Edited by N. Alexander Aguado

Constitutional Reform in Alabama

NEVER GONNA CHANGE?

An Examination of the 1901 Alabama Constitution

The Constitution's Effects on Public Policy, People, Political Culture, and Democracy

Never Gonna Change? An Examination of the 1901 Alabama Constitution

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Preface

In 2002, *A Century of Controversy: Constitutional Reform in Alabama* was published to reflect on the problematic history of Alabama's Constitution. From its inception, the 1901 Constitution was a document that sought to codify white supremacy (Jackson, 2002). It created a system where election rules were actively tilted toward the affluent while disenfranchising Black voters and poor whites (Webb, 2002). The collection illustrated how Alabama's tax code is overwhelmingly dependent on sales tax revenue and extremely regressive. The over-reliance on sales tax revenue, which are highly variable from year to year, puts Alabama's institutions into crisis mode whenever the national economy slows, making service delivery unpredictable (Williams, 2002). Alabama competes with other states and nations for businesses and investments. The tax structure, which is embedded in the constitution, makes raising revenue for education, roads, bridges, and telecommunications difficult - all of which are important to industries that are looking to relocate. Ultimately, the 1901 Constitution undermines Alabama's future and its ability to remain competitive in a global economic environment.

In addition, the 1901 Constitution violates the values of democracy and self-determination at the local level (Sumners, 2002). The 1901 Constitution limits the ability of local jurisdictions to address the unique issues facing their communities and has created long-lasting governance problems for Alabama. Bailey Thomson (2002) optimistically argued that through education and collective action, citizens can band together to improve the state. His book cites that incremental steps have been taken to reform Alabama's constitution in small but meaningful ways (e.g., Schaefer, 2002) and that there are options for improvement within the current framework (Walthall, 2002).

Never Gonna Change builds on that optimism, with the idea that bringing attention to problems can motivate people to improve upon the status quo. In Chapter 1, Short, Aguado, and Collins offer insight into how policy change can happen in places resistant to change - the only caveat is that many things have to fall into place for that change to occur. In Chapter 2, historian Brucie Porter makes a case that the Alabama Constitution was designed to underserve poor communities and Black Alabamians, and it continues to do so. Professor Susan Pace Hamill then delves into the elusiveness of tax reform in Alabama. Alabama's tax policy is regressive, where the poor pay a greater proportion of their income to taxes than the affluent. She takes the reader on her journey as an advocate for reform in Alabama and offers a sobering assessment of the future of the state's governance. *Never Gonna Change* also has Professor Brandon Blankenship bring to light the cruel and violent state of Alabama prisons and how the Constitution enables the violence there. He also proposes reforms to make for a more just and effective carceral system. Finally, I make the case that the 1901 Framers created a government that undermines democracy, stifles governance, and encourages voters to disengage. The 1901 Framers aimed to prop up white supremacy and to keep

themselves in power. In Alabama, that strategy has created a culture that is distrustful of government and even more distrustful of politicians and officeholders. That cynicism keeps the 1901 Constitution thriving and in place despite its 2022 recompilation.

Alabamians feel that state government officials do not care about their opinions (Horn, 2019, p. 21). They feel as if they have no say in state government (Horn, 2019, p. 22). This raises a question: how might a modern and efficient constitution enable politicians to further alienate voters and residents? That is the challenge of reform. That is the challenge of trying to rid the state of a document that enshrined white supremacy at the cost of democracy. It has so tainted the waters of reform that people do not trust to exchange it for a meaningfully representative and democratic framework for how government should operate.

Change can happen. In 2022, Alabama voters overwhelmingly passed a recompilation of the 1901 Constitution, which removed its racist text and reorganized it. But the spirit of the 1901 Constitution continues in the recompilation. When Bailey Thomson's *A Century of Controversy* was published in 2002, there were 706 amendments to the Alabama Constitution. Prior to the 2022 recompilation, there were 977 amendments. The recompilation reorganized those amendments, moving them into the main articles that they amended and sorted the local amendments by county, municipality, and topic (Cason, 2022). It continues to be the longest constitution in the United States. It is still overly statutory. It is not a framework for government. The cumbersome nature of the document is a national embarrassment. It does not have to be this way. Thomson hoped that an informed electorate would choose the path seeking equity, justice, and fairness. He called upon civil society and community stocks of social capital to accomplish this change. This collection is a step toward that end.

This book was inspired by Bailey Thomson's (2002) work. Derek Malone, the Dean of Olin Library at Rollins College, and Jennifer Pate, Director of OpenEd at Texas A&M, both formerly at the University of North Alabama, encouraged me and supported the development of this project under the UNA OER Press @ Collier Library. *Never Gonna Change* also benefitted from the peer review work and feedback of my colleagues: Chris Purser, Tim Collins, Matt Schoenbachler, Justin Joseph, Katie Owens-Murphy, Lynne Reiff, Quinn Gordon, Jim Day (University of Montevallo), Patrick Tate, and Kayla Bohannon. Brucie Porter, Brandon Blankenship, and Rebecca Short also served as peer reviewers. Finally, I am thankful to Donnalee Blankenship, who provided the cover art and illustrations at the start of each chapter of this book.

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1

Policy Change in the Deep South: An Analysis of Three States

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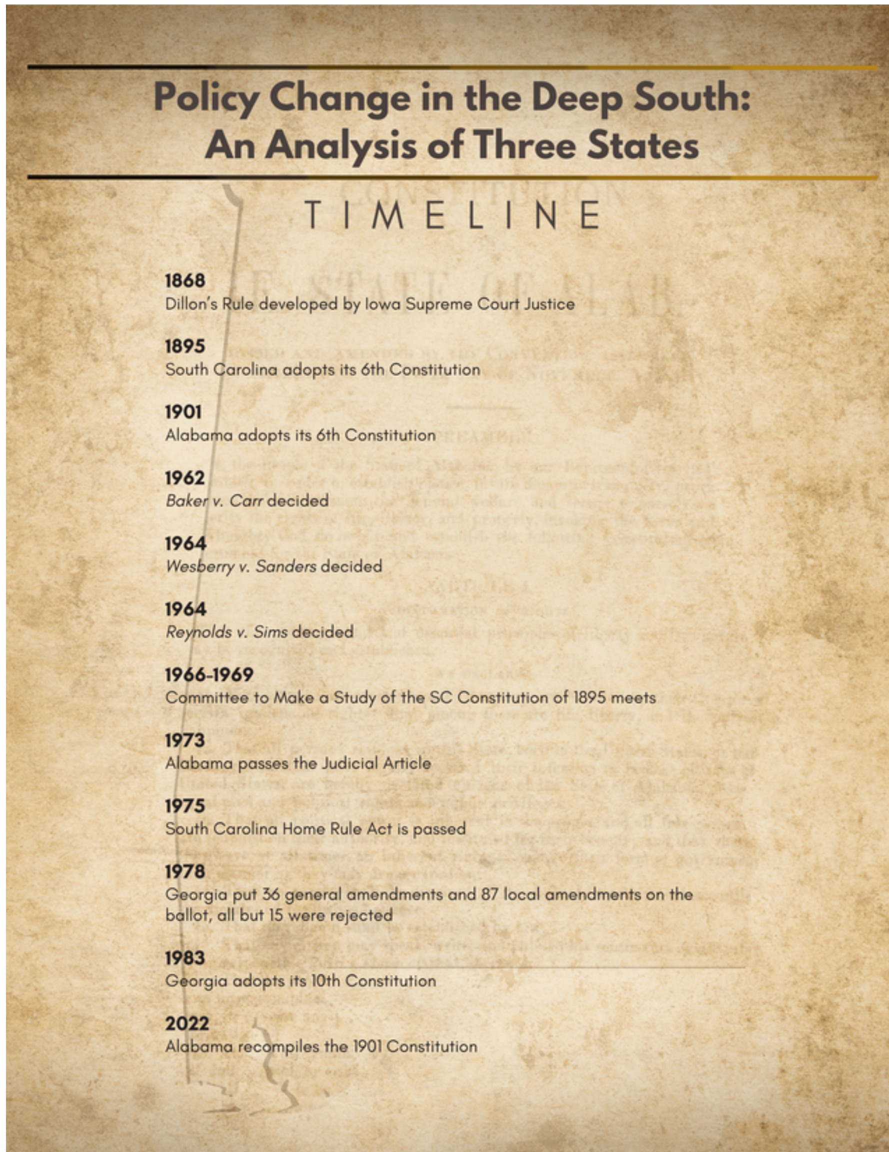
ABSTRACT

This chapter uses Kingdon's (2003) multiple streams framework (MSF) to explain policy changes that brought home rule to South Carolina, a modern constitution to Georgia, and the Judicial Article in Alabama. Policy change in the Deep South is rare, but it can happen. Short et al. provide a comparative study between three states in the Deep South to illustrate how policy changes can occur in traditionalistic political cultures. In every case, unusual events came together just at the right time. In Alabama and Georgia, ambitious politicians pushed their pet policies to attain policy change. In South Carolina, a confluence of events came together to allow some forms of local-level democracy in the state. Finally, this chapter applies the MSF to the 2022 recompilation of the Alabama Constitution of 1901. The voter-approved recompilation deleted the most racist and embarrassing parts of the document and reorganized it. These changes, though, have left the obstructionist spirit of the 1901 Constitution intact, as the Alabama constitution is still the longest, most statutory state constitution in the United States (McMillan, 1978).



Dates covered in this chapter

INTRODUCTION

> *Change in Alabama is difficult to achieve, and organization is absolutely necessary. Reform requires a grassroots movement and a collaborative effort on the part of like-minded individuals.*
>
> -Robert Martin Schaefer, A Taste of Reform: The Judicial Article

The traditionalistic political cultures of Southern states like South Carolina, Georgia, and Alabama pose unique challenges to policymaking. The political culture across the South is characterized by the prevalence of the region's status quo – where policy change is met with resistance, and the government's role is perceived as preserving the hierarchical social order (Elazar 1972). Traditionalistic political cultures also tend to have low levels of participation in elections. Those who are not involved in politics are not expected to be active citizens and are unlikely to vote (Elazar, 1972, p. 99). This chapter delves into the intricacies of policymaking in areas resistant to change. We use Kingdon's (2003) multiple streams framework (MSF) to explain the serendipitous nature of policy change. Our aim is to highlight the conditions that led to home rule in South Carolina, constitutional reform in Georgia, and judicial reform in Alabama. Finally, we discuss the concerted efforts of reformers that led to the 2022 recompilation of the 1901 Alabama Constitution.

THE MULTIPLE STREAMS FRAMEWORK (MSF) AND PUBLIC POLICY

Scholars have sought to understand why some problems get addressed by the government while others get ignored. Kingdon (2003) offered a model of public policy that recognized that policymaking was inherently chaotic. Many idiosyncratic events must intersect for policy change to happen. In some cases, lawmakers have to act on mandatory issues that require action; for example, budgets must get passed within a certain timeframe, but most issues are discretionary, and lawmakers can choose to take up these issues or pass on them. Nonetheless, all issues are extremely important to some political constituency.

Kingdon's (2003) multiple streams approach posits that there are three streams – the problem stream, the policy stream, and the political stream – that converge in a "policy window," which is where policy change can occur (Rinfret et al., 2023, p. 41). The problem stream is comprised of the various issues that people worry about. Problems abound. They are ubiquitous. The country faces a myriad of issues and challenges in every state and community. Problems include issues like the cost and access to medical care, setting the minimum wage, or whether or not Alabama should adopt a new, modern constitution. Some of these issues get addressed, while most get ignored. Issues get overlooked because lawmakers have time constraints, limited information, and a lack of expertise. For example, the Alabama legislative session is "limited to 30 meeting days within a period of 105 calendar days."[1] If time is a limited resource, so are lawmakers' expertise and staff, who can help them analyze proposals sent to them by policy advocates. Further, it is unrealistic to have lawmakers fully understand the full scope of the numerous problems faced by the people of their state. All problems and the proponents who want their issues addressed compete for lawmakers' attention.

The policy stream is comprised of the "community of specialists – bureaucrats, people in planning and evaluations and the budget offices,... staffers, academics, interest groups, researchers – which concentrates on generating proposals" (Kingdon, 2003, p. 87). At any point in time, policies and proposed solutions are trying to garner the attention of policymakers. Policy advocates are trying to get their solution on the policy agenda. The proponents of the various solutions do their best to attach them to a problem and ultimately get on the policy agenda. Advocates of the solution, policy entrepreneurs, will attach their solution to whatever problem garners the attention of policymakers. For instance, a proposal for mass public transit will attempt to attach itself to any one of the many problems existing in the world: global climate change, traffic congestion/gridlock, or even a sluggish or slow economy. All could be solved by mass transit. In many cases, there are policy entrepreneurs who are serving as advocates for specific solutions (policies). Some of these individuals are "people that sense there is a problem, and they advocate solutions to solve the problem" (Kingdon, 2003, p. 123). Kingdon noted that policy entrepreneurs

> could be in or out of government, in elected or appointed positions, in interest groups or research organizations. However, their defining characteristic, much as in the case of a business entrepreneur, is their willingness to invest their resources—time, energy, reputation, and sometimes money—in the hope of a future return (Kingdon, 2003, pp. 122-123).

Finally, the political stream is comprised of the public's mood, public opinion, election results, changes in the legislature, and interest group pressure campaigns (Kingdon, 2003, p. 87). Kingdon's model offers that the streams exist independently of each other. On rare occasions, they converge – a problem attaches to a policy proposal (solution) that is facilitated by the politics of the moment – to allow for policy change to occur. The streams couple, and the opportunity to push the solution through a "policy window" opens for a short time. "The coupling of streams at opportune times is key for an item to rise to the decision agenda and it is the policy entrepreneurs, willing to invest resources and reputation on their pet projects, who affect this coupling" (Rawat & Morris, 2016, p. 610).

The multiple streams framework can help us understand why policy change was able to occur in the Deep South. Across two of the three cases offered in this chapter, there is a consistency in how problems were championed by well-established politicians, who also served as the policy entrepreneurs who successfully campaigned for a "modern constitution" in Georgia and judicial reform in Alabama. In the case of South Carolina, the streams converged around a rare set of circumstances, including a set of Supreme Court decisions that sought to improve representation and address malapportionment. In every case, the politics of the moment, the solutions, and the problems converged to produce policy change despite a political culture that makes reform difficult.

HOME RULE IN SOUTH CAROLINA

The critical comparison between the Alabama and South Carolina constitutions is that they are both reactive rather than proactive. For example, each state creates legislation for a particular problem in a particular jurisdiction, and each amendment to the state constitution is specific to that topic. Even if the next problem is only slightly different, the prior legislation will typically not address it because of the specificity of the previous issue. South Carolina's constitution is significantly smaller than Alabama's, but the number of amendments (over 400) makes both documents unwieldy. South Carolina's 1895 Constitution, like Alabama's, was established out of fear of Black voting power after the Civil War. It mandated literacy or "intelligence" as a prerequisite for voting, imposing reading and writing tests on potential voters. While the framers of the 1901 Alabama Constitution sought to institutionalize white supremacy, the framers of the 1895 South Carolina Constitution created their governing document to "avoid erecting a numerous democracy" (Underwood, 1989, p. 81). South Carolina created its state government where the governor is merely a symbol, and the legislature is the primary core of governmental action. James Underwood, an emeritus professor from the University of South Carolina Law School, wrote a four-volume narrative about South Carolina's Constitution, which focuses on the evolution of power allocation under the South Carolina Constitution. Underwood (1986) argued that South Carolina's Constitution reflects the popular opinion of when the document was written. Like Alabama, the power of local governance was centralized in the state legislature. Centralizing local policy decisions within the state legislature offers advantages to interest groups, who can influence state and local politics by having an overwhelming presence in the capitol. Additionally, centralization of power shifted issues from the local governments to the state house, causing citizens to seek representation from interest groups to access the political decision-making processes.

Local governments are recognized as creatures built by the state. Local and county governments can only do what the state legislature empowers them to do. This conceptualization of local power was developed in 1868 by an Iowa Supreme Court Justice, John F. Dillon. Dillon held:

> that local governments are limited to the powers expressly granted to them by their state and to those powers indispensable to the stated objectives and purposes of each local government... Dillon built a legal argument that the Tenth Amendment secures power for the states but not for the local governments... Dillon's Rule holds state power trumps local government power, which means that state legislatures invariably win when they engage in power struggles with local governments (Smith & Greenblatt, 2024, p. 357).

Dillon's Rule impedes local democracy, power, and autonomy. Local governments are limited in their ability to solve local problems. State legislatures ultimately control what

municipal and county governments can and cannot do across the fifty states. Alabama's Constitution keeps much of the local-level policymaking authority centralized with the state legislature. 2 Not all states limit their local governments' power - "Oregon and Maine give localities the most freedom" (Smith & Greenblatt, 2024, p. 357). The independence of local governments, as they relate to their respective state government, varies significantly across the United States. Some states allow for substantial local autonomy, known as "home rule." States with home rule give wide latitude to local governments to exercise policymaking authority. Limiting home rule was a means by which the state legislature could control local governments.

The Problem Stream. The South Carolina Constitution of 1895 made local and county governments virtual wards of the state (Albert, 1977). Before 1975, state legislators split their time as policymakers for statewide issues and as the local legislators for their particular counties (Tyler, ND). "The county delegations, which consisted of the senator and the House members from that county, was the county governing body" (Ulbrich et al., 2011, p. 3). They were responsible for preparing the county budget, which was enacted into law by the General Assembly. They "also approved requests from school districts to levy taxes for school purposes" (Ulbrich et al., 2011, p. 3). The centralization of policymaking in the state capitol stifled local-level democracy by consolidating matters of local governance with state legislators.

The Policy Solution Stream. South Carolina's General Assembly realized the 1895 Constitution was "no longer suited for the times" (Underwood, 1989, p. 116) and created the *Committee to Make a Study of the S.C. Constitution of 1895* (which met from 1966 to 1969). Home rule issues were the catalyst for the committee's formation because "not only does special legislation consume much General Assembly time on matters that essentially are local in nature but such laws may afford inequitable advantages to favored political actors" (Underwood, 1989, p. 120). Many of the committee's recommendations were included in the 1973 amendments to the South Carolina Consitution that ultimately created Article VIII – "the Revised Article on local government" (McFadden, 1976, p. 26), which called for stronger local government provisions. Article VIII gave South Carolina local governments more power and led to the passage of The Local Government Law of 1975, the Home Rule Act (Tyler, ND).

The Politics Stream. In 1975, local governments were under severe financial stress (Watson, 1977), which set the conditions for policymakers to adopt new policies that dealt with issues concerning the structures and powers of local governments. Additionally, citizens simultaneously demanded more from their local governments and wanted to pay fewer taxes. "This imbalance between people's aspirations for local government services and their willingness and ability to pay for them is at the heart of the fiscal problems of the nation's cities and counties" (Watson, 1977, p. 57). Further, structural changes that improved voter representation and addressed malapportionment were changing the political landscape of state and local governments:

In the 1960s, the decisions of the U.S. Supreme Court in *Baker v. Carr, Wesberry v. Sanders,* and *Reynolds v. Sims* brought about the "one-man, one-vote" requirement for state legislatures, which resulted in the redrawing of legislative and electoral district lines. This, together with urbanization and the growing complexity of state government, led to a movement to give local governments more autonomy and restrict micromanagement by the General Assembly. Reapportionment resulted in a shift of power in the 1970s from rural legislators to urban and suburban-elected legislators, who were more sympathetic to the home-rule argument (Tyler, 2016).

Coupling/convergence, the policy window, and the creation of public policy. South Carolina's General Assembly saw growing resident demands for new and improved services. Likewise, they also saw that residents did not wish to pay the additional taxes necessary to provide these services. In 1975, the problem stream – centralized policymaking, lagging self-determination of local governments; the policy stream – proposals that sought to empower local government through home rule; and the political stream – public demands for new local government services while keeping taxes low – converged to create the passage of new policy. The Home Rule Act (1975) provided local lawmakers control over the ability to approve or deny new services along with the following powers that affected cities, but mostly counties:

- Cities provide penalties for violations of ordinances they enact.
- Counties were empowered to assess uniform service charges for a wide range of services.
- Counties could levy uniform license taxes.
- Counties increased their ability to finance their operations.
- A broadening of the ability of counties to raise revenue locally. 3

Though there continues to be fragmentation of power that causes inefficiency, duplication of efforts among counties and the state, confusion between state agencies, and an added expense to the state, the revision process in South Carolina has been a continuous one, article by article, since 1968. The reform is piecemeal but consistent and reflects a political culture that is open to reform but cautious in its approach.

GEORGIA ADOPTS A MODERN CONSTITUTION

Georgia has adopted ten constitutions since 1777. The most recent, ratified in 1983, gave the state the second newest Constitution in the United States, proceded by Rhode Island in 1986. The Georgia Constitution of 1877 closely resembled the 1901 Alabama Constitution. Among other goals, it extended voting to "free white male citizens," addressed many "vagrancy and anti-enticement statutes designed to restore white control of Black labor," created public schools for whites, and excluded Blacks from juries (Cobb, 1997, pp. 29-30). Similar to Alabama, Georgia had adopted a poll tax as part of the 1877 Constitution and also instituted an elaborate literacy test to exclude poor

white and Black voters from participating in elections. During the Depression Era, politics in Georgia began to take a gradual turn. The state's leadership was concerned with rebuilding the economy and focusing on economic growth. Although it took several years after the Depression to create momentum, the state started to see change during the 1940's.

In 1948, Governor Herman Talmadge advocated for Georgia's move toward a new political era. He enhanced public education by sponsoring a three percent sales tax to narrow the gap between segregated schools. While appealing to "the farmer," he became an influential proponent of the Industrial Era. In turn, voters approved a constitutional amendment for tax breaks for new factories (Cobb, 1997, pp. 62-63). In 1965, the Voting Rights Act changed Georgia's political landscape, meaning more African Americans gained political office. William B. Hartsfield, the longest-serving Mayor of Atlanta, was quoted as saying that Atlanta was "too busy to hate" (Cobb, 1997, p. 70). Georgia's 1945 constitution was its first after the post-Civil War document of 1877. Revision of the 1945 document began in 1963. This revision was mainly due to efforts from the state legislature and Governor Ellis Arnall, who pushed for revision. Although the document intended to revise the 1877 constitution, not much in the way of change was implemented.

The Problem Stream. Georgia's previous nine constitutions created fatigue among voters who had to make numerous choices, sometimes over issues that were not directly affecting voters' communities. The Constitution was full of "statutory detail, that every time there was a need for a change in one minor provision, there would be a need for a new constitutional amendment to fix it" (Hill, 2011, p. 24). Georgians demanded a leaner constitution that would eliminate the need for so many amendments every other year (p. 24). A watershed moment occurred in 1978. There were 36 general amendments and 87 local amendments on the ballot. Voters rejected all but 15 general amendments. This served as the catalyst that drove policymakers to push for change.

The Policy/Solution Stream. The Select Committee on Constitutional Reform had three goals: brevity, clarity, and flexibility. The intent was to revise the document, ultimately making the undertaking a constitutional reform and not a revision. The new document was one-half the length of the 1976 constitution and was easier to navigate. In addition, the new document allowed the General Assembly to deal with policy matters through statutes. One of the most significant changes was that amendments dealing with one county, city, or locality were absent. These types of amendments have been strictly prohibited through legislation. In addition to home rule, Georgia's current constitution allows counties to amend or repeal local acts by ordinance under some circumstances. Counties can write ordinances to govern their property, affairs, and local government. Georgia's Constitution eliminated laws that excluded home rule by creating a more general document allowing localities to create laws within certain limitations.

The Political Stream. George Busbee, who was a state legislator during the 1976 revision, claimed revision was too complicated at this point in the process. He then ran for governor on the platform of revising the Constitution on an article-by-article basis. This came to fruition after he won the election. He decided on a simple reorganization of the document, which was implemented after approval from the legislature. This proved to be the catalyst for the reform and drafting of the 1983 constitution. By 1978, Georgia Governor George Busbee (1975-1983) saw a problem – that the 1976 Constitution had made local governance untenable. Local communities were rejecting local legislation as a means of objecting to the bloated constitution and the "bed sheet ballot," ballots so long they looked like bed sheets. In this case, Governor Busbee served as the policy entrepreneur who advocated for constitutional revision, and his position as governor made it possible for his being an effective spokesman who campaigned for the change.

Coupling/convergence, the policy window, and the creation of public policy. Constitutional revision of the 1976 constitution was already on the policy agenda. Shortly after Georgia's 1976 constitution was ratified, the state legislature created the Select Committee on Constitutional Revision. In 1977, the members started working on a complete document revision. The article-by-article revision of the 1976 constitution was a lengthy process. Each revised article was drafted and approved by the Select Committee on Constitutional Reform and the General Assembly. The outcome of the 1978 general election, where the majority of general and local amendments to the constitution failed, opened the policy window for the new constitution. The final version of the document was submitted to the General Assembly in 1981. The legislature approved the new document in September 1981. The amendment process continued through the regular session in 1982 and was submitted to voters for approval that year. All three branches of government supported the ratified version, which was "bolstered by a strong effort to educate the public about its content" (*The Georgia Encyclopedia*, The Constitution of 1983). It became effective on July 1, 1983, after being ratified by voters – 657,663 in favor to 211,342 opposed.

The 1983 Georgia Constitution was new and not merely revised. It was the first reformed Constitution since 1877. The new document resulted from almost 20 years of intense discussion and debate among Georgia's leadership. While the new Constitution contained some of the original provisions of the 1877 document, it contained an equal protection clause, a division of the courts into seven distinct classes, a requirement for uniform court rules, record-keeping rules by class for all divisions of courts, nonpartisan election of judges, and is "a reflection of the state's rich political and social history" (Cobb, 1977, p. 80).

ALABAMA JUDICIAL ARTICLE

The Judicial Article of 1973 marks the most significant change to the 1901 Alabama Constitution since its inception. Unlike South Carolina's piecemeal reforms over many years, which have effectively revised its still unwieldy constitution, or Georgia's replacement of its old constitution with a new one, Alabama's 1901 Constitution remains largely intact despite several efforts over the years to reform it (refer to footnote 2). A case study of one of the most successful instances of reform can perhaps shed light on why Alabama has not followed a path of reform like either South Carolina or Georgia.

The Problem Stream. Before 1973, Alabama had one of the worst court systems in the United States. Its dockets were backed up. Justices of the Peace arbitrarily ruled fiefdoms. Judicial procedures were not uniform across the state, making it difficult for nonlocal lawyers to try cases. "Home cooking" was the euphemism used to describe "justice" dished out to nonresidents (Schaefer, 2002). "Among state supreme courts, Alabama's was considered to have the notable record for cynical disregard of the law" (Schaefer, 2002, p. 141). In the 1950s and 1960s, the Alabama Supreme Court "purposely thwarted individuals' civil rights." Federal courts overturned many decisions issued by Alabama judges (p. 141). The courts were often mysterious to the general public, creating an atmosphere that would ultimately stimulate a change to improve the system (Short, 2015). Reformers were motivated by the judicial branch's lack of professionalism. "For decades, the conservative planters and the Big Mule industrialists ruled the legislature... [and] effectively controlled the judicial rules and procedures. It was common for a legislator to adversely affect court procedures in his county" (Schaefer, 2002, p. 142).

The Policy/Solution Stream. The key to judicial reform was the Unified Court System. Chief Justice Howell Heflin (1971-77) had five detailed principles for the system:

1. Simple appeals process
2. Time and energy savings for appellate courts and litigants
3. Permit judges to specialize and reduce the need for special courts
4. Avoid waste of manpower attributable to personnel unavailability and lack of justifications for needed assignment
5. Cooperation among courts would increase if courts and judges had equal jurisdiction

Heflin also wanted judicial reform to eliminate Justices of the Peace (JOPs). Often appointed by mayors for political or nepotistic reasons, Justice of the Peace

> courts were rackets; Justices would be in trailers, and the highway patrol or sheriff's people would be out on the highways. They would stop somebody, take them to a moveable trailer housing the JOP, and collect fees and the fine right there, and maybe split the take among themselves (Schaefer, 2002, p. 143).

Heflin's judicial reform plan created a system allowing citizens to lodge complaints about judges or justices formally. The reform also gave "the chief justice authority to regulate financial functions, court workloads, and juror selection procedures" (Schaefer, 2002, p. 143)

The Political Stream. Court reform swept across most states by the 1970s (Halloman, 1970). As an advocate for judicial reform, Heflin was the policy entrepreneur who shouldered the responsibility for the reform's success. He organized the Citizens Conference on the Alabama Courts in 1966 (Schaefer, 2002, p. 142). He was respected in Alabama legal circles, serving as president of the state bar, and was later elected to the state Supreme Court as Chief Justice in 1970. Heflin was a savvy politician and framed the judicial reform platform around politically neutral goals: greater administrative efficiency, legal professionalism, and improving legal services for Alabama's people (Freyer & Pruitt, 2001, p. 116). The Citizens Conference served to bring together disparate groups who were all motivated to reform the Alabama court system. Heflin believed that the key to success would be to gain support from all segments of the state's population and that citizen support would be critical. His strategy was to enlist support from everyday citizens such as laborers, small business people, and other professional business positions. He would use attorneys and judges to work behind the scenes to implement the revision. Heflin led the statewide ratification campaign, which involved a strategic publicity campaign to ensure judicial reform became a household topic.

Coupling/convergence, the policy window, and the creation of public policy. It was the task of the key players who supported the revision to persuade those in opposition to accept the positive changes the Article would bring. Proponents of judicial reform played up the idea of a uniform system, cost savings, and efficiency. The opposition came from probate judges and rural attorneys "who felt the article centralized judicial power" (Freyer & Prutt, 2001, p. 125). Ultimately, the opposition could not stop the state-wide coalition of diverse groups all backing reform. The Alabama House and Senate narrowly approved the judicial article, placing it on the state ballot as a proposed amendment to the 1901 Constitution (*Encyclopedia of Alabama*, 2023). On December 18, 1973, 118,449 Alabamians voted. Of this number, 73,609 (62.1%) voted for the article and 44,840 (37.9%) voted against it.

The success of judicial reform in Alabama was the result of several events. First was the tireless work of Howell Heflin. He leveraged his position in various influential groups, such as the Alabama Bar Association, to ensure judicial reform remained on the policy agenda. Second, the timing of Albert Brewer's governorship (1968-1971) was also crucial to the Judicial Article. Brewer's Constitutional Commission worked with Heflin's Citizens' Conference to propose a judicial reform proposal. Though Brewer was no longer governor, judicial reform passed despite Governor George Wallace – who claimed indifference to its passage. 4 A third reason for success was that the membership of the state legislature had the correct individuals in key positions to

ensure the passage of the Judicial Article. Specifically, the "Muscle Shoals Mafia," or members of the legislature who were loyal to Howell Heflin and represented towns near his hometown of Tuscumbia, were influential in the legislature.

The Alabama Judicial System identifies several key factors that contributed to the successful campaign to pass the Judicial Article of 1973. First, the national state court reform movement provided a platform for the topic to be discussed in Alabama. Second, the availability of federal funds through the Law Enforcement Assistance Administration enabled leaders in the reform movement to conduct research and educate citizens during the reform process. Third, the leadership role of Howell Heflin was crucial in both the developmental and adoption stages of the Judicial Article. Fourth, the leadership role of CC “Bo” Torbert as the Chief Justice (1977-89) was instrumental in implementing the revisions to the Judicial Article. Fifth, the work of legislators, commissions, conferences, and committees within and outside of the General Assembly was key to the success of the reform. Sixth, the success of those involved in generating media and public acceptance of the revisions to the Judicial Article was a significant factor. In addition to these six prominent factors, the ability of key players to take specific actions at the opportune times and places was crucial to the success of the reform. 5

Kingdon’s (2003) MSF can be used to understand the passage of the Judicial Article:

> In the case of Alabama judicial reform, Howell Heflin and Bo Torbert were the principal policy entrepreneurs. Through determination and work through the Alabama Bar Association, Heflin placed the issue of state judicial reform on the state's policy agenda. He played the lead role by joining forces with the Alabama Constitutional Commission in the development of the options for providing a solution to the problems of case backlog, which resulted, he believed, from an uncoordinated, ununified, and unmanaged judicial system. He was a principal policy entrepreneur in the third stream, the political stream, in getting public and official support to adopt the judicial article. At this point, the role of the principal policy entrepreneur changed from Heflin to Torbert. As previously stated, it is debatable to what degree the causal factors that brought these three streams together can be attributed to a single or set of factors. It is also debatable as to whether or not, or how, they could be brought together again to achieve the same or different objectives. In the context of the policy landscape of Alabama and regardless of the merits of the specifics of judicial reform, the adoption of comprehensive judicial reform is an impressive achievement (Short, 2015, p. 68).

DISCUSSION

This chapter has argued that change is possible in states with traditionalistic cultures, but a lot has to go right. The confluence of idiosyncratic events eventually came together to allow for policy change. In 2022, constitutional change finally happened in Alabama. Policy entrepreneurs like Representative Merika Coleman, the assistant minority leader in the Alabama House, argued that reforming the constitution would improve the state's reputation. The campaign for reform started in 2020, with the COVID-19 Pandemic, the murder of George Floyd by Minneapolis police, and the Black Lives Matter movement (Swetlik, 2022) all being part of the political stream. These events called attention to the 1901 Constitution's racist roots, enforced segregation (which are gone but still part of the document), and its deliberate efforts to disenfranchise Black voters. Despite not being enforced, these portions of the constitution were all still part of the state constitution, which can make up the problem stream. The effort toward reform took place in two steps. First, Representative Colemen proposed Amendment 951 to the Alabama Constitution. The Amendment directed "the head of the Legislative Services Agency (LSA) to develop the draft of the recompiled Constitution" (Cason, 2022). Voters approved Amendment 951 with a margin of 2 to 1 in 2020. The LSA spent two years working on drafts of the amendment's passage.

> *There were numerous public meetings, opportunities for the public to engage and participate. When we were done with that process it had to pass both legislative bodies again by a three-fifths vote. They were debated, talked about during the legislative process. Then, of course, it's got to be ratified in November. So, we're not talking about a quick or simple process. It really was a process with multiple, pretty significant hurdles that had to be checked through the representative government process.*
>
> Othni Lathram, Director of the Alabama Legislative Services Agency 6

Representative Coleman was able to campaign across the state to garner support for the Constitution's recompilation, building a bipartisan coalition in the process. Like Heflin with the Judicial Article, Coleman brought attention to the politically neutral issues that made up the reform proposal. "The bill limited changes to four categories: Remove racist language; delete duplicative and repealed sections; consolidate economic development provisions; and arrange local amendments by county" (Cason, 2022). Ultimately, the constitution's recompilation was passed in the November 8, 2022 general election with 76% of the vote. The 1901 Constitution stood "at 420,000 words, while the 2022 Constitution's deletion of repeated text puts it at 373,274" (Swetlik 2022). The recompilation did not address any of the fundamental problems of the 1901 Constitution. Even in its recompiled state, the 2022 Alabama Constitution remains the longest state constitution in the United States.

The accomplishment of Representative Coleman, Director Lathram, the Alabama Citizens for Constitutional Reform, and others for generating a document that has had

the racist relics of the 1901 Constitution removed while also creating a more user-friendly document by "removing duplicative and repealed provisions, and organizing local constitutional amendments by county" is significant (Spencer, 2024). That it happened in conservative, traditionalistic Alabama is astounding. It is also important to note that the reorganized constitution made no substantial changes in Alabama's governance.

> The 1901 Constitution turned out to be the longest, most statutory, rigid and prohibitive in state history… the electorate in 1901 did not trust their state or local governments and wanted the least government possible – their fears of a strong unrestrained government coming out of their nineteenth-century history (McMillan, 1978, p. vi).

This statement still holds true, and despite its recompilation, which extricated the portions of the document that were a national embarrassment, the spirit of the 1901 Constitution continues.

CONCLUSION

Policy change in the Deep South is possible. As Kingdon's (2003) model illustrates, the streams must line up, and the policy window has to open at just the right time. Serendipity plays a vital role in this model. In many cases, the right people, conditions, and solutions had to line up to get the policies turned into law. In South Carolina, the right circumstances had to align to get the Home Rule Act passed; that is, Supreme Court decisions changed the representation in the state, the population became less rural and more urban, and, generally, residents wanted more control over the direction of their local governments. State legislators wanted to give local governments more control. Governor George Busbee in Georgia made better governance an issue and shepherded Georgia's proposal for a modern constitution. Likewise, the recompilation and passage of Alabama's 2022 Constitution is one of the most significant forms of constitutional reform seen in Alabama since the passage of the Judicial Article in 1973. In both cases, it took savvy, innovative policy entrepreneurs. While Kingdon's (2003) model explains how these issues' "time has come," that is, these agenda items eventually became laws, policymaking never stops, and there is always room for improvement via the feedback loop of the policy process (Anderson, 2011). The failure of Alabama's Judicial Article to address partisan elections for judges has made Alabama the "land of unseemly judicial election wars" (Schaefer, 2002, p. 148). The recompilation of the 1901 Constitution is a significant step towards a modern constitution, but there is still work to do (Spencer, 2024). In the policy stream, there are groups and policy entrepreneurs who are still campaigning for constitutional reform. The problem stream sees that these reform groups have defined a myriad of problems that are all related to the constitution's framework, taxing, education funding, and the centralization of local policymaking in

Montgomery. The political stream, or public mood for reform, has heretofore not coupled with the other streams. Because of the role of serendipity in Kingdon's model, it is difficult to assess when or what form the public demand for constitutional change will arise.

In a study that compared political and economic variables and their effect on public policy, Dye (1966) found that policymaking in the states was more a result of forces of economic development than political factors. In the case of Alabama's 2022 recompilation, the blatant racism of Alabama's 1901 Constitution continued to serve as a national embarrassment for the state and undermined its ability to attract industry (e.g., Sher 2019). In an environment where states are compelled to compete with each other for residents and industries, the 1901 Constitution made the process of convincing national and international businesses to move to Alabama more difficult, all things being equal.

> *On the economic development side, we also want folks to know we're open for business. We want people to come to the state of Alabama, spend your tax dollars, and that we again are a state that is this 21st century state, all kinds of different people, all kinds of different cultures, and we do not reflect what was in that 1901 constitution. 7*
>
> Representative Merika Coleman (D – Pleasant Grove)

Implicit in the political stream, in all the cases presented, is that the changing old policies, lack of home rule in South Carolina, a dated Constitution in Georgia, a convoluted judicial system in Alabama, and the 1901 Constitution, can be understood as being "good for business." In all these cases, the status quo can be argued to be bad for the states' economy – which is key in shaping policy (Dye, 1966) and the public's capacity to palate change.

KEY TERMS

Agenda Setting – The agenda is comprised of all the issues to which policymakers and the public might pay attention. Policy advocates will work to get their preferred policy solutions and pay attention to these issues, thus placing them on the agenda.

Decision Agenda – The part of the policy process where policymakers deliberate about whether or not the policy will become a law.

Dillon's Rule – Formulated by Iowa Supreme Court Justice John F. Dillon in 1868, this rule holds that local governments are creatures of the state and that local governments only have the powers allotted to them by the state legislature.

Home Rule – The power of local governments to make laws for themselves so that they have autonomy over what happens in their jurisdiction.

Local Governance – The doing of public policy at the local level. Local governance includes quality of life issues including trash collection, filling potholes, administering

schools, county jails, hospitals, etc.

Policy Entrepreneur – An advocate for a preferred policy solution. Policy entrepreneurs can be public officials, bureaucrats, interest group leaders, or citizen activists.

DISCUSSION QUESTIONS

1. What do you think the framers of the South Carolina constitution meant when they opted to create a document that sought to "avoid erecting a numerous democracy?"

2. How does centralizing power in the legislature, away from local governments, empower interest groups? Why would this structure give advantages to organized interest? Which types of groups will have the greatest advantage?

3. Was South Carolina's adoption of the Home Rule Act (1975) a way for the state legislature to defer blame for raising taxes to provide the services that voters demanded? Why or why not?

4. How did the "bed sheet ballot" lead to voters' rejection of the Georgia constitution and in favor of a new one?

5. How would you characterize Alabama's judicial system prior to the passage of the 1973 Judicial Act?

6. What factors led to the passage of the 2022 recompilation of the Alabama constitution? Frame those factors within the multiple streams framework.

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NOTES

1. See https://alison.legislature.state.al.us/session-information-sublanding
2. Note that the recompilation shows that Alabama has a new constitution passed in 2022. The 2022 Alabama Constitution made important steps towards removing explicitly racist parts from the document and organized it more intuitively, it did not deal with any issues that meaningfully affect governance in the state. Notably, local-level democracy is still stifled, there is no home rule, and the tax structure is still embedded within the document.
3. This list is excerpted from Watson (1977) p. 57-59.
4. See LibGuides: Alabama's Unified Judicial System Celebrates 50 Years: The Legislative Process, n.d. at https://judicial-alabama.libguides.com/alabamasunifiedjudicialsystem/factorsincourtreform
5. See LibGuides: Alabama's Unified Judicial System Celebrates 50 Years: The Legislative Process, n.d. at https://judicial-alabama.libguides.com/alabamasunifiedjudicialsystem/factorsincourtreform
6. Cited in Cason (2022, July 31).
7. Cited in Cason (2021, September 2).

2

The System Works As Intended: Alabama's 1901 Constitution and Financing Public Education

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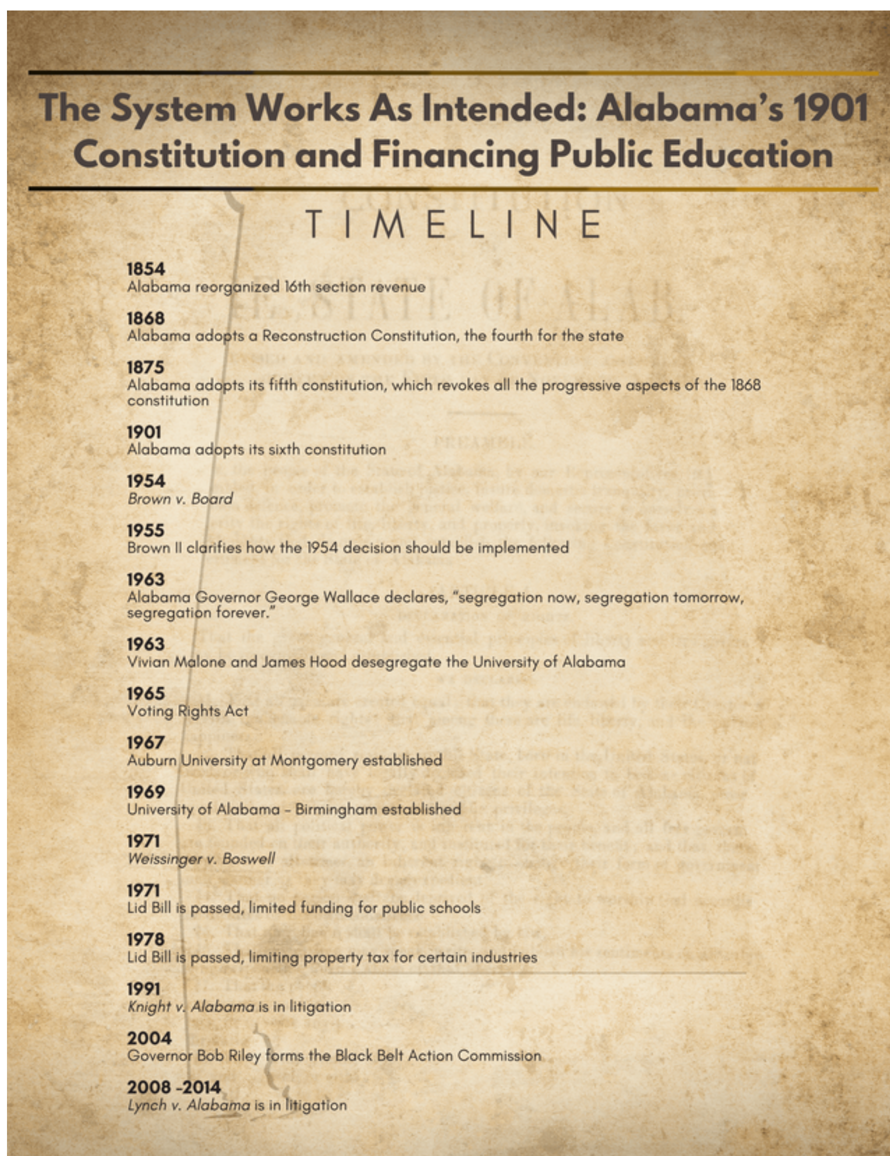
ABSTRACT

From 1990-2014, Alabama fought against improving the property tax system for the benefit of public schools in *Knight v. Alabama* (2007) and *Lynch v. Alabama* (2014). *Knight* and *Lynch* charged the State with upholding a racially discriminatory property tax system that served to keep public school systems, particularly in rural, predominately Black counties, severely underfunded. *Brown v. Board* compelled Alabama to desegregate its school systems with "all deliberate speed," but school systems remained unequal due to funding disparities from the state's overly complicated tax system. Despite over 700 amendments by 2014, Alabama's constitution left the property tax system created in 1901 nearly unchanged. The system created in 1901 worked to keep property taxes low and profits for large landowners high, while disenfranchising Black citizens and demolishing the public school system. To protect the system created in 1901, the Alabama Legislature, during Governor George Wallace's administration, responded to Brown and the 1965 Voting Rights Act by removing the responsibility of funding public schools from the state and removing the power to change property taxes from local officials. While the courts acknowledged the racially discriminatory intent behind Alabama's property tax system, they refused to amend the systems created by the 1901 and 1963 state governments. The rulings in *Knight* and *Lynch* highlight the contentious relationship between property rights and civil rights deeply embedded in Alabama's history of state-sanctioned racism.


The System Works As Intended: Alabama's 1901 Constitution and Financing Public Education

TIMELINE

1854
Alabama reorganized 16th section revenue

1868
Alabama adopts a Reconstruction Constitution, the fourth for the state

1875
Alabama adopts its fifth constitution, which revokes all the progressive aspects of the 1868 constitution

1901
Alabama adopts its sixth constitution

1954
Brown v. Board

1955
Brown II clarifies how the 1954 decision should be implemented

1963
Alabama Governor George Wallace declares, "segregation now, segregation tomorrow, segregation forever."

1963
Vivian Malone and James Hood desegregate the University of Alabama

1965
Voting Rights Act

1967
Auburn University at Montgomery established

1969
University of Alabama – Birmingham established

1971
Weissinger v. Boswell

1971
Lid Bill is passed, limited funding for public schools

1978
Lid Bill is passed, limiting property tax for certain industries

1991
Knight v. Alabama is in litigation

2004
Governor Bob Riley forms the Black Belt Action Commission

2008 -2014
Lynch v. Alabama is in litigation

Dates covered in this chapter

INTRODUCTION

Alabama fought against improving the property tax system for the benefit of public schools in landmark cases from 1990-2014. *Knight v. Alabama* (2007) and *Lynch v. Alabama* (2014) charged the state with upholding a racially discriminatory property tax system that served to keep public school systems, particularly in rural, predominately Black counties, severely underfunded. The troubles faced by *Knight* and *Lynch*'s plaintiffs began nearly a century earlier with the end of Reconstruction. Seeking to

disenfranchise African Americans and prevent access to public education, Alabama's legislators in 1901 devised a constitution according to their desires that survives nearly unaltered in the present day. Whereas public education depends on revenue derived from property taxes, lowering or capping property taxation padded the pocketbooks of wealthy elites. Building on previous cases, *Knight* and *Lynch* reflect the battle to achieve equal public-school education in Alabama following the *Brown v. Board of Education* Supreme Court decision (*Brown v. Board of Education*, 1954). The *Brown* ruling signaled a watershed moment for public education throughout the nation, particularly in the South. Despite the real, revolutionary changes *Brown* catalyzed, the effects of decades of unequal education could not be undone overnight. Whereas *Brown II* (1955) compelled Alabama to desegregate its school systems with "all deliberate speed," school systems remained unequal due to funding disparities from the State's overly complicated tax system created in 1901.

While histories on public education post-*Brown* acknowledge the difficulties in achieving equal public schools despite *Brown*'s initial success, they largely omit the role of property taxes in perpetuating discrimination in education (Bagley, 2010; Kruse, 2005; Tullos, 2011). 1 This chapter analyzes the rulings, key actors, and political climate contributing to the creation of Alabama's 1901 Constitution and its effects on property taxation and public school financing. *Knight* and *Lynch* provide a direct line from 1901 to 2014 to highlight the lasting effects of the Alabama Legislature on public school funding inequities post-1954. The rulings in *Knight* and *Lynch* highlight the contentious relationship between property rights and civil rights that is deeply embedded in Alabama's history of state-sanctioned racism. The property tax system created in 1901 by white legislators looking to remove political power from Black citizens remained essentially unchanged by the end of the *Lynch* case in 2014. In *Lynch's* concluding opinion, the appellate judges noted,

> In deciding this difficult appeal, we are cognizant of Alabama's deep and troubled history of racial discrimination. And given the evidence at trial, we share the district court's concern regarding Alabama's public education system: Alabama continues to be plagued by an inadequately funded public school system alike… courts, however, are not always able to provide relief, no matter how noble the cause (*Lynch v. Alabama*, 2014, p.28).

Lynch's concluding opinion reflected decades of policies that served the interests of white property owners at the expense of public schools. Despite a recognition of wrongdoing in both *Knight* and *Lynch*, the system created in 1901 continued to work as intended. 2

The poignancy of history lies in the inability to escape it. Both *Knight* and *Lynch* reflect decades of previous litigation surrounding Alabama's tax system. Therefore, one must analyze the origins of the system to understand its effects. The chapter begins with a summary of the 1901 Constitution, and the 1868 Constitution it sought to overturn. 3

Alabama responded to civil rights litigation in two distinct ways concerning public education. In response to *Brown*, Alabama attempted to prevent desegregation by removing the state's responsibility to finance public education. After the federal government compelled Alabama to desegregate, the state took the power to assess property out of the hands of local officials to ensure that white legislators controlled the allocation of tax revenues. Following the Voting Rights Act in 1965, Alabama's predominately white legislature feared that communities, particularly in the Black Belt region, would elect Black local officials who would work to provide decent funding to recently integrated public schools. *Knight* and *Lynch* affirmed that underfunded public schools constituted state-sanctioned segregation; however, neither case succeeded in proving the connection between discrimination and the property tax system. Whereas *Knight* petitioned the court to redress desegregation and property tax disparities in higher education, the court chose to only respond to the desegregation claim. *Lynch* built on the failures in *Knight* by taking the same claims and applying them to Alabama's K-12 schools. The district court concluded in *Lynch* that Alabama's property tax system worked to underfund public schools in predominately Black communities, yet refused to redress the system based on a legal technicality. In each case, the district courts affirmed the prosecution's argument but declared the judiciary unable to act. The architects behind Alabama's tax structure in 1901 developed a system for the express purpose of removing political power and educational opportunities from African Americans to protect the wealth of whites with large amounts of land. Looking at the verdicts of *Knight* and *Lynch*, it appears that over a century later, Alabama continues to privilege the pocketbooks of agribusiness industry heads at the expense of proper political representation and public education.

CREATING THE CONSTITUTION: 1868-1901

Three years after the Civil War ended, the Alabama legislature drafted a constitution to reflect the interests of its newly freed citizens. Created during Reconstruction, the Republican-dominated legislature worked to protect the rights of citizenship for all Alabamians. For the first time in Alabama's history, African Americans had a voice in their government. The election of thirty Black delegates to Alabama's House of Representatives in 1868 reflected real change as promised by the right to vote enshrined in the 15th Amendment to the U.S. Constitution. Black elected officials in Alabama, for example, represented counties in the Central and Tennessee Valley plantation belts where "on average sixty percent of the residents were Black" (Hahn, 2003, p. 208). Alabama's first interracial Constitutional Convention ushered in a series of progressive policies deemed "radical" by later state governments, such as the protection of property rights for married women and strong state support for public education. Prior to 1865, white Alabamians put little effort into funding education at public expense. Until emancipation, it was illegal in Alabama to teach African Americans

how to read or write. The federal government, rather than the state, primarily contributed to the funding of public schools in Alabama for white children until the mid-nineteenth century. Prior to Alabama's admittance as a state, the federal government surveyed the territory of Alabama and divided the land into sections. The government granted the 16th section of each township for the benefit of public education. Profitability, or the ability to produce high-yielding crops, was not taken into account when designating the 16th section, so counties with agriculturally profitable 16th sections, such as the Black Belt region, received more funding than neighboring areas. This method worked to ensure that the tax revenue from wealthy areas went directly to schools in those districts. By 1854, the state reorganized the 16th section revenue into a general fund which was distributed equally on a per-student basis. This general education fund catalyzed the formation of a statewide system of public education. However, in antebellum Alabama, public schools primarily served poor children whose families could not afford private tutoring. After emancipation, the consensus by wealthier whites and freedmen believed some form of public education would be beneficial for all. The formation of Alabama's Board of Education in 1868 emphasized the delegates' belief that proper public education established the foundation for social change (Hall, 2015; Harvey, 2010). Formerly enslaved people, in particular, strongly believed in public education as a means to secure and protect their status as free people. In one Alabama community, a formerly enslaved man contributed his entire life savings of $38 in nickels, dimes, and pennies to fund a local school stating, "I want to see the children of my grandchildren have a chance so I am giving my all" (Werner, 1939, p.129). To finance the growth of Alabama's public schools, the Constitution greatly increased property taxes and designated nearly twenty percent of the state budget to public schools (Ala. Const. art. XI. §11, 1868). While the 1868 delegates hesitated to compel integration, they insisted that each school receive equal shares of state funding, explaining that, "should it prove expedient to have separate schools for white and colored children, The Board of Education shall cause an equal division of the school fund in such district where such division is demanded" (State of Alabama Constitutional Convention, 1868). To create an equal division of funds, the Board of Education consolidated the 16th Section Fund and distributed the revenue based on student population. By promising adequate funding to all public schools regardless of race or region, the Constitution provided financial protection for public schools. While the reallocation of property tax revenue created a more equitable public school system, for wealthier whites it appeared as if their hard-earned tax dollars were being stripped from their local school district and redistributed to poor whites and African Americans.

Less than a decade after the 1868 convention, Reconstruction ended as former Confederates and white elites of the Democratic party regained state control, allegedly seeking to "redeem" the state from radical rule. The nearly all-white legislature removed any doubt of their intentions when they erased "all men are created equal" from the preamble of the Constitution during their first convention. The 1875 Constitution thus revoked nearly all progressive policies implemented during

Reconstruction to restrict Black access to political power. "Radical" Reconstruction, as one historian explained, "[saw] remarkable political inversions on the local and state levels, but it also proved to be a very painful lesson in the nature and boundaries of American democracy" (Hahn, 2003, p. 8). To appeal to the agricultural and industrial interests of wealthy whites, the "Redeemers" implemented a state tax ceiling, which substantially cut revenues for public school systems. Whereas the previous constitution set the rate property could be taxed, the new constitution capped the amount of revenue that could be derived from property. For example, if a large farm was worth $1,000,000 under the 1868 Constitution, the public education system received 20% of the farm's assessed value. Under the 1875 Constitution, the public school system could receive up to $100,000 from property taxes, regardless of whether the tax rate exceeded that amount. These laws served to promote Alabama's anti-tax and agricultural interests at the expense of social improvement, creating a policy agenda that predominated through the next century.

The Redeemer government believed "free education beyond the basic rudiments was imported here by a gang of carpetbaggers...and that taxation to support it was socialistic. It should be provided to pauper children only, as before the war" (Woodward, 1971, p. 61). Furthermore, the Democrats feared "education of the negroes would make them less easily manipulated in elections" (Woodward, 1971, p. 64). A particular concern for the Redeemers, prosecutors in *Lynch* noted, "[was] to prevent the possibility that taxes could again be levied on the property of Alabama Planters in an onerous amount to educate blacks" ("U.S Supreme Court Review of Petition for Writ of Certiorari in India Lynch v. Alabama" *[U.S. Review]*, 2014, p.4). Pushing an anti-tax agenda served to restrict African Americans' education under the guise of keeping "carpetbag" influences out of Alabama. By abolishing the Board of Education and capping property taxes, the 1875 Constitution all but killed any chance of adequate public education in Alabama.

If the 1875 Constitution reinstated white control, the 1901 Constitution solidified it. The delegates pronounced on day two of the 1901 convention that for white supremacy to succeed, it must be codified into law ("Proceedings of the Alabama Constitutional Convention" [Ala. Const. Conv.], 1901, p.9). As historian J. Mills Thornton noted, "there [was] nobody at the convention who [was] not a white supremacist" (*Knight v. Alabama,* 2004). Indeed, the Planters and Big Mules crafted a series of amendments tailored to their interests. 4 Although the delegates primarily focused on disenfranchising Black citizens

> the records also clearly and convincingly establish that another objective of nearly equal importance... was that of reaffirming those provisions of the 1875 Constitution suppressing the millage rates of *ad valorem* property taxes that could be devoted to the support of black education at public expense (U.S. Review, 2014, p.5).

THE SYSTEM WORKS AS INTENDED: ALABAMA'S 1901 CONSTITUTION AND FINANCING PUBLIC EDUCATION

The funding necessary to improve education rests on two factors: the property tax (or millage rate) and the assessed value of property. 5 Property taxes are commonly used to fund public education because they are a stable source of revenue in comparison to sales and income taxes. However, unlike other states such as Georgia, the classification system used to determine the millage rate in Alabama is applied uniformly throughout the state rather than on a case-by-case basis. Class III land, or rural/agricultural land, is taxed at the lowest rate and constitutes over 80% of all land in the state ("Declaration of Dr. Dan Sullivan," *Lynch v. Alabama*, 2008). Whereas all Alabama citizens benefited from a functioning education system, low tax rates primarily served the interests of white elites. Lacking the oversight of the Board of Education, under the new constitution, school boards uniformly received funding based on total student population but disproportionately allocated revenue to white schools (U.S. Review, 2014, p.7). By 1924, even though African Americans represented 40% of the state's population, Alabama spent less than $1.5 million on Black public schools compared to $13 million for white schools. In addition, rural areas like Lowndes County averaged less than $5 for Black children versus $96 for whites (Hamill, 2007). In some ways, the effects of the 1901 Constitution mirrored the later phenomena of white flight. As public schools rapidly deteriorated due to underfunding, wealthy white children fled to privately funded schools, forcing Black children to rely on the goodwill of Northern philanthropists and Black school teachers who tirelessly worked amid the underfunding of Alabama's public school systems (Fairclough, 2001, p. 4).6 By 1901, Alabama's schools primarily depended on state support. Facing the effects of a crumbling educational infrastructure, delegates worked to amend their image as effective leaders while maintaining a commitment to state rule and low taxes. Alabama's Superintendent of Education provided a report to the state lamenting that, "schools have been almost broken up by partisan politicians and their followers..." Although upset, the Superintendent worked to assuage the all-white legislature noting that, "all reports on the subject of education for Alabama have been entirely on the public schools without any account taken whatever of private or denominational schools" (Alabama Department of Education, 1898). The superintendent understood that public schools primarily educated poor white and Black children; thus, private schools protected the education of wealthy white children from the dangers of party politics. On the second day of the 1901 convention, one delegate proclaimed,

> I believe we should keep faithfully the pledges we have given not to increase taxation, but this should not deter us from making every effort to rid our State of the disgrace of its illiteracy... it will not do to say you are too poor to educate the people—you are too poor not to educate them (Ala. Const. Conv. 1901, p.15).

The 1901 delegates insisted, like many future legislators, that Alabamians could receive a decent education without paying higher taxes. However, the statistics proved that adequate public education and an anti-tax agenda could not co-exist. As one study noted, "the state has the ability to do vastly more than it has done," explaining that "at no

such time since 1880 has the assessed value of property reached the required sixty percent of its fair and reasonable cash value" (Department of the Interior, 1919, p.21). The report concluded that if Alabama assessed property at the required rate, the state could provide $24 per child rather than the current amount of less than $7 (Department of the Interior, 1919, p.21).

Despite constituting a majority of the population, African Americans in the Black Belt region of the state could not elect public officials after disenfranchisement. As county officials held the power to assess property and distribute funds to local schools, property assessments and school fund distributions overwhelmingly favored whites. Indeed, Black Belt counties from 1900-1917 voted against local tax levies to aid public schools because white schools in the area already compared favorably with other schools in the South (Sisk, 1956, p.192). The combination of disenfranchisement and retrenched tax policies from the 1901 Constitution created enormous funding disparities between white and Black schools. For example, in 1907, Wilcox County allocated $10.58 per white child and $0.37 per Black child (Sisk, 1956, p.193). By devising a system that ensured that whites retained most of their land value while simultaneously undermining educational and political opportunities for African Americans, the 1901 delegates succeeded in codifying white supremacy. Once again, the system worked as intended.

RESPONSE TO BROWN

Section 256 of the 1901 Constitution declared,

> the legislature shall establish, organize, and maintain a liberal system of public schools throughout the state... separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.

As part of a Jim Crow society, every aspect of education in Alabama was segregated by race. Sonnie Hereford III had to walk six miles to attend Huntsville's public school for Black children, even though there were buses that ran along that route. Hereford noted that school buses were reserved for white children and that oftentimes, on his way to school, "the buses would kick up dirt as they passed, and sometimes white children would throw things out the window or spit at the Black children" (Harris, 2020). The Court found that daily humiliations such as those faced by Hereford caused significant harm to a child's education noting, "Segregation of white and colored children in public schools has a detrimental effect on the colored children...a sense of inferiority affects the motivation of a child to learn" (*Brown v. Board of Education*, 1954). When the Supreme Court found that "in the field of public education, the doctrine of 'separate but equal' has no place" in 1954, Alabama's legislature responded by amending Section 256,

removing the responsibility of funding public education entirely (*Brown v. Board of Education*, 1954). As one historian explained, "The committee reasoned that if children were not entitled to an education, then desegregation could not be pressed in courts" (Key, 2009). By 1956, the Constitution read, "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense" (Ala. Const., art.XIV,§ 256, Amend. 111, 1901). The Court in *Brown* stated,

> Education is perhaps the most important function of state and local government. It is the very foundation of good citizenship. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education (*Brown v. Board*, 1954).

If schools did not exist, at least in the eyes of Alabama's government, federal desegregation could not occur.

Determined to prevent full-scale desegregation, Governor George Wallace resorted to physically evading the federal government. When two federal officers appeared in Wallace's office to serve a court order for interfering with school desegregation in 1963, Wallace sent out a secretary to retrieve the papers as he was "too busy" to be disturbed (*Daily Northwest Alabamian*, 1963). The glacial pace of the law granted Wallace and his government time to craft mechanisms to ensure public schools remained in white control. Indeed, Alabama's schools remained largely segregated nearly a decade after *Brown*. *The Anniston Star* reported in 1963 that, "little more than 9% of the Negro public school students in Southern and border states are attending elementary and high school with whites" ("Barely Tops One Percent," *The Anniston Star*, 1963). However, Alabama could not defy the federal government forever. Vivian Malone and James Hood desegregated the University of Alabama in 1963 (Alabama Governor administrative files, 1958). For anyone watching the five o'clock news, the arrival of federal troops to the University of Alabama's campus signaled the end of an era. The federal government, it appeared, finally defeated the wayward state of Alabama. Although desegregation prevailed, underfunded school systems remained. Unlike states such as Virginia, Alabama did not close its schools in the aftermath of desegregation. Instead, Wallace and his government responded to desegregation by amending Section 256, and devising a series of "Lid Bills" in the 1970s which further limited access to funding for public schools (Kruse, 2005, p.25). 7

1971 AND 1978 LID BILLS

By 1965, the combination of federally ordered desegregation, the flight of white children from newly integrated public schools, and an increasingly enfranchised Black electorate from the Voting Rights Act caused Wallace and his white political associates to fear the election of local officials in the majority-Black, Black Belt region of the state. White

Alabamians with large tracts of agricultural property or timberland worried that a Black local official would increase the property taxes. As one chairman during the 1901 constitutional convention warned six decades before, "if you had a n------ tax assessor... he would increase the assessment of white land" (U.S. Review, 2014, p.10). Under the limitations outlined in Alabama's Constitution, tax reform proved difficult but not impossible. In 1971, the courts ruled the tax system unconstitutional for reasons unrelated to race in *Weissinger v. Boswell*. Before Weissinger, "essentially all property in Alabama was assessed at less than fair market value, but the ratio of assessed value to fair market value varied widely from county to county" (U.S. Review, 2014, p.8). Described as "the most fervent and committed segregationist in State history," the Democratic Chairman of the State Senate's Finance and Taxation Committee, Walter Givhan, proposed the Lid Bill package in response to *Weissinger* as an appeal to the state's flourishing agribusiness industries such as the Alabama Farmers Federation (ALFA) (Bagley, 2010, p.209). 8 Instead of adjusting the tax rate to reflect the varying property values, the state froze assessment values and removed the power to change them from local officials. Under the Lid Bill amendments, timber and farmland is taxed on current use rather than market value. Despite constituting nearly 70% of all land in Alabama, under the current use restrictions, forestland contributes less than 2% of total property tax revenue (Blalock, 2008). To adjust the tax rate, local officials are required to submit a request to the Legislature, and over half of the Legislature must approve a request for an adjustment to be implemented (Ala. Const., art.XIV,§ 269,1901). One veto from a major interest group such as ALFA, therefore, would kill a county request to increase the millage rate.

Having contributed nearly $80,000 to the Democratic Party in the primary election of 1978, ALFA assured that Alabama remained a "No-Party" state to protect the anti-tax agenda and anti-unionist sentiments that served their business interests. In other words, opposition to the Democratic Party did not exist (Latimer, 1979). Of the four proposed bills supported by ALFA and the Democratic legislators, the Alabama Education Association (AEA) opposed all but one (Hamilton, 1978). While ALFA and its supporters, such as Wallace, portrayed the Lid Bills as a helping hand for everyday Alabamians, AEA executive secretary Paul Hubbert noted that while some small farmers and homeowners might benefit from the bills, "... it is going to be the Big Mules who benefit the most." Hubbert noted that some industries such as Alabama Power could save nearly $7 million under the Lid Bills (Hamilton, 1978). Yet, "as promoters emphasized cheap labor and low taxes, they neglected to explain that maintaining these advantages for industry helped to perpetuate less than advantageous living conditions for Southerners at large" (Cobb, 1993, p.264). In 2020, a report by the Business Education Alliance in Alabama found that the state faced a workforce crisis stemming from its inability to develop skilled workers, noting that Alabama is on pace to have a shortage of close to 200,000 highly skilled workers by 2025-2026. Researchers highlighted statistics that rank Alabama's fourth graders 47th nationally in reading and 50th in math as evidence of the state's inability to develop a highly skilled workforce

(Harper, 2020). The desperation for attracting industry without improving the living conditions for industry workers mirrored Alabama's policies from 1901 in which "New South leaders persisted in achieving a developed economy at the expense of a developed society" (Cobb, 1993, p.3). Thanks to the Voting Rights Act of 1965, the state could no longer prevent Black Alabamians from electing local officials. Thus, the Lid Bills removed the power to raise property taxes from local officials entirely, ensuring major industries like those represented by ALFA retained their profit margin.

Whereas in 1963, Wallace declared "segregation now…segregation tomorrow… segregation forever," promising to protect Alabama's schools and industries from the "tyranny" of the federal government, by 1970, he employed a litany of code words to support a white supremacist strategy "designed to withstand the scrutiny of law" (Wallace, 1963; Bagley, 2010, p.4). Wallace stressed "the urgent need for relief from high taxes, the high cost of living, and the solving of the crisis in our public schools" to his supporters during his reelection campaign (*The George C. Wallace Newsletter*). Wallace understood, as did his predecessors, that underfunded public schools primarily affected Black children. Speaking to white private school patrons in Bibb County, Wallace remarked, "I think it's horrible that you people have to pay taxes to support public schools. Then you have to dig in again to pay for quality education for your children in a private school" ("Lynch v. Alabama," 2014, p.25). Wallace and his allies believed that as long as the ability to reform taxes remained in white control, segregation could remain "today…tomorrow…and forever" (Wallace, 1963). Under the new Lid Bill provisions established by Wallace's government,

> the maximum permissible local property tax for the support of public schools… [was] a mere 69 cents. A $1 million farm or timber plantation would under the statutory method thus be valued on average at about $274,000, have an assessed value of $27,400, and be subject to a maximum tax for the support of the public schools of a paltry $411 (U.S. Review, 2014, p.12).

As one historian noted, the Lid Bills served as "the instrument preserving the status quo of Alabama's past" by privileging property rights over civil rights in Alabama, and reflected a new ideology of conservatism based on protecting industrialists and white middle-class Southerners (Bagley, 2010, p.215). Indeed, it appeared that industrialists cared more for low taxes than for school systems as "starving education was best for attracting industries" (Cobb, 1993, p.3).

In response to the Lid Bills, the president of ALFA spoke for Wallace's allies in industry writing, "You have won a victory for every person in this country who believes that individual freedoms are the basis for this country's greatness and who do not have the opportunity to speak their opinions" (Hays, 1964). Furthermore, he applauded Wallace as "A champion of state's rights, and a sworn enemy of those forces who would trample us down under the hypocritical cry of civil rights…he has shown himself to be a friend of the farmer" (Hays, 1964). Clearly, ALFA understood the connection between the anti-

tax agenda and the discrete opposition to civil rights coming out of the modern conservative movement. As Bagley aptly noted, "The Lid Bills had done what they were designed to do: withstand a legal test, protect white tax dollars, and protect white rights" (Bagley, 2010, p.6).

KNIGHT 1991-2007

By the late 1990s, Alabama's practice of creating controversies for the federal government to fix designated it as the "make me" state or "the federal court order capital of the country" (Tullos, 2011, p.176). Indeed, Alabama's decision to amend rather than rescind its nearly hundred-year constitution resulted in numerous federal court cases such as *Knight v. Alabama*. While Alabama changed significantly between the twentieth and twenty-first centuries, its property tax system mirrored the intentions of the 1901 Legislature. The tax rates created in 1901 and retrenched in 1978 continued to stunt Alabama's schools, and in 1991, John F. Knight alongside representatives of Alabama State University (ASU) and Alabama A&M University filed a case to redress the effects of underfunding in higher education (*Lynch v. Alabama*, 2014, p.3).

While desegregation allowed students of either race to attend previously all-white or all-black schools, historically Black schools suffered from inadequate state funding, causing students to flee to well-financed historically white universities. Alumni and faculty members worried that the lack of financial resources for HBCUs would destroy the decades of commitment to providing education for the Black community. As one of *Knight*'s leading attorneys, Harold Watkins explained, "We felt that by the late 1970s and early 1980s that our backs were against the wall," noting, "...if you were a Black institution, you were either downgraded or closed. Your students were sent to a white institution.... This whole thing started out as a vehicle and concept to survive" (Klass, 2014). Although the district court did not issue a ruling until 1991, it eventually found "numerous actionable vestiges of discrimination surviving in Alabama's system of higher education" and issued a remedial decree in 1995 to improve recruitment and hiring in HBCUs (*Knight v. Alabama*, 2004, p.6). The trial's short duration and initial success allowed Governor Bob Riley to posture that "Alabama truly is in on the cusp of magnificence" (Tullos, 2011, p.177). The remedial decree set out specific steps to be implemented over ten years under court oversight, yet the prosecution determined near the end of the ten-year period that "chronic underfunding of elementary and secondary schools" prevented the state from fulfilling its duties as outlined in the decree (Bagley, 2010, p.6). The second claim pushed *Knight* back into court, shedding light on the inadequacies of Alabama's "magnificence."

In the aftermath of *Brown,* federal oversight of Alabama's educational systems resulted in a series of successful desegregation cases. However, the federal government usually declined to oversee issues of taxation, leaving Alabama's courts in charge of tax reform.

After thirty years of litigation, the court reiterated in 2007 that parts of Alabama's constitution intentionally discriminated against Black students. Alabama's tax system, the court contended, "[was] a vestige of discrimination," however, the court refused to act because "...relief for those constitutional violations was not within the scope of the higher education claim" ("*Lynch v. Alabama*," 2014, p.28). In other words, because *Knight* initially sought to address desegregation, the court could not alter the tax provisions. In a last stand, *Knight* petitioned the Supreme Court in the hopes that the federal government could provide relief. However, the court declined to hear the case.

Reflecting on the court's decision, Harold Knight commented that "without federal courts intervening, nothing seems to happen" in Alabama (Tullos, 2011, p.176). *Knight* served as the continuation of a longer history of civil rights litigation which attempted to pull Alabama into a new era of progress, only to be stopped short of the finish line by those unwilling to imagine change. As seen by the *Weissinger* decision in 1971, Alabama could, when needed, adjust property taxes promptly. However, white interests needed to be threatened for change to occur with any sense of haste. Federal oversight protected Alabama against the perpetuation of segregated schooling, but the government left issues of taxation in the hands of the state leaving the Lid Bills to hamper progressive reforms. Despite these setbacks, the movement persevered. *Knight* represented just one battle in the long war against inequitable education in Alabama.

LYNCH 2008-2014

Four years after the Supreme Court neglected to hear *Knight*'s case, prosecutors filed a suit against the state on behalf of children in Lawrence and Sumter Counties, directly targeting Alabama's Lid Bills. By filing the same case under a different scope, *Lynch*'s prosecution hoped to force the court to address the relationship between property taxes and funding disparities in education. By 2011, the district court agreed that "several provisions of the Alabama Constitution of 1901 were adopted for the purpose of limiting the imposition on whites of property taxes that would pay for the education of Black public-school students" (U.S. Review, 2014, p.1). Yet, the state argued that victory for the plaintiffs' "would throw an already complicated tax system into disarray" (Carsen, 2011). Perhaps Alabama's tax system seemed complicated because it remained nearly unaltered from its original form produced in 1901. Indeed, collecting revenues for 21st-century necessities from property tax rates based on a 20th-century economy is difficult. Despite 977 amendments as of 2021, the effects of Alabama's property tax system mirror the intentions of the government in 1901 (Warren, 2011).

As the Sumter County Schools Superintendent, Dr. Fred Primm, lamented, "We're working with very little revenue. Basically, you have no money to do anything creative or innovative."

"If things continue the way they are with farmland and timberland not being taxed properly," remarked plaintiff Stella Anderson, "what we're going to see is more declining of educational resources... the poor will continue to get poorer, the educational system coming from rural distressed communities will continue to diminish" (Carsen, 2011).

Because Alabama taxes property based on "use" or type, and each county holds varying types of property in different proportions, some schools have larger revenue pools than others. Children in urban or suburban school systems benefit from a larger tax base with higher assessment values than schools in rural areas. In addition, urban and suburban centers receive a diverse array of property taxes as various stores, shops, and homes contribute to the property tax pool. Schools in rural areas, however, primarily receive funding from land used by Alabama's agricultural and timber industries. In other words, a town filled with high-end department stores, exclusive suburban neighborhoods, and high-powered industries like hospitals and business centers receives exponentially more property tax revenue than a town with little more than a gas station and the occasional Wal-Mart. The Sumter County school systems, for example, is located in "Alabama's overwhelmingly rural Black Belt, where in half of the counties, the school system is over 98% Black," with "[African Americans] owning only about 3% of Alabama's agricultural acreage and 2% of its timber acreage" despite representing the majority of the population (U.S. Review, 2014, p.6). Not only do the majority of Black Belt residents suffer from embarrassingly low property values, they do not receive the benefits of the low assessments because they do not own the property.

Instead of implementing the necessary reforms outlined by *Lynch*'s prosecution, Alabama's legislature paid homage to the issues highlighted in *Knight* through a Black Belt Action Commission created in 2004. Governor Bob Riley stressed, "The Black Belt has been studied and studied. The problems there have already been identified. It's time to take action—to put into practice a new approach that focuses on results and measurable improvements"(Alabama Governor administrative files, 2004). Yet, Riley declined to outline avenues for "results and measurable improvements" unless they benefitted Alabama's industries. Furthermore, Riley's commitment to "keep the interest of business first" fell short as Alabama suffered from immense financial issues caused by the 2008 recession during his final term in office (Tullos, 2011, p.179). Black Belt counties experienced unemployment rates of over twenty percent, while Alabama's legislature "cut education spending and drained the rainy-day fund" to mitigate expenses (Tullos, 2011, p.179). Riley's Black Belt Action Commission promised to benefit local Alabamians just as Wallace's Lid Bill campaign promised to protect the interests of everyday people. Yet, both the Commission and the Lid Bills overlooked the actual needs of the people in favor of business interests and economic reform. Riley's fight to protect citizens within the Black Belt reflected an ideological lynchpin for the modern conservative movement based on a "mythical South" that bore little resemblance to reality (Lassiter & Crespino, 2010, p.310). Indeed, looking back to the arguments posited by the 1978 Legislature,

"one would assume that [Alabama] continues to be dominated by a population who lives and earns its livelihood from agriculture. Such, however, is not the case" (*Alabama School Journal*, 1982, p.11). While the Commission included a nature trail, a heritage guide, and a fruit and vegetable marketing center for small farmers to sell their product "to buyers in Alabama and beyond Alabama," Black Belt citizens needed employment opportunities and educational improvements to survive financial hardships (*Selma Times Journal,* 2010).

By 2012, the district court in *Lynch* ruled in favor of the state and refused to remove the Lid Bills stating, "Although the district court acknowledged that Alabama's racist past… cast long shadows, it ultimately found that the Lid Bills were financially, and not discriminatorily motivated" (U.S. Review, 2014, p.26). In defining the Lid Bills as a financial reaction to *Weissinger* rather than a response to civil rights legislation, the 1978 Legislature succeeded in passing anti-Black policies under the guise of an anti-tax agenda. District Judge Lynwood Smith once commented that "Interest groups spend untold amounts in lawyers, lobbying, and advertising to promote legislation enhancing the wealth of their members," noting, "State powerbrokers perceive little benefit from investing in a quality statewide public school system because the children of their most influential constituents are generally enrolled in exclusive suburban school systems…or in private schools" (Lyman, 2014). Indeed, ALFA spent nearly $4 million in 1994 to "purchase" candidates and place them in positions like governor, attorney general, and state chief justice (Alfa, *The Anniston Star*, 1996). By refusing the upend the Lid Bills, the courts appeased hard-hitting lobbyists like ALFA, ignoring the needs of everyday Alabamians. As one report noted, "…representing farmers has become a side crop for ALFA. What it really does is run Alabama politics" (Alfa, *The Anniston Star*, 1996). Furthermore, because the children of wealthy elites received adequate education regardless of property tax revenue, "it did not matter where the money might go; [the State] did not want it to go anywhere" (Paying Taxes in Alabama, *The Anniston Star*, 2011). By projecting sympathy for the plaintiffs while ruling in favor of the State, the district court's decision emphasized the durability of property taxes as an avenue for discrimination, despite changing attitudes towards race. However, Alabama's attention to special interest groups like ALFA left the courts as "the last refuge for justice for those little folks who can't afford $4 million worth of influence" (Alfa, *The Anniston Star*, 1996).

Between 1981 and 2014, the "little folks" in Lawrence and Sumter counties sought relief through Alabama's judicial system. Yet, as the district judge in *Lynch* concluded, "Courts are not always able to provide relief, no matter how noble the cause" (*Lynch v. Alabama,* 2014, p.28). The district court justified its decision by noting, "…because the requested remedy would not redress the alleged injury, the plaintiffs lacked standing to challenge the millage cap provisions despite the district court's finding that they were enacted with discriminatory intent" (*Lynch v. Alabama*, 2014, p.28). The "requested remedy," as proposed by *Lynch*'s prosecutors, sought to return the power to raise taxes to local

county officials which the 1978 Legislature usurped. However, the Court concluded that because the prosecution could not prove that local officials would choose to raise property taxes, it declined to give them the opportunity. The court of appeals refused to engage in "guesswork as to how independent decision-makers—e.g., the county commissioners otherwise empowered to increase millage rates—will exercise their judgment" (*Lynch v. Alabama,* 2014, pp.16-17). Furthermore, the court declared that "millage caps…create no cognizable injury, because a court could only speculate about whether [the plaintiffs'] efforts would succeed in the absence of the caps" (*Lynch v. Alabama,* 2014, p.19). Without the power to predict the future, the plaintiffs' claims failed to produce any change. The district court reflected Alabama's unwillingness to alter property taxes under any circumstance, even if the system proved unconstitutional.

In an alarmingly tone-deaf response to the district court's ruling, one Alabama think tank blamed the Lawrence and Sumter County citizens for their underfunded schools stating, "A community's willingness to pay higher taxes for the benefit of their schools is directly tied to the citizen's level of engagement and involvement in the schools" (Robertson, 2014). The think tank neglected to acknowledge that the state, rather than the citizens, held the authority to raise taxes. By the policymakers' reasoning, the state's unwillingness to raise property taxes reflected a low level of engagement and involvement in rural school systems. Indeed, in 2007, *Education Weekly* placed Alabama among the bottom five states in offering children a chance for success according to K-12 education improvement policies (Tullos, 2011, p.245). While *Education Weekly* focused on K-12, the National Center for Public Policy and Higher Education issued Alabama a failing grade in all six categories, including preparation, participation, affordability, benefits, completion, and learning in 2008. Analyzing the outcomes from *Weissinger*, *Knight*, and *Lynch*, the state opposed any improvements in public education at the expense of Alabama's agriculture industries. Despite assurances from elected officials, Alabama's public schools were not "fine," and they certainly could not be described as "on the cusp of magnificence." Meanwhile, ALFA continued to generate millions of untaxed dollars through membership dues to advance the organization's cause across the state (Tullos, 2011, p.165). Thanks to the support of Alabama's legislature and court systems, agribusiness executives could rest easy knowing the state protected their revenues from silly little expenditures like education.

CONCLUSION 2014-2020

When asked about their state's history, the children of Lawrence and Sumter counties might struggle to provide a confident answer as they read about the triumphs of the civil rights movement in a classroom unable to provide necessities. Part of Alabama's education standards for social studies requires students to analyze the Alabama Constitution of 1901 "to identify how its key components impact the relationship of

funding between state, local, and special interest groups." 9 As students learn about the influence of special interest groups on Alabama's government, they understand the mutually beneficial relationship between the two. Students would be shocked, then, to discover that their state worked alongside the largest lobbying group in Alabama against the needs of their school. If the students understood the implications of *Lynch*'s ruling, they might question the requirement to "explain how the balance between individual versus majority rule is essential to the functioning of American democracy." 10 Indeed, after learning about the importance of a representative government and fair elections, students might ask how an individual is supposed to assert rule if they are not allowed to do so. However, like the district court's refusal to connect Alabama's Lid Bills to a longer history of anti-Black legislation, the lessons given to Alabama's students are not fully historicized. Beginning with the 1875 Constitution, Alabama's Legislature retracted state support of public education to prevent tax dollars from educating Black citizens. In 2018, 90.34% of students attending Alabama's 75 "failing" schools were African American (Patterson, 2020). As seen in the 1901 Constitution, the 1956 Amendment of Section 256, and the 1970 Lid Bills, Alabama's response to progressive reforms usually serves to further undermine Black citizen's opportunities for equitable education. Yet, unequal and inequitable education disadvantages all Alabamians. One research report notes that "higher educational attainment is correlated with higher rates of labor force participation, higher personal income, and higher GDP per capita, as well as better health outcomes" (Patterson, 2020). For those holding on to hope that Alabama might change, the federal government appears a likely ally. Yet, despite the historical narrative promoted by *Brown*, the federal government cannot always undermine Alabama's wayward legislation. *Lynch*'s opening statement to the district court declares, "In the best of all possible worlds, state and local governments would ensure adequate funding for all facets of their public education system." However, "the reality is that some public school systems do not have sufficient resources to educate the children entrusted in their care" (*Lynch v. Alabama*, 2014, p.1). Unlike the court's refusal to amend Alabama's tax structure, the lack of adequate funding for Alabama's public schools is not a government oversight. As seen in *Knight* and *Lynch*, the state, alongside the court system, chose to support multimillion-dollar agribusiness industries against the interests of poor, rural schoolchildren. In doing so, Alabama's legislative decisions post-1954 question the extent to which equitable schools can exist without adequate funding. As Dr. Derryn Motten, chair of the Department of History and Political Science at Alabama State University stated, "We're losing… if Alabama wants to thrive, Alabama has to invest in all of its children, not some of its children" (Patterson, 2020).

KEY TERMS

***ad valorem* taxes:** "Ad valorem" refers to the assessed value of an item. Ad valorem property taxes are taxes based on the assessed value of property such as farm land, or personal property.

Assessment value: The assessed value of an item such as property is determined by an assessor. Assessed value is different from market value, which is the amount an item can be sold for.

Current Use: Property in Alabama is divided into Class I, II, III, and IV. Class III represents all residential, agricultural, and forest properties, and has the lowest assessment ratio in comparison to Class I, II, and IV.

Black Belt: The Black Belt is a region of Alabama across the middle portion of the state. The eighteen counties within the Black Belt are largely rural and have a majority African American population. The region derives its name from the rich black soil within the area.

Lid Bills: Bills passed in 1971 and 1978 which amended the state's property tax system. Collectivley, the bills affirmed classifications for different types of property, set the assessment rate for each class, and capped the revenue that could be derived from property taxes.

New South: Coined by Henry Grady to describe the South's promise for industrial development after the Civil War, historians of the American South have debated the existence of a "New South" as opposed to the "Old South", defined by slavery and a plantation economy.

Big Mules: Alabama's wealthy powerbrokers, including coal mining, iron, steel, power, insurance, and other industrial institutions.

"Mythical South": A categorization of the American South that emphasizes whiteness, conservative values, and Protestantism. This portrayal discounts the diverse array of people, religions, and ideologies within the American South.

Dixie: An idiom for the American South typically associated with bigotry, state's rights, and conservatism.

Think tank: Institute that performs research for a specific topic or discipline.

DISCUSSION QUESTIONS

1. How did Alabama's 1868 Constitution differ from the 1875 Constitution? What was the main goal of Alabama's 1901 Constitution, and how did it differ from the 1875 Constitution?

2. What are some of the benefits of funding public education with property tax? What are the associated downsides?

3. When faced with desegregating schools because of the Brown v. Board of Education decision, what did policymakers in Alabama decide to do and why?

4. How did race influence policymakers' choices in how public education was funded in Alabama?

5. Who benefits from assessing property at "current use" versus market value? How does "current use" assessment affect public education funding?

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NOTES

1. For works on Alabama school systems post-Brown, see Joseph Bagley's Politics of White Rights, chapter five of Wayne Flynt's Alabama in the Twentieth-Century (2004), Tondra Loder-Jackson's Schoolhouse Activists (2015), and Brian Landsberg's Revolution By Law (2022).
2. I have drawn from several among the vast historiographies of educational and southern history. In addition to the works on Alabama schools post-Brown, see Ansley Erickson's Making the Unequal Metropolis (2016), Sonya Ramsey's Reading, Writing, and Segregation (2008), and Noquera Wing's Unfinished Business (2019). For Brown's historical legacy, see Steve Suitt's Overturning Brown (2020), William Hustwit's Integration Now (2019), and Gay Orfield's Dismantling Desegregation (1996). For residential and financial discrimination see Richard Rothstein's Color of Law (2017), Destin Jenkin's Bonds of Ineuality (2021), Camille Walsh's Racial Taxation (2018), and Crystal Sander's A Chance for Change (2016).
3. For reasons too complicated to address in this analysis, the 1901 Constitution continues to serve as the governing doctrine for Alabama. Thus, it will be referred to throughout the examinations of both cases.
4. "Planters" historically refer to large landowners, mostly from the Black Belt region. "Big Mules" refer to industry leaders in the early twentieth-century, who were primarily representatives in the banking, railroad, and industrial community.
5. The tax rate in Alabama is expressed in "mills." One mill equals $1.00 of tax per $1,000 of assessed property value.
6. For more on the extraordinary work of Black teachers, see Williams (2009), Ramsey (2008), Green (2016), Fairclough (2007), and Loder-Jackson (2015).
7. The Lid Bills appear to be named for the "lid" or cap they placed on property tax revenue.
8. The Alabama Farm Bureau formed in 1918 as part of the national American Farm Bureau Federation. In 1981 the Alabama Farm Bureau broke away from the national organization.
9. See https://alex.alsde.edu/stds/COS/32674
10. See https://alex.alsde.edu/stds/COS/32707

The Elusiveness of Tax and Constitutional Reform

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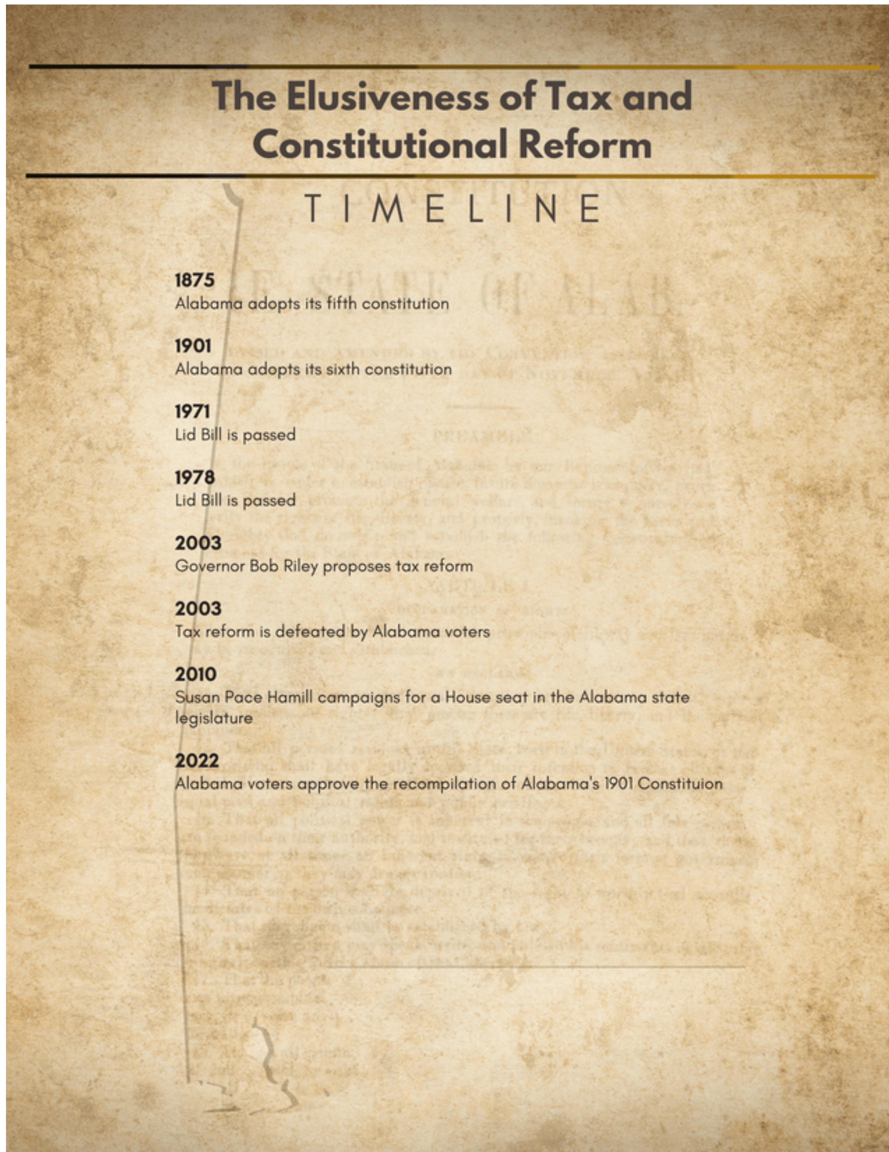
ABSTRACT

In this chapter, Professor Hamill illustrates that Alabama's regressive tax policy oppresses poor Alabamians and denies their children a chance for a better future and explains why the 1901 Constitution makes meaningful tax reform impossible. She then shows that Governor Bob Riley's 2003 failed reform efforts and ten years of unsuccessful civil rights litigation which followed, means reformers must convince Alabama's citizens at the ballot box. Professor Hamill's story of her personal experiences as an outspoken reformer, especially the anecdotes of her speaking to thousands of voters at their doors when she was a candidate for the legislature, illuminate why meaningful reform has remained elusive and reveals the distasteful strategy reformers must adopt to have any chance of success.



Dates covered in this chapter

INTRODUCTION

Today, we in Alabama cannot wait for our government to reform itself. We citizens, empowered with inner strength and confident on our ability to govern ourselves, must seize the high ground—the common, civic ground. We must make a new compact with ourselves, one that will bequeath to our children the best democracy we can fashion… (Thomson, 2002, p.170) If reformers can help enough citizens realize how poorly the current system works, and why that failure diminishes future opportunities, I believe

> *we can see a remarkable cultural shift. In other words, citizens can be persuaded through education and good leadership to cross over to what reformers might consider "the right side of history" (p. 175).*
>
> -Bailey Thomson, Whose Government Anyway? A Call for Citizen-Based Reform

The late Bailey Thomson's (1949-2003) passionate words penned at the turn of the twenty-first century, shortly before his untimely death, expressed great confidence that through education, reformers could persuade Alabama's citizens to support political candidates who would lead the state towards constitutional and tax reform. The unexpected death of Bailey Thomson on November 26, 2003, was a devastating blow to the revival of Alabama's constitutional reform effort (Blalock, 2005). As the third decade of the twenty-first century gets well underway, there is no meaningful possibility of reforms on the horizon in either area. This frustrating situation, as well as Thomson's words and dedication to Alabama's constitution reform movement during the bulk of his professional life, invoke questions that continue to haunt Alabama's reformers.

Why is tax and constitution reform so politically difficult? Why do so many Alabamians tolerate tax policy that is grossly unfair to most Alabamians and fails to adequately fund education? Why is it so challenging to persuade our citizens to reform Alabama's constitution, the state's fundamental governing document that is mired in the past and enshrines these inequities? Finally, what will it take politically to successfully achieve genuine tax and constitutional reform? 1

After first illustrating that Alabama's tax policy, which overtaxes the poor and underfunds education, is anchored in the state's 1901 Constitution, I recount two significant unsuccessful reform attempts. Governor Bob Riley's 2003 tax plan was rejected by the voters by a two-to-one margin even though more than half of Alabamians would have received a tax cut and benefited from increased public school funding. *Knight v. Alabama* and *Lynch v. Alabama*, two civil rights cases that challenged Alabama's property tax structure on race-based equal protection grounds, failed to bring relief from the federal courts. The demise of these reform efforts means reformers must convince Alabama's citizens to vote for political candidates who not only support constitution and tax reform but are willing to make these goals a top priority.

Finally, from a grassroots perspective, I explore the political difficulty constitution and tax reformers face by sharing my experiences engaging with persons outside academic circles. My adventures involved substantial work supporting Governor Bob Riley's tax reform proposal, which included publishing editorials aimed at the ordinary reader, numerous speaking engagements to a wide variety of audiences all over the state and answering mail I received responding to my editorials supporting Riley's plan. As a candidate for the legislature in 2010, I spoke with well over two thousand regular voters at their doors during a fourteen-week field campaign and personally engaged with many Alabamians who did not read my editorials, attend my speaking engagements, or

reach out to me by email or snail mail. This illuminating ordeal showed me how these Alabamians feel, thereby providing a window into their mindset and revealing the uncomfortably offensive strategies we must take when future opportunities for reform present themselves. Hopefully, my story and observations will help reformers better understand the hostile political reality that has always and continues to cement the status quo in place.

ALABAMA'S TAX POLICY ANCHORED IN ALABAMA'S CONSTITUTION

For over a century, leaders from both sides of the political aisle have urged tax and constitutional reform, while others have thwarted these efforts (Flynt, 2004; Jackson, 2004). My own early twenty-first century research declared Alabama's tax structure biblically immoral due to its grossly inadequate revenues, especially underfunding public education, and the extremely regressive tax burdens inflicted on poor and low-income Alabamians (Hamill, 2002). This led to working with Bailey Thomson and more scholarship documenting how Alabama's 1901 Constitution enshrines these tax inequities, thereby linking constitutional reform as essential to achieving tax reform (Hamill, 2003e).

Alabama's regressive sales and income tax structures overtax poor and lower middle-class Alabamians. Sales taxes have no constitutional barriers and, therefore, can be raised at the state level by the legislature and the local areas according to their procedures unencumbered by the legislature. Sales taxes, which account for almost half of Alabama's revenues, greatly aggravate Alabama's regressivity due to rates that approach and sometimes exceed double digits and inadequate exemptions for necessities (Hamill, 2002a; Hamill, 2004; Washington, 2024). Three main features of the income tax structure cause it to be regressive. These are a superficially mildly progressive rate structure with a top rate of five percent that flattens at low-income levels, deductions such as the deduction for federal taxes paid that overwhelmingly benefit higher income Alabamians, and grossly insufficient exemptions, which fail to protect poverty level incomes (Hamill, 2002a).

To start addressing the grossly inadequate funding of public services while reducing the regressive tax burden inflicted on lower-income Alabamians, Alabama must increase income tax revenues by requiring upper middle-class and wealthy Alabamians to pay more income taxes. This requires raising the five percent rate at higher income levels and eliminating the deduction for federal taxes paid. However, the income tax rates cannot be raised, nor can this deduction be eliminated without amending the constitution, which requires the support of three-fifths of the House and the Senate and must also be ratified by a majority of voters in a state-wide election (Hamill, 2003e). In addition to raising income taxes paid by wealthier Alabamians, income tax exemptions

must be increased to prevent taxing income below the poverty line (Flynt, 2004; Jackson, 2004; Kirby, 2015).

Income tax reform alone cannot completely solve Alabama's revenue shortfall nor materially address the regressive tax burden borne by low-income Alabamians. Alabama's per capita lowest-in-the-nation property tax revenues cause the state to over-rely on sales taxes. Alabama's "lowest-in-the-nation" property tax revenues are largely responsible for the state's per capita lowest-in-the-nation revenues and grossly inadequate funding of public services, especially K-12 education (Hamill, 2002a). Hostility towards property taxes first appeared in Alabama's 1875 Constitution, continued with the 1901 Constitution, and has not changed (Jackson, 2004). An intricate web of interwoven provisions blocks the state and local governments from raising even remotely adequate property tax revenues. These provisions address three distinct features of the property tax structure—the base, the rates (referred to as millage rates; one mill is a tenth of a percent and 10 mills is one percent) that apply to the base and caps on the dollar amount of property tax that each piece of property can generate.

Amendments to the constitution in 1971 and 1978, known as the Lid Bills, categorize property into four classes that dictate the percentage of the property's value subject to the millage rates. The base for Class I, consisting of all utility property, is thirty percent of fair market value. Class II includes commercial and industrial property and compromises well over fifty percent of Alabama's property tax revenues, and the base is twenty percent of fair market value. Fifteen percent of Class IV property, consisting of motor vehicles, is in the base. Class III property, which defines the base as ten percent of current use value, contains personal residences, which compromise just under a third of property tax revenues, as well as timber and agriculture (Hamill, 2002a; 2003e).

Although property taxes are generally very low, timber's property taxes are *de minimis* because the current use formula, anchored in the constitution, shrinks its property tax base to practically nothing. Despite comprising over seventy percent of Alabama's land mass and nationally ranking in the top 10 for forestry and logging, forestry support, and wood products industries, timber acres account for less than two percent of total property tax revenues, averaging less than one dollar an acre. Moreover, agribusiness timber farms with acreage in the thousands benefit the same from the current use formula as small farms with acreage in the hundreds. To raise adequate revenues and reduce reliance on sales taxes, the constitution must be amended to increase the property tax base, especially for big timber. Merely increasing the millage rates will not be effective—a higher millage rate translates to big timber's property taxes being less than two percent of a little more than nothing (Hamill, 2002a; 2003e). Like the procedures for raising income tax rates and eliminating the deduction for federal taxes paid, amending the constitution to alter the property tax base requires support of three-fifths of the House the Senate and must be ratified by a majority of voters in a state-wide election (Hamill, 2003e, p 443).

The constitution imposes significant limitations on the property tax millage rates. Unless the constitution is amended under the procedures for altering the property tax base, the state's property tax rate cannot exceed 6.5 mills (Hamill, 2003e, p. 441). At the county, municipality, and school district levels, the constitution caps the millage rates that can be levied under locally based political procedures, which largely keeps local property tax rates under three percent (Hamill, 2003e, pp. 441-442). The Lid Bill amendments require communities in local areas desiring an increase in property tax rates beyond these caps to follow an elaborate constitutional amendment procedure. In addition to securing support from three-fifths of both the House and the Senate of the state legislature and the majority of the voters in the local area who would be subject to the increase, if a dissenting vote is cast in either the House or the Senate, even if the three-fifths positive threshold has been met, the proposed increase also must receive a majority of the votes in a state-wide election (Hamill, 2003e, pp. 444-445).

In addition to substantially shrinking the property tax base subject to the millage rates and making it extremely difficult for local areas to raise their millage rates, the Lid Bill amendments impose absolute dollar limits on the amount of property taxes that each piece of property can generate. These limitations are expressed as a percentage of the property's value before being reduced by the assessment ratio. The percentage setting this limitation is the smallest, a mere one percent, for Class III property. This caps property taxes at the lowest levels for personal residences and especially for timber and agriculture, property already excluding the largest portion of its value from the property tax base. For example, a Class III personal residence with a fair market value (determined according to its current use as a residence) of $100,000 is limited to a property tax of $1,000 per year even if a greater amount would otherwise be due under the millage rate that was passed by a valid constitutional amendment. Only the cities of Mountain Brook, Vestavia, and Huntsville are exempt from these absolute dollar amount limitations (Hamill 2003e, pp. 445-446).

GOVERNOR RILEY'S FAILED TAX REFORM PROPOSAL AND THE DEFEAT OF THE RACE-BASED EQUAL PROTECTION CHALLENGES TO THE PROPERTY TAX PROVISIONS

Facing enormous budget deficits and the prospect of substantial spending cuts, on May 19, 2003, Governor Bob Riley, a conservative Republican who had never supported a federal tax increase during his six years in Congress, proposed a significant tax reform plan. The proposal, which had many components, was packaged as a single amendment to the 1901 Constitution, widely referred to as Amendment One. If ratified by the voters, Riley's plan would have raised $1.2 billion over the course of several years, wiped out the state's deficit, and substantially increased funding for important programs, especially education (Rawls, 2003a; 2003b).

The centerpiece of Governor Riley's plan proposed changes to the state's income and property tax structures that would have increased taxes for those with a greater ability to pay and reduced the regressivity of the tax burden. The state income tax rate would have been raised from five to six percent for wealthier Alabamians and companies, and the deduction for federal taxes paid would have been repealed. Increased exemptions would have reduced or eliminated income taxes for lower-income Alabamians (Rawls, 2003a; 2003b; Spencer, 2003; White, 2003). For all classes of property, the state millage rate would have applied to one hundred percent of the property's value and current use valuation determining the property tax base would only apply to the owner's first 2,000 acres of timber. [2] Riley's plan would have also eased the property tax burden on Alabamians owning property with modest values through increased homestead exemptions and other provisions protecting small family farms (White, 2003). Even though more than half of all Alabamians would have enjoyed an immediate tax cut and benefitted from a significant increase in funding for education, Riley's plan failed at the polls by a two-to-one margin on September 9, 2003 (Halbfinger, 2003).

The failure of Governor Riley's plan helped reignite a two-decade-old civil rights case. *Knight v. Alabama*, first filed in 1981 by John Knight and backed by supporters of Alabama State University and Alabama A&M University (both historically Black universities), challenged Alabama's higher education system as racially discriminatory. After two trials in the 1990s, the U.S. District Court held that the state's policies unconstitutionally fostered segregation in higher education and ordered remedial changes while retaining authority for ten years to supervise the state's progress. [3]

Two years before the ten-year supervisory period expired, John Knight filed a Motion for Additional Relief with Respect to State Funding of Public Higher Education, alleging that the remedial changes ordered by the District Court in 1995 were not being met. [4] Specifically, Knight claimed that significant underfunding of Alabama's K-12 and higher education systems materially compromised the goals ordered by the U.S. District Court. He also argued that Alabama's property tax laws, particularly the 1971 and 1978 Lid Bill Amendments, violated the U.S. Constitution because those laws were designed to starve funding for the education of Black students and continue to cause grossly inadequate underfunding of Alabama's public schools that disproportionately harms Black students at both the K-12 and higher education levels (Knight v. Alabama, 2004, pp. 1278-1279). [5]

The District Court declared Alabama's property tax system as a "vestige of discrimination" [6] and held that Black Belt and urban industrial interests produced all the state constitutional barriers to property taxes from 1875 to the present, including the 1971 and 1978 Lid Bill Amendments, in order to shield white property owners from property taxes needed to fund the education of Black students. [7] The District Court also held that the effect of low property tax revenues has had a crippling effect on majority Black school districts, especially in the rural areas. [8] Nevertheless the District Court refused to hold Alabama's property tax structure unconstitutional primarily because the *Knight* case challenged higher education funding. [9]

In affirming the District Court's refusal to hold the property tax provisions unconstitutional, the Eleventh Circuit strongly emphasized that *Knight* sought higher education remedies and that the connection of higher education to the property tax provisions and K-12 funding was tenuous. 10 However, the Eleventh Circuit did not disturb the District Court's damning factual findings regarding the racial animus motivating the property tax limitations anchored in the constitution, including the goals behind the 1971 and 1978 Lid Bill Amendments. 11 The Eleventh Circuit also accepted the District Court's holding that the property tax limitations continue to have a crippling effect on majority Black school districts, especially in the rural areas. 12

Encouraged by the District Court's findings, as acknowledged by the Eleventh Circuit, in 2007, supporters of public education filed another lawsuit, *Lynch v. Alabama*, challenging Alabama's property tax structure and its current effects on K-12 education funding on race-based Equal Protection grounds. 13 Consistent with *Knight*, the District Court in *Lynch* held that the 6.5 mills limitation of the property tax rate at the state level and the caps on local property tax rates that could be levied under local procedures were enshrined in Alabama's Constitution for racially discriminatory purposes. 14 Contrary to *Knight*, the District Court in *Lynch* found no racially discriminatory intent motivating the 1971 and 1978 Lid Bill Amendments, creating four classes of property for assessment purposes, including the current use formula for timber and agriculture, as well as the constitutional amendment process local areas must follow to secure higher property tax rates than the local caps allow and the absolute dollar limitations. 15

When comparing the *Knight* and *Lynch* opinions, *Lynch* contains a vastly more detailed examination of Alabama's history and the central role of race woven throughout that history. 16 The District Court in *Lynch* held that the stains of racism surrounding the intent behind the 1971 and 1978 Lid Bills were circumstantial and lacked direct evidence or a "smoking gun" that conclusively established racial animus as the motivation. 17 The District Court further held that the direct evidence behind the Lid Bills pointed to an economic desire to protect the largest property owners from increased property taxes. 18 Given the differences in plaintiffs and claims between the two cases, the doctrine of *res judicata* did not bar the District Court in *Lynch* from holding that the plaintiffs failed to meet their burden of proof that racial animus motivated the Lid Bills despite the District Court's finding in *Knight* that such racial animus existed. 19

When determining if the racial animus motivating the limitations on the state's property tax rate and the local property tax rates continued to have a disparately discriminatory impact on Black students, the District Court in *Lynch* focused on K-12 school districts state-wide. 20 On the theory of "equal inadequacy," which the judge harshly criticized as mandated by the Supreme Court's refusal to recognize K-12 education as a constitutional right, the District Court, which the Eleventh Circuit affirmed, refused to hold Alabama's property tax structure unconstitutional (Guyse, 2013; Weaver, 2016). Because the challenged provisions impacted Black and white students "roughly equally," the plaintiffs did not meet their burden of demonstrating a disparate impact

on a suspect class that would have subjected the provisions to heightened scrutiny. To add insult to injury, the Supreme Court's refusal to recognize education as a fundamental right also limited the court's analysis to rational basis review (Weaver 2016). The loss of the *Knight* and *Lynch* cases as well as the Supreme Court's unwillingness to recognize access to an adequately funded K-12 public education as a constitutional right, means Alabama's political process is the sole avenue to secure tax and constitutional reform, which must occur to provide Alabama's children access to an adequately funded education (Hamill, 2022). 21

THE DIFFICULT POLITICAL CHALLENGES OF GOVERNOR RILEY'S TAX REFORM PROPOSAL

The defeat of Governor Bob Riley's tax reform plan by the very voters who would have received immediate benefits had it succeeded reveals that tax and constitution reform supporters face vast political challenges. Indeed, in the days following the voters' rejection of Riley's plan, people all over the country who had been rooting for the plan from afar reached out to me for an explanation. Although the details varied, the essence of these email and telephone exchanges are reflected by one brutally honest conversation permanently etched in my memory: "How in the hell could you have lost a tax reform proposal when more than half of the voters would have gotten a tax cut?" one frustrated caller inquired. "I have no idea," I admitted, "but I'd better figure it out."

Leaders in faith-based communities are partly to blame for the failure of Governor Riley's plan. Although Riley, a devout Southern Baptist, had identified Alabama's tax policy as immoral under faith-based ethics and stated that his faith motivated him to propose his tax reform proposal, he did not receive unwavering support from leaders of the Southern Baptist Convention (Chandler, 2003; Smietana, 2003; Spencer, 2003a, 2003b). The Southern Baptist Convention remained neutral throughout the campaign even though it had vigorously opposed Governor Don Siegelman's lottery proposal and had supported tax reform as a concept before an actual proposal materialized (Chandler, 1999). Although the leadership of the Methodist, Presbyterian, Episcopal and Catholic churches formally endorsed Riley's plan, their support failed to reach local pastors and church members deep in the communities across Alabama, thus contributing to Riley's difficulties reaching communities at the grassroots level (Barrow & Campbell, 2003, Chandler, 2003c, Reeves, 2003a, 2003b).

The demise of Governor Riley's tax reform plan cannot be fully explained by the absence of enthusiastic support from leaders in the faith-based community. During the summer of 2003, I spoke to numerous audiences in churches, civic clubs, advocacy organizations, and college campuses in thirty of Alabama's sixty-seven counties and most of the people in these audiences were favorable towards the plan. Although political polls early in the summer indicated significant opposition, optimism permeated the campaign (Barrow,

2003; West, 2003). Shortly after Riley announced his plan, I published a hopeful opinion editorial offering unwavering support, deeming Riley's proposal "a solid single that gets us on first base." Admitting that the plan does not address many inequities, for example, the punishing high sales tax rates, the editorial reminded readers that "Alabamians disappointed that the governor's proposal does not go far enough should remember that more ball games are won with singles than with home runs" (Hamill, 2003a, 2003b, 2003c).

During the early weeks of the campaign, negative letters to the editor published by Alabama's major newspapers were balanced by positive letters supporting Governor Riley's plan (Hamill, 2015). For example, one writer groused, "The governor is now leading the charge to raid our wallets," while another, who had voted against Riley's election, marveled, "Riley 'gets it'... I owe [him] an apology" (Hamill, 2015, p. 260). Others complaining, "We all pay enough taxes as it is" and labeling Riley's plan "tyrannical," were balanced by positive letters, one noting "For the first time in many years, Alabama has an opportunity to join our sister Southeastern states to fund essential needs for our citizens," and another stating, "Now we are in a new century and we have a man at the helm who is prepared to lead us out of bondage and into a new life" (Hamill, 2015, p. 261).

As Governor Riley's campaign moved towards mid-summer, vast discontent and anger smoldering below the surface, reflecting the true mindset of many otherwise invisible Alabamians, bubbled up as a bad omen. I first saw a glimpse of this on July 17, 2003, when I was a guest on an AM radio talk show, which I described in an email to another supporter of Riley's plan. On the subject line I wrote, "we are in trouble" (Hamill, 2015, p. 264). On the program, I used simple examples to show the audience, largely low-income people across Tuscaloosa County, that the plan would decrease their personal tax burdens. After my brief remarks, the host invited the audience to call in and talk to me directly. Numerous calls from the audience, none of whom were persuaded to support the plan, destroyed my optimistic bubble. Their hatred of Governor Riley reverberated across the phone. "He lied and is just a millionaire," one said. They believed I was also a liar because I drove the wrong kind of car, had no experience with manual labor (waiting tables did not count), and I had never been laid off while trying to feed children. One caller bluntly sneered, "you're just a college type who has never really worked" (Hamill, 2015, p. 264).

These callers and countless other Alabamians who were not attending presentations or reading editorials had undoubtedly heard the vicious and personal barrage of negative advertisements dominating the airwaves and mail pieces sent all over the state that had been funded with millions of dollars provided by special interest groups, such as the Alabama Farmers Federation (ALFA), which represented many of the wealthiest Alabamians and largest landowners (Gettleman, 2003; Denton, 2003). Their advertisements and propaganda were laced with lies and distortions designed to convince lower-income Alabamians that Governor Riley's plan would hurt them

(Beyerle, 2003; Moore, 2003; Sieckmann, 2003). One advertisement that ran on Black radio stations featured a man with poor diction warning, '"[o]ur property taxes could go up as much as four hundred percent,' and blaming 'Montgomery insiders who have been ignorin' us for years'" (Russakoff, 2003, p. A1). Another showed men in business suits slapping each other on the back and lighting up cigars, while a male voice says, "The insiders and politicians pushing Montgomery's $1.2 billion tax increase are stopping at nothing to take more of your money…[y]ou'll pay more while the big utilities get a tax break…[v]ote no on Amendment One. It doesn't make sense" (Owen & Brantley, 2003).

Reflecting far less confidence that victory was within our grasp, in early August, I published a second opinion editorial in many of Alabama's newspapers. The editorial called out those attacking Governor Riley's plan based on lies and distortions and false economic studies as immorally motivated by greed. The editorial also insisted that wealthier Christians have a moral obligation to vote for Governor Riley's plan even though their taxes will increase. Finally the editorial pleaded with Alabamians of goodwill to not only vote "yes," but also "energetically, and loudly promote Governor Riley's plan to your neighbors, friends, colleagues, church and civic clubs…[or else] greed and ignorance will condemn our state to remain stagnated at the bottom and the enormous gap between who we say we are, and who we really are, will continue to grow" (Hamill, 2003c).

Numerous emails, which I have a included a select sample, poured in my mailbox responding to my second editorial supporting Governor Riley's plan. These emails often attacked Governor Riley and I personally and sharply contrasted with the mostly positive feedback I was receiving at my presentations all over the state. These writers did not trust Governor Riley, the legislature, or me. They also believed their personal tax burden would increase and the additional tax revenues would be wasted, and they resented academics and other experts, who they sensed were looking down on them.

After putting in the subject line, "Your degrees and other credentials are meaningless," one writer declared, "There are no real reforms in this package only further taxes that will be put into the hands of the 'Pork Swilling Thieves' that we call our legislature" (Hamill, 2015, p. 265). Another spewed in a stream of consciousness, "To see our tax dollars wasted, time aned [sic] time again, to pay the high salaries of our so called leaders is one thing, but to be told that if don't vote for Riley tax plan is unchristian...........just who do you think you are.......get off your white horse and go attack the big dogs with the power to waste the money they already have and tell them no more until they step down or take a reduction in salary before hitting on the working class that caries [sic] the burden of the taxes in this state" (Hamill, 2015, p. 266). Another, a retired middle-class homeowner on a fixed income, said "your statements reek of academic elitism to say the least," and accused, "you failed to mention that the 'plan' pours the money into an unaccountable fund" (Hamill, 2015, p. 268). An alarmist started with, "Attention Alabamians: The end of the world is here. School closings,

prisoners set free, no food and the sun will burn out. That's the message of Sponge Bob Tax Pants and his faithful sheep," and then addressed me, "You may question my character in voting against it [sic] but I question your intelligence in voting for it. This plan is nothing more than a redistribution of wealth, which is a basic tenet of socialism" (Hamill, 2015, p. 268). A sarcastic, sad missive wrote, "Since you seem to have all the answers on the [sic] tax reform, maybe you should enlighten me how the tax reform will work.......tell me how the money will be used........please tell me, ole wise one, so that someone of my misinformed ways can see the light.....but, please be sure to keep it simple for I'm, [sic] just a working man that does not trust, [sic] anybody.......TELL US WHERE THE MONEY WILL GO" (Hamill, 2015, p. 270).

Shortly after Governor Riley's plan failed, I spoke at a Rotary Club in a predominately white rural county, where more than eighty percent had voted against the plan. The mayor, who had enthusiastically supported the plan, told me that most of the audience at a town hall meeting thought Riley's representatives were "a bunch of liars from Montgomery." Answering my inquiry, she also told me they had not invited her to be on stage with them. Had Governor Riley's campaign representatives publicly identified the mayor as on their team the audience might have been more receptive. After studying the state's history and culture, I concluded that if we partnered with local community leaders across sixty-seven counties, such as this small-town mayor, we could convince the voters that tax and constitutional reform was in their best interests. I believed that scholarly work illustrating this truth still played a dominant role. I thought that Thomson's belief that citizens can be persuaded through education was correct if we harnessed support from local community leaders to play a major role. If we partnered with these local community leaders as equals in the tax and constitutional reform cause, like the sun's rays together, we could shed light on the inequity and injustice to convince their constituents to support tax and constitutional reform (Hamill, 2012).

CANDIDACY FOR PUBLIC OFFICE REVEALS THE MINDSET OF ALABAMA'S VOTERS

During the 2010 election season, when I was a Democratic candidate for the Alabama legislature, House District 63, I discovered that my initial thoughts what it would take to successfully achieve tax and constitutional reform were wrong. Using the same sophisticated program as President Obama's 2008 presidential campaign, during a fourteen-week field campaign, I spoke with 2,431 regular voters at their doors and learned that I needed to reach the voters at an emotional level. This experience showed me that my scholarly work was not the metaphorical sun, but more like Saturn, and if we continue to put well-reasoned ideas at the center of our strategy, political reforms will remain elusive. In an essay *telling* readers this, I analogized political campaigns to a football game and said we have the wrong people on the field. Campaign managers

capable of tapping into the voters' emotions need to be on the field and the rest of us, including local community leaders, need to be bringing them water (Hamill, 2012).

The rest of this section, which starts below, are selected excerpts from an unpublished manuscript about my campaign for the Alabama legislature. The manuscript focuses on my experience talking to voters at their doors, which hopefully will help *show* readers the mindset of voters. 22 The work takes readers on my journey to *show* them the mindset of many voters and the political reality public policy reformers are up against. The story's arc accomplishes this by following my visits to a new hairdresser during the campaign. These events are true, and all characters are real people, although their names have been changed. The characters in this excerpt are Ryan, my field manager; Bo, my campaign manager; Steve (a retired minister), and Colton (an undergraduate at the University of Alabama), two of my volunteers during the field walks; Eugenia, my hairdresser, Raevyn, Eugenia's assistant, and Mitzi, a long-time client of Eugenia's and a pillar of the community.

EXCERPTS FROM PRETTY HAIR: DISCOVERING THE GRASSROOTS ON THE CAMPAIGN TRAIL

FROM CHAPTER TEN: AN AWKWARD START

On the second day of my field campaign, Ryan discovered I was even more timid than he expected. We approached a man in his early fifties watering his lawn. Even though it was far less likely that a person who happened to be outside would be bothered, I was still afraid of him. I stood on the street, paralyzed.

"He's right there in his front yard," Ryan said. "Go up and talk to him *now*."

The man didn't ask any questions. He just took the card and said that even though he normally votes Republican, he would vote for me because I had come by personally. He even agreed to put one of my signs in his yard. Ryan rarely expressed emotion, especially approval, but he did after I spoke to that voter. He softly patted my back.

"You need to get responses like that all over the district," Ryan said.

Ryan had to teach me when to recognize a lost cause and move on. I walked towards an elderly squat woman in a straw hat, weeding flowers on her knees. Without looking up she waved her stubby fingers in my direction and responded that she always voted straight Republican, no exceptions. I argued that Republicans supported the grocery tax and that they wouldn't protect her social security and Medicare benefits, but she refused to listen. Finally, Ryan pulled me away.

"Reasoning with people like her is a complete waste of time," Ryan said. "With voters like that, you cut it short and move on." Ryan also noticed that I needed to develop a

thicker skin. He read me a sixty-five-year-old man's name in front of a modest garden home.

"Grandpa, someone wants to talk to you," a young teenager said. A morbidly obese man shuffled to the door in a walker and read my card.

"Democrat or Republican?"

"Conservative blue dog Democrat sir," I said.

"You *damn* Democrats are ruining this country. You have nerve coming here and bothering me. You get out right..."

"Oh," I gasped, tears coming to my eyes in the middle of his tirade.

"Grandpa, let's just go sit down," the embarrassed boy said....

Steve was very helpful with Christian voters. A woman with two children opened one door. I immediately launched into my spiel praising the public schools.

"I homeschool my children," she interrupted. "And I always vote Republican."

Steve jumped in. He introduced himself, pointed at the reference on my card to the Beeson Divinity School and then thanked her for talking with us. About ten minutes later Steve and I saw her running towards us holding two bottles of water. We gratefully drank as she asked me questions about my Beeson experience. Then she told me she would strongly consider voting for me.

"Who would have thought you'd have a chance with a homeschooler," Steve said, as he changed her results on his phone.

At one house, I noticed a huge pick-up truck filled with landscaping equipment that had a small cross hanging from the rearview mirror. A man answered the door wearing a baseball hat, old jeans and a sweaty T-shirt. He declined my offer to shake hands, noting he had just finished working. I immediately established my expertise in limited liability companies and commitment to help small businesses.

"I admire your work ethic," he said. "It's clear you're better than anyone else and would do a great job." He told me it was a shame I was not running as a Republican and that he didn't think he could vote for a Democrat.

"It's a secret ballot, sir," Steve said, after introducing himself. "You can vote for her and only you and God ever have to know...."

Towards the end of my third week out in the field, Bo called a campaign strategy meeting in his new office.... [and] instructed Ryan to prioritize my walks. First, we'd focus on the lower-middle-class neighborhoods and then move to the middle-class ones. We would cover the upper-middle-class areas only if we had time. Bo ordered us to skip the houses in the wealthiest neighborhoods because my being at their

door would make no difference. Many of those voters already displayed my yard signs on their grand lawns, while the others wouldn't support me no matter what I did.

"Dear, if you want to bang your head against a wall, there's one outside," Bo quipped, referring to the latter group.

We also discussed the fact of my not being originally from Alabama—a real problem. Alabama is one of the most provincial states in the country—more than seventy percent of its residents were born here. Many native Alabamians viewed people born elsewhere as "outsiders" no matter how long they'd lived in the state. Some native Alabamians believed that only people whose family had been in Alabama for generations qualified as real Alabamians....

Bo provided tips on how to deal with the "where are you from" issue.

"If you're asked, tell them you grew up in Florida and you've lived here longer than anywhere. Be very self-deprecating. Say something like, 'Shucks, I guess the accent gave me away. Sorry, I haven't been able to shed that yet.' Then talk about the grocery tax."

Bo and I spent two hours role-playing. He first instructed me how to answer certain complicated questions that had little or no relevance to a state representative. Then he pretended to be the voter and made me practice giving pithy answers.

"How do I respond if they ask me about gay marriage?"

"You say marriage is a sacred sacrament sanctioned by God between a man and a woman. And don't get into any more detail."

I rolled my eyes.

"But I'm a tax person," I said.

"I'm sorry but this is politics, darling."

"How do I respond if they ask me about abortion?"

"You say, 'I *hate* abortion,' and don't get into any detail."

"What if someone asks me whether abortion should be made illegal?"

"You rant, 'I'm against putting a woman in jail and letting the men off scot free,' and be more critical about deadbeat men if the voter pushes it...."

I should have been extremely uncomfortable that Bo's required pithy answers were allowing the voter to reach whatever conclusion he or she wanted without really knowing where I stood, but I wasn't uncomfortable at all. At this point the campaign had numbed me. Also, Bo had told me in no uncertain terms that if I failed to connect with the voters, he would pull me out of the field. Even though he was running over

thirty campaigns, including the Democratic nominee for governor, I knew Bo's staff scrutinized the results of my walks, which my volunteers emailed to Bo's firm every evening. He had told them to alert him immediately if my performance was problematic. More than anything, I did not want Bo to cancel my field campaign so, other than telling bald-faced lies, I was willing to say whatever he wanted.

During this stygian instructional Bo reminded me of a Baptist preacher delivering a hellfire and brimstone sermon. He stood up and opened his hands. His arms waved back and forth perfectly in sync with the inflection of his voice, which spiked when he emphasized key words.

"*Never* offer information about what you do for a living," he expounded. "Don't say *anything* about that unless the voter asks."

"What if the voter asks?"

"Tell them you're a *teacher*," Bo replied. "Never use the word *professor* at the door and only admit you teach at the university if the voter asks where you teach...."

Bo asked me one question repeatedly, throughout the session.

"Dear, why are you at the door?"

"To get the voter to like me," I said each time.

"That's right. You want them to say after you've just left, 'She's a nice lady, I *like* her.'"

FROM CHAPTER ELEVEN: CATCHING ON

I asked Eugenia to explain the viscerally angry reaction of a voter I'd met only days after my campaign strategy meeting with Bo and Ryan. A man in his middle forties had opened the door of a dilapidated house outfitted with a junk-filled carport, releasing an odor of stale tobacco, flat beer, and urine. I offered him a campaign card. When I truthfully answered his question that I was running as a conservative blue dog Democrat, he'd snatched the card out of my hand, torn it up, thrown the pieces at me, and slammed the door in my face. The wind scattered the pieces all over the front stoop. I picked them up, told Ryan he was opposed, and moved on. After hearing this story, Eugenia rolled her eyes.

"I've known many people like him," Eugenia said with a sigh. "He didn't make the switch. He didn't get across the tracks."

A puzzled expression crossed my face.

"Susan, everyone wants someone beneath them—it's human nature," she elaborated. "Even though whites at the top dismissed people like him as 'not our kind,' their superiority over Blacks kept a lid on their resentment." Eugenia then identified the Civil Rights Movement as having "disturbed this balance," which

caused the simmering discontent of people like him, even those born much later, to explode into rage.

"The man who tore up your campaign card is like many white Southerners. They are still angry that they haven't advanced, so they scapegoat Blacks," Eugenia explained. "I've heard people like him say things like, 'They don't even work, the government takes care of them, we pay taxes and all they do is lie around having babies' in situations where they didn't realize that I don't view Black people the way they do."

I argued that her explanation made no sense because low-income Blacks suffered the same way that low-income whites did. Eugenia shook her head the way I sometimes shook mine when my students failed to understand when I gave what I considered clear answers to their questions.

"Should I be concerned?" I asked.

"He's indicative of many Republicans...."

While I waited under the dryer, I told Raevyn that not only had I approached voters' side doors without my companion nearby and gone into voters' houses, I had also broken another ironclad rule for field campaigns. Through a carport's window, I had seen a couple in their late sixties sitting at their kitchen card table eating hotdogs and Golden Flake potato chips and drinking Cokes from glass bottles. Fox News had blared from a small TV wedged on the counter between a pile of paper plates and a loaf of Wonder Bread. They invited me in and offered to share their supper with me. I accepted. I held up the hotdog before taking a bite and noticed a cross on the wall in the small hallway.

"They make you pay 9% sales tax just to eat, that's wrong," I had said. "It's immoral biblically too," I had added, heeding Bo's advice again. "I *know* because I've studied the Word at the Beeson Divinity School." They told me enthusiastically that they liked Beeson, would vote for me, and were happy to put a sign in their yard. I finished the last swallow of Coke at their door and handed the man the bottle. Ryan had been peeking around the corner and pacing the entire time.

"Yard sign!" I had announced, after leaving the house.

Ryan proceeded to point to a spot towards the yard's edge on the left side. He knew where to place the sign so it could be seen from the corner where two streets intersected. Then he had gone nuts and scolded me both for going in and for eating their food.

"Come on, those people weren't going to hurt me," I had protested. Raevyn nodded approvingly, remarking "you should accept their food, you wouldn't want them to think it's not good enough...."

I also told Eugenia and Raevyn stories about the voters I had met in the trailer parks and confessed that the thought of visiting trailer parks had initially made me nervous.

"Oh, that's silly!" Eugenia said.

"Those places aren't pretty, but they're really no worse than anywhere else," Raevyn said.

I described the trailers lined up close together along a walkway that was not wide enough for a car. During these trips, a volunteer driver had dropped Ryan and I off at the beginning of each walkway and then had picked us up at the end. Ryan was always with me at the trailer parks. Ryan and I trudged past many trailers—usually at least ten—before he'd stop and send me to a door. Many of these voters had informed me that they always voted straight Republican. Although none displayed the rage of the man who tore up my campaign card, they often sounded irritated.

At one trailer, I had won over a straight Republican voter with a bit of sacrificial limb. The instant a woman in her early sixties had opened the door, a little wiener dog barreled out onto the small rotting porch and nipped me below my right knee. The bite broke the skin and blood oozed from the wound.

"I'm so sorry!" the lady had screeched.

She scooped the dog in her arms, threw him in the trailer, and slammed the door. She continued to apologize and told me that he was up to date on his shots. I had noticed the dog's new shiny oval tag on his collar—it was just like the one Sammy had received after he got his one-year rabies shot. I tried to conceal how shaken up I was.

"It's OK, really, I have it under control," I had said to Ryan, standing about ten feet behind me. Then I talked to the lady about my candidacy and gave her my card.

"I really appreciate you coming by," she said. "Nobody ever comes to see me. Even though I normally vote Republican, I'm going to vote for you."

"Thank you, ma'am, I'm honored," I said. "Would you like one of my signs?"

"Can someone tape it to the side of my trailer?"

I'm not sure how strongly the sympathy factor played in her decision, but I was happy to get the vote for whatever reason. While Ryan was taping the sign on the lady's trailer, Colton had cleansed and bandaged my cut. He relaxed when I told him I was positive the dog had been vaccinated and informed me that this was not bad compared to dog bites he'd seen on other field campaigns.

"That vote almost cost you a leg," Colton quipped.

Eugenia enjoyed hearing about the trailer park voter who demonstrated that my initial fear of the trailer parks was just as irrational and paranoid as the anxiety I experienced driving out to the county to meet the firefighters for the first time. The sounds of a Beethoven symphony had immediately relaxed me the moment a woman in her early thirties had opened her door. While the woman slowly read my card, I looked inside. Off to the far side a refrigerator wedged next to a tiny stove near a small table with two chairs defined the kitchen. In the den, a little girl was curled up reading on a couch positioned behind a table.

The woman had told me she was glad I'd caught her before her night shift job began. She said she was a single mom and promised to vote for me. She took one of my signs and put it over her window, so my logo was visible to people outside the trailer. Her window was so small the sign completely obstructed all the incoming light. Then she called her daughter to come to the door and talk to me. Her daughter told me she made all As, in a gifted program for fifth graders and really wanted to go to college.

"What do you do when you're not running for office?" the little girl asked.

"I'm a professor at the law school over at the university," I replied, violating Bo's iron-clad rule, not to mention my ivory tower job.

She told me that she wanted to be a lawyer. I squatted down and shared my story of how I'd put myself through law school by borrowing money for tuition. I also advised that she must continue to get all As and that this wouldn't be easy because in middle and high school too many girls get distracted by boys and going to the mall.

"You must keep your eyes on the prize," I urged.

I encouraged the little girl that if she graduated with all As, took advanced placement classes, and did well on standardized tests, she could get a scholarship at the university. Before saying goodbye, I gave her one of my cards and stated I hoped to hear from her when she was grown up and in college. Eugenia and I both knew I had been much more optimistic than the situation merited. We agreed, however, that even though she did face a steep uphill climb, she still could make it to college because she was zoned for the city schools, which were better funded than the county schools. She had a small chance if she did everything right and if budget shortfalls didn't cut the gifted program and the skeleton of advanced placement classes. Eugenia pronounced that this little girl was the epitome of why it was important that people like me served in the legislature. She looked annoyed when I told her Ryan had complained that I had spent too much time talking to the little girl, especially since I had already secured her mother's vote.

"Sit still," Eugenia commanded, reaching for the rollers. I stopped talking while she strategically placed heated rollers all over my head and fastened them with plastic clips. She looked at her watch, remarking that the rollers had to stay in two minutes,

which gave me just enough time to squeeze in another voter-at-the-door story, this one more personal than the others.

In a lower middle-class neighborhood near one of the trailer parks, Ryan had read a name that sounded vaguely familiar. When the woman answered the door, I recognized her immediately. The last time I'd seen her, she wore a uniform issued by the university that resembled a prison jumpsuit. This lady had been a housekeeper at the law school for years, the only white housekeeper on the staff. She'd retired last year on disability for health reasons. She had also recognized me.

"Are you feeling better? Aren't you glad you escaped the law school?" I asked.

"I still have trouble breathing sometimes," she wheezed.

"I would really appreciate your vote," I said to her. "My big goal is to eliminate the tax on food. That tax has got to hurt."

"Did she promise to vote for you?" Eugenia asked.

I told Eugenia that this lady had confessed that she didn't normally vote for Democrats, but she'd consider voting for me because I'd always treated her with respect. Eugenia didn't say anything as she styled my hair, but I could tell by her expression that she found that lady's comments unsettling because rationally I was a better choice for her.

That lady's comments unsettled me as well, but for different reasons. For years, she had existed in the shadows of my workplace, yet like many workers comprising the backbone of our nation's economy, she also felt disrespected on a regular basis. Before I met her at the door, I didn't know that. It occurred to me at that moment I should've known this because I'd seen some of my peers throughout my professional career treat staff disrespectfully. I had wrongly assumed then that my respectable conduct remedied the situation and now realized that on at least some of those occasions I probably should've said something on the staff person's behalf. The irony posed by the timing I had encountered the law school's former housekeeper at her door—only a few days before Labor Day—was not lost on me.

Mitzi was in the waiting room talking to Raevyn when Eugenia escorted me to the check-out counter. Mitzi fawned over my "stunning pretty hair," stifling any additional platinum warnings Eugenia might have considered repeating. I whipped out my phone and narrated my campaign's participation in the Labor Day parade. I probably sounded like a proud parent showing endless slides of her child performing the lead role in the school play....

After I finished the Labor Day Parade anecdote, I huddled Eugenia, Raevyn and Mitzi close, lowered my voice, and informed them that Bo was astonished how much my field performance had improved since the campaign strategy meeting in Ryan's office, not even a month ago. I had roughly doubled the number of doors I knocked

on and the ratio of favorable voters rose from twenty percent to a third and many had agreed to put signs in their yards. I then said that Ryan had recently informed me that my list of walking volunteers was up to fourteen and that if I thought I could manage it he'd let me out seven days a week starting today. I pointed out to them the magnitude of this commitment. I confided that I wasn't sure how I would get everything done, including my classes and continuing fundraising full-force, if my one day of rest disappeared. I was afraid that extra day could end up being the proverbial straw that broke the camel's back.

"You've clearly caught on," Eugenia asserted. "You should go for it."

Raevyn and Mitzi both nodded approvingly.

"There's one more thing," I said to Eugenia. "Can we talk in private?"

"Sure, let's go outside and sit on the porch," Eugenia said. "I could use a little fresh air."

Over the past ten years there had been only a few occasions in which I really needed to talk to my mother. This was one of those times. My relationship with Eugenia had charted an uncanny, almost supernatural course—it had evolved to a point inside of which we could have been mistaken as mother and daughter.

I reached into my purse and pulled out two pieces of hate mail I had received less than a week ago. I told Eugenia I possessed a large box of hate mail back at the office, which I had collected over the years. In a convoluted way, all this other hate mail was a badge of honor because it highlighted—albeit not how the sender intended—that my work and ideas really were on track, but these two pieces were different.

I moved closer to Eugenia and warned her that what I was about to show her was beyond ugly. I started with the mail piece. The picture on the front side of the half-a-foot-long card featured a woman in her early thirties, grocery shopping with two little kids in the cart surveying the food with a worried expression.

"I remember that one," Eugenia said. "It was very effective."

"But look at it," I said. I held it up and turned it over. On the back, a picture of an elderly couple navigating the medicine aisle took up a third of the space. Messages about the evils of the grocery tax were written in red and black. One of the messages said, "In Alabama we give a tax break for the purchase of formula for baby cows, but we make families pay full sales tax on formula for baby humans. There's something wrong with that." Eugenia put on her glasses and noticed the corner for the person's name and address had been ripped off. Large, angry letters scrawled with a thick black magic marker read:

*"YOU SUPPORT THE N***** OBAMA. I WON'T BE VOTING FOR YOU. OBAMA ISN'T EVEN A U.S. CITIZEN."*

"Oh, that's awful," Eugenia said. I then started reading the second piece, an email which went on for nearly a page.

"You are clueless," I began, "about how much hard working 'so called wealthy people' are paying in taxes and if you can't find anything better to campaign on than those darn rich people don't pay enough taxes then *you are as full of hot air and lies as your president.*" I stopped for a moment and gazed at Eugenia. I didn't know exactly what I was looking for, but I believed, like my mother would have had if I could have asked her, that Eugenia had the answer. For a moment, before I continued reading the email, in my imagination I saw myself ascending, bloated full of hot air with no idea where I was going.

"You are purposefully misleading the people," I continued, cutting to a later part of the email, "to spread your lies, and misrepresentations...a truth telling Christian that supposedly has an education such as yours should know better." I told Eugenia that four weeks ago I had started teaching my fall classes, but I could only remember fragments of these classes, except for the one class Colton and his girlfriend, who he had recruited to help with the field walks, had visited. After I had finished teaching that class, they had looked at me like I was balancing two separate heads on my shoulders.

"So, you really are smart," she had said, causing me to choke. "I'm so relieved, I was getting worried for a while."

"Whatever made you think I wasn't?" I had stammered

"Listening to you at the door," she had answered.

I said to Eugenia that to them I probably resembled a modern, female representation of *Janus*, the ancient Roman god of beginnings and transitions, usually depicted with two faces opposite one another—one looking forward towards the future and other back to the past. Eugenia consoled me that the email was crazy and not worth paying attention to. While I agreed with her, I had to admit that it bubbled up uncomfortable questions that I had been repressing for months —questions concerning my willingness to essentialize myself into marketing gimmicks for the good of the campaign.

Lies and misrepresentations, I repeated in my head. *Lies like the president—full of hot air*. While still looking at Eugenia, I asked her and myself a hard question: *Was* I telling lies at the door? Of all my mother's qualities that I strived to maintain for myself and teach my children, integrity topped the list. Could it be that I had become divided in a dishonest way? Janus's forward face sometimes represented a profoundly exalted transition, but also at times reflected a dreadful disintegration. I confessed to Eugenia that Colton's girlfriend had forced me to ask myself whether my professorial face was now the one looking in the past.

Eugenia said nothing. As she offered me comforting glances, I wondered if I was purposefully misleading people to try to win a campaign so that I could help them. Was there some sick truth buried in that email's otherwise unfair and irrational accusations—not about Obama—but about me?

The proudly displayed American flag fluttered back and forth near us. The salon personified the best in the South, while those mail pieces personified the worst. Reading the email aloud sent me up into the sky, ascending to a place where I would have to confront the truth about what I was trying to do and how I was trying to do it.

FROM CHAPTER TWELVE: ON A ROLL

My field campaign lasted a total of fourteen weeks, seven of which I was out all seven days. I knocked on 5,032 doors, attempted to reach 7,221 voters, and personally spoke with 2,431 voters. Of the 861 voters who committed to vote for me, 215 agreed to put signs in their yard. Most of the rest were undecided or said they would strongly consider me. I ran all my volunteers ragged, aside from Colton. His energy matched mine; he supervised more field walks than any other volunteer, including my last field walk on October 30—a Saturday, three days before the election. On that last walk, my son, who was home from college for fall break, drove and helped put up signs. By then Colton had long become Ryan's second in command even though he was only an undergraduate. Colton and my son got along famously, communicating in a millennial language difficult for me to follow. I found it hard to believe that Colton was a college kid just like my son.

"I honestly thought you'd quit for sure," Colton admitted to me a couple of weeks after Labor Day. I appreciated his honesty. How I'd been able to keep going was a mystery to me as well. On a typical day, as I was finishing phone calls, I felt completely drained despite having already consumed at least five cups of coffee. If I closed my eyes even for a second, I'd fall asleep. When Ryan and the scheduled volunteers arrived, I scuttled into the bathroom to fix my hair for the walk. It was the hairspray that energized me.

Within a few days of adopting the seven-day-a-week schedule, I discovered that something wonderful, new, and strange had overpowered me—I was no longer afraid of the people at the door. Instead, I couldn't wait to meet them....

Working class white men between the ages of forty and sixty were the toughest voters for me to reach. I already had one strike against me: I was a woman. Not being from Alabama—my accent gave that away—was the second strike. Being that far behind in the count before I even knocked on the door meant I'd better come up with some common ground quick or I'd strike out for sure.

For these voters, money was tight, so the grocery tax really stung. Steve was especially helpful because most of these voters were also evangelical Christians,

who valued traditional families. I learned as soon as a forty-to-sixty-year-old white man opened his door to begin the conversation along these lines: “Good afternoon, sir, I’m Susan Pace Hamill and I want to be your representative. I’m running because the tax on food is not only unfair to you but is also unbiblical. I know that because I’ve studied the Word at the Beeson Divinity School. I’m not ordained, sir, but I’ve studied the Word.”

“So, you’re Baptist, right?” the forty-to-sixty-year-old man often asked.

“Oh, no sir, I’m Methodist,” I’d reply, “and here’s my husband and two children.” I turned over the campaign card, which included a photo of my family, and explained that my husband’s daddy was a Methodist preacher and I’d joined my husband’s church when we’d gotten married.

“Don’t you think I did the right thing?” I’d ask the voter.

“Of course, you did the right thing,” he’d usually respond. “That’s the only thing you could’ve done. Methodists are fine. We all worship the same God!”

I did join my husband’s church after we got married. I didn’t tell these voters that I’d never been part of a Baptist church, nor was I baptized in the Methodist church. I was baptized a Roman Catholic but had never been confirmed….

Canvassing further out in the county carried certain challenges and risks that significantly differed from the city. I knocked on the door of a permanent mobile home, which had no driveway and was located a far piece from the road. Nobody answered. Suddenly, a gigantic gray matted monster of a dog barreled from around the back, barking viciously.

“*Head for the car! Run!*” Ryan hollered.

I put the door hanger version of my campaign card on the doorknob and took off. Ryan, who was about ten feet behind me, dropped back and let me run ahead. As we sprinted, the dog caught up right alongside Ryan. He swatted it with his clipboard. I flew into the back seat. A few seconds later Ryan hopped in the front passenger seat and the dog slammed into the side of the car. Our driver hit the gas, causing the wheels to spin. Gravel flew everywhere.

On the next house’s front porch, several dogs roamed freely.

“Do you want to skip this one?” Ryan panted, still catching his breath.

“No,” I said. “Three voters are in there.”

Another memorable voter in the county displayed an enormous Confederate flag on a tall, shiny pole centered in the yard. The crumbling bricks demarking the porch held up two columns of rotting wood, and peels of paint lay scattered near the door’s ripped screen. An old lady emerged and gave us four homemade cornbread

cupcakes that were still warm. The driver and I ignored Ryan's lecture about accepting food as we each ate one, but the delicious smell eventually wore him down, and he ate the other two.

Steve supervised quite a few of my county walks. In mid-September, on one of the few walks when it was just the two of us, he pulled up next to a trailer. Broken glass and junk blocked the front door and a draped Confederate flag covered up half the fence in the back. Steve read me the name of a sixty-two-year-old man.

"I think you should skip this one," he sighed, shaking his head.

"No," I said.

Even though the Confederate flag unsettled me as well, I ordered Steve to wait in the car. I noticed a faded, "I'm voting for Joe the Plumber—McCain-Palin," bumper sticker stuck on the trailer's metal siding near the back door. A man who looked much older than sixty-two appeared. He was shoeless, wearing holey jeans, a dirty T-shirt, and a grimy baseball hat. He was also missing two toes and some teeth. I introduced myself, handed him my card, and hammered the grocery tax. After telling me his name, which was how I knew for sure he was the voter on our list, he identified himself as a Vietnam vet that relied on disability. He admitted nobody ever came by except his mama, when she delivered groceries. He promised me his vote, and, also said he'd ask his mama to vote for me too.

FROM CHAPTER THIRTEEN: SHIFTING WINDS

Following the campaign strategy grid, Bo heavily ran the TV commercials and radio ads the last three weeks before the election. Eugenia and the voters reminded me of the day-long tribulation I had endured almost four months ago filming for the TV commercial.

"You look fabulous and animated and *your hair sparkles*," Eugenia had said at our last appointment before the election. "People all over town are saying, 'Her hair looks great on TV, is that your client?' and I told them of course you are. Who else could do your hair like that?"

I had only seen the thirty-second TV commercial that featured me once when I had to approve it. I avoided the TV and kept my car radio off the last three weeks before the election....

"The commercial with your family won me over," numerous favorable voters told me on the phone. The struggle my family and I endured while sitting under those lights for the two hours of filming was not apparent in the finished product. Instead, the viewer enjoyed a buoyant, well-grounded family, chatting with ease. The image subliminally invoked the nostalgia of the television series *Father Knows Best*. If the family in the commercial had been someone else's, I would have had to admit that they looked like a lovely family. It disturbed me at a deep psychological level that I

couldn't even explain to myself that it was *my family* being put on public display. The only part of the commercial that didn't bother me was the classroom scene. I could stomach the image of me at my desk thumbing through a book and taking notes on a legal pad.

"I *loved* the commercial with the little girl," several enthusiastic voters told me over the phone. That commercial was Bo's finest work. In it, an innocent little girl's voiceover described the burdensome tax on food and medicine as ordinary people bought those items in a store. Then the little girl appeared. As their parents watched, she and her brother opened Christmas gifts that turned out to be loaves of bread and canned food. A close-up of her face followed.

"It doesn't have to be this way," the little girl said. "Please elect leaders that will repeal the grocery tax, leaders like Susan Pace Hamill."

The ad ended with my logo flashed across the screen. People all over town thought my daughter was the little girl. By the end of the commercial, the viewer was ideally feeling, either consciously or subconsciously, that this evil tax had robbed those children of the toys they should have received for Christmas.

"We only charged your campaign for part of the costs," Bo said. "Do you mind if the commercial is used in the future?"

"Of course not, Boss, I'm honored that I helped inspire it," I said, thinking all they would have to do is substitute another candidate or a proposed referendum to repeal the grocery tax for my name and logo at the end. I loved that commercial and added it to my favorites so I could watch it on my computer whenever I wanted to. Later, it occurred to me that the only thing that separated this commercial from the attack ad Bo had designed for the mayoral campaign—featuring the white woman with the long, blonde hair and a red line across her face—was the different nature of the emotional wells he tapped into. Bo's work could trigger the very best and the very worst primal instincts. I was glad that the commercials for my campaign reflected only the good side of his genius, but the reason for that didn't occur to me until after the election....

In a nice neighborhood, a woman in her late thirties appeared with a black eye. I tried to ignore it and began my spiel.

A deep mean voice hollered from inside, "Who's at the door?"

"Susan Pace Hamill, sir," I said as cheerfully as I could. "I'm running for the legislature and would be honored if you would talk to me."

"Democrat or Republican?" he growled.

"Conservative blue dog Democrat sir..."

"You get the *hell* out of here now. All you *damn* Democrats are nothing but a bunch of corrupt, stinking, lying sons of a bitches. You get the *hell out of here now or you'll be sorry*."

"I guess you can't consider me," I murmured to the woman.

"Yes, I will," she whispered back, her voice barely audible. She put my card in her dress pocket and closed the door.

I returned to the car with tears in my eyes. I instructed Ryan to mark that voter opposed. I didn't want campaign mail pieces to stir that monster up. I also told Ryan to note "DV victim."

"That creep either isn't registered or doesn't vote regularly," Ryan said. "Hers is the only name on our list for that house...."

As the weather grew colder, the campaign started to deteriorate. Changes were coming on many levels that were not going in the direction we wanted. Voters on the phone and at the door were now frequently bringing up President Obama.

A lady snarled, "What are you going to do about Obama?" Her curlers vibrated around her head as I shivered at the door.

"He's a Muslim," another said.

"He wasn't even born here."

"I don't like him. He doesn't have real family."

"He's ruining this country."

"He's a socialist."

"He wants to take our money and give it to people like *him*."

"I *hate* Obama, but I'll vote for you anyway because you called."

And on and on....

Bo's response when I reported the voters' hostile comments about Obama were not reassuring. He reminded me of his earlier warnings that many voters in the district had an irrational hatred of President Obama and he also informed me that the latest polls revealed that voters were expressing increased hostility to all candidates on the Democrat ticket solely because of being in the same party as Obama. We both knew that the Republican party had unleashed a barrage of advertisements and mail pieces, not tied to any individual candidate, with messages like, "oppose Obama, vote Republican," designed to stir up dormant racism that had been simmering under the surface for years....

Bo offered me concrete advice what to say at the door to deflect Obama hatred.

"Darling, if the voters bring up Obama, you've got to make a dismissive comment about Washington and get back on message," he said. "There's no other way."

Bo made me practice saying, "You couldn't pay me all the money in the world to run for Congress or be part of Washington DC," which was always supposed to be quickly followed by, "I want to be your state representative and work on making the taxes fairer to you right here at home." I said those words so many times I felt like a broken record. Although most of these voters either told me they would vote for me despite their hatred of Obama or promised they would give me serious consideration, I had trouble believing them. Just a few weeks ago Obama had never come up, but two weeks before the election, he was ever-present, even though he wasn't even on the ballot. I had to remind myself of the earlier advice I'd been given —not to present well-reasoned ideas—to stop myself from explaining to these voters that Obama's tax policy plans would in fact provide them relief.

Yard signs proved to be the surest omen of trouble. Emails and calls complaining about stolen signs increased substantially as the campaign progressed....If the volunteers noticed a missing sign on one of their patrols, they knocked on the door and asked the voter if they wanted a new one. Until a week before the election, the voter always wanted a new sign. During that last week, the volunteers reported that some voters had taken the signs down themselves....

CONCLUSION

On election night, our get-out-the-vote callers reported that a significant number of the people that I had met at their door who had promised to vote for me confessed that they had changed their minds and decided to vote straight Republican. Many were very apologetic, saying things like, "I loved her, she came to the door, but I've got to make a statement against that Obama." The experience of personally persuading people to vote for me at their door and then having them change their minds because they hated our nation's first Black president taught me that winning their support to begin with had nothing to do with anything substantive about me. Like the first pig in *The Three Little Pigs*, at the door with most of the voters I had no choice but to win their support by metaphorically building a house made of straw, easily blown away by stronger emotional forces and hate is usually much stronger than love. It wasn't that those voters didn't love me, it's just they hated President Barack Obama more.

In Alabama's 2010 election season Democrats in safe seats lost and candidates in toss up or uphill climb districts, like mine, lost by landslides. People who had not voted in years appeared in droves and voted straight Republican to make a statement against President Obama. It did not matter who was on the ballot. Both chambers of the

legislature flipped to supermajority far right-wing Republicans, and the Republicans won all the state-wide offices.

What will it take politically to obtain genuine tax and constitutional reform in Alabama? My downright depressing, somber thoughts are opposite to Bailey Thomson's belief that it is possible to persuade enough citizens through education to support good leadership. If my good friend Bailey were alive today, he would argue with me and would want to dismiss my answer to this question as other educated, well-meaning academics and reformers will undoubtedly react. This is because what I have to say is painful and extremely difficult to accept. However, everyone who cares about achieving tax and constitutional reform must hear and at least consider embracing my message.

First, the political climate's window of opportunity, which was shut in 2003 and locked in 2010, must crack open. When that will happen is impossible to predict, and I believe it is likely years, perhaps decades, away, but circumstances could bring it forward. When that window opens, courageous candidates for public office committed to tax and constitutional reform who have a real chance of winning must step up. These candidates will suffer fiercely negative smear attacks orchestrated by powerful special interests. Negative campaigns begin with opposition research, which locates some grain of truth in the public figure's background that can be twisted to be something totally false, or as one experienced political veteran warned me after I had announced my candidacy, "If they can't find anything juicy about you, they will just make shit up."

To have a chance of prevailing, these good candidates must be willing to fight back using the same offensive tactics. Before committing to run for office, I recklessly did not think this through, so for me personally, the backlash against President Obama had a silver lining. The real chance my campaign manager said I had before I started my field campaign did not last, so I was spared from deciding whether to authorize what his assistant had earlier spilled would have been a local version of a Willie Horton attack against my opponent, the thought of which nauseated me to the core. 23 Political candidates committed to public policy, such as tax and constitutional reform, that uplifts the most vulnerable tend to be decent human beings, who will be deeply offended by having to denigrate themselves into the very sort of people they despise.

Will they be willing to do that? Would I be willing to do that? I honestly do not know.

The harsh reality is that good Alabamians must step up to the plate. Otherwise, Alabama's political world will continue to be dominated by the demagogues who want to keep all lower middle-class and poor children oppressed, who are determined to maintain this status quo by thwarting tax and constitutional reform efforts, and who have no remorse when they use dirty tactics to achieve these immoral goals. The skilled campaign managers who oppose this status quo must be relied on to play the dominant role in defeating these demagogues.

Well-meaning reformers, academics, and good local community leaders must accept their demotion in importance. When the political climate's window of opportunity opens again, we must get behind these skilled campaign managers who want tax and constitutional reforms as much as we do, but who can also communicate with the voters on an emotional level. Well-meaning reformers, academics, and local community leaders also must accept the sickening reality that when achieving genuine tax and constitutional reform comes within our grasp, regretfully crossing that finish line will involve a brutal war fought by both sides' skilled campaign managers and the winner will be the side that most effectively manipulates the voters using negative attacks (e.g., Flynt, 2004, pp. 96-97; Jackson, 2003, pp. 289-290). 24

KEY TERMS

Lid Bills (1971 and 1978) – Created an elaborate constitutional amendment procedure on proposals that seek to increase property tax rates and change the definition of the property tax base. The Lid Bills also imposed absolute dollar limits on the amount of property taxes that each piece of property can generate.

Class I Property – Under the Lid Bills this is utility property, and the base is 30% of fair market value.

Class II Property — Under the Lid Bills, this includes commercial and industrial property and compromises well over fifty percent of Alabama's property tax revenues. The base is 20% of fair market value.

Class III Property – Under the Lid Bills, the base is ten percent of current use value. This class contains personal residences, which compromise just under a third of property taxes, and timber and agriculture, which contribute less than 2% of Alabama's total property taxes.

Class IV Property – Under the Lid Bills, this property consists of motor vehicles and the base is 15% of fair market value.

Current use - Allows property to be assessed/appraised by how it is being used, which is often a substantially smaller figure, than what the property would sell for in the market.

Market value - The price at which a property would sell if put up for sale.

Regressive tax – A tax where poor taxpayers pay a larger proportion of their income than affluent taxpayers; the sales tax is an example of a regressive tax.

DISCUSSION QUESTIONS

1. Why is tax and constitutional reform so politically difficult?

2. Why do so many Alabamians tolerate tax policy that is grossly unfair to most Alabamians and fails to adequately fund education?

3. Why is it so challenging to persuade our citizens to reform Alabama's constitution, the state's fundamental governing document mired in the past and enshrined these inequities?

4. What will it take politically to achieve genuine tax and constitutional reform?

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NOTES

1. On November 8, 2022, Alabama adopted a "new" constitution, which rearranges the amendments to locate similar subjects together (including economic development and local amendments by county), deletes repeated and repealed amendments, and removes the racist language. However, the Alabama Constitution of 2022 makes no changes related to taxes and still concentrates power over local matters (including local property taxes) in the state legislature, thus essentially leaving the state governed under the same structure that existed under the Alabama Constitution of 1901.
2. See H.B. 3, 2003 Leg., 1st Spec. Sess. (Ala. 2003).
3. See Knight v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985), rev'd Knight v. Alabama, 828 F.2d 1532 (11th Cir. 1987), cert denied, 487 U.S. 1210 (1988), on remand, Knight v. Alabama, 787 F. Supp. 1030 (N.D. Ala. 1991), aff'd in part, rev'd in part, vacated in part, Knight v. Alabama, 14 F.3d 1534 (11th Cir. 1994), on remand, Knight v. Alabama, 900 F. Supp. 272 (N.D. Ala. 1995).
4. Knight v. Alabama, 458 F. Supp. 2d 1273, 1279 (N.D. Ala. 2004).
5. Id. at 1278-79.
6. Id. at 1275.
7. Id. at 1297.
8. Id. at 1299.
9. Id. at 1312.
10. See Knight v. Alabama, 458 F. Supp. 2d 1273, (N.D. Ala. 2004), aff'd, 476 F.3d 1219, 1226-27 (11th Cir. 2007), cert denied, 551 U.S. 1146 (2007).
11. Knight v. Alabama, 476 F.3d 1219, 1226 (11th Cir. 2007) (Eleventh Circuit opinion identifies the District Court's findings of racial animus motivating the property tax provisions, then clearly leaves the District Court's findings alone and moves on to affirm the District Court's opinion based on the attenuated connection between tax policy and higher education school choice).
12. Id. at 1223 (Eleventh Circuit opinion agrees with and accepts the District's Court's reasoning regarding the crippling effect on majority Black school districts).
13. See Lynch v. Alabama, 568 F. Supp. 2d 1329 (N.D. Ala. 2008). Lynch was considered a "sequel" to Knight. Id. at 1331, 1335.
14. "[T]he overwhelming weight of evidence in this record establishes—clearly, convincingly, and beyond reasonable debate—that virtually every provision of the basic charter of Alabama government drafted by the delegates to the 1901 Constitutional Convention was perverted by a virulent, racially-

discriminatory intent." (emphasis in the original). Lynch v. Alabama, No. 08-S-450-NE, 2011 WL 13186739, at *327 (N.D. Ala. Nov. 7, 2011), aff'd in part, vacated in part sub. nom. I.L. v. Alabama, 739 F.3d 1273 (11th Cir. 2014), cert. denied, 574 U.S. 814 (2014).

15. "Alabama was still in the midst of racial turmoil in the early years of the decade beginning in 1970... [e]ven so, there is no direct evidence in the record that either Amendment 325 or Amendment 373 was racially motivated." Id. at *328 (emphasis in the original).
16. The District Court in Lynch issued an 804-page order which dedicates over 150 pages to background information and over 200 pages to historical findings of fact. See id.
17. See supra note 15.
18. In Weissinger v. Boswell, the Middle District held that Alabama could not constitutionally tax the same class of property at different ratios. Weissinger v. Boswell, 330 F. Supp. 615, 625 (M.D. Ala. 1971). After the Weissinger decision, all Alabama property owners faced the prospect of higher ad valorem taxes. "The danger was most acute for large landowners in rural areas." Lynch, 2011 WL, at *333. "The clear purpose of the two amendments . . . was to ensure that the Weissinger decision did not cause the property of large landowners to be appraised and assessed similarly to public utilities and industrial groups." Id.
19. Latin for "a thing adjudicated," Black's Law Dictionary defines res judicata as "an issue that has been definitively settled by judicial decision" or "an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit." Res judicata, Black's Law Dictionary (11th ed. 2019). The three elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privy with the original parties. Id. See Southern Pacific R. Co. v. United States, 168 U.S. 1, 48-49 (1897) (a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ."). Because res judicata only precludes actions between the same parties, the Lynch plaintiffs were not precluded from challenging the same constitutional provisions that were challenged in Knight.
20. Lynch, 2011 WL at *334.
21. See Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988); Papasan v. Allain, 478 U.S. 265, 284-86 (1986); Plyler v. Doe, 457 U.S. 202, 203 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 37 (1973).
22. Susan Pace Hamill, Pretty Hair: Discovering the Grassroots on the Campaign Trail (unpublished manuscript, approximately 73,000 words in four parts and sixteen chapters) (on file with the author). The manuscript has benefitted from collaborative work with the University of Alabama's MFA program and a professional editor, but due to the difficulty in publishing this kind of work in a credible fashion it may very well remain unpublished.
23. My campaign manager's assistant was referring to famous political ads used by George H.W. Bush against Michael Dukakis in the 1988 presidential campaign, which had featured a furloughed convicted murderer who had raped a woman while Dukakis was governor of Massachusetts. The chilling ads depicted a revolving prison door and an image of Horton himself, a Black man with an unkempt beard and thick afro-hair.
24. Unfortunately, Alabama's history also illustrates that this reality is true. Flynt (2004, pp. 96-97) described George Wallace's 1970 campaign defeating Albert Brewer, who was widely viewed as a potential New South governor, using radio ads warning white men that Brewer's support of Black state troopers endangered their wives of being stopped on rural roads and raped, and an unsigned circular accusing Brewer of being homosexual, his wife of being an alcoholic and his daughter of having sex with Black men, as "the dirtiest campaign in Alabama political history." See also Jackson (2003, pp. 289-90) describing Guy Hunt's 1990 gubernatorial campaign defeating Paul Hubbert as attacking Hubbert for being tolerant of homosexuality and tapping into latent racism with a series of T.V. commercials "showing a cigar-smoking Hubbert sitting in the back seat of a car with Joe Reed, one of the most powerful Black politicians in the state."

4

A New Way Forward for Alabama Prisons

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This chapter has descriptions of violence and sexual assault.

Abstract

Blankenship delves into the harrowing realities and historical evolution of Alabama's prison system, offering a critical lens on Alabama’s prisons from their inception to the present day. The narrative begins with a vivid description of the dire conditions within the prisons, where systemic violence, neglect, and deprivation prevail, underscoring the urgent need for comprehensive reform. It traces the roots of the current crisis back to the state's early reluctance to establish a penitentiary system, coupled with a persistent failure to address the underlying issues of overcrowding, inadequate healthcare, and violence. The chapter highlights the historical role of federal interventions in attempting to rectify these chronic problems, detailing landmark lawsuits and judicial rulings that have shaped the state's correctional landscape. Despite these efforts, the chapter illustrates how Alabama's prisons remain plagued by a cycle of violence and neglect, largely due to a lack of political will and societal indifference toward the plight of people in prison. The analysis then shifts to a forward-looking perspective, proposing a new paradigm for Alabama's prison system that emphasizes humane treatment, a genuine commitment to rectifying past injustices, and equipping people in prison for re-entry as productive citizens. By weaving together historical insights, legal analysis, and contemporary accounts of prison life, this chapter aims to provide a comprehensive understanding of the complexities and challenges facing Alabama's penal system while advocating for a more just and humane approach to correctional management.

A New Way Forward for Alabama Prisons

TIMELINE

1820-1830s
Alabama did not have a state prison system. Alabamians preferred justice to be administered by local citizens or county officials.

1839
Alabama's first state penitentiary was built.

1964
Cooper v. Pate recognized the right of prisoners to sue prison officials for civil rights violations under Section 1983 of the Civil Rights Act of 1871.

1972
Judge Frank M. Johnson, Jr. ruled that the inadequate medical care provided to inmates in Alabama prisons violated the Eighth Amendment's prohibition of cruel and unusual punishment.

1976
Judge Frank M. Johnson, Jr. ruled that conditions in Alabama prisons were so deplorable that they violated the Eighth Amendment's prohibition of cruel and unusual punishment. He appointed a 39-member Human Rights Committee to oversee the implementation of extensive reforms of Alabama's prison system, which he found to be in critical condition and unfit for human habitation.

1977
Newman v. Alabama established the necessity for adequate food, clothing, shelter, sanitation, medical care, and personal safety for prisoners and disbanded the Human Rights Committee.

1979
Governor Fob James was appointed oversee and implement reforms in Alabama prisons.

1981
Federal court ordered hundreds of people released from Alabama prisons.

1982
In the appeal of *Newman v. Alabama*, the appellate court ruled that the federal court overstepped its authority by ordering prisoner releases, emphasizing the need for less intrusive measures.

1984
Newman v. Graddick established that federal court exceeded its authority when reversed contempt orders against Attorney General Graddick and Corrections Commissioner Smith.

2019
Department of Justice report finds that Alabama's prison system violated the Eighth Amendment due to widespread violence, unsafe conditions, and systemic failures.

2019
Governor Kay Ivey establishes Governor's Study Group on Criminal Justice Policy.

Dates covered in this chapter

There is a place in Alabama where citizen caretakers care for other citizens, and many of those citizens work to provide for each other. Despite the hot weather in Alabama, which can last for up to seven months and can get to over 100 degrees with humidity factors in the 80-percentile range, citizens do not have air conditioning. The heat and humidity are ideal conditions for bacterial skin conditions that cause constant itching. Citizens are provided with coarse

and cheap clothing, and rules prohibit them from wearing their own clothing (Lindsay & Rush, 2016, p. 255).

Rules also prohibit fighting. Even so, daily fights are so common they are usually only recorded when someone is seriously injured or killed. Often the reports reflect one citizen being beaten by three or more citizens while caretakers look on.

Rules prohibit citizens from bringing any person or anything into this place that might hurt other citizens. Even so, many citizens have weapons made from every available material. An effective weapon, for example, is a sock filled with locks. Citizens routinely stab or cut other citizens. When citizens or caretakers attempt to intervene, they are sometimes cut or stabbed. Screams from victims are so common that citizens sometimes hear victim screams in their sleep (U.S. Dept. of Justice, 2019, 2). Routinely, citizens who do not immediately die from violence are transported, often by helicopter, to nearby hospitals.

Weapons are also used to coerce male citizens to perform sexual acts with other male citizens.

Rules have been established to prohibit any addictive or poisonous drugs from the place. Even so, inspections by caretakers consistently produce cigarettes laced with drugs, methamphetamines, and drugs that cause extreme paranoia, severe hallucinations, and violent nausea. Deaths from drug overdoses are common.

Even though citizens are separated into different buildings based on whether they are male or female, caretakers are not. Male caretakers rape, fondle, and expose themselves to women citizens. They coerce women to engage in oral sex. Male caretakers engage in voyeurism, forcing women to disrobe, shower, and use the toilet while they watch. Caretakers sexually harass women, subjecting them to a daily barrage of sexually explicit verbal abuse. Caretakers trade sex acts for necessities, such as feminine hygiene products and laundry services (U.S. Dept. of Justice, 2014).

In one instance, in a building for men, a caretaker brutally hit, kicked, and struck a male citizen with an expandable baton. Two nurses saw the caretaker beat the citizen, and two other nurses could hear the beating from a nearby room. The citizen did not antagonize the caretaker before the beating, and his hands were handcuffed behind his back. During the beating, all four of the nurses heard the caretaker yell something to the effect of, "I am the reaper of death, now say my name!" Eventually, the citizen begged the caretaker to kill him. At one point, a nurse observed the caretaker place his right foot on the side of the citizen's face to grind his head onto the floor. The caretaker then paced

the floor with the prisoner's blood on his clothing, threatening healthcare workers to keep quiet (U.S. Dept. of Justice, 2019, 11). 1

INTRODUCTION

Alabama authorizes correctional officers to use violence on a continuum up to and including death (Ala. Code 1975, § 13A-3-27). It protects their violence with nearly impregnable immunity (*Ex parte Ala. Dep't of Corr.*, 2016). Until recently, the Alabama Constitution has authorized people in prison to be treated so that correctional officers can exact the treatment on behalf of the people of the State of Alabama. Alternatives to violence, such as segregation or isolation, are rare. As a result, correctional officers, left with very few tools to encourage non-violence, resort to violence (U.S. Dept. of Justice., 2020, p. 10). The natural progression is that some correctional officers use force as a form of retribution and others for the sole purpose of inflicting pain up to the point of self-identifying as reapers of death (U.S. Dept. of Justice 2020, p. 10).

Some correction officers are not satisfied acting alone. They informally deputize certain prisoners as "strikers" and extend to them the authority to assault other prisoners with hoe handles, broomsticks, or homemade knives. Other prisoners are deputized as "flunkies" and armed to break up fights in the dormitories. Strikers and flunkies often mistreat other people in prison who do not have the favor of corrections officers. Rapes and assaults are everyday occurrences (Yackle, 1989, 80-81, 257). In 1923, the legislature arranged for state-run executions. Ed Mason, an inmate, was provided building materials and forced to make an electric chair for executions. Mason painted the chair with yellow paint leftover from striping Alabama highways. The chair became known as "Yellow Mama" (Lindsay & Rush, 2016, p. 12).

In the early history of its statehood, when delegates from the Alabama Territory convened in Huntsville to draft a constitution and establish a state government for admission into the United States, the concept of a state prison was notably absent. The Constitution of 1819 recognized certain rights for individuals accused of crimes, yet it failed to address the issue of establishing a state correctional facility. This oversight marked the beginning of a complex history of prisons in Alabama, a history that has been punctuated by federal interventions and a recurring failure to learn from past mistakes. Despite possessing the authority to establish the function of prisons, Alabama has faced challenges in balancing the goals of habitable confinement, funding, and successful re-entry. Recent amendments to the Alabama Constitution affirm the right to self-determination, a principle embodied by people who were in prison but now exemplify the potential for personal transformation. This chapter explores the evolution of Alabama's approach to incarceration, highlighting the shifts towards humanizing reform in forging a new, more hopeful direction for its prison system.

ALABAMA PRISONS FROM THE BEGINNING

In the 1820's and 1830's, Alabamians did not want a state prison. They preferred the administration of justice to be left in the hands of local citizens or their officials (Alabama Dept. of Corrections, 2019). Under this so-called "home rule," justice was swift and harsh, often carried out through staged hangings in the public squares rather than through extended incarceration. These festive spectacles attracted large crowds from miles around, eager for the entertainment atmosphere the settlement's merchants created. Flogging, branding, and other mutilation and humiliation events were also made public. Hanging offenses included murder, rape, robbery, burglary, stealing slaves, rustling livestock, counterfeiting, and treason (Alabama Dept. of Corrections, 2019).

Slaves had few legal rights and were treated harshly. Punishments were often more severe for Blacks, disproportionate to the crime, and those who administered the punishment did so without fear of repercussions. When the first state penitentiary was built in 1839, Alabamians demanded that it be self-sufficient. They were willing to surrender some people to state prison, but they were unwilling to pay more taxes to do it. As such, home rule continued until the conclusion of the Civil War in 1865.

The prison population in Alabama increased significantly due to several factors, including that Blacks had been historically punished through home rule rather than being formally charged in the criminal justice system. For those who did end up being formally charged, Alabama's criminal justice system was harsh, and Alabama's high rate of poverty often translated into no meaningful defense. As the prison population grew, the number of prison beds did not. This led to a number of problems, including overcrowding, poor sanitation, violence, and inadequate medical care. In response, Alabama did little to remedy abuses. Federal courts adopted a "hands off" doctrine when faced with state prison abuses. However, in 1964, in *Cooper v. Pate*, the U.S. Supreme Court deviated from that doctrine by holding that a state prisoner may bring an action under the federal Civil Rights Act of 1871. The shift away from the "hands off doctrine" made federal intervention into how states ran their prisons possible. Within a decade, the federal courts had effectively taken over Alabama prisons.

FEDERAL INTERVENTION INTO ALABAMA PRISONS: *NEWMAN, PUGH, AND JAMES*

Alabama prisoners filed a civil rights lawsuit claiming that their U.S. Constitutional rights had been violated by inadequate medical care. On October 4, 1972, Judge Frank M. Johnson found that medical care in Alabama prisons was so inadequate that it resulted in cruel and unusual punishment, which violated the Eighth Amendment of the U.S. Constitution. He further found that approximately 10% of the people in Alabama

prisons were psychotic and another 60% mentally disturbed enough to require treatment and ordered Alabama to undertake extensive changes to provide people in prison adequate medical care (*Newman v. Alabama*, 1972).

Within a year of Johnson's order, Jerry Lee Pugh was incarcerated for a parole violation and assigned to live in a dormitory that housed over two hundred people though it was only designed for eighty. Tensions ran high, and Pugh became convinced that violence was imminent. Prisoners brandished nightmarish weapons - sharp blades up to 16 inches long, steel bars as long as thirty-six inches, as well as hatchets and pick handles. Pugh's repeated requests to be transferred to safer quarters were denied by corrections officers who, for their own safety, stayed well away from the dormitory after dark. Prisoners locked inside were left to fend for themselves. When violence finally erupted that summer, Pugh was badly beaten and, by his account, left for dead under a bunk. Other people in prison rescued him after order was restored. Medical records showed that Pugh suffered multiple lacerations and fractures; a part of his skull was crushed. Without the benefit of an attorney, Pugh hammered out a civil rights complaint on an old prison typewriter and filed it (Yackle, 1989, p. 51). The case was assigned to Judge Johnson.

Attorney Robert D. "Bobby" Segall represented Pugh. Segall was creative in fashioning a legal theory on which to proceed. He argued that the practice of housing large numbers of prisoners in crowded dormitories without regard to the violent propensities of individuals made brutality the common currency of prison life. The fault lay not solely with the inmates who fought with each other in the dormitories, but with the penal authorities who knew or should have known, that the consequences of their policies would be violence, injury, and, in some instances, death. The conditions in Alabama's prisons, conditions ascribable to deliberate decisions by state penal officials, thus ensured that prisoners would be subjected to assault on a routine basis. The obvious vehicle was the Eighth Amendment's prohibition on cruel and unusual punishment. Segall proposed that Alabama penal authorities punished prisoners in violation of the Eighth Amendment by placing them in threatening circumstances without safeguarding them from attack (Yackle, 1989, p. 52). The lawyer claimed that Alabama had a responsibility to protect individuals it placed in situations where they were likely to experience violence, especially when it simultaneously stripped them of the right to self-defense and the ability to escape.

The immediate problem was identifying some standard against which prison conditions could be measured. At what point does the risk of violence trigger Alabama's duty to protect? As he reflected on that question, Segall believed that he could best explain what was wrong with the Alabama prison system by explaining what must be done to set things right. He could best provide Judge Johnson with a standard for judgment by describing a state of affairs in which prison violence would be unlikely to occur and then contrasting such a regime with the status quo. The effect would be to merge two matters that lawyers typically hold apart: what must be shown to win a lawsuit and

what the winner obtains in victory. Anticipating the kind of order that he would ask Judge Johnson to issue after judgment,

> Segall laid in place, at least temporarily, the linchpin connecting what may be called the negative version of his case (the claim that the conditions of confinement produced unconstitutional violence) and a more affirmative version of the case (a claim that, in order to be free from unconstitutional violence, prisoners were entitled to something positive–something that, if granted, would prevent violence) (Yackle, 1989, 53).

Segall formulated the contention that prison inmates had a constitutional right to "rehabilitation." If, Segall reasoned, the elimination of prison violence would be attained only by reducing prisoners' frustration in confinement, and if prisoners' frustration could be reduced only through educational and vocational programs, then "rehabilitation [became] a prerequisite to the elimination of violence and, thus, a constitutional right" (Yackle, 1989, pp. 52-53).

Plausible as such an idea was, it failed. He could not persuade the penal expert he consulted. Despairing that he would not convince the judge of his "rehabilitation" theory without an expert witness who would testify in support, Segall reoriented his thinking around a simpler "right to protection" theory. He proposed that "[w]hen a state denies people their liberty and forces them to live in confined quarters and without self-defense, ... that state assumes a corresponding duty to protect people [in prison] from physical and mental harm..." (Yackle, 1989, 52-53).

Ultimately, Segall's choice to pursue the right-to-protection theory and forgo the rehabilitation theory was prudent. A new complaint filed by a different prisoner, Worley James, squarely presented the rehabilitation claim. Judge Johnson found that assertions of an Eighth Amendment violation based upon some generalized obligation of the state to provide rehabilitative services to all prisoners had not stated a claim upon which relief could be granted; however, the court ruled that certain other claims were sufficient to proceed to trial. These included assertions that Alabama inflicted cruel and unusual punishment by impairing prisoners' efforts at self-rehabilitation and, in violation of due process requirements, engaged in arbitrary and capricious housing assignments of inmates among the few housing units with limited available educational, vocational, and health treatment facilities (*James v. Wallace, 1977*).

After the trial wherein the James and Pugh cases were consolidated, Judge Johnson issued his findings in favor of Alabama prisoners, comprehensively directing the state to undertake specific measures meeting "minimum constitutional standards" to address overcrowding, segregation and isolation shortcomings, classification issues, mental health care, protection from violence, living conditions, food service, education/recreation/vocational/work opportunities, physical facilities, correspondence and visitation, and staffing (including staff numbers, training and

reductions in racial and cultural disparities) (*Pugh v. Locke, 1976)*. As Judge Johnson entered his order containing these sweeping reforms of Alabama prisons, he was surely mindful of Governor George Wallace defiantly standing in the schoolhouse door to block a federal court order ending the racial segregation of Alabama schools. Rather than directly monitor compliance with his prison order, he appointed a committee of 39 respected Alabamians to mobilize and maintain public support. This so-called Human Rights Committee (HRC) was to monitor the implementation of his order. It was authorized to "inspect facilities and records, interview prisoners, and review any plans developed by the defendants" (Yackle, 1989, pp. 103-104). Unfortunately, members of the HRC were met with hostility, stonewalling, and inaction. Progress was further slowed by leading politicians such as the Alabama Attorney General and Governor Wallace, who, while joining in a chorus of being hard on crime, took turns resisting federal intervention and pointing fingers at each other and prison leadership (Yackle, 1989, pp. 136-137).

Following Alabama's Appeal, U.S. Circuit Court of Appeals Judge James Coleman approved of the steps taken by Judge Johnson to ensure prisoners had adequate food, clothing, shelter, necessary medical attention, and personal safety. He observed that many of the steps viewed in isolation may have exceeded constitutional mandates but, when considered in totality, were justified by the need to eradicate Eighth Amendment violations. While Judge Coleman affirmed that the Eighth Amendment does not require a state to provide rehabilitative, educational, and vocational opportunities, he agreed that, if offered, such programs are to be available impartially and with equal access to prisoners on an objective standard of basic utility to the individual (*Newman v. Alabama, 1977*).

Although the HRC failed to accomplish all the goals set for it by the court, it can be credited, at least in part, to a systemwide prison school district, a prison industries division, and "good time" credit to incentivize inmates (Conrad, 1989, pp. 313-316). Regardless of its successes or promise of future successes, Judge Colemen asserted that "the Committee undoubtedly did impermissibly intrude and had every appearance of impermissibly intruding upon functions properly belonging to the daily operation of the Alabama prison system" and ordered it to be disbanded (*Newman v. Alabama*, 1977, 289-290).

When Governor Fob James took office in 1979, he took proactive steps to address prison issues and was more willing to cooperate with the federal mandates (Taylor, 1990, p. 188). On February 2, 1979, as compliance with his order lagged, Judge Johnson appointed Governor James to serve as the temporary receiver of Alabama's prison system. James' main solution was to bring the prison system into federal compliance through new and self-sufficient prisons (Taylor, 1990, pp. 186-199). To address overcrowding, Governor James increased the capacity of Alabama prisons from 4,241 when he took office to more than 10,1000 (Taylor, 1990, p. 200). Unfortunately, he did not address the institutional dysfunction in managing the prisons.

In May 1979, the Alabama prison litigation was transferred to U.S. District Judge Robert E. Varner. Overcrowding and understaffing continued in Alabama prisons. With the state's continued failure to comply with the court's decree that its prisons meet minimum constitutional standards, on July 15, 1981, Judge Varner ordered Alabama to release 1,000 prisoners who were least deserving of incarceration. Judge Varner also instructed that the next 250 prisoners least deserving of incarceration would be paroled six months earlier than planned.

For about a year, Attorney General Charles Graddick unsuccessfully fought against releasing prisoners to relieve overcrowding. Then, on August 9, 1982, Judge Gerald B. Tjoflat, sitting on the newly formed U.S. Court of Appeals for the Eleventh Circuit, granted Alabama's motion for a stay of the prisoner release order (*Newman v. Alabama,* 1982). Over 1,000 prisoners were released, but the release of additional prisoners seemed unlikely.

With Judge Varner unable to order prisoner releases, the parties began negotiations toward ending federal court supervision of the Alabama prisons. On January 18, 1983, Judge Varner approved a consent agreement and conditionally dismissed a large portion of the case. Roughly ten months later, as a contempt sanction for Alabama's breach of the consent agreement, Judge Varner ordered the Attorney General to pay the court one dollar per day for each state inmate held in any penal institution wherein overcrowded conditions have existed for a specified number of days. Judge Varner further ordered Alabama to release from confinement the number of inmates by which state facilities were overcrowded. On September 10, 1984, Alabama's appeal of his order succeeded (*Newman v. Graddick,* 1984). Judge Hitch Roney upheld the January 1983 consent decree from attack by the state's Attorney General and held that Judge Varner should hold more hearings to consider modifications of earlier orders, given recent precedent interpreting the Eighth Amendment. Prisoner release orders would be warranted only if another trial were held to assess current prison conditions against these more recent standards. Moreover, the contempt findings were also set aside relieving the Alabama Attorney General from having to pay the dollar-per-day sanction.

After Roney's ruling, the parties negotiated a settlement stating that Alabama was in "sufficient compliance" to "permit" the parties to recommend that the *Pugh* and *James* cases be dismissed - subject to being reopened if Alabama's prison conditions deteriorate. The agreement also provided three additional years of monitoring (Yackle, 1990, p. 250). Judge Varner approved the agreement and dismissed the case on November 27, 1984.

After Governor James' receivership ended, Judge Varner approved an Implementation Committee (IC) made up of four Alabama citizens to monitor the implementation of the plan for improvements in the prison system. The IC would monitor three areas: state prisoners in county jails, mental healthcare for inmates, and conditions in isolated confinement. Further, the IC would report to the federal court, and if any party felt that

the IC's actions were jeopardizing their rights, they could apply to the federal court for relief. In retrospect, the IC was repeating the past. It took on responsibilities that might have been performed years earlier had Judge Johnson's appointment of the HRC in 1976 not been resisted so harshly by Alabama officials and ultimately disbanded by Judge Coleman.

Like the HRC, the IC had its successes. It attempted to reduce prison overcrowding by implementing a Supervised Intensive Restitution (SIR) program (releasing certain property crime offenders to live and work in the community, remitting a portion of their earnings to their prior victims). Before long, officials' threats to end the SIR program led Judge Varner to take further action.

ALABAMA HAS BEEN CONDEMNED TO REPEAT THE PAST

Briefly reviewing history suggests that external interventions and extrinsic motivations do not effectively work to reform prisons in Alabama. Attempts by Judge Johnson to oversee prison reform through the HRC and attempts by Judge Varner to oversee prison reform through the IC were a microcosm of the larger Alabama corrections system, which still yearned for “home rule.” In response to the abuses that carried over in the 1800s from “home rule,” Alabama’s first prison was completed in 1841. At the conclusion of the Civil War, Alabama adopted the practice of leasing people in prison to private companies for forced labor to offset the skyrocketing prison population while profiting from prison labor. In 1898, 73% of Alabama’s annual state revenue came from leasing people in prison (Perkinson, 2010). Within 30 years, the barbarism associated with leasing people in prison, also referred to as “convict leasing,” again resulted in some prisoners being returned to overcrowded prisons. Around 1893, Alabama's solution was to build a reformatory for prisoners under 16. Even though leasing people in prison was outlawed, it continued in various forms through 1927 when prisoners returned to overcrowded prisons en masse (Alabama Dept. of Corrections, 2019). Thus, the cycle continued. Have a problem, build a prison. Alabama went from one prison in 1841 to 27 prisons in 2014 (Alabama Dept. of Corrections, 2014), and it is building new prison facilities in 2024 (Alabama Dept. of Corrections, 2021). Even so, severe overcrowding, extreme violence, insufficient mental health care, and a lack of overall resources persist. This reality summarizes the conditions of Alabama's prisons in the 1970s when Judge Johnson effectively took them over and continues to define prison conditions today.

Three decades after Judge Johnson’s intervention ended in 1989, state officials are confronted with these same issues. Looking back on the federal court intervention, Segall commented, “I feel like, after a certain period of time, it was like the case never existed” (Lyman, 2021). State Senator Cam Ward, an active participant in Alabama criminal justice policy, aptly describes the situation as déjà vu.

> The problems enumerated in federal District Judge Frank Johnson's order closely parallel the issues raised in the Department of Justice's April 2019 investigation report. Both documents paint a grim picture of violence and a generally unsafe and disorderly environment in state prisons, compounded by a lack of essential resources and staff (Lyman, 2021).

Much like the recent DOJ reports, 2 Judge Johnson's findings in the 1970s concluded that Alabama prisons were violating inmates' constitutional rights.

Governor James' changes led to improvements in security and medical and mental health care and improved professionalism for correctional officers. A court-ordered cap on the number of inmates allowed into the system gave time for the state to improve the training of correctional officers. Ward gave James credit for taking on the issue. "It was much easier for politicians to say, 'We're doing this because we have to do this,'" he said. "And that's a problem. Whereas, the thing about James is, when he became governor, he said, 'This is something we've got to fix'" (Lyman, 2021). However, progress did not go beyond minimum standards. Rehabilitation remained limited. Training opportunities often involved farm work, which did little to prepare people in prison for jobs outside of prison.

Despite improvement, the gains did not last. Tough-on-crime laws and a warehousing model for inmates repeated an overcrowding crisis. When federal oversight ended in December 1988, there were 12,440 inmates in state prisons. By 1996, a year before the state opened its last prison to date, the number had topped 21,000. Alabama's current prison system grapples with escalating violence, to the extent that it now faces the looming possibility of federal intervention again in another federal action filed in 2020 (*United States v. State of Alabama, et al.*, 2020). Recent years have witnessed a staggering 200% increase in reported homicides within Alabama prisons. Prisoners describe an unrelenting atmosphere of fear and hostility that seems eerily reminiscent of the conditions Jerry Pugh endured when he was wounded back in August 1973 (Lyman, 2021).

One significant yet often overlooked challenge in addressing prison reform in Alabama is the shared characteristic among the state's residents, including people in prison, its governors, attorney generals, and corrections leadership–a deeply ingrained sense of fierce independence and strong determination. This attribute, while commendable, can lead to resistance against external influences and motivations. The spirit of self-determination, a hallmark of Alabama's culture, is as prevalent within the walls of its prisons as it is in the state's leadership. Much like their fellow Alabamians, people in prison hold an aversion to being motivated by external influences (Downs, 2014).

Alabama's history and motto, "We dare defend our rights," embody the state's longstanding tradition of valuing independence and the willingness to stand up for its beliefs, even in the face of unpopularity. This pervasive attitude of self-reliance and

skepticism towards outside motivation is a critical factor to consider in reform initiatives. Recognizing and engaging with this deeply embedded spirit of autonomy among all Alabamians, including those behind bars, is essential for the effective implementation of reforms aimed at improving the state's correctional system. Rather than expecting reform to result from federal litigation or other external influences, intrinsic motivation could be explored. Perhaps Alabamians can look to their own Constitution for that motivation.

ALABAMA'S GOAL TO PUNISHMENT AND BEYOND

Alabama has the power to establish criminal laws as a fundamental aspect of its role in maintaining social order, protecting the safety and well-being of its citizens, and upholding the principles of justice. In the context of people who have been convicted, Alabama has referred to that government function as a legitimate penological goal (*Ex parte Henderson*, 2013).

A penological goal is clearest when a citizen criminally harms another and remains an immediate threat to harm again. In that circumstance, the foremost goal is incapacitation. Prison serves as a barrier, ensuring that as long as the citizen is an imminent threat to harm other citizens, they are deprived of the capacity to do so, often by remaining in housing that keeps them away from those they might harm.

Another goal of prison is to deter future crime by making people who may consider breaking the law afraid of the consequences. Although a stated penological goal, studies consistently conclude that punishment severity shows weak to no deterrent effects for crime (Dölling, 2009).

A third goal of prison is retribution, which punishes people for committing crimes and makes them pay for the harm they have caused. After 15 years as a federal prosecutor and another decade as a defense attorney, Matt Martens studied the government's threat or use of physical force to punish people convicted of crimes. Provided that the conviction was accurate, he concluded that retribution is a legitimate penological goal. He goes further to conclude that failing to punish the guilty is immoral. Justice demands that impartial due process be observed, that the verdict speaks accurately, and that the punishment be proportional (Martens, 2023, p. 161). A punishment is just because it is deserved, but it cannot be an end in itself: it must be proportionally constrained to the penological goals of deterrence and rehabilitation. What makes a punishment deserved is its correspondence to the severity of the wrong committed (Martens, 2023, p. 156).

Especially since punishment has not shown a deterrent effect, proportionality is a maximum that may be imposed rather than an absolute that must be imposed. The goal is restoration, which can be pursued through a punishment up to a maximum that corresponds to the severity of the crime but may necessitate less than the maximum

punishment that proportionality permits (Martens, 2023, p. 28). In other words, the point of proportional punishment is not only case-specific but society-wide. A just punishment makes a statement–both to the victim and society–about the wrong the person who violated the law has done. The hope is that the statement will serve its instructional ends both to the offender and the broader society so that the offender will change his ways and others will be dissuaded from such conduct, all in anticipation of a more just social order. The end of punishment, the goal, is a more just social order.

Punishment can serve the good end of social order by deterring people before they harm, incapacitating them from doing future harm, and reforming them so that they no longer desire to harm (Martens, 2023). A just punishment, however, is constrained by a requirement of proportionality to the end it serves and to the crime to which it responds. The severity of the crime limits the severity of the punishment (Martens, 2023).

According to Alabama Governor Bagby, in 1840

> The 'great objective' of [prison] was to 'reform' criminal offenders. An 1888 report on the prisons similarly insisted that imprisonment itself was the punishment for crime and that any 'other or different punishment' within a penal institution was 'unjust.' Another report by W.H. Oakes in 1914 argued that it was 'futile' to subject criminal offenders to 'indignities' that would cause them to 'hate' the very law it was hoped they should respect and to turn out men who were as much the enemies of society as the 'law could make [them]' (Yackle, 1989, p. 9).

Considering the insufficient evidence that imprisonment deters crime, crimes committed in prison and those committed after release may be partly due to the focus on punishment. Recidivism merely measures the tendency of a person convicted of breaking the law to break the law again. A different goal might frame a system subjecting prisoners to different treatment. Treatment that might recognize that they are citizens and neighbors rather than felons or convicts.

Alabama citizens have a right to "life, liberty and the pursuit of happiness" (*Alabama Const. Art. I, § 1*). A criminal conviction authorizes the violation of those rights. Imprisonment itself, the confinement itself, violates all three as punishment. Any additional abuses resulting from the conditions of confinement are additional punishments for crimes which people in prison have not been convicted and for which they have not been sentenced. Someone sentenced to prison is not sentenced to prison plus any of those conditions highlighted in the beginning of this chapter–beating, stabbing, rape, terror, etc. A punishment that degrades someone tells a falsehood about them, suggesting that what they have done has emptied them of their humanity (Martens, 2023). Encouraging people in prison to determine to regain their life, liberty, and to pursue happiness would be a different goal that recognizes people in prison are

still citizens. Citizens who will, for the most part, learn something in prison. Something that makes Alabama better–or not.

ISOLATION, DETERRENCE, AND PUNISHMENT AS A BAD RETURN ON INVESTMENT

Prisons are instruments that publicly denounce crime. Beyond their physical walls and barred cells, prisons stand as public declarations, signaling society's disapproval of transgressions and communicating what it means, in part, to be an Alabamian. Yet, building a prison as a communication tool is limited in its effectiveness. What happens inside prisons, however, can maximize Alabama's return on investment.

Deterrence is a simple yet powerful idea: the fear of punishment should make people think twice before breaking the law. In practice, it does not have the desired effect. Many people, for example, fear that they will have to pay a fine for speeding, but they speed anyway. Yet, not everyone sees prisons solely as a tool for deterrence. Some see prison as a tool for retribution and punishment. For them, when a citizen commits a crime, they owe a debt. Not a debt that can be paid in coins or notes, but a debt that must be paid in time and freedom, maybe even suffering. Prisons, in their eyes, are places where people pay back society for the wounds they inflict upon it.

Carceral time and suffering, however, is an expensive form of punishment, and it can have several costly consequences for people in prison and their families. Even though some Alabamians have a hunger for retribution, they resist paying for it. They expect people in prison to suffer while earning enough to be self-sufficient. Since Alabama's first prisons, an expectation of the institution has been self-sufficiency. To the degree that Alabamians see self-sufficiency as personal responsibility, they value it and detest freeloading.

When Alabama's first penitentiary was established, the idea was to employ inmates in various trades and labor activities that would generate enough revenue to offset the costs of running the institution. This was not a unique idea: many American prisons of the era aimed for self-sufficiency, both as an economic strategy and as a part of the penitentiary's reformative mission. The belief was that hard work and discipline would reform prisoners and make them productive members of society upon release.

People in Alabama prisons were forced to work in a variety of trades, from blacksmithing to shoemaking. The prison also had its own cotton mill and brickyard. However, achieving true self-sufficiency proved challenging. While the labor did generate revenue, the prison often grappled with financial issues, and at times, the state had to step in to provide additional funds.

After the Civil War, Alabamians took advantage of a provision in the 13th Amendment which ended slavery "except as a punishment for crime whereof the party shall have

been duly convicted..." which was paralleled in the Constitution of Alabama of 1901 (*Alabama Const., art. I, § 32*). This resulted in leasing people in prison to plantations, mining companies, and industry.

As horrific as slaves were treated, people in prison who were leased to the mines of Birmingham were arguably treated worse resulting in Alabama's prison system being the most profitable in the nation. To mines and Alabama, mostly Black prisoners provided, respectively, sources of cheap labor and state revenue. By 1883, a significant percentage of the workforce in the Birmingham coal industry was made up of leased prisoners. But to the families and communities from which the prisoners came, leasing people was a living symbol of the dashed hopes of fairness. Indeed, the lease — the system under which the prisoners labored for the profit of the mining company and the state — demonstrated Alabama's reluctance to let go of slavery and its insistence that prisons be profitable no matter what the human cost. Despite the efforts of prison officials, progressive reformers, and labor unions, the state refused to stop leasing people in prison to coal mines (Curtin, 2000).

The strongest opposition to leasing people in prison came from Birmingham mine workers who opposed leased prisoners driving down wages and breaking union strikes. One of the greatest obstacles to ending leasing people in prison was the fact that the state made much profit from it. The practice continued in Alabama and other states and territories until the 1960s when it was finally eradicated. Even then, people who had been subjected to leasing were forced back into state penitentiaries and jails.

Leasing people in prison was only one of many failed schemes intended to make Alabama prisons profitable. In 2021, Alabama spent over $650 million on corrections. Only a small portion of funding was self-generated, and over 83% of correction costs were subsidized by the state (Gorski, 2023). Perhaps, rather than considering the cost of corrections as a short-term expense, it could be considered a long-term investment with a sustainable return.

INVESTING IN A RIGHT TO SELF-DETERMINATION RESULTS IN A SUSTAINABLE RETURN ON INVESTMENT

Other than prison, there is no place that Alabamians would tolerate this treatment of its citizens. Alabamians do not just tolerate the treatment; they invest in it. For all of the discussions around penological goals and self-sustainability, what Alabamians measure is recidivism.

Consider, for example, Derrick Ervin. Ervin served 13 years in an Alabama prison. After release, he returned to his home community, where he now owns and operates a successful business with contracts in 37 states and benefits the community by providing services and creating jobs (Dewees, 2021). His impact as a husband and father is not

measured. Neither his impact on the economy nor his impact on the people he employs is measured to determine the economic impact his reentry has had on the economy. Economic impact, in this instance, is the effect that reentry has on the financial and material well-being of a region and can include quality of life measures.

Were Ervin's personal recidivism to be measured the count would be zero, but what about the positive economic impact he has had and is having on Alabama? How can Alabama taxpayers, or leaders for that matter, know what return they are getting on their prison tax dollar investment? The return on investment (ROI) is a measure of the profitability of an investment both in tangible and intangible value. To know whether or not Alabama's corrections system is profitable, the impact must be measured on a broader scale. Recidivism is not a measure of profit; it only measures cost. The ROI for rehabilitation and successful reentry remains, for the most part, invisible because it is not measured.

Some studies have found that investments in certain programs that address the mental health or substance abuse problems of people in prison may get a ROI of over $5 per taxpayer dollar spent (Executive Office of the President, 2016). The ROI for programs that help people in prison develop marketable skills or trades may be much higher. For Ervin, his recidivism rate is zero. His economic impact is comparatively staggeringly high, we just do not know how high it is because it is not measured.

If Alabamians demand that prisons be self-sufficient, then the return on investment must be accurately measured in its entirety. Simply measuring the societal impact of Derick Ervin, and people like him who are determined to be productive members of society demonstrates that supporting people's right to self-determination is sustainable.

A NEW WAY FORWARD

Segall argued to Judge Johnson that "[w]hen a state denies people their liberty and forces them to live in confined quarters and without self-defense, ... that state assumes a corresponding duty to protect these people from physical and mental harm" (Yackle, 1989, 52-53). The argument held more significance than Judge Johnson acknowledged.

Self-defense is one of the oldest recognized natural rights. It predates the Second Amendment by more than a millennium. It is clearer to conceptualize it as a natural right by considering the pre-government person who cannot rely on the police power of government. Natural rights precede government. Faced with a challenge to their life or liberty, a person had a natural right to protect themselves, even if that meant harming others. The Second Amendment recognized that natural right and extended it to the legal right of securing 'arms' for the ends of self-defense.

Likewise, liberty is a natural right dating back to antiquity. Liberty has been referred to as the chief natural right because all other rights hinge on it. The natural right of self-defense is not limited to protecting one's life. It may also be used to justify force, reasonably, in response to an attempt to violate one's liberty. There is a natural right to forcibly resist another who attempts to violate one's liberty. For example, the natural right of liberty was not created for American slaves by the 13th Amendment. The slave was naturally liberated, always liberated. The 13th Amendment is positive law that freed the slave from the wrongful violation of their natural right of liberty.

The punishment of a crime illustrates how a government may violate natural rights when a government function authorizes the violation. Government may assert, for example, that public safety is a government function and, since punishment for criminal behavior is designed to make the public safe, violations of natural rights to the ends of achieving that government function are authorized because the violation is aligned with the end of that government function (Blankenship, 2023).

Section 36 of the Alabama Constitution provides that those individual rights declared in it "shall forever remain inviolate." "Inviolate" in this context is a misnomer. For example, in addition to the Second Amendment, the Alabama Const, Art. I, Sec. 26(a) provides that "[e]very citizen has a fundamental right to bear arms in defense of himself or herself and the state." The very next sentence of Sec. 26(a) provides that "[a]ny restriction on this right shall be subject to strict scrutiny." The declaration itself anticipates a restriction violating the right. It is not inviolate. People in prison are citizens but their right to "bear arms in defense" may be violated to further legitimate government function, namely safety. However, as Alabama limits the right to bear arms for the person in prison, Segall argued, it assumes a corresponding duty to protect inmates from physical and mental harm.

Segall's positive "right of protection" faced a structural obstacle. The right most reasonably flows from the natural right to self-defense. The challenge with resting a right to protection on the right to self-defense was that many citizens, and by extension many courts, held the opinion that people incarcerated because they had been duly convicted of a crime did not have the rights of a citizen. Instead, their rights were more aligned with that of a slave. When Segall made his argument, both the U.S. Constitution and the Alabama Constitution prohibited slavery except for those duly convicted of a crime (*U.S. Const. Amend. 13*) (*Alabama Const. Art. 1, § 32*). As such, people in prison were not asked to work, they were forced to work.

Although part of the small set of U.S. Supreme Court opinions now viewed as wrongly reasoned or decided, this attitude is illustrated in the U.S. Supreme Court opinion that started when Dred Scott was born around 1799 as a slave in Virginia. After being taken to states where slavery was not legal, Scott sued to be recognized as a free citizen based on the legal theory of "once free, always free." As a citizen, Scott would have certain rights guaranteed by the U.S. Constitution. The U.S. Supreme Court rejected Scott's

arguments and ruled that he was not a citizen, could not become a citizen, and had no rights–not even the right to sue in federal court (*Dred Scott v. Sandford*, 1857).

The *Dred Scott* decision was eventually overturned by the Thirteenth Amendment which ended slavery. However, Dred Scott did not completely close the door on slavery as it permits slavery "as a punishment for crime whereof the party shall have been duly convicted" (*U.S. Const. Amend. 13*). Thus, the attitude persisted that people in prison have no rights and the only limit on how they are treated is that their treatment cannot be cruel and unusual (*U.S. Const. Amend. 8*).

Under the Alabama Constitution, enslaved people in Alabama had no rights and very few legal protections. The law generally prohibited brutal cruelty and death. For example, an overseer named Flanigin whipped a slave named Jacob and beat him with the whip handle. Shortly thereafter, Jacob died. The physician who performed the postmortem stated that the body evidenced stripes and blows inflicted "with great violence," which, altogether, could have caused death. The jury found Flanigin guilty of second-degree murder. On appeal, Judge Collier affirmed the conviction as Flanigin's treatment was brutally cruel (*State v. Flanigin*, 1843).

With this structural obstacle, only the Eighth Amendment protection against cruel and unusual punishment was available for Segall to build a "right of protection." Where the citizen who is not in prison has no positive right of protection, Segall argued, the right arises when the government restricts a citizen's ability to defend themself. As such, the positive right of protection only arose when a person in prison was in imminent threat of or suffered unusual, cruel, or brutally cruel treatment. In 2022, however, when Alabama finally closed the door on Dred Scott, there was a new way forward.

ALABAMA FINALLY CLOSED THE DOOR ON SLAVERY

Alabama's Constitution was amended in 2022 to remove the prohibition on slavery and involuntary servitude as punishment for a crime. The change was approved by voters in a statewide referendum (Swetlik, 2022). The previous language of the Alabama Constitution stated "That no form of slavery shall exist in this state; and there shall not be any involuntary servitude, otherwise than for the punishment of crime, of which the party shall have been duly convicted." The new language of the Alabama Constitution states, "That no form of slavery shall exist in this state; and there shall not be any involuntary servitude" (*Alabama Const. Art. I, § 32*).

The 13th Amendment overturned *Dred Scott* except it continued to authorize Alabama, and states like it, unfettered treatment of people in prison until the treatment crossed the outer limits of unusual, cruel, or brutally cruel. However, once Alabama closed the door on slavery and involuntary servitude, it extended the same rights to all people

whether in prison or not. Now, to violate those rights, Alabama must demonstrate a legitimate government function.

Arguing for a right to rehabilitation based on the Eighth Amendment's prohibition of cruel and unusual punishment posed a more formidable challenge than establishing a basic right to protection for people in prison. People who are duly convicted of a crime and therefore can be classified as slaves do not have rights. We do not have to speculate about how the right to rehabilitation claim based in the Eighth Amendment fared. George Taylor pursued the claim in *Worley James v. Wallace*. There were certainly implications that Alabama intended to rehabilitate people it held in prisons. The officers in charge of them were often given the title of correctional officer, that is an officer charged with correcting something, making it right. Alabama expressly states that one of its functions is rehabilitation and successful reentry.

Even though rehabilitation was mentioned in both state and federal law, no court had grounded a legal right to rehabilitation in the Constitution. Under the Eighth Amendment, “educational, vocational, and other beneficial programs for prisoners could be sought as a remedial right for prison conditions that currently constituted cruel and unusual punishment” (Yackle, 1989, 58) but could not be asserted as a positive right.

Taylor asserted the right to rehabilitation as a positive right that citizens detained for the purposes of rehabilitation were constitutionally entitled. In essence, if people were incarcerated for correction, they must be provided correctional programs and guidance. He also asserted the right to rehabilitation as remediation for violations of the Eighth Amendment in that Alabama had “failed … to eliminate those conditions which make impossible the…rehabilitation…of [prisoners]” (Yackle, 1989, p. 59). Restated, people in prison are entitled to a right to rehabilitation or “they must not allow the conditions of incarceration to obstruct the voluntary and personal initiatives aimed at rehabilitation.” Prisoners have a “right ‘not to be deprived’ of an opportunity to rehabilitate themselves” (Yackle, 1989, p. 61).

Judge Coleman “disparaged the very idea of ‘rehabilitation’ in prison, declaring that prison inmates *did* deteriorate and that ‘no power on earth’ could prevent it” (Yackle, 1989, p. 135). At the time of Coleman’s order, people in Alabama prisons could be treated progressively worse as long as their treatment did not become unusual, cruel, or brutally cruel. Once the door on slavery was closed, once the Constitution of Alabama no longer permits another class of persons without the rights of citizens, Judge Coleman’s finding cuts the other direction. Alabama is only authorized to protect citizens in the enjoyment of life, liberty, and property. Not exerting its general powers to prevent people in prison from deteriorating then is usurpation and oppression (*Alabama Const. Art. I, § 35*) and exceeds the function of government.

Alabama is authorized to violate the rights of people as long as the violation is authorized by a government function, such as penological goals. However, since people in prison

are citizens, prison is a rehabilitative bridge back to society rather than just a place of confinement and punishment. If an emphasis is placed, from the very beginning, on inviting people back into society, it results in fostering the desire to control one's own actions, honing marketable skills, and nurturing a sense of community belonging.

This is not to assert that the function of government is limited to people in prison. The function extends to victims of crime. Instead of focusing only on the people in prison, this view considers the broader harm caused by crime. Consider automobile theft. The person who stole the automobile may be caught and sentenced to prison, but the victim is still without an automobile. Broader rehabilitative efforts seek reconciliation with victims and the broader community affected by the criminal act. While prisons are not always the venues for this reconciliation, they may serve as the starting point for these restorative journeys.

Further, government function extends beyond people in prison and victims to include corrections officers and prison staff, emphasizing the importance of offering alternatives to coercion, violence, and lethal force. This government function may be informed by recognizing that correctional practices not solely focus on punishment. Merely aiming to coerce people in prison to be law-abiding falls short of addressing the root causes of criminal behavior, which often include factors such as substance abuse, mental health, and deficits in education or vocational skills. The government's function extends to equipping people in prison with the necessary tools and support for overcoming these challenges, facilitating their successful reintegration into society as contributing members.

Now that the door is closed on *Dred Scott*, on slavery, the government function may re-focus on people in prison, victims, and the ripple effect they have on families, communities, and the state. What might best accomplish this re-focusing is turning to the Alabama Constitution to find a positive legal right of self-determination for all citizens.

A POSITIVE RIGHT TO SELF-DETERMINATION

At least 85% of all State prisoners will be released at some point (Hughes & Wilson, 2023). In Alabama, they will return to almost every neighborhood. They will stay in a sister's spare bedroom, an outbuilding on their brother's farm, or reentry housing. The Alabama Department of Corrections touts its mission as "[d]edicated professionals providing public safety through the safe and secure confinement, rehabilitation, and successful reentry (*Alabama Dept of Corrections, 2013*). Rehabilitation and successful reentry help to ensure that people in prison are not simply punished for their crimes, but also allowed to become productive members of society.

But rehabilitation is a government function that cannot be forced onto inmates. Alabama can force someone to sit in a classroom, but it cannot make them learn. It can force them to meet with a counselor, but it cannot make them do the interpersonal work necessary to improve. “The question of whether prisoners should derive advantages from the programs designed for their rehabilitation is a topic that stands at the intersection of justice and governance. Simultaneously, it also addresses the state's responsibility in compelling inmates to partake in programs that they may resist. This dilemma becomes especially pertinent when considering methods such as "drug aversion therapy" and various "behavior modification" schemes” (Yackle, 1989, 57). The introduction of these techniques has prompted a reexamination of the principles surrounding coerced rehabilitation and has challenged many proponents of these initiatives to reconsider their positions.

Rejecting Segall’s theory that Alabama had a duty to protect people in prison because it had taken from them, as a condition of confinement, their right to self-defense, Judge Johnson, in part, rejected a positive right to rehabilitation “on the ground that persons convicted of felonies do not acquire by virtue of their conviction a constitutional right to services and benefits unavailable as of right to persons never convicted of criminal offenses” (Yackle, 1989, p. 62). Where this rationale cuts against a positive right of rehabilitation, it supports a positive right of self-determination for all citizens, convicted of crimes or not.

Citizens who are not confined to prison have an individual right to self-determination. Reframing the right constitutionally, it flows from the natural right of liberty. Citizens can freely pursue their economic, social, and cultural interests without interference from the government unless there is a legitimate government basis for the interference. To the degree that Alabama, as a condition of prison confinement, deprives citizens of their right of self-determination, they are entitled to accommodations unless the deprivation serves some penological function. Accommodation would be considered on a case-by-case basis and may be rehabilitative (such as education or vocational training) but is much broader.

Although illustrative, this individual right is something different than the *community* right to self-determination set out in Alabama Const., Art. I, Sec. 2 which provides:

> That all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient.

This principle is re-stated throughout international law as a compelling rule that cannot be excepted or ignored, a *jus cogens* rule: that people, based on respect for the principle of equal rights and fair equality of opportunity, have the right to freely choose their

sovereignty and international political status without interference from a foreign sovereign.

Much like the right to keep and bear arms safeguards the natural rights to life and liberty, rehabilitative resources safeguard the natural right of self-determination for people in prison. In cases where a citizen's liberty is legitimately violated through incarceration or through the conditions of confinement, they possess a constitutional right to the opportunity to self-determine.

SEARCHING THE ALABAMA CONSTITUTION FOR A RIGHT OF SELF-DETERMINATION

The United States Constitution is the supreme law of the land creating a system of limited power. It "establishes a government of enumerated powers, with such being supplemented by implied powers. The state governments are quite the opposite in that such are governments of general powers. Thus, one could properly view one of the primary purposes of a state constitution as placing limitations upon the broad inherent powers of the state government" (Brewer & Cole, 1997, p. iii). Alabama's general powers are the inherent powers to regulate behavior and enforce order within its territory for the betterment of the health, safety, morals, and general welfare of its citizens. General powers are exercised by the legislative and executive branches of Alabama through the enactment and enforcement of laws.

Alabama has the power to compel obedience to these laws through whatever measures it sees fit, provided those measures do not infringe upon any of the rights protected by the United States Constitution or its own Constitution. Otherwise, the limits on unreasonably arbitrary or oppressive state power are the citizen's vote, expression, and protest. Methods of enforcement can include legal sanctions and physical coercion. As a limitation on general powers, Alabama's Constitution establishes the objective of state government in its Declaration of Rights,

> That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression (*Alabama Const. Art. 1, § 35*).

And excepts the Declaration of Rights from general powers,

> That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate (*Alabama Const. Art. 1, § 36*).

Even though these declared rights are expressly stated, when citizens are convicted of a crime, certain rights are legitimately violated to the extent the violation protects citizens in the enjoyment of life, liberty, and property. People in prison, however, do not stop being citizens, and so Alabama's violation of their rights must also align with Alabama's objective of protecting them in the enjoyment of life, liberty, and property. Any actions that are not so aligned are a usurpation and oppression and offend the Alabama Constitution.

The Declaration of Rights in the Alabama Constitution affirms a "right to self-determination" by expressing the nature of the right and establishing protections against the violation of the right. A citizen that is "free" (*Alabama Const. art. I, § 1*) is not under the control of another and is able to act as they determine. A citizen that is "independent" is free from outside control and not dependent on another's authority. Once a person has life, what they choose and how they act in pursuit of happiness is theirs to determine. Alabama's "sole object and only legitimate end" is to protect its citizens as they determine what their life will be, how they will be happy, and how they will create and maintain property (*Alabama Const. Art. I, § 35*). Also, inherent in the right of self-determination is the right to not be happy or not have property or to do nothing. Self-determination is recognized as the right to experience the outcomes and consequences resulting from one's personal decisions.

The right to self-determination is natural in that it exists pre-government. Were a person to find themselves on an island void of the jurisdiction of any government power, that person would have the natural right to make choices to maximize their enjoyment of life, liberty, and to pursue what makes them happy. As they establish property, it is theirs. Were a government to subsequently be established, its power to violate this right to self-determination would extend only to the degree that a government function authorized the violation.

The legal right to self-determination is a cornerstone of the Declaration of Rights in the Alabama Constitution, highlighting the importance of personal freedom and independence to Alabamians. It can be defined as the constitutionally recognized right of an individual to freely make personal decisions regarding their life, liberty, happiness, and property without undue interference or control by the government.

FURTHER DEFINING THE RIGHT TO SELF-DETERMINATION

Edward Deci and Richard Ryan co-created self-determination theory (SDT). Even though SDT is a psychological motivation theory, it is instructive in understanding what a legal right to self-determination is, what government functions are related to it, and what effects it might have on the results of corrections (Ryan & Deci, 2018). SDT is based on the idea that people are motivated by three basic psychological needs: autonomy, competence, and relatedness. Autonomy is the need to feel like people are in control of

their own lives and that their actions are their own. Competence is the need to feel like people are capable of doing things and that they are mastering their environment. Relatedness is the need to feel connected to others and to feel like they belong.

These psychological needs are threaded through the Declaration of Rights of the Alabama Constitution. Declaring that citizens are equally free and independent underscores the principle of autonomy among individuals (Ala. Const. Art I, § 1). This autonomy is further emphasized by protecting citizens right to life, liberty, the pursuit of happiness, and access to courts (Ala. Const. Art I, § 10), alongside the mandate that citizens be compensated for their labor (Ala. Const. Art I, § 32), which collectively affirms citizen competence. The right to assemble (Ala. Const. Art I, § 25) along with right to speak and write amongst each other (Ala. Const. Art I, § 4) supports relatedness, highlighting the importance of social connections among citizens. Relatedness is also protected as citizens worship together (Ala. Const. Art I, Secs. 3, 3.01), hunt, fish, and harvest wildlife together (Ala. Const. Art I, § 36.02). Moreover, Section 35 articulates that the primary role of government is to safeguard the citizens' enjoyment of life, liberty, and property, reinforcing the notion of competence by stating that any deviation from these objectives constitutes usurpation and oppression. These constitutional provisions affirm all three SDT psychological needs: autonomy, competence, and relatedness.

SDT proposes that when people's basic psychological needs are met, they are more likely to be engaged in activities and to experience intrinsic motivation. Intrinsic motivation is the desire to do something because people enjoy it and find it rewarding. Extrinsic motivation, on the other hand, is the desire to do something because people expect to receive an external reward or avoid punishment.

> [T]hose who persist in criminal behavior feel that their lives are largely out of their own hands, controlled instead by correctional and probation officers. ... [D]esisters assumed a full sense of responsibility over their lives and charted out concrete plans for their futures (Petrich, 2020, p. 360).

Both those who persisted in criminal behavior and those who desisted from criminal behavior exercised self-determination.

To Alabamians not confined to prison, SDT has several implications for education, parenting, and the workplace. For example, SDT suggests that teachers and parents create environments that support student and child autonomy, competence, and relatedness. SDT also suggests that employers should create workplaces that promote employee autonomy, competence, and relatedness. This is not a call for anarchy nor an invitation to disregard law and order. It is, however, recognizing that people in prison who determine to choose opportunities to improve themselves not be deprived of those opportunities. Likewise, people in prison who choose not to improve themselves have those opportunities as well.

Ronald McKeithen was found guilty of first-degree robbery. After some time in prison, he fashioned a birthday card for his grandmother by drawing on a piece of scrap cardboard and mailing it to her. Impressed with how good it looked, she wrote Ronald back and encouraged him to keep drawing. Growing up, Ronald's school did not have art supplies. There were no art supplies in his home. Encouraged by his grandmother's affirming words, Ronald took the occasional art class offered in prison, saved art supplies, and bartered with other prisoners for their leftover art supplies. Ronald continued to draw cards for his grandmother. Eventually, he added writing and painting (McKeithen, 2023). Ronald now lives in Birmingham, where he works as the Re-entry Coordinator and Advocate at Alabama Appleseed. Both Ed Mason and Ronald McKeithen were provided materials in prison. Ed Mason was provided the materials for a chair for execution, and he made one. Ronald was provided materials for art, and the art he made has been displayed in exhibitions, businesses, and homes where it communicates a recurring theme of mother and child, family and community–the essence of life. The economic impact he has on his community is measurable. Ronald's impact on society is immeasurable.

Beyond life, liberty, and happiness, the right to self-determination is a constitutionally recognized positive right of people to freely make personal decisions and efforts to determine their autonomy, competence, and relatedness without undue interference or control by the government. When there is a legitimate government function to violate the right, the violation should not deprive people of opportunities to better themselves. As such, there is a constitutionally required function for Alabama to support people in prison in their determination to reintegrate into and contribute to society to the degree Alabama has violated their right of self-determination.

A BLUEPRINT FOR A WAY FORWARD

To address the continuing challenges facing Alabama prisons, Governor Kay Ivey established The Governor's Study Group on Criminal Justice Policy (the "Study") which began meeting in July 2019. Justice Champ Lyons, Jr., who chaired the group delivered the Study's recommendations to Governor Kay Ivey on January 30, 2020. The recommendations suggested a shift in prison policy away from seeing people in prison as slaves and toward seeing them as autonomous human beings who have the right to determine, to the greatest degree practical, their own future. In seven instances, the recommendations support a right to self-determination.

- **Expand Mental Health Services** for people who struggle with mental health issues and who are vastly overrepresented in Alabama's county jail population (17% compared to 5% of the general population). Since traditional forms of punishment are less likely to be effective with this population, research suggests that it is more effective to connect these arrestees with appropriate mental health services to

address the underlying cause of their criminal behavior (Lyons, Jr., 2020). This recommendation is aligned with self-determination in that it requires early assessment to determine potential treatment options. Then dedicated case managers would work directly within county jails, offering assistance to people after arrest who grapple with mental illness. The case manager's primary objective would be to guide these individuals toward the right mental health services, ultimately reducing the likelihood of them being re-arrested (ISTC, 2023).

- **Expand in-custody educational programs** like those currently provided by J.F. Ingram State Technical College (ISTC) which offers a range of educational and career-oriented programs, along with critical soft skills training, exclusively to people within the Alabama corrections system (Lyons, Jr., 2020). ISTC plays a pivotal role in bridging the employment gap in the state by offering technical training across 20 different career fields. Additionally, ISTC provides adult education and comprehensive GED preparation, ensuring that inmates are well-prepared to succeed in today's dynamic workforce. Provided that students have autonomy in their course of study, this recommendation is aligned with self-determination in that it expands student choices to become more competent and connected to others. Further, this recommendation is a prime opportunity to study the economic impact of rehabilitation efforts. Research suggests that investing in correctional education reduces reincarceration costs. The return on investment, however, is better measured by the broader economic impact made by people who contribute to their communities after release. People who complete college courses, for example, are eligible for higher-paying jobs compared to people without a college education (Davis et al., 2014, p. 18).
- **Provide identification documents** to people before they are released from prison such as a non-driver photo identification card. This recommendation is aligned with self-determination in that it removes a barrier to successful reintegration into society — and thereby increases the likelihood that they will become productive, law-abiding citizens (Lyons, Jr., 2020).
- **Expand pre-release supervision** by releasing inmates nearing the end of their sentence to help them adjust to life outside prison while being supervised. The expansion would reduce the likelihood of recidivism and thereby promote public safety (Lyons, Jr., 2020). This recommendation is aligned with self-determination as it facilitates a transition to independent, autonomous living.
- **Expand hours for parole officers** to provide greater access on nights and weekends. Many parolees work jobs that have schedules that are not flexible due to specific working hours and other requirements. But those job requirements often make it more difficult for a parolee to check in with their parole officer as required to avoid going back to jail or prison. These parolees find themselves in a catch-22: They are trying to better themselves and society by working; but by working, they are more likely to break the terms of their parole. Expanding parole officer access resolves the catch-22 (Lyons, Jr., 2020). This expansion is aligned with self-determination as it

broadens employment opportunities for parolees while reducing the anxiety around parole revocation and actual recidivism with the potential of enhancing competence, autonomy, and relatedness.

- **Redesignate existing executive-level leadership positions** to be responsible for inmate or parolee rehabilitation. These newly redesignated executive-level roles would be specifically charged by state law with responsibility for the development, implementation, and improvement of programs to reduce recidivism (Lyons, Jr., 2020). This redesignation is aligned with self-determination as the needs of people in prison to self-determine are based on a case-by-case analysis and in a constant state of flux.
- **Further study of community corrections** such as alternative courts (drug courts, veterans courts, etc.) and the pretrial diversion programs administered by district attorneys' offices and municipal governments. Several alternative courts and diversion programs across Alabama work extremely well and help divert people from further illegal activity. But in many places, these programs are unavailable, underfunded, or simply inaccessible. These programs hold enormous potential for the State because they guide low-level offenders into programs that address underlying factors that often results in criminal activity—substance abuse, lack of educational attainment, and lack of employment (Lyons, Jr., 2020). Community corrections aligns with self-determination as it offers opportunities to determine for themselves whether to participate in programming that benefits autonomy, competence, and relatedness.

HOPE FOR ALABAMA TO DETERMINE A WAY FORWARD

A system in which people in prison become more violent in prison and then commit new crimes upon release from prison only to return to prison is not sustainable (Lyons, Jr., 2020). Excepting some motivations like mental illness and developmental disabilities, a criminal act is self-determined. It is a choice followed by a criminal act. People are active agents in their own lives. Self-determination theory is a useful perspective for understanding how people's ability to make choices can be either encouraged or discouraged through the ideas that (a) people perform better and act more independently when they are motivated by their own desires (intrinsic motivation); (b) intrinsic motivation is more likely when individuals have their basic psychological needs met, including feelings of competence (like self-confidence), relatedness, and autonomy; and (c) environmental conditions can either support or hinder the fulfillment of these needs (Petrich, 2020, p. 354). In simpler terms, SDT suggests that when individuals feel motivated by their own desires, they tend to perform better. The environment can encourage confidence, connection to others, and freedom to make positive choices.

To the contrary, when the conditions of prison confinement force action through coercive language, punishments/rewards, surveillance, or pressuring evaluations and deadlines; uses shame or rejection; or makes people feel incompetent in an overly challenging or chaotic environment it leads to maladaptive outcomes (Petrich, 2020, p. 356). Is it possible that the conditions of confinement in Alabama prisons cause or contribute directly to recidivism because "those who persist in criminal behavior feel that their lives are largely out of their own hands, controlled instead by correctional and probation officers" (Petrich, 2020, 360)? Expanding choices for people in prison expands their options to self-determine to desist from crime and become productive citizens and neighbors.

The Study heard, time and again, how important the idea of "hope" is to people in prison (Lyons, Jr., 2020). Self-determined people, that is, people who assume a full sense of responsibility over their lives and chart out concrete plans for their future are more likely to desist from offending again (Petrich, 2020, p. 360). To that end, they recommended that, in conjunction with increased educational and technical training opportunities, the idea of enhanced early release incentives be provided to those who successfully participate in educational programming. The Study believed this program could give hope to people, which could positively affect their mental health and decrease the likelihood of their involvement in violent incidents and illegal activity while incarcerated so that they can go on to live productive lives outside of prison walls (Lyons, Jr., 2020).

Alabama's struggle with prison reform serves as a reminder that the lessons of the past can guide its path forward. It's an opportunity to learn from history and ensure that the mistakes of the 1800s, 1900s, and 2000s are not repeated. This resolution will be over months rather than days. What can be done immediately, however, is to shift the goal of prison from punishment to encouraging the Alabama citizens in its prisons not just to desist from further crime but to join other Alabamians who want to paint a better future.

KEY TERMS

Civil Rights Act of 1871 – attaches personal responsibility to anyone acting on behalf of a state to violate the constitutional rights of another.

Convict Leasing – forced labor that provided people in prison to private parties and companies for profit.

Deterrence – the action of discouraging people from breaking the law through instilling fear of the consequences.

***Jus Cogens* Rule** – a compelling rule which cannot be excepted or ignored and usually prohibits egregious conduct, such as crimes against humanity, genocide, slavery, and human trafficking.

Penal – relating to, used for, or prescribing the punishment of people who break the law.

Recidivism – the tendency of a person who has been convicted of breaking the law to break the law again.

Retribution – to punish people for committing crimes and make them pay for committing crimes.

Right to Self-Determination – control over one's own life (autonomy), mastery of one's own environment (competence), and connection to others (relatedness) that should not infringed unless explicitly authorized by a government function.

Right to Rehabilitation – a legal requirement that sentencing and correctional policies be compatible with rehabilitative prison conditions. American courts have not acknowledged a positive Federal right to rehabilitation, but they have recognized it in a negative way as the right to counteract the deteriorating effects of imprisonment.

DISCUSSION QUESTIONS

1. How would you compare Alabama's prison system to other states?

2. How would you characterize the series of court case decisions' effects on the prison system in Alabama?

3. Why is it important to understand recidivism and understand that former prisoners can also have a positive effect on their communities?

4. What are the author's recommendations for a more equitable and just prison system?

5. Is prison reform likely to pass in the Alabama state legislature? What are the political obstacles that make prison reform unlikely?

6. Why is the court system the most likely avenue for seeking reform in the courts? Is using the courts for relief (justice) the only avenue for reform? Why is that a good strategy? Why is it a bad strategy?

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NOTES

1. In this narrative, this place is Alabama prisons. Citizen caretakers are correctional officers who care for people in prison. Citizens are the people in prison, and the facts are based on an amalgamation of investigations of Alabama prisons by the U.S. Department of Justice.
2. The Department of Justice reports were summarized at the beginning of this chapter.

5

Political Indifference and the Withering of Democracy in Alabama

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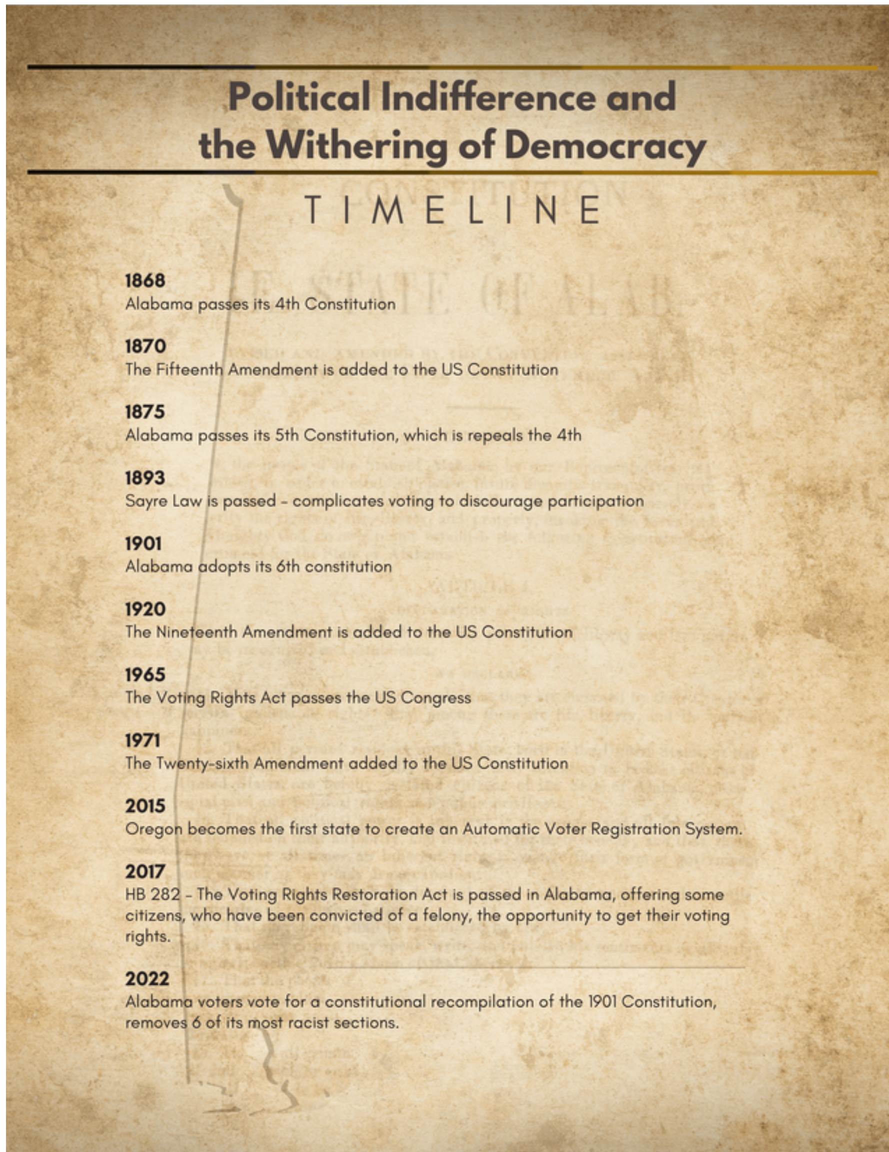
Abstract

Alabama's 1901 Constitution was drafted to codify white supremacy by removing African Americans from the voter rolls. Alabama did not invent voter suppression, nor does it have a monopoly on policies that deny African Americans, minorities, and poor people the right to vote. This chapter provides examples of how and to what effect disenfranchisement has been used in Alabama and other communities throughout the United States. This chapter also chronicles Alabama's unique constitutional feature that centralizes policymaking in the capitol – further suppressing democracy at the local level to the advantage of affluent interest groups entrenched in Montgomery. Consolidating policymaking at the Capitol has fostered antipathy and disaffection among Alabamians. Further, the voice of the few over the voice of the many has become a feature in contemporary American politics, as states gerrymander their legislative districts, creating legislative bodies that are not representative of the broader public. The framers of Alabama's 1901 Constitution created an enduring document whose spirit lives on – despite the 2022 recompilation. The Alabama Constitution has cultivated a political culture where voters are skeptical of substantive constitutional reform because Alabamians have learned that the state government should not be trusted and does not deserve more power.



Dates covered in this chapter

INTRODUCTION

Developed after the Civil War, Alabama's 1868 constitution was drafted by a biracial convention and was devoted to raising additional revenue, providing universal education, expanding state services, enlarging the size and scope of state government, and encouraging business and industry (Flynt, 2001, p. 67). This constitution, Alabama's fourth, did not mention legal segregation, did not provide separate schools for white and Black Alabamians, and did not prohibit interracial marriage. It also expanded the

franchise to include Black men. The Radical Republicans' ambitions for effective governance in Alabama were short-lived, and their most relevant accomplishment was that they united their adversaries – the conservative Democrats (Fitzgerald, 1988). As federal Reconstruction ended, the support for the 1868 constitution waned along with the power of the Radical Republicans. Alabama's "native whites" begrudged the 1868 constitution as an imposition that was forced on them by federal Reconstruction policies (Stewart, 2011). Once the commitment to federal Reconstruction had subsided, Alabama's white elites mobilized to prevent their opponents from ever governing the state (Stewart, 2011, p. 10). By 1875, Alabama had a new constitution, which served as the first step toward codifying white supremacy in the state. The 1875 Constitution "was a reactionary document designed to overcome what whites perceived as the excesses of radical Republicans" (Flynt, 2001, p. 68). It was the polar opposite of the progressive 1868 constitution. It reduced the size of government and services it provided, lowered taxes, and constrained the political power of African Americans (p. 68). Although the 1875 framers were adamant about institutionalizing white supremacy, they withheld from disenfranchising Black voters so soon after the passage of the Fifteenth Amendment (ratified in 1870). They were concerned that doing so would invite federal action, which Alabama's ruling class wanted to avoid (Jackson, 2002). To accomplish that task, Alabama's ruling class held yet another constitutional convention and passed yet another constitution that attempted to rid the voter rolls of poor and Black Alabamians altogether.

Voting is the most common form of political participation (Aldrich, 1993). It is the mechanism that allows people to hold lawmakers and the government accountable. Citizens can choose to vote if the expected benefits of voting are greater than the expected costs; otherwise, they choose not to participate (Blais, 2000). Voting can be considered an exchange (Riker & Ordeshook, 1968). If citizens decide to vote, they can vote for candidates who promise to pass laws that benefit voters personally, such as cutting taxes or protecting programs that make up the social safety net, like Social Security, Medicaid, and Medicare. Citizens also vote as a form of political expression – as partisans or as responsible citizens who vote out of a sense of duty (Fiorina, 1976). Additionally, voting has systemic benefits, as democracy legitimizes government actions (Buchanan, 2002). Mass participation provides the legitimacy the government needs to do what it is supposed to do – provide safety and security, regulate commerce, and collect the taxes that pay for the services that voters demand. In the United States, the authority of the government to make laws is derived from "the people" – at least in theory. It is within this context that meaningful representative democracy can exist. In 1901, the economic and political elites in Alabama understood that their grip on power depended on the electorate's makeup. If the legitimacy of the governing regime rested on the outcome of elections, they sought to redefine the terms of who could cast ballots and vote in the state. They crafted a constitution that excluded voters they thought unlikely to vote for them. They did this to guarantee their enduring electoral success at the cost of meaningful democracy.

The promise of American democracy is that government will be accountable to the people. However, democracy in practice in the United States is more consistent with Alabama's – a system defined by those in power rewriting laws and redesigning and reforming institutions to prolong their hold on power. This chapter argues that Alabama's 1901 Constitution has fostered a culture of non-participation in Alabama. Passive citizenship cultivated by the 1901 Constitution is an extension of its anemic capacity to govern. The 1901 Constitution has reinforced voter cynicism and distrust of governing institutions in the electorate. Today, Alabama voters have little confidence in Alabama's government, and calls for substantive constitutional reform fall on deaf ears. Voters have little faith that reformers and policymakers in the state could be trusted with *more* power. To make this argument, I offer some background on the lead-up to the 1901 constitutional convention and provide a broader context by illustrating how the ruling classes in other states and cities have sought to undermine democracy. With growing concern over the current global erosion of democracies, it is all the more relevant to reflect on previous efforts to subvert democracy in the United States.

THE POPULIST REVOLT AND THE CALL FOR CONSTITUTIONAL REFORM IN 1901

The U.S. Constitution leaves questions of voting to the states. Amendments to the Constitution expanded the franchise by prohibiting states from denying the right to vote based on race (Fifteenth Amendment ratified in 1870) and sex (Nineteenth Amendment ratified in 1920). The Twenty-sixth Amendment extended the right to vote to eighteen-year-old citizens in 1971. However, there was little political will to enforce the Fifteenth Amendment, and for the next century, many states systematically denied African Americans the right to vote. It was not until the passage of the Voting Rights Act of 1965 that the federal government appropriated resources and enforcement mechanisms to protect voting rights for African Americans.

Alabama has had seven constitutions. The 1875 constitution, its fifth, was designed to undo the 1868 constitution and limit government by placing caps on state and local property tax, segregating schools, and prohibiting "the state from loaning money or extending credit to internal improvements" (Flynt, 2004, p. 5). Only the fear of federal intervention prevented the 1875 framers from explicitly disenfranchising Black voters. The near electoral success of a coalition comprised of poor white and Black farmers in 1890s Alabama set the stage for adopting the 1901 Constitution (Webb, 2002). Alabama's coalition of poor farmers campaigned on populist policies that sought better prices for cotton and other goods they produced. They wanted reasonable terms for credit to ease the burden on farmers and more government regulation of monopolistic corporations like banks and railroads. Proposed reforms were a threat to the powerful men who dominated the state's economic and political system – merchants, landlords, plantation owners, directors of railroads, corporate lawyers, and leaders of Alabama's

growing iron and steel industry (Webb, 2002, p. 5). These moneyed interests are often referred to as the Big Mules, or Bourbons, and they dominated the Alabama Democratic Party. The Populist Party, which had emerged from the Farmers Alliance, had an egalitarian philosophy:

> The principle of "equal rights for all and special privilege to none" ... Protection against elites' privileges lay in the ballot box, and "campaigned for the abolition of all property qualifications for voting and officeholding" (Webb, 2002, p. 9).

The populist reformers' efforts came close to fruition in the 1892 state election – too close for Alabama's establishment politicians. The short-run solution was to pass new legislation that made it more difficult for African Americans and poor whites to vote. The Bourbons

> gerrymandered town limits to reduce the number of enfranchised Black voters; they made state and local offices appointive rather than elective, especially in areas of majority Black population; they complicated election laws (the 1893 Sayre Election Law arranged candidates on the ballot alphabetically under the office they ran for without listing party, required voters to produce a certificate of identity, and only registered new voters during May) (Flynt, 2004, p. 5).

In 1901, the *Mobile Register* quoted a leading state senator saying that the Sayre Election Law was "the best and cheapest method of swindling that the white people have ever devised for the maintenance of white supremacy" (Webb, 2002, p. 19).

Instead of changing their platform and policies to appeal to a broader constituency, the Bourbons changed the rules by making voting more difficult. To solve the problem of competitive elections, the ruling party pursued a new constitution that made it easier for Alabama's Democratic Party to neutralize political threats. They wanted to win elections, keep the government small, and centralize their hold on power. The 1901 framers first sought to remove African Americans from Alabama politics (Stewart, 2016). The Alabama Democratic Campaign Committee 1 urged party members to ratify the new constitution with the motto "White Supremacy, Honest Elections, and the New Constitution, One and Inseparable" (Flynt, 2002, p. 36). The convention's presidential address was clear as to what the agenda for the new constitution should be:

> ...to establish white supremacy in this State. This is *our* problem, and we should be permitted to deal with it, unobstructed by outside influences. But if we would have white supremacy, we must establish it by law—not by force or fraud.
>
> -John B. Knox, President of the 1901 Alabama Constitutional Convention

The 1901 Constitution reshaped the electorate by adding institutional barriers to voting, including poll taxes, literacy tests, disqualifications for "*idiocy*, insanity," criminal convictions, and property and residency requirements. These measures

disenfranchised a broad swath of poor Alabama voters, Black and white. An additional push for disenfranchisement came from the Constitution's oddly precise language in the registration of voters. In the Jim Crow Era, it was extremely tedious to register to vote in Alabama. "Those who wished to sign up had to take a twenty-page test on the US and Alabama constitutions and the structure of state and local government" (Stewart, 2016, p. 140). But the Alabama Constitution also offered voter registrars broad discretion in terms of who they could allow to vote. For instance, the Grandfather Clause allowed someone to vote if their grandfather voted, and provisions like the "fighting" Grandfather Clause allowed a person to qualify to vote automatically if their grandfather was a Civil War or War of 1812 veteran. The poll tax also prohibited voting for many Alabamians. The poll tax was $1.50 a year and would accumulate in cost if not paid yearly; it would be double the next year, and so on. Literacy tests were also used to keep citizens from exercising their right to vote and were seen as a means of producing a competent electorate (Rodriguez, 2008). In practice, literacy tests were strictly enforced against Black registrants who would fail "for misspellings and the like" (Rodriguez, 2008, p. 1143). Literacy and poll taxes were important tools in the disenfranchisement of voters. The 1901 Alabama Constitution allowed county voter registrars the ability to use these tools to keep Black and poor Alabamians from voting. The new Constitution's effects on the electorate were almost immediate. It had a crippling effect on participation.

TABLE 1: EFFECTS OF THE 1901 CONSTITUTION ON VOTING

	Voters in 1900, under the 1875 Constitution	Voters in 1903, under the 1901 Constitution
African Americans	~181,000	2,890
Black Belt African Americans (southern Alabama)	79,311	1,081
Whites	232,800	191,500
Gubernatorial election turnout	155,300 in 1900	94,700 in 1906

Source: Flynt (2002, 2004)

In sum, the framers of the 1901 Constitution understood the threat posed by the coalition of poor white and Black farmers to the Alabama Democratic Party's control of the government in the 1890s. The populist coalition demanded public investment in roads and other methods of getting their products to market; they wanted to renegotiate bank debts and expand "the power of government to enlarge opportunities for ordinary citizens" (Flynt, 2004, p. 6). After the populists lost in a tumultuous and violent election in 1892 (Webb, 2002), the economic and political elites saw constitutional reform as a means of controlling who voted, who was elected, and what

laws were passed by the state government (Jackson, 2002). The framers understood that controlling access to the ballot box was important in reaffirming control over who gets what, when, and how (Laswell, 1950). Their intuition on the importance of this power was not wrong. Research has shown a marked difference in policy preferences between poor, people of color, who tend to vote less regularly, and people of means – who tend to regularly vote (Hajnal & Trounstine, 2013, p. 63). Poor people and minorities favor redistributive policies, including public housing, health care, education, and other social services. “Whites and the middle class are especially concerned about attracting business and other aspects of development, reducing taxes, and improving their quality of life through better parks and recreation and easier transportation” (Hajnal & Trounstine, 2013, pp. 63-64). In an analysis of voter turnout in local elections, Hajnal and Trounstine (2013) found that lower voter turnout affected how those cities allocated their funds. Local elections with low turnout resulted in less spending on redistributive policies and more spending on parks, police protection, lower taxes, and less government debt.

WHO VOTES MATTERS: STATE POLICIES CAN PROMOTE OR UNDERMINE ELECTORAL PARTICIPATION

Elections are mechanisms for democratic accountability. Elections allow ordinary people to hold lawmakers accountable and thereby control the direction of government. Political science research has documented that elected officials have several priorities, the first of which is reelection (Mayhew, 1974). Elected officials are responsive to voter demands because they want to get elected to office, then they want to get reelected. Political scientists have also established that “politicians are under no compulsion to pay much heed to classes and groups of citizens that do not vote" (Key, 1984, p. 99). The desire of economic and political elites to stay in power is not unique to Alabama. In a federal government, where states are semi-autonomous, states implement policies that shape the electorate. The U.S. Constitution provides that citizens over 18 can vote regardless of race or sex and prohibits poll taxes. Aside from those individual protections in the U.S. Constitution’s Amendments, state governments can institute measures that can simplify and make it easier to vote, thus increasing turnout. Likewise, state governments can also institute barriers that can make voting less convenient. In 1901, Alabama’s ruling class sought to limit democracy by making it more difficult for Black and poor people to vote. Alabama was not the first to use voter suppression measures – nor was it the last.

One method used by Alabama’s 1901 framers was the disenfranchisement of felons, a practice that dates back to Ancient Greece and Rome (Manza & Uggen, 2004). People convicted of felonies, despite having paid their debt to society, are barred from voting in many states. Fourteen states deny the right to vote to inmates, parolees, and some or all ex-felons. “In some states, 15 percent of adult African American men were

disfranchised" (Keyssar, 2013, p. 41) because of African Americans' overrepresentation behind bars. States with a larger proportion of non-white prison population were more likely to have policies for the disenfranchisement of felons (Manza & Uggen, 2004, p. 493). The partisan and ideological dimension of felon disenfranchisement falls into a predictable pattern. Since prisoners are disproportionately from working-class backgrounds, Black and/or Latino, it is assumed that former prisoners will vote for the liberal or Democratic Party (Uggen & Manza, 2002). Conservatives, "reluctant to support legislation that could hurt their own electoral fortunes" (Keyssar, 2013, p. 42), are not typically supportive of extending the franchise to people who have served time in prison (Yoshinaka & Grose, 2005). Likewise, the 1901 Alabama Constitution disqualifies people who commit "crimes of moral turpitude" from voting. The ACLU of Alabama estimates that in 2017, approximately 250,000 Alabamians were disenfranchised because they had a felony conviction. That is, those convicted of any felony lost their right to vote in Alabama, as all felonies were considered crimes of moral turpitude. A 2017 Alabama law, HB282, provides a list of specific felonies 2 that define "crimes of moral turpitude." This specification allows for the restoration of voting rights to many who have felony convictions for crimes such as theft of property, burglary, and robbery. 3 There are no current figures of how many people who have served time for a felony conviction are now voters because of this law, and the process to restore voting rights requires applicants to file for a Certificate of Eligibility to Register to Vote (CERV) with the Alabama Bureau of Pardons and Paroles.

The United States stands out as being less voter-friendly when compared to other Western democracies (Theiss-Morse & Wagner, 2023, p. 74). In 2023, most states required that voters register, making voting in the U.S. a two-step process by which "the burden of registration is on the individual" (Theiss-Morse & Wagner, 2023, p. 74). According to the National Conference of State Legislatures (2023), 22 states "have implemented same-day registration, which allows any qualified resident of the state to register to vote and cast a ballot at the same time." And "since Oregon became the first state to create an Automatic Voter Registration (AVR) system in 2015, there are now more than a dozen states that register people to vote when they interact with the Department of Motor Vehicles, or in some cases other agencies" (Smith & Greenblatt, 2020, p. 107). Alabama voters, on the other hand, must register 15 days before the election in which they intend to vote. Research indicates that same-day registration "increases turnout among individuals aged 18-24 (an effect between 3.1 and 7.3 percentage points)" (Grumbach & Hill, 2022, p. 405).

Voter identification laws have also become popular among state lawmakers who claim that the policies are needed to protect the ballot box from fraud. Research indicates, though, that such fraud is rare, and when it does occur, it is minuscule and inconsequential (Keyssar, 2013). Opponents of Voter ID laws claim that the laws are passed as a means to suppress the turnout of the poor and people of color. Democratic Party officials strongly oppose strict photo ID laws (Highton, 2017, p. 150), and the

rhetoric of state-level Republican lawmakers gives credence to the claims that they are trying to suppress turnout and deliver an electorate that is more likely to vote for Republican candidates (e.g., Blake, 2021; Wines, 2016). While some studies have concluded that these policies "are partisan tools, designed with the marginalized fringe of the Democratic party in mind, to shape the electorate primarily in favor of state Republican legislatures facing competitive elections" (Barreto et al., 2019, p. 246), others have argued that these laws are more benign and that Voter ID does not affect aggregate voter turnout (Mycoff et al., 2009; Grimer et al., 2018). One explanation of this null effect may be that groups that oppose Voter ID laws effectively mobilize voters to obtain acceptable forms of identification and, in the process, intensify their get-out-the-vote efforts. Nonetheless, evidence indicates that Voter ID laws disproportionately affect minorities and alter the makeup of the voting population (Kuk et al., 2022, p. 132), with other studies finding that whites were more likely to possess a valid form of ID than people from different racial groups (Barreto, 2019). The null effect conclusion fails to consider that the resources spent by pro-participation advocates can be otherwise spent on other efforts.

Alabama's history is not unusual. It is one that is shared with many other states, where those with economic and political power seek to create a system that protects their dominance by preserving the status quo. They crafted rules that limited the scope of government. They locked in low taxes, and they limited democracy so that poor and people of color would not vote and thus not have a voice in who governs them. These types of policies are not limited to states or the Deep South. Throughout the United States, local governments have pursued similar strategies. For instance, economic and political elites in Austin, Dallas, Galveston, San Antonio, San Jose, San Diego, Albuquerque, and Phoenix pursued policies similar to those of the Alabama 1901 Constitution's framers. Policymakers in these cities redesigned institutions to promote growth, keep taxes low, and undermine their political opposition, all while using the rhetoric of good government through non-partisanship and professional administration (Bridges, 1997). Elites in these cities pursued policies that stimulated industry growth in their cities. They kept taxes low to cater to middle-class and affluent voters while excluding poor people of color from civic life (Bridges, 1997). The governing institutions in these cities were heavily influenced by property developers who chose city boundaries that captured affluent white voters. The ruling coalitions insulated municipal government from the demands of poor residents by creating voting districts that diluted the voices of poor people in local elections and ensured their concerns about unacceptable municipal services went unheeded. When elites included poor residents in the city's governance, elites opted to change the structure of elections and adopted at-large elections, which diluted the voices of poor and minority residents. In at-large election systems, "if there are five city council seats, each seat is elected separately by all voters in the city" (Donavan et al., 2010, p. 67). At-large elections were sold as 'good government' reform, in part for their ability to get working-class whites, Blacks, and socialists off of the city councils (Donovan et al., 2010, p. 63). District elections, on the

other hand, divide the city into regions that can take race, partisanship, and geography into consideration. Most cities have areas of town that have a concentration of poor, affluent, mostly Black, mostly Asian, or Latino residents. District elections give candidates from minority communities a better chance of getting elected to office (Donovan et al., 2010, pp. 63-64).

Policymakers in these cities also adopted nonpartisan elections. At face value, the move to nonpartisan elections seems wholesome. Lawmakers representing affluent interests argued that nonpartisan elections took the politics out of local government. After all, there is not a Republican or Democratic way of fixing a pothole in a street or collecting the trash. But political party labels serve as invaluable shorthand for voters. A candidate's party affiliation allows voters to make informed decisions with limited or no information about the individual candidate on the ballot. Non-partisan elections require voters to possess a level of information about the candidates that many people do not have. The time required to make an informed choice ultimately discourages people from voting (Schaffner et al., 2001). To further obfuscate accountability, policymakers in cities adopted and promoted professional city management and the council-manager form of government. That is, "by weakening the powers of the mayor and shifting more power into the hands of an unelected city manager, this structural change may have reduced the direct influence of voters and decreased the incentive for local residents to vote" (Hajnal & Lewis, 2003, p. 647). Undemocratic reforms at the municipal level was not limited to the South and Southwest. The Great Migration of Black Americans out of Jim Crow states "led Northern cities to switch to city manager systems" (Grumbach et al., 2023, p. 1). City elites reacted to the influx of Black Americans in their cities by insulating policymaking from increasingly diverse electorates (Grumbach et al., 2023).

Institutional structures can be used to undermine political participation. Policymakers throughout the United States instituted measures that increase the costs of voting to reduce turnout. As discussed, lawmakers have kept those convicted of felonies from exercising the right to vote despite serving their debt to society. Many states require citizens to register to vote, which makes voting a two-step process, and voters must re-register if they change residences. States have also passed Voter ID laws that mandate that voters present forms of identification to vote. Cities throughout the United States have utilized similar strategies to limit the participation of voters that might compel municipal governments to spend money on programs inconsistent with the pro-growth, low-tax agenda that affluent developers and business owners support. Many cities adopted at-large, non-partisan elections, and the council-manager form of government to insulate institutions from voters' demands. The policies adopted by elites in municipal governments and by legislators who sought policies that increased the costs of voting were analogous to those adopted by the drafters of Alabama's 1901 Constitution. Like the legislators that passed the Sayre Election Laws (1893), which were designed to suppress the turnout of poor people and people of color in Alabama, policymakers,

generally, have understood that the makeup of the electorate is an important determinant of the outcome of elections, which go on to determine the government's priorities.

ANEMIC ALABAMA GOVERNMENT AND ITS EFFECT ON ITS CITIZENS

In addition to limiting access to the ballot, Alabama's 1901 Constitution also centralized power in Montgomery and limited the state government's capacity to solve problems at the local level. The white supremacists that drafted the 1901 Constitution knew that if majority Black counties allowed Black Alabamians to vote, they would control local political institutions. To ensure that Black residents would not be able to govern their communities, the 1901 Constitution gave the state legislature "vast authority over local matters, rather than allowing local governments to make decisions on purely local issues... This allowed legislators to impose unsought and undesired decisions on local governments" (Stewart, 2016, p. 76). By centralizing policymaking in Montgomery, economic and political elites exerted control over local matters without being present in any of Alabama's sixty-seven counties. This continuing feature compels local leaders to have a good working relationship with their state legislators. "Alabama has been identified as one of two states with county governments that lack substantial home rule and are therefore dependent on advance state legislative approval for many county initiatives" (Stewart, 2016, p. 160). The 1901 Constitution outlines in detail what local governments cannot do (Sumners, 2002, p. 70). Because of this provision, minor policy changes in city and county governments require amendments to the state constitution. Prior to the 2022 recompilation, the Alabama Constitution had been amended over 977 times. In 2002, one analysis found that approximately 75% of the amendments in the Alabama Constitution applied to only one county (Sumners, 2002, p. 76). The 2022 recompilation did little to change this problem, as the local amendments have been resorted into the "new" constitution by county and topic. The 2022 recompilation did not address the fundamental issues associated with the 1901 Constitution but did remove the most racist, defunct parts and reorganized it into a more navigable document. Alabama's constitution is still three times longer than the next longest state constitution (Swetlik, 2022)

The 1901 Constitution also limited taxation for the general welfare and prohibited state aid for internal improvements (Jackson, 2002, p. 17). The 1901 Constitution's taxing provisions, notably its restriction on property taxes, established a state government incapable of addressing the state's needs. The Alabama state government continues to have problems raising the capital needed for roads, public education, aid to the poor, and healthcare. The underperformance of state services fosters a political culture of distrust and cynicism among Alabama voters. The legacy of institutions designed to protect the power of the affluent has ultimately created a traditionalistic political culture

(Elazar, 1984). "States with traditionalistic cultures seek to preserve the status quo and maintain benefits of the politically powerful, or wealthy elite" (Rinfret et al., 2023, p. 68). Traditionalistic states tend to have depressed turnout in elections, as voters have "tuned out," a result of the belief that elections are a foregone conclusion. That definition describes Alabama voters conditioned to stay away from the polls as one vote does not seem to matter. Voter disengagement is all the more concerning as research has shown that disaffected, dissatisfied citizens will withdraw and stop participating altogether – putting democracy in peril (Lerman, 2019).

In sum, the controversy over voting rights, controlling who can and cannot vote, is a story about tensions between haves and have-nots. In Alabama and various communities throughout the United States, economic and political elites redesigned political institutions to protect and preserve their privilege from the electoral challenges of poor people of color. Research has demonstrated that socioeconomic status, education and wealth, are correlated with participation rates. Affluent and well-educated people are more likely to vote when compared to poor, less-educated people (Theiss-Morse & Wagner, 2023). Typically, Black, Latino, and young voters are less likely to turn out when compared to older white voters (Theiss-Morse & Wagner, 2023). Research indicates that increasing the cost of voting through institutional barriers will decrease turnout among disadvantaged groups (Juelich & Coll, 2020).

Making politics more inclusive, participatory, and democratic is one of the advances made in American politics. But the values of democracy are constantly challenged by those who are threatened by the changing electorate. A more inclusive electorate means diversity in terms of ethnicities and race, in the values of new constituencies, and of the priorities new groups might set for government. An inclusive electorate might translate into new policies and new taxes. History illustrates how the economic and political elite have used the political system and government for their interests. Alabama is not an outlier, as other states and communities have sought institutional structures that insulate government from voters' demands. They have changed the rules of institutions to maintain their hold on power.

DEMOCRATIC BACKSLIDING AND ALABAMA

In *Federalist #10*, James Madison wrote about the threat of majority factions and their capacity to oppress minorities. Contemporary politics has realized the opposite of what Madison warned – the rise in the *tyranny of the minority*. For instance, in an unprecedented move, the Speaker of the House, Kevin McCarthy (R-Calif.), was deposed by eight members of his political party in October 2023. That is, eight Republican members of the House, who represent less than 2% of the U.S. population, were able to disrupt the operation of the U.S. House of Representatives. It took three weeks to replace McCarthy. In another example, U.S. Senator Tommy Tuberville (R-

Ala.) blocked nearly 400 upper-level military commissions for ten months in 2023. Senator Tuberville's block of the military commissions was over the Whitehouse's policy that allowed servicemembers reimbursement for travel costs related to getting abortions.4 Another example of how political minorities are imposing policies that are not reflective of the preferences of the broader electorate is that of gerrymandering at the state level. The U.S. Constitution requires that a census be taken every ten years and congressional seats be reapportioned. Accordingly, state legislatures are compelled to redraw electoral/legislative district lines. Within a state, voting districts should have equal populations (*Reynolds v.* Sims, 1964). Gerrymandering – drawing electoral districts for partisan advantage – traces its origins to the early republic. Majority political parties in state legislatures use this process to draw electoral districts that allow them to press their advantage (McGhee, 2020). State legislators draw electoral districts that are overwhelmingly made up of the majority party's voters and make it very difficult for their opponents to win an election. Using sophisticated data about voter's geographical distribution (i.e., where voters live) and their party affiliation, the state's legislative majority can draw a district that *packs* all of their opponents into one district, making every other district more secure for the majority. The other option is to *crack* the voters of the minority opposing party so that their numbers are scattered among districts consisting of the majority party. One effect of gerrymandering is lower turnout. Gerrymandering takes the competition out of elections and ensures that the party that controls the legislature will win in the next election. The cumulative effect of gerrymandering, cracking and packing, is to "waste" a larger part of the other party's votes, either in support of losing candidates or through excessive support for winning candidates (Engstrom, 2020, p. 23). Put another way, gerrymandering undermines participation because voters are less inclined to vote in noncompetitive elections (Baumgartner & Francia, 2019). Heather Cox Richardson (2023) provides an example of withering democratic norms caused by partisan redistricting:

> In Wisconsin, the electoral districts are so gerrymandered that although the state's population is nearly evenly divided between Democrats and Republicans, Republicans control nearly two-thirds of the seats in the legislature and it is virtually impossible for Democrats ever to win control of the state legislature.

Gerrymandering insulates lawmakers from democratic accountability by affording them the luxury of electoral safety. In a representative democracy, politicians should be concerned about appeasing their constituents and getting reelected (Mayhew, 2004), and voters should be able to voice their concerns to their representatives. Gerrymandering effectively takes the competition out of the election and suppresses turnout (Anderson, 2018; Jones et al., 2023). If democracy requires free, fair, and competitive elections, gerrymandering constitutes a severe distortion of democracy.

In 2023, the U.S. Supreme Court upheld a judgement of a federal three-judge panel finding that the Alabama legislature had created a congressional map that violated the

Voting Rights Act. Alabama's congressional map centered on the demographic makeup of the second district, which, as drawn by the legislature, had a population that was 40% African American. The court order would require Alabama to have two districts with a near-majority Black population. The Alabama legislature responded to the court by offering a map that continued to violate the court order. Governor Kay Ivey responded by echoing John B. Knox: "The Legislature knows *our* state, *our* people and *our* districts better than the federal courts or activist groups." 5 The federal court's three-judge panel, made up of two Trump and one Reagan appointee, responded:

> We are disturbed by the evidence that the State delayed remedial proceedings but ultimately did not even nurture the ambition to provide the required remedy... We are not aware of any other case in which a state legislature — faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district — responded with a plan that the state concedes does not provide that district... The law requires the creation of an additional district that affords Black Alabamians, like everyone else, a fair and reasonable opportunity to elect candidates of their choice (Greenberg, 2023).

Madison's warning of the tyranny of the majority has been turned on its head. In contemporary politics, small privileged groups have an outsized influence in political institutions. The influence of the few over the voice of the many has manifested in national institutions (Dahl 2003). In states, partisan lawmakers (the few) choose their voters (the many) through the gerrymandering process. This is not how it should be - voters are supposed to choose lawmakers, not the other way around. Ultimately, the result is less voter participation, as people feel they cannot influence the elections because they live in noncompetitive districts. As a callback to an earlier point, the centralization of policymaking in Montgomery is another example of how interest groups, who represent the few, have an outsized influence in the Alabama legislature because of the features of the state constitution. Few voters can afford to camp out in Montgomery and compete with interest groups and professional lobbyists for the duration of the legislative session.

The framers of the 1901 Constitution understood that elections have consequences and that the results of elections determine who represents the public's interest in governing institutions. American history has shown that those with power will go to great lengths to keep their place of privilege and influence. In states like Alabama and cities throughout the United States, politically entrenched groups that are economically and politically powerful have used their policymaking authority to "reform" the voting rules and redesign institutions to maintain the status quo.

CONCLUSION

The United States Constitution is limited in its ability to preserve the participatory aspects of American democracy. It prohibits states from denying the ballot based on gender and race. The Twenty-Fourth Amendment (1964) abolished the poll tax. The Twenty-Sixth Amendment (1971) extended the right to vote to those over 18. Federal legislation has prohibited literacy tests. Nevertheless, states can still disqualify voters for being convicted of a felony and immorality. The rights established by the U.S. Constitution are insufficient because the amendments that protect individual voting rights require congressional legislation. The Fifteenth, Nineteenth, Twenty-Fourth and Twenty-Sixth Amendments include that "Congress shall have the power to enforce this article by appropriate legislation." Congressional action is needed to give these amendments the force of law to enable the appropriate government agencies authority and the resources needed to police the behavior of state and local governments regarding voting rights. Consider that the Fifteenth Amendment was ratified on February 3, 1870, but was not meaningfully implemented until the Voting Rights Act of 1965 was passed 95 years later.

Popular sovereignty means that the people govern – they make laws that can affect one's life, liberty, and property. Elections serve as the means by which voters/citizens legitimate government and its laws. "It is often asserted that the greater the participation, the more legitimate the democracy, which is said to be a prerequisite for stability" (Bennet & Resnick, 1990, p. 773). The lack of meaningful democracy and low turnout in elections is symptomatic of systemic disorder that can allow anti-democratic forces to take over (Bennet & Resnick, 1990, p. 773). Participation in the electoral system is an inherent good, 6 enabling the individual to become a fuller and more competent citizen. Low levels of voter participation mean that poor citizens will turn out in elections at lower rates, exacerbating inequality (Lijphart, 1998). Low levels of political participation indicate that nonvoters are less knowledgeable about political issues and are, therefore, less likely to be engaged in the larger community. As Robert Putnam warned over twenty years ago, "Like a fever, electoral abstention is even more important as a sign of deeper trouble in the body politic than as a malady itself" (2000, p. 35).

The framers of Alabama's 1901 Constitution drafted a document that undermined the ability of their opponents to challenge the power of entrenched political and economic elites. By limiting the electorate, they guaranteed their success at the ballot box. They also disempowered the government so that it could not solve collective problems for the people of Alabama. They accomplished this by strangling democracy and the government's capacity to raise funds for improvements to roads, schools, and other essential services for Alabamians. Alabama's roads and bridges remain wanting – the American Society of Civil Engineers awarded Alabama infrastructure with a score of C- in 2022. According to US News, Alabama ranked 47th in education and 45th in

healthcare. The long-term consequence of restrictive voting, enfeebled local democracy, and limited government capacity to govern has translated into a political culture defined by paternalism whereby government elites use their power to maintain the existing social order (Elazar, 1984). The consequence of the 1901 Constitution's effects on democracy in Alabama is that it also created a political culture that is hesitant to replace it with a capable government. Most Alabamians would be loath to give the state more power as most are disaffected by its government. In 2017, 63% of Alabamians said that they "have no say in what the government in Montgomery does," 61% claimed the same in 2021 – with 58% of Democrats and 66% of Republicans agreeing with the statement (Town, 2021). The 2022 midterm elections in Alabama had the lowest turnout in 36 years. Unfortunately, the common reaction to bad government is not to reform and change it for the better but to withdraw (Lerman, 2019). The Alabama Constitution has created an ineffective government that few Alabamians trust (Horn, 2019). And that was the entire point of its creation. Constitutional reform and effective governance would be anathema to Alabamians, as they have learned over time that the government should not be trusted and does not deserve more power.

KEY TERMS

At-large elections – Often used to dilute the influence of minority voters, these types of elections allow candidates to run citywide.

Disenfranchise (or disfranchise) – To take the right to vote away.

District elections — Often used to allow minority groups to get elected, district elections subdivide a city (or state) into several jurisdictions. Districts can consider geography and natural boundaries.

Franchise – The right to vote.

Gerrymander – The drawing of district lines for partisan purposes.

Home rule – The ability of cities and counties to have autonomy from the state government to make policies that solve local problems.

Literacy tests – Civics tests administered to would-be voters, often used to deny minorities the right to vote. The Voting Rights Act of 1965 outlawed the use of literacy tests.

Poll tax – Fee charged by the state to would-be voters. The Twenty-Fourth Amendment, passed in 1962, prohibits the collection of a poll tax for federal offices.

DISCUSSION QUESTIONS

1. What were the goals of the 1868 Alabama Constitution?

2. Why did the 1875 fail to disenfranchise Black Alabamians totally?

3. How did the Sayre Election Law affect turnout in Alabama elections?

4. What did Alabama's populist party campaign on in the 1892 election? What did they want?

5. What were the primary goals of the rewritten 1901 Alabama constitution?

6. What are notable ways by which other governments, state and local, made it more difficult to vote?

7. The author makes the case that making it more difficult to vote in the US has become more common. What are some examples from contemporary bills and laws in state legislatures that make it more difficult for people to vote? What are examples of legislatures and lawmakers acting undemocratically? Are there also examples of other states implementing policies that enhance democracy?

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NOTES

1. It is important to note that the ruling Democratic Party from the end of the Civil War to c. 1960 was very different from the contemporary Democratic Party. Likewise, the Radical Republicans, who dominated national politics after the Civil War, were ideologically opposite the contemporary Republican Party.
2. See https://www.aclualabama.org/en/voting-rights-restoration
3. See https://www.aclualabama.org/en/how-to/restore-your-voting-rights
4. See https://www.nbcnews.com/politics/congress/sen-tommy-tuberville-drops-hold-hundreds-military-nominees-rcna128138
5. Emphasis mine.
6. Fukuyama (2013) and Putnam (2000) make this claim implicitly and explicitly.

Epilogue

This collection intended to update Thomson's (2002) work in time for the 125th anniversary of the 1901 Constitution. The essays in *A Century of Controversy* continue to be enlightening. Alabama's tumultuous history is fascinating and troubling. The book highlights that the framers of the 1901 Constitution sought to create a form of government that institutionalized white supremacy, undermining democracy in the process. Throughout Alabama's history, when opportunities arose to right the wrongs of the 1901 Constitutional Convention - to adequately fund education and infrastructure and allow for local-level democracy - Alabama's lawmakers have consistently chosen not to do so (Hamill, 2024; Porter, 2024; Blankenship, 2024; Aguado, 2024). The 1901 framers devised a system of governance designed to forestall reform. It is a long-lasting document because voters have learned to distrust governing institutions, as generations of corrupt and malicious policymakers and politicians consistently underserved Alabamians. In the fall of 2003, I recall discussing Governor Riley's tax proposal with a student who said they supported it but would vote against it because they trusted Governor Riley but did not trust who might succeed him. That is the legacy of the 1901 Constitution. It tainted the very public institutions that could address the complicated needs the state has had since 1901.

And where Thomson has a call for reform through education, civil society, and social capital, this work, collectively, is much less hopeful. All the authors submitted their

works to this collection with limited guidance from the editor – a list of topics and a call to reflect on Alabama's 1901 Constitution. All reached similar conclusions. The state is still underserving its most needy and putting the vulnerable in harm's way (Hamill 2003).

And it may be that nothing will ever change in Alabama, at least not in the way that Thomson (2002) advocated. Political scientists reflect on voter fatigue as a reason for low voter turnout (Lijphart, 1996). That is, there are so many elections in the U.S. that people get tired of voting. In 2022, "Alabama ranked 46th in percentage of voting-eligible population to cast a ballot, with only 37% of voters turning out for the general election" (Spencer 2024b, p. 2). Similarly, one of the reasons for the pervasiveness of the status quo is that people are exhausted by the nature of politics in this state. The problems (underfunded education, infrastructure, an inhumane carceral system, lack of local democracy) have just become circumstances that Alabamians have learned to deal with. And again, that is where the 1901 framers succeeded. They created a lasting Constitution that eroded the public's capacity to care about these problems. The people of Alabama now have a choice: engage a system impervious to change or leave – many have chosen the latter. In 2024, Warren Kulo reported that Alabama was among the states suffering the biggest "brain drain." That is, people in the top third of the national education distribution between the ages of 31 and 40 are leaving this state, ranking Alabama 10th among states suffering the largest losses among the educated population (Kulo, 2024). Smart, ambitious people in Alabama are leaving this state. Tiebout (1956) made the case that "the consumer-voter may be viewed as picking that community which best satisfies his preferences for public goods… the consumer-voter moves to that community whose local government best satisfies his set of preferences" (p. 418). Tullock (1971) concluded that people consider a bundle of government services and taxes and ultimately vote with their feet. They relocate. Where are these people moving to? Cebula (2009) makes the case that people move to areas with higher per-pupil public primary and secondary outlays. Porter (2024) demonstrated how Alabama lawmakers have failed to address adequate funding for education in the state. Hamill (2024) furthers the case by showing that the funding inadequacies are structural. They are built into the framework of Alabama's government.

Constitutional change came to Alabama. The constitution's recompilation was passed in the November 8, 2022, general election with 76% of the vote. It rearranged the constitution so that similar subjects are located together, removed racist language, deleted repeated or repealed portions/language, placed all amendments that deal with economic development together and arranged local amendments by county. The recompilation is a significant accomplishment for the advocates of constitutional reform in Alabama. Yet Alabama still has the longest constitution. The constitution continues to give the state legislature extraordinary power over local jurisdictions. It is still less a structural document, establishing what the government can and cannot do, and more of a legislative document. As Thomas Spencer (2024a) points out, "Despite the new Constitution, we remain governed by the basic operating system established by the 1901

Constitution. And that operating system was recognized as obsolete and an obstacle almost as soon as it was adopted." He quotes Governor Emmet O'Neal, whose words are as relevant today as they were when he was governor (1911-1915).

> *No real or permanent progress is possible in Alabama until the present fundamental law is thoroughly revised and adapted to meet present conditions.*

There is still work to be done.

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Notes on Process

This section provides background about how this project came together. I wanted to share the steps taken to create this collection and provide a template for how others might employ similar methods in their work and develop no-cost Open Educational Resources. I also want to convey the efforts taken to ensure that academic rigor was part of this process.

In the summer of 2023, a “call” was emailed to every faculty member in Alabama's sociology, criminal justice, history, public administration, and political science departments. I went through each academic program’s website in Alabama and emailed individual faculty. I also emailed the directors of graduate study at various Alabama universities and asked them to encourage their doctoral students to consider participating in the project.

The contributors to this collection submitted their works in early November of 2023. Those works were then sent to peer reviewers. The peer reviewers included Dr. Jim Day, at the University of Montevallo, Drs. Quinn Gordon, Lynne Reiff, Katie Owens-Murphy, Justin Joseph, Christopher Purser, and Tim Collins at the University of North Alabama. Contributors to the collection also served as peer reviewers: historian Brucie Porter, Professor Brandon Blankenship, and Dr. Rebecca Short. Each work had at least two reviews. The peer reviews were sent back to the contributing authors for revision, and the finished drafts were sent back to me in March of 2024. Additionally, Dr. Lynne Reiff, Dr. Matt Schoenbachler, Patrick Tate, ABD, and Dr. Kayla Bohannon read rough drafts and offered constructive feedback.

I copy-edited the manuscripts in the spring and summer of 2024 using Microsoft Word and exported chapter text (via copy-and-paste) into Ketty by Coco. Grammarly editing software and the AI editing tools found in Ketty were used throughout the editing process. The Open Education Network (OEN) helped by allowing this work to be part of the Ketty pilot program for single-source publishing. The Coko Foundation provided technical assistance in the publication process. The book files were added to a Pressbooks site that hosts the files and serves as a permalink that allows others to access the work at: una.pressbooks.pub/nevergonnachange.

NEVER GONNA CHANGE? An Examination of the 1901 Alabama Constitution

Since the conclusion of the Civil War, the U.S. Constitution has changed to include amendments that secured the rights of all Americans and expanded democracy. In stark contrast to the U.S. Constitution, Alabama's 1901 Constitution was designed in response to the nation's broader democratic aspirations. Though the Alabama Constitution was recompiled in 2022, the spirit of the 1901 Constitution continues. This collection has chapters on:

- The factors that influence policy change in the Deep South and the likelihood of constitutional reform
- The perseverance of inadequate education funding as a structural feature
- The contemporary possibility of change through litigation.
- The consequences of Alabama tax policy and how it is embedded in the 1901 Constitution.
- The capacity for a more humane carceral system.
- The role that the Constitution has played in undermining democracy in Alabama.

The capacity for reform cannot be achieved through litigation. Reform cannot be hoisted upon Alabama's government by the federal courts or by congressional action. It must be initiated and done by the people of Alabama.

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