacturing mandated revising school governance. The new factory system propagated the conviction that better performance is achieved through better management.²²² Manufacturing prospered thanks to the assembly-line production model. Activists set out to replicate this model for schools, imagining the educated child as the end product.²²³ Assembly lines required top-down management: the manufacturing corporation relied on an executive board. Accordingly, the reformers concluded that to replicate the clean efficiency of the assembly line, school management by a compact body of professional managers was necessary.

By definition, the city’s general—and political—bodies could not fulfill this role. They did not consist of professional managers, and were premised on broad, open-ended, and inclusive decisionmaking.²²⁴ A separate body was necessary. The existing school committee was such a separate body, containing an executive board’s seeds. But only the seeds. The contemporaneous committee’s powers and standing in relation to other city bodies, molded to satisfy its post-Independence rationale—political representation—was in fact the antithesis of the desired centralized governance form.²²⁵

To accommodate the shift in separate school governance’s rationale, the committee’s standing within the governing system had to, and did, change. The change would generate a school committee of exclusive powers in the educational realm.²²⁶ Since the reformers’ paramount goal

²²⁰ SCHULTZ, *supra* note 152, at 142.

²²¹ HORACE MANN, SEVENTH ANNUAL REPORT 21–23 (1844).

²²² A contemporary succinctly noted: “the [free school system’s] influence has not been the greatest and best which the *same means*, under better management, might produce.” James G. Carter, *Letters on the Free Schools of New England*, in 1 AMERICAN JOURNAL OF EDUCATION, No. XI 661 (1826).

²²³ BISHOP, *supra* note 219, at 8–9.

²²⁴ Boston’s legislature consisted of a Common Council of seventy-five members elected by ward and a Board of Aldermen of eight. CHARTER OF THE CITY OF BOSTON AND ORDINANCES MADE AND ESTABLISHED (1827).

²²⁵ Presenting a reform plan to the Rhode Island legislature, one Mann disciple explained that “civilized men had to decide for the urban poor how to best raise them from barbarism.” HENRY BARNARD, REPORT ON THE CONDITION AND IMPROVEMENT OF PUBLIC SCHOOLS OF RHODE ISLAND 34 (1846).

²²⁶ SCHULTZ, *supra* note 152, at 41.

was centralization, the committee's powers were augmented and competing power centers weakened. Gradually the committee became *the* decisionmaker in all school affairs. For example, as early as 1818, the Boston school committee insisted on appointing a primary school board declaredly opposed to the policies of the town meeting.²²⁷ Then in 1835, a law announced that all educational powers lay with the committee, and removed the city's aldermen from participating in school committee deliberations.²²⁸ In 1837, the committee proclaimed sole discretion in decisions respecting the assignment of students to schools.²²⁹ Finally, the committee was empowered to appoint a professional superintendent, emulating a corporate board appointing an expert foreman.²³⁰

At the break of the Civil War, therefore, Boston had a politically independent body governing its schools, as it had had at the Revolution's conclusion.²³¹ But that committee was dissimilar in its functioning—and more prominently, in its animating rationale—from its earlier version. Originally, the school committee was established as the answer to a dearth of representative bodies. Now it was the purveyor of centralized management. The new rationale made the committee indispensable even after Boston had other representative bodies that could have assumed democratic control of schools. Moreover, centralization made an independent school board appear crucial everywhere public schooling was introduced—irrespective of the question whether other local representative governments existed in those places. With this new rationale propelling the school committee, the legal institution was well-positioned to pervade an ever-expanding nation.

2. *Nationalizing the School District.*—Until this point in American legal history, the school district's story had been a distinctly New England affair. That began to change in the nineteenth century's middle decades. During those decades, the school district, already well ensconced in New England thanks to developments just reviewed, spread throughout the nation. Previously, other states had not recognized school committees or districts. But neither did they recognize public schools.²³² Throughout the

²²⁷ *Id.* at 41.

²²⁸ Act of Apr. 7, 1835, ch. 127, 1835 Mass. Acts 480.

²²⁹ SCHULTZ, *supra* note 152, at 119.

²³⁰ On the campaign to empower boards to appoint superintendents, see JOSEPH M. CRONIN, *THE CONTROL OF URBAN SCHOOLS: PERSPECTIVE ON THE POWER OF EDUCATIONAL REFORMERS* 53–55 (1973).

²³¹ See *supra* notes 164–66 and accompanying text.

²³² CARROLL D. WRIGHT, *THE NEW CENTURY BOOK OF FACTS: A HANDBOOK OF READY REFERENCE* 976–78 (1909) (listing public schools' history in the different states).

century, the two progressed hand in hand across the states: wherever public education was introduced, a separate body to govern schools emerged.²³³ But the universal nature of this end result obscures its diverse roots. The following review of the processes through which the school district scheme was instituted in different states reveals, in order, four distinct motivations for its adoption: imitation, lack of other local governments, political needs for community-level decisionmaking, and funding necessities.

The first, and inarguably decisive, reason for the school district's spread during the nineteenth century was emulation. Although the body was originally created due to the special, and parochial, circumstances of colonial Puritan New England, by the nineteenth century the district was a decades-, if not centuries-old characteristic of the country's first public schooling system.²³⁴ Lawmakers thus viewed the school district as essential for an education system.

This attitude clearly reigned in the first non-New England states to establish public education. New York and Ohio were both heavily settled by New Englanders, whose advocacy led to the enactment in those states, in 1812 and 1824, respectively, of school laws replicating Massachusetts's 1789 Act.²³⁵ The pattern was similar in Midwestern states admitted to the Union later, even those with a less marked presence of New Englander settlers.²³⁶ The Michigan Supreme Court, for example, explicitly identified the state's 1827 public education law as modeled after Massachusetts's, and thus read it as aiming to emulate the New England-style school district system.²³⁷

Michigan was also impacted by the second reason responsible for the nineteenth-century spread of the school district system: new states' origins

²³³ Even the few states diverging from the Massachusetts scheme relied on school districts. South Carolina's first education law established a state-centric system; yet it still divided the state into districts, each managed by local commissioners, who were governor-appointees. 1811 S.C. Acts 27–30. Maryland's early law empowered county courts, which appointed county-level school commissioners. The latter, in turn, divided counties into school districts—deemed bodies politic—whose trustees were elected. 1825 Md. Laws 130–31, 142.

²³⁴ See *supra* Sections II.A–B.1.

²³⁵ 1812 N.Y. Laws 353, 392, 482, 600–01; 1824 Ohio Laws 36–38. In 1805, Ohio had permitted the creation of school districts, 1805 Ohio Laws 69, and in 1820, an optional Massachusetts scheme was introduced, 1820 Ohio Laws 51–52. The scheme was made mandatory several years later. 1824 Ohio Laws 36–38.

²³⁶ E.g., 1824 Ind. Acts 379–80 (duplicating Ohio's law). Horace Mann drafted Iowa's law. DAVID TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980*, at 46 (1982). Outside the Midwest, the educational clause in Texas's Reconstruction era constitution, TEX. CONST. of 1869, art. IX, § 3, requiring school districts is representative of New England traditions. TEX. VERNON'S ANN. CONST., *THE PUBLIC FREE SCHOOLS*, art. VII, § 1, at 398–400 (2007) (interpretive commentary).

²³⁷ *Stuart v. Sch. Dist. No. 1 of Vill. of Kalamazoo*, 30 Mich. 69, 81–82 (1874).

as federal territories. The federal Northwest Ordinance, establishing a legal framework for the Union's first organized territories—the Northwest Territory, which included future Michigan—provided that schools “shall forever be encouraged” in those lands.²³⁸ Stirred by this high-minded ideal—and by somewhat less high-minded pecuniary considerations—the United States offered to grant Ohio, the first state admitted from the Territory, free land for school purposes in every township in exchange for Ohio's agreement not to tax federal lands for five years after their sale (thereby rendering those lands more appealing to the federal government's buyers).²³⁹ Ohio assented,²⁴⁰ as did all subsequent states carved from federal territories.²⁴¹

The grants presented the new states with a governance challenge. All townships were now in possession of land to fund schools. The land required management: it had to be farmed or leased. At a minimum, waste had to be prevented. Yet the townships had no schools—or local governments—to assume that management task. The solution was to import the school committee—even before a school existed or was planned. Territories enacted laws empowering settlers to elect school commissioners to manage school lands.²⁴² This process was reminiscent of the template set back in colonial Boston: the body governing schools emerged since other government bodies were absent. Yet the process's fortuity was even more pronounced in the new territories and states. Boston needed a body to govern schools since it had schools and was dedicated to schooling; in the territories, the governance body was created without schools to govern and with little concern for schooling.

This wavering support for education ironically generated a third cause for the attachment to the school district in the nineteenth century: a desire to enable community decisionmaking. As seen in Section II.A.1, in Puritan New England, statutes forced communities to provide free education. Elsewhere, where the population was more religiously diverse, compulsion was not politically viable.²⁴³ Some communities—often, those with New

²³⁸ Northwest Ordinance of 1787, art. III, *reprinted in* 1 U.S.C. at LIX (2012).

²³⁹ PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 289 (1968).

²⁴⁰ Act of Mar. 3, 1803, ch. 21, 2 Stat. 225, 225–27.

²⁴¹ In other words, all later states other than Maine, Texas, and West Virginia. *E.g.*, *Powell v. Bd. of Educ.*, 97 Ill. 375, 380–81 (1881) (describing Illinois's assent).

²⁴² 1819 Ill. Laws 107 (requiring a county to appoint trustees for school land if the township residents agreed); 1816 Ind. Acts 104–05 (requiring county commissioners to appoint a superintendent to take charge of school land and allowing residents, once numbering twenty, to elect their own commissioners to manage school lands).

²⁴³ *See* CUBBERLEY, *supra* note 115, at 212–13.

England roots—desired public schooling; others did not.²⁴⁴ The sole way for legislatures to appease all communities was to enable each to chart its own course,²⁴⁵ an approach particularly appropriate in an era infused with Jacksonian ideas of popular self-determination.²⁴⁶ This goal could be achieved by separating school governance from general governments. Early school acts authorized, but did not force, residents to form a school committee.²⁴⁷ Thereby, distinct communities, even when subject to the same general government—i.e., county or township—could differ in their approach to education.²⁴⁸ Each community within the county or township could create its own public schooling system—or choose to refrain from creating one.

The school district was the smallest, and most voluntary, unit of self-government in the political system. Since the district was thus not required to geographically overlap with a general government, it could break down existing political boundaries. The average Midwestern township contained nine school districts.²⁴⁹ The school district similarly accommodated communities straddling political boundaries: parents could form a district across township and county lines.²⁵⁰ The scheme was also employed within cities, for example, Chicago and Pittsburgh,²⁵¹ to likewise empower individual neighborhoods to decide whether to sustain schools.²⁵² It then allowed neighbors to pick teachers reflecting neighborhood ethnicities.²⁵³ In

²⁴⁴ E.g., TYACK & HANSOT, *supra* note 236, at 51 (describing infighting in Wisconsin); Scott Walter, “Awakening the Public Mind”: *The Dissemination of the Common School Idea in Indiana, 1787–1852*, in HOOSIER SCHOOLS: PAST AND PRESENT 3 (William J. Reese ed., 1998) (describing infighting in Indiana).

²⁴⁵ Paul Theobald, *Country School Curriculum and Governance: The One-Room School Experience in the Nineteenth-Century Midwest*, 101 AM. J. EDUC. 116, 126 (1993).

²⁴⁶ DONALD B. COLE, *THE PRESIDENCY OF ANDREW JACKSON* 276–77 (1993).

²⁴⁷ E.g., 1838 Iowa Acts 180–81; 1846 Miss. Laws 98; 1828 Mo. Laws 49 (mandating the creation of boards, but requiring that a majority of residents within each district approve before the board levies a tax to fund its activities). As late as 1874, Illinoisans petitioned for creating a school district for their community. *Trumbo v. People*, 75 Ill. 561, 562–63 (1874).

²⁴⁸ For example, Ohio’s original law explicitly allowed residents of a “neighborhood” to demand a separate district even if the township elected not to have schools. 1820 Ohio Laws 51–53.

²⁴⁹ WAYNE E. FULLER, *THE OLD COUNTRY SCHOOL: THE STORY OF RURAL EDUCATION IN THE MIDDLE WEST* 44 (1982).

²⁵⁰ *Id.*

²⁵¹ The Pennsylvania Free Public School Act of 1834 established each ward of Pittsburgh a sub-school district. Chicago originally had five separate school districts, each of which employed teachers, levied taxes, and built schools. ELLWOOD P. CUBBERLEY, *PUBLIC SCHOOL ADMINISTRATION* 5 n.2 (1922).

²⁵² See Robert H. Wiebe, *The Social Functions of Public Education*, 21 AM. Q. 147, 154 (1969) (“[A]s long as cities remained a collection of semi-autonomous subdivisions, substantial citizens moved to those areas where they could substantially control their schools as they chose.”).

²⁵³ CRONIN, *supra* note 230, at 57.

the cities as in the countryside, the district system emerged, therefore, as a powerful tool for small-scale communities to design their own public institutions and services and to manage their affairs.

The fourth and final factor rendering the district scheme appealing in the nineteenth century was also grounded in certain communities' demands for education: the school district plan could furnish such communities with funding for education. In the nineteenth century's swelling cities, the original funds allocated for schooling quickly grew unsatisfactory,²⁵⁴ and parents were saddled with fees.²⁵⁵ Reformers thus campaigned—successfully—for statutes establishing school boards, separate from major cities' general governments, with independent powers to finance schools and compel the raising of funds.²⁵⁶

The school district further promoted such financing goals once, later in the century, commitment to education hardened and states began mandating schooling. Legislatures created school boards and tasked them with raising funds for schooling—thereby bypassing the era's languid general governments that ran miniscule budgets and hardly raised taxes.²⁵⁷ This legislative practice was challenged—but courts approved it, and in the process explicated the school district's normative grounding.²⁵⁸ A Utah case is illustrative. The plaintiff rail company was taxed by a newly minted school district.²⁵⁹ The company's property was separated from the actual school by twenty-five miles of mountainous land impassable in winter.²⁶⁰ Yet the territorial court found immaterial the company's inability to enjoy the school. Education, the court reasoned, was not merely a "local" or

²⁵⁴ FULLER, *supra* note 249, at 28. Mismanagement and resource diversion were responsible for the paltry revenues derived from the federal school land grants. George W. Knight, *History and Management of Federal Land Grants for Education in the Northwest Territory (Ohio, Indiana, Illinois, Michigan, Wisconsin)*, in 1 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION 162–65 (1885).

²⁵⁵ SAMUEL RANDALL, THE COMMON SCHOOL SYSTEM OF THE STATE OF NEW-YORK 32 (1851) (detailing that in 1830 parental fees funded \$346,807 of the \$586,520 paid to New York teachers).

²⁵⁶ *E.g.*, J.M. KEATING, 1 HISTORY OF THE CITY OF MEMPHIS 417 (1888) (explaining that though the City of Memphis retained the taxing power, the Memphis school board was granted the power to compel the city to pay for contracts the board entered).

²⁵⁷ Until the 1830s, localities hardly imposed any taxes, and even after that era, much of their revenue was based not on taxation, but on special assessments: charges levied on property owners who stood to benefit from the specific local improvement funded (e.g., those abutting a street to be paved). Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUD. 201, 201–02 (1983).

²⁵⁸ *Bd. of Comm'rs v. Cty. Comm'rs*, 20 Md. 449, 451–59 (1864); *Nashville & Chattanooga & St. Louis R.R. Co. v. Franklin*, 73 Tenn. 707, 712–14 (1880); *Kuhn v. Bd. of Educ.*, 4 W. Va. 499, 511–12 (1871).

²⁵⁹ *See King v. Utah Cent. R.R. Co.*, 6 Utah 281, 281 (1889).

²⁶⁰ *See id.* at 282.

private concern of its consumers.²⁶¹ It was a public concern, and thus establishing a special government to fund it irrespective of the local general government's desires was justified—and necessary.²⁶²

The legal commitment to education was finally, and unquestionably, established. So was, by this point, the commitment to the school district. Different states might have used distinct, and circuitous, routes to get to the school district, but by the century's second half they all had arrived there.²⁶³ A spate of court decisions in the 1870s and 1880s removed any doubt as to the institution's preeminence. Courts brusquely rejected challenges to the system, stating in unambiguous terms that schooling was to be provided by separate governments.

In 1872, the Supreme Court of Ohio explained that the “management and control” of schools has been placed “*exclusively* in the hands of directors, trustees, or boards of education.”²⁶⁴ Two years later the Supreme Court of Michigan announced: “by law the [school] board had [full control] over the schools of the district.”²⁶⁵ The court would “spend no time” considering a challenge to the school board's authority.²⁶⁶ The Supreme Court of Louisiana resorted to even more forceful terms: “there can be no doubt that . . . the city board of school directors . . . shall have sole and exclusive control and regulation of the public schools within the city *as against* the apprehended antagonistic authority over the subject that might be set up by the City Council.”²⁶⁷ Similarly, the Supreme Court of Kansas clarified that “the board of education of the city of Topeka is a distinct corporation from the municipal corporation of the city of Topeka.”²⁶⁸ Therefore, the city lacked authority to interfere with the board's powers over education: “The fact that [the Board's] limits or boundaries are the same as that of the city of Topeka, makes no difference.”²⁶⁹ The Supreme

²⁶¹ See *id.* at 283.

²⁶² See *id.*

²⁶³ Arguably the most serpentine route was taken in places where public education succeeded private charity schools. After private corporate charity schools for the indigent grew insufficient, they were replaced by public schools for the poor that were then transformed into general public schools. Since the original charity organizations were chartered as corporations, the public school districts assumed their corporate guise. *E.g.*, 1817 Pa. Laws 124 (incorporating Philadelphia's schools for the poor as “[t]he first school district of the state,” which replaced the private “Philadelphia Society for the Free Instruction of Indigent Boys”), followed by 1836 Pa. Laws 625 (transforming the poor school districts throughout the state into general districts).

²⁶⁴ *Bd. of Educ. v. Minor*, 23 Ohio 211, 241 (1872).

²⁶⁵ *Stuart v. Sch. Dist. No. 1*, 30 Mich. 69, 85 (1874).

²⁶⁶ *Id.*

²⁶⁷ *Third Ward Sch. Dist. v. City Bd. of Sch. Dirs.*, 23 La. Ann. 152, 158 (1871).

²⁶⁸ *Knowles v. Bd. of Educ.*, 7 P. 561, 567 (Kan. 1885).

²⁶⁹ *Id.* at 566.

Court of North Carolina held that the general government—the county—could not change school districts' boundaries.²⁷⁰ The Supreme Court of North Dakota ruled that the district's bonds were separate from the township's unless a specific statute provided otherwise,²⁷¹ and courts in Tennessee and Maryland decided that so were the school district's tax funds.²⁷² Under similar reasoning, the Supreme Court of Indiana refused to read a city tax exemption as extending to school district taxes.²⁷³ A West Virginia court summarized by characterizing the township and school district as “distinct and independent corporations.”²⁷⁴

As these court decisions demonstrate, by the nineteenth century's final quarter, the school district's status in American law, as a politically separate entity with secure governing powers, was unassailable. The district had been elevated to that position by several factors that were unearthed in this Section. Many of these reasons can be written off as happenstance. First and foremost, public schools' founders, observing their New England predecessors, simply assumed that only a separate government could control public schooling. Additionally, some states turned to the district system because they were in need of a body (any body) to govern a resource (federal land grants for schools) when no local governing body existed. Even the substantive goals the school district was set to advance were mostly reactions to contemporary exigencies: a political reality demanding community-option-respecting schooling and a funding vacuum necessitating a separate revenue stream.

These reasons all account for the school district's proliferation. They cannot, however, explain its persistence. How did this legal institution survive the disappearance of the serendipitous conditions to which it owed its ascent? Immediately upon the school district's continental consolidation, as just described, conditions in America changed dramatically. Thus, our quandary respecting the school district's endurance can only be fully answered through an exploration of that next chapter of the school district's legal history—during which the original stimuli for its appearance receded.

²⁷⁰ *McCormac v. Comm'rs*, 90 N.C. 452, 457–58 (1884).

²⁷¹ *Coler v. Dwight Sch. Twp.*, 55 N.W. 587, 591–92 (N.D. 1893).

²⁷² *Bd. of Comm'rs v. Cty. Comm'rs*, 20 Md. 449, 463–65 (1864); *Nashville & Chattanooga & St. Louis R.R. Co. v. Franklin*, 73 Tenn. 707, 713 (1880).

²⁷³ *City of South Bend v. University of Notre Dame Du Lac*, 69 Ind. 344, 347 (1879).

²⁷⁴ *Kuhn v. Bd. of Educ.*, 4 W. Va. 499, 511 (1871); *see also Horton v. Mobile Sch. Comm'rs*, 43 Ala. 598 (1869); *Richter v. Bd. of Pub. Educ.*, 149 Ga. 32 (1919); *Powell v. Bd. of Educ.*, 97 Ill. 375 (1881).

C. *The Established School District: Progressive Era Reforms*

The school district, born in colonial times, became an inveterate American government body in the century following Independence. During those decades, as the school district was expanding in legal stature and geographical reach, an alternative system of school administration was never even suggested. Thanks to the school district's esteemed colonial provenance coupled with the Mann movement's centralization credo, an unshakeable faith in its indispensability prevailed, as the preceding Section highlighted.²⁷⁵

But the turn of the twentieth century was a period for unsettling most such unshakeable faiths and questioning seemingly indispensable government bodies. Confronted with unprecedented economic, technological, and demographic changes wrought by mass industrialization, thinkers, activists, and lawmakers—in what would eventually be christened the Progressive Era—found many old principles and institutions outdated.²⁷⁶ Reformers poured special scorn upon nineteenth-century governments—which they disparaged as ill-equipped and too corrupt to rise to the new century's challenges.²⁷⁷ Thus began a reconsideration of government's role in American life that fostered reforms on all government levels.²⁷⁸ The school district, as a government created in response to bygone eras' peculiar demands, appeared especially ripe for such reconsideration.²⁷⁹

Accordingly, during the Progressive Era, schemes for the school district's overhaul and even replacement were contemplated for the first time in American history. Progressives introduced expertise as the value to which all institutions must adhere, and they fiercely assailed the school district—and its traditional rationales—for its incompatibility with that value. Yet all the era's turmoil would eventually leave the school district unscathed; indeed, it would leave it vindicated. Progressives ended up viewing the school district not as expertise's enemy, but as its

²⁷⁵ See *supra* Section II.B.2.

²⁷⁶ See generally RICHARD HOFSTADTER, *THE AGE OF REFORM* 3–22 (1989) (discussing the Progressive Era).

²⁷⁷ SAMUEL P. HAYS, *CONSERVATION AND THE GOSPEL OF EFFICIENCY* 1 (1999) (stating that the reform movement was “[c]ast in the framework of a moral struggle between the virtuous ‘people’ and the evil ‘interests’”).

²⁷⁸ E.g., U.S. CONST. amend. XVII (providing for senatorial elections); Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 790 (1997) (discussing the introduction of state-level direct democracy).

²⁷⁹ S.P. Orth, *The Cleveland Plan of School Administration*, 19 POL. SCI. Q. 402, 402 (1904) (identifying the school district as an inheritance from colonial New England, which “remained in its primitive form” unadjusted to the “complex needs of the constantly growing populations in our great cities”).

embodiment—and thus as superior to other local governments. To fully depict the transformation, this Section will first review the challenge posed to the legal institution of the school district by the new value of expertise, and then turn to its wedding to that value—a reimagination process that produced the current, impregnable school district described in Part I.

1. Expertise-Driven Assault on the School District.—Progressive Era reforms were reactions to changing American realities.²⁸⁰ They were also, however, products of changes in scientific thinking, particularly in the social sciences. The social sciences were creatures of the late nineteenth century.²⁸¹ Economics, sociology, psychology, and the political sciences were the hallmarks of the new research university.²⁸² Another academic field introduced at the time was education: Universities opened the first-ever education departments.²⁸³ In education, as in all research fields, contemporary academics' ambitions expanded beyond scholarly advancement.²⁸⁴ The era's academics believed that through academic exploration, solutions could be devised to the problems besetting their society.²⁸⁵ Specifically, they were persuaded that furnished with empirical data and informed analysis, government could effectively deal with industrialization's challenges.²⁸⁶

A natural target for such efforts at social bettering through expert governing was the local arena.²⁸⁷ Cities were the industrial upheaval's locus: encumbered with unregulated manufacturers, unprecedented density, and devastating poverty.²⁸⁸ Moreover, reformers could easily attribute

²⁸⁰ ROBERT H. WIEBE, *THE SEARCH FOR ORDER 1877–1920*, at 164–95 (1967).

²⁸¹ THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977).

²⁸² EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* 15–30 (1973).

²⁸³ The first chair in education was created in 1873; in 1891, eleven college departments existed; in 1934, five hundred. CUBBERLEY, *supra* note 115, at 508, 690–91.

²⁸⁴ For example, Cubberley urged his Stanford colleagues: “the department should strive to have an uplifting influence on the schools of California and an ennobling influence on the teachers of the state.” JESSE B. SEARS & ADIN D. HENDERSON, *CUBBERLEY OF STANFORD AND HIS CONTRIBUTIONS TO AMERICAN EDUCATION* 57, 111 (1957).

²⁸⁵ See, e.g., DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 98–101 (1998) (discussing economists).

²⁸⁶ For an exhaustive study of expertise's rise and its effects on the New Deal, see DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991). Cf. MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 137 (1977) (describing how private firms increasingly relied on expert decisionmaking, science, and technology as a result of industrialization).

²⁸⁷ JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 642 (1919) (“There is no denying that the government of cities is the one conspicuous failure of the United States.”).

²⁸⁸ See generally JACOB A. RIIS, *HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK* (New York, Charles Scribner's Sons 1890) (famously portraying residents' plight).

cities' failures in tackling these trials to incompetent governance.²⁸⁹ They portrayed local governments as inept and corrupt²⁹⁰ and set out to substitute existing structures with expertise-driven replacements.²⁹¹

Progressive Era reformers' battle, under the banner of expert government, against local "machine politics" prompted drastic changes in American local government law. As others have chronicled, key attributes of current law—home rule,²⁹² the ban on special legislation,²⁹³ city managers,²⁹⁴ zoning,²⁹⁵ and the special district²⁹⁶—date to those efforts. But the reformers' efforts also profoundly affected education's governance.²⁹⁷ Dedicated to science, social work, and knowledge's redeeming virtues, progressives emphasized education as a crucial component of their agenda for saving the poor, and the nation.²⁹⁸ This celebration of education, combined with the abhorrence of machine politics, led reformers to intensely campaign to divorce education's management from politics.²⁹⁹ The goal, one writer explained, must be "placing the schools beyond the reach of the politicians."³⁰⁰

²⁸⁹ *E.g.*, LINCOLN STEFFENS, *THE SHAME OF THE CITIES* 3–18 (1904) (portraying the struggle as between "good government" reformers and "commercial politician[s]").

²⁹⁰ *See, e.g.*, LINCOLN STEFFENS, *THE AUTOBIOGRAPHY OF LINCOLN STEFFENS* 422 (1931) ("Philadelphia, Corrupt and Contented, . . . [was not the] worst in the land . . . It was only *older* than St. Louis and Minneapolis." (emphasis added) (internal quotation marks omitted)).

²⁹¹ Samuel P. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 *PAC. NW. Q.* 157, 160 (1964).

²⁹² *See generally* David J. Barron, *Reclaiming Home Rule*, 116 *HARV. L. REV.* 2257 (2003) (describing the Progressive Era efforts to both grant and limit the authorities of local governments in order to enable cities to bring about urban reform).

²⁹³ Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *COLUM. L. REV.* 1, 9–10 (1990).

²⁹⁴ *See generally* HARRY AUBREY TOULMIN, JR., *THE CITY MANAGER: A NEW PROFESSION* 156–68 (1915) (describing the rise of and response to the city manager plan as a method of municipal reform).

²⁹⁵ *See generally* Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 *YALE J. REG.* 91 (2011) (describing the legal adoption of zoning laws at the time).

²⁹⁶ *See generally* Shoked, *supra* note 22, at 1986–87 (describing how progressive New Dealers embraced and promoted the special district).

²⁹⁷ Schools had their own muckraker. *See generally* JOSEPH M. RICE, *THE PUBLIC-SCHOOL SYSTEM OF THE UNITED STATES* (New York, The Century Co. 1893).

²⁹⁸ CUBBERLEY, *supra* note 115, at 763–64 ("Education in a democratic government such as ours is the greatest of all undertakings for the promotion of the national welfare."); *see also* LAWRENCE A. CREMIN, *THE GENIUS OF AMERICAN EDUCATION* 6–7 (1965) (highlighting progressives' determination that education was the task of schools—not home or society).

²⁹⁹ JOHN D. PHILBRICK, U.S. BUREAU OF EDUC., *CIRCULARS OF INFORMATION OF THE BUREAU OF EDUCATION*, No. 1-1885: *CITY SCHOOL SYSTEMS IN THE UNITED STATES* 14 (1885) ("[A]s is your school board, so are your schools.").

³⁰⁰ Orth, *supra* note 279, at 416.

Initially, this goal entailed undermining the school district.³⁰¹ The *New York Times* announced “the best method of proceeding to reform the schools . . . is by reforming the whole system of their management.”³⁰² To reformers’ dismay, the school district had remained throughout its existence an elected, political body.³⁰³ Even worse—from the prejudiced perspective of these genteel activists—the identity of those elected to serve on district boards was changing. Mass immigration had transformed the franchise—and the candidates chosen for office.³⁰⁴ Reformers characterized board members as at best amateurs,³⁰⁵ and at worst corrupt political hacks utilizing the office for patronage or as political stepping stone.³⁰⁶ Such inferior officials had to be replaced by experts running the schools to everyone’s benefit.³⁰⁷

Calls were made to weaken the school board by transferring more powers to an appointed expert school superintendent.³⁰⁸ These calls were sometimes intensified to pleas for the board’s outright abolition.³⁰⁹ Commentators noted that other specialized city boards were disappearing.³¹⁰ Some thus envisioned the school board’s duties assumed by a professional school department within city government.³¹¹ Combining these two lines of thinking, one major professional organization proposed a legislative education board appointed by the city mayor contenting itself

³⁰¹ See TYACK & HANSOT, *supra* note 236, at 204 (noting that liberal reformers “believed in granting greater power and autonomy to professional educators”).

³⁰² *Wanted—Money and Brains*, N.Y. TIMES, Jan. 7, 1895, at 4.

³⁰³ DAVID B. TYACK, *THE ONE BEST SYSTEM: A HISTORY OF AMERICAN URBAN EDUCATION* 130 (1974) (quoting reformers who explained that the “strong . . . honest and experienced men” needed for the government of schools cannot be secured through “unrestricted suffrage”); see also Wiebe, *supra* note 252, at 152 (noting that teachers were playing a subordinate role in education).

³⁰⁴ E.g., Orth, *supra* note 279, at 406–07 (describing how “foreign influx” into Cleveland changed the city’s “political complexion,” including school administration).

³⁰⁵ See, e.g., PHILBRICK, *supra* note 299, at 52, 55 (arguing that school boards are behind the times, incompetent, or indifferent to the public interest).

³⁰⁶ CRONIN, *supra* note 230, at 64–68.

³⁰⁷ TYACK & HANSOT, *supra* note 236, at 107.

³⁰⁸ E.g., RICE, *supra* note 297, at 18–19 (suggesting that school boards should appoint superintendents with sufficient independent power); William H. Maxwell, Nat’l Educ. Ass’n, *Report of Committee of Fifteen*, 1895 J. PROC. & ADDRESSES, at 232, 234 (listing as issues for discussion the responsibilities, authorities, and qualifications of superintendents).

³⁰⁹ Charles H. Judd, *Abolish the School Boards*, 15 PUB. MGMT. 321, 321 (1933).

³¹⁰ See, e.g., 1 CITY OF NEW YORK, REPORT OF COMMITTEE ON SCHOOL INQUIRY, BOARD OF ESTIMATE AND APPORTIONMENT 55 (1913) (noting that “[t]he large unwieldy school board is being abandoned”).

³¹¹ Charles H. Judd, *School Boards as an Obstruction to Good Administration*, 13 NATION’S SCHS. 13, 14–15 (1934).

with general policy, leaving decisionmaking to a professional superintendent.³¹²

These proposals conveyed a clear message: the politicized school district should lose its primacy in the education field.³¹³ It ought to be replaced by a professional agent or body within the city's bureaucracy. Several major cities heeded that message. Most prominently, in 1920, San Francisco voters substituted their school board with one appointed by the mayor.³¹⁴ Earlier, in 1905, Houston had already adopted such an appointed board.³¹⁵ As a legal institution, the politically independent district was slumping. But not for long.

2. *Expertise-Driven Embrace of the School District.*—The progressive attack on the school district stands out not only for its fierceness, but also for its brevity. Experiments with educational systems not centered on a politically independent school district were outliers.³¹⁶ San Francisco's move emanated from very peculiar, and parochial, political circumstances,³¹⁷ and even there, residents were, immediately after the appointed-board plan was adopted, afforded the right to ratify mayoral appointees to the board.³¹⁸ Houston's spell as an outlier was short-lived: in 1923 it reverted to an elected board.³¹⁹ Elsewhere, reformers' stated hostility towards the existing school district scheme did not translate into actual moves to rein in separately elected boards. St. Louis rejected all such proposals.³²⁰ Buffalo, in the midst of an effort to modernize its school system, was urged by authorities on school administration to adopt an elected board.³²¹ In New York City and Chicago, mayoral involvement with school boards was scathingly criticized.³²²

³¹² Andrew S. Draper, Nat'l Educ. Ass'n, *Report of the Sub-Committee on the Organization of City School Systems*, 1895 J. PROC. & ADDRESSES, at 375, 375–88.

³¹³ More radical calls demanded that the state replace it. CUBBERLEY, *supra* note 115, at 746.

³¹⁴ Victor L. Shradar, *Ethnicity, Religion and Class: Progressive School Reform in San Francisco*, 20 HIST. EDUC. Q. 385, 388–89, 485 (1980).

³¹⁵ CRONIN, *supra* note 230, at 96–97.

³¹⁶ See Orth, *supra* note 279 (failing to produce examples).

³¹⁷ Shradar, *supra* note 314, at 398–99 (showing that the vote to abolish the elected board did not trace the usual elite versus working class lines, but rather the local elite were successful since the city's conditions enabled them to form an alliance with the local native-born working classes in opposition to the Catholic working class).

³¹⁸ CRONIN, *supra* note 230, at 131–32.

³¹⁹ *Id.* at 132.

³²⁰ *Id.* at 73.

³²¹ See BUFFALO MUN. RESEARCH BUREAU, REPORT OF THE BUFFALO SCHOOL SURVEY 22–23 (1931).

³²² CRONIN, *supra* note 230, at 133.

Reformers were not blind to this poor track record. As early as the 1930s, commentators were noting the scant headway made by proposals for merging school governments with other, general governments.³²³ The truth was, however, that almost from the outset, reformers' own opposition to the politically separate school district dithered.³²⁴ The reason was simple: the school district may not have been reformers' ideal expertise-driven body for managing schools, but the alternative was even less palatable. General governments were progressives' *bêtes noires*. "[T]he city governments of the United States," one wrote, "are the worst in Christendom."³²⁵ Thus it was not surprising that most reformers balked at suggestions that city governments control schools.³²⁶ A typical critique of these initiatives reiterated reformers' mantra "that education [was] too 'important' to be a municipal function."³²⁷ Progressives were advocating expertise-driven decisionmaking: their concern, unlike that of earlier Mann-era reformers, was not simply centralization.³²⁸ City government was local government's hub, but it was also the nub of political activity, and thus constitutively impervious to expertise-driven decisionmaking.³²⁹ Reformers had for decades focused their efforts on removing powers from the city's purview. The notion that responsibilities should be added to the city's portfolio was anathema.³³⁰

Reformers' original misgivings gave way: politically independent school districts' merits were reconsidered.³³¹ The school district was similar

³²³ See NELSON B. HENRY, *SCHOOLS AND CITY GOVERNMENT* 2 (1938) (describing how citizens were fearful of a "dependent" school system due to the risk of political abuses, such as the misuse of school funds).

³²⁴ TYACK, *supra* note 303, at 145–47 (explaining that despite their strong endorsement of administrative control of schools by an expert superintendent, reformers still entertained the endurance of the school board as a buffer between the experts and the politicians); see also RAYMOND E. CALLAHAN, *EDUCATION AND THE CULT OF EFFICIENCY* 193–96 (1962) (describing debates among reformers about the need for local control over the expert administrator they imagined running the schools).

³²⁵ Andrew D. White, *The Government of American Cities*, FORUM (1890), reprinted in *URBAN GOVERNMENT* 213 (Banfield ed., 1961).

³²⁶ CUBBERLEY, *supra* note 251, at 96, 104; GEORGE D. STRAYER, *EDUC. POLICIES COMM'N, THE STRUCTURE AND ADMINISTRATION OF EDUCATION IN AMERICAN DEMOCRACY* 59 (1938).

³²⁷ CRONIN, *supra* note 230, at 140 (citation omitted).

³²⁸ See Charles Francis Adams, Jr., *The Development of the Superintendency*, 1880 ADDRESSES & J. PROC. NAT'L EDUC. ASS'N, at 61, 64–65 (assailing Mann reformers as "pseudo-intellectual[s]," obsessed with mindless organization rather than academic expertise).

³²⁹ See TYACK & HANSOT, *supra* note 236, at 108 (contrasting political issues decided by elected representatives on central committees with "matters of administrative discretion" decided by experts).

³³⁰ See CRONIN, *supra* note 230, at 139–43 (describing the controversy surrounding one scholar's campaign to abolish school boards).

³³¹ TYACK & HANSOT, *supra* note 236, at 108. Isolated commentators agitated again for board abolition during the Depression to save money. CRONIN, *supra* note 230, at 138.

to the special district—a legal institution whose status and similarities to the school district were introduced in Section I.B. Reformers were enamored with the special district, a supposedly specialized entity that drained powers (over housing, water, etc.) from the loathed political city.³³² Like the special district, the school district removed powers over the provision of a service (in this case, education) from city hall. The school district could thus appeal to reformers.³³³

But the school district did not truly replicate the cherished model of the special district: true, it removed powers from city hall, but it did not place those powers beyond the reach of politics. Unlike most special districts, the school district was always elected by the general public—therefore it was inevitably placed at the midst of the political thicket. To serve the new expertise rationale the existing school district thus had to be reshaped.³³⁴ Several legal moves were accordingly pursued by reformers, forming an “organizational revolution” transforming the school district.³³⁵

The revolution’s overarching concern was depoliticizing the school district.³³⁶ New York’s highest court explained: “If there be one public policy well-established in this State it is that public education shall be beyond control by municipalities and politics.”³³⁷ The general strategy was to turn the school district into a broader administrative unit, rendering it less “parochial.”³³⁸ Thus power was consolidated in the city’s school board as ward (i.e., neighborhood) boards set to manage individual schools were abolished.³³⁹ Next, often prodded by state legislatures, school boards switched from ward-based representation to at-large elections,³⁴⁰ allegedly producing members not beholden to narrow constituencies, but to the people’s general interest.³⁴¹ Boards were also reduced in size to improve members’ quality.³⁴² And in the most celebrated reform, Cleveland attacked

³³² Shoked, *supra* note 22, at 1986–87.

³³³ Orth, *supra* note 279, at 408.

³³⁴ *Id.* at 403.

³³⁵ TYACK, *supra* note 303. *See generally* WILLIAM A. BULLOUGH, *CITIES AND SCHOOLS IN THE GILDED AGE* (1974).

³³⁶ Nat’l Educ. Ass’n, *Secretary’s Minutes, Department of Superintendance*, 1892 J. PROC. & ADDRESSES, at 561, 568.

³³⁷ *Divisich v. Marshall*, 22 N.E.2d 327, 328 (N.Y. 1939).

³³⁸ CUBBERLEY, *supra* note 115, at 746.

³³⁹ RAVITCH, *supra* note 45, at 155.

³⁴⁰ *E.g.*, CRONIN, *supra* note 230, at 50 (discussing the rise and fall of ward representation in Buffalo, Chicago, and Boston, among other cities).

³⁴¹ TOULMIN, *supra* note 294, at 42.

³⁴² CUBBERLEY, *supra* note 251, at 92 (explaining that large boards prioritized political grandstanding).

the authority of politically accountable school board members.³⁴³ It removed powers from board members, transferring those powers to an executive elected directly.³⁴⁴ The voters were not free to elect whomever they fancied, however, for that post; the statute required the executive to deposit an exceptionally steep bond,³⁴⁵ thereby assuring that he be among the city's business elite, and "practically eliminat[ing]" politics from the schools.³⁴⁶ Pittsburgh went a step further: there, starting in 1911, judges appointed school board members.³⁴⁷

These radical two plans, as well as the more restrained (and common) reforms toward consolidation of major cities' boards, aimed to render the school district a conduit for expertise—rather than political expression. This transformation in the school district's normative purpose was perhaps even more pronounced in reforms pursued outside cities. Originally, as explained in Section II.B.2, rural school districts were created as county and township subareas wherever a group of residents desired a school. Thus in many states, the countryside was littered with hundreds, if not thousands, of miniscule districts, each controlling just one school.³⁴⁸ The small, one-room ungraded schools these districts ran struck reformers as inadequate for the new century's demands.³⁴⁹ These school districts' scheme of governance also starkly contradicted reformers' preference for larger units promoting professionalization, sound school finances,³⁵⁰ and the "entire elimination of politics" that otherwise dominated small, community-controlled governments.³⁵¹

Thus began the drive to consolidate rural school districts.³⁵² Some states allowed school districts to initiate the process themselves,³⁵³

³⁴³ Andrew S. Draper, *Plans of Organization for School Purposes in Large Cities*, 1894 NAT'L EDUC. ASS'N J. PROCEEDINGS & ADDRESSES, at 298, 307 ("[The Cleveland Plan] is radical in its innovations. There is nothing else like it in the country. It came from the best and most substantial thought of a great city, which has deep interest in its public schools . . . It is in the direction of, if it does not go beyond, what has been advised by the best educational thought of the country.").

³⁴⁴ Orth, *supra* note 279, at 415.

³⁴⁵ Bond was set at \$25,000, while the annual salary was \$5,000. *Id.*

³⁴⁶ *Id.*

³⁴⁷ Act of May 18, 1911, art. II, §§ 201–02, 206, 1911 Pa. Laws 309, 317–18.

³⁴⁸ Fischel, *supra* note 45, at 177.

³⁴⁹ MABEL CARNEY, COUNTRY LIFE AND THE COUNTRY SCHOOL 140–42 (1912). The Commission on Country Life appointed by President Roosevelt in 1908 singled out the one-room school as holding rural areas back. COUNTRY LIFE COMMISSION, REPORT OF THE COMMISSION ON COUNTRY LIFE 26–27 (Sturgis & Walton eds., 1917).

³⁵⁰ FULLER, *supra* note 249, at 232.

³⁵¹ CUBBERLEY, *supra* note 115, at 721.

³⁵² JONATHAN SHER, PUBLIC EDUCATION IN SPARSELY POPULATED AREAS OF THE UNITED STATES 28–29 (1977).

³⁵³ Act of Mar. 11, 1901, ch. CC, § 1, 1901 Ind. Acts 437, 437.

sometimes enticing them with subsidies.³⁵⁴ Other states empowered county officials to unilaterally change subcounty school districts' boundaries.³⁵⁵ Still other states mandated the process: formally abolishing the district system,³⁵⁶ or proclaiming each county one school district.³⁵⁷ By the early 1900s, all New England states had largely consolidated school districts along township lines—achieving almost perfect geographical overlap between the school district and the general government.³⁵⁸ Tellingly, in 1901, the educational system adopted for recently colonized Puerto Rico consisted of elected boards governing school districts geographically conterminous with existing municipalities.³⁵⁹

But in many places, particularly in the Midwest, the consolidation campaign stalled³⁶⁰—resulting in the lack of geographical overlap between school districts and general governments still prevalent today, as described in Part I. Local communities fought back against expert-driven centralization,³⁶¹ and statutory reforms were often rescinded within a few years.³⁶² Reformers would not relent, however. The eventual compromise carried portentous results for American law. Consolidation was to continue, but control was ceded to local residents. Local residents were empowered to create consolidated school districts as they desired.³⁶³ Districts were thus to follow lines residents deemed “organic” or corresponding to “natural community” boundaries, rather than to general government lines. The outcome was enlarged districts—geared towards the new value of expertise—but whose boundaries diverged from other governments' boundaries—justified by an appeal to community values, reminiscent of the

³⁵⁴ Central Rural Schools Act, ch. 55, art. 6-B, 1914 N.Y. Laws 278, *amended by* Act of Apr. 16, 1925, ch. 673, § 185, 1925 N.Y. Laws 1118, 1118–19.

³⁵⁵ Act of Mar. 9, 1907, ch. 329, § 1, 1907 Kan. Sess. Laws 500, 500.

³⁵⁶ 1890 N.D. Laws Chap. 62, sec. 35, *in* LAWS PASSED AT THE FIRST SESSION OF THE LEGISLATIVE ASSEMBLY OF THE STATE OF NORTH DAKOTA 183 (1890) (mandating that all townships not organized into districts during the territorial period will constitute “school corporation[s]”).

³⁵⁷ Act of Aug. 19, 1919, art. VIII, sec. V, § 76, 1919 Ga. Laws 288, 320.

³⁵⁸ HAL S. BARRON, *MIXED HARVEST* 49–56 (1997).

³⁵⁹ Act of Jan. 31, 1901, § 13, 1900 P.R. Laws 29, 33.

³⁶⁰ BARRON, *supra* note 358, at 75.

³⁶¹ *E.g.*, LAWRENCE W. LEVINE, *DEFENDER OF THE FAITH* 289 (1987) (“A scientific soviet . . . is attempting to dictate what shall be taught in our schools . . .” (quoting William Jennings Bryan)).

³⁶² *E.g.*, Julian E. Butterworth, *The Evolution of Rural School Organization in New York*, *in* YOUR SCHOOL DISTRICT 193, 195 (Howard A. Dawson & Floyd W. Reeves eds., 1948) (describing the repeal of New York's 1917 law).

³⁶³ Howard A. Dawson & Floyd W. Reeves, *Foreward*, *in* YOUR SCHOOL DISTRICT, *supra* note 362, at 13.

representation and small-scale community decisionmaking values propping up the district earlier during the nineteenth century.³⁶⁴

This concession to older values should not, however, conceal the break with the past the progressive reforms managed to accomplish—in the countryside as in the cities. In earlier periods, the core of the school district’s normative appeal was its closeness to the people. The school district’s new expertise-laden justification abhorred that closeness and the populist urges it exuded.³⁶⁵ The pioneering social worker Jane Addams described the battle over the Chicago school board’s structure as “an epitome of the struggle between efficiency and democracy.”³⁶⁶ For many reformers, choosing sides was easy: they “believed less in the people and more in the possibility of philosopher-kings.”³⁶⁷ Reformers were blunt in their denial of democratic precepts: to increase “efficiency” schools should “give up the exceedingly democratic idea that all are equal, and that our society is devoid of classes.”³⁶⁸

Thus the import of the Progressive Era’s legal reforms should not be downplayed. The reforms themselves may in hindsight appear technical—a reduction in the number of school board members and of districts, the transfer of powers to executives, and the establishment of a non-neighborhood-based representation scheme. But through these adjustments, the school district’s normative role was transformed.³⁶⁹ To the extent possible, the board was distanced from the people: Democracy was contained.³⁷⁰ The ease of this transformation was extraordinary. It demonstrated the school district’s normative malleability—and durability. Through technical reforms those who had been committed to the school district’s annihilation in the name of expertise became the district’s leading champions—in the name of expertise. The fiercest and most-principled

³⁶⁴ MARTIN, *supra* note 151, at 206 (detailing consolidation opponents’ claims).

³⁶⁵ TYACK & HANSOT, *supra* note 253, at 107.

³⁶⁶ JANE ADDAMS, *TWENTY YEARS AT HULL HOUSE* 335 (12th prtg. 1962).

³⁶⁷ CRONIN, *supra* note 230, at 118.

³⁶⁸ ELLWOOD P. CUBBERLEY, *CHANGING CONCEPTIONS OF EDUCATION* 56–57 (1909); *see also* Andrew Sloane Draper, *Education Organization and Administration*, in *EDUCATION IN THE UNITED STATES* 9–10 (Nicholas Murray Butler ed., 1900) (asserting that the more centralized township system has produced “better schools and schools of more uniform excellence” compared to the district system).

³⁶⁹ Douglas E. Mitchell, *Major Efforts to Improve School Performance*, in *SHAPING EDUCATION POLICY*, *supra* note 109, at 213 (“The Progressive . . . [r]eform movement [was] largely successful in separating educational governance systems from those responsible for the rest of local civic policies.”).

³⁷⁰ *See* CHARLES DERBER ET AL., *POWER IN THE HIGHEST DEGREE: PROFESSIONALS AND THE RISE OF A NEW MANDARIN ORDER* 87–89 (1990) (reviewing the claim that in the new industrial order education became a front of class warfare); Wiebe, *supra* note 252, at 159 (“The modern system, despite the democratic claims of its defenders, more obviously served one class of citizens than had its predecessor.”).

attack on the school district's separate legal standing mounted until that point—or, as the ensuing century would prove, after that point—was not only repelled, but converted into a crusade on the school district's behalf.

D. Summary: The Normative Values Sustaining the School District

The school governance scheme which emerged from the Progressive Era—a politically separate government whose limited-sized board manages all schools located within geographic boundaries that may not correspond to those of a general government—is wholly recognizable. It is the one presented in Part I as currently characterizing American law, and thus here concludes this Part's historical story of the manner in which the American school district surfaced. An answer can now be synthesized for the question driving the effort: Why did American law develop this separate local body to govern education?

First and foremost, the answer is that at relevant times no local governing entities existed that could assume that chore. Colonial New England towns had to operate schools on a daily basis but had no ongoing governments. Later, townships in the territories and nascent states to the west had to manage lands granted for school purposes, but, still in early development stages, had no governing entities whatsoever. Path dependence similarly played a role. Since the first communities to introduce public education—the colonial New England towns—governed it through districts, later adopters perceived school districts as requisite.

Nonetheless, some informed institutional design principles were apparent at times—even if they were mostly used to sustain the school district after it had already appeared. The district was fortified as a bulwark of democratic representation in post-Independence New England. Relatedly, it was embraced starting in the Jacksonian Era as a tool for facilitating self-determination by small-scale communities—a task it had also performed earlier in rural Massachusetts. Conversely, the separate school district was sometimes urged through a denial of these democratic and communitarian values: as proffering centralization (for Mann era reformers) and expertise-driven management (for Progressive Era reformers). Finally, a politically separate government for schools was at times (e.g., post-Independence Massachusetts, the nineteenth century's second half) promoted since it could fence off funding for schools.

For all these diverse reasons—some based on convenience, others on normative calculation—American law created and molded the school district from the mid-seventeenth century through the mid-twentieth century. These reasons do not, however, necessarily justify its retention today. Can the school district still serve its goals, given the economic,

political, social, and legal realities of the postwar era? That inquiry animates the Article's next Part.

III. THE TOLL OF THE SCHOOL DISTRICT

The school district, a legal institution created in the colonies, forged on the frontier, and ripened in the Progressive Era, now operates in the environment of the twenty-first century. An important contrast between current and earlier settings is that now all states recognize general purpose local governments that could potentially manage schools: cities and counties. Thus, the original and principal justification for the school district's establishment and empowerment—the absence of a local alternative—is obsolete.

The school district is justifiable today only if it outperforms that now-existing alternative: the general government, especially since in American law that government is the default government for other local services. Earlier Progressive Era reformers, struggling with the same question respecting the school district's relative merits, eventually deemed it superior to the general government. Roughly a century later, that conclusion does not necessarily hold.

Furthermore, an updated comparison of the qualities of the school district and those of alternative governments need not be conducted in light of only one normative metric, the sole value those reformers cherished—expertise. Rather, the assessment ought to be eclectic and agnostic: Does the school district still serve *any* of the substantive values ascribed to it better than general governments?

This Part will thus revisit each of the justifications employed in the past to establish, or sustain, the school district, to see if any hold water in 2017. These justifications, as Part II discerned, included democratic participation, small-scale community building, efficient school management through expertise, and stable school funding. The focus on these values is prompted by the school district's history, but it is warranted regardless. For these values run the full gamut of the benefits commentators typically associate with local government, which count popular participation, efficient provision of public services, and community building.³⁷¹

Therefore, as this Part's review will show, in and of itself each of the four values to which appeals were made in the past to justify the school district still hold much normative allure today. However, as the separate treatment of each of these normative values will also reveal, the school

³⁷¹ See *supra* Section II.C.

district can no longer nurture any of them better than the general government. Modern social, economic, political, and legal changes have hampered the institution's ability to serve the worthwhile values that had vindicated it. Some of these values are even, in all likelihood, disserved by the school district today.

A. The Modern School District and Democratic Participation

Since its original induction into state law, in post-Independence Massachusetts, the school district has repeatedly been justified as a vehicle for citizen representation.³⁷² Even those, like Progressive Era reformers, who dismissed the value of popular representation in school management, recognized the school district's contribution to democratizing education.³⁷³ An elected school board could empower citizens to express their preferences respecting schooling as voters and as candidates for office. Still today, this rationale is often cited by commentators and courts extolling the school district.³⁷⁴

This endorsement remains feasible now, even in the presence of general governments also composed of elected leadership bodies, because the school district enjoys a built-in democratic advantage over those governments. When voting in general elections for mayoral or council candidates, a resident picks among bundled products: each candidate offers a menu of positions on varied issues.³⁷⁵ The resident must vote for one candidate, though no candidate can perfectly reflect all her preferences across the many diverse fields of local policy.³⁷⁶ The resident therefore compromises and settles for a candidate that—while agreeable to her on some issues (say, policing and taxation)—does not match all her

³⁷² See *supra* notes 157–60, 206 and accompanying text.

³⁷³ See *supra* notes 334–47 and accompanying text.

³⁷⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49 (1973); *Wright v. Council of Emporia*, 407 U.S. 451, 469 (1972); RONALD W. REBORE, SR., *A HANDBOOK FOR SCHOOL BOARD MEMBERS* 5 (1984) (“School districts are perhaps the most democratically controlled agency of government.”); CHARLES EVERARD REEVES, *SCHOOL BOARDS* 10 (1954) (describing boards as “[b]ulwarks of [d]emocracy”); Wong & Farris, *supra* note 109, at 217 (“An independent local school district that is free from general government control is consistent with the American ethos. An autonomous school system reflects strongly held public beliefs in democratic, nonpartisan control over public education.”).

³⁷⁵ See ROBERT S. AMDURSKY ET AL., *MUNICIPAL DEBT FINANCE LAW* 312–13 (2d ed. 2013) (describing how voters are “restricted to voting for or against a candidate based on their overall performance, rather than expressing their approval or disapproval of discrete decisions”); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1546–47 (2005) (explaining that elections are an inexact means to discern voter preferences).

³⁷⁶ Clayton P. Gillette, *Direct Democracy and Debt*, 13 J. CONTEMP. LEGAL ISSUES 365, 372 (2004).

preferences (say, respecting zoning). When, conversely, the resident votes for an official whose responsibilities, and thus platform, are confined to one issue—e.g., education for the school board member—she need not compromise. The candidate she picks, by definition, shares her preferences with respect to that one issue: education.³⁷⁷ In this manner, separate school district elections promote educational governance that better reflects residents' views.

This theory of the school district's superior democratic effectiveness is unquestionably appealing, and it probably offered a fair representation of school districts' democratic functioning up until the Progressive Era.³⁷⁸ Unfortunately, however, intervening factors have since knocked the school district off this democratic pedestal. In reality, for reasons that will be explained next, the modern elected school district is, on average, inferior to the modern elected general government in producing representatives and policies accurately reflecting citizen preferences.

The key contemporary political trend responsible for the school district's decline as a tool for effectuating representative government is consistently low turnout rates for school board elections.³⁷⁹ In modern America, voting rates decrease, dramatically, the lower the level of the government holding the elections.³⁸⁰ Fewer citizens vote in state elections than in federal elections, and fewer still in local elections.³⁸¹ On this smallest level of government, turnout decreases further the more specialized the government.³⁸² Thus, on average, turnout at school board

³⁷⁷ *From the Editors: Mayoral Takeovers in Education: A Recipe for Progress or Peril?*, 76 HARV. EDUC. REV. (2006), <http://hepg.org/her-home/issues/harvard-educational-review-volume-76-issue-2> [<https://perma.cc/JX4B-MRSR>] ("Most citizens do not base their votes for mayor solely on the performance of the school system . . . [S]chool boards [thus] retain one big advantage: They are the only mechanism that provides a direct point of entry for citizens—especially parents—to express their concerns about education to the very officials who make education policy.").

³⁷⁸ At the time, since they were topic-specific and less central to the political patronage system, school district elections facilitated principled participation. *E.g.*, NEWLON, *supra* note 35, at 243. Indeed, fierce debates about schools' role often surrounded board elections, spiking participation. *E.g.*, MARGARET LAMBERTS BENDROTH, *FUNDAMENTALISTS IN THE CITY* 60–64 (2005) (describing how Protestant and Catholic groups competed for control over Boston schools in the 1880s).

³⁷⁹ JOHN SIDES ET AL., *CAMPAIGNS & ELECTIONS* 304 (2012).

³⁸⁰ Charles S. Bullock III, *Turnout in Municipal Elections*, 9 POL. STUD. REV. 539, 539 (1990). The phenomenon is striking also in comparative terms. The postwar gap in turnout rates between national elections and local ones is dramatically larger in the United States than it is in Western European nations. Robert L. Morlan, *Municipal vs. National Election Voter Turnout: Europe and the United States*, 99 POL. SCI. Q. 457, 462 (1984).

³⁸¹ CHARLES M. KNEIER, *CITY GOVERNMENT IN THE UNITED STATES* 397–99 (rev. ed. 1947).

³⁸² Curtis Wood, *Voter Turnout in City Elections*, 38 URB. AFF. REV. 209, 220–21 (2002); *e.g.*, Ann Allen & David N. Plank, *School Board Election Structure and Democratic Representation*, 19 EDUC. POL'Y 510, 516 (2005) (finding that turnout in general elections was three times the rate for special elections in two cities in 1999).

elections is a paltry 18%,³⁸³ lower than the already depressed rates prevalent at general local elections.³⁸⁴ In most school board elections, researchers claim, the central issues are undefined and the candidates' positions unclear.³⁸⁵ Minimal campaigning or public interest is involved.³⁸⁶ The boards operate in a nonpartisan environment, which encourages candidates to avoid controversial questions.³⁸⁷ Lively public debates are absent even where researchers anticipated contentious competitions, for example, when evangelicals (expected to promote a controversial creationist agenda) seek office.³⁸⁸ Even these candidates tend to avoid such controversial matters in their campaigns, and, once elected to serve on the board, in the board's deliberations and policymaking.³⁸⁹ Everywhere, board elections and public board meetings materialize as dreary affairs, and school boards proffer little opportunity for meaningful participation today.³⁹⁰

The cause for this low degree of public engagement in the governance of a service that still immensely impacts many is debatable. It may be the homogenous socioeconomic nature of many present-day school districts,³⁹¹ or voters' sense that in a now nationalized—even globalized—economy lower level governments have little effect,³⁹² or the limited media exposure of lower office holders;³⁹³ or the difficulty voters experience, in a political world no longer based on continuous face-to-face interaction, in assessing down-ballot candidates' quality.³⁹⁴

³⁸³ KENNETH K. WONG ET AL., *THE EDUCATION MAYOR* 6 (2007).

³⁸⁴ City elections, while also notoriously underrepresentative, tend to register somewhat higher turnout. See Wood, *supra* note 382, at 223 (finding an average turnout rate of 34% across 57 cities).

³⁸⁵ FREDERICK M. HESS, *SPINNING WHEELS* 63 (1999).

³⁸⁶ See Frederick Hess, *School House Politics*, in *BESIEGED*, *supra* note 19, at 235 (noting that campaign contributions play a minimal role in school board elections).

³⁸⁷ HESS, *supra* note 385, at 65–66.

³⁸⁸ MELISSA M. DECKMAN, *SCHOOL BOARD BATTLES: THE CHRISTIAN RIGHT IN LOCAL POLITICS* 168–69 (2004).

³⁸⁹ *Id.*

³⁹⁰ MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 388 (3d ed. 1992); see also MAEROFF, *supra* note 48, at 9 (finding that citizens hardly attend board meetings).

³⁹¹ J. Eric Oliver, *The Effects of Metropolitan Economic Segregation on Local Civic Participation*, 43 AM. J. POL. SCI. 186, 204 (1999) (finding that more economically homogenous cities have lower political participation).

³⁹² Don Martindale, *Theory of the City*, in NOEL IVERSON, *URBANISM AND URBANIZATION: VIEWS, ASPECTS, AND DIMENSIONS* 28 (1984) (explaining that the “social character of contemporary man is more shaped by his experience as a national or an ethnic . . . than as a citizen of a city”); H. G. WELLS, *MANKIND IN THE MAKING* 381 (Charles Scribner’s Sons ed., 1916) (“Local politics remain . . . more and more in the hands of the dwindling section of people whose interests really are circumscribed by the locality. These are usually the small local tradesmen, the local building trade, sometimes a doctor and always a solicitor . . .”).

³⁹³ Wood, *supra* note 382, at 213.

³⁹⁴ STEFFENS, *supra* note 289, at 3 (noting that citizens do not follow local affairs).

Regardless of its root, the prevalent voter apathy creates an opening for concentrated groups invested in school board elections' subject matter to dominate elections and produce bodies unreflective of majority preferences.³⁹⁵ These groups are either entrenched political machines³⁹⁶ (that treat school boards as employment opportunities and circulate candidate slates) or teacher unions (whose members, school employees, are heavily interested and thus form the sole permanent organized interest group in board elections).³⁹⁷ As dependable and disproportionate suppliers of votes and campaign funding, these interest groups hold elected school boards' ears, and thus receive benefits they desire—whether or not those benefits are also advantageous to most voters.

Thus, for example, New Jersey's state takeover of the Newark School District in 1994—marring future efforts to deploy school resources as described in the Introduction—was provoked by the gross mismanagement and corruption of an elected board heeding unions and political operatives, favoring employees over residents and students.³⁹⁸ And Newark is not unrepresentative. Everywhere, elected school boards, as data indicates, are prone to better represent organized groups' peculiar preferences than the preferences of the majority of residents who do not participate.³⁹⁹

The upshot is that the current school district is likely to underperform the broader general government in providing effective reflection of residents' preferences. The general government enjoys wider powers, and its leaders are more visible and can spend more on campaigning. These factors contribute to higher rates of participation in local elections for general government posts.⁴⁰⁰ They also generate a more diverse collection

³⁹⁵ Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1598–1600 (1965) (noting that in part because of voter apathy, “one interest group is often able to impose its conception of the community on the entire populace” of a smaller city).

³⁹⁶ Martindale, *supra* note 392, at 21–22.

³⁹⁷ Terry M. Moe, *Teacher Unions and School Board Elections*, in *BESIEGED*, *supra* note 19, at 256.

³⁹⁸ RUSSAKOFF, *supra* note 11, at 19–20.

³⁹⁹ See SARAH F. ANZIA, *TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS* 166 (2014) (describing the effectiveness of teachers' unions at influencing school board elections); L. Harmon Zeigler, *School Board Research: The Problems and the Prospects*, in *UNDERSTANDING SCHOOL BOARDS* 3, 3–5 (Peter J. Cistone ed., 1975) (describing how school boards are not responsive to the needs of the public); see also NAT'L SCH. BD. FOUND., *LEADERSHIP MATTERS: TRANSFORMING URBAN SCHOOL BOARDS* 12 (1999) (noting divergent perceptions of school performance by school board members and the general public).

⁴⁰⁰ Thomas M. Holbrook & Aaron C. Weinschenk, *Campaigns, Mobilization, and Turnout in Mayoral Elections*, 67 POL. RES. Q. 42, 52 (2014) (finding that lower campaign intensity and spending result in lower turnout in local elections); see also Neal Caren, *Big City, Big Turnout? Electoral Participation in American Cities*, 1 J. URB. AFF. 31, 31 (2007) (noting that voter turnout may be low in local elections in part because “mayors . . . have less powers than other executives”); Zoltan L. Hajnal

of interest groups vying for influence over the general government, rendering it harder for any one individual group to capture the general government. That government is thus less likely to ignore the preferences of a major portion of the electorate—let alone of a majority of the electorate. Therefore, the school district’s historical role notwithstanding, it can no longer be embraced as an important democratic arena—or even as one that necessarily tends to improve on the opportunities for representation offered by the general government.

B. The Modern School District and Small-Scale Community Building

Participation’s demise as a normative value that can justify the school district’s political separation from the general government does not necessarily portend a similar fate for the related interest of small-scale community building, on whose allure the district’s foundations were often laid, whether in rural colonial Massachusetts or in Jacksonian Era western settlements. In fact, even more than participatory ideals, communal notions are intrinsically associated with the separate school district. As a distinct entity, the school district’s geographical boundaries may deviate from those of other governments and align better with “real” communities.⁴⁰¹ As seen, geographically separate, rural school districts survived Progressive Era agitation precisely because countryside communities perceived district boundaries as, unlike general government boundaries, overlapping with their organic community lines.⁴⁰² Thus even as community building faded into irrelevance for many urban school districts—which grew at the time geographically conterminous with cities or counties—it remained not only relevant, but also ideologically determinative, elsewhere.⁴⁰³

As a normative value, community building still holds much—if not more—appeal today. The idea of community empowerment through non-city/county local governments is straightforward. Unlike its earlier predecessors—e.g., the colonial town—the modern general government

& Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 645–46 (2003) (comparing turnout rates for national versus local elections); Albert K. Karnig & B. Oliver Walter, *Decline in Municipal Voter Turnout: A Function of Changing Structure*, 11 AM. POL. Q. 491, 491–92 (1983) (describing how “citizen apathy, the absence of competition, less money donated to campaigns, [and] less glamorous positions and candidates” account for lower turnout in local elections compared to presidential elections).

⁴⁰¹ On the distinction between “Gemeinschaft” (community) and “Gesellschaft” (society), see ROBERT A. NISBET, *THE SOCIOLOGICAL TRADITION* 47–48 (1966).

⁴⁰² See *supra* notes 360–64 and accompanying text.

⁴⁰³ *Milliken v. Bradley*, 418 U.S. 717, 741 (1974) (“[T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country . . .”).

does not permit face-to-face interactions between all members as is believed necessary for true community life.⁴⁰⁴ Size is to blame: the modern general government covers too large a territory and population.⁴⁰⁵ Moreover, it is not organized around one specific institution (like the old church, town hall, or grazing commons) that all residents frequent and where they must all interact.⁴⁰⁶

Because the schoolhouse is such an institution—students and parents all inevitably interact there—the school district has traditionally offered an appealing, community-based alternative to standard general governments.⁴⁰⁷ The promise is premised on a tie that the separate school district offers between the individual school—in which all members are personally invested—and school governance—which consequently forces those members to meet and actively cooperate in decisionmaking.⁴⁰⁸ Though that tie dissipated in urban centers with the abolition of ward- or neighborhood-based representation during the Progressive Era, it lived on in rural areas where, alongside the one-room school,⁴⁰⁹ the one-school school district dominated.⁴¹⁰

The problem today is, however, that time did not stand still, even in the countryside. The middle decades of the twentieth century witnessed a precipitous decline in the number of one-room schools, and accordingly, of rural school districts.⁴¹¹ Researchers debate whether rural school district consolidation was pressed on local communities by external, state-based

⁴⁰⁴ HANNAH ARENDT, *ON REVOLUTION* 269–73 (2006); RICHARD SENNETT, *THE USES OF DISORDER* 163–71 (1970).

⁴⁰⁵ Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 *DUKE L.J.* 75, 84–89 (1998).

⁴⁰⁶ See RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 17 (1977) (describing the demise of common spaces where city residents might interact).

⁴⁰⁷ See SENNETT, *supra* note 404, at 190–93 (identifying the school as a place where people of different backgrounds and interests reconcile their views). Thomas Jefferson thus suggested that Virginia be divided into smaller political units, “wards,” each centered around one school. JACK CRITTENDEN, *DEMOCRACY’S MIDWIFE: AN EDUCATION IN DELIBERATION* 20 (2002).

⁴⁰⁸ See Aaron J. Saiger, *The School District Boundary Problem*, 42 *URB. LAW.* 495, 519–20 (2010) (describing how, in contrast to other units of local government, school districts are “more likely to be genuine ‘functional communities’” due to the high degree of parent involvement (quoting James S. Coleman, *Schools and the Communities They Serve*, 66 *PHI DELTA KAPPAN* 527, 529 (1985))).

⁴⁰⁹ FULLER, *supra* note 249, at 7 (explaining that the one-room school enabled interaction and thus community building).

⁴¹⁰ See *supra* note 348 and accompanying text.

⁴¹¹ WILLIAM A. FISCHER, *MAKING THE GRADE: THE ECONOMIC EVOLUTION OF AMERICAN SCHOOL DISTRICTS* 5–6 (2009) (explaining that the decline in the number of school districts is owed to consolidation of rural one-room schools); Christopher Berry, *School Consolidation and Inequality*, 9 *BROOKINGS PAPERS ON EDUC. POL’Y* 49, 49 (2007) (noting that between 1930 and 1970, 90% of school districts were eliminated through consolidation).

centralizing pressures,⁴¹² or was organically pursued by local communities desirous for standardized educational modes necessary in the new nationalized economy.⁴¹³ The outcome, however, is unquestionable. Today, even if its geographical boundaries misalign with the general government's, the school district tends to encompass more than one school. Its diverging boundaries no longer mark "genuine" community spaces centered on a specific school and facilitating community empowerment.⁴¹⁴

An example is provided by the Introduction's East Ramapo Central School District, whose boundaries bring together communities sharing exceptionally little and whose members never interact in any school.⁴¹⁵ East Ramapo's case is unquestionably extreme, but every school district nowadays is a rather large bureaucratic entity like all other governments.⁴¹⁶ It thus can mostly do little to promote the traditional value of small-scale community building historically associated with it.⁴¹⁷

While the separate school district, therefore, probably no longer promises to stimulate interaction among community members better than the general government, it definitely can, and does, effectively perform today another community building function: exclusion of outsiders.⁴¹⁸ Two 1970s Supreme Court decisions transformed the school district's geographic separation from the general government into an exclusionary weapon. In 1973, the Court ruled that the boundary separating two school districts—even those, as in that case, located within one city—may block tax funds' redistribution from the rich to the poor district.⁴¹⁹ One year later, it held that such boundaries could also inhibit student integration between the white and black school districts.⁴²⁰ In tandem, these decisions

⁴¹² Berry, *supra* note 411, at 53–54.

⁴¹³ FISCHER, *supra* note 411, at 101.

⁴¹⁴ See David Strang, *The Administrative Transformation of American Education: School District Consolidation, 1938–1980*, 32 ADMIN. SCI. Q. 352, 352 (1987).

⁴¹⁵ Acknowledging the reality that general governments may more closely coincide with community lines than school districts do, Utah creates an easy route for cities within a district to secede and create a smaller district coterminous with their boundaries. UTAH CODE ANN. § 53A-2-118 (2017); see also *City of Herriman v. Bell*, 590 F.3d 1176, 1194 (10th Cir. 2010) (explaining the rationales for Utah's law).

⁴¹⁶ See Berry, *supra* note 411, at 49; Strang, *supra* note 414, at 355.

⁴¹⁷ CRONIN, *supra* note 230, at 6 (arguing that by the 1970s, a consensus emerged that school boards were detached from actual communities).

⁴¹⁸ See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 246 (1990); Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137, 144 (2013); Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1420 (2014).

⁴¹⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 11–17 (1973).

⁴²⁰ *Milliken v. Bradley*, 418 U.S. 717, 741–45 (1974).

barricaded school district boundaries, and assured their status as tools for excluding other community members—those who are poor and minority.⁴²¹

Recent events in Omaha provide stark illustration of this form of community building that separate school district geographic lines currently effectuate.⁴²² Omaha's municipal lines do not correspond to the geographical boundaries of any one school district. Instead, the city is dissected by several districts, some established specifically to fight absorption into the Omaha Public School District (OPS) covering the inner city.⁴²³ In 2005, a struggling OPS—of whose students 70% are minority and a larger portion poor—turned to a statute dating to 1891,⁴²⁴ which empowered the district to annex all other school districts situated within the city's municipal boundaries.⁴²⁵ The effort, dubbed “One City, One School District,” provoked intense opposition from the targeted, and affluent, separate school districts that lobbied for state reprieve.⁴²⁶ The first legislative response would have dissolved OPS into smaller school districts corresponding to alleged community lines.⁴²⁷ Not coincidentally, the three suggested community-based school districts were racially identifiable.⁴²⁸ Following national uproar,⁴²⁹ the plan was scrapped.⁴³⁰ But affluent communities' demands would not go unattended, and the state legislature did strip OPS of its annexation powers.⁴³¹

The Nebraska legislature's insistence on preserving separate school districts within one city exemplifies the type of power separate school

⁴²¹ Wayne Batchis, *Urban Sprawl and the Constitution: Educational Inequality as an Impetus to Low Density Living*, 42 URB. LAW. 95, 98 (2010); Saiger, *supra* note 408, at 495.

⁴²² Batchis, *supra* note 421, at 98 (summarizing a study's findings showing that areas with small school districts and increased school district fragmentation were likely to have high levels of school racial segregation).

⁴²³ For example, Westside was established in 1947 by white affluent neighborhoods who immediately demanded—and received—a special exemption from OPS's annexation power. Chris Burbach, *'70s Decisions Haunt OPS*, OMAHA WORLD-HERALD, Nov. 28, 2005, at 1A.

⁴²⁴ NEB. REV. STAT. § 79-409 (2016).

⁴²⁵ See Complaint at 36, NAACP v. Heineman, No. 8:06-cv-00371 (D. Neb. May 16, 2006).

⁴²⁶ JENNIFER JELLISON HOLME ET AL., CHARLES HAMILTON HOUS. INST. FOR RACE & JUSTICE, USING REGIONAL COALITIONS TO ADDRESS SOCIOECONOMIC ISOLATION: A CASE STUDY OF THE OMAHA METROPOLITAN 5–6 (2009), <http://gs4a.org/wp-content/uploads/2015/05/Holme-Using-Regional-Coalitions.pdf> [https://perma.cc/2HZ6-H8B5].

⁴²⁷ A.M. 3142 to L.B. 1024, 99th Leg. (Neb. 2006).

⁴²⁸ Given city demographics, one district was to contain primarily white students, while the others served minority residents. HOLME ET AL., *supra* note 426, at 7–8.

⁴²⁹ Sam Dillon, *Law to Segregate Omaha Schools Divides Nebraska*, N.Y. TIMES, Apr. 15, 2006, at A9.

⁴³⁰ L.B. 641, 100th Leg. (Neb. 2007).

⁴³¹ *Id.*

districts currently bestow on communities.⁴³² Separate districts today may limit interactions with, and therefore responsibility towards, other city or county residents of different socioeconomic identity.⁴³³ This is precisely the form of community building many commentators deplore as perverse—since while allegedly reinforcing internal cohesion, it limits interactions with other individuals, community building’s supposed goal.⁴³⁴

Separate school districts today cannot, as already seen, stimulate such meaningful interactions, even within their boundaries—their traditional, and beneficial, community-building function—since those boundaries are mostly detached from individual schools.⁴³⁵ The twenty-first-century school district is just as unfit as other traditional governments—cities and counties—for face-to-face communal interaction through governance.⁴³⁶ At the same time, and even more than those general governments, school districts are fit for contemporary attempts to deflect any chance of such

⁴³² *Sheff v. O’Neill*, 678 A.2d 1267, 1274 (Conn. 1996) (arguing that district lines are “the *single most important factor* contributing to the present concentration of racial and ethnic minorities in the Hartford public school system”). The Supreme Court has accordingly held that district lines cannot be drawn in a manner that will perpetuate segregation. *Wright v. Council of Emporia*, 407 U.S. 451, 462 (1972). Another example is Memphis: after the formation of a countywide school district, white, middle-class communities seceded to form separate districts. Susan Eaton, *How a ‘New Secessionist’ Movement Is Threatening to Worsen School Segregation and Widen Inequalities*, NATION (May 15, 2014), <https://www.thenation.com/article/how-new-secessionist-movement-threatening-worsen-school-segregation-and-widen-inequal/> [<https://perma.cc/MQC2-4GYX>]. For a discussion of the earlier formation of the countywide district, see Michelle Wilde Anderson, *Making a Regional School District: Memphis City Schools Dissolves into Its Suburbs*, 112 COLUM. L. REV. SIDEBAR 47 (2012). A similar scenario is currently unfolding in Jefferson County, Alabama. The mostly white suburb of Gardendale is seeking to secede from the countywide school district and form its own district, a move contested in federal courts for its potential to reestablish segregation. See generally Plaintiffs’ Corrected Objection to Motion to Operate Municipal School System, *Stout v. Jefferson Cty. Bd. of Educ.*, No. 2:65-CV-00396-MHH (N.D. Ala. Aug. 29, 2016). The district court reluctantly approved the separation, despite the fact that the judge was persuaded that “race was a motivating factor in Gardendale’s decision to separate from the Jefferson County public school system.” *Stout v. Jefferson Cty. Bd. of Educ.*, No. 2:65-CV-00396-MHH, 2017 WL 1488349, at *56 (N.D. Ala. Apr. 24, 2017), *supplemented by*, 2017 WL 1857324 (N.D. Ala. May 9, 2017).

⁴³³ Kiel, *supra* note 418, at 144.

⁴³⁴ *E.g.*, GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 140 (1999) (rejecting as a “romanticized sense of togetherness” community building that stresses homogeneity); YOUNG, *supra* note 418, at 226–27 (arguing that “city life” is “an openness to unassimilated otherness”). A somewhat more neutral portrayal of the distinction separates bridging social capital—which is outward looking—from bonding social capital—which is inward looking. ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 22 (2000).

⁴³⁵ *Milliken v. Bradley*, 418 U.S. 717, 794–95 (1974) (Marshall, J., dissenting); see also *Bd. of Educ. of Kiryas Joel Vil. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994) (banning the creation of a school district accommodating a religious community).

⁴³⁶ See *Mass. Fed’n of Teachers v. Sch. Comm. of Chelsea*, 564 N.E.2d 1027 (Mass. 1991) (discussing parents’ and students’ claim that a district is too broad an entity to represent them).

interaction with community members who are different.⁴³⁷ Whether this common impact is perceived as a disadvantage or not, the school district is simply unlikely to offer an advantage over the general government in terms of community building in 2017.

C. *The Modern School District and Expertise*

As Part II highlighted, throughout the school district's long American story, its normative *raison d'être* oscillated between two diametrical poles: democracy (i.e., participation and relatedly small-scale community building) and efficiency (expertise and relatedly stable funding isolated from popular pressures). As the preceding Sections illustrated, a gulf now separates the school district from the values of participation and small-scale community building. This widening gap should bring the district closer to the opposite ideal of efficient provision of education through expertise-driven governance.

That ideal continues to have normative salience. A plethora of modern studies show that effective education determines a child's prospects, and thus national welfare.⁴³⁸ A clear majority of commentators also agree that for effective education, specialized knowledge is key.⁴³⁹ Professionalizing educational services, accordingly, tends to be a rallying cry for activists of diverse ideological persuasions.⁴⁴⁰

A separate entity responsible for governing schools has traditionally served such desired expertise-driven public education by removing power over the field from political—and inherently lay—governments.⁴⁴¹ Hence, as Section II.C.2 highlighted, Progressive Era reformers grudgingly embraced the school district once they had inched its operational mode

⁴³⁷ Briffault, *supra* note 36, at 441–42 (“[T]his results in a local politics aimed at the maintenance of class and ethnic homogeneity . . . the insistence on separate suburban school districts reflects a determination to shield local children from exposure to economic, social and cultural differences that are perceived as a threat to family values.”).

⁴³⁸ MCKINSEY & CO., THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS 17–20 (2009); NAT'L COMM'N ON EXCELLENCE IN EDUC., *supra* note 40, at 15.

⁴³⁹ See Steven G. Rivkin et al., *Teachers, Schools, and Academic Achievement*, 73 *ECONOMETRICA* 417, 419 (2005) (identifying the impact of teachers and high-quality instruction on student achievement).

⁴⁴⁰ See, e.g., BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED EDUCATION REFORM 21–60 (2008) (describing the adoption and growth of education standards through the late 2000s); Press Release, Nat'l All. for Pub. Charter Sch., U.S. Education Secretary Arne Duncan Urges Public Charter School Supporters to Demand Quality; Children's Defense Fund Leader Agrees Charter Sector Must Hold Itself Accountable for Student Success (June 22, 2011).

⁴⁴¹ An example of contemporary attachment to this goal is the popularity of charter schools, which, freed from direct governmental control, are supposedly managed like businesses. Robert A. Garda, Jr., *Culture Clash: Special Education in Charter Schools*, 90 *N.C. L. REV.* 655, 663 (2012).

closer to that of the special district. A key way in which the special district's legal architecture, unlike that of the general government, could prioritize expertise was, and is, by legitimizing governance schemes not based on equal representation, but on the different stakes held by citizens in the relevant governmental service.⁴⁴² Those citizens that are more impacted by the special district's policies (for example, farmers relying on a water district's services) are supposedly likelier to make informed decisions and elect knowledgeable officials, and hence only they are granted the franchise.⁴⁴³ So as to promote such informed decisionmaking in the educational sphere, this logic of the special district thus demanded that a school board's election scheme favor parents, and perhaps taxpayers.⁴⁴⁴ In this fashion the school district would be superior to general governments—which hold general, politicized elections—in furthering expert leadership.

But Progressive Era reformers' aspirations for applying the special district's governance template to the school district notwithstanding, the current school district does not favor the more impacted voters or their supposed educational expertise and investment in schools' management. Indeed, as Section I.B. noted, the school district is legally barred from doing so. Modern law does not consider the school district to be a typical special district; instead it now subjects the school district to many of the rules applicable to general governments—particularly those safeguarding popular political representation.

Specifically, when New York employed the expertise rationale to defend a school board election scheme confining the vote to students' parents, property taxpayers, and their spouses, the Supreme Court would not accept the rationale.⁴⁴⁵ The Court clarified that regardless of the argument's soundness, the school district was subject to the one person, one vote rule.⁴⁴⁶ No resident may be excluded from voting—even if an inclusive franchise renders experts' election unlikely. In this regard, in current American law, the school district is the equivalent of the general

⁴⁴² *E.g.*, *Ball v. James*, 451 U.S. 355, 370 (1981).

⁴⁴³ *E.g.*, *Briffault*, *supra* note 80, at 365.

⁴⁴⁴ *See Doremus v. Bd. of Educ. of Hawthorne*, 342 U.S. 429, 435 (1952) (Douglas, J., dissenting) (arguing that “[t]here is no group more interested in the operation and management of the public schools than the taxpayers who support them and the parents whose children attend them”). Arguably, taxpayers, even if they do not rely on the schools, have a strong incentive—generated by schools' effect on property values—to be concerned with the state of schools. Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1392 (1994).

⁴⁴⁵ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 630–32 (1969).

⁴⁴⁶ *Id.* at 628–29 (explaining that once the school district is made an elected body the one person, one vote rule is to be applied—regardless of the district's lack of general governmental powers).

government, not of the special government.⁴⁴⁷ Relatedly or not, school boards today are mostly constituted not of experts, but of amateurs elected by an uninformed electorate: “in a school board election, there are twelve people up and it’s like throwing six darts at a board, and the six people hit win the election.”⁴⁴⁸ Given the dictates of current law, the Progressive Era goal of insulating board management from political forces inherent to general elections is by and large unattainable.⁴⁴⁹

Accordingly, unlike their predecessors whose work was reviewed in Section II.C, modern writers celebrating the school district’s promotion of efficient education normally do not cite its supposed promise of apolitical management. Rather, they highlight the competition between public providers that the school district’s existence generates, and said competition’s power to assure the provision of education of the quality and quantity that residents desire.⁴⁵⁰ This idea is familiar to any student of local government law. It draws on the highly influential Tiebout Model: local governments promote efficiency in the supply of public goods since they compete among themselves for residents.⁴⁵¹ To attract residents, they adjust their behavior and the products they proffer to the preferences of residents—in a similar manner to private providers of a good (say cars or private schools).⁴⁵² Therefore, the proliferation of options—of providers of public education—intensifies competition and increases the likelihood that

⁴⁴⁷ See Briffault, *supra* note 80, at 353–56.

⁴⁴⁸ HESS, *supra* note 385, at 63. Board members cannot be assumed to be better education experts than general government officials. They have little opportunity to acquire special expertise: they are elected for specified terms, and, since in most cases they are unpaid, they almost always have other jobs. See Jacqueline P. Danzberger, *Governing the Nation’s Schools: The Case for Restructuring Local School Boards*, 75 PHI DELTA KAPPAN 367, 369 (1994) (listing criticisms of school boards); Samantha Sell, *Running an Effective School District: School Boards in the 21st Century*, 186 J. EDUC. 71, 74–75 (2005) (detailing the arguments against the effectiveness of school boards in the provision of efficient education); FREDERICK M. HESS, NAT’L SCH. BDS. ASS’N, SCHOOL BOARDS AT THE DAWN OF THE 21ST CENTURY 4 (2002), <http://files.eric.ed.gov/fulltext/ED469432.pdf> [<https://perma.cc/QR5B-GH5J>] (finding that the vast majority of board members are unpaid).

⁴⁴⁹ See *Fumarolo v. Chi. Bd. of Educ.*, 566 N.E.2d 1283, 1309 (Ill. 1990) (foreclosing, at least in the context of elections for the body actually governing the schools, the possibility of elections by parents alone—a scheme seemingly even more narrowly tailored to align representation with actual voter interest and knowledge). Furthermore, in many states, the Progressive Era ideal of appointive—rather than elective—boards is similarly out of reach. Several constitutions provide that school boards be elected, in stark contrast to the boards of special districts. *E.g.*, GA. CONST. art. VIII, § 5, ¶ II; LA. CONST. art. VIII, § 9; COLO. CONST. art. IX, § 15.

⁴⁵⁰ See, *e.g.*, Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185, 1202 (1996) (“[C]ompetition . . . obligates the government provider to be attentive to the demands of its constituents.”). For a forceful critique of this conception of education as a consumption good, see Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998).

⁴⁵¹ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

⁴⁵² *Id.* at 422–24.

a resident will find the school district providing services meeting her preferences respecting the quantity, quality, and pricing (embodied in taxes) of public education.⁴⁵³ Some commentators find empirical backing for this prediction and conclude that a larger number of individual school districts in a given area increases schooling's quality and parents' satisfaction with it.⁴⁵⁴ Others hotly contest the finding.⁴⁵⁵

Importantly, however, this debate revolves around the effect of the number of governments within a metropolitan area providing educational services, not necessarily around the effect of those governments' identity. In other words, these works ask whether a large number of governments providing schooling increases efficiency; they do not ask whether efficiency is increased if those governments whose numbers are enlarged are separate, as opposed to general, governments. Since, as seen in Part I, there are hardly any general governments providing education in America today, it is perhaps impossible to produce a meaningful empirical answer to this latter question, the one that is of concern to this Article. A sound comparison between the performance of schools controlled by general governments and by school districts may simply be unfeasible.⁴⁵⁶ Theoretical predictions can be made in both directions.⁴⁵⁷ Since

⁴⁵³ See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297 (2007); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1072 (2007); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987) and detailing the advantages of decentralized decisionmaking).

⁴⁵⁴ Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 AM. ECON. REV. 1209, 1236–37 (2000).

⁴⁵⁵ Jesse Rothstein, *Does Competition Among Public Schools Benefit Students and Taxpayers?* *Comment*, 97 AM. ECON. REV. 2026, 2036–37 (2007).

⁴⁵⁶ Some researchers have attempted to assess the efficiency gains attained through mayoral takeover of school districts (these reforms will be discussed in Part IV). They claim to find gains, e.g., Kenneth K. Wong, *Does Mayoral Control Improve Performance in Urban Districts?*, in *WHEN MAYORS TAKE CHARGE: SCHOOL GOVERNANCE IN THE CITY* 64, 79 (Joseph P. Viteritti ed., 2009), but given the small and skewed sample size, these analyses are at best anecdotal. Furthermore, other researchers provide contradicting data points. *Mayoral Takeovers in Education*, *supra* note 377 (describing the struggles of mayor-controlled districts in Boston and Chicago to maintain student achievements that earlier researchers had celebrated).

⁴⁵⁷ In places where the district does not geographically overlap with the general government (and only in such places), it may enable residents to pick districts separately from their pick of a general government. Thus, residents can move within the same general government guided in that move solely by their preference for schooling (rather than the preference for other services, like policing, that are held constant between the different sites since they are provided by the same general government reigning over both school systems). The school district thus unbundles the complex product that is the house. See Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 873–75 (introducing the idea of the house as a bundled product). At the same time, whether or not the district and general government geographically overlap, a variety of governments ruling the same area taxes potential residents' ability to gather and process information about a potential housing destination, and thereby

commentators refuse to assume that school district boundaries, as compared to the boundaries of general governments, are inherently a better fit for the provision of education (correctly, as the haphazard history of the district showed),⁴⁵⁸ separate school districts' contribution to efficient local competition is, at best, indeterminate.

The current argument made on behalf of school districts' efficiency—their promotion of interlocal competition—is therefore in actuality an argument for fragmentation and local government control of schools generally, not specifically for separate school governance.⁴⁵⁹ The historical argument for separate school governance's efficiency did specifically highlight these separate governments' superiority to general governments, by citing school district management's insulation from political pressures.⁴⁶⁰ That argument, however, is no longer applicable due to twentieth-century legal rulings vindicating general voting rights in school district elections. Modern law has thereby placed the school district on equal footing with general governments respecting the capacity to promote efficient management. Consequently, the contemporary independent school district can hardly be said to be necessary for the promotion of efficient education.

D. *The Modern School District and Stable Funding*

Regardless of its (in)ability to deliver on the normative values typically associated with local government—participation, community

decreases the accuracy of the signals sent by their locational choices. If, when moving, a resident needs to only collect information about one government, she is likelier to make an accurate decision, as compared to when she needs to gather that same information respecting a plethora of governments, each responsible for a different service. Shoked, *supra* note 25, at 1356.

⁴⁵⁸ If school districts' coverage areas aspired to represent ideal areas for education provision, they would have clearly offered the potential of gains in productive efficiency. Gillette, *supra* note 444, at 1388. However, the Progressive Era claim that district boundaries were not set for this goal is commonly still followed. As Part II has shown, these boundaries are understood as set with other concerns in mind. See Briffault, *supra* note 36, at 384–85 (explaining that school district boundaries are associated with ideas of parental control and local community). To the extent commentators believe that these boundaries were once guided by ideas respecting the ideal geographical scope of a school government, they also assert that those ideas are no longer relevant. See Hoxby, *supra* note 454, at 1216 (assuming that school district lines correspond to streams located within a county since originally those offered natural barriers—even though modern forms of student transportation easily overcome them). It should also be noted that it is unclear what should be the desired, optimal size of school districts. Research has tried to address the optimal size of individual schools (centering on the effectiveness of smaller schools), but the question respecting the optimal size of the entity managing the schools is distinct. See Shoked, *supra* note 25, at 1370.

⁴⁵⁹ Roger B. Parks & Ronald J. Oakerson, *Comparative Metropolitan Organization: Service Production and Governance Structures in St. Louis (MO) and Allegheny County (PA)*, 23 PUBLIUS 19, 28–29 (1993).

⁴⁶⁰ See *supra* Section II.C.2.

building, and expertise—the school district, as a separate political entity, might provide a more practical benefit: stable school funding. The latter can be viewed as a component, alongside expertise, in promoting efficiency: the provision of effective education to the nation’s youth. As Part II illustrated, past legislators often held this view when empowering school districts. The post-Independence Massachusetts legislature provided taxing powers to school districts in order to combat towns’ financial neglect of schools.⁴⁶¹ Similar later acts were adopted in response to parents’ angst over student fees.⁴⁶² These moves reflected a state-level judgment that education carried wide-ranging benefits—in modern economic parlance, positive externalities—not registered by existing local governments, which underinvested in education relative to its true social value.⁴⁶³ States searched for tools to subsidize education’s provision so that it fully produced its positive externalities. They settled on a separate government with an independent, dedicated revenue stream.

As in those earlier times, schools today are also struggling with devastating financial shortfalls,⁴⁶⁴ and tools propping up their standing are still in high demand.⁴⁶⁵ Unfortunately, the school district is no longer such a tool. Due to a century’s worth of financial and legal developments, a school district’s political independence is now irrelevant to the task of easing schools’ financial crises. Indeed, it might at certain times intensify those crises.

To a great extent, the school district’s historical potential to reinforce school financing was born of specific historical circumstances, rather than a quality innate to the institution. As noted, in the nineteenth century an autonomous revenue source for schools had to be identified, since, beyond drying up receipts from federal land grants, schools received no funding from upper level governments.

By the mid-twentieth century however, the necessity of a distinct local school funding mechanism was waning fast: the state was assuming an

⁴⁶¹ See *supra* notes 198–200 and accompanying text.

⁴⁶² See *supra* notes 255–56 and accompanying text.

⁴⁶³ See, e.g., Barbara L. Wolfe & Robert H. Haveman, *Social and Nonmarket Benefits from Education in an Advanced Economy*, in *EDUCATION IN THE 21ST CENTURY* 97, 118–19 (Yolanda K. Kodrzycki ed., 2002) (discussing positive externalities associated with an additional year of schooling).

⁴⁶⁴ Kristi L. Bowman, *Before School Districts Go Broke: A Proposal for Federal Reform*, 79 U. CIN. L. REV. 895, 904 (2011) (describing spending by, and outstanding debts of, school districts).

⁴⁶⁵ See, e.g., James W. Guthrie & Arthur Peng, *A Warning for All Who Would Listen—America’s Public Schools Face a Forthcoming Fiscal Tsunami*, in *STRETCHING THE SCHOOL DOLLAR* 19, 21 (Frederick M. Hess & Eric Osberg eds., 2010) (describing how school districts occasionally become insolvent, sometimes requiring states to oversee such districts).

aggressive role in school funding.⁴⁶⁶ Evolving ideas respecting education and government's duties may have contributed, but the new responsibility was often thrust on states by court decisions.⁴⁶⁷ Starting in the 1970s, more than half of the state supreme courts interpreted their constitutions' educational clauses as mandating minimal funding for schools.⁴⁶⁸ Consequently, the majority of states now set a per-student amount of funding each district must enjoy, and enforce formulas to subsidize districts that cannot autonomously raise those amounts.⁴⁶⁹ States thus regulate local educational spending's floor.⁴⁷⁰ The state's role does not end there, however. Some states also enforce a ceiling.⁴⁷¹ Most have some sort of limit on tax rates school districts can charge.⁴⁷² A few go further, dictating the specific tax rate to be raised for schools or the portion of local revenues dedicated to schools.⁴⁷³ Many states simply deprive districts of fiscal powers: school boards submit budgets to the appropriate general government for approval and tax levying.⁴⁷⁴

Whether or not the school district preserves its formal fiscal independence, almost everywhere the state thus both finances local schools and polices local revenue and expenditure levels.⁴⁷⁵ In East Ramapo, for example, the state, not the school district, guarantees minimal support for

⁴⁶⁶ Berry, *supra* note 411, at 54.

⁴⁶⁷ Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 789 (1998); e.g., *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 189 (Ky. 1989); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989).

⁴⁶⁸ For a summary by state, see SCHOOLFUNDING.INFO, <http://www.schoolfunding.info> [<https://perma.cc/3GV6-ZME4>].

⁴⁶⁹ Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1, 15–18 (2002).

⁴⁷⁰ In 2014, \$288.6 billion of school systems' revenue came from the state, \$52.9 billion from federal sources, and \$276.2 billion from local sources. U.S. CENSUS BUREAU, G14-ASPEF, PUBLIC EDUCATION FINANCES: 2014, at xi (2016).

⁴⁷¹ Daniel R. Mullins, *Fiscal Limitations on Local Choice*, in STATE AND LOCAL FISCAL POLICY 201, 203 (Sally Wallace ed., 2010) (noting that all but three states enforce such ceilings).

⁴⁷² E.g., ARIZ. REV. STAT. ANN. § 15-972 (2017); NEV. REV. STAT. ANN. § 387.195 (West 2017).

⁴⁷³ California's constitution actually requires such legislation. CAL. CONST. art. XIII, § 21.

⁴⁷⁴ Only thirty-four states still have fiscally independent boards. MAEROFF, *supra* note 48, at 31. Even in those states, some districts are deprived of the power. E.g., N.Y. EDUC. LAW § 2576 (McKinney 2017).

⁴⁷⁵ Sharon N. Kioko, *Structure of State-Level Tax and Expenditure Limits*, 31 PUB. BUDGETING & FIN. 43, 46 (2011). The resultant negation of local autonomy can count as unconstitutional. *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 797–98 (Tex. 2005) (striking down a school tax cap as amounting to a state tax).

schools.⁴⁷⁶ Within the current contours of American law, the school district's separation from general governments is mostly irrelevant for the purpose of sustaining minimal funding levels the state deems necessary.

Worse still, in many states the effect of the school district's separate standing on school funding is not neutral: it is sometimes detrimental. Inevitably, the school district's detached political status generates a competition over revenues with other local governments drawing on the same property tax base. Each government's political leader craves a larger portion of the joint income pie to employ for the attainment of visible achievements within her responsibility field—at the expense of expenditures in fields for whose performance she herself is unaccountable to voters. A mayor will seek to capture local resources so she can spend them on street improvements, park expansion, police services, and the like, rather than on the schools for which she is not responsible. A school board official will seek to seize those same resources precisely for this latter use—the only one for which she is responsible. In this competition, the playing field may be tilted against school districts' leaders. Districts' fiscal powers are almost invariably more constrained than those of other local governments.⁴⁷⁷ At the same time, general governments may employ legal tools—most prominently, tax increment financing (TIF)—to divert some of the school district's portion of local tax revenues into their own coffers.⁴⁷⁸

The TIF's rise serves as a sad coda to the school district's promise of guaranteeing funding for schools. The district is immaterial today as a tool to assure adequate financing—as that assurance is now provided by the state. The independent school district may actually defeat the goal of expanding school financing opportunities by incentivizing general governments, released of schooling responsibilities, to take measures to reduce educational funding.

⁴⁷⁶ The New York Court of Appeals has held that the state is constitutionally obliged to ensure the availability of a “sound basic education” to all its children. *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359, 369–70 (N.Y. Ct. App. 1982). Consequently, the state provides local districts with subsidies to meet minimal funding standards. *Id.*

⁴⁷⁷ MAEROFF, *supra* note 48, at 31–33.

⁴⁷⁸ Under a TIF, a territorial district is created within a city, and revenues generated by applying the tax rate to increases in property values within the district above the values at the time of its creation are, for the life of the district, set aside and paid to the city alone (to the exclusion of all other local tax authorities, such as the school district, covering the TIF district), supposedly for further improvements within the district. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 67 (2010). TIFs have consequently been costly to some school districts. Rachel Weber et al., *The Effect of Tax Increment Financing on School District Revenues: Regional Variation and Interjurisdictional Competition*, 40 ST. & LOC. GOV. REV. 27, 37–40 (2008) (noting that while TIFs have benefitted rural and certain urban districts such as Chicago, other urban districts were harmed by TIFs).

E. Summary: The Modern School District's Normative Deficiencies

This Part's analysis indicated that today, unlike in the past, the independence of the school district is not normatively worthwhile. That is not to say that the normative values that originally, as seen in Part II, gave rise to the school district in American law are no longer relevant. Those values—representation, small-scale community building, expertise, and stable funding—each still enjoy strong backing among thinkers, courts, and policymakers. The problem is that modern developments have handicapped the independent school district's ability to surpass the general government in the delivery of these goals. Low turnout and interest group dominance render school districts an inferior representative arena. School district consolidation detached districts from “genuine” communities; still worse, court decisions transformed school districts into mechanisms for excluding community members. Other court rulings, proclaiming that the school district is not a special district, mean that its potential for expertise-driven management cannot surpass the city's. The state's commandeering of school-funding duties decreased the significance of the school district's independent standing for financing purposes; due to intergovernmental competition over resources sometimes that standing is now financially detrimental.

Currently, in sum, the school district fails to outperform the general government on every normative value; on three (participation, community building, and stable funding) it potentially, if not actually, underperforms it. Thus, the special place American law has for centuries reserved for the school district no longer appears justifiable. If questions remain, they are not about the functioning and potential of the school district: they are about the functioning and potential of American law without the school district. The Article's next, and final, Part addresses those possible questions.

IV. BEYOND THE SCHOOL DISTRICT

If a separate local government for education is not normatively superior to the local general government, the latter should gain authority over the field. In local government law, cities and counties are the default local governments: as *general* governments they wield most powers reserved to localities. Thus, in and of itself, Part III's conclusion should lead lawmakers to consider school districts' abolition and transfer of educational powers to general governments—a move facing no legal impediments in most states, as all local governments are state creatures.⁴⁷⁹

⁴⁷⁹ *E.g.*, *Fruit v. Metro. Sch. Dist. of Winchester-White River Twp.*, 172 N.E.2d 864, 866 (Ind. 1961) (holding that an act compelling school district consolidation was not invalid under the state

Still, its normative desirability and legal ease notwithstanding, this suggested move represents a break from a longstanding practice of American law, as Part II related. Thus an overview of its practical effects may be helpful. This concluding Part outlines the potential workings of the general government once tasked with governing schools.⁴⁸⁰ Specifically, it demonstrates how these workings can advance the normative values traditionally ascribed to local control of education, as identified in the preceding Parts.

To draw a full image of the suggested reform's potentialities, the discussion is divided into two Sections. The first Section underlines the congeniality of general governments' modern structure to effective control of education, highlighting that structure's capacity to negotiate competing values of participation and expertise. The second Section singles out legal mechanisms that will enable general governments, once in control of education, to transcend challenges of scale and alleviate the tension between interests in community building—necessitating small-scale governments—and in shoring up school funding—which benefit from economies of scale. Each Section will also introduce the pertinent existing reforms to school governance some states have already toyed with in the last few years.

A. Structure: Balancing Representation and Expertise

Once awarded powers over education, how will general governments handle the responsibility? Some readers, even if persuaded that the school district is an ineffective institution, may be apprehensive about the city or county taking charge. Given the negative image of city politics dominating American consciousness and law,⁴⁸¹ they may contemplate with dread the answer to the question. But in actuality the answer is reassuring. The source of skepticism is the paucity of precedents for cities governing

constitution, notwithstanding township disapproving vote); *Tuohy v. Barrington Consol. High Sch. Dist. No. 224*, 71 N.E.2d 86, 91 (Ill. 1947) (holding consolidation and detachment of school districts constitutional); *State v. Bd. of Educ. of Chetopa*, 252 P.2d 859, 868–69 (Kan. 1953) (“[T]here are no vested rights in the existence of a school district and . . . the legislature has authority to extend or limit its boundaries, consolidate two or more as one, or to abolish a district altogether.”). *But see* *Mendoza v. California*, 57 Cal. Rptr. 3d 505, 529 (Cal. Ct. App. 2007) (striking down mayoral takeover of the Los Angeles school board).

⁴⁸⁰ The choice between city and county will depend on the size of the relevant community. Another potential model can be found in states that currently have school districts' boundaries which correlate to both county and city lines, as seen in Section I.C.1.

⁴⁸¹ *See* Frug, *supra* note 20, at 1109–20; Michael Tager, *Corruption and Party Machines in New York City*, 3 CORRUPTION & REFORM 28, 30 (1988). *See generally* MORTON & LUCIA WHITE, *THE INTELLECTUAL VERSUS THE CITY* (1962).

education, not cities' governmental structure.⁴⁸² This Section will show that through their existing institutional architecture, cities can now effectively merge expert management with democratic accountability in school administration.

On the expertise side of the equation, the general government of the twenty-first century is no alien to the production of complex services. Education is not dissimilar to other highly professionalized services general governments already provide—e.g., policing or transportation—and for which they have developed over the twentieth century robust organizational frameworks.⁴⁸³ Namely, while the general government's political bodies—e.g., mayor and council—set general policies in such fields, actual management is vested in experts—e.g., the police or transportation department.⁴⁸⁴ Political involvement is delineated: the department head—police or transportation commissioner—is a mayoral appointee (often subject to city council confirmation)⁴⁸⁵ but lower ranked managers and employees are civil servants.⁴⁸⁶ An education department within the general government will function in a similarly professional manner.⁴⁸⁷ No less than an independent government for education, an education department within city government could thus be a hub of expertise run by professionals.

Furthermore, such a department may promote efficient management even better than the existing independent school district, since it will interact with the city's other professional departments.⁴⁸⁸ In reality, as opposed to current institutional design, education is never disconnected from other local policies: for example, the location and size of schools is dictated by land-use decisions, while in turn, schools' location and size

⁴⁸² In addition, nowadays, school districts are just as prone to mismanagement and corruption as cities, and it is far from clear that their public image is better than that of general governments. For example, in Newark, during the years it was still elected, the school board was at least as dysfunctional as city government. RUSSAKOFF, *supra* note 11, at 19–20.

⁴⁸³ WONG ET AL., *supra* note 383, at 6 (“[I]f democracy can be trusted to safeguard our social services, police forces and other essential services, why wouldn’t it work to protect our most precious resource, our children?” (quoting New York Mayor Michael Bloomberg)).

⁴⁸⁴ E.g., CHI., ILL., MUN. CODE tit. 2 (2016) (creating departments and commissions).

⁴⁸⁵ *Id.* § 2-102-020 (specifying that the mayor appoints the transportation commissioner subject to council approval); *id.* § 2-84-040 (specifying the same for police superintendent); N.Y.C., N.Y., CHARTER ch. 1, § 6 (2009) (“The mayor shall appoint the heads of administrations, departments, all commissioners . . .”).

⁴⁸⁶ On civil service laws, see 3 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12:124, Westlaw (database updated Mar. 2017).

⁴⁸⁷ Robert H. Salisbury, *Schools and Politics in the Big City*, 37 HARV. EDUC. REV. 408, 421–22 (1967) (noting the mistaken assumption that under city control, professionals will lose their prominence).

⁴⁸⁸ Michael D. Usdan, *Mayoral Leadership in Education: Current Trends and Future Directions*, 76 HARV. EDUC. REV. 147, 149 (2006).

have marked effects on the surrounding built environment;⁴⁸⁹ schools require transportation accommodations and police support; and aid to poor students is not confined to the classroom.⁴⁹⁰ In current law, however, education's management, vested in a separate government, is severed from the management of these other services. Prospects at coordination and better overall performance are inevitably hampered. In a role reversal, therefore, if awarded control over schools, the general government, by integrating all disparate services under one roof (through disparate professional departments operating within one city hall), could be the better purveyor of professionalism for educational management as compared to the school district.

This stance has been embraced by many state legislatures.⁴⁹¹ Dismayed by urban schools' performance, and pinning part of the blame on the supposedly unduly politicized school district, they turned to the general government as antidote.⁴⁹² Starting in the late 1980s, laws were passed conferring control over several major cities' school boards on mayors, as mentioned in Section I.C.2.⁴⁹³ These acts are promoted as serving a professionalized, business-like approach to school management.⁴⁹⁴ Often they follow a state takeover of school districts graded "failing"—indicating disquiet over school districts' vices and faith in city management's virtues.⁴⁹⁵

But city control of schools, as suggested here, is promising not only in these terms of professional management already associated with mayoral

⁴⁸⁹ See, e.g., *Gurba v. Cmty. High Sch. Dist. No. 155*, 40 N.E.3d 1, 7–8 (Ill. 2015) (holding that the school district was subject to municipality's zoning powers and hence could not construct higher bleachers for a football stadium that negatively affected the property values of surrounding properties). The result was enacted into Illinois law in late August 2016. 65 ILL. COMP. STAT. 5/11-13-27 (2016).

⁴⁹⁰ See, e.g., *Abbott v. Burke*, 575 A.2d 359, 400 (N.J. 1990) (noting that poverty, poor housing, poor nutrition, and other conditions linked to poverty affect children in a manner that is likely to depress their educational performance).

⁴⁹¹ DAVID R. BERMAN, *LOCAL GOVERNMENT AND THE STATES* 126 (2003).

⁴⁹² WONG ET AL., *supra* note 383, at 31, 40 (discussing the takeover of school districts in Boston and New York); Alan D. Bersin, *Making Schools Productive*, SAN DIEGO UNION-TRIB. (June 5, 2005), http://legacy.sandiegouniontribune.com/uniontrib/20050605/news_lz1e5making.html [<https://perma.cc/J4MA-CS59>].

⁴⁹³ For a list of appointed boards, see NAT'L SCH. BDS. ASS'N, *SELECTION OF LOCAL SCHOOL BOARDS* (2009), <https://www.nsba.org/sites/default/files/reports/electionschart.pdf> [<https://perma.cc/M4C4-QEHT>].

⁴⁹⁴ Jeffrey R. Henig, *Mayoral Control: What We Can and Cannot Learn from Other Cities*, in *WHEN MAYORS TAKE CHARGE*, *supra* note 456, at 25 (“[I]n many of the places that have adopted mayoral control, state legislators and civic leaders have simply concluded that the school boards they have tried to work with are amateurish”); Joseph P. Viteritti, *Why Governance Matters*, in *WHEN MAYORS TAKE CHARGE*, *supra* note 456, at 5–7.

⁴⁹⁵ WONG ET AL., *supra* note 383, at 30–47 (discussing Chicago, Cleveland, Hartford, and Detroit as examples).

control: it portends gains in the terms of the other important normative component of governance—democratic participation. Current reforms instituting mayoral control of schools are often criticized for their failings in this regard.⁴⁹⁶ Inevitably, the suspension of elections for school boards in favor of mayoral appointees interferes with representation values.⁴⁹⁷ Minority groups have especially felt sidelined.⁴⁹⁸ In some cities, the mayoral-control scheme’s unpopularity led to its downfall.⁴⁹⁹ Even where it persists, mayoral control is often temporary, conditioned on periodic legislative renewals,⁵⁰⁰ because, as seen in Section I.C.2, the school board is still not legally integrated into city government.⁵⁰¹ Conversely, this Article suggests full integration. Such reform will not only improve on this stopgap nature of mayoral control, but also, and more importantly, addresses mayoral control’s substantive weakness—its democratic deficit.⁵⁰² Full integration entails education’s subjection to full city/county governance—not solely to the mayor.⁵⁰³ Through their council representatives, communities will supervise educational decisionmaking—as they supervise all other local decisionmaking.⁵⁰⁴

⁴⁹⁶ See 1 COMM’N ON SCH. GOV., FINAL REPORT OF THE COMMISSION ON SCHOOL GOVERNANCE 16–17 (2008) (recommending that mayoral control of the schools be reformed to allow for more input from parents).

⁴⁹⁷ Courts have upheld the practice regardless. *Mixon v. Ohio*, 193 F.3d 389, 393–94 (6th Cir. 1999); *Cohanim v. N.Y.C. Bd. of Educ.*, 204 F. Supp. 2d 452, 455 (E.D.N.Y. 2002); *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1092–93 (Pa. 2003). *But see* *Mendoza v. California*, 57 Cal. Rptr. 3d 505, 508–09 (Cal. Ct. App. 2007).

⁴⁹⁸ Jeffrey R. Henig & Wilbur C. Rich, *Mayor-centrism in Context*, in *MAYORS IN THE MIDDLE* 3, 18 (Jeffrey R. Henig & Wilbur C. Rich eds., 2004).

⁴⁹⁹ WONG ET AL., *supra* note 383, at 45–49 (discussing Detroit and Washington, D.C. as examples).

⁵⁰⁰ *E.g.*, N.J. STAT. ANN. § 18A:7A-49(h) (Westlaw 2017) (requiring the state board to renew the order placing a school district under state control every three years); N.Y. EDUC. LAW § 2590-b (McKinney 2017).

⁵⁰¹ New York City is a partial exception. The board—appointed by the mayor—was rendered advisory, deprived of executive powers. N.Y. EDUC. LAW § 2590-g (McKinney 2017). The power to “[c]ontrol and operate” the school was vested in a chancellor, serving at the mayor’s pleasure. *Id.* § 2590-h. Still, other democratically elected city bodies have no powers over the schools. *City of New York v. Phila. Indem. Ins. Co.*, 2010 WL 3069654, at *12 (S.D.N.Y. 2010) (holding that “[w]hatever his status vis-à-vis the City,” the Comptroller has no relationship to the school board, and “the City and the Board remain separate legal entities” (quoting *Perez ex rel. Torres v. City of New York*, 837 N.Y.S.2d 571 (N.Y. Sup. Ct. 2007)); *see also* *Perez*, 837 N.Y.S.2d at 572).

⁵⁰² DOROTHY SHIPPS, *SCHOOL REFORM, CORPORATE STYLE* 4 (2006) (critiquing mayoral control).

⁵⁰³ Jackson, Mississippi, offers an interesting example. Since 2010, the mayor appoints board members but they must be confirmed by the council. Still, the board maintains its separate legal standing. MISS. CODE ANN. § 37-7-203(3) (Westlaw 2017).

⁵⁰⁴ WONG ET AL., *supra* note 383, at 22 (arguing that the problem of mayoral control is centralization, not the supposedly inherent representative qualities of the displaced separate school board).

Such supervision should be more democratically effective than current school board elections. As Section III.A stressed, participation rates in general local elections are higher than in school board elections and thus general governments are less prone to special interest capture. Moreover, limited existing experience indicates that when general governments wield educational powers, education immediately tops the list of debated general-election topics.⁵⁰⁵ Thus not only can the general government offer efficient management—through its professionalized departments—it also promises democratic gains, through more truly popular elections.⁵⁰⁶

As Part II's historical investigation discovered, American law recognized the school district because general governments were nonexistent, or once existent, were imperfect facilitators of meaningful participation and unpalatable conduits for expert management. That view of city politics, though, is now anachronistic. With municipal services' professionalization and their—at least partial—detachment from old-style political machines, the city, even if not an optimal management body, often offers better prospects for expertise and representation than the school district.⁵⁰⁷ Some states acknowledge this reality, and turn to mayoral control. Yet these reforms do not go far enough organizationally, while going too far normatively. They maintain the legally separate school board—with its attendant financial costs—but centralize control in one person—with its attendant democratic costs. Striking a better balance between expertise and representation values, the full integration of education into general governments will improve on this scheme—and on the still-prevalent separately elected school board scheme.

B. Scale: Balancing Community Building and Stable Funding

Modern general governments' internal structures are thus probably up to the task of effectively running schools. But would their external boundaries not obstruct the effort? Unlike school districts, general governments were not created with education's governance in mind. Accordingly, some may be concerned that these governments' geographic coverage areas might be too big (inhibiting efforts at community building

⁵⁰⁵ *Id.* at 28.

⁵⁰⁶ *Id.* at 20 (noting that relative to board elections, general elections are high-profile, not single issue, and hence interest groups have less influence).

⁵⁰⁷ In an indication that boards are now prone to corrupt practices characteristic of old city machines, states pass acts setting special ethics duties for them, prohibit their interference in professional affairs, regulate their reimbursement practices, etc. *E.g.*, GA. CODE ANN. § 20-2-63 (Westlaw through Act 10 of 2017 Legis. Sess.); LA. STAT. ANN § 17:81(P) (Westlaw through 2017 First Extraordinary Sess.). Both laws were adopted in the aftermath of breathtaking school district corruption cases.

through schools) or too small (increasing costs and undermining stable school funding). Of course, as Part III highlighted, current school districts themselves are not particularly hospitable to either value.⁵⁰⁸ But to soothe remaining doubts, this Section identifies two mechanisms now available to general governments that enable them to transcend their scale's potential limitations: micro-local reforms (allowing general governments to accommodate smaller communities), and interlocal agreements (allowing them to capitalize on economies of scale).

As seen in Part II, general governments were not tapped to run schools partially because those governments' large scale normally diverges from the boundaries of genuine communities centered around individual schools. But today, a legal fix is available for this handicap. The fix was developed since that handicap now also afflicts, as Section III.B demonstrated, the school district. To reattach education governance to the individual school, states recognize school-level councils, operating underneath the existing school district.⁵⁰⁹ These micro-local entities can engage in the community-building function to which the local government governing the schools—currently the school district—cannot contribute. Over the past two decades, many states have established such site-based councils consisting of teachers, parents, and other community members, albeit only as advisory bodies.⁵¹⁰ In a small, though growing, number of places these councils also hold meaningful powers, determining curriculum and hiring teachers.⁵¹¹ These prevalent micro-local reforms—especially if their reinforcement presses on and spreads—can answer the challenge of effective community building under a government, like the general government suggested here, that may cover a large area and population.

While capacity for community building is a (solvable) challenge generated by the general government's bigness, another potential challenge—the capacity to assure stable funding—is presented by the general government's smallness. Any service's provision benefits from economies of scale: as the service's scope expands, the cost per unit of added service decreases since fixed costs are spread over a larger number of output units.⁵¹² Since some costs of construction, administration, and teaching are fixed, it is cheaper to operate one school serving four hundred

⁵⁰⁸ Generally, the effects of the size of a governing body on education quality are unclear. Berry, *supra* note 411, at 56–57 (reviewing contradictory findings).

⁵⁰⁹ For an overview, see Shoked, *supra* note 25, at 1341–43.

⁵¹⁰ Shoked, *supra* note 25, at 1341.

⁵¹¹ *E.g.*, 105 ILL. COMP. STAT. 5/34-2.3(1) (2016); KY. REV. STAT. ANN. § 160.345(2) (West 2017).

⁵¹² RONALD J. OAKERSON, GOVERNING LOCAL PUBLIC ECONOMIES 16 (1999).

students than to have four schools, each serving one hundred students.⁵¹³ A general government might be too small physically to draw on these economies of scale.

This worry about the limits set by the general government's potential small size is exaggerated, if not misplaced. Legal units routinely overcome the economic constraints set by physical smallness through the plainest of legal devices: contracts. Thus already today, general governments that cannot independently realize economies of scale achieve them through cooperation with neighboring general governments.⁵¹⁴ The law enables these agreements that local governments regularly employ to jointly provide diverse services such as policing and transit.⁵¹⁵ For educational services too, existing school districts often contract to permit interdistrict student transfers, to rely on other districts' special education facilities, and more.⁵¹⁶ Thus an individual general government's physical smallness would not jeopardize its effective operation and financing of schools. The small general government will contract around the problem.

Some may contend, however, that a general government's financial drawbacks in operating schools will stem not from its inability to economically fund schools, but from an unwillingness to sufficiently fund schools—a problem for which contractual solutions are irrelevant. This concern relates not to the general government's physical size, but to its substantive scope: since the general government holds many responsibilities—not only education—it may choose to spend its revenue elsewhere.⁵¹⁷ But this is an imaginary concern. As explained in Section III.D, state governments dictate minimal levels of school funding. Hence, the general government, if awarded responsibility for the schools, like the school district responsible for them today, will never be free to wholly underfund schools.⁵¹⁸ If it opts not to fund schools beyond state-mandated minimal levels—prioritizing other local services, say policing or economic development—that decision, responding to a democratic and economic

⁵¹³ BERMAN, *supra* note 491, at 132.

⁵¹⁴ See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 210–12 (2001) (describing various motivations for such interdistrict contracts).

⁵¹⁵ ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN AMERICA: CHALLENGE TO FEDERALISM 87–88 (1966).

⁵¹⁶ E.g., N.Y. EDUC. LAW § 1950 (McKinney 2017) (setting a framework for interdistrict “cooperative educational services”).

⁵¹⁷ Salisbury, *supra* note 487, at 424.

⁵¹⁸ See *Town of Dartmouth v. Greater New Bedford Reg'l Vocational Tech. High Sch. Dist.*, 961 N.E.2d 83, 93–94 (Mass. 2012) (holding that a local agreement to divert school funding was preempted by state law); *Bd. of Educ. of the City Sch. Dist. of New York v. City of New York*, 362 N.E.2d 948, 950–51 (N.Y. 1977) (upholding the state's power to bar the city from reducing the share of its budget apportioned for schools).

calculation of citizens' needs and wants, is normatively justified. Whether or not education needs win out this democratic and Tieboutian calculation, such an informed competition between local issues will represent an improvement over current allocation patterns.⁵¹⁹ As Section III.D documented, the division of funds between schools and other local priorities is today often the product of the much less principled bureaucratic competition between local entities (general government and school district).⁵²⁰

Combining schools' management with the management of other local services does not portend inherently worse, or less rational, patterns of allocation of funds to the school system. Neither, as this Section explained, does it threaten encumbering that system with impractical physical boundaries. The move to commit educational powers to general governments—suggested here—does not imply that educational services and policy will invariably be pegged to those entities' boundaries. Under city or county rule, some decisions could be made on a scale smaller than the city or county—i.e., on the individual school level—to serve community-building interests. Other decisions could be reached on a scale larger than the city or county—i.e., on the state or interlocal levels—to serve financing interests. In its suggested role as focal point for education governance, the contemporary general government materializes as a promising arbiter of activities taking place on disparate local levels and as a fair assessor of the demands of disparate policy needs.

C. *Summary: Why the General Government?*

The general government is an appealing alternative to the school district's dominance in the educational field not solely due to the latter's failings—identified in Part III—but also thanks to its own potential, established in this Part. Thanks to its existing structures—political leaders elected in contested general elections who supervise an administration of civil servants—the general government can effectively reflect residents' preferences and promote professionalized management; thanks to legal mechanisms—micro-local individual school councils and interlocal contracts—it can overcome limits of scale to accommodate smaller scale

⁵¹⁹ There is reason to believe that due to its political salience education will be strongly positioned in the competition over resources among the city's multiple responsibilities. *See, e.g.*, Wong & Farris, *supra* note 109, at 231–32 (describing how once education becomes a city concern, media coverage increases and elected officials allocate more attention—and resources—to it).

⁵²⁰ *See also* Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1355 (4th Cir. 1989) (noting that one justification for appointed boards is avoiding fragmented fiscal responsibility).

decisionmaking for community-building purposes and larger scale cooperation for money-saving purposes.

That is not to say that granting general governments control over education will cure all the maladies afflicting American schools: meaningful racial integration may require regional bodies;⁵²¹ equitable funding may require more state involvement;⁵²² elevated overall quality may require federal intervention.⁵²³ But some pitfalls currently besetting the school district-dominated system will be avoided if general governments run the schools. Recall the Introduction's East Ramapo and Newark. Awarded educational powers, the villages and towns in East Ramapo whose residents are actually concerned with public education will undoubtedly contract to jointly operate schools—achieving economies of scale without seeing school funding diverted to other purposes by officials unconcerned with public education. For its part, if asked to run the schools, the City of Newark's leadership, elected in broad, competitive elections,⁵²⁴ could not continuously mismanage school funds and favor employees as easily as the old elected board of the school district did.⁵²⁵

In 2017, unlike in times past, there is limited reason to fear city power; conversely, there is much reason to fear school district power. Already-adopted steps to empower mayors or school-level councils indicate the weakening hold of the school district on the American legal imagination. That, however, is not enough. The school district's grip should be fully dislodged, for only then might the full potential of local control be unleashed.

CONCLUSION

Many school districts throughout the country are flourishing. In all likelihood, most readers have either attended, or sent children to, a school in one of these thriving districts: districts that are the opposite image of the East Ramapo and Newark districts that launched this Article. These successful districts, serving relatively affluent communities, often live up to

⁵²¹ See Wilson, *supra* note 418, at 1421–24 (stating that “metropolitan fragmentation, in conjunction with localism, creates inequalities between neighboring localities” and suggesting regionalism as an alternative to localism in public education (citations and footnotes omitted)).

⁵²² See Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 758–59 (2009) (“Because some of the largest gaps between rich and poor school districts occur in states with the lowest percentage of state funding, most state funding reform involves . . . an increase in the percentage of the state’s share of the total education budget.” (citations and footnote omitted)).

⁵²³ *E.g.*, 20 U.S.C. § 6301 (2012) (identifying the purpose of federal supervision).

⁵²⁴ See RUSSAKOFF, *supra* note 11, at 13, 206–08 (describing Newark’s general election contests).

⁵²⁵ *Id.* at 19.

the school district's original promise: highly trained professionals offer outstanding education to students; residents actively participate in elections and debates over contested issues; funding is never a concern; and communities rally around schools through PTAs, extracurricular activities, and the like.⁵²⁶ In other words, expertise, participation, stable funding, and community building—all the values historically associated with the school district—are alive and well in those districts today.

But as this Article illustrated, even there these values are sustained not thanks to the institution of the school district, but despite it. Even in the best functioning of school districts, the general government, if awarded educational powers, should easily meet the performance standard set by the school district. In many other school districts—the lesser functioning of school districts—the general government would normatively outperform the school district. The conclusion, therefore, is inescapable: three hundred years in, the time is ripe for American law to consider setting aside that uniquely American oddity, the school district.

⁵²⁶ IOWA ASS'N OF SCH. BDS., IASB'S LIGHTHOUSE STUDY: SCHOOL BOARDS AND STUDENT ACHIEVEMENT (2000), <http://connecticutlighthouse.org/Reports/LHI-Compass.pdf> [<https://perma.cc/8DXR-KX8G>] (detecting these performance levels among high-achieving districts).