

# Annulment: Inside the Largest—and Briefest—School District Consolidation in American History

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## I. INTRODUCTION

The sun shone brightly as I walked through downtown Memphis on the morning of September 4, 2012. It did not take long to walk the

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\* FedEx Professor of Law, The University of Memphis Cecil C. Humphreys School of Law. I am grateful to the staff of the University of Memphis Law Review for allowing me the opportunity to share my experiences through this extraordinary moment in a somewhat non-traditional way. During the school district merger, my law students helped keep me grounded, and I have thoroughly enjoyed sharing my experiences with students since that time, so I am excited to capture some of that here. This piece is being completed amidst another extraordinary moment, as COVID-19 has disrupted the spring 2020 semester—that disruption, and the distance it has created as I have moved to virtual classrooms, has only further reminded me how central my students are to all of my work. Thus, I dedicate this piece to my students, past, present, and future.

few blocks north from my office at The University of Memphis Cecil C. Humphreys School of Law down Main Street, a brick road only for pedestrians and trolleys that had once been the economic heart of the city, and into the giant concrete plaza that housed a series of government buildings. My destination was the federal building, the “new” one,<sup>1</sup> which had opened in 1963 and had the architecture to prove it—it stood twelve stories tall, constructed of beige and brown concrete. I crossed the civic center plaza and paused before entering the Clifford Davis/Odell Horton Federal Building.

“Clifford Davis/Odell Horton.” Right there, on the sign outside of the federal building, was the microcosm of Memphis’s twentieth century history. Davis had represented western Tennessee in Congress for over two decades in the middle of the century and was part of the political machine of E.H. “Boss” Crump that dominated the area. Davis had served as Commissioner of Public Safety in Memphis during the 1930s, during which time he led the city’s police. Davis was also a member of the Ku Klux Klan, an affiliation he shared with almost 70% of the police force he led.<sup>2</sup> As a member of Congress, Davis had signed the Southern Manifesto in 1956, a document that decried the Supreme Court’s *Brown v. Board of Education* decision as “destroying the amicable relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding.”<sup>3</sup> The manifesto went on to commend states resisting the *Brown* decision and the signers—nineteen senators and eighty-one members of the House—pledged themselves “to use all lawful means to bring about a reversal of this decision . . . and to prevent the use of force in its implementation.”<sup>4</sup> At the time, Davis represented all 500,000 residents of Shelby County, about 37%

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1. My law school office was actually in the “old” federal building, which had been converted from a mostly vacant post office into the university’s law school in 2010.

2. MICHAEL K. HONEY, *GOING DOWN JERICHO ROAD: THE MEMPHIS STRIKE, MARTIN LUTHER KING’S LAST CAMPAIGN* 11 (2007); *see also* SHARON D. WRIGHT, *RACE, POWER, AND POLITICAL EMERGENCE IN MEMPHIS* 33 (Toni-Michelle C. Travis ed., 2000).

3. *THE SOUTHERN MANIFESTO* (1956).

4. *Id.*

of whom were African American.<sup>5</sup> The federal building took Davis's name in 1970.<sup>6</sup>

Clifford Davis was of an era in Memphis and Shelby County when barriers were erected and fortified to keep African American residents from exercising democratic and economic power. Odell Horton, the name on the other side of the federal building's slash, was of a different era. Horton, who was African American, returned to West Tennessee in the late 1950s after serving in both World War II and Korea to begin his law practice in Memphis. Over four decades, Horton would serve as an assistant U.S. attorney and in the mayoral administration of Henry Loeb. In 1976, he was appointed a federal bankruptcy judge, and in 1980, President Carter appointed Horton to the district court for the western district of Tennessee. He was the first African American federal judge appointed in Tennessee since Reconstruction, and he served until 1995. In 2007, his name was added to the federal building where he kept his chambers.<sup>7</sup>

As I entered the federal building on that September morning in 2012, I marveled at the juxtaposition of Davis and Horton in the building's name. It seemed to capture so much about my hometown. The fundamental features underpinning both Clifford Davis and Odell Horton—a mostly White fortification of a status quo that protects power, wealth, and privilege and an often-Black push for reform, inclusion, and greater equity for a broader swath of the community—are fully present in Shelby County, in nearly equal measure. The tension between them is often defined by slashes, boundaries between things, sometimes visible, sometimes not. Black/White. City/County.

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5. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CENSUS OF POPULATION 1950: GENERAL CHARACTERISTICS OF THE POPULATION FOR COUNTIES 42-96 (1952). Somewhat interestingly, the 9th district, at the time the boundaries were coextensive with the county, had a population that far exceeded other congressional districts in the state. This was one of the circumstances that led to the Supreme Court case *Baker v. Carr*, which provided the principle of “one person, one vote” in 1966. After *Baker*, the geographic size of the 9th district shrunk so that it included approximately the same number of residents as the state's other districts. Clifford Davis had been defeated in the Democratic primary in 1964 and no longer served.

6. Act of Dec. 31, 1970, Pub. L. No. 91-633, 84 Stat. 1877.

7. See *Name Change Approved for Memphis Federal Building*, WMC ACTION NEWS 5 (May 4, 2007), <https://www.wmcactionnews5.com/story/6470515/name-change-approved-for-memphis-federal-building/>.

Davis/Horton. This was not merely history; indeed, confronting one of those barriers was the reason for my visit to the federal building.

Nearly two years earlier, the Board of Memphis City Schools (MCS) voted to surrender its operating charter, effectively dissolving a district that was created in the aftermath of the Civil War. This act triggered the possibility that the district, which served over 100,000 students living in the city, would merge with the adjacent Shelby County Schools (SCS), a district serving the nearly 50,000 students residing in Shelby County beyond the Memphis city lines. This was a cataclysmic disruption of the settled status quo among the area's schools and unleashed a communal reckoning with our history, our present, and our future. Through this period, from December 2010 when the Memphis City Schools charter was surrendered until August 2014 when a new normal emerged, I had the experience of seeing issues I had studied and written about come roaring to life. I was drawn into the process in many ways, as community educator, as appointed commissioner, and on that September morning, as expert witness in the litigation that inevitably resulted. In this essay, I reflect on that period, offering a glimpse of my experiences and the lessons I have drawn from this failed effort to eliminate one of the lines that separated the students of Shelby County.

In Part II, I will describe the turn of events that led the two school districts of Shelby County to suddenly merge into one, then to quickly splinter into a new normal with seven school districts in the county, offering observations from living through that process in the various roles I took. In particular, I will describe my role as a member of the commission charged with crafting the plan of merger and the experience of watching that work unravel. Part III will then zoom out to place the Shelby County merger and de-merger into broader context, connecting the events in Shelby County to similar contemporary conflicts over schooling, mergers, and secession. In this section, I will examine both the motivations that impacted those events and the effects of the splintered outcome. Finally, in Part IV, I will conclude with a series of lessons I have taken away from this tumultuous period—lessons that may be personal or professional, political or legal, and that can inform other individuals and communities encountering analogous moments.

I must offer a disclaimer from the outset. Though I have written about these events in my role as an academic, this essay aims for

something different than the dispassionate, objective analysis of a researcher's typical scholarship. Rather, my goal is to capture something more personal, and it is crucial for the reader to understand the perspective from which I approached this moment.

I was a strong supporter of the merging of Shelby County's school districts. As someone who has studied the history of education in Memphis and Shelby County, I am familiar with and disappointed by the repeated legal and political efforts to isolate students from one another and the effect such isolation has continued to have on the distribution of educational resources. For many years, the legal line was between Black students and White students. Following *Brown v. Board of Education*, the legal line that increasingly separated students was the city boundary of the city of Memphis, which separated students in the Memphis City Schools from those in Shelby County Schools. That line, of course, had racial effects as well. I saw the dissolution of that line as an important administrative step on the way toward a potentially transformative change in the way our community views itself. Rather than continuing to compete internally among ourselves, I felt that a common school district could cause a small psychological change that would lead more of us to believe that our common destiny as a community depended on providing the best for everyone rather than worrying primarily about narrower interests. I knew enough to realize that the practical impact of a school district merger was unlikely to be revolutionary in schools and classrooms, but I felt that a generation of students that could not point to an administrative boundary between school districts might find it easier to recognize commonality across the slashes that divide. It was a very long view, but it was also one that understood that the other path—the path of cementing separation—would ensure that the future of our community would remain haunted by the slashes of the past. Everything I experienced through this process—and thus, everything I share in this essay—has been filtered through that lens of (possibly misplaced) hope.

## II. THE MERGER AND DEMERGER OF SCHOOLS IN SHELBY COUNTY

I must confess that I did not know as much about the history and structure of Memphis City Schools as I appeared to. I had, less than fifteen years earlier, been an MCS student, and I had published an

article on the desegregation of schools<sup>8</sup> and was working on a documentary film about the first students who desegregated MCS in 1961. But that was all history. When word arrived that the MCS Board had “surrendered” the district’s charter in December 2010, I really did not know what that meant. I wasn’t alone.

“Schools Dazed” ran the bold banner headline across the front of the *Commercial Appeal* the day following the MCS Board’s unprecedented vote, and uncertainty reigned.<sup>9</sup> Over the coming months, virtually every governmental body with influence in Shelby County would take action seeking to clarify the uncertainty. But in the first weeks, few truly understood why the Board had taken such dramatic action; and even fewer could answer the pressing questions of students, parents, and teachers about what would come next.

Even before the Charter surrender, I sensed a crossroads approaching. A long-simmering discussion about the relationship between the two school districts of Shelby County—Memphis City Schools serving the students of Memphis and Shelby County Schools serving the students within the county outside of Memphis’s city limits, including those living in the county’s six suburban municipalities—was coming to a boil in the wake of the elections of November 2010. During that election, the county’s voters had rejected an effort to merge the county’s dueling governments into a consolidated metropolitan government.<sup>10</sup> In a failed effort to make that plan more palatable, school district consolidation had been excluded from the governmental consolidation plan.<sup>11</sup> The November 2010 elections also brought an increased Republican majority in the Tennessee state legislature, a dynamic that would strengthen Shelby County’s suburban state legislators.<sup>12</sup> For years, there had been talk that SCS wished to become a “special school district” in order to freeze its boundaries, but state law

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8. Daniel Kiel, *Exploded Dream: Desegregation in the Memphis City Schools*, 26 *LAW & INEQ.* 261 (2008).

9. Zack McMillin, Jane Roberts & Sherri Drake Silence, *Schools Dazed—Shelby County System Begins Preparations for Crafting Megadistrict*, *COM. APPEAL*, Dec. 22, 2010, at A1, 2010 WLNR 25339448.

10. See Wanda Rushing, *School Segregation and Its Discontents: Chaos and Community in Post-Civil Rights Memphis*, 52 *URB. EDUC.* 3, 10 (2017).

11. See *id.*

12. *Id.* at 12.

prevented such a conversion. Might the newly-elected legislature change the law? And what would be the effect if they did?<sup>13</sup>

These questions animated discussions of the future of local schooling in December 2010, but they sounded to me like echoes of previous discussions in 1954 and 1961 and 1972, major moments in the local desegregation story. “We have reached this crossroads, in part, because of the choices that were made the last time Memphis encountered a moment where the existing educational structure proved unsustainable,” I wrote at the time.<sup>14</sup>

A direct line can be drawn from the failures of the desegregation era to the crisis of today . . . . If the next three decades are to provide a more productive model for public education than the past decades have, it is imperative that we avoid repeating these mistakes.<sup>15</sup>

I cited political interference with educational decision making and a lack of leadership that allowed for loud, polarizing voices to drive the discussion as mistakes to avoid this time around.

After the charter had been surrendered, amidst the uncertainty that followed in the wake of that action, I got a call from a friend seeking someone to give a community presentation on how the community had reached this moment and what the future might hold. Within a week, I found myself in front of a large and anxious crowd in the auditorium of BRIDGES, a local community organization that brings young people from all over the community together “to become confident and courageous leaders committed to community transformation.”<sup>16</sup> Several leaders, including the chairpersons of both MCS and SCS, offered their perspectives before I was charged with providing an overview of the facts. I gave a 15-slide presentation about school funding and local tax policy, competing interests of the two districts, and the intricacies of state education law. It was not the most riveting of topics, but as

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13. See STEVE REDDING, CHARLES MENIFIELD & CHARLES A. SANTO, REGIONAL ECONOMIC DEVELOPMENT CENTER UNIVERSITY OF MEMPHIS, IMPACT OF A SPECIAL SCHOOL DISTRICT ON MEMPHIS AND SHELBY COUNTY 1 (2008).

14. Daniel Kiel, *We Must Learn from Past Education Failures*, COM. APPEAL, Dec. 10, 2010, at A11, 2010 WLNR 24501156.

15. *Id.*

16. *Our Mission*, BRIDGES, <https://bridgesusa.org/about/history> (last visited Feb. 16, 2020).

occurs in front of a classroom (sometimes), I could sense the audience's engagement. It must have been a cogent presentation—on the heels of the presentation at BRIDGES, I was invited to present elsewhere. For nearly three months, even as the landscape continued to solidify and then shift again, I gave multiple presentations each week to a broad range of audiences that took me to all parts of the county.<sup>17</sup> And so it was that a law professor became the “go-to-guy” on the community's issue of the day. The details of what happened in the build-up to and aftermath of the charter surrender have been covered elsewhere,<sup>18</sup> but a summary is in order.

### A. *Background and Tremors*

The charter of the Memphis City Schools that was surrendered in 2010 had first been granted in 1869.<sup>19</sup> That act set up the basic structure of public education in Shelby County, transferring oversight for the public schools within the city of Memphis to MCS, while leaving the remainder of the county as part of the county school district. Over nearly a century and a half, as the city of Memphis grew, MCS grew with it. The 1869 charter, adopted during Reconstruction, accounted for the education of African Americans, but mandated racially separate

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17. See Jane Roberts, *Landscape for Legal Nightmare*, COM. APPEAL, Feb. 13, 2011, at A1, 2011 WLNR 2924070 (describing Daniel Kiel as “the University of Memphis law professor who's become the go-to guy on the ins and outs of school charter surrender”).

18. See, e.g., RACE, ECONOMICS, AND THE POLITICS OF EDUCATIONAL CHANGE: THE DYNAMICS OF SCHOOL DISTRICT CONSOLIDATION IN SHELBY COUNTY, TENNESSEE (John M. Amis & Paul M. Wright eds., 2018); Michelle Wilde Anderson, *Making a Regional District: Memphis City Schools Dissolves Into Its Suburbs*, 112 COLUM. L. REV. SIDEBAR 47 (2012); Erica Frankenburg, Genevieve Siegel-Hawley & Sarah Diem, *Segregation by District Boundary Line: The Fragmentation of Memphis Area Schools*, 46 EDUC. RESEARCHER 449 (2017) [hereinafter *Segregation by District Boundary Line*]; Daniel Kiel, *A Memphis Dilemma: A Half-Century of Public Education Reform in Memphis and Shelby County from Desegregation to Consolidation*, 41 U. MEM. L. REV. 787 (2011); Rushing, *supra* note 10; Genevieve Siegel-Hawley, Sarah Diem & Erica Frankenburg, *The Disintegration of Memphis-Shelby County, Tennessee: School District Secession and Local Control in the 21st Century*, 55 AM. EDUC. RES. J. 651 (2018) [hereinafter *The Disintegration of Memphis-Shelby County*].

19. MARCUS D. POHLMANN, OPPORTUNITY LOST: RACE AND POVERTY IN THE MEMPHIS CITY SCHOOLS 46 (2008).

schools.<sup>20</sup> Over time, the expansion of Memphis and the racial desegregation of schools would substantially impact public education in Shelby County.

In 1950, the city accounted for 104 square miles within Shelby County, approximately 14% of the county's area; by 2010, on the eve of the merger, annexation of unincorporated portions of the county had grown Memphis to 295 square miles, nearly 40% of Shelby County.<sup>21</sup> Those annexations were driven by the city's need to maintain a sizeable tax base, but each one also expanded the footprint of MCS. Despite the annexations, suburban growth outpaced the expanding city, particularly after 1970. In 1970, 86% of the county's total population was within the city of Memphis; by 2010, that number was down to 74%.<sup>22</sup>

A number of factors contributed to the shift in wealth and population outside of the city limits, but school desegregation played a role. Though MCS was initially desegregated in 1961, by 1970, most students remained in largely homogenous schools—89% of Black students and 81% of White students were in schools that were more than 90% single-race.<sup>23</sup> At that time, MCS was the 10th largest district in the United States, with over 147,000 students.<sup>24</sup> With the Supreme Court having signaled impatience at the progress of desegregation over fifteen years after *Brown v. Board of Education* and progress in Memphis stalled by recalcitrant city and school leaders, local federal district court judge Robert McRae entered a desegregation order aimed at disrupting the segregated status quo.<sup>25</sup> The May 1973 order, which McRae termed “Plan Z,” called for busing nearly 40,000 students “in the hope that this will be the terminal plan for this long-standing problem in Memphis.”<sup>26</sup> In many ways, though perhaps not the way Judge McRae had hoped, it would be.

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20. *Id.*

21. Kiel, *supra* note 18, at 808.

22. *Id.*

23. Kiel, *supra* note 8, at 286–87. Indeed, 39% of Black students and 26% of White students were in entirely single-race schools in 1970. *Id.*

24. *Id.* at 285.

25. See *Northcross v. Board of Education*, 489 F.2d 15, 15 (6th Cir. 1973) (affirming Judge McRae's “Plan Z” order).

26. ROBERT M. MCRAE, ORAL HISTORY OF THE DESEGREGATION OF MEMPHIS CITY SCHOOLS 1954–1974, at 91 (1997); see *Northcross*, 489 F.2d at 16; Kiel, *supra* note 8, at 294.

The Plan Z order led to an immediate and sizable drop in White enrollment in MCS that would never recover, despite annexation of largely White areas in the coming decades. By 1978, the White student enrollment in MCS had dropped by nearly 40,000 students from almost 70,000 at the beginning of the decade, and 72% of the district's students were African American, up from 55% in 1970.<sup>27</sup> According to Marcus Pohlmann, “[m]any whites simply refused to be bussed,” and “the system ran out of whites to bus and predominantly white schools to which to bus black students.”<sup>28</sup> What began in the early 1970s continued through the following decades so that the racial makeup of MCS in 2010 was 85.0% African American, 7.1% White, 6.5% Hispanic or Latino, and 1.3% Asian.<sup>29</sup>

The white flight from MCS contributed to the unfolding suburbanization in Shelby County, and a sizeable number of White students ended up in the adjacent (and expanding) Shelby County Schools. In 1977, for example, in the context of its own school desegregation suit, SCS received court approval for construction of six new schools to relieve overcrowding.<sup>30</sup> Thus, even as the city of Memphis continued to annex unincorporated portions of the county and shrink SCS's footprint, its student population grew from 35,000 in 1970 to over 48,000 in 2010.<sup>31</sup> In contrast to MCS, the SCS student population was 37.8% African American, 52.3% White, 4.6% Hispanic or Latino, and 4.9% Asian.<sup>32</sup> A snapshot of the county's two school systems on the eve of the charter surrender is captured in Chart 1 below.

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27. POHLMANN, *supra* note 19, at 81–82.

28. *Id.* at 77.

29. *Data Downloads & Requests, Profile & Demographic Information, Profile Data Files: District-Level 2010*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Apr. 6, 2020). Even the number 7.1% might be misleading as 40% of the district's White students were clustered in only 6 schools, each of which had a White student population of over 39.8%. In full disclosure, I attended three of those schools.

30. Kiel, *supra* note 18, at 802–03 (citing Order Granting in Part and Denying in Part the Joint Motion to Dissolve Order of the Court and Declare Shelby County School System a Unitary System, *Robinson v. Shelby Cty. Bd. of Educ.*, No. 63-4916, at 23 (W.D. Tenn. July 26, 2007)).

31. *Id.* at 808.

32. *Data Downloads & Requests, Profile & Demographic Information, Profile Data Files: District-Level 2010*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Apr. 6, 2020). Again, a

	Total # Students	% African American	% White	% Hispanic or Latino	% Asian	% Economically Disadvantaged
Memphis City School District	108,433	85.0	7.1	6.5	1.3	82.8
Shelby County School District	48,243	37.8	52.3	4.6	4.9	35.2
<b>Total Shelby County Public School Population</b>	<b>156,676</b>	<b>70.1</b>	<b>21.3</b>	<b>6.0</b>	<b>2.4</b>	<b>68.1</b>

Chart 1: School Districts of Shelby County, Tennessee in 2010<sup>33</sup>

Although the two districts served adjacent student populations, the racial and socioeconomic differences are apparent and were even more pronounced at the school level. Though there were schools within each district with racially diverse student populations, these were the exception. All but 20 of MCS's 200 schools had student populations that were more than 70% African American, and 140 of those schools were more than 90% African American.<sup>34</sup> In contrast, 20 of the 52 SCS schools were more than 70% White; somewhat paradoxically, in a reflection of school-level segregation within a diverse overall district, 6 SCS schools were more than 80% Black.<sup>35</sup> The resulting perception was that MCS was a "Black" district and SCS a "White" district.<sup>36</sup> This perception was reflected in leadership as well. In 2010,

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similar, but opposite effect is present in SCS—the figure of Black students (37.8%) is skewed due to sizeable Black majorities in 6 of the district's schools, each with a population of over 80% African American. Nearly 30% of the district's Black students were in those 6 schools.

33. *Id.*

34. *Data Downloads & Requests, Profile & Demographic Information, Profile Data Files: School-Level 2010*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Apr. 6, 2020) (statistics compiled from the data by author).

35. *Id.*

36. Not mentioned here, but potentially important, is the fact that Shelby County is also home to a third system of schools, a sizeable private school sector that

all seven SCS board members and the superintendent were White, while seven of the nine MCS board members and the superintendent were African American.<sup>37</sup> Such perceptions and the racialization of local education underlaid the drama that would follow the December 2010 MCS charter surrender.

Another perception prevalent at the time of the charter surrender concerned the relative quality of the two school districts. Based on achievement metrics reported by the state, SCS appeared to be outperforming MCS. The graduation rate was significantly higher (91.3% in SCS, compared to 69.4% in MCS), average ACT scores were higher, and SCS schools fared far better under the state's accountability system under the No Child Left Behind law.<sup>38</sup> On a variety of measures of academic output and over a significant period of time, SCS appeared to be a stronger overall district.<sup>39</sup> The overlay of perceived disparities in educational qualities with the racialization of the two districts—the whiter district achieving higher than the district of predominantly African American students—fueled charges of educational injustice that harkened back to the Jim Crow era of schooling. Indeed, in explaining her thinking in the runup to the charter surrender, MCS Board Member Tomeka Hart said, “I have no intention of saying we should remain separate and more unequal.”<sup>40</sup>

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serves approximately 15% of the county's students, the vast majority of whom are White. See POHLMANN, *supra* note 19, at 87.

37. See Marcus D. Pohlmann, *Race, Politics, and Consolidation Efforts*, in RACE, ECONOMICS, AND THE POLITICS OF EDUCATIONAL CHANGE: THE DYNAMICS OF SCHOOL DISTRICT CONSOLIDATION IN SHELBY COUNTY, TENNESSEE 105, 113 (John M. Amis & Paul M. Wright eds., 2018); Wanda Rushing, *Memphis and Durable Inequality*, in RACE, ECONOMICS, AND THE POLITICS OF EDUCATIONAL CHANGE: THE DYNAMICS OF SCHOOL DISTRICT CONSOLIDATION IN SHELBY COUNTY, TENNESSEE 80, 90 (John M. Amis & Paul M. Wright eds., 2018).

38. *Data Downloads & Requests, Additional Data, Attendance and Graduation Files: District-Level 2010*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Apr. 6, 2020) (statistics compiled from the data by author).

39. See POHLMANN, *supra* note 19, at 91–113; see also Paul M. Wright & Jenn M. Jacobs, *Quality and Equity in Education*, in RACE, ECONOMICS, AND THE POLITICS OF EDUCATIONAL CHANGE: THE DYNAMICS OF SCHOOL DISTRICT CONSOLIDATION IN SHELBY COUNTY, TENNESSEE 213, 213–42 (John M. Amis & Paul M. Wright eds., 2018).

40. Jane Roberts, *School Board Sweats Options—Surrendering Charter Isn't Out of Question*, COM. APPEAL, Nov. 19, 2010, at B1, 2010 WLNR 23124791.

The educational disparities between the districts, however, could largely be explained by the significant difference in the number of economically disadvantaged students between the two districts. In 2010, 35.2% of SCS students were labeled “economically disadvantaged,” while the number was 82.8% for MCS students.<sup>41</sup> National trends suggest that schools with significant numbers of economically disadvantaged students—which virtually all MCS schools were—have fewer high quality teachers, less than adequate facilities, and less challenging curricular content.<sup>42</sup> According to Marcus Pohlmann, who isolated the effects of poverty in the performance of MCS and SCS schools, “the primary difference between the two sets of schools . . . are their degree of poverty.”<sup>43</sup> By this judgment, it is difficult to determine the relative quality of the education within the two districts. The differences are more attributable to the disparities among the student populations than to a qualitative difference in education.

Still, the perception that SCS was a “good” district and MCS a “failing” one would impact the discussion of merging the districts that unfolded in 2011. One erroneous charge cited as a cause for the disparities between the districts was that SCS, serving a wealthier student population in the more economically thriving suburbs, had access to greater financial resources. In terms of school funding, this was not true. Both districts received nearly half of their budget from the state of Tennessee.<sup>44</sup> Neither district had its own independent taxing authority, so each relied on local governments for local funding. The Shelby County government, primarily through countywide property taxes, contributed an equal per pupil amount to each district—nearly 40% of the MCS and 45% of the SCS budgets.<sup>45</sup> MCS, however, had an additional source of funding—the Memphis city government. Memphis city residents paid an additional and separate property tax that provided

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41. *Data Downloads & Requests, Profile & Demographic Information, Profile Data Files: District-Level 2010*, TENN. DEP’T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Apr. 6, 2020). In terms of number of students, that means 16,995 of the 48,243 SCS students (35.2%) were considered economically disadvantaged, while 89,784 of the 108,433 MCS students (82.8%) were considered economically disadvantaged. *Id.*

42. Wright & Jacobs, *supra* note 39, at 215.

43. POHLMANN, *supra* note 19, at 92.

44. Kiel, *supra* note 18, at 813.

45. *Id.*

nearly 10% of the MCS budget. The result from this additional funding, as well as additional federal and state funds available due to the high concentration of economically disadvantaged students in MCS, was that 2010 per pupil spending was \$10,767 in MCS and \$8,439 in SCS.<sup>46</sup>

Though contrasting racial demographics and perceptions of disparities in quality among MCS and SCS were cause for discussion, the primary trigger for the surrender of the MCS charter was fiscal. Two factors drove members of the MCS Board to conclude that surrendering the district's charter and compelling a merger with SCS was necessary. First, the city of Memphis had abruptly ceased providing MCS with funding in spring 2008 on the grounds that its contributions were not mandatory, thus putting the MCS budget in peril.<sup>47</sup> Though MCS would win a lawsuit establishing an obligation for the city to continue to fund the district, the economic realities that led to the city's decision remained—the city faced a shrinking tax base and increased obligations but could not increase taxes without burdening an economically vulnerable population. Second, the MCS Board was aware that SCS had long sought a change in state law that would have frozen the boundaries between the districts, boundaries that were unstable due to the city's periodic annexations. There was precedent in Tennessee that such a change could result in a new funding reality for the districts with each drawing only from the tax base within its school district boundaries. This would have led to taxpayers of Memphis funding MCS and taxpayers in the suburbs and unincorporated portions of the county funding SCS, a significant change from the status quo.<sup>48</sup> That outcome,

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46. *Data Downloads & Requests, Profile & Demographic Information, Profile Data Files: District-Level 2010*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Apr. 6, 2020).

47. *State ex rel. Bd. of Educ. v. City of Memphis*, 329 S.W.3d 465, 469 (Tenn. Ct. App. 2010); *see also* Kiel, *supra* note 18, at 829 n.167.

48. As practiced in 2010, Shelby County government collected taxes from the entire county and distributed to the two districts on a per pupil basis, a setup that did result in a subsidy from suburban taxpayers to city school students because the share of the county's property values outside of the city of Memphis (approximately 50%) was greater than the share of the county's student population from the same area (33%). Through most of the twentieth century, that subsidy had been reversed, with city taxpayers subsidizing SCS, but the county's suburbanization had led to a shift. It is worth noting that SCS leaders had not advocated for such an outcome and have denied any desire to create self-funding districts.

several MCS Board members worried, would result in the bankrupting of MCS. Thus, the financial vulnerability from these two possibilities—loss of funding from the city of Memphis or a move to two self-funding districts within the county—was thought to be an existential threat that required dramatic action. That dramatic action occurred on December 20, 2010, when the MCS Board voted 5-4 to surrender the district’s charter, essentially shutting down a district that had been in existence since just after the Civil War.

### *B. Into the Abyss*

The strategy of consolidating Shelby County’s school districts through the surrender of the MCS charter was not a new idea. As far back as 1960, MCS Board President Walter Armstrong suggested the idea to Memphis Mayor Henry Loeb as part of a broader plan to consolidate the county’s two school districts.<sup>49</sup> The main concern at that time was the danger in “subjecting the operation of a highly developed urban school system of roughly four times the size of the county system to administration under the statutes and procedures designed primarily for rural school systems.”<sup>50</sup> Armstrong laid out a potential path toward consolidation that sought to maintain quality in both systems during a period of transition. The plan called for (1) a formal plan for consolidation with a fixed timeline; (2) election of a single county wide school board; (3) appointment by the school board of an administrative head of the consolidated system; and (4) surrender of the MCS charter.<sup>51</sup> The last of these steps, Armstrong wrote, would require a change in law that would provide the MCS Board with the discretion to surrender its charter. “This will require very careful draftsmanship,” Armstrong explained.<sup>52</sup>

During the 1961 session of the Tennessee General Assembly, the MCS charter was indeed amended to

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49. Minutes of the Board of Education of the Memphis City Schools, Meeting of Feb. 10, 1961, at 979–81 (on file with author) (reading “The Armstrong Letter” into part of the official Minutes of the MCS Board).

50. *Id.* at 979.

51. *Id.* at 981.

52. *Id.*

authorize the Board of Education of the Memphis City Schools to dissolve the charter . . . at such time as the said Board of Education shall determine by resolution that such action is desirable, all of which shall be subject to the approval, by resolution of the Board of Commissioners of the City of Memphis.<sup>53</sup>

Though one portion of the Armstrong plan, the ability to surrender the charter, was granted in 1961, the MCS Board did not use this new power at that time.<sup>54</sup> A half century later, it did. The other elements of the Armstrong plan for managing the transition to a single countywide school district in Shelby County did not exist when the MCS Board took its action in December 2010, leading to widespread uncertainty in the community in early 2011. Governmental bodies and groups of citizens scrambled to fill the void. Reaction outside of Memphis was swift and one-sided: “Anything that has anything to do with merging with Memphis is taboo in the suburbs,” a suburban mayor said.<sup>55</sup> That had been proven definitively a month earlier when 85% of suburban Shelby County voters rejected a plan for consolidation into a metropolitan government (though without merging school districts).<sup>56</sup> Within Memphis, opinion was divided amidst the confusion—MCS superintendent Kriner Cash called the charter surrender “junior-high fighting nonsense,”<sup>57</sup> while the board members who had put the plan in motion continued to argue for its necessity.

Among governmental bodies, the Tennessee legislature was the first to act. Responding to the apparent concerns of their constituents, legislators from suburban Shelby County introduced bills at the outset of the 2011 legislative session to either avoid consolidation or govern the process. In February 2011, the Memphis City Council approved a

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53. 1961 Tenn. Priv. Acts ch. 375.

54. I do not know why this didn't happen. Nashville consolidated its city and county governments in 1963. It may have to do with the other legislative changes required to make schools-only consolidation happen. Maybe it was difficult to get that general legislation because of the lopsided representation in the state legislature.

55. *What They're Saying*, COM. APPEAL, Dec. 22, 2010, at A2, 2010 WLNR 25246212.

56. Pohlmann, *supra* note 37, at 124.

57. John Branston, *Kriner Cash Takes Off the Gloves*, MEM. FLYER (Dec. 21, 2010, 7:32 AM), <https://www.memphisflyer.com/CityBeatBlog/archives/2010/12/21/kriner-cash-takes-off-the-gloves>.

resolution that sought to ratify the charter surrender and govern the transition process;<sup>58</sup> the same day, the state legislature approved a statute to guide the transition as well.<sup>59</sup> With conflicting plans for an impending transition, the Shelby County Schools Board joined the fray, filing a lawsuit asserting, among other things, that the MCS charter surrender was invalid.<sup>60</sup> As all of this legal and legislative action unfolded, Memphis voters prepared for a March referendum on the charter surrender question. Ultimately, city residents approved the charter surrender by a 2-1 margin.<sup>61</sup>

As the 2010–11 school year ended, there remained deep uncertainty about the future structure of public schooling in Memphis. The Memphis City Council and Tennessee Legislature had each passed a competing timeline and plan for school district merger, and answers to the multitude of legal questions were before federal district court Judge Samuel Mays. Emotions were high as the 2011–12 school year neared, still with great uncertainty.

The first dose of clarity came in August 2011, when the district court provided guidance as to the appropriate path forward. Among the various laws vying to guide the transition process, the court identified the recently-crafted state law as the appropriate legal path toward merger of Shelby County’s school districts.<sup>62</sup> That law, section 49-2-502 of the Tennessee Code (often referred to as the Norris-Todd bill after its sponsors), mandated the appointment of a transition team to orchestrate the process toward merger over a two-year period.<sup>63</sup> Thus, the court concluded that a merged system would begin operation for the 2013–14 school year. The statute also laid out details for how the transition team would be appointed and what subjects a transition plan

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58. See Richard Locker & Amos Maki, *Memphis Council’s Unanimous Vote OKs Surrender of Charter by City Schools*, COM. APPEAL, Feb. 11, 2011, 2011 WLNR 28006370.

59. See Richard Locker, *Tennessee House Approves Bill to Delay Memphis School Consolidation*, COM. APPEAL, Feb. 11, 2011, 2011 WLNR 28007316.

60. Complaint for Declaratory Judgment at 5, *Bd. of Educ. v. Memphis City Bd. of Educ.*, No. 11-2101 (W.D. Tenn. Feb. 11, 2011).

61. Pohlmann, *supra* note 37, at 127. In addition to all of this, the Shelby County Commission ordered enlargement of the Shelby County Board of Education from seven to twenty-five members. See *Bd. of Educ. v. Memphis City Bd. of Educ.*, No. 11-2101, 2011 WL 3444059, at \*5 (W.D. Tenn. Aug. 8, 2011).

62. *Memphis City Bd. of Educ.*, 2011 WL 3444059, at \*46.

63. TENN. CODE ANN. § 49-2-502(b) (2016).

must include, such as ensuring “no diminution in the level of the educational service in the schools in any of the systems involved,” transferring existing assets and liabilities, and preserving pension and tenure rights of employees.<sup>64</sup> Significantly, the statute also removed a decades-old statutory ban on the creation of new school districts, though only in the affected county.<sup>65</sup> Thus, even as the statute dictated how a consolidated school district would be created, it opened the door to the dissolution of that same consolidated district. In 2011, Judge Mays found any challenge to this portion of the statute not yet ripe, writing that “any harm resulting from the addition of this sub-section would not occur until an attempt was made to create a municipal school district or special school district.”<sup>66</sup> Although there had been a clear desire on the part of suburban governments to secede from a merged district,<sup>67</sup> Judge Mays noted that “[n]othing in the record suggests that such an attempt has been made or will be made in the future.”<sup>68</sup>

This was the context in which I found myself seated in the audience at an August 2011 MCS Board meeting. The now-governing statute, section 49-2-502, called for appointment of five members of the transition team from each of the affected school districts, as well as five others appointed by the county mayor and three members appointed through the state government. MCS was the first to act, and I had been nominated to serve on what would come to be known as the Transition Planning Commission (TPC). To that point, I had only played the role of educator, helping the community work through the confounding events of the previous nine months; and with my appointment to the TPC, I would enter the fray. As a law professor, I felt some conflict about taking on this role. Education reform in Memphis had been a primary topic of my research agenda, and I feared that participating directly might impact my ability to examine this rich period of change as a scholar. However, I also felt strongly about the importance of this moment to the community and I hoped my experience studying

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64. *Id.* §§ 49-2-502, -1201(i)(2).

65. *Id.* § 49-2-502(b)(3) (2016).

66. *Memphis City Bd. of Educ.*, 2011 WL 3444059, at \*26.

67. See Sam Dillon, *Merger of Memphis and County Districts Revives Race and Class Challenges*, N.Y. TIMES (Nov. 5, 2011), <https://www.nytimes.com/2011/11/06/education/merger-of-memphis-and-county-school-districts-revives-challenges.html>.

68. *Memphis City Bd. of Educ.*, 2011 WL 3444059, at \*26.

the history of desegregation might help avoid some of the mistakes of that era which had impacted the landscape of Memphis education for generations. Further, though I loved the work of a professor inside of the University of Memphis law school—teaching, writing, working with students—I recognized the value that academics might bring to unfolding public issues and felt that participating directly might even serve as a model for my students to engage as citizens beyond the typical practice of law. Ultimately, the MCS Board appointed me, and a gaggle of reporters surrounded me for comment as the meeting closed.<sup>69</sup> By the time the full TPC gathered for the first time weeks later, I had found my footing and pushed through any internal conflicts. In that moment in September 2011, I remained optimistic that the merger process could lead toward a more cohesive community that could move beyond our entrenched racial, economic, and geographic divisions. Cited as the best exemplification of the enthusiasm of the moment, I told a reporter, “I’m excited to be part of something that we’ve been kicking down the road for a long time.”<sup>70</sup>

### C. *The Work of the TPC*

The TPC consisted of 21 members, 18 of whom had been appointed and 3 ex officio members (the board chairs of MCS and SCS, along with county mayor Mark Luttrell). Joining me on the Commission were a university president, the general counsel of FedEx Corporation, the mayor of Bartlett (one of the suburban municipalities within Shelby County), a school principal, the local director of the advocacy group Stand for Children, and several other prominent leaders. Our work began in October 2011, guided by the hand of Barbara Prescott, a former MCS board member and the unanimously appointed chair of the TPC. Throughout the process, Dr. Prescott navigated difficult currents with strength and good humor, an exemplar of leadership. In

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69. I vividly recall being a bit overwhelmed by the speed with which the reporters approached. I had grown comfortable with the media over the preceding months, but those encounters had been one-on-one; the night of my appointment, I was surrounded by a larger group sticking cameras, lights, and microphones in my face. After stammering a bit, I caught the eye of a friendly reporter, found my way, and waded further into public service. I remain grateful to her.

70. Otis Sanford, *Unified School Board Off to Symbolic Start*, COM. APPEAL, Sept. 25, 2011, 2011 WLNR 28007960.

addition to Dr. Prescott's steady leadership, I also admired the passion and incisive questioning of Kenya Bradshaw (director of Stand for Children), the straightforward brilliance of Christine Richards (general counsel for FedEx Corporation), the practical vision of Louis Padgett (principal of Northaven Elementary, an SCS school), and the humble understanding of the currents of the community displayed by Fred Johnson. Through the nine-month heart of the TPC's work, I was regularly impressed at the earnestness with which commissioners approached their task. Even Bartlett Mayor Keith McDonald, who made no secret about his opposition to the merger and his desire to create a new school district for his city, engaged sincerely in the work of crafting a merger plan for a county-wide school district.<sup>71</sup>

Perhaps, as Dr. Prescott joked, the members of the TPC got along so well because we had no real power. This was true. The statutory charge to the TPC was to create a merger plan; but the implementation of that plan would be left to the new, countywide school board.<sup>72</sup> Still, as the body with the task of shaping the potential future system, the TPC took the lead on not only imagining what such a system might look like, but also considering how getting there might be accomplished. Beyond the legal and political maneuverings impacting the planning process, the TPC operated amidst anxious teachers, parents, and students, each of whom found his or her own place along the spectrum from worry about disruption of the status quo to excitement about

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71. Through an anonymous donation, the TPC was able to hire Boston Consulting Group (BCG) to aid in the transition process. Although this assistance was not without controversy, see Diane Ravitch, *Theft of Public Education in Memphis (Update)*, DIANE RAVITCH'S BLOG (July 2, 2012), <https://dianeravitch.net/2012/07/02/theft-of-public-education-in-memphis/>, I found the BCG personnel to be uniformly excellent. They had both the benefit and challenge of being outsiders to the community. On one hand, they were able to observe our community without any personal baggage and with the ability to place Memphis in a broader context; but they also faced the challenge as outsiders of understanding local context and culture that might not be obvious on the surface. Still, the individuals with whom I worked were fully invested in devising a plan that was responsive to our community.

72. After Judge Mays's August 2011 ruling, the various parties in the litigation came to an agreement as to the makeup of a new countywide school board. For the period of transition 2011–2013, 7 newly-appointed school board members would join the existing MCS Board (9) and SCS Board (7) on a 23-person school board. Then, when the county-wide district began merged operations in 2013–2014, the 7 newly-appointed members would continue on as the school board.

creating a new model of education for the community. To give the public a sense of the values informing its work, the TPC early on settled on a set of guiding principles:

- The academic success and well-being of our students come first
- Educators and staff are our most important resource
- We have high expectations
- We are all in this together
- We aim to enhance our district by balancing stability with needed change
- We desire excellent community schools and options for all
- We believe parent engagement is essential
- We must save where we can to fund what we need
- We value strong leadership
- This is our once-in-a-lifetime opportunity.<sup>73</sup>

The guiding principles were an attempt to speak to the various worries we knew were present throughout the community. They spoke of the centrality of students and teachers, the importance of family support, and the need to maintain stability while also pushing to improve. They hinted at some of the tensions lurking in the TPC’s work—maintaining “community schools” while also providing “options” and needing to be fiscally responsible (“save where we can”) while providing resources to achieve goals (“fund what we need”). And they captured the aspirations of the moment that so excited me— “all in this together,” “once-in-a-lifetime opportunity.” As the TPC began the more substantive portion of its work at the outset of 2012, there was cause for optimism.

It did not take long, however, to puncture that optimism. The TPC divided itself into various committees, each charged with the task of crafting a portion of the plan as required by statute. I was assigned as co-chair of the Educational Services Committee and as a member of the Communications Committee. In the latter role, I participated in “listening sessions” in the community during which we presented a brief overview of the TPC and the merger process and then listened as members of the community raised questions, concerns, or hopes for the

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73. SHELBY CTY. TRANSITION PLANNING COMM’N, TRANSITION PLAN FOR THE MERGER OF MEMPHIS CITY SCHOOLS AND SHELBY COUNTY SCHOOLS 20 (2012).

merged system. In January and February, the TPC held 14 such listening sessions across the county, reaching nearly 3,000 people.<sup>74</sup> The one I remember most vividly was the first, on January 10, 2012, at United Methodist Church in Collierville. Collierville, situated in the southeast corner of Shelby County, is one of the county's six suburban municipalities. It is geographically far from the governmental and economic hubs in Memphis—30 miles from downtown Memphis. That distance, however, seemed to shrink annually as development stretched east, filling in gaps that had been farmland with residences and shopping centers. In 1990, the population of Collierville had been 14,427.<sup>75</sup> By 2010, it had tripled to 45,603.<sup>76</sup> In a county that was 54.1% African American and 41% White, Collierville was 76.1% White and 12.4% African American in 2010.<sup>77</sup>

It would have taken me over half an hour from my home in Midtown to reach the church in Collierville where we held our first listening session. I do not remember everything that was said that evening, but I remember that the audience was sizable and the energy heightened. One comment, however, sticks out: “With all due respect, I hope you fail.” I was not naïve about the sentiments in the suburbs about the merger. I had seen the returns from the 2010 government consolidation referendum and the swiftness with which suburban leaders and citizens mobilized to avoid a school district merger. But it was still jarring to hear the flatness with which this comment was delivered. Here we were, in the earliest stages of work that would impact the entire county, and it was apparent that for some, there was no acceptable plan we could devise.

That evening, we heard two concerns that would animate the entire process from the suburban point of view—a desire to maintain local control and assertions that smaller school districts were better than larger ones. More specifically, we heard concerns that the existing suburban schools would be disrupted, with teachers and students being

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74. *Id.* at 23–24.

75. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION: GENERAL POPULATION CHARACTERISTICS TENNESSEE 2 (1992), <https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-44.pdf>.

76. *QuickFacts Collierville Town, Tennessee*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/fact/table/colliervilletowntennessee/RHI125218#RHI125218> (last visited Mar. 29, 2020).

77. *Id.*

moved throughout the county. “Busing” was cited as a reason to oppose a countywide district, displaying a worry among some that children would be reassigned and sent far from home. I knew this to be unlikely given the legal, political, and financial context in which the merger unfolded. Legally, both districts had been released from desegregation orders (though SCS had only been released in 2009<sup>78</sup>). Politically, the early 1970s had proven how resistant some would be to reassignment, and there was talk of a loss of population to adjacent Fayette County if the districts merged and students were reassigned. Finally, given the financial state of the districts, it was unlikely that money would have been spent on transportation beyond that necessary to get students safely to school. Operating bus routes across a vast, sprawling county would stress the district’s finances substantially, even if there was an educational case for greater racial and socioeconomic integration. The frequency with which busing was cited as a danger of the merger, however, revealed the depth to which the battles of desegregation continued to influence thinking about education. The scars of that time remained unhealed.

Not every speaker that evening was so adamantly opposed to our task; indeed, many expressed a combination of concern and hope about a potentially radical change. Suburban residents, in particular, had reason for anxiety. The merger was being foisted upon them, and they stood to see their influence over the schools in their communities diluted in a merged district. Many had chosen to live outside of the Memphis city limits, in part, based on perceptions about relative school quality, and a merger might be seen to threaten that choice.<sup>79</sup> Still, I was disheartened by those voices—often the loudest—who called for all-out resistance to a merger as it ran directly counter to the TPC governing principle I found most compelling—we are all in this together. Lurking beneath the kneejerk rejection of merger, before any aspect of a merger plan had taken shape, was a narrowed self-interest that hampered effective solutions to the county’s problems, including education.

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78. *Robinson v. Shelby Cty. Bd. of Educ.*, 566 F.3d 642, 646–47 (6th Cir. 2009).

79. Daniel Kiel, *The Enduring Power of Milliken’s Fences*, 45 URB. LAW. 137, 153–55 (2013) (describing disparate perceptions about school quality and citing, *inter alia*, surveys performed for the benefit of the TPC by Yacoubian Research highlighting the perception in the suburban municipalities where 65% of respondents graded MCS a D or F, while 75% graded SCS an A or B).

It would be misleading to imply that all of the resistance to the merger came from outside of the Memphis city limits. Memphians, too, were unsure about where a merger might lead. Neighborhoods built around schools, families relying on school-based jobs, and children in need of stability faced anxiety about the future. There were similar expressions of both hope and concern, and there was also a sense of distrust about such a massive reorganization. This, too, echoed the desegregation era, where an intervention that might have seemed hopeful at first had proven ineffective. Several speakers at the Memphis-based listening sessions admonished the perceived disparities among the existing school districts and registered anger at the vehemence against which merger was being fought in the suburbs.

For me, the most memorable of the Memphis-based sessions took place at the local headquarters of the American Federation of State, County, and Municipal Employees (AFSCME), the union representing the custodial staff of MCS. More than other MCS employees outside of the central office, these workers faced the prospect of lost employment; one option being floated to cut costs in the merged district involved outsourcing custodial responsibilities. The sentiment at the AFSCME hall in downtown Memphis was largely hostile, and one speaker seemed intent on speaking her disapproval with the work of the TPC directly at me. As she spoke, I felt the extent to which, regardless of my motivations for serving on the TPC and my professed hope for community improvement, in the listening sessions, I represented a (largely White) power structure that many in the community had good reason to be suspicious of.

The listening sessions, like the educational presentations I gave throughout the county in early 2011, provided me with a broad exposure to the diverse individuals and interests of Shelby County. Though many were anxious about the educational future, and there were certainly some who were outright opposed to even the thought of coming together, I sensed a commonality of purpose across the disparate venues. Regardless of whether we were on a massive suburban church campus or a high school in an economically struggling neighborhood, many of the comments were the same. Where will my child go to school? How will a merger make schools better? Will this program be preserved? I only wish the participants could have heard one another and seen this commonality themselves. As it was, due to the barriers of distance, race, and economics, most of our listening sessions

consisted of homogenous audiences. Though the overall range of voices we heard was very diverse due to intentional efforts to visit a range of neighborhoods, each individual session was not. Only the commissioners (and the media) got to see just how much was actually shared.

One of those common questions was the toughest—how will a merger make schools better? After all, convincing people that a merger was necessary to avoid an unsustainable school funding system relying solely on Memphis property taxes could not really be put on a bumper sticker: “Support the Merger to Avoid Disaster!” And the truth was that there was no guarantee that a merger would make a significant difference educationally, certainly not in the short term. Even those with minds open to merger needed a tangible and realistic hope that it would be worth all the effort and anxiety, but offering that hope was difficult. The merger was not bringing with it any influx of new resources beyond what the districts had to begin with. It was possible, in fact, that the city of Memphis might pull its school funding since it had no legal obligation to support the new district as it had had to support MCS.<sup>80</sup> This would actually lead to a net *decrease* in funding. In addition, the context in the community made significant redistribution of students that might lessen the number of schools made up almost entirely of students experiencing economic disadvantage highly unlikely. The merged district would exist in the same schools, have mostly the same supplies, utilize the same curricula (at least initially), offer the same programs, rely on mostly the same teachers, and serve mostly the same students within the same schools. When people asked how the merger would improve schools, the most realistic answer was that it would take time. There was a chance that best practices could be shared across the district or that, eventually, resources could be better targeted as needed, but this merger was not the beginning of an educational revolution. It may have been a “once-in-a-lifetime” opportunity, but any fruit from that opportunity would take years to bear.

My other committee assignment, Educational Services, was tasked with creating the foundation upon which such educational improvement might one day occur. The merger added another layer to an already shifting educational landscape in Memphis. Even before the specter of the largest school district consolidation in American history,

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80. The city of Memphis did end up ceasing funding schools after the merger.

Memphis was seen as a hub of contemporary education reform. In 2010, Tennessee had been the largest recipient of the federal government's first round of funding under its Race to the Top program.<sup>81</sup> In its application, the state had lifted its cap on charter schools and created a statewide turnaround district, the Achievement School District (ASD), to serve the state's lowest performing schools.<sup>82</sup> Both of these changes would be felt most substantially in Memphis, the district with the largest number of low-performing schools. MCS received about \$70 million in Race to the Top funding, by far the most among Tennessee districts.<sup>83</sup> In addition, in 2009, MCS had also received a sizable multi-year grant from the Gates Foundation to redesign its teacher recruitment, retention, and evaluation systems,<sup>84</sup> an opportunity that, along with the Race to the Top funding, brought national attention as well as "new assets, new decision makers, and new stakeholders to the process of making decisions about public education in Memphis and Shelby County."<sup>85</sup> New charter schools, including national operators, were beginning to open, and other national organizations, such as Teach for America, were establishing a strong base of operations in Memphis as part of the reform movement. These new players entered a landscape that still included two large school districts, each making its own efforts to tackle the community's educational challenges.

Amidst the unfolding drama surrounding the merger, President Barack Obama selected Booker T. Washington High School in southwest Memphis to deliver a 2011 commencement address, affirming the city as a hub in educational change. "[I]f success can happen here at Booker T. Washington," the President said, "it can happen anywhere in Memphis. And if it can happen in Memphis, it can happen anywhere in Tennessee. And [if] it can happen anywhere in Tennessee, it can happen all across America."<sup>86</sup> The merger provided an additional

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81. Richard Locker, *Tennessee Wins Big in Race to the Top School Funding*, COM. APPEAL, Mar. 30, 2010, 2010 WLNR 27835230.

82. Daniel Kiel, *The Endangered School District: The Promise and Challenge of Redistributing Control of Public Education*, 22 B.U. PUB. INT. L. J. 341, 373 (2013).

83. Rushing, *supra* note 37, at 91.

84. Wright & Jacobs, *supra* note 39, at 223.

85. Rushing, *supra* note 37, at 91–92.

86. *Read President Obama's Commencement Address at Booker T. Washington High School*, TIME (June 2, 2016, 2:31 PM), <https://time.com/4340922/obama-commencement-speech-transcript-booker-t-washington-high-school/>.

opportunity to disrupt the structure of the educational status quo in Shelby County, and the TPC sought to design a new structure that could best enable student success.

Perhaps the craziest fact about the merger of MCS and SCS was that the central offices of the two districts already shared a building. At the corner of Hollywood and Avery, near the geographic center of Memphis, is a drab beige building surrounded by a sea of parking. It is actually two buildings, connected by a hallway. The northern portion of the building, closer to Avery, housed the central offices of MCS, while SCS administrators worked separately in the southern portion of the building. The two offices were connected by an empty corridor, locked on either side behind windowless doors.<sup>87</sup> Former MCS deputy superintendent Irving Hamer called it the “Berlin Wall.”<sup>88</sup> The corridor was not only symbolic, a physical reminder of the separation of the county’s top education officials from one another. Perhaps the most inspiring work I did on the TPC was in watching what happened when those officials were asked to work together.

In creating the TPC’s recommendations, the Educational Services committee sought first to learn what each district was already doing on a huge range of topics, from serving students under the Individuals with Disabilities Education Act (IDEA) to assigning teachers to schools and classrooms to making disciplinary decisions. The TPC asked individuals from each district to meet and work with their counterparts to identify what would work best for a new district. These were individuals who, perhaps more than any other group of stakeholders, operated amidst great anxiety about their own future employment. After all, it seemed possible that many central office positions could be cut to reduce duplication in a merged district. Yet, despite the noise surrounding the process outside the building and whatever uncertainty might have existed for them personally, these professionals came together toward creating a plan that took the best from the existing districts.<sup>89</sup> The work of our committee could not have proceeded without them, and though the district did not remain together, the education

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87. Dillon, *supra* note 67.

88. *Id.*

89. Michael Kelley, *Focus Difficult with Transition*, COM. APPEAL, Feb. 13, 2012, at A1, 2012 WLNR 3101666 (“Each template detailed one aspect of special ed and how SCS handles it in one column and how MCS handles it in the second, and what the two districts have in common in the third . . .”).

plan provided a starting point of priorities for the district that would serve the majority of public school students in Shelby County.<sup>90</sup>

Among the top of those priorities was a stronger focus on early childhood education. The TPC recommended that 100% of the county's four-year-olds have access to a high-quality preschool experience<sup>91</sup> and expansion of pre-kindergarten has been a priority among educational leaders since. To achieve this, the TPC recommended not only that the district expand eligibility criteria and the number of public pre-k classrooms, but also that the district support a collaborative of community organizations to advocate for this and other priorities with a broad community impact.<sup>92</sup> In this recommendation, the TPC confronted the two non-schooling factors that hamper educational attainment in Shelby County.

The focus on pre-kindergarten came out of a recognition that some of the disparities that persist among the community's children already exist before students even enter schooling. This is a result of entrenched poverty, and it showed itself in the benchmarking performed by the TPC's assessment committee. For example, among third graders, 66% of higher-income students were proficient or advanced in reading on the state's assessment, compared to 22% of lower-income students.<sup>93</sup> The TPC acknowledged that the challenge went beyond the work of whatever school districts exist in the county. The call for a community collaborative grew out of the same recognition. Though the landscape of institutions serving the children of Shelby County might be diverse—school districts, community and faith-based organizations, public and private institutions—each of these providers played a part in the larger effort to ensure quality and equity in the development of the next generation of Shelby County residents. Yet, so often, the efforts lacked cohesion and were animated more by competition than an “all in this together” conviction. The result has been fragmentation and rivalry—city schools and county schools, public schools and private schools, traditional schools and charter schools.

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90. I have written elsewhere about the TPC's proposed delivery model, the “Multiple Achievement Paths” plan, and how it fits among broader trends in educational restructuring. Specifically, the TPC Plan called for a balance between autonomy for schools and a reliable central district. *See* Kiel, *supra* note 82.

91. SHELBY CTY. TRANSITION PLANNING COMM'N, *supra* note 73, at 34.

92. *Id.* at 35, 47.

93. *Id.* at A26.

The TPC's call for a collaborative was a call for a change in mindset among the diverse institutions serving the community's children. It was my hope that a single, countywide district would enable and symbolically encourage such collaboration—still, that's quite a mouthful for a bumper sticker.

#### *D. Unraveling*

Though the TPC sought to operate independent of the various interests swirling among the relevant political bodies still vying to shape the county's educational future, as the work neared the June 2012 target for an initial draft of a plan, maintaining that independence became increasingly difficult. In particular, the efforts of the county's six suburban municipalities—Arlington, Bartlett, Collierville, Germantown, Lakeland, and Millington—to avoid joining or quickly break away from a merged district continued in parallel to the work of the TPC to create a merged district.

As mentioned earlier, the legislation that created the TPC also opened the door for the creation of new school districts within Shelby County. Even before the TPC's first meeting, the suburban municipalities commissioned studies regarding the feasibility of creating new school districts for their communities, and each seemed eager to do so.<sup>94</sup> However, an attorney general opinion interpreting the relevant statute concluded that the municipalities could not take any official action toward creating new school districts—such as passing ordinances and holding referenda—until the transition process had concluded.<sup>95</sup> Thus, the municipalities would have to wait until August 2013, the date that the countywide district was to begin operation, before taking any official steps. To remedy this, suburban representatives in the state legislature simply pushed to change the law. State Senator Mark Norris put forth a bill that would amend the original Norris-Todd legislation to enable the suburban municipalities to hold referenda on the creation of new municipal districts as early as August 2012. In the context of

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94. See Lela Garlington & Cindy Wolff, *Germantown, Collierville Approve Pact with Consulting Firm Regarding Operation of Municipal District*, COM. APPEAL, Sept. 13, 2011, 2011 WLNR 28009044; Cindy Wolff, *Feasibility Report: Millington Must Annex, Raise Taxes to Form Own School District*, COM. APPEAL, Mar. 9, 2012, 2012 WLNR 28810567.

95. 12 Tenn. Op. Att'y Gen. 39 (2012), 2012 WL 1061136.

that legislation, Senator Norris suggested that achieving clarity on the likelihood of municipal districts would aid the TPC in crafting a meaningful plan, a comment that drew a rebuke from TPC Chairperson Barbara Prescott: “I am simply requesting, respectfully, that you not make statements that imply that the TPC favors, requested or has indicated that the bill and amendment you are sponsoring will assist in its planning process.”<sup>96</sup> Dr. Prescott later indicated a desire to complete the process under the same legislation under which the TPC began its work.<sup>97</sup>

In this context, TPC commissioner Jim Boyd raised a motion through which the TPC would formally object to the pending legislation in April 2012. I supported that motion, noting that it was not even clear that the statute enabling the creation of municipal school districts was constitutional.<sup>98</sup> The motion failed, however; even Dr. Prescott voted against, fearing that such a statement would give the appearance that the TPC opposed municipal districts.<sup>99</sup> From my perspective, I certainly did not like the idea of municipalities breaking away from a countywide district, though I recognized that the law had been written giving them a right to do so. However, I felt that allowing referenda on the question *before the TPC had even completed its plan* to be not only inconsistent with the original statute under which the TPC began its work, but also designed to pre-determine the outcomes of such referenda. Given the choice between an unknown countywide district and an unknown municipal district, I knew that many suburban residents would prefer the latter. The timing of the referenda, which would actually take place August 3, 2012, just one day after the TPC plan was submitted to the countywide school board, forced voters to pre-judge. The original statute had created some space for a countywide district, as planned by the TPC, to demonstrate its success before suburban voters could be asked whether they wished to leave or not. The new, accelerated timeline set up a situation where the merged district was dead

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96. Kontji Anthony, *Heated E-mail Exchange About Municipal Schools*, WMC ACTION NEWS 5 (Sept. 10, 2012, 1:03 AM), <https://www.wmcactionnews5.com/story/19497329/heated-e-mail-exchange-about-municipal-schools/>.

97. Michael Kelley, *School Planners Decline Lobbying—Panel Won’t Protest Bills for Municipal Districts*, COM. APPEAL, Apr. 20, 2012, at B1, 2012 WLNR 8374582.

98. *Id.*

99. *Id.*

on arrival—I understood that with only fears about a countywide district, suburban residents would undoubtedly opt out.

Over the next several months, the TPC completed its plan, submitted it for approval, and began assisting in implementation. However, the work to dismantle the district accelerated. The proposed change to the legislation allowing municipal districts passed, and referenda were held in August 2012. As expected, voters in each municipality voted overwhelmingly to create new districts.<sup>100</sup> Four of the six suburbs had votes in favor of 80% or higher.<sup>101</sup> With the suburban municipalities having now taken official action toward creation of new school districts, the issue that had not been ripe in the first run of the pending federal lawsuit<sup>102</sup> now sat squarely before the court. It was in this moment that I was called to make the walk through downtown Memphis (past the Jefferson Davis statue) to the Clifford Davis/Odell Horton federal building to serve as an expert witness. I was asked to testify as to the effect the creation of municipal districts would have on the TPC's plan and on the overall educational landscape in Shelby County. The primary legal issue before the court was the constitutionality under the Tennessee constitution of the targeted lifting of the prohibition on new school districts, which, under the existing statute, realistically only applied to Shelby County. The charge was that such a statute was “special legislation” rather than “general legislation” and thus violated article XI, section 9 of the Tennessee constitution.<sup>103</sup> My testimony was not on this legal issue, but rather on the practical impact of allowing new school districts.

This was my first time serving as a witness in a trial—indeed, it was my first participation of any sort in a federal trial—and though I was certainly invested in the issues at stake, I also found the experience to be outstanding professional development for my day job as a law

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100. Pohlmann, *supra* note 37, at 127.

101. *Id.*

102. *See supra* notes 66–68 and accompanying text.

103. The Tennessee constitution reads: “[A]ny act of the General Assembly private or local in form or effect applicable to a particular county or municipality either in its governmental or its proprietary capacity shall be void and of no effect unless the act by its terms either requires the approval by a two-thirds vote of the local legislative body of the municipality or county, or requires approval in an election by a majority of those voting in said election in the municipality or county affected.” TENN. CONST. art. XI, § 9.

professor. I felt the full pressure of answering questions directly, and the anxiety of being cross examined.<sup>104</sup> I drew sarcastic comments from Judge Mays when, midway through my testimony, I asked for a short recess so that I could call the law school and cancel my class—my time on the stand was running longer than anticipated. These experiences, like all of my experience in practice prior to becoming a professor, would inform my teaching by enabling me a perspective I could share with students.<sup>105</sup>

In the end, Judge Mays concluded that the statute improperly targeted Shelby County. Regardless of having been phrased in general terms, Judge Mays concluded that the lifting of the ban on new school districts could really only apply in Shelby County.<sup>106</sup> As such, any actions taken to that point by the suburban municipalities toward the creation of new school districts were declared void, and the municipalities were enjoined from taking any new action under the statute.<sup>107</sup> One practical effect of this decision in November 2012 was that there would indeed be at least one year in which the public schools of Shelby County operated as a single, countywide school district. This district would be named Shelby County Schools, though it would encompass the schools formerly in SCS as well as all former MCS schools. The TPC's plan, as adopted and implemented by the new school board, would go into effect, at least to begin with.

Another effect, however, was that the state legislature went back to the drafting board and simply wrote a new statute that did not trigger

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104. In a twist of fate, the law firm representing the suburban interests in the trial was the firm at which I worked prior to becoming a professor. Thus, I was cross examined by an old colleague who I had worked for as an inexperienced associate and found the opposing counsel's table filled with former colleagues and students.

105. Now, with even greater distance since I left legal practice, I try to offer regular reminders to myself and my students that as interesting as the legal questions we encounter might be, the practice of law is highly pragmatic.

106. *Bd. of Educ. v. Memphis City Bd. of Educ.*, 911 F. Supp. 2d 631, 659–60 (W.D. Tenn. 2012) (finding that “[t]he legislative history of [the statute], taken as a whole and fairly considered, firmly establishes that [it] was designed to apply only to Shelby County” and that the statute “establishes a series of conditions that have no reasonable application, present or potential, to any other county”).

107. *Id.* at 660.

the same constitutional concerns.<sup>108</sup> That statute, which went into effect in April 2013, just four months before the countywide district was to begin operation, opened the door for another round of referenda in the suburbs in July 2013. Even though the TPC's merger plan was complete, the votes were again taken without the benefit of voters having seen what a countywide district would actually look like. The results were again overwhelming, even more so: votes in four of the suburbs were over 90% in favor.<sup>109</sup>

Thus, the merged Shelby County Schools opened in August 2013 with an expiration date less than a year away—this would be both the largest school district consolidation in American history<sup>110</sup> and the briefest. As the 2013–14 school year unfolded, SCS negotiated with the municipalities over transfer of school buildings and the distribution of assets and liabilities, settling the terms for a divorce ending a marriage that was over before it had started. In August 2014, instead of the single countywide district, Shelby County was home to several school districts—SCS continued to serve the 110,000 students in Memphis and unincorporated portions of the county, while six new municipal districts served the 35,000 students in the suburban municipalities. Though suburban leaders would not have framed it as such, the secession from association with Memphis certainly signaled an aversion to sharing resources with students in Memphis. Adding to that rejection from the suburbs, the city of Memphis also ceased its own contributions to students in the aftermath of the merger—the city argued that its obligation to contribute had been tied to MCS. Now that MCS no longer existed, the city had no obligation to continue contributing the tens of millions of dollars annually that it had always provided for local education. This, of course, ignored the practical reality that though there had been a change in name and character, the new Shelby County Schools was an almost exact reincarnation of the pre-merger Memphis City Schools, the only difference being that students from

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108. Act of April 24, 2013, Tenn. Pub. Acts, ch. 256, § 1 (amending TENN. CODE ANN. § 6-58-112(b) to remove the restriction on the creation of new municipal school districts).

109. Pohlmann, *supra* note 37, at 127.

110. See Paul M. Wright & John M. Amis, *The Largest School District Consolidation in US History: A Cautionary Tale*, in RACE, ECONOMICS, AND THE POLITICS OF EDUCATIONAL CHANGE: THE DYNAMICS OF SCHOOL DISTRICT CONSOLIDATION IN SHELBY COUNTY, TENNESSEE 243, 243 (John M. Amis & Paul M. Wright eds., 2018).

unincorporated areas were now being served by the district. The abandonment of Memphis students deepened even further when Memphis voters rejected a sales tax increase to fund expanded pre-kindergarten in November 2013,<sup>111</sup> a result that could be read as a rejection of another of the TPC's recommendations.<sup>112</sup>

In the end, what began for me as a moment of profound hope ended in sadness. If my primary hope had been the potential long-term psychological change from a district that served the entire county, the secession that unfolded would have a vastly different psychological effect. Instead of "we are all in this together," the merger produced a reaffirmation of narrowed self-interest and separation. That such an outcome had been enabled by state law that had been repeatedly changed in the middle of the process—first (helpfully) to create the mechanisms for transition, then to accelerate the secession process, and finally to correct and reinstate the process for the creation of new districts—confirmed which interests the law aimed to protect.<sup>113</sup> The

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111. Jackson Baker, *Memphis Voters Reject Pre-K Sales-Tax Increase*, MEM. FLYER (Nov. 22, 2013), <https://www.memphisflyer.com/memphis/memphis-voters-reject-pre-k-sales-tax-increase/Content?oid=3553389>. The city and county governments have since set aside funding to preserve pre-K classrooms, and a 2019 sales tax increase might provide additional funds to support early childhood education. See Jacinthia Jones, *Memphis Voters Approved a Sales Tax Increase for Police and Fire—And Maybe Pre-K, Too*, CHALKBEAT TENN. (Oct. 9, 2019), <https://chalkbeat.org/posts/tn/2019/10/09/231984/>.

112. Admittedly, utilizing a sales tax increase with its regressive effects in a community saddled with significant poverty is not the optimal way of raising revenue, even for an investment in early childhood education. Coupled with the city's 2008 effort and 2013 decision to end school funding, the cumulative message, however, seems to be a lack of willingness to commit resources to local children. To my mind, that sentiment is revealing of where public priorities are. See Daniel Kiel, *Message to City Schools' Students: Buzz Off*, UNEVENKIEL (June 20, 2008), <https://unevenkiel.wordpress.com/2008/06/20/message-to-city-school-students-buzz-off/> ("The damage done by the City Council's action is not limited to the short-term budgetary mess that has been created or the lawsuit the school board filed this week in an attempt to rescind the budget cuts—though both of those will be huge distractions from the district's primary mission of education. The most significant damage comes from the signal the action sends: The Memphis City Schools are not worth supporting. While the technical substance of the council's action may have been fiscal, there can be no mistaking the message that supporting the city schools is not a high priority.").

113. The power imbalance among city and suburbs in the legislature was demonstrated by state laws proposed by Shelby County legislators which required

city's abandonment of public school funding saddened me further—not only was the sense of common destiny rejected, the de-prioritization of education spoke to a grim view of the future of our community. I do not regret the hours I committed to this process, but I deeply regret the outcome. Some merger supporters might point to success in having prevented the fiscal worst case scenario for Memphis students, the possibility that local funding for Memphis schools might rest solely on the shoulders of Memphis taxpayers, but that offers me small solace from a moment that represented the opportunity to drastically shift our local education narrative. Such opportunities may not be once-in-a-lifetime, but they likely are once-in-a-generation. For this generation, we failed to disrupt the status quo.<sup>114</sup>

### III. CONTEXT

From December 2010 when the MCS charter was surrendered through the August 2014 dawn of the new educational landscape for Shelby County and its seven separate school districts, I was focused on the education and community issues right in front of me. However, I was aware that the unfolding structural shifts in Shelby County, however unique, were part of a broader context. Both school district consolidation and school district secession have played and are playing roles in the enduring effort to increase equity in education. In this Part, I expand the lens examining the merger and de-merger in Shelby

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support from legislators far from Shelby County to overcome the concerted opposition of state lawmakers from Memphis.

114. To say that the merger failed to disrupt the status quo is not to say other efforts to improve quality and equity are not valuable. Tireless work continues to improve education in Shelby County, and many efforts to reform education that existed prior to the merger continued in its wake. These include national trends, such as charter schools, turnaround districts and models, assessment and accountability, and reconsideration of teaching policies. As has been the case nationally, the results have been checkered. There have been successes since the merger/demerger, and there have been failures, but these reflect the regular churn of steering a large school district serving a significant number of students in poverty. That challenge would have remained even in a merged district. To my mind, the merger went beyond a typical reform to represent an opportunity for a structural reimagining of local education—indeed, that was the result, though not the one I would have preferred. Thus, to say that the merger failed is not to lament the idea that a merged district would have magically solved all local education problems; rather, it is to regret a missed opportunity to create an institution that the entire community might feel a stake in supporting.

County from my own personal experiences to how this event fits into larger stories beyond Shelby County.

During the twentieth century, school district consolidations radically transformed the nation's educational landscape from one with 200,000 small districts into one with fewer than 20,000 districts.<sup>115</sup> Consolidating districts brought the potential for efficiency through economies of scale and for greater equity through standardization of the educational experience.<sup>116</sup> In some instances, consolidation occurred in the midst of school desegregation, providing an additional opportunity for improved equity by creating larger, more diverse school districts with greater flexibility to produce diversity in schools.<sup>117</sup> Though school district consolidation stalled as a trend in the 1970s following the Supreme Court's decision in *Milliken v. Bradley*, the twenty-first century has seen an increase in government and school district consolidation achieved through dissolution, as occurred in Shelby County. Due to economic decline or fiscal crisis, dissolution of governmental units—like Memphis City Schools—has increased.<sup>118</sup> Such dissolutions can have the same effect as school district consolidation as the dissolved entity becomes a part of something larger, just as MCS dissolved to become part of an enlarged Shelby County Schools. Indeed, one observer has noted:

It would be tempting to view the Memphis dissolution as accomplishing what, decades ago, the *Milliken v. Bradley* Court decided could not be done with civil rights law: the annulment of school district borders that separate a high-poverty, urban, and minority district from a middle

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115. Christopher Berry, *School Consolidation and Inequality*, in BROOKINGS PAPERS ON EDUCATION POLICY 49 (Tom Loveless & Frederick M. Hess eds., 2006/2007).

116. Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 511 (2010).

117. Daniel Kiel, *Accepting Justice Kennedy's Dare: The Future of Integration in a Post-PICS World*, 78 FORDHAM L. REV. 2873, 2878–79 (2010) (discussing consolidation of Louisville and Jefferson County schools in the context of school desegregation there).

118. Anderson, *supra* note 18, at 59; *see also* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L. J. 1364 (2012).

class, suburban, and predominantly white district in order to achieve school desegregation.<sup>119</sup>

However tempting, such consolidation was not ultimately accomplished, in part because the dissolution was overridden by forces that allowed secession from the consolidated county-wide district.<sup>120</sup>

Like consolidation, school district secession also has roots in education history and is experiencing a contemporary resurgence, of which the Shelby County district secessions are a part. One reaction to the 1954 *Brown* decision was for predominantly White municipalities to attempt to secede from larger school districts to avoid federal court oversight.<sup>121</sup> The South typically had larger, countywide school districts—ironically, this was in part to help facilitate *segregation* by ensuring large enough student populations for racially segregated schools<sup>122</sup>—and when the prospect of desegregation arrived, secession offered a path for avoidance. The Supreme Court ultimately invalidated such secessions when the effect would impede desegregation.<sup>123</sup> Thus, while existing school district boundaries in a metropolitan area could not be crossed to remedy desegregation in a single district,<sup>124</sup> the Court prohibited the creation of *new* boundaries to avoid desegregation.<sup>125</sup> In school districts under desegregation orders, secession was not an option.

In the twenty-first century, however, school districts are increasingly free of federal desegregation orders. In the 1990s, the Supreme Court signaled its willingness to enable school districts to be incrementally released from desegregation orders<sup>126</sup> and lowered the standard for districts to achieve unitary status and thus end desegregation

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119. Anderson, *supra* note 18, at 47–48.

120. In her essay, which was written in the midst of the merger, Anderson identifies the unilateral nature of the MCS action to trigger a merger against the wishes of suburban constituencies and the state of Tennessee's intervention to reduce Memphis control of the outcome of the merger as potential reasons that the merger would not actually produce a consolidated, equitable result. See Anderson, *supra* note 18.

121. Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 144 (2016).

122. *Id.* at 153 n.71.

123. *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972).

124. *Milliken v. Bradley*, 418 U.S. 717 (1974).

125. *Wright*, 407 U.S. at 453.

126. *Freeman v. Pitts*, 503 U.S. 467 (1992).

oversight.<sup>127</sup> Without such oversight, school districts and municipalities have greater flexibility to employ the tool of secession—no longer will such efforts be scrutinized for their effects on desegregation as they had under *Wright v. Council of City of Emporia*. Communities—typically, wealthier communities made up of a large percentage of White residents—have been employing this “new secession” by carving smaller school districts out of larger ones.<sup>128</sup> According to one report, 128 communities have attempted to secede from school districts since 2000, and 73 have succeeded.<sup>129</sup>

The creation of new school districts in Shelby County both fits and does not fit these trends. On one hand, the secession of majority White suburbs from a majority-Black school district fits the model of many of the contemporary school district secessions. In addition, Shelby County Schools was released from its desegregation order in 2009, just a short time before the merger and de-merger drama began.<sup>130</sup> Thus, the secessions occurred in the aftermath, but not with the oversight of a federal desegregation case. Had the federal court maintained oversight, the implications of the dissolution of MCS and the further implications of the secession of municipal districts would have been viewed through a very different lens.

This latter point is demonstrated through an attempted secession unfolding around the same time in Jefferson County (Birmingham), Alabama. In the majority-White city of Gardendale, individuals launched a campaign in 2010 to create a new school district within the county-wide district to serve Gardendale residents (and not students from other areas within Jefferson County that were currently attending schools located in Gardendale).<sup>131</sup> That effort, however, occurred in a county subject to an ongoing desegregation order. Thus, when local residents

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127. *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991); *see also* *Missouri v. Jenkins*, 515 U.S. 70 (1995).

128. Susan Eaton, *How a ‘New Secessionist’ Movement is Threatening to Worsen School Segregation and Widen Inequalities*, THE NATION (May 15, 2014), <https://www.thenation.com/article/archive/how-new-secessionist-movement-threatening-worsen-school-segregation-and-widen-inequal/>.

129. *Fractured: The Breakdown of America’s School Districts*, EDBUILD, <https://edbuild.org/content/fractured#intro> (last visited Mar. 29, 2020).

130. *Robinson v. Shelby Cty. Bd. of Educ.*, 566 F.3d 642 (6th Cir. 2009).

131. *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988, 994–95 (11th Cir. 2018).

approved of the move and even elected a school board, the Gardendale Board had to make a motion in the context of the desegregation case to approve of the secession. Citing evidence of the motivations driving the effort in Gardendale, the district court found that the secession was motivated by a racially discriminatory purpose and that it would impede desegregation efforts in Jefferson County.<sup>132</sup> Though the district court allowed for a partial secession, the Eleventh Circuit rejected even that and denied the secession motion.<sup>133</sup>

In Shelby County, there have been charges of racial motivation in the creation of suburban districts.<sup>134</sup> However, without the framework of a desegregation case and the additional inquiry into the effect of new districts on desegregation, a plaintiff challenging the secessions in Shelby County as racially discriminatory would be forced to prove intent under the high standard of *Washington v. Davis*.<sup>135</sup>

Though there may be such evidence, such a suit would also have to grapple with the unusual chronology leading to municipal districts in Shelby County. In the typical twenty-first century school district secession, an area or municipality that had long been served by a larger school district seeks secession and exclusion. In Gardendale, for example, the city has always been a part of the Jefferson County district and included in its decades-old desegregation suit.<sup>136</sup> In contrast, through 2010, the municipalities in Shelby County were not part of a countywide school district—rather, they, along with unincorporated portions of the county, were served by the (legacy) Shelby County Schools and separated from the Memphis City Schools. That school district had a majority of students who were White and was subject to a desegregation order until 2009. Then, without the consent of suburban residents, their district absorbed the dissolving Memphis City Schools to create a larger Shelby County Schools that served nearly 150,000 students, the majority of whom now were African American. It was only then that the creation of new districts was enabled by state law and officially pursued by the municipalities. Thus, while it is true that, as in the typical secession, Shelby County's municipalities

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132. *Id.* at 1000–03.

133. *Id.* at 1013.

134. See *The Disintegration of Memphis-Shelby County*, *supra* note 18; Rushing, *supra* note 10.

135. 426 U.S. 229 (1976).

136. *Stout*, 882 F.3d at 992–95.

seceded from a district with an African American majority, the municipalities had only been in that version of the district for a single year (as opposed to the decades of history in more typical secessions). The quirks of the Shelby County merger and de-merger, along with the termination of local desegregation cases before the merger unfolded, place Shelby County in a different legal context than, for example, the attempted secession in Gardendale. That does not mean, however, that the underlying motivations are not similar.

#### *A. Motivations*

Whereas attempted school district secessions of the desegregation era could, through timing and an examination of who promoted them, be connected to a desire to avoid the oversight of a federal desegregation order, the motivation for twenty-first century school district secessions is not as apparent. Scholars have sought to provide a framework through which to understand these breakaway efforts, both broadly and in Shelby County in particular. The root motivation has been connected to localism. That localism, however, has been pursued within a race- and class-based backdrop that harkens back to an earlier era.

Localism has roots that trace all the way to Thomas Jefferson's vision that decentralized power at the level of government closest to the people would help prevent government abuses and empower people's right to self-determination.<sup>137</sup> According to proponents, localism promotes efficiency, fosters democratic ideals through increased civic participation, and cultivates community through local control of institutions.<sup>138</sup> Within the schooling context, local control has been recognized as a mechanism to ensure engagement among citizens in the operation and funding of public schools. The Supreme Court has recognized its centrality to education, stating that "No single tradition in public education is more deeply rooted than local control over the operation of schools."<sup>139</sup> On the Court, however, there has also been

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137. Wilson, *supra* note 121, at 180.

138. *Id.* at 181.

139. *Milliken v. Bradley*, 418 U.S. 717, 741 (1974); *see also Wright v. Council of City of Emporia*, 407 U.S. 451, 469 (1972) ("Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society . . .").

criticism through the observation that robust local control may not be equally available in all communities as a result of disparities in resources.<sup>140</sup>

Applying these principles to contemporary school district secession, Erika Wilson has argued that proponents' motivations better reflect "defensive localism," that is based less on these theoretical justifications for local autonomy and authority and more on a desire to *protect* local institutions from engagement with broader social challenges.<sup>141</sup> Spurred by a sense of lost control, defensive localism results in a decentralization that "allows the broader political community to concentrate social and economic problems in particular places and refuse[s] to take responsibility for those problems."<sup>142</sup> When this occurs, Wilson posits that it can result in "destructive localism" that (1) results in homogenous communities, (2) allows some communities to benefit from being adjacent to a larger community without experiencing the social and financial costs experienced within that community, and (3) may harm adjacent localities.<sup>143</sup>

In Shelby County, opposition to the merger and support for school district secessions strongly utilized the rationale of local control. Indeed, in the earliest debates about the surrender of the MCS charter, some opponents of dissolving the district argued that the merger would lead to a loss of control by Memphians of the schools.<sup>144</sup> Once the merger began, suburban constituents framed their opposition almost exclusively around local control.<sup>145</sup> For example, one suburban resident framed his concern about a merged district around a dilution of suburban representation on a countywide school board: "What kind of

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140. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 130 (1973) (Marshall, J., dissenting) ("[A]ffirmance of the District Court's decisions would hardly sound the death knell for local control of education. . . . In fact, in striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decision-making a reality for all Texas school districts.").

141. Wilson, *supra* note 121, at 195–96.

142. *Id.* at 195.

143. *Id.* at 202.

144. *The Disintegration of Memphis-Shelby County*, *supra* note 18, at 667.

145. In a study based on interviews with individuals involved in the merger and de-merger, it was noted that "[e]very white political leader representing the new municipal districts mentioned local control of public schools as the central rationale for secession." *The Disintegration of Memphis-Shelby County*, *supra* note 18, at 668.

representation will you get for your community and how influential will that be in the decisions made that affect the schools in your community?”<sup>146</sup> Indeed, the control that suburban residents had over the preexisting Shelby County schools would be diluted in a merged district—prior to the merger, the SCS board had been elected exclusively by constituents in the suburbs and unincorporated portions of the county; in a countywide district, the school board would include representation from Memphis, where a majority of the county’s residents lived.<sup>147</sup> The secessions, therefore, reclaimed a local control that had been threatened in the merger.<sup>148</sup>

Local control also allowed the discussion to avoid confronting the race- and class-based backdrop against which the merger and de-merger unfolded. A group of scholars studying the Shelby County merger and de-merger concluded that “the local control justification for school district secession still carries with it harmful exclusion from key resources and opportunities” and provides a “positive, legally sanctioned, and politically persuasive rationale for making choices that further cement advantage for their children.”<sup>149</sup>

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146. *Id.* at 676; see also Laura Meckler & Kate Rabinowitz, *The Lines that Divide: School District Boundaries Often Stymie Integration*, WASH. POST (Dec. 16, 2019), <https://www.washingtonpost.com/education/2019/12/16/lines-that-divide-school-district-boundaries-often-stymie-integration/?arc404=true> (quoting a school board member in Collierville, a suburb in Shelby County that now has its own municipal school district, as saying “I remember thinking that we will never have a voice in that school system. . . . There was going to be this mega-system, and what does that mean for us? There was fear they would be reassigning teachers and changing boundaries and those kind of things. . . . Neighborhood schools wouldn’t be neighborhood schools”).

147. See *Bd. of Educ. v. Memphis City Bd. of Educ.*, No. 11-2101, 2011 WL 3444059, at \*26 (W.D. Tenn. Aug. 8, 2011).

148. Suburban local control had also been reduced because of the periodic annexations by the city of Memphis that shifted the boundaries of the county’s two school districts. This instability had led to the push for the freezing of boundaries through creating a “special school district” for the Shelby County suburbs, a push that also reflected a protection of localism. See Kiel, *supra* note 18, at 806–07. Of course, it was that push for a special school district that triggered the preemptive action of MCS to dissolve its charter and merge the districts.

149. *The Disintegration of Memphis-Shelby County*, *supra* note 18, at 653.

As has been the case in other contemporary school district secessions,<sup>150</sup> racial fears and a perceived loss of power influenced the Shelby County secessions, even as the focus on local control obscured that context. For example, according to an African American resident of the suburbs:

Local control means exactly what they're saying, that people who look like me get to run the school district for the kids who belong to us. And so whether you parse that down and look at it in terms of race or income or education level or whatever it is, it is this idea that I want the folks who look like me and who live near me to make decisions about where our kids go to school. And the reality is that Memphis is largely black and largely poor.<sup>151</sup>

The racial identifiability of Memphis and MCS, as well as the presence of African Americans in the suburbs, further allowed criticisms of the city and school district to be framed without explicitly mentioning race. If Memphis City Schools were thought of as an African American district, is a statement about a desire to “save” students from a “plight that befell the children of Memphis”<sup>152</sup> a non-racial concern about safety or school quality or a coded, but race-based appeal to prejudice? I am not alone in feeling that a significant part of the resistance to the merger of school districts was based on race even if it was not phrased racially.<sup>153</sup> But the local control rationale utilized colorblind language to rebut such charges and ultimately insulate the secessions from legal challenge.

The secession of majority White communities from larger, more diverse school districts on grounds that are not explicitly based on race reflects a central challenge to increasing educational equity in the

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150. See *Stout v. Jefferson Cty. Bd. of Educ.*, 882 F.3d 988 (11th Cir. 2018); *supra* text accompanying notes 131–33.

151. *The Disintegration of Memphis-Shelby County*, *supra* note 18, at 678–79.

152. Jane Roberts, *Foes of Memphis, Shelby County School Consolidation Brace for Fight*, COM. APPEAL, Dec. 24, 2010, 2010 WLNR 27837692.

153. See Rushing, *supra* note 10; *The Disintegration of Memphis-Shelby County*, *supra* note 18, at 653; Dillon, *supra* note 67 (quoting SCS Board Member as saying “[t]here’s the same element of fear . . . . In the 1970s, it was a physical, personal fear. Today the fear is about the academic decline of the Shelby schools”).

twenty-first century. There seem to be persistent legacies of historic efforts to subjugate African American students through the education system that still affect today's students but proving that causal connection or the racial motivation for new inequity-producing efforts is increasingly difficult. Such proof would, potentially, increase the prospects for remedies. The difficulty is only deepened by the incongruity in the perception of the role race continues to play (or, I suppose, does not play).

### *B. Effects*

In 2010, Shelby County had two school districts, including one serving a 100,000-student population that was largely African American and economically disadvantaged and another primarily serving the county's suburban students. In 2020, Shelby County has a 100,000-student school district that is largely African American and economically disadvantaged and six additional districts to serve the county's suburban students. What is today known as Shelby County Schools consists primarily of the pre-merger Memphis City Schools; aside from the name change and the inclusion of unincorporated portions of the county, almost nothing has changed. Given this, one could conclude that the drama of 2010–2014 was much ado about nothing. However, the merger and de-merger of schools in Shelby County stands as a marker in local education history because it re-formalized a status quo of separation and inequality that is unlikely to be challenged again for a generation.

One limited, but important effect of the process was accomplishment of the goal that animated the initial dissolution of the MCS charter—preservation of countywide tax support for education of students in Memphis. In 2020, local funding for today's Shelby County Schools (now primarily serving Memphis) continues to be provided through Shelby County government from taxes collected from throughout the county, Memphis and suburbs included. The same fund provides most local funding to the new, suburban districts as well, with the overall distribution based on the per pupil populations in each of the county's seven districts. As one observer noted, “[i]f the dissolution achieves

tax relief for the inner city, it will have gained no more (and no less) than Memphis residents asked of it.”<sup>154</sup>

Though this is an important effect, many merger proponents had larger hopes for this opportunity to reshape local education. Another effect, then, of the four-year process has been the negation of the potential benefits of a consolidated county-wide school district. A larger, countywide district held the potential for more equitable distribution of resources within the county, shared governance across a diverse community, and greater diversity in schools. Now that a new status quo has emerged, these gains are out of reach. In addition, there are fewer tangible effects on the community that make breaking out of that status quo even more unlikely.

Though racial integration of students was always an unlikely outcome given the economic and geographic realities of Shelby County, erasure of the boundary between city and suburban schools brought with it at least some potential for greater diversity. Instead, the fragmentation of education in Shelby County has established new fences between districts that reflect the national trend that racial segregation is worse *between* districts than within them.<sup>155</sup> The district-level demographics of Shelby County’s seven districts reflects this, as seen in Chart 2 below.<sup>156</sup>

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154. Anderson, *supra* note 18, at 57.

155. Meckler & Rabinowitz, *supra* note 146.

156. In addition to the traditional school districts, some students in Shelby County are served by the state-operated Achievement School District (ASD). The ASD can take over operation of a school that is struggling under the state’s accountability system, but ASD oversight of a school is intended to be temporary with the school eventually returned to be operated by the local district. For purposes of this chart, ASD schools are included in the figures for SCS. In addition, the various charter schools that operated in SCS under charters granted by the district are also included in the SCS figures.

	Total # Students	% African American	% White	% Hispanic or Latino	% Asian	% Economically Disadvantaged	Per Pupil Spending
<b>Memphis + Unincorporated Areas</b>	121,694	78.6	6.9	12.6	1.5	58.7	
Shelby County Schools	109,664	77.0	7.5	13.5	1.7	58.6	\$11,995.50
Achievement School Districts	12,030	93.4	1.6	4.6	0.3	77.3	\$11,244.70
<b>Suburban Municipalities</b>	31,894	20.6	65.6	5.4	7.3	9.3	
Arlington	5,139	14.7	75.1	6.3	3.5	5.9	\$8,520.80
Bartlett	8,838	28.3	61.9	4.5	4.0	13.5	\$9,181.80
Collierville	8,382	18.3	63.3	5.1	12.5	2.7	\$9,218.80
Germantown	5,933	11.1	74.2	3.6	10.3	5.7	\$8,769.50
Lakeland	952	9.8	75.2	4.3	9.7	7.5	\$9,746.60
Millington	2,650	39.5	44.3	13.1	2.2	34.7	\$10,609.30
<b>Shelby County Total Public School Population</b>	<b>153,588</b>	<b>66.6</b>	<b>19.0</b>	<b>11.2</b>	<b>2.8</b>	<b>47.9</b>	

Chart 2: School Districts of Shelby County, Tennessee in 2016–17<sup>157</sup>

In a county with a public school population that is two-thirds African American, four of the six suburban districts have student populations that are less than 20% African American; in a county with a public school population that is one-fifth White, five of the six suburban districts have student populations that are more than 60% White.<sup>158</sup> Although these numbers point to broad racial identifiability of districts,

157. *Data Downloads & Requests*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Nov. 17, 2020) (scroll down to the “Profile & Demographic Information” subsection; click the dropdown arrow titled “Profile Data Files” and select the “District-level” profile for 2017) (analyzing data from the 2016–17 school year for each of the respective districts).

158. *Id.*

the segregative effect of the newly-created boundaries between districts is demonstrated more vividly when comparing schools that are near one another but sit on different sides of the boundary. For example, in southeastern Shelby County, an SCS school (Southwind High) sits only 7.5 miles from Collierville High School, which is part of the Collierville Municipal Schools. Southwind's student population is 85.3% African American and 13.1% Hispanic or Latino, and over 36.8% of students are classified as being economically disadvantaged.<sup>159</sup> Meanwhile, Collierville High has a student population that is 67.7% White, while only 0.3% of students are economically disadvantaged.<sup>160</sup> Thus, even if broad integration was not a likely outcome of the district merger, the new boundaries between districts are maintaining racial identifiability of schools even in geographic areas where student integration might have been possible. Chart 3 demonstrates these demographic disparities comparing six high schools located near the boundary between SCS and the suburban districts in the eastern portion of the county.

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159. *Id.* (reviewing 2016–17 data on Shelby County School Southwind High).

160. *Id.* (reviewing 2016–17 data on Collierville Municipal School Collierville High).

District	School	Total # Students	% African American	% White	% Hispanic or Latino	% Asian	% Economically Disadvantaged
<b>High Schools in Shelby County School District</b>		5,865	72.2	10.4	13.9	3.2	29.5
SCS	Cordova High	2,311	64.0	12.9	20.5	2.4	32.8
SCS	Germantown High	2,026	71.7	14.9	7.2	6.0	20.4
SCS	Southwind High	1,528	85.3	0.7	13.1	0.8	36.8
<b>High Schools in Municipal Districts</b>		6,313	17.5	69.8	4.6	7.3	3.2
Arlington	Arlington High	2,034	18.4	72.4	4.8	3.9	4.7
Collierville	Collierville High	2,396	18.4	67.7	4.9	8.4	0.3
Germantown	Houston High	1,883	15.3	69.8	4.2	9.8	5.5

Chart 3: Demographics of Six High Schools in Eastern Shelby County in 2016–17<sup>161</sup>

161. *Data Downloads & Requests*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Nov. 17, 2020) (scroll down to the “Profile & Demographic Information” subsection; click the dropdown arrow titled “Profile Data Files” and select the “District-level” profile for 2017) (analyzing data from the 2016–17 school year for each of the respective districts). This chart presents data from the three eastern most SCS high schools and three municipal district high schools that are proximate to them, but across the SCS boundary line. But for the boundary line, it would be possible for pairs of these schools to distribute the student populations in a less racially separated manner. The appropriate pairs for comparison are Southwind High School (SCS) and Collierville High School (7.5 miles apart); Cordova High School (SCS) and Arlington High School (11 miles apart); and Germantown High School (SCS) and Houston High School (5.5 miles apart). Though Germantown High School sits physically in the city of Germantown, its student population is drawn from outside of Germantown and it is operated by SCS. It was the subject of a settlement between SCS and the municipal districts regarding ownership of school buildings and is a source of endless confusion. See Clay Bailey & Jennifer Pignolet, *SCS is Offered \$25M for Schools; City Offers Five Times What It Did A Year Ago*, COM. APPEAL, May 3, 2017, at A11, 2017 WLNR 13642804. For more on the segregative effects of the boundary between SCS and the municipal districts, see *Segregation by District Boundary Line*, *supra* note 18.

Finally, only one of the municipal districts (Millington) has a percentage of African American students near that of the pre-merger Shelby County Schools (37.8%). Combining the municipal districts together, approximately 20.6% of students are African American.<sup>162</sup> The disparity between pre-merger SCS (37.8%) and post-merger municipal districts (20.6%) reveals that the portion of the student population of the pre-merger suburban district is geographically excluded from the new municipal districts (i.e., students from unincorporated areas in the county) is disproportionately African American.<sup>163</sup> Indeed, there were 18,226 African American students in the suburban district before the merger;<sup>164</sup> after the merger, there are only 6,695 African American students in the six suburban districts.<sup>165</sup> By transitioning service for students in unincorporated areas of the county, the majority of whom were African American, from the suburban district (pre-merger) to the large, urban district (post-merger), an effect was to make the new districts even Whiter than the suburban district had been before. In sum, the failure of the merger did not disrupt the preexisting racial separation of schooling in Shelby County, and, in some instances, actually made homogeneity worse.

Independent of effects on the racial makeup of schools, one of the allures of consolidation from an equity standpoint is the potential

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162. *Data Downloads & Requests*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Nov. 17, 2020) (scroll down to the "Profile & Demographic Information" subsection; click the dropdown arrow titled "Profile Data Files" and select the "District-level" profile for 2017) (analyzing data from the 2016–17 school year for all six municipal school districts).

163. *See supra* Charts 1 and 2.

164. *Data Downloads & Requests*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Nov. 17, 2020) (scroll down to the "Profile & Demographic Information" subsection; click the dropdown arrow titled "Profile Data Files" and select the "District-level" profile for 2010).

165. *Data Downloads & Requests*, TENN. DEP'T EDUC., <https://www.tn.gov/content/tn/education/data/data-downloads.html> (last visited Nov. 17, 2020) (scroll down to the "Profile & Demographic Information" subsection; click the dropdown arrow titled "Profile Data Files" and select the "District-level" profile for 2017). Of the 6,695 African American students, 754 attended Arlington schools, 2,505 attended Bartlett schools, 1,536 attended Collierville schools, 661 attended Germantown schools, 93 attended Lakeland schools, and 1,046 attended Millington schools. *Id.*

to distribute resources—funding, expertise, people—in a way that brings greater equity within a diverse community. In addition, it is argued that consolidated districts can achieve greater efficiency in operation. The collapse of the merger in Shelby County meant that neither of these effects would be achieved. With regard to resources, the outcome is even more dim as a result of the city of Memphis having ceased its fiscal support so that the overall per pupil budget of the large, urban district is smaller after the de-merger than it was before the process began.

School district boundaries have a tendency to allocate educational quality based on geography and relative wealth, aspects of students' lives that are beyond the student's control.<sup>166</sup> Thus, they impact a metropolitan area's future by impacting its young people unequally, and "it is not apparent that such interlocal competition is healthy for the individual municipalities or the region as a whole if it results in school districts that offer substantially different and disparate qualities of education."<sup>167</sup> In addition, smaller districts may be inefficient because they serve smaller student populations with overhead costs that might be duplicated in multiple districts.<sup>168</sup> The erection of boundaries in Shelby County creates precisely this effect—resources are bucketed according to student population of each district rather than need,<sup>169</sup> and

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166. Saiger, *supra* note 116, at 501.

167. Wilson, *supra* note 121, at 189.

168. Meaghan E. Brennan, *Whiter and Wealthier: "Local Control" Hinders Desegregation by Permitting School District Secessions*, 52 COLUM. J. L. & SOC. PROBS. 39, 49–50 (2018) (reporting on conclusions that smaller districts might usurp excessive state funds, though acknowledging that larger districts may be more difficult to manage).

169. A particularly egregious example of this occurred in the immediate aftermath of the de-merger when municipal districts were allocated Title I funds that were calculated based on multi-year averages of economic disadvantage in their district. Because of their prior connection to the larger district and its large numbers of students with economic disadvantage, the averages in the municipal districts were artificially high and resulted in a windfall of Title I funds at the expense of the poorer, adjacent Shelby County Schools. See Jennifer Pignolet, *Suburban Shelby Schools Got Millions Meant for Poor Students. Here's How They Spent It*, COM. APPEAL (Aug. 24, 2018, 7:00 AM), <https://www.commercialappeal.com/story/news/education/2018/08/24/schools-shelby-county-suburbs-funding/1046962002/>; Jennifer Pignolet, *Suburban Districts Exploring How to Spend Windfall of Money Meant for Poor Students*, COM. APPEAL (July 2, 2017, 6:00 AM),

those resources may be utilized to duplicate functions that could have more efficiently been met in a larger district.

The bucketing problem, however, could be minimized if the districts would coordinate services and share resources. Education in Shelby County was already moving toward greater fragmentation before the merger, with an increase in autonomous charter schools and the operation of a state-run takeover district (the Achievement School District, or ASD) reducing the monopolistic nature of the large, central district.<sup>170</sup> The TPC's structural model for the countywide district acknowledged and even embraced this reality with a model that incorporated multiple school operators and granted broad autonomy.<sup>171</sup> The plan divided the countywide district into geographic regions, seeking a balance between autonomy and coordination. Though the plan only operated for a year, the prospect for coordination even across school district lines seems possible. Management might require a county-level individual or office charged with coordinating among autonomous districts.<sup>172</sup> The barrier, however, is will.

The prospect of shared governance across a diverse community, which was in place during the transition, has been extinguished in the aftermath of the merger and de-merger. For a moment, education within the county had been a concern shared by all; the return of fragmented governance, with multiple sovereign districts responsible for and accountable to only a limited portion of the community, assures a narrowed frame through which to view education. For Memphians and suburbanites alike, the only district that seems to matter is the one serving their own local community.

School district boundaries re-emphasize the instinct to consider public education as an individual good rather than a collective benefit.<sup>173</sup> By narrowing the lens to the local school district, the local

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<https://www.commercialappeal.com/story/news/education/2017/07/02/suburban-districts-exploring-how-spend-windfall-money-meant-poor-students/443972001/>.

170. Kiel, *supra* note 82, at 368, 373.

171. SHELBY CTY. TRANSITION PLANNING COMM'N, *supra* note 73, at 90.

172. Laura Faith Kebede, *Mayor Harris Hires Former Superintendent to Encourage Shelby County School Systems to Work Together*, CHALKBEAT TENN. (Dec. 20, 2018, 8:00 AM), <https://chalkbeat.org/posts/tn/2018/12/20/exclusive-mayor-harris-hires-former-superintendent-to-encourage-shelby-county-school-systems-to-work-together/>; *see also* Kiel, *supra* note 79, at 175–76.

173. *The Disintegration of Memphis-Shelby County*, *supra* note 18, at 659.

school, or even the individual student, education can be reduced to a zero-sum competition with relative winners and losers. The good of the whole and the community impact of education, conceived broadly, diminish in importance as enclaves or select schools rise to improve narrowed communities while ignoring systemic investment geared toward broader improvements.<sup>174</sup> These instincts are even more intense when attached to racially-distinct communities or when attached to communities that have a label, such as a suburb. In Shelby County, both of these intensifiers are present. The new school districts are attached to existing municipalities, the names of which now signal not only separation from the city of Memphis, but also from Memphis schools. That such separation carries with it a racially distinct student population from that of the city ensures that the fortification of school district boundaries in Shelby County will make a shift to viewing education as a collective benefit difficult for years to come. That is true not only for those in the suburbs, who will increasingly attach value to their separation and the school district boundaries that protect it, but to those in the city, who will remember the rejection of the suburbs and be rightfully suspicious of any cooperative efforts.

In many ways, the effects in Shelby County reflect those that result when “destructive localism” has led to school district secession elsewhere. New districts reflect an exclusionary “citizenship” that enables resource concentrations and isolates social and educational challenges.<sup>175</sup> One observer summed up this outcome as applied in Shelby County:

In the process of first unifying, then redividing school districts, the categorical distinctions between unequal pairs, for example, city–county, urban–suburban, Black–White, and rich–poor, became more salient. And efforts to maintain social, political, and educational boundaries between these unequal categories relied on old symbols,

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174. *Id.*

175. Wilson, *supra* note 121, at 202–04. Another impact Wilson mentions is the turning over of assets, including school buildings, that results from school district secession. *Id.* at 203. Suburban schools built with contributions from throughout a county become the property of a single municipality within the county. This has occurred in Shelby County and was the subject of some discussion in the context of final resolution of the lawsuit regarding the merger.

images, and ideologies of individualism, competition, and local autonomy to reinforce the status quo. The struggle over separate school districts also stirred old fears and misunderstandings about the era of court-mandated busing and civil rights mandates, generating an acrimonious “unification.” These fears and misunderstandings, along with categorical distinctions, served both advantaged (suburban) and disadvantaged (urban) interests in efforts aimed at strategically hoarding their resources and protecting them from would be competitors. In the end, persistent patterns of segregation and inequality addressed by *Brown v. Board of Education* continue after 60 years.<sup>176</sup>

These pairs on opposite sides of a slash—city—county, urban—suburban, Black—White, rich—poor—are the ingredients for durable inequality,<sup>177</sup> and they reflect a community that tends to divide itself. The name of the federal building—Clifford Davis/Odell Horton—was just another pairing, divided by a barrier. As I have said, “[w]e’re looking at a community that does not view itself as a single community, but rather as a series of smaller communities that are often looking out for their own best interests. . . . There’s no sense here that we are all in it together.”<sup>178</sup> The lack of that sense seems destined to last another generation.

#### IV. LESSONS

The first sign that there was something wrong was a flicker of lights. Thunderstorms were expected, and, from the sound of it, this was one of those southern thunderstorms that brought an extra level of violence. The rain pelted the roof at the community center in Frayser where I had been invited to speak on the questions surrounding the school district merger. This visit came somewhat early in the process, in February 2011, before the TPC had been created and well before what would unfold in the coming years—the creation and destruction of a countywide school district in Shelby County. If I had known

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176. Rushing, *supra* note 10, at 26.

177. Rushing, *supra* note 37.

178. Meckler & Rabinowitz, *supra* note 146.

precisely what lay ahead, I wonder if that would have changed my presentation.

The flickering of the lights quickened as the pounding rain and cracking thunder grew louder. Everyone in the room grew distracted, including me as I had a hard time focusing on my slides. Then, the sirens started, wailing to signal a tornado warning.<sup>179</sup> I took a seat and texted my family before we were all guided downstairs into two rooms and a hallway on the lowest level, halfway underground. While we were downstairs, the power in the building went out and we waited in the darkness. I texted my family again. Based on my (non-expert) perception, when tornados come through Shelby County, they tend to run either north or south of the central city corridor where I live. While this usually provides me comfort, Frayser was situated north of the central corridor and, for all I knew, was right in the tornado's path. Sitting in the darkness, for a fleeting moment I thought this might be it for me.

And then, a quite unusual thing happened. In the darkness, one of the attendees approached and asked a question about the dissolution of the Memphis City Schools. The referendum for Memphis voters was in a couple weeks and this person wanted to learn more. I addressed the question as best I could, and then another person asked a question. Before long, a group had gathered around to continue the interrupted discussion from upstairs. I continued to check on my family, and eventually, the lights came back on and the sirens ceased. I actually don't remember if we continued the formal presentation after that or just broke up the event and headed home. But I will always remember the impromptu gathering in the dark basement amidst a tornado warning; the questions on people's minds were *that* important to them.

From the time of surrender of the MCS charter in December 2010 through my service on the TPC, the merger of school districts in Shelby County became a central part of my life. Looking back nearly ten years, knowing how the story ends (for now), I can appreciate many lessons both for me and for my community.

In the earliest weeks, my journal is filled with frustration at trying to figure out how I, a law professor who had studied the

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179. *National Weather Service Forecast Office—Memphis, TN—February 24, 2011 Severe Weather Outbreak*, NAT'L WEATHER SERV., <https://www.weather.gov/meg/feb242011severeweather> (last visited Mar. 29, 2020).

desegregation era, might contribute to the unfolding crisis. “It felt like I had a chance to use what I knew to potentially stop [what happened during the desegregation era] from happening this time,” I wrote. I felt like I had something to add but could not see an outlet to do so until I found my niche as community resource. For a law professor, this utilized similar skills to teaching and fulfilled my impulse to serve not only my students within the building, but the community more broadly. That this put me in the public eye, however, brought with it some challenges.

First, the role I played early in the process required informing more than advocating. Though that is something I am certainly comfortable with in the classroom, it required me to strike a more objective tone in my public appearances than I might have been feeling privately. I undoubtedly had strong feelings about the topics I spoke on, but, early in the process especially, I felt the need to maintain credibility by articulating the various perspectives rather than directly advocating for the one I believed in. Looking back, I still believe that the invitations I received to present during the period of uncertainty in early 2011 was due to the perception that I was *not* advocating—there were plenty of others who *were*, and therefore, what I could provide was different. However, another lesson, discussed below, is that I feel I could have and should have done more to articulate a vision in support of the merger, and I wonder if beginning my involvement in the role of professor made me less likely to argue forcefully later in the process.<sup>180</sup>

In addition, as my involvement became more direct, I was reminded of the enormous difference between studying or teaching about something and getting work done in the real world. It was easy to look back on the desegregation era, for example, and opine about what might have changed that narrative. It was far more difficult to be in the midst of a similar moment, subject to the political winds of the times, trying to impact the story going forward. For example, I *knew* that the merger was highly unlikely to lead to the busing of students to achieve racial integration in schools (even if I might have supported such a project).

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180. A related concern that a colleague at another institution raised as I was considering accepting my appointment to the TPC was the loss of academic objectivity that would come with being directly involved in a subject I might want to write about in a scholarly way. I have not let that deter me from authoring scholarship on this story, but I do recognize that danger and have acknowledged it early in each piece I’ve written on the topic.

Yet, no matter how often I explained why busing was not a topic in play here, it continued to impact the perception of the merger throughout the process. In addition, I opined early in the process that the law that enabled the creation of new school districts would require several years of operation as a single district before such secessions could occur. I still think I was correct about that, but we will never know because the state legislature changed the law so that the districts could begin breaking away almost as soon as the countywide district opened. The former example demonstrated to me that information alone could not override emotions and feelings of people affected; the latter example showed how fluid the law could be in the moment and made me realize that had the desegregation story unfolded differently, I could not truly know what reactions might have resulted from even the slightest change in facts.

The involvement of the state also chastened my understanding of how things get done. At 33, I was one of the two youngest appointees to the TPC, and I can look back at a level of naivete I brought to the process. I suppose that I believed that the parties involved would come together and keep in mind all of the interests at stake. That was how I thought I was approaching my task. But I learned quickly (“with all due respect, I hope you fail”) the depth of feeling and the intensity of self-interest that would impact the end result. The creation of new municipal districts might be the most prominent example of this, but the city of Memphis’s jumping at the opportunity to cease funding public schools also demonstrated how self-interest drove decision making.

I came to appreciate this reality better as the work of the TPC carried forward and the state changed the law on several occasions, and, in response, I grew into more of an advocate for the merger. I regret not bringing greater (and maybe, earlier) energy to my advocacy in support of a countywide district. I felt very strongly that this moment presented an opportunity for our community to tear down a barrier that had come to mean so much in many people’s minds, but that actually distorted the reality that our community is bound together. I believe it is a false boundary between Memphis and the rest of the county—it impacts jurisdiction and the distribution of resources and is infused with racial and socioeconomic tones, and it masks the reality that our county’s educational and economic fate is very much tied together. I felt that a merged district could provide a sense that education was a community benefit that we all shared a stake in. At the same time, I

knew enough to know that the practical impact of a merger would be limited at best. Thus, advocates of the merger (including me) failed to offer a compelling vision of a merged district. That impacted the enthusiasm of those who were open to the idea of merger, and it left a huge void that opponents could fill with fear and uncertainty. To be fair, given the choice between a complete unknown merged district and an unknown municipal district, it is difficult to blame those in the suburbs for closing ranks within their municipalities. Of course, that choice was forced upon the process by changes in state law—had the state not undercut the work of the TPC by accelerating the ability of the municipalities to secede, the choice might have been between a merged district that had operated for several years and a new, municipal district. I am not certain that the outcome would have been different, but it would have forced a more informed decision.

The state's overall role was very informative to me as well because it demonstrated the ways that power could be leveraged to achieve desired results. The TPC had no power beyond what the state had granted it, which was truly very little in the end. I believe that we gained influence through the work we did, utilizing judgment and maintaining distance from politics, but when it came time to implement and preserve the plan we drafted, power lay in other places. The most powerful players in the process were Judge Mays of the federal district court and the state legislature, which seemed to be guided primarily by the interests of suburban Shelby County. On two occasions, Judge Mays brought clarity and guidance to the process by saying what the law required. Meanwhile, after the MCS board and the people of Memphis voted for dissolution, the Tennessee General Assembly took over and directed the process to its conclusion. State law created the TPC and enabled the creation of municipal districts. When original enactments were found to be insufficient to achieve the legislature's ends, new statutes were written.

This power reality makes me question whether any other outcome was truly possible. It seems that any obstacle to the outcome of avoiding the merger could have been overcome in the legislature, perhaps with the exception of a court opinion concluding that the creation of the new districts was racially-motivated. Maybe providing an alternative vision or delaying the timing of the vote could have altered the story, but neither would have affected the fundamental distribution of power and, thus, may not have impacted the ultimate conclusion.

Confronting a similar dynamic in the desegregation era, I have argued that individual leaders might have utilized their own power to nudge outcomes differently, and I believe that to be true in the merger story as well. For example, the state legislature may have acted with disproportionate influence from suburban Shelby County, but Governor Bill Haslam did not have to sign the legislation presented to him. At some points, it appeared he might have utilized his influence in this way, but he ultimately chose not to.<sup>181</sup> More locally, Mayor Mark Luttrell, the county executive and the only individual representing all of the community involved, might have been more forceful in urging discussion of solutions that took the entire community into account. I recall pleading with Mayor Luttrell to do so; he and his office were very supportive of the work of the TPC (which I'm certain came at some political cost with his suburban base), but he also ultimately chose not to utilize his influence as he might have.

In the absence of an alternative vision or any moderating leadership, the merger and de-merger was guided more by the passion and emotion of the loudest elements of the community rather than the patient and thoughtful inquiry of the many residents of Shelby County who, I believe, do want a solution that looks at education as a collective benefit. That is not to say that there is anything inherently wrong with passion and emotion—parents of children receiving special services, teachers serving students across the county, and custodians concerned about outsourcing were among the many who had a great deal personally at stake in this uncertain moment. Some of the most profound moments of learning for me during this process came in listening to the passionate worry of people. Yet, I lament that my own passion for tearing down the wall between districts as a step toward building community, as far in the future as that vision may be, was unable to sustain support for the merged district.

The end result, I fear, is merely delaying a reckoning with the central challenge of life in Shelby County—fences between neighbors that obscure our shared destiny. Writing in dissent in *Milliken v. Bradley* in 1974, Justice Thurgood Marshall wrote, “[i]n the short run, it may seem to be the easier course to allow our great metropolitan areas

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181. Zack McMillin, *Gov. Haslam, Schools Merger and New Legislation*, POLITIFACT (May 20, 2012), <https://www.politifact.com/factchecks/2012/may/20/bill-haslam/gov-haslam-schools-merger-and-new-legislation/>.

to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.”<sup>182</sup> Justice Marshall believed that divisions using administrative fences within communities would continue to send the same signals as had been confronted in the seminal case of his career, *Brown v. Board of Education*.<sup>183</sup>

In the aftermath of a failed opportunity to tear fences down, Shelby County seems destined to instead fortify those fences for another generation. That, I predict, our community will ultimately regret.

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182. 418 U.S. 717, 814–15 (1974) (Marshall, J., dissenting).

183. 347 U.S. 483 (1954); *see Bd. of Educ. v. Dowell*, 498 U.S. 237, 263 (1991) (Marshall, J., dissenting) (“Against the background of former state-sponsorship of one-race schools, the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation.”).

