

ALABAMA LAW REVIEW

Volume 53

Fall 2001

Number 1

ALABAMA CONSTITUTIONAL REFORM

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I am certainly not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their . . . ancestors.¹

These words etched in the wall of the Jefferson Memorial in Washington, D.C. describe the plight of Alabama, captured in an ancient constitution that discourages growth, progression, and efficiency. Alabama's constitution was conceived in 1901.² Because of its flawed provisions, the document has grown to almost one thousand amendments making it the longest constitution in the world. Instead of enunciating

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1. Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816) (inscription on the Jefferson Memorial, Washington, D.C.).

2. ALA. CONST. of 1901 (1901).

overarching principles of government like the United States Constitution, Alabama's constitution deals with the minutiae of state government. Because it is flawed and unwieldy, Alabama's constitution is an anachronistic impediment to reform and a barrier to efficient state and local government. At the advent of the new millennium, the Legislature should initiate a process of reform to restore faith in state government and prepare Alabama for challenges ahead.

There should be two phases to Alabama's constitutional reform. First, a series of constitutional amendments could significantly reduce the number of amendments currently in the constitution. This method is often referred to as "recompilation."³ Because recompilation would largely entail conversion of hundreds of amendments into statutory form, this first phase of constitutional reform should be relatively uncontroversial.⁴

A second phase of constitutional reform will be very controversial. Phase two of the reform should take one of two forms: (1) a constitutional reform commission that would study substantive reform proposals and make recommendations, or (2) a constitutional convention. However, because the convention method may be more vulnerable to special interest control,⁵ a constitutional commission would be better suited to propose meaningful reform.⁶ The Legislature should empower itself and the governor to appoint members of the Legislature and private citizens to special action panels to revise the Constitution of 1901. These action panels should be modeled after other states' successful efforts to re-

3. Benjamin B. Spratling III, Revision: The Case for Recompilation, Proceedings of the Symposium on the Alabama Constitution (Dec. 14, 1995), at 1, available at <http://www.auburn.edu/~lcsan/alacon/sym/proceed/spratlin.html> (last visited Oct. 29, 2001).

4. In fact, a recompilation scheduled for a statewide vote was scrapped by the state Supreme Court in *State v. Manley*, 441 So. 2d 864 (Ala. 1983). This decision's effect on constitutional revision is discussed *infra* at Part II.C.

5. See William H. Stewart, *The Alabama Constitution*, in ALABAMA POLITICAL ALMANAC 61, 66 (James Glen Stovall et al. eds., 2d ed. 1997) [hereinafter *Alabama Constitution*] ("[M]any opinion leaders fear that, in the present interest group climate, interests which they believe to be averse to the good of the state as a whole might gain even greater clout as a result of a new Constitution written by convention delegates whose selection they would heavily influence.").

6. See WILLIAM H. STEWART, JR., *THE ALABAMA CONSTITUTIONAL COMMISSION: A PRAGMATIC APPROACH TO CONSTITUTIONAL REVISION* 7 (1975) [hereinafter *CONSTITUTIONAL COMMISSION*]. In his book, Stewart states:

[T]he constitutional commission . . . [is the] most practical way of making needed changes in the Alabama Constitution of 1901. . . . Three of Alabama's neighboring states, Georgia, Florida, and Louisiana, have used commissions to consider constitutional reforms. In its common form, the constitutional commission is an agency of the Legislature, created to consider proposals for constitutional alterations and recommend the best for legislative approval. In some instances commissions have proposed whole new constitutions. . . . When proposals for change are submitted to the legislature, they must pass with the same margin required for any constitutional amendment.

Id.

structure state government.⁷

Because many of the state's special interests are protected by the current document, meaningful reform may be politically unrealistic.⁸ Niccolo Machiavelli warned of the dangers of reform in his masterpiece, *The Prince*:

It must be considered that there is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order, and only lukewarm defenders in all those who would profit by the new order, this lukewarmness arising partly from fear of their adversaries, who have the laws in their favour; and partly from the incredulity of mankind, who do not truly believe in anything new until they have had actual experience of it.⁹

Despite this dire forecast, perhaps the spirit engendered by a new millennium, a desire to make government more responsive, and a sense that Alabama needs to reform in order to compete in the new global marketplace will provide new impetus to the constitutional reform movement that has existed in Alabama throughout the twentieth century.¹⁰ Alabama should enact home rule, strengthen the power of the governor, allow counties to devise their own property tax rates, provide for a constitutional revision cycle to prevent the stagnation that currently plagues the document, and eliminate the constitution's excessive "earmarking" of state funds.

Hopefully, this Symposium Issue of the *Alabama Law Review* will initiate a serious constitutional reform effort. However, without a strong governor to take the lead, Alabama's constitutional reform will likely remain on the drawing board. When the day for constitutional revision comes, this Article will hopefully serve as reference for the reformers. Accordingly, Part I of this Article will catalogue the prob-

7. See Janice C. May, State Constitutional Reforms: Recent Experiences, Proceedings of the Symposium on the Alabama Constitution (Dec. 14, 1995), at 1, available at <http://www.auburn.edu/~lcsan/alacon/sym/proceed/may.html> (last visited Oct. 29, 2001).

8. See generally CARL GRAFTON & ANNE PERMALOFF, BIG MULES AND BRANCHHEADS: JAMES E. FOLSOM AND POLITICAL POWER IN ALABAMA (1985); *Dixie's Broken Heart*, MOBILE PRESS REG., Oct. 11-17, 1998 (seven part series).

9. NICCOLO MACHIAVELLI, THE PRINCE 49-50 (1980) (within chapter entitled "Of New Dominions Which Have Been Acquired by One's Own Arms and Ability").

10. See JOURNAL OF THE HOUSE OF REPRESENTATIVES OF ALABAMA 309-10 (1915). In 1915, Governor O'Neal stated that the Constitution of 1901 provided "insuperable barriers to most of the important reforms necessary to meet modern conditions and to secure greater economy and efficiency in the administration of every department of the state government." *Id.*; see also William H. Stewart, Reform of the Alabama Constitution, Proceedings of the Symposium on the Alabama Constitution, at 1 (Dec. 14, 1995), available at <http://www.auburn.edu/~lcsan/alacon/sym/proceed/stewart.html> (last visited Oct. 29, 2001).

lems with Alabama's Constitution of 1901, while Part II will briefly recount the past efforts at reform.

I. THE PROBLEM WITH ALABAMA'S CONSTITUTION

A. *The Constitution is Incomprehensible and Plagued by Minutiae*

Alabama's constitution is the longest in the world.¹¹ The Constitution of 1901 may have been amended over 1,000 times by now.¹² "One amendment alone—the amendment establishing the 'Forever Wild' program—is longer than the entire U.S. Constitution."¹³ Many amendments can only charitably be described as bizarre. A 1988 amendment specifies that purchases by the Morgan County sheriff's posse are property of the Morgan County sheriff's office.¹⁴ A 1994 study found that 69% of the Constitution of 1901's first 555 amendments affect only one city, one county, or a county and its cities.¹⁵ Many of the amendments are exclusively for school taxes in counties and municipalities.¹⁶ Most of the hundreds of amendments to the constitution are simply of a statutory nature.¹⁷ This elevation of what should be statutory law into constitutional amendments clutters Alabama's controlling document.¹⁸

The need for the hundreds of amendments littering the Constitution of 1901 results from a "feature of the 1901 Constitution inherited from its predecessor, the 1875 Constitution."¹⁹ To curb the "real or imagined excesses of the Reconstruction legislatures"²⁰ the framers of the Constitution of 1875 "placed limits on the bonded indebtedness and on the rates of ad valorem taxation affecting the state, counties, and municipalities."²¹ Thus, to circumvent the broad prohibitions contained in the Constitution of 1901, the Legislature must pass an amendment to grant authority to a county or municipality to act.

The genius of the U.S. Constitution, in part, is its simplicity. The

11. CONSTITUTIONAL COMMISSION, *supra* note 6, at 2; see also Dr. David L. Martin, *Wordy is One Way to Describe It*, ALA. NEWS MAG., Mar., 1983, at 10; Phillis Wesley, *1901 State Code Isn't the Oldest*, MONTGOMERY ADVERTISER, Nov. 13, 1983, at 1B.

12. Sam Hodges, *World's Biggest But Nobody's Proud*, MOBILE PRESS REG., Dec. 11, 1994, at 31.

13. *Id.*

14. ALA. CONST. of 1901, amend. 502 (1988).

15. Dewey English & Carol McPhail, *No Easing of Amendment Rat Race*, MOBILE PRESS REG., Dec. 11, 1994, at 81 (reporting a study conducted by the Alabama Law Institute).

16. ALA. CONST. of 1901, amends. 162-82 (1961).

17. CONSTITUTIONAL COMMISSION, *supra* note 6, at 1.

18. *See id.*

19. Albert P. Brewer, *Constitutional Revision in Alabama: History and Methodology*, 48 ALA. L. REV. 583, 583 (1997).

20. *Id.*

21. *Id.* at 583-84.

U.S. Constitution is studied by high school government classes, while there are only a few scholars in Alabama who can navigate the intricacies of Alabama's governing document.²² The incomprehensibility of the Constitution of 1901 is marked by its frequent lapses into painstaking minutiae.²³ Amendment 489 authorizes the Alabama Music Hall of Fame to acquire tapes and compact discs,²⁴ while amendment 373 ensures that pick-up trucks receive favorable property tax treatment.²⁵ "An understandable constitution is a fundamental component of good state and local government."²⁶

B. The Constitution of 1901 is Riddled With Special Interest Protection

"The generality of a rule stresses the hand of the law, of legal principle, of the court. It can be used against unduly prominent special interests. It provides for the cohesion of our law system and it allows for flexibility and development."²⁷ Rather than enunciating general principles or embodying a bundle of compromises,²⁸ the Constitution of 1901 "teems with special exemptions and privileges granted to particular cities, counties, industries and interest groups."²⁹ Many industries have achieved overt protection and promotion by amendment.³⁰

Large landowners and members of the Alabama Farmers Association (ALFA) enjoy special protection under Alabama's lid law,³¹ a provision designed to keep property taxes the lowest in the nation³² by assessing land according to its current use rather than its actual value. Perhaps the most formidable force in Alabama politics, ALFA uses its

22. See 48 Proposed Constitutional Amendments on November 1998 Ballots, PARCA REP. (Pub. Affairs Research Council of Ala., Birmingham, Ala.), Fall 1998, at 6, available at <http://parca.samford.edu/rpt35.pdf> (last visited Oct. 29, 2001) [hereinafter PARCA REP. NO. 35] (noting that "[the Constitution of 1901] is now virtually incomprehensible").

23. CONSTITUTIONAL COMMISSION, *supra* note 6, at 1.

24. ALA. CONST. of 1901, amend. 489 (1988).

25. ALA. CONST. of 1901, amend. 373 (1978).

26. PARCA REP. NO. 35, *supra* note 22, at 7.

27. Winfried Tilmann, *The Legal Basis for a European Civil Code*, 5 EUR. REV. OF PRIVATE L. 471, 473 (1997).

28. See THE FEDERALIST NO. 37 (James Madison).

29. Hodges, *supra* note 12; see also Sam Hodges, *Special Interests Fear 'Can of Worms'*, MOBILE PRESS REG., Dec. 11, 1994, at 61 [hereinafter *Can of Worms*]. "'We don't have a general constitution,' said Gerald W. Johnson, associate vice president for research at Auburn University and an adviser to Fob James during James' tenure as governor. 'We have a constitution which protects every vested interest in the state.'" *Id.*

30. See, e.g., ALA. CONST. of 1901, amend. 492 (1988) (promoting the catfish industry); ALA. CONST. of 1901, amend. 449 (1984) (protecting cotton from the boll weevil); ALA. CONST. of 1901, amend. 400 (1982) (promoting the production and distribution of swine).

31. Amendment 373, also known as the "lid law," caps amounts on property tax assessment. ALA. CONST. of 1901, amend. 373 (1978).

32. Hodges, *Can of Worms*, *supra* note 29, at 61.

political action committees and legislative muscle to resist reform of the property tax structure.³³ The Alabama Education Association (AEA), Alabama's powerful teacher's union, enjoys constitutional protection in the Special Education Trust Fund that safeguards money for teachers' salaries, leaving funding for students to the arbitrariness of proration.³⁴ Given Alabama's historically low levels of per capita spending per pupil³⁵ and low levels of performance in nationwide rankings,³⁶ the AEA would seem to be a natural ally of constitutional reform. However, the AEA apparently likens constitutional reform to Pandora's Box—once opened, trouble would ensue.³⁷ Since the Constitution of 1901 enshrines the source of teachers' salaries,³⁸ any reform is perceived as a threat to teachers' pocketbooks.³⁹

While the Alabama Bar Association has no official position on constitutional reform, the state's lawyers are often cited as defenders of the status quo.⁴⁰ Finally, the Legislature itself must be considered a special interest protected by the Constitution of 1901. The document's concentration of power in Montgomery in the hands of the Legislature is at the expense of the state's county governments. Home rule⁴¹ exists for cities but not for counties, in part because rural legislators wanted to maintain

33. Robert Day, *A More Representative, Still Conservative Political Force—Interview with Jerry Allen Newby, President of ALFA*, BUS. ALA. MONTHLY, Mar. 1999, at 9-10. In the interview, Mr. Newby stated:

We will continue to hold our position on property taxes. [ALFA] feel[s] like the property tax is a [sic] unfair tax, not based at all on the ability to pay. [ALFA] feel[s] like [the property tax] was created in this state and other parts of the country (with the idea) that a person's property was his wealth, and that is certainly not the case today. I have a lot of friends who are professional people and are more wealthy than I am, and they don't have to pay property tax on their wealth. The real problem is that a farmer can have a losing year on his farm and be in the red and still have to pay property tax where he is really not able to do so.

Id.; see also Bessie Ford, *Boss Myrick Resigns*, BUS. ALA. MONTHLY, Nov. 1998, at 7.

34. ALA. CONST. of 1901, amend. 61 (1947).

35. Alabama is ranked 50th in per capita state and local government expenditures for elementary and secondary education for 1995 and 41st in expenditures per pupil in elementary and secondary schools in 1998. STATE RANKINGS 1999: A STATISTICAL VIEW OF THE 50 UNITED STATES 138, 140 (Kathleen O'Leary Morgan & Scott Morgan eds.). Alabama is ranked 45th in per capita state and local government expenditures for education for 1995. *Id.* at 135.

36. Alabama has the eighth highest drop-out rate in the United States. *Id.* at 131.

37. Hodges, *Can of Worms*, *supra* note 29, at 61 ("Once you open up the can of worms, there's no telling what could get in or get out of the constitution," said Mike Martin, director of public relations for the AEA.).

38. See *supra* note 34 and accompanying text.

39. Bessie Ford, *Tax Commission—The First Shot of a Civil War?*, BUS. ALA. MONTHLY, June 1990, at 6, 11.

40. Hodges, *Can of Worms*, *supra* note 29, at 71 ("If you have a new constitution . . . you're clearing out a lot of little niches that have been carved out, and out of those niches people have made a lot of money in attorney fees [and] underwriting fees, etc."); see also discussion regarding Alabama Bar Association opposition to the proposed Constitution of 1983 *infra* Part II.C.

41. See discussion *infra* at Part I.C.

a high degree of control over local affairs.⁴²

C. The Constitution of 1901: Concentration of Power in the Hands of the Legislature at the Expense of County Commissions Fosters Unresponsive, Inefficient Government

Alabama is widely viewed as a bastion of conservatism. Despite this image, the concentration of power in the state Legislature amounts to "overly-centralized government," a proposition perpetually decried in conservative circles. Alabama's constitutional balance contradicts its historical states' rights philosophy. States' rights, at its core, accepts that a state government's proximity to the governed makes it superior to a federal solution fashioned in a far away capital. However, Alabama's constitution ignores the principle that "the government governing closest to the people governs best" through its concentration of political power in Montgomery.

An Alabama county's ability to address local problems is hampered by the Dillon Rule. The Dillon Rule restricts the powers of Alabama's counties to those expressly delegated by the Constitution of 1901.⁴³ Thus, because the Constitution of 1901 is silent on whether the Mobile County Commission is able to take measures to control mosquitoes, the Mobile County Commission cannot act without a specific grant of authority from the state.⁴⁴ Because a county does not possess the inherent power of self-government, the Constitution of 1901 contains hundreds of amendments authorizing counties to regulate the overgrowth of weeds, erect statues and excavate graves.⁴⁵ Thus, the constitution resembles a compendium of local ordinances rather than an embodiment of governing principles.⁴⁶ Giving the county commissions the power to

42. *Hot Home-Rule Issue Still Boils With New Charter*, BIRMINGHAM NEWS, Oct. 23, 1983, at 7G; see also Bessie Ford, *Big Brother Government—The Alabama Model*, BUS. ALA. MONTHLY, Jan. 1999, at 13 ("The ultimate ruler over counties has historically been the Legislature, which has jealously guarded that power.").

43. PERRY C. ROQUEMORE, JR., ALABAMA LEAGUE OF MUNICIPALITIES, QUESTIONS AND ANSWERS ON COUNTY HOME RULE, at 16; see also *Askew v. Hale County*, 54 Ala. 639 (Ala. 1875) (noting that counties possess no inherent power of self-government; they may exercise only the powers which the legislature delegates to them.).

44. See Ford, *supra* note 42, at 13 (describing county commissions as "handcuffed" to the Legislature).

45. See ALA. CONST. of 1901, amend. 497 (1988) (prohibiting the overgrowth of weeds and junk cars in Jefferson County); see also ALA. CONST. of 1901, amend. 437-438 (1984) (enabling Macon County and Tuskegee to accrue debt to erect a statue to Tuskegee Airman "Chappie" James); see also ALA. CONST. of 1901, amend. 520 (1990) (allowing Madison County to charge for the excavation of human graves); see also ALA. CONST. of 1901, amend. 521 (1990) (setting fees for the landfill in Pickens County).

46. While counties are restricted to exercise only rights specifically granted, municipalities are only restricted from exercising rights specifically barred by the constitution. The disparate treatment arises from their definitions under Alabama law. A municipal corporation is an association created originally by the voluntary assent of the community and its citizens. Therefore it

enact ordinances without the Legislature's permission is often referred to as "Home Rule."

Aside from contributing to the incomprehensibility of the document, this system fosters inefficient and unresponsive government.⁴⁷ One might assume that problems occurring in unincorporated parts of Alabama would fall under the jurisdiction of county commissions. However, because the Constitution of 1901 is silent on matters of zoning, the county commission must petition the Legislature for authority to restrict land use.⁴⁸ Typical of zoning problems is the growth of mobile home parks or hog farms near residential areas.⁴⁹ Instead of swift county action to segment land according to usage, the county cannot act absent specific authority from the Legislature.⁵⁰

Additionally, the Constitution of 1901 regulates the enactment of legislation authorizing bond issues⁵¹ and imposes limits on the counties' ability to address property taxes or incur indebtedness above certain prescribed amounts.⁵² The Constitution of 1901 allows a maximum county property tax rate of 23.6 mills, although certain amendments to tax at rates in excess of the 23.6 mills exist.⁵³ Thus, absent specific authorization to act, a county commission must petition its legislative delegation for authority to change taxation levels. If the legislative delegation consents to the proposed grant of authority, the delegation must shepherd such legislation through the Legislature, which only meets twice a year. While the delegation's support for the authority is rarely denied, navigating the legislative process is onerous, allowing the underlying problem to fester. After the Legislature passes granting authority, the measure is subjected to a popular vote and only the counties affected by the granting authority are permitted to vote. However,

enjoys certain privileges and rights designed to enable the community to better satisfy its local needs, whereas a county is a political subdivision of the state created by statute to aid in the administration of state functions. Since counties possess only limited delegated powers and exist primarily as agents of the state, the law recognizes them as quasi-corporations. *Montgomery v. City of Athens*, 155 So. 551, 552-53 (Ala. 1934); *James v. Conecuh County*, 79 Ala. 304, 306 (Ala. 1884); *Askew v. Hale County*, 54 Ala. 639, 641 (Ala. 1875).

47. CONSTITUTIONAL COMMISSION, *supra* note 6, at 2-3; *see also* Ford, *supra* note 42, at 13 ("And because county commissioners are handcuffed to the Legislature, their react [sic] time in dealing with these increasingly urgent, often disparate demands by property owners, can be excruciatingly slow.").

48. Ford, *supra* note 42, at 14.

49. *See Hogs at the Door*, MOBILE PRESS REG., Oct. 12, 1998, at 8A; *see also* Ford, *supra* note 42, at 13.

50. Ford, *supra* note 42, at 14. The Executive Director of the Association of County Commissions of Alabama "blames Alfa for resistance to planning and zoning. 'The Alfa mentality has been for years to keep taxes down and no regulation on the use of land, because (it figured) if our farmers cannot be crop rich, they want them to be land rich . . .'" *Id.*

51. ALA. CONST. of 1901, art. IV § 104(17).

52. CONSTITUTIONAL COMMISSION, *supra* note 6, at 4.

53. JAMES D. THOMAS, MANUAL FOR ALABAMA COUNTY COMMISSIONERS 58 (1963).

up until 1994, the entire state had to vote on local legislation. The referendum, in turn, can be scheduled for a minimum of ninety days after its passage by the Legislature and after being published in the newspapers of the counties affected. A special grant of authority takes many months.⁵⁴

The costs of this process can be measured in three ways. First, local delegations must expend time and legislative capital in the Legislature to guarantee passage. Second, during this onerous process, the problem persists. Third, of course, referenda conducted specially, rather than concurrent with a regular legislative election, are expensive.⁵⁵

Because it takes months to merely receive the authority to address local concerns, the county commission is barred from acting efficiently to address the needs of its citizens. "Local communities routinely have had to seek amendments just to improve their schools, encourage economic development or build hospitals and roads. As many as 125 amendments fall into this category—granting a specific community the power to undertake one of these four essential tasks."⁵⁶ The exercise of receiving permission from the Legislature to pass local legislation is wasteful and breeds inefficiency. Rather than focusing legislative energy and capital on statewide problems, legislators must expend time and effort to shepherd local legislation through the legislative maze.⁵⁷

The Public Affairs Research Council of Alabama studied census data in Alabama and concluded that metropolitan counties "are the engines that drive the state's economic progress. Their success in accommodating both population and economic growth will benefit the entire state, and it is important for them to develop good local government to assist in this process."⁵⁸

54. See ALA. CONST. of 1901, amend. 555 (1995); see also *Alabama Constitution*, *supra* note 5, at 77.

55. CONSTITUTIONAL COMMISSION, *supra* note 6, at 4 (quoting Judge Fowler, Chairman of the Constitutional Commission, "[t]he existing Constitution burdens the Legislature with an excessive amount of responsibility for the structure and functioning of local government.").

56. English & McPhail, *supra* note 15, at 81 (reporting on a study conducted by Alabama Law Institute).

57. *Id.*

58. *Improving County Government in Alabama's Metropolitan Areas*, PARCA REP. (Pub. Affairs Research Council of Ala., Birmingham, Ala.), Spring 1998, at 1, available at <http://parca.samford.edu/rpt32.pdf> (last visited Oct. 29, 2001) [hereinafter PARCA REP. NO. 32].

D. The Constitution of 1901's Restrictions on the Legislature Restricts the Ability of the Legislature to Address Alabama's Problems Thereby Creating an Inefficient and Inflexible Government

The Constitution of 1901 also unnecessarily restricts the ability of the Legislature to address problems affecting the state as a whole. In 1999, the United States Supreme Court struck down Alabama's corporate franchise tax in *South Central Bell Telephone Company v. Alabama*.⁵⁹ Because the tax generated greater than one million dollars in revenue, the Alabama Department of Revenue had to come up with an alternative tax to make up the shortfall. The rigidity of the Constitution of 1901 complicated this task. For example, one option to make up the shortfall was to abolish the Alabama tax structure's deduction for federal income tax.⁶⁰ However, this option was unpalatable because the deduction is embedded in Alabama's Constitution and can only be changed by a constitutional amendment that requires passage by the Legislature and a statewide referendum.⁶¹ A second option, an increase in the corporate income tax rate, would similarly require a constitutional remedy because it mandates that such revenue be earmarked to the Special Education Trust Fund.⁶² While anti-tax advocates favor such restrictions on the ability to tax, the elevation of statutory laws into the constitution unduly restricts the options of the state government to address emergency problems like the invalidation of tax generating millions of dollars in annual revenue.

Thus, Alabama's Constitution of 1901 encourages piecemeal amendments to circumvent its anachronistic prohibitions thereby contributing to a sense that local and state government are unable to promptly and efficiently address a community's or the state's problems.⁶³

E. The Constitution of 1901 Contributes to Alabama's Education Crisis

Alexander Hamilton wrote in the *Federalist Papers* that "[a] complete power . . . to procure a regular and adequate [source of revenue,] as far as the resources of the community will permit, may be regarded

59. 526 U.S. 160 (1999).

60. Professor Bruce Ely, Class Lecture at The University of Alabama School of Law (Apr. 12, 1999).

61. The merits of this remedy are beyond the scope of this Article. The dilemma is mentioned to underscore the inefficiency fostered by Alabama's constitution. *Id.*

62. *Id.*

63. See PARCA REP. NO. 35, *supra* note 22, at 1.

as an indispensable ingredient in every constitution."⁶⁴ The Constitution of 1901, while providing the ability to raise revenue, significantly restricts the ability of the Legislature and the counties to tailor a tax structure to their needs.⁶⁵ This lack of constitutional flexibility fosters excessive reliance on sales taxes to fund education.⁶⁶ Nationwide, property taxes are the most common way to fund schools.⁶⁷ The Alabama Constitution's strict provisions on property taxes pose an almost insurmountable barrier to increasing education funding.⁶⁸ The school board must appeal to the county commission to receive more funding.⁶⁹ In turn, the county commission must pass a resolution calling on the Legislature to allow it to increase funding.⁷⁰ The county's legislative delegation must then approve the property tax plan and shepherd it through the Legislature.⁷¹ Only then can the measure be placed on the ballot for a vote by the public.⁷² "[T]he constitution should not make it unduly difficult for the people to provide needed governmental services. Education is the number one public function in Alabama."⁷³

Moreover, the instability of Alabama's tax base, coupled with the Constitution of 1901's proration provisions,⁷⁴ damages Alabama's educational system:

Our dependence on sales and income taxes to finance education results in an unstable tax base that is very susceptible to dips in the economy. . . . Both the general fund and education budgets in Alabama remain in a state of chronic proration and budget cuts. Until we have a stable system of financing education in this state, we will continue on the roller coaster of funding that retards progress and hampers attempts to attract new industry. Such cuts also hamper efforts to improve educational quality and, if they continue, they can lead to an actual decline in quality of education. . . . Our overdependence on these revenue sources reinforces the image of instability and lack of commitment to Alabama education that has developed through the years.⁷⁵

64. THE FEDERALIST NO. 30 (Alexander Hamilton).

65. ALA. CONST. of 1901, art. IV, § 70; see also ALA. CONST. of 1901, art. V, § 213-16.

66. See Carol McPhail, *Hostage: County's Desire to Hike Tax*, MOBILE PRESS REG., Dec. 11, 1994, at 131-141.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. McPhail, *supra* note 66, at 131.

72. ALA. CONST. of 1901, art. XI; see also McPhail, *supra* note 66, at 131.

73. *Alabama Constitution*, *supra* note 5, at 67.

74. See discussion of proration *infra* text accompanying notes 85-87.

75. James E. Martin, *Business Begins with Education*, BUS. ALA. MONTHLY, Oct. 1987, at

This Article does not take a position on the wisdom of raising the taxes on the citizens of Alabama, especially given the documented waste and duplication in Alabama's junior and community college system. However, the current system of providing for Alabama's public schools is inadequate. The first step to educational reform should be to reform the inflexibility of the Constitution of 1901.

F. Alabama's Earmarking of State Revenues Contributes to Governmental Inflexibility and Inefficiency

Alabama, more than any other state, earmarks nearly ninety percent of its revenue.⁷⁶ Earmarking is a practice by which certain taxes and funds are automatically designated for a particular program.⁷⁷ Earmarking is problematic because if revenue increases in an area that is earmarked, proceeds may not be diverted into an area that needs extra funding.⁷⁸

Earmarking began as a politically expedient means to make tax increases palatable to the public.⁷⁹ Rather than levying taxes through its own power, the Legislature enshrined tax increases as constitutional amendments because amendments required voter approval. Thus, by circuitously raising taxes, the Legislature ensured the public took some responsibility for tax increases. Whether unnecessarily fixing tax rates in the Constitution of 1901 to require popular approval were acts of political cowardice or mass democracy at work, the method, in some measure, made the tax easier to pass because the voter could rest assured that the proceeds of the tax would be dedicated to a prescribed need.⁸⁰ Aside from helping ensure passage of tax increases, supporters of earmarking contend that it is necessary because it restricts the power of the Legislature.⁸¹ Former State Budget Officer Charles Rowe indicated that earmarking is not "all bad" because it would be "dangerous" to allow the Legislature to set all the state's priorities.⁸²

While distrust of the elected officials is perhaps warranted, earmarking unduly restricts the Legislature's ability to deal with changing

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76. Bessie Ford, *Could the State Be Run as a Business?*, BUS. ALA. MONTHLY, July 1991, at 14, 17; see also REPORT OF THE ALABAMA COMMISSION ON TAX AND FISCAL POLICY REFORM 16 (Jan. 1991) [hereinafter TAX COMMISSION REPORT].

77. See BLACK'S LAW DICTIONARY 525 (7th ed. 1999).

78. James D. Bryce, *Tax Reform Issues in Alabama*, 43 ALA. L. REV. 541, 542 (1991).

79. See IRA W. HARVEY, A HISTORY OF EDUCATIONAL FINANCE IN ALABAMA 1819-1986, at 409 (1989).

80. Roy Bahl, *The Economics of Alabama's Proposed Tax Reform*, 43 ALA. L. REV. 601, 614 (1991).

81. *Id.*

82. Ford, *supra* note 76, at 17.

economic conditions.⁸³ For example, a typical legislative response to a recession is to lower taxes in hopes of encouraging consumer spending. However, because a constitutional amendment passed in 1933 fixes Alabama's income tax rate at 5% for individuals and 3% for corporations,⁸⁴ the Legislature cannot swiftly act to reduce tax rates. The structural delay inherent in changing the constitution via legislative action and popular referendum ensures that Alabama's response to an economic downturn will be limited to riding out the storm.

The inflexibility of the Constitution of 1901 is even more dramatic when the document's proration measures⁸⁵ take effect. Proration is a mechanism where most state services are cut across the board when revenues do not meet projections.⁸⁶ It seems the very essence of the Legislature is to make difficult decisions in times of economic despair. However, because virtually all revenues are automatically dedicated to a particular spending program, the Legislature is prohibited from priority-shifting. Thus, earmarking could force the absurd situation where a surplus in a road-building fund could not be used to offset budgetary shortfalls in the Special Education Trust Fund. Therefore, earmarking creates an inelastic structure, where funds are forced into outdated or over-funded programs at the expense of more needy outlays.⁸⁷

G. The Constitution of 1901 and Statutory Law's Different Treatment of Cities and Counties is Unequal and Unfair

The Constitution of 1901's lack of home rule restricts a county's authority, leaving county commissions ill-equipped to handle problems arising from rapid growth. In 1907, the Legislature authorized the incorporation of cities and towns in areas with as few as 300 residents, and granted municipal governments the power to "adopt and enforce ordinances not inconsistent with the laws of the state."⁸⁸ As noted above, the Dillon Rule restricts counties by limiting their power to only those functions specially delegated by the Legislature.⁸⁹ However, forty-four percent of Alabama's population growth has occurred in unincorporated areas.⁹⁰ This trend promotes uneven, unequal government

83. Memorandum from Melinda Mitchell to Pat Harris on Constitutional Revision 1 (Oct. 25, 1978) (on file at the Alabama Department of Archives and History, Montgomery, Ala.).

84. ALA. CONST. of 1901, amend. 25 (1933).

85. ALA. CONST. of 1901, amend. 26 (1933).

86. *Alabama Constitution*, *supra* note 5, at 73.

87. Keith J. Ward, Taxes and Finance in the Alabama Constitution, Proceedings of the Symposium on the Alabama Constitution (Dec. 14, 1995), at 1 available at <http://www.auburn.edu/~lcgsan/alacon/sym/proceed/ward.html> (last visited Oct. 29, 2001).

88. PARCA REP. NO. 32, *supra* note 58, at 1-2.

89. See *supra* text accompanying notes 43-44.

90. PARCA REP. NO. 32, *supra* note 58, at 2.

because an already impotent county commission is left less able to handle increased demand for services and zoning ordinances that necessarily accompany population increases. The disparate treatment of counties and cities in Alabama results in anomalies in the quality of service a governing body is allowed to provide.

[C]ounty governments—even those with hundreds of thousands of residents—never have been given general ordinance-making power similar to that possessed by the smallest municipality. This means, for example, that the county commission in Mobile County, which has 124,000 residents in unincorporated areas, cannot adopt zoning regulations where they are needed, while the city council of Wilmer, which has fewer than 600 residents, can. Every other southeastern state has remedied this kind of problem by providing county governments with some form of general decision-making power, subject of course to the limitations of state law.⁹¹

Thus population growth has exacerbated the need for governmental services from those bodies least able to give it. This lack of home rule guarantees that citizens in unincorporated areas will receive less efficient governance than those residing within municipal areas.

II. HISTORY OF MODERN REFORM EFFORTS

Part II of this Article details the history of modern efforts to reform the Constitution of 1901.⁹² The purpose of Part II is to serve as a reference for future reformers of the Constitution of 1901. After describing the content of each reform proposal, this section will draw heavily upon media accounts and scholarly opinions and analyses to decipher why each reform proposal failed.

There are several general impediments to constitutional reform that have plagued past efforts and will hamper future reform initiatives. Chief among general impediments to reform is public apathy. Because the constitution is incomprehensible and any reform must grapple with arcane issues, voter interest in reform never registers in statewide public opinion polls.⁹³ Perhaps influencing public apathy is an attitude of "if it ain't broke, don't fix it."⁹⁴ Alluding to the weight of tradition,

91. *Id.* at 3.

92. Governor Emmet O'Neal, Governor Kilby, the Alabama Policy Committee and Governor Jim Folsom called for constitutional reform in 1915, 1923, 1936 and 1947, respectively. See Stewart, *supra* note 10, at 1.

93. See ALABAMA POLITICAL ALMANAC 383-417 (James Glen Stovall et al. eds., 2d ed. 1997) (discussing a lack of interest in constitutional reform).

94. *Alabama Constitution*, *supra* note 5, at 66.

Professor Stewart of The University of Alabama described lack of interest in reform as a product of the notion that there is not a serious problem with the constitution.⁹⁵

Similarly, because the rubric of "constitutional reform" means consideration of many disparate issues, special interests concerned only with narrow issues oppose broad reform efforts for fear that their niche of protection will be eliminated.⁹⁶ Some county commissioners charged with implementing good government in Alabama's unincorporated areas oppose increasing their own power via home rule.⁹⁷ The status quo, however impotent to deal with issues ranging from zoning to taxation, gives county commissioners political cover—they can blame their lack of authority and the Legislature for failures and delays in addressing their county's shortcomings.⁹⁸

This history of Alabama's failed reform efforts also examines the recommendations of two study groups founded to reform Alabama's taxation system. Because much of Alabama's tax rates are fixed in the Constitution of 1901, the Torbert Commission Plan and the Carruthers Reform Plan were attempts to revise Alabama's Constitution and are therefore properly considered under the rubric of constitutional reform in Alabama.

A. *The Proposed Constitution of 1973—The Fowler Constitutional Commission*

After a bitter fight with Alabama's "Big Mules," Governor Brewer succeeded in passing a bill to create a Constitutional Commission to study constitutional revisions and to make recommendations.⁹⁹ The Commission consisted of twenty-five members, fourteen appointed by the Governor and the rest appointed by legislative officers.¹⁰⁰ With Governor Albert Brewer's defeat in 1970 at the hands of George Wal-

95. *Id.*

96. See *infra* text accompanying notes 162-172 regarding bond attorneys' niche in the Constitution of 1901.

97. PARCA REP. NO. 32, *supra* note 58, at 3. The Public Affairs Research Council of Alabama states that:

Sometimes it is argued that county officials do not want such power. It may be true that some officials prefer not to have choices for which they could be held accountable. But the reason for placing decision-making power at the county level is to benefit the citizen and the taxpayer, not the official. The purpose is to make county officials accountable to the voters for meeting their needs efficiently and effectively.

Id.

98. Ford, *supra* note 42, at 14.

99. Sam Hodges, *Political Reformers Try and Fail*, MOBILE PRESS REG., Dec. 11, 1994, at 41 ("When constitutional reform fever took hold, under Governor Albert Brewer in 1969, the special interests fought even the creation of a commission to study the issue.").

100. CONSTITUTIONAL COMMISSION, *supra* note 6, at 9.

lace, the new constitution lost its most fervent supporter.¹⁰¹ "Brewer had planned to call legislators into special session to deal with the new constitution and to stump for it. Wallace, by contrast, had little interest in constitutional reform. Without a governor behind it, the proposed constitution never came up for a vote in the Legislature."¹⁰²

1. *What the 1973 Plan Changed*

The proposed constitution of 1973 increased the power of the governor by reorganization of the executive branch. Alabama's Governor would have the "new power" to reorganize agencies of the executive via executive order.¹⁰³ The Commission modeled this addition on similar provisions in North Carolina, Illinois and Virginia.¹⁰⁴ This new executive power would trump existing statutes if submitted to the Legislature.¹⁰⁵ Thus, provided the Legislature failed to countermand the executive's reorganization, the change became statutory law.¹⁰⁶ The Commission also proposed the elimination of the pocket veto and annual sessions of the Legislature.¹⁰⁷

The proposed constitution of 1973 changed the onerous local bills procedure, discussed above, making the process of passing local legislation less burdensome. The Commission report contended its provision would reduce the need for general bills of local application.¹⁰⁸

With regard to local taxation, the Commission eliminated the provision requiring the passage of a constitutional amendment to raise taxation while retaining a multi-step process that included: (1) approval by the local governing body; (2) approval by the Legislature; and (3) approval by the voters.¹⁰⁹

The proposed constitution of 1973 would have also provided home rule for Alabama's counties. After legislative approval of a home rule charter, counties would be granted residual powers—the power to do anything not directly at odds with the state's powers.¹¹⁰ Aside from empowering local governments to deal with problems promptly and efficiently, Judge Fowler, Chairman of the Constitutional Commission,

101. Hodges, *supra* note 99, at 41.

102. *Id.*

103. REPORT OF THE CONSTITUTIONAL COMMISSION, PROPOSED CONSTITUTION OF ALABAMA 88-89 (1973).

104. *Id.*

105. *Id.*

106. *Id.*

107. JAMES D. THOMAS & WILLIAM H. STEWART, ALABAMA GOVERNMENT & POLITICS 45 (1988).

108. REPORT OF THE CONSTITUTIONAL COMMISSION, PROPOSED CONSTITUTION OF ALABAMA 78 (1973).

109. *Id.* at 117.

110. *Id.* at 128.

noted that it would relieve the Legislature from the mountains of "paper work and the expense of adopting laws for county and city governments that they should be allowed to do for themselves."¹¹¹

The proposed constitution of 1973 also addressed the amendment and convention procedures. Instead of requiring three readings of proposed amendments, the Commission recommended only one.¹¹² Furthermore, the Commission sought to curtail expensive special elections for "emergencies" and to change the notice requirement.¹¹³ Calls for a constitutional convention would require only a majority vote and conventions could be held to address only one subject.¹¹⁴ While the proposed constitution of 1973 would have retained the election of delegates to the convention, it would have required voter approval of the convention's changes.¹¹⁵

Finally, the Commission left intact the state ad valorem taxation maximum of 6.5 mills.¹¹⁶ The proposed constitution of 1973 would have prohibited the Legislature from earmarking new or increased revenue for specific uses.¹¹⁷ Also, "constitutional limits on the rate of local taxes would be abolished, and the maximum amount of taxes property owners pay would be permitted to go above the present limitation of 1.5% of the assessed market value."¹¹⁸ "In addition, the commission seeks to grant local governing authorities more responsibility in issuing bond issues when they do not exceed certain debt limitations if approved by the voters."¹¹⁹

B. The Proposed Alabama Constitution of 1979—Governor James

After campaigning for constitutional reform, Governor James appointed a committee of lawyers to draft a new constitution that was submitted to the Legislature in 1979.¹²⁰ The committee, chaired by Opelika attorney Yetta Samford, was composed of twenty-three members who submitted their report to a thirty-four member legislative study

111. Don F. Wasson, *Legislature to Get Proposed State Constitution*, MONTGOMERY ADVERTISER, Apr. 29, 1973, at 12B.

112. REPORT OF THE CONSTITUTIONAL COMMISSION, PROPOSED CONSTITUTION OF ALABAMA 142 (1973).

113. *Id.* at 141.

114. *Id.* at 143.

115. *Id.* at 144.

116. *Id.* at 114.

117. Rex Thomas, *New Constitution Would Mean Big Changes*, BIRMINGHAM NEWS, May 13, 1973, at 26A; see also THOMAS & STEWART, *supra* note 107, at 45 ("The commission also suggested extensive changes in the area of state and local finance—discontinuing the practice of 'earmarking' revenues . . . and modernizing tax and debt limitations, for example.").

118. Thomas, *supra* note 117, at 26A.

119. Al Fox, *O'Bannon Puts Forth First Bills to Revise State's Constitution*, BIRMINGHAM NEWS, May 28, 1971, at 2A.

120. Hodges, *supra* note 99, at 41.

committee, chaired by Lieutenant Governor George McMillan and co-chaired by Speaker of the House Joe McCorquodale.¹²¹ The 1979 James Plan used the Constitutional Commission's proposal as its guide.¹²² After a modified version passed in the Senate, the reform effort failed in the House of Representatives.¹²³ Had the measure passed the Legislature, Governor James intended to offer the proposal to the voters "on an article by article basis so voter resentment of one particular piece will not lead to defeat of the whole package."¹²⁴

1. *What the 1979 Proposal Changed*

James' plan would have implemented optional home rule, voter recall, and a voter referendum initiative.¹²⁵ The 1979 proposal provided that counties could opt for home rule "in two ways: (1) by following the procedures for adopting a "home rule charter" or (2) by opting for a form of county government provided by the legislature if the legislature allows home rule with that form."¹²⁶

"The 1979 proposal contained a[n] . . . extensive revision of the Declaration of Rights specifically adding an equal protection clause and eliminating a number of the existing sections."¹²⁷ The 1979 proposed constitution invented a Legislative Salary Commission to formulate legislative pay and would have allowed the Legislature to provide retirement benefits for elected officials.¹²⁸

The James Plan eliminated the provision against the Legislature authorizing lotteries and deleted Section 104 that lists subjects on which a local law may not be passed.¹²⁹ With regard to the executive branch, the James proposal gave the governor reorganization power over the executive department of state government and also created a legislative Reapportionment Commission. The 1979 document also eliminated certain revenue earmarked for education. While the Legislature was required

121. Roy Summerford, *Constitution Proposals Due Monday*, MONTGOMERY ADVERTISER, Jan. 28, 1979, at 1A.

122. Working Paper on Constitution Recommended by Governor Fob James 6 (from papers of Fob James' Administration on file at the Alabama Department of Archives and History, Montgomery, Ala.).

123. THOMAS & STEWART, *supra* note 107, at 48.

124. Summerford, *supra* note 121, at 1A.

125. *Constitutional Revision Lacks Reform*, BIRMINGHAM POST-HERALD, Oct. 21, 1983, at C1; Bill Stephens, *Comparison of Presently Proposed Constitution to 1979 James' Proposal* (on file at the Alabama Department of Archives and History, Montgomery, Ala.).

126. Summary of Draft Constitution Recommended by Governor Fob James 2 (from papers of Fob James' Administration on file at the Alabama Department of Archives and History, Montgomery, Ala.).

127. Stephens, *supra* note 125.

128. *Id.*

129. *Id.*

by general law to provide optional plans of local government for counties, the 1979 proposal required the adoption of home rule charters.¹³⁰

The 1979 plan also eliminated earmarking with regard to taxation and debt limitation. The James proposal "remove[d] earmarking of funds from the constitution but preserve[d] as a matter of statutory law all funds that are now earmarked in the present constitution."¹³¹ Governor James contended that "the Legislature is free to earmark or to un-earmark future taxes as it sees fit. Thus, the proposal allows the Legislature to remove earmarked funds by legislative act rather than by constitutional amendment."¹³² The 1979 proposal also continued the *ad valorem* lid law. Further, it limited borrowing to one million dollars. The 1979 proposal would have also permitted local amendments.¹³³

2. *Why the Proposed Constitution of 1979 Failed*

The Alabama Education Association (AEA) opposed James provision to abolish earmarked funds.¹³⁴ While the James Administration contended that thirty-five percent of the constitutionally earmarked revenues would remain dedicated by statute, the Congress of Parents and Teachers joined the AEA in opposing the plan.¹³⁵ Attempts to "un-earmark" the ninety percent of revenues were met by heavy opposition from all education forces.¹³⁶

The bundling of the diverse reform measures contributed to the demise of the reform effort.

[Governor James' Proposal] experienced opposition in both the preliminary and the legislative stages of its consideration. Some legislators, for example, opposed the recall, arguing that this device for removing elected officials before the expiration of their terms (by petition and election) could be used against courageous officials who took an unpopular stand on a controversial public-policy issue. A provision that would have discontinued the practice of earmarking revenues was opposed by groups interested in maintaining the system of dedicated taxes for the support of such functions as education and highways. Home rule came in for its share of criticism, as did numerous other provisions, either because they had been included or not in-

130. *Id.*

131. Summary of Draft Constitution Recommended by Governor Fob James 1 (papers of Fob James' Administration on file at the Alabama Department of Archives and History, Montgomery, Ala.).

132. *Id.*

133. *Id.*

134. Hodges, *Can of Worms*, *supra* note 29, at 61.

135. *Proposed Constitution Drops Earmarking PTAs Told*, ALA. J., Feb. 28, 1979, at 46.

136. Ford, *supra* note 39, at 6.

cluded in the proposed document. In short, it succumbed to the cumulative opposition that . . . so often besets a proposed constitution.¹³⁷

C. *The Proposed Alabama Constitution of 1983—Baxley-DeGraffenried Plan*

Lieutenant Governor Bill Baxley and State Senator Ryan DeGraffenried engineered an attempt to reform Alabama's constitution in 1983. Rather than proposing a constitutional convention or a series of revised amendments to the Constitution of 1901, the Legislature crafted an entirely new constitution into one amendment.¹³⁸ This "super-amendment" passed the Legislature in 1983 and was scheduled to appear on statewide ballots on November 8, 1983. While the traditional Big Mules of Alabama politics largely avoided this reform effort, the seemingly non-controversial measure failed because of efforts by the Alabama Bar Association, led by influential bond lawyers in Birmingham.¹³⁹ Backed by the bond lawyers, State Representative Richard Manley filed suit to halt the statewide referendum on the grounds that an entire constitution could not be passed in the form of a single amendment.¹⁴⁰ The Alabama Supreme Court in *State v. Manley* held that the Legislature acted as a constitutional convention, thereby contravening the Constitution of 1901's prescribed avenues of revision.¹⁴¹

1. *What the 1983 Proposal Changed*

The proposed constitution of 1983 contained a provision calling for the Legislature to provide home rule options for local governments.¹⁴² Referred to as a "mechanism" for home rule "[i]n essence, it says the Legislature must propose an unspecified number of optional plans for

137. THOMAS & STEWART, *supra* note 107, at 48 (citing MONTGOMERY ADVERTISER, Jan. 18, 1979, at 3; MONTGOMERY ADVERTISER, Jan. 30, 1979, at 1, 2; MONTGOMERY ADVERTISER, Mar. 1, 1979, at 17; MONTGOMERY ADVERTISER, Mar. 2, 1979, at 9).

138. COMMITTEE ON CONFERENCE SENATE BILL 58, REPORT OF CONFERENCE COMMITTEE ON SENATE BILL 58, REVISED CONSTITUTION OF 1983; *see also* *State v. Manley*, 441 So. 2d 864 (Ala. 1983).

139. Eddie Lyons, *Special Interests Keeping Low Profile on Drafting a New State Constitution*, HUNTSVILLE TIMES, Sept. 18, 1983, at B3; *but see* Hodges, *Can of Worms*, *supra* note 29, at 61. The special interests "came from everywhere, [State Senator and sponsor of the proposed Constitution of 1979] deGraffenried recalled, citing ALFA, AEA and the Alabama League of Municipalities, which he said lobbied to prevent counties from getting home rule." *Id.*

140. Hodges, *supra* note 99, at 41.

141. Manley, 441 So. 2d at 864 (Ala. 1983).

142. COMMITTEE ON CONFERENCE SENATE BILL 58, *supra* note 138, at § 167; *see also* Phillis Wesley, *League of Women Voters Endorses New Constitution*, MONTGOMERY ADVERTISER, Oct. 19, 1983, at 9.

local government and that residents of each county either can adopt one of the plans or keep their county's current set-up."¹⁴³ Since some counties wanted home rule and others did not, the measure mandated the Legislature to come up with optional plans and left it to the counties whether they wanted to assume more local control.¹⁴⁴

The measure also added a new section to limit amendments to those of uniform statewide application, removing the ability of local governments to amend the constitution.¹⁴⁵ The proposed constitution of 1983 addressed the extraordinary length of the Constitution of 1901 by converting those amendments not incorporated into or inconsistent with the proposed constitution of 1983 into "super statutes" that could only be repealed by a statewide vote.¹⁴⁶ However the proposed constitution of 1983 was largely a non-controversial document that sought to eliminate outdated language and delete provisions declared unconstitutional by the United States Supreme Court.¹⁴⁷ For example, the article on suffrage and elections was changed to delete passages intended to disenfranchise blacks.¹⁴⁸ The 1983 document also changed the Declaration of Rights to provide that women, in addition to men, are equally free and independent.¹⁴⁹

Efforts to clean up the Constitution of 1901 are frequently termed "recompilation."¹⁵⁰ Typical of the "housecleaning" measures in the proposed constitution of 1983 was a section authorizing counties to change employees from the fee system to salaries.¹⁵¹ This modest provision would have eliminated forty-five amendments.¹⁵² Also, the 1983 document would have eliminated the mandatory age seventy retirement requirement for judges.¹⁵³ Finally, the 1983 document did not change the ad valorem tax law.¹⁵⁴

143. *Hot Home-Rule Issue Still Boils With New Charter*, BIRMINGHAM NEWS, Oct. 23 1983, at 7G.

144. *Id.*

145. Bill Stephens, *Article by Article Comparison of Alabama Constitution and New Proposal*, BIRMINGHAM NEWS, Oct. 23, 1983, at 5G.

146. Stephens, *supra* note 125; Ted Bryant, *The New Constitution*, BIRMINGHAM POST-HERALD, Oct. 21, 1983, at C1.

147. Stephens, *supra* note 145, at 5G; Paul Rilling, *Alabama's Proposed Constitution*, ANNISTON STAR, Oct. 2, 1983, at 1D.

148. *Constitutional Revision Lacks Reform*, BIRMINGHAM POST-HERALD, Oct. 21, 1983, at C1.

149. Stephens, *supra* note 125.

150. Spratling, *supra* note 3.

151. COMMITTEE ON CONFERENCE SENATE BILL 58, *supra* note 140; see also Hodges, *supra* note 99, at 4I.

152. Stephens, *supra* note 145, at 5G.

153. Stephens, *supra* note 125.

154. *Id.*

2. *Why the Proposed Constitution of 1983 Failed*

Unlike more controversial reform proposals that would mandate home rule and change the taxation system, the 1983 reform effort was comparatively modest. The proposal was criticized as lacking real reforms.¹⁵⁵ Despite nominal support from Governor Wallace,¹⁵⁶ the 1983 proposal was opposed by the League of Municipalities,¹⁵⁷ the Association of County Commissions, and the Alabama Bar Association.¹⁵⁸ Many city and county governments opposed the 1983 plan because of the uncertainty regarding their ability to issue general obligation warrants without a referendum to fund local projects.¹⁵⁹

The most organized and vociferous opposition to the 1983 plan came from the Alabama State Bar Association led by Birmingham bond attorneys and State Representative Rick Manley of Demopolis, "a perennial opponent of constitutional reform" who also opposed Governor James' efforts in 1979.¹⁶⁰ Bond attorneys contended that the state's bond rating could be lowered if the new constitution were approved.¹⁶¹ Bond ratings determine the rate of interest that must be paid on bonds.¹⁶² The bond lawyers argued that a decreased bond rating would cost taxpayers millions because the state would have to pay more interest on bonds.¹⁶³ These fears apparently arose because of the Constitution of 1901's ambiguity regarding whether bond debt can be prorated when revenues fall short of budget projections during a recession. Proration is a reduction in spending by the state that is mandated by the constitution when tax revenues fall short of spending by the Legislature. "Bond debt in the past has not been prorated when spending for education and other functions of state government have been."¹⁶⁴ The bond lawyers contended

155. *Constitutional Revision Lacks Reform*, BIRMINGHAM POST-HERALD, Oct. 21, 1983, at C1.

156. Ted Bryant, *It's Important When 'Late' Cumulates*, BIRMINGHAM POST-HERALD, Oct. 25, 1983, at A4.

157. Hodges, *Can of Worms*, *supra* note 29, at 61 ("[The special interests] came from everywhere," [State Senator and sponsor of the proposed Constitution of 1979] deGraffenried recalled, citing Alfa, AEA and the Alabama League of Municipalities, which he said lobbied to prevent counties from getting home rule.").

158. Wesley, *supra* note 142.

159. *Constitutional Revision Lacks Reform*, BIRMINGHAM POST-HERALD, Oct. 21, 1983, at C1.

160. *The Issues*, MONTGOMERY ADVERTISER, Sept. 28, 1983, at 6A. Manley also sponsored the lid law, a constitutional amendment passed in 1978 and designed to keep Alabama's property taxes as low as possible.

161. 'May' is the Key Word in Controversy Over Bond Debt, BIRMINGHAM NEWS, Oct. 23, 1983, at 6G; Michele MacDonald, *Constitution Plan 'Outrage' Specialist Says*, BIRMINGHAM NEWS, Oct. 18, 1983, at 1A.

162. Bryant, *New Constitution*, *supra* note 146.

163. 'May' is the Key Word in Controversy Over Bond Debt, BIRMINGHAM NEWS, Oct. 23, 1983, at 6G.

164. *Id.*

that the new constitution might allow the Legislature to reduce payments of the bond debt, thereby causing a lower bond rating.¹⁶⁵

Specifically, the proposed constitution of 1983 would have provided that the Legislature "may exempt the payment of bonded indebtedness of the state."¹⁶⁶ Thus the Legislature may or may not exempt bond debt from proration.¹⁶⁷ "Use of the word 'shall' in place of 'may' would have been better, opponents say, because it would have signaled [to] potential bond holders that the state constitution specifically intended for bond debt to be paid in full, regardless of economic conditions."¹⁶⁸ Another point of contention regarded warrants. Warrants are used by city and county governments to raise money for public projects as state and local governments sell bonds to raise money for public projects. The difference is that warrants do not have to be submitted to a public vote while bond issues do.¹⁶⁹ The Birmingham bond attorneys argued that the proposed constitution of 1983 would prohibit the use of warrants thereby depriving mayors of a mechanism to easily raise money since warrants, state courts have held, can be issued without a referendum.¹⁷⁰ With regard to the provision to eliminate local amendments, the bond attorneys claimed this provision would not actually shorten the length of the bloated document since it did not mandate implementation of home rule.¹⁷¹ Attempts to placate the bond attorneys failed as they could not agree on wording of the section affecting their practice.¹⁷²

*D. 1991 Alabama Commission on Tax and Fiscal Reform—
The Torbert Plan*

Reform of the Constitution of 1901's tax provisions seemed possible when the Business Council of Alabama (BCA), one of the most powerful special interest groups in the state, pushed for revision. However, the establishment of a commission to study and recommend changes to the tax system resulted only after intense special interest wrangling. The BCA, the proponents of the Commission, had to make serious compromises regarding members of the Commission and the date the Commission's finding would be published.¹⁷³ The Commission was composed of four appointees of Governor Hunt, three each by

165. *Id.*

166. *Id.* (internal quotations omitted).

167. *Id.*

168. 'May' is the Key Word in Controversy Over Bond Debt, BIRMINGHAM NEWS, Oct. 23, 1983, at 6G.

169. *Id.*

170. *Id.*

171. MacDonald, *supra* note 161, at 1A.

172. *Why It Lost?*, MONTGOMERY ADVERTISER, Dec. 2, 1983, at 10A.

173. Ford, *supra* note 39, at 6.

Lieutenant Governor Folsom and House Speaker Jimmy Clark, one by the Alabama State Bar Association from its tax section, one by the Alabama Society of Certified Public Accountants from its membership, and one by the Public Affairs Research Council of Alabama that is run by Governor Brewer.¹⁷⁴ Clark selected retired state Supreme Court Justice C.C. "Bo" Torbert as one of his appointees.¹⁷⁵ Governor Hunt acknowledged the political power of the timber industry by appointing Gulf States Paper's Vice-President Charles Allison. Hunt also appointed a farmer and former state senator Rick Manley,¹⁷⁶ the plaintiff who successfully sued to halt the statewide referendum on the DeGraffenried Reform Proposal.¹⁷⁷

The Torbert Commission decided to make its "decisions and recommendations without regard to political considerations, that is, the ease or the difficulty of enacting into law its recommendations."¹⁷⁸ The Commission presented its proposal to the Legislature in January 1991. By July 29, 1991, the recommendations were converted into legislation.¹⁷⁹

1. *What the Torbert Plan Changed*

The theme of the Commission on Tax and Fiscal Reform Plan (Torbert Commission) consisted of "expanding the tax base and . . . getting rid of exemptions wherever possible."¹⁸⁰ Finding that the slight progressivity of Alabama's income tax did not offset the regressivity of the sales and excise taxes,¹⁸¹ the Torbert Commission recommended that the income tax conform "as closely as possible to the federal income tax, with federal adjusted gross income as a beginning point, to broaden the base and lower the rate."¹⁸² The Commission contended its simpler income tax would make people more willing to pay taxes, reduce compliance and administrative costs, and remove 115,000 low-income families from the tax rolls by conforming to the federal model.¹⁸³ Finally, the Torbert Commission cited increased progressivity as an attribute of its income tax proposal.¹⁸⁴

174. *Id.* at 11.

175. Bessie Ford, *Revenue No Man's Land*, BUS. ALA. MONTHLY, July 1990, at 6, 10.

176. *Id.* at 10-11.

177. See discussion *infra* Part II.C.

178. C.C. Torbert Jr., *Introduction: The Alabama Commission on Tax and Fiscal Policy Reform*, 43 ALA. L. REV. 533, 536 (1992).

179. *Id.* at 536.

180. Chris McFadyen, *Alabama Tax Reform: A Post-Mortem*, BUS. ALA. MONTHLY, Apr. 1993, at 12.

181. TAX COMMISSION REPORT, *supra* note 76, at 6.

182. Torbert, *supra* note 178, at 537.

183. TAX COMMISSION REPORT, *supra* note 76, at 7.

184. *Id.*

Calling sales taxes the cornerstone of the Alabama tax system, the Torbert Commission recommended an overhaul of the "unnecessarily complex" and regressive sales tax system.¹⁸⁵ Chief among its transaction tax (sales, use, lodging and lease) reform measures was to tax repair, personal care, construction, computer programming, and professional services.¹⁸⁶ The Commission argued that a services tax would broaden the tax base and permit an overall reduction in the state four percent sales tax levy.¹⁸⁷

The Torbert Commission also addressed the contentious issue of property taxation by recommending the abolition of the three-tiered classification structure, which taxes utilities, commercial property, and homes, timberland, and farmland at different rates.¹⁸⁸ The Commission argued that the classification system narrowed the tax base because homes, timberland, and farmland make up sixty-six percent of the value in Alabama, but are taxed at the lowest rate.¹⁸⁹ The Commission, arguing that land should be assessed at one hundred percent of its value, indicated that the state millage tax could be rolled back from 6.5 mills to 1.1 mills.¹⁹⁰ The Commission raised the homestead exemption to \$40,000 from \$4,000, acknowledging the social value in encouraging home ownership.¹⁹¹ Rather than completely discarding the "current use" provisions in amendment 373, which allow property to be assessed according to the value of its current use rather than actual value, the Commission recommended a "new system of 'actual use' valuation that would be available to homes, farms, and timberland. In each case the actual use value would be determined not by a formula, but by looking at market sales of similar property used for the same purpose"¹⁹²

The Torbert Commission recommended a "property tax on intangible property (stocks, bonds, and bank accounts) in excess of a generous exemption."¹⁹³ Additionally, the plan would have modeled Alabama's corporate income tax on the federal corporate income tax.¹⁹⁴

In addition to its recommendations to change Alabama's constitutionally imposed taxation methods, the Torbert Commission decried the earmarking embedded in Alabama's fiscal policy.¹⁹⁵ The Commission found that earmarking "unduly restricts the legislature in deciding how

185. *Id.* at 8.

186. *Id.* at 9.

187. *Id.*

188. TAX COMMISSION REPORT, *supra* note 76, at 11.

189. *Id.* at 10.

190. *Id.* at 11.

191. *Id.*

192. *Id.*

193. Torbert, *supra* note 178, at 537.

194. *Id.* at 538.

195. TAX COMMISSION REPORT, *supra* note 76, at 16.

to meet the many needs of the state" and distorts the budget process as "agencies that are not traditionally thought of as being concerned with education try to characterize part of their activity as educational in order to participate in the Special Educational Trust Fund."¹⁹⁶ With regard to earmarking, the Commission recommended three interdependent actions:

- [1] amend the Alabama constitution to provide that education is an essential function of state government;
- [2] repeal all earmarking; and,
- [3] provide that all appropriations for all state functions will be equally subject to proration. This will assure that all functions of state government will share in any revenues that are available while allowing the Legislature to change appropriations to meet identifiable needs.¹⁹⁷

The Torbert Commission insisted that earmarking must be addressed within the tax reform context because

different taxes are earmarked in different ways. For example, the Commission recommends an increase in the corporate income tax and a corresponding decrease in the corporate franchise tax. If the taxes remain earmarked as they now are, that change would result in an increase of revenues for education, to which all the corporate income tax revenues are earmarked, and a decrease in revenues for the general fund, the public welfare trust fund, and the counties.¹⁹⁸

The Torbert plan, in its original form, proposed unearmarking many of Alabama's taxes, including the ninety-six percent of revenue destined for teachers' salaries.¹⁹⁹ While the Torbert proposal recommended unearmarking all but eight of Alabama's taxes, the legislative process returned many of the earmarking provisions to the reform package.²⁰⁰

The Torbert Commission also addressed local government issues. In the interest of simplicity, the plan called for restrictions on the sales tax authority of local governments and for greater flexibility in adopting millage rates.²⁰¹ The Commission abolished the requirement that the Legislature approve any proposed local property millage increase, but

196. *Id.*

197. *Id.* at 16-17.

198. *Id.* at 17.

199. McFadyen, *supra* note 180, at 13.

200. *See id.*

201. TAX COMMISSION REPORT, *supra* note 76, at 18.

retained a local referendum on the issue once the local governing body approved a millage increase.²⁰² Finally, the Torbert Commission recommended changes in industrial development incentives.²⁰³

2. *Why the Torbert Plan Failed*

The Business Council of Alabama led the campaign to lobby the Legislature for creation of the Alabama Commission on Tax and Fiscal Reform.²⁰⁴ However, while the so-called "pin-stripe" sector of the business community supported tax reform, the farmers embodied in ALFA and the Alabama forestry industry opposed creation of the Commission for fear that property taxes, although the lowest in the nation,²⁰⁵ might be raised.²⁰⁶ This split on property taxes between the BCA and the farmers is perhaps explained best by ALFA's former Executive Director, John H. Dorrill. According to Dorrill, Alabama Power and the BCA support property taxes because it can be passed on to the consumer through higher rates and prices, while the "buck stops" with the farmer and the homeowner who cannot pass on the increased expense.²⁰⁷ Additionally, the foresters and farmers worried that tax reform could mean the elimination of the Constitution of 1901's generous sales tax exemptions.²⁰⁸

E. The Tax Reform Task Force—The Carruthers Plan

After the Torbert plan failed, Governor Hunt appointed a second group to push for the reform of Alabama's tax system.²⁰⁹ The Tax Reform Task Force, also known as the Carruthers Committee, named after its chairman, a Birmingham tax attorney, "had a broad representation from business, education and government, and its recommendation, while watering down the equalizing zeal of Torbert . . . gain[ed] the support of a broad coalition."²¹⁰

While the Torbert Commission drafted its plan without reference to

202. *Id.* at 18-19.

203. *Id.* at 19-20.

204. See Ford, *supra* note 39, at 6.

205. *A Veteran's Perspective*, BUS. ALA. MONTHLY, May 1990, at 38 (interview with former Governor Albert Brewer).

206. Ford, *supra* note 39, at 6; see also McFadyen, *supra* note 180, at 12 ("[The Torbert Commission's proposals] raised immediate alarms among a host of special interests, not the least of which were farm timber interests opposed to Torbert's plan to equalize ad valorem assessments.").

207. John H. Dorrill, *Should Alabama's Property Tax be Repealed?*, BUS. ALA. MONTHLY, May 1991, at 38.

208. See Ford, *supra* note 39, at 6.

209. McFadyen, *supra* note 180, at 12.

210. *Id.*

political feasibility, the Carruthers Committee based its recommendation, in part, on polling that indicated the Alabama public would not accept tax increases without assurances of "increased accountability and performance in state government and in education at every level."²¹¹ Thus, the Carruthers Committee coupled its proposals for increased revenue with a host of measures designed to increase governmental and educational accountability.²¹²

Most of the bills submitted by the Carruthers Committee passed the House and were amended before passing the Senate.²¹³ Despite some legislative progress, most of the Carruthers Plan died in conference committee.²¹⁴ After a brief attempt in the House to resuscitate the package, the threat of the school equity funding suit provided "a welcomed excuse for legislators, eager to duck" the tax reform issue.²¹⁵ The legislators contended that tax reform would be fruitless if the school equity funding suit mandated changes in Alabama's system for funding public education.²¹⁶

1. *What the Carruthers Plan Changed*

The Carruthers Committee, like the Torbert Commission, recommended substantive changes to Alabama's tax system, which was embedded in the Constitution of 1901. The Carruthers Plan would have raised \$119 million in revenue through a 4.6% rate for incomes between \$0 and \$35,000 and a 5% rate for earners in excess of \$35,000 federal taxable income.²¹⁷ Thus, the deduction of the federal income tax contained in amendment 225 would have been repealed.²¹⁸ Purportedly, the Carruthers Plan also would have garnered an additional \$143 million from the corporate income tax through a 6.5% rate and disallowance of the federal income tax deduction embodied in amendment 212

211. REPORT OF THE TAX REFORM TASK FORCE, FINAL REPORT 1 (Feb. 4, 1992) (on file at the Alabama Department of Archives and History, Montgomery, Ala.) [hereinafter FINAL REPORT].

212. See, e.g., *id.* at 3-4. The Report stated that Alabama needed to:

Adopt a performance based budgeting process . . . Develop a strategic planning cycle . . . Develop procedure to limit "pork projects." All appropriations must be specifically identified in budget process by purpose . . . Consensus reached on expanding and funding the oversight authority of the standards on excellence commission . . . Consensus reached on testing of teacher candidate graduates as per the Education Improvement Act of 1991 . . . Consensus reached on removing tenure for principal's position . . .

Id.

213. McFadyen, *supra* note 180, at 13.

214. See *id.*

215. *Id.*

216. *Id.*

217. FINAL REPORT, *supra* note 211, at 10.

218. *Id.* at 18.

of the Constitution of 1901.²¹⁹ With regard to transaction taxes (sales, use, leasing, and transient occupancy taxes), the Carruthers Committee would have raised an additional \$97 million by taxing the installation and repair of tangible personal property, abolishing the ad hoc list of non-profit organizations that are exempt on purchases, and capping rates of local sales taxes at levels as of January 1, 1992.²²⁰

The Carruthers Plan also proposed dramatic changes to the property tax in amendment 373 of the Constitution of 1901. "As a condition for receiving any funds whatsoever from the state minimum program, each school district would be required to impose 20 mills of property tax (not 'or equivalent') A further increase to 30 mills or equivalent will be required by 2000."²²¹ To increase revenue by \$80 million, the state ad valorem tax would be raised by 7.5 mills, five of which would be dedicated to the settlement of the school equity law suit.²²² The Carruthers Plan would have retained the requirement of public approval for ad valorem taxation but eliminated the provision requiring legislative approval.²²³ The three-tiered classification system of amendment 373 would have been revised to tax all business property except agriculture and timberland at 20%, automobiles at 15%, and homes, including timber and farms at 10%.²²⁴ The "current use" provisions were largely retained.²²⁵ The Carruthers Committee also recommended changing Amendment 61 of the Constitution of 1901 to enable the income tax revenues to be spent on education, rather than merely for teachers' salaries.²²⁶

2. *Why the Carruthers Plan Failed*

Because of anti-tax sentiment, resentment at their exclusion from the deliberations of the Carruthers Committee, and the usual strong special-interest group opposition, the Legislature failed to enact most of the tax increases and reforms contained in the Carruthers Plan.

Voters' anti-tax sentiments hung like a stormy cloud over the recent special session that Hunt called to rescue the crippled state General Fund. Lawmakers made it clear they were not going to commit political suicide by raising consumer taxes or alienate special interests who will finance their 1994 re-election

219. *Id.* at 12.

220. *Id.* at 13.

221. *Id.* at 15.

222. FINAL REPORT, *supra* note 211, at 15.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 18.

campaigns [Moreover,] [k]ey legislators whined during the regular session that Hunt's commission handed them a package to stamp without giving them the benefit of input in the early stages.²²⁷

However, many of the Carruthers Plan's recommendations were changed during the legislative process. For example, Alabama Power's President Elmer Harris convinced lawmakers that the percentage rate for a utility's ad valorem assessment should be reduced from 30% to 20%, to bring their rate even with the rate paid by other corporations.²²⁸ Perhaps inspired by Alabama Power's success, rental property owners, led by Mobile developer Mayer Mitchell, asked that their rate be reduced from 20% to 10%, to bring their rate even with owner-occupied homes.²²⁹ In an amazing acknowledgement of the power of special-interest groups in Alabama, House of Representatives Speaker Jimmy Clark agreed to the reduction for Alabama Power and the rental property-owners on the condition that they "spend big bucks to convince a majority of voters to support the tax changes."²³⁰ "[Alabama Power and the rental property owners are] going to have to sell it and they're the only ones with the credibility and the money."²³¹ However, in the end, the so-called "Big Mules" of Alabama politics, Alabama Power, ALFA, and the BCA, killed the tax reform bills in the Senate.²³²

The Senate killed the tax package in May 1992 just three days after a handful of business leaders, lobbyists, and lawmakers gathered on the eighth floor of the State House on a Friday evening to write a final version filled with tax breaks for the powerful "It became a tax-relief package for powerful special interests . . . who have the ability to influence, like landlords, utilities, big corporations, banks, [and] insurance."²³³

Thus, the Carruthers Committee's attempt to pass meaningful tax reform legislation met the same fate as previous attempts to alter Alabama's Constitution of 1901.

227. Bessie Ford, *Nothing Meaningful*, BUS. ALA. MONTHLY, Nov. 1992, at 7.

228. See ALABAMA POLITICAL ALMANAC 343 (James Glen Stovall et al. eds., 2d ed. 1997).

229. *Id.*

230. *Id.* at 344.

231. *Id.*

232. See *id.*

233. ALABAMA POLITICAL ALMANAC 344 (James Glen Stovall et al. eds., 2d ed. 1997).