

**360 DEGREES OF SEGREGATION: A HISTORICAL  
PERSPECTIVE OF SEGREGATION-ERA SCHOOL  
EQUALIZATION PROGRAMS IN THE SOUTHERN UNITED  
STATES\***

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**Introduction**

The modern school finance litigation movement in the United States is largely based on the presumption that school funding is correlative to the academic success of poor and minority children. Although the start of this movement is generally recognized as beginning in 1971<sup>1</sup>, its more notable precursors are the southern school equalization programs of the 1940s and 50s. This article explores the impact of a historic attempt to preserve de jure segregation<sup>2</sup> through an equalized school funding program to black and white schools; it then compares that program and its effects to current levels of funding and achievement in the South's mostly de facto segregated schools.<sup>3</sup>

Part I provides a brief overview of the American South's early system of public education up until the mid-twentieth century, while Part II explores the political factors—with a focus on its dual priorities of preserving segregation and improving education for rural white children—that led to the

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<sup>1</sup> The school finance reform is recognized as having three waves, the first of which is based on claims of violation of the federal Constitution's Equal Protection Clause; the second is based on inequitable expenditures as violative of state constitutions; and the third and current wave is based on claims that the schools and districts are funded insufficiently to meet a standard of adequacy. *See* *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 56 (1973); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (1989); *see also* J. F. Morse, *A level playing field: school finance in the Northeast*, University of New York Press, 2007.

<sup>2</sup> De jure segregation is defined as segregation that is mandated or permitted by law. *Black Law Dictionary*, 6<sup>th</sup> ed. 1990, 1479-1480.

<sup>3</sup> De facto segregation is segregation that occurs without state authority usually on the basis of socioeconomic factors. *Ibid.*

passage of the southern school equalization programs. This section focuses on Georgia's 1949 Minimum Foundation Program for Education ("MFPE"), which was the most extensive of the southern equalization programs. It also briefly describes similar equalization programs in Mississippi and South Carolina.

Finally, Part III demonstrates, through an update of the southern public school system, that the educational challenges black and poor children faced during the *de jure* period of segregation still exist (albeit to a lesser degree) throughout the nation's *de facto* segregated public school system. While it is beyond the scope of this article to propose solutions to low academic achievement, it is the authors' hope that this brief discussion of the full circle the United States has come in using funding to avoid desegregation efforts serve as a reminder that while funding and desegregation are critical elements of a complex formula for academic success, alone neither is a panacea for closing the racial and economic achievement gap in education.

## I. Before School Equalization

### *I.1 Early Public Education in the South*

Public education in the south has its roots in ideas that took shape in the colonial period and was heavily influenced by the English educational system.<sup>4</sup> Following independence from England, some southern leaders began to see public education as a necessity in a new democratic nation.<sup>5</sup> In contrast to New England whose early settlers had been persecuted in England, the settlers of the southern states often maintained closer ties to the mother country.<sup>6</sup> In fact, just as the development of the plantation system in the south reflected the land gentry of England, the southern states' affiliation for English culture resulted in the development of a nearly identical educational structure.<sup>7</sup>

Throughout the South a two-tier educational system prevailed. Academics were to educate white children from wealthy families, and the state supported poor schools for all other white children.<sup>8</sup> Both the concepts of Academies for the children of well-to-do, and some sort of public support for poor education were English concepts borrowed by the southern states.<sup>9</sup> North Carolina and Georgia mandated public supported education in their first post-independence constitutions<sup>10</sup>, while other southern states did not

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<sup>4</sup> E. W. Knight, *Public Education in the South*, 21 (Ginn & Co. 1922)

<sup>5</sup> *Id.* at 117.

<sup>6</sup> *Id.* at 10-11.

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.* at 129, 133, 135.

<sup>9</sup> *Id.* at 6-8.

<sup>10</sup> "That a school or schools shall be established by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and, all useful learning shall be duly encouraged and promoted in one or more universities." N.C. Const, art. XLI (1776); "Schools shall be

include education in their constitutional provisions until much later.<sup>11</sup> Notably, before the 1870's there was often resistance from wealthier whites to fund public education through tax dollars, and there was also a shared fear among whites that funding public schools would lead to mixed-race schools.<sup>12</sup>

In some states the disbursement of school funds was often subject to the whims of the legislature.<sup>13</sup> Consequently, in 1810 Virginia established a permanent public-school fund, which freed school funding from annual appropriations battles.<sup>14</sup> Soon all the southern states, save South Carolina, followed suit by adopting permanent public school funds.<sup>15</sup> Virginia also took the lead in establishing the “district free-school system”, in which communities were divided into school districts that could raise money to provide for the education of all white children.<sup>16</sup> This system of common schools would come to dominate the antebellum south until the Civil War.<sup>17</sup>

The growing support of public education in the South did not extend to everyone. At the turn of the 19<sup>th</sup> century, the antebellum South did not provide for the education of blacks; in fact, the laws of the time explicitly prohibited teaching slaves or free persons of color to read.<sup>18</sup> After the Civil War the South was uniform in establishing separate schools for blacks and whites<sup>19</sup>, and many state constitutions in the south included public education for all children.<sup>20</sup> As late as 1889, funding for black and white schools was largely equal, but post-reconstruction the southern states stripped blacks of those rights and civil liberties<sup>21</sup>, and when taxes became a strain, public officials began to divert education funds to primarily fund white schools.<sup>22</sup>

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erected in each county and supported at the general expense of the State, as the legislature shall hereafter point out.” GA. Const, art. LIV. (1777)

<sup>11</sup> Knight, *supra* note 4, at 118-119 (Virginia added a provision in 1851, and all other southern states except Louisiana, included a provision upon their admission to the union).

<sup>12</sup> H. A. Bullock, *A history of negro education in the south, from 1619 to the present*, Praeger Publishers, 1967, , 36-60

<sup>13</sup> See D.Orr, *A history of education in Georgia*, Univ. of N.C. Press 1950, p. 77 (noting that some in the Georgia Legislature viewed the Poor School Fund as a necessary and troublesome evil); see also Knight, *supra* note , at 129 (noting that in South Carolina class differences and cultural differences between the state's regions were often the source of conflict when it came to poor school funding).

<sup>14</sup> Knight, *supra* note 4, at 167.

<sup>15</sup> South Carolina did not establish its first permanent school fund until after the civil war. *Id.*

<sup>16</sup> *Id.* at 200.

<sup>17</sup> *Id.* at 266-267.

<sup>18</sup> E. G. Dexter, *A history of education in the United States*, McMillian, 1916 , p. 454,

<sup>19</sup> *Id.* at 456.

<sup>20</sup> Orley Ashenfelter et. al., *Evaluating the Role of Brown v. Board of Education in School Equalization, Desegregation, and the Income of African Americans*, 8 AM. L. & ECON. REV. 3 (2006).

<sup>21</sup> *Id.*

<sup>22</sup> Bullock, *supra* note 12 , at 86.

The rationale for the disparity was that blacks did not need education of a quality comparable to that of whites.

The 1896 Supreme Court case of *Plessy v. Ferguson*<sup>23</sup> legitimized the southern mantra of “separate but equal”, but the South’s racially-divided public school system was anything but equal. In fact, the only education-related case the Supreme Court heard between *Plessy* and *Brown v. Board of Education*<sup>24</sup> (which overturned *Plessy* fifty-eight years later) was a Georgia case that illustrated the separate but equal fallacy.<sup>25</sup> In that case, *Cummings v. Richmond County Board of Education*<sup>26</sup>, the Richmond County Board of Education closed the county’s black high school, yet continued to fund the operation of the county’s white high school.<sup>27</sup> The Court rejected the plaintiff’s claim that this use of tax dollars violated the Equal Protection Clause of the U.S. Constitution.<sup>28</sup> Writing for the majority of the Court, Justice Harlan opined that despite the inequalities of the racially segregated school system, state taxation was a state matter in which the federal government should not interfere unless there was a blatant violation of the Equal Protection Clause and hostility to “the colored population.”<sup>29</sup>

After *Cummings* legitimated separate and unequal education funding, racial disparities in education remained pronounced. In 1870, only 10% of black students in the South attended any kind of school.<sup>30</sup> In 1900, in the sixteen former slave states, there were 93 blacks students for every black teacher compared to 57 white children for every white teacher.<sup>31</sup> Yet despite the disparities, black literacy rates rose. In 1860, southern blacks had a 95% illiteracy rate, by 1880 that rate dropped to 70% and would continue to fall to 30% in 1910.<sup>32</sup>

In the early 1900s, 90% of Blacks lived in the South<sup>33</sup>, yet throughout the first third of the twentieth century, racial inequities in school resource allocation was the standard; white school boards disproportionately allocated state funds (which were calculated based on the total number of school-aged children) to white schools.<sup>34</sup> Significantly, in 1900, large numbers of black

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<sup>23</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896) (affirming state-imposed racial segregation by holding that so long as the legal and political right of the races were equal, social inequalities did not violate the Equal Protection Clause under the 14<sup>th</sup> Amendment).

<sup>24</sup> *Brown v. Board of Education* (I), 347 U.S. 483 (1954).

<sup>25</sup> M.J. Klarman, *From Jim Crow to civil rights: the supreme court and the struggle for radical equality*, Oxford Univ. Press, 2004, 45

<sup>26</sup> *Cumming v. Board of Educ. Of Richmond County*, 175 U.S. 528, (1899).

<sup>27</sup> *Id.* at 530-41.

<sup>28</sup> *Id.* at 543-545.

<sup>29</sup> *Id.* at 545.

<sup>30</sup> Bullock, *supra* note 12, at 170.

<sup>31</sup> J.D. Anderson, *The Education of Blacks in the south*, North Carolina Press 1988, p.111

<sup>32</sup> *Id.* at 31.

<sup>33</sup> Bullock, *supra* note 12, at 149 (noting that “[o]ver 60 percent of these were living in Georgia, Mississippi, Alabama, the Carolinas, and Louisiana.”)

<sup>34</sup> Ashfelter, *supra* note 20, at 3.

children were engaged in gainful work, 49.3% of black boys aged ten to fifteen, and 30.6% of black girls were engaged in gainful work.<sup>35</sup> This compares to 22.5% and 7% of white boys and girls respectively.<sup>36</sup>

The length of school terms also reflected racial disparities.<sup>37</sup> The average southern white school had a school year of 128 days in 1909-1910, and by 1928-29 the school year had increased to 164 days.<sup>38</sup> Black school terms were notably shorter, with only 101 days in 1909-10 and 144 days in 1928-29.<sup>39</sup> During the 1914-15 school year, the southern states spent in aggregate \$72,051,460 on public education, but only \$40,073,312, or 11.7%, was spent on black children.<sup>40</sup> The average southern black child was apportioned \$4.01 for his education in 1915, while the average southern white student received the benefit of \$10.82 of education spending.<sup>41</sup>

In 1915, most major southern cities had no black public high schools, yet during this same period, southern politicians worked vigorously to increase the number of public high schools for white students.<sup>42</sup> One example of the stark racial disparity of educational resources in the early 1900s was the relatively cosmopolitan city of Atlanta, Georgia. In Atlanta, there were thirty-eight grammar schools, a boys' high school, a high school and commercial school for girls, and five night schools for its 17,000 white children. Yet, for the slightly more than half of 10,000 black school-aged population actually enrolled in school, there were only eleven grammar schools.<sup>43</sup> The per capita expenditure for black schools was \$1.71 compared to \$15 for white schools.<sup>44</sup>

Because education was primarily funded at the local level (public high schools were funded exclusively at the local level), urban schools were more likely to have a stronger system of education, as rural schools barely eked by.<sup>45</sup> There was a marked disparity between the educational funding and achievement of prosperous districts versus their poorer mostly rural neighbors; moreover, the more prosperous communities increased their

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Bullock, *supra* note 12, at 176.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 179.

<sup>41</sup> *Id.*

<sup>42</sup> Anderson, *supra* note 31 at 193.

<sup>43</sup> J. Dittme, *Black Georgia in the progressive era, 1900-1920* 145 (Univ. of Ill. Press 1977).

<sup>44</sup> A. P. Blaustein and C.C. Ferguson jr. *Desegregation and the law: the meaning and effect of the school segregation cases* 103, Rutgers Univ. Press, 1957.

<sup>45</sup> 2008-09 Education policy primer, *Education in Georgia The new Georgia Encyclopedia*, available at: [http://www.gpee.org/fileadmin/files/pdf/Education\\_inGeorgia.pdf](http://www.gpee.org/fileadmin/files/pdf/Education_inGeorgia.pdf) [hereinafter education policy primer].

educational advantages as their wealth grew.<sup>46</sup> School attendance and graduation rates of white and black schools in rural counties trailed the urban districts, and by the turn of the century the old Academy system had virtually disappeared, replaced in rural areas by a system of a large number of smaller schools.<sup>47</sup> Funding in many rural schools was only sufficient to run the schools for three to five months, and qualified teachers in rural areas left for more populous and prosperous areas, leaving behind only those teachers poorly equipped, poorly paid, and often unqualified for the rural area teaching positions.<sup>48</sup>

### *I.2 Education in Rural Areas Becomes a Priority in the Progressive Era*

Between 1890 and 1920, rural legislators increasingly recognized the disparities between the southern states' urban and rural schools,<sup>49</sup> and the Progressive Era educational campaigns of 1900 to 1915 resulted in greater appropriations of funds for the public education of white children in the South.<sup>50</sup> Following the Progressive Era of the early twentieth century, the Foundations Movement of the 1930s and 40s, called for an equalization of educational opportunities among white children.<sup>51</sup> As the Foundations Movement improved education for poor rural white schools, it actually heightened racial disparities because the local school boards appropriated the majority of education funds to white schools.<sup>52</sup> The twentieth century brought changes in reforms such as school consolidation to white schools but black schools were often denied these benefits.<sup>53</sup> Consequently, in the late 1930s and early 1940s, things were bad (but improving) for southern rural white students, but worse (and not improving) for black students.

The late 1940s brought about great pressure for social change in the country and a push for equality for black citizens. The Roosevelt Administration's New Deal, which spurred a federal campaign to help the poor, increased the

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<sup>46</sup> ORR, *supra* note 13, at 250 (The great number of small school districts under this system allowed more prosperous districts, including cities and towns to separate themselves from their less fortunate neighbors).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> This period is recognized as the "Progressive Era" and is characterized by a push for governmental reform and increased state services throughout the country. Dittmer *supra* note 43 at xi; *see also* ORR, *supra* note 13, at 210 (In the Georgia House of Representatives the charge for better rural education was led by George Carswell who has served several years on the County Board of Education of rural Wilkinson County.).

<sup>50</sup> Klarman, *supra* note 25, at 45 (describing local school boards as arbiters of how school funds were allocated).

<sup>51</sup> Thomas V. O'Brien, *Georgia's Response to Brown v. Board of Education: The Rise and Fall of Massive Resistance, 1949-1961* 3 (1992) (unpublished Ph.D. dissertation, Emory Univ.) (on file with Hugh F. MacMillan Law Library, Emory Univ.)

<sup>52</sup> Klarman, *supra* note 25, at 45 (noting that local school boards were the arbiters of how school funds were allocated).

<sup>53</sup> School consolidation involves the closing of small, one to five teacher schools, and their replacement with larger, modern, and centralized schools. *See* Ellwood Patterson Cubberly, *Public education in the United States*, Riverside 1919, p.470

number of black professionals.<sup>54</sup> Increased urbanization resulted in cities that were less racially restrictive with regard to voting and social separation. Moreover, blacks of the urban south had a rising middle class that benefitted from the segregated economy and used its economic power for social change.<sup>55</sup> Blacks recognized more power through increased education (particularly in urban areas), and its corollary ability to engage in successful social protest.<sup>56</sup> In fact, their faith in the power of education was so strong that between 1890 and 1930 the overall rate of black literacy in the South grew faster than that of whites.<sup>57</sup>

The rise of black political power was critical to this rapid social change. In the years after the *Smith v. Allwright* decision struck down the white primary,<sup>58</sup> black voter registration rose exponentially in the South, with the fastest increase in voter registration occurring in Georgia from 20,000 in 1940 to 125,000 in 1947.<sup>59</sup> Post WWII, blacks who had fought for their country and black community leaders were less willing to endure the humiliation of being treated as subhuman.<sup>60</sup> Concurrently, a black political class with growing confidence moved to increase the quality of education.<sup>61</sup>

On the legal front, blacks began to challenge segregation in public schools. During the late 1920s, the NAACP planned to launch a series of lawsuits that sought to equalize school expenditures.<sup>62</sup> Keenly aware of the NAACP's limited resources, NAACP strategist Nathan Margold wanted to limit the number of lawsuits by litigating the funding inequities "of a single school to within a state to invalidate the funding of that state's entire educational system."<sup>63</sup> Fearing backlash, during the 1930s and 40s the NAACP limited the scope of its legal pursuits to those of discrimination in teachers' salaries and admission to professional school.<sup>64</sup>

Ultimately, the rising social consciousness and increasing legal challenges to segregation in education imparted on southern whites a growing recognition that threats to the institutionalized system of segregated schools were

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<sup>54</sup> S. G. N. Tuck, *Beyond Atlanta: the struggle for radical equality in Georgia 1940-1980* 110 (Univ. of Ga. Press 2001).

<sup>55</sup> *Id.* at 103. (also noting that white violence (and more specifically lynchings) were more common in rural than urban areas).

<sup>56</sup> *Id.* (observing the astounding rate of progress blacks made in a short span of time, "[i]lliteracy rates for southern blacks aged ten and over fell from 76.2 percent in 1880 to 26 percent in 1920. In 1900 only about 1,000 blacks attended college in the United States, but by 1930 roughly 20,000 did.").

<sup>57</sup> Bullock, *supra* note 12, at 172-173.

<sup>58</sup> *Smith v. Allright*, 321 U.S. 649 (1944) (holding that denying blacks the right to vote in primary elections was a violation of the Fifteenth Amendment of the U.S. Constitution).

<sup>59</sup> Klarman, *supra* note 25, at 236-53.

<sup>60</sup> *Id.* at 104.

<sup>61</sup> O'Brien, *supra* note 51 at 2.

<sup>62</sup> Ashenfelter, *supra* note 20, at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 7.

inevitable. It was in this political environment that the southern school equalization programs came into being.

## II. SCHOOL EQUALIZATION PROGRAMS IN THE SOUTH

### *II. 1 Georgia's Minimum Foundations Program for Education: The Political Impetus for Equalization*

In 1945, Georgia adopted a new Constitution that drastically reshaped the state's education policy<sup>65</sup> by consolidating and reducing the number of school tax districts, increasing the minimum tax rate for schools and granting the authority to extend public schooling from eleven grades to twelve grades. The next year, the state embarked on a broad study to identify the problems of Georgia schools and make recommendations for their improvement.<sup>66</sup> This study was a cooperative effort of more than 20,000 lay and professional people to assess the deficiencies of Georgia's education system.<sup>67</sup>

The study led the legislature and chief proponent Governor Herman Talmadge to propose the Minimum Foundation Program for Education, a program designed to improve the quality of education for rural white children while maintaining the system of segregated education.<sup>68</sup> Despite its affirmation of segregationist principles, staunch segregationists opposed any attempt to improve black education at public expense, going so far as to oppose the spending of any white tax dollars on black education.<sup>69</sup> Former Georgia Speaker of the House and political powerhouse Roy Harris led the opposition, while Harris vigorously supported school equalization for poor rural whites, he preferred dismantling the entire Georgia system of public

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<sup>65</sup> Among the provisions of the 1945 Constitution were, a lay board of education, an 85 percent reduction in the number of school tax districts, a simplification of procedures for voting for school bonds, the professionalization of the office of county school superintendent, the authority to extend the public school system from 11 to 12 grades, and an increase in the maximum tax rate for schools from five to fifteen mills. Ga. const. of 1945 art. VIII; ORR, *supra* note 13, at 387.

<sup>66</sup> The study, "A Survey of Public Education of Less Than College Grade in Georgia" and its recommendation was of critical importance to the passage of the MFPE. ORR *supra* note 13 at 387-88.

<sup>67</sup> Peggy Steelmon, *Growth and Development of the Georgia Education Association 184 (1966)* (unpublished Ph.D. dissertation, University of Georgia)(on file with Horace W. Sturgis Library, Kennesaw State University)(noting that among the deficiencies cited by the study were: "1 School term of only seven months, 2 Salaries too low, 3 Insufficient numbers of teachers, 4 Inadequate funds for supplies and other operating costs, 5 Not enough aid for transportation, 6 No financial aid for school construction.").

<sup>68</sup> ORR, *supra* note 13, at 387-88 (of the southern public school equalization programs Georgia's was the most extensive; Georgia spent nearly double South Carolina's 75 million dollar building program, which was even larger than Mississippi's program; David Robertson, *Sly and able: a political biography of James F. Byrnes*, 507-10 (W W Norton & Co Inc 1994); Charles C. Bolton *Mississippi's school equalization program, 1945-1954: 'A last gasp to try to maintain a segregated education system'*, J. of Southern History 66(4): at 797.

<sup>69</sup> O'Brien *supra* note 51, at 4.



education to equalizing black and white schools.<sup>70</sup> Talmadge responded by arguing that northern “agitators” were attempting to move black children into white schools, and that school equalization under the MFPE would perpetuate segregation under the banner of separate but equal.<sup>71</sup> Initial attempts to finance the MFPE faltered when a referendum to finance the program was defeated by a three to one vote.<sup>72</sup> However, the political climate of 1949 foreshadowed significant challenges to segregation, and as school segregation schemes began to fall to Equal Protection Clause challenges<sup>73</sup>, staunch segregationists—perhaps believing that maintaining separate facilities for blacks and whites was more important than ideological opposition to spending white tax dollars on black education—joined Governor Talmadge in pushing the MFPE through the legislature.<sup>74</sup> At the 1950 Georgia Democratic Convention, Harris-led delegates voted to support fully funding the MFPE within the separate-but-equal doctrine.<sup>75</sup>

The following year, Governor Talmadge forced a 3% statewide sales tax through the legislature that raised over \$200 million for education, and would be used to fully fund the MFPE’s equalization of education throughout the state.<sup>76</sup> The MFPE forever changed the scope of the state’s involvement in education and was the first time that Georgia made a serious effort to fiscally support black schools at anywhere near the level of white schools, albeit with goal of preserving de jure segregation.<sup>77</sup>

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<sup>70</sup>*Id.* at 3. Paper Presented at the 1993 American Educational Research Association Annual Meeting April 12-16; *see also* A.B. Blaustein and C.C. Ferguson jr. *Desegregation and the law: the meaning and effect of the school segregation cases* 258, (Rutgers Univ. Press 1957)(noting that rather than desegregate Georgia policymakers proposed to close the public schools and lease their facilities to private owners committed to promoting continued segregation.)

<sup>71</sup>O’ Brien *supra* note 51, at 5.

<sup>72</sup>Peggy Steelmon, *supra* note 67 at 184.

<sup>73</sup>*See e.g.*, *Sipuel v. Board of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (requiring the plaintiff be admitted to the previously all white University of Oklahoma School of Law noting “[t]he State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.”); *see also*, *Sweatt v. Painter* 338 U.S. 865 (1949) (granting writ of certiorari to review the Texas Supreme Court’s decision that opening a law school for blacks should defeat Sweatt’s 14<sup>th</sup> Amendment challenge to whites only admissions policy at the University of Texas.)

<sup>74</sup>Steelmon, *supra* note 67, at 192. The MFPE passed on February 18<sup>th</sup>, 1949, with one vote against it in the Senate and two dissenting votes in the House.

<sup>75</sup>O’ Brien, *supra* note 51. Paper Presented at the 1993 American Educational Research Association Annual Meeting April 12-16 (*The NAACP’s complaint in Aaron v. Cooper specifically attacked the issue of inequity in Georgia’s funding of black schools and came on the heels of Sweatt v. Painter*, 339 U.S. 629 (1950) (desegregated Univ. of Texas Law School) and *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950) (desegregating the University of Oklahoma). Both cases were decided only months before the August 1950 Georgia State Democratic Convention.)

<sup>76</sup>1951 Ga. Laws 360-381.

<sup>77</sup>N. V. Bartley, *The creation of modern Georgia*, p. 206 (Univ. of Ga. Press (1990))(describing Talmadge’s political tactics as a combination of political arm twisting, the

## *II. 2 The Scope of Georgia's MFPE*

The MFPE (or “the Act”) was built around the concept of using universal minimum standards of funding as a tool for school equalization.<sup>78</sup> Section 1 of the Act declared it was “the public policy of the State of Georgia that educational opportunities for all citizens of this state shall be equalized...”<sup>79</sup> Although this language was similar to Georgia’s earlier equalization legislation in its stated goal, it was the broad scope and specificity with which MFPE attacked funding disparities that made the MFPE a revolutionary piece of legislation, particularly in the South. Along with the unprecedented magnitude of state educational expenditures, the MFPE set up a non-discriminatory means of allocating state education funds, even going so far as to require districts to guarantee that funds would be appropriated on a non-discriminatory basis.<sup>80</sup>

The MFPE established a nine-month school year<sup>81</sup> and gave students in public schools access to free textbooks.<sup>82</sup> The Act also mandated that teachers, principals, supervisors, and superintendents be certified by the state pursuant to the rules and regulations of the State Board of Education.<sup>83</sup> It provided for calculating Teacher-Pupil Ratios based on population density; however these ratios were calculated separately for whites and blacks.<sup>84</sup>

Large sections of the MFPE were devoted to revenue and expenditures.<sup>85</sup> The Act established the “Minimum Foundation Program Fund” to support the program.<sup>86</sup> Section 6 established a minimum teacher salary schedule that did not differentiate among grades or subjects taught.<sup>87</sup> The MFPE gave the State Board of Education the ability to calculate the funding needs of local systems with regards to pupil transportation.<sup>88</sup> The Act also provided detailed calculations on how expenditures for schools should be calculated, how to

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threat of educational integration, and the promise of future prosperity, brought about by better education, to garner support for the 3% sales tax).

<sup>78</sup> 1949 Ga. Laws 1406-22.

<sup>79</sup> *Id.*

<sup>80</sup> R.O. Johnson, *Desegregation of Public Education in Georgia—One Year Afterward* 24 J. Negro Education 228, 228-30 (also noting that this program did not address the fact that Georgia still made no provision for blacks in higher education).

<sup>81</sup> The Act established that from and after July 1, 1949, the public schools of Georgia shall be operated for at least nine months during each school year and that each year should consist of twenty school days. 1949 Ga. Laws 1409

<sup>82</sup> 1949 Ga. Laws 1417-18.

<sup>83</sup> The MFPE required that all teachers, principals, supervisors, or superintendents hold a certificate from the State Board of Education, certifying their qualifications for the position. However, the certification requirements did not extend to elected county school superintendents. 1949 Ga. Laws 1409.

<sup>84</sup> 1949 Ga. Laws 1410.

<sup>85</sup> 1949 Ga. Laws 1406-22.

<sup>86</sup> 1949 Ga. Laws 1408.

<sup>87</sup> 1949 Ga. Laws 1409-10.

<sup>88</sup> 1949 Ga. Laws 1411-12 (Notably, in calculating the density of pupils per square mile, the law required white students and blacks to be calculated separately).

determine a locality's ability to pay for these programs, and how the state would fund the difference between a locality's costs and its ability to pay for programs.<sup>89</sup> The Act provided that should a local unit of administration fail to comply with one or more provisions of the Act, the State Board of Education could withhold payments from the Minimum Foundation Program Fund until districts were in full compliance.<sup>90</sup> Most significantly, the MFPE set a budget that totaled \$96 million for education in Georgia, \$69 million of which would come from the state.<sup>91</sup>

### *II. 3. The Impact of the MFPE in Georgia*

Between 1950 and 1958, the MFPE increased Georgia's expenditures on public education from \$53 million to \$150 million, and by 1961, Georgia was expending more than 50% of its tax revenues on education.<sup>92</sup> To facilitate the MFPE's objective of equalizing blacks schools in order to preserve legal segregation, Governor Talmadge designated more than half the initial spending, \$30 million, to black schools even though black students made up only one-third of the total enrollment in Georgia schools.<sup>93</sup> The state began an effort to consolidate and expand black schools.<sup>94</sup> When Georgia engaged in a \$200 million school building program, more than half of those funds went toward construction and improvement of black schools.<sup>95</sup> In the 1949-50 school year, there were 1,596 white schools and 2,310 black schools.<sup>96</sup> Of the 1,300 one-teacher schools in Georgia, 1,254 were black.<sup>97</sup> Within a decade, through school consolidation and building, the total number of schools had dropped to 1,930 (of which there were 341 white high schools and 177 black high schools)<sup>98</sup>; the number of one-teacher schools dropped to only fourteen.<sup>99</sup> Moreover, the MFPE equalized teachers' salaries and effectively ended the disparity between the pay of white and black educators. In the 1949-50 school year the average teacher earned only \$1,997 per

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<sup>89</sup> 1949 Ga. Laws 1412-13.

<sup>90</sup> 1949 Ga. Laws 1419.

<sup>91</sup> 1949 Ga. Laws 1422.

<sup>92</sup> State of Ga., Joint Comm. on Educ. Report on Public Educ. Expenditures, 101<sup>st</sup> Gen. Assem. 5, 19, 21 (1962).

<sup>93</sup> TUCK, *supra* note 54, at 77.

<sup>94</sup> See *A.S. Chiphart*, *Torches of light: Georgia teachers and the coming of the modern south*, p.230 (Univ. of Ga. Press 2005). For example, Hall County's Oliver's School was transitioned from a general school with grades up to grade eight to an elementary-only school. The influx of state funds also allowed for the provision of buses to transport rural black children of Hall County to the improved schools of the county seat Gainesville.

<sup>95</sup> Letter from T.A. Carmichael Dir. of Negro Educ. to Don Rawlins (copy on file with author).

<sup>96</sup> While it may seem odd that there were more black schools than white schools given their populations this is a statistical aberration caused by the large number of 1 teacher black schools. Ga. dept. of education statistical summaries of Georgia schools, (1959-1960) [hereinafter statistical summaries].

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Ga. Dept. of Education, miscellaneous info on ga. Public Schools, (Dec. 29, 1960). Four of the fourteen one teacher schools in 1960 were special schools, not regular one teacher schools.

year.<sup>100</sup> By 1960, schools for whites employed 23,602.5 teachers, black schools employed 10,123, and average teacher salaries, both black and white, rose to \$3,802.<sup>101</sup>

#### *II.4 School Equalization in Mississippi and South Carolina*

While not as extensive as Georgia's MFPE, other southern states implemented school equalization programs to avoid integration.<sup>102</sup> This section focuses on two of the states, Mississippi and South Carolina, that implemented school equalization programs with that objective.<sup>103</sup>

Just as in Georgia, social movements of 1920s and 30s led Mississippi legislators to improve the quality of education of rural white students while ignoring the educational needs of black students.<sup>104</sup> In Mississippi, only 5% of black students were enrolled in high school compared to 20% of white students in the year 1944-45.<sup>105</sup> Expenditures were similarly disparate, with \$45.79 spent per capita on white students yet only \$10.10 per black student.<sup>106</sup> Mississippi state leaders, perhaps understanding that legal challenges would potentially prohibit such unequal standards, sought to equalize spending in the late 1930s and 40s.<sup>107</sup> However, the Mississippi plan suffered ad hoc implementation of the school equalization measures, with some communities making great strides as others maintained the status quo.<sup>108</sup>

Perhaps the greatest flaw of the Mississippi equalization scheme was its funding.<sup>109</sup> Unlike Georgia's equalization plan, the Mississippi plan did not provide for the equalization of white and black teacher salaries.<sup>110</sup> Notably, the lack of parity between black and white teacher salaries led to the case of *Bates v. Batte* in which a black schoolteacher brought a suit from fixing and maintaining a teacher salary scale on the basis of race.<sup>111</sup> While the case was dismissed for the plaintiff's failure to exhaust administrative remedies, the case certainly foreshadowed additional challenges to the disparities in the state's segregated system of public education.<sup>112</sup>

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<sup>100</sup> statistical summaries, *supra* note 96.

<sup>101</sup> The 23,603.5 teachers for white schools include part-time teachers who were counted as fractional full-time teachers. *Id.*

<sup>102</sup> Knight, *supra* note 4, at 112.

<sup>103</sup> Bolton, *supra* note 68 at 782.

<sup>104</sup> *Id.* at 783.

<sup>105</sup> F.O. Alexander, The education of negroes in Mississippi, 375.

<sup>106</sup> *Id.* at 378.

<sup>107</sup> Bolton, *supra* note 68, at 786-787.

<sup>108</sup> *Id.* at 806.

<sup>109</sup> Bolton, *supra* note 68, at 802.

<sup>110</sup> *Id.* at 802.

<sup>111</sup> *Bates v. Batte*, 187 F.2d 142 (5<sup>th</sup> Cir. 1951).

<sup>112</sup> *Id.* (citing Georgia case *Cook v. Davis*, 178 F.2d 595 (5<sup>th</sup> Cir. 1949) in which the court also dismissed on the basis that the plaintiff had not exhausted administrative remedies).

From its inception the program faced funding problems, and by 1953 Mississippi legislators balked at providing any funding for the program. When the Supreme Court handed down its decision in *Brown v. Board of Education* in 1954, Mississippi legislators considered the quest for equalization a moot point. In fact “as late as 1962 the average Mississippi school district, despite sixteen years of state-sponsored equalization measures, still spent nearly four dollars per capita in local instruction funds on white children for every dollar expended on black students.”<sup>113</sup>

South Carolina also implemented a school equalization program in an attempt to preserve de jure segregation.<sup>114</sup> As in the rest of the South, pressures to abolish the Jim Crow education system grew in South Carolina after WWII.<sup>115</sup> Of the southern states, South Carolina’s racial disparities in educational expenditures were the greatest; the state spent ten times the amount on white students as black students.<sup>116</sup> The state justified these disparities under the rationale that since whites paid the majority of taxes, they were entitled to the lion’s share of the benefits of those taxes for white educational facilities.<sup>117</sup> In the 1929-30 school year, black spending was \$15.86 per capita but spending on white education had increased to \$42.39.<sup>118</sup> By 1940, campaigns to strengthen black education brought results, as 90% of blacks aged ten to fourteen were attending some school compared to 91% of whites,<sup>119</sup> Yet by the 1944-45 school year 71% of South Carolina’s black schools were one- or two-teacher schools, while for that same school year only 46% of white schools had two or fewer teachers.<sup>120</sup> Moreover, only 9% of black students were provided with transportation to public school.<sup>121</sup>

South Carolina’s equalization program began under the Governorship of former Supreme Court Justice James F. Byrnes and was spurred in part by the challenges raised by *Briggs v. Elliot*, the first of five cases to ultimately be consolidated into the *Brown v. Board of Education* lawsuit that challenged the separate but equal doctrine.<sup>122</sup> The case originated in Summerton, a town in

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<sup>113</sup> Bolton, *supra* note 59, at 814.

<sup>114</sup> Rebekah Dobrasko, Upholding “Separate but equal” South Carolina’s School Equalization Program, 1851-1955 1 MA Thesis University of South Carolina 2005. Cooper Library  
*Id.* at 3.

<sup>116</sup> Bullock, *supra* note 12, at 180. South Carolina spent \$10.70 on white students in 1914-15 and 1.09 on black students. By 1929-30 these figures had increased to \$52.89 for whites and \$5.20 for blacks.

<sup>117</sup> J. Clyburn and J. Revels, Uncommon courage: the story of briggs V. Elliot, South Carolina’s unsung civil rights battle 17, (PCF Press 2004)

<sup>118</sup> Bullock, *supra* note 12, 180.

<sup>119</sup> J. D. Anderson, *supra* note 31, at 181-182.

<sup>120</sup> F. A. Decosta, The education of negroes in South Carolina, 405-6.

<sup>121</sup> *Id.* at 406.

<sup>122</sup> *Id.* at 1 (*Briggs v. Elliot*, 342 U.S. 350 (1952) was the first of four cases that were eventually combined into *Brown v. Board of Education*; the plaintiffs in the *Briggs* case sought equal educational opportunities and eventually changed their position to seek the complete desegregation of South Carolina schools).

Clarendon County, South Carolina. The appropriation of public education funds in Clarendon County was illustrative of the racial disparities of the time. In 1947, 74% of Clarendon County was black, yet black schools only received one-third of the funding.<sup>123</sup> As Briggs made its way to the Supreme Court (where it would ultimately become part of *Brown v. Board of Education*), Governor Byrnes moved forward with South Carolina's equalization program. South Carolinians' desire for segregation was so strong, however, that Governor Byrnes was able to garner enough support from South Carolina to pass the state's first sales tax (3%) to raise money for the equalization efforts.<sup>124</sup>

The centerpiece of Byrnes's plan for equalizing education in South Carolina was a massive school construction effort.<sup>125</sup> South Carolina's program uniquely focused on school facilities, and resulted in the construction of hundreds of schools.<sup>126</sup> As in other southern states with equalization programs, many whites resisted the concept of white tax dollars going to support black schools.<sup>127</sup> School equalization advocates also faced resistance from local school boards and officials.<sup>128</sup> Local white officials and parents wanted to funnel the state funds into projects that exclusively benefited white students,<sup>129</sup> and rather than spending them on black students funds often went unallocated.<sup>130</sup> Furthermore, the equalization legislation in South Carolina was concentrated on equalizing buildings, and provided no state control over the amount of local money spent on schools, nor on the equalization of the curricula or transportation.<sup>131</sup>

Ultimately, South Carolina's program failed in its goal of preserving de jure segregation; it did, however, provide South Carolina's white leaders with political justification for resisting the Supreme Court's order to desegregate.<sup>132</sup> Once the *Brown v. Board of Education* decision overturned the premise of "separate but equal", equalization advocates lost the legal basis for equalization programs, and by 1955 South Carolina ceased its concentrated efforts to improve black schools.<sup>133</sup>

### III. MODERN CHALLENGES OF EQUITABLE SPENDING AND DESEGREGATION

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<sup>123</sup> Clyburn, *supra* note 117, at 20.

<sup>124</sup> Clyburn, *supra* note 117 at 35.

<sup>125</sup> Dobrasko, *supra* note 114, at 12 (noting that improvement of facilities for black students was one of the hallmarks of the South Carolina plan).

<sup>126</sup> Dobrasko, *supra* note 114, at 8.

<sup>127</sup> *Id.* at 13.

<sup>128</sup> *Id.* at 16.

<sup>129</sup> *Id.* at 17.

<sup>130</sup> *Id.* at 17.

<sup>131</sup> *Id.* at 26.

<sup>132</sup> *Id.* at 34.

<sup>133</sup> *Id.* at 36.

### ***III.1 The Continued Problems of Equitable Spending***

The problems of inequalities in education funding did not die with de jure segregation. A national school finance reform litigation movement sought to build on the successes of the desegregation litigation<sup>134</sup> to equalize educational opportunity.<sup>135</sup> When the Supreme Court held in 1973 that education was not a fundamental right under the Equal Protection Clause of the Fourteenth Amendment<sup>136</sup>, school finance reform plaintiffs brought claims that the disparate spending on public education violated the education and equal protection clauses of state constitutions.<sup>137</sup> While plaintiffs initially experienced success, by the late 70s and early 80s courts were less inclined to favor plaintiffs in these suits.<sup>138</sup>

Notwithstanding the shift away from successful plaintiff suits based on equitable educational expenditures, during the 1980s states began to adopt academic standards for what children should know and learn as part of education funding legislation. Currently, school finance litigation suits are brought not only on equity of expenditures, but are based on the premise that expenditures are insufficient to meet state constitutional guarantees of adequate education.<sup>139</sup>

### ***III.2 De Facto Segregation and the Continued Achievement Gap***

Although the 1954 *Brown v. Board of Education* decision overturned de jure segregation, its effects had little immediate effect on southern schools. Notably, the South began to address racial disparities in school expenditures twenty years before the *Brown* decision, while school desegregation in the South did not begin until a decade after the *Brown* decision.<sup>140</sup> From 1955 until 1968, the U.S. Supreme Court (along with the other branches and levels

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<sup>134</sup> See e.g., *Brown v. Board of Educ.* 347 U.S. 483 (1954); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971);

<sup>135</sup> See Michael Heise, *Equal Educational Opportunity Hollow Victories and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543 at 556 (1998).

<sup>136</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1(1973)(holding that the negative impact the Texas school finance system had on poor children enrolled in the public school system did not violate the Equal Protection Clause of the Fourteen Amendment and that education is not a fundamental right warranting protection under the U.S. Constitution).

<sup>137</sup> See generally, Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1.

<sup>138</sup> See e.g., Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L.REV. 1151,1157-62 (1995)(discussing the mixed record of the second wave of school finance reform and citing plaintiff failures in *Shoftstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982)(en banc); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); and *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975).

<sup>139</sup> See generally, Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMPLE L.R. 1151.

<sup>140</sup> Ashenfelter, *supra* note 20, at 1.

of government) abandoned any efforts to desegregate schools.<sup>141</sup> Georgia did not begin to integrate its public schools until the fall of 1960, and in 1963 desegregation “had yet to expand beyond a few large cities”.<sup>142</sup> Even as late as 1967, 86% of public schools in the South were segregated, and by 1974, Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Virginia were the most segregated states in the nation with 29.9% of black students enrolled in schools that were 89% or more black.<sup>143</sup>

Since the 1980s, America, and the South in particular, has steadily reversed its progress towards integration of public schools.<sup>144</sup> Although there was a national rise in the integration of public schools between the years of 1954 and 1988, the trend began to reverse in the late 1980s and early 1990s. Desegregation in schools across the nation peaked in 1988, and in 2006, segregation patterns began to increase.<sup>145</sup> The number of black students in the South who attended majority white schools between 1954-1988 went from almost 0 to 43.5%, but then dropped to 32.7% in the period between 1988 and 1998.<sup>146</sup> In 1990, the degree of segregation in the South was “high or extremely high,” and although that level declined slightly later in the 90’s (except in Arkansas and the District of Columbia) the levels of segregation in southern schools still remained in those high or extremely high ranges in 2000.<sup>147</sup> Notably, it was a U.S. Supreme Court case that originated in Georgia that was one of the cases to strike a major blow at the effort to desegregate the nation’s public schools.<sup>148</sup>

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<sup>141</sup> J. Harvie Wilkenson III, *From Brown to Bakke: the supreme court and school integration: 1954-1978*, 61 (Oxford University Press 1979)(noting that the period of non-decision ended with *Charles C. Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968))

<sup>142</sup> Klarman, *supra* note 25, at 348, 360(this integration occurred in Atlanta and proceeded without incident).

<sup>143</sup> Clyburn, *supra* note 117, at 47, 49.

<sup>144</sup> See generally, Gary Orfield, *Reviving the Goal of an Integrated Society: A 21<sup>st</sup> Century Challenge*, Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA (2009).

<sup>145</sup> Gary Orfield, *Reviving the Goal of an Integrated Society: A 21<sup>st</sup> Century Challenge*, Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA (2009) 13.

<sup>146</sup> Gary Orfield, *Schools More Separate: Consequences of a Decade of Resegregation* Boston, MA: The Civil Rights Project, Harvard University (2001).

<sup>147</sup> Sean F. Reardon and John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1900-2000*, 81 N.C. L. REV. 1563, 1573 (although this article focuses on black-white segregation it is interesting to note that “[w]hite/Hispanic segregation levels, in contrast were generally in the low to moderate range for all states except those with large Hispanic populations—Texas and Florida. White/Hispanic segregation increased substantially in Arkansas, the District of Columbia, Georgia, and Maryland; in each of these places the Hispanic population grew sharply.”)

<sup>148</sup> Gary Orfield and David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 759 (noting that many consider *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) and *Board of Education v. Dowell*, 498 U.S. 237 (1991) as the cases that signaled the end of “the era of mandatory school desegregation).



In the 1992 *Freeman v. Pitts* decision<sup>149</sup>, the Court reviewed the Northern District of Georgia's continued enforcement of a 1969 desegregation order that required the DeKalb County School System ("DCCS") to desist in its segregation and inequitable results. DCCS filed a motion for declaratory judgment that would effectively result in the District Court's withdrawal of its oversight and recognize the county as officially desegregated.<sup>150</sup> DCCS relied on six categories: student assignments, transportation, physical facilities, extracurricular activities, faculty assignments and resource allocation—upon which the Supreme Court relied in *Green v. County School Board of New Kent County* to determine whether there existed a dual school system based on race.<sup>151</sup> DCCS presented evidence to support that it met four (student assignments, transportation, physical facilities, and extracurricular activities) of those six categories despite the fact that in 1986, the year that the DCCS filed its motion, the DCCS was fourth of the country's largest districts in the decline of white students and second in its proportional increase of black students.<sup>152</sup> The Respondents argued that the Court should continue to oversee the desegregation process until DCCS had met the six categories and then for some years afterwards to ensure continued compliance.<sup>153</sup> The Supreme Court unanimously held that the District Court was correct in limiting its supervision of the desegregation order to only those two categories that DCCS did not meet.<sup>154</sup> The Court noted that in cases of partial compliance where the school district has achieved unitary status<sup>155</sup> in some but not all areas, the court may return control of the successfully desegregated areas to school officials while retaining supervision over areas that remain segregated.<sup>156</sup>

In *Freeman*, the Court used the factors it examined in *Green* to provide a framework for lower courts to determine whether a district unlawfully segregated its schools.<sup>157</sup> By evaluating the *Green* factors independently of each other, the court came to the conclusion that partial compliance would allow the system to achieve unitary status over some aspects, thereby

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<sup>149</sup> 503 U.S. 467 (1992).

<sup>150</sup> 503 U.S. 467 at 467.

<sup>151</sup> *Id.*; *Green v. County School Board of New Kent County*, 391 U.S. 430,435 (1968)(in determining whether there was a segregated system the court examined segregation in: composition of the student body, faculty, staff, transportation, extracurricular activities and facilities).

<sup>152</sup> Richard Kluger, *Simple justice: the history of Brown V. Board of education and black America's struggle for equality*, 770 (Alfred A. Knopf New York 2004).

<sup>153</sup> *Freeman v. Pitts*, 503 U.S. at 477.

<sup>154</sup> *Id.* at 468-70.

<sup>155</sup> "The Court first used the term "unitary" in *Green v. New Kent County School Board*" to describe a system in which no one was excluded based on race or color." Gary Orfield, David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 762-63 (1993) at 762-63.

<sup>156</sup> 503 U.S. 467; see also Gary Orfield, David Thronson, *supra* note 148 at 759, 763 (noting that Pitts "attempted to articulate a new standard for dissolving court decrees and allowing partial dismantling of desegregation plans.")

<sup>157</sup> *Freeman v. Pitts*, 503 U.S. 467 (1992).

enabling DCCS to concentrate its efforts on areas where the effects of de jure discrimination had not been eliminated.<sup>158</sup> The Court noted that racial imbalance alone was insufficient to demonstrate that the district was in noncompliance with its duties under the desegregation decree.<sup>159</sup> Indeed, Justice Kennedy said “where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.”<sup>160</sup> Accordingly, if segregation is de facto rather than de jure, even where it is a result of a state’s inaction rather than state action, the Court will not step in.<sup>161</sup>

The 2007 United States Supreme Court case *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>162</sup> is likely to impair desegregation efforts even further. In that case, the Supreme Court held that school districts are unable to consider race in attempts to integrate schools.<sup>163</sup> The combined effects of *Parents Involved* and white flight may result in a national public education system reminiscent of an era that legitimized racial separateness, and its companion unequal school quality. While scholars debate the potential impact of the decision,<sup>164</sup> policymakers must now consider race-neutral alternatives to achieving more equitable access to quality education. Segregated schools, whether by race, economics, or both, are realities that are unlikely to abate in the immediate future.

### III,3 *The Return to Separate and Unequal*

Today, the South is 26.5% black and 21.5% Latino, with 40% percent of these students attending “intensely segregated schools.”<sup>165</sup> Schools with higher percentages of black students are more likely to have higher teacher turnover, fewer teachers with advanced degrees, fewer experienced teachers, and generally lower-quality resources.<sup>166</sup> It is not easy to separate race from

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<sup>158</sup> *Id.* at 493.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Kluger, *supra* note 152, at 770.

<sup>162</sup> *Parents Involved Community Schools v. Seattle School District no. 1*, 551 U.S. 701 (2007) (holding that considering race in assigning students to public high schools violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>163</sup> *Id.*

<sup>164</sup> See e.g., Jonathan Fischbach, Will Rhee, Robert Cacace, *Race at the Pivot Point: The Future of Race-Based Policies to Remedy de Jure Segregation After Parents Involved in Community Schools*, 43 HARV. C.R.-C.L. L. Rev. 491 (analyzing the potential impact of the Parents Involved decision on desegregation and constitutional law doctrine).

<sup>165</sup> Gary Orfield, *Reviving the Goal of an Integrated Society: A 21<sup>st</sup> Century Challenge*, Los Angeles, CA: The Civil Rights Project/Proyecto Derechos Civiles at UCLA (2009) pg 11, 12, 23 (also noting that although during the civil rights movement the small towns and rural areas were the most resistant to integration, those areas are currently the least segregated school districts).

<sup>166</sup> See generally, Catherine Freeman, Benjamin Scafidi & David Sjoquist, *Radical segregation in Georgia public schools 1994-2001: trends, causes and impacts on teacher quality*, FRP Report No. 78 (December 2002) (Georgia State University)

economic status. “There is literature that suggests that minority schools are highly correlated with high-poverty schools and these schools are also associated with low parental involvement, lack of resources, less experienced and credentialed teachers, and higher teacher turnover—all of which combine to exacerbate education inequality for minority students.”<sup>167</sup> The effects of resegregation and school funding are likely to have the greatest impact in the South. Currently, the South is the first and only region in the nation to have a majority of students of color in its public schools<sup>168</sup>, with a student population of color of 51%.<sup>169</sup> The South is also the only region in the nation where low-income students are in the majority in public schools.<sup>170</sup> Of the 50 states and the District of Columbia, southern states (with the exception of Florida) tend to be at the bottom academic achievement.<sup>171</sup> “The students who now constitute the largest groups in the South’s public schools are the students who in the aggregate are scoring lowest on state-mandated tests and on the federal National Assessment of Educational Progress (NAEP), the only national performance examination for K-12 students.”<sup>172</sup> Southern students of color and low-income students of all races, “score below average on virtually every state-required test in every subject.”<sup>173</sup> The South has the lowest percentage of students scoring at proficient or above on NAEP’s 4<sup>th</sup> and 8<sup>th</sup> grade tests, and the lowest percentages of students graduating from high school on time.<sup>174</sup> The South also funds its students at the lowest per-pupil expenditures.<sup>175</sup> Accordingly, the country’s fewest educational resources are allocated in the region with the highest numbers of students of color and low-income students.<sup>176</sup>

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<sup>167</sup> Ericka Frankenberg and Chungmei Lee, *Race in American Public Schools: Rapidly Resegregating School Districts* 5 (The Civil Rights Project Harvard University 2002) .

<sup>168</sup> See generally, Southern Education Foundation, “A New Diverse Majority: Students of Color in the South’s Public Schools”

<http://www.sefatl.org/pdf/New%20Diverse%20Majority.pdf> (2010)(describing the South as having the most diverse public schools in the country and noting the challenges that blacks and Latinos face in gaining equal access to quality education in the South).

<sup>169</sup> *Id.* at 6.

<sup>170</sup> See generally, S. educ. found., A. new majority: low income students in the south’s public schools, (2007) available at <http://www.sefatl.org/pdf/A%20New%20Majority%20Report-Final.pdf> (2007)(The “South” as defined in this report includes the following states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia).

<sup>171</sup> *Editorial projects in education research center, quality counts*, (2008) available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/K-12\\_education/National%20Highlights%20Report.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/K-12_education/National%20Highlights%20Report.pdf) (ranking the 50 states based on: chance for success; K-12 achievement; standards, assessments and accountability; transitions and alignment; the teaching profession; and school finance).

<sup>172</sup> See generally, s. educ. found., *a new diverse majority: students of color in the south’s public schools*, (2010) available at <http://www.sefatl.org/pdf/New%20Diverse%20Majority.pdf>.

<sup>173</sup> *Id.* at 15-16.

<sup>174</sup> *Id.* at 16.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* (“This pattern of underfunding has a long history and is shared by states outside the region. But unlike most other states, Southern states are now underfunding the education of a majority of their students”).

Now that forced desegregation is becoming untenable as a legal strategy, states are again relying on funding to compensate for the racial inequities in public education. States may be forced to abandon desegregation efforts and to focus on increased resources in low-income school districts. However, funding alone is not the answer. A study on school attendance in 1900 by educational historian Robert Margo concluded that “equalizing school characteristics would have narrowed the racial gap but that family characteristics (such as parents’ literacy and household head’s occupational status) were quantitatively more important...”<sup>177</sup> Given that minority and low-income students inevitably face inequitable educational access, one possible approach is to concentrate efforts on educational expenditures that include measurable inputs such as class-size reduction and teacher quality.<sup>178</sup> There is an important federal interest in ensuring that districts and schools are accountable for educational expenditures, while respecting the importance of local control in education decision-making. Even in 1960, the Committee for Economic Development (180 top executives and educators) observed at the conclusion of a three-year study: “Where the decentralized system cannot provide good schools, federal aid to education is an urgent necessity.”<sup>179</sup> The federal government should continue to enforce the requirement under *No Child Left Behind*<sup>180</sup> that federal funds be connected to demonstrated success in closing the academic achievement gap, and that test performance continued to be disaggregated by race, ethnicity, gender, disability status, migrant status, English proficiency, and status as economically disadvantaged.<sup>181</sup>

## Conclusion

The recent *Parents Involved*<sup>182</sup> decision and upward trends of re-segregated schools make the prospect of desegregated public education as unlikely as it was in the 1950s when southern states undertook a massive funding effort to avoid integration. Given that reality, perhaps it is time to focus less on “separate” and more on “equal”. History has already demonstrated that neither desegregation nor appropriating expenditures without an effective strategy to raise achievement alone bring about great strides in overall

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<sup>177</sup> Ashenfelter, *supra* note 20, at 8.

<sup>178</sup> Preston C. Green, III et. al., *Achieving Racial Equal Educational Opportunity Through School Finance Litigation*, 4 *stan. J. Civ. Rts. And civ. Liberties*, 283, 313(2008) (citing *Sweatt v. Painter* Court as an example of the Court looking to “educational inputs (e.g., faculty quality and library holdings) and educational outcomes (passage of the bar and success in the profession) to determine that Texas’ black law school was substantially inferior to the white law school”, also citing *Hobson v. Hanson*, 269 F. Supp. 401 (D.D.C. 1967) (in which the court applied the *Sweatt* analysis.)

<sup>179</sup> *Education: Federal Aid (Contd.)*, *Time Magazine*, February 8, 1960 available at <http://www.time.com/time/magazine/article/0,9171,828651,00.html>.

<sup>180</sup> 20 U.S.C. §6301 et seq.

<sup>181</sup> 20 U.S.C. §6311(h)(1)(describing the disaggregation reporting requirements).

<sup>182</sup> 551 U.S. 701.

educational performance. In order to facilitate greater results, states may need to rely on a combination of federal, state, and local funding and control that target input expenditures in lower income and lower performing schools.

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