LESSONS FROM *LEWIS*: EQUAL PROTECTION AND CONSTITUTIONAL HORIZONS OF STATE PREEMPTION

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INTRODUCTION

Since 2010, conservative-leaning state legislatures have prosecuted a wave of aggressive enactments preempting progressive local government regulation across a wide range of salient issue areas.[1] Formally speaking, the idea that a state legislature might override local decision-making is not in itself

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[1] *See*, *e.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1999-2002 (2018) (identifying some of the major areas of state preemption as including labor law (e.g., minimum wage, paid sick leave, and rideshare policies), environmental and public health law (e.g., menu and plastic bag regulations), anti-discrimination law (pertaining, e.g., to gender-based bathroom usage and civil war memorials), and housing law (e.g., regulations addressing home sharing, short-term renting, and inclusionary zoning)).

worrisome.[2] But this "new preemption,"[3] as Professor Richard Briffault has called it, has been implicated in several distinct forms of harm, and, as such, may be subject to a variety of legal challenges.[4]

A prominent criticism of the new preemption is that it has at times inflicted disparate burdens on low-income state residents, many of whom are also racial minorities.[5] The pattern follows a basic, two-step process. First, a progressive-leaning municipality

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[2] CHANGELAB SOLS., FUNDAMENTALS OF PREEMPTION 2 (2019), https://www.changelabsolutions.org/sites/default/files/2019-07/Fundamentals_of_Preemption_FINAL_20190621.pdf [https://perma.cc/7MGH-B8DR] ("Preemption itself is neither bad nor good . . . . states have increasingly used preemption to protect the power and financial interests of established political or commercial entities and thwart local jurisdictions' efforts to adopt laws that advance health equity; some states even punish local officials and local governments that adopt such laws").

[3] Briffault, *supra* note 1, at 1997 (distinguishing "classic preemption," which "consisted of a judicial determination of whether a new local law conflicted with preexisting state law," from "new preemption," which refers to "sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems"). Building on Briffault, subsequent legal scholarship has also stressed that the new preemption may appear in various forms. *See*, *e.g.*, *id.* (distinguishing between "punitive preemption," whereby states impose harsh penalties on local officials or governments simply for having such measures on their books and "nuclear preemption," which entails "effectively blowing up the ability of local governments to regulate without affirmative state authorization"); CHANGELAB SOLS., *supra* note 2, at 2-3 (explaining that the new preemption can come in many forms, including "floor preemption, which occurs when a higher level of government passes a law that establishes a minimum set of requirements and allows lower levels of government to pass and enforce laws that impose more rigorous requirements," "ceiling preemption," which "occurs when a higher level of government prohibits lower levels of government from requiring anything more than or different from what the higher-level law requires," and "vacuum" or "null preemption," which "occurs when a higher level of government chooses not to enact any regulations on a particular topic but still forbids lower levels of government from doing so, creating a regulatory vacuum").

[4] *See*, *e.g.*, Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, J. AM. CONST. SOC'Y ISSUE BRIEFS 12-17 (2017) (identifying existing and potential state and federal constitutional challenges); Briffault, *supra* note 1, at 2008-17.

[5] *See*, *e.g.*, Courtnee Melton-Fant, *New Preemption as a Tool of Structural Racism: Implications for Racial Health Inequities*, 50 J.L. MED. & ETHICS 15, 20 (2022) ("New preemption has created racial health inequities and threatens future efforts to ameliorate those inequities."); *see also* R. A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J.C.R. & C.L. 265, 269 (2011) (contending that local governments' "on-the-ground experience with the realities of race and its operation in the twenty-first century arguably places them in a better position than courts to develop innovative approaches to the structural racial inequities with which so many municipalities must grapple").

enacts (or makes plans to enact) measures that would provide low-income residents with minimum wages or access to key social services like paid sick leave or housing.[6] In short order, however, their state's conservative-leaning legislature passes a facially neutral law banning such regulations, thus abandoning poor and working-class residents to the exigencies of the market.[7] Arguably unproblematic on its face, such preemption may burden racial minorities more than others because they disproportionately tend to be members of the poor and working classes and thus also to make up an outsized percentage of the preempted regulation's would-be recipients.[8]

While, in some cases, racial minorities may be able to seek respite under federal anti-discrimination law, the latter is certainly no panacea. For example, while federal anti-discrimination law makes disparate impact claims available in housing contexts, it provides little in the way of tools for defending progressive local work laws against state preemption.[9] Faced with situations of this

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[6] *See, e.g.*, Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2228, 2240-57 (2017) (finding that cities in recent years have attempted to pass progressive policies only to have their efforts negated by state preemption).

[7] *Id.* at 2227-28.

[8] *See*, *e.g.*, LAURA HUIZAR & YANNET LATHROP, FIGHTING WAGE PREEMPTION: HOW WORKERS HAVE LOST BILLIONS IN WAGES AND HOW WE CAN RESTORE LOCAL DEMOCRACY 6 ("Workers of color—especially Black and Latino workers—who are disproportionately represented in low-wage industries and occupations are frequently concentrated in our cities and metro areas.") (*citing* LAURA HUIZAR & TSEDEYE GEBRESELASSIE, WHAT A $15 MINIMUM WAGE MEANS FOR WOMEN AND WORKERS OF COLOR (Dec. 2016), (available at https://www.nelp.org/app/uploads/2016/12/Policy-Brief-15-Minimum-Wage-Women-Workers-of-Color.pdf [https://perma.cc/8RPZ-3DTT])); *see generally* WILLIAM H. FREY, MELTING POT CITIES AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000S BROOKINGS: CITIES AND COMMUNITIES (May 2011), (available at https://www.brookings.edu/wp-content/uploads/2016/06/0504_census_ethnicity_frey.pdf [https://perma.cc/CK3E-CQ7H]).

[9] *Compare*, *e.g.*, Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 545-46 (2015) (holding that "disparate-impact claims are cognizable under the Fair Housing Act upon considering its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose"), *with* Noah D. Zatz, *The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?*, 2009 U. CHI. LEGAL F. 1, 30 (explaining that "Advocates for raising the minimum wage often note that higher wages (setting aside any corresponding job losses) would disproportionately benefit groups that anti-discrimination laws are designed to protect. The flip side of this

kind, advocates in recent years have implemented a number of creative legal strategies and achieved varying degrees of success.[10]

Among the most provocative developments, in this vein, was the 2018 case of *Lewis v. Governor of Alabama*,[11] which involved an Equal Protection Clause challenge to a state preemption with racial disparate impact. The relevant facts of *Lewis* begin back in 2015, when the City Council of Birmingham, a majority-Black municipality, enacted Ordinance 15-124, a law providing that minimum wages for Birmingham employees would incrementally increase from $8.50 to $10.10 per hour by July 2017.[12] Just sixteen days after the ordinance passed, the Alabama state legislature introduced and enacted the Alabama Uniform Minimum Wage and Right-to-Work Act,[13] which preempts any municipal legislation regulating employee-employer relations, including local wage minimums.[14] The vote broke down across racial lines; not a single Black legislator voted for the preemption—indeed, every

same point is that low wages disproportionately harm these same groups, who are segregated into low-wage occupations. . . . [I]t is difficult to imagine successfully using Title VII of the Civil Rights Act or the ADA to attack an employer's wage schedule for imposing a disparate impact . . . .").

[10] In some jurisdictions, for example, advocates have convinced state courts to strike down minimum wage preemptions under their state constitutions' procedural restraints on legislative power. *See*, *e.g.*, Coop. Home Care, Inc., v. City of St. Louis, 514 S.W.3d 571, 575-576 (Mo. 2017) (holding that a state statute preempting a local minimum wage regulation violated Article III, § 23 of the Missouri Constitution because it contained more than one subject); City of Bexley v. State, 92 N.E.3d 397, 401-02 (Ohio Com. Pl. 2017) (finding similarly under Article II, Section 15(D) of the Ohio Constitution and finding that the same statute deprived municipal corporations of the ability to regulate such issues by the adoption of local ordinances); Hudson v. State, 112 N.E.3d 442, 443, 447 (Ohio Ct. App. 2018) (The Court determined that the Court of Common Pleas in Summit County, Ohio, erred in its August 1, 2017 ruling that a minimum wage preemption did not violate the single-subject rule of the Ohio Constitution). Looking beyond the courts, advocates in many jurisdictions have also sought to repeal their states' minimum wage preemptions through the democratic process. *See* HUIZAR & LATHROP, *supra* note 8, at 19-21 (cataloguing recent efforts and contending that campaigns to overturn minimum wage preemptions "are grounded in a long history of organizing and an ever-evolving battle between corporate interests and working people").

[11] Lewis v. Governor of Alabama, 896 F.3d 1282, 1287-88, 1297-99 (11th Cir. 2018).

[12] *Id.* at 1287-88.

[13] *Id.* at 1288; 2016 Alabama Laws Act 2016-18 (H.B. 174).

[14] *Lewis*, 896 F.3d at 1288.

representative who did so was white[15]—and it passed into law without chance for public comment.[16]

In April that same year, suit was brought by National Association for the Advancement of Colored People, Greater Birmingham Ministries, and Marnika Lewis and Antoin Adams, two Black Birmingham workers who had been making less than $10.10 per hour, and thus would have stood to benefit from the preempted minimum wage ordinance.[17] They claimed, *inter alia*, that the government had intentionally discriminated against them on the basis of their race, thereby violating the Equal Protection Clause of the Fourteenth Amendment.[18]

For those familiar with standard equal protection doctrine, this might sound somewhat surprising. The preemption was neutral on its face and the legislative record contained no obvious expressions of racial animus. But the plaintiffs hoped that in proving the preemption's racial disparate impact—in conjunction with other factors, like the racist history of Alabama politics and the hurried way in which the preemption had been pushed through the legislature—they might still prove that they had been victims of invidious discrimination. As it turns out, their theory held some water. On an appeal from a motion to dismiss, a three-justice panel on the Eleventh Circuit found for the plaintiffs.[19] In that court's eyes, it was at least plausible that "the Minimum Wage Act had the purpose and effect of depriving Birmingham's black citizens equal economic opportunities on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment."[20]

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[15] *Id.*

[16] *Id.* at 1295.

[17] Complaint for Declaratory and Injunctive Relief at 4-7, Lewis v. Bentley, 896 F.3d 1282 (2018) (No. 2:16-cv-00690-SGC).

[18] *Id.* at 2-3, 17-21 (outlining the government's alleged violations of the 1965 Voting Rights Act, Thirteenth and Fifteenth Amendments, and Fourteenth Amendment's Equal Protection Clause).

[19] *See Lewis*, 896 F.3d at 1299.

[20] *Id.*

In affirming the plaintiffs' theory that racial disparate impact could be central to an intentional discrimination claim, the Eleventh Circuit's *Lewis* decision challenges some long-held assumptions regarding equal protection doctrine. Since the late 1970s, the Supreme Court has generally disfavored evidence of disparate impact in equal protection litigation,[21] and by largely internalizing this preference, constitutional scholars have generally conceded that the Equal Protection Clause has relatively little to say of facially neutral state action.[22] But *Lewis* complicates this established presumption. Specifically, its lesson is that evidence of disparate may go a surprisingly long way toward proving intentional discrimination and thus play load-bearing role in the law of equal protection.

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[21] *See*, *e.g.*, Washington v. Davis, 426 U.S. 229, 246-48 (1976) (holding that the Equal Protection Clause does not demand the "more rigorous" disparate impact standard applied in Title VII contexts); Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264-65 (1977) (affirming *Davis*' principle "that official action will not be held unconstitutional [under the Equal Protection Clause] solely because it results in a racially disproportionate impact").

[22] *See*, *e.g.*, Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323 (1987) (critiquing the discriminatory intent standard because it ignores the reality of unconscious bias and the effect of historic racism on the "collective unconscious"); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 955 (1989) (contending that *Davis*' discriminatory intent standard tamed the radical anti-discrimination theories inherent in *Brown v. Board of Education* by excluding the consideration of "stigma, subordination, or second-class citizenship" and by ignoring the impact of state action on "established institutions"); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 7 (2011) (referring to *Davis* as "the single most important decision of the United States Supreme Court for understanding the failure (or refusal) of the Justices to recognize structural racism"). If anything, recent constitutional scholarship has tended to examine the relationship between equal protection and disparate impact from the other end of the kaleidoscope, asking not whether laws *creating* disparate impacts violate the Equal Protection Clause, but whether those *forbidding* disparate impact do. *See*, *e.g.*, Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 496 (2003) (noting that in decisions like *City of Richmond v. J.A. Croson Co.*, *Shaw v. Reno*, *Adarand Constructors, Inc. v. Pena*, and *Gratz v. Bollinger*, the Court rendered equal protection doctrine "hostile to government action that aims to allocate goods among racial groups, even when intended to redress past discrimination"); Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 656, 668-78 (2015) (contending that the Roberts Court's decision in *Fisher v. University of Texas at Austin* "undermines the view that disparate impact is unconstitutional in purpose").

Taking *Lewis*' lesson seriously shifts the constitutional horizons of our Fourteenth Amendment rights and, by the same token, that of state preemption as well. *Lewis* teaches that, when litigating intentional discrimination claims under the Equal Protection Clause, the role that evidence of racial disparate impact can perform is considerably less determined than we might otherwise think. Equal protection doctrine leaves room for substantial play in the joints, thus leaving it up to judges, lawyers, and activists to determine the significance of racial disparate impact evidence on a case-by-case basis.

What *Lewis* shows, in other words, is that the Equal Protection Clause sets forth constitutional limits on state preemption. The extent of these limits may ultimately depend on the degree to which courts deign to consider evidence of disparate racial disparate impact in intentional discrimination claims. By disfavoring such evidence, they will tend to distribute more authority to states. By contrast, if they permit such evidence to fill out claims of intentional discrimination, they will likely expand the horizons of local power.

The claim thus explored in this brief piece is that the Equal Protection Clause can in fact offer a salutary bulwark against harms associated with the new preemption. I begin by providing a brief overview of *Lewis*. I then contend that the Eleventh Circuit's seemingly unique approach may be harmonized with the basic tenets of the Equal Protection Clause's intentional discrimination doctrine. A short Conclusion reiterates *Lewis*' basic implications for future state preemption challenges.

I. INTENTIONAL DISCRIMINATION IN *LEWIS V. GOVERNOR*

A. Background

The question of how power should be distributed between states and localities is a key theme in local government law and scholarship.[23] Yet, as Judge R. David Proctor would note in his memorandum opinion for the district court in *Lewis*, plaintiffs and defendants alike believed that the case represented more than a mere "tug of war," between state and city, "over the authority to establish a minimum wage."[24] In the defendants' portrayal, *Lewis* was about "ensuring consistency" in the treatment of employers.[25] The plaintiffs, by contrast, painted the case as "yet another chapter in Alabama's civil rights journey."[26]

Race-based state intervention in local democracy, of course, is a well-established theme in Southern political history.[27] Still, as it would turn out, the *Lewis* plaintiffs' narrative was not enough to convince Judge Proctor, who dismissed their claims *in toto*.[28] On appeal before the Eleventh Circuit, however, the plaintiffs managed to persuade a three-justice panel that at least one of their claims had merit: their allegation that the defendants had intentionally discriminated against them in violation of the Equal Protection Clause of the Fourteenth Amendment.[29] In dismissing this aspect of the plaintiffs' case, the appellate justices pointed out, Judge Proctor had "[r]ecklessly" garbled the law of intentional discrimination as established in *Village of Arlington Heights v.*

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[23] *See*, *e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1151-52 (1980); *see generally* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986); *see also* Felipe Ford Cole, *Unshackling Cities*, 90 CHI. L. REV. 1365, 1376-77 (2023) (using the history of Dillon's Rule to demonstrate that local government law also distributes power between public and private entities).

[24] Lewis v. Bentley, No. 2:16-CV-690-RDP, 2017 WL 432464, at *1 (N.D. Ala. Feb 1, 2017).

[25] *Id.*

[26] *Id.*

[27] *See*, *e.g.*, Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 479-482 (2017) (describing "Jim Crow localism" as a phenomenon in which "broad private power over poor black residents was protected by government").

[28] *Lewis*, 2017 WL 432464, at *13.

[29] Lewis v. Governor of Alabama, 896 F.3d 1282, 1290-91 (11th Cir. 2018).

Metropolitan Housing Development Co.[30] Back in the 1970 case of *Griggs v. Duke Power Co.*,[31] the Burger Court had established that facially neutral employment practices with racially disparate effects could run afoul of Title VII of the Civil Rights Act of 1964. Soon after, however, in a case called *Washington v. Davis*,[32] it clarified that *Griggs*' disparate impact standard would not apply to facially neutral state practices challenged under the Equal Protection Clause.[33] In *Arlington Heights*, it upheld *Davis* by stipulating that the Equal Protection Clause merely prohibits racially disparate treatment, but it also asserted that evidence of disparate impact could be factor in in determining whether an official enactment had been colored by discriminatory intent.[34]

As the Eleventh Circuit pointed out, Judge Proctor had elected not to follow *Arlington Heights*' "longstanding framework," and instead imported a "clearest proof" standard from a "line of cases dealing with ex post facto challenges to civil statutes" that "has no place in equal protection law."[35] Under this standard, it had been relatively easy for him to dismiss the plaintiffs' intentional discrimination claim for failing to meet the "plausibility" standard that is partially constitutive of modern Article III standing doctrine.[36] To wit, as the Eleventh Circuit would put it, the inferior court's proposed clearest proof standard decisively "turn[ed] a blind eye to the realities of modern discrimination," which "hides, abashed, cloaked beneath ostensibly neutral laws and legitimate bases, steering government power toward no less invidious ends."[37] Standing after *Arlington Heights*, as it then explained, permits no such blindness.[38] To the contrary, what that case asserted was that any assessment as to whether "invidious discriminatory purpose was a motivating factor" behind a state's facially neutral conduct

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[30] *Id.* at 1296; *see generally* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

[31] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[32] Washington v. Davis, 426 U.S. 229 (1976).

[33] *Id.* at 239.

[34] *Arlington Heights*, 429 U.S. at 265-66.

[35] *Lewis*, 896 F.3d at 1296 (discussing the clearest proof standard).

[36] *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that, in order to survive a 12(b)(6) motion to dismiss, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face").

[37] *Lewis*, 896 F.3d at 1296-97.

[38] *Id.*

must be made via "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available[,]" including "'impact of the official action;' the 'historical background of the decision;' the 'specific sequence of events leading up' to the challenged law; departures from substantive and procedural norms; and 'legislative or administrative history.'"[39] As it stands, in other words, courts assessing the possible presence of discriminatory intent should not look for smoking guns and instead derive their inference from the accumulating weight of multiple kinds of indirect evidence.

Having retrieved *Arlington Heights'* multi-factor test, the Eleventh Circuit then applied it to find that the *Lewis* plaintiffs had alleged facts sufficient to demonstrate the plausibility of their intentional discrimination claim for Article III purposes.[40] In large part, its determination rested upon the fact that the state's minimum wage preemption had imposed special burdens on Birmingham's Black workers.[41] As it explained, racial disparate impact can be demonstrated using evidence that a policy "bears more heavily on one race than another."[42] In this case, the court found that the Minimum Wage Act had "denied 37% of Birmingham's black wage workers a higher hourly wage, compared to only 27% of white wage workers[,]" a disparity that was amplified by the fact that "black wage workers in Birmingham make, on average, $1.41 less per hour than white wage workers, and $2.12 less per hour statewide."[43]

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[39] *Id.* at 1294 (quoting *Arlington Heights*, 429 U.S. at 266-68).

[40] *Id.* at 1294-95.

[41] *Id.*

[42] *Id.* at 1294-95 (quoting Young Apartments, Inc. v. Town of Jupiter, Fla., 529 F.3d 1027, 1045 (11th Cir. 2008)).

[43] *Id.* at 1294.

Importantly, the appeals court did not rest the entirety of its finding on evidence of a racially disparate impact. Following *Arlington Heights*' guidance, it also noted the sequence of events leading to the Act's enactment.[44] Here, it found, evidence attesting to "rushed, reactionary, and racially polarized nature of the legislative process" further suggested the plausibility of the plaintiffs' intentional racial discrimination claim.[45] Several key factors helped it reach this conclusion: first, the Minimum Wage Act was introduced by representatives of "Alabama's least diverse area"; second, while the "Birmingham City Council, which represents more [B]lack citizens (and more [B]lack citizens living in poverty) than any other city in Alabama," remains majority Black, every state legislature who voted in favor of the Minimum Wage Act was white; third, no Black lawmaker voted for the bill; and, fourth, the Act had been rushed through the legislative process without the possibility of public comment, despite the fact that the state legislature had never before sought to regulate local minimum wages.[46]

Additionally, the Eleventh Circuit considered the historical background of the enactment to identify further evidence that an inference of intentional racial discrimination was plausible.[47] Putting the point in striking terms, it asserted that the Minimum Wage Act represented nothing less than a recapitulation of "Alabama's historical use of state power to deny local black majorities authority over economic decision-making."[48] Emphasizing the explicitly white-supremacist origins of the Alabama Constitution,[49] the panel observed that the state's racism "has consistently impeded the efforts of its black citizens to achieve

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[44] *Id.* at 1295.

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1295-96.

[48] *Id.* at 1295.

[49] *See* OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, 1901, TO SEPTEMBER 3RD, 1901, 7-8 (1940) (recording statements by John B. Knox, the President of the Convention, who remarked in his opening speech to the delegates that "the people of Alabama have been called upon to face no more important situation than now confronts us . . . . And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.").

social and economic equality."[50] Ultimately, they unequivocally sided with the plaintiffs' right "to make good on their claim" that the "circumstances" surrounding "the Minimum Wage Act reflect a motivation consistent with Alabama's many historical barriers [erected] to keep [B]lack persons from full and equal participation in the social, economic, and political life of the state."[51]

In sum, then, the Eleventh Circuit, in *Lewis*, used three sources of evidence to determine that intentional discrimination had plausibly been a motivation of the Alabama legislature's minimum wage law preemption: disparate impact, the sequence of events leading to the enactment, and the historical circumstances that surrounded it.

Though certainly not the only factor involved, evidence disparate impact thus played a key role in their determination. Just how much influence it exerted in the analysis, of course, would be difficult to say. But the fact that it was involved at all warrants attention. It suggests, as the next section explains, that the dominant narratives surrounding modern equal protection jurisprudence may require some revision.

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[50] *Lewis*, 896 F.3d at 1295.

[51] *Id.* at 1296 (internal quotation omitted).

B. Renovating Arlington Heights

In a much-celebrated 1989 law review article entitled *Discriminatory Intent and the Taming of* Brown, Professor David Strauss contended that the Burger Court had effectively cabined equal protection jurisprudence to what he termed "an excessively cautious and conservative" standard of "discriminatory intent."[52] In Strauss' telling, *Davis* effected this sea change and *Arlington Heights* confirmed it,[53] thus giving birth to a new, "comprehensive"[54] approach to equal protection for race. Post-*Arlington Heights*, he argued, courts could invalidate invidious racial discrimination under the Equal Protection Clause only "if the government has in fact used race as a criterion, even if it has not done so explicitly."[55]

Standing as a challenge to this now-familiar narrative, *Lewis* suggests that Strauss' influential argument may have been somewhat overstated. In particular, it highlights that while *Arlington Heights* affirmed *Davis*' holding that race-based equal protection violations must demonstrate intentional discrimination, it also affirmed the latter's insistence that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination . . . ."[56] In so doing, *Lewis* points out that while the concept of discriminatory intent may well have subsumed that of invidious discrimination for equal protection purposes, intentional discrimination itself is complex and multi-faceted category. The suggestion might be stated in the following way: while impact without intent will be unlikely to violate the Equal Protection Clause, impact *as* intent still can.

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[52] Strauss, *supra* note 22, at 937.

[53] *See id.* at 951.

[54] *Id.* at 952 (explaining *Davis*' holding that discriminatory intent would provide the comprehensive meaning of unconstitutional discrimination).

[55] *Id.* at 952-53 n.63 (hazarding a definition of discriminatory intent following *Davis*).

[56] Washington v. Davis, 426 U.S. 229, 242 (1976); *see Lewis*, 896 F.3d at 1294 (citing Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S.252, 266-68 (1977)); *Arlington Heights*, 429 U.S. at 264-65 ("Our decision last Term in *Washington v. Davis* made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact.") (citation omitted).

As we saw, the *Lewis* court significantly grounded its holding that the plaintiffs' intentional discrimination claim was plausible on evidence that the Minimum Wage Act burdened Black workers more than it did white ones.[57] This move fit squarely within the Court's suggestion, in *Arlington Heights*, that "[t]he impact of the official action whether it 'bears more heavily on one race than another,' may provide an important starting point" when testing for intentional discrimination.[58] Noteworthy in *Lewis*' analysis, however, is that impact was clearly situated as something *more* than a place to start. While *Arlington Heights* described impact as one of several factors that may, in the aggregate, build a case for finding that racial discrimination was a motivating factor, *Lewis* announced that *any* equal protection challenge to a facially neutral law should demonstrate some evidence of impact. It put the standard as follows: "In order to prevail on an equal protection challenge to a facially neutral law, plaintiffs must prove *both* discriminatory impact *and* discriminatory intent or purpose."[59] Clearly evident in the court's version of the *Arlington Heights* rule is that disparate impact has migrated from its presumptive status as either a starting point or, but one of many, equally important factors, to stand, instead, as the first tier in a two-pronged test.

What exactly to make of the Eleventh Circuit's interpretation of *Arlington Heights* is not immediately clear. Did it break with precedent or preserve it? The judges repeatedly emphasized that a successful equal protection challenge to a facially neutral law needs to show both intent and impact.[60] Further, their conclusion carefully specified that the plaintiffs had "stated a plausible claim that the Minimum Wage Act had the *purpose* and *effect* of depriving Birmingham's [B]lack citizens equal economic opportunities on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment."[61] For some, these invocations may indicate that the *Lewis* court ultimately broke with *Arlington Heights*, and thus transcended its constitutional authority.

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[57] *Lewis*, 896 F.3d at 1295.

[58] *Arlington Heights*, 429 U.S. at 266 (*quoting Davis*, 426 U.S., at 242) (citations omitted).

[59] *Lewis*, 896 F.3d at 1294 (emphasis added).

[60] *Id.*

[61] *Id.* at 1299 (emphasis added).

But this is certainly not the only way to interpret *Lewis*. Indeed, it is equally plausible to read the decision as "closely track[ing] the *Arlington Heights* framework."[62] To do so, the claim would be that *Lewis* did not announce a new test so much as it emphasized the importance of disparate impact as a key *Arlington Heights* factor. Supporting this alternative reading would be the fact that the *Lewis* court's actual analysis treated impact as important both on its own terms and as one of several important factors—like the historical backdrop, the preceding sequence of events, and departure from substantive norms—rendering the plaintiff's discriminatory intent claim plausible.

Regardless of how one interprets the decision, however, it is clear that the *Lewis* court treated disparate impact as vitally important for proving that a facially neutral, state preemption law may have violated the Equal Protection Clause. The significance of this choice lies in its tendency to read *Arlington Heights* in ways that grind against its typical uptake as a straightforwardly anti-impact ruling. As previous commentators have pointed out, Justice Lewis F. Powell, Jr.'s opinion for the majority in *Arlington Heights* took substantial liberties with precedent.[63] Indeed, Justice Byron White himself pointed out in his *Arlington Heights* dissent that the majority had already departed from *Davis*, which easily could have justified a decision simply to "remand the case for consideration."[64] Yet Justice Powell elected to do more, "to flesh out the meaning of the *Davis* standard and to provide a roadmap for how courts should apply its invidious discriminatory purpose requirement."[65] Rather than letting *Davis* lie, he chose to adumbrate the set of key factors by which courts, going forward, would have to infer discriminatory intent, thus creating the "motiving factor" test that stands as the

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[62] EQUAL PROTECTION—RACE DISCRIMINATION—ELEVENTH CIRCUIT REVERSES DISMISSAL OF DISCRIMINATION CLAIM RELYING ON HISTORICAL AND STATISTICAL EVIDENCE.—*Lewis v. Governor of Alabama,* 896 F.3d 1282 (11th Cir. 2018), 132 HARV. L. REV.: RECENT CASES 771, 774 (2018) https://harvardlawreview.org/wp-content/uploads/2018/12/771-778_Online.pdf [https://perma.cc/ZMV7-FC99].

[63] *See*, *e.g.*, *Arlington Heights*, 429 U.S. at 273 (White, J., dissenting).

[64] *Arlington Heights*, 429 U.S. at 272-73 (White, J., dissenting).

[65] Robert G. Schwemm, *Reflections on* Arlington Heights*: Fifty Years of Exclusionary Zoning Litigation and Beyond*, 57 UIC L. REV. 389, 421 (2024) (internal quotation omitted).

standard framework for intentional discrimination claims arising under the Equal Protection Clause to this day.[66]

For those skeptical of the liberties Justice Powell took in *Arlington Heights*, *Lewis* offers a way to read his test anew. In *Arlington Heights*, as Professor Robert Schwemm has recently pointed out, Justice Powell mobilized his newly constructed test to mispresent what were ultimately extremely complex questions of law as an uncomplicated "roadmap for future judicial decision[-]making."[67] In so doing, Schemm argues, Justice Powell offered a model of equal protection analysis that would ultimately render future discriminatory intent claims "more difficult to win."[68] In *Lewis*, however, the Eleventh Circuit demonstrated that the *Arlington Heights*'s motivating factor test need not be limited in its application to Justice Powell's "often one-sided, incomplete, and confusing" application thereof.[69] Courts may apply *Arlington Heights* differently; they may choose to take it in divergent directions and opt, ultimately, to use it in ways that Justice Powell may not have foreseen. In charting their own courses in determining the kinds of inferences to be drawn from the facts, they may, as the *Lewis* decision reflects, decide to allow evidence of disparate impact to play a substantial, even leading, role in their analyses. Of course, there are limits to how far such evidence can go; modern equal protection doctrine clearly specifies that, except in the most extreme cases, it cannot stand on its own as evidence of discriminatory intent. Beyond that, however, the horizon is relatively open—or, at least, that is what *Lewis* seems to imply.

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[66] *Arlington Heights*, 429 U.S. at 265-66 (outlining several of the factors on which a discriminatory intent claim might be built); *Id.* at 270-71 n.21 (explaining that proving the defendant's decision "was motivated in part by a racially discriminatory purpose" would not necessarily invalidate it but rather would merely shift "to the [defendant] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.").

[67] Schwemm, *supra* note 65, at 435 (focusing on how Justice Powell's decision elided the difficulty inherent in determining whose purposes should be considered in intentional discrimination adjudication).

[68] *Id.* at 437 (making this claim specifically with reference to exclusionary zoning cases).

[69] *Id.*

The fact that *Lewis* was a reasonable interpretation and application of *Arlington Heights* is not the end of the story. When the Eleventh Circuit subsequently reheard the case en banc in 2019, it about faced and found, contrary to their decision the year prior, that the plaintiffs had in fact failed to demonstrate Article III standing.[70] Importantly, however, the court's change of heart left its earlier meditations on the Equal Protection Clause intact, conserving its proposed theory of intentional discrimination as a bequest for future courts and litigants to consider.[71] Still, as the next section briefly considers, those who might lean on *Lewis* should be aware that, even if the theory ultimately harmonizes with *Arlington Heights*, it may still be subject to doctrinal constraints that emerge elsewhere in the Supreme Court's equal protection jurisprudence.

C. Statistics? History?

Whether they deal with state preemption or not, future extensions of *Lewis* must consider that the decision sailed over at least two potential roadblocks. In the years since *Arlington Heights*, the Supreme Court's constitutional case law has at times expressed skepticism toward the use of history and statistics as evidence of racial discrimination. A decade after *Arlington Heights*, Justice Powell authored the majority opinion in the case of *McCleskey v. Kemp*,[72] a decision curtailing the role of statistical evidence in intentional discrimination claims arising under the Equal Protection Clause. In *Kemp*, Warren McClesky, an African American man scheduled to be executed in Georgia, used statistical

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[70] *See* Lewis v. Governor of Alabama, 944 F.3d 1287, 1306 (11th Cir. 2019) (en banc) (holding "that plaintiffs lack Article III standing to bring their equal-protection claim against the Alabama Attorney General because they have failed to establish that their injuries (while real and cognizable) are fairly traceable to the Attorney General's conduct or that those injuries would be redressed by a decision in their favor"); Lewis v. Governor of Alabama, 816 F. App'x 422, 424 (11th Cir. 2020) (per curiam) ("For the reasons given in the en banc opinion, we affirm the district court's dismissal of the plaintiffs' claims against the Alabama Attorney General for lack of jurisdiction. That reasoning applies equally to the plaintiffs' standing to sue the State of Alabama, so we affirm the district court's dismissal there too. And for the reasons we gave in the panel opinion—with which the en banc court expressed no disagreement—we affirm the district court's dismissal of the City of Birmingham from the suit.").

[71] *See Lewis*, 944 F.3d at 1296.

[72] *See generally* McCleskey v. Kemp, 481 U.S. 279 (1987).

evidence that the state's death sentencing process disproportionately burdened Black people convicted of killing whites to claim that it violated the Equal Protection Clause.[73] The Court accepted the validity of McClesky's evidence but ultimately held against him on the view that he had not shown that the Georgia legislature's death penalty statute was enacted or enforced in order to discriminate against African Americans.[74]

Though the tragic facts surrounding *Kemp* and its resulting influence on equal protection law had little impact on the proceedings in *Lewis*,[75] the case surely functions as a cautionary tale. But this does not mean that skilled lawyer cannot distinguish the two cases. Most importantly, perhaps, *Kemp*, unlike *Lewis*, failed to give adequate consideration to the historical context of the challenged state action. Had it done so, as Justice William Joseph Brennan, Jr. pointed out in his *Kemp* dissent, it may well have concluded that "subtle, less consciously held racial attitudes" had influenced Georgia's application of its death penalty process.[76]

While it is important not to overstate the significance of Justice Brennan's critique, *Kemp* does provide certain guidance around the use of history in intentional discrimination litigation. In a potentially damaging footnote, Justice Powell wrote that "unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value" for purposes of proving intentional discrimination.[77] At the same time, however, he also acknowledged that, only four years prior,[78] the Court had accepted historians' analysis of the proceedings of Alabama's 1901 Constitutional Convention as evidence that some of its provisions were constructed with a racially discriminatory purpose.[79]

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[73] *Id.* at 287.

[74] *Id.* at 298.

[75] Importantly, while the district court who first heard *Lewis* did superficially consider *Kemp* in order to draw support for its standing analysis, neither it nor the Eleventh Circuit considered how its doctrine might bear upon the *Lewis* plaintiffs' use of statistical analysis. *See Lewis*, No. 2:16-CV-690-RDP, 2017 WL 432464, at *13; Lewis v. Governor of Alabama, 896 F.3d 1282 (11th Cir. 2018).

[76] *Kemp*, 481 U.S. at 334 (Brennan, J., dissenting).

[77] *Id.* at 298 n.20.

[78] *Id.* (citing Hunter v. Underwood, 471 U.S. 222, 228-33 (1985)).

[79] *See id.*; *Hunter*, 471 U.S. at 228-29 .

In other words, *Kemp* seems to affirm *Lewis*' conclusion that, at least in some intentional discrimination claims, historical evidence may be used to buttress that of racial disparate impact. Rather than prohibiting the use of statistics and history, *Kemp* invites judges to consider these factors in assessing whether, on the whole, it was more likely than not that the state is intentionally discriminating on the basis of race.[80]

CONCLUSION

What do we learn from *Lewis*? First and foremost, *Lewis* apprises us of a consequential insight: when it comes to intentional discrimination claims arising under the Equal Protection Clause, evidence of a disparate impact may play a probative role. If, as it currently exists, equal protection law continues to work this way, then it may be more capable of enforcing racial equity goals—and thus more capable of limiting state preemption—than longstanding narratives might lead one to believe. Of course, there are limits to *Lewis*' approach. But these, it seems, may also be more habitual than they are doctrinal. What this means is that, on the one hand, judges and lawyers should feel confident building on *Lewis* in the future, and that, on the other, they should expect some pushback. *Lewis*' practical limits lie in the mistaken premise that *Davis* and *Arlington Heights* abolished the role of a disparate impact analysis from an equal protection doctrine perspective. And old habits of mind can be difficult to break. But *Lewis* can help us begin to free ourselves of certain elements of past judicial practice and, in so doing, point the way forward.

The way of *Lewis* has implications for the future of state preemption. While state legislatures have wide latitude to preempt local enactments, they cannot do so in ways that violate individual constitutional rights. States preemptive measures may be particularly immune to constitutional challenge if they are facially

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[80] *See*, *e.g.*, *Kemp*, 481 U.S. at 293 (observing *Arlington Heights*' authority and noting that "[t]he Court has accepted statistics as proof of intent to discriminate in certain limited contexts"). *See also id.* at 293-97 (suggesting that courts should be particularly cautious when relying on statistical evidence in capital-sentencing contexts).

neutral. And yet, if they have a racial disparate impact, it can be asked whether—and sometimes proved that—they violate the Fourteenth Amendment's Equal Protection Clause.