

CASE NO. 05-11527-BB

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

JOHN F. KNIGHT, JR., AND ALEASE S. SIMS, ET AL.,

Plaintiffs-Appellants,

UNITED STATES OF AMERICA,

Plaintiffs,

vs.

STATE OF ALABAMA, ET AL.,

Defendants-Appellees.

BRIEF OF ALABAMA STATE UNIVERSITY APPELLEES

SOLOMON S. SEAY, JR.
Post Office Box 210998
Montgomery, AL 36121-9998
(334) 274-0722 - office
(334) 274-0775 - fax
solomon.s.seay@aol.com

FRED D. GRAY
Gray, Langford, Sapp, McGowan,
Gray & Nathanson
Post Office Box 830239
(334) 727-4830 - office
(334) 727-5877 - fax
fgray@glsmgn.com

ARMAND G. DERFNER
Derfmer, Altman & Wilborn, LLC
Post Office Box 600
Charleston, SC 29402
(843) 723-9804 - office
(843) 723-7436 - fax
aderfner@dawlegal.com

Attorneys for Alabama State University Appellees

CERTIFICATE OF INTERESTED PERSONS

Appellees, through undersigned counsel, certify that the following persons, firms, and entities have an interest in the outcome of this case:

1. Algert S. Agricola, Jr.
2. State of Alabama
3. Alabama A&M University
4. Board of Trustees for Alabama A&M University
5. Alabama Commission on Higher Education
6. Alabama Public School and College Authority
7. Alabama State Board of Education
8. Alabama State University
9. Board of Trustees for Alabama State University
10. Edward S. Allen
11. James R. Andrews
12. Athens State College
13. Auburn University
14. Dennis Charles Barnett
15. Ella B. Bell

Knight and Sims v. Alabama, No. 05-11527

16. Stephanie W. Bell
17. James U. Blacksher
18. John G. Blackwell
19. Dr. Maree Macon Blackwell
20. David R. Boyd
21. J. R. Brooks
22. Hall Bryant, Jr.
23. Paul W. Bryant, Jr.
24. Ralph Bufkin
25. Susan Buskey
26. David F. Byers, Jr.
27. Dr. Taylor Byrd
28. Judge John L. Carroll, Dean and Ethel P. Malugen, Professor of Law,
Cumberland School of Law, Stamford University
29. Calhoun State Community College
30. Richard F. Calhoun
31. Frederick Carodine
32. Dr. Mary Jane Caylor

Knight and Sims v. Alabama, No. 05-11527

33. Jesse L. Cleveland
34. Bettye Fine Collins
35. Angus R. Cooper, II
36. James C. Cox
37. Larry E. Craven
38. Oscar Crawley
39. Vonda Cross
40. Buford Crutcher
41. Thomas P. Davis
42. Elton N. Dean, Sr.
43. Armand Derfner
44. Gerald O. Dial
45. Roy H. Drinkard
46. Judge John H. England
47. Joseph C. Espy, III
48. Thomas Figures
49. Wayne Flynt, Distinguished University Professor, history, Auburn University, Auburn, Alabama

Knight and Sims v. Alabama, No. 05-11527

50. Jeffery A. Foshee
51. Byron P. Franklin
52. Alma S. Freeman
53. Charles W. Gamble, Henry Upson Sims, Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama
54. William F. Gardner
55. Edward M. George
56. H. Lewis Gillis
57. Jeremiah Glassman
58. Carlos A. Gonzalez
59. Fred D. Gray
60. Stanley F. Gray
61. Edgar R. Haden
62. Dr. Ethel H. Hall
63. Susan Pace Hamil, Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama
64. John Harrison
65. R. Douglas Hawkins

Knight and Sims v. Alabama, No. 05-11527

66. Lamar P. Higgins
67. Robert Holmes, Jr.
68. Robert D. Hunter
69. Andria S. Hurst
70. Harvey H. Jackson, III, Professor and Head, Department of History and Foreign Languages, Jacksonville State University, Jacksonville, Alabama
71. Johnnie Jackson-McDougald
72. Jacksonville State University
73. Clinton L. Johnson, Sr.
74. Carl E. Johnson, Jr.
75. Dr. Roy Johnson
76. Toreathea M. Johnson
77. Dr. Jeanette Jones
78. Robert Jones, Jr.
79. Bobby Judkins
80. Michael G. Kendrick
81. Olin B. King

Knight and Sims v. Alabama, No. 05-11527

82. John F. Knight, Jr.
83. Robin G. Laurie
84. Lawrence J. Lemak
85. Norma M. Lemley
86. Vanessa Leonard
87. Thomas M. Lovett
88. Robert E. Lowder
89. Peter L. Lowe
90. Joseph Lowman
91. Gail Main
92. Jim Main
93. Patrick Mallory
94. Alice H. Martin
95. Golda A. McDaniel
96. Sidney L. McDonald
97. Candis A. McGowan
98. Milton McGregor
99. Randy McKinney

Knight and Sims v. Alabama, No. 05-11527

100. John J. McMahon, Jr.
101. Dr. Charles Edwards McMillan
102. Earlon C. McWhorter
103. Emma J. Melton
104. John C. H. Miller, Jr.
105. Pauline Miller
106. Gary Mitchell, Jr.
107. Dr. Joe Morton
108. Hon. Harold L. Murphy, U.S. District Judge
109. C. Charles Nailen, Jr.
110. Demetrius Newton
111. Allen E. Owen, III
112. Tammi Palmer
113. Danny K. Patterson
114. Betty Peters
115. Carl Petty
116. George W. Ponder, III
117. James W. Rane

Knight and Sims v. Alabama, No. 05-11527

118. Sandra Ray
119. Joe L. Reed
120. Horace W. Rice
121. Robert W. Rieder
122. Bob Riley, Governor of the State of Alabama
123. Mark Sabel, Attorney for *Amici Curiae*
124. Robert D. Segall, Attorney for *Amici Curiae*
125. Braxton Schell, Jr.
126. Stephen W. Shaw
127. Dr. Richard Showers
128. Alease S. Sims
129. Stacey Levis Sims by Her Parents Levi Sims and Alease S. Sims
130. Reginald L. Sorrells
131. Paul J. Spina, Jr.
132. Norma Stein, Douglas Arant, Professor of Law, University of Alabama School of Law, Tuscaloosa, Alabama
133. Finis E. St. John, IV
134. John Russell Thomas

Knight and Sims v. Alabama, No. 05-11527

135. William K. Thomas
136. Anthony Y. Lavonne Thompson by His Mother Lois N. Thompson
137. Sara L. Thompson
138. Dan Tibbs, jr.
139. Velma Tribue
140. Troy State University
141. Allen Tucker
142. Jean Walker Tucker
143. United States of America
144. University of Alabama
145. University of Montevallo
146. University of North Alabama
147. University of South Alabama
148. University of West Alabama
149. Kreslyon Lynette Valrie by Her Mother Georgia S. Valrie
150. Professor Howard P. Walthall, Sr., Cumberland School of Law,
Samford University, Birmingham, Alabama
151. Oliver Washington, III

Knight and Sims v. Alabama, No. 05-11527

152. Susan J. Watterson
153. Roberta O. Watts
154. Joe R. Whatley, Jr.
155. James W. Wilson, III
156. Ronald W. Wise
157. R. M. Woodrow
158. Catherine W. Wright
159. Frankie Patricia Yarbrough

Armand Derfner
One of the Attorneys for the
Alabama State University Appellees*

*These appellees include Alabama State University, the Board of Trustees of Alabama State University, and the named members of the Board of Trustees in their official capacities. For convenience, all are referred to collectively as “the Alabama State University appellees” or “these appellees.”

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS..... C1-C10

TABLE OF CONTENTS.....*i-ii*

TABLE OF AUTHORITIES.....*ii-iv*

ISSUES PRESENTED.....1

STATEMENT OF FACTS.....2

Discriminatory Purpose.....2

Discriminatory Effect.....4

Decisions Below.....7

SUMMARY OF ARGUMENT.....8

ARGUMENT.....11

Introduction.....11

A. The Law of Discriminatory Purpose and Effect.....13

B. Hunter v. Underwood.....14

C. Hunter v. Erickson and Romer v. Evans.....16

**D. Continuing Discriminatory Effect and the Nature of
 the Injury.....20**

E. The State’s Interest in the Challenged Provisions.....23

F. Relief.....29

CONCLUSION.....30

TABLE OF AUTHORITIES

CASES:

<i>Arlington Heights v. Metropolitan Housing Dev. Corp.</i> , 429 U.S. 252 (1977).....	15, 29
<i>Carrington v. Rash</i> , 380 U.S. 89 (1965).....	22
<i>Champlin Ref. Co. v. Corporation Comm.</i> , 286 U.S. 20, 234 (1932).....	17
<i>City of Richmond v. United States</i> , 422 U.S. 358 (1975).....	14
<i>Dorchy v. Kansas</i> , 264 U.S. 286 (1924).....	17
<i>Giles v. Harris</i> , 189 U.S. 475 (1903).....	12
<i>Giles v. Teasley</i> , 193 U.S. 146 (1904).....	12
<i>Gomillion v. Lightfoot</i> , 364 U.S. 339 (1960).....	9, 15, 28
<i>Gordon v. Lance</i> , 403 U.S. 1 (1971).....	21, 22
<i>Griffin v. County School Board</i> , 377 U.S. 218 (1964).....	15
<i>Hunter v. Erickson</i> , 393 U.S. 385 (1969).....	7, 10, 20, 21, 22
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985).....	2, 7, 9, 23, 24, 27, 28
<i>INS v. Chadha</i> , 462 U.S. 919 (1983).....	17
<i>Johnson v. Governor of Florida</i> , 405 F3d 1214 (2005)(<i>en banc</i>).....	9, 14, 15, 28
<i>Jones v. Montague</i> , 194 U.S. 147 (1904).....	12
<i>Knight v. Alabama</i> , 787 F.Supp. 1030 (N.D.Ala. 1991).....	24

<i>Louisiana v. United States</i> , 380 U.S. 145 (1965).....	10, 29
<i>Mills v. Green</i> , 159 U.S. 651 (1895).....	12
<i>Palmer v. Thompson</i> , 403 U.S. 217 (1971).....	15
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	10, 21
<i>Selden v. Montague</i> , 194 U.S. 153 (1904).....	12
<i>Underwood v. Hunter</i> , 730 F.2d 614 (11 th Cir. 1984).....	17
<i>United States v. Fordice</i> , 505 U.S. 717 (1992).....	8
<i>United States v. O’Brien</i> , 391 U.S. 367 (1968).....	15
<i>United States v. Reading Co.</i> , 226 U.S. 324, 357 (1912).....	14
<i>Washington v. Davis</i> , 426 U.S. 229 (1975).....	15
<i>Washington v. Seattle School Dist. No. 1</i> , 458 U.S. 457 (1982).....	20
<i>Western Union Tel. Co. v. Foster</i> , 247 U.S. 105(1918).....	14
<i>Williams v. Mississippi</i> , 170 U.S. 213 (1898).....	12
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886).....	9, 13

CONSTITUTION AND STATUES:

Constitution of Alabama (1875).....	<i>passim</i>
Art. XI, § 4.....	3, 17
Art. XI, § 5.....	3, 17
Art. XI, § 7.....	3, 17

Constitution of Alabama (1901).....*passim*

 § 182.....*passim*

 § 214.....3

 § 215.....3

 § 216.....3

 § 269.....3

 Amendment 325 (Lid Bill of 1971).....*passim*

 Amendment 373 (Lid Bill of 1978).....*passim*

ISSUES PRESENTED

The district court made well-supported findings of fact that certain provisions of the Alabama Constitutions of 1875 and 1901, including amendments in 1971 and 1978, were adopted with a racially-discriminatory purpose and have a continuing racially-discriminatory effect. It nevertheless read certain doctrines of the Supreme Court and this Court to preclude it from holding those provisions unconstitutional, in violation of the Equal Protection Clause of the Fourteenth Amendment.

In these circumstances, the following issues are presented:

1. Where the district court found as a fact that both the purpose and effect of the challenged provisions are racially discriminatory, did the court err in failing to hold the provisions unconstitutional?
2. Has any court of the United States ever held that a provision with an invidious, racially-discriminatory purpose and a racially-discriminatory effect may nonetheless be held to be constitutional?

STATEMENT OF FACTS

The Alabama State University appellees adopt the Statement of the Case and Statement of Facts of the appellants. We summarize only the highlights here.

Discriminatory Purpose

Freedom for the newly-emancipated slaves was a tragically short interval in Alabama, as it was in the surrounding states. Beginning with racially-discriminatory tax provisions in the “Redeemer” Constitution of 1875, the district court found as a fact that the Alabama Constitution’s provisions restricting the taxing ability of all governing bodies, from the state legislature to the county level, were adopted for the purpose of discriminating against the African-American race.

Most of the focus was on the 1901 Constitution, as to which the United States Supreme Court has said “a zeal for white supremacy ran rampant through the convention.”¹ The district court found as a fact that the central purpose of the Alabama Constitution of 1901 was to discriminate against the African-American race. Doc.3294, at 19. The provisions challenged here were inserted in the Constitution in accordance with that central purpose, more specifically, for the purpose of preventing white taxpayers from paying for the education of members

¹*Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

of the African-American race. Doc.3294, at 19-22.² These undisputed findings of fact were based on direct evidence (statements of participants), circumstantial evidence, and expert testimony.

The district court further found that the same racially-discriminatory purpose produced related Alabama constitutional provisions, including the Constitution of 1875 and the “Lid Bills” of 1971 and 1978. These provisions were also adopted to further the same racially discriminatory purpose, for example, the 1875 Constitution, which reflected white Alabamians’ opposition to paying taxes “for purposes that they largely regarded as illegitimate, such as the education of the Freedmen.” Doc.3294, at 17.³

The cited provisions were designed not only to achieve their discriminatory purposes at the time, but also to embed those policies in the Alabama Constitution – the organic document of the State – so that state and local governments in

²The challenged provisions are §§ 214, 215, 216, and 269 of the Alabama Constitution of 1901, and Amendments 325 and 373 of 1971 and 1978, respectively (the so-called Lid Bills). The district court found as a fact that these provisions in the 1901 Constitution carried forward the same racially motivated millage caps placed in the 1875 Alabama Constitution. Doc. 3294, at 16-17. See Ala. Const., Art. XI, §§ 4, 5 and 7 (1875). All previous Constitutions of Alabama had left taxation to the plenary authority of the Legislature. Doc. 3294, at 12-13.

³“Those property tax policies were created to maintain the lowest possible taxation because property taxation is associated with funding for education for black children, and . . . that’s anathema . . .” Doc.3294, at 48.

Alabama would lack the power even in the future to abandon or change those discriminatory policies. Doc.3294, at 16-17, 46.

Overall, the district court left no doubt about its findings of invidious racial purpose:

“Indeed, Black Belt and urban industrialist interests successfully used the argument that it was unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill amendments.” Doc.3294, at 49.

Discriminatory Effect

The district court further found as a fact that the cited provisions continue to have a racially-discriminatory effect by denying access to higher education for African Americans, in disproportionate numbers, because low state funding shifts more of the cost to those least able to afford it. Doc.3294, at 57, 73-74, 76-77. In this way, the court found, the property tax restrictions even today advance the goal of the 1901 framers of denying an education to members of the African-American race. Doc.3294, at 78-79. ⁴

⁴Much of the findings related to appellants detailed analysis (which these appellees support) of Alabama’s overall tax structure and the relationship between funding K-12 schools and funding higher education. However the facts stated here show that even if that analysis were disregarded, the district court was able to draw a straight line from limiting property taxes to denying college access to poor, mostly black, students.

Higher education is not free. The district court described two paths to make access to higher education possible and affordable:

“The first path is to offer universally low tuition . . . The second path, in the absence of universally low tuition, is to offer need-based financial aid . . .” Doc.3294, at 72-73.

Rather than following either of these paths, Alabama, as the district court found, “is erecting roadblocks to those paths.” Doc. 3294, at 72. The district court recounted in detail Alabama’s pattern, unique among the states, of sharp tuition increases aggravated by sharp drops in the already meager level of need-based financial aid; *e.g.*, Doc. 3294, at 68-70, 74-76. Indeed, Alabama, already at or near the bottom in financial aid of all states, has now lost even federal matching funds because its own contribution is so low. Doc. 3294, at 76.

As access to education has become relatively harder for low income students, Doc. 3294, at 69, the gap between college-going rates for whites and blacks has grown. Doc. 3294, at 76-77. This is hardly surprising in view of lower income and wealth levels among black students and families – a finding based not only on general knowledge but on statistical evidence presented below.

For example, there is a 20-percentage-point gap between blacks and whites in qualifying as needy students. Doc. 3294, at 73-74. This gap may be understated because it measures income (where the white to black ratio is approximately 1.6 to

1) rather than family net worth (where the white to non-white ratio is a stunning 7 to 1). Heller testimony, May 5, 2004, Transcript, at 189-92. The district court recognized that access is not simply being able to afford entering college, but also “persistence” and graduation – being able to afford staying and receiving a degree, in the face of problems like tuition increases, or excessive hours at an outside job (studies show working more than 15 hours a week seriously jeopardizes academic success). Doc. 3294, at 73, 78.

These findings were augmented by findings about particular universities: at Alabama A & M, a predominantly African-American school, as many as 88% of students required financial aid. Doc. 3294, at 58. At the University of Alabama, a program designed to help students threatened with losing their financial aid had a student clientele which was 40% black even though only 14% of the student body was black. Doc. 3294, at 80.

Overall, the district court provided detailed and lengthy findings that the property tax restrictions have a continuing disparate effect on African Americans.

Decisions Below

The district court made these findings of fact in a detailed Order of October 4, 2004, Doc. 3294, and reaffirmed them in a subsequent Order of February 10, 2005. Doc. 3320.

The Alabama State University appellees fully support these careful findings, which are solidly based on the evidence presented below.

Notwithstanding these findings, however, the district court proceeded to hold that the challenged constitutional provisions of 1875, 1901, 1971 and 1978 “do not violate the Fourteenth Amendment.” Doc. 3294, at 90.

In reaching this conclusion of law the district court rejected arguments based on three lines of doctrine stemming from decisions of the United States Supreme Court: *Fordice* doctrine, *Hunter v. Underwood* doctrine, and *Hunter v. Erickson* doctrine.

This appeal followed.

SUMMARY OF ARGUMENT

The district court's well-supported findings should have led to a liability decision that the challenged provisions unconstitutionally deny equal protection of the laws. To the best of appellees' knowledge, no court of the United States has ever held valid a provision afflicted with such an illegitimate purpose and continuing adverse effect.

The Alabama State University appellees adopt the appellants' argument based on *United States v. Fordice*, 505 U.S. 717 (1992), and will not address that issue separately in this brief.

Instead, this brief focuses on the district court's explicit findings of fact of racial purpose and racial effect. Those findings are well-supported by the evidence, and this Court is therefore due to accept them.

The Supreme Court and other courts have wrestled from time to time with the constitutionality of state provisions that have a discriminatory purpose or a discriminatory effect, and have ultimately concluded that neither is sufficient by itself. The Supreme Court has always been clear, however, that a provision that has both discriminatory purpose and discriminatory effect cannot stand.

That is precisely what this Court faces here. Indeed, the provisions at issue in this case are not simply incidental discrimination, nor did a discriminatory

purpose simply manage to creep in. Rather, these provisions come largely from a 1901 enterprise wholly dedicated to discrimination and were then, in an eerie reprise, stiffened under Governor Wallace in 1971 and 1978.

But, as the district court amply found, these are not simply episodes of history. They continue to play a crucial role in denying African Americans the opportunity to be educated. The evidence was abundant that the challenged constitutional restrictions on taxation help put education beyond the reach of many African Americans, just as was intended by the framers of the 1901 Constitution and the other challenged provisions.

A host of cases provide the rule that provisions like this must fall – not as punishment for their original intent but to prevent their continuing infliction of unwarranted injury in the present and the future.

Among the landmark cases standing for this fundamental proposition are giants of American judicial history: *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Hunter v. Underwood*, 471 U.S. 222 (1985). Those rules have been resoundingly repeated in this Court's recent en banc decision, *Johnson v. Governor of Florida*, 405 F3d 1214 (11th Cir. 2005)(en banc).

Moreover, the invidious policy was fastened into the State's organic law, for the precise purpose of putting it beyond the reach of ordinary correction by later

lawmakers. Another group of landmark cases makes such actions doubly suspect and doubly invalid. *See Romer v. Evans*, 517 U.S. 620 (1996), which reaffirmed *Hunter v. Erickson*, 393 U.S. 385 (1969).

If, as these appellees urge, this Court remands the case to the district court for a finding of liability, the district court will then face the question of appropriate relief, which would be guided by the mandate of *Louisiana v. United States*, 380 U.S. 145 (1965).

ARGUMENT

Introduction

One of the most unfortunate legacies of our society is our long history of passing laws to discriminate against the African-American race. Before 1865 such laws were arguably or even explicitly permitted by the United States Constitution, as an adjunct to the institution of slavery that our Constitution embraced. After passage of the Thirteenth and Fourteenth Amendments ended slavery and transformed the former slaves into citizens, however, there arose a veritable industry of lawmakers passing laws to discriminate, *i.e.*, to make certain that the new citizenship was second-class citizenship. These laws reached their crest in the 1890-1908 period, when the former slave states wrote new state constitutions whose only purpose was to eviscerate the Fourteenth Amendment by enshrining white supremacy as a permanent institution.

The issue here is not to judge our ancestors, but to face the present-day legacy of their work, to determine whether that legacy has discriminatory consequences for today and the future and, if so, to deal with those consequences forthrightly.

A court dealing today with a law dating from the past is at a cross-roads. It cannot simply pass the law off as a relic of former days. If that law has present-

day consequences, the court decision will either stem those consequences or it will allow them to go on. If the court takes the latter course, it becomes complicit, as was the United States Supreme Court of the 1890's and early 1900's.⁵ That is what this case is about.

⁵Those Justices were men of their times. One who reads those cases must conclude, sadly, that the opinions were apologia for gross violations of the Constitution; *e.g.*, *Williams v. Mississippi*, 170 U.S. 213 (1898); *Giles v. Harris*, 189 U.S. 475 (1903); *Giles v. Teasley*, 193 U.S. 146 (1904). *See also* *Mills v. Green*, 159 U.S. 651 (1895); *Jones v. Montague*, 194 U.S. 147 (1904); *Selden v. Montague*, 194 U.S. 153 (1904).

A. The Law of Discriminatory Purpose and Effect

No case of the United States Supreme Court has ever upheld a state law provision that was racially discriminatory in both purpose and effect. To the contrary, all our jurisprudence unhesitatingly condemns such enactments.

The Supreme Court laid out the basic principle of fairness and equality that undergirds a legitimate society in a case involving a hand laundry not long after passage of the Civil War amendments:

“But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth ‘may be a government of laws and not of men.’

That language was part of the Court’s discussion of a just and constitutional society in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The Court went on to examine both the purpose and effect of the city ordinance before it and condemned that ordinance for violating these basic principles:

“Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust that illegal discriminations between persons in similar circumstances, material to

their rights, the denial of equal justice is still within the prohibition of the Constitution.” 118 U.S. at 373-74.

From that time, many other cases have stated the obvious fact that a purposefully discriminatory law transgresses the Equal Protection Clause of the Fourteenth Amendment. This is so even if the law deals with what would otherwise be a matter within the competence and power of the enacting body. Thus, acts generally lawful may become unlawful when done to accomplish an unlawful end, *United States v. Reading Co.*, 226 U.S. 324, 357 (1912), and a constitutional power cannot be used to attain an unconstitutional result. *Western Union Tel. Co. v. Foster*, 247 U.S. 105, 114 (1918).

Put most simply, as the Supreme Court said in *City of Richmond v. United States*, 422 U.S. 358, 378 (1975), acts done for a discriminatory purpose “have no credentials whatsoever.”

This Court recently restated the basic principle in *Johnson v. Governor of Florida*, 405 F3d 1214, 1218 (11th Cir. 2005)(en banc):

“Of course, the Equal Protection Clause prohibits a state from using a facially neutral law to *intentionally* discriminate on the basis of race.” 405 F3d at 1214, 1218 (italics in original).

The importance of discriminatory purpose is thus plain. As to the role of discriminatory effect, after some uncertainty the Supreme Court held in 1971 that

purpose without effect is insufficient to prove an equal-protection claim. *Palmer v. Thompson*, 403 U.S. 217 (1971).⁶ Then, to square the circle the Court held that effect without purpose is likewise insufficient. *Washington v. Davis*, 426 U.S. 229 (1976)(cited for this proposition in *Johnson v. Governor of Florida, supra*).

Finally, shortly after *Washington v. Davis*, the Supreme Court provided the formula most often quoted today:

“Official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”

Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977).

This rule compels invalidation of the Alabama constitutional provisions involved in this case.

B. Hunter v. Underwood

⁶Some earlier Supreme Court cases sounded like discriminatory purpose alone could be enough. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and *Griffin v. County School Board*, 377 U.S. 218 (1964). Then the Supreme Court rejected a purpose-only first amendment challenge to a draft-card-burning law, *United States v. O'Brien*, 391 U.S. 367 (1968), and soon made the purpose-plus-effect rule explicit in *Palmer v. Thompson*.

Against this background, the Supreme Court decided *Hunter v. Underwood*, 471 U.S. 222 (1985). That case is doubly relevant here. First, it provided a detailed roadmap for analyzing the purpose and effect of a challenged enactment; second, it dealt with the same constitutional framers involved in this case, the members of the Alabama Constitutional Convention of 1901.

Hunter v. Underwood involved a challenge to Section 182 of the Alabama Constitution of 1901, based on the ground that the provision had a racially-discriminatory purpose and continued to have a racially-discriminatory effect. Section 182 had vastly expanded the list of crimes for which a person would be disqualified from voting; whereas the 1875 Constitution (which was not challenged in *Hunter*) had generally disfranchised those convicted of crimes punishable by prison, § 182 added a “laundry list” of misdemeanors and petty offenses which the 1901 framers thought were most likely committed by blacks. The lead plaintiff, Victor Underwood, was a white man, and he along with the other plaintiff, Carmen Edwards, a black woman, had been barred from the voting rolls because of bad check convictions. They alleged that a “bad check” offense was one of the “black” crimes selected by the 1901 framers to further the goal of discriminating against African-Americans.

The same type of evidence was presented at trial in *Hunter v. Underwood* as was presented here, including direct evidence in the form of quotations from members of the 1901 Constitutional Convention, circumstantial evidence of other events, and expert testimony by scholars. The district court rejected plaintiffs' claims on both the facts and the law, but this Court reversed. This Court held that the district court's findings in favor of § 182 were plainly erroneous. *Underwood v. Hunter*, 730 F.2d 614 (11th Cir. 1984).

Turning to relief, this Court erased the provisions of § 182 that dated from the 1901 Constitution. This left in place the 1875 Constitution, under which only prison-level offenders were disfranchised:

“Those provisions of § 182 that disfranchise nonprison offenders lack legal effect. *Dorchy v. Kansas*, 264 U.S. 286, 289-90 (1924); *see INS v. Chadha*, 462 U.S. 919, 933 (1983)(citing *Champlin Ref. Co. v. Corporation Comm.*, 286 U.S. 20, 234 (1932)), . . . The district court shall issue an injunction ordering voter registration upon request by members of plaintiff class who qualify in all other respects for registration on the electoral rolls.” 730 F.2d at 621.⁷

⁷In this case, the district court found the property tax clauses of the 1875 Constitution (Art. XI, §§ 4, 5 and 7) also had a racially discriminatory purpose, so invalidating the discriminatory provisions here would mean striking down the 1875 clauses, not restoring them.

On review the United States Supreme Court affirmed. The Court held that in light of the evidence, this Court had correctly found plain error in the district court's rejection of plaintiffs' proof of discriminatory purpose. 471 U.S. at 229. The Supreme Court put aside its frequent statements about the difficulty of proving legislative intent in light of the massive record about the 1901 Alabama Constitutional Convention.

Justice Rehnquist's opinion for a unanimous Court used unusually forceful language in describing the racial purpose of the 1901 Constitutional Convention – a purpose not limited to voting and disfranchisement provisions but extending to white supremacy across the board. Justice Rehnquist said a “zeal for white supremacy ran rampant at the convention,” and quoted the opening words of the Convention President:

“And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.” 471 U.S. at 228.

In *Hunter* the State did not contest the racial motivation of the 1901 Convention. The Supreme Court noted that the State's lawyer, in oral argument, said “I would be very blind and naive” to deny that race was involved “in the decisions of the people who were at the constitutional convention of 1901.” 471 U.S. at 229.

Turning to the issue of continuing effect, the Supreme Court pointed out that “section 182 on its face is racially neutral, applying equally to anyone convicted of one of the enumerated crimes.” 471 U.S. at 227. In operation, however, § 182 had a vastly disproportionate impact when first enacted, and evidence at trial showed that blacks were still 1.7 times as likely as whites to be disfranchised by § 182. 471 U.S. at 228, citing 730 F2d at 620. This disparity was enough for the Supreme Court to conclude that both prongs of an equal-protection claim had been met.

The main portion of Justice Rehnquist’s opinion was devoted to the State’s contention that it had a legitimate interest in keeping offenders away from the polls, and that a part of the purpose of the 1901 Constitutional Convention had been to disfranchise not only black voters but also poor whites. These arguments were rejected with vigor by the Supreme Court, as they should be here.

C. Hunter v. Erickson and Romer v. Evans

This is a familiar doctrine, and it has led to invalidating provisions even when they are not invidious in themselves. In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court struck down a provision which repealed a city ordinance protecting civil rights and incorporated into the city charter a bar against future civil rights ordinances. The measure would have been upheld if it simply repealed the existing ordinance, but embedding the prohibition in the city charter pushed the measure over the threshold of voidness.

There was no proof that the measure struck down in *Hunter v. Erickson* was purposely invidious in itself. Here there is such proof, so the case against allowing Alabama's measures to remain in its constitution is even stronger than in *Hunter v. Erickson*. That much is also shown by *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), where a statewide initiative was struck down because it put a heretofore local issue beyond the reach of local citizens and did so on the basis of race. Four Justices dissented but indicated they would have followed *Hunter v. Erickson* if there had been a showing of discriminatory purpose in the Washington initiative. See 458 U.S. at 493 (Powell, J., dissenting) ("The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to '[place] *special* burdens on racial

minorities within the governmental process.’ *Hunter v. Erickson*, 393 U.S. at 391.”)

The Supreme Court cited these cases recently in striking down a Colorado constitutional amendment in *Romer v. Evans*, 517 U.S. 620 (1996). The invalid measure, Amendment 2, repealed legal protections for gay men and lesbians and created a constitutional bar to re-enacting these or any other protections for them “unless the state constitution is first amended to permit such measures.” 517 U.S. at 627 (quoting the Colorado Supreme Court).

Because it not only withdrew legal protections but also barred reinstatement, Amendment 2 was held unconstitutional because it “imposes a special disability on those persons alone.” 517 U.S. at 631. The Supreme Court also noted that a provision like Amendment 2 suggested an official animus toward its targets, 517 U.S. at 633, animus which in the case of Alabama’s 1901 Constitution is not simply “suggested” but is palpable and undisputed.

To the same effect is *Gordon v. Lance*, 403 U.S. 1 (1971), where the Supreme Court emphasized that decisions about government structure could not be covers for discrimination. In *Gordon* (which was also cited in *Romer v. Evans*), the Supreme Court upheld a West Virginia provision requiring a 60% referendum

vote to pass a bond issue, but the Court was at pains to emphasize that cases involving intentional discrimination were exceptions to its rule:

“Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no ‘discrete and insular minority’ for special treatment.” 403 U.S. at 5.

“ . . . no sector of the population may be said to be ‘fenced out’ from the franchise because of the way they will vote. *Cf. Carrington v. Rash*, 380 U.S. 89, 94 (1965).” *Id.*

“We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.” 403 U.S. at 7.

In upholding the West Virginia provisions, *Gordon v. Lance* showed plainly that discriminatory provisions like the Alabama Constitution are very different and cannot be upheld.

D. Continuing Discriminatory Effect and the Nature of the Injury

The burden of showing continuing discriminatory impact, once an original discriminatory purpose is shown, is not a heavy one. This is logical because once a discriminatory purpose has been shown, the only function of discriminatory effect is to ascertain that the provision is still in play and is not simply an abstraction of the past. Thus, in *Hunter v. Underwood*, the Supreme Court found a sufficient showing of discriminatory effect based simply on the fact that in two counties, black voters were 1.7 times as likely as white voters to be disqualified by the challenged provision. 471 U.S. at 227-28.

The discriminatory impact in this case more than meets that test. The district court was able to draw a straight line between the property tax restrictions challenged here and unequal denial of access by African Americans to higher education. The district court found that Alabama “erects roadblocks” to both paths to higher education – through high tuition and low financial aid – and that this burden falls disproportionately on African Americans. This is exactly where the framers of the 1901 Constitution wanted the burden to fall.

Of course these burdens also fall on poorer white students as well, but that cannot save the challenged provisions, any more than the identical fact could save § 182 in *Hunter v. Underwood*:

“An additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a ‘but-for’ cause for the enactment of § 182.” 471 U.S. at 232.

The district court discounted these findings because it decided that, as a legal matter, the injuries inflicted today by the discriminatory taxing restrictions are too “attenuated” from constitutional rights related to higher education.

If the district court was looking only at whether the discriminatory provisions continue to have segregative effects, that view would be too narrow. Although much of the focus of this case has been – and rightly so – on desegregating Alabama’s prior system of de jure segregation, the constitutional injury to the plaintiffs encompasses far more than that; it certainly encompasses denial of access to education in the name of white supremacy.⁸

In its 2005 Order, Doc.3320, the district court made clear that it viewed the injury as encompassing denial of access as well as segregation. Nevertheless, the

⁸As the district court has found in great detail; *e.g.*, *Knight v. Alabama*, 787 F.Supp. 1030, 1065-1119 (N.D.Ala. 1991), and as scholars have universally recognized, the evil of segregation was not an end in itself but was a temporary strategy (albeit very long-lasting) in the enduring quest for white supremacy. The framers of the 1901 Constitution certainly believed that if they had to pay for schooling black students it must be in segregated schools, but they greatly preferred not having to pay for black schooling at all – and the provisions challenged here carried out that preference quite well.

district court appears to have focused on how the challenged provisions hamper funding for K-12 schools, with the difficulties in higher education being simply an outgrowth, and thereby “too attenuated.”

This too was erroneous. The injury to African-American students in denying access to higher education is a direct consequence of lack of state funding, and the property tax provisions of the 1901 Constitution are steel-hard nails in the coffin of low state funding.

These consequences fall most heavily, and quantifiably, on black students, just as the 1901 framers intended.

That is continuing injury of the sort that led the Supreme Court in *Hunter v. Underwood* to strike down § 182 of the 1901 Constitution. It should have led the district court to strike down the same Constitution’s property tax provisions.

E. The State's interest in the challenged provisions

The principle argument advanced for not striking down the challenged provisions was the state's interest in its property tax system, and the fact that people and states have many grounds besides discriminatory ones for controlling taxes. Related to these is the argument that the provisions affect only property taxes, and do not close off the state's other methods of raising revenue.

All these arguments have been rejected in previous cases.

As the district court found, Alabama's provisions are unique. No other state has such detailed restrictions built into its constitution, including subjecting local tax decisions to state supervision. The consequences are likewise unique. Few other states provide so little need-based aid to students. While there may be a public interest in regulating the taxing power, that interest may be met in other ways not partaking of the discrimination here.

In *Gomillion v. Lightfoot*, *supra*, the defendants asserted a state interest every bit as fundamental as the interest in the taxing power. There, the State of Alabama asserted it had simply engaged in "redefining metes and bounds," of a political subdivision, a routine exercise of state sovereignty. 364 U.S. at 347. This characterization was plainly a sham:

"According to the allegations here made, the Alabama Legislature has not merely redrawn the Tuskegee city

limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries." 364 U.S. at 347.

The Supreme Court flatly rejected the State's claim of unreviewable sovereignty over municipal organization:

"A statute which is alleged to have worked unconstitutional deprivations of petitioners' rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries." *Id.*

The Supreme Court then stated the principle more generally:

"When a State exercises power wholly within the domain of a state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U.S. at 347.

In *Hunter v. Underwood*, the State of Alabama tried still another tack for defending an invidious enactment. There the State argued that § 182 had been stripped of its offensive purpose in the years since 1901 so that it now simply reflected the legitimate state interest of denying the franchise to those convicted of moral turpitude. That post hoc rationale fared no better with the Supreme Court:

"Without deciding whether § 182 would be valid today if enacted without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of

race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.” 471 U.S. at 233.

To paraphrase *Gomillion*, Alabama has not simply adopted restrictions on governmental taxing power and incidentally inconvenienced African Americans; rather it has set out to injure African Americans, and to that end it has incidentally regulated officials’ exercise of the taxing power.

In *Johnson v. Governor of Florida, supra*, this Court has recently held that a modern re-enactment of a provision may be valid if it is sufficiently independent of its dubious predecessor. The record and findings in this case are to the contrary. Far from seeking to eliminate the taint of the 1901 Constitution, Alabama has twice acted in the modern day – 1971 and 1978 – to aggravate the evils of the 1901 provisions. The district court properly found as a fact that each of these modern provisions was also motivated by the same discriminatory scheme.

To uphold the validity of the Alabama property tax provisions would make a mockery of this Court’s analysis in *Johnson*. Why should a state bother to do right today if it can do wrong and still be upheld?

F. Relief

The district court found no liability. Although it addressed some issues of remedy, a remand by this Court would reopen the remedy question before the district court.

These appellees believe that as an initial matter, an injunction should be entered against enforcement of the challenged provisions of the 1875 and 1901 Constitutions, and the 1971 and 1978 Lid Bills. Such an injunction would not interfere with state taxing policy, but would remove clogs on the legitimate exercise of that policy.

Beyond that, the district court should consider such relief (including appellants' suggestions) as will "eliminate the discriminatory effects of the past as well as bar-like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

CONCLUSION

We return to the Supreme Court's admonition in *City of Richmond* that acts done to discriminate "have no credentials whatsoever." *Johnson v. Governor of Florida* dictates that the offending provisions here must be held to violate the Fourteenth Amendment. Appellants' prayer to reverse the judgment below should be granted.

Respectfully submitted,

SOLOMON S. SEAY, JR.
Post Office Box 210998
Montgomery, AL 36121-9998
(334) 274-0722 - office
(334) 274-0775 - fax
[solomon s seay@aol.com](mailto:solomon_s_seay@aol.com)

FRED D. GRAY
Gray, Langford, Sapp, McGowan,
Gray & Nathanson
Post Office Box 830239
Tuskegee, AL 36083-0239
(334) 727-4830 - office
(334) 727-5877 - fax
fgray@glsmgn.com

ARMAND G. DERFNER
Derfmer, Altman & Wilborn, LLC
Post Office Box 600
Charleston, SC 29402
(843) 723-9804 - office
(843) 723-7436 - fax
aderfner@dawlegal.com

Attorneys for Alabama State university Appellees

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B), Fed.R.App.P. This brief contains 7,572 words.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document was served upon the following counsel of record on June 30, 2005, by first class mail:

Hon. Carlos A. Gonzalez, Court Monitor, P.O. Box 450888, Atlanta, GA 30345;

JSU: R. M. Woodrow, P.O. Box 2286, Anniston, AL 36202;

UA: C. Glenn Powell, Norma Lemley, The Office of Counsel, The University of Alabama System, 1818 University Blvd., Tuscaloosa, AL 35401;

SBE and Postsecondary Chancellor:

Jeffrey A. Foshee, Edward M. George, 900 South Perry Street, Suite B,
Montgomery, AL 36104

AU: David Boyd, P.O. Box 78, Montgomery, AL 36101;

Edward S. Allen, M. Stanford Blanton, John Russell Campbell,
P.O. Box 306, Birmingham, AL 35201;

A&M:

Joe R. Whatley, Jr., Peter H. Burke, P.O. Box 10647, Birmingham, AL
35202-0647;

Braxton Schell, Jr., 1125 Financial Center, 505 N. 20th Street, Birmingham,
AL 35203-4601;

TSU: William F. Murray, Jr., 420 North 20th Street, Suite 3000, Birmingham, AL 35203;

William F. Gardiner, William K. Thomas, P.O. Box 830612, Birmingham, AL 35283-0612;

UWA:

Michael G. Kendrick, Mark T. Waggoner, 2101 Sixth Avenue North, Suite 700, Birmingham, AL 35203;

US: Jeremiah Glassman, Pauline Miller, Educational Opportunities Litigation Section, U.S. Dept. of Justice, P.O. Box 65958, Washington, DC 20035-5958;

SBE:

Reginald L. Sorrells, Gregory M. Biggs, Office of General Counsel, State Dept. of Education, Room 5103, Gordon Parsons Bldg., P.O. Box 302101, Montgomery, AL 36130-2101;

UM: Carl E. Johnson, Jr., Bishop, Colvin & Johnson, P.O. Box 370404, Birmingham, AL 35237;

STATE:

Robert D. Hunter, Deputy Attorney General, 210 Inverness Center Drive, Birmingham, AL 35242;

John B. Tally, Adams and Reese/Lange Simpson, LLP, 2100 3rd Avenue North, Suite 1100, Birmingham, AL 35203-3367;

USA:

Jean Walker Tucker, University Attorney, University of South Alabama, 131 Admin. Bldg., Mobile, AL 36688;

UNA:

Thomas M. Lovett, University Counsel, UNA Box 5023, Florence, AL 35632-0001.