SUPREME COURT OF ALABAMA

OCTOBER TERM, 2001-2002

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

Ex parte Governor Fob James et al.

(In re: Alabama Coalition for Equity, Inc., an Alabama nonprofit corporation, et al.

v.

Fob James, Jr., in his official capacity as Governor of the State of Alabama and as a president of the State Board of Education, et al.)

Ex parte Governor Fob James et al.

(In re: Mary Harper, suing as next friend of Deion Harper; and Kerry Phillips, a minor, et al.

v.

Fob James, Jr., in his official capacity as Governor of the State of Alabama and as president of the State Board of Education, et al.)

Fob James, Jr., in his official capacity as Governor of the State of Alabama and as president of the State Board of Education, et al.

v.

Alabama Coalition for Equity, Inc., et al.

Fob James, Jr., in his official capacity as Governor of the State of Alabama and as president of the State Board of Education, et al.

v.

Mary Harper et al.

Joyce Pinto et al.

v.

Alabama Coalition for Equity et al.

Joyce Pinto et al.

v.

Alabama Coalition for Equity et al.

Montgomery Circuit Court
(CV-90-883 and CV-91-117)

On June 29, 2001, Order Vacating December 3, 1997, Remand Order

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PER CURIAM.

This Court "shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala. Const. 1901 § 43 (emphasis added). In Alabama, separation of powers is not merely an implicit "doctrine" but rather an express command; a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns. Amendment 582 to the Alabama Constitution of 1901 reflects this State's adherence to this command by effectively nullifying any "order of a state court, which requires disbursement of state funds, ... until the order has been approved by a simple majority of both houses of the Legislature." Compelled by the weight of this command and a concern for judicial restraint, we hold (1) that this Court's review of the merits of the still pending cases commonly and collectively known in this State, and hereinafter referred to, as the "Equity Funding Case,"[1] has reached its end, and (2)

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[1]On May 3, 1990, the Alabama Coalition for Equity and various other plaintiffs filed a complaint ("the ACE complaint") in the Montgomery Circuit Court, challenging Alabama's method of funding Alabama public schools as violating the equal protection of the laws as allegedly guaranteed by §§ 1, 6, and 22 of the Alabama Constitution of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 that, because the duty to fund Alabama's public schools is a duty that -- for over 125 years[2] -- the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought. Accordingly, we hold that the Equity Funding Case is due to be dismissed.

1901. Alabama Coalition for Equity, Inc. v. Hunt, CV-90-883. On January 18, 1991, a group of plaintiffs eventually known as the Harper class filed a similar complaint ("the Harper complaint") challenging the funding as violating a "fundamental right to education" for "all of Alabama's children between the ages of seven and twenty-one years," allegedly guaranteed in Art. XIV, § 256 of the Alabama Constitution of 1901, as originally adopted. Harper v. Hunt, CV-91-117. Additionally, on July 24, 1992, the court certified as a subclass a group of plaintiffs (the "Doe subclass") who intervened to add claims under Ala. Code 1975, §§ 16-39-3 and 16-39A-2. These cases were eventually consolidated into what is now known as the "Equity Funding Case," a case that is still pending before the Montgomery Circuit Court.

[2]The Constitutions of 1819, 1861, and 1865 provided that education should simply be "encouraged." Ala. Const. 1819, Art. VI; Ala. Const. 1861, Art. VI; Ala. Const. 1865, Art. IV, § 33. The Reconstruction Constitution of 1868 went further and created a detailed education system, supervised by a "Board of Education" invested with "full legislative powers" over educational institutions. Ala. Const. 1868, Art. XI, § 5. The "Board of Education" was charged with the duty to establish free public schools in each township or school district, and its "acts" had the force and effect of law, subject to a veto by the Governor. Id. at § 6. The Constitutions of 1875 and 1901, however, placed the power over education in the Legislature (or General Assembly). Ala. Const. 1875, Art. XIII, § 1; Ala. Const 1901, Art. XIV, § 256 (unamended).

Concerns regarding judicial restraint and the separation of powers have constituted a repeated refrain in this litigation. See James v. Alabama Coalition for Equity, Inc., 713 So. 2d 937, 943 (Ala. 1997) (discussing the Court's refusal to review the merits of the Liability Order); Id. at 953 (Maddox, J., concurring in the result but dissenting from the rationale, noting that this case involves "a debate about the doctrine of separation of powers among coordinate, independent branches of state government and about whether certain orders were 'final' or not"); Ex parte James, 713 So. 2d 869, 878 (Ala. 1997) (refusing to consider the merits of the Liability Order, but addressing the political-question doctrine and noting "the American judiciary's understandable preference for restraint in this complex area of litigation," 713 So. 2d at 881); Id. at 891-94 (Maddox, J., concurring in part and dissenting in part, opining that state officials "should be free to exercise their discretion," 713 So. 2d at 894, with regard to their school-funding duties); Pinto v. Alabama Coalition for Equity, 662 So. 2d 894, 900 (Ala. 1995) (refusing to allow intervention to "reopen or relitigate the question of the constitutionality of the educational system");

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Id. at 901 (Maddox, J., concurring specially, stating that "the question of the power of the circuit court, in the remedy phase, might, and probably will, present questions involving the division of powers between the Executive Branch and the Legislative and Judicial Branches of government"); Id. at 903 (Houston, J., concurring in the result, discussing Ala. Const. 1901 § 43 and noting that the legislative and executive branches have the responsibility of "providing for public education"); Opinion of the Justices, No. 338, 624 So. 2d 107, 110 (Ala. 1993) (discussing the "principle of separation of powers" and noting that "[t]he executive and legislative branches of the State have broad powers and responsibilities in the area of public education").

As the various opinions attached to this and other decisions of this Court stemming from the Equity Funding Case demonstrate, members of this Court have expressed serious concerns regarding the underlying foundations of this case and the trial court's actions and legal conclusions leading up to and included in its March 31, 1993, "Liability Order." See, e.g., Ex parte James, 713 So. 2d at 895-923 (Hooper, C.J., dissenting, and among other things, describing the proceedings

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 before the trial court as a violation of the separation-of-powers doctrine and as a "sham" due to a lack of true adversity between the parties); Pinto, 662 So. 2d at 901-10 (Houston, J., concurring in the result, criticizing the trial court's "interpretation of the Constitution of Alabama of 1901, §§ 1, 6, and 22, which [the trial court interpreted] to provide equal protection," 662 So. 2d at 904). However, the Liability Order having been purportedly made "final" by the trial court pursuant to Rule 54(b), Ala. R. Civ. P., and never appealed, this Court has, rightly or wrongly, so far refused to review the merits of the Liability Order.

Given our ultimate holding in this opinion, we deem it judicially imprudent now -- after issuing four decisions in this case over the past nine years -- to test the bounds of judicial restraint in such a manner. Our present concerns parallel the rationale that undergirds the principle of stare decisis:

> "The rule of stare decisis is founded on principles of conservatism; not intended to prevent progress in the science of the law, and such modifications and adaptations of judicial decisions as may be required by the varying and advancing conditions of society and industries; but most beneficial, when applied in the exercise of a sound and wise discretion. The rule does not rest on a

> disaffirmance of judicial fallibility. Its invocation implies, that former decisions may be erroneous, adherence to which, though erroneous, will be productive of much less evil than a departure therefrom. ... The quieting of litigation; the public peace and repose; respect for the judicial administration of the law, and confidence in its reasonable certainty, stability, and consistency, and all considerations of public policy call for permanently upholding acts done, contracts executed, rights vested, and titles to property acquired on the faith of decisions of the court of last resort."

Bibb v. Bibb, 79 Ala. 437, 443-44 (1885). However, our restraint should not be seen as establishing some new formula for determining when this Court will decline to rule on an issue or to exercise its inherent appellate and supervisory powers; the undisputedly sui generis nature of this case precludes such an interpretation. See Ex parte James, 713 So. 2d at 876 (stating that "this case is sui generis in Alabama jurisprudence").

Like the issues surrounding the Liability Order, the issue of the proper remedy in this case raises concerns for judicial restraint, albeit of a different type. With regard to the remedy, our concern is not that this Court should refrain from potentially harming the public's confidence in the "reasonable certainty, stability, and consistency" of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 decisions of the judicial branch, but rather that the pronouncement of a specific remedy "from the bench" would necessarily represent an exercise of the power of that branch of government charged by the people of the State of Alabama with the sole duty to administer state funds to public schools: the Alabama Legislature. As Justice Houston noted in Ex parte James:

> "Circumstances have denied this Court the opportunity to review the trial court's liability order. Even so, it is the duty of the Judicial Department of Alabama government only to determine what the Constitution of Alabama requires. In my opinion, the Legislative Department and the Executive Department, and not the Judicial Department, have the power and duty to implement a plan that would make this system equitable (and hence, according to the trial court's liability order, constitutional). I trust that the Legislative Department and the Executive Department will proceed to exercise the power and perform the duty they have been called upon to exercise and perform to make Alabama's public educational system constitutional. The 'Separation of Powers' provision of the Constitution of Alabama of 1901 (Art. III, § 43) prohibits me from doing more, without resorting to unconstitutional judicial activism, which I have heretofore avoided."

713 So. 2d at 895 (emphasis added) (Houston, J., concurring in the result in part and dissenting in part).

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Our consideration of this issue stems from our June 29, 2001, order vacating the remand in Ex parte James;[3] however, our conclusion merely purifies and extends -- in the light of § 43 of the Alabama Constitution of 1901 -- the analysis previously undertaken in Ex parte James. In Ex parte James, the Court recognized the serious difficulties implicated by judicial involvement in the administrative details of school

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[3]On June 29, 2001, after issues involved in the Equity Funding Case were brought before us as a purported shield to proration in Siegelman v. Alabama Ass'n of School Boards, [Ms. 1000951, June 29, 2001] ___ So. 2d ___ (Ala. 2001), eight members of this Court (with one Justice recusing) issued the following order vacating our remand of the case in Ex parte James:

"ORDER

"On December 3, 1997, we remanded cases 1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 to the trial court with directions that that court retain jurisdiction. In order that the question of this Court's subject-matter jurisdiction over those cases may be addressed, that remand order is ex mero motu vacated to the limited extent of requiring the parties to present briefs directed to the issue whether the order in the liability phase entered on March 31, 1993, declaring that Alabama's public education system violated 'Ala. Const. art. I, §§ 1, 6, 13, and 22 ... and art. XIV, § 256 ...' was a final, appealable order.

"All parties are given 28 days from the date of this order, to file briefs addressing this limited issue."

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 funding. 713 So. 2d at 880-82. In its discussion of whether the judiciary had the authority to provide a specific remedy directing the administration of public-school funds, a plurality[4] of this Court summarized the relevant decisions of other jurisdictions as follows, acknowledging that courts defer to the legislative branch in matters of public education, but apparently finding solace in what those decisions do not say:

> "Other courts have deferred to their legislatures, expressing in language similar to that used in Rose [v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989)] confidence that their

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[4]See Ex parte James, 713 So. 2d at 899 (Hooper, C.J., dissenting) ("As to the liability order, there exists a majority. As for the remedy order, there appears to be a plurality."). The main opinion in Ex parte James was written by Justice Cook with Justices Shores, Kennedy, and Ingram concurring. Justice Almon concurred specially, but specifically stated that he "express[ed] no opinion as to the merits of the Remedy Plan or as to the proper scope of any remedy order that may ultimately be entered," and that "any serious constitutional questions, such as a separation of powers question, could be addressed to the extent that they apply to a remedy order." 713 So. 2d at 887 (Almon, J., concurring specially). Justice Butts recused himself, and Justice Maddox, Justice Houston, and Chief Justice Hooper each wrote specially and opined that it was the sole duty of the legislative branch to remedy any problems regarding the administration of school funding. See 713 So. 2d at 889-94 (Maddox, J., concurring in part and dissenting in part), at 894-95 (Houston, J., concurring in the result in part and dissenting in part), and at 900-18 (Hooper, C.J., dissenting).

> legislatures would promptly act to remedy constitutional infirmities in their public educational systems. See, e.g., Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71, 104 (1978) ('We have great faith in the Legislature and its ability to define "basic education" and a basic program of education....'); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) ('We are confident that the Legislature, aided by what we have said today ..., will be able to devise a public school financing system which achieves constitutional conformity....'), cert. denied, 432 U.S. 907, 97 S.Ct. 2951, 53 L.Ed.2d 1079 (1977). None of the cases we have found in our research, however, has held that the judiciary lacks the power to order a specific remedy if the legislature ultimately fails adequately to address the constitutional deficiency.

Ex parte James, 713 So. 2d at 880 (some emphasis added; some emphasis original).

We find nothing in the plurality's argument, based on silence, that could justifiably support judicial intrusion into legislative matters. Arguments based on what courts do not say, logically speaking, are generally unreliable and should not be favored by the judiciary; this is especially true when the judiciary is faced with, as we are here, a contrary constitutional mandate such as § 43 of the Alabama Constitution of 1901. Cf. United States v. Butler, 207 F.3d 839, 851 (6th Cir. 2000) (noting that an argument based on congressional silence on an issue would not overcome textual

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 evidence of congressional intent (citing Burns v. United States, 501 U.S. 129, 136 (1991)). Moreover, such judicial intrusion would represent a jurisprudential divergence with other state courts, who, including those mentioned in Ex parte James, have refused to become involved with school-funding matters, acknowledging, as we do today, such matters to be purely legislative in nature. See, e.g., Seymour v. Region One Bd. of Educ., 28 Conn. L. Rptr. 508 (Conn. Super. Ct. 2001) (not published in A.2d) (dismissing a challenge to a state law allocating school funds because the case raised what were purely "questions for lawmakers"); Lewis E. v. Spagnolo, 186 Ill. 2d 198, 208, 710 N.E.2d 798, 804, 238 Ill. Dec. 1, 7 (1999) ("'questions relating to the quality of education are solely for the legislative branch to answer'" (quoting Committee for Educ. Rights v. Edgar, 174 Ill. 2d 1, 24, 672 N.E.2d 1178, 1189, 220 Ill. Dec. 166, 177 (1996))); Marrero v. Commonwealth, 559 Pa. 14, 20, 739 A.2d 110, 114 (1999) (affirming that such matters are "exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government"); Abbeville County School Dist. v. State, 335 S.C.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 58, 69, 515 S.E.2d 535, 541 (1999) (refusing to "usurp the authority of [the legislative branch] to determine the way in which educational opportunities are delivered to the children of [South Carolina]" or to allow "the courts of this State to become super-legislatures").

Our conclusion that the time has come to return the Equity Funding Case in toto to its proper forum seems a proper and inevitable end, foreshadowed not only by the obvious impracticalities of judicial oversight,[5] but also by the Court's own actions in Ex parte James. While the plurality in Ex parte James opined that, in the abstract, the judiciary had the authority to implement a remedy, it did not attempt this task (which may have proven illustrative, because its concrete, rather than abstract, form would have proven its legislative nature) and instead admitted that "the legislature ... bears the 'primary responsibility' for devising a

[5]See City of Pawtucket v. Sundlun, 662 A.2d 40, 59 (R.I. 1995) (noting that, in attempting to define what constitutes a "thorough and efficient" education under the New Jersey Constitution, "the New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a Legislature.").

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 constitutionally valid public school system." Id. at 882 (quoting McDuffy v. Secretary of the Exec. Office of Educ., 415 Mass. 545, 619 n.92, 615 N.E.2d 516, 554 n.92 (1993) (quoting Edgewood Indep. School Dist. v. Kirby, 777 S.W.2d 391, 399 (Tex. 1989))). Accordingly, the opinion vacated the trial court's remedy plan and directed the Legislature to formulate a constitutional education system within one year. Id. at 882. Almost a year later, on rehearing, a majority of the Court modified that opinion to allow the Legislature an undefined and open-ended "reasonable time" within which to formulate such an education system, and the case was remanded to the trial court, which would retain jurisdiction. Id. at 935. [no pun intended]

Continuing the descent from the abstract to the concrete, we now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature.[6] Accordingly, compelled by the authorities

[6]We note that the Legislature has not been inactive with respect to education while this litigation has been proceeding. See Ala. Code 1975, § 16-6A-2 et seq. (the Educational Reform Act of 1994); Ala. Code 1975, § 16-6B-1 et seq. (the Education Accountability Act of 1995); and Ala. Code 1975, § 16-13-230 et seq. (the Foundation Program Act of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 discussed above -- primarily by our duty under § 43 of the Alabama Constitution of 1901 -- we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we "never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala. Const. 1901, § 43 (emphasis added).

CASES DISMISSED.

See, Brown, Harwood, and Stuart, JJ., concur. (7-1)

Houston, J., concurs specially.

Woodall, J., concurs in the result.

Moore, C.J., concurs in the result in part and dissents in part.

Johnstone, J., dissents.

Lyons, J., recuses himself.

1995).

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HOUSTON, Justice (concurring specially).

I concur.

If the State of Alabama had requested that this Court set aside the Liability Order in this litigation, I would have voted to do so for the following reasons.

Alabama Code 1975, § 12-2-13, provides:

> "The Supreme Court, in deciding each case when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion, at that time is law, without any regard to such former ruling on the law by it. ..."

(Emphasis added.)

In Ex parte James, 713 So. 2d 869, 878 (Ala. 1997), Justice Cook summarized what is established law:

> "'[T]he lack of subject matter jurisdiction is not waivable and may be raised at any time by the suggestion of a party or by a court ex mero motu.' Judgments entered without subject-matter jurisdiction can 'be set aside at any time as void, either on direct or on collateral attack.'"

(Citations omitted; emphasis added.)

My opinion now, as it was in 1995[7] and in 1997,[8] is that the Liability Order was wrongly decided, and that § 256 of

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[7]See Pinto v. Alabama Coalition for Equity, 662 So. 2d 894, 901-10 (Ala. 1995).

[8]See Ex parte James, supra, at 894-95.

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Amendment No. 111 of the Constitution of Alabama of 1901 (hereinafter "Amendment 111") was a duly ratified constitutional amendment that does not violate the Fourteenth Amendment to the Constitution of the United States. My opinion now differs from my opinion in 1995 and 1997, because now I believe that the trial court was without subject-matter jurisdiction to decide the liability issue. See Part I of this special writing.

I raise this issue in this special writing, because I think I have an obligation to do so. A trial judge elected by the majority of the voters in a single Alabama judicial circuit has declared a portion of the Alabama Constitution unconstitutional.[9] My research has failed to reveal that this has ever been done before. I, and all Alabama judges and Justices, have taken an oath to "support ... the Constitution of the State of Alabama ...." Ala. Const. 1901, Art. XVI, § 279. "Support, uphold, back, advocate, champion. These verbs mean to give aid or encouragement to a person or a cause.

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[9]I have written, in a passionate but not scholarly article, and I believe, that "Alabama needs a new constitution!" J. Gorman Houston, Jr., A Justice Looks at a Constitution, 30 Cumb. L. Rev. 1 (1999-2000). However, until there is a new Constitution, I will support the 1901 Constitution and its myriad amendments.

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Support is the most general." The American Heritage Dictionary of the English Language 1739 (4th ed. 2000) (emphasis in original).

I am a great admirer of Judge Learned Hand. I try to be guided by Judge Hand's speech given at the "I Am an American Day" in Central Park in New York City, on May 21, 1944. In that speech he said: "The spirit of liberty is the spirit which is not too sure that it is right. ..." Gerald Gunther, Learned Hand: The Man and the Judge 549 (Alfred A. Knopf 1994). Therefore, I go beyond Amendment 111, where I think that I am right, to a point where I am sure that I am right.

My opinion now is that even if Amendment 111 violated the Fourteenth Amendment, and that this violation revitalized the original § 256 of the Alabama Constitution of 1901 (hereinafter the "original § 256") (which I do not believe that it did -- see Part II below), there is no way the second sentence of the original § 256 violated the Fourteenth Amendment. This sentence provided: "The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age [between 7 and 21] therein ...." (Emphasis added.) The trial court does not

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 explain how this sentence -- which requires equal payment for the education of each Alabama child regardless of race, color, creed, gender, citizenship, or national origin -- violates the Equal Protection Clause of the Fourteenth Amendment; it merely declares that it does: "The second ... sentence[] [is] declared to be without force or effect under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." How can a constitutional provision that requires that school funds be spent equally for each school child in Alabama be a violation of the Equal Protection Clause? See Part III of this special writing.

However, because the majority of this Court is now doing what I said had to be done in my special writing concurring in the result in part and dissenting in part in Ex parte James, supra, I am merely raising my concerns about the lack of subject-matter jurisdiction of the trial court as to all or part of the Liability Order, and I am concurring with the majority of this Court in dismissing these cases.

In Ex parte James, 713 So. 2d at 895, I wrote:

> "I concur to remand for the trial court to vacate its judgment insofar as it concerns the Remedy Plan. ... A trial court has declared the Alabama educational system unconstitutional.

> Circumstances have denied this Court the opportunity to review the trial court's liability order. Even so, it is the duty of the Judicial Department of Alabama government only to determine what the Constitution of Alabama requires. In my opinion, the Legislative Department and the Executive Department, and not the Judicial Department, have the power and duty to implement a plan that would make this system equitable (and hence, according to the trial court's liability order, constitutional). I trust that the Legislative Department and the Executive Department will proceed to exercise the power and perform the duty they have been called upon to exercise and perform to make Alabama's public educational system constitutional. The 'Separation of Powers' provision of the Constitution of Alabama of 1901 (Art. III, § 43) prohibits me from doing more, without resorting to unconstitutional judicial activism, which I have heretofore avoided."

(Houston, J., concurring in the result in part and dissenting in part.) (Second emphasis added.)

It is not that I do not personally agree with what has been attempted -- I do. In my heart and mind, I believe all Alabama children deserve an adequate education. Judge Hand concluded his "Spirit of Liberty" speech with the following: "[T]he spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest." Gunther at 549. It is just that I

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 cannot judicially agree with what has been done, and I am writing as Justice J. Gorman Houston, Jr., not as citizen J. Gorman Houston, Jr. The Constitution is the command of "We the people of Alabama,"[10] and it inhibits Justices and judges. If, as in the New Jersey Constitution, the Alabama Constitution assured its citizens of "a thorough and efficient system of free public schools," and if there were no separation-of-powers provision in the Alabama Constitution, then perhaps I could reach judicially the results reached in some of the decisions that led to Abbott v. Burke, 710 A.2d 450 (N.J. 1998), which the New York Times declared "may be the most significant education case since the Supreme Court's desegregation ruling nearly 50 years ago." A Truce in New Jersey's School War, N.Y. Times, Feb. 9, 2002, at A18. However, judicially I cannot take the language that pertains to education in the Alabama Constitution, originally or as amended, and hold that it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. That fact combined with the strong separation-of-powers

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[10]Ala. Const. 1901, Preamble ("We, the people of the State of Alabama ..., do ordain and establish the following Constitution ... for the State of Alabama ....").

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provision in the Alabama Constitution[11] prohibits me from attempting to exercise legislative and/or executive powers to fix education in Alabama.

I.

Simply put, I believe (1) that the trial court was and is without subject-matter jurisdiction to rule on the parties' challenge to Amendment 111; (2) that the trial court's lack of subject-matter jurisdiction leaves the Equity Funding Case with no foundation; and (3) that Amendment 111 remains part of the Constitution of Alabama and empowers the Alabama Legislature to enact all, part, or none of the plaintiffs' proposed educational reform.

Both complaints in the Equity Funding Case list as their "First Claim" what in fact serves as the foundation and essential first step of these cases: a requested declaration that Amendment 111 is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, so that educational reform can be accomplished by judicial fiat and not by legislative will. Education is not listed as a right

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[11]"[T]he judicial [department] shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men." Ala. Const. 1901, § 43.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 in the Declaration of Rights in the Alabama Constitution of 1901 (Art. I, §§ 1-36). Additionally, there is no federal fundamental right to education, as the United States Supreme Court, in San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (a case involving a challenge to Texas's public-school funding method), has held that no such right exists under the federal constitution.

Amendment 111 provides:

> "It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.
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> "The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or

> eleemosynary corporations or associations organized under the laws of the state.
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> "To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide."

Amend. No. 111, § 256, Ala. Const. 1901.

The plaintiffs moved for a partial summary judgment, asking the trial court to declare Amendment 111 unconstitutional under the Fourteenth Amendment's Equal Protection Clause. Decisions by this Court and by a three-judge panel of the federal district court, whose decision was affirmed by the United States Supreme Court, had previously declared that Amendment 111 was the law of Alabama and that the Amendment served as the conduit through which the Legislature was free to repeal school-segregation laws. See Mitchell v. McCall, 273 Ala. 604, 606, 143 So. 2d 629, 630 (1962) (stating that Amendment 111 imposes on the State of Alabama "no constitutional obligation to provide public schools"); Opinion of the Justices No. 179, 275 Ala. 547, 550, 156 So. 2d 639, 643 (1963) (stating that, under Amendment 111,

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 "it appears that the power to provide for the operation of schools is in the legislature"); Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372, 379-81 (N.D. Ala. 1958) (in which Judge Richard Rives, writing for himself and Judges Lynn and Grooms, specifically addressed Amendment 111 and the constitutionality of the "School Placement Law" enacted in conjunction with the Amendment, pointing out that, without Amendment 111, the original § 256 (which explicitly required segregated schools) would represent the law in Alabama), aff'd, 358 U.S. 101 (memorandum). Although the Shuttlesworth opinion dealt with the constitutionality of the School Placement Law enacted after the ratification of Amendment 111, the plaintiffs in that case proffered the same evidence of "improper motivation" that the parties in this case offered. Judge Rives noted: "If, however, we could assume that the Act was passed by the legislature with an evil and unconstitutional intent, even that would not suffice," because the impact of the implementation of the law must also be unconstitutional. Shuttlesworth, 152 F. Supp. at 381. As noted above, the United States Supreme Court affirmed this holding.

Even so, the trial court entered the following order on August 13, 1991:

> "1. Amendment 111, Section 256 of the Alabama Constitution is declared and hereby is void ab initio and in its entirety under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
>
> "2. The mandate of Section 256 of the Alabama Constitution of 1901 is declared, and hereby is, in effect to the extent that it provides: 'The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.' The second and third sentences of Section 256 of the Alabama Constitution of 1901 are declared to be without force or effect under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
>
> "Copies of this order shall be distributed forthwith by the Clerk of this Court to all counsel of record.
>
> "DONE and ORDERED this 13th day of August, 1991."

(Footnotes omitted.) On October 18, 1991, the trial court purported to make this order final pursuant to Rule 54(b), Ala. R. Civ. P.; this Court has never addressed the finality of that August 13, 1991, order.

The August 13, 1991, order provided the necessary foundation for the trial court's March 31, 1993, order, which

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 essentially held that "the present system of public schools in Alabama violates the constitutional mandate of art. XIV, § 256, and the provisions of art. I[,] §§ 1, 6, 13, and 22 of the Alabama Constitution." (March 31, 1993, Order, Appendix to Opinion of the Justices No. 338, 624 So. 2d 107, 110 (Ala. 1993)). The foundational nature of the August 13, 1991, order was made clear in James v. Alabama Coalition for Equity, Inc., 713 So. 2d 937, 947-50 (Ala. 1997), in which we held that the plaintiffs were entitled to recover attorney fees under 42 U.S.C. § 1988 because they had prevailed in asserting their federal claim; namely, striking down Amendment 111 under the Equal Protection Clause of the Fourteenth Amendment. In response to the defendant's assertions "that the [March 31, 1993,] Liability Phase judgment was based entirely on the Constitution of Alabama," 713 So. 2d at 949, and thus did not rest upon the August 13, 1991, resolution of the plaintiff's federal claims, Justice Cook, writing for the Court, stated:

> "On the contrary, the only basis for its [March 31, 1993] holding that the system by which Alabama administered its public schools violated §§ 1, 6, 13, 22, and 256 of the Alabama Constitution was its [August 13, 1991,] holding that Amendment 111 was unconstitutional, and, therefore, inapplicable. Had it held otherwise, the trial court would then have been unable to locate any principle of logic or

> constitutional construction of which we are aware that would have enabled it to circumvent the specific provisions of Amendment 111 -- nullifying the mandate of § 256 -- and, thereby, to reach the result obtained in the Liability Phase. In a real sense, the court's holding that Amendment 111 violated the Fourteenth Amendment is the linchpin of this entire action. We hold, therefore, that the plaintiffs-cross appellants, who prevailed on this pivotal question of federal constitutional law as the basis for the entire action, are entitled to an award of attorney fees, pursuant to § 1988."

James v. Alabama Coalition for Equity, Inc., 713 So. 2d at 950.

Essentially, the August 13, 1991, order is, by necessity, incorporated into and inseparable from the March 31, 1993, order. With this in mind, I turn now to an examination of the fundamental question of the trial court's subject-matter jurisdiction.

Essential to the validity of any action by a trial court is proper subject-matter jurisdiction. Accordingly, any examination of an order issued by a trial court includes an examination of that court's subject-matter jurisdiction. A jurisdictional defect, when discovered, is of such an important nature that it may be raised by a reviewing court, ex mero motu if necessary. Ex parte State ex rel. James, 711 So. 2d 952, 959-60 (Ala. 1998).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

Addressing jurisdictional matters is not a procedure foreign to our decisions in the Equity Funding Case. We followed this very procedure in Ex parte James (the very case before us now based upon our June 29, 2001, order vacating our remand in that case). In Ex parte James, we declined to examine the merits of the Liability Order but made it clear that a review of the trial court's subject-matter jurisdiction was appropriate, even after we had issued two opinions related to this litigation in Pinto v. Alabama Coalition for Equity, 662 So. 2d 894 (Ala. 1995); and Opinion of the Justices No. 338, 624 So. 2d 107 (Ala. 1993):

> "Because the Liability Phase was never appealed, we are here presented with no issue as to the correctness of that holding. The only issue that we may consider is whether the trial court -- in addressing the merits of this dispute -- violated the separation of powers doctrine of our constitution. If it did, then it had no subject matter jurisdiction and the judgment was void. We may address this issue because '[t]he lack of subject matter jurisdiction is not waivable and may be raised at any time by the suggestion of a party or by a court ex mero motu.' Judgments entered without subject-matter jurisdiction can 'be set aside at any time as void, either on direct or on collateral attack.'"

Ex parte James, 713 So. 2d at 878 (citations omitted). While the Court in Ex parte James wrestled with the issue of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 political questions, I believe that the equally fundamental issue of standing -- an issue yet to be addressed -- should be determinative here.

A plaintiff's standing is an essential (and, in fact, the chief) component of justiciability:

> "Not all controversies, even very public ones, are justiciable. Justiciability is a compound concept, composed of a number of distinct elements. Chief among these elements is the requirement that a plaintiff have 'standing to invoke the power of the court in his behalf.' Ex parte Izundu, 568 So. 2d 771, 772 (Ala. 1990)."

Ex parte State ex rel. James, 711 So. 2d at 960 (emphasis added); see also Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (stating that because "the question of standing goes to this Court's jurisdiction ... we must decide the issue even though the court below passed over it without comment." (citation omitted)). As this Court stated in State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1027-28 (Ala. 1999), standing requires injury in fact:

> "Standing ... turns on 'whether the party has been injured in fact and whether the injury is to a legally protected right.' Romer v. Board of County Comm'rs of the County of Pueblo, 956 P.2d 566, 581 (Colo. 1998) (Kourlis, J., dissenting) (emphasis added). See also NAACP v. Town of East Haven, 892 F. Supp. 46 (D. Conn. 1995). ...

"....

> "When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction. Barshop v. Medina County Underground Water Conservation District, 925 S.W.2d 618, 626 (Tex. 1996) ('Standing is a necessary component of subject matter jurisdiction'). See also Raines v. Byrd, 521 U.S. 811, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997); Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996); United States v. Hays, 515 U.S. 737, 742, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995) ('"standing 'is perhaps the most important of [the jurisdictional] doctrines'"'); National Organization for Women, Inc., v. Scheidler, 510 U.S. 249, 255, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) ('Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.'); Romer v. Board of County Comm'rs of the County of Pueblo, supra, 956 P.2d at 585 ('standing is a jurisdictional prerequisite to every case and may be raised at any stage of the proceedings') (Martinez, J., dissenting); Cotton v. Steele, 255 Neb. 892, 587 N.W.2d 693 (1999)."

In the context of a challenge to a provision's facial constitutionality, the plaintiff's injury must "directly aris[e] from" the language of the provision. See Ex parte Blue Cross & Blue Shield of Alabama, 582 So. 2d 469, 474 (Ala. 1991); Virginia v. American Booksellers Ass'n, 484 U.S. 383, 392 (1988) (plaintiffs had standing to make facial challenge to the constitutionality of a statute because the statute was "aimed directly at plaintiffs, who, if their interpretation of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution"); Initiative & Referendum Inst. v. Walker, 161 F. Supp. 2d 1307, 1310 (D. Utah 2001) (plaintiffs, whose alleged injury was "directly traceable to the existence of" an amendment to the Utah Constitution, had standing to challenge the facial constitutionality of that amendment).

My review of this case convinces me that the plaintiffs have no standing to challenge the facial constitutionality of Amendment 111. As stated above, standing to challenge Amendment 111 would require that the plaintiffs demonstrate that they have been "injured in fact" by the existence of Amendment 111. The problem is that Amendment 111 cannot itself be the source of the alleged injuries.

It should be apparent that Amendment 111 -- through which the Legislature was able to repeal the various forced segregation laws[12] -- merely authorizes certain legislative

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[12]In Shuttlesworth v. Birmingham Board of Education, supra, 162 F. Supp. at 379-80, the United States District Court for the Northern District of Alabama described how Amendment 111 provided the Legislature with the ability (previously unavailable under the original § 256) to repeal segregation laws:

"Section 256 of the Alabama Constitution of 1901

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 activities and requires or precludes virtually none. The first paragraph states a general policy of "fostering and promoting" education and declares that the Alabama Constitution of 1901 provides no fundamental right to a public education.[13] Of course, the citizens of a state are free to

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> had provided in part: 'Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.' The Amendment eliminating that provision [Amendment 111], having been submitted by the Legislature, was adopted by the people on August 28, 1956. After the adoption of that amendment, the 1955 School Placement Law, Acts 1955, p. 492, was amended to implement the amended Constitutional provision by repealing various statutes which had required the maintenance of separate schools for the races. Acts 1957, p. 482."

(Footnote omitted.)

[13]The only way this language could even begin to approach a demonstrable "injury" to the plaintiffs is by a theory of "sin by omission," i.e., that the Amendment removes a fundamental right to education that is required to be recognized. However, (1) such a right could be "required to be recognized" only if required by the United States Constitution, which contains no such right, see Rodriguez, supra, and (2) even if the right did exist in the federal constitution, conflicts with federal constitutional guarantees serve only to nullify the application of conflicting state constitutional provisions, and not to copy federal guarantees into state constitutions. See Petuskey v. Clyde, 234 F. Supp. 960, 963-64 (D. Utah 1964) (noting that conflicts with the guarantees of the United States Constitution render portions of state constitutions "totally void in application").

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 construct their state constitution in any way they deem fit, and they are, therefore, not required to recognize any particular right. There can be no "injury-in-fact" stemming from this language.

The second paragraph includes the only actual requirement to be found in the entire Amendment 111 -- that "[r]eal property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state." Not surprisingly, the plaintiffs do not allege any injury under this language. The remainder of the second paragraph, as characterized by the first three words ("The legislature may"), is a mere authorization for the establishment of schools "upon such conditions as [the Legislature] may prescribe" (emphasis added). There is no method prescribed, duty imposed, or action required or prohibited; therefore, there is no possible injury-in-fact to the plaintiffs.

Likewise, in terms of active language that binds or compels the actions of the Legislature, the third paragraph is similarly barren. Under this paragraph, the Legislature "may"

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 allow parents to choose to send their children to private, racially segregated schools -- something that, according to decisions of the United States Supreme Court, parents of any race had the right to do at the time Amendment 111 was proposed and ratified.[14] While interpreting this paragraph as somehow allowing parents to send their children to racially segregated public schools is wholly irrational, given that such schools were declared unconstitutional before Amendment 111 was even proposed, see Brown v. Board of Education, 347 U.S. 483 (1954), even this irrational interpretation would not

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[14]See Norwood v. Harrison, 413 U.S. 455, 461-63, 469 (1973) (acknowledging its prior holding in Pierce v. Society of the Sisters, 268 U.S. 510 (1925), that parents had a right "to provide an equivalent education for their children in a privately operated school of the parents' choice," and stating that while private, racially segregated schools can enjoy no direct state support, "[s]uch private bias is not barred by the Constitution"); see also School Dist. of Abington Township v. Schempp, 374 U.S. 203, 242 (1963) (Brennan, J., concurring) ("Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated."). The Supreme Court has never held private, racially segregated schools to be unconstitutional. In 1976 the Court did hold that the maintenance of private, racially segregated schools was prohibited by 42 U.S.C. § 1981, a federal civil rights statute that prohibits the denial, on the basis of race, of the ability to make and enforce contracts. Runyon v. McCrary, 427 U.S. 160 (1976). However, at the time that Amendment 111 was proposed and ratified, § 1981 applied only to bar "discriminations imposed by state law." Runyon, 427 U.S. at 192 (White, J., dissenting).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 provide a basis for these plaintiffs to demonstrate standing unless racially segregated public schools had in fact been established by the State. Of course, this is not the case, see Shuttlesworth v. Birmingham Board of Education, 162 F. Supp. 372 (N.D. Ala. 1958), aff'd 358 U.S. 101 (memorandum), and the plaintiffs do not so allege.

What the plaintiffs appear to allege as the "injury" is the effects of school-funding policies promulgated while Amendment 111 was in effect,[15] i.e., that because Amendment 111 was proposed and ratified with an improper purpose[16] -- an

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[15]An example of an educational policy promulgated while Amendment 111 was in effect and that was challenged as being unconstitutional under the Equal Protection Clause is found in Shuttlesworth, supra, in which a three-judge federal panel upheld the Alabama School Placement Law against a constitutional challenge. This holding was then affirmed by the United States Supreme Court.

[16]It is beyond dispute that a improper purpose alone does not equal injury. The United States Supreme Court has clearly and unequivocally stated that in order to establish a violation of the Equal Protection Clause, both improper purpose and injury -- two distinct elements -- must be shown. Hunter v. Underwood, 471 U.S. 222, 227-28 (1985) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (quoting Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 264-265 (1977) and citing Washington v. Davis, 426 U.S. 229, 239 (1976))); see also Coleman v. Miller, 117 F.3d 527, 529-31 (11th Cir. 1997) (holding that the display of the

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 attempt to temper the United States Supreme Court's mandate in Brown -- the "injuries" stemming from these policies are therefore "injuries" stemming from Amendment 111. If the fallacy of this reasoning is not apparent on its face, it is easily demonstrated by the following example.

Imagine that the following hypothetical constitutional provision was, for some racist purpose, proposed and ratified as an amendment to the Alabama Constitution:

> "The Legislature may enact laws regulating the riding of bicycles on public streets."

Subsequently, the Legislature enacts a statute restricting only white citizens from riding bicycles on public streets. It is obvious that those white citizens would have been injured so as to have standing to challenge the constitutionality of the statute. However, those white citizens were in no way injured by the amendment itself, because the amendment -- even though created with racist

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Confederate flag over state office buildings did not violate the plaintiff's rights under the Equal Protection Clause, because the plaintiff could not demonstrate discriminatory "impact," and therefore did not satisfy the "two-pronged" test discussed in Hunter); Shuttlesworth, supra, 162 F. Supp. at 381 (stating that "[i]f ... we could assume that the [Alabama School Placement Law] was passed by the legislature with an evil and unconstitutional intent, even that would not suffice" to hold the School Placement Law unconstitutional).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 motivations -- did not in any way compel the Legislature to regulate at all, let alone to regulate in an unconstitutional manner.

Given the nature of the language of Amendment 111, it is not surprising that the plaintiffs have failed -- even after having been notified that the issue of standing was under examination -- to address specifically how Amendment 111 itself causes any injury-in-fact to the plaintiffs. In short, the plaintiffs can show no injury-in-fact from Amendment 111 because the Amendment actually allows the Legislature to provide any type of funding method it so desires, and therefore does not preclude the Legislature from adopting -- and in fact gives the Legislature the power to adopt -- the very same funding method sought by the plaintiffs in this case! The ACE plaintiffs even acknowledge this fact in their complaint, which states that Amendment 111 "appears to authorize any kind of funding system for education." (ACE complaint at 23, emphasis in original.)

Without any basis from which to demonstrate that they have been injured by the existence of Amendment 111 itself, rather than by school-funding policies promulgated while

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Amendment 111 happened to be in effect, the plaintiffs in this case have no standing to challenge the constitutionality of Amendment 111. Without standing, the constitutional challenge to Amendment 111 is nonjusticiable, a fact that renders the trial court without jurisdiction to rule on the issue.

As stated above, because the trial court's ruling on this issue is "the only basis for its [March 31, 1993,] holding that the system by which Alabama administered its public schools violated §§ 1, 6, 13, 22, and 256 of the Alabama Constitution," and because this sole basis -- indeed the essential and undisputed foundation of the March 31, 1993, order -- is, in my opinion, void because of a fundamental and fatal jurisdictional defect, had the State of Alabama requested that this Court vacate the Liability Order, I would have voted to do so on this basis.

Certainly, Amendment 111 is not rendered impervious to challenge simply because its language is inert; the citizens of this State reserved to themselves the ability to challenge any constitutional provision through the amendment procedure described in Article XVIII of the Alabama Constitution of 1901, as amended. In fact, this procedure allows the added

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 benefit of not only nullifying the effect of a constitutional provision (which is the result of having the provision declared unconstitutional), but of changing the substance of the provision itself to reflect the specific desires of the citizenry. The power to rewrite the constitution properly rests in the hands of the people, and not in the judiciary; it is of this power that the plaintiffs in this case, in my opinion, should have availed themselves.[17]

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[17]I note that a perfect example of the use of the amendment procedure by those with concerns similar to the plaintiffs is Senate Bill 336, a proposed constitutional amendment submitted on January 31, 2002, by Senator Hank Sanders; Senate Bill 336 reads as follows:

"A BILL
"TO BE ENTITLED
"AN ACT

"Proposing an amendment to the Constitution of Alabama of 1901, to provide for a revised Section 256 of Article XIV as amended by Amendment 111 of the Constitution of Alabama of 1901 to require the Legislature to establish, organize, and maintain a system of public schools which provides equitable and adequate educational opportunities to all schoolchildren.

"BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

"Section 1. The following amendment to the Constitution of Alabama of 1901, as amended, is proposed and shall become valid as a part thereof when approved by a majority of the qualified electors voting thereon and in accordance with

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Sections 284, 285, and 287 of the Constitution of Alabama of 1901, as amended:

"PROPOSED AMENDMENT

"Section 256 of Article XIV as amended by Amendment 111 of the Constitution of Alabama of 1901, is repealed and the following Section 256 is adopted:

"Section 256. Duty of Legislature to establish and maintain public school system.

"The Legislature shall establish, organize, and maintain a system of public schools throughout the state which provides equitable and adequate educational opportunities for all schoolchildren in kindergarten through high school.

"Section 2. An election upon the proposed amendment shall be held in accordance with Sections 284 and 285 of the Constitution of Alabama of 1901, as amended, and the election laws of this state.

"Section 3. The appropriate election official shall assign a ballot number for the proposed constitutional amendment on the election ballot and shall set forth the following description of the substance or subject matter of the proposed constitutional amendment:

"'Proposing an amendment to the Constitution of Alabama of 1901, to provide for a revised Section 256 of Article XIV relating to the duty of the Legislature to establish, organize, and maintain a system of public schools which provides equitable and adequate educational opportunities for all schoolchildren. Proposed by Act _____.'"

II.

Assuming that the plaintiffs had standing, which they did not; and assuming that the trial court was correct in holding that Amendment 111 was unconstitutional, which it was not;[18] the voidance of an amendment to a constitutional provision does not automatically revive the unamended provision.

It is true that Alabama recognizes the common-law rule of statutory construction that a predecessor statutory provision is revived when the repealing statute is held unconstitutional.

> "Revival of predecessor statutes has long been a part of American jurisprudence. See, E. Crawford, The Construction of Statutes, § 321 (1940). Simply stated, revival means that the very act of declaring a statute unconstitutional brings the predecessor statute or the applicable common law rule back into full force. See, id.; and Dewrell v. Kearley, 250 Ala. 18, 32 So. 2d 812 (1947). Thus, the trial court's declaration that Act No. 82-444 was unconstitutional automatically gave new life to the predecessor statutes, Acts No. 76-710 and 80-797."

Deputy Sheriffs Law Enforcement Ass'n v. Mobile County, 590 So. 2d 239, 242-43 (Ala. 1991). However, the rule of automatic revival of predecessor statutes is not similarly

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[18]See supra, note 9, discussing the test applied when analyzing the validity of a law under the Equal Protection Clause of the Fourteenth Amendment.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 applicable to the revival of constitutional provisions. Davis v. Synhorst, 225 F. Supp. 689 (S.D. Iowa 1964). With regard to constitutional provisions, the intent of the Legislature to repeal the predecessor provision is controlling. Id. Where the Legislature has intended that the subsequent amendment repeal the predecessor provision, there is no revival of the pre-existing provision. Id.; City of Klamath Falls v. Oregon Liquor Control Comm'n, 146 Or. 83, 29 P.2d 564 (1934) (refusing to use the statutory-revival rule to revive a constitutional provision that had been implicitly repealed by two subsequent amendments after those subsequent amendments were themselves repealed). Therefore, the question becomes: did the Alabama Legislature intend for Amendment 111 to repeal the original § 256? The answer is yes.

Clearly, Amendment 111 repealed the original § 256, because it is a complete revision of that section. An amendment to the Alabama Constitution "must prevail over, operate a repeal or modification of any other inconsistent or repugnant elder provisions in the Constitution, to the extent such inconsistency or repugnancy exists." Opinion of the Justices No. 1, 209 Ala. 593, 601, 96 So. 487, 496 (1923).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Furthermore, the differences between the original § 256 and the amended provisions make it clear that Amendment 111 was intended to replace the original § 256. Therefore, because by ratifying Amendment 111 the people clearly repealed the original § 256, it could not automatically be revived by a declaration that Amendment 111 is unconstitutional.

III.

Assuming that the plaintiffs had standing, which they did not; assuming that the trial court was correct in holding that Amendment 111 was unconstitutional, which it was not; and assuming that the trial court was correct in holding that its finding that Amendment 111 was unconstitutional automatically revived the original § 256, which it was not; Amendment 111 cannot logically, rationally, or coherently be unconstitutional and wholly void while part of the original § 256 is constitutional and remains in effect.

The clause in § 256 as amended by Amendment 111 that, according to the trial court violates the Fourteenth Amendment, states that "the legislature <u>may</u> authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 election to that end ...." (Emphasis added.) The original § 256 contains a sentence that stated: "Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." (Emphasis added.) Amendment 111 uses the word "may," while the original § 256 uses the word "shall."

> "'The word "shall" has been defined as follows:
>
> > "'"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary signification, the term 'shall' is a word of command, and one which has always [been given] or which must be given a compulsory meaning; as denoting obligation. The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."
>
> "'Black's Law Dictionary 1375 (6th ed. [1990]).'

"Ex parte Prudential Ins. Co. of America, 721 So. 2d 1135, 1138 (Ala. 1998)."

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

Ex parte Looney, 797 So. 2d 427, 428-29 (Ala. 2001). See also State ex rel. Hartmant v. Thompson, 627 So. 2d 966, 970 (Ala. Civ. App. 1993) ("In the absence of clear legislative intent to the contrary, the word 'shall' is to be afforded a mandatory connotation when it appears in a statute."). In contrast, as discussed above, the word "may" denotes a permissive act, as opposed to a mandatory act. American Bankers Life Assurance Co. v. Rice Acceptance Co., 739 So. 2d 1082 (Ala. 1999). According to the plain language of each provision, the original § 256 mandated that public schools be provided for children and mandated that those schools be segregated, while Amendment 111 mandated nothing. Therefore, under the trial court's reasoning, if Amendment 111, which mandates nothing, is unconstitutional in its entirety, based only upon a racist intent, then, certainly, the original § 256 must also be unconstitutional in its entirety because it commands that the State provide segregated schools.

In an attempt to support the reasoning behind the disparate treatment of the first paragraph of Amendment 111 and the first sentence of the original § 256, the trial court's order misleadingly sets out selected portions of the

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 chairman's opening address to the 1901 constitutional convention. The trial court did not refer to the portion of the chairman's address that shows the racist intent of the 1901 Convention. See 1 Official Proceedings of the Constitutional Convention of 1901, pp. 7-14.

The trial court does hold in its August 13, 1991, order that a portion of the original § 256 is unconstitutional. However, the trial court's construction of Amendment 111 cannot be reconciled with its construction of the original § 256. The trial court's 1991 order states:

> "1. Amendment 111, Section 256 of Alabama Constitution is declared and hereby is void ab initio and in its entirety under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.
>
> "2. The mandate of Section 256 of the Alabama Constitution of 1901 is declared, and hereby is, in effect to the extent that it provides: 'The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.' The second and third sentences of Section 256 of the Alabama Constitution of 1901 are declared to be without force or effect under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

(Footnotes omitted.) If, under the rationale of the trial court, Amendment 111 violated the Fourteenth Amendment because

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 the Amendment had a discriminatory intent, then, certainly, the original § 256 did as well. See, e.g., 1 Official Proceedings of the Constitutional Convention of 1901 pp. 7-14.

The trial court voided, without any analysis or explanation, Amendment 111 in its entirety as violating the Fourteenth Amendment; in contrast, when it came to the original § 256, the trial court simply severed the last two sentences instead of declaring the whole provision void as it did with Amendment 111. The trial court gives no explanation for the different treatment of the two provisions, and we can find no such explanation in the law.

Assuming that the trial court was correct in holding that Amendment 111 was unconstitutional, which it was not; assuming that the trial court was correct in holding that its finding that Amendment 111 was unconstitutional automatically revived the original § 256, which it did not; and assuming that the trial court could disparately hold that Amendment 111 was void in its entirety, while only some of original § 256 was unconstitutional, which it could not; how could the trial court hold that the second sentence of original § 256 violates the Equal Protection Clause of the Fourteenth Amendment?

That sentence provides:

> "The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the county as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships."

Certainly, the judicial mind cannot reasonably comprehend how this second sentence of original § 256 offends the Equal Protection Clause of the Fourteenth Amendment. It does not. How could this be more equal? The State is to provide an equal amount for each child of school age (as defined by the first sentence of the original § 256 as ages 7 through 21), regardless of race, color, creed, gender, citizenship, or national original, regardless of where that child lives in Alabama. Each child receives the same amount from the State for his or her education. I can only assume that this sentence had to be removed to allow the trial court to interpret the word "liberal" in the first sentence of the original § 256 unrestrained by the command for equality. The second sentence of original § 256 violates no equal-protection clause, and the trial court erred when, without explanation, it held that it did.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

IV.

In response to Justice Johnstone's dissent, I believe that it is essential to note that our inquiry was not initiated ex nihilo, but rather was prompted only after the yet unreviewed March 31, 1993, Liability Order was raised before us by parties -- some of whom were parties in the Equity Funding Case -- as a defense to proration in Siegelman v. Alabama Association of School Boards, [Ms. 1000951, June 29, 2001] ___ So. 2d ___ (Ala. 2001).

In our review of the Siegelman case, we discovered that there may in fact be a jurisdictional problem relating to the finality of the March 31, 1993, order. Therefore, in an exercise of our supervisory and inherent appellate powers, we issued -- without dissent -- the following order on the same day we released our June 29, 2001, decision in Siegelman, ex mero motu recalling our remand of the case in Ex parte James:

"ORDER

> "On December 3, 1997, we remanded cases 1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 to the trial court with directions that that court retain jurisdiction. In order that the question of this Court's subject-matter jurisdiction over those cases may be addressed, that remand order is ex mero motu vacated to the limited extent of requiring the parties to present briefs directed to the issue

> whether the order in the Liability Phase entered on March 31, 1993, declaring that Alabama's public education system violated 'Ala. Const. art. I, §§ 1, 6, 13, and 22 ... and art. XIV, § 256 ...' was a final, appealable order.
>
> "All parties are given 28 days from the date of this order, to file briefs addressing this limited issue."

Eight Justices of this Court, including Justice Johnstone, concurred with this order; one Justice recused himself.[19] See June 29, 2001, order of this Court attached to this special writing as Appendix A.

It cannot be denied that our review of the Equity Funding Case has proceeded along an unusual path; however, given the highly unusual nature of the Equity Funding Case,[20] that fact

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[19]After reviewing the briefs submitted in accordance with our June 29, 2001, order, important considerations that had never before been previously addressed arose relating to issues fundamental to the trial court's ability to make the March 31, 1993, order final. Accordingly, on January 10, 2002, five members of this Court, in accordance with the Court's internal rules, ex mero motu placed on rehearing Ex parte James, supra, and Pinto v. Alabama Coalition for Equity, 662 So. 2d 894 (Ala. 1995) (another decision stemming from the Equity Funding Case), and directed the parties to address certain additional concerns, including the trial court's subject-matter jurisdiction. However, after further consideration pursuant to our June 29, 2001, order, we determined that placing these cases on rehearing was not necessary.

[20]See Ex parte James, 713 So. 2d at 895-920 (Hooper, C.J., dissenting) (describing some of the troublesome aspects of the

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 should be unremarkable. However, the fact that a court's action does not navigate a familiar course does not automatically indicate that the court is without authority so to navigate. Instead, as is true in this case, it may simply mean that unusual circumstances have compelled the court to exercise little-used but quite legitimate powers. I believe that our June 29, 2001, order implicates two such powers: our general powers of supervisory authority as the Supreme Court of Alabama over courts of inferior jurisdiction and our inherent appellate power to recall our judgments.

A. Supervisory Authority

This Court, as the Supreme Court of Alabama, has constitutionally grounded supervisory authority over the State courts of Alabama.[21] Amendment 328, § 6.02(b), Ala. Const. 1901, Amending Art. VI, § 140 ("The supreme court shall have original jurisdiction ... to issue such remedial writs or orders as may be necessary to give it general supervision and

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procedural posture of the Equity Funding Case).

[21]In other words, this power has been instilled in us by the citizens of the State of Alabama.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 control of courts of inferior jurisdiction");[22] Ex parte Burch, 236 Ala. 662, 666, 184 So. 694, 698 (1938) (stating that the Supreme Court of Alabama "possesses supervisory power over inferior tribunals, and it is its clear duty to exercise that power whenever it is made to appear that an inferior court is guilty of usurpation or abuse of jurisdiction"). Accordingly, just as the United States Supreme Court is the final arbiter of federal law, see, e.g., New York v. Ferber, 458 U.S. 747, 767 (1982) (stating that "this Court is the final arbiter of whether the Federal Constitution necessitated the invalidation of a state law"); Grantham v. Avondale Indus., Inc., 964 F.2d 471, 473 (5th Cir. 1992) (noting that "[i]t is beyond cavil" that the federal courts are not bound by state-court

[22]This Court's supervisory authority has been constitutionally recognized throughout the history of this State. See Ala. Const. 1819, art. V, § 2 ("[T]he supreme court shall have power to issue writs of injunction, mandamus, quo-warranto, habeas corpus, and such other remedial and original writs, as may be necessary to give it a general superintendence and control of inferior jurisdiction."); Ala. Const. 1861, art. V, § 2 ("general superintendence and control of inferior jurisdiction"); Ala. Const. 1865, art. VI, § 2 ("general superintendence and control of inferior jurisdictions."); Ala. Const. 1868, art. VI, § 2 ("general superintendence and control of inferior jurisdiction"); Ala. Const. 1875, art. VI, § 2 ("general superintendence and control of inferior jurisdictions"); Ala. Const. 1901, art. VI, § 140 ("general superintendence and control of inferior jurisdictions").

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 interpretations of federal law), the Supreme Court of Alabama is the final arbiter of Alabama law, with ultimate authority to oversee and rule upon the decisions of the lower State courts. See Wainwright v. Goode, 464 U.S. 78, 84 (1983) (stating that "the views of [a] state's highest court with respect to state law are binding on the federal courts"); Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940) ("It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. .... [S]tate courts will not be the final arbiters of important issues under the federal constitution; and ... we will not encroach on the constitutional jurisdiction of the states."); see also Ala. Code 1975, § 12-2-7(6)(a) (barring the Alabama Supreme Court from transferring to the Alabama Court of Civil Appeals "[a] case that ... presents a substantial question of ... state constitutional law").

And like the United States Supreme Court's duty with regard to the federal constitution, our status as final arbiter imputes to us a particularly important duty with regard to the Alabama Constitution, because while our interpretations of statutes can be, in a sense, "overruled" by

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subsequent legislative enactment, our interpretations of the Alabama Constitution are beyond legislative alteration. See Marsh v. Green, 782 So. 2d 223, 232 (Ala. 2000) (noting that, in cases involving constitutional adjudication, the doctrine of stare decisis plays little role "because, in such cases, '"'correction through legislative action is practically impossible.'"'" (quoting Seminole Tribe of Florida v. Florida, 517 U.S. 44, 63 (1996)); see also Agostini v. Felton, 521 U.S. 203, 235 (1997) (noting that the policy which undergirds the principle of stare decisis -- that sometimes "it is more important that the applicable rule of law be settled than that it be settled right" -- "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions" (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (Brandeis, J., dissenting)); City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997) (discussing Congress's inability to change the Court's interpretation of the United States Constitution); Napue v. Illinois, 360 U.S. 264, 271 (noting that the Supreme Court has a "solemn responsibility for maintaining the Constitution inviolate") (citing Martin v.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); and Cooper v. Aaron, 358 U.S. 1 (1958)).

Additionally, the instillation of supervisory authority in a sovereign's highest court is not a concept unique to Alabama. See, e.g., United States v. Hale, 422 U.S. 171, 180 n.7 (1975) ("We recognize that the question whether evidence is sufficiently inconsistent to be sent to the jury on the issue of credibility is ordinarily in the discretion of the trial court. 'But where such evidentiary matter has grave constitutional overtones ... we feel justified in exercising this Court's supervisory control.'" (quoting Grunewald v. United States, 353 U.S. 391, 423-24 (1957))); Dominguez v. Enterprise Leasing Co., 197 Ga. App. 664, 666, 399 S.E.2d 269, 271 (1990) ("The superior courts have ever in our history been the great reservoir of judicial power -- the aula regis, as it were -- in which the judicial powers of the state were vested, and ... the practice has been uniform to retain in [the Supreme Court] ... supervisory power over them...." (quoting Porter v. State, 53 Ga. 236, 238 (1874))); Winder v. State, 640 So. 2d 893, 900 (Miss. 1994) (Hawkins, J., concurring specially) ("Contrary to many state constitutions which give

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 their supreme courts supervisory power over trial courts in addition to appellate jurisdiction, our Constitution is silent as to such authority. We have nonetheless asserted and exercised a supervisory power over trial courts ... as inherent in us by virtue of being the final court of appeals in this State."); Tenn. Code § 16-3-501 (1994) (stating that the Tennessee Supreme Court "is hereby granted and clothed with general supervisory control over all the inferior courts of the state").

Furthermore, examples of courts exercising this extraordinary power in extraordinary circumstances are not difficult to find. In State Farm Mutual Automobile Insurance Co. v. Robbins, 541 So. 2d 477 (Ala. 1989), we examined a remittitur that had been raised in a judgment notwithstanding the verdict, but that had been effectively waived by the filing of a notice of appeal. Given the extremely unique circumstances of the procedural posture of the case, we described the case as "sui generis," and, in an exercise of our supervisory powers, we considered the remittitur as though it had not been waived. Id. at 479.

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In Panama R. Co. v. Napier Shipping Co., 166 U.S. 280 (1897), the court of appeals had originally reversed a decree dismissing a libel in admiralty, and remanded the case for a determination of damages. On the second appeal, it affirmed the determination of damages. It was argued that on certiorari review of the final judgment, the Supreme Court could review only the damages issue. That argument was rejected:

> "If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas, as was recently said ..., it is and generally should be issued only after a final decree. ... But, while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

Id. at 284 (emphasis added). Although the final order had not been issued, the United States Supreme Court exercised its supervisory jurisdiction to review the entire case. See also Jackson v. Jackson, 425 So. 2d 379 (La. Ct. App. 1982)(holding that although "the judgment of the trial court is not an appealable partial final judgment" under Louisiana law, "by

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 exercising our supervisory jurisdiction, this court has authority to review the case."); Barber v. Commonwealth, 353 Mass. 236, 239, 230 N.E.2d 817, 819 (1967) (stating that "[w]hile these [supervisory] powers are by nature extraordinary, in an appropriate case this court could and should act at whatever stage in the proceedings it becomes necessary to protect substantive rights" (emphasis added)).

Our supervisory authority, while broad, is certainly not unlimited; its use is governed by the particular circumstances of a case in accordance with our "clear duty to exercise that power whenever it is made to appear that an inferior court is guilty of usurpation or abuse of jurisdiction." Burch, 236 Ala. at 666, 184 So. at 698. I believe that the exceptional circumstances of this case certainly validate the use of this power.

B. Inherent Power to Recall Judgments

Related to our general supervisory authority, this Court, as an appellate court, has the inherent power to recall its judgments. See, e.g., Ex parte Martin, 616 So. 2d 353 (Ala. 1992) (placing a case on rehearing ex mero motu after initially denying the defendant's 1991 petition for certiorari

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 review); Brown v. State, 277 Ala. 108, 167 So. 2d 291 (1964) (discussing generally the ability to recall a judgment); see also Youngblood v. State, 372 So. 2d 34, 35 (Ala. Crim. App. 1978) (placing a case on rehearing ex mero motu in light of a problematic intervening opinion, in order "[t]o avoid confusion and to assure a final judgment of this court in the instant case conformable to the present views of this court"); Watts v. State, 337 So. 2d 91 (Ala. Crim. App. 1976) (restoring a case to the rehearing docket ex mero motu); Dye v. Kansas State Supreme Court, 48 F.3d 487, 490-91 (10th Cir. 1995) (noting the Kansas Supreme Court's "general supervisory powers" and holding that the court had the right to recall and correct the mandate of the Kansas Court of Appeals).

This power has been and continues to be widely recognized as a power inherent in federal and state appellate courts. See, e.g., Calderon v. Thompson, 523 U.S. 538, 549 (1998) (stating that "the courts of appeals are recognized to have an inherent power to recall their mandates"); IAL Aircraft Holding, Inc. v. Federal Aviation Admin., 216 F.3d 1304, 1305-07 (11th Cir. 2000) (recalling mandate and vacating earlier decision after the court learned of a jurisdictional defect in

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 the earlier decision); Sargent v. Columbia Forest Prods., Inc., 75 F.3d 86, 89-90 (2d Cir. 1996) (discussing generally the court's "unquestioned" ability to recall a mandate); Demjanjuk v. Petrovsky, 10 F.3d 338, 356 (6th Cir. 1993) (reopening ex mero motu a habeas proceeding the court had affirmed six years earlier); Coleman v. Turpen, 827 F.2d 667, 671-72 (10th Cir. 1987) (recalling ex mero motu a mandate issued over two years before, and stating that "an appellate court has power to set aside at any time a mandate that was procured by fraud or act to prevent an injustice, or to preserve the integrity of the judicial process."); Uzzell v. Friday, 625 F.2d 1117, 1119-21 (4th Cir. 1980) (describing reasons for recall of mandate and reargument of case); Greater Boston Television Corp. v. FCC, 463 F.2d 268, 275-80 (D.C. Cir. 1971) (discussing generally the power to recall an appellate mandate); State v. Earl, 336 Ark. 271, 273, 984 S.W.2d 442, 443 (1999) (noting, as an example of the appropriate use of the inherent recall power, "when a subsequent Supreme Court decision renders a previous appellate court decision demonstrably wrong"); District of Columbia v. Stokes, 785 A.2d 666, 671 (D.C. 2001) (discussing the court's

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 inherent authority to recall mandate to prevent injustice); John W. Brown Props. v. Blaine County, Idaho, 132 Idaho 60, 61-62, 966 P.2d 656, 657-58 (1997) (citing cases from various jurisdictions); Jameson Chem. Co. v. Love, 403 N.E.2d 928, 928 (Ind. Ct. App. 1980) (stating that "[t]he Court of Appeals has inherent power to correct, on its own motion, an error in a decision and an opinion it has handed down"); Harrison v. Harrison, 109 Md. App. 652, 681-82, 675 A.2d 1003, 1017-18 (1996) (stating that "even absent a statute permitting the correction of judgments, i.e., mandates, an appellate court has always had the inherent power to correct its mandates" and citing several other states' recognition of that power); State v. Breit, 122 N.M. 655, 660, 930 P.2d 792, 797 (1996) ("Appellate courts have the power, in exceptional situations, to recall one of their own mandates after it has issued." (citing Lindus v. Northern Ins. Co., 103 Ariz. 160, 162, 438 P.2d 311, 313 (1968)).

It is true that appellate courts have historically adopted self-imposed time limitations on their power to recall judgments. For example, the Florida Supreme Court generally follows a rule pursuant to which the Court's power to recall

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its judgment ends at the conclusion of the "term" within which the judgment being recalled was rendered.[23] Chapman v. St. Stephens Protestant Episcopal Church, 105 Fla. 683, 138 So. 630 (1932). We specifically adopted the rule as stated in Chapman in Brown v. State, supra, 227 Ala. at 109, 167 So. 2d at 292-93. However, this "term" limitation is not considered to be constitutionally (or otherwise) mandated; rather, it is merely an arbitrary, but historical, rule based upon pragmatic concerns relating to "ending litigation"; even then the rule provided for exceptional circumstances:

> "The prevailing rule is that an appellate court is without power to recall a mandate regularly issued without inadvertence and resume jurisdiction of the cause after the expiration of the term at which its judgment was rendered and the mandate issued. It also appears to be a rule, sustained by an overwhelming weight of authority, that a judgment rendered by an appellate court cannot be vacated or amended by such court after the expiration of the term at which it was rendered, except for the purpose of correcting clerical error and mistake, or perhaps where shown for some reason to be absolutely void. This is in keeping with the sound principle of jurisprudence that some time, somewhere within

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[23]The Florida courts do not always insist on a strict application of the rule. See Peter v. Seapine Corp., 678 So. 2d 508, 509 (Fla. Dist. Ct. App. 1996) (discussing the court's jurisdiction to recall a mandate after the term expires, so long as the motion to recall has been filed before the term expires).

> reasonable limits, there must be an end to litigation."

Washington v. State, 92 Fla. 740, 745, 110 So. 259, 260-61 (1926) (cited in Chapman, supra, 105 Fla. at 696-97, 138 So. at 631-32) (citations omitted; emphasis added).

While "terms of court" technically exist with regard to Alabama's appellate courts, see Ala. Code 1975, §§ 12-2-8, 12-2-9, and 12-3-12, they have not served a significant jurisprudential role because the Alabama appellate courts have always remained open. The Legislature has provided that the Supreme Court's regular term commences on the first Monday in October and ends on the last day of June of the ensuing year. Ala. Code 1975, § 12-2-8. This would assure the Supreme Court a three-month recess, as is taken by the United States Supreme Court. However, since 1985, when I became a Justice on the Court, the Supreme Court has remained open year-round, ordering and holding a special term for the months of July, August, and September, which we are authorized to do by Ala. Code 1975, § 12-2-9.

Furthermore, the notion that an appellate court's inherent power to recall its mandate is strictly and in all circumstances limited by the "term" of court has fallen on

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hard times. The outdated nature of the "term of court" designation and the arbitrary nature of the "term" limitation was recently acknowledged by one Florida court,

> "The concept of a 'term of court' in the 21st century seems odd and anachronistic. It is a relic of an agrarian time when cases were fewer and courts did not sit continuously in session. It was also forced by the slow pace of travel in a large geographic district when the court moved from place to place within the district to hold court. We now sit throughout the year (except for August when we schedule no oral arguments) and easily travel within our district to hold court. It is no longer necessary to designate specific 'terms of court' when everyone can expect that court will be held. It would therefore seem that it is long past time for the legislature to send this relic to history's museum as an oddity, like the powdered wig and the quill pen, tied to our beginnings. Today it seems that the only function of a term of court is to artificially limit our power to recall a mandate."

Pinecrest Lakes, Inc. v. Shidel, 802 So. 2d 486, 487 n.2 (Fla. Dist. Ct. App. 2001) (emphasis added). Moreover, the "term" limitation has been completely abandoned in the federal system:

> "Our power to recall a mandate is unquestioned. See generally 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene Gressman, Federal Practice and Procedure § 3938 (1977). The power 'apparently originated in the inherent power of all federal courts to set aside any judgment during the term of court at which it was entered.' Id. at 276. It 'exists as part of the court's power to protect the integrity of its own processes,' Zipfel v.

> Halliburton Co., 861 F.2d 565, 567 (9th Cir. 1988), and is analogous to the power conferred on district courts by Fed.R.Civ.P. 60(b).
>
> "Amendments to the federal judicial code in 1948 extended this power beyond the current term of court, see 28 U.S.C. § 452, and we thus have the power to reopen a case at any time. Fine v. Bellefonte Underwriters Ins. Co., 758 F.2d 50, 53 (2d Cir.), cert. denied, 474 U.S. 826, 106 S.Ct. 86, 88 L.Ed. 2d 70 (1985); Patterson v. Crabb, 904 F.2d 1179, 1180 (7th Cir.1990). See also 2d Cir.R. 27(c). However, this power is to be 'exercised sparingly,' Greater Boston Television Corp. v. FCC, 463 F.2d 268, 277 (D.C.Cir. 1971), cert. denied, 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972), and reserved for 'exceptional circumstances.' Fine, 758 F.2d at 53."

Sargent, supra, 75 F.3d at 89; see also Aerojet-General Corp. v. American Arbitration Ass'n, 478 F.2d 248, 254 n.6 (9th Cir. 1973) (noting that "the better view is that [the 'term'] limitation was removed by the abolition of the 'term' concept in 1948, the lapse of time being significant only with respect to the court's duty to "prevent injustice" (quoting Greater Boston, supra, 463 F.2d at 275-76)).

Furthermore, the cases relying on the "term" rule do not address the situation where, as here, the underlying litigation is still pending before the trial court when recall is considered. The still pending nature of the underlying action -- while perhaps not determinative by itself, see

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Sargent, supra, 75 F.3d at 91 (stating that "[e]ven if litigation of an action is ongoing, the reopening of previously dismissed claims is thus not lightly contemplated") -- must factor into any decision to recall a judgment. For example, in Maryland Casualty Co. v. Hallatt, 326 F.2d 275 (5th Cir. 1964), the United States Court of Appeals for the Fifth Circuit considered of great importance the fact that underlying litigation had not terminated when it decided to recall and correct a judgment it had issued almost three years earlier:

> "As a general rule, the decision of an appellate court in a case establishes the law of the case, not only for trial upon remand, but also for the appellate court itself upon subsequent review. But this rule is not an inexorable command, and must not be used to accomplish an obvious injustice. We recognize that an appellate court's power to depart from its own ruling on a former appeal should be exercised sparingly and only in exceptional cases. This is an exceptional case. The litigation has not yet terminated. The initial error was our misapplication of governing state law. That error is revealed by an intervening clear enunciation emanating from a Florida Appellate Court.
>
> "This Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were 'dead wrong.' The Florida Court in Barnes[v. Thresherman & Farmers Mut. Cas. Ins. Co., 146 So. 2d

> 119 (Fla. Dist. Ct. App. 1962)] has saved us from committing a miscarriage of justice. We are not insensible to possible complications but are of the opinion that under the total circumstances it is our duty to conform our decision to the supervening decision of the State Court, such decision being under Erie [R.R. v. Tompkins, 304 U.S. 64 (1938)] the right decision.
>
> "....
>
> "Accordingly, we now grant the petition for rehearing in Civil Action 18485, vacate our initial opinion and order therein, and affirm the judgment of the District Court rendered on June 17, 1960."

Hallatt, 326 F.2d at 276-77 (footnote omitted; emphasis added).

The fact that limitations on this inherent appellate power have been based upon pragmatic concerns does not necessarily invalidate or disparage the wisdom of applying much restraint to the use of this power. However, given that no particular time limitations are constitutionally mandated, the exercise of this power falls within this Court's discretion. I do not believe that it is necessary, at this point, to delineate specific standards for the use of that discretion in all cases, because I find it beyond dispute that our June 29, 2001, recall of the case then pending on remand in James -- which had Justice Johnstone's vote and approval

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 (see the appendix to this special writing) -- was appropriate. I earnestly believe that recalling our remand in this case -- a still pending, and without doubt, sui generis case involving extremely important issues of constitutional integrity (which this Court, as explained above, has a special duty to protect) in order to examine fundamental separation of powers and other jurisdictional concerns -- is certainly within our power. See Ala. Code 1975, § 12-2-13.

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APPENDIX to Justice Houston's Special Writing

IN THE SUPREME COURT OF ALABAMA
June 29, 2001

1950030

Ex parte Governor Fob James et al. (In re: Alabama Coalition for Equity, Inc., an Alabama nonprofit corporation, et al. v. Fob James, Jr., in his official capacity as Governor of the State of Alabama and as president of the State Board of Education, et al.)

1950031

Ex parte Governor Fob James et al. (In re: Mary Harper, suing as next friend of Deion Harper; and Kerry Phillips, a minor, et al. v. Fob James, Jr., in his official capacity as Governor of the State of Alabama and as president of the State Board of Education, et al.)

1950240

Fob James, Jr., in his official capacity as Governor of the State of Alabama and as president of the State Board of Education, et al. v. Alabama Coalition for Equity, Inc., et al.

1950241

Fob James, Jr., in his official capacity as Governor of the State of Alabama and as president of the State Board of Education, et al. v. Mary Harper et al.

1950408

Joyce Pinto et al. v. Alabama Coalition for Equity et al.

1950409

Joyce Pinto et al. v. Alabama Coalition for Equity et al.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

ORDER

On December 3, 1997, we remanded cases 1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 to the trial court with directions that that court retain jurisdiction. In order that the question of this Court's subject-matter jurisdiction over those cases may be addressed, that remand order is ex mero motu vacated to the limited extent of requiring the parties to present briefs directed to the issue whether the order in the liability phase entered on March 31, 1993, declaring that Alabama's public education system violated "Ala. Const. art. I, §§ 1, 6, 13, and 22 ... and art. XIV, § 256 ..." was a final, appealable order.

All parties are given 28 days from the date of this order, to file briefs addressing this limited issue.

This the 29th day of June 2001.

Moore, C.J., and Houston, See, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

Lyons, J., recuses himself.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

WOODALL, Justice (concurring in the result).

As previously recognized by this Court, the trial court's Liability-Phase order was based, in part, on its holding that § 256 of Amendment 111 to the Alabama Constitution of 1901 "is void ab initio and in its entirety under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." James v. Alabama Coalition for Equity, 713 So. 2d 937, 949 (Ala. 1997) (emphasis omitted). Today, this Court, for the fifth time, has properly refused to review the Liability-Phase order, including the trial court's holding regarding Amendment 111.

Justice Maddox, writing specially in Ex parte James, noted:

> "The plaintiffs have sought a resolution in a case involving a justiciable controversy. The trial court heard substantial evidence, interpreted the law, and decided the 'case' or 'controversy,' not as a result of a constitutional assignment of a special competence or superiority of the judiciary vis-à-vis the other branches in this regard, but in the performance of a constitutional duty. It would appear that the state defendants would be bound by that judicial resolution, which has become final because the state defendants did not appeal. If these state defendants, or any other defendant, could decide, on a case-by-case basis, which decisions they will or will not obey, then we would have a government of men, which the Constitution

> forbids, rather than a government of laws. § 43, Ala. Const. 1901.
>
> "In conclusion, the Constitution is a species of law superior to legislative action or inaction. It appears to me that if the state defendants disagreed with the judicial interpretation, they should have appealed to this Court. Having failed to do so, they are bound by the declaration made in the Liability Phase, which states their duties in general terms. In performing their duties, however, I do not believe they should be bound by a specific plan, but should be free to exercise their discretion in protecting what has been judicially determined to be the constitutional rights of Alabama citizens. I personally believe that they will carry out their duties, and I would consider the role of the judicial branch [in this case] to be at an end once it declared what those [general] duties and responsibilities were."

Ex parte James, 713 So. 2d 869, 894 (Ala. 1997) (Maddox, J., concurring in part and dissenting in part). I agree with Justice Maddox's conclusions; therefore, I concur in the result.

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MOORE, Chief Justice (concurring in the result in part, dissenting in part).

I concur in the result in part and dissent in part. I not only agree that this case should be dismissed, but I would go further and say that it should be vacated. As I explain in this special writing, the trial court never had subject-matter jurisdiction over the original complaints. Therefore, the circuit court's every act -- from the first day -- was illegal and is void. I cannot concur with the rationale of the majority opinion because the "Liability Order," which was not a legal order in the first place, could never be final. Therefore, while I agree with this Court in finally ending the judicial system's usurpation of legislative power by dismissing this case, I state unequivocally my opposition to a court even beginning to exercise such power.

The question before this Court is whether the order in what has been termed the "Liability Phase" of the Equity Funding Case, entered on March 31, 1993, declaring that Alabama's public-education system violated Art. I, §§ 1, 6, 13, and 22, and Art. XIV, § 256, Ala. Const. 1901, was a final, appealable order. Because the issues involved in the

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 plaintiffs' complaint and the trial court's orders involved nonjusticiable political questions, the trial court lacked subject-matter jurisdiction[24] to issue the March 31, 1993, order -- or any other order in this case.[25] Therefore, the

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[24]A court may not issue an order in a case if it lacks subject-matter jurisdiction; there must always be a "case" for a trial court to review, i.e., a controversy between at least two adverse parties. Amendment 328, § 6.04(b), Ala. Const. 1901. "The lack of subject matter jurisdiction is not waivable and may be raised at any time by the suggestion of a party or by a court ex mero motu." Greco v. Thyssen Mining Constr., Inc., 500 So. 2d 1143, 1146 (Ala. Civ. App. 1986). "Ex mero motu" is the Latin phrase for "on the court's own motion."

[25]The United States Supreme Court explains nonjusticiable political questions this way:

> "It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 March 31, 1993, order could never become final and appealable; it was void ab initio. Even if it was not void, there is a fundamental problem with one of the grounds upon which that order was based, i.e., the basis of equal protection under the Alabama Constitution of 1901. In Ex parte Melof, 735 So. 2d 1172 (Ala. 1999), this Court determined that an equal protection clause does not exist and has never existed in a combination of §§ 1, 6, and 22, Ala. Const. 1901. Also, with respect to the trial court's August 13, 1991, order, because no party had standing to contest the constitutionality of § 256 and/or Amendment 111, which, among other things, amends § 256, the court lacked jurisdiction. I would vacate all judgments heretofore entered in these cases and then dismiss them.

Peculiar Nature of this Case

On February 2, 2001, Governor Don Siegelman prorated state funds at 6.2%. In order to stop proration from affecting the order in the Equity Funding Case, the Alabama Coalition for Equity ("ACE"), the original plaintiff in the Equity

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departments on one question."

Baker v. Carr, 369 U.S. 186, 217 (1962).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Funding Case, sought a declaratory judgment in the Montgomery Circuit Court. The circuit court granted ACE injunctive relief on February 22, 2001. On appeal to this Court, the intervenors, as well as ACE, raised the issue of the constitutionality of the proration order, based on the orders that had been entered in the Equity Funding Case. It was clear that the finality of the March 31, 1993, order in the Equity Funding Case was critical to any resolution of that issue. We ordered the parties to address the question of the finality of that order, and during the study of that question, discovered that the trial court may well have lacked jurisdiction to rule in the Equity Funding Case. That discovery led to our order to the parties to brief the issues of the jurisdiction of the trial court to rule and the constitutionality of that March 31, 1993, order and all other orders associated with the Equity Funding Case.

This Court has never had to deal with a case as unusual as this one, and it is unusual in several ways. The trial court violated the limits of its own jurisdiction with respect to the other two branches of the civil government of this State, to which the Constitution delegates the power to

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 establish a public-education system. As I explain below, the very name of the case -- "Equity Funding"[26] -- describes the jurisdictional violation committed by the trial court.

While this case was pending in the trial court, the then governor was convicted of a felony; that, in turn, produced the unusual occurrence that several of the plaintiffs realigned themselves as defendants, so that there appeared to be adverse parties and a case and controversy during the 42-day period within which an appeal could be taken. In reality there was no case or controversy and there were no adverse parties. Lacking a case or controversy, the case should have been dismissed. Lacking any disagreement between the parties, there was no case or controversy before the March 31, 1993, order was certified as final on June 9, or during the 42-day appeal period following that date. Nor did the trial court allow any other interested parties to intervene in the case.[27]

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[26]Funding, both its appropriation aspect and spending aspect, is a function of the legislative branch. Art. IV, Ala. Const. 1901.

[27]The University of Alabama and Auburn University filed a motion to intervene on June 8, 1993, within the 42-day period for an appeal, but the trial court denied that motion on July 19, 1993. Even though "the power to regulate and control the public schools is confided to the Legislature," Dickinson v. Cunningham, 140 Ala. 527, 541, 37 So. 345, 348 (1904), the

While the case was pending before the trial court, the

Legislature could not have appealed the trial court's order because it was not properly a party to the case. The Anderton and Pinto classes did not file their intervention motions until after the 42-day appeal period expired. Nevertheless, Justice Houston, concurring in the result, wrote pointedly in Pinto v. Alabama Coalition for Equity, 662 So. 2d 894 (Ala. 1995), as to the odd procedural results in the trial court:

> "I am not a member of the legislative branch or the executive branch of government, whose responsibilities include providing for public education. I am a member of the judicial branch of government, which is enjoined by the Constitution of Alabama of 1901, Article III, § 43, to 'never exercise the legislative and executive powers, or either of them.' This limitation does not impinge upon the judicial duty to interpret the constitution and say what the law is. However, it is in the failure of the defendants, realigned as plaintiffs, and then, after the liability order was entered, realigned as defendants, to challenge the trial court's interpretation of the constitution in the liability order and in the non-final remedy orders that causes me to hold that these intervenors [the Anderton and Pinto classes] were not adequately represented. San Antonio Independent School District v. Rodriguez, [411 U.S. 1 (1973).]"

662 So. 2d at 903-04 (Houston, J., concurring in the result). This peculiar situation must be part of the reason Chief Justice Hooper called the case a "sham." Ex parte James, 713 So. 2d 869, 896 (Ala. 1997) (Hooper, C.J., dissenting). The fact that there existed no adverse party to appeal during that 42-day period contradicts this Court's statement in Ex parte James that "any infirmity allegedly attaching after Governor Hunt left the case was assuredly cured by the participation of the present State parties and the intervenors." 713 So. 2d at 878. In light of the fact that there was no adverse party to appeal the March 31, 1993, order, such a statement represents a shocking denial of reality.

trial judge campaigned for a position on the Alabama Supreme Court as "The Judge for Education Reform." In his campaign literature he stated that he was a "tough judge" because he had ruled "Alabama's education system unconstitutional," "order[ed] the Legislature back to work," and told "a governor and the Legislature to fix the problem." Those public statements ultimately forced his removal from the case while it remained pending. However, before his removal, the trial judge declared his orders final and then continued to order hearings and different forms of relief, in contradiction to the supposed finality of his own order. Using racism as a basis, the trial court declared all of the education portion of Amendment 111, Ala. Const. 1901, unconstitutional, but preserved a portion of the original Art. XIV, § 256, Ala. Const. 1901. He divided the case into two parts -- a "Liability Phase" and a "Remedy Phase" -- a faulty distinction. Then, using one word found in § 256 -- "liberal" -- the trial judge renovated and reformed the entire education system to the tune of an estimated $1 billion and instituted a scheme of continuing supervision by his court of every aspect and agency of the entire Alabama education system,

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 including the Alabama Legislature, the Governor, and the State Board of Education.

The orders issued to promulgate this plan would necessarily require an increase in taxation, amounting to taxation without representation, and would create a "right" to public education which was expressly prohibited by Amendment 111. The trial judge proceeded to set up this program even though the Legislature was not properly a party to the action. He went to great lengths to micromanage the State's school system, to the point of requiring that adequate toilet paper be provided for each student.[28] A trial court in

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[28]Just one of the dozens of different requirements the trial court placed on the defendants in this matter was the following:

> "'Schools shall have appropriate maintenance services that provide for systematic repair and care of the site, buildings and equipment. School buildings and grounds shall be clean, safe and sanitary. Bathroom supplies, including soap, paper towels and toilet paper shall be available in adequate supply at all schools.'"

See VII. A. of the trial judge's December 3, 1993, Remedy Order, Ex parte James, 713 So. 2d 869, 929 (Ala. 1997), attached as an appendix to Chief Justice Hooper's dissent.

The "Liability Order" was even more ambitious:

> "(e) [A]dequate educational opportunities shall consist of, at a minimum, an education that provides

> students with the opportunity to attain the following:
>
> "....
>
> "(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential."

March 31, 1993, Order, Conclusion, ¶ 2.e.ix, Opinion of the Justices No. 338, 624 So. 2d 107, 166 (Ala. 1993). How a trial court judge in Montgomery would have more expertise as to the most minute aspects of the administration of education than both houses of the Alabama Legislature, the Governor, the State Board of Education, and all 67 county boards of education in this State is beyond my ability to conceive. The United States Supreme Court wisely refused to exercise such tremendous power in a 1973 case:

> "The majority of the United States Supreme Court wisely noted in San Antonio Independent School District v. Rodriguez, 411 U.S. at 42-43, 93 S.Ct. at 1301-02:
>
> > "'In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.' Dandridge v. Williams, 397 U.S. 471, at 487 [90 S.Ct. 1153, at 1163, 25 L.Ed.2d 491] (1970). The very complexity of the problems of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

a proper case may hold an act of the Alabama Legislature unconstitutional, but to enter an order that would require the Legislature to pass legislation and spend money on an education project of the trial judge's own making is unprecedented in the history of this State.[29] By its wholesale striking of Amendment 111, the trial court appears to have attempted to create a new right to public education,

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> financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. Jefferson v. Hackney, 406 U.S. 535, at 546-47 [92 S.Ct. 1724, 1731, 32 L.Ed.2d 285] (1972)....'
>
> "Nonetheless, the trial court chose to enter this complex area. No appeal was taken from that decision, and the Alabama Judiciary is now involved in determining fiscal and educational policy."

662 So. 2d at 909-10 (Houston, J., concurring specially).

[29]In addition, one of the bases that the trial court rested his March 31, 1993, "Liability Order" upon was Alabama's "equal protection clause" contained in §§ 1, 6, and 22, a clause that we have since explained does not exist and never has existed in the 1901 Alabama Constitution. See Ex parte Melof, 735 So. 2d 1172 (Ala. 1999). However, in my opinion, the decision in this case depends on an even more fundamental basis, i.e., subject-matter jurisdiction.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 disregarding the expressed wishes of the people as set forth in Amendment 111 to the Alabama Constitution.[30] Even if the

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[30]Justice Houston expressed his concern about the court's infringing on the powers of the Legislature in his special writing in Pinto:

> "One cannot read the trial court's March 31, 1993, liability order without wondering why this was not appealed to this Court (a Court composed of Justices elected from the state-at-large by taxpayers and citizens and parents of school students) and without concluding either that additional taxes must be imposed or that existing educational tax dollars must be redistributed to carry out the mandate of the trial court's order.
>
> "The dreaded 'taxation without representation' may occur if the trial court, for whom the Anderton intervenors had no right to vote, attempts to impose taxes in the remedy phase of this trial to fulfill the duties imposed upon State officials in the liability phase. The assurance that there would be no taxation without representation was a concept upon which this nation was founded. If that concept is not sufficient to provide a class of taxpayers 'a direct, substantial, and legally protectable interest in the proceeding,' I do not know what is!"

662 So. 2d at 902 (Houston, J., concurring specially). He quotes authoritatively in a footnote the following:

> "'"This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary ... ." Rees v. City of Watertown, 19 Wall. 107, 116-117, 22 L.Ed. 72 (1874).'"

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 trial court had had jurisdiction -- and I conclude that it did not -- we should not ignore an abuse of power by the judicial branch that represents an attempt to change our constitution.

It is not surprising that there has been a lack of clarity on several matters in this litigation. The trial court made legislative and executive, instead of judicial, decisions. While some states have been willing to allow their courts to make extensive and endless forays into supervising education in the name of necessity, particularly in this type of litigation, see Chief Justice Hooper's dissent in Ex parte James, 713 So. 2d 869, 906-08 (Ala. 1997), Alabama must not make such a fundamental error. Any change to our constitution must be effected only by the lawfully established amendment process. Under our constitution, the power over public education belongs to the Legislature, not the courts. An attempt to usurp that power by the judicial branch is a fundamental breach of the separation-of-powers doctrine and an improper subject of the court's jurisdiction. Courts issue opinions that are binding on the parties to a particular case and controversy; those opinions have precedential value only

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662 So. 2d at 902 n.4.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 so far as they correctly interpret and faithfully apply the law.

Procedural History

The March 31, 1993, order is but one of numerous orders the Montgomery Circuit Court issued in this case, and it is but one of several the circuit court certified as final, appealable orders.

Those orders, collectively part of what is known as the "Equity Funding Case," originated with a complaint filed in the Montgomery Circuit Court on May 3, 1990, by ACE. Additional plaintiffs filed separate actions, and the circuit court subsequently consolidated those cases. The plaintiffs sought both declaratory and injunctive relief, but did not seek money damages.

The plaintiffs requested a declaration that Alabama's public-education system violated schoolchildren's statutory and constitutional rights to a state-funded education. On August 13, 1991, the circuit court purported to grant plaintiffs' summary-judgment motion, declaring that § 256, Ala. Const. 1901, as amended by Amendment 111, violated the Fourteenth Amendment to the United States Constitution and

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 that all but the first sentence of § 256 as it originally appeared in the Alabama Constitution of 1901 was without force and effect because it violated the Equal Protection Clause of the Fourteenth Amendment.

The trial judge again purported to grant declaratory relief on March 31, 1993. Based on evidence admitted at trial, the trial judge ruled "[t]hat the present system of public schools in Alabama violates the aforesaid constitutional and statutory rights of plaintiffs." Opinion of the Justices No. 338, 624 So. 2d at 166 (Ala. 1993). (For full transcript of March 31, 1993, order, see 624 So. 2d at 110-67.)

The March 31, 1993, order also purported to provide injunctive relief, stating "[t]hat the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize and maintain a system of public schools, that provide equitable and adequate educational opportunities to all school-age children." 624 So. 2d at 166.

On June 9, 1993, the trial judge purported to certify the March 31, 1993, order as a final, appealable order pursuant to Ala. R. Civ. P. 54(b). Because of the rather unusual sequence

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

of events related above, some of the named plaintiffs who were initially defendants again became defendants. Because they had previously supported the plaintiff's position, these defendants understandably did not appeal the March 31, 1993, order within the 42 days required by the Alabama Rules of Appellate Procedure for taking an appeal.

The issue of the finality of the March 31, 1993, order has been raised before by parties in the Equity Funding Case and summarily referenced by this Court. In one of its opinions in this case, this Court operated on the assumption that the March 31, 1993, order was properly certified as a final order under Rule 54(b), Ala.R.Civ.P., and that it had not been appealed or could not be appealed.[31] On June 29, 2001, after

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[31]This Court stated in Pinto v. Alabama Coalition for Equity, 662 So. 2d 894, 898 n.2 (Ala. 1995):

> "Our [April 10, 1995,] order [denying a writ of prohibition as to the Liability Order] stated that the trial court's March 31, 1993, order had become 'final and appealable on July 21, 1993.' Actually, as the statement of facts in this present opinion indicates, that March 31, 1993, order had become final, and therefore appealable, on June 9, 1993. On July 21, 1993, the 42-day appeal period expired, with no appeal having been taken."

In Ex parte James, 713 So. 2d 869 (Ala. 1997), this Court briefly addressed the certification question. This Court commented in its advisory opinion of April 27, 1993, on the

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 reviewing an appeal dealing with the proration of Alabama's education system, we requested the parties to brief this Court as to whether the Montgomery Circuit Court had issued a final judgment in this case. Although this question did not come before this Court in an appeal from the order, the finality of which was being questioned, this Court has jurisdiction to review the finality of the March 31, 1993, order because the procedural status of the case at that time as follows:

> "This order is not presently appealable, because the trial court has retained jurisdiction in order to address other aspects of this litigation. ...
>
> "The Justices typically refuse to answer questions involving matters that are the subject of pending litigation. The question posed by Senate Resolution 97, however, is of great importance to the people of the State of Alabama and to the Legislature, and your request for an Advisory Opinion indicates that you are interested in promptly addressing the matters required to be addressed by the order of the circuit court in the two consolidated cases.
>
> "Because the legal issues presented in those cases could be raised on appeal, provided an appeal should be taken within the time provided for by Rule 4, Ala.R.App.P., we deem it both appropriate and advisable that we call your attention to some of the principles of law that govern us as we respond to your inquiry."

Opinion of the Justices No. 338, 624 So. 2d at 108-09. There is no indication that any party addressed the justiciability issue at that time.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 trial court did not have subject-matter jurisdiction to issue that order. We may review a question of lack of subject-matter jurisdiction at any time:

> "[L]ack of subject-matter jurisdiction is not waivable and may be raised at any time by either the parties or by the court, ex mero motu. Ex parte Johnson, 715 So. 2d 783 (Ala. 1998); Greco v. Thyssen Mining Constr., Inc., 500 So. 2d 1143 (Ala. Civ. App. 1986). '"The question of jurisdiction is always fundamental, and if there is an absence of jurisdiction, over the person, or the subject matter, a court has no power to act, and jurisdiction over the subject matter cannot be created by waiver or consent."' Poff v. General Motors Corp., 705 So. 2d 442, 443 (Ala. Civ. App. 1997) (quoting B.F. Goodrich Co. v. Parker, 282 Ala. 151, 155, 209 So. 2d 647, 650 (1967))."

State Dep't of Rev. v. Medical Care Equip., Inc., 737 So. 2d 471, 473 (Ala. Civ. App. 1999).

> "Furthermore, the lack of subject matter jurisdiction is an issue that is reviewable at any time, whether or not it has been preserved by way of objection."

Ex parte Tuck, 707 So. 2d 292, 294 (Ala. Crim. App. 1997). With this opinion, I address that issue specifically and in a more detailed manner than has heretofore been provided.

The Orders

August 13, 1991, Order Certified as Final on October 18, 1991

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

Section 256, as amended by Amendment 111, expressly states that it is the policy of the State to promote education, but that there is no right to an education at public expense.[32] The circuit court ruled that Amendment 111

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[32]Section 256, as amended by Amendment 111, states:

> "It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.
>
> "The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.
>
> "To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The stated reason for its ruling was that other parts of Amendment 111, adopted in 1956, were designed to permit the State to maintain a segregated public-school system in spite of the United States Supreme Court's ruling in Brown v. Board of Education, 347 U.S. 483 (1954). However, those parts of Amendment 111, which allowed the Legislature to authorize parents or guardians of children to elect to send the children to schools comprised of members of their own race, were never implemented by the Legislature; therefore, no injury ever occurred because of that language.

The August 13, 1991, order, although certified as final pursuant to Rule 54(b), Ala.R.Civ.P., was never appealed.

March 31, 1993, Order Certified as Final on June 9, 1993

The circuit court bifurcated the nonjury trial into what it called a "Liability Phase" and a "Remedy Phase." Trial in the Liability Phase began on August 3, 1992, and was completed on August 27, 1992. Not until March 31, 1993, did the trial

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> schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide."

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 court issue its ruling purporting to grant declaratory and injunctive relief, which was improperly titled a "Liability Order." The term "Liability Order" suggests that the trial court found only that some legal standard had been breached and that no remedy had yet been provided. However, on the face of the March 31, 1993, order, an injunction -- a form of remedy -- was issued, ordering state officials to establish a school system meeting as yet unidentified requirements of State law.

The March 31, 1993, order also set the matter for a status conference to be held on June 9, 1993 "for the purpose of establishing the procedures and timetable for determination of an appropriate remedy in this case." 624 So. 2d at 166. Even though the trial court certified the March 31, 1993, order as final, and therefore appealable, on June 9, 1993, it held a hearing the same day to determine the dates for further proceedings. It also issued an order purporting to provide further injunctive relief to the plaintiffs even though the period within which to appeal the March 31, 1993, order had not elapsed. In other words, the circuit court itself, by continuing to hold hearings and provide further relief, did

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 not treat the March 31, 1993, order as final under recognized legal standards, even after it had certified it as such.

June 9, 1993, Certification of of March 31 Order as Final

On June 9, 1993, the circuit court issued an order that (a) directed the defendants to cooperate with the plaintiffs in developing a remedy, (b) directed the defendants to submit a proposed remedy by a day certain, (c) appointed Professor Wayne Flynt as "court facilitator," (d) allowed attorney fees and costs to the plaintiffs, and (e) "pursuant to Rule 54(b), the Court certifie[d] th[e] Order as a final judgment."

December 3, 1993, Order Certified as Final on October 6, 1995

The defendants submitted a proposed "Remedy Plan," which the Circuit Court, subject to a "fairness hearing," incorporated into an order it issued on October 22, 1993. Following a fairness hearing on November 18, 1993, the circuit court incorporated a modified Remedy Plan into an order it issued on December 3, 1993.

A copy of the entire Remedy Order is found as an appendix to Chief Justice Hooper's dissent in Ex parte James, 713 So. 2d 869, 923 (Ala. 1997). By that order, the circuit court judge used legislative and executive powers to conform the

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Alabama school system with his vision for public-education reform. That order contained, in embryonic form, further orders the circuit court would be required to issue to accomplish that reform. Those orders would have ensured, among other things, that the Legislature appropriated sufficient moneys to fund the program, that teachers would be trained and paid in accordance with the trial court's specifications, and that students would be inculcated with the values the trial judge believed were important.

October 6, 1995, Order Certified as Final on October 6, 1995

Because of a series of events I recount in detail at the end of this opinion, the December 3, 1993, order was not made final until October 6, 1995, by an order of the trial judge who had succeeded the original trial judge after he was removed from the case by the Judicial Inquiry Commission for his campaign conduct relating to the case. In its opinion, the Judicial Inquiry Commission stated that he was "disqualified from continuing to sit in the case." Between December 3, 1993, and May 19, 1995, the circuit court had denied certain parties the right to intervene. This Court

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 reversed that order on May 19, 1995. Pinto v. Alabama Coalition for Equity, 662 So. 2d 894 (Ala. 1995).

The circuit court purported to certify a "Remedy Order" as final, and therefore appealable, on October 6, 1995. The succeeding judge made one modification to the original trial judge's December 3, 1993, "Remedy Order" by striking paragraph XI(F). That paragraph stated that the trial court retained jurisdiction to issue further orders. Yet at the same time the trial judge asserted the trial court's "inherent power to issue such orders as necessary to render its judgments effective," Governor Fob James filed a timely appeal of that order.

The Alabama Supreme Court vacated the December 3, 1993/October 6, 1995, order on January 10, 1997, to the extent that it concerned the implementation of the Remedy Plan. Ex parte James, 713 So. 2d 935 (Ala. 1997). This Court then remanded the case to the trial court with directions that that court stay the action "while retaining jurisdiction" for one year to allow coordinate branches of the government to formulate a plan complying with the March 31, 1993 order.

February 6, 1996, Order Reversed on January 10, 1997

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

On February 6, 1996, after the December 3, 1993/October 6, 1995, order had been certified as final pursuant to Rule 54(b), the circuit court issued another order, this time appointing an independent monitor to report to the trial court regarding the implementation of the remedy plan. The trial judge issued that order in spite of the fact that she had certified the October 6, 1995, order as final under Rule 54(b), Ala.R.Civ.P., and the Equity Funding Case was pending on appeal. Like the original trial judge, she did not treat the order as final and appealable, in spite of her own Rule 54(b) certification.

May 15, 2001, Order

Following this Court's decision on January 10, 1997, there were no further proceedings until March 21, 2001, when certain plaintiffs moved to reopen the case for remedy proceedings because they believed that no adequate remedy plan had been developed. On May 15, 2001, the trial judge ordered the State Board of Education to file its proposed remedy plan by October 15, 2001, and ordered responses from the plaintiffs to that proposed plan by November 21, 2001. She set the case for hearing on December 5, 2001.

Finality of the March 31, 1993, Order

Courts have inherent authority to issue final judgments:

> "The Constitution of Alabama of 1901 vests the judicial power in the Unified Judicial System. Ala. Const. 1901, amd. 328, §§ 6.01(a). The judicial power, at its core, is the power to render final judgments in cases before the courts. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ('It is emphatically the province and duty of the judicial department to say what the law is.'); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (stating that the Constitution gives the 'Judiciary the power, not merely to rule on cases, but to decide them'); Sanders v. Cabaniss, 43 Ala. 173, 177 (1869) (stating that the judicial power requires the exercise of judgment in a case or controversy). Inherent in the constitutional obligation to render final judgments is the power to conduct judicial proceedings in an efficient and effective manner."

Ex parte Segrest, 718 So. 2d 1, 5 (Ala. 1998). If an Alabama trial court goes further and issues an order it does not have jurisdiction to enter, the order is void and can never be final. It is this Court's duty to vacate such an order.

The rationale behind a Rule 54(b) certification is that it is more efficient to have a single appeal than to have multiple appeals. Without interlocutory appeals, a trial will proceed more rapidly to completion. The basis for 54(b) certification entails more than mere policy considerations. A trial court continues to have jurisdiction until a case is

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 final, and two courts (trial and appellate) cannot have jurisdiction at the same time. In this case, however, Rule 54(b) certification has been used to multiply, rather than to reduce, the number of appeals.

A commonly used definition of the term "final judgment" is that it is an order that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). The distinction is clearer in cases at law where money damages are the remedy sought. Thus, where a court issues an order establishing liability for damage but has delayed hearings on the amount of damages, it has not issued a final judgment. Moody v. State ex rel. Payne, 351 So. 2d 547 (Ala. 1977).

For example, consider a typical action in negligence arising out of injuries sustained in an automobile accident. The question of breach of duty is analytically distinct from the question of the amount of damages. It is not necessary to determine the amount of damages in order to determine whether there has been a breach of duty. If a driver crosses the centerline because he is distracted while talking on his cellular telephone and hits an oncoming car, his breach of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

duty can be determined without knowing what the damages are. Yet a judgment entered on his liability would not be final and appealable until damages are determined and awarded.

By the eighteenth century, English courts were applying different rules in equity cases. Appeals might be taken from interlocutory orders and decrees as well as from final decrees. Crick, The Final Judgment Rule as a Basis for Appeal, 41 Yale L.J. 539, 541-43, 545-48, 550 (1932). The trend in American courts, of the other hand, has been to apply the common-law rule of final judgments to equity cases. 41 Yale L.J. at 541-43, 545-48, 550.

During the course of this litigation the circuit court judges certified several orders as final, but it is primarily the March 31, 1993, order with which this Court is concerned. Rule 54(b), Ala.R.Civ.P., states:

> "When more than one claim for relief is presented in an action ... or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

The common-law rule is that orders may not be reviewed until all matters in a particular case are final. Because modern

rules of civil procedure generally provide for more liberal joinder of parties and claims in a single action, it is necessary also to give some flexibility to the finality rule. That, in part, is the purpose of Rule 54(b). That rule provides that a trial court may certify certain orders as final, and therefore appealable, even if all claims of all parties have not been finally resolved by the trial court.[33] The plaintiffs in this case argue that the March 31, 1993, order resolved fewer than all claims and that the resolved claim was separate and distinct from the unresolved ones. However, Rule 54(b) does not change the common-law standard of finality as to individual claims or parties. A Rule 54(b) certification cannot make final an order that is not inherently final, such as the denial of a motion for a summary judgment. It is my opinion that the March 31, 1993, order resolved nothing at all.

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[33]For example, Rule 54(b) would allow a circuit court judge to certify as final a summary judgment granted for one defendant in a multiple-defendant case in order to expedite appeal of that particular judgment. Otherwise, a trial might proceed as to the other defendants. Even in that situation, however, the summary judgment granted the one defendant must still meet the rule for finality, i.e., it must adjudicate all claims as to that defendant.

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The plaintiffs contend that one of the claims was made final by the order of March 31, 1993; however all of the claims are intertwined and focus on the alleged unconstitutionality of Alabama's public-school system. Whether any claim is or is not final depends upon whether the order reaches a definitive resolution. The Rule 54(b) partial-claim adjudication rule stated above applies to one or more, but not all, of the claims being adjudicated to a complete resolution. It does not allow an incomplete resolution of one claim. Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 742-744 (1976) (interpreting Rule 54(b), Fed.R.Civ.P.).

In many cases, the award of equitable relief is functionally, if not essentially, the same as the award of damages, and there clearly is no need for more than one final order in a particular action. For example, ordering specific performance of a contract is functionally the same as awarding damages. The order is final, and although the damages award is not an order directed personally to the defendant, if he does not pay voluntarily, the court may have to issue subsequent orders to execute the judgment. Other equity cases may not bear as marked a similarity to cases at law for damages. For

example, an order to partition real estate may be final even though the court issues a subsequent order calling for an accounting, which may also be final.

The plaintiffs argue that this case has been properly divided into a "Liability Phase" and a "Remedy Phase" that are analytically distinct. In other words, liability can be determined without determining an appropriate remedy. Additionally, the plaintiffs argue that because the remedy sought and awarded in this case is equitable in nature, this action can have more than one final order. The intervenors in the proration case (the universities), which have filed briefs in response to this Court's question as to the finality of the March 31, 1993, order, argue that the distinction between law and equity has been abolished in Alabama and that the same finality rule that applies to cases where the plaintiff seeks damages at law should apply to cases where the plaintiff seeks an equitable remedy. In short, the plaintiffs argue that the case should be treated as a case in equity, while the intervenors argue that the case should be treated like any action at law for purposes of applying the final-order rule.

The question of the finality of an order is one of jurisdiction. "A final judgment is necessary to give jurisdiction to this court on appeal." Marsh v. Wittmeier, 280 Ala. 172, 173, 190 So. 2d 920, 920 (1966).[34] The purpose of Rule 54(b), Ala.R.Civ.P., is to make final "an order which does not adjudicate the entire case but as to which there is no just reason for delay in the attachment of finality." Foster v. Greer & Sons, Inc., 446 So. 2d 605, 609 (Ala. 1984), overruled on other grounds, Ex parte Andrews, 520 So. 2d 507 (Ala. 1987).

Rule 54(b) does not create an exception to the rule that finality is required in order for a judgment to be appealable.

> "[N]one of the procedures that this Court has adopted to facilitate the policies underlying Rule 54(b) should be construed as relaxing the Rule 58 requirements for the entry of a proper judgment .... On the contrary, these provisions, taken in conjunction with the cases construing them, compel the conclusion that if an order entered in a case with multiple claims 'does not meet the requirements

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[34]Section 12-22-2, Ala. Code 1975, provides:

> "From any final judgment of the circuit court or probate court, an appeal lies to the appropriate appellate court as a matter of right by either party, or their personal representatives, within the time and in the manner prescribed by the Alabama Rules of Appellate Procedure."

> of Rule 54(b),' then 'no formal "judgment" [has been] entered.'"

Burlington Northern R.R. v. Whitt, 611 So. 2d 219, 223 (Ala. 1992), quoting Balboa Ins. Co. v. Sippial Elec. Co., 379 So. 2d 579 (Ala. 1980).

> "A final judgment is an 'order that conclusively determines the issues before the court and ascertains and declares the rights of the parties involved.' An order or ruling that 'adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties.'"

Lunceford v. Monumental Life Ins. Co., 641 So. 2d 244, 246 (Ala. 1994) (citations omitted).

The proper use of Rule 54(b) dictates that even in actions involving multiple claims or parties there must be full adjudication of one claim or of all claims as to one party. Therefore, a ruling that holds a defendant liable without fully deciding the remedies is not final and cannot be the subject of a Rule 54(b) certification. A prime example of this type of ruling was present in Liberty Mutual Insurance Co. v. Wetzel, supra. In that case, the trial judge, by entering a partial summary judgment, held the defendant liable but failed to determine the remedies. The United States Supreme Court held that "despite the fact that the District

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Court undoubtedly made the findings required under the Rule,[35] had it been applicable, those findings do not in a case such as this make the order appealable pursuant to 28 U.S.C. § 1291 [the federal equivalent to §12-22-2, Ala. Code 1975]" 424 U.S. at 743-44, because orders "where assessment of damages or awarding of other relief remains to be resolved have never been considered to be 'final' within the meaning of 28 U.S.C. § 1291." 424 U.S. at 744.

In this case, the trial court purportedly found liability and then ordered some remedies in its March 31, 1993, order, but left determination of other remedies for a later date. The order is not, by its own terms, a final disposition of the claim at issue in the case; therefore, it does not meet the standards of Rule 54(b). "[T]he trial court cannot confer appellate jurisdiction upon this court through directing entry of judgment under Rule 54(b) if the judgment is not otherwise 'final.'" Robinson v. Computer Servicenters, Inc., 360 So. 2d 299, 302 (Ala. 1978). Thus, the March 31, 1993, order cannot be considered a final, and therefore appealable, order.

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[35]This is a reference to Rule 54(b), Fed.R.Civ.P. "Rule 54(b) [Ala.R.Civ.P.] is a verbatim copy of its counterpart in the Federal Rules of Civil Procedure." Cates v. Bush, 293 So.2d 535, 538 (Ala. 1975).

This Court explained the requirement in Jewell v. Jackson & Whitsitt Cotton Co., 331 So. 2d 623, 625 (Ala. 1976). There the Court stated:

> "A final judgment is a terminative decision by a court of competent jurisdiction which demonstrates there has been complete adjudication of all matters in controversy between the litigants within the cognizance of that court. That is, it must be conclusive and certain in itself. All matters should be decided; damages should be assessed with specificity leaving the parties with nothing to determine on their own. A judgment for damages to be final must, therefore, be for a sum certain determinable without resort to extraneous facts."

(Citations omitted.) Nevertheless, as stated earlier, where a court anticipates further "remedies," an order will not be considered final. In other words, the Court erroneously fashioned different rules for finality in a case seeking equitable relief as opposed to one seeking money damages.

Such a ruling is at odds with the elimination of the distinction between law and equity, accomplished in Alabama in 1973.[36] This Court has emphasized on several occasions that "it should be remembered that the procedural differences between law and equity have been abolished and there is only one form of action, known as a 'civil action.'" Du Boise v. Brewer, 349

[36]Rule 2, Ala.R.Civ.P., states that "[t]here shall be one form of action to be known as 'civil action.'"

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 So. 2d 1086, 1087 (Ala. 1977). It is also at odds with other rulings of this Court, where the rule of requiring "complete disposition" of a claim has been applied in cases seeking equitable remedies. See Tubbs v. Brandon, 366 So. 2d 1119, 1120 (Ala. 1979) (applying the final-judgment rule in dismissing an appeal from an order in an action to enjoin the violation of a restrictive covenant); Chambers v. Chambers, 356 So. 2d 634, 635 (Ala. 1978) (dismissing an appeal because "[a]s yet the trial court has not decided whether the property can be equitably divided, or whether a sale is necessary, or whether the multiple plaintiffs are entitled to the accounting requested"); Cates v. Bush, 293 Ala. 535, 307 So. 2d 6 (1975) (applying the final-judgment statute in dismissing an appeal from a decree in a case involving, among other things, requests for sale of land); Cherokee County Hospital Bd. v. Retail, Wholesale & Department Store Union, 294 Ala. 151, 313 So. 2d 514, 517 (1975) (dismissing an appeal in an action seeking an injunction).

It would be counterproductive to our unified system of law and equity to continue the distinction set forth in James v. Alabama Coalition for Equity; the result being that some

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 cases would require finality and others would not, depending on the type of remedy sought. Moreover, to do so ignores the Supreme Court's words in Liberty Mutual Insurance v. Wetzel: "[W]here assessment of damages or awarding of other relief remains to be resolved," the order will not be considered final. 424 U.S. at 744 (emphasis added).

Even in James, this Court quoted the proper standard for finality but elected to draw a distinction between final judgments at law as opposed to those at equity. Quoting Newton v. Ware, 271 Ala. 444, 450, 124 So. 2d 664, 670 (1960), the Court stated: "'If there is a decree directing further proceedings under the direction of the court in order to make the final decree effective, such decree is interlocutory and remains within the control of the court because as to such decree and further proceedings thereunder the cause remains in fieri.'" 713 So. 2d 945.

That description precisely defines the March 31, 1993, order, because the order itself expressly provided for further proceedings "for the purpose of establishing the procedures and timetable for determination of the appropriate remedy in this case." Appendix to The Opinion of the Justices No. 338,

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 624 So. 2d at 166. Thus, by this Court's own words, if we ignore the distinction between law and equity, as we should, the March 31, 1993, order represented an interlocutory order, which the trial court could never make final unless he had fashioned a remedy.

This Court directed the parties to address the issue whether the March 31, 1993, order was a final, and therefore appealable, order. Although the March 31, 1993, order is the only one directly at issue, the question cannot be answered without considering its relationship to the other orders entered in this case that were certified under Rule 54(b) or that were reviewed on appeal. The record shows that the circuit court contemplated the issuance of further orders and that it, in fact, issued further orders. The "Liability Order" contained partial remedies, demonstrated in part by the fact that the trial court stated that further proceedings would be necessary. In fact, in March of this year, the plaintiffs filed a motion to reopen the remedy proceedings and seek to refine and implement the "declaratory judgment" relief of the March 31, 1993, order. That order is still not final; it can

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 never be final. I now consider whether the orders addressing the claims in this case could ever become final.

The Unconventional Aspect of this Lawsuit

Trying to determine whether this particular matter is equitable or legal in nature is the main problem with trying to determine whether the March 31, 1993, order is final. But this problem also provides the resolution to the matter because courts do not have subject-matter jurisdiction over political questions.

The parties have cited and discussed numerous Alabama cases dealing with the issue of finality. The nature of this lawsuit and the various orders it has engendered is such that the orders are not susceptible to analysis by traditional judicial and common-law rules. Legal remedies and traditional equitable remedies have in common the purpose of restoring an injured party to his status before the injury or of making him whole. Those remedies, despite their differences, are designed to return the parties to the status quo they occupied before the alleged injury. The order of March 31, 1993, in spite of its apparent form as a judicial remedy, is not judicial in nature; it is a political decree, in the nature of a

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legislative enactment or an executive order. The nonjudicial character of the order makes it impossible for that order to be a final judgment. Legal remedies return the parties to their condition before the injury; the trial judge's order of March 31, 1993, creates an entirely new relationship between the parties in the future. See "Liability Order," attached as appendix to Opinion of the Justices No. 338, 624 So. 2d at 110-67, for examples of the trial judge's requirements, most of which are not legally quantifiable by the Alabama Constitution.

This lack of judicial character to the March 31, 1993, order is the primary reason it was not a final, appealable order. It was a political decree issued to coequal branches of the government, one of which -- the Legislature -- was not properly a party to the case.[37] The order did not direct a

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[37]Can the Legislature be named a party in such an action? It is questionable whether it can. As this opinion illustrates, if the court questions the wisdom or policy choices of the Legislature without finding it "clear beyond a reasonable doubt that [the Legislature is acting] violative of the fundamental law," State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 334, 186 So. 487, 489 (1939), and then in order to fashion an appropriate remedy, needs the Legislature as a party, surely we have a political question of the first order. And has not the court, in ordering the Legislature to act in such a situation, simply remade itself into a superlegislature with self-appointed authority to overrule the Legislature at

party to perform an identifiable legal duty, which the court had authority to issue. The order did not provide a judicial remedy but pretended to establish an ongoing relationship between the trial court and the Legislature and the governor. The circuit court, by that order and by the others that followed it, established itself as the Superintendent of the Alabama Public Education System. The potential term of that position was, at the time the order was issued, and is now, indeterminable. The number of prospective orders is also indefinite.

Although this type of "lawsuit" has not been common to Alabama, recent legal history shows that it has occurred often enough in other states to acquire certain labels and identifying characteristics.[38]

The Structural Injunction

A traditional injunction seeks to restore a party by ordering an offending party to cease some harmful behavior or

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will, even without a case against the Legislature being filed? Neither the constitution nor the most expansive jurisprudential philosophy would support such arrogation of power by this Court, much less by a local trial court judge.

[38]See Ex parte James, 713 So. 2d 869, 912-17 (Ala. 1997) (Hooper, C.J., dissenting).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 to undo some harm done or to perform a specific legal duty. It is judicial and remedial in nature. It is designed to restore a party following some harm done or to ensure a discontinuation of some harmful action. Injunctions must be clear, and they must be confined to the wrong done. "Typically in these traditional injunctions, the injunctive order requires or prohibits a discrete, unitary act; when the injunction is issued, the case is over." Dan B. Dobbs, The Law of Remedies 641 (2d ed. 1993).

The types of "remedy" imposed in equity funding cases in some states are so different that they have been termed "structural injunctions," meaning that their purpose is to restructure a governmental institution, a power clearly outside the purview of the judiciary. In order to restructure the education system, the trial judge must restructure the relationship of the three branches of government. This de facto amending of the constitution usurps not only the powers of the legislative and executive departments, but also usurps a basic principle of the rule of law requiring the consent of the governed. The people of Alabama have not entrusted to the courts the executive and legislative powers, nor have they

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 delegated to the courts the authority to make major structural changes to the Alabama Constitution. The trial judges in this case appear to have acted less as judicial officers and more as legislators, executive branch agents, and school superintendents.

The school-equity funding cases involve injunctive remedies of a very different nature from those sought in the traditional lawsuit. The typical structural injunction is aptly described

> "as a cycle in which the court issues a general injunctive decree, which is followed by disobedience or unsatisfactory compliance, which is followed by further hearings, and a supplemental decree stating in more detail what is required of the defendant. The cycle is then repeated several times, with each decree becoming more precise in its demands."

Dobbs at 642. In this case there have already been numerous orders certified as final pursuant to Rule 54(b) or actually appealed. It is clear that the trial court expected to issue injunctions on a continuing basis, similar to a chief executive officer managing a business, or a superintendent managing a school system. Because those management decisions are based largely on policy judgments rather than on legal judgments, this Court would be called upon on appeal to

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 perform the duties of a board of directors for a corporation or a school board for a school system rather than the duties of a court. And an appeal would presumably be available every time the trial court issued a "remedy" that it considered necessary for the "equitable and efficient" functioning of the state school system.

Twenty-six years ago, Professor Abraham Chayes made this observation:

> "We are witnessing the emergence of a new model of civil litigation and, I believe, our traditional conception of adjudication and the assumptions upon which it is based provide an increasingly unhelpful, indeed misleading framework for assessing either the workability or the legitimacy of the roles of judge and court within this model."

Abraham Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (May 1976). It is not at all surprising to find that the traditional common-law doctrine of finality cannot be applied to a case like the Equity Funding Case. The workability of the rules of procedure are predicated on the distinction between law and politics, and upon the separation of the legislative, judicial, and executive powers.

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Characteristics of the Traditional Lawsuit as opposed to an Action Seeking a Structural Injunction

Western law, particularly constitutional law, builds upon a distinction between law and politics. This is the fundamental separation between the political (i.e., legislative and executive) and judicial branches of government. Political bodies render decisions on policy matters but as to the manner of reaching those decisions, there is a fundamental difference between the judicial process and the political process. Judicial bodies are set up to operate very differently from legislative and executive bodies with respect to the rendering of decisions or judgments. Professor Chayes provides a very useful summary of what he calls the "defining features" of a traditional lawsuit:

> "(1) The lawsuit is bipolar. Litigation is organized as a contest between two individuals or at least two unitary interests, diametrically opposed, to be decided on a winner-takes-all basis.
>
> "(2) Litigation is retrospective. The controversy is about an identified set of completed events: whether they occurred, and if so, with what consequences for the legal relations of the parties.
>
> "(3) Right and remedy are interdependent. The scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get

> compensation measured by the harm caused by the defendant's breach of duty -- in contract by giving plaintiff the money he would have had absent the breach; in tort, by paying the value of the damage caused.
>
> "(4) The lawsuit is a self-contained episode. The impact of the judgment is confined to the parties. If plaintiff prevails there is a simple compensatory transfer, usually of money, but occasionally the return of a thing or the performance of a definite act. If defendant prevails, a loss lies where it has fallen. In either case, entry of judgment ends the court's involvement."

Chayes at 1282-83 (footnotes omitted).

Comparing the traditional lawsuit to the public-interest lawsuit, Chayes notes that the public-interest lawsuit, which represents a court's attempting to act improperly in the stead of a Legislature, differs at every point from the traditional lawsuit.

> "The party structure is sprawling and amorphous, subject to change over the course of the litigation. ... The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders -- masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continuing involvement in administration and implementation."

Chayes at 1284.

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The litigation before us does not focus on a particular wrong done to some plaintiff or group of plaintiffs but on the application of regulatory policy to the activities of a different branch of civil government. In this type of case, the court does not apply the law to provide a remedy for a past wrong but establishes a regime ordering the manner of the future interaction of the parties and subjects the parties to continuing judicial oversight.

> "The traditional model of adjudication was primarily concerned with assessing the consequences for the parties of specific past instances of conduct. This retrospective orientation is often inapposite in public law litigation, where the lawsuit generally seeks to enjoin future or threatened action, or to modify a course of conduct presently in train or a condition presently existing."

Chayes at 1296 (footnotes omitted).

> "In the remedial phases of public law litigation, factfinding is even more clearly prospective. As emphasized above, the contours of relief are not derived logically from the substantive wrong adjudged, as in the traditional model. The elaboration of a decree is largely a discretionary process within which the trial judge is called upon to assess and appraise the consequences of alternative programs that might correct the substantive fault. In both the liability and remedial phases, the relevant inquiry is largely the same: How can the policies of a public law best be served in a concrete case?

> "In public law litigation, then, factfinding is principally concerned with 'legislative' rather than 'adjudicative' fact. And 'fact evaluation' is perhaps a more accurate term than 'factfinding.' The whole process begins to look like the traditional description of legislation: Attention is drawn to a 'mischief,' existing or threatened, and the activity of the parties and court is directed to the development of on-going measures designed to cure that mischief. Indeed, if, as is often the case, the decree sets up an affirmative regime governing the activities in controversy for the indefinite future and having binding force for persons within its ambit, then it is not very much of a stretch to see it as, pro tanto, a legislative act."

Chayes at 1296-97 (footnotes omitted).

> "[T]he prospective character of the relief introduces large elements of contingency and prediction into the proceedings. Instead of a dispute retrospectively oriented toward the consequences of a closed set of events, the court has a controversy about future probabilities. Equitable doctrine, naturally enough, given the intrusiveness of the injunction and the contingent nature of the harm, calls for a balancing of the interests of the parties."

Chayes at 1292-93.

In addition, the remedy is independent of the right violated and is usually structural in nature.

> "The centerpiece of the emerging public law model is the decree. It differs in almost every relevant characteristic from relief in the traditional model of adjudication, not the least in that it is the centerpiece. The decree seeks to adjust future behavior, not to compensate for past wrong. It is deliberately fashioned rather than

> logically deduced from the nature of the legal harm suffered. It provides for a complex on-going regime of performance rather than a simple, one-shot, one-way transfer. Finally, it prolongs and deepens, rather than terminates, the court's involvement with the dispute."

Chayes at 1298.

> "At this point, right and remedy are pretty thoroughly disconnected. The form of relief does not flow ineluctably from the liability determination, but is fashioned ad hoc. In the process, moreover, right and remedy have been to some extent transmuted. The liability determination is not simply a pronouncement of the legal consequences of past events, but to some extent a prediction of what is likely to be in the future. And relief is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved."

Chayes at 1293-94 (footnotes omitted).

Moreover, in such cases, the lawsuit is ongoing.

> "Once the ongoing remedial regime is established, the same procedure may be repeated in connection with the implementation and enforcement of the decree. Compliance problems may be brought to the court for resolution and, if necessary, further remediation. Again, the court will often have no alternative but to resort to its own sources of information and evaluation.
>
> "I suggested above that a judicial decree establishing an ongoing affirmative regime of conduct is pro tanto a legislative act. But in actively shaping and monitoring the decree, mediating between the parties, developing his own sources of expertise and information, the trial

> judge has passed beyond even the role of legislator and has become a policy planner and manager."

Chayes at 1301-02 (footnotes omitted).

Characteristics of the Equity Funding Case

The course of events in the Equity Funding Case place it squarely in the public-interest-lawsuit category, not the traditional-lawsuit category. The traditional rules of procedure are not designed for the public-interest lawsuit because by its very nature that type of lawsuit involves a legislative and an executive determination rather than a judicial determination. The common-law rule as to the finality of judgments does not work with respect to public-interest litigation because that rule is designed for judicial proceedings, not determinations by the legislative branch or the executive branch. I now analyze the Equity Funding Case as public-interest litigation.

(1) The parties involved. A trait of public-interest litigation is that it directly affects a vast number of persons, many or most of whom are not represented as parties in the litigation. The Equity Funding Case involves every school-age child in the State of Alabama and every taxpayer. In the Liability Order of March 31, 1993, and the order of

December 3, 1993, the trial court presumed to order the Legislature to raise and appropriate moneys to fund the circuit court judge's vision for Alabama's education system. Legislators are bound by oath to uphold the constitution and the laws of Alabama and the United States. Can the Legislature properly be a party to such an action and how can the Legislature be bound by a court order in a proceeding in which it is not a party? How does a Legislature defend itself in court, even if it is properly a party? How does it even appear in court? The Equity Funding Case affects multiple parties and people not even represented in the proceedings and is, therefore, more akin to the public-interest lawsuit than a traditional lawsuit. To enact a judge's public policy vision for the schools represents an attempt to have the judiciary act in a legislative capacity.

The plaintiffs' counsel have argued that the orders in this case are simply equitable remedies long recognized and enforced by the courts. However, there are practical difficulties with that position. Courts use their contempt powers to enforce injunctions. Are we to believe that the circuit judge of Montgomery County has the power to hold the

Legislature in contempt and that it has the power to confine those legislators who do not vote to appropriate funds sufficient to finance the judge's vision for public-school education? If those confined legislators prove recalcitrant and continue to refuse to comply with those orders, will the judge commandeer the Department of Revenue, and, in its stead, commission officers who would be willing to impose a tax on the people of Alabama in order to fund this newly revised education system?

(2) Prospective in nature. The course of this litigation was not designed to determine if harm had been done to any particular party or parties with a view to fashioning a remedy that would restore that party or those parties to the status quo ante. It involved the kind of fact-finding process characteristic of the legislative process. It was designed to identify a social problem in the Alabama education system. The legislative and executive branches apparently did not respond to the plaintiffs' satisfaction to perceived problems in Alabama's education system; therefore, they sought a remedy in court by way of a judicial decision. They found fault with the current education system, and instead of seeking new

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 legislation or a constitutional amendment, they appeared before the trial court, as if it were the Legislature, with what they thought was a serious social problem, to lobby for "better" funding to enact their vision of a proper education system. The trial judge's fact-finding did not fix fault on anyone in particular. The trial judge engaged in fact-finding that sought to discover a response to the general complaint that something ought to be done to better manage Alabama's flawed education system.

(3) The remedy involved. The injunction sought and awarded in this case was clearly structural, not restorative, in nature. The orders were not remedies designed to restore parties who have been wronged in some particular way. Those orders were designed to restructure the largest single portion of Alabama's civil government, its public life, and its public-school system. Those orders require increased taxation of Alabama citizens by an official most Alabamians had no say in electing. They impose duties on executive branch officers, and they even dictate what subjects students must study, what

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 they must read, and what values the public-school teachers must inculcate in these students.[39]

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[39]For example, the "Liability Order" contained the following language:

> "(e) adequate educational opportunities shall consist of, at a minimum, an education that provides students with opportunity to attain the following:
>
> > "(i) sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years;
> >
> > "(ii) sufficient mathematic and scientific skills to function in Alabama, and at the national and international levels, in the coming years;
> >
> > "(iii) sufficient knowledge of economic, social, and political systems generally, and of the history, politics, and social structure of Alabama and the United States, specifically, to enable the student to make informed choices;
> >
> > "(iv) sufficient understanding of governmental processes and of basic civic institutions to enable the student to understand and contribute to the issues that affect his or her community, state, and nation;
> >
> > "(v) sufficient self-knowledge and knowledge of the principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being;
> >
> > "(vi) sufficient understanding of the arts to enable each student to appreciate his or her cultural heritage and the cultural heritages of

(5) The ongoing nature of the case. This case entails ongoing oversight and management of the entire Alabama system of public education. As this Court stated in Pinto: "[T]he court intended to oversee and direct the processes of education 'reform' for an indefinite period." 662 So. 2d 899. This case has already spanned 12 years, and there is presently no end in sight. See the appendix to Chief Justice Hooper's dissent in Ex parte James, supra.

Nonjusticiable Political Matter

> others;
>
> "(vii) sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently;
>
> "(viii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in Alabama, in surrounding states, across the nation, and throughout the world, in academics or in the job market; and
>
> "(ix) sufficient support and guidance so that every student feels a sense of self-worth and ability to achieve, and so that every student is encouraged to live up to his or her full human potential."

March 31, 1993, Order, Appendix to Opinion of the Justices No. 338, 624 So. 2d 107, 166 (Ala. 1993).

False Distinction Between Liability Phase and Remedy Phase

The circuit court's March 31, 1993, order and its subsequent orders provided injunctive remedies. It is clear that the court and the parties contemplated that there would be a series of successive orders providing further relief. Those orders entailed the extensive and intrusive exercise by the trial judge of legislative and executive powers, in violation of the Alabama Constitution. The plaintiffs' argument that the March 31, 1993, order was final, and therefore appealable, is predicated on a distinction between a liability phase and a remedy phase. The March 31, 1993, order, insofar as it has been referred to as a Liability Order is misnamed. The "Liability Order" contains declaratory and injunctive remedies. It also imposed a partial (though vague and incomprehensible) remedy, which was in fact not a legal remedy -- it was a political decree.

My belief that the March 31, 1993, order is not final, and therefore not appealable, is based only in part on the fact that it included a partial remedy. The flaw is more fundamental than the fact that there was a mixture of liability and remedy in the same order or that the remedy was

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 incomplete. The distinction made in this case between a liability phase and a remedy phase is an artificial distinction borrowed from traditional lawsuits and imposed on this type of public-interest litigation. In a public-interest lawsuit, the liability and the remedy are "coterminous," i.e., they have the "same or coincident boundaries" and are "coextensive in scope or duration."[40] It would be impossible to separate the trial into conceptually distinct liability and remedy phases. An Equity Funding Case is not like a traditional negligence action. In a traditional lawsuit the determination as to whether a defendant has breached the duty of care (i.e., liability) is conceptually distinct from, and can be determined without any determination as to, the amount of recovery available (i.e., remedy). It is not necessary to determine the amount of damages in order to determine whether there was a breach of duty. However, even in the traditional lawsuit, the liability determination is not a final judgment. How much more is that the case here?

There is an even more fundamental problem with the Equity Funding Case. The liability and the remedy are not

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[40]Merriam-Webster's Collegiate Dictionary (10th ed. 1999).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 analytically distinct. It is impossible to know that an education system is deficient (i.e., that there is liability) unless the judge has determined that a constitutional right to an education requires a certain quality of education (i.e., a remedy). For example, a court could not have known that teachers are not being paid an adequate salary (liability) unless the court had already determined what the Constitution requires as to teacher's salaries (remedy). The March 31, 1993, order simply asserts that the present education system is unconstitutional. The court did not at that time tell the defendants what to do to "fix" the lack of equity in the education system. If the constitution does not quantify a standard, then a court may not simply make one up.

The defendants and others were told to fix the problem and then to check back with the court to determine whether they had fixed the problem to the judge's satisfaction. If they did not respond correctly the first time, they would have to try again. The circuit court found that the defendants had breached an unknown, and unknowable, standard. In this case, the circuit court itself apparently did not know what the law

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 requires because it reserved the complete remedy for a future determination.

The circuit court found itself in this intractable position because it adopted the fundamentally false proposition that every dispute involving a constitutional provision is subject to judicial resolution. The judgments involved in making educational decisions are fundamentally political in nature; therefore, they have been properly delegated to the executive and legislative branches of government. They are not fundamentally political in nature simply because they involve a public controversy. They are fundamentally political in nature because of the reasoning process involved in making such decisions.[41]

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[41]This year, the Connecticut Supreme Court distinguished judicial and political questions in the education context. The Connecticut plaintiffs claimed that one town in one county was discriminated against in the distribution of education funds for that county because of a particular statute:

> "The named defendant, Attorney General Richard Blumenthal, moves to dismiss the case for lack of subject matter jurisdiction in that: (1) the claims raise nonjusticiable political questions; and (2) the plaintiffs lack standing to pursue their claims.
>
> "....
>
> "The plaintiffs argue that the present case poses a pure constitutional, not a political

The Alabama Constitution makes clear that the power to establish a system of public schools is delegated to the Legislature. This is true of both Amendment 111, which amended § 256 of the Constitution, and of § 256 itself. It is

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question. ...

"....

"The concluding paragraph in [San Antonio Independent School District v.]Rodriguez[, 411 U.S. 1 (1973)] is instructive, stating that: '[t]he consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative process of the various States ... the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.' Id., 58-59. The issue upon which Horton[v. Meskill, 172 Conn. 615, 626, 376 A.2d 359 (1977)] was decided was whether the state was providing a substantially equal opportunity to its youth. In the present case the plaintiffs make no claim as to the adequacy of the educational opportunity but only question the sources of the funding. There is no claim that Article Eighth, § 1, of the constitution of Connecticut has been violated. Accordingly, the questions cast by the plaintiffs as equal protection claims are actually questions for lawmakers and are non-justiciable. Based on this finding, it is unnecessary to address the issue of plaintiffs' standing.

"For the foregoing reasons, the defendant's motion to dismiss is granted."

Seymour v. Region One Board of Education et al., [Ms. CV000082467S, January 2, 2001] 28 Conn. L. Rptr. 508 (Conn. 2001) (emphasis added; not published in A. 2d).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 universally recognized that a Legislature makes laws that are in the public interest or common good.

Assuming that there is a public interest or common good that can be identified or agreed upon, the lawmaker determines, within the bounds of law, the best or most efficient legislative means to correct a social "evil." The Legislature may attempt to justify the legislative means in one of two ways. First, it may justify a piece of legislation as an enactment or a particularization of something that is inherently right. In this instance, the lawmaker need not engage in a utilitarian calculation of whether a particular law will or will not promote the common good. The operative assumption is that doing the right thing necessarily advances the common good. This truth is encapsulated in the maxim, "honesty is the best policy." It presumes the existence of a moral order that man can know and that man has the authority, at least in some limited way, to promote through positive law.

The second method of legislative decision-making involves something different from the direct implementation of basic moral postulates. Where there is no necessary right or wrong, the lawmaker must determine the most efficient way of

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 achieving a particular end. The Legislature must project the outcome of alternative courses of action into the future. It may do so in a rather informal way by acting upon its common or collective experience. Ideally, at other times it will proceed with great deliberation, systematically and comprehensively collecting data, conducting hearings, calling upon experts, and reviewing studies to calculate the relative costs and benefits of various courses of action.

It is the cost-benefit utilitarian methodology that is most distinctly political, as opposed to judicial, in nature. The Legislature faces difficulties in making law by balancing interests or engaging in cost-benefit analyses. Those difficulties are further exacerbated when a court, designed to conduct a very different kind of evidentiary inquiry than that of a legislative body, assumes the legislative mantle.

The political methodology involved in law-making requires an entirely different approach than a judicial methodology. A legislative body, in making law, collects a wide range of information. It is forward-looking, because it gathers historic information with a view to accomplishing some future or ongoing goal of improving society. The end of the fact-

gathering process is to develop a rule of law that courts can apply to the facts of particular cases. A court does not envision a future social goal and order the Legislature to conform to its vision of the future; that would be turning the constitutional system on its head and making the legislative branch dependent upon the judges instead of upon the voters the legislators represent.

The executive branch, as a political branch, makes decisions using essentially the same methodology as the legislative branch. Its discretion is limited not only by inherent standards of right and wrong and by the constitution but also by statutes passed by the Legislature. The executive branch makes utilitarian cost-benefit decisions as to the most efficient means of enforcing the law. For example, a prosecutor has discretion to decide the best way to enforce the law. He has discretion as to whom he will prosecute and for what crimes. Those decisions are not reviewable by a court unless the prosecutor is breaking the law in doing so.

The courts have no jurisdiction over the political branches of the government unless those branches break some provision of the law. Courts do not have the authority to

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 review legislative or executive discretion, no matter how unwise or inefficient or even unfair they think the exercise of that discretion may be.

> "'[Q]uestions of propriety, wisdom, necessity, utility, and expediency are held exclusively for the legislative bodies, and are matters with which the courts have no concern. This principle is embraced within the simple statement that the only question for the court to decide is one of power, not of expediency or wisdom.'"

Densmore v. Jefferson County, [Ms. 1000264, September 21, 2001] ___ So. 2d ___, ___ (Ala. 2001) (quoting City of Orange Beach v. Duggan, 788 So. 2d 146, 151 (Ala. 2000), quoting in turn Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 9-10, 18 So. 2d 810, 815 (1944)). "[I]t is not the duty of this Court to question the wisdom, or the lack thereof, used by the Legislature in enacting the laws of this State." Ex parte T.D.T., 745 So. 2d 899, 904 (Ala. 1999).

> "It scarcely need be said that the matter of policy is one for the Legislature, and whether wise or unwise is of no concern to the courts. We are called upon to determine the question of legislative power, and that alone."

State ex rel. Wilkinson v. Murphy, 237 Ala. 332, 342, 186 So. 487, 497 (1939). The Constitution provides for review of such political judgments. It is called an election.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409

The orders that the Montgomery Circuit Court issued and that provided injunctive relief represented the exercise of wide-ranging executive and legislative powers. Those orders infringed upon the powers of the other branches of State government. It may be that the Alabama education system could be better funded and operated. Obviously, there is frustration in various sectors of Alabama with alleged inaction in this area by the Alabama Legislature. But such frustration in a portion of this State is no reason for this Court or for executive officers or even for the Legislature (which may wish to shirk the responsibility of making hard choices) to allow one circuit court judge in Montgomery County to take upon himself or herself such immense -- and unconstitutional -- authority.

Based on the remedies imposed in the various orders, including the March 31, 1993, order, the circuit court has engaged in a far-reaching exercise of legislative and executive powers in violation of the Alabama Constitution. And as discussed above, the remedies in a case of this nature are too intertwined with "liability" to separate them.

Because the "Liability Phase" cannot be distinguished from the "Remedy Phase" in an Equity Funding Case, the position that the attorney general has taken is as untenable as that taken by the plaintiffs. The attorney general has argued that the circuit court had jurisdiction to find that the State failed to provide a system of public education that complied with the Alabama Constitution, but that the circuit court had no jurisdiction to issue a remedy, and, if it did have such jurisdiction, the State was now in compliance. Because of the peculiar nature of this litigation, it is impossible to determine liability without also determining the remedy. The remedy determination is inherently political in nature. This Court has no more jurisdiction to determine whether the education system complies with whatever requirements can be divined from the word "liberal" in § 256 of the Alabama Constitution than do the trial courts. That is a political judgment not subject to judicial review. The laws the Legislature passes are subject to adjudication only if they violate the Constitution, and the manner in which the executive branch implements those laws is subject to adjudication only if in implementing the law that branch

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 breaches a rule of law set down by the Legislature, not a standard of efficiency determined by a judge. There is no discretion on the part of those branches to break the law, and if an officer acts illegally he may be held criminally or civilly liable.

The Function of the Judiciary

The trial court lacks jurisdiction because the judiciary's definitive function is to resolve disputes or controversies -- not to make policy pronouncements on what the courts have termed "nonjusticiable political questions." We must define the judiciary's function in order to follow the Alabama Constitution:

> "The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Ala. Const. 1901, § 42.

> "In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of

> them; to the end that it may be a government of laws and not of men."

Ala. Const. 1901, § 43 (emphasis added). Any Alabama court that goes beyond its authority not only infringes upon the authority of another branch of government but also subverts the very foundation of our constitutional system. This separation-of-powers principle is derived from our federal Constitution.

In his 1796 farewell address as President, George Washington recognized the importance of maintaining that separation:

> "It is important, likewise, that the habits of thinking in a free country should inspire caution in those intrusted with its administration to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it which predominates in the human heart is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or

> modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

George Washington, Farewell Address, Documents of Freedom 50 (2d ed. 1979). Washington concisely stated some key concepts and invested them with peculiar importance. The encroachment of one power or branch upon the powers of another tends toward despotism. The necessity for checks and balances among the separate branches stems not from some formality or technical procedural requirement but from the very nature of the human heart and its love for power. Therefore, constant vigilance against such encroachment in civil government will always be necessary. And lastly, he explains in one sentence that although the encroachment may seem to remedy an urgent wrong, the precedent of giving, by mere acquiescence to the judiciary, too much power to one branch always leads to an even greater wrong -- the loss of the balance of power in a constitutional government. The final word as to "fixing" the constitution is always with the people.

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The order issued by the trial judge on March 31, 1993, violated this delicate separation of powers by encroaching upon the duty of the Legislature to make law and policy regarding education in Alabama under Amendment 111 to the Constitution of Alabama of 1901. In doing so, the trial judge was without subject-matter jurisdiction of the case.

Nonjusticiable Provisions of a Constitution

A constitution determines who has the authority to exercise various powers. The Alabama Constitution delegates certain basic responsibilities to the Legislature. It enacts laws pursuant to that power. The Legislature represents all the people of the State of Alabama; it is familiar with all the programs requiring State funding; and it can conduct the type of fact-finding necessary to make policy judgments. The fact that the Constitution expressly delegates political powers to the legislative and executive branches makes decisions exercised pursuant to those powers outside the scope of judicial review unless those decisions contravene that Constitution.

> "Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline to do so. The high

> power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums."

Luther v. Borden, 48 U.S. (7 How.) 1, 46-47 (1849).

An illustration from a provision found in the United States Constitution demonstrates this proposition. Like the Alabama Legislature, Congress has been delegated legislative power. Congress is given the power to raise an army and maintain a navy and to prescribe rules and regulations for the armed forces. The President is the Commander in Chief of the armed forces. Congress has the power to declare war. The President and Congress must perform their duties faithfully in providing for the defense of the country. They have to decide how to allocate funds among the competing programs. Because the Constitution assigns those powers to other bodies, the judiciary has no authority to review such decisions. If Congress declares war, the courts will not review that

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 decision to determine whether it is a good idea or a bad one, fair or efficient. If Congress decides to build a missile-defense shield, the courts may not use a cost-benefit analysis to determine whether it is adequate to the defense of the country or whether that money would be better spent elsewhere. The courts cannot tell Congress or the President that it or he must give pay raises to the military, devote more time to hand-to-hand combat training, or inculcate values the courts believe will make the military better able to compete in a global environment.

Likewise, Alabama courts do not have authority over decisions of the Legislature with regard to the constitutional exercise of their powers. May the courts tell the Legislature that the tax system is unfair and then go about reshaping it, or that the health-care system is unfair and go about establishing a new system? May a court tell the governor that the roads throughout the State are not paved fairly and equitably? The power of a court would not be restricted if there were no distinction between judicial questions and political questions or if the standard for reviewing statutes and constitutional provisions was whether they were "efficient

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 and equitable?" Decisions regarding public education under the Alabama Constitution, like taxation, declarations of war, maintenance of an army or a navy, and the establishment of a postal service under the United States Constitution are political in nature. Political powers are inherently different from judicial powers.

The constitutions of several states give their respective Legislatures jurisdiction to establish a "thorough and efficient" system of public education. See, e.g., DeRolph v. State, 78 Ohio St. 3d 193, 677 N.E.2d 733 (1997). Those words, "thorough and efficient," are not in the Alabama Constitution, but they are the language Legislatures use in making cost-benefit analyses and which they must consider for the proper administration of the entire state government, not just one aspect thereof, like education. Those constitutions attempt to make explicit what is entailed in all political judgments. Efficiency is not a judicial standard. It is a political standard to be arrived at through the policy-making process of weighing the costs and the benefits of alternative courses of action. That process is inherently political in nature. In other words, even if Alabama's constitutional provisions

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 dealing with education required that public education be "thorough and efficient," neither this Court nor any other court could review the Legislature's application of those words. The Montgomery Circuit Court, in its analysis of one aspect of State government -- education -- endeavored to use the word "liberal," another word of general application for the Legislature, as a standard of review. It failed, predictably, in that endeavor.

The main issue in the complaint filed by the plaintiffs is not education; it is the funding of public education,[42] i.e., how the citizens of Alabama are taxed to fund the system of public education. The trial court in this case has criticized the Legislature for enacting a purportedly unconstitutional taxing scheme where funding for education is concerned. Taxing is a distinctly legislative issue. As the United States Supreme Court aptly explained in Madden v. Kentucky, 309 U.S. 83, 87-88 (1940):

> "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. ... [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by

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[42]That emphasis explains the popular title of these cases -- "Equity Funding Case."

> a legislature in formulating sound tax policies. ... It has ... been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. ... [T]he members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have ...."

(Footnotes omitted.)

The trial court not only decided that Alabama's system of taxation for education is inadequate; it also instructed the Legislature how it must distribute funds for education throughout the State. In other words, not only did the trial court infringe upon the Legislature's power to tax; it also commandeered its spending power. The appropriation of public funds is also a distinctively legislative matter. "The authority to determine the amount of appropriations necessary for the performance of the essential functions of government is vested fully and exclusively in the legislature." Morgan County Comm'n v. Powell, 292 Ala. 300, 306, 293 So. 2d 830, 834 (1974). In dictating to the Legislature how it must appropriate funds for public education, the trial court violated long-understood constitutional boundaries of jurisdiction between the branches of government.

In the context of this case, a court's jurisdiction with respect to appropriation matters is necessarily limited. Courts have no jurisdiction over appropriation matters in a constitutional context beyond saying that the Legislature must spend money on what the Constitution commands it to spend money on, or that it cannot spend money on what the Constitution does not grant it the power to spend money on. They do not have the authority to tell the Legislature in what manner it must tax the citizenry or in what fashion it must spend public funds in a particular area.

Section 256 of the Alabama Constitution gives the Legislature the power to provide a "liberal" system of education. The circuit court, without proper justification, rewrote § 256 and replaced the term "liberal" with the term "equal." Even if we were to construe the term "liberal" to mean "equal," it is impossible to give any normal meaning to that term in an educational setting. As is evident from certain assertions made in this case, students with special needs are to be treated differently from students without special needs. There are innumerable variables that students bring with them to the educational setting, and even more that

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 cannot possibly be controlled and equalized.[43] It may be that those decisions the circuit court has made and proposed to make are actually more familial in nature than legislative. Those decisions call for individualized treatment, which goes

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[43]Even the United States Supreme Court refused to exercise such power when asked to do so in the 1975 case, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 42-43 (1975):

> "On even the most basic questions in this area the scholars and educational experts are divided. Indeed, one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education -- an assumed correlation underlying virtually every legal conclusion drawn by the District Court in this case. Related to the questioned relationship between cost and quality is the equally unsettled controversy as to the proper goals of a system of public education. And the question regarding the most effective relationship between state boards of education and local school boards, in terms of their respective responsibilities and degrees of control, is now undergoing searching re-examination. The ultimate wisdom as to these and related problems of education is not likely to be divined for all time even by the scholars who now so earnestly debate the issues. In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."

(Footnotes omitted; emphasis added.)

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 against the equality principle the circuit court wrote into § 256. The trial court went beyond its authority by acting as a Legislature, a school board, a censor of curricular matters, and even as a parent for all schoolchildren in Alabama's public schools.

Did a Case or Controversy Exist?

Another reason this Court can question the circuit court's subject-matter jurisdiction in this case is the fact that during this case and particularly the period within which an appeal of the "Liability Order" could have been taken to this Court, the parties were not adverse to one another; therefore, no case or controversy existed. Chief Justice Hooper described much of the problem with respect to this issue in his 1997 dissent. "If the case was not a sham, it certainly has the appearance of one." James v. Alabama Coalition for Equity, 713 So. 2d at 896 (Hooper, C.J., dissenting). I will review the main events that demonstrate the lack of a controversy in this case.

The history of the realignment of parties in this case is as follows. Originally, Governor Guy Hunt was a defendant, along with State Director of Finance Robin Swift, Lieutenant

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Governor James Folsom, Jr., Speaker of the House of Representatives James Clark, State Superintendent of Education Wayne Teague, and the members of the Alabama State Board of Education. Later, all the defendants except Governor Hunt and his finance director were realigned as plaintiffs. Why? Because those defendants agreed with the position advanced by ACE.

The attorney general at the time, Jimmy Evans, indicted Governor Hunt and obtained a felony conviction after the trial judge had issued his "Liability Order," which declared unconstitutional the State's method of funding education. Governor Hunt's conviction forced him from office on April 22, 1993, and Lieutenant Governor James Folsom, Jr., became governor. On June 9, 1993, the trial judge purported to certify the March 31, 1993, order as final under Rule 54(b).[44]

Then another realignment occurred. On May 28, 1993, Speaker Clark, Superintendent Teague, and the members of the Board of Education were realigned as defendants in their official capacities -- again. On June 8, 1993, Governor Folsom

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[44]Rule 54(b) certifications should be granted only in exceptional cases; they "should not be entered routinely or as a courtesy or accommodation to counsel." Page v. Preisser, 585 F.2d 336, 339 (8th Cir. 1978).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 was substituted as a defendant in place of former Governor Hunt. Folsom's finance director then replaced Governor Hunt's finance director as a defendant.[45] Why would these people return to being defendants? Had they not just recently realigned as plaintiffs?

A governor who agreed with the position advanced by the plaintiffs was now in office. To say that the office itself, not the individual occupying that office, was the party defies logic; an office can assert neither a favorable nor unfavorable position without the person who directs its actions. The alignment of plaintiffs and the defendants in the Equity Funding Case ended this way -- those defendants who agreed with the plaintiffs and therefore had realigned as plaintiffs later re-realigned as defendants when Folsom became governor. No one was adverse to anyone in the case, i.e., no justiciable controversy existed, and the case should have been dismissed. Alabama Nursing Home Ass'n v. Alabama State Health Planning Agency, 554 So. 2d 1032, 1033 (Ala. Civ. App. 1989) ("'[T]he circuit courts of this state do not have jurisdiction

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[45]As this Court stated in Opinion of the Justices No. 338: "The Court assumes that the finance director adopts the positions taken by Governor [Folsom]." 624 So. 2d at 112 n.3.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 to issue advisory opinions when there is no case or controversy presented.'").

The question of the existence of a case or controversy is not an idle debate. That there be an actual controversy between parties that appear before a court has from time immemorial been a bedrock judicial principle. The question involves the foundational principles upon which our tripartite form of constitutional government was formed. This Court has stated:

> "[O]ur Constitution vests this Court with a limited judicial power that entails the special competence to decide discrete cases and controversies involving particular parties and specific facts. Ala. Const. 1901, amend. 328, § 6.01 (vesting the judicial power in the Unified Judicial System); see, e.g., Copeland v. Jefferson County, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969) (stating that courts decide only concrete controversies between adverse parties)."

Alabama Power Co. v. Citizens of Alabama, 740 So. 2d 371, 381 (Ala. 1999) (emphasis added). See also Jefferson County v. Johnson, 232 Ala. 406, 406-07, 168 So. 450, 451 (1936), in which this Court stated:

> "The weight of authority is that, to give the court jurisdiction to render a declaratory judgment, there must be 'a bona fide existing controversy, with subject-matter and parties in interest in court, and a situation where adequate relief is not presently available through medium of other existing

> forms of action.' Union Trust Co. of Rochester v. Main & South Streets Holding Corporation, 245 App.Div. 369, 282 N.Y.S. 428, 429 [headnote 2]; 33 Corpus Juris, p. 1097, § 57."

This matter ceased to be a controversy, if in fact it ever was one, when Governor Hunt was removed from office.[46] At that point, no adversary relationship existed before or after certification of the final order, thereby denying the trial court the opportunity to hear a full debate of the issues and to fully adjudicate the matters in question. The Equity Funding Case is a classic example of a nonjusticiable controversy; clearly, the trial court lacked jurisdiction to issue an order where no controversy existed.

The August 13, 1991, Order

The trial court in this case lacked subject-matter jurisdiction, and no justiciable controversy existed; therefore, this Court should examine the rulings actually finalized in this case. On January 22, 1991, the plaintiffs

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[46]In Ex parte James, this Court, in holding that the case was justiciable, cited an April 6, 1993, newspaper article that stated that Hunt would not appeal the March 31, 1993, order. That article was published before the order even became final on June 9, 1993. This Court should not rely on speculation in a newspaper article to determine legal issues of such moment as whether a case or controversy exists in this case.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 moved for a partial summary judgment on their claim that Amendment 111 of the Alabama Constitution was adopted in violation of the Fourteenth Amendment to the United States Constitution. The trial court declared on August 13, 1991, that Amendment 111 was void in its entirety because one portion of the Amendment violated the Equal Protection Clause of the United States Constitution. The court also held that § 256 of the Alabama Constitution of 1901 was in effect to the extent that it provides: "The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years," but that the second and third sentences of § 256 were void, also as violating the Fourteenth Amendment.

This ruling set the table for the "Liability" and "Remedy" Orders, because it opened the door for the trial court to impose its own requirements on the Legislature concerning public education, rather than those of Amendment 111. That August 13, 1991, order has never been appealed to this Court, and this Court has never issued an opinion addressing the question of the plaintiffs' standing to file

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 the action or the legitimacy of the trial court's order determining that Amendment 111, to the extent it amended § 256, was unconstitutional. The trial judge's method of constitutional interpretation leaves much to be desired,[47] but because of the jurisdictional problems in this case, it would not be essential to a ruling by this Court dismissing the case.

In their complaint, the plaintiffs sought "[a] declaration that Amendment 111 of the Constitution of Alabama violates the Equal Protection Clause of the Fourteenth

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[47]I agree with Justice Houston's thorough autopsy of the ruling in his special writing. Chief Justice Hooper, in his dissent in Ex parte James, referred to this rewriting of constitutional provisions by the trial judge as "selective editing ... by judicial fiat." Ex parte James, 713 So.2d at 901. Even granting that the sentences in both the original § 256 and that section as amended by Amendment 111 that refer to segregated schools are unconstitutional, that is not a reason to strike the perfectly viable portions of Amendment 111, or, for that matter, of the original § 256. In fact, the rule of interpretation is the opposite:

> "The unconstitutionality of a part of an act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932).

Amendment of the Constitution of the United States." The basis for this declaration, the complaint explained, was that Amendment 111 "has a racially discriminatory purpose and effect." The plaintiffs, however, never alleged in their complaint that they were the victims of racial discrimination. In fact, none of the plaintiffs even mentioned their race in the complaint.[48] Unless the plaintiffs showed that the

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[48]The plaintiffs made three other claims. They indicate that the action was an integrated attempt to enact the plaintiffs' version of education reform and that the claim as to Amendment 111 was bundled within that overarching purpose:

> "[2] The statutes, procedures, and administrative determinations constituting the State funding structure for public education in the State of Alabama result in disparities between the ability of property wealthy local school systems and the ability of property poor local school systems to provide equal educational opportunity for children within those systems in violation of Sections 1, 6, and 22 of the Constitution of Alabama, which guarantees equal protection of the law.
>
> "[3] The statutes, procedures and administrative determinations constituting the State funding structure for public education in the State of Alabama are irrational and arbitrary, and deprive the individual plaintiffs to this action of their rights to equal protection and due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.
>
> "[4] The statutes, procedures and administrative determinations constituting the State funding structure for public education in the State of Alabama are irrational and arbitrary, and deprive the individual

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Legislature "authorize[d] the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end," there can be no injury to anyone based on Amendment 111. No one in this case ever alleged that he or she was a victim of a violation of the United States Constitution based on a racially discriminatory application of § 256 or of Amendment 111, Ala. Const. 1901. Thus, although a certain section of Amendment 111 appears on its face to be discriminatory, because no plaintiff in this case alleged that he or she suffered an injury under this section, no case and controversy was ever presented to the trial court to invoke its jurisdiction. Amendment 111 had substantially amended § 256, and the ruling of the United States Supreme Court in Brown effectively prohibited either Amendment 111 or § 256 from being interpreted to allow any racial discrimination.

> plaintiffs to this action of their right to due process of law as guaranteed by Sections 6 and 13 of the Constitution of Alabama."

Complaint of ACE, R. 27-28.

Declaratory judgments are issued pursuant to § 6-6-222, Ala. Const. 1975.[49] "There must be a bona fide existing controversy of a justiciable character to confer upon the court jurisdiction to grant declaratory relief under the declaratory judgment statutes ...." State ex rel. Baxley v. Johnson, 293 Ala. 69, 73, 300 So. 2d 106, 110 (Ala. 1974). In fact, "the [complaint] must show such a controversy to exist before the court has jurisdiction to grant declaratory relief under the Declaratory Judgment Act." City of Mobile v. Jax Distrib. Co., 267 Ala. 289, 290, 101 So. 2d 295, 296 (Ala. 1958). As I stated above, the plaintiffs made no allegations of racial discrimination in their complaint.

The racially discriminatory portion of Amendment 111 was not, when this action was filed, and is not now, applied in this State, nor did the plaintiffs allege that they had been discriminated on the basis of this provision.[50]

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[49]The statute, also known as the Declaratory Judgment Act, provides, in pertinent part: "Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."

[50]As the United States Supreme Court has explained with respect to federal cases, an allegation of actual injury is essential for the parties to have standing to appear in court.

In O'Shea v. Littleton, 414 U.S. 488 (1974), the plaintiff class, purported to represent "'all those who, on account of their race or creed and because of their First Amendment rights, have (been) in the past and continue to be subjected to the unconstitutional and selectively discriminatory enforcement and administration of criminal justice in Alexander County.'" 414 U.S. at 491. No one in the case had alleged direct discrimination, however. The parties had simply maintained in the abstract that the laws in Alexander County were being selectively enforced against blacks as opposed to whites. On those claims, the Supreme Court held:

> "The complaint failed to satisfy the threshold requirement imposed by Art. III of the Constitution that those who seek to invoke the power of federal courts must allege an actual case or controversy. Plaintiffs in the federal courts 'must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction.' There must be a 'personal stake in the outcome' such as to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' ... Abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.' Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."

414 U.S. at 493-94 (citations and footnotes omitted; emphasis added).

In Allen v. Wright, 468 U.S. 737 (1984), the plaintiffs, parents of black schoolchildren attending public schools,

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Because the plaintiffs did not allege in their complaint that they were harmed through racial discrimination resulting from

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alleged that the Internal Revenue Service failed to deny tax-exempt status to racially discriminatory private schools, in contravention to statute and the United States Constitution's Equal Protection Clause. "Respondents do not allege that their children have been the victims of discriminatory exclusion from the schools whose tax exemptions they challenge as unlawful. ... Rather, respondents claim a direct injury from the mere fact of the challenged Government conduct ...." 468 U.S. at 746. The Court stated:

> "[T]he case or controversy requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are 'founded in concern about the proper -- and properly limited -- role of the courts in a democratic society.'"

468 U.S. at 750.

> "[A] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."

468 U.S. at 738.

> "Insofar as their first claim of injury is concerned, respondents are in exactly the same position: unlike the appellee in Heckler v. Mathews, supra, 465 U.S., at 740-741, n. 9, 104 S.Ct., at 1396, n. 9 [(1984)], they do not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment."

468 U.S. at 755 (summarizing the cases Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), and Rizzo v. Goode, 423 U.S. 362 (1976)).

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 the application of Amendment 111, they lacked standing to move for a declaration of unconstitutionality.

> "'To present a justiciable case or controversy, the individual plaintiff must have standing to sue; to have standing, the individual must allege an injury directly arising from or connected with the wrong alleged. The standing requirement applies whether the plaintiff sues individually or on behalf of a class.'"

Ex parte Blue Cross & Blue Shield of Alabama, 582 So. 2d 469, 474 (Ala. 1991) (quoting 1 Newberg on Class Actions, p. 190 (1977)).

> "When a party without standing purports to commence an action, the trial court acquires no subject-matter jurisdiction. Barshop v. Medina County Underground Water Conservation District, 925 S.W.2d 618, 626 (Tex. 1996) ('Standing is a necessary component of subject matter jurisdiction'). See also Raines v. Byrd, 521 U.S. 811, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997); Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); United States v. Hays, 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) ('"standing 'is perhaps the most important of [the jurisdictional] doctrines'"'); National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 255, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) ('Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.'); Romer v. Board of County Comm'rs of the County of Pueblo, supra, 956 P.2d [566] at 585 [(Colo. 1998)] ('standing is a jurisdictional prerequisite to every case and may be raised at any stage of the proceedings') (Martinez, J., dissenting); Cotton v. Steele, 255 Neb. 892, 587 N.W.2d 693 (1999)."

State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1028 (Ala. 1999).

In their briefs filed in response to the January 10, 2002, order of this Court and in answer to four questions propounded by this Court to the parties, the plaintiffs allege, without supporting proof, the following injurious effects of Amendment 111: continuing existence of all-white academies, a reduction of the white population in the public schools as a result of the existence of such academies, and the lack of public support for public education as a result of private schools. For the first time since this case has been litigated, the plaintiffs tell us that "[m]any of the plaintiff parents and schoolchildren are black." ACE Brief, p. 50. For a plaintiff to have made a claim that Amendment 111 is racially discriminatory and therefore unconstitutional, without even identifying the plaintiff's race, is a significant omission. Nevertheless, even with that belated addition of a most critical element of a racial-discrimination claim in the plaintiffs' latest briefs to this Court, it remains that they have not shown any actual particularized injury or harm that has occurred to black plaintiffs caused by

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Amendment 111. Such a showing is essential to establish standing for the plaintiffs to file such an action.[51]

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[51]Individual "injury in fact" is critical to the question of standing. See United States v. Hays, 515 U.S. 737, 742-44 (1995):

> "The question of standing is not subject to waiver, however: '[W]e are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of the [jurisdictional] doctrines."'
>
> "It is by now well settled that 'the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of .... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.' In light of these principles, we have repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power.
>
> "....
>
> "The rule against generalized grievances applies with as much force in the equal protection context as in any other. Allen v. Wright, [468 U.S. 737 (1984)], made clear that even if a governmental actor is discriminating on the basis of race, the resulting injury 'accords a basis for standing only to "those persons who are personally denied equal

In view of the fact that the Legislature never used Amendment 111 to discriminate against any school students and the inability of any student plaintiffs to show an "actual injury" resulting from Amendment 111, plaintiffs did not have standing to bring this case.

The plaintiff school boards claim standing because they are charged with supervising the educational interests of each county and with maintaining a uniform and effective system of public schools throughout their respective counties. They

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> treatment" by the challenged discriminatory conduct.'"

(Citations omitted; emphasis added.) The general accusations against the private-school system are inadequate and unsupported, and they do not show actual individual racial discrimination against the black plaintiff schoolchildren, much less the white plaintiff schoolchildren and the handicapped children. Do the plaintiffs seriously contend that the existence of private schools, for which there is no evidence as to how many are "all white," denies public education to those black children in public schools? And, if I were to assume that a drop in support for public education has occurred, do the plaintiffs seriously contend that there exists a constitutional right not to have a drop in public support for education? And to what am I to attribute that drop in public support? I have no evidence of the contention that white parents are racially motivated in using private schools. It could be that parents of both races are dissatisfied with the quality of the public schools. I question whether adequate evidence of such an "injury" by the "public" could ever support a claim against the civil government of the State of Alabama.

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 argue that the State's method of disbursing funds prevents them from performing this duty. However, the Alabama Constitution grants to the Legislature the supervision and maintenance of public schools; the Legislature has delegated some of that power to the school boards, but nowhere does a statute or a constitutional provision give county school boards the power of initial disbursement of taxpayer funds. More importantly, the school boards are an entity created by the Legislature and are a part of the State itself. The State cannot sue itself.

Because the plaintiffs lacked standing to sue on the issue of racial discrimination, the very reason the trial court declared Amendment 111 unconstitutional, that claim was not ripe for adjudication and the trial court should not have entertained it. "The declaratory judgment statutes do not empower courts to decide moot questions, abstract propositions or to give advisory opinions, however convenient it might be to have the questions decided for the government of future cases." Alabama-Tennessee Natural Gas Co. v. City of Huntsville, 275 Ala. 184, 192, 153 So. 2d 619, 626 (1963). Because the trial court lacked jurisdiction to declare

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Amendment 111 unconstitutional, the court's revival of the original § 256 was also unnecessary and improper.

The plaintiffs' core claim was that the Alabama public school "funding structure is economically detrimental to the State of Alabama and irreparably damaging to the education of its schoolchildren." A declaration of unconstitutionality with regard to Amendment 111 was requested to rid the plaintiffs of the Amendment's declaration that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education," not to dispose of a racially discriminatory provision.

A constitutional provision granting the Legislature complete discretion in formulating an education system prevents any lawsuit complaining about inequitable funding in that system. If the plaintiffs had presented a document, similar in content to the March 31, 1993, "Liability Order," to the Legislature or to a legislative committee charged with education funding, it would have been appropriate as a lobbying tool to accomplish the plaintiffs' goals. Instead,

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 they sought to employ the judiciary to force the Legislature's hand. This is contrary to the proper purposes of a lawsuit. Though the "Liability Order" may contain many laudable goals for education in Alabama, this Court cannot allow good intentions to stand in place of the rule of law. Where the Legislature has been given discretion by the the people, it is not the place of the courts of this State to interpose their own will in the stead of the voters.

If ever the State of Alabama uses the provisions of Amendment 111 and § 256, Ala. Const. 1901, to discriminate against citizens of this State on the basis of race and a party with standing exercises a challenge to those provisions seeking a declaratory judgment, then, on appeal, this Court can review that case and analyze those parts of the constitution under appropriate legal guidelines. But the trial court in this case did not have before it a party alleging injury caused by Amendment 111 or by § 256, and the August 13, 1991, order was too intimately bound in purpose with and as a basis for the rest of the rulings entered in this case. Therefore, the trial judge lacked jurisdiction over the entire

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 case, including those issues addressed in the August 13, 1991, order.

Conclusion

In his farewell address, the first President of the United States warned us to "resist with care the spirit of innovation upon [the Constitution's] principles, however specious the pretexts." Farewell Address at 47. The division of powers between different branches of government, each with a distinct area of operation, is a basic principle of the Constitution of the United States and the Constitution of the State of Alabama. Equally true is the fact that there exist many "pretexts" that invite a violation of that separation by the usurpation of the powers of one branch by another, such as the genuine desire for quality education.

We are all legitimately concerned about the education of our children. The Constitution of Alabama wisely placed the issue of public education in the hands of those best able to discern the wishes of the people -- the elected representatives of the people, the Alabama Legislature. The judges of this State were not elected to formulate policy for education or to spearhead education reform. Judges are elected

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 to ensure that justice is administered in accordance with fundamental principles of law. The acknowledged role of a judge is to interpret the law, not to make the law; "he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." 1 William Blackstone, Commentaries on the Laws of England, at 69. The job of making law belongs exclusively to the Legislature. The desire or need for action in a particular area of public policy cannot justify a court's intruding itself into the field of legislation in order to reach a desired result, whether that result concerns education, health care, taxation, or any other area of public interest.

With regard to one branch of civil government breaching the separation-of-powers principle by acting outside its assigned sphere of authority, Washington said that "the precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." Farewell Address at 50. That permanent evil begins to be reflected in this case in the myriad of conflicting orders,

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 the alignment and realignment of parties attempting to create adversity, the lack of standing of any party to challenge the constitutionality of § 256 and Amendment 111, the pendency of the case for over 12 years with no foreseeable conclusion, and the threatened imposition by one trial court judge of over a billion dollars of taxes on the people of Alabama without their consent.

For the trial judge to have campaigned for a position on the Alabama Supreme Court by claiming that he told the governor and the Legislature what to do is not only unethical, but such orders to the governor and the Legislature are also a clear usurpation of the powers of coequal branches of government and a violation of our Constitution. I agree with the majority opinion that the judicial branch should leave the repair, renovation, improvement, and/or overhaul of the education system of this State to the Legislature, the governor, the State Board of Education, local boards of education, and the people of Alabama, where it properly belongs.

That this matter was outside the subject-matter jurisdiction of the Montgomery Circuit Court is clear. No

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 justiciable controversy existed, not only because of the absence of a plaintiff with standing to bring an action alleging racial discrimination but also because of a lack of adversity, both before and after the certification of the March 31, 1993, order. Moreover, the lack of subject-matter jurisdiction is clearly evident in the fact that the circuit court had absolutely no authority to make legislative and executive decisions necessary to operate a school system or to set public policy in the field of education. Such decisions are political in nature and are not within the purview of the judicial branch of government.

The finality of any order depends on the existence of a court's jurisdiction over the case. The lack of subject-matter jurisdiction may not be waived and may be raised by the parties at any time or by the court ex mero motu. That question is a fundamental one, preliminary to any adjudication. Absence of subject-matter jurisdiction deprives the court of all authority to act whatsoever.

The courts must ever be cognizant of their own limitations under our Constitution. I recognize the inherent evil in usurping the power of the legislative branch, and

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 reaffirm the proper role of the courts not to make the law, but to say what the law is.

Because the trial court never had subject-matter jurisdiction, all orders the trial court issued were therefore void. In addition to dismissing these cases, I would also overrule Ex parte James, Pinto v. Alabama Coalition for Equity, and Opinion of the Justices No. 338, supra, to the extent that those cases are inconsistent with the proper exercise of the judicial power by the courts of this State.

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JOHNSTONE, Justice (dissenting).

I respectfully dissent from the decision of this Court purporting to dismiss these cases. We lack appellate jurisdiction to review these cases, to enter any order affecting these cases, and to express any rationale for any such order.

This Court issued its last certificates of judgment in these cases and in a subsequent review of the same cases under different case numbers on January 6, 1998. Our corresponding opinions are reported as Ex parte James, 713 So. 2d 869 (Ala. 1997), and James v. Alabama Coalition for Equity, Inc., 713 So. 2d 937 (Ala. 1997). Our appellate jurisdiction, construed at its greatest limit of durability, expired either at the end of 120 days following the January 6, 1998, date of those certificates of judgment, Internal Rule VI.J.3., or at the end of the then existing term of court, Brown v. State, 277 Ala. 108, 109, 167 So. 2d 291, 293 (1964), Childress v. Younger, 258 Ala. 219, 220-21, 61 So. 2d 808, 809 (1952), Wade v. State, 51 Ala. App. 441, 441-43, 286 So. 2d 317, 318-19 (1973), Martin v. State, 22 Ala. App. 191, 192-93, 113 So. 452, 453 (1927). That term of court, mandated by § 12-2-8,

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 Ala. Code 1975, and Internal Rule V.A., expired on June 30, 1998.

Both deadlines for our appellate jurisdiction expired without any application in any form for further appellate review. Indeed, even after the expiration of those deadlines, no party has sought appellate review in any form. I respectfully submit that all of our orders issued since the expiration of our appellate jurisdiction are nullities and any rationales for those orders are not holdings or even obiter dicta.

I will discuss only Part IV of Justice Houston's special concurrence, which addresses this dissent of mine. On the one hand, Justice Houston's Part IV contains a splendid explanation of the supervisory powers of this Court, although I do not agree with Justice Houston's diminution of the importance of the doctrine of stare decisis on questions of constitutional law, see my dissent in Ex parte Melof, 735 So. 2d 1172, 1205 (Ala. 1999). On the other hand, and of particular pertinence to this dissent of mine in these equity funding cases, I respectfully disagree with Justice Houston's assertion that the time limits imposed by this Court on its

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 own power to recall its judgments are not still in effect. They are still in effect.

"Regular terms of the Supreme Court" are expressly mandated by § 12-2-8, Ala. Code 1975, and special terms are allowed by § 12-2-9, Ala. Code 1975. Likewise, § 12-3-12, Ala. Code 1975, mandates like regular terms for "the courts of appeals." Article I, § 43, Alabama Constitution of 1901, commands judicial respect for these legislatively mandated terms of court. Section 43 reads:

> "In the government of this state, except in the instances of this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either or them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men."

While Justice Houston's special writing asserts that terms of court "have not served a significant jurisprudential role," ___ So. 2d at ___, that assertion begs the very question at issue, in that terms of court have served the significant jurisprudential role of limiting the willingness of the Alabama appellate courts to recall their own mandates.

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Only one of the Alabama cases cited by Justice Houston reveals any deviation from our self-imposed recall time limits of the 120th day after our issuance of the certificate of judgment or the end of the term when the certificate was issued. While the recall in Ex parte Martin, 616 So. 2d 353 (Ala. 1992), did occur 23 days after the end of the term when the certificate had been issued, the recalls in Youngblood v. State, 372 So. 2d 34 (Ala. Crim. App. 1979), Watts v. State, 337 So. 2d 91 (Ala. Crim. App. 1976), and Brown v. State, 277 Ala. 108, 167 So. 2d 291 (1964), all occurred during the respective terms when the respective certificates of judgment had been issued. Ex parte Martin appears to have been an oversight rather than an intended departure from our express limits.

The entirely unsolicited nature of the instant purported review of these "equity funding cases" exacerbates our lack of appellate jurisdiction. We do not want to become like the Iranian judges who roam the streets of Tehran ordering a whipping here and a jailing there. On the other hand, if this tardy and unsolicited purported review does prevail, I suppose the consolation will be that some old cases which I think or

1950030, 1950031, 1950240, 1950241, 1950408, and 1950409 shall think grossly unfair will once again be subject to review.