

THE USURPATION OF LEGISLATIVE POWER BY
THE ALABAMA JUDICIARY: FROM LEGISLATIVE
APPORTIONMENT TO SCHOOL REFORM

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I. INTRODUCTION

The distribution of governmental power among different departments, so that the whole power is never concentrated in a single individual or group, is fundamental to the American concept of government. The federal and state constitutions reflect the influence of the French philosopher Montesquieu, who asserted that separation of powers was essential to liberty:

When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. . . . There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.¹

Like many of her sister states, Alabama expressly forbids each branch of government to usurp the power of any other branch.² Alabama's separation of powers clause is the primary constitutional limit on the exercise of judicial power. Until recently, the separation of powers clause constrained Alabama courts from exercising power explicitly vested in the legislature, even as a means to remedy constitutional violations by the legislature. However, the Alabama Supreme Court has now shown a willingness to perform tasks assigned to the legislature despite the state's separation of powers provision.

In *Brooks v. Hobbie*³ and *Ex parte James (In re Alabama Coalition for Equity, Inc. v. James)*,⁴ the Alabama Supreme Court endorsed the judiciary's substitution of judicially created laws for their unconstitutional legislative counterparts in cases in which the state legislature failed to enact constitutional laws

1. 1 CHARLES SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 151-52 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748).

2. ALA. CONST. art. III, § 43.

3. 631 So. 2d 883 (Ala. 1993).

4. 713 So. 2d 869 (Ala. 1997).

after a reasonable opportunity to do so.⁵ This Article posits that these holdings represent a new theory of judicial power under which Alabama courts may exercise powers beyond the limits placed on them by the state constitution, particularly the separation of powers clause. Part II examines the scope of the state judiciary's power to decide whether acts of the coordinate branches are constitutional and considers the state constitution's separation of powers clause as a limit on the judiciary's power to remedy constitutional violations by the executive or legislature. Part III examines *Brooks v. Hobbie* and *Ex parte James* in light of Alabama's separation of powers clause. Part IV concludes that judicial exercise of power vested in the legislature, even as a means of remedying constitutional violations by the legislature, is inconsistent with the separation of powers clause and is an unconstitutional usurpation of legislative power by the judiciary.

II. THE JUDICIAL POWER AND ITS LIMITS UNDER THE ALABAMA CONSTITUTION

The Alabama Constitution establishes the familiar American tripartite form of government, dividing the powers of the state government among three departments: the legislative, the executive, and the judicial.⁶ The state's "judicial power" is vested in a "unified judicial system."⁷ The power of the state judiciary is thus limited by definition to that which is "judicial." Furthermore, the judicial power is limited by Alabama's separation of powers clause, which provides that "the judicial [department] shall never exercise the legislative and executive powers, or either of them."⁸

5. *Brooks*, 631 So. 2d at 890; *Ex parte James*, 713 So. 2d at 882.

6. ALA. CONST. art. III, § 42.

7. ALA. CONST. amend. 328, § 6.01.

8. ALA. CONST. art. III, § 43. Regarding separation of powers in Alabama, see generally ALBERT P. BREWER & CHARLES D. COLE, ALABAMA CONSTITUTIONAL LAW 489-512 (1997).

A. The Judicial Power Includes the Power to Determine Whether Acts of the Other Branches Are Constitutional

The judicial power in Alabama includes the power to determine whether acts of the legislative or executive branches are constitutionally permissible. This Article adopts the terminology preferred by Dean Frank R. Strong⁹ and refers to this judicial power as "constitutional review," rather than "judicial review," which, although more familiar to law-trained readers, is less descriptive.¹⁰ Constitutional review was a well-established judicial power in Alabama prior to the adoption of the Constitution of 1901.¹¹ Neither the adoption of the Constitution of 1901

9. FRANK R. STRONG, JUDICIAL FUNCTION IN CONSTITUTIONAL LIMITATION OF GOVERNMENTAL POWER 18 (1997).

10. Strong argues that the federal judiciary's power of constitutional review is on shaky ground at best. STRONG, *supra* note 9, at 21. He asserts that the famous 1787 North Carolina case of *Bayard v. Singleton*, 1 N.C. (Mart.) 48 (1787), which is widely cited as the first case in which a court declared a legislative act void as unconstitutional, has been misinterpreted. STRONG, *supra* note 9, at 16-19. According to Strong, *Bayard* does not stand for the proposition that a court may review the constitutionality of any law; rather, it stands for the much narrower proposition that a court may invalidate an unconstitutional statute that infringes on the court's power to exercise its judicial function. *Id.* at 18. He acknowledges that this view is unorthodox. *Id.* at xi. Irrespective of whether Strong's views are correct as to the legitimacy of constitutional review by the federal judiciary, they are immaterial to the scope of the power conferred upon the Alabama judiciary and are briefly recounted here simply as a reference to the reader interested in the development of constitutional review in the eighteenth and nineteenth centuries.

11. Before 1901, the Alabama Supreme Court had declared numerous legislative acts void as violative of the state or federal constitution. See, e.g., *Thompson v. Town of Luverne*, 29 So. 326, 326 (Ala. 1900) (holding as unconstitutional the portion of an act incorporating a town that authorized the town government to borrow money to build a courthouse because it violated a constitutional requirement that each act address one subject only); *Nolen v. State ex rel. Moore*, 24 So. 251, 253 (Ala. 1898) (striking down an act authorizing the governor to suspend tax assessors from office because it conflicted with a constitutional provision authorizing certain courts to remove them from office); *Selma Sash, Door & Blind Factory v. Stoddard*, 22 So. 555, 556 (Ala. 1897) (holding mechanic's lien law unconstitutional); *Carr v. State*, 17 So. 350, 352 (Ala. 1895) (invalidating an act prohibiting bankers from receiving deposits when bank is insolvent, requiring violators to pay a fine of double the deposit, half to go to the depositor, and placing violators at risk of imprisonment for nonpayment because it violated a constitutional provision that no person shall be imprisoned for debt); *Birmingham Mineral R.R. Co. v. Parsons*, 13 So. 602, 604 (Ala. 1893) (ruling that the portion of an act imposing strict liability on railroads for damages caused by cattle passing over or through railroad cattle guards was unconstitutional as violative of due process); *Jones v. Jones*, 11 So. 11, 13 (Ala. 1892) (holding

nor subsequent amendments have stripped this power from the judiciary. Furthermore, constitutional review is mandatory when a litigant in a justiciable controversy alleges a constitutional violation.¹²

1. *The Legitimacy of Constitutional Review Under the Alabama Constitution.*—Alabama courts apparently never accepted the argument that they were powerless to determine that acts of the coordinate branches were unconstitutional. Such a view had been espoused by Justice Gibson of the Pennsylvania Supreme Court, dissenting in the 1825 Pennsylvania case of *Eakin v. Raub*.¹³ Gibson asserted that the Pennsylvania judiciary did not have the power to declare legislative acts unenforceable as violative of the state constitution because the legislature was as competent to determine the constitutional limits on its authority as was the judiciary and because constitutional review by the judiciary would lead to "collisions" between the judiciary and the other branches of government.¹⁴

The Alabama Supreme Court rejected Justice Gibson's argument in *State ex rel. Attorney General v. Porter*,¹⁵ stating that "no serious collision need be apprehended; for [a court] will have only to pronounce its judgment, to induce a conformity of action by the executive officers of the law."¹⁶ This statement reflects the court's belief that the other branches of government had

that a legislative grant of divorce was void as in conflict with constitutional prohibition on legislative suspension of the operation of any general law for the benefit of an individual when general law provided grounds and procedures for divorce in courts); *Collins v. State*, 7 So. 260, 261 (Ala. 1890) (determining that an act providing for trial of misdemeanors by eight-man juries was void as violative of a constitutional provision which contemplated trial by twelve-man juries); *Hall v. Hall*, 43 Ala. 488, 498 (Ala. 1869) (holding that the ordinance of secession was "a nullity"); *Tennessee & Coosa R.R. Co. v. Moore*, 36 Ala. 371, 388 (Ala. 1860) (legislative act was void as violative of Federal Constitution because it would have impaired the state's obligation under a prior contract with a railroad company); *State ex rel. Attorney General v. Porter*, 1 Ala. 688, 706 (Ala. 1840) (invalidating the legislative appointment of a member of the legislature to a newly created circuit judgeship because the appointment violated a constitutional prohibition against legislators being appointed to offices created while they were serving in the legislature).

12. See *infra* Part II.A.2-3.

13. 12 Serg. & Rawle 330 (Pa. 1825).

14. *Eakin*, 12 Serg. & Rawle at 345-48 (Gibson, J., dissenting).

15. 1 Ala. 688, 706 (Ala. 1840).

16. *Porter*, 1 Ala. at 700.

accepted its power of constitutional review and would defer to judicial determinations in proper cases. However, the court acknowledged that other branches would not defer to a court if it acted outside the scope of judicial power: "True, if the judiciary were to arrogate to itself the right to adjudge a political question, the decision of which properly pertains to either of the other departments, a collision might arise; but such an assumption cannot be anticipated."¹⁷

2. *Mandatory Versus Permissive Constitutional Review.*—In 1833, the Alabama Supreme Court considered the role of constitutional review in a tripartite form of government in the case of *State ex rel. Attorney General v. Paul*,¹⁸ observing that

it is the province of the judiciary to construe, and administer the law: the consequence is, that the constitution, being the *supreme law*, it must prevail, in preference to the statute, and the latter become a dead or silent letter. This, however, is not the result of any superiority in the judicial, over the legislative department.¹⁹

Although the *Paul* court affirmed its power of constitutional review, it denied that it must exercise this power in all cases. The *Paul* court refused to consider whether the legislature's appointment of a state legislator to fill a vacant circuit judgeship was constitutional.²⁰ The court stated that if the judiciary were "reduced to the *necessity* of passing on the constitutionality of any appointment by the legislature," it had authority to do so.²¹ However, the court determined that *Paul* did not present such a necessity.²² In refraining from exercising its power of constitutional review, the court observed that if the judiciary were to attempt to control legislative appointments, in any form or manner, "such intermeddling [sic] would tend to destroy the harmony,

17. *Id.*

18. 5 Stew. & P. 40 (Ala. 1833).

19. *Paul*, 5 Stew. & P. at 49.

20. The state constitution forbade the appointment of a person to fill an office which had been created while that person was serving as a state legislator. ALA. CONST. of 1819, art. III, § 25. Paul had been appointed by the state legislature to fill the office of judge of a judicial circuit that was created during Paul's term as a legislator. *Paul*, 5 Stew. & P. at 41.

21. *Paul*, 5 Stew. & P. at 50 (emphasis added).

22. *Id.*

which is essentially necessary between the departments."²³

To the extent that *Paul* stood for the proposition that the judiciary should not review the constitutionality of legislative appointments, it was rejected seven years later in *Porter*.²⁴ The *Porter* court held that "the powers of this court not only authorize, but require" the court to determine the constitutionality of a legislative appointment when challenged in an otherwise justiciable case.²⁵ The *Porter* court summarized its view of constitutional review:

The constitution is regarded as fundamental, and paramount law; and the Legislature is its creature, whose powers are to be ascertained, by a reference to the declared will of the creator. This being the relation which the constitution bears to the Legislature, a judge could not discharge his pledge to the public, without treating as a nullity, a legislative act, which oppugns a constitutional provision.²⁶

The court thus viewed constitutional review as mandatory when the constitutionality of an act of a coordinate branch was challenged in an otherwise justiciable controversy. The *Porter* court's view of constitutional review as mandatory has stood the test of time, and is still the rule in Alabama.²⁷

3. *Political Questions*.—Alabama courts have long recognized that their power does not extend to the determination of "political questions."²⁸ Alabama's "political question doctrine," unlike its federal counterpart, is consistent with the mandatory view of constitutional review.²⁹ The distinction between political questions and judicial questions, according to the Alabama Supreme Court, has varied little since 1840.

In *Paul*, the court refused to decide whether a legislative appointee was constitutionally unqualified to hold office, deem-

23. *Id.*

24. 1 Ala. 688, 706 (Ala. 1840).

25. *Porter*, 1 Ala. at 706.

26. *Id.* at 699.

27. See *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 159 (Ala. 1991) ("[I]f it clearly appears that an act of the legislature unreasonably invades rights guaranteed by the Constitution, we have not only the power but the duty to strike it down.").

28. See, e.g., *Paul*, 5 Stew. & P. at 52; *Porter*, 1 Ala. at 700.

29. See *Paul*, 5 Stew. & P. at 52; *Porter*, 1 Ala. at 700.

ing that determination to be a political question.³⁰ The *Porter* court took a different view: the legislature could appoint whomever it wished to fill the vacant office, as long as the appointee was constitutionally qualified.³¹ In other words, the court was powerless to determine whom the legislature should appoint because such a determination presented a political question, but the court had both the power and the duty to determine whether a particular appointee was constitutionally unqualified to fill the office when the appointee's qualifications were challenged in a judicial proceeding.³² This view acknowledges the legislature's absolute discretion to choose from among all constitutionally qualified persons the one person it wishes to fill the office, but also acknowledges the judiciary's role in preventing the legislature from overstepping the limits of its authority by appointing a constitutionally unqualified person.

Alabama's refusal to decide "political questions" has, in almost all cases, simply been a refusal to interfere when a coordinate branch has acted within its discretion.³³ In those cases, a constitutional violation was not alleged.³⁴ Although earlier in

30. *Paul*, 5 Stew. & P. at 53.

31. *Porter*, 1 Ala. at 698.

32. *Id.*; accord, *State ex rel. James v. Reed*, 364 So. 2d 303, 307-08 (Ala. 1978) (holding that a constitutional provision that no person convicted of bribery or other infamous crime was eligible to hold office in state legislature was a limit on legislative authority to determine the qualifications of its own members, and the court could enforce the provision).

33. See, e.g., *City of Birmingham v. Tutwiler Drug Co.*, 475 So. 2d 458, 468 (Ala. 1985) (holding that the determination of whether a particular urban renewal project was desirable was within the power of the legislative body and was therefore a political question); *St. Clair County v. Town of Riverside*, 128 So. 2d 333, 339-40 (Ala. 1961) (refusing to enjoin the closing of a highway because highway department, as a legislative agency, has discretion to construct roads; in absence of "manifest abuse of authority or arbitrariness," court's intervention would "amount to judicial usurpation of an exclusively legislative function clearly beyond the powers of courts").

34. Although judicial determination is mandatory in Alabama courts when a constitutional violation has been alleged, the judiciary's power of review is limited by an evidence rule when the alleged violation occurred in enacting a bill or constitutional amendment. In determining whether all constitutional requirements were fulfilled in such cases, Alabama courts may not consider evidence outside of the legislative journals. *Alabama Citizens Action Program v. Kennamer*, 479 So. 2d 1237, 1240 (Ala. 1985); *In re Opinion of the Justices No. 113*, 47 So. 2d 643, 646-47 (Ala. 1950); *Robertson v. State*, 30 So. 494, 495-96 (Ala. 1901). Although this rule limits the court's ability to determine whether a bill or constitutional amendment was validly

this century the court had shirked its duty of constitutional review in challenges to Alabama's malapportioned legislature,³⁵ it rejected those cases in *Brooks v. Hobbie*.³⁶ The *Brooks* court went further than simply recognizing the duty of constitutional review, however, and held that courts could exercise the concededly legislative power to reapportion the legislature.³⁷ Alabama's courts have frequently cited federal cases defining "political questions,"³⁸ but they do not follow the federal political question doctrine, under which federal courts must not exercise constitutional review under certain circumstances.³⁹

4. *Power to Remedy Constitutional Violations.*—Prior to the 1960s, courts exercising their powers of constitutional review limited themselves to determining whether an act was constitutionally permissible and, if not, treating it as a nullity.⁴⁰ Furthermore, it was

well settled that the courts ha[d] no power to enforce the mandates of the Constitution which are directed at the legislative branch of the government or to coerce the legislature to obey its duty, no matter how clearly or mandatorily imposed on it, with respect to its legislative function.⁴¹

Thus, under traditional notions, courts did not dictate what the

enacted, it does not excuse the court from making a determination based upon evidence in the legislative journals and, therefore, cannot be described as a true exception to the court's duty of constitutional review.

35. See *Ex parte Rice*, 143 So. 2d 848 (Ala. 1962); *Waid v. Pool*, 51 So. 2d 869 (Ala. 1951).

36. See 631 So. 2d 883, 884-85 (Ala. 1993).

37. See discussion *infra* Part III.A.

38. See, e.g., *State ex rel. James v. Reed*, 364 So. 2d 303, 305 (Ala. 1978) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

39. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 14 (1994) ("Under current law, the political question doctrine consigns certain allegations of constitutional violations to the other branches of government . . ."). Regarding the federal political question doctrine, see generally CHERMERINSKY, *supra*, at 142-66.

40. See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, in *THE COURTS: SEPARATION OF POWERS* 39, 40 (Bette Goulet ed., 1983).

41. Annotation, *Power and Duty of Court Where Legislature Renders Constitutional Mandate Ineffectual by Failing to Enact Statute Necessary to Make It Effective or by Repealing or Amending Statute Previously Passed for That Purpose*, 153 A.L.R. 522 (1944).

other branches must do.⁴²

As a result of opinions from both federal and state courts upholding judicial reapportionment plans, this principle is no longer well settled, although some courts still claim to adhere to it.⁴³ Professor Horowitz traces the development of judicial supervision of public institutions back to *Brown v. Board of Education*⁴⁴ and *Baker v. Carr*,⁴⁵ further observing that "[h]ad it not been for *Baker v. Carr*, school desegregation might have been regarded as a very special case."⁴⁶ But once the Court in *Baker* declared reapportionment to be a judicial question, "the earth quaked beneath the panoply of doctrines that had kept the courts away from the internal affairs of other governmental bodies."⁴⁷

Acceptance of the practice of telling other branches of government what to do, and in some cases doing it for them, spread throughout the federal courts⁴⁸ and is now spreading to state courts. Often, state courts have first approved of this practice in reapportionment cases, ignoring or reinterpreting the texts of their state constitutions or their judicial precedents to allow them to reapportion the state legislature and thereby avoid the exercise of federal judicial power over a peculiarly state concern. Such has been the case in Alabama.⁴⁹

42. See Horowitz, *supra* note 40, at 40.

43. See, e.g., *Wells v. Purcell*, 592 S.W.2d 100, 104 (Ark. 1979) ("[L]egislature is responsible to the people alone, not to the courts, for its disregard of, or failure to perform, a duty clearly enjoined upon it by the constitution, and the remedy is with the people, by electing other servants, and not through the courts."); *Nielsen v. Connecticut*, 670 A.2d 1288, 1293 (Conn. 1996) ("[A] court cannot mandate performance of a constitutional duty by a legislature, particularly where that duty involves the exercise of discretion necessary to the enactment of legislation."); *Fonfara v. Reapportionment Comm'n*, 610 A.2d 153, 157 (Conn. 1992) (holding that judiciary did not have power to reapportion legislature except on terms specified in constitution; constitution stipulated that judiciary could reapportion only after failure of both legislature and special reapportionment commission).

44. 347 U.S. 483 (1954).

45. 369 U.S. 186 (1962).

46. Horowitz, *supra* note 40, at 49.

47. *Id.*

48. See *id.* at 51-55.

49. See *supra* Part II.A.

*B. Alabama's Separation of Powers Clause
Prohibits the Judiciary from Substituting Its Judgments for
Invalid Acts of the Legislature*

Article III, section 43 of the Alabama Constitution (hereinafter, "section 43") states:

In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.⁵⁰

1. *How Government Powers Are Separated.*—The division of American governmental powers among three departments is unquestionably traceable to the influence of Montesquieu.⁵¹ America's Founding Fathers subscribed to Montesquieu's views regarding the necessity of separating government powers in order to preserve individual liberty,⁵² and in framing the Constitution of 1787 they accordingly divided the powers of the federal government among three departments.⁵³ Although the Federal Constitution contains no explicit separation of powers

50. ALA. CONST. art. III, § 43. This type of separation of powers clause is not necessarily typical of state constitutions. Arkansas and Missouri have similar clauses, ARK. CONST. art. IV, §§ 1, 2; MO. CONST. art. II, § 1, but other states allow for separate branches to share functions "provided each branch maintains its core duties." James D. Robertson, Note, *Spradlin v. Arkansas Ethics Commission: A Hard-Line Approach to Separation of Powers*, 48 ARK. L. REV. 755, 761 (1995).

51. See, e.g., WILLIAM BONDY, *THE SEPARATION OF GOVERNMENTAL POWERS IN HISTORY, IN THEORY, AND IN THE CONSTITUTIONS* 13 (1967) (describing Montesquieu as "the first to demonstrate that the separation of governmental powers is indispensable to civil liberty"); ANNE M. COHLER, *MONTESQUIEU'S COMPARATIVE POLITICS AND THE SPIRIT OF AMERICAN CONSTITUTIONALISM* 148 (1988) (attributing Montesquieu's views on legislation to the framers of the federal Constitution); William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of Government*, 25 YALE L.J. 599, 600 (1916) (attributing knowledge of Montesquieu's writings to the participants in the Constitutional Convention of 1787 as well as in the ratifying conventions).

52. See ARTHUR T. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 4 (1953).

53. See U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

clause, the scheme is unmistakable in the structure of the Constitution,⁵⁴ and the existence of a doctrine of separation of powers rooted in the Constitution is almost universally accepted⁵⁵ (although the content of the doctrine is the subject of debate).

Many state constitutions go a step further than the Federal Constitution and include explicit separation of powers clauses.⁵⁶ Alabama's section 43 is almost identical to a clause in the first constitution of Massachusetts, which, having been adopted in 1780, predates the Federal Constitution.⁵⁷ Section 43 was originally proposed as a provision of the Declaration of Rights in the Preamble to the Constitution of 1901.⁵⁸ The provision was moved to and adopted as part of Article III, which also contains the clause distributing governmental powers among the branches.⁵⁹ The state's constitutional framers nevertheless viewed the separation of powers as a "monument[] of liberty."⁶⁰ Thus, irrespective of where the provision was located in the constitution, its purpose was seen as preserving individual liberties by preventing a concentration of governmental powers.

Courts have often construed state constitutions as distributing the powers of government among the three branches according to the "nature" of the various powers of government; that is, as vesting powers which are legislative in nature in the legislature, "powers executive in their nature in the executive department . . . , and powers judicial in their nature in the courts."⁶¹ This interpretation belies history and reasoning. Governmental

54. See U.S. CONST. arts. I-III.

55. See, e.g., THE FEDERALIST NO. 47, at 300-01 (James Madison) (Clinton Rossiter ed. 1961); GERHARD CASPER, SEPARATING POWERS: ESSAYS ON THE FOUNDING PERIOD 1 (1997).

56. See BONDY, *supra* note 51, at 19-21.

57. See *id.* at 19.

58. 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21, 1901, TO SEPTEMBER 3, 1901, at 785 (1940) [hereinafter OFFICIAL PROCEEDINGS].

59. 4 OFFICIAL PROCEEDINGS, *supra* note 58, at 4689.

60. 2 OFFICIAL PROCEEDINGS, *supra* note 58, at 2442 (noting applause by the convention after a delegate who, while objecting to a measure that would involve the governor in the process of formulating revenue bills, exhorted to the convention: "Keep your departments separate and distinct. Reserve the monuments of liberty, and your people will bless you rather than curse you when you go to your homes.").

61. BONDY, *supra* note 51, at 69.

powers are not distributed according to their "nature."⁶² Consider, for example, the power to "establish[] a rule of civil conduct . . . which . . . must be conceded to be legislative in its nature."⁶³ This power is exercised not only by the legislature, but also by the courts in establishing common law rules as well as by the executive in promulgating regulations.⁶⁴ Also, the "power to ascertain facts and to apply the law to the facts . . . , is judicial in its nature."⁶⁵ Nevertheless, such powers are vested in legislative bodies in the form of the impeachment power.

Instead of separating all governmental powers according to their nature, constitutional framers distributed powers with more practical concerns in mind. Most of the quintessentially legislative powers were vested in legislatures, most such executive functions in the executive, and most such judicial functions in the judiciary.⁶⁶ Other governmental powers were then vested in whichever department could exercise them to best effect.⁶⁷ For example, the framers of the Federal Constitution vested the power to make treaties in the President, who is best suited to negotiate with foreign heads of state, although this power is not absolute but subject to approval of the Senate.⁶⁸

This participation by the legislative branch in the executive function of treaty making exemplifies another feature of the American scheme of separation of powers: checks and balances. Under the American system of checks and balances, each department "participate[s] in the functions exercised by the others, so as to check but not so as to control them."⁶⁹

The inescapable conclusion is that the powers of government are not separated strictly according to their nature, and are indeed not completely separated.⁷⁰ The phrase "separation of powers" is therefore used in this Article in a loose sense and

62. *Id.* at 69-74.

63. *Id.* at 70.

64. *Id.*

65. *Id.* at 71.

66. See BONDY, *supra* note 51, at 74.

67. *Id.* at 74-75.

68. *Id.* at 76.

69. *Id.* at 38.

70. Former President and Chief Justice William Howard Taft observed that "[i]t is impossible to avoid a twilight zone in the division of powers between the three branches" Taft, *supra* note 51, at 600.

refers to explicit constitutional provisions or to judicially recognized doctrines which forbid one branch of government from exercising a specific power that is explicitly vested in another branch.

Many governmental powers are explicitly vested by constitutions. For example, the Alabama Constitution explicitly assigns the legislature the duty, and therefore necessarily the power, to periodically reapportion the legislature.⁷¹ Assignment of powers not explicitly vested by a constitution is also a legislative power.⁷² Some difficulty arises in defining the content of certain constitutionally vested powers (for example, "the judicial power"), and authorities are split as to whether historical tests should be used to define the content of such a power.⁷³ This Article focuses only on powers that are explicitly vested by the constitution in the legislature and sufficiently described by the constitution to avoid definitional problems.

2. Judicial Enforcement of Alabama's Separation of Powers Clause.—Prior to *Brooks v. Hobbie*, the state supreme court had repeatedly acknowledged Alabama's constitutional separation of powers clause as a limit on its own power. As late as 1992, the court observed that "[g]reat care must be exercised by the courts not to usurp the functions of other departments of government. No branch of the government is so responsible for the autonomy of the several governmental units and branches as the judiciary."⁷⁴

In *Friday v. Ethanol Corporation*,⁷⁵ the court explained that separation of powers principles prevented Alabama courts from invalidating legislative acts unless they were unconstitutional beyond a reasonable doubt.⁷⁶ The court elaborated on its role:

To assure that we, the Judiciary, do not exercise power reserved by the Constitution to the Legislature, and thereby violate the

71. ALA. CONST. art. IV §§ 198, 199, 200.

72. BONDY, *supra* note 51, at 79.

73. *Id.* at 85.

74. *Piggly Wiggly No. 208, Inc. v. Dutton*, 601 So. 2d 907, 911 (Ala. 1992) (quoting *Finch v. State*, 124 So. 2d 825, 829 (Ala. 1960)).

75. 539 So. 2d 208 (Ala. 1989).

76. *Friday*, 539 So. 2d at 211.

fundamental law separating the powers of government into three distinct departments, we have held that when testing the constitutionality of a statute the only question for the court to decide is one of legislative power, not of legislative expediency or legislative wisdom.⁷⁷

Moreover, based on separation of powers, the court has limited the power of constitutional review to the judiciary. For example, in 1988 the Alabama Supreme Court held that passing on the validity and legality of an ad valorem tax assessment was a judicial power which could not be exercised by a county commission.⁷⁸

In the 1974 case of *Morgan County Commission v. Powell*,⁷⁹ the court held that separation of powers prevented courts from appropriating funds because appropriation of funds was a legislative function:

Within their respective spheres each branch of government is supreme. Judicial power and legislative power are coordinate, and neither can encroach upon the other. The authority to determine the amount of appropriations necessary for the performance of essential functions of government is vested fully and exclusively in the legislature.⁸⁰

That the legislature has the exclusive power to appropriate funds was reaffirmed in 1976, when the supreme court held that the governor could not, by executive order, appropriate public funds for education.⁸¹ Furthermore, the court in 1993 reaffirmed that the legislature may not delegate the power of appropriation: "It is settled law that the Legislature may not constitutionally delegate its powers, whether the general power to make law or the powers encompassed within that general power, including the 'power of the purse'—the power to make appropriations."⁸²

77. *Id.*

78. *Corbitt v. Magnum*, 523 So. 2d 348 (Ala. 1988).

79. 293 So. 2d 830 (Ala. 1974).

80. *Id.* at 834 (citations omitted); accord *Sparks v. Parker*, 368 So. 2d 528, 531 (Ala. 1979) (stating that "[i]t is therefore not within the sphere of the judicial branch to determine what appropriations are to be made").

81. *Wallace v. Baker*, 336 So. 2d 156, 156 (Ala. 1976).

82. *Folsom v. Wynn*, 631 So. 2d 890, 894 (Ala. 1993); accord *Jetton v. Sanders*, 275 So. 2d 349, 352 (Ala. 1973).

The judiciary's refusal to substitute its judgments for decisions made by the state legislature is particularly evident in utility rate cases. Rate making is a legislative function, and "courts have no right to sit as a board of review to substitute their judgment for that of the Legislature."⁸³ Therefore, an Alabama court had no power to instruct the Public Service Commission to promulgate a telephone rate schedule conforming to the court's finding of what proper rates would have been.⁸⁴ Also, courts may not add to legislation: "[T]he courts are organized to administer and properly construe the law, and not from their own notions of what should be done, to supply deficiencies in legislation. The correction of such deficiencies is the function of the legislative department of the government."⁸⁵

Thus, before *Brooks v. Hobbie*, Alabama's courts had consistently refused to substitute their judgments for those of the legislature. However, *Brooks v. Hobbie* and *Ex parte James* indicate that the judiciary no longer views section 43 as an insurmountable bar to substituting judicially created laws for legislative enactments.

III. *BROOKS V. HOBBIE* AND *EX PARTE JAMES*: ABROGATION OF SECTION 43 AS A LIMIT ON JUDICIAL POWER

A. *Brooks v. Hobbie: Judicial Exercise of Legislative Power Permissible when Legislature Fails to Act*

In the 1962 landmark case of *Baker v. Carr*,⁸⁶ the United States Supreme Court held that federal courts had jurisdiction to redraw legislative district boundaries as a way of remedying equal protection violations.⁸⁷ A generation later, in the 1993 case of *Grove v. Emison*,⁸⁸ the Court held that federal courts must "defer consideration of disputes involving redistricting

83. *City of Birmingham v. Southern Bell Tel. & Tel. Co.*, 176 So. 301, 304 (Ala. 1937).

84. *Southern Bell*, 176 So. at 306; accord *Jefferson County v. City of Leeds*, 675 So. 2d 353, 355 (Ala. 1995).

85. *Stiles v. Endsley*, 122 So. 458, 459 (Ala. 1929).

86. 369 U.S. 186 (1962).

87. *Baker*, 369 U.S. at 236.

88. 507 U.S. 25 (1993).

where the State, through its legislative or judicial branch, has begun to address that highly political task itself."⁸⁹

Alabama's constitution requires the State Legislature to reapportion legislative districts after each decennial United States census.⁹⁰ The same constitution prohibits the state judiciary from exercising legislative powers.⁹¹ In accordance with the plain meaning of section 43, the state judiciary may not apportion legislative districts because this is the exercise of a legislative power. Nevertheless, in *Brooks v. Hobbie*, the Alabama Supreme Court held that an Alabama circuit court acted within its power when it reapportioned the state legislature.⁹² *Brooks v. Hobbie* arose out of litigation that began in the United States District Court for the Middle District of Alabama in 1992.⁹³ In *Brooks v. Camp*,⁹⁴ a group of African-American plaintiffs sued Alabama officials, asserting that Alabama's state legislative districts were apportioned in violation of federal law.⁹⁵ In *Peters v. Folsom*,⁹⁶ a group of Republican plaintiffs asserted similar claims.⁹⁷ Both *Camp* and *Peters* were consolidated into *Brooks v. Hobbie*.⁹⁸

While *Camp* and *Peters* were pending in the district court, the United States Supreme Court announced its decision in *Grove v. Emison*.⁹⁹ The district court stayed further proceedings in the *Camp* and *Peters* cases because "the Alabama legislative process had not run its course with regard to redistricting the legislature."¹⁰⁰

The *Camp* plaintiffs and other African-American plaintiffs then asserted their claims in the Circuit Court of Montgomery County in an action titled *Sinkfield v. Bennett*.¹⁰¹ On May 12,

89. *Grove*, 507 U.S. at 33.

90. ALA. CONST. art. IV, §§ 198, 199, 200.

91. ALA. CONST. art. III, § 43.

92. *Brooks*, 631 So. 2d at 884.

93. *Id.* at 883-84.

94. *Brooks v. Camp*, No. 92-T-364-N (M.D. Ala. 1992).

95. *Brooks*, 631 So. 2d at 883-84.

96. *Peters v. Folsom*, No. 93-T-124-N (M.D. Ala. 1993).

97. *Brooks*, 631 So. 2d at 883.

98. *Id.* at 884.

99. 507 U.S. 25 (1993).

100. *Brooks*, 631 So. 2d at 884.

101. *Id.* (citing *Sinkfield v. Bennett*, CV-93-689 (Ala. Cir. Ct. Montgomery County 1993)).

1993, the circuit court tentatively approved a consent judgment adopting a plan for redistricting the state legislature.¹⁰² On August 13, 1993, after receiving preclearance by the United States Justice Department, the circuit court entered final judgment implementing the plan.¹⁰³

Thus, the new apportionment plan was the product of an agreement among the *Camp* plaintiffs and the Alabama officials who were the defendants in both the *Camp* and the *Peters* actions.¹⁰⁴ Those parties sought to dismiss both cases from the federal court.¹⁰⁵ The *Peters* plaintiffs, however, opposed the new plan and opposed the dismissal of the cases from federal court.¹⁰⁶ They argued that "the Alabama state courts lack[ed] subject matter jurisdiction to redistrict or reapportion the State Legislature."¹⁰⁷ By certified question, the federal court asked the Alabama Supreme Court "whether the Montgomery County Circuit Court had [subject matter] jurisdiction to enter its order adopting a plan for the reapportionment of the State Legislature."¹⁰⁸

In *Brooks v. Hobbie*, the Alabama Supreme Court answered "yes."¹⁰⁹ The court held that while "the legislature has the initial responsibility to act in redistricting matters . . . in the event the legislature fails to act, the responsibility shifts to the state judiciary."¹¹⁰

1. *Treatment of Prior Alabama Cases.*—The *Peters* plaintiffs relied on *Waid v. Pool*¹¹¹ and *Ex parte Rice*¹¹² for the proposition that Alabama state courts had no jurisdiction to reapportion legislative districts.¹¹³ In *Waid v. Pool*, the plaintiffs sought an injunction preventing the secretary of state from certifying the

102. *Id.*

103. *Id.*

104. *Id.*

105. *Brooks*, 631 So. 2d at 884.

106. *See id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Brooks*, 631 So. 2d at 889-90.

111. 51 So. 2d 869 (Ala. 1951).

112. 143 So. 2d 848 (Ala. 1962).

113. *Brooks*, 631 So. 2d at 884.

nominations and elections of candidates for the state House of Representatives on the ground that the state's legislative districts were malapportioned in violation of the state constitution.¹¹⁴ The circuit court dismissed the case for lack of jurisdiction.¹¹⁵ In affirming the dismissal, the supreme court stated that the plaintiffs "are seeking interference by the judicial department of the state in respect to matters committed by the constitution to the legislative department."¹¹⁶ The court added that "[t]he grievance complained of and recourse therefor should be made to the legislature and the people of the state, not to the court."¹¹⁷

In *Ex parte Rice*, the supreme court denied without opinion a petition for a writ of mandamus ordering a Montgomery County Circuit Judge to review the decree whereby he dismissed the petitioner's case.¹¹⁸ The petitioners had filed a bill in equity seeking to have the circuit court reapportion the legislature and also seeking an injunction to prevent the calling of a primary election until the legislative districts had been reapportioned.¹¹⁹ The trial court judge's decree dismissing the case had noted that "this matter is a legislative function," and that "the Court has no jurisdiction."¹²⁰

In *Brooks v. Hobbie*, the supreme court denied that *Waid v. Pool* and *Ex parte Rice* stood for the proposition that Alabama courts have no subject matter jurisdiction to reapportion the legislature.¹²¹ Instead, the court said, in these cases, the court "deferred to the legislature," and "declined to exercise jurisdiction."¹²² Without referring to section 43 or any other specific provision of the Alabama Constitution, the court also stated that *Waid* and *Rice* "were not based upon any provision of the state constitution that would limit the power of the courts to entertain these actions."¹²³

114. *Waid*, 51 So. 2d at 869-70.

115. *Id.* at 870.

116. *Id.* (citing ALA. CONST. art. III §§ 43, 44 & art. IX § 199).

117. *Id.*

118. *Ex parte Rice*, 143 So. 2d at 848.

119. *Id.*

120. *Id.*

121. *Brooks*, 631 So. 2d at 885.

122. *Id.*

123. *Id.*

Waid v. Pool and *Brooks v. Hobbie* represent two extremes: in *Waid*, the judicial department stated that it was without jurisdiction to pass on the constitutionality of the state's legislative apportionment, whereas in *Brooks v. Hobbie*, the judiciary affirmed jurisdiction not merely to invalidate the legislative apportionment scheme, but also to substitute a judicially created apportionment plan for it. The court in *Waid* can be criticized for not going far enough: it avoided its responsibility to determine whether a law was unconstitutional and therefore void. However, the court in *Brooks v. Hobbie* went too far by affirming the circuit court's power to substitute its own apportionment plan for the plan adopted by the legislature. The legislature is charged with the responsibility of apportioning legislative districts.¹²⁴ Although the judiciary can invalidate an unconstitutional apportionment plan, it may not reapportion the legislative districts without exceeding the limits imposed on judicial power by the unambiguous language of section 43.

2. *Consideration of Baker v. Carr and Other Federal Cases.*—The court referred to *Waid v. Pool* and *Ex parte Rice* as "old cases" "decided at a time when our Alabama state courts, like other state courts, stayed out of 'political' issues such as re-districting of the legislature."¹²⁵ The court discussed the line of Supreme Court cases, including *Baker v. Carr*¹²⁶ and *Reynolds v. Sims*,¹²⁷ in which claims grounded on the malapportionment of legislative districts were held to be justiciable in federal courts.¹²⁸ In *Baker v. Carr*, the Court held that a federal court had subject matter jurisdiction to entertain a challenge to Tennessee's legislative apportionment based on the Equal Protection Clause of the Federal Constitution's Fourteenth Amendment.¹²⁹ In so holding, the Court rejected the defendants' argument that the case was a non-justiciable political question.¹³⁰ This case was a turning point in the federal courts' application

124. ALA. CONST. art. IX, §§ 198, 199, 200.

125. *Brooks*, 631 So. 2d at 884.

126. 369 U.S. 186, 209 (1962).

127. 377 U.S. 533, 584 (1964).

128. *Brooks*, 631 So. 2d at 885-87.

129. *Baker*, 369 U.S. at 204.

130. *Id.* at 209.

of the political question doctrine. In *Reynolds v. Sims*, the so-called "one person-one vote" case, which originated in Alabama, the Court held that state legislative districts must be "as nearly of equal population as is practicable."¹³¹ The Court affirmed the district court's invalidation of Alabama's legislative districting plan, and affirmed the district court's power to "order into effect" a temporary legislative apportionment plan.¹³² In the same year, the Court invalidated districting plans for several other states.¹³³

In *Brooks v. Hobbie*, the Alabama Supreme Court reasoned that state courts have a mandate under the Federal Constitution to invalidate unconstitutional legislative districting plans.¹³⁴ It then extended this reasoning to conclude not only that state courts may invalidate such districting plans, but also that they may substitute judicially created districting plans for the invalid plans.¹³⁵

Without distinguishing between the sources of subject matter jurisdiction in federal courts and in Alabama state courts, the court concluded that "[i]n light of *Baker v. Carr* and its progeny, it is no longer legitimate for a court to decline to enforce the right of every citizen to a vote with a weight equal to the weight of every other citizen's vote."¹³⁶ The court observed:

Since *Reynolds v. Sims*, state courts have shown little reluctance to entertain cases involving "political" issues where there is a constitutional right at issue. . . . Federal and state courts entertain them because the Constitution of this country, as construed by the United States Supreme Court, requires judicial intervention to ensure that the constitutionally protected right of every citizen is observed.¹³⁷

The *Brooks v. Hobbie* court went further than concluding that state courts must exercise their subject matter jurisdiction to protect federal constitutional rights, a conclusion which, in and

131. *Reynolds*, 377 U.S. at 577.

132. *Id.* at 586-87.

133. See *Brooks*, 631 So. 2d at 886 (listing cases in which the Supreme Court invalidated districting plans).

134. *Id.* at 887.

135. *Id.* at 887-88.

136. *Id.* at 886.

137. *Id.* at 886-87.

of itself, is unremarkable. It stated that Alabama circuit courts "have the same power . . . to provide relief for violations of federal law as do the federal courts."¹³⁸ This conclusion is extraordinary and has far-reaching implications: any limit imposed by a state constitution on the powers of its courts can be surpassed if a federal court is not bound by a similar limit.

3. *Treatment of Cases from Other States.*—The court also looked to cases from Texas and Tennessee to support its conclusion that Alabama courts have jurisdiction to reapportion the legislature. In *Terrazas v. Ramirez*,¹³⁹ the Texas Supreme Court observed that "[a]lthough state courts in Texas have invalidated apportionment statutes, none has ever imposed a substitute plan upon the State. Nevertheless, we do not doubt the power of our courts to do so. United States District Courts have this power . . . and have exercised it in Texas."¹⁴⁰ The Texas court declared that "[r]eason and experience argue that courts empowered to invalidate an apportionment statute which transgresses constitutional mandates cannot be left without the means to order appropriate relief."¹⁴¹

Like Alabama's, the Texas Constitution requires the state legislature to reapportion the state's legislative districts after each United States decennial census.¹⁴² If the legislature fails to do this, the responsibility falls to a redistricting board.¹⁴³ The Texas Supreme Court is empowered to compel the board to perform its duties "by writ of mandamus or other extraordinary writs."¹⁴⁴ In the 1971 case of *Mauzy v. Legislative Redistricting Board*,¹⁴⁵ the Texas Supreme Court held that the state constitution did not authorize a court to issue a declaratory judgment that the apportionment scheme was unconstitutional because such a remedy was not envisioned in the phrase "other extraordinary writs."¹⁴⁶ In *Ramirez*, the Texas court held that it had

138. *Brooks*, 631 So. 2d at 889.

139. 829 S.W.2d 712 (Tex. 1991).

140. *Ramirez*, 829 S.W.2d at 717-18.

141. *Id.* at 718.

142. TEX. CONST. art. III, § 28.

143. *Id.*

144. *Id.*

145. 471 S.W.2d 570 (Tex. 1971).

146. *Mauzy*, 471 S.W.2d at 575.

not only the authority, but the duty, to issue a declaratory judgment that the apportionment scheme was unconstitutional.¹⁴⁷ The *Ramirez* court did not refer to the prior inconsistent holding in *Mauzy*.

Much like Alabama, the Texas judiciary went from one extreme to another: from denying that it had jurisdiction to invalidate a demonstrably unconstitutional apportionment plan, to affirming its power to substitute its own apportionment plan for the legislature's. In both cases, the courts apparently acted to prevent reapportionment by a federal court.

It is far from clear, however, that reapportionment by state courts is preferable to reapportionment by federal courts, especially when state courts must step beyond constitutional limits on their power. Professor Earl M. Maltz has observed that noninterpretive state court review¹⁴⁸ of alleged violations of the Federal Constitution is of "questionable value."¹⁴⁹ He asserts that such review "merely duplicate[s] already existing federal review,"¹⁵⁰ yet exacts significant institutional costs.¹⁵¹ According to Maltz, the cost of noninterpretive state court review includes "decreasing the ability of local legislatures to respond to changing conditions"¹⁵² and an increase in "uncertainty about the scope of constitutional rights."¹⁵³

In addition to the costs of noninterpretive state court review Maltz cites, there are also costs when state courts impose remedies for violations of the Federal Constitution which exceed the limits of power under their state constitutions. One such cost is the breakdown of the state's governmental structure. Once the state court transcends the limits of its power in order to remedy a violation of the Federal Constitution, precedent exists for exer-

147. *Ramirez*, 829 S.W.2d at 717.

148. Courts exercise "noninterpretive" constitutional review when they give weight to considerations beyond the intent of the constitutional framers in determining whether an act is constitutional. In contrast, courts exercising "interpretive" constitutional review "seek primarily to divine and implement the intent of the framers" Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 995-96 (1985).

149. *Id.* at 1023.

150. *Id.*

151. *Id.* at 1002-06.

152. *Id.* at 1023.

153. Maltz, *supra* note 148, at 1023.

cising extrajudicial power to remedy violations of the state constitution. It may be possible to articulate a doctrine under which state courts could exceed the limits placed on their power by state constitutions only to remedy violations of the Federal Constitution, but state courts have not done so. The result is that state court power has bled over the lines drawn by state constitutions to remedy federal violations, and the lines have remained obscured.

In addition to the Texas decision, the Alabama Supreme Court also looked to the Tennessee Supreme Court's decision in *Lockert v. Crowell*¹⁵⁴ for validation of its conclusion that Alabama courts have jurisdiction to reapportion the legislature. In *Lockert*, the Tennessee Supreme Court rejected an argument that the Tennessee judiciary would violate the separation of powers doctrine by reapportioning the legislature.¹⁵⁵ Like Alabama and other states,¹⁵⁶ the Tennessee court's decision was impacted by the *Baker v. Carr* line of federal cases, as well as by subsequent state reapportionment cases.¹⁵⁷ In reviewing similar cases from other states, the Tennessee court noted that those cases were "replete with statements that apportionment is primarily a legislative function, and that the courts should act only if the legislature fails to act constitutionally after having had a reasonable opportunity to do so."¹⁵⁸ Thus, the Tennessee court concluded that a state court would not violate the separation of powers doctrine by reapportioning the legislature because the court "would not in effect be preempting the General Assembly."¹⁵⁹

The Tennessee court's reasoning seems to embody a waiver

154. 631 S.W.2d 702 (Tenn. 1982).

155. *Lockert*, 631 S.W.2d at 705-06.

156. Tennessee, Texas, and Alabama have all followed a national trend. The Alabama court quoted a passage from a legal encyclopedia that illustrates this point:

[I]t is generally recognized that a court of competent jurisdiction possesses the power to reapportion when state reapportionment statutes fall short of constitutional requirements, or where there is either persistent failure, refusal, or undue delay by the legislature or the body empowered to act to come forth with a valid plan of reapportionment after having had an adequate opportunity to do so.

Brooks, 631 So. 2d at 888-89 (citing 81A C.J.S. *States* § 77 (1977)).

157. See *Lockert*, 631 S.W.2d at 705-06.

158. *Id.* at 706.

159. *Id.*

principle: if the legislature does not act constitutionally within a reasonable time, it has waived its power to reapportion the legislative districts; that power having been waived by the legislature, devolves to the court. The problem with applying this reasoning to affirm the power of an Alabama court to reapportion legislative districts is that section 43 does not allow governmental powers to be transferred between the branches except by express constitutional provision. Transfer of power by waiver is inconsistent with section 43. Nevertheless, the Alabama court's holding in *Brooks v. Hobbie* seems to adopt the waiver principle. The court concluded that while "the legislature has the initial responsibility to act in redistricting matters . . . in the event the legislature fails to act, the responsibility shifts to the state judiciary."¹⁶⁰

4. *Conclusion: Court Abrogated Section 43 While Ignoring It.*—Nowhere in its opinion in *Brooks v. Hobbie* did the court consider section 43 of the state constitution. Nevertheless, the court declared that "[t]o suggest that anything in the Alabama Constitution denies a circuit court in Alabama jurisdiction to entertain an action like the *Sinkfield* case is to misread that constitution."¹⁶¹ This statement may be correct. Insofar as "an action like the *Sinkfield* case" is one seeking a declaration that a legislative apportionment plan violates the state or Federal Constitution, an Alabama circuit court would have jurisdiction. However, section 43 denies jurisdiction for an Alabama court to substitute its judgment for the judgment of the legislature in exercising governmental powers vested exclusively in the legislature.

In *Brooks v. Hobbie*, the Alabama Supreme Court expanded state court subject matter jurisdiction beyond the limits established in the state's constitution.¹⁶² Perhaps the *Brooks v. Hobbie* "doctrine" only operates to abrogate section 43 and provide state courts jurisdiction to impose a remedy when the alternative is a remedy imposed by a federal court. Under this view, state court jurisdiction springs into existence whenever

160. *Brooks*, 631 So. 2d at 890.

161. *Id.* at 888.

162. *See id.* at 883.

federal court jurisdiction threatens the state judiciary's notion of state sovereignty. Justice Shores did find it "gratifying to have [the federal court] recognize that it is appropriate that judges elected by the people of Alabama be given the opportunity to resolve this question."¹⁶³ Perhaps this statement provides the key to understanding why the court upheld the judicial exercise of legislative power without addressing section 43. In any event, in view of the national trend of state judicial reapportionment, it seems clear that state horizontal separation of powers provisions are collapsing under the pressure of vertical separation of powers (i.e., federalism) concerns caused by federal judicial intervention in state legislative apportionment.

*B. Ex parte James: Judicial Power in the Public
School Equity Funding Case*

In *Ex parte James*, the Alabama Supreme Court held that the Montgomery Circuit Court did not violate section 43 in determining whether state's public education system complied with constitutional mandates.¹⁶⁴ The court also stated that section 43 would not prohibit the judiciary from fashioning a remedy for the constitutional violations, but that the circuit court had abused its discretion by ordering a remedy without giving the coordinate branches a reasonable opportunity to comply with the circuit court's newly articulated constitutional standards.¹⁶⁵

1. Chronology and Overview of the Public School Equity Funding Case.—*Ex parte James* is one of several supreme court opinions relating to the litigation known as the Public School Equity Funding Case (hereinafter, "equity funding case").¹⁶⁶ The equity funding case comprises two class actions brought on behalf of several Alabama school systems, school children and parents.¹⁶⁷

163. *Id.* at 890.

164. *Ex parte James*, 713 So. 2d 869, 879 (Ala. 1997).

165. *Ex parte James*, 713 So. 2d at 881-82.

166. *Id.* at 869. Other opinions include *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894 (Ala. 1995) and *Opinion of the Justices No. 338*, 624 So. 2d 107 (Ala. 1993).

167. See *Opinion of the Justices No. 338*, 624 So. 2d at 111 (reprinting the Mont-

The plaintiffs originally sued the following state officials: then-Governor Guy Hunt in his capacity as governor and as president of the state board of education; the state finance director; then-Lieutenant Governor James Folsom; the speaker of the House of Representatives; the state superintendent of education; and members of the Alabama State Board of Education.¹⁶⁸ In May and June 1990, all defendants except the governor and the state finance director realigned as plaintiffs, "indicating that they agreed with plaintiffs' claims."¹⁶⁹

a. Editing the Alabama Constitution

One of the first steps taken by the judiciary toward "reforming" the state's public school system was to avoid certain state constitutional provisions. In 1991, the circuit court, by summary judgment in favor of the plaintiffs in the equity funding case, effectively rewrote the state constitution's education provisions.

In 1956, in the wake of *Brown v. Board of Education*, Alabamians approved Amendment 111 to the state constitution, which provided:

It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for educational purposes under such cir-

gomery County Circuit Court's order dated April 1, 1993) [hereinafter, the "Liability Order"]. The two cases are *Alabama Coalition for Equity, Inc. v. Hunt*, No. CV-90-883-R (Ala. Cir. Ct. Montgomery County 1990) and *Harper v. Hunt*, No. CV-91-117-R (Ala. Cir. Ct. Montgomery County 1991).

168. *Opinion of the Justices No. 338*, 624 So. 2d at 111.

169. *Id.*

cumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.¹⁷⁰

By order dated August 13, 1991, granting partial summary judgment in the equity funding case, the supreme court declared Amendment 111 to be "void ab initio in its entirety" as violative of the Fourteenth Amendment to the United States Constitution.¹⁷¹ The amendment having been voided, the court next dealt with the original constitutional provision, which provided:

The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.¹⁷²

The court declared both the second and third sentences void as violative of the Fourteenth Amendment Equal Protection Clause.¹⁷³ Thus, all provisions addressing the method of funding the public schools were voided, and the only remaining constitutional provision was the first sentence of the original provision.¹⁷⁴

170. ALA. CONST. amend. 111, § 256.

171. 624 So. 2d at 111.

172. ALA. CONST. art. XIV, § 256.

173. *Opinion of the Justices No. 338*, 624 So. 2d at 111-12.

174. The reader may question why Amendment 111 was apparently non-severable and therefore void in its entirety, while section 256 was severable and only partially

b. The Liability Order

In the next phase of the case, the circuit court focused on the meaning of the word "liberal," concluded that it meant "equitable and adequate," further concluded that the state's school system was neither equitable nor adequate, and ordered "the state officers charged by law with responsibility for the Alabama public school system" to make the school system equitable and adequate.¹⁷⁵ These conclusions are set forth in the circuit court's order dated March 31, 1993, referred to hereinafter as the "Liability Order."¹⁷⁶

On the date of the Liability Order, the only defendants were the governor and the state finance director.¹⁷⁷ After Governor Folsom succeeded Governor Hunt on April 22, 1993,¹⁷⁸ another realignment of parties occurred.¹⁷⁹ On June 9, 1993, the speaker of the House, state superintendent of education, and members of the state board of education, were all realigned (again) as defendants, and Governor Folsom was formally substituted for Governor Hunt as a defendant.¹⁸⁰ Also on June 9, all defendants, including those who had been plaintiffs the day before, moved to have the Liability Order certified as a final judgment pursuant to Alabama Rule of Civil Procedure 54(b), and their motion was granted.¹⁸¹ The defendants never appealed from the Liability Order.¹⁸²

The Liability Order, which includes the court's findings of fact as well as its legal conclusions, is appended to *Opinion of the Justices No. 338*.¹⁸³ The order includes a declaration of the state's constitutional requirements regarding public education

void. Unfortunately, time and space restrictions prohibit analysis of all of the interesting issues in the equity funding case, and this issue is but one of many which are beyond the scope of this Article.

175. 624 So. 2d at 166.

176. *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 896 (Ala. 1995).

177. *Pinto*, 662 So. 2d at 896.

178. Governor Hunt was convicted of a felony on April 22, 1993, and was removed from office by operation of law. *Id.* at 897.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Ex parte James*, 713 So. 2d at 878.

183. 624 So. 2d at 107.

and a determination that the state's public school system did not meet the constitutional requirements.

The most extraordinary part of the order is an injunction ordering "the state officers charged by law with responsibility for the Alabama public school system" to "establish, organize and maintain a system of public schools" that meets the constitutional requirements.¹⁸⁴ The court declared that the term "state officers," to whom this injunction was directed, included "*but [was] not limited to*, all parties who were originally defendants to this lawsuit and their agents, successors and assigns."¹⁸⁵ Under the state constitution, as interpreted by the circuit court, the legislature is charged with the responsibility to "establish, organize, and maintain" the state's public school system.¹⁸⁶ Thus, not only did the circuit court order the defendants, but it also ordered *an entire branch of government*, whose members were not even parties to the lawsuit, to take action.

The State Senate responded by seeking an advisory opinion from the supreme court¹⁸⁷ as to whether it was required to comply with the Liability Order.¹⁸⁸ The justices acknowledged that the Senate's question raised "a question of fundamental constitutional law relating to the separation of powers of government."¹⁸⁹ However, the justices' answer to the question did not address the important separation of powers issues: whether the circuit court properly applied the "beyond a reasonable doubt" standard when it declared most of the state constitution's public school provisions invalid, and whether the judiciary had the power to order the legislature to take action. Rather, the justices replied that "the order has the force of law unless modified by the trial court, until it is modified or reversed on appeal, and the Legislature, like other branches of government, must comply with it."¹⁹⁰ This answer is the equivalent of saying "yes, you must comply with the Constitution;" it does not address the

184. *Id.* at 166.

185. *Id.* (emphasis added).

186. ALA. CONST. art. XIV, § 256.

187. ALA. CODE § 12-2-10 (1995) authorizes the justices of the supreme court to give advisory opinions on "important constitutional questions" to the governor or either house of the legislature.

188. *Opinion of the Justices No. 338*, 624 So. 2d at 107.

189. *Id.* at 109.

190. *Id.*

issue of whether the legislature was bound to comply with that portion of the order directing it to take actions.

c. The Remedy Order

On June 9, 1993, the same day that the Liability Order was certified as a final judgment, the circuit court ordered the defendants to "develop, in cooperation with the plaintiffs and with Dr. J. Wayne Flynt, a court-appointed 'facilitator,' a 'single comprehensive Remedy Plan for the purpose of ensuring full and complete compliance with' the Liability Order."¹⁹¹ On October 1, 1993, the governor, lieutenant governor, speaker of the House and state finance director submitted a proposed remedy plan.¹⁹² On October 22, 1993, the court issued a preliminary remedy order which incorporated the proposed remedy plan, subject to revision after notice to members of the plaintiff classes and a class action fairness hearing.¹⁹³ On December 3, 1993, the court entered the Remedy Order, which embodied substantially the remedy plan proposed by the defendants.¹⁹⁴ Excerpts from the Remedy Order were appended to Chief Justice Hooper's dissent in *Ex parte James*.¹⁹⁵

After Fob James became governor in 1995, the tenor of the defense changed. Governor James, new State Finance Director James Baker, and Attorney General Jeff Sessions (hereinafter "state parties") moved the trial court to vacate the Liability Order and the Remedy Order and to dismiss the action for lack of subject matter jurisdiction.¹⁹⁶ The trial court denied the motions and certified the Remedy Order as a final judgment pursuant to Alabama Rule of Civil Procedure 54(b). The state parties petitioned the supreme court for permission to appeal the denial of their motions to dismiss the action and also appealed the Remedy Order.

In *Ex parte James*, the supreme court granted the state

191. *Pinto*, 662 So. 2d at 897.

192. *Id.*

193. *Id.*

194. *Id.* at 897-98.

195. *Ex parte James*, 713 So. 2d at 923-35 (Hooper, C.J., dissenting).

196. *Id.* at 872.

parties' petition to appeal,¹⁹⁷ but held that the circuit court did have subject matter jurisdiction of the case.¹⁹⁸ In so holding, the court rejected the state parties' arguments that the case was not sufficiently adversarial to be justiciable¹⁹⁹ and that the trial court had violated the separation of powers doctrine because the case involved a political question.²⁰⁰

The court also held that, despite the Rule 54(b) certification, the Remedy Order was not a final order and could not be appealed.²⁰¹ It observed that the Remedy Order was "interlocutory by its very nature and *will remain so* until an educational system that complies with the constitution is in place."²⁰² According to the court, although specific provisions of the Remedy Order could be appealed, the Order could not be appealed in toto because it was not a final order.²⁰³

2. *Ex parte James: The Main Opinion.*—The main opinion in *Ex parte James* was written by Justice Cook and joined by three other justices, thus representing the opinions of half the participating justices.²⁰⁴ The main opinion addressed several issues, but this Article discusses only those relating to separation of powers. The state parties argued that the circuit court lacked subject matter jurisdiction to enter either the Liability Order or the Remedy Order because both orders violated the state constitution's separation of powers clause.²⁰⁵

a. Liability Order Affirmed: Court Had Subject Matter Jurisdiction, No Timely Appeal Taken

Because no party appealed from the Liability Order within

197. *Id.* at 873.

198. *Id.* at 879.

199. *Id.* at 876-78.

200. *Ex parte James*, 713 So. 2d at 877.

201. *Id.* at 873-74.

202. *Id.* at 873.

203. *Id.* at 874. Consideration of the court's finality analysis is beyond the scope of this Article. The court's holding is provided here to give context regarding the court's review of the Remedy Order.

204. Justice Butts recused and Justice Almon concurred specially, the significance of which is discussed *infra* at notes 218-19 and accompanying text.

205. *Ex parte James*, 713 So. 2d at 878.

the forty-two day time period allowed by law, the supreme court did not review the order.²⁰⁶ It limited its consideration to whether the trial court had the power "to review the constitutionality *vel non* of the school system."²⁰⁷ Having thus framed the issue as whether the trial court had the power of constitutional review, the court came to the unsurprising conclusion that the trial court had both the power and the duty to review the constitutionality of the school system.²⁰⁸ Only Chief Justice Hooper dissented from this holding.²⁰⁹

By framing the issue in terms of the judicial power of constitutional review, the court necessarily avoided several issues, including whether the trial court's power of constitutional review extended beyond the power to declare specific acts void to include the power to declare the "school system" "unconstitutional." It is important to note what the trial court did not do: it did not invalidate a particular statute or any other legislative or executive act. Thus, either the court did not exercise its judicial duty of nullifying an unconstitutional act, or there was no unconstitutional act to nullify. In either case, the trial court's actions are impossible to reconcile with the Alabama Supreme Court's prior interpretations of the state judiciary's power and duty of constitutional review.

The court's narrow framing of the issue also resulted in its missing an opportunity to articulate a doctrine rooted in section 43 under which the court could have reviewed portions of the Liability Order. The court had previously acknowledged that the separation of powers doctrine plays a role in determining the standard of review the trial court must apply when exercising its power of constitutional review.²¹⁰ In *Ex parte James*, the court had the opportunity to acknowledge that errors of law by which trial courts exceed limits imposed by separation of powers are analogous to exercises of judicial power in the absence of

206. *Id.*

207. *Id.*

208. *Id.* at 879.

209. *Id.* at 895-923 (Hooper, C.J., dissenting). In addition to the four justices whose opinions are represented by the main opinion, Justice Almon, 713 So. 2d at 886, Justice Maddox, 713 So. 2d at 887, and Justice Houston, 713 So. 2d at 894 all concurred with this holding.

210. See *Friday v. Ethanol Corp.*, 539 So. 2d 208 (Ala. 1989).

subject matter jurisdiction, and thus a "no waiver, no consent" rule should apply. Under such a rule, appellate review of a very narrow class of legal errors could be reviewed in an out-of-time appeal. Review under this doctrine could be limited to a determination of whether a trial court properly applied the "beyond a reasonable doubt" standard in invalidating portions of the state constitution. In the equity funding case, for example, such a doctrine would have permitted review of the partial summary judgment invalidating most of Alabama's constitutional provisions dealing with public schools.

b. Remedy Order: Court Abused Discretion by Ordering Remedy Plan Without Giving Coordinate Branches Time to Act

The portion of the main opinion that drew the most dissent was the determination that the trial court did not violate the separation of powers clause by entering the Remedy Order.²¹¹ The court held "not that the trial court lacked the *power* to implement the Remedy Plan, but that it *abused its discretion* in attempting to do so before providing the coordinate branches of government the opportunity to act."²¹² It further stated:

Ultimately, of course, the action, or inaction, of those branches "in this subject area, or in any area, is . . . *subject to the scrutiny of the judiciary*. We reiterate that the power inherent in this judicial scrutiny also *includes the power to fashion a remedy and to require compliance therewith*."²¹³

The four justices concurring in the main opinion would have remanded the case with directions to stay the implementation of the Remedy Order for one year to allow the coordinate branches to fashion a remedy.²¹⁴

This holding and the accompanying statement about the power of "judicial scrutiny" are extraordinary: the court acknowledged that the legislature "bears the 'primary responsibility' for devising a constitutionally valid public school system,"²¹⁵ but

211. *Ex parte James*, 713 So. 2d at 881.

212. *Id.* at 882.

213. *Id.* (citation omitted).

214. *Id.*

215. *Id.* (quoting *McDuffy v. Secretary of the Executive Office of Educ.*, 615

then stated that if the legislature "fails or refuses to take appropriate action," the judiciary has the power to reform the state's school system.²¹⁶ This "springing" judicial power is inconsistent with section 43 and is not found elsewhere in the Alabama Constitution.

c. Precedential Force of the Main Opinion

The precedential force of the main opinion in *Ex parte James* is questionable: the court's judgment has since been modified, and there is no clear majority holding that the circuit court had the power to order reforms in the state's public school curriculum or school finance systems.

i. Subsequent Modification

The court's judgment, dated January 10, 1997 and embodied in the main opinion and a special concurrence, was modified and perhaps clarified on December 3, 1997, by the following statement contained in the court's opinion denying a rehearing:

The judgment in the Liability Phase is affirmed. The judgment in the Remedy Phase is vacated and the cause is remanded with directions to the trial court to retain jurisdiction. The parties may petition the trial court to reopen the case if within a reasonable time the coordinate branches of government have not formulated an educational system that complies with the judgment in the Liability Phase.²¹⁷

This statement removes the one-year time limit which the main opinion (representing half the court, but not a majority) had set and makes clear that the remedy order is vacated instead of merely suspended. However, by directing the trial court to retain jurisdiction of the case, the court left open the door for further judicial efforts to reform public school curriculum and funding systems.

N.E.2d 516, 554 n.92 (Mass. 1993)).

216. *Ex parte James*, 713 So. 2d at 882.

217. *Id.* at 935.

ii. Lack of Clear Majority Approving Court's Power to Order Remedy

The main opinion was written by Justice Cook, with Justices Shores, Kennedy and Ingram concurring. Justice Almon concurred specially, stating that "the implementation of any remedy by a court should be deferred until the Legislature has had an adequate opportunity to address the matters set out in the Liability Order."²¹⁸ With Justice Almon's concurrence, a majority of the court concurred in the determination that the trial court should not have ordered its remedies without giving the other branches ample opportunity to act.

However, Justice Almon's special concurrence did not endorse the use of judicial power to reform the state's public school curriculum or the school finance system. He

emphasize[d] that [he] express[ed] no opinion as to the merits of the Remedy Plan or as to the proper scope of any remedy order that may ultimately be entered. Although the Liability Order declaring a right to equitable and adequate funding became final without an appeal, [he] would look closely at the scope of any remedy order that required "adequate" funding of education and proposed judicial oversight of such a requirement. Although the Liability Order is final, any serious constitutional questions, such as a separation of powers question, could be addressed to the extent that they apply to a remedy order.²¹⁹

Thus, Justice Almon neither affirmed nor denied that the circuit court had the power to reform Alabama's public schools.

3. The Dissents.—Justice Maddox dissented from the main opinion insofar as it affirmed the remedy order, even though it delayed the order's effective date,²²⁰ stating "I believe that the trial judge went too far in his Remedy Order and encroached on the powers the people had delegated to the Legislature."²²¹ Maddox presented a view of separation of powers that would allow courts to exercise "extraordinary" powers to remedy in-

218. *Id.* at 887 (Almon, J., concurring).

219. *Id.*

220. *Id.* at 889 (Maddox, J., dissenting).

221. *Ex parte James*, 713 So. 2d at 891.

fringements of "such fundamental rights as liberty of conscience, and other procedural democratic rights like the right to vote, which are inalienable in our constitutional democracy."²²² Maddox described the right to "an adequate and equal educational opportunity" as "valuable," but not "fundamental."²²³ Although he did not directly state that courts could exercise powers delegated to the other branches to remedy violations of fundamental rights, such a conclusion is implicated by his willingness to allow courts to use "extraordinary" powers in such cases.

Justice Houston also dissented from the main opinion insofar as it directed or permitted the trial court to retain jurisdiction of the case for purposes of ordering a remedy.²²⁴ Houston stated:

A trial court has declared the Alabama educational system unconstitutional. Circumstances have denied this Court the opportunity to review the trial court's liability order. Even so, it is the duty of the Judicial Department of Alabama government *only* to determine what the Constitution of Alabama requires. In my opinion, the Legislative Department and the Executive Department, and not the Judicial Department, have the power and duty to implement a plan that would make this system equitable (and hence, according to the trial court's liability order, constitutional).²²⁵

Justice Houston concluded that section 43 of the state constitution prohibits the judiciary from remedying the constitutional violations.²²⁶

Chief Justice Hooper dissented passionately and at length.²²⁷ Hooper distinguished *Brooks v. Hobbie*, reasoning that the court's holding in *Brooks v. Hobbie* was consistent with *Baker v. Carr*, but that the court's holding in *Ex parte James* was inconsistent because, applying the factors articulated by the United States Supreme Court in *Baker v. Carr*, the case presented a nonjusticiable political question.²²⁸ He noted also that although "[t]here is also strong federal caselaw supporting judi-

222. *Id.* at 892.

223. *Id.* at 889.

224. *Id.* at 895 (Houston, J., dissenting).

225. *Id.*

226. *Ex parte James*, 713 So. 2d at 895.

227. *Id.* at 895-923 (Hooper, C.J., dissenting).

228. *Id.* at 910.

cial action in the area of reapportionment," federal case law does not support judicial action "[i]n the area of equitable funding of education."²²⁹

IV. CONCLUSION

Alabama's constitutional separation of powers clause is unambiguous. The judiciary is forbidden ever to exercise the legislative or executive powers. The clause allows for no exceptions that are not expressly provided elsewhere in the constitution. Nevertheless, the Alabama Supreme Court has created an exception: if the legislature fails to comply with constitutional mandates, Alabama courts may step in and do the legislature's job.

In *Brooks v. Hobbie*, the usurpation of legislative power is plain: the state constitution directs the legislature to adjust legislative district boundaries, but a circuit court did the job instead. After *Ex parte James*, it is unclear how far the supreme court will let a circuit court go in its attempt to reform the state's school system, but at least four justices thought the power to implement reforms was part of the court's power of "judicial scrutiny."

In his famous 1958 lectures at Harvard, Judge Learned Hand urged caution in the exercise of judicial power.²³⁰ Hand considered the source and nature of the federal courts' power of constitutional review, concluding that such a power was necessary to prevent the failure of the government created by the Constitution.²³¹ However, he admonished that the power of constitutional review should be confined "to the need that evoked it;" that is, as a check on the usurpation of power by the other branches.²³² Under Hand's theory of constitutional review, the judiciary plays a necessary role in maintaining a government "between absolutism and the kind of democracy that so often prevailed in Greek cities during the sixth to fourth centu-

229. *Id.* (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

230. LEARNED HAND, *THE BILL OF RIGHTS* 29 (1958).

231. *Id.*

232. *Id.*

ries before our era."²³³

In Hand's view, no single branch should have absolute power, especially not the judiciary. He observed:

For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.²³⁴

To Hand, it was "better to take our chances that such constitutional restraints as already exist may not sufficiently arrest the recklessness of popular assemblies"²³⁵ than to allow "judge[s] to serve as communal mentor[s]"²³⁶ and let "courts . . . light the way to a saner world."²³⁷

The wisdom of Judge Hand, of Montesquieu, of America's Founding Fathers, and of Alabama's constitutional framers is embodied in section 43. After *Brooks v. Hobbie* and *Ex parte James*, Alabama citizens should be aware that the Alabama circuit courts have exercised, and may again exercise, legislative powers. How far the Alabama Supreme Court will allow a circuit court to go in its exercise of legislative powers remains to be seen, but Alabama has clearly embarked on a journey toward "rule[] by a bevy of Platonic Guardians" that is forbidden by the state's constitution.

Susan Thompson Spence

233. *Id.* at 73.

234. *Id.* at 73-74.

235. HAND, *supra* note 230, at 74.

236. *Id.* at 71.

237. *Id.* at 70.