

ARTICLES

DE JURE, DE FACTO, & DÉJÀ VU ALL OVER AGAIN: A HISTORICAL PERSPECTIVE OF GEORGIA'S SEGREGATION- ERA SCHOOL EQUALIZATION PROGRAM

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I. INTRODUCTION

The modern school finance litigation movement 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 1971,¹ its more notable precursors are the southern school equalization programs of the 1940s and 1950s. This article explores the impact of Georgia's historic attempt to preserve de jure segregation² through a school funding program meant to equalize black and white schools; it then compares that program and its effects to current levels of funding and achievement in Georgia's mostly de facto segregated schools.³

1. School finance reform era is recognized as having three waves: claims based on violations of the United States Constitution's Equal Protection Clause; claims based on inequitable expenditures as violative of state constitutions; and the third, and most current, wave, claims that schools and districts are funded insufficiently to meet a standard of adequacy. *See generally* *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 56 (1973); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955). *See also* JANE FOWLER MORSE, *A LEVEL PLAYING FIELD: SCHOOL FINANCE IN THE NORTHEAST* (State Univ. of N.Y. Press 2007).

2. "De jure segregation" is defined as "[s]egregation that is mandated or permitted by law." BLACK'S LAW DICTIONARY 1479-80 (6th ed. 1990).

3. "De facto segregation" is defined as "[s]egregation that occurs without state authority usually on the basis of socioeconomic factors." BLACK'S LAW DICTIONARY 1479-80 (6th ed. 1990).

Part II provides a brief overview of Georgia's early system of public education up until 1949, while Part III 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 passage of Georgia's school equalization program, the 1949 Minimum Foundation Program for Education ("MFPE"). This section details the changes the MFPE program brought to Georgia's public school system, including the challenges policymakers faced in implementing the program and its degree of success.

Finally, Part IV demonstrates, through an update on Georgia's 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 state's *de facto* segregated public school system. While it is beyond the scope of this article to propose solutions to low academic achievement in Georgia, it is the authors' hope that this exploration of the history of education funding in Georgia may provoke ideas about how to avoid repeating the mistakes of the past.

II. BEFORE SCHOOL EQUALIZATION

A. The Creation of a System of Public Education in Georgia

Georgia's first Constitution of 1777 included a provision that compelled the state to support public education.⁴ That education clause was eliminated from the Georgia Constitution of 1789⁵ but returned in the Constitution of 1798, which provided for "seminaries of learning to be supported by the legislature."⁶ Based on this language, the General Assembly

4. GA. CONST. of 1777, art. LIV; OSCAR H. JOINER, A HISTORY OF PUBLIC EDUCATION IN GEORGIA, 1734-1976 14 (gen. ed., R. B. Bryan Co. 1979). In 1783, Georgia established its first academy in Augusta. *Id.*

5. GA. CONST. of 1789. This Constitution was modeled after the U.S. Constitution; it was the shortest of Georgia's Constitutions with the fewest provisions and did not include the specific directive for education. *See* The New Georgia Encyclopedia, The Constitution of 1789, <http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-588> (last visited Mar. 22, 2010).

6. GA. CONST. of 1798, art. IV, § 13.

issued charters for private academies in several counties;⁷ these academies were not public common schools, but instead, were designed to educate children whose parents were financially able to pay the tuition necessary to attend.⁸ Between 1790 and 1817, any public education monies available for public education went into the academies, and no public funds were allocated to children of parents unable to pay academy tuition.⁹

By 1817, political leaders began to recognize that an educated populace better served the democratic form of government.¹⁰ That same year, a legislative committee lent its recommendation to the creation of a fund to finance free schools throughout the state.¹¹ The Georgia legislature responded by establishing a “Poor School Fund” (“Fund”) for children of parents unable to pay the tuition of the local academies in 1822.¹² The Fund was to be allocated among the counties based on the number of poor children per county, but a year later, Governor Clarke informed the Georgia General Assembly that the \$12,000 Fund had not been distributed because so many areas failed to account for the number of poor children.¹³

To many politicians in the state legislature, the Poor School Fund became a “troublesome but necessary evil.”¹⁴ The Fund’s ad hoc nature led to counties experimenting with their school

7. DIGEST OF THE LAWS OF THE STATE OF GEORGIA 132-34 (Horatio Marbury & William H. Crawford eds., Seymour, Woolhopter, & Stebbens 1802).

8. JOINER, *supra* note 4, at ix-x, 20. The Academy system, established by legislative action, was based on a curriculum that was classical in nature, stressing mathematics, English grammar, Latin and Greek; and was seen as a preparatory step for attending a university. *Id.*

9. *Id.* at 20. While academies may have been chartered by the state, parents were still responsible for tuition, preventing much of the population from accessing education. *Id.*

10. DOROTHY ORR, A HISTORY OF EDUCATION IN GEORGIA 69 (Univ. of N.C. Press 1950).

11. *Id.*

12. JOINER, *supra* note 4, at ix, 11 (describing the academies and explaining that they provided for no more than three years of basic reading, writing, and arithmetic at public expense).

13. ORR, *supra* note 10, at 77. Some advocates of education thought the Poor School Fund could be made more effective and inviting to counties by expansion. This led to a \$20,000 appropriation for the fund in 1824. *Id.*

14. *Id.* at 78.

systems,¹⁵ and hardly a year went by without the legislature modifying the law in some form.¹⁶ In response to the deficiencies of the existing system of school funding, Georgia established “a general system of education by common schools” in 1837.¹⁷ The Bill to Establish a General System of Education by Common Schools proposed to fund education through a distribution of surplus funds from the Federal Treasury¹⁸ and to combine one-third of the surplus, the Poor School Fund, and the academic fund to finance the new system.¹⁹ However, economic factors forced the legislature to rescind the Bill before it could come into effect.²⁰

Within five years, state economic prospects improved, and, through the “Poor School Law,” the state legislature assigned management of the Poor School Fund to justices of inferior courts.²¹ These justices, upon recommendation from a grand

15. *Id.* Houston County attempted to consolidate the Academy Funds with its Poor School Funds, while in Gwinnett County, legislation was adopted to establish free schools in 1826. *Id.*

16. *Id.* at 79-80. Among the changes was legislation in 1826 that required the governor to withhold distribution until an accounting of all white children. However, because four counties failed to make such an account, no funds were distributed in 1827. *Id.*

17. *Id.* at 92-93. The Common School system of 1837 was at this point Georgia’s most comprehensive education plan. The State formed a committee to study the education system of other areas, the New England States in particular, in order to study their school systems. The committee’s report was used as the basis for a bill to install a general system of education by common schools, and while the bill passed in 1837, the economic crisis generated by the panic of 1837 led to the postponement of its actual establishment until January 1, 1839. *Id.*

18. *Id.* at 89. President Andrew Jackson had been notoriously tough with states that had previously refused to collect tariffs for the federal government; consequently, he was able to pay off the national debt, and the U.S. ran surpluses for several years. JON MEECHAM, *AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE* 167, 298 (Random House 2008).

19. JOINER, *supra* note 4, at 28.

20. ORR, *supra* note 10, at 89. The Panic of 1837 was followed by a long depression brought on by excessive speculation, particularly in agriculture. The prices of cotton, slaves, and land all dropped precipitously, causing Georgia’s state bonds to be repudiated and Georgia’s access to credit to dry up. *Id.*

21. *Id.* at 100-01. The Poor School Law of 1843 also established a permanent fund comprised of 1,744 shares of capital stock in the Bank of the

jury, were authorized to levy and collect an extra tax, to be combined with whatever funds were received from other sources, to add to the Poor School Fund.²² Yet, the Poor School Law left an already unstable system of education even weaker; justices often failed to hold grand juries, and, consequently, only fifty-three of ninety-three counties applied for funds.²³ As a result, in 1850, per-pupil expenditures dropped precipitously to less than sixty-three cents, a four dollar decrease from twelve years earlier.²⁴ Furthermore, there was often a failure to appropriate sufficient funds to pay teachers.²⁵ The refusal of justices to account for poor children led the legislature, in 1857, to give the Education Commissioner the power to hold justices in contempt if counts were not made.²⁶ By 1858, there was growing public support for universal public education,²⁷ and the legislative session passed a bill establishing a new plan for the funding of education in Georgia.²⁸ Then, a year later, the legislature amended the law to establish local county boards of education to manage schools.²⁹

State of Georgia, 890 shares of stock of the Bank of Augusta, and all available assets of the Central Bank; unfortunately, for many years, little from this permanent fund was spent on education. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. When courts did not convene sessions or grand juries, no taxes were levied, and consequently, districts often did not pay their teachers. *See, e.g., Johnson v. Governor*, 17 Ga. 179 (1855).

26. 1857 Ga. Laws 9-10. The 1857 law made no provision for maintaining either the academy or the poor school fund. *Id.*

27. *See* HELEN FIELDER, A SKETCH OF THE LIFE AND TIMES AND SPEECHES OF GOVERNOR JOSEPH E. BROWN 157, 607-08 (Springfield Printing Co. 1883) (noting that Governor Joseph E. Brown, a vocal promoter of public education for white children in Georgia, argued that a system of schools should be established so that every free white child should have the right to attend); *see also* ORR, *supra* note 10, at 157, 173. The period between 1846 and 1860 saw a dramatic turnaround in Georgia's financial fortunes. The price of cotton had risen gradually and steadily since the crash of 1837. This return to prosperity encouraged groups such as the Southern Central Agricultural Society to lobby for a system of common schools. *Id.*

28. 1858 Ga. Laws 49-51. The 1858 law relied upon a \$100,000 annual draw from the net earnings of the Western and Atlantic Railroad to fund schools. *Id.*

29. 1859 Ga. Laws 29-31.

B. Georgia's Black Students Gain Educational Opportunities in the Civil War Era

The growing support of public education in Georgia did not extend to everyone. At the turn of the 19th century, as was common with states in the antebellum south, Georgia 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.³⁰ The first step towards educating blacks in Georgia began in 1864 at a meeting among Secretary of War Henry Stanton, Union General William Tecumseh Sherman, and five or six leading black ministers just after the Civil War.³¹ Parties to the meeting agreed that there should be free schools available for the freed men, and a short time thereafter, Georgia's first school for blacks was opened in a building that had previously served as a slave market.³² Immediately following the Civil War, the legislature mandated a free public school system.³³ However the act provided that only free white inhabitants between the ages of six and twenty-one were eligible to be students in the new free schools.³⁴ Cities that established public schools under this system focused on the education of white children, leaving the education of blacks to northern charities and the Freedman's Bureau.³⁵ Later, Georgia's Constitution of 1868 required the State to fund, through poll and liquor taxes, "a thorough system

30. *See, e.g.*, *Bryan v. Walton*, 14 Ga. 185 (1853). Whites were subject to a fine of \$500 and imprisonment in the common jail for teaching freed blacks to read. A free black person who dared teach other freedmen to read was subject to whipping in addition to the fine. *Id.*

31. W.E.B. DU BOIS & AUGUSTUS DILL, *THE COMMON SCHOOL AND THE NEGRO AMERICAN* 56 (Atl. Univ. Press 1911).

32. *Id.* While not a public school, this marked the first time a free school was available to teach Georgia's blacks.

33. 1866 Ga. Laws 58-65.

34. *Id.* at 59. The law also made provisions for the free education of disabled and indigent soldiers of Georgia under 30. *Id.*

35. ASA H. GORDON, *THE GEORGIA NEGRO, A HISTORY* 150 (Edwards Bros. 1937). In 1865 the Freedman's Bureau reported that there were 66 schools in Georgia, staffed by 66 teachers and serving 3,500 pupils. The New England Freedman's Aid Society and the American Missionary Association supported 62 schools, while the Union Commission and the Freedman's Aid Society of the Methodist Episcopal Church spent \$20,000 on black education in Georgia. *Id.*

of general education, to be forever free to all children of the State.”³⁶

On October 13, 1870, the Georgia Legislature enacted “An Act to Establish a System of Public Instruction.”³⁷ The first schools under this new system were opened the following summer (including Georgia’s first public schools for blacks).³⁸ These schools were suspended a year later due to a lack of funding³⁹ as nearly \$330,000 of the school funds were appropriated for other purposes.⁴⁰ From 1871 to 1874, the legislature repeatedly failed to enact a general local tax law to fund public schools.⁴¹ Conservative southerners saw a system of public education as a symbol of Reconstruction, and many white politicians demanded that only taxes directly paid by black citizens be used to support black schools.⁴² The failure to properly fund the public school system led Georgia to revisit public education as a state-wide priority,⁴³ and by 1874, every county had some form of publicly-funded education.⁴⁴

C. *The Georgia Constitution of 1877 Reinforces Segregated Education*

In 1877, Georgia adopted a post-Reconstruction constitution that enshrined the concept of racially separate education and

36. GA. CONST. of 1868, art. 2, § 1; *see supra*, note 25 and accompanying text. Later that same year, Congress ratified the Fourteenth Amendment of the United States Constitution guaranteeing equal protection under the law to all persons. U.S. CONST. amend. XIV, § 1.

37. 1870 Ga. Laws 49-61.

38. W.E.B. DU BOIS & DAVID L. LEWIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880 651 (Simon & Schuster 1999).

39. DU BOIS & DILL, *supra* note 31, at 56.

40. JOINER, *supra* note 4, at 82.

41. DU BOIS & DILL, *supra* note 31, at 56.

42. JOINER, *supra* note 4, at 86. To ensure that white tax dollars were not used to support black schools, the Legislature passed a law in 1874 requiring separate tax returns for blacks and whites and to require the comptroller general to exhibit them separately in his reports. *Id.*

43. ORR, *supra* note 10, at 89.

44. GA. P'SHIP FOR EXCELLENCE IN EDUC., EDUCATION POLICY PRIMER: EDUCATION IN GEORGIA 12 (2008), *available at* http://www.gpee.org/fileadmin/files/pdf/Education_in_GA.pdf [hereinafter EDUCATION POLICY PRIMER].

provided funding for public schools via state taxes;⁴⁵ thereafter, Georgia's public education took the form with which it would be associated for almost a century, a system of publicly-financed schools segregated on the basis of race.

Georgia embraced the banner of "separate but equal" legitimized by *Plessy v. Ferguson*,⁴⁶ but Georgia's racially divided system was anything but equal. In fact, the only education related case the Supreme Court heard between *Plessy* and *Brown v. Board of Education*,⁴⁷ which overturned *Plessy* fifty-eight years later, was a case that began in Georgia.⁴⁸ In that case, *Cummings v. Richmond County Board of Education*,⁴⁹ 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.⁵⁰ The Court rejected the plaintiff's claim that this use of tax dollars violated the Equal Protection Clause of the U.S. Constitution.⁵¹ 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."⁵²

After *Cummings* legitimated separate and unequal education funding, racial disparities in education remained pronounced.

45. GA. CONST. of 1877, art. VIII, § 1 (specifying that education need only be "separate" but did not call for equal education and stating "[t]here shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races").

46. *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 Fourteenth Amendment).

47. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

48. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 45 (Oxford Univ. Press 2004).

49. *Cumming v. Bd. of Educ.*, 175 U.S. 528 (1899).

50. *Id.* at 530-41.

51. *Id.* at 543-45.

52. *Id.* at 545.

Georgia's McMichael Law of 1905 "required that each county be divided into school districts and given the right to vote to tax property for school funds."⁵³ The McMichael Law was the culmination of many years of planning by the Georgia Teachers Association to bring local taxation to the entire state of Georgia.⁵⁴ The law, which required the submission of a constitutional amendment, provided that an election could be called in counties without delay and that a tax of "not more than one half of one percent could be levied" if it were approved by two-thirds of the voters.⁵⁵ However, the broad discretion given to the local school boards by the McMichael Law allowed widespread abuse.⁵⁶ Furthermore, a majority of the school districts laid out by the McMichael Law either proposed no local taxes, had their proposed taxes defeated at the ballot box, or voted to allow a minimum tax on property of low value leaving insufficient funds for the operation of schools.⁵⁷ Wealthier districts could vote for a minimum tax and still have sufficient revenue to fund their schools.⁵⁸ Moreover, because the local, white school boards controlled the common school fund and local revenues, black schools were dependent on their willingness, or more commonly their unwillingness,⁵⁹ to provide funding for black students.⁶⁰

While the McMichael Law provided that counties could levy taxes to provide for improved elementary schools, no such

53. 1906 Ga. Laws 61-72.

54. ORR, *supra* note 10, at 260.

55. *Id.* at 261. Since the McMichael Law required a constitutional amendment to become law, it was not until the next general election, in 1904, that it was ratified by popular vote. County boards of education used the provisions of the act to cordon off the richest parts of a county and levy taxes for only that district. *Id.*

56. *Id.* at 260.

57. JOINER, *supra* note 4, at 222.

58. *Id.*

59. See, e.g., JOHN DITTMER, BLACK GEORGIA IN THE PROGRESSIVE ERA, 1900-1920 145 (Univ. of Ill. Press 1977) (quoting *Resolutions of the Sixteenth Annual Conference*, in DU BOIS & DILL, *supra* note 31, at 6-8 (citing numerous disparities between black and white education expenditures including that, in 1905, the average monthly salary of white teachers was \$42.85 while black teachers earned an average monthly salary of \$19.88)).

60. The state appropriated the common school funds but the local school boards had final control of how those funds were allocated. ORR, *supra* note 10, at 315.

provision was made to establish and support high schools.⁶¹ In 1912, the Stovall Amendment and the Elders-Carswell Bill responded to that deficiency by expanding the state school system to provide for public high schools,⁶² again without much consideration (mental or fiscal) to black schools.⁶³ For example, 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.⁶⁴ Yet, there were only eleven grammar schools for the slightly more than half of 10,000 black school-aged population actually enrolled in school.⁶⁵ The per capita expenditure for black schools was \$1.71 compared to \$15 for white schools.⁶⁶

Along with legitimizing segregation in public schools, Georgia's 1877 Constitution limited state funding to elementary schools and the state university.⁶⁷ Because education was primarily funded at the local level (with public high schools funded exclusively at the local level), urban schools were more likely to have a stronger system of education while rural schools

61. 1906 Ga. Laws 61-72. By 1903 there were only seven four-year high schools in Georgia, all of which were white. ORR, *supra* note 10, at 263.

62. The Stovall Amendment struck the restrictive language, which allowed for the support only of elementary education, from the Constitution and allowed at last public support for high schools while the Elders-Carswell Bill appropriated to the local government funds to support high schools. JOINER, *supra* note 4, at 179, 201.

63. See EDUCATION POLICY PRIMER, *supra* note 44, at 12; see also DITTMER, *supra* note 59, at 144 ("Educational opportunities in the state were so limited that a 1911 Atlanta University study concluded: 'It is certain that of the Negro children 6 to 14 years of age not 50 percent had a chance today to learn to read and write and cipher correctly.'"). In 1911, there was no public high school in Georgia for black students. *Id.*

64. DITTMER, *supra* note 59, at 14.

65. *Id.*

66. ALBERT P. BLAUSTEIN & CLARENCE C. FERGUSON, JR., *DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES* 103 (Rutgers Univ. Press 1957).

67. EDUCATION POLICY PRIMER, *supra* note 44, at 12. The Georgia Constitution provided "[t]here shall be a thorough system of common schools for the education of children in the elementary branches of an English education only, as nearly uniform as practicable, the expenses of which shall be provided for by taxation, or otherwise. The schools shall be free to all children of the State, but separate schools shall be provided for the white and colored races." GA. CONST. of 1877, art. VIII, § 1.

barely eked by.⁶⁸ 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 educational advantages as their wealth grew.⁶⁹ 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 several smaller schools.⁷⁰ 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.⁷¹

D. Education in Rural Areas Becomes a Priority in the Progressive Era

Between 1890 and 1920, rural legislators increasingly recognized the disparities between the state's urban and rural schools,⁷² 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.⁷³ In 1916, the Georgia General Assembly enacted legislation that made school attendance compulsory for "all children between the ages of eight and fourteen."⁷⁴ Three years later, the Georgia legislature passed a constitutional amendment that was the first in a series

68. See generally EDUCATION POLICY PRIMER, *supra* note 44.

69. ORR, *supra* note 10, 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. *Id.*

70. *Id.*

71. *Id.*

72. 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 59, at xi; see also JOINER, *supra* note 4, at 210. In the Georgia House of Representatives, the charge for better rural education was led by George Carswell who had served several years on the County Board of Education of rural Wilkinson County. *Id.*

73. KLARMAN, *supra* note 48, at 45 (noting that local school boards were the arbiters of how school funds were allocated).

74. 1916 Ga. Laws 101.

of legislative attempts to address the urban-rural disparity; it required counties to “levy a local tax of not less than one nor more than five mills for the support of schools.”⁷⁵ Through the Barrett-Rogers Act of 1919, the Georgia legislature appropriated \$100,000 to rural school districts to facilitate the consolidation of their many small schools into larger and more efficient schools.⁷⁶ Additionally, for the first time, the state established a Board of Education comprised of laypeople as opposed to “professional school leaders and ex officio leaders.”⁷⁷ Seven years later, Georgia passed the 1926 Equalization Act,⁷⁸ which earmarked a portion of gasoline taxes to equalize educational opportunities among districts.⁷⁹ Following the Progressive Era of the early twentieth century, the Foundations Movement of the 1930s and 1940s called for an equalization of educational opportunities among white children.⁸⁰ In 1937, the legislature passed the “Seven Month School Law” and the “Equalization of Educational Opportunities Law,” which required all schools to have seven-month terms, setup a system of local pay supplements, provided for free textbooks, and set specific provisions to equalize financial support to counties and cities.⁸¹

While Georgia seemed committed to the improvement of rural schools, the legislature showed minimal, if any, interest in the poor state of black schools. As the Foundations Movement improved education for poor rural white schools, it actually heightened racial disparities because the local school boards

75. 1919 Ga. Laws 66. None of these laws addressed the disparities between black and white schools. In fact, the distribution of public school funds was left to the individual school districts resulting in a continuation of the disparate funding between white and black schools. *Id.*

76. 1919 Ga. Laws 287-88.

77. *Id.*

78. 1926 Ga. Laws, Extraordinary Session 39-40.

79. *Id.* These laws did not address the disparities between black and white schools.

80. 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.) (noting that the Foundations movement did little to nothing to improve education for black children).

81. 1937 Ga. Laws 882-901.

appropriated the majority of education funds to white schools.⁸² Consequently, in the late 1930s and early 1940s, things were bad (but improving) for Georgia's rural white students, but worse (and not improving) for black students. In 1940, there were more blacks in Georgia than in any other state (comprising thirty-four percent of the state's population);⁸³ yet Georgia provided nominal funds for black schools at a very small percentage of their white counterparts.⁸⁴

For example, by the 1944-1945 school year, black students comprised approximately 34% of public school enrollment, but black schools were allocated only 14% of Georgia's public school funds.⁸⁵ This disproportionate distribution of funds left black schools with less than one-fifth of public school funding to allocate among over one-third of public school enrollment. Consequently, Georgia's black schools were substandard and often lacked the physical improvements and amenities that local school boards allocated to white schools in the same area.⁸⁶ Black teachers' salaries were, on average, half that of white teachers,⁸⁷ and teachers in Georgia's black schools taught, on

82. KLARMAN, *supra* note 48, at 45 (noting that local school boards were the arbiters of how school funds were allocated).

83. Aaron Brown, *The Education of Negroes in Georgia*, 16 J. NEGRO EDUC. 347, 347 (1947) (citing the Sixteenth Census of the United States noting that 360,283 were children between the ages of five and nineteen) (internal citation omitted).

84. ORR, *supra* note 10, at 312; *see also* DITTMER, *supra* note 59, at 145 (noting that "as late as 1930 three fourths of Georgia's Negro public schools were shabby, one-room affairs in remote rural areas").

85. Brown, *supra* note 83, at 353.

86. ORR, *supra* note 10, at 314; *see also* GA. JEANES SUPERVISOR, FINAL REPORT ON DEKALB COUNTY, SCHOOLS (1936) (noting that DeKalb County had fifteen schools for blacks, with eleven of them having two or fewer teachers). This report also noted that two-thirds of the black schools had pit toilets and that these schools were encountering problems handling large groups without enough teachers. *Id.* *See also* Brown, *supra* note 83, at 347, 349 (observing that "a large percentage" of black elementary schools were housed in "churches and lodge halls").

87. STEPHEN G. N. TUCK, BEYOND ATLANTA: THE STRUGGLE FOR RACIAL EQUALITY IN GEORGIA 1940-1980 15 (Univ. of Ga. Press 2001); Brown, *supra* note 83, at 349 ("Annual salaries of white elementary teachers averaged \$620 in 1929-1930 while those for Negro teachers averaged \$240; in 1944-1945, the white teachers received an average of \$1130 while Negro elementary teachers received an average salary of only \$540.").

average, forty-three students compared to thirty students in white schools.⁸⁸ Teacher training was also disparate. During the 1944-1945 school year, black elementary school teachers had completed only an average of two years of college, while white teachers had completed an average of three years.⁸⁹ During this time, Georgia's black students received, on average, 153 days of education compared to 170 days for white students.⁹⁰ Also, in the mid-1940s, 142 elementary schools for black students met the minimum standards for state accreditation while 864 elementary schools for white students met these same standards. Likewise, 491 white four-year high schools were state accredited while only 90 black four-year high schools were accredited.⁹¹

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 a decade earlier, increased the number of black professionals.⁹² 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.⁹³ Blacks recognized more power through increased education (particularly in urban areas) and its corollary ability to engage in successful social protest.⁹⁴

The rise of black political power was critical to this rapid social change. In the years after the *Smith v. Allwright*⁹⁵

88. TUCK, *supra* note 87, at 15.

89. Brown, *supra* note 83, at 349.

90. Orley Ashenfeler 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. 213, 217 (2006).

91. Brown, *supra* note 83, at 349.

92. *Id.* at 110.

93. *Id.* at 103 (also noting that white violence and, more specifically, lynchings were more common in rural than urban areas).

94. *Id.* ("Illiteracy 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.")

95. *Smith v. Allwright*, 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).

decision struck down the white primary, 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 1947.⁹⁶ After WWII, blacks who had fought for their country and black community leaders were less willing to endure the humiliation of being treated as subhuman.⁹⁷ Concurrently, a black political class with growing confidence moved to increase the quality of black education.⁹⁸ 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 inevitable. It was in this political environment that Georgia's school equalization program came into being.

III. THE SCHOOL EQUALIZATION PROGRAM

A. The Political Impetus for the Minimum Foundations Program for Education

In 1945, Georgia adopted a new Constitution that drastically reshaped the state's education policy 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 to twelve grades.⁹⁹ The next year, the state embarked on a broad study to identify the problems of Georgia schools and make recommendations for their improvement.¹⁰⁰ This study was a cooperative effort of

96. KLARMAN, *supra* note 48, at 236-53.

97. *Id.* at 104.

98. O'Brien, *supra* note 80, at 3.

99. GA. CONST. of 1945, art. VIII. Among the provisions of the 1945 Constitution were a lay board of education, an 85% reduction in the number of school tax districts, a simplification of procedures for voting on school bonds, the professionalization of the office of county school superintendent, the authority to extend the public school system from eleven to twelve grades, and an increase in the maximum tax rate for schools from five to fifteen mills. *Id.*; see also JOINER, *supra* note 4, at 387.

100. JOINER, *supra* note 4, at 387-88 (citing OMER C. ADERHOLD, A SURVEY OF PUBLIC EDUCATION OF LESS THAN COLLEGE GRADE IN GEORGIA: A REPORT TO THE GENERAL ASSEMBLY OF GEORGIA BY ITS SPECIAL

more than 20,000 lay and professional people to assess the deficiencies of Georgia's education system.¹⁰¹ 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.¹⁰²

Despite the MFPE's 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.¹⁰³ 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 education to equalizing black and white schools.¹⁰⁴ Talmadge in turn argued

COMMITTEE ON EDUCATION (1947) and stating the study's recommendation were of critical importance to the passage of the MFPE.

101. 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").

102. JOINER, *supra* note 4, at 387-88. Georgia was not alone in its plans to evade integration via school equalization; both Mississippi and South Carolina instituted similar programs. However, neither Mississippi nor South Carolina's program was of the same scale as Georgia's, and, like Georgia's, both were doomed to failure in their stated goal of preserving de jure segregation. Georgia spent nearly double South Carolina's 75 million dollar building program, which was even larger than Mississippi's program. *Id.* See also 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 Educational System*, 66 J. S. HIST. 781, 797 (2000).

103. O'Brien, *supra* note 80, at 4.

104. *Id.* at 3; see also BLAUSTEIN & FERGUSON, *supra* note 66, at 258 (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).

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.¹⁰⁵

Initial attempts to finance the MFPE faltered when a referendum to finance the program was defeated by a three to one vote.¹⁰⁶ However, the political climate of 1949 foreshadowed significant challenges to segregation, and as school segregation schemes began to fall to Equal Protection Clause challenges,¹⁰⁷ 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.¹⁰⁸ At the 1950 Georgia Democratic Convention, Harris-led delegates voted to support fully funding the MFPE within the separate-but-equal doctrine.¹⁰⁹ 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.¹¹⁰ The MFPE forever changed the scope of the state’s involvement in

105. O’Brien, *supra* note 80, at 5.

106. Steelmon, *supra* note 101, at 192.

107. *See, e.g.*, Sipuel v. Bd. of Regents, 332 U.S. 631 (1948) (requiring that the plaintiff be admitted to the previously all white University of Oklahoma’s law school, noting “[t]he State must provide [legal education] 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 Fourteenth Amendment challenge to whites-only admissions policy at the University of Texas).

108. Steelmon, *supra* note 101, at 192. The MFPE passed on February 18, 1949, with one vote against it in the Senate and two dissenting votes in the House. *Id.*

109. O’Brien, *supra* note 80, at 3. The NAACP’s complaint in *Cooper v. Aaron*, 358 U.S. 1 (1958), specifically attacked the issue of inequity in Georgia’s funding of black schools and came on the heels of *Sweatt*, 338 U.S. 865 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. *Sweatt*, 338 U.S. 865; *McLaurin*, 339 U.S. 637.

110. 1951 Ga. Laws 360-81.

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.¹¹¹

B. The Scope of the MFPE

The MFPE was built around the concept of using universal minimum standards of funding as a tool for school equalization.¹¹² Section 1 of the MFPE declared it was “the public policy of the State of Georgia that educational opportunities for all citizens of this state shall be equalized.”¹¹³ Although this language was similar to Georgia’s earlier equalization legislation in its stated goal, it was the broad scope and specificity with which the MFPE attacked funding disparities that made it such 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.¹¹⁴

The MFPE also established a nine-month school year¹¹⁵ and gave students in public schools access to free textbooks.¹¹⁶ It also mandated that teachers, principals, supervisors, and superintendents be certified by the state pursuant to the rules

111. NUMAN V. BARTLEY, *THE CREATION OF MODERN GEORGIA* 206 (Univ. of Ga. Press 1990). Talmadge used a combination of political arm-twisting, the threat of educational integration, and the promise of future prosperity brought about by better education, to garner support for the 3% sales tax. *Id.*

112. 1949 Ga. Laws 1406-22.

113. *Id.*

114. R.O. Johnson, *Desegregation of Public Education in Georgia - One Year Afterward*, 24 J. NEGRO EDUC. 228-30 (1955) (also noting that this program did not address the fact that Georgia still made no provision for blacks in higher education).

115. 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 month should consist of twenty school days. 1949 Ga. Laws 1409.

116. 1949 Ga. Laws 1417-18.

and regulations of the State Board of Education.¹¹⁷ It provided for calculating Teacher-Pupil Ratios based on population density; however, these ratios were calculated separately for whites and blacks.¹¹⁸

Large sections of the MFPE were devoted to revenue and expenditures.¹¹⁹ The MFPE established the “Minimum Foundation Program Fund” to support the program.¹²⁰ Section six established a minimum teacher salary schedule that did not differentiate among grades or subjects taught.¹²¹ The MFPE gave the State Board of Education the ability to calculate the funding needs of local systems with regards to pupil transportation.¹²² It also provided detailed calculations on how expenditures for schools should be calculated, how to 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.¹²³ The MFPE provided that, should a local unit of administration fail to comply with one or more provisions of the program, the State Board of Education could withhold payments from the MFPE fund until districts were in full compliance.¹²⁴ Most significantly, the MFPE set a budget that totaled \$96 million for education in Georgia, \$69 million of which would come from the state.¹²⁵

C. *The Impact of the MFPE*

Between 1950 and 1958, the MFPE increased Georgia’s expenditures on public education from \$53 million to \$150

117. 1949 Ga. Laws 1409. 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. *Id.*

118. 1949 Ga. Laws 1410.

119. 1949 Ga. Laws 1406-22.

120. 1949 Ga. Laws 1408.

121. 1949 Ga. Laws 1409-10.

122. 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. *Id.*

123. 1949 Ga. Laws 1412-13.

124. 1949 Ga. Laws 1419.

125. 1949 Ga. Laws 1422.

million, and by 1961, Georgia was expending more than 50% of its tax revenues on education.¹²⁶ To facilitate the MFPE's objective of equalizing black schools in order to preserve legal segregation, Governor Talmadge designated more than half the initial spending, approximately thirty million dollars, to black schools even though black students made up only one third of the total enrollment in Georgia schools.¹²⁷ The state began an effort to consolidate and expand black schools.¹²⁸ When Georgia engaged in a \$200 million school building program, more than half of those funds went toward construction and improvement of black schools.¹²⁹ In the 1949 - 1950 school year, there were 1596 white schools and 2310 black schools.¹³⁰ Of the 1300 one-teacher schools in Georgia, 1,254 were black.¹³¹ 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);¹³² the number of one-teacher schools dropped to only fourteen.¹³³ Moreover, the MFPE equalized teachers' salaries and effectively ended the disparity between the pay of white and black educators. In the 1949-1950 school year, the average

126. State of Ga., Joint Comm. on Educ., Report on Public Educ. Expenditures, 101st Gen. Assem 5, 19, 21 (1962).

127. TUCK, *supra* note 87, at 77.

128. See ANN SHORT CHIRHART, *TORCHES OF LIGHT: GEORGIA TEACHERS & THE COMING OF THE MODERN SOUTH* 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 in Gainesville. *Id.*

129. Letter from T.A. Carmichael, Dir. of Negro Educ., Ga. Dep't of Educ., to Don Rawlins (copy on file with author).

130. GA. DEP'T OF EDUC., *STATISTICAL SUMMARIES OF GEORGIA SCHOOLS (1959-1960)* [hereinafter *STATISTICAL SUMMARIES*] (including statistics from the prior decade).

While it may seem odd that there were more black schools than white schools given their populations, this is merely a statistical aberration caused by the large number of one-teacher black schools.

131. *Id.*

132. *Id.*

133. GA. DEP'T OF EDUC., *MISCELLANEOUS INFO. ON GA. PUBLIC SCHS.* (Dec. 29, 1960). Four of the fourteen one-teacher schools in 1960 were special schools, not regular one-teacher schools. *Id.*

teacher earned only \$1997 per year.¹³⁴ By 1960, schools for whites employed 23,602.5 teachers, black schools employed 10,123, and average teacher salaries, both black and white, had risen to \$3802.¹³⁵

IV. IMPLICATIONS OF THE MFPE AND SIMILAR PROGRAMS ON MODERN SCHOOL FINANCE REFORM

A. *The Continued Problems of Equitable Spending*

The tremendous impact of the MFPE could not fully compensate for the much lower starting point of black schools. For example, during the 1959-1960 school year, black students had lower rates of attendance,¹³⁶ completed school at a lower rate than whites, and often were not promoted to the next grade at the same rate as their white counterparts.¹³⁷

By the 1960s, state funding began to decrease under the MFPE. Following the start of school integration in Georgia, the MFPE was reauthorized, with a renewed focus on “minimum” standards in 1964.¹³⁸ However, throughout the 1960s, the percentage of education funds supplied by the state declined and by 1971, state support had dropped to 58%, with state funds accounting for only 55% of Georgia education funding over the following three years.¹³⁹ Subsequently, both black and white students from grades four through twelve increasingly lagged in academic performance.¹⁴⁰

After newly-elected Governor Jimmy Carter took office in 1971, he noted that the MFPE was not adequate for financing

134. *Id.*

135. STATISTICAL SUMMARIES, *supra* note 130. The 23,603.5 teachers for white schools include part-time teachers who were counted as fractional full-time teachers. *Id.*

136. *Id.*

137. *Id.*

138. 1964 Ga. Laws 3-49.

139. *McDaniel v. Thomas*, 285 S.E.2d 156, 158 (Ga. 1981).

140. JOINER, *supra* note 4, at 472. Among other problems to be addressed by the APEG was the tendency of some districts to refuse state and federal funds for school consolidation and maintaining a small school system. DEANNA L. MICHAEL, *JIMMY CARTER AS EDUCATIONAL POLICYMAKER* 83 (State Univ. of N.Y. Press 2008).

the educational needs of Georgia students.¹⁴¹ Carter proposed a new program to address the deficiencies of the MFPE, and the legislature responded, adopting the Adequate Program for Education in Georgia (“APEG”) in 1974.¹⁴² The APEG was the most comprehensive and constructive Georgia education law to date.¹⁴³ It outlined requirements for instructional programs, including special education,¹⁴⁴ support services,¹⁴⁵ and the financial foundations of the program.¹⁴⁶ The APEG was funded through local, state, and federal funds.¹⁴⁷

Despite its comprehensiveness, the APEG was a relatively short-lived bridge between the segregation era of the MFPE and Georgia’s current system of funding public education. In 1983, at the request of Governor Joe Frank Harris, the Georgia legislature established the Education Review Commission.¹⁴⁸ Governor Harris believed that the continued deficiencies of Georgia’s education system, plus the innovations brought about by new technologies, demanded that the APEG be reformed.¹⁴⁹ Key to the Governor’s thinking was the progression from a “minimum” standard of education to an “adequate” education, finally moving to a “quality” education.¹⁵⁰ It had become clear that the APEG’s scheme of apportioning funds strictly on the basis of the number of students was exacerbating funding inequities.¹⁵¹ Because the APEG did not examine a school

141. GA. DEP’T OF ARCHIVES, ADDRESSES OF JIMMY CARTER, GOVERNOR OF GEORGIA, 1971-1975 5 (Frank Daniel ed., 1975).

142. MICHAEL, *supra* note 140, at 78-84.

143. JOINER, *supra* note 4, at 476.

144. 1974 Ga. Laws 1047.

145. 1974 Ga. Laws 1057.

146. 1974 Ga. Laws 1069.

147. JOINER, *supra* note 4, at 500-02 (“Although there had been numerous efforts to reduce or even abolish local support for public schools, the members felt that any effort to modify the property tax should be thoroughly examined in terms of required local effort.”).

148. GA. DEP’T OF ARCHIVES, ADDRESSES OF JOE FRANK HARRIS, GOVERNOR OF GEORGIA, 1983-1991 (Frank Daniel ed., 1990) (referring to speech of Jan. 11, 1985).

149. *Id.* at 99 (referring to Joe Frank Harris, Georgia Governor, Speech at the Abraham Baldwin Symposium on History and Government: Georgia Governors in an Age of Change, 1943-1983 (Oct. 30, 1985)).

150. *Id.*

151. EDUCATION POLICY PRIMER, *supra* note 44, at 12.

system's financial condition, the large districts that were often the wealthiest were the largest recipients of state funds.¹⁵²

In the meantime, the problems of inequalities in education funding had not died with segregation. A national school finance reform litigation movement sought to build on the successes of desegregation litigation¹⁵³ to equalize educational opportunity.¹⁵⁴ When the Supreme Court held in 1973 that education was not a fundamental right under the Equal Protection Clause of the Fourteenth Amendment,¹⁵⁵ school finance reform plaintiffs brought claims that the disparate spending on public education violated the education and equal protection clauses of state constitutions.¹⁵⁶ While plaintiffs initially experienced success, by the late 1970s and early 1980s courts were less inclined to favor plaintiffs in these suits.¹⁵⁷ It was during this period that the Georgia Supreme Court decided *McDaniel v. Thomas*.¹⁵⁸ In *McDaniel*, the court held that, while Georgia's system of public school funding did in fact result in disparities between rich and poor school districts, educational equity was not a fundamental right under the Georgia Constitution's education or equal protection clauses.¹⁵⁹

152. *Id.*

153. See generally *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

154. 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, 556 (1998).

155. *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 Fourteenth Amendment and that education is not a fundamental right warranting protection under the U.S. Constitution).

156. See generally Robert M. Jensen, *Advancing Education through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1 (1997).

157. 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 Board of Education*, 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)).

158. *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981).

159. *Id.* at 166-68.

Accordingly, the Court determined that it was enough for the state to have a rational basis for its funding scheme.¹⁶⁰

Notwithstanding the Georgia Supreme Court's refusal to recognize equitable educational expenditures as a right, during the 1980s, Georgia adopted academic standards for what children should know and learn¹⁶¹ as a part of the current education funding legislation, the Quality Basic Education Act of 1985 ("QBE").¹⁶² The QBE provides Georgia's current framework for education funding.¹⁶³ Under the QBE's fair-share provision, money is allocated to local districts, not based

160. *Id.* at 168.

161. GA. DEP'T OF EDUC., GEORGIA PERFORMANCE STANDARDS, *available at* <https://www.georgiastandards.org/standards/GPS%20Support%20Docs/Curriculum%20Frequently%20Asked%20Questions.pdf> (last visited Mar. 21, 2010).

162. O.C.G.A. § 20-2-132 (2009).

163. *Id.* The QBE resulted from the recommendations of the Governor's Education Review Commission on how to improve the system of APEG. The primary goals of the QBE in its current form are: "(1) A substantial reduction in the number of teachers who leave the teaching profession for reasons of job dissatisfaction; (2) A decrease in the percentage and number of students who enter school but drop out prior to graduation; (3) The elimination of emergency teaching certificates and waivers for teaching outside of specialty; (4) A decrease in the percentage of students who fail the Georgia High School Graduation Test; (5) A significant increase in the test scores of Georgia students who take the Scholastic Assessment Test (SAT) or the ACT Assessment (ACT); (6) An increase in the number of students mastering each skill in reading, mathematics, and other subject areas; (7) An accountability system for education programs that measures efficiency and effectiveness and ensures that programs produce improvement in student achievement scores for all students; (8) A comprehensive program and financial information system that provides data that allow for the accurate evaluation of program effectiveness; (9) A seamless education system that allows students to be served in the most effective and efficient way possible; (10) The elimination of school violence; (11) A decrease in the percentage of students who perform below grade level; (12) An increase in parental and community involvement in schools; (13) Better coordination between education agencies and other organizations providing instructional and related services to students; (14) A more competent school work force through the effective use of evaluation tools, training, and school improvement teams that promote best practices; and (15) More flexibility for high-performing schools so that services can be better adapted to student needs." *Id.*

based on the number of students, but rather, on how many hours students are in class during a school day.¹⁶⁴ The QBE includes provisions setting out the requirements and minimum salaries for teachers¹⁶⁵ and gives the state Board of Education the ability to establish a core curriculum for all public schools in Georgia.¹⁶⁶ Perhaps most significantly, the QBE gives the state the power to compel poorly-funded systems to spend more money on programs found deficient.¹⁶⁷

Funding under the QBE comes in the form of Equalization Grants,¹⁶⁸ yet the name is somewhat misleading because the grants do not truly equalize funding between districts. Instead, they seek to bring each district up to some minimum (adequate) level of funding.¹⁶⁹ Not surprisingly, in the absence of a legally mandated equality requirement, per-pupil funding varies.¹⁷⁰ By

164. O.C.G.A. § 20-2-161 (2009).

165. O.C.G.A. § 20-2-212 (2009).

166. O.C.G.A. § 20-2-140 (2009).

167. O.C.G.A. § 20-2-165 (2009).

168. *Id.*

169. *Id.*

170. The data from two of Georgia's largest school districts—Henry County and Chatham County—serves as a prime example. In suburban Atlanta, Henry County, with 39,000 students, spends just over \$11,000 per pupil. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., SEARCH FOR PUBLIC SCHOOL DISTRICTS: HENRY COUNTY (2007-2008), <http://nces.ed.gov/ccd/districtsearch/index.asp> (under "State," select "Georgia", under "County" enter "Henry," and click "search"). The Chatham County School District, which includes Savannah and serves 34,000 students, serves a similarly sized population of students but spends only \$9000 per student. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., SEARCH FOR PUBLIC SCHOOL DISTRICTS: CHATHAM COUNTY (2007-2008), <http://nces.ed.gov/ccd/districtsearch/index.asp> (under "State," select "Georgia", under "County" enter "Chatham," and click "search"). The disparities are just as stark in smaller districts. The Quitman County School District which serves just 287 students spends over \$16,000 per student. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., SEARCH FOR PUBLIC SCHOOL DISTRICTS: QUITMAN COUNTY (2007-2008), <http://nces.ed.gov/ccd/districtsearch/index.asp> (under "State," select "Georgia", under "County" enter "Quitman," and click "search"). Taliaferro County where 256 students attend public schools, expends just over \$12,000 per student. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., SEARCH FOR PUBLIC SCHOOL DISTRICTS: TALIAFERRO COUNTY (2007-2008), <http://nces.ed.gov/ccd/districtsearch/index.asp> (under "State," select "Georgia", under "County" enter "Taliaferro," and click "search").

the early 1990s, the QBE made it possible for the poorest districts in Georgia to close the funding gap,¹⁷¹ yet the QBE is criticized for being underfunded and for allowing the gap between average per-pupil spending in rich districts and average per-pupil spending poor districts to expand.¹⁷² The language of the QBE mirrors a shift in the wider school finance reform movement, from equality to adequacy.

Currently, school finance litigation suits are brought not only on equity of expenditures, but also on the premise that expenditures are insufficient to meet state constitutional guarantees of adequate education.¹⁷³ Georgia is in the midst of adequacy litigation; in 2004, the Consortium for Adequate School Funding in Georgia filed suit against the state, claiming that the QBE formula provided inadequate funding to meet the cost of providing an adequate education.¹⁷⁴ It seeks increased funding “in order to meet higher educational standards and new systems of accountability; increased funding for programs for students at risk for academic failure; funding for capital construction; and increased state funding for special education and preschool education.”¹⁷⁵ On September 16, 2008, the Consortium withdrew its lawsuit, but it intends to file a new suit in another not-yet-identified Georgia court.¹⁷⁶

171. Betsy White, *Study: QBE Law Moderated Inequities in Pupil Spending*, ATLANTA J.-CONST., Apr. 2, 1991, at D2.

172. *THE JOE FRANK HARRIS YEARS; Highs and Lows; The Ups and Downs of the Harris Administration*, ATLANTA J.-CONST., Jan. 7, 1991, at A8.

173. See generally Heise, *supra* note 154.

174. Complaint at 2, Consortium for Adequate Sch. Funding in Ga., Inc. v. State, No. 2004CV91004 (Super. Ct. of Fulton County, Ga. 2004), available at http://www.casfg.org/litigation/Ga_School_Finance_Complaint.pdf.

175. STARTING AT 3, EDUCATION LAW CENTER, SECURING ACCESS TO PRESCHOOL EDUCATION: GEORGIA STATE PRESCHOOL PROGRAM OVERVIEW (2008), http://www.startingat3.org/state_laws/StatelawGAdetail.htm (last visited Mar. 22, 2010).

176. GEORGIA SCHOOL FUNDING ASSOCIATION: LITIGATION, <http://www.casfg.org/litigation> (last visited Mar. 22, 2010).

B. De Facto Segregation and the Continued Achievement Gap

Although the 1954 *Brown v. Board of Education* decision overturned legitimized segregation, its effects had little immediate impact on Southern schools. From 1955 until 1968, the U.S. Supreme Court (along with the other branches and levels of government) abandoned any efforts to desegregate schools.¹⁷⁷ 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.”¹⁷⁸

Since the 1980’s, the country—and the South in particular—has steadily reversed its progress towards integration of public schools.¹⁷⁹ Notably, it was a U.S. Supreme Court case that originated in Georgia that struck a major blow upon the effort to desegregate the nation’s public schools.¹⁸⁰ In the 1992 *Freeman v. Pitts* decision,¹⁸¹ 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.¹⁸² DCCS filed a motion for final dismissal that would effectively result in the District Court’s withdrawal of its oversight and recognize the county as officially desegregated.¹⁸³

177. J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954-1978 61 (Oxford Univ. Press 1979) (noting that the period of non-decision ended with *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968)).

178. KLARMAN, *supra* note 48, at 348, 360. This integration occurred in Atlanta and proceeded without incident. *Id.*

179. *See generally* GARY ORFIELD, THE CIVIL RIGHTS PROJECT, REVIVING THE GOAL OF AN INTEGRATED SOCIETY: A 21ST CENTURY CHALLENGE (2009), available at http://www.civilrightsproject.ucla.edu/research/deseg/reviving_the_goal_ml_k_2009.pdf.

180. Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 759 (1993) (noting that many consider *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) and *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237 (1991) to be the cases that signaled the end of “the era of mandatory school desegregation”).

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

182. *Id.*

183. *Id.* at 467.

DCCS's argument focused on the six categories - student assignments, transportation, physical facilities, extracurricular activities, faculty assignments and resource-allocation - which the Supreme Court in *Green v. County School Board*,¹⁸⁴ relied upon to determine whether there existed a dual school system based on race.¹⁸⁵ DCCS presented evidence to support that it met four of those six categories (student assignments, transportation, physical facilities, and extracurricular activities)¹⁸⁶ despite the fact that in 1986, the year that the DCCS filed its motion, the DCCS was fourth, among the country's largest districts, in the decline of white students and second in its proportional increase of black students.¹⁸⁷ The Respondents argued that the Court should continue to oversee the desegregation process until DCCS had met all six categories and then for some years afterwards to ensure continued compliance.¹⁸⁸ 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.¹⁸⁹ The Court noted that, in cases of partial compliance where the school district has achieved unitary status¹⁹⁰ in some but not all areas, the reviewing court may return control of the successfully desegregated areas to school officials while retaining supervision over areas that remain segregated.¹⁹¹

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.¹⁹² By evaluating the

184. *Green v. County Sch. Bd.*, 391 U.S. 430 (1968).

185. *Freeman*, 503 U.S. at 467 (citing *Green*, 391 U.S. at 435).

186. *Id.* at 467.

187. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 770 (Vintage 2004).

188. *Freeman v. Pitts*, 503 U.S. 467, 477 (1992).

189. *Id.* at 468-70.

190. "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." Orfield & Thronson, *supra* note 180, at 762-63.

191. *Freeman*, 503 U.S. at 467; *see also* Orfield & Thronson, *supra* note 180, at 763 (noting that *Pitts* "attempted to articulate a new standard for dissolving court decrees and allowing partial dismantling of desegregation plans").

192. *Freeman*, 503 U.S. at 467.

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 enabling DCCS to concentrate its efforts on areas where the effects of de jure discrimination had not been eliminated.¹⁹³ The Court noted that racial imbalance alone was insufficient to demonstrate that the district was in noncompliance with its duties under the desegregation decree.¹⁹⁴ 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.”¹⁹⁵ Accordingly, if segregation is de facto rather than de jure, or where it is a result of a state’s inaction rather than state action, the Court will not step in.¹⁹⁶

The effects of the nation’s decreased desegregation efforts are vast. Desegregation in schools across the nation peaked in 1988, and in 2006, segregation patterns began to increase.¹⁹⁷ While 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, especially in the South.¹⁹⁸ In 1990, the degree of segregation in the South was “high or extremely high,” and although that level declined slightly later in the 90s (except in Arkansas and the District of Columbia), the levels of segregation in Southern schools

193. *Id.* at 493.

194. *Id.* at 498.

195. *Id.* at 493.

196. KLUGER, *supra* note 187, at 770.

197. ORFIELD, *supra* note 179, at 13.

198. CATHERINE FREEMAN ET AL., RACIAL SEGREGATION IN GEORGIA PUBLIC SCHOOLS, 1994-2001: TRENDS, CAUSES, AND IMPACT ON TEACHER QUALITY 1 (2002), available at http://aysps.gsu.edu/publications/segregated_schools.pdf (citing GARY ORFIELD, THE CIVIL RIGHTS PROJECT, SCHOOLS MORE SEPARATE: CONSEQUENCES OF A DECADE OF RESEGREGATION (Harvard Univ. 2001), available at

http://www.civilrightsproject.ucla.edu/research/deseg/Schools_More_Separate.pdf (documenting that the number of black students who attended majority white schools between 1954-1988 in the South went from almost 0 to 43.5%, but then dropped to 32.7% in the period between 1988 and 1998)).

remained in those high or extremely high ranges in 2000.¹⁹⁹ Georgia in particular has clung to its system of desegregated schools. A 2002 Civil Rights study reported that “of the 13 Southern states in its analysis, Georgia placed only 10th in terms of increased black-white integration in the 1970s.”²⁰⁰ The same study noted that although many Southern states experienced a significant “decline in black-white segregation across schools between 1970 and 1980, Georgia did not.”²⁰¹

Today, the South is 26.5% black and 21.5% Latino, and 40% of students attend “intensely segregated schools.”²⁰² The Civil Rights Study noted that 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.²⁰³ Eighty-five percent of the nation’s teachers are white,²⁰⁴ and in Georgia, where over 80% of the state’s teachers are white, teachers are “much more likely to leave schools that serve higher proportions of minority students.”²⁰⁵

199. Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1900-2000*, 81 N.C. L. REV. 1563, 1573 (2003). 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.” *Id.*

200. FREEMAN ET AL., *supra* note 198, at 4 (“In 1970, the typical black student in Georgia went to a public school that had 31.5 percent white students. By 1980, that percentage increased to only 38.3 percent.”).

201. *Id.*

202. ORFIELD, *supra* note 179, at 11-12, 23 (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).

203. *See generally* FREEMAN ET AL., *supra* note 198.

204. ORFIELD, *supra* note 179, at 16.

205. FREEMAN ET AL., *supra* note 198, at 27.

C. Desegregation as Déjà Vu

The 2007 United States Supreme Court case, *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁰⁶ is likely to impair desegregation efforts even further. In that case, the U.S. Supreme Court held that school districts are unable to consider race in attempts to integrate schools.²⁰⁷ The combined effects of *Parents Involved* and the flight of whites from neighborhoods where the minority population increases 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,²⁰⁸ policymakers need to 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.

It may be that one solution is to abandon desegregation efforts and to focus on increased resources in low-income school districts. The South is the only region in the nation where low-income students are in the majority in public schools.²⁰⁹ The South is also the first and only region in the nation to have a majority of students of color in its public schools,²¹⁰ with Georgia's student population of color at

206. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. 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).

207. *Id.*

208. See, e.g., Jonathan Fischbach et al., *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 (2008) (analyzing the potential impact of the *Parents Involved* decision on desegregation and constitutional law doctrine).

209. 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>.

210. 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> (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).

53.9%.²¹¹ Given that low-income students inevitably face inequitable educational access, perhaps the focus should instead be on educational expenditures that include measurable inputs such as class-size reduction and teacher quality.²¹² There must also be a system to ensure that districts and schools are accountable for educational expenditures. While local control in education decision-making is critical, state oversight is a necessity. Moreover, the federal government should continue the requirement under No Child Left Behind²¹³ that federal funds be connected to demonstrated success in closing the academic achievement gap. Even in 1960, the Committee for Economic Development (comprised of 180 top executives and educators) observed at the conclusion of a three-year study: “[w]here the decentralized system cannot provide good schools, federal aid to education is an urgent necessity.”²¹⁴

Since the passage of the QBE, there has been slow but steady improvement in student achievement in the core areas of math, science, reading, and writing.²¹⁵ This trend has continued since the passage of the No Child Left Behind Act of 2001.²¹⁶ Notably, Georgia’s academic achievement gap between white and black students has tightened significantly in many areas.²¹⁷

211. *Id.* at 21.

212. Preston C. Green, III et al., *Achieving Racial Equal Educational Opportunity through School Finance Litigation*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 283, 313(2008) (citing *Sweatt v. Painter*, 338 U.S. 865 (1949) 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,” and *Hobson v. Hanson*, 269 F. Supp. 401 (D.D.C. 1967) in which the court applied the *Sweatt* analysis).

213. 20 U.S.C. § 6301 (2010).

214. *Education: Federal Aid (Contd.)*, TIME MAGAZINE, Feb. 8, 1960, available at <http://www.time.com/time/magazine/article/0,9171,828651,00.html>.

215. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., NAT’L ASSESSMENT OF EDUC. PROGRESS (1990-2006), <http://nces.ed.gov/nationsreportcard/naepdata/dataset.aspx> [hereinafter NAT’L ASSESSMENT] (to retrieve data using NAEP’s Data Explorer, select the desired subject and grade).

216. *Id.*; 20 U.S.C. § 6319 (2010).

217. Data from the NCES shows the achievement gap narrowing slowly under the QBE but, in some areas, notably mathematics the rate of the gap closing increased under NCLB. NAT’L ASSESSMENT, *supra* note 215.

Yet, while Georgia ostensibly seems to be closing the achievement gap between white, black and Latino students, it seems to be failing in its attempts to provide its children with an adequate education. Georgia still ranks 38th nationally in terms of academic achievement for all children²¹⁸ and 32nd with respect to the academic achievement of low-income and minority students.²¹⁹

V. CONCLUSION

With the resegregation of schools trending upward, the recent *Parents Involved* ruling makes the prospect of future desegregation of public education as unlikely as it was in the 1950's, when Georgia 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 appropriating expenditures without an effective strategy to raise achievement does not bring about great strides in overall educational performance. In order to facilitate greater results, Georgia may need to rely on a combination of federal, state, and local funding and control that targets input expenditures in lower income and lower performing schools.

218. U.S. Chamber of Commerce, Leaders and Laggards: A State-by-State Report Card on Educational Innovation, www.uschamber.com/icw/reportcard/default (last visited Mar. 22, 2010). This ranking includes the fifty states and the District of Columbia. *Id.*

219. *Id.* This ranking included forty-four states and the District of Columbia.