

# EDUCATION IN ALABAMA: A PRIVILEGE OR RIGHT? WHAT ALABAMA'S TAX DECISIONS REVEAL ABOUT HISTORICAL AND INTENTIONAL K-12 EDUCATION DISENFRANCHISEMENT, AND THE UNLIKELIHOOD OF POOR ALABAMIANS EVER RECEIVING A PROPER EDUCATION

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“Today, education is perhaps the most important function of state and local governments. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if . . . denied the opportunity of an education.”<sup>1</sup>

## ABSTRACT

*It is no secret that Alabama has had a long and sordid history with inequality as well as with socio-economic and racial oppression. Home to both the birthplace of the confederacy and the civil rights movement, Alabama's history has been dually complicated and inspiring. For many decades, Alabama received national attention for being a state in which elected officials like George Wallace perpetuated systems of inequality and oppression within the education system. Although George Wallace has long been a figure of Alabama's past, this essay argues that semblances of Alabama's dark history with inequity can still be seen in its education system today. This essay seeks to explain how Alabama's socio-economic and racial biases throughout history have impacted the current structure and design of the state's present K-12 education finance system. Alabama's present system of education finance—deeply rooted in and stemming from a prejudicial state history—is unable to promote an equitable and quality K-12 public education system. After assessing Alabama's history and present state of education inequity, this essay reviews the funding decisions of Florida and Massachusetts to glean lessons from their education funding and equity successes. This essay ends with suggestions for creating more funding equity within Alabama's education system as well as with a discussion of some of the past and present barriers to such.*

I. INTRODUCTION .....	296
A. Terms of Art Specific to Education and Tax Policy Defined .....	297

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<sup>1</sup> DAPHNE A. KENYON, THE PROPERTY TAX—SCHOOL FUNDING DILEMMA 9 (2007) (quoting Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954)).

1. The Distinction between Education Equity & Equality.....	298
2. The Meaning of Progressive and Regressive in Tax Policy .....	299
B. The Present State of K–12 Public Education in Alabama.....	300
II. A COMPARATIVE LOOK AT ALABAMA AND OTHER STATES’ EDUCATION FINANCE SYSTEMS .....	302
A. A Comparative Look at Florida and Massachusetts .....	303
B. Lessons from Florida and Massachusetts .....	304
1. Comparing State Funding Sources .....	304
2. Comparing State Funding Distribution.....	306
III. RECOMMENDATIONS FOR ALABAMA .....	307
A. Raising Property Tax Amounts .....	307
B. Creating a New Funding Distribution Formula.....	309
IV. LEGAL BARRIERS TO CHANGE .....	310
V. CONCLUSION .....	313

## I. INTRODUCTION

In the aftermath of the Civil War and during Reconstruction, Alabamians found themselves living in a time in which newly freed blacks voted, held public office, and even drafted laws within the state.<sup>2</sup> During this period, with the aid of white Republican allies, Alabama witnessed increases in public services, particularly for education.<sup>3</sup> Such “radical” views and attempts “to expand the power of government in order to enlarge opportunities for ordinary citizens” led to tremendous racial and political tensions within the state.<sup>4</sup> By 1900, this tense political climate led to a realization and consensus amongst Alabama’s white population that “something must be done . . . in order to maintain white supremacy.”<sup>5</sup>

By 1901, white supremacists had waged a campaign within the state to rewrite the state’s constitution to stall progress and disenfranchise blacks.<sup>6</sup> Alabama’s 1901 Constitutional Convention lacked black representatives.<sup>7</sup> Instead, the “Planters” and “Big Mules” dominated the convention.<sup>8</sup> Whereas the “Planters” were known as the large landowners of the time, mostly representative of property owners from the Black Belt, the “Big Mules” were industry leaders of the time,

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2. WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY 4 (2004).

3. *Id.*

4. *Id.* at 6.

5. *Id.*

6. *Id.* at 7.

7. *Id.* (“Of the 155 delegates elected to the 1901 constitutional convention, 141 were Democrats, 7 were Populists, 6 were Republicans, and 1 was an independent; 96 of the delegates were lawyers and 12 were bankers. No Negroes or women were elected.”)

8. *Id.* at 7–8.

representative of the banking, railroad, and industrial community.<sup>9</sup> As these two groups joined forces at the 1901 convention, the main question to be resolved was whether blacks would be eliminated in a process entirely aimed at them or whether delegates would add poor whites as secondary casualties of a process transferring all governmental power into “the hands of the intelligent and virtuous.”<sup>10</sup>

After choosing the latter option, this delegation set out to write a state constitution which codified their desire to strip blacks and poor whites of their power and ability to usurp or challenge the status quo and system of white supremacy which had long dominated Alabama history prior to Reconstruction.<sup>11</sup>

Although newspapers warned that the 1901 Constitution, if ratified, would ultimately result in inadequate funding of Alabama’s public education system,<sup>12</sup> some convention delegates intentionally “sought to deny [education] rights because they envisioned a future race war, which education would better equip blacks to wage.”<sup>13</sup> Against this backdrop, and with knowledge that blacks within Alabama “had the most to gain from public services [such as] . . . public schools,” the drafters of the 1901 Constitution set out to ensure that “there was neither the will nor the money to provide such services” as they would “disproportionately favor” blacks.<sup>14</sup> This, along with a desire to protect the property interests of the two dominant groups drafting the 1901 Constitution, led to the cap placed on taxes which could be collected to fund state services such as public education.<sup>15</sup>

This essay argues that Alabama’s present system of education finance cannot promote a vertically equitable K–12 public education system. This essay explores and suggests alternative financing methods which may be enacted by Alabama’s legislature to promote an equitable K–12 public education system. The first section of this essay compares Alabama’s education finance system to that of other states. This essay concludes with recommendations for restructuring Alabama’s present system.

#### *A. Terms of Art Specific to Education and Tax Policy Defined*

Throughout this essay it will be important for the reader to note the difference between equity and equality. Although these terms are often used interchangeably in day-to-day conversations, in the context of education policy they have distinct meanings. Similarly, in day-to-day policy discussions, the term “progressive” is often interchangeable with the term “liberal” and is an antonym to the word “conservative.” However, “progressive” carries different meaning in the realm of

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9. *Id.* at 8.

10. *Id.*

11. *See generally id.* at 1–7.

12. *See id.* at 8 (“The *Orphan’s Call* in Evergreen . . . wrote prophetically that the low fixed tax rate for education would not provide adequate funding for schools.”).

13. *Id.* at 16.

14. *Id.*

15. *See generally id.*

tax policy and this article. Given the importance of these terms to this essay, The following sections provide foundational definitions to assist the reader in understanding the distinct meaning of these phrases in the realms of education and tax policy.

### 1. The Distinction between Education Equity & Equality

At times, the concepts of education equity and equality go hand in hand and can be used to promote one another.<sup>16</sup> However, when referring to education and education funding, specifically, these two terms convey distinctive meanings.<sup>17</sup> Equality pertains to outcomes—the idea of treating everyone similarly by distributing resources equally.<sup>18</sup> Throughout this article and in the context of public K–12 education finance, “equality” refers to spending the same amount of money on every child.<sup>19</sup> Equity, on the other hand, pertains to fairness and the means, process, and approaches utilized when distributing societal resources.

There are two different types of equity: vertical and horizontal.<sup>20</sup> When collecting taxes, vertical equity refers to taxing people in accordance with their ability to pay.<sup>21</sup> This kind of equity “requires that those who have more income (or property) pay more in taxes because they are better able to pay” than persons with less.<sup>22</sup> For example, if pie were currency and person A had two-thirds of a pie and person B had only one-third, vertical equity would require person A to pay a greater portion of her pie in taxes than person B, simply because person A had more pie to begin with. In contrast, horizontal equity refers to taxing similarly situated taxpayers in a similar and consistent manner.<sup>23</sup>

Using the aforementioned example of the pie as currency, imagine that this time there are three people rather than two people sharing a pie. If each of these three people had an equal one-third portion of the pie, then horizontal equity would dictate that none of them be taxed more or less than the other because they are all

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16. Blair Mann, *Equity and Equality Are Not Equal*, THE EDUCATION TRUST (Mar. 12, 2014), [https://edtrust.org/the-equity-line/equity-and-equality-are-not-equal/?utm\\_source=Ad%20Words&utm\\_medium=Search%20Ads&utm\\_content=Equity%20Line%20%20Equity%20and%20Equality%20Are%20Not%20Equal&utm\\_campaign=Equity%20Line&gclid=COT98cf87soCFdgUgQoduSgMmg](https://edtrust.org/the-equity-line/equity-and-equality-are-not-equal/?utm_source=Ad%20Words&utm_medium=Search%20Ads&utm_content=Equity%20Line%20%20Equity%20and%20Equality%20Are%20Not%20Equal&utm_campaign=Equity%20Line&gclid=COT98cf87soCFdgUgQoduSgMmg) (“There is a common misconception that equity and equality mean the same thing—and that they can be used interchangeably, especially when talking about education. But the truth is **they do not—and cannot**. Yes, the two words are similar, but the difference between them is crucial.”) (emphasis added).

17. *Id.*

18. See Sam Walker, *Equality & Equity*, LINKEDIN SLIDE SHARE 4 (Dec. 7, 2012), <http://www.slideshare.net/toejamatic/31-equalityequity> (defining equality as “the situation where goods and services in a society are distributed equally.”).

19. See Mann, *supra* note 16 (stating that the question “Should per student funding at every school be exactly the same?” is a “question of equality”).

20. Walker, *supra* note 18 at 5.

21. *Id.*

22. *Id.*

23. *Id.*

similarly situated. Only when both horizontal and vertical equity is achieved is a system deemed equitable.<sup>24</sup>

When discussing the equity of allocation of tax revenues, we are looking at the ways in which we as a society, through the distribution of resources, attempt to promote equality.<sup>25</sup> Because taxes are collected from citizens and then used to pay for services provided to benefit citizens, “equity and fairness means that, over the long run, governmental agencies provide adequate public goods and services to meet the needs of taxpayers and their families.”<sup>26</sup> In addition, “[E]quity also allows for the sharing of pooled resources with others in return for the promise of future benefits if and when needed.”<sup>27</sup> Often, the concept of equity is concerned with providing remedies to the effects of historic injustices.<sup>28</sup> As it pertains to education spending specifically, “[e]quity should require that every student receives sufficient resources to have the same chance to succeed, rather than that every child gets the same level of funding.”<sup>29</sup> In contrast to equality, equity acknowledges that rather than “investing much more in the richest students than [states] do in the poorest students, . . . [g]iving kids in high-poverty areas an equal opportunity to succeed requires spending more money on those [poor] students.”<sup>30</sup>

## 2. The Meaning of Progressive and Regressive in Tax Policy

Taxes can be either progressive or regressive. A progressive tax is directly proportional to the taxpayer’s ability to pay,<sup>31</sup> whereas a regressive tax is not tied

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24. *Id.*

25. *Equity*, THE GLOSSARY OF EDUCATION REFORM (May 5, 2015), <http://edglossary.org/equity/> (“It has been said that ‘equity is the process; equality is the outcome,’ given that equity—what is fair and just—may not, in the process of educating students, reflect strict equality—what is applied, allocated, or distributed equally.”).

26. *Guiding Principles for Tax Equity and Fairness*, AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS 4 (2007), [27. \*Id.\*](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwibYbKrfXKAhWBMSYKHfEUAgkQFggcMAA&url=https%3A%2F%2Fwww.aicpa.org%2FAdvocacy%2FTax%2FDownloadableDocuments%2FTPCS%25204%2520-%2520principles%2520for%2520tax%2520equity%2520and%2520fairness.doc&usg=AFQjCNH0XuBA186Mt7JB8cph2g1WH9uLQ&sig2=0RENEBZVFcsdooZRvk_Rg&bvm=bv.114195076,d.eWE.</a></p></div><div data-bbox=)

28. See *Equity*, *supra* note 25 (“Inequities occur when biased or unfair policies, programs, practices, or situations contribute to a lack of equality in educational performance, results, and outcomes. For example, . . . [o]ne of the fundamental theories motivating equity-driven educational reforms is that people and groups who suffer from discrimination, prejudice, or unfair treatment may develop emotional responses and behaviors that can perpetuate the consequences of discrimination even when discrimination is not clearly or actively present.”).

29. Marin Gjaja, *Equity is the Key to Better School Funding*, EDUCATION WEEK (Feb. 18, 2014), <http://www.edweek.org/ew/articles/2014/02/19/puckett.h33.html?tkn=YTSFRxDVweV0UzHwx9Aym/V3Q+4zrXMh8oov&print=1>.

30. *Id.*

31. See, e.g., Chuck Taylor, *Progressive and Regressive Taxes*, <http://home.hiwaay.net/~taylorc/politics/concepts/progressive-tax.html> (last visited Apr. 16, 2017) (“A progressive tax is defined as a tax whose rate increases as the payer’s income increases. That is, individuals who earn high incomes have a greater proportion of their incomes taken to pay the tax.”).

to an individual's ability to pay. Regressive taxes and tax systems often require people with fewer resources to pay the same amount in taxes as people with more resources.<sup>32</sup>

Let's assume that you have two fictional friends named Bob and Jim. Bob makes ten dollars a year, while Jim makes one hundred dollars a year. Now assume that your two friends live in a jurisdiction where they must pay a seven-percent annual tax on income. In such an instance, Bob would have to pay only seventy cents in taxes, whereas Jim would have to pay seven dollars in taxes. This is an example of a progressive tax.

What if, regardless of income, both Bob and Jim were forced to pay seven dollars in taxes each year? Bob would be taxed at a seventy-percent income rate (paying seven dollars of his ten-dollar annual income in taxes), whereas Jim would be taxed at a seven-percent income rate (paying only seven dollars of his hundred-dollar annual income in taxes). This is an example of a regressive tax. As this example shows, “[a] regressive tax affects people with low incomes more severely than people with high incomes.”<sup>33</sup>

#### *B. The Present State of K–12 Public Education in Alabama*

Alabama's deep rooted prejudices and intent to disenfranchise certain groups of citizens persists in its education system. Over the years, Alabama has remained one of the lowest and worst-ranked states in the nation on annual K–12 public school education quality assessment reports.<sup>34</sup> There has long been a debate within the education policy realm regarding the correlation between K–12 student performance outcomes and how much money is spent to fund education.<sup>35</sup> Although some argue that education spending does not affect student outcomes,<sup>36</sup> research demonstrates that the amount money that “state governments spend per pupil and how they spend it does in fact have a significant correlation with achievement, particularly for the low-income students whose performance on average significantly lags behind that of students from more advantaged

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32. *Regressive Tax*, INVESTOPEDIA, <http://www.investopedia.com/terms/r/regressivetax.asp> (last visited Apr. 16, 2017).

33. *Id.*

34. See, e.g., Evan Belanger, *Alabama 8th-graders Rank 50th in Math; See How We Compare with Other States in Reading, Science*, AL.COM (July 21, 2014), [http://www.al.com/news/index.ssf/2014/07/see\\_how\\_alabama\\_public\\_schools.html](http://www.al.com/news/index.ssf/2014/07/see_how_alabama_public_schools.html) (“The largest and longest running assessment of U.S. education performance shows Alabama lagging behind the rest of the nation in all subjects. The latest available data from the National Assessment of Education Progress or NAEP shows Alabama fourth and eighth graders garnering average scores below the national average in all subjects. Most notably, the state’s eighth graders ranked 50th of 52 states and non-state school jurisdictions in math, and Alabama’s fourth graders ranked 47th in math.”).

35. Gjaja, *supra* note 29 (“The relationship between government spending on K–12 public education and student outcomes has been an endless source of debate among those involved in education policy.”).

36. *Id.* (“Some argue that there is no correlation between spending and outcomes.”).

backgrounds.”<sup>37</sup> Because “almost ninety percent of Alabama’s public schools have grossly inadequate funding,”<sup>38</sup> K–12 students receive a substandard education. Additionally, the education system failures within Alabama disproportionately impact poorer school districts and low-income students.<sup>39</sup>

The effects of Alabama’s inequitable funding are best seen in student performance and standardized test outcomes. For example, between 2003 and 2013, Alabama’s K–12 public education system as a whole made significant progress and improvements on national assessments of reading and math.<sup>40</sup> Nevertheless, the percentage of Alabama’s poorest students (those receiving free or reduced lunch) scoring proficient or better on reading and math assessment exams was among the lowest in the nation.<sup>41</sup> In fourth grade reading assessments, the percentage of poor students that scored proficient or better on the 2013 exams was below the national average.<sup>42</sup> Likewise, in eighth grade reading assessments, the percentage was the second lowest in the nation, and in both fourth and eighth grade math assessments, the percentage was the lowest in the nation.<sup>43</sup>

Although a number of factors influence school performance among poorer students, research does show that “states with increased equity ratios (the ratio of per-student funding between high- and low- poverty districts) have had a positive impact on low-income students’ performance in reading and math.”<sup>44</sup> Equitable schools are those that ensure that “every student receives sufficient resources to have the same chance to succeed,” by making sure that students with increased needs receive greater funding “rather than [simply ensuring] that every child gets the same level of funding.”<sup>45</sup> Additionally, increased vertical equity in education funding has been found to benefit students at every income level because of the wide range of income backgrounds in most school districts.<sup>46</sup> Even in states where overall spending on education cannot be increased, it has been suggested that

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37. *Id.*

38. Susan Pace Hamill, *An Open Letter to Alabama’s Political Leaders: Only Real Tax Reform Can Save Our Children* (March 2003), <http://www.law.ua.edu/misc/hamill/hamill-openletter.pdf>.

39. See Ella B. Bell, *Alabama Doesn’t Need Its Own Educational ‘Corridor of Shame’: ’ Guest Opinion*, AL.COM (Feb. 6, 2014), [http://www.al.com/opinion/index.ssf/2015/02/alabama\\_doesnt\\_need\\_its\\_own\\_ed.html](http://www.al.com/opinion/index.ssf/2015/02/alabama_doesnt_need_its_own_ed.html) (“Recently, the U.S. Chamber of Commerce issued a state-by-state report card on K–12 educational effectiveness called “Leaders and Laggards”. This report card measured the academic achievement of poor children and children of color. In both of these areas Alabama received an F. According to the report, Alabama is failing miserably with educating poor children and children of color. This is totally unacceptable in 2015.”).

40. MATTHEW LADNER & DAVID J. MYSLINSKI, REPORT CARD ON AMERICAN EDUCATION 17–30 (19th ed. 2013), [https://www.alec.org/app/uploads/2015/12/19th\\_Report\\_Card.pdf](https://www.alec.org/app/uploads/2015/12/19th_Report_Card.pdf).

41. *Id.*

42. *Id.*

43. *Id.*

44. Gjaja, *supra* note 29.

45. *Id.*

46. *Id.*

overall academic performance can be improved by simply increasing the level of equity in funding.<sup>47</sup>

## II. A COMPARATIVE LOOK AT ALABAMA AND OTHER STATES' EDUCATION FINANCE SYSTEMS

Inequitable funding of its public education system has been a trend throughout Alabama's history. Prior to *Brown v. Board of Education*,<sup>48</sup> during the era of "separate but equal," despite the fact that "40% of the state's population was black, Alabama spent less than \$1.5 million to educate black children in 1924, compared to \$13 million for white children."<sup>49</sup> By 1930, areas such as Lowndes County "averaged less than \$5 a child for black education, compared to \$96 for whites."<sup>50</sup> Although times and trends have changed greatly over the last century, one thing that has not changed is the fact that all of Alabama's public K–12 students do not receive the same amount of funding for their education.

Alabama has a regressive educational funding system. High-poverty districts within the state receive less state and local revenue than low-poverty districts.<sup>51</sup> In 2010, the mean amount of state and local revenue spent per pupil was \$8591.<sup>52</sup> A student at a zero-percent poverty rate could expect to receive more than \$1000 in funding than a student at a thirty-percent poverty rate.<sup>53</sup>

To its credit, Alabama makes more of an effort than most other states to fairly fund its public schools.<sup>54</sup> In the ten-year timeframe immediately following an Alabama Supreme Court declaration asserting that "education is a fundamental right under the Alabama Constitution"<sup>55</sup> (1993–1994 to 2003–2004), Alabama increased its per-pupil expenditure by 32.7% for all students as a whole.<sup>56</sup> During those ten years, Alabama ranked eighth in the nation for the percent change in constant expenditures per pupil.<sup>57</sup> However, problems persist because Alabama's school funding method is *not* one that ensures that school districts with higher

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47. *Id.*

48. 347 U.S. 483 (1954).

49. Susan Pace Hamill, *A Tale of Two Alabamas*, 58 ALA. L. REV. 1103, 1114 (2007) (reviewing WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY (2004)).

50. *Id.*

51. BRUCE D. BAKER, DAVID G. SCIARRA, & DANIELLE FARRIE, IS SCHOOL FUNDING FAIR? A NATIONAL REPORT CARD 19 (1st ed. 2010).

52. *Id.* at 15.

53. *Id.* at 17 (students at a zero-percent poverty rate received \$9465 compared to \$8433 received by students at a thirty-percent poverty rate).

54. *Id.* at 24 (Alabama ranked twenty-first in the nation regarding effort exerted to fairly fund schools. Effort refers to the amount of available revenue which a state devotes to fund education. In this study, effort was determined by dividing the amount of state and local revenue per pupil by the state GDP to determine the percent of state-level economic productivity spent on public education).

55. Opinion of the Justices, 624 So. 2d 107, 159 (Ala. 1993).

56. ANDREW T. LEFEVRE, REPORT CARD ON AMERICAN EDUCATION: A STATE-BY-STATE ANALYSIS 73 (13th ed. 2006).

57. *Id.*

poverty rates and higher need receive higher funding.<sup>58</sup> Thus, although Alabama has worked hard to achieve horizontal equity in school funding, it has failed to achieve vertical equity.

#### *A. A Comparative Look at Florida and Massachusetts*

The National Assessment of Education Progress (NAEP) is a tool that has been used since 1969 to track national assessments of student accomplishments.<sup>59</sup> Under current law, NAEP bi-annually administers uniform mathematics and reading assessments to fourth and eighth grade students throughout the nation.<sup>60</sup> Since 1995, the American Legislative Exchange Council (ALEC) has published an annual report analyzing K–12 public education throughout the nation. In its annual publication, *Report Card on American Education*, ALEC gives an in-depth state-by-state analysis of a number of topics including education quality, funding, improvements, and policy.<sup>61</sup> Additionally, ALEC uses each state's NAEP test scores to compare and rank each state's K–12 public education quality from best to worst.<sup>62</sup>

In an effort to see what Alabama may learn from other states, this section looks closely at Massachusetts and Florida—two states that have received noteworthy rankings from ALEC's National Report Card in recent years.<sup>63</sup> Table 1 shows how each of these states have ranked nationally over the last seven years:<sup>64</sup>

Table 1: A Comparison of Changes in Public Education Quality in Alabama, Massachusetts, and Florida over a Seven Year Span			
State	2006 Rank	2013 Rank	Change in Rank over 7yr period
Massachusetts	1	1	+0
Florida	43	10	+33
Alabama	48	44	+4

For the purposes of this essay, Massachusetts and Florida are ideal points of comparison for Alabama for several reasons. First, from a teaching perspective, Massachusetts and Florida are able to represent two very different yet important ideals—education quality and vertical equity within education quality. In terms of education quality, Massachusetts represents the nation's best public education

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58. *Id.* at 31.

59. See A.E. BEATON, NATIONAL ASSESSMENT OF EDUCATION PROGRESS (2011), <http://nces.ed.gov/nationsreportcard/about/newnaephistory.aspx>.

60. *Id.*

61. See generally LADNER, *supra* note 40.

62. *Id.*

63. *Id.*

64. LEFEVRE, *supra* note 56, at 73. (containing the data found in this chart).

system. For many years, Massachusetts has been at the top of the list of states for education quality and student performance.

In contrast, Florida represents potential and hope. As shown in Table 1, much like Alabama, Florida is a southeastern state that was ranked poorly in the recent past. However, within a decade, Florida made significant progress in transforming itself into a provider of one of the best K–12 public educations in the nation. Thus, education quality was the initial factor assessed when choosing Massachusetts and Florida as potential model states for Alabama.

Another important factor that was considered was vertical equity in education quality. Massachusetts and Florida are not the only states that have either consistently ranked highly or significantly improved their quality of education over the last few years.<sup>65</sup> However, an important question to answer for purposes of this research was: *In what states was the favorable education quality enjoyed by both high- and low-income pupils?* Massachusetts and Florida were the only highly ranked states that fit that description.<sup>66</sup> In Massachusetts and Florida, the percentage of students receiving free or reduced lunch scoring proficient or better on 2013 reading and math assessments are above the national percentage. Each of these states found ways to ensure that poor students within the state were proficient in the subjects tested on the biannual NAEP assessment tests.

#### B. Lessons from Florida and Massachusetts

This essay will now explore and seek to answer the following questions: what exactly are Florida and Massachusetts doing right? How are they able to achieve equity and improve or maintain the quality of their public education systems? And how do their funding and tax policies compare to those of Alabama?

##### 1. Comparing State Funding Sources

Although Alabama makes an effort to dedicate a high proportion of its fiscal capacity to its education system, as a state it still provides a below-average amount of funding to its public education system.<sup>67</sup> Compared to the rest of the nation, southeastern states have a history of providing less funding to K–12 public education.<sup>68</sup> Even among the southeastern states, K–12 public education in Alabama has historically been among the worst funded.<sup>69</sup> This stems in large part from intentional acts to ensure disenfranchisement of Alabama's black and poor

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65. *Id.* (listing Hawaii, the District of Columbia, Georgia, New Mexico, and Tennessee as other states with high ranks and/or significant improvements in education quality).

66. *Id.* Hawaii would have been on this short list as well had it not been for its fourth grade reading NAEP results. *Id.*

67. *Id.* at 31.

68. PUB. AFFAIRS COUNCIL OF ALA., LOOKING AT ALABAMA'S PUBLIC SCHOOL INVESTMENT AND PERFORMANCE 1 (1997), <http://parca.samford.edu/PARCA2/execsummaries/educate.pdf> ("Southeastern states generally invest less money in their public schools than states in other parts of the country, and Alabama is near the bottom of the southeast.").

69. *Id.*

citizens. For example, in its 1901 state constitution, Alabama codified barriers to increasing funding for public services such as education.

Throughout the nation, the level of funding received by public schools is a function of several factors, including a state's wealth as determined by tax policies and decisions made by a state regarding how to distribute that wealth among school districts.<sup>70</sup> Although the federal government provides partial funding for public K–12 education throughout the nation, state and local governments are responsible for providing approximately ninety-five percent of the funding for K–12 public schools.<sup>71</sup> Most public schools receive some additional funding from state and local sources.<sup>72</sup> Often, corporate and personal income and sales tax are the source of state funding and property taxes serve as the source of local funding.<sup>73</sup>

Local funding that relies on property taxes is the education funding "system that causes the most dramatic differences between states, and even within districts,"<sup>74</sup> as many states still provide the least amount of funding to school districts serving students with the greatest needs. Alabama receives 31.6% of its funding for K–12 public schools from local funds, 53.8% from state funds, and 14.6% from federal funds.<sup>75</sup> In contrast, Florida's K–12 public education system receives 47.9% of its funding from local funds, 34.3% from state funds, and 17.8% from federal funds.<sup>76</sup> Similarly, Massachusetts receives 54.2% of its K–12 public education revenue from local funds, 37.9% from state funds, and 7.8% from federal funds.<sup>77</sup>

Massachusetts and Florida rely much more heavily than Alabama on local funds to support their public education systems, and each achieves much better results than Alabama in both education quality and equity. Because Alabama has the lowest property tax in the nation, it is unable to depend as heavily on local funding to properly fund education. Table 2 compares Alabama's property tax rates to those of Florida and Massachusetts:<sup>78</sup>

Table 2: A Comparison of Property Tax Rates in Alabama, Massachusetts, and Florida

70. BAKER, *supra* note 51, at 28.

71. *How Do We Fund Our Schools?*, PBS (Sept. 5, 2008), <http://www.pbs.org/wnet/wherewestand/reports/finance/how-do-we-fund-our-schools/?p=197>.

72. *See id.*

73. *Id.*

74. *Id.*

75. LADNER, *supra* note 40.

76. BAKER, *supra* note 51.

77. LADNER, *supra* note 40, at 60.

78. *State and Local Property Tax Collections Per Capita by State: 2006–2010*, TAX FOUND (Sept. 13, 2013), <http://taxfoundation.org/article/state-and-local-property-tax-collections-capita-state-2006-2010> (last visited Jan. 1, 2017).

State	2010 Property Tax Collection Per Capita	National Rank
Alabama	\$539	50
Florida	\$1507	15
Massachusetts	\$1986	8
U.S. average	\$1434	

Florida collects nearly three times as much per capita in property tax as Alabama, and Massachusetts collects nearly four times as much.

## 2. Comparing State Funding Distribution

The amount of revenue that Alabama, Florida, and Massachusetts collect from property tax directly correlates to the amount of money ultimately spent on each student's public education costs. In 2012, Alabama's annual average spent per student was \$9874,<sup>79</sup> whereas Florida's was \$10,031 per student<sup>80</sup> and Massachusetts' was \$16,495.<sup>81</sup>

As stated previously, Alabama has a regressive approach to distributing education funds. However, so does Florida. Table 3 shows Alabama, Florida, and Massachusetts' approach to distributing funds to school districts with higher poverty rates and thus with greater need:<sup>82</sup>

Table 3: A Comparison of Public Education Fund Distribution in Alabama, Massachusetts, and Florida					
State	Mean Actual State & Local Revenue per Pupil	At 0% Poverty	At 10% Poverty	At 20% Poverty	At 30% Poverty
Massachusetts	\$14,355	\$12,146	\$12,880	\$13,658	\$14,483
Florida	\$9947	\$10,216	\$9884	\$9562	\$9251
Alabama	\$8591	\$9465	\$9107	\$8764	\$8433
U.S. average		\$10,153	\$10,127	\$10,144	\$10,207

Among the three states, only Massachusetts has a progressive funding distribution approach, whereas Alabama and Florida have a regressive approach.

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79. LADNER, *supra* note 40, at 47.

80. BAKER, *supra* note 51.

81. LADNER, *supra* note 40, at 60.

82. BAKER, *supra* note 51, at 16–17.

Unlike Alabama, Florida's funding distribution is regressive in a manner deemed not significant.<sup>83</sup> Florida's regressive funding system may have less of an impact on education equity because: (1) Florida spends nearly \$1000 more than Alabama per pupil on education; or (2) Alabama has a higher percentage of students living in poverty,<sup>84</sup> as demonstrated by Table 4<sup>85</sup> below.

Table 4: A Comparison of the Poverty Rates of Students Receiving a Public Education in Alabama, Massachusetts, and Florida		
State	Poverty Rate of students	% of students receiving Free/Reduced lunch
Massachusetts	11%	28%
Florida	15%	45%
Alabama	21%	51%

### III. RECOMMENDATIONS FOR ALABAMA

Within the last two years, Alabama has passed several significant pieces of education reform legislation.<sup>86</sup> However, until Alabama begins to better fund its schools, any reform efforts are Band-Aids placed on a bullet wound. In order to promote a more equitable K–12 public education system, Alabama should amend the 1901 constitutional provisions that codify and control its present property tax system, as well as implement a new formula for distributing education funds in a less regressive manner.

#### A. Raising Property Tax Amounts

An easy solution for Alabama to achieve more equitable education outcomes for its students from both low- and high-income backgrounds is to increase

83. See, e.g., J. Rody Borg, Mary O. Borg, & Harriet A. Stranahan, *Closing the Achievement Gap Between High-Poverty Schools and Low-Poverty Schools*, RESEARCH IN BUS. & ECON. J., 12–14 (Feb. 2012)(providing an explanation of statistical significance and the statistical correlations between poverty, school funding, and student performance).

84. *Id.* at 21 (discussing how impoverished students must overcome the effects of additional barriers and a lack of resources outside of the classroom which affect test scores, education outcomes, and needs. Claims that in regards to test scores, an achievement gap “exists between the average students in . . . high-poverty schools and the average students in . . . low-poverty schools[;]” and that “[a]dditional resources in the high-poverty schools would be a useful first step to closing the achievement gap.”)

85. BAKER, *supra* note 51, at 39–40.

86. See, e.g., Carol Gundlach, *2015 legislative update: Alabama Accountability Act Changes Receives Final Legislative Approval* (June 4, 2015), <http://arisecitizens.org/index.php/publications-topmenu-32/fact-sheets-topmenu-36/state-government-topmenu-52/2949-2015-legislative-update-alabama-accountability-act-changes-receive-final-legislative-approval>; Mike Cason, *Charter Schools Coming to Alabama: Here's More About What That Means*, AL.COM (Mar. 22, 2015), [http://www.al.com/news/index.ssf/2015/03/charter\\_schools\\_coming\\_to\\_alab.html](http://www.al.com/news/index.ssf/2015/03/charter_schools_coming_to_alab.html).

property tax amounts in a progressive manner. Although “the decision to largely fund public education through property tax revenue is one that is often challenged,”<sup>87</sup> Massachusetts and Florida’s funding mechanisms demonstrate that reliance on property tax as the largest source of education funding can yield positive results in education quality as well as in education equity. Additionally, Florida demonstrates that even while maintaining a seemingly regressive funding distribution system, when more money is spent on each student, low-income students are able to meet “proficient” standards on the NAEP tests.<sup>88</sup>

It is very possible to reform Alabama property tax policy in ways that are progressive as well as beneficial to the education system as a whole. For example, changes in the ways that Alabama presently classifies and assesses taxes for certain kinds of property could add a significant amount of money to local revenue coffers. By either altering property tax caps or raising property tax rates altogether, Alabama could significantly increase the amount of money it has to fund education.

Alabama’s local property tax rate is presently a mil—the equivalent of only one dollar of tax per thousand dollars of a property’s value.<sup>89</sup> Several other laws and tax policies within the state exacerbate the minimal property tax obligations.<sup>90</sup> For example, the 1978 Lid Bill capped property tax collections for a number of industries.<sup>91</sup> As a result, Alabama taxes several kinds of property at only a fraction of their value:<sup>92</sup>

Table 5: Alabama’s Current Property Tax Rates for Various Kinds of Property	
Property Classification	Property Tax Cap
Utility Company	30% of fair market value
Commercial Property	20% of fair market value
Individually owned vehicles	15% of fair market value
Farms	10% of fair market value
Timberland	10% of fair market value

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87. Magda Derisma, *Opposing Views: The Divide in Public Education Funding—Property Tax Revenue*, 34 CHILD. LEGAL RTS. J. 121 (2013), <http://www.luc.edu/media/lucedu/law/students/publications/clrj/pdfs/derisma.pdf>.

88. *Supra* Section II.A.

89. ARISE CITIZEN’S POLICY PROJECT, THE ALABAMA TAX & BUDGET HANDBOOK 32–39 (2d ed. 2015), [http://arisecitizens.org/index.php/component/docman/doc\\_view/1154-the-alabama-tax-budget-handbook-2015?Itemid=44](http://arisecitizens.org/index.php/component/docman/doc_view/1154-the-alabama-tax-budget-handbook-2015?Itemid=44).

90. *See id.*

91. THE ALABAMA TAX & BUDGET HANDBOOK, *supra* note 90.

92. *Id.*

Owner-occupied residential property	10% of fair market value
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In addition to these caps, Alabama also offers other property tax rate reducers, such as exemptions for seniors and disabled citizens, as well as homestead exemptions for owner-occupied houses.<sup>93</sup> With these factors combined, an owner of a \$100,000 house in Alabama can often expect to pay less than \$300 in property tax each year.<sup>94</sup>

In order to better fund its education system, Alabama should increase its state property taxes by either amending present property tax caps or changing the present property tax millage rate. Even with such changes, by continuing to allow need-based exemptions such as those already allowed for the elderly and disabled, as well as by providing phase-out exemptions for houses worth less than a certain amount, Alabama can design and implement a more effective yet progressive education funding mechanism. Although these changes seem simple and feasible, they are in fact politically complicated due to the obstacles associated with reforming Alabama's constitution.

Former Governor Bob Riley's failed tax reform plan of 2003 is an example of a reform plan that acknowledged the need for better education finance and "would have started the process of raising adequate revenue and making government more accountable" had it been able to level the political support and statewide referendum votes needed to successfully overcome the associated constitutional reform obstacles.<sup>95</sup> Under Riley's plan, "increases in property taxes would have totaled about \$487 million per year when fully phased in by 2008" by making substantial changes to Alabama's property tax constitutional provisions, including changes in millage rates and property tax caps.<sup>96</sup> Additionally, it "would have significantly shifted the tax burden away from the poor and lower-middle classes, granting more than half of all Alabamians a tax cut, while requiring wealthier Alabamians and the largest landowners to bear greater taxes."<sup>97</sup> Unfortunately, due to the influence of special interest groups and well-funded lobbyists within the state of Alabama, this plan was unable to survive the political attack mounted against it.<sup>98</sup>

#### *B. Creating a New Funding Distribution Formula*

Compared to other states, Alabama does not do a good job distributing funds to school districts with greater needs.<sup>99</sup> In addition to raising property taxes,

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93. *Id.*

94. *Id.*

95. Hamill, *supra* note 49, at 1133.

96. *Id.* at 1134.

97. *Id.* at 1133.

98. *Id.*

99. BAKER, *supra* note 51, at 17.

Alabama should explore additional solutions that aim to answer the question of “how to use school resources in ways that [better] benefit students living in poverty.”<sup>100</sup> One way Alabama can do this is by moving from a regressive education funding distribution system to a more progressive distribution system. Studies show that while the level and source of education spending matters, the equity of spending matters just as much. Additionally, Alabama should ensure that it explores and takes advantage of all ways to improve education through practices and means unrelated to funding (*e.g.*, best practices for hiring and training quality teachers, the availability of high-quality curriculum, designing schools in ways that prioritize and focus on in-depth learning and student needs, etc.).<sup>101</sup>

Presently, Alabama’s funding system has horizontal equity, yet lacks vertical equity.<sup>102</sup> Horizontal equity exists because Alabama practically attaches a dollar amount to each child’s head and ensures that that dollar amount or minimum level of funding needed to educate a child is distributed to schools. However, resources and funding amounts are not adjusted according to variances in student or school district needs. This vertical equity feature is lacking.

To better distribute education funding in a manner which effectively takes into account need and achieves vertical equity, Alabama can use a funding distribution model that calculates a set variation in the amount of spending money needed for students with greater need. For example, rather than determining that each school should get “X” amount for every student enrolled there, Alabama can place different funding values on differ kinds of students, such as those from poverty-stricken districts. Thus, schools and students would receive the base amount of funding plus a needs-adjusted amount to ensure that students with greater need receive the proper resources.

#### IV. LEGAL BARRIERS TO CHANGE

During the civil rights movement, activists and lawyers were successful in getting many of the overtly racist sections of the state’s constitution stricken. However, it has been much harder for Alabamians to mount successful legal challenges to the “less obvious and more profound discrimination . . . deeply embedded in provisions dealing with tax policy [and] education.”<sup>103</sup> Since 1990 alone, at least three major legal battles were mounted in Alabama in an effort to

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100. Borg, *supra* note 83, at 21.

101. See, *e.g.*, Linda Darling-Hammond, Transforming Urban Public Schools: The Role of Standards and Accountability (2001) (unpublished manuscript) (on file with Harvard University), <https://www.hks.harvard.edu/urbanpoverty/Urban%20Seminars/December2000/hammond.pdf> (outlining various non-funding related recommendations and best practices for school systems to utilize).

102. APA CONSULTING, EQUITY AND ADEQUACY IN ALABAMA SCHOOLS AND DISTRICTS 30 (March 2015), <https://www.alsde.edu/sec/comm/Related%20Documents/Alabama%20Final%20Report%209.8.15.pdf>.

103. FLYNT, *supra* note 2, at 17.

rectify funding disparities associated with the way Alabama funds its K–12 public education system.<sup>104</sup>

Just last year, the Eleventh Circuit Court of Appeals acknowledged that “Alabama continues to be plagued by an inadequately funded public school system—one that hinders the upward mobility of her citizens, blacks and white alike, especially in rural counties. . . . As a result, the children of the rural poor, whether black or white, are left to struggle as best as they can in underfunded, dilapidated schools.”<sup>105</sup>

Although acknowledging “Alabama’s deep and troubled history of racial discrimination” and its effects within Alabama’s constitution and education system, the Eleventh Circuit has stated that it is “[un]able to provide relief, no matter how noble the cause.”<sup>106</sup> The Circuit’s rationale in reaching this decision was based on the separation of powers doctrine.<sup>107</sup> It reasoned that the legislature, rather than the court, is the proper forum for dealing with and making decisions regarding education funding in Alabama.<sup>108</sup> Subsequently, the United States Supreme Court denied certiorari.<sup>109</sup>

In similar legal challenges in other states, the fact that education is not recognized as a fundamental right has been a significant barrier to increasing equity in education funding.<sup>110</sup> In American jurisprudence, a fundamental right is typically a right that has been deemed necessary to a just government,<sup>111</sup> and “[w]hen such rights exist, the Supreme Court has mandated that they must be protected.”<sup>112</sup> In the 1970s, the Supreme Court held that public education is not a federally recognized fundamental right.<sup>113</sup> Had the Supreme Court ruled differently in *San Antonio Independent School District v. Rodriguez*, “[t]he consequence of identifying public education as a constitutionally protected fundamental right [would have been] that any regulation of public education would be subject to strict judicial scrutiny.”<sup>114</sup> As a result, in any legal challenges to education-related

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104. “For example, in 1993 Alabama’s highest court ruled that the state’s school funding system unconstitutional. But in 2002, the highest court reopened the case and dismissed it.” KENYON, *supra* note 1, at 57. And as recently as 2014, a third legal challenge was being made. See Brian Lyman, *U.S. Supreme Court rejects Alabama school-funding case*, THE MONTGOMERY ADVERTISER (Oct. 6, 2014), <http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2014/10/06/us-supreme-court-rejects-al-school-funding-case/16810717/>.

105. I.L. v. Alabama, 739 F.3d 1273, 1288 (11th Cir. 2014) (internal quotations omitted).

106. *Id.*

107. *See id.*

108. *See id.*

109. *See Lynch v. Alabama*, 135 S. Ct. 53 (2014).

110. KENYON, *supra* note 1, at 8.

111. *See, e.g.*, Brooke Wilkins, *Should Public Education be a Federal Fundamental Right?*, 2005 B.Y.U. EDUC. L. J. 261, 266 (2005).

112. *See Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989).

113. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 3 (1973).

114. Wilkins, *supra* note 113, at 270.

decisions, the “government, on both state and federal levels, would be required each time to show that every action taken regarding public education is necessary to accomplish the goal of education.”<sup>115</sup> Furthermore, such a ruling would mean that government would be required “to provide for and finance public education.”<sup>116</sup> However, since *San Antonio Independent School District* was decided, the opposite holds true.

Specifically, the fact that children in Alabama do not have a fundamental right to an education presents grave consequences—especially for the hundreds of children presently trapped in the state’s failing schools. As the list of failing schools in Alabama continues to grow, some Alabamians argue that more funding is not the solution. Rather, the solution is better use of current funds.<sup>117</sup> The state legislature has since turned to implementing bills that are designed to increase accountability and school choice within Alabama.<sup>118</sup>

Although these bills might prove to be beneficial for a certain number of Alabama students, questions remain regarding what will happen to the students trapped in failing schools yet unable to benefit from such pieces of legislation.<sup>119</sup> While some legal groups have opposed legislation for this reason on equal protection grounds,<sup>120</sup> none have gone so far as to argue that the fact that Alabama requires students stuck in failing schools to still attend such schools (or risk punishment under state truancy laws)<sup>121</sup> is in and of itself unconstitutional.

Although such a claim logically makes sense, there may be a fear among education advocates of pushing the envelope so far, due to the risk of having public education opportunities completely stripped from the most vulnerable communities and children within the state. Nevertheless, it would be interesting to see if such a claim could form the basis for a successful legal challenge in the future.

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115. *Id.*

116. *Id.*

117. See, e.g., John Hill, *New NAEP Scores Show No Link Between Education Spending and Outcomes*, ALABAMA POLICY INSTITUTE (Nov. 12, 2015), <http://www.alabamapolicy.org/new-naep-scores-show-no-link-between-education-spending-and-academic-outcomes/>.

118. See, e.g., Kim Chandler, *Southern Poverty Law Center Files Lawsuit Challenging Alabama Accountability Act*, AL.COM (Aug. 19, 2013), [http://blog.al.com/wire/2013/08/southern\\_poverty\\_law\\_center\\_fi.html](http://blog.al.com/wire/2013/08/southern_poverty_law_center_fi.html).

119. *See id.*

120. *See id.*

121. See Allison Mechanic, *Trouble with Truancy: Keeping Alabama Students in School*, WTVY.COM (Sept. 13, 2014), <http://www.wtvy.com/home/headlines/Trouble-with-Truancy-Keeping-Alabama-Students-in-School-273688681.html> (“According to Alabama Law, parents and students can get in trouble for school absences...Guardians can face up to a year in jail and up to a \$6,000 fine if they violate this law. If it is the students who are causing the absences, they can be sent to juvenile court, be put on probation, given electronic monitoring or be put in out-of-home placement.”).

## V. CONCLUSION

The drafters of Alabama's 1901 Constitution were fully aware of the central role that taxes and tax policy play in funding public services within the state. However, they intended to use property tax caps and other mechanisms (such as the inability of local governments to raise taxes) to make it difficult—if not impossible—for future governments to further tax property.<sup>122</sup> Many problems have resulted from Alabama's tax structure developed by the 1901 Constitution.<sup>123</sup> Unlike most other states that have “updated their governing documents as they modernized,” since the start of the twentieth century, Alabama remains tethered to its 1901 constitution.<sup>124</sup>

Although several efforts have been made in the twenty-first century to fix the inequities inherent to the funding of Alabama's education system, Alabama still has much room for improvement in promoting a more equitable and quality K–12 public education system. Because legal challenges have often failed, solutions to removing the barriers codified by Alabama's 1901 constitution must come from the Alabama Legislature. Although past reform efforts of this nature have failed, valuable lessons can be learned from those failures which may help future efforts be successful. For example, Former Governor Riley's plan “failed for a number of reasons, including the smoldering resentment and the complete lack of trust in state government widely felt by the average voter and the difficulties of reaching communities at the grassroots level.”<sup>125</sup> Also, the silence (if not opposition) of religious groups as it relates to issues regarding Alabama's education problems has been noted as a historic barrier to change and reform.<sup>126</sup>

Despite such obstacles, in the past year, organizations such as the Black Alliance for Education Options have done work that offers hope and demonstrates’ an ability for each of these issues to be tackled head on in a way that can lead to true education reform within the state of Alabama. Although this organization has not attempted to address the inequitable funding issue within Alabama, their grassroots work and ability to build coalitions with local churches was instrumental in getting a controversial school choice bill passed this year.<sup>127</sup> Although Alabama's recent school choice legislation offers a glimmer of hope for students trapped in failing schools it simultaneously is likely to exacerbate the

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122. See FLYNT, *supra* note 2, at 17 (“It was the intent of the 1901 framers that government have a difficult or impossible task taxing property.”).

123. See *id.* (“The Brookings Institution concluded in 1932 that the taxing authority of the 1901 constitution warped and distorted revenue production and created a gravely defective budgetary system.”) (internal quotations omitted).

124. *Id.* at 3.

125. Hamill, *supra* note 49, at 1135.

126. *See id.* at 1139.

127. See Elizabeth Beshears, *Alabama Legislature Passes Historic Charter School Charter Schools Bill*, YELLOWHAMMER NEWS (Mar. 18, 2015), <http://yellowhammernews.com/politics-2/alabama-legislature-passes-historic-charter-schools-bill/>.

cycle of income-based educational disparities in the state. As the 1901 ratifiers of the state constitution once acknowledged, the best way to create and [in]equitable education system within our state is by either amending present property tax caps or changing the present property tax millage rate. Unless or until that happens, economic background, more than anything else, will determine whether a child receives a quality K-12 education. For now, in Alabama, all public education is *not* created equal.