THE NEW "SCHOOL HOUSE DOOR": HALTING WEALTH SEGREGATION & THE DEFUNDING OF AMERICAN PUBLIC SCHOOLS

Todd Panciera, Jr.[1]

I. INTRODUCTION

> *Let my body dwell in poverty, and my hands be as the hands of the toiler; but let my soul be as a temple of remembrance where the treasures of knowledge enter and the inner sanctuary is hope.*[2]

On February 28, 2013, a six-person committee—four Republicans and two Democrats— convened in the Alabama State House to iron out issues with an eight-page, bipartisan "flex bill" designed to allow schools to seek exemptions from certain state policies and laws.[3] When committee Republicans called a brief recess, they switched the eight-page flex bill for the twenty-eight page "Alabama Accountability Act," which they passed through the committee along party lines, and then put to a heated voice vote.[4] The "AAA" easily cleared both houses, passing the senate in the midst of a shouting match.[5] The AAA provides up to $7,500 tax credit[6] to parents of students who transfer out of one of the state's 78 "failing

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2. GEORGE ELIOT, DANIEL DERONDA 179–80 (Edinburgh & London, William Blackwood & Sons 1876) (emphasis added).

3. Mike Cason, *School Flex Bill Triples in Size in Conference Committee, Takes Aim at "Failing Schools*,"AL.COM (Feb. 28, 2013), http://blog.al.com/wire/2013/02/school_flex_bill_triples_in_si.html.

4. *Id.*

5. The AAA passed the House by a 51–26 vote, and the Senate by a 22–11 vote. Kim Chandler, *Republicans in Bombshell Move Push Through Bill Giving Tax Credits for Kids at "Failing" Schools to go to Private Schools*, AL.COM (Feb. 28, 2013), http://blog.al.com/wire/2013/02/ republicans_push_through_bill.html.

6. ALA. CODE § 16-6D-9(a)(2) (2013). Per student, parents may deduct the lesser of 80% of the average annual cost of attending a public school or the actual cost of attending a non-failing public school or non-public school. *Id.*; ALA. CODE § 16-6D-8(a)(1) (2013). For example, for the 2010–2011 tax year, the deduction would have been $3,553 per child. Robert McClendon, *Alabama Accountability Act FAQ: a Guide to the Most Radical Education Reform in Decades*, AL.COM (Mar. 1, 2013), http://blog.al.com/wire/2013/03/alabama_accountability_act_faq.html.

schools"[7] into a participating non-failing school in the same or a nearby district.[8] Innocuous in appearance, the real effect, in the most poverty-stricken areas of the state, is that transferring students leave behind their more disadvantaged peers, taxing underperforming schools and the state's education trust fund.[9]

This article contends that the "AAA," and other voucher and tax incentive programs like it, impermissibly discriminate against the disadvantaged children who are left behind, in violation of the Equal Protection Clause of the Fourteenth Amendment. Put simply, this article asks: what role does *Brown v. Board of Education* play in a modern understanding of Equal Protection, given the Court's admonishment that, "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education? Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[10]

II. BACKGROUND

A. A Brief History of Vouchers & Tax-Based Incentives

1. Vouchers and Tax Scholarships

Vouchers, the conceptual predecessors to tax incentive programs like the AAA, have a long history.[11] Maine and Vermont, for example, utilized voucher programs as early as 1869 and 1873, respectively, to enable students to attend private schools in districts without public schools.[12] More recently, voucher programs have been heralded as a way to introduce free-market competition to public education by providing a base level of funding for each student; "creat[ing] competition in both cost and quality of schools, promoting higher quality schools while weeding out 'inferior' schools."[13] The philosophical core of voucher programs is "school

7. This number was computed by adding the fourteen "persistently low-performing" schools to the seventy-two "lowest 6% of schools," and subtracting schools that "exclusively serve a special population of students." *See Alabama Accountability Act 2013 Information*, ALA. DEP. OF EDU. (June 18, 2013); ALA. CODE § 16-6D-8(a)(1) (2013).

8. *See* ALA. CODE § 16-6D-8(b)(5) (2013).

9. *See* discussion *infra* Part IV.

10. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

11. The close relationship between vouchers and tax incentive programs is explained *infra*.

12. Ellen M. Halmstead, *After* Zelman v. Simmons-Harris, *School Voucher Programs Can Exclude Religious Schools*, 54 SYRACUSE L. REV. 147, 150 (2004). *See also* Catharine V. Ewing, *Constitutional Law: Vouchers, Sectarian Schools, and Constitutional Uncertainty: Choices for the United States Supreme Court and the States*, 53 OKLA. L REV. 437, 440 (2000).

13. Hannah M. Rogers, Note, *School Vouchers: A Solution to an Educational Crisis or Impermissible Government Involvement in Religion?*, 52 DRAKE L. REV. 821, 825 (2004) (arguing that the Establishment Clause provides the most fertile ground for new legal challenges to school voucher programs).

choice," the theory that vouchers allow parents to move their struggling student from an ill-performing or underserving public school to another school better equipped to meet that student's specific needs.[14]

Florida, for example—the first state to implement a statewide voucher program—collects and redistributes money to students in the state's designated-failing public schools.[15] Florida's "Opportunity Scholarship" program closely approximates a true voucher program in that it is a government-granted entitlement, given to an individual up front, that will be used to pay for educational services up to the dollar limit specified by the statute.[16] Other states have implemented vouchers on a smaller scale. For example, the city of Cleveland, Ohio, implemented a pilot program that made priority payments of up to $2,250 to children of families 200% below the poverty line, which was limited by per-school students accepted and geography—the only participating schools were from the Cleveland City School District.[17] To date, the National Conference of State Legislatures counts thirteen states with implemented voucher-type programs.[18]

2. Tax incentives

Tax-based incentive programs are also premised on a free choice theory, but function slightly differently than vouchers or tax scholarships. Unlike their ideological relatives, tax incentives do not provide a "scholarship" up front for a pre-determined sum; instead, parents pay first and are reimbursed later in their income tax returns.[19] This subtle difference actually works a significant hardship on the poor, who often do not have the initial capital to take advantage of the incentive[20] or are not part of a high enough tax bracket to reap proportionate returns on expenditures.[21] Staunch advocates of "school choice" for its effects on the underprivileged experience diminishing returns in a pay-first tax program. These tax incentive programs are the plans to which the AAA is most akin. Unlike

14. *See* Isabel Chou, Note, *"Opportunity" for All?: How Tax Credit Scholarships Will Fare in New Jersey*, 64 RUTGERS L. REV. 295, 297–98 (2011) (questioning the constitutionality of New Jersey's Opportunity Scholarship Act, a tax credit scholarship program.).

15. *See* Rogers *supra* note 12, at 826–27. It should be noted that, as of July 1, 2013, Florida has enacted a tax credit program that closely resembles the AAA's tax credit scholarships. *See* FLA. STAT. § 1002.395 (2013).

16. *See* Bush v. Holmes, 919 So. 2d 392, 400–02 (2006) (construing prior version of FLA. STAT. § 1002.38 (2012)).

17. Rogers, *supra* note 12, at 827–30.

18. NAT'L CONF. OF STATE LEGIS., *School Vouchers*, NCSL.ORG, http://www.ncsl.org/research/education/school-choice-vouchers.aspx (last visited Dec. 20, 2013).

19. *See, e.g.,* ALA. CODE § 16-6D-8 (2013); MINN. STAT. § 290.0674 (2013); N.C. GEN. STAT. § 105–151.33, *repealed by* Children With Disabilities Scholarship Grants, S.L. 2013–364, § 1.

20. *See* Vada Waters Lindsey, *The Vulnerability of Using Tax Incentives in Wisconsin*, 88 MARQ. L. REV. 107, 114 (2004) (arguing that "a tax incentive is useless for lower income taxpayers because they invariably lack the requisite resources to make educational expenditures").

21. *See id.*

Florida's tax-based scholarships, student-recipients in Alabama do not have the benefit of an up-front payment.[22] Instead, they must rely on their own income to afford a transfer to one of the state's non-failing schools. This presents a significant problem, as will be shown below, from both a schematic and a practical standpoint.

To date, constitutional challenges to incentive programs have centered primarily on the Establishment Clause of the First Amendment.[23] Though Equal Protection violations have been alleged in some cases, these claims mostly focus on religious liberty and have been roundly rejected.[24] A new type of challenge argues that tax incentive programs like AAA disparately impact a particular class of persons, thereby greatly hindering their opportunity for an equal education.

III. EQUAL PROTECTION JURISPRUDENCE

On August 19, 2013, the Southern Poverty Law Center (SPLC) filed suit in the Middle District of Alabama on behalf of minority plaintiffs seeking to enjoin the Alabama Accountability Act.[25] The complaint alleged that the AAA "creates two classes of students assigned to failing schools–those who can escape them because of their parents' income or where they live and those . . . who cannot."[26] In light of this fact, plaintiffs argued that

> [AAA]'s benefits are not equally available to all students and because an education is necessary to prepare students to participate effectively in our democracy, the Plaintiff-students are being denied the equal protection of the law as guaranteed by the Fourteenth Amendment.[27]

The *C.M.* plaintiffs' argument implicates the equal protection clause of the Fourteenth Amendment. The discussion below analyzes this argument

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22. *Compare* FLA. STAT. § 1002.38 (2012) *with* ALA. CODE § 16-6D-8 (2013).

23. *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (holding that an Ohio statute which provided private school tuition assistance for children in Cleveland was valid under the Establishment Clause); Mueller v. Allen, 463 U.S. 388 (1983) (holding that a Minnesota statute which allowed tax deduction for expenses parents incurred in sending their children to parochial schools was valid under the Establishment Clause); Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999) (challenging a state statute authorizing direct grants to nonsectarian schools for reimbursement of tuition for students who had no public schools available).

24. *See, e.g.,* Eulitt *ex rel.* Eulitt v. Maine, Dept. of Educ., 386 F. 3d 344, 354 (1st Cir. 2004) (rejecting an equal protection challenge to Maine's refusal to provide tuition assistance to children in private sectarian schools, holding that the Free Exercise Clause provides the primary framework for deciding religious discrimination claims)(citing Locke v. Davey, 540 U.S. 712, 720 n.3 (2004)).

25. Complaint at 1, Marshall *ex rel.* C.M. v. Bentley, No. 2:13-cv-00591 (M.D. Ala. Aug.19, 2013), *available at* http://media.al.com/wire/other/Read%20the%20SPLC%20lawsuit.pdf.

26. *Id.* at 2.

27. *Id.*

in light of the Supreme Court's modern jurisprudence respecting education and wealth classifications. Specifically: Part One is a general overview of the Court's modern equal protection scheme; Part Two examines the historical significance of education, particularly as evinced in the landmark civil rights case of *Brown v. Board of Education*;[28] Part Three highlights the inadequacies of the Court's traditional "two-tiered" equal protection analysis as applied to educational opportunity and wealth classifications; and Part Four suggests a more flexible equal protection jurisprudence—based on Justice Thurgood Marshall's "sliding scale"—under which victims of wealth-based deprivations of educational equality could challenge programs like the AAA.

A. Introduction to Modern Equal Protection

The Supreme Court's modern Equal Protection jurisprudence can be broken into two basic categories: cases in which the Court applies heightened scrutiny on the basis of finding a suspect or quasi-suspect classification, such as race or gender, [2930] and cases in which the Court finds no suspect classification but nevertheless applies heightened scrutiny because a fundamental right is implicated.[31] Put another way:

> [W]here a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless 'the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective.' This presumption of constitutional validity, however, disappears if a statutory classification is predicated on criteria that are, in a constitutional sense, 'suspect'. . . . [32]

Implicit in this analysis, then, is an apparent requirement that a court engage a complex enquiry to find, at a minimum, either a fundamental

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28. 347 U.S. 483, 494–95 (1954).

29. No majority has held gender to be a "proscribed classification" *See* U.S. v. Virginia (*VMI*), 518 U.S. 515, 533 (1996). *But, c.f.*, Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect.") Nonetheless, gender is treated like a suspect classification in that the Court applies heightened scrutiny. *See VMI*, 518 U.S. at 533; J.E.B. v. Ala., 511 U.S. 127, 135 (1994) ("Since *Reed v. Reed* . . . this Court consistently has subjected gender-based classifications to heightened scrutiny."). *See also* Craig v. Boren, 429 U.S. 190 (1976).

30. *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967); *Brown*, 347 U.S. at 495; *VMI*, 518 U.S. at 533–34 (1996) (requiring an "exceedingly persuasive justification" for classifications based on gender).

31. *See, e.g.,* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (invalidating the Oklahoma Habitual Criminal Sterilization Act as a violation of equal protection, on the basis that "[m]arriage and procreation are fundamental to the very existence and survival of [humankind]").

32. Harris v. McRae, 448 U.S. 297, 322 (1980) (internal citations omitted) (alteration in original).

right or a suspect or quasi-suspect classification before it can apply heightened scrutiny to an alleged equal protection violation.[33] Further, heightened scrutiny is itself decidedly manifold—for example, the Court applies "strict," "heightened," or "intermediate scrutiny," or even rational-basis-plus[34], depending completely upon: the class implicated, the invidiousness of the discrimination, and the rights involved. Finally, even in cases like this one, which involve a facially neutral law that nonetheless improperly classifies, the reviewing court may undertake additional inferential steps as required to reach an Equal Protection violation.[35] This section examines the potential rights and classifications implicated under the AAA, and asks how they might be aggregated into a successful equal protection claim.

B. Brown's Education Mandate

In the doctrinal equal protection case *Brown v. Board of Education*, the Supreme Court held that public schools could not segregate based on race.[36] Though *Brown* was brought specifically to determine the constitutionality of race-based classification, its essence was its refutation of the separate-but-equal doctrine in *Plessy v. Ferguson*, an 1896 Supreme Court Case upholding on equal protection grounds Louisiana's segregated intrastate railcar statute.[37] The complete abandonment of *Plessy* was the final inferential jump to be made from the education-based equal protection decisions preceding *Brown*.[38] Perhaps, education was a convenient battleground because of its direct connection to state and local government—unequal education provided a more compelling argument than, say, transportation. More likely, *Brown*'s holding was made inevitable because education is uniquely fundamental to the full expression of one's constitutional

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33. *But c.f.* Plyler v. Doe, 457 U.S. 202, 223 (1982) (invalidating Texas statute that denied school funding used to educate illegally admitted children, despite holding that the statute implicated no fundamental right or suspect class.); Cleburne v. Cleburne Living Ctr.r, 473 U.S. 432 (1985) (invalidating Cleburne, Texas's zoning board decision denying a permit to construct a nursing facility for the mentally retarded, despite holding that the mentally retarded are not a quasi-suspect class.).

34. As in *Plyler* and *Cleburne*, above.

35. *See* Hunter v. Erickson, 393 U.S. 385, 391 (1969) (invalidating law requiring approval by majority referendum before the passage of any law prohibiting housing discrimination because "although the law on its face treat[ed] [black] and white, Jew and gentile in an identical manner, the reality [was] that the law's impact [fell] on the minority"); *Cf.* Washington v. Davis, 426 U.S. 229, 242 (1976) ("Necessarily, an invidious discriminatory purpose may often be inferred from the totality of relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.").

36. 347 U.S. 483, 494–95 (1954).

37. 163 U.S. 537, 552 (1896) *rev'd by Brown*, 347 U.S. at 494–95.

38. On this point, *Brown* speaks expressly: "In none of [the prior] cases was it necessary to reexamine the [*Plessy*] doctrine to grant relief to the Negro plaintiff. And in Sweatt v. Painter . . . the Court expressly reserved decision on the question whether Plessy v. Ferguson should be held inapplicable to public education. In the instant case, that question is directly presented . . . [we] must look instead to the effect of segregation itself on education." *Brown*, 347 U.S. at 492 (internal citation omitted).

rights.[39] Evidence of that fact is exemplified in Chief Justice Warren's *Brown* opinion, in which he wrote:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic responsibilities . . . Today, it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms*.[40]

Looking backward at the three Supreme Court cases preceding *Brown*—whose ideological sum is embodied in Justice Warren's statement—it is evident just how integral a role education played in developing the doctrine that undermined *Plessy*. In the first pre-*Brown* case of *Missouri* ex rel. *Gaines v. Canada*, the Court considered a challenge to the University of Missouri's refusal to admit an otherwise qualified candidate to its law school.[41] Rejecting Missouri's argument that the applicant's option to attend a neighboring state's integrated law school satisfied the separate-but-equal mandate of *Plessy*, the Court held that it was Missouri's "duty when it provide[d] [legal] training to furnish it to the residents of the State upon the basis of an equality of right."[42]

Later, in *McLaurin v. Oklahoma State Regents for Higher Education*, the fundamentality of education again provided the impetus to end a policy of segregation.[43] The *McLaurin* court took *Missouri* ex rel *Gaines* rationale—thereafter reaffirmed in *Sweatt v. Painter*[44]—to its logical conclusion

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39. *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("[E]ducation [is] pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society.") (quoting *Plyler*, 457 U.S. at 221); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."); *Brown*, 347 U.S. at 493 ("[education] is the very foundation of good citizenship."). This language tracks the Court's analysis of the right to vote, which it has called "a 'fundamental right,' because [it is] preservative of other rights." Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

40. *Brown*, 347 U.S. at 493 (emphasis added).

41. 305 U.S. 337, 342 (1938).

42. *Id.* at 349.

43. 339 U.S. 637, 642 (1950).

44. 339 U.S. 629 (1950) (holding that a black applicant denied admission because of his race to the University of Texas law school could "claim his full constitutional right: legal education equivalent to that offered by the State to students of other races").

when it invalidated Oklahoma's policy of offering a black University of Oklahoma law student an education that was nominally identical but substantively inferior to that of his classmates.[45] In *McLaurin*, a state law relegated the University's only black law student to a segregated table in the library and cafeteria, and to a segregated row in the classroom.[46] Despite the fact that "there [was] no indication that the seats to which he was assigned . . . [had] any disadvantage of location," the "restrictions [which] impair[ed] . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession" could not be reconciled with the Fourteenth Amendment's equal protection guarantee.[47] In other words, the "intangible factors" of a University of Oklahoma education compelled the *McLaurin* court to hold that tangibly equal accommodations were in fact unequal for purposes of the Fourteenth Amendment. [48]

C. Education, Wealth-Based Classification, and Supreme Court Scrutiny Post-Brown

1. Education as a Fundamental Right

Some courts have warned against abstracting *Brown*'s statements about education from their race-specific context.[49] For example, the District of Maryland in *Parker v. Mandel* reasoned: "the strict scrutiny test was applied in *Brown* not because education is a fundamental interest but because classification by race is clearly suspect."[50] However, this analysis undervalues the role that education has played in advancing equal protection jurisprudence.[51] Fundamentality, after all, is simply "a function of the right's importance in terms of effectuation of those rights which are in fact constitutionally guaranteed."[52]

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45. *Id.*
46. *Id.* at 640.
47. *Id.* at 641–42.
48. *See* Julie M. Amstein, United States v. Virginia*: The Case of Coeducation at Virginia Military Institute*, 3 AM. U.J. GENDER SOC. POL'Y & L. 69, 76–78 (1994). An apt definition of "intangible factors" could be drawn from *McLaurin*: "those qualities which are incapable of objective measurement, but which make for greatness in a . . . school." McLaurin v. Okla. State Regents for Higher Ed., 339 U.S. 637, 634 (1950).
49. *See, e.g.,* Lujan v. Colo. State Bd. of Educ., 649 P.2d 1005, 1018n. 13 (Colo. 1982); Parker v. Mandel, 344 F. Supp. 1068, 1075–77 (D. Md. 1972). *See also*, Timothy D. Lynch, Note, *Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence*, 26 HOFSTRA L. REV. 953, 954 (1998) ("Courts have held that the statement quoted . . . from *Brown* should not be interpreted as support for the proposition that one has a fundamental right to equal education because the *Brown* Court was dealing with . . . racial segregation.") (emphasis omitted).
50. *Parker*, 344 F. Supp. at 1077.
51. *See* discussion *supra* Part 2.
52. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 62 (1973) (Brennan, J., dissenting).

Nevertheless, in 1973 the Supreme Court seemingly turned away from its historical commitment to education when in *San Antonio Independent School District v. Rodriguez* it declared that education was not a fundamental right guaranteed by the Constitution.[53] In dissent, Justice Thurgood Marshall reasoned that the majority had reached this incongruent conclusion by conducting a too-rigid fundamental rights analysis.[54] Specifically, he opined: "[I]t will not do to suggest that the 'answer' to whether an interest is fundamental for purposes of equal protection . . . 'is a right . . . explicitly or implicitly guaranteed by the Constitution.'"[55]

The *Rodriguez* holding did considerable damage to the progress proponents of education as a fundamental right had made.[56] Prior to *Rodriguez*, many state and federal courts had recognized, either in holding or dicta, the existence of a fundamental right to education.[57] Perhaps the best example of pre-*Rodriguez* case law comes from *Serrano v. Priest*.[58]

In *Serrano*, plaintiffs brought suit seeking to enjoin a California school-funding scheme that, by nature of its dependence on local property taxes, disparately funded schools in Los Angeles County.[59] The California Supreme Court examined the historical importance of education and its expression in *Brown*, determining that education was a fundamental right under the Fourteenth Amendment of the United States Constitution.[60] Today, however, the federal equal protection analysis in *Serrano* has been abrogated, and only the California Supreme Court's interpretation of the California constitution remains.[61]

Other state parties have not been so lucky; the *Rodriguez* holding has foreclosed not just federal judicial remedies,[62] as in *Serrano*, but has "sig-

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53. *Id. at* 36–37.

54. *Id.* at 98 (Marshall, J., dissenting).

55. *Id.* at 100 (quoting Maj. opinion at 33). Illustrating this point, Justice Marshall noted difficulty in pinpointing where the Constitution provides rights to procreate, vote, or appeal from a criminal conviction. *Id.* Yet, the Court has been willing to employ strict scrutiny where these "important interests" are "at stake." *Id.*

56. Lynch, *supra* note 48, at 992 (arguing that the *Rodriguez* decision "was a significant blow to ensuring that America's poorest children receive the same equal education opportunities as children in more affluent communities").

57. *See, e.g.,* Holt v. Shelton, 341 F. Supp. 821, 823 n. 3 (M.D. Tenn. 1972) ("Indeed, it is strongly arguable that the right to education is, itself . . . a fundamental right."); Moore v. Bd. of Trs.s of Charleston Cnty. Consol. Sch. Dist., 344 F. Supp. 682, 686–87 (D. S.C. 1972) (noting that a fundamental right to education cannot be found explicitly in the first eight amendments to the Constitution; nevertheless, courts "have treated public education as a substantive right implicit in the 'liberty' assurance of the due process clause"); Russo v. Shapiro, 309 F. Supp. 385, 392 (D. Conn. 1969) (citing *Brown* for the proposition that "the opportunity to obtain an education may be regarded as a fundamental right"); Krause v. State, 285 N.E.2d 736, 747 n.14 (Ohio 1972) (citing *Brown* as support for the proposition that education is a fundamental right).

58. 487 P.2d 1241 (Cal. 1971).

59. *Id.* at 1244.

60. *Id.*

61. Lynch, *supra* note 48, at 972.

62. One author notes that, "[b]ecause of the holding in *Rodriguez*, there have not been any suc-

nificantly influenced the outcome of state court litigation over education rights," too.[63] Recently, state courts have become increasingly hostile to challenges of school funding statutes, usually citing justiciability and separation of powers issues.[64] Many of these same state courts had in the past held such challenges to be justiciable.[65]

As for its own jurisprudence, the Supreme Court has struggled to reconcile *Rodriguez* with the mandate of *Brown*. Nowhere is this more evident than in *Plyler v. Doe*, where the Court opined that: "education has a fundamental role in maintaining the fabric of our society,"[66] yet refused to proclaim education a fundamental right.[67] Regardless, it is clear that unless it is reversed, *Rodriguez* forecloses federal equal protection challenges brought on the basis that education is a fundamental right.[68]

2. Griffin, Harper, and Classifications Based on Wealth

Just as it did regarding access to education, The *Rodriguez* court held that a classification based on wealth did not rise to a constitutionally suspect level.[69] However, as it did in its fundamental rights analysis, the *Rodriguez* court spoke of wealth disparity with some ambiguity, which has left the door open for scholarly interpretation.[70] For instance, Henry Rose[71] argues that the *Rodriguez* court never directly answered the question of whether wealth is a "suspect class," because the Court was unable to discern a "definitive description of the classifying acts or . . . disfavored class" from plaintiff's facts.[72]

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cessful federal claims regarding school finance . . . [and] there has been little attempt at litigating in the federal system to reform schools." Kerry P. Burnet, Note, *Never a Lost Cause: Evaluating School Finance Litigation in the Face of Continuing Education Inequality in Post-Rodriguez America*, 2012 U. ILL. L. REV. 1225, 1235 (2012) (referencing a survey of unsuccessful education litigation appearing in Laurie Reynolds, *Full State Funding of Education As a State Constitutional Imperative*, 60 HASTINGS L. J. 749, 762–63 (2009)).

63. Lynch, *supra* note 48, at 992.

64. Reynolds, *supra* note 61, at 762 (arguing that property-tax based state education-funding statutes inequitably fund schools).

65. *See* Tenn. Small Sch.Sys. v. McWherter, 851, S.W.2d 139, 147 (1993).

66. 457 U.S. 202, 221 (1982).

67. *Id.* at 223.

68. *See* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105 (1995) (arguing that challenges to the adequacy of educational opportunity, rather than equality, present the most viable claims after *Rodriguez*).

69. *Rodriguez*, 411 U.S. at 24 ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality.").

70. *Id.* at 26 (suggesting if certain economic correlations could be proved, wealth might be a sufficiently definable class to merit "suspect class" consideration).

71. Henry Rose is a Professor of Law at Loyola University Chicago whose scholarship focuses on civil law specifically as it affects low income persons. *Full Time Faculty: Henry Rose*, LUC.EDU, http://www.luc.edu/law/fulltime/rose.shtml (last visited Dec. 16, 2013).

72. Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 416 (2010) (quoting *Rodriguez*, 411 U.S. at 19).

The first equal protection challenges to wealth discrimination arose under criminal law.[73] For example, Griffin v. Illinois was brought by criminal defendants too poor to afford the transcripts necessary for their appeal as of right.[74] In those cases, a "[s]tate [could] no more discriminate on account of poverty than on account of religion, race or color."[75] The Court thereafter used similarly condemnatory language in civil cases; the *Harper* majority stated that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored," and therefore, any wealth qualification attending the exercise of the voting franchise was "capricious" or "irrelevant."[76]

However, where wealth classifications are not presented concomitant with a fundamental rights violation, heightened scrutiny has remained just beyond plaintiffs' reach.[77] In *Dandridge v. Williams*, for example, the Supreme Court recognized the "dramatically real factual difference" between cases involving state regulation of business or industry and a case involving impoverished people's access to public welfare assistance[78], yet on the facts before it could find "no basis for applying a different constitutional standard."[79] Nevertheless, the Court's strong language in cases like *Dandridge* suggests that the Court might disfavor wealth classifications much the same as it has disfavored other arbitrary classifications, which when coupled with a pseudo-fundamental interest trigger an equal protection violation.[80]

D. The Marshall Model of Equal Protection

Craig J. Tiedemann argues that since *Rodriguez*, the Court has strayed from its "two-tiered" analysis of equal protection and has begun applying intermediate scrutiny where the right or class implicated does not rise to

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73. *Id.* at 411.
74. 351 U.S. 12, 14–15 (1956).
75. *Id.* at 17. *See also* Douglas v. California, 372 U.S. 353 (1963); Rose *supra* note 71, at 411.
76. *Harper*, 383 U.S. at 668. Professor Rose notes that, though "*Harper* suggested that classifications on the basis of wealth, like classifications on the basis of race, should receive heightened scrutiny under Equal Protection," *Harper*'s facts implicated a fundamental right, and therefore the application of heightened scrutiny in *Harper* does not rest solely on the indigent status of the plaintiffs. Rose, *supra* note 71, at 412.
77. *See Harper*, 383 U.S. at 668 (invalidating Virginia's $1.50 poll tax as disparately effecting the voting rights of the poor); *Griffin*, 351 U.S. at 18 (invalidating an Illinois law that required criminal appellants to purchase their own transcripts as disparately effecting the accused's right to appellate review).
78. The Court noted that welfare "involves the most basic economic needs of impoverished human beings." 397 U.S. 471, 485 (1970).
79. *Id.*
80. *Cf. Plyler*, 457 U.S. at 223 (invalidating a Texas law that "impose[d] a lifetime hardship on a discrete class of children not accountable for their disabling status" as illegal aliens, despite the Court's failure to find either a suspect class or a fundamental right).

traditionally cognizable levels.[81] Tiedemann suggests that the *Plyler* court used this more flexible framework to find an equal protection violation based on education's "non-fundamental, yet important" nature, attributing its origins to Justice Marshall's dissent in *Dandrige*.[82] Though the Court never fully embraced the idea, Justice Marshall thought equal protection analysis should move beyond the "rigidified" two-tiered approach.[83]

Under Justice Marshall's analysis, if the Court were to view discrimination on the "spectrum of standards" that his dissenting *Rodriguez* opinion drew from his "principled reading" of Supreme Court precedent,[84] it would find an equal protection violation anywhere an interest of great constitutional and societal importance is adversely affected by an invidious classification.[85] The benefit of a more flexible analysis is that it acknowledges real nuances in the way equal protection standards of review have been applied since *Brown*.[86] In other words, it applies a type of sliding scale with which the Court might compare: [T]he character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[87] This approach would invalidate a disparately effective wealth classification that touches a societally protected interest, such as education, where the state shows only a minimally rational purpose.

Justice Marshall's test can be applied to reconcile holdings in modern equal protection cases that involve more complex rights and classifications, which do not pigeonhole neatly into the Court's established categories. For example, despite its failure to find a suspect class or fundamental right in *Romer v. Evans,* the Court invalidated a Colorado constitutional amendment that prohibited all state action designed to protect homo-

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81. Craig J. Tiedemann, *Taking a Closer Look at Massachusetts Public School Expulsions: Proposing an Intermediate Standard of Judicial Review After* Doe v. Superintendent of Schools, 31 NEW ENG. L. REV. 605, 644 (1997) (analyzing the application of intermediate scrutiny to school expulsion cases in Massachusetts, based upon the quasi-fundamentality of education).

82. *Id.* at 645–46. Tiedemann points to Craig v. Boren, 429 U.S. 190 (1976), arising six years after *Dandridge*, as the first majority opinion to clearly delineate an intermediate standard of review. *Id.* at 644.

83. *See Plyler*, 457 U.S. at 231 (Marshall, J., dissenting).

84. *See Rodriguez*, 411 U.S. at 98–99 (Marshall, J., dissenting).

85. *See id.*

86. *See, e.g.,* U.S. v. Windsor, 133 S. Ct. 2675, 2694 (2013) (invalidating federal statute defining marriage to exclude same-sex relationships because the law "demean[ed]" the class and was not sufficiently counterbalanced by a strong governmental interest); Romer v. Evans, 517 U.S. 620, 634 (1996) (invalidating Colorado's constitutional amendment that prohibited civil protection statutes for homosexual persons, despite failing to find a suspect class or a fundamental right, because the amendment evinced "a bare . . . desire to harm a politically unpopular group") (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); *Plyler*, 457 U.S. 202 (invalidating Texas statute that denied funding to schools, where the money was to be used for the education of illegally admitted children, under "rational basis" review); Levy v. Lousiana, 391 U.S. 68 (1968) (allowing out of wedlock children to maintain a claim for the wrongful death of their mother).

87. *See Rodriguez*, 411 U.S. at 98–99 (Marshall, J., dissenting).

sexual persons from discrimination, holding that the act exhibited "a bare . . . desire to harm a politically unpopular group [could not] constitute a legitimate government interest."[88] Because the Court reached this decision without regard to the Colorado legislature's proffered state interests,[89] *Romer* is an apparent departure from "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise . . . social policy."[90] The *Romer* court acknowledged as much when it noted that the Colorado amendment at issue defied its traditional two-tiered inquiry.[91] Other cases—such as *United States v. Windsor,*[92] and *United States v. Virginia*,[93] to name but a few—locate no suspect class nor fundamental right, standing alone, yet they appear to apply something higher than rational basis review to invalidate a broadly discriminatory law.

Rebecca Greenlee traces these so-called "heightened scrutiny" cases to the Burger Court's "'thus far and no further'" approach to fundamental rights analysis.[94] She argues that the Court applies intermediate scrutiny or rational basis with "bite" to "enunciate the social value of certain other interests while maintaining the present limits on the rights already deemed fundamental."[95] In this context, quasi-fundamental rights like education, which are more than "'governmental "benefit[s]" indistinguishable from other forms of social welfare legislation,'" are justiciable under the Equal Protection Clause.[96]

IV. THE AAA VIOLATES EQUAL PROTECTION

A. The AAA Infringes the Fundamental Right to Education as Envisioned by Justice Marshall

Applying Marshall's analytical framework, it is clear that the AAA violates Alabama children's right to equal protection under the Fourteenth Amendment. As a preliminary note, factual differences are evident between *Rodriguez* and the AAA. The *Rodriguez* Court acknowledged the

88. *See* Romer v. Evans, 517 U.S. 620, 634 (1996). The *Romer* court purportedly applied rational basis to reach its holding. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) ("[In Romer] we concluded that the provision . . . had no rational relation to a legitimate government purpose.").

89. Colorado offered its policy interest in protecting citizens' freedom of association and conservation of resources used to fight discrimination against other groups as reasons for Amendment 2's passage. *Romer*, 517 U.S. at 535.

90. *See Dandridge*, 397 U.S. at 486.

91. *See Romer*, 517 U.S. at 632–33.

92. 133 S. Ct. 2675 (2013).

93. 518 U.S. 515 (1996).

94. Rebecca E. Greenlee, Note, 17 REV. JUR. U.P.R. 335, 349 (1983) (analyzing the effects of *Plyler*'s fundamental rights as applied to Puerto Rico's education funding scheme).

95. *Id.* at 343.

96. *See id.* at 350 (quoting *Plyler*, 457 U.S. at 221 (Brennan, J., dissenting)).

factual shortcomings of the *Rodriguez* plaintiff's case: "This is not a complaint that Congress . . . has unconstitutionally denied or diluted anyone's right to vote but rather that Congress violated the Constitution by not extending the relief effected (to others similarly situated) . . . ."[97]

In the case of the AAA, however, part of plaintiff's argument is that, by taking money from the state's education trust fund, the quality of education in public schools in which they are trapped will continue to deteriorate.[98] Therefore, in a very real sense, the children left behind in failing schools will be deprived of a meaningful education. If this deprivation could fairly be said to be a "fail[ure] to provide each child with an opportunity to acquire the basic minimal skills necessary for the full enjoyment of the rights of speech and of full participation in the political process," the hypothetical presented in *Rodriguez* may be satisfied.[99] As the California Supreme Court put it, "surely the right to an education today means more than access to a classroom."[100]

Looking to statistics reveals the full impact that AAA has on the availability of meaningful education in Alabama. The AAA suffers from all of the traditional shortcomings attending incentive programs like it. Characteristically, it asks parents to pay for education in the fall though they cannot be reimbursed until the spring.[101] Parents of children in Alabama's failing schools are among the most likely persons to be unable to float the costs of education in the interim, as the most common composition of schools on Alabama's failing school list has 95% of students at or below the poverty line.[102] Of the 78 failing schools, 92% of all students qualify for free or reduced lunch,[103] and the mode composition of the 78 failing schools is 99% black.[104]

Further, 40% of failing schools are located in Alabama's Black Belt, a largely rural region.[105] Out in these areas, there are few participating schools into which students may transfer, resulting in a tax incentive bene-

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97. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

98. *See* Complaint, *supra* note 25, at 2.

99. The *Rodriguez* majority noted in dicta that, "[i]f, in fact, these correlations [between the wealth of districts and quality of education] could be sustained," a comparative theory of educational disadvantage might sustain an equal protection challenge. *See Rodriguez*, 411 U.S. at 26.

100. Serrano v. Priest, 487 P.2d 1241, 1257 (1971).

101. Challen Stephens, *The Demographics of Alabama's Failing Schools*, AL.COM(June 18, 2013), http://blog.al.com/wire/2013/06/alabamas_failing_schools.html.

102. *Id.*

103. Challen Stephens, *A Look at Failing Schools in Alabama*, AL.COM (March 20, 2013), http://blog.al.com/wire/2013/03/a_look_at_failing_schools_in_a.html?fb_action_ids=10101379180268755&fb_action_types=og.likes&fb_ref=s%3DshowShareBarUI%3Ap%3Dfacebook-like&fb_source=aggregation&fb_aggregation_id=288381481237582.

104. *Id.* Regarding the racial impact, the author notes that his is not a claim that the AAA constitutes invidious racial segregation—though perhaps that argument could be respectably made. The inclusion of this number was intended to show the overall disproportion in the distribution of Alabama's educational quality.

105. *See* Complaint, *supra* note 25, at 12.

ficiary having to travel over long distances to reach her new school.[106] Because the AAA requires that parents of transferring students pay their own transportation costs,[107] travel becomes cost prohibitive.

The net effect of all these factors is that the tax credits reach students least likely to be able to take advantage of them. The majority experience will be that of the *Marshall* ex rel *C.M.* plaintiffs, who because of their economic station will be unable to leave an already failing school, where they will remain with per-capita less state money.

V. CONCLUSION

Statistics clearly define a class of "poor" students[108] who under the AAA will be deprived of an appreciable quality of education[109]—a quasi-fundamental right that "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[110] The *C.M.* plaintiffs' AAA challenge presents the Court with an opportunity to reconcile its recent departure from its strict two-tiered equal protection analysis in cases like *Plyler* and *Windsor* by expressly applying Justice Marshall's more flexible "sliding scale." By doing so, it gives voice to classes disparately denied access to rights foundational to their participation in a free electorate. In the words of the California Supreme Court:

> "We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school. This was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. . . [T]oday, an education has become the Sine qua non of useful existence.
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> . . .
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> [S]urely the right to an education today means more than access to a classroom.[111]

106. *Id.*
107. *See* ALA. CODE § 16-6D-8(b)(8) (2013).
108. *Contra Rodriguez*, 411 U.S. at 25.
109. As in *Rodriguez*, "[t]he issue is neither provision of the most effective speech nor of the most informed vote. Appellees do not now seek the best education [the state] might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. 411 U.S. at 115–16 (Marshall, J., dissenting).
110. *See Brown,* 347 U.S. at 493.
111. *Serrano*, 487 P.2d at 1257.