

# Whiter and Wealthier: “Local Control” Hinders Desegregation by Permitting School District Secessions

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*When a school district is placed under a desegregation order, it is to be monitored by the district court that placed the order until the district is declared unitary. Many school districts have been under desegregation orders since shortly after Brown v. Board, but have failed to desegregate. Even when a school district is making an honest attempt, fulfilling a desegregation order is difficult. These attempts can be further complicated when a racially-identifiable set of schools secedes from the district. Such school district disaggregations make traditional desegregation remedies more difficult by further isolating children of different races.*

*In the past few decades, dozens of school districts have seceded to create wealthy districts filled with white children adjacent to poorer districts with children of color. This Note argues that school district secessions harm desegregation efforts and, in turn, the educational achievement of students in those districts. Two school districts — one in Jefferson County, Alabama and another in Hamilton County, Tennessee — serve as examples of how secession movements arise and how the conversations progress. Secession proponents often advocate for increased “local control” — seemingly innocuous rhetoric that serves as a guise for racism and other prejudice.*

*This Note argues that school district disaggregation is made far too easy by judicial preoccupation with local control and by the moral-political failure of state legislatures. But it is possible to discourage segregative school district disaggregation by reworking the concept of local control so that it prioritizes all children, and by adopting state legislation that promotes consolidated, efficient school districts.*

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## I. INTRODUCTION

School district disaggregation has been taking place for decades, but the media and researchers have cast new light on the phenomenon in recent years.<sup>1</sup> This trend of smaller communities within a larger school district seceding to form their own school districts can create whiter, wealthier communities adjacent to larger, racially and socioeconomically diverse urban districts that have been struggling to fulfill desegregation orders.<sup>2</sup>

This Note proposes a way to discourage segregative school district disaggregation by reworking the concept of local control as a legal justification for suspect educational policy decisions and by adopting state legislation that promotes consolidated, efficient school districts, rather than allowing easy secessions. Both steps will lead to a more equitable distribution of resources, and better fulfill the promises of both *Brown v. Board of Education*<sup>3</sup> and of state constitutions to provide education to all.<sup>4</sup>

Part II discusses how smaller, racially and socioeconomically segregated districts contribute to resource inequity and inefficiency and impede states' fulfillment of their moral-political responsibility to educate their citizenry. Part III examines trends in secession, first by looking at disaggregation in Jefferson County, Alabama, then by examining a statistical survey of seceding districts nationwide, and finally by considering a proposed secession in Hamilton County, Tennessee.

Part IV considers the Supreme Court case law and legal literature surrounding "local control": the main justification propo-

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1. See EDBUILD, *FRACTURED: THE BREAKDOWN OF AMERICA'S SCHOOL DISTRICTS* (2017), <https://edbuild.org/content/fractured/fractured-full-report.pdf> [https://perma.cc/6HH5-4CH5] [hereinafter *FRACTURED*]; Nikole Hannah-Jones, *The Resegregation of Jefferson County*, *THE N.Y. TIMES MAGAZINE, THE EDUCATION ISSUE* (Sept. 6, 2017); Lauren Camera, *The Quiet Wave of School District Secessions*, *U.S. NEWS* (May 5, 2017), <https://www.usnews.com/news/education-news/articles/2017-05-05/the-quiet-wave-of-school-district-secessions>.

2. See generally, *FRACTURED*, *supra* note 1.

3. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

4. In focusing on local control, this Note acknowledges that those seeking to enforce desegregation orders and eliminate segregative practices need do much more than overcome the powerful justification of local control. In order to enforce a desegregation order through litigation, Plaintiffs must also establish racial motivation and causation of harm. This Note focuses on the issue of local control, in part because of the poverty of literature on the subject, but also because, as this Note establishes, local control is used to mask racial motivation and can make establishing causation of harm difficult. By recognizing the dangers of local control justification, racially motivated actions are easier to recognize.

nents offer and courts often accept for permitting secessions and other suspect education policies to proceed. This Part identifies three primary problems with the Court's understanding and use of local control in this way: (1) the Court attributes both social value and educational success to local control, but the empirical evidence on the effects of local is strongly to the contrary; (2) the Court employs local control and prioritizes it over constitutional rights in an inconsistent and dissonant manner; and (3) when used selectively to value only certain people and viewpoints within a community, local control can provide a guise for racism and other prejudice. As an alternative, Part V suggests a way to rework considerations of local control in judicial contexts to ensure that the benefits of an education system are extended to all members of a community. Part V also encourages state legislators to take responsibility for preventing disaggregation, promoting more efficient school district organization, and more equitably distributing resources to all communities.

## II. THE PROBLEM: SMALL, SEGREGATED SCHOOL DISTRICTS AND EDUCATIONAL EFFICIENCY

Nearly sixty-five years ago, *Brown v. Board of Education* made clear that the Equal Protection Clause of the Fourteenth Amendment prohibits de jure segregation in public schools and obliges state legislatures, as well as state and federal judiciaries, to prevent and overturn such segregation.<sup>5</sup> Still, today, racial animosity too often controls school district divisions.<sup>6</sup> This Part discusses how segregation — particularly in small, segregated school districts — contributes to poorer educational outcomes for all students, contributes to heightened inefficiency, and keeps

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5. *Brown*, 347 U.S. at 493 (“Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”). *Brown v. Board* stands as the preeminent desegregation case, establishing the principle that “[s]eparate educational facilities are inherently unequal,” *id.* at 495, and effectively ending lawful state-sponsored segregation in the United States.

6. As noted, *Brown v. Board* has been interpreted to apply only to de jure segregation. This Note proceeds from the assumption that all of the case studies and communities, both those involving federal desegregation orders and those that do not, involve impermissible segregative intent and are thus constitutionally suspect. While the existence of desegregation orders shifts the burden to be an effect-based test (*see* Part II.B), the Fourteenth Amendment intent-based tests are always at play. As live desegregation orders gradually disappear across the country, intent-based tests will become more salient, and will have to be robust in order to adequately prevent segregative disaggregation.

states from fulfilling their obligation to provide an adequate education for all.<sup>7</sup>

#### A. RACIAL AND SOCIOECONOMIC SEGREGATION AND ITS EFFECTS ON EDUCATIONAL ACHIEVEMENT

Under *Brown v. Board*, states that undertake to provide education have a responsibility to provide it equally to all public school students, in keeping with the Fourteenth Amendment's Equal Protection Clause.<sup>8</sup> Though the Equal Protection Clause only prohibits de jure segregation, evidence shows that segregation in general correlates with unequal educational outcomes. Segregated education also represents a moral-political failure on the part of states to fulfill their responsibility to provide equal education. All fifty states have language regarding free public schools or common schools in their constitutions, and all states have some form of compulsory education law.<sup>9</sup> Segregation is not only unconstitutional under federal law, but its resulting inequities in resource and educational outcomes, discussed in this Part, are indicative of that state moral-political failure.

Part of why separating students into schools by race is so harmful, and such a failure of this moral-political responsibility, lies in the relationship between race and poverty, and in the severe effects that the concentration of poverty has on the cost of education and educational outcomes. Segregation can become even more harmful when it happens by school district rather than by individual school because 1) unequal resource distribution can be exacerbated by concentrated populations of high-need students, segregated housing patterns, and property tax-based funding, and 2) remedying segregation becomes more difficult as there are fewer, more difficult options for reassigning students between

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7. The statistics in this Part generally do not distinguish between de facto and de jure segregation, but this author maintains that both have harmful effects on resource distribution and student outcomes, even if only de jure segregation is constitutionally relevant.

8. *Brown*, 347 U.S. at 493 (“Such an opportunity [to receive an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).

9. *State Compulsory Education Laws*, FINDLAW, <http://education.findlaw.com/education-options/current-state-developments-in-compulsory-education.html> [https://perma.cc/X7AS-KCBL] (last visited Nov. 4, 2017).

districts.<sup>10</sup> Disaggregation thus exacerbates segregation and makes it more difficult to remedy, as segregated schools become segregated districts.<sup>11</sup>

There are around 13,500 regular public schools districts in the United States.<sup>12</sup> Though this number is dramatically lower than the estimated 117,108 regular public school districts in the 1939–1940 school year, the number of school districts has remained fairly stable since the 1970s.<sup>13</sup> With so many thousands of districts, they will inevitably vary in outcomes, resource allocation, per pupil expenditures, racial and socioeconomic distribution, and geographic and population size. But there is cause for concern when a school district’s predominant race and class is strongly predictive of its student outcomes. In January 2018, the United States Commission on Civil Rights (the “Commission”) released a report, which confirmed just that: poor schools filled predominantly with students of color tend to have fewer resources and poorer educational outcomes.<sup>14</sup> Put simply: segregation widens the achievement gap.

Exemplifying inequity is the role of money in schools. There is a correlation between the race and socioeconomic class of stu-

10. Within a district, integration options like redrawing school district zones, offering transfer options for students, or creating specialized program are much simpler to implement than implementing such programs across school districts. See *infra* Part IV.A for a discussion of *Milliken v. Bradley*, 418 U.S. 717 (1974), and the impossibility of inter-district remedies.

11. This principle has been accepted since lower courts first implemented *Brown v. Board*, and communities promptly sought secession to avoid integration. See *Lee v. Macon Cty. Bd. of Ed.*, 448 F.2d 746, 752 (5th Cir. 1971) (“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.”); *Wright v. Council of Emporia*, 407 U.S. 451 (1972) (enjoining the creation of a splinter school district when its creation would impede desegregation efforts in the county school district).

12. *Digest of Educational Statistics*, NAT’L CTR. FOR EDUC. STATISTICS, tbl.241.10 (2017), [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_214.10.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_214.10.asp) [<https://perma.cc/8X7U-ZBHP>].

13. *Id.* The dramatic decrease in school districts between the 1940s and 1970s took place as states took more control of education, municipalities modernized and reformed, and the country became more urban. See ULRICH BOSER, *SIZE MATTERS: A LOOK AT SCHOOL-DISTRICT CONSOLIDATION*, CTR. FOR AM. PROGRESS 5 (Aug. 2013); KATHRYN ROONEY & JOHN AUGENBLICK, *AN EXPLORATION OF DISTRICT CONSOLIDATION* 3 (2009).

14. U.S. COMM’N ON CIVIL RIGHTS, *PUBLIC EDUCATION FUNDING INEQUITY IN AN ERA OF INCREASING CONCENTRATION OF POVERTY AND RESEGREGATION* 67–68 (Jan. 5, 2018) (“Variations in academic achievement are ‘very highly correlated with the socioeconomic characteristics of families in the local community,’ and ‘racial differences in exposure to poor schoolmates is linked to achievement gaps.’ In addition, in heavily segregated areas that experience ‘racial disparities in socioeconomic conditions,’ achievement gaps are larger.”) [hereinafter USCCR REPORT].

dents in schools and school districts, and the funding those schools receive. For example, Title I schools, which receive federal funding because of their high numbers or high percentages of low-income students,<sup>15</sup> struggle financially.<sup>16</sup> Title I provides only about \$500 to \$600 per pupil each year,<sup>17</sup> and controversies about disbursement formulas raise questions about whether this money ever makes it to the students who need it.<sup>18</sup> Disparities exist in teacher salaries and teacher quality, with the former contributing to the latter,<sup>19</sup> and studies indicate that having a quality teacher can have substantial effects on educational outcomes and future earning capacities of students.<sup>20</sup> Yet school districts that disproportionately serve low-income students and students of color often pay lower teacher salaries,<sup>21</sup> and school districts with large numbers of students of color tend to invest less in physical infrastructure, resulting in crumbling schools and facilities in many of these districts.<sup>22</sup> The majority of students in schools receiving Title I funding, which suffer from these inadequacies, are students of color.<sup>23</sup>

Although education policy experts disagree about the impact of funding on student outcomes, the Commission's report concludes that there is "a measurable link between increased spending and achievement gains for students in low-income districts."<sup>24</sup> Furthermore, "districts serving the largest numbers of students of color receive about \$2,000 less per-pupil than districts who

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15. See 20 U.S.C. §§ 6301–6339, 6571–6578 (2012); USCCR REPORT, *supra* note 14, at 43.

16. Title I schools serve as an example of how schools with low-income students are inadequately funded — which becomes a crucial issue when these schools are isolated from wealthier neighbors through disaggregation.

17. *Id.* at 43.

18. Lauren Camera, *Title I: Rich School Districts Get Millions Meant for Poor Kids*, U.S. NEWS (June 1, 2016), <https://www.usnews.com/news/articles/2016-06-01/title-i-rich-school-districts-get-millions-in-federal-money-meant-for-poor-kids>.

19. USCCR REPORT, *supra* note 14, at 49, 69.

20. *Id.* at 70.

21. *Id.* at 71.

22. *Id.* at 47–48. See also Julie Bosman, *Crumbling, Destitute Schools Threaten Detroit's Recovery*, N.Y. TIMES (Jan. 20, 2016), <https://www.nytimes.com/2016/01/21/us/crumbling-destitute-schools-threaten-detroits-recovery.html> [https://perma.cc/2CZP-M5RX] (discussing the Detroit "Sick Out" in which teachers went on strike to protest the dilapidated conditions in their schools).

23. *Kids Count Data Center*, THE ANNIE E. CASEY FOUND (last updated Oct. 2016), <http://datacenter.kidscount.org/data/tables/8418-children-in-title-i-schools-by-race-and-ethnicity#detailed/1/any/false/1381,1246,1124,1021,909/167,168,133,3,185,107/17042> [https://perma.cc/5UCG-M4VK].

24. USCCR REPORT, *supra* note 14, at 78–9.

serve the fewest students of color.”<sup>25</sup> There is less money going into poor school districts, especially districts with large numbers of students of color, and that lack of money inhibits educational achievement. This disparity is aggravated when wealthier, whiter segments of the district disaggregate, further isolating poor students and students of color.

Though educational achievement disparities based on race have narrowed marginally over the past several decades, researchers found disparities based on both race and socioeconomic status are still severe.<sup>26</sup>

A substantial body of research shows that students who attend racially and socioeconomically diverse schools have higher academic performance and higher graduation rates than students who do not attend diverse schools. Black students, in particular, who attend integrated schools have access to more challenging curriculum, have higher graduation rates, often have higher earnings, and experience better health outcomes than black students in segregated environments.<sup>27</sup>

In other words, segregated schools lower achievement outcomes. It is important to note that this relationship is associative, not causal — a high percentage of black students in schools does not cause lower outcomes, but heightened teacher turnover, lessened resources, and other factors may.<sup>28</sup> School integration is thus not

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25. *Id.* at 7. Intensifying the issue, the Commission says that remedying this situation would require not only that money be equalized, but that it must be made equitable — the most disadvantaged school districts need substantially more money flowing in than their more affluent counterparts. *Id.* at 51.

26. *Racial and Ethnic Achievement Gaps*, STANFORD CTR. FOR EDUC. POLICY ANALYSIS, <http://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/> [<https://perma.cc/BY7D-MWUM>] (last visited Oct. 13, 2018) (“As of 2012, the white-black and white-Hispanic achievement gaps were 30–40% smaller than they were in the 1970s. Nonetheless, the gaps are still very large, ranging from 0.5 to 0.9 standard deviations.”).

27. USCCR REPORT, *supra* note 14, at 87.

28. NAT’L ACADEMY OF EDUC. COMM. ON SOCIAL SCI. RESEARCH EVIDENCE ON RACIAL DIVERSITY IN SCHS., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 18 (Robert L. Linn & Kevin G. Welner eds., 2007) (“[A]fter controlling for factors such as socioeconomic status, peer effects, and teacher characteristics, the school-level percentage of African American students substantially and negatively affects student achievement, particularly the achievement of other African American students. Importantly, this finding is associational, not

only constitutionally mandated by the Fourteenth Amendment, it is a sound educational policy that leads to better outcomes.<sup>29</sup>

This situation — poor, segregated schools with inadequate educational outcomes — has not happened by accident. In its report, the Commission noted a famed quote by scholar Charles R. Lawrence, III: “Segregation is not a system of mutual separation, but a system that one group imposed on another.”<sup>30</sup> Segregation — de jure and de facto — was created to keep people of color away from white people, and to disadvantage people of color.

The worst news is that this structure of inequality is getting worse. The Commission wrote, “[t]he Government Accountability Office has reported that our nation’s public schools are heavily segregated by race and class, and segregation has worsened, with over 20 million students of color attending under resourced schools, isolated by race and class.”<sup>31</sup> School enrollment patterns have changed in recent years, leading to a phenomenon the Commission calls “double segregation,” or segregation by both race and concentrated poverty.<sup>32</sup> Segregation has not resolved itself on its own, and will likely remain or worsen absent legislative and judicial intervention.

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causal. The effect may be due to unmeasured school resource differences or due to some of the other factors such as teacher turnover.”).

29. Both white students and students of color benefit socially and academically from integrated schools. See JENNIFER AYSCUE, ERICA FRANKENBERG, & GENEVIEVE SIEGEL-HAWLEY, NAT’L COAL. ON SCH. DIVERSITY, THE COMPLEMENTARY BENEFITS OF RACIAL AND SOCIOECONOMIC DIVERSITY IN SCHOOLS. RESEARCH BRIEF NO. 10 (Mar. 2017); AMY STUART WELLS ET AL., HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS BENEFIT ALL STUDENTS, THE CENTURY FOUND (Feb. 2016), <https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/?session=1&agreed=1> (last visited Sept. 23, 2018); ROSLYN ARLIN MICKELSON, NAT’L COAL. ON SCH. DIVERSITY, SCHOOL INTEGRATION AND K-12 OUTCOMES: AN UPDATED QUICK SYNTHESIS OF THE SOCIAL SCIENCE EVIDENCE. RESEARCH BRIEF NO. 5 (Oct. 2016); Anya Kamenetz, *The Evidence That White Children Benefit From Integrated Schools*, NPRED (Oct. 19, 2015, 6:04 AM), <https://www.npr.org/sections/ed/2015/10/19/446085513/the-evidence-that-white-children-benefit-from-integrated-schools/> [<https://perma.cc/NY3K-H5CU>]; GENEVIEVE SIEGEL-HAWLEY, NAT’L COAL. ON SCH. DIVERSITY, HOW NON-MINORITY STUDENTS ALSO BENEFIT FROM RACIALLY DIVERSE SCHOOLS. RESEARCH BRIEF NO. 8 (Oct. 2012).

30. USCCR REPORT, *supra* note 14, at 54.

31. *Id.* at 85.

32. *Id.* at 14; PAUL A. JARGOWSKY, CONCENTRATION OF POVERTY IN THE NEW MILLENNIUM: CHANGES IN PREVALENCE, COMPOSITION, AND LOCATION OF HIGH POVERTY NEIGHBORHOODS 4, [https://tcf.org/assets/downloads/Concentration\\_of\\_Poverty\\_in\\_the\\_New\\_Millennium.pdf](https://tcf.org/assets/downloads/Concentration_of_Poverty_in_the_New_Millennium.pdf) [<https://perma.cc/SQK8-Z4DN>] (“High-poverty neighborhoods are disproportionately composed of members of minority groups, reflecting both the higher average poverty rates of minority groups and the continuation of racial and ethnic segregation.”).

Combatting racial and socioeconomic school segregation can be and has historically been done through a variety of means — busing, school district rezoning, school district consolidation, majority-to-minority transfer programs, etc.<sup>33</sup> Unfortunately, segregation can be exacerbated, and solutions prevented, when a school district disaggregates.<sup>34</sup> It is common sense that if a predominantly white, wealthy community splits off from a larger, diverse school district, then both districts will be more segregated as a result. Furthermore, integration efforts can be severely hindered, as traditional remedies like bussing and majority-to-minority transfer programs become complicated or impossible.<sup>35</sup>

And of course, when a community secedes from a larger district, resources need to be reallocated — taxes, facilities, teachers, transportation, special education programs, and extracurricular activities are all thrown into flux. The next Subpart discusses the resource allocation problem with smaller school districts, particularly when those school districts are socioeconomically segregated, and how school district secessions complicate these matters.

## B. SCHOOL DISTRICT SIZE AND EFFICIENCY

Intuitively, smaller communities could have a heightened ability to respond to the unique needs of a community. Lines of communication could perhaps be simpler, problems may be less complex, and change efforts may mobilize faster.<sup>36</sup> This principle

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33. In *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971), the Supreme Court held the district court was within its authority to mandate a limited use mathematical ratios of white to black students, to order a bussing system that helped equalize the race of students in schools, and to create non-contiguous school zones that sought to dismantled a racially dual, segregated school system. Each method of combatting segregation has its own controversies, but this Note abstains from these particular policy debates.

34. See *supra* note 11; *infra* note 130.

35. See *infra* Part IV.A for a discussion of *Milliken v. Bradley*, 418 U.S. 717 (1974) and the impossibility of inter-district remedies.

36. See Genevieve Siegel-Hawley, Sarah Diem, & Erica Frankenberg, *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RES. J. 651, 671 (2018) (“People want to be able to go directly to their school principal; they want to feel comfortable going to the principal. They want to feel comfortable going to see the teacher. They want to be able to reach out to their school board members. They go to church with them. They go out to the cafeteria and have Sunday dinner with them. They’re in the community with them. There’s that familiarity and that closeness that comes with it.”).

underlies concepts like federalism and localism,<sup>37</sup> and is assumed to be true in some judicial analyses of education.<sup>38</sup> Proponents of school district disaggregation may also seek to shield their children and communities from problems that do not affect their neighborhood but are present in a larger adjacent community.<sup>39</sup> If community members want to improve the education of their children and their community, it is not hard to imagine how concentrating on a smaller area would seem appealing. The success of movements to increase school performance through increased community engagement might add credence to these views.<sup>40</sup>

There are, however, countervailing considerations that families, communities, courts, and legislatures should consider when deciding whether to pursue or permit disaggregation. Notably, secession may actually be contrary to the interests of those families and communities that consider secession. For example, splitting off smaller neighborhoods from larger communities can isolate residents and their school-aged children culturally, racially, and economically, to the detriment of those children.<sup>41</sup> In addition, larger districts have a variety of efficiency advantages that should be taken into consideration both by families and communities considering secession, and by courts and legislatures that regulate the option.

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37. See Pietro S. Nivola, *Why Federalism Matters*, BROOKINGS INST (Oct. 1, 2005), <https://www.brookings.edu/research/why-federalism-matters/> [<https://perma.cc/3ZC9-NJ85>]; for a critique of localism, see Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1–2 (1990) (“Localism reflects territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to a minority of affluent localities, to the detriment of other communities and to the system of local government as a whole. Moreover, localism is primarily centered on the affirmation of private values. Localist ideology and local political action tend not to build up public life, but rather contribute to the pervasive privatism that is the hallmark of contemporary American politics.”).

38. See, e.g., *Milliken*, 418 U.S. at 742 (1974) (“[L]ocal control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition for educational excellence.’”) (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 50 (1973)).

39. Denise R. Superville, *Schools Become Whiter and Wealthier in Communalities That Secede From Districts*, EDUC. WK.: DISTRICT DOSSIER (June 21, 2017), [http://blogs.edweek.org/edweek/District\\_Dossier/2017/06/Schools\\_Becoming\\_More\\_Segregated.html?r=309796097](http://blogs.edweek.org/edweek/District_Dossier/2017/06/Schools_Becoming_More_Segregated.html?r=309796097) [<https://perma.cc/M3DV-QY9T>] (“There are a lot of problems in the inner city and big city that we don’t have in municipalities in terms of poverty and crime.”).

40. See generally ANNEBERG INST. FOR SCH. REFORM’S VOICES IN URBAN EDUC., SKILLS FOR SMART SYSTEMS (2007).

41. See *supra* note 29 for how segregation harms the educational outcomes of all students, including white students.

In a 2013 study on school district consolidation, the Center for American Progress concluded that small, non-remote school districts — typically small suburban districts<sup>42</sup> — are economically inefficient and unnecessarily usurp excessive state funds.<sup>43</sup> The study stated, “the continued existence of small, nonremote school districts may represent \$1 billion dollars in lost costs [nationally] every year — money that could and most certainly should — be put to better use.”<sup>44</sup> The Center for American Progress also noted racial patterns in the division between districts. For example, North Carolina’s Halifax County has three school districts, divided along racial lines.<sup>45</sup> New Jersey’s Essex County, which includes Newark and a number of suburban townships, has over a dozen racially-identifiable school districts.<sup>46</sup> As discussed in the previous Subpart, racially-identifiable school districts result in financial inequities, in addition to being inefficient.

Small school districts tend to be inefficient because they often have small student populations with high overhead costs, and because they may offer as wide an array of course offerings as larger districts, but to fewer students.<sup>47</sup> Imagine a small, suburban district with a large percentage of wealthy, educated parents. These parents may want a large selection of Advanced Placement (AP) classes, a variety of music lessons, SAT and ACT prep cours-

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42. Boser, *supra* note 13, at 6.

43. *Id.* at 11, 15.

44. *Id.* at 12. Many of the states with the highest estimated loss potential are Northern or Midwestern states, rather than the Southern states on which this Note focuses. This Note concentrates on Southern school districts because 1) those districts are more likely to be under desegregation orders, and 2) there tend to be fewer, larger, county-based school districts in Southern states, while Northern states tend to have a greater number of small districts. USCCR REPORT, *supra* note 14, at 31. Interestingly, the phenomenon of these fewer, larger school districts in the South leads to, on average, less of a differential in per pupil expenditures between poorer and richer school districts. *Id.* Accordingly, more Southern districts may be at risk of disaggregating into smaller, inefficient districts while Northern states — like New Jersey and New York — may already have a large number of small, nonremote districts.

45. Boser, *supra* note 13, at 5.

46. GARY ORFIELD, JONGYEON EE, & RYAN COUGHLAN, THE CIVIL RIGHTS PROJECT, NEW JERSEY’S SEGREGATED SCHOOLS TRENDS AND PATHS FORWARD 20 fig.8 (2017), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/new-jerseys-segregated-schools-trends-and-paths-forward/New-Jersey-report-final-110917.pdf> [<https://perma.cc/XH34-EHUR>].

47. FRACTURED, *supra* note 1, at 4 (“From all sources, our country spends over \$3,200 more on students enrolled in small school districts (fewer than 3,000 students) than those on the scale of those left behind (25,000–49,999). And with higher overhead costs, small districts tend to spend about 60% more per-pupil on administrative costs.”); Boser, *supra* note 13, at 6.

es, and intensive remedial tutoring options. But if the schools and district are small, there may be only be, perhaps, eight students in an AP chemistry class for which the district needs to hire a qualified teacher and provide a lab and classroom stocked with appropriate materials. Special education resources also pose a problem for small districts, as a school district might have to hire a full-time occupational therapist for only a handful of students once or twice each week, or — worse — neglect to hire the appropriate staff and instead ask an unqualified educator to take on a variety of such roles. In a larger district, AP courses, labs, classrooms, materials, and special education services, such as school buses for students with disabilities, can be more efficiently allocated.

Public interest and efforts towards consolidation have slowed in recent years, perhaps because of the diseconomies of districts that are too large, or because even geographically contiguous districts may not consider themselves to be culturally compatible.<sup>48</sup> In the latter regard, parents may worry about a lack of familiarity with teachers and other students, about the loss of a quality they consider to be inherently superior about their particular community or current school, or a diminution in real estate values after purchasing a home in a high-demand school district or attendance zone with favorable property values.<sup>49</sup> The problem, however, is that any of these benign-sounding cultural concerns may mask a desire for, or greater comfort level with, racial isolation.

The Center for American Progress report acknowledges mixed evidence on optimal school district size and its relationship to student outcomes and notes that district management, which can be more difficult in larger districts, is also likely to have an impact on school success.<sup>50</sup> Pursuing the latter point, some scholars maintain that school district consolidation has only a minimally positive effect on state budgets and a negative effect on student achievement, because smaller school districts tend to have lower concentrations of poverty.<sup>51</sup> There is reason to be skeptical of such studies, as the favorable conditions they identify in smaller

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48. FRACTURED, *supra* note 1, at 4.

49. *Id.* at 8.

50. *Id.*

51. See, e.g., BRIAN KENNEDY & JESSICA TOLBERT, THE IMPORTANCE OF SCHOOL DISTRICT SIZE, SBSCOL 591 — CAPSTONE COURSE IN PUBLIC POLICY (2012).

districts may be possible only through the exclusion of poor, minority, immigrant, homeless, and other high-need students in nearby larger, urban districts. Students that require more supplementary services can be costly to educate. If a wealthy suburb with a low number of high-need students secedes from a diverse metropolitan district with a medium number of high-need students, the smaller, non-remote district will likely improve its achievement statistics and increase its per capita resources. But that effect may occur entirely because the smaller district's students' already-higher achievement levels are no longer being averaged with the lower achievement levels of less privileged children in other parts of the city, and because its property wealth per student is likewise greater than the average property wealth of the city as a whole. In other words, the secession may do nothing to change the education actually provided to the smaller district's children, nor make more resources available to them. Simultaneously, it may have a harmful effect on the rest of the larger metropolitan district by artificially lowering its achievement statistics and substantially diminishing its resources.<sup>52</sup>

These bolstered student achievement statistics in small non-remote districts can be artificial. Wealthy, white schools have a leg up, as socioeconomic status is such a strong indicator of educational achievement, and educational outcomes will always be influenced by a large number of high-need students in a district.<sup>53</sup> Poverty, and many of the life experiences that tend to accompany it, create myriad barriers to learning that schools must over-

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52. To take an example from the case studies in Part III, *infra*, perhaps Gardendale, a community attempting secession, could become a successful school district in terms of student achievement, but the effect on the rest of its district would be detrimental, both in terms of lost property taxes and, perhaps, a higher concentration of high-need students (due to socioeconomic class, language status, special needs, etc.). Consider also Signal Mountain Schools, which are already academically successful schools. Perry, *infra* note 111, at 41. If Signal Mountain secedes from its school district, the county's scores will decrease when Signal Mountain students are not factored in, and the small, white, suburban district of Signal Mountain would seem successful. Such comparisons are made much more difficult by the wildly accepted fact that socioeconomic status is one of the best indicators of school performance, and that children from wealthy, educated families are likely to test well regardless of their schools.

53. *Educ. and Socioeconomic Status Factsheet*, AM. PSYCHOLOGICAL ASSOC., <http://www.apa.org/pi/ses/resources/publications/factsheet-education.pdf> (last visited Sept. 13, 2018) [<https://perma.cc/LJ72-VGNZ>]. See also *supra* note 14, at 67–68 (“Variations in academic achievement are ‘very highly correlated with the socioeconomic characteristics of families in the local community,’ and ‘racial differences in exposure to poor schoolmates is linked to achievement gaps.’ In addition, in heavily segregated areas that experience ‘racial disparities in socioeconomic conditions,’ achievement gaps are larger.”).

come.<sup>54</sup> Yet some parents look at their children's schools and instead of thinking, "How can the county more efficiently help all of the students in the school system?," think, "How can I make my child's school be more successful?" and "How can I make sure that my tax dollars support only my own children's schools?" Whether consciously or not, parents may be reticent to send money to schools attended by children they perceive as different than their own, especially struggling populations with high-need students. As this Note discusses in Parts III and IV, this dilemma is part of the concern that "local" and "community" are coded words to exclude students of a lower socioeconomic class or different race.

Small, segregated school districts are thus resource inefficient, a barrier to student outcomes, and an impediment to fulfilling the promises of *Brown v. Board*, the Fourteenth Amendment, and state moral-political responsibilities to educate their citizenries. This Note now examines trends in school secession — how an already big problem is exacerbated by a "this is mine, that is yours" complex and hidden racial motivations.

### III. IT GETS WORSE: TRENDS IN SECESSION

As demonstrated in the preceding Part, segregation in education is a problem morally, constitutionally, and for educational policy reasons. Secessions exacerbate the problem. This Part illustrates the problem with the long history of school district disaggregation in Jefferson County, Alabama; provides a statistical analysis of school district disaggregation nationally; and takes a prospective look at a community considering a school district disaggregation in Hamilton County, Tennessee.<sup>55</sup> These dis-

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54. See generally Eric Jenson, *Chapter 2: How Poverty Affects Behavior and Academic Performance*, TEACHING WITH POVERTY IN MIND (2009), <http://www.ascd.org/publications/books/109074/chapters/How-Poverty-Affects-Behavior-and-Academic-Performance.aspx> (last visited Sept. 13, 2018) [<https://perma.cc/B97G-YW4J>].

55. These two districts were chosen as case studies to represent two common disaggregation controversies. Jefferson County, Alabama has a long, troubled racial history. Civil rights proponents in its largest city, Birmingham, were met with terrible violence in 1963. *Explore: The Birmingham Campaign*, PBS, <http://www.pbs.org/black-culture/explore/civil-rights-movement-birmingham-campaign/#.Wy6BF1MvzVo> [<https://perma.cc/4EH7-AHWR>] (last visited June 23, 2018). The Alabama governor famously "stood in the schoolhouse door" to prevent the integration of the University of Alabama the same year. *Fifty Years Ago Today: The Stand in the Schoolhouse Door*, LDF (June 11, 2013), <http://www.naacpldf.org/news/fifty-years-ago-stand-schoolhouse-door> [<https://perma.cc/J4JN-Q2V8>]. And Jefferson County has undergone numerous secession since *Brown v.*

aggregations are part of an alarming trend, in which racial animus drives efforts to reproduce and intensify segregation, all under the guise of controlling schools at a local level.

#### A. NARRATIVE: JEFFERSON COUNTY

The Jefferson County School District in Jefferson County, Alabama, a county encompassing Birmingham and surrounding areas, has been under a desegregation order since 1971.<sup>56</sup> As such, many changes in the district's organization require court approval. Some changes are necessary and uncontroversial, but even matters such as school rezoning to accommodate a subdivision growth must be approved by the court.<sup>57</sup> Other matters are more contentious.

Recently, the decades old desegregation order, established in *Stout v. Jefferson County*, made headlines when Gardendale, Alabama sought to separate from the Jefferson County School District and govern itself.<sup>58</sup> In doing so, Gardendale would become

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*Board*. Hamilton County, Tennessee was chosen because of the unique disaggregation law in Tennessee and the wealth of public online information about the secession attempts.

56. When a federal court determines that a school district is operating a racially dualized system, it is placed under a court-ordered desegregation order. The court then oversees the school district until it is declared unitary. School districts can also go under a desegregation order voluntarily. *Stout v. Jefferson County* represents a series of cases dealing with desegregation and splinter districts in Jefferson County, and managing the way those splinter districts interact with desegregation efforts in Jefferson County post-*Brown v. Board*. See *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) (instructing the creation of a desegregation plan “which encompasses the entire Jefferson County School District as it stood at the time of the original filing of this desegregation suit”).

No student in the Jefferson County system or in the separate systems affected by this order will be segregated or discriminated against on account of race or color in any service, facility, activity or program (including transportation, athletics, or other extracurricular activity) that may be conducted or sponsored by, or affiliated with, the school in which he is enrolled.

Amended Order at 11, *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403 (5th Cir. 1971).

57. Anna Beahm, *Federal Judge Approves Hoover Schools Rezoning*, AL.COM (Dec. 15, 2017), [http://www.al.com/news/birmingham/index.ssf/2017/12/federal\\_judge\\_approves\\_hoover.html](http://www.al.com/news/birmingham/index.ssf/2017/12/federal_judge_approves_hoover.html) [https://perma.cc/6UV6-T6XW].

58. *Stout v. Jefferson Cty. Bd. of Educ.*, 448 F.2d 403, 404 (5th Cir. 1971) directed the creation of a student assignment plan, encompassing all districts that were part of Jefferson County when the suit was filed. *Stout v. Jefferson Cty. Bd. of Educ.*, 466 F.2d 1213 (5th Cir. 1972) again “direct[ed] the splinter districts to accept a proper role in the desegregation of the county system,” a determination made in light of concurrent Supreme Court decisions on splinter districts, namely *Wright v. Council of Emporia*, 407 U.S. 451 (1972). *Id.* at 1214, 1215. The Court in the 1972 case did insist that “[t]he courts should not remove local control indefinitely.” *Id.* at 1215. Jefferson County and the surrounding

the thirteenth school district in Jefferson County. Among these districts are some smaller, majority non-white districts, which have existed since long before *Brown v. Board* prohibited de jure segregation and have faced declining enrollment in recent years (the Bessemer, Birmingham, Fairfield, and Tarrant districts).<sup>59</sup> The predominantly white school districts of Homewood, Hoover, Leeds, Midfield, and Trussville all formed later, as secessions authorized by *Stout v. Jefferson County* litigation.<sup>60</sup> Jefferson County School District remains the largest of the districts in the county, both geographically and by population, though it has faced declining enrollment and a decrease in its white population in recent years.<sup>61</sup> Like the other areas to secede since the desegregation order, Gardendale has a predominantly white population and a larger percentage of white residents than white students in its schools.<sup>62</sup>

Four Jefferson County School System schools serve the town of Gardendale: Snow Rogers Elementary, Gardendale Elementary, Bragg Middle School, and Gardendale High School. In addition to Gardendale children, students from the nearby towns of Brookside and Graysville and from the unincorporated areas of North Smithfield Manor-Greenleaf Heights (North Smithfield) and Mount Olive attend the Gardendale schools. Also attending the Gardendale schools are students of color from elsewhere in the Jefferson County School District who are part of a majority-to-minority transfer program.<sup>63</sup>

When talks about forming a new school district began in 2012,<sup>64</sup> a disquieting number of Gardendale residents offered

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school districts under the order have not been declared unitary, so Gardendale's efforts to secede require judicial approval.

59. ERICA FRANKENBERG & KENDRA TAYLOR, PENNSTATE COLLEGE OF EDUC. CTR. FOR EDUC. AND C.R., SCHOOL DISTRICT SECESSIONS: HOW BOUNDARY LINES STRATIFY SCHOOL AND NEIGHBORHOOD POPULATIONS IN JEFFERSON COUNTY, ALABAMA, 1968–2014 at 9 tbl.1 (2017).

60. *Id.* In addition, the municipality of Pleasant Grove was permitted to secede, but lost that privilege when it was found to not be fulfilling its required role in desegregation efforts.

61. *Id.* at 5, 9.

62. Initial Brief of Appellants at 12, *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018) (No. 17-12338) (2017 WL 3505220).

63. Initial Brief of Appellants, *supra* note 62, at 10.

64. A group of parents formed an organization called FOCUS (Future of Our Community Utilizing Schools) Gardendale in 2012. Hannah-Jones, *supra* note 1. See also FOCUS Gardendale, *Focus Gardendale*, YOUTUBE (Oct. 3, 2013), <https://www.youtube.com/watch?v=yKQlrXdAtj8> [<https://perma.cc/9HXT-5CPY>].

views at community meetings, on a Facebook group, and in fliers that reflected or at least hinted at racial animus. For example, one resident active on social media described his support for secession as a way to get “better control over the geographic composition of the student body [and] protection against the actions of other jurisdictions that might not be in our best interests.” He claimed, “A look around at our community sporting events, our churches are great snapshots of our community. A look into our schools, and you’ll see something totally different.”<sup>65</sup> In another example, a flier circulated that pictured a blonde, white, school girl and the question, “Which path will Gardendale choose?” The flier juxtaposed four communities, composed and recognizable by local residents as made up primarily of people of color, that remain in the Jefferson County School District with four predominantly white communities — Homewood, Hoover, Vestavia Hills, and Trussville — that formed their own school districts.<sup>66</sup> Implying that the former four areas are not attractive locales, the flier identifies the latter four as “some of the best places to live in the country” — presumably, racial make-up contributes to this status — and insinuates that if Gardendale does not secede, its community demographics and quality of life could shift.<sup>67</sup>

In another example, in community meetings and on social media, Center Point, a community that used to be predominantly white and now is predominantly black, was repeatedly raised as a cautionary tale for towns that did not secede.<sup>68</sup> As talks continued, supporters of a Gardendale district sought to include Mount Olive, a nearby predominantly white community, in their new

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65. *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 995 (11th Cir. 2018).

66. See *supra* note 58 and *infra* note 82 for more about the creation of the Pleasant Grove, Vestavia, Midfield, and Homewood districts, which were permitted to occur under *Stout v. Jefferson Cty. Bd. of Educ.*, 466 F.2d 1213 (5th Cir. 1972), shortly after the Supreme Court’s decision on splinter districts in *Wright v. Council of Emporia*, 407 U.S. 451 (1972).

67. See app. fig.1.

68. *Stout*, 882 F.3d at 996. In response to a suggestion that racial concerns were animating the movement, one Facebook post read that “non-resident students are increasing at a [sic] alarming rate in our schools. . . . We are using buses to transport non-residents into our schools (without additional funding) from as far away as Center Point (there’s your redistribution of wealth).” Another stated, “[D]id you know we are sending school buses to Center point [sic] and busing kids to OUR schools in Gardendale, as well as from Smithville [sic]! . . . [Some of the transfer students] have been bused here for years due to the desegregation from decades ago and that should have already been changed because we have a very diverse population now in our area. . . . We are busting at the seams and can’t continue on this path!” *Id.*

school district, but to eliminate North Smithfield, a nearby predominantly black community.<sup>69</sup> Perhaps most egregiously, when it came time to form a Gardendale school board, one of the most qualified candidates, Dr. Sharon Porterfield Miller, an African-American woman, was passed over in favor of white candidates with much less education experience.<sup>70</sup> Dr. Miller testified at trial that she believed her race was a factor in the Gardendale City Council's decision not to select her.<sup>71</sup> The Gardendale Board of Education then drafted a separation plan that excluded North Smithfield, though North Smithfield students had been attending Gardendale middle and high schools for decades.<sup>72</sup> Later, concerned that Gardendale would be unable to fulfill the desegregation order without North Smithfield, the Board adopted a new plan that included North Smithfield but not Mount Olive, Graysville, or Brookside — without consulting any of the communities.<sup>73</sup>

In 2017, the most recent iteration of *Stout v. Jefferson County*, Gardendale filed a motion in the front of Judge Madeleine Haikala of the District Court for the Northern District of Alabama to secede. The plaintiff black schoolchildren opposed the motion.<sup>74</sup> Although Judge Haikala found that the secession was motivated by racial animus and, in the alternative, that it would impede the desegregation efforts of Jefferson County, she *sua sponte* permitted a partial secession, allowing the new district to operate its two elementary schools independently for three years, after which the court would consider whether to allow the district to operate its middle and high schools.<sup>75</sup> In order to overcome the presumption against actions infected with racial animus, Judge Haikala relied on the importance of Gardendale parents' desire

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69. *Id.*

70. Initial Brief of Appellants, *supra* note 62, at \*16; *see also* Hannah-Jones, *supra* note 1.

71. Hannah-Jones, *supra* note 1.

72. *Id.*

73. *Id.*

74. *Stout v. Jefferson Cty. Bd. of Educ.*, 250 F. Supp. 3d 1092 (N.D. Ala. 2017), supplemented, No. 2:65-CV-00396-MHH, 2017 WL 1857324 (N.D. Ala. May 9, 2017).

75. *Id.* at 1182–1184. The plan included continued desegregation monitoring by the court, as required by the 1971 desegregation order, and the Gardendale district would have to pay for the Jefferson County School District school buildings that they want to take over. In her supplementary opinion, Judge Haikala expressed a desire to keep an eye on Gardendale while she could, for fear that the court would no longer be able to monitor Gardendale's actions at all, if Jefferson County were to be declared unitary soon.

for “local control” over their schools.<sup>76</sup> “Local control” is a buzzword in education law jurisprudence that expresses respect for the role of the state, county, city and especially local communities in the education of children.<sup>77</sup>

On February 13, 2018, the Eleventh Circuit affirmed the district court’s findings that the secession was motivated by racial animus and that the effects of the secession would impede desegregation efforts in Jefferson County,<sup>78</sup> while reversing the district court’s approval of a partial secession as an abuse of discretion.<sup>79</sup> The panel rejected the grant of partial sessions for two reasons — one effect-based, and one intent-based. First, the panel rejected the secession by stating that the inquiry ends upon finding that a secession would impede Jefferson County’s segregation efforts.<sup>80</sup> As long as the county remains under the 1971 desegregation order, district secessions are impermissible if they have the effect of undermining the order. The panel also rejected the secession, and the use of local control, because a racially motivated action is impermissible under the Fourteenth Amendment.<sup>81</sup> In any event,

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76. “The third practical consideration pertains to families in Gardendale who support a municipal separation for reasons that have nothing to do with race. . . . All parents want the best possible education for their children, and there is nothing inherently wrong with preferring a small local district to a large county district. . . . Therefore, the Court must, to the extent practicable, honor the wishes of parents who support a local system simply because they want greater control over their children’s education.” *Id.* at 1180–81.

77. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 849 (2007); *Wright v. Council of Emporia*, 407 U.S. 451, 78 (1972); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973); *Milliken v. Bradley*, 418 U.S. 717, 738 (1974).

78. *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1009 (11th Cir. 2018).

79. *See id.* at 1006.

80. *Id.* at 1013 (“Our precedents make clear that a splinter district must propose and defend a secession plan that will not impede the desegregation efforts of the school district subject to an ongoing desegregation order. When the splinter district fails to satisfy that burden, ‘the district court may not . . . recognize [its] creation.’ *Stout I*, 448 F.2d at 404 (citation omitted). For example, in *Ross II*, we declared that ‘[t]he division of a school district operating under a desegregation order can be permitted only if the formation of the new district will not impede the dismantling of the dual school system in the old district,’ and ‘[i]n such a situation, the proponents of the new district must bear a heavy burden to show the lack of deleterious effects on desegregation.’ 583 F.2d at 714.”).

81. *Id.* at 1015 (“Faced with a motion to amend that [1971 *Stout* desegregation] order by a school board motivated by invidious discrimination, the district court was obliged to deny the motion.”).

Though the Eleventh Circuit did make these two findings, both of which require a denial of the motion for secession, it is worth noting that the finding that a segregative effect made the secession impermissible because of the desegregation order is a stronger foundation. When there is a live desegregation order in place, the burden is on the party seeking secession to prove that there will not be a segregative effect. A finding that a secession is impermissible because of racial intent under the Fourteenth Amendment is more difficult,

actions motivated by racial animus are inappropriate, no matter what other justifications might be asserted.<sup>82</sup> The panel left no room for any justifications of compelling state interest.

The Eleventh Circuit instead rejected the district court's use of "impermissible" considerations, including speculation that the district may soon become unitary, consideration of social tension if the secession was not permitted, and — most importantly for this Note — consideration of the "benign" motivations of Gardendale residents: namely, local control.<sup>83</sup> The panel cited an important principle of an earlier Supreme Court school secession case *Wright v. Council of Emporia* — "[t]he existence of a permissible purpose cannot sustain an action that has an impermissible effect" on a desegregation remedy.<sup>84</sup> Though *Wright* itself explicitly values local control, the Eleventh Circuit clearly used its rea-

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as the burden is on the party opposing secession. Districts still under desegregation orders are becoming fewer as the years pass, and it is crucial to consider how to prevent secessions when there is no desegregation order in place. See Will Stancil, *Is School Desegregation Coming to an End?*, THE ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/education/archive/2018/02/a-bittersweet-victory-for-school-desegregation/554396/> [<https://perma.cc/NMY6-94HD>] ("But this broad authority has an expiration date. When violations are sufficiently remedied and a desegregation order is lifted, court oversight vanishes. And if schools slowly resegregate, the order stays gone, unless new plaintiffs can once again prove that schools are being intentionally segregated."); Nikole Hannah-Jones, *Hundreds of School Districts Have Been Ignoring Desegregation Orders For Decades*, PACIFIC STANDARD (May 2, 2014), <https://psmag.com/education/hundreds-school-districts-ignoring-desegregation-orders-decades-80589> [<https://perma.cc/6YHB-SS79>] ("Across the country, original court orders and their underlying records have been destroyed by fire, shipped to a central archive center, or lost in the dusty parchment graveyards of courthouse basements. Some orders have lain dormant for so long that everyone involved, including judges and lawyers, are either retired or dead.").

82. Given this finding, and the way the Eleventh Circuit interpreted both *Stout v. Jefferson County Board of Education*, 466 F.2d 1213 (5th Cir. 1972) and *Wright v. Council of Emporia*, 407 U.S. 451 (1972), the 1972 secession of Pleasant Grove, Vestavia, Midfield, and Homewood may seem puzzling. Erika Frankenberg noted accordingly in her article *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869 (2009). She states the district court required minor alterations to district boundaries and transfers, which have remained in place through the present, and ordered several studies, though the results of such studies or whether they occurred is not known. *Id.* at 886. The Fifth Circuit affirmed the decision in 1976, shortly after the *Milliken v. Bradley*, 418 U.S. 717 (1974), decision, when the possibility of creative and broad remedies for segregation seemed impossible. *Id.* See *infra* Part IV.A and note 123 for further discussion of *Milliken*.

83. *Stout*, 882 F.3d at 1015–16.

84. *Id.* at 993 (quoting *Wright v. Council of Emporia*, 407 U.S. 451 (1972)). The district court found that, under *Wright*, it was no longer bound *Stout I*, but the panel rejected this understanding. *Stout*, 882 F.3d at 1013.

soning to reject the use of local control to overcome either racial intent or segregative effect.<sup>85</sup>

While principles of local control have not allowed the residents of Gardendale to form their own district — at least as of yet — the Jefferson County case represents a vivid example of how white, relatively wealthy suburban residents are willing to pursue secessions in search of “improvements” to their own communities and their own children’s education, but to the great detriment of the larger metropolitan area’s efforts at desegregation and educational achievement.<sup>86</sup> The case sparked a flurry of commentary attacking the secession as a blatant attempt to avoid a desegregation order. Though Gardendale was unsuccessful, nationally, forty-seven school districts have seceded from larger districts in the last thirty years to create whiter, wealthier districts.<sup>87</sup> Analyzing this trend, how and why it happens, is crucial — especially when a school district does not have the safety of a desegregation order.<sup>88</sup>

## B. STATISTICAL: EDBUILD

A comprehensive report by educational research and advocacy non-profit, EdBuild, entitled *Fractured: The Breakdown of America’s School Districts*,<sup>89</sup> examines school district disaggregation efforts in Memphis, Tennessee; East Baton Rouge Parish, Louisiana; and Yuma, Colorado. Memphis is a particularly interesting

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85. For an account of *Wright’s* emphasis on local control, see *infra* Part IV.A (“Direct control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.”).

86. As of yet, Gardendale has not appealed the Eleventh Circuit decision. It remains to be seen what effect the Eleventh Circuit decision will have on other school desegregation case. The decision could hold sway over district courts within the Circuit that monitor school districts under desegregation orders, or may deter those seeking from secede, as they know the matter is less likely to be a perfunctory rubber stamp. It will be interesting to watch the Hoover school district, which remains under the 1971 Stout order, as it is currently seeking unitary status in a collaborative arrangement with the NAACP Legal Defense Fund and the U.S. Department of Justice. Trisha Powell Crain, *Hoover schools on path to end federal oversight in 53-year-old lawsuit*, AL.COM (Jun. 14, 2018), [https://www.al.com/news/index.ssf/2018/06/hoover\\_schools\\_on\\_path\\_to\\_endi.html](https://www.al.com/news/index.ssf/2018/06/hoover_schools_on_path_to_endi.html) [<https://perma.cc/Z4PF-L8AS>].

87. Lauren Camera, *The Quiet Wave of School District Secessions*, U.S. NEWS (May 5, 2017), <https://www.usnews.com/news/education-news/articles/2017-05-05/the-quiet-wave-of-school-district-secessions>.

88. See *supra* note 81. When there is no desegregation order in place, the burdens to prove intent are high for those opposing secession, but when there is a desegregation order, any secession with a segregative effect is impermissible.

89. FRACTURED, *supra* note 1.

case. In 2013, Memphis dissolved its school district, which by law had the effect of the district merging with the surrounding whiter, wealthier Shelby County suburban district. Within a year, however, six small municipalities rushed to split away from the newly integrated Shelby County district and create new districts.<sup>90</sup> As there was no federal desegregation order in place, state law governed as long as there was no federal intent-based civil rights violation, and a 2013 change to Tennessee's municipal schools law made the secession simple.<sup>91</sup> Although representatives from the seceding areas insist their actions were designed to retain local control, the timing of the secessions — in reaction to the county district suddenly becoming more racially diverse — raises questions.<sup>92</sup> Further, the secessions have had the effect of creating a number of wealthier and whiter districts while generating heavier concentrations of low-income students of color in the remainder of the Shelby County District.<sup>93</sup>

Since the 2013 state law change, Tennessee has one of the most lenient secession policies in the country: municipalities with a student population of 1500 or greater can secede from a district if a majority of voters *in the seceding area* approve.<sup>94</sup> EdBuild's

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90. Denise R. Superville, *Memphis-Area School Year Starts With Opening of Six Breakaway Districts*, EDUC. WK.: DISTRICT DOSSIER (Aug. 5, 2014), [http://blogs.edweek.org/edweek/District\\_Dossier/2014/08/school\\_year\\_opens\\_with\\_six\\_new.html?qs=Shelby+county+inmeta:gsaentity\\_Source%2520URL%2520entities%3DEducation%2520Week%2520Blogs+inmeta:Cover\\_year%3D2014](http://blogs.edweek.org/edweek/District_Dossier/2014/08/school_year_opens_with_six_new.html?qs=Shelby+county+inmeta:gsaentity_Source%2520URL%2520entities%3DEducation%2520Week%2520Blogs+inmeta:Cover_year%3D2014) [https://perma.cc/7WF2-24DT].

91. Jackson Baker, *The Municipal — Schools Bill, 2013 Version, Passes Both Houses of Tennessee General Assembly*, MEMPHIS FLYER (Apr. 15, 2013), <https://www.memphisflyer.com/JacksonBaker/archives/2013/04/15/the-municipal-schools-bill-2013-version-passes-both-chambers-of-the-general-assembly> [https://perma.cc/52WV-WMKS]. In 2012, a similar bill was proposed that would only apply to Shelby County, but Judge Hardy Mays of the United States District Court for the Western District of Tennessee struck it down as a private bill under the guise of a general bill. Jackson Baker, *Mays Puts Halt to Municipal School Districts*, MEMPHIS FLYER (Nov. 27, 2012), <https://www.memphisflyer.com/JacksonBaker/archives/2012/11/27/mays-puts-halt-to-municipal-school-districts> [https://perma.cc/UG6C-NTHQ].

92. Superville, *supra* note 39, (“‘There are a lot of problems in the inner city and big city that we don’t have in municipalities in terms of poverty and crime,’ Terry Roland, the commissioner, told the online education news outlet. ‘We’re able to give folks more opportunities because our schools are smaller.’”).

93. Prior to the Memphis-Shelby County merger, Memphis City schools were 7.1% white, and Shelby County schools were 50.5% white. When merged, the combined Shelby County school district was 20.2% white. After the six municipalities seceded, Shelby County schools were 8.1% white, and the splinter districts ranged from 46.7% to 79.3% white. Siegel-Hawley et al., *supra* note 36, at 666 tbl.2.

94. *Id.* See also Tenn. Code Ann. § 49-2-127 (West) and “Chapter 0520-1-8 Creation or Reactivation of City School Systems,” Rules of the State Board of Education, February 1999.

survey reveals that, in order to secede from a school district, only four states (Arizona, Connecticut, Texas, and Vermont) require approval from voters in the district left behind.<sup>95</sup> Seventeen states require action by voters from the seceding area, twenty-one states require approval by a state authority, Ohio requires action by the state legislatures, and Florida, Georgia, and Louisiana require a constitutional amendment.<sup>96</sup> Only six states require the consideration of the racial and socioeconomic effects of secessions, and only nine states require consideration of the effect on funding.<sup>97</sup> Thus, generally speaking, state legislatures fail to regulate this significant aspect of education.

In its report, EdBuild discusses how swiftly communities seek to cut themselves off from struggling, adjacent school districts, or simply school districts of a different racial or socioeconomic makeup.

The notion of allowing small enclaves to withdraw a portion of their taxes to serve only themselves is one that is unique to education. Imagine allowing a citizen to withhold taxes for a library that they don't use or a sidewalk on which they don't walk. Picture a neighborhood attempting to opt out of public works support if they promised to keep only their street patched or if they agreed to never cross the bridge that needs repair. Envision providing exemptions from federal taxes for people who don't have family members receiving Medicare or those who may object to foreign policy. Surely, there is a legitimate argument to be made for each one of these options, but that argument never outweighs the case for the public good . . . .

Our school funding structure means that, whatever the express motivation for a proposed school district split, "local control" through secession will always be tied to money. Incentivizing communities to opt out of the public good, create inefficiencies, and keep their money for themselves will only

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95. FRACTURED, *supra* note 1, at 13.

96. *Id.*

97. Arkansas, California, Colorado, Wisconsin, Nebraska, and Wyoming, require the consideration of the racial and socioeconomic effects of secessions, while Arizona, California, Indiana, Nebraska, New Jersey, South Dakota, Utah, Wisconsin, and Wyoming require consideration of the effect on funding. *Id.*

further the economic divide in our country as it relates to our children.<sup>98</sup>

Though few would want to admit apathy or hostility towards “the public good,” the American populace, judiciary, and legislators have accepted this idiosyncratic treatment of educational secession as inevitable, or even reasonable.

Underlying this acceptance may be a tacit assumption that belies the “American dream” and reveals subconscious baselines of racial and economic inferiority. Do Americans believe that poor children and children of color *rightfully* have lesser educational outcomes and opportunity? Statistics show that Americans are unaware of the extent of inequality around them, are happier when they personally experience less inequality, but are still fairly comfortable with the general existence of inequality.<sup>99</sup> Americans congratulate themselves for their own fortune — revealing an idea of opportunity and success that fails to recognize the inequality at the starting line.<sup>100</sup> In the context of school district disaggregation, this attitude may manifest in a drive to increase advantage, opportunities, and outcomes for one set of children but to exclude other children. It may be to think, “I’ll take care of mine, even if it requires taking from yours.” Below, we can look at another school district to further understand how this urge to secede is born and develops.

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98. *Id.* at 19.

99. Maria Konnikova, *America’s Surprising Views on Income Inequality*, THE NEW YORKER (Nov. 17, 2017), <https://www.newyorker.com/science/maria-konnikova/americas-surprising-views-on-income-inequality> [<https://perma.cc/A7MD-QBCL>] (connecting American views about inequality to America underdog culture); Joseph E Stiglitz, *Inequality Is a Choice*, N.Y. TIMES: OPINIONATOR (Oct. 13, 2013), <https://opinionator.blogs.nytimes.com/2013/10/13/inequality-is-a-choice/> [<https://perma.cc/553K-5XGW>] (asserting that income inequality is a choice Americans make, and that it is worsening).

100. See Rea Hederma & David Aserrad, *Defending the Dream: Why Income Inequality Doesn’t Threaten Opportunity*, THE HERITAGE FOUNDATION (Sept. 13, 2012), <https://www.heritage.org/poverty-and-inequality/report/defending-the-dream-why-income-inequality-doesnt-threaten-opportunity> [<https://perma.cc/XZ5S-D982>] (“The real American Dream is first and foremost about hard work and the opportunities created by a free economy. . . . The American Dream is about hard work and self-reliance, not handouts and dependence; equal opportunity, not equal results; emulating those who make it, not being envious of their success; pulling yourself up, not dragging others down.”). See also Kimberlé Crenshaw, *The Court’s Denial of Racial Societal Debt*, 40 HUM. RTS. 12, 12–13 (2013) (“If there is nothing owed and nothing due — if the current distribution of access, power, privilege, and disadvantage is just the way things are — then efforts to reform our institutions so as not to reinforce historical exclusions are morally bankrupt.”).

## C. PROSPECTIVE: SIGNAL MOUNTAIN AND CHATTANOOGA

On the other side of Tennessee, another suburban area, Signal Mountain, is considering secession from Hamilton County Schools, a school district that includes Chattanooga. In June 2017, a committee from Signal Mountain even met with leaders from the Shelby County splinter districts to discuss the process of forming a new district.<sup>101</sup> A 2010 U.S. Census puts the white population of Signal Mountain at 97.7% , Hamilton County at 75.3% , and Chattanooga at 59%. Chattanooga is 36.8% black.<sup>102</sup>

Chattanooga schools merged into the Hamilton County District in 1997. A 1997 article demonstrates that the merger was fraught with racial tension, including fears of bussing, NAACP involvement, efforts to increase the number of black teachers, and efforts to correct inequality by bringing up-to-date textbooks into Chattanooga schools.<sup>103</sup> Other accounts of the merger show a culture shock because of more nuanced differences between the school systems — city schools used more innovative pedagogy that drew much-needed grants and funding, while county schools used traditional teaching methods.<sup>104</sup> Though the county had much higher test scores, neither system had great success educating low-income children.<sup>105</sup>

Coming years after the merger, the proposed Signal Mountain secession has sparked great controversy in the community. Proponents of the split have offered justifications based on a desire for local control of Signal Mountain schools and for an increase in state funding. Reports suggest a split could result in an extra \$2 million from the state for the Signal Mountain district and Signal

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101. Caroline Baumna, *Signal Mountain leaders look to Shelby County as model for school district secession*, CHALKBEAT (June 22, 2017), <https://www.chalkbeat.org/posts/tn/2017/06/22/signal-mountain-leaders-look-to-shelby-county-as-model-for-school-district-secession/> [https://perma.cc/WAA6-A4ZS].

102. TENNESSEE: 2010 SUMMARY POPULATION AND HOUSING CHARACTERISTICS, 2010 CENSUS OF POPULATION AND HOUSING (2012), <https://www.census.gov/prod/cen2010/cph-1-44.pdf>.

103. Beth Reinhard, *Us Versus Them? Chattanooga Prepares for Merger*, EDUC. WK. (June 18, 1997), <https://www.edweek.org/ew/articles/1997/06/18/38chatt.h16.html> [https://perma.cc/3P6B-89RM].

104. *Chattanooga, 1995: City Referendum on Consolidating Schools, and No Legislative Interference*, SMART CITY: MEMPHIS (Jan. 31, 2011), <http://www.smartcitymemphis.com/2011/01/chattanooga-1995-city-referendum-on-consolidating-schools-no-legislative-interference/>. Originally published in Education Week (Aug. 2, 1995).

105. *Id.*

Mountain students, but where that money could be found in the budget is unclear.<sup>106</sup> In addition, Signal Mountain, like Gardendale, hopes to take their school buildings with them, but those buildings belong to the Hamilton County Department of Education (HCDE), and the price could be prohibitively expensive — even if HCDE is willing to sell.<sup>107</sup> Yet a School System Viability Committee (SSVC), a seven-person committee appointed by the Town Council in December 2016, has determined that the secession is viable.<sup>108</sup>

Local debates have been heated, with substantial commentary in local newspapers, many community meetings, an active Facebook group,<sup>109</sup> and accusations of “bullying.”<sup>110</sup> Even Signal Mountain parents have a variety of concerns about a potential split, including special education, finances, and unnecessary, risky change. States assume responsibility for the education of children with disabilities, both through state law and as directed by the federal Individuals with Disabilities in Education Act, and reorganizing resources currently provided through HCDE into a separate Signal Mountain District could be costly, difficult, and disruptive for students who most need consistency.<sup>111</sup> Still other

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106. Kendi A. Rainwater, *Signal Mountain Schools: Breakaway could result in nearly \$2 million in additional funding*, TIMES FREE PRESS (Aug. 17, 2017), <http://www.timesfreepress.com/news/local/story/2017/aug/17/signal-mountainschools-committee-suggests-bump/443943/>.

107. Rosana Hughes, *Signal Mountain panel concludes it's feasible to split from Hamilton County school system*, TIMES FREE PRESS (Oct. 16, 2017), <http://www.timesfreepress.com/news/local/story/2017/oct/16/panel-report-signal-schools-breakaway-seen-vi/454622/>.

108. Meghan Mangrum, *Signal Mountain council to address breakaway from Hamilton County Schools*, TIMES FREE PRESS (Dec. 11, 2017), <http://www.timesfreepress.com/news/breakingnews/story/2017/dec/11/live-signal-mountain-council-addresses-breakaway-hamilton-county-schools/458983/> (“SSVC’s report, with all but one committee members in agreement, ultimately concluded that a separate school district would be viable so long as the town was able to overcome three obstacles — control of the three school buildings, inclusion of Walden and other nearby unincorporated Hamilton County populations and how the Signal Mountain itself would be required to contribute to the school district.”).

109. *Signal County School District Forum Page*, FACEBOOK, <https://www.facebook.com/Signal-Mountain-School-District-Forum-721319874685429/> [<https://perma.cc/9SXT-42YG>] (last visited Sept. 14, 2018).

110. *Redefining Bully, Opinion*, THE CHATTANOOGAN (Nov. 29, 2017) <http://www.chattanooga.com/2017/11/29/359292/Redefining-Bully.aspx> [<https://perma.cc/S44J-TZQM>]; Roy Exum, *Roy Exum: It's Time for Talking*, THE CHATTANOOGAN (Nov. 30, 2017) <http://www.chattanooga.com/2017/11/30/359312/Roy-Exum-Its-Time-For-Talking.aspx> [<https://perma.cc/9D6P-9QWK>].

111. Gail Perry, *Overflow Crowd Attends Latest Signal Mountain Meeting on Leaving County Schools*, THE CHATTANOOGAN (Dec. 12, 2017), <http://www.chattanooga.com/2017/12/12/360010/Overflow-Crowd-Attends-Latest-Signal.aspx> [<https://perma.cc/3T6R-8P7N>].

Signal Mountain parents worry that school choice will be diminished, as Signal Mountain students would have a harder time being admitted to HCDE magnet schools, or that the secession is too great a financial risk.<sup>112</sup> Signal Mountain schools are actually very successful schools as is — a quarter of the 2017 graduating class at the Signal Mountain high school scored a 30 or above on the ACT, a college admissions exam<sup>113</sup> — prompting some to question why any changes are necessary.<sup>114</sup>

As is always the case with secessions, concerns about racial animus and perpetuating inequity along racial lines are front and center. The SSVC Report from September 2017 seems to admit that Signal Mountain would be a racially identifiable district, but concludes that the causes are beyond the control of the residents of Signal Mountain and should not be held against the proposed Signal Mountain district.<sup>115</sup> At least one opinion in a local newspaper calls claims of racial discrimination a strawman.<sup>116</sup>

Notably and perhaps surprisingly, there is community sentiment in Signal Mountain opposed to secession, with parents and

112. *Id.* Magnet schools are public schools, usually with specialized curriculums, that use application processes to draw from a larger geographic area, often for the purposes of creating diverse schools with high-achieving students. *See Magnet Schools*, HAMILTON CTY. DEPT OF EDUC., [https://www.hcde.org/departments/magnet\\_schools](https://www.hcde.org/departments/magnet_schools) [<https://perma.cc/5B4J-8QM6>] (last visited Oct. 6, 2018).

113. *Id.* The ACT score range is between 1 and 36. The median composite score for all test-takers in the class of 2017 was 21. *What is a Good ACT Score?*, PRINCETON REV., <https://www.princetonreview.com/college-advice/good-act-scores> [<https://perma.cc/5MEW-Y3JX>] (last viewed June 24, 2018).

114. Opinion, *There's No Need For A Separate Signal Mountain School District — And Response*, THE CHATTANOOGAN (Aug. 9, 2017), <http://www.chattanooga.com/2017/8/9/352743/There-s-No-Need-For-A-Separate-Signal.aspx> [<https://perma.cc/2R6D-RL7R>].

115. FINAL REPORT OF THE SCHOOL SYSTEM VIABILITY COMMITTEE SIGNAL MOUNTAIN, TENNESSEE (2017), [http://signalmountaintn.gov/assets/ssvc/pdfs/final\\_report.pdf](http://signalmountaintn.gov/assets/ssvc/pdfs/final_report.pdf) [<https://perma.cc/22V3-2JYS>] (“[T]he argument that creation of a separate school district would be driven by ‘white flight’ is not only erroneous, it is disingenuous. The current racial makeup of the Signal Mountain schools is viewed by many residents of Signal Mountain as a disadvantage and a negative factor in the quality of education in the Signal Mountain schools, but it is a problem over which they have no control, due to policies established by the Hamilton County Department of Education. Local control of Signal Mountain schools could be the path toward remedying this problem.”).

116. Clint Cooper, *One Less Signal Mountain Worry*, TIMES FREE PRESS (Dec. 6, 2017), <http://www.timesfreepress.com/news/opinion/freepress/story/2017/dec/06/cooper-one-less-signal-mountaworry/458588/> (“In fact, one could make the argument that the schools leaving the Hamilton County system actually would make the district more equitable. After all, removing three of the highest performing schools from the district would no longer skew district scores on standardized tests. Not having the three schools would cut down on complaints about some parents being able to foot the bill to give their children the ‘extras’ that other parents in high poverty areas can’t afford.”).

teachers among those speaking up.<sup>117</sup> Dan Landrum of the Signal Mountain Town Council reported that seventy-nine percent of the emails received before a meeting on December 11, 2017 opposed a split.<sup>118</sup> Before a session actually occurs, a referendum among the residents of Signal Mountain — not among the rest of the county — is required.<sup>119</sup> By February 2018, the SSVC had been disbanded, but the council voted to affirm the SSVC's decision that an independent Signal Mountain School system is viable.<sup>120</sup> Though Councilman Landrum asked the council to state that it was no longer pursuing a secession, he fell short of the required number of votes.<sup>121</sup> For now, Signal Mountain schools will remain a part of HCDE, but secession is still on the table.<sup>122</sup>

In Shelby County, and other communities in the EdBuild report, secessions exacerbated the problem with small, segregated districts discussed in Part II. The look at Gardendale and Signal Mountain demonstrates that these efforts to segregate persist. Having demonstrated in Part II how the creation via secession of smaller, wealthier, whiter communities leads to resource inefficiencies, inequities, and educational harms to the children left behind, it is then necessary to understand how and why legislatures and courts allow secessions to proceed. To do so, Part IV

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117. Meghan Mangrum, *Signal Mountain Citizens Voice Opposition to Independent School District*, TIMES FREE PRESS (Dec. 12, 2017), <http://www.timesfreepress.com/news/local/story/2017/dec/12/signal-mountcitizens-express-oppositiindepen/459009/>.

118. *Id.*

119. Anna LaFlore, *Questions Swirl Around Possible Signal Mountain Split from HCDE*, NEWS CHANNEL 9 (Dec 12, 2017), <http://newschannel9.com/news/local/questions-swirl-around-possible-signal-mountain-split-from-hcde> [https://perma.cc/MY4M-FHU7].

120. Gail Perry, *Signal School System Viability Committee To Be Disbanded, But Council Does Not Approve Motion to Say Council Was No Longer Pursuing Possible School Pullout*, THE CHATTANOOGAN (Jan. 27, 2018), <http://www.chattanooga.com/2018/1/26/362295/Signal-School-System-Viability.aspx> [https://perma.cc/7BV9-CE5H].

121. *Id.*

122. Meghan Mangrum, *After Signal committee disbands, UnifEd offers to mediate future school breakaway talks*, TIMES FREE PRESS (Feb. 13, 2018), <http://www.timesfreepress.com/news/local/story/2018/feb/13/committee-disbanded-unified-offers-faciliate/463562/>. The disbanding of SSVC and questions about whether the split will occur have also been marred by controversy surrounding a proposed bill in the Tennessee state legislature, Senate Bill 1755, which would require that, when a municipality secedes, county school buildings follow the seceding municipality. *Id.* This bill would ease a lot of the financial impediments to seceding for municipalities like Signal Mountain. *Id.* In the wake of the SSVC disbanding, local education advocacy group UnifEd offered to serve as a mediator for future community conversations. *Id.* They are opposed to Senate Bill 1755, but it remains to be seen what their role will be, and whether Signal Mountain secedes. *Id.*

takes a closer look at the “local control” justification that drives and has been used by courts to justify such secessions.

#### IV. HOW THEY DO IT: THE DOCTRINE OF LOCAL CONTROL

Education in the United States has historically been a function of state and local governments. In this vein, judicial decisions regarding education often use claims of “local control” to excuse or justify otherwise questionable educational policy choices. Based on a review of Supreme Court case law developing that justification and of secondary legal literature raising questions about that justification, this Part identifies three primary problems with the way the Court uses principles of local control in education jurisprudence.

##### A. CASE LAW

In 1974, the Supreme Court determined in *Milliken v. Bradley* that the Fourteenth Amendment does not permit a multidistrict remedy for unconstitutional intentional segregation by some state officials absent proof of invidious discrimination on the part of each school district involved.<sup>123</sup> The district court in *Milliken* had determined that the Detroit Board of Education, as a state entity, had violated the equal protection clause in creating and perpetuating a system of de jure system of segregation in Detroit public schools.<sup>124</sup> The district court ordered the state to create two desegregation plans, one that included only the Detroit schools, and another that included schools in the three-county metropolitan area, although plaintiffs had neither sued the surrounding schools nor claimed that any of them committed their own constitutional violations.<sup>125</sup> In explaining their decision to order and uphold the broader desegregation plan, the district

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123. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (“With no showing of significant violation by the 53 outlying school districts and no evidence of any interdistrict violation or effect, the court went beyond the original theory of the case as framed by the pleadings and mandated a metropolitan area remedy. To approve the remedy ordered by the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court.”). The case returned the to the Supreme Court again in *Milliken II*, which held that an educational remedy to segregation violations was permissible. *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

124. *Milliken*, 418 U.S. at 725.

125. *Id.* at 729–730.

court and the Sixth Circuit concluded that a desegregation plan that did not include the nearly all-white suburban districts surrounding Detroit would fail to cure the violation as it would only “desegregate” what by then had become the nearly all-black Detroit schools.<sup>126</sup>

The Supreme Court, however, invalidated the multidistrict remedy, reasoning that federal remedial power extended no further than the constitutional violation and relying on the doctrine of local control to conclude that, although the offending Detroit school district was a creature of the State of Michigan, as were all of the suburban districts, those districts all had to be treated as separate and unconnected entities for purposes of understanding the extent of the violation and thus of the remedy<sup>127</sup>:

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. *See Wright v. Council of the City of Emporia*, 407 U.S. at 469. Thus, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages “experimentation, innovation, and a healthy competition for educational excellence.”<sup>128</sup>

To be sure, the *Milliken* Court unanimously concluded that school district lines and principles of local control would have to give way to the remedial power of the federal courts if either the state or the suburban school districts had intentionally drawn those lines or taken other actions to segregate white and black children on either side of them.<sup>129</sup> Notwithstanding that all of the districts were entities of the state, the Court refused to hold the segrega-

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126. *Id.* at 735. The Sixth Circuit did say that the affected suburban districts should be made party upon remand. *Id.* at 736.

127. *Id.* at 738.

128. *Id.* at 741–42.

129. *Id.* at 744 (“School district lines and the present laws with respect to local control, are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies.”).

tive actions of one such district against the others. They instead concluded that treating the districts as less than fully independent would undermine the local control of schools, which it assumed was necessary to promote successful schools and fulfill other American values.

*Milliken* relies heavily on *Wright v. Council of Emporia*, an important precedent in school district disaggregation cases.<sup>130</sup> The majority in *Wright* wrote that, “[d]irect control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.”<sup>131</sup> As in *Milliken*, the Court in *Wright* found educational, as well as societal, value in locally-governed school districts.

Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well. The success of any school system depends on a vast range of factors that lie beyond the competence and power of the courts. Curricular decisions, the structuring of grade levels, the planning of extracurricular activities, to mention a few, are matters lying solely within the province of school officials, who maintain a day-to-day supervision that a judge cannot. A plan devised by school officials is apt to be attuned to these highly relevant educational goals; a plan deemed preferable in the abstract by a judge might well overlook and thus undermine these primary concerns.<sup>132</sup>

Again, the origin and empirical basis of this reasoning is not clear. Of course, in *Wright*, as opposed to *Milliken*, the principles of local control were overridden in order to protect desegregation efforts.

Dissenting in *Milliken*, Justice Thurgood Marshall emphasized a basic principle of American education — education is a

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130. *Wright v. Council of Emporia*, 407 U.S. 451 (1972) (enjoining the establishment of a new school district, the secession of which would have created a predominantly-white suburban district and hindered a desegregation order in the parent district). It is worth noting that Judge Haikala’s decision at the district court interpreted *Wright* such that *Stout I* no longer bound its decisions regarding *Jefferson County*, but the panel rejected this understanding. *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 1013 (11th Cir. 2018). This Note does not dwell on this aspect of *Stout v. Jefferson County*.

131. *Wright*, 407 U.S. at 469.

132. *Wright*, 407 U.S. at 478.

primary responsibility of the state, and the state is responsible for constitutional educational violations.<sup>133</sup> Michigan was found responsible for the de jure segregation in *Milliken*, not merely Detroit. It is not so far-fetched, then, that areas of Michigan beyond Detroit proper could be responsible for remedying the state's constitutional violation.

Between *Wright* and *Milliken*, the Court relied on local control to make some of education law's most frustrating determinations: in *San Antonio v. Rodriguez*, the Court determined that there is no fundamental right to an education under federal law, that the poor are not a protected class according to the Fourteenth Amendment, and that funding schemes based on local property taxes are not irrational.<sup>134</sup> The majority opinion and all of the dissenting opinions assigned value to the justifications of local control. Yet the majority placed a weight on local control so significant as to nearly abdicate its responsibility to protect from discrimination — fretting about the possibility that the Equal Protection Clause could run amuck.<sup>135</sup> Accordingly, Texas's funding scheme, which resulted in highly unequal funding system based on local property taxes, was found to be rational, in part because it promoted local control.<sup>136</sup>

This case raises a lot of questions about what courts mean when they say "control." Clearly, it is not the ability to attend Parent Teacher Association meetings, volunteer at field trips, or join a committee to paint the school cafeteria. In the case of *San Antonio v. Rodriguez*, it seems like "control" is merely a euphemism for "money." At which point, it may be more accurate, though far more crass, to state that the value is not "local control" but "this is mine, that is yours." Money buys resources, of course, and plays far too crucial a role in school systems. Accordingly, it

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133. *Milliken v. Bradley*, 418 U.S. 717, 797 (1974) ("Whatever may be the history of public education in other parts of our Nation, it simply flies in the face of reality to say, as does the majority, that in Michigan, '(n)o single tradition in public education is more deeply rooted than local control over the operation of schools' As the State's Supreme Court has said: 'We have repeatedly held that education in this state is not a matter of local concern, but belongs to the state at large.'") (citations omitted).

134. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). This case was primarily a challenge to Texas's property-tax-based school funding system. Such property-tax-based funding systems are overwhelmingly the primary way of funding public schools in the U.S.

135. "In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause." *Id.* at 41.

136. *Id.* at 2.

is illuminating to notice when “local control” is a euphemism for “money” and when it stands for a different sort of control. A look at *Parents Involved v. Seattle* illustrates such inconsistency.

The above cases demonstrate an overwhelming support for local control principles, but their use as a way to rationalize education policy is not nearly so coherent and universal as one may think. In *Parents Involved*, the Court unceremoniously tossed aside justifications of local control in rejecting two voluntary desegregation programs in Seattle, Washington and the Louisville, Kentucky area.<sup>137</sup> The majority in *Parents Involved* did not address local control at all, but dissenting opinions by Justices Stevens and Breyer each discussed the concept. The dissenting opinions rattled off instances in which the Court has emphasized local control as a noble education policy, wondering why no weight is there being given to school boards and communities who desired the desegregation arrangements.<sup>138</sup>

Justice Kennedy, in his concurrence, accused the dissenting view of not having a principled limit — claiming that under the dissent’s logic, Congress would be able to mandate a nationwide desegregation program for elementary schools.<sup>139</sup> He rejects several of the dissent’s listed limiting factors, including “local control

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137. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). See also Tiffani N. Darden, *Parental Exclusion from the Education Governance Kaleidoscope: Providing a Political Voice for Marginalized Students in Our Time of Disruption*, 22 WM. & MARY BILL OF RTS. J. 1093, 1104 (2014) (“Yet, the Court reneged on its promised fidelity to local officials: A majority of the Court found their policies unconstitutional.”).

138. *Parents Involved*, 551 U.S. at 849 (“Indeed, in the context of school desegregation, this Court has repeatedly stressed the importance of acknowledging that local school boards better understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their pupils. See *Milliken*, 418 U.S. at 741–742 (‘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’). See also *San Antonio*, 411 U.S. at 49–50 (extolling local control for ‘the opportunity it offers for participation in the decisionmaking process that determines how . . . local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence’); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (‘Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities’); *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 299 (1955) (‘Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.’)).

139. *Parents Involved*, 551 U.S. at 791.

... the unique history of school desegregation ... and the fact that these plans make less use of race than prior plans,” arguing that their use “seem[s] more rhetorical than integral to the analytical structure of the opinion.”<sup>140</sup> In rejecting these important considerations, Justice Kennedy tossed aside a supposed foundation of education jurisprudence. The local communities of Seattle and Jefferson County, Kentucky (Louisville) made policy choices in reaction to very real re-segregation in their communities — a trend that their school boards and communities clearly found alarming and undesirable. Yet their “local control” preferences were discarded.

The above case law thus demonstrates two primary problems with the Court’s use of local control doctrine. First, the Court attributes both social value and educational success to local control, but the empirical evidence on the effects of local control is strongly to the contrary. Second, the Court employs local control, and prioritizes it over constitutional rights, in an inconsistent and dissonant manner. These inconsistencies are recognized in legal literature on education jurisprudence, but much of the critique revolves around a third problem: how communities can be disadvantaged when courts rely on principles of local control to make their decisions.

## B. LITERATURE

Several legal and other academic scholars have discussed the role of local control doctrine in school district disaggregation cases and emphasize this third problem with local control doctrine: local control can be used as a guise for racism and other prejudice. When local control is used to justify a policy decision, the voices of those with power tend to be advantaged, while those in need of protection are denied their own right to control.

Erica Frankenberg, who has written extensively on the subject of school district disaggregation, examined Jefferson County, Alabama.<sup>141</sup> She discussed the racial motivations behind communi-

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140. *Id.*

141. Erica Frankenberg, *Splintering School Districts: Understanding the Link Between Segregation and Fragmentation*, 34 LAW & SOC. INQUIRY 869, 903–905 (2009) (“Fueled by a desire for local control of schools and a belief that they could provide better opportunities for their children, communities in Jefferson County continue to break away from the predominantly white county school system leading to small, independent school districts that educate students who are overwhelmingly of one race. . . . The suburbs’ repeated refusal

ty insistence on local control, exemplified by the long line of secession in Jefferson County.<sup>142</sup> In a more recent article, Frankenberg, along with Genevieve Siegel-Hawley and Sarah Diem, tell the story of Shelby County.<sup>143</sup> They see local control rationalized through two primary attitudes: 1) a belief in colorblindness and 2) prioritizing the individual child over the collective good.<sup>144</sup>

Tiffani N. Darden is more optimistic about the use of local control. She acknowledges local control's role in creating insular communities, but wants to encourage judicial use of local control by emphasizing parental involvement as a way to include the voices of marginalized communities.<sup>145</sup> Darden's solution speaks

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to merge with Birmingham, combined with their subsequent decisions to develop separate municipal school systems in their respective communities to maintain local control over education of 'their' children, cemented the lines dividing white students and black students in Jefferson County. In both the votes to defeat the proposed merger and in deciding to establish school systems separate from the county school system, suburban residents have demonstrated a distinct preference for protecting white privilege in K-12 education. And while local control and community wealth may allow some districts to provide high-quality educational opportunities for their children, other districts try to provide for those left behind with few resources."); *see also* Frankenberg & Taylor, *supra* note 59.

142. As discussed *supra* Part III.A, some proponents of the Gardendale secession used the stories of neighboring areas like Center Point to tell cautionary tales of how the racial demographics of Gardendale might shift if Gardendale remained a part of the Jefferson County district. Initial Brief of Appellants, *supra* note 62, at \*16; Hannah-Jones, *supra* note 1. Judge Haikala recognized that the local control-based insistence on the split was racially motivated, but relied on case law that privileged local control values in order to forgive the racial motivation.

143. Siegel-Hawley, Diem, & Frankenberg, *supra* note 35.

144. *Id.* at 658 ("Similarly, school choice supporters argue that by permitting families to choose the best school for their child, they will create competition among schools, ultimately improving the quality of all schools. This represents a fairly significant swing toward believing that parents, not educational leaders, have the most expertise for determining a student's appropriate educational setting. It may also reflect an extension of the perception that policies adopted as a result of the Civil Rights Movement required too much governmental involvement. Parallel politics flow through contemporary Tea Party ideology that prioritizes individual rights and freedom from government. School choice moves the goal of student assignment from balancing the needs of all children in the district to focusing on individual children. This stands in contrast to school desegregation, which required students' school assignments to ensure that all schools were racially diverse, benefiting the collective.") (citations omitted).

145. Darden, *supra* note 137, at 1096 ("Local control brings greater attention to the parental voice's ability to affect community schools, encourages the local media to focus on unique geographical educational concerns, and fosters the hope that everyone will pay greater attention to the local school board's ability to effectuate the state and federal policies that we deem important to redirect the trajectory of public education."); *see also id.* at 1119 for a historical discussion of parental involvement in education jurisprudence. Parental involvement in education has been historically valued in substantive due process jurisprudence. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding a fundamental right to educate a child at a private religious or sectarian school); *Myer v. Nebraska*, 262 U.S. 390 (1923) (finding a fundamental right to educate a child in the language of the parent's choosing).

to this third problem of local control doctrine — only some parents, some children, and some groups are usually considered valuable voices whose opinions could serve the social values and educational benefits that local control supposedly bolsters. She advocates a form of local control that includes the voices of all parents by prioritizing the rights of parents to educate their children.<sup>146</sup>

Erika K. Wilson, likewise hopeful about a positive use of local control in education, has examined the trend of Southern municipal school district secessions through the broader doctrinal lens of localism,<sup>147</sup> arguing that localism is being used as a race-neutral proxy to create segregated school systems and avoid legal challenges.<sup>148</sup> However, she does not argue that localism is necessarily objectionable, instead, suggesting a normative framework for evaluating whether localism is being used properly: one must evaluate the appropriate conception of community, the impact on the larger community, and protections for traditionally marginalized groups.<sup>149</sup>

Though over-emphasizing local control can lead to ill, the above literature suggests that by identifying its shortcomings and misuse, the doctrine can be reformed. Reliance on local control must move past unempirical assumptions, inconsistent applications, and tendencies to maintain current structures of privilege and power. Part II demonstrated how small, segregated districts have a negative effect on resource distribution and educational outcomes. This Note now proposes reworking local control, such that it cannot be used as a justification to create small whiter,

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146. Darden, *supra* note 137, at 1119 (“In the education context, I believe that local control has been inappropriately disconnected from the historically established fundamental right of parents to direct their children’s education. Reverence to this fundamental right would permit the expansion of local control, through accounting for political involvement, to include undocumented immigrants, and it would focus greater attention to the procedure and access hurdles in place that deter the involvement from socioeconomically disadvantaged parents.”).

147. *See generally* Briffault, *supra* note 37.

148. Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 230 (2016) (“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.”).

149. *Id.* at 204–209 (“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 obtaining those classic benefits of localism while simultaneously perpetuating destructive localism.”).

wealthier, school districts through secessions. By loosening local control's grip on policy and legal evaluations of secessions, local control will not be as readily usable to validate the creation of whiter, wealthier splinter districts.

## V. SOLUTION: LOOSENING LOCAL CONTROL'S GRIP ON EVALUATIONS OF SECESSIONS

The preceding Parts have asserted three primary problems with "local control" that contribute to small, segregated districts, which impede efficiency and equity in education: 1) The Court attributes both social value and educational success to local control, but the empirical evidence on the effects and local control is strongly to the contrary; 2) the Court employs local control and prioritizes it over constitutional rights in an inconsistent and dissonant manner; and 3) when used selectively to value only certain people and viewpoints within a community, local control can provide a guise for racism and other prejudice.

This Part proposes that local control can, and must, be redefined in a way that takes into account all members of a community and that leads to better educational outcomes. To do so, the concept "local" must be redefined in jurisprudence, so that judges presiding over school district disaggregation and reorganization cases more thoroughly consider the racial realities and economic circumstances of the districts over which they have control. Legislators must also fully accept their self-appointed moral-political duty to educate their citizenry, and pass legislation that incentivizes empirically-validated reorganization and consolidation and makes improperly-motivated secessions more difficult.

### A. RESTRICTING DISAGGREGATION BY REDEFINING "LOCAL" IN JURISPRUDENCE

Attempts to secede from larger urban school districts are often prompted by both racial and economic motivations. It is a reality — maybe even an inevitable one — that there will be pockets of wealthy, maybe even segregated, neighborhoods adjacent to more racially diverse, lower income urban centers. When a suburb's desire for "local control" is granted respect and legitimacy, it is implicit that those neighborhoods are distinct from the larger metropolitan area — that Gardendale gets to control Gardendale,

that Signal Mountain gets to control Signal Mountain. By interrogating the idea of “local,” however, one starts to question where these lines are drawn: when a wealthy school district considers secession, which communities — even which subdivisions, streets, and families — are included and which are excluded? When “local” becomes more inclusive, a court can better consider the interests of a larger community, including those persons within it who are historically marginalized and stripped of the power to determine the welfare and destiny of their communities.

Gardendale cherry-picked which communities were to be included in their secession — and which communities were included and excluded demonstrate a clear racial pattern.<sup>150</sup> The story of Jefferson County, Alabama shows that suburbs of Birmingham have been doing the same thing for years — new school districts have been fabricated to create racial insulation, and the very act of creating the school districts not only stalls integration, but promotes segregation.<sup>151</sup>

Though she also acknowledged racial motivation, Judge Haikala recognized the parents of Gardendale as having a desire for “local control.” Yet this generosity afforded to the Gardendale parents, painting them as well-meaning activist parents who want the best education for their children, was not afforded to parents of other communities. The parents of North Smithfield were excluded from the conversation, even though children from North Smithfield had been attending Gardendale schools for decades and the parents of North Smithfield, like the parents of Gardendale, may have chosen their homes because of the school zoning opportunities.<sup>152</sup> Yet only the Gardendale quest for local control was considered legitimate.

Redefining “local” must involve closely examining the racial and socioeconomic makeup of a community asking for local control, and the racial and socioeconomic makeup of those excluded communities. If, as is often the case, a white community seeks local control, it is necessary to ask whether the judiciary gives weight only to the white community’s desire for promoting its own children’s quality education, and whether there is a subconscious baseline that predominantly white communities are meant to have better schools, more money, and better educational out-

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150. Hannah-Jones, *supra* note 1.

151. Frankenberg & Taylor, *supra* note 59.

152. *See supra* note 69.

comes. The expectation must be instead that educational resources will be fairly distributed — that the best configuration is that which leads to the best educational outcomes as a whole, not the best educational outcomes for those students who are already set up for success through their race, neighborhood, and socioeconomic status.

Other promoters of local control are more directly motivated by economics. Because of *San Antonio v. Rodriguez*, the common school-funding structures based on property taxes means the wealth of your neighborhood defines the resources of your school. Parents and local school administrators fear being “brought down” by low-income communities, believing that the taxes of high-income areas are being unfairly used to support high-need and low-income areas, instead of bolstering the already-successful schools with more advanced classes, facilities, and programming. These parents, unfortunately, are not mistaken in their belief that insulating their higher-income, predominately white communities will lead to better resources and higher funding for their local schools. Black plaintiffs in cases like *Milliken* were familiar with the adage that “green follows white.”<sup>153</sup>

But when local control proponents of secession assert that they are losing the education that is rightfully theirs, they misrepresent resource distribution in a county system. If the secession had completed, Jefferson County schools would have lost Gardendale property tax funding, the new Gardendale High School, teachers in the system attracted to Gardendale, and a majority-to-minority transfer school selection choice. In addition to creating a higher concentration of high-need students and low test score statistics, students would face further demoralization through increased isolation. Those resources belong to the students and parents of Jefferson County as much as they belong to Gardendale, and to pretend otherwise, to pretend that Gardendale has a right to be advantaged, is to consider a more privileged community more deserving of a favorable resource allocation.

Courts must redefine “local” in a way that recognizes the expectations and desires of all members of a school district. Michelle Adams says that local control doctrine is almost like a

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153. Lia B. Epperson, *True Integration: Advancing Brown’s Goal of Educational Equity in the Wake of Grutter*, 67 U. PITT. L. REV. 175, 190 (2005); Michelle Adams, Benjamin N. Cardozo School of Law Professor, 2017 Critical Race Theory Colloquium: The End of Integration (Oct. 19, 2017).

half-hearted apology on the part of the courts — acknowledging that education is a vital state interest without going so far as to classify it as a fundamental constitutional interest.<sup>154</sup> Yet in recognizing its importance but not its necessity, the courts only guarantee quality education to some — flying in the face of *Brown v. Board* and the Equal Protection Clause. Local control has become a privilege granted to those who the courts let claim it — protecting white privilege and socioeconomic status. If education were a fundamental interest, it would be made available to all.

Local control must be reconceived as a way to remedy the unique needs of a broader community. As Darden said, local control must recognize the voices of the marginalized as powerful voices.<sup>155</sup> As Wilson claimed, one cannot consider what is “local” without evaluating the impact on the larger community and ensuring protections for traditionally marginalized groups.<sup>156</sup> Local control must not be a way to ensure that privileged communities get to grow their privilege at the expense of marginalized neighbors who are denied power, resources, and opportunities.

Most importantly, the judiciary must keep in mind their ultimate goal of ensuring the promises of *Brown v. Board*. For both school districts under desegregation order and for districts where racial motivation controls policy more surreptitiously, education should be provided to all on equal terms. Any judicial decision must act in furtherance of the Fourteenth Amendment by rooting out racially-motivated educational inequities. True local control, then, may involve school district consolidation or massive reorganization, rather than disaggregation. It may involve reversing *Milliken* and permitting multidistrict remedies. It almost definitely involves, eventually, reversing *San Antonio v. Rodriguez* to recognize a fundamental right to education, recognize poor individuals as a protected class, and eliminate irrational property-tax funding schemes. It may involve intentionally and proudly funneling resources into high-need areas. Local control cannot be a code word for reinforcing racial and economic patterns, and it cannot be an excuse for allowing a community to unilaterally impose segregation upon the area’s schools.

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154. Adams, *supra* note 152.

155. Darden, *supra* note 137, at 1096.

156. Wilson, *supra* note 148, at 204.

## B. RESTRICTING SECESSIONS THROUGH LEGISLATION

The judiciary is not, of course, the only government entity responsible for school districts. It is, in fact, far from the primary entity. State legislatures must step up and take responsibility to make empirically-informed decisions to combat segregation by fulfilling their moral-political responsibility to provide adequate education to their citizenry. Whether their states have districts under desegregation orders or not, and whether the segregation is decades old or newly arising, state legislatures have an obligation to the children of their states.

As *San Antonio v. Rodriguez* made abundantly clear, there is no federal right to an education. In the absence of such a federal right, the state's obligation becomes far more crucial. The duty of educating a citizenry has been implicitly entrusted to the states, and states that do not properly control the disaggregation, consolidation, and reorganization of their school districts are ignoring that moral-political responsibility. As discussed previously, *Brown v. Board* states that, "Such an opportunity [to receive an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms."<sup>157</sup> That instruction is primarily directed at state legislatures, for educating their citizenries has long been considered an important state interest.<sup>158</sup> All fifty states have language regarding free public schools or common schools in their constitutions, and all states have some form of compulsory education laws.<sup>159</sup> Accord-

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

158. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) ("No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."). An uneducated populace of course leads to effects on individual lives and communities, but the economic effects, health effects, and effects on crime are felt by entire states if not the nation. HENRY LEVIN ET AL., *TEACHER'S COLLEGE, COLUMBIA UNIVERSITY, THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN 1* (2007) (finding that the net economic benefit to the public is \$127,000 per student, and the benefits are 2.5 greater than the cost) ("If the number of high school dropouts in this age cohort was cut in half, the government would reap \$45 billion via extra tax revenues and reduced costs of public health, of crime and justice, and in welfare payments.").

159. *State Compulsory Education Laws*, FINDLAW, <http://education.findlaw.com/education-options/current-state-developments-in-compulsory-education.html> [<https://perma.cc/DW95-29R5>] (last visited Sept. 15, 2018); It is worth noting that Washington D.C. does not have a constitution and, accordingly, does not guarantee a right to

ingly, every state has “undertaken to provide” public education, and must then make it available to all on equal terms. Doing so requires fulfilling responsibilities like adequately funding education,<sup>160</sup> investigating civil rights violations in issues like racial discrimination, gender discrimination, and special education, and, of course, ensuring legislation that discourages school district secession and encourages efficient school district reorganization.

Yet, as discussed in Part III.B, few states have legislation that requires full consideration that school district disaggregation will have on communities, both economically and in regards to segregation, and even fewer states allow the left-behind community to have a voice.<sup>161</sup> This is problematic because of the inefficiency of small, non-remote school districts, and because of their role in racial and socioeconomic segregation. Efficiency requires taking a hard look at the benefits of consolidation, rather than disaggregation. Even if a small, wealthy district will experience personal benefits in finances and/or educational outcomes from seceding from a larger district, adjacent districts must be considered — especially if they are socioeconomically disadvantaged communities or communities of color. In addition, a state’s ability to ensure adequate educational outcomes for all — not just those students with the loudest, most politically-powerful parents — must be considered.

The responsibility to educate children is an important one, but when state legislatures shirk that responsibility by failing to

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education, since federal law does not guarantee a right to education. EMILY PARKER, EDUC. COMM’N OF THE STATES, 50-STATE REVIEW (2016) <https://www.ecs.org/ec-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> [https://perma.cc/N3N6-ZZKY].

160. For an interesting piece of impact litigation, resulting in a decision that required a funding increase for New York public schools, as the currently under-funded system was found to deny students their constitutional rights under state law, see Campaign for Fiscal Equity Inc. v. State, 86 N.Y.2d 306 (1995). For information about how that decision has not been implemented, see *Equity*, AQENY.ORG, <http://www.aqeny.org/equity/> [https://perma.cc/WJ6D-NC6K] (last visited Sept. 15, 2018).

161. Four states (Arizona, Connecticut, Texas, and Vermont) require approval from voters in the district left behind, seventeen states require action by voters from the seceding area, twenty-one states require approval by a state authority, Ohio requires action by the state legislatures, and Florida, Georgia, and Louisiana require a constitutional amendment, and Florida, Georgia, and Louisiana require a constitutional amendment. Only six states must consider racial and socioeconomic factors (Arkansas, California, Colorado, Wisconsin, Nebraska, and Wyoming), and only nine states must consider the effect of funding (Arizona, California, Indiana, Nebraska, New Jersey, South Dakota, Utah, Wisconsin, and Wyoming). FRACTURED, *supra* note 1, at 13.

promote efficient school district organization and by making district organization motivated by racial animus easy, students suffer. Likewise, when judiciaries half-heartedly and inconsistently use local control as a justification for communities trying to keep resources away from their neighbors, students suffer. Both parties must take responsibility in reworking local control and restricting secessions.

## VI. CONCLUSION

By making secessions more difficult legislatively and recognizing “local control” as a euphemism for racism, we can create more inclusive communities that better acknowledge all local needs — rather than protecting privilege at the expense of the public good. Right now, principles of local control are abused in the judiciary, in legislation, and by those seeking to economically, culturally, and racially insulate their communities to the disadvantage of others. The trend of school secession is common and alarming. Even more importantly, it is inefficient and contributes to a failure to fulfill both the promises of *Brown v. Board* and the Fourteenth Amendment, as well as the promises of the state constitutional right to an education. By reworking local control to adequately consider the effect on a larger community and ensuring that the goal is to ensure proper education for all, rather than just the most politically powerful, and by changing legislation to encourage better school district organization, we can prevent further harmful secessions and remedy those that have already happened.

## APPENDIX

FIGURE 1: WHICH PATH WILL GARDENDALE CHOOSE?<sup>162</sup>**Which path will Gardendale choose?**

Places that chose NOT to form and support their own school system:

- ✓ Adamsville/Forestdale
- ✓ Hueytown
- ✓ Pleasant Grove
- ✓ Center Point/Huffman

Communities that chose to form and support their own school system, and are listed as some of the best places to live in the country:

- ✓ Homewood
- ✓ Hoover
- ✓ Vestavia
- ✓ Trussville

**On which list will you place Gardendale?**

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<sup>162</sup> Stout v. Jefferson Cty. Bd. of Educ., 882 F.3d 988, 998 (11th Cir. 2018).