ESSAY:
THE HYPOTHETICAL IMPACT OF ALABAMA'S FAILED AMENDMENT 2 ON PUBLIC SCHOOL FUNDING

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In 1901, Alabama enacted a new state constitution providing that "[s]eparate 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."[1] The U.S. Supreme Court, however, declared racial segregation in public schools unconstitutional in its 1954 decision in *Brown v. Board of Education*.[2] Just two years later, Alabama amended its state constitution—not to remove the unconstitutional language but rather to entrench it further.[3]

In 2004, Alabama voted again on the segregationist language. This time, proposed Amendment 2 to the state constitution would have purged that language. To be more precise, Amendment 2 sought to remove from the Alabama Constitution unenforceable language relating to poll taxes and separate schools for blacks and whites, as well as language essentially refuting a constitutional right to education.[4] The 2004 ballot initiative generated strong opposition in the weeks leading up to the election. Following an automatic statewide recount, the amendment failed 690,376 to 688,530—a margin of just 1,846 votes or 0.13%.[5]

Opponents argue that Amendment 2 was a "Trojan Horse,"[6] which, if passed, would have opened the door to judicial findings of inequitable funding in Alabama public schools and the remedial imposition of taxes.[7] Pro-

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1. ALA. CONST. art. XIV, § 256 (amended in 1956).

2. 347 U.S. 483 (1954).

3. ALA. CONST. amend. 111 (amendment ratified Sept. 7, 1956); *see also infra* note 17 (discussing the segregationist motives behind Amendment 111).

4. *See infra* note 13.

5. *See* State of Alabama, Amended Certification of Results: Statewide Amendment 2 (Dec. 17, 2004), *available at* http://www.sos.state.al.us/downloads/dl3.cfm?trgturl=election/2004/general/statecert-amendment2-recount-12-17-2004.pdf&trgtfile=statecert-amendment2-recount-12-17-2004.pdf.

6. Jim Jackson, *Amendment 2—A Trojan Horse*, suppressednews.com, *at* http//suppressednews.com/newsitems/local/EpAIZlyZZZgnYTZIRG (Oct. 24, 2004).

7. Some of the more prominent expositions of the opposition's legal argument include: Christian Coalition of Alabama, *The Truth About Amendment 2*, *at* http://www.ccbama.org/EmailAlerts/ea102504.asp (Oct. 25, 2004) (quoting, among others, former Alabama Supreme Court Chief Justice Roy Moore); Mo Brooks, *Legal Advice on Amendment 2*, Conservative Christians of Alabama, *at* http://www.ccofal.o

ponents hotly dispute this contention and argue that Amendment 2 was simply designed to remove all tainted segregation-era language.[8] Both sides, not surprisingly, argue that the other is mischaracterizing the amendment's implications. The Alabama Supreme Court, in the aftermath of the election, rejected a request by the State House of Representatives to issue an advisory opinion on Amendment 2's potential tax implications, specifically whether Amendment 2 gives state or federal courts the authority to order the imposition of taxes for school funding purposes.[9] Thus, even as the Legislature continues to debate the promulgation of a similar amendment for the next election, confusion and controversy persists on this pivotal issue.

This Essay seeks to end that confusion and controversy. The following discussion provides an objective legal analysis—free from election rhetoric—as to Amendment 2's potential impact on K-12 school funding and the resulting tax consequences, focusing on the effect of removing the language refuting a constitutional right to education.[10]

I. BRIEF BACKGROUND ON AMENDMENT 2

The Alabama Citizens' Constitution Commission, formed by Governor Bob Riley in 2003, recommended a constitutional amendment to remove certain segregation-era language from the 1901 Alabama Constitution.[11] The Commission's version, first introduced in the State Senate, recommended the repeal of language relating to separation of schools by race and

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rg/alabama/2004/advice_amendment_2.phtml (visited Dec. 10, 2004). I do not discuss the "fringe" legal arguments that Amendment 2 would lead to free adult education, harm home schooling, or affect private school curriculums.

8. *See, e.g.*, John Ehinger, *On Amendment Two: Nothing in the Nov. 2 Ballot Measure Would Raise State Taxes*, HUNTSVILLE TIMES, Oct. 12, 2004, *available at* www.constitutionalreform.org/news/article 9.shtml; David White, *Governor Supports Amendment 2*, BIRMINGHAM NEWS, Oct. 21, 2004, *available at* http://www.al.com/news/birminghamnews/index.ssf?/base/news/1098350172236500; David White, *Davis: Amendment 2 Has Nothing to Do with Taxes*, BIRMINGHAM NEWS, Oct. 27, 2004, *available at* htt p://www.al.com/election/birminghamnews/index.ssf?/base/news/109880293252570.xml.

9. *See Opinion of the Justices No. 382*, 2005 WL 428460 (Ala. 2005).

10. This Essay does not attempt to weigh in on the merits of Amendment 2 as a tool of racial reconciliation, or the motivations and implications underlying its failure; plenty of other commentaries, both in the Alabama press and the national media, have already done so. *See, e.g.*, Wayne Flint, *In Heart of Dixie, Demagoguery Thrives*, BIRMINGHAM NEWS, Dec. 5, 2004, *available at* www.ocm.auburn.edu/clip pings/120604.pdf.; Bob Blalock, *Amendment 2 Defeat Will Be Used Against State*, BIRMINGHAM NEWS, Nov. 7, 2004, *available at* http://www.al.com/opinion/birminghamnews/bblalock.ssf?/base/opinion/1099 822742151300.xml; Manuel Roig-Franzia, *Alabama Vote Opens Old Racial Wounds*, WASH. POST, Nov. 28, 2004, at A1; Sherell Wheeler Stewart, *Jim Crow Constitution Upheld in Alabama*, blackamericaweb.com, *at* www.justicepolicy.org/print_article.php?id= 460 (Nov. 5, 2004); Fannie Flono, *On Race, The Post Is Still Not Past in Alabama*, CHARLOTTE OBSERVER, Nov. 12, 2004, at 11A; Dusty Nix, *Discarding Old Baggage*, COLUMBUS LEDGER-ENQUIRER, Nov. 10, 2004, at A10. In the interest of full disclosure, this author has also written an op-ed lamenting the Amendment's failure in light of Alabama's past civil rights record, the impact on its future reputation, and the statement made to its black citizens. *See* Pratik Shah, *State's Image Needed Amendment 2*, BIRMINGHAM NEWS, Nov. 28, 2004, at B1.

11. *See* Alabama Citizens' Constitution Commission, *Report of the Alabama Citizens' Constitution Commission to Governor Bob Riley* 28, 34-35 (Mar. 27, 2003), *available at* http://accr.constitutionalrefo rm.org/graphics/section1.pdf.

to the poll tax.[12] The House version of the bill—the one ultimately passed by the Legislature and appearing on the ballot as Amendment 2—sought removal of additional language relating to a constitutional construction against the right to education.[13]

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12. *See* S.B. 442, 2003 Reg. Sess. (Ala. 2003).

13. *See* H.B. 587, 2003 Reg. Sess. (Ala. 2003). The final ballot initiative read:

> Proposing an amendment to the Constitution of Alabama of 1901, to repeal portions of Section 256 and Amendment 111 relating to separation of schools by race *and repeal portions of Amendment 111 concerning constitutional construction against the right to education*, and to repeal Section 259, Amendment 90, and Amendment 109 relating to the poll tax. (Proposed by Act 2003-203).

Proposed Statewide Amendment Ballot Language—Nov. 2, 2004 General Election (emphasis added), *available at* http://www.sos.state.al.us/election/2004/statewideamendments.htm. The relevant referenced portions of the Alabama Constitution read as follows:

> Section 256: Duty of legislature to establish and maintain public school system; apportionment of public school fund; separate schools for white and colored children.
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> *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 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 counties so as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. 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.

ALA. CONST. art. XIV, § 256 (amended in 1956) (emphasis added).

> Amendment 111 (amendment of Sec. 256): Educational policy of the state; authority of legislature to provide for or authorize establishment and operation of schools by persons, municipalities, etc.; grant, donation, sale or lease of funds and property for educational purposes; election of certain schools for attendance by parents of minors.
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> 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 condition, or procedures deemed necessary to the preservation of peace and order.*
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> . . . .
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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.

ALA. CONST. amend. 111 (emphasis added). The underlined language in both sections above would have been removed by Amendment 2; the italicized language is relevant to the opposition's legal contention and thus the focus of this Essay.

Interestingly, in the Official Recompilation of the Alabama Constitution of 1901—released a few months after the election and Amendment 2's failure—the original text of Section 256 is completely replaced by the text from Amendment 111 (the 1956 Amendment to Section 256). *See* § 256 of the Official Recompilation of the Ala. Const. of 1901, as amended. Thus, only the latter provisions at issue in Amendment 2 continue to appear in the newly recompiled constitution. Nevertheless, the Code Commissioner's historical note explicitly states that the purpose of the recompilation is not to make any substantive changes in the state constitution, and that—in the event of any conflict in interpretation—the text of the original constitution and the amendments prevail. *See* Code Commissioner's Notes, Official Recompilation of the Ala. Const. of 1901.

II. THE OPPOSITION'S STRONGEST LEGAL CONTENTION

The disputed consequences of that additional change form the basis of the opposition to Amendment 2. Although the campaign literature lacks a single, detailed articulation of the opposition's legal contention, several key elements emerge. In its clearest and most compelling form: (1) the Alabama Constitution currently states that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense";[14] (2) Amendment 2 will remove that language; (3) removing that language will lead to the constitutional construction of an enforceable right to education in Alabama by "activist" judges; (4) based on the existence of an enforceable right to education, and in light of existing inequities, judges will order extensive changes in the public school system and increases in school funding; and (5) such changes and increases will result—either directly or indirectly—in higher state taxes.

III. THE LEGAL BACKDROP TO THE OPPOSITION'S CONTENTION

The opposition's legal contention appears to be based largely on a group of cases brought in 1990 in response to the plight of inequitably funded and inadequately performing public schools in Alabama, popularly known as *The Equity Funding Cases*.

On April 1, 1993, an Alabama trial judge determined that inequitable school funding and inadequate educational performance violated Section 256 of the Alabama Constitution requiring "a liberal system of public schools throughout the state for the benefit of the children."[15] Before reaching that conclusion, the judge struck down as unconstitutional the limiting language in Amendment 111 (the 1956 amendment to Section 256)—so important to Amendment 2's opposition—providing that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense."[16] The judge found that the language violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution due to its racially discriminatory purpose.[17] In the absence

14. ALA. CONST. amend. 111.

15. *See* Ala. Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117-R (Ala. Cir. Ct. filed Apr. 1, 1993), *reprinted in* Opinion of the Justices No. 338, 624 So. 2d 107, 110-67 (Ala. 1993) [hereinafter April 1993 Order]. The court also found liability under related state equal protection and due process theories pursuant to Article I, Sections 1, 6, 13, and 22 of the Alabama Constitution. *See id.* at 156-57, 161-62.

16. *See* Alabama Coalition for Equity, Inc. v. Hunt, Nos. CV-90-883-R, CV-91-0117-R, slip op. at 2 (Ala. Cir. Ct. filed Aug. 13, 1991) [hereinafter August 1991 Order] (on file with author).

17. *See id.*; April 1993 Order, *supra* note 15, at 147 n.41. Notably, the opposition's ancillary claim that the clause refuting a right to education has nothing to do with Jim Crow is flatly wrong. Although facially race-neutral, the clause was added in response to the U.S. Supreme Court's decision in *Brown v. Board of Education*, 349 U.S. 294 (1955), in an attempt to subvert the desegregation mandate by permitting Alabama districts to shut down rather than integrate their schools. *See* Jay Murphy, *Can Public Schools Be "Private"?*, 7 ALA. L. REV. 48, 49 (1954) (discussing the 1954 Report of the Alabama Interim Legislative Committee on Segregation in the Public Schools and its suggestion that public schools

of that language, the judge gave full effect to the original clause in Section 256, and found that it creates an enforceable constitutional right to education.[18]

The court next addressed the crucial and complex question of the remedy. The April 1993 order stated that "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 provides equitable and adequate educational opportunities to all school-age children."[19] The judge soon thereafter ordered, with relatively minor changes, a skeletal remedial plan negotiated by the parties under which the State would formulate more specific policies to implement the plan's requirements, including (but not limited to) the appropriation of sufficient educational funds.[20] The Alabama Supreme Court in 1997 vacated as premature the remedial order and stayed the action to permit the coordinate branches of the government to formulate a new plan complying with the original April 1993 order.[21] Following that decision, there were no further proceedings until 2001, when the plaintiffs moved to reopen the case alleging that no adequate remedial plan had been developed. In response, the State Board of Education submitted a proposed plan to the trial court with an estimated annual increase in expenditures of $1.7 billion.[22]

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be discontinued "as a last step" to avoid racial mixing in coming to the conclusion that Amendment 111 "would certainly be declared unconstitutional" given its explicit segregationist purpose); Edward R. Crowther, *Alabama's Fight to Maintain Segregated Schools, 1953-1956*, 30 ALA. REV. 206, 216 (1990) (characterizing Alabama's abolishing of the constitutional basis for a state-supported education as "a futile attempt to resist desegregation of public schools"); Martha I. Morgan, *The Alabama Constitution's Right to Public Education: A Background Paper on the First Clause of the 1901 Alabama Constitution's Education Article*, 33 CUMB. L. REV. 387, 390 (2003); *Vote Yes on Amendment No. 2*, MONTGOMERY ADVERTISER, Aug. 26, 1956, at A1 ("[Amendment 111] gives the legislature the power to abolish . . . public schools threatened with compulsory race mixing and to provide some other method of teaching children on a private, segregated basis."); Bob Ingram, *Top Educators Give Support to Choice Bill*, MONTGOMERY ADVERTISER, Aug. 25, 1956, at 1A ("This is the intent and purpose of this amendment. Amendment [111] will prevent any child in Alabama being compelled by Alabama law to attend a mixed school."); Bob Johnson, *Purpose of the Amendment Was to Preserve Segregation*, TUSCALOOSA NEWS, Dec. 26, 2004, at B1.

18. *See* August 1991 Order, *supra* note 16, at 2; April 1993 Order, *supra* note 15, at 146-47; *see also* James v. Ala. Coalition for Equity, Inc., 713 So. 2d 937, 947-50 (Ala. 1997) (making clear the foundational nature of the August 1991 Order); *Ex parte* James, 836 So. 2d 813, 824 (2002) (Houston, J., concurring).

19. April 1993 Order, *supra* note 15, at 166.

20. *See* Remedy Order (Ala. Cir. Ct. filed Dec. 3, 1993), *reprinted in Ex parte* James, 713 So. 2d 869, 923-35 (Ala. 1997) (appendix to Chief Justice Hooper's dissent).

21. *See Ex parte James*, 713 So. 2d at 882 (giving state legislative and executive officials one year to comply); *id.* at 935 (extending the compliance period to a "reasonable time").

22. There are two notable discrepancies among the figures reported in available sources. First, estimates of the cost of the Board's plan varied, but the final estimated cost was $1.7 billion (compared to the initial estimate of $1.4 billion). Second, reported totals for Alabama's 2001 expenditures on public schools also varied from $2.9 billion to $4 billion, but the latter figure appears to include higher education while the former is limited to the relevant pool of K-12 public schools. *Compare* Charles J. Dean, *Board OKs Plan for Adequate Schools: Would Require Another $1.7 Billion a Year*, BIRMINGHAM NEWS, Feb. 12, 2002, at A1 *with* Campaign for Fiscal Equity Inc., *Alabama Adequacy Plan Calls for 50% Increase in School Funding*, *available at* http://www.schoolfunding.info/states/al/12-01AdeqPlan.php3.

In 2002, the Alabama Supreme Court issued a final order in *The Equity Funding Cases*, effectively ending that litigation. The court held that, "because the duty to fund Alabama's public schools is a duty that—for over 125 years—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."[23] The court primarily relied on Section 43 of the Alabama Constitution, providing that the 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."[24] Because "[t]he pronouncement of a specific remedy 'from the bench' would necessarily represent an exercise of [legislative] power,"[25] and because "such judicial intrusion would represent a jurisprudential divergence with other state courts who . . . have refused to become involved with school-funding matters,"[26] the court held that the imposition of a specific remedy for the violation of any constitutional right to education is beyond its judicial capacity.[27]

Notably, the court made clear (albeit reluctantly) that it was *not* disturbing the trial court's April 1993 liability order establishing the merits of the plaintiff's substantive claim—namely, that there is an enforceable right to education under the Alabama Constitution and that the state had violated that right. About the April 1993 order, the court stated:

> [H]aving 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 [that] 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.[28]

Seven justices agreed with the separation of powers rationale and the ultimate result.[29] Two of the seven would have gone further and likely reversed the April 1993 order.[30] One justice abstained.[31] Only one justice dissented, on the ground that the court lacked appellate jurisdiction to review

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23. *Ex parte James*, 836 So. 2d at 815.

24. *Id.* at 819.

25. *Id.* at 817.

26. *Id.* at 818.

27. *Id.* at 819.

28. *Id.* at 816.

29. Four justices spoke only through the *per curiam* opinion. *See id.* at 820. Justice Woodall concurred in the result. *Id.* at 841. Justices Houston and Moore wrote separately but agreed with the result. *See infra* note 30.

30. *See id.* at 828 (Houston, J., concurring); *id.* at 842 (Moore, C.J., concurring in part, dissenting in part).

31. Justice Lyons recused himself. *Id.* at 820.

the cases (including the remedial orders) due to the expiration of time limits.[32]

IV. WHY AMENDMENT 2 IS IRRELEVANT TO TAX CONCERNS

A. Amendment 2 Would Not Affect the Status Quo

The opposition's contention is premised on the notion that Amendment 2 would have led courts to recognize a constitutional right to education. But Alabama law—as reflected in the still valid April 1993 order—already does so. That order voided as unconstitutional the same limiting language from Amendment 111 (rejecting a constitutional construction of a right to education) that Amendment 2 would have expunged. Even if Amendment 2 had added a provision explicitly guaranteeing a fundamental right to education—which it clearly did *not* do—the status quo would not be affected because the Alabama Supreme Court's 2002 decision assumed (without affirming) the existence of such a right.

Amendment 2 might have made it marginally easier for a future Alabama Supreme Court to embrace on the merits the prior trial court's interpretation of a constitutional right to education, in that the court would not have to take the additional step of affirming that Amendment 111 is indeed unconstitutional.[33] But it is difficult to see what impact that affirmation would have in light of the Alabama Supreme Court's 2002 decision precluding any judicial relief. As explained above, the Court's holding is based solely on separation of powers principles, embodied principally in Section 43 of the Alabama Constitution. Nothing in Amendment 2 would have altered the Alabama Supreme Court's reasoning or conclusion; Amendment 2 did not at all affect Section 43 or speak to separation of powers issues more generally. Therefore, it is simply wrong to claim, as one Amendment 2 opponent (an attorney) did, that the Alabama Supreme Court dismissed *The Equity Funding Cases* "in reliance on the very language Amendment 2 removes from our constitution."[34]

In sum, Amendment 2 would not have increased the incentive for proponents of increased educational funding to pursue further litigation. The plaintiffs in *The Equity Funding Cases* had already won their merits claim establishing the state's liability. But without the carrot of a potential remedy, further litigation would be fruitless.

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32. *See id.* at 877-78 (Johnstone, J., dissenting).

33. Even with Amendment 2, however, the recognition of a constitutional right to education by the Alabama Supreme Court is by no means certain. First, there is the pragmatic reality that the Alabama Supreme Court has become increasingly conservative. *See infra* note 35. Second, the court could adopt Justice Houston's view that striking parts of Amendment 111 does not necessarily revive the relevant clause in the original Section 256 that would serve as the basis for finding a constitutional right to education. *See Ex parte* James, 836 So. 2d 813, 830 (2002) (Houston, J., concurring). Upon merits review, the court could conceivably find that Section 256 no longer has force or can no longer support such a right, further rendering the opposition's argument moot.

34. Brooks, *supra* note 7.

B. Potential Counter-Arguments

Two potential counter-arguments come to mind, but neither merits serious concern.

1. Reversal by the Alabama Supreme Court

Perhaps most obviously, the Alabama Supreme Court could overrule itself and decide that the principle of separation of powers, specifically Section 43 of the Alabama Constitution, does not preclude judicial relief in the area of school funding reform. As previously noted, however, Amendment 2 would not have made this possibility any more or less likely.

In any case, there are two reasons why such a reversal is highly unlikely. First, the Alabama Supreme Court's membership has become more, not less, conservative since the 2002 decision. Seven justices agreed with the separation of powers rationale in 2002. Since then, Republican candidates won the three open seats in the 2004 election, one expressly running in part on opposition to Amendment 2 and higher taxes for school funding.[35] The lone dissenting justice is no longer serving on the court.[36] Therefore, as a practical matter (stare decisis aside), the 2002 decision is not in any jeopardy for the foreseeable future.

Second, another portion of the Alabama Constitution—Amendment 582—poses a significant legal obstacle for judges seeking to reverse the effect of the 2002 decision. Although mentioned only briefly in that decision, Amendment 582 effectively nullifies 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."[37] The last sentence of Amendment 582, stating that nothing in the amendment precludes a court from making findings that constitutional standards are not being met or "from ordering the responsible entity or entities to comply with such standards," may provide some hope for litigants.[38] However, because Amendment 582 was passed largely in response to *The Equity Funding Cases*,[39] the

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35. *See* Secretary of State, State of Alabama, *2004 Election Information*, *available at* http://www.sos.state.al.us/election/2004/ (last visited Apr. 21, 2005); Sallie Owen & Bill Barrow, *GOP Sweeps into Supreme Court*, MOBILE REGISTER, Nov. 3, 2004, *available at* www.al.com/election/mobileregister/index.ssf?/base/news/109947735870800.xml. Justice Tom Parker joined the opposition to Amendment 2 during his campaign. *See, e.g.*, Flono, *supra* note 10, at 11A.

36. Justice Johnstone, a Democrat, chose not to run for another term. *See* Owen & Barrow, *supra* note 35.

37. ALA. CONST. amend. 582; *see also Ex parte James*, 836 So. 2d at 815. Amendment 582 appears as Section 43.01 in the new Official Recompilation of the Alabama Constitution of 1901.

38. ALA. CONST. amend. 582.

39. *See* David White, *8 Amendments on Tuesday Ballot*, BIRMINGHAM NEWS, Oct. 31, 2004, *available at* http://www.al.com/election/birminghamnews/index.ssf?/base/news/1099218170276381.xml (quoting Howard Walthall, law professor at Cumberland School of Law at Samford University); Phillip Rawls, *Voters to Decide Limits on Judges*, MONTGOMERY ADVERTISER, June 2, 1996, at 6B ("Gov. James proposed the constitutional amendment to limit [the trial judge in *The Equity Funding Cases*] and other judges that he said were encroaching on the power of the Legislature to allocate tax revenue.").

Alabama Supreme Court—even if it had the desire—would be hard pressed to find that the legislative approval requirement did not apply in the school funding context. Given the limited nature of the legislature's response since the April 1993 liability order, the provision is likely to be effective in stemming increased spending (and thus increased taxes).

2. Federal Court Intervention

Another possibility raised by opponents is that a federal court could intervene and order the funding changes and concomitant tax increases. Presumably, Section 43 or Amendment 582 of the Alabama Constitution would not directly limit a federal court's remedial powers, since those provisions only regulate *intra*-state separation of powers and thus the extent of state court authority. Once again, however, Amendment 2 did not speak to this issue at all, and nothing in Amendment 2 would have altered the status quo with respect to a federal court's remedial authority in this area.

As to liability, to the extent a federal court might rely on federal law as the substantive basis for finding deficiencies in K-12 school funding, Amendment 2—which dealt solely with state law—is entirely irrelevant. In theory, a federal court could conceivably have jurisdiction to make such findings on state law grounds (that is, under the Alabama Constitution) as well. But that possibility is remote at best. First, it is highly unlikely that a federal court would have diversity jurisdiction, since out-of-state plaintiffs would lack standing. Second, assuming plaintiffs pled both federal and state law claims to avail themselves of federal question jurisdiction, it is highly unlikely that a federal court would exercise supplemental jurisdiction over the related state law claims. A federal court may decline to exercise supplemental jurisdiction if, among other reasons, "the claim raises a novel or complex issue of state law," or "the district court has dismissed all claims over which it has original jurisdiction."[40] Federal courts would likely be hesitant to decide complex issues of state constitutional law in an area of extensive state control such as public school funding. Furthermore, U.S. Supreme Court precedent such as *San Antonio Independent School District v. Rodriguez*[41] could bring about quicker resolution of the federal law claims, making it even harder for a federal court to justify adjudication of any remaining state law claims. Finally, and perhaps most importantly, the U.S. Supreme Court has held that the Eleventh Amendment precludes (absent state consent or waiver) a federal court from hearing pendent state law

40. 28 U.S.C. §1367(c) (2002).

41. 411 U.S. 1, 55 (1973) (refusing to recognize a fundamental right to education under the U.S. Constitution and denying federal judicial relief). *But cf.* Plyler v. Doe, 457 U.S. 202 (1982) (declaring unconstitutional a Texas law that provided free public education to citizens and to children of documented immigrants but required undocumented immigrants to pay). Notably, claims of racial discrimination in violation of federal law might be more viable in the Alabama educational context. *Cf.* Knight v. State of Alabama, 14 F.3d 1534 (11th Cir. 1994) (targeting vestiges of de jure racial segregation in Alabama's system of higher education under federal law).

claims against a state government official who has been sued for violating federal law.[42] Not surprisingly, the academic literature confirms the virtual abandonment of federal courts in favor of state courts for K-12 school funding litigation.[43]

CONCLUDING THOUGHTS

Whatever the motives behind Amendment 2—whether simply aimed at expunging all segregation-tainted language or aimed at substantive school funding reform—the legal reality is that Amendment 2 would not have had any meaningful effect on judicial intervention in school funding or state taxes. The opposition's misguided and plainly untenable legal contention obscured that reality for Alabama voters. Why would intelligent, accomplished, and influential advocates adopt and promote such misinformation? And what are the implications of that misinformation for the people of Alabama? These questions—undoubtedly important—are beyond the scope of this Essay. But for the present, this exercise should help clarify the legal and historical record, both to facilitate exploration of the deeper social and political questions raised by Amendment 2's failure and to guide Alabama legislators as they contemplate a new amendment to expunge some remnants of the state's racist legacy.[44]

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42. *See* Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).

43. *See, e.g.*, Christine Kiracofe, *The Natural Relationship Between Desegregation and School Funding Litigation*, 184 Educ. L. Rep. 1, 5-7 (2004); John Dayton, Serrano *and Its Progeny: An Analysis of 30 Years of School Funding Litigation*, 157 Educ. L. Rep. 447, 447 (2001); Michael A. Rebell, *Adequacy Litigation: A New Path to Equity*, 141 PLI/NY 211, 220 (2004).

44. Several competing versions of a revised amendment have already emerged in the Alabama legislature. One version, clearly in response to Amendment 2's effective (albeit inaccurate) opposition, would no longer eliminate the language refuting the constitutional construction of a right to education. *See* H.B. 154, 2005 Reg. Sess. (Ala. 2005). However, the Legislative Black Caucus, amongst others, has expressed opposition to that proposal because it would leave intact the segregation-motivated clause. *See* Bob Johnson, *Black Caucus May Fight Plans to Rewrite*, Associated Press, Dec. 12, 2004. Thus, some legislators support a version identical to Amendment 2. *See* H.B. 66, 2005 Reg. Sess. (Ala. 2005). A third, compromise version would repeal the same language as Amendment 2 would have repealed, but would add new (albeit unnecessary and extraneous) language expressly reinforcing that the amendment should not be interpreted by the judiciary to require an increase in state taxes. *See* S.B. 173, 2005 Reg. Sess. (Ala. 2005).