

## ALABAMA'S SHAME: THE HISTORICAL ORIGINS OF THE 1901 CONSTITUTION

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When constructing history, context is all-important. Specific events tell us less about reality than the social, political, and cultural environments that produced them.

The application of this truism is especially apparent in the construction of Alabama constitutions. The 1819 Alabama document that created the state was written in the aftermath of the American Revolution and amidst westward expansion. Its assumptions were democratic and expansive within the context of a culture that believed African-Americans<sup>1</sup> were unfit for political participation and that white women should not be exposed to such a sullied process.<sup>2</sup> If political culture allowed only white males to vote, then Alabama's constitution makers believed *all* white males should be granted suffrage without regard to whether they owned property, attended church, believed in God, or were literate.<sup>3</sup> Such beliefs were consistent with the prevalent Jacksonian democracy of the Southern frontier.

After two constitutions in the 1860s addressed the specific issues of secession, Civil War, and the loss of the war, the 1868 document, crafted by a biracial convention dedicated to new ways of commerce, education, state government, and race relations, was a constitution devoted to raising additional revenue, providing universal education and expanded state services, enlarging the size and scope of state government, and encouraging business and industry.<sup>4</sup> The historical context was Federal Reconstruction. Such beliefs were consistent with the defeat of Confederate armies, the ascendancy of new political factions, the enfranchisement of African-Americans, and the idealism of emanci-

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1. In this Article, the terms "African-American" and "black" are used interchangeably.  
2. See MALCOLM COOK McMILLAN, *CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM* 30-46 (The Reprint Co. 1978). This remains one of the finest studies of Alabama Constitution-making.

3. McMILLAN, *supra* note 2, at 30-46.

4. *Id.* at 134-50.

pation and the extension of rights to black Alabamians.<sup>5</sup>

The 1875 Constitution occurred in the context of "redemption" from Reconstruction.<sup>6</sup> It was a reactionary document designed to overcome what whites perceived as the excesses of radical Republicans.<sup>7</sup> It was drafted the year after white conservative Democrats recaptured gubernatorial power from the Republicans.<sup>8</sup> It was designed to reduce the size of government and the services government provided, lower taxes, and constrain the political power of African-Americans.<sup>9</sup>

Although not entirely representative of the population, the 1875 constitutional convention did contain eighty white Democrats, twelve Republicans (four of whom were African-American), and seven Independents.<sup>10</sup> The primary concern of delegates was fear lest the federal government, courts, or Congress would overturn their work, as had occurred a decade earlier when Congress had ignored the conservative 1865 Constitution, forcing the state to rewrite it.<sup>11</sup> In 1875, delegates went as far as they dared in overthrowing Reconstruction by providing for segregated schools, abolishing the lieutenant governor's office and the state Board of Education, moving to biennial sessions of the Legislature, lengthening gubernatorial terms to four years without succession, and forbidding the state, counties, or cities from lending money or extending credit for internal improvements or to any individual, association, or corporation.<sup>12</sup> Most notably, delegates limited the powers of taxation by state, county, and municipal governments.<sup>13</sup> They thereby reduced funds for public schools and other state services.<sup>14</sup> Had delegates not feared federal intervention, they probably would have given the governor the power to appoint judges with the consent of the senate, limited the franchise of blacks, established educational or property qualifications for voting, segregated transportation on common carriers, and prohibited interracial marriage.<sup>15</sup> But fear of federal authority postponed most of these changes for a quarter century. The result was a partisan document approved by white Democratic delegates but opposed by half the Republicans.<sup>16</sup>

What followed the adoption of the 1875 Constitution was an unpar-

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5. *Id.*
  6. *See id.* at 175-88.
  7. *Id.*
  8. MCMILLAN, *supra* note 2, at 175.
  9. *Id.* at 175-210.
  10. *Id.* at 188.
  11. *See id.* at 189-216.
  12. *Id.*
  13. MCMILLAN, *supra* note 2, at 189-216.
  14. *Id.*
  15. *See id.*
  16. *Id.*

alleled era of political corruption and violence. Ironically, white Democratic Redeemers, who had drafted their new constitution to end the alleged corruption of Republican Reconstruction, ushered in an era of white Democratic conservative corruption.<sup>17</sup> Black voters were disfranchised by gerrymandering, gubernatorial appointments that replaced elections, and in 1893 by the Sayre Election Law that allowed registration of voters only in May, arranged candidates alphabetically and without party identification under the office they sought, and required voters to display registration certificates (voter identification).<sup>18</sup> Threatened by a biracial coalition of independent movements under a variety of names (the Grange, Agricultural Wheel, Greenback-Labor Party, Knights of Labor, Farmers' Alliance, Jeffersonian Democrats, and Populists), Conservative Democrats, under the new, official title of their party, waged constant war to hold onto power.<sup>19</sup> In both 1892 and 1894, they apparently stole gubernatorial elections from Reuben F. Kolb, the nominee of the Jeffersonian Democratic/Populist/Republican coalition.<sup>20</sup>

So furious were agrarians at this corruption and repression that they flirted with civil insurrection, even threatening in 1894 to seat their candidate by Winchester rifle and shotgun.<sup>21</sup> Advocating a reformist platform that promised to protect the voting rights of Negroes, regulate trusts, end the convict lease system, inaugurate labor reforms, expand the supply of currency with silver coins, abolish national banks, enact a graduated income tax, and nominate political candidates in a direct statewide primary rather than in a closed party convention, the insurgents fundamentally threatened Conservative Democratic control.<sup>22</sup> Although the Conservative Democrats were able to defeat agrarians statewide by manipulating voting returns in the Black Belt, the new coalition won power in many counties throughout the hill country and Wiregrass, imposing whatever reforms they could at the local level.<sup>23</sup>

Of course the insurgency did not expire entirely due to external corruption. It also fell victim to its own internal flaws. Most prominent among these were white racism toward black allies, lack of effective leadership or a compelling central vision, and a split along ideological,

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17. WILLIAM WARREN ROGERS, *THE ONE-GALLUSED REBELLION: AGRARIANISM IN ALABAMA, 1865-1896* (1970). Rogers' book is the standard study of pre-1900 agrarian radicalism, and he carefully documents the fraudulent Conservative Democratic returns in the Black Belt that almost certainly illegally denied Kolb the governorship in 1892 and 1894.

18. ROGERS, *supra* note 17 *passim*.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. ROGERS, *supra* note 17, *passim*.

racial, and policy lines stemming from the diversity of the coalition.<sup>24</sup>

With the defeat of the Populist revolt and the gradual return of economic prosperity after 1896, many insurgents returned to their respective parties—whites to the Democratic Party, and blacks to the Republican Party.<sup>25</sup> However, many white North Alabama Populists remained permanently alienated from the Democratic Party and constituted the white reform wing of the GOP.<sup>26</sup>

The emotionalism surrounding the insurgents' frank appeal for black votes was not lost on white voters either. If whites divided politically, they invited black voters to control the balance of power. If freely allowed to vote, blacks could not themselves govern, but they could decide which of the two white factions would rule. This specter of a neo-Reconstruction government revived all the demons of racial politics that lurked (indeed, *still* lurk) just below the surface of Alabama life. To prevent such racial assertiveness during the disruptive 1890s and keep blacks "in their place," whites turned to violence and committed 177 lynchings during the decade—more than in any other state.<sup>27</sup>

Without understanding the Populist insurgency and social upheaval, or the threat to the economic, political, and racial order of things, one cannot understand the 1901 Constitution. At its most elemental level, the new constitution was an attempt to replace "informal, fluctuating, and non-uniform patterns" of disfranchisement with "legal, static, and uniform methods" of moving African-Americans to the periphery of Alabama life.<sup>28</sup> The racial agenda, deferred in 1875 for fear of federal intervention, could be boldly advanced in 1901. By then America was of one mind with the South regarding Negro inferiority. Social Darwinists, eugenicists, and other new social engineers had found in ideas such as the survival of the fittest and eugenics, a "scientific" way to advance society by purging its inferior types. Even paternalists, who resisted the cold, calculating extremes of the new science, admitted that African-Americans were not yet prepared for the full responsibilities of civilization.<sup>29</sup> Like the inhabitants of the newly occupied territories resulting from American imperialism, such inferior races would have to be restrained during the duration of their tutelage.

Evidence for the racial origins of the 1901 Constitution abound. In 1900 Montgomery passed an ordinance segregating seating on street-

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. SHELDON HACKNEY, *POPULISM TO PROGRESSIVISM IN ALABAMA* 180-81 (1969).

29. HACKNEY, *supra* note 28, at 182.

cars, sparking an unsuccessful black boycott.<sup>30</sup> An editorial appearing in the *Birmingham Age-Herald* in 1901 stated that Alabama's best white men, even "ministers of the gospel," had stolen votes in order to maintain "white supremacy."<sup>31</sup> The *Selma Times* editorialized frankly in 1895: "The *Times* is one of those papers that does not believe it is any harm to rob or appropriate the vote of an illiterate Negro. We do not believe they ought ever to have had the privilege of voting."<sup>32</sup>

Furthermore, delegates to the 1901 Constitutional Convention were not under any illusions about the central purpose of their gathering. Corporate lawyer John B. Knox of Calhoun County, the successful candidate for president of the convention, spoke directly to the issue in his opening address.<sup>33</sup> In his judgment, the people of Alabama had confronted no more important issue than disfranchisement since the 1860 secession vote: "Then, as now, the Negro was the prominent factor in the issue . . . . So long as the Negro remains in significant minority, and votes the Republican ticket, our friends in the North tolerate him."<sup>34</sup> But the North's attempt to bestow political rights upon him, "without previous training or preparation,"<sup>35</sup> created conflict between the races. "And what is it that we want to do?,"<sup>36</sup> Knox inquired of the delegates. Then, answering his own question, he told them: "Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State. This is our problem, and we should be permitted to deal with it unobstructed by outside influences."<sup>37</sup> "But if we would have white supremacy," he rationalized, "we must establish it by law—not by force or fraud."<sup>38</sup> Suffrage was not a natural right. Indeed, the state had a right to deny suffrage to anyone who would endanger or imperil the common good. To discriminate against the Negro, Knox concluded, was not based on race, but on the Negro's inferior intellectual and moral condition.<sup>39</sup> There was:

in the white man an inherited capacity for government, which is wholly wanting in the Negro. Before the art of reading and writing was known, the ancestors of the Anglo-Saxon had established an orderly system of government . . . the Negro on the other hand, is descended from a race lowest in intelligence and

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30. *Id.*

31. MCMILLAN, *supra* note 2, at 225.

32. *Id.* at 225 n.49 (emphasis omitted).

33. MCMILLAN, *supra* note 2, at 264-66.

34. 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, May 21, 1901 to September 3, 1901, at 7 (1901) [hereinafter PROCEEDINGS].

35. PROCEEDINGS, *supra* note 34, at 9.

36. *Id.* at 8.

37. *Id.*

38. *Id.* at 9.

39. MCMILLAN, *supra* note 2, at 268.

moral perceptions of all the races of men.<sup>40</sup>

Although other concerns (such as constitutional restrictions on the state's ability to build roads or recruit business and tax restrictions that hamstrung local education) factored into the call for a constitutional convention, race figured largest.<sup>41</sup> Perhaps the next most compelling issue was the desire of powerful elites to disfranchise poor and working-class whites.<sup>42</sup> Having cast their lot largely with the insurgents of the 1890s and taken over many county governments, lower-class whites threatened planter and business hegemony.<sup>43</sup> These elites, therefore, searched for a mechanism capable of denying lower class whites the ballot. Furthermore, disfranchisement of black voters would strip the elites of their most important line of defense, a powerless block of votes that they could manipulate however they needed.<sup>44</sup> Black Belt Conservative Democrats in the Legislature had proposed bills to establish literacy and property requirements for voting throughout the 1890s that were defeated by Populists until 1901.<sup>45</sup>

Before conservative legislators would even agree to a vote for the proposed constitutional convention, they required certain guarantees: the convention would not change legislative representation, remove the 1875 limits on taxation, or move the capital from Montgomery.<sup>46</sup> With these conditions met, they passed a bill calling for a public referendum on drafting a new constitution. In the ensuing referendum, approximately 70,000 voted to hold a convention and 46,000 voted against doing so.<sup>47</sup> Opposition was strongest in the old Populist strongholds of the Wiregrass and hill counties: seventeen of twenty-four anti-convention counties had voted Populist in the 1890s.<sup>48</sup>

Of the 155 delegates elected to the convention, none were women or blacks.<sup>49</sup> It was, in fact, both in representation and intent, the least democratic of all Alabama's constitutional conventions. By political preference, 141 delegates were Democrats, 7 were Populists, 6 were Republicans, and 1 an independent.<sup>50</sup> All Populists and Republicans came from the hill country, except one of each party, who represented

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40. PROCEEDINGS, *supra* note 34, at 12.

41. MCMILLAN, *supra* note 2, at 261-82.

42. *Id.* at 261-309.

43. *Id.*

44. *Id.*

45. *Id.*

46. MCMILLAN, *supra* note 2, at 257.

47. *Id.* at 261-62.

48. *Id.*

49. *Id.* at 263.

50. *Id.*

the Wiregrass.<sup>51</sup> By profession, ninety-six of the delegates were lawyers and twelve were bankers.<sup>52</sup> Most were over forty years of age, and thirty-eight were Confederate veterans.<sup>53</sup> Black Belt and business leaders quickly took charge of the convention, elected John Knox president, and dominated procedural debates.<sup>54</sup> They appointed sympathetic conservatives to the key committee, the Committee on Suffrage and Elections, and quickly set about their chief purpose.<sup>55</sup> The majority report proposed a plan that would clearly result in massive disfranchisement: a residence requirement aimed at a highly transient, poor population; a poll tax of \$1.50 per year which became cumulative if one failed to pay each year; a showing of literacy in English; a requirement of real or personal property assessed at \$300 or more or forty acres of land owned tax free; and the absence of records for such offenses as bigamy, adultery, sodomy, vagrancy, miscegenation or other crimes.<sup>56</sup> In a small victory for Populist whites, the committee did allow illiterate citizens to register temporarily (prior to January 1, 1903) if they met age, residency, and poll tax requirements, and if they or an ancestor had fought in American wars since 1812, or were of good character and understood the duties of citizenship. Given the simple mathematics of literacy in Alabama, delegates were under no illusions about the effect of their work.<sup>57</sup> Of 232,000 white males of voting age, nearly 32,000 were illiterate.<sup>58</sup> Of 181,000 black males of similar age, more than 73,000 were illiterate, and few were veterans or descendants of veterans.<sup>59</sup>

On other matters, the bosses of the 1901 convention found the 1875 Constitution quite compatible to their interests. They reduced the upper limit on state taxes from 7.5 mills to 6.5, although they did guarantee that 3 of the mills would be allocated to education.<sup>60</sup> But they hedged this educational "victory" by denying local district elections for schools.<sup>61</sup> As in the 1875 document, the new constitution set the maximum county and municipal tax limit at 5 mills.<sup>62</sup> It also limited municipal or county indebtedness to 3.5%, leaving the tax provisions of the new document essentially the same as in 1875.<sup>63</sup> The result was a drag

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51. MCMILLAN, *supra* note 2, at 263.

52. *Id.*

53. *Id.*

54. *Id.* at 263-301.

55. *Id.* at 266-67.

56. MCMILLAN, *supra* note 2, at 267-301.

57. *Id.* at 276.

58. *Id.*

59. *Id.*

60. *Id.* at 318-31.

61. MCMILLAN, *supra* note 2, at 318-31.

62. *Id.*

63. *Id.*

on industrial and municipal growth and an encouragement to finance improvements though the sale of bonds, often at high interest rates.<sup>64</sup> The limits on ad valorem taxes forced the state to rely more heavily on licenses, privilege taxes, and after the 1930s, sales taxes.<sup>65</sup>

One concession that delegates made to traditional Alabama democracy was to allow citizens a vote on the new constitution.<sup>66</sup> No other Southern state allowed such a procedure for disfranchisement constitutions, for good reason, as the Alabama referendum made clear.<sup>67</sup> Populist whites in north Alabama and in the Wiregrass understood the suffrage implications and furiously opposed ratification.<sup>68</sup> The response of black leaders varied, but they generally opposed ratification as well. Behind the scenes, Booker T. Washington mobilized much of the black press and black churches against disfranchisement.<sup>69</sup> Mrs. Carrie A. Tuggle's Jefferson County newspaper, *The Truth*, and Reverend J.H. Eason's *Baptist Leader*, the official voice of the Alabama Colored Baptist State Convention, opposed disfranchisement and urged blacks to vote against ratification.<sup>70</sup> So did other black papers such as *The Journal* of Huntsville and the *Southern Watchman* of Mobile.<sup>71</sup> But some black leaders simply acquiesced to what they considered inevitable.<sup>72</sup>

The final vote on ratification was 108,613 in favor to 81,734 against. Twenty-four mainly white counties in the hill country and Wiregrass voted in opposition.<sup>73</sup> But twelve Black Belt counties turned in overwhelming majorities for ratification, 32,224 to 5,471.<sup>74</sup> Outside these twelve, the other fifty-four counties voted 76,263 to 72,389 against ratification.<sup>75</sup>

That margin demands closer scrutiny. Of the twelve decisive counties, all were in the Black Belt where whites controlled the political apparatus and blacks constituted most of the population.<sup>76</sup> African-Americans cast more than half the vote to disfranchise African-

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64. *Id.*

65. *Id.*

66. John Sparks, *Alabama Negro Reaction to Disfranchisement, 1901-1904*, 49 (1973) (unpublished M.A. thesis, Samford University) (on file with Samford University Library). This is the best study of African-American response to disfranchisement.

67. Sparks, *supra* note 66, at 49.

68. *Id.* at 10.

69. *Id.* (citing AUGUST MEIER & ELLIOTT RUDWICK, *FROM PLANTATION TO GHETTO*, 181 (1966)).

70. *Id.* at 55.

71. Sparks, *supra* note 66, at 58-60.

72. *Id.*

73. *Id.* at 72.

74. *Id.*

75. *Id.*; David Alan Harris, *Racists and Reformers: A Study of Progressivism in Alabama, 1896-1911* 185 (1967) (unpublished Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with the Bounds Law Library, The University of Alabama School of Law).

76. MCMILLAN, *supra* note 2, at 350-52.

Americans in these counties if the returns are believed. For instance, Lowndes County with a population of 1,000 white and 5,600 black adult male voters cast 5,326 votes for ratification to only 338 against.<sup>77</sup> Assuming that every single white adult male voted, and voted for ratification, the returns require that we believe that 4,326 blacks joined white supremacists in voting to deny themselves the right to vote. Such an assumption must attribute either incredible passivity, resignation, apathy or stupidity to black voters, or incredible corruption to white leaders. Ten counties in or near the Black Belt recorded more votes than there were males over twenty-one within the population.<sup>78</sup> In all, seventeen counties cast more votes for disfranchisement than they numbered adult white males.<sup>79</sup>

Twice Booker T. Washington raised money from sympathetic Northern supporters to appeal the new constitution to the Supreme Court.<sup>80</sup> But the Supreme Court decision in *Giles v. Teasley* made it clear that disfranchised black voters could expect no relief from the federal bench.<sup>81</sup>

The consequences of ratification became apparent immediately and fully justified black attempts to have the 1901 Constitution declared unconstitutional. In 1900 there were 181,000 registered black male voters; in 1903 there were less than 5,000.<sup>82</sup> In 1900, 232,000 white males were registered; in 1903 their ranks had declined by nearly 40,000.<sup>83</sup> In the first election held after enactment of the 1901 Constitution, overall voter turnout declined by 38% (the white turnout by 19%, black voting by 96%).<sup>84</sup> A study by the Alabama Policy Conference based on the 1940 census estimated that in 1941 and 1942, various provisions of the state constitution disfranchised some 600,000 whites and 520,000 blacks directly or indirectly.<sup>85</sup> Only 440,291 adults were registered to vote and in most counties, more whites than blacks fell victim to disfranchisement.<sup>86</sup>

Perpetuating their power legally when possible, the architects of the new government did so unconstitutionally when necessary. Despite the existence of Section 199 in the constitution (which required the Legislature, as its first duty after the decennial U.S. census, to reapportion itself based on the number of inhabitants in each county), conservative

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77. *Id.* at 352 n.79.

78. *Id.* at 350 n.72.

79. *Id.* at 350.

80. Sparks, *supra* note 66, at 4.

81. 193 U.S. 146 (1904).

82. MCMILLAN, *supra* note 2, at 352.

83. *Id.* at 353.

84. *Id.* at 352-55.

85. *Id.* at 354.

86. *Id.*

Black Belt Democrats prevented reapportionment until the federal courts intervened during the 1960s, a decade when the courts also desegregated schools and abolished the poll tax in federal elections.<sup>87</sup> Opponents of federal intervention resurrected the same states' rights rhetoric they had used against restrictions on the right of states to expand slavery into the territories a century earlier. But, despite growing support for such constitutional theories within the Republican party, most Americans continued to interpret states' rights rhetoric within the historical context of racism, where historically it found its most congenial home.

The drafters of the 1901 Constitution had done their work well. By setting limits on property taxes, they had protected their own financial interests and forced future revenues to be levied from those least able to pay them, creating one of the nation's most regressive tax systems.<sup>88</sup> By severe restrictions on suffrage, they had transformed Alabama from one of the most democratic states in 1819 to one of the least democratic a century later. By stripping counties of home rule and centralizing power in Montgomery, they had protected themselves against a neo-Populist revival within individual counties. After 1901 powerful special interests would no longer have to worry about thousands of local elections. All they had to do was to control statewide campaigns for governor and lieutenant governor plus 140 legislative races. By maintaining a poorly apportioned Legislature and directing sufficient funds into the hands of sympathetic legislative and gubernatorial candidates, they could generally control at least one branch of the Legislature, enough to forestall reformist proposals by unsympathetic governors such as Bibb Graves or James E. Folsom.

The fact that Alabama remained throughout the twentieth century one of the poorest, most racially divided, and least educated states in the South was no accident. These were merely unintended consequences of decisions made in 1901. What is most remarkable is not that reactionary forces so completely dominated constitution-making in 1901 but that a century later the edifice they constructed has been modified only by federal court decisions and not by Alabama citizens, who either had too great a stake in the system, or were too uninformed, or too powerless to remove "Alabama's shame."

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87. MCMILLAN, *supra* note 2, at 354.

88. Wayne Flynt & Keith Ward, *Taxes, Taxes, Taxes: Alabama's Unresolved Dilemma*, Ala. Heritage, Spring 1992, at 12-14. This Article explains the relationship between the 1901 Constitution, politics, and tax policy.