

**STILL ON THE BOOKS: JIM CROW AND
SEGREGATION LAWS FIFTY YEARS AFTER
*BROWN V. BOARD OF EDUCATION***

**A REPORT ON LAWS REMAINING IN THE CODES OF
ALABAMA, GEORGIA, LOUISIANA,
MISSISSIPPI, MISSOURI, SOUTH CAROLINA,
VIRGINIA AND WEST VIRGINIA**

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I. INTRODUCTION: JIM CROW IN TODAY'S LAW

Fifty years after the Supreme Court's landmark decision in *Brown v. Board of Education*,¹ laws designed to enforce racial segregation in public schools remain on the books throughout the former Confederate states. Although some of these statutes are apparently defunct, others reflect governmental promotion of racial separation which has continuing effects even now, including the allocation of taxpayer funds in the service of segregation. These statutes should be repealed and their effects analyzed.

Although *Brown* is sometimes understood as marking the end of "separate but equal" schools,² in reality it led to a period of fierce legal resistance. State legislatures enacted a variety of laws designed to ensure that public schools remained segregated. Many former Confederate states repealed laws requiring school attendance, and provided that schools would be defunded or closed if integrated. Many of these laws remain on the books.

Of course, closing public schools would disadvantage white as well as African American children. Accordingly, state funds were used to create a system of racially segregated private schools that still exist today. Southern states donated public property and services to these schools, offered tuition grants to children who attended them, and allowed private school teachers to join desirable state pension programs. Private schools still enjoy the benefit of public property given to them in an effort to frustrate *Brown*. A number of states still provide for support of these schools in their laws. Our research suggests that public monies collected from taxpayers of all races are today being used to pay pensions to retired teachers who taught at segregated private schools.

¹ 347 U.S. 483 (1954).

² PETER IRONS, *JIM CROW'S CHILDREN* 342 (Viking 2002) ("Many people, liberals and conservatives alike, believe that the Supreme Court ended the Jim Crow system with its historic *Brown* decision in 1954.")

This network of anti-desegregation laws worked. In 1964 – a full decade after *Brown* – 98% of southern African-Americans attended totally segregated schools.³ Today in Alabama, the average percentage of white students in an average African-American student’s school is only 30%. In Birmingham, African-American students attend public schools that are only 2.8% white.⁴ These numbers continue to worsen; nationwide, school segregation is increasing.⁵

This report examines Jim Crow laws partly out of respect for *Brown*. In press releases, proclamations and public ceremonies, *Brown* is honored on its fiftieth anniversary. For example, President George Bush hailed *Brown* as a “landmark decision, [in which] the Supreme Court declared an end to the shameful and unconstitutional practice of legal segregation in schools” in his 2004 African American History Month proclamation.⁶ Yet, the official policy of many states embodied in constitutions and codes of laws reflects the view that *Brown* was a dreadful mistake, to be resisted with all the power of the state. In *Green v. County School Board of New Kent County, Virginia*, the United States Supreme Court held that governmental officials were required to ensure that “racial discrimination would be eliminated root and branch.”⁷ The legacy of this case should include elimination of the numerous laws designed to prevent integration and guarantee segregation.

In addition, it is impossible to comprehend the current situation without understanding the present-day effects of these laws. These laws were designed to allow bureaucrats to

³ ERICA FRANKENBERG ET AL., A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM? 17 (Harvard University 2003) (available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf>).

⁴ *Id.* at 9.

⁵ Erwin Chemerinsky, *What Role Should Courts Play in Influencing Educational Policy?: The Segregation and Resegregation of American Public Education: The Courts’ Role*, 81 NORTH CAROLINA LAW REVIEW 1597, 1599 (2003). See generally CHUNGMEI LEE & GARY ORFIELD, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE* (Harvard Civil Rights Project 2004) (available online at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>); GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (New Press 1996).

⁶ <http://www.whitehouse.gov/news/releases/2004/02/20040204-2.html>

⁷ 391 U.S. 430, 438 (1968).

discriminate against African Americans in public education, and to channel state funds and property to support segregation and institutions resisting integration. As states repeal these laws, they should examine how much state support segregated private schools received in the years or decades they were in effect, and the extent to which current educational policies and procedures were created to harm African Americans by keeping them segregated from whites.

II. LAWS ON THE BOOKS DESIGNED TO PREVENT PUBLIC SCHOOL INTEGRATION

Half a century beyond *Brown*, it may be difficult for those who were not there, and even some who were, to appreciate the depth of southern hostility to racially integrated education. One reminder is the Southern Manifesto,⁸ introduced into the Congressional Record in 1956, which was signed by 101 southern Representatives and Senators (including the entire southern Senate delegation except for Albert Gore Sr., Lyndon B. Johnson and Estes Kefauver). The Southern Manifesto explained that the difficulties faced by African Americans were caused not by segregation and racial prejudice, but instead by the Supreme Court in *Brown* and its progeny:

It is destroying the amicable relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding.⁹

These Senators and Representatives made clear that compliance with *Brown* was undesirable: “We commend the motives of those States which have declared the intention to resist forced integration by any lawful means. . . . We pledge ourselves to use all lawful means to bring about a reversal of this decision.”¹⁰

⁸ *The Decision of the Supreme Court in the School Cases—Declaration of Constitutional Principles*, 102 CONGRESSIONAL RECORD 4459-4460 (March 12, 1956) (available on line at <http://www.people.fas.harvard.edu/~bnjohns/SouthernManifesto.htm>).

⁹ *Id.*

¹⁰ *Id.*

The Southern Manifesto reflected the views of many mainstream government officials in the former Confederate states. The Mississippi Supreme Court unanimously stated in 1964 that racial segregation was more important to many Southerners than their religious faith: “Large numbers of people, in this broad land, are steeped in their customs, practices, mores and traditions. In many instances, their beliefs go as deep or deeper than religion itself.”¹¹

In 1950, the attorneys general of Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia filed a remarkable amicus brief in the United States Supreme Court raising arguments so bizarre that they are almost incomprehensible to a modern reader. Explaining why the University of Texas Law School should be kept racially segregated, they stated:

Experiences of the past have left marks that no laws or court decisions can erase overnight. It is a mistake for any “observer from afar” to assume that prejudice and fear against “crossing the color line” in intimate social contact are limited to the Southern white man alone. They exist just as strongly in the average Negro man of the South. Negro men do not want their daughters, wives, and sweethearts dancing, dating and playing with white men any more that white men want their women folk in intimate social contact with Negro men. “White trash” is the hated name which Southern Negroes apply to white men who keep the company of the women folk. Worse names are applied to Negro men who “cross the line.” The result in the South today is almost universally antipathy toward intimate mixed social relationships. The results of the disregard of these circumstances in the past have been tragic to both races, physically, socially, and politically.¹²

The past legal actions of the southern states resisting *Brown* are much more comprehensible in light of these views.

¹¹ Knight v. State, 161 So. 2d 521, 523 (Miss. 1964).

¹² Brief of Amici Curiae of the states of Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia, in *Sweatt v. Painter*, 339 U.S. 629 (1950) (No. 49-44).

A. Outright Refusal to Desegregate (Alabama, Louisiana)

One technique¹³ states used to avoid integration was simply to refuse to do it. Louisiana law guarantees a teacher his salary when he is “away from his normal duties as a consequence of federal action relating to integration of the races in public schools.”¹⁴ This does not apply simply if the school is closed, but even if the teacher “is imprisoned or confined pursuant to an order or judgment of a federal court.”¹⁵ Teachers could feel comfortable defying federal court orders or even participating in mob actions, secure in the knowledge that their salary would still be paid. This law is still in force in the Louisiana code.

A slightly more subtle technique was to authorize racial segregation by choice rather than by state mandate. Although public school students in Alabama may not choose to attend a school exclusively with classmates of a particular political party, religious faith, or professional aim, the Alabama Constitution does allow them to choose the race of their fellows:

To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.¹⁶

B. Closing Public Schools (Georgia, Louisiana, Mississippi, South Carolina)

Another method to circumvent *Brown* was to close public schools.¹⁷ Louisiana law grants the governor the discretion to close schools temporarily. If the governor closes a school,

¹³ Several sources outline the legal response of the southern states to *Brown*. The *Race Relations Law Reporter* is essential. See also 2 U.S. COMMISSION IN CIVIL RIGHTS REPORT: EDUCATION (1961); U.S. COMM’N ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-’67, at 70-79 (1967); NUMAN V. BARTLEY, THE RISE OF MASSIVE RESISTANCE (LSU Press 1969); REED SARRATT, THE ORDEAL OF DESEGREGATION (Harper & Row 1966).

¹⁴ LOUISIANA REVISED STATUTES § 17:335(A) (added by La. Acts 1958 No. 187, §§ 1-2).

¹⁵ *Id.*

¹⁶ ALABAMA CONSTITUTION OF 1901, amend. 111, § 256.

¹⁷ See *School Closing Plans*, 3 RACE RELATIONS LAW REPORTER 807, 807 (1958) (“It has been widely assumed . . . that the principle of [*Brown*] can be legally avoided by a state withdrawing from the field of education.”)

and determines the school “may not be reopened and operated on a racially segregated basis, he may declare the school[] permanently closed.”¹⁸ The statute remains in the code even though over 40 years ago a district judge declared the statute unconstitutional in a decision affirmed by the United States Supreme Court.¹⁹ Georgia, Mississippi and South Carolina also retain laws on the books authorizing the governor to close educational institutions.²⁰

C. Repealing Compulsory School Attendance Laws (Georgia, Virginia)

Integrating or closing schools created problems because many states required school attendance of children of certain ages.²¹ Many states resisting *Brown* changed their laws to relax or eliminate this requirement to facilitate school closing and excuse parents from sending their children to integrated public schools. Virginia reacted to *Brown* by appointing a committee whose goal was to come up with “the best that can be devised to avoid integration,”²² ensuring that “no child will be compelled to attend a mixed school.”²³ One of their proposals was to provide that a child may be “excused from school” with consent of a parent or guardian, and proper recommendations from school authorities.²⁴ This proposal became law and remains on

¹⁸ LOUISIANA REVISED STATUTES § 17:349.2(D).

¹⁹ *Bush v. Orleans Parish School Board*, 188 F. Supp. 916, 930 (E.D. La. 1960) (three judge court) (“this court . . . declares [inter alia] Act . . . 12, 14, 23, 24 . . . of the First Extraordinary Session of 1960 unconstitutional. This court will prepare the decree enjoining their enforcement.”), *aff’d mem. per curiam*, 365 U.S. 569 (1961). Another statutory system providing for closing schools following a referendum was only partially repealed even though it was held unconstitutional in 1961. LOUISIANA REVISED STATUTES §§ 350.2 - .14, *added by* La. Acts 1961, 2d Ex. Sess., No. 2 (held unconstitutional in *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649 (E.D. La. 1961) (three judge court), *aff’d mem. per curiam*, 368 U.S. 515 (1962)).

²⁰ See GEORGIA CODE ANNOTATED § 20-3-70 (1998); MISSISSIPPI STATUTES ANNOTATED § 37-65-1 (1958); SOUTH CAROLINA CODE § 59-19-90(7) (1976).

²¹ Charles K. Woltz, *Compulsory Attendance at School*, 20 LAW & CONTEMPORARY PROBLEMS 3 (1955).

²² Education in Virginia: Report of the Commission on Education (Mar. 31 1959), *reprinted in* 4 RACE RELATIONS LAW REPORTER 392, 394 (1959).

²³ *Id.* at 395.

²⁴ *Id.* at 400.

the books.²⁵ This statute now could be used by hostile school authorities to encourage African American students of any age to opt out of school entirely.

Relaxed attendance laws enabled Virginia to close schools forced to desegregate. For example, in Prince Edward County in 1959, the public schools closed when the Board of Supervisors refused to fund public schools.²⁶ White students were attending private schools, while black children stayed home.²⁷ It took five years for the Supreme Court to order the public schools to reopen.²⁸

Georgia law also passed a law during the period of resistance to *Brown* which remains on the books creating discretion to suspend compulsory education when integration threatens. It provides that the Governor may suspend compulsory education laws “over the entire state or in any portion thereof” based on “any riot, insurrection, public disorder, disturbance of the peace, natural calamity, or disaster.”²⁹

D. Other Segregation Laws (Mississippi, Missouri, West Virginia)

Mississippi. In 1942, the Mississippi legislature passed and the governor approved a statute granting money and land in Madison County for a “camp for Negro 4-H Club members.”³⁰ On its face, the 4-H Club statute is aimed squarely at segregating African Americans by creating a “camp for Negro 4-H Club members,” which when it is not used as a

²⁵ 1959 Va. Laws Ch. 72, § 4, codified as amended at VIRGINIA STATUTES § 22.1-254(C) (1) (“A school board may excuse from attendance at school: On recommendation of the principal and the division superintendent and with the written consent of the parent or guardian, any pupil who the school board determines, in accordance with regulations of the Board of Education, cannot benefit from education at such school”).

²⁶ Jennifer E. Spreng, *Scenes from the Southside: A Desegregation Drama in Five Acts*, 19 U. ARKANSAS LITTLE ROCK LAW JOURNAL 327, 349 (1997).

²⁷ *Id.* at 349.

²⁸ *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964).

²⁹ GEORGIA CODE ANNOTATED § 20-2-702 (1998) (added by Ga. Acts 1957, p. 168, § 1).

³⁰ MISSISSIPPI CODE ANNOTATED § 37-113-31.

camp may only be “rented to other Negro organizations.”³¹ The land was granted to keep African Americans out of white 4-H clubs by creating a separate (but, presumably equal) 4-H club.³²

Missouri. Missouri law still refers to a segregated reform school. Title 12, Chapter 205, § 205.900(1) of the Missouri Revised Statutes states:

The county superintendent of public welfare shall give such oversight and supervision to prisoners who are on parole from the . . . Missouri Training School for Boys and to girls on parole from the State Training School for Girls or from the State Training School for *Negro* Girls, as may be requested by the state department of corrections and human resources³³

Missouri law provided for segregated reform schools by statute until 1947.³⁴ The State Training School for Negro Girls was opened in 1916 in Tipton, Missouri, and operated as a segregated juvenile detention center until the mid-1950s.³⁵ Even though the State Training School for Negro Girls has not been operational for approximately half a century, the law recognizing the authority of the county superintendent over this defunct institution still exists.

West Virginia. In West Virginia code, two statutes dating to the era of racial segregation³⁶ still contain the word “Negro.” One section of the West Virginia code regulates the ability of County Boards of Education to hire African American assistant superintendents. The pertinent language provides:

³¹ *Id.*

³² Apart from this statute’s segregative purpose, it is also objectionable because of the use of the offensive term “negro.” In a case involving custom license plates, the Utah Supreme Court recently constructed a simple framework to determine whether specific language is offensive: would a reasonable person who understands why the word is offensive to the person who claims it is offensive agree that specific language was offensive? If so, then the court can order the state not to use the offensive language. *McBride v. Motor Vehicle Division*, 977 P.2d 467, 470 (Utah 1999). See also Jeff Dolley, *The Four R’s: Use of Indian Mascots in Educational Facilities*, 32 JOURNAL OF LAW AND EDUCATION 21, 28 (2003).

³³ MISSOURI REVISED STATUTES § 205.900 (2004) (italics added).

³⁴ See PAULI MURRAY, STATES’ LAWS ON RACE AND COLOR 253 (1951) (U. Ga. Press Davison Douglas ed. 1994).

³⁵ Gary Kremer, *System Failed Residents of Home for Negro Girls*, JEFFERSON CITY TRIBUNE, June 21, 1998 (available at www.tiptonmo.com/history/tcc.htm).

³⁶ For a description of West Virginia’s race-based laws, see MURRAY, *supra* note 34, at 504-12 (noting that West Virginia prohibited, among other things, interracial education, marriage, and National Guard service).

The board shall not employ more than one assistant for each two hundred teachers or major fraction thereof: Provided, however, That in such districts in which assistants are employed and fifty or more negro teachers are employed therein, the board may employ one negro assistant superintendent.³⁷

Interestingly, this quota allows for the hiring of an African-American assistant superintendent, but also *limits* the number of persons that can be hired.

The other reference to the structure of segregation is in a statutory provision changing the name of The Bluefield State Teachers' College to Bluefield State College. In paragraph three, the statute refers to how the “Negro board of education” will work in conjunction with the state board of education to manage curricular changes and conditions for graduation.³⁸

III. LAWS ON THE BOOKS DESIGNED TO SUPPORT SEGREGATED PRIVATE SCHOOLS

Another strategy states used to enforce segregation was to create and support segregated, private schools.³⁹ Many believed that these schools could replace public schools as the primary way of educating southern children.⁴⁰ One court explained that the laws created “a means by which public schools under desegregation orders may be changed to ‘private’ schools operated in the same way, in the same buildings, with the same furnishings, with the same money, and under the same supervision as the public schools.”⁴¹ By the mid-1970’s, the Supreme Court made clear

³⁷ WEST VIRGINIA CODE § 18-5-32.

³⁸ WEST VIRGINIA CODE § 18-14-1.

³⁹ See Note, *Segregation Academies and State Action*, 82 YALE LAW JOURNAL 1436, 1438 (1973); see also DAVID NEVIN & ROBERT E. BILLS, *THE SCHOOLS THAT FEAR BUILT: SEGREGATIONIST ACADEMIES IN THE SOUTH* (Acropolis Books 1976); SEAN F. REARDON & JOHN T. YUN, *PRIVATE SCHOOL RACIAL ENROLLMENTS AND SEGREGATION* (2002) (available online at http://www.civilrightsproject.harvard.edu/research/deseg/Private_Schools.pdf); Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TULANE LAW REVIEW 563, 568 & n.15 (2001).

⁴⁰ The South relied on private schools before 1870 and it was predicted that the South could once again rely on private schools. RAYMOND WOLTERS, *THE BURDEN OF BROWN: THIRTY YEARS OF SCHOOL DESEGREGATION* 95 (The University of Tennessee Press 1984).

⁴¹ *Hall v. St. Helena Parish School Board*, 197 F. Supp. 649, 651 (E.D. La. 1961) (three judge court), *aff'd mem. per curiam*, 368 U.S. 515 (1962).

that state assistance to racially segregated private schools was unconstitutional,⁴² yet, many laws authorizing support of segregated private schools remain on the books. Furthermore, as *Brown* itself shows, mere declaration of a legal principle does not necessarily result in immediate compliance.⁴³

These laws successfully funneled white children into private schools.

[P]rivate academies in many cases had the benefit of the government's promise to pay tuition in the crucial early days in which the schools were organized. And in most states, the government was able to provide considerable support to the private schools in the form of contributions of school buildings, school supplies, or direct financial payments.⁴⁴

Between 1961 and 1970 there was a 242 percent increase in the number of non-sectarian private schools in the Southeast.⁴⁵ Moreover, most new southern private schools were racially segregated. For example, in Louisiana alone, there were 16 white, non-sectarian private schools before *Brown*, a decade after *Brown*, there were 69 segregated non-sectarian private schools.⁴⁶ Segregated private schools that were opened shortly after *Brown* threatened to cause integration in the local public schools continue to exist and educate white students only.⁴⁷

⁴² See *Gilmore v. City of Montgomery*, Alabama, 417 U.S. 556 (1974) (invalidating program allowing use of recreational facilities by segregated private schools); *Norwood v. Harrison*, 413 U.S. 455 (1973) (invalidating Mississippi text book loan program); *Poindexter v. Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La. 1967) (three judge court) (invalidating tuition grant program), *aff'd per curiam*, 389 U.S. 571 (1968); *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475-78 (M.D. Ala.) (three judge court) (invalidating tuition grant program), *aff'd mem per curiam sub nom.* *Wallace v. United States*, 389 U.S. 215 (1967); see also *Griffin v. Board of Supervisors*, 339 F.2d 486 (4th Cir. 1964); *Coffey v. State Educational Finance Commission*, 296 F. Supp. 1389 (S.D. Miss. 1969) (three judge court); *Griffin v. State Board of Education*, 239 F. Supp. 560 (E.D. Va. 1965) (three judge court).

⁴³ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (University of Chicago Press 1991); BRADLEY C. CANON & CHARLES A. JOHNSON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (CQ Press 2d ed. 1999).

⁴⁴ Helen Hershkoff & Adam S. Cohen, *School Choice and the Lessons of Choctaw County*, 10 YALE LAW & POLICY REVIEW 1, 7 (1992). See also HARRELL R. RODGERS JR. & CHARLES S. BULLOCK, III, *COERCION TO COMPLIANCE* 43 (Lexington Books 1976) (noting that the existence of segregated private contributed to racial segregation in the public schools in the districts studied.)

⁴⁵ ROSENBERG, *supra* note 43, at 97, n.32.

⁴⁶ *Id.* at 83.

⁴⁷ See CHARLES S. AIKEN, *THE COTTON PLANTATION SOUTH SINCE THE CIVIL WAR* 274-78 (Johns Hopkins 1998). As former President Carter explained:

A. Tuition Grants to Segregated Private Schools (Georgia, South Carolina, Virginia)

Several states have laws on the books designed to pay tuitions for students who wish to attend segregated private schools, rather than attending integrated public schools.

Georgia. In 1960, the Committee on Schools of the Georgia General Assembly recommended establishing a program of tuition grants “for the benefit of any child whose parent chooses to withdraw said child from an integrated school.”⁴⁸ The Georgia legislature followed this recommendation, passing a law, still in the Code, authorizing tuition payments to private schools.⁴⁹

When the public schools were first required to integrate in the wake of *Brown v. Board of Education*, there was a mass exodus of white students whose parents could pay the tuition fees to enroll in the private “segregation academies” that sprang up in almost all communities. A few of these private schools have flourished and developed good academic programs, but most have not been able to compete in terms of quality and have based their continuing existence on parental dedication to racial segregation. Even worse, many public school boards have come to be dominated by affluent members whose children attend the community’s private schools. Inevitably, their interests tend to be concentrated on holding down the property tax rates that finance the public schools than on providing adequate support to enhance the curriculum in the schools their children do not attend.

JIMMY CARTER, *TURNING POINT: A CANDIDATE, A STATE, AND A NATION COME OF AGE 187-88* (Times Books 1992).

⁴⁸ Report of the Committee on Schools of the General Assembly of Georgia, *reprinted in* 5 RACE RELATIONS LAW REPORTER 509, 516 (1961). *See also* Board of Public Education for City of Savannah and County of Chatham v. Georgia, 1992 WL 699499, * 2 (S.D. Ga. Aug 11, 1992) (“The repeal of these segregation laws did not signal the end of state resistance to desegregation efforts. In 1961, the General Assembly provided tuition grants for students who wished to attend private, segregated schools. Moreover, state officials offered to provide legal services to local school boards that defended against desegregation suits”); OPINION OF THE GEORGIA ATTORNEY GENERAL No. U93-8, *1 (Sept. 20, 1993) (“This statute was passed at a time when the state legislature was enacting laws in an attempt to offset the impact of the United States Supreme Court’s decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny.”).

⁴⁹ GEORGIA CODE ANNOTATED § 20-2-642 provides:

Every child between the ages of six and 19 years residing in this state who has not finished or graduated from high school and who is otherwise eligible and qualified to attend the elementary and secondary public schools of the local school system wherein such child resides shall, in lieu of attending the public schools of such local school system, be eligible to receive an education grant to be expended for the purpose of paying or otherwise defraying the cost of tuition

South Carolina. South Carolina authorizes tuition grants in the current code, which was updated in 1976.⁵⁰ South Carolina was permanently enjoined from enforcing the statute in 1968 in a decision affirmed by the United States Supreme Court.⁵¹

Virginia. The Virginia Supreme Court invalidated Virginia's tuition grant program in 1955 on the ground that it violated the state constitutional prohibition on public support of private schools.⁵² The constitution was then amended to allow grants to private schools, and it continues to do so today.⁵³

B. Segregated Private School Teachers Granted Public Pensions
(Alabama, Georgia, Virginia)

After *Brown*, many states authorized private school teachers to join the state pension program for public school teachers. This would encourage current public school teachers to transfer to newly created segregated private schools, and make it easier for those schools to hire new teachers in the future. Arkansas⁵⁴ and Virginia⁵⁵ repealed their statutes in the 1980s, but

at a nonsectarian private school located in any state of the United States or a public school located outside this state but within some other state of the United States, in the amount and manner provided by and subject to this article.

(Added by Ga. Laws 1961, at 35 § 2). The full statute is contained in Sections 640 to 650. *See also* *Lowe v. State*, 482 S.E.2d 344 (Ga. 1997) (affirming denial of mandamus petition seeking to compel funding of act).

⁵⁰ *See* SOUTH CAROLINA CODE ANNOTATED § 59-41-20 (“Subject to the terms and provisions of this chapter every school child in the State who has not yet finished or graduated from high school and who desires to attend a private school located within the State shall be eligible for and entitled to receive a State scholarship grant in an amount equal to the per pupil cost to the State of public education as certified by the Governor.”).

⁵¹ *Brown v. South Carolina State Board of Education*, 296 F. Supp. 199 (D.S.C.) (three-judge court) (permanently enjoining section), *aff’d mem. per curiam*, 393 U.S. 222 (1968).

⁵² *Almond v. Day*, 89 S.E.2d 851 (Va. 1955).

⁵³ *See* VIRGINIA CONSTITUTION, ART. VIII, § 10 (“No appropriation of public funds shall be made to any school . . . not owned or exclusively controlled by the State . . . ; provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may . . . , appropriate funds . . . which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning. . .”).

⁵⁴ Ark. Acts 1959, No. 55, §§ 1, 2, codified at ARKANSAS CODE ANNOTATED § 24-7-503 (1987), *repealed*, Ark. Acts 1987, No. 4, § 4.

⁵⁵ Va. Laws 1956, Ch. 64, codified at VIRGINIA CODE § 22-188.3, VIRGINIA CODE § 51-111.38:1, *reprinted in* 1 RACE RELATIONS LAW REPORTER 1098-00 (1956). Evidently, private school participation stopped in 1983. *Bradley*

those of Alabama⁵⁶ and Georgia⁵⁷ remain on the books. Our research suggests that participants in the Virginia program continue to receive payouts.

C. Donations of State Property and Services to Segregated Schools (Alabama, Georgia)

Georgia. After *Brown*, many Southern states passed laws allowing the state or counties to give real property, services or other valuables to racially segregated private schools, or to sell them at bargain prices. For example, Georgia law currently authorizes leasing of school property to private institutions.⁵⁸ This law remains on the books even though several times Georgia was enjoined from transferring public schools for use as private, segregated schools.⁵⁹

Alabama. In Alabama, a 1954 constitutional amendment granted the state legislature the power to give property and to fund segregated private schools.⁶⁰ The amendment gave Alabama a powerful tool to combat desegregation.⁶¹ The amendment provides:

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies

v. Baliles 639 F. Supp. 680, 684 (E.D. Va. 1986), *aff'd sub nom.* School Board of the City of Richmond v. Baliles, 829 F.2d 1308 (4th Cir. 1987).

⁵⁶ ALABAMA STATUTES ANNOTATED § 16-25-1(3) (teacher means “Any teacher, principal, superintendent, supervisor, college professor, administrative officer, or clerk employed in any public school or public college within the state or employed in any private nondenominational school operated nonprofit for the education of children of school age residing within a district where no public school is available for the children”) (added by Alabama Acts 1957, No. 532, p. 747, § 1).

⁵⁷ GEORGIA CODE ANNOTATED § 47-3-64 (“Any teacher or school employee who is employed in a public school, who is covered by laws relating to a retirement fund or pension system maintained by any county, city, or independent school district in this state or the board of education thereof, and who accepts employment in a nonsectarian private school in this state attended by students who are eligible for grants from the state shall continue to be subject to such retirement fund or pension system and shall be entitled to all of its benefits, provided that he makes or causes to be made to such retirement fund or pension system the contributions required of and for the benefit of such teacher or school employee had he continued employment in the public schools.”) (added by Ga. Laws 1957, p. 8, § 1).

⁵⁸ GEORGIA CODE ANNOTATED § 20-2-553(a)(3) (added by Ga. Acts No. 15, 1956).

⁵⁹ *See, e.g.,* Wright v. Baker County Board of Education, 501 F.2d 131 (5th Cir. 1974); Graves v. Walton County Board of Education, 465 F.2d 887 (5th Cir. 1972).

⁶⁰ ALABAMA CONSTITUTION OF 1901, Amendment No. 111, § 256 (2003).

⁶¹ Laws and actions designed to preserve segregation in Alabama included (1) amending/repealing compulsory attendance laws, (2) encouraging private schools, (3) pupil assignment, (4) permitting school closure, (5) awarding scholarships out of state, (6) removing teachers, (7) tuition grants, and (8) withholding aid to desegregated schools. ROSENBERG, *supra* note 43, at 350.

or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

Amendment 111's legislative history reveals a government policy of forced segregation.⁶² As the joint committee appointed by the Alabama legislature reported,⁶³ "the people of our state are determined to have ... [n]o compulsory mixing of races in our schools."⁶⁴ To defeat *Brown*, Amendment 111 was designed to "modify our system of education so as to meet the threat of compulsory racial integration."⁶⁵ In areas where schools might be forced to begin to integrate, Amendment 111 gave the legislature the power to "discontinue public schools and, instead, grant public aid, such as tuition and transportation, directly to the pupils, white and negro, and enable them to attend private schools where, of course, there would be no compulsory commingling."⁶⁶ Amendment 111 meant that *Brown* could be defied, and it is still on the books, and still gives the legislature the power to control schools.

There are cases enjoining payments by Alabama to segregated private schools.⁶⁷ In 1974, the Supreme Court upheld an injunction against Montgomery's support of private schools by

⁶² Note that another part of Amendment 111 authorizes voluntarily segregated public schools. *See* note 16, *supra*, and accompanying text.

⁶³ The committee was chaired by future Birmingham mayor Albert Boutwell, and included Jack C. Gallalee, president of the Mobile County School Board from 1961-65. The committee also reported that it was "grateful for the cooperation of Governor Gordon Persons." *See* Jay Murphy, *Can Public Schools Be "Private"?*, 7 ALABAMA LAW REVIEW 48, 70 (1954) (including an appendix which recounts the legislative history of Amendment 111.)

⁶⁴ *Id.* at 64.

⁶⁵ *Id.* at 65.

⁶⁶ *Id.* at 68.

⁶⁷ *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475-78 (M.D. Ala. 1967) (three judge court) (invalidating 1965-66 tuition grant laws), *aff'd mem. per curiam sub nom. Wallace v. United States*, 389 U.S. 215 (1967); *Lee v. Macon County Board of Education*, 231 F. Supp. 743 (M.D. Ala. 1964) (three judge court) (invalidating 1957 tuition grant laws).

allowing them access to public recreation facilities.⁶⁸ But other funds and real property were put into the hands of private schools for purposes of segregation in instances where the U.S. Department of Justice or civil rights lawyers were unaware of the transfers or unsuccessful in opposing them.⁶⁹

Courts have refused to invalidate Amendment 111. As recently as 2002, the Supreme Court of Alabama held that section 256 of Amendment 111 prevented the courts from getting involved with school funding, since the amendment ceded all control of school funding to the legislature.⁷⁰ On the other hand, Alabama Supreme Court Justice Houston admits that Amendment 111 allows the legislature to spend money on schools as it pleases, “Amendment 111 ... merely authorizes certain legislative activities and requires or precludes virtually none.”⁷¹ Thus, the legislator may authorize money for suburban, mostly white public schools, less money for urban, mostly African American public schools, or money and land grants to totally segregated private schools – but the courts refuse to take an active role in creating any change.

D. Present Effects: Diminished Public Support for Public Schools

In Virginia, legislators cut taxes by fifty-three percent when white children withdrew from public schools and were sent to private schools.⁷² With white children no longer in public schools, funding to public schools was slashed and taxes cut. This freed up funds for private schools, which were supported in large part by donations.⁷³

⁶⁸ *Gilmore v. City of Montgomery*, Alabama, 417 U.S. 556 (1974).

⁶⁹ *Hershkoff & Cohen*, *supra* note 44, at 8 (noting that Choctaw County Board of Education “provided a public school building for the establishment of South Choctaw Academy at a nominal fee.”); *see also* U.S. COMMISSION ON CIVIL RIGHTS, SOUTHERN SCHOOL DESEGREGATION 1966-’67 at 77-78 (1967) (discussing private school in Lowndes County, Alabama located in former public school building which had been donated to a recreational association).

⁷⁰ *Ex parte James*, 836 So. 2d 813, 819 (Ala. 2002).

⁷¹ *Id.* at 826.

⁷² *Spreng*, *supra* note 26, at 351.

⁷³ *Id.*

This is consistent with the traditional underfunding of public schools serving African Americans.⁷⁴ The Alabama state constitution insures that urban public schools will continue to be underfunded through a tax code that University of Alabama College of Law Professor Susan Pace Hamill calls “neither rational, fair, nor sound.”⁷⁵

There is no mistake in the tax code: history shows that it was designed to keep property taxes low for wealthy, white land owners to insure that their money would never be used to adequately fund public schools or other basic services for African Americans.⁷⁶ The tax code is still fully operational in that it keeps property and income tax rates very low, making it difficult to adequately fund the states poorest public schools. This motivation, together with the overtly racist language used to mandate segregated public and private schools discussed above, renders the Alabama Constitution in serious need of repair.

⁷⁴ The limit on the property tax rate that can be used to support schools is 1.5%. See Susan Pace Hamill, *Working Paper: Constitutional Reform in Alabama: A Necessary Step Toward Achieving a Fair and Efficient Tax Structure*, 33 CUMBERLAND LAW REVIEW 437, 441 n.14 (2002). Furthermore, state income taxes on individuals are capped at 5% and corporations are capped at 6.5% by a constitutional amendment. ALABAMA CONSTITUTION OF 1901, amend. 25 (1932). The corporate income tax rate was originally 3%, but raised to 6.5% by Amendment 662. Individuals are allowed to deduct their federal income taxes paid for state income tax purposes. ALABAMA CONSTITUTION OF 1901, amend. 225 (1965). That means that the people that pay the most in federal taxes—the wealthiest people in Alabama—pay proportionally the least in state taxes because of the deductions. Hamill, *supra*, at 439.

⁷⁵ Hamill, *supra* note 74, at 452.

⁷⁶ White landowners after the Civil War were opposed paying property taxes that would be used to support basic services that African Americans needed. Alabama’s Constitution of 1875 imposed limitations on the ability of landowners to be taxed and the Constitution of 1901 continued in the spirit of these racist goals by barring African American citizens from any political power (including the right to vote) and by maintaining low property taxes for white landowners. The effect was to negatively impact all poor people in Alabama, African American and white alike. WAYNE FLYNT, *POOR BUT PROUD: ALABAMA’S POOR WHITES* 6, 18, 50, 63, 224-225, 273 (1989).

IV. CONCLUSION

In 2004, the fiftieth anniversary of *Brown v. Board of Education*, states should repeal laws intended to support racial segregation and avoid compliance with the United States Constitution. In addition, the operation and effect of these laws should be carefully examined by responsible authorities.

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The *Jim Crow Study Group (JCSG)* is an academic organization at the University of Arizona. Consistent with the public mission of the University, a state-supported institution, and the desire of *JCSG* staff to use their work to contribute to improvement of the legal system, *JCSG* decided to share its research findings. The views expressed herein are solely those of the authors and not necessarily those of the University of Arizona or any of its Colleges, Schools or Departments.

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