

REACTION AND REFORM: TRANSFORMING THE JUDICIARY UNDER ALABAMA'S CONSTITUTION, 1901-1975

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During the twentieth century Alabama's Constitution of 1901 proved resistant to change. At the turn of the century, the constitution emerged from a predominately small-town, rural society and a political order controlled by a Democratic Party committed to white supremacy. Over the course of the seven decades that followed, amid the Great Depression, World War II, and the Civil Rights struggle, leaders of the state's social and political order appealed to the legitimacy the constitution represented to justify the status quo.¹ Ultimately, with the support of the United States Supreme Court and the federal judiciary, the national government, and Northern public opinion, African-Americans overcame the Alabama Constitution's sanction of Jim Crow.² This was a case of forced change. Alabamians revealed, however, a greater facility for adapting the constitution to changing times in the campaign to reform the state's judicial system which lawyers organized under the

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** Assistant Law Librarian, Bounds Law Library. Thanks for encouragement and support to Dean Kenneth C. Randall, to Professor Timothy L. Coggins of The University of Richmond School of Law, and to Timothy Alan Lewis, Director, Alabama Supreme Court and State Law Library. Many thanks also to Assistant Law Librarian Penny Calhoun Gibson and Archivist David I. Durham of the Bounds Law Library and to Professor Timothy Dixon of Nova Southeastern University.

1. See generally DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995); WILLIAM WARREN ROGERS ET AL., *ALABAMA: THE HISTORY OF A DEEP SOUTH STATE* (1994).

2. See generally JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS* (1993); MICHAEL R. BELKNAP, *FEDERAL LAW AND SOUTHERN ORDER: RACIAL VIOLENCE AND CONSTITUTIONAL CONFLICT IN THE POST-BROWN SOUTH* (1987); TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954-63* (1988).

leadership of Chief Justice Howell Heflin from 1970 to 1975. Although judicial reform did not directly raise issues of racial injustice identified with civil rights, it nonetheless presented a similar threat to the established political power structure and social order.³ In the mid-1950s, an effort to reform Alabama's judiciary failed primarily because it was associated with federal authority and its defense of equal justice.⁴ Heflin and his fellow attorneys avoided the same fate largely because they shaped their campaign to the newer demands of the market for legal services, effectively undercutting the political and social inertia the constitution had reinforced.⁵

Article VI of the 1901 Constitution left primary control of the judicial branch to the Legislature.⁶ Over the first half of the twentieth century the Legislature authorized a proliferation of local courts. Legislators also granted the supreme court conditional authority to establish rules of procedure throughout the state's court system, but the exercise of this power remained contingent on legislative approval, encouraging the supreme court's inaction.⁷ The constitution's sanction of legislative control of judicial organization and procedure perpetuated a decentralized judicial system dominated by the small town society and the Democrats' one party rule which characterized Alabama until the 1950s.⁸ However, during the following decade, despite persistent poverty and mounting civil rights conflict, Alabama's population was for the first time predominately urban and more than ever connected to the national consumer economy. The growth of urban population altered the demand for legal services, accentuating the divergence between the small town Bar of general practitioners and urban firms constituted largely of corporate defense attorneys and plaintiff's lawyers, who were themselves divided on the basis of the clients each represented. As a result, on both the supply and demand side of the market for legal services, the delays, inefficiencies, and susceptibility to favoritism the decentralized judicial

3. G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 69-123 (1988).

4. *But see* Chief Justice Howell T. Heflin, *Rule-Making Power*, 34 ALA. LAW. 263, 264 (1973) (stating that "the inherent problems of legislative procedure thwarted the adoption of modern comprehensive civil rules.").

5. *See* Charles D. Cole, *Judicial Reform In Alabama: A Survey*, 4 CUMB. L. REV. 41 (1973); Robert Martin, *Alabama's Courts—Six Years of Change*, 38 ALA. LAW. 8 (1977); *see also supra* notes 1, 3; *see also* discussion *infra* Parts I, II.

6. ALA. CONST. art. VI, § 139 (repealed 1973); *see also* A GUIDE TO ALABAMA COURT PROCEDURES 1 (1996).

7. *See* ROBERT J. FRYE, *THE ALABAMA SUPREME COURT: AN INSTITUTIONAL VIEW* 86 (1969); Richard H. Gill, *The Proposed Alabama Appellate Rules: An Overview*, 26 ALA. L. REV. 639 (1974); Jacob A. Walker Jr., *The Proposed New Rules of Appellate Procedure*, 35 ALA. LAW. 144 (1974).

8. *See* sources cited *supra* notes 1, 3.

system fostered were increasingly the subject of public criticism.⁹

The defeat of judicial reform during the mid-1950s evidenced the established order's grip on the judicial system. Nevertheless, changes in Alabama's professional legal culture and the urbanization of the state's economy encouraged Heflin and his fellow reformers to believe that a campaign for judicial reform through constitutional revision could achieve success.¹⁰ Unlike the fundamental issues of racial justice motivating Alabama's civil rights struggle, judicial reform involved technical matters of procedure and process; yet the underlying issues of changing the center of power and accountability were similar.¹¹ Even so, Heflin and the lawyers were engaged in a campaign of constitutional revision and described themselves as reformers; as such, they were part of a reform tradition that law professionals associated with the Progressive movement that developed early in the twentieth century.¹² By the 1960s and 1970s, these reforms had acquired new focus under the leadership of the American Judicature Society and a federal agency, the Law Enforcement Assistance Administration (LEAA).¹³ Heflin brought these resources to bear in support of the Alabama lawyers' reform campaign.¹⁴ A leading study gives Heflin much of the credit for the success of this effort; Heflin himself, however, ascribed the reform campaign's ultimate triumph to the ability of the state's lawyers to at last attain control of their profession from the old order.¹⁵

This Article examines the origins and triumph of the movement to amend the constitution's judicial article. The argument is that reform was the expression of activism by the Alabama legal profession. Although changes in Alabama's social and economic order were a precondition for the reformers' success, the inertia inherent in the state's politics could only be overcome through an effective campaign to mobilize support among the general public and legal professionals alike. Even so, individuals made a difference. Part I locates the twentieth century development of Alabama's legal profession in the slowly changing

9. See discussion *infra* Parts I, II.

10. See generally sources cited *supra* notes 3, 5, 7.

11. See generally sources cited *supra* notes 2, 3, 5, 7.

12. See sources cited *supra* notes 5, 7; see also MICHAL R. BELKNAP, *TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY* 1-32 (1992); Thomas W. Scroggins, *Judicial Reform in Alabama: A Historical Perspective Twenty Five Years Later* 12 (1997) (unpublished student paper, The University of Alabama School of Law) (on file with the Alabama Law Review) (addressing the role of the Law Enforcement Assistance Administration (LEAA) in Alabama's judicial reform effort).

13. BELKNAP, *supra* note 12, at 171-266.

14. *Id.* at 220, 247, 267-68; see Scroggins, *supra* note 12, at 2, 5-11.

15. Compare Chief Justice Howell Heflin, Acceptance Address to American Judges' Association (Nov. 20, 1975), reprinted in Scroggins, *supra* note 12, at 2 (sharing the award with state court officials "without [whose] efforts it would not have come about."), with TARR, *supra* note 3, at 90, 93-97.

demographic and cultural trends, including racial struggle, which constituted a market for legal services under the Constitution of 1901. The social and political dynamics shaping the proliferation of local courts and the consequences of the supreme court's failure to exercise leadership in its rule-making authority, which the civil rights conflict dramatized, are the themes of Part II. Part III considers how the defeat of the reform measures in the mid-1950s influenced the Alabama Bar's and Howell Heflin's efforts to initiate a new reform movement, culminating in Heflin's election as Chief Justice in 1970 on a platform urging the transformation of the constitution's judicial provisions. Part IV describes and analyzes the reasons for the success of Heflin's two-phase reform campaign, which aimed first at the Legislature and then at the process of constitutional revision itself. A conclusion follows.

I. THE TWENTIETH CENTURY SOCIAL AND POLITICAL CONTEXT OF THE MARKET FOR LEGAL SERVICES

Throughout the century, basic demographic factors were central to the gradually changing demand for legal services. In the early and middle decades of the twentieth century, Alabama's demographic changes were steady if unspectacular. The state's population increased from 2.35 million in 1920 to 3.27 million in 1960.¹⁶ Meanwhile the black population gradually declined, from nineteenth century levels of nearly 50% to about 30% in 1960.¹⁷ Black citizens were still a majority in several Black Belt counties, but black migration to Birmingham, Mobile, Montgomery, and various Northern cities was ongoing throughout the period.¹⁸ Such numbers parallel a general movement of Alabamians to urban areas. Though only 28% of the state's citizens lived in towns or cities in 1930, by 1960 Alabama was no longer a predominantly rural state.¹⁹

Steel-making remained Alabama's most visible industrial enterprise during these years, and Birmingham remained a great steel-making center.²⁰ With the exception of the aerospace development centered in Huntsville in the 1950s and 1960s, most of the state's industries—iron and steel manufacturing, mineral extraction, lumbering, and textiles—were continuations of "New South" enterprises.²¹ However, agriculture

16. See ROGERS, *supra* note 1, at 376-77, 465-66, 477, 545, 593.

17. *Id.*

18. DONALD B. DODD, HISTORICAL ATLAS OF ALABAMA 119, 124, 135-37 (1974); see THE ENCYCLOPEDIA OF ALABAMA 135-36 (1998).

19. See DODD, *supra* note 18, at 119, 124, 135-37; ROGERS, *supra* note 1, at 376-77, 465-66, 477, 545, 593; ENCYCLOPEDIA OF ALABAMA, *supra* note 18, at 135-36.

20. DODD, *supra* note 18, at 99-121; see ROGERS, *supra* note 1, at 443-47, 581-83.

21. DODD, *supra* note 18, at 99-121; see ROGERS, *supra* note 1, at 443-47, 581-83.

was more diversified over the course of the twentieth century. Faced with the onset of the boll weevil, farmers in the southeastern Wiregrass turned from cotton planting to peanut production.²² Farmers in the Black Belt, the Tennessee Valley and North Alabama continued to grow cotton while many landowners experimented successfully with cattle or chicken raising operations.²³

Unfortunately such enterprises did not bring about general prosperity. Alabama's rural population continued to include large numbers of tenant farmers and sharecroppers, black and white, many of whom were deeply in debt to landlords.²⁴ Many industrial workers earned the low wages typical of extractive industries.²⁵ The Great Depression destabilized the lives of poor Alabamians and forced thousands to seek relief through federal programs.²⁶ Even the boom times of World War II and the military buildup of the Cold War could not reverse the state's persistent poverty.²⁷ A demographic historian has noted that, as late as the 1960s, Alabama "ranked 46th in housing, 47th in per capita income, and 45th in education" among the states.²⁸

In dealing with the cultural demography of twentieth century Alabama, we are compelled to deal with questions of race and segregation—matters which seemed inseparable to white citizens of the time. The physical separation of the races had become an issue of politics, law, and religion immediately after the Civil War.²⁹ In the hundred years which followed, a web of statutes, state and federal court decisions, municipal ordinances and customs had affected near-total segregation in schools, churches, public accommodations such as water fountains and restrooms, transportation facilities, places of residence, and places of work.³⁰ Similar restrictions were applied, on a *de facto* basis, to residents of all-white "mill villages" who lived, worked, worshiped, shopped, and went to school in facilities controlled by owners of the local mill.³¹

In terms of political demography, blacks and lower-class whites were not so much segregated as quashed. The state's 1901 Constitution was the product of an alliance between Black Belt landowners and ur-

22. DODD, *supra* note 18, at 99-121; see ROGERS, *supra* note 1, at 443-47, 581-83.

23. DODD, *supra* note 18, at 99-121; see ROGERS, *supra* note 1, at 443-47, 581-83.

24. See ROGERS, *supra* note 1, at 453-56, 465-83, 487-93, 566-88.

25. See *id.* at 465-93.

26. See *id.*

27. See *id.* at 566-88.

28. DODD, *supra* note 18, at 121.

29. PETER KOLCHIN, *FIRST FREEDOM: THE RESPONSES OF ALABAMA'S BLACKS TO EMANCIPATION AND RECONSTRUCTION* 107, 108-27, 143-45, 170-71 (1972).

30. See ROGERS, *supra* note 1, at 255-57, 260-64, 274, 547-48; SHELDON HACKNEY, *POPULISM TO PROGRESSIVISM IN ALABAMA* 43, 44-45, 181-82 (1969).

31. WAYNE FLYNT, *POOR BUT PROUD: ALABAMA'S POOR WHITES* 98-107 (1989).

ban business interests. The constitution's voter registration mechanisms disenfranchised nearly all black voters and significant numbers (eventually, a third or more) of white voters.³² The Democratic Party was supreme in Alabama at the cost of making "white supremacy" its fundamental message. Even the most brilliant and well-intentioned white Alabamians found it difficult to distance themselves from provincial orthodoxy. For example, Hugo Black's early involvement with the Ku Klux Klan shows how reformism and racism were intertwined.³³ To this world of political and cultural constraints, the 1954 *Brown* decision³⁴ and subsequent activism and legislation posed a profound threat. Of course, *Brown* also brought the threat of change into the lives of the lawmakers, lawyers, and judges in whose interest it was to maintain the old regime.

Demographic changes among legal professionals in Alabama mirrored the slow-moving patterns of the general population. A State Bar Association survey of 1922 found just over 1,300 lawyers in practice, whereas the Martindale-Hubbell directories for 1932 and 1952 contain the names of over 1,500 and 2,000 Alabama lawyers, respectively.³⁵ University of Alabama law professor John C. Payne conducted a statistical analysis of the 1965 Martindale-Hubbell and found more than 2,700 entries for Alabama.³⁶ Yet he concluded that only 1,950 individuals made up "the full-time practicing profession," a distinct, but not dramatic increase over the size of the Bar forty years earlier.³⁷ The geographical distribution of Alabama lawyers likewise remained steady. In 1922, more than 29% of the state's attorneys lived in Jefferson County, which is home to Birmingham.³⁸ More than four decades later, Payne's statistical study showed that 851 legal professionals, 31.3% of

32. HACKNEY, *supra* note 30, at 147-79; MALCOLM COOK MCMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 352-55 (1955); ROGERS, *supra* note 1, at 343-57.

33. See ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 59-121 (1994). Of course, mention of law and racial segregation conjures up images of the extra-legal forms of racial control used by white Southerners and all too often winked at by law enforcement officials, notably lynching. See generally Glenn Feldman, *Lynching in Alabama 1889-1921*, 48 ALA. REV. 114 (1995) (giving narrative and statistical information about lynching in Alabama from 1889-1921).

34. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

35. *Proceedings of the Forty-Fifth Annual Meeting of the Alabama State Bar Association*, 45 ALA. ST. B. ASS'N 110-27 (1922) [hereinafter *45th Proceedings*]; 1 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 1, 1-19 (64th ed. 1932) [hereinafter MARTINDALE-HUBBELL 1932]; 1 MARTINDALE-HUBBELL LAW DIRECTORY, pt. 1, 1-27 (84th ed. 1952) [hereinafter MARTINDALE-HUBBELL 1952].

36. John C. Payne, *A Statistical Analysis of the Alabama Bar*, 27 ALA. LAW. 32, 33 (1966).

37. *Id.* at 37-38; see TONY FREYER & TIMOTHY DIXON, DEMOCRACY AND JUDICIAL INDEPENDENCE: A HISTORY OF THE FEDERAL COURTS OF ALABAMA, 1820-1994, at 188 (1995) (listing Alabama State Bar membership data).

38. *45th Proceedings*, *supra* note 35, at 117-21.

the Alabama total, were based in Jefferson County.³⁹ The Bar in Alabama's second and third largest cities (Mobile and Montgomery, respectively) grew at a more rapid rate, from a combined total of more than 13% of state lawyers in 1922, to more than 23% in 1965.⁴⁰ Although the movement toward a predominantly urban Bar was a major feature of the twentieth century, the numbers and influence of more rural practitioners remained strong. For example, in his 1965 study, Payne commented on the "disproportionate concentration" (12%) of practitioners in "extremely small towns."⁴¹

If small-town and rural practitioners remained strong components of the Bar, old-fashioned modes of practice likewise prevailed well into the twentieth century. Solo practitioners consistently made up the largest number of lawyers in Alabama.⁴² As late as the mid-1960s, John Payne reported that, while 904 lawyers were practicing as partners in firms, 924 were "solos."⁴³ Lawyering in such an atmosphere was far removed from practice in the larger cities of the East and Midwest—where legal economics had encouraged the creation of multi-lawyer firms, in which managing bodies of partners were served by dozens of associate lawyers in an atmosphere of high technology and specialization.⁴⁴ Even in the cities, such innovations were slow to take hold in Alabama.

Indeed, the largest Alabama firms listed in the 1932 *Martindale-Hubbell* were Bradley, Baldwin, All & White (ten partners and five associates) and London, Yancey & Brower (seven partners and three associates).⁴⁵ Similarly, the largest firms listed in 1952 were White, Bradley, Arant, All & Rose (nine partners and eight associates), Martin, Turner, Blakey & Bouldin (six partners and eight associates), and Lange, Simpson, Robinson & Somerville (nine partners and three associates).⁴⁶ These firms were all based in Birmingham, and displayed some big-city traits beyond that of their size and general corporate

39. Payne, *supra* note 36, at 35 (indicating that in 1965, Jefferson County contained 851 of 2,716 Alabama lawyers). The 1922 count indicated 381 of 1,305 lawyers were in Jefferson County. *45th Proceedings*, *supra* note 35, at 110-27.

40. *45th Proceedings*, *supra* note 35, at 122-24 (stating that in 1922 Mobile and Montgomery County each had 86 lawyers out of a total of 1,305 in the state); Payne, *supra* note 36, at 33, 35 (stating that in 1965 Mobile County was home to 319 lawyers and Montgomery County was home to 311 lawyers out of 2,716 in the state).

41. Payne, *supra* note 36, at 36-37. He found that 52% of legal professionals were based in the three large cities, 21% lived in "medium" cities of 20,000 to 99,999 people, 15% were located in cities of 5,000 to 19,999 people, and 12% in towns of 4,999 or less. *Id.* at 36.

42. *See id.* at 39-40.

43. *Id.* at 39. Payne also noted that 122 lawyers were practicing as associates in firms or with solo lawyers. *Id.*

44. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 1-19 (1991).

45. MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 1, at 3, 5.

46. MARTINDALE-HUBBELL 1952, *supra* note 35, pt. 1, at 6-7, 9.

practice.⁴⁷ London, Yancey & Brower, for example, specialized in representing insurance companies, while White, Bradley, Arant, All & Rose tended to represent heavy industry.⁴⁸ Lange, Simpson, Robinson & Somerville had a branch office in Montgomery.⁴⁹ These firms, however, were not typical. Most Alabama firms had only two or three partners and were geared towards handling the problems of farmers, storekeepers, and small-scale industrialists.⁵⁰

Given the racial history of post-Civil War Alabama, it should not be surprising that the membership of these firms was exclusively white.⁵¹ As late as 1932, *Martindale-Hubbell* listed only two black lawyers in Alabama, both practicing in Birmingham.⁵² Yet, after the 1937 admission of Arthur Davis Shores, who made a specialty of civil rights suits, the number of black practitioners began to grow.⁵³ By the 1950s, outspoken black attorneys were practicing in several cities including: Shores in Birmingham, Fred Gray in Montgomery, and J.L. Chestnut, Jr. in Selma.⁵⁴ Chestnut would eventually put together the largest black law firm in Alabama.⁵⁵ Even so, a study published in 1974 concluded that there were only forty black lawyers practicing in Alabama, less than 1.7% of the Bar.⁵⁶

The number of women admitted to the Bar in Alabama likewise grew slowly from October 1908 when Maud McLure Kelly began her career as the state's first woman advocate.⁵⁷ At that time, most Southern states did not allow women to practice; Alabama's law had been altered in 1907 to extend the diploma privilege to women enrolled at The University of Alabama School of Law.⁵⁸ Like their black counter-

47. See MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 1, at 3, 5; see also MARTINDALE-HUBBELL 1952, *supra* note 35, pt. 1, at 21.

48. See MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 2, at 3, 5.

49. See MARTINDALE-HUBBELL 1952, *supra* note 35, pt. 1, at 6, 7, 9.

50. *Id.* at 1-27.

51. See *id.*

52. MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 1, at 1-19.

53. See J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944, at 274-75 (1993).

54. MARTINDALE-HUBBELL 1952, *supra* note 35, pt. 1, at 8; JOHN A. SALMOND, THE CONSCIENCE OF A LAWYER: CLIFFORD J. DURR AND AMERICAN CIVIL LIBERTIES, 1899-1975, at 171, 172 (1990); J.L. CHESTNUT, JR. & JULIA CASS, BLACK IN SELMA: THE UNCOMMON LIFE OF J.L. CHESTNUT, JR. 81-143 (1990).

55. CHESTNUT & CASS, *supra* note 54, at 398-99.

56. Albert E. Drake, Racial Composition of Attorneys and Law Program for the State of Alabama 3 (June 27, 1974) (unpublished study, The University of Alabama) (on file at the Bounds Law Library, The University of Alabama School of Law). Note that Drake gives a figure of 1.06%, a miscalculation. See also Note, *Negro Members of the Alabama Bar*, 21 ALA. L. REV. 306 (1969).

57. CYNTHIA NEWMAN, MAUD MCLURE KELLY: ALABAMA'S FIRST WOMAN LAWYER 1 (1984).

58. *Id.* at 8; Act of Mar. 2, 1907, no. 201, 1907 Ala. Acts 201; see JOHN MCDUFFIE, TO INQUIRING FRIENDS IF ANY: AUTOBIOGRAPHY OF JOHN MCDUFFIE 137-38 (Mary Margaret Flock

parts, women practitioners congregated initially in cities. Of the twelve female attorneys identified in the 1932 *Martindale-Hubbell*, eight practiced in Birmingham and two in Mobile.⁵⁹

Whatever obstacles they faced, it is apparent that women lawyers gradually spread out around the state. In 1952, of thirty-three women listed in *Martindale-Hubbell*, thirteen were practicing in such small towns as Alexander City, Enterprise, Hurtsboro, and Union Springs.⁶⁰ More than a decade later, the Payne study identified fifty women, thirty of whom met the standard of being "full-time practitioners."⁶¹ Half of the latter were based in Birmingham, Montgomery or Mobile and half in smaller communities, including seven in towns with populations of 5,000 or less.⁶² Statistics show that women made up 1.8% of the Bar in 1965, a proportion below the national figure of 2.3%, but approximately equal to that of black lawyers.⁶³

With regard to their vital statistics, mid-twentieth century Alabama lawyers were a middle-aged group.⁶⁴ More than 43% of Birmingham lawyers in 1932 were in their thirties and forties; 17% were in their fifties.⁶⁵ By 1965, the 30 to 49 age group made up more than 53% of the state Bar, while lawyers aged 50 to 59 were another 20% of the total.⁶⁶ Given these trends, it is interesting that inexperienced attorneys were relatively numerous.⁶⁷ In 1932, more than 27% of the Birmingham Bar had practiced less than ten years; statewide in 1965, persons with less than ten years' experience constituted 23% of the Bar.⁶⁸ However, a youthful career did not necessarily mean a youthful lawyer. The two World Wars caused many people to delay getting a legal education and eras of prolonged prosperity (the 1920s and 1950s) may have influenced the older novices who sought entry into the profession.⁶⁹

ed., 1970).

59. MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 1, at 1-19. It is difficult to identify women in *Martindale-Hubbell* because so many lawyers used only initials. *Id.*

60. MARTINDALE-HUBBELL 1952, *supra* note 35, pt. 1, at 1-27.

61. Payne, *supra* note 36, at 44.

62. *Id.* at 45.

63. *Id.* at 33, 44; Judge Frank C. Hammond, *Census Shows Growth in Lawyer Population*, 23 ALA. LAW. 83, 83-84 (1962); Drake, *supra* note 56, at 3.

64. See MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 1, at 1-19.

65. *Id.* at 2-8. These figures are based on a count of 476 attorneys listed in the 1932 *Martindale-Hubbell*. *Id.* In all, information provided by 207 lawyers identified them as being in their thirties or forties, and 81 identified themselves as being in their fifties. *Id.*

66. Payne, *supra* note 36, at 33-34. Payne lists 1,464 lawyers in their thirties and forties, and 542 in their fifties, out of a total of 2,716. *Id.* at 34.

67. See MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 1, at 1-19.

68. See sources cited *supra* note 18. In Birmingham in 1932, 130 lawyers (out of 476) listed themselves as having practiced less than ten years. MARTINDALE-HUBBELL 1932, *supra* note 35, pt. 1, at 1-19. In Payne's *Statistical Analysis of the Alabama Bar*, 626 (out of 2,716) had practiced less than ten years. Payne, *supra* note 36, at 34.

69. See Payne, *supra* note 36, at 34.

One factor which marked the Bar as a prestigious group in Alabama was the extent to which lawyers were both college-educated and trained for practice in an academic setting. By 1932, 75% of lawyers associated with firms which advertised in *Martindale-Hubbell* had been to college, and 85% had been to law school.⁷⁰ Two decades later, the respective figures among lawyers listed in *Martindale-Hubbell* (a much larger group) were 79.4% and 81.8%.⁷¹ These numbers reflect the rise and dominance of university-based legal education in America, but in particular that of The University of Alabama School of Law.⁷²

In the 1920s, under the leadership of Albert J. Farrah (Dean, 1913-1944), the School of Law had won accreditation by the American Bar Association and membership in the American Association of Law Schools; during the same years, the curriculum was expanded to three years of study.⁷³ Through the 1950s, it offered the only standardized and comprehensive legal education in the state.⁷⁴ Since the 1870s, graduates of the law school had enjoyed the diploma privilege—the right to practice law without taking a Bar examination.⁷⁵ Following the Second World War, a flood of new law students came to Tuscaloosa to study with the financial assistance of the G.I. Bill.⁷⁶

It is scarcely surprising, that John Payne was able to report in 1966 that “almost exactly two-thirds of Alabama’s lawyers come from the University Law School.”⁷⁷ Of course, all of these graduates were white, since the University of Alabama (like all educational facilities in Alabama) was racially segregated. Indeed, the Legislature in 1945 authorized the State Board of Education to provide assistance to black students seeking professional education, which was “not available” to them in Alabama.⁷⁸ Since the state maintained no black law school, this

70. Educational information is not available in the general state listings of the 1932 *Martindale-Hubbell*. However, in the “Biographical Section,” 35 firms placed advertisements; educational information was not available for eleven of the 124 lawyers identified in these advertisements, so the figures cited for 1932 are based on a sample of 113 persons. See MARTINDALE-HUBBELL 1932, *supra* note 35, at 1-17.

71. The 1952 general listings for Alabama do provide educational information; the figures cited for 1952 are based on listings for 2093 lawyers. See MARTINDALE-HUBBELL 1952, *supra* note 35, at 1-27.

72. See ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S, at 3-10 (1983).

73. Robert H. McKenzie, *Farrah's Future: The First One Hundred Years of the University of Alabama Law School, 1872-1972*, 25 ALA. L. REV. 121, 137, 139-40 (1972).

74. See DAVID J. LANGHUM & HOWARD P. WALTHALL, FROM MAVERICK TO MAINSTREAM: CUMBERLAND SCHOOL OF LAW, 1847-1997, at xiii, 196-97 (1997) (documenting the Cumberland Law School's move to Alabama in 1961).

75. Paul M. Pruitt, Jr., *The Life and Times of Legal Education in Alabama, 1819-1897: Bar Admissions, Law Schools and the Profession*, 49 ALA. L. REV. 281, 300 (1997).

76. McKenzie, *supra* note 73, at 144.

77. Payne, *supra* note 36, at 35.

78. ALA. CODE § 52-40(1) (1958).

meant that black attorneys were necessarily educated out-of-state, and were to that extent further isolated from their white counterparts.

Despite the impressive state of its general training, the Alabama Bar displayed an air of provincialism. This was reflected in the fact that a considerable majority of the Bar was content to practice only in state courts, despite the fact that during and after the New Deal, issues of commerce, labor, and civil rights law were increasingly federalized.⁷⁹ Notably, the number of attorneys admitted to practice between 1930 and 1940 before the state's busiest federal courts, those of the Northern District, grew from only 88 to 155.⁸⁰ Each of those figures was less than 10% of the respective populations of state lawyers. Eventually, the Alabama Bar responded to the expanding role of federal courts; by 1960 approximately one-third of state lawyers were members of the Northern District Bar.⁸¹ Until that time, federal practice had been dominated by urban lawyers imbued with the "culture" of federal courts.⁸² Thus, these lawyers were somewhat detached from the world of the typical Alabama practitioner.

Anecdotal evidence of provincialism can be found in reminiscences and stories written by twentieth-century Alabama practitioners. Francis Hare's *My Learned Friends: Memories of a Trial Lawyer* is devoted partly to tracing the increasing dignity of plaintiff's attorneys.⁸³ Yet, he also describes men who "never saw the inside of a college, but they could make noises like lawyers, and they were neither hindered nor handicapped by any strict rules."⁸⁴ By way of illustration, Hare tells of a lawyer, his partner in one case, who resorted to the bizarre maneuver of objecting in open court to Hare's arguments. They lost the case, and the man later explained that he had been trying (under his interpretation of Alabama's complex and outdated rules of procedure) to ensure that their side had an appealable issue.⁸⁵

Grover McLeod's *Sketches from the Bar* is a collection of gritty stories that their author describes as "caricatures," yet which bear the im-

79. See FREYER & DIXON, *supra* note 37, at 124-32. Another measure of provincialism was the low rate of membership of Alabama lawyers in the American Bar Association. Among the lawyers identified in the "Biographical Section" in the 1932 *Martindale-Hubbell*, 113 provided substantial professional information; of these, 45, or 39.7%, were ABA members. See MARTINDALE-HUBBELL 1932, *supra* note 35, at 1-17. Of 2,093 lawyers listed in the 1952 *Martindale-Hubbell*, only 416, or 19.9% were ABA members. See MARTINDALE-HUBBELL 1952, *supra* note 35, at 1-27.

80. FREYER & DIXON, *supra* note 37, at 129.

81. See *id.* at 186-89.

82. *Id.*

83. FRANCIS HUTCHESON HARE, *MY LEARNED FRIENDS: MEMORIES OF A TRIAL LAWYER* 3-25 (1976).

84. HARE, *supra* note 83, at 31.

85. *Id.* at 31-32.

press of his many years' practice in Alabama courts.⁸⁶ Most of the attorneys he describes are small-time practitioners who are not concerned with justice, grand principles, or even clever pleading, but rather with the study of human nature in the hope of winning larger fees.⁸⁷ "[M]oney is the secret to this business, eh men?" says one of his characters, addressing a smiling assembly of the profession.⁸⁸ The only lawyer of scholarly disposition presented by McLeod is the pompous chairman of "one of those numerous paper committees of the Bar, which someone had foolishly given the title, 'Committee to make all Uniform Codes Uniform!'"⁸⁹

Of course, the storytelling of Hare and McLeod does not encompass the full story of lawyers in their time, any more than Joseph Glover Baldwin's *The Flush Times of Alabama and Mississippi* is a well-rounded history of the antebellum legal profession.⁹⁰ Many twentieth century Alabama lawyers rose well above, sometimes magnificently above, the level of provincialism. In the early 1920s, Borden Burr worked mightily within the State Bar Association to modernize the admission and discipline of the Bar. His younger contemporary, Douglas Arant, served in 1941 as chairman of an American Bar Association committee on the Bill of Rights, displaying a sympathetic interest in legal problems that the Jehovah's Witness denomination was then experiencing in Alabama.⁹¹

Burr and Arant were corporate lawyers in Birmingham. Hugo Black had also been a Birmingham plaintiffs' attorney before winning election to the U.S. Senate in 1926; however, he would spend much of the rest of his life in Washington, D.C. serving successively as a leading New Deal senator and supreme court justice.⁹² Clifford J. Durr followed a different trajectory. After leaving a successful practice in Birmingham to work with the Reconstruction Finance Corporation and the Federal Communications Commission, he returned in 1951 to a general practice in Montgomery.⁹³ In 1955, he was the first lawyer to represent Rosa Parks; indeed, he and his wife Virginia were among the few local whites known to be sympathetic to the Montgomery Bus Boycott.⁹⁴

Burr, Arant and Durr had left the state for their legal educations.⁹⁵

86. GROVER S. MCLEOD, *Introduction to SKETCHES FROM THE BAR* (1966).

87. *See id.* at 18.

88. *Id.*

89. *Id.* at 36.

90. JOSEPH GLOVER BALDWIN, *THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI* (1853).

91. MERLIN OWEN NEWTON, *ARMED WITH THE CONSTITUTION: JEHOVAH'S WITNESSES IN ALABAMA AND THE U.S. SUPREME COURT, 1939-1946*, at 85, 164 n.47 (1995).

92. SALMOND, *supra* note 54, at 37-45, 69-97, 145-54.

93. *Id.*

94. *Id.* at 33-143, 154-95.

95. *See* THOMAS MCADORY OWEN, *HISTORY OF ALABAMA AND DICTIONARY OF ALABAMA*

But, Black was a product of The University of Alabama School of Law, as was the great civil rights jurist Frank M. Johnson.⁹⁶ Richard Rives, another highly regarded federal judge, had read law in the Montgomery firm of Hill, Hill, Whiting and Stern, known for its advocacy on behalf of poor people, white or black.⁹⁷ Most of these men came from prosperous middle-class families; Arant, raised in poverty, was an exception. It is hard to explain their broader cultural and intellectual horizons, except to point to breadth of experience (Black and Durr), family or work-related influences (Rives and Johnson), or simply to a personal receptivity to the values embodied in the U.S. Constitution. These men, and others like them, were a minority within the Bench and Bar. Too often, their role was that of prophet without honor. In the early 1920s, the leaders of the Alabama State Bar Association, many of them corporate lawyers from Birmingham and other cities, were preoccupied with the difficulty of imposing standards of ethics and decorum among lawyers. Many of them were convinced that they were on the verge of a long-awaited triumph. Yet, their predecessors had felt much the same way thirty-five years before, when the State Bar Association had voted to endorse Thomas Goode Jones' Code of Ethics, an eloquent document that commanded lawyers to deal honestly and courteously with each other, to seek no advantages with judges, to defend the poor and friendless, and above all to refrain from encouraging litigation.⁹⁸ Jones' work was so consistent with the self-image of elite lawyers that it was later substantially adopted by the American Bar Association.⁹⁹

The problem with the Jones Code was that it lacked statutory authority.¹⁰⁰ This fact was impressed upon leaders of the Birmingham corporate Bar in 1891 when they failed to disbar plaintiffs' attorney Peyton G. Bowman for hiring "runners" to drum up business.¹⁰¹ The *Bowman* case revealed that some members of the State Bar Association were

BIOGRAPHY 267 (1921); see MARTINDALE-HUBBELL 1932, *supra* note 35, at 3-4; see SALMOND, *supra* note 54, at 19-32.

96. FREYER & DIXON, *supra* note 37, at 274; NEWMAN, *supra* note 33, at 17-20.

97. FREYER & DIXON, *supra* note 37, at 227.

98. *Code of Ethics Adopted by the Alabama State Bar Association, Proceedings of the Tenth Annual Meeting of the Alabama State Bar Association*, 10 ALA. ST. B. ASS'N iv-vi, viii-ix, x-xi, xiii, xv, xvi (1887) [hereinafter *10th Proceedings*]; Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471, 471-73 (1998).

99. Marston, *supra* note 98, at 503-07.

100. See Act of Sept. 22, 1885, No. 30, 1885 Ala. Acts 94 (giving the Alabama State Bar Ass'n the power to bring disbarment proceedings). However, the statutory regulations governing "the duty of attorneys" had been set forth in the Code of Alabama, Sections 738 through 746, as were the rules and procedures for disbarment. ALA. CODE §§ 747-762 (1852). These laws, which were repeated in every code down to that of 1940, provided a framework of legal ethics similar to the one later put forward by Jones albeit less developed. See James Thomas Norton, *A Survey of Disbarment in Alabama*, 18 ALA. LAW. 391, 394-95 (1957).

101. See *Proceedings of the Twelfth Annual Meeting of the Alabama State Bar Association*, 12 ALA. ST. B. ASS'N 12-17 (1889) [hereinafter *12th Proceedings*].

deeply ambivalent about the enforcement of ethical standards; several lawyers chose resignation rather than assisting in the prosecution.¹⁰² The division of the urban Bar into plaintiff and corporate mentalities was evident in the 1912 report of the Garber Committee, commissioned by the State Bar Association to study the state of ethical standards in Jefferson County. Headed by former attorney general Alexander Garber, this group uncovered a complex world of runners and ambulance-chasers. Yet the committee concluded that such activities were offset by the work of claims agents, company physicians and jury selection specialists employed by corporations and their attorneys.¹⁰³

While it was difficult for State Bar Association members to agree on matters of professional propriety, many of them shared a desire to expand the size and influence of their organization. From its origins, the State Bar Association had aspired to speak for the Bar. Yet its membership had never been large; as late as the early 1920s, Association lawyers made up less than one-fourth of Alabama's lawyers.¹⁰⁴ Its 1921 state convention debated schemes involving automatic membership for University of Alabama graduates and participation by members of local Bar associations.¹⁰⁵ At the same time, a number of members were showing interest in a plan of absolute expansion and centralized discipline that had originated in states of the West and Midwest: the "integrated Bar," by which all lawyers were required by statute to belong to a single organization.¹⁰⁶

From the standpoint of elite lawyers, a self-regulated Bar was a perfect mechanism for controlling both admissions and disbarments.

102. See *id.*; *Ex parte* State Bar Association, 92 Ala. 113, 114 (1890); see generally BIRMINGHAM DAILY NEWS, Jan. 17, 30, Feb. 3, Mar. 14, 23, 30, 31, Apr. 1, 1891 (including articles on the Birmingham Bar Association, whose leaders had been prominent in seeking Bowman's disbarment).

103. *Proceedings of the Thirty-Fourth Annual Meeting of the Alabama State Bar Association*, 34 ALA. ST. B. ASS'N 95-97 (1911) [hereinafter *34th Proceedings*]; See generally WILLIAM G. THOMAS, *LAWYERING FOR THE RAILROAD BUSINESS, LAW, AND POWER IN THE NEW SOUTH* 33-60 (1999) (addressing the treatment of the division of the New South bar into corporate and plaintiffs' contingents).

104. See *Proceedings: First Meeting of the Alabama State Bar and of the Forty-Seventh Annual Meeting of the Alabama State Bar Association*, 47 ALA. ST. B. ASS'N 69-77 (1924) [hereinafter *47th Proceedings*]. Not counting honorary or deceased members, there were 280; 21.5% of the 1,300. *Id.*

105. *Proceedings of the Forty-Fourth Annual Meeting of the Alabama State Bar Association*, 44 ALA. ST. B. ASS'N 6-14, 16-21 (1921) [hereinafter *44th Proceedings*].

106. *Id.* at 42-49; *47th Proceedings*, *supra* note 104, at 137 (recognizing that, after North Dakota and Idaho, Alabama was the third state to adopt such a bar statute); See generally JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 292-93 (1950). Note the comparison in *Proceedings of the Forty-Sixth Annual Meeting of the Alabama State Bar Association*, of law to medicine and other professions in Alabama. *Proceedings of the Forty-Sixth Annual Meeting of the Alabama State Bar Association*, 46 ALA. ST. B. ASS'N 252 (1923) [hereinafter *46th Proceedings*]. For years Alabama physicians had been self-regulating through a Board of Medical Examiners. ALA. CODE §§ 1626-1646 (1907).

The latter aspect was particularly attractive to the corporate Bar, for disbarment actions under then-current law were tried in Circuit Court, where they were treated as quasi-criminal and where plaintiffs' attorneys enjoyed many procedural advantages.¹⁰⁷ In 1922, after much preliminary discussion, Birmingham corporate lawyer Borden Burr pushed successfully for creation of a Bar Association committee instructed to draft an integrated Bar bill; his goal was to lobby both the 1922 state Democratic convention and the Legislature for such an act.¹⁰⁸

That summer, Burr and his committee wrote their bill, the chief feature of which was the creation of a powerful Bar commission, a governing body elected by attorneys, to consist of one member from each judicial circuit.¹⁰⁹ Endorsed by the Democratic Party and passed by the Senate, the measure stalled in the House through the opposition of lawyer-legislators who saw in the commission the potential for arbitrary and even partisan action.¹¹⁰ At an April 1923 meeting of the Bar Association, Burr and his allies made concessions to their critics and prepared to return to the fray. Their second effort was successful because, in August of 1923, the Legislature passed a version of Burr's Bar integration act.¹¹¹

Under the new legislation, the Bar commissioners were vested with power to regulate admissions, to establish rules of professional ethics, and to try disbarment cases.¹¹² However, they were constrained to uphold existing statutory law concerning admissions qualifications, and their rulemaking and removal powers were subject to review by the Alabama Supreme Court.¹¹³ Plaintiffs' attorneys had succeeded thus far in watering down centralized control, but they had not been able to preserve the right to a jury trial for respondents in disciplinary actions. Throughout the campaign for an integrated Bar, Burr and his allies had maintained that disbarment was not a quasi-criminal process, but an inherent right of courts.¹¹⁴

In coming years it would be clear that the 1923 law had created new levers of potential power without greatly diminishing those belonging to the old State Bar Association. Surely the state-wide organization of the

107. Norton, *supra* note 100, at 397; 45th *Proceedings*, *supra* note 35, at 52-70; 46th *Proceedings*, *supra* note 106, at 51-57.

108. 45th *Proceedings*, *supra* note 35, at 56-70, 17-18, 19-38; 44th *Proceedings*, *supra* note 105, at 44.

109. See 46th *Proceedings*, *supra* note 1076, at 254-55.

110. *Id.* at 56-57.

111. 46th *Proceedings*, *supra* note 1076, at 246-54; 47th *Proceedings*, *supra* note 104, at 24-26. It is worth noting that Burr held a public meeting in Birmingham in July 1922. 46th *Proceedings*, *supra* note 106, at 246.

112. Act of Aug. 9, 1923, No. 133, 1923 Ala. Acts 100, 102-03.

113. *Id.*

114. See *id.* at 102-06; 46th *Proceedings*, *supra* note 1076, at 250-52.

Bar was potentially a democratic innovation. Yet by 1927, the Alabama State Bar Association had secured laws grafting its name upon the integrated Bar and allowing for election of state Bar presidents by the delegates to its annual convention.¹¹⁵ The laws further provided that the state Bar president should also be president of the Board of Commissioners.¹¹⁶ In short, while the mass of lawyers could elect the men who were to exercise control over admission and discipline, the veteran convention-goers of the old organization retained an influential voice.¹¹⁷

Urban corporate practitioners were the most influential group within the Alabama Bar Association; yet they were slow to achieve their disciplinary goals within the State Bar Commission. The Commissioners authorized local grievance committees to bring charges against erring lawyers; but the Commission itself, with one member from each judicial circuit, was scarcely a mirror of the urban Bar.¹¹⁸ Indeed, more than a third of early Commissioners lived in villages or very small towns, and, evidently less than half of them were members of firms.¹¹⁹

115. Act of June 6, 1931, No. 241, 1931 Ala. Acts 284, 285.

116. Act of Aug. 9, 1923, No. 133, 1923 Ala. Acts 100, 102; *47th Proceedings*, *supra* note 104, at 40-47. An organization styled the Alabama State Bar had come into being under authority of the Bar Commissioners in 1924. *Id.* Initially it was under the name of the Alabama State Bar, it had almost immediately merged with the Alabama State Bar Association. *Id.*

117. In 1931, for example, with the backing of Bar Association members, the legislature removed the limitations previously placed on the Bar Commission concerning educational qualifications for admission. ALA. CODE § 6225 (1928 & Supp. 1936).

118. See Act of Aug. 9, 1923, No. 133, 1923 Ala. Acts 100; ALA. CODE §§ 6223, 6225 (1928 & Supp. 1936) (showing grievance committees); see also *Proceedings of the Alabama State Bar Association: Fifty-Fourth Annual Meeting*, 51 ALA. ST. B. ASS'N 17-18, 42 (1931) [hereinafter *54th Proceedings*].

119. These statements are based on studies of members of the Board of Commissioners in 1927 and 1931. ALABAMA DEPARTMENT OF ARCHIVES AND HISTORY, ALABAMA OFFICIAL AND STATISTICAL REGISTER 30 (1927) (listing membership information); ALABAMA DEPARTMENT OF ARCHIVES AND HISTORY, ALABAMA OFFICIAL AND STATISTICAL REGISTER 46 (1931); see MARTINDALE'S AMERICAN LAW DIRECTORY, pt. 1 at 2, 5, 7-13, 15, 17, 18 (1927) [hereinafter MARTINDALE'S 1927] (listing practice information on the Commissioners); MARTINDALE'S AMERICAN LAW DIRECTORY, pt. 1, at 2, 5, 10-14, 16, 18-21 (1930) [hereinafter MARTINDALE'S 1930] (listing practice information on the Commissioners). Like other directories of its kind, *Martindale's* is organized by town and the population of each town is given at the head of its entry. See MARTINDALE-HUBBELL 1932, *supra* note 35, at 1-19. A survey of the 1927 Commission revealed that, of 21 members, 4 lived in towns having a population of 1,000 or less; 5 in towns whose population was 1,001 to 2,000; 6 in towns whose population was 2,001 to 10,000; three in towns whose population was 10,001 to 25,000; and one each in Birmingham, Montgomery, and Mobile. 1 THE MARTINDALE-HUBBELL LAW DIRECTORY, pt. 1, 1-19 (60th ed. 1927) [hereinafter MARTINDALE-HUBBELL 1927]. The 1927 *Martindale-Hubbell* listings for these Commissioners indicated that only seven of them were connected with firms. *Id.* at 1-19. A survey of the 1931 Commission revealed that of 23 members, 3 lived in towns having a population of 1,000 or less; 5 in towns whose population was 1,001 to 2,000; 6 in towns whose population was 2,001 to 10,000; 6 in towns whose population was 10,001 to 25,000; and one each in Birmingham, Montgomery, and Mobile. MARTINDALE-HUBBELL 1932, *supra* note 35, at 1-19. The 1930 *Martindale-Hubbell* listings for these Commissioners indicated that eleven of them were connected with firms. Few of the Commissioners in either year listed corporate clients in their advertisements. 1 THE MARTINDALE-HUBBELL LAW DIRECTORY, pt. 1, at 1-21 (62d ed. 1930) [hereinafter MARTINDALE-HUBBELL 1930].

Since the 1923 act required a two-thirds majority vote for suspension or disbarment, it is no surprise that corporate practitioners did not always have their way. Perhaps the best proof of their frustration was the fact that in 1931 they changed the rules, securing passage of an act which provided that a simple majority of Commissioners present could remove a lawyer from practice.¹²⁰

Yet the enforcement of legal ethics remained a difficult task, in part because lawyers remained divided over the precise limits of ethical behavior. It was not until 1940 that the Bar Commission exercised its right to promulgate rules of conduct for the profession issuing a collection of "Amended Rules" which began with a summary of the Jones Code.¹²¹ At the heart of the new document was a series of rules (20 through 23) aimed directly at the old problem of ambulance-chasing and agents, which forbade an attorney to "[s]olicit his employment or professional engagement," "[e]mploy any person to seek for . . . or procure a client or professional business," or "[p]romise to give . . . any valuable consideration to any person" who might place "in the hands . . . a claim or demand or an item of business of any kind."¹²²

At no point during the mid-twentieth century was there a purge of the plaintiffs' Bar, nor even a prolonged increase in disciplinary actions.¹²³ It may be that the task of investigating misconduct in a growing legal profession was simply more than the Commissioners were able or willing to perform.¹²⁴ Or it may be that the development of workmen's compensation law in the state, followed by the rise in the 1950s of a professionally dignified Alabama Plaintiffs' Lawyers Association, dulled the edge of competition between the corporate and plaintiffs' Bars.¹²⁵ Whatever the case, it seems clear that the Bar Commission's

120. Act of June 6, 1931, No. 241, 1931 Ala. Acts 284, 286; see also ALA. CODE § 6225 (1928 & Supp. 1936); *Proceedings of the Fifty-Third Annual Meeting of the Alabama State Bar Association*, 53 ALA. ST. B. ASS'N 36-48 (1930) [hereinafter *53d Proceedings*].

121. AMENDED RULES GOVERNING THE CONDUCT OF ATTORNEYS IN ALABAMA, 239 ALA. xxiii (1940).

122. *Id.* at xxiv (citing rules 20-23). Rule 32 is similarly aimed at corporate defense attorneys who might deal with firms "in the business of investigating or adjusting" claims for "personal injuries or wrongful death." *Id.* at xxv.

123. *53d Proceedings*, *supra* note 120, at 30-32. Immediately after passage of the 1923 act, the Bar Commission "disbarred three or four lawyers, [and] tried two or three more"; yet afterwards disbarment trials and even charges tapered off. *Id.* at 30; see *Board of Commissioners Meet.*, 8 ALA. LAW. 209 (1947) (demonstrating a fairly relaxed atmosphere toward disbarment in a Bar Commission meeting at which there were two appeals for reinstatement (one granted) and one set of charges considered which resulted in a 90-day suspension); see also Lawrence F. Gerald, *Bar Commission Activities*, 11 ALA. LAW. 48 (1950) (demonstrating a lack of disciplinary business).

124. *53d Proceedings*, *supra* note 120, at 36.

125. See ALA. CODE §§ 26-253 to 329 (1940); see also ALBERT B. MOORE, HISTORY OF ALABAMA 813 (1951) (stating that the reform of workman's compensation laws in Alabama dates from a statute of 1919 which standardized the compensation for various injuries and "and allowed employers to insure themselves against their risks"); see also House Joint Resolution of

disciplinary power served chiefly as a check against outrageous behavior, to be applied when the evidence, or the consensus of local attorneys, was overwhelming.

Such was the case when two Shelby County lawyers were disbarred in 1953 after a parade of witnesses had testified to their solicitation of business.¹²⁶ Similar factors on a larger scale influenced the Bar Commission's response to a later "quickie divorce" scandal. A trifling change of statutory law in 1945 had opened the way for courts of equity jurisdiction to grant discreet, speedy divorces to residents of other states. Word spread among Alabama (and New York) lawyers, and within a few years business was booming in the courts whose judges were willing to countenance such proceedings. Many of the latter presided over inferior courts in rural counties; one such tribunal in Geneva County granted about 5,800 divorces in two years.¹²⁷

The divorce situation was discussed as a nuisance detrimental to the profession and the state's reputation as early as 1957.¹²⁸ Yet it was not until 1961 that the Bar Commission changed the rules of professional conduct to forbid lawyers to act in a divorce case in which there was "knowledge or reasonable cause to believe that neither party" was a "bona fide resident."¹²⁹ Over the next three years, the Bar Commission's Grievance Committee investigated the divorce business in various counties. In Geneva County it secured the suspension of one judge and one attorney through what amounted to a plea bargain, and disbarred two attorneys after formal proceedings; in the process it overcame a lawsuit filed to keep it from examining a cache of secret records.¹³⁰

These events may show the real (if slow-acting) power of the Bar Commission; they also show the continuing difficulty of uniting Alabama lawyers around any pattern of professional decorum. Such in fact were the weaknesses which plagued the organized Bar beyond the first six decades of the twentieth century. It was a small wonder that lawyers

September 25, 1915, No. 828, 1915 Ala. Acts 944-45 (demonstrating legislation that created a commission to reform the workman's compensation law).

126. See *In the Matter of T.K. Selman*, Special Publication (Bd. of Commissioners of Ala. State Bar 1953); see generally Oscar L. Tompkins, *Impeachment and Removal of Three Circuit Judges*, 21 ALA. LAW. 211 (1960) (reviewing analogous proceedings regarding judges).

127. D.L. Rosenau, Jr., *Those "Quickie" Alabama Divorces*, 18 ALA. LAW. 37 (1957); Robert E. Steiner, III, *Complaints Against Lawyers and Their Handling*, 25 ALA. LAW. 373, 378 (1964).

128. See, e.g., Rosenau, *supra* note 127; see also J.H. Perdue, *Unprofessional Solicitation of Employment*, 21 ALA. LAW. 106 (1960).

129. ALABAMA SUPREME COURT: RULES GOVERNING THE CONDUCT OF ATTORNEYS, AMENDMENT TO RULE 25, 272 ALA. xxii (1961).

130. Robert A. Martin, *It Was About Power and Judicial Independence*, 60 ALA. LAW. 196 (1999) (stating that, in all, "[o]ver 20 judges and lawyers were disbarred or suspended."); Steiner, *supra* note 127, at 373-80.

were unable to formulate a coordinated response to the Civil Rights movement, much less serve as interpreters and mediators of the changes sweeping over the state!

II. LEGISLATIVE CONTROL, JUDICIAL DECENTRALIZATION, AND THE SUPREME COURT'S INACTION

Reform legislation in 1915 consolidated *nisi prius* courts in Alabama and abolished free-standing chancery courts as well as a patchwork of city and county courts. The product of this revolution was a network of circuit courts presided over by the Chief Justice of the Supreme Court of Alabama. The latter was invested with power to alter the schedules and assignments of courts and judges so as to avoid the evils of unequal case loads and overburdened dockets.¹³¹ Appellate justice was administered by a three-judge court of appeals, which because it was limited to cases worth \$1,000 or less was, in effect, a criminal appeals court, and the seven-member supreme court.¹³² The supreme court was given conditional power to establish rules of procedure for the lower courts.¹³³ The hope in 1915 was that the Bench might, to some degree, escape from the legislative domination under which it had struggled since the adoption of the Code of 1852.¹³⁴

Predictably, the circuit court system grew with the population from nineteen circuits in 1917 to thirty-seven in 1970.¹³⁵ Litigation flourished most in urban areas, as had been the case since after the Civil War. For instance, over the two-year period from 1936 to 1938, Alabama Circuit Courts disposed of more than 16,000 criminal cases, of which more than 2,800 were tried or processed in Jefferson County.¹³⁶ Two decades later, the combined Circuit Courts saw more than 13,900 criminal actions filed and more than 7,500 cases decided in just the first six months of 1960; the corresponding figures for Jefferson County were 3,361 filings and 2,048 cases decided.¹³⁷

131. Act of Aug. 16, 1915, No. 217, 1915 Ala. Acts 279-280; Act of Sept. 18, 1915, No. 521, 1915 Ala. Acts 592-594; Act of Sept. 25, 1915, No. 712, 1915 Ala. Acts 809-814; see also 1915 Ala. Acts LV-LIX, LX-LXXIII.

132. ALA. CODE §§ 7308-09, 10269 (1923).

133. Act of Sept. 17, 1915, No. 537, 1915 Ala. Acts 607 (codified as amended at ALA. CODE § 3227 (1907)) (effective Sept. 17, 1915).

134. See *Proceedings of the Thirty-Seventh Annual Meeting of the Alabama State Bar Association*, 37 ALA. ST. B. ASS'N 43-50, 88-92 (1914) [hereinafter *37th Proceedings*].

135. *Judges of Circuit Courts During the Time the Cases in This Volume Were Tried*, 200 Ala. iv (1916-17); *Judges of Circuit Courts During the Time the Cases in This Volume Were Tried*, 286 Ala. vi-ix (1969-70).

136. 1936-1938 BIENNIAL REP. OF THE ATT'Y GEN. 804-11, 868-70; see also *id.* at 879-80 (demonstrating that Marengo County in the Black Belt dealt with 212 cases in the same interval).

137. Chart of Alabama Circuit Courts Criminal Dockets for Jan.-June, 1960, 23 ALA. LAW. 62, 63-65 (1962) (demonstrating that corresponding figures for Marengo County were 128 filings

Overcrowded dockets had been a problem in urban counties prior to 1915, and consolidation of jurisdictions had not reversed the trend. At the end of proceedings in the first six months of 1960, twenty-one counties each had 100 or more cases remaining on their equity dockets; twenty-four were similarly situated with regard to civil dockets, as were seventeen with regard to criminal dockets. Jefferson County experienced by far the worst backlog, with 2,542 equity cases, 6,159 civil cases, and 1,313 criminal cases left over. But dockets in several other counties, including Mobile, Montgomery, Etowah, and Calhoun, were also notably congested.¹³⁸ In theory, such imbalances could have been corrected by the chief justices. In practice the latter used their scheduling powers only when requested by a circuit's chief judge, though by the mid-1960s such requests were apparently fairly common.¹³⁹

Such overcrowding might be taken to reflect a natural phase of a court system planted in an expanding and urbanizing population. Yet the growing pains were accompanied by growing discontent among judges, lawyers, and the public with the state's outmoded procedural system, which had not been altered substantially since the adoption of the 1852 Code. That document, though it instructed lawyers to use plain language in pleadings and provided a number of pleading-forms, had not replaced the old forms of action with a general "civil action." As a result, mid-twentieth century litigants were still subject to the delays and subterfuges which marked common law pleading at its worst.¹⁴⁰

Over the years, many reformers had advocated the rationalization of procedure, perhaps most notably Chief Justice George W. Stone, who made an important address on the subject before the State Bar Association in 1889.¹⁴¹ In fact, power over procedure belonged chiefly to the legislature, which proved to be an imprecise instrument for such a technical endeavor.¹⁴² Legislators proved reluctant to diminish their

and 127 cases decided; however, it should be noted that the Jefferson County criminal docket was busier in the first six months of 1960 than in the last months of that year).

138. *Id.* at 54-55, 58-59, 62-63 (demonstrating that Mobile County's overload consisted of 2,591 equity, 2,407 civil, and 692 criminal cases; Montgomery County's overload consisted of 1,012 civil and 415 criminal cases (Montgomery County did not report equity cases); Etowah County's overload consisted of 833 equity, 1,175 civil, and 566 criminal cases; Calhoun County's overload consisted of 501 equity, 725 civil, and 147 criminal cases).

139. ROBERT J. FRYE, *THE ALABAMA SUPREME COURT: AN INSTITUTIONAL VIEW* 19, 20 (1969). Charles D. Cole, *Judicial Reform in Alabama: A Reflection*, 60 ALA. LAW. 185, 186 (1999) (blaming this condition on the low level of staffing afforded to chief justices).

140. ALA. CODE §§ 1-2227, 1-2236 (1852); Thomas E. Skinner, *Stagnation or Modernization: Alabama's Procedural Crisis*, 32 ALA. LAW. 128, 139 (1971).

141. Skinner, *supra* note 140, at 130-31 (citing *12th Proceedings*, *supra* note 101, at 108, 113-14).

142. Legislative intent was not necessarily reactionary. Skinner, *supra* note 140, at 138-39 (discussing an effort by lawmakers to change common law rules to allow a "principal or master to be sued jointly with his servant"). The initial act was passed in 1947 but the rule, challenged

power over the courts; even the 1915 grant of rule-making power to the supreme court placed judge-made rules below statute law.¹⁴³ It should be noted, though, that the state's procedural reformers were not alone in their frustration. The American Bar Association had advocated a uniform code of judicial procedure as early as 1912, but for more than twenty years would enjoy little success in promoting it.¹⁴⁴

In 1938, the United States Supreme Court adopted and promulgated the Federal Rules of Civil Procedure which were designed to simplify and streamline pleadings. According to one authority, the impact of the F.R.C.P. was to provide "knowledge or disclosure to all with no bonus for tricks of concealment."¹⁴⁵ These regulations were powerfully appealing to Bench and Bar across the nation and, by the mid-1950s, more than twenty states had adopted them in whole or part.¹⁴⁶ In Alabama, the Federal Rules excited considerable interest among leaders of the State Bar Association, whose presidents twice commended the F.R.C.P. in addresses to the annual convention.¹⁴⁷ More to the point, procedural reformers spent years in behind-the-scenes discussion; finally in 1955 the Legislature created a Commission for Judicial Reform.¹⁴⁸ Chaired by Thomas E. Skinner of the Birmingham Bar, the reform commission numbered among its members Martin Leigh Harrison, Dean of The University of Alabama School of Law, various practicing lawyers and officials of the Bar Association, Attorney General John Patterson, and several state and federal judges, including Chief Justice J. Ed Livingston.¹⁴⁹ In addition the commission employed noted

in the courts, was not firmly in place until 1964. *Id.* The 1955 introduction of discovery principles demonstrate another progressive (and less prolonged) legislative accomplishment. *Id.* at 146. See Act of Sept. 8, 1955, No. 375, 1955 Ala. Acts 901-07; see Thomas E. Skinner, *Pre-trial and Discovery Under the Alabama Rules of Civil Procedure*, 9 ALA. L. REV. 202 (1957). Yet here the supreme court construed the law so that it did not apply to criminal cases. H.H. Grooms, *Discovery and Evidence Under Act 375, Acts of 1955 and Title 7, Section 474 (1)-(18), Code of Alabama of 1940*, 22 ALA. LAW. 42 (1961).

143. Act of Sept. 17, 1915, No. 537, 1915 Ala. Acts 607 (codified as amended at ALA. CODE § 3227 (1907)) (effective Sept. 17, 1915); Skinner, *supra* note 140, at 131 (discussing a package of procedural reforms proposed in the legislation in 1923, of which only one passed).

144. Charles E. Clark, *Alabama's Procedural Reform and the National Movement*, 9 ALA. L. REV. 167 (1957).

145. *Id.* at 170 (discussing the history of the adoption of the F.R.C.P.).

146. *Id.*

147. Skinner, *supra* note 140, at 131.

148. *Id.* at 132; Alice Merchant, *The Historical Background of the Procedural Reform Movement in Alabama*, 9 ALA. L. REV. 284, 290-93 (1957). Some progress had been made prior to 1955. In 1940 the supreme court, acting upon specific legislative authority, had adopted new equity rules. *Id.* at 293. In 1951, a joint legislative committee worked with members of the Bar Association; their most significant conclusion was that the supreme court should begin to exercise its rule-making function. *Id.*

149. *Id.* at 294-96 (discussing membership of the Commission for Judicial Reform and the separate Judiciary Advisory Council, whose members consisted of members of the House and Senate, including the Speaker of the House and the Lieutenant Governor).

civil procedure expert Charles Alan Wright as a consultant.¹⁵⁰

Divided into panels, the group worked for eighteen months and in May 1957 presented their finished product, an adaptation of the Federal Rules, to the Legislature.¹⁵¹ Without doubt, their work had required a degree of unanimity and cooperation among legal professionals not seen since the passage of the Integrated Bar Act in 1923.

Sadly, it was all for nothing. After passing the House, the Alabama Rules of Civil Procedure were defeated in the Senate, apparently by the delaying tactics of two senators.¹⁵² The integrated Bar had overcome legislative roadblocks, but Alabama's version of the F.R.C.P. came before the Legislature at a time when civil rights advances threatened the state's culture of segregation and racial discrimination. Federal judges, especially Federal District Judge Frank M. Johnson, were perceived as agents of these sweeping changes, with the result that few white politicians were willing to wage a prolonged battle for anything "federal."¹⁵³ Rather, as the career of lawyer and former Circuit Judge George C. Wallace illustrates, the state's officers were gearing up to mount a last-ditch campaign in which "white supremacy" was both the object to be achieved and the weapon of choice.¹⁵⁴

In short, law reform flew in the face of everything provincial and inward—turning in the minds of the conventional white Southerners. Moreover, when the crisis of their social system came, most white lawyers turned inward. Readers of the *Alabama Lawyer*, the organ of the State Bar Association, were treated to the jurisprudence of segregation in diverse forms.¹⁵⁵ However, ideological stands have practical conse-

150. Skinner, *supra* note 140, at 132 n.21.

151. *Id.* at 132. See John Patterson Papers (on file with the Bounds Law Library, The University of Alabama School of Law) (documenting the work of the Commission for Judicial Reform). See generally Charles Alan Wright, *Modern Pleading and the Alabama Rules*, 9 ALA. L. REV. 179 (1957).

152. Skinner, *supra* note 140, at 132. See 1 JOURNAL OF THE SENATE OF ALABAMA 193-94, 373, 716-17 (Reg. Sess. 1957) (tracking the Rules bill (H. 14), indicating a delay of further consideration by a vote of 23 to 9); see also 1 JOURNAL OF THE SENATE OF ALABAMA 846-49 (Reg. Sess. 1957) (showing eighteen bills related to or adding appendices to H. 14 which were proposed jointly by Senators E.W. Skidmore and Neil Metcalf). See generally *Calhoun Bar Endorses Proposed Rules*, 18 ALA. LAW. 221 (1957) (documenting a unanimous vote).

153. See FREYER & DIXON, *supra* note 37, at 215-55.

154. See generally DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* (1995); BILL JONES, *THE WALLACE STORY* 19-31 (1966).

155. See R. Carter Pittman, *The Federal Invasion of Arkansas in the Light of the Constitution*, 19 ALA. LAW. 168 (1958) (demonstrating segregationist and/or states-rights thinking); see also Charles L. Bloch, *We Who Love the Law*, 24 ALA. LAW. 58 (1963); James S. Coleman, *The Bill of Rights*, 19 ALA. LAW. 186 (1958); Jule W. Felton, *An Appeal to Save Our Written Constitutional Form of Government*, 21 ALA. LAW. 390 (1960); Robert Tennent Simpson, *Forced Integration in 173 B.C.*, 21 ALA. LAW. 406 (1960); L.C. Waddington, *Legislative Reapportionment and the Courts*, 24 ALA. LAW. 65 (1963). Readers who wish to see the persistence of conservative Southern thinking in general should browse the *Alabama Lawyer* for the 1950s and early

quences. By abandoning law reform for the better part of a decade, lawyers and judges tied themselves to a system so formal that substantial justice was frequently sacrificed to precision of wording. A multiplicity of "counts" and "replications," and the sweeping use of "demurrers," fostered delays that could stretch into years. They were choosing to preserve, as Thomas E. Skinner said of Alabama's equity practice, a "fertile field for the proliferation of the artifices of medieval procedure."¹⁵⁶ As noted above, power over the circuit courts belonged to the legislature, while responsibility (under the 1915 statutes) remained with the supreme court. Yet, for several reasons, the latter was not equipped to carry out its supervisory duties effectively. First, the high court was understaffed. Under the "recompiled" Code of 1958, each of the justices was allowed a law clerk and a secretary; in addition, the court employed an (administrative) clerk, a reporter, a stenographer, a marshal-librarian, an assistant to the marshal-librarian, and a servant.¹⁵⁷ These officials assisted in the preparation of decisions and operations of the court itself. Their administrative powers scarcely extended beyond the supreme court chambers. Certainly it was not their function to compile statistics on the operation of trial courts. But as the chairman of the Bar Association's Committee on Jurisprudence and Law Reform pointed out in 1958, without such information it was impossible "to see the picture as a whole."¹⁵⁸

Viewed in retrospect, that larger picture would have included decentralizing features beyond even those which affected the circuit courts—specifically, the continued existence of local courts of law and equity and justice of the peace courts. After abolishing local trial courts in 1915, the Legislature simply could not resist the political benefits of creating new ones. The result was a briar patch of semi-independent jurisdictions in which, in the absence of supervision by the Chief Justice, corruption of the "quickie divorce" type could take root.¹⁵⁹ Like-

1960s. It is notable that many of the articles cited above were by residents of other states. Robert T. Simpson, however, was a justice of the Alabama Supreme Court and was addressing Alabama circuit judges.

156. Skinner, *supra* note 140, at 140.

157. ALA. CODE §§ 13-10(1), 13-46, 13-49, 13-61, 13-63, 13-74, 13-75, 13-79, 13-84 (Recompiled 1958).

158. Fred S. Ball, *1958 Report of Committee on Jurisprudence and Law Reform*, 19 ALA. LAW. 374 (1958). At this point, Marshal-Librarian Richard W. Neal had developed statistical forms which had been approved by Chief Justice Livingston and which were to be sent out. *Id.* at 375.

159. Hugh Maddox, *The Scope and Applicability of the Proposed Alabama Rules of Civil Procedure to the Courts of Alabama*, 18 ALA. LAW. 216, 217 n.6, 219 nn.6-9 (1957) (listing some of these courts and arguing that the then-proposed Alabama Rules of Civil Procedure might not apply to some of them); see also Hugh Maddox, *Reflections on the 25th Anniversary of the Judicial Article*, 60 ALA. LAW. 182, 184 n.1 (1999); Pelham J. Merrill, *The Facts About Alabama Courts and Judges Today*, 28 ALA. LAW. 139, 141 (1967).

wise, the survival of justice courts in many counties was an invitation to ignorance on the Bench and to private arrangements with law enforcement officers, typically on behalf of small-town "speed traps."¹⁶⁰ Such subordinate tribunals encouraged the provincialism of lawyers who practiced before them, perpetuating a legal culture in which procedure was to an extent merely a function of traditions sustained by politics.

Unfortunately the supreme court itself was a part of that culture. Certainly it was afflicted with survivals and traditions which prevented the justices from making coherent use of their own procedures. Predictably, the rickety system of lower courts sent many appeals (especially of civil cases) their way. The volume of cases was such that each justice was expected to write forty to fifty decisions per year, almost double that of his counterparts in most states.¹⁶¹ Yet the justices were not able to make effective use of their time, largely because a turn-of-the-century statute required them to schedule large amounts of time for hearing oral arguments from each of eight "divisions" of counties.¹⁶²

Of its own accord, the court insisted on adhering to its long-time practice of assigning cases (without discussion or examination of documents) by means of a rotation of justices. This method produced "one-man" decisions in which the final disposition of a case was made after the opinion was written. Under this system, it was very difficult for members of the court to engage in productive debates or (in the long run) for them to develop an evolving consistent body of case law. These problems were made worse by the fact that the supreme court had, since 1903, been divided for most working purposes into two sections, each of which had little knowledge of the other's cases.¹⁶³ It should not be surprising that few justices wrote dissenting opinions; dissenting opinions triggered full-court votes, thus slowing down the system. Nor should it be surprising that the court had to rule on rehearing motions concerning half its cases.¹⁶⁴

Faced with administering a complex system in which there was neither time nor incentive for consideration of the impact of law upon policy, the justices were naturally inclined to decide cases upon technicalities of procedure.¹⁶⁵ This reliance upon technicalities could take the

160. Martin, *supra* note 130, at 196.

161. Merrill, *supra* note 159, at 143.

162. ALA. CODE §§ 5958-5959 (1907); FRYE, *supra* note 7, at 12, 42-45, 46-49, 56 n.40. Note that arguments in cases originating in rural districts often did not take up the time allotted.

163. FRYE, *supra* note 7, at 37-39, 41, 55-56; see ALA. CODE § 5949 (1907).

164. FRYE, *supra* note 7, at 58-61.

165. *Id.* at 18, 69 (estimating that twenty percent of supreme court cases were decided on points of procedure); see Skinner, *supra* note 140, at 133 (observing that Alabama courts in

form of strict adherence to schedules; in 1955 the court rejected the appeal of a murder conviction because the appellant filed the transcript one day after the deadline.¹⁶⁶ Other technical decisions, as Thomas E. Skinner wrote in a 1971 article, turned upon the court's rule that "pleadings are, on demurrer, to be construed most strongly against the pleader."¹⁶⁷ In practice, adherence to this rule meant the denial of appeals because of the misuse of words such as "aforesaid," or the omission (in an otherwise clear description of harmful acts) of the word "negligently." One appeal was rejected because a lawyer used the singular rather than the plural form of a noun.¹⁶⁸

The court likewise insisted upon the letter of its regulations in the matter of "assignment of errors." An aspect of pleading intended to be a mere overview of errors alleged to have been committed by the trial court, the assignment of errors had become a procedural minefield for appellants' lawyers. The supreme court, for example, required that arguments within briefs must be tied to specific assignments of error, and waived any assignment of error which was not so argued. In practice, attorneys could argue "several unrelated assignments of error . . . together;" but the court, if it determined that one of them lacked merit, would throw them all out.¹⁶⁹ Such rules were foundation stones in a structure which, according to a 1969 study, "in many respects makes a mockery of the rationale and purpose of appellate review."¹⁷⁰

Alabama Supreme Court justices were in a sense immune to politics until well after the middle of the century. Of the thirty-nine persons who served on the court between 1900 and 1969, eighteen (51.4%) first gained that office through appointment; as late as 1969, only two of seven sitting justices had first reached the court through election.¹⁷¹ There was little opposition from the Republican Party, even in the "Goldwater" sweep of 1964, and Democratic voters apparently were content to keep judicial incumbents in office.¹⁷² The result was a system

general "attach more importance to semantics than substance").

166. FRYE, *supra* note 7, at 67 (citing *Hornbuckle v. State*, 105 So. 2d 864 (Ala. 1958)).

167. Skinner, *supra* note 140, at 133.

168. *Highland Ave. & B.R. Co. v. Miller*, 24 So. 955 (Ala. 1898); *see also* *Alabama Power Co. v. King*, 190 So. 2d 674 (Ala. 1966); *Mathews v. Donald*, 66 So. 2d 195 (Ala. 1953); *Birmingham Ry., Light & Power Co. v. Weathers*, 51 So. 303 (Ala. 1909).

169. FRYE, *supra* note 7, at 52-54, 67-68. FRYE notes that the assignment of errors was "one of the most antiquated" of the court's appellate procedures. *Id.* *See generally* REVISED R. SUP. CT. ALA. (Feb. 1, 1955) (showing the court's rules late in the pre-reform era). Rule 9 specifies the form of appellants' briefs. *Id.* at 4-5.

170. FRYE, *supra* note 7, at 63 (discussing changes in the rules of Alabama appellate procedure proposed within the State Bar Association).

171. *Id.* at 23; *but see* Merrill, *supra* note 159, at 144.

172. *See* FRYE, *supra* note 7, at 27, 30. The tenure of chief justices was notably long. In the twentieth century, John C. Anderson held that office from 1914 to 1940, Lucien Gardner from 1940 to 1951, and James E. Livingston from 1951 to 1970. *Id.* at 25; *see also* Merrill, *supra* note 159, at 144 (noting that three Alabama Supreme Court justices were candidates for

that favored judicial careerists and discouraged the injection of policy issues into judicial races.¹⁷³ There were occasional exceptions, such as the 1952 primary in which Pelham Merrill defeated Lawrence K. Andrews.¹⁷⁴ This contest was doubly unusual as both men had reputations as prominent legislators, and Merrill was known to be a supporter of the quasi-Populist James "Big Jim" Folsom.¹⁷⁵

Certainly, Alabama judicial politics produced a supreme court whose members were attuned to the mores of the state's legal profession and of small-town white society. More than half of the twentieth century justices were graduates of The University of Alabama's School of Law.¹⁷⁶ Nearly half had held judicial posts immediately prior to joining the supreme court.¹⁷⁷ Likewise, rural counties, South Alabama, and the Black Belt were well represented on the court.¹⁷⁸ No justices were chosen from Mobile, Huntsville, or Gadsden, all urban centers; only two were elected from Jefferson County.¹⁷⁹ It was natural that the court's personnel should be familiar with the practice of Alabama law in all its turgid complexity. But it was unfortunate that so many of them were products, fundamentally, of communities whose lawyers were likely to be comfortable with the most provincial aspects of Alabama practice.¹⁸⁰

Since members of the Alabama Supreme Court were rewarded for staying out of the public eye, it is not surprising that the mid-twentieth century court was no hotbed of procedural reformism. Chief Justice Livingston and fellow justices James J. Mayfield and David F. Stakely involved themselves in the work of the Commission for Judicial Reform.¹⁸¹ Yet not all of the justices were supportive of the proposed Rules, and when these reforms were defeated, the court seemed content

reelection in 1964 but had no Republican opposition).

173. See FRYE, *supra* note 7, at 30-31.

174. *Id.* at 26.

175. *Id.*; see generally Scrapbooks, Pelham J. Merrill Collection (on file in the Bounds Law Library, The University of Alabama School of Law) (containing clippings on the Merrill-Andrews race).

176. FRYE, *supra* note 7, at 31.

177. *Id.* at 30.

178. *Id.* at 32-34.

179. *Id.* at 34. However, nine (of thirty-five) justices were chosen from Montgomery County and four from Tuscaloosa County; both were urban centers of the Black Belt. *Id.* at 33; see also ROGERS, *supra* note 1, at 412-13, 577 (discussing the continuing (but soon declining) political importance of the Black Belt).

180. Note, however, that specially created courts, the ultimate in provincial practice, were as likely to exist in urban as in rural centers. See Merrill, *supra* note 159, at 141.

181. Skinner, *supra* note 140, at 148; BIRMINGHAM NEWS, Aug. 21, 1955, at 2A (photograph and caption) (on file at Box 2, File 17, Patterson Papers in the Bounds Law Library, The University of Alabama School of Law) (demonstrating the involvement of Justice Mayfield (who died in Apr. 1956)).

to let the matter lie.¹⁸² In 1961, Governor John Patterson (former member of the Commission for Judicial reform) pushed through the Legislature a bill creating a Judicial Conference which was intended to be a supervisory and reformist body headed by the Chief Justice. As late as 1969, Livingston had not yet called a meeting.¹⁸³

However, the greatest challenge faced by the supreme court, and indeed by the legal profession of the time, had less to do with procedure than with fundamental justice. Under the leadership of the Reverend Martin Luther King, Jr. and other courageous men and women, the black people of Alabama sought for a long decade—from the start of the Montgomery Bus Boycott in 1955 to the Selma March of 1965—to gain or regain certain rights.¹⁸⁴ Leaders of a Civil Rights movement which was national in scope and backed increasingly by public opinion outside the South, King and his supporters staged peaceful demonstrations and marches protesting the denial of equal access to public facilities, the persistence of segregated education, and other basic inequalities faced by black citizens.¹⁸⁵

In the pursuit of their rights, these black Alabamians knew that they were unlikely to receive equal treatment in the state courts. As noted above, black lawyers were few. Black policemen were scarcely to be found, and black judges were nonexistent. White officials were products of a segregated society in which black people had been presumed, for a very long time, to occupy a subordinate place; as a result, white officials simply did not pick black people for jury duty.¹⁸⁶ Moreover, white judges often did not give black citizens any more due process than was absolutely necessary. It was not uncommon for indigent black

182. See Letter from Thomas E. Skinner to Members of the Commission for Judicial Reform and Members of the Judicial Advisory Council (Apr. 16, 1957) (on file at Box 2, File 16, Patterson Papers in the Bounds Law Library, The University of Alabama School of Law) (demonstrating Supreme Court opposition). This letter states that Justice Thomas Lawson "has expressed some apprehension" concerning the proposed Rules, and describes an unsuccessful effort to set up a conference with the justices. *Id.*

183. Act of Sept. 15, 1961, No. 74, 1961 Ala. Acts 1949-51; FRYE, *supra* note 7, at 21 nn.42, 22. Pelham Merrill was the leading procedural reformer on the court in the early 1960s. In December 1966, he addressed the Citizens' Conference on the State Courts; his words quoted below reflect his sense of isolation. Referring to the "divisions" of the court, Merrill said that he did "not often get the opportunity to present my ideas that are not checked by three other justices; but I have that opportunity now and don't blame the court for what you hear from me, because my colleagues have not told me what to say and have not had the opportunity to concur in what I say." Merrill, *supra* note 159, at 140.

184. See generally ROGERS, *supra* note 1.

185. See ROGERS, *supra* note 1, at 545-65 (summarizing the Civil Rights movement in Alabama); see generally BRANCH, *supra* note 2; TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-1965* (1998) (giving an overview of the Civil Rights movement).

186. See DAN CARTER, *SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 196-97*, 320 n.114 (1st ed.) (1969) (discussing the proposition that white officials did not pick black people for jury duty).

defendants to be assigned counsel at the commencement of trial.¹⁸⁷ Such was the case at the first of the notorious Scottsboro rape trials of the 1930s.¹⁸⁸ Where blacks were accused of crimes against whites, court officials, though there were honorable exceptions, often took only the most perfunctory steps to achieve impartial verdicts.¹⁸⁹

The manner in which the Scottsboro defendants were repeatedly denied justice touched off a national scandal.¹⁹⁰ Yet state officials commenced a quieter (and therefore more effective) defense of "White Supremacy" in the summer of 1955, when they attempted to put the National Association for the Advancement of Colored People (NAACP) out of business.¹⁹¹ As a strong and well-financed civil rights organization, the NAACP had evoked great hostility among white Alabamians.¹⁹² Therefore, to Attorney General John Patterson, there was no political risk in asking Circuit Judge Walter B. Jones for an injunction banning NAACP activities on the grounds that the organization had not registered under the state's corporation laws, and had backed the attempted integration of The University of Alabama by Autherine Lucy and the Montgomery Bus Boycott.¹⁹³ A prominent figure in state legal circles, Jones was also a vocal defender of segregation.¹⁹⁴ He issued the order and even required the NAACP to hand over an array of records that included membership lists.¹⁹⁵ When the NAACP, fearing reprisals, refused to surrender the lists, Jones held the organization in contempt; meanwhile his injunction remained in force.¹⁹⁶

The NAACP sought relief in the Alabama Supreme Court where, from July through December 1955, it was rebuffed in a series of procedural rulings by which it was told, successively, to rely upon a writ of certiorari, informed that their filings were not adequate, and finally informed that it should have been seeking a writ of mandamus all along.¹⁹⁷ The NAACP next took its case to the United States Supreme

187. See HARE, *supra* note 83, at 45-47.

188. CARTER, *supra* note 186, at 22-23.

189. See *id.* at 22-23. Certainly Circuit Judge James L. Horton, Jr., was one of the honorable exceptions. He presided in a fair manner over two of the Scottsboro trials, reversing the conviction of one defendant, Haywood Patterson. He was then defeated for reelection in a 1934 primary. *Id.* at 192-239, 264-69, 272-73.

190. *Id.* at 48-50.

191. See MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 283-300 (1994). Tushnet notes that attorneys general in Arkansas and Louisiana used similar tactics against the NAACP; more particularly, state officials in Alabama and other states cited statutes originally designed to hamper the activities of the Ku Klux Klan. *Id.* at 283-84.

192. See *id.*

193. *Id.* at 283.

194. *Id.*

195. TUSHNET, *supra* note 191, at 283.

196. *Id.*

197. *Id.* at 284.

Court, where its general counsel, Robert L. Carter, working with Arthur D. Shores and other attorneys, argued both procedural and "free-expression" issues.¹⁹⁸ The Supreme Court responded favorably in 1958 with an opinion which noted the Alabama court's procedural inconsistencies and backed Carter's contention that revealing members' names, in this case, would restrict their right of free association.¹⁹⁹ The case was returned to Alabama for trial, with the expectation that Judge Jones would make final rulings on the status of the NAACP.²⁰⁰

What followed was a remarkable episode of the law's delay. First, the Alabama Supreme Court effectively defied the United States Supreme Court's decision, declaring in February of 1959, that the latter had been mistaken in accepting that the NAACP had offered to produce all records except membership lists.²⁰¹ The United States Supreme Court brushed aside this irrelevancy and, in October 1959, denied the state's petition for a rehearing.²⁰² By July of the next year the Alabama Supreme Court, still disagreeing, finally remanded the cause to Judge Jones; but in the meantime the NAACP, employing Alabama attorneys Fred Gray and Arthur D. Shores, had asked the federal courts to vacate Jones' injunction.²⁰³ Their request traveled from Frank Johnson's Montgomery courtroom to the United States Supreme Court, which gave the state a January 1962 deadline to let the NAACP argue its case against the injunction.²⁰⁴

A few days before the deadline, Judge Jones finally heard arguments and made his ruling which, in effect, denied the NAACP the right to exist in Alabama.²⁰⁵ The NAACP appealed to the Alabama Supreme Court, which delayed until February 1963 and then, with its other means exhausted, fell back upon its old reliable "assignment of error" rules.²⁰⁶ Under these regulations, the court claimed that the sections of the NAACP brief devoted to "argument" (discussions of Jones' alleged errors) each contained at least one claim without merit; therefore the whole appeal was void.²⁰⁷ In July 1964 an infuriated United States Supreme Court declared such reasoning "wholly unacceptable" and ordered the Alabama Supreme Court to dissolve Jones' permanent

198. *Id.* at 284-85.

199. *Id.* at 287.

200. *NAACP v. Alabama*, 357 U.S. 449 (1958); Tushnet, *supra* note 190, at 287; see Elliot E. Slotnick, *National Association for the Advancement of Colored People v. Alabama ex. rel. Patterson*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 572 (Kermit Hall et al. eds., 1992).

201. TUSHNET, *supra* note 191, at 287.

202. *Id.*

203. *Id.*

204. *Id.* at 288.

205. TUSHNET, *supra* note 191, at 288.

206. *Id.* at 288-89.

207. *Id.*; see also FRYE, *supra* note 7, at 54-55.

injunction.²⁰⁸

In staging its own version of massive resistance, Alabama's supreme court had diminished its credibility. A few years later, a University of Alabama study would state that the court's brief-preparation rules as well as its "interpretations of these rules are needlessly complex and petty."²⁰⁹ The furor of the times blinded many white lawyers and even more white office-holders and politicians to what they knew perfectly well—that too often Alabama courts were inadequate to conduct even routine business.²¹⁰ To such men, their ability to use various legal devices to nullify civil rights laws was a victory of sorts, despite the scorn it brought down upon them.²¹¹

It was strangely appropriate that, in 1960, in the midst of the crisis of the old order, the world should be introduced to a fictional character who was the ideal image of an old-school lawyer. The daughter of an Alabama attorney, Harper Lee had herself studied law at The University of Alabama.²¹² Her Pulitzer-Prize winning novel *To Kill a Mockingbird* features lawyer Atticus Finch, a man who believed that the legal system must operate fairly and reasonably, with due process for black and white alike.²¹³ Truly, Finch was portrayed as the true inheritor of a glorious common law tradition; but it should be noted that in the novel he lost case and client alike.²¹⁴ Even in his fictional 1930s setting, Finch seemed a survival from some earlier and more honorable day. In the real world, by the time *To Kill a Mockingbird* was published, younger men were taking the stage. They would muster the legal and political skills necessary to bring about changes that the best of the old guard had worked for, but had failed to attain.

III. THE NEW REFORM MOVEMENT AND HOWELL HEFLIN

The failure of reform during the 1950s reflected the divisions within the state's legal profession. In 1955, the Legislature established the Commission for Judicial Reform and it produced the most compre-

208. *NAACP v. Alabama*, 377 U.S. 288, 296 (1964) *vacated, remanded by NAACP v. State*, 167 So. 2d 171 (Ala. 1964); *NAACP v. Gallion*, 190 F. Supp. 583 (M.D. Ala. 1960), *vacated by* 290 F.2d 337 (5th Cir. 1961), *vacated by* 368 U.S. 16 (1961); *see also Ex parte NAACP*, 91 So. 2d 214 (Ala. 1956), *rev'd NAACP v. Alabama*, 357 U.S. 449 (1958), *remanded to Ex parte NAACP*, 109 So. 2d 138 (Ala. 1959) *rev'd NAACP v. Alabama*, 360 U.S. 240 (1959); *see TUSHNET, supra* note 191, at 289.

209. FRYE, *supra* note 7, at 54-55.

210. *See generally* discussion *infra* Part I.

211. *See* Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1164-91 (1963) (demonstrating well-restrained scorn).

212. CLAUDIA DURST JOHNSON, *TO KILL A MOCKINGBIRD: THREATENING BOUNDARIES* xii (1994).

213. *See generally* HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

214. *Id.*

hensive study of Alabama court procedure in over a century.²¹⁵ The Commission recommended that the Legislature adopt a set of rules differing little from the Federal Rules of Civil Procedure.²¹⁶ In 1957, the House of Representatives passed the proposal, but they were never allowed to come to a vote in the Senate.²¹⁷ A few senators were able to block the measure²¹⁸ by appealing to anger against the federal defense of civil rights. Those favoring reform nonetheless perceived that the opposition had employed hyperbole in order to defeat the proposals.²¹⁹ The House majority vote for reform thus suggested contrary interpretations. Lawyers and judges who identified with the traditional order could believe that the divisions among the state's local legal establishments were such that reformers were unlikely to achieve a state-wide consensus supporting their cause.²²⁰ Proponents of change recognized, however, that a House majority reflected wide sources of public discontent that a properly managed campaign might mobilize on behalf of reform.²²¹

Over the next decade, reform-minded members of the Alabama State Bar pursued their goal. In 1966, the organization, led by President Howell Heflin, held a Citizen's Conference on Alabama Courts, which helped to identify the local judges and lawyers who were most willing to work actively toward reform.²²² Central to this effort was a resolution the Alabama State Bar adopted in 1966 calling for the Legislature to transfer its rule-making authority to the supreme court.²²³ Unlike the 1957 proposals that required the Legislature to vote on the rules themselves, the state Bar's resolution simply asked the Legislature to relinquish a power it had declined to meaningfully exercise anyway.²²⁴ Still, in order to succeed, judicial reform had to resolve an interconnected institutional and political problem.²²⁵ It was not difficult for critics to describe the traditional order as antiquated. Thus, the "Alabama system still retains as relics of by-gone days many features of the court systems of over a century ago; traditions with regard to judicial processes die hard in the state," wrote Robert J. Frye of The

215. See Clark, *supra* note 144, at 167-78; Merchant, *supra* note 148, at 284-97.

216. Talbert B. Fowler, Jr., *Available Materials on the Federal Rules of Civil Procedure*, 9 ALA. L. REV. 259 (1957); Edward D. Morgan, *Simplifying Present Alabama Procedure by Pouring Old Wine into Fewer Bottles*, 9 ALA. L. REV. 1 (1956); Wright, *supra* note 151, at 180.

217. Heflin, *supra* note 4, at 264.

218. *Id.*; Skinner, *supra* note 140, at 132.

219. See Heflin, *supra* note 4, at 264.

220. See *id.*

221. *Id.*

222. Martin, *supra* note 5, at 10, 14.

223. See Heflin, *supra* note 4, at 263-64.

224. See Howell T. Heflin, *Symposium: The Alabama Rules of Civil Procedure—Remarks of the Chief Justice*, 25 ALA. L. REV. 663 (1973).

225. See FRYE, *supra* note 7, at 15-18, 87 (discussing the Alabama Supreme Court).

University of Alabama in 1969.²²⁶ The system nonetheless prevailed because within the state and local legal establishment were many who could use the weight of institutional inertia to the benefit of their clients.

Even so, the traditional system carried its own seeds of discontent. Following the Second World War, Alabama's population grew unevenly; accordingly, in some urban areas the national market created demands for legal services that the local system could not address. At the same time, other local courts, especially in rural areas, experienced no such pressure.²²⁷ Although the Alabama Legislature held ultimate authority over the procedural rules the local courts applied, the Legislature did not act. As a result, local judges fashioned their own procedure, thereby entrenching their autonomy.²²⁸ In addition, the court procedure existing throughout Alabama was both overly technical, and diverse.²²⁹ The field code the Legislature enacted in 1852 established, in principle, that judges had delegated their common-law rule making authority to the legislative branch.²³⁰ In 1969, Supreme Court Justice Pelham Merrill was quoted as affirming the principle concisely: "Our Supreme Court has held many times that the 'rule-making power' resides in the Legislature, and it is my opinion that the Legislature will have to grant us that power if we are to have it."²³¹ Yet as a practical matter, the state's decentralized judicial order permitted innumerable common-law pleadings and, more generally, the rule of procedural technicality.²³²

As a result, even many of those belonging to the local legal establishment conceded that technicalities rather than the merits often controlled a suit's outcome.²³³ Critics pointed to several cases as examples of form prevailing over substance.²³⁴ A basic common law rule was that pleadings should be strictly construed.²³⁵ In 1909, the Alabama Supreme Court decided against an injured plaintiff because the lawyer had alleged that the "jerk" of the railroad car had caused the fall rather than stating that the railroad's negligence had caused the car to "jerk."²³⁶

226. FRYE, *supra* note 7, at 3.

227. *See generally supra* Part I.

228. *See generally* FRYE, *supra* note 7, at 22 (discussing lack of judicial scrutiny).

229. *See id.* at 54-55 (discussing the complexity of brief preparations).

230. *See generally supra* Part II.

231. FRYE, *supra* note 7, at 17 (quoting Pelham J. Merrill, *The Facts About Alabama Courts and Judges Today*, 28 ALA. LAW. 139, 146 (1967)).

232. *See sources cited supra* note 7; Doug Rendleman, *More on Procedural Reform*, 33 ALA. LAW. 37 (1972).

233. Skinner, *supra* note 140, at 133-37.

234. *Id.*

235. *Birmingham Ry., Light & Power Co. v. Weathers*, 51 So. 303, 306 (Ala. 1909).

236. *Birmingham Ry., Light & Power Co.*, 51 So. at 305.

Moreover, the court also rejected the plaintiff's argument because in describing the defendant the plaintiff's lawyer had omitted the words "as aforesaid."²³⁷ The supreme court had decided the second case as recently as 1966.²³⁸ Again, the plaintiff lost because the formal argument was stated improperly.²³⁹ The plaintiff had alleged that the defendant Alabama Power Company "failed to maintain its said system of electric wires . . . in a reasonably safe condition."²⁴⁰ The court denied the claim because the plaintiff did not allege that the defendant had "negligently failed to maintain" the wires.²⁴¹ Proponents of procedural reform used such cases to show not only that formalism led to unfair results, but also that it demonstrated how far Alabama was behind the times.²⁴²

The focus upon the clear deficiencies of procedural formalism strengthened the appeal of other reform arguments. Failure to address the problems resulting from technical forms prevailing over a suit's substantive merits impeded the ability of Alabama law to adapt to changed postwar economic conditions. Accordingly, the traditional order retarded the growth of the substantive doctrines of tort, contract, and property, which imposed costs on local and interstate businesses operating in the national market. In practical terms, reformers aroused popular concerns that delays inherent in formalism cost money.²⁴³ The persuasiveness of this appeal made credible the reform argument that centralizing the rule-making authority in the supreme court would ameliorate the institutional inertia resulting from uneven legislative interference and judicial decentralization.²⁴⁴ This logic in turn established the reasonableness of the claim that the Legislature should relinquish its authority over procedure and delegate it to the supreme court.²⁴⁵

Advocating administrative centralization under the supreme court aided the reformers' arguments in other ways. First, it suggested a defense strategy. Opponents of change could assert that the court aimed simply to enhance its own power; the reformers could respond, however, that they sought only an improved organizational efficiency that clearly was in the best interests of all Alabamians. The focus upon institutional effectiveness also reflected popular concerns that many lawyers and judges within the local legal establishment had themselves

237. *Id.*

238. *Ala. Power Co. v. King*, 190 So. 2d 674 (Ala. 1966).

239. *Ala. Power Co.*, 190 So. 2d at 679.

240. *Id.* at 676.

241. *Id.* at 677.

242. See Skinner, *supra* note 140, at 134-35.

243. See FRYE, *supra* note 7, at 69 (noting that procedural technicalities often led to new trials).

244. See Heflin, *supra* note 4, at 264.

245. See Skinner, *supra* note 140.

raised. Linking the remedy for a generally recognized problem to the judiciary itself appealed to those local courts which confronted the pressures of national market change, while at the same time it isolated the contrary interests of those localities which remained wedded to the status quo. In addition, the defense strategy established the legitimacy of a specific reform Robert Frye suggested in 1969: "Alabama's judicial system could well profit from the creation of an administrative office to provide a variety of staff functions to the Chief Justice in his administration of the court system."²⁴⁶ Frye's proposal reflected the reformers' belief that increased judicial centralization was not a problem; it was the solution.

During the late 1960s, then, what did "reform" mean to Alabama lawyers and judges seeking change? At the most practical level it was understood as a necessary correction to certain institutional problems. Of course, to the proponents of the status quo the existing regime worked well enough; indeed, they viewed it as a system that had served the state adequately throughout the century. So, before the reformers could advance solutions, they had to redefine the judicial system in terms that even many of those with a stake in the established order might agree were legitimate reasons for public concern. The issue of common law pleading was a conspicuous case in point. The Legislature's failure to establish a uniform procedure had encouraged pervasive diversity across Alabama resulting in entrenched local control.²⁴⁷ Most lawyers and judges survived because they had grasped the essentials of this common law framework.²⁴⁸ But it was not difficult to show that undue complexity caused delay and even injustice. Accordingly, the reformers could gain support from lawyers who were familiar with the traditional practice by suggesting that attorneys routinely filed numerous demurrers to test complaints; these were followed by the motions and arguments on those motions.²⁴⁹ After the motion stage, the lawyer made a series of special pleas and, usually, the judge was asked to entertain further demurrers and replications.²⁵⁰ An experienced lawyer could manage the complexity, but some would clearly abuse it, and most would agree that inefficiency was a serious problem.²⁵¹

Finding support among Alabama's lower court judges presented a similar tactical challenge. Again, it was necessary to define problems in terms that suggested incentives for those who would have to adopt reforms in their courts, despite the weight of institutional inertia that fa-

246. FRYE, *supra* note 7, at 20.

247. *Id.* at 84-87.

248. *Id.* at 86-87.

249. See Skinner, *supra* note 140, at 141-42 (discussing demurrers).

250. *Id.*

251. See *supra* notes 126, 190 and accompanying text.

vored traditional local control. Above all, it was necessary to demonstrate that in return for giving up extensive autonomy, trial judges would receive administrative and budgetary assistance that would improve the operation of their courts. That these were elected judges was also not unimportant. Some local judges would count on satisfying the lawyers and their clients, who were the voters in the community most interested in judicial elections, by defending the traditional order. Others, however, particularly newly elected judges, could see the value of appealing to those members of the local Bar that understood institutional inefficiency to be a legitimate source of public concern.²⁵²

The most pressing problem was the backlog of docketed cases in the trial and appellate courts. Yet, here again, the great diversity of jurisdictions—numbering as many as 400—created further complexity.²⁵³ Some local courts made little effort to resolve docket backlogs, no doubt because in some cases the clients of members of the local Bar benefited from the slower process. Other jurisdictions, however, experienced community pressures for improved service. But, from the local level to the supreme court, there were no state-wide standards of administrative efficiency to which all courts might be held. Thus, reformers could mobilize judicial support around a call for an office of court administration. Such an office could provide information based on the operational needs of the state's whole judicial system; this information would in turn establish the means for instituting and enforcing a reasonable standard of administrative efficiency throughout Alabama.²⁵⁴

Other institutional problems involved financial control and jury service. The system of local judicial autonomy left fundamental budgetary authority in the hands of county commissioners.²⁵⁵ Many county commissions were concerned primarily with addressing the interests of real estate and construction industries; particularly the road building industry.²⁵⁶ If a court generated income, commissioners viewed it with favor. More generally, however, commissioners found that the opposite was true: courts were a drain on county budgets.²⁵⁷ Reformers could gain support among lower court judges, then, by linking the cause of improved judicial administration to the need for strengthening the financial independence of the state's entire court system. Moreover, a sure

252. Questionnaire I by Judge Richard Hundley, 8th Judicial Circuit, in Decatur, Ala. (May 22, 1972) in Scroggins, *supra* note 12, at 15-16. Robert Martin administered the distribution of these questionnaires to the state's judges during the reform campaign of the first half of the 1970s. Scroggins, *supra* note 12, at 13-16.

253. See generally sources cited *supra* note 191.

254. See generally sources cited *supra* note 7.

255. Hundley, *supra* note 252, at 3.

256. *Id.*

257. *Id.*

way to achieve this goal was to establish a vertical administrative and budgetary structure under the control of the office of the Chief Justice of the Alabama Supreme Court.²⁵⁸ By the late 1960s, protracted delay also affected the administration of the pool of voters from which trial courts drew jurors. Historically, male members of farming communities constituted the group of eligible jurors, and, generally, for such individuals time spent on jury service did not unduly interfere with employment.²⁵⁹ But as urban job sectors increasingly characterized Alabama's working population, lengthy periods of jury service added to employers' scheduling costs which in turn aroused resistance among potential jurors as well as the wider community.²⁶⁰ As a result, some judges perceived that more efficient judicial administration would remedy the problem by shortening the time jurors spent away from their jobs.²⁶¹

Two seemingly minor judicial offices also troubled some members of the local Bench and Bar. State law established the elected office of Circuit Court Clerk which local political bosses used as a patronage post often filled by an aged or infirm party loyalist.²⁶² Accordingly, managing the procedural minutia upon which a fair and effective judicial process depended often was left to those without professional legal expertise. Administrative inefficiency was the most common result, but the political dimension also invited potential favoritism. These problems, though on a larger scale, also characterized the office of the Justice of the Peace.²⁶³ An elected position established by constitutional provision, the JP's jurisdiction included numerous misdemeanor offenses, such as drunk driving.²⁶⁴ Professional legal training was not required of those holding the office.²⁶⁵ Generally, the penalty structure involved nothing more than the payment of money, which encouraged what critics called "cash register justice."²⁶⁶ The system's combination of weak professionalism and political dependency fostered public doubt regarding the justice meted out in all local courts. Thus many believed that the office had outlived its time. Again, reformers found a source of local discontent they hoped to tap into order to build support for their

258. Byron E. House, Perspectives on Chief Justice Howell Heflin and the Judicial Reforms of the 1970s, at 6 (1995) (unpublished student paper, The University of Alabama School of Law) (on file with the Alabama Law Review).

259. Hundley, *supra* note 252, at 3-4, 8-9.

260. *Id.* at 9.

261. Hundley, *supra* note 252, at 3-4, 8-9.

262. *Id.* at 9.

263. House, *supra* note 258, at 6.

264. Cole, *supra* note 5.

265. *Id.*

266. See Martin, *supra* note 5, at 10.

campaign.²⁶⁷

In 1970 the initiative for judicial reform achieved new focus under Howell Heflin's leadership. Since 1957, members of the State Bar Association, including many lawyers and judges belonging to the local legal establishment, had promoted the reform cause; especially through the 1966 recommendations which had grown out of the Citizens' Conference of the previous year.²⁶⁸ Robert Frye's insightful academic study of 1969, which documented the numerous institutional weaknesses that plagued Alabama's judiciary, further justified the need for reform.²⁶⁹ At the same time, however, political dislocation identified with George Wallace's battle against civil rights and the defiance of the federal government suggested that institutional inertia in Alabama was as intractable as ever.²⁷⁰ These contradictory pressures shaped the reform campaign that Heflin organized and then led during the 1970s.²⁷¹ Clearly, the content of the procedural and administrative reforms themselves were not Heflin's own, because they had emerged from the state Bar's struggle over many years. Still, the state's perennial resistance to change among those wedded to the traditional order was so deeply rooted that only strong organization and creative leadership could overcome it.²⁷² Heflin possessed unusual organizational resources and leadership skills; accordingly, his role in the reform process was indispensable.²⁷³

Heflin ran for election to the office of Chief Justice of the Alabama Supreme Court. In 1970, the man retiring from that office was J.E. Livingston who had been a member of the court since the 1940s. Re-elected with little or no opposition throughout the years, Livingston represented Alabama's traditional legal establishment. Heflin's bid to succeed the long-time Chief Justice thus symbolized the expectations of a new generation of Alabama lawyers, many of whom had become adults during the Great Depression and the Second World War. Heflin was born in 1921 into one of North Alabama's prominent families and graduated from college in 1942. He then went to war in the Pacific theater. As a member of the United States Marine Corps, Heflin received the Silver Star and Purple Heart for courageous combat service. He then graduated from The University of Alabama School of Law in

267. *Id.*

268. See Scroggins, *supra* note 12, at 13-16.

269. FRYE, *supra* note 7.

270. See generally sources cited *supra* nn.1, 2.

271. See Clark, *supra* note 144.

272. See generally sources cited *supra* nn.12, 144.

273. See generally Clark, *supra* note 144; see also Brad Murray, The Perspective of the Participant Observer: Interviews with Daniel T. McCall, Jr., and Sam A. Beatty, Retired Supreme Court Justices (1995) (unpublished student paper, The University of Alabama School of Law) (on file with the Alabama Law Review).

1948 and in less than two decades he had achieved sufficient professional standing that, in 1965, the Alabama State Bar chose him as its president.²⁷⁴

Heflin was a member of a successful law firm in Tuscumbia, a community in northeast Alabama not far from the larger urban areas of Gadsden and, most importantly, Birmingham, the state's leading metropolitan center.²⁷⁵ This locale gave Heflin considerable first hand experience with the problems facing both big-city and small town lawyers and courts during Alabama's post war decades. Additionally, over the years Heflin had pursued organizational solutions that drew upon improved professional education. From 1957 to 1958, he was a member of the Alabama Educational Commission.²⁷⁶ At the same time the Bar's reform recommendations were defeated in the state legislature, the Commission recognized that legal education could contribute to judicial reform. From 1964 to 1966, Heflin was President of The University of Alabama Law School Foundation that deepened his familiarity with the academic dimensions of reform.²⁷⁷ He also helped to establish the Alabama Trial Lawyer's Association, an organization that reflected the interests of those attorneys most directly affected by the problems that judicial reform intended to address.²⁷⁸

As Alabama State Bar President and principal organizer of the 1965 Citizens' Conference, Heflin developed a deep understanding of both the legal and political factors that had to be addressed if reform was to succeed.²⁷⁹ As an active member of the Chamber of Commerce, Heflin also gained an appreciation of the post-war economic conditions that were unevenly transforming the local market for legal services across Alabama.²⁸⁰ Moreover, between 1960 and 1970, the total number of active lawyers practicing law in the state jumped from 1,821 to 2,974.²⁸¹ This increase created the feeling among young lawyers entering the profession that a "glut" would hinder their future advancement.²⁸² As State Bar President, Heflin clearly grasped that these con-

274. See generally sources cited *supra* note 5; see also Stephen Barlas, *A Judge in the Senate*, Nat'l Law J., Apr. 27, 1981, at 1.

275. Martin, *supra* note 5, at 9.

276. *Id.*

277. See generally sources cited *supra* note 5.

278. See *supra* note 5; see also Stephen Barlas, *A Judge in the Senate*, NAT'L L.J., Apr. 27, 1981, at 1.

279. Martin, *supra* note 5, at 10.

280. See generally sources cited *supra* note 5; see also Stephen Barlas, *A Judge in the Senate*, Nat'l Law J., Apr. 27, 1981, at 1; cf. *supra* Parts I, II.

281. Letter from Reginald T. Hamner, Executive Director, Alabama State Bar, to Tony A. Freyer (Jan. 30, 1992) (on file with the authors); cf. Payne, *supra* note 36 (providing estimates of active lawyers in 1965).

282. Letter from Reginald T. Hamner, Executive Director, Alabama State Bar, to Tony A. Freyer (Jan. 30, 1992) (on file with the authors); see generally sources cited *supra* note 5; see

cerns might be addressed through judicial reform. Meanwhile, during the decade from 1954 to 1964, when resistance to civil rights and federal authority made Alabama notorious around the world, Heflin was chairman of the Tuscumbia Board of Education. This position made Heflin well aware that any effort to change the state's basic institutions involved finding some way to overcome the political tactics that a few Senators had used in 1957 to block the reform proposals that a clear majority of the state's House had passed.²⁸³

Running on a platform of judicial reform in the Chief Justice race involved two other political factors. The first and most important consideration was George Wallace. By 1970, Wallace's grass roots political influence was formidable. Unable to succeed himself in 1966, Wallace convinced his wife to run for governor—an election she won—enabling her husband to maintain political control throughout the state.²⁸⁴ Mid-way through the four-year term, however, Lurleen Wallace died of cancer, elevating Lieutenant Governor Albert Brewer to the governorship.²⁸⁵

In the 1970 gubernatorial race, Wallace faced Brewer in what pundits expected to be a brutal campaign.²⁸⁶ At this time, the basic political necessity for Heflin was to keep his own campaign and the cause of judicial reform separate and distinct from the gubernatorial race. This was especially vital, because whoever was elected governor would greatly influence how the Legislature approached the reform measures that Heflin would introduce as Chief Justice. Moreover, if Wallace won, as most informed observers expected, he could exert considerable pressure upon the Legislature through his extensive local political apparatus, which included lawyers and judges who had the most to lose from judicial reform.²⁸⁷

The second political factor was the Alabama Constitutional Commission, which the Legislature had established in 1969. The Commission's charge was to draft a new constitution for Alabama to replace the one ratified in 1901.²⁸⁸ Civil rights victories in the federal courts had invalidated the Jim Crow provisions of the Alabama Constitution; however, there remained many other provisions that had nothing to do with race, but simply reflected the rural society that had characterized Ala-

also Barlas, *supra* note 274, at 1.

283. See generally sources cited *supra* note 5; see also Barlas, *supra* note 274, at 1.

284. ROGERS, *supra* note 1, at 575.

285. See *id.* at 576.

286. See Stephan Leshner, George Wallace: American Populist 121, 149, 234, 310, 314, 324, 321, 344 (Addison-Wesley 1994); ROGERS, *supra* note 1, at 576.

287. STEPHAN LESHNER, GEORGE WALLACE: AMERICAN POPULIST 121, 149, 234, 310, 314, 324, 321, 344 (1994).

288. Martin, *supra* note 5, at 14; see Ala. Const. Comm., *Proposed Constitution of Alabama—Final Report of the Constitutional Commission* (May 1, 1973).

bama at the start of the twentieth century.²⁸⁹ Indeed, the judicial article was one of the provisions that was most in need of change, and the reform platform upon which Heflin was campaigning was precisely designed to meet this need.²⁹⁰ Thus, at one level, the Commission's efforts complimented the judicial reform proposals. At the same time, however, the Commission's charge of comprehensive constitutional revision multiplied the challenges to entrenched political interests. The political question was thus whether full scale constitutional revision would hurt or strengthen the traditional legal order. These uncertainties compelled Heflin to craft his reform platform to accentuate greater administrative efficiency, enhance legal professionalism and, above all, improve legal services for Alabama's people. In other words, Heflin's campaign emphasized strict political neutrality.

Heflin defeated John Patterson in the race for Chief Justice.²⁹¹ Patterson had served as Alabama's Attorney General and then Governor during the 1950s and early 1960s.²⁹² While serving in both positions, he had opposed civil rights and defied the federal government. However, as a member of the Judicial Commission of 1955 he had supported procedural reform.²⁹³ Thus, by 1970 Patterson represented the state's traditional legal establishment in defending segregation; on the other hand, as a member of a leading Montgomery law firm, he defended the substance of the reform proposed in 1955.²⁹⁴ Despite this fact, since 1906 Alabama's governors, reflecting the political advantage of a one-party state, had appointed loyal Democrats as Chief Justice after the current office holder resigned. This practice gave the appointee the benefit of incumbency before the electoral campaign even began. It also satisfied two other political necessities. On one hand, the Democratic leadership could use the office to reward the faithful while, on the other hand, it permitted a few individuals like Livingston to remain in office for years without serious electoral challenge.²⁹⁵ Heflin, however, did not conform to political custom. His campaign, based as it was on a reform platform which was not entangled with segregation, employed a new electoral strategy for judicial office whereby a candidate appealed directly to voters independent of the Party's traditional legal establishment.²⁹⁶ His

289. See generally sources cited *supra* note 1; see also *supra* Part II.

290. See generally sources cited *supra* note 5; see also FRYE, *supra* note 7, at 3.

291. Scroggins, *supra* note 12, at 21.

292. Merchant, *supra* note 148, at 294.

293. *Id.*

294. See CARTER, *supra* note 1 (illustrating Patterson's pro-segregationist past); See Editorial, *Heflin for Top Court*, TUSKEGEE NEWS, Apr. 9, 1970 (indicating that Heflin faced Patterson in the May 1970 Democratic Primary); MARTINDALE-HUBBEL LAW DIRECTORY 50 (1970).

295. See generally sources cited *supra* notes 163; see Frye, *supra* note 7, at 58-61.

296. Martin, *supra* note 5, at 10-11; see Charles D. Cole, *Judicial Reform in Alabama: A Survey*, 4 CUMB. L. REV. 41 (1973).

victory suggested that support for the old order had eroded.

Heflin began a six-year term in January of 1971 and turned to making reform a reality. He recruited a staff that would pursue the reform agenda on several levels at once. First, the staff fashioned the reform measures into separate packages. Statutory proposals required legislative enactment alone, whereas constitutional provisions had to be passed by the Legislature and then approved by a majority vote in a statewide election.²⁹⁷ At the same time, the staff used the media to inform the public about judicial reform that, in turn, put pressure on the Legislature and governor to give their support.²⁹⁸ Finally, the staff maintained contact with the lawyers, judges, and members of the general public who had worked so long on behalf of the reform cause. Meanwhile, many lawyers and judges, in conjunction with state and community Bar organizations, used the staff's resources to further promote reform throughout Alabama. Heflin himself put the office of the Chief Justice behind all these efforts, and campaigned as vigorously as he had during the election.²⁹⁹

Several factors contributed to the staff's effectiveness. Heflin put Charles Y. Cameron in charge of recruiting the staff and coordinating its functions.³⁰⁰ Cameron surveyed numerous applications from recent law school graduates, people with data processing skills, and even those with experience as military judge advocate generals.³⁰¹ While Cameron interviewed every applicant, he made each hire in consultation with Heflin who wanted to ensure not only job fitness, but also that the individual would bring the maximum political benefit to the reform cause.³⁰² No one was more important in this regard than Robert A. Martin. A journalist without legal training, Martin was the editor of the *Florence Times Tri-Cities Daily*, a position that put him in contact with both the big-city and small town news media.³⁰³ He also possessed excellent communication skills and a wide understanding of the Alabama political landscape. Martin was well qualified to carry out the charge Heflin gave him in a memorandum dated March 6, 1972: "[Y]ou are the one that is to give us new, different and innovative evaluations of present court systems and fresh and different ideas towards the solution of the problems."³⁰⁴ Around Cameron and Martin, Heflin established a loyal staff well equipped to implement the reform agenda.

297. Scroggins, *supra* note 12, at 17-20.

298. *Id.*

299. *Id.* at 12.

300. *Id.*

301. *Id.*

302. Scroggins, *supra* note 12, at 12.

303. *Id.* at 13-14.

304. *Id.* at 13.

Heflin also had access to national institutional resources that further strengthened his organization's effectiveness and independence. The staff and its work received financial and administrative support from the federal Law Enforcement Assistance Administration.³⁰⁵ The LEAA was a federally funded agency that provided grants to assist local communities to address a wide range of issues, including judicial reform. In the agency's Atlanta office, Heflin established an excellent working relationship with William Herndon, Chief Courts Specialist for the southeast region.³⁰⁶ Herndon's office provided Heflin and his staff with technical and qualitative data concerning judicial reform throughout the region and nation; Herndon also assisted Alabamians in the procurement of federal grants that included the funding of staff positions, thereby reducing dependency on the limited state budgetary allocations.³⁰⁷ Heflin also maintained budgetary independence in funding the Second Citizen's Conference on Alabama State Courts during April 5-7, 1973.³⁰⁸ Unlike its predecessor in 1966, which had modest public impact, the Second Conference was central to a successful public relations campaign that mobilized considerable popular support for the reform program.³⁰⁹ The American Judicature Society, in conjunction with the Alabama State Bar and other professional organizations, sponsored the Conference.³¹⁰ Heflin's ability to procure external sources of funding and professional expertise both broadened the reach of the reform campaign and reinforced its independence from the state's traditional power centers.³¹¹

Since the mid-1950s many Alabama lawyers and judges were aware of the problems facing legal order. They had a reasonably clear idea, too, of the following necessary substantive reforms: establish a state-wide uniform procedure modeled on the Federal Rules, have the Legislature delegate rule-making authority to the supreme court, institute the court's centralized administrative authority over all trial and appellate courts throughout Alabama, and abolish such venerable local offices as the Justice of the Peace.³¹² However, implementation of the program meant that certain state and local officials would lose the power upon which their constituent's interests had depended during most of the twentieth century. Unquestionably, the economic nationalization Alabama was undergoing facilitated a new market for legal services that

305. *Id.* at 12.

306. *Id.* at 25-27.

307. Scroggins, *supra* note 12, at 13.

308. *Id.* at 27.

309. *Id.*

310. *Id.*

311. *Id.* at 13.

312. See Heflin, *supra* note 4, at 264; see also Martin, *supra* note 5, at 10-11.

encouraged growing numbers of the state's lawyers and judges to favor change. But Alabama's defiant resistance to the civil rights struggle suggested both how intractable the traditional power structure was and that the same power structure had defeated judicial reform in the past.³¹³ Whether the reform measures could establish institutional efficiency thus depended upon meeting the political challenge. Heflin's staff and its centralized organization under the office of Chief Justice nonetheless gave the reform cause an advantage it had not possessed before.³¹⁴ A final political factor was that Wallace, who also won election in 1970, had told Heflin he would not, in principle, oppose judicial reform; what that meant, exactly, Heflin would learn as the reform campaign moved forward.³¹⁵

IV. JUDICIAL REFORM AND CONSTITUTIONAL REVISION SUCCEED

Heflin's reform campaign went through two principal phases before ending in 1975. In the first phase, the reformers mobilized the legal profession's support for legislative action alone; by contrast, the second phase required winning not only legislative approval, but also state-wide electoral votes in favor of constitutional amendments. Heflin's electoral victory over Patterson indicated that the support for the reform platform was greater than that for the traditional order. However, the need to procure both legislative and constitutional enactments multiplied the opportunities for the opposition to employ political maneuvers and ideological appeals like those which had defeated reform in 1957. This was the challenge the reformers had to meet. Moreover, while Heflin had a six-year term, he knew that to avoid entangling reform in another gubernatorial race, the program had to succeed by 1975.³¹⁶

Beginning in the spring of 1971, Heflin presented to the Legislature the initial package of proposals. Broadly, the measures strengthened the authority of the Chief Justice's office. Technically, state law required the Chief Justice to oversee the operation of all courts throughout the state; but the Legislature had never conferred upon that office the formal authority to establish an administrative structure to do so. Accord-

313. See discussion *supra* Parts I, II.

314. Scroggins, *supra* note 12, at 6; see also Sean P. Costello, *Modernizing Alabama Justice: How Heflin Moved the State's Court System Into the 20th Century* 9 (1997) (unpublished student paper, The University of Alabama School of Law) (on file with Alabama Law Review); House, *supra* note 258, at 6.

315. House, *supra* note 258, at 16-18.

316. Cole, *supra* note 5, at 53; Costello, *supra* note 314, at 9; See Heflin, *supra* note 4, at 264; House, *supra* note 258, at 6-13; Johnson, *supra* note 2, at 855; Martin, *supra* note 5, at 10-11; Scroggins, *supra* note 12, at 6-20.

ingly, among the first reforms the legislature approved was a Department of Court Management. Under the auspices of the Chief Justice, the Department compiled statistics that enabled the staff to develop a realistic operational profile of all courts throughout the state. This profile especially accounted for caseload disposition and docket backlogs. Based upon survey data from each judicial circuit in Alabama, the Chief Justice instituted a program to use supernumerary judges and judges from rural circuits with light caseloads to alleviate the backlog. The legislature also passed laws creating the same sort of system to resolve the appellate courts' backlog problems. Legislators also enacted measures which provided for continuing judicial training, other educational programs and the mandatory retirement of judges.³¹⁷ The Legislature also created a permanent commission empowered to study and make recommendations for Alabama's judicial system.³¹⁸

Procuring the supreme court's control over rule-making was the most important reform of the initial stage. Locating this power in the Legislature weakened the judiciary's independence and the accountability inherent in constitutional checks and balances. Ironically, the Legislature had failed to act, leaving a policy vacuum filled by discretionary formalism which in turn promoted a decentralized judicial order dominated by localism.³¹⁹ Getting the Legislature to relinquish its power to the court thus had been, according to one commentator, "sought by jurists and commentators for almost three decades."³²⁰ As a practical matter, granting the court an authority to make its own rules of pleading and procedure facilitated administrative autonomy at the top, which in turn enabled the court to establish organizational centralization down to the grass roots level. Although the reform directly affected the supreme court, its broader impact was upon Alabama's entire judicial system, including the interests of lawyers and judges across the state. One observer summarizes succinctly what was at stake: "Because of enlightened legislation, prompt and efficient action, and the necessary support from the Bench and Bar, the Alabama state courts will experience a long overdue reform of [our] court procedures."³²¹

Led by Heflin, the reformers' lobbying of the Legislature succeeded. The 1971 session ended with legislation which gave the supreme court the authority to make its own rules of procedure.³²² The triumph was nonetheless just the first step in achieving procedural uni-

317. Martin, *supra* note 5, at 10-11.

318. See Cole, *supra* note 5, at 67-70.

319. See *id.* at 48-52.

320. *Id.* at 52.

321. *Id.* at 52-53.

322. Martin, *supra* note 130, at 11.

formity throughout the entire system.³²³ With input from the staff and other reform-minded individuals, Heflin appointed an Advisory Committee to develop new rules for Alabama practice and procedure.³²⁴ While the committee clearly possessed the necessary technical expertise, it also reflected the interests of lawyers, judges, and academics who were active in the reform campaign.³²⁵ Drawing upon the resources of such national organizations as the LEAA and the American Judicature Society, the committee modeled its recommendations upon the Federal Rules of Civil Procedure.³²⁶ In 1957, opponents of reform had defeated similar reform proposals in the Legislature because they were identified with the federal government.³²⁷ The reform was politically vulnerable because legislators held direct power over what the rules were to be. Sixteen years later, the reform proposals grew out of authority the supreme court itself possessed.³²⁸ After public comment and review, the Alabama Supreme Court unanimously promulgated the Alabama Rules of Civil Procedure on January 3, 1973, to become effective six months later.³²⁹

The same process of committee expertise and mobilization of public support resulted two years later in the court adopting the new Alabama Rules of Appellate Procedure.³³⁰ Earlier, the Legislature had approved Heflin's request for legislation to increase the number of judges on the court of criminal appeals from three to five.³³¹ Taken as a whole, the new system of trial and appellate procedure under the centralized administration of the supreme court transformed the operation of Alabama's legal order. By mid-1972 the court had eliminated its own caseload backlog; within a short time the caseload of the intermediate civil and criminal appellate courts were similarly eliminated.³³² In trial courts throughout the state there was basic uniformity in the rules of pleading and practice, which meant that technical formalism reflecting the interests of local legal establishment no longer controlled the merits or the outcome of cases.³³³ In addition, Alabama now possessed an educational and administrative apparatus that worked to the advantage of the Bench and Bar across the state and kept them abreast of legal prac-

323. Costello, *supra* note 314, at 10; see Scroggins, *supra* note 12, at 6-8; see also House, *supra* note 258, at 6-7.

324. Scroggins, *supra* note 12, at 9.

325. Heflin, *supra* note 4, at 264.

326. BELKNAP, *supra* note 12, at 194-202, 228-32, 238-39, 245; Heflin, *supra* note 4, at 264-65.

327. See Heflin, *supra* note 4, at 264.

328. See Heflin, *supra* note 4, at 264; see also Martin, *supra* note 5, at 10-11.

329. Heflin, *supra* note 4, at 265.

330. See Walker, *supra* note 7, at 144.

331. Howell Heflin, *State of the Judiciary*, 33 ALA. LAW. 371, 372 (1972).

332. Martin, *supra* note 5, at 11-12.

333. See *id.* at 12.

tice throughout the nation.³³⁴

The second phase of reform required changing the Alabama Constitution's judicial article. The reforms enacted between 1971 and 1973 could only be achieved through legislative action.³³⁵ What the Legislature gave, however, it could withdraw under altered political circumstances. Indeed, both the old order that had evolved over seven decades and the new system of reforms emerged from the constitution's article VI, which granted the Legislature extensive control over the judiciary.³³⁶ In phase two, the reformers sought to incorporate the reforms they had won into a new constitutional article which would strengthen the judiciary's independence from the Legislature. Now that the Legislature had granted rule-making and administrative authority to the judicial branch, the reformers wanted to make it as difficult as possible for the Legislature to reverse the process in the future. Even so, constitutional revision demanded political action: the Legislature would first have to adopt the proposed revision, and then submit it for approval by the people in a state-wide vote. Thus, Heflin and the reform campaign would have to extend their organizational initiative to convince not only legislators, but also voters across Alabama that a more independent judiciary would better serve the public welfare.³³⁷

The reformers pursued their goal through the process of constitutional amendment.³³⁸ The first step was an amendment abolishing the Justice of the Peace (JP), an office which required no formal legal training and was subject to local political influence.³³⁹ Removing the JP's jurisdiction over a wide range of minor offenses opened the way to instituting a new system of local courts subject to professional legal standards.³⁴⁰ The creation of these courts was included in more comprehensive structural and substantive provisions incorporated into a second constitutional amendment: amendment 328, which formally replaced article VI of the 1901 Constitution.³⁴¹ The new constitutional article stated that the "chief justice of the supreme court shall be the administrative head of the judicial system [and] [h]e shall appoint an administrative director of courts and other needed personnel to assist him with his administrative tasks."³⁴² The section that followed granted the supreme court the power to "make and promulgate rules governing . . .

334. Heflin, *supra* note 4, at 372; Martin, *supra* note 5, at 14-17.

335. Martin, *supra* note 5, at 14-17.

336. Heflin, *supra* note 4, at 263; see also Martin, *supra* note 5, at 10-11.

337. See House, *supra* note 258, at 9-12; see Scroggins, *supra* note 12, at 6-9; see also Costello, *supra* note 314, at 19-26.

338. Cole, *supra* note 5, at 53.

339. *Id.*

340. *Id.* at 56-57.

341. ALA. CONST. amend. 328.

342. *Id.* § 6.10.

practice and procedure in all courts."³⁴³ Amendment 328 thus incorporated the first phase reforms into a complete revision of the constitution's judicial article. Overall, within a single constitutional text, it unified some 400 courts into a three-tiered system, provided uniform jurisdiction for all trial courts, sanctioned flexible assignment of judges, and established a centralized judicial administration within a permanent organizational structure.³⁴⁴

The passage of amendment 328 coincided with the wider movement for constitutional revision underway since 1969. Heflin and his staff worked closely with the chairman of the Alabama Constitutional Commission, Shelby County Probate Judge Conrad Fowler.³⁴⁵ The Commission popularized the idea that the Constitution of 1901 needed changing; it soon became apparent, however, that there was not enough support within the Legislature to adopt wholesale constitutional reform.³⁴⁶ Heflin then convinced Fowler and his colleagues that only one provision should be submitted to the Legislature for approval: the proposed judicial article, amendment 328.³⁴⁷ Crafting the amendment in the substantive terms that were already law made it unlikely that the Legislature would reject the same principles introduced as constitutional language.³⁴⁸ Even so, this strategy required Heflin's reform campaign to omit from its amendment a recommendation to select judges through a merit process which would end the state's practice of popular election of judges.³⁴⁹ Heflin knew that even among Alabama's reform-minded judges there was little support for doing away with direct judicial election and so, ultimately, the principle was not incorporated in the proposed amendment.³⁵⁰

The campaign to win approval for the constitutional article appealed to two distinct groups. Most important for legislative adoption were the legal professionals, the judges and lawyers, many of whom the reformers had already mobilized during the successful first phase. Yet, passage of the constitutional amendment required support from all segments of Alabama's people.³⁵¹ Martin, Heflin's chief public relations

343. *Id.* § 6.11.

344. Costello, *supra* note 314, at 12-13; House, *supra* note 258, at 12; Martin, *supra* note 5, at 17; see also Scroggins, *supra* note 12, at 11-16; Ben Wilson, The Alabama Supreme Court as an Administrator of the Judiciary 6-7 (1995) (unpublished student paper, The University of Alabama School of Law) (on file with Alabama Law Review).

345. Martin, *supra* note 5, at 14.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* at 16.

350. See House, *supra* note 258, at 17 (discussing interview with John M. Karrh, Circuit Judge (retired)); see Martin, *supra* note 5, at 16.

351. See generally Costello, *supra* note 314, at 22; House, *supra* note 258, at 9-12; Scroggins, *supra* note 12, at 11-20.

tactician, noted the distinction between the two constituencies: "The lawyers and the judges could work behind the scenes, but support [from] persons in labor, the professions and business would have to be in the forefront" in a state-wide voter drive on behalf of the constitutional amendment.³⁵² Heflin, along with many members of the state's Bench and Bar carried on an active speaking campaign throughout Alabama, tailoring comments to the expectations of legal professionals and lay people alike.³⁵³ Heflin also got the state's Educational Television System to air programs aimed at informing legal professionals, while Martin led the way in cultivating the big-city and small town media.³⁵⁴

Perhaps the most conspicuous public relations effort was the Second Citizens' Conference on Alabama State Courts. While it built upon the network established during the 1965 conference, with added funding from the American Judicature Society and in-state organizations, the Second Conference had a wider public impact than the first.³⁵⁵ Over 200 citizens from throughout the state and all walks of life met in Birmingham's Thomas Jefferson Hotel on the first weekend of April 1973.³⁵⁶ The conference received media coverage across Alabama.³⁵⁷ The focus of attention was the proposed judicial article.³⁵⁸ Within a month the Legislature would convene in Montgomery and vote whether to send it to the people. A nationally reported Associated Press story conveyed the Conference's success.³⁵⁹ "A citizens' group Saturday recommended sweeping changes in the state's judicial system and urged the legislature to let the voters decide the fate of a proposed Judicial Article for the Alabama Constitution," it read.³⁶⁰ A "consensus statement" confirmed that "vast improvements have occurred in the judicial system in the past two years . . . [b]ut the group said it found additional improvements and reforms necessary for the judicial branch to function properly."³⁶¹

As the article headed into the legislative session Heflin addressed two concerns. First, he had to temper the enthusiasm of certain reform voices in the Conference who urged the inclusion of a merit selection of judges provision in the amendment.³⁶² According to Martin, Heflin convinced the group to put the issue "on the back burner."³⁶³ The real chal-

352. Martin, *supra* note 5, at 14.

353. *Id.* at 18.

354. *Id.* at 12, 17-18.

355. *See id.* at 14.

356. *Id.* at 15.

357. *Id.*

358. *See* Martin, *supra* note 5, at 15.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 16.

363. Martin, *supra* note 5, at 16.

lenge came from probate judges and rural attorneys, backed up by small town newspapers, "who fe[lt] that the article centralize[d] judicial power."³⁶⁴ But the reformers had done their work well; led by State Senator Stewart O'Bannon and Representative Ronnie Flippo, the Legislature approved the article on the last day of the 1973 regular session.³⁶⁵ On December 18, 1973, Alabama's citizens would vote in a special election to approve or reject amendment 328.³⁶⁶ Again, the reform campaign went into action. A speaker's bureau organized the presentation of over one hundred talks at civic clubs throughout the state favoring the measure's adoption.³⁶⁷ During the two months prior to the vote, Heflin himself delivered more than fifty speeches, including television appearances; on one occasion he spoke before 100 of Alabama's journalists at a "Media Seminar on Alabama Courts."³⁶⁸ The reformers garnered the endorsement of some forty-five organizations, including twenty state-wide groups, and twenty of the twenty-five daily newspapers including all those in the major cities.³⁶⁹ The *Montgomery Advertiser* stated that it was "the most significant amendment to face the voters since the 1901 constitution was adopted."³⁷⁰

Amendment 328 passed with the support of 62% of Alabama's voters, but victory was incomplete.³⁷¹ Portions of the judicial article went into effect immediately, but others, particularly because they raised budgetary concerns, required formal legislation.³⁷² The amendment stipulated a four-year period in which the Legislature could address these issues, but Heflin did not want to risk delay.³⁷³ By early June of 1974 he had appointed fifty-five members to a Judicial Article Implementation Committee.³⁷⁴ Within a year the Committee had prepared a 168-page bill and submitted it to the Legislature.³⁷⁵ There was considerable debate, especially over the funding provisions; but with 25 of 35 senators and 72 of 105 House members expressing formal support, the bill passed easily by a vote of 100-to-1 in the House and 30-to-0 in the Senate.³⁷⁶ On October 10, 1975, Governor George Wallace signed the

364. Don F. Wasson, *Light Voting Expected in Tuesday's Balloting*, MONTGOMERY ADVERTISER, Dec. 17, 1973, at 1A.

365. Martin, *supra* note 5, at 16.

366. Don F. Wasson, *Vote Culminates Heflin Effort, Judicial Article: Its Goals*, MONTGOMERY ADVERTISER, Dec. 9, 1973, at 1A.

367. Martin, *supra* note 5, at 18.

368. *Id.* at 18, 17.

369. *Id.* at 17, 18.

370. Wasson, *supra* note 366, at 1A.

371. Martin, *supra* note 5, at 18.

372. Martin, *supra* note 5, at 18-19.

373. Martin, *supra* note 5, at 19.

374. *Id.*

375. *Id.* at 20.

376. *Id.*

bill into law.³⁷⁷

The triumph of judicial reform engendered contrasting evaluations within and outside Alabama. While the reforms themselves involved technical matters obscure to most laypersons, contemporary journalistic and legal commentary alike agreed that their successful implementation had a broader public significance.³⁷⁸ Stories appearing in the *New York Times* and *Washington Post* in 1975 and 1977 presented the reform movement as a measure of positive change in Alabama following the most painful years of civil rights struggle.³⁷⁹ The title of a survey article published in *The Economist* of London in 1978 suggested this perspective most pointedly, asking "Is There Life After Wallace?"³⁸⁰ Such largely political assessments focused upon Heflin's leadership, suggesting that it represented the emergence of more moderate Southern public officials who rejected the confrontational style Wallace symbolized.³⁸¹ Even national organizations of legal professionals such as the Judicature Society, which clearly understood the substantive character of the reforms, emphasized the chief justice's role.³⁸² The perspective of Alabama's commentators was nonetheless more muted on this point: it gave Heflin due recognition as a "catalyst" for reform, but viewed his involvement as indicative of a broad movement among the state's lawyers to "seize [their] profession."³⁸³

These differing views about the meaning of reform suggested certain ironies. Employing the reforms as a measure of political change away from the intractable states' rights regime identified with Wallace's defiance of federally enforced racial justice ignored the fact that Wallace quietly signed the reforms into law without opposition.³⁸⁴ The focus of national professional organizations upon Heflin's leadership inadequately recognized that the Chief Justice succeeded largely because Alabama already possessed the elements of an active reform movement that he could effectively mobilize.³⁸⁵ Thus, the Alabama commentators were clearly correct to emphasize the stake the legal profession as a whole had in establishing more efficient procedure and process, and given that the reforms would have likely failed had not many lawyers and judges been so involved, it is reasonable to view the successful

377. *Id.*

378. See TARR & PORTER, *supra* note 3, at 93-103.

379. *Alabama Praised on Court Reform: New Justices Join State's Top Tribunal Tomorrow*, N.Y. TIMES, Jan. 19, 1975, at 47; J.M. McFadden, *Alabamas Courts Run Out of Money*, WASH. POST, June 2, 1977, at A12.

380. *Alabama: Is There Life After Wallace?*, THE ECONOMIST, Oct. 7, 1978, at 54.

381. TARR & PORTER, *supra* note 3, at 95-96.

382. See BELKNAP, *supra* note 12, at 234-35.

383. Murray, *supra* note 273, at 18.

384. House, *supra* note 258, at 16-18.

385. Martin, *supra* note 5, at 9-11.

outcome in terms of professional empowerment.³⁸⁶ But ultimately, achieving victory was impossible without the support of the great mass of Alabama voters to whom appeals of professional interest meant little. The reform strategy aimed at winning over the general public was different, then, from that targeting the legal profession, which explained why the reform campaign involved two distinct phases.³⁸⁷

The first phase strategy required consolidating support among legal professionals. During the first year-and-a-half of his tenure as Chief Justice, Heflin worked to inform local judges about the benefits of locating the rule-making authority in the supreme court. Early in 1971 he called upon all newly-elected circuit judges to attend a four-day orientation program.³⁸⁸ The first of its kind in the nation, the program presented these new members of the judiciary the most recent innovations in court administration and process that were being developed by national reform organizations such as the Judicature Society and the LEAA.³⁸⁹ These judges had less of a stake in the problematic system of pleading and procedure than their more experienced colleagues, and so were more likely to be receptive to change. In addition, Martin circulated questionnaires among local judges soliciting views regarding the practical problems their courts faced on a daily basis as well as recommended solutions.³⁹⁰ Data collection was only one goal of the questionnaire process; it also offered the resources of the new Department of Management to assist judges in improving court administration.³⁹¹ Martin often visited judges to reinforce how important their opinions and needs were to both the Department of Management and the Chief Justice.³⁹²

Heflin pursued a similar strategy with lawyers practicing before the local courts. Under the Chief Justice's leadership, the staff organized a series of seminars, educational programs, symposiums and meetings conducted by local Bar associations, the state Bar, and the law schools. In order to reach as many members of the Bar and Bench as possible, Heflin succeeded in getting the legal education programs presented on the Educational Television System.³⁹³ Recalling that, in 1957, oppo-

386. See *id.* at 10.

387. See Scroggins, *supra* note 12, at 5-6 (concluding that "the first wave of reform laid the groundwork without which the second wave would have been impossible."). See generally Martin, *supra* note 5, at 14 (stating that "support from persons in labor, the professions and business would have to be in the forefront for revision of the judicial portion of the 1901 Constitution to be successful.").

388. Heflin, *supra* note 331, at 373.

389. Scroggins, *supra* note 12, at 26-27.

390. Scroggins, *supra* note 12, at 15.

391. *Id.* at 16.

392. Scroggins, *supra* note 12, at 16.

393. Heflin, *supra* note 4, at 263-66.

nents had derailed the adoption of procedural reform by linking it to anger over "federal rules," Heflin's educational programs ignored the issue.³⁹⁴ Instead, as had been the case with the judges, the educational process focused directly upon the objective benefits.³⁹⁵ Thus, Heflin and the staff used the educational forums to demonstrate just what lawyers would gain if the legislature relinquished its rule-making authority to the supreme court.³⁹⁶ The emphasis was upon how a uniform procedure operating throughout the state, administered under the court's centralized authority, would equalize the access of lawyers and their clients to a consistent system of justice.³⁹⁷

A strategy aimed at consolidating Bench and Bar support implicitly recognized a vital demographic reality. Wide involvement in professional legal and business organizations made Heflin keenly aware that the state's post-war economic growth had a profound but uneven impact on the legal profession's support for the traditional order.³⁹⁸ The Alabama State Bar's membership had grown by over 50% during the 1960s; from 1970 to 1980, the membership would nearly double, from 2,974 to 5,788.³⁹⁹ The legal profession's impressive rate of growth meant that there were more lawyers than ever before who lacked a deep attachment to the decentralization and procedural formalism that historically characterized Alabama's system of local control. The special attention that Heflin gave to newly elected circuit judges in his four-day orientation seminar, as well as the broad ranging educational programs he provided for the legal profession as a whole, appealed directly to the interests of the profession's newest members.⁴⁰⁰ Moreover, many of these new lawyers and judges pursued their careers in the state's growing urban areas, among a population of potential clients whose expectations were contrary to the delay and sporadic abuse inherent in the established order. In these same urban areas were many experienced lawyers already wrestling with the demands of the new market for legal services.⁴⁰¹ Although the perception of a "glut" of lawyers reflected increasing competition, many of those same lawyers could see advantages for client representation in adopting the new system Heflin was publicizing.⁴⁰²

Additionally, for the judges holding court in the growing urban cen-

394. *Id.*

395. *Id.* at 267-68.

396. *Id.*

397. See Rendleman, *supra* note 232, at 44-45; see also Martin, *supra* note 5, at 10.

398. See Scroggins, *supra* note 12, at 4-5.

399. Letter from Reginald T. Hamner to Tony A. Freyer, *supra* note 281.

400. See generally sources cited *supra* nn.255-57.

401. See generally sources cited *supra* nn.1, 3.

402. See Letter from Reginald T. Hamner to Tony A. Freyer, *supra* note 281.

ters, the promise of improved administrative efficiency was appealing. A circuit judge from Decatur responded to Martin's questionnaire, stating: "[I]t is difficult for some judges to know what is going on in their own courts other than from a general and instinctive position."⁴⁰³ He welcomed the assistance of the Department of Court Management because, if it "can put into finite terms the financial, personnel and equipment needs of the courts over this state sufficiently adequate to handle the present case loads and project them into the reasonably near future, a great service will have been done."⁴⁰⁴ He also recognized how administrative centralization freed the court from the county commission's budgetary influence: "The financial needs of courts should be submitted vertically . . . [to] judicial persons, who are able to evaluate the needs realistically and grant or deny them according to judicial concepts and not according to road building theories."⁴⁰⁵

The judge suggested more generally how reform of the established order benefited Alabama's changing society. Doing away with the Justice of the Peace paved the way for:

a uniform system of inferior courts In my judgment the problem of the drinking driver will never be solved until there is uniformity of enforcement of the highway laws throughout the width and breadth of this state in uniform courts using uniform procedure and practice and punishments.⁴⁰⁶

He also embraced the idea of ending the elected office of the Circuit Clerk and replacing it with an enlarged administrative staff whose selection and operation was directly under judicial control.⁴⁰⁷ Finally, he suggested that the legal order had to adapt to changing times, especially in Alabama's increasingly urbanized northern section. The traditional order was rooted in:

a nineteenth century concept which was designed to function to the end of providing justice for a people that lived on the land in rural communities and who were able and willing to take the time and effort to come to court either as witnesses or jurors and proceed with interest and due deliberation to the ends of justice in criminal and civil cases.⁴⁰⁸

By 1972, at least in his circuit in the Tennessee Valley, Hundley felt

403. House, *supra* note 258, at app. 2.

404. *Id.*

405. *Id.* at 3.

406. *Id.*

407. *Id.* at 8-9.

408. House, *supra* note 258, at app. 9.

that "we do not have that sort of society, background or interest."⁴⁰⁹

These factors help to clarify the strategy Heflin pursued to win passage of the first phase of reform. In 1957, despite a positive majority vote in the House, procedural reform was vulnerable to defeat in the Senate on ideological grounds, as the Legislature was deciding upon the substantive rules themselves.⁴¹⁰ In order to avoid a recurrence of this situation, Heflin did not raise with the Legislature the content of the procedures; instead, he simply asked the Legislature to relinquish its rule-making authority to the supreme court.⁴¹¹ Prior to proposing this change, however, Heflin consolidated the support of a large number of lawyers and local judges by demonstrating that greater administrative efficiency ameliorated the problems they faced as a result of Alabama's changing market for legal services.⁴¹² Through an extensive educational process, he in turn, convinced these legal professionals that administrative efficiency was best achieved through the supreme court's centralized organization.⁴¹³ Thus, by the time the Legislature voted to give up rule-making power to the supreme court, Heflin's organization had diffused potential opposition.

Other factors worked in favor of reform. During the same session, in which Heflin introduced the reform bill, the legislature was considering a wide range of taxation, bond, mental health, educational, and congressional redistricting measures, as well as hundreds of local proposals.⁴¹⁴ Under such circumstances, a majority of legislators in both houses could have viewed the strong support lawyers and judges gave the bill as indicating that the best political move would be to satisfy the influential constituency by turning over rule-making authority to the court. Moreover, Heflin had successfully detached from the issue any symbolic content susceptible to populist hyperbole, thereby reducing it to a technical matter possessing meaning only for the same legal professionals the reform organization had so effectively mobilized prior to legislative action.⁴¹⁵ Accordingly, the *Montgomery Advertiser*, the state paper that gave the most in-depth coverage to legislative matter, did not even mention that Heflin's bill passed unanimously in the House and by a vote of 22-to-10 in the Senate.⁴¹⁶ Wallace signed the bill into law on September 17, 1971.⁴¹⁷ He had, of course, advised Heflin during the

409. *Id.*

410. See sources cited *supra* notes 202-07.

411. Heflin, *supra* note 4, at 264.

412. Scroggins, *supra* note 12, at 5.

413. See generally sources cited *supra* notes 243, 254-55, 259-60.

414. Don F. Wasson, *Mountain of Work Awaits Legislature*, MONTGOMERY ADVERTISER, Sept. 19, 1971, at 12A.

415. See generally sources cited *supra* notes 202-07.

416. Don F. Wasson, *supra* note 365, at 12A (failing to mention passage of judicial reform).

417. Act of Sept. 17, 1971, No. 1311, 1971 Ala. Acts 2259-60.

election that, as governor, he would not oppose reform. Even so, one of Wallace's closest advisors later observed that the governor's staff had studied the reform measure and had not objected as long as there was no attempt made to end popular election of judges.⁴¹⁸ Apparently, Wallace was also distracted because he was preparing to run for the United States Presidency in 1972, and had little reason to give state judicial reform a high priority.⁴¹⁹ Thus, the first phase of reform passed because Heflin's strategy and the reformers' effective campaign coincided with a Legislature and a governor preoccupied with more pressing concerns.

The reformers employed a different strategy to achieve the constitutional restructuring of Alabama's judicial branch. Unlike the first phase of the relief movement, the support of legal professionals alone was insufficient to win passage of a constitutional revision on the scale of amendment 328. Not only did the process of legislative approval, state-wide referendum and, then, legislative implementation demand mobilization of voter opinion throughout the state, but the budgetary requirements suggested taxation concerns.⁴²⁰ Political dimensions of this scope increased the opportunities for opposition to exert pressure. Admittedly, the successful abolition of the Justice of the Peace in 1972 suggested that one of Alabama's most venerable constitutional offices was too politically isolated to resist the well organized reform campaign.⁴²¹ Wallace's unwillingness to defend the JPs indicated their political impotence. Although Wallace had benefited from their support throughout his long reign of power, he declined to intervene on behalf of the JPs during either the legislative or referendum processes that ended the office.⁴²² Still, this triumph, notwithstanding any symbolic significance it may have represented, was of secondary importance, compared to the more diverse political challenge amendment 328 raised.

Above all, the phase two strategy recognized the need to reach Alabama's voters as a whole. The procedural and rule-making issues addressed in the first stage of reform were commented upon primarily among legal professionals themselves and within the Legislature, where media attention was insignificant.⁴²³ By contrast, the lobbying effort which mobilized political support for legislative crafting of amendment 328 itself, ratification in the state-wide referendum, and, finally, legislative implementation and funding, received considerable, ongoing pub-

418. Interview with John M. Karrh, Circuit Judge (Retired), *supra* note 350, at 7.

419. Rich Oppel, *Wallace to Enter Florida Demo Primary Today*, MONTGOMERY ADVERTISER, Jan. 13, 1972, at 1A.

420. See Martin, *supra* note 5, at 14.

421. Cole, *supra* note 5, at 53-55.

422. Interview with John M. Karrh, Circuit Judge (Retired), *supra* note 350, at 8.

423. See Cole, *supra* note 5, at 52-53; Martin, *supra* note 5, at 14.

lic scrutiny. Not surprisingly, it was during this process of constitutional revision that vocal criticism arose from within the rural legal establishment.⁴²⁴ The focus of criticism was not on procedural technicalities, but on the threat judicial centralization presented to community self control. One small town editorial summed up the danger by reminding its readers of Governor Wallace's frequent rage against federal courts interfering in Alabama's grass roots government, and by speculating that a more centralized state judiciary might pose a similar evil.⁴²⁵ The broad based support the Second Citizens Conference garnered within the state's business, civic, and labor groups was indicative of the reformers skill in countering such attacks.⁴²⁶ Indeed, Heflin's initiative, which resulted in maintaining judicial election—consistent with Wallace's expectations—enabled the reformers to argue that amendment 328 left democratic control of the new system to all of Alabama's people.⁴²⁷

V. CONCLUSION

Reforming the judicial article of Alabama's 1901 Constitution represented a formidable challenge. During the first half of the twentieth century, the state's vested interests employed the constitution's judicial power to resist change. Alabama's small-town society, one-party politics, and tenacious adherence to preserving white racial supremacy reinforced the constitutional sanction of the status quo. By the 1960s, the ascendancy of an urban population within the state and its increased integration within the nation's post-war consumer economy eroded the established order's foundations. However, seizing the potential these changes offered depended upon three socio-cultural factors. First, it was necessary to mobilize Alabama's legal profession, particularly younger lawyers and judges having a stake in the new market for legal services. Effective mobilization, in turn, required leadership possessing unusual organizational skills, strategic vision, and personal credibility. In addition, the leader had to appeal successfully to legal professionals and laypersons alike. Howell Heflin was, of course, just such a leader. The third factor was George Wallace: his approval of the reform effort undercut the racially coded, anti-federal government demagoguery which had defeated constitutional judicial reform during the mid-1950s. An understanding of how these socio-cultural factors worked in conjunction with demographic and market changes suggests the significance

424. See House, *supra* note 258, at 10.

425. *Id.* (citing Editorial, *MOBILE PRESS REGISTER*, Jan. 19, 1974, at D2).

426. See Martin, *supra* note 5, at 15.

427. Interview with Circuit Judge (Retired) John M. Karrh, *supra* note 350, at 7.

of the successful reform of the Alabama Constitution's judicial article.

