

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

INDIA LYNCH, by her parent, SHAWN KING *
LYNCH; WENDELL PRIDE, JR., by his parent, *
WENDELL PRIDE; IVY ROSE BALL, by her *
parent, MIRANDA BALL; SLADE BERRYMAN *
and CANNON BERRYMAN, by their parent, *
TYLER BERRYMAN; ROCHESTER *
ANDERSON and CEZANNE ANDERSON, by *
their parent, STELLA ANDERSON; SHARNAY *
BROOKS, by her parent, MICHAEL BROOKS; *
ZEKEIAH ORMOND, by his parent, BARBARA *
L. ORMOND; ADRIAN WIDEMON, by his *
parent, ADA WIDEMON JONES, individually *
and on behalf of others similarly situated, *

Plaintiffs, *

v. *

Civil Action No.
CV-08-S-0450-NE

THE STATE OF ALABAMA; BOB RILEY, in his *
official capacity as Governor of Alabama; and *
TIM RUSSELL, in his official capacity as *
Commissioner of Revenue, *

Defendants. *

**EXHIBIT D TO
PLAINTIFFS' BRIEF REPLYING TO DEFENDANTS' BRIEF
OPPOSING SUMMARY JUDGMENT AND TO DEFENDANTS'
MOTION TO STRIKE PLAINTIFFS' PROPOSED UNDISPUTED FACTS**

**State Defendants' Proposed Findings of Fact and Conclusions of Law,
Knight v. Alabama, CA No. 83-1676 (N.D. Ala.), Doc. 3277, June 7, 2004**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

04 PM -7 PM 4:14

09/03/2008

09/03/2008

JOHN F. KNIGHT, JR., etc., et al,
Plaintiffs and Plaintiffs-Intervenors,

*
*
*
*
*

UNITED STATES OF AMERICA,
v.

Civil Action Number:
CV 83-M-1676-S

*
*
*
*

THE STATE OF ALABAMA, et al.,
Defendants.

*
*
*

**STATE DEFENDANTS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The State of Alabama Defendants submit these Proposed Findings of Fact and Conclusions of Law in response to the Motion for Additional Relief With Respect to State Funding of Public Higher Education. Citations to the transcript of the evidentiary hearing held on May 4 and 5, 2004 will appear below as "May 4 Tr. p. ____." Citations to deposition testimony are indicated by the name of the deponent followed by the page number, thus: (Thornton p. ____).

I. ALABAMA'S PROPERTY TAX SYSTEM IS NOT "TRACEABLE TO" VESTIGES OF THE STATE'S PAST *DE JURE* SEGREGATION OF HIGHER EDUCATION.

1. The Constitutional standard regarding the desegregation of Alabama's higher education system is announced in *United States v. Fordice*. Plaintiffs' Motion, paragraph 11; *see also United States v. Fordice*, 505 U.S. 717 (1992) ("[i]f 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 education practices.”)

2. On April 24, 2004, plaintiffs’ expert J. Mills Thornton testified that there were racially discriminatory motives behind the public school funding provisions of Alabama’s 1901 Constitution that are “traceable to similar provisions in the 1875 Constitution of Alabama.” Deposition of J. Mills Thornton (“Thornton”), p. 119. However, instead of addressing the question whether there is any causal connection, in the legal sense, between Alabama’s current property tax system and vestiges of *de jure* segregation in Alabama’s system of higher education, Thornton offered the opinion, as a historian, that every decision collectively made by Alabamians is related to race. (Thornton pp. 185-186, 193-194, 196) Indeed, he asserted that race helped create a “political culture . . . a set of institutions, and a set of institutional assumptions, of a way of thinking about politics, and a way of thinking about power and social relationships which became ingrained in people and they take it . . . to be second nature.” (Thornton p. 173)

3. Thornton goes so far as to acknowledge that he believes that the past is so strong a determinant in our lives today that “everything that exists today is traceable to what came before” and that this statement includes “every single thing.” (Thornton p. 189) In using “traceable to” in this sense, Thornton clearly uses that expression in the sense one would expect of a professional historian, but this meaning is markedly different

from the legal sense. Thornton acknowledges as much when he concedes that he is *not* saying that Alabama's property tax system is a *product of* racism. (Thornton p. 197) The *Fordice* requirement of a showing that a challenged policy is "traceable to" past segregation means that the challenged policy must be shown to be the *product of* segregation; not just that it is "traceable to" segregation in the sense in which Thornton uses the term.

4. Thornton philosophically argues that "nothing we can ever do is – can be divorced from our lived experience of race" in Alabama. (Thornton p. 179) This is because Thornton believes that racism created a "political culture" which "becomes ingrained in people." (Thornton p. 173) Therefore, since the property tax system exists via a political process necessarily deriving from Alabama's political culture, it (along with all other taxes in the State, from the sales tax to the cigarette tax, as well as the earmarking of the majority of Alabama's tax receipts to public education purposes) must be "traceable to" racism. Such an obvious overgeneralization provides scant support for a finding that a particular portion of the State's tax system is somehow racist in a constitutionally significant sense. Indeed, Thornton never demonstrates how an allegedly racist taxation system might be said to perpetuate *de jure* segregation in higher education.

5. Plaintiffs' assertions of traceability are so inclusive that they are meaningless to this case for two reasons. First, if one accepts the notion that "everything that exists today" is traceable to what occurred in the past, it is impossible to determine proximate, legal causation for any specific act. Second, if, as Thornton asserts,

Alabamians can never escape from the culture that was molded by racism (Thornton pp. 175-177, 179), then the vestiges of Alabama's racist past can never be eradicated, making this or any other Court's orders to eradicate vestiges of *de jure* segregation essentially vain efforts because they will always be ultimately inefficacious.

6. A case cited by the *Fordice* Court, *Cooper v. Aaron*, is instructive in understanding the legal meaning of the key term "traceable to." *Cooper v. Aaron*, 358 U.S. 1 (1958). There, the school authorities in Little Rock, Arkansas, claimed that despite their best efforts to desegregate the Little Rock school system pursuant to *Brown v. Board of Education*, the Arkansas governor and legislature took actions that made such efforts impossible. *Id.* at 7-9. Therefore, the school officials asked the United States District Court in Arkansas to allow them to postpone implementing *Brown*. The District Court, due to the "chaos, bedlam, and turmoil" surrounding the desegregation efforts, granted the officials' request. *Id.* at 13. In affirming the Eighth Circuit's overruling of the District Court's decision, the Supreme Court stated that the conditions at the school "are directly traceable to the actions of legislators and executive officials of the State of Arkansas." *Id.* at 15. The Court then held that the creation of this chaotic situation "is the product of state action." *Id.* at 16. By using the "traceable to" language as equivalent to a requirement that the challenged action was the "product of" State action, the *Cooper* Court uses the term "traceable to" in a legal causation sense, not in the sense that everything that exists today could be considered traceable to what came before.

7. In the more recent case of *Freeman v. Pitts*, in which the Supreme Court held that district courts supervising desegregation of schools may relinquish supervision of school systems in incremental stages, the Court stated that “the district Court may determine that it will not order further remedies in the area of student assignments where racial imbalance is not traceable, *in a proximate way*, to constitutional violations.” *Freeman v. Pitts*, 503 U.S. 467, 491 (1992). The Court’s use of the word “proximate” to modify “traceable” shows that “traceable to” in the legal sense of that phrase as used in desegregation cases, differs from the professional historian’s sense, because the Court requires a showing of a causal connection to the alleged constitutional violation.

8. In another Civil Rights case, *Allen v. Wright*, the Supreme Court addressed the meaning of “traceable to” in the context of Article III Standing. *Allen v. Wright*, 468 U.S. 737, 739-740 (1984). In this case, the parents of black children who attended public schools that were undergoing desegregation challenged the IRS’s guidelines regarding the granting of tax-exempt status to private schools. To have standing, a plaintiff must have 1) an injury that is 2) traceable to a defendant’s conduct and 3) that can be redressed by the requested relief. Speaking of these elements, the Court stated that “[t]he ‘fairly traceable’ and ‘redressability’ components of the constitutional standing inquiry were initially articulated by this Court as ‘two facets of a single causation requirement’.” *Id.* at 753 n.19 (internal citation omitted). The Court further held that “[t]o the extent there is a difference, it is that the former [the fairly traceable component] examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief

requested.” *Id.* As with *Fordice* and *Freeman* discussed above, “traceable” refers to a causal connection, not simply an environment or a state of concurrent existence.

9. In almost exactly the same language, the Supreme Court held in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida* that standing requires the plaintiff to show “a causal relationship between the injury and the challenged conduct, by which we mean that the injury ‘fairly can be traced to the challenged action of the defendant’.” *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 664 (1993) (internal citation omitted).

10. There is no traceability, in the *Fordice* causal connection context, between Alabama’s present property tax system and Alabama’s past practice of *de jure* segregation of higher education. First, the property tax is not directly related to the state’s system of higher education. Second, developments over time, including elections in which African Americans have enjoyed the full opportunity to, and have, voted, have broken any proximate link between a past racist ideology and Alabama’s property tax system. Simply because the plaintiffs’ experts testified that Alabama’s political culture was forged at a time when racism was a factor in many of the laws of the State does not mean that Alabama’s current tax structure is “traceable to” and therefore the “product of” that political structure. Indeed, Thornton, on whose opinions plaintiffs place so much reliance, testified under oath that that it would be wrong to say that opposition to property taxes is the “product of” racism. (Thornton p. 197)

11. Another plaintiffs' expert, Robert J. Norrell, a professor of history at the University of Tennessee, admitted that blacks participated in the political process in the 1970s and that after 1970, blacks were so active politically that they literally changed the face of Alabama politics. (May 4 Tr. 131) The 1978 Lid Bill, which forms the constitutional basis for Alabama's present ad valorem property tax system was approved by a majority of Alabamians at a time when, as Norrell admitted, increasing black political participation had "changed the face of Alabama politics." (May 4 Tr. 131)

12. William Stewart, professor emeritus of Political Science at the University of Alabama, testified that the 1978 Lid Bill received popular approval by Alabama voters, which certainly included African Americans. (May 5 Tr. 126-130) Stewart also testified that the 1978 Lid Bill, the constitutionality of which has been upheld by the Eleventh Circuit,¹ was not the product of racism, i.e., its adoption was not traceable to racism. (May 5 Tr. 129) Overall, Dr. Stewart sees no proximate or legal traceability between Alabama's current tax system and vestiges of *de jure* segregation of higher education. (May 5 Tr. 129-131) Dr. Stewart testified that the current property tax system in Alabama is not a product of racism because the 1978 Lid Bill was passed at a time in Alabama when black voters were participating fully in the political process. (May 5 Tr. 129) He pointed out that in 2003, Governor Riley, the present governor of Alabama, campaigned and worked tirelessly to obtain some revisions to provisions of the 1978 Lid Bill, and legislation that had been enacted pursuant thereto, through voter approval of his tax reform proposal known as Amendment 1, but the people of Alabama, voting in 2003,

¹ See *Weissinger v. White*, 733 F.2d 802 (11th Cir. 1984)

when participation of voters of all races is essentially ensured, “overwhelmingly said they didn’t want it.” (May 5 Tr. 133) Finally, Dr. Stewart noted that there is a trend nationwide for voters to oppose property tax increases (May 5 Tr. 157-158) and that surveys show that when people are asked which tax is their least preferred tax, almost every time they specify the property tax, meaning the tax on real estate. (May 5 Tr. 158)

13. Alabama’s current property tax system has been approved by and amended by the voters of Alabama, both black and white, after the end of the *de jure* system of segregation in higher education. (May 5 Tr. 126-132)

14. John Knight, one of the named plaintiffs in this action and a member of the Alabama Legislature and Chairman of the Finance and Appropriation Committee of its House of Representatives, acknowledged that the Governor of Alabama proposed what was described as “Amendment 1” to the Alabama legislature. (May 5 Tr. 64) The legislature passed many of the measures proposed by the Governor and sent them to the voters for approval, but the voters voted down the proposed constitutional amendments. (May 5 Tr. 64) Representative Knight acknowledged that the prospect of increasing taxes “is not a popular issue with any member, any elected official, at this particular time.” (May 5 Tr. 65)

15. Representative Knight also testified that “I can tell you it’s extremely difficult in the Alabama legislature on tax reform.” (May 5 Tr. 58) Representative Knight added that “Short of federal court intervention, it just seems like it’s almost

impossible to address many of those issues.” Despite Representative Knight’s opinion that the legislature has difficulty proposing tax reform measures, he also acknowledged that, last year, the governor brought to the legislature a plan of massive tax reform which included many measures which were passed by the legislature and sent to the voters for approval. (May 5 Tr. 64) As evidenced by last year’s legislative action and subsequent vote of the citizens, federal court intervention is not necessary in order for the political process in Alabama to result in a tax system that reflects the current will of the people of the state.

16. Because the plaintiffs’ proposed remedy exceeds the scope of any constitutional violation they have been able to show, and because it is not tailored to redress the effects of any violation they may have been able to show, this Court lacks any justifiable authority to impose the sought remedy. If ordered, the proposed remedy would interject this Court into a traditional legislative function, the “fundamental and delicate power of taxation.” *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) (*Jenkins I*). It would amount to an attempt to reverse the results of a string of elections held in Alabama over the last 25 years, at both the State and the local level. While Alabama’s property tax system may be far from ideal and in need of reform, if the State is to raise more funds than are now derived from the present levies for which property taxes are raised in Alabama, it remains beyond the power of this Court to take it upon itself to order such sweeping changes as the plaintiffs suggest.

17. Dr. Daniel Sullivan, a Professor of Economics at the University of Minnesota, testified that an unusual feature of Alabama property tax is the limit on the authority of the legislature to act on and change the property taxes. (May 5 Tr. 110) He testified that the fact that it is necessary to have a constitutional amendment to change the property tax is one of the things that, according to Dr. Sullivan, is preventing or hindering the State of Alabama from raising its property taxes. (May 5 Tr. 110-111) Dr. Sullivan also acknowledged, however, that the 1978 Lid Bill was itself a constitutional amendment which required approval of the voters of Alabama. (May 5 Tr. 111) Not only did the 1978 Lid Bill receive approval of the voters of Alabama, it passed overwhelmingly and passed in counties that had majority black populations. (May 5 Tr. 111, 112) It is important to note that Dr. Sullivan's testimony may have engendered a less than fully accurate impression as to the degree of flexibility in raising property taxes locally under 1978 Lid Bill. Under paragraphs (c) and (f) of the 1978 Lid Bill, local authorities of all types levying property taxes for any purpose may alter the ratio of assessed value to market value and increase the rate of taxation at any time through the medium of local initiative following a public hearing, passage of any appropriate local law by the Legislature and a favorable vote by the affected electorate. As Dr. Sullivan recognizes, a constitutional amendment approach may also be taken, and this approach has been taken many times, as a casual review of the many amendments to Alabama's Constitution will reveal, e.g., Amendment No. 420 (1982) (increasing local property taxes for schools in Macon County by 10 mills), Amendment No. 461 (1985) (raising local property taxes by 10 mills in Wilcox County), Amendment No. 527 (1990) (Choctaw County), Amendment No. 593 (1995) (Perry County), Amendment No. 720

(2002) (Calhoun County). The 1978 Lid Bill's paragraph (f) provisions have been utilized numerous times since 1978 to propose additional property taxes to the electorate, with the public record revealing that Alabama voters have approved increased local property taxes for schools in the years subsequent to the 1978 Lid Bill well over one-third of the time.

II. BECAUSE THE PROPOSED REMEDY EXCEEDS THE SCOPE OF THE CONSTITUTIONAL VIOLATION, THIS COURT LACKS AUTHORITY TO ORDER THE PROPOSED REMEDY.

18. The plaintiffs' proposed remedy encompasses several Alabama constitutional provisions. Sections 214, 215 and 216 of the Alabama Constitution limit the ad valorem tax rate the Alabama Legislature (§ 214), Alabama counties (§ 215), and Alabama municipalities (§ 216), may place on taxable property to the extent such limits have not been increased through local constitutional amendment or referenda conducted pursuant to provisions of the 1978 Lid Bill. ALA. CONST. art. XI, §§ 214-216. Section 269 of the Alabama Constitution limits the ad valorem tax rate counties may place on taxable property levied specifically for the benefit of public education and requires voter approval of these property taxes in a referendum election again except to the extent such limitation has been effectively altered by local constitutional amendment or local referenda conducted pursuant to the 1978 Lid Bill. ALA. CONST. art. XIV, § 269. Amendment 325, also known as the 1972 Lid Bill, establishes separate classes of property for purposes of the ad valorem tax, set assessment ratios for each class of property, created a cap or "lid" on total ad valorem taxes payable in respect of any particular item of taxable property, and continued the requirements for voter approval of

property tax increases in excess of the limit otherwise then applicable. ALA. CONST. amend. 325. Amendment 373, also known as the 1978 Lid Bill, amended the property classes further, adding a new class and lowering the assessment ratios for two of the existing classes, authorized the legislature to develop a current use method of property assessment for qualifying property, and established separate “lids” on total ad valorem taxes for properties within each class of taxable property. ALA. CONST. amend. 373. The plaintiff’s remedy would also encompass and nullify or modify numerous provisions of Alabama statutory law implementing the property tax system as set forth in Article 7 and other portions of Title 40, Ala. Code.

19. The plaintiffs propose a declaratory judgment that the state property tax system is unconstitutional and a one-year deadline for the State to overhaul the system. If the State fails in this mission, the plaintiffs propose that this Court overhaul the tax system itself by uniformly applying all millage rates and taxing property at a rate of at least 60% of the property’s current market value. Such court action would appear to eradicate the availability of the current use method of property valuation, eliminate the classification of property for taxation purposes, and the assessment ratios found in the two lid bills. Plaintiffs’ Motion 7-8; Brief 79.

20. All witnesses seem to agree that “earmarking revenue is an inefficient way of funding obligations of the state. (May 5 Tr. 113 (Daniel Sullivan), 129 (William Stewart)) In order for this court to grant the relief requested by plaintiffs, it would have to earmark some or all of the funds generated by the new tax system for higher education

and, more particularly, for minority recruitment and retention, a notoriously inefficient practice.

A. Because Plaintiffs' Proposed Remedy Exceeds the Scope of the Constitutional Violation this Court lacks the Authority to Order the Proposed Remedy.

21. The United States Supreme Court has long instructed that in racial segregation cases “the scope of the remedy is determined by the nature and extent of the constitutional violation.” *Milliken v. Bradley*, 433 U.S. 267, 270 (1977) (*Milliken II*) (citing *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 16 (1971)). Courts are given wide latitude to fashion “equitable principles” to address vestiges of racial segregation but this authority is not without limit. *Id.* at 280.

22. The Supreme Court has identified a three-part framework to guide district courts in the exercise of their remedial authority:

In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . The remedy must therefore be related to the *condition* alleged to offend the constitution. . . . Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’. . . Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

Missouri v. Jenkins, 515 U.S. 70, 88 (1995) (*Jenkins II*) (citations omitted and emphasis in original)).

23. The preceding sections explain how the constitutional and statutory property tax provisions at issue are not “traceable” to any policies and practices that may continue to have segregative effects in the Alabama higher education system. *See* Section I; *see also Fordice*, 505 U.S. at 732. For this reason, the plaintiffs proposed remedy of a declaration that these provisions are unconstitutional and therefore require an overhaul of the property tax system exceeds the scope of the constitutional violation. This Court has already determined the depth of the constitutional violation and plaintiffs’ attempt to revisit those exhaustive findings and recommendations is unwarranted.

24. Even if this Court were to adopt the plaintiffs’ view of the property tax system as a vestige of segregation, this Court would be unable to impose the remedy sought by the plaintiffs. Plaintiffs propose what is in essence a complete overhaul and dismantling of the property tax system in Alabama. Because this is a remedy that would necessarily benefit those who were not victims of desegregation and burden those who were, the proposed remedy fails to be *remedial* in nature and cannot be ordered by this Court. Moreover, the proposed remedy intrudes on the legislature’s traditional taxation power and impermissibly interjects this Court into the legislative arena. Thus, the plaintiffs request the Court to impose remedies which are not practicable and fail to meet the third step of the *Fordice* test. *Fordice*, 505 U.S. at 732.

25. The drastic measures propounded by the plaintiffs would burden all taxpayers in Alabama, whether black or white. The dismantling of the property classifications and current use method would tax all property at the same rate *and* at a drastically higher rate than that currently imposed, at least 60% under the plaintiffs’ plan.

Thus, all homeowners, landowners and business owners, white or black, would be burdened with a higher tax rate. Renters would not be exempt since leases, either by their terms or otherwise, eventually incorporate taxes as a component of the rents charged. The second prong of the three-part remedial analysis queries whether the remedy is truly remedial in nature, that is to say, is it “designed as nearly as possible ‘to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.’” *Jenkins II*, 515 U.S. at 88 (citing *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*)). Burdening the black taxpayers of Alabama with a higher tax rate would not put the black taxpayers in the position they would have occupied in the absence of such conduct.

26. Moreover, placing a higher tax burden on white taxpayers, as well as businesses, of all types, foreign and domestic, owning property in Alabama, would work to extract money from persons who have had no presence or representation in this suit. Such action by this Court would be a blatant denial of due process. *See Jenkins I*, 495 U.S. at 66-67 (Kennedy, J., concurring in part and concurring in the judgment) (stating that a district court order that overrides the citizens’ state-law protection against taxation without referendum approval “can in no sense provide representational due process”).

27. Further, such a drastic step would benefit both black students and white students seeking education at an institute of higher education in Alabama. Both black students and white students would enjoy greatly increased school budgets that could result in capital improvements, expanded curricula, more scholarships and possibly even

lower tuition. Such a broad benefit to *all* Alabama students, black and white, while laudable, nonetheless is not a remedy “designed as nearly as possible to restore the victims of discriminatory conduct” to positions they would have enjoyed but for the discrimination. *Id.* Of tangential interest is that the plaintiffs’ remedy would increase tax receipts for taxes levied for all other governmental purposes as well. While the proportion of total property tax millage rates devoted to education varies among taxing jurisdictions in Alabama, in many cases the levies made for other purposes exceed those of education and the plaintiffs’ remedy would thus have significant effects far beyond the scope of this Case, completely unrelated to the discrimination claims that formed its basis.

B. This Court cannot Fashion a New Tax Rate.

28. The plaintiff asks that if the State fail to remedy the property tax system within one year, the court hold the millage rates at current levels, disregard the property classifications and current use formulas, and impose a property tax assessment ratio of at least 60% on all property based on its fair market value. Such a drastic step would interject this Court into the governmental function of taxation, a power traditionally held by the legislative branch. Besides implicating federalism and separation of powers concerns, the United States Supreme Court has expressly found such a remedy as beyond the broad remedial powers a district court enjoys in desegregation cases.

29. In *Jenkins I*, the Supreme Court unanimously agreed that a federal district court had exceeded its authority in ordering the property tax rate of the Kansas City,

Missouri School District raised for the next fiscal year. *See Jenkins I*, 495 U.S. at 41, 52; *id.* at 58 (Kennedy, J., concurring in part and concurring in the judgment). Calling the imposition of such a tax increase an “extraordinary event,” the Court concluded that the district court failed to ensure that no permissible alternatives were available to accomplish the required task. *Id.* at 51. Moreover, the Court stated that allowing the local government institutions to devise their own remedies, instead of the Court, would place the responsibility for “solutions to the problems of segregation upon those who have themselves created the problems.” *Id.*

30. Similarly, the plaintiffs’ proposed remedy fails to consider other permissible alternatives available to eradicate the vestiges of segregation. Plaintiffs fail to advocate or indeed consider whether other approaches, such as ordering increases in local or State millage rates, discarding the maximum tax limitations of paragraph (i) of the 1978 Lid Bill, altering the current use valuation formula adopted by the Legislature in implementing the 1978 Lid Bill, or denying the availability of such valuation approach to some or all otherwise qualifying properties, could achieve their intended purpose as well or better than the elimination of the State’s property classifications might. Plaintiffs further fail to discuss whether altering the “earmark” characteristics of the overwhelming majority of State tax revenues levied for particularized educational purposes, such as the State income tax’s earmark for teacher salaries only, might be a way to achieve their goal. Of course, the plaintiffs make no case whatever for raising other taxes, such as the income tax, or the insurance premium tax, or the severance tax, or business franchise taxes, etc., the precursors of the current versions of which are contained in provisions of

the constitution of Alabama adopted long before blacks were granted full participation in the electoral process and might be shown to be as clearly traceable vestiges of segregation as the property tax.

31. Moreover, if this Court were to impose this extraordinary remedy, this Court would be leaping into the legislative arena, where the power of taxation traditionally resides. Taxation is a “power that has always been thought legislative in nature.” *Id.* at 67 (Kennedy, J., concurring).

The power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and second, by the power of the legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume . . . this authority at once so delicate and so important.

Rees v. City of Watertown, 19 Wall. 107, 116-17, 22 L.Ed. 72 (1874).

32. While it might be appropriate, were the defendants failing in their duties under the remedial decrees, for this court to order additional funding for minority recruitment and retention in higher education, it is not appropriate for this court to require the state to revamp its entire tax structure, with resulting impact not only on every citizen of the state but also on every aspect of state finance, in order to achieve that limited end. It may be tempting to imagine that this court could provide more funds for all the state’s needs, but that is within neither this court’s function nor its ability.

33. Henry Mabry, a State Finance Director from 1999 to 2003, one of the witnesses called by the plaintiffs, testified that bills were introduced in the Alabama

Legislature in 1991 and 1992 in an effort to reform the property tax as well as many other taxes in the State of Alabama. (May 5 Tr. 33) Mabry acknowledged that, these proposals were introduced in the Alabama legislature at a time when Alabama had more elected black officials than any other state in the country, and that the proposals had the support of the Alabama Education Association, both proposals died in the legislature. (May 5 Tr. 34) Nevertheless, the proposals died in the legislature. (May 5 Tr. 34) Mabry also acknowledged that, during his tenure with the State of Alabama, the Seigelman administration offered tax incentives to automobile manufacturers and that he considered the attraction of the manufacturers “a plus that they came to Alabama even though they weren’t paying those taxes.” (May 5 Tr. 35)

34. This Court lacks the authority to impose a higher tax rate on the citizens of Alabama; that function is reserved for the people through their legislators or to themselves to the extent they restrict the legislature in this regard. This Court may order the property tax system reformed at the State’s hands but only if such reform would restore the victims of the constitutional violation to a position that they would have enjoyed had there been no violation. Because such a remedial goal is not achieved with the proposed remedy, because ordering such a remedy would intrude on the legislative power to tax, and because the United States Supreme Court has specifically instructed that any such action taken by a district court would exceed its authority of a district court in a desegregation case, the plaintiffs’ proposed remedy must be denied.

III. THE STATE OF ALABAMA HAS COMPLIED WITH REMEDIAL DECREES.

35. In determining whether the State has complied with this Court's prior orders and whether to relinquish supervision over part of the case, the Supreme Court has enunciated three factors for this Court to consider:

[W]hether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good-faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

Freeman v. Pitts, 503 U.S. 467, 491 (1992). Of these factors the ultimate inquiry is whether the constitutional violator "complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." *Jenkins II*, 515 U.S. at 89 (citing *Freeman*, 503 U.S. at 492). The starting point for this Court's analysis therefore is whether the State has complied in good faith with this Court's prior decree and the practicable extent the State has eliminated vestiges of past discrimination. Even a cursory review of the State's actions in this suit demonstrate that the State has complied in good faith every task appointed to it and attempted to eliminate the prior affects of desegregation in every way imaginable. Thus, this Court's analysis begins with an understanding that the State has made a good faith effort to eliminate the vestiges of discrimination and continues to strive toward that goal.

36. According to the stipulated testimony of Bill Newton, Assistant Finance Director for the State of Alabama, expenditures in most areas of state government have increased significantly over the last 10 years, with increases of over 100% in employees' health insurance, nursing home expenditures, and parts of the Medicaid Program. (Stipulation as to the testimony of Bill Newton and Henry Mabry, ¶ 2) The state government faces losses of federal funds and budget shortfalls in various areas as well. (Stipulation as to the testimony of Bill Newton and Henry Mabry, ¶ 4) Despite the difficulties the State of Alabama faces in various areas that have no relation to education, the Annual Reports submitted in this case, which will be supplemented this month, show that the State of Alabama has expended \$192,256,395.00 as of May 28, 2004, in compliance with remedial decrees in this case.

37. These efforts have produced positive results. Many of the positive results appear in Exhibit 04-001 of the State defendants which was an exhibit to the deposition testimony of Mike Malone, Executive Director of the Alabama Commission of Higher Education. According to Exhibit 04-001, in the 2002-03 academic year, Alabama State University showed a 606% increase in the number of degrees awarded to white students as compared with the 1991-92 academic year. It also showed an increase of 353% in the total graduate and first professional degrees awarded to white students in the 2002-03 academic year as compared with the 1991-92 academic year. For all institutions of higher education in the State of Alabama, there was an increase of 96.4% in all degrees awarded to black students in the 2002-03 academic year compared with the 1991-92

academic year. At the same time, there was an overall decrease in degrees awarded to white students of 8.2%.

38. State defendants' Exhibit 04-001 also shows that, compared with the 1991-92 academic year, the 2002-03 academic year saw increases in the number of degrees awarded to black students in each and every institution of higher education in the State of Alabama. These increases included an increase of 311.8% at the University of Alabama in Huntsville, 182.7% at Troy State University in Montgomery, 152.5% at Auburn University at Montgomery, and 130.2% at Alabama State University. The number of all degrees awarded to black students in the State of Alabama in all institutions of higher education almost doubled from the 1991-92 academic year to the 2002-03 academic year – from 2,378 in the 1991-92 academic year to 4,671 in the 2002-03 academic year, an increase of 96.4%. During the same period, the total of degrees awarded to white students actually decreased from 19,362 in the 1991-92 academic year to 17,774 in the 2002-03 academic year, a decrease of 8.2%. (State defendants' Exhibit 04-001) Total baccalaureate and post-baccalaureate certificates and degree completions for black students in the 2002-03 academic year increased 82.7% over the 1991-92 academic year. At the same time, degrees awarded to white students decreased 14.4%. (State defendants' Exhibit 04-001)

39. Exhibit 04-008 of the State defendants, the Minority Student Recruitment and Retention Section of the 2002-2003 Title VI Report, shows that progress at the University of Alabama during the term of the Remedial Decree is impressive. In fall

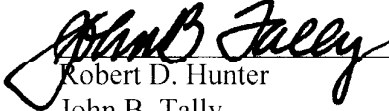
2002, African-Americans represented 13.1% of the University's student body. This continues a fairly consistent trend of increasing the percentage of African-American students since 1991, when African-American enrollment at the University was 9.55%. African-American undergraduate enrollment for fall 2002 was 2,197, representing 14.2% in their proportion of African-American students and an impressive increase from 10.3% in 1991. (State defendants' Exhibit 04-008, page UA-85) The University of Alabama ranks 44 (in the top 8%) among 561 public institutions granting bachelors degrees or higher when ranking institutions by the number of additional black students in 2001 compared to 1992, and ranks 92nd (in the top 17%) when examining which of those institutions most increased their percentage of black representation during that same time. (State defendants' Exhibit 04-008, page UA-86) The annual reports, taken as a whole, show that institutions in the State of Alabama have complied with the requirements of the Remedial Decree.

40. The testimony of Dr. Michael E. Malone, Executive Director of ACHE, showed that the change in black enrollment in higher education in Alabama from 1991 to 2002 showed an increase of almost 56%. During the same period, white enrollment declined 12.33%. (Malone pp. 153 and 154) Dr. Malone also identified State defendants' Exhibit 04-004, showing that, while the higher education portion of the Education Trust Fund has decreased over the period from 1991 to the present, the total appropriation has increased. (Malone p. 157) The court has already ordered relief relating to minority access to higher education in various ways; for example, by

providing diversity scholarship programs. *Knight v. Alabama*, 900 F. Supp. 272, 356-358 (N.D. Ala. 1995).

41. To attempt to remedy the alleged denial of access in the manner described in plaintiffs' Motion for Additional Relief With Respect to Funding of Public Higher Education would require the Court to declare the existing provisions of the Constitution of Alabama regarding property taxes unenforceable, require the State of Alabama to enact new property taxes, require some or all of the revenue from the new property taxes to be used for the support of higher education, and then require that some or all of the revenue devoted to higher education must be used for minority recruitment and retention. It is beyond the scope of this Court's remedial authority to attempt to solve whatever problems may exist regarding reform of the property tax structure within the State of Alabama.

Respectfully submitted,


Robert D. Hunter
John B. Tally
Attorneys for State of Alabama
Defendants

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
Telephone: (205) 250-5000
Facsimile: (205) 250-5034

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing document was served upon the following counsel of record by placing a copy of same in the U.S. Mail, postage prepaid and properly affixed, on this 7th day of June, 2004.

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

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

ASU:
Mr. Fred D. Gray
Mr. Stanley F. Gray
P. O. Box 830239
Tuskegee, AL 36083-0239

Mr. Solomon S. Seay, Jr.
P. O. Box 210998
Montgomery, AL 36121-9998

Mr. Armand Derfner
116 Church Street, 3rd Floor
P. O. Box 600
Charleston, SC 29402

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

SBE and Postsecondary Chancellor:
Mr. Jeffrey A. Foshee
Mr. Edward M. George
900 South Perry Street, Suite B
Montgomery, AL 36104

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

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

A&M:
Mr. Joe R. Whatley, Jr.
Mr. Peter H. Burke
P. O. Box 10647
Birmingham, AL 35202-0647

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

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

Mr. William F. Gardner
Mr. William K. Thomas
P. O. Box 830612
Birmingham, AL 35283-0612

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

US:

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

SBE:

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

UM:

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

USA:

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

UNA:

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

Plaintiffs' Attorneys:

James U. Blacksher, Esquire
710 Title Building
300 North Richard Arrington, Jr. Blvd.
Birmingham, AL 35203-3352

Ms. Sarah L. Thompson
2422 Sixth Street
Tuscaloosa, AL 35401

Mr. Demetrius Newton
P. O. Box 2525
Birmingham, AL 35202

Ms. Susan J. Watterson
2610 19th Street South
Birmingham, AL 35209


OF COUNSEL