

Constitutional Reform in Alabama

A Long Time in Coming

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On January 31, 2003, Alabama's new Republican governor, Bob Riley, convened a diverse group of citizens in Montgomery to begin deliberating changes he proposed for the state's 1901 Constitution. Thus he fulfilled his promise that constitutional reform would be the first item on his agenda to make Alabama more competitive for jobs and its government more efficient. In creating by executive order the Alabama Citizens' Constitution Commission, he gave the group ninety days to draft five changes he wanted to propose during the 2003 legislative session: providing "limited" home rule for counties on a local option basis, lessening reliance on designating revenues for particular purposes, strengthening the governor's veto power, recompiling the 1901 Constitution to remove amended language, and requiring a three-fifths majority of the legislature to impose new statewide taxes. Riley said he would ask the commission members to look at other areas of the 1901 Constitution as reform moved forward.

Riley argued, as have many other Alabamians, that the 1901 Constitution's restrictions and antiquated provisions hinder efforts to reform government and improve the economy. As a result, Alabama fares poorly in comparisons with neighboring states. In particular, Riley has pointed to North Carolina's economic success to show the connection between progressive government and concrete results. By contrast, one would be hard pressed to find a politician from another state who held up Alabama as an inspiration. The U.S. Census Bureau reported, for example, that Alabama lost 12,200 people in 2001–02. Yet the state is the geographical heart of a booming region. Why are people going elsewhere? Analysts and business leaders attributed the trend to declining prospects for good jobs.

As one exclaimed in exasperation, “It’s disheartening that we’re not growing as fast as Mississippi.”¹

This article explores how constitutional reform has emerged since 2000 as a centerpiece for political, economic, and social change in a state that typically addresses its most serious issues only after the federal courts require a response. Repeated failures to revise or replace the 1901 Constitution, beginning within less than a generation of its ratification, illustrate the difficulty of achieving broad reforms, particularly when issues of race cloud discussions about substantive progress. Meanwhile, the legislature and local governments have resorted to, as of early 2003, 743 amendments to patch the Constitution and evade its restrictive language. Thus Alabama’s Constitution has ballooned to nearly 350,000 words, making it by far the nation’s longest. One wag noted the document is about the length of *Moby Dick*, give or take a few whaling chapters.²

Since 1914, advocates for constitutional reform have arisen mainly from among the state’s business progressives, with the exception of Governor James E. Folsom, Sr., whose two administrations in the post–World War II years revived populist themes that had lain dormant since the 1890s. What separates present attempts from previous ones is that for the first time advocates managed to create a dialogue at the grassroots level, mainly through the founding of Alabama Citizens for Constitutional Reform. The nonprofit organization and the movement it has helped inspire have enjoyed extraordinary coverage and support from the state’s newspapers, in contrast to the press’s lukewarm interest in previous reform efforts. This article examines the present movement’s birth and tactics—a subject that the author approaches from first-hand experience as an advocate and cofounder of ACCR. Further, it looks at prospects for reform under the new gubernatorial administration. But first, let us briefly review the history of the 1901 Constitution and the earlier efforts to revise or replace its provisions.

ORIGIN OF THE 1901 CONSTITUTION

Alabama has had six constitutions, all written by conventions. Historians have praised the first document, which accompanied the state into the Union, for providing universal manhood suffrage for whites and embodying the aspirations of Jacksonian democracy. The next three constitutions reflected the state’s experiences in leaving the Union and its forcible rein-

tegration during Reconstruction. The 1875 Constitution, in turn, represented the return of conservative Democrats to power with the strong support of white yeoman farmers, who favored minimal government and low taxes. The new document limited the state's taxing authority, reduced the number of state offices, cut public salaries, and prevented local governments from lending credit to or subsidizing private corporations. The 1875 Constitution even forbade the state from engaging in internal improvements—a reaction to development schemes during Reconstruction that had more than quadrupled the state's debt. (With good reason, Governor Joseph E. Johnston, elected in 1896, called the 1875 document a “constitution of prohibition.”)³

African Americans continued to vote after the 1875 Constitution signaled the return of conservative rule, but the removal of federal soldiers from the state made them easy targets for intimidation. In the Black Belt region, where many of the state's plantations lay, local whites actually came to value African Americans as voters—but only in a fictitious sense. Having regained control of the election machinery and having largely forced independent-minded blacks from politics, these whites developed ballot fraud into an art form. Their purpose no longer was to seize power from blacks, who made up about three-fourths of the plantation region's population; they already had accomplished that goal. Instead, conservative Democrats wielded the Black Belt's heavily black voting rolls as a club against other parts of the state, particularly those counties where the populations were mostly white and where agriculture was dependent on small farms. As one observer explained to Booker T. Washington, the famous black educator at Tuskegee, “[The black man] not only does not vote where his vote is regarded as dangerous, but upon the contrary, his vote is usually ‘counted’ wherever it is needed, upon the side of [D]emocratic candidates. They would rather count the Negro *in* as a democrat than count him *out* as a [R]epublican.”⁴

Fraudulent voting became particularly critical for the plantation interests when agrarian unrest swept Alabama, as it did in many other southern and western states, in the late 1880s. Caught between falling prices and rising costs, small farmers demanded the government's help to stabilize incomes and battle what they perceived to be greedy corporations, especially railroads. The movement split the Democrats into warring factions and eventually inspired the formation of the Populist Party. The agrarians' champion, Reuben Kolb, twice sought the governorship during the emotional and sometimes violent campaigns of 1892 and

1894. At one point, three different parties competed: the conservative Democrats, the Populists, and the Republicans.⁵

Faced with this threat to their power, conservative Democrats began toying with disfranchisement. Particularly worrisome to them was the agrarians' appeal across racial lines for class solidarity between white and black farmers. Conservatives in the Black Belt even considered surrendering their fictitious black majorities in return for stripping African Americans elsewhere from the voting rolls. Moreover, they reasoned that voting restrictions such as literacy and property requirements eventually would snare most poor whites as well, thereby devastating the agrarians' electoral base. A legislative act passed in 1893 made voting more difficult, especially for poorly educated citizens, and thereby diminished the agrarians' resistance. Finally, in 1901 the conservatives rolled up sufficient majorities in the plantation districts to carry an election calling for a constitutional convention in Montgomery. They brazenly hoisted the banner of white supremacy to cover a political agenda that went far beyond race.⁶ Advocates of this strategy were emboldened in 1898 when the U.S. Supreme Court allowed Mississippi's disfranchisement plan to stand on the dubious notion that the state had not targeted blacks per se when it imposed literacy tests and the payment of poll taxes on citizens who wanted to vote.⁷

The convention's 155 delegates, while elected, came mostly from well-to-do circles of planters, lawyers, and businessmen. No African Americans served in that body and certainly no women. There were some dissident voices, men who were concerned about the worsening plight of small farmers and workers. And there were even a few Republicans who challenged the notion that a single party—a party for white men only—should rule the state.⁸ Leaders of the convention, however, offered no concessions nor did they hide their determination to establish white supremacy. “There is a difference . . . between the uneducated white man and the ignorant negro,” declared John B. Knox, a railroad lawyer, in his presidential address to the delegates. “There is in the white man an inherited capacity for government, which is wholly wanting in the negro.”⁹

As the proceedings of the convention indicate, the framers meant to establish rule not just for whites but for only the right kind of white people. While quickly eliminating blacks' participation at the polls, the nation's most restrictive voting rules eventually would disfranchise an even larger number of poor whites. Suffrage provisions, for example, went beyond literacy and property holding to require that voters pay \$1.50

annually in poll taxes. The tax was accumulative until the age of forty-five—a feature that put the cost of voting at \$36, well beyond the means of many small farmers. The new rules also disqualified, under section 182, anyone from voting who had been convicted of a crime from a long list of offenses, which included vagrancy, a charge often used to keep blacks and poor whites in line, and miscegenation.¹⁰ The convention's bosses did provide for a two-year grace period from complying with all of these new rules, ostensibly so that Confederate veterans and their sons might register before the door closed.

Although some delegates considered themselves to be progressives, even justifying their votes for disfranchisement on the argument that they were purifying democracy by removing unfit voters, the convention did not challenge the existing order of things. Representing mainly a coalition of planters and industrialists, its leaders wanted to preserve a weak state government and a docile and uneducated workforce. Thus the new document kept much of the anti-Reconstruction provisions of the 1875 Constitution, carrying forward, for example, its prohibition against the state's building roads, bridges, and docks, or making other internal improvements. Also preserved was the prohibition against local governments' entering into economic partnerships with corporations. Moreover, the proposed new constitution actually lowered taxes from the parsimonious levels permitted by the 1875 document. Real reforms, meanwhile, went begging. For example, the convention refused to provide better regulation of railroads. It also failed to correct the abusive system of leasing the state's convicts to private companies—a sore that would fester on the state's conscience until 1928.¹¹

When the convention sent its handiwork to the voters for their ratification, opposition formed across racial lines. Even as the convention was under way, black leaders such as Booker T. Washington had petitioned delegates to treat their race fairly. Washington did not openly agitate against ratification. Instead he argued that restrictions, if applied fairly to both races, would make votes of educated, property-owning blacks more valuable—rather than be tossed aside with others in fraud. As his leading biographer has noted, Washington was no great democrat.¹² Washington later would work behind the scenes, however, to have the new constitution's disfranchising provisions thrown out by the federal courts. Other blacks adopted this strategy as well, although they were vociferous in their criticism of the document. On September 25, 1901, more than 100 African Americans, united behind the leadership of A. N. Johnson, editor

of the Mobile Press, met in Birmingham and called on poor whites to vote against the proposed constitution, since the latter group would also suffer disfranchisement under its suffrage article. The black protesters vowed to boycott the election and put their hopes in the U.S. Supreme Court.¹³ White opponents of the proposed constitution, meanwhile, were far less likely to call for united action. "I am not speaking for the Negro in this campaign," retorted former Governor Johnston. "I am speaking for the white man, who can vote now because the old constitution said so, but next year only the Lord and three registrars will know what he can do."¹⁴

The 1901 Constitution's champions proved to be better organized and enjoyed the support of leading daily newspapers, who equated the proposed constitution with white supremacy and honest government. Proponents also had one last trump card to play. As totals came in on November 11, 1901, from the plantation districts, results showed the Democrats had outdone themselves in a final act of deceit. The "yes" vote was more than 95 percent in six Black Belt counties where African Americans accounted for 75 percent of the population. Elsewhere, the proposed constitution lost, 76,263 to 72,389, in what was probably a more accurate reflection of the majority's will.¹⁵ Despite the certainty of fraud, Governor William D. Jelks certified the new constitution on November 21, 1901.¹⁶

EARLIER REFORM EFFORTS

The state's new charter achieved its framers' goal of eliminating any electoral threat to the privileged classes. By 1908, only 2 percent of black males could vote in Alabama. Less noticed was an even greater numerical decline over time of participation among whites, so that by 1940 only about a third of the state's adults were even registered to vote.¹⁷ The Constitution also ensured a minimal role for government in keeping with the 1875 predecessor's many restrictions. Soon, however, governors began to chafe from the straightjacket on their power to address challenges of the twentieth century. The first to complain publicly was Emmet O'Neal, whose father had been governor before him. The younger O'Neal had served in the 1901 convention. He had argued for home rule to provide more autonomy to local governments, but the majority preferred to centralize power within the legislature, where it could be more easily manipulated and controlled by conservative business and planter interests.

O'Neal was elected governor in 1910 on the pledge to run the state like a good business, thereby reducing fraud and waste. Yet once in office, he recoiled from how few options the 1901 Constitution allowed for responsive government. In particular, he deplored how the state lacked money for schools. "The first and most important step to improve the educational conditions in Alabama would be the convening of a constitutional Convention to revise our present antiquated fundamental law," O'Neal said in a speech to University of Alabama alumni in 1914.¹⁸ He summarized his arguments in his annual report to the legislature in 1915, declaring that the defects of the present document "are so numerous and radical, and so intermingled in the different sections" that only remodeling the entire Constitution could suffice.¹⁹

In the early 1920s, Governor Thomas E. Kilby, a progressive from the emerging industrial city of Anniston, likewise condemned the Constitution's restrictive nature. To make government work more efficiently, he advocated naming a commission to recommend ways that a convention might rewrite the 1901 Constitution. Yet like O'Neal, Kilby left for others the great task of drafting what amounted to a new business plan for the state. Similar calls for reform came from two other sources before World War II. First, the Brookings Institution, in a report it prepared in 1932 at the request of Governor B. M. Miller, observed that no significant improvements in government could occur without rewriting many of the restrictive provisions of the 1901 Constitution. Later in that decade, a group of citizens who called themselves the Alabama Policy Committee began studying the Constitution and issuing papers about its defects. In 1938, the group called for a new constitution and then recommended a model document of its own. The efforts, however, produced no reforms.²⁰

The most ardent champion for a new constitution proved to be not a business progressive but rather a spiritual heir of populism. Governor James E. Folsom had grown up listening to his father and uncle, an avowed populist, talk about politics. Voters in Coffee County, where they lived in the southeastern corner of the state, had been sympathetic to the agrarian revolt in the 1890s and opposed to the 1901 Constitution. As an adult, Folsom moved to Cullman County in northern Alabama to run his family's insurance business. There he found a similar political history. Thus Folsom's successful candidacy for governor in 1946 managed to span two distinct regions of the state and help unite them under a neopopulist platform.²¹

“Big Jim,” who stood six feet and eight inches tall, campaigned with a string band called the Strawberry Pickers. They would warm up the crowds in school auditoriums or courthouse squares. Then Folsom would take the microphone and, holding up a corn shuck mop, promise to clean out Montgomery. He liked to talk about letting a “cool, green breeze” blow through the Capitol. In his rustic plain speech, he articulated what many people wanted, as attention shifted to peacetime and hopes for prosperity. He promised to build new roads and provide better schools. Old people would have small pensions, and teachers would earn adequate pay. Above all, Folsom maintained that citizens should rule and not the plantation owners and industrialists who traditionally ran things in Montgomery.

Folsom shocked the political establishment, first by making the runoff election and then by defeating Lieutenant Governor Handy Ellis by 55,000 votes. Unlike many Southern politicians, Folsom did not appeal to racial prejudice, nor did he blame “outside agitators” for the state’s poor image and its low rankings on services such as public education. Rather, he tried to explain to people that Alabama had inflicted much of the backwardness on itself through its failure to embrace the nation’s democratic ideals.²² True to his promise, Folsom brought constitutional reform to center stage. Unlike O’Neal and Kilby, he was prepared to commit political capital to this issue. Indeed, he declared in his inaugural address on January 20, 1947, “I am not afraid of too much democracy. I am afraid of what happens to people when they have too little democracy.”²³

A few weeks later, Folsom called the legislature into special session to demand it approve a constitutional convention. Only through rewriting the state’s fundamental charter, he argued, could citizens hope to achieve fair representation in place of the rotten borough system that had prevailed since 1901. Folsom complicated his efforts, however, by also asking the Senate to confirm three new trustees for the state’s land-grant college at Auburn. He intended to remove the powerful Agricultural Extension Service from political participation, an ambition that its leaders and their allies in the Alabama Farm Bureau were determined to thwart. They worked through friendly senators to inflict a humiliating defeat on Folsom.²⁴

Nevertheless, Folsom repeatedly called lawmakers into special sessions to consider constitutional reform. His first objective remained reapportionment of the legislature to break the stranglehold that the planter-industrialist coalition had enjoyed since 1901. In particular, Folsom

wanted more representation for what he called the “piney woods and hill country,” areas that in the 1890s had revolted against rule by conservative Democrats. The legislature’s refusal to reapportion itself according to population punished the former populist strongholds, while punitive voting rules continued to disfranchise most African Americans and many poor whites. Folsom made some of his best arguments in a radio address on April 3, 1949: The main purpose of the 1901 Constitution, he told his listeners, was to deny the ballot to Alabama’s black citizens. But the document’s many voting restrictions, especially a punitive poll tax, had disfranchised poor whites as well. Thus the 1901 Constitution was profoundly racist and antidemocratic and contrary to the values that Americans had just fought to protect in World War II. Second, Folsom decried how the 1901 Constitution made no provision for allowing local people to govern themselves. Instead, legislators passed local laws for counties, often swapping favors among themselves to promote pet legislation. Indeed, the Constitution so distrusted government at all levels that it impeded progress and the creation of good jobs. Finally, the Constitution enshrined an unfair tax system that afforded certain groups special privileges, while denying the state adequate revenues. This practice violated the principle that each should pay according to his means. The governor concluded his remarks by stating, “I believe that the progress we have made in the past 50 years will be many times surpassed during the half century ahead if we do not remain hide-bound by old-fashioned laws. And certainly the greatest single need toward that progress is a new constitution.”²⁵

Folsom could not succeed himself in office, but the four years that intervened between his first and second terms left him more determined to finish what he had started in 1947. Reelected without a run-off in 1954, he once again pushed for the long-awaited constitutional convention. Some legislators indicated they might go along if a convention could be limited to certain topics. They feared that the immensely popular Folsom might pressure the convention into allowing a governor to succeed himself. More indicative of the times, however, was their concern that a convention might weaken white supremacy.²⁶ Indeed, legislators from the Black Belt made no effort to hide the intent of the present voting laws. In opposing a bill to abolish the \$1.50 poll tax, Representative W. L. Martin of Greene County retorted that such action might “destroy the fundamental principles behind the constitution.” Noting that blacks outnumbered whites six to one in his county, he warned colleagues they might be sitting next to an African-American lawmaker if the poll tax were

repealed.²⁷ The Alabama Supreme Court heightened such fears when it ruled that section 284 of the Constitution allowed for no restrictions on a convention.²⁸

Folsom called the legislature to another special session on January 3, 1956, and again he asked for a convention.²⁹ The issue of school desegregation, however, quickly overtook his reform agenda. On January 19, the legislature passed, with just four dissenting votes, a resolution declaring the U.S. Supreme Court's 1954 decision *Brown v. Board of Education* to be "null, void and of no effect." Folsom reacted with disdain, calling a press conference to scold the legislators for ignoring constitutional reform and for being obsessed with the race issue.³⁰ His political strength, however, which had been so evident the year before, quickly began to dissipate in relation to his continued moderation on race.

Emotions boiled over on February 3 when Autherine J. Lucy, an African American, began attending classes at the University of Alabama. A riot ensued in Tuscaloosa, and on February 6 the Board of Trustees suspended its first black student, ostensibly for her own safety. Folsom's failure to act decisively during this crisis, coupled with many white Alabamians' anger over his lack of enthusiasm for resisting civil rights, caused him to suffer a humiliating loss the following May, when Alabama voters overwhelmingly rejected his bid for a place on the Democratic National Committee. His crusades over, Folsom limped through the rest of his term in an alcoholic daze.³¹

Constitutional reform would be revived a decade later by a lawyer from Decatur named Albert Brewer. He had served in the legislature during the second Folsom administration and went on to be speaker of the House. In 1966 he won election as lieutenant governor. Though forced to operate within the state's rigid segregationist system, Brewer wanted a new constitution. Like Folsom, he chafed at the planter-industrial coalition's control of the state's politics, to the detriment of his native Morgan County on the Tennessee River. Brewer got his chance when Governor Lurleen Wallace, a surrogate in office for her pugnacious husband, George, died of cancer on May 7, 1968. Upon succeeding her, Brewer began pursuing a progressive agenda, which included a new constitution.

He advocated a constitutional commission and in 1969 asked the Legislature to adopt a suitable plan for proceeding. After considerable wrangling within that body over how to appoint a commission—including one suggestion that all 140 legislators should serve—a conference committee finally produced an acceptable method. It called for a com-

mission of twenty-one members, with the governor appointing fourteen of them. In signing the new legislation, Brewer put the full support of his young administration behind what would be the most ambitious effort since 1901 to draft a new constitution. He appointed Conrad Fowler, a respected probate judge from Shelby County, as chairman of the group and advised commissioners that they should concentrate on those areas of the old document that most needed reform. The group assembled a staff of experts and began deliberating.³²

As the new commission worked, Alabama's politics continued to boil over racial integration—and over George Wallace's ambitions. Wallace told Brewer that he would not oppose the latter's election to a full term, but the former governor reneged because he needed access to high rollers who would contribute to his next presidential campaign in return for lucrative state contracts. Once in the race, Wallace returned to the segregation issue, which had propelled him to office in 1962, and he excoriated national politicians, federal bureaucrats, and others whom he accused of taking away control of local schools. Most of the daily newspapers, however, threw their support behind Brewer, and the first primary ended with Wallace trailing. Shocked at what appeared to be a repudiation of his politics, Wallace and his supporters resorted in the second primary to a bagful of dirty tricks so outrageous that even the nation's press took notice. So that no one missed the point, Wallace's campaign newspaper warned that blacks were about to seize control of the state. The appeal to old prejudices worked, thereby ending Brewer's promising career as a reformer.³³

Though orphaned and hardly a priority of the legislature, the Brewer commission pressed on with its work. It presented its final report on May 1, 1973, along with its proposed revision of the 1901 Constitution. The changes it recommended for the legislature to consider recognized seven basic principles for reformers to follow. One called for removing "undue and unnecessary restrictions on the power of the Legislature." Annual sessions were viewed as one step toward this goal. Another principle advocated vesting more authority in the governor, in recognition of greatly increased responsibilities. Likewise, the state's court system needed modernization. One particularly significant feature was a proposed new article that would grant home rule to local governments, even to the point of allowing counties to operate under charters ratified by their electors. If adopted, this model for home rule would have tracked efforts in other southern states to provide for local democracy on issues such as growth management, environmental protection, and exercise of police powers.³⁴