

# The New School Segregation

Erika K. Wilson

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# THE NEW SCHOOL SEGREGATION

Erika K. Wilson†

*The South has a long and sordid history of resisting school desegregation. Yet after a long and vigorous legal fight, by the mid-1980s, schools in the South became among the most desegregated in the country. An important but often underappreciated tool that aided in the fight to desegregate schools in the South was the conventional and strategic use of school district boundary lines. Many school systems in the South deliberately eschewed drawing school district boundary lines around municipalities and instead drew them around counties. The resulting county-based system of school districts allowed for the introduction of school assignment plans that crossed racially and economically segregated municipal boundary lines.*

*Some affluent and predominantly white suburban municipalities in the South are threatening to reverse this progress. They are doing so by seceding from racially diverse county-based school districts and forming their own predominately white and middle-class school districts. The secessions are grounded in the race-neutral language of localism, or the preference for decentralized governance structures. However, localism in this context is threatening to do what *Brown v. Board of Education* outlawed: return schools to the days of separate and unequal with the imprimatur of state law.*

*This Article is the first to examine Southern municipal school district secessions and the localism arguments that their supporters advance to justify them. It argues that localism is being used as a race-neutral proxy to create segregated school systems that are immune from legal challenge. It con-*

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† Assistant Professor of Law, University of North Carolina at Chapel Hill. B.A. University of Southern California; J.D. UCLA School of Law. I am thankful to have had the opportunity to present earlier iterations of this paper during the Harvard Yale Stanford Junior Faculty Forum, the Lutie Lytle Writing Workshop at Vanderbilt Law School, the New York University Clinical Writers Workshop, the University of Alabama Junior Senior Scholarship Workshop, and the University of North Carolina Faculty Workshop. For detailed comments on drafts, I am grateful to Ian Ayres, Tamar Birckhead, Derek Black, Jack Boger, Al Brophy, Alexa Chew, Heather Elliott, Barbara Fedders, Michele Gilman, Catherine Kim, Robin Lenhardt, Audrey McFarlane, Stephen Rushin, Kathryn Sabbeth, Reva Siegel, and Judith Wegner. I am also grateful to Amna Akbar, Elise Boddie, Wilson Parker, Ted Shaw, and Mark Weidemaier for their willingness to serve as sounding boards for the ideas contained in this Article.

cludes by introducing a normative framework to evaluate the legitimacy of the localism justification for Southern school district secessions specifically and decentralized public education governance structures more broadly.

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INTRODUCTION

*They're not only going to take the richer white kids out of the district, they are going to take their money out of it.*<sup>1</sup>

*We believe that we can set a model, not only for the state of Louisiana . . . . We can set a model of governance for the United States of America that many other cities can follow.*<sup>2</sup>

Predominantly white and affluent suburbs in the South are reviving an old method of resisting school desegregation: seceding from racially diverse, county-based school districts and forming their own racially homogenous school districts.<sup>3</sup> In Jefferson County, Alabama, for example, the city of Gardendale recently voted to leave the Jefferson County School District in

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<sup>1</sup> Margaret Newkirk, *Parents in Baton Rouge Try to Drop Out of School*, BLOOMBERG BUSINESSWEEK (Feb. 20, 2014), <http://www.bloomberg.com/bw/articles/2014-02-20/baton-rouge-parents-in-public-school-revolt-want-their-own-city> [<http://perma.cc/3UP3-KPY9>] (quoting local parent Tania Nyman).

<sup>2</sup> Diana Samuels, *St. George Report Lays Out 'Potentially Harmful' Impacts of Proposed New City in East Baton Rouge Parish*, TIMES-PICAYUNE, (Dec. 2, 2013), [http://www.nola.com/news/baton-rouge/index.ssf/2013/12/st\\_george\\_report\\_lays\\_out\\_pote\\_1.html](http://www.nola.com/news/baton-rouge/index.ssf/2013/12/st_george_report_lays_out_pote_1.html) [<https://perma.cc/ZUF3-FZQU>] (quoting St. George spokesman Lionel Rainey).

<sup>3</sup> This issue is receiving much attention in the national news. See, e.g., Susan Eaton, *How a 'New Secessionist' Movement Is Threatening to Worsen School Segregation and Widen Inequalities*, NATION (May 15, 2014), <http://www.thenation.com/article/179870/how-new-secessionist-movement-threatening-worsen-school-segregation-and-widen-inequal#> [<https://perma.cc/4878-EYEG>] (describing efforts by predominately white and socioeconomically advantaged cities to secede from racially and economically diverse county-based school districts).

order to form its own school district.<sup>4</sup> Similarly, in East Baton Rouge Parish, Louisiana, an unincorporated suburban territory called St. George is attempting to incorporate as its own independent city for the sole purpose of forming its own school district.<sup>5</sup> If Gardendale and St. George are successful, the students in the newly formed Gardendale and St. George school districts will be overwhelmingly white and affluent.<sup>6</sup> The county-based school districts they leave behind will see a significant increase in the percentage of poor and minority students they enroll.<sup>7</sup> Gardendale and St. George are not alone in their secession efforts. Suburbs throughout the South are seceding from county-based school districts against a similar backdrop of race- and class-based discord.<sup>8</sup> Indeed, over the last five years alone, more than ten suburban municipalities in the South have either seceded, or attempted to secede, from county-based school districts.<sup>9</sup>

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<sup>4</sup> See Kent Faulk, *Jefferson County Board of Education Asks Federal Judge to Decide Gardendale School Split*, AL.COM (Mar. 19, 2015), [http://www.al.com/news/birmingham/index.ssf/2015/03/jefferson\\_county\\_board\\_of\\_educ\\_1.html](http://www.al.com/news/birmingham/index.ssf/2015/03/jefferson_county_board_of_educ_1.html) [<https://perma.cc/M9Q4-8JB5>] (describing the attempt by the city of Gardendale, Alabama to leave the Jefferson County, Alabama school district and form its own independent school system).

<sup>5</sup> Newkirk, *supra* note 1.

<sup>6</sup> See JAMES A. RICHARDSON & ROY L. HEIDELBERG, *SCHOOL DISTRICT RESTRUCTURING & REFORM: EAST BATON ROUGE PARISH 5-6* (2012) (analyzing the racial demographics of schools if St. George were to create its own school district and finding that St. George district would be primarily white with a median family income of \$90,000 while the East Baton Rouge System would see an overall increase in the percentage of poor and Black students it enrolls, with a median family income dropping from \$74,067 to \$60,562, an 18.3% decrease); Kent Faulk, *Judge: Significant Concerns Remain for Gardendale Schools Split*, AL.COM (Nov. 10, 2015), [http://www.al.com/news/birmingham/index.ssf/2015/11/judge\\_significant\\_concerns\\_rem.html](http://www.al.com/news/birmingham/index.ssf/2015/11/judge_significant_concerns_rem.html) [<http://perma.cc/PF23-T8QU>] (noting that the changes in the Jefferson County school district racial demographics that would occur if Gardendale is permitted to secede and form its own school district would be that the majority of Black children—75%—who now go to Gardendale High School but live outside of the proposed new Gardendale district boundary lines would be forced to attend a school in Jefferson County that is already 89% Black).

<sup>7</sup> See Eaton, *supra* note 3 (describing how the demographics of the Jefferson County and East Baton Rouge Parish school districts will show an increase in the number of minority students if Gardendale and St. George are successful in their secession efforts).

<sup>8</sup> See, e.g., Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869, 894–98 (2009) (documenting the ways in which school district splintering in Alabama widened racial and socioeconomic segregation between suburban and county-based school districts); David Osborne, *America's New Apartheid: Prosperous White Districts Are Choosing to Break Away from Black Cities and Go It Alone*, INDEP. (Aug. 27, 2014) (describing the race and class disparities in newly created suburban school districts in Alabama and Georgia).

<sup>9</sup> See Osborne, *supra* note 8.

The current wave of Southern suburban school district secessions highlights a critical yet underexamined intersection between school desegregation and state and local government law. State and local government law typically afford municipalities the discretion to determine the breadth of services, such as public education, that residents who live within a municipality's boundary lines receive.<sup>10</sup> As a result, municipalities can intentionally create distinct communities.<sup>11</sup> They can do so by exercising their substantial power over zoning and taxation policies to enact policies that have the effect of welcoming certain types of residents, while excluding others.<sup>12</sup> Notably, the community creation function often occurs along the lines of race and class. Exclusionary zoning techniques in particular regularly result in certain suburban municipalities consisting primarily of white and affluent residents.<sup>13</sup> When school district boundary lines track municipal boundary lines, they can reinforce the exclusionary effect of municipal community creation.<sup>14</sup>

While similar secessions are occurring outside the South,<sup>15</sup> Southern secessions raise unique equity and fairness con-

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<sup>10</sup> See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1130 (1996) ("Local boundaries frequently determine the scope of local services . . . . [L]ocalities are rarely obligated to provide services beyond their borders.").

<sup>11</sup> See *id.* at 1142 ("Once bounded and incorporated, the locality has the power to regulate land use and to design a mix of taxes and services that attracts settlers the locality desires. Moreover, boundaries themselves—apart from the local public policies of incorporated communities—can mold the demographic development of the locality.").

<sup>12</sup> See Gerald E. Frug, *Is Secession from the City of Los Angeles a Good Idea?*, 49 UCLA L. REV. 1783, 1792 (2002) (arguing that state allocation of zoning and taxation authority to cities enables cities to exclude lower income people and to make sure that the tax money generated from the wealthy is only spent on the wealthy).

<sup>13</sup> See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1861 (1994) ("[L]ocal boundaries, once established, are difficult to alter; segregated localities form autonomous political units whose internal political processes tend to replicate existing demographics; wealthier localities have strong economic incentives to enact policies of exclusionary zoning to maintain homogeneity of class and therefore of race; and, each of these factors tends to reinforce the others.").

<sup>14</sup> See Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1446 (2014) (discussing the role of school district boundary lines in creating disparate student communities and finding that "[w]hile local government boundary lines are racially stratified, racial stratification along school district boundary lines is particularly acute").

<sup>15</sup> See Dale Murray, *Presumptions Against School District Secession*, 7 THEORY & RES. EDUC. 47, 47–48 (2009) (noting that school district secession represents the most common form of local government balkanization in the United States); Kyle Spencer, *Malibu Wants Out: Wealthy Seek Secession from School District*,

cerns. In the South, the secessions are occurring against the backdrop of a recent history of state-mandated racial segregation in schools, followed by lengthy and determined attempts to evade court-mandated desegregation.<sup>16</sup> Indeed, insofar as the South is concerned, municipal secessions from county-based school districts are an old trick. In the aftermath of *Brown v. Board of Education*,<sup>17</sup> a number of predominantly white municipalities attempted to secede from county-based school districts in order to avoid compliance with federal court school desegregation orders.<sup>18</sup> Those secession efforts were quashed by the Supreme Court's 1972 decision in *Wright v. Council of Emporia*.<sup>19</sup> There, the Court held that a municipality could not secede from a county-based school district if the effect would be to impede a county school system's ability to desegregate pursuant to a federal court desegregation order.<sup>20</sup>

The *Wright* decision was part of an important line of Supreme Court cases that sanctioned aggressive court intervention to desegregate school districts in the South that previously engaged in de jure segregation.<sup>21</sup> Such aggressive

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NBC NEWS (Nov. 2, 2014), <http://www.nbcnews.com/feature/in-plain-sight/malibu-wants-out-wealthy-seek-secession-school-district-n238471> [http://perma.cc/C4TK-V5SV] ("In recent years, 'separatist movements' . . . have become increasingly common, as parents in mostly white, mostly middle-class communities in and around Memphis, Salt Lake City, Baton Rouge and Dallas, have sought to break away from their more economically and racially diverse school districts.").

<sup>16</sup> See *infra* subpart I.A.

<sup>17</sup> 347 U.S. 483 (1954).

<sup>18</sup> See, e.g., *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) ("[W]here the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann v. Charlotte-Mecklenburg*, recognize their creation." (footnotes omitted) (citation omitted)); *Lee v. Macon Cty. Bd. of Educ.*, 448 F.2d 746, 749–54 (5th Cir. 1971) (finding that it was unconstitutional for a city to remove its schools from the county school district while the county school district was operating under a federal court desegregation order if the effect and purpose of the removal was to adversely impact school desegregation efforts in the county-based school system); *Burleson v. Cty. Bd. of Election Comm'rs*, 308 F. Supp. 352, 356–57 (E.D. Ark. 1970) (holding that the Dollarway school system could not withdraw itself from the Jefferson County schools because the effect would be to create a stark racial and financial imbalance in the Jefferson County school district).

<sup>19</sup> 407 U.S. 451 (1972).

<sup>20</sup> *Id.* at 470 ("[A] new school district may not be created where its effect would be to impede the process of dismantling a dual system.").

<sup>21</sup> See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 201, 208 (1973) (extending requirements to desegregate to districts that did not maintain de jure segregated systems but in which school board actions resulted in de facto segregated schools); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27–29 (1971) (emphasizing the broad remedial powers that district courts have to fashion effective school desegregation remedies); *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 437–38

court intervention eventually resulted in Southern schools becoming among the most racially diverse in the country.<sup>22</sup> Yet the progress made toward school desegregation in the South has slowly eroded since the 1980s.<sup>23</sup> The erosion was caused primarily by a normative retrenchment in cultural and legal views about school desegregation. Culturally, much of the public—and even some African-American school desegregation plaintiffs—raised doubts about both the merits and efficacy of school desegregation and declined to aggressively pursue school desegregation remedies.<sup>24</sup> Legally, the Supreme Court undermined the necessity of school desegregation by easing the standards required for school districts to be released from federal school desegregation orders.<sup>25</sup> Consequently, over the last fifteen years, racial segregation in Southern schools has increased substantially, in some areas coming close to the pre-*Brown* levels.<sup>26</sup> Suburban municipal secessions from county-based school districts threaten to further the resegregation of

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(1968) (noting that school systems had an “affirmative duty to take whatever steps might be necessary” to desegregate).

<sup>22</sup> See GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, *SOUTHERN SLIPPAGE: GROWING SCHOOL SEGREGATION IN THE MOST DESEGREGATED REGION OF THE COUNTRY* 8 (2012), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/southern-slippage-growing-school-segregation-in-the-most-desegregated-region-of-the-country/hawley-MLK-South-2012.pdf> [http://perma.cc/D26J-TKWR] (“In an extremely short period of time—from the mid-1960s to the early ‘70s—the formerly *de jure* segregated South rapidly became the most integrated region of country for black students. The gains made during that timeframe persisted for several decades.” (footnotes omitted)).

<sup>23</sup> See generally GARY ORFIELD, *SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION* 3 (2001) (describing the trend toward resegregation beginning in the 1990s).

<sup>24</sup> See, e.g., Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 482 (1976) (describing shifts in Black parents’ attitudes toward racial integration as an effective remedy for obtaining quality education for their children and the tension between the parents and civil rights lawyers prosecuting school desegregation cases).

<sup>25</sup> See Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 *N.C. L. REV.* 1623, 1645–46 (2003) (noting that the possibility of district courts awarding school districts unitary status seems all but guaranteed and that even school districts protesting unitary status are awarded unitary status by district court judges).

<sup>26</sup> GARY ORFIELD, JOHN KUCSERA & GENEVIEVE SIEGEL-HAWLEY, *E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS* 33 (2012), [https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf) [http://perma.cc/7TQ6-N465] (examining resegregation trends in the South and finding that “[m]ore than 60 years after the *Brown* decision rendered the separate but equal doctrine null and void, these [resegregation] figures for black students highlight a significant reversion to the all-black schools mandated during the Jim Crow-era”).



schools in the South, and for this reason, they deserve close scrutiny.

Proponents of Southern school district secessions justify their efforts to secede through arguments related to localism—namely that small, decentralized, municipally-based school governance structures are preferable.<sup>27</sup> They suggest that more centralized county-based school systems are inefficient and do not sufficiently meet the educational needs of students because of the size and diversity of the county-based school districts.<sup>28</sup> They maintain that the creation of smaller, more localized school districts will correct these problems.<sup>29</sup>

Yet, as with most modern invocations of localism, issues of race and class lie right at the surface.<sup>30</sup> Opponents of the secessions argue that they reflect only the newest example of resistance to school desegregation in the South.<sup>31</sup> They suggest that the white and affluent demographics of the newly created districts<sup>32</sup> demonstrate that the secessions may principally be rooted in a desire for separation rather than localism.<sup>33</sup> They further argue that even if the localism justification is otherwise legitimate, the secessions are not justifiable because they have a negative financial impact on the remaining county-

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<sup>27</sup> See *infra* subpart III.A.

<sup>28</sup> See Samuels, *supra* note 2 (reporting that St. George residents do not feel that Baton Rouge's centralized, metropolitan form of government reflects their values and that they desire a school system that is more responsive to the needs of St. George students).

<sup>29</sup> See *id.*

<sup>30</sup> See, e.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1993 (2000) (suggesting that localism with its focus on decentralization allows localities to give in to their worst biases by engaging in practices that exclude residents on the basis of race and class); Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 635 (2011) (“[P]urported justifications [for localism] perpetuate pervasive falsities about the racial inequalities that now exist between schools and school districts throughout the country.”).

<sup>31</sup> See ORFIELD, *supra* note 23, at 4.

<sup>32</sup> See, e.g., John Archibald, *Breakaway School Districts Are Shakespearean*, AL.COM (Nov. 12, 2013), [http://www.al.com/opinion/index.ssf/2013/11/break-away\\_school\\_districts\\_are.html](http://www.al.com/opinion/index.ssf/2013/11/break-away_school_districts_are.html) [<https://perma.cc/4D7C-SAHY>] (describing the racial implications of suburban secessions from school districts in Jefferson County Alabama); Max Brantley, *House Clears Bill to Pave Way for Sherwood, Maumelle to Leave Pulaski School District*, ARK. TIMES: ARK. BLOG (Feb. 23, 2015), <http://www.arktimes.com/ArkansasBlog/archives/2015/02/23/house-clears-bill-to-pave-way-for-sherwood-maumelle-to-leave-pulaski-school-district> [<http://perma.cc/2BFN-WP92>] (noting the racial implications of the suburban Maumelle leaving the Pulaski School District and comments suggesting that the state was responsible for school segregation and should not allow the secession).

<sup>33</sup> See Newkirk, *supra* note 1.

based districts and significantly increase racial segregation in the county-based school districts.<sup>34</sup>

This Article is the first in the legal literature to examine the resurgence of Southern school district secessions and the localism justification in which the secessions are grounded. It adds to the state and local government law literature on localism by challenging the commonly held belief that localism in public education is both desirable and quintessential to a well-functioning democracy.<sup>35</sup> It also proposes a new theoretical framework for evaluating the localism justification of the school district secessions in the South specifically and decentralization of public education governance structures more broadly. The Article proceeds as follows:

Part I provides an analysis and overview of the legal fight for school desegregation in the South. Part II provides a factual and legal orientation to the issue of school district secessions in the South and highlights the complexities presented by the secessions.

Part III grounds the Southern school district secessions in the state and local government literature on localism. It analyzes whether the secessions represent a legitimate attempt to reinvigorate public schools through localism, as proponents suggest, or whether they perpetuate a more harmful form of racial segregation that results in the creation of public school enclaves exclusively for white and middle-class students, as opponents suggest.

Part IV argues that some school district secessions reflect an inadequately acknowledged dimension of localism: destructive localism. It defines destructive localism as the use of decentralization to foster the tenets of localism for one group, but in a way that divorces that group from serious social problems and allows them to hoard and insulate vital resources. The Article then provides a framework for ferreting out whether secessions evince destructive localism, finds that it does, and contends that such secessions should therefore be disfavored. While the framework provided by the Article is used in the context of school district secessions, it could also be used to evaluate the localism justification for decentralization of public education governance structures more broadly.

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<sup>34</sup> See *id.*

<sup>35</sup> See *infra* notes 278–279 and accompanying text.

## I

## THE FIGHT FOR DESEGREGATED SCHOOLS IN THE SOUTH

## A. Southern History of Using Municipal Secessions from School Districts to Evade School Desegregation

In the aftermath of the Supreme Court's decision in *Brown*, particularly during the 1960s, school districts in the South used many tools to resist desegregation.<sup>36</sup> Municipal secessions from county-based school districts were one of the more popular tools used to resist school desegregation. Predominately white municipalities in Alabama, Arkansas, Virginia, Louisiana, and North Carolina, to name a few, attempted to secede from county-based school systems shortly after the counties were subject to school desegregation orders.<sup>37</sup> The municipalities all provided non-racially discriminatory reasons for the secessions that, standing alone, could reasonably be construed as valid reasons for secession. For example, the municipalities cited geographical distance and concerns regarding bussing young children;<sup>38</sup> a desire to "control their own schools and be in a position to determine their direction;"<sup>39</sup> a desire to spend more money on their students and

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<sup>36</sup> For example, schools in the South often used freedom of choice plans or resorted to closing down entire public school systems in order to avoid school desegregation. See, e.g., *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 440 (1968) (finding that freedom of choice plans that permitted all students to choose which schools they wanted were an insufficient means of desegregating schools); *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218 (1964) (ordering Prince Edward County, Virginia, to reopen schools that the County had closed in order to avoid operating a desegregated school system). For a comprehensive examination of the techniques used by schools in the South to avoid school desegregation, see Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstituted Segregated Schools*, 88 N.C. L. REV. 787, 800 (2010) ("In response to the Court's tentative and vague decision in *Brown II*, most of the South waged a campaign of 'massive resistance' to the decision that included almost all of the congressmen and senators from the South signing a pledge that denounced and pledged to overturn *Brown*.").

<sup>37</sup> See *Lee v. Macon Cty. Bd. of Educ.*, 448 F.2d 746, 752 (5th Cir. 1971); *United States v. Halifax Cty. Bd. of Educ.*, 314 F. Supp. 65, 67-72 (E.D.N.C. 1970); *Wright v. Cty. Sch. Bd.*, 309 F. Supp. 671, 674 (E.D. Va. 1970), *rev'd sub nom. Wright v. Council of Emporia*, 442 F.2d 570 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972); *Burleson v. Cty. Bd. of Election Comm'rs*, 308 F. Supp. 352, 352-57 (E.D. Ark. 1970).

<sup>38</sup> See *Burleson*, 308 F. Supp. at 353 (noting that an area called Hardin was a part of the Dollarway School District but located a substantial distance from other municipalities and schools within the district; residents sought to secede in the wake of the enforcement of *Brown* and cited concerns regarding bussing younger children to and from school).

<sup>39</sup> *Halifax Cty. Bd. of Educ.*, 314 F. Supp. at 72.

increase the quality of education their students received;<sup>40</sup> and a desire to have a school system exclusively for the students within the municipality's boundary lines.<sup>41</sup> Remarkably, many of the justifications given for the secessions back then are similar to the justifications advanced today.<sup>42</sup>

Notwithstanding these seemingly legitimate and racially neutral reasons, the secessions all occurred against the backdrop of pending federal court desegregation decrees.<sup>43</sup> African-American plaintiffs claimed that the secessions were being used as a pretext to thwart desegregation and challenged the secessions.<sup>44</sup> Many of the district courts sided with the African-American plaintiffs, finding that any benefit to individual municipalities gained through secession was outweighed by the detrimental obstacles the secessions placed on the ability of county-based systems to desegregate.<sup>45</sup> The district courts were clear that any improvement to the education received by students in one municipality could not come at the expense of the ability of the county school system to desegregate and provide a high-quality education for all students.<sup>46</sup>

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<sup>40</sup> See *Wright*, 309 F. Supp. at 674 (noting that one of the reasons for the secession was that “[t]he city clearly contemplates a superior quality educational program. . . . [T]he cost will be such as to require higher tax payments by city residents”).

<sup>41</sup> See *Lee*, 448 F.2d at 752 (noting that the city of Oxford's asserted basis for seceding from Calhoun County schools was “its freedom to keep its pupils in schools within the city limits”).

<sup>42</sup> See *infra* Part II.

<sup>43</sup> See *supra* note 37 and accompanying text.

<sup>44</sup> See *Lee*, 448 F.2d at 752; *Wright*, 309 F. Supp. at 674; *Burleson v. Cty Bd. of Election Comm'rs*, 308 F. Supp. 352, 352 (E.D. Ark. 1970).

<sup>45</sup> See, e.g., *Wright*, 309 F. Supp. at 680–81 (holding that even where secession has the potential to improve education quality in the seceding municipality, “separation [is] barred where the impact on the remaining students' right to attend fully integrated schools would be substantial”).

<sup>46</sup> See, e.g., *Lee*, 448 F.2d at 752 (“The city cannot secede from the county where the effect—to say nothing of the purpose—of the secession has a substantial adverse effect on desegregation of the county school district. If this were legally permissible, there could be incorporated towns for every white neighborhood in every city.”); *Aytch v. Mitchell*, 320 F. Supp. 1372, 1376–77 (E.D. Ark. 1971) (“From the record established in this proceeding, the testimony of witnesses, exhibits thereto, arguments of counsel and briefs the Court concludes that the division of the existing district as proposed would inflict severe damage upon the Coleman area. If the Coleman district proposed to be established had to rely upon the revenues that it would receive, it is questionable that it could provide any kind of quality education for its students or improve or maintain its present accreditation.” (footnote omitted)); *United States v. Halifax Cty. Bd. of Educ.*, 314 F. Supp. 65, 72 (E.D.N.C. 1970) (“The effect of the new unit on the other students in the county would be to leave the Halifax County unit with fewer whites in its school system.”); *Burleson*, 308 F. Supp. at 357 (“While the Court is satisfied that a desire to escape the impact of the Court's decree was not the sole motive for the circulation of the election petitions and was not the sole factor

In 1972, the Supreme Court weighed in definitively on the issue in *Wright v. Council of Emporia*.<sup>47</sup> There, the Court considered a Fourth Circuit Court of Appeals decision that deviated from most lower court decisions and allowed the city of Emporia, Virginia to secede from the Greensville County School District.<sup>48</sup> The Fourth Circuit applied a dominant purpose test and held that where “the creation of a new school district is designed to further the aim of providing quality education and is attended secondarily by a modification of the racial balance . . . the federal courts should not interfere.”<sup>49</sup> In a sharp departure from the standard outlined by the Fourth Circuit, the Supreme Court determined that in assessing the constitutionality of a municipal secession from a school district under a federal court desegregation order, courts should not be guided by the motivation of the officials but by the effect of the secession.<sup>50</sup>

The Court noted that the Emporia secession would have the effect of substantially impeding desegregation: the Greensville County School District would be 72% Black and only 28% white whereas the newly created Emporia School District would be 48% white and 52% Black.<sup>51</sup> The Court also expressed concern that the creation of the new district would encourage white flight to Emporia and deny Black students what “*Brown II* promised them: a school system in which all vestiges of enforced racial segregation have been eliminated.”<sup>52</sup> As a result, the Court deemed the secession unconstitutional. The import of the Court’s decision in *Wright* was, at least temporarily, to preclude Southern municipalities from using school district secessions as a means of avoiding court-ordered school desegregation.<sup>53</sup>

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taken into consideration by Hardin residents who voted for secession, the Court is also convinced and finds that the belief or hope of the Area residents that by seceding from Dollarway they could keep their children out of integrated schools or at least would be able to send them to districts having a smaller Negro population than Dollarway was a powerful selling point for the measure in the Area.”)

<sup>47</sup> 407 U.S. 451 (1972).

<sup>48</sup> See *Wright v. Council of Emporia*, 442 F.2d 570, 571-72 (4th Cir. 1971), *rev'd*, 407 U.S. 451 (1972).

<sup>49</sup> *Id.* at 572.

<sup>50</sup> See 407 U.S. at 462.

<sup>51</sup> *Id.* at 464.

<sup>52</sup> *Id.* at 463 (emphasis added).

<sup>53</sup> Significantly, the Court emphasized that, once a school district under a federal court desegregation order achieved unitary status, a municipality could lawfully secede as long as the secession was not motivated by racial animus or an intent to discriminate. See *id.* at 470 (“As already noted, our holding today does not rest upon a conclusion that the disparity in racial balance between the city and county schools resulting from separate systems would, absent any other considerations, be unacceptable. . . . Once the unitary system has been estab-

## B. Southern School Desegregation Progress: The Role of the Courts and School District Boundary Lines

The *Wright* decision was critical in facilitating school desegregation in the South. It ensured that school district boundary lines could not be redrawn to “limit the scope or effectiveness of a school desegregation remedy . . . [by] increas[ing] white flight from one of the local school districts.”<sup>54</sup> It was also consistent with a stream of aggressive Supreme Court decisions issued during the 1960s and early 1970s that required Southern school districts to take *affirmative* steps to desegregate their schools;<sup>55</sup> analyzed the actual *effects* of desegregation plans to ensure that they were effective before finding them permissible;<sup>56</sup> and allowed for the implementation of mandatory black-white student quotas in student assignment and large-scale bussing plans.<sup>57</sup>

As a result of these far-reaching orders, school desegregation in the South increased exponentially.<sup>58</sup> For example, in 1968 almost 80% of Black students in the South attended intensely racially segregated schools; however, that figure fell to 23% by 1980.<sup>59</sup> In large part because of the aggressive actions taken by federal courts,<sup>60</sup> the South continues to report the lowest overall levels of racial segregation in schools across all regions of the country even today.<sup>61</sup>

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lished and accepted, it may be that Emporia, if it still desires to do so, may establish an independent system . . . .”). As discussed in Part II, a number of school districts in the South have been released from federal school desegregation orders and are no longer subject to the *Wright* test for determining the constitutionality of municipal secessions from county-based school districts.

<sup>54</sup> Myron Orfield, Milliken, Meredith, and Metropolitan Segregation, 62 UCLA L. REV. 364, 386 (2015).

<sup>55</sup> See Green v. Cty. Sch. Bd., 391 U.S. 430, 437–38 (1968).

<sup>56</sup> See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971).

<sup>57</sup> See *id.* at 22–25

<sup>58</sup> See, e.g., ORFIELD, *supra* note 23, at 3 (noting that until the 1980s, “[s]ubstantial desegregation was most common in the 17 states which had legal apartheid—segregation mandated by law—in their schools before the 1954 *Brown* decision”).

<sup>59</sup> ORFIELD, KUCSERA & SIEGEL-HAWLEY, *supra* note 26, at 34 tbl.11.

<sup>60</sup> See *id.* at 44. Notably, federal legislation was also instrumental in speeding up the pace of school desegregation in the South. Some commentators suggest that federal legislation was a critical catalyst in getting Southern schools to desegregate. See, e.g., Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 VA. L. REV. 7, 9–10 (1994) (“Only after the 1964 Civil Rights Act threatened to cut off federal educational funding for segregated school districts and the Department of Health, Education, and Welfare in 1966 adopted stringent enforcement guidelines did the integration rate in the South rise to 32% in 1968–1969 and 91.3% in 1972–1973.”).

<sup>61</sup> ORFIELD, KUCSERA & SIEGEL-HAWLEY, *supra* note 26, at 44; see also Gary Orfield, *The Southern Dilemma: Losing Brown, Fearing Plessy*, in SCHOOL RESEGREGATION

By contrast, in other parts of the country, high levels of racial segregation in schools have always existed and continue to persist today.<sup>62</sup> A primary culprit in the continued high levels of segregation in schools outside of the South is the traditional scale at which those school districts have long been organized. Outside of the South, particularly in the Northeast and Midwest, school district boundary lines often track municipal boundary lines, meaning that each individual municipality has its own school district.<sup>63</sup> Importantly, high levels of residential racial segregation tend to exist across municipal boundary lines.<sup>64</sup> Thus, individual municipalities often come to be known as a predominately white or predominately minority municipality. As a result, when school district boundary lines track municipal boundary lines, similar patterns of racial segregation emerge between school districts.<sup>65</sup>

Yet through its 1974 decision in *Milliken v. Bradley*,<sup>66</sup> the Supreme Court eventually afforded legal immunity to the kinds of interdistrict school segregation that often plagues schools in the Northeast and Midwest. In *Milliken*, the Court severely limited the remedial authority of federal courts to issue desegregation orders between school districts by requiring a finding that there be both an “interdistrict violation and interdistrict effect” before imposing such an order.<sup>67</sup> The aforementioned standard is a difficult one to meet, and only a handful of courts have ordered an interdistrict desegregation order since the

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GATION: MUST THE SOUTH TURN BACK 1, 6–7 (John Charles Boger & Gary Orfield eds., 2005) (describing the progress made in the South towards school desegregation and noting that “[b]y the end of the 1960s, the South experienced a level of interracial schooling that had probably never been seen anywhere in American history on a large scale”).

<sup>62</sup> See Kendra Bischoff, *School District Fragmentation and Racial Residential Segregation: How Do Boundaries Matter?*, 44 URB. AFF. REV. 182, 197–200 (2008) (describing high levels of school segregation outside of the South due to school district fragmentation and racial segregation between districts); Gary Orfield, *Why It Worked in Dixie: Southern School Desegregation and Its Implications for the North*, in RACE AND SCHOOLING IN THE CITY 24, 38 (Adam Yarmolinsky et al. eds., 1981) (describing the structures in the North that made desegregation of schools difficult, including migration patterns and local government structures).

<sup>63</sup> Wilson, *supra* note 14, at 1438–39.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* For a historical analysis of the patterns of residential segregation outside of the South that led to segregation within schools outside of the South, see also HARRY S. ASHMORE, *THE NEGRO AND THE SCHOOLS* 78 (1954) (chronicling school segregation outside of the South and noting that “segregation in education in the non-South will not be eliminated so long as rigidly segregated residential patterns survive”).

<sup>66</sup> 418 U.S. 717 (1974).

<sup>67</sup> *Id.* at 745 (“[W]ithout an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”).

Court's decision in *Milliken*.<sup>68</sup> Consequently, the racial segregation between school districts often seen in the Northeast and Midwest is an intractable problem.

In contrast, as previously noted, the school district boundary lines in the South are more likely to track county boundary lines than municipal boundary lines.<sup>69</sup> Thus, neighboring municipalities in the South are likely to share county-wide school districts rather than have their own independent school districts.<sup>70</sup> Ironically, many school districts in the South were initially organized at the county level rather than the municipal level, in part, so that *de jure* school segregation laws could easily be enforced.<sup>71</sup> After *Brown*, the county-wide organizational structure was helpful for the inverse reason. The county-wide structure made it much easier to desegregate schools in the South due to the large population from which students could be drawn.<sup>72</sup> The wide scale made it difficult for whites to escape school desegregation by moving to a neighboring city or municipality.<sup>73</sup>

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<sup>68</sup> See, e.g., *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 778 F.2d 404, 407–08 (8th Cir. 1985); *United States v. Bd. of Sch. Comm'rs*, 637 F.2d 1101, 1116–17 (7th Cir. 1980); *Evans v. Buchanan*, 582 F.2d 750, 756 (3d Cir. 1978); *Newburg Area Council, Inc. v. Bd. of Educ.*, 510 F.2d 1358, 1359–61 (6th Cir. 1974).

<sup>69</sup> See William A. Fischel, *The Congruence of American School Districts with Other Local Government Boundaries: A Google-Earth Exploration* 10 (Mar. 1, 2007) (unpublished manuscript) (on file with author) (“[T]he South’s most typical [school district] arrangement is a rural county school district surrounding a single, separate central-city district. Most of the South lacks the multitude of independent suburban jurisdictions that characterize the North and the larger cities in the West.”).

<sup>70</sup> *Id.*

<sup>71</sup> WILLIAM A. FISCHEL, *MAKING THE GRADE: THE ECONOMIC EVOLUTION OF AMERICAN SCHOOL DISTRICTS* 181 (2009) (“A single school district thus had to manage both white and black schools. Running two parallel, if not exactly equal, school systems over the same territory meant that school districts had to be bigger.”); LOUIS R. HARLAN, *SEPARATE and Unequal: Public School Campaigns and Racism in the Southern Seaboard States 1901-1915* 11–15 (1958) (describing how Southern schools were arranged into county districts and noting that in the county-based districts the financial and social costs of running a dual system were large).

<sup>72</sup> See DIANA PEARCE, *BREAKING DOWN BARRIERS: NEW EVIDENCE ON THE IMPACT OF METROPOLITAN SCHOOL DESEGREGATION ON HOUSING PATTERNS* 7 (1980).

<sup>73</sup> See *id.* at 45 (researching the impact of metropolitan-wide school desegregation on residential housing choices and finding “[a]t the neighborhood level . . . a metropolitan desegregation plan by definition removes white enclaves as far as the school is concerned. If minority families move into one’s neighborhood, one can flee residential integration, but not school integration.”); FISCHEL, *supra* note 71, at 183 (“The modern irony is that the South’s oversize school districts, which were created to assure white control of black schools, now make it difficult for Southern whites to avoid desegregation by moving to the suburbs with independent school districts.”)



Indeed, during the 1980s, because of their “large, often county-wide [organizational structure], southern schools were more integrated than southern neighborhoods.”<sup>74</sup> To the extent that Southern municipal secessions reduce this scale by allowing school district boundary lines to track municipal boundary lines, the secessions threaten to impose upon the South the same types of interdistrict segregation that exists in other parts of the country.<sup>75</sup>

### C. The Implications of Southern School Desegregation Progress

The widespread progress that the South made in desegregating its schools undoubtedly benefited the region. To be sure, a vast body of research suggests that all students benefit from attending desegregated schools.<sup>76</sup> White students gain better critical thinking and problem solving skills, a diminished likelihood of harboring racial prejudices, and higher levels of cultural competencies.<sup>77</sup> Research also provides evidence that white students are also not harmed in any way by attending desegregated schools.<sup>78</sup>

For minority students, the benefits of attending desegregated schools include a decrease in black-white achievement

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<sup>74</sup> DAVID RUSK, CITIES WITHOUT SUBURBS: A CENSUS 2010 PERSPECTIVE 95 (4th ed. 2013).

<sup>75</sup> For a further discussion on how Southern school district secessions threaten to make school districts in the South mirror racial segregation in other parts of the country, see *infra* Part III.

<sup>76</sup> See generally Janet Ward Schofield & H. Andrew Sagar, *Desegregation, School Practices, and Student Race Relations*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 58, 59 (Christine H. Rossell & Willis D. Hawley eds., 1983) (finding that the social impact of desegregation may be more important in influencing occupational and social success of students than any academic impact); Meyer Weinberg, *The Relationship Between School Desegregation and Academic Achievement: A Review of the Research*, 39 LAW & CONTEMP. PROBS. 241, 268 (1975) (examining the effects of school desegregation and concluding that “overall, desegregation does indeed have a positive effect on minority achievement levels,” but noting that most studies suffer from definitional and methodological weaknesses).

<sup>77</sup> Genevieve Siegel-Hawley, *How Non-Minority Students Also Benefit from Racially Diverse Schools*, NAT’L COAL. ON SCH. DIVERSITY RES. BRIEF No. 8, Oct. 2012, at 2.

<sup>78</sup> See Brief of 553 Social Scientists as *Amici Curiae* in Support of Respondents at app. 19, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908) [hereinafter Brief *Amicus Curiae* of 553] (“Numerous studies—recent as well as those that were conducted in the immediate aftermath of court-ordered desegregation—suggest that school desegregation has little or no measurable negative impact on the test scores of white students. Thus, fears that desegregation will undermine their achievement seem unfounded.”).

gap scores;<sup>79</sup> access to higher quality teachers and curriculum;<sup>80</sup> and “increased . . . college quality and adult earnings, reduced . . . probability of incarceration, and improved adult health status.”<sup>81</sup>

While the benefits of desegregated education are often touted, criticisms of desegregation certainly exist.<sup>82</sup> Such criticisms make it easy to downplay the significance of the potential resegregative effects of Southern municipal school district secessions. One of the primary criticisms of school desegregation is that the benefits of school desegregation are “highly variable . . . , [and] the effects . . . modest.”<sup>83</sup>

While the research in this regard is indeed varied,<sup>84</sup> a substantial body of research unequivocally demonstrates that students are harmed by attending racially segregated schools.<sup>85</sup>

<sup>79</sup> See generally Katherine Magnuson & Jane Waldfogel, *Introduction to STEADY GAINS AND STALLED PROGRESS: INEQUALITY AND THE BLACK-WHITE TEST SCORE GAP 1*, 5–11 (2008) (demonstrating that the period of greatest progress in closing the gap coincided with the historic push for school desegregation in the 1960s and 1970s. Stagnation came after efforts to integrate schools slowed down. Today, the test score gap is nearly 50% larger in states with the highest levels of school segregation); Kirsten Kainz & Yi Pan, *Segregated School Effects on First Grade Reading Gains*, 29 EARLY CHILDHOOD RES. Q. 531, 535 (2014) (finding that African American students’ early reading developments, more so than any other racial group, are compromised by attending racially segregated schools).

<sup>80</sup> See Brief *Amicus Curiae* of 553, *supra* note 78, at 10–11 (finding that students who attend predominantly minority schools have less access to stable and high-quality teachers and that honors and Advanced Placement courses are not equally available at schools serving large percentages of minority students).

<sup>81</sup> Rucker C. Johnson, *Long-Run Impacts of School Desegregation & School Quality on Adult Attainments 2* (Nat’l Bureau of Econ. Research, Working Paper No. 16664, 2011).

<sup>82</sup> See, e.g., JAMES S. COLEMAN ET AL., *TRENDS IN SCHOOL SEGREGATION, 1968-73* 27 (1975); David J. Armor, *The Evidence on Busing*, 28 PUB. INT. 90, 109–10 (1972).

<sup>83</sup> David J. Armor & Christine H. Rossell, *Desegregation and Resegregation in Public Schools*, in *BEYOND THE COLOR LINE* 219, 239 (Abigail Thernstrom & Stephan Thernstrom eds., 2002).

<sup>84</sup> See, e.g., NANCY H. ST. JOHN, *SCHOOL DESEGREGATION OUTCOMES FOR CHILDREN* 18–22 (1975) (finding that the academic effects of integration were mixed); Derrick A. Bell, Jr., *Waiting on the Promise of Brown*, 39 LAW & CONTEMP. PROBS. 341, 357–60 (1975) (questioning the efficacy of school desegregation and exploring other avenues such as Black community control as a means of increasing the quality of education for Black students); Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, 42 LAW & CONTEMP. PROBS. 17, 24 (1978) (reviewing seventy-three studies and finding forty with positive results and twelve with negative).

<sup>85</sup> See, e.g., Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 404–09 (2012) (documenting the research that shows the harm that minority students suffer as a result of attending racially segregated schools); Christopher S. Jencks, *The Coleman Report and the Conventional Wisdom*, in *ON EQUALITY OF EDUCATIONAL OPPORTUNITY* 69, 71 (Frederick Mosteller & Daniel P. Moynihan eds., 1972) (“The

For minorities, attending racially segregated schools limits their access to high-quality and stable teaching staffs.<sup>86</sup> It also denies them access to quality facilities, curricula, and peers who can positively influence the learning environment.<sup>87</sup> For white students, attending nearly all-white schools limits their exposure to non-white students and increases the likelihood that they will harbor racial prejudices and manifest those prejudices in harmful ways.<sup>88</sup> Thus, even if the benefits of desegregated education are minimal, the harms of segregation are not. For that reason, maintaining desegregated schools is important.

Another criticism of school desegregation is that it encourages white flight. The line of argument here is that while courts can mandate an end to state-sponsored discrimination, they cannot use judicial remedies to interfere with private associational choices.<sup>89</sup> A significant number of whites—particularly during the early stages of desegregation—did indeed flee school systems at least in part to avoid school desegregation.<sup>90</sup> Importantly, however, during this same time period whites also fled

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achievement of lower-class students, both black and white, was fairly strongly related to the socioeconomic level of their classmates.”).

<sup>86</sup> See Brief *Amicus Curiae* of 553, *supra* note 78, at 10–11, app. 31.

<sup>87</sup> See *id.* at 11–12.

<sup>88</sup> See, e.g., John Charles Boger, *Willful Colorblindness: The New Racial Piety and the Resegregation of Public Schools*, 78 N.C. L. REV. 1719, 1794 (chronicling the harms of growing up in a racially segregated white community and noting that “segregation foreclosed my opportunity ever to know [minorities], [and] it was a psychologically damaging and educationally destructive experience for my white friends and myself”); Robert A. Garda, Jr., *The White Interest in School Integration*, 63 FLA. L. REV. 599, 643 (2011) (noting that empirical evidence shows that white racially and ethnically homogenous neighborhoods and schools breed negative prejudices and stereotypes against minority groups).

<sup>89</sup> See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (arguing that if “freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant”).

<sup>90</sup> For a comprehensive examination of the research surrounding the issue of school desegregation and white flight, see Thomas F. Pettigrew & Robert L. Green, *School Desegregation in Large Cities: A Critique of the Coleman “White Flight” Thesis*, 46 HARV. EDUC. REV. 1, 33–40 (1976) (challenging Coleman’s studies of white flight on methodological and conceptual grounds); Christine H. Rossell, *Applied Social Science Research: What Does It Say About the Effectiveness of School Desegregation Plans?*, 12 J. LEGAL STUD. 69, 80–94 (1983) (examining the relationship between desegregation and white flight). Further, the flight was arguably not just white flight but middle-class flight as Black residents with the means often flee core cities for suburban cities with better services and better performing schools. See generally Sheryll D. Cashin, *Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for Metropolitan America*, 86 CORNELL L. REV. 729, 768–71 (2001) (describing the ways in which middle-class Black flight in some ways both parallels and diverges from middle-class white flight).

cities that had school systems that were not under court-mandated desegregation orders.<sup>91</sup>

Rather than a per se rejection of desegregation, white flight can also be viewed as flowing from a failure of the judiciary to meaningfully implement school desegregation policies. Indeed, the Court's decision in *Milliken* effectively limited the scope of desegregation orders and created suburban enclaves that were immune from desegregation.<sup>92</sup> White flight can only occur in metropolitan areas in which white enclaves exist to which whites can flee.<sup>93</sup> Failure to enact comprehensive school desegregation plans allowed whites to escape desegregation by fleeing to a neighboring jurisdiction within the metropolitan area.<sup>94</sup> In areas with larger metropolitan-wide school desegregation requirements, white flight was significantly less than in areas with more geographically limited school desegregation boundaries.<sup>95</sup> Thus, the failure to fully commit to school desegregation by broadening the scope of desegregation plans within metropolitan areas, not school desegregation, was arguably the primary cause of white flight.<sup>96</sup>

In sum, Southern schools experienced significant desegregation as a result of aggressive federal court desegregation orders. School desegregation was on the whole beneficial for all students in the South. As the following subpart explains, the critical gains in desegregation in the South have eroded in large part due to a series of Supreme Court cases issued during the 1990s that significantly narrowed students' right to demand a desegregated education.

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<sup>91</sup> See generally ORFIELD, KUCSERA & SIEGEL-HAWLEY, *supra* note 23.

<sup>92</sup> Daniel Kiel, *The Enduring Power of Milliken's Fences*, 45 URB. LAW. 137, 138 (2013) ("[D]istrict boundaries made sacrosanct by *Milliken* represent a major impediment to confronting the persistent gap in educational opportunity.").

<sup>93</sup> PEARCE, *supra* note 72, at 45 (researching the impact of metropolitan wide school desegregation on residential housing choices and noting that "[a]t the neighborhood level . . . a metropolitan desegregation plan by definition removes white enclaves as far as the school is concerned. If minority families move into one's neighborhood, one can flee residential integration, but not school integration").

<sup>94</sup> *Id.*

<sup>95</sup> Erica Frankenberg, *The Impact of School Segregation on Residential Housing Patterns: Mobile, Alabama, and Charlotte, North Carolina*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?, *supra* note 61, at 164, 180.

<sup>96</sup> *Id.* at 180 ("When school districts are completely desegregated, pressure lessens for whites with children to move out of racially mixed neighborhoods . . . since racial balance is guaranteed at all area schools.").

D. The Supreme Court's Decontextualization of Race in School Desegregation Cases and the Return of Segregated Schools in the South

Despite the positive benefits of desegregated schools for both minority and white students, Southern states are increasing the list of places with intense racial segregation in schools.<sup>97</sup> A significant cause of this resegregation is that the Supreme Court's more recent school desegregation jurisprudence significantly narrowed students' ability to receive a desegregated education. That legal pathway for students to challenge racially segregated education was first laid out in *Brown v. Board of Education* (hereinafter *Brown I*)<sup>98</sup> and more concretely spelled out in *Green v. County School Board of Education*.<sup>99</sup> In *Green*, the Court was clear that the right to a desegregated education means that officials must take "affirmative . . . steps" to eliminate the effects of de jure segregation "root and branch."<sup>100</sup> The Court also listed six areas, commonly referred to as the *Green* factors, that must be desegregated before a school district can be released from a federal school desegregation order.<sup>101</sup>

While the Supreme Court did not articulate a specific formula for determining when a school district can be successfully deemed to have eliminated prior de jure segregation "root and branch," the Court was unequivocal in insisting that

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<sup>97</sup> See ORFIELD, KUCSERA & SIEGEL-HAWLEY, *supra* note 26, at 44 ("During the era of court-ordered desegregation and enforcement, virtually no southern states appeared in the rankings. More recently, though, the rollback of desegregation efforts has led to a situation where at least 3 to 4 southern states have emerged in the top 20 on selected measures of black student segregation."); Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563, 1585 (2003) ("Public school segregation between white and black students in southern states increased slightly in the 1990s, reversing several decades of stable integration patterns in most of the South."). *But cf.* Armor & Rossell, *supra* note 83, at 254 ("The biggest threat to desegregation is not the dismantling of plans but rather the inexorable demographic changes that have left the majority of larger school systems predominately minority.").

<sup>98</sup> 347 U.S. 483, 494 (1954). The core principles of what *Brown* stood for were (and still are) subject to much debate. For a detailed discussion of the meaning of *Brown* and the ways in which the conception of what *Brown* meant have changed over time, see generally James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 352 (1990).

<sup>99</sup> 391 U.S. 430 (1968).

<sup>100</sup> *Id.* at 437–38.

<sup>101</sup> These factors include faculty, staff, the assignment of students to particular schools, extracurricular activities, facilities, and transportation. See *id.* at 435–36.

school districts “fashion steps which promise realistically to convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”<sup>102</sup> Thus, *Green* can fairly be read as standing for the proposition that, at least initially and in the remedial context, school systems found to have violated the Equal Protection Clause by maintaining racially segregated schools had a remedial obligation to provide students with non-racially identifiable schools. Such a reading of *Green* is buttressed by the Courts repeated admonitions about the harms of racially segregated schools in *Brown*, *Green*, and subsequent cases.<sup>103</sup>

Yet, in the decades that followed *Green*, the Supreme Court significantly narrowed the obligation of previously de jure school systems to provide students with a desegregated education. It did so by decontextualizing the significance of race when examining the continued necessity of ongoing federal court school desegregation orders.<sup>104</sup> Bluntly stated, the Court either ignored or denied the salience of schools becoming racially identifiable, particularly schools becoming identifiable as predominately Black schools.<sup>105</sup> Instead of acknowledging the harms of racially identifiable schools as it had once done, the Court looked at the race of the students attending the schools as “neutral, apolitical descriptions, reflecting merely ‘skin color’ or country of ancestral origin . . . [completely] unrelated to ability, disadvantage, or moral culpability.”<sup>106</sup> Two critical examples from the Supreme Court’s more recent school desegregation jurisprudence demonstrate how the Court’s decontextualization of race significantly narrowed students’ right to a desegregated education.

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<sup>102</sup> *Id.* at 442.

<sup>103</sup> *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (“Segregation was the evil struck down by *Brown I* as contrary to the equal protection guarantees of the Constitution.”); *Alexander v. Holmes Cty. Bd. of Educ.*, 396 U.S. 19, 20 (1969) (“[C]ontinued operation of segregated schools under a standard of allowing ‘all deliberate speed’ for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (“To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

<sup>104</sup> *See* Liebman, *supra* note 98, at 352–55 (describing the Court’s treatment of *Brown* in the decades following the decision).

<sup>105</sup> *See id.*

<sup>106</sup> Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 4 (1991).

First, the Court pivoted dramatically from the results-oriented principles articulated in *Green* and instead began to focus on the purported efforts put forth by school districts to desegregate schools. Most notably, in *Board of Education of Oklahoma City School District v. Dowell*,<sup>107</sup> the Court was asked to consider whether a school district achieved “unitary status”<sup>108</sup> and could be released from a federal court desegregation order.<sup>109</sup> The Court determined that the appropriate test to use in answering that question was whether a district “complied in *good faith* with the desegregation decree since it was entered” and “the vestiges of past discrimination had been eliminated *to the extent practicable*.”<sup>110</sup>

The test articulated in *Dowell* marked a substantial narrowing of school systems that previously maintained de jure segregated school systems to provide students with a desegregated education in the remedial context. Instead of students being entitled to specific results (e.g., the right to attend non-racially identifiable schools), under *Dowell*, students were deemed to be entitled to school officials’ “best efforts” to provide a desegregated school. Such a focus on “best efforts” inherently meant that courts were left in the difficult position of attempting to judge the subjective intent of school officials to create non-racially identifiable schools.<sup>111</sup> Indeed, the district court on remand in *Dowell* acknowledged the difficulty of gauging school officials’ subjective intent and engaged in only a cursory review of the efforts taken by school officials to desegregate before deciding that school officials did employ their “best efforts.”<sup>112</sup>

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<sup>107</sup> 498 U.S. 237 (1991).

<sup>108</sup> *Id.* at 244. For a discussion of what “unitary status” means, see generally Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1107–08 (1990) (noting that “[a] school system has achieved unitary status when a federal court determines that it is not only desegregated but also has eliminated the vestiges of its prior racial discrimination” and going on to describe the vagaries as to when a school district is determined to have met this standard); Parker, *supra* note 25, at 1631 n.50 (describing unitary status as “the end point of school desegregation litigation. Once a school district is determined to have converted from ‘black schools’ and ‘white schools’ to ‘just schools’ . . .”).

<sup>109</sup> 498 U.S. at 244.

<sup>110</sup> *Id.* at 249–50 (emphasis added).

<sup>111</sup> See Robinson, *supra* note 36, at 823–24 (arguing that the standard articulated in *Dowell* necessitated an emphasis on subjective intent that marked a substantial departure from the Court’s previous standards for determining compliance with school desegregation orders).

<sup>112</sup> *Dowell v. Bd. of Educ. of Okla. City Pub. Schs.*, 778 F. Supp. 1144, 1157 (W.D. Okla. 1991) (“Plaintiffs . . . do not offer any suggestion or hint of any noncompliance with the tenets of the decree from 1977–1985. Effective compli-

Further, the *Dowell* standard also introduced into the school desegregation lexicon the concept of eliminating the vestiges of past discrimination “to the extent practicable.” This marked yet another sharp departure from *Green*, this time from the “root and branch” requirements. Under the “extent practicable” standard, school officials now only have to implement some plan to desegregate. They are excused from failing to desegregate schools if they can point to some intervening cause that made it too difficult for them to fashion an effective desegregation plan. In the aftermath of *Dowell*, school officials often find cover by pointing to private choices by home buyers that have led to residential segregation as an intervening force that makes effective desegregation impossible and are consequently permitted to operate racially segregated neighborhood schools.<sup>113</sup>

The second way in which the Supreme Court decontextualized race in its school desegregation jurisprudence was by elevating local control over the mandate issued in *Brown I* to provide students with desegregated education. Stated differently, the Court in its more recent school desegregation jurisprudence essentially found that returning school systems back to the hands of local officials is a more important and pressing goal than preventing the harms caused by racially segregated schools. As I noted in a prior work, “the Fourteenth Amendment *Brown I* right of minority children to attend non-segregated schools has arguably been subjugated to the American value preference for ‘local control’ over schools.”<sup>114</sup>

For example, in *Freeman v. Pitts*,<sup>115</sup> the Court allowed schools to be released from federal court supervision in piecemeal fashion, meaning that school systems can be declared unitary in some aspects of the *Green* factors, but not others.<sup>116</sup>

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ance with the desegregation plan’s requirements during this nine-year period is, therefore, uncontested in this case.” (footnote omitted)).

<sup>113</sup> See, e.g., NAACP, Jacksonville Branch v. Duval Cty. Sch., 273 F.3d 960, 972 (11th Cir. 2001) (finding that although a number of schools were racially segregated, school officials desegregated schools to the extent practicable and that “voluntary residential patterns have re-segregated a number of the core city’s schools.”); Lee v. Autauga Cty. Bd. of Educ., No. 2:70CV3098T (WO), 2005 WL 1868745, at \*4 (M.D. Ala. July 19, 2005) (finding that school officials had met their obligation to desegregate schools to the extent practicable even while noting that the school system “enrolls approximately 8,800 students, 23% of whom are African-American” while “[t]he student population enrolled at the Autaugaville School is 98% African-American.”).

<sup>114</sup> Wilson, *supra* note 30, at 644.

<sup>115</sup> 503 U.S. 467 (1992).

<sup>116</sup> See *id.* at 490 (“We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of



In doing so, the Court emphasized that the ultimate objective of school desegregation litigation is to return school districts to local control of local authorities.<sup>117</sup> As other scholars have remarked, the effect of *Freeman* was to effectively “reconstitutionalize segregation because the decision exempted school districts from ever instituting a complete remedy of the constitutional violation.”<sup>118</sup>

Other key Supreme Court school desegregation cases have also emphasized that principles of federalism necessitate that federal supervision of local schools be a temporary measure and that local control of schools be returned as soon as possible.<sup>119</sup> The Supreme Court often takes such a position, while simultaneously minimizing the relevance of local control resulting in a return to racially segregated, racially identifiable schools.<sup>120</sup> Indeed, in its misguided decontextualization of the significance of racially identifiable schools, the Supreme Court even curtailed school districts’ ability to voluntarily implement race-conscious school assignment plans that seek to desegregate schools.<sup>121</sup>

The Court’s focus on local control comes at the cost of allowing ongoing segregation in schools to persist, even when

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school districts in incremental stages, before full compliance has been achieved in every area of school operations.”)

<sup>117</sup> *Id.* at 489.

<sup>118</sup> Robinson, *supra* note 36, at 826; *see also* Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1169 (2000) (“Partial unitary status greatly eases the burden on defendants because it allows piecemeal remedies over a set period of time; the remedy need not be complete in redressing the remedy the violation at one point in time.”).

<sup>119</sup> *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995) (“On remand, the District Court must bear in mind that its end purpose is not only ‘to remedy the violation’ to the extent practicable, but also ‘to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.’” (quoting *Freeman v. Pitts*, 503 U.S. 467, 489 (1992))); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) (“[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination.”); *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”).

<sup>120</sup> *See, e.g.*, *Jenkins*, 515 U.S. at 115 (Thomas, J., concurring) (“The mere fact that a school is black does not mean that it is the product of a constitutional violation. A ‘racial imbalance does not itself establish a violation of the Constitution.’” (quoting *United States v. Fordice*, 505 U.S. 717, 745 (1992) (Thomas J., concurring))).

<sup>121</sup> *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (finding voluntary race conscious school assignment plans unconstitutional and noting “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”).

school districts remain under some form of federal court supervision. Indeed, an examination of active school desegregation cases found that the Supreme Court's emphasis on local control often results in district court judges affording undue deference to defendant school officials.<sup>122</sup> Thus, even when school districts are under federal court supervision, in the name of local control, great deference is often afforded to defendant school districts, which arguably results in lax enforcement of ongoing school desegregation orders.<sup>123</sup>

In sum, the Supreme Court's understanding of what it means to return to racially identifiable schools is completely divorced from the reality of the ways in which race functions in America both as a historical marker of past injustices and, more likely than not, as a present indicator of ongoing marginalization and subordination. As a result of this jurisprudence, racial segregation in schools is not only legally normalized but socially normalized as well.<sup>124</sup> Few people voice meaningful objections to racial segregation in schools; it is now tacitly accepted as a way of life.<sup>125</sup> As the following Part demonstrates, the legal and social normalization of racial segregation in schools paved the way for municipal secessions from Southern county-based school districts. These secessions, in turn, threaten to further re-segregate schools in the South.

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<sup>122</sup> See Parker, *supra* note 25, at 1650.

<sup>123</sup> See *id.* at 1650–52 (arguing that district court judges grant school districts wide latitude in controlling school desegregation cases and suggesting that many district court judges “seem exhausted from their decades-long effort and anxious to terminate their jurisdiction.”); Wilson, *supra* note 30, at 644 (“Because the Court has so freely embraced localism, defendant school districts have enjoyed significant latitude to exercise control over the school desegregation remedial process.”).

<sup>124</sup> See John Charles Boger, *Brown and the American South*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*, *supra* note 61, at 305, 311 (noting a “drift away from integrated public schooling and [a] deeper loss of urgency about integrated public institutions”).

<sup>125</sup> See David L. Kirp, *Making Schools Work*, *N.Y. TIMES* (May 19, 2012), [http://www.nytimes.com/2012/05/20/opinion/sunday/integration-worked-why-have-we-rejected-it.html?\\_r=0](http://www.nytimes.com/2012/05/20/opinion/sunday/integration-worked-why-have-we-rejected-it.html?_r=0) [<https://perma.cc/6JZQ-UYVG>] (chronicling the resegregation of schools in America and the declining interest in desegregation remedies and noting that, “[t]o the current reformers, integration is at best an irrelevance and at worst an excuse to shift attention away from shoddy teaching”); cf. Nikole Hannah-Jones, *The Problem We All Live With*, *THIS AM. LIFE* (July 31, 2015), <http://www.thisamericanlife.org/radio-archives/episode/562/the-problem-we-all-live-with> [<http://perma.cc/85EZ-FY8E>] (criticizing the abandonment of school desegregation remedies and noting how effective school desegregation was).

## II

A LEGAL AND FACTUAL ORIENTATION TO SOUTHERN  
SCHOOL DISTRICT SECESSIONS

School districts in the South no longer face the exacting desegregation scrutiny they once did, either because they were released from federal court desegregation orders or because enforcement of ongoing desegregation orders is deferential to defendant school districts.<sup>126</sup> Consequently, school districts in the South are able to use state and local government laws to restructure their school districts in ways that threaten to further exacerbate the resegregation of schools in the South. One such tool that they are using is municipal secession from county-based school districts that the Supreme Court in *Wright* previously deemed unconstitutional.<sup>127</sup>

As a matter of law, a municipal secession is generally defined as the process by which a territory detaches itself from one established municipality and forms its own municipality or joins another municipality.<sup>128</sup> A municipal secession can also take the form of a municipal incorporation insofar as it may involve a “self-contained community with common interests seek[ing] to establish itself as a separate entity.”<sup>129</sup> Alternatively, a municipal secession can take the form of a de-annexation in the sense that it can consist of a territory detaching from one municipality and incorporating as a brand new municipality.<sup>130</sup> At its core, a municipal secession is essentially a procedural mechanism that allows a territory to form new geographic boundary lines that have both legal and political significance.

Using the aforementioned definition of municipal secession, this Part provides an in-depth analysis of Southern sub-

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<sup>126</sup> See *supra* subpart I.C.

<sup>127</sup> See *supra* note 20 and accompanying text.

<sup>128</sup> See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 794 (1992) (noting that in a secession people are determined to leave a jurisdiction and take their territory with them); Allen Buchanan, *Toward a Theory of Secession*, 101 ETHICS 322, 327 (1991) (“A right to secede implies not only the severance of political obligation but also a valid claim to territory.”); Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1412 (1997) (describing secession as local governments “deannex[ing] themselves from larger communities”).

<sup>129</sup> Joseph P. Viteritti, *Municipal Home Rule and the Conditions of Justifiable Secession*, 23 FORDHAM URB. L.J. 1, 20–21 (1995).

<sup>130</sup> See, e.g., *Carlyn v. City of Akron*, 726 F.2d 287, 288–90 (6th Cir. 1984) (describing a township in Ohio that detached from Springfield and was annexed by the city of Akron).

urban municipal secessions from county-based school districts. It offers the first in-depth examination of municipal secessions from school districts in the legal literature.<sup>131</sup> In subparts A and B, examples from two Southern counties, Jefferson County, Alabama and East Baton Rouge Parish, Louisiana, help to provide a factual orientation to the issues presented by Southern school district secessions.<sup>132</sup> Subpart C concludes by locating school district secessions in the municipal law on boundary changes and analyzes special legal considerations that attend all municipal secessions, including municipal secessions from school districts.

A. A Factual Orientation to School District Secessions:  
Jefferson County, Alabama

In Alabama, the Jefferson County School District (JCSD) provides a rich example of the complexities surrounding suburban secessions from county-based school districts in the South. JCSD is the second-largest school district in the state of Alabama.<sup>133</sup> It contains fifty-five schools and serves thirty-six thousand students from nearly every city or municipality within Jefferson County.<sup>134</sup>

The state of Alabama in general, and the JCSD in particular, has a long and ignoble history of fiercely resisting school desegregation. In 1965, JCSD was sued and came under the purview of a federal school desegregation order, yet resistance to school desegregation in JCSD remained rampant and pro-

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<sup>131</sup> Other scholars in the field of education have examined this phenomenon, but this section offers the first in-depth examination in the legal literature. See, e.g., Frankenbergh, *supra* note 8, at 887–903 (offering an analysis of school district splintering in Alabama); Murray, *supra* note 15, at 53–55 (2009) (examining the nature and legitimacy of school district secessions).

<sup>132</sup> These two secession examples represent two of many attempted or completed secessions from school districts by suburbs in the South. For example, suburbs in Pulaski County, Arkansas, Shelby County, Tennessee, and Montgomery, Alabama, to name a few, have all successfully seceded from county-based school districts. See Brantley, *supra* note 32; Denisa R. Superville, *Memphis Area Starts Year with Six Breakaway Districts*, EDUC. WK. (Aug. 19, 2014), <http://www.edweek.org/ew/articles/2014/08/20/01brief-3.h34.html> [<https://perma.cc/2M49-V6B7>]; Rebecca Burylo, *Pike Road School a ‘Catastrophic’ Hit to MPS Budget*, MONTGOMERY ADVERTISER (Sept. 10, 2015), <http://www.montgomeryadvertiser.com/story/news/education/2015/09/09/pike-road-school-catastrophic-hit-mps-budget/71964578/> [<https://perma.cc/3NGR-QGD9>].

<sup>133</sup> Ten municipalities within Jefferson County have their own independent school districts, and all other municipalities are served by JCSD. See CRAIG POUNCEY, EXECUTIVE SUMMARY: JEFFERSON COUNTY BOARD OF EDUCATION 2 (Nov. 14, 2014), [www.advanc-ed.org/oasis2/u/par/accreditation/summary/pdf](http://www.advanc-ed.org/oasis2/u/par/accreditation/summary/pdf) [<http://perma.cc/9FAQ-P87L>].

<sup>134</sup> *Id.*

gress slow.<sup>135</sup> Over the course of the last fifty years, plaintiffs have brought claims alleging that JCSD was not in compliance with several of the *Green* factors, including student assignment, staffing, bussing, and the construction of new schools.<sup>136</sup> JCSD remains under a federal court desegregation order today.<sup>137</sup>

Notwithstanding the active federal desegregation order, several predominantly white suburbs in Jefferson County municipalities have seceded from JCSD.<sup>138</sup> This seeming anomaly is possible for three reasons. First, Alabama state law creates very permissive rules that make it easy for school districts to leave a county-based district and form their own district.<sup>139</sup> Second, when municipalities have exercised their right under Alabama state law to secede, they received virtually no resistance from the Jefferson County Board of Education—even though the Board has the authority to challenge the secessions as violating the ongoing school desegregation order.<sup>140</sup>

Third, and most importantly, when the secessions first began, the U.S. Court of Appeals for the Fifth Circuit declined to enjoin suburban municipalities from leaving the JCSD.<sup>141</sup> In-

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<sup>135</sup> See *Stout v. Jefferson Cty. Bd. of Educ.*, 845 F.2d 1559, 1560 (11th Cir. 1988) (“The history of this litigation may be traced to 1965, when an action seeking to desegregate the public schools of Jefferson County, Alabama, was filed on behalf of a class of black schoolchildren.”).

<sup>136</sup> See Kent Faulk, *Federal Court Document Traces Early Years of 50-Year-Old Desegregation Lawsuit Against Jefferson County Schools*, AL.COM (Oct. 31, 2014), [http://www.al.com/news/birmingham/index.ssf/2014/10/federal\\_court\\_document\\_traces.html](http://www.al.com/news/birmingham/index.ssf/2014/10/federal_court_document_traces.html) [<http://perma.cc/GCH7-V5WV>].

<sup>137</sup> See *Stout v. Jefferson Cty. Bd. of Educ.*, No. 2:65-cv-0396 (N.D. Ala. 1965).

<sup>138</sup> See Frankenberg, *supra* note 8, at 875 (“Contrary to the earlier trend of school district consolidation across the United States, the number of school systems in Jefferson County, Alabama, has proliferated.”).

<sup>139</sup> See *infra* subpart II.C.

<sup>140</sup> *Stout*, No. 2:65-cv-0396 (N.D. Ala. 1965); *Supplemental Report to the Court Regarding Matters Related to the Formation of the Gardendale School System*, *Stout*, No. 2:65-cv-0396 (1965) (No. 1001) (filed Mar. 12, 2015) [hereinafter *Supplemental Report*] (noting that “[h]istorically, the County Board has not opposed the approval of splinter districts” under the ongoing school desegregation order but instead “the County Board has taken a neutral position in response to what have largely been pro forma submissions”).

<sup>141</sup> After the Supreme Court’s decision in *Wright*, the Fifth Circuit originally required any suburban municipalities formed after the federal court school desegregation decree to be included in the desegregation order. See *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) (finding that the Jefferson County School desegregation decree should encompass the entire Jefferson County School District as it stood at the time the desegregation order was entered and noting that “where the formulation of splinter school districts, albeit validly created under state law, have the effect of thwarting the implementation of a unitary school system, the district court may not, consistent with the teachings of *Swann v. Charlotte-Mecklenburg*, recognize their creation” (citation omitted)). The

stead, the court applied a legal standard that is inconsistent with *Wright* and allowed suburbs to operate school districts separate and apart from the JCSD as long as they “accept[ed] a proper role in the desegregation of the county[-based school district] system.”<sup>142</sup>

Accepting “a proper role” in the county-based school system desegregation efforts essentially amounted to the suburban districts agreeing to federal court supervision as part of the ongoing federal desegregation order, while at the same time being permitted to operate a separate district.<sup>143</sup> African-American private plaintiffs initially challenged the secessions as violating the ongoing desegregation order and sought relief in the form of bussing as a remedy.<sup>144</sup> However, the Fifth Circuit declined to order such a remedy, relying on the familiar ahistorical refrain that segregation was caused by geographic forces outside the remedial purview of the federal court system.<sup>145</sup>

As a result of the lax Alabama state rules for secession and the Fifth Circuit’s failure to enjoin the secessions, predominantly white suburbs in Jefferson County with the financial and political wherewithal to secede are doing so. In the last ten years alone, two suburbs seceded from JCSD: the city of Trussville seceded in 2005<sup>146</sup> and the city of Gardendale in 2014.<sup>147</sup> The Gardendale secession is finally being challenged by the Jefferson County Board of Education on the grounds that it would exacerbate segregation and violate the ongoing school desegregation order.<sup>148</sup> The issue is currently pending before

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Fifth Circuit later reversed itself in *Stout v. Jefferson Cty. Bd. of Educ.*, 466 F.2d 1213, 1214–16 (5th Cir. 1972) and allowed the suburban municipalities to operate separate school systems apart from the Jefferson County School District.

<sup>142</sup> *Stout*, 466 F.2d at 1214.

<sup>143</sup> See Frankenberg, *supra* note 8, at 885.

<sup>144</sup> See *Stout v. Jefferson Cty. Bd. of Educ.*, 537 F.2d 800, 801 (5th Cir. 1976).

<sup>145</sup> *Id.* at 801–02 (finding that bussing between two schools would require crossing a substantial chain of hills or small mountains on dangerous and heavily traveled roads and declining to order bussing as a remedy despite the existence of two all-black schools and one all-white school).

<sup>146</sup> See Frankenberg, *supra* note 8, at 886.

<sup>147</sup> See Madison Underwood, *Gardendale School System Split Dispute Will Be Handled in Federal Court*, AL.COM (Mar. 24, 2015), [http://www.al.com/news/birmingham/index.ssf/2015/03/gardendale\\_school\\_system\\_split.html](http://www.al.com/news/birmingham/index.ssf/2015/03/gardendale_school_system_split.html) [<http://perma.cc/55QS-42CC>] (describing Gardendale’s proposed split from the JCSD and the legal issues that need to be worked out before the split can occur).

<sup>148</sup> See *Supplemental Report*, *supra* note 140, at 7. Notably, the JCSD Board of Education concedes that its failure to contest previous secessions has resulted in a slow grade exit of predominately white municipalities out of JCSD and that the Gardendale secession threatens to be the proverbial straw that breaks the camel’s back. See *id.* at 15.

the district court judge overseeing the ongoing federal desegregation order.<sup>149</sup>

In making the decision to secede, residents and policymakers in both Gardendale and Trussville cited three primary goals: (i) obtaining municipal local control of schools so that the schools can reflect the needs and desires of their communities; (ii) increasing efficiency by creating smaller sized school districts; and (iii) bringing more businesses and employers to Jefferson County by increasing the quality of the schools.<sup>150</sup> Some proponents also wish to distance themselves from a financially failing county (the Jefferson County municipal government filed for bankruptcy in November of 2011) and an academically struggling county-based school system.<sup>151</sup> To that end, residents in both Gardendale and Trussville agreed to raise taxes on themselves in order to finance their new independent school districts.<sup>152</sup>

The suburban secessions from JCSD highlight two critical issues related to school desegregation that have not previously been explored in the legal literature: student assignment and school facilities. With respect to student assignment, under Alabama law, when a secession occurs, the new school district is permitted to draw new boundary lines that track municipal-

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<sup>149</sup> See *id.* at 15–16.

<sup>150</sup> GARDENDALE BD. OF EDUC., GARDENDALE CITY SCHOOLS: FREQUENTLY ASKED QUESTIONS 1, <http://images.pcmac.org/Uploads/GardendaleCS/GardendaleCS/Sites/DocumentsCategories/Documents/FAQs-Gardendale-revamped%282%29.pdf> [<https://perma.cc/DVQ7-7EC3>] (noting that the Gardendale school system was created because “[i]t is the intent of the Gardendale Board of Education and Administration to have the ability to focus specifically on what matters to the parents and students in the Gardendale area: academics and curriculum, diverse course offerings, achievement in athletics and in the arts, as well as community service and civic participation. Ultimately, this is about Gardendale having more local control, and access to greater resources which will directly benefit our children. And we believe this will encourage young families to move into Gardendale”); Tiffany Ray, *School Districts May Fuel New Segregation*, AL.COM (Dec. 13, 2009), [http://blog.al.com/spotnews/2009/12/school\\_districts\\_may\\_fuel\\_new.html](http://blog.al.com/spotnews/2009/12/school_districts_may_fuel_new.html) [<http://perma.cc/9FX7-JHSB>] (quoting the mayor of the city of Trussville as stating that the separation from the Jefferson County School District had nothing to do with race but was instead rooted in a desire to provide high quality education to children who are residents of Trussville and to obtain more local control over public education for Trussville students).

<sup>151</sup> See generally Martin Z. Braun, Darrell Preston & Liz Willen, *The Banks That Fleeced Alabama*, BLOOMBERG MKTS. (Sept. 2005), at 52, <http://www.mobilebaytimes.com/alabama.pdf> [<http://perma.cc/JD5M-E9UT>] (describing how financial mismanagement led to Jefferson County filing bankruptcy and its impact on the Jefferson County schools).

<sup>152</sup> See Ray, *supra* note 150; Newkirk, *supra* note 1.

ity boundary lines.<sup>153</sup> The newly created district can, but is not required to, permit students who live outside the boundaries to attend their schools.<sup>154</sup> When the newly created districts draw their district boundary lines to match municipal boundary lines, the demographics of the new districts look very different than the demographics of the county-based district.

For example, the JCSD demographics are relatively diverse at 46% white, 45% Black, 6% Hispanic, and 57% socioeconomically disadvantaged.<sup>155</sup> However, the city of Gardendale's demographics are considerably less diverse at 88% white, 8% Black, 1% Asian, 1% Latino, and only 4.8% socioeconomically disadvantaged.<sup>156</sup> If Gardendale exercises its legal right to draw new boundary lines so that they track municipal boundary lines, the school district will likely closely replicate the demographics of the broader Gardendale municipality, resulting in the creation of a predominately white and middle-class school district.<sup>157</sup>

JCSD will also lose a significant number of white students, thereby increasing racial segregation in JCSD. Further, it is possible that many of the students who lived outside of Gardendale but previously attended schools in Gardendale may no longer be permitted to attend those schools and might have to be assigned to new schools.<sup>158</sup> Indeed, approximately 3,000 students now attend schools in Gardendale, 2,300 of whom live inside the city of Gardendale and 700 of whom live in neighboring cities or unincorporated areas outside of the city of

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<sup>153</sup> See ALA. CODE § 16-13-199 (1975) (“[C]ontrol of the school or schools of the territory within the municipality shall be vested in a city board of education . . .”); see also *Supplemental Report*, *supra* note 140, at 20–21 (describing the school district boundary line changes that would occur if Gardendale is permitted to secede).

<sup>154</sup> See *Supplemental Report*, *supra* note 140, at 22–23.

<sup>155</sup> See A+ EDUC. P'SHIP, ALABAMA PUBLIC EDUCATION AT A GLANCE 5 (2014), [http://www.aplusala.org/uploadedFiles/File/A\\_AtGlance\\_Flip\\_Book\\_for\\_Web.pdf](http://www.aplusala.org/uploadedFiles/File/A_AtGlance_Flip_Book_for_Web.pdf) [<http://perma.cc/RP6G-6SVK>].

<sup>156</sup> See “Quick Facts: Gardendale City, Alabama,” UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/01/0129056.html> [<http://perma.cc/NA6X-ZUSL>].

<sup>157</sup> Indeed, Trussville School District, which seceded in 2005, chose that approach. Trussville now has a very small student body at 4,000 students and a demographic profile that is 85% white, 10% Black, 1% Hispanic and 4% categorized as “other.” See A+ EDUC. P'SHIP, *supra* note 155, at 8; *About TCS*, TRUSSVILLE CITY SCHS., <http://www.trussvillecityschools.com/?PN=AboutUs> [<https://perma.cc/M22F-6CVF>].

<sup>158</sup> *Supplemental Report*, *supra* note 140, at 20 (describing the impact of the Gardendale secession on students who attend schools located in Gardendale but live outside of Gardendale).



Gardendale.<sup>159</sup> Gardendale has indicated some willingness to allow students who live outside of Gardendale in predominately black unincorporated territories to attend schools within the new Gardendale school system on a permanent basis in order to quell concerns about the segregative effects of their departure from the Jefferson County School System.<sup>160</sup> Yet questions remain as to the effects of the segregation on the Jefferson County School System, as both the Department of Justice and the Jefferson County School Board remain opposed to the secession.<sup>161</sup> This student assignment issue—particularly the potential for race and class imbalances between the new and old districts, and displacement of students—occurs in nearly all Southern municipal secessions from county-based school districts.<sup>162</sup>

Additionally, with respect to facilities, when municipalities secede from school districts, they often take with them the physical school buildings that are located within the attendance zone associated with the municipality. Gardendale is seeking to take with it all elementary, middle, and high school buildings located in the city of Gardendale,<sup>163</sup> including a new \$46 million state high school that was funded by a special school construction tax paid for by all residents of Jefferson County.<sup>164</sup> A question that emerges is what responsibility, if

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<sup>159</sup> See Kent Faulk, *Brookside, Graysville Ask Court to Block Gardendale Request to Form School System*, AL.COM (Apr. 6, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/04/brookside\\_graysville\\_ask\\_court.html](http://www.al.com/news/birmingham/index.ssf/2016/04/brookside_graysville_ask_court.html) [<https://perma.cc/8UEZ-UNTZ>].

<sup>160</sup> See Kent Faulk, *Gardendale's New School System Would Include North Smithfield Students Outside the City*, AL.COM (Apr. 05, 2016), [http://www.al.com/news/birmingham/index.ssf/2015/12/gardendales\\_new\\_school\\_system.html](http://www.al.com/news/birmingham/index.ssf/2015/12/gardendales_new_school_system.html) [<https://perma.cc/TB9F-F9AN>].

<sup>161</sup> See Kent Faulk, *DOJ Opposes Gardendale Split from Jefferson County Schools; Federal Judge to Have Last Word*, AL.COM (June 28, 2016), [http://www.al.com/news/birmingham/index.ssf/2016/06/doj\\_opposes\\_gardendale\\_split\\_f.html](http://www.al.com/news/birmingham/index.ssf/2016/06/doj_opposes_gardendale_split_f.html) [<https://perma.cc/HQ6C-5CF6>].

<sup>162</sup> See, e.g., Brantley, *supra* note 32 (describing the racial segregation that will occur as a result of municipal secessions from school districts in Arkansas); *Municipality Split*, CHALKBEAT, <http://tn.chalkbeat.org/topics/municipality-split/> [<http://perma.cc/TZ6Q-K8U7>] (describing municipal secessions from the Shelby County School District and noting that “Shelby County and the city of Memphis . . . brought lawsuits alleging that the creation of the new municipal districts was racially motivated, violating the law.”).

<sup>163</sup> See Faulk, *supra* note 160.

<sup>164</sup> See Madison Underwood, *Gardendale Will Learn This Week How Much It Must Pay to Split from Jefferson County Schools*, AL.COM (Feb. 22, 2015), [http://www.al.com/news/birmingham/index.ssf/2015/02/gardendale\\_will\\_learn\\_to\\_morrow.html](http://www.al.com/news/birmingham/index.ssf/2015/02/gardendale_will_learn_to_morrow.html) [<http://perma.cc/E78Q-ER3Y>] (describing the facilities issues associated with the Gardendale secession and noting that the Jefferson County Commission approved a one-cent county-wide sales tax to fund \$1 billion dollars’

any, Gardendale has to compensate JCSD for the buildings it takes with it. To date, Gardendale has taken the position that the compensation should be minimal.<sup>165</sup>

JCSD however contends that the students remaining in JCSD are entitled to enjoy the same or equivalent facilities that would have been available to them but for the city system's separation from the county, particularly in light of the fact that county taxes were used to upgrade the Gardendale school facilities.<sup>166</sup> The issue is also being decided by the Alabama federal court overseeing the desegregation order.<sup>167</sup> Nonetheless, the aforementioned issues related to school assignment and school facilities provide a window into the equity issues that are often at play whenever there is a school district secession. As described in the subpart that follows, municipal secessions from county-based schools can also raise issues of financial parity and hyper-racial segregation as well.

#### B. A Factual Orientation to School District Secessions: East Baton Rouge Parish, Louisiana

The school system in East Baton Rouge Parish, Louisiana, is also experiencing high numbers of suburban municipal secessions. East Baton Rouge Parish consists of four cities: Baton Rouge, Baker, Central, and Zachary.<sup>168</sup> It also includes a large tract of unincorporated territory known as St. George.<sup>169</sup> Baker, Central, and Zachary were at onetime part of the East Baton Rouge Parish School System (EBRPSS) but seceded and formed their own independent school districts.<sup>170</sup> As a result,

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worth of school construction and that the Jefferson County Board of Education chose to use \$46 million dollars of the money it received from the Commission to build a new state of the art high school in Gardendale).

<sup>165</sup> Gardendale is offering to pay approximately \$8 million dollars in costs and to enact a transition plan that allows students who currently reside within JCSD's attendance zone for Gardendale to continue attending Gardendale schools through graduation. See *Supplemental Report, supra* note 140, at 5, 8.

<sup>166</sup> See *id.* at 25.

<sup>167</sup> See Robert Carter, *Federal Judge Puts Brakes on Gardendale Schools' Lawsuit Against JefCoEd; Hearing Set for Tuesday*, N. JEFFERSON NEWS (Mar. 18, 2015), [http://www.njeffersonnews.com/news/federal-judge-puts-brakes-on-gardendale-schools-lawsuit-against-jefcoed/article\\_e29c361c-cded-11e4-9107-4fd2ad909d8c.html](http://www.njeffersonnews.com/news/federal-judge-puts-brakes-on-gardendale-schools-lawsuit-against-jefcoed/article_e29c361c-cded-11e4-9107-4fd2ad909d8c.html) [<http://perma.cc/6QKL-J2UM>].

<sup>168</sup> See JAMES RICHARDSON, JARED LLORENS & ROY HEIDELBERG, *BRAC White Paper: On the Possibility of a New City in East Baton Rouge Parish* 1 (Dec. 7, 2013), [http://brac.org/docs/pdf/brac\\_white\\_paper\\_new\\_city\\_ebr.pdf](http://brac.org/docs/pdf/brac_white_paper_new_city_ebr.pdf) [<http://perma.cc/MLL9-MFF6>].

<sup>169</sup> See *id.* at 1, 3.

<sup>170</sup> *Id.* at 1.

the EBRPSS now only contains the City of Baton Rouge and the large tract of unincorporated land known as St. George.<sup>171</sup>

Further, like many school systems in the South, EBRPSS also has a long ignoble history of resisting school desegregation. Black plaintiffs filed suit in order to force EBRPSS to comply with *Brown I* in 1956.<sup>172</sup> The lawsuit was at one point the longest-running school desegregation case in the country, but the case settled in 2003 and the district court released EBRPSS from federal court supervision in 2007.<sup>173</sup>

It is against this backdrop that residents of the unincorporated territory of St. George are making a serious and sustained effort to secede.<sup>174</sup> Proponents of the St. George secession essentially rely upon the same three rationales for secession as the JCSD proponents of secession: a desire for increased municipal local control over schools, enhanced efficiency because of the smaller size of the school district, and the likelihood that a higher-quality school district will attract desirable businesses and residents.<sup>175</sup> The potential secession by St. George highlights two critical but different issues than those raised by the JCSD secessions: (i) the possibility of creating a hypersegregated county-based school district, defined as a school where a supermajority of the students are minorities;<sup>176</sup> and (ii) the adverse financial ramifications for the county-based school district from which secession is sought.<sup>177</sup>

With respect to the issue of hypersegregation, students in the new St. George district would be 70% white, 23% Black,

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<sup>171</sup> See *id.* (“[T]he East Baton Rouge Parish School System provid[es] public education for families living in the City of Baton Rouge and in unincorporated areas of the parish.”).

<sup>172</sup> See *Davis v. E. Baton Rouge Par. Sch. Bd.*, 214 F. Supp. 624, 625 (E.D. La. 1963).

<sup>173</sup> See COWEN INST. FOR PUB. EDUC. INITIATIVES, LOUISIANA DESEGREGATION CASE STUDIES: EAST BATON ROUGE, WEST CARROLL, AND TANGIPAHOA 3 (2010), <http://www.coweninstitute.com/wp-content/uploads/2010/08/Louisiana-Desegregation-Case-Studies.pdf> [<https://perma.cc/A35X-48MU>].

<sup>174</sup> See FAQ’s, ST. GEORGE, LA., <http://www.stgeorgelouisiana.com/about/faqs> [<http://perma.cc/HKY4-E7SQ>].

<sup>175</sup> See *id.*

<sup>176</sup> See ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 25–26 (2010) (defining hypersegregation in terms of the dissimilarity index and noting that demographers consider a dissimilarity index over sixty to indicate high or hyper segregation, and also noting the hypersegregation of public schools); GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *Brown v. Board of Education* 359 (1996) (highlighting the drastic negative consequences of hypersegregation).

<sup>177</sup> RICHARDSON, LLORENS & HEIDELBERG, *supra* note 168, at 11–14.

and 4% Asian, with a mean family income of \$94,824.<sup>178</sup> Students residing within the EBRPSS boundary lines by contrast would be 55% Black, 40% white, and 3% Asian, with a mean family income of \$68,958.<sup>179</sup> However, a large percentage of white students residing within EBRPSS currently opt out of the public school system and attend private school.<sup>180</sup> Only 10% of the students who now attend EBRPSS schools are white, while 80% are Black.<sup>181</sup> Thus, decreasing the percentage of white students even eligible to attend school within the system would likely also decrease the already small percentage of white students who attend EBRPSS schools. This would in turn elevate the potential for increasing hypersegregation within the EBRPSS.

Further, there would be significant financial consequences for EBRPSS if St. George secedes. The new city of St. George “would be one of the wealthiest cities in the state.”<sup>182</sup> Importantly, the boundary lines for the new proposed city of St. George contain a number of major retail centers.<sup>183</sup> The sales taxes generated by those retail centers make up a significant portion of the tax base that is used to fund schools within the EBRPSS.<sup>184</sup> The St. George secession would mean that the EBRPSS would lose the tax revenue generated by retail centers in St. George to fund EBRPSS schools.<sup>185</sup> Instead, that tax revenue would all go to the new St. George School District.<sup>186</sup>

Lastly, in addition to losing tax revenue, if St. George successfully secedes, the EBRPSS may be solely responsible for paying what are known as district “legacy costs.” These are ongoing legally obligated payments for things such as employee retirement that the county-based district is required to continue paying.<sup>187</sup> As a result of the legacy costs and the loss of sales tax revenue from its tax base, economists predict that the

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<sup>178</sup> *Id.* at 4, 25.

<sup>179</sup> *Id.*

<sup>180</sup> See Diana Samuels, *New Orleans Has Highest Percentage of Private School Students, Baton Rouge Is 4th*, *TIMES-PICAYUNE* (Aug. 14, 2014), [http://www.nola.com/education/baton-rouge/index.ssf/2014/08/new\\_orleans\\_has\\_highest\\_percen.html](http://www.nola.com/education/baton-rouge/index.ssf/2014/08/new_orleans_has_highest_percen.html) [<https://perma.cc/JQ29-XKVP>].

<sup>181</sup> *East Baton Rouge Parish School System, Louisiana*, NAT'L COUNCIL ON TCHR. QUALITY, <http://www.nctq.org/districtPolicy/contractDatabase/district.do?id=75> [<https://perma.cc/G9SQ-7ZS6>].

<sup>182</sup> RICHARDSON, LLORENS & HEIDELBERG, *supra* note 168, at 5.

<sup>183</sup> *Id.* at 19.

<sup>184</sup> *Id.* at 25 (noting that revenues from sales taxes in the high sales taxes generating part of the parish would no longer be available to the EBRPSS).

<sup>185</sup> *Id.* at 24–25.

<sup>186</sup> *Id.*

<sup>187</sup> RICHARDSON & HEIDELBERG, *supra* note 6, at 9.

amount of revenue per pupil that EBRPSS would have available to spend would decrease from \$9,635 per student to \$8,870.<sup>188</sup> In contrast, they predict that the per pupil revenue available for students in the new St. George school system would be \$11,686.<sup>189</sup>

All in all, the secession efforts in both Jefferson County, Alabama and East Baton Rouge Parish, Louisiana provide a window into the racial, socioeconomic, revenue, and school financial consequences that attend the school district secessions. Proponents of the secessions suggest that the secessions are warranted due to the municipal local control of schools, alleged efficiency gains, and increased quality of education for the seceding school districts that they can use to recruit businesses and residents.

However, any benefits of the secessions must be considered in context with the racial and class differences between new and old districts, along with the potentially adverse financial consequences for the districts left behind after the secession. As discussed in subpart C, each individual state has plenary authority to allow (or disallow) school district secessions. The legal framework that states establish with respect to secessions can play a tremendous role in either facilitating or circumscribing school district secessions.

### C. Locating School District Secessions Within the Law on Municipal Boundary Changes

As a matter of conventional state and local government law, in the absence of discrimination or other conditions that violate the federal Constitution,<sup>190</sup> the legislature in each state has plenary power to determine whether a territory can secede from a municipality and, if so, what the process for secession will entail.<sup>191</sup> Further, the state also has the power to create or

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<sup>188</sup> RICHARDSON, LLORENS & HEIDELBERG, *supra* note 168, at 25–26.

<sup>189</sup> *Id.* at 26.

<sup>190</sup> *See, e.g.*, *Moorman v. Wood*, 504 F. Supp. 467, 477 (E.D. Ky. 1980) (“The Constitution of the United States enacts neither principles of consolidated metropolitan government nor those of decentralized government in villages and small towns. It is silent on these subjects. It grants the federal courts no power to construct solutions to urban blight or suburban sprawl, or to invalidate solutions reached by a state, if racial discrimination or some other unconstitutional factor is not involved.” (footnote omitted)).

<sup>191</sup> *See, e.g.*, *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state.”); Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971, 2024 (2013) (finding that under U.S. law “municipalities have no vested rights in their bounda-

alter the boundary lines of all local governments, including school districts.<sup>192</sup> Thus, states also have plenary power to decide when and under what conditions to allow a municipality to secede from a school district.<sup>193</sup> Two important legal issues are relevant to school district secessions: home rule and voting rights. Each of these issues is addressed in turn.

### 1. *Home Rule*

One issue that potentially presents a limit to the plenary power that states have over municipal secessions is the concept of home rule. Home rule authority gives local governments the ability to act without first obtaining permission from their state legislature.<sup>194</sup> More specifically, it gives local governments a range of authority to deal with inherently local matters that do not infringe upon state laws or policies.<sup>195</sup> Though the issue of whether or not a territory should be permitted to secede is arguably an “inherently local matter,” many courts have found that home rule authority does not change the plenary authority afforded to states over municipal boundary line changes, including secessions.<sup>196</sup> Thus, as other local

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ries” and that most states only allow for “unilateral secession [in] very particular circumstances”).

<sup>192</sup> See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907) (“The state, therefore, at its pleasure, may . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.”); *Gragg v. Unified Sch. Dist. No. 287*, 627 P.2d 335, 338 (Kan. Ct. App. 1981) (“A school district is an arm of the state existing only as a creature of the legislature to operate as a political subdivision of the state. A school district has only such power and authority as is granted by the legislature . . . .” (quoting *Wichita Pub. Sch. Emps. Union v. Smith*, 397 P.2d 357 (Kan. 1964))); *Town of Lisbon v. Lisbon Vill. Dist.*, 183 A.2d 250, 253 (N.H. 1962) (finding that state legislatures have the power to create local governments and also to “modify or divide them in such manner as to meet the public exigencies”).

<sup>193</sup> See, e.g., TENN. CODE. ANN. § 49-2-502(b)(3) (2013) (removing the restrictions in the Tennessee law on school district creation and allowing any locality that is part of a county district that was subject to a unilateral merger to secede and form a new school district); *Norton v. Lakeside Special Sch. Dist.*, 133 S.W. 184, 185 (Ark. 1910) (“The [l]egislature is primarily vested with the power to create school districts, and it may create or abolish a school district, or change the boundaries of those established for any reason that may be satisfactory to it.”).

<sup>194</sup> Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule*, 84 N.C. L. REV. 1983, 1990 (2006) (“[I]n a home rule state, local governments have authority to act on matters of local concern unless a state statute preempts local action; in a non-home rule state, local governments may act on a matter only if a state statute authorizes local action.”).

<sup>195</sup> See *id.*

<sup>196</sup> See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (re-marking that the *Hunter v. Pittsburgh* case “continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority

government law scholars have suggested, “[m]ost state courts treat municipal boundaries as interlocal matters, outside the scope of home rule immunity.”<sup>197</sup> Further, most school districts do not have home rule authority, so the state most certainly has plenary power over municipal secessions from school districts.<sup>198</sup> For those reasons, home rule typically does not in any way limit the considerable power that states have in shaping the landscape for Southern municipal secessions from county-based school districts.

## 2. Voting Rights

Once a state gives a municipality the authority to secede, some states require a voter referendum in order for the secession to proceed.<sup>199</sup> A key question in states that require a voter referendum is which residents have the right to vote: the residents in the seceding territory *only* or both the residents in the seceding territory *and* the residents in the territory from which secession is sought. Constitutional interests attach and may be infringed upon when the state gives the right to vote to some residents but not to others.<sup>200</sup>

The Supreme Court applies strict scrutiny to any restriction on voting that denies the right to vote to a person regarding a matter that substantially impacts that person.<sup>201</sup> Certainly,

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upon them”); *In re Town of E. Hampton v. New York*, 263 A.D.2d 94, 96 (N.Y. App. Div. 1999) (finding that home rule amendment did not require the state legislature to enact general mechanism for the creation of new counties); *City of New York v. New York*, 158 A.D.2d 169, 173 (N.Y. App. Div. 1990), *aff’d by* 562 N.E.2d 118 (N.Y. 1990) (“Legislation dealing with matters of State concern, albeit of localized application and having a direct effect on the most basic of local interests, does not violate the Constitution’s home rule provisions.”); *see generally* George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 5, 9–10 (1990) (noting that as a general rule home rule authority has not changed the plenary authority that states have over municipal boundaries).

<sup>197</sup> Briffault, *supra* note 128, at 810.

<sup>198</sup> *See* Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 780 (1992) (“Home rule is rarely, if ever, extended to special districts, such as school districts.”).

<sup>199</sup> *See* Briffault, *supra* note 128, at 791–92.

<sup>200</sup> *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 264–65 (1977).

<sup>201</sup> *See, e.g., Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (“Statutes granting the franchise to residents on a selective basis always pose the danger of denying some citizens any effective voice in the governmental affairs which substantially affect their lives. Therefore, if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.” (footnote omitted)); *Herriman City v. Swensen*, 521 F. Supp. 2d 1233, 1237 (D. Utah 2007) (same).

the secession of a territory has a substantial effect on both the residents who are seceding and the residents who reside in the territory from which secession is sought. Given that logic, it would seem that limiting the right to vote to only one class of residents affected by secession (e.g., those attempting to secede) might violate the 14th Amendment, in the absence of a compelling state interest for doing so. Yet, the Supreme Court has held that “the protection of the right to vote . . . only extends within a political jurisdiction.”<sup>202</sup> The Court has further held that states have broad authority to determine which voters get to vote in elections that impact local boundary lines.<sup>203</sup> Thus, limiting the right to vote in a secession referendum to only residents of the locality attempting to secede does not violate the 14th Amendment.<sup>204</sup> Indeed, when such limitations have been challenged in the context of municipal secessions from school districts, courts have found them constitutional.<sup>205</sup>

In sum, states have plenary power to set the legal parameters for school district secessions. They can use that power to create a landscape that allows for the proliferation or circumscription of school district secessions. For example, under Alabama law, any municipality with more than five thousand residents is permitted to form their own school district.<sup>206</sup> The only requirements for doing so are that the city wishing to secede: (i) create a school board;<sup>207</sup> and (ii) negotiate an agreement regarding the financials related to the split and school facilities.<sup>208</sup> A consequence of the relatively lenient requirements under Alabama law for forming a new school district has resulted in a bevy of secessions in JCSD and other parts of the state.<sup>209</sup> In contrast, the requirements for forming a new school district under Louisiana law are much more taxing.

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<sup>202</sup> Briffault, *supra* note 128, at 793; *see* *Dunn v. Blumstein*, 405 U.S. 330, 343–44 (1972) (“An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.”).

<sup>203</sup> *See* *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978) (upholding differential treatment of residents outside of “the geographic boundaries of the governmental entity concerned”); *Town of Lockport*, 430 U.S. at 272–73 (citing “substantially differing electoral interests” as sufficient justification for differential treatment of voters).

<sup>204</sup> *See* Briffault, *supra* note 128, at 791–93.

<sup>205</sup> *E.g.*, *Bd. of Supervisors v. Local Agency Formation Comm’n*, 838 P.2d 1198, 1211 (Cal. 1992).

<sup>206</sup> ALA. CODE § 16-11-1 (1975).

<sup>207</sup> *See* ALA. CODE § 16-11-2 (1975).

<sup>208</sup> *See* ALA. CODE § 16-8-20 (1975).

<sup>209</sup> *See supra* subpart II.A.



Under Louisiana law, only the state legislature can approve the creation and funding of a school district.<sup>210</sup> Two bills were put through the Louisiana state legislature that would have allowed for the creation and funding of a St. George School District but the legislative efforts were not successful.<sup>211</sup> Efforts to create a separate St. George school system are ongoing but to date have also not been successful, largely because of the onerous state requirements for creating a new school district.<sup>212</sup>

Importantly, a key component in how states use the plenary power they have is often inextricably tied to state legislatures' views on the most effective forms of governance, particularly whether they prefer centralized or decentralized governance structures.<sup>213</sup> State legislatures that exhibit a preference for localism and decentralized governance structures are more likely to create a legal landscape that favors school district secessions.<sup>214</sup> The Part that follows examines how the preference for localism plays out in the context of suburban municipal secessions from school districts in the South.

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<sup>210</sup> LA. CONST. art. VIII, § 9 (“The legislature shall create parish school boards and provide for the election of their members.”)

<sup>211</sup> See Senate Bill 199, Regular Session (La. 2013), <http://www.legis.la.gov/legis/BillInfo.aspx?i=222589> [<https://perma.cc/HH22-MSHP>] (establishing the creation of a new St. George school system); Senate Bill 73, Regular Session (La. 2013), <http://www.legis.la.gov/legis/BillInfo.aspx?i=222163> [<https://perma.cc/57LB-2X46>] (proposing funding for the St. George school system, which was unsuccessful); see also Diana Samuels, *East Baton Rouge, St. George Bills Turn Out to Be Much Ado, With No Results*, TIMES-PICAYUNE (June 2, 2014), [http://www.nola.com/news/baton-rouge/index.ssf/2014/06/east\\_baton\\_rouge\\_st\\_george\\_bil.html](http://www.nola.com/news/baton-rouge/index.ssf/2014/06/east_baton_rouge_st_george_bil.html) [<https://perma.cc/AL9Z-UQRZ>] (chronicling the failed legislative attempts to create and fund an autonomous St. George school system).

<sup>212</sup> Those efforts even included an attempt to incorporate St. George into its own independent municipality with the hope that it would be easier politically to establish a new school system if St. George became an autonomous municipality. Yet the St. George incorporation effort failed. See Diana Samuels, *St. George Petition Comes Up Short by 71 Signatures; Campaign Says ‘This Is Far from Over,’* TIMES-PICAYUNE (June 13, 2015), [http://www.nola.com/news/baton-rouge/index.ssf/2015/06/st\\_george\\_petition\\_comes\\_up\\_sh.html](http://www.nola.com/news/baton-rouge/index.ssf/2015/06/st_george_petition_comes_up_sh.html) [<https://perma.cc/VQ2R-GKfV>] (describing the shortcomings of St. George’s efforts to incorporate as a city and noting that the impetus for the incorporation efforts were that “St. George supporters felt disenfranchised by their local government, and that there were no suitable options for public schools for their families in East Baton Rouge Parish”).

<sup>213</sup> See Briffault, *supra* note 128, at 802–03 (discussing how the preference for centralized instead of decentralized governance structures influences the legal rules that are put in place regarding municipal secessions).

<sup>214</sup> See *id.*

## III

## LOCALISM AND SCHOOL DISTRICT SECESSIONS

At their core, Southern municipal school district secessions are premised upon the belief that decentralized systems of school governance are preferable to the more centralized county-based systems of school governance.<sup>215</sup> They also reflect an ardent belief that local municipalities should have legal and political autonomy over schools. Such calls for municipal autonomy over schools are undoubtedly connected to a broader theory of governance called localism. Indeed, as discussed in subpart I.D, the Supreme Court's embrace of local control essentially elevated localism in education to a constitutional norm that is more highly valued than the ability of students to attend a nonsegregated school. Southern municipal secessions threaten to serve as the proverbial nail in the coffin for students' ability to attend nonsegregated racially schools, at least in the South.

This Part locates the Southern municipal school district secessions in the state and local government law literature on localism. It introduces two different forms of localism: classic localism and defensive localism. It examines the theoretical underpinnings of classic localism and suggests that, as both a theoretical and practical matter, Southern municipal school district secessions do not truly evince the benefits of classic localism. It concludes by analyzing the tenets of defensive localism and suggesting that Southern school district secessions more closely resemble defensive localism.

#### A. Classic Localism and Its Theoretical Underpinnings

Localism is broadly defined as an ideological preference for decentralized, independent local government structures.<sup>216</sup> It is a theory of governance that advocates for the "legal and political empowerment of local areas."<sup>217</sup> Traditionally, the term "local areas" is conceptualized as meaning the lowest level of local government, namely the city or municipality.<sup>218</sup> Localism advocates that local areas should be afforded plenary legal

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<sup>215</sup> See *supra* subparts II.A–II.B.

<sup>216</sup> Cashin, *supra* note 30, at 1988; Wilson, *supra* note 30, at 630.

<sup>217</sup> Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 2 (2000).

<sup>218</sup> See *id.* at 1–2 (noting that localism contemplates that autonomy and power should be afforded to a relatively large number of small cities or municipalities); cf. Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1329–30 (2014) (arguing that a new form of localism called micro-localism supports decentralizing power down to levels even lower than the municipality, such as the neighborhood or school board).

and political rights so that they can be completely autonomous.<sup>219</sup> This Article refers to this form of localism as “classic localism.”

The roots of classic localism lie in Jeffersonian conceptions of democracy. Thomas Jefferson’s vision was that of a decentralized, agrarian republic consisting of federal, state, county, and local ward governments.<sup>220</sup> He argued that the local ward government must be the lifeblood of the democracy.<sup>221</sup> He warned that each local ward should be small—five square miles or less—so that sovereignty can lie with individual citizens who could act directly and personally toward their own best interests.<sup>222</sup> Decentralizing power down to the local ward of government was in Jefferson’s view an ideal way to guard against excessive abuses of state and/or federal power.<sup>223</sup> Accordingly, one of the central tenets of classic localism is that the provision of government services should be subject *primarily* to the control of local governments with the interests of local residents as the central focus of policy decision makers.<sup>224</sup>

Classic localism is the antithesis of a centralized system of governance. In a centralized system of governance, power and decision making are concentrated within the realm of a central body, and smaller localities are subject to the authority of that central body.<sup>225</sup> Using that definition, a county-based system of school governance is considered a centralized system because individual municipalities within the county are subject to the decisions and power asserted by the county-based school district.

Proponents of classic localism suggest that a centralized system of governance is inefficient, disempowers citizens, and incentivizes them not to participate in the democracy.<sup>226</sup> Con-

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<sup>219</sup> See generally Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) (arguing that a theory of localism allows local governments to have “considerable autonomy over matters of local concern”).

<sup>220</sup> ANWAR HUSSAIN SYED, *THE POLITICAL THEORY OF AMERICAN LOCAL GOVERNMENT* 3–4 (1966).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 38–40.

<sup>223</sup> *Id.*

<sup>224</sup> Wilson, *supra* note 30, at 630–31.

<sup>225</sup> See Briffault, *supra* note 217, at 1–7 (describing localism as being in opposition to centralized forms of governance such as regionalism). County-based school districts provide an example of centralized governance systems insofar as individual cities or municipalities within the county are subject to the authority of the county for purposes of school governance.

<sup>226</sup> See, e.g., Gerald E. Frug, *Against Centralization*, 48 BUFF. L. REV. 31, 37 (2000) (“[T]here is no reason to identify centralization with the ability to solve

versely, in line with the Jeffersonian vision of an ideal democratic governance structure, localism is promoted on the grounds that “smaller government provides a better context in which to cultivate citizens and nurture a sense of community.”<sup>227</sup> Further, classic localism is widely touted as being beneficial on the grounds that it: (i) promotes efficiency in the provision of public goods, (ii) fosters democratic ideals, particularly citizen participation, and (iii) cultivates a better sense of community by allowing for autonomy and self-determination by locally defined territorial communities.<sup>228</sup> Each of these tenets of classic localism is further fleshed out in the paragraphs that follow.

The efficiency rationale for localism tracks Charles Tiebout’s Theory of Local Expenditures.<sup>229</sup> In line with Tiebout’s theory, localism is said to promote efficiency by providing citizens with a diverse set of small local governments from which to choose.<sup>230</sup> The sheer number of local governments in close proximity to one another allows citizens to vote with their feet and move to a locality that offers a mix of public services that best suits their needs.<sup>231</sup> The proliferation of local governments also purportedly creates competition between local governments for residents.<sup>232</sup> The competition in turn incentivizes local governments to offer the best possible set of public services to citizens in order to attract and maintain a desirable base of citizens.<sup>233</sup> The interlocal competition for residents ostensibly ensures that local governments will remain efficient because if they do not, they will lose citizens to neighboring

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inter-jurisdictional problems and decentralization with the protection of local selfishness. Historically, centralization has been a major contributor to the promotion of local selfishness, and the conventional definition of federalism is simply the most familiar attempt to recognize that entities that exercise decentralized power can together form an indivisible union.”).

<sup>227</sup> Cashin, *supra* note 90, at 753.

<sup>228</sup> Cashin, *supra* note 30, at 1998 (“[T]he values of democratic participation, efficiency, and community undergird an entrenched predisposition toward localized authority among local government scholars, judges, and legislatures.”).

<sup>229</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–18 (1956).

<sup>230</sup> Cashin, *supra* note 30, at 2000.

<sup>231</sup> Briffault, *supra* note 217, at 15 (“Decentralization allows local governments to tailor services, regulation and taxation to the needs and desires of their particular constituents.”).

<sup>232</sup> See Tiebout, *supra* note 229, at 417.

<sup>233</sup> See Cashin, *supra* note 30, at 2000 (“[L]ocal governance is preferable to centralized government: the greater the number of localities and the greater the variation among them, the greater the likelihood that a ‘consumer-voter’ will find a locality meeting his or her preferences.”).

jurisdictions.<sup>234</sup> Importantly, the efficiency rationale assumes that localities bear the costs of their actions and that the only people impacted by the localities' decisions are the citizens who reside within the locality.<sup>235</sup>

In addition to promoting efficiency, classic localism is also believed to further democratic ideals by providing citizens with a meaningful opportunity to participate in the political process.<sup>236</sup> Localism purportedly increases citizen participation because the small size of local governments affords people opportunity for the exercise of genuine power and decision making.<sup>237</sup> This, in turn, creates more of an incentive for citizens to participate in their own governance.<sup>238</sup>

Finally, classic localism is also strongly defended on the grounds that it cultivates a sense of community amongst residents.<sup>239</sup> The community-building function purportedly derives from the collective choices of like-minded individuals to reside in a particular locality.<sup>240</sup> Indeed, classic localism is said to allow "groups of people with shared concerns and values—distinct from those of the surrounding world" to come together.<sup>241</sup> Such like-minded individuals are theorized as being more cohesive, more likely to participate in their own governance, and therefore more likely to embody certain positive democratic ideals.<sup>242</sup>

For these reasons, classic localism as manifested through large-scale decentralization of power to a large number of small

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<sup>234</sup> Briffault, *supra* note 217, at 16 ("The resulting interlocal competition checks local taxing, spending, and administrative inefficiency.").

<sup>235</sup> See Tiebout, *supra* note 229, at 419 (noting that local governments will be efficient only when there are "no external economies or diseconomies between communities").

<sup>236</sup> Cashin, *supra* note 30, at 1998–2000.

<sup>237</sup> *Id.* at 1999.

<sup>238</sup> Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1070 (1980) ("No one is likely to participate in the decisionmaking of an entity of any size unless that participation will make a difference in his life. Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so.").

<sup>239</sup> Cashin, *supra* note 30, at 2001–02; Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 622 (1997) ("[L]ocal governments, through the existence of choice, allow for the fullest expression of self.").

<sup>240</sup> Poindexter, *supra* note 239, at 622 ("[T]he community is but a reflection of its residents' individualities.").

<sup>241</sup> Briffault, *supra* note 217, at 17.

<sup>242</sup> See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 445 (1990) ("Local borders, once created, reinforce local identification, become a focus of sentiment and symbolism and create a powerful legal bulwark for the preservation of local interests.").

cities or municipalities is viewed by some scholars and policy-makers alike as a preferable form of governance.<sup>243</sup> While criticisms of classic localism certainly exist,<sup>244</sup> classic localism is still romanticized by some scholars as being the paradigmatic model for state and local government relations.<sup>245</sup> Indeed, the proponents of school district secessions advance classic localism-related reasons for favoring secession.<sup>246</sup> Yet, as discussed in the subpart that follows, the tenets of classic localism, particularly the efficiency and community tenets, often do not necessarily ensue from the secessions.

### B. The Limits of Classic Localism and School District Secession

Classic localism is a highly regarded value in public education.<sup>247</sup> In the public education context, it plays out to mean that although states are responsible for providing education, the actual legal and political authority to provide public education is decentralized down to local governments known as school districts.<sup>248</sup> In keeping with the tenets of classic localism, school districts are afforded wide legal and political discretion to govern schools.<sup>249</sup> Further, also in keeping with the tenets of classic localism, school districts are seen as further-

<sup>243</sup> See, e.g., Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 565 (1990) (arguing the benefits of local control or localism on efficiency grounds); Poindexter, *supra* note 239, at 611 (defining localism as a legitimate form of governance and suggesting that “[i]nstead of attempting to convince those who have left the city (both businesses and residents) that it is in their best interest to care about the city that they left behind, the law should validate their locational decisions by strengthening the independence of individual communities”); Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 553 (1987) (advancing arguments in favor of affording local municipalities more power).

<sup>244</sup> See generally Briffault, *supra* note 10, at 1115 (criticizing localism on the grounds that “the close association of local powers with local boundaries generates spillovers, fiscal disparities, and interlocal conflicts”); Ford, *supra* note 13, at 1909–10 (suggesting that localism leads to racial segregation and parochial public policy decision-making); Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 416–24 (2001) (suggesting that localism with its emphasis on community and boundary lines has inevitable exclusionary consequences).

<sup>245</sup> Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 509–10 (2005) (“The desire for localism remains pervasive, and its voice influences our state legislatures.”).

<sup>246</sup> See *supra* subparts II.A–II.B.

<sup>247</sup> See, e.g., Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 84 (1986) (illustrating and criticizing the Supreme Court’s adherence to localism in its education rights cases); Wilson, *supra* note 14, at 1441–42 (describing how a strong preference for localism in public education leads to regional disparities in education between school districts).

<sup>248</sup> See *infra* subpart II.C.

<sup>249</sup> Wilson, *supra* note 14, at 1441.

ing democratic ideals by cultivating an enhanced sense of community.<sup>250</sup>

Proponents of school district secessions suggest that in order for them to *truly* reap the benefits of classic localism in public education, the power afforded to school districts must be decentralized down to the municipal level rather than the county level.<sup>251</sup> Put another way, they suggest that the only way that the tenets of classic localism can truly occur is to create smaller governance at the municipal rather than county level.<sup>252</sup> But the belief that the benefits of classic localism can only be wrought by decentralizing power and autonomy down to the municipal level is specious. It is specious because it presupposes an accuracy in defining two key localism concepts, “local area” and “community,” that do not exist. Each of these definitional limitations is discussed in turn.

### 1. *The Definition of “Local Area”*

As a default position, classic localism accepts the proposition that the lowest level of local government—in this instance the municipality or the city—is the appropriate level to which power should be decentralized.<sup>253</sup> To be sure, this is the argument that proponents of Southern school district secessions make.<sup>254</sup>

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<sup>250</sup> *Id.* at 1433; see also Robert A. Garda, Jr. & David Doty, *The Legal Impact of Emerging Governance Models on Public Education and Its Office Holders*, 45 URB. LAW. 21, 49 (2013) (“The historic backbone of education governance in the United States is ‘local control’—the notion that cities, towns, and localities control their schools.”).

<sup>251</sup> See Eaton, *supra* note 3 (citing the motivation for the secession as being the desire to build the “‘best in class’ school system ‘which exceeds the capabilities of the system which we are exiting’”).

<sup>252</sup> See Margaret Newkirk, *Baton Rouge’s Rich Want New Town to Keep Poor Pupils Out: Taxes*, BLOOMBERG NEWS (Feb. 6, 2014), <http://www.bloomberg.com/news/articles/2014-02-06/baton-rouge-s-rich-want-new-town-to-keep-poor-pupils-out-taxes> [<https://perma.cc/QY7C-W43M>] (describing the secession proponents as “[s]aying they want local control . . . [t]hey envision their own district funded by property taxes from their higher-value homes”).

<sup>253</sup> See, e.g., Shoked, *supra* note 218, at 1327 (“The city used to be the most local, or lowest, level of government responsible for welfare and health; it also used to be the most local, or lowest, level of government responsible for planning.”); Schragger, *supra* note 244, at 462–63 (noting that the substantive defense of localism often envisions the relevant local area or community as one that is defined by specific naturalized jurisdictional boundaries that more often than not track municipal boundary lines).

<sup>254</sup> See, e.g., Emily Lane, *St. George Leaders Surrender Legal Battle for Now, Vow to Explore Options*, TIMES-PICAYUNE (July 16, 2015), [http://www.nola.com/news/baton-rouge/index.ssf/2015/07/st\\_george\\_lawsuit\\_baton\\_rouge.html#in\\_cart\\_story\\_package](http://www.nola.com/news/baton-rouge/index.ssf/2015/07/st_george_lawsuit_baton_rouge.html#in_cart_story_package) [<http://perma.cc/PGM9-P57U>] (extolling the ability of a municipally-based school district to “create an ‘outstanding’ public school system

Yet the reliance upon the municipality or city as the relevant local area to reap the benefits of localism is arguably misguided. It reflects an outdated mode of thinking that belies the realities of the ways in which localities actually function in modern times. In the past, localities were intensely separated from one another; residents did not have much interaction with any locality other than the one in which they lived.<sup>255</sup> This is no longer the case.

The shift to a global economy restructured the ways in which citizens interact with local government structures.<sup>256</sup> In particular, “the decentralized global economy operates best where physical proximity and networking among a large number of specialized people and businesses can be realized.”<sup>257</sup> Consequently, people who live in metropolitan regions often interact with multiple municipalities throughout the day. They may work in one city, live in another, and go grocery shopping in yet another.<sup>258</sup> As a result, for purposes of reaping the benefits of classic localism, “[t]he real city [may indeed be] the . . . metropolitan area.”<sup>259</sup>

Despite the modern realities that people now interact with multiple local governments on a daily basis, “local area” continues to be narrowly defined at the singular municipal level. Two problems occur when such a narrow definition of local area is used. First, it negates the efficiency gains purportedly associated with classic localism. It does so by allowing large-scale externalities<sup>260</sup> to occur, which leads to municipalities not

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and a city government that is ‘responsive to their needs and responsible with their tax dollars’”); Marie Leech, *To Split or Not to Split? Gardendale Voters to Weigh Starting Own School System with Property Tax Vote*, AL.COM (Nov. 12, 2013), [http://blog.al.com/spotnews/2013/11/to\\_split\\_or\\_not\\_to\\_split\\_garde.html](http://blog.al.com/spotnews/2013/11/to_split_or_not_to_split_garde.html) [http://perma.cc/RHT9-H7RR] (quoting the Gardendale City Council President as stating “[h]aving our own school system now will ensure that our sense of educational ideals, community values, and sound fiscal policies are preserved for future generations”).

<sup>255</sup> Briffault, *supra* note 10, at 1133 (finding that in the past localities were “set farther apart by unincorporated land, and people focused more of their activities within the territorial limits of their particular locality”).

<sup>256</sup> Griffith, *supra* note 245, at 510 (“Today’s mobile workforce competes in regional markets, and economic development is best handled on a regional basis.”).

<sup>257</sup> *Id.*

<sup>258</sup> Briffault, *supra* note 217, at 3 (“[A metropolitan] region is a real economic, social, and ecological unit. . . . [T]he people who live there do not concentrate their daily lives within any one locality but, rather, regularly move back and forth among multiple municipalities across a region.”).

<sup>259</sup> See DAVID RUSK, *CITIES WITHOUT SUBURBS* 5 (2d ed. 1995).

<sup>260</sup> This Article uses the term “externalities” to mean a side effect or consequence of one party’s actions that affects some third party.



bearing the full cost of all their policy-related decisions. Second, it causes stark disparities in the quality of public education provided by neighboring municipalities and raises important normative questions regarding the appropriateness of using public schools as part of an interlocal competition for residents.

A key component of the efficiency rationale for classic localism is that residents move between smaller local governments depending upon their preferences for certain public goods.<sup>261</sup> Local governments presumably respond accordingly by producing public goods at socially optimal levels in accordance with residents' tastes and desires.<sup>262</sup>

However, unless local governments bear the full costs of their actions, externalities that the municipality is not bearing shift outside and are borne by other governments and their citizens. Speaking economically, if a municipality does not bear the full costs of its policy decisions, they may as a result produce a sub-socially optimal level of a particular public good.<sup>263</sup>

An example from the land-use context provides an apt illustration of this logic. If municipalities enact restrictive or exclusionary land-use policies<sup>264</sup> that have the effect of restricting entry into the municipality for some residents while encouraging entry by other residents, neighboring localities that do not utilize restrictive or exclusionary land-use policies often end up absorbing a disproportionate share of residents who are excluded.<sup>265</sup> As a result, both municipalities end up theoretically producing a sub-optimal amount of low-income

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<sup>261</sup> Tiebout, *supra* note 229, at 417 (“[T]he government’s revenue-expenditure pattern for goods and services is expected to ‘adapt to’ consumers’ preferences.”).

<sup>262</sup> *Id.* at 421.

<sup>263</sup> *Id.* at 419 (suggesting that the accuracy of his model was dependent upon “[t]he public services [being] supplied exhibit[ing] no external economies or diseconomies between communities”).

<sup>264</sup> Examples of restrictive or exclusionary land use policies include zoning ordinances that restrict land use to single-family dwellings, allowing for no or very few multi-family dwellings. See generally *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 736 (N.J. 1975) (Pashman, J., concurring) (describing historical practices of exclusionary land use).

<sup>265</sup> Lisa T. Alexander, *The Promise and Perils of “New Regionalist” Approaches to Sustainable Communities*, 38 *FORDHAM URB. L.J.* 629, 637 (2011) (“The decisions of a particular locality to exclude or include certain land uses, or to provide public subsidies for housing construction or economic development, will inevitably generate externalities or have spillover effects on neighboring localities.”); Briffault, *supra* note 10, at 1134 (“When one locality acts to exclude a use, its neighbors may feel compelled to adopt comparable regulations to protect themselves from the growth they fear will be diverted to them by the initial locality’s regulation.”).

affordable housing and middle/upper-middle-class housing; the municipality with exclusionary land-use policies produces too little affordable housing and too much housing for middle/upper-middle-class residents while the reverse may be true for neighboring municipalities.<sup>266</sup>

Insofar as public education is concerned, when too narrow of a definition of “local area” is utilized, similar externalities to the housing illustration transpire. Externalities that are both direct and indirect occur. The direct externality is that when school district boundary lines track municipal boundary lines, the school districts located in less affluent municipalities end up absorbing a disproportionate share of poor and minority students.<sup>267</sup> When school districts located in poorer municipalities absorb a disproportionate share of poor and minority students, social welfare losses occur because of the negative effects that accrue when disadvantaged students are concentrated in one school district.<sup>268</sup>

Stated differently, for students who attend school districts with a disproportionate share of poor and minority students, they do not obtain the positive-peer effects associated with schools that enroll students from different socioeconomic statuses and races.<sup>269</sup> Instead, the districts are forced to educate a predominately poor and minority population, whom it actually costs more to educate.<sup>270</sup> Thus, the infusion of such a negative externality to a neighboring municipality negates rather than enhances efficiency. It does so by forcing the municipality that absorbs an excess share of poor and minority students to produce a sub-optimal amount of the kind of high-

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<sup>266</sup> See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1132 (2007) (“Desiring to keep property taxes low and exclude social ‘undesirables,’ municipalities often engage in exclusionary zoning, isolating the poor (and often racial and ethnic minorities) in decaying urban cores or in a few low-income, low-service cities within the region.”); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1183 (1996) (“Too often local citizens are united, not by a common taste for certain local services, but only by their shared disdain for the poor or for minority groups. As a result, ‘autonomy’ signifies the effort to fence out those who threaten their homogenous lifestyles or those who threaten to consume more in services than they pay in taxes.”).

<sup>267</sup> See Wilson, *supra* note 14, at 1437–39.

<sup>268</sup> See *supra* subpart I.C.

<sup>269</sup> See *id.*

<sup>270</sup> See Black, *supra* note 85, at 410–11 (“[A] small but high-profile contingent of predominantly poor and minority schools defy the odds and achieve at high levels. But delivering a quality education to students under these circumstances can cost far more per pupil than it otherwise would.” (footnote omitted)).

quality education that is produced when you have a mix of students from different races and classes.<sup>271</sup>

Further, an indirect externality stems from the fact that the positive externalities associated with providing quality public education most certainly cross municipal boundary lines. Indeed, quality public education has a number of positive externalities such as reducing crime, positively impacting a metropolitan region's economic and social success, and lowering the number of people who require public welfare assistance.<sup>272</sup> A definition of "local area" that is limited to the individual municipal level cannot appropriately account for all of these positive externalities when making allocative decisions regarding public education. Consequently, as other scholars have noted, "[t]he more far-reaching . . . externalities [are, the more they] necessitate supervision by the largest-scale [of] government legally permissible"<sup>273</sup> because smaller local governments are not adequately equipped to factor all of the externalities into their decision making.<sup>274</sup>

Finally, in addition to the efficiency problems, using too narrow of a definition of "local area" also causes interregional disparities in public education between municipalities.<sup>275</sup> The existence of interregional disparities leads to important norma-

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<sup>271</sup> See DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 141 (1993) (finding that poverty is associated with poor educational performance and "[t]he organization of public schools around geographical catchment areas . . . concentrat[es] low-achieving students in certain schools, . . . creat[ing] a social context within which poor performance is standard and low expectations predominate."); John Charles Boger, *Education's "Perfect Storm"? Racial Resegregation, High Stakes Testing, and School Resource Inequities: The Case of North Carolina*, 81 N.C. L. REV. 1375, 1416 (2003) ("[F]or the country as a whole, the correlation [between the proportion of a school's pupils in poverty and its average achievement level] is about .5 or .6. No other single social measure is consistently more strongly related than poverty to school achievement." (alteration in original) (quoting ALISON WOLF, NAT'L INST. OF EDUC., *THE RELATIONSHIP BETWEEN POVERTY AND ACHIEVEMENT I-II* (1977))).

<sup>272</sup> See MASSEY & DENTON, *supra* note 271, at 140–42, 153; Shoked, *supra* note 218, at 1367–68.

<sup>273</sup> Shoked, *supra* note 218, at 1368.

<sup>274</sup> For example, if municipally-based school districts truly accounted for all of the positive externalities associated with quality public education, they might develop a more rational school assignment policy that more freely allowed students in other districts, particularly poor performing districts, to attend schools in their district. Yet this rarely happens, as very few high performing school districts have interdistrict school transfer policies or open enrollment policies. Instead, the districts act in their own self-interest, narrowly conceptualizing the benefits that will accrue to their students by keeping out students who do not live within the geographic boundaries of the high performing district.

<sup>275</sup> Wilson, *supra* note 14, at 1441–42 (describing how a strong preference for localism in public education leads to regional disparities in education between school districts).

tive questions about the use of public schools as a bargaining chip in the interlocal competition for residents. For example, proponents of the Southern school district secessions make competition-based arguments regarding efficiency as a reason for ceding local control of schools to individual cities or municipalities. In particular, they contend that having their own school district will enable them to create a high-quality district that they can use as an asset in winning the interlocal competition for residents and businesses.<sup>276</sup>

Given the ways in which municipalities within regions are economically and socially interdependent, it is not apparent that such interlocal competition is healthy for the individual municipalities or the region as a whole if it results in school districts that offer substantially different and disparate qualities of education.<sup>277</sup> Moreover, it is also unclear that it is normatively appropriate to use public education as a bargaining chip in interlocal competition for residents and businesses.

From the inception of the provision of free public education in America, public education was viewed as being vital to the health and well-being of the American democracy.<sup>278</sup> It was viewed, and still is in some ways today, as being the training ground for citizens, as giving citizens the tools necessary to make a living, and as leveling the playing field so that social mobility across classes can occur.<sup>279</sup> This vision of public education is inapposite with the Tieboutian principles of efficiency

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<sup>276</sup> See, e.g., Sarah A. McCarty, *Gardendale Council Members Unanimously Support Separate City School System*, AL.COM (Nov. 12, 2013), [http://blog.al.com/spotnews/2013/06/gardendale\\_council\\_members\\_una.html](http://blog.al.com/spotnews/2013/06/gardendale_council_members_una.html) [<https://perma.cc/3LG9-QY6Z>] (quoting the city council president as saying “[o]ne thing you’ve got to look at as far as your town is the fact that having your own school system is definitely a draw. People migrate to cities that have their own school systems. Typically you see a definite significance in property value increases.”).

<sup>277</sup> See Wilson, *supra* note 14, at 1446 (demonstrating how “interlocal competition for residents strengthens wealthy white school districts while weakening poorer minority districts”).

<sup>278</sup> See, e.g., RICHARD D. KAHLENBERG, *ALL TOGETHER NOW* 13 (2001) (quoting Thomas Jefferson as saying that universal public education was necessary to ensure “the selection of the youths of genius from among the classes of the poor” and “to avail the State of those talents which nature has sown so liberally among the poor as the rich, but which perish without use, if not sought for and cultivated”).

<sup>279</sup> See, e.g., AMY GUTMANN, *DEMOCRATIC EDUCATION* 134 (1987) (“The democratic truth in equalization is that all children should learn enough to be able not just to live a minimally decent life, but also to participate effectively in the democratic processes by which individual choices are socially structured. A democratic state, therefore, must take steps to avoid those inequalities that deprive children of educational attainment adequate to participate in the political processes.” (emphasis omitted)).

that are purportedly occurring when there is an interlocal competition for residents.

Tiebout relies purely on a market model in which individuals maximize their own *individual* goals as a way to obtain efficiency for *individual* local governments.<sup>280</sup> However, as evidenced by the aforementioned purposes of public education, public education is a social good.<sup>281</sup> Society has independent interests in maximizing the *collective* needs and values of public education. Consequently, a Tieboutian efficiency model predicated on allowing variance in the quality of public education across school district boundary lines and using those variances as a means of better positioning certain localities in relation to others, runs counter to the social good function of public education. Further, given the reality that municipal boundary lines are often circumscribed by both race and class, it reinforces group-based inequality,<sup>282</sup> which runs counter to one of the fundamental purposes of public education—ameliorating inequality.

In sum, the definition of “local area” used in conceptualizing the benefits likely to accrue from classic localism is too narrow. Such a narrow definition undercuts the efficiency justification for decentralized public education governance structures because it allows negative externalities to accrue and leads to a sub-optimal production of high-quality public education in some municipalities. It also highlights the ways in which the Tieboutian market-based efficiency model for allocating public goods is a mismatch for allocating public education given that public education is supposed to function as a social good.

## 2. *The Definition of “Community”*

One of the strongest normative justifications for classic localism is that it furthers community. In particular, the community rationale for classic localism portends that municipalities are not just “small groups of people who happen to buy

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<sup>280</sup> See *supra* notes 229–238 and accompanying text.

<sup>281</sup> See Boger, *supra* note 271, at 1410–11 (decrying the efficiency rationale for public education and instead arguing that “public schooling is more than a consumer good provided for the benefit of students and their parents. Society itself has deep and legitimate interests in social re-production—the intellectual, moral, and social development of the present youth who must become society’s leaders in all fields of endeavor.”).

<sup>282</sup> See ANDERSON, *supra* note 176, at 27 (“When important goods are asymmetrically distributed across space and groups are sorted into separate spaces containing more or less of these goods, group inequality results.”).

public services or engage in public decision-making together.”<sup>283</sup> Instead, municipalities consist of people who voluntarily gravitate to territorial spaces because those spaces are comprised of people who share their same values and norms.<sup>284</sup>

Importantly, citizens are presumed to voluntarily locate in municipalities precisely because they wish to associate with like-minded individuals who share their norms and values.<sup>285</sup> Smaller and more homogenous communities are said to more effectively “galvanize around issues that impact their community and to agree on collective courses of action” that best suit their needs.<sup>286</sup> As such, the community justification for classic localism advocates affording municipalities power and autonomy because doing so purportedly vindicates individual choice and allows citizens to form communities that are responsive to their needs.<sup>287</sup>

The community rationale features prominently in the localism justification for Southern municipal secessions from school districts. Members of the Gardendale city council, for example, justified their decision to secede from the Jefferson County School District on the grounds that Gardendale residents should be able to create a school district that meets the specific needs of Gardendale residents.<sup>288</sup> They also reasoned that the creation of a Gardendale School District would better enable them to enact curricular changes and policy reforms suited to the needs of students in Gardendale.<sup>289</sup> Residents in St. George, Louisiana and other municipalities in the South

<sup>283</sup> Briffault, *supra* note 217, at 17.

<sup>284</sup> *Id.*

<sup>285</sup> *See id.*

<sup>286</sup> Wilson, *supra* note 14, at 1433.

<sup>287</sup> *See* Schragger, *supra* note 244, at 391 (summarizing the arguments in favor of the community justification for localism as being that “[d]ecentralized government allows for a wider array of forms of association, thereby vindicating individual autonomy and the efficiency and responsiveness of government in general.”).

<sup>288</sup> *See, e.g.,* McCarty, *supra* note 276 (noting that one council member indicated that “[e]ach community has different needs for what it needs to expand on, and Gardendale might be different than Mortimer Jordan or Center Point. I just think issues will be handled more effectively by a local school board that’s more accountable to people in Gardendale.”).

<sup>289</sup> CITY OF GARDENDALE, CREATING A GARDENDALE CITY SCHOOL SYSTEM: FREQUENTLY ASKED QUESTIONS 2, [http://www.cityofgardendale.com/FILE\\_UPLOADS/FAQs.pdf](http://www.cityofgardendale.com/FILE_UPLOADS/FAQs.pdf) [<https://perma.cc/K9SU-4XS7>] (noting that a “greater community feel makes parents more comfortable when interacting with teachers and administrators” and that local control will allow “[o]pportunities for innovation in encouraging students to pursue the study of mathematics and science”).

seeking to secede from county-based school districts put forth similar arguments.<sup>290</sup>

This community justification for classic localism, particularly in the context of municipal secessions from school districts, raises important questions regarding equity and community formation. For starters, the community that localism seeks to reify is arguably one based on principles of exclusion rather than inclusion. This is the case because intense racial and class-based segregation often exists between municipalities.<sup>291</sup> Because of the intense racial and economic segregation that exists between municipalities, any community-building bred by localism will necessarily be an exclusionary one based on race and class. To that end, localism vis-à-vis municipal secessions from county-based school districts “facilitates a perverse type of community-building that breeds racial and economic exclusion.”<sup>292</sup> This type of community-building is particularly dangerous in the South, given its brutal history of racial exclusion in schools.

Further, the community-building rationale for localism presupposes that citizens voluntarily elect to live in municipalities that best meet their needs and in which like-minded people exist. As a matter of theory and practical application, this justification for localism is only partially true. Certainly those who are more affluent and/or have greater social and political capital can shop for a municipality that best meets their needs, particularly when it comes to schools.<sup>293</sup> In this sense, the formation of communities, particularly school-based communities, is indeed intentional.

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<sup>290</sup> See Jack Barlow, *The St. George Movement in Baton Rouge: An Education Revolution, or White Flight?*, GUARDIAN (Apr. 8, 2015), <http://www.theguardian.com/us-news/2015/apr/08/st-george-movement-baton-rouge-louisiana-schools> [<https://perma.cc/H5ZE-CWMA>] (reporting that the St. George secession attempt is rooted in a desire for more autonomy over the St. George community and their affairs); Tom Charlier, *Eight School Systems Open in Shelby County with Few Problems*, COM. APPEAL (Aug. 4, 2014), <http://www.commercialappeal.com/news/schools/eight-school-systems-open-in-shelby-county-with-few-problems-ep-536009714-324356851.html> [<http://perma.cc/2ABG-R8PR>] (describing community-based rationales for secession of eight suburban municipalities from the Shelby County, Tennessee School District).

<sup>291</sup> MASSEY & DENTON, *supra* note 271, at 22–25.

<sup>292</sup> Wilson, *supra* note 14, at 1435.

<sup>293</sup> See Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 192–94 (2002) (chronicling the ways in which more affluent homebuyers intentionally shop for homes based on perceptions regarding the quality of the public school district in which the home is located).

However, for many poor and minority families, the municipality or neighborhood in which they live is not necessarily based on an intentional and well-calculated choice.<sup>294</sup> Instead, such families are often forced to locate to a community that is most affordable or offers the kinds of support networks that they need in order to subsist.<sup>295</sup> Thus, the community-building rationale for localism, particularly to the extent it relies on notions of voluntary community formations, is often a one-way street that can rarely be traveled by poor and minority families. Thus, because municipal boundary lines are more typically built around principles of exclusion rather than inclusion, and the choice to move to a particular municipality is not voluntary for everyone, the community rationale for localism is arguably seriously flawed.

All told, the localism justification for municipal secessions from Southern school districts specifically has many shortcomings. In particular, the flawed definition of “local area,” along with the incoherent connection between residence and community, call into question whether municipal secessions from county-based school districts actually result in the benefits of classic localism that proponents suggest that they do. The subpart that follows considers an alternative form of localism—defensive localism—and suggests that municipal secessions may actually be more likely to result in defensive localism than classic localism.

### C. Defensive Localism

As discussed in the preceding subparts, adherence to localism results in individual cities or municipalities purporting to become their own separate and autonomous enclaves. The boundary lines of these municipalities are at least in theory permeable: citizens can choose to “vote with their feet” and locate themselves within the boundary lines of any municipality. Yet municipalities have wide latitude to craft zoning and taxation policies that effectively determine who lives there (and

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<sup>294</sup> Schragger, *supra* note 244, at 392–93 (describing the limitations of community formation vis-à-vis justifications for localism).

<sup>295</sup> See, e.g., Joanna M. Reed et al., *Voucher Use, Labor Force Participation, and Life Priorities: Findings from the Gautreaux Two Housing Mobility Study*, 8 CITYSCAPE 219, 235 (2005) (describing the importance of social networks in the housing choices of poor minority participants in a housing mobility study and noting that their commitment to those networks made it unlikely that they would move to a higher opportunity area).



who does not).<sup>296</sup> To that end, “powerful incentives [exist] for well-off citizens to form separate political jurisdictions, thus shielding themselves from the economic costs and political dangers of coping with the less well-off.”<sup>297</sup> Indeed, municipalities and their boundary lines are demarcated by both race and class.<sup>298</sup>

Classic localism ignores the aforementioned race and class-based fragmentation that marks American cities and municipalities. In addition to failing to account for racial pluralism, classic localism also assumes that local governments assert significant power and autonomy in ways that allow them to control their own destinies. However, some scholars question both the failure of localism to account for modern-day racial pluralism and the amount of power and autonomy that local governments actually have.<sup>299</sup>

The failure of classic localism to acknowledge the ways in which municipalities within the American metropolis are marked along the lines of race and class, along with the contested belief that local governments do indeed exercise power and autonomy, has led some theorists to fashion an alternative theory of localism called defensive localism.<sup>300</sup> The scholarly literature on defensive localism conjoins two different and disparate hypotheses as to how municipalities utilize local autonomy in a defensive posture.

The defensive localism framework is an apt one in which to examine the Southern municipal secessions from school districts. For the reasons articulated in subpart III.B, it is not

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<sup>296</sup> See generally Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay for” Model of Local Government*, 56 FLA. L. REV. 373, 381 (2004) (describing the wide range of taxation tools that municipalities have at their disposal and how the techniques they choose to implement influences who ultimately lives there).

<sup>297</sup> See Margaret Weir, *Urban Poverty and Defensive Localism*, DISSENT MAG. 337, 339 (1994).

<sup>298</sup> See Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1047 (1996) (“Every American metropolitan area is now divided into districts that are so different from each other they seem to be different worlds. Residential neighborhoods are African American, Asian, Latino, or white, and upper middle class, middle class, working class, or poor; many are populated by people who share a single class and racial or ethnic status.”).

<sup>299</sup> See, e.g., Cashin, *supra* note 30, at 1994 (critiquing localism and noting that “empirical literature on locational choice suggests that race, as opposed to the mix of services and taxes a jurisdiction offers, is the strongest of the factors that influence locational decisions”); Frug, *supra* note 238, at 1059–60 (arguing that cities or municipalities are intentionally kept powerless and unable to exercise that much autonomy or authority and that true power and autonomy lies with the state).

<sup>300</sup> See *infra* section III.C.1.

clear that school district secessions will actually provide all of the classic benefits of localism that proponents suggest that they will. Instead, a close examination of the secessions could arguably lead to the conclusion that the secessions evidence a combination of the first and second suppositions regarding defensive localism, more than they do classic localism. Each of these principles of defensive localism and their relevance to the Southern school district secessions is considered in the sections that follow.

1. *Defensive Localism as Spatially Containing Social and Economic Problems*

Critics of localism suggest that decentralization of power down to local governments at the municipal level is designed less for purposes of affording local autonomy and more for the subversive purpose of limiting state action in addressing urban economic and social problems.<sup>301</sup> More specifically, this iteration of defensive localism suggests that power and autonomy are pushed down to lower levels of government so that the social problems associated with poverty—and their costs—can be contained within defined spatial and political boundaries.<sup>302</sup> While proponents of this version of defensive localism acknowledge that the use of localism in a defensive manner is “not explicitly organized around race, . . . racial antipathies [are] nonetheless central to its success.”<sup>303</sup>

Further, the proponents of this version of defensive localism also suggest that “[i]n a spatial context segregated by race and income, local empowerment can become a very conservative goal that allows the broader political community to concentrate social and economic problems in particular places and refuse to take responsibility for those problems.”<sup>304</sup> In essence, this version of defensive localism suggests that decentralization allows spatial and jurisdictional divisions to serve as a proxy for race and class-based divisions. Put another way, decentralization through localism allows the state to do implicitly what it cannot do explicitly for both legal and political reasons: divide and allocate public education resources on the basis of race and class.

Applying this first theory of defensive localism to the secessions, a primary effect of the secessions is often to congregate

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<sup>301</sup> See Weir, *supra* note 297, at 338–39.

<sup>302</sup> *Id.* at 342.

<sup>303</sup> *Id.* at 337.

<sup>304</sup> *Id.* at 341.

poor and minority students in the county-based districts while isolating white and affluent students in the suburban municipal districts. Indeed, the Jefferson County Board of Education is opposed to the Gardendale secession for this very reason.<sup>305</sup> Opponents of the St. George secession also raise this concern.<sup>306</sup> Southern municipal secessions in other states are also being opposed on these grounds.<sup>307</sup>

While proponents of the secessions contend that race and class-based isolation is not their intent,<sup>308</sup> the likely impact of the secessions should be the controlling factor. This is especially true given the history and ramifications of racial segregation in Southern schools. While the secessions amount to a facially race- and class-neutral mechanism for purportedly seeking greater local autonomy, they at the same time segregate schools in the South by both race and class, much in the same way that the Supreme Court warned against in *Wright*.<sup>309</sup> Race-neutral policies like the secessions, when “set against an [sic] historical backdrop of state action in the service of racial segregation . . . predictably reproduce and entrench racial segregation and the racial-caste system that accompanies it.”<sup>310</sup>

Because the secessions will recreate racially identifiable school systems in the South, the effect will be to leave poorer and minority communities on their own to overcome the inherent disadvantages that are endemic to predominantly poor and

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<sup>305</sup> *Supplemental Report*, *supra* note 140, at 16 (arguing that the Jefferson County Board of Education is at a crossroads in terms of its ability to provide students with a desegregated education because of “school system separations and annexations, . . . which, if unabated, could eventually leave it a reseggregated system”).

<sup>306</sup> See Samuels, *supra* note 2 (noting that opposition to the St. George secession exists because the racial demographics of the new St. George district would be overwhelmingly white and affluent while the East Baton Rouge Parish District would be predominately Black and poor).

<sup>307</sup> See, e.g., Brantley, *supra* note 32 (documenting criticisms of a school district secession in Pulaski County, Arkansas on the grounds that it will “leave a majority black remnant school district with inferior facilities”); Sam Dillon, *Merger of Memphis and County School Districts Revives Race and Class Challenges*, N.Y. TIMES (Nov. 5 2011), [http://www.nytimes.com/2011/11/06/education/merger-of-memphis-and-county-school-districts-revives-challenges.html?\\_r=0](http://www.nytimes.com/2011/11/06/education/merger-of-memphis-and-county-school-districts-revives-challenges.html?_r=0) [<http://perma.cc/6CSU-BZTW>] (describing a pattern of racial fear causing the predominantly white suburbs to secede from the Shelby County, Tennessee School District and to form their own independent school districts).

<sup>308</sup> See *supra* subpart III.B.

<sup>309</sup> *Wright v. Council of Emporia*, 407 U.S. 451, 467–68 (1972) (rejecting arguments regarding the need for local autonomy on the grounds that it would harm the ability of minority students to obtain a quality desegregated education).

<sup>310</sup> Ford, *supra* note 13, at 1845.

minority schools.<sup>311</sup> In particular, research suggests that predominately poor and minority schools deliver an inadequate and inferior education to students in several major curricular areas.<sup>312</sup> While poor and minority students are certainly capable of learning in the absence of white and affluent students, the institutional limitations imposed by racial segregation and high levels of poverty in schools make it exceedingly difficult.<sup>313</sup>

On the other hand, by virtue of the demographics alone, the newly created suburban school districts will be able to congregate both the tangible and intangible benefits that come with having predominantly white and affluent students in a single school district.<sup>314</sup> They will also be able to lessen the social costs that often accompany educating poor students.<sup>315</sup> Indeed, proponents of the St. George secession hit upon this undercurrent by labeling the secession attempt as “middle-class and upper-middle-class flight.”<sup>316</sup> In short, the secessions in many ways comport with the first theory of defensive localism in which localism is used in a defensive posture in order to spatially contain social and economic problems.

## 2. *Defensive Localism as a Form of Reasserting Local Autonomy and Power*

The second theory of defensive localism, more sympathetic to municipalities, is advanced by proponents of localism. It hypothesizes that municipalities use local power in a defensive

<sup>311</sup> For a discussion regarding the challenges faced by predominately poor and minority schools, see *supra* notes 76–88 and accompanying text.

<sup>312</sup> Those curricular areas include curriculum, teacher quality, student achievement, graduation rates, access, and readiness for higher education. See Black, *supra* note 85, at 404–08.

<sup>313</sup> *Id.* at 404 (“It is not just that a student’s individual demographic characteristics make him or her less likely to succeed; rather, high-poverty schools have a negative impact on a student’s educational outcomes regardless of the student’s individual socioeconomic status.”).

<sup>314</sup> *Id.* at 410 (“[T]he intangible benefits that middle-income students bring to the learning environment make them a vital resource. . . . Middle-income parents instinctively recognize this and jockey to enroll their children in solidly middle-income schools or, at least, middle-income classes if they cannot secure a middle class school.”).

<sup>315</sup> See, e.g., *id.* at 403 (“[T]he cost of delivering adequate or equal educational opportunities in schools with concentrated poverty far exceeds the cost of delivering adequate or equal opportunities in middle-income schools.”); Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 115 (2012) (noting the increased costs required to properly educate poor, minority, and other disadvantaged students).

<sup>316</sup> Diana Samuels, *St. George Incorporation Portrayed as ‘Secession’ in National Media*, TIMES-PICAYUNE (Dec. 4, 2013), [http://www.nola.com/news/baton-rouge/index.ssf/2013/12/st\\_george\\_incorporation\\_portra.html](http://www.nola.com/news/baton-rouge/index.ssf/2013/12/st_george_incorporation_portra.html) [http://perma.cc/ZE78-ZNHX] (quoting state Senator Mack “Bodi” White).

manner not for nefarious reasons but because local autonomy for municipalities is in fact illusory.<sup>317</sup> In particular, the second theory suggests that defensive localism is “a form of active engagement that is spurred by a feeling of not being in control.”<sup>318</sup>

Simply put, the second theory of defensive localism portends that defensive localism is likely to occur when municipalities feel “limits on local policymaking, and greater-than-local forces exert[ing] significant pressure on local choices.”<sup>319</sup> When municipalities feel powerless, a parochial mindset takes over and prompts them to use the limited power they do have to protect their resources from those outside of the municipality. Supporters of this second theory of defensive localism suggest that the answer is not to centralize power but to instead truly afford localities more power and autonomy so that they start using the little autonomy they have in a more collaborative manner.<sup>320</sup>

Refrains of this second theory of defensive localism can be seen in the Southern municipal school district secessions as well. Traditionally, local school districts have been afforded, as a matter of law, power and autonomy over issues of school governance such as funding, school assignment, and curriculum.<sup>321</sup> Yet the power that they have is increasingly being limited by state and federal mandates.<sup>322</sup> Indeed, state departments of education play a significant role in both school

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<sup>317</sup> David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 264–67 (2005).

<sup>318</sup> *Id.* at 271.

<sup>319</sup> *Id.* at 261.

<sup>320</sup> *Id.*

<sup>321</sup> See Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 864 (2006) (“States’ sweeping grants of authority to districts generally include power to tax (a power primarily exercised through the property tax); to budget and to spend; to hire and to fire, powers especially important vis-à-vis the appointment of the district superintendent and the conduct of collective bargaining with teachers; to set curricula; and to establish general policies for the conduct of all aspects of the educational program.”).

<sup>322</sup> See, e.g., Denis P. Doyle & Chester E. Finn, Jr., *American Schools and the Future of Local Control*, 77 PUB. INT. 77, 90 (1984) (“[L]ocal control of public education’ as traditionally conceived is in reality disappearing, even though its facade is nearly everywhere intact. . . . [L]ocal school systems are evolving in practice into something that they always were in a constitutional sense: subordinate administrative units of a state educational system, with some residual power to modify statewide regulations and procedures in order to ease their implementation within a particular community, and with the residual authority (in most states, though not all) to supplement state spending with locally raised revenues.”); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 937 (2004) (describing the federal No Child Left Behind Act as “remarkably ambitious and unusually intrusive”).

funding and in setting curriculum. States can and often do intrude in areas of funding and curriculum in ways in which local districts disapprove.<sup>323</sup> Individual municipalities that are part of a county-based school district may feel particularly constrained because their school governance is limited by federal, state, and county layers of governance. In order to alleviate the feeling of powerlessness that municipalities within county-based school districts might feel, in accordance with the second theory of defensive localism, municipalities are using the power and autonomy they do have under state law to try and separate themselves from the county districts and to forge their own paths.

Indeed, a common refrain oft heard from proponents of secessions is that the county-based school systems leave them completely powerless, that they lack the autonomy to govern schools as they see fit.<sup>324</sup> Another argument is that their tax dollars make up the majority of the tax dollars used to fund the schools but that they are not getting the benefit of the schools.<sup>325</sup> They further suggest that decentralizing from a county-based system of education to a municipally-based system of education will increase their ability to actually enjoy true local autonomy in the areas of school funding, teacher selection, and curriculum.<sup>326</sup> Such refrains closely parallel the second theory of defensive localism.

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<sup>323</sup> See, e.g., Fred Davenport, *Local School Board Leaders Upset Over State's Actions to Take \$80 Million from Education Trust Fund*, WVTV 13 (Sept. 20, 2015), <http://www.wvtn13.com/news/local-school-board-leaders-upset-over-states-actions-to-take-80-million-from-education-trust-fund/35373692> [<https://perma.cc/6FXN-KNYN>] (describing the Alabama State Legislature's intent to reduce state funding for schools by 80 million dollars and the dissenting voices at the local level).

<sup>324</sup> See, e.g., Barlow, *supra* note 290 (summarizing the motivations for the attempted secession by St. George residents and noting that residents are "aggrieved about the school system" and that the secession attempt comes from a place of "frustration"); McCarty, *supra* note 276 (citing a Gardendale City Council member as favoring the secession because it would "bring[] forth more accountability with the school board and the superintendent living in the community.").

<sup>325</sup> See, e.g., JR Ball, *Baton Rouge, 'It's the Public Schools, Stupid!'*, TIMES-PICAYUNE (Oct. 14, 2015), [http://www.nola.com/opinions/baton-rouge/index.ssf/2015/10/baton\\_rouge\\_public\\_schools.html#incart\\_story\\_package](http://www.nola.com/opinions/baton-rouge/index.ssf/2015/10/baton_rouge_public_schools.html#incart_story_package) [<https://perma.cc/U2RX-Z45D>] (listing among the reasons for the St. George attempted secession residents complaints about "the percentage of taxes it pays relative to other income groups, and what it gets in return for those public dollars, [and] a public school system (absent the magnet and gifted & talented programs) unworthy of educating [their] children"); Eaton, *supra* note 3 (finding that a strong motivation for the secessions is that suburban municipalities do not prefer to share "tax dollars, benefits of economic growth, or power on school boards").

<sup>326</sup> See, e.g., Scott McKay, *Here Comes St. George*, AM. SPECTATOR (June 5, 2015), <http://spectator.org/articles/62967/here-comes-st-george> [<https://>

In sum, Southern suburban municipal secessions evidence forms of both the first and second theories of defensive localism. Acts rooted in defensive localism are detrimental because they reduce municipality willingness to collaborate with neighboring localities, despite the many ways in which the various neighboring localities are interconnected. Thus, whether the defensive localism is based on a desire to separate due to racial antipathies or a feeling of powerlessness, the impact is the same. It decreases willingness of the suburban to participate in a more inclusive form of governance that benefits residents both inside and outside of the municipal boundary lines, notwithstanding the extra-local effects of public education. As described in the Part that follows, such an exercise of defensive localism can lead to a form of localism that is harmful to the community at large.

#### IV

#### A THEORY OF DESTRUCTIVE LOCALISM: A NORMATIVE FRAMEWORK FOR EVALUATING LOCALISM JUSTIFICATIONS FOR SECESSIONS OR DECENTRALIZATION

*Right now, there exists an almost ironclad link between a child's ZIP code and her chances of success . . . . Our education system, traditionally thought of as the chief mechanism to address the opportunity gap, instead too often reflects and entrenches existing societal inequities.*<sup>327</sup>

This Part introduces the concept of destructive localism to describe the impact of localism that is rooted in defensive localism rather than classic localism. It then develops a normative framework to assess the localism justification for Southern suburban municipal school district secessions. While the framework is developed in the context of school district secessions, it might also be used to normatively assess decentralization of public education governance structures more broadly.

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perma.cc/R2F3-PWKE] (touting the St. George secession as presenting an opportunity to “design from scratch a 21st century school system” and an opportunity for middle-class self-governance that would allow for innovation and the creation of better schools).

<sup>327</sup> Corydon Ireland, *The Costs of Inequality: Education is the Key to It All*, U.S. NEWS (Feb. 16, 2016), <http://www.usnews.com/news/articles/2016-02-16/the-costs-of-inequality-education-is-the-key-to-it-all?page=2> [<http://perma.cc/7AFQ-6RJ6>] (quoting Dean of Harvard Graduate School of Education James E. Ryan).

### A. Theory of Destructive Localism

Support for classic localism is predicated on the premise that decentralization of powers down to the city or municipality is on the whole beneficial for American democracy. In accordance with Thomas Jefferson's vision, the autonomy that classic localism affords municipalities is supposed to buttress democratic ideals. Yet, as described in the preceding Parts, classic localism undeniably can have a race- and class-based exclusionary impact. It benefits a "favored quarter," namely more affluent and typically white citizens, by allowing them to build enclaves for themselves while excluding citizens, such as racial minorities and the poor, who are seen as less than desirable.<sup>328</sup>

Importantly, the pluralistic American democracy that exists today is very different from the democracy that Jefferson likely envisioned when he championed classic localism. His vision was admittedly one consisting of primarily white communities.<sup>329</sup> Given the status of Blacks and other racial minorities at the time of Jefferson's localism musings, his vision of a localist democratic governance system did not account for the cleavages that are prone to exist in a racially pluralistic society. Instead of buttressing democratic ideals in a way that is inclusive of the modern pluralistic democracy, modern localism in too many instances is doing just the opposite: splintering democratic ideals of citizenship by serving as a conduit for legalized race- and class-based segregation. While this Article focuses on public education and Southern school district secessions, the segregative import of localism can also be seen in other areas such as housing, transportation, and policing as well.<sup>330</sup>

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<sup>328</sup> See Cashin, *supra* note 30, at 1987 (critiquing the exclusionary import of localism and suggesting localism breeds a "favored quarter," defined as "suburbs that typically represent about a quarter of the entire regional population but that also tend to capture the largest share of the region's public infrastructure investments and job growth").

<sup>329</sup> See, e.g., Ian Bartrum, *The Constitutional Canon as Argumentative Metonymy*, 18 WM. & MARY BILL RTS. J. 327, 373 (2009) (summarizing the work of historians who found that "Jefferson did not view black men as nearly the equal of whites").

<sup>330</sup> See, e.g., JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE 67-85 (2006) (discussing connections between localism and transportation); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1415-18 (2015) (describing the impact of decentralization and localism on law enforcement); David D. Troutt, *Katrina's Window: Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1152 (2008) (demonstrating the connection between localism and housing segregation).



The realities wrought by modern invocations of localism result in what this Article defines as “destructive localism.” Destructive localism, this Article contends, occurs when one group enjoys the benefits that come with local autonomy but does so by: (i) forming communities that are racially and economically homogenous; (ii) taking advantage of the benefits of being connected to a larger network of municipalities while at the same distancing themselves from the social and financial costs associated with group membership; and (iii) inflicting tangible and/or intangible harm on neighboring localities. More precisely stated, destructive localism occurs when local autonomy is afforded to one group such that its members are able to enjoy the benefits of classic localism at the cost or expense of another group. The subpart that follows outlines the ways in which Southern municipal secessions from school districts in some ways evince destructive localism.

## B. School District Secessions and Destructive Localism

Using the definition of destructive localism outlined in the preceding subpart, a case can be made that the school district secessions evidence destructive localism. For starters, discussions about school district boundary lines are essentially discussions about “citizenship,” specifically which students are afforded citizenship and which students are denied citizenship in a school-based community. The secessions, through the drawing of new school district boundary lines, limit citizenship in the new districts to the citizens who reside within the municipalities’ boundary lines. Because those municipality boundary lines are more often than not demarcated by both race and class, the new forms of school citizenship are similarly demarcated by both race and class. Thus, the demographics of new districts, like Gardendale, result in the formation of racially and economically homogenous communities.

Further, by distancing themselves from the social and financial costs associated with group membership, the secessionists in Gardendale, St. George, and elsewhere typically take with them county school district infrastructure in the form of school buildings and in some cases even teachers.<sup>331</sup> While most of the secessionists are usually required to pay some facilities replacement fee, the amount of the fee is often disputed and can be far less than what would be perceived as an

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<sup>331</sup> See *supra* subparts II.A–II.B.

adequate amount by the jurisdiction from which secession is occurring.<sup>332</sup>

In doing so, the seceding districts get to enjoy autonomy over infrastructure that was paid for by county-based taxes, which students who do not qualify for citizenship in the newly created school districts will be prohibited from enjoying. The districts seceded from may also be taxed with “legacy costs” that in many instances will be borne solely by them and not the newly created school district.<sup>333</sup> The aforementioned financial costs are borne by neighboring localities that remain a part of the county-based school districts, even as the seceding municipalities are able to enjoy their fruits.

In addition to the financial costs, possibly even more problematic are the social costs. The costs of properly educating poor and minority students is often high both in terms of real dollars and the intangible environmental supports needed. By cordoning themselves off, seceding municipalities avoid these costs. The racial resegregation of schools also comes with a social cost, particularly given the South’s past history of racial segregation in schools. That social cost is the perpetuation of an education for minority students less full and adequate than the one white students in the predominately white municipal districts are receiving. It will only serve to exacerbate the long-standing racial inequalities in the South that *Brown I* once condemned. Most disturbingly, because racial segregation is done under the cover of the race-neutral rubric of localism, it is effectively done with the sanction of the law and without legal recourse.

Finally, the secessions inflict serious tangible and intangible harm on the neighboring localities that remain in the county-based districts. They do so by creating new boundary lines that in all likelihood will encourage white and affluent flight into those localities.<sup>334</sup> Such flight not only poses harm to the health and vitality of the county-based school systems

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<sup>332</sup> The attempted secession in Gardendale provides an acute example of this. The JCSD requested thirty-three million dollars to provide new, equivalent facilities to replace the ones that Gardendale will take with it in the separation. A state superintendent determined that Gardendale would only have to pay eight million dollars. *Supplemental Report, supra* note 140, at 5, 8–9. The amount that will be paid is still being contested by both parties. *See id.* at 25–26.

<sup>333</sup> *See supra* subpart II.B (describing legacy costs as “ongoing legally obligated payments for things such as employee retirement that the . . . district [losing territory and students are] required to continue paying”).

<sup>334</sup> *See generally* GREGORY R. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 35–36 (1991) (setting forth an argument that boundary lines serve a recruitment function by establishing patterns

but also to the neighboring localities' general purpose local governments that are a part of the county-based school systems. The Supreme Court in *Wright* long ago recognized the dangers of school district secessions and white flight and for that reason proscribed them in the early days of school desegregation.<sup>335</sup> The very concerns that the Court in *Wright* warned against pose a real danger of happening, but because the present secessions are being carried out under the guise of localism, they are ostensibly immune from meaningful legal challenge.

In sum, Southern municipal secessions from county-based school districts result in a form of destructive localism that allows the seceding municipalities to enjoy the fruits of local autonomy but at the expense of the neighboring localities in the county-based school systems that they leave behind. The subpart that follows offers criteria that can help ferret out municipal secessions, or decentralization more broadly, that promote harmful destructive localism.

### C. Framework for Evaluating the Localism Justification for Municipal Secessions

Because of the racially and economically segregated nature of local municipalities, when localism is used as a justifying principle to decentralize education governance structures, unsettling results can ensue. The Southern school district secessions in particular can sharpen and perpetuate race- and class-based inequalities amongst citizens and allow a "favored quarter" to wall themselves off from the social and financial costs incurred by the larger community.

Yet the localism justification for decentralization more broadly, and municipal secession generally in the context of public education governance structures, is not always specious. The classic tenets of localism, namely efficiency, increased citizen participation, and an enhanced sense of community, when appropriately contextualized, are legitimate reasons in some instances to favor localist governance structures. The difficulty lies in ensuring that municipalities are not

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that give residents information about the types of residents that reside in a particular municipality).

<sup>335</sup> See *Wright v. Council of Emporia*, 407 U.S. 451, 463 (1972) ("Certainly, desegregation is not achieved by splitting a single school system operating 'white schools' and 'Negro schools' into two new systems, each operating unitary schools within its borders, where one of the two new systems is, in fact, 'white' and the other is, in fact, 'Negro.'").

obtaining those classic benefits of localism while simultaneously perpetuating destructive localism.

Secessions have impacts that stretch beyond the individual municipality or even the county-based school districts. Indeed, the effect of any secession, whether by a general purpose local government or school district, has ramifications for the economic and social viability of the state as a whole.<sup>336</sup> As such, states should have an incentive to more carefully monitor secessions from school districts. This section offers criteria that can be used by both state legislators and judges overseeing school desegregation orders in evaluating the justness of the localism justification for Southern school district secessions. While the framework is set forth in the context of school district secessions, it might also be applied more to decentralization in public education more broadly.

### 1. *Appropriate Conceptualization of Community*

Currently, localism presupposes that the appropriate or relevant definition of community should be based on municipal boundary lines. For the reasons articulated in the preceding Parts, such a definition of community ignores the reality of how people, particularly poor and minority residents, actually come to reside in a community. It also fails to account for the interconnected nature of municipalities within metropolitan regions, causing interlocal externalities which breed inefficiency.

State legislatures have plenary authority in setting forth the rules for municipal secession, particularly for school districts, given that most school districts typically do not enjoy home rule authority.<sup>337</sup> As such, an important criterion that should go into the state legislative calculus of whether and how to permit secession is the quality of the community that would be formed as a result of the secession.

Two factors might be useful in making this determination. First, legislators should consider the racial and socioeconomic demographics of the new community formed by the secession along with how it impacts the racial and socioeconomic demographics of the remaining territorial community from which secession is occurring. While racially and economically homogenous demographics are not indicative of malicious intent, intent should not be the metric by which legislators gauge whether the communities formed as a result of the secessions

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<sup>336</sup> Viteritti, *supra* note 129, at 62–63 (acknowledging that secessions impact both the territories involved in the secession as well as the state).

<sup>337</sup> See *supra* section II.C.1.

are justifiable. Instead, given the well-known negative consequences of racially and economically segregated schools, secessions that result in racially and economically homogenous communities should be disfavored.<sup>338</sup> To be sure, private preferences for homogenous racial demographics must be subverted for the betterment of the pluralistic society in which we live.

Second, legislators should consider whether the *entire* community from which secession will occur truly consents to secession. Obtaining consent is an important part of community formation. It ensures that consent to community formation is not presumed to exist simply because of one's place of residence. To that end, residents of the territory from which secession will occur should be able to exercise their voice in some way over the propriety of the secession. Admittedly, requiring a positive vote by the entire territory from which secession is sought may prevent those who wish to secede from doing so simply because they are outnumbered by majoritarian interests.<sup>339</sup>

However, an alternative might be to adopt a voting structure that appropriately balances the interest in autonomy of the territory that is seeking secession with the interest of the territory from which secession is sought in remaining intact, and most importantly with the greater interest of the metropolitan region as a whole. One way to accomplish this might be to adopt the following three-tiered voting structure proposed by Professor Richard Briffault:

- (i) conduct a referendum in the area seeking to secede in order to get an authoritative statement of the views of the people who would obtain municipal independence; then (ii) require the consent of the municipality from which they seek to secede, since that municipality would be directly and significantly affected by secession . . . [; and] then (iii) provide for a state-level review of the action of the existing municipality, a review that could overturn the denial of consent to secession on the basis of the "overall public interest" of the region.<sup>340</sup>

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<sup>338</sup> For a discussion of the ills associated with racially and economically segregated schools, see *supra* subpart I.C.

<sup>339</sup> See, e.g., Briffault, *supra* note 128, at 847 ("Secession should be predicated on a showing that the municipal majority is systematically exploiting the minority, or at the very least that the majority is advancing only its own values and consistently ignoring the minority's needs and interests.")

<sup>340</sup> *Id.* at 818-19.

Adopting such a voting structure might be a good way to evaluate whether a municipal secession serves the interests of the entire community, not just the seceding area. Further, for judges who are evaluating whether to allow a secession, the manner in which the secession vote took place, particularly whether it allowed the entire community impacted by the secession to have some say, is a factor that judges could weigh in their decision.

## 2. *Assessing the Impact of the Secessions on the Viability of the Larger Community*

A second factor that should be considered is how the secessions will impact the viability of the greater community, meaning both the seceding territory and the territory from which secession is sought. This could be measured by evaluating: (i) the economic impact of the secessions on both the territory from which secession is sought and the territory which is seceding—both must be capable of being financially sound standing alone;<sup>341</sup> (ii) how the existence of the new territory might impact residential location patterns; and (iii) whether the new district lines might serve a recruitment function that draws more affluent (and typically white) families to the municipality where the new district is located, potentially creating inequalities across the region as a whole.<sup>342</sup> Secessions that would weaken the viability of the seceding territory, or the greater region as a whole, are most likely to evidence destructive localism and should be disfavored.

## 3. *Enhanced Tenets of Classic Localism for the Larger Community as a Whole, Not Just the Seceding Area*

The tenets of classic localism, namely a more efficient government, greater citizen participation, and an enhanced sense of community, are certainly laudable goals. Research suggests that decentralization down to lower levels of government may indeed bring about the tenets of classic localism for the lower level of government, particularly in the context of school gov-

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<sup>341</sup> As other scholars examining feasibility of secessions have noted, one way to evaluate the economic viability of a secession is to consider “such factors as the existing revenue base, the current cost of providing municipal services, the capacity of the new government to enter the bond market, and the overall health of the local economy.” Viteritti, *supra* note 129, at 42. Similar factors could be adopted in assessing the economic viability of municipal secessions from school districts.

<sup>342</sup> For a thorough discussion of the recruitment role that school district boundary lines might play, see WEIHER, *supra* note 334, at 35–36.

ernance.<sup>343</sup> Yet because of the limitations inherent in the default definitions of “local area” and “community,” the classic benefits of localism rarely accrue to the *relevant* larger community when decentralization or secession occurs; instead it typically only occurs for the area that has seceded or been afforded the enhanced power of decentralization. For example, a number of the county-based districts from which municipal secessions occurred are now facing financial, student performance, and reputational harms as a result of the secessions.<sup>344</sup> Such harms impair the ability to provide a high-quality public education to the students remaining in the county-based districts.

This is particularly problematic in the context of public education because, as other scholars have noted, localism in public education is not only supposed to provide benefits in terms of “the quality of education but also the quality of democracy.”<sup>345</sup> Thus, in normatively evaluating the legitimacy of the localism justification for any secession or form of decentralization in public education, a key criterion should be how far the tenets of classic localism will actually reach.

#### 4. *Protections for Traditionally Marginalized Minority Groups*

The fourth and final criterion that should be considered is whether the secession or decentralization process has protections for traditionally marginalized minority groups. This criterion is particularly important in light of the Southern history of racial segregation in schools. Staunch adherence to localism in public education can cause a re-entrenchment of racial segregation. There is no question that decentralization through mechanisms such as secession often reify racial segregation through the use of race-neutral municipal boundary lines. The

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<sup>343</sup> For example, research has shown that decentralization in the public school context down from the school district to the individual school can be very beneficial to individual schools. See, e.g., James M. Ferris, *School-Based Decision Making: A Principal-Agent Perspective*, 14 EDUC. EVALUATION & POL'Y ANALYSIS 333, 336 (1992) (describing the benefits of decentralization down from the school district to the individual school as being that “[t]hose closest to the students are in the best position to judge their needs and abilities and, hence, to choose the most suitable methods and technologies for successful learning.”).

<sup>344</sup> See, e.g., Burylo, *supra* note 132 (summarizing financial consequences to the Montgomery County School District as a result of the town of Pike Road seceding, including an \$8,400,000 loss in the Montgomery County school system budget); Eaton, *supra* note 3 (describing the adverse academic impact of the municipal secessions on the county-based school systems).

<sup>345</sup> Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 522 (2010).

demographics of the newly formed suburban municipal school districts are a testament to that.

In areas with a history of racial segregation and subordination, legislatures could require some form of regional cooperation between the county-based school district and the new suburban municipal district in order to ensure that minorities and the poor are not trapped in the county-based districts without an exit option. One such example might be to enact comprehensive interdistrict transfer agreements or to require some form of revenue sharing between the new municipal districts and the county-based districts.<sup>346</sup> Enacting such measures might ensure that at least some protections exist for historically marginalized minorities to protect against reentrenchment of racial and economic segregation in Southern schools.

In sum, the aforementioned framework offers some criteria for evaluating the legitimacy of the localism justification for municipal secessions or decentralization in public education more broadly. Most notably, though the framework does not offer an exhaustive list of criteria, it lays the groundwork for ensuring that municipal secessions (or decentralization in public education more broadly) do not perpetuate harmful destructive localism.

#### CONCLUSION

The South has a long and ignominious history of resisting school desegregation. After a long and hard-fought legal battle, however, schools in the South made substantial progress, ultimately becoming among the most desegregated schools in the country. That progress was unfortunately short-lived. The Supreme Court's modern-day school desegregation jurisprudence severely undercut the progress made in desegregating public schools by decontextualizing the significance of racially identifiable schools. A key consequence of the Court's jurisprudence is that racial segregation in schools is now both legally and culturally normalized. Indeed, since racially segregated neighborhood schools now operate with the imprimatur of the law,

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<sup>346</sup> See Wilson, *supra* note 14, at 1476–78 (describing a regional system of school governance between a school district in Omaha, Nebraska and eleven outer-lying suburbs in which the districts agreed upon a system that would allow for student assignments and transfers between the school districts as well as a revenue sharing plan in which a tax was levied across both the Omaha school district and suburban school district, which resulted in funds the state then “redistributed . . . from the levy to individual school districts based on their level of need according to a formula generated by the state.”).



few people voice objections to them. Instead they are accepted as an inevitable reality that cannot be changed absent extraordinary measures.

The aforementioned legal and cultural normalization of racial segregation in schools arguably paved the way for predominantly white and affluent school districts to secede from racially diverse county-based schools with minimal protest or objection. The asserted basis for the secessions is that suburban municipalities should have more local control and autonomy over their schools, or classic localism. Proponents of the secessions suggest that the only way to obtain the benefits of classic localism is through decentralization of school governance down to the municipal, rather than the county, level.

Yet, this Article demonstrates that suburban municipal secessions from county-based school districts are premised on an incomplete and misleading understanding of localism. It suggests that localism can no longer be used to obfuscate the reality of the racial retrenchment represented by the lawful school secessions. It also sets forth a normative framework for assessing the legitimacy of the localism justifications for school district secessions generally and decentralization of public education structures more broadly. Importantly, finding ways to evaluate the harms of localism in a racially plural society is crucial. If we do not, we will allow the wholesale resegregation of schools under the guise of a facially race-neutral device such as localism.