

# THE TORTURED HISTORY OF EFFORTS TO REVISE THE ALABAMA CONSTITUTION OF 1901

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## I. INTRODUCTION

The Alabama Constitution of 1901 was conceived with the ignoble purpose of removing African-Americans from the political process in this state. Following the Civil War and black emancipation, the newly freed slaves participated openly and freely in politics and were frequently elected to significant public offices. With the end of Reconstruction in the mid-1870s, however, black political victories were few and far between. Even so, continuing into the 1890s blacks remained active and, during the political upheavals of the last decade of the nineteenth century, often worked on common concerns with white Populists and Republicans.

White landed interests were alarmed at the possibility of revived black political power, as well as poor whites capturing control of state government and employing it for reformist purposes. As the decade of the 1890s waned, calls were heard increasingly for a "reform" constitutional convention primarily to deal with the problem of black voting. Without violating the Reconstruction Amendments to the Constitution, especially the Fifteenth which specifically authorized black suffrage, ways had to be found to keep most blacks away from the ballot box.

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\* Professor Emeritus of Political Science, The University of Alabama; Ph.D., The University of Alabama. This Article draws heavily on the author's previous writings on the history of constitutional reform efforts in Alabama, including: JAMES GLEN STOVALL ET AL., ALABAMA POLITICAL ALMANAC 1995, 39-57 (1995) [hereinafter STOVALL]; WILLIAM H. STEWART, THE ALABAMA CONSTITUTION: A REFERENCE GUIDE (1994) [hereinafter STEWART, A REFERENCE GUIDE]; WILLIAM H. STEWART & JAMES D. THOMAS, ALABAMA GOVERNMENT AND POLITICS (1988) [hereinafter STEWART, POLITICS]; WILLIAM H. STEWART, THE ALABAMA CONSTITUTIONAL COMMISSION (1975) [hereinafter STEWART, THE COMMISSION]; William H. Stewart, *New Effort for an Old Problem*, TUSCALOOSA NEWS, Jan. 7, 1996, at 4E. The movement for constitutional reform appeared to be gathering some momentum in the spring of 2001, with Governor Siegelman's announcement of support for it. Due to publication deadlines, this analysis of efforts to improve the state's basic law has had to conclude at the end of April.

White aristocrats in the Black Belt, since the end of Reconstruction, had frequently "voted" the blacks residing in this part of the state on behalf of white candidates and issues, but many had grown wary of having to resort to this manipulation and suspected that its effectiveness could not endure forever.

Thus the "reformers" of a century ago are rightly identifiable as racists. They convened the constitutional convention which met for several months in Montgomery in 1901 for the primary purpose of "purifying" the suffrage; in other words, eliminating blacks and, many hoped, radical-minded white farmers who were greatly upsetting things as far as Alabama politics was concerned. Even though the assembly was the first major Alabama political gathering of the new twentieth century, the delegates were largely unconcerned with twentieth century problems. In fact, it could be argued that Alabama has not had comprehensive constitutional reform since 1875 because, except for the black disenfranchising provisions, the 1901 Constitution is so similar to the one adopted a quarter-century earlier. A national publication of the time, *The Outlook*, quoted the chairman of the convention, John B. Knox, as saying, "What we want to do is, within the limits imposed by the federal Constitution, to establish white supremacy in the State of Alabama."<sup>1</sup>

As the delegates were deliberating in Montgomery, they could be reasonably confident that the United States Supreme Court and other institutions of the federal government would be likely not to void white initiatives to keep blacks from voting—if they appeared to conform to the letter of the national Constitution. Thus Alabama elites were prepared to join with other southern states to put in place a new state basic law that would accomplish this objective. Dr. Bailey Thomson, then associate editor of the *Mobile Register*, noted several years ago that to pass the 1901 Constitution its architects "imposed their will through a criminal act."<sup>2</sup> "They stole the election to ratify their monstrosity, and they did it in such a bold, outrageous manner that their evil deed stuck."<sup>3</sup> Thomson's conclusion is based on the fact that the relatively narrow victory for the constitution "came from the 12 Black Belt counties, where a small group of white planters ran up huge majorities in favor of the constitution by fraudulently reporting black votes."<sup>4</sup> Elsewhere, the constitution was mostly disfavored. "What an irony," Thomson concludes, "that the planters stole votes from the very black

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1. Max Bennett Thrasher, *The Alabama Constitutional Convention*, 67 *OUTLOOK* 437 (1901) (internal quotations omitted).

2. *Conceived in Fraud*, *MOBILE REG.*, Dec. 11, 1994, at 2C.

3. *Id.*

4. *Id.*

men that the convention proposed to disfranchise."<sup>5</sup>

While they achieved the "reform" they most wanted—emasculating blacks politically—other emerging problems remained unresolved. The actual black disfranchising efforts would vary over the years from the original mechanisms put in place in the 1901 Constitution, but the "reform" goal itself would be mostly successful until two-thirds into the twentieth century when the Voting Rights Act of 1965 was enacted following the Selma-to-Montgomery march. It should be pointed out that Alabama's early political history was characterized by frequent constitutional change—even the replacement of one constitution with another is not unheard of in Alabama. The 1901 Constitution was the sixth constitution for Alabama since statehood in 1819. Professor Howard P. Walthall of the Cumberland School of Law has noted that, "All the revised constitutions in the nineteenth century came about as a product of either the Civil War, Reconstruction or some revolutionary significant event."<sup>6</sup>

Alabama has had substantial constitutional change since 1901, even if not a new constitution. Although the racist language remained, albeit unenforceable, in the constitution, dramatic changes were made by opening not only the ballot box and elected office to blacks, but also by requiring integrated schools instead of the rigidly Jim Crow pattern envisioned by the Constitution of 1901. Besides the reforms specifically related to race, women and eighteen-year-olds are empowered to vote by virtue of the Nineteenth and Twenty-sixth Amendments to the United States Constitution. Taxes must be fairly assessed throughout the state by order of the federal courts. Both House and Senate must be districted according to the one-person-one-vote principle, again according to federal judicial edicts, despite what the Constitution of 1901 says about the apportionment of seats in the two legislative chambers.

This Article will focus on efforts that began to be made within Alabama only a relatively short time after the Constitution of 1901 went into effect to revise or replace it, and continued into the present constitutional reform movements. Some of these efforts made noticeable progress while most others were virtually stillborn. None, however, have yet resulted in any comprehensive change in the original 1901 document. Formal constitutional change has happened, but it has been the result of hundreds of amendments which had, well before the end of the twentieth century, made the Alabama Constitution easily the longest in the nation and, some were saying, in the world.<sup>7</sup> These piecemeal

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5. *Id.*

6. Barnett Wright, *Vestavia Panel Set: Rewrite of Restrictive Constitution Is V3 Topic*, BIRMINGHAM NEWS, Mar. 4, 2001, at 13A.

7. STEWART, THE COMMISSION, *supra* note \*, at 2.

changes to the 1901 document have not changed its inherently racist and ultra-conservative character, however. In some instances, they have made matters worse rather than better.

## II. THE TWENTIETH CENTURY

### A. *The First Rumblings of Discontent*

Only seven years after the constitution went into effect, its preoccupation with race concerned even those who had strongly supported the white supremacist efforts to suppress blacks. In addition to their racial fears, the 1901 delegates had also been extremely preoccupied with preventing the accumulation of large public debt since the state was still paying off Reconstruction obligations.<sup>8</sup> One major way for the state to incur debt was to participate in works of public improvement, so the constitution forbade it.<sup>9</sup> As it happened, however, this was just at the time of important technological change, especially the invention and gradual perfection of the automobile.

It would be many years before most Alabamians would have motorized vehicles, but the farmers, a majority of the population, did need passable roads for their wagons to transport cotton and other crops to market. Also, they wanted their children to get access to what limited educational opportunities were available. Only the state could devise and oversee the development of even a rudimentary highway system because building a system of roads was beyond the capacity of counties and other local governments. So, only seven years after the constitution had said no, the white male voters of Alabama said yes and authorized the state to participate in a very limited way in highway construction by amending section 93 of the document.<sup>10</sup> A state highway agency was formed a few years after that, spurred on by the passage of the Federal Aid Road Act in 1916.<sup>11</sup> Even after the 1908 change, the state still did not actually build roads, but instead subsidized county efforts to "get the farmer out of the mud."

### B. *O'Neal's Observations*

The first high-level, explicit acknowledgement that the Constitution

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8. STEWART, POLITICS, *supra* note \*, at 37.

9. *Id.*

10. *Id.*

11. *Id.* at 30.

of 1901 was seriously deficient came in the January 1915 farewell addresses of Governor Emmet O'Neal. The Governor noted, "[L]ittle consideration was given to other matters of reform," besides racial policies, in the 1901 Constitution.<sup>12</sup> He recognized that the 1901 document represented practically a readoption of the 1875 Constitution.<sup>13</sup> Based on the problems that had confronted him as governor, O'Neal recommended convening a constitutional convention to draft a new constitution for Alabama.<sup>14</sup> O'Neal observed:

[M]any of the provisions of our present antiquated fundamental law constitute insuperable barriers to most of the important reforms necessary to meet modern conditions and to secure greater economy [always highly prized] and efficiency [these were the twin public administration themes of the times] in the administration of every department of the state government.<sup>15</sup>

The 1901 convention had been obsessed with preventing a recurrence of the financial indiscretions of Reconstruction and removing blacks from the political process. O'Neal argued that the state could not keep looking backward to the "saturnalia . . . and extravagance" which characterized the Reconstruction era.<sup>16</sup> O'Neal was not a racial liberal and firmly supported the white supremacist provisions of the constitution. He termed the black exclusionary provisions a "wise solution."<sup>17</sup> These aspects of the 1901 Constitution would not need to be changed since it was probably true, as the framers of that document believed, that "the danger of federal interference no longer existed."<sup>18</sup>

Outgoing Governor O'Neal contended that "no real or permanent progress is possible in Alabama, until the present fundamental law is thoroughly revised and adapted to meet present conditions."<sup>19</sup> He especially wanted the constitution to stimulate additional local tax efforts in support of public education. He doubted that any "permanently successful system of elementary education [could] be maintained that relies entirely upon state aid and not upon local taxation, initiative and effort."<sup>20</sup>

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12. 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF ALABAMA SESSION OF 1915, at 309 (1915) [hereinafter 1915 HOUSE J.].

13. *Id.* at 309-10.

14. *See id.* at 310-24.

15. *Id.* at 308-09.

16. *Id.* at 309.

17. 1915 HOUSE J., *supra* note 12, at 310.

18. *Id.* at 309. Governor O'Neal did want "Alabama [to] put an end to lynch law" and, as a step in this direction, proposed that the governor have the right to remove sheriffs who failed to do their duty to protect black prisoners. *Id.* at 311.

19. *Id.* at 310.

20. *Id.* at 318.

Governor O'Neal thought that a constitutional convention was needed instead of a few simple amendments. He stated, "The defects in our present constitution are so numerous and radical, and so intermingled in the different sections that it would be practically impossible by any manner or series of amendments to remedy the defects."<sup>21</sup> He felt that the Legislature should take steps to assemble another constitutional convention to "take into consideration the entire subject and re-model the entire constitution so that it might make an harmonious whole."<sup>22</sup> Expressing himself as he did on his way out of office probably made Governor O'Neal feel better. However, his words had no impact. The Legislature made no response to the lame duck chief executive's suggestions, and the media discussion following O'Neal's "farewell address" was minimal.<sup>23</sup>

### C. Governor Kilby's Commission

Governor Thomas E. Kilby also made a plea for constitutional reform as he was about to leave office—when it was too late for Kilby himself to do anything about the problems of which he complained. The advocacy of a new constitution came at the conclusion of a comprehensive message sent in writing to the Legislature on January 9, 1923.<sup>24</sup> Kilby reflected back on his four years as governor, observing "that much progressive legislation, badly needed and greatly desired, has been restrained because of some constitutional limitation or inhibition."<sup>25</sup> He conceded that piecemeal constitutional amendments amounted to a partial remedy for this problem.<sup>26</sup> However, "[t]he result [was] that we now have much confusion and a great lack of coordination in the fundamental law of the State."<sup>27</sup> After only a little more than two decades in operation, Kilby was already able to characterize the constitution with its amendments as a "patch work."<sup>28</sup> Kilby was concerned that it was not "an harmonious whole."<sup>29</sup>

Also, like O'Neal, Kilby called for a popular referendum on the question of whether or not to hold a constitutional convention. However, Kilby added the suggestion for "the creation of a commission

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21. 1915 HOUSE J., *supra* note 12, at 324.

22. *Id.*

23. A thorough search of major state newspapers of the time by the author revealed no mention of Governor O'Neal's advocacy for a new constitution.

24. See 1 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF ALABAMA SESSION OF 1923, at 135-39 (1923) [hereinafter 1923 HOUSE J.].

25. *Id.* at 135-36.

26. See *id.* at 136.

27. *Id.*

28. *Id.*

29. 1923 HOUSE J., *supra* note 24, at 136.

composed of, for example, thirty-five citizens of the State, drawn from the worthy members of such groups of our people as the farmers, the business men, the educators, the bankers, the doctors, the bench and bar, the press and organized labor."<sup>30</sup> The task of this study group would be to draft proposed changes for consideration of the convention delegates.<sup>31</sup> Governor Kilby was realistic enough to know that the new Legislature, which he addressed, was not likely to show great deference to a lame-duck chief executive. Of course, he was right.

#### *D. The Brookings Report*

All efforts, however meager, to reform the Alabama Constitution noted thus far were gubernatorially initiated. This continued to be the case in the 1930s, when Governor B.M. Miller commissioned a study by the original "think tank," the Brookings Institution.<sup>32</sup> The Brookings survey showed "that no adequate reorganization of the government of Alabama"—the primary focus of the study—was "possible without amendment of a considerable number of the provisions of the present Constitution."<sup>33</sup> Among the defects in the 1901 Constitution, which most justified revision, were those "relating to organization, the selection of administrative officers, and their powers and duties which should have been left to the legislature."<sup>34</sup> "Conditions [since 1901] have changed," the Brookings team of experts pointed out, "but the existence of inflexible and unchangeable provisions, essentially statutory, in the Constitution has made it difficult or impossible for the State government to adjust itself to new needs."<sup>35</sup> A fairly progressive governor, particularly in dealing with the financial ravages of the Great Depression, Miller did nothing to follow-up on the constitutionally related suggestions of the Brookings report.

#### *E. The Alabama Policy Committee*

Later in the 1930s there was some stirring among a small portion of the citizenry for constitutional reform. An unofficial group of liberal citizens who called themselves the Alabama Policy Committee (APC) functioned from the mid-1930s to the mid-1940s.<sup>36</sup> Participants in its

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30. *Id.*

31. *See id.*

32. INSTITUTE FOR GOVERNMENT RESEARCH OF THE BROOKINGS INSTITUTION, ORGANIZATION AND ADMINISTRATION OF THE STATE GOVERNMENT OF ALABAMA: REPORT ON A SURVEY SUBMITTED TO GOVERNOR B.M. MILLER 51 (1932) [hereinafter BROOKINGS INST.].

33. *Id.*

34. *Id.*

35. *Id.*

36. *See Merit System in State Urged*, BIRMINGHAM AGE-HERALD, July 16, 1938, at 10.

meetings included college professors, businessmen, newspaper writers, church activists, and several elected officials.<sup>37</sup> After a couple of years of study, in July 1938, the APC called for replacement of the 1901 Constitution with a new one.<sup>38</sup> Following this initial call for a new constitution, members began laboring to produce a model document. The proposals of the committee—for example, removing payment of a poll tax as a prerequisite for voting—were never given any serious consideration by official policymakers, however, and the group itself expired by the mid-1940s without any policy successes to its credit.<sup>39</sup> Even if not due to the efforts of the Brookings Institution or the Alabama Policy Committee, the state did experience constitutional change during this period. Professor Harvey Jackson observed, however, that “[a]lthough during the 1930s the constitution was amended 25 more times, those amendments did little to change the foundation on which the edifice was raised.”<sup>40</sup>

#### F. Folsom for Reform

James E. Folsom, Sr., was the only chief executive prior to Albert Brewer (1968-71) to actively seek constitutional reform early on in his administration. Folsom fought hard and persistently, if unsuccessfully, for a new constitution in both his first (1947-51) and second (1955-59) administrations. On March 1, 1947, only a few weeks after taking the oath of office, Governor Folsom, whose election had stunned conservative forces, convened a special session of the legislature.<sup>41</sup> Folsom wanted the assembly to pass a resolution calling a constitutional convention and to consider his choices for the Auburn University Board of Trustees.<sup>42</sup> However, the Governor failed in both of these challenges to the political status quo.<sup>43</sup>

With respect to the main subject of interest here, neither racial nor

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37. *Id.*

38. *Id.*

39. Illustrative articles related to the Alabama Policy Committee can be found in both the BIRMINGHAM NEWS and the BIRMINGHAM AGE-HERALD of October 23, 1937. See also WILLIAM VERNON HOLLOWAY & CHARLES W. SMITH, JR., GOVERNMENT & POLITICS IN ALABAMA 4 (1941). The APC issued a series of bulletins describing its work and presenting minutes from its meetings. One paper read, for example, was entitled, “Was Alabama’s Constitution of 1901 Actually Adopted?” The author noted evidence that African-Americans in the Black Belt portions of the state were, as pointed out earlier in this Article, in effect, “voted” by wealthy whites to ensure approval of the constitution and to offset opposition by poor whites, particularly in North Alabama.

40. Harvey H. Jackson III, *Bourbons Keep State in Check*, BIRMINGHAM NEWS, Apr. 2, 2000, at C1.

41. *Special Session Call Surprises Folsom’s Friends*, BIRMINGHAM AGE-HERALD, Mar. 3, 1947, at 1.

42. *Id.*

43. STEWART, THE COMMISSION, *supra* note \*, at 5-6.

economic conservatives of the late 1940s were about to allow a constitutional convention while Folsom was Alabama's governor. It was a negative rather than a positive fact that the CIO-PAC, the most liberal activist labor group in Alabama at the time, championed constitutional reform. Like Folsom, union interests especially wanted to see the poll tax outlawed and the over-representation of the Black Belt in the Legislature reduced. The Governor and the Legislature were totally at cross-purposes when Folsom made his appeal for a constitutional convention. Predictably, Folsom's plea for a constitutional convention went unheeded by the Legislature.

Throughout the remainder of his initial term, Folsom routinely petitioned legislators to call a constitutional convention, but he waited until 1950, the last full year of the term, to make his most bizarre pleas for reform of the state's basic law. The "lyin' newspapers," as the Governor referred to them, saw Folsom's renewed support for a new constitution essentially as early campaigning for 1954 when he could point out to voters that he had indeed fought hard for their favored causes.<sup>44</sup> Five special legislative sessions were called in 1950, more than in any single year ever before or since. Uniformly, the Governor appealed for a convention to draft a new constitution and, just as consistently, the legislature flatly refused. In one mid-summer session, the senate adjourned *sine die* almost immediately after the members took their seats.<sup>45</sup> At the fourth of the five sessions, the senate would not even give a pro forma second reading to the administration's constitutional convention resolutions.<sup>46</sup>

In issuing his last plea for constitutional reform, Folsom warned that "if the legislature continues to adjourn before the constitution is properly complied with [particularly with respect to reapportionment], I expect to use whatever power [is] in my command to keep the legislature in session until the woods have been properly and brilliantly persimmoned."<sup>47</sup> A capitol reporter explained, "Persimmons usually don't ripen until after the first big frost in the Fall," which was several months later.<sup>48</sup> Nevertheless, the legislature's will, rather than the Governor's, prevailed, although the assembly technically remained "in session" until late October. At no time did a constitutional convention command more than a modicum of support.

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44. Hugh W. Sparrow, *Folsom Orders Another Session After Last Dies*, BIRMINGHAM NEWS, July 28, 1950, at 1.

45. 3 JOURNAL OF THE SENATE OF ALABAMA, THIRD SPECIAL SESSION OF 1950, at 12 (1950).

46. 4 JOURNAL OF THE SENATE OF ALABAMA, FOURTH SPECIAL SESSION OF 1950, at 1-70 (1950).

47. *Special Session Ends, Folsom Calls Another*, BIRMINGHAM NEWS, Aug. 4, 1950, at 16.

48. *Id.*

Folsom won a landslide victory in the May 1954 Democratic primary which was "tantamount to election" in that era. In April 1955, a few months after his second inaugural the Governor called a special session of the legislature. Even though the representatives and senators now seemed more susceptible to gubernatorial influence generally than they had been during Folsom's initial term, they were no more responsive to his calls for constitutional renewal than they were a few years earlier. On the first day of this legislative gathering, the House recessed even before the Governor's bill calling for a constitutional convention was delivered.<sup>49</sup>

The *Brown v. Board of Education* desegregation decision was handed down on May 17, 1954.<sup>50</sup> In an atmosphere of increasing white Southern determination to maintain racial barriers, support for reforming the Alabama Constitution, already weak, declined further. Folsom's racially moderate views were inconsistent with many of his fellow white Alabamians' opinions, especially in the Black Belt, and they wondered "if a constitutional convention could do away with Alabama's segregation laws."<sup>51</sup> The Birmingham industrial "big mules" were just as adamant about retaining legal safeguards against higher taxes and more union organization. Albert Boutwell—a racially moderate Birmingham mayor of a decade later, but earlier a conservative anti-Folsom state senator—warned that "if a constitutional convention were called to change [the] organic laws of our state, industrial development might be greatly slowed down."<sup>52</sup>

Folsom attempted a more politically pragmatic strategy by pledging that his proposed constitutional convention would confine itself to consideration of more equitable legislative apportionment.<sup>53</sup> However, the Supreme Court of Alabama undercut this approach by holding that a constitutional convention could not be limited to an agenda specified in advance.<sup>54</sup> In 1956, Governor Folsom once more asked the legislature to put the question of calling a constitutional convention before the voters.<sup>55</sup> Once again, he sought to allay legislative anxieties by emphasizing that his goal was fair legislative reapportionment and nothing else. "I am not trying to cram a personalized version of the Constitution

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49. 3 JOURNAL OF THE HOUSE OF REPRESENTATIVES OF ALABAMA, THIRD EXTRAORDINARY SESSION OF 1955, at 5 (1955).

50. 347 U.S. 483 (1954).

51. Fred Taylor, *No Convention Needed—Boutwell Says Reapportionment Legislature By Simple Bill*, BIRMINGHAM NEWS, Apr. 14, 1955, at 64.

52. *Id.*

53. Fred Taylor, *Legislative Gets Bills on Reapportionment Only*, BIRMINGHAM NEWS, Apr. 13, 1955, at 1.

54. See Opinion of the Justices, 81 So. 2d 678 (Ala. 1955).

55. Hugh Sparrow, *Signs Are Folsom Faces Rebuff on Convention*, BIRMINGHAM NEWS, Jan. 3, 1956, at 26.

down the throats of our people," he said.<sup>56</sup> This appeal appeared to change no minds, however, and the legislators went back home shortly after convening. It was not until the late 1960s and early 1970s that constitutional reform would again occupy any visible position on the Alabama political agenda. Professor Jackson observed that during the Folsom era, which covered most of the years "between 1945 and 1960, the [constitution] was altered more than 100 times, with no small number of the amendments relating to local taxation, social services (especially health care), public works, infrastructure improvements and education."<sup>57</sup> These incremental changes, he felt, meant that "less was heard of [comprehensive] constitutional revision and tax reform."<sup>58</sup>

### G. *The Constitutional Commission*

During the long George Wallace era, gubernatorial interest in constitutional reform was virtually nonexistent. However, in 1967, the only full year Lurleen Wallace served in the governorship following her succession to her husband's position, several independent-minded legislators did ask their colleagues to examine a number of plans for updating the state constitution.<sup>59</sup> These efforts enjoyed no success.<sup>60</sup> The next year, upon Mrs. Wallace's death, Lieutenant Governor Albert Brewer became governor and constitutional discontent at last bore fruit. The new chief executive said shortly after taking office that, "at the proper time," he would propose a constitutional reform agenda.<sup>61</sup>

The first step involved the creation of a constitutional commission supported by the new Governor. Unlike in the 1920s, when Governor Kilby recommended such an agency, this time no subsequent convening of a constitutional convention was anticipated.<sup>62</sup> Instead of merely laying the foundation for constituent delegates, the commission would itself draft constitutional articles and present them to the legislature that would then have the option of passing them on for voter approval or disapproval.<sup>63</sup> Although most House and Senate members seemed to have no enthusiasm for any kind of substantial constitutional change, they did give at least grudging support to the establishment of what was originally a twenty-one member Alabama Constitutional Commission.<sup>64</sup>

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56. 1 JOURNAL OF THE SENATE OF ALABAMA, FIRST EXTRAORDINARY SESSION OF 1956, at 25 (1956).

57. Jackson, *supra* note 40.

58. *Id.*

59. STEWART, THE COMMISSION, *supra* note \*, at 6-8.

60. *Id.*

61. *Id.* at 8.

62. *See id.* at 8-11.

63. *Id.* at 11.

64. STEWART, THE COMMISSION, *supra* note \*, at 14-18.

The Alabama Constitutional Commission met in an organizational session in January of 1970, and began holding regular meetings and hearings in different parts of the state shortly thereafter.<sup>65</sup> In order to act more expeditiously, the Commission divided into subgroups—for example, a committee on taxation and debt limitation and a committee on the executive and legislative branches—to study particular aspects of the existing constitution.<sup>66</sup> Commission hearings were poorly attended.<sup>67</sup> To the extent that they took any part in the work of the study group at all, most witnesses were spokespersons for organizations determined to retain their advantages under the existing constitution.<sup>68</sup> For example, the Alabama Press Association was primarily concerned that, if publication requirements for proposed legislation were somewhat reduced, both as an economy measure and to expedite the passage of needed legislation, its members would lose the legal advertising revenue.<sup>69</sup> The fact that most interest groups with a stake in the status quo did not concern themselves much with the work shows that they had little to fear in the way of their cherished constitutional privileges being taken away. Political analyst Ted Bryant observed considerably later that, “Special-interest groups, largely through the document’s [many] amendments, have written into the constitution the provisions they want and are not willing to risk losing their power.”<sup>70</sup> They would have been fiercely active had they felt their existing prerogatives to be at all in jeopardy. The League of Women Voters, as would be expected, did take an active role in support of the work of the Commission; so did the Jaycees, an organization that had been championing the cause of constitutional reform for about a decade.<sup>71</sup>

Following several meetings and hearings, members of the Commission met with legislators at the end of 1970 to discuss their preliminary findings with respect to the need for specific constitutional changes.<sup>72</sup> However, events on the large playing field of Alabama politics had more to do with the ultimate fate of the Commission’s reform proposals than anything else. In extremely bitter Democratic primaries in May 1970, former Governor George Wallace eked out a narrow victory over

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65. *Id.*

66. *Id.* at 14-15.

67. *Id.* at 20.

68. *Id.* at 24.

69. STEWART, THE COMMISSION, *supra* note \*, at 26.

70. Ted Bryant, *State Constitution Out of Date; Officials Reluctant to Move*, BIRMINGHAM NEWS, Jan. 20, 1996, at 1C.

71. STEWART, THE COMMISSION, *supra* note \*, at 25. The League of Women Voters put out a pamphlet titled, *Alabama Constitution: A Stoplight to Progress*, in Birmingham around Jan. 1970. *Id.*

72. *Id.* at 18.

his one-time ally, incumbent Governor Brewer.<sup>73</sup> This meant that Brewer would not be around to provide the mandatory gubernatorial push for constitutional change. He planned to implement reform on an incremental basis had he stayed in office.<sup>74</sup> Successively, if all went according to Brewer's projected approach, new constitutional articles could have been proposed, adopted by the Legislature, and then approved by the voters in popular referenda.<sup>75</sup>

George Wallace, as we have previously seen, was basically satisfied with the general character of the Alabama Constitution, even though he supported and sponsored numerous amendments relating to various types of public works.<sup>76</sup> Brewer exited the governorship in January 1971, leaving the Constitutional Commission without any encouragement at the top of Alabama state government; however, the more dedicated members continued to do the job they were appointed to perform.<sup>77</sup> At the conclusion of public hearings in Montgomery and Birmingham in March 1971, the Commission suggested constitutional changes in several areas, and the Legislature recommended annual sessions to replace biennial meetings.<sup>78</sup> May of 1971 was given as the target date for the agency to complete its work after its members were originally named.<sup>79</sup> However, given the massive nature of the task entrusted to them, a month before the initial deadline they asked for a two-year additional lease on life.<sup>80</sup> The Legislature did agree to this but, at the same time, put additional legislators on the Commission.<sup>81</sup>

One of the most common elements of comprehensive constitutional reform in the American states is the desire of the legislature, although a creature of the constitution, to maintain as much control over the process as possible. Typically, legislatures prefer constitutional commissions to constitutional conventions because they can exercise much greater dominance over the former than over the latter. The fact that all Constitutional Commission proposals would first have to be approved by the Legislature before being submitted to the voters gave the Alabama senators and representatives overwhelming control at the outset. However, surveys typically show that voters are skeptical of legislative direction in the constitutional revision process.<sup>82</sup> A 1993 voter sampling found that nearly 82% opposed legislative rewriting of the constitu-

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73. *Id.* at 31.

74. *Id.*

75. STEWART, THE COMMISSION, *supra* note \*, at 35.

76. *Id.* at 32.

77. *Id.* at 31.

78. *Id.* at 33-35.

79. *Id.* at 15.

80. STEWART, THE COMMISSION, *supra* note \*, at 23.

81. *Id.*

82. *Legislative Rewrite Opposed*, BIRMINGHAM NEWS, Jan. 13, 1993, at 6E.

tion.<sup>83</sup> Most felt this task, if it were to be performed at all, should be the work of a convention of delegates elected specifically for this purpose; but, in the 1970s like in the 1990s, there was not enough support for a convention.<sup>84</sup>

A substantial number of Commission members, legislators and non-legislators alike, had little interest in the group's work and absented themselves from many of its meetings.<sup>85</sup> At times it was difficult to get a quorum so that the Commission could vote on proposed constitutional articles.<sup>86</sup> Given coverage of more sensational news, the work of the Constitutional Commission, even though open to the media and the public, got little attention and most Alabamians were probably unaware of its existence.<sup>87</sup> The Commission, which was very modestly funded, lacked adequate staff support and physical facilities to be able to perform its work in a timely manner.<sup>88</sup>

In its preliminary report in May of 1971—when George Wallace was about half way through the first full year of his second term and was intensely involved in plans for his presidential campaign the next year—the Commission suggested changes in several areas, including annual salaries instead of per diem and annual in place of biennial legislative sessions.<sup>89</sup> It was not difficult to win legislative acceptance for these ideas, but popular approval was a different matter. Simultaneously with President Nixon carrying Alabama in his re-election campaign in November of 1972, voters decisively turned down the annual session plan.<sup>90</sup>

The final Constitutional Commission report was offered in May of 1973. In summary, the Commission concluded that "the 1901 constitution, with its [then] 327 amendments, is obsolete and should be replaced with a constitution that is more adequate for the citizens of the state and for their government, both state and local."<sup>91</sup> The absence of home rule was pointed to as the greatest single defect of a highly problematic constitution.<sup>92</sup> Because so much minutiae relating to local governments was in the constitution, this meant that the constitution had to be amended frequently to update these essentially statutory or ordi-

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83. *Id.*

84. *Id.*

85. STEWART, THE COMMISSION, *supra* note \*, at 18-19.

86. *Id.*

87. *Id.* at 23-24.

88. *Id.* at 19-20.

89. ALABAMA CONSTITUTIONAL COMMISSION, INTERIM REP., at 11-12 (1971).

90. STEWART, THE COMMISSION, *supra* note \*, at 39-42.

91. ALA. CONSTITUTIONAL COMM'N, REPORT ON PROPOSED CONSTITUTION OF ALABAMA, at iii (May 1, 1973).

92. *Id.* at viii.

nance-type provisions.<sup>93</sup> It was almost certain that unless changes were effected, then the pace of constitutional amendments, which had already made the Alabama Constitution not merely the longest state constitution but supposedly the longest constitution in operation anywhere in the world, would only accelerate in the future.

Even though lack of home rule was identified as the number one constitutional problem, provisions of the draft constitution relating to local government got even less attention than other provisions did. Wayne Flynt, Auburn University historian and author, told a major daily newspaper years later that:

[W]hile officials of progressive counties want home rule, many county commissioners are not sure they want more power because it would mean more responsibility to the voters. . . . A lot of county commissioners don't favor it (home rule) because that would mean counties really do have power over their own affairs, and a lot of county commissioners don't want power over their own affairs.<sup>94</sup>

Of course, state legislators, who currently exercise much local control, are not going to beg the locals to accept more power.

The Commission had developed a succinct basic law that might have met state needs had there been the needed leadership to push it. By mid-1973, Governor Wallace was severely disabled as a result of the assassination attempt a year earlier and was not in a position to be active either for, or against, any constitutional reforms.<sup>95</sup> Commission leaders met with Governor Wallace, but he was noncommittal about supporting their recommendations.<sup>96</sup> Even though, in cases of conflict between the desirable and the feasible as far as constitutional change was concerned, the Commission generally opted for the latter, leadership was not in place to promote even modest recommendations. Its final report was mostly forgotten about—just another tantalizing example of an opportunity for reform lost.

Like the executive, the Legislature was also not interested in a systematic consideration of the draft constitution as proposed by the Alabama Constitutional Commission.<sup>97</sup> Some have explained this reluctance on grounds that the legislature, which then met only biennially in regular session, did not have adequate time to consider a new constitution.<sup>98</sup>

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93. *Id.*

94. Ted Bryant, *State Constitution Out of Date*, BIRMINGHAM NEWS, Jan. 20, 1996, at 1C.

95. STOVALL, *supra* note \*, at 36.

96. STEWART, THE COMMISSION, *supra* note \*, at 32.

97. *Id.* at 114-115.

98. *Id.*

A more accurate observation would be that the Legislature was not, in the majority, supportive and would not have passed, or even seriously considered, approving the draft constitution, no matter how much time they had had—even if Governor Wallace had been willing to call a special session—which he was not. While Wallace was officially neutral on the subject of constitutional reform he was generally perceived as opposed and legislators anxious not to offend him probably took their cues from this perception. Also, an argument may be made that 1973 was not a good time for constitutional reform because legislative elections were scheduled for the very next year. This rationalization is frequently used to explain why the Legislature fails to act on a particular problem.

More recently in the *Tuscaloosa News*, an editorial writer observed, “The same Legislature that a recent survey says is overwhelmingly for rewriting our awful constitution is the same Legislature that ignored a couple of chances . . . to make that happen.”<sup>99</sup> Specifically, in this attempt at constitutional reform a couple of decades later, the members had “refused to pass a bill allowing voters to choose whether they wanted a constitutional convention [and they] refused to approve bills re-writing the first two articles of the 1901 constitution.”<sup>100</sup> To the contrary, “[they] gave us 35 new amendments” on top of the twelve that had already passed and were scheduled for ratification votes.<sup>101</sup> These comments were made at about the same time a poll showed eighty-eight percent of legislators responding agreed that Alabama did indeed need a new constitution.<sup>102</sup> The most recent survey showed just five percent of the representatives and seven percent of the senators going on record as opposing the rewriting of the state constitution.<sup>103</sup>

#### H. Judicial Reform

Returning to the 1970s, one part of the Commission’s report was not ignored by those whom it would most immediately and directly impact. The draft judicial article was taken up and pushed by then-Chief Justice Howell Heflin who assumed the leadership role on the supreme court in January of 1971.<sup>104</sup> He had long been a proponent of constitutional reform for the courts.<sup>105</sup> The initial push for judicial reform had come in late 1966 with the convening of the first Citizens Conference

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99. *Going For Broke*, TUSCALOOSA NEWS, May 26, 2000, at 10A.

100. *Id.*

101. *Id.*

102. *Lawmakers: Constitution Needs Overhaul*, BIRMINGHAM NEWS, Feb. 5, 2000, at 6A.

103. Phillip Rawls, *Rewriting State Constitution Not Top Priority For Some Legislators*, TUSCALOOSA NEWS, Feb. 5, 2001, at 6A.

104. STEWART, THE COMMISSION, *supra* note \*, at 80.

105. *See id.* at 79.

on Alabama State Courts.<sup>106</sup>

Judicial structures and procedures are matters of low salience, as far as most people are concerned, and proposals for comprehensive change in these parts of the constitution do not arouse the instantaneous disapproval that demands for change in other areas are apt to do. Still, reform of the judicial article of the constitution, although easier to achieve, was not a simple matter and required much political skill on the part of Chief Justice Heflin and his colleagues among the bench and bar. Throughout the 1973 legislative session they labored to muster critical legislative support for the proposed new judicial article, recognizing the need to compromise, but not wanting to sacrifice any more in their quest for a modern, unified judicial system than was necessary.<sup>107</sup> George Wallace, now in his third term, was an uninterested spectator.<sup>108</sup>

For example, the Heflin camp realized that to offer a pure Missouri Plan for the selection of judges would doom judicial constitutional reform so they simply suggested merit-oriented nominating commissions to help fill judicial vacancies.<sup>109</sup> However, even these were eliminated for the state as a whole during legislative consideration.<sup>110</sup> Additional compromises were necessary as well, particularly to give the maximum possible protection to incumbent judges and preserve the separate municipal courts in those cities that desired to keep them.<sup>111</sup> The proposed judicial article passed both chambers in a considerably amended form on the last day of the 1973 regular session.<sup>112</sup>

Chief Justice Heflin continued to be the key point man in the campaign to get the new judicial reform article ratified by the voters once it had cleared the Legislature. One strategy was forging an alliance with hog farmers, who had a pork promotion amendment vote on the same day that brought support to both.<sup>113</sup> The campaign for the judicial amendment also benefited from the fact that it was up for ratification in a special referendum rather than in a general election.<sup>114</sup> The latter brings out many voters who are probably uninformed about constitutional matters and are distrustful of proposals for constitutional change. Newspaper editorials uniformly supported the proposed judicial reform.<sup>115</sup> The new judicial article went before the voters in December

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106. *Id.*

107. *See id.* at 81-111.

108. *See id.* at 32.

109. STEWART, THE COMMISSION, *supra* note \*, at 100.

110. *Id.* at 100-02.

111. *Id.* at 104-06.

112. *Id.* at 106-07.

113. *Id.* at 108.

114. *See* STEWART, THE COMMISSION, *supra* note \*, at 110.

115. *Id.* at 109.

1973, and was approved by a margin of sixty-three percent in favor to only thirty-seven percent opposed.<sup>116</sup> After its acceptance by voters, Alabama was reputed to have one of the most modern judicial systems among the fifty states, particularly from the perspective of the chief justice being the genuine head of a unified court system. "It brought Alabama into the forefront in the nation in terms of efficiency and modernization of the judicial system," commented Heflin's colleague at the time, Justice Janie Shores.<sup>117</sup> The annual sessions concept, which as previously noted had also been endorsed by the Constitutional Commission, won voter approval in June 1975, when the voter turnout again was low and general citizen dissatisfaction with the Legislature was piqued as little as possible.<sup>118</sup>

### I. *Fob James's Constitution*

Let us now add to the names of gubernatorial proponents of constitutional change—O'Neal, Kilby, Miller, Folsom, and Brewer—that of Forrest (Fob) James. James followed George Wallace's third term that concluded in January 1979. Shortly after he was elected, James named a committee to make recommendations for needed constitutional reforms.<sup>119</sup> The new chief executive was especially upset with the necessity for local amendments—a major source of clutter in the constitution—that were to be voted on statewide.<sup>120</sup>

Governor James's "working group" came up with an even shorter and simpler constitution than had been proposed by the Constitutional Commission six years earlier. In fact, the streamlined document proposed by Governor James could be printed on about three-and-three-quarter pages of a daily newspaper.<sup>121</sup> The James constitution strongly emphasized subjects in which Governor James was interested—specifically, the popular democratic mechanisms of initiative and recall as well as low taxes, mainly on property.<sup>122</sup> The new constitution proposed to end subsequent earmarkings of taxes, although it allowed the continuation of earmarkings already in effect.<sup>123</sup> With regard to property taxes, the James constitution provided that, after the end of the

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116. *Id.* at 110.

117. Lucinda Coulter, *The Governor's Time to Lead is Now*, TUSCALOOSA NEWS, Oct. 22, 2000, at 6D.

118. STEWART, POLITICS, *supra* note \*, at 46.

119. *Id.* at 47.

120. This has since been changed, causing it to be even easier to amend an excessively amended constitution. STOVALL, *supra* note \*, at 56.

121. *See Proposed Constitution Text Given*, TUSCALOOSA NEWS, Jan. 31, 1979, at 10.

122. STEWART, POLITICS, *supra* note \*, at 48.

123. *Proposed Constitution Text Given*, *supra* note 121. Alabama earmarks about 90% of its taxes, far more than any other state. STEWART, THE COMMISSION, *supra* note \*, at 73.

1981 fiscal year, the state would not be authorized to assess any taxes on property.<sup>124</sup> Local governments could tax property, but the "lid" provisions would make increasing existing property taxes an even more tedious process. The proposed constitution provided for a greater measure of municipal autonomy from the state and also authorized county home rule charters.<sup>125</sup>

The initiative and recall were provided for in article thirteen of the proposed new constitution and, if the initiative were in effect now, the formal obstacles to constitutional change would be considerably less forbidding. For example, the initiative would have given the people the right to propose laws, both statutory and constitutional, that the Legislature had been unwilling to pass.<sup>126</sup> Moreover, the companion provision would have subjected all public officials in the state, except for judicial officers, to the possibility of removal from office before the expiration of their terms if there was a sufficiently high level of public dissatisfaction with their performance.<sup>127</sup>

A first in terms of the tortured history of efforts to revise the Alabama Constitution is that, in this instance, a proposed new constitution did pass one house of the Legislature. The James constitution won approval in the Senate but did not clear the House.<sup>128</sup> Post-mortem discussion about the fate of the 1979 constitution focused on controversial provisions relating to the recall, the unearmarking of taxes, and home rule.<sup>129</sup> Also, for the first time, *stare decisis* was pronounced as a reason for an objection to comprehensive constitutional change since a large quantity of case law has developed under the old 1901 Constitution, and some of it may be invalidated should it be replaced with a new document.<sup>130</sup> When he took office for his second term in 1995, James said he no longer was convinced that the state needed a new constitution and, even if it did, support would have to come from some other quarter because he had higher priorities.<sup>131</sup>

#### *J. A New Constitution as a Single Amendment*

When he was campaigning for lieutenant governor in 1982, Bill Baxley, who previously had served as attorney general, raised the issue of constitutional reform. During his first year as lieutenant governor he

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124. *Proposed Constitution Text Given*, *supra* note 121.

125. *Id.*

126. *Id.*

127. *Id.*

128. STEWART, *POLITICS*, *supra* note \*, at 48.

129. *Id.* at 48.

130. *See id.*

131. *See Bryant*, *supra* note 94.

moved to make good on his pledge to get something done while George Wallace, now serving his fourth and last gubernatorial term, remained uninterested.<sup>132</sup> Baxley did have the assistance of one of the most knowledgeable legislators, Ryan deGraffenried of Tuscaloosa.<sup>133</sup>

As an initial step, Baxley appointed a special committee to come up with a new constitution.<sup>134</sup> This group was not expected to actually write a new constitution, but instead was to "clean up" the cluttered 1901 Constitution; for example, by getting rid of obsolete and duplicative provisions.<sup>135</sup> The final product would not only be a more concise and comprehensible fundamental law, but it would also make it easier to see what remained of value in the old document and what actually needed to be reformed when further revision efforts were attempted.<sup>136</sup> This clean-up process shrunk the constitution by two-thirds of its current length.<sup>137</sup> While even this seemingly innocuous expurgated constitution proved objectionable to some, nevertheless, for the first time, a "new" constitution did pass both houses of the legislature in 1983.<sup>138</sup> Jane Katz of the Alabama League of Women Voters observed that, while the Baxley product did "eliminate a lot of verbiage and much, but by no means all, of the archaic language in the 1901 Constitution," it was seriously inadequate in that "it fail[ed] to address the most significant problems the 1901 Constitution has posed,"; for example, a lack of local home rule and an inflexible tax system.<sup>139</sup> While the constitution draft did not provide explicitly for home rule, it permitted the Legislature to set up a classification system for counties and allowed for more local discretion, particularly for the more populous jurisdictions.<sup>140</sup>

Senator deGraffenried, in defense of the reform efforts, noted that at that time the Alabama Constitution contained 172,113 words while one amendment contained nearly 7,500 words, about the length of the whole United States Constitution.<sup>141</sup> A "house-cleaning," as deGraffenried characterized the 1983 approach, was definitely in order.<sup>142</sup> However, the work of Baxley, deGraffenried, and their allies proved fruitless when, shortly before a scheduled referendum on the constitution,

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132. STEWART, POLITICS, *supra* note \*, at 48.

133. See Ryan deGraffenried, Jr., *A New Document*, MONTGOMERY ADVERTISER, May 3, 1983, at 7A.

134. STEWART, POLITICS, *supra* note \*, at 48.

135. *Id.*

136. See *id.*

137. See Tommy Stevenson, *New Constitution for State Unveiled*, TUSCALOOSA NEWS, Apr. 14, 1983, at 1.

138. STEWART, POLITICS, *supra* note \*, at 48-49.

139. Jane Katz, *No Real Revision*, MONTGOMERY ADVERTISER, May 3, 1983, at 7A.

140. *Id.*

141. deGraffenried, Jr., *supra* note 133.

142. *Id.*

the Alabama Supreme Court held that the Constitution of 1901 did not allow the legislature to give voters the opportunity to adopt a new constitution in the form of a mere single amendment.<sup>143</sup> So ended, now nearly two decades ago, the most notable effort to date to make at least some headway in dealing with one of Alabama's most pressing constitutional problems—the extreme length of the document.

### K. *Developments in the 1990s*

In early May 1993, the Senate, on a voice vote, passed a resolution sponsored by Senator Mac Parsons which, had it been approved by the House, would have permitted Alabama voters to decide if they wanted a constitutional convention to convene in 1995.<sup>144</sup> However, the House did not concur. The late Representative Jimmy Clark, then the Speaker of the House, believed that any convention might be dominated by the trial lawyers, a group with which he was at odds.<sup>145</sup> Also, he felt that Alabama had more serious problems, which ranked considerably ahead of the supposed need for constitutional reform.<sup>146</sup> Even highly respected political analysts, such as the late *Birmingham Post-Herald* columnist Ted Bryant, were apprehensive about the convening of a constitution-making assembly. Bryant felt that “[l]obbying organizations that go to much effort and expense to control the Legislature would make an even stronger attempt to control a constitutional convention.”<sup>147</sup> He particularly had in mind the Alabama Farmers Federation, the trial lawyers, the Business Council of Alabama, and the Alabama Education Association.<sup>148</sup> The Alabama Education Association, for example, was unalterably opposed to removing the earmarking of most of state taxes for teachers' salaries.<sup>149</sup>

In 1994, voters approved a constitutional amendment calling for a new procedure for consideration of purely local amendments to the Alabama Constitution.<sup>150</sup> The new amendment continued the commission, created in 1982, that determines whether or not an amendment is local or statewide, but removed the veto power of any one member to

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143. *State v. Manley*, 441 So. 2d 864 (Ala. 1983) (ruling on a challenge to reform efforts made by State Senator Richard Manley).

144. *Alabama's 1901 Segregationist Constitution Must Be Dealt With*, BIRMINGHAM NEWS, May 9, 1993, at 2C.

145. Parsons, *Curry Seek Constitutional Convention*, TUSCALOOSA NEWS, May 10, 1993, at 6A.

146. *Id.*

147. Ted Bryant, *How Do We Get a New Constitution?*, BIRMINGHAM POST-HERALD, Nov. 8, 1994, at A4.

148. *Id.*

149. Elaine Witt, *Looking at History of State's Constitution*, BIRMINGHAM NEWS, Apr. 7, 2001, at 1C.

150. ALA. CONST. OF 1901, amend. 555 (1994).

prevent the submission of an amendment for popular approval.<sup>151</sup> The U.S. Justice Department had concerns that this individual veto was working to the detriment of amendments favored by African-American legislators. However, glut in the Constitution of 1901 increased even more when the requirement for a statewide, instead of a merely local, vote on a proposed amendment was dropped. Local concerns should not be the subject of constitutional amendments in the first place since this erodes the distinction between statutory law or ordinances and constitutional law that is already so frequently violated in Alabama. Twenty-five other amendments were also on the ballot on November 8, 1994, when the new local amendment proposal was approved.<sup>152</sup>

In 1995, the Legislature drafted, and the voters subsequently ratified, an amendment that updated the old Article VIII of the 1901 Constitution dealing with voting and elections. Leadership for this very incremental approach to constitutional change came from State Representative Jack Venable of Tallassee in his capacity as chairman of the Constitution and Elections Committee of the State House of Representatives.<sup>153</sup> Three succinct paragraphs replaced twenty sections from the old constitution, much of it invalid, because it had been drafted for the obvious purpose of preventing blacks from participating in the political process in Alabama.<sup>154</sup> Venable was ambitious enough to believe that the next article he could revise would be the one dealing with the executive branch of state government.<sup>155</sup> However, since the new voting-elections article was approved, no other abridged constitutional articles have been approved by the Legislature.

Late in 1995, Auburn University's Center for Governmental Service hosted a symposium on the Alabama Constitution in Montgomery, at which prominent speakers from government, academia, and interest groups addressed the subject of constitutional reform, most being supportive.<sup>156</sup> Auburn also did the logistical work for what was termed the Alabama Constitution Project, funded by major corporations and media, including AmSouth Bank, Alabama Power Company, the *Montgomery Advertiser*, the *Birmingham News*, and the *Mobile Press Register*.<sup>157</sup> The project also drew on the expertise of the Kettering Foundation,

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151. *Id.*

152. Bryant, *supra* note 147.

153. Ted Bryant, *Old Election Laws Facing Rewrite*, BIRMINGHAM NEWS, July 31, 1995, at D2.

154. Bryant, *supra* note 94.

155. Bryant, *supra* note 153.

156. Bryant, *supra* note 94.

157. See generally A Symposium on the Alabama Constitution, Dec. 14, 1995, available at <http://www.auburn.edu/~1cgsan/alacon/sym.html> (last visited Oct. 29, 2001) (reproducing the proceedings of the symposium).

headed by former University of Alabama President David Mathews.<sup>158</sup> The project hosted poorly publicized electronic town meetings in early 1996 in ten Alabama communities following the Montgomery symposium, but it received very little publicity.<sup>159</sup> The Constitution Project was also responsible for the production of a TV “expose” of the Alabama Constitution that was aired on Alabama Public Television and was shown widely to students in high schools and colleges.<sup>160</sup>

### III. THE TWENTY-FIRST CENTURY

#### A. *The New Millennium*

In 2000, the first year of the new millennium, two seemingly non-controversial replacement parts for the old constitution passed the House but did not reach the floor in the Alabama Senate. The first would have updated the Declaration of Rights by adding an equal protection clause and eliminating seemingly male-only language.<sup>161</sup> The other would have clarified state boundaries now no longer in dispute.<sup>162</sup> In 2001, the House again passed a revised version of the Declaration including the equal protection provision and, in addition, authorizing six-person juries under mutually agreed circumstances.<sup>163</sup> Male-oriented language was replaced with gender-neutral wording.<sup>164</sup> Finally, state and county boundary descriptions were updated in a new Article I for the constitution.<sup>165</sup>

The previous year, in 2000, a new organization was established to promote the cause of constitutional reform in Alabama for the long term. The Alabama Citizens for Constitutional Reform (ACCR) gave itself the mission of “leading the charge” for change.<sup>166</sup> ACCR’s first big event was a rally held in early April 2000, on the old capital

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158. Bryant, *supra* note 94. Conspicuously absent from the list of potential new constitution supporters were the Alabama Education Association and the Alabama Farmers Federation.

159. Bryant, *supra* note 94.

160. *Going to Great Lengths: Alabama’s Constitution* (Ala. Pub. Television broadcast, Oct. 22, 2000) (on file with the author).

161. *House Approves Revising Article I of Constitution*, TUSCALOOSA NEWS, Feb. 17, 2001, at 7A.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. See generally Alabama Citizens for Constitutional Reform, About Us, at <http://www.constitutionalreform.org/getinvolved/aboutus.html> (last visited Oct. 29, 2001). The foundation’s Chairman is Dr. Thomas Corts, head of the Samford University. *Id.* The second-in-command is former Republican U.S. Representative Jack Edwards. *Id.* A prominent African-American civil rights leader, Odessa Woolfolk, is the group’s Secretary. *Id.*

grounds in Tuscaloosa.<sup>167</sup> This function, moderated by former governor Albert Brewer, had some business support, but no statewide leader, except for Secretary of State Jim Bennett, attended. Similar rallies were held in Mobile and Huntsville in October and November 2000, respectively.<sup>168</sup> To the present, ACCR continues to sponsor activities, statewide and local, to try to generate support for constitutional reform. For example, in March 2001, local meetings were held in Vestavia and Montevallo.<sup>169</sup> Attendees were mostly of the "good government" variety and representatives of liberal religious groups. As the 2002 state elections near, the ACCR is urging candidates to put constitutional reform into their campaign platforms.<sup>170</sup>

At the level of youth activities, in the summer of 2000, the High School Boys State conference made constitutional reform its theme. The high school youth wrote a new constitution for the state only six pages in length that provided home rule for cities and counties, simplified the tax structure, and authorized merit appointment instead of partisan election of appellate court judges.<sup>171</sup> To marshal some of the energies of older youth, the Alabama Collegiate League for Constitutional Reform has been established. None of the activities mentioned thus far appear to have stimulated much concern on the part of the masses of Alabamians, however.

A Montgomery pollster associated with the AEA said that his surveys showed constitutional reform being a public concern at close to the level of tax reform and campaign finance reform.<sup>172</sup> If this is indeed the case, prospects for constitutional change are still very poor because no state action in either of the other two areas is likely to occur for many years. Of course, tax reform and constitutional reform are closely inter-related. The AEA poll found seventy-five percent of the respondents believing that "it's somewhat or very important for the state to have a new constitution."<sup>173</sup> Fifty-eight percent, however, also said that they had a favorable impression of the current constitution.<sup>174</sup> A survey in April 2001 found that while voters did endorse the concept of a new constitution for Alabama, they nevertheless had some anxieties that it

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167. Tommy Stevenson, *Speakers Say It's Time to Revise State Document*, TUSCALOOSA NEWS, Apr. 8, 2000, at 1A.

168. *A Political Issue*, BIRMINGHAM NEWS, Mar. 1, 2001, at 8A.

169. Wright, *supra* note 6; Nancy Wilstach, *Panel Urges Tax, Constitutional Reform in State*, BIRMINGHAM NEWS, Mar. 13, 2001, at B2.

170. Dana Beyerle, *Constitutional Reform on Agenda*, TUSCALOOSA NEWS, Feb. 15, 2001, at 4B.

171. Mike Wendling, *Boys State Reps Rewrite Alabama's Constitution*, BIRMINGHAM NEWS, June 17, 2000, at 15A.

172. *Polls: Most Want New Constitution*, TUSCALOOSA NEWS, May 15, 2000, at 6A.

173. *Id.*

174. *Id.*

could lead to higher taxes as a result.<sup>175</sup> Even though the AEA sponsored polls showing increased support for a new constitution, it was predicted that should a revising convention materialize the group would do its best to keep most taxes earmarked for education—mostly for teachers' salaries—and thus frustrate “all efforts to modernize the state budgeting process.”<sup>176</sup>

The executive director of the ACCR said his organization's “biggest challenge [was] educating people on the need for constitutional reform.”<sup>177</sup> Somehow, the ACCR and others needed “to raise awareness and convince people that (the constitution) does have an effect on their lives.”<sup>178</sup> ACCR leader Jack Edwards stated that the old constitution should be viewed as “the root of all the primary ills of our state.”<sup>179</sup> Gubernatorial adviser Jim Hayes said his reading of public sentiment was, in contrast, that “the public is pretty much oblivious to the issue.”<sup>180</sup>

### B. Legislative Initiatives

Within the Legislature, several approaches to constitutional reform continued sporadically and simultaneously. An Associated Press survey of Alabama legislators found that sixty-one percent of the House and sixty-two percent of the Senate approved in principle the idea of the assembly annually rewriting a small number of articles of the old constitution.<sup>181</sup> Consistent with this view, Republican Representative Chris Pringle introduced bills to “clean up” the constitution by getting rid of obsolete provisions (e.g., regulation of dueling) while consolidating scores of purely local constitutional amendments (e.g., those authorizing bingo) into one which would cover multiple communities.<sup>182</sup> This is the modest, cosmetic approach to constitutional reform.

Democratic Senator Roger Bedford proposed to revive the Baxley-deGraffenried strategy of the 1980s by proposing a constitutional amendment which would overturn the Alabama Supreme Court decision

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175. *Survey Shows Support for Rewrite*, TUSCALOOSA NEWS, Apr. 9, 2001, at 8A.

176. See Elaine Witt, *Looking at History of State's Constitution*, BIRMINGHAM NEWS, Apr. 7, 2001, at 1C. Alabama has by far the highest percentage of designated taxes of any state in the nation. STEWART, *THE COMMISSION*, *supra* note \*, at 73.

177. Dana Beyerle, *6 Bills Propose Making Change to Constitution*, TUSCALOOSA NEWS, Feb. 11, 2001, at 1A.

178. Wilstach, *supra* note 169.

179. *Listen to the People*, TUSCALOOSA NEWS, Feb. 16, 2001, at 8A.

180. David White, *Officials: No Demand for Replacing Constitution*, BIRMINGHAM NEWS, Oct. 18, 2000, at 1A.

181. See Phillip Rawls, *Rewriting State Constitutions Not Top Priority for Some Legislators*, TUSCALOOSA NEWS, Feb. 5, 2001, at 6A.

182. Perry C. Roquemore, Jr., *Legislature Discusses Revision of State Constitution*, ALA. MUN. J., Mar. 2000, at 9, 22.

prohibiting voters from balloting on a new constitution in the form of a single amendment to the old one.<sup>183</sup> As a starter, Senator Bedford drafted a “cleaned-up” constitution that expunged approximately 600 amendments presently in the constitution and proposed to authorize home rule to counties if they desired it.<sup>184</sup> He called his approach “a third way of rewriting the constitution.”<sup>185</sup> Bedford said his approach was probably the only practicable one because, “[r]ight now, there’s not enough support in the Legislature to call a constitutional convention.”<sup>186</sup> Republican Lieutenant Governor Steve Windom instead thought a convention should be called. He seemed sympathetic to constitutional reform, but he didn’t like Bedford’s approach because “it won’t involve people.”<sup>187</sup> In the House, Democrat Representative Ken Guin, taking a similar tack to that of Bedford in the Senate, introduced a bill authorizing the Governor to call the Legislature into session to function as a constitutional convention itself, an approach that has limited public or official support.<sup>188</sup>

Showing the significance of partisanship as a new variable in the complex equation of constitutional reform in Alabama, Republicans as a group were mostly responsible for the defeat of Democrat Bedford’s constitutional reform efforts. Republican Senator Larry Dixon said, “I don’t want the trial lawyers, the unions and the people who keep putting Roger Bedford in office in charge of the constitution.”<sup>189</sup> Bedford himself attributed the failure of his reform efforts in the spring of 2001 to “the Republicans’ organized effort against it.”<sup>190</sup> Republicans attempted to load the Bedford plan up with amendments, which its sponsor would not accept.<sup>191</sup> For example, any new constitution could not increase income tax rates or make the ownership and use of firearms subject to more restrictions.<sup>192</sup> Republican amendments, he contended, were aimed mainly at putting GOP legislators on record as favoring causes presumably popular with many Alabamians in preparation for the 2002 state elections.<sup>193</sup> The *Birmingham News* criticized the new

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183. Beyerle, *supra* note 177.

184. *See id.*

185. Kim Chandler, *Reform Proposal for Constitution Stalls in Senate*, BIRMINGHAM NEWS, Apr. 6, 2001, at 5C.

186. David White, *House Delays Vote on Constitution Plan*, BIRMINGHAM NEWS, Mar. 23, 2001, at 6B.

187. Dana Beyerle & Tommy Stevenson, *Rallies Pit Reform Against Those Who Want Status Quo*, TUSCALOOSA NEWS, Apr. 5, 2001, at 1B.

188. *See id.*

189. Chandler, *supra* note 185.

190. *See id.*

191. *See* Beyerle & Stevenson, *supra* note 187.

192. *Id.*

193. *See* Kim Chandler, *Constitution Rewrite Plan Tangles Senate*, BIRMINGHAM NEWS, Apr. 4, 2001, at 3C; Mike Cason, *Constitution Bill Raises Dispute*, MONTGOMERY ADVERTISER, Apr.

chair of the Alabama Republican Party, Marty Connors, for employing the constitutional reform discussions "to take shots at Gov. Don Siegelman and Democrats in the Legislature."<sup>194</sup> Connors had previously said that "the governor's office [had] frittered away any confidence and trust of the people . . . and [did] not deserve or have the political capacity of leading any such constitutional reform."<sup>195</sup> "As a purely practical matter," Connors continued, "we do not need the same crowd who has mismanaged this state into the worst education proration in 40 years rewriting our constitution."<sup>196</sup>

Also, Bedford angrily called Republican efforts "a sad attempt . . . to prop up a racist document that has been a straitjacket on state government."<sup>197</sup> African-American Representative Alvin Holmes said people who wanted to keep the old constitution were "living in the dark ages."<sup>198</sup> He found most objectionable the references the old constitution made to segregation even though they were null and void.<sup>199</sup> At a pro-reform rally (discussed below) Republican Secretary of State Jim Bennett noted that one of the main objectives of proponents of change was to "strike racially-divisive language."<sup>200</sup>

Democratic Senator Ted Little introduced a bill in the upper chamber calling not for an ad hoc but for a permanent constitutional revision commission.<sup>201</sup> This was similar to the approach of Secretary of State Bennett's thirty-one member bipartisan revision commission that would have conducted public hearings in trying to generate support for the new constitution that it would have written based on the input they received.<sup>202</sup> The commission was also reminiscent of the Alabama Constitutional Commission of the late 1960s and early 1970s.<sup>203</sup> Finally, as far as legislative initiatives not yet involving the Governor are concerned, Republican Representative Todd Greeson, in following the most orthodox approach, introduced a resolution giving voters the option of call-

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4, 2001, at 3C.

194. *No Cheap Shots*, BIRMINGHAM NEWS, Apr. 8, 2001, at 2C.

195. Stan Bailey & Patricia Dedrick, *Constitution Sparks Rival Rally*, BIRMINGHAM NEWS, Apr. 4, 2001, at 1A.

196. *GOP Chairman Says Don't Rewrite Constitution Now*, TUSCALOOSA NEWS, Apr. 4, 2001, at 2B. The education funding crisis is discussed later in this Article.

197. Phillip Rawls, *Senate Split Along Party Lines Over Constitutional Revisions*, TUSCALOOSA NEWS, Apr. 4, 2001, at 2B.

198. Garry Mitchell, *Constitution Reformers Hitch Up Mules*, TUSCALOOSA NEWS, Apr. 2, 2001, at 5A.

199. *See id.*

200. Beyerle & Stevenson, *supra* note 187.

201. *See* Roquemore, *supra* note 182, at 9.

202. *See* Phillip Rawls, *Bennett Wants Bipartisan Constitution Revision Panel*, TUSCALOOSA NEWS, Sept. 22, 2000, at 3B; Steve Reeves, *Bennett Offers Up a Plan*, BIRMINGHAM POST-HERALD, Sept. 22, 2000, at D1.

203. Rawls, *supra* note 202; Reeves, *supra* note 202.

ing a traditional constitutional convention.<sup>204</sup> If a majority approved, there would be another trip to the polls in 2004 to select 105 convention delegates, one from each of the state's House of Representatives constituencies.

### C. Governor Siegelman's "Conversion"

The main actor on the stage of the current constitutional reform drama is Governor Don Siegelman. As early as 1976, Governor Siegelman was an advocate for constitutional reform.<sup>205</sup> When he was serving as Alabama Secretary of State in 1983, Siegelman continued to be a proponent of a new constitution and attempted to generate public support during meetings held in different parts of the state.<sup>206</sup> He also published an essay entitled, "A New Constitution . . . What does it mean to you?"<sup>207</sup> In Secretary Siegelman's view, "[t]he [1901] constitution hinder[ed] democratic values . . . and . . . produce[d] inefficiency."<sup>208</sup> Siegelman further contended that "[a] document of this length and detail greatly exceeds the statement of basic principles and structure of government a constitution is supposed to be."<sup>209</sup> The old constitution put "both the Legislature and local governments in a Constitutional straightjacket."<sup>210</sup> The fundamental problem, the Secretary of State explained further, was "not the number of amendments or the length of the document."<sup>211</sup> These features were "mere symptoms of the real problem, which is a framework that is archaic and illogical in the context of today."<sup>212</sup>

At the outset of the most recent movement for constitutional reform in Alabama, however, Governor Siegelman's reported view was that "there is no grass-roots support for reforming the constitution, and until there is, he won't spend any time thinking about it."<sup>213</sup> A Siegelman adviser told a group of reform supporters that his boss's opinion was that "we've got to build a critical mass or movement that we can ride."<sup>214</sup> At the time, Siegelman himself was not interested in attempting to win this critical backing. Popular support, the Governor said, "is

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204. See Beyerle & Stevenson, *supra* note 187.

205. See Dana Beyerle, *Board Will Try Again*, TUSCALOOSA NEWS, Mar. 18, 2001, at 6D.

206. Charles Drennen, *Constitutional Straightjacket*, TUSCALOOSA NEWS, Mar. 25, 2001, at 6D.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Drennen, *supra* note 206.

212. *Id.*

213. Beyerle, *supra* note 170.

214. David White, *Officials: No Demand For Replacing Constitution*, BIRMINGHAM NEWS, Oct. 18, 2000, at 1A.

something that's got to bubble up from the grass roots. You've got to convince the public, who can then convince the Legislature."<sup>215</sup> He was "not interested in tilting at windmills."<sup>216</sup>

A veteran of the constitutional reform wars, however, was very skeptical of this early approach by Siegelman in the current crusade to fundamentally alter Alabama's governmental charter. Former Lieutenant Governor Bill Baxley had stated several years earlier, "You are never going to get the people to march on Montgomery and demand a new constitution. . . . They don't perceive it as a crisis. You've got to have people in office that will push for it."<sup>217</sup> The editor of the *Talladega Daily Home* said, "[T]he governor ought to be out front touting [the Constitution's] reform rather than waiting for momentum to build before he ventures out."<sup>218</sup> The *Birmingham Post-Herald* observed, "The governor is the only elected official with the political power and potential public backing needed to stand up to various interest groups that like the status quo."<sup>219</sup>

Political analyst and committed reformer Dr. Keith Ward suspected that Siegelman's position might change once he was safely in office for a second term following the 2002 elections. "Just because it's not on his agenda in 2001 doesn't mean it won't be there in 2003, when re-election is out of the way."<sup>220</sup> However, well before the latter year Siegelman began to signal a shift in his position. In a position paper in the *Birmingham News* in late March 2001, the Governor wrote:

We need to change the way we do business [in Alabama]. The only meaningful way to do this is to look at reforming Alabama's antiquated constitution. . . . What I said years ago [as quoted above] is just as true today . . . I will have more to say about this matter in coming weeks.<sup>221</sup>

A gubernatorial aide said that Governor Siegelman was now "monitoring the groundswell" for constitutional reform which he had said he had been hoping for and he would no longer be an observer of the burgeoning reform movement but an active participant in it.<sup>222</sup> He began

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215. *Constitutional Reform: Talladega Daily Home*, BIRMINGHAM NEWS, June 17, 2000, at 9A.

216. *The Right Stuff*, BIRMINGHAM NEWS, Mar. 27, 2001, at 6A (reporting statement made by Governor Siegelman to the Public Affairs Research Council of Alabama in February of 2000).

217. *Reform, Stage One*, TUSCALOOSA NEWS, Dec. 18, 1995, at 11A.

218. *Constitutional Reform: Talladega Daily Home*, *supra* note 215.

219. *Welcome Aboard, Governor*, BIRMINGHAM POST-HERALD, Mar. 30, 2001, at A6.

220. *Still No Push For New Constitution*, BIRMINGHAM NEWS, Feb. 6, 2001, at 1A.

221. Don Siegelman, *Lawmakers Should Lead to Save School Funds*, BIRMINGHAM NEWS, Mar. 25, 2001, at 1C.

222. *What Motivates Leaders*, TUSCALOOSA NEWS, Mar. 27, 2001, at 6A (quoting an unnamed aide).

his more active role by speaking to the April rally sponsored by the ACCR in Montgomery.<sup>223</sup>

Ben Windham, editorial page editor of the *Tuscaloosa News*, attributed the apparent change on the part of the Governor and some other state leaders to the crisis in education funding which hit Alabama early in 2001. Windham observed that drastic shortfalls in anticipated education revenues—which required extremely controversial proration of funds for both K-12 and higher education—“radically altered the landscape. People began to see that constitutional reform is [sic] linked directly to the tax reforms that Alabama needs to improve schools, make progress and improve the quality of life throughout our state.”<sup>224</sup> Another editorialist attributed the Governor’s apparent switch from neutrality to support for constitutional reform to the fact that he was “tired of being blasted regularly by virtually every newspaper editorial page in Alabama” and also wished “to deflect attention from the current state government crisis” with respect to school funding.<sup>225</sup> A few days into March of 2001, Siegelman summoned a special session of the Legislature to deal with the problem of severe education budget shortfalls, but the session was a failure and public confidence in the Governor’s leadership appeared to drop.<sup>226</sup>

In his address to the constitutional reform rally on April 4, 2001, Governor Siegelman stressed education almost to the exclusion of all other considerations as a motive for constitutional reform.<sup>227</sup> His main objection to the old constitution was that it had “held our schools back for more than 100 years.”<sup>228</sup> He likened the 1901 document to “a wagon that wasn’t sturdy enough to carry its load when it was first put together—a wagon which has hindered progress in education.”<sup>229</sup> He noted ruefully the unsuccessful constitutional reform efforts of his gubernatorial predecessors—specifically, O’Neal, Kilby, Miller, Folsom, and Brewer.<sup>230</sup> He omitted Fob James, who went so far as to propose a new constitution for legislative consideration.<sup>231</sup> Also, James enjoyed more success than any of his predecessors, even to the extent of having a replacement constitution pass one house of the Legislature.<sup>232</sup> Siegel-

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223. Don Siegelman, *Time to Retire That Ol’ Rickety Wagon and Let Students Fly*, BIRMINGHAM NEWS, Apr. 8, 2001, at 1C.

224. *It’s About Time*, TUSCALOOSA NEWS, Mar. 28, 2001, at 6A.

225. *Taking the Plunge: Governor Edges Toward True Leadership on Constitution*, BIRMINGHAM NEWS, Mar. 30, 2001, at 12A.

226. *What Motivates Leaders*, *supra* note 222.

227. *See* Siegelman, *supra* note 223.

228. *Id.*

229. *Id.*

230. *Id.*

231. *See id.*

232. *See supra* notes 118-131 and accompanying text.

man suggested that the current revision movement might not have success right away, possibly not until he was out of office.<sup>233</sup>

Siegelman did not outline a program for constitutional reform in his April rally address and this disappointed ardent supporters of change. Tom Scarritt of the *Birmingham News* said, "There may be a point at which Don Siegelman must risk his political life in pursuit of greater good."<sup>234</sup> The *Tuscaloosa News* called the Governor's support only "a half-hearted endorsement . . . His heart's not in it."<sup>235</sup> The *Tuscaloosa News* was particularly concerned that the Governor was so pessimistic regarding the prospects for fairly quick action on constitutional reform, had no plan at the time for trying to accomplish this objective, and was so preoccupied with education that he didn't even broach the subject of tax reform.<sup>236</sup> A news story prior to the pro-reform rally pointed to the Governor's lack of agreement "with constitutional reformers whose motive is to change tax laws and boost the state's lagging tax revenues."<sup>237</sup> Siegelman was said at the time to feel that "any hint that constitutional changes are a sneaky way to increase taxes that have been made part of the document means the move to change the constitution will be 'doomed to defeat.'"<sup>238</sup>

Within a short time, Governor Siegelman made yet another move that demonstrated a stronger commitment to the cause of constitutional reform. In an April 16, 2001, speech to the Alabama Commerce Commission, he endorsed a constitutional convention as the preferred method of bringing about constitutional change for the state instead of the Legislature.<sup>239</sup> "On this one we need to trust the people," Siegelman said.<sup>240</sup> One specific provision he would like to see in a new constitution would be authorization for local communities to increase their property taxes for schools through popular referenda without securing the approval of the Legislature.<sup>241</sup> Still associating a new constitution with education, Siegelman, a week later, suggested that a new basic law might also do away with separate boards of trustees for individual universities and replace them with a statewide board of regents, possibly leading to greater coordination and a more effective use of scarce resources by higher education.<sup>242</sup> This controversial suggestion, made in

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233. See Siegelman, *supra* note 223.

234. Tom Scarritt, *Siegelman Emerging as a Hero*, BIRMINGHAM NEWS, Apr. 8, 2001, at 1C.

235. *Bark, But No Bite*, TUSCALOOSA NEWS, Apr. 9, 2001, at 10A.

236. *Id.*

237. *Siegelman: Constitution, Tax Separate*, BIRMINGHAM NEWS, Apr. 3, 2001, at 2B.

238. *Id.*

239. David White, *Siegelman Endorses Constitutional Convention*, BIRMINGHAM NEWS, Apr. 17, 2001, at 1A.

240. *Id.*

241. *Id.*

242. *Governor: Consider Regents Board*, BIRMINGHAM NEWS, Apr. 24, 2001, at 1A.

the midst of bitter conflict between the Governor and university leaders, had the potential to retard rather than advance the movement for constitutional reform.

The Governor did not, at this time, indicate when he planned to ask the Legislature to start in motion the steps leading to the meeting of an assembly of delegates to rewrite the constitution, but he suggested it would be awhile.<sup>243</sup> Before making any requests to the Legislature, he planned to travel over the state and listen to suggestions from voters as to what they would want included or not included in any new constitution, and the way they preferred it to be drafted.<sup>244</sup> "It's up to the people of Alabama as to how they want to change their constitution. . . . It shouldn't be up to me. It shouldn't be up to the Legislature."<sup>245</sup> Elaborating on his belief that constitutional reform was not something that would be accomplished quickly, Siegelman observed, "There are lots of questions on the procedure that need to be asked before you can really move forward. . . . Then you get into the substance, which takes a lot of time and effort."<sup>246</sup>

#### D. Organized Opposition to Reform

Opposition to constitutional reform in Alabama is not going to crumble, even if the governor becomes an even stronger proponent for change. Governors have been supportive of reform in the past, but the old constitution has remained firmly in place. One legislator, not yet on the bandwagon, observed, "If what they're talking about is taking out the antiquated language, that's easy, but if we're talking about tax reform, that's problematic, and if we're talking about giving county commissions home rule, that's problematic."<sup>247</sup> Another senator, along the same lines as Siegelman noted earlier, said, "If the public equates constitution reform with tax increases, it won't go anywhere."<sup>248</sup> After a House committee once more voted down a bill that would have permitted voters to summon a constitutional convention, one member said that the reform efforts were being made mostly by those who wanted to increase taxes.<sup>249</sup>

This new-constitution-means-higher-taxes type of sentiment is one that interest groups, especially the Alabama Farmers Federation, can

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243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. Beyerle, *supra* note 177.

248. Tommy Stevenson, *Speakers Say It's Time to Revise State Document*, TUSCALOOSA NEWS, Apr. 8, 2000, at 1A (internal quotations omitted).

249. Michael Sznajderman, *Constitutional Convention Dead*, BIRMINGHAM NEWS, Apr. 27, 2000, at 5B.

use to great advantage. Elaine Witt, political columnist for the *Birmingham Post-Herald*, identified ALFA as “the protector of large landowners who are essentially untaxed,” and predicted that this group would continue to try to make generating revenue for vital public services as difficult as possible.<sup>250</sup> Lieutenant Governor Steve Windom cautioned those in attendance at a constitutional reform conference, “What won’t work [as far as a reform strategy is concerned] is a property tax increase masquerading as a new constitution.”<sup>251</sup> Windom, the Republican, like his Democratic counterpart in the House, Speaker Seth Hammett, was not ready to join the advocates of constitutional reform assembled at Samford University for the meeting in the fall of 2000.<sup>252</sup> However, several months later, this author personally observed the Lieutenant Governor at the pro-reform rally addressed by Governor Siegelman.

#### E. Chief Justice Moore and His Supporters

With apparent broad support, at least verbally, from most major state executive and legislative officials—including the Republican Lieutenant Governor and Secretary of State as well as the Democratic Speaker of the House, auditor, and treasurer—the new Republican Chief Justice Roy Moore emerged in the spring of 2001 as the most influential cautionary voice with respect to making major changes in Alabama’s basic law. He said he did not like the Legislature drafting a new constitution because “[i]f you put changing the constitution in one branch of government, isn’t there a conflict in the balance of powers?”<sup>253</sup> Moore, seeing strong points in the existing constitution, said, “It has kept our taxes reasonable. It has kept things like the lottery out of the state. It has held down special interests.”<sup>254</sup> The Chief Justice did not expressly support or oppose constitutional revision, but did urge his fellow state officials to exercise restraint in this area.<sup>255</sup>

Kayla Moore, the wife of Roy Moore, attended, but did not address the anti-reform rally which was held simultaneously with the pro-reform rally headlined by Governor Siegelman.<sup>256</sup> Literature promoting the rally urged interested sympathizers to “[c]ome stand with Mrs. Roy

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250. Elaine Witt, *Looking at History of State’s Constitution*, BIRMINGHAM POST-HERALD, Apr. 7, 2001, at C1.

251. White, *supra* note 214.

252. *See id.*

253. Phillip Rawls, *Moore: Don’t Rush to Change Constitution*, TUSCALOOSA NEWS, Apr. 8, 2001, at 1B.

254. *Id.*

255. *Id.*

256. Stan Bailey, *Constitution Reform Foes: Rewrite Aim Is Tax Boost*, BIRMINGHAM NEWS, Apr. 15, 2001, at 1A.

Moore and many others. Let's not destroy or revise. Let's preserve our constitution."<sup>257</sup> Costs of the opposition event were borne by Value PAC, the political action committee which financed the successful Moore campaign for chief justice.<sup>258</sup> The sponsoring organization was identified as the Association for Judeo-Christian Values.<sup>259</sup> Attendance at this event was estimated by one reporter as being "two dozen or so."<sup>260</sup> Another unsympathetic observer said, "[T]he two dozen or so reporters and camera people who covered the [opposition] rally . . . swell[ed] their wet and anemic crowd by nearly half."<sup>261</sup>

Lobbyist Joyce Perrin, a speaker at the rally named "Keep Our Constitution" which was held on the steps of the Alabama judicial building, asserted that the 1901 Constitution was "written by godly men" and deserved to be retained rather than scrapped.<sup>262</sup> She stated that the Alabama Constitution was founded on the Ten Commandments, the public display of which had made Roy Moore's reputation, and it was doubtful that a new document, formed in a much more secular time, would have the same basis.<sup>263</sup> A few days later, speakers at an opposition symposium, identified as "Our Godly Constitution & Agenda 21 in Alabama," expressed anxiety that a new constitution could "remove references to God contained in the 1901 constitution," facilitate the increasing of property and income taxes without popular votes, authorize comprehensive zoning, and enlarge the sphere of gambling operations in Alabama.<sup>264</sup> One political analyst assumed that indeed "gambling interests [would] almost certainly . . . use the drive for constitutional reform as yet another chance to try to legalize casinos."<sup>265</sup> The current Alabama Constitution begins with a preamble which says, "We, the people of the State of Alabama . . . invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama."<sup>266</sup> However, this was not new with the 1901 document. The same language had appeared in the 1861, 1865, 1868, and 1875 constitutions. It should also be noted that other religiously motivated people see the existing constitution as full of injustices toward poorer Alabamians—for exam-

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257. *Moore's Wife Expected at Pro-Constitution Rally*, TUSCALOOSA NEWS, Apr. 1, 2001, at 1B.

258. *Id.*

259. *Id.*

260. Bailey, *supra* note 2566.

261. Tommy Stevenson, 'Evil Media' Want New Constitution, TUSCALOOSA NEWS, Apr. 8, 2001, at 6D.

262. Beyerle & Stevenson, *supra* note 187.

263. *See id.*

264. Rawls, *supra* note 2533.

265. Witt, *supra* note 2500.

266. ALA. CONST. of 1901 pmbl.

ple, the current, highly regressive tax structure. One minister said, "Christians have to be in favor of reform because of what a new constitution could do to help Alabama's poor. . . . How can Christians not be in favor of constitutional reform, when everything our faith stands for and represents requires [it]?"<sup>267</sup>

Two former legislators spoke at the opposition rally and both stressed, as their colleagues had previously, that "constitutional reform is all about raising taxes."<sup>268</sup> The chair of the Association for Judeo-Christian Values indicated that religious concerns were not the only ones of interest to her group when she also exclaimed that she was glad the old constitution did amount to a straitjacket because, if it wasn't, "our taxes would be out of sight."<sup>269</sup> Opposition to possible strengthening of land-use laws was also mentioned. Former State Representative Larry Sims stated that residents of this state had "never agreed to let county governments have the authority to zone and the authority to tax, and that's what the proponents of a radical change of our constitution want."<sup>270</sup>

Professor John Eidsmoe of the Jones School of Law at Faulkner University in Montgomery also spoke at the symposium. He sought to heighten anxiety among those wary about the prospect of a constitutional convention by pointing to Section 286 of the 1901 document that does not specifically require popular ratification.<sup>271</sup> "There is no guarantee the ratification process for a new constitution will be what we think it will be," he warned.<sup>272</sup> Professor Eidsmoe cited a 1955 opinion of the Alabama Supreme Court, in an advisory capacity only, observing that "the present thought is that a constitutional convention cannot adopt a constitution without giving the people an opportunity for their approval or rejection."<sup>273</sup> However, one justice at the time, John L. Goodwyn, indicated that it would be within the prerogative of the convention to proclaim its product ratified without popular assent—as had been the case with each of the state's first three constitutions in 1819, 1861, and 1865.<sup>274</sup> The Legislature, while setting in motion the procedure for assembling a constitutional convention, could stipulate that the document it drafted would have to receive popular approval in order to

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267. Johnny Green, *Christians Should Not Be Opposed to a New Constitution*, BIRMINGHAM NEWS, Apr. 8, 2001, at 1C.

268. Bailey, *supra* note 256.

269. Rawls, *supra* note 197.

270. Stan Bailey, *Constitution Reform Foes: Rewrite Aim Is Tax Boost*, BIRMINGHAM NEWS, Apr. 5, 2001, at 1A.

271. Phillip Rawls, *Constitution Does Not Mention Voter Ratification*, BIRMINGHAM NEWS, Apr. 15, 2001, at 16A.

272. *Id.*

273. *Id.*

274. *Id.*

go into effect.

Gary Palmer, president of the conservative Alabama Policy Institute, attacked the constitutional reform movement from several perspectives. One objection was that a revised constitution might make it easier to raise taxes. "[B]ecause Alabama voters almost always refuse to vote themselves a tax increase," he claimed that reformers desired to "take away [their] right to vote and give the power to tax to the local authorities without referendum approval."<sup>275</sup> Palmer, in an obvious exaggeration, said that reform proponents were defining and promoting a concept of home rule "that would allow local governing bodies . . . and county commissions, to raise taxes and set zoning policies without voter input."<sup>276</sup> The least credible arguments made at the opposition events were the extreme right-wing assertions that support for constitutional reform in Alabama was tied to "Agenda 21 and the United Nations."<sup>277</sup> These claims related to an alleged international movement to abolish property rights, erase existing territorial lines and make transition to a world government easier. Beyond the rally and symposium, the sponsors of these events said they planned to see that the retention of the 1901 Constitution was an issue in the 2002 election campaigns and that their backing would go to those candidates who pledged to maintain the old basic law.

#### IV. CONCLUSION

Constitutional reform is now a cause to which more of Alabama's political elites are willing to give at least lip service. However, the "tortured road" illustrated in this Article still apparently does not lead to a new constitution anytime in the foreseeable future. Alabama in the nineteenth century was characterized by frequent constitutional change. For example, the 1901 Constitution was the sixth following Alabama's admission to the Union. The last document did not really represent comprehensive reform, however, being so heavily focused on racially repressive measures. The twentieth century saw plenty of change, but it was in the form of the hundreds of amendments to a constitution that was outdated as soon as it went into effect. The federal government dictated the most fundamental changes in Alabama, particularly in the second half of the century. What remains to be seen is whether the state itself can determine its course for the twenty-first century.

The state's dominant interests assembled the 1901 convention with

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275. Gary Palmer, *Progressives' Idea on State Constitution About Taxation*, BIRMINGHAM NEWS, Apr. 8, 2001, at 4C.

276. *Id.*

277. Rawls, *supra* note 253.

one primary purpose in mind. Now there are several fundamental objectives, but the main problem is the old constitution itself. The interests of a century ago were in agreement that something fundamental needed to be done. The interest structure of today is much more complex and getting a consensus on the urgency of fundamental change is much more difficult. There are many additional "veto points" to inhibit unwanted changes. In 1901, when a small number of interests agreed that a new constitution was essential, they could effectively put it through despite the vociferous opposition of dissenting, but less powerful interests.

Interests favored in the current patchwork of amendments to the 1901 Constitution will be loath to give up the privileges conferred upon them—for example, universities with trustees enjoying protected constitutional status. Some of the interests that have gone so far as to financially subsidize current efforts in reforming the constitution could be expected to fall by the wayside or even switch to the opposition camp if it looked as though protections against higher property taxes would be lost in a new constitution. The groups that have been most visible in opposition to the current reform campaign probably will not be as important in the long run as the major players in Alabama interest group politics—organizations such as ALFA, AEA, the trial lawyers, and the Business Council. So far, these forces have been able to remain largely on the sidelines, leaving the "dirty work" to be done by others.

Further complicating matters is the fact that all of the previous reform efforts analyzed in this Article were made when Alabama was essentially a one-party state as far as state politics were concerned. This is not the case today. Now, although the executive and legislative branches of government are mostly Democratic, the Republicans have a strong presence in those branches and could be expected to oppose any new constitution, or even a movement in that direction, that seemed to favor partisan Democratic interests. However, so far, organizers of pro-reform groups have been careful to include Republicans in top leadership positions.

On the positive side is the fact that Alabama is more affluent and developed than when previous reform efforts were attempted. More philanthropic capital is available to finance movements for change. This helps to offset the huge advantage enjoyed by interests with a heavy stake in maintaining the status quo. These restraining forces may not be able to hold up change indefinitely. Problems such as the 2001 crisis in education funding may dictate drastic action.

The method for constitutional reform that has the greatest legitimacy is the convention, and surveys suggest the Alabama public favors that option among the possible choices. The Legislature typically pre-

fers methods over which it has the most control. As we have seen, the Legislature could function as a constitutional convention itself or simply clean up the existing document and submit it for ratification as one amendment—if yet another amendment is added to authorize this procedure. Another possibility is for interested legislators simply to continue proposing mostly uncontroversial revisions on an article-by-article basis. Finally, the Legislature could, as it did in the late 1960s, once again establish a constitutional commission, either to submit recommendations to the Legislature or for the consideration of a convention if one is ultimately called. Nothing can happen as far as any of these options are concerned unless the Legislature gives its assent.

Most of the literature on Alabama constitutional reform points to the governor as the central figure. This Article has noted the minimal or substantial efforts of several twentieth and twenty-first century Alabama governors on behalf of reform—specifically, O’Neal, Kilby, Miller, Folsom, Brewer, James, and Siegelman. Some outstanding governors went unmentioned because they chose not to confront what they regarded as an impossible challenge—Bibb Graves, who implemented the New Deal in Alabama, and Frank Dixon, who reformed Alabama’s administrative structure through statutes and executive orders.

Don Siegelman’s level of commitment to the cause of constitutional reform was still a source of uncertainty in late spring of 2001. His verbal support was at times strong, but his preoccupation with current education funding and his reelection concerns appeared to mitigate his willingness to take leadership. To be effective, he needs to provide the public with a vision for a new constitution and tell how he will work to make this vision a reality. Even if Siegelman were fully committed to this cause, however, it is by no means certain this would be enough. The Governor was strongly convinced of the need for a state lottery for education, but it was defeated soundly at the polls while he was still in his “honeymoon” period, shortly after taking office.

The third branch of government, the judiciary, has not been encouraging to constitutional reformers, except when the reforms proposed related directly to and were favored by the courts. While reluctant to make constitutionally expansive rulings, in the manner of an activist United States Supreme Court, the judiciary has checked legislative and executive initiatives. It ruled against Folsom in the 1950s when he wanted a convention limited to reapportioning the Legislature. The Alabama Supreme Court also ruled against legislative leaders in the 1980s when they desired to submit a “cleaned up” constitution to the voters as a single amendment. Now, in the twenty-first century, Chief Justice Roy Moore, who is idolized by the adamant defenders of Alabama’s old constitution, leads the judiciary. The supporters of the Chief

Justice fear that the references to God in the existing document might be excised. Moore himself has urged caution as far as changing the constitution is concerned and has made several public comments favorable to it.

Even though the racial provisions in the constitution are null and void, race will still complicate and retard efforts to achieve constitutional reform—as it has complicated and retarded efforts toward progress in other areas of Alabama public life. Neo-Confederate groups, increasingly vocal, will argue that to displace the 1901 Constitution formed by men who had either fought for the South in the Civil War or who were the sons of veterans would amount to disloyalty to Alabama's heritage. If too much stress is put on the admittedly racist character of the old Constitution, it will hamper efforts to replace it. The Constitution will take on the same status as the Confederate flag which is alternately viewed unashamedly either as an integral part of Alabama's history or as a symbol of hate and African-American repression.

Public apathy will also continue to be a major inhibiting factor to the achievement of a new constitution. The worse the old Constitution has become, the more difficult it becomes to explain why it needs to be replaced. This is an area of low salience as far as most citizens are concerned. It is hard to explain how a "bad" constitution is consequential. Some people feel that having a new constitution would make no difference except that they would probably have to pay higher taxes as a result. They believe, correctly or incorrectly, that Alabama has more pressing problems to deal with.

Alabama is never going to have a "model" constitution. Whatever new constitution the state may ultimately adopt (probably well into the twenty-first century), it will reflect a combination of the desirable and the feasible. As this Article has shown, given a panoply of complicating factors, there will have to be a heavy emphasis on the feasible.

