Pointing a Way Toward a Brighter Future for Public Education: A Comment on *Lynch v. Alabama*

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* Vanderbilt University School of Law class of 2014. I would like to thank my wife Taylor for her helpful feedback and support during this long project; Dr. Randolph Horn for introducing me to the sordid history of the Alabama Constitution; Dr. Mark Brandon for his fantastic instruction in Con Law II; Sean Mahard for his helpful comments and suggestions; and finally Judge Charles Lynwood Smith for undertaking an extraordinary effort to expose inequalities in Alabama's education system and illuminate potential legal paths to help eliminate them. The views and opinions set forth herein are the personal views or opinions of the author; they do not necessarily reflect views or opinions of the law firm with which he is associated.

I. INTRODUCTION

Day two of the 1901 Alabama constitutional convention opened with prayer: "We pray Thee, Heavenly Father, that . . . [Thy servants'] . . . minds and hearts, be so guided and controlled by Thy Holy Spirit as that the result of their labors will be of benefit to all the inhabitants and citizens of this State."[1] Shortly after the roll was called, the opening statement shed more light on the convention's purpose. "And what is it that we want to do?" asked convention President John B. Knox: "[w]hy[,] it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."[2] The 1901 Constitution still governs Alabama today. Indeed, it is longer than any other Constitution in the world. Alabama tax and education policy have evolved within its framework.

In 2008, a group of public school students filed suit against the State of Alabama and its officers in the United States District Court for the Northern District of Alabama.[3] They claimed that Alabama's system of ad valorem taxation, which provides funds for public education in the State, was discriminatory in purpose and effect in violation of the United States Constitution.

District Court Judge Charles Lynwood Smith, Jr., an Alabama native and former state judge, issued an opinion on the merits in favor of the defendants. That he did so in an 854-page opinion in which he harshly criticized both the Alabama Constitution and relevant Supreme Court precedent leaves observers and higher courts to consider whether either is worth preserving.[4]

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1. The Alabama Journal, Day 2 Remarks at 5–6, http://www.legislature.state.al.us/aliswww/history/constitutions/1901/proceedings/1901_proceedings_vol1/day2.html [https://perma.cc/587B-2WN3].

2. *Id.* at 8.

3. *Lynch v. Alabama*, No. 08-S-450-NE, slip op. at 17 (N.D. Ala. Nov. 7, 2011) (hereinafter *Lynch*, at #).

4. *See, e.g.*, Brian Lawson, *Federal Judge Rails Against Alabama Education System, but leaves current law intact*, AL.COM (Oct. 21, 2011), http://blog.al.com/breaking/2011/10/federal_judge_rails_against_al.html [https://perma.cc/DDD7-2ZDP] (analyzing the *Lynch* opinion's content and effects).

Race was a—if not *the*—prominent issue in Alabama when the State adopted its constitution in 1901, and it remained so throughout the twentieth century.[5] Judge Smith analyzed the historical roots of Alabama politics from the State's settlement in the early 1800s to the adoption of the 1901 Constitution and into the political debates that raged around the Constitution throughout the twentieth century.[6] Judge Smith begrudgingly accepted the "Supreme Court jurisprudence that has allowed unequal and inadequate public school funding to evolve" because he had little choice in the matter.[7] He did not have kind words for that jurisprudence, however, calling it the second of "two unfortunate realities" that "plague[]" Alabama with "an inadequately funded public-school system . . . that hinders the upward mobility of her citizens."[8] He exhaustively described the school financing litigation that preceded *Lynch* before analyzing the history and effects of the challenged enactments under the applicable constitutional framework.

This Comment is more limited. While I summarize some of the Alabama Constitution's sordid origins and *Lynch's* predecessor litigation for context, I do not undertake a full-scale analysis of either. I leave that to Judge Smith in the *Lynch* opinion itself. *Lynch* exposes deficiencies in Equal Protection jurisprudence that precluded Judge Smith from finding for the plaintiffs. I review *Lynch* and conclude by suggesting two possible doctrinal shifts the Supreme Court might make in response to problems highlighted in *Lynch*.[9] The first would lessen the burden on plaintiffs when they challenge a law as discriminatory in purpose and effect. The second would recognize an adequate or roughly equal education as a fundamental right. Part II discusses the specific facts and background of *Lynch*. Part III analyzes the constitutional framework for discriminatory-purpose-and-effect challenges and challenges to educational funding schemes. Part IV discusses Judge Smith's findings in *Lynch*, as well as some of the historical background of the case and its predecessor litigation. I conclude by quoting Judge Smith at length about the state of Alabama's education system and the Equal Protection jurisprudence that constrained the *Lynch* opinion.

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5. *See Lynch*, at 5–13 (discussing slavery and post-slavery minority oppression in a section entitled "The Centrality of Race").

6. *Id.* at 453–753.

7. *Id.* at 798–99; *see also id.* at 797 ("Ultimately, this court must confront the fact that trial court judges cannot write opinions on clean sheets of paper.").

8. *Id.* at 797–98.

9. Many scholars, opinion-leaders, and some politicians have called for constitutional reform in Alabama. The 1901 Constitution carries a legacy of racism and inhibits economic growth, among other maladies. This Comment does not address the need for constitutional reform in Alabama. It instead suggests two doctrinal shifts whereby Equal Protection jurisprudence would allow a court to strike down Alabama's constitutional provisions that were at issue in *Lynch*.

Finally, I offer two possible solutions to the problems identified in the case, both of which would involve shifts in how judges interpret and apply the Equal Protection Clause. At bottom, this Comment focuses on a simple proposition brought to the fore by *Lynch*: If Alabama's 1901 Constitution—with its patently racist origins and the unequal education and tax policies it generated—withstands scrutiny under the current Equal Protection framework, we should question how well that framework is working.

II. CASE BACKGROUND

The *Lynch* plaintiffs[10] challenged five tax provisions of the Alabama Constitution on the grounds that the provisions were discriminatory in purpose and effect on the basis of race in violation of the Fourteenth Amendment. First, they challenged Article XI, Section 214, which "limits the rate of ad valorem[11] taxation *the State* may levy upon real and personal property to 6.5 mills."[12] The second challenge was to Article XI, Section 215, a provision that "limits the rate of ad valorem taxation that *county governments* may levy upon taxable property to 5 mills."[13] The third, Article XI, Section 216, (similar to the other provisions) "limits the rate of ad valorem taxation *municipalities* may levy upon taxable property to 5 mills."[14]

The fourth challenged provision, Article XI, Section 217**,** became more complex after the relevant constitutional language was amended, first in 1972 and then in 1978.[15] Amendment 373, passed in 1978, created four classes of property and lowered the amount of ad valorem tax that could be applied to each one.[16] The final amendment also put

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10. The group consisted of five public school students from Lawrence County, Alabama—three white students and two African-American students, joined by their parents—along with five African-American students from Sumter County, Alabama. *Lynch*, at 17.

11. This phrase means "proportional to the value of the thing taxed." *Ad Valorum*, BLACK'S LAW DICTIONARY (9th ed. 2009).

12. *Lynch*, at 19 (emphasis added). A "mill" is equivalent to $0.001.

13. *Id.* at 20 (emphasis added).

14. *Id.* at 21 (emphasis added).

15. *Id.* at 21–22.

16. *Id.* at 23. The classes created by Amendment 373 are:

> Class I[:] all real and personal property owned by public utility companies used in the business of such utilities—assessed at 30% of fair market value.
>
> Class II[:] all property not otherwise classified (a catch-all category, capturing all real and personal property that does not fit within the definitions of the other three classifications, and including most business, commercial, and industrial properties and 'second homes' not occupied as the owner's primary residence)—assessed at 20% of fair market value.

"lids" on the overall amount of tax that can be assessed to a parcel of property in each class.[17] Most importantly, it established a property tax structure that allows owners of class-III property to have their property assessed by "current use" value rather than the "fair-market-value" assessment required for the other three classes.[18] Finally, Article XIV, Section 269, as amended by Amendment 111, limits the amount of tax revenue a county can use to support education to 1 mill.[19] Reading these five provisions together, the plaintiffs alleged that they were "injured by the racially discriminatory property tax restrictions . . . which impede their ability and the ability of their elected representatives to raise state and local revenues adequately to fund the public services they need, including public education."[20]

The plaintiffs sued to enjoin Alabama from future enforcement of the tax provisions, alleging that the provisions violated the Equal Protection Clause. They made clear that this case was about the *adequacy* of the funding mechanisms, not the *distribution* of education funds.[21] The court quoted Plaintiffs' complaint to summarize their claims: "the [] racially motivated property tax provisions have accomplished their two-pronged racially discriminatory purpose: whites are favored with lower taxes, and blacks are burdened with less funding for schools."[22]

III. CONSTITUTIONAL FRAMEWORK

The Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the

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> Class III[:] all agricultural, forest, and single-family owner-occupied residential property, and historic buildings and sites—assessed at 10% of fair market value;
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> and,
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> Class IV[:] all private passenger automobiles and motor trucks of the type commonly known as 'pickups' or 'pickup trucks' owned and operated by an individual for personal or private use, and not for hire, rent, or compensation—assessed at 15% of fair market value.

Id. at 23–24.

17. *Id.* at 25.

18. *Id.* at 25–28.

19. *Id.* at 31.

20. *Id.* at 32 (quoting Complaint).

21. *Id.* at 40 ("'The gravamen of plaintiffs' Complaint is the inability of local school systems to raise sufficient ad valorem tax revenues to provide for an adequate education.'" (quoting Plaintiffs' post-trial brief)).

22. *Id.* at 37–38.

laws."[23] If a law singles-out a class of persons for differential treatment, the law can be challenged under the Equal Protection Clause by members of the class discriminated against. While courts review most laws under the "rational basis" test (a deferential review that nearly always results in the court upholding the statute), laws that facially discriminate on the basis of a protected class, including race, are reviewed with "strict scrutiny."[24] Strict scrutiny review also applies when a law does not facially discriminate based upon race, but instead has a discriminatory purpose and effect on the members of a protected class. Furthermore, the Supreme Court has held that some interests are so fundamental that, when laws infringe upon those interests, Equal Protection challenges to those laws should be reviewed under strict scrutiny, whether or not the discriminatory treatment is based on a protected class.

To mount challenges to education funding schemes under the Equal Protection Clause, plaintiffs have traditionally challenged the laws under one of two theories: the scheme is either challenged as discriminatory in purpose and effect or as impinging on the party's fundamental interest in education. These are the two avenues available for challengers to persuade courts to review such laws under strict scrutiny, and the latter theory is hardly a viable one after a 1973 Supreme Court decision.

A. Discriminatory Purpose and Effect and Fundamental Interests

To challenge a facially neutral law as discriminatory in purpose and effect under the Equal Protection Clause, a plaintiff must prove that racial discrimination was the intent of the enacted provision and that it results in the effect of disparities along racial lines.[25] In *Arlington Heights v. Metropolitan Housing Corp.*, the Supreme Court provided guidance on how courts might discern a racially discriminatory purpose, noting that the historic background, specific sequence of events that led up to the provision's enactment, departures from normal procedures, and legislative or administrative history can be effective indicators of a discriminatory purpose.[26] If the plaintiff

23. U.S. CONST. amend. XIV.

24. Adarand Constructors v. Peña, 515 U.S. 200 (1995).

25. Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring that there be a racially discriminatory purpose in addition to a racially discriminatory effect for the prima facie case to be met).

26. 429 U.S. 252, 270 (1977) (upholding a Chicago suburb's decision not to grant the request to rezone a single-family home to a multiple-family home because plaintiffs did not meet the burden of showing discriminatory purpose).

shows discriminatory purpose and effect, the burden shifts to the defendant to provide a nondiscriminatory reason for the law. If the defendant cannot, then the court reviews the law under strict scrutiny. Otherwise, the law is reviewed under the deferential rational basis test. The Court reiterated in *Hunter v. Underwood* that, to establish a discriminatory purpose, a party must show that "racial discrimination [was] a substantial or motivating factor behind enactment of a law."[27]

In exceptional circumstances, the Supreme Court has held that some interests are so fundamental that classifications affecting those interests are to be reviewed using strict scrutiny, even when the classification is not based upon a protected category (like race). The Court has primarily limited this framework to laws affecting voting rights and access to courts.[28] But the Court has, at times, signaled that it might extend this brand of Equal Protection to laws affecting a citizen's interest in education.

B. Supreme Court Precedent

Two Supreme Court decisions shed light on how the Equal Protection Clause applies to public education. In *San Antonio Independent School District v. Rodriguez*, decided in 1973, the Supreme Court held that Texas's system of financing public schools did not violate the Equal Protection Clause of the Fourteenth Amendment.[29] The Court overturned a three-judge district court panel that had held both that education was a fundamental interest and wealth a suspect classification, requiring strict scrutiny review.[30] Justice Powell, writing for the five-Justice majority, reasoned that the wealth classification did not warrant increased scrutiny of the Texas education funding scheme:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[31]

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27. 471 U.S. 222 (1985). In *Hunter*, the Supreme Court struck down under the Equal Protection Clause a provision of the Alabama constitution that provided for disfranchisement for those convicted of crimes involving moral turpitude, because, although the law was facially neutral, the purpose and effect of that provision was to disfranchise African-Americans. *Id.* at 232–33.

28. *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (access to courts).

29. 411 U.S. 1, 19 (1973).

30. *Id.* at 18–19.

31. *Id.* at 28.

The Court went on to explain why education is not considered a "fundamental" right that would require strict scrutiny:

> [The] key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[32]

The Court found that there was not.

Justice Marshall penned an impassioned dissent in *Rodriguez*, taking issue with the Court's "rigidified approach to Equal Protection analysis" and countering that "[the Court] has applied a spectrum of standards [in Equal Protection cases] . . . depending . . . on the constitutional and societal importance of the interest adversely affected . . . ."[33] He went on to say that he would have analyzed the law with careful judicial scrutiny. He argued that there was a close nexus between a person's interest in education—which is not explicitly listed in the Constitution's text—and voting and free speech—which are—and that the close nexus should require heightened judicial scrutiny of laws affecting a person's interest in an adequate education.[34] At the end of the day, Justice Marshall and two other dissenters would have struck down the Texas scheme on either of two independent grounds: as a classification based upon wealth and because the classification impinged upon the fundamental interest of education.

In *Plyler v. Doe*, decided in 1982, the Supreme Court applied intermediate scrutiny to strike down a Texas law that excluded undocumented students from Texas public schools. Intermediate scrutiny is a type of review that falls somewhere between strict scrutiny and rational basis review.[35] Applying this standard, the Court explained that "the discrimination contained in [the law] can hardly be considered rational unless it furthers some substantial goal of the State."[36] The Court rejected Texas's arguments that the law furthered the goals of discouraging illegal immigration and avoiding burdens on public schools.[37] "If the State is to deny a discrete group of innocent children the free public education that it offers to other children

32. *Id.* at 34.

33. *Id.* at 98–99.

34. *Id.* at 102–03.

35. "Intermediate scrutiny" has taken a variety of forms, but, in essence, it is a review more searching than rational basis but not as stringent as strict scrutiny. See, e.g., United States v. Virginia, 518 U.S. 515 531 (1996) (applying another form of intermediate scrutiny requiring states to provide an "exceedingly persuasive" justification for gender-based classifications).

36. Plyler v. Doe, 457 U.S. 202, 224 (1982).

37. *Id.* at 225–27.

residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here."[38]

While the Court did not explicitly rest its holding on the fact that the law involved a protected class or a fundamental interest, it used strands of both theories to strike down the law. The Court went out of its way to state that "[u]ndocumented aliens cannot be treated as a suspect class . . . [n]or is education a fundamental right."[39] But the Court waxed eloquent about the importance of education:

> Public education . . . [is not] merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. . . . In sum, education has a fundamental role in maintaining the fabric of our society.[40]

The Court also suggested that the particular class of citizens affected by the law prompted its departure from a "rational basis" review: "[the law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[41]

IV. THE *LYNCH* OPINION

The plaintiffs in *Lynch* challenged various provisions of the Alabama Constitution as discriminatory in purpose and effect. The challenged provisions, taken together, established the framework for Alabama's ad valorem tax system by which the State substantially funds its system of public education. The court held that, while some of the provisions had a discriminatory purpose, the plaintiffs had not shown a discriminatory effect along racial lines that would allow the court to strike down the laws establishing Alabama's education funding system under the Fourteenth Amendment.

A. Historical Considerations

Judge Smith's opinion begins with the "central paradox of American history": slavery, and the systems of white supremacy that flourished in a country founded on principles of liberty and equality.[42] He then summarizes the plaintiffs' case as a challenge to Alabama's ad valorem tax system, "the oldest type of tax that we know anything

38. *Id.* at 230.
39. *Id.* at 223.
40. *Id.* at 221 (internal quotations omitted).
41. *Id.* at 223.
42. *Lynch*, at 5, 5–14.

about,"[43] before going on to describe the specific provisions challenged by the plaintiffs.[44]

The opinion takes care to describe the "Black Belt" region of Alabama, named for its rich soil, and its "history of plantation agriculture in the nineteenth century[] and[] [the] very high percentage of African-Americans in [its] population."[45] Many former slaves continued to live in this region following emancipation and throughout the reign of terror between Reconstruction and the end of Jim Crow. Judge Smith explains how the region continues to struggle today: "Because of the decline of family farms, the rural communities in the Black Belt commonly face acute poverty, exodus to cities, inadequate education programs, low educational attainments, poor health care, high infant mortality rates, short life expectancies, substandard housing, and high levels of crime and unemployment." [46]

Historical context looms large throughout the opinion, which Judge Smith begins by describing Alabama's settlement and how the Black Belt became "Alabama's Third World."[47] For example, aristocratic elites from the Wessex region of England, who first settled in Virginia before moving south to Georgia and what became Alabama, left their mark on the State.[48] Judge Smith describes, contrary to some historical accounts, how the culture carried over from Wessex aristocrats likely caused slavery to take hold in Virginia and "spread like Kudzu into the Black Belt of Alabama."[49]

The opinion describes how settlers from Virginia and northern Georgia migrated to Alabama after the War of 1812 and the defeat of the Creek Indian Nation in 1814.[50] Although the settlers first landed in northern Alabama, they quickly "realized that Alabama's Black Belt had more to offer in terms of the malleability of the region and the fertility of the soil for cotton production."[51] Planters from Georgia and Virginia came to appreciate the fertile land and ideal climate in the Black Belt, and "[t]hey only needed one other ingredient to establish a

43. *Id.* at 15 (quoting Harry H. Haden, *Equality—The Cornerstone of Democracy*, 21 ALA. LAW. 269, 270–71 (1960)).

44. *Id.* at 17–41.

45. *Id.* at 49.

46. *Id.*

47. *Id.*

48. *Id.* at 50–54. Judge Smith notes that, strikingly, the people who eventually settled the Alabama region hailed from the Wessex region of London, where "slavery lasted far longer than in any other part of England." *Id.* at 54.

49. *Id.* at 55 (discussing DAVID HACKETT FISCHER, ALBION'S SEED: FOUR BRITISH FOLKWAYS IN AMERICA (1989)).

50. *Id.* at 57–69.

51. *Id.* at 69.

booming cotton industry—labor."[52] The planters got their labor from African slaves. Because cotton was so labor intensive, "the Planters in the Black Belt were *far outnumbered* by the people they enslaved, and the Black Belt historically had a demographic makeup distinct from the rest of the state."[53] That anomaly, born of slavery and disenfranchisement, persisted through the Civil War and eventually gave the planter elite classes of the Black Belt disproportionate political influence.[54] The concentration of African-Americans in the Black Belt endures to this day.[55]

B. Overview of Property Taxes and Education Funding in Alabama

Alabama's 131 school districts receive funding from a multitude of sources and programs—approximately 8.3% comes from federal sources, 48% from the state, 37.5% from local sources, and 6.2% from unspecified sources.[56] Judge Smith describes in detail the programs that fall under each level of government. The extent to which Alabama relies on local funding is important because much of that funding is derived from property taxes.

In Alabama, "[a]ll real and personal property . . . is subject to ad valorem taxation, unless specifically exempted . . . ."[57] The State may not tax any property for more than 6.5 mills of the property's assessed value.[58] Amendment 373 changed the Alabama Constitution by allowing one class of property—Class III—to be assessed at its "current use" value rather than its fair and reasonable market value.[59] This means that a great deal of agricultural, timberland, and residential property in Alabama gets taxed at a mere 10% of its current-use value rather than its fair and reasonable market value.[60]

52. *Id.* at 72.
53. *Id.* at 76.
54. *Id.* at 72–82.
55. *Id.* at 77–78.
56. *Id.* at 139.
57. *Id.* at 177.
58. *Id.* A mill is $0.001. *Id.* at 178.
59. *Id.* at 184.
60. I offer this brief overview at the outset. Alabama's ad valorem tax system is discussed more thoroughly in *supra* Section IV.C.3.

C. Important Education, School-Finance, and Taxation Precedent

To borrow the oft-quoted adage, "school finance reform is like a Russian novel: it's long, tedious, and everybody dies in the end."[61] The axiom aptly characterizes *Lynch* and its predecessors. For example, the *Knight* litigation went on for over 30 years, long enough that the original plaintiffs who sought redress were long since out of school. This Section provides a brief overview of important holdings and lessons from prior education funding challenges. The cases discussed below, along with the numerous other cases addressed by Judge Smith, form the backdrop of the Equal Protection challenge brought in *Lynch*.

1. *Brown* and Its Legacy

The history of school desegregation in the United States fails to vindicate the high aspirations of what is probably the most famous Supreme Court case in history: *Brown v. Board of Education*. Judge Smith describes the evolution of Equal Protection jurisprudence from *Plessy v. Ferguson* through *Brown v. Board of Education*.[62] First, he chronicles the rise of "Jim Crow" laws after *Plessy* and laments the resistance to integration that followed *Brown*'s directive to proceed "with all deliberate speed."[63] Second, he explains that, as courts began to fashion remedies for districts to integrate, the Supreme Court held that "inter-district" remedies could only be used when outer-lying districts had committed a constitutional violation, thus effectively shutting down inter-district remedies as a solution to integrate schools.[64] District courts' inability to fashion inter-district remedies, combined with "white flight" and continued resistance to integration efforts by states, left the nation's school districts unable to deliver on the promise of *Brown*—schools remained segregated.[65]

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61. Mark G. Yudof, *School Finance Reform in Texas: The Edgewood Saga*, 28 HARV. J. ON LEGIS. 499, 499 (1991). Thanks to Daniel Hay, Vanderbilt Law School class of 2015 and Vanderbilt Law Review Editor-in-Chief, for directing me to this quotation.

62. *Lynch*, at 204–18.

63. *Id.*

> The directive for lower courts to dismantle segregated public school systems "with all deliberate speed" surely is among the least-happy utterances in American constitutional law. The phrase provided an interstitial space into which racist demagogues throughout the Nation, but especially those hate-mongers residing within the eleven states comprising the former Confederacy, drove obstructive wedges. Southern states used every imaginable technique to resist desegregation.

Id. at 217–18.

64. *Id.* at 225–29 (discussing Milliken v. Bradley, 418 U.S. 717 (1974)).

65. *Id.* at 221–228 (discussing Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999 (1994)). Judge

2. The Equity Funding Cases

In the early 1990s, Alabama courts consolidated a group of cases—known as "the equity funding cases"—that involved challenges to Amendment 111 to the Alabama Constitution, which was adopted to "allow Alabama public schools to close rather than desegregate."[66] The presiding state trial judge initially held that Alabama's education funding scheme failed to conform to the education clause of Alabama's constitution, as well as the due process and equal protection clauses of the State's Constitution.[67] The judge also ordered state officials to remedy the defects in the state's education system according to a set of "essential principles" outlined in the opinion.[68] After reversing its initial ruling over five years later, the Alabama Supreme Court held that the trial judge's remedial orders were improper based on the State's separation of powers doctrine.[69]

3. *Weissinger*

In the first *Weissinger* case in 1971, the district court panel "concluded that Alabama's *ad valorem* tax laws were being administrated in violation of the Fourteenth Amendment's Equal Protection Clause and the Alabama Constitution."[70] The laws ran afoul of the Equal Protection Clause because the taxing authority assessed tax value on an ad hoc basis, assessing property anywhere from "nine to thirty percent" of its value.[71]

Under court-order from the first *Weissinger* decision, the Alabama state legislature passed, and Alabama voters approved, an amendment to the Alabama Constitution that created four classes of taxable property with different tax-assessment ratios: (I) utility property assessed at 30%; (II) otherwise unclassified property assessed at 20%; (III) "agricultural, forest, historical, and single-family, owner-occupied residential properties," assessed at 10%; and (IV) automobiles

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Smith also discussed *Serrano v. Priest*, 487 P.2d 1241, 1259 (Cal. 1971), which held that education was a fundamental interest under the Equal Protection Clause and that wealth was a suspect classification only one year before the Supreme Court came to the opposite conclusion in *Rodriguez*, 411 U.S. at 44–55. *Lynch*, at 233–35. The opinion then delves into *Rodriguez*. *Id.* at 235–50.

66. *Lynch*, at 250-51, n. 532 (quoting ERWIN CHEMERINSKY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 36 (2010)).

67. *Id.* at 252–53.

68. *Id.* at 253.

69. *Id.* at 256.

70. *Id.* at 325 (citing Weissinger v. Boswell, 330 F. Supp. 615 (M.D. Ala. 1971) (per curiam) ("*Weissinger I*")).

71. *Id.* at 325.

assessed at 15%.[72] Importantly, owners of Class III property were (and still are) entitled to have their property assessed at its current-use value, rather than a fair and reasonable market value.[73] The Eleventh Circuit upheld Alabama's new scheme in *Weissenger II*, noting that "'[e]ven an intentionally discriminatory [property] classification will pass muster [under the U.S. Constitution] if it is founded upon a reasonable distinction, or difference in state policy, or any state of facts reasonable can be conceived that would sustain it.'"[74]

After noting that the 1984 *Weissinger II* decision "would seem to preclude a broad-based attack on the constitutionality of Alabama's present *ad valorem* tax system," Judge Smith distinguished the *Lynch* plaintiffs' claims from the claims the Eleventh Circuit ruled on in *Weissinger II*:

> [The] plaintiffs' challenge in the present case is *not* that the State's *ad valorem* tax system is unconstitutional because of differing assessment ratios for the four Classes of property created by Amendment 373, but that the system created in response to the mandate in *Weissinger I* is unconstitutional because it was devised as a means of perpetuating, as much as possible, the same anemic *ad valorem* tax revenues generated by a system that had been devised with the racially discriminatory intent of minimizing the monies available for the education of black children, *and*, that continues to adversely impact the educational opportunities of the State's black and poor-white children by unreasonable restrictions on the mechanism for increasing the millage rates of local *ad valorem* property taxes devoted to education. Indeed, plaintiffs hope to avoid the application of *Weissinger I* by asserting that the tax system is itself racially discriminatory, not that it generates revenue through the dissimilar treatment of similarly situated properties.[75]

In essence, the *Lynch* plaintiffs attempted to "develop a tie between the alleged racial motivation of the legislature in creating the post-*Weissinger I ad valorem* tax system, and the limited funds available for K-12 education statewide," a task "akin to threading a very small needle."[76]

4. *Knight v. Alabama* and *United States v. Fordice*

The *Knight* cases "began with a suit to desegregate Alabama's public colleges and universities," filed in 1981.[77] The original plaintiffs asserted that Alabama had "perpetuated a *de jure* system of segregated

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72. *Id.*

73. *Id.* at 325–26.

74. *Id.* at 326 (quoting Weissinger v. White, 733 F.2d 802, 806 (11th Cir. 1984) ("*Weissinger II*")).

75. *Id.* at 326–27. Judge Smith went on to note that a subclass of plaintiffs in the *Weissinger* cases made a similar claim as did the *Lynch* plaintiffs, but the Eleventh Circuit did not rule on the particular issue raised by those plaintiffs. *Id.* at 327–28.

76. *Id.* at 329.

77. *Id.* at 331.

public institutions of higher education" that violated the Equal Protection Clause.[78] The initial action was stayed as the State engaged in administrative proceedings with the Department of Education over whether the State had sufficiently desegregated its colleges and universities.[79] The administrative proceedings resulted in a referral of the matter to the Department of Justice, which filed suit in the Northern District of Alabama, where that action was consolidated with the original *Knight* case.[80] After Judge U.W. Clemon conducted a trial, ruled in favor of the United States, and ordered Alabama to "eliminate all vestiges of the dual system of higher education," the Eleventh Circuit reversed, ordered the complaints brought by the DOJ and the *Knight* class dismissed without prejudice, and removed Judge Clemon from presiding over the proceedings if the case was refiled.[81]

The Eleventh Circuit appointed Judge Harold Murphy, a district judge from the Northern District of Georgia, to preside over the matter on remand. Judge Murphy conducted a second trial, after which he issued an opinion that found Alabama liable for maintaining vestiges of *de jure* segregation in the maintenance of Alabama's system of higher education.[82] The judge found that the vestiges of *de jure* segregation "result in the racial identifiability of Alabama's colleges and universities, and the perpetuation of a dual system of public higher education within the State."[83] He therefore ordered the State to remedy the problem by addressing specific practices related to funding, admissions policies, and faculty and administration hiring at institutions to allow greater access to African-Americans who wanted to attend predominantly white institutions and vice versa.[84]

Shortly after Judge Murphy issued his order, the Supreme Court issued an opinion in *United States v. Fordice*, a case involving similar issues surrounding Mississippi's failed efforts to desegregate its public

78. *Id.* at 331–32.

79. *Id.* at 332.

80. *Id.* at 332–33.

81. *Id.* at 337–38.

82. *Id.* at 340–41.

83. *Id.* at 341.

84. Judge Murphy also set out numerous findings of fact, many of which Judge Smith quoted in *Lynch*. Some notable findings include the following: "With the possible exception of a creole school in Mobile, there is no record of a school for black children in the State of Alabama prior to 1860. . . . The 1901 Alabama Constitution not only disenfranchised the black population but entrenched a system of educational funding that was designed to improve white schools by raiding black students' portion of the public school fund." *Id.* at 343, 360 (quoting Knight v. Alabama, 787 F. Supp. 1030, 1066–74 (N.D. Ala. 1991) (Murphy, J., sitting by designation) ("*Knight I*")).

colleges and universities.[85] In *Fordice*, the Supreme Court reversed the lower courts' ruling in favor of Mississippi, and held that:

> [i]f the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by influencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system. Such policies run afoul of the Equal Protection Clause, even though the State has abolished the legal requirement that whites and blacks be educated separately and has established racially neutral policies not animated by a discriminatory purpose . . . .[86]

The Eleventh Circuit commended Judge Murphy for his prescience, as the *Knight* opinion applied principles that anticipated the standards the Supreme Court used in *Fordice*.[87] Nevertheless, the Eleventh Circuit reversed and remanded the case for further consideration in light of *Fordice*.

On remand, Judge Murphy conducted another trial, appointed five neutral expert witnesses, and issued another opinion, outlining remedial orders calculated to "eliminate the vestiges of historical racial discrimination within the Alabama system of public higher education."[88] Judge Murphy appointed a monitor and dictated that the remedial decree would terminate in 2005, ten years after entry.[89] In 2005, the plaintiffs filed a motion for additional relief before the sunset on the remedial decree. The motion was entitled "Motion for Additional Relief with Respect to State Funding of Public Higher Education," and it concerned the limitations that Alabama's property tax system placed on raising funds, limitations that resulted in unfair and inadequate funding mechanisms for schools, specifically those schools serving African-American students.[90] Despite Judge Murphy's finding that Alabama's property tax structure was a vestige of *de jure* segregation that "cripples the effectiveness of state and local governments in Alabama to raise funds adequate to support higher education," Judge Murphy held that the defendants demonstrated that the challenged provisions did not have a "continuing segregative effect," and that they had thus met their burden under *Fordice*.[91]

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85. 505 U.S. 717 (1992).

86. 505 U.S. at 731–32 (footnote omitted).

87. Knight v. Alabama, 14 F.3d 1534, 1540 (11th Cir. 1994).

88. *Lynch*, at 373 (citing Knight v. Alabama, 900 F. Supp. 272, 349 (N.D. Ala. 1995) ("*Knight II*")).

89. *Knight II*, 900 F. Supp. at 374.

90. *Lynch*, at 374–75 (quoting Knight v. Alabama, 458 F. Supp. 2d 1273, 1277–79 (N.D. Ala. 2004) ("*Knight III*")).

91. *Id.* at 376–77 (citing and quoting *Knight III* at 1311–12) (internal quotation marks omitted).

The Eleventh Circuit affirmed Judge Murphy's final *Knight* opinion, noting its agreement with "the district court that plaintiffs' present claim is fundamentally about reforming Alabama's K-12 school funding system, and not about desegregating its colleges and universities."[92] At bottom, the Eleventh Circuit found that "even if underfunding of Alabama's K-12 schools were related to segregation in its colleges and universities, [the] relationship is too attenuated and rests on too many unpredictable premises to entitle plaintiffs to relief under *Fordice*."[93] The Eleventh Circuit's final opinion in *Knight*, however, "did not foreclose the possibility of a separate action, specifically aimed at those constitutional provisions constraining the extent to which the State of Alabama, its counties, municipalities, and school districts fund public education from pre-school and kindergarten programs through high school."[94]

D. Controlling Principles of Law

Judge Smith begins his legal analysis with an overview of the Fourteenth Amendment and the explanation of the reasons behind the Equal Protection Clause that the Supreme Court explained in the Slaughter-House Cases.[95] The opinion then goes on to explain the difference between facial classifications and facially neutral laws with a discriminatory purpose and effect, focusing on the latter.[96] The thrust of this section is that "[t]he Equal Protection Clause was intended to excise from our society not only the cancer of *overt* official prejudice (*de jure* racial discrimination), but also the more subtle, more devious forms of discrimination."[97]

Judge Smith then describes the evolution of discriminatory purpose and effect cases from a time when it was unclear whether a plaintiff had to show discriminatory purpose *or* discriminatory effect,[98]

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92. Knight v. Alabama, 476 F.3d 1219, 1223 (11th Cir. 2007).

93. *Id.* at 1228.

94. *Lynch*, at 396.

95. *Id.* at 397 (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872)) (""The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.'").

96. *Id.* at 399–406; *see also supra* Part III (describing the constitutional framework of challenges to education funding schemes).

97. *Lynch*, at 401 .

98. *Id.* at 401–04 (citing Palmer v. Thompson, 403 U.S. 217, 224–26 (1971) (holding that a Jackson, Mississipi decision to close swimming pools to resist integration did not violate the Equal Protection Clause); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding a local ordinance to be discriminatory in purpose and effect because, while facially neutral, the ordinance was enforced only against a particular race of people)).

to the modern Supreme Court jurisprudence that requires a plaintiff to show both.[99] Judge Smith explained that, "to demonstrate that a facially neutral law is a subterfuge for racial discrimination, a plaintiff must prove the existence of a causal connection between the discriminatory intent of the governmental decisionmakers and the disproportionate, adverse impact that the plaintiff identifies."[100] If the plaintiff can do so and the defendant cannot rebut that showing, the law is reviewed under "strict scrutiny"; otherwise, the court analyzes the law under "rational basis" review.

Judge Smith clarified the standard for showing a sufficient impact along racial lines:

> [T]his element of an Equal Protection claim does not entail proof that *more blacks* than whites were adversely affected by the contested law, because such a requirement of proof would undermine the central minority-protective rationale for the Equal Protection Clause by setting an often-insurmountable evidentiary hurdle. Rather than requiring proof that *more blacks* than whites are adversely affected, the discriminatory effects requirement in a race-classification case . . . contemplates proof that *blacks are more affected* than are whites. In other words, racially-motivated legislation violates the Constitution only when it "affect[s] blacks differently than whites"; or, better stated, when the law disadvantages "*a greater proportion* of one race than of another."[101]

Concluding his analysis of the "effect" prong of the discriminatory purpose and effect standard, Judge Smith stated that the *Hunter* case made clear that—whether or not a certain group my be absolutely more disadvantaged numerically—what matters is that African-Americans are *disproportionately* impacted by a law, even though the absolute number of African-Americans adversely impacted might be lower that the absolute number of whites impacted.[102]

Judge Smith read the controlling law to allow the court to reach either the impact question or the motivation question first.[103] He also reiterated that a plaintiff must show both a racially disproportionate impact and a racially motivated purpose in order to succeed.[104] He noted how difficult it is to prove a discriminatory purpose, but also described

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99. *Lynch*, at 405–06; *see, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

100. *Lynch*, at 407.

101. *Id.* at 413 (quoting *Washington*, 426 U.S. at 242) (emphasis added in *Lynch*)).

102. *Id.* at 415–16 (discussing *Hunter*) ("Even though, in absolute terms, there very well may have been more whites disfranchised by the challenged provision, blacks were nearly *twice as likely* to be disfranchised, satisfying the Court that the provision had a present disproportionate effect that justified an inquiry into the motivation or intent behind its enactment.") (emphasis in original).

103. *Id.* at 417.

104. *Id.* at 417–18.

how it might be done.[105] The opinion states that "[t]he Supreme Court has also clarified that there must exist a strong, direct, causal relationship between the racially-discriminatory intent motivating a facially-neutral statute, *and*, its disproportionate effects upon the targeted population."[106] Causation applies to both the discriminatory purpose and effect—i.e., the decisionmakers must have enacted the provision because of the anticipated racially discriminatory effect.[107]

E. Statistical Findings

After giving extensive treatment to Alabama's history—especially the racism that for so long has infected its government—Judge Smith made a few crucial findings of fact in assessing whether the challenged provisions created a disparate impact based upon race.[108] First, Judge Smith noted the higher rates of poverty among Alabama's African-American citizens—almost 30% in 2006—and described the staggering poverty of African-Americans residing in Alabama's Black Belt, who in 2000 had a mean, per-capita annual income of $8,847.[109] Citing evidence that African-Americans in Alabama suffer higher rates of poverty and lower rates of literacy, Judge Smith concluded that "any disparity in educational funding will likely have an adverse impact on black students, both in terms of their daily educational experience *and* in terms of their life outcomes."[110]

Because the *Lynch* plaintiffs were challenging Section 217 of the Alabama Constitution, as modified by Amendments 325 and 373, which creates four classes of property and allows Class III property to be assessed at its "current use" value, Judge Smith made factual findings with regard to the relationship between Class III, current use property and the racial makeup of counties. "Alabama's majority-black counties have a significantly higher percentage of their land area subject to appraisal by 'current use' methodologies than the State's non-majority black counties."[111] But, "when the statistics are viewed statewide, the State's *total* black population does not tend to live in counties with a

105. *Id.* at 419–24.

106. *Id.* at 425 (citing Freeman v. Pitts, 503 U.S. 467, 506 (1992)).

107. *Id.* at 427. The opinion goes on to discuss the burden shifting framework—if the plaintiffs show discriminatory purpose and effect, the defendants may show that the provision would have been enacted even without the racially discriminatory intent. *Id.* at 428 (citing Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977)).

108. Judge Smith's findings of historical fact were extensive, spanning over 230 pages of the opinion. *Lynch*, at 453–688.

109. *Id.* at 695–96 (citations omitted).

110. *Id.* at 697 (emphasis in original) (citations omitted).

111. *Id.* at 699.

high proportion of 'current use' property."[112] This phenomenon is explained by the fact that the vast majority of African-Americans in Alabama live in one of four urban centers, while the less populated but majority-black, rural counties are home to most of the Class III, current-use property.

Judge Smith also made numerous findings about the relationship between the racial makeup of counties and the property-tax base, focusing on the portion of property taxes that raise money for local schools. Based on the statistical evidence presented at trial, Judge Smith found no statistically significant relationship between race and a county's ability to raise property-tax revenue, a county's "per-capita school property tax base," or the "per-student school property tax base."[113] Judge Smith also found "an absence of a statistically significant relationship between race and yield per mill per-student," which is a measure of the "revenue raised for each student by the application of one mill of school property tax."[114]

Finally, Judge Smith made statistical findings that any relationship between race and property-tax revenues generated by county and school expenditures was not statistically significant, and importantly, that "[s]tatewide, blacks fared better than whites in terms of school tax revenue per-capita."[115] Judge Smith also analyzed how tax revenues for schools might change under three hypothetical scenarios: (1) if the classification system were struck down, but the "current use" valuation of property remained; (2) if the "current use" valuation provision were struck down, but the classification system remained; and (3) if both provisions were struck down.[116] Judge Smith found that the first scenario "would do very little to change the unequal per-capita school tax revenues among the different groups of counties."[117] He likewise found that striking down the "current use" provision would not substantially amerliorate inequality in school tax bases.[118] Finally, under the third scenario, Judge Smith found that "the what-if analysis does not show a benefit to blacks as opposed to whites."[119]

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112. *Id.* at 700.

113. *Id.* at 716, 719–20.

114. *Id.* at 721, 723–24.

115. *Id.* at 733–38.

116. *Id.* at 739–40.

117. *Id.* at 743–44.

118. *Id.* at 747–50 ("The statewide analysis shows that blacks would not benefit to a greater degree than whites from the abolition of 'current use' appraisal methodologies.").

119. *Id.* at 754.

F. Legal Conclusions

The *Lynch* decision hinged (as most Equal Protection challenges do) on whether the court reviewed the challenged provisions under strict scrutiny or rational basis. To decide, Judge Smith had to determine whether each provision was enacted with a discriminatory purpose and resulted in discriminatory effects.

The court found that "the *overwhelming* weight of evidence in this record establishes—clearly, convincingly, and beyond reasonable debate—that virtually every provision of the basic charter of Alabama government . . . was perverted by a virulent, racially-discriminatory intent."[120] Thus, four of the challenged constitutional provisions were indeed enacted with racist intent.[121] However, the plaintiffs had not satisfied their burden of showing that the constitutional amendments adopted in the 1970s were enacted with racially discriminatory intent.[122] Rather, Judge Smith cited significant evidence from trial showing that those amendments were enacted for economic reasons, not racial animus.[123]

> The evidence presented at trial illuminates Alabama's twisted racist past: a historical reality that many would like to ignore, but old sins cast long shadows. In the present year of 2011, marking the sesquicentennial of the outbreak of hostilities in the Civil War, we are reminded of the calamity that historical reality wreaked on the American people. The evidence further demonstrates that racism did not die with the 618,000 Americans who perished in Blue and Gray, but instead still festered more than a century later. But the general existence of racism is not sufficient, alone, to show that particular constitutional provisions were enacted with a discriminatory intent.
>
> Plaintiffs have shown that Alabama's governing 1901 Constitution was written with clear discriminatory intent and purposes. Its ratification was an outright fraud. Therefore, Sections 214, 215, and 216, unchanged since 1901, are infected by that racist intent. Plaintiffs have also shown that Amendment 111 was a racially motivated reaction to the Brown decisions. But they have not sustained their burden to show that the amendments adopted in the 1970s, and which reformed Section 217, were enacted because of a racial animus. Therefore, the court finds that there was no racially discriminatory intent in the enactment of Amendments 325 and 373, or in the current use statutes passed in 1982.[124]

Judge Smith next analyzed whether each provision resulted in (and was enacted because of an anticipated) racially disparate impact. Judge Smith analyzed racial impact on a statewide basis and found that "Alabama's black citizens and black public school students are not

120. *Id.* at 757–58, 773. Judge Smith was referring to Sections 214, 215 and 216, which limit the rate of ad valorem taxation the state, counties, and municipalities, respectively, may levy on taxable property. *Id.* at 772–73.

121. *Id.* at 776.

122. *Id.*

123. *Id.* at 761–72.

124. *Id.* at 776.

disparately impacted by the challenged provisions," and that they affect white students similarly.[125] After a detailed analysis of the potential racial impact on multiple measures of property taxes and school expenditures, Judge Smith concluded:

> [J]ust as all of the contemporary measures of impact comparing counties and school systems do not reveal an adverse impact on the basis of race, a 'what-if' analysis—comparing counties in a hypothetical Alabama lacking the challenged provisions to counties as they exist under the present laws—does not reveal a disparate impact either.[126]

Judge Smith recognized, however, that the challenged provisions made it very difficult for poor, rural counties to raise funds through property taxes for their school districts. "However, residence in a rural area is not a constitutionally protected suspect class."[127] At bottom, the plaintiffs could not succeed because the racial animus that infected most of the challenged enactments negatively impacts all students in poor, rural school districts, not just black students.[128] Without a showing of discriminatory impact along racial lines, Judge Smith upheld the provisions under rational basis review.[129]

V. *LYNCH* ON APPEAL

The Eleventh Circuit affirmed Judge Smith's decision upholding the challenged provisions of Alabama's Constitution.[130] Because the Eleventh Circuit held the challenges to some specific provisions of the constitution were nonjusticiable, the court only decided the constitutionality of the property classification provisions.[131] The Eleventh Circuit emphasized that the standard of review for the district court's finding that there was no racially discriminatory intent behind the provisions was the "clearly erroneous" standard.[132] The challengers argued that "the district court committed legal error by impermissibly

125. *Id.* at 779.

126. *Id.* at 783.

127. *Id.* at 786.

128. *Id.*

129. *Id.* at 787–792.

130. I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014), *cert. denied sub nom*. Lynch v. Alabama, 135 S. Ct. 53, 190 L. Ed. 2d 30 (2014). The Eleventh Circuit reversed the district court on the standing issue, holding that the plaintiffs did not have standing to challenge the "millage caps" provisions (§§ 214, 215, and 216 of Article XI and § 269 of Article XIV) of the constitution because "'[i]t is not at all clear that the removal of Alabama's constitutional restrictions on property tax rates will necessarily result in either *increased tax rates or increased tax revenues*.'" 739 F.3d at 1280 (quoting *Knight*, 476 F.3d at 1227). Otherwise, the Eleventh Circuit upheld the district court's holdings.

131. *Id.* at 1286.

132. *Id.*

discounting the probative value of the historical context surrounding the enactment of the challenged Amendments."[133] The Eleventh Circuit rejected that argument, holding that evidence in the record supported the district court's finding that the motivation behind the challenged 1970s amendments were motivated by financial and political reasons, rather than racial animus, and noting that the trial court was free to choose from different permissible views of the evidence without committing clear error.[134]

The final paragraphs of the Eleventh Circuit's decision, however, illuminate a potential bright spot for future litigants using the discriminatory purpose-and-effect framework for Equal Protection challenges to state statutes. "Although the evidence presented could have supported a finding of discriminatory intent, sufficient evidence also rendered permissible the district court's finding that these Amendments were financially, and not discriminatorily, motivated."[135] The finding that evidence in the record *was sufficient* to support a finding of discriminatory intent could invigorate challenges to a host of Alabama statutes and constitutional provisions. Courts typically do not make findings or decide issues in the alternative if it is not necessary, but the Eleventh Circuit went out of its way to note that the evidence would have supported a finding of discriminatory intent. Although the plaintiffs would have also needed to show discriminatory impact, which they failed to do, the Eleventh Circuit suggested that the evidence would have supported a finding of discriminatory intent even with respect to the 1970s amendments, a suggestion that could have implications for future challenges.

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133. *Id.* at 1286–87. It is worth including the Eleventh Circuit's recitation of the challengers' case:

> [The Challengers] point to, among other things, Alabama's long-lived hostility to the use of property taxes for funding public education of black children. They note that the enactment of these Amendments was embedded in, and indeed a continuation of, Governor George C. Wallace's "popular campaign of massive resistance to school desegregation." . . . And they emphasize that Alabama chose to entrench its historically low property assessments into the Constitution—after two special sessions of the Legislature—at the "same time that nearly all whites in the Black Belt were fleeing the public schools, leaving behind underfunded public school systems that were almost entirely black." . . .

Id. at 1287 (internal citations omitted).

134. *Id.* at 1287.

135. *Id.* at 1288.

VI. CONCLUSION

A. Problems Identified by Lynch

Judge Smith made no apologies for his scathing critique of the motivations behind the 1901 Alabama Constitution:

> The journal of proceedings during Alabama's 1901 constitutional convention is a singular historical document, unique in the breadth and rawness of the racist statements uttered by nearly every delegate. The savagery of the language of intolerance and hatred that permeated almost every day of every debate is so shocking that this court cannot imagine that the fundamental charter of any other state could possibly equal the patently racist animus that motivated virtually every article of the document drafted by the delegates.[136]

Even so, the court was constrained by Supreme Court precedent that compelled a decision to uphold the provisions. As Judge Smith explained, he "cannot write opinions on clean sheets of paper."[137] "[T]he precedent that controls this court's decision in a case of this nature creates a secular theology devoid of the doctrine of original sin."[138]

Judge Smith also offered a harsh policy critique of Alabama's taxation and school-funding regime:

> Alabama continues to be plagued by an inadequately-funded public school system—one that hinders the upward mobility of her citizens, black and white alike, especially in rural counties. . . . The children of the rural poor, whether black or white, are left to struggle as best as they can in underfunded, dilapidated schools. Their resulting lack of an adequate education not only deprives those students of a fair opportunity to prepare themselves to compete in a global economy, but also deprives the State of fully-participating, well-educated adult citizens.[139]

The sorry state of Alabama's education system, however, could not prevent a finding for the defendants.

In Judge Smith's view, the Supreme Court decisions since *Brown* have undone that monumental case's central promise: equal and integrated schooling for black and white students. The *Lynch* opinion contained harsh words for the precedent that ultimately required Judge Smith to find for the State of Alabama. Those words coalesce around an important question: If Alabama's Constitutional framework for education funding in the state—with its overtly racist origins, amendments passed when a segregationist undercurrent permeated state politics, and its lasting negative impact on African-American schoolchildren in the poorest parts of the state—withstands scrutiny under the Equal Protection Clause, should courts develop a new framework for analyzing similar claims under the Fourteenth

136. *Lynch*, at 795.
137. *Id.* at 797.
138. *Id.* at 760.
139. *Id.* at 797–98.

Amendment? Or, as Judge Smith might put it: When the "Original Sin" of racism and subjugation infects the political and legal foundations of a state's education funding system, why should courts not review challenges to the laws establishing that system under strict scrutiny, even if the laws have an adverse impact beyond just African-American students?

B. Possible Paths Forward

The *Lynch* opinion offers a striking critique of the way Alabama (and many other states) operates its public schools and the way the Supreme Court handled Equal Protection challenges after *Brown*. *Lynch* may also offer a way forward by offering a path to future litigants and suggestions for reshaping the legal framework courts employ to decide similar issues. Two potential changes to the equal-protection framework could help alleviate the problem: (1) the Constitution's Equal Protection Clause could be read to require strict scrutiny review if racial animus was a substantial motivation behind a challenged law, even if the racially motivated law affects those outside of the racial class; or (2) the Constitution could be interpreted to guarantee some level parity or adequacy of education as a fundamental right because of the importance of education to full participation in the political process.

1. Lessening the Burden for Plaintiffs to Show Discriminatory Effects

As strange as it sounds, the primary reason the court could not find for the plaintiffs in *Lynch* was that the challenged laws affected poor, rural white students in a similar, negative way they affected African-American students in similar circumstances. There was no doubt that Alabama's constitutional delegates and later legislatures enacted the provisions with racial discrimination as an animating factor. But Supreme Court precedent requires that litigants show an adverse impact along racial lines in order to show discriminatory purpose *and* effect. Maybe the Constitution's Equal Protection Clause should require that, when a state passes a law, and a substantial motivating factor is racial animus, courts must review those laws under strict scrutiny (and ultimately strike them down), whether or not the laws adversely affect citizens of other races as well. Just because a law with a racially discriminatory purpose negatively affects those outside of the racial class is not an adequate reason to allow that type of provision to withstand scrutiny under the Equal Protection Clause.

2. Education as a Fundamental Right

The second potential legal solution is to follow Justice Thurgood Marshall's dissent in *Rodriguez*. This would elevate education to a fundamental interest, requiring laws that affect education to be reviewed with strict scrutiny. Judge Smith echoed Justice Marshall's *Rodriguez* dissent and the Supreme Court's decision in *Plyler* when he discussed the fundamental importance of education to exercise the other rights we regard as fundamental and to maintain our public institutions. Maybe courts should interpret the Constitution to guarantee some level parity or adequacy of education as a fundamental right because of the importance of education to informed voting, as well as other important opportunities for citizens to participate in the political process.

I suggest that the first approach should be adopted for reasons theoretical and practical. Although some level of education is essential to political participation, no line of precedent or legal theory running through prior Supreme Court decisions interpreting the Constitution could easily evolve into holding that education is a fundamental interest such that all laws affecting it must be reviewed with strict scrutiny. It would be an about-face, the type of groundbreaking change perhaps better suited to happen through political processes, state or federal.[140] As a practical matter, establishing education as a fundamental right would require judicial policymaking on a large scale, as courts grappled with how to define the contours of the right and difficult questions of resource allocation on a state-by-state basis.[141]

The first approach, lessening the burden on plaintiffs showing discriminatory impact, would represent only a slight change in the interpretive framework of the Equal Protection Clause with a big potential payoff to students (and others) adversely affected by racially

140. Many states have already taken this step. It is also noteworthy that the federal government has dramatically increased its role in education policy in the years since Rodriguez. See Sarah Boyce, Note, *The Obsolescence of* San Antonio v. Rodriguez *in the Wake of the Federal Government's Quest to Leave No Child Behind*, DUKE L.J. 1025, 1053 (2012) (arguing that "Congress's enactment of NCLB, in conjunction with the Department of Education's growing prominence, has established an implicit federal right to education that is equivalent, and perhaps even superior, to any right the judiciary could identify and protect").

141. *See, e.g.*, Jeffrey S. Sutton, San Antonio Independent School Dist. v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1980 (2008) (arguing that applying strict scrutiny to "education spending, taxing and policy decisions, . . . almost certainly would have spawned a host of unintended consequences," resulting in either skeptical judicial review over the vast minutiae of local education policy decisions or "a tangled web of line-drawing and difficult-to-apply hybrid levels of review").

biased laws. It would also result in courts deciding matters already within their purview—namely, analyzing a law to determine if it was motivated by racial animus. If it was, the court would review the law under strict scrutiny, likely striking it down, and then the state would have to go back to the drawing board to enact a new provision free from racial bias. This approach is practically feasible and fits well within the primary purpose of the Equal Protection Clause—to invalidate laws passed for the purpose of racial subjugation.[142]

C. A Brighter Future

Judge Smith handed down his 854-page *Lynch* opinion after a distinguished career as a state and then federal judge. The opinion deserves attention because it shines a light in a dark place that is often ignored. Judge Smith's commitment to convince readers of the urgent need for state-constitutional reform and a doctrinal shift in interpreting the Equal Protection Clause leaps from every page of the opinion. His belief that Alabama can do better for all of its students undergirds his persuasive, if exhaustive, opinion: "[P]erhaps [the *Lynch* opinion] will point the way to a brighter future for the funding of public education in Alabama."[143] Judge Smith's opinion may well illuminate the path for future litigants who aspire to a more just system of education funding for the students of Alabama.

142. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) ("The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.").

143. Letter from Judge Charles Lynwood Smith to William Weaver (Feb. 20, 2014) at 2 (on file with author).