

THE TANGLED WEB OF ALABAMA'S EQUALITY DOCTRINE AFTER *MELOF*: HISTORICAL REFLECTIONS ON EQUAL PROTECTION AND THE ALABAMA CONSTITUTION

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I. INTRODUCTION

Initial reports of the Alabama Supreme Court's 1999 decision in *Ex parte Melof*¹ referred to it as "clarifying" or "holding" that the Alabama Constitution has no equal protection guarantees,² creating the impression that Justice Gorman Houston, who wrote the main opinion, had finally won majority support for his decade-long argument on this point.³ But upon reading the numerous separate opinions in the case,

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1. 735 So. 2d 1172 (Ala. 1999).

2. "Supreme Court clarifies that no equal protection guarantees exist under the Alabama Constitution." *The Week In Brief*, 8 ALABAMA LAW WEEKLY 1 (June 4, 1999). See also Rachel Sanders-Cochran & Wilbur G. Silberman, *Recent Decisions*, 60 ALA. LAW 353 (1999).

3. For earlier separate opinions making similar arguments, see *American Legion Post No. 57 v. Leahey*, 681 So. 2d 1337, 1347-48 (Ala. 1996) (Houston, J., dissenting); *Smith v. Schulte*, 671 So. 2d 1334, 1347-48 (Ala. 1995) (Maddox, J., dissenting); *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 901-10 (Ala. 1995) (Houston, J., concurring in the result); *Ex parte St. Vincent's Hosp.*, 652 So. 2d 225, 230-31 (Ala. 1994) (Houston, J., concurring specially); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 174-78 (Ala. 1991) (Houston, J., concurring in the result).

one discovers a much more complex decision.⁴ As the court has subsequently acknowledged, the debate continues over the extent to which the Alabama Constitution contains express or implied equal protection guarantees.⁵ *Melof* has merely muddied these waters.

This Article takes a closer look at the issues raised in this ongoing judicial debate. As to the primary questions posed in the debate itself, we reach the two-fold conclusion that, despite the racist central aim of most of the framers of the 1901 Constitution, they were neither intent upon, nor successful in, ridding our state constitution of all equal protection guarantees. This conclusion is consistent with the decisions of a majority of the justices, in their separate *Melof* opinions, to disassociate themselves from the main opinion's siren call to topple "pillar provisions"⁶ of the Alabama Constitution's longstanding equal protection doctrine.⁷

4. Four of the five justices in the supposed majority on this point wrote or joined one of three separate special concurrences, with Justice Houston himself writing a fourth special concurrence. The remaining three participating justices dissented from this portion of the main opinion. Justice Lyons did not participate in the decision. See *infra* Part II for further discussion of the justices' positions.

5. *Hutchins v. DCH Reg'l Med. Ctr.*, 770 So. 2d 49, 59 (Ala. 2000) (per curiam) ("The question whether §§ 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws remains in dispute."). See also, e.g., *Cackowski v. Wal-Mart Stores, Inc.*, 767 So. 2d 319 (Ala. 2000); *Marsh v. Green*, 782 So. 2d 223, 233 (Ala. 2000) (Cook, J., concurring in part and dissenting in part); *Melof*, 735 So. 2d at 1188 (Maddox, J., concurring specially). Also see, Albert P. Brewer & Robert R. Maddox, *Equal Protection Under the Alabama Constitution*, 53 ALA. L. REV. 31 (2001) in this symposium issue.

6. *Melof*, 735 So. 2d at 1205. In his *Melof* opinion, Justice Cook stated:

It was a credit to this Court that it—like the courts of Colorado, Maryland, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Vermont, West Virginia, and Wisconsin—found a guarantee of equal protection to be inherent in the due-process and other pillar provisions of its Constitution. The main opinion sounds a retreat from this court's long-standing solicitude to a process under the Alabama Constitution that assured to Alabama citizens a means by which to measure the validity of classifications created by state laws. This Court thus ushers in the new millennium, out of the mainstream of American constitutional thought and deficient in its application of the fundamental constitutional concept of equal protection of the laws.

Id.

7. The Alabama Supreme Court's treatment of the doctrine of stare decisis in the *Melof* main opinion seems premised on mistaken assumptions about the application of the doctrine in constitutional interpretation. While the U.S. Supreme Court has applied the doctrine somewhat more flexibly when interpreting the federal constitution than when interpreting statutes, it has developed and purports to apply careful standards for justifying departures from stare decisis in the constitutional context. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Moreover, the somewhat less rigid standards for federal constitutional interpretation are justified by the comparative difficulty of constitutional as opposed to statutory amendment at the federal level—a justification that has little or no validity in the context of interpreting Alabama law. As *Melof* illustrates, abandoning standards for justifying departures from stare decisis allows judges to make changes in the law without careful consideration of the wisdom of prior decisions. Justice Antonin Scalia has acknowledged the disruptive effects of foreswearing stare decisis and concedes that where his theory of "originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpious new ones."

This historical review of Alabama's state constitutional equality doctrine also demonstrates the need for the debate now to turn to exploring how these equality guarantees can be fully appreciated and enforced in a manner that affords equal protection to all Alabamians. It demonstrates that, though formally, Alabama constitutions have long purported to guarantee equal protection, those who have been able to find shelter in these guarantees have differed over time, as has the judicial understanding of what true equality under law encompasses.⁸ In many respects, the waxing and waning of Alabama equality doctrine has followed a path similar to that found in tracing the uneven history of the interpretation and enforcement of the federal Equal Protection Clause.⁹ Taking up the debate about what concepts like "equality," "equal protection" and "equal justice under the law" really mean, and how to realize their promise, is where the attention of all Alabamians, and particularly that of the Alabama Bar and of the Alabama Supreme Court, should now turn.

Before proceeding, some clarification of this Article's conclusion concerning the intent of the framers of the 1901 Constitution is in order. The very reason for the 1901 convention was to disfranchise black Alabamians. The central aim of most of its delegates was to craft suffrage provisions that would accomplish this result, immediately and for the future as well.¹⁰ Many of them also hoped that the measures they drafted would eliminate poor white men from future voting rolls and they rejected calls to extend voting rights to any women.¹¹ Undoubtedly, the racism, classism, and sexism underlying these aims limited and distorted, to different degrees,¹² their abilities or desires to envision

ANTONIN SCALIA, A MATTER OF INTERPRETATION 139 (1997). For further discussion of the Alabama Supreme Court's treatment of stare decisis in *Melof* and other recent cases, see Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273 (2001) in this symposium issue.

8. See *infra* Part V.

9. For discussion of this history in the context of federal equality doctrine, see Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323-57 (1952).

10. See generally, e.g., MALCOLM COOK MCMILLAN, *CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM* (Reprint Co. 1978) (1955).

11. *Id.* at 281 (discussing reactions to the populist successes of the late 1800s); WILLIAM WARREN ROGERS ET AL., *ALABAMA: THE HISTORY OF A DEEP SOUTH STATE*, 346 (1994).

12. The delegates themselves held different views on many issues—even to some degree with respect to the central aims of the suffrage plan. See generally MCMILLAN, *supra* note 10; MICHAEL PERMAN, *STRUGGLE FOR MASTERY: DISFRANCHISEMENT IN THE SOUTH 1888-1908* (2001). For example, former Governor Oates lost out to John Knox in the selection of a president, in part because prior to the convention he had opposed both the idea of a grandfather clause and any property qualifications for voting, and had voiced his opinion that "the disfranchisement of the whole Negro race would be unwise and unjust." MCMILLAN, *supra* note 10, at 264. Although a distinct minority among the 141 Democrats, most of the (six) Republican and (seven) Populist delegates favored the continuance of universal manhood suffrage. *Id.* at 295. The degree of support for, or acceptance of, the disfranchisement of poor white males is more difficult to

how equal protection principles could or should be applied. But acknowledging this is different from concluding, as the *Melof* main opinion does, that the framers intended to remove all equal protection guarantees from the state constitution.

Moreover, even if some or all of the framers did intend this result, they failed to achieve it. The search for, or more accurately, construction of, constitutional meaning rarely leads down a straight and well-lit path—particularly when part of the interpretive enterprise depends on deciphering cases from different eras, along with other historical records that include lengthy, and often ambiguous, convention debates.¹³ But a closer look at the language that the framers did adopt, along with Alabama Supreme Court jurisprudence interpreting this and similar language both before and after 1901, refutes claims of success, if removal of equal protection guarantees was the framers' intent.

This debate cannot be dismissed as "academic;"¹⁴ more is at stake here. True, Alabamians are protected by the equal protection guarantees of the federal Constitution, regardless of the existence of any state constitutional equality guarantees. But given their separate language¹⁵ and history,¹⁶ the equality provisions of the Alabama Constitution provide a vital, independent state "safety net" that protects Alabamians against weaknesses or retreats in federal equal protection doctrine.

In prior cases, the Alabama Supreme Court sometimes has analyzed state equal protection claims using an analysis similar or identical to that used under the federal Equal Protection Clause.¹⁷ But the court also

gauge given the Democrats' desire not to be seen as violating their pre-convention pledge that no white man would be disfranchised. For references to the delegates' differing views on women's suffrage, see *infra* note 140.

13. OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901 (1940) [hereinafter PROCEEDINGS]. The PROCEEDINGS are published in four volumes, containing a total of 5,070 pages plus indexes.

14. *Melof*, 735 So. 2d at 1188 (Maddox, J., concurring specially) (quoting *Smith v. Schulte*, 671 So. 2d 1334, 1347 (Ala. 1995) (Maddox, J., dissenting)).

15. For the text of key provisions of the 1901 Alabama Constitution's Declaration of Rights, which will be referred to throughout this Article, see Appendix A, *infra*.

16. In addition to being called the "disfranchising convention," the 1901 Convention has been called "the lawyer's convention" because that was the educational background of 96 of its 155 delegates. For that reason, many of the delegates would have been more aware of the history of equal protection guarantees in prior Alabama Constitutions and of the cases interpreting them than those pursuing other lines of work. The delegates to the 1901 Convention included two former governors, two former justices of the Alabama Supreme Court, two former attorneys general, one member of the 1867 Convention, and four members of the 1875 Convention. MCMILLAN, *supra* note 10, at 263. McMillan reports that, unlike constitutional conventions in other Southern states, prior Alabama constitutional conventions had not included former high officials, noting that the press here had opposed this beginning in 1819. *Id.* at 266 n.21.

17. See, e.g., *Hutchins*, 770 So. 2d at 49. Justice See's *Melof* opinion noted prior cases containing similar language:

FN12. See, e.g., *Plitt v. Griggs*, 585 So. 2d 1317, 1325 (Ala.1991) (holding that Ala. Code 1975, § 6-5-548(c), which establishes requirements for admission of an expert opinion against a health-care provider in a medical-malpractice action, does

has insisted that, though it may at times find federal doctrine helpful or persuasive when interpreting similar or analogous state constitutional provisions, it is not bound to do so.¹⁸ For example, state constitutional equality guarantees provide one source for Alabama's independent state law rules against discrimination in the exercise of peremptory challenges to jurors based on race or sex.¹⁹ Also, as Justice See noted in his *Melof* special concurrence,²⁰ a plurality opinion of the court endorsed an independent standard of review for analyzing state equal protection guarantees in *Moore v. Mobile Infirmary Ass'n*.²¹ (This is the same case in which Justice Houston first announced his discovery that Alabama's state equal protection guarantees were nonexistent.)²² And, as Part V's discussion of equality jurisprudence illustrates, Alabama's state equal protection guarantees have long been important in key gender discrimination cases, providing more protection at times than might have been available under then prevailing interpretations²³ of the federal Constitu-

not violate §§ 1, 6, and 22 of the Alabama Constitution) ("However, [the plaintiff] states no reason, and we are aware of none, that our analysis of the equal protection issue under the United States Constitution should not be equally applicable to [the plaintiff's] equal protection issue regarding the Alabama Constitution; therefore, we consider the above analysis [under the Fourteenth Amendment to the United States Constitution] to apply equally to that issue."); *Jefferson County v. Braswell*, 407 So. 2d 115, 122 (Ala.1981) (holding that local law regulating retail beer sales in Jefferson County did not violate the equal-protection guarantee of the Alabama Constitution) ("We consider our analysis of the equal protection and due process issues under the United States Constitution equally applicable to those same issues under the Alabama Constitution.").

Melof, 735 So. 2d at 1193-94 n.12 (See, J., concurring specially).

18. See, e.g., *Brooks v. Hobbie*, 631 So. 2d 883, 889 (Ala. 1993) and cases cited therein. Also see *Davis v. Everett*, 443 So. 2d 1332 (Ala. 1983), in which the court views federal equal protection doctrine as providing a floor but not a ceiling for state equal protection doctrine. *Id.* at 1236.

19. See, e.g., *Mac Smith, Inc. v. Jackson*, 770 So. 2d 1068 (Ala. 2000); *Looney v. Davis*, 721 So. 2d 152, 164 n.3 (Ala. 1998); *Ex parte Bruner*, 681 So. 2d 173 (Ala. 1996). Alabama's statute prohibiting such discrimination provides an alternative adequate and independent state law basis for these holdings. ALA. CODE § 12-16-56 (West 1995).

20. *Melof*, 735 So. 2d at 1195 (See, J., concurring specially). Justice See also pointed out, however, that in equal protection challenges to taxation statutes, the Alabama Supreme Court has applied an analysis similar to the federal rational-basis test. *Id.*

21. 592 So. 2d 156 (Ala. 1991). See also *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995) (plurality). Independent state equal protection guarantees are also one of the alternative sources of Alabama schoolchildren's rights to educational equality in *ACE & Harper v. Hunt*, reprinted in Appendix to *Opinion of the Justices No. 333*, 624 So. 2d 107 (1993). The related opinion in *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894 (1995) is one of the pre-*Melof* cases in which Justice Houston authored a separate opinion presenting his "no equal protection guarantees" argument. *Id.* at 901 (Houston, J., concurring in the result).

22. *Moore*, 592 So. 2d 156 at 174 (Houston, J., concurring in the result).

23. In *The Slaughter House Cases*, 83 U.S. 36 (1873), the Court expressed "doubt" that the Fourteenth Amendment's Equal Protection Clause would ever be found to apply beyond the context of race discrimination. And it was not until the 1971 decision in *Reed v. Reed*, 404 U.S. 71 (1971), that the legal strategies of now Justice Ruth Bader Ginsburg and others convinced the Court that a law that discriminated based on sex violated the federal Equal Protection Clause.

tion alone.²⁴ Undoubtedly, prudent counsel will often decide to raise both state and federal claims where similar or analogous guarantees exist. But there is no reason Alabamians should have to “make a federal case of it” to lay claim to the basic equal protection that they are due under the state constitution standing alone. There are many reasons counsel may decide against raising parallel federal claims—including the expense and uncertainty of possible eventual review by the United States Supreme Court.

Particularly when coupled with recently renewed interest in state constitutional reform, the plea Justice Houston has issued to the Alabama Legislature to propose an equality amendment to the 1901 Constitution warrants careful consideration.²⁵ Approval of additional equality provisions seems unobjectionable and indeed laudable—even if unnecessary. But regardless of any equality provisions that might be added to the state constitution in the coming years, this centennial year seems an appropriate time to clarify the record on the present document’s equal protection guarantees in the hope of preventing serious future damage to these fundamental state constitutional rights. It is also time to take these guarantees and their meaning more seriously. We hope the discussion that follows, and particularly the examination of key state equal protection cases presented in Part V, will prove helpful in future considerations of the meaning of the principles embodied in the concept of equal protection and of the applicability and scope of the Alabama Constitution’s present equal protection guarantees.

The Article is organized as follows: Part II summarizes the various opinions in *Melof* for readers who may be unfamiliar with the case. Part III provides a historical overview of the principal equality guarantees of Alabama’s six state constitutions, with emphasis on the provisions of the 1901 Constitution. Part IV examines records of the 1901 Constitutional Convention, revealing that, in the current search for the intent of the framers with respect to the existence of equal protection guarantees, portions of their debates have been disregarded and other

24. This independent protection could prove important in the future as well. *See, e.g.*, *Nguyen v. I.N.S.*, 121 S. Ct. 2053 (2001) (deciding 5-4 to uphold a gender-based classification in a citizenship statute that concededly discriminated against the fathers of certain children born abroad and rejecting a federal equal protection claim).

25. *Melof*, 735 So. 2d at 1191 (Houston, J., specially concurring). As we will see in Part IV, however, reformers must carefully consider the text of new provisions. For example, Justice Houston’s *Melof* proposal to restore the original language of section 2 of the 1868 and 1875 Constitutions—whose omission from the 1901 Constitution serves as the basis for his contention that the 1901 Constitution has no equal protection guarantee—would probably raise more questions than it would resolve. It is the failure to closely read and fully understand the language of former section 2, and the history of its omission from the 1901 Constitution, that underlies much of the flawed reasoning of the main opinion in *Melof*. For the text of section 2 as it appeared in the 1868 and 1875 Constitutions, see Appendix B *infra*.

portions are more riddled with complexities than has been assumed. Part V traces jurisprudential milestones in the development of equality doctrine under Alabama's state constitutions, demonstrating that key cases have been overlooked or misread in arguments positing the non-existence of state equal protection guarantees. Finally, Part VI offers some concluding reflections on the past and future of equality doctrine under the Alabama Constitution.

II. THE JUSTICES' POSITIONS IN *EX PARTE MELOF*

In *Ex parte Melof*,²⁶ Justice Houston authored a main opinion²⁷ describing his earlier discovery about the "phantom" nature of any equal protection guarantees under the Alabama Constitution of 1901.²⁸ At first glance, this opinion appeared to represent the view of a majority of the justices on this issue. For this reason, the decision merits closer attention than it initially received. In *Melof*, the Alabama Supreme Court granted a petition for a writ of certiorari to review a decision of the court of civil appeals, which had affirmed the trial court's grant of summary judgment for the State in a case challenging portions of the state's income tax laws. The plaintiffs attacked the state's scheme of exempting retirement benefits of certain classes of individuals from state income taxation, while taxing those of private retirees, retirees from federal employment (including the military), and retirees of certain Alabama political subdivisions.²⁹ Four sub-classes of retirees who had been required to pay income taxes on their retirement benefits filed suit and eventually raised three challenges to the income tax scheme: (1) that the scheme violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution; (2) that it violated an equal-protection guarantee provided under a combination of sections 1, 6, and 22 of the Declaration of Rights of the Alabama Constitution of 1901, and (3) that it violated Amendment 25 of the Alabama Constitution of 1901, which authorizes the Legislature to adopt a state income

26. 735 So. 2d 1172 (Ala. 1999).

27. As previously noted, Justice Houston failed to persuade a majority of the justices considering the case to accept fully his views on equal protection under the state constitution. We refer to Justice Houston's opinion announcing the court's judgment as the *Melof* main opinion. Justice Houston also wrote a separate concurring opinion in which he further explained his regret that the state constitution does not contain an equal protection guarantee and included a copy of his letter pleading with the Alabama Legislature to propose a constitutional amendment that would restore the language of section 2 of the 1875 Constitution. *Melof*, 735 So. 2d at 1188 (Houston, J., concurring specially).

28. In *Melof*, Justice Houston pointed out that in several previous dissenting and concurring opinions he and Justice Maddox had argued that there is no equal protection provision within the state constitution. 735 So. 2d at 1186.

29. *Id.*

tax and imposes certain limits on such taxes.³⁰

The court's determinations that the taxation scheme was not invalid on any of these grounds were set forth in Justice Houston's main opinion. It concluded that the trial court's grant of summary judgment in favor of the state defendants on the claim that "an equal protection guarantee of the Alabama Constitution had been violated"³¹ was appropriate because "there is no equal protection clause in the Constitution of 1901."³² The opinion contained broader language as well, asserting that the Alabama Constitution is devoid of any guarantee of equal protection.

Although Justice Houston authored the main opinion in *Melof*, he failed to persuade a majority, or indeed any of the seven other participating justices,³³ to voice unqualified acceptance of his views on the lack of equal protection guarantees under the 1901 Constitution,³⁴ as the court later made clear in *Hutchins v. DCH Regional Medical Center*.³⁵ In this 2000 per curiam opinion, the Alabama Supreme Court acknowledged that the debate continues over whether sections 1, 6, and 22 create express or implied equal protection rights under the state constitution.³⁶ To enable readers unfamiliar with the *Melof* decision to better understand this ongoing debate, what follows is a closer look at its main opinion and each of the separate opinions.

Justice Houston's *Melof* main opinion declared that the court's prior recognition of "an equal protection provision" under the Alabama Constitution rested on no more than a mistake by the court in *Peddy v. Montgomery*,³⁷ a 1977 case in which it "unfortunately leapt upon a violently egregious editorial error made by an unofficial annotator."³⁸ The main opinion traced the historical and legal events that had earlier convinced him that the 1901 Constitution contains no equal protection guarantees.³⁹ It pointed out that, while article I, section 1 of the 1901 Constitution contained language identical to that of section 1 in the 1875 Constitution and similar to that of section 1 of the 1868 Constitu-

30. *Id.* at 1173.

31. *Id.* at 1186.

32. *Id.* (quoting Opinion of the Justices No. 102, 41 So. 2d 775, 777 (Ala. 1949)).

33. Justice Lyons did not participate in this decision.

34. Justice Cook later noted in *Marsh v. Green* that, of the eight justices who participated in *Melof*, at least five justices either disagreed with, or expressed no opinion concerning, Justice Houston's main opinion position on equal protection guarantees under the state constitution. 782 So. 2d 223, 283 n.3 (Ala. 2000) (Cook, J., concurring in part and dissenting in part). The count is even higher in terms of justices refusing to express unqualified support for the state equal protection discussion in the *Melof* main opinion.

35. 770 So. 2d 49 (Ala. 2000).

36. *Hutchins*, 770 So. 2d at 59.

37. 345 So. 2d 631 (Ala. 1977).

38. *Melof*, 735 So. 2d at 1181.

39. *Id.* at 1182.

tion, these two previous constitutions each contained as their article I, section 2, a provision that was not included in the 1901 Constitution.⁴⁰ Section 2, as it appeared in the 1868 Constitution, provided "[t]hat all persons resident in this state, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privileges."⁴¹ The 1875 Constitution removed the phrase "and public privileges" from section 2 but retained the remaining language.⁴²

Based on the inclusion of section 2 as it appeared in the 1868 and 1875 Constitutions, Justice Houston's main opinion found it "evident" that the 1868 and 1875 drafters believed section 1 was insufficient in itself to provide for equal protection.⁴³ It further contended that an analysis of the 1901 constitutional proceedings demonstrated that the omission of section 2 of the 1875 Constitution from the 1901 Constitution was undertaken "with the understanding that everything in that § 2 was 'covered already by the Fourteenth Amendment [to the United States Constitution].'"⁴⁴

After setting out the argument that the omission of section 2 as contained in the 1875 Constitution demonstrated an intent on the part of the 1901 constitutional convention delegates to remove all equal protection guarantees from the 1901 Constitution, Justice Houston's main opinion turned to the Alabama Supreme Court's decision in *Pickett v. Matthews*,⁴⁵ the decision he contended an unofficial annotator had misinterpreted as holding that the 1901 Constitution contains an equal protection provision.⁴⁶ In *Pickett*, the court's opinion contained a section entitled "Sections 1, 6, 22, State Constitution; Amendment 14, Federal Constitution" followed by the statement that "[t]hese taken together guarantee the equal protection of the laws, protect persons as to their inalienable rights; prohibit one from being deprived of his inalienable rights without due process; and prohibit irrevocable or exclusive grants of special privileges or immunities."⁴⁷ The *Melof* main opinion concluded that "the associative nature of this language could not be clearer. Four constitutional provisions are cited, and four corresponding constitutional doctrines are associated. Stated another way, each

40. *Id.* at 1181-82. For the text of section 1 of each of Alabama's six constitutions and the text of section 2 as it appeared in the 1868 and 1875 Constitutions, see Appendix B *infra*.

41. *Id.* at 1182 (quoting ALA. CONST. art. I, § 2 (1868)).

42. *Id.* at 1182.

43. *Melof*, 735 So. 2d at 1182.

44. *Id.* (quoting 2 PROCEEDINGS, *supra* note 13, at 1640).

45. 192 So. 261 (Ala. 1939).

46. *Melof*, 735 So. 2d at 1184-85.

47. *Pickett*, 192 So. at 264.

doctrine is . . . to be identified with a specific constitutional provision."⁴⁸

According to Justice Houston's main opinion, the "language structure" of this section of the *Pickett* opinion "reflect[ed] the same understanding of equal protection that the delegates to the Constitutional Convention of 1901 had agreed upon: that any equal-protection guarantee in the State of Alabama would stem solely from the Fourteenth Amendment."⁴⁹ It also pointed to the following language from *Pickett*: "It is thought that to do so deprives one of 'life, liberty, or property' without due process (section 6, Constitution), because such rights are inalienable under section 1, and create a special privilege under section 22, and violate the equal protection of the Fourteenth Amendment."⁵⁰

The primary case authority the *Melof* main opinion gives for its assertion that the 1901 convention delegates had reached an agreement "that any equal protection guarantee in . . . Alabama would stem solely from the Fourteenth Amendment"⁵¹ is a 1949 *Opinion of the Justices*.⁵² In their letter refusing to answer a request for an advisory opinion on whether a proposed bill violated the due process clause of section 6 of the 1901 Constitution, the justices included the following statement: "We point out that there is no equal protection clause in the Constitution of 1901. The equal protection clause of the Constitution of 1875 was dropped from the Constitution of 1901."⁵³

After providing this legal and historical backdrop, Justice Houston's main opinion stated that "the seemingly unmistakable and historically consistent language of the *Pickett* decision was horribly confused by an erroneous unofficial annotation that appeared in the annotations to §§ 1 and 22 of the Constitution as printed in Ala. Code 1940 (Recompiled 1958)."⁵⁴ The contention here is that two 1977 Alabama Supreme Court

48. *Melof*, 735 So. 2d at 1184.

49. *Id.* at 1185.

50. *Id.* at 1185 (quoting *Pickett*, 192 So. at 264) (alteration in original).

51. *Id.*

52. *Opinion of the Justices* No. 102, 41 So. 2d 775 (Ala. 1949).

53. *Opinion of the Justices*, 41 So. 2d at 777. The excerpt from this *Opinion of the Justices* that is quoted in the *Melof* main opinion includes cites to two earlier cases, *Hamilton v. Adkins*, 35 So. 2d 183 (Ala. 1948), and *McLendon v. State*, 60 So. 392 (Ala. 1912). *Id.* As will be discussed in Part V *infra*, neither supports the *Melof* main opinion's broad assertion.

54. *Melof*, 735 So. 2d at 1185. This annotation stated: "Sections 1, 6 and 22 of the Constitution, taken together, guarantee the equal protection of the laws, protect persons as to their inalienable rights, prohibit one from being deprived of his inalienable rights without due process, and prohibit irrevocable or exclusive grants of special privileges or immunities." *Id.* at 1185 (quoting ALA. CODE Vol. 1, 26 (1958)). As the main opinion in *Melof*, 735 So. 2d at 1186, points out, this has been changed and the annotation to *Pickett* in the current cumulative supplement to the Alabama Code states:

Section 1, 6, and 22, and the 14th Amendment to the United States Constitution, taken together, guarantee the equal protection of the laws, protect persons as to their inalienable rights, prohibit one from being deprived of his inalienable rights

decisions, *City of Hueytown v. Jiffy Chek Co.*,⁵⁵ and *Peddy v. Montgomery*,⁵⁶ relied upon the annotator's mistaken description of the *Pickett* opinion when they held that sections 1, 6, and 22, taken together, form an equal protection provision under the 1901 Constitution,⁵⁷ and accordingly, "[t]he fact that Alabama's so-called 'equal protection provision' sits upon a totally nonexistent foundation is evident."⁵⁸ The main opinion concluded by rejecting the argument that the doctrine of stare decisis should be applied to uphold these prior decisions. Asserting that the doctrine of stare decisis should not be used to preserve an "erroneous" constitutional interpretation, the main opinion reasoned that it certainly should not be used to allow "a wholly inaccurate unofficial annotation . . . to amend the Alabama Constitution."⁵⁹

Several justices, including Justice Houston,⁶⁰ concurred specially in *Melof*. A review of the other opinions demonstrates the unwillingness of the other justices to accept that the framers had removed all equal protection guarantees from the constitution.⁶¹ Chief Justice Hooper admitted that for him the issue of whether the constitution contains any equal protection guarantees presented "a difficult decision." He was convinced that the 1901 Constitution contains no "explicit equal-protection clause" but also that the current constitution "contains an aspect of equal protection, no matter how hard the 1901 Convention tried to remove it."⁶² Chief Justice Hooper concluded that, while he

without due process, and prohibit irrevocable or exclusive grants of special privileges or immunities.

ALA. CODE, VOL I, at 68 (Supp. 2000).

Although not mentioned in any of the *Melof* opinions, one of the current Westlaw Headnotes describes this portion of the opinion in *Pickett v. Matthews* as follows:

The statute prohibiting recovery from owner or operator of motor vehicle for injuries to guest, unless caused by wanton misconduct, is not violative of equal protection provisions of State and Federal Constitution because guest is deprived of right of damages from subsequent negligence which still exists at suit of trespasser, since there is sufficient difference between "guest" and "trespasser" to make them separate classes in prescribing police regulation. Gen. Acts 1935, p. 918; Const. Ala. 1901 §§ 1, 6, 22; U.S.C.A. Const. Amend. 14.

192 So. 261, West Headnote 13 (Ala. 1939) (emphasis added).

55. 342 So. 2d 761 (Ala. 1977). In *Melof*, Justice Houston's main opinion noted that the court "used language that closely resembled that of the faulty annotation." 735 So. 2d at 1185.

56. 345 So. 2d 631 (Ala. 1977).

57. *Melof*, 735 So. 2d at 1185-86.

58. *Id.* at 1186.

59. *Id.*

60. In his special concurring opinion, Justice Houston stated that even though he wished that the constitution contained an equal protection guarantee and had urged the Legislature to propose an amendment for the inclusion of one, he felt that for the Alabama Supreme Court to determine that equal protection guarantees existed under the state constitution would "shift the power to amend the Constitution from the hands of the people into the hands of nine Supreme Court Justices." *Id.* at 1188-92, 1190.

61. *Id.* at 1186-1208.

62. *Melof*, 735 So. 2d at 1186.

agreed with Justice Houston's main opinion that no explicit equal protection provision existed under the 1901 Constitution, the "courts of this State should apply the explicit protections of the 1901 Constitution, of which there are many, evenly and without partiality."⁶³

Justice Maddox wrote the shortest and perhaps most enigmatic of the special concurrences, stating that he concurred "completely" with Justice Houston's main opinion (which also addressed federal equal protection challenges and challenges under Amendment 25 of the state constitution)⁶⁴ "[e]xcept to note my views on the equal-protection issue that some of the Justices address in separate opinions."⁶⁵ He reiterated his support for the view that "the Alabama Constitution did not contain an express equal-protection clause"⁶⁶ but noted that the separate opinions in the case showed that "the debate on the issue continues."⁶⁷ Moreover, he wrote:

As I have previously stated, although I recognize that the framers of the Constitution did not include an equal-protection clause in the 1901 Constitution, this Court, on several occasions, has held specifically that Alabama's Constitution, particularly §§ 1, 6, and 22, guarantee equal protection of the laws. I have concurred in some of those opinions.⁶⁸

In a special concurrence joined by Justice Brown, Justice See acknowledged that "[p]rior decisions of this Court have recognized the possibility of an implied equal-protection guarantee" in the state constitution.⁶⁹ He noted that even in *McLendon v. State*,⁷⁰ a case relied on by Justice Houston's main opinion,⁷¹ the Alabama Supreme Court "recognized a general limitation on the power of the Legislature to engage in unreasonable discrimination in the imposition of taxes."⁷² As will be discussed in Part III, Justice See pointed to several provisions of the Alabama Constitution not before the court in *Melof* as possible sources of state equal protection guarantees. He disagreed with Justice Houston's main opinion's broad declaration that no equal protection guarantees exist under the state constitution:

Although the main opinion correctly states that there is no

63. *Id.* at 1187.

64. *Id.* at 1175-80.

65. *Id.* at 1188.

66. *Id.*

67. *Melof*, 735 So. 2d at 1188.

68. *Id.* (citations omitted)

69. *Id.* at 1192.

70. 60 So. 392 (Ala. 1912).

71. *See Melof*, 735 So. 2d at 1185.

72. *Id.* at 1192.

single, express equal-protection provision in the Constitution of 1901, I do not believe it follows that there can be no claim of denial of equal protection cognizable under the Constitution of Alabama. To accomplish the rule of law, all provisions of the Constitution of Alabama of 1901 are attended by principles of equal protection of the law. Any equal-protection claim, however, must be founded in the language of the constitution.⁷³

In addition to these special concurrences, Justice Cook wrote a lengthy opinion which Justice Kennedy joined.⁷⁴ Justice Cook concurred only in the main opinion's result.⁷⁵ He set forth several different grounds for rejecting its position on the absence of state equal protection guarantees. His opinion began by pointing out that most state constitutions do not contain express "equal protection clauses" (indeed, that only nine do)⁷⁶ and that many of the guarantees of equal protection found in other state constitutions "closely correspond to those provisions in the Alabama Constitution [§§ 1, 6, 13, 22, and 35] in which this Court has found an equal-protection guarantee."⁷⁷ He described Justice Houston's main opinion's interpretation of *Pickett* as unpersuasive and as, more important,

miss[ing] the point . . . that this Court has so often *reaffirmed* that principle throughout the years that the cases so holding are too numerous to cite. Therefore, it is too late in the day to suggest, as the main opinion does, that Alabama's equal-protection guarantee springs from an erroneous annotation regarding the holding of *Pickett*.⁷⁸

Justice Cook's opinion also emphasized that some courts have interpreted due process as providing equal protection guarantees, a fact "especially significant" because the Alabama Constitution contains express due process guarantees.⁷⁹ He observed that application of due process principles could serve to provide equal protection guarantees because "it is difficult to imagine a case in which the guarantee of due process is *satisfied*, but the guarantee of equal protection offended."⁸⁰ Finally, Justice Cook included his own selection of lengthy excerpts from the

73. *Id.* at 1194.

74. *Id.* at 1196-97.

75. *Id.*

76. *Melof*, 735 So. 2d at 1196-97.

77. *Id.* at 1197.

78. *Id.* at 1196 n.20 (Cook, J., dissenting). The opinion also criticized Justice Houston's main opinion for ignoring precedent prior to *Pickett* "finding general principles of equality and uniformity inherent in various provisions of the Constitution." *Id.*

79. *Id.* at 1199.

80. *Melof*, 735 So. 2d at 1201.

1901 convention—those showing the framers' clear intent to disfranchise black voters and establish "white supremacy by law."⁸¹

In a dissenting opinion, Justice Johnstone agreed with Justice Cook's interpretation of the 1901 Constitution's equal protection guarantees.⁸² As an "additional source" of equal protection guarantees, he argued that the paramount purpose of article III, section 43 of the 1901 Constitution, which guarantees "a government of laws and not of men," was "to protect citizens from arbitrary discrimination by government officials."⁸³ He contended the provision's "purpose would be entirely frustrated if the men (and now women) in the legislature could make laws which, themselves, arbitrarily discriminate among citizens."⁸⁴ Echoing the sentiments of Justice Cook, Justice Johnstone stated that the current constitution "contains so much textual support for the guarantee of equal protection . . . that the Alabama Supreme Court precedents recognizing the inclusion of this guarantee in the Constitution cannot be correctly condemned as judicial usurpation of the power to write the Constitution."⁸⁵ The opinion also noted that courts must often decide constitutional issues from "debatable constitutional text."⁸⁶ It argued that especially for such a seemingly settled issue, the doctrine of stare decisis should play a more prominent role in the interpretation of the constitution. According to Justice Johnstone, "[s]tare decisis should not be violated except to end some practical injustice being wreaked upon the citizens by an unjust precedent."⁸⁷ Under this approach, the doctrine certainly should be applied to uphold the court's many prior decisions on the existence of state equal protection guarantees.

III. OVERVIEW OF THE EQUALITY GUARANTEES OF THE ALABAMA CONSTITUTION

As several of the separate opinions in *Melof* point out, there are numerous express and implied equality guarantees in the Alabama Constitution. We begin our reexamination of Alabama's equality doctrine with an overview of the key equality provisions as contained in the present Alabama Constitution as well as the history of some of the same or similar provisions in prior constitutions of this state.

This focus on specific textual provisions should in no way detract from the truth of the broader views, expressed by former justices of the

81. *Id.* at 1202-05.

82. *Id.* at 1205-06 (Johnstone, J., dissenting).

83. *Id.* at 1206 (Johnstone, J., dissenting).

84. *Id.*

85. *Melof*, 735 So. 2d at 1206 (Johnstone, J., dissenting).

86. *Id.*

87. *Id.* at 1206-07.

Alabama Supreme Court such as Chief Justice Goldthwaite and Justice Mayfield,⁸⁸ that equal protection is fundamental to a republican form of government. It is the foundation for U.S. notions of the rule of law and of democratic government. In this sense, equal protection is, and has been, implicit as well as express in Alabama's state constitutions, beginning with the 1819 Statehood Constitution.

Just as the Declaration of Rights has always been first and foremost among the articles of this state's six post-statehood constitutions, some version of an equality provision has always been first and foremost among the sections of the Declaration of Rights. The full text of article I, section 1 of each of Alabama's six constitutions is as follows:

1819 - "1. That all freemen, when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services."

1861 - "1. That all freemen, when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive, separate public emoluments or privilege, but in consideration of public services."

1865 - "1. That no man, and no set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services."

1868 - "1. That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

1875 - "1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

1901 - "1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable

88. See *In re Dorsey*, 7 Port. 293, 360 (Ala. 1838) (Goldthwaite, J.) ("The first section of our declaration of rights announces the great principle which is the distinctive feature of our government, and which makes it to differ from all others of ancient or modern times."); *McLendon v. State*, 60 So. 392, 399 (Ala. 1912) (Mayfield, J., dissenting) ("*Equality of right is the first principle of American jurisprudence.*") (emphasis in original). Also see Justice Denson's opinion for the court in *Beauvoir Club v. State*, 148 Ala. 643, 651 (1907) ("Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.'—Locke on Civil Government, § 142. 'This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments.' Cooley's Const. Lim. (2d ed.) 391.").

rights; that among these are life, liberty and the pursuit of happiness."⁸⁹

Given the plain text of section 1 of the 1901 Declaration of Rights, an outsider to Alabama's equality debate might wonder what the fuss is about—why would anyone argue that the constitution does not contain an express equal protection guarantee in its first section? The main opinion in *Melof* does not explain the justification for looking beyond the plain text of section 1 in its search for equal protection guarantees.⁹⁰ In earlier opinions, Justice Houston acknowledged the necessity of justifying a departure from the plain meaning rule with respect to section 1.⁹¹ He claimed ambiguity in the meaning of the phrase "equally free and independent"⁹² justified departure from the plain meaning rule of interpretation. The dictionary definitions he earlier had quoted contained multiple meanings, as is usual, but among those for "free" was "[e]njoying full civic rights"⁹³ and "possessing civil liberties"⁹⁴ and the Black's Law Dictionary definition of "independent" he had quoted defined the term as: "Not dependent; not subject to control, restriction, modification, or limitation from a given outside source."⁹⁵ Equally "[e]njoying full civic rights"⁹⁶ and equally "possessing civil liberties,"⁹⁷ along with being equally "not subject to control, restriction, modification, or limitation from [the state],"⁹⁸ is a clear definition of a guarantee of equal protection, as was the 1868 "all men are created equal" language.⁹⁹

89. THOMAS E. SKINNER, SKINNER'S ALABAMA CONSTITUTION ANNOTATED 35-36 (1938).

90. *Melof*, 735 So. 2d at 1173.

91. *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 904-06 (Ala. 1995) (Houston, J., concurring in the result).

92. *Pinto*, 662 So. 2d at 905.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Pinto*, 662 So. 2d at 905.

98. *Id.*

99. *Id.* It is unclear why this change was made. The 1875 Constitutional Convention clearly wanted to "redeem" the state from Republican rule but was generally careful to avoid making changes that might provoke the federal government or spark its further intervention. See discussion *infra* Part IV.A. Judicial opinions of the era dealing with issues such as miscegenation suggest one possible reason for the change. These cases contain statements to the effect that the Creator did not make blacks and whites the same, though they might possess equal legal rights, by nature they were different. See, e.g., *Green v. State*, 58 Ala. 190, 194 (1877) (citing *Philadelphia & W. Chester R.R. Co. v. Miles*, 2 Am. L. Rev. 358 (1868)). In *Green*, the court stated:

Why the Creator made one black and the other white, we know not; but the fact is apparent and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar.

Id. Under this interpretation, the new language would not necessarily have been seen as weaker

In addition to section 1, however, each of the six constitutions has also included several other equality provisions in the Declaration of Rights. Each includes clauses guaranteeing "due process of law" or the "due course of law." These protect against deprivation of life, liberty, or property: "but by due course of law" (section 10 of the 1819 and 1861 Constitutions and section 7 of the 1865 Constitution), "but by due process of law" (section 8 of the 1868 Constitution, section 7 of the 1875 Constitution), or "except by due process of law" (section 6 of the 1901 Constitution).¹⁰⁰ And each of the six constitutions includes a provision guaranteeing every person access to courts and a remedy for "any injury done him, in his lands, goods, person or reputation" by "due course of law" (1819, 1861, 1865) or "due process of law" (1865, 1868, 1875, 1901).¹⁰¹ Significantly, though overlooked thus far in the Alabama equal protection debate, it is the Due Process Clause of the Fifth Amendment that is the source of the federal Constitution's guarantee of equal protection against actions of the federal government.¹⁰² The federal Bill of Rights itself includes no explicit equal protection clause.

Moreover, the 1875 and 1901 Constitutions add to the provision found in all six constitutions that prohibits *ex post facto* laws or laws impairing obligations of contract, language that expressly prohibits any law "making any irrevocable grants of special privileges or immuni-

in terms of legal rights but would have been intended to denote many of the framers' racist belief in the "natural" or "inherent" superiority of the white race.

"Equally" free and independent also could mean "similarly" or "alike," and thus might be argued to be weaker than the "equal" terminology in the 1868 Constitution. Read in the context of the other language of section 1 and section 2 of the 1875 Constitution, this constitution's inclusion for the first time of a section recognizing the Fifteenth Amendment, the delegates' obedience to their pledge not to impose any property or education requirements for suffrage, and their failure to even seriously consider sections segregating the races on common carriers or forbidding interracial marriages (due to fears of federal intervention), MCMILLAN, *supra* note 10, at 201, the former suggestion seems more plausible to us. And, as Part V, *infra* demonstrates, judicial interpretations of section 1 do not support this latter view.

100. SKINNER, *supra* note 89, at 54-55.

101. *Id.* at 115-16. The Alabama Supreme Court continues to rely on both sections 6 and 13 of the 1901 Constitution as due process guarantees in civil cases. *See, e.g.,* Alabama Power Co. v. Citizens of Ala., 740 So. 2d 371 (Ala. 1999) ("Both the Constitution of the United States and the Constitution of the State of Alabama of 1901 guarantee 'due process of law.' U.S. Const. Amends. V, XIV; Ala. Const. 1901, §§ 6 and 13.") *Id.* at 371. Earlier, Justice Houston argued that section 6 can only be applied in the context of criminal proceedings. *Pinto*, 662 So. 2d at 904.

102. *See, e.g.,* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (companion case to *Brown v. Bd. of Educ.*, 347 U.S. 294 (1954), holding federal laws requiring segregation of Washington, D.C. public schools unconstitutional under the Fifth Amendment Due Process Clause). Like section 6 of the Alabama Constitution, the Fifth Amendment's Due Process Clause is contained in a provision that expressly pertains primarily to those accused of crimes, but the guarantees of this federal Due Process Clause have not been limited to the criminal context. Given that the Alabama Constitution contains an additional guarantee of due process in section 13, it is not surprising that at different times Alabama courts and counsel have relied alternatively or cumulatively on sections 6 and 13 as sources of due process and equal protection guarantees. *See* the preceding note for further discussion of these state due process clauses.

ties" (1875), or "making any irrevocable or exclusive grants of special privileges or immunities" (1901).¹⁰³ And each of the six constitutions has contained a provision similar to section 29 of the 1901 Constitution which provides: "That no title of nobility or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State; and that no office shall be created, the appointment to which shall be for a longer time than during good behavior."¹⁰⁴

The Declaration of Rights of the 1875 and 1901 Constitutions include another equality-related feature. Both documents state: "That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and when government assumes other functions it is usurpation and oppression."¹⁰⁵ Further, the Declaration of Rights of each of Alabama's constitutions has included a final provision declaring that the enumeration of certain rights shall not impair or deny (or disparage) others retained by the people. In the 1868 and 1875 Constitutions the sections are limited to this language but the 1901 Constitution returns to broader language similar to that found in the first three constitutions:

Art. I, Sec. 36:

That this enumeration of certain rights shall not impair or deny others retained by the people; *and, to guard against any encroachments on the rights herein retained, we declare that everything in this declaration of right is excepted out of the general powers of government, and shall forever remain inviolate.*¹⁰⁶

Additionally, there are numerous equality provisions contained in sections of the 1901 Constitution other than those of the Declaration of Rights. Justice See refers to several of these, including article III, section 43's commitment to a government of laws and not of men, as well as to several of the previously mentioned equal protection guarantees within the Declaration of Rights, in a footnote of his *Melof* special concurrence.¹⁰⁷

103. SKINNER, *supra* note 89, at 243.

104. *Id.* at 214. In addition, both the 1875 and 1901 Constitutions have sections encouraging immigration, reinforced by a section providing that: "Foreigners who are, or may hereafter become, bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens." *Id.* at 217.

105. *Id.* at 218.

106. *Id.* at 223 (emphasis added).

107. *Melof*, 735 So. 2d at 1195 n.17:

FN17. Because the plaintiffs do not claim that the taxation scheme violates any provisions other than §§ 1, 6, and 22, I do not address whether a guarantee of equal protection is embodied in other provisions of the Constitution of Alabama of 1901. Cf., e.g., Ala. Const. 1901, art. I, § 13 ("every person, for any injury done him, in his lands, goods,

The Education Article of the 1901 Constitution also contains a guarantee of equal protection. The first sentence of section 256 of article XIV of the 1901 Constitution provides that: "The legislature shall establish, organize and maintain a liberal system of public schools throughout the State for the benefit of the children thereof between the ages of seven and twenty-one years."¹⁰⁸ The Alabama Supreme Court has interpreted section 256 of the 1901 Constitution as continuing the common understanding of an equitable operation of the system of "public schools," as earlier interpreted in *Elsberry v. Seay*.¹⁰⁹

Finally, as Justice Ruth Bader-Ginsburg has pointed out with respect to the (older but less frequently amended) federal Constitution,¹¹⁰

person, or reputation, shall have a remedy by due process of law"); art. I, § 29 ("That no title of nobility or hereditary distinction, privilege, honor, or emolument shall ever be granted or conferred in this state; and that no office shall be created, the appointment to which shall be for a longer time than during good behavior."); art. I, § 35 ("That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression."); art. III, § 43 (*separating the powers of government among three equal branches "to the end that it may be a government of laws and not of men"*); art. IV, § 104, amended by Amends. No. 375 and No. 397 (*prohibiting the legislature from passing any special, private, or local law, among other things, "exempting any individual, private corporation or association from the operation of any general law"*); art. XI, § 211 ("All taxes levied on property in this state shall be assessed in exact proportion to the value of such property"); art. XI, § 217 ("The property of private corporations, associations, and individuals of this state shall forever be taxed at the same rate"), amended by Amends. No. 325 and No. 373.

Id. (emphasis added).

108. SKINNER, *supra* note 89, at 886.

109. 83 Ala. 614, 3 So. 804 (1887); see also *Tucker v. State*, 165 So. 2d 249, 253 (Ala. 1935) (interpreting section 256 as "meaning such a system as would 'operate upon, and in favor of, all the children equally, without special local privileges to any'"); *In re Opinion of the Justices*, 155 So. 699 (1934). The history of the 1901 Constitutional Convention provides ample evidence of the framers' views on the equal protection guarantee embodied in section 256. For example, in introducing the report of the Education Committee, its Chair John Brown Graham stated: "I believe that the delegates of this Convention are unified upon the one subject of public education for all the children of this State, and that they believe it should fall, as the dews and the gentle rain, upon all alike, without reference to their condition." 4 PROCEEDINGS, *supra* note 13, at 4162-63. And Convention President John Knox included the following comments on education in his opening address (which also contains his infamous statements on race and suffrage):

[I]t will not do to say you are too poor to educate the people—you are too poor not to educate them.

Nothing has so retarded the rapid growth and development of our State as the absence of a well regulated system of public schools, so as to place within the reach of every child in the State, both rich and poor, the means of obtaining free of tuition fees, such instruction as will qualify him for the responsible duties of life.

...
You cannot expect skilled labor to enter our State, if by doing so their children are to be denied the means of a common school education. We must fight ignorance as we would fight malaria, for it is only by educating its people that a State can gain and maintain a proud position among the nations of the earth.

1 *id.* at 15.

110. Videotape: U.S. Supreme Court Visitor's Guide Video (United States Supreme Court

we do not have today the same document that the framers approved. For example, whether or not they were necessary given contemporary federal equal protection doctrine, recent amendments replacing the 1901 Alabama Constitution's Suffrage Article, and annulling its provision on miscegenation laws, are now as much a part of the state constitution and its understanding of equality as are the original provisions that remain in effect.¹¹¹

In closing this overview of state constitutional equality provisions, we reiterate that in addition to these express equality features, the Alabama Supreme Court has long recognized implicit guarantees of equal protection that flow from the spirit of the constitution, our unique form of government under the rule of law, and from the document's express provisions, individually or collectively, including its provisions recognizing the inalienability of certain fundamental human rights whether expressly enumerated or not. Indeed, Justice See acknowledged as much, in *Melof*, with respect to the court's 1912 majority opinion in *McLendon*.¹¹²

Given this overview of the history of the Alabama Constitution's key equality provisions, it is not surprising that the Constitution's concept of equal protection has at times been referred to as being based in one or more of these express provisions, or as constituting an interrelated web of express and/or implied guarantees. Failure to understand the various threads of this state's equal protection doctrine and how they are mutually intersecting and reinforcing has contributed to the tangled state of affairs presented in *Melof*.

1997).

111. ALA. CONST. amend. 579; ALA. CONST. amend. 667. Amendment 579 repealed Article VIII on Suffrage and Elections of the Constitution of 1901. Ratified June 19, 1996, it expressly provides that:

[e]very citizen of the United States who has attained the age of eighteen years and has resided in this state and in a county thereof for the time provided by law, if registered as provided by law, shall have the right to vote in the county of his or her residence.

ALA. CONST. amend. 579. Amendment 667 annuls and sets aside article IV, section 102 of the 1901 Constitution. Section 102 provided that "[t]he legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro or descendant of a negro." SKINNER, *supra* note 89, at 467.

While unnecessary perhaps, given prevailing interpretations of the federal Constitution, these amendments have now formally erased any vestiges of inconsistency between the 1901 framers' intentions or understandings with respect to how legal concepts of equal protection with respect to social, civil, and political rights might differ and the plain text of what they adopted as section 1's equality provision and other express or implied equality provisions such as sections 6, 13, 22, 29, and 35.

112. *Melof*, 735 So. 2d at 1173; see also *Bessemer Theatres v. City of Bessemer*, 75 So. 2d 651 (Ala. 1954); *McLendon v. State*, 60 So. 392 (Ala. 1912).

IV. THE 1901 CONSTITUTIONAL CONVENTION

The express language of the equal protection provisions of the 1901 Constitution (as discussed in Part III above) and the judicial interpretations given to them and similar provisions before and after 1901 (as discussed in Part V) demonstrate that, regardless of their intent, the framers of the 1901 Constitution were unsuccessful in removing equal protection guarantees from the new constitution. After closer review of the convention debates, we also conclude that though the broad assumption that this was their intent in omitting section 2 is understandable, it is likely wrong.

We reiterate that attempting to draw conclusions from the records of the lengthy and often ambiguous (at least to readers of today) debates of the 1901 Constitutional Convention is an uncertain enterprise. Despite the clarity, intensity, and repugnancy of most of the delegates' support for the convention's primary goal of black disfranchisement, the record is not as revealing on other issues. The delegates' statements often appear incongruent. Indeed, it is difficult to fathom how, at different times and on different issues, the same delegates could express such intense and seemingly inconsistent sentiments.

Arguments have been made that, given the racism underlying the primary purpose of the Constitutional Convention, the entire 1901 Constitution is invalid under the federal Fourteenth Amendment's Equal Protection Clause.¹¹³ Until such arguments prevail (or a new constitu-

113. Black Alabamians immediately began litigation challenging the 1901 Constitution's suffrage scheme but were unsuccessful in convincing either state or federal courts to reach the merits of their claims that the suffrage scheme violated the Fourteenth and Fifteenth Amendments of the federal Constitution. In *Giles v. Teasley*, 136 Ala. 228, 33 So. 820 (Ala. 1902), Justice Tyson wrote the Alabama Supreme Court's two-paragraph opinion, stating in full:

The petition in this case is for a writ of *mandamus* to compel the board of registrars for Montgomery county to register the petitioner as an elector. It alleges that sections 180, 181, 183, 184, 185, 186, 187 and 188 of Art. VIII of the constitution of 1901, fixing the qualifications of electors and prescribing the mode of registration, are unconstitutional because violative of the 14th and 15th amendments of the constitution of the United States. The prayer is in substance that these sections of the constitution above enumerated be declared null and void, and that an alternative writ of *mandamus* issue to the board of registrars commanding them to register as a qualified elector of the State of Alabama, upon the books provided therefor, the name of petitioner and to issue to him a certificate of the fact in disregard of said section of the constitution, etc. etc.

As these sections of the Constitution assailed created the board of registrars, fixed their tenure in office, defined and prescribed their duties, if they are stricken down on account of being so unconstitutional, it is entirely clear that the board would have no existence and no duties to perform. So, then, taking the case as made by the petition, without deciding the constitutional question attempted to be raised or intimating anything as to the correctness of the contention on that question, there would be no board to perform the duty sought to be compelled by the writ and no duty imposed of which the petitioner can avail himself in this proceeding, to say nothing of his right to be registered.

Affirmed.

Id. at 820-21.

Giles' related federal court claims were also rejected. In *Giles v. Harris*, 189 U.S. 475 (1903), the Court responded to a certificate of a federal circuit judge in Alabama raising the question of whether it had jurisdiction over claims under the Fourteenth and Fifteenth Amendments brought by Giles on behalf of himself and "more than 5,000 negroes, citizens of the county of Montgomery," under Rev. Stat. § 1979 (now codified as 42 U.S.C. § 1983). Justice Holmes' majority opinion summarized the allegations as follows:

The plaintiff is subject to none of the disqualifications set forth in the constitution of Alabama and is entitled to vote—entitled, as the bill plainly means, under the constitution as it is. He applied in March, 1901, for registration as a voter, and was refused arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered. Under Section 187 of Article 8 of the Alabama constitution persons registered before January 1, 1903, remain electors for life unless they become disqualified for certain crimes, etc., while after that date severer tests come into play which would exclude, perhaps, a large part of the black race. Therefore, by the refusal, the plaintiff and the other negroes excluded were deprived not only of their votes at an election which has taken place since that bill was filed, but of the permanent advantage incident to registration before 1903. The white men generally are registered for good under the easy test [extending eligibility to veterans and their descendant as well as "[a]ll persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government"] and the black men are likely to be kept out in the future as in the past. This refusal to register the blacks was part of a general scheme to disfranchise them, to which the defendants and the State itself, according to the bill, were parties. The defendants accepted their office for the purpose of carrying out the scheme. The part taken by the State, that is, by the white population which framed the constitution, consisted in shaping that instrument so as to give opportunity and effect to the wholesale fraud which has been practised.

Id. at 482-83.

Justice Holmes' opinion reached beyond the narrow question presented (as to which the Court assumed, for purposes of decision, that the "subject matter was not wholly beyond the jurisdiction of the Circuit Court"). With Justices Harlan, Brown, and Brewer dissenting, the majority also concluded, "it seems to us impossible to grant the equitable relief which is asked." *Id.* at 486. Pointing out that proceedings in equity had not traditionally embraced a remedy for "political wrongs," but noting that the majority was unwilling to stop there because "we cannot forget that we are dealing with a new and extraordinary situation," Justice Holmes wrote:

The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But of course he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If then we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? . . .

The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in § 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a State, although the State is not and could not be made a party to the bill. *Hans v. Louisiana*, 134 U.S. 1. The Circuit Court has no constitutional power to control its action by any direct means. And if we leave the State out of consideration, the court has little practical power to deal with the people of the State in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon

tion is adopted), the difficult task of sorting through these parts of this State's constitutional history is a necessary one.

In any event, it is a history that should not be forgotten. Indeed, it is a history that should speak even louder today if one admits that the framers were complex men, with different and perhaps inconsistent motives. It is much easier simply to write off, as dead and gone, racism in the past (and thus fail to see it in the present), if we are able to characterize all the acts of those who wrote these chapters of our past as motivated entirely by such evil intentions.

Claims that the framers' primary racist aim was such a central motivating factor that the entire constitution should be declared void on federal equal protection grounds merit closer attention than they have received to date. But to otherwise employ this primary intent—selectively and in the service of restricting individual rights and liberties—would have the perverse results of enhancing its harmful effects and of permitting these effects to survive even the express repeal of the original suffrage article.

A. *The History of Section 1 of the Declaration of Rights*

Alabama's first two constitutions—the "Statehood Constitution" of 1819 and the "Secession Constitution" of 1861—included the language quoted above, "that all freemen, when they form a social contract, are equal in rights; and that no man or set of men are entitled to exclusive, separate public emolument or privileges, but in consideration of public service."¹¹⁴ The delegates to the pre-Reconstruction 1865 Constitutional Convention removed the first clause of the former section 1. McMillan reports that "[f]earing Negro participation in the government, the con-

the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the State itself, must be given by them or by the legislative and political department of the Government of the United States.

Id. at 486-88. Compare Justice Rehnquist's opinion for the Court in *Hunter v. Underwood*, 471 U.S. 222 (1985) (Section 182 of the 1901 Constitution's suffrage article, which disenfranchised those convicted of certain felonies and misdemeanors—including "any crime involving moral turpitude"—was intentionally adopted to disenfranchise blacks and violated the federal equal protection clause; that the framers also may have intended to disenfranchise poor whites did not render nugatory their intent to discriminate against blacks.). As previously noted, it was not until 1996, that the voters of Alabama repealed and replaced the original article VIII of the 1901 Constitution by approving Amendment 579.

The Giles litigation did not attack the validity of the entire 1901 Constitution, of course. More recently, attempts to do so have been made, particularly in prisoner litigation, but these also have been unsuccessful. *See, e.g.,* *Holley v. Jones*, 2000 WL 1848373 (S.D. Ala. 2000).

114. SKINNER, *supra* note 89, at 35-36.

vention struck from the declaration of rights of former Alabama constitutions the proviso 'that all freemen, when they form a social compact, are equal in rights.'¹¹⁵ Indeed, this pre-Reconstruction convention debated whether to include language prohibiting slavery and, while finally doing so, refused to include provisions granting the newly freed Alabamians property rights or rights of testifying in court, instead providing that the next Legislature: "pass such laws as will protect the freedmen of this state in the full enjoyment of all their rights of person and property, and guard them and the state against all evil that may arise from their sudden emancipation."¹¹⁶

The 1865 Convention adjourned on September 30, just eighteen days after it had begun work. Congress took only shortly more time to pass its judgment on the 1865 Constitution. In December 1865, it refused to seat the representatives and senators elected under the 1865 Constitution.¹¹⁷

The 1867 "Reconstruction Convention" first met on November 5, 1867. At least ninety-six of the one hundred male delegates to this convention were Republicans,¹¹⁸ and eighteen of these were African-American (unlike the delegates to the previous conventions who had all been white males). The Convention restored an equal protection guarantee in the new language of section 1, declaring "[t]hat all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."¹¹⁹ It added, as a new second section, a broad definition of state citizens (that included not only all state residents born in the United States or naturalized but those who declared their intent to become U.S. citizens as well)¹²⁰ who were described as possessing equal civil and political rights. Corresponding to the new section 2, under the suffrage provisions adopted by this convention, males over twenty-one who had declared their intent to become U.S. citizens possessed suffrage rights.

115. MCMILLAN, *supra* note 10, at 103.

116. *Id.* at 97. The Legislature responded to this charge by passing Alabama's notorious "Black Code." See ROGERS, *supra* note 11, at 238.

117. MCMILLAN, *supra* note 10, at 110.

118. *Id.* One of the two Democrats was James Hurt Howard, Martha Morgan's great-great-grandfather. According to the Dictionary of Alabama Biography first published in 1921, "James Howard was educated at Tuskegee; was a lifelong farmer in Crenshaw County; superintendent of education of that county; and a member of the constitutional convention of 1867, from the eighth district, including Crenshaw County." THOMAS MCADORY OWEN, III, HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 852 (Reprint Co. 1978) (1921). McMillan reports that "James Hurt Howard of Crenshaw, one of the two Democratic delegates in the convention, made the sole speech against Negro suffrage." MCMILLAN, *supra* note 10, at 126.

119. SKINNER, *supra* note 89, at 35.

120. The first sentence of section 1 of the Fourteenth Amendment provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. 14.

It is not surprising that this constitution contained some definition of state citizenship—the first to appear in a constitution of the state—given that the Fourteenth Amendment had not yet been ratified when the convention met.¹²¹ McMillan explains the extension of rights to those having declared their intent to become U.S. citizens as designed to encourage immigration into Alabama.¹²²

The membership of the 1875 Constitutional Convention reflected white conservatives' return to political power (though the convention did have twelve Republicans and seven Independents among its ninety-nine male delegates, including four black delegates). Accordingly, the convention made several changes in the 1868 Constitution as part of their proclaimed effort to "redeem" the state from Republican rule. But they feared provoking renewed federal intervention and did little to change the Declaration of Rights of the 1868 Convention. For example, they included express language forbidding racial discrimination in suffrage rights and prohibitions on using ownership of property as a suffrage qualification. The only change made in section 1 or 2 was that mentioned earlier of replacing the phrase "all men are created equal" in section 1 with the language "all men are equally free and independent."¹²³

121. *Id.* Although the Fourteenth Amendment, with its definitions of state and federal citizenship was ratified in 1868, the delegates to the 1875 Convention unanimously approved carrying forward the language of section 2, with only one change (the omission of the words "and public privileges") and without debate. They also approved a suffrage article that continued to include male foreigners who had declared their intent to become U.S. citizens among those eligible to vote, modifying the proposed language only to add the word "legally" before declared.

122. MCMILLAN, *supra* note 10, at 124. The delegates rejected proposals to amend the constitution to expressly guarantee what were argued to be "social" rights of racial equality with respect to access common carriers and other public accommodations. *Id.* at 134.

123. SKINNER, *supra* note 89, at 35. The *Melof* main opinion repeats Justice Houston's prior arguments that it is "evident" that the drafters of both the 1868 and 1875 Constitutions felt, that to provide for equal protection, something more was needed than the (differing) language of section 1 as contained in these documents. *Pinto*, 662 So. 2d at 906. This is evident he argues, because these sections were followed by the equal rights language of section 2. *Id.*

How the framers in 1867 (or in later conventions) understood the relationship between the equality language of sections 1 and 2 is not clear. Initially introduced and approved in the 1867 Convention as a single section that also included express language against racial discrimination, these two sections were later separated and re-approved. A third proposal expressly prohibiting discrimination in public accommodations was defeated, as was a proposal to permit segregation in such accommodations. As mentioned above, the delegates included the citizenship language of section 2 to provide a definition of state citizenship that included African-Americans as well as immigrants who had declared their intent to become U.S. citizens. MCMILLAN, *supra* note 10, at 124, 134-36.

In 1867, 1875, and 1901, the delegates were acting during a long period of unsteady transition to legal positivism accompanied by gradual acceptance of broader notions of state legislatures as possessing inherent police powers. Thus, it is difficult to decipher exactly how delegates at these conventions may have understood the relationship and overlap between the broad equality language of the first clause of section 1 (whose later clauses sound in the natural law language of inalienable rights) and the last phrase (for it is not really a clause) of section 2 describing all state citizens as possessing equal political and civil rights. In its narrowest sense, some may have

Section 1 was approved as proposed by the Committee without discussion in 1875. Likewise, the delegates to the 1901 Convention approved of the language of section 1, as proposed by the Committee on the Preamble and Declaration of Rights, when first read and without debate.¹²⁴ The language proposed and adopted in 1901 is identical to that contained in section 1 of the 1875 Constitution. The 1901 Convention records indicate that earlier three ordinances proposing changes in this section had been read and referred without further comment to the Committee.

First, Mr. Barefield introduced Ordinance 62:

To amend Article I, Section 1 Declaration of Rights of the Constitution of Alabama. Be it ordained by the people of Alabama in convention assembled,

That Section 1, of Article I be amended so as to include the word reputation.¹²⁵

Later, Mr. Case introduced Ordinance No. 81, which suggested including equal protection guarantees that tracked language of section 1 and other clauses of the 1875 Alabama Constitution and that of the Fourteenth Amendment:

Ordinance to amend Article I of the Constitution-Declaration of Rights.

Be it ordained by the people of Alabama in Convention assembled, That Article I, of the Constitution be amended so as to read as follows:

That the great, general and essential principles of liberty and free government may be established, we declare:

First—That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that the sole object and only legitimate end of gov-

used the term civil rights to refer to rights of access to courts or the legal system for the protection of fundamental rights. The 1896 Code annotation discussed later supports this view of the term "civil rights" in section 2, and explains its use in conjunction with the access to courts and right to remedy clause. In any event, "civil rights" at least encompassed rights of equal access to courts. That the framers saw it as advisable, and in no way inconsistent, to provide "multiple" assurances in this regard refutes the argument that their addition of the last phrase of section 2 makes it "evident" that they felt that section 1 alone did not guarantee equal protection.

Perhaps the best evidence that both section 1 and section 2 of the 1868 Constitution were viewed as providing equal protection guarantees comes from the pen of one of the convention delegates. Shortly after the 1867 Convention, Associate (and later Chief) Justice Peters of the Alabama Supreme Court, who had himself been a member of that convention, wrote opinions that separately interpreted *both* sections 1 and 2 as protecting against discrimination based on sex. See Part V *infra* (discussing the trilogy of early sex discrimination cases from the 1870s).

124. 2 PROCEEDINGS, *supra* note 13, at 1622.

125. 1 *id.* at 160-61.

ernment is to protect the citizen in the enjoyment of these principles; and when the government assumes other functions, it is usurpation and oppression, and that this State shall not make or enforce any law which shall abridge the principles (sic) or immunities of citizens of the United States; nor shall it deny to any person within its jurisdiction the equal protection of the laws.¹²⁶

Finally, Mr. Craig¹²⁷ introduced Ordinance 234, which proposed amendments to both sections 1 and 2. It would have removed the words "all men are equally free and independent" in first clause of section 1 as well as the phrase "possessing equal civil and political rights" at the end of section 2:

To amend Sections 1 and 2 of Article I of the Constitution of Alabama.

Be it ordained by the people of Alabama in Convention assembled: That Sections 1 and 2 of Article I of the Constitution of Alabama be amended so as to read as follows, to wit:

Section 1. That all men are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuits of happiness.

Sec. 2. That all persons resident in this State, born in the United States, or naturalized, or who have legally declared their intention to become citizens of the United States, are hereby declared to be citizens of the State of Alabama.¹²⁸

Mr. Lomax, who chaired the Committee on the Preamble and Declaration, presented the committee's report and made the following comments on its consideration of these and other ordinances referred to it:

The Committee has carefully examined and considered all of the ordinances referred to it and has incorporated the principles of some of them in the Article herewith reported. A large number of them have been rejected by the Committee because it was believed that the great and essential principles of liberty embodied in the bill of rights, being, as they are, the crystallization of the experience of centuries, should be preserved, as far as possible, from change and innovation.¹²⁹

126. 1 *id.* at 168-69.

127. 1 *id.* at 320-21.

128. 1 *id.*

129. 1 PROCEEDINGS, *supra* note 13, at 784.

*B. The Misunderstood History of the Omission of Former Section 2
From the 1901 Constitution*

It is the 1901 Convention's treatment of section 2 of the 1875 Constitution that has fueled the recent judicial debate over whether the 1901 Constitution has any equal protection guarantees. The controversy focuses on whether, in omitting section 2 from the 1901 Constitution, the framers intended to remove all equal protection guarantees from the document.

As discussed above, section 2's definition of state citizenship and description of its attributes first appeared in the 1868 Constitution. The only difference between these sections in the prior two constitutions was that the 1875 Convention eliminated the 1868 Constitution's reference to "public privileges":

1868, Article I, Sec. 2:

That all persons resident in this State, born in the United States, or naturalized, or [who] shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privilege.

1875, Article I, Sec. 2:

That all persons resident in this State, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights.¹³⁰

In the judicial debate about the existence of equal protection guarantees under the 1901 Constitution, former section 2 has been spoken of as "the equal protection clause" of the 1875 Constitution. But it is a mistake to equate the omission of this one section from the 1901 Constitution with the elimination of equal protection guarantees from the new constitution. Although not free of all ambiguity, the constitutional debates (and, as we will discuss further in Part V, early judicial consideration of the framers' intent) do not support the broad inferences that have been drawn about the intent in omitting section 2.¹³¹

Opinions in *Melof*—including Justice Houston's main and concurring opinions and Justices Cook's¹³² and Johnstone's opposing opin-

130. SKINNER, *supra* note 89, at 45.

131. In the interest of historical accuracy and for the convenience of readers, the full text of the debate over the inclusion of former section 2 is included as Appendix C *infra*.

132. Justice Cook's opinion notes that "[t]he first portion of § 2 was also inconsistent with immigration and residency requirements proposed by the Committee on Suffrage. II *Official Proceedings*, at 1623-42." *Melof*, 735 So. 2d at 1205 n.23. But none of the opinions refer further

ions—view the framers' omission of section 2 as motivated by concerns that its language was inconsistent with their aim of disfranchising black voters.¹³³ Given most of the delegates' expressed aim of disfranchising black males and the accompanying aim of many of the delegates to ultimately eliminate poor white male voters as well, this is a logical assumption. However, the concerns the delegates expressed that the section would be inconsistent with the new suffrage provisions that the Committee on Suffrage had drafted centered on other specific aspects of the suffrage plan. More important, all the concerns raised about section 2 related to its reference to "political rights." Although the language they ultimately tabled and removed spoke both of civil and political rights, none of the delegates (men who elsewhere are candid about their actual designs) suggested that by this tabling action they intended to negate the existence of state equal protection guarantees outside the political context of voting or office holding. The express concerns raised by the framers with respect to section 2 centered on the impact that this section's definition of state citizenship and its accompanying recognition of equal "political" rights might have with respect to the rights of certain foreigners to vote¹³⁴ and hold office¹³⁵ in the state and with respect to the suffrage committee's proposal to require two years residency.¹³⁶

Immediately after the initial reading of section 2, Mr. Sanford moved to amend it to remove language defining certain aliens as state citizens, stating: "I move to amend that Section by striking out the words '*persons who have legally declared their intention of becoming citizens.*'"¹³⁷ In the debate that followed, Mr. Pillans argued that section 2 of the 1875 Constitution was unconstitutional because it was inconsistent with congressional control over naturalization and with the Fourteenth Amendment's definition of state citizenship.¹³⁸ Others voiced concerns that it would be inconsistent with the Suffrage Committee's

to this issue or to the subsequent debates on the suffrage report that further detail the highly controversial issue of disfranchising certain white foreigners who then voted under the 1875 Constitution.

133. The delegates, as noted by Justice Cook in *Melof*, repeatedly emphasized that their aim was to disfranchise as many black voters as was constitutionally permissible under the federal constitution. *Melof*, 735 So. 2d at 1202-05. Thus they claimed that their suffrage plan did not conflict with the Fifteenth Amendment because the criteria they used to accomplish their aim were not those of race, color, or previous condition of servitude. 2 PROCEEDINGS, *supra* note 13, at 1762; 3 *id.* at 2777-78. And the Fourteenth Amendment, though reversing the *Dred Scott* decision by recognizing the citizenship of African-Americans, was not read as guaranteeing the extension of suffrage rights. 3 *id.* at 2777-78.

134. 2 *id.* at 1628 (Mr. Burns), 1629-30 (Mr. Oates), 1632 (Mr. Sanford).

135. 2 PROCEEDINGS, *supra* note 13, at 1624 (Mr. Sanford).

136. 2 *id.* at 1622 (Mr. Coleman). Coleman moved to strike section 2 at this point, but apparently his motion was not considered in order.

137. 2 *id.* at 1623 (emphasis added).

138. 2 *id.* at 1624.

plan to change the existing suffrage provisions to deny voting rights to such foreigners. Not all were convinced by Mr. Lomax's repeated assurances that there was no inconsistency with the suffrage plan because, under existing law, voting was considered a privilege¹³⁹ and not a political right of citizenship.¹⁴⁰ Lomax argued that section 2 served as encouragement to the "desirable class" of immigrants and that by removing it "we would exclude from coming to the State of Alabama the most desirable class of foreign citizens that come into this country and we would simply have come in amongst us people who [did] not care whether they had secured the rights of citizenship in one or five years."¹⁴¹

Not persuaded by Lomax's repeated assurances that voting would not be considered a "political right," Mr. Pettus offered a substitute amendment near the end of the debate on section 2:

MR. PETTUS—I will ask the gentleman from Greene if he will yield to me to offer a substitute for the amendment offered by the gentleman from Montgomery.

MR. COLEMAN—If I am to have the floor in the morning. The amendment was read as follows:

Amend by striking out the words "*and political*" in line three of Section 2, Article I.¹⁴²

139. 2 *id.* at 1625-26, 1633 (referring to *Washington v. State*, 75 Ala. 582 (1884)). To reinforce their understanding in this regard, the Committee Report had recommended, and the delegates later approved, changing what became section 33 of the 1901 Constitution to refer to the "privilege" of suffrage, rather than the "right" of suffrage as had the corresponding section 34 of the 1875 Constitution. 1 PROCEEDINGS, *supra* note 13, at 785; 2 *id.* at 1759. As approved, the section reads: "The privilege of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult, or other improper conduct." ALA. CONST. art. I, § 33.

140. During the debate over section 2, delegates were reminded that women (and minors) were citizens of Alabama, with civil and political rights in the State, but could not exercise the "privilege" of voting. 2 PROCEEDINGS, *supra* note 13, at 1626. Later, the convention debated at length various proposals to change the existing situation with respect to women's suffrage. Several prominent women petitioned the convention to extend the franchise to women. Miss Frances Griffin was permitted to address the delegates on this issue and her strikingly candid remarks are included in the convention proceedings. 1 *id.* at 464-71. Indeed, at one point, the delegates voted to allow women property owners to vote on municipal bond issues but then reversed their vote the following day. See, MCMILLAN, *supra* note 10, at 278-279; PROCEEDINGS at 3823, 3873-74.

For a fuller discussion of the history of women's suffrage in Alabama, including the unsuccessful struggle from 1914 to 1915 to amend the Alabama Constitution to correct the 1901 delegates' rejection of women suffrage demands, the Alabama Legislature's 1919 refusal to ratify the Nineteenth Amendment to the federal Constitution, and the impact of the federal amendment's ultimate adoption in 1920 (despite the Alabama Legislature's refusal to ratify it until 1923), see MARY MARTHA THOMAS, *THE NEW WOMAN IN ALABAMA: SOCIAL REFORMS AND SUFFRAGE, 1890-1920* (1992).

141. 2 PROCEEDINGS, *supra* note 13, at 1626.

142. 2 *id.* at 1633 (emphasis added).

When the convention's debates later turned from the Declaration of Rights to the Suffrage Article, one bitter controversy centered on whether the Suffrage Committee's proposal denying the franchise to white foreigners who currently voted in the state was consistent with the Democrats' pre-convention pledge that no white man would be disenfranchised.¹⁴³ After extensive debate, the convention delegates eventually compromised on the issue by "grandfathering" those aliens who had the right to vote in 1901, as long as they became naturalized citizens when eligible. This served to protect against claims that the Democrats had broken their pledge that no white man would be disenfranchised. Perhaps more pointedly, it sought to avoid such aliens' negative votes in what was foreseen to be a close vote on adoption of the 1901 Constitution itself—an election in which it was acknowledged that these aliens would be eligible voters and would vote.¹⁴⁴

An express explanation for striking Section 2 was given when the debate turned to the suffrage article. Mr. Pillans reminded the delegates that they had struck section 2 of the 1875 Constitution from the new Declaration of Rights and stated the reason for its omission.¹⁴⁵ His explanation comes after the first section of the suffrage article had been amended from the floor by Mr. Beddow so as to grandfather in as eligible to vote "every male person of foreign birth who, before the adoption of this Constitution, may have legally declared his intention to become a citizen of the United States."¹⁴⁶ Mr. Pillans then moved to change the word "citizen" to "person" in the second section of the suffrage article, which described other voter qualifications (so that such foreigners would have to meet the same voting requirements as citizens).¹⁴⁷ The following exchange follows:

MR. PILLANS—I regret that my voice is not in very good shape for presenting my views to the Convention, but I am so persuaded that an error will be committed by the adoption of this section, if the first line is unchanged, that I offer this amendment. I know the Chairman of the Committee has stated in his statement here to the Convention that persons who are authorized to vote by the first section are declared to be citizens of Alabama.

MR. DEGRAFFENREID—I want to call your attention—It

143. See 2 *id.* at 2715-50; 3 *id.* at 3216-40.

144. 3 *id.* at 3232. For discussion of the fraudulent vote counting that nevertheless was necessary to obtain ratification of the 1901 Constitution, see Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67 (2001), in this Symposium issue.

145. 2 PROCEEDINGS, *supra* note 13, at 2746.

146. 2 *id.* at 2715.

147. 2 *id.* at 2745-46.

has been adopted already by the Convention, under the Bill of Rights in Section 3 (sic).

MR. PILLANS—I think if the Chairman of the Bill of Rights Committee is here, he will bear me out that we struck out that entire section. We had in the old Constitution, the existing Constitution of the State of Alabama an absurd provision and an unconstitutional provision that every person who has declared his intention to become a citizen was a citizen of the United States and a citizen of Alabama; that was absurd, because unconstitutional under the Federal Constitution, which distinctly declares that Congress alone should pass uniform laws of bankruptcy and naturalization, wherefore the Alabama Constitutional Convention of 1875 erred grievously in attempting to make an unnaturalized person a citizen of the State of Alabama. Well, we have not done that today. We have been wiser than they. We have struck out that absurd proposition from the projected Constitution, and we have no pretense in this Constitution that a person who is not a native born in the United States, or one who is naturalized by the processes provided by the act of Congress can become a citizen. We have struck down any other idea. Now comes the suffrage report, harmonized as originally written, and I have no complaint of it as originally written, but we have amended it this very afternoon by declaring that persons who may vote shall be male citizens of the State who are citizens of the United States, or foreigners not citizens of the United States who have declared their intention to become citizens, so far as those foreigners have so declared prior to the ratification of the Constitution. Now, I undertake to say, and I say it without the fear of successful contradiction from the chairman of the committee or any other member of the committee or any other member on the floor, that does not make of those persons so privileged, who have declared their intention prior to the adoption of this Constitution, citizens of this State. They do not become citizens of Alabama and they cannot be made citizens of Alabama until you strike down the Federal Constitution¹⁴⁸

As this subsequent exchange suggests, regardless of why the delegates narrowly voted (49 ayes to 42 noes)¹⁴⁹ to table section 2 and its amendments, in doing so they did not “agree,” as the main opinion in *Melof* states, “that any equal-protection guarantee in the State of Alabama would stem solely from the Fourteenth Amendment.”¹⁵⁰ True, the debates over the proposed section 2 contain references to the Fourteenth

148. 2 *id.* at 2746.

149. 2 *id.* at 1642.

150. *Melof*, 735 So. 2d at 1185.

Amendment.¹⁵¹ Committee Chair Lomax, who supported including section 2 as it appeared in the 1875 Constitution,¹⁵² twice refers to the Fourteenth Amendment (no clause specified) as covering everything contained in the section.¹⁵³ He noted that "we could not change or alter it if we undertook to do so."¹⁵⁴ The comment by Mr. Coleman, which does refer to specific portions of the Fourteenth Amendment, refers to its Citizenship Clause and to its Privileges and Immunities Clause.¹⁵⁵ Mr. Walker's question to Mr. Pillans about whether certain rights—such as corporations' equal access to courts—were protected by the Fourteenth Amendment does seem to be a reference to the Equal Protection Clause. However, even this comment is ambiguous given what delegates may have then understood to be the meaning of the Fourteenth Amendment's Privileges and Immunities and Equal Protection Clauses in the post-*Plessy*, pre-*Brown* era. In any event, regardless what particular section(s) of the Fourteenth Amendment these delegates may have had in mind, their comments fall short of establishing any "agreement" or intent to eliminate all equal protection guarantees from the Alabama Constitution so that "any equal-protection guarantee in the State of Alabama would stem solely from the Fourteenth Amendment."

Without mention of the complexities and ambiguities depicted in the convention proceedings referred to above, the only portion of the convention debate on section 2 quoted in the main opinion in *Melof* begins shortly before the vote to table was taken, with Mr. Pillans informing other delegates of the results of his overnight research into the 1896 Annotated Code.¹⁵⁶ The full text of the exchange that followed is pre-

151. During this debate, none of the delegates referred to their understanding of the equal protection guarantees that remained under other sections of the Declaration of Rights (such as what became sections 1, 6, 13, and 22 of the 1901 Constitution) or to the extent to which provisions of the Fourteenth Amendment also afforded alternative coverage, but this is understandable given that no one was proposing to remove those provisions.

152. 2 PROCEEDINGS, *supra* note 13, at 1628.

153. 2 *id.* at 1640, 1642.

154. 2 *id.* at 1640.

155. 2 *id.* at 1628. That the framers may have thought of the Fourteenth Amendment's Privileges and Immunities Clause in this regard is not as surprising as it might first appear. Although the clause has mostly lain dormant since the narrow interpretation given it in the *Slaughter-House Cases*, 83 U.S. 36 (1873), as the recent decision in *Saenz v. Roe*, 526 U.S. 489 (1999), illustrates by "breathing new life" into the clause, its meaning has long been a source of confusion and of scholarly and judicial controversy. Before *Saenz*, the U.S. Supreme Court had relied upon it only once before, in the case of *Colgate v. Harvey*, 296 U.S. 404 (1935), *overruled by Madden v. Kentucky*, 309 U.S. 83 (1940). While the 1901 delegates did not have the advantage of foresight, even if they had, they might not have known what to make of this clause. As Justice Thomas noted in his *Saenz* dissent, even today, "[l]egal scholars agree on little beyond the conclusion that the Clause does not mean what the Court said it meant in 1873." 526 U.S. at 522.

156. *Melof*, 735 So. 2d at 1183. The full text of the 1896 Code annotations to section 2 (and section 1) are as follows:

sented below:

MR. PILLANS—It is simply this, the section as we find it in our last Code of this State, has appended to it a note, stating “the effect of this section is to place all persons natural and artificial on a basis of equality in the courts.” Citing the case of South and North Railroad against Morris, 65th, 75th, 85th, 87th and 106th Alabama, etc., and see also citations to another section: “there can be no discriminative advantage bestowed by law between the parties to the same suit,” citing other authorities. “The statute against miscegenation is not a denial of equal civil and political rights to the races.” Now if it appear from that, very likely that is a clause that has some efficacy and meaning, and has force in protecting investments and corporate rights^[157] and perhaps individual rights in this State, against hasty and ill advised legislation.

ARTICLE I.
DECLARATION OF RIGHTS.

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:—

Effect and office of the declaration of rights.—*Ex parte* Dorsey, 7 Port. 293.

§1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

A guarantee to each citizen of all the rights and privileges enjoyed or possessed by any other citizen.—*Ex parte* Dorsey, 7 Port. 293. Free egress from, or transit through the State may be regulated but not prevented.—*Joseph v. Randolph*, 71 Ala. 499.

§2. That all persons resident in this State, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights.

Effect is to place all persons, natural and artificial, on a basis of equality in the courts. *S. & N. R. Co. v. Morris*, 65 Ala. 193; *Smith v. L. & N. R. Co.*, 75 Ala. 449; *L. & N. R. Co. v. Baldwin*, 85 Ala. 619; *Brown v. A. G. S. R. Co.*, 87 Ala. 370; *Randolph v. B. & P. Supply Co.*, 106 Ala. 501. See also citations to Art. I., Sec. 14; Art. XIV., Sec. 12. There can be no discriminative advantage bestowed by law between the parties to the same suit.—*S. & N. R. Co. v. Morris*, 65 Ala. 193; *Randolph v. B. & P. Supply Co.*, 106 Ala. 501. The statute against miscegenation is not a denial of equal civil and political rights to the races.—*Ford v. State*, 53 Ala. 150; *Green v. State*, 58 Ala. 190 (overruling *Burns v. State*, 48 Ala. 195); *Hoover v. State*, 59 Ala. 57; *Pace v. State*, 69 Ala. 231 (affirmed 106 U.S. 583).

ALA. CONST. of 1896, art. I (1896), reprinted in ALA. CODE Vol. 1, at 60 (1896) (emphasis in original) (available in the Bounds Law Library Special Collections, The University of Alabama School of Law).

157. As demonstrated in this Article's later discussion of pre-1901 interpretations of sections 1 and 2 as they appeared in the 1868 and 1875 Constitutions, either section 1 or section 2, sometimes in conjunction with other equality provisions, were relied upon as sources of equal protection guarantees for natural persons. Section 2, however, was the source referred to, sometimes along with other provisions, when the equality rights of corporations were at issue.

MR. WALKER—Will the gentleman allow a suggestion?

MR. PILLAN—Yes.

MR. WALKER—Isn't that purpose completely effected by the provision of the Fourteenth Amendment to the Constitution of the United States.

MR. PILLANS—It is, possibly. I only wanted to say that I expect to vote against laying the section on the table for the reason that it can be amended and preserved.

MR. LOWE (Jefferson)—I desire to state the grounds of my objection, and why I declined to agree to unanimous consent upon this question. It merely grows out [of] my indisposition to mutilate our old constitution more than is necessary. I doubt if any gentleman on the floor has suggested a single instance or particular, in which any harm has come from the declaration contained in the old constitution. To my mind I can find no good reason for changing that language, or modifying it in any respect. Therefore, acting upon the principle, and upon the belief, that unless a necessity exists for a change we should adopt not only the spirit, but the letter of the old Constitution. I hope that the amendment will be voted down, and that the report of the Committee will be adopted.

MR. LOMAX—In reply to the suggestion of the gentleman from Mobile, I will state that an investigation which I made last night demonstrated the fact that this provision is not contained in any Constitutions at all, in the language in which it appears in our Constitution. It appears substantially in the following Constitutions: New York, Connecticut, Indiana, Minnesota, South Carolina and Virginia, and does not appear in the Constitution of any other State, except those named, and, as I say, it does not appear in this language in those Constitutions. I have no doubt, however, that everything contained in that section is covered by the Fourteenth Amendment, as I said before, and we could not possibly alter it if we undertook to do so. I think the section ought to stand as it is written, and as it was adopted unanimously by the convention of 1875, or else it ought to go out altogether, and therefore I renew my motion to table both the amendments and the section.^[158]

MR. PETTUS—I would like to ask the gentleman a question. If you strike out Section Two, will there appear any where in the Constitution of Alabama a section declaring who are citizens of the State of Alabama?

MR. LOMAX—There will not appear in the bill of rights any statement of that sort. I do not know what the subsequent committees may do. It is not necessary in any event. I now renew my motion to table.

158. *Melof*, 735 So. 2d at 1183. The excerpts in *Melof* stop at this point, excluding Mr. Lomax's reply to Mr. Pettus' final question as to the effect of striking section 2.

Upon a vote being taken a division was called for, and by a vote of 49 ayes to 42 noes the section and the amendments were laid upon the table.¹⁵⁹

The main opinion in *Melof* fails to note that immediately preceding the annotation to section 2 that Mr. Pillans reads to the convention, and on the same page of the 1896 Annotated Code, appears the following annotation to section 1 of the 1875 Constitution:

A guarantee to each citizen of all the rights and privileges enjoyed or possessed by any other citizen.—*Ex parte* Dorsey, 7 Port. 293. Free egress from, or transit through the State may be regulated but not prevented.—*Joseph v. Randolph*, 71 Ala. 499.¹⁶⁰

This annotation provides further evidence that the 1901 framers would have understood the language of section 1—the provision they had adopted without discussion just before turning to debate and omit the proposed section 2—as carrying forward a guarantee of equal protection, though changed from that of the 1819 and 1868 Constitutions. Undoubtedly, their racism, classism, and sexism limited, to different degrees, their abilities and desires to envision what the principle embraced in this clause, or other equality provisions in the 1901 Constitution, really meant or would require (especially in the context of equal application of the laws). But acknowledging that is far different from concluding that they reached an agreement to remove all equal protection guarantees and leave the Fourteenth Amendment's Equal Protection Clause as the sole such guarantee Alabamians could look to against arbitrary or discriminatory government actions.

In sum, the convention debates on section 2¹⁶¹ focus on the meaning

159. 2 PROCEEDINGS, *supra* note 13, at 1641-42.

160. ALA. CODE ANN. Vol. 1 at 60. As will be discussed in more detail in Part V, *infra*, this annotation treats section 1 of the 1875 Constitution as carrying forward the principle of equal protection as first found in the different language of section 1 of the 1819 Constitution as interpreted in *Ex parte* Dorsey, 7 Port. 293, in 1838.

161. Additional evidence of the framers' determination to maintain the broadest possible control over what they deemed to be the privilege of suffrage can be found in later actions of the delegates with respect to the Declaration of Rights. For example, as previously noted, the Committee proposed and the delegates adopted changing the language of what is now section 33 to refer to the "privilege" of suffrage rather than the "right" of suffrage as had the corresponding provision of the 1875 Declaration. And nearer the end of their consideration of the Declaration of Rights, the delegates omitted (by voting to lay on the table) the language of proposed section 37 which would have provided, as had the 1875 Constitution "[t]hat no restraint upon the privileges of suffrage on account of race, color or previous condition of servitude, shall be made by law." 2 PROCEEDINGS, *supra* note 13, at 1761. Here they were explicit about their concerns that this language could thwart their eventual hope of some day being able to use race as a criterion for suffrage. 2 *id.* at 1761-65. All acknowledged that under the Fifteenth Amendment such discrimination was forbidden. 2 *id.* Committee Chair Lomax argued that though he believed the

of its reference to equal "political rights"¹⁶² and, on the whole, support the conclusion Justice Mayfield reached in 1912—that the framers neither intended, nor accomplished, the removal of equal protection rights unrelated to electoral rights from the 1901 Constitution.¹⁶³

I know it is contended by some that the omission from the Constitution of 1901 of section 2 of the Bill of Rights contained in the Constitution of 1875 has the effect to now authorize the state Legislature to deny the equal protection of its laws to its citizens. I do not think so, and I am sure not a member of that Convention had any such idea. This was not the purpose of the omission. Its only purpose was to prevent this section from being in conflict with the new article as to franchise and elections, and to authorize statutes to carry into effect the new provisions as to elections and the right to vote. It was never intended to authorize arbitrary discriminations against the civil rights of any citizen or class of citizens. As I have above shown, if we need an express provision against such statutes as the one in question,^[164] we have it in sections 1, 22, 35, and 36 of the state Constitution, and in articles (sic) 4 and 14 of the federal Constitution.¹⁶⁵

suffrage plan was constitutional under the Fifteenth Amendment because "there is not a line or a syllable in the majority or minority report of the Committee on Suffrage which undertakes to say, or which pretends to say that there will be any restriction of the privilege of suffrage on account of race, color or previous condition of servitude," 2 *id.* at 1762, taking this language out might be looked to by the U.S. Supreme Court as evidence that their intentions were indeed racially motivated and thus unconstitutional. But Mr. Pettus argued that he hoped that one day the Fifteenth Amendment would be repealed and if so he did not want "our hands shackled" as to regulating the privilege of suffrage by the State Constitution. 2 *id.* at 1761.

162. As this examination of the text of former section 2 and the relevant 1901 Convention debates suggests, Justice Houston's proposal that the constitution now be amended to include the language of section 2 of the 1875 Constitution is unobjectionable though unnecessary insofar as it would add additional express equality guarantees. However, one could argue that we would still lack an "express" "equal protection" clause, if by that one means language identical to that of the Fourteenth Amendment's Equal Protection Clause. And the language of section 2's recognition of the equal political and civil rights of all citizens of the state is narrower than that of the equal protection clause which refers to "any person within its jurisdiction."

By purporting to confer state citizenship, and accompanying equal civil and political rights on all foreigners who have legally declared their intent to become U.S. citizens, however, his proposed amendment would reopen questions about the meaning of state citizenship and political rights under our state constitution and, if adopted, would undoubtedly face challenges under the federal Constitution.

163. *McLendon v. State*, 60 So. 392, 404-05 (Ala. 1912). For further discussion of majority and dissenting opinions in this case, see Part V, *infra*. The Alabama Supreme Court first addressed the omission of section 2 in *Finklea v. Farish*, 40 So. 366 (Ala. 1908), discussed in Part V *infra* and concluded that the purpose related to concerns about the Legislature's power to impose qualifications for office-holding. Justice Mayfield joined the majority opinion. *Id.* at 369.

164. Earlier portions of the dissent include extensive arguments that the 1901 Constitution embodies implied equal protection guarantees as well.

165. *McLendon*, 60 So. at 404-05 (emphasis added). Justice Mayfield was familiar with the controversy that had arisen in the 1901 Convention over the voting rights of foreigners. Three

V. STATE CONSTITUTIONAL EQUAL PROTECTION JURISPRUDENCE

The 1901 convention debates undercut the bald assertion in the *Melof* main opinion that the 1901 framers "agreed" that thereafter the only equal protection guarantee Alabamians would have would be under [an unspecified clause or clauses of] the Fourteenth Amendment. The flaws in the *Melof* main opinion, however, lie not only in its reading of the convention debates on Section 2 but in its disregard for how prior Alabama Supreme Court opinions, especially those written by judges much closer in time to the 1901 Convention, have interpreted both the omission of section 2 and the meaning of the equal protection provisions that *were* included in the 1901 Constitution—particularly section 1 and the due process clauses of sections 6 and 13. A review of key prior cases shows that the main opinion's broad assertion is wrong regardless of the 1901 framers' reasons for omitting section 2.

First, we continue the exploration of the intent of the 1901 framers by discussing several cases in which the Alabama Supreme Court has expressly mentioned the omission of section 2 of the 1875 Constitution. The *Melof* main opinion quotes from one of these opinions, which itself cites to two more, as support for the broad conclusion about the intent underlying this omission. The discussion also includes two other cases that explicitly discuss this history, apparently the earliest cases to do so, and the later case of *State v. Alabama Power*.¹⁶⁶

Next, we turn to a more-or-less chronological presentation of key cases that have been cited in this debate or are relevant to it. We begin with pre-1901 cases under sections 1 or 2 of prior constitutions and then turn to the first cases decided under the 1901 Constitution. We

years earlier, he had authored the court's opinion in *Gardina v. Board of Registrars of Jefferson County*, 48 So. 788 (Ala. 1909), which was unanimous in finding no authority for registering "foreigners who have merely declared their intention to become citizens of the United States since the Constitution of 1901 was ratified, but who have not perfected their naturalization as required, to register or vote in this state, and it is doubtful if the Legislature could so authorize." *Id.* at 790. The preceding portion of this opinion provides further explanation of the Convention's ultimate compromise on the voting rights of foreigners.

It will be observed that the Constitution of 1901, and the election laws thereafter, wrought a complete change in the qualifications of electors and mode of registration as prerequisites to vote. It is also clear that only those foreigners who had declared their intention before the adoption of the Constitution of 1901 could register or vote thereafter, and they must have become citizens at the time they were entitled to become such, else they lost their right to vote or register until they did become citizens.

Id.

Justice Mayfield's opinion notes that former section 2 was not adopted as part of the 1901 Constitution and that it contained no substitute for the former section's citizenship definition. *Id.* at 789-91. For further discussion of this opinion, see Part V *infra*.

166. 48 So. 2d 445 (Ala. 1950).

examine cases decided before *Pickett v. Mathews*¹⁶⁷ in an effort to uncover how section 1, the due process clauses, and other provisions of the 1901 Constitution containing express or implied equal protection guarantees were viewed prior to 1939 (and thus before any possible "contamination" due to the purportedly erroneous unofficial annotation to that case). Then we examine the opinion in *Pickett v. Mathews* itself followed by the 1977 decisions in *Jiffy Chek*¹⁶⁸ and *Peddy*,¹⁶⁹ in which Justice Houston contends the erroneous annotation to *Pickett* made its way into the court's opinions. After more closely examining *Peddy*, we describe some of the post-1977 cases that rely upon the concept of various sections of the 1901 Constitution combining to form an equal protection guarantee. We end this discussion of pre-*Melof* equal protection jurisprudence by examining some illustrative post-*Peddy* opinions, including some that are apparently "uncontaminated" by that decision. Some of these cases refer to section 1 standing alone (and another relies on section 1 in conjunction with section 35) as grounds for state equal protection claims; another case uses state due process alone as a source of equal protection rights.

Just as the previous section included sometimes lengthy excerpts from the 1901 convention debates, this case review includes lengthier excerpts from key opinions than is typical. We do this in order to enable readers to better assess for themselves the significance of these cases and their potential use in future state equal protection litigation.

This case review demonstrates that from the 1819 Constitution forward,¹⁷⁰ the Alabama Supreme Court has interpreted the differing versions of section 1 of the Declaration of Rights as containing equal protection guarantees. In addition, at times, state due process clauses or section 1 along with some combination of clauses 6, 13, 22, 29, and 35 have been relied upon as combining to form express or implied equal protection guarantees.

The historical nature of this review also lays bare the record of how, over time, those who have been able to invoke the aid of the bar and judiciary of this state to claim their rights under these provisions have changed. Alabama's 1819 Constitution was remarkable for its time in its broad guarantee of equal rights to all "freemen" and its embrace of "universal" white male suffrage.¹⁷¹ The Alabama Supreme Court justices' early pronouncements on equality in *Dorsey's Case*,¹⁷² accu-

167. 192 So. 261 (Ala. 1939).

168. *City of Hueytown v. Jiffy Chek Co. of Ala.*, 342 So. 2d 761 (Ala. 1977).

169. *Montgomery v. Peddy*, 355 So. 2d 698 (Ala. 1978).

170. We have found no cases, however, construing the admittedly weakened language of section 1 of the short-lived 1865 Constitution.

171. MCMILLAN, *supra* note 10, at 35; ROGERS, *supra* note 11, at 69; Flynt, *supra* note 144.

172. 7 Port. 293 (1838).

rately reflected the implicit and explicit premises of equality of this first constitution. The early post-Civil War period produced judicial opinions under the 1868 Alabama Constitution's equality provisions that afforded protection against race and sex discrimination.

The Alabama Constitution's equality guarantees continued to be a fertile field for judicial opinions under the 1875 Constitution and 1901 Constitution. But after 1875, the cases have a different flavor; those most successful in resorting to these guarantees are frequently railroads and other corporate or commercial interests. The Alabama Supreme Court rejects claims of racial discrimination and reverses its earlier case striking down a state law punishing interracial adultery more harshly than same-race adultery. For a large part of the 1900s, the record is similar. The court's active consideration of equal protection claims under one or more of the 1901 Constitution's equality guarantees is generally invoked and afforded in cases dealing with general social and economic regulations. It is not until later that the Alabama Supreme Court again starts to render decisions enforcing the constitution's equality guarantees against race¹⁷³ and sex discrimination¹⁷⁴ and decisions extending their protection to tort victims. And it is not until 1991, that the ongoing debate over the existence of state equal protection guarantees begins.¹⁷⁵

A. Cases Addressing the Purpose or Effect of the Omission of Former Section 2

Justice Sayre's 1908 opinion for the court in *Finklea v. Farish*¹⁷⁶ contains the first judicial discussion found of the omission of section 2. At issue in *Finklea* was a challenge to legislation prescribing qualifications for office. As Justice Sayre described the issue:

[T]he contention is that the Legislature cannot add to the general qualifications for holding office [in Section 60 of the 1901 Constitution]. The theory of this contention is that eligibil-

173. See *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987); *Ex parte Jackson*, 516 So. 2d 768 (Ala. 1986). Perhaps the most egregious example of the persistence of the failure to extend equal protection to all Alabamians is the Alabama Supreme Court's rejection of challenges to Alabama's law allowing our elected trial judges to overrule a jury's determination that a defendant should be sentenced to life imprisonment and instead impose the death penalty. The court has recently interpreted the statute to require that judges state their reasons for exercising such overrides but trial judges still exercise virtually standardless discretion in imposing the ultimate sanction on another human being. See, e.g., *Ex parte Taylor*, 2001 Ala. LEXIS 62 (2001).

174. See *Montgomery v. Peddy*, 355 So. 2d 698 (Ala. 1978); *Parker v. Hall*, 362 So. 2d 875 (Ala. 1978).

175. See *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 174-78 (Ala. 1991) (Houston, J., concurring in the result).

176. 49 So. 366 (Ala. 1909).

ity to office belongs to all persons not excluded by the Constitution as an attribute of citizenship, and therefore the Legislature cannot impose any general qualification which the Constitution does not require. [Cases from other jurisdictions] and our own cases of *Kentz v. Mobile*, (citations omitted) and *Dorsey's Case* (citations omitted) sustain the general aspect of the argument. But this court has for long stood by the doctrine that the Constitution is not the source of legislative power, and there are no limits to the legislative power of the state government save such as are written upon the pages of its Constitution.¹⁷⁷

Justice Sayre noted that, unlike the 1875 Constitution which had a single section defining those ineligible to register, vote, or hold office (which included those convicted of treason, embezzlement of public funds, malfeasance in office, larceny, bribery or other crimes punishable by imprisonment in the penitentiary, and "[t]hose who are idiots or insane"),¹⁷⁸ the 1901 Constitution addressed eligibility to register and vote in section 182 and its sole provision governing eligibility to hold office was section 60: "No person convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to the Legislature, or capable of holding any office of trust or profit in this state."¹⁷⁹ Accordingly, he concluded:

These adjunctive changes made, the omission by the framers of the Constitution of 1901 to carry forward a section of like nature as section 2 of the Bill of Rights of 1875 and similar sections in previous Constitutions, evinced a purpose to change the policy of the state, to avoid the implications adjudged to arise out of such sections in *Dorsey's Case* and in *Kentz v. Mobile*, *supra*, to leave the general qualifications for office—other than those enumerated in section 60—to the discretion and determination of the Legislature.¹⁸⁰

The *Finklea* majority's assumption about the 1901 Convention's purpose in omitting section 2 provides no support for an argument that the delegates intended to rid the state constitution of equal protection guarantees. The focus is on the extreme limitations on legislative power related to imposing qualifications for office holding that the two earlier opinions cited had derived from section 1 of the 1819 Constitution and section 2 of the 1875 Constitution, respectively. Thus, *Finklea* provides no support for the view that the 1901 framers meant to leave Alabam-

177. *Finklea*, 49 So. at 367.

178. *Id.*

179. *Id.* at 368.

180. *Id.*

ians to look solely to the Fourteenth Amendment for any guarantee of equal protection. It is noteworthy that Justice Mayfield joined the court's opinion in *Finklea*.¹⁸¹

The following year, the court again discussed the omission of the language of section 2 of the 1875 Constitution from the 1901 Constitution. In *Gardina v. Board of Registrars of Jefferson County*, Justice Mayfield wrote the opinion in which the court unanimously agreed that no authority existed for registering "foreigners who have merely declared their intention to become citizens of the United States since the Constitution of 1901 was ratified, but who have not perfected their naturalization as required, to register or vote in this state, and it is doubtful if the Legislature could so authorize."¹⁸² Justice Mayfield's opinion makes the following observation about the omission of section 2:

It will be observed that section 2, art. 1, of the Constitution of 1875, defined or prescribed who were citizens of this state, and that appellant would be a citizen under that section; but it also appears that that section was not embraced in, or adopted as a part of, the Constitution of 1901, and there is no substitute for it in the new Constitution.¹⁸³

181. *Id.* at 369.

182. *Gardina v. Bd. of Registrars of Jefferson County*, 160 Ala. 155, 160 (1909). For further discussion of this case, see Part IV, *supra*.

183. *Gardina*, 160 Ala. at 160-61. The opinion continued:

We must, therefore, resort to other sources for a definition of "citizen of this state." The word "citizen" has come to us from the Roman law. In Roman law it designated a person who had the freedom of the city of Rome and could exercise the political and civil privileges of the Roman government. 2 Kent, Com. p. 76, note. It was both an honor and a sacred privilege to be a Roman citizen. Paul, the great Apostle of the Gentiles, claimed and asserted the right of a Roman citizen when apprehended in Jerusalem. The chief captain answered him: "With a great sum obtained I this freedom but Paul said, 'I was free born.'" Again this great Apostle is heard to say: "I am a man which am a Jew, of Tarsus, a city in Cilicia, a citizen of no mean city." Citizenship has always been regarded as the most sacred right or privilege that the sovereign can confer. Mr. Webster defines "citizen" as "a person, native or naturalized, who has the privilege of voting for public officers and who is qualified to fill public offices in the gift of the people; also either native-born or naturalized persons who are entitled to full participation in the exercise and enjoyment of so-called private rights." Bouvier says a citizen, in American law, is one who, under the Constitution and law of the United States, has a right to vote for Representatives in Congress and other public officers and who is qualified to fill offices in the gift of the people; that all persons, born or naturalized, in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.

The Supreme Court of Nebraska has held that "citizen," as used in that Constitution, relative to the right to hold office, means a person who is an American citizen by birth or a person of foreign birth who has been naturalized. *State v. Boyd*, 31 Neb. 682, 48 N.W. 739, 51 N.W. 602. The Constitution of the United States provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." Const. Amend. 14. Congress of the United States has exclusive power to provide for naturalization,

Not surprisingly given his own strong views to the contrary as expressed shortly thereafter in the case that follows, Justice Mayfield's opinion for the court in *Gardina* lends no support for the contention that the omission of the former section 2 left the 1901 Constitution without equal protection guarantees.

McLendon v. State,¹⁸⁴ the primary case cited in the 1949 *Opinion of the Justices* that Justice Houston relies upon in *Melof* for his explanation of the omission of section 2,¹⁸⁵ also fails to support his extreme position. In *McLendon*, the court answered a certified question from the Alabama Court of Appeals asking whether a statute that exempted Confederate veterans from an occupational tax placed on certain professions violated the state or federal constitutions.¹⁸⁶ As Justice See pointed out in his *Melof* special concurrence, the majority opinion by Justice Somerville assumes the continuation of equal protection guarantees under the 1901 Constitution.¹⁸⁷ The majority held that the law did not violate of any of the state constitutional provisions it had considered.¹⁸⁸ Justice Somerville's opinion quotes former section 2, finding it noteworthy that it was dropped and stating that "such a declaration might well be regarded as forbidding any valuable immunity to Confederate veterans of the Civil War which is denied to veterans of that war in general."¹⁸⁹ Importantly, his majority opinion acknowledges prior Alabama Supreme Court opinions before and after 1901 holding that unreasonable discriminations in privilege taxes "might invade some of the general constitutional limitations above quoted"—and sections, 1, 6,

and is required to establish a uniform rule for all states, though it may provide for naturalization to be acquired by and through state courts. Constitution U. S. art. 1, §8, sub. 4. Naturalization is therefore a national right and privilege, rather than a matter of state concern. *Scott v. Strobach*, 49 Ala. 490.

There are, then, under our republican form of government, two classes of citizens, one of the United States and one of the state. One class of citizenship may exist in a person, without the other, as in the case of a resident of the District of Columbia; but both classes usually exist in the same person. The federal Constitution, by this amendment, has undertaken to say who shall be citizens both of the states and United States. Prior to this amendment, the states could probably have determined, respectively, who were citizens of each, though naturalization has been exclusively a national subject, rather than a state, since the federal Constitution was first adopted. Consequently we find no authority, state or national, for registering appellant as an elector of this state.

The judgment of the lower court is affirmed.

Id. at 161-62.

184. 60 So. 392 (Ala. 1912).

185. *Melof*, 735 So. 2d at 1185.

186. *McLendon*, 60 So. at 392.

187. *Melof*, 735 So. 2d at 1192 (See, J., concurring specially) (quoting the following language from *McLendon*, "Whilst there is no provision of the Constitution [of Alabama], commanding in terms equality and uniformity, the principle should underlie and regulate the provisions of every law imposing public burdens and charges . . .").

188. *McLendon*, 60 So. at 393.

189. *Id.*

22, 29, and 35 were among those limitations so quoted.¹⁹⁰ The text of the majority opinion relating to the state constitutional claims includes the following comments:

We are aware that in *Montgomery v. Kelly*, 142 Ala. 552, 38 South. 67, 70 L. R. A. 209, it was in effect held that unreasonable discriminations in the imposition of privilege or occupation taxes might invade some of the general constitutional limitations above quoted, although not forbidden by sections 211 and 217. And this principle seems to have found express recognition in earlier cases, also. *Phoenix Carpet Co. v. State*, 118 Ala. 151, 152, 22 South. 627, 72 Am. St. Rep. 143; *Phoenix Ass. Co. v. Fire Department*, 117 Ala. 631, 653, 23 South. 843, 42 L. R. A. 468; *W. U. Tel. Co. v. State Board*, 80 Ala. 273, 280, 60 Am. Rep. 99. In the last cited case it was said: "Whilst there is no provision of the Constitution, commanding in terms equality and uniformity, the principle should underlie and regulate the provisions of every law imposing public burdens and charges. * * * The requirement is complied with, when the tax is levied equally and uniformly on all subjects of the same class and kind." And again in *Phoenix Carpet Co. v. State*, supra, it was said: "We may concede that when a tax is imposed on avocations, or privileges, or on the franchises of corporations, it must be equal and uniform. The equality and uniformity consists in the imposition of the like tax upon all who engage in the avocation, or who may exercise the privilege taxed."

Nevertheless, while recognizing this general limitation on the Legislature with respect to these forms of taxation, we are unable to clearly see that the exemption of Confederate veterans from the payment of this occupation tax, as here provided for, is inconsistent with that principle, or in violation of any of the general provisions of the Bill of Rights. Section 2 of the Bill of Rights in the Constitution of 1875 provided: "That all persons resident in this state, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the state of Alabama, possessing equal civil and political rights." It is noteworthy that this section was dropped from the Constitution of 1901; for such a declaration might well be regarded as forbidding any valuable immunity to Confederate veterans of the Civil War which is denied to veterans of that war in general, even conceding that veterans in general (that is, both Confederate and Union) might be thus marked for favor.

190. *Id.*

In the conclusion above stated all the Justices concur, except MAYFIELD, J., who dissents in a separate opinion.¹⁹¹

In his dissent, Justice Mayfield suggested that the majority had allowed its veneration for Confederate veterans to influence its determination that the exemption was consistent with the state constitution.¹⁹² His opinion specifically referred to sections 1 and 22 as constitutional provisions that prohibited the exemption:

Our Constitution ordains and declares, among other things: "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness" That no law shall be passed, conferring any "special privileges or immunities." Const. § 22. If a statute denies to one man the right to practice medicine or law without paying a privilege or license tax, but allows another man to practice such profession or business without a license or tax, are those two "men equally free and independent"? Has their equal pursuit of happiness not been denied? Does the statute which attempts to make this discrimination not confer special privileges or immunities? If it does not, I submit it is difficult to suppose one that would violate these provisions.¹⁹³

191. *McLendon*, 60 So. at 392-93. While the majority might be able, as Justice Mayfield asserted, to favor Confederate over Union veterans even at the expense of state constitutional precedent, they arguably knew, given similar cases that already had been decided, that federal courts would not tolerate such favoritism of Confederate veterans under the Fourteenth Amendment. *Id.* at 394. Thus a majority of the seven justices—including Justice Mayfield and three of the six judges who joined Justice Somerville's opinion on the state constitutional claims—found the exemption in the law was in violation of the Fourteenth Amendment. *Id.* at 393. In the end, all the justices except Justice Simpson concurred that the exemption could not be severed from the statute without invading legislative prerogatives.

192. Justice Mayfield began this dissent by acknowledging the difficulty of the case for him:

I regret that I cannot concur in the conclusion upholding the statute in question. Two things make this action of mine in dissenting painful. One, the necessity of disagreeing with the majority of my Brothers; the other, that my views of the law deprive the Confederate veterans of a privilege or immunity which the Legislature has attempted to bestow upon them. I yield to no one in respect for the opinion of my Brothers, nor in veneration or love for the Confederate soldier. If this were a question of policy or philanthropy, I could gladly concur in the conclusion of my Brothers in upholding this statute, which attempts to exempt the Confederate soldier from a privilege tax, and to so exempt him for no other reason than that he is a Confederate soldier. But the question is not one of state policy, nor one of general or local philanthropy. It is a question purely of constitutional limitation and legislative competency.

Id. at 394 (Mayfield, J., dissenting).

193. *Id.* at 402. Mayfield also articulated his position on equality under the 1901 Constitution in other decisions. Writing for a majority in *Ex parte Rhodes*, 79 So. 462 (Ala. 1918), Mayfield offered a vigorous declaration of the express and implied rights afforded and protected by the 1901 Constitution:

As previously noted, Justice Mayfield's dissenting opinion also rejects any suggestion that the exclusion of section 2 as contained in the 1875 Constitution expunged equal protection guarantees from the 1901 Constitution, or that this was the intent of any of the 1901 delegates.

The somewhat more recent authority that Justice Houston quotes from to support his view that there is no equal protection guarantee in the Alabama Constitution is a 1949 advisory opinion—or more precisely, a refusal to give one. *Opinion of the Justices No. 102*¹⁹⁴ is the justices' response to a Senate request for an advisory opinion on the constitutionality of a proposed amendment to the definition of employers in the state unemployment compensation law. The justices replied:

So, your inquiry is substantially this: Does this classification violate the due process clause of § 6 of the state constitution? We point out that there is no equal protection clause in the Constitution of 1901. The equal protection clause of the Consti-

When the people of this state, through their representatives, met in convention to form this state government, they reserved to themselves and their descendants and successors certain rights, liberties, privileges, and immunities . . . They also exacted guaranties of the government so formed to protect each person in the state, and secure to him the enjoyment and exercise of these rights, liberties, privileges, and immunities, so reserved against encroachment or destruction thereof by other persons, whether majorities or minorities of the whole, or officers of any department of the government itself. Some, but not all, of these rights, liberties, privileges, and immunities, are enumerated in the Bill of Rights, which comprises the first 36 sections of our Constitution.

Id. at 463. In the case, Mayfield cited approvingly from *Ex parte Dorsey* for the proposition that certain types of legislative action were prohibited under the Declaration of Rights. *Id.* at 464.

Dissenting, in *State v. Teasley*, 69 So. 723 (Ala. 1915), Justice Mayfield stated the following concerning the authority of the legislature to deny equality to citizens:

I do not believe it to be within legislative competency to arbitrarily deny to certain citizens mere privileges which are enjoyed by others of the same class. This, in my judgment, is the necessary effect of the decision, though not of the opinion. It makes no difference whether the privileges are conferred by natural, civil, common, constitutional, or statutory law; they cannot be taken arbitrarily from certain individuals, if others of the same class are allowed to enjoy them, without violating the constitution. Ours is "a government of laws, and not of men." I am, therefore, of the opinion that if the provisions of the act here in question are held to be lawful provisions, and to be retroactive, then four citizens of this state are deprived arbitrarily of rights, and denied privileges, which are enjoyed by all other citizens of the same class.

I do not doubt, much less deny, the power of the Legislature to fix any reasonable qualifications upon the privilege of holding office, and to deny the privilege to any citizen who does not possess the qualifications so fixed; but I do deny the power of the Legislature to take arbitrarily from certain individuals privileges enjoyed by others of the same class. I do not believe that an act of the Legislature, attempting so to do, is made valid by a classification of the citizens which did not then, never did, and never can, apply to any other citizens than those intended to be discriminated against. Such I believe is the effect, if not the purpose, of the provisions of the act in question.

Id. at 729-30 (Mayfield, J., dissenting).

194. 41 So. 2d 775 (Ala. 1949).

tution of 1875 was dropped from the Constitution of 1901.—*Hamilton v. Adkins*, 250 Ala. 557, 35 So.2d 183; *McLendon v. State*, 179 Ala. 54, 58, 60 So. 392, Ann.Cas.1915C, 691. Of course, the due process and equal protection clauses of the Fourteenth Amendment are involved here, although no specific reference is made thereto in your inquiry.

While the due process and equal protection guaranties are not coterminous in their spheres of protection, equality of right is fundamental in both. Each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances.—*Beeland Wholesale Co. v. Kaufman*, 234 Ala. 249, 174 So. 516; *Washington Nat. Ins. Co. v. Board of Review*, N.J., 64 A.2d 443. It is essential that the classification itself be reasonable and not arbitrary, and be based upon material and substantial distinctions and differences reasonably related to the subject matter of the legislation or considerations of policy, and that there be uniformity within the class.—*Washington Nat. Ins. Co. v. Board of Review*, *supra*.

What is the reason for this classification? What is the rational basis for the distinction which the proposed bill makes between industrial employers? Why should there be one standard for contractors, builders, and subcontractors and another standard for all other industrial employers? We have before us no information upon which to base an answer to these questions. While good faith and a knowledge of existing conditions on the part of the legislature are to be presumed, yet we do not think it well to advise as to the validity of the proposed bill upon a presumption when the bill upon its face appears to be discriminatory. With no recital in the proposed bill to show that the classification is reasonable and not arbitrary and no facts called to our attention or which we judicially know to show that the classification is reasonable and based on a rational basis, we feel that your inquiry should not be categorically answered in response to this request for an advisory opinion.¹⁹⁵

The justices' letter to the Senate falls short of saying, much less holding, that there are no state equal protection guarantees in the 1901 Constitution and indeed suggests the opposite. Justice Houston has argued that the justices' comment on the relationship between equal protection and due process refers to the Equal Protection Clause of the United States Constitution and not to the Alabama Constitution.¹⁹⁶ But the reason for discussing the relationship between these clauses seems

195. *Opinion of the Justices*, 41 So. 2d at 775-77.

196. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 174 n.10 (Ala. 1991) (Houston, J., disagreeing with the rationale of the Court's opinion but concurring in the result).

to be the justices' prior comment that there is no state "equal protection clause." And the citation to *Beeland Wholesale v. Kaufman*¹⁹⁷ reinforces this explanation because, as will be discussed further below, that case (written by Justice Foster just two years before his opinion in *Pickett*) involved both a due process claim under section 6 of the Alabama Constitution and a claim under the Fourteenth Amendment Equal Protection Clause.

The justices' 1949 advisory opinion also cites *McLendon*, discussed above, and *Hamilton v. Adkins*,¹⁹⁸ which had been decided the previous year. In *Hamilton v. Adkins*, Justice Stakely's opinion for the court reviewed both federal and state constitutional challenges to an increase in property tax assessments. After rejecting the federal equal protection claim, Justice Stakely's opinion turned to address state claims, including arguments that the increase violated the tax uniformity provisions of sections 211 and 217 of the 1901 Constitution. In discussing, and ultimately rejecting, these claims he stated:

But for the sake of the record it is a mistake to think that these sections are exactly equivalent to an equal protection clause. The equal protection clause in the Constitution of 1875 was dropped from the Constitution of 1901. *McLendon v. State*, 179 Ala. 54 (58), 60 So. 392, Ann. Cas. 1915C, 691. In other words the right of any of the appellees to be protected against discrimination under the state constitution must be rested on lack of due process and the general idea of uniformity rather than on an express provision for equal protection. *McLendon v. State, supra*.

. . . .
To sum up the situation, the effect of the equal protection clause of the Federal Constitution and state uniformity requirements are substantially similar and what violates the one will contravene the other.¹⁹⁹

The final case included in this subsection is Justice Stakely's opinion for the court in *State v. Alabama Power Co.*,²⁰⁰ decided the year after the advisory opinion discussed above and two years after the opinion in *Hamilton v. Adkins*. *Alabama Power* was an appeal from a decree overruling a demurrer of the State to a bill in the nature of a bill of equity. Thus the court initially noted that the only issue before it was the legal one of the sufficiency of the bill to make out a case for re-

197. 174 So. 516 (Ala. 1937).

198. 35 So. 2d 183 (Ala. 1948).

199. *Adkins*, 35 So. 2d at 188-89 (citations omitted).

200. 48 So. 2d 445 (Ala. 1950).

lief.²⁰¹ Alabama Power challenged tax code provisions that assessed its property at a ratio of 60% of its taxable value while assessing the property of others at only 40% of its taxable value. It raised state constitutional claims based on sections 211 and 217, regarding property tax uniformity, and on sections 6, 13, and 35 of the Declaration of Rights and also raised federal constitutional claims under the Fourteenth Amendment's Due Process and Equal Protection Clauses. Justice Stakely's opinion for the court discussed the relationship between these federal and state claims in the following excerpt:

The state insists that §§ 211 and 217, which together with the due process clauses afford the equivalent of the equal protection to taxpayers, *Hamilton v. Adkins*, *supra*, must be tested by the rules applicable to the 14th Amendment to the Federal Constitution. This is not correct. In about eight states [FN1 omitted] the state constitutions specifically authorize classification and assessment of different types of property and different rates of taxation to be applied thereto. For example the Constitution of West Virginia provides four separate classifications and four rates of taxation and California provides for different classification. It seems that in these states there can be systematic and intentional classification of different types of property and different rates of taxation. In these states it appears that there is no violation of the respective state constitutions nor is there a violation of the equal protection clause of the 14th Amendment. Authorities from these states cannot be regarded as persuasive here.

The Supreme Court of the United States has held that the equal protection clause of the 14th Amendment is not nearly so narrow or "cramping" as state constitutions.

So decisions of the Supreme Court of the United States recognize that provisions of state constitutions as to equality and uniformity can be and often are more restrictive in their requirements than is the equal protection clause of the 14th Amendment. While the latter is not necessarily violated by classification, a state constitution such as that of Alabama is violated by classification for tax assessment purposes unless there is uniformity and equality among all taxpayers, "private corporations, associations and individuals alike," both as to ratio and percentage of taxation and also as to rate of taxation. Accordingly it is not correct to say that the Alabama Constitution which requires equality and uniformity in tax assessments and tax rates is as flexible and broad as the equal protection clause

201. *Alabama Power*, 48 So. 2d at 451-52.

of the 14th Amendment.

There is nothing in the decision of this court in *Hamilton v. Adkins*, 250 Ala. 557, 35 So.2d 183, which is contrary to what has here been said. The court in that case was calling attention to the omission in the Constitution of 1901 of the equal protection clause of the Constitution of 1875, Art. 1, § 2, as follows: "That all persons resident in this state, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights."

However, despite the omission of the foregoing clause from the Constitution of 1901, we said in substance that the due process clause coupled with §§ 211 and 217 afforded the equivalent of equal protection to a taxpayer to have his tax assessment uniform and equal with other taxpayers and not to be discriminated against by systematic or intentional assessment. The question of classification which we are considering now was not before the court in that case. However if any inference can be drawn from that opinion contrary to what is here said, that opinion is hereby corrected to conform hereto.²⁰²

After further pointing out that an amendment to the state constitution had been deemed necessary to authorize the imposition of a graduated income tax, the court held that Alabama Power had made out a case for relief.²⁰³

In short, none of the cases referenced in the *Melof* main opinion, and none of these additional cases discussing the purpose or effect of the 1901 convention's omission of the language of section 2 of the 1875 Constitution, hold that the 1901 convention either intended to remove, or was successful in removing, all equal protection guarantees from the 1901 Constitution.

B. Pre-1901 Cases

We now turn to a period-based review of Alabama equality jurisprudence. As previously discussed, though the language of some of the state constitution's equality guarantees has remained virtually identical since 1819, the language of other such sections has differed over time. Pre-1901 opinions provide an important background for understanding later opinions which interpret the 1901 Declaration of Rights as carrying forward equal protection doctrine forged in these early cases. As we will see, despite language changes—including those in the phrasing

202. *Id.*

203. *Id.* at 458.

of section 1—the Alabama Supreme Court has consistently interpreted section 1 and several other sections of the 1901 Constitution, separately or collectively, as containing equal protection guarantees. These early cases are also important because they begin to illustrate the changing nature of the persons and interests afforded protection under state equality provisions in different periods.

1. *Cases Decided Under the 1819 and 1868 Constitutions*

The leading equal protection case under the 1819 Alabama Constitution is *Dorsey's Case*,²⁰⁴ which relied both on the concept of equal protection as implicit in our form of government and on section 1 of our first state constitution. The case declared unconstitutional an 1828 statute referred to as the “dueling act”²⁰⁵ that required all legislators, public officers, and attorneys to take a retrospective and prospective oath with respect to engaging in or aiding and abetting dueling. The justices delivered their opinions seriatim but the opinion of Justice Goldthwaithe is the one that has been most frequently cited in subsequent cases. He declared:

The first section of the declaration of rights, announces the great principle which is the distinctive feature of our government, and which makes it to differ from all others of ancient or modern times: “All freemen, when they form a social compact, are equal in rights, and no man, or set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services.” This is no empty parade of words: it means, and was intended to guarantee to each citizen, all the rights or privileges which any other citizen can enjoy or possess. Thus, every one has the same right to aspire to office, or to pursue any avocation of business or pleasure, which any other can. As this general equality is thus expressly asserted and guaranteed as one of the fundamental rights of each citizen, it would seem to be clear, that the power to destroy this equality must be expressly given, or arise by clear implication, or it can have no legal existence. Such, indeed, we find to be the case, in the instances which have been quoted from the constitution. Wherever no qualification is prescribed as a condition for office or station, the door is open to every citizen; and wherever power is given to exclude, it specifies, with much precision, the cases in which it may be exercised. This view of the case, does not detract from the legislative power, to prescribe qualifications to be possessed, before any avocation or business can be

204. *In re Dorsey*, 7 Port. 293 (Ala. 1838).

205. *Dorsey*, 7 Port. at 295.

pursued, so long as the qualifications can be attained by all. If otherwise, if any citizen is disqualified from the pursuit of any avocation or business, which any other citizen can pursue, an immediate and direct inequality is produced, which, to be legal, must, in my opinion, find its warrant in some express grant of power. It will be conceded, that in all the cases where qualifications are prescribed by the constitution, none other can be imposed by law: thus, an elector, otherwise qualified, cannot be required to possess a freehold or other estate. As the constitution is silent with respect to the pursuits of business or pleasure, the general assembly has the power to prescribe any qualifications, not inconsistent with the rule, that equality of right must be preserved: in other words, that any citizen may lawfully do what is permitted to any other. It rests with the legislative power, to prescribe the conditions on which any avocation or calling shall be pursued, so that the door is closed to none; and there seems to be no other limit to their discretion, than the one which arises from the first section of the declaration of rights, before adverted to. . . .²⁰⁶

In the early 1870s, a trilogy of early opinions discussing sex equality were written by (later Chief) Justice Thomas Minott Peters,²⁰⁷ who had himself been a member of the 1867 Constitutional Convention that drafted and approved sections 1 and 2 of the 1868 Constitution. Justice Peters' opinions in these cases rely alternatively on both sections 1 and 2 as providing equal protection guarantees for women.

The first of these cases, *Goree v. Walthall*²⁰⁸ and *O'Neal v. Robinson*,²⁰⁹ are important from a gender equality perspective because they establish that the reference to "men" in section 1 of the 1868 Constitution includes women. They are even more important from a general equality perspective because they illustrate that section 1 was understood as a guarantee of equality rights. In discussing married women's property rights in *Goree*, Justice Peters wrote:

Then the wife may acquire property just as the husband may acquire property, except in the single manner forbidden in the statute. In this she stands on an equal footing with him. She is his equal and his peer. The law so intends it The statute is made for her protection and assistance, and not to cumber her

206. *Dorsey*, 7 Port. at 360-62.

207. During the Civil War, Peters proved an "ardent and uncompromising friend of the Union." THOMAS MCADORY OWEN, HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA BIOGRAPHY 1349 (1978). He served as a member of the Alabama Supreme Court from 1868-1874. *Id.*

208. 44 Ala. 161, 164 (1870).

209. 45 Ala. 526, 534 (1871), *overruled in part by* *Weil v. Pope*, 53 Ala. 585 (1875).

with inabilities, as at common law. The statutes of this State clothe the wife with the great, inalienable right to own and hold property, as any other reasonable human being may do, under the limitations imposed by law.—Const. Ala. 1867, art.I, § 1.²¹⁰

In *O'Neal*, decided the following year, which also dealt with issues of married women's property rights, Justice Peters wrote:

[A]t the present day our fundamental law has changed the institutions of this country from "the old law" to a new basis more in conformity with humanity and a purer sense of right. According to our constitution, "All men are created equal;" and the word "man" includes persons of both sexes. Then, the wife is the peer and equal of the husband in all her great rights of life, liberty, and the pursuit of happiness.—Const. Ala. 1867, Art. I, § 1; Rev. Code § 1; Const. U.S. XIV Amend. § 1. And to protect her in these important rights, the statute [sic] [governing the statutory separate estate of the wife] under discussion was enacted.²¹¹

The third case in this series of early sex equality cases, *Fulgham v. State*,²¹² deals with an appeal from a criminal conviction of a husband for assault and battery upon his wife, in which the judge denied the

210. *Goree*, 44 Ala. at 164.

211. *O'Neal*, 45 Ala. at 534. Although not referred to in this opinion, provisions regarding married women's property rights in the 1868 Constitution appear to be the first explicit constitutional mention of women's rights in Alabama. Writing for the Court in *Holt v. Agnew*, 67 Ala. 360 (1880), Chief Justice Brickell explained this aspect of the 1868 and 1875 Constitutions as follows:

For twenty years before the present provision was introduced into the constitution, the statutes had enlarged the capacity of married women to take and hold property, and had abrogated the common law rights of the husband to the estate, real or personal, of the wife. The purpose of the constitution was the prevention by legislative enactment of a restoration of the common law, and the preservation of the enlarged capacity of the wife.

Holt, 67 Ala. at 365.

For fuller discussion of the history of Alabama women's rights generally, see Marjorie Fine Knowles, *The Legal Status of Women in Alabama II: A Crazy Quilt Restitched*, 33 ALA. L. REV. 427 (1982); Marjorie Fine Knowles, *The Legal Status of Women in Alabama: A Crazy Quilt*, 29 ALA. L. REV. 427 (1978); Camille W. Cook, "Why Can't a Woman Be More Like a Man," Or Vice Versa?, 35 ALA. LAW. 409 (1974).

212. 46 Ala. 143 (1871). The reporter's prior history of the case contains the following further description of the facts:

From the bill of exceptions, it appears that the accused was chastising one of his children, when the wife remonstrated, thinking the punishment excessive. The child ran, pursued by the father, and both followed up by the wife. When the wife came up with her husband, he struck her twice on the back with a board, and she returned the blows with a switch. The blows inflicted on the wife made no permanent impression. Both were high tempered, and were emancipated slaves, and were husband and wife.

Fulgham, 46 Ala. at 144.

defendant's request for a jury charge that "a husband can not be convicted of a battery on his wife unless he inflicts a permanent injury, or uses such excessive violence or cruelty as indicates malignity or vindictiveness."²¹³ Justice Peters began by discussing the authority relied upon by the defendant's counsel and continued as follows:

This authority, on the part of the husband, to chastise the wife with rudeness and blows in order to coerce her obedience to his domestic commands, was not admitted in the age of Judge Blackstone . . . *except* among "the lower rank of the people, who were always fond of the old common law," The language of the authority relied on by the learned counsel for the accused, clearly shows that there was a rank of the people excluded from its operation. Such partial laws can not be enforced in this State. The law for one rank is the law for all ranks of the people, without regard to station Therefore, a rod which may be drawn through the wedding ring is not now deemed necessary to teach the wife her duty and subjection to the husband. The husband is therefore not justified or allowed by law to use such a weapon, or any other, for her moderate correction. The wife is not to be considered as the husband's slave. And the privilege, ancient though it be, to beat her with a stick, to pull her hair, choke her, spit in her face or kick her about the floor, or to inflict upon her like indignities, is not now acknowledged by our law. The husband may defend himself, his children, and those relations whom the law permits him to defend, against the violence of the wife. But in person, the wife is entitled to the same protection of the law that the husband can invoke for himself. She is a citizen of the State, and is entitled, in person and in property, to the fullest protection of its laws. Her sex does not degrade her below the rank of the highest in the commonwealth.

. . . .
. . . [T]he constitution has wisely and justly extended the protective power of the State to all its people alike. It [sic] shield is stretched out over the high and the low, the rich and the poor, the strong and the weak, the wise and the simple, the learned and the unlearned, and the good and the bad, without distinction of rank, caste or sex. All stand upon the same footing before the law, "as citizens of Alabama, possessing equal civil and political rights and public privileges." And no special "privilege" to any rank of the people is allowed to exist in this State, because such a privilege is forbidden by the fundamental

213. *Id.*

law.—Const. Ala. 1867, Art. I, §§ 2, 32.²¹⁴

These early opinions treat both sections 1 and 2, as well as section 32, of the 1868 Constitution as containing equal protection guarantees. Section 32 of that constitution provided:

That no title of nobility, or hereditary distinction, privilege, honor, or emolument, shall ever be granted or conferred in this State; that no property qualification shall be necessary to the election to, or holding of, any office in this State, and that no office shall be created, the appointment to which shall be for a longer time than during good behavior.²¹⁵

Except for its addition of the clause prohibiting property qualifications for office,²¹⁶ this language has been included in the Declaration of all six of Alabama's constitutions. It is included as section 29 of the 1901 Constitution.

During this post-war period, the court also relied on section 2 of the 1868 Constitution to strike down a law prohibiting interracial marriages.²¹⁷ In *Burns v. State*,²¹⁸ the court reviewed the conviction of a

214. *Id.* at 145-47 (citations omitted).

215. ALA. CONST. of 1868, art. I, § 32.

216. Article I, section 38 of the 1875 Constitution provided: "No educational or property qualification for suffrage or office, nor any restraint upon the same on account of race, color, or previous condition of servitude, shall be made by law."

217. In 1868, the Alabama Supreme Court had rejected a challenge to this same provision (in a case alleging adultery rather than intermarriage) as inconsistent with the federal Civil Rights Act of 1866 in *Ellis v. State*, 42 Ala. 525 (1868). The case was an appeal from the criminal conviction of Thornton Ellis, described as "a negro, descended of negro ancestors" and Susan Bishop, described as a white woman, for living together in adultery or fornication. *Id.* They were convicted under the law prohibiting inter-racial marriage or adultery that carried a penalty of two to seven years in the state penitentiary or at hard labor. *Id.* The circuit court, however, had allowed the jury to assess a fine of \$100 against each of them. *Id.* at 526. This would have been permissible under the general law prohibiting adultery or fornication, which provided for a fine of not less than \$100 and the possibility of imprisonment or hard labor for six months for first offenses. *Id.* Justice Walker's opinion for the Court surmised that:

The course pursued in the circuit court probably originated from the belief that § 3602 was invalid because it prescribes a punishment for adultery by the conjunction of a negro and white person, different from that which is prescribed for adultery in other cases. The invalidity of the section was, we conclude, attributed to its supposed inconsistency with the act of congress of 9th April, 1866, entitled "an act to protect all persons in the United States in their civil rights, and furnish the means of their vindication." U.S. Stat. at Large, 27.

. . . .

We think the court erred in the conclusion that Sec. 3602 contravenes the act of Congress Adultery between persons of different races is the same crime as to white persons and negroes, and subject to the same punishment. There are many statutes which make the status of a person an element of an offense. Our laws, on the subject of gaming with minors and apprentices, and of selling liquor to them, are some of the many examples of such legislation.—Revised Code, §§ 3624, 3619.

Ellis, 42 Ala. at 526-27. The Court reversed the judgment and remanded based on "the error as to the punishment imposed in the circuit court." *Id.* at 527.

justice of the peace for "solemnizing the rites of matrimony between a white person and a negro."²¹⁹ On appeal, Burns argued that the Code provisions he was convicted under were rendered invalid by the Civil Rights Act of 1866 and also that these provisions violated both state and federal constitutions. Justice Saffold's opinion for the court agreed:

In *Ellis v. The State*, (42 Ala. 525,) it was held that there is no conflict between this act and the sections of the Revised Code referred to.

Marriage is a civil contract, and in that character alone is dealt with by the municipal law. The same right to make a contract as is enjoyed by white citizens, means the right to make any contract which a white citizen may make. The law intended to destroy the distinctions of race and color in respect to the rights secured by it. It did not aim to create merely an equality of the races in reference to each other. If so, laws prohibiting the races from suing each other, giving evidence for or against, or dealing with one another, would be permissible. The very excess to which such a construction would lead is conclusive against it.

It is self-evident that an inhabitant of a country, proscribed by its laws, approaches equality with the more favored population in proportion as the proscription is removed . . .

. . . . The spirit and express declaration of [Section 1 of the 14th amendment] are, that no person shall be disfranchised, in any respect whatever, without fault on his part, except for his own good, reasonably apparent, and that the persons who acquire citizenship under it shall not be distinguished from the former citizens for any of the causes, or any of the grounds, which previously characterized their want of citizenship. The second section of article 1 of our State constitution, is to the same effect. The indictment fails to charge any offense [sic], and the facts set forth in it show that no prosecution can be sustained against the defendant.²²⁰

As these four cases illustrate, post-Civil War equality jurisprudence under the 1868 Constitution established that both sections 1 and 2 of

No mention was made of the state constitution in *Ellis*. It was decided in June 1868, the same month that Congress passed, over President Johnson's veto, the bill providing for the readmission of Alabama to the Union under the 1868 Constitution, (which had been approved by a majority of those voting, but not a majority of the registered voters as the Reconstruction Act applicable at the time of the ratification election had required) as soon as its new legislature ratified the Fourteenth Amendment.

218. 48 Ala. 195 (1872), *overruled in part by* *Green v. State*, 58 Ala. 190 (1877).

219. *Burns*, 48 Ala. at 196.

220. *Id.* at 197-99.

that constitution guaranteed equal protection. And the Alabama Supreme Court interpreted these guarantees as protecting against both sex and race discrimination.

Democrats regained control of all three branches of state government in the elections of November 1874.²²¹ In March of 1875, the Alabama Legislature passed an act calling for the 1875 Constitutional Convention to begin meeting on September 6th of that year. During the intervening summer, the Alabama Supreme Court issued a brief per curiam opinion in *Ford v. State*, affirming the convictions of "a white man and a negro woman . . . for living together in adultery or fornication."²²² The appellants had demurred to the indictment on the ground that the code provision "violated the Constitution of the State and of the United States."²²³ The entire opinion stated as follows:

On the question involved in this case, we can add nothing to the thorough discussion it received in *Ellis v. State*, 42 Ala. 525. We do not see that there is any conflict between the decision in that case, and the decision in *Burns v. State*, 48 Ala. 195 [17 Rep. 34]. The latter case involved only the validity of the statute prohibiting marriage between whites and blacks. The validity of the statute prohibiting such persons from living in adultery was not involved. Marriage may be a natural and civil right, pertaining to all persons. Living in adultery is offensive to all laws human and divine, and human laws must impose punishments adequate to the enormity of the offence [sic] and its insult to public decency.

Affirmed.²²⁴

2. Cases Decided Under the 1875 Constitution

The Alabama Supreme Court continued to deny the claims of those convicted of crimes of interracial intimacy during the late 1870s and 1880s, though in this period the justices' discussion focused on federal law rather than the state constitution. In *Green v. State*,²²⁵ the court overruled the earlier opinion in *Burns v. State*,²²⁶ without mention of its state law grounding, and upheld a state anti-miscegenation law on federal grounds because it punished blacks and whites "in precisely the same manner and to the same extent."²²⁷ As the court viewed it, Con-

221. McMILLAN, *supra* note 10, at 175.

222. *Ford v. State*, 53 Ala. 150, 151 (1875).

223. *Id.*

224. *Id.*

225. 58 Ala. 190 (1877).

226. 48 Ala. 195 (1872), *overruled by* *Green v. State*, 58 Ala. 190 (1877).

227. *Green*, 58 Ala. at 192.

gress had no authority over such matters by virtue of the Fourteenth, or any other, amendment because "[t]he amendments to the [federal] Constitution were evidently designed to secure to citizens, without distinction of race, rights of a civil or political kind only—not such as are merely social, much less those of a purely domestic nature. The regulation of these belongs to the States."²²⁸ Likewise in *Pace v. State*,²²⁹ Justice Somerville's opinion for the court, which was subsequently affirmed by the U.S. Supreme Court, found that the Fourteenth Amendment was not offended by the state law prohibiting interracial adultery or fornication.

When dealing with the equality provisions of the 1875 Alabama Constitution, the Alabama Supreme Court's attention often centered on cases brought by railroads and claims that artificial persons were denied equal access to Alabama courts. As previously noted, the first two annotations to section 2 in the 1896 Code state: "Effect is to place all persons, natural and artificial, on a basis of equality in the courts," and "[t]here can be no discriminative advantage bestowed by law between the parties to the same suit."²³⁰ Several cases are cited and at least two of them expressly refer to section 2,²³¹ along with one or more of the other provisions of the 1875 Declaration of Rights relating to due process and access to courts, the right to defense, the only legitimate end of government, and, in one of the cases, section 12 of article XIV ("all corporations *shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons*").²³² Although not mentioning section 2, other cases cite earlier versions of these sections.

The first of the two cases that explicitly rely, in part, on Section 2 of the 1875 Constitution is *South and North Alabama Railroad Co. v. Morris*.²³³ *Morris* is an appeal from a circuit court judgment awarding an attorney's fee of twenty dollars against the railroad in an unsuccessful appeal from a judgment against it by a justice of the peace in an action for damages for the killing of a hog by one of its trains. Justice Somerville, during his first period of service on the court, wrote the opinion for the court, and held unconstitutional the statute authorizing a reasonable attorney's fee not to exceed twenty dollars against "[a]ny corporation, person or persons, owning or controlling any railroad in this state, or any complainant against such corporation, person or per-

228. *Id.* at 196.

229. 69 Ala. 231 (1881), *aff'd sub nom. Pace v. Alabama*, 106 U.S. 583 (1882), *overruled in part by* *McLaughlin v. Fla.*, 379 U.S. 184 (1964).

230. See discussion *supra* note 155.

231. *Randolph v. Builders' & Painters' Supply Co.*, 17 So. 721, 723 (Ala. 1894); *S. & N. Ala. R.R. Co. v. Morris*, 65 Ala. 193, 199 (1880).

232. *Morris*, 65 Ala. at 199 (emphasis added).

233. 65 Ala. 193 (1880).

sons, taking an [unsuccessful] appeal from a decision rendered by a justice of the peace."²³⁴ Justice Somerville began the court's consideration of the constitutionality of this provision, by listing the following pertinent sections of the Declaration of Rights and describing their effect as relevant to the case:

After a careful consideration of this question, during which it has been held under protracted advisement by the whole bench, a conclusion has been reached, which clearly persuades us that this particular section of the Code is violative of both the constitution of the State and that of the United States. The following sections of the Declaration of Rights (Const. 1875, Art. 1,) are pertinent to this subject:

Section 2 provides, that all persons resident in this State, who are citizens, are entitled to possess "*equal civil and political rights.*"

Section 11: "That *no person* shall be *debarred* from *prosecuting* or *defending*, before any tribunal in this State, by himself or counsel, *any civil cause* to which he is a party."

Section 14: "That *all courts shall be open*; and that *every person*, for any injury done him, in his lands, goods, person or reputation, shall have a remedy by *due process of law*; and *right and justice shall be administered, without sale, denial, or delay.*"

Article XIV, section 12 of the constitution, also declares, that "*all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.*"

It is further asserted that "the sole object and only legitimate end of government is to *protect the citizen* in the enjoyment of life, liberty, and property; and when the government assumes other functions, it is usurpation and oppression."—Art. I, § 37.

The clear legal effect of these provisions is to place all persons, natural and corporate, as near as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this State, except so far as may be otherwise provided in the constitution. This right, though subject to legislative regulation, can not be impaired or destroyed under the guise or device of being regulated. Justice can not be sold, or denied, by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to an other [sic], without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right, by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of es-

234. *Morris*, 65 Ala. at 198.

tablishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some favored class or classes, and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions.

[Discussion of Tennessee and Massachusetts cases omitted.]

The section of the Code under consideration (§ 1715) prescribes a regulation of a peculiar and discriminative character, in reference to certain appeals from justices of the peace. It is not general in its provisions, or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land, by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax-fee, not to exceed twenty dollars. A law which would require all farmers who raise cotton to pay such a fee, in cases where cotton was the subject-matter of litigation, and the owners of this staple were parties to the suit, would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians, or merchants, or ministers of the gospel, would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the Bill of Rights of every State constitution of the various commonwealths of the American government. We think this section of the Code is antagonistic to these provisions of the State constitution, and is void. *Durkee v. City of Gainesville*, 28 Wis. 464; *Gordon v. Winchester Association*, 12 Bush, 110; *Greene v. Briggs*, 1 Curtis, 327; Cooley's Const. Lim. (3d ed.) § 393.²³⁵

These excerpts show that the court relied not only upon section 2 but also upon the "law of the land" or due process clause that was section 14 of the 1875 Constitution. The law's "peculiar and discriminative character,"²³⁶ according to Justice Somerville, was that "[i]t is not general in its provisions, or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land."²³⁷ It is also noteworthy that the court never referred to section 2 as "the equal protection clause" of that Constitution or suggested it was the 1875 Constitution's sole guarantee of equal protection.

Likewise, the court's opinion in the 1894 case of *Randolph v.*

235. *Id.* at 199-201.

236. *Id.* at 200.

237. *Id.*

Builders' & Painters' Supply Co.,²³⁸ which expressly relies on section 2 of the 1875 Constitution, also relies upon its due process clause in section 14 to declare another attorney's fee statute unconstitutional.²³⁹ The act in question provided "a lien for all costs and for an attorney's fee, in the discretion of the court, not to exceed \$25" in favor of persons having a mechanic's or material man's lien.²⁴⁰ The court agreed with the contention that the fee provision was unconstitutionally discriminatory "class legislation" because it allowed a fee to the plaintiff's attorney but not to the defendant's attorney.²⁴¹

Another decision during this period invoked section 1 of the 1875 Constitution in a different context to strike down a law imposing a heavy tax on persons removing certain laborers from the state. The 1882 opinion in *Joseph v. Randolph*,²⁴² written by Justice Somerville, held that the law was inconsistent with section 1's guarantee of free egress from the state, and thus found it unnecessary to reach the "class legislation" claims that had been included. Portions of his opinion are excerpted below.

The question presented for decision is a constitutional one, involving the validity of an act of the General Assembly of this State, entitled "An Act to require a person who employs, or in any way engages laborers in the counties of Dallas, Perry," and other counties therein named, "*for the purpose of removing said laborers from the State, to pay a license tax;*" which act, as originally approved on January 22, 1879, designated the amount of such license at one hundred dollars.--Acts 1878-9, p. 205. It was amended December 8, 1880, so as to increase this license to *two hundred and fifty dollars*.--Acts 1880-81, p. 162. [The opinion later notes that "The license required might amount to twice or three times the annual value of the hireling's labor."]

It is insisted, among other things, that the plain intent and natural effect of this statute is to tax, by indirection, the constitutional right of the citizen to have free egress, at all seasonable times, by emigration from the State. If this view be correct, it is clear that the validity of the act can not be sustained.

There can be no denial of the general proposition that every citizen of the United States, and every citizen of each State of the Union, as an attribute of personal liberty, has the right, ordinarily, of free transit from, or through the territory of any

238. 17 So. 721 (Ala. 1894).

239. *Randolph*, 17 So. at 723-24.

240. *Id.* at 723.

241. *Id.*

242. 71 Ala. 499 (1882).

State. This freedom of egress or ingress is guaranteed to all by the clearest implications of the Federal, as well as of the State constitution. [Discussion of federal authorities omitted] . . .

. . . .
Our present State constitution contains an obvious recognition of the right under discussion in the declaration, that "*emigration* shall not be prohibited," and in the fundamental maxim that "all men are endowed by their Creator with certain inalienable rights, among which are "*life, liberty and the pursuit of happiness*."—Const. 1875, Decl. Rights, §§ 1, 31.

. . . .
Construing the act under consideration by the test of these principles, we do not see how it can be sustained. It must be pronounced void as an indirect tax upon the citizen's right of free egress from the State, operating to hinder the exercise of his personal liberty, and seriously impair his freedom of emigration.—*Webber v. Virginia*, 103 U. S. 344; *Vines v. State*, 67 Ala. 73; *Passenger Cases*, *supra*.

There are other objections urged to this act besides the one we have above considered. It is ably assailed as a species of vicious *class legislation*, applicable alone to *laborers* and to no other persons in the community. It is also attacked as being repugnant to the Fourteenth Amendment of the Federal Constitution, the ground of objection being that it is a denial by the State to laborers, as a class, of "the *equal protection* of the laws." What force there may be in these objections we need not consider, as it is rendered entirely unnecessary in view of the conclusion to which we have come, pronouncing the law void for other and distinct reasons.²⁴³

The court did not specify what section or sections of the state constitution might have been implicated had it been necessary to reach the state law claims that this was "class legislation."

Finally, the court's 1898 opinion in *Kentz v. City of Mobile*,²⁴⁴ expressly relied on article I, section 2 of the 1875 Constitution along with the provision of article IV, section 14, that required judges to be "learned in the law."²⁴⁵ The court struck down a Mobile city charter provision providing for the election of a recorder and directing that "said recorder shall be learned in the law and a practicing attorney, at the time of his election."²⁴⁶ The opinion includes the following discussion of section 2:

243. *Joseph*, 71 Ala. at 504-09.

244. 24 So. 952 (Ala. 1898).

245. *Kentz*, 24 So. at 954.

246. *Id.*

In the declaration of rights—section 2 of article 1 of the constitution of this state—it is provided, “that all persons resident in this state, * * * are hereby declared citizens of the state of Alabama possessing equal civil and political rights.” Under this provision, each citizen is entitled to all the rights or privileges which any other citizen can enjoy or possess, and every citizen has the right to aspire to and hold any office, or pursue any lawful vocation, any other citizen may hold or pursue; except wherein the power to destroy this equality is expressly given or arises by clear implication from some other part of the fundamental law *Dorsey’s Case*, 7 Port. 293; *Cooley*, Const. Lim. 485.²⁴⁷

The court pointed out that section 14 of article IV was the only other provision of the constitution which limited this right of the citizen to aspire to and hold public office. After noting that “counsel for the city does not deny, that this legislative restriction as to the holding the office of recorder, is in violation of the declaration of rights, as it plainly appears to us to be,”²⁴⁸ Justice Haralson’s opinion for the court concluded that the offending words could be severed from the law. This case was too recent to be included in the 1896 Code’s annotations to section 2 that were referred to in the 1901 convention debates, but some of the delegates did ask questions and express concerns about requirements for holding office in the discussion over section 2. Given that 96 of the 155 delegates were lawyers,²⁴⁹ it seems likely that many would have been aware of this recent case.

C. 1901-1939 Cases

Some of the early equality cases under the 1901 Constitution were included in the prior discussion of judicial opinions related to the significance of the omission of section 2 of the 1875 Constitution. Here, we include other early cases (many of which are cited in the separate opinions in *Melof*) that demonstrate the continuation and development of equal protection doctrine under the 1901 Constitution. As in the cases of the late 1800s, these early decisions under the 1901 Constitution generally dealt with inequalities in general social and economic regulation rather than with race or sex discrimination.

During the first decade under the new constitution, the court decided two 1904 cases that struck down laws based on sections 1 and 35 and, as discussed above, offered its views on the meaning of the omis-

247. *Id.*

248. *Id.* at 955.

249. MCMILLAN, *supra* note 10, at 263.

sion of section 2 in *Finklea* (1908) and *Gardina* (1909). It was not until *McLendon* (1912), when faced with a law providing a special tax exemption for Confederate soldiers, that the majority of the court balked at using state equality doctrine to strike down a discriminatory law. Even here, the justices continued to acknowledge sections 1 and 35, along with sections 22 and 29, as sources of general limitations on discriminatory legislation. Later cases in this period are more varied in their results, as concepts of legislative power in the realm of social and economic legislation evolve. But throughout the period prior to the 1939 decision in *Pickett v. Matthews*,²⁵⁰ the court repeatedly recognized the existence of equal protection guarantees under one or more of these provisions.

The two earliest equal protection cases we have found that were decided under the 1901 Constitution were decided in November 1904. Both endorse pre-1901 understandings of state equal protection guarantees, especially as contained in section 1 of the 1875 Constitution, which had been adopted verbatim as section 1 of the 1901 Constitution. First, in *Toney v. State*,²⁵¹ the issue was the constitutionality of an act that made it a crime in certain counties of the state for individuals to abandon a contract involving a labor agreement or the tenancy or sharecropping of land and then enter into another such contract without informing the other party about the existence of a previous contract.²⁵² An opinion by Justice Sharpe striking down the act stated:

This enactment cannot operate consistently with the guarantees of *equality*, liberty, and property made by the federal and *also by the state Constitution*. In the state Constitution as it existed when this act was passed, and as it now exists, "life, liberty, and property" are enumerated as being among the inalienable rights of all men, and to protect the citizen in the enjoyment of "life, liberty, and property" is declared to be the sole object and only legitimate end of government. In the fourteenth amendment to the federal Constitution it is declared: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law."²⁵³

Later the same month, the court issued a unanimous opinion in the

250. 192 So. 261 (Ala. 1939).

251. 37 So. 332 (Ala. 1904).

252. *Toney*, 37 So. at 333.

253. *Id.* (emphasis added). That the court did not also quote the Equal Protection Clause of the Fourteenth Amendment reinforces our reading of its understanding of section 1 as a source of state equality rights.

case of *City Council of Montgomery v. Kelly*,²⁵⁴ in which the issue was the constitutionality of a city ordinance (passed after the adoption of a general ordinance imposing a regular license fee for merchants) that fixed a license fee of \$1,000 on trading stamp companies. It was applicable to merchants who issued trading stamps and imposed a penalty of \$100 per stamp issued without such a license.²⁵⁵ Justice Simpson's opinion concluded that this was "such a palpable attempt under the guise of a license tax to fix a penalty on the merchant for conducting his business in a certain way, that, under the authorities heretofore cited, we hold it to be unconstitutional and void. Our own court has decided that the trading stamp business is not a gift enterprise or lottery."²⁵⁶ In discussing the applicable constitutional principles, Justice Simpson wrote:

[In another case,] Brickell, C. J., said, "We may concede that, when a tax is imposed on avocations or privileges, or on the franchises of corporations, it must be equal and uniform. The equality and uniformity consists in the imposition of the like tax upon all who engage in the avocation, or who may exercise the privilege taxed."—*Phoenix Carpet Co. v. State*, 118 Ala. 151, 152 As a constitutional warrant for this expression of the Chief Justice, our Constitution provides that among the inalienable rights of every citizen "are life, liberty and the pursuit of happiness." (Const. Ala. § 1); also "that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty and property, and, when the government assumes other functions it is usurpation and oppression" (Const. Ala. § 35); while the fourteenth amendment to the Constitution of the United States prohibits a state from making or enforcing "any law which shall abridge the privileges or immunities of citizens," etc. The Supreme Court of the United States has declared that "the Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." *Lawton v. Steele*, 152 U.S. 137. While perfect equality in taxation of any kind is unattainable, yet "when, for any reason, it becomes discriminative between individuals of the class taxed, and selects some, for an exceptional burden, the tax is deprived of the necessary element of legal equality, and becomes inadmissible." *Cooley on Taxa-*

254. 38 So. 67 (Ala. 1905), *overruled by* *Standard Chem. & Oil Co. v. City of Troy*, 77 So. 383 (Ala. 1917). The court later qualified and overruled this case but only to the extent that one portion of its language might appear inconsistent with pre-1901 case law involving the levying of a non-discriminatory tax for police purposes against useful lines of trade and business. *Standard Chem.*, 77 So. at 387.

255. *City Council of Montgomery*, 38 So. at 68.

256. *Id.* at 70.

tion (2d Ed.), p. 169; *Id.* (3d Ed.) pp. 259, 260. . . .

The liberty which is so sedulously guarded by the Constitutions of the United States, and of this and other states comprehends more than the mere freedom from personal restraint. It includes the right to pursue any useful and harmless occupation, and to conduct the business in the citizens' own way, without being discriminated against either by being prohibited from engaging in it or by being burdened with discriminative taxation.²⁵⁷

In 1912, five days after the majority rejected the state constitutional challenges to the tax exemption for Confederate soldiers in *McLendon*, the case of *Alabama Consolidated Coal & Iron Co. v. Herzberg*²⁵⁸ was decided. The court, in answering questions certified to it by the court of appeals, dealt with the constitutionality of a statute that imposed a tax not "upon persons, firms, or corporations conducting stores or commissaries, but only upon those wherein the employees trade upon checks, orders, or other devices."²⁵⁹ Justice Anderson's opinion for the court stated that the section imposing the tax must fall:

The tax is not, therefore, imposed upon the business, or upon all engaged in a similar business, but is based solely upon the manner in which a party may conduct the business; and the foregoing section is repugnant to the state and federal Constitutions, under the authority of *City of Montgomery v. Kelly*. . .
"260

In 1915, in *Birmingham-Tuscaloosa Railway and Utilities Co. v. Carpenter*,²⁶¹ the court considered the constitutionality of a statute that imputed negligence to passengers in motor vehicles in which the passengers did not pay a fare and when the vehicle was not regularly used for public hire.²⁶² Justice Anderson, writing for the unanimous court in affirming a judgment by Judge Bernard Harwood ("the Elder"), held that singling out one type of passenger was "repugnant both to our state and federal Constitutions. It is an unwarranted and unjust discrimination between persons of the same class; that is, it discriminates against persons riding in motor vehicles, because it does not reach those riding in any other kind of vehicles under similar terms and conditions."²⁶³

257. *Id.* at 69.

258. 59 So. 305 (Ala. 1912).

259. *Herzberg*, 59 So. at 305-06.

260. *Id.* at 306.

261. 69 So. 626 (Ala. 1915).

262. *Birmingham-Tuscaloosa Ry.*, 69 So. at 627.

263. *Id.* at 628.

The opinion continued by stating the following:

We do not mean to hold that the Legislature cannot enjoin upon motor vehicle operatives certain duties and restrictions not placed upon other vehicles of an inherently different nature and character, for the protection of the public. But the right to do this does not authorize the penalizing of people who ride in same, by depriving them of a legal right enjoyed by persons riding in any other kind of vehicle, and such a discrimination cannot be justified upon the basis of a reasonable classification. Section 34 not only discriminates against persons riding in motor vehicles in favor of those riding in all other vehicles under similar conditions, but it discriminates between those who ride in motor vehicles for hire The section denies an equal protection of the law to all persons similarly situated, and is an unwarranted discrimination

Of course, this constitutional guaranty does not forbid the Legislature from making a reasonable classification in the operation of our laws; but such a classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any such substantial basis. Arbitrary selection, it had been said, cannot be justified by calling it classification.²⁶⁴

A 1917 concurring opinion also bears mention in this chronology. In *Barrington v. Barrington*,²⁶⁵ a case that the court decided without reaching a challenge to the constitutionality of an act that allowed a wife to seek a divorce in cases of actual or threatened violence by the husband,²⁶⁶ Justice Thomas' concurrence discussed equal protection issues raised by the act.²⁶⁷ His opinion indicated that a divorce statute unfairly and arbitrarily favoring wives would create an invalid classification that denied husbands "fundamental right of citizenship—a right or privilege enjoyed by other citizens, to wit, the right accorded to their wives."²⁶⁸ Such a statute, according to Thomas, would "deny to husbands the equal right of liberty and 'the pursuit of happiness,' in the enjoyment of marriage"²⁶⁹ protected by section 1 of the Alabama Constitution and violate state constitutional guarantees of equality.²⁷⁰ Justice Thomas found the act in question violated the "liberty and equality

264. *Id.* This case is distinguished based on changed circumstances in *Pickett v. Matthews*.

265. 76 So. 81 (Ala. 1917).

266. *Barrington*, 76 So. at 84.

267. *Id.* at 92-94.

268. *Id.* at 93.

269. *Id.*

270. *Id.*

guaranteed by the [Alabama] Constitution."²⁷¹

Five years later, in *Maurry v. State*, Justice Anderson wrote an unusual opinion. His opinion affirmed the judgment of a circuit court that had upheld a statute imposing a tax on the lending of money by real estate agents who operated on a commission basis but he argued to the contrary in the opinion and thus dissented, along with Justices Sayre and Miller.²⁷² Although these three justices believed the law repugnant to section 35 of the 1901 Constitution as well as the federal Constitution's Fourteenth Amendment, the other four justices disagreed. The opinion stated:

This tax is not upon all money lenders or all real estate agents, or even upon all real estate agents who operate upon a commission basis; nor is it a tax upon all who may engage in lending money as an incident to their regular business. It is simply an attempt to regulate the business of real estate agents who operate upon a commission basis by burdening the lending of money by them by the imposition of an unwarranted tax, which said tax violates both the state and the federal Constitution under the authority of *City Council v. Kelly*, 142 Ala. 552, 38 South. 67, 70 L. R. A. 209, 110 Am. St. Rep. 43; *Ala. Cons. Co. v. Herzberg*, 177 Ala. 248, 59 South. 305; *Mefford v. Sheffield*, 148 Ala. 539, 41 South. 970.

A tax quite similar to this was condemned in the case of *Beckett v. Mayor of Savannah*, 118 Ga. 58, 44 S. E. 819; and while the Georgia court applied a constitutional provision not identical to any one in our own Constitution, yet the reasoning in the opinion against the validity of said tax is an apt illustration of its repugnancy to section 35 of our Constitution, as well as the Fourteenth Amendment to the federal Constitution. This Georgia case, *supra*, has been cited and followed in *State v. Mercer*, 132 Md. 263, 103 Atl. 570, *Iowa Mut. Ass'n v. Gilbertson*, 129 Iowa, 658, 106 N. W. 153; and *State ex rel. Greenwood v. Nolan*, 108 Minn. 170, 122 N. W. 255.

A majority of the court, however, composed of McCLELLAN, SOMERVILLE, GARDNER, and THOMAS, JJ., are of the opinion, and so hold, that the above provision is not repugnant to the state or federal Constitution, that it is but a reasonable classification for purposes of taxation, and that the *Kelly Case*, *supra*, as explained in the case of *Birmingham v. O'Connell*, 195 Ala. 60, 70 South. 184, is inapt.

The judgment of the circuit court is affirmed.

271. *Barrington*, 76 So. at 93.

272. 93 So. 802 (Ala. 1922).

ANDERSON, C. J., and SAYRE and MILLER, JJ., dissent.²⁷³

The issue presented to the Alabama Supreme Court in 1925, in *Woco Pep Co. of Montgomery v. City of Montgomery*, was the constitutionality of a municipal license tax on gas and oil.²⁷⁴ The opinion contained the following statement concerning the requirement for uniformity in taxation:

This [requirement of equality and uniformity in taxation] necessarily follows in the exercise of the inalienable right of every citizen and guarantee that the sole object and only legitimate end of government is to protect the citizen in his privileges or immunities that they be not abridged, that private business be not arbitrarily interfered with, and that the lawful occupations of citizens may not have imposed thereon unusual and unnecessary restrictions.²⁷⁵

In addition to the Fourteenth Amendment of the United States Constitution, the court also relied upon sections 1 and 35 of the Alabama Constitution and upon state precedent.²⁷⁶

In 1933, six years before the opinion in *Pickett v. Matthews*, the court considered a challenge to a provision of the Workmen's Compensation Act that included claims under sections 1, 6, and 22 of the Alabama Constitution and under the Fourteenth Amendment. In *Larry v. Taylor*, the challenge was to the constitutionality of a provision in the Compensation Act that excluded the minority age of the injured person or his dependents as a condition that would toll the applicable one-year statute of limitation but allowed tolling of this statute of limitations for mental and physical incapacity.²⁷⁷ The claim was for the death of Steiner Larry in April 1928. The action by his minor dependent children, who were ten and seven years of age at the time of his death, was filed in October 1932. According to the court's opinion by Justice Bouldin, the statute of limitations as applicable to minors was challenged as "arbitrary, discriminatory, and void because in contravention of the Fourteenth Amendment of the Federal Constitution and kindred sections of the Constitution of Alabama, such as sections 1, 6, and 22."²⁷⁸ Despite the earlier solicitude it generally had shown to those subject to discriminatory taxes, the court rejected the children's claim with the following explanation:

273. *Maury*, 93 So. at 83.

274. *Woco Pep. Co. v. City of Montgomery*, 105 So. 2d 214, 215 (Ala. 1925).

275. *Woco*, 105 So. at 219.

276. *Id.*

277. *Larry v. Taylor*, 149 So. 104, 105 (Ala. 1933).

278. *Larry*, 149 So. at 105.

Suffice to say the entire scheme of the Workmen's Compensation Law awarding compensation to minor dependents is to furnish them present maintenance; is limited to those under eighteen years of age, except when physically or mentally incapacitated. Code, § 7552; *Ex parte Cline*, 213 Ala. 599, 105 So. 686. It is not contemplated that proceedings shall or may be delayed until the disability of minority has passed, and presumably the period of dependence.

In keeping with this policy, minor employees are, by our statute, made *sui juris*, or quasi *sui juris*, subject to the power of the court to safeguard their interests by guardianship (Code, § 7549), and to relieve from oppressive settlements generally (Code, § 7550).

The provision of the Workmen's Compensation Law is made to apply to minors employed in violation of child labor laws. Code, § 7539; *Ivey v. Railway Fuel Co.*, 218 Ala. 407, 118 So. 583.

By amendment of the statute, double compensation is now awarded where the minor is employed in violation of law. General Laws 1931, p. 415.

Maybe in some cases the statute should make more direct provision for the protection of children of tender years in giving notice required by section 7568, and bringing suit under section 7570, but, with all the legal, industrial, and social agencies of our day, it is not to be presumed such dependent children will be friendless.

In this case there is a mother, authorized by law to receive compensation for them. She could have sued within one year, and not after four years. Code, § 7554; *Ex parte Central Iron & Coal Co.*, 212 Ala. 367, 102 So. 797.

We are unable to see any sound basis for declaring this case without the general rule that a legislative act creating a claim, not theretofore existing, may prescribe the conditions and procedure under which such right is to be effectuated. In general, one cannot claim the benefits of an act and at the same time challenge its constitutionality. *Woodward Iron Co. v. Bradford*, 206 Ala. 447, 90 So. 803.

We conclude the constitutional point raised cannot be sustained.²⁷⁹

In 1935, the Alabama Supreme Court again made reference to section 1 as a source of equal protection under the law in *Dillon v. Hamilton*.²⁸⁰ In considering the application of a law affecting the salary and commissions of a public official, the court stated that "[w]e have

279. *Id.*

280. 160 So. 708 (Ala. 1935).

often held that a general law may have unequal public application . . . but not as it may affect individuals, private corporations, or associations, who are entitled to the equal protection of the laws. Section 1 and 108, Constitution [and also citing an Alabama Supreme Court decision].²⁸¹

That same year, in *State v. Alabama Education Foundation*, the Alabama Supreme Court addressed the constitutionality of an educational property tax exemption that failed to include religiously affiliated schools.²⁸² Discussing the power of government to exempt certain classifications from taxation, Justice Foster declared for a unanimous court, "that the Legislature may classify for such exemptions . . . provided the classification meets the requirements of the equal protection features of the State and Federal Constitutions."²⁸³ One of the authorities relied upon was *McLendon v. State*.²⁸⁴

Finally, in 1937, Justice Foster wrote the court's opinion in *Beeland Wholesale Co. v. Kaufman*, which expressly considered but rejected claims that Alabama's 1935 Unemployment Compensation Act was legislation designed to tax one class for the personal benefit of another and thus violated section 6's due process clause and the Fourteenth Amendment, as well as section 23 of the 1901 Declaration of Rights (which addresses eminent domain).²⁸⁵

Although some of the cases from this period reject state equal protection claims on their merits, and others fail to reach the claims, none hold that there are no state equality guarantees or otherwise deny their existence. These pre-*Pickett* cases amply demonstrate that sections 1, 6, and 22, among other provisions of the 1901 Declaration of Rights, were accepted state law sources of equal protection guarantees long before Justice Foster's 1939 opinion in that misunderstood case.

D. *Pickett v. Matthews* (1939) to *Peddy v. Montgomery* (1977)

Justice Houston's discovery of the "erroneous" annotation to *Pickett* is a cornerstone of his no-state-equal-protection-rights argument. But as Justice Cook suggests in *Melof*, perhaps the error lies in Justice Houston's reading of *Pickett*.²⁸⁶ A closer reading indicates that Justice Foster's opinion for the unanimous court in *Pickett* considers the due process clause of section 6 of the 1901 Constitution as a source of

281. *Dillon*, 160 So. at 710.

282. *State v. Ala. Educ. Found.*, 163 So. 527, 529 (Ala. 1935).

283. *Ala. Educ. Found.*, 163 So. at 530.

284. *Id.*

285. *Beeland Wholesale Co. v. Kaufman*, 174 So. 516 (Ala. 1937).

286. *Ex parte Melof*, 735 So. 2d 1172, 1197 (Ala. 1999) (Cook, J., concurring).

the equal protection claim in the case.²⁸⁷ Arguably, other of the cited provisions were also considered as "similar provisions" to the Fourteenth Amendment's Equal Protection Clause.

After the portion of the opinion quoted in *Melof*, the court in *Pickett* accepted that the Alabama Guest Statute deprived the challengers of "a right of property or of life and liberty safeguarded by the due process and other features of the Constitution, unless they yield to some power recognized to be superior in respect to the situation,"²⁸⁸ but concluded that it was within the police power.²⁸⁹ The court then discussed the challengers' equal protection claims as follows:

The insistence is made that the Act violates the Fourteenth Amendment to the Federal Constitution, *and the due process clause of the State Constitution*, that it makes an arbitrary ill-founded classification, *and therefore denies the equal protection of the laws*. It is thought that our case of *Birmingham-Tuscaloosa Ry. & Utilities Co. v. Carpenter*, 194 Ala. 141, 69 So. 626, and those soon thereafter decided on its authority are here controlling.

That case was dealing with an act by which the negligence of the operator of a motor vehicle was imputed to an occupant riding in it, who was not a passenger paying fare on a vehicle regularly used for public hire. The court held it to be an unwarranted and unjust discrimination against persons riding in motor vehicles, because it does not reach those riding in any other kind of vehicle under similar terms and conditions. We have judicial knowledge of the fact that in 1915, when that opinion was written, the highways were not infested with a hoard of "hitchhikers" seeking, and many obtaining, a free ride from operators of a motor vehicle. The court dockets did not abound with cases by them for damages for negligent operation. But, as was observed in *State ex rel. Wilkinson v. Murphy*, supra, [237 Ala. 332, 186 So. 496, 121 A.L.R. 283], "Time moves on, and government takes account of the measured step of progress for the application of the police powers to meet new public needs." The court was then dealing with intoxicating liquors, as to which the policy of the State's power was entirely changed by subsequent events. The other states have found little difficulty in sustaining such an act when considered in the light of changed conditions.

Moreover when the United States Supreme Court construes the Federal Constitution and its application to a given situation, it is controlling on us insofar as that constitution is concerned. When we construe similar features of the State Constitution as

287. *Pickett v. Matthews*, 192 So. 261 (Ala. 1939).

288. *Pickett*, 192 So. at 264.

289. *Id.* at 264-65.

applicable to the same situation the decision of the United States court, though not controlling on us should be persuasive. A different conclusion would produce much confusion and instability in legislative effectiveness.

That court in *Silver v. Silver*, supra [280 U.S. 117, 50 S.Ct. 59, 74 L.Ed. 221, 65 A.L.R. 939], in this connection sustained an act similar to the one here under consideration against an attack of inequality under the Fourteenth Amendment, and in argument observed: "in this day of almost universal highway transportation by motorcar, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the Legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit."

But it is argued that the Act in question does not afford equal protection because the guest is deprived of a right of damages from subsequent negligence which still exists at the suit of a trespasser. There is sufficient difference between a guest and a trespasser to make of them separate classes in prescribing police regulations.²⁹⁰

Indeed, while Justice Houston reports in *Melof* that the "erroneous" unofficial Alabama Code annotation has since been corrected,²⁹¹ one of the current unofficial West Headnotes describes this portion of the *Pickett* opinion as follows:

The statute prohibiting recovery from owner or operator of motor vehicle for injuries to guest, unless caused by wanton misconduct, is not violative of equal protection provisions of State and Federal Constitution because guest is deprived of right of damages from subsequent negligence which still exists at suit of trespasser, since there is sufficient difference between "guest" and "trespasser" to make them separate classes in prescribing police regulation. Gen. Acts 1935, p. 918; Const. Ala. 1901 §§ 1, 6, 22; U.S.C.A. Const. Amend. 14.²⁹²

In a strictly chronological progression, the Alabama Supreme Court's 1948 opinion in *Hamilton v. Adkins* and the 1949 *Opinion of the Justices*, both discussed in Part A of this section, would appear

290. *Id.* at 265-66 (emphasis added). Moreover, one of the federal cases Justice Foster quotes from in *Pickett's* subsequent discussion of the equal protection claims was decided under the *due process clause* of the Fifth Amendment, which is the recognized source of equal protection doctrine with respect to actions of the federal government despite the absence of an express equal protection guarantee in the original Bill of Rights.

291. *Melof*, 735 So. 2d at 1186.

292. *Pickett*, 192 So. at 262.

here. Another opinion from this period that bears mention before turning to *Jiffy Check* and *Peddy*, is the 1954 opinion in *Bessemer Theatres v. City of Bessemer*.²⁹³ The per curiam opinion first describes the controversy and claims before the court:

The controversy was with reference to the validity of a city ordinance (No. 833) adopted by the City of Bessemer. Section 2 of the ordinance levied a license tax on all those who operated a motion picture theatre within the corporate limits of the city. The amount of the tax (the same as to all) was one cent on each charge for admission of more than ten cents and less than and including fifteen cents; and two cents on each charge for admission in excess of fifteen cents.

....

The contention of complainant is that the ordinance selects the motion picture business and burdens it with a different and greater amount of license tax than that imposed upon any other class of business, and so vastly greater that it makes it an arbitrary and capricious exercise of the power of the city to raise revenue by that means. Reliance is had upon the equal protection clause and the due process clause of the Fourteenth Amendment to the Constitution of the United States *as well as pertinent provisions of the Alabama Constitution, there being in the latter no equal protection clause except as implied in other sections*. *McLendon v. State*, 179 Ala. 54, 84, 60 So. 392.²⁹⁴

The court concluded: "We are of the opinion that on the basis of the undisputed facts shown by legal evidence the decree of the trial court was correct in holding that the license tax here involved does not violate the Federal or State Constitution as contended by appellant."²⁹⁵ As we have seen in the earlier discussion of *McLendon*, sections 1, 6, 22, and 29 were among the general limitations in the 1901 Declaration of Rights that the court had considered (though found not to be violated) in reviewing the state claims of discrimination in that case.

Justice Houston contends that it was in *City of Hueytown v. Jiffy Chek Co.*²⁹⁶ that Alabama's "phantom" equal protection guarantee probably made its first surreptitious appearance. The decision is a short

293. 75 So. 2d 651 (Ala. 1954). A noteworthy earlier opinion from this period is *Messer v. Southern Airways Sales Co.*, 17 So. 2d 679 (Ala. 1944), in which the court unanimously considered but rejected claims that city council resolutions denying Messer the use of the municipal airport violated sections 1, 6, and 22 of the Constitution of 1901 as well as the Fifth and Fourteenth Amendments to the U.S. Constitution. *Messer*, 17 So. 2d at 682. Justice Livingston wrote the opinion for the court. *Id.* at 680. Justice Foster concurred in the opinion, which made no mention of the opinion in *Pickett v. Matthews*. *Id.* at 683.

294. *Bessemer*, 75 So. 2d at 653-54 (emphasis added).

295. *Id.* at 658.

296. 342 So. 2d 761 (Ala. 1977).

unanimous opinion by Justice Embry affirming a trial court ruling that the city's denial to Jiffy Chek of a license to sell wine was an unconstitutional denial of equal protection.²⁹⁷ The opinion stated:

Sections 1, 6, and 22 of the Alabama Constitution combine to guarantee equal protection of the laws. The essence of the theory of equal protection of the laws is that all similarly situated be treated alike. An individual cannot be subjected to arbitrary exercise of governmental powers. *Vernon v. State*, 245 Ala. 633, 18 So.2d 388 (1944).²⁹⁸

The opinion gives no citation for its holding that sections 1, 6, and 22 guarantee equal protection. (The citation to *Vernon*, a criminal appeal, is to a discussion of due process that cites a United States Supreme Court decision and a Missouri case.) Justice Houston argues in *Melof*, as he had earlier, that this is where the erroneous annotation to *Pickett v. Matthews* first made its way into a judicial decision²⁹⁹ because this opinion "used language that closely resembled that of the faulty annotation."³⁰⁰ But, in any event, he asserts, "[t]he question whether the Court was actually relying on the unofficial annotation to declare the existence of an equal-protection provision in Alabama was answered later that same year in *Peddy v. Montgomery*."³⁰¹

Justice Shores' opinion in *Peddy v. Montgomery*,³⁰² which Justice Houston has characterized as "the rock on which the concept of equal protection under the Alabama Constitution was founded,"³⁰³ is hardly an aberration in Alabama equality jurisprudence. It is another of the important cases in the development of the Alabama Supreme Court's state constitutional gender equality jurisprudence. In *Peddy*, the court held that a law which denied a wife the power of alienating or mortgaging her lands without the assent and concurrence of her husband violated state equal protection guarantees.³⁰⁴ Justice Shores' opinion states that

297. *Jiffy Chek*, 342 So. 2d at 762.

298. *Id.*

299. *Melof*, 735 So. 2d at 1185.

300. *Id.*

301. *Id.*

302. 345 So. 2d 631 (Ala. 1977).

303. Justice Houston refers to *Peddy*, in his dissenting opinion in *Smith v. Schulte*, 671 So. 2d 1334, 1348 (Ala. 1995), as "the rock on which the concept of equal protection under the Alabama Constitution was founded," *Schulte*, 671 So. 2d at 1348, and characterizes its state equal protection holding as having recognized "a nonexistent constitutional right created only by judicial error." *Id.* at 1349. In referring to the equal protection claim in *Smith* he further states: "The equal protection [claim] in this case is based *solely* on whatever guarantee of equal protection may be afforded by the [Alabama Constitution of 1901]. There is none. Alabama citizens are protected only by the equal protection provision in the Fourteenth Amendment to the United States Constitution." *Id.* at 1348-49.

304. *Peddy*, 345 So. 2d at 637.

"[a]ny doubt about whether the Constitution of Alabama contained an equal protection provision was dispelled in *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939)," and also quotes from Justice Peters' 1871 opinion relying on Section 1 of the 1868 Constitution as an equality guarantee in *O'Neal v. Robinson*:

. . . According to our constitution, "All men are created equal;" and the word "man" includes persons of both sexes. Then the wife is the peer and equal of the husband in all her great rights of life, liberty, and the pursuit of happiness.-Const. Ala. 1868, Art. I, Sec. 1, Rev. Code, Sec. 1; Const. U.S. XIV Amend. Sec. 1 . . ." *O'Neal v. Robinson*, 45 Ala. 526, 534 (1871).³⁰⁵

In a concurring opinion in *Pinto v. Alabama Coalition for Equity*, Justice Houston seeks to dismiss the importance of Justice Shores' reliance on *O'Neal* by pointing out that she failed to note the language change to section 1 of the 1868 Constitution made by the 1875 Constitutional Convention and carried over in section 1 of the 1901 Constitution.³⁰⁶ As previously noted, the language of section 1 of the 1875 and 1901 Constitutions differs from that of the 1868 Constitution in this respect: the first section of the 1868 Constitution begins with the proclamation that "all men are created equal,"³⁰⁷ whereas the 1875 and 1901 documents declare that "all men are equally free and independent."³⁰⁸ But it seems unlikely that none of the justices in *Peddy* were aware that the language of section 1 had changed over time.

More pointedly, Justice Houston fails to give weight to the actual holding of *Peddy*. Justice Shores' majority opinion concludes:

We hold that Title 34, § 73, Code, limiting the freedom of a married woman to alienate or mortgage her lands, or any interest therein, without the assent and concurrence of her husband, violates the provisions of Article 1, Constitution of 1901, in that it denies to that category of adult landowners rights guaranteed to all other adult landowners by the Constitution and laws

305. *Id.*

306. *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 909 (Ala. 1995) (Houston, J., concurring in the result). Justice Houston's opinion includes only the first clause of section 1 of the 1867 or 1901 documents, thus highlighting this one difference and failing to acknowledge that the clauses say more than this. *Pinto*, 662 So. 2d at 911. Section 1 also declares in identical language in the 1867, 1875, and 1901 Constitutions that "they [all men] are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." ALA. CONST. art. I, § 1 (1868); ALA. CONST. art. I, § 1 (1875); ALA. CONST. art. I, § 1 (1901).

307. ALA. CONST. art. I, § 1 (1868).

308. ALA. CONST. art. I, § 1 (1875); ALA. CONST. art. I, § 1 (1901).

of this state. See *In re Dorsey*, 7 Port. 293, 361 (1838), holding that the Constitution of this state:

" . . . means, and was intended to guarantee to each citizen, all the rights or privileges which any other citizen can enjoy or possess As this general equality is thus expressly asserted and guaranteed as one of the fundamental rights of each citizen, it would seem to be clear, that the power to destroy this equality must be expressly given, or arise by clear implication, or it can have no legal existence"

There is no provision of the Constitution which would permit the legislature to deny to married women rights possessed by all other adults. Its authority to do so must be found in that document, and cannot rest upon an ancient myth that married women are presumed to be more needful of protection of their own interests than other adults, male or female.

The judgment of the trial court is reversed and the cause remanded.³⁰⁹

Surely, Justice Shores and the other justices joining her opinion were not unaware that the language of section 1 has changed since the 1819 Constitution, which governed at the time *Dorsey* was decided.³¹⁰ But the court also recognized, as our review of the earlier equality jurisprudence has shown, that section 1 of the 1901 Constitution, as well as other provisions of article I such as sections 6 and 22, continued to embrace similar implicit and explicit general equal protection guarantees.

E. *Post-Peddy Cases*

Consideration of the existence of equal protection guarantees under the 1901 Alabama Constitution should also take into account post-*Peddy* precedent in which the Alabama Supreme Court has affirmed the existence of such guarantees. In addition to numerous cases reaffirming the interpretation of sections 1, 6, and 22 (and/or 13 and 35) in combination as forming an equal protection guarantee, the Alabama Supreme Court has also relied separately upon due process provisions and the equal protection guarantee provided by Section 1 of the 1901 Constitution. The following treatment, rather than attempting to cover all post-*Peddy* state equal protection cases,³¹¹ will proceed as follows: First we

309. *Peddy*, 345 So. 2d at 637.

310. Justice Houston later criticized the plurality in *Moore* for citing to *Dorsey* because the language of section 1 has changed since the 1819 Constitution. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 176-77 (Ala. 1991) (Houston, J., concurring).

311. In his *Melof* special concurrence, in which Justice Brown concurs, Justice See notes

discuss the fractured opinions in *Moore v. Mobile Infirmary*, the case in which Justice Houston first presented, and a majority of the justices first rejected, his arguments on the absence of state equal protection guarantees. Then we highlight one area that demonstrates the importance of independent state equal protection guarantees—the rules governing peremptory juror challenges. Finally, we present some post-*Peddy* cases in which the Alabama Supreme Court has indicated that either Section 1 or state due process, standing alone, provide equal protection guarantees, as well as an illustration of the court relying upon sections 1 and 35 in this manner.

separately the following cases as examples first, of times the court has stated that sections 1, 6, and 22 combine to guarantee equal protection of the laws, and second, of cases in which the court has in fact held legislation invalid on the grounds that it violated the equal protection guarantee of sections 1, 6, and 22:

FN10. See, e.g., *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 165 (Ala. 1991) (plurality opinion) ("Sections 1, 6, and 22 of the Declaration of Rights combine to guarantee equal protection under the laws of Alabama."); *Plitt v. Griggs*, 585 So. 2d 1317, 1325 (Ala. 1991) ("Sections 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws."); *Mayo v. Rouselle Corp.*, 375 So. 2d 449, 451, 452 (Ala. 1979) (answering in the negative the certified question whether Ala. Code 1975, § 7-2-725, "violates §§ 1, 6 and 22 of the Alabama Constitution of 1901, which provide for equal protection of the law"); *Black v. Pike County Comm'n*, 360 So. 2d 303, 306 (Ala. 1978) ("Sections 1, 6 and 22 of the Alabama Constitution combine to guarantee equal protection of the laws."); *Peddy v. Montgomery*, 345 So. 2d 631, 633 (Ala. 1977) ("Any doubt about whether the Constitution of Alabama contained an equal protection provision was dispelled in *Pickett v. Matthews*, 238 Ala. 542, 192 So. 261 (1939), where it was held that §§ 1, 6 and 22 of Article 1 of the Constitution of 1901, taken together, guarantee the equal protection of the laws, and prohibit one from being deprived of his inalienable rights without due process."); *City of Hueytown v. Jiffy Chek Co. of Alabama*, 342 So. 2d 761, 762 (Ala. 1977) ("Sections 1, 6, and 22 of the Alabama Constitution combine to guarantee equal protection of the laws."). But see *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 901, 904-10 (Houston, J., concurring in the result) (criticizing those cases); *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 171, 174 (Houston, J., concurring in the result) (same).

FN11. See, e.g., *Jolly v. Knopf*, 463 So. 2d 150, 153 (Ala. 1985) ("We hold . . . the statute [Ala. Code 1975, § 35-6-100] violates the equal protection provisions of the Constitution of this state, §§ 1, 6, and 22, . . . as well as the Constitution of the United States, Amendment 14."); *Harrison v. Buckhalt*, 364 So. 2d 283, 286 (Ala. 1978) ("[W]e hold [the city liquor ordinance] discriminatory, arbitrary, unreasonable, and therefore a denial of equal protection of the laws guaranteed by Sections 1, 6 and 22 of the Constitution of Alabama of 1901."); see also *Smith v. Schulte*, 671 So. 2d 1334, 1337 (Ala. 1995), cert. denied, 517 U.S. 1220, 116 S.Ct. 1849, 134 L.Ed.2d 950 (1996) (stating, in reliance upon *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156 (Ala.1991), *supra*, note 3, that Ala. Code 1975, § 6-5-547, which limited to \$1,000,000 the amount recoverable in a wrongful-death action against medical providers, violated the equal-protection guarantee of the Alabama Constitution) (plurality opinion).

735 So. 2d at 1193 (See, J., concurring specially).

1. *Sections 1, 6, and 22 Revisited: Moore v. Mobile Infirmary*

Moore v. Mobile Infirmary Association,³¹² the 1991 case in which Justice Houston initially argued that the 1901 Constitution contains no equal protection guarantees, is illustrative of the many post-*Peddy* cases which address the issue of whether sections 1, 6, and 22 provide equal protection guarantees. Although Justice Adams' opinion was a plurality opinion as to its equal protection analysis of the statutory cap on non-economic damages in medical malpractice suits that was at issue, a majority of justices agreed that equal protection rights do exist under the Alabama Constitution. Three other justices joined in the main opinion's equal protection analysis,³¹³ and Justice Maddox, though in dissent as to the validity of the statute at issue, stated in his dissenting opinion, in which Justice Steagall concurred,³¹⁴ that he agreed with the plurality's views concerning sections 1, 6, and 22 combining to guarantee equal protection under the 1901 Constitution.³¹⁵ Justice Almon, who concurred with another part of the main opinion, clarified that he expressed no views as to its equal protection analysis.³¹⁶ In *Moore*, then, at least six justices agreed that an equal protection provision exists under the Alabama Constitution, with only Justice Houston offering a contrary view. Justice Adams' opinion was adamant in its rejection of Justice Houston's views:

On Mr. Justice Houston's astounding assertion that the Constitution of Alabama contains no equal protection guarantee, we will not long deliberate. Suffice it to say that §§ 1, 6, and 22 so fundamentally reflect the spirit and principles embodied in the Preamble to the Constitution of the United States; the Declaration of Independence; and the principles upon which this nation was founded as to dispel any doubt that the Constitution of Alabama guarantees to the citizens of this state equal protection of the laws. See *In re Dorsey* . . . (Ala. 1838) ("the first section of the declaration of rights . . . was intended to guarantee to each citizen, all the rights or privileges which any other citizen can enjoy or possess" and assures a "general equality . . . as one of the fundamental rights of each citizen.")³¹⁷

Justice Houston, relying on many of the same arguments subse-

312. 592 So. 2d 156 (Ala.1991).

313. *Moore*, 592 So. 2d at 171.

314. *Id.* at 183.

315. *Id.* at 182 (Maddox, J., dissenting). Justice Maddox quoted directly from *Pickett v. Matthews* in asserting that equal protection guarantees exist under the Alabama constitution. *Id.* at n.22. But see his later opinions.

316. *Id.* at 178 (Almon, J., concurring specially).

317. *Moore*, 592 So. 2d at 170-71.

quently presented in *Melof*, asserted in his opinion concurring in the result in *Moore* that the exclusion of Section 2 of the 1875 Constitution from the 1901 Constitution established the intent of convention delegates to expunge equal protection guarantees from the 1901 Constitution and that an unofficial annotator's mistake created a "phantom" equal protection provision.³¹⁸ His opinion also took exception to Justice Adams' reliance on *In re Dorsey* and contended that the plurality opinion's equal protection analysis distorted the portion of that opinion from which it quoted.³¹⁹ Justice Houston reiterated that the original state constitution contained the phrase "'All freemen, when they form a social compact, are equal in rights.'" ³²⁰ He was emphatic about the importance he attached to that language and to its absence from the current constitution:

Nowhere! Nowhere in that entire document [1901 Constitution] do these words appear! These words are the first section of the declaration of rights referred to [in the *Dorsey* special concurrence]. If these words did appear in the Constitution of Alabama of 1901, we would have an express provision affording equal protection, but these words do not appear in our present Constitution.³²¹

2. *Peremptory Jury Challenges*

The standards governing peremptory jury challenges in Alabama merit attention because they not only demonstrate a post-*Peddy* application of the equal protection guarantees of sections 1, 6, and 22, but also illustrate how independent state equal protection may provide greater protection than that afforded under federal standards. In 1996, in *Ex parte Bruner*,³²² the Alabama Supreme Court's brief per curiam opinion, quashing a writ of certiorari as improvidently granted, disapproved of the court of civil appeals' reliance on *Hernandez v. New York*³²³ and *Purkett v. Elem*,³²⁴ stating that "[t]hose federal cases do not control Alabama's peremptory challenge procedure, which is based on adequate and independent state law."³²⁵ Justice Cook wrote a special concurring

318. *Id.* at 174-75.

319. *Id.* at 176.

320. *Id.* (alteration in original).

321. *Id.* at 177.

322. 681 So. 2d 173 (Ala. 1996).

323. 500 U.S. 352 (1991).

324. 514 U.S. 765 (1995).

325. *Bruner*, 681 So. 2d at 173. For further description of these federal standards, see *Hernandez*, 500 U.S. at 1865-66 (holding that a party only had to offer some neutral reason for a strike and that the challenger had to produce evidence of the subjective intent for the strike); *Purkett*, 514 U.S. at 1770-71 (permitting the strike of an African-American venire member be-

opinion in *Bruner*,³²⁶ rejecting the argument in Justice Maddox's separate opinion that federal standards are the basis for the rules on peremptory strikes in Alabama.³²⁷ Writing pre-*Melof*, Justice Cook pointed to the court's opinions in *Ex parte Jackson*³²⁸ and *Ex parte Branch*³²⁹ as having relied upon state equal protection doctrine to formulate independent state equal protection doctrine to formulate independent state standards to govern peremptory challenges.³³⁰ In 1998, in *Looney v. Davis*,³³¹ the court reaffirmed that Alabama's rules governing peremptory challenges are based on independent state law grounds.³³²

3. Cases Referencing Solely Section 1 or Sections 1 and 35

Generally overlooked in the ongoing equal protection debate are those post-*Peddy* opinions that have indicated that section 1 alone is an independent source of equal protection. In 1984, in *Home Indemnity Company v. Anders*,³³³ the Alabama Supreme Court considered whether a statute limiting governmental liability "violate[d] the remedy provisions of Article I, § 13, and denie[d] equal protection as guaranteed in Article I, § 1."³³⁴ While Justice Torbert's opinion for the court upheld the act as constitutional, it engaged in an equal protection analysis as to whether the legislation was "arbitrary or unreasonable."³³⁵ The court's analysis implicitly accepted that section 1 is sufficient by itself to provide equal protection under the 1901 Constitution.

In 1990, in *Yarchak v. Munford, Inc.*,³³⁶ the Alabama Supreme

cause of long hair and holding that a proffered explanation for a strike need not be persuasive or plausible but simply nondiscriminatory). These cases significantly relaxed the standards from *Batson v. Kentucky*, 476 U.S. 79 (1986), governing defenses to peremptory strikes in federal court.

326. *Bruner*, 681 So. 2d at 173.

327. *Id.* at 182.

328. 516 So. 2d 768 (Ala. 1986).

329. 526 So. 2d 609 (Ala. 1987).

330. *Bruner*, 681 So. 2d at 174, 177. The opinion also noted that §§ 12-16-55, 56 of the Alabama Code provides additional authority for a separate Alabama standard. *Id.* at 177.

331. 721 So. 2d 152 (Ala. 1998).

332. *Looney*, 721 So. 2d at 164 n.3. Though not in the context of peremptory challenges, the court has at other times noted that the state and federal equal protection are not identical. Federal standards provide a floor—state standards may require more but not less protection. In *Davis v. Everett*, 443 So. 2d 1232 (Ala. 1983), the court, in holding that a claimant was prevailing party for purposes of attorney fees under 42 U.S.C. § 1988, when she prevailed on a state constitution equal protection claim even though the trial court did not grant or deny relief on her federal claims, note that while it is "not necessary . . . to equate equal protection under the Constitution of 1901, Art. I, §§ 1, 6, and 22, with equal protection under the United States Constitution for all purposes; however, the Alabama Constitution necessarily embraces at least the minimal requirements of the United States Constitution." *Id.* at 1236.

333. 459 So. 2d 836 (Ala. 1984).

334. *Home Indemnity Co.*, 459 So. 2d at 840.

335. *Id.* at 841.

336. 570 So. 2d 648 (Ala. 1990).

Court stated the following concerning section 1:

Article I, § 1, is Alabama's equivalent to the equal protection clause of the 14th Amendment to the United States Constitution, and it reads "[t]hat all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."³³⁷

Similarly, in a 1993 decision, the court referenced *Home Indemnity's* reliance on section 1 as a guarantor of equal protection under the state constitution.³³⁸

Earlier in this period, in *Robert Burton Associates v. Eagerton*,³³⁹ the court had relied upon sections 1 and 35 to uphold an equal protection challenge to a state tax imposed on gummed cigarette papers but not on ungummed cigarette papers.³⁴⁰ Although the act was passed to hinder the "marijuana trade,"³⁴¹ the court found that it constituted "an unreasonable classification not based upon a real and substantial distinction and constitut[ed] an unequal treatment proscribed by the Constitution of this State, Article I, §§ 1 and 35."³⁴²

337. *Yarchak*, 570 So. 2d 648 at 649 n.2.

338. *Garner v. Covington*, 624 So. 2d 1346, 1351 (Ala. 1993).

339. 432 So. 2d 1267 (Ala. 1983).

340. *Eagerton*, 432 So. 2d at 1268.

341. *Id.*

342. *Id.* at 1269. Sections 1 and 35 have also been found, in combination, to afford due process protections in the context of economic liberty interests. In *State v. Mapco Petroleum, Inc.*, 519 So. 2d 1275, 1276 (Ala. 1987), the court considered the constitutionality under the state constitution of a statute that prohibited the below cost sale of petroleum products. *Id.* at 1276. While not invalidating the entire statute, the court found unconstitutional those portions that could allow "one marketer . . . [to] artificially place another in violation of the Act by raising his own cost of doing business." *Id.* at 1287. In its analysis, the court noted how sections 1 and 35 protect economic liberty interests:

[T]he jurisprudence in Alabama has derived the substantive protection of a liberty interest in economic matters from §§ 1 and 35 without specific invocation of 'due process' principles. Nevertheless, the issues and their analysis are essentially the same here as under the liberty interest protected by due process . . .

Id. at 1278 n.1. The use of sections 1 and 35 to provide due process protection for economic liberty interests is another example of how the court has alternatively relied upon multiple provisions of the state constitution that provide similar or identical guarantees. Compare Justice See's opinion for the court in *Alabama Power Co. v. Citizens of Ala.*, 740 So. 2d 371 (Ala. 1999), stating: "Both the Constitution of the United States and the Constitution of the State of Alabama of 1901 guarantee 'due process of law.' U.S. Const. Amends. V, XIV; Ala. Const. 1901, §§ 6 and 13." *Id.* at 371. Justice See's opinion rejects any suggestions from prior cases (including *Mapco*) that the court should apply a more activist state substantive-due-process review of economic regulations than the post-*Lochner* era federal standard and adopts the following standard: "If there is 'any state of facts either known or which could reasonably be assumed,' that would establish a rational relationship between the economic regulation and a legitimate state interest, we will uphold the statute against a substantive-due-process challenge." *Id.* at 381.

4. Due Process

White v. Associated Industries of Alabama, Inc.,³⁴³ is a key post-*Peddy* case relying on state due process alone as a direct guarantee of equal protection. The Alabama Supreme Court held that an act mandating that employers pay the regular salaries of their employees in the military when the employees fulfilled their service obligations arbitrarily benefited one class and burdened another was unconstitutional on state due process grounds. Justice Faulkner's opinion for the court quoted the 1949 *Opinion of the Justices*' statement concerning equality of rights being fundamental to both due process and equal protection provisions. Although the 1901 Constitution may have "no equal protection clause, as such," the court concluded that "a classification made in legislation must be reasonable and not arbitrary to avoid violation of the due process clause of Art. I, § 6."³⁴⁴

VI. UNTANGLING THE WEB: CONCLUSIONS

The cases examined above, along with those cited in the accompanying notes, illustrate that equal protection doctrine has long been a fertile field in Alabama constitutional law. This caselaw and the history of the 1901 Convention, separately and collectively, refute the *Melof* main opinion's assertion that it is "evident" that Alabama equal protection doctrine is "nonexistent"—that it is based only upon an egregiously erroneous annotation to the 1939 opinion in *Pickett v. Matthews*, which in turn led to the appearance in 1977, of a "phantom" state equal protection clause. The very opinions relied upon in the *Melof* main opinion show that Alabama's equal protection doctrine is far more than an apparition.

There is certainly a haunting quality, however, to how, over time, the Alabama Constitution's commitments to equal protection often have been breached more than honored in the actions of state and local offi-

343. 373 So. 2d 616 (Ala. 1979).

344. *Associated Industries*, 373 So. 2d at 617. The case of *Juneman Electric, Inc. v. Cross*, 414 So. 2d 108 (Ala. Civ. App. 1982), cert. denied 414 So. 2d 108 (Ala. 1982), is a post-*Peddy* example of the court of civil appeals analyzing (but rejecting) an equal protection challenge under state due process guarantees. The case presented a challenge by an employer to a state statute requiring employers to compensate full-time employees summoned for jury duty for the difference between their compensation as jurors and their regular level of compensation. *Juneman Electric*, 414 So. 2d at 110. The employer contended that the act was unconstitutional on state due process grounds as "arbitrary and unreasonable" by singling out employers as a class to bear the burden of the statute and full-time employees to receive a special benefit. *Id.* at 112. The employer sought to rely on *White v. Associated Industries of Alabama, Inc.* The court in *Juneman* upheld the act in question but only because the state offered "cogent justification" for the classifications. *Id.* at 112.

cials and in the daily application of the laws of this state. But constitutional rights are not subject to any law of adverse possession. And, at least on paper, if not in practice, our state constitution has always contained guarantees of equal protection and the Alabama Supreme Court has continuously understood it to do so.

The steady and unrelenting progression of opinions finding various state equal protection guarantees under the 1901 Constitution cannot be dismissed as mere lapses in judicial scholarship. Despite repeated acknowledgments of the omission of section 2 of the 1875 Constitution, and despite differences between the language of section 1 of the 1875 and 1901 Constitutions and that of section 1 of the 1819 Constitution, and to a lesser degree, that of section 1 of the 1868 Constitutions, the Alabama Supreme Court has consistently viewed section 1 or the due process clauses, standing alone, or in conjunction with one or more of the 1901 Constitution's other pillar provisions, to guarantee equal protection. Although the 1901 Constitution lacks a clause that tracks the precise language of the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution, no opinion, including *Melof*, has ever "held" that the 1901 Alabama Constitution has no equal protection guarantees.

The Alabama Supreme Court's pre-*Melof* equal protection jurisprudence is consistent with the plain text of section 1 of the 1875 and 1901 Constitutions and with what we conclude is the better reading of the intent of the framers in omitting section 2 of the 1875 Constitution. In short, taken separately or together, the text, history, and precedent that we have examined make a convincing case that, if erroneous unofficial annotations are implicated in Alabama's equal protection debate, they are the initial descriptions of *Melof* referred to at the beginning of this Article.

Justice See's insistence that it was incumbent upon the plaintiffs in *Melof* to present a contextual state equal protection analysis based on sections 1, 6, and 22 separately, or collectively, merits attention. Plaintiffs may have had little warning such analysis would be required of them given the court's failure to insist upon or engage in any such contextual analysis in many prior cases involving these and other provisions of the Alabama Constitution that have close or analogous federal counterparts. But future litigants would be well advised to become more accustomed to presenting such analyses when making claims under these and other state constitutional provisions. We hope that the cases discussed above will assist in these endeavors.

We leave to another day further exploration of the full scope and applicability of the Alabama Constitution's present equal protection guarantees. For now, suffice it to reiterate that the Alabama Supreme

Court has long recognized the importance of our state constitution's web of fundamental equal protection guarantees. We close with an expression of hope that, before casting aside (rather than casting more broadly) the Alabama Constitution's "safety net" of equal protection guarantees, justices of the Alabama Supreme Court and any framers of future state constitutions will heed Justice Jackson's admonitions about the importance of (federal) equal protection doctrine:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. *Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.*³⁴⁵

345. *Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (emphasis added).

APPENDIX A

SELECTED SECTIONS OF ARTICLE I OF THE 1901 CONSTITUTION

CONSTITUTION OF ALABAMA 1901

PREAMBLE

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:

ARTICLE I.

DECLARATION OF RIGHTS.

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare:

Sec. 1. Equality and rights of men.

That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

Sec. 6. Rights of persons in criminal prosecutions generally; self-incrimination; due process of law; right to speedy, public trial; change of venue.

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indict-

ment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement.

Sec. 13. Courts to be open; remedies for all injuries; impartiality of justice.

That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Sec. 22. Ex post facto laws; impairment of obligations of contracts; irrevocable or exclusive grants of special privileges or immunities.

That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment.

Sec. 29. Titles of nobility, hereditary distinction, etc.; restriction on appointments to office.

That no title of nobility or hereditary distinction, privilege, honor, or emolument shall ever be granted or conferred in this state; and that no office shall be created, the appointment to which shall be for a longer time than during good behavior.

Sec. 35. Objective of government.

That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression.

Sec. 36. Construction of Declaration of Rights.

That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Decla-

ration of Rights is excepted out of the general powers of government, and shall forever remain inviolate.

APPENDIX B

SECTIONS 1 OF ALABAMA'S SIX CONSTITUTIONS

1819, Art. I, Sec. 1:

1. "That all freemen, when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive, separate public emoluments or privileges, but in consideration of public services."

1861, Art. I, Sec. 1:

1. "That all freemen, when they form a social compact, are equal in rights; and that no man or set of men are entitled to exclusive, separate public emoluments or privilege, but in consideration of public services."

1865, Art. I, Sec. 1:

1. "That no man, and no set of men, are entitled to exclusive separate public emoluments or privileges, but in consideration of public services."

1868, Art. I, Sec. 1:

1. "That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

1875, Art. I, Sec. 1:

1. "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

1901, Art. I, Sec. 1:

1. "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."³⁴⁶

SECTIONS 2 OF 1868 AND 1875 ALABAMA CONSTITUTIONS

1868, Art. I, Sec. 2:

346. THOMAS E. SKINNER, ALABAMA CONSTITUTION ANNOTATED 35-36 (1938).

"That all persons resident in this State, born in the United States, or naturalized, or [who] shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights and public privileges."

1875, Art. I, Sec. 2:

"That all persons resident in this State, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights."³⁴⁷

347. *Id.* at 45.

APPENDIX C

OFFICIAL PROCEEDINGS

Subdivision 2 of the Article was read as follows:

Second—That all persons resident in this State, born in the United States, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights.

MR. LOMAX—I move the adoption of that Section of the bill of rights.

MR. SANFORD (Montgomery)—I move to amend that Section by striking out the words “persons who have legally declared their intention of becoming citizens.”

THE PRESIDENT—The gentleman will have to reduce his amendment to writing.

MR. SANFORD—I will do it in a moment.

MR. BURNS—While we pause in the proceedings, I desire to ask this Convention to extend the privileges of the floor to the Hon. S. S. Scott, scholar, statesman and poet, and a member of the last Constitutional Convention of Alabama.

There being no objection, the privileges of the floor were extended Mr. Scott.

MR. COLEMAN(Greene)—It seems that Section 2 is rather in conflict with the provision of the Committees' report on Suffrage and Elections.

MR. LOMAX—The Committee apprehended there might be some conflict perhaps between this provision and the Suffrage Article, after it was adopted, but we thought the Committee on the Order, Consistency and Harmony of the Constitution could reconcile those questions without any trouble.

MR. COLEMAN—I hold to the view that the Committee on Har-

mony cannot change the sense of an enactment of the Convention. It can only harmonize—

MR. LOMAX—Inconsistent provisions.

MR. COLEMAN (Greene)—I move to strike out Section 2.

MR. LOMAX—One moment. I would like to direct the attention of the gentleman from Greene to this proposition; I presume the part of the Section he refers to is the last paragraph—

MR. COLEMAN—it reads that “all persons resident in this State, born in the United States or naturalized, or who have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama.” Now the Committee on Suffrage declare that it requires a two years’ residence—

MR. LOMAX—Does being a citizen of Alabama necessarily give him the right to vote? He might be a citizen and still not have the right to vote, and, consequently, there would be no conflict between the section and the suffrage amendment.

MR. JONES—I would like to inquire of the chairman of the committee if a woman is not a citizen?

MR. LOMAX—Yes.

Mr. Sanford’s amendment was here read as follows:

Amend Section 2 by striking out the words “those who have legally declared their intention to become citizens of the United States.”

MR. SANFORD—I make that motion from the fact that whoever has declared his intention to become a citizen of the United States possesses all the rights of those that are born here, so that a man may owe allegiance to King Edward, or the Emperor of Germany, and hold the office of Chief Executive of this State, or Chief Justice of this State, or any other high and responsible office when he owes allegiance to some foreign power. When he becomes a citizen of the United States, my objection of course disappears, but until he is a citizen, he should not have the right to be the Governor of Alabama, the Chief Justice or Justice of our Supreme Court, or hold any other position in the State of Alabama, and, therefore, I move to strike out those words, where he

has simply declared his intention to become a citizen of the United States. There is nothing in that section that will prevent his holding any office in the State of Alabama, unless that be stricken out.

MR. PILLANS—I entirely and heartily concur with the amendment offered, and hope the Convention will vote for it, and will call special attention to the fact, as Judge Dargan said, after the adoption of the Constitution of 1875, with that same clause in it, that the Alabama Constitution had an unconstitutional clause in it. By the powers conferred by the Federal Constitution upon the Federal Congress, it alone can create citizens out of foreign material, and we undertook to create citizens of Alabama, which Congress alone can do by the passage of uniform naturalization laws. It has done so. Its naturalization laws do not make citizens of those persons who have declared their intention to become citizens. However, in this clause, if we should adopt it, as we unwittingly did heretofore, we override the Constitution of the United States, or at least, attempt to do so, and that we ought not to do. No man should be made a citizen of Alabama who is an alien, and has not been naturalized under the uniform naturalization laws of the United States.

MR. O'NEAL (Lauderdale)—I think this section is in conflict with the provisions in reference to Suffrage and Elections.

THE PRESIDENT—The question before the Convention is the amendment proposed by the gentleman from Montgomery to Section 2.

MR. O'NEAL (Lauderdale)—I understand that, and I think the amendment of the gentleman from Montgomery should be adopted for that reason. The Committee on Suffrage gave very careful consideration to the question whether those who had [1625]declared their intention to become citizens of the United States should be classed as citizens of Alabama, and after careful consideration and discussion of that subject, we omitted it from the section of suffrage, which declares "that every male citizen of this State, who is a citizen of the United States."

Now, under the old provision on suffrage and elections, found in the present Constitution, it provided every male citizen of the State, or who had declared his intention. That is also found in the old section in reference to suffrage, and there would be a manifest conflict between these two provisions, unless the amendment suggested by the gentleman from Montgomery is adopted, and I call the attention of the chairman of the committee to the conflict and hope that he will agree to the amend-

ment.

MR. OATES—I desire to suggest that the amendment offered by my colleague (Colonel Sanford) is not exactly in the language of the section. He uses the word “those.” The words that ought to be stricken out are “or who shall have legally declared their intention to become citizens of the United States.”

THE PRESIDENT—That is manifestly the intention of the gentleman.

MR. OATES—That is the intention but not the words.

MR. SANFORD—I will make it exactly in the words. I did not have the section before me.

MR. O’NEAL (Lauderdale)—Will the chairman let me call his attention to the old Constitution before he concludes his remarks? The old Constitution provides; “Every citizen of the United States and every person of foreign birth who may have legally declared his intention to become a citizen of the United States.” Now we omitted that intentionally, and it seems to me there would be a conflict there.

MR. LOMAX—I submit that there is nothing in this proposed section of our bill of rights which has anything to do with the privilege of suffrage. The fact that we declare in our bill of rights that any person who shall have legally declared his intention to become a citizen of the United States, shall be a citizen of Alabama, does not and cannot confer upon that man the privilege of suffrage, and the fact that we have further declared in this section that they are citizens of Alabama, possessing equal civil and political rights, does not confer upon any person named in the section the privilege of suffrage. We make them citizens whether they have been in the State the time required for naturalization, when they have declared their intention. We confer upon them all civil and political rights, but we still retain the power and exercise the power to keep from them the privilege of suffrage. And [1626] there is no better drawn nor better recognized distinction. It is directly and distinctly, and in terms, recognized by our own court, that suffrage is not a right but a privilege. Now the declaring that a person shall have equal political and civil rights, does not declare that he shall exercise the privilege of suffrage.

MR. PETTUS—May I ask the gentleman a question?

MR. LOMAX—Certainly.

MR. PETTUS—For information, would holding office be a political right under that section?

MR. LOMAX—No, he could not hold office under the suffrage clause, unless he was a voter I take it.

MR. JONES—I would like to ask the gentleman, is not a woman a citizen of Alabama?

MR. LOMAX—Certainly she is.

MR. JONES (Montgomery)—And a minor.

MR. LOMAX - And a minor.

MR. JONES (Montgomery)—And none of them can vote?

MR. LOMAX—None of them can vote, but they have civil and political rights in the State. Now what would be the effect of adopting the amendment of my distinguished friend from Montgomery, Mr. Sanford? The result of that would be to say to any foreign-born person who desired to come to the State of Alabama, you must live in this State for five years before you can become a citizen thereof.

The result of that would be we would exclude from coming to the State of Alabama the most desirable class of foreign citizens that come into this country and we would simply have come in amongst us people who dild [sic] not care whether they had secured the rights of citizenship in one or five years.

MR. WADDELL—Will the gentleman allow a question?

MR. LOMAX—Yes.

MR. WADDELL—What does political rights mean then?

MR. LOMAX—It don't mean suffrage, and that is the question here.

MR. WADDELL—What does it mean?

MR. LOMAX—Suffrage is a privilege and not a right.

MR. O'NEAL (Lauderdale)—Will the gentleman permit a question. Under this section "any person who has legally declared [1627] his intention to become a citizen of the United States" is declared a citizen of Alabama?

MR. LOMAX—Yes, sir.

MR. O'NEAL (Lauderdale)—Now, section 1, of the report of the Committee on Suffrage, provides that every male citizen of this State who is a citizen of the United States, shall be an elector.

Now, I ask this question; If section 1 of the ordinance submitted by the Committee on Suffrage is adopted, would not any man then who had declared his intention to become a citizen of the United States thereby being a citizen of Alabama?

MR. LOMAX—No, sir, he would not, because it is conferred upon the citizens of the United States and not upon the citizens of Alabama.

MR. O'NEAL (Lauderdale)—Oh, no, it says citizens of Alabama.

MR. PILLANS—Do I understand if a person, an alien, came to Savannah, Georgia, and resided there four years after declaring his intention, and then moved to Alabama, he could not, if these words were stricken out, at the end of five years in the United States, though not in the State, claim his citizenship?

MR. LOMAX—I hope the gentleman did not so understand me. My proposition was simply this: That by saying in our Constitution that a man could not acquire the rights of citizenship until he had been here five years, we would keep out of our State a most desirable class of emigrants; and get in those people who did not care whether the right of citizenship was conferred upon them or not, and therefore I do not think that the amendment of the gentleman from Montgomery ought to be adopted.

Now, I do not propose, and do not know that I am prepared at this time, to go into an elaborate discussion of what is meant by civil and political rights. I have not the authorities before me, but I am very sure that neither the word civil rights, or political rights have any reference

to the privilege of suffrage. Consequently, the adoption of this amendment would not have any effect upon the suffrage article.

MR. HOOD—I would like to ask the delegate from Montgomery if political rights would include the right to hold office?

MR. LOMAX—No, sir; not if the suffrage article requires a person to be a legal voter, it would not.

MR. HOOD—If it does not include any political rights, or the right to hold office, what does it mean? [1628]

MR. LOMAX—I just stated that I am not in a position at this time to go into a definition of what political rights mean, but they do not mean or include the right to hold office, or the privilege of suffrage, if a right to hold office is dependent upon the persons being a legal voter within the State.

MR. BURNS—Will the gentleman allow a question?

MR. LOMAX—I will, with pleasure, if I can answer it.

MR. BURNS—Suppose a foreigner comes over here, and belongs to the Mafia or some such crowd, and comes to one of our cities, New Orleans we will say, and remain in statu quo until they perhaps elect Aldermen, or at the election of a Mayor, or some other officer in this State, and he should not become naturalized until he saw that he could get the position. You understand, suppose that was a fact; that the time he saw he was going to get a position, then he became a citizen of the United States, but at the same time he might stay here and belong to the Mafia in New Orleans, or somewhere else, and still be a subject of a foreign country. Now, do you suppose that he shall stand upon the same footing and have the same political rights as any other citizen of the United States?

MR. LOMAX—We propose to give him exactly the rights he has had for twenty-five years in Alabama and no more.

MR. BURNS—Then we will endorse the amendment.

MR. COLEMAN (Greene)—Delegates of the Convention, it seems to me this Section 2 of the Declaration of Rights is out of place in the Constitution of the State of Alabama. The Fourteenth Amendment to

the Constitution of the United States protects all citizens in their privileges and immunities equally, and if these words have no meaning at all, the words, privileges and immunities cover everything proposed to be covered or protected or made by the argument of the delegate from Montgomery, the Chairman of the committee. Now, when a question comes up that admits of so much debate, as to which there is such a contrariety of opinion has arisen upon the subject of this question, it seems to me that the Convention ought not to adopt it. In view of the fact that all citizens of the United States have equal rights, privileges and immunities in Alabama, as much as according to his own argument the words have no force, I move to lay the section on the table.

MR. LOMAX—And on that I demand the ayes and noes.

THE PRESIDENT—The pending question is on the amendment offered by the gentleman from Montgomery.

MR. COLEMAN (Greene)—I move to lay that on the table, because if my motion prevails it reaches the purpose intended by [1629] the gentleman from Montgomery, and I move to lay the whole section on the table.

THE PRESIDENT—It is moved that Section 2, with the pending amendment, be laid upon the table.

MR. LOMAX—I ask for the ayes and noes on that proposition. It is the same provision as in the Constitution of seventy-five and in two-thirds of the Constitutions of the States of the Union.

The call for the ayes and noes was not sustained.

MR. OATES—I am heartily in favor of the amendment for the reasons, in addition to the reasons already given that this is exceptional in the Constitution of Alabama. Scarcely any Constitution of any State in the Union has such a provision. New York, which has a much greater number of foreigners in it than any other one, or two, or three States, has no such provision in its Constitution. This seems to have been adopted and incorporated into the Constitution made by the Convention in 1875, without ever having been fully considered. Another thing, at that time one reason for it, was that in their provisions in regard to the suffrage, those who had legally declared their intention to become citizens were allowed to vote and hence it was in harmony with that provision.

Now, sir, as we are making a Constitution, not for today, nor for tomorrow, but one perhaps for forty or fifty years, we cannot tell just exactly what will occur. Why, sir in the service that I rendered upon Committee of Investigation in the Congress of the United States in regard to the "suffrage mills" you might call them, established in New York and Boston, for the purpose of manufacturing citizens out of foreigners who had just arrived, we looked very closely into a business, which was most extensive. Evasions of the laws of the United States, processes by which, in twenty-four hours after one's arrival, if he had the money to pay for it, he would become a full-fledged citizen and have his papers duly stamped. Those people up there in those cities have had a great deal of trouble with the foreign element. We do not reject them. We welcome them to our shores. We want them to come and live among us. But we have a law of the United States, very liberal in its terms to allow them, when they arrive, to make their declaration of intention to become citizens of the United States, and within a reasonable time, five years, they can perfect their citizenship, and sir, before they do that, what is the nature of the declaration of intention? That of itself does not throw off their obligations, nor completely relieve them from their obligations of loyalty to the government from which they come. It is necessary that they be declared citizens of the United States, to take the oath when they are entirely freed from all obligations to any foreign prince or potentate, and become full-fledged citizens here. Prior to [1630] that time there is no difficulty, as has been insinuated, because they are not declared to be citizens entitled to all the rights. Our laws, sir, protect all foreigners that come in here. They have in their rights in the ownership of property, as well as any other person, and all the rights that are extended to our citizens, and there is no just complaint on that ground. It simply postpones them according to the laws of the United States until they have thrown off their allegiance to the country from which they come and become citizens of the United States, and therefore I think it is wholly unnecessary, in view of what perhaps this Convention will do on the suffrage question, to retain this language in the Constitution.

MR. O'NEAL (Lauderdale)—Will the gentleman allow a question?

MR. OATES—Certainly.

MR. O'NEAL (Lauderdale)—Is it not a fact that this provision was not contained in any Constitution in Alabama, until after the civil war?

MR. OATES—No; and it is not contained in one Constitution in

twenty of the States of the Union.

MR. O'NEAL (Lauderdale)—Is it not a fact that it is not in the Constitution of 1819, and was not incorporated in any other Constitution?

MR. OATES—Never, in any, until 1875.

MR. O'NEAL (Lauderdale)—I will ask you a further question. If making all persons who declare their intention to become citizens of the State of Alabama, would not make them electors under the first section of the suffrage provision, as reported by the committee?

MR. OATES—Well, probably not.

MR. O'NEAL (Lauderdale)—Why not?

MR. OATES—But it might give rise to confusion, and there is no necessity of retaining it as it is.

MR. O'NEAL—If they are citizens of the State of Alabama, would they not be electors, if they had resided here two years?

MR. OATES—That is what it might do, because it confers upon them all rights—

MR. O'NEAL (Lauderdale)—It says if they are citizens of Alabama—

MR. OATES—But I think the court, considering the whole instrument, together, he would not be held to be entitled to the [1631] rights of suffrage under the report of the committee, but as there is no use for this language, and it does not impair the rights of the people when they are not electors, it ought not to be retained, and I am in favor of the amendment.

MR. SORRELL—I move the previous question on the amendment of the gentleman from Montgomery and the section.

MR. PETTUS—I will ask the gentleman to withdraw it.

MR. SANFORD—I hope the amendment suggested will be adopted. We know that all the questions—

THE PRESIDENT—The gentleman from Tallapoosa has moved the previous question upon the section and the amendment.

The main question was ordered.

MR. SANFORD—Now, Mr. President, of all the questions that have disturbed Christendom, that of citizenship has been the most universal—

THE PRESIDENT—The chair will state to the gentleman from Montgomery that the previous question has been ordered.

MR. O'NEAL—I rise to a point of order. The gentleman introduced the amendment, and has the right to conclude the argument, even after the previous question is ordered.

MR. SANFORD—It has always been done—

THE PRESIDENT—The previous question has been ordered upon the proposed amendment and the section proposed by the committee, and the gentleman from Montgomery (Mr. Lomax) chairman of the committee, has the right to conclude, unless he yields to the gentleman.

MR. LOMAX—I do not care to say anything.

MR. SANFORD (Montgomery)—As I remarked, you remember, and this Convention remembers, that in 1850 or '51, Coster, an Austrian citizen, had declared his intention to become a citizen of the United States, or had become one. He was in the East. One of the Austrian vessels seized him as a citizen of Austria, and then it was that Lieutenant Ingram told them unless they released him that he would blow their ships out of the water. I mention that incident to show that the fact that a man may declare his intention does not make him a citizen. There was a long controversy between Chevalier Houselman and Mr. Webster, then Secretary of State, upon the subject. We remember also until since the war in Alabama, no man who was not a naturalized citizen could hold real estate in this commonwealth. [1632]

MR. OATES—Allow me to call your attention to another fact, that this provision which gives full citizenship to those who have legally declared their intention, has given rise to controversies between this Government and foreign Governments about the relations they hold to

it.

MR. SANFORD—Time and again, until many Germans are afraid to go to Germany today, where they have simply declared their intention, unless they be seized and placed in the army.

So I say they are not citizens of this country. They are citizens of their native places, and you know that as a general principle nothing reverts so soon to its original condition as citizenship, and, therefore, it has been the cause of much negotiation and some hostile feelings between the different nations. Why should a man who is not a citizen of Alabama, or rather, of the United States, enjoy the rights and privileges which only citizens enjoy? Citizenship is a high privilege. It is a great distinction to be an American citizen. He becomes a sovereign power in this land when he is a citizen, and why we should seek to confer the great rights upon men who owe their allegiance to Turkey, to China, to England, to France, Belgium and all the foreign countries, and put them upon an equality with our own native born and naturalized citizens, I am at a loss to know.

The fact that it never existed in this State until within the last twenty-five years is a good reason for recurring to the former basis. Therefore, I hope that the amendment will prevail.

MR. COLEMAN (Greene)—I hope that the gentleman will withdraw his motion for the previous question.

MR. PETTUS—I rise to a point of order.

MR. HEFLIN (Chambers)—I make the point of order that the previous question has been ordered.

THE PRESIDENT—The previous question has been ordered. It can only be taken up on a motion to reconsider.

MR. O'NEAL (Lauderdale)—Can that be taken up now? A motion to reconsider?

THE PRESIDENT—It might, by a suspension of the rules.

MR. O'NEAL (Lauderdale)—I move that the rules be suspended, and that the Convention reconsider the vote by which the previous question was ordered on this Section.

Upon a vote being taken the rules were suspended.

THE PRESIDENT—The question is on the motion to reconsider the vote whereby the previous question was ordered on Section 2 of the Article, and the pending amendments. [1633]

MR. LOMAX—A parliamentary inquiry. Can you reconsider a motion ordering the previous question?

MR. PETTUS—I will ask the gentleman from Greene if he will yield to me to offer a substitute for the amendment offered by the gentleman from Montgomery.

MR. COLEMAN—If I am to have the floor in the morning.

The amendment was read as follows:

Amend by striking out the words “and political” in line three of Section 2, Article I.

MR. COLEMAN—Whatever may be the final determination as to the meaning of those words, it is very clear some courts hold that “political privilege” does include the right of franchise. I have a decision of the Supreme Court of California in my hands, holding exactly that view. “As was well said by Judge Mills of the Court of Appeals of Kentucky, ‘the mistake on the subject arises from not attending to a sensible distinction between political and civil rights. The latter constitute the citizen while the former are not necessary ingredients. A state may deny all her political rights to an individual and yet he may be a citizen.’” [sic] and it goes on and holds that political rights include the right of suffrage. And to the same effect you will find another decision in Harris’ Reports, in the body of the decision. I do not want the Convention to act hastily in this matter, because the law is uncertain. It is not settled in this State that I know of—

MR. LOMAX—Will the gentleman from Greene permit me to ask a question.

MR. COLEMAN (Greene)—Yes.

MR. LOMAX—Has he ever examined the case of Washington against the State in the 75th Alabama?

MR. COLEMAN (Greene)—Yes.

MR. LOMAX—Does not that case hold that voting is not a right but a privilege?

MR. COLEMAN (Greene)—Voting is a privilege. There is no doubt about it. And there will be found a much abler decision by Judge Stone in the 73d Alabama, page 26, the State against Green, where all these questions are discussed. But as I stated before, when I was upon the floor, there is no necessity whatever for Section 2 in our Bill of Rights. If the Convention thinks proper, however, to retain any part of Section 2, then we should eliminate from it all objectionable features whatever. Both the one suggested by my friend, the delegate from Montgomery, General Sanford, and also by the amendment of the gentleman from Limestone. [1634]

MR. COBB—We are about to adjourn. Will the gentleman yield to me to make a motion to reconsider the action on your motion, or will you do it?

MR. COLEMAN (Greene)—It has been reconsidered.

THE PRESIDENT—Will the gentleman from Greene suspend.

The hour of 6 having arrived, the Convention adjourned until tomorrow morning.³⁴⁸

[1639]

THE PRESIDENT—The next order of business will be the special order which is the consideration of the report of the Committee on Preamble and Declaration of Rights. The matter before the Convention is section two of the Article reported by the Committee to which is pending an amendment by the gentleman from Montgomery, and an amendment to the amendment offered by the gentleman from Limestone.

Is the Convention ready for the question on the amendment to the amendment?

MR. LOMAX—I believe at the adjournment of the Convention last evening the gentleman from Greene had the floor. If the gentleman

348. 2 PROCEEDINGS, *supra* note 13, at 1622-34.

from Greene will yield to me, I think perhaps we can settle this matter without further controversy. I ask the unanimous consent of the Convention to make a statement, however, prior to stating what the action of the Committee will be upon this matter. I will say that the statement will probably cut off debate, and settle the matter in controversy between us, and I ask leave to make that statement.

THE PRESIDENT—The Chairman of the Committee on Preamble and Declaration of Rights asks unanimous consent to make a statement explanatory of the position taken by the Committee.

To which there was no objection.

MR. LOMAX—Now, Mr. President, on yesterday, I think it is due to myself and to the Convention, I should state that having fully satisfied myself from the decisions of the Supreme Court of Alabama, notably the case of Washington against the State, in the Seventy-fifth Alabama, that the words "political rights," in this section had no bearing upon the question of suffrage whatever. I had not taken the trouble to investigate the question of political rights in such a way as to be able, off hand, to give a definition of the words "political rights," not believing that the question could possibly arise in connection with any matter of suffrage before this Convention. I am still, from a further investigation of [1640] the authorities, convinced that if those words "political rights" might remain in this section, and that it would have no bearing upon any suffrage proposition which might be adopted by us, and I am sustained in that position, not only by the Supreme Court of Alabama, but in my judgment by the Supreme Court of the United States, and by the meager definitions which I find in the law books of the term "political rights," but the Committee is not disposed to have any great pride of opinion as to this particular matter. We do not desire to get up a heated discussion about the meaning of words in the declaration of rights. We believe that everything in that particular section of the bill of rights is covered already by the Fourteenth Amendment and we could not change or alter it if we undertook to do so.

We are not informed of the reasons why the Convention of 1875 adopted the bill of rights with this section in it without a dissenting vote, as the journal of that Convention show. But, entertaining the opinions which I have expressed, that the striking out of the words political rights, or the striking out of the words "any person who has legally declared his intention to become a citizen of the United States" are not material to be declared in the declaration of rights, the Commit-

tee are willing and ask the unanimous consent of this Convention to accept the amendments, and I will state, Mr. President, that when this Convention has granted its consent to accept the amendments, I shall on my own responsibility, move to strike out the entire section.

MR. BEDDOW—I would like to ask the Chairman of the Committee a question. What effect would the striking out of those words, as proposed by the amendment, have on those citizens of the State who have declared their intention, and who have been voting in the last few elections?

MR. LOMAX—I do not think it will have any effect, provided they have the right to vote under the suffrage article adopted by this convention.

THE PRESIDENT—Is the Convention ready for the question on the amendment offered by the gentleman from Limestone?

MR. COLEMAN (Greene)—I understood the Chairman to say he is willing to accept both amendments, and I think unanimous leave will be granted.

MR. LOMAX—We will accept both of them, by the consent of the Convention.

THE PRESIDENT—Does the gentleman ask unanimous consent?

MR. LOMAX—Yes, sir.

To which objection was made. [1641]

MR. LOMAX—As the Convention refused to grant unanimous consent, I move that the section and the amendments be laid on the table.

MR. PILLANS—Will the gentleman allow me to call his attention to one thing that may be material to be considered before that is done. Will he withdraw?

MR. LOMAX—Yes.

MR. PILLANS—It is simply this, the section as we find it in our last Code of this State, has appended to it a note, stating "the effect of this section is to place all persons natural and artificial on a basis of

equality in the courts." Citing the case of South and North Railroad against Morris, 65th, 75th, 85th, 87th and 106th Alabama, etc., and see also citations to another section: "there can be no discriminative advantage bestowed by law between the parties to the same suit," citing other authorities. "The statute against miscegenation is not a denial of equal civil and political rights to the races." Now if it appear from that, very likely that is a clause that has some efficacy and meaning, and has force in protecting investments and corporate rights and perhaps individual rights in this State, against hasty and ill advised legislation.

MR. WALKER—Will the gentleman allow a suggestion?

MR. PILLANS—Yes.

MR. WALKER—Isn't that purpose completely effected by the provision of the Fourteenth Amendment to the Constitution of the United States.

MR. PILLANS—It is, possibly. I only wanted to say that I expect to vote against laying the section on the table for the reason that it can be amended and preserved.

MR. LOWE (Jefferson)—I desire to state the grounds of my objection, and why I declined to agree to unanimous consent upon this question. It merely grows out [of] my indisposition to mutilate our old constitution more than is necessary. I doubt if any gentleman on the floor has suggested a single instance or particular, in which any harm has come from the declaration contained in the old constitution. To my mind I can find no good reason for changing that language, or modifying it in any respect. Therefore, acting upon the principle, and upon the belief, that unless a necessity exists for a change we should adopt not only the spirit, but the letter of the old Constitution. I hope that the amendment will be voted down, and that the report of the Committee will be adopted.

MR. LOMAX—In reply to the suggestion of the gentleman from Mobile, I will state that an investigation which I made last night demonstrated the fact that this provision is not contained [1642] in any Constitutions at all, in the language in which it appears in our Constitution. It appears substantially in the following Constitutions: New York, Connecticut, Indiana, Minnesota, South Carolina and Virginia, and does not appear in the Constitution of any other State, except those named, and, as I say, it does not appear in this language in those Constitutions. I

have no doubt, however, that everything contained in that section is covered by the Fourteenth Amendment, as I said before, and we could not possibly alter it if we undertook to do so. I think the section ought to stand as it is written, and as it was adopted unanimously by the convention of 1875, or else it ought to go out altogether, and therefore I renew my motion to table both the amendments and the section.

MR. PETTUS—I would like to ask the gentleman a question. If you strike out Section Two, will there appear any where in the Constitution of Alabama a section declaring who are citizens of the State of Alabama?

MR. LOMAX—There will not appear in the bill of rights any statement of that sort. I do not know what the subsequent committees may do. It is not necessary in any event. I now renew my motion to table.

Upon a vote being taken a division was called for, and by a vote of 49 ayes to 42 noes the section and the amendments were laid upon the table.³⁴⁹

349. 2 PROCEEDINGS, *supra* note 13, at 1639-42.