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The Adverse Impact of Inadequate Funding

Last year the Alabama Supreme Court effectively ended the so-called Equity Funding Cases that were pending when this Court entered its 1991 opinion and remedial decree. *Ex parte James*, 836 So.2d 813 (Ala. 2002). See *Knight v. Alabama*, 787 F.Supp. 1030, 1104 n.24 (N.D. Ala. 1991), *aff'd in relevant part*, 14 F.3d 1534 (11th Cir. 1994). The Equity Funding Cases had sought to require the State of Alabama to provide the financial and educational resources needed to ensure that all students in Alabama's K-12 public school system receive an adequate and equal education. The Alabama Supreme Court, although leaving intact the trial court's liability order, has held that the relief sought impermissibly would inject the state judiciary into legislative functions and would violate the state constitution's separation of powers command. Thus the principle of federal deference to state judicial consideration of state law issues, which previously made it premature to raise claims regarding Alabama's school funding system in this action, no longer prevents review by this Court of the impact on this Court's remedial decrees of state constitutional and statutory restrictions on public school revenues.

The *Ex parte James* ruling comes at a time when Alabama's Education Trust Fund, from which appropriations are made for both K-12 and higher education, is experiencing one of its worst financial crises in history. Moreover, the fifteen-year term of this Court's remedial decrees is due to expire August 1, 2005.

This Court has made findings that an educationally sound and practicable remedy for Alabama's historical *de jure* racial discrimination in public higher education cannot be implemented without adequate funding from the State. For example:

The Court realizes that competition for black faculty is best described as keen. Undoubtedly institutions such as Auburn face at best an up-hill battle in attracting qualified black faculty. Without a sincere and genuine effort to do so, Auburn will never be able to eliminate the vestiges of segregation which cling to the racial composition of its faculty to this day. 787 F.Supp. at 1191, ¶956.

Before making its recommendation, ACHE projects how much money will be available to fund higher education based upon projections of the size of the ASETF and bearing in mind the traditional percentage of the trust fund that is allocated to higher education. Rutledge (2/20/91) 149; Sullivan (2/11/91) 50, 57-59. ACHE uses its funding formula to determine how the money available for higher education will be allocated among the various sectors of the public higher education community. Rutledge (2/20/91) 44. 787 F.Supp. at 1194, ¶986.

The total funding formula is composed of the regular academic program formula, combined with the special formulas described above. The total formula, as applied to each institution, generates a figure referred to as the regional standard or, in earlier years, "need." Rutledge (2/20/91) 46.

...

Generally, the money available to fund higher education in Alabama is less than the amount recommended by the formula. Rutledge (2/20/91) 47-48. Since about 1984 or 1985, ACHE has tried to make a recommendation to the Governor and the Legislature that is more akin to what the state might actually provide. Ibid. 787 F.Supp. at 1197, ¶¶ 1012, 1014.

1105. The funds available to an institution and its students have critical effects both on the ability of the institution to educate its students and on its ability to desegregate by attracting other-race students.

1106. Over a period of time the funds available to an institution impact the nature and reputation of the institution, and the mission it can carry out for the state and its citizens. To change these long-term characteristics takes a long-term effort. Specifically, the effects of long-term discrimination in funding cannot be overcome simply by additional funding for a short period. 787 F.Supp. at 1209.

1117. Inequality in funding over a number of years cannot be made up overnight. The funding level over a period of years affects a school's mission, program, facilities, and reputation, all of which can then change only very slowly. Leslie (10/30/90) 30.

1118. Of the major considerations that can affect raw financial comparisons--such as economy of scale, enrollment trends, and historical patterns--the historical patterns are the most important. This is because historical deficits tend to continue over a period of time, and become cumulative, which, of course, means they cannot be erased overnight. Leslie (10/30/90) 30; Leslie (10/31/90) 99. 787 F.Supp. at 1227.

1124. 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." USX 5, p. 39.

1125. Change takes a long time, and does not occur by itself, but rather requires a major effort. "It is extremely rare for an institution to undergo major change in as little as a decade. Where this does happen, there is usually a massive influx of funds." USX 5, p. 39. 787 F.Supp. at 1228.

1130. State funds directly affect an institution's ability to raise other funds. An institution that is better funded can pay higher faculty salaries, which attract professors and researchers who can get research grants from the federal and state governments as well as from private sources. These grants provide supplementary compensation for faculty, which puts the institution in a better market position for hiring strong faculty. These grants also allow an institution to bring in graduate research assistants, who further cut the school's costs by taking on some of the teaching load. Leslie (10/31/90) 125-26. Also related to the funding of an institution is its public service activities.

1131. Broad based public service is important, because it gives an institution a higher profile and an advantage in attracting special state funding. This visibility is also critical in securing private and corporate contributions. Leslie (10/31/90) 126-27.

1132. The financial slack that occurs when an institution has money not directly needed for the day-to-day operations of its basic programs can be put to use developing new programs, especially graduate-level programs, which in Alabama then in turn generate large amounts of money because of the high weights in the funding formula. Leslie (10/31/90) 127. 787 F.Supp. at 1228-29.

262. The Court agrees with Dr. Leslie, "that money is in itself nothing. It's only what money enables an institution to do, and, of course, an institution can use that money very wisely or moderately wisely or whatever. But without money, it's almost impossible to do anything." Leslie (2/28/95) 6. 900 F.Supp. at 306-07

266. The Court finds that, although the State has funded ASU and AAMU better than the other state institutions for at least the last twenty-five years, such funding has not yet put those institutions in the place they would have been but for their black heritage and the de jure system. Formula funding, like Alabama's system, is the effect of cumulative past history. Sullivan (3/8/95) 31.

267. In particular, the lack of funding and, the concomitant dearth of high quality and/or differentiated programs prevents white students who would otherwise attend an HBI, from choosing to do so. Becton (2/23/95) 63; Conrad (2/28/95) 5. General Becton believes that "there will be some students who will not go to A & M. I believe there will be other students who will attend A & M. And I think that once the state gets serious about the business of demonstrating to A & M it is a quality institution, ..., that it will no longer be a concern of being a, quote, black institution, but a quality institution." Becton (2/23/95) 63. General Becton's statement applies with equal force to ASU.

268. Lacking at ASU and AAMU is the reputation as an institution, equal in quality to the proximate institutions, resulting from higher levels of funding and programming. Consequently the underdevelopment hinders the HBI in overcoming white students' and white parents' resistance to attending, or sending a child to, either ASU or AAMU, especially when a high quality PWI exists in the same locale. Conrad (2/28/95) 24-25; Jordan (3/8/95) 22. 900 F.Supp. at 307

368. Among high school juniors and seniors in Madison County who are considering attending a "local school" (e.g. UAH, AAMU, CSCC-H or Drake), factors dealing with financial aid, economic cost and tuition ranked higher than factors such as the number of specialized major programs, the presence of many graduate programs, or the level of admission requirements. 95 UASX 239, Table Survey 38. The Court notes that this cost-concern characteristic generally holds true for nontraditional students.

369. Most white students currently enrolled at ASU receive scholarships or other forms of financial aid, and for many of these students the amount is full tuition and fees. 95 ASUXs 39-48; Steptoe (3/7/95) 61-62. The total includes 67 new students, a total apparently spurred by an article in the Montgomery Advertiser about scholarship money available for white students. 95 ASUX 48; 95 ASUX 147. In a survey, 84% of white ASU students stated that financial aid was important or extremely important in their decision to attend ASU. Allen (3/9/95) 105. 900 F.Supp. at 319.

As noted above, the state funds available for higher education come from the ETF that funds K-12 schools. Because of the lack of adequate property taxes, which are supposed to be the primary source of K-12 revenues, an increasing portion of the ETF has been allocated to K-12 appropriations. In 1991 higher education was appropriated 34% of the ETF. In 2001-02 higher education received only 28% of the ETF. See Appendix A.

The remedies crafted by this Court to eliminate the vestiges of historical discrimination in Alabama's system of public higher education took account of the limited funds available for the entire system, and the success of those remedies depends to some extent on the expectation that there would be growth in higher education funding.

The Court has recognized the strides made by the State, and where possible, has incorporated those developments into the Decree. In this manner, the Court has sought to minimize the amount of money required on the front end. For example, the Court requires Alabama State University and Alabama A & M University to use monies already appropriated for Title VI purposes, where and to the extent possible. 900 F.Supp. at 349.

Alabama A & M University shall be entitled to compete competitively for at least 10% of the funding dollars available for experiments conducted on the AAES facilities. All Alabama A & M University agricultural experiment projects submitted to the AAES for approval are subject to the normal selection process utilized by the AAES in choosing experiments for funding at its facilities. As with all other projects wishing to use AAES funds and facilities, all Alabama A & M University research proposals must comply with the requirements and needs of the AAES. A proposed research project that cannot withstand the normal selection process, need not be funded by the AAES. Projects may be jointly proposed between two or more researchers at two or more institutions. 900 F.Supp. at 366.

Commencing with the fiscal year 1995-96 there shall be paid out of the Alabama Special Education Trust Fund to Alabama A & M University for extension purposes an additional 10% of the sum appropriated for extension purposes in 1994-95, which is One Hundred Thousand (\$100,000.00) Dollars, and each year thereafter, the prior year's extension appropriation shall be increased by at least 10% annually for ten years.

Hereafter, and in addition to the aforementioned sums, there shall be paid over to Alabama A & M University starting with fiscal year 1996-97, an amount equal to 10% of any increase in appropriations to Auburn University for extension work over and above the appropriation to Auburn University for extension purposes in the 1994-95 appropriations bill. Such monies are to be used by Alabama A & M University in support of the Alabama Cooperative Extension System's urban affairs and new nontraditional programs. 900 F.Supp. at 368

The deep cuts in state funding for higher education have seriously impeded the ability of ASU and AAMU successfully to implement the growth in their academic, research and public service functions contemplated by the Remedial Decrees. A year ago, ASU was forced to increase tuition by 15% and made substantial cuts in its operating budget. On February 7, 2003, ASU's Board increased tuition another 24% to \$3,600, \$100 over the state average. AAMU increased its tuition by 28.6%, the seventh highest tuition increase in 2001-02 among public four-year colleges in the U.S. Rising tuition will further inhibit the ability of ASU and AAMU to attract other-race students and to offer accessible higher education to all Alabama citizens, black and white.

Tuition increased again at all the state universities in 2002-03. Jeff Amy, *College Expense is Rising Sharply*, MOBILE REGISTER ONLINE, July 21, 2002 ("Of the 16 public universities in Alabama, 15 are increasing their tuition and mandatory fees this fall, according to the Alabama Commission on Higher Education and Mobile Register research. The median increase of 7.16 percent for undergraduate Alabama residents will mark a fourth year of significant bumps. Rates

for resident graduate students will increase by a similar percentage, and rates for non-resident students will increase by more. Since the end of the 1998-1999 academic year, the median resident undergraduate tuition at Alabama public colleges has gone up almost 43 percent, according to ACHE figures.”). These university tuition increases are directly linked to the overall public school funding crisis. *E.g., Editorial: Rising Tuition: Inadequate Funding Behind Heavier Burden on Students*, THE BIRMINGHAM NEWS ONLINE, June 7, 2002 (“But lay the blame for the double-digit tuition increase not at the feet of the Auburn board of trustees, but at state leaders who twiddle their thumbs as the state education budget comes up short and the state colleges and universities as well as K-12 schools must cut back.”).

The defendant HWIs have consistently responded to plaintiffs’ complaints about lack of progress in the hiring and retention of African Americans on their faculties and administrations by pointing to the lack of sufficient funds to allow them to compete for black scholars in the academic marketplace. The last proposal of the Monitor and Oversight Committee for resolving plaintiffs’ pending motion for enforcement of the Remedial Decree provisions regarding black faculty and administrators, which was incorporated in this Court’s order entered April 3, 2002, lowered the already small amount of funds originally proposed to be placed at the disposal of the HWIs for this purpose, in recognition of the current crisis in public school funding. The lack of funding makes it difficult for all state universities to compete with other states for quality faculty. Jeff Amy, *College Expense is Rising Sharply*, MOBILE REGISTER ONLINE, July 21, 2002 (“According to a 2000 survey by the Chronicle of Higher Education, faculty at Alabama public colleges made an average of \$49,640 a year, second lowest in an 11-state Southeastern region, and 10 percent below the regional average of \$55,353. Administrators say to keep good professors or hire new

ones, they have to pay more. Most universities are aiming to pay at least the regional average.”).

The racially discriminatory property tax system in Alabama forces state and local governments to rely disproportionately on income taxes, sales taxes, and other types of taxes to fund public education. Alabama’s property taxes are the lowest in the U.S. and would have to be tripled to reach the national average and doubled just to reach the level in Mississippi, which ranks 49th. See Appendix B. The result is an over reliance on other state sources of funds, which disadvantages both K-12 and higher education.

1089. The state annually appropriates funds for the operation of institutions of higher education. For a number of years, funding per student in higher education in Alabama has been below the regional average for the Southeast. Rutledge (2/20/91) 47-48.

1090. Alabama State University's finance expert, Dr. Daniel Sullivan, testified that Alabama devotes a higher percentage of its total state budget to education than does any other state in the country. Sullivan (2/11/91) 220. Auburn University's finance expert, Dr. Mary McKeown, also examined this issue. AUX 281, pp. 6-12, (Tables 1.1 through 1.7). Her data indicate that Alabama's expenditures for higher education are higher per capita than neighboring states and the nation as a whole; and that, in terms of financial capacity as measured by per capita income, Alabama's effort to fund higher education is the second highest in the nation. *Id.* p. 12; McKeown (2/13/91) 18.

1091. Almost half of the total state revenue dollars in Alabama are earmarked for the Alabama Special Educational Trust Fund (hereinafter "the ASETF"). Rowe (2/26/91) 103. 787 F.Supp. at 1208.

The current public school funding crisis pitted K-12 interests against public higher education interests when the Governor was forced to declare a deep proration of the ETF. ASU and AAMU filed a brief in support of the higher education interests, in which they argued that some portion of Amendment 111 to the Alabama Constitution of 1901 was not unconstitutional. So far as plaintiffs are aware, neither ASU and AAMU nor any of the other defendant state universities pointed out in their Alabama Supreme Court briefs the findings of this Court with respect to Amendment 111. E.g., 787 F.Supp. at 1104, ¶259 (“Amendment 111 to the Alabama

Constitution, adopted by the Legislature and ratified by the voters in 1956, adopted most of the recommendations of the 1954 Interim Legislative Committee report for the racially discriminatory purpose of preserving segregation in the public elementary and secondary schools of the state. KX 3672.”) (footnote omitted).

Alabama’s public school funding crisis adversely impacts the access to higher education of black students in particular.

7. To the extent that particular racial, ethnic, or socioeconomic groups have lower college attendance rates, aspirations of students in those groups to attend post-secondary institutions may be influenced more heavily by non-family factors such as school officials, peers, and other non-familial efforts--such as providing information and encouragement to middle school students regarding post-secondary opportunities, and student financial aid. Hossler (2/14/95) 13; 95 UASX 243, pp. 10-12.

...

11. The two most direct ways, external to the family, to influence the process by which students choose colleges are (1) post-secondary encouragement during the middle school years and (2) efforts to lower the price and other costs of a college education. 95 UASX 243, p. 15.

12. After developing an aspiration to higher education, students establish a set of institutions in which they may possibly enroll. A student establishes the "choice set" based upon a range of factors important to the individual student. Research literature on student choice, however, demonstrates that the following factors exert the greatest influence on students' choice: tuition, costs, financial aid, academic reputation, location, size, social atmosphere, and, occasionally, special academic programs. 95 UASX 243, p. 36.

...

16. At this point in the choice process, the net cost of attending college (after considering financial aid) becomes a crucial factor in the selection of a college. 95 UASX 243, p. 38. 900 F.Supp. at 283.

Because public higher education is not adequately funded, all state universities have been forced in the last few years to increase tuition dramatically and, at the same time, to reduce financial assistance drastically. Alabama has one of the highest poverty rates and one of the lowest educational levels in the nation. The state’s unbalanced tax burden falls

disproportionately on Alabama's low income population, which remains predominately black. Consequently, as the end of the term of this Court's Remedial Decrees approaches, new financial barriers are aggravating the lack of equal access to public higher education for African Americans that the Remedial Decrees aimed to eliminate.

Alabama's political and educational leaders have acknowledged that reform of the state's racially discriminatory property tax system is practicable, consistent with sound educational practices, and, indeed, necessary for the educational and economic future of all citizens of Alabama. Recently, State School Superintendent Dr. Ed Richardson unveiled the Department of Education's estimate of what improvements need to be made in the state's K-12 system merely to bring it up to the level of adequacy. These improvements are estimated to cost an additional \$1.6 billion in the state's annual school appropriations.

Make no mistake about it: \$1.6 billion can't be found by eliminating waste and fraud in state government. Neither will it be found in an education lottery, or by going after corporations the governor thinks don't pay their fair share of taxes.

It's going to require new revenue possible only through real changes in the way state collects and spends revenue. In other words: tax reform.

To get an idea of the scope of Richardson's plan, consider that a lottery, based on Gov. Don Siegelman's projection three years ago, would generate less than one-tenth of the \$1.6 billion needed. Putting an additional \$1.6 billion a year into schools means an increase of about 50 percent in the approximately \$3 billion a year the state gives K-12 schools.

Keep in mind that Richardson's plan doesn't include luxuries. It's what the superintendent and state education officials have determined is the bare minimum to bring state schools up to adequacy; i.e., close to what other states in the Southeast do for their schools.

Editorial: \$1.6 Billion for Schools: Preacher and Choir Have Much Work To Do, THE

BIRMINGHAM NEWS ONLINE, July 26, 2002.

The *Fordice* Constitutional Standard

The constitutional standard governing this higher education desegregation action is set out in *United States v. Fordice*, 505 U.S. 717, 729-30 (1992): “If policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational practices.” This constitutional obligation of the State extends to all of its policies which impact public higher education, not just familiar desegregation case policies like admissions requirements and mission assignments. *Id.* at 733. It is not necessary to prove that a particular policy itself was established or is maintained with racially discriminatory intent. Plaintiffs “need not show such discriminatory intent to establish a constitutional violation for the perpetuation of policies **traceable** to the prior *de jure* segregative regime which have continuing discriminatory effects.” *Id.* at 733 n.8 (bold emphasis added).

This memorandum traces the current policies governing the production of revenues for Alabama’s system of public higher education to racially discriminatory regimes from the beginning of the state’s history to the present. The current lack of adequate funds to implement the institutional reform and equal educational opportunity objectives of the remedial decrees in *Knight v. Alabama* is directly traceable to policies of intentional racial discrimination in Alabama’s history. In addition, the school funding crisis is creating new barriers to African Americans’ access to higher education by forcing up tuition and costs at all the institutions of higher education and by lowering or eliminating already inadequate state funded financial assistance.

The 1819 Constitution and Antebellum Alabama

The issue of race controlled the very basis on which Alabama was admitted to the Union in 1819. The State of Georgia ceded to the United States in 1802 all its claims to that part of the Mississippi Territory which now forms Alabama on the conditions that it be admitted as a state “as soon as it shall contain sixty thousand free inhabitants” and that slavery be allowed in the new state. (Harvey 1989, pp. 18-19). The early decades of the history of the United States were dominated by the dispute over slavery, whether it would be allowed in the new western territories, whether the number of slave states would keep pace with the number of free states, and whether slavery should be abolished altogether. The U.S. Constitution of 1787 provided, in Article I, § 1, that the importation of slaves could not be prohibited by Congress prior to 1808. In 1807 Congress passed a statute outlawing the slave trade effective January 1, 1808. The slave states generally evaded or refused to comply with this statute right up to the time of the Civil War. There was a debate in Alabama’s constitutional convention of 1819, in light of Congress’ efforts to restrict slavery in Missouri, about whether statehood should be conditioned on Congress’ acceptance of the proposed Constitution of Alabama notwithstanding its provisions legalizing slavery in the new state. (McMillan, pp. 43-44.)

“Settlers poured into Alabama by the thousands during the period between 1816 and 1819. In fact the growth was so rapid that by 1819 Alabama had enough settlers in its territory to petition the Congress for statehood, which was granted that same year. The settlers brought slaves with them to the newly open territory in contravention of the Northwest Ordinance. Upon the admission of Alabama into the Union, the provision of the Northwest Ordinance prohibiting

the importation of slaves was removed. Thornton (11/5/90) 24-33.” 787 F.Supp. at 1066.

The act of Congress admitting Alabama to statehood on March 2, 1819, continued the practice first adopted under the Northwest Ordinances of including in acts creating new territories or states provisions reserving the sixteenth section of every township as a permanent endowment for public schools and reserving one or two full townships as an endowment for a state university. The Alabama Constitution of 1819 charged the Legislature with the duty to “provide effectual means for the improvement and permanent security” of the state university endowment lands, by improving them “by rent, lease or sale....” 1819 Ala. Const., art. VI. However, because the Congressional grant of ownership of the public school lands was to the inhabitants of the townships, not to the Alabama state government, the 1819 Constitution could only require the Legislature to “preserve [them], from unnecessary waste or damage ... and apply the funds, which may be raised from such lands, in strict conformity to the object of such grant.” *Id.* The statewide total of sixteenth section public school lands was approximately 1 million acres. (Harvey 1989, p. 27)

The Alabama Legislature immediately set up local mechanisms for leasing the sixteenth section lands for public schools. School commissioners were authorized to be appointed by the county court both to manage the sixteenth section lands and to appoint trustees for each school district. Rents from the leases were disappointingly low at first, but before a rational scheme for obtaining regular income from the school lands could be devised, the economic circumstances of Alabama’s so-called “flush times” brought irresistible pressure to sell the sixteenth sections. (Harvey 1989, pp. 28-30).

During this ante-bellum period, there was a lot of money to be made from the agricultural economy, and planters were hungry for capital to invest in these enterprises. Capital funds were needed to buy the two primary means of acquiring wealth: slaves and land. Private banks were unable to satisfy the demands of borrowers, so in 1823 the Legislature established a state bank to meet their needs. To provide lending capital for the state bank, the Alabama Legislature successfully petitioned Congress in 1827 to authorize the state to sell the sixteenth section lands. The March 2, 1827, act of Congress specified that the school lands could be sold only with the consent of the inhabitants of the township which owned them and that the proceeds be devoted exclusively to the use of the schools. (Harvey 1989, pp. 29-30).

In 1828, the Legislature established procedures for selling the sixteenth section lands, which basically opened them up to voracious speculators, many of whom were authorized by law to pay for their land purchases over time. The proceeds of the school land sales were required to be deposited in the state bank, where they became an additional source of capital for speculative borrowers. There were even special acts passed providing liberal terms for the benefit of individual borrowers. By act of the Legislature on January 15, 1828, the State assumed fiduciary responsibility for this “public school fund” and became obligated to pay interest directly to the townships and school districts. (Harvey 1989, p. 27).

At first the state bank was a success, able to supply money to run both the few local school districts then existing and the modest costs of state government. But the inevitable collapse eventually came. When investments outstripped profits, school land purchasers failed to make their payments, and the economy collapsed. The state bank failed in 1843, and most of the sixteenth section lands were lost. The land endowment that Congress had intended to provide financially stable public schools ended up being sold to speculators so they could enslave more persons of African descent.

The most pronounced feature of “flush times” in Alabama was the expansion of the slavery regime. There seemed to be no limits to the profitable production of cotton, and there was a mad scramble for lands and slaves, which resulted in a very marked appreciation in the value of both. The mania for lands and slaves made large demands upon capital and invoked a very extensive use of credit. The great agricultural development undertaken called for the expansion of the transportation plan, and leaders in this field also rushed upon the banks for loans. People were willing to mortgage their futures for the paper money of the banks, nor did they stop to ask whether it was properly secured, so long as it would purchase lands and slaves. The pressure upon the banks was enormous; too strong, in fact, to be resisted by directors who did not scruple to use the people’s money for private gain. Speculation begat bank notes and loans, and notes and loans begat speculation. It is impossible to say which was the stronger force, and, therefore, to apportion the responsibility for what happened.

(Harvey 1989, p. 32, *quoting* ALBERT BURTON MOORE, *HISTORY OF ALABAMA AND HER PEOPLE* 297-98 (1927)).

When the state bank failed, most of the bad debt was owed by legislators and bank directors. (Harvey 1989, p. 33). Lost was \$1.3 million derived from sales of sixteenth section lands and over \$300,000 from the sale of the university lands. (Harvey 1989, p. 36). The State’s indebtedness to the worthless school fund was fixed at \$2,831,295. Adding insult to injury, the Legislature in 1848 committed the State to pay interest at 6% on the indebtedness in perpetuity. “By the Act of 1848, the State shifted from itself to the tax payers the burden of providing the equal interest on a paper fund, the principal of which had been invested and lost.” (Harvey 1989, pp. 34-35, *quoting* A. J. HARRIS, *STATE LANDS OF ALABAMA: A BRIEF HISTORY* 9-10 (1951)).¹ Today,

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The land grant funds accepted in trust by the state were lost when the Bank of Alabama went bankrupt in the panic of 1837. But the state accepted the land grant amount as a permanent debt against the state and agreed in the future to pay "interest" on that imaginary amount. This interest constituted the sole support for

even this artificial sixteenth section trust fund, the proceeds of which are supposed to be dedicated to the residents of each township, is being borrowed against by state government to cover shortfalls in the ETF. David White, *Tax shortfalls raise odds state will tap reserves*, THE BIRMINGHAM NEWS ONLINE, August 3, 2002.

Only Mobile County managed to preserve most of its original sixteenth section lands. An act of the Legislature on January 10, 1826, had established the Board of School Commissioners of Mobile County to control the first public school system in Alabama. By the act of December 19, 1836, the Mobile County School Commissioners were given complete control over the management and appropriation of funds from these school lands. They were also authorized to levy a property tax not to exceed one-fourth of the county tax. Thus Mobile County's sixteenth section lands were not lost in the crash of the state bank. Subsequent Alabama Constitutions have preserved Mobile County's autonomy with respect to its school lands, and Mobile County School Commissioners still control all but a small portion of its original 24,000 acres, most of which is managed by a professional forester. It was necessary to pass a constitutional amendment in 1969 to set aside 608 acres of Mobile County's sixteenth section lands for use as the campus for the newly created University of South Alabama. In return, Mobile County received 4,700 acres of state indemnity land. (Harvey 1989, pp. 46-50). By an act of January 16, 1854, an additional property tax equal to one-fourth the county tax was levied and made payable to the Mobile School Commissioners. *Holt v. School Comm'rs of Mobile*, 29 Ala. 451 (1856).

UA during much of the nineteenth century. Thornton (11/5/90) 34-37.

787 F.Supp. at 1067.

The Mobile County School Commissioners were given the discretion to levy the property tax without the need of voter approval. *Id.*

A statewide public school system was not established until the act of February 14, 1854, which authorized each county to levy a one mill school tax on real and personal property, the revenue from which was to be paid directly into the county treasury. At this time, Mobile County and other local school systems still relied heavily on the remnants of revenue from the sixteenth section land fund, and the 1854 act also provided for distribution of these funds on a per capita basis. (Harvey 1989, p. 53). Funding for this statewide school system depended primarily on local taxation.

Each county was authorized to levy a special annual tax upon real and personal property not exceeding one mill “for the support of common schools therein and for providing suitable houses and purchasing libraries and apparatus for such schools.” The revenue was to be paid into the county treasury with at least 50 percent going for teacher salaries. All of the funds from the Educational Fund were to be used for teachers only. This authorization for a local county property tax for the support of public education would die with the Civil War Constitution of 1861 and not reappear until the Constitution of 1901.

(Harvey 1989, p. 53) (citation omitted).

Of course, Alabama’s ante-bellum public schools were reserved exclusively for whites. “In 1832, the year following Nat Turner's bloody insurrection in Virginia, the Legislature of Alabama, like those in most other Southern states, enacted a statute making it a crime to instruct any black person, free or slave, in the arts of reading and writing. KX 653, 1832 Ala.Acts, sec. 10, p. 16.” 787 F.Supp. at 1067. “With the possible exception of a creole school in Mobile, there is no record of a school for black children in the State of Alabama prior to 1860.” 787

F.Supp. at 1067.

Resistance to free, democratic and public schools, even for whites, was centered in the Black Belt.

In the Black Belt there was hostility toward public education from its beginning. When the Legislature of 1854 voted on the bill to set up and finance a system of public schools, the only negative votes in the House (twelve of them) were cast by Black Belt county representatives. Their opposition was based upon the provisions of the bill which would take from the counties all the sixteenth section funds, with which the Black Belt was richly endowed, and distribute them throughout the state according to school population. Among the Black Belt planters, opposition to public education grew from the old system of sending poor children to the subscription schools or academies at public expense. Public schools were looked upon as pauper schools, and the aristocrats preferred to send their children to private schools. They resented taxation for the schooling of poor whites and Negroes. In the Black Belt the need for more schools was less urgent than in other sections of the state because of the large number of private schools and academies in the section. In 1857 forty-one of the 93 private schools of Alabama, as well as twenty-two of the 76 academies and two colleges were located in Black Belt counties. Thus the Black Belt clung to its aristocratic private schooling and was slow to cooperate in the trend toward a more democratic school system.

(Sisk 1953, p. 127).

The Constitutions of 1861 and 1865

Both the Secession Constitution of 1861 and the conservative Reorganization Constitution of 1865 continued the minimalist provisions of the 1819 Constitution concerning education. “[A]side from promising to encourage education and maintain the lands granted for education, the funding of education was a matter left to the will of local townships and the legislature.” (Harvey 1989, p. 54). “Again, the mood of the time was not concerned with property taxation, and certainly not taxation for the support of education.” (Harvey 1989, p. 55).

The 1868 Constitution

The 1868 Reconstruction Constitution, however, made free public education for all children, black and white, one of its main themes.

Former Alabama constitutions had contained sections on education; but the article on education in 1868 broke with the past both in regard to the administrative system and the large amount of funds allocated to schools. . . . The Republicans recognized that an efficient school system was desperately needed to educate the new electorate, but declared that thousands of whites were also illiterate. They often cited the educational activities of the Freedmen's Bureau in order to prove their party's interest in education. Hence, when the convention met, the educational problem had been made second in importance only to the suffrage.

(McMillan, p. 143) (footnotes omitted). This Court's findings of fact discussed the radical change in the administration of schools brought about by the "Radical" Constitution of 1868 (adopted by convention in 1867 and ratified by the eligible electorate in 1868):

63. Reflecting the importance blacks and Republicans placed on education, the 1867 Constitution completely centralized the entire state school system by delegating full legislative power over all education matters to the State Board of Education, ("SBE") including governance of the University of Alabama. Following the model of the Iowa constitution, the 1867 Alabama Constitution set up a procedure whereby the SBE would pass education laws, which then had to be signed or vetoed by the governor, with the SBE retaining the authority to override the governor's veto. In addition, the Legislature retained the authority to declare any act of the SBE void. Thornton (11/5/90) 80-82.

787 F.Supp. at 1070. The funding provisions for public education in the 1868 Constitution were also far reaching.

One-fifth of the aggregate annual revenue of the state was devoted exclusively to the maintenance of public schools. In addition, certain sources of income were designated for education. A state poll tax of \$1.50 was to be used exclusively for

public schools. Moreover, school districts were given power to levy a poll tax to be used locally for education. Furthermore, all federal lands granted for educational purposes and a tax placed on industrial and commercial corporations in the state were earmarked for education.

(McMillan, p. 144) (footnotes omitted).

Commensurate with this statewide centralization of public education, the 1868 Constitution placed a duty on the legislature to limit the taxing authority of local governments. 1868 Ala. Const., Art. XIII, § 16 (“It shall be the duty of the general assembly to provide for the organization of cities and incorporated towns, and to restrict their power of taxation, assessment and contracting of debt.”). No constitutional limit was specified, however.

Until the constitution of 1868, municipal corporations, created by special enactment, were but seldom confined to any particular rate of taxation. The officers charged with the power and duty of levying and collecting municipal taxes were elected by the inhabitants on whom the taxes were to be imposed, and the official term was of brief duration; thereby affording, as was supposed, ample security against other taxation than such as the municipal necessities required.

Mayor of Mobile v. Stonewall Ins. Co., 53 Ala. 570, 1875 WL 1208 (Ala.), p. 2 (1875).

The Reconstruction state legislature added more public school revenues, but these efforts were short-lived.

During the period between 1868 and 1875, an additional source of revenue was added to those already provided by the constitution, an annual donation from the state of \$100,000 as provided by Section 957 of the revised code. This, with the local county tax of one mill, the local county poll tax, and the previously identified state support was still not sufficient to provide adequately for a state system of schools. Money was not readily available, and the state entered into a financial depression.

...

In spite of the promises for increased revenues made by the Constitution of 1868, a depression ravaged in the state, charges of misuses of school funds abounded, and controversy swirled about equality of education for blacks and whites alike. The free school system instituted under the Constitution of 1868 ended in failure in 1875.

(Harvey 1989, p. 57) (citations omitted). Professor McMillan concluded that this was a failure of execution more than of design under the 1868 Constitution.

The article on education was significant in several major particulars: (1) the high degree of centralization in the system; (2) the broad powers bestowed upon the board, especially its legislative powers; and (3) the large amount of revenue earmarked for education. Although the value of some features of the education article (such as endowing the board with legislative powers) may be questionable, the article was the result of a sincere attempt to give the state a good public school system. It was not the fault of members of the convention that continued economic depression, the disorganized condition of society following the war, and the incompetence and mismanagement of some school officials prevented the organization of a good public school system on the basis of the education article.

(McMillan, pp. 145-46).

The incompetence and mismanagement complained of was to a significant extent an expression of white outrage over their taxes being used to pay for the education of blacks. This Court alluded to this problem in its 1991 findings:

73. The SBE was very unpopular with white Democrats and scalawag Republicans “because it aggressively sought educational opportunities for blacks and it cooperated with the schools that had been established in Alabama by white northern missionaries during the years after 1865.” Thornton (11/5/90) 83.

74. During the period of Redemption the SBE faced the wrath of the Democrats. The 1875 Constitution abolished the SBE both as the governing body of the University of Alabama and as the governing body of the public schools, in large part because it had sought to further equal educational opportunities for blacks. There would be no State Board of Education in Alabama from 1875 until 1919. Thornton (11/6/90) 130.

787 F.Supp. at 1071-72. This Court's findings about the origins of ASU also alluded to the powerful resistance of whites to taxation of their property for the benefit of blacks' education:

101. By the end of 1869, the Lincoln School faced its first financial crisis. The AMA's funds were running out, and the Freedmen's Bureau was phasing out as well. Even though Republicans controlled state government, they could not afford to offend too directly the system of white supremacy. Most white people in Marion were opposed to the Lincoln School because of the egalitarian style and content of education Steward and the AMA were affording blacks. In an attempt to force public funding of Lincoln, Senator Steward succeeded in getting a bill through the legislature on February 16, 1870, requiring Marion to levy a property tax of one-half of one percent to support education. Thornton (11/5/90) 91-92.

102. Whites were furious that their property would be taxed to support blacks' education, and a lawsuit was filed by a white citizen of Marion, Elias Dunkin. The court enjoined collection of the tax and was applauded by the white newspaper in Marion:

It was a bare-faced attempt to rob the white people for the benefit of soap-eyed Steward, and as such it ought at least to have secured the condemnation at the hands of every white man in the town.

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787 F.Supp. at 1075. According to McMillan, “[white conservatives] flayed the [1968] constitution because ‘it places to a great extent the property of the country at the mercy of non-property holders – a lamentable condition for any people.’” (McMillan, p. 161) (footnote omitted). “Conservative Robert Wilde Walker stated that ‘the theory of this constitution is that the power of making the laws shall be confided to those who have the least to be protected by the laws, and that the right to levy the taxes shall be bestowed on those who have no taxes to pay.’” (Chaney at 256 n.194 (quoting McMillan, p. 161)). Ira Harvey also alludes to the white backlash to the education of blacks:

This radical provision [Article XI, § 6] (at the time) made obligatory upon this legislative body [the State Board of Education], operating in parallel to the general assembly, the establishment of free public schools open equally to both races. According to State Superintendent of Education Palmer, “The result was that the public schools were brought into great disrepute among the white people of the State” (*Annual Report*, 1890, p. lxxxix).

(Harvey 1989, p. 56). Mills Thornton has tied the hostility of white landowners to increased taxation during Reconstruction to the demise of slavery:

Here’s an irony: The end of slavery also ended an Alabama tax structure that was in many ways more progressive than what replaced it. States that before the Civil War drew a large portion of their revenue from taxes on slaves (slaveowners paid a tax based on the work worthiness of each slave) no longer had that source of income. So general taxes were increased to make up for that lost revenue, triggering a citizen revolt which eventually led to a new constitution with barriers on taxation.

“In the antebellum period, the primary source of state revenue was the tax on slaves,” said Dr. J. Mills Thornton, an expert on Southern tax policy of that period. The tax structure at that time was considered progressive because the wealthier paid a higher portion of taxes.

Land taxes, meanwhile, were very low, leaving the yeoman, nonslave-owning farmer with very little tax liability. In fact, Thornton said, the average farmer in Alabama would have paid probably \$5 a year in property taxes between 1820 and 1860.

“The abolition of slavery imposed a twin threat to this order,” Thornton said in a telephone interview. “By abolishing slavery, you abolished a major tax source. Also, by abolishing slavery, you dramatically increased the number of citizens that needed costly state services in one fell swoop.

“Instead of being a source of revenue, these freed black slaves now needed public schools and a whole range of public services. On top of that, they were poverty stricken and had no property to be taxed.”

Thornton, an Alabama native and now a history professor at the University of Michigan, said this state’s experience was typical of many in the South at the time.

During Reconstruction, poor whites who owned a piece of land were suddenly hit with high property taxes. “Their tax burden soared,” Thornton said. “For the typical poor white but landholding farmer, all of a sudden he was having to pay enormous new quantities of taxes, and all for the benefit of nonproperty-owning blacks.

“It created a great deal of hostility, knowing he was paying all this and getting nothing more in return.”

Disputes over tax policy became a principal issue in political fights between Democrats and Republicans during Reconstruction. Many new officeholders won on promises of returning the tax burdens on poor whites closer to levels that were in place before the Civil War.

Alabama Citizens for Constitutional Reform, ALABAMA: A TAXING PROBLEM, Part 2 (reprinted from the *Huntsville Times*), <http://www.constitutionalreform.org/news/hville/abolition.html>.

Mobile County, which had the largest and best funded school system in Alabama during Reconstruction, was a primary battleground for white resistance to public funding of schools for blacks. Some of the findings of fact made by Judge Virgil Pittman on this subject in 1982 are set out below:

The 1868 Alabama Constitution provided for a new state board of education with full legislative power to enact laws in regard to education. Alabama Const., art. XI, section 5 (1868). The new educational system departed from the previous system in providing for a high degree of centralization, broad legislative powers in the state board and the earmarking of state revenue for public education. Noah B. Cloud was elected as the State Superintendent of Public Instruction. George L. Putnam, of Mobile, was elected to the State Board of Education. Putnam was from a northern state, and he came to Mobile after the Civil War to set up a Freedmen's School as a representative of the American Missionary Association (A.M.A.). This school for blacks was called variously the Emerson Institute or the Blue College.

In 1868, the Republican-controlled legislature passed a law providing that the school commissioners of Mobile County be appointed by the State Superintendent of Public Instruction. Acts of Alabama 1868, pp. 148-49, 151. State Superintendent Cloud appointed George L. Putnam as Superintendent of the Mobile County Public Schools in July, 1868.

When Putnam tried to post bond to serve as superintendent, Gustavus Horton, who was a member of the Mobile County School Board and probate judge, refused to accept Putnam's bond. Consequently, Putnam was not able to assume the duties of superintendent. In January, 1869, [State Superintendent] Cloud came to Mobile and attempted to resolve the controversy with the Mobile County School Board, whose members were adamantly opposed to the intentions

of Putnam and the State Board of Education to have the A.M.A. school for blacks, the Blue College, included in the Mobile County public system and its teachers paid by public funds. This was not a question of integrating the schools; not even the Radical Republicans proposed so drastic a change during Reconstruction times. Rather, the white conservative Mobile School Commissioners simply were opposed to the progressive principles employed by the A.M.A. teachers, who taught their black students that they were entitled to equal rights. The A.M.A. schools were still operating with Putnam apparently running them. The white schools were under the control of the Mobile School Commissioners.

The efforts of State Superintendent Cloud to compromise the dispute between the "old board" and County Superintendent Putnam failed, despite several proposals and counter proposals.

...
Negotiations between State Superintendent Cloud and the old board continued during the spring of 1869. Again, a compromise was apparently reached under the direction of State Superintendent Cloud. Once again, however, the proposed compromise failed, primarily because the old board refused to undertake the general management of the schools in Emerson Institute and operate free public schools in Mobile County.

Finally, on June 30, 1869, State Superintendent Cloud informed Acting Mobile Superintendent Ryland and members of the old board that he was removing them from office for failure to discharge their duties under Alabama law. These suspensions by State Superintendent Cloud were officially approved by the State Board of Education on August 19, 1869.

By September, 1869, Mr. Putnam appointed a twelve-member board of school commissioners for Mobile County. Three of the twelve members of the Mobile school board (C. Perez, L. S. Berry and V. Henry) appointed by Superintendent Putnam were black.

At the time when the Putnam-appointed school board began to function in 1869, the old all-white board continued to assert that it was the only legally valid school board in power. The old and new school boards, both claiming simultaneously to govern the Mobile County school system, stood in sharp racial contrast to one another. As reported in 1869, in the Democratic-controlled Mobile Daily Register :

As to a comparison of the new Putnam ... board with the old board, it is only to be said that the old board has on it a few Radicals who on the Mobile system have been tried and found faithful, and on the new board are to be found three Negroes. Tried white men are safer than untried Negroes.... The existing or old board is not "mongrelized" at all....
The old board refused to turn over the books, papers and other property

belonging to the Mobile school system to the new board, and in September, 1869, the new board and County Superintendent Putnam filed suit in state court seeking an order compelling the old board to relinquish control over the Mobile County school system. On September 23, 1869, the old board unanimously resolved that if the state court decision was adverse to them, the old board would refuse to turn over school property to the new board and would inform the state court of its position.

About October 1, 1869, the state court judge rendered a decision in favor of the new Putnam-appointed board. The old board refused to vacate their offices and all twelve members were ordered to the county jail on October 2, 1869. While in jail, the members of the old board conducted one school board meeting wherein they voted not to charge tuition for pupils in the intermediate and primary grades.

On October 3, 1869, the Alabama Supreme Court granted a writ of certiorari “in the case of the Old Board of School Commissioners, and order(ed) the release of the prisoners.” The next day, the public schools opened once again under the auspices of the old board. In 1870, the Alabama Supreme Court affirmed the lower state court ruling in favor of the new school board. *Mobile School Comm'rs v. Putnam*, 44 Ala. 506 (1870).

While the appeal of the state court ruling was pending in the Alabama Supreme Court in 1870, negotiations between the old and new school boards continued. These negotiations were initiated by Peter Hamilton, an attorney who served as the old board's legal counsel and who represented the old board in the state court litigation. By April 14, 1870, the old board, which by that time had suffered several legal defeats in state court on financial issues contested with Mr. Putnam, agreed to a compromise proposed by Mr. Putnam. . . . Schools in Mobile County remained under the direction of County Superintendent Putnam from 1870 until the spring of 1871.

Beginning in the fall of 1870, Alabama began a period of “Redemption”--a period of several years in which state and local officials sought to regain and restore “white supremacy” in the governmental affairs of the state and in Mobile. . . .

The November, 1870, election results showed significant political gains in Alabama for the Democratic and Conservative Party. Democrat Robert Lindsay defeated incumbent Republican W. H. Smith for Governor, and Colonel Joseph Hodgson, a Democrat, defeated Republican Dr. Noah Cloud for State Superintendent of Public Instruction. Republicans controlled one house of the legislature and Democrats the other. As of December 4, 1870, the State Board of Education was comprised of eight Republicans (one of whom was black) and four (white) Democrats. The state board met daily in November and December, 1870, with State Superintendent Joseph Hodgson presiding. . . .

On December 14, 1870, the State Board of Education passed a law which restored the election of Mobile County school commissioners. Public School Laws, art. XIV (Nov. Term 1870). The 1870 statute does not appear in the Acts of Alabama because it was enacted by the State Board of Education rather than by the legislature. . . .

The 1870 law governing elections for the Mobile County school board provided “that there shall be twelve commissioners, but that only nine shall be voted for on any one ticket—the purpose ... being to secure to the minority a representation in affairs wherein they are interested.” The term “minority” as used in this context refers to black voters or black voter interests. The political explanation for this compromise probably can be found in the fact that by 1870 a Democratic governor had been elected, but the two houses of the legislature were split between Republican and Democratic control, and the State Board of Education was still controlled by a Republican majority, although the state superintendent was a Democrat. The old Mobile County School Commissioners agreed to accept this compromise.

Elections for the Mobile County School Board were held in March, 1871. The Democrats ran a slate of nine candidates; the Republicans ran a slate of nine. The Democrats, again using the editorial pages of the Mobile Daily Register, called on white voters to unite behind the Democratic slate of candidates to defeat “the Professor of Carpet-baggery,” Mr. G. L. Putnam.

The Democrats openly appealed to the racial prejudices of the white Mobile County electorate in the March, 1871 school board election, claiming that Putnam's “strength is chiefly confined to the less intelligent voters of the city and county”. The Democratic Party also contended that only “Radical colored people” supported Putnam, and implied that black voters would likely cast their ballots for Putnam since “these men (black voters) make it a point to go for anybody for an office that the people at large do not want.” . . .

The slate of nine Democratic party candidates was elected to the Mobile County school board in 1871, and Democratic party candidate Dickson edged Putnam for the Mobile County school superintendency. As a result of the election provision that limited the number of votes that could be cast on any one ticket to nine, “the three highest candidates on the Radical ticket (were) elected, Messrs. Couch, Lomery and Thompson.” Drury Thompson appears to have been black or Creole. The newly elected school board accepted the Freedmen's schools as part of the public school system in Mobile, pursuant to the political compromise. However, it appears that the elected school board had less authority, met less often and conducted less business during the period between 1871 and 1876, if their minutes are an accurate reflection. Probably the board turned over most of the operation of the schools to the superintendent.

. . .

The twelve-member school board elected in March, 1871 served for six years as the governing body in Mobile County. No elections for any county public school offices were held in Alabama between March, 1871 and 1876, inasmuch as the State Board of Education in 1873 repealed the law which had provided for county school board elections every two years beginning in 1871. (Gov. Exh. 71 at 23).

The 1875 Constitution, adopted in the spirit of state-wide "Redemption", re-established the local autonomy of the Mobile County school system and required "that separate schools for each race shall always be maintained by said school authorities." Ala.Const. (1875), art. XIII, section 11. The new constitution repealed the provision of the 1868 constitution that had given the State Board of Education legislative authority in educational matters.

Brown v. Board of School Comm'rs of Mobile County, 542 F.Supp.1078,1084-89 (S.D. Ala. 1982), *aff'd* 706 F.2d 1103 (11th Cir.), *aff'd per curiam*, 464 U.S. 1005 (1983) (footnotes and citations omitted).

The 1875 Constitution

This Court made similar findings about the 1875 Redeemer Constitution:

68. In 1874 the Democrats drew the color line in order to eliminate the Republican threat to white supremacy once and for all. There was considerable intimidation and violence directed at both black and white Republicans, and outright fraud was used to stuff ballot boxes in the Black Belt. The Democrats circulated "massive fright propaganda" claiming that Republicans might seek racially mixed schools to win over whites in North Alabama, many of whom previously had voted with the Republicans. The Democrats won all the statewide offices and both houses of the legislature in 1874. Thornton (11/5/90) 75-76.

69. This Democratic victory led to adoption of the 1875 "Redeemer" Constitution, which

redeemed ... white rule. Redemption in all of the southern states is a term which essentially means the tossing out of Republicans and particularly blacks from public life, and the conversion of all offices to white Democratic incumbency.

Thornton (11/5/90) 79.

70. The Democratic white conservatives who took control of the Alabama State House in 1874 spun a web of subordination around black schools sufficient to ensure adequate white control of black educational aspirations. Thornton (11/5/90) 139-40. While de facto segregation existed from the beginning of Alabama's public school system, the Constitution of 1875 made segregated

schools part of Alabama's basic law. The members of the constitutional convention understood that this constitutional segregation applied to all levels of public education. Thornton (11/5/90) 140-146.

787 F.Supp. at 1070-71.

Wealthy property owners, who controlled the Democratic caucus in the 1875 constitutional convention, used two strategies to insulate their property from taxation: (1) they blamed local governments for the huge public indebtedness incurred during Reconstruction to finance railroads and other industrial ventures, and (2) they played the race card, justifying evisceration of the education tax base with the argument that white men's property should not be taxed to educate blacks. Republicans unsuccessfully tried to rally poor whites to oppose the conservative Democrats. The most prominent Republican newspaper warned:

The poor whites of this commonwealth will lose their free schools, if that constitutional convention ever meets. We warn the people of the poor white counties that all the school fund they will ever afterwards receive will be their sixteenth section fund, which amounts to but a few dollars. And we finally warn the poor white people of Alabama that, if this convention ever assembles, a property and educational qualification will be required of voters. In the effort to keep down the Negroes, these old secession leaders will sacrifice every poor white man in the State.

(McMillan, p. 186 (quoting the *Alabama State Journal*, April 2, 1875)).

In addition to abolishing the State Board of Education, providing for election of a State Superintendent of Education and requiring racially segregated schools, the 1875 Constitution became the first Alabama constitution to place strict constitutional limits on the ability of both the state legislature and local governments to tax property. The General Assembly was prohibited from levying property taxes in excess of three-fourths of one percent (7.5 mills), and counties were limited to one-half of one percent (5 mills). Ala. Const., Art. XI, §§ 4 and 5 (1875). “To quote State Superintendent Feagin, ‘when the constitution of 1875 was adopted, the people of the state, for their own protection against exploitations by those from without and

within who had recently come to exercise the right of suffrage voluntarily surrendered the right of local taxation for schools.” (Swift and Goldthorpe, p. 102 (*quoting Alabama Department of Education Report*, 1916, p. 30)).

In spite of the devastating impact on public schools these novel constitutional taxing limits would have, the call to redeem the state from “black rule” drowned out all other arguments, and voters ratified the 1875 Constitution. Appeals for racial fairness were useless: “When . . . [the Bourbons] assert [wrote the editor of the Montgomery Alabama State Journal, March 25, 1876,] that they refuse to tax the white property owners for the education of the Negroes, they only exhibit the malice in their hearts against a race which toiled and struggled for them in the days of slavery.” (McMillan, p. 207 n.117). The adverse impact of the 1875 Constitution on school funding was felt immediately. “The last year under the 1868 constitution the school revenue amounted to \$484,000 as contrasted with \$348,891 for the first year under the 1875 constitution.” (McMillan, p. 207 n.118 (citation omitted)).

There is no disputing the racially discriminatory motives behind the diminished school funding required by the 1875 Constitution.

The large Negro population of the Black Belt presented an almost overwhelming problem to the new system. The task of Negro schooling was itself an extremely difficult undertaking. An even greater problem, and one which hampered the progress of the public schools for many years, arose from the de-rooted concept of white supremacy. The necessity of providing a schooling for the Negroes under a public system annoyed many of the white people of the section, so that almost every educational issue in the state was affected by the race problem.

The Constitution of 1875 followed the example of the 1867 Constitution in apportioning public school funds according to a census of children of school age, regardless of race. As long as the school funds were distributed on a per capita basis, the Black Belt representatives in the state legislature were opposed to an increase in the state school appropriations, because they felt that the state, at the expense of the white land-owners, was already doing enough for the education of the Negroes.

(Sisk, 1953, pp. 127-28 (footnotes omitted)).

The legislative sessions following ratification of the 1875 Constitution took other measures to shield white landowners' property from taxation that would benefit black students. For example, the Legislature further reduced the state property tax to 7.0 mills in 1877, then to 6.5 mills in 1880, and to 4.0 mills in 1890. (Harvey 1989, p. 59). The Legislature took steps to prevent black elected officials from being able to levy even these pitifully low property taxes. It totally abolished elected county commissions in many Black Belt counties and replaced them with whites appointed by the Governor. (McMillan, p. 222). One legislator explained why the courts of county commissioners of Dallas and Montgomery Counties were replaced with appointed boards:

Montgomery county came before us and asked us to give them protection of life, liberty and property by abolishing the offices that the electors in that county had elected. Dallas asked us to strike down the officials they had elected in that county, one of them a Negro that had the right to try a white man for his life, liberty and property. Mr. Chairman, that was a grave question to the Democrats who had always believed in the right of the people to select their own officers, but when we saw the life, liberty and property of the Caucasians were at stake, we struck down in Dallas county the Negro and his cohorts. We put men of the Caucasian race there to try them. . . . In Montgomery county we struck down the Commissioners Court because they would not protect the rights of property in that county.

(McMillan, pp. 222-23 n.31 (*quoting Montgomery Advertiser*, April 23, 1899).

As the nineteenth century neared its end, black voters were increasingly either suppressed or controlled by whites through massive fraud and intimidation. With whites firmly in control of nearly all aspects of the political process, public pressure mounted for changes that would empower state and local governments to produce the revenues required to provide desperately needed public services and public schools. E.g., Professor McMillan quotes Samuel Davis Weakley, later Chief Justice of the Alabama Supreme Court, joining the chorus in 1896 for constitutional reform and relief from its limits on taxation: "Although these safeguards may have been needed in an era when the ignorant Negro electorate and Radical excesses made it doubtful

whether a republican form of government could exist in Alabama, ‘conditions have vastly changed since 1875,’ he said.” (McMillan, p. 234). There began a scramble to find ways of getting around the constitutional tax caps.

Finding it impossible to increase state taxation for schools, those interested in education turned to local taxation, one of the main sources of income for education in most of the states. Some municipalities and counties did appropriate to public schools a part of the five mills which they could constitutionally levy, often at a sacrifice to internal improvements. The legislature adopted a policy in the eighteen-eighties of creating numerous schools [sic] districts, many of which were given power to levy special taxes of the five mills or less to be used solely for education. However, the Alabama Supreme Court ruled that school districts were neither municipal corporations nor counties and hence as such had no right to levy taxes.

(McMillan, p. 237 (footnotes omitted) (*citing Schultes v. Eberly*, 82 Ala. 242 (1887))).

Then the Legislature tried to get around the 5 mill constitutional cap on local property taxes by delegating to the local government a part of the state’s own 7.5 mill limit. But the Alabama Supreme Court struck down this device as well, concluding that,

if this were allowed, it would effectually emasculate this constitutional prohibition [limiting the amount of property taxes local governments may levy]. It would sanction the levy of a tax by the state for the purposes of public education in the city, which the city itself is prohibited by the constitution from levying and collecting, and which, if sanctioned as to one city, might be extended to every other locality in the state, in overthrow of this fundamental law. It would allow a thing to be done indirectly, which is forbidden to be directly done.

Alabama v. Southern Ry., 115 Ala. 250, 22 So. 589, 592 (1897). Wealthy corporate landowners even challenged laws empowering local governments to dedicate a portion of the property taxes they could levy under the cap established by the 1875 Constitution, but these devices, at least, were upheld by the Alabama Supreme Court. *Southern Ry. v. St. Clair County*, 124 Ala. 491, 27 So. 23 (1899). The court’s reasoning is instructive:

The primal, decisive question the case involves whether it lies within legislative power to authorize a county keeping within the constitutional limitation of taxation on property to appropriate a part of the revenue derived from such taxation in aid of the public schools therein? Or, to state the question in a form meeting the argument directed against the validity of the enactment, is not the constitution prohibitory of all local taxation in aid of the public schools? Whatever may be the form in which the question is stated, it is of manifest importance to all the people of the state, and on its solution may depend in a large degree the prosperity and usefulness of the public schools in counties and municipalities in which similar legislation now exists.

27 So.2d at 24-25. The landowners' argument was that the 1875 Constitution implicitly restricted the Legislature from levying any more taxes for public schools than it provides explicitly. The court agreed that some restrictions were necessarily implied; e.g.: "From the express, affirmative provision of the constitution that 'separate schools be provided for the children of citizens of African descent' (article 13, § 1), the implication necessarily arises that by legislation the children of the two races shall not be commingled in the public schools." *Id.* at 25. But, it concluded, the constitution's restrictions on the rate of taxation did not restrain the purposes that could be legislated for their use.

When the constitution is silent, the power to legislate exists, or there must be departure from the established principle "that constitutions are not in the nature of enabling acts, but are limitations upon the otherwise boundless powers of the legislature; or, in other words, that the general assembly is not to look to the organic law to ascertain what is permitted it to do, but only to find what inhibitions are thereby put on its action."

Id. (quoting *Mayor, etc., v. Klein*, 89 Ala. 465, 7 So. 386 (1890)). The court applied this principle to local school taxation:

Neither counties nor municipalities have an inherent power of taxation. Whatever of power they may have, is of legislative delegation; and upon them, in the absence of special constitutional restriction, the general assembly may confer the taxing power in such measure as it deems expedient.-"in other words, with such limitations as it sees fit as to the rate of taxation, the public purposes for which it is authorized, and the objects (the persons and property) which shall be subjected

to taxation.” That the education of children, the support of public or common schools,— schools not confined to any class, but open to all,— is a public use supporting taxation, state or local, cannot be doubted. And that local taxation contributes to the usefulness and prosperity of public schools, is generally regarded as axiomatic.

Id. at 27-28 (citations omitted).

A constitutional amendment, sponsored by Oscar R. Hundley of Huntsville, which would have authorized local school districts to levy a 2.5 mill property tax finally passed the Legislature in the 1892-93 session. In an effort to assuage opposition to taxation of whites’ property for the education of blacks, the proposed amendment would have authorized the school districts to apportion to black schools only the amount of taxes paid by black citizens. 1892-93 Ala. Acts, p. 1215. However, the proposed amendment failed to obtain the requisite majority of the whole vote cast in the general election of 1894. This was the heated gubernatorial election between the Populist candidate, Reuben Kolb, and the conservative Democratic candidate, William Oates, in which African Americans in the Black Belt were voted against their own interests to “count out” the black-white Populist coalition. (Rogers, pp. 283-85). Even though there were more votes for than against the Hundley Amendment, there were many more votes for governor than there were either for or against the amendment. (McMillan, pp. 237-38 and n.33).

After the defeat of the Hundley Amendment, agitation by education interests for a constitutional convention increased. The problems cited sound very much like those confronting public schools today:

In 1896, the Alabama Education Association appointed a committee under the chairmanship of Dr. John Herbert Phillips (after other duties prevented Dr. J.L.M. Curry from accepting the post) in order to further by “all means the holding of a constitutional convention” to secure educational reforms. The Committee drafted resolutions to be presented to the legislature setting forth the “immediate and imperative need of a new constitution as the primary step toward educational progress in Alabama” and outlined “the constitutional provisions and legal enactments recommended by the teachers of the state.” Included among the

reforms recommended were local taxation for public schools, higher qualifications for state superintendents, the establishment of school districts with taxing power, the creation of a state board of education, the allocation of a fixed per centum of the state's total revenues to education, a more equitable system of distribution for school revenues, consolidation of schools, and the reorganization and unification of the several departments of the state school system including the higher institutions of learning.

(McMillan, pp. 238-39 (footnotes omitted)).

The 1901 Constitution

Notwithstanding public interest in educational reform, disfranchisement of black voters was "the cardinal reason" why a constitutional convention finally was convened in May 1901.

(McMillan, p. 267).

Although the motives from which any individual acted in regard to the convention were often complex, it is not difficult to say which of the several sections gave the greatest impetus to the convention movement. In Alabama, it came from the black counties (both the Black Belt and counties in which the Negro held the balance of power) which in turn were supported by the business interests. These groups wished to disfranchise most of the Negroes and the uneducated and propertyless whites in order to legally create a conservative electorate.

(McMillan, p. 269). Professor Flynt explains some of the political complexities that made suppression of the black vote such a powerful force at the 1901 constitutional convention:

The emotionalism surrounding the [Populist] insurgents' frank appeal for black votes was not lost on white voters either. If whites divided politically, they invited black voters to control the balance of power. If freely allowed to vote, blacks could not themselves govern, but they could decide which of the two white factions would rule. This specter of a neo-Reconstruction government revived all the demons of racial politics that lurked (indeed, **still lurk**) just below the surface of Alabama life. To prevent such racial assertiveness during the disruptive 1890s and keep blacks "in their place," whites turned to violence and committed 177 lynchings during the decade--more than in any other state.

Without understanding the Populist insurgency and social upheaval, or the threat to the economic, political, and racial order of things, one cannot understand the 1901 Constitution. At its most elemental level, the new constitution was an attempt to replace "informal, fluctuating, and non-uniform patterns" of disfranchisement with "legal, static, and uniform methods" of moving African-

Americans to the periphery of Alabama life. The racial agenda, deferred in 1875 for fear of federal intervention, could be boldly advanced in 1901. By then America was of one mind with the South regarding Negro inferiority. Social Darwinists, eugenicists, and other new social engineers had found in ideas such as the survival of the fittest and eugenics, a “scientific” way to advance society by purging its inferior types. Even paternalists, who resisted the cold, calculating extremes of the new science, admitted that African-Americans were not yet prepared for the full responsibilities of civilization. Like the inhabitants of the newly occupied territories resulting from American imperialism, such inferior races would have to be restrained during the duration of their tutelage.

(Flynt at 70) (footnotes omitted) (emphasis added).

But the condition for obtaining disfranchisement of blacks was a pre-convention agreement to establish constitutional protections against increased taxation of Black Belt and corporate landowners.

Before conservative legislators would even agree to a vote for the proposed constitutional convention, they required certain guarantees: the convention would not change legislative representation, **remove the 1875 limits on taxation**, or move the capital from Montgomery. With these conditions met, they passed a bill calling for a public referendum on drafting a new constitution. In the ensuing referendum, approximately 70,000 voted to hold a convention and 46,000 voted against doing so. Opposition was strongest in the old Populist strongholds of the Wiregrass and hill counties: seventeen of twenty-four anti-convention counties had voted Populist in the 1890s.

(Flynt at 72) (emphasis added).

Representatives of the poor white counties understood that they were being targeted by the suffrage revisions in the constitution and that propertied whites who dominated the convention would use the race card to deflect efforts to increase funding for public schools. For this reason,

a considerable number of North Alabama and Wiregrass delegates were in favor of striking from the suffrage article the property, educational, and employment sections and leaving the poll tax. “If any are to be disfranchised, let them disfranchise themselves” by not paying a poll tax for public schools, they reasoned.

In 1901, the attitude of many Alabamians toward the poll tax stemmed

from the background of poll tax history in the state. A poll tax, which was levied by statute before the Civil War, was in January, 1867 assigned by law to the upkeep of the insane hospital at Tuscaloosa. The Radical convention placed a poll tax of \$1.50 in the Constitution of 1868 and assigned it to public schools. However, it was not made a pre-requisite for voting. Although a compulsory tax, it proved impossible of collection when one had little for the state to attach, and many thousands of Negroes and poor whites failed to pay it under the Constitutions of 1868 and 1875. Its payment not having been enforced, it became something of a “joker” to many whites and Negroes. Moreover the grandfather clause and other registration tests secured so much popular attention as to overshadow the accompanying movement for a poll tax pre-requisite for voting. Also, by 1901 the poll tax had become associated in the public mind with the developing public school system, in general more popular in North Alabama than in any other section of the state. These conditions and perhaps a lack of understanding of the full import of the tax when made a pre-requisite for voting, lessened opposition to it.

(McMillan, pp. 299-300 (footnotes omitted)).

Black leaders also placed greater emphasis on protecting African Americans’ access to public education than they did on protecting their right to vote. Booker T. Washington, William Hooper Council, and thirteen other prominent black citizens presented a petition to the 1901 constitutional convention that pleaded

for “some humble share” for [blacks] “in choosing those who shall rule over him.” But the petitioners knew that the disfranchisement of a large majority of the Negroes in Alabama was inevitable. Their real intent was to combat a strong movement in the convention to assign taxes paid by each race to the schools of that race – a policy by which Negro schools would “be virtually blotted out.” “While the amount of direct taxes paid by the negro is small,” maintained the petitioners, “all will acknowledge that he is a large factor in enabling some one else to pay taxes for the negro who rents a farm or a house not only pays the rent, but indirectly, the taxes also.”

(McMillan, p. 302 (footnote omitted)). The white delegates from the Black counties defeated the racial apportionment of taxes because it was against their own interests in securing a greater share of school revenues, which they were already allocating disproportionately to their white schools. Hypocritically, they cited the burden of educating their black populations as a

justification for maintaining whole population, not just white population, as the basis for apportioning seats in the Legislature. “The white people of the black belt are responsible for the civilization of the colored people, for their education, for their support and for their protection, and . . . have a right to representation in the law making bodies of the State’ based on the whole population, declared one delegate.” (McMillan, p. 307 (footnote omitted)).

Because of the alliance between corporate interests and the Black Belt oligarchy, “[a]dvocates of reform . . . faced a convention in which corporate conservative influences were greater even than in recent sessions of the legislature.” (McMillan, p. 311). For example, a petition to establish a commission to regulate railroads was defeated by the corporate-Black Belt alliance through its racial strategy. “As the petition campaign grew in intensity, the railroads pressed for immediate consideration of the suffrage article in the belief that once it was disposed of the convention would soon adjourn ‘and do nothing the railroads opposed.’ A revision of the suffrage was the main reason for the convention; any controversial measure in the new constitution might defeat the suffrage plan and the whole document when submitted for popular sanction, they argued.” (McMillan, pp. 313-14 (footnotes omitted)). Analysis of the vote against the railroad commission proposal

shows an alignment not very different from that on the suffrage; the chairmen of the suffrage and representation committees and a large majority of the other Black Belt delegates voted with railroads. . . . Ordinances levying a tax on corporations for school purposes, limiting the amount of land owned by a corporation, and prohibiting one corporation from owning stock in another were never reported from the committees to which they were referred.

It soon became apparent that the convention, under the control of the conservatives, would consider no constitutional alteration that changed the existing order. Again and again the majority argued that the convention had been called “to reform the suffrage” and “perpetuate white supremacy”; any change of a controversial nature would threaten the major work of the convention when submitted for ratification.

(McMillan, pp. 315-16 (footnote omitted)).

The conservative manipulation of the white supremacy theme destroyed any chance of changing the status quo established by the 1875 Constitution with respect to public education and

the taxes needed to pay for it.

The problems of taxation and education, two of the most important issues to come before the convention, were closely related since education was by far the largest single item in the state's budget. Future funds for education would depend on the degree to which limits were set on the state's taxing power, on the share of tax levies assigned to education, and on whether the convention provided for local taxation for public schools. Educational progress had been throttled by constitutional restrictions on local taxation for schools under the old constitution. According to the debates in the convention Alabama was the only Southern state whose constitution prohibited special local school taxation in the late nineteenth century. In pre-convention pledges, the Democratic party had promised that the convention would not raise the tax limit; nor would it take any "backward step in the cause of education." "I believe we should keep faithfully the pledges we have given not to increase taxation, but this should not deter us from making every effort to rid our State of the disgrace of illiteracy," declared President Knox in his opening address, Knox also observed that Southern states which had already limited the suffrage "have rightfully considered that the betterment of facilities for securing an education for all the people was a necessary and essential part of any just and wise scheme for the regulation of the right of suffrage, and the purification of the ballot.

"White" county interest in a convention dedicated to the advancement of public schools had been made well known through their newspapers and leaders. Some white county delegates asserted that their people were more interested in additional support for public education than in disfranchisement of the Negro. On the other hand white counties charged that the black counties did not share their interest in additional support for public education because existing funds available to them were more than sufficient for the education of white children. Under the Apportionment Act of 1891 the state superintendent of education was instructed to apportion funds to all counties in the state "according to the entire number of children of school age," but township trustees were then empowered to distribute the money "as they may deem just and equitable." As a result of this law, township trustees in the black counties did not divide funds between the races on a per capita basis. Negro teachers were hired for less than white teachers and less money was spent on buildings and equipment for Negroes. Thus more money became available per capita for the white child in the Black Belt than in the white counties. **Funds were often available in the black counties to defray all or part of the expenses of white students who went away to an academy or college.** When the prevailing attitude, that the education of the Negro "ruined a good field hand" is also taken into consideration, the lack of general enthusiasm for additional taxation for public schools in the Black Belt is at least explainable. On the other hand, the desire of the white counties to furnish better educational

opportunities to white children brought insistent demands for better public schools. Nevertheless, considerable support for dividing funds for public education according to the taxes paid by each race existed in both the white and black counties. Race feeling, based on social and economic rivalry with the Negro, had always run high among the poorer whites. . . .

Proponents of reduction reviewed the history of taxation since 1875, showing how as a result of rising evaluations the tax of 7.5 mills on each \$100 was reduced in 1877 to 7 mills, in 1880 to 6.5 mills, and finally in 1890 to 4 mills. It was true that after the panic of the eighteen-nineties the tax level had reached the 7.5 mill limit again. But rising property evaluations, the growing importance of license and privilege taxes, and a surplus in the treasury were all evidences that the reduction could now be made, they declared. They pointed to the pledge that taxes would be reduced if possible, and emphasized the happy effect that a reduction of the tax limit would have in the campaign for ratification. John W. A. Sanford best expressed the basic philosophy of restrictions on government, accentuated in Alabama since the Reconstruction era. "The more you limit power, the more you expand liberty; the more you curtail authority, the better it is for freedom, and therefore, I am for limiting the Legislature in its power of taxation to the utmost point that can safely be done," he asserted.

. . . [W]ith the Carpetbag era more than a quarter century in the past, it was foolish to make the tax limit even more severe, opponents of the plan declared. Delegates and newspapers pointed out, as the Brookings Institute did at a later date, that tax limitations really defeat their own purpose since they hamper the ability of the state to pay bonded indebtedness and thus cause interest rates to rise. No tax limit is to be found in the constitutions of "the great and progressive States of the Union," observed Emmet O'Neal. Despite letters of opposition from Governor William D. Jelks, the state auditor, the state treasurer, and other high state officials, all of whom warned of possible financial disaster, the 6.5 mills tax limit was adopted by a vote of 66 to 32. The convention . . . postponed for consideration with the report on education a recommendation in favor of special county and municipal taxes for education.

John Brown Graham of Talladega, chairman of the committee on education, was superintendent of schools of Talladega County and a well known educator. However, the membership of his committee was not equally apportioned among the different sections of the state. Fourteen of its nineteen members came from counties with Negro majorities. The committee submitted a majority and a minority report. The former provided for a 3 mill school tax and a 1 mill local optional tax to be levied by the counties; the latter to be exclusive of the 6.5 mills limit for the state. This optional county tax, of course, brought the tax limit to 7.5 mills again. It was included in the education report as a result of

the 1 mill tax reduction by the taxation committee, as the committee on education had previously voted down any such proposal despite great popular pressure for some kind of local taxation for schools. The minority report declared: “The divorcement of the white and colored school systems stand side by side in importance with the proper suffrage regulations.” Practically, however, it differed from the majority only in that Negro school districts were to be organized, without reference to each other as to territorial boundaries, each to have the privilege of levying a one mill tax for schools on the property of its own race by a vote of three-fifths of the white or colored qualified electors of the district as the case might be. The 3 mill tax levy on an evaluation of \$270,408,000 was the equivalent of the annual appropriation of \$550,000 for schools and the annual 1 mill school levy amounting to \$257,000 – a total of \$807,000 for schools in 1900-1901 exclusive of the poll tax and other special funds. Public opinion demanded that a 1 mill tax for Confederate veterans levied since 1896 be maintained. With a limit of 6.5 mills, only 2.5 mills remained for the general expenses of the state.

...
One part of the report of the education committee, adopted by the convention, incorporated into the new constitution phraseology similar to that of the 1891 school apportionment act, which gave wide discretionary powers to local trustees and made a per capita division of funds between the races unnecessary. . . .

Strangely enough, the minority report on education, providing for the division of a local 1 mill district tax by the creation of independent white and Negro local school districts, was signed by four delegates from the white counties, which had only five delegates on the committee. None of the fourteen delegates from the black counties gave it their support. The whole plan was an attempt at political strategy by the white county delegates. They knew that with the Black Belt and industrial interests in control of the convention, the only hope of district taxation for schools lay in hurdling the race issue. They reasoned that the Black Belt might support the plan if relieved of dividing funds with a Negro school population that exceeded two-thirds of the whole. Therefore, what seems to be a more bitter attitude toward the Negro on the part of the white county committee members was really only an effort to secure support for local district taxation by playing the game of the black counties – making the issue a race issue. They failed in their attempt to use a strategy so often used successfully by the Black Belt as the convention voted down the plan 90 to 31. In the debate, advocates of the minority plan pointed out that by act first approved in 1875, the poll tax had been divided between the races for schools according to the amount paid by each race. Moreover, it was argued that the Negro favored the plan because it would develop race pride and initiative. Richard C. Jones of Wilcox County, speaking for a small group of Black Belt paternalistic leaders, replied that he had never

heard of a Negro who wanted taxes divided as paid by race “from Booker T. Washington to a boot black.” The main argument, however, was that the white people demand such a division because “they have the negroes hung about their necks like a chain.” Again, the most effective answer came from one who spoke in the Wade Hampton tradition of Black Belt paternalism. “If we do not lift them up, they will drag us down,” declared ex-Governor Thomas Goode Jones.’

In addition to the race issue, the debate concerned the relative merits of optional school district taxation or a similar county levy for schools. Also, the issue of whether qualified electors or property holders only should vote in elections deciding whether to levy the 1 mill tax. On the latter issue, J. Thomas Heflin, determined opponent of the Negro and champion of the poor whites, bitterly opposed “letting property decide.” He spoke in the interest of the white tenant. Curiously enough, on the issue of support for Negro schools, he argued that the Negro paid little taxes, and therefore deserved little school money. State Superintendent John W. Abercrombie, John Herbert Phillips, superintendent of city schools of Birmingham and nationally known educator, the Alabama Educational Association, and other educational forces in the state backed a school district tax levy similar to the one adopted by the Louisiana convention of 1898. But conservatives opposed school district taxation for the very reason that many educators favored it; in other states it had aroused more interest, proven easier to levy, and hence was more effective than school taxation by counties. Opponents of the district tax argued that in school districts where evaluations were high because of industrial development, schools would secure large sums as contrasted with other school districts in poorer parts of the same county. However, the same criticism applied all the way up the scale. The poorer counties lost funds to the richer counties when the convention reduced the state tax limit 1 mill and the taxation and education committees proposed instead local taxation for education. The convention debated and turned down the proposal of the taxation committee for special local school taxation by municipalities; and its recommendation that only “property taxpayers who are qualified electors” should participate in local school taxation elections. It adopted the plan of the education committee, providing for a 1 mill optional county tax for education to be levied only after an affirmative vote of three-fifths of the qualified electors voting at an election for that purpose.

(McMillan, pp. 317-25 (footnotes omitted) (emphasis added)). Thus § 269 of the 1901

Constitution was adopted; it provides:

The several counties in this state shall have power to levy and collect a special tax not exceeding ten cents on each one hundred dollars of taxable

property in such counties, for the support of public schools; **provided, that the rate of such tax, the time it is to continue, and the purpose thereof, shall have been first submitted to a vote of the qualified electors of the county, and voted for by three-fifths of those voting at such election. . . .**

(Emphasis added). This was the first time in Alabama’s history that a requirement of voter approval was placed on the authority to levy a tax of any kind. The property tax for school purposes remains the only tax levy that not only must obtain approval of a majority of the local jurisdiction’s elected representatives but must survive a popular referendum as well. Of course, any property tax levied by either the Alabama Legislature or by a county or municipality in excess of the millage caps first placed in the 1875 Constitution and preserved in the 1901 Constitution requires a constitutional amendment, which also requires voter approval.

Education leaders considered the constitutional restriction on local school taxes to be the greatest detriment to educational progress in Alabama.

The year following the adoption of the Constitution of 1901, the state superintendent of education reported that “an amendment to the constitution should be submitted allowing school districts to levy a local tax for school purposes whenever the people of the district desire it. The schools of Alabama can never rank with the schools of other states until provision is made for local taxation.

FN 116: In 1915, in a message to the legislature Governor Emmet O’Neal declared: “The present constitution has checked our educational growth by denying the counties and school districts the right to supplement state aid by local taxation. Every student and authority on elementary education admits that no permanently successful system of elementary education can be maintained that relies entirely upon state aid and not upon local taxation, initiative and effort.”

(McMillan, pp. 325-26 (citations omitted)).

The public school funding provisions of the 1901 Constitution are directly traceable to the racially discriminatory motives of the 1875 Constitution, and propertied interests in the state were successful once again in using the race card to protect their financial interests.

The tax provisions of the Constitution of 1901 are substantially the same as those in the 1875 Constitution. Having taken form and shape in the agricultural era of the pre-1875 period, they are thus ill suited for Alabama's twentieth century semi-industrial economy. The delegates not only incorporated no new ideas on taxation in the Constitution of 1901, but continued the outmoded provision requiring the legislature to enforce uniformity in taxation, which prevents the classification of property for effective tax purposes. The social, political, and economic changes of the past century have increased the demands upon government and constitutional restrictions have only served to thwart the objectives of responsible government. Tax limitations only encourage bonding as a means of hurdling the tax limitation and serve to injure credit and compel the state, county, or municipality "to pay high interest rates to bond buyers." **This situation is directly traceable to a distrust of the taxing and spending powers of the legislature, so evident in 1875, and which had in no sense abated by 1901.** Tax limitations, first written into the Alabama Constitution of 1875 as a safeguard against a re-occurrence of the extravagance and mismanagement of the Reconstruction era, hampered the growth of cities, all kinds of internal improvements, and educational development during the last quarter of the nineteenth century. The demand for relief from their "strait jacket" effects, especially strong in urban areas, was one of the reasons for calling the convention of 1901. **A convention controlled by the non-urban Black Belt, the railroads, and industrialists, who were generally conservative and wished tax protection for themselves denied any adequate relief. The debates show that they were able to use past Alabama history every [sic] effectively in their successful attempt to write their own interests into the Constitution of 1901.**

(McMillan, p. 329 (footnotes omitted) (emphasis added)).

In addition to the anti-tax measures, section 93 of the 1901 Constitution prohibited the state from engaging in internal improvements or lending its credit for the purpose of such improvements.

Immediately, Section 93 was found to be one of the most troublesome elements of the constitution, thus resulting in the first constitutional amendment in 1908. Moreover, this section is the 'most amended section of the Constitution of 1901.' Section 93 reflects the 'naiveté of the framers of the early twentieth-century Alabama Constitution. Only a group of white gentlemen preoccupied with completing the removal of the possibility of blacks playing any significant role in Alabama political life could have believed that [such a provision] . . . would work in future years.'

(Chaney at 250-51 (*quoting* WILLIAM H. STEWART, *THE ALABAMA STATE CONSTITUTION: A REFERENCE GUIDE* 63 (1994)) (footnotes omitted)).

In its general revision of the constitution, the convention of 1901 acted with the utmost conservatism for two reasons. In the first place it was dominated by the conservatives. And in the second place, these conservatives were able to convince other delegates that any change of a controversial nature would endanger ratification of the suffrage decision. **It was the old story of using the Negro issue to prevent change or reform.** The convention . . . provided for a more severe state tax limit, and gave counties and municipalities little relief from tax limits. The convention made some progress in education and refused to adopt the unjust and unconstitutional proviso for division of the schools funds according to the amount of taxes paid by each race. Here, however, the decision was made with its effects on suffrage revision in mind. . . . **Fundamentally, except in regard to the suffrage, the Constitution of 1901 was a re-adoption of that of 1875.** “The Constitutional Convention of 1901 was called for the paramount purpose of reforming the suffrage and removing from our electorate the menace of an ignorant and purchasable vote,” declared Governor Emmet O’Neal in asking for a new constitution in 1914. “Little consideration was given to matters of reform, and hence the Constitution of 1875 which had been framed to meet conditions which can never again exist, was practically readopted.”

(McMillan, pp. 338-39 (footnotes omitted) (emphasis added)).

Discrimination against African Americans was the prevailing theme which carried ratification of the 1901 Constitution by the electorate.

Above all else the ratificationists based their campaign on “white supremacy” and the moral issue of an honest ballot. As one newspaper simply expressed it, the new constitution “is a clean white man’s document and should be approved.” Emphasis was placed on the issue of Negro disfranchisement and speaker after speaker declared that no white man would be denied the ballot. Again and again speakers compared the campaign to that of 1874, when the Democrats regained control of the state under the leadership of George S. Houston. Much of the literature of that earlier campaign, as well as the old and new constitutions, were reprinted in the newspapers and the people were told that “white supremacy” was as much at stake as in 1874.

(McMillan, p. 346 (footnotes omitted)). Even so, 32 counties voted against ratification, and the 26,879 margin for ratification was provided by the majority-black counties, making it appear that African Americans had voted for their own disfranchisement.

Charles M. Shelley and other opponents of the constitution charged that the constitution was “counted in” by the Negro vote of the Black Belt. And contemporary accounts support them. . . . Although one cannot prove that the large Negro vote in the black counties in favor of the constitution was fictitious, a study of the election returns, contemporary sources, and the Black Belt voting practices has convinced the author that is [sic] some counties almost every eligible Negro was “voted” although thousands never appeared at the polls. In other cases the Negro appeared at the polls and either voluntarily or involuntarily voted away an interest so fundamental to him as the franchise. Figures prove that the constitution was adopted by the majorities of the black counties, whether the vote was fictitious or real.

It is also true that in some parts of the state where a strong tradition of “voting” the Negro did not exist, the Negro voted against the constitution.

(McMillan, pp. 351-52 (footnotes omitted)).

Thus, throughout Alabama’s constitutional history, even in those matters which did not address concerns about African Americans directly, the conservative forces who enjoyed property and privilege used the race issue to achieve their personal and corporate objectives.

The presence of the Negro in large numbers has been the most important factor in the constitutional history of the state. No major constitutional issue has faced the state since 1819 that has not been decided largely in the light of the presence of the Negro. Scarcely less important has been the concentration of this Negro population in the rich agricultural area of South-Central Alabama, with very few Negroes in the hills of North Alabama. This fact, based on geography, has resulted in an intense sectionalism, reflected in every constitutional convention in the state’s history. The controversy in the convention of 1819 over whether to adopt the “white basis” or the “federal ratio” for apportionment in the state legislature began a sectional struggle between North and South Alabama which has lasted to this day.

(McMillan, p. 362).

This Court's findings of fact addressed the racially discriminatory motives of the 1901 Constitution and the negative impact of disfranchisement on the funding of education for African Americans in Alabama:

174. The systematic disenfranchisement of blacks, accomplished by the 1901 Alabama Constitution was a main plank in the platform of Southern Progressivism culminating in defeat of efforts in the 1890's to form political coalitions between Hill Country white Populists and black voters. According to Dr. Thornton, such a coalition threatened to undermine the color line of white supremacy that had been drawn in 1874 with the ascendancy of the Democrats. Thornton (11/5/90) 200-04.

175. The 1901 Constitution (FN22) embodied a major compromise between white political forces in various parts of the state. Hill Country whites, Black Belt land owners, Bourbon whites and their "Big Mule" industrial allies, agreed that the Hill Country whites would control election of the governor through direct primary elections, while the Bourbons and Big Mules would preserve their interests by creating and maintaining a malapportioned state legislature that overrepresented Black Belt counties. Rogers (3/13/91) 48-58.

Ever pragmatic in their approach to politics, the majority of the Bourbon elite took the lesson of the populist period to heart. Without the Negro vote, they could not maintain themselves in power. But as long as Negroes remained legal voters, there was always the danger that a dissident white group might capture the Negroes' confidence, and with these allies go on to effect a complete revolution in state government. Clearly, the way to prevent such an eventuality was to admit to some degree of power the excluded white groups from whose ranks dissident movements had time and again arisen, while concurrently eliminating the Negro from politics. Of course, such a program meant a considerable diminution of power for the Bourbons, but, "half a loaf was better than none." The result was the Constitution of 1901. The Bourbons contented themselves with disproportionate power in the malapportioned legislature, while largely--through the institution of the direct primary--abandoning executive offices to the formerly excluded white groups. The Negro was removed as a possible bone of contention between the two segments of the white electorate by his disfranchisement.

176. Ironically, ratification of the 1901 Constitution would have failed if the Black Belt whites had not fraudulently stuffed the ballot boxes with captive black votes. Incredulously, the returns show that blacks voted for their own disenfranchisement. Thornton (11/5/90) 203-04.

177. As a practical matter, blacks had been denied a fair vote and a fair count even before the 1901 Constitution, because the Black Belt Bourbon white politicians used fraud and intimidation to manipulate the black vote to support conservative Democratic candidates. The threat of black political influence gave blacks the potential of determining election outcomes and thus some leverage--albeit minimal--to demand fair treatment. For example, the U.S. House of Representatives threw out the declared Democratic winners for congressional seats after the 1892, 1894 and 1896 elections and seated their Populist opponents based on the evidence of fraud with respect to the black vote.

So that kind of intervention from outside could give blacks some sense that there was something to be gained by holding on to this legal right to vote, even though it only in certain occasions never [sic] (ever) became a practical ... thing. After 1901 that hope is gone.

Thornton (11/5/90) 202-03.

178. The 1901 Alabama Constitution not only disenfranchised the black population but entrenched a system of educational funding that was designed to improve white schools by raiding black students' portion of the public school fund. This constitutional policy of racial discrimination in education was a hallmark of the so-called "Progressive" period in Alabama, as it was throughout the South.

Vann Woodward in his *Origins of the New South* calls the chapter on progressivism *For Whites Only*. And that really is accurate, indeed one of the ways in which increased funding for white schools is achieved by the progressives is transferring of financial resources out of the black schools and towards the white schools.... [B]etween 1891 and 1908, the percentage that the black children are getting from the common school funds falls from 38 percent to 12 percent.

Thornton (11/5/90) 196-97. The gap between state funds received by white and black students grew at all school levels, including higher education. Thornton (11/5/90) 197.

787 F.Supp. at 1090-91. This Court focused in particular on the way disfranchisement of blacks was tied to the constitutional restrictions placed on school taxes:

181. The diversion of funds from blacks' share of the common school fund to the education of white students greatly accelerated during the Progressive Period (roughly 1900-1919). A cardinal element of the Progressive program was improvement of public education--but only for whites. The plundering of blacks' educational resources was a ready means to fund white educational improvements without raising taxes. ASU and AAMU, which were funded out of the common

school fund, suffered this deprivation along with black elementary and secondary schools. Thornton (11/5/90) 196-97.

787 F.Supp. at 1091. This scheme is explained more extensively in a scholarly article published in 1956:

Having survived the dark days of Reconstruction, Alabama had kept her public schools barely alive and struggling. One reason was hard times; another reason was the Negro problem. The late nineties, however, were more prosperous years in the state, and in 1901 a new state constitution, which had the effect of disenfranchising the Negro, was adopted. The white people were then more willing to support their schools.

...
In the Black Belt there was general approval of the new teacher certification law, of uniform textbooks, and of the redistricting law. The local tax privilege, however, was not popular. It was voted by Perry County in 1904 and by Greene and Marengo the following year. By 1914 of the forty-six counties in Alabama which levied the local school tax, only one of them (Marengo) was in the Black Belt.

Various reasons for the failure to levy a county tax for schools were offered by county school superintendents. Bullock, Dallas, and Montgomery were said to be opposed to the levy because the citizens who paid the heaviest taxes were residents of cities and towns, where municipal appropriations helped to support the schools. Hale County residents were opposed to a tax which would be partially used in other districts, and so they favored a district rather than a county tax. In Sumter the people were so heavily in debt from building roads and a courthouse that they could not levy further taxes for education. The underlying cause, however, appears to have been expressed by the superintendent of education in Montgomery County, who reported, "It is not necessary for our patrons to supplement, as we have sufficient public funds to run our schools."

It seems reasonable to conclude, after a careful examination of the school statistics for 1905-1906, that the Black Belt counties did not vote local supplements for the schools because their white schools already compared favorably with those of other counties. With the state funds already available, and with very low tuition charges, the salaries of the teachers were higher and the school terms longer in their white schools than in the other Alabama counties. It had been so at least since 1902. The average monthly salary of white teachers in Black Belt counties in 1906 was \$47.18, which could be compared with \$39.91 in other counties, and the school terms averaged 134 days, compared with an average of 106 days in the rest of the state. Since the salaries of Negro teachers in the

Black Belt were considerably lower than those of the white teachers, and the school terms were shorter, it appears that white schools were favored when the state funds were allocated.

The discrepancy between the support of Negro and white schools goes back to an act of 1891, which left with township trustees the discretion for distribution of funds as between Negro and white schools, and the Constitution of 1901 reaffirmed this policy. The result is illustrated by the expenditures in Wilcox County, where money spent for teachers' salaries per child in the school census amounted to \$1.02 per white child in 1889-90, but, in 1907-08, amounted to \$10.58 per white child and thirty-seven cents per Negro child.

(Sisk 1956, pp. 191-93 (footnotes omitted)).

Ira Harvey summarizes the public school funding provisions made by the Constitution of 1901:

The new constitution which went into effect on November 28, 1901, is marked both for what it did and for what it did not do for education. It did provide a constitutional basis for supporting education at the state level, and it allowed local governments limited taxation privilege, but it left unresolved the still muddled question of direct taxation for schools by municipalities. The new constitution allowed a 3.0 mill state tax for education out of a statewide limit of 6.5 mills and thus recognized and made constitutional a statewide tax for education. Under the old Constitution of 1875 a 1.0 mill tax had been collected for education, but its legality had been questioned. Requiring the 3.0 mill state tax for the use of public schools made the old lump-sum appropriation of the legislature obsolete. The new tax would grow with the wealth of the state and money for schools would not be left to the whim of the legislature (Constitution of 1901, Section 260).

The constitution also granted to counties the power to levy a total county tax of 6.0 mills, of which 1.0 mill was earmarked for schools, the new constitutional limit being 12.5 mills for local and state taxes combined (Section 269). There were exceptions, however. Montgomery County was given the right to levy a special tax of 7.5 mills for the interest and principal of the public debt and for public schools and public conveniences. Three cities were also excepted: Decatur was allowed a levy of 3.0 mills for "public schools, public school buildings, and public improvements," and New Decatur and Cullman were allowed 3.0 mills for "educational purposes (section 216)."

In summary, for public education the state tax of 3.0 mills was made obligatory, the county tax of 1.0 mill was made optional, municipalities were allowed to tax for schools below the general limit, and the four municipalities

mentioned above were given special power to exceed the constitutional limit. The ink was hardly dry on the document, however, before State Superintendent Abercrombie begin [sic] pressing for an amendment for local taxation. **The one issue of educational finance of greatest importance then and today was the question of direct local taxation for schools in towns and municipalities and in the local units.**

(Harvey 1989, pp. 87-88 (citation omitted) (emphasis added)).

In 1916, Amendment 3 to the constitution was ratified, which authorized both counties and school districts to levy an additional 3.0 mills. This was only a small improvement. In 1919, State Superintendent Spright Dowell reported to Governor Kilby: “Under the present constitution, and in fact, since the Constitution of 1875, we have found ourselves more limited and restricted in the matter of local school support than any state in the Union.” (Harvey 1989, p. 103 (citation omitted)).

However modest and inadequate were the local taxation provisions of Amendment 3, the “educational awakening” they were one part of in the second decade of twentieth century Alabama was made possible by the disfranchisement of blacks.

This time most of the Black Belt counties voted the county tax. It was still true that the state school funds, made available by the legislative enactments, were divided among the counties according to the school population and were apportioned to the schools by the local county authorities as they saw fit; and it was still true that the funds were diverted in favor of the white schools. Therefore, the white schools of the Black Belt tended to be superior in length of terms, teachers’ salaries, and the preparation of teachers.

Thus, with some reluctance, did the Alabama Black Belt share in the “Educational Awakening” of the state. The reluctance was caused not by any lack of appreciation for the value of public school education, but by the constant guarding of **a principle that the white people considered paramount: white supremacy**. This principle, important throughout the state and the South as well, was adhered to with constant persistence in the Black Belt, where Negroes greatly out-numbered the white people. The Black Belt white citizen viewed school legislation in the light of his white supremacy belief, and, accordingly, accepted the law if no conflict existed; or, if there were a conflict, he made efforts to change the law. Failing that, he simply neglected to enforce the law. This did not

mean that Negroes were to be deprived of any educational opportunities. It did mean, however, that the largest portion of the public funds for education were to be used in schools for white children.

(Sisk 1956, pp. 195-96 (emphasis added)).

It became apparent quickly that the constitutional caps on the ability of both the Legislature and local governments to levy property taxes in support of public schools would require resort to other forms of taxation. The Alabama Special Educational Trust Fund was created in 1927 during the first administration of Governor Bibb Graves. Act No. 163, 1927 Ala. Acts. (Harvey 1989, pp. 130-31). The original mix of taxes dedicated to the ETF included excise taxes on the gross receipts of railroad, telegraph, telephone, express, hydroelectric, coal, iron, sand and gravel, and sleeping car companies, as well as a 15% tax on tobacco products. A state income tax was added during the Miller administration in 1933. Ala. Const. 1901, amend. 25. (Harvey 1989, pp. 148-54).

In 1947, the first Folsom Administration was desperate to find revenues to ameliorate the post-World War II teacher crisis in Alabama. Conservative land owners were mobilized against incursions on their property taxes; they had just the year before procured adoption of the Boswell Amendment, Ala. Const., Amend. 55, which created the “read and understand” voter registration requirements aimed at stifling increasing black voter registration.² Black Belt landowners in particular were worried that local officials elected by black voters would raise their property taxes. In these circumstances, it was hopeless for Folsom to try to raise property taxes, and there was a surplus of income tax revenues, so he procured passage of Amendment 61, which earmarked 90% of income tax revenues for teacher salaries. In this way, the earmarking of the state income tax is also traceable to Alabama’s enduring constitutional history of shielding white property owners from taxes used to educate blacks.

An attempt was made to raise the constitutional limit on local property taxes in 1955, but racial issues once again contributed to its defeat.

² The Boswell Amendment was declared unconstitutional in *Davis v. Schnell*, 81 F.Supp. 872 (S.D. Ala.) (3-judge court), *aff’d*, 336 U.S. 933 (1949).

The rate of ad valorem taxation which was constitutionally fixed at a maximum of 7.0 mills had not been changed since Amendment 3 was approved in 1916. Permissive legislation and the required constitutional amendments had granted 13 county and 23 city school districts the right to raise their school ad valorem taxes, with the highest rates being 17.5 mills. The local school tax amendment would allow the addition of another 5.5 mills to the allowable seven mills to produce a total of 12.5 mills for school purposes when local citizens so desired.

. . . But highly publicized charges about waste in state spending led to public confusion over the actual amount of revenue available for schools, and the **segregation controversy** further clouded the issue. In response the public failed to approve those tax increases over which they had control; these included taxes to benefit education. The same 1955 legislature increased the tax rate 16.67 percent on gasoline to raise \$50 million for highways and levied for welfare a tobacco tax to raise \$2.4 million and increased taxes on alcoholic beverages and corporations. The people of the state had no chance to vote against these issues, but they did exercise their prerogative to disapprove taxes when the school tax amendments were placed before them.

The constitutional amendments affecting education were all soundly defeated at the polls on December 6, 1955. This defeat threw education in Alabama into the worst proration of funding since the depression.

(Harvey 1989, pp. 205-06 (emphasis added)). According to Dr. Harvey, “[t]he impact of *Brown I & II* cannot be denied in the voters’ decision to reject these proposals.” (Harvey 1989, p. 209). On December 20, 1955, the voters approved Amendment 111, which this Court found to have “adopted most of the recommendations of the 1954 Interim Legislative Committee report for the racially discriminatory purpose of preserving segregation in the public elementary and secondary schools of the state.” 787 F.Supp. At 1104.

Undoubtedly the desegregation issue and the provisions of amendment 111 spurred both the legislature and local white citizens to deny additional taxes for the support of public education, a condition which lasted until 1963 and from which it took education many years to recover. This provision remains unchanged today, and the support of public education is constitutionally permitted but not required in Alabama.

(Harvey 1989, p. 210). *But see* 787 F.Supp. at 1104 n.24: “The Circuit Court for Montgomery County, Alabama recently found Amendment 111 to the Alabama Constitution void in its entirety since it violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *See, Alabama Coalition for Equity Inc. v. Guy Hunt, Governor*, No. CV-91-117-R (August 13, 1991);” *dismissed by Ex parte James*, ___ So.2d ___, 2002 WL 1150823 (Ala., May 31, 2002).

By 1959, as the campaign of massive resistance got in full gear, there was an almost total collapse of support for public school funding.

[Governor] Patterson . . . recommended a \$75 million revenue bond issue for school construction, to be financed from the ASETF. However, he admitted that the desegregation issue was a major force in the state and could work against further education spending. His position against integration was plainly stated:

As long as the Negro citizens of this state will work with us toward having a good, equal and segregated public school system for all of our children, I am willing to work night and day and do everything in my power to provide such an education for all our children, regardless of their race. However, if they turn against us and try to force integration upon us, I would scrap the public education system before I would submit to it (Patterson, June 24, 1959, pp. 163-165).

(Harvey 1989, p. 215). Patterson may or may not have been bluffing with his threat to close schools.

A charitable and probably correct interpretation of his school-closing proposal is that it disarmed segregationists who opposed public school funding because of the possibility that the schools soon would be integrated. Patterson maintains today that very few state leaders seriously entertained the idea of closing public schools if they became integrated. However, Charles “Pete” Mathews, a longtime legislator and lobbyist, argues that as the threat of integration intensified, legislative enthusiasm for funding public schools sharply diminished.

(Permaloff and Grafton, p. 97 (footnotes omitted)).

The Legislature did establish the Alabama Education Authority and authorized it to sell bonds not exceeding \$100 million to support capital building. Acts 1959, 2nd Ex. Sess., No. 126, p. 369. \$23 million of the initial bond issue was allocated to higher education. (Harvey 1989, p. 216). But, as this Court found, black students received very little benefit from it. “When it became clear that its separate-but-equal defense of segregation would fail, the state government withdrew the financial support that had allowed Alabama State and Alabama A & M to gain accreditation briefly. Both black colleges lost their accreditation in the early 1960's, despite pleas by their presidents for the additional funding needed to prevent it. Thornton (11/7/90) 192-93; (11/26/90) 13-14. It was not until several years later that ASU and Alabama A & M regained full collegiate accreditation.” 787 F.Supp. at 1104-05.

One component of Alabama’s early campaign of massive resistance was a policy of devolving state educational authority to local jurisdictions, where segregation could be defended more easily against federal attack. The 1959 Legislature authorized the creation of independent school districts throughout the state. Acts 1959, 2nd Ex. Sess., No. 126, p. 198. In 1962, at Governor Patterson’s request, the Legislature passed a constitutional amendment authorizing county commissions to increase property taxes by 5 mills, subject to approval by a majority of the voters.

This amendment was approved by the voters on May 1, 1962, and proclaimed ratified as Amendment 202 on May 10, 1962. It could have added revenue of \$14,157,146 if all 67 counties actually approved the newly allowed tax. Even so, however, no revenue could accrue before the 1962-63 school year and the amendment could be of no help in the immediate situation. The passage of this amendment constitutionally authorized a total of 12.0 mills of district and county taxation for public education. But since the Minimum Program required only 7.0 mills, the public apparently felt no need to provide more than the minimum as there was no compulsion to raise its own taxes. Only three cities and eight counties actually passed additional ad valorem taxes in 1962. Many more than this were turned down.

(Harvey 1989, p. 221).

The Failure of Tax Equalization and Tax Reform

Even as the miserly constitutional caps on state and local millage rates rose incrementally over the course of the twentieth century, the actual proceeds of ad valorem taxes available for public schools tended to go down because of several other factors: (1) the constitutional requirement that voters approve property tax increases in a referendum election, (2) legislative action that has watered down the definition of fair market value of property and that placed limits on the percentage or ratio of value that can be assessed, and (3) arbitrary non-enforcement of existing assessment laws by state and local officials.

The Constitution of 1901 allowed an overall ad valorem tax not to exceed 12.5 mills and to be composed of a state 6.5 mill tax, a local county 1.0 mill tax for schools, and a balance of 5.0 mills to be levied in some combination by cities and counties. While this may seem today to be a very low millage, we must balance this rate against an allowable assessment ratio of 100 percent then and an effective ratio today of about 15 percent. Obviously, a mill applied to 100 percent of value is worth 100/15 of a mill applied to only 15 percent of the value of property.

In 1916, Amendment 3 authorized an additional 3.0 mill county tax for public schools and, when levied, an additional 3.0 mill district tax. With the enactment of the minimum program in 1935, levying of the now permissible 7.0 mills was made a prerequisite for participation (This came to be known as the “basic seven mills”). In 1962, an additional 5.0 mill county tax was authorized by Amendment 202; in 1980 Amendment 382 authorized an additional 3.0 mill school district tax. The total permissible statewide levy is thus 15.0 mills. In addition, 82 amendments have been authorized for individual school districts to allow them to levy over and above the state-wide 15.0 mills. . . . However in 1986-87, 20 city school systems . . . and 32 county schools systems . . . had not implemented all ad valorem millage in excess of the 7.0 mills (as adjusted under the provisions of Amendment 373) presumably levied first in 1935 due to minimum program requirements. These implementation failures have resulted from the refusal of voters or local boards of education to call for a referendum – or by the voters’ rejection of such a referendum.

In many cases where millage rates have been increased over the years, local school officials have found assessment rates going in the opposite direction.

To paraphrase an old quotation, “A mill today just isn’t what it used to be.” The failure of the state to properly assess property would become the major factor in limiting local school revenues.

(Harvey 1989, p. 461).

The Legislature put the first limitation on the meaning of fair market value in 1911, when it required that “the taxable property within this State shall be assessed, for the purpose of taxation, at sixty per cent of its fair and reasonable cash value.” 1911 Ala. Acts, Reg. Sess., No. 216, p. 185. In 1935, as a companion to the Minimum Program Acts, the statute was amended to require property assessment at 60% of “its fair and reasonable market value.” 1935 Ala. Acts, Reg. Sess., No. 194, p. 263. But the Legislature could not amend the constitutional requirement that all taxpayers, whether they be individuals or corporations, be taxed at the same rate applied to the same percentage of assessment value.

Section 211 of the Alabama Constitution provides in pertinent part that:

All taxes levied on property in this state shall be assessed in exact proportion to the value of such property. ***

Section 217 of the Alabama Constitution provides as follows:

The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate; provided, this section shall not apply to institutions devoted exclusively to religious, educational, or charitable purposes.

These constitutional provisions have been consistently interpreted by the Supreme Court of Alabama as requiring “uniformity and equality among all taxpayers, ‘private corporations, associations and individuals alike’, both as to ratio and percentage of taxation and also as to rate of taxation.” In other words under Sections 211 and 217, all taxable property, by whomsoever owned, in the State of Alabama must be assessed and taxed at uniform ratios for ad valorem purposes. Thus, rather than establishing various classes of taxable property, the State of Alabama has chosen to place all taxable property within the state in a single class for ad valorem tax purposes.

Weissinger v. Boswell, 330 F.Supp. 615, 620 (M.D. Ala. 1971) (3-judge court) (quoting *State of Alabama v. Alabama Power Co.*, 254 Ala. 327, 336, 48 So.2d 445, 453 (1950); *Hamilton v. Adkins*, 250 Ala. 557, 563, 35 So.2d 183 (1948); *State of Alabama v. Murphy*, 45 Ala. App. 637, 644, 235 So.2d 888 (Ct. of Civ. App.1970)). These tax equalization provisions were placed originally in the 1868 Constitution for the specific purpose of ending the unfair practices of local taxing authorities that had developed during the antebellum era.

Under former constitutions the taxing power was not defined, qualified, or restrained by any other provision than the simple declaration: "All lands liable to taxation in this State shall be taxed in proportion to their value." On personal property, taxes, either specific or *ad valorem*, could be imposed as the legislature deemed best. **Slaves, formerly the chief subject of taxable personal property**, were uniformly taxed, not according to value, but a specific tax was levied, graduated by the age of the slave. On other articles of personal property, such as watches, clocks, &c., a specific, not an *ad valorem* tax, was imposed. The inequalities of this mode of taxation were the cause of complaint, and we find in the constitution of 1868 the provision, which has been generally introduced into the later constitutions of our sister States: "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property." The general assembly could confer on municipal corporations, for municipal purposes, the power of taxation it could exercise without the agency of such corporations. No governmental power is more easily abused, or more often perverted, than the taxing power. Possessing it without limitation, municipalities resorted to it too often without a just regard to the interests of the tax payer. To prevent the abuse of the power, to protect the citizen subject to it, the framers of the constitution were not satisfied with the mandate addressed to the general assembly, found in the 16th section of the 13th article, to which we have referred, but they expressly provided: "The general assembly shall not have power to authorize any municipal corporation to pass any laws contrary to the general laws of the State, *nor to levy a tax on real and personal property to a greater extent than two per centum of the assessed value of such property.*" Art. 4, § 36. The mandate to the general assembly was to restrict power. A limitation beyond which the corporation could not pass, and within which it must be restrained, the extent of corporate power, was defined by the clause last quoted.

Mayor of Mobile v. Stonewall Ins. Co., 53 Ala. 570, 1875 WL 1208 (Ala.), p. 4 (1875) (bold emphasis added).

The problem was that neither the constitutional nor statutory provisions for levying property taxes were ever actually enforced, and the historical pattern of arbitrary and unequal property taxation continued in practice.

In 1969 the State Department of Revenue commenced an assessment-sales ratio study to determine the ad valorem tax assessment ratio of fair and reasonable market value of real property in each county in the state and to determine the statewide median ratio. The results of this study, the reliability of which is not in issue, reveal that the median ratios for the individual counties in the State of Alabama range from lows of 6.7 and 7 percent of fair market value in rural Hale and Washington Counties to highs of 23.1 and 26.8 percent of fair market value in urban Madison and Jefferson Counties. The study further reveals that the median assessment ratio for the state was approximately 16.9 percent of fair market value.

Weissinger v. Boswell, 330 F.Supp. at 621 (footnotes omitted). This systematic pattern of unlawfulness was supported by the alliance of “Bourbon aristocracy” Black Belt planters and “Big Mule” urban industrialists, who continued to use the race issue, as they had done since Reconstruction, to protect their private financial interests. A 1957 report by the Legislative Interim Committee on Revision of State Tax Laws, chaired by Rep. Joe Dawkins and Senator Albert Boutwell,

lamented that low property-tax levels were undermining Alabama schools, noting that in 1953 school districts received only 18 percent of their revenues from this source compared to a mean of 68 percent for school districts nationwide. This “neglect and virtual abandonment of the property tax has developed out of restrictive effects of Constitutional rate maximums and completely unrealistic assessment levels.”

(Permaloff and Grafton, p. 93 (footnote omitted)). That same year, the Alabama Education Commission rejected proposals to reform the corrupt property tax system and instead recommended a sales tax increase. “This classic regressive tax had long been supported by the Big Mules as the only way to ensure that blacks and other poor Alabamians paid their ‘fair share’ of the tax burden.” (Permaloff and Grafton, p. 94). This was the post-*Brown* period during which the Big Mule-Black Belt alliance took advantage of resistance to federal school desegregation efforts to shield their property from taxes.

Supporters of public education feared that opponents might use public sentiment against *Brown v. Board* to block increased funding for public schools. In July 1959 Superintendent of Schools Austin Meadows issued a statement that warned, “The enemies of public schools and those who did not want to pay the school bills timed sharp and deep threats at public schools with the fear of integration to choke education in this state.” Their attacks, according to Meadows, were not direct: “They oppose the means for providing education.”

(Permaloff and Grafton, p. 95 (footnote omitted)). At that time, the most powerful lobbying organizations in the Big Mule-Black Belt alliance were the Alabama Chamber of Commerce, the Associated Industries of Alabama and the Alabama Farm Bureau Federation. (Permaloff and Grafton, p. 100).

In 1959 the Patterson administration, led by former UA law professor Harry Haden, whom Governor Patterson had appointed Revenue Commissioner, tried to equalize property taxes. In *State v. Alabama Power Co.*, 254 Ala. 327, 48 So.2d 445 (1950), the Alabama Supreme Court had held that the practice of taxing the property of utilities companies at 60% of their market value, while the property of individuals was being assessed at 40% and below of its market value, violated the tax equalization provisions of the 1901 Alabama Constitution.

The legislature has the undoubted right to select certain species or classes of property for taxation. So it may select one species or class and fail or refuse to select another species or class. For example it may select for taxation only real estate, with resulting exemption of personalty and vice versa. *State v. Birmingham Southern Ry. Co.*, 182 Ala. 475, 62 So. 77. But once a species or class of property is selected by the legislature for taxation then the constitutional provisions come into play and all property of such species or class that is taxed must be taxed uniformly or equally at the same rate regardless of its ownership. *Lee v. State Tax Commission*, 219 Ala. 513, 123 So. 6. Once property is made taxable there is but one classification and that classification is property under the very language of the constitution.

48 So.2d at 453 (citations omitted). “Haden calculated that uniform assessments at 30 percent of market value would satisfy the court and would generate an additional \$40-50 million per year.” (Permaloff and Grafton, p. 107). So, exercising his statutory authority as Revenue Commissioner, Haden issued a revenue regulation that required all property to be assessed at 30% of its market value. Big Mule and Black Belt forces in the Legislature introduced bills that would strip the Revenue Commissioner of his powers.

The major foes of property tax equalization were rural, but [Jefferson County Senator] Larry Dumas’s active opposition, plus that of Associated Industries, individual mining companies and the Alabama Mining Institute, the Committee of 100, U.S. Steel, and Alabama Power, indicate that the alliance was still functioning. John Patterson regards this explanation as valid, saying that opposition to equalization came from a “classic Black Belt-industrial coalition (with some exceptions) with a lot of other help and little enthusiasm on our side.

(Permaloff and Grafton, p. 109). In the end, Patterson compromised by agreeing to give up Haden’s equalization program in return for abandonment of the bills stripping the Revenue Commissioner of his authority. (Permaloff and Grafton, p. 110).

The Big Mule-Black Belt alliance was shaken by the reapportionment controversies of 1962, which broke down along generic urban-rural lines. *See Sims v. Frink*, 208 F.Supp. 431

(M.D. Ala. 1962) (3-judge court), *aff'd sub nom. Reynolds v. Sims*, 377 U.S. 533 (1964). “What was left of the alliance in 1962? The rural counties had been shrinking for decades while Jefferson County and Mobile County had been growing. Nevertheless, the Black Belt agricultural interests and Birmingham industry still shared some common views (for example, opposition to increased taxes) even though their formal partnership was at an end.” (Permaloff and Grafton, p. 138).

Whites were deeply concerned about losing control of their local governments, first, because blacks were gaining the balance of power in local elections by the mid-1950s in Montgomery and Tuskegee, and because blacks were gaining voting majorities by 1966 in Macon, Greene and potentially a dozen more counties. For Black Belt landowners the connection between legislative reapportionment, the rise of the black vote and fear of increased property taxes was particularly strong. It was what made the infamous white supremacist Sam Engelhardt of Macon County enter politics in 1949, when Governor Jim Folsom was pushing hard for reapportionment of the Alabama Legislature.

Behind [Sam Engelhardt’s] concern about black voting lay economic self-interest. “Everybody has an angle when they get in [politics]. I was worried . . . about the tax assessor . . . because of all our holdings,” he said later, referring to the many thousands of acres of rich agricultural land the Engelhardt family owned in Shorter. “That was my angle—to protect ourselves. Not only me, but my family. My aunts, uncles, and cousins owned land.” He based his concern about who was tax assessor on a racist assumption. “If you have a nigger tax assessor,” he rhetorically asked a journalist in 1956, “what would he do to you?” The obvious answer, to Engelhardt, was that a black tax assessor would try to exploit white landowners.

(Norrell, pp. 79-80). Engelhardt went on to lead the White Citizens’ Councils in Alabama and was a spokesman for the white-supremacist positions through the 1950s and early 1960s, when he was State Highway Commissioner, State Senator and Chairman of the State Democratic

Executive Committee. He was the architect of several changes to the laws governing local elections that were designed to prevent black voters from electing candidates of their choice.

State Representative Sam Englehart [sic] of Macon County, Alabama was the sponsor of the state laws banning single-shot voting. Englehart was the founder of the racist White Citizens Council Movement of the 1950's and was a notorious segregationist. Englehart was also the author of the infamous, racially inspired Tuskegee gerrymander struck down by the federal courts in the 1960's. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that a constitutional challenge to the Tuskegee gerrymander could be entertained by the federal courts.). The racial purpose behind the laws banning single-shot voting was not kept secret. Englehart's father-in-law, then a state senator, explained to a newspaper that the legislature had passed the laws because "there are some who fear that the colored voters might be able to elect one of their own race to the [Tuskegee] city council by 'single shot' voting." For the same racial reasons, the ban on single-shot voting was extended in the late 1950's to cover at-large primary elections for county commissioners.

The laws banning single-shot voting were repealed in 1961 and replaced with laws requiring that candidates run for numbered places in all state, county and municipal at-large elections, both primary and general. The numbered place laws had the same effect on black voting strength in at-large elections as the laws banning single-shot voting, and there can be no doubt that they sprang from the same motivation. Shortly after the enactment of numbered place laws, at a meeting of the State Democratic Executive Committee with Englehart presiding, a committee member explained the state legislature's open and unabashed racist motive behind the new numbered place laws and the significant role the laws were to play in keeping black voters from electing black persons in the primary elections to be conducted by the Committee:

"[W]e have got a situation in Alabama that we are becoming more painfully aware of every passing day, that we have a concerted desire and a campaign to register Negroes en masse, regardless of the fact that many of them ordinarily cannot qualify because of their criminal records, or criminal attitudes, because of the fact that they are illiterate and cannot understand or pass literacy tests.... [I]t has occurred to a great many people, including the legislature of Alabama, that to protect the white people of Alabama, that there should be numbered place laws."

These racially inspired numbered place laws exist and operate today.

Dillard v. Crenshaw County, 640 F.Supp. 1347, 1357 (M.D. Ala. 1986).

During his first term as governor, George Wallace, who grew up in Barbour County, made no attempt to achieve property tax reform. (Permaloff and Grafton, p. 186). Throughout the 1960s and 70s, his hallmark opposition to school desegregation, his rural county constituent base, and the growth of private school options for white flight all contributed not only to the defeat of property tax reform but to increased protections for wealthy landowners. Whites in the Black Belt had been abandoning public schools since 1963, and earlier, in the case of Montgomery. The spread of segregation academies was epidemic through the mid-1960s.

The inception of private primary and secondary schools received little notice from the press, but they came to have a devastating effect on school integration and support for public school funding. . . .

. . . Today in Alabama, outside of a few districts in or near the University of Alabama, the Huntsville NASA facility, wealthier Birmingham suburbs, and Auburn University, it is unusual to find a successful attorney, physician, business person, university professor, or other professional whose children have attended only public schools from kindergarten through the twelfth grade. . . . These professionals and their spouses were the ones who in past years would have been working and voting to support public education. With their children's welfare no longer dependent on the public schools, their energies and leadership are no longer directed in full or even partial support of the public school system. The net effect on the overall quality of public education cannot be positive.

(Permaloff and Grafton, pp. 192-93).

Desegregation of higher education, of course, also figured into Wallace's grand strategy.

In January 1964 Auburn University registered its first black student, Harold Franklin. At first the university tried to deny the young man a dormitory room, but Judge Frank Johnson intervened. Governor Wallace characterized Judge Johnson's order as "shocking."

In that same month, Wallace toured the newly opened Macon Academy. He praised the private school and a month later called for public contributions to support white students boycotting Macon County's integrated schools. Wallace's office maintained a file of letters from individuals giving money to the Macon

Academy; one contribution was for twenty thousand dollars. A woman wrote to Wallace telling him that she would like to donate seven thousand dollars toward the improvement of education in Alabama and asked him to suggest where it should go. He replied: "You may wish to contact the Macon Academy in Tuskegee, Alabama. The academy is a private school which was set up by individuals in Macon County who were not satisfied with the Federal Court order which did away with their rights to run the schools in that County as they saw fit." There were many more letters like this in the one-and-a-half-inch-thick file. Wallace also supported white academies in other counties, and he pressured cabinet members to contribute to them. His office maintained lists of contributors.

(Permaloff and Grafton, pp. 197-98).

When Lurleen Wallace succeeded her husband as Governor, Wallace's Black Belt supporters, sensing that court action eventually would end non-enforcement of the property tax laws, took advantage of Wallace's ongoing campaign of massive resistance to desegregation and its effect of undermining popular support for public education and began to push for legal means of protecting their property against increased taxes. Their strategy was to amend the 1901 Constitution to eliminate, once and for all, the century-old requirement of equal assessment and taxation rates. They failed on their first attempt, during the first legislative session under Lurleen Wallace. They were forced to moderate their efforts when Ms. Wallace died in 1968 and was succeeded by the Lieutenant Governor, Albert Brewer, who was a supporter of public schools. But the Black Belt powers finally prevailed after George Wallace defeated Brewer in the November 1970 gubernatorial election.

Black Belt forces started their initiative during Governor Lurleen Wallace's first legislative session, following the events described in this Court's findings:

261. The March 22, 1967, order in *Lee v. Macon County Board of Education*, 267 F.Supp. 458 (1967), reinitiated the campaign of massive resistance orchestrated by the Governor and Legislature. The *Lee v. Macon* order required the desegregation of all elementary and secondary schools and a start towards the desegregation of the junior colleges and state colleges administered by the SBE, including ASU, AAMU, TSU, JSU and UNA. Following the court's order, the SBE immediately went into executive session with George and Lurleen Wallace. (FN25) SOF p 55.

262. A week later, Governor Lurleen Wallace announced to the Legislature in a televised speech a five-point plan of open resistance to the federal court. The Legislature was to resolve itself into a committee of the whole, receive testimony about the damage compliance with the court order would do, issue a "cease and desist" resolution, and if a stay was denied turn the whole education system over to the Governor, who would interpose the state's sovereignty. On the same day as Governor Wallace's speech, five state university presidents signed a resolution urging appeal of the March 22nd decree and the seeking of a stay of the decree's effects pending the appeal. SOF p 56.

263. President Philpott of AU and President Rose of UA urged appeal of the *Lee v. Macon* order, even though it was addressed to neither of their institutions. SOF p 57.

264. When the March 1967 *Lee v. Macon* order was appealed, one of the Governor's chief legal arguments against the statewide disestablishment of the dual system of elementary and secondary education was that the state government lacked authority to control local school boards to the extent needed to comply with federal court orders. This was a tactic advocated by the experts who were counseling Southern states involved in school desegregation cases. John Satterfield of Yazoo City, Ms., the Governor's lawyer, explained it to members of the Alabama Legislature.

787 F.Supp. at 1105.

It was against this background of the Wallaces' campaign of massive resistance that the Black Belt forces launched their drive in the Legislature for amendment of the constitutional provisions governing property taxes:

In 1967 the legislature's Joint Committee on Ad Valorem Taxation issued a report that could have been written by Harry Haden and John Patterson in 1959. It recommended the establishment of a statewide reassessment program with

professional qualifications required of county boards of equalization and lowering of the fictional 60 percent assessment maximum rate to a more realistic 30 percent. Timberland would be assessed at its bare-land value. Growing timber would be exempt from property taxation, as were other crops, but a severance tax would be levied on timber when marketed. There would be no exemptions for machinery or other personal property (for example, autos, boats, airplanes, trucks, and trailers) used in a business.

A report issued by a four-person minority of the interim committee recommended different percentage levels for the assessment of the various classes of property. In particular, it recommended that rural property be assessed at lower levels than other kinds. Bills reflecting this Farm Bureau Federation perspective were introduced in the Senate on Tuesday in the third week of July and assigned to the Finance and Taxation Committee. . . .

On August 8 the Farm Bureau bill was defeated in the House because it failed to win the three-fifths vote required of a constitutional amendment. Except for a few scattered "No" votes, the division consisted of Jefferson, Mobile, and Etowah Counties against the rest of the state. Four of Montgomery's five representatives voted with the rural counties. The reporter Don Wasson cited their vote as evidence that urban interests were split concerning property tax reform because many wealthy urbanites or their relatives owned rural property.

Two days later the House voted to reconsider the legislation, and the motion passed seventy-two to sixteen. In the bill that finally passed the House, personal property was assessed at 20 percent, business property at 25 percent, residential property at 20 percent, and utilities at 40 percent. Farm land was assessed at the lowest rate of all, 15 percent.

The urban-rural conflict in the Senate over property tax reform was intensified by a parallel battle over the education budget, which will be discussed below. . . .

Ultimately, the legislature passed a 30 percent cap on property tax assessments plus a number of exemptions that changed virtually nothing. This outcome represented a victory for the rural counties despite the fact that the legislation did not contain property categories. Absent from all accounts of these battles is any significant involvement by the Wallace administration. Wallace did not take a public position in favor of property tax equalization, but there is also no indication that he worked behind the scenes for the rural position. Of course, his legislative leadership appointments were sufficient to assure a rural victory, and his day-to-day involvement was probably unnecessary.

Through the early months of 1967, pro-education forces publicized the need for increased spending as they had at the beginning of the Patterson and first Wallace administrations. With apparently no warning, Governor Lurleen Wallace

released an education budget proposal containing cuts, the deepest of which hit teacher salaries and public school operations. Given an expected \$25 million surplus in the Special Education Trust Fund at the beginning of the 1967 academic year, education forces had little choice but to interpret this as an attack on education fostered by civil rights discord and the opposition of many outspoken AEA members to George Wallace's presidential aspirations. Albert Brewer supported this view, maintaining that Wallace became angry at boards of education because they obeyed court orders requiring school integration: "He would call them names such as sissy britches."

(Permaloff and Grafton, pp. 249-51 (footnotes omitted)).

Thus this anti-tax reform legislative victory of rural landowners was made possible by the anti-desegregation demagoguery of George Wallace. During his first term and during his wife's administration, "Wallace basically served the role of caretaker for a dismal public primary and secondary education system while vigorously promoting the cause of segregated private academies. The growth of these institutions weakened political support for public schools among middle-and upper-middle-class parents who could afford to send their children to private schools. . . . He also damaged the schools by inaction. He ignored property tax reform and other tax reforms as well as educational reform." (Permaloff and Grafton, p. 267). "Opponents of federal intervention resurrected the same states' rights rhetoric they had used against restrictions on the right of states to expand slavery into the territories a century earlier. But, despite growing support for such constitutional theories within the Republican party, most Americans continued to interpret states' rights rhetoric within the historical context of racism, where historically it found its most congenial home." (Flynt at 76).

Codified as Ala. Code, Title 51, § 17(1) (Supp.1969), Act No. 502, Acts 1967, p. 1215, did not propose to amend the 1901 Constitution to establish the separate property tax classes the Farm Bureau forces had wanted, but it did formally repeal the 60% uniform assessment ratio, capping all property assessments at 30% of fair market value and "granting state and local tax

officials wide discretion in the setting of ad valorem assessment rates.” *Weissinger v. Boswell*, 330 F.Supp. at 619. This assured wealthy landowners that local officials would not increase their taxes significantly.

When Lurleen Wallace died and Albert Brewer became Governor, education forces tried once again to get genuine tax equalization through the Legislature. Brewer, however, did not have the political clout to overcome the anti-tax reform lobby’s manipulation of public antipathy to desegregation, and he was content to limit his efforts to an incentive formula for local counties and school districts to raise their own taxes voluntarily. Urban-rural differences over property tax equalization divided both the House and the Senate.

Meanwhile, an agriculture study commission, concerned that farmers might be asked to shoulder property taxes at rates comparable to what others were paying, proposed to change Alabama law to provide that assessments be based on current use and not the market value of property. The current use notion undermines the basic principle behind property taxation – that property is taxed according to its market value, not an arbitrary figure determined by the property owner. The value of any property is the value of its best use. That use might be its current use or an alternative use such as a factory site or housing.

The Alabama Farm Bureau Federation seemed to understand the unwieldiness of the current use standard, because it offered a version of the straightforwardly discriminatory multirate plan that it had pushed through the House in 1967. (The plan had failed in the Senate.) The Farm Bureau plan assessed utilities at 40 percent of valuation, commercial and industrial property at 25 percent, personal property at 30 percent (an increase), and farm and timberland at 15 percent. To compensate for the resulting loss in revenues, the Farm Bureau suggested that others pay more through corporate and individual income tax increases and heightened taxes on beer and soft drinks.

The Alabama Farm Bureau Federation was not an organization of poor dirt farmers. It was a nonprofit tax-exempt corporation. Like its parent corporation, the American Farm Bureau Federation, the Alabama Farm Bureau issued life, automobile, and fire insurance and was involved in a wide variety of businesses. It also owned large amounts of property including shopping centers.

. . . Brewer’s approach focused on a county’s tax effort and ability to pay measured by the county’s mean per-capita income compared to the mean per-capita income of the state. A relatively poor county making a relatively strong effort to support its schools would be rewarded with extra state funds. A

relatively wealthy county doing a below-average job of supporting its schools would be denied some funds even if it raised more taxes than the poorer county. The plan gave counties two years to bring their tax systems up to the state standard and gave county commissions the power to propose tax increases to their electorates. . . .

...
The urban bloc began a filibuster in the Senate on April 15, 1969. Its proximate target was the bill to create the postsecondary education commission, but it could have been any bill. The urban bloc had tried to wring concessions on property tax equalization out of Brewer in the House and wanted funding distribution formulas closer to a per student basis. Brewer favored property tax equalization, but he feared that it would not get through the special session and that it would probably tangle up his other bills as well.

...
The Achilles' heel in the urban bloc's Senate filibuster was that urban legislators favored much of Brewer's education program. They knew or suspected that in 1970 he would be competing for reelection against George Wallace, who would not support property tax equalization. To embarrass Brewer too much with their filibuster would be counterproductive.

...
Despite doubts about the usefulness of Brewer's new minimum standard property tax bill with its penalty provision, urban legislators supported it. It passed the legislature and was signed into law.

By 1971, when the penalty provision of the law was scheduled for implementation, few underassessed counties had acted to bring themselves up to the state norm. Some counties had tried but failed to win the taxpayers' approval. For example, the Montgomery County Board of Education asked its electorate for a 5 mill property tax increase that would have yielded \$1.7 million and was turned down. Under the provisions of the 1969 act, Montgomery schools could lose \$14 million. In all, thirty-nine counties stood to lose funds.

(Permaloff and Grafton, pp. 283-86 (footnotes omitted)).

This was the situation facing the three-judge federal court in *Weissinger v. Boswell*, 330 F.Supp. 615 (M.D. Ala. 1971) (3-judge court), which proceeded to rule that the 1967 statute violated both the federal and state constitutions.

Section 17(1), literally interpreted, encourages, if not authorizes, the very situation we have previously condemned--unequal taxation among members of the same class--by permitting state and local tax officers to use assessment rates ranging from 0 to 30 percent of fair market value. Vesting such wide discretion in

the hands of tax officers, no matter how good their motives, necessarily will result in an arbitrary and discriminatory system of taxation.

[FN33: The literal language of Section 17(1) also appears to violate Section 211 of the Alabama Constitution, in that it does not require all property in the state to be assessed in exact proportion to the value of such property.]

330 F.Supp. at 625. Since the 1967 law had been declared unconstitutional, said the court, the 30% of market value assessment ratio it contained could no longer be enforced, and the 60% ratio set out in the 1935 statute was restored. The court gave the state one year to bring its property tax laws into compliance with the court's equalization mandate. 330 F.Supp. at 625. Subsequently, in an unreported order, because of the difficulties in conducting a statewide reassessment of property, the court extended to June 29, 1979, the deadline for applying equal assessment ratios for all like property throughout the state. (Harvey 1989, p. 467).

In the meantime, however, George Wallace had defeated Albert Brewer in the 1970 gubernatorial election. This had been one of the most openly racist campaigns in Alabama history.

Near the end of the runoff campaign Wallace returned to the race issue. His official campaign newspaper carried the headline: "UNLESS WHITES VOTE ON JUNE 2, BLACKS WILL CONTROL THE STATE." A newspaper advertisement read in its entirety:

WHAT ABOUT THE 23% AND YOU!

What about a 23% Governor? You have heard about a full time Governor. Only 23% of the white people voted for Brewer. Can any 23% of the white people and their negro friends elect the next Governor? Not if you vote for your own kind.

VOTE RIGHT – VOTE WALLACE!

Wallace also spoke directly about the bloc vote: "If you want to save Alabama as you know Alabama, remember! The block vote – Negroes and their white friends – nearly nominated Brewer on May 5th. This black and white socio-political alliance must not dominate the people of Alabama! This spotted alliance must be defeated! This may be your last chance.."

...

Few blacks ran for positions in the state legislature in 1970. One of those running was Fred Gray, a civil rights attorney. He was the only black to win.

Just as the Black Belt and rural legislators were the core of the Wallace

leadership base, so Black Belt and rural voters had been the core of his electoral support. As more blacks entered the electorate and the urban areas continued to grow in the 1970s, Wallace's support base eroded. Winning future elections would be more difficult.

(Permaloff and Grafton, pp. 297-98 (footnotes omitted)).

Even though only one black legislator had been elected in 1970, the three-judge federal court in Montgomery clearly was headed toward new decrees that would more nearly equalize the populations in House and Senate districts and empower additional black voter majorities. Black Belt whites in particular were concerned about the prospect of increased property taxes they feared would come from greater black influence in the Legislature. Legislative power was already passing to urban areas, where there was much stronger support for property taxes, and where rates were already higher than the rates in rural areas. Blacks in the cities were better organized politically and were more capable of making their influence felt in the Legislature. There was a sense of urgency among Black Belt representatives that constitutional caps be placed on property taxes.

When he addressed the Regular Session of the Legislature on May 4, 1971, Wallace expressly linked opposition to tax increases with opposition to federally mandated school desegregation:

Education is still the primary function of State Government, and I believe under existing revenues we can have a teacher salary increase, a better free textbook program, a better retirement program which has already been introduced.

Other legislation along this line will be introduced, because I am proud of the fact that during the time I was Governor the first time, a breakthrough in education came. The largest increases at any time because of our interest. But I am frank to tell you, and to tell educators, that the people of Alabama are simply turned off on education and some educators because of what the Federal Courts and HEW have done to their children from Huntsville to Mobile. Every one of you know I am telling you the truth when I tell you that.

(Harvey 1989, p. 256 (citation omitted)).

The *Weissinger v. Boswell* decision came down on June 29, 1971, and the Regular Session adjourned without passing either a General Fund or an Education Fund budget. “The dissension caused by the issues of legislative redistricting and court-ordered ad valorem tax reform made constructive legislation during the closing days and hours impossible.” (Harvey 1989, p. 257). An Education budget finally was adopted in a second special session in November 1971. A third special session was called to respond to *Weissinger v. Boswell*. A law was enacted requiring local county authorities to reappraise all property or have it done for them by the State Department of Revenue. Act No. 160, 1971 Ala. Acts (Third Special Sess.). And a bill was passed proposing what became Amendment 325 of the 1901 Constitution when it was ratified by the voters on June 8, 1972. Act No. 116, 1971 Ala. Acts (Third Special Sess.). Amendment 325 abolished the uniform property assessment and taxation rate requirements that had been in the state constitution since 1868. In a double whammy victory for the Black Belt and Farm Bureau forces, it established for the first time separate classes of property for taxation purposes and went on to authorize variations from county to county:

- (a) All taxable property within this state, not exempt by law, shall be divided into the following classes for the purposes of ad valorem taxation:
 - Class I. All property of utilities used in the business of such utilities,
 - Class II. All property not otherwise classified,
 - Class III. All agricultural, forest and residential property.
- (b) With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes thereof as herein defined at the following ratios of assessed value to the fair and reasonable market value of such property:
 - Class I. 30 per centum
 - Class II. 25 per centum
 - Class III. 15 per centum
- (c) With respect to ad valorem taxes levied by counties, municipalities or other taxing authority, all taxable property shall be forever taxed at the same rate, and such property shall be assessed for ad valorem tax purposes according to the classes of property defined in paragraph (a) herein and at the same ratios of

assessed value to the fair and reasonable market value thereof as fixed in paragraph (b) herein, provided, however, that the legislature may vary the ratio of assessed value to the fair and reasonable market value as to any class of property as defined in paragraph (b) herein, and provided, further, that the legislature may fix a uniform ratio of assessment of all property within a county defined in paragraph (a) herein as Class II and III and may fix a different ratio of assessment for property defined in paragraph (a) as Class I. Such ratios as herein authorized may vary among counties so long as each such ratio is uniform within a county.

No class of property shall have a ratio of assessed value to fair and reasonable market value of less than 15 per centum nor more than 35 per centum.

(d) A county, municipality, or other taxing authority may decrease any ad valorem tax rate at any time, provided such decrease shall not jeopardize the payment of any bonded indebtedness secured by such tax. When the tax assessor of each county shall complete the assembly of the assessment book for his county for the ad valorem tax year immediately following the adoption of this amendment and the computation of ad valorem taxes that will be paid upon such assessment, he shall certify to each authority within his county that levies an ad valorem tax the amount of ad valorem tax that will be produced by every levy in that year but excluding for this purpose any assessment of property added to the tax rolls of such county for the tax year in which such certification is made that was not included on the tax rolls for the next preceding tax year. If it shall appear that the estimated ad valorem tax receipts from any levy so estimated shall be less than the receipts from the same levy during the next preceding ad valorem tax year, then the levying authority shall increase each tax rate by such millage as is necessary to produce revenue that is not less than and that is substantially equal to that received during such immediately preceding tax year. It is further provided that any and all millage adjustments shall be made in increments of not less than 1/2 mill. The adjustment herein required shall be made only one time and shall be made in the ad valorem tax year immediately following the adoption of this amendment.

(e) Any county, municipality, or other taxing authority may increase the rate at which ad valorem taxes are levied above the limit now provided in the Constitution provided that the proposed increase shall have been (1) proposed by the authority having power to levy the tax after a public hearing on such proposal, (2) thereafter approved by an act of the legislature, and (3) subsequently approved by a majority vote of the qualified electors of the area in which the tax is to be levied or increased who vote on the proposal.

(f) The legislature is authorized to enact legislation to implement the provisions of this amendment, and may provide for exemptions from taxation; provided, however, that any statutory exemption existing prior to the adoption of this amendment shall not be repealed, except by subsequent legislative act, and

shall remain in full force and effect.

(g) Wherever any constitutional provision or statute provides for, limits or measures the power or authority of any county, municipality or other taxing authority to levy taxes, borrow money, or incur indebtedness in relation to the assessment of property therein for state taxes or for state and county taxes such provision shall mean as assessed for county or municipal taxes as the case may be.

(h) Any provision of the Constitution of Alabama to the contrary notwithstanding, ad valorem taxes shall never exceed 1 1/2 % of the fair and reasonable market value of the property in any one taxable year.

(i) The following property shall be exempt from all ad valorem taxation: the real and personal property of the state, counties and municipalities and property devoted exclusively to religious, educational or charitable purposes.

“The result of Amendment 325 was to legalize the de facto classifications in effect when *Weissinger v. Boswell* was filed in 1969. The reappraisal period was stretched over seven years.” (Harvey 1989, p. 468). The “local option” Amendment 325 provided counties to vary their assessment ratios and tax rates were carefully constrained to maintaining the status quo. Bill Sellers, political commentator for the Mobile Press Register, explained:

Various technical, legal or constitutional reasons were voiced for the opposition to local option, but some observers feel that the main objection stems from the fact that in a growing number of Alabama counties, blacks are gaining control of county governments. Senators representing some of these counties are considered fearful that the black political leaders, who also enjoy voting majorities, will exercise local options and set property taxes at the highest rates possible in order to raise additional funds for their governmental operations. These taxes will be paid by the property owners, considered by the senators to be white owners of large farms and corporate interests with large timberland holdings

MOBILE PRESS REGISTER, Dec. 12, 1971.

The provision in Amendment 325 giving the Legislature authority to vary the assessment ratios from county to county, and the laws enacted pursuant to it, Ala. Code 40-8-1 (1975), were challenged on non-racial equal protection grounds in a separate federal lawsuit filed in Mobile. On April 21, 1978, Judge Hand ruled that the statutory variations of assessment ratios among the counties violated the Equal Protection Clause of the Fourteenth Amendment. *McCarthy v.*

Jones, 449 F.Supp. 480, 484 (S.D. Ala. 1978). However, he declined to strike down Amendment 325 itself, on the theory that it was possible that the Legislature could vary the assessment ratios among counties in a rational way that met equal protection standards. 449 F.Supp. at 485.

With the June 1979 *Weissinger* deadline drawing near and with the local option on assessment ratios struck down by *McCarthy*, Governor Wallace was in the last year of his third term of office. “In 1978, Governor George Wallace appealed to the legislature to approve new legislation designed to circumvent the effect of *Weissinger vs. Boswell* by providing a set of ad valorem tax laws which would produce comparable revenues, both state and local, in the same amounts as those produced before the court mandate.” (Harvey 1989, p. 468). One piece of this package was Amendment 373, which was adopted in the Second Special Session and “ratified in the November 7, 1978, general election by a vote of 313,577 to 205,782 Only Jefferson, Shelby, Walker, Blount, and Wilcox counties voted against the measure.” (Harvey 1989, p. 468).

Amendment 373 added a fourth class of property, automobiles and pickup trucks, and lowered the assessment ratio for residential, agricultural and forest property to 10%. It also authorized assessment of residential, agricultural and forest property at their “current use,” rather than at their fair market value, and authorized the Legislature to enact formulas for measuring current use values. Amendment 373 became known as the “lid bill,” because it also adjusted the caps on the absolute amount of tax that could be levied on each class of property, regardless of the assessment ratio and millage rate combinations, that first had appeared in Amendment 325. The highest cap is 2% of the fair market value of Class I or utilities property, and the lowest cap is 1% of the fair market value of Class III or residential, agricultural and forest property.

1978 was the year the Office of Civil Rights of HEW began its investigation of Alabama’s compliance with Title VI in its system of higher education. 787 F.Supp. at 1047. *Knight v. James* was filed in 1981, and *U.S. v. Alabama* in 1983. In 1983, the *Weissinger* district court rejected the (non-race based) equal protection challenge to Amendment 373 in an unpublished opinion, which was affirmed by the court of appeals. *Weissinger v. White*, 733 F.2d 802 (11th Cir. 1984).

Conclusion

The preceding sections of this brief trace specific structural features of Alabama's Constitution to an unwavering intent to shield the property of white landowners from taxes that will be used to support the public education of African Americans. This is not simply a narrative of broad societal discrimination; rather, it is a tale of carefully calculated *de jure* segregation and discrimination governing the system for funding public schools, including higher education.

One thing is clear from this shameful, two-century story about the intimate connection between protection for corporate and wealthy landowners and the oppression of African Americans: Alabama's public school system, including its system of higher education, is doomed to remain the worst funded system in the United States until and unless federal courts force state government to confront and to correct the vestiges of slavery and Jim Crow in its tax laws. All Alabama residents, not just African Americans, will continue to suffer the pervasive social, political and economic consequences of substandard public education until this historical problem is corrected.

The fact that Alabama remained throughout the twentieth century one of the poorest, most racially divided, and least educated states in the South was no accident. These were merely unintended consequences of decisions made in 1901. What is most remarkable is not that reactionary forces so completely dominated constitution-making in 1901 but that a century later the edifice they constructed **has been modified only by federal court decisions** and not by Alabama citizens, who either had too great a stake in the system, or were too uninformed, or too powerless to remove "Alabama's shame."

(Flynt at 76 (footnote omitted) (emphasis added)). The landed beneficiaries of this historical

discrimination are so well entrenched in their political power that all of the several efforts in the twentieth century to reform or rewrite the 1901 Constitution, as well as those of the current Governor, have more or less promised to avoid any substantial increase in property taxes. Opposition to constitutional reform continues to base defense of the status quo on veiled references to race.

Even though the racial provisions in the constitution are null and void, race will still complicate and retard efforts to achieve constitutional reform--as it has complicated and retarded efforts toward progress in other areas of Alabama public life. Neo-Confederate groups, increasingly vocal, will argue that to displace the 1901 Constitution formed by men who had either fought for the South in the Civil War or who were the sons of veterans would amount to disloyalty to Alabama's heritage. If too much stress is put on the admittedly racist character of the old Constitution, it will hamper efforts to replace it. The Constitution will take on the same status as the Confederate flag which is alternately viewed unashamedly either as an integral part of Alabama's history or as a symbol of hate and African-American repression.

(Stewart at 333). Thus there is no realistic chance that, without federal court intervention, genuine reform of Alabama's unfair and racially discriminatory property tax system will occur through the political process.

The inequities in Alabama's school revenue laws are both uniquely traceable to slavery and racial segregation and arguably the most damaging of all the vestiges of official discrimination. Land was the single resource set aside by Congress to fund public education at Alabama's founding, and that land trust was squandered by state government in a financial scramble to enslave more African Americans. Through cherished Alabama custom and through the laws of descent and distribution, land is the financial resource most directly linked to our

ancestors, to the unjust means used to obtain ownership of it, and to the state's century-long policy of white supremacy, which was used – and is still used – to shield private land from fair taxation. Very little landed wealth in Alabama is owned by African Americans, precisely because the state's history of slavery and white supremacy denied them any realistic access to it. Indeed, this Court credited the testimony of Dr. James Smith in 1995 “that black farmers left farms because of lack of capital, lack of land, lack of labor, and generally impoverished circumstances, and not because of poor extension services.” 900 F.Supp. at 329. In short, the fact that Alabama's property taxes today are the lowest in the United States is no historical accident. Rather, it is the inevitable result of an ongoing, two centuries-long and ultimately self-defeating state policy of minimizing the extent to which white people's property can be taxed for the benefit of black people's education.

Proposed Remedy

The following provisions of the laws and constitution of the State of Alabama are traceable to *de jure* discrimination against African Americans, and, to the extent that they apply to the funding of public schools, which includes public institutions of higher education, they may not be enforced by the State or in any way be relied on as a basis for the State's failure legislatively to eradicate all vestiges of official racial discrimination in the State's system of public school finance, to the extent practicable and consistent with sound educational practices:

1901 Alabama Constitution:

§214: property tax limit on Legislature;

§ 215: property tax limit on counties;

§ 216: property tax limit on municipalities;

§ 269: special county school tax limits and voter referendum requirements, as amended by Amendments 3, 111, 202 and 382;

Amendment 325: establishing separate classes of property for purposes of ad valorem taxation, lowering assessment ratios, requiring voter approval of all property tax increases, and establishing a cap or "lid" on total ad valorem taxes;

Amendment 373: amending property classes, lowering assessment ratios, establishing the current use method of property assessment and establishing new "lids" on total ad valorem taxes.

The defendant State should be given one year, as the *Weissinger* court did, to implement a tax reform plan that eliminates the vestiges of *de jure* racial discrimination in public school funding and that provides adequate funding for its system of higher education without denying K-12 schools the adequate and equitable funding they need. The Court should be flexible in its determination of what levels of funding would be fair and adequate, taking into account the totality of historical and current circumstances. Some obvious criteria of fairness and adequacy are regional and national comparisons, the share of ETF appropriations higher education received when this action was filed, the amount of additional revenues the State Department of Education has estimated is necessary to bring K-12 education up to minimum levels of adequacy, and the capital and operating funds required to meet the remedial objectives of this Court's decrees.

If the State defaults in these remedial obligations, this Court should consider temporary court-ordered measures that will provide incentives for effective state action, such as the restoration of 60% – or even 100% – property assessment ratios that the *Weissinger* court threatened to impose.

In assessing the adequacy of the State's proposed remedy, the Court may take into account the proposed amendments to the 1901 Constitution contained in Act 2003-78, which passed the Legislature in Special Session on June 7, 2003, and which must be approved in a statewide referendum on September 9, 2003. See <http://www.sos.state.al.us/election/2003/scae/index.cfm>. The Governor, who proposed this tax reform and accountability package, and the members of the Legislature who substantially enacted it, should be recognized for their political courage in making this initial effort to reform

Alabama's unfair and grossly inadequate system for financing public education. Whether it will be ratified by the voters remains to be seen. However, the legal and political constraints imposed on the Governor and the Legislature by the above discriminatory provisions of the 1901 Constitution as amended understandably limited the reforms they could consider. Even if the amendments proposed in Act 2003-78 are approved by the voters on September 9, they will not eradicate the vestiges of *de jure* racial discrimination in Alabama's property tax system; in some respects, they will make more severe and will more deeply entrench the constitutional constraints on legislative action.

Act 2003-78 necessarily perpetuates the primary mechanism of historical discrimination, namely, embedding nearly all the details of property tax policy in the constitution. This is the fundamental barrier to the kind of plenary legislative action every state requires to establish revenue policies that are efficient, equitable and flexible enough to address changing needs and public priorities. Most other states, including those in the Southeast, do not place detailed constitutional constraints on the property tax powers of the legislature or local governments, and none embeds assessment ratios and millage rates as low as those in Alabama's constitution. This disparity in effective property tax rates between Alabama and neighboring states tends to distort private sector land use and location decisions. And, as the 1875 and 1901 constitutional conventions intended, forcing nearly every change in property tax policy through the cumbersome, multi-step procedure of constitutional amendment, culminating in a popular referendum, severely restricts the possibility of significant reform.

The constitutional amendments proposed by Act 2003-78 progressively raise assessment

ratios for statewide property taxes to 100% for all property classifications, but they actually lower the 1901 cap on state property taxes from 6.5 mills to 3.5 mills, instead of leaving the decision about any reduction in millage to the Legislature. The current use exemptions and overall property tax lids are retained in only slightly modified forms. But the severe constitutional constraints on property taxes levied by local governments, which account for about 80% of residential taxes, are not changed by Act 2003-78. The four separate classifications of property, assessment ratios as low as 10% for residential, agricultural and forestry property, the millage caps and overall lids in Amendment 373 still will apply to local property taxes. Increases in local property taxes will still require a resolution by the local governing body, an act of Legislature, and a majority vote approving the increase in a referendum election.

In short, even if the Act 2003-78 amendments are approved by the voters, the shadow of the 1875 Redeemer Constitution and the 1901 Disfranchisement Constitution will continue to hang over Alabama's system for funding public education, perpetuating vestiges of *de jure* segregation and racial discrimination by impeding fair and effective remedial action by the Legislature. Barring a complete revision of the 1901 Constitution, only federal judicial action can remove these entrenched discriminatory vestiges.

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