

# TULANE ENVIRONMENTAL LAW JOURNAL

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VOLUME 34

SUMMER 2021

ISSUE 2

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## The Equal Protection Cure: Attacking Alabama’s Rural Sanitation Crisis (and Its Resultant Tropical Diseases Outbreak) as an Inequitable Distribution of Municipal Provisions

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## I. INTRODUCTION<sup>1</sup>

An eight-year-old child in Fort Deposit, Alabama, sits on the stoop of a mobile home.<sup>2</sup> Immediately below the boy's feet, a battered white pipe ran from the base of the home, across the yard, and deposited its contents, a stream of raw sewage, into a brush of trees.<sup>3</sup> Elsewhere in this small Alabama county, a senior citizen lives in a home with her daughter and grandchildren.<sup>4</sup> Despite paying a sewage fee, raw sewage emanates from the area where their house sits.<sup>5</sup> Photographs taken by researchers capture the perverse ordinariness of the scene: a child's basketball rests in a puddle of human waste; a vegetable garden is planted some fifty feet from effluent discharged from within the residence.<sup>6</sup> Similar scenes are tragically common in this region of Alabama, located southwest of Montgomery.<sup>7</sup> In fact, the Alabama Department of Public Health found that between forty

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1. While this Article does not cite to the author's personal experience, narrative devices are employed to provide context to a uniquely human tragedy. It is the position of the author that more legal scholarship should contain narrative elements in order to humanize the effects of laws. For a more detailed discussion of this topic, see Jean C. Love, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87, 92 (1998); see also Richard A. Matasar, *Storytelling and Legal Scholarship*, 68 CHI.-KENT L. REV. 353, 356 (1992).

2. See Ed Pilkington, *Hookworm, a Disease of Extreme Poverty, is Thriving in the U.S. South. Why?*, THE GUARDIAN (Sept. 5, 2017), <https://www.theguardian.com/us-news/2017/sep/05/hookworm-lowndes-county-alabama-water-waste-treatment-poverty> [<https://perma.cc/KS8R-4FZN>].

3. See *id.*

4. See Duke Franklin Humanities Institute, *Catherine Flowers—America's Dirty Secret: Living Amongst Raw Sewage*, YOUTUBE (Dec. 9, 2014), [https://www.youtube.com/watch?time\\_continue=89&v=kSFEB\\_2jqQI](https://www.youtube.com/watch?time_continue=89&v=kSFEB_2jqQI).

5. See *id.*

6. See *id.*

7. See Lyndsey Gilpin, *The Rural South's Invisible Public Health Crisis*, SOUTHERLY (July 5, 2018), <https://southerlymag.org/2018/07/05/the-rural-souths-invisible-public-health-crisis/> [<https://perma.cc/3CGD-MZ7X>].

and ninety percent of Lowndes County households lack adequate sanitation.<sup>8</sup>

Furthermore, as a result of residents' constant exposure to human waste,<sup>9</sup> hookworm—a tropical disease once thought eradicated from the developed world—abounds among the population.<sup>10</sup> The disease, while not deadly,<sup>11</sup> causes iron deficiencies, the stunting of physical development,<sup>12</sup> and cognitive delays in children.<sup>13</sup> The lack of adequate

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8. See *Alabama Rural Poverty and the Basic Human Right to Water and Sanitation is Subject of United Nations Inquiry*, EQUAL JUSTICE INITIATIVE (Mar. 3, 2011), <https://eji.org/news/united-nations-investigates-water-and-sanitation-in-rural-alabama> [<https://perma.cc/482D-54L7?type=image>].

9. Megan L. McKenna & Shannon McAtee, et al., *Human Intestinal Parasite Burden and Poor Sanitation in Rural Alabama*, 97 AM. J. TROP. MED. & HYGIENE 1623, 1623 (2017) (“We found that, among [the sample size], 42.4% reported exposure to raw sewage within their home, and from [the sample set] stool samples . . . 34.5% tested positive for *N. americanus* [(hookworm)] . . . 7.3% for *Strongyloides stercoralis* . . . and 1.8% for *Entamoeba histolytica*. Stool tested positive for *N. americanus* contained low levels of parasite DNA (geometric mean 0.0302 fg/μL). Soil studies detected one (2.9%) *Cryptosporidium* species, and *Toxocara* serology assay detected one (5.2%) positive in this population. Individuals living in this high-risk environment within the United States continue to have stool samples positive for *N. americanus*. Gastrointestinal parasites known to be endemic to developing countries are identifiable in American poverty regions.”).

10. According to the Centers for Disease Control, “An estimated 576-740 million people in the world are infected with hookworm. . . . Hookworm, *Ascaris*, and whipworm are known as soil-transmitted helminths (parasitic worms). Together, they account for a major burden of disease worldwide.” *Parasites—Hookworm*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/parasites/hookworm/index.html> [<https://perma.cc/ZY7U-PSKM?type=image>] (last visited Dec. 3, 2019). Additionally, “*Necator americanus* is the major hookworm species in the Americas. Transmission requires fecal contamination of soil and dermal penetration of human hosts. Conditions for larval survival, include moist and temperate environments. These soil-transmitted helminths are mainly found in areas where sanitation and hygiene are poor, most commonly in resource-limited countries.” McKenna, *supra* note 9.

11. *The Clean Water State Revolving Fund: How Federal Infrastructure Investment Can Help Communities Modernize Water Infrastructure and Address Affordability Challenges Hearing Before the Comm. on Transp. and Infrastructure Subcomm. on Water Res. and Env't*, 116th Cong. 26 (2019) (testimony of Catherine Coleman Flowers, Witness) (“Hookworms are not deadly, but can cause delays in physical and cognitive development in children.”)

12. See McKenna, *supra* note 9.

13. One of the authors of the previously cited 2017 study “Human Intestinal Parasite Burden and Poor Sanitation in Rural Alabama,” Professor Rojelio Mejia of the National School of Tropical Medicine at Baylor College of Medicine stated in an interview that the disease is particularly insidious in that, despite causing developmental delays in children, it does not manifest many other discernable symptoms. Furthermore, Mejia cited the adverse physical and cognitive effects of the disease as “contribut[ing] to the cycle of poverty.” See Lyndsey Gilpin, *In Rural Africa, Lessons for the U.S. South About Eradicating Poverty-Related Diseases*, *The Montgomery Advertiser* (Aug. 30, 2018), <https://www.montgomeryadvertiser.com/story/news/local/solutions-journalism/2018/08/30/rural-south-wastewater-infrastructure-lessons-learn-rural-africa-eradicating-poverty-related-disease/1108809002/> [<https://perma.cc/8N6H-X3W3?type=image>]. Further, “[d]iseases of poverty facilitate the cycle of poverty in that they decrease earning ability and economic productivity.” Lawrence O. Gostin, *Meeting Basic Survival Needs of the World's Least Healthy People: Toward a Framework Convention on Global Health*, 96 *Geo. L.J.* 331, 339

utilities, and the consequential infections of parasitic hookworms, should be looked upon with particular concern as Black citizens are disproportionately affected.<sup>14</sup> The presence of such a disparity led to a fact-finding mission from the United Nation's Special Rapporteur on Extreme Poverty and Human Rights,<sup>15</sup> which concluded, in part:

In Alabama, I saw various houses in rural areas that were surrounded by cesspools of sewage that flowed out of broken or non-existent septic systems. . . . But since the great majority of White folks live in the cities, which are well served by government built and maintained sewerage systems, and most of the rural folks in areas like Lowndes County, are Black, the problem doesn't appear on the political or governmental radar screen.<sup>16</sup>

These stark depictions illustrate the importance of a particular subcategory of the national environmental justice effort: ensuring Americans' access to equitable sanitation services. Lowndes County is not the sole example of extreme disparities in sanitation services in Alabama<sup>17</sup> or the United States

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(2008). Such a public health crisis may be a rather extreme example of the challenges contemplated by Dr. Martin Luther King in one of his late speeches. See Martin Luther King, Jr., *Local 1199 Salute to Freedom: The Other America* (Mar. 10, 1968), available at <https://www.crmvet.org/docs/otheram.htm> [<https://perma.cc/C86C-7WEZ?type=image>]. For a discussion of *The Other America's* contemporary relevance, see Danya Bowen Matthew, "Lessons from 'The Other America' Turning a Public Health Lens on Fighting Racism and Poverty," 49 U. Mem. L. Rev. 229, 240 (2018) ("Even before it became popular to say, Dr. King realized that 'Place Matters,'" and he addressed the multiple reasons that one's zip code is a more important determinant of health than one's genetic code . . . [C]oncentrated poverty exposes people to increased environmental pollution, violence, and excessive and disparate policing, while disproportionately limiting their access to healthy food, recreational spaces, educational opportunity, and positive social networks.").

14. Catherine Coleman Flowers & Peter Hotez, *How Poverty and Disease Is Impacting Human Rights in the South*, THE HILL (Mar. 5, 2018, 2:45 PM), <https://thehill.com/opinion/energy-environment/376798-how-poverty-and-disease-is-impacting-human-rights-in-the-american> [<https://perma.cc/B9HK-URLR?type=image>].

15. Marc Silver & Nadia Whitehead, *The U.N. Looks at Extreme Poverty in the U.S., From Alabama to California*, NPR (Dec. 12, 2017, 3:56 PM), <https://www.npr.org/sections/goatsand-soda/2017/12/12/570217635/the-u-n-looks-at-extreme-poverty-in-the-u-s-from-alabama-to-california> [<https://perma.cc/3Q9Z-JUVE?type=image>].

16. Press Release by Phillip Alston, United Nations Special Rapporteur on extreme poverty and human rights, United Nations Human Rights Office of the High Commissioner, Statement on Visit to the USA, (June 22, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22533> [<https://perma.cc/BH3U-EWJJ>].

17. For example, Wilcox County has experienced sanitation woes. THE ALA. CTR. FOR RURAL ENTER., FLUSHED & FORGOTTEN: SANITATION & WASTEWATER IN RURAL CMTYS. IN THE UNITED STATES 19 (2019) ("Approximately 70% of Wilcox County, Alabama, is Black. The County faces a sanitation crisis linked to poverty and the environment. One 2016 study indicates that approximately 90% of residents have unpermitted sewage systems, overwhelmingly comprised of straight pipes. Decades of failing septic systems and the use of straight-piping have led to the persistence of hookworm in Wilcox. It is estimated that 550,000 gallons of raw sewage from Wilcox County enters the Alabama River watershed every day."). Additionally, the town of

at large,<sup>18</sup> but it presents a particularly instructive case study in the sanitation service gaps between poor minority populations and their nearby white counterparts.<sup>19</sup>

In response to the glaring needs of the area, the non-profit environmental litigation organization Earthjustice<sup>20</sup> and the Alabama Center for Rural Enterprise filed suit against the state of Alabama and Lowndes County and alleged that the entities' inaction in alleviating the problem constituted racial discrimination.<sup>21</sup> Notably, the organizations predicated this complaint<sup>22</sup> on Title VI of the Civil Rights Act of 1964.<sup>23</sup> Absent from the complaint was mention of the Equal Protection Clause.<sup>24</sup> It is likely that the nonappearance of an argument grounded in equal protection jurisprudence is the result of the environmental justice

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Uniontown, in Alabama's Black Belt, has experienced a sanitation crisis of its own. *See id.* ("The case of nearby Uniontown, Alabama, demonstrates how flawed wastewater disposal solutions can exacerbate structural sanitation problems, and harm communities rather than support them. Uniontown, where the population is 86.3% Black, has long relied on spray fields, where sewage is pumped into a designated field where it is meant to be absorbed into the ground. The spray fields lack the capacity to handle all Uniontown's waste. As a result, wastewater has reportedly leaked into nearby creeks and rivers for over a decade.").

18. Access to quality sanitation is also a pressing issue for communities throughout the United States. The Census Bureau estimates that 1.6 million Americans live in houses "lacking complete plumbing facilities." *See Why We Ask About Plumbing Facilities, Kitchen Facilities, and Telephone Services*, U.S. CENSUS BUREAU, <https://www.census.gov/acs/www/about/why-we-ask-each-question/plumbing/> [<https://perma.cc/6JRK-HRRF?type=image>].

19. This is at least in part due to the relatively considerable media coverage garnered by the situation in Lowndes County. *See* Dennis Pillion, *How Much Untreated Sewage Gets Dumped in Alabama's Black Belt? UA Team Trying to Find Out*, ADVANCE LOCAL MEDIA (Apr. 13, 2019), <https://www.al.com/news/2019/04/how-much-untreated-sewage-gets-dumped-in-alabamas-black-belt-ua-team-trying-to-find-out.html> [<https://perma.cc/WCE4-HG78?type=image>] ("The sanitation issues in the Black Belt drew worldwide media attention in 2017. . . . In recent months, political figures including Cory Booker, Al Gore, and Alexandria Ocasio-Cortez have attempted to draw attention to the area's struggles, but it's still not clear just how widespread those problems are.").

20. This organization was formerly referred to as the Sierra Club Legal Defense Fund. *Sierra Club Legal Defense Fund Changes Name to Earthjustice Legal Defense Fund*, EARTHJUSTICE (Jun. 14, 1997), <https://earthjustice.org/news/press/1997/sierra-club-legal-defense-fund-changes-name-to-earthjustice-legal-defense-fund> [<https://perma.cc/3Q26-6UG4?type=image>].

21. *See* Jay Reeves, *Complaint: Racial Bias Behind Health Woes in Alabama County*, ASSOCIATED PRESS (Sept. 28, 2018), <https://apnews.com/e5769bbacee241cc999145f0057ff61e> [<https://perma.cc/Q6LR-5B69?type=image>].

22. *Two Alabama Health Agencies Face Federal Bias Complaint over Sewage Problems*, EARTHJUSTICE, <https://earthjustice.org/news/press/2018/two-ala-health-agencies-face-federal-bias-complaint-over-sewage-problems> [<https://perma.cc/M6SA-ZKSH?type=image>].

23. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1964).

24. *See* U.S. CONST. amend. XIV, § 1.

movement's growing misgivings of such claims.<sup>25</sup> However, it is the position of this paper that the absence of adequate sanitation provisions in Lowndes County, Alabama, not only constitutes a public health crisis, but also an inequitable distribution of municipal services under the Equal Protection Clause. As such, environmental justice activists should not hesitate in pursuing action on the basis of equal protection, and frame an argument utilizing the "inequitable distribution of municipal services framework."

In order to establish that Lowndes County's sanitation crisis is a result of a denial of its citizens' rights to equal protection of the laws, brief historical background as well as accounts of current governmental actions are necessary. Consequently, Part I will provide context for the long-established equal protection framework regarding the inequitable distribution of municipal services. Next, Part II will apply factual evidence of racial discrimination in Lowndes County, Alabama within the inequitable distribution of municipal services framework so as to make a showing of purposeful discrimination on the part of the state and county sufficient to trigger a strict scrutiny analysis. Finally, Part III will argue that the government's actions are not narrowly tailored to further a compelling governmental interest sufficient to withstand application of the strict scrutiny standard.

## II. THE INEQUITABLE PROVISION OF MUNICIPAL SERVICES CONSTITUTES A VIOLATION OF EQUAL PROTECTION DUE TO ITS DISPARATE IMPACT AND RACIALLY DISCRIMINATORY INTENT

For decades, environmental justice advocates have avoided grounding claims on the basis of equal protection.<sup>26</sup> This was due, in large

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25. See Uma Outka, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 218-23 (2005) ("Practicing lawyers recognize that, right or wrong, the courts' current approach to equal protection analysis holds little promise for environmental justice claimants."). See *infra* note 26 for additional discussion of Outka's article.

26. For a brief, yet instructive summation and analysis of the notable environmental justice cases argued on equal protection grounds, see Outka, *supra* note 25. In the article, Outka argues that the Supreme Court's decisions in *Washington v. Davis* and *Arlington Heights* establishes that "the disproportionate impact of a governmental action on a racial group does not entitle that group to Fourteenth Amendment protection without proof of intent to discriminate." *Id.* Outka continued, "This intent requirement has proven formidable for environmental justice claimants." *Id.* Virtually all of the paradigmatic environmental justice cases that scholars cite as examples of why such claims should not be sought on equal protection grounds deal with landfill siting. See *id.*; see also Carlton Waterhouse, *Abandon All Hope Ye That Enter? Equal Protection, Title VI, and the Divine Comedy of Environmental Justice*, 20 FORDHAM ENV'T L. REV. 51, 67 (2009); see also Brian Faerstein, *Resurrecting Equal Protection Challenges to Environmental Inequality: A Deliberately Indifferent Optimistic Approach*, 7 U. PA. J. CONST. L. 561, 564 (2004). While this Article does not

part, to the “discriminatory intent” hurdle placed before such claims as a result of *Washington v. Davis*, 426 U.S. 229, 247-48 (1976) and *Village of Arlington Heights v. Metropolitan Housing Development Corp. (Arlington Heights)*, 429 U.S. 252, 265-66 (1977). However, courts have been significantly more receptive to claims of purposeful discrimination in cases involving the distribution of municipal services.<sup>27</sup>

#### A. *Disparate Impact and Discriminatory Intent*

An equal protection analysis is implicated when a government action works to “classify persons so as to extend them unequal treatment.”<sup>28</sup> The most recognized “doctrinal features” of equal protection jurisprudence are the suspect classification analysis and the tiers of scrutiny analysis.<sup>29</sup> These analyses are also the chief mechanisms courts use in sorting equal protection claims.<sup>30</sup> The level of scrutiny a court assigned to a particular governmental action is highly determinative in the outcome of a case.<sup>31</sup> Rational basis review, the lowest level of scrutiny and the default in equal protection jurisprudence, overwhelmingly leads to losses for plaintiffs.<sup>32</sup>

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specifically address siting cases, it is important for readers of this article to understand why there is such hesitance in bringing equal protection arguments among environmental lawyers.

27. See Major Willie A. Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, 22 OHIO N.U. L. REV. 1227, 1282 (1996) (arguing that courts exhibit a willingness to find intentional discrimination in municipal service cases but not in siting cases because of four factors: (1) “[I]t is more difficult to establish intentional discrimination in the context of siting decisions because most communities typically only host a few landfills and other waste facilities. In contrast, municipalities typically provide a range of services.” Therefore, attorneys arguing in municipal service cases have “more opportunities to generate evidence of disparities if such patterns exist.” (2) governments are typically more “passive” in allowing or prohibiting a site proposed by a private entity. “Courts are less likely to find intentional discrimination because the agency is acting only to review and ratify a decision rather than acting as the proponent of a given course of action. (3) Courts may find remedies more palatable in the municipal context than the siting context. In the municipal context, an injunction can be issued and services can be ordered to be equalized. “However, in a siting case, a favorable ruling for the plaintiff could mean that some other community must be burdened.” (4) Finally, “apparently neutral factors can be readily used to justify site selections in minority areas.”).

28. See Mitchell F. Rice, *The Discriminatory Purpose Standard: A Problem for Minorities in Racial Discrimination Litigation?*, 6 B.C. THIRD WORLD L.J. 1, 1 (1986) (quoting Frank I. Michelman, *The Supreme Court, 1968 Term-Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 33 (1969)).

29. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 743 (2014).

30. See *id.*

31. Ashutosh Baghwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 304 (1997) (“On the other hand, strict scrutiny has historically tended to be, in the oft-quoted words of Gerald Gunther, ‘strict’ in theory and fatal in fact.”).

32. See Pollvogt, *supra* note 29.

Conversely, strict scrutiny review, the most exacting and burdensome standard for governments to overcome, is brought about when “suspect” classifications experience discrimination.<sup>33</sup> Certain classifications are viewed by the Court as particularly suspect, including race, national origin, and religion.<sup>34</sup> Therefore, when a governmental action is deemed to have discriminated against a population on the basis of race, the action is strictly scrutinized.<sup>35</sup>

The contours of equal protection jurisprudence have developed over the past century and a half.<sup>36</sup> In *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886),<sup>37</sup> the Court reviewed a San Francisco ordinance barring the operation of commercial laundries in wooden buildings without prior consent from the board of supervisors.<sup>38</sup> At the time of the ordinance’s enactment, there were approximately 320 laundries in the city, of which 310 were constructed from wood.<sup>39</sup> At the same time, Chinese Americans owned a substantial majority of the city’s laundries.<sup>40</sup> Eventually, municipal authorities arrested a significant number of the Chinese American laundry owners, while the white merchants were “left unmolested, and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination.”<sup>41</sup> The Court held that the ordinance

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33. See Russell W. Galloway, Jr., Basic Equal Protection Analysis, 29 SANTA CLARA L. REV. 121, 132 n.45 (1989). (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. . . . Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose.”) (quoting *Palmore v. Sidote*, 466 U.S. 429, 432-33 (1984)).

34. Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 146 (2011) (“Facial classifications based on race, national origin, and religion are considered suspect and receive strict scrutiny.”).

35. *Id.*

36. The first such case, *Strauder v. West Virginia*, 100 U.S. 303 (1880), held that a law permitting only whites to serve on juries was unconstitutional in light of the Equal Protection Clause. See Sanford Levinson, *Why Strauder v. West Virginia is the Most Important Single Source of Insight on the Tensions Contained within the Equal Protection Clause of the Fourteenth Amendment*, 62 ST. LOUIS U.L.J. 603 (2018).

37. Relatively detailed summaries of the facts of this case and *Gomillion v. Lightfoot* are warranted. These cases represent an exceptional variety of purposeful discrimination cases, once referenced in *Arlington Heights* as “rare” cases where “a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.” *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (“Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence.”).

38. *Yick Wo v. Hopkins*, 118 U.S. 356, 367 (1886).

39. *Id.* at 365.

40. *Id.*

41. *Id.*



violated the Chinese American petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>42</sup> The Court reasoned that even if a law appears neutral on its face, if it is applied in a manner that inflicts disproportionate burdens on certain classifications of persons, it violates equal protection.<sup>43</sup>

A similar holding was delivered in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).<sup>44</sup> In *Gomillion*, the Court reviewed a 1957 Alabama state legislative act which drastically redefined the corporate boundaries of Tuskegee, Alabama.<sup>45</sup> The legislation altered the city's shape from a square to an "uncouth twenty-eight sided figure."<sup>46</sup> The result was an exclusion from the city limits of all but roughly five of the city's African American residents, while not a single white resident was removed from the new map.<sup>47</sup> The Court held that when a governmental body "singles out" a racial minority "for special discriminatory treatment," it runs afoul of constitutional principles of equal protection.<sup>48</sup>

Further, the Court addressed the nature of a state's control over a municipality.<sup>49</sup> In particular, the Court was troubled by the fact that respondents failed to offer "any countervailing municipal function which [the legislative enactment] is designed to serve."<sup>50</sup> After all, the state's power to "establish," "destroy," contract, or expand is not unrestricted or

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42. *Id.* at 373.

43. *Id.* at 373-74.

44. Marie A. Falinger, *Yick Wo at 125: Four Simple Lessons for the Contemporary Supreme Court*, 17 MICH. J. RACE & L. 217, 255 (2012) (noting that "[i]n many constitutional law texts, [*Yick Wo* and *Gomillion v. Lightfoot*] stand for the proposition that legislative purpose will be found invidious when the racially disparate impact is 'tantamount for all practical purposes' . . . that the legislature's purpose is to segregate people on the basis of race.").

45. See *Gomillion v. Lightfoot*, 364 U.S. 339, 340 (1960).

46. See *id.*

47. See Richard B. Sobol, *Gomillion Versus Lightfoot: The Tuskegee Gerrymander Case*, 62 COLUM. L. REV. 748, 748 (1962). It is worth noting that, partially as a result of the town being the home of the Tuskegee Institute, the city possessed a large African American population. See *id.* at 749. As African Americans outnumbered whites by a proportion of four-to-one, the measure was an attempt by the white political class to "prevent [black] enfranchisement on the ground that any substantial amount of [black] registration would result in political domination of the whites." *Id.*

48. It is significant that *Gomillion* dealt specifically with the right of franchise in the municipal context. See 364 U.S. at 347 ("When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.").

49. See Michael A. Lawrence, *Do 'Creatures of the State' Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 VILL. L. REV. 93, 101 (2002) "Gomillion thus sets forth the important principle that there are constitutional limits to the degree of control that may be asserted by a state over municipal corporations, through legislation or otherwise.").

50. See *Gomillion*, 364 U.S. at 342.

absolute;<sup>51</sup> a state's power to control its municipalities is subject to the relevant restrictions imposed by the Constitution.<sup>52</sup>

The latter half of the twentieth century brought significant modifications to the Court's equal protection framework. In 1976, the Court elevated the threshold standards required for plaintiffs to prevail in unconstitutional racial discrimination cases to require a discriminatory purpose.<sup>53</sup> The first such case, *Washington v. Davis*, 426 U.S. 229, 237-38 (1976), held that a qualifying exam utilized to determine civil service promotions was permissive, despite four times as many African Americans failing the test as whites. The Court ruled that a governmental action is not unconstitutional exclusively because it has a racially disproportionate impact; instead, the law must reflect a racially discriminatory purpose<sup>54</sup> to warrant strict scrutiny review.<sup>55</sup> Further, "the totality of relevant facts," including whether the law produces a disparate burden on one race over another,<sup>56</sup> can be taken into account in determining whether discriminatory purpose was the motivating force behind an official act.<sup>57</sup> Therefore, "disproportionate impact is not irrelevant, but it is not the sole touchstone" of an unconstitutional act of discrimination.<sup>58</sup>

Next, the Court supplemented the *Washington* decision in a residential zoning case, *Arlington Heights*. In *Arlington Heights*, a nonprofit housing developer sought to rezone a parcel of land from a single-family to multi-family classification.<sup>59</sup> The developers' intent was to build townhouses for low- and middle-income residents.<sup>60</sup> The rezoning

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51. *Id.*

52. *Id.* at 344-45.

53. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 763-64 ("Even with respect to the five established heightened scrutiny classifications, the Court has restricted the ambit of its protections. The 1976 case of *Washington v. Davis* articulated the most significant constraint. . . . Indeed, the Court took the occasion to distinguish between the protections afforded by Title VII and the equal protection guarantee. The *Davis* Court held that, in the constitutional context, disparate impact was not, in and of itself, enough to require a heightened level of scrutiny.").

54. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

55. *Id.* at 242.

56. The court provides jury cases as an instructive example of such a disparate impact. *See id.* ("It is also not infrequently true that the discriminatory impact in the jury cases for example, the total or seriously disproportionate exclusion of Negroes from jury venires may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.").

57. *Id.*

58. *Id.*

59. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 254 (1977).

60. *Id.*

proposal was met with hostility from community members and was ultimately voted down by the local planning commission.<sup>61</sup> The Court reviewed the board's decision to determine the presence or absence of discriminatory purpose, and ultimately ruled in favor of the planning commission.<sup>62</sup>

In reaffirming *Washington*,<sup>63</sup> the Court held that proof of discriminatory purpose did not necessarily require a plaintiff to prove that racially discriminatory motive was the sole basis of a governmental action, nor that it was a dominant factor.<sup>64</sup> In fact, when racial discrimination is shown, the judicial deference normally given to legislative directives "is no longer justified."<sup>65</sup> When impact alone cannot sufficiently prove discriminatory intent, the Court required that new evidentiary sources must be explored.<sup>66</sup> Factors to be balanced include the historical background of a decision, "particularly if it reveals a series of . . . actions taken for invidious purposes;" the sequence of events leading to a decision;<sup>67</sup> departures from normal procedure or substance; and legislative or administrative history.<sup>68</sup>

More recently, in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 280-81 (1979), the Court upheld a preferential hiring program that favored veterans for state employment. The inevitable effect of the program was that men were disproportionately favored for upper-level state positions over women.<sup>69</sup> The Court held that in order to demonstrate purposeful discrimination, it must be shown that the

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61. *Id.*

62. It should be noted that both opponents and supporters of the development spoke of the "social issue," presumably a reference to the "desirability or undesirability of introducing . . . low- and moderate-income housing, housing that would probably be racially integrated." The court made factual mention of the phrase but failed to revisit it later in their analysis. *See id.* 257-71.

63. *See id.* at 264-265 ("Our decision last term . . . made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts.").

64. *See id.* at 265 ("Davis does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature . . . made a decision motivated solely by a single concern, or even . . . [a] 'dominant' or 'primary' one.").

65. *Id.* at 265-66.

66. *Id.* at 266.

67. The Court provides a helpful example of what it meant by the rather vague "sequence of events" factor. *See id.* at 267 ("For example, if the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case.").

68. The Court additionally does not purport that this list be exhaustive. *See id.* at 267-68.

69. *Pers. Adm'r of Mass. V. Feeney*, 442 U.S. 256, 270-71 (1979).

government actor possessed something more than “volition” or “awareness of consequences.”<sup>70</sup> Instead, there must be evidence that the action was carried out “at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”<sup>71</sup> In this case, the adverse impact on women was foreseeable; however, the preferential treatment of veterans also would necessarily disparately impact some men, and thereby failed to meet a standard of “invidious gender-based discrimination.”<sup>72</sup>

*B. Purposeful Discrimination Challenges to the Inequitable Distribution of Municipal Services*

The line of cases that began with *Yick Wo* and *Gomillion*, and was later completed by *Davis, Arlington Heights*, and *Feeney*, allowed for the development of a relatively new subset of equal protection jurisprudence: the inequitable distribution of municipal services cases.<sup>73</sup> The first major case to address the distribution of municipal services under an equal protection theory was *Hawkins v. Town of Shaw*.<sup>74</sup> In that case, a class of Black citizens sued the Town of Shaw, Mississippi alleging racial discrimination in the provision of a host of municipal services, including street paving, street lighting, and sanitary sewers.<sup>75</sup> The town’s population at the time of the suit was approximately 2,500, of which African Americans made up sixty percent and whites the remaining forty percent.<sup>76</sup> The Black population tended to reside “in the town’s peripheral or outer

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70. *Id.* at 279

71. *Id.*

72. *See id.* at 281 (Stevens, J., concurring). Interestingly, Stevens’ concurrence was silent on the majority’s rejection of the foreseeable consequences test which he initially championed in his concurrence in *Washington v. Davis*. *See* Marjorie J. Weinzwieg, *Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem*, 1 LAW & INEQUALITY 277, 290 (1983).

73. *See* Sten-Erik Hoidal, *Returning to the Roots of Environmental Justice: Lessons from the Inequitable Distribution of Municipal Services*, 88 MINN. L. REV. 193, 197-99 (2003); *see also* Naiking Tsao, *Ameliorating Environmental Racism: A Citizen’s Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 389, 405-06 (1992); *see also* Adam Swartz, *Environmental Justice: A Survey of the Ailments of Environmental Racism*, 2 HOW. SCROLL 35, 48 (1993). The line of cases presented herein represents something of a consensus among scholars. The cases beginning with *Hawkins v. Town of Shaw*, and continuing through to *Apopka, Johnson*, and *Ammons* are all cited as criterion cases within this field of equal protection jurisprudence.

74. *See* Hoidal, *supra* note 73, at 196-97 (calling the case the “paradigmatic” case of the movement). *See also* Tsao, *supra* note 73, at 389 (“one of the first cases to apply an equal protection theory to the issue of the inequitable distribution of municipal services”).

75. *Hawkins v. Shaw*, 303 F. Supp. 1162, 1163 (N.D. Miss. 1969).

76. *Id.* at 1164.

area,” while the white population largely resided “near the town’s business or commercial center.”<sup>77</sup>

As a result of this history of residential segregation,<sup>78</sup> stark disparities existed regarding the placement and delivery of services.<sup>79</sup> Of the houses fronting unpaved streets, ninety-eight percent were occupied by African Americans.<sup>80</sup> Similarly, of the dwellings not serviced by sanitary sewers, ninety-seven percent belonged to African Americans.<sup>81</sup> Every single mercury vapor street lighting fixture was in largely white residential areas, while the less effective “bare bulb lighting” fixtures were predominant in the areas with a largely Black populace.<sup>82</sup>

The court held that while the record did not directly evidence “bad faith, ill will, or any evil motive,” equal protection refers to something “more than merely the absence of governmental action designed to discriminate.”<sup>83</sup> Instead, lack of action resulting from an “arbitrary quality of thoughtlessness” also deprived citizens of their rights to the equal protection of laws.<sup>84</sup> Citing *Yick Wo*, the court held that a reasonable inference could be drawn supporting the notion that the distribution of services in *Hawkins* represented “clear overtones of racial discrimination,” and resulted in the same effect of those policymakers who purposely disregard principles of equal protection.<sup>85</sup> As such, the court ordered the town to “formulate a plan to eliminate the disparities.”<sup>86</sup> While *Hawkins* was decided in the years before *Davis* and its progeny, subsequent affirmation from the courts convinced environmental justice advocates of its prospects.<sup>87</sup>

In the post-*Davis* era, three cases have furthered the jurisprudential principles established by *Hawkins*.<sup>88</sup> In the first such case, *Johnson v. City*

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77. *Id.*

78. The court noted that “little change” occurred between 1930 and the initiation of the suit. Further, the court made a point that “[r]esidential racial segregation is almost total.” Of the black housing units, ninety-seven percent were located in neighborhoods where no whites resided. *Hawkins v. Shaw*, 437 F.2d 1286, 1288 (5th Cir. 1971).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 1291-92.

84. *Id.* at 1292.

85. *Hawkins v. Shaw*, 461 F.2d 1171, 1173 (5th Cir. 1972).

86. *Id.* at 1174.

87. See Hoidal, *supra* note 73, at 197 (“*Hawkins v. Shaw* became the template for successful municipal service equalization claims.”).

88. Fortunately, for potential Lowndes County, Alabama plaintiffs, each of these cases were decided within the Eleventh Circuit. See *Johnson v. Arcadia*, 450 F. Supp. 1363, 1380 (M.D.

of *Arcadia*, a class of Black citizens brought an action against Arcadia, Florida alleging inequality in the provision of street paving.<sup>89</sup> At the time, Arcadia's population totaled 7,000 residents, roughly thirty-two percent of whom were African American and sixty-eight percent white.<sup>90</sup> Further, it was established that the city had developed around historically segregated residential lines.<sup>91</sup> Data showed that Black residents were roughly "two and a half times as likely as white residents to live on an unpaved street."<sup>92</sup>

In ruling for the plaintiffs, the court held that "the three elements [needed] for plaintiffs to prove a constitutional violation in municipal service suits" are: "(1) existence of racially identifiable neighborhoods in the municipality; (2) substantial inferiority in the quality or quantity of the municipal services and facilities provided in the [B]lack neighborhood; and, (3) proof of intent or motive."<sup>93</sup> Furthermore, citing a central principle of *Arlington Heights*, the court held that a past history of racial discrimination with respect to public services is "persuasive evidence" that the "inequalities in the distribution of municipal services" is the "result of racial discrimination."<sup>94</sup> The plaintiffs established all three elements by providing the court with evidence of statistical disparities in the provision of municipal services, and evidence of residential segregation "perpetuated by historical discrimination on the part of the city."<sup>95</sup>

In *Dowdell v. Apopka*, the Eleventh Circuit reviewed a lower court holding that the town of Apopka, Florida subjected Black residents to the

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Fla. 1978); *Dowdell v. Apopka*, 698 F.2d 1181, 1186 (11th Cir. 1983); *Ammons v. Dade City*, 783 F.2d 982, 983 (11th Cir. 1986).

89. See 450 F. Supp. 1363, 1368 (M.D. Fla. 1978).

90. *Id.*

91. See *id.* ("The entire black community is bordered by railroad tracks to the east, north, and west. . . . No blacks reside anywhere outside this small geographical area in the southwest portion of Arcadia.")

92. *Id.* at 1370 ("There is presently 261,160 feet of residential street footage (public rights of way on which one or more persons reside) within the corporate limits of the town. The black population resides on 48,380 feet of these streets while the white population resides on 212,780 feet. Of the 48,380 of residential streets in the black community, 5,020, or 10.3%, are unpaved. In the white community, however, only 4.2%, or 9,075 feet of residential street footage, black or white, is 2.4 to 1. This means that black residents of Arcadia are approximately two-and-one-half times as likely as white residents to live on an unpaved street.")

93. *Id.* at 1379.

94. *Id.* at 1378.

95. See Hoidal, *supra* note 73, at 198. Adam Swartz argued that the challenge of proving statistical disparities have historically been less burdensome for plaintiffs in inequitable distribution of municipal services cases. Swartz, *supra* note 73, at 48 ("[I]t may be easier to prove disparate impact in municipal services than in [traditional] environmental racism cases." For example, the plaintiff in *Ammons* could show that ninety-eight percent of all unpaved streets in the town abutted a black residence. "As the quibbling over statistics in *East Bibb Twiggs* and *Bean* demonstrates, it is difficult for environmental justice plaintiffs to present evidence that is so stark.")

discriminatory provision of street paving, water distribution, and storm drainage systems.<sup>96</sup> The appellate court held that, even though discriminatory intent is a “fluid concept,”<sup>97</sup> nearly every factor laid out in *Arlington Heights* was present.<sup>98</sup> As such, the appellate court affirmed the finding of discriminatory intent by the district court.<sup>99</sup> Additionally, in *Ammons v. Dade City*, another class of Black citizens in Florida modeled an action after the classes in *Hawkins*, *Johnson*, and *Apopka*.<sup>100</sup> Upon determination of the presence of a racially identifiable neighborhood<sup>101</sup> and substandard services within the neighborhood,<sup>102</sup> the court advanced into a discriminatory intent analysis.<sup>103</sup> The court found that intentional discrimination existed, focusing particularly on the foreseeability of deprivation of services.<sup>104</sup>

Due in part to such decisions, there is a clear trend among scholars that framing equal protection arguments in the context of municipal services provide for greater viability in proving a discriminatory motivation behind environmental policies that disproportionately affects one race. For example, Hoidal noted that the inequitable distribution cases can serve as bases for environmental justice claims on equal protection grounds.<sup>105</sup> This is principally the case because “they succeeded,” unlike

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96. 698 F.2d 1181, 1183 (11th Cir. 1983).

97. *Id.* at 1185-86.

98. *See id.* at 1186 (The court noted the following three factors in determining that discriminatory intent was present: (1) “the magnitude of the disparity, evidencing a systematic pattern of municipal expenditures in all areas of town except the black community, is explicable on racial grounds.” (2) the legislative and administrative pattern of decision-making, extending from nearly half a century in the past to Apopka’s plans for future development, indicates a deliberate deprivation of services to the black community. In addition, a law remained in effect until 1968 restricting blacks to reside only “on the south side of the railroad tracks,” and African Americans were wholly under-represented in local government. (3) “[T]he continued and systematic relative deprivation of the black community was the obviously foreseeable outcome of spending nearly all revenue sharing monies received on the white community in preference to the visibly underserved black community.”).

99. *Id.* at 1186.

100. *Compare Ammons v. Dade City*, 783 F.2d 982, 983 (11th Cir. 1986) *with id.*

101. *Id.* at 985 (The court found that “[t]he City’s black residential community” is comprised of two adjoining areas that are geographically segregated “on the other side of the railroad tracks.”).

102. *Id.* at 986.

103. *Id.* at 987.

104. *Id.* at 988 (“[W]hen it is foreseeable, as the evidence reflects in this case, that the allocation of greater resources to the white residential community at the expense of the black community will lead to the foreseeable outcome of a deprived black residential community. . . then a discriminatory purpose as found by the district court is properly shown.”).

105. *See Hoidal*, *supra* note 73, at 210.

the traditional environmental justice (i.e. siting) cases.<sup>106</sup> Two of the chief explanations for the success of inequitable distribution arguments are that (1) these cases, as opposed to the siting cases, clearly established the presence of a “spatially isolated and identifiable minority,”<sup>107</sup> and (2) the sheer disparities between services delivered to whites and those delivered to African Americans were stark and thus alarming to courts.<sup>108</sup> In the siting cases, oftentimes the courts would get mired in the minutiae of statistics.<sup>109</sup> In municipal distribution cases, either there was an adequate delivery of services or there was not.<sup>110</sup> Certainly, the situation in Lowndes County can be seen as an analog to these cases.

### III. APPLICATION OF THE INEQUITABLE DISTRIBUTION OF MUNICIPAL SERVICES FRAMEWORK TO EVIDENCE OF DISCRIMINATION IN LOWNDES COUNTY, ALABAMA

#### A. *Brief Discussion of State and Local Governments’ Insufficient Response to Lowndes County’s Sanitation Woes*

Lowndes County is situated in rural south-central Alabama, directly west of Montgomery, Alabama’s capital city.<sup>111</sup> The county is roughly 72.5 percent African American,<sup>112</sup> its median per capita income is \$18,976,<sup>113</sup> and 26.6 percent of its population lives in poverty.<sup>114</sup> Historically, the area’s economy centered around agriculture.<sup>115</sup> In fact, the county’s

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106. *Id.*

107. *Id.* at 211.

108. *Id.* at 211-12.

109. See Outka, *supra* note 25, at 219.

110. See Hoidal, *supra* note 73, at 211-12.

111. Official Highway Map of Alabama. 1979-1980. “Alabama Department of Archives and History,” <http://digital.archives.alabama.gov/cdm/singleitem/collection/maps/id/198/rec/7> [<https://perma.cc/PC42-89J5?type=image>] (last visited Dec. 1, 2020).

112. *QuickFacts: Lowndes County, Alabama*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/lowndescountyalabama/IPE120218#IPE120218> [<https://perma.cc/ZA82-KZDG?type=image>]. This number contrasts with the national population percentage, 13.3 percent. See Inga T. Winkler and Catherine Coleman Flowers, “*America’s Dirty Secret: The Human Right to Sanitation in Alabama’s Black Belt*,” 49 COLUM. HUM. RTS. L. REV. 181, 185 (2017).

113. *Quick Facts: Lowndes County, Alabama*, *supra* note 112. This number contrasts with the national average of roughly \$54,000; see also Winkler and Flowers, *supra* note 112, at 185.

114. *QuickFacts: Lowndes County, Alabama*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/lowndescountyalabama> [<https://perma.cc/ZA82-KZDG?type=image>] (last visited Mar. 23, 2021).

115. See Donna J. Siebenthaler, *Lowndes County*, ENCYCLOPEDIA OF ALA., <http://www.encyclopediaofalabama.org/article/h-1349> [<https://perma.cc/A9YQ-B9N8?type=image>].



farming efforts are greatly enhanced by the dark and rich soil present throughout the county's geography.<sup>116</sup>

In the modern era, however, Lowndes County cannot be separated from its often-times violent history of racism. The county served as a hotbed of civil rights organizing in the 1960s.<sup>117</sup> In fact, the Selma to Montgomery march route ran straight through the middle of the county.<sup>118</sup> Eventually, the activism among disenfranchised African Americans led to a desire for formal political power.<sup>119</sup> After a period of noted violence, a newly created political party formed by Lowndes County African

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116. It is the color of the soil that gives Lowndes County's home region its name, the Alabama Black Belt. In recent times, "the Black Belt" has also become a recognized sociological term, a reference to the area's large African American population. It cannot go unmentioned the supporting role that the unique soil plays in this saga. As one researcher posited:

The same rich, fertile clay soils that define the Alabama Black Belt cause problems for septic systems—the most widespread wastewater treatment method for much of the rural US. The soils are dominated by shrink-swell clays which are both poorly draining and easily damage and clog septic field lines as they expand and contract over wet and dry periods. The Natural Resources Conservation Service's (NRCS) Soil Limitations Rating System puts 93.4% of Lowndes County as "very limited" for use as septic tank absorption fields.

Emily Meza, *Examining Wastewater Treatment Struggles in Lowndes County, Alabama* (Apr. 27, 2018) (unpublished Master's project, Duke University), [https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/16516/MP\\_2018\\_04\\_20\\_FinalDraft.pdf?sequence=1&isAllowed=y](https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/16516/MP_2018_04_20_FinalDraft.pdf?sequence=1&isAllowed=y) [<https://perma.cc/T7YQ-B92P?type=image>]. Another researcher wrote:

Several factors make simple solutions to this problem nonviable. Though the Black Belt's rurality makes decentralized systems like septic tanks more economically feasible in many cases than traditional sewer lines, the clay soil that covers many parts of the region will not drain well enough for a traditional septic system. More advanced household systems typically cost as much or more than the median household income of the region.

Danielle Purifoy, *The Contingent Victory of the Alabama Black Belt*, HARV. HUM. RTS. J. ONLINE (2017), <https://harvardhrj.com/the-contingent-victory-of-the-alabama-black-belt/> [<https://perma.cc/7VVQ-7WUL?type=image>].

117. HASAN JEFFRIES, BLOODY LOWNDES (2010) (the seminal work detailing treatment of Lowndes County's role in the Civil Rights Movement). In BLOODY LOWNDES, author Hasan Jeffries explores the Civil Rights Movement as a fight for "freedom rights," the key organizational elements of the Lowndes movement, SNCC and the black power movement in Lowndes, and the development of the Lowndes County Freedom Organization.

118. See Siebenthaler, *supra* note 115.

119. Danielle Purifoy, *Stories from a Town Built in the Face of Racist Violence*, SCALAWAG (Jan. 24, 2017), <https://www.scalawagmagazine.org/2017/01/stories-from-a-town-built-in-the-face-of-racist-violence/> [<https://perma.cc/VA4C-7X6B?type=image>] (I cite heavily to this source purposely. It is one of the very few sources to detail the career of John Jackson, the founding mayor of White Hall, Alabama, and a central figure in the fight for adequate sanitation. As one can recognize, his story is evidence of overt racism in the denial of municipal services).

Americans, named the Lowndes County Freedom Organization, garnered marginal success at the ballot box.<sup>120</sup>

The story of White Hall, Alabama's incorporation provides a particularly revealing example of how white officials denied equitable delivery of sanitation services. In the late 1970s, the white supremacist model of governance maintained its hold on the county, and seeped into the county government's decisions on how to distribute government services.<sup>121</sup> This fact angered organizer John Jackson to the point that he petitioned the state of Alabama and Lowndes County to incorporate White Hall, a predominately African American hamlet, as an independent municipality.<sup>122</sup> Jackson reckoned that incorporation would allow for state and federal funding for a "basic water and sewer infrastructure" because "[c]ounty government simply would not . . . provide such basic public services."<sup>123</sup> Though Jackson was successful in the incorporation effort, success was fleeting due to "the persistence of white supremacist politics played at the county and state level by officials who were the descendants of the white residents and officials who terrorized Black people in the 1960s."<sup>124</sup> In short, the White Hall story is typical of the animus shown to African Americans in the provision of services throughout the county.

This local history, combined with nationwide trends in the development of sanitation systems, have made for tragic consequences. When much of the water and sanitation infrastructure was constructed, minority communities were among those systematically excluded from service areas.<sup>125</sup> In addition, present-day infrastructure funding strategies also indicate the presence of discrimination. State loan programs, such as the Clean Water State Revolving Fund,<sup>126</sup> prioritize "creditworthiness over

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120. See JEFFRIES, *supra* note 117, at 205.

121. See Purifoy, *supra* note 119.

122. See *id.*

123. See *id.*

124. See *id.*

125. See PATRICIA A. JONES AND AMBER MOULTON, UNITARIAN UNIVERSALIST SERV. COMM., THE INVISIBLE CRISIS: WATER AFFORDABILITY IN THE UNITED STATES (2016) <http://uswateralliance.org/sites/uswateralliance.org/files/Invisible%20Crisis%20-%20Water%20Affordability%20in%20the%20US.pdf> ("U.S. water and sewer infrastructure, much of which is over 80 years old, has often excluded low-income and minority neighborhoods and towns, Native American communities, and low-income rural areas.").

126. STATE REVOLVING FUND, ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, <http://adem.alabama.gov/programs/water/srf.cnt> [<https://perma.cc/4F2E-5PJM?type=image>] (last visited Dec. 7, 2020) ("The Clean Water State Revolving Fund (CWSRF) and the Drinking Water State Revolving Fund (DWSRF) are low interest loan programs intended to finance public infrastructure improvements in Alabama. The programs are funded with a blend of state and federal capitalization funds.").

necessity in making funding decisions,”<sup>127</sup> which in turn perpetuates a gross cycle of racism. Predominately African American communities, particularly in Alabama, have lacked access to credit due to a variety of factors including historical redlining<sup>128</sup> and low tax bases.<sup>129</sup> Furthermore, “most Black Belt communities cannot pursue economic development without access to credit and credit access generally requires some economic development.”<sup>130</sup> Without adequate sanitation infrastructure in place, economic development efforts have been fruitless.<sup>131</sup> As such, under the current conditions, the odds that Lowndes County communities will receive large-scale grants are dubious.

Compellingly, noted actors within this tragedy—both within the activist class and the government—have alleged that race was a motivating factor in the selection of where to build formal sanitation systems. In numerous interviews, Catherine Coleman Flowers, a prominent local activist for the equalization of sanitation services, pointed to entrenched racism as a driving force behind the lack of operational sanitation systems. In one interview, Coleman stated,

[A]s a result [African Americans] that stayed in the area [post-slavery], there were no jobs, no investment in terms of infrastructure to keep people in the area. Even to the point that where they did have wastewater treatment, you can trace it back to those areas that were first inhabited largely by white populations. And even in the two towns that had wastewater infrastructure, it stopped, you know, where the Black community started. So those legacies still exist to this day.<sup>132</sup>

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127. Purifoy, *supra* note 119.

128. Redlining was a policy that was conducted chiefly by the federal Home Owner’s Loan Corporation whereby minority communities were outlined in red ink and labeled as not creditworthy. The effects of this policy, made illegal 50 years ago, are still being felt today. Tracy Jan, *Redlining Was Banned 50 Years Ago. It’s Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/> [https://perma.cc/N36G-NNFE?type=image].

129. See Purifoy, *supra* note 119.

130. *Id.*

131. Danielle Purifoy, *In Lowndes County, Getting Free Means Getting Infrastructure*, SCALAWAG (Feb. 13, 2017), (quoting Catherine Coleman Flowers, “I found out [economic development] couldn’t happen without infrastructure. Because a lot of places are not going anywhere if you don’t have certain types of infrastructure—be it natural gas, electricity, water, and wastewater treatment. And there was no wastewater treatment.”).

132. Anita Rao & Frank Stasio, *Catherine Coleman Flowers Fights for Sanitation as a Human Right*, WUNC (Apr. 12, 2017), <https://www.wunc.org/post/catherine-coleman-flowers-fights-sanitation-human-right> [https://perma.cc/BDE6-WMLP?type=image].

Perhaps most tellingly, Alabama's state health officer<sup>133</sup> responded to an interviewer's question on the subject:

There's a clear racial disparity here, there's no question about it. I think people who are impoverished of any color, but particularly African American people who are impoverished lack the social capital to be able to get their problems addressed. They are unable to get government to answer to them in the way that people who are more well off or have better connections can do.<sup>134</sup>

Acute inadequacies are not simply present among households with individual septic systems. Even in areas of the county where there is

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133. The Alabama state health officer acts as the agency head of the Alabama Department of Public Health. Ala Code 22-2-8 ("The State Health Officer shall exercise general supervision over county boards of health and county health officers . . . , take prompt measures to prevent such invasions and keep the Governor and the Legislature informed as to the health conditions prevailing in the state, especially as to outbreaks of any of the diseases enumerated in Chapter 11 of this title, and submit to the Governor and Legislature such recommendations as he deems proper to control such outbreaks.").

134. The quote, when placed in full context of the PBS NewsHour report, is no less arresting for its implications of race and the distribution of sanitation systems. It is the position of the author that the candor and concern exhibited by Alabama's chief health official in this discourse should be applauded. The partial transcript read:

Ostrovsky: How many households would you say don't have proper sewage facilities?

Alabama State Health Officer: Far too many. Although we don't have great data on that, we have made efforts in the past to try to count those numbers, but we don't have a way that we're confidently collecting all that information. In Lowndes County, for example, we think those numbers could be, you know, maybe 20 percent, you know, or it could be significantly higher, or it might be lower, but we know it's a substantial number of the population.

Ostrovsky: When we interviewed Philip Alston, he told us that he got the sense that the local authorities didn't feel that it was their responsibility, and not only that, they didn't know how big an issue it was because they'd never conducted a survey.

Harris: I don't know about every person that he spoke with, but clearly it's an issue. We've identified it as an issue and we've tried to educate local people on how important it is.

Ostrovsky: *Do you think there's a problem where you see the better off white part of town being connected to the sewer system, and the poor; worse off black part of town not being connected to the system here in Lowndes County?*

Alabama State Health Officer: *There's a clear racial disparity here, there's no question about it. I think people who are impoverished of any color, but particularly African American people who are impoverished lack the social capital to be able to get their problems addressed. They are unable to get government to answer to them in the way that people who are more well off or have better connections can do* (emphasis added).

*The Story of American Poverty, As Told by One Alabama County*, PBS NEWSHOUR (July 7, 2018, 3:19 PM), <https://www.pbs.org/video/the-story-of-american-poverty-as-told-by-one-alabama-county-1530988828/>.

municipal sanitation infrastructure, there are often extreme deficiencies.<sup>135</sup> For example, the town of Hayneville employs a lagoon style sewage system.<sup>136</sup> In the event of heavy rain, the system tends to brim over and seep into the backyards of the subdivision that immediately abuts the lagoons.<sup>137</sup> Revealingly, the municipality placed the two lagoons constituting its wastewater management infrastructure immediately behind an overwhelmingly African American neighborhood.<sup>138</sup> Residents have alleged that such a governmental action constitutes racial animus.<sup>139</sup>

Not only has the delivery of municipal services proven inadequate, but the failure to respond effectively to shortfalls has also sparked allegations of disparate treatment. In particular, the Alabama Department of Public Health has categorically denied the presence of hookworm and other tropical diseases despite independent scientific evidence to the contrary.<sup>140</sup> Further, the state of Alabama still maintains statutes that deem “the maintenance or use of insanitary sewage collection” a misdemeanor, putting Lowndes County residents at risk of arrest.<sup>141</sup> Taking into account Lowndes County’s troubling history of racism and the contemporary remarks of researchers and government officials, a compelling case can be made that inequitable sanitation services exist due to state and local governments’ employment of intentional discrimination.

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135. See Pilkington, *supra* note 2. Fort Deposit houses its own municipal wastewater system. See FORD DEPOSIT WATER WORKS & SEWER, <http://fortdepositwater.com> [<https://perma.cc/5X9N-GKN9?type=image>] (last visited Feb. 1, 2021).

136. A lagoon style sanitation system consists of large ponds that hold in a town’s waste. “*Environmental Racism*”: *How Alabama’s Sewage Crisis is Affecting the State’s Poorest*, IN THE NOW (Feb. 20, 2019), <https://www.youtube.com/watch?v=lqq8omDQrJ8>.

137. See *id.*

138. See *id.*

139. See *id.*

140. Press Release, Alabama Department of Public Health, Notice: Environmental Study in Lowndes County, Alabama, Fails to Prove Hookworm Infection (Apr. 9, 2018), <https://www.alabamapublichealth.gov/infectiousdiseases/assets/hookworm-notice.pdf> [<https://perma.cc/PG7U-TRQA?type=image>] (Put simply, it is the position of the state of Alabama that hookworm infections are not “statistically significant.”).

141. See Winkler and Flowers, *supra* note 112, at 191-92 (“Not only are low-income homeowners individually responsible for wastewater disposal with little support from the authorities, but they can also be charged for failing to put sanitation systems in place. . . . Between 1999 and 2002, arrest warrants were issued for a number of people, but the Department of Public Health claims that this is no longer present practice. Those who were charged, however, have an arrest on their criminal record—simply because they did not have the means to put in place sanitation infrastructure. . . . The arrests and prosecution of people living in poverty and people of color in Lowndes County reinforces structural violations of basic human rights that have long been a part of Alabama’s history.”).

*B. Application of Evidence to the Johnson v. City of Arcadia Test*

In *Johnson v. City of Arcadia*, the court fashioned a three-part test to determine whether a denial of governmental services rises to the level of a constitutional violation: “(1) existence of racially identifiable neighborhoods in the municipality; (2) substantial inferiority in the quality or quantity of the municipal services and facilities provided in the Black neighborhood; and, (3) proof of intent or motive.”<sup>142</sup> By briefly applying evidence from the information detailed above to the Johnson test, it is apparent that the denial of services in Lowndes County was the result of purposeful racial discrimination.

Although Lowndes County is overwhelmingly African American, there are pockets of concentrations of white residents, historically including two of the largest population centers and hubs of commerce, Hayneville and Fort Deposit.<sup>143</sup> In contrast, the population of the town of White Hall—which is comparable in size to Fort Deposit and Hayneville—is ninety-eight percent African American.<sup>144</sup> Furthermore, White Hall has historically been largely populated by Black landowners, and was an epicenter of protest during the Civil Rights Movement.<sup>145</sup> Yet Hayneville and Fort Deposit are the only towns in Lowndes County serviced by centralized sewer systems.<sup>146</sup> Although White Hall lobbied for years for a municipal sewer system of its own, the county government denied the efforts, sparking an incorporation campaign on White Hall’s behalf.<sup>147</sup>

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142. 450 F. Supp. 1363, 1379 (M.D. Fla. 1978).

143. Hayneville has a relatively low percentage of whites, 10.5 percent, but is still higher than towns of comparative size. See *Hayneville*, ENCYCLOPEDIA OF ALA., <http://www.encyclopediaofalabama.org/article/h-2938> [https://perma.cc/LD5R-EHHK?type=image]. Fort Deposit’s white population, on the other hand, constitutes 17.4 percent of the overall total. *Fort Deposit*, ENCYCLOPEDIA OF ALA., <http://www.encyclopediaofalabama.org/article/h-3017> [https://perma.cc/RN2W-T8X2?type=image]. Furthermore, a noted history of coordinated exclusion of blacks from the city of Fort Deposit took place in the mid-twentieth century. See JEFFRIES, *supra* note 117, at 2-3 (“Fort Deposit’s black population, which hovered around sixty percent, fell noticeably below the local standard; at the time, the black population in the entire county was eighty percent. The relatively low concentration of African Americans made Fort Deposit an oasis of sorts for whites and a particularly dangerous place for blacks.”).

144. James P. Kaetz, *White Hall*, ENCYCLOPEDIA OF ALA., <http://www.encyclopediaofalabama.org/article/h-3381> [https://perma.cc/MF8F-FZF5?type=image].

145. See *id.*

146. See Lowndes County, LOWNDES COUNTY EDC, <https://lowndescountyedc.com/facts-data/utilities> [https://perma.cc/E2HR-8HPD?type=image].

147. See Purifoy, *supra* note 119.

It has been well-established that, especially outside of the municipal sewer systems, sanitation conditions are dire.<sup>148</sup> Raw sewage in yards and streets is commonplace, and resultant tropical diseases are becoming more of an inevitability for Lowndes residents.<sup>149</sup> County governments have sited sewage containers especially prone to flooding immediately behind an African American neighborhood.<sup>150</sup> Furthermore, perhaps few other counties in America have a more decisive history of formal racism than Lowndes.<sup>151</sup> Furthermore, a chief state government official tasked with protecting public health stated that race is an inextricable element in the sewage crisis.<sup>152</sup> These facts, taken together, and applied to the Johnson test indicate clearly that (1) there are neighborhoods distinguishable by race, (2) there is a gross disparity in the provision of sewerage, and (3) when the systems were set up, there was potential intent to discriminate. As such, it can be argued that the county government purposely discriminated against its African American citizens in denying the equitable provision of municipal services.

#### IV. IN THIS CASE, THE STATE OF ALABAMA AND LOWNDES COUNTY CANNOT WITHSTAND STRICT SCRUTINY

Generally, courts will apply one of three standards when examining the constitutionality of governmentally created classifications.<sup>153</sup> Strict scrutiny is considered the most exacting.<sup>154</sup>

##### A. *The Strict Scrutiny Standard*

Any imposition of a racial classification by a governmental actor must withstand strict scrutiny review.<sup>155</sup> When the plaintiff “succeeds in establishing racial predominance,” the burden shifts to the governmental actor.<sup>156</sup> The government must then prove that the racial classification is “narrowly tailored to achieve a compelling interest.”<sup>157</sup> Whether an action is “narrowly tailored” to further a “compelling interest” are two separate

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148. See Gilpin, *supra* note 7.

149. See John Hope Franklin, *supra* note 4.

150. See “*Environmental Racism*,” *supra* note 136.

151. See JEFFRIES, *supra* note 117, at 4-5.

152. See *The Story of American Poverty*, *supra* note 134.

153. See Pollvogt, *supra* note 29, at 743-44.

154. See Galloway, *supra* note 33.

155. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

156. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 800-01 (2017).

157. See *id.* at 801.

questions.<sup>158</sup> The rationale behind the “narrowly tailored” requirement is to ensure that “the means chosen ‘fit’ th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”<sup>159</sup> Separately, a compelling governmental interest is something more than an important, or even legitimate, interest.<sup>160</sup> Instead, the interest must be of paramount importance.<sup>161</sup> The strict scrutiny standard is the most stringent standard, and as such, when the burden shifts, is exceedingly difficult for the government actors to overcome.<sup>162</sup>

### B. *Strict Scrutiny Applied*

Having shown that municipal services were inequitably distributed on account of race, the burden shifts to the governmental actor to prove a narrowly tailored action in order to further a compelling governmental interest. The most conceivable argument for the State of Alabama and Lowndes County is that that the governments have a compelling state interest in protecting state and local taxpayers from the costly burdens of sewer system construction. However, “saving money is a legitimate state interest but not a compelling one.”<sup>163</sup>

As a secondary argument, the governmental bodies might allege that each entity possesses a right to establish and contract political subdivisions as it sees fit, including the maps determining where a sanitary system would be constructed and operated. However, the Court held in *Gomillion*, that while the determination of the shapes of political subdivisions are an “importan[t] aspect of the State’s political power,” it is not “absolute” and

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158. As in *Sherbrooke*, where the court conducted two separate analyses. See *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 970-971 (8th Cir. 2003).

159. See *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

160. Ronald Steiner, *Compelling State Interest*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/31/compelling-state-interest> [<https://perma.cc/NK8M-6PVH?type=image>].

161. See Caleb C. Wolanek and Heidi Liu, *Applying Strict Scrutiny: An Empirical Analysis of Free Exercise Cases*, 78 MONT. L. REV. 275, 287-88 (2017) (“If this requirement ‘really means what it says,’ then interests are compelling only when they are of the highest order.”). Common examples of compelling governmental interests asserted by governmental actors, include “[p]rison safety and security,” “[p]ublic health,” and “[g]ender equality.” See *id.* at 294.

162. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 824-25 (2006) (arguing that based on an empirical study of cases between 1992 and 2002, strict scrutiny is “becoming more difficult for laws to satisfy.”).

163. STEVEN D. JAMAR, *CONSTITUTIONAL LAW: POWER, LIBERTY, AND EQUALITY* 877 (2017).



must abide by the “relevant limitations imposed by the United States Constitution.”<sup>164</sup> Furthermore, the justifications likely to be advanced by the state and county stand in firm contrast to the furtherance of the health and safety of the political subdivision’s citizens, a governmental interest not infrequently held to be “decisive[ly]” compelling.<sup>165</sup> Thus, the likely interests to be argued by the governments do not constitute “compelling interests.” As such, the state and county cannot withstand the strict scrutiny analysis.

#### V. CONCLUSION

For decades, the environmental justice community has hesitated to bring claims on equal protection grounds due to its failure in siting cases. However, the sanitation crisis in Lowndes County, Alabama, presents a stark scene of disparity against the unfortunate backdrop of institutional racism. As such, it is ripe for an equal protection challenge using the inequitable distribution of municipal services framework. This equal protection theory has a track record of success in the Eleventh Circuit, and some of its cases are analogous to the gaps in services currently experienced by residents in Lowndes County. The deprivation can be proven to be the result of discriminatory intent. An analysis of the disparate impact, historical background, and the contemporary statements of government actors will show clear evidence of discriminatory purpose, thus triggering strict scrutiny. In the end, the state of Alabama and Lowndes County will be unable to withstand the exacting scrutiny in which the standard entails.

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164. See *Gomillion v. Lightfoot*, 364 U.S. 339, 342, 344-45 (1960).

165. *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 655-56 (1995).