

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

Wallace and the legislature took little notice of the commission's recommendations, with a couple of notable exceptions. Legislators did approve and offer to voters in 1973 an amendment to rewrite the 1901 Constitution's judicial article. With the electorate's approval of what became amendment 328, Alabama replaced its chaotic and often ridiculed judicial system with one that quickly earned praise.³⁵ The leadership of Chief Justice Howell Heflin, who went on to become a U.S. senator, demonstrated that any reform, regardless of how well-intentioned, required a strong champion to overcome entrenched opposition.³⁶ Two years later, voters approved amendment 339, which provided for annual sessions of the legislature. Reformers hailed this action for providing legislators with more flexibility to address the state's problems.³⁷

Throughout these discussions, reformers had assumed that the legislature could revise the 1901 Constitution or even draft a new document to replace it, subject to voters' ratification. Indeed, they considered such a proposal from Governor Fob James, who succeeded Wallace in 1979. The Senate approved a proposed constitution he offered, but the House refused to go along. In 1983, the legislature under the leadership of Lieutenant Governor Bill Baxley, who presided over the Senate, recompiled the 1901 Constitution and offered some improvements. The proposed document already was ready for submission to voters when a last-minute challenge, led by Rick Manley, a senator from the Black Belt region, persuaded the Alabama Supreme Court to declare Baxley's method to be unconstitutional. The court's majority narrowly interpreted section 286 of the Alabama Constitution to mean that only a convention could draft a new document. The legislature could not simply offer what amounted to a new document under the guise of amending the Constitution. Instead, the legislature had to proceed with revision on a piecemeal basis, although presumably it could offer more than one article at a time to voters.³⁸

THE CURRENT REFORM MOVEMENT

The Need for Reform

The case for replacing the 1901 Constitution remains overwhelming, even as the history of reform provides a sad story of frustration. The document suffers from at least three serious defects:

First, the Constitution places such severe restrictions on government that it often fails to meet the demands of a modern society. Stark evidence of this deficiency can be found in studies published in 1999 and 2001 by *Governing* magazine, in collaboration with the Maxwell School of Syracuse University. These studies ranked state governments' performance in various areas. In both studies, Alabama placed last.³⁹

Second, the Constitution is profoundly distrustful of democracy, especially when exercised at the local level. In fact, Alabama is the only southeastern state that denies its counties the authority to plan for growth. Neighboring states allow counties to pass their own laws, provided they are consistent with statewide policy. By contrast, about half of the Alabama legislature's agenda is devoted to issues of local interest, while lawmakers often ignore larger statewide questions.⁴⁰ Local governments often have little choice but to seek a change in fundamental law to achieve some needed action at home, such as pest control or even the removal of dead farm animals. Every critic of the Constitution has his favorite amendment to evoke a risible response to the document's statutory nature, but local governments depend on such changes for authorization to do their essential work.

Finally, the 1901 Constitution enshrines an unfair and ineffective tax system. Indeed, a study published in the February 2003 issue of *Governing* ranked the system among the nation's bottom three for its unfairness.⁴¹ Because two of the major tax sources—property and income—are shielded by the Constitution and thereby difficult to change, governments and school boards in Alabama must rely to a dangerous degree on regressive and fickle sales taxes. Therein lie the seeds of the financial crisis that Riley, the new governor, inherited. On the eve of their regular session, lawmakers learned they would need \$500 million more than their experts had forecast to maintain present levels of spending and meet rising costs for pension and health care for public employees.⁴²

Compounding the state's present financial difficulties is the practice of designating, either by constitutional or statutory law, how nearly 90 percent of state dollars must be spent. By comparison, Mississippi earmarks less than 30 percent of its public dollars, and North Carolina only 15 percent. The United States average is about 22 percent.⁴³ As a consequence of Alabama's extreme reliance on earmarking, the legislature may not shift dollars from the \$4.2 billion education fund to the much smaller general fund to relieve, say, crowding in prisons. The Constitution earmarks revenues from the income tax for teachers' salaries, and the powerful Alabama

Education Association ferociously guards this source. Besides, Alabama's public school system requires, by conservative estimates, at least an additional \$1 billion to achieve the goals that its board desires.

A modern constitution, by contrast, would establish broad principles under which government would operate, while not imposing restrictions to impede good lawmaking. Certainly, it would recognize that local problems need to be solved at home and not in Montgomery. While protecting citizens' rights, it would organize government into efficient branches. To provide for revenues, the constitution would need only to authorize certain types of taxation. By contrast, the present document is a virtual tax code in itself, specifying provisions right down to assessment rates for motor vehicles.⁴⁴ Finally, a modern constitution would speak to citizens' aspirations for their democracy. The U.S. Constitution is the model for the world because it embodies and articulates the belief that free people can govern themselves in a republic. That achievement contrasts with the Alabama's Constitution's shameful attempt to roll back democracy and freeze into place conditions that discouraged people from becoming educated, productive citizens.

The Process of Reform

Such arguments received renewed attention in 1994, when the *Mobile Register* published a special report on the Alabama Constitution titled "Sin of the Fathers."⁴⁵ Motivation for this considerable investment of staff energy came from earlier investigations into persistent problems that bedeviled the state, particularly in the areas of inadequate educational funding and inefficient government at both state and local levels. The report, published in a tabloid format, provided in-depth explanation on how the document exacerbated these and other problems. An accompanying series of editorials, which called for a constitutional convention, became a finalist for the Pulitzer Prize. The newspaper's work inspired a conference in Montgomery in December 1995, attended by scholars, business leaders, politicians, and journalists. After hearing speeches from political leaders and papers by scholars and legal experts, the participants held a mock convention in the Alabama House's chamber. Later, the event's sponsors published the conference's proceedings.⁴⁶ They also sponsored a statewide town meeting, televised by Alabama Public Television and moderated by David Mathews, president and chief executive officer

of the Kettering Foundation. Panelists in various cities aired their views, pro and con, on the merits of constitutional reform.

Unfortunately for the reformers, however, the election of Fob James to his second term as Alabama's governor—this time as a Republican instead of a Democrat—put on hold any hopes for leadership on this issue. James not only had lost interest in rewriting the 1901 Constitution by this time but even showed hostility toward reform in general. For example, he expressed pride that Alabama had the nation's lowest taxes per capita. However, scholars such as Wayne Flynt, a distinguished history professor at Auburn University, noted the correlation between low taxes among Mississippi, Alabama, Louisiana, and Arkansas and with the low standings in certain key measures of quality of life, such as children living in hunger, births to teenagers, low per-capita incomes, and high school dropouts.⁴⁷ Meanwhile, the Constitution continued to swell with new amendments, most of them addressing local matters.

Lieutenant Governor Don Siegelman trounced James from office in 1998, but the Democrat did not immediately embrace reform either. His failure to win voters' approval for a state lottery left him chastened to the point that he announced in early 2000 that he would not tilt at windmills such as constitutional and tax reform. Siegelman's ill-chosen words immediately inspired the *Birmingham News* to dub him "Don Quixote" and to ridicule his timidity in face of growing problems at the state level.⁴⁸ When Siegelman finally did support reform a year later, many citizens remained skeptical of his sincerity. The *Mobile Register's* cartoonist characterized his new enthusiasm as that of a convert on his political deathbed.⁴⁹

Leadership for constitutional reform, meanwhile, surfaced among the citizenry when the West Alabama Chamber of Commerce in Tuscaloosa held a rally on April 7, 2000, to put the issue on the state's agenda. Former Governor Brewer and William Winter, a former reform-minded governor of Mississippi, were among the speakers, along with historian Wayne Flynt at Auburn, whose research and writing had pricked the state's conscience for years. Well attended and covered by the press, the rally brought back memories of old-style politics with its string music, food, and impassioned speeches. More important, the event marked the beginning of a statewide organization that would devote its energies to achieving the reformers' goals. The rally's participants confirmed Dr. Thomas E. Corts, president of Samford University in Birmingham, as the new chairman, while designating a dozen citizens to guide the new organization's formation.⁵⁰

Alabama Citizens for Constitutional Reform (ACCR), the new reform group, could count on something new: Support was growing among business leaders for fundamental improvements in how Alabama governs itself. The old legislative coalition of Birmingham-area industrialists and large landowners from the Black Belt had disintegrated by the early 1960s, as urban interests diverged significantly from the old status quo on issues such as reapportionment and public services.⁵¹ Moreover, urban business leaders came to recognize that they needed a well-educated workforce more than they needed a miserly tax system and weak government. By the 1990s a new generation of business leaders had emerged, inspired by examples such as William Smith, an heir and executive at Royal Cup Coffee who organized and led the state's most prominent educational reform group, A Plus. The Public Affairs Research Council, a small think tank in Birmingham, provided citizens and lawmakers with independent analysis of the state's problems through regular publication of reports on issues such as taxation and education.

ACCR's organizers recruited a diverse group of leaders and civic activists for its board. Operating at first from the author's spare bedroom, the non-profit group gradually built membership and began issuing newsletters and holding public events. In January 2001, it opened a small office in Montgomery and hired a young consultant named Bill Smith, who had experience in managing Republican political campaigns. He helped refine ACCR's message and create a legislative agenda for 2001.

Crafting a legislative strategy was essential because the Legislature must initiate and approve any constitutional changes. By a three-fifths vote of each legislative chamber, it may submit proposed constitutional amendments to voters, as provided in section 284. Section 286 authorizes a majority of all members in each legislative chamber to call a constitutional convention. The legislature decides how delegates will be selected and how the convention will organize itself. Once adopted, the proposal for a convention must be submitted to the electorate for approval.

Leadership in the House of Representatives had tried on several occasions prior to 2001 to revise the 1901 Constitution on an article-by-article basis, beginning with the more outrageously antiquated provisions, but had succeeded only after federal legislative or court action already had nullified the original language. Thus in 1996 Amendment 579 replaced the lengthy article VIII, which contained the infamous restrictions on voting. Four years later, voters ratified Amendment 667, which removed the prohibition on interracial marriages found in section 102. But

progress stalled after those revisions. Representative Jack Venable of Tallahassee, chairman of the House's Rules Committee, proposed in 2002 to amend six more articles. His target was outdated language, such as found in article XIII, which authorizes state banks to circulate bills as money and to redeem them in gold or silver, and article II, which inaccurately describes the state's boundaries. Opponents, however, read dark conspiracies into his proposed changes. The House approved the amendments, but the Senate either refused to act or added provisions that Venable would not accept.⁵²

Despite such vocal protests against even a cleanup of constitutional language, public opinion polls consistently showed strong support for revision among citizens at large. The great majority of respondents who supported reform favored the convention method. For example, ACCR employed Washington pollster Jan van Lohuizen to conduct a scientific survey of six hundred registered voters from March 3 through 6, 2002. He found that two-thirds of the respondents were aware of reform efforts. Of that group, 58 percent favored writing a new constitution, while only 12 percent trusted the legislature to do the job.⁵³

In hopes of encouraging the legislature to push reform higher on its agenda while addressing the fears that many lawmakers expressed about holding a convention, ACCR in 2001 supported an alternative approach proposed by Representative Ken Guin, chairman of the House Elections Committee. He proposed an amendment that would permit the legislature to submit a new constitution for voters' approval. In effect, this amendment would nullify the Alabama Supreme Court's 1983 *Manley* decision,⁵⁴ which limited legislative reform to no more than a few articles at a time. Guin was unable to generate sufficient interest among his House colleagues to pass the proposal, although he did manage to bring the issue to the floor for debate. The majority of members clearly were not ready yet to take responsibility for drafting a new constitution themselves, nor were they disposed to delegate that authority to a citizens convention.⁵⁵

Still, reform continued to gain attention, as ACCR built a bipartisan base that managed to transcend the bitterness between Democrats, who retained a comfortable majority in both houses, and Republicans, who continued to smart over how the majority party in 1999 had prevented their colleague, Steve Windom, from exercising the traditional powers of lieutenant governor as presiding officer of the Senate. ACCR gained statewide attention in April 2001 when Siegelman publicly endorsed its mission at a rally in Montgomery. Later that year, he summoned the spirit

of Jim Folsom in calling for a convention to write a new constitution. He said schoolchildren would be the main beneficiaries once a new document lifted restrictions on how communities taxed themselves for education. At the time, the state's educational system was in the throes of "pro-ration"—a reduction in spending that the 1901 Constitution mandates when revenues fall short of the budget's expectation. Siegelman vowed that schools would not suffer such a fate again under his watch if he could help it—a stance that drew praise from editorialists.⁵⁶

ACCR continued to hold rallies and forums around the state through its strategy of educating and motivating voters. Donations from public-minded corporations, along with dues and contributions from about 1,500 members, allowed the organization to hire a small staff. This emphasis on organization sharply distinguished the present movement from previous efforts. Although five governors and a lieutenant governor had advocated constitutional reform and on three occasions their efforts had even inspired proposed new documents, no citizens group had operated independently to build grassroots support for change. Indeed, this growing bipartisan movement belied the scoffing of some legislators and special interests that no one cared about a new constitution.

The movement also triggered intense reaction from groups claiming to represent conservative Christians. Opponents began to crank up web sites and issue press releases, warning that a new constitution could lead to higher taxes, antireligious actions, or worse. It seemed that the more outlandish and conspiratorial their responses, the more likely these opponents were to appear alongside the reformers on talk shows and televised town meetings.

Although the state's newspapers covered opposition groups, sometimes providing them with more attention than their numbers might warrant, reporters and editorial writers began conducting their own investigations of the constitutional issues. In the process, their remarkably thorough work helped make the complex history and issues of constitutional reform accessible to newspaper readers, while moving the subject higher on the public agenda. In this aspect of public attention, the present experience differed remarkably from previous efforts to achieve reform. In the early 1970s, for example, the state's newspapers showed little interest in the work of Brewer's commission, in part because it dragged on for more than three years, often with little enthusiasm among some of its members. A generation earlier when Folsom had repeatedly brought

the legislature into special sessions to call a convention, the dailies had focused more on his political and personal failures rather than on their obligation to explain the issues behind constitutional reform. By contrast, Alabama's newspapers began in 2000 publishing carefully researched reports and issuing thunderous editorials for change. This massive body of journalistic work amplified ACCR's message to an extraordinary volume, while providing independent evidence in support of reform.⁵⁷ Meanwhile, the attention lavished on constitutional reform helped inspire renewed scholarly interest in the subject. The *Alabama Law Review*, for example, devoted an entire issue in the fall of 2001 to constitutional reform.⁵⁸

Among the principles that ACCR had promulgated in 2001 was a strong preference for a convention of citizen delegates to draft a new constitution. (The board, however, did not rule out pursuing revision through an article-by-article basis, preferring to emphasize the larger goal of reform over any particular methods.) With the help of Professor Howard Walthall and former Governor Brewer at the Cumberland Law School at Samford University, ACCR's staff and legislative specialists translated this preference into a resolution calling for a convention. Sympathetic lawmakers introduced the resolution in the 2002 regular session.⁵⁹

The legislation offered the following provisions:

- During the next general election, voters would decide whether to call a constitutional convention.
- If they said yes, then seven months later, they would elect 105 delegates from the newly apportioned House districts. These districts would ensure a fair representation of minority voters.
- Delegates would convene the following August to organize and elect a president. Afterward, they could adjourn to wherever they saw fit to conduct their business. They would be fairly compensated for up to 120 days. They would also have the support of the legislative staff to conduct their work.
- The convention would present its document to the voters for ratification no sooner than 90 days after the work was finished. This interim would assure voters ample time to get copies of the proposed constitution and study it.
- If voters approved, the new constitution would take effect the following January 1.

In offering its plan for calling a convention, ACCR meant to provide the legislature with a blueprint rather than insist that the legislation be accepted or rejected in its original form. In retrospect, the failure to consult with more legislators beforehand, particularly members of the black caucus, left opponents with an excuse to dismiss the legislation without giving it full consideration. While Siegelman publicly endorsed ACCR's legislation and substituted it for a convention plan he had announced earlier, the governor's office proved to be of little help in securing legislative support. Nevertheless, ACCR's plan did survive its first committee hearing, a raucous affair in which opponents of every persuasion testified along with advocates for change. But the bill failed on a voice vote on the House floor.⁶⁰ To add insult to that inglorious end, legislators awarded their "Black Shroud" to one of the bill's sponsors, in recognition that the proposal was dead on arrival.

ACCR did see the passage without opposition of its proposed amendment to clarify confusion over interpretations of section 286 and guarantee that voters would have final say on any new constitution. This proposal sought to quell fears, fanned by opponents of reform, that a convention might run wild and saddle citizens with unpopular provisions and higher taxes. In the general election of November 4, 2002, the measure, now Amendment 714, passed with an approval rate of 81 percent—by far the largest margin of that election.

The arguments offered by opponents to ACCR's carefully drawn plan for a convention deserve some comments here, even as Riley has chosen to pursue reform through amendments to the present document.

First, legislators expressed fear that special interests would dominate a convention. ACCR's response was that its proposed legislation imposed some of the tightest restrictions possible under present law on political contributions and gifts. For example, a supporter could contribute only \$100, either in money or services, to a candidate for delegate. A candidate could accept no gift, not even a cup of coffee. By contrast, Alabama law imposes no limit on how much an individual or a political action committee may donate to someone running for the legislature. Legislators even refused to end the practice of political action committees' transferring money back and forth to one another, thereby obscuring the sources of political contributions. Equally insidious is that a lobbyist may spend up to \$250 per day on each legislator—plying him or her with meals, trips, and other gifts—without having to report the expenditure to the state Ethics Commission.

Second, some African-American legislators argued that minorities would not be sufficiently represented in a convention, particularly if the elections were nonpartisan. ACCR's plan called for electing 105 delegates on a non-partisan basis from newly drawn House districts because their boundaries already had passed muster with the federal courts as fairly representing Alabama's racial composition. In ACCR's view, electing delegates on this basis would virtually guarantee a strong minority presence in a convention, just as the districts assure such representation in the legislature. Under the plan, the remaining delegates would be the twelve lawmakers whom the legislature elects every four years to serve on a council that conducts business between sessions. Without being large enough to dominate the proceedings, this group would bring to the convention valuable experience in the practical aspects of government. Four of the elected council members in 2002 were African Americans. Such arguments, however, failed to quell the objections, although many black legislators assured ACCR's leadership that they favored constitutional reform.⁶¹

Finally, certain legislative leaders insisted, mostly in private conversations, that drafting a constitution was too complicated to entrust with citizens elected as convention delegates. Their concerns, however, did not explain why the same voters, who appeared to be quite competent when electing legislators, could not be trusted to select delegates for a convention. This attitude on the part of lawmakers was in stark contrast to sentiments expressed in public opinion polls and letters to the editor that voters actually trusted citizen delegates far more than legislators to draft a new constitution. ACCR's plan actually prohibited legislators and other statewide elected officials from running as a delegate on the grounds that responsibility for writing job descriptions for such elected officials was best left to the employers themselves: the citizens.

Whatever their reasons for opposing a convention, legislators sidestepped the central issue: Who deserves the final say in Alabama? Article I, section II of the Alabama Constitution vests all political power in the people. They have an "inalienable and indefeasible right to change their form of government in such manner as they may deem expedient." But for now, at least, it appears that the people will have to exercise this right indirectly through the Legislature, which shows no inclination to surrender any of its considerable prerogatives to a convention of elected delegates.

With the 2002 legislative session over, politics focused on the primaries and general elections of 2002. Siegelman announced that he