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MAKING A REGIONAL DISTRICT: MEMPHIS CITY SCHOOLS DISSOLVES INTO ITS SUBURBS

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An extraordinary thing is underway in the City of Memphis. The city is consolidating its school district with that of its suburbs—without the suburbs’ permission.

Last spring, in the face of fiscal stress and in the name of educational quality, Memphis City Schools dissolved its charter.¹ Under a provision of Tennessee law, a completed dissolution of that kind transferred the administration of the schools to the county board of education for that district—that is, to Shelby County Schools. A central city district that is 85% black and 6.5% Hispanic will merge with a majority white district;² a district severely impacted by household poverty will merge with one that is middle class.³ Shelby County will absorb administration and education for 103,000 new students, more than tripling its current population of 47,000.⁴

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

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1. The national press first brought news of these events to my attention. See Sam Dillon, *Merger of Memphis and County School Districts Revives Race and Class Challenges*, N.Y. Times, Nov. 6, 2011, at A18 (noting “as the overwhelmingly black Memphis school district is being dissolved into the majority-white Shelby County schools” the “[t]oughest of all [challenges] may be bridging the chasms of race and class”); Campbell Robertson, *Memphis to Vote on Transferring School System to County*, N.Y. Times, Jan. 28, 2011, at A21 (discussing “voluntary surrender of the [Memphis] city schools’ charter”); Campbell Robertson, *Memphis Votes for County to Run Schools*, N.Y. Times, Mar. 9, 2011, at A16 [hereinafter Robertson, *County to Run Schools*] (discussing “end to the [Memphis] city school system”).

2. Daniel Kiel, *Memphis Dilemma: A Half-Century of Public Education Reform in Memphis and Shelby County from Desegregation to Consolidation*, 41 U. Mem. L. Rev. 787, 814 (2011) [hereinafter Kiel, *Dilemma*].

3. Specifically, 87.2% of students in Memphis City Schools are economically disadvantaged, compared to 37.1% in Shelby County Schools. *Id.*

4. Robertson, *County to Run Schools*, supra note 1.

borders that separate a high-poverty, urban, and minority district from a middle class, suburban, and predominantly white district in order to achieve school desegregation.⁵ As it turns out, for reasons I'll explain later, racial integration is an unlikely outcome of the Memphis dissolution. Nonetheless, Memphis should be of great interest to policymakers and academics dedicated to regional equity, because the dissolution promises to bring metropolitan redistribution of school funding and regional governance of a critical public service.

As a story of regionalism, however, Memphis is a curious breed. The City Schools acted unilaterally, without suburban permission, state leadership, or judicial mandate. One government deployed its power over the protests of another, and the coercive government was neither the state nor a court. The lever of coercion at work in Memphis lies in the structure of local autonomy itself: the grant of self-determination rights to cities when it comes to dissolution and incorporation law, with no corresponding authority over such matters for counties. Dissolution law permits cities to die just as they are born—without permission from their home county.⁶ Our legal structure treats counties as residual governments, a baseline from which additional local governments may spring or burst at their own choosing.

This asymmetry in city and county power over incorporation and dissolution means that cities have power to shape their counties' responsibilities. Incorporation of a new city marks a critical change for a county, because it withdraws land from unincorporated status and thus reduces counties' responsibility for land use control and service provision in that area. Dissolutions add land back in to counties' unincorporated territory. The events in Memphis do not create or dissolve a municipality, but formation or dissolution of a city school district is a close analogy in states, including much of the South, with county school districts. The presence or absence of a separate school district in a municipality determines whether children in the city's territory will be part of the county district.

Yet paradoxically, a dissolution over which a county is powerless ultimately augments county power: In the death of a lower-tier local government, dissolutions can turn counties into metropolitan-scale governments without counties' consent. The structure of dissolution law, combined with the nature of city and county government, thus gave

5. This signature Supreme Court case is quite familiar. In *Milliken v. Bradley*, the 1974 Court struck down a district court's remedial reorganization of multiple school districts within a metropolitan desegregation area, citing local autonomy as a bulwark against federal remedial power. 418 U.S. 717, 741 (1974); see also Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 *Stan. L. Rev.* 931, 969–71 (2010) (exploring *Milliken* and other federal civil rights cases where courts expressed deep hesitation about their remedial power to relocate local borders).

6. See Michelle Wilde Anderson, *Dissolving Cities*, 121 *Yale L.J.* (forthcoming April 2012) (manuscript at 115–16) (on file with the *Columbia Law Review*) (“Very few states give counties a right to notice regarding a pending dissolution; even fewer states give counties any rights to influence the outcome of a proposed dissolution.”).

Memphis the chance to create something that metropolitan voters and the state had repeatedly refused to approve: a regional school district that includes both the city and its suburbs. This form of regionalism is poised to become more common in coming years. As local governments falter across the country, dissolution activity is markedly on the rise.⁷ Since 1995, nearly 400 municipal governments have dissolved—more than the total number of dissolutions in the rest of the twentieth century.⁸

At its heart then, the demise of the Memphis City Schools is a story of dissolution and city-county relations. Part I of this Essay briefly describes the story on the ground, Part II considers its implications. My goal here is not to provide a comprehensive description or legal diagnosis, but rather to comment on the significance of these events for regional equity and local government law.⁹

I. DISSOLVING THE DISTRICT

In a southern state with a Republican state government, how does a predominantly black city enact the consolidation of its school district with a majority white suburban district? Don't ask for permission. That is the short version of the Memphis dissolution; a more careful one follows. All is by way of brief background.

A. *Race and Schools in Memphis*

In Memphis and its suburbs, from the origins of local public education in 1848¹⁰ to its present day, few black children and white children have gone to school together. A system of de jure segregation, in which black schools and white schools remained separate under threat of criminal penalty, remained in place through 1961.¹¹ By the 1964 school year, after

7. *Id.* (manuscript at 124) (noting “more municipalities dissolved in the past fifteen years than at any time before that” and stating “[m]any more have scheduled elections that could pull their plug”).

8. *Id.* (manuscript at 181).

9. A more thorough history and analysis of the events discussed here was aptly provided by Daniel Kiel, an expert on race and education in Memphis. See Kiel, *Dilemma*, *supra* note 2, at 825–43 (reviewing origins, specific details, and legal questions arising from school consolidation in Memphis and Shelby County).

10. See David N. Plank & Marcia E. Turner, *Contrasting Patterns in Black School Politics: Atlanta and Memphis 1865–1985*, 60 *J. Negro Educ.* 203, 205 (1991) (discussing origins of Memphis public education system).

11. Daniel Kiel, *Exploded Dream: Desegregation in the Memphis City Schools*, 26 *Law & Ineq.* 261, 270–72 (2008) [hereinafter Kiel, *Exploded Dream*]; see also *Northcross v. Bd. of Educ.*, 302 F.2d 818, 820 (6th Cir. 1962) (describing dual area maps zoned by race and enforced without transfers until 1960). Kiel provides the most valuable, contemporary analysis of school desegregation in Memphis. For other accounts of school desegregation in Memphis, see generally Roger Biles, *A Bittersweet Victory: Public School Desegregation in Memphis*, 55 *J. Negro Educ.* 470 (1986); George W. Noblit & Thomas W. Collins, *School Flight and School Policy: Desegregation and Resegregation in the Memphis City Schools*, 10 *Urb. Rev.* 203, 203–12 (1978); John Branston, *Integration and Innocence: Enlisted in a Cause They Barely Understood as First-Graders, Memphians Look Back at Desegregation*,

a desegregation lawsuit to enforce *Brown v. Board of Education* finally looped through the Sixth Circuit,¹² still less than 1% of black students attended integrated schools.¹³ For fifteen years after *Brown*, school district officials and a Memphis district court judge nullified civil rights and sheltered resistance on the ground.¹⁴ Meanwhile, beyond the schools, civil rights advocates had to fight for the end of de jure segregation in Memphis in every aspect of city life (pools, parks, buses, drinking fountains, lunch counters, public housing, unions, higher education, and employment access) for many years after higher court decisions like *Brown*, *Palmer*, and *Gautreaux*.¹⁵

In 1971, three years after Martin Luther King, Jr. was assassinated on a Memphis balcony, de jure integration measures, including busing, came to the city.¹⁶ Immediately, white families flooded out of the Memphis school system and the city itself.¹⁷ Parents and segregationists opened new private and parochial schools for white children in church basements and trailers.¹⁸ Households relocated by the thousands into Shelby County suburbs, giving them a place in the predominantly white Shelby County School District.¹⁹

Today, the Memphis district is 91.5% black and Hispanic and 7.1% white; the Shelby County district is 42.4% black and Hispanic and 52.3% white.²⁰ More than twice as many children in the Memphis district are considered economically disadvantaged as in Shelby.²¹ Private education in Memphis is the most racially segregated private system in the country,

Memphis Flyer, May 20–26, 2004, at 13; John Branston, School Desegregation Recalled: Fifty Years After *Brown v. Board of Education*, “A Slow Walk Back to the Way It Was,” Memphis Flyer, May 13–19, 2004, at 9.

12. See *Northcross*, 302 F.2d at 819–21 (describing case’s procedural posture).

13. Kiel, *Exploded Dream*, supra note 11, at 274–77; see also *Northcross*, 302 F.2d at 823 (“The inescapable conclusion is that . . . the schools of Memphis were operated on a basis of ‘white schools’ for white children and ‘Negro schools’ for Negroes.”).

14. Kiel, *Exploded Dream*, supra note 11, at 264–84. In comparison to the violent resistance to school desegregation in other Southern cities, Memphis experienced a peaceful transition, yet one also characterized by administrative resistance and extreme delays in implementation. See *id.* at 272–73; see also Biles, supra note 11, at 471–74.

15. Kiel, *Exploded Dream*, supra note 11, at 276, 284, 287; see also *Watson v. City of Memphis*, 373 U.S. 526, 539 (1963) (desegregating public recreational facilities); Biles, supra note 11, at 473 (describing NAACP efforts to integrate higher education, buses, and other aspects of private city life); Michael Honey, *A Dream Deferred: After Bloody Battles for Desegregation, Blacks in Memphis are Still Behind*, *Nation*, May 3, 2004, at 36 (remembering union and employment desegregation).

16. Kiel, *Exploded Dream*, supra note 11, at 288–91.

17. *Id.* at 295 (noting nearly one-third of white children in Memphis City Schools withdrew permanently from system upon implementation of comprehensive busing order in 1973–74 school year, and this population continued to drop during following years).

18. *Id.*; see also Biles, supra note 11, at 479–81 (describing flight of white students from Memphis public schools in 1970s).

19. Kiel, *Exploded Dream*, supra note 11, at 295.

20. Kiel, *Dilemma*, supra note 2, at 814–15.

21. See supra note 3 (noting percentages of students in Memphis and Shelby considered economically disadvantaged).

and 75% of white children in Memphis attend private schools.²² In 1999, the NAACP's school desegregation lawsuit was dismissed—not because integration had been achieved, but because the student population of the Memphis City Schools was too homogeneously black to make integration possible.²³

B. *The Dissolution*

Dissolution did not come to Memphis abruptly. For several decades, local leaders have proposed regional consolidation of the general purpose governments of the City of Memphis and Shelby County.²⁴ Some of these proposals included school consolidation, but most of them did not. And the closely watched, analogous politics of UniGov (the consolidation of Indianapolis with Marion County) had shown that mergers might only be possible if schools were removed from the picture.²⁵ Meanwhile, beginning in 1990, various proposals to consolidate the school districts rose and fell.²⁶ Most notably, in 2002, Memphis Mayor Willie Herenton offered a plan to consolidate Memphis and Shelby schools as well as some departments of the city and county governments.²⁷ The plan created a single funding source for all schools in the county, but it expressly froze existing school catchment districts to reassure suburban voters. This plan

22. Tenn. Advisory Comm. to the U.S. Comm'n on Civil Rights, *School Desegregation in Tennessee* 16 (2008) [hereinafter *Tenn. Advisory Comm.*], available at <http://www.usccr.gov/pubs/TNDESEGFULL.pdf> (on file with the *Columbia Law Review*); Kiel, *Exploded Dream*, supra note 11, at 298.

23. Tenn. Advisory Comm., supra note 22, at 16; Kiel, *Exploded Dream*, supra note 11, at 296.

24. Reform efforts in 1962, 1971, 2005, and 2010 proposed broad governmental consolidation of the city and the county, which would have required concurrent majority passage by both the city and the unincorporated portions of the county under Tennessee law. See Tenn. Const. art. XI, § 9 (describing consolidation process in Tennessee). These consolidation efforts repeatedly failed to obtain requisite suburban support. Kiel, *Dilemma*, supra note 2, at 825; Clay Bailey, *Consolidation: Memphis Suburbs' Rejection of Merger 'Loud and Clear'*, *Com. Appeal (Memphis)* (Nov. 2, 2010, 11:55 PM), <http://www.commercialappeal.com/news/2010/nov/02/consolidation-memphis-shelby-voters-weighting-merge/> (on file with the *Columbia Law Review*).

25. William Blomquist & Roger B. Parks, *Fiscal, Service, and Political Impacts of Indianapolis-Marion County's Unigov*, *Publius: J. Federalism*, Fall 1995, at 37, 40.

26. See, e.g., S.B. 0358, 102d Gen. Assemb., 1st Reg. Sess. (Tenn. 2001) (requiring all counties to run single school districts); Jackson Baker, *A Lost Cause*, *Memphis Flyer* (Feb. 28, 2001, 4:00 AM), <http://www.memphisflyer.com/JacksonBaker/archives/2001/02/28/a-lost-cause> (on file with the *Columbia Law Review*) (describing bill's failure); Sherri Drake Silence, *Repeating History: School Merger Proposed 20 Years Ago Sparked Similar Debate*, *Com. Appeal (Memphis)* (Jan. 17, 2011, 12:00 AM), <http://www.commercialappeal.com/news/2011/jan/17/showdown-over-schools-repeating-history/> (on file with the *Columbia Law Review*) (highlighting similar reactions to proposed consolidation in 1990 and 2011 consolidation plan).

27. John Branston, *Fields Support: Attorney Says It's "Time for a Deal" on Schools*, *Memphis Flyer*, Jan. 10–16, 2002, at 9; Scott Shepard, *Divisive Issue: Would Four Systems Be Better than One?*, *Memphis Bus. J.* (Mar. 17, 2002, 11:00 PM), <http://www.bizjournals.com/memphis/stories/2002/03/04/story7.html> (on file with the *Columbia Law Review*).

fizzled, as did a 2005 effort to surrender the city schools' charter to necessitate merger with county schools.²⁸ Fiscal distress in city government and equity concerns about state financing formulas led the city to cut educational funding in 2008, a move that launched an intergovernmental task force to consider city-county funding consolidation.²⁹ In 2009, Shelby County schools rejected funding consolidation, reasoning that it was a slippery slope towards consolidation of the districts themselves.³⁰

Efforts to block consolidation or suburban inclusion within Memphis and its schools took just as many forms in recent years, including various incomplete attempts at suburban municipal incorporations,³¹ subdivision of Shelby County,³² state legislation to freeze school district borders,³³ and state legislation to permit formation of new school districts within Shelby County.³⁴ In 2010 and 2011, amidst the legal confusion of the dissolution process itself, proposed state legislation also sought to bar school system mergers without consent of both districts,³⁵ while the

28. See Willie W. Herenton, Organizational Meeting Education Task Force 1–15 (2005), available at <http://www.smartcitymemphis.com/wp-content/uploads/March17presentationbookletfortaskforce.pdf> (on file with the *Columbia Law Review*) (describing plan).

29. Bill Dries, Single Source School Funding Idea Moves Forward, Daily News (Memphis) (Dec. 11, 2008), <http://www.memphisdailynews.com/editorial/Article.aspx?id=39873> (on file with the *Columbia Law Review*).

30. Lela Garlington, Lawmakers Likely to Balk on Single-Source School Funding, Ritz Says, Com. Appeal (Memphis) (Sept. 6, 2009, 12:00 AM), <http://www.commercialappeal.com/news/2009/sep/06/hurdles-on-school-02/> (on file with the *Columbia Law Review*); Lela Garlington, Pickler Attacks Single-Source School Funding Proposal: County Board Chairman Lobbies Against 'Plan B,' Com. Appeal (Memphis) (Aug. 26, 2009, 12:00 AM), <http://www.commercialappeal.com/news/2009/aug/26/pickler-attacks-funding-02/> (on file with the *Columbia Law Review*).

31. A distinct set of affluent unincorporated suburbs obtained state legislation permitting fast track municipal incorporation, which allowed these so-called "Toy Towns" to block proposed annexation by the City of Memphis (and thus its school district) in 1997. John Branston, Toy (Town) Story: The City-County Squabble, Nashville Scene, Oct. 23, 1997, at 14; Phil Campbell, Memphis's Unruly Suburbs, Metropolis Magazine (Dec. 1997–Jan. 1998), http://www.metropolismag.com/html/content_0198/ja98mem.htm (on file with the *Columbia Law Review*).

32. In 1990, suburban mayors within Shelby County began to organize a breakaway to form their own county (and new county school district), an effort that receded when the Memphis School Board failed to obtain the requisite votes to surrender its charter. Silence, *supra* note 26.

33. In 2005, Shelby County Board of Education President David Pickler unsuccessfully sought legislation to freeze school boundaries across the state. See S.B. 2062, 104th Gen. Assemb., 1st Reg. Sess. (Tenn. 2005); State Lawmaker Offers Consolidation Alternative, MarkNorris.org (Mar. 4, 2005), <http://www.marknorris.org/media2005/03-04-05a.htm> (on file with the *Columbia Law Review*).

34. Kiel, Dilemma, *supra* note 2, at 826–29.

35. Ann Marie Hartman, Norris Bill on School Unification Heads to State Senate, WMCTV.com (Feb. 2, 2011, 9:58 PM), <http://www.wmctv.com/story/13957888/norris-bill-on-school-unification-heads-to-state-senate?redirected=true> (on file with the *Columbia Law Review*).

Shelby County Board pursued a right to consent to the merger.³⁶ All of these efforts were geared toward granting Memphis suburbs the legal independence necessary to refuse school consolidation with the city. None passed in time.

In December 2010, the Memphis School Board made a conclusive move, voting 5-4 to surrender its charter.³⁷ The move was justified primarily by the City's budgetary stress and resulting need to reduce its funding of city schools, but the timing also represented a preemptive strike against proposals that would turn Shelby County Schools into its own special school district, thereby reducing county funding to the city schools.³⁸

Concerned about legal ambiguity in the means by which to accomplish the dissolution, the School Board approved two separate paths of dissolution, one based on the City Schools' charter,³⁹ and the other based on the following provision of Tennessee law, which was applicable due to the Memphis City Schools' classification as a special school district:

The . . . duly constituted administrative officials of any special school district are authorized and empowered to transfer the administration of the schools in the special school district to the county board of education⁴⁰

The City of Memphis strongly endorsed the dissolution, as expressed by a unanimous City Council vote⁴¹ and a voter referendum approving the dissolution by nearly a 2-1 margin.⁴²

36. Jason Miles, Possible Compromise in School Charter Debate Could Delay Vote, WMCTV.com (Jan. 12, 2011, 9:46 PM), <http://www.wmctv.com/story/13834090/possible-compromise-in-school-charter-debate-could-delay-vote> (on file with the *Columbia Law Review*).

37. Jane Roberts, Memphis City Schools Board Surrenders Charter Pending Voter Approval, Com. Appeal (Memphis) (Dec. 20, 2010, 6:41 PM), <http://www.commercialappeal.com/news/2010/dec/20/memphis-school-board-vote-charter/> (on file with the *Columbia Law Review*).

38. See, e.g., Memphis, Tenn., City Council Resolution to Surrender Charter of Memphis City Schools (2011), available at <http://www.commercialappeal.com/education/council-accepts-charter-surrender/> (on file with the *Columbia Law Review*) (discussing motivations for resolution); Board Votes to Surrender Memphis City Schools Charter, WMCTV.com (Dec. 21, 2010, 12:33 AM), <http://www.wmctv.com/story/13718120/board-votes-to-surrender-memphis-city-schools-charter> (on file with the *Columbia Law Review*) (discussing vote to surrender Memphis City Schools's charter).

39. See Kiel, Dilemma, *supra* note 2, at 834–35.

40. Tenn. Code Ann. § 49-2-502(a) (2011).

41. Pursuant to the first dissolution pathway, the Memphis City Council voted unanimously to approve the charter surrender without a voter referendum. Richard Locker & Amos Maki, Memphis Council's Unanimous Vote OKs Surrender of Charter by City Schools, Com. Appeal (Memphis) (Feb. 10, 2011, 11:03 PM), <http://www.commercialappeal.com/news/2011/feb/10/memphis-city-council-affirms-city-schools-vote-sur/> (on file with the *Columbia Law Review*); Amos Maki, City Council Affirms Memphis School Board Vote to Surrender Charter: Resolution Could Force Merger Without Vote, Com. Appeal (Memphis) (Jan. 18, 2011, 11:34 PM), <http://www.commercialappeal.com/news/2011/jan/18/memphis-city-council-may-move-affirm-memphis-city/> (on file with the *Columbia Law Review*).

42. Zack McMillin & Jane Roberts, Memphis Voters OK School Charter Surrender, Com.

The state responded with swift and forceful opposition to the dissolution. The Norris-Todd Act, which was introduced, enacted, and signed within a month of its introduction, amended the state dissolution statute quoted above.⁴³ The new law applies only to rare (if not singular) cases like Memphis, where a successful dissolution referendum would more than double the size of a county district. The Act requires development of “a comprehensive transition plan,” and it delays any transfer of children or responsibility until the third school year after the vote.⁴⁴ Even more strikingly, it mandates establishment of a transition planning commission in which the county and the state would hold more than twice as many seats as the city school board, with no representation at all from the city government.⁴⁵ Memphis may have enacted the dissolution alone, but the state made sure that the city would have little control over the terms of implementation.

In addition to punishing Memphis, the Norris-Todd Act pacified the county’s largest and wealthiest suburbs by creating the legal means for their secession. The law lifts the ban on the creation of new special school districts within any county district that has been subject to a unilateral merger.⁴⁶ The impact is apparent: Suburbs within Shelby County can now withdraw from the merged district to form their own enclaves, perhaps leaving the Shelby County district to become little more than Memphis itself and the poorest parts of the county.

As the spring came, lawsuits bloomed: city versus county, county versus city, parents versus the state. At issue in the consolidated case are the city’s decisions, the Norris-Todd legislation, and the Shelby Board of Education’s cooperation, as well as the operation of separate school systems that, according to Memphis parents, deny their children equal educational opportunity.⁴⁷ On August 8, 2011, Judge Hays of the Western

Appeal (Memphis) (Mar. 8, 2011, 11:24 PM), <http://www.commercialappeal.com/news/2011/mar/08/memphis-school-charter-approval/?partner=popular> (on file with the *Columbia Law Review*).

43. S.B. 25, 107th Gen. Assemb., 1st Reg. Sess. (Tenn. 2011); Bill Dries, Haslam Signs School Consolidation Bill, *Daily News (Memphis)* (Feb. 11, 2011), <http://www.memphisdailynews.com/editorial/Article.aspx?id=56257> (on file with the *Columbia Law Review*); Press Release, Tenn. Gov’t, Haslam Signs Legislation Regarding School Consolidation: Bill Addresses Two of Governor’s Largest Concerns, TN.gov (Feb. 11, 2011), available at <http://news.tn.gov/node/6698> (on file with the *Columbia Law Review*).

44. Tenn. Code Ann. § 49-2-502(b).

45. Specifically, the transition planning commission includes ten appointed seats (plus two ex officio seats) for the County Mayor and the County Board of Education, five appointed seats (plus one ex officio seat) for the City Board of Education, and three appointed seats jointly chosen by the Governor and the heads of the state legislature. As applied to Memphis, that gives fifteen seats to the county and state, and six to the city of Memphis. The Mayor and City Council for Memphis are excluded entirely (in contrast to the general purpose county government). *Id.* § 49-2-502 (b)(2).

46. *Id.* § 49-2-502 (b)(3).

47. *Bd. of Educ. v. Memphis City Bd. of Educ.*, No. 2:11-cv-02101-SHM-cgc, slip op. at 14–25 (W.D. Tenn. Aug. 8, 2011), available at <http://www.tnwd.uscourts.gov/PublicInterestCases/civil/211cv2101/243.pdf> (on file with the *Columbia Law Review*) (listing litigants’ claims).

District of Tennessee ruled that the merger can proceed, and mandated that Shelby County Schools immediately integrate its school board with proportional representation from Memphis—a decision that will ensure the city’s representation on the current school board, even if it is underrepresented in the transition planning process mandated by Norris-Todd.⁴⁸ If school board presence was a major win for Memphis, so too did the state and potential breakaway cities win big: The order upheld Norris-Todd’s relaxed standards for the formation of new school districts.⁴⁹ In the fall of 2011, transition planning for the new Shelby County School District formally commenced, as did several suburbs’ research and policy debates about district formation.⁵⁰

C. *The Future of Race and Schools in Memphis*

The dissolution of a predominantly black school district into a majority white one could hypothetically change racial dynamics in Memphis metropolitan schools along three dimensions: integration, funding redistribution, and governance. On the first, however, change is unlikely. At first glance it might appear that the Memphis School Board’s actions would achieve the remedy for school segregation that was rejected by the Supreme Court in *Milliken v. Bradley*—that is, to fuse inner city and suburban school districts in order to create integrated schools. Memphis and the Detroit of *Milliken* indeed have faced a common barrier to integration: Public schools in the central city are too overwhelmingly minority to achieve desegregation within the city’s borders. In fact, however, the Memphis dissolution holds little promise for integration. The border between Memphis and Shelby will be gone, but it is all but certain that school catchment districts and assignment policies will not change, thus preserving the racial demographics of specific schools.⁵¹ Residents

48. *Id.*, slip op. at 143–46; see, e.g., Zack McMillin, *Shelby County Schools Mull Merger: Body Facing Decision to Appeal or Include Memphis City Schools*, Com. Appeal (Memphis) (Aug. 9, 2011, 11:15 PM) [hereinafter McMillin, *County Schools Mull Merger*], <http://www.commercialappeal.com/news/2011/aug/09/shelby-county-commissioners-discuss-us-district-co/> (on file with the *Columbia Law Review*) (“Mays ruled that Memphis must be given proper representation on the county school board.”).

49. See McMillin, *County Schools Mull Merger*, supra note 48 (discussing Judge Mays’s “ruling in favor of the new Norris-Todd state law”).

50. See Clay Bailey & Lela Garlington, *Suburbs Seek Advice for New Districts: Pending Merger with Memphis City Schools Stirs Quest for Breakaway Options*, Com. Appeal (Memphis) (Aug. 31, 2011, 12:00 AM), <http://www.commercialappeal.com/news/2011/aug/31/suburbs-seek-advice-for-new-districts/?partner=RSS> (on file with the *Columbia Law Review*); Zack McMillin, *Merger Basics. Or, Merger for (not so) Dummies, Eye on Schools Merger: Covering the Merger of Memphis and Shelby County Schools* (Oct. 5, 2011, 9:52 AM), <http://memphisnewsblog.com/2011/10/merger-basics-or-merger-for-not-so-dummies.html> (on file with the *Columbia Law Review*). Journalist Zack McMillin of the regional newspaper *The Commercial Appeal* is covering the details of the transition planning as they emerge on the Memphis News Blog. See *Eye on Schools Merger: Covering the Merger of Memphis and Shelby County Schools*, <http://memphisnewsblog.com/> (last visited Feb. 13, 2012).

51. Nothing in the dissolution itself could have required otherwise, and the transition

will still be free to exercise a Tieboutian choice not to attend integrated schools through their residential location decisions, but residential sorting to maintain or promote self-segregation could occur within rather than across the school districts. Daniel Kiel has argued compellingly that the rhetoric of the dissolution echoes resistance to desegregation (particularly busing), but that in fact, this dissolution will not achieve racial integration of Memphis metropolitan schools.⁵²

Redistribution among schools, more the province of *Milliken II*,⁵³ may be another matter. Consolidation of the city and county schools should mean that budgets for the two districts will be consolidated, such that the entire territory of Shelby County will support the costs of education for all children within it. Predictions say that the result will be increased county-based property taxes across Shelby (including for city residents) to take on the new expenditure of schools in Memphis.⁵⁴ Meanwhile, however, support for city schools would come off the city's ledger, leading to a reduction in city-based property taxes within Memphis.⁵⁵ Countywide taxes up, city taxes down means that consolidation will likely redistribute the costs of education for the city of Memphis to some extent. If Shelby suburbs successfully break away into new districts, however, all bets are off as to the final funding picture for Memphis and Shelby children.

When the Memphis school district has dissolved into Shelby, a third critical issue will arise: Will the sharing of governance between Memphis and Shelby result in vote dilution and reduced racial autonomy for black voters in the city? As I have argued in the context of city dissolution, from the point of view of race, dissolution can put two sets of values in tension: the loss of hard-won political self-determination and power, on one hand, and racial integration or redistribution, on the other.⁵⁶ Some dilution is indeed inevitable in Memphis as the city comes to share governance with a suburban territory that is whiter, though the demographics of Shelby County as a whole mean that African-Americans will nonetheless hold a majority on the Shelby school board. In the short run, however, the punishing Norris-Todd Act will dilute the power of Memphis voters over the merger's terms.

Of course, the final impact of the dissolution for integration,

planning process that the state has tried to impose (pending lawsuits as to its applicability in Memphis's case) tries to make that certain by giving the state and county a large majority of the planning committee.

52. Kiel, *Dilemma*, supra note 2, at 817–24. On the issue of the rhetoric of suburban resistance, Kiel reported one response that was particularly evocative of resistance to integration: “A group, Save Our Students, organized ‘to save the helpless children of this community from a plight that befell the children of Memphis decades ago.’” *Id.* at 836 (quoting Jane Roberts, *Foes of Memphis, Shelby County School Consolidation Brace for Fight*, *Com. Appeal* (Memphis) (Dec. 23, 2010, 11:47 PM), <http://www.commercialappeal.com/news/2010/dec/23/anti-consolidation-activist-launches-online-fight> (on file with the *Columbia Law Review*)).

53. *Milliken v. Bradley*, 433 U.S. 267 (1977).

54. Kiel, *Dilemma*, supra note 2, at 829–33.

55. *Id.*

56. Anderson, *Dissolving Cities*, supra note 6, (manuscript at 145–53).

redistribution, and governance will be shaped profoundly by any future demographic changes in the population of the Shelby County Schools. Longstanding escape routes for white flight will continue to exist (such as private schools, and critically, other county school districts in Tennessee, Arkansas, and Mississippi that compete as suburbs in the Memphis metropolitan area). And by permitting new cities or school districts to form within Shelby County, the Norris-Todd Act added a new and even more potent lever for white flight—one that would not require either paying private tuition or moving one's family.

From its inception, the Memphis dissolution has always been about alleviating the heavy tax burden shouldered by the metropolitan area's poorest residents to pay for the area's weakest schools. If the dissolution achieves tax relief for the inner city, it will have gained no more (and no less) than Memphis residents asked of it.

II. WHERE IT FITS, WHAT IT MEANS

There are many ways to view the actions of the people, school board, and city council of Memphis. The County, along with the Republican leadership of the state, read the city's dissolution measure as either an abdication (as in, "We failed, your turn.") or as hostile, desperate, and damning. Residents of the city have expressed a wholly different picture—one in which the suburbs of Memphis are culpable in the city and city school district's struggles. The dissolution resolution itself conveys that Memphis heavily subsidized its suburbs through city tax dollars spent on infrastructure there, conveying the message: "We're just sending the suburbs a long overdue bill for their debts."⁵⁷ Though not expressed formally, Memphis leaders and voters must surely also see culpability in the segregation before 1971; the immediate, sweeping flight from Memphis public schools as a result of the first meaningful court ordered integration; and the loss of jobs, tax revenue, population, and commerce from the city attendant to this flight from integration. For them, dissolution may symbolize desegregation ("Tear down the ghetto walls.") or redistribution to remedy past harms and ongoing unjust enrichment by the suburbs ("You created this mess, now you can fix it."). Or, perhaps the view behind the city's actions is more simple: The white district has tax capacity and funding resources the city district can't offer to its children in any other way ("Green follows white.").

The legal and theoretical context for the dissolution helps to navigate among these views. Step one in providing that context is to investigate the Tennessee law called upon by the city. Under terms that I have defined

57. Memphis, Tenn., City Council Resolution to Surrender Charter of Memphis City Schools (2011), available at <http://www.commercialappeal.com/education/council-accepts-charter-surrender/> (on file with the *Columbia Law Review*) (describing use of city-generated property taxes to finance growth in Shelby County outside Memphis city limits, "result[ing] in 49% of the total residential appraised property values of Shelby County being located beyond the city limits of Memphis").

previously, it is a voluntary dissolution code—the law allows a special school district to dissolve its own charter without consent or coercion by the state.⁵⁸ That means the dissolving entity makes the dissolution decision. (In an involuntary dissolution, the state dissolves a district or a city that is in breach of state norms or standards like school district accreditation minimums.)⁵⁹

Calling the code voluntary, however, is incomplete (and perhaps even deceiving) when we widen our lens to include the volition of Shelby County, in addition to Memphis and the state. With respect to Shelby County, Memphis made a nonconsensual, unilateral decision. Tennessee’s law does not require approval of the dissolution by the receiving county school district or the state. Most precisely then, the Tennessee code at issue is a unilateral, voluntary dissolution law; i.e., it permits locally led dissolution without consent by other affected local governments or their citizens.

Where does a voluntary, unilateral dissolution law fit in the context of educational reform and local government law? Voluntary dissolution laws for school districts are quite common across the country; however, a scan of them for the present Essay indicated that they are rarely unilateral.⁶⁰ If we simply view Memphis City Schools and Shelby County Schools as peer school districts, it is rare that states permit voluntary dissolution by one school district without granting approval rights to the receiving school district, just as it is rare that states grant cities the right to merge with a neighboring city without consent by both entities.⁶¹

58. See Anderson, *Dissolving Cities*, supra note 6, (manuscript at 114–15) (defining voluntary dissolutions as those made at dissolving entity’s discretion; involuntary as those imposed by state).

59. Involuntary dissolutions belong in a category of structural educational reforms that Aaron Saiger has usefully called disestablishment remedies—alterations in the grant of authority to school districts. See Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 *Colum. L. Rev.* 1830, 1845 (1999). Disestablishment remedies include, for instance, replacing local district governance with either state or mayoral substitutes in response to multi-year failures to meet state educational standards. See *id.* at 1848 & n.90, 1850 & nn.94–95.

60. Iowa Code §§ 275.12–275.22 (2011) (allowing school districts to merge upon approval by voting majority of all affected districts); *id.* §§ 275.51–275.57 (granting veto authority over dissolution to districts affected by it); Neb. Rev. Stat. § 79-413 (2011) (setting rules for dissolution and consolidation that require voter approval within each affected district); N.D. Cent. Code § 15.1-12-09 (2011) (authorizing contiguous school districts or portions thereof to consolidate upon approval by the boards of each district); *id.* § 15.1-12-11 (allowing state to enact reorganization plan, which must be approved by popular vote of proposed new district’s residents). Some statutes lack specific approval provisions for the receiving district, but instead require approval of voluntary dissolutions by the state or the county board of education. See, e.g., Minn. Stat. § 123A.46 (2011) (specifying approval procedures limited to county board of education and voters within dissolving district); Neb. Rev. Stat. § 79-413 (permitting voluntary dissolution of certain types of districts after approval by state committee and district election).

61. This is notwithstanding the fact that one of the most famous federal cases in local government law reviews a state law permitting a forcible merger. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 176–79 (1907) (rejecting City of Allegheny’s federal constitutional arguments). Much has changed since then, including the dramatic weakening of cities’

But seeing Memphis as a horizontal merger or consolidation depends on a conception of the Memphis City Schools and Shelby County Schools as peer governments. In my view, that is not quite right. Instead, the case reflects the county-city hierarchy, in which a lower level government forfeits its charter and a higher-level one acts as an automatic residual entity to assume responsibility. The right to public education means that the children of a dissolved school district must be absorbed by another provider. To make the receiving school district the county, as in Tennessee, conveys that these are governments within a hierarchy—a smaller district nested within a higher-level county that operates the default school district for the county’s regional territory.

This view of cities and counties as positioned in a vertical hierarchy may not be common in school district dissolution law, but it is the norm for municipal dissolution law. Counties very rarely exercise any influence, let alone veto authority, over the dissolution of a city back into their unincorporated territory.⁶² Indeed, state law rarely even gives them official notice of a pending dissolution. Under city dissolution law, counties are treated as default governments; it is only cities that are given the power of territorial self-definition.

While I view the city-county hierarchy as the more coherent way to understand the Tennessee law, it is not a perfect fit in the context of school districts. The dissolution of the Memphis City Schools puts new territory under the county district’s jurisdiction. The right to a public education gives all children one and only one school district; city and county districts are thus mutually exclusive. By contrast, a general purpose county government includes a municipality’s territory before a dissolution as well as after it—technically, no new constituents are added by a city dissolution. A school district dissolution that adds population and service territory thus arguably has a greater impact on the receiving county agency. Yet city and school district dissolutions both mean substantial changes to a county’s service responsibilities, fiscal health, and political economy. Ultimately, I read the Memphis vote and the Tennessee law on which it depends as the dissolution of a troubled lower tier of government into a larger state subdivision, rather than a “hostile takeover.”⁶³

When the Memphis dissolution is situated among dissolutions of other types of local governments, the events there align with an increase in dissolution activity by struggling cities across the country. In a forthcoming work, I note the recent spike in city dissolutions.⁶⁴ Across the board, I found that such activity was triggered by slow economic decline, if not acute fiscal crisis, with secondary themes of tax control, race dynamics, and postcorruption institutional reform emerging in significant

abilities to absorb a neighboring territory without its permission, whether incorporated or unincorporated.

62. Anderson, *Dissolving Cities*, supra note 6, (manuscript at 116–17).

63. Robertson, *County to Run Schools*, supra note 1.

64. Anderson, *Dissolving Cities*, supra note 6, (manuscript at at 103–04).

numbers of cities.

Having said that dissolution is increasingly common as a coping mechanism for fiscal crisis, and that it is common for state laws to treat counties as default receivers upon the dissolution of city entities, unilateral dissolution is only a good idea if counties are given what they need to succeed as larger, regional governments and if counties embrace their role in the vertical hierarchy as regional entities. The dissolution of Memphis City Schools gives the county the opportunity to discuss and consider potential gains from a regional district. For instance, predictions indicate the dissolution will cause a net fall in property taxes within the city, something that would make it cheaper to live within the city of Memphis. Such a change may benefit current city residents, whether rich or poor. But these tax reductions might also go further by attracting new residents to the city, including the significant population of county families that send their children to private and parochial schools and thus are particularly unsympathetic to tax costs for education.

From the point of view of regional policy values—including control of sprawl, inner city revitalization, improved public safety, broader housing opportunities within the metropolitan employment center, and racial integration of inner city housing—these redistributive effects might be positive not only from the point of view of Memphis, but from the point of view of the county as a broader government. If Shelby rises to the occasion of a regionalist mandate, the new financing structures for the district might help to lift all ships by lightening the city's tax burden. Educational innovations may be possible as well, such as the establishment of regional magnet schools. And whatever the changes to come, the new school district will need support to succeed. As captured by County Commissioner Mike Carpenter: “Whether you are in private school, whether you are for [the] municipal school district, whatever the case may be, our future workforce in this community and our ability to grow economically are dependent upon making this work.”⁶⁵

The state has a critical role to play in determining whether the dissolution is an opportunity or a setback for Shelby County. It is not just dissolution laws, and the response to their deployment, that need to nurture counties' fiscal health and good government. County consent and power in city or district incorporation proceedings is independently and symmetrically significant. Losses or gains in taxable land and service territory both matter. If dissolution laws that give counties no power to consent and affect the terms of the dissolution illustrate a form of county powerlessness that may hurt counties facing dissolutions of troubled cities, so too does it hurt counties when their richest property tax base can escape into incorporated status and leave the county with leftover pockets of rural and suburban poverty.

When we properly situate our assessment in this way, considering school district incorporation law as well as dissolution law, the Norris-

65. McMillin, *County Schools Mull Merger*, *supra* note 48.

Todd Act passed after the Memphis dissolution made things dramatically worse for Shelby County, including Memphis. To answer a struggling district that opts for dissolution, the state could have and should have made its county subdivision as strong and competent as possible so as to stabilize the service provided in the dissolving district without hurting county children. Instead, Norris-Todd hobbles the combined district, favoring the strongest area suburbs over metropolitan Memphis as a whole. By permitting the breakaway school districts within Shelby County, the state has created the high probability that the best-resourced subterritories within the former Shelby County Schools district will break away into new districts.

The Tennessee law permitting voluntary, unilateral dissolution by special school districts can be read as favoring county powerlessness (no choice in the dissolution) or county empowerment (unified regional territory). The breakaway provisions of Norris-Todd are poised to choose the first route, weakening the county schools at their time of greatest vulnerability. Much power now lies with Shelby County's wealthiest suburbs: Will they contribute to helping the new, regional Shelby County Schools succeed, or will they secede?

CONCLUSION

Much is still to be determined in Memphis as the dissolution transition continues to advance. As things evolve, Tennessee and Shelby County—including those constituents who live within the City of Memphis—should look beyond the immediate administrative confusion and threat of change to imagine what opportunities for educational quality and regional equity could come from the dissolution. Law has built county governments to be distinct from cities, to be higher-level governments whose duties flow to regional territory. When events support county empowerment, local constituents and the state should support the county at rising to the occasion of regional authority. Unlike the state legislature, local leaders like John Aitken, the Superintendent of Shelby County Schools, found the right spirit for moving forward: “My family just got bigger,” he said.⁶⁶

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http://www.columbialawreview.org/assets/sidebar/volume/112/47_Anderson.pdf

66. Wendi C. Thomas, How Will We Spend Education Interim Before Merger?, *Com. Appeal* (Memphis) (Aug. 11, 2011, 12:00 AM), <http://www.commercialappeal.com/news/2011/aug/11/how-will-we-spend-education-interim/> (on file with the *Columbia Law Review*).