

William & Mary Bill of Rights Journal

Volume 8 (1999-2000)
Issue 1

Article 2

December 1999

Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia

Molly O'Brien

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Education Law Commons](#)

Repository Citation

Molly O'Brien, *Discriminatory Effects: Desegregation Litigation in Higher Education in Georgia*, 8 Wm. & Mary Bill Rts. J. 1 (1999), <https://scholarship.law.wm.edu/wmborj/vol8/iss1/2>

Copyright c 1999 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

WILLIAM & MARY BILL OF RIGHTS JOURNAL

VOLUME 8

DECEMBER 1999

ISSUE 1

DISCRIMINATORY EFFECTS: DESEGREGATION LITIGATION IN HIGHER EDUCATION IN GEORGIA

Molly O'Brien*

While no one can deny the importance of desegregating all educational institutions over the past half-century, one of the unexpected consequences of the movement has been to make uncertain the legality of historically black public colleges. This uncertainty has created an opportunity for those who oppose historically black colleges, for whatever reason, to bring suit against them and potentially close their doors for not enrolling a student body that represents the racial make-up of the state. Professor O'Brien explores this issue in her Article by chronicling the progress of higher education in Georgia, from the establishment of a dual system, to the successful efforts of the NAACP and others to desegregate white colleges and universities, and finally to the efforts of white plaintiffs to desegregate historically black colleges and universities. By examining traditionally black colleges in their historical context, she concludes that the Supreme Court's focus on remedying the racial identifiability of institutions is misguided. Instead, she argues that the remedies for the constitutional harm caused by de jure segregation must be designed such that only the actual harms of desegregation are addressed and further regimes of desegregation are halted.

* * *

* Administrative Professor of Law and Director of Advocacy Skills Programs at Emory University Law School. I would like to thank Professors Ann Bartow, Theresa Glennon, and Richard Greenstein for their thoughtful comments on an earlier draft of this article. Thanks are also due to Puja Gakhar and Jason Lichtstein for their valuable research assistance. I am also indebted to the participants of the 1998 Southeastern Conference of the AALS for their comments on an earlier draft of this article.

INTRODUCTION

For more than one hundred years, black public colleges¹ have faced extraordinary challenges. Founded to create educational opportunities during the era when black students were excluded from all but a few colleges and universities,² black colleges survived during post-Civil War Reconstruction and the segregationist era in spite of white opposition to their existence,³ a constant struggle for funds,⁴ and heated debate over their curricula.⁵ In the second half of the twentieth century, the greatest perceived threat to black public colleges has been, ironically, desegregation litigation.⁶ Although black public colleges have maintained race-neutral admissions

¹ The institutions I refer to as "black public colleges" are sometimes referred to in other literature as "Historically Black Institutions" (HBIs), "Historically Black Colleges and Universities" (HBCUs), "Traditionally Black Institutions" (TBIs), or "Predominantly Black Institutions." The institutions I focus on in this article are three historically, traditionally, and predominantly black institutions. They are also publicly funded. I decided not to use one of the standard abbreviations, as none is tailored to the focus of this article.

² See JEAN L. PREER, *LAWYERS V. EDUCATORS: BLACK COLLEGES AND DESEGREGATION IN PUBLIC HIGHER EDUCATION 5-14* (1985) (tracing the legal history of the establishment of black public colleges).

³ In his 1935 chronicle of Reconstruction, W.E.B. DuBois described the "attack upon higher education for black folk" as "sustained and violent." W.E.B. DUBOIS, *BLACK RECONSTRUCTION* 637 (Harbor Scholars' Classics 1956) (1935); see also WILLARD RANGE, *THE RISE AND PROGRESS OF NEGRO COLLEGES IN GEORGIA 1865-1949*, at 43-44, 61-62 (1951) (recounting an attempt to abolish Atlanta University in 1871 and a plan to tax black colleges out of existence).

⁴ See HENRY ALLEN BULLOCK, *A HISTORY OF NEGRO EDUCATION IN THE SOUTH* 117-46 (1970) (describing the philanthropic efforts required to keep black colleges afloat); Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29, 45-64 (1987) (chronicling the underfunding of black public colleges between 1890 and the 1940s).

⁵ See *infra* notes 46-58 and accompanying text.

⁶ A number of scholars have written recently about desegregation's implicit threat to the existence of black public colleges. See, e.g., Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994); Lorne Fienberg, *United States v. Fordice and the Desegregation of Public Higher Education: Groping for Root and Branch*, 34 B.C. L. REV. 803 (1993); S. David Friedman, *College Desegregation: Toward Abandoning the Integrative Ideal to Save Publicly Funded Black Institutions of Higher Education*, 11 N.Y.L. SCH. J. HUM. RTS. 339 (1994). Even before the NAACP's success in desegregating institutions of higher learning, black scholars and college leaders had warned that college integration might have negative consequences for black colleges and black students. See Jane E. Smith Browning & John B. Williams, *History and Goals of Black Institutions of Higher Learning*, in *BLACK COLLEGES IN AMERICA: CHALLENGE, DEVELOPMENT, SURVIVAL* 68, 85 (Charles V. Willie & Ronald Edmonds eds. 1978) (quoting Martin D. Jenkins, president of Morgan State

policies, they have remained racially identifiable—that is, they are still predominantly black. Black colleges are vulnerable to attack as the “most visible vestige” of the segregationist era,⁷ and elimination of their racial character has been a goal of states seeking to eliminate the remnants of *de jure* segregation.⁸

In the years since *Brown v. Board of Education*,⁹ black public colleges have faced nearly unrelenting controversy and continuous litigation.¹⁰ During thirty-eight years of post-*Brown* litigation, federal judges operated without Supreme Court guidance on what was required to achieve “desegregation” in the context of higher education, and often “assumed that historically black colleges stood as obstacles to school desegregation.”¹¹ When the Supreme Court finally broke its silence on desegregation in higher education, the status of publicly funded black colleges remained unresolved. In *United States v. Fordice*,¹² a case that addressed the desegregation of the university system of Mississippi, the Court rejected the argument that the adoption of race-neutral policies alone would suffice to demonstrate that the state had completely abandoned its former dual system.¹³ The Court further held that state policies and practices that continued to have *discriminatory effects* must be justified by sound educational policy or be eliminated.¹⁴ Justice White wrote:

That an institution is predominantly white or black does not in itself make out a constitutional violation. But surely the State may not leave in place policies rooted in its prior officially segregated system that serve to maintain the racial identifiability of its universities if those policies can practicably be eliminated without eroding sound educational policies.¹⁵

College, who warned at that time that for most black colleges “integration would mean participation in state systems reorganized to offer services to the majority”).

⁷ See Leland Ware, *The Most Visible Vestige: Black Colleges After Fordice*, 35 B.C. L. REV. 633 (1994).

⁸ See *infra* notes 337-53 and accompanying text.

⁹ 347 U.S. 483 (1954).

¹⁰ See, e.g., *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994) (suit seeking desegregation of Alabama colleges); *United States v. Louisiana*, 9 F.3d 1159 (5th Cir. 1993) (action alleging maintenance of dual college system based on race); *United States v. Alabama*, 828 F.2d 1532 (11th Cir. 1987); *Geier v. Alexander*, 801 F.2d 799 (6th Cir. 1986) (suit seeking to use racial quotas to eliminate effects of *de jure* segregation); *Geier v. University of Tenn.*, 597 F.2d 1056 (6th Cir. 1979) (suit seeking desegregation of public colleges in Tennessee); *Richardson v. Blanton*, 597 F.2d 1078 (1979); *Sanders v. Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968) (suit seeking a plan to desegregate Tennessee colleges), *vacated by Geier v. Richardson*, 881 F.2d 1075 (6th Cir. 1989).

¹¹ Ware, *supra* note 7, at 651; see also *infra* notes 211-42 and accompanying text.

¹² 505 U.S. 717 (1992).

¹³ See *id.* at 729.

¹⁴ See *id.* at 741.

¹⁵ *Id.* at 743.

The decision in *Fordice* placed an affirmative duty on the states to reform “policies traceable to the *de jure* system” that are “still in force and have discriminatory effects,” but did not explicitly describe or define the nature of those “discriminatory effects.”¹⁶ Instead, the Court equated “discriminatory effects” with “segregative effects,” leaving room for the racially-identifiable public black colleges to be seen as a problem to be corrected.¹⁷

What the *Fordice* decision meant for traditionally black public colleges, the “most obvious outgrowths of the segregated system,”¹⁸ was far from clear. Justice White suggested that “closure of one or more institutions would decrease the discriminatory effects of the present system,”¹⁹ while Justice Thomas asserted in his concurrence that “historically black colleges have become ‘a symbol of the highest attainments of black culture,’”²⁰ and held out the possibility that there might exist “‘sound educational justification’ for maintaining historically black colleges *as such*.”²¹ Justice Scalia predicted a “number of years of litigation-driven confusion and destabilization in the university systems of all of the formerly *de jure* States, that will benefit neither blacks nor whites, neither predominantly black institutions nor predominantly white ones.”²²

As Justice Scalia predicted, renewed controversy concerning the status of public black colleges ensued.²³ In spite of abundant scholarly research demonstrating that black public colleges play a vital role in the on-going effort to provide equal opportunity in higher education to black students,²⁴ litigants continue to argue that

¹⁶ *Id.* at 729.

¹⁷ See *infra* notes 211-42 and accompanying text.

¹⁸ Committee L on the Historically Black Institutions and the Status of Minorities in the Profession, American Association of University Professors, *The Historically Black Colleges and Universities: A Future in the Balance*, 81 ACADEME 49 (1995) [hereinafter Committee L].

¹⁹ *Fordice*, 505 U.S. at 742.

²⁰ *Id.* at 748 (Thomas, J., concurring) (quoting PREER, *supra* note 2, at 2).

²¹ *Id.* at 748.

²² *Id.* at 762 (Scalia, J., concurring in the judgment in part and dissenting in part).

²³ See, e.g., *Ayers v. Fordice*, 111 F.3d 1183 (5th Cir. 1997), *cert. denied* 522 U.S. 1084 (1998); *Knight v. Alabama*, 14 F.3d 1534 (11th Cir. 1994). Other states involved in the continuing controversy over higher education desegregation include Florida, Kentucky, Maryland, Pennsylvania, Texas, and Virginia. See Patrick Healy, *U.S. Officials Try Less Confrontational Approach to Gaining College Desegregation*, CHRON. OF HIGHER EDUC., Sept. 22, 1995, at A42.

²⁴ See JULIAN B. ROEBUCK & KOMANDURI S. MURTY, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: THEIR PLACE IN AMERICAN HIGHER EDUCATION 150-73, 203 (1993) (discussing survey data showing black student discomfort at predominantly white institutions and white student discomfort at predominantly black institutions as well as advantages of majority black colleges for black students); Kenneth S. Tollett, Sr., *The Fate of Minority-Based Institutions After Fordice: An Essay*, 13 REV. LITIG. 447 (1993) (explaining seven educational reasons for maintaining majority-minority institutions). For other scholarly works that discuss the continuing need for black colleges, see ALVIS V.

black public colleges should be dismantled, abandoned, merged, or eradicated. In March, 1997, seven white and four black plaintiffs filed an action claiming that racial segregation persisted in public higher education in Georgia.²⁵ They sought a "mandatory remedial injunction requiring [the Board of Regents of the University System of Georgia] to implement a desegregation plan which is realistically designed to end [the] racial identifiability and academic disparities between traditionally white and traditionally black institutions."²⁶ The lawsuit is the latest salvo in a battle that has held black public colleges under siege for many years. The outcome of the battle is not yet clear.²⁷ In the tale of the siege, however, lies the key to understanding continuing discriminatory effects of the former system of *de jure* segregation in higher education.

This Article will chronicle Georgia's experience with segregation and desegregation in higher education. The Georgia story is significant not only because of the recent law suit, but also because Georgia has operated for more than twenty-five years under an "affirmative duty" standard similar to the one articulated by the Supreme Court in *Fordice* in 1992. Although *Fordice* was the first Supreme Court pronouncement on the nature of the state's duty to desegregate higher education, the affirmative duty described in *Fordice* was neither new nor untried. As early as 1973, the Georgia Board of Regents had in hand a federal court order and a letter from the Office for Civil Rights both of which resolved, albeit not finally, the question of whether the Equal Protection Clause and Title VI required the state to go beyond the

ADAIR, *DESEGREGATION: THE ILLUSION OF BLACK PROGRESS* (1984); *ELUSIVE EQUALITY: THE STATUS OF BLACK AMERICANS IN HIGHER EDUCATION* (Lorenzo Morris ed., 1979); *IN PURSUIT TO EQUALITY IN HIGHER EDUCATION* (Anne S. Pruitt ed., 1987); PREER, *supra* note 2; Brown, *supra* note 6; Brown-Scott, *supra* note 6; Browning & Williams, *supra* note 6; Friedman, *supra* note 6; Tollett, *supra* note 24; Ware, *supra* note 7; James A. Washburn, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115 (1994). The need for black colleges was also recognized by the American Association of University Professors. See Committee L, *supra* note 18. For works criticizing black colleges, see CHRISTOPHER JENCKS & DAVID REISMAN, *THE ACADEMIC REVOLUTION* (1968); J. Junod, *Are Black Colleges Necessary?*, 27 ATLANTA MAG. 78-119 (1987).

²⁵ See *Wooden v. Board of Regents*, 32 F. Supp. 2d 1370, 1373 (S.D. Ga. 1999). Plaintiffs advanced a "two-prong" attack against the policies and practices of the Board of Regents. In "prong one" plaintiffs challenged affirmative action admissions policies at the University of Georgia. In "prong two" plaintiffs attacked policies affecting the black public colleges. See *id.* at 1372.

²⁶ *Id.* at 1372.

²⁷ In an order dated March 12, 1999, Judge Avant Edenfield granted partial summary judgment, dismissing the desegregation "prong" of the suit on the grounds that the plaintiffs lacked standing. See *id.* The court did not reach the issue of whether the state had met its duty to move from a dual to a unitary system of higher education. An appeal of the order for partial summary judgment is currently pending. See *id.*, *appeal docketed*, No. 497-45 (July 22, 1999).

enactment of neutral policies and to take affirmative steps to remove remaining vestiges of *de jure* segregation.²⁸

Georgia's experience with affirmative desegregation of its university system reveals that the "affirmative duty" standard was not sufficient to eliminate segregation's discriminatory effects; nor was the standard sufficient to protect black students from the new discriminatory effects of desegregation. Lack of clarity about segregation's harm led to desegregation "remedies" that involved sustained but unsuccessful efforts to eradicate the racial identifiability of Georgia's black public colleges. Because institutional racial identifiability has been a focal point for deciding whether a state has satisfactorily dismantled its prior *de jure* system,²⁹ Georgia's black public colleges have been treated as a constitutional harm to be remedied, a discriminatory vestige of a segregationist past. When one takes full measure of the history of Georgia's black public colleges and the efforts to desegregate them, however, it becomes apparent that these institutions are not only the victims of past discrimination, but also its adaptive and vital survivors. Further, while the prospect of closing or merging black public colleges might, when viewed in the abstract, appear to be efficient, logical, or even beneficial to black students, when viewed in the context of their history and their continuing role in educating black students, the injustice of closing or merging black colleges is apparent.

Part I of this Article provides a brief history of the establishment of a dual system of higher education in Georgia and the successful campaign by the NAACP and black plaintiffs to eliminate legal barriers to the admission of black students into the segregated white institutions. Part II focuses on the first of several attempts by white plaintiffs to disestablish Georgia's black colleges through desegregation litigation. Part III chronicles the sustained efforts to desegregate black public colleges in Georgia. Together, Parts II and III demonstrate that measures designed to desegregate black public colleges substantially privileged whites and acted on white supremacist notions in ways that humiliated blacks, causing further discriminatory injury. Finally, Part IV returns to the *Fordice* "affirmative duty" standard and argues that the Court's conception of the discriminatory effects of *de jure* segregation is inadequate. By formulating the "discriminatory effects" of past segregation as coextensive with "segregative effects," the Court's remedial focus is inappropriately directed at the racial make-up of institutions within the state's university system. Desegregation remedies focused on the racial identifiability of institutions have ignored the real discriminatory effects of *de jure* segregation and caused their own new discriminatory effects. Desegregation remedies have maintained the siege on black public colleges.

An adequate formulation of segregation's discriminatory effects requires attention to history. Only when one examines higher education segregation in its historical context does it become apparent that public black colleges are not part of

²⁸ See *infra* notes 240-43 and accompanying text.

²⁹ See *United States v. Fordice*, 505 U.S. 717, 730 n.4, 743 (1992); see also *infra* notes 358-62 and accompanying text.

segregation's harm. Moreover, when higher education desegregation is examined in its historical context, the discriminatory effects of focusing on the racial identifiability of institutions are revealed.

I. DESEGREGATION LITIGATION IN THE CONTEXT OF A CENTURY OF BLACK STRUGGLE FOR EDUCATIONAL OPPORTUNITY IN HIGHER EDUCATION

The history of black progress in higher education has, until the last decade [1970s], been characterized by both the monumental efforts of blacks and the relentless resistance and indifference of the larger society.³⁰

A. *The Establishment of Black Public Colleges in Georgia: Separate and Unequal*

The establishment of black public colleges in the nineteenth century South was a triumph against tremendous odds. Before the Civil War, blacks in Georgia generally received no formal education at all. Teaching slaves to read or write was prohibited by law.³¹ When the Civil War ended, former slaves, long deprived of any education, embraced education enthusiastically, viewing it as a vehicle for both social and economic advancement.³² The white public, on the other hand, showed much resistance to and little support for black public education.³³

Founded in 1867, the first college for blacks in Georgia was called Atlanta University, even though professors did not teach college-level courses there for several years because the entering students lacked formal preparatory education.³⁴ The Freedmen's Bureau, tuition, and charitable contributions from the American Missionary Association provided the school's original funding.³⁵ After 1874, the

³⁰ ELUSIVE EQUALITY, *supra* note 24, at 2.

³¹ See 1829 Ga. Laws 171. In the pre-Civil War South, public schooling was not widely available to either whites or blacks. White children from wealthy families generally attended private academies; poor white children were educated, if at all, in woefully inadequate pauper schools. See DUBOIS, *supra* note 3, at 640; A HISTORY OF PUBLIC EDUCATION IN GEORGIA 1734-1976, at ix-xi (Oscar H. Joiner ed., 1979). Although it has been suggested that some slaveholders found it economically efficient to teach slaves to read and write, see DWIGHT OLIVER WENDELL HOLMES, THE EVOLUTION OF THE NEGRO COLLEGE 8-9 (photo. reprint 1969) (1932), the rule of enforced illiteracy was widely observed. See HORACE MANN BOND, NEGRO EDUCATION IN ALABAMA 17 (1994).

³² See DUBOIS, *supra* note 3, at 638; see also, JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860-1935, at 5 (1988); MEYER WEINBERG, A CHANCE TO LEARN: A HISTORY OF RACE AND EDUCATION IN THE UNITED STATES 41 (1977).

³³ See DUBOIS, *supra* note 3, at 638.

³⁴ See RANGE, *supra* note 3, at 21, 27-28.

³⁵ See CLYDE W. HALL, ONE HUNDRED YEARS OF EDUCATING AT SAVANNAH STATE COLLEGE 1890-1990, at 3 (1991); RANGE, *supra* note 3, at 35-36; ROEBUCK & MURTY, *supra* note 24, at 26.

school also received some funding under the Morrill Act of 1862,³⁶ which provided federal money for the establishment of state land grant colleges.³⁷ In 1887, however, state legislators were “shocked” to discover that a few white children, mostly children of white faculty, were attending Atlanta University.³⁸ When the school refused to abandon its commitment to integration, the state withdrew the school’s funding.³⁹

In 1890, Congress passed the Second Morrill Act,⁴⁰ which required states to make an equitable division of funds between white and black colleges to qualify for funding.⁴¹ Having severed its relationship with Atlanta University, Georgia legislators passed a bill creating a new land grant college for blacks to be called Georgia State Industrial College for Colored Youth.⁴² No college or site for the college yet existed; it was only after “prodding from Washington” that a location was chosen.⁴³ The black community in Savannah lobbied successfully for the college to be located there.⁴⁴ In October, 1891, the college opened with eight students and a classical curriculum, including courses in Greek, Latin, biology, mathematics, physics, and chemistry.⁴⁵

By the second year of operation, however, the all-white board of directors had exerted its control over Richard Wright, the black president of the school, insisting that he introduce “manual training” or “industrial education.”⁴⁶ Although the ideological debate within the black educational community between proponents of the classical curriculum and advocates of industrial education would endure for a

³⁶ 7 U.S.C. § 301 *et seq.* (1994).

³⁷ See *id.*; DONALD L. GRANT, *THE WAY IT WAS IN THE SOUTH: THE BLACK EXPERIENCE IN GEORGIA* 239-40 (1993).

³⁸ See GRANT, *supra* note 37, at 239-40. The 1880s-1890s marked the beginning of the enactment and strict enforcement of “Jim Crow” segregation laws. See C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH: 1877-1913*, at 211-12 (1987).

³⁹ See GRANT, *supra* note 37, at 240; HALL, *supra* note 35, at 3. Willard Range suggests that it was the university’s “drive for racial equality” taking place “within sight of the state capitol” that had kept white opposition poised to attack the college from its inception. RANGE, *supra* note 3, at 59-61; see also DOROTHY ORR, *A HISTORY OF EDUCATION IN GEORGIA* 374 (1950). The college continued to grow and develop as a private college, and today continues to operate as Clark Atlanta University. See J. WILSON BOWMAN, *AMERICA’S BLACK & TRIBAL COLLEGES* 68 (1994).

⁴⁰ Morrill Act of 1890, 7 U.S.C. § 323 (1994).

⁴¹ See *id.* Jean Preer points out that the Second Morrill Act not only “provided the only dependable federal support for black land-grant colleges, but also legitimized their separate status” six years before the Supreme Court provided its imprimatur to the doctrine of separate but equal. PREER, *supra* note 2, at 7-8.

⁴² See HALL, *supra* note 35, at 4; ORR, *supra* note 39, at 374; RANGE, *supra* note 3, at 62-63.

⁴³ RANGE, *supra* note 3, at 63.

⁴⁴ See HALL, *supra* note 35, at 4-5.

⁴⁵ See *id.* at 8.

⁴⁶ See RANGE, *supra* note 3, at 72.

generation,⁴⁷ that debate was all but moot at the state-funded black college in Savannah.⁴⁸ In 1897, the college offered courses in blacksmithing, wheelwrighting, carpentry, masonry, sign writing, glazing, shoe making, tailoring, cooking, and laundering.⁴⁹ Until 1926, the college trained teachers for elementary schools, taught trades, and offered almost no post-secondary course work.⁵⁰

After a 1923 federal survey revealed that Georgia State Industrial College for Colored Youth was serving primarily as an elementary and secondary school for the county, the governor of Georgia instituted changes.⁵¹ The college's buildings were in disrepair, and students were doing little or no college level work.⁵² The federal Bureau of Education threatened to withdraw the state's federal land grant subsidy if the situation was not improved.⁵³ Thus, instruction at the post-secondary level began in 1926.⁵⁴

In the succeeding years, two other black colleges with industrial and secondary course curricula were added to the roster of state-supported institutions. Both were initially established by black leaders as private schools. John W. Davidson, a graduate of Atlanta University, chartered Fort Valley High and Industrial School in 1895, hoping to provide a liberal arts education to black Georgians.⁵⁵ In order to attract funding from Northern philanthropists, Davidson adopted the "Hampton-Tuskegee" model of industrial education.⁵⁶ The Hampton-Tuskegee curriculum focused on training for manual labor and was designed to avoid confronting the inequalities and racism of the south.⁵⁷ Because philanthropists were not convinced that Davidson was committed to the conservative model, the school struggled for

⁴⁷ See CARTER GOODWIN WOODSON, *THE MIS-EDUCATION OF THE NEGRO* 12 (Charles H. Wesley & Thelma D. Perry eds., The Associated Publishers 1969) (1933); see also ANDERSON, *supra* note 32, at 33-78 (discussing the Hampton Model of industrial education); BOND, *supra* note 31, at 245 (quoting a 1933 pamphlet, "There is absolutely no place in this land for the arrogant, aggressive, school-spoilt Afro-American, who wants to live without manual labor."); DUBOIS, *supra* note 3, at 645-46 (describing white resistance to educating former slaves); BARBARA SUE KAPLAN LEWINSON, *THREE CONCEPTIONS OF BLACK EDUCATION* (1973) (examining the educational ideas of Benjamin Mays, Booker T. Washington, and Nathan Wright); Browning & Williams, *supra* note 6, at 75-85 (describing the continuing curricular debate).

⁴⁸ See RANGE, *supra* note 3, at 75-79.

⁴⁹ See *id.* at 72-74.

⁵⁰ See BOWMAN, *supra* note 39, at 72. The college awarded certificates of proficiency in the industrial courses and awarded diplomas for graduation from the "literary" course, which offered some high school and some college subjects. See ORR, *supra* note 39, at 374-75.

⁵¹ See RANGE, *supra* note 3, at 190-91.

⁵² See *id.*

⁵³ See *id.* at 191.

⁵⁴ See BOWMAN, *supra* note 39, at 72.

⁵⁵ See ANDERSON, *supra* note 32 at 115-17; ORR, *supra* note 39, at 376.

⁵⁶ See ANDERSON, *supra* note 32, at 116.

⁵⁷ See *id.* at 33.

funds, eventually merging with the State Teachers and Agricultural College of Forsyth, renamed Fort Valley State College in 1939.⁵⁸

In 1904, Joseph Winthrop Holley, who was inspired by Booker T. Washington and was known for working well with the white power structure, founded Albany State Bible and Training School, eventually renamed Albany State College.⁵⁹ Between 1917 and 1932, the college operated as a semi-private or partially-subsidized school, training students to teach basic academic skills and giving instruction in trades and industries.⁶⁰ In 1932, when the Board of Regents was established, both Fort Valley and Albany State colleges became part of the University System of Georgia.⁶¹ At that time, although blacks made up over one-third of the state's population, the university system operated twenty-three institutions of higher learning for white students and only three for black students.⁶²

Perhaps the greatest impediment to increased educational opportunity for blacks during this period was the absence of significant political or economic power. One scholar pointed out in 1932:

The public institutions are supported primarily from the public treasuries to which all citizens contribute either directly or indirectly. Appropriations from this source, however, for educational as well as other purposes, are determined by the racial group in charge of the machinery of government. Since control usually follows support, it is evident that the ultimate control of the Negro colleges will be mainly in the hands of the white people of this country for many years to come. Therefore, the future of these schools depends largely upon the wisdom and benevolence of those who hold the purse strings.⁶³

Unfortunately, in Georgia, those who held the purse strings demonstrated little wisdom or benevolence. A state-sponsored study of "Higher Education of Negroes in Georgia," conducted in 1938, revealed that Georgia's entire state expenditure of \$65,500 for black public colleges was less than any other segregated state except Arkansas.⁶⁴ While the university system commanded a budget in excess of \$1.5 million, black public colleges, like black public elementary and secondary schools, suffered from "fiscal strangulation."⁶⁵ Black public colleges scraped by with

⁵⁸ See *id.* at 117-21; BOWMAN, *supra* note 39, at 70; GRANT, *supra* note 37, at 241; ORR, *supra* note 39, at 376.

⁵⁹ See GRANT, *supra* note 37, at 241; ORR, *supra* note 39, at 304.

⁶⁰ See RANGE, *supra* note 3, at 187.

⁶¹ See *id.*

⁶² See WALTER COCKING, REPORT OF THE STUDY ON HIGHER EDUCATION OF NEGROES IN GEORGIA 10 (1938); CAMERON FINCHER, HISTORICAL DEVELOPMENT OF THE UNIVERSITY SYSTEM OF GEORGIA: 1932-1990, at 4 (1991).

⁶³ HOLMES, *supra* note 31, at 203.

⁶⁴ See COCKING, *supra* note 62, at 60.

⁶⁵ Wayne J. Urban, *Introduction* to HORACE MANN BOND, NEGRO EDUCATION IN

inadequate facilities, underpaid and underqualified teachers, and unprepared students.⁶⁶ Problems at Georgia State College in Savannah included overcrowded dormitories, poor science equipment, insufficient library facilities, low teacher salaries, no faculty housing, no retirement or life insurance plan for faculty, and a heavy load of year-round teaching for the faculty.⁶⁷ Addressing the question of why faculty continued to stay at the college, Mr. Harry Little, head of the college's department of education, indirectly indicated just how difficult and violent life was for black teachers across the South:

[I]t will be easier to hold the teachers here in Savannah than it would in most places in the South. This is due to the very fine influence exerted by the thinking people of your group in the City as a whole. My people are willing to remain here because they feel free from molestation on the part of the lawless.⁶⁸

In 1938, Georgia had only seventy-eight high schools, thirty-three of which were unaccredited, for black students in 159 counties.⁶⁹ No public college in the state provided graduate education for black students.⁷⁰ Furthermore, the separate and unequal education provided in the public sector was not an education designed to empower and prepare the students for a full participatory role in a democracy; instead, it was an education for subordination.⁷¹ Higher education for blacks was funded to "educate elementary and secondary school teachers," to educate students for "farm and home leadership," and to provide "training in trades and industries available to Negro workers."⁷² Thus, the white-controlled public sector funded black education to prepare black students to teach children or to do manual labor. It did not fund programs designed to produce business leaders, professionals, or full-fledged social decision-makers. Notably, even when the legislature appropriated tax money to support vocational training programs for blacks, the programs as implemented did

ALABAMA, A STUDY IN COTTON AND STEEL, at XX (photo. reprint 1994) (1969).

⁶⁶ See COCKING, *supra* note 62, at 20-32; FINCHER, *supra* note 62, at 7.

⁶⁷ See Georgia State Archives, Atlanta, Georgia, Negro Education Division Files, 12-6-17, location # 435-02, box 1.

⁶⁸ Letter from Harry Little, to R.L. Cousins (Apr. 12, 1938) (available at Georgia State Archives, Atlanta, Georgia, Negro Education Division Files, 12-6-17, location # 435-02, box 1).

⁶⁹ See COCKING, *supra* note 62, at 74.

⁷⁰ See *id.* at 23.

⁷¹ See generally DONALD SPIVEY, *SCHOOLING FOR THE NEW SLAVERY: BLACK INDUSTRIAL EDUCATION, 1868-1915* (1978) (discussing the use of industrial education as a means of subjugating black laborers); Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 365-379 (1997) (contrasting the egalitarian ideal of universal public education for citizenship and the "education for subordination" provided to blacks in the South).

⁷² COCKING, *supra* note 62, at 80.

not put blacks in significant competition with white wage earners. The 1938 survey material reflected that the Georgia State College in Savannah offered a three-year course in shoe repairing (25 enrolled), a three-year course in carpentry (10 enrolled), a three-year course in painting (20 enrolled), a four-year course in building and construction (14 enrolled), a two-year course in manual training (20 enrolled), a three-year course in laundry (22 enrolled), and an auto mechanics course (20 enrolled).⁷³ Carter Woodson pointed out in his 1933 critique of black education that such training programs for blacks were inferior: "The schools in which they were educated could not provide for all the experience with machinery which white apprentices trained in factories had. Such industrial education as these Negroes received, then, was merely to master a technique already discarded in progressive centres"⁷⁴ Additionally, the 1938 study painted a dim picture of the options available to blacks who sought to improve public higher education: "The Negro has been deprived of community participation, denied adequate educational opportunities, politically disinherited, without tools of redress."⁷⁵

B. *Tools of Redress: Breaking Down the Barriers*

The 1938 study's characterization of the plight of blacks in Georgia in the 1930s was not far from accurate. Discrimination against blacks was enforced by law, by violence, and by custom.⁷⁶ The Great Depression caused whites to accept positions formerly held by blacks, thereby pushing blacks further down the social and economic scale.⁷⁷ The white primary and the county unit system kept blacks in Georgia from obtaining political power through the vote.⁷⁸ Further, early black appeals to the court system to invalidate segregation laws and to require the state to treat them equally under the "separate but equal" doctrine had been unsuccessful.⁷⁹

⁷³ See Survey Materials for Study on Higher Education of Negroes in Georgia, Georgia Archives, Atlanta, Georgia, Negro Education Division Files, 12-6-17, location # 435-02, box 1.

⁷⁴ WOODSON, *supra* note 47, at 13.

⁷⁵ COCKING, *supra* note 62, at 11.

⁷⁶ See generally JOHN CELL, *THE HIGHEST STAGE OF WHITE SUPREMACY* (1982) (comparing the evolution of segregation in America with South Africa); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955) (discussing the origins of the Jim Crow laws).

⁷⁷ See generally ARTHUR FORD, *POLITICAL ECONOMICS OF RURAL POVERTY IN THE SOUTH* (1973).

⁷⁸ See V. O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 117-24 (1949) (describing the county unit system); *id.* at 553-643 (describing various restrictions on black suffrage, including literacy tests, the poll tax, and the white primary); see also J. L. BERND, *GRASSROOTS POLITICS IN GEORGIA* (1960).

⁷⁹ See, e.g., *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (upholding a Georgia county board of education decision to close a black high school while continuing to fund high school education for whites); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that a Louisiana statute requiring racial segregation in railroad cars did not

There were, however, resources within the black community that were not obvious to whites. "Behind the wall of segregation," blacks had established private schools and colleges, built their own churches, and established their own press, civil rights organizations, fraternal societies, and a teachers' association.⁸⁰ Private colleges in Georgia included Spelman College, Morris Brown College, Clark University, Morehouse College, and Paine College.⁸¹ Sizable numbers of blacks operated their own small businesses, and a few opened banks, undertaking businesses, and insurance companies.⁸² Between 1904 and 1916, thirteen black-owned banks were founded in Georgia, all but three of which survived the stock market crash of 1929.⁸³ Cities like Atlanta, Savannah, Athens, Columbus, Macon, and Augusta had well-established black middle class communities.⁸⁴

Black public colleges achieved success beyond what could have been expected given the meager support they received from the public treasury. Black colleges were able to continue to educate impoverished students during the Depression by allowing students to pay tuition in farm produce or by performing maintenance work around the college.⁸⁵ With a dedicated core of black faculty, the black public colleges provided basic skills to a large number of black students who were not being served by the public elementary and secondary school systems and provided higher education and teacher training to a smaller number.⁸⁶ Fort Valley State College also served as a center of black rural community life, sponsoring programs in home gardening and farm management, and serving the community with a health clinic.⁸⁷ Georgia State Industrial College developed programs to encourage home ownership and agricultural development.⁸⁸ The black colleges developed summer programs to train uncertified black teachers.⁸⁹ All of the black public colleges had black presidents and predominantly black faculty.⁹⁰ Both the public and the private colleges had produced educated leaders who were teachers, ministers, scholars, and entrepreneurs.⁹¹

violate the Equal Protection Clause of the Constitution).

⁸⁰ See GRANT, *supra* note 37, at 247-48; HALL, *supra* note 35, at 12.

⁸¹ See BOWMAN, *supra* note 39, at 68-84.

⁸² See Edward Aaron Gaston, Jr., A History of the Negro Wage Earner in Georgia, 1890-1940, at 33-34 (1957) (unpublished Ph.D. dissertation, Emory University) (on file with Emory University's library).

⁸³ See *id.*

⁸⁴ See GRANT, *supra* note 37, at 248; see also GARY M. POMERANTZ, WHERE PEACHTREE MEETS SAINT AUBURN 106-28 (1996) (describing black middle class life in Atlanta 1924-1938).

⁸⁵ See HALL, *supra* note 35, at 54.

⁸⁶ See O'Brien, *supra* note 71, at 378.

⁸⁷ See BOND, *supra* note 31, at 411; GRANT, *supra* note 37, at 255.

⁸⁸ See GRANT, *supra* note 37, at 246-47.

⁸⁹ See *id.*

⁹⁰ See *id.* at 239-43.

⁹¹ See *id.* at 243-47.

Graduates of Georgia colleges also went on to graduate school in other states and returned with professional degrees in medicine and in law.⁹²

In the 1920s, the National Association for the Advancement of Colored People, with the assistance of a group of brilliant young lawyers under the guidance of Charles Houston of Howard University, began implementing a legal campaign to end discrimination in public schools.⁹³ Beginning in the 1930s, the NAACP won significant victories in cases challenging separate wage scales for black and white teachers,⁹⁴ and in cases challenging segregation in higher education.⁹⁵

Officials in the Georgia Department of Education watched the activities of the NAACP with more than a little interest and, perhaps, trepidation. In 1936, the Georgia Teacher Educators Association (GTEA), a black teachers' association, presented the Director of the Division of Negro Education with an eight-point plan which included gaining accreditation for public higher education programs and obtaining an equalized pay scale for black and white teachers.⁹⁶ According to the GTEA, most counties paid white teachers an average of five times more than black teachers.⁹⁷ The Director of the Division of Negro Education, anticipating a challenge to the discriminatory teacher salaries, sent a letter to his governmental counterparts in Florida, Arkansas, and Alabama, seeking advice:

You know, without my stating it for you, what problems our division will face in [determining teacher salaries]. Some differences in salary levels for white and Negro teachers will be almost inevitable. We hope to reduce that as much as possible. In order, then, that we may have something from which to work, will you write me how this is administered in your state[?] What is the ratio of salaries of Negro teachers to salaries of white teachers and how do you arrive at that ratio? How was this difference made constitutional? ⁹⁸

⁹² See *id.* at 256-57.

⁹³ For excellent accounts of the NAACP's legal campaign to end discrimination in public schools, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976) and MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

⁹⁴ More than thirty teacher salary equalization cases were brought between 1930 and 1950—most were successful. See ROBERT A. MARGO, *RACE AND SCHOOLING IN THE SOUTH 1880-1950*, at 64-65 (1990).

⁹⁵ See, e.g., *Pearson v. Murray*, 182 A. 590 (Md. 1936) (ordering Maryland Law School to admit qualified black resident because no separate alternative provided equal treatment under the law).

⁹⁶ See GTEA, *Eight Point Program* (available at Georgia State Archives, Atlanta, Georgia, Negro Education Division Files, 12-6-71, location # 435-04, box 3).

⁹⁷ See *id.*

⁹⁸ Letter from J.C. Dixon to various state officials in Florida, Arkansas, and Alabama (Sept. 26, 1936) (available at Georgia State Archives, Department of Education, Correspondence of Director of Negro Education, box 1).

Making inequality constitutional presented a challenge to Georgia officials. Yet, the teacher salary problem was a simple money problem that could be resolved through greater appropriations. When the NAACP won a court victory requiring Missouri to admit a black student to its previously all white law school, however, southern state officials became seriously concerned. In *Missouri ex. rel. Gaines v. Canada*,⁹⁹ the Supreme Court held that Missouri's offer to send Lloyd Lionel Gaines, a black graduate of the state's publicly supported black college, to another state for law school did not satisfy the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁰ When the Court ruled that Gaines must be admitted to the University of Missouri Law School, southern state governments scrambled to find a way to avoid desegregating their graduate schools. Even though the Supreme Court had held that out-of-state scholarships did not satisfy the state's constitutional duty, southern state governments continued to explore the possibility of "regional education," creating cooperative agreements among the segregated states for each state to provide specific graduate programs for black students.¹⁰¹ The director of Negro Education at the Georgia Department of Education, Robert L. Cousins, even called Howard University's Charles Houston seeking advice concerning what to ask the state to do regarding scholarships for Negro students to attend college and professional schools.¹⁰² When Houston replied that Georgia should provide equally for both the white and Negro students, Cousins made a note in his file but took no action.¹⁰³

Hoping to avoid desegregation, the state then embarked on a program of improvement of higher education for black students. In 1939, Georgia Normal and Agricultural College in Albany was upgraded to a four-year, degree-granting institution.¹⁰⁴ Fort Valley Normal and Industrial School merged with the State Teachers and Agricultural College at Forsyth to become Fort Valley State College.¹⁰⁵ The philosophy of the state with regard to black schools during this period was summed up by a later director of the Division of Negro Education who said, "I firmly believe that the better we treat them under segregated schools the harder it will be for them to bring suit to enter the white schools."¹⁰⁶

⁹⁹ 305 U.S. 337 (1938).

¹⁰⁰ See *id.* at 349-50.

¹⁰¹ See generally REDDING S. SUGG, JR. & GEORGE HILTON JONES, *THE SOUTHERN REGIONAL EDUCATION BOARD: TEN YEARS OF REGIONAL COOPERATION IN HIGHER EDUCATION* (1960) (discussing the development and operation of the Board).

¹⁰² See Robert L. Cousins, notes (available at Georgia State Archives, Atlanta, Georgia, Division of Negro Education, Director's Subject Files 12-6-71, location # 435-01, box 1).

¹⁰³ See *id.*

¹⁰⁴ See RANGE, *supra* note 3, at 202.

¹⁰⁵ See BOWMAN, *supra* note 39, at 70; FINCHER, *supra* note 62, at 19; GRANT, *supra* note 37, at 241.

¹⁰⁶ T.A. Carmichael, Speech to Greenville Kiwanis Club (Apr. 28, 1959) (available at Georgia State Archives, Atlanta, Georgia, Negro Education Division Files, 12-6-71, location # 435-11).

For white politicians, improving the segregated colleges was the only possible response to the new Supreme Court ruling. Coeducation of the races was not a possibility—it could not even be discussed. Among white state officials only Dr. Walter Cocking, Dean of Education at the University of Georgia and principal author of the 1938 study *Higher Education of Negroes in Georgia*, and Dr. Marvin Pittman, president of Georgia Teachers College, openly advocated admitting black students to the state's graduate programs.¹⁰⁷ Both were summarily fired. Governor Eugene Talmadge requested the Board of Regents to oust these two, and, when the board refused, Talmadge installed a new board of regents to accomplish the task.¹⁰⁸

The improvements to the state's black colleges were in no way sufficient to "equalize" them. During the 1930s and 1940s, state expenditures for black colleges increased from four percent to twelve percent of the total board of regents budget.¹⁰⁹ In 1958, only six percent of all expenditures for capital improvements to Georgia's University System went to black colleges.¹¹⁰ While the University of Georgia in Athens built a multi-million dollar science complex with a chemistry building, a biology building, a physics building and more, Fort Valley State College built a dairy barn and a gymnasium, and Savannah State College built a Technical Institute and Trades Building.¹¹¹ The Southern Association of Colleges and Secondary Schools refused to accredit any black college,¹¹² and no black public college in Georgia offered graduate level study.¹¹³

During the 1940s, the NAACP continued to pursue graduate school cases, winning Supreme Court victories in *Sipuel v. Board of Regents*,¹¹⁴ *Sweatt v. Painter*,¹¹⁵ and *McLaurin v. Oklahoma State Regents*.¹¹⁶ Following these decisions, state and federal courts ordered black students admitted to graduate programs in five

¹⁰⁷ See BENJAMIN MAYS, *BORN TO REBEL* 221 (1971).

¹⁰⁸ See FINCHER, *supra* note 62, at 23. The governor's interference with the operation of the university system caused an investigation by the Southern Association of Colleges and Schools. The University of Georgia temporarily lost its accreditation. The "Cocking Affair," as it came to be called, became a major factor in the subsequent defeat of Eugene Talmadge and the election of Ellis Arnall. See *id.* at 23-24; CALVIN TRILLIN, *AN EDUCATION IN GEORGIA: CHARLAYNE HUNTER, HAMILTON HOLMES, AND THE INTEGRATION OF THE UNIVERSITY OF GEORGIA* 45 (Brown Thrasher 1991) (1964).

¹⁰⁹ See RANGE, *supra* note 3, at 220.

¹¹⁰ See GEORGIA EXECUTIVE DEPT., *A PROMISE MADE, A PROMISE KEPT* 34 (1958).

¹¹¹ The total allocation of state funds for buildings was \$30,552,560. The amount allocated to black colleges was \$2,055,386. See *id.*

¹¹² The Southern Association of Colleges and Secondary Schools finally admitted Albany State, Atlanta University, Clark College, Fort Valley State College, and Morehouse in 1957. See GRANT, *supra* note 37, at 382.

¹¹³ See RANGE, *supra* note 3, at 203.

¹¹⁴ 332 U.S. 631 (1948), *mandamus denied sub nom.* *Fisher v. Hurst*, 333 U.S. 147 (1948).

¹¹⁵ 339 U.S. 629 (1950).

¹¹⁶ 339 U.S. 637 (1950).

more states.¹¹⁷ Only five Southern states—Alabama, Florida, Georgia, Mississippi, and South Carolina—remained completely segregated at the graduate level in 1952.¹¹⁸

Georgia proved to be remarkably creative in devising schemes to maintain the segregated system. In 1944 the state began offering scholarships allowing black students to pursue graduate study in private or out-of-state graduate and professional programs.¹¹⁹ When a black student applied to a white institution, the Board of Regents would automatically assist the student in obtaining a scholarship for study at an out-of-state school.¹²⁰ If a student was not willing to accept an offer of a scholarship to attend another school, the state would find other ways to exclude him.

In September 1950, Horace Ward, a black teacher who had studied at Morehouse College and Atlanta University, applied to the University of Georgia Law School and was denied admission.¹²¹ Six weeks after he applied, the Board of Regents adopted an elaborate appeals procedure for challenging an admission decision.¹²² During the ensuing delay, Ward was drafted, served two years in the military, and ultimately began law school at Northwestern University.¹²³ Ward's case did not come to trial until December, 1956, when his application to University of Georgia was deemed moot because he had refused at trial to swear that he would transfer from Northwestern to the University of Georgia.¹²⁴

In the meantime, the Board of Regents adopted several new admission requirements designed to prevent black students from enrolling at the all-white schools. After 1953, applicants for admission to all-white schools were required to submit certificates from two alumni of the institution, and a certificate from the clerk

¹¹⁷ See *Gray v. University of Tenn.*, 342 U.S. 517 (1952) (Tennessee); *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951) (North Carolina); *Wilson v. Board of Supervisors*, 92 F. Supp. 986 (E.D. La. 1950), *aff'd*, 340 U.S. 909 (1951) (Louisiana); *State ex rel. Toliver v. Board of Educ.*, 230 S.W.2d 724 (Mo. 1950) (Missouri); U.S. COMM'N ON CIVIL RIGHTS, EQUAL PROTECTION OF THE LAWS IN PUBLIC HIGHER EDUCATION 34 (1960) (Virginia).

¹¹⁸ See Mary Ann Connell, *The Road to United States v. Fordice: What is the Duty of Public Colleges and Universities in Former De Jure States to Desegregate*, 62 MISS. L.J. 285, 301 (1993).

¹¹⁹ See RANGE, *supra* note 3, at 203. In its first three years of operation, the program distributed nearly \$50,000 for graduate study to 1291 students. See *id.*

¹²⁰ See *Hunt v. Arnold*, 172 F. Supp. 847, 852 (N.D. Ga. 1959). Georgia State Archives currently holds 50 boxes of applications for out-of-state scholarships filed between 1944 and 1972. See Record Group 33-1-41, University System.

¹²¹ See *Ward v. Regents of the Univ. Sys.*, 191 F. Supp. 491, 492 (N.D. Ga. 1957).

¹²² See *Holmes v. Danner*, 191 F. Supp. 394, 401 (M.D. Ga. 1961). The procedure required an appeal to the president of the institution to which the applicant had applied for admission. The president would then appoint a faculty committee to investigate the matter and act after considering the report of the faculty committee. If the president did not admit the applicant, a further appeal was required to the Chancellor of the university system. That decision was appealable to the board of regents. See *Hunt*, 172 F. Supp. at 853-54.

¹²³ See *Ward*, 191 F. Supp. at 493-94.

¹²⁴ See *id.* at 494.

of the superior court, all certifying the applicant's good moral character, residence, and ability to successfully pursue the course of study.¹²⁵ The Board of Regents also passed a resolution allowing each institution to require intelligence and aptitude tests and to refuse admission based on the results.¹²⁶

In the years following *Brown v. Board of Education*,¹²⁷ which held that "the separate but equal doctrine had no place in education,"¹²⁸ white Southerners mounted a campaign of "massive resistance,"¹²⁹ passing dozens of laws to avoid racial integration including a Georgia statute cutting off state funds to any racially integrated division of the university system.¹³⁰ During these years, the Ku Klux Klan

¹²⁵ See *Hunt*, 172 F. Supp. at 853. In 1956, the Board of Regents amended the regulation to allow applicants from counties with a population of 100,000 or more to substitute a certificate from a third alumnus in lieu of the clerk's certificate. See *id.* at 853. The third alumnus had to be one on a list of alumni designated by the president of the alumni association of the institution. See *id.*

¹²⁶ See *id.* at 854.

¹²⁷ 347 U.S. 483 (1954); see also *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (directing school authorities to dismantle segregated systems with "all deliberate speed").

¹²⁸ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 655 (5th ed. 1995). This is, perhaps, the simplest possible statement of the holding in *Brown*. The message and meaning of *Brown* have been a subject of unending debate since the decision was announced. The literature explicating *Brown* is too vast to enumerate. For two early-expressed and influential views of the decision, see Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22-35 (1959).

¹²⁹ There are a number of excellent works that chronicle the politics of massive resistance. See, e.g., NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950S* (1969); EARL BLACK, *SOUTHERN GOVERNORS AND CIVIL RIGHTS* (1976); JAMES W. ELY, JR., *THE CRISIS OF CONSERVATIVE VIRGINIA* (1976); NEIL R. McMILLEN, *THE CITIZENS' COUNCIL* (1971); BENJAMIN MUSE, *VIRGINIA'S MASSIVE RESISTANCE* (1961); THOMAS V. O'BRIEN, *THE POLITICS OF RACE AND SCHOOLING* (1999); WOODWARD, *supra* note 76.

¹³⁰ See 1956 Ga. Laws 753, *et seq.* ("[a]ppropriations made . . . for the benefit of the State Board of Regents and the University System . . . are limited to schools and colleges providing separate education for the white and colored races . . ."). The statute also explicitly anticipated court-ordered desegregation and required that state funds be cut off from any desegregated division of the University system. See 1956 Ga. Laws 762 ("[I]n the event any suit is prosecuted to effective judgment of a court of competent jurisdiction against the State Board of Regents . . . the school or college affected by such judgment shall not thereafter be included in any apportionment of the State Board of Regents nor in any order of the State Budget Authorities making funds available."). See also 1959 Ga. Laws 15 (authorizing education grants and school closure); 1956 Ga. Laws 6 (authorizing public school closure and education grants). A state-wide study by the Sibley Commission in 1960 reported that 64% of the witnesses who testified before the Commission preferred to close the public schools rather than accept even token desegregation. See Thomas V. O'Brien, *Georgia's Response to Brown v. Board of Education* 253-56 (1992) (unpublished Ph.D. dissertation, Emory University) (on file with Emory University's library).

experienced renewed political influence¹³¹ and Citizens' Councils,¹³² made up of the "more respectable" white southerners, worked to protect the "Southern Way of Life" by effectively silencing the voices of white moderates.¹³³ Thus, any black student who sought to enforce the right to attend an all-white public institution of higher education faced not only endless administrative delay followed by lengthy litigation, but also open hostility and threats of violence.

Nevertheless, in 1956, three black women who had sought admission to the Georgia State College of Business Administration in Atlanta, brought a class action lawsuit against the University System alleging that the college was unconstitutionally segregated by race and that the admissions process was discriminatory.¹³⁴ The court agreed that the college was racially segregated in violation of the Fourteenth Amendment's Equal Protection Clause.¹³⁵ The court also took judicial notice that it was "not customary for Negroes and whites to mix socially or to attend the same public or private educational institutions in the State of Georgia . . ."¹³⁶ Thus, the alumni certificate requirement had the effect of preventing black applicants from being admitted and was discriminatory.¹³⁷ The court enjoined the University System from continuing to limit the Georgia State College of Business Administration only to white students.¹³⁸ Even so, the college never admitted any of the three plaintiffs. Defendants scrutinized the plaintiffs' backgrounds looking for any reason to reject their applications.¹³⁹ Two of the three plaintiffs were eventually excluded for "lack of moral character."¹⁴⁰ Finding no grounds to deny admission to the third plaintiff, Iris Mae Welsh, a woman in her forties, the state enacted the "Age Limit Law of 1959."¹⁴¹ This law restricted enrollment of undergraduates older than 21 and graduates older than 25.¹⁴²

¹³¹ See DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM AND THE TRANSFORMATION OF AMERICAN POLITICS* 95 (1995).

¹³² Citizens' Councils were organizations of white men dedicated to the maintenance of segregation. They differed from the Klan in that they did not advocate violence against individual blacks. See generally MCMILLEN, *supra* note 129 (1971) (exploring the history of the Citizens' Council).

¹³³ See CARTER, *supra* note 131, at 82.

¹³⁴ See *Hunt v. Arnold*, 172 F. Supp. 847, 850 (N.D. Ga. 1959); see also CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* 141 (1998) (recounting the story behind the case).

¹³⁵ See *Hunt*, 172 F. Supp. at 856-57. The parties had stipulated that there were "no Negro alumni of the Georgia State College of Business Administration or of any other white institutions in the University System." *Id.* at 856.

¹³⁶ *Id.*

¹³⁷ See *id.* at 857.

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ One of the plaintiffs gave birth before she was married; another gave birth only four months after her marriage. See *id.* at 850-51; see also TRILLIN, *supra* note 108, at 10.

¹⁴¹ 1959 Ga. Laws 472.

¹⁴² See FINCHER, *supra* note 62, at 51. The law, which was enacted to keep Iris Mae

Georgia's creation of a web of regulations designed to restrict access of black students to white institutions coincided with an era of explosive growth and "democratization" of higher education. After World War II, the G.I. Bill made college more affordable for large numbers of returning soldiers. By the 1950s, "[h]igher education was no longer a privilege for an intellectual elite";¹⁴³ higher education had become an important means for personal, social, and economic advancement. Increasingly, a college degree was a necessary credential in the economic marketplace. Access to higher education was more important than ever. While the Georgia Board of Regents scrambled to prevent black students from entering white colleges, it also scurried to create new opportunities to meet the booming demand for college education. In 1959, five years after *Brown*, the university system acquired Armstrong College of Savannah, a segregated white college only a few miles away from Savannah State College.¹⁴⁴ Plans were also begun to create a white junior college in Albany.¹⁴⁵ Georgia proceeded with building a segregated system at break-neck speed.

The color line was not broken in Georgia education until January 1961, when a federal judge ordered the University of Georgia to admit Charlayne Hunter and Hamilton Holmes.¹⁴⁶ Hunter and Holmes were outstanding graduates of Turner High School in Atlanta.¹⁴⁷ They originally applied for admission to the University of Georgia for the fall semester of 1959.¹⁴⁸ At that time, the university claimed it lacked space for these two students.¹⁴⁹ Throughout the litigation, the university system maintained that it did not exclude these two applicants because of their race, but instead it excluded the two applicants because of lack of space, the applicants' failure to complete the application process, and poor performance during the interview.¹⁵⁰ Incredibly, the University System claimed it had no policy of limiting admissions to the University of Georgia to white people.¹⁵¹

Welsh from enrolling at Georgia State, also had the effect of restricting the enrollment of many older white students. *See id.*

¹⁴³ *Id.* at 51.

¹⁴⁴ *See* HALL, *supra* note 35, at 75.

¹⁴⁵ *See* FINCHER, *supra* note 62.

¹⁴⁶ *See* Holmes v. Danner, 191 F. Supp. 394, 410 (M.D. Ga. 1961).

¹⁴⁷ *See id.* at 409-10. For a detailed description of Hunter and Holmes and of the events surrounding their admission to the University of Georgia, *see* TRILLIN, *supra* note 108. *See also* CHARLAYNE HUNTER-GAULT, *IN MY PLACE* (1992).

¹⁴⁸ *See* Holmes, 191 F. Supp. at 404.

¹⁴⁹ *See id.* at 405.

¹⁵⁰ *See id.* at 405-09.

¹⁵¹ *See id.* at 396. By 1960, the constitutional precedents outlawing racial segregation were so well-established as to make an argument in favor of segregated education appear ridiculous. The alternative arguments presented in this case were not novel. Arguments similar to those raised by the University System had been rejected by federal courts that had required the admission of black students to previously all-white colleges in Tennessee, Alabama, and Arkansas. *See* Booker v. Tennessee Bd. of Educ., 240 F.2d 689 (6th Cir. 1957), *cert. denied*, 353 U.S. 965 (1957); Whitmore v. Stilwell, 227 F.2d 187 (5th Cir.

The admission of Hunter and Holmes to the University of Georgia created a legal crisis for the governor, who was required to extinguish funding to the University of Georgia when it admitted a black student.¹⁵² After the federal court held that the funding laws were unconstitutional, the governor asked the legislature to repeal the funding cut-off laws and to "seek new and better defenses—to perfect alternative plans—to act with courage and resolve . . . [and] to carry on resistance [to court-ordered desegregation] with every means available."¹⁵³

Hunter and Holmes became the first black students to attend the University of Georgia. Giving up comfortable lives as students at Morehouse College (Holmes) and Wayne State University (Hunter), they became Georgia pioneers.¹⁵⁴ At the end of their first week on campus, a riot broke out outside of Hunter's dormitory and the university suspended Hunter and Holmes "in order to protect all students."¹⁵⁵ Hunter and Holmes were re-admitted by court order five days later,¹⁵⁶ and they graduated despite the nearly constant stress of overt white racism.¹⁵⁷ Like Hunter and Holmes, the few black students who enrolled at the University of Georgia during the next few years were subjected to racist taunts, residential segregation, and social ostracism.¹⁵⁸

Throughout the 1960s, black students continued to apply and enroll in Georgia's previously all-white colleges and universities in slowly increasing numbers.¹⁵⁹ Even so, from 1961 to the present, thousands of black students have examined their options and decided to attend one of Georgia's black public colleges.¹⁶⁰

1955); *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619 (5th Cir. 1956), *cert. denied*, 351 U.S. 931 (1956).

¹⁵² See 1956 Ga. Laws 753, *et seq.*

¹⁵³ 1961 Georgia House Journal 237. The legislative response to the governor's call for continued resistance to desegregation included a bill to privatize public elementary and secondary schools. See 1961 Ga. Laws 35. For a history of private school tuition vouchers and their role in race segregation, see O'Brien, *supra* note 71, at 359.

¹⁵⁴ See HUNTER-GAULT, *supra* note 147, at 169-92 (1992).

¹⁵⁵ See *Holmes v. Danner*, 191 F. Supp. 394, 417 (M.D. Ga. 1961).

¹⁵⁶ See *id.*

¹⁵⁷ See generally HUNTER-GAULT, *supra* note 147.

¹⁵⁸ See *id.*; TRILLIN, *supra* note 108.

¹⁵⁹ Court battles continued elsewhere, however. James Meredith became the first black student to attend the University of Mississippi in 1962. See *Meredith v. Fair*, 305 F.2d 343, 344 (5th Cir. 1962), *cert. denied*, 371 U.S. 828 (1962). In 1963, Harvey Gantt became the first black student admitted to Clemson College in South Carolina. See *Gantt v. Clemson Agric. College*, 320 F.2d 611 (4th Cir. 1963), *cert. denied*, 375 U.S. 814 (1963). Six months later, Governor George Wallace took his famous stand in the schoolhouse door to make a public demonstration of his opposition to the enrollment of James Hood and Vivian Malone at the University of Alabama. See JACK GREENBERG, *CRUSADERS IN THE COURTS* 338-40 (1994).

¹⁶⁰ In 1996, black public colleges enrolled approximately 6000 black students in Georgia. This number represented one-third of all full time, black students enrolled in Georgia colleges in 1996. See SOUTHERN EDUCATION FOUNDATION, *MILES TO GO: A REPORT ON BLACK STUDENTS AND POSTSECONDARY EDUCATION IN THE SOUTH* A-21 (1998).

II. DESEGREGATION WITH A TWIST: THE ERA OF THE WHITE PLAINTIFF

A. *The Road from Hunter and Holmes to Hunnicutt*

The campaign for racial justice that began in the courts catalyzed a larger civil rights movement and brought about profound social, legal, and political upheaval.¹⁶¹ Victories in the court were reinforced by legislative victories in Congress, the most important of which was the passage of the Civil Rights Act of 1964.¹⁶² Title VI of the Civil Rights Act of 1964 declared that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."¹⁶³ The statute was designed to relieve the courts of the burden of desegregation litigation by giving a federal agency the power to monitor state compliance with the directive of *Brown* and to cut off federal funding from discriminating school systems.¹⁶⁴ The statute was also designed to create a financial incentive for voluntary compliance.¹⁶⁵

During the succeeding years, traditionally white colleges in the south began admitting small numbers of black students who brought the school certain advantages. In 1966, the Director of the Southern Study in Higher Education pointed out reasons why college administrators might accept desegregation even though it did not fit with their personal views. White colleges could now raid black colleges for their best athletes and simultaneously reap financial benefits for their "successful" desegregation.

¹⁶¹ There are several excellent accounts of the civil rights movement. *See, e.g.*, TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS* (1988); DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* (1986); FRED POWLEDGE, *FREE AT LAST? THE CIVIL RIGHTS MOVEMENT AND THE PEOPLE WHO MADE IT* (1991); HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY 1954-1992* (2d ed. 1993). For details on civil rights movement activity in Georgia, see Paul D. Bolster, *Civil Rights Movements in Twentieth Century Georgia* (1972) (unpublished Ph.D. dissertation, University of Georgia) (on file with University of Georgia's library).

¹⁶² 42 U.S.C. § 2000 *et seq.* (1994). Stephen Halpern describes the 1964 Civil Rights Act as "a culmination of the struggle by the black civil rights movement to use legal reform to achieve racial equality." STEPHEN C. HALPERN, *ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT I* (1995).

¹⁶³ 42 U.S.C. § 2000(d) (1994).

¹⁶⁴ *See* HALPERN, *supra* note 162, at 44.

¹⁶⁵ *See id.* Title VI applies both to higher education and to elementary and secondary education. *See* 42 U.S.C. § 2000(d) (1994). The focus of a majority of school desegregation litigation after 1964 turned to elementary and secondary schools where, in spite of Title VI, desegregation would prove to become one of "the most onerous litigation tasks in history," occupying countless federal courts across the nation for decades. O'Brien, *supra* note 71, at 378. A discussion of desegregation in elementary and secondary schools is beyond the scope of this paper.

In one college, for example, six Negro students are enrolled, of whom only one is *not* on an athletic scholarship. In recent desegregation developments, the admission of a few Negro students—and their successful retention—is a clear net fiscal asset in grants and loans in the hundreds of thousands of dollars.¹⁶⁶

Nevertheless, progress toward truly equal access for black students was minimal. In the fall of 1968, the University of Georgia reported an enrollment of 14,360 students, only seventy-two of whom were black.¹⁶⁷ At the historically all-white land grant colleges in seventeen southern and border states, black students accounted for only 1.76% of the total enrollment.¹⁶⁸ An overwhelming majority of black college students still attended black colleges.

In late 1969 and early 1970, the Department of Health Education and Welfare (HEW) sent letters to the governors of ten states, including Georgia, informing them that their state's systems of higher education stood in violation of Title VI and risked losing federal funds.¹⁶⁹ The letter requested a desegregation plan to be submitted within 120 days.¹⁷⁰ Louisiana, Mississippi, Oklahoma, North Carolina, and Florida never submitted plans.¹⁷¹ Georgia submitted a plan on May 15, 1970, but no formal action was taken either to accept or reject it.¹⁷² In October 1970, the NAACP Legal Defense Fund filed a class action to require HEW to enforce Title VI on behalf of black students and parents.¹⁷³ The action, *Adams v. Richardson*,¹⁷⁴ was filed in the United States District Court for the District of Columbia against the Secretary of HEW and the Director of HEW's Office for Civil Rights.¹⁷⁵ The complaint sought enforcement of Title VI in ten states.¹⁷⁶

Before any judicial action was taken in the *Adams* case, Wilbur Avera, the white chief registrar of voters in Fort Valley, filed an action in the United States District Court for the Middle District of Georgia seeking the desegregation of Fort Valley State College.¹⁷⁷ His motivation for filing the action was clear. He was not interested

¹⁶⁶ SAM P. WIGGINS, *THE DESEGREGATION ERA IN HIGHER EDUCATION* 77 (1966).

¹⁶⁷ See JOHN EGERTON, *STATE UNIVERSITIES AND BLACK AMERICANS: AN INQUIRY INTO DESEGREGATION AND EQUITY FOR NEGROES IN 100 PUBLIC UNIVERSITIES* 14 (1969).

¹⁶⁸ See *id.*

¹⁶⁹ See *Adams v. Richardson*, 356 F. Supp. 92, 94 (D.D.C. 1973).

¹⁷⁰ See *id.*

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.* at 92-94. See also *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977).

¹⁷⁴ 356 F. Supp. 92 (D.D.C. 1973).

¹⁷⁵ See *Adams v. Richardson*, 480 F.2d 1159, 1160-61 (D.C. Cir. 1973).

¹⁷⁶ The defendant states were Arkansas, Florida, Georgia, Louisiana, North Carolina, Maryland, Mississippi, Oklahoma, Pennsylvania, and Virginia. See *Adams*, 356 F. Supp. at 94.

¹⁷⁷ See *Avera v. Burge*, No. 2732 (M.D. Ga., filed April 4, 1972).

in improving educational opportunity for black students in middle Georgia, but rather was interested in maintaining white control of local politics.¹⁷⁸

Fort Valley was, and still is, a small town in Peach County, Georgia. Unlike Savannah and Albany, Fort Valley was not a significant site of civil rights protests during the early 1960s.¹⁷⁹ However, it had been the site of a prolonged battle by whites to maintain control of local political power. Although whites were a minority of the population of Peach County, they successfully dominated local politics through various methods of disenfranchising black voters.¹⁸⁰ In 1970, whites began to lose their monopoly on local political power. Black voters successfully challenged the outcome of a city council election and a Fifth Circuit decision ultimately resulted in a recount of votes and a victory for Claybon Edwards, a black mortician.¹⁸¹ Whites began to fear a total "black takeover" when students began to register to vote in great numbers after opinions of the Georgia attorney general in 1971 and 1972 clarified that students were allowed to register to vote where they went to school.¹⁸²

Wilbur Avera sued the Board of Regents alleging that the failure to desegregate Georgia's system of higher education created a violation of the Voting Rights Act.¹⁸³ Avera asserted that, because he was white, he was a member of a racial minority in Fort Valley and that the addition of nearly 2400 black student voters would cause the dilution of the weight of his vote.¹⁸⁴ He also claimed standing as a taxpayer to seek

¹⁷⁸ See *infra* notes 182-210 and accompanying text.

¹⁷⁹ Students at Savannah State College were active in civil rights protests, including lunch counter sit-ins in March 1960. The governor demanded that the president of Savannah State discipline the students. The students were suspended. See HALL, *supra* note 35, at 75. In 1961, Albany took center stage in the civil rights movement. See BRANCH, *supra* note 161, at 529-44. Though it was not a center of the movement, some civil rights protests were held in Fort Valley. For example, black residents of Fort Valley conducted a successful boycott of white merchants in 1964. Using the slogan "Don't Buy Where You Cannot Work," they pressured local businesses to hire and promote more blacks. See Interview with Professor Donnie Bellamy, in Fort Valley, Georgia (July 17, 1998) (on file with author).

¹⁸⁰ After the white primary was found unconstitutional, black voting was discouraged by voter segregation and fear of reprisals. See *Smith v. Allwright*, 321 U.S. 649 (1944). In 1964, a run-off system was adopted to minimize the possibility of electing a black official. See GRANT, *supra* note 37, at 447.

¹⁸¹ See *Edwards v. Sammons*, 437 F.2d 1240 (5th Cir. 1971).

¹⁸² The passage of the Twenty-Sixth Amendment to the Constitution in 1971, which granted the right to vote to all 18-year olds, and the voter registration campaigns of the civil rights movement raised students' consciousness of their right to vote. Further, a 1971 opinion of the Attorney General made clear that students were entitled to establish a residence apart from their parents for voting purposes. See 71 Op. Att'y Gen. 151 (1971); U72 Unofficial Op. Att'y Gen. 20 (1972).

¹⁸³ See Transcript of Hearing on Defendants' Motion to Dismiss at 4, *Avera v. Burge*, No. 2732 (M.D. Ga. filed June 22, 1972); see also Complaint, *Avera* (No. 2732).

¹⁸⁴ See Transcript of Hearing on Defendants' Motion to Dismiss at 4, *Avera* (No. 2732).

the desegregation of publicly supported education.¹⁸⁵ He sought to compel the Board of Regents to change the enrollment of Fort Valley State College so that it would have the same racial composition as the entire university system.¹⁸⁶ In other words, he wanted to change Fort Valley State College from ninety-nine percent black to eighty-five percent white.¹⁸⁷ The Honorable Wilbur D. Owens, Jr., dismissed the Voting Act claim for lack of jurisdiction, but proceeded with a hearing on the merits of the taxpayer action for desegregation.¹⁸⁸

In support of their motion to dismiss, defendants offered to demonstrate that the Regents were cooperating with HEW's letters and suggestions.¹⁸⁹ Judge Owens was not impressed. The judge queried, "Can you point me to the first case in these United States where HEW has compelled a Negro college to desegregate? Have you ever heard of one?"¹⁹⁰ Judge Owens made it clear that he believed that the holding of *Green v. County School Board*¹⁹¹ applied in the higher education context.¹⁹² In *Green*, a case involving Virginia elementary schools, the Supreme Court rejected a "freedom of choice" plan that had not led to any meaningful level of racial desegregation and charged the school authorities with the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."¹⁹³ Now, Judge Owens rejected out of hand any suggestion that a "freedom of choice" plan or a race-neutral admissions policy would satisfy the Regents' "affirmative duty . . . to cause every school to be a unitary school"¹⁹⁴ and asked what the Regents had done to attract white students to Fort Valley.¹⁹⁵

The attorneys for the Regents went on to discuss what they had done to recruit white students, noting that "there has never been a white applicant at Fort Valley State who has been rejected."¹⁹⁶ Then, in what may have been an unfortunate overstatement, the attorney for the Regents asserted, "We have done everything in our power to bring about racial balance or racial—er—a school that is not identifiable as a distinct racial make up."¹⁹⁷

¹⁸⁵ See *id.*

¹⁸⁶ See Complaint, *Avera* (No. 2732).

¹⁸⁷ See Donnie D. Bellamy, *White Students—Historically Black Fort Valley State College: A Study of Reverse Desegregation in Georgia*, 33 THE NEGRO EDUC. REV. 112, 118-19 (July-Oct. 1982).

¹⁸⁸ See Transcript of Hearing on Defendants' Motion to Dismiss at 28, *Avera* (No. 2732).

¹⁸⁹ See *id.*

¹⁹⁰ *Id.* at 15.

¹⁹¹ 391 U.S. 430 (1968).

¹⁹² See Transcript of Hearing on Defendants' Motion to Dismiss at 15, *Avera* (No. 2732).

¹⁹³ *Green*, 391 U.S. at 437-38.

¹⁹⁴ Transcript of Hearing on Defendants' Motion to Dismiss at 11-12, *Avera* (No. 2732).

¹⁹⁵ See *id.*

¹⁹⁶ *Id.* at 17.

¹⁹⁷ *Id.* at 19.

After the Regents presented testimony concerning their efforts to bring white faculty and students to Fort Valley, Avera called his first witness, Jack R. Hunnicutt.¹⁹⁸ Hunnicutt was an electrical contractor in Fort Valley who had served as chairman of the local utilities commission for 16 years.¹⁹⁹ He testified that he had gone to meet with the Regents and had taken with him a list of points to cover.²⁰⁰ His first point was that Fort Valley State College should have the same entrance and graduation requirements as the other colleges in the University System.²⁰¹ He read his second point aloud in court:

The total University System enrollment is 90,000 students and the total black [enrollment] in the University System is 8,000 and the Fort Valley State enrollment is 2,400. This means we have 30% of all blacks in the University System in Fort Valley, Georgia with enrollment now at 2,400 and projected at 3,500 by 1975. This situation will become worse. [We] fear that this will have an overpowering effect on our community with population of only 10,000 people.²⁰²

Jack Hunnicutt's "points to cover" also illuminated another factor motivating the suit. In 1970, Peach County attempted to desegregate its public elementary and secondary schools.²⁰³ The black high school, Henry Hunt High School, was closed and a new, predominantly white high school was opened.²⁰⁴ Black elementary schools were also abandoned and black students and teachers were moved into the formerly all-white schools.²⁰⁵ For the first time, white students in the public schools in Peach County were being taught by black teachers, many of whom had been trained at Fort Valley State.²⁰⁶ In his "point number 6," Hunnicutt explained:

Fort Valley State is primarily training blacks for careers in education and social studies. If graduates in these fields are not well qualified, yet by virtue of approval of the State Board of Certification they can hold jobs on par with graduates of the University of Georgia or Georgia Tech, the long range effect will be to downgrade the quality of public education.²⁰⁷

¹⁹⁸ See *id.* at 60.

¹⁹⁹ See *id.* at 62.

²⁰⁰ See *id.* at 66.

²⁰¹ See *id.* at 68.

²⁰² *Id.*

²⁰³ See Interview with Professor Donnie Bellamy, *supra* note 179.

²⁰⁴ See *id.*

²⁰⁵ Notably, black administrators were not necessarily moved into the white schools. The principal of Henry Hunt High School was given a position as Assistant Superintendent of Schools, a position that had not previously existed and had no real power. See *id.*

²⁰⁶ See *id.*

²⁰⁷ Transcript of Hearing on Defendants' Motion to Dismiss at 69, *Avera* (No. 2732).

Hunnicuttt further explained that he had suggested several steps that the Regents could undertake to integrate the college, but that the Regents had taken no action on his suggestions.²⁰⁸ The court took further testimony about the size and composition of the faculty and student body and the entrance requirements.²⁰⁹ The parties stipulated that there were only fifteen white students at Fort Valley State and twenty-five white faculty out of 125 total faculty.²¹⁰ In the end, Judge Owens deferred ruling on the motion pending the receipt of briefs and additional information about plaintiff's standing.²¹¹

B. Hunnicutt I

Ultimately, no ruling was necessary. Within a few weeks, Jack R. Hunnicutt, along with other white residents of Fort Valley, two white professors employed at Fort Valley State College, and three white students at Fort Valley State College, filed a class action suit seeking to compel the university system to desegregate the college.²¹² The residents claimed to represent "parents of students desiring to attend a racially integrated and academically improved Fort Valley State College," although none of the residents' children had applied for admission to the college.²¹³ Plaintiffs, who were white students and professors of the college, did not claim to be entitled to relief based on any specific instances of discrimination against them, but instead based on the racial identifiability of the institution.²¹⁴

Plaintiffs wanted to enjoin registration for fall classes and sought an immediate hearing.²¹⁵ A hearing on plaintiffs' motion for a preliminary injunction was hastily set for July 17, 1972.²¹⁶ The courtroom in the Federal Courthouse in Macon, Georgia, was packed.²¹⁷ White residents of Fort Valley filled the gallery behind the plaintiffs.²¹⁸ Black residents of Fort Valley, students, professors, and alumni of the

²⁰⁸ Hunnicutt's suggestions included transferring the teacher training program to another unit of the University System, making Fort Valley State a technical school, and adding programs to meet the needs of whites in the area. *See id.* at 68-70.

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ *See id.* at 85.

²¹² *See Hunnicutt v. Burge*, 356 F. Supp. 1227, 1228 (M.D. Ga. 1973) (hereinafter *Hunnicuttt I*); *see also* Complaint, *Hunnicuttt I*, 356 F. Supp. 1227 (No. 2754).

²¹³ *Hunnicuttt I*, 356 F. Supp. at 1228 n.2.

²¹⁴ *See* Complaint, *Hunnicuttt I*, 356 F. Supp. 1227 (No. 2754).

²¹⁵ *See id.*

²¹⁶ *See id.* at 1229.

²¹⁷ *See* Interview with Robert J. Castellani, Superior Court Judge of Dekalb County, Georgia, in Decatur, Georgia (July 14, 1998) (on file with author); Interview with Professor Donnie Bellamy, *supra* note 179.

²¹⁸ *See id.*

college packed the rows behind the Regents' attorneys.²¹⁹ Reporters and television cameras crowded into the back of the room.²²⁰

Judge Owens was anxious to move ahead quickly. Rather than address the issue of whether the case could properly be consolidated with *Avera v. Burge*, he simply made the transcript of the previous hearing part of the record.²²¹ He deferred ruling on defendants' motions to dismiss for lack of standing, and for clarification of the class, and began taking testimony on the merits.²²² Plaintiffs presented white witnesses who related anecdotes about the poor quality of students' work,²²³ the school's low admission standards, grading irregularities,²²⁴ and trash on the ground at the campus.²²⁵ One of the witnesses compared drawings that he said were exemplars of Fort Valley student work to drawings done by his seven-year-old daughter.²²⁶ White spectators in the courtroom laughed at tales of incompetence on campus and were warned that they would be removed from the court if decorum could not be maintained.²²⁷

The Fort Valley faculty, students, and alumni who were listening to the testimony quickly realized that the fate and reputation of the school were seriously at risk. That afternoon a group of faculty retained Thomas Jackson, a noted black civil rights attorney.²²⁸ On the second day of the hearing, the court heard Thomas Jackson's motion to intervene on behalf of Fort Valley's non-white faculty and on behalf of students registered to enroll as freshmen in the next September.²²⁹ The faculty had an interest in the action, he asserted, because the action called for bringing in white faculty to replace the present faculty and because the "allegations of inferiority call into question the integrity and reputations of the professors at Fort Valley State College."²³⁰ Judge Owens granted the motion to intervene without remarking on the irony of adding black parties as defendants in a desegregation action against the Georgia Board of Regents.²³¹

²¹⁹ See *id.*

²²⁰ See *id.*

²²¹ See *id.*

²²² See Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction at 140-61, *Hunnicut I*, 356 F. Supp. 1227 (No. 2754).

²²³ See *id.*

²²⁴ See *id.* at 85-105.

²²⁵ See *id.* at 139.

²²⁶ See *id.* at 145.

²²⁷ See *id.*

²²⁸ See Interview with Professor Donnie Bellamy, *supra* note 179. Thomas Jackson had worked with the well known and powerful black attorney C.B. King. See BRANCH, *supra* note 161, at 524-25 (describing C.B. King and his law firm).

²²⁹ See Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction at 188-90, *Hunnicut I*, 356 F. Supp. 1227 (No. 2754).

²³⁰ *Id.*

²³¹ *Id.* at 190.

In another full day of testimony, defendants and intervenors presented testimony about the strength, quality, and need for Fort Valley programs.²³² Nothing persuaded Judge Owens, who leveled harsh criticism against Fort Valley State programs in his decision.²³³ Eight months after the hearing, Judge Owens issued an order requiring the Board of Regents to present "a written plan that realistically is designed to eliminate the racial identity of this college."²³⁴ The basic facts that Judge Owens relied on were historical and irrefutable: Fort Valley State College was founded to meet the educational needs of black students during the segregationist era; its programs were designed specifically to meet black students' needs; and its enrollment and faculty were still almost all black.²³⁵ In essence, nothing had changed at Fort Valley State College since the advent of desegregation. Relying on *Brown*'s holding that "separate educational facilities are inherently unequal," Judge Owens went on to say that "educational programs designed explicitly for the black minority, and thus designed to attract just the black minority, are inherently unequal."²³⁶ He further called the program at Fort Valley "factually unequal."²³⁷ He wrote, "It is academically inferior to the educational programs of other state institutions and . . . it does regularly award degrees that are not really earned."²³⁸ Judge Owens rejected the argument that the Regents had fulfilled their duty to desegregate by adopting a non-racial admissions policy and by encouraging the recruitment of white students and teachers.²³⁹ To meet their "legal responsibility to take affirmative action to desegregate,"²⁴⁰ the court held, the Regents must present specific proposals for breaking the nexus between the segregationist program design and the current "all-black racial identity of this college."²⁴¹

Five days after Judge Owens issued his order the Office for Civil Rights (OCR) took action under court order in the *Adams* case.²⁴² OCR sent a letter to the Chancellor of the Board of Regents stating that Georgia's previous desegregation plan was unacceptable and that the state must submit a new plan to eliminate all vestiges of the formerly dual system of higher education.²⁴³ The letter cautioned that

²³² See *id.* at 232-347.

²³³ See *Hunnicut I*, 356 F. Supp. at 1230-38.

²³⁴ *Id.* at 1230.

²³⁵ See *id.* at 1238.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ See *id.* at 1230.

²⁴⁰ See *id.*

²⁴¹ See *id.* at 1238.

²⁴² On February 16, 1973, Judge John H. Pratt issued an order requiring OCR to institute enforcement actions against states that were not in compliance with Title VI. See *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973).

²⁴³ See Answer, app. at 2-3, *Wooden v. Board of Regents*, 32 F. Supp. 2d 1370 (S.D. Ga. 1977) (No. CV 497-45).

a non-discriminatory admissions policy was insufficient where the student population continued to reflect the formerly *de jure* racial identification of the institution.²⁴⁴

Thus, in early 1973, the Georgia Board of Regents had in hand a federal court order and a letter from the OCR, both of which resolved, albeit not finally, the question of whether the Equal Protection Clause and Title VI required the state to go beyond the enactment of race-neutral admissions and staffing policies and to take affirmative steps to remove remaining vestiges of *de jure* segregation. This issue would be at the heart of the legal debate in cases involving the desegregation of higher education for the next twenty years and would not be addressed by the Supreme Court until *United States v. Fordice*²⁴⁵ in 1992. Both Judge Owens and the OCR anticipated the *Fordice* standard.²⁴⁶

III. DESEGREGATION UNDER THE *HUNNICUTT/ADAMS* AFFIRMATIVE DUTY STANDARD

A. *Adding Insult to Injury*

From the perspective of the students and faculty of Fort Valley State College, Judge Owens' order added insult to injury. Most of the Fort Valley students were in elementary school when the first nine black students attended previously all-white Atlanta high schools.²⁴⁷ They had witnessed first hand white resistance to desegregation. Further, because that resistance had been effective in preventing desegregation for many years after *Brown*, the Fort Valley students had probably attended segregated elementary and high schools. Or, they may have ridden to elementary school on a bus that went past the remains of a black neighborhood elementary school that was closed when the black and white schools were "merged" to allow for desegregation.²⁴⁸ The Fort Valley students may not have known that between 1968 and 1970, in 123 reporting school districts in Georgia, sixty-six black

²⁴⁴ See *id.*

²⁴⁵ 505 U.S. 717 (1992).

²⁴⁶ Several other decisions also anticipated the *Fordice* standard. See *Geier v. Dunn*, 337 F. Supp. 573 (M.D. Tenn. 1972); *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd*, 404 U.S. 907 (1971); *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458 (M.D. Ala. 1967), *aff'd* 389 U.S. 215 (1967).

²⁴⁷ Seven years after the *Brown* decision, 268 black students applied to take part in the court-ordered desegregation of Atlanta's public schools. Only nine were transferred to previously all-white high schools in Atlanta's much-publicized end to segregation in the "city too busy to hate." See Thomas V. O'Brien, Georgia's Response to *Brown v. Board of Education* 281, 282 (1992) (unpublished Ph.D. dissertation) (on file with Emory University's library); see also ROBERT COLES, CHILDREN OF CRISIS: A STUDY OF COURAGE AND FEAR (1967) (relating the story of the "Atlanta Nine").

²⁴⁸ Black elementary schools were commonly closed in desegregation efforts. See, e.g., *Freeman v. Pitts*, 503 U.S. 467, 473 (1992).

principals were eliminated, and seventy-five white principals were added.²⁴⁹ They also may not have been aware of the ways in which the desegregation process disproportionately burdened black children.²⁵⁰

It was well-known on campus, however, that no whites had tried to desegregate Fort Valley before black students were given the right to vote.²⁵¹ Judge Owens had ignored the political motivation of the plaintiffs in fashioning a remedy for a "harm" that the students did not seek to have remedied. He adjudged them to be "unprepared for the real college contest"²⁵² and decided that eliminating "the racial character" of the college was the solution to this problem.²⁵³ A newspaper reporter described the students as "quietly seething" over the decision which had highlighted the college's low entry requirements and deemed their education "inferior."²⁵⁴ One student declared Judge Owens' order "yet another case of white oppression."²⁵⁵ In a statement released to the press, a Fort Valley professor of education commented, "'The fact that Fort Valley is a predominantly black college does not make it inferior. The mere fact of white presence does not add to intelligence, talent, integrity and well-being of blacks or vice versa.'"²⁵⁶

The State Board of Regents vowed to appeal the decision, but talked openly about alternatives for changing Fort Valley, including raising the number of white faculty, beefing up certain programs, and even closing the college as a last resort.²⁵⁷ In May 1973, the Regents' appeal was dismissed as premature.²⁵⁸ The state would have to prepare a desegregation plan.

The plan devised by the Regents included elevating white faculty to positions of greater authority at Fort Valley, offering financial incentives for white students to attend the college, instituting voluntary temporary faculty exchanges with other units of the university system, and adding academic programs that would attract white students.²⁵⁹ The Regents began implementing the plan in July 1973, even though it was not approved by the court for two more years. Under the Regents' direction, the

²⁴⁹ See ADAIR, *supra* note 24, at 91.

²⁵⁰ See *id.*; see also COLES, *supra* note 247; Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interest in School Desegregation Litigation*, in CRITICAL RACE THEORY 5, 9-12 (Kimberle Crenshaw et al. eds., 1995).

²⁵¹ See Henry Woodhead, *Political, Say Fort Valley Students*, ATLANTA CONST., Mar. 27, 1973, at 3-A.

²⁵² Hunnicutt v. Burge, 356 F. Supp. 1227, 1238 (M.D. Ga. 1973).

²⁵³ *Id.* at 1230.

²⁵⁴ Woodhead, *supra* note 251, at 3-A.

²⁵⁵ *Id.*

²⁵⁶ Bill Montgomery, *Fort Valley Prof Hits Court Integration Plan Order*, ATLANTA J. & ATLANTA CONST., Apr. 8, 1973, at 12-A (quoting Dr. Robert Threatt).

²⁵⁷ See Steve Stewart, *Fort Valley Appeal is Scheduled*, ATLANTA CONST., Apr. 12, 1973, at 13-A.

²⁵⁸ See Sam Hopkins, *Regents' Fort Valley Appeal Dismissed*, ATLANTA CONST., May 24, 1973, at 22-A.

²⁵⁹ See Steve Stewart, *Fort Valley Deseg Plan is Unveiled*, ATLANTA CONST., July 3, 1973, at 7-A.

position of associate dean of the faculty was filled by a white chemistry professor.²⁶⁰ White faculty were appointed to chair newly created departments in Special Studies, Art, Political Science, and Psychology.²⁶¹ The school also hired whites as Registrar, head college nurse, and as the first full-time recruiter.²⁶² Whites were also hired in twelve secretarial and data processing positions.²⁶³ Newly developed "affirmative action" faculty search processes increased the percentage of white faculty to twenty-four percent by December 1974.²⁶⁴ The plan's voluntary faculty exchange program and a program of privately funded scholarships for white students were also implemented.²⁶⁵

After a hearing in March 1974, Judge Owens rejected the Regents' first plan, suggesting that "involuntary transfers of employees to and from other institutions" and "radical modification of hiring practices" were needed to eliminate the racial identity of the faculty and staff.²⁶⁶ "There is ample precedent," the judge wrote, "for court-ordered involuntary transfers of school teachers and employees, and likewise . . . for public college teachers and employees."²⁶⁷ The Regents refused to submit a plan that called for mandatory faculty transfers and the court appointed a panel of educational experts to devise a plan acceptable to the court.²⁶⁸

Meanwhile, the Regents were engaged in negotiations with OCR to devise a state-wide plan that would comport with newly devised Title VI guidelines required by

²⁶⁰ See University Board of Regents, *Plan for the Further Desegregation of the University System, Part II*, Figure 3 (*Table of Key Appointments of White Individuals During the Eighteen Month Period Ending December 31, 1974*) (1977); see also Bellamy, *supra* note 187, at 121.

²⁶¹ See Bellamy, *supra* note 187, at 121.

²⁶² See *id.*

²⁶³ See *id.* at 122. Other non-blacks (non-whites) made up 7% of the faculty.

²⁶⁴ See *id.*

²⁶⁵ See Stewart, *supra* note 257, at 7-A. In an effort to increase white enrollment, the "Twin Thrust" program used privately raised financial aid to bring pairs of students, one black and one white, to Fort Valley. See University Board of Regents, *supra* note 260, at 74.

²⁶⁶ Order dated Mar. 13, 1974, *Hunnicut v. Burge*, 356 F. Supp. 1227 (M.D. Ga. 1973) (No. 2754).

²⁶⁷ *Id.* There was no precedent for involuntary student, faculty or employee transfers at the college level. All of the existing precedent at the time involved elementary and secondary schools. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (approving use of mandatory student transfers and the use of bus transportation to achieve racial integration in elementary and secondary schools); *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969) (approving mandatory teacher reassignment to desegregate faculty in grade schools); *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (rejecting a "freedom of choice" plan to desegregate elementary and secondary schools).

²⁶⁸ See Paul West, *Regents Resubmit Rejected Plan*, ATLANTA CONST., Apr. 16, 1974, at 7-A.

Judge Pratt in the *Adams* litigation.²⁶⁹ OCR's 1973 investigation of the Georgia University System revealed that black enrollment at the historically white colleges was only 4.7%, that 88% of the system's full-time black faculty were employed at the three black colleges, and that black faculty represented only .006% of the total faculty at the system's historically white institutions.²⁷⁰ Furthermore, the University System continued to acquire and expand institutions with predominantly white enrollment in close proximity to the black public colleges.²⁷¹

The OCR requested a plan that would address admissions standards, institutional missions, eliminating unnecessary curricular duplication, student recruitment, increasing white enrollment at black institutions and black enrollment at white institutions, retaining black students, and desegregating faculty and staff.²⁷² Georgia submitted a plan addressing these and other OCR concerns in June 1974.²⁷³ Although the OCR approved the Georgia plan, the NAACP Legal Defense Fund (LDF) found the plan unacceptable and filed a "Motion for Further Relief" before Judge Pratt in the District Court in Washington, D.C.²⁷⁴

During this time, the Fort Valley State campus began to see the damage done by *Hunnicuttt I*. Reports of the college's "inferior" programs and rumors that the Regents would close the school depressed enrollment. By September 1974, enrollment dropped from 2373 to 1835 students.²⁷⁵ Enrollment continued to drop through 1975, as the Board of Regents hedged on the question of whether Fort Valley would remain open.²⁷⁶ All of the efforts to "lure" and "attract" white students had yielded an enrollment of fifty-four white students.²⁷⁷ The Black Caucus of the Georgia House of Representatives formed the University System Oversight Committee to address the concerns within the black community that "the concept of

²⁶⁹ See *Adams v. Richardson*, 356 F. Supp. 92, 94-100, (D.D.C. Cir. 1973). During the summer of 1973, HEW developed a set of guidelines entitled "Basic Components of Statewide Higher Education Desegregation Plans." See AN ANALYSIS OF THE ARKANSAS-GEORGIA STATEWIDE DESEGREGATION PLANS, 88 (Leonard L. Haynes, III ed., 1979) [hereinafter ANALYSIS].

²⁷⁰ See ANALYSIS, *supra* note 269, at 88.

²⁷¹ See *id.* at 87-88. In 1964, the Regents elevated Savannah State's nearby competitor, Armstrong College, to a four-year senior institution. In 1966, the Regents created a competitor for Albany State College by chartering Albany Junior College, which had a white enrollment of 88.8%. In 1968, Macon Junior College was opened about 22 miles from Fort Valley, with an enrollment of 91.8% white students. See *id.*

²⁷² See Answer, app. at 4-5, *Wooden v. Board of Regents*, 32 F. Supp. 2d 1370 (S.D. Ga. 1977) (No. CV 497-45).

²⁷³ See ANALYSIS, *supra* note 269, at 88.

²⁷⁴ See *id.* at 88-91; see also HALPERN, *supra* note 162, at 160-62.

²⁷⁵ See Nancy Lewis, *Hearing on Desegregation Delayed*, ATLANTA J. & ATLANTA CONST., Sept. 22, 1974, at 11-A.

²⁷⁶ See Alexis Scott Reeves, *Closing Feared at Fort Valley*, ATLANTA CONST., May 28, 1975, at 12-A.

²⁷⁷ See Bellamy, *supra* note 187, at 184.

desegregation held by the Regents and other state officials implied that the system's black colleges would either be phased out or eliminated altogether."²⁷⁸

On August 11, 1975, Judge Owens apparently gave up on the idea that rapid desegregation of Fort Valley could be accomplished through mandatory faculty reassignment. He entered a final judgment in the *Hunnicutt I* case, approving a plan for the desegregation of Fort Valley State that was essentially the same plan that the Regents began implementing in 1973.²⁷⁹ The court retained jurisdiction over the case and required the Regents to submit semi-annual progress reports.²⁸⁰

B. *Whitening Black Colleges*

In 1977, Judge Pratt finally decided the Motion for Further Relief that the LDF filed in 1975.²⁸¹ Because the plans accepted by OCR in 1974 had not yielded significant progress toward the desegregation of higher education, the court held that OCR must notify the offending states of their Title VI violation, develop specific guidelines or criteria for revised desegregation plans, and either accept or reject those plans expeditiously.²⁸² In his order, Judge Pratt, prompted by an amicus brief filed by the National Association for Equal Opportunity in Higher Education (NAFEO),²⁸³ included a directive to the OCR to consider the important role of black institutions in providing educational opportunity for black students.

The process of desegregation must not place a greater burden on Black institutions or Black students' opportunity to receive a quality public higher education. The desegregation process should take into account the unequal status of the Black colleges and the real danger that desegregation will diminish higher education opportunities for Blacks. Without suggesting the answer to this complex problem, it is the responsibility of HEW to devise criteria for higher education desegregation plans which will take into account the unique importance of Black colleges and at the same time comply with the congressional mandate.²⁸⁴

In February 1978, HEW issued its *Revised Criteria Specifying the Ingredients of Acceptable Plans to Desegregate State Systems of Public Higher Education*.²⁸⁵ The HEW criteria required states to develop plans "to provide an education to all

²⁷⁸ ANALYSIS, *supra* note 269, at 93.

²⁷⁹ See Final Judgment, *Hunnicutt v. Burge*, 356 F. Supp. 1227 (M.D. Ga. 1973) (No. 2754); see also, BOARD OF REGENTS, UNIVERSITY SYSTEM OF GEORGIA, A PLAN FOR THE FURTHER DESEGREGATION OF FORT VALLEY STATE COLLEGE (1975).

²⁸⁰ See Final Judgment, *Hunnicutt* (No. 2754).

²⁸¹ See *Adams v. Califano*, 430 F. Supp. 118, 119 (D.D.C. 1977).

²⁸² See *id.* at 120.

²⁸³ See *id.* at 120 n.1.

²⁸⁴ *Id.* at 120.

²⁸⁵ 43 Fed. Reg. 6658 (1978).

citizens without discrimination or segregation” in “a unitary system free of the vestiges of state imposed racial segregation.”²⁸⁶ The HEW criteria also required states to take affirmative action to dismantle the dual system of higher education and to develop specific goals and timetables for the desegregation of students, faculty, administrators, non-academic staffs, and governing boards of state public higher education systems.²⁸⁷ In accord with Judge Pratt’s admonition, the criteria explicitly recognized the “unique importance” of traditionally black colleges and called for the enhancement of historically black colleges.²⁸⁸ However, the criteria also required not only increased black enrollment at the historically white institutions, but also increased white enrollment at the historically black institutions,²⁸⁹ the elimination of unnecessary program duplication at historically black and historically white institutions serving the same area, and institutional mission statements formulated on a basis other than race.²⁹⁰

Following Judge Pratt’s order requiring new desegregation criteria, the Board of Regents assembled a drafting committee to formulate a new desegregation plan.²⁹¹ Milton Jones, Chairman of the Desegregation Drafting Committee, commented that the HEW officials “seemed to lock in on the three historically black colleges and what we’re going to do regarding them.”²⁹² Many of the steps outlined in the new desegregation plan, such as money for faculty development, for campus beautification, new buildings, and improved remedial programs were aimed at enhancing black public colleges. Nevertheless, Georgia could not achieve one of OCR’s required goals, racial balance within the system, while a large number of black students attended the black colleges. Thus, the desegregation process in Georgia returned to the business of “whitening” the black public colleges.²⁹³

²⁸⁶ *Id.* at 6660.

²⁸⁷ *See id.* at 6658-59. The HEW criteria specifically provided that the “goals” were “not quotas” and stated that “[f]ailure to achieve a goal is not sufficient evidence, standing alone, to establish a violation of Title VI.” *Id.* at 6659.

²⁸⁸ *See id.* at 6659-60.

²⁸⁹ *See id.* at 6662. The HEW criteria also required states to adopt goals that would increase the proportion of black high school graduates entering college, increase the number of black students enrolled at traditionally white four-year institutions, increase the proportion of black students entering graduate and professional schools, and reduce the rate of black college drop-outs. *See id.*

²⁹⁰ *See id.* at 6661-62.

²⁹¹ The development of the criteria and the state desegregation plans proceeded simultaneously and involved negotiations among “[a] Blue Ribbon Panel of members from the higher education community, interested civil rights groups, and HEW officials.” H.R. REP. NO. 100-334, *reprinted in* 7 COMMITTEE ON GOVERNMENT OPERATIONS, FAILURE AND FRAUD IN CIVIL RIGHTS ENFORCEMENT BY THE DEPARTMENT OF EDUCATION (1987). HEW initially published its criteria on July 5, 1977, revised them one month later based on input from the states, and revised them further on February 2, 1978. Shortly thereafter the OCR accepted revised desegregation plans from six states, including Georgia. *See id.*

²⁹² ANALYSIS, *supra* note 269, at 106-08.

²⁹³ *See* ANALYSIS, *supra* note 269, at 107-08. The plan ultimately adopted by the Board

The Desegregation Committee assembled work groups at each of the three black colleges and held public meetings to allow for input from various community groups.²⁹⁴ Five options were discussed at the meetings: (1) merging neighboring black and white institutions; (2) specializing nearby colleges so that one would offer lower division courses and the other upper level and graduate courses; (3) creating a lower division branch campus; (4) installing unique programs at predominantly black campuses and closing duplicative programs at predominantly white colleges; and (5) combinations of the other options.²⁹⁵

The desegregation plan that was finally approved by HEW included a number of provisions for the affirmative desegregation of the black colleges, including white student recruitment measures, scholarship funding, and a number of campus enhancements for the black public colleges.²⁹⁶ The plan called for improvements to the physical plants, new "unique" degree programs,²⁹⁷ and increased funding. The new degree programs and the money appropriated for "beautification" were designed to attract white student enrollment.²⁹⁸

The plan also called for the elimination of program duplication in the Savannah area by transferring Armstrong State's business administration program to Savannah State and transferring Savannah State's teacher education program to Armstrong State.²⁹⁹ Students at Savannah staged a protest against the proposed program merger and filed an action in the U.S. District Court seeking to enjoin the Regents from taking any action that would degrade the academic status of Savannah State or have an adverse effect on black college students.³⁰⁰ The students were unsuccessful in their challenge, and the programs were merged.³⁰¹

The impact of the "program merger" between Savannah State and Armstrong State was "negative and severe" according to H. Dean Propst, Chancellor of the

of Regents also included specific measures for minority recruitment and retention at the historically white institutions. These measures included mailing a brochure about the SAT and PSAT tests to black high school students, providing more college information to black high school students, providing a simpler process for transfer between junior colleges and four-year institutions, inaugurating Summer Enrichment Programs for academically deficient minority students, and expanding remedial education. See BOARD OF REGENTS, *supra* note 279, at 27-52.

²⁹⁴ See ANALYSIS, *supra* note 269, at 100-01.

²⁹⁵ See GEORGIA BOARD OF REGENTS, REPORT, CONSOLIDATION STUDY: ARMSTRONG STATE COLLEGE/SAVANNAH STATE COLLEGE, DARTON COLLEGE/ALBANY STATE COLLEGE, May 11, 1988.

²⁹⁶ See BOARD OF REGENTS, *supra* note 279.

²⁹⁷ For example, between 1979 and 1981, Fort Valley State implemented new programs in Ornamental Horticulture, Agri-Economics and Farm Management, Agricultural Mechanization Technology, Computer Science, and Historical Administration. See Bellamy, *supra* note 187, at 128.

²⁹⁸ See *id.*

²⁹⁹ See Order of Sept. 9, 1979, *Artis v. Board of Regents*, No. 479-251 (S.D. Ga. 1981).

³⁰⁰ See *id.*

³⁰¹ See *id.*

University System.³⁰² White enrollment in the business administration program declined, as did black enrollment in the teacher education program.³⁰³ Ten years after the program merger, the total enrollments of both colleges were below their 1978 levels.³⁰⁴ Savannah State faculty and alumni rankled at the loss of the college's nationally accredited education program and the transfer of its most dedicated and creative faculty members.³⁰⁵ Furthermore, while Savannah State set up and maintained the School of Business with a white dean, Armstrong abolished the School of Education and the school's deanship after the five-year desegregation plan expired.³⁰⁶ The black dean, who was transferred from Savannah State to Armstrong State as a result of the plan, left the institution.³⁰⁷

In the following years, Georgia's system of higher education proceeded with its desegregation plans under the monitoring and supervision of both the OCR and Judge Owens. Semi-annual reports to Judge Owens showed little growth in white enrollment at Fort Valley despite continuing programs to lure them there. For example, the Regents reported to Judge Owens that caucasian recipients of financial aid increased in number by thirty percent in 1980-81,³⁰⁸ and the dollar value of aid increased from \$87,750 to \$151,349.³⁰⁹ With these expenditures, white enrollment at Fort Valley reached an all time high of 12% before dropping off to 5.7% in 1988.³¹⁰

The Regents had even less success in reaching the other numerical goals outlined in the desegregation plan; for example, the state had committed to increase first-year black enrollment at white senior colleges and universities from 1539 students in 1978 to 3118 by 1983 (a projected increase of 1579 black students).³¹¹ Yet, the state "fell far short of [that] goal," enrolling only 1544 first year black students at the predominantly white institutions in 1983 (an increase of only five black students).³¹² The state similarly fell short of its commitments to reduce black attrition, and increase black faculty, administrators, staff, and governing board members to equal

³⁰² H. Dean Propst, Consolidation Study Speech (May 11, 1988) (Submitted with annual reports to Judge Owens in *Hunnicut v. Board of Regents*, 122 F.R.D. 605 (M.D. Ga. 1988) (No. 86-236-1-MACWDO)).

³⁰³ *See id.*

³⁰⁴ *See id.*

³⁰⁵ *See HALL, supra* note 35, at 134.

³⁰⁶ *See id.*

³⁰⁷ *See id.*

³⁰⁸ *See* Supplemental Report to Judge Wilbur J. Owens, *Hunnicut I* (No. 2754).

³⁰⁹ *See id.*

³¹⁰ *See* SUSAN T. HILL, *THE TRADITIONALLY BLACK INSTITUTIONS OF HIGHER EDUCATION: 1860-1982*, at 94 (1983); U.S. DEP'T OF EDUC., *THE ALMANAC OF HIGHER EDUCATION* 291 (1992).

³¹¹ *See* H.R. REP. NO. 100-334, *supra* note 291, at 14 (citing JESSE L. HIGH, OFFICE FOR CIVIL RIGHTS, *GEORGIA ADAMS STATUS REPORT FOR THE UNIVERSITY SYSTEM OF GEORGIA*, 35).

³¹² *See id.*

the proportion of black students graduating with the appropriate degrees.³¹³ Moreover, the state failed to fulfill its commitments in other respects—promised campus enhancements, new buildings, and program improvements at the black colleges had not been implemented.³¹⁴

In 1983, OCR notified the Regents of its default on its plan commitments but took no enforcement action other than sending a letter to the governor.³¹⁵ In 1985, the OCR changed its method of determining compliance with the desegregation plans; rather than consider outcomes (which consistently failed to meet goals), the OCR would consider the state's "good faith" implementation of planned measures as demonstrating compliance.³¹⁶ Meanwhile, desegregation efforts, whether they were half-hearted or "good faith" efforts, showed minimal results. Testifying before Congress in April 1987, Julius Chambers, Director and General Counsel of the NAACP Legal Defense Fund, said:

Public colleges and universities, which formerly excluded black students by law, remain virtually all-white. Often a significant percentage of the black students enrolled are on athletic scholarships and many of these students do not graduate. Black faculty and administrators at most of the traditionally white institutions are virtually non-existent. Black individuals seeking employment in state institutions of higher education must find their opportunities in traditionally black institutions. Institutions which were established by the state for blacks remain predominantly black and underfunded, with inferior academic programs and facilities—in other words, separate and unequal.³¹⁷

C. Hunnicutt II

In February 1986, Guy Hunnicutt, the son of Jack Hunnicutt, filed a new class action suit on behalf of white parents and their children "who desire access to Fort Valley State only in the event that its present racial identity is eliminated and its

³¹³ See *id.* at 15-16.

³¹⁴ See Defendants' Answer, app. at 13-15, *Wooden v. Board of Regents*, 32 F. Supp. 2d 1370 (S.D. Ga. 1999) (No. 49-975).

³¹⁵ See *id.* This notification sparked new discussions of mergers between Savannah State and Armstrong State, Albany State and Darton College. Despite the apparent lack of success in merging the programs of the predominantly white and predominantly black institutions, the merger issue was continually raised at each step of the desegregation process. See ANALYSIS, *supra* note 269.

³¹⁶ See H.R. REP. NO. 100-334, *supra* note 291, at 2. For an extensive discussion of the differences in Title VI enforcement under the Carter and Reagan administrations, see HALPERN, *supra* note 162, at 137-235.

³¹⁷ H.R. REP. NO. 100-334, *supra* note 291, at 34 (quoting *Civil Rights Enforcement by the Department of Education: Hearing before a Subcommittee of the Committee on Government Operations*, 100th Cong. 14-15 (1987)).

present state of academic inferiority and standing is remedied"³¹⁸ This action, like the one filed by Guy Hunnicutt's father, was assigned to Judge Wilbur Owens. As in the last case, none of the plaintiffs had actually applied to attend Fort Valley State.³¹⁹ The complaint alleged that the college was still racially identifiable, with a student body which was 92.7% black³²⁰ and was "in virtually every respect inferior to the other colleges in the University System."³²¹ The suit sought an order requiring the desegregation of the faculty and administration, the appointment of white faculty members to fill vacancies, the addition of "non-black new faculty members" to teach "in areas of particular interest to white students," reduction of remedial courses offered, changes in admission standards, and financial aid money earmarked for the recruitment of white students.³²² The suit also sought to end the institution's racial identifiability and to halt the entry of a new racially identifiable freshman class.³²³

In reaction to the suit, the president of Fort Valley State commented that "[t]his suit will probably make it even harder to recruit whites."³²⁴ Recruiting whites became the focus of the suit, which was settled by consent decree on July 5, 1988.³²⁵ The decree committed Fort Valley State "to continue its progress towards complete integration together with a high standard of academic excellence," and set in place an advisory council and various committees to study possibilities for faculty development programs, a management review team, program review teams, and a new campus entrance.³²⁶ The decree continued the court's jurisdiction over the case until September 1991, when the Advisory Council issued its final report.³²⁷ The major achievement of the suit was the building of a road and a new campus entrance that allowed whites to enter the campus without driving through a black neighborhood.³²⁸

While Fort Valley continued under the supervision of Judge Owens, the federal government deemed Georgia's system of higher education to be unitary. After reviewing various measures the Regents had taken to complete the commitments laid out in its desegregation plan, the Office for Civil Rights notified the Georgia governor

³¹⁸ See Complaint at 3, *Hunnicutt v. Board of Regents*, 122 F.R.D. 605 (M.D. Ga. 1988) (No. 86-236-1-MACWDO) [hereinafter *Hunnicutt II*].

³¹⁹ See *id.* at 3.

³²⁰ See *id.* at 5.

³²¹ *Id.* at 8.

³²² *Id.* at 11-13.

³²³ See *id.* at 13.

³²⁴ David Beasley, *Suit May Hinder Recruiting Whites*, ATLANTA CONST., Aug. 22, 1986 at A24.

³²⁵ See Consent Decree, *Hunnicutt II* (No. 86-236-1-MAC).

³²⁶ *Id.*

³²⁷ See *id.*

³²⁸ See Final Report of the Advisory Council, *Hunnicutt II* (No. 86-236-1-MAC); Interview with Bellamy, *supra* note 179.

that "Georgia's system of public higher education is now in compliance with Title VI, and no additional desegregation measures will be required by OCR."³²⁹

Judge Owens dismissed the *Hunnicut II* case in September 1991, and for a moment it appeared that the desegregation of Georgia's higher education would be left to voluntary efforts by the Regents. In March 1997, however, a group of white and black plaintiffs filed a lawsuit in the United States District Court in the Southern District of Georgia based on the Regents' "failure to eliminate the vestiges of de jure segregation in higher education."³³⁰ The specific relief sought by plaintiffs included implementing the merger of Armstrong State and Savannah State and making a "concentrated effort to increase the white student population at Albany State University and Fort Valley State University."³³¹ Specifically, the plaintiffs asked to increase white enrollment at Fort Valley and Albany State by creating new scholarship programs to attract white students to enroll, increasing efforts to recruit and retain white students, faculty, and staff, and expanding programs at the black public colleges.³³²

Once again, a new set of plaintiffs asserted that the University System had not satisfied its affirmative duty to eliminate the vestiges of the former system of *de jure* segregation. Twenty-five years of affirmative desegregation measures aimed at attracting white students to the black public colleges had failed. Nevertheless, litigation aimed at "whitening" Georgia's black colleges would continue.³³³

IV. DEFINING THE AFFIRMATIVE DUTY TO ELIMINATE THE VESTIGES OF *DE JURE* SEGREGATION

A. *The Fordice Decision*

From the admission of the first two black students to the University of Georgia in 1961, to the declaration of "unitary status" in 1989 and the dismissal of *Hunnicut II* in 1991, Georgia's University System proceeded without guidance from the Supreme Court on whether and how constitutional remedies developed for the

³²⁹ Letter from LeGree S. Daniels, Assistant Secretary for Civil Rights, to Governor Joe Frank Harris (March 17, 1989) (filed as Attachment B to Answer to Complaint in *Wooden v. Board of Regents*, No. 497-45 (S.D. Ga. filed July 29, 1997). Some greeted the announcement of the end of federal supervision as more evidence of the Reagan administration's general unwillingness to enforce civil rights statutes. Allegations of fraud and abuse in civil rights enforcement under the Reagan administration had led to Congressional hearings in 1987. The hearings highlighted the failure of OCR-approved desegregation plans to increase black graduate school enrollment, achieve racial parity in undergraduate enrollment, and increase the numbers of black faculty at the predominantly white institutions. See H.R. REP. NO. 100-334, *supra* note 291, at 296.

³³⁰ Complaint, *Wooden* (No. 497-45).

³³¹ Amended Complaint, *Wooden* (No. 497-45).

³³² See *id.*

³³³ See *id.*

desegregation of elementary and secondary schools applied to segregated public colleges. In *United States v. Fordice*,³³⁴ the Supreme Court ended “forty years of near silence” on these issues.³³⁵ *Fordice* was originally brought in 1975 by black plaintiffs seeking the desegregation of higher education in Mississippi.³³⁶ After the United States intervened on behalf of the plaintiffs, the parties engaged in twelve years of negotiations aimed at devising a consensual plan for the desegregation of Mississippi’s university system.³³⁷ When the case finally went to trial in 1987, the central issue was whether the state had fulfilled its duty to disestablish its segregative system by implementing and maintaining non-discriminatory, race-neutral policies.³³⁸

At the heart of the controversy was whether the Equal Protection Clause and Title VI require the state to go beyond the enactment of race-neutral policies and to take affirmative steps to remove remaining vestiges of *de jure* segregation.³³⁹ In the appeal to the Supreme Court, the question of the nature of the state’s duty to dismantle the prior dual system was posed as a choice between the models provided in two earlier cases: *Green v. County School Board*³⁴⁰ and *Bazemore v. Friday*.³⁴¹ Although the rule of *Brown v. Board of Education*³⁴² was held to apply to higher education in 1956,³⁴³ the holding of *Green* did not, on its face, apply to the state’s duty with regard to systems of higher education. In *Green*, the Court held that the adoption of a race-neutral attendance policy, known as a “‘freedom-of-choice’ plan,” did not satisfy the state’s duty to disestablish a dual system of grade-school education.³⁴⁴ *Green* required school boards to act affirmatively to “convert promptly to a system without a ‘white’ school and a ‘Negro’ school, but just schools.”³⁴⁵

States would argue in subsequent cases that the *Green* standard was inappropriate in higher education because, in contrast to elementary and secondary school authorities, higher education administrators could not effectuate racial balance through mandatory student reassignment.³⁴⁶ During the 1960s and 1970s, several cases yielded contradictory holdings relating to the state’s affirmative duty to dismantle the segregative aspects of the formerly dual systems of higher education.³⁴⁷

³³⁴ 505 U.S. 717 (1992).

³³⁵ Gil Kujovich, *Desegregation in Higher Education: The Limits of a Judicial Remedy*, 44 BUFF. L. REV. 1, 2 (1996).

³³⁶ See *Fordice*, 505 U.S. at 723.

³³⁷ See *id.* at 724.

³³⁸ See *id.* at 725.

³³⁹ See *id.* at 723.

³⁴⁰ 391 U.S. 430 (1968).

³⁴¹ 478 U.S. 385 (1986).

³⁴² 347 U.S. 483 (1954).

³⁴³ See *Florida ex rel. Hawkins v. Board of Control of Florida*, 350 U.S. 413 (1956).

³⁴⁴ See *Green*, 391 U.S. at 430.

³⁴⁵ *Id.* at 442.

³⁴⁶ See, e.g., *Ayers v. Allain*, 914 F.2d 676, 686-87 (5th Cir. 1990).

³⁴⁷ See *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979) (requiring the merger of a predominantly black with a predominantly

In 1986, states' arguments that the *Green* standard should not apply in the context of voluntary programs received some additional support from *Bazemore v. Friday*.³⁴⁸ In *Bazemore*, the Court held that the state could meet its duty to comply with equal protection principles by adopting race-neutral policies for state-sponsored voluntary activities like 4-H and Homemaker Clubs.³⁴⁹

In *Fordice*, the Court declined to embrace either standard for higher education but adopted a standard more like *Green* than *Bazemore*. The Court acknowledged that a university system is different from primary and secondary schools because of the accepted element of student choice of institutions in higher education and because of differences in the missions of various institutions of higher education.³⁵⁰ Student choice makes remedies commonly used in lower school desegregation like busing, attendance quotas and zoning unavailable.³⁵¹ Nevertheless, the state must do more than implement race-neutral policies.³⁵² The Court rejected the argument that the state's race-neutral admissions policies demonstrated the abandonment of the state's former dual system.³⁵³ Justice White wrote:

In a system based on choice, student attendance is determined not simply by admissions policies, but also by many other factors. Although some of these factors clearly cannot be attributed to state policies, many can be. . . . If policies traceable to the *de jure* system are still in force and have *discriminatory effects*, those policies too must be reformed to the extent practicable and consistent with sound educational practices.³⁵⁴

B. *Defining Discriminatory Effects*

In Supreme Court decisions, the term "discriminatory effect" is generally contrasted with "discriminatory intent" or "discriminatory purpose" in discussing

white institution based on state's failure to dismantle dual system); *Norris v. State Council of Higher Educ.*, 327 F. Supp. 1368 (E.D. Va. 1971), *aff'd without opinion*, 404 U.S. 907 (1971) (holding that the expansion of a predominantly white institution in an area already served by a predominantly black institution was invalid because it perpetuated prior *de jure* segregation); *Alabama State Teachers Ass'n v. Alabama Pub. Sch. and College Auth.*, 289 F. Supp. 784 (D. Ala. 1968), *aff'd without majority opin.*, 393 U.S. 400 (1969) (holding that a state's duty to dismantle a dual system did not prevent the state from establishing a branch of a predominantly white institution in a city already served by a predominantly black institution, despite its tendency to perpetuate segregation).

³⁴⁸ 478 U.S. 385 (1986).

³⁴⁹ *See id.* at 386-88.

³⁵⁰ *See Fordice*, 505 U.S. at 729 ("Mississippi's institutions of higher learning are not fungible—they have been designated to perform certain missions. Students who qualify for admission enjoy a range of choices of which institution to attend.").

³⁵¹ *See id.*

³⁵² *See id.*

³⁵³ *See id.*

³⁵⁴ *Id.* (emphasis added).

state actions that violate the Constitution.³⁵⁵ Discriminatory effects can also be understood, however, to encompass the constitutional harm to be remedied. Because the purpose of a remedy for a constitutional violation is “to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,”³⁵⁶ it is axiomatic that constitutional remedies must be tailored to address the specific harms created by the unconstitutional conduct.³⁵⁷ Yet, if the harm is misunderstood, the remedy may be ill-conceived. Therefore, one would expect to find the “discriminatory effects” of *de jure* discrimination in higher education to be well-defined or, at least, much discussed in the cases; but, they are not. In *Fordice*, the Court neither cited a definition from precedent nor found specific discriminatory effects based on facts in the record.

To the extent that the nature of the harm flowing from *de jure* segregation in higher education was addressed at all in *Fordice*, it was equated simply with state fostered segregation. The Court identified the policies to be reformed as those policies “traceable to the *de jure* system” that have “discriminatory effects.”³⁵⁸ Then, the justices went on to describe the target of reform as “policies and practices traceable to [the state’s] prior system that continue to have *segregative effects*.”³⁵⁹ The Court in *Fordice* used the term “discriminatory effects” interchangeably with “segregative effects,”³⁶⁰ policies that “foster segregation,”³⁶¹ practices that “tend to perpetuate the segregated system,”³⁶² and policies that “contribute to institutional racial identifiability,”³⁶³ identifying these as the policies and practices to be eliminated. The Court also identified restrictions on student choice of colleges as a “discriminatory effect” of the remnants of the dual system.³⁶⁴ Yet, the only restrictions identified as having “present discriminatory effects” were those that “restrict the range of choices of entering students in a way that *perpetuates segregation*.”³⁶⁵ In *Fordice*, institutional racial identifiability was treated as a condition to be “ameliorated,”³⁶⁶ and the discriminatory effect of *de jure* segregation was defined as segregation itself.

This concept of the discriminatory effects of segregation is tautological; the harm of past state-enforced *de jure* segregation is continuing state-fostered segregation.

³⁵⁵ See, e.g., *id.* at 732-33 (discussing “race-neutral” policies that maintained a dual university system based on race).

³⁵⁶ *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

³⁵⁷ See *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

³⁵⁸ *Fordice*, 505 U.S. at 729.

³⁵⁹ *Id.* at 731 (emphasis added).

³⁶⁰ *Id.* at 730 n.5.

³⁶¹ *Id.* at 729.

³⁶² *Id.* at 741.

³⁶³ *Id.* at 733.

³⁶⁴ See *id.* at 734-35.

³⁶⁵ *Id.* at 734 (emphasis added).

³⁶⁶ *Id.* at 730 n.4.

However, according to the Court, racial separation is not a harm. As long ago as 1974, Chief Justice Burger, writing for the majority in *Milliken v. Bradley*,³⁶⁷ wrote that racial imbalance is a “signal” to the court that shifts the burden of proof with regard to the constitutional violation.³⁶⁸ Seen in this light, proof of continuing racial segregation is merely *evidence* of unconstitutional state policies. Justice Thomas, concurring in *Missouri v. Jenkins*,³⁶⁹ pointed out that race separation is not injurious.

Racial isolation itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based on a theory of black inferiority.³⁷⁰

Though racial isolation is not a harm, Justice Thomas’ assertion that “only state-enforced segregation is [a harm]”³⁷¹ merely begs the question of the nature of the harm. The fact that state-enforced segregation or state policies that “foster segregation” are unconstitutional,³⁷² and that segregation may be evidence of those unconstitutional policies, does not define the harm or the “discriminatory effect” flowing from the constitutional violation.

The difficulty in identifying the continuing discriminatory effects that flow from the system of *de jure* segregation can be traced back to *Brown v. Board of Education*.³⁷³ In *Brown*, the Court was faced with lower court findings that the material effects of *de jure* segregation had been or were being remedied through “equalization” programs, which were described as equalizing the “tangible” aspects of the white and black elementary schools involved.³⁷⁴ Professor Mark Tushnet writes, “No one familiar with the South could have accepted those ‘findings’ with a straight face. But, concern not to insult people the justices thought of as responsible

³⁶⁷ 418 U.S. 717 (1974).

³⁶⁸ *See id.* at 741 n.19.

³⁶⁹ 515 U.S. 70 (1995).

³⁷⁰ *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995) (Thomas, J., concurring). *Fordice* is one of several cases in which the Court has acknowledged that “racial balance is not to be achieved for its own sake.” *Freeman v. Pitts*, 503 U.S. 467, 494 (1992). *See also* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971) (“If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.”); *Milliken I*, 418 U.S. at 740-41 (stating that desegregation does not require any particular racial balance).

³⁷¹ *Jenkins*, 515 U.S. at 122 (Thomas, J., concurring).

³⁷² *Fordice*, 505 U.S. at 731.

³⁷³ 347 U.S. 483 (1954).

³⁷⁴ *See id.* at 492 n.9.

white Southerners, the Court chose to rely on the findings and emphasized . . . other inequalities 'inherent' in a segregated system."³⁷⁵ Thus, even though the material discrimination against black children in books, materials, staffing, and building maintenance was widely acknowledged, the decision could not "turn on merely a comparison of these tangible factors."³⁷⁶ Instead, the Court turned to the "stigma" placed on children who were separated by race and decided that separate facilities were "inherently" unequal.³⁷⁷ In language now both famous and controversial, Chief Justice Warren wrote, "To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."³⁷⁸

This passage has been criticized by a number of writers, including Justice Thomas, who wrote in a concurring opinion in *Missouri v. Jenkins*, "Segregation was not unconstitutional because it might have caused psychological feelings of inferiority."³⁷⁹ Neither Justice Thomas nor the Court, however, has provided an adequate alternate explanation of segregation's harm.³⁸⁰ Although later cases acknowledged that programs and funding provided to black children under the segregated system were inferior, and remedies for *de jure* segregation routinely included program improvements aimed at improving the quality of education for black children, the Court continued to maintain the premise that the stigmatic injury of segregation was the principal wrong of the *de jure* system.³⁸¹ Throughout the forty years of desegregation litigation involving public elementary and secondary schools, the Court continued to discuss the harm of segregation in terms of stigma. In 1992, in *Freeman v. Pitts*,³⁸² a case addressing the desegregation of elementary and secondary schools in Dekalb County, Georgia, the Court quoted the language of the three-judge district court that was cited in *Brown*:

³⁷⁵ Mark V. Tushnet, *The "We've Done Enough" Theory of School Desegregation*, 39 HOW. L.J. 767, 769-70 (1996) (citation omitted).

³⁷⁶ *Brown*, 347 U.S. at 492.

³⁷⁷ *See id.* at 495.

³⁷⁸ *Id.* at 494.

³⁷⁹ *Jenkins*, 515 U.S. at 121 (1995) (Thomas, J., concurring). *See also* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?* 78 CORNELL L. REV. 1, 67-69 (1992) (arguing that the ideological framework that approved desegregation remedies further promoted the assumption of African-American inferiority).

³⁸⁰ Justice Thomas argued in *Missouri v. Jenkins* that, regardless of any psychological harm and differences between the quality of the schools, "segregation violated the Constitution because the State classified students based on their race." *Jenkins*, 515 U.S. at 121 (Thomas, J., concurring).

³⁸¹ *See Freeman v. Pitts*, 503 U.S. 467, 485-86 (1992) (citing stigmatic injuries as the principal wrong inflicted by the unconstitutional *de jure* system of segregation); *see also* *Milliken v. Bradley*, 433 U.S. 267, 279-88 (1977) (approving compensatory education programs); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971) (establishing compulsory integration as the primary cure for state-enforced segregation).

³⁸² 503 U.S. 467 (1992).

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."³⁸³

Even if this conception of the harm of state-enforced or state-fostered segregation were accurate and adequate to describe the harm to elementary and secondary school students, and many have argued that it is not, it is plainly an inadequate definition of the discriminatory effects of *de jure* segregation in higher education. Whatever occurs in the "hearts and minds" of elementary school children cannot describe the discriminatory effects of *de jure* segregation on college students.

C. *Looking to History for the Discriminatory Effects of De Jure Segregation*

In *Fordice*, as in *Brown*, the Court did not provide an adequate legal conception of segregation's discriminatory effects. An inadequate concept of the harm of *de jure* segregation is problematic because it leads to the development of inadequate remedies.³⁸⁴ Yet, if the Court is to move beyond the tautological definition of segregation's harm, it must first turn to history. Neither the inequality nor the harm of segregation is *inherent* in separate institutions.³⁸⁵ On the other hand, separate facilities created under state-enforced segregation are not, as the Court wrote in *Plessy v. Ferguson*,³⁸⁶ unequal "solely because the colored race chooses to put that

³⁸³ *Freeman v. Pitts*, 503 U.S. 467, 486 (1992) (quoting *Brown*, 347 U.S. at 494).

³⁸⁴ See *supra* notes 247-333 and accompanying text (discussing remedies designed to eliminate the racial identifiability of institutions in Georgia's University System).

³⁸⁵ In 1935, W.E.B. DuBois pointed out:

[T]he Negro needs neither segregated schools nor mixed schools. What he needs is Education. What he must remember is that there is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers, with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer.

W.E.B. DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328, 335 (1935).

³⁸⁶ 163 U.S. 537 (1896).

construction on [them].”³⁸⁷ Rather, the inequality and the harm of state enforced segregation is indelibly inscribed in the history and social meaning of Jim Crow segregation.³⁸⁸ State-sanctioned racial segregation violates the Constitution because of its history as a symbolic and material means to effect the “massive intentional disadvantaging of the Negro race, as such, by state law.”³⁸⁹ Separate but equal is historically unequal.³⁹⁰

Understanding the history of segregation is integral to discovering the legal meaning of its harm. It is only history that reveals the callous stupidity of *Plessy*’s assertion that “separation of the two races stamps the colored race with a badge of inferiority . . . solely because the colored race chooses to put that construction on it.”³⁹¹ Without history, racial segregation might appear as a neutral principle. As Professor Harold Berman points out:

Law is more than morality or politics and more than morality and politics combined. Law is also history. What is morally right in one set of historical circumstances may be morally wrong in another; likewise, what is politically required in one set of historical circumstances may be politically objectionable in another. More important, the apparent conflict between a moral and a political approach to law may be resolved in the context of historical circumstances Law, indeed may be defined as the balancing of justice and order in the light of experience.³⁹²

Although this Article will not attempt to iterate a full historical definition of the harm flowing from *de jure* segregation in higher education, some historical basics are apparent. *De jure* segregation functioned as a symbol of white-supremacy and as an instrument of enforcing white racial power and privilege. In higher education, the material harm inflicted by *de jure* segregation included the denial of access to programs maintained exclusively for whites and the underfunding and purposeful

³⁸⁷ *Id.* at 551.

³⁸⁸ See Charles Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) (arguing that the *Brown* decision was correct because of the history of and discriminatory purpose behind segregation laws).

³⁸⁹ *Id.* Kimberle Crenshaw points out that the material and symbolic subordination of race discrimination may be reciprocally reinforcing rather than mutually exclusive. See Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment*, in CRITICAL RACE THEORY 103, 114 (Kimberle Crenshaw et. al eds., 1995).

³⁹⁰ That is not to say that separate is currently acceptable or equal. See Kujovich, *supra* note 4, at 165-72 (describing continuing inequality in educational opportunities available to black students).

³⁹¹ *Plessy*, 163 U.S. at 551. Charles Black, remarking on this statement, wrote, “The curves of callousness and stupidity intersect at their respective maxima.” Black, *supra* note 388, at 422 n.8.

³⁹² Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 787-88 (1988).

restriction of the development of black public colleges.³⁹³ During the era of *de jure* segregation, black public colleges were allowed to develop only a few graduate or professional programs.³⁹⁴ Black students were similarly denied an equal opportunity to reap the benefits of the state's program of higher education. The essence of segregation's harm was the denial of equal access and opportunity.³⁹⁵

Furthermore, because the harm of segregation is tied to its history, the continuing history of segregation and desegregation must be scrutinized to understand its current or continuing discriminatory effects. As Justice Souter pointed out, "There is in fact no break in the chain of causation linking the effects of desegregation with those of segregation. There would be no desegregation orders and no remedial plans without prior unconstitutional segregation."³⁹⁶ Desegregation, like segregation, may have its own discriminatory effects.

D. *Desegregation of Black Colleges: New Discriminatory Effects*

Opportunity in higher education for black students in Georgia is only marginally better than it was when Jack Hunnicutt filed a lawsuit to desegregate Fort Valley State College.³⁹⁷ For example, the total number of doctorates awarded to blacks rose from *three* to *eight* between 1979 and 1991.³⁹⁸ Although blacks constitute about one third of the state's college age population, they receive only 4.9 percent of the doctorates.³⁹⁹ Black students represent 32.5 percent of the total high school graduates in Georgia, but only 3.9 percent of the enrollment at the state's "flagship" university, University of Georgia.⁴⁰⁰ In 1991, blacks comprised only three percent of the faculty at the University of Georgia.⁴⁰¹

One cannot measure the extent to which the *Hunnicutt* cases and *Adams v. Richardson* desegregation litigation contributed to the marginal improvement in higher education opportunity. In all likelihood, post-1970 desegregation efforts have contributed positively to black access to higher education and degree attainment. However, a great deal of effort has been dedicated to achieving a goal that cannot realistically be achieved and is not legally defensible: the "whitening" of the black colleges.

³⁹³ See *supra* notes 31-160 and accompanying text. See also Kujovich, *supra* note 4, at 81-113 (discussing the many disadvantages faced by students and faculty at black public colleges in states practicing segregation).

³⁹⁴ See Kujovich, *supra* note 4, at 81-113.

³⁹⁵ See generally SOUTHERN EDUCATION FOUNDATION, MILES TO GO, *supra* note 160.

³⁹⁶ Missouri v. Jenkins, 515 U.S. 70, 164 (1995) (Souter, J., dissenting).

³⁹⁷ See SOUTHERN EDUCATION FOUNDATION, MILES TO GO, *supra* note 160, at A-2; 1 SOUTHERN EDUCATION FOUNDATION, REDEEMING THE AMERICAN PROMISE A-14, A-15, A-54 (1995).

³⁹⁸ See *id.*

³⁹⁹ See *id.*

⁴⁰⁰ See *id.*

⁴⁰¹ See *id.*

From the 1970s through the 1990s, Georgia's efforts to desegregate black colleges involved developing programs, hiring faculty, and building facilities that will attract white students to attend formerly all-black institutions.⁴⁰² Desegregation strategies employed in Georgia have worked on the premise that white students acting in their own self-interest would enroll at black colleges in programs that were academically strong or programs that were not conveniently available at a predominantly white school. This "if you build it, they will come" philosophy has not worked for black colleges. As one writer despairingly noted, "Whites have not, do not intend to, nor will they choose to matriculate at Historically Black Colleges."⁴⁰³

Despite efforts to attract white students, large numbers of white students have not enrolled at historically black colleges.⁴⁰⁴ As each new measure fails in attracting significant numbers of white students, more new measures are called for. These measures, in turn, also fail to attract white students. Even when the School of Business was completely transferred from white Armstrong State to black Savannah State, white enrollment declined and did not recuperate.⁴⁰⁵

These failed measures are not neutral. They carry their own, new discriminatory effects. The symbolic message conveyed is that without white enrollment these colleges are inferior. Moreover, the historic position of white officials has been to view each white student's choice not to attend a black college as a reconfirmation of their inferiority. This is so regardless of the reason that the white student chooses to attend a traditionally white college.⁴⁰⁶ Each choice to attend a more "prestigious" traditionally white institution perpetuates the racial status quo. Meanwhile, the simple fact remains that black colleges will remain racially identifiable until large numbers of whites choose to enroll. Thus, scrutiny for "segregative effects" and the attempts "ameliorate" racial identifiability are endless. Their effect is to demoralize and humiliate the constituencies of black colleges, to put the colleges themselves under constant threat of merger or closure, and to keep them under perpetual siege.

Measures taken to attract white students to black colleges implicitly disrespect the choice to attend a black college. During the 1970s, when access for black students to white colleges showed some substantial increase, many whites believed that black schools would fail for lack of applications.⁴⁰⁷ The prevailing idea was that

⁴⁰² See *supra* notes 257-65 & 288-95 and accompanying text.

⁴⁰³ ADAIR, *supra* note 24, at 137.

⁴⁰⁴ In 1996, white students enrolled at black public colleges accounted for three percent of student enrollment. See SOUTHERN EDUCATION FOUNDATION, MILES TO GO, *supra* note 160, at A-21.

⁴⁰⁵ See *supra* notes 299-307 and accompanying text.

⁴⁰⁶ A number of recent studies document the continuing power of racism and social stereotyping. See Judith Olans Brown et al., *Some Thoughts About Social Perception and Employment Discrimination Law*, 46 EMORY L.J. 1487, 1492-98 and sources cited therein (1997).

⁴⁰⁷ See ELUSIVE EQUALITY, *supra* note 24, at 199-200 (describing the federal approach to black institutions as wavering between celebration and prophecy of demise); WIGGINS, *supra* note 166, at 72 (comparing black colleges to a village that used to be on the main

anyone with a real choice would not choose a black public college. Since that time, enrollment at black colleges has continued to grow, suggesting that factors not apparent to white officials come into play when black students choose a college. For example, black colleges may have a very different reputation and level of prestige within the black community than within the white community. With more than 100 years of history and traditions, black public colleges have graduated generations of black teachers and leaders and have functioned as community centers.⁴⁰⁸ Black family and community ties to alumni and faculty contribute to the institutional prestige.⁴⁰⁹ Furthermore, black students who attend black colleges report more favorable relationships with professors, better academic performance, greater social involvement, and higher occupational goals than black students who attend predominantly white colleges.⁴¹⁰

This Article does not suggest that black colleges should be cultivated as “publicly financed exclusively black enclaves by private choice,” a notion that *Fordice* rejected.⁴¹¹ Racial integration remains an important ideal, worthy of pursuit; however, it should not be pursued blindly. Black public colleges—open to all students—should not be subject to discriminatory treatment because of their racial identifiability. Bribing whites to attend black colleges privileges whites and discriminates against blacks.⁴¹² Measures taken to eliminate the discriminatory effects of *de jure* segregation must not depend on making historically black institutions attractive to whites. Attractiveness to whites is not an appropriate measure of an institution’s value, especially given the persistence of white racism. Black colleges are the survivors rather than the discriminatory effect of the history of state-enforced segregation. They are part of the remedy for the lack of black educational opportunity, not a harm to be cured.

CONCLUSION

In 1988, a journalist for the *Atlanta Constitution*, trying to explain the continuing legal efforts to desegregate Fort Valley State College, wrote, “The one unending

road and is bypassed by an interstate highway); Margaret Lawson, *Black Campuses: Can They Survive Desegregation?*, WASH. POST, Apr. 1, 1979, at B1; Reginald Stuart, *Black Colleges Survive, But Students are Fewer*, N.Y. TIMES, Feb. 1, 1984, at 18.

⁴⁰⁸ See *supra* notes 85-92 and accompanying text.

⁴⁰⁹ See *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950) (acknowledging the importance of intangible factors in higher education); *Sweatt v. Painter*, 339 U.S. 629, 634-35 (1950) (same).

⁴¹⁰ See *Committee L*, *supra* note 18, at 52-53.

⁴¹¹ *United States v. Fordice*, 505 U.S. 717, 743 (1992).

⁴¹² In addition to Georgia, other university systems have used financial incentives to try to attract white students to black public colleges. See, e.g., Patrick Healy, *Alabama State to Raise Bar Standards on Grants for Whites*, CHRON. OF HIGHER EDUC., Jan. 8, 1999, at A47, available in 1999 WL 10220597 (describing a \$1 million “Diversity Scholarship” fund available to assist white students who attend public black colleges).

problem, in the legal context, is that [Fort Valley State College] has simply not attracted very many white students.”⁴¹³ The explanation sounds absurd, and yet, it highlights the core deficiency of decades of efforts to desegregate Georgia’s black public colleges. Georgia’s story reveals that the court-imposed desegregation remedies designed to eradicate the racial identifiability of Georgia’s black public colleges have substantially privileged whites and have acted on white supremacist notions in ways that have humiliated students and faculty at black public colleges and caused further discrimination injury. Both program mergers and desegregation measures designed to attract white students to traditionally black colleges have had their own discriminatory effects.

Fordice did not recognize the full range of discriminatory effects that *de jure* segregation and the efforts to achieve desegregation have imposed on black college students. Courts must not view the existence of historically black colleges as a constitutional harm to be remedied. Instead, the constitutional harm flowing from the prior *de jure* segregation must be carefully defined in light of its historical context and remedies must be carefully crafted to address its real and continuing discriminatory effects and to avoid creating a new discriminatory regime.

⁴¹³ Hank Ezell, *Court Guidance, Lawsuits Not Enough to Attract Whites to Fort Valley College*, ATLANTA J. AND CONST., Aug. 21, 1988, at B1.