

# **Maryland's Failure to Desegregate Its Historically Black Institutions:**

Policies And Practices Rooted In The De Jure Era

The Coalition For Equity And Excellence In Maryland Higher  
Education et al. v. Maryland Higher Education Commission

**Plaintiffs' Opening Statement January 3, 2012**

# Maryland's Affirmative Obligation Under *Fordice*

“Our decisions establish that a State does not discharge its constitutional obligations until it eradicates policies and practices traceable to its prior de jure dual system that continue to foster segregation.”

*U.S. v. Fordice*, 505 U.S. 717, 728 (1992).

# Maryland's Traceable Policies

## 3 Policies/Practices Traceable to De Jure Era

**Limited Missions:** Maryland Assigns Limited Roles and Missions To Historically Black Institutions (“HBIs”)

**Underfunding:** Maryland Underfunds HBIs, Including Through Mission-Driven Funding Formula

**Program Duplication:** Maryland Unnecessarily Duplicates Programs and Fails to Provide Unique High Demand Programs at the HBIs

# The Definition Of “Policy”

## Dictionary

“A plan or course of action adopted by government, ruler, political party, etc”  
New World Dictionary, 2nd Edition

## Fordice

“It is important to state at the outset that we make no effort to identify an exclusive list of unconstitutional remnants of Mississippi’s *prior de jure* system.... With this caveat in mind, we address four policies of the present system: admissions standards, program duplication, institutional mission assignments, and continued operation of all eight public universities.” *Fordice*, 505 U.S. at 733 (emphasis added).

# A “Policy” Need Not Be Written Regulations

In *Spell v. McDaniel*, the 4<sup>th</sup> Circuit affirmed the district court’s definition of a “municipal policy” as including “not only ‘official policy directives, regulations or ordinances,’ but ‘what the law considers de facto or in fact practices, custom, or policies caused, maintained, tacitly encouraged or condoned’ . . . ‘even though these ... have at no time received **formal** approval through the local government's decision making channels.’” 824 F.2d 1380, 1397-98 (4th Cir. 1987) (emphasis added).

# “Practice” Refers To State Action

Dictionary

“ To do or engage in frequently”

New World Dictionary, 2nd Edition

Fordice

“Thus, even after a State dismantles its segregative admissions policy, there may still be state action that is traceable to the State’s prior de jure segregation and that continues to foster segregation.” *Fordice*, 505 U.S. at 729.

# The Legal Definition Of Practice Is The Same As The Dictionary Definition

*Moseke v. Miller and Smith, Inc.*,  
202 F. Supp. 2d 492 (E.D. Va. 2002)

- The court noted ‘little has been written in the federal courts...about the meaning of the term ‘practice.’” *Id.* at 502. Looking to Black’s Law Dictionary, the court accepted the plain meaning of “practice” as: “Repeated or customary action; habitual performance; a succession of acts of similar kind.” *Id.*
- The court also looked to the Random House Dictionary, which defined “practice” as: “[H]abitual or customary performance; operation; habit; custom; repeated performance or systematic exercise.” *Id.* at 502-03.
- As a result, the court read an occurrence of a discriminatory practice to constitute an event or incident that encompasses a discriminatory action. *Id.* at 503

# Unnecessary Program Duplication Under Fordice

“It can hardly be denied that such duplication was part and parcel of the prior dual system of higher education—the whole notion of ‘separate but equal’ required duplicative programs in two sets of schools—and that **the present unnecessary duplication is a continuation of that practice.**”

*Fordice*, 505 U.S. at 738 (emphasis added).



# The Definition of “Traceable” Is Not Hyper-Technical

Dictionary

“Evidence or an indication of the former presence or existence of something; a vestige”

Fordice

Referring to traceable policies/practices as “remnants” -- *E.g., Fordice, 505 U.S. at 733.*

# Proving Traceability Is Not A High Hurdle

## Justice Thomas Concurrence in Fordice

“Plaintiffs are likely to be able to identify, as these plaintiffs have identified, specific policies traceable to the de jure era that continue to produce a current racial imbalance. As a practical matter, then, the district courts administering our standard will spend their time determining whether such policies have been adequately justified—a far narrower, more manageable task than that imposed under *Green*. A challenged policy does not survive under the standard we announce today if it began during the prior de jure era, produces adverse impacts, and persists without sound educational justification.”

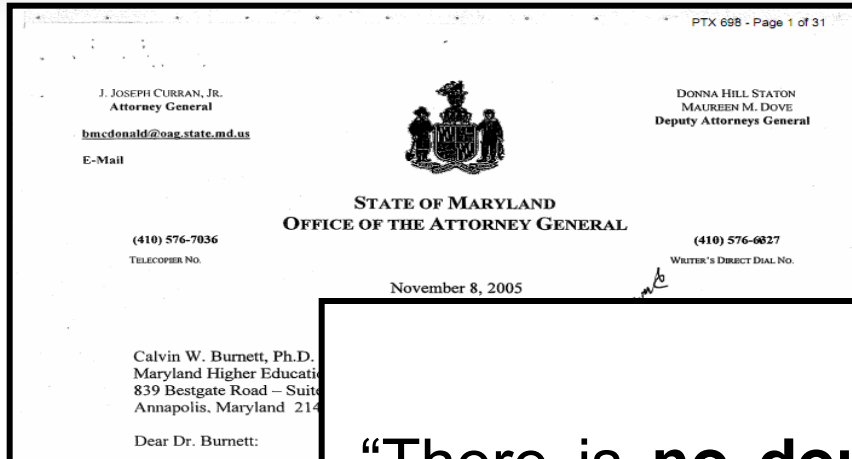
*Fordice*, 505 U.S. at 746.

# 3 Specific Policies/Practices

<b>De Jure Era Polices/Practices</b>	<b>Current Policies/Practices</b>
Maryland Assigned HBIs More Limited Roles and Missions	Maryland Assigns HBIs More Limited Roles and Missions
Maryland Knowingly Underfunded Its HBIs	Maryland's Knowingly Underfunds Its HBIs through Formula
Maryland Unnecessarily Duplicated Programs and Failed to Establish Unique High Demand Programs	Maryland Unnecessarily Duplicates Programs (Including over the objection of the Attorney General's Office) and Provides Few Unique, High Demand Programs


Maryland has Conceded that Program  
Duplication and Limited Missions are  
Traceable

# 2005 Attorney General Opinion: Policies are Traceable to De Jure Era



“There is **no doubt** that Maryland operated de jure segregated public higher education programs before 1969 when OCR found the State in violation of Title VI, and that some policies, **such as program duplication** at geographically proximate schools, **are traceable** to that era.”

# Asst. AG's Objection To Duplication Of Morgan's MBA Program in 2005 Also Finds Traceability

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TELECOPIER No. (410) 260-3202	MARYLAND HIGHER EDUCATION COMMISSION	WRITER'S DIRECT DIAL No.
<i>Privileged and Confidential</i>		
TO: John J. Olin Maryland H		
FROM: Pace J. Mc Assistant A		
RE: University		

“Unnecessary program duplication is part and parcel of the prior segregated system of higher education in Maryland. Under these circumstances, approval of the proposed program would be a continuation of a policy and practice, at least in this instance, that is a vestige of the prior segregated system. Rather than eliminating a vestige of the dual system, the State would be maintaining a vestige.”

# Maryland Concedes Program Duplication and Limited Missions are Traceable in 2006 Committee I Report

## Report of Committee I

Partnershi  
United S

In accordance with the “Partnership Agreement,” the Maryland Higher Education Commission (MHEC or “the Commission”) has an obligation to remedy all policies and practices in the Maryland Higher Education System traceable to a prior system of segregated education. This was embodied in Commitment 8. There are two aspects of this commitment:

- (1) avoidance of unnecessary program duplication among geographically proximate Historically Black Institutions (HBIs) and Traditionally White Institutions (TWIs); and
- (2) expansion of mission and program uniqueness and institutional identity at the HBIs.

# The 3 Challenged Policies Affect Student Choice

“Two broad categories of practices ... inhibit “free choice” by students as to university attendance. The first category comprises policies that have the effect of discouraging or preventing blacks from attending HWIs... . The second category consists of policies that discourage whites from seeking to attend HBIs, examples of which include: **duplication of programs at HBIs and HWIs in the same geographic area; the assignment to HBIs of institutional missions that restrict them to programs of instruction that cannot effectively attract whites; and the failure to fund HBIs comparably to HWIs or to locate high-prestige programs at HBIs.** As a result of such policies, disproportionate numbers of whites *can* satisfy their curricular desires at HWIs, and *cannot* satisfy them at HBIs, thereby discouraging them from choosing to attend HBIs.”

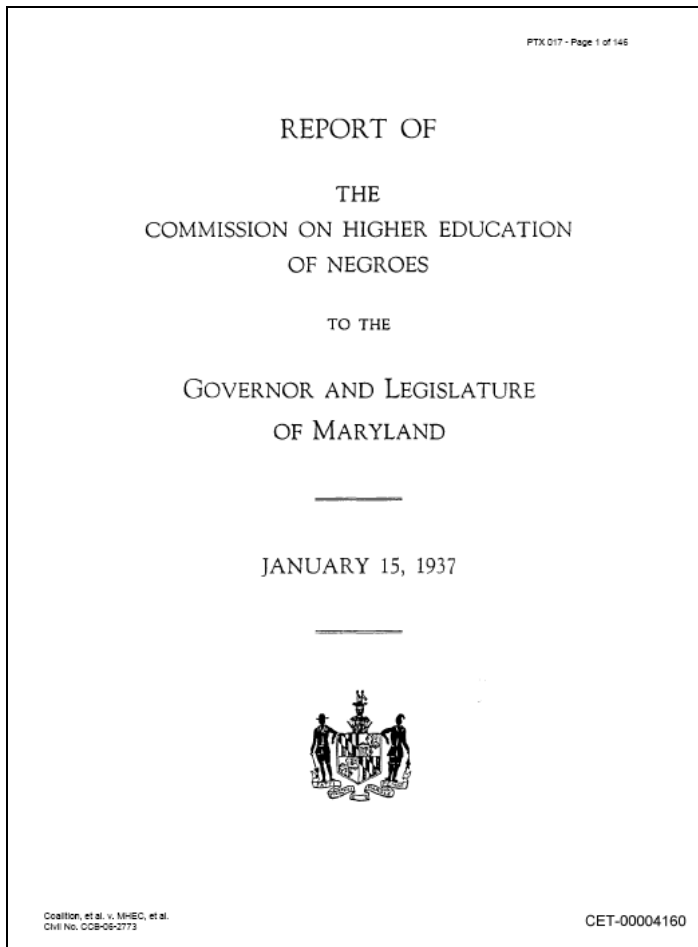
*Knight v. Alabama*, 14 F.3d 1534, 1541 (11<sup>th</sup> Cir. 1994).



# Overview of Maryland's De Jure History

- Chronicled in official state reports from the de jure era through the present
- Put HBIs at a tremendous disadvantage in comparison to the TWIs

# “Enormous Differential In Favor of The White Race”



“In the field of higher education, *while the State has fostered white colleges for one hundred and fifty years it made its first grant to a Negro college in 1914 or twenty-two years ago. ...* The contrast between the amounts of money received by the two racial groups would show, if possible of computation, an enormous differential in favor of the white race.”

# 1937: “Deficiencies” in Curriculum, Library and Labs

PTX 017 - Page 1 of 146

REPORT OF  
THE  
COMMISSION ON HIGHER EDUCATION  
OF NEGROES  
TO THE  
GOVERNOR AND LEGISLATURE  
OF MARYLAND

JANUARY 15, 1937



Coalton, et al. v. MHEC, et al.  
Civil No. CCB-06-2773

CET-00004160

“On the academic side, the curriculum has always been weak because of lack of adequate library and deficiencies in instruction in modern languages, but more especially in laboratory work in the sciences.”

“One doubts that the equipment is sufficient to offer the most elementary courses in the physical sciences. In comparison with the numerous laboratories at the University of Maryland, replete with modern apparatus ... .”

# 1937: Limited De Jure Program Offerings

PTX 017 - Page 1 of 145

REPORT OF

THE

COMMISSION

8. Aside from the scholarship provisions, several of the important functions exercised by white institutions are entirely missing in the program of the Negro institutions.

GOVERNOR AND LEGISLATURE

OF MARYLAND

14. Only one Negro institution of higher learning is accredited by the standardizing body.

15. The instruction in the Negro institutions, generally speaking, is considerably inferior to that provided in the white institutions.

16. Negro students have no opportunity, as white students have, to obtain a bachelor's degree, or four years' work, in elementary education.

Coallton, et al. v. NHEC, et al.  
Civ. No. CDB-06-2773

# 1937: Limited De Jure Program Offerings

PTX 017 - Page 1 of 145

COMMISSION

23. Business education is almost entirely neglected in the Negro institutions while strongly stressed in several white colleges.

GOVERN

24. Health and physical education are not stressed as strongly or taught as efficiently in the Negro institutions as in the white, notwithstanding the greater health needs of the Negro race.

J

25. Fine arts instruction, that is, in art and music, is much superior in the white institutions. In addition, the state and Baltimore City appropriate considerable sums to the Maryland Art Institute which excludes Negroes.



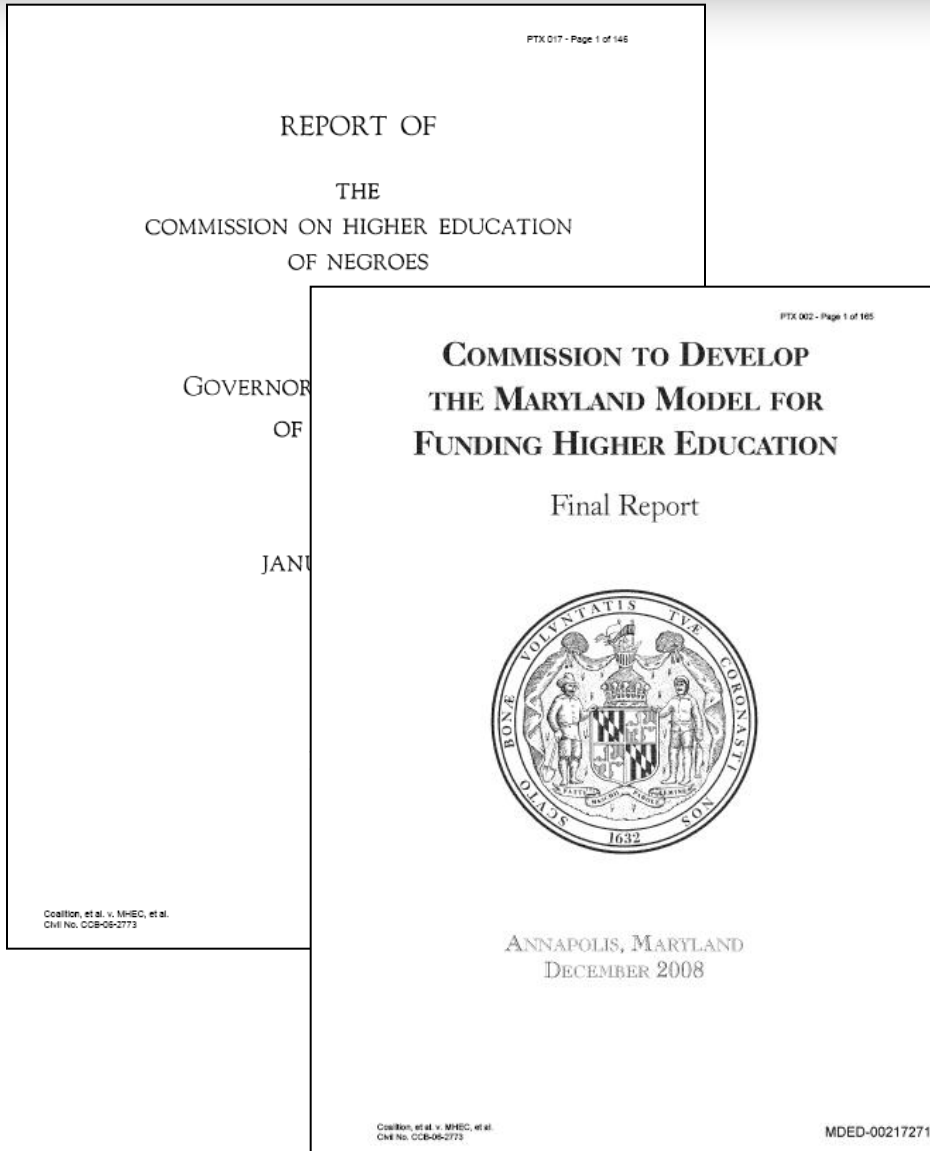
Coallton, et al. v. NHEC, et al.  
Civil No. CDB-06-2773

27. Research graduate opportunities do not exist for Negro students. This, in spite of a real need, and of the actual feasibility of such opportunities.

# 1937: Discrimination Limited Growth of Historically Black Institutions

“From these figures we may reasonably conclude that the enrollment of white state-aided institutions is very much more stimulated by the aid given than is the case with the Negro institutions. We may also conclude that the enrollment in the Negro institutions would be very considerably greater if State aid to Negro students were on a par with that offered white students.”

# De Jure Origins of Dual Mission

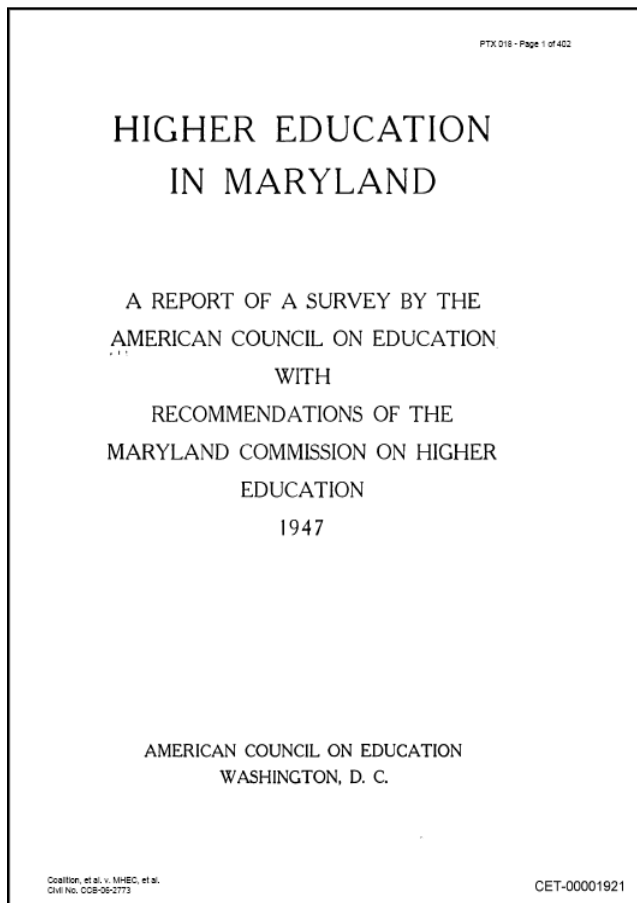


**1937:** “It will be granted that, generally speaking, Negro college students come from economic environments much less likely to provide them with funds for higher education than is the case with white students. In other words, Negro students really need more assistance from public funds than white students.”

## Continuation of Dual Mission:

**2008:** “HBIs need a different form...because unlike the TWIs, the HBIs have a dual mission: (1) to carry out their regular collegiate programs...and (2) to provide strong programs in developmental education to ensure access and success to students, mostly from low-income families, who otherwise would not have an opportunity to pursue a bachelor’s degree.”

# 1947 Report Calls for Equal Funding of Black Schools



“The state has consistently pursued a policy of providing higher education facilities for Negroes which are inferior to those provided for whites. The meager appropriations and the inferior accreditation status of the Negro colleges attest to this fact.”

“It seems to us that the state's obligation to afford equal facilities requires the adoption of a policy of supporting institutions for the higher education of whites and of Negroes at the same financial level.”



# 1947 Princess Anne: “Shamefully Neglected”

“Princess Anne College is now a branch of the University of Maryland. Under this arrangement the development of the Negro land-grant college has been shamefully neglected. Without question it is the weakest land grant college anywhere in the United States.”


(PTX 18 at CET-00002268.)

# 1950 Report Describes “Continuous Uphill Struggles”

Maryland  
LC  
2902  
1376  
1950

PTX 826 - Page 1 of 76

*Report*  
AND  
*Recommendations*  
OF THE  
COMMISSION  
TO STUDY THE QUESTION OF  
NEGRO HIGHER EDUCATION  
To  
THE GOVERNOR  
THE LEGISLATIVE COUNCIL  
And  
THE GENERAL ASSEMBLY OF MARYLAND



*In compliance with Senate Resolution  
approved April 1, 1949*

June 30, 1950

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CM No. CGS-05-2773

CET-00003919

The continuous uphill struggle on the part of the Negro colleges to secure facilities on a par with white institutions is a factor which cannot be overlooked in a survey of this kind.

The position of Maryland State College at Princess Anne has been an anomalous one almost from its very inception and it has always been forced to play the role of an unwanted step-child.

# Maryland Largely Ignored The Brown Decision

**Defendants' Statement of the Case (Dkt. No. 178), at 2-3:**

“For a number of years there continued to be at best benign neglect of the State’s obligation to desegregate and at worse outright hostility and foot-dragging.”

# 1955: Limited De Jure Program Offerings

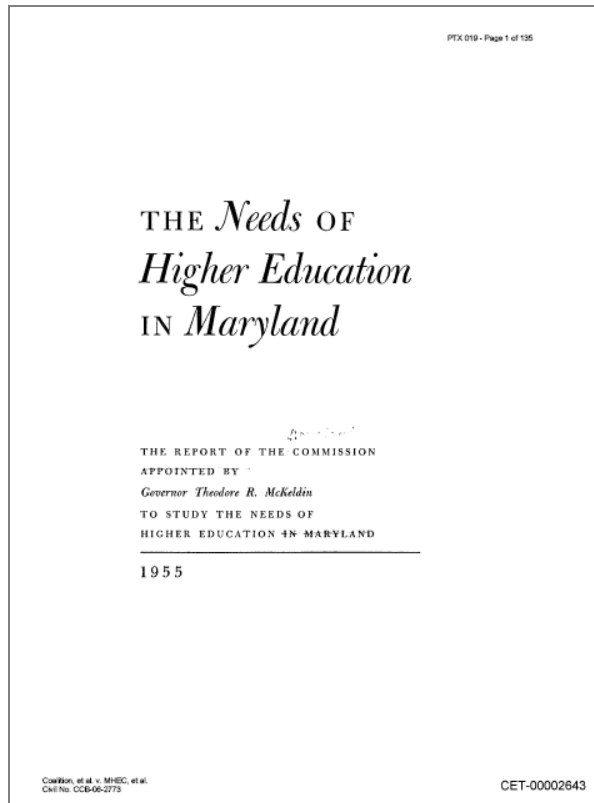


TABLE 7 Types of Programs Offered

Institution	Junior college	Liberal arts	Teacher education	Graduate professional
Baltimore Jr. College	X			
Carver Jr. College	X			
Hagerstown Jr. College	X			
Montgomery Jr. College	X			
St. Mary's Seminary Jr. College	X			
Villa Julie Jr. College	X			
State Teachers College, Bowie			X	
State Teachers College, Coppin			X	
State Teachers College, Frostburg	X		X	
State Teachers College, Salisbury	X		X	
State Teachers College, Towson	X		X	
College of Notre Dame		X	X	
Goucher College		X	X	X
Hood College		X	X	
Loyola College		X	X	X
Maryland State College (Pr. Anne)		X	X	
Morgan State College		X	X	
Mt. St. Agnes College		X	X	
Mt. St. Mary's College (Emmitsburg)		X	X	
St. John's College		X		
St. Joseph's College		X	X	
Washington College		X	X	
Washington Missionary College		X	X	
Western Maryland College		X	X	X
Johns Hopkins University		X	X	X
University of Maryland		X	X	X
Baltimore College of Commerce				
Eastern College of Commerce & Law				
Maryland Institute		(1)		
Peabody Conservatory of Music		(1)	(2)	X
University of Baltimore	X			X

<sup>1</sup> Fine arts.    <sup>2</sup> Some teacher-training courses.

# Maryland Refused to Expand Missions Of HBIs

By 1960, HBIs had expressed a desire to expand their mission, and state reports advocated mission expansion.

**Fleming, 'Desegregation in Higher Education in Maryland' 1958:** "These colleges believe, also, that as their facilities are improved, they will attract white students, as well as many Negro students who now go to out-of-state institutions."

**Framptom Commission Report, 1960:** "Morgan State College would serve as a branch of the University of Maryland in the Baltimore area far more logically than the State Teachers College at Towson."

# 1960-66 Maryland Refuses to Expand Role of Morgan State

- 1960 -- Framptom Commission recommended that Morgan be expanded to serve role of principal institution in Baltimore. Maryland ignored recommendation
- 1966 -- Maryland establishes entirely new institution -- UMBC

# 1970's – Maryland Ignores Report That Would Have Made UMES Principal Institution on Eastern Shore

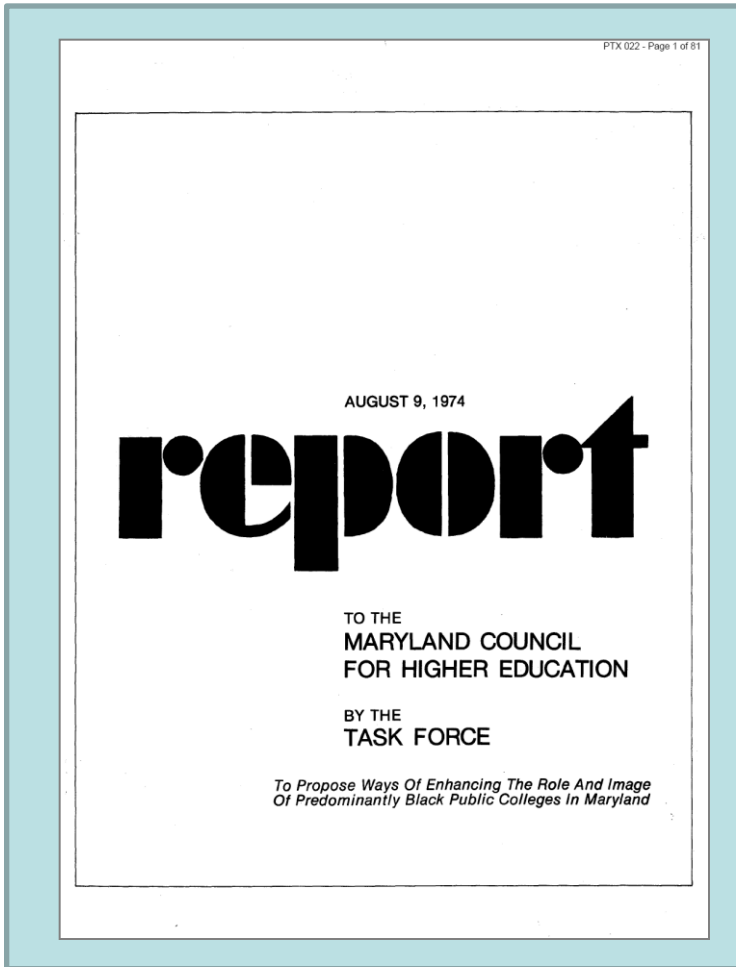
“Salisbury State College should change its function and be converted into a two-year community college. Maryland State [UMES] should remain a four -year institution and might be put within the state college system.”

*1970 Report*

In 1975, a Governor’s panel recommended merging SSU into UMES because the merger “would result in a better opportunity for students of both, better teaching and learning situations for all, and a more adequate service to the community.”

*Final Report of the  
Governor’s Commission on  
Education (1975)*

# 1974 Cox Commission Recommends Special Funding for HBIs



The first conclusion reached by the Task Force was that certain inequities and disadvantages which can be attributed to insufficient State fiscal support in terms of per capita wealth and public attitudes about all higher education in Maryland, have been faced particularly by Black colleges since their beginnings. Black colleges filled the need that was precipitated by racism, denial of opportunity, and repression. This need was to provide

## *RECOMMENDATION 1:*

A DEGREE OF CONSCIENTIOUS FUNDING -- BEYOND THE CONVENTIONAL FUNDING -- MUST BE PROVIDED TO ALLOW THE HISTORICALLY BLACK COLLEGES TO FURTHER ENHANCE THEIR ROLE AND IMAGE, AND TO DEVELOP INTERNAL MANAGEMENT SYSTEMS TO ACHIEVE GREATER EFFICIENCY IN REALIZING INSTITUTIONAL OBJECTIVES. WE FURTHER RECOMMEND THAT THIS SPECIAL FUNDING BE INITIALLY REFLECTED IN THE FISCAL 1976 BUDGET OF THE STATE OF MARYLAND.

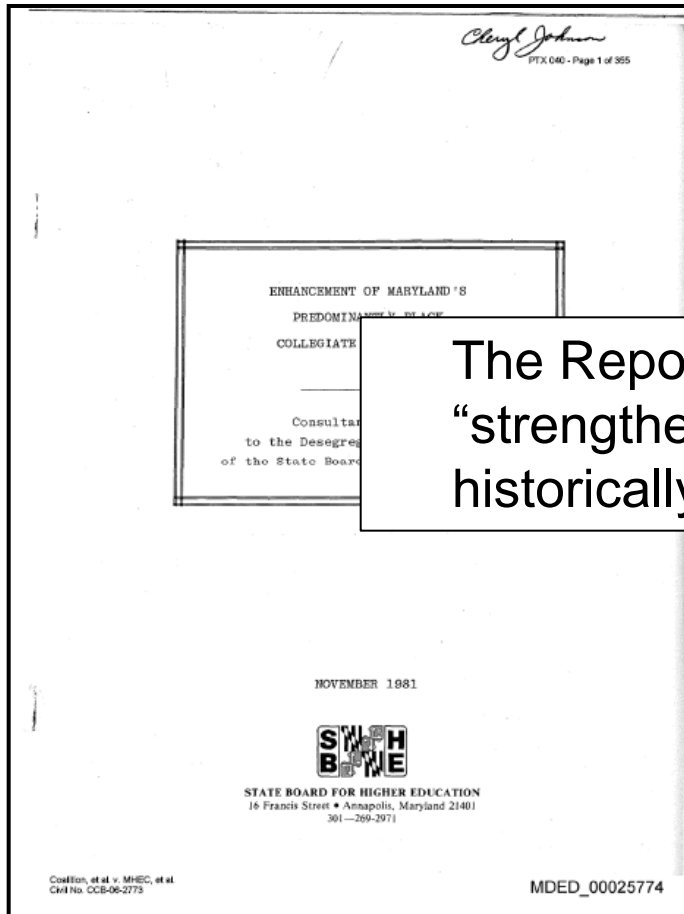


# 1975-Maryland Acquires University of Baltimore Rather Than Invest in Morgan

- In 1975, Maryland acquired the bankrupt University of Baltimore
- Originally only offered upper-division undergraduate programs (Jr/Sr) and graduate programs
- Fall 2007 – University of Baltimore admits Freshman and Sophomores

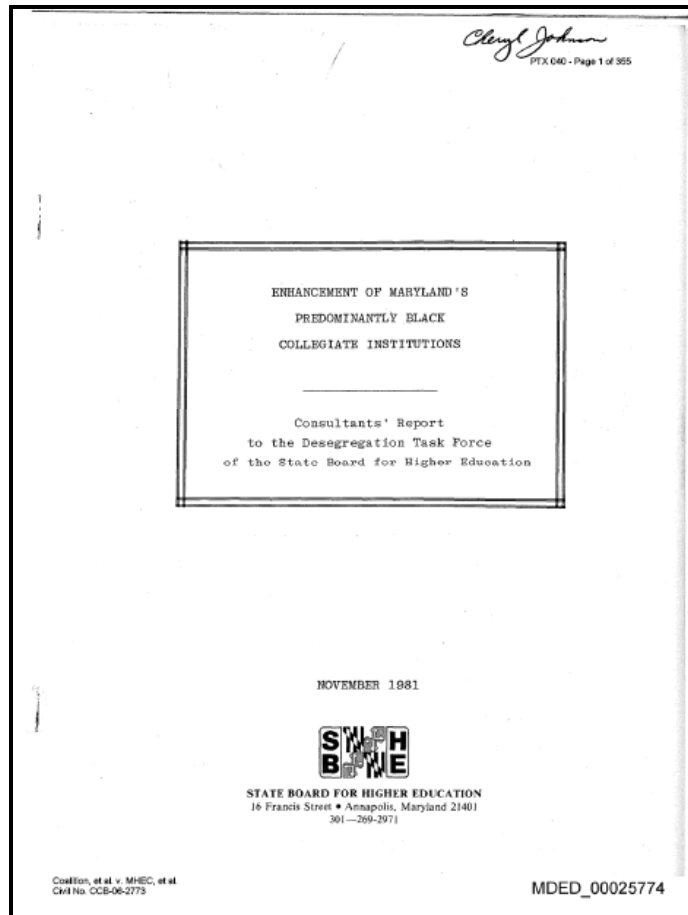
# 1981 Report Documents Continued

## Limited Role and Missions



The Report calls upon Maryland to “strengthen the **role and mission** of the historically black institutions”

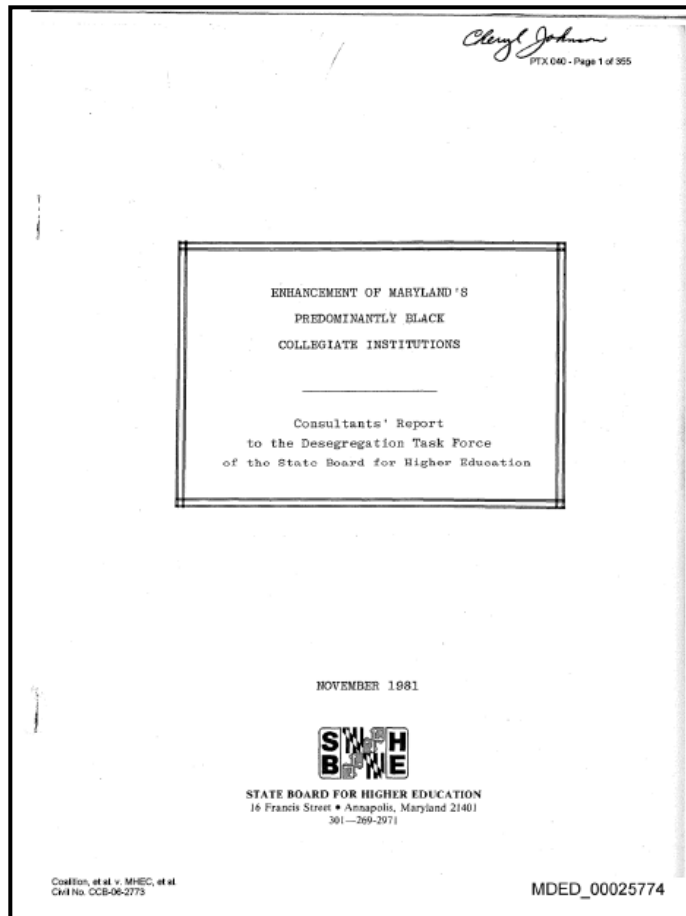
# 1981: Continuation of De Jure Conditions



“From evaluation of the overall quality and condition of facilities and equipment, three notable deficiencies stand out among the Black Institutions:

1. The deplorable condition of science laboratories.
2. The pronounced need for improved support for equipment maintenance and replacement.
3. The generally poor condition of the residential space.”

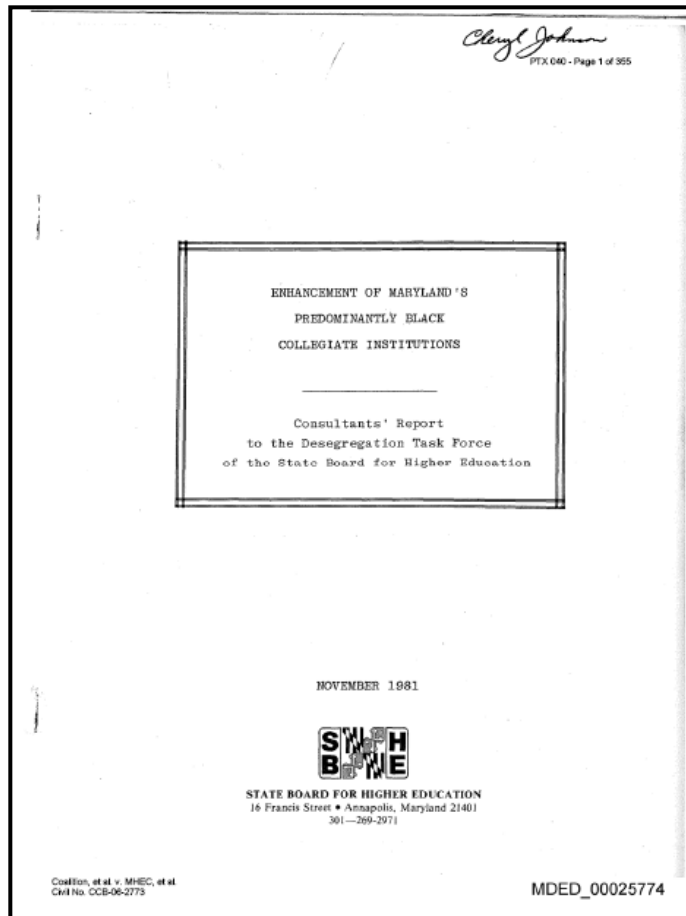
# 1981: Report Calls for Increased Library Funding



“The libraries of the four historically black institutions are in need of new, expanded financial support, consistent funding . . .

Failure to respond and correct these problems can only add to the current shortcomings of the library system . . . . If steps are not taken now to overcome the situation, the damage will continue and become permanent.”

# 1981: Report Calls for Increased Maintenance Funding



“Most of the campuses, notably Morgan and UMES, suffer from a serious burden of ‘deferred maintenance.’ While the reality of tight budgets and fiscal constraints cannot be ignored, **a definite and equitable plan is essential to restore the rapidly deteriorating segments of the campuses’ physical plant.**”

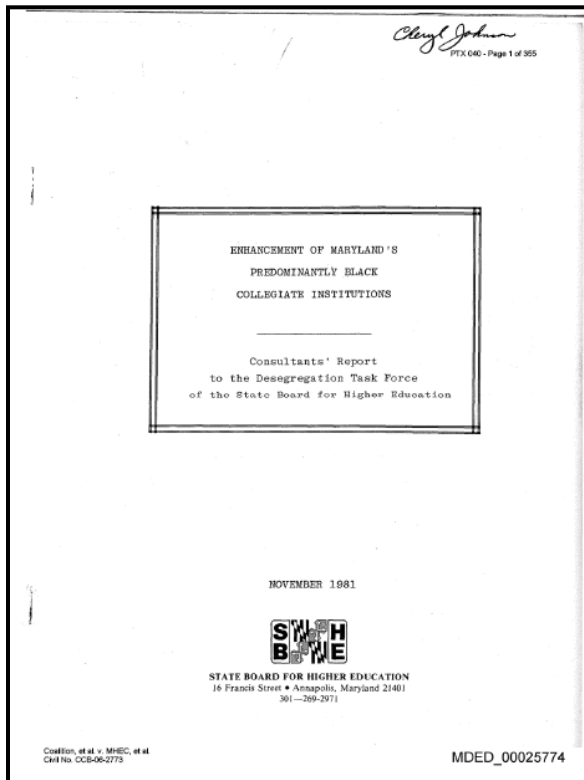
# 1981: Chronic Underfunding

“Coppin appears to lack sufficient funds for proper equipment and maintenance. Staff cutbacks had been especially severe, and funds for equipment, replacement of burned out lights, etc., are short.”

“UMES has had continuing difficulty with the air conditioning unit for several years. It now may require complete overhaul, and was non-functional at last report. In addition, the processing area in Douglass Library is crowded and located in an area which partially blocks an emergency exit.”

“At Morgan, the infirmary was forced to abandon one of its examination rooms due to a serious roof leak.”

# 1981 Report: Morgan v. UMBC and Towson



“Any student who visited the neat, trim, well-kept, well-supplied, clean, freshly painted, well-lit classrooms, halls, studios and seminar rooms at UMBC or Towson and then compared them with Morgan would immediately choose the former regardless of the quality of the program.”

“Any student, parent, or counselor who visited UMBC would be extremely impressed and excited about it. ... As mentioned earlier, the contrast with Morgan in almost all cases is **extreme**. Only the dedication of the faculty seems to compare.”

# 1981 Report: Bowie, Coppin “Inadequate”

## *Bowie and Coppin*

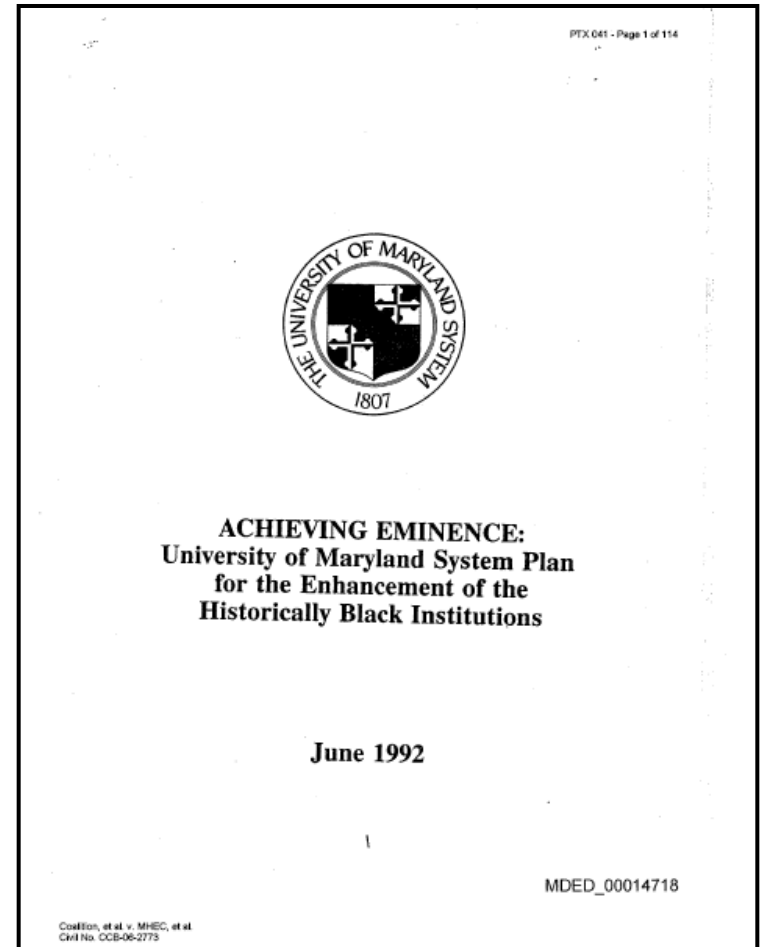
“Limited resources affect the ability of Bowie and Coppin State Colleges to offer quality teacher education programs on a parity with those at Towson State University.”

“Bowie and Coppin have inadequate equipment for science education. If institutions such as Bowie and Coppin are expected to offer quality programs which will in turn produce quality graduates, then these institutions must be funded at a level that will assure effective programs.”



# 1992 Maryland Commits to Remedy Underfunding of HBIs But Fails To Do So

“In developing enhancement plans, it became clear that the achievement of eminence for the historically Black institutions must address... “catch-up,” which includes funding of enrollment increases that over the years have had limited or no General Fund support, and areas of under-funding which include, for example, scholarships, student services, information technologies, libraries, and other institutional infrastructures”



# Cumulative Effect of Underfunding

“Discrepancies in funding grow and become embedded over the years. ‘A discrepancy of a few hundred dollars in spending per student may have little impact in a single year, but if this discrepancy continues year after year, sometimes less and sometimes more, the basic fabric of the institutions being disparately treated begins to vary more and more.’”

–*Knight*, 900 F. Supp. at 311.

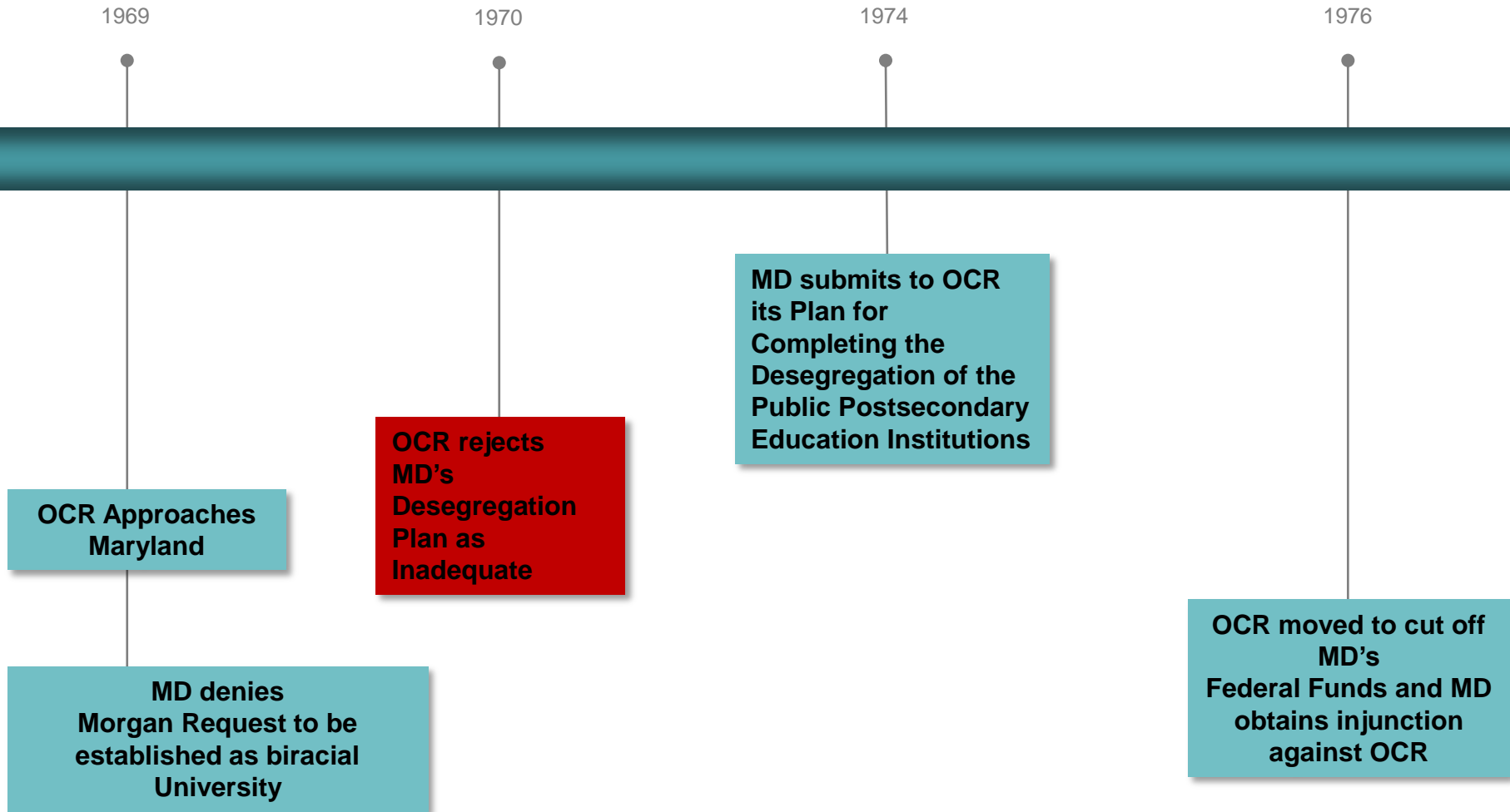
# Maryland's History With OCR

- Began in 1969
- In 2000, reached Partnership Agreement

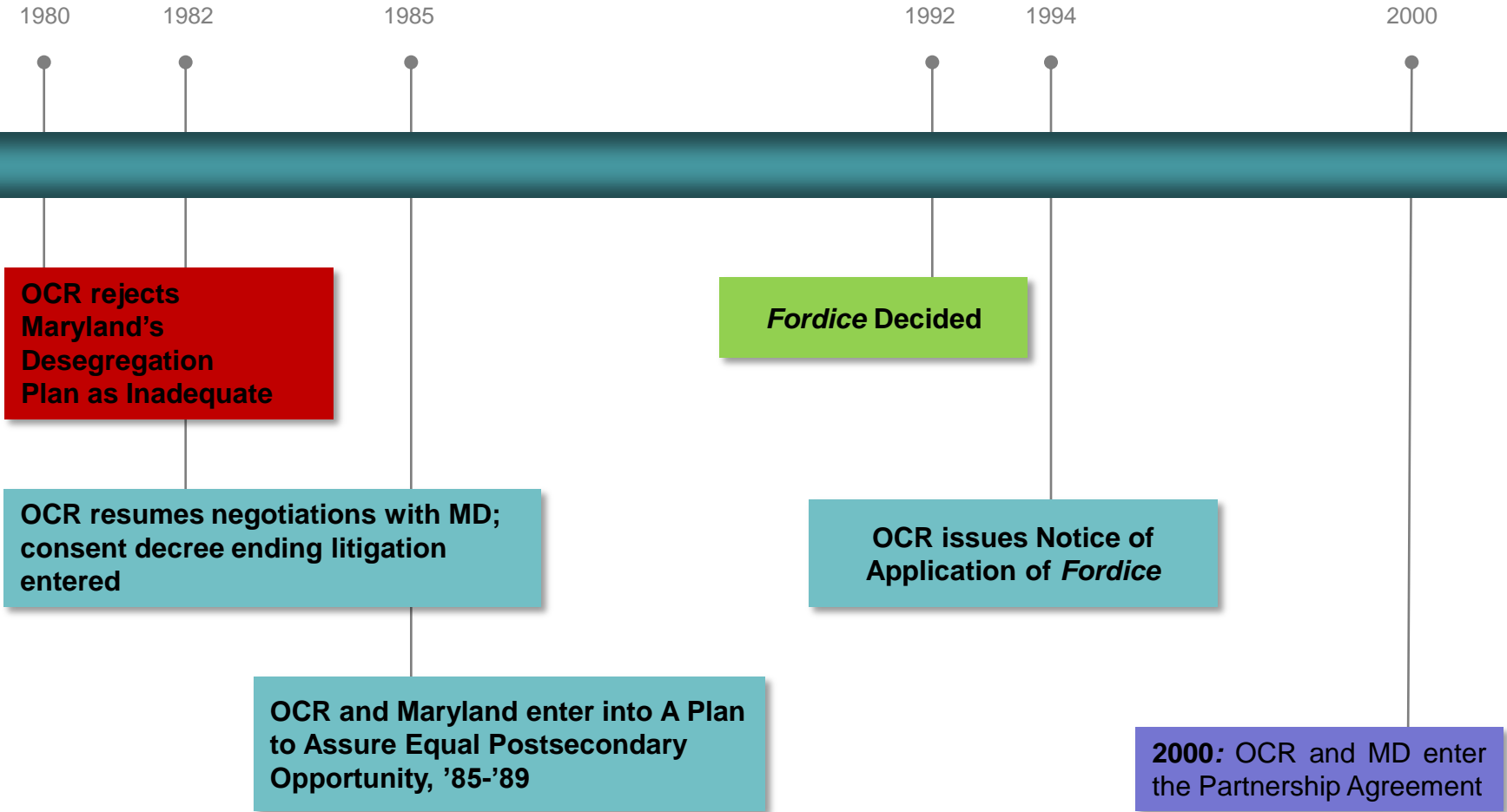
# 1969 OCR Notice To Maryland

“In 1969, OCR notified the State of Maryland that it was one of ten states operating a racially segregated system of higher education in violation of Title VI and applicable federal law.”

# Maryland's Negotiations With OCR



# Maryland Negotiates With OCR, While Refusing To Expand Mission of Historically Black Institutions



# Plaintiffs' Expert Dr Clifton Conrad Worked With OCR To Identify Traceable Policies With Segregative Effects

- Partnership Agreement Commitment #8
- Partnership Commitment #9

# Maryland's AG Agreed The 2000 Partnership Agreement Identified Policies With Segregative Effects

## 2005 Maryland Attorney General Opinion: Legal Advice to MHEC

“Finally, you asked us to identify other factors that should be evaluated in an effort to determine whether Maryland has dismantled its *de jure* segregated higher education system. The answer to this question is informed by Maryland’s decades of work with OCR, spanning multiple desegregation plans, to identify **policies** with **segregative effects** and to implement appropriate remedies. The **consensus** reached by Maryland educators and OCR officials undoubtedly identified the universe of areas where remediation might be appropriate.”



# Maryland's Signatory To Partnership Agreement Testified Partnership Agreement Addresses Vestiges of Segregation

## Testimony of Mr. John Oliver

Q. Did MHEC understand at the time of the initiation of the Partnership Agreement that vestiges of segregation still existed in Maryland?

THE WITNESS: Yes.

Q. How do you know that?

A. We signed an agreement recognizing that there was a need reflected in these commitments to address the vestiges, which were in essence generally articulated in those nine commitments.

Q. Is it fair to say that by signing the Partnership Agreement, MHEC understood there to be vestiges of segregation?

A. Yes.

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# 2000 Partnership Agreement Addresses 3 Segregative Policies/ Practices

## Policy/Practice:

Assignment of More Limited Mission to HBIs

Approving Unnecessarily Duplicative Programs

Underfunding HBIs through funding formula

## Educationally-Sound Remedy

Maryland agreed to expand missions of HBIs and provide unique, high demand academic programs. (PTX 4 at 32.)

Maryland agreed to avoid unnecessary program duplication. (PTX 4 at 32.)

Maryland agreed to fund HBIs sufficiently to allow them to compete for white students with TWIs. (PTX 4 at 35.)

# 2000 Partnership Agreement Included The Goal of Attracting White Students To HBIs

“At the October 25, 1999 meeting, it was agreed that the State of Maryland would engage in this review [of desegregation] through a partnership approach with OCR. During this meeting, OCR informed Maryland that, based on its analysis, it would focus the review on the following issues:

1. Enhancing Maryland’s four HBUs in order to improve educational opportunities for African Americans students who attend them and to increase their attractiveness to students of all races, especially white students, including addressing the problem of unnecessary academic program duplication among the HBCUs and geographically proximate TWIs.”

# The Partnership Agreement Commits Maryland To Desegregating Its Historically Black Institutions

Maryland agrees “to assure that African Americans have equal access to public higher education in Maryland at the undergraduate, graduate and professional levels in desegregated institutions, including desegregated TWIs and HBCUs.”

# Partnership Agreement Recognized Desegregation Requires Expanding Role, Mission of HBIs

The objectives and strategies include “enhancing the missions of HBCUs and their enrollment of non-African American students; strengthening the undergraduate and graduate programs at HBCUs; developing high-demand unique academic programs at HBCUs; avoiding unnecessary program duplication at geographically proximate HBCUs and TWIs.”

# Partnership Agreement Recognized Desegregation Requires Additional State Investments In HBIs

“Additionally, the Plan recognizes that sustaining a desegregated system will require additional State investments in HBCUs as well as a commitment to programs that improve the educational opportunities for African American students.”

# Commitment #8

- “Avoiding Unnecessary Program Duplication of and Expansion of Mission and Program Uniqueness and Institutional Identity at the HBCUs”
- “The State will take appropriate steps to ensure that unique, high demand and other programs that are approved for HBCUs by operation of law or by MHEC, for the purpose of promoting their institutional competitiveness and ensuring that these institutions attract students regardless of race”

# Commitment #9 Enhancing HBIs

“[T]he State commits to design measures which ensure that HBCUs are comparable and competitive with the TWIs in all facets of their operations and programs, as soon as possible and before the expiration of this Agreement. These measures will be designed to ensure that these institutions provide equal opportunity for a quality education to all students who choose to attend them and to enable them to compete for and be attractive to students regardless of race.”



# 2001: OCR Expressed Concern About Maryland's Funding of HBIs

“OPERATING FUNDS: ... Our analysis of that information [funding data] found that the funding actually approved for Maryland TWIs represents increases for the *TWIs as a whole that were substantially greater than the increases in funding for Maryland's HBCUs. Indeed*, rather than enhancing the position of the HBCUs in relation to the state's other public four year institutions, these funding decisions are likely to move Maryland further away from the goal of comparability.”

## 2005: OCR Expressed Concern Maryland Misinterpreted *Fordice*, Allowing Duplication of Morgan's MBA Program

“We are concerned that MHEC has misinterpreted the requirements of Title VI of the Civil Rights Act of 1964 and the U.S. Supreme Court’s *Fordice* decision, as they relate to unnecessary program duplication during the desegregation of a formerly *de jure* system of higher education.”

# Maryland Employs Wrong Standard For Unnecessary Program Duplication

## Testimony of Sue Blanshan, Maryland 30(b)(6) Witness

Q. Thank you. Are you familiar with the phrase "unnecessary program duplication"?

A. Yes, somewhat.

Q. What does that refer to?

MS. BAINBRIDGE: Objection.

BY MS. HARRIS:

Q. You may answer.

A. It is not a term that we utilize in program review. We look at unreasonable program duplication that causes unnecessary harm.

## 2005: AG's office Advises Maryland Is Fostering Segregation By Allowing Duplication of Morgan's MBA Program

- “Under these circumstances, approval of the proposed program would be a continuation of a policy and practice, at least in this instance, that is a vestige of the prior segregated system. Rather than eliminating a vestige of the dual system, the State would be maintaining a vestige.”
- “Perhaps most alarming is a complete lack of an analysis regarding the possibility of accomplishing legitimate educational objectives through less segregative means, particularly in light of existing programs at HBIs that are not at capacity.”

# 2005: HBI Presidents Object to Limited Missions And Program Duplication

- “Historically, HBIs have had relatively narrow missions and substantially fewer academic programs than majority campuses. This has limited their attractiveness to students of all races.... However, rather than become more distinct, campuses have tended to become more duplicative of one another in recent years.”
- “[T]he position of these four institutions threatens to deteriorate even further as certain TWIs are being targeted as growth institutions and any uniqueness in mission and programs between HBIs and TWIs is being systematically eroded.”

# 2005: HBI Presidents Note Insufficient Funding Prevents Expansion of Missions

- “The commitment to operating budget enhancement at HBIs in the Plan unfortunately is weak ... **This approach generally makes it difficult for campuses to expand their missions ...**”
- “It is apparent that the State has treated HBI enhancement as an effort that can be compartmentalized into minor components and as a short-term commitment. This can no longer be the case. HBIs need to offer students the same quality and range of educational experiences as students attending other campuses receive. ... A good indicator of the extent to which HBIs are competitive with their peers will be the extent to which they will be able to compete for and attract students **of other races** based on program quality instead of how much scholarship they offer... .”

# HBI Presidents Call For Expanded Missions

## 2005 Report Calls for Appointment of Panel of Experts To Study:

- “How the missions of HBIs can be expanded and made more substantive. How to ensure that when new academic, research, and service programs supporting the expanded missions are developed at HBIs they will be adequately funded rather than requiring support to be re-allocated from existing programs. What measures are necessary to ensure mission and academic program[s]...”

# Dr. Clifton Conrad Has Confirmed Concerns of HBI Presidents

## Limited Role and Missions

HBIs have more limited role and missions than TWIs. (Unique high demand programs 11 HBI -122 TWI.) No academic programmatic identity other than as “black colleges.”

## Unnecessary Program Duplication

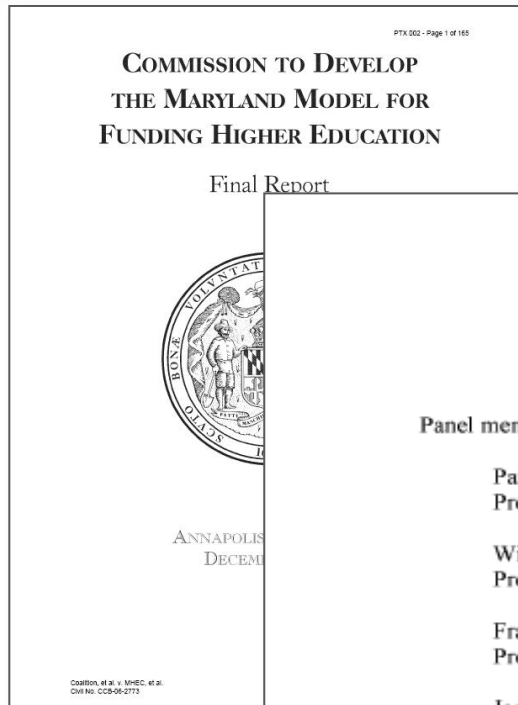
Widespread in Maryland. More Unnecessary Program Duplication Than in *Fordice*.



# 2008 Bohanan Commission To Study Higher Education Funding

- “[I]ncludes senators, delegates, cabinet secretaries, college presidents, higher education association presidents and executive directors, members of the business community and members of the public.”
- Charged “with reviewing options and making recommendations relating to the ***appropriate level of funding*** for the state’s historically black institutions (HBIs) to ensure that they are comparable and competitive with other public institutions.”

# 2008 Bohanan Commission Creates HBI Study Panel



## **The Panel on the Comparability and Competitiveness of Historically Black Institutions in Maryland**

### **Panel members:**

**Patrick M. Callan**  
President, The National Center for Public Policy and Higher Education

**William B. DeLauder**  
President Emeritus, Delaware State University

**Franklyn G. Jenifer**  
President Emeritus, University of Texas at Dallas

**James M. Rosser**  
President, California State University, Los Angeles

**David S. Spence (Chair)**  
President, Southern Regional Education Board

**Judith A. Winston**  
Former Under Secretary and General Counsel, U.S. Department of Education

# Maryland Has Fully Adopted The Findings of The HBI Panel And Bohanan Commission

*Deposition Testimony of George Reid, MHEC  
Asst. Secretary for Planning & Academic Affairs  
30(b)(6):*

“Q. Is it correct that MHEC believed that the content of the HBI study panel report was accurate?”

“A. Yes.”

# 2008 HBI Panel Called For Change In Maryland Policies/ Practices

## Called upon Maryland to:

- “[R]estructure the process that has caused the inequities and lack of competitiveness between the HBIs and the traditionally white doctoral institutions.”
- “We refer to the process by which a state sets university missions, approves new programs, funds them through some model or process, and then holds universities accountable for results.”

# Missions Are Critical In Maryland Higher Education

## Maryland's Statement of The Case

- “The kind of mission a university develops influences many aspects of its operations. It affects the kinds of programs it offers, the funding it receives, the buildings it constructs, and the students it attracts.”

# Maryland Education Code

*Maryland Shall:*

“Develop a mission for each campus which builds upon the unique strength of the campus and embodies a diversity of programs[.]”

# Maryland Education Code: College Park As Flagship

## College Park– The Flagship

- “Enhance the mission of the University of Maryland, College Park as the State's flagship campus with programs and faculty nationally and internationally recognized for excellence in research and the advancement of knowledge;
- Admit to the campus freshmen who have academic profiles that suggest exceptional ability;
- Provide access to the upper division undergraduate level of the campus for students who have excelled in completing lower division study; and
- Provide the campus with the level of operating funding and facilities necessary to place it among the upper echelon of its peer institutions[.]”

# MD Education Code Missions: UMBC vs Morgan

UMBC	Morgan
<p>“Maintain and enhance an academic health center and a coordinated Higher Education Center for Research and Graduate and Professional Study in the Baltimore area, comprised of the University of Maryland, Baltimore and the University of Maryland Baltimore County, with a focus on science and technology[]”</p>	<p>“Morgan State University: (1) has the responsibility, with other educational institutions, for providing higher education research and graduate study in the Baltimore area, (2) is the State’s public urban university with a mission of instruction, research and service.”</p>
<p>“Enhance and support high quality undergraduate, teacher preparation, and masters programs at the regional comprehensive institutions, recognizing and supporting the unique mission of each of these institutions[]”</p>	



# Maryland Education Code Missions

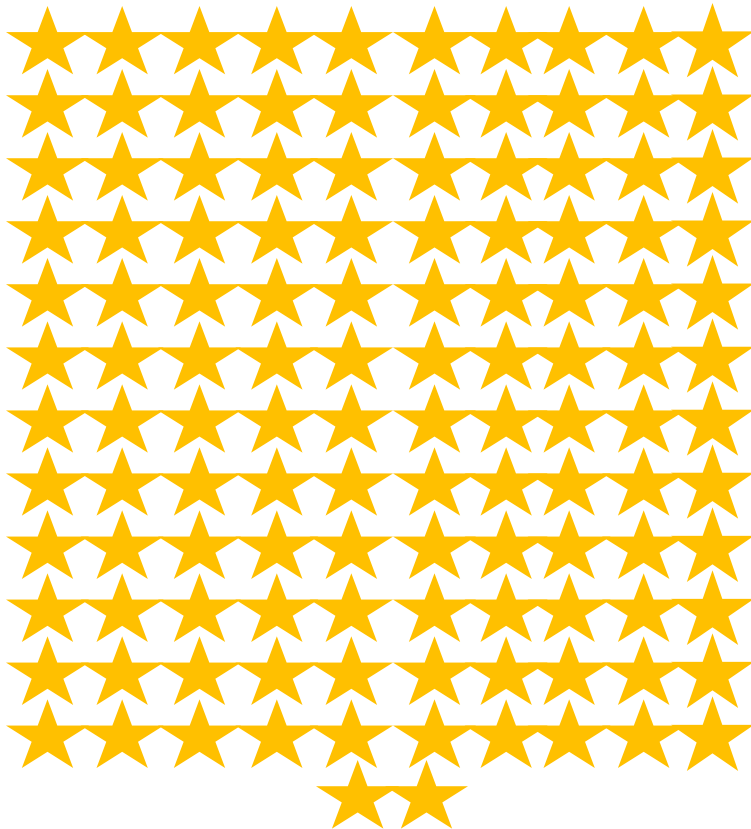
- **TOWSON** -- “Support Towson University as the largest comprehensive institution[]”
- **HBIs** -- “Enhance the historically African American institutions and recognize the role of the University of Maryland Eastern Shore as the State's 1890 land grant institution[]”

# Role And Mission of Maryland HBIs

De Jure Era	Today
Educate Black Students	Educate Primarily Black Students
More Limited Academic Program Offerings	More Limited Academic Program Offerings
Serve, without additional state support, poorer students with substantial remedial needs	Serve, without additional state support, poorer students with substantial remedial needs

# Large Disparity in Unique, High Demand Programs

**Traditionally White  
Institutions: 122 Programs**



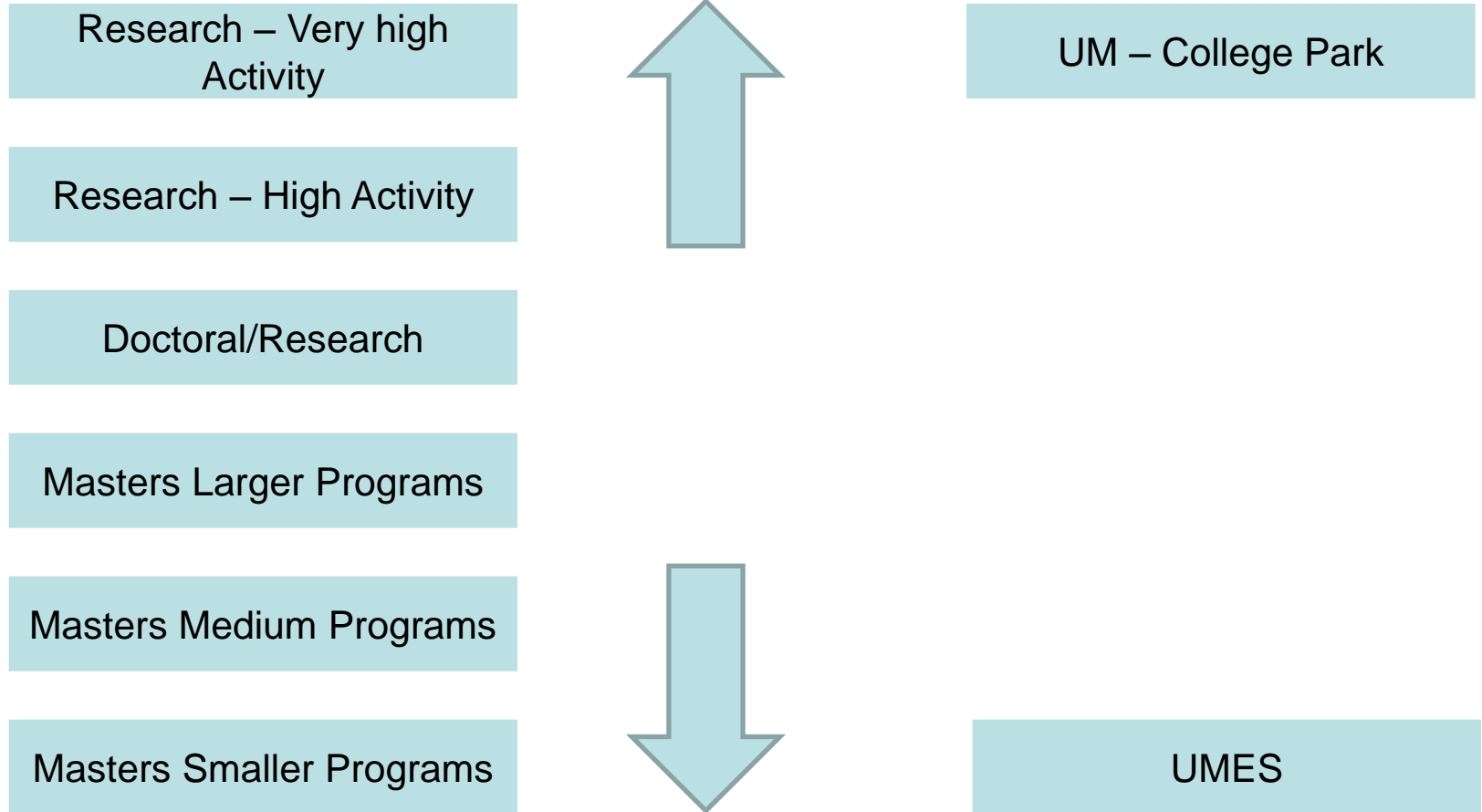
**Historically Black  
Institutions: 11 Programs**



# Example: Morgan State v UMBC

	Morgan State	UMBC
Doctoral Programs	8	19
Carnegie Classification	Doctoral Research	Doctoral Research High Activity
Library Size	378,687 books	1,020,138 books

# Maryland Describes UMES As “Research” Institution But It Lacks Programs And Infrastructure



# Maryland Blames Historically Black Institutions For Their Limited Missions

## Maryland's Statement of the Case

- “Each university determines its own written mission, subject to limited review and comment by MHEC.”

# There Is A Difference Between Mission And Mission Statement

## Mission, Role and Scope in Higher Education

- “A mission is what an institution sees itself to be in a broad philosophical sense, including its major goals, the way it sees its major responsibilities. It has certain aspirational and futuristic aspects to it. Under this technical definition, the State of Alabama has nothing to do with institutional mission.”
- “Role essentially is what an institution does, and generally, with respect to three major functions, instruction, research and public service. Also involved with role would be the clientele that an institution serves.”
- “Scope [is] the extent to which the institution carries out its role or does what it does. In a practical sense, ACHE uses this word referring to the academic program inventory for the instructional scope of an institution.”

*Knight v. Alabama*, 900 F. Supp. 272, 290 (N.D. 1995) (internal citations and emphasis omitted).

# Enhancing Missions Is An Appropriate Remedy Under Fordice

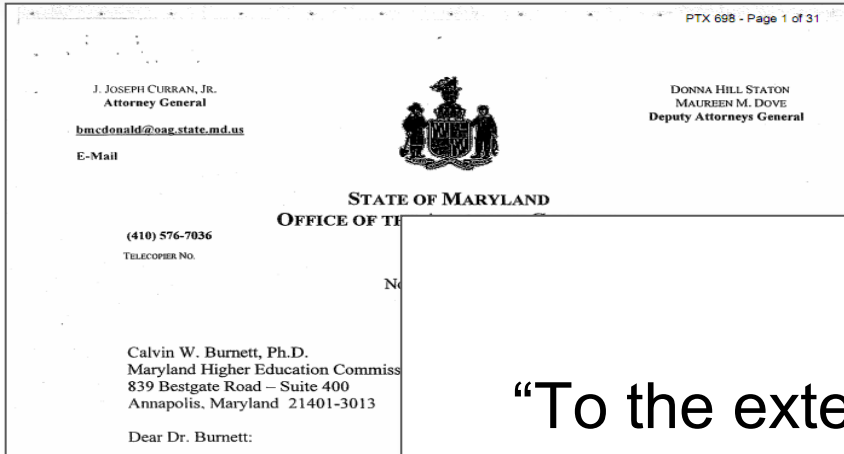
## Knight v. Alabama

“Second, insofar as defendants argue that, as a matter of law, limited missions at HBIs can never be vestiges of segregation having segregative effects, or that HBI mission enhancement can never be required to remedy the effects of past segregation, those contentions fail under *Fordice*. ... However, ... [the Court] expressly held that where upgrading HBIs “is necessary to achieve a full dismantlement [of the prior de jure segregated system],” then such measures can indeed be part of a constitutionally required remedy.”

*Knight v. Alabama*, 14 F.3d 1534, 46 (11th Cir. 1994) citing *Fordice*, 112 S.Ct. at 2743 (internal citations omitted).



# Maryland's Attorney General Has Conceded That Enhancements May Be Constitutionally Required



“To the extent that enhancements are necessary to cure funding inequities traceable to *de jure* segregation, then they are constitutionally required.”

# In Maryland, Funding Flows From Mission And Role

“Base funding in accordance with the role and mission of the institution, as approved by the Maryland Higher Education Commission”

-- Maryland Education Code 10-203(c)(1)

# The HBI Panel Concluded HBIs Need “Substantial Additional Resources”

“There are many indicators that suggest that substantial additional resources must be invested in HBIs to overcome the competitive disadvantages caused by prior discriminatory treatment; the lack of modern state of the art science and technology labs, the aging physical plants and lack of consistent funding for maintenance, the poor retention and graduation rates of students as compared to TWIs, and the large number of low income and educationally underserved students in need of financial assistance.”

# HBI Panel Seeks to Adopt Policies and Practices To Remedy Inequality

“Indeed, one can reasonably assume that had the state consistently treated HBIs over their lifespan in a manner comparable to the treatment of TWIs, the HBIs would currently be competitive with other public institutions in these and other aspects of their operations both at the undergraduate and doctoral levels. The goal is to **adopt a set of policies and practices** that ultimately lead to the achievement of a public higher education system of national eminence in Maryland.”

# The HBI Panel Report Concludes That Maryland's Current Policies And Practices Contribute To Inequality

- “In introducing the section on doctoral education the Panel noted the crucial way that Maryland's process for coordinating higher education state wide contributed to the current situation regarding the comparability and competitiveness of MSU and UMES.”
- “The Commission expressed its openness to the Panel's observations and suggestions for strengthening the state-wide coordination process so that, going forward, there is more clarity in the relationship among program approval or improvement, program funding, and program accountability.”
- “Strengthening this process will be particularly relevant as the State considers requests from HBIs for additional funding to reach the goals of comparability and competitiveness.”

# Maryland's HBI Panel Concludes That Mission Assignments And Funding Marginalizes Historically Black Institutions

- “We refer to the process by which a state sets university missions, approves new programs, funds them through some model or process, and then holds universities accountable for results.”
- Whether intentional or not, the past treatment of the historically black institutions in this process in contrast to the treatment of other public institutions in the state has had the effect of substantially marginalizing the HBIs and their ability to develop and maintain comparable quality and competitiveness in the state’s system of higher education.”

# HBI Panel Concludes That Dual Mission of HBIs Is More Challenging Than Mission of TWIs

- “[T]he mission of the HBIs in providing an undergraduate degree is substantially different and more challenging than that of TWIs. HBIs historically and into the future have a dual mission. They are committed to the traditional mission of any institution of higher education to provide a quality educational experience and guide students to the attainment of an undergraduate degree.”
- “HBIs in the State of Maryland also have as their mission to address the educational needs of students who come from families with traditionally less education and income and who are often under prepared as a result of their circumstances - not their abilities - for college level work. Helping these under prepared students earn a bachelor’s degree is central to the HBI mission. This function for the HBIs is disproportionately more important than in the TWIs.”

## **HBI Panel Called For Strategic Funding Approach That Takes Into Account Cumulative Underfunding of Historically Black Institutions**

“The Commission's charge to the Panel portends its intent to pursue a more strategic approach to the enhancement of HBI programs and facilities to eliminate any vestiges and effects of prior discrimination and the disadvantages created by the cumulative shortfall of funding over many decades. The charge also portends an intent to adopt a strategic funding plan to acknowledge that shortfall and appropriate funds over time that will build the capacity of HBIs and make them comparable in terms of quality and resources to the state's public TWIs.”



# Plaintiffs' Expert Dr. Toutkoushian Has Quantified The "Cumulative" Underfunding Acknowledged By HBI Panel

- Insufficient Data to Quantify De Jure Era Underfunding
- Dual Mission Underfunding: \$450 million from 1990-2009 (uses \$1400 per FTE reported by Bohanan Commission)
- Overall Underfunding (1990-2009)
  - \$2.19 billion in unrestricted revenues
  - \$2.36 billion in total revenues
  - \$644 million in state appropriations

# Dr. Toutkoushian Explains How Funding Formula Relies On Mission

- “For several reasons, the comparator institutions chosen for Maryland’s HBCUs work to their disadvantage and lead to lower levels of recommended funding.”
- “The first reason is that the comparators used for Maryland’s four HBCUs are biased towards more teaching oriented missions, and thus will tend to have less financial resources per student. “
- “Because the de jure system of higher education in Maryland contributed to the HBCUs being assigned less research intensive missions than the TWIs, the comparators chose for the HBCUs are on the whole less-research intensive and this further biases funding against the HBCUs in Maryland.”

# Maryland Agrees HBIs Need Substantial Additional Resources To Be Competitive With TWIs

*Deposition Testimony of Geoffrey Newman,  
MHEC Director of Finance Policy:*

Q. I'm sorry, just to be clear, MHEC agrees that there are many indicators that suggest that substantial additional resources must be invested in HBIs –

A. Yes.

Q. to overcome the competitive disadvantages caused by prior discriminatory treatment?

A. Correct.

# Maryland's 2009 State Plan: HBIs Need Substantial Resources To Attract Diverse Students

Maryland's Historically Black Institutions need “substantial additional resources” for “recruiting, retaining, and graduating, an academically, racially, culturally, and ethnically diverse student body.”

## Maryland's 2009 State Plan: It Is Sound Public Policy & Practical To Increase Funding For Its HBIs

“The State of Maryland has identified as a priority for higher education the goal of providing the funding necessary to ensure that its four public HBIs— Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore – are comparable and competitive with the State’s public TWIs.”

# Maryland's Reports v Maryland's Current Litigation Position

Maryland's Reports	Maryland's Litigation Position
<p>Historically Black Institutions Need Substantial Additional Resources for academic programs, libraries, IT, faculty, science labs, and faculty to overcome past discrimination and compete with Traditionally White Institutions for white students.</p>	<p>On per student basis HBIs are better funded.</p>

# Maryland's Reports v Maryland's De Jure Era Litigation Position

## De Jure Era: Maryland Official Reports

- “The state has consistently pursued a policy of providing higher education facilities for Negroes which are inferior to those provided for whites”
- Conditions are “a disgrace to the state of Maryland”
- Funding: “Enormous differential in favor of the white race”
- “Negro land grant college has been shamefully neglected”

## De Jure Era: Maryland Litigation Defense

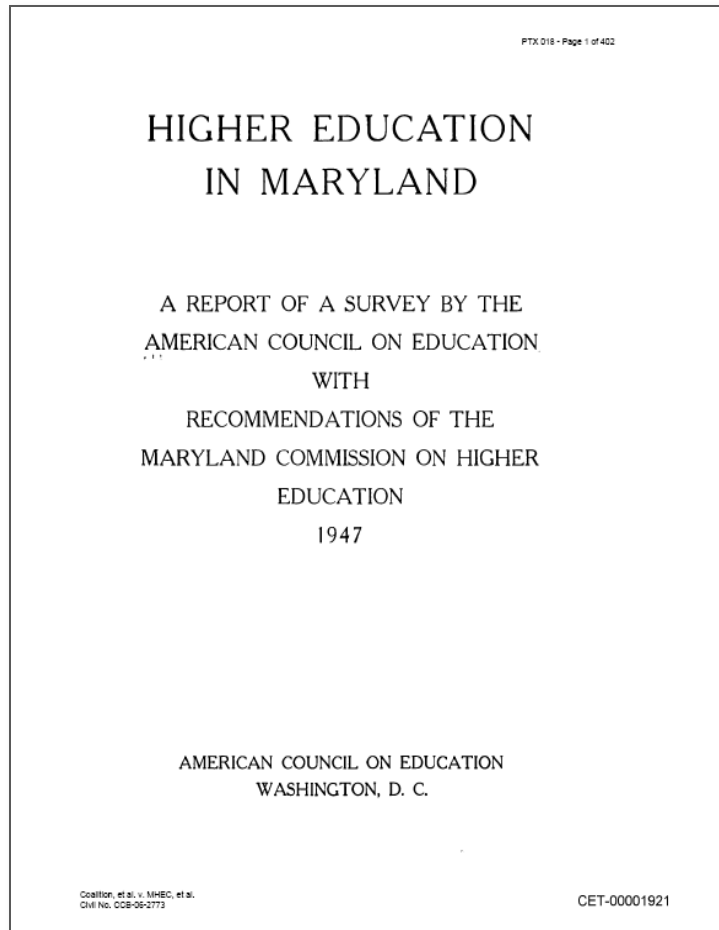
Princess Anne (now UMES) is three or four times better funded on per student basis  
(*Murray v Maryland* -- 1935)

# In 1935, Maryland Argued Black Schools Were Better Funded Than White Schools

	<i>Student enrollment</i>	<i>State appropriation</i>	<i>Amt. spent per Student enrolled</i>
<i>Colored</i>			
Morgan			
1934-35	600	\$23,400.	\$39.
1935-36	600	\$35,000.	\$58.
Princess Anne			
1934-35	33	\$15,000.	\$468.
<i>White</i>			
Un. of Md.			
1934-35	3,600	\$318,000.	\$88.
1935-36	3,600	\$288,000.	\$80.



# But Maryland Reports Recognize Misleading Nature of “Per Student” Comparisons of Larger TWIs To Smaller HBIs



**1947:** “Comparisons between Princess Anne College and any other institution are not appropriate because none of the degree granting colleges has as small an enrollment. Although Princess Anne College spends more per student than the University of Maryland spends, it would need to spend three or four times as much as it now does in order to have anything like a comparable program for its small enrollment.”

# ***Knight* – Economies of Scale**

“Other considerations influence the financial picture. First, the economy of scale means that in general a large school can educate students more economically than can be done at a small school. Second, enrollment trends affect financing. A school with a declining enrollment does not decrease its costs proportionally, and thus a school with a declining enrollment will seem to be better financed than it really is. ...This means, of course, that the HBU's will appear to be in a better financial position than they are in actuality.”

–Knight v. Alabama, 900 F. Supp. 272, 311 (N.D. Al. 1995)

# Conclusion

- Maryland has not eradicated the vestiges of discrimination from the de jure era.
- Maryland's policies and practices regarding mission, funding, and programs are traceable under *Fordice*.