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EQUALITY FOR ALL: THE CASE FOR A NEW DECLARATION OF RIGHTS ARTICLE OF THE ALABAMA CONSTITUTION

BRYAN K. FAIR¹

I. INTRODUCTION

I support constitutional reform in Alabama for myriad reasons. The 1901 Alabama Constitution lacked legitimacy from the outset. Today, it resembles more a municipal code than an outline of state powers and individual rights. The current document is incomprehensible and unwieldy. Its designation as the nation's longest constitution is not an honor. Instead, Alabama's Constitution is oppressive. It impedes local autonomy and judgment by constraining reforms not approved by the rulers in Montgomery. The foxes (the Legislature and its financiers) guard their power by making it difficult to alter even trivial, local policies without statewide approval. There is no reason to clutter a state Constitution with minutiae of concern only to a single county. It is simply not a constitutional matter whether one county raises revenue for its schools, sewers, or to pay its firefighters higher wages. Yet, in recent elections Alabamians have been asked to amend the constitution to allow local government to do its job. This arrangement turns democracy on its head, making the rulers more important than local people. We must have constitutional reform to restore the power of the people.

Education, tax, and land use reform, all central to the

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success of every city and county, are all made more difficult by constitutional provisions that preclude local action without legislative consent or constitutional approval. Change cannot occur without a new constitution.

Moreover, the 1901 Constitution was not drafted by or for the people of Alabama. It did not recognize the dignity of all Alabamians; it did not weigh the future costs for constitutional inequality. All Alabamians have suffered in some way because the 1901 delegates chose the low road of inequality. The delegates squandered the great potential of our state by devaluing some citizens. All throughout our state we live with the poverty, illiteracy, and despair caused, at least in part, by generations of constitutional inequality.

What we have learned is that all Alabamians deserve equal opportunity. No citizen should be superior under law because of race or gender or class or religion. No Alabamian should be left behind or held back. We all have value and dignity. The minimum promise of government must be to prevent the creation of castes. We all must have the opportunity to improve our lives and to be treated with respect.

The central reason that I support constitutional reform is that the delegates who framed the 1901 Alabama Constitution set as their chief aim to establish white supremacy by law. They intended to enshrine political, economic, and social caste for all African Americans. Those delegates were champions of white power, white privilege, and white supremacy. Rather than serving and protecting the interests and rights of all citizens, the 1901 delegates dishonored themselves by turning the State's charter of rights against Alabama's most vulnerable people. Since I reject all theories of racial supremacy as racist, I cannot support a document founded on racist principles. I want to reform our Constitution and rest its provisions solidly on equality and fairness principles that in practice actually extend to all persons.

In addition to ensconcing white privilege, the delegates centralized power among wealthy landowners and in the State Legislature. Local reform efforts have been constrained by constitutional provisions that require state approval of the most mundane city or county policies. As a result the 1901 Constitution has over 700 amendments, most of which have no statewide relevance.

The purpose of this article is to explain how delegates framed the Declaration of Rights Article of the 1901 Constitution. In Part II, I illustrate how the delegates altered

the 1875 Constitution and why they excluded an equal protection guarantee. The record reveals that the delegates omitted a state equality guarantee as an essential part of its strategy to establish white supremacy by law. In Part III, I compare Alabama's Bill of Rights with those of the other states, concluding that the Alabama Constitution contains many common clauses, but unlike 80 percent of the states, the Alabama Constitution does not textually set forth an equal protection clause. Finally, in Part IV, I propose a revised Declaration of Rights Article that does not omit any existing rights, but that grounds the Alabama Bill of Rights on the basis of equality and fairness. I comment on each proposal in turn.

II.

A. 1901 Constitutional Convention: Its Chief Aim

Preliminarily, it is important that all Alabamians understand the principal purpose of the 1901 Constitutional Convention. The chief goal was to disenfranchise African American voters. That primary goal pervades the entire document, not simply the individual rights provisions. Convention delegates reviewed each Article for consistency and harmony with other provisions. Any provisions that might impede the delegates' primary goal were altered. Thus, one cannot read Articles of the Constitution in isolation. As we question provisions in one Article, we must consider the whole document's design and purpose.

The Official Proceedings of the 1901 Constitutional Convention² leave little ambiguity about the overarching aim of the delegates. Below, I excerpt a few paragraphs to convey the candor with which the delegates proceeded.

On May 21, 1901, Alabama Chief Justice Thomas N. McClellan called the Constitutional Convention to order and spent the remainder of that day conducting a roll call registration of the 155 delegates. Each delegate took an oath of office to support the Constitution of the United States and to honestly and faithfully perform the duties of delegates of the Convention.

² OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21 - SEPT. 3, 1901 (4 vols.) (1940); GEORGE HUDDLESTON, JR. & JAMES N. BLOODWORTH, INDEX TO THE OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1901, STATE OF ALABAMA (1948).

The next day's proceedings (and the next 80 days) began with a prayer, which read in part:

... unto Thee we come this morning with prayer to Thee for guidance, for strength and for wisdom and for blessing. . . . We pray Thee Heavenly Father, that Thou wilt cause Thy face to shine upon these Thy servants, who are met together from different parts of this state to engage in this undertaking which is before them. . . . We pray that Thou will restrain them from any unwise proceedings; and that Thou will uphold them in all undertakings which are for the interest of the people, and that Thou wilt sustain all their efforts to Thy name's honor and glory, and to Thee we shall give the praise, world without end. Amen.

Notwithstanding the solemnity of the undertaking, it is easy to conclude that all Alabamians were not represented at the 1901 Convention. Even more problematic, the delegates intentionally set a course to diminish the civil/political rights of some Alabamians.

John B. Knox of Calhoun County was nominated and by acclamation elected President of the Convention. Knox, a lawyer, candidly disclosed why a new constitutional convention had been called. He said:

Then (during Reconstruction), as now, the negro was the prominent factor in the issue.

The Southern people, with this grave problem of the races to deal with, are face to face with a new epoch in Constitution-making, the difficulties of which are great, but which, if solved wisely, may bring rest and peace, and happiness. If otherwise, it may leave us and our posterity continuously involved in race conflict, or what may be worse, subjected permanently to the baneful influences of the political conditions now prevailing in the state.

So long as the negro remains in insignificant minority, and votes the Republican ticket, our friends in the North tolerate him with complacency, but there is not a Northern state, and I might go further and say, there is not an intelligent white man in the North, not gangrened by sectional prejudice and hatred of the South, who would consent for a single day to submit to negro rule. . . .

One has studied the history of recent event to very little purpose who has failed to discover that race prejudice exists at the North in as pronounced a form as at the South, and that the question of negro domination, when brought home, will arouse the same opposition in either section.

And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution to establish white supremacy in this state (emphasis added).

...

The Southern man knows the negro, and the negro knows him. The only conflict which has, or is ever likely to arise, springs from the effort of ill-advised friends in the North to confer upon him, without previous training or preparation, places of power and responsibility, for which he is wholly unfitted, either by capacity or experience.

...

But if we would have white supremacy, we must establish it by law - not by force or fraud (emphasis added).³

What happened to the pledge to uphold the federal constitution? What about the prayers? How could the delegates so unequivocally commit the state government to white supremacy? What can be done today to correct this injustice? Should the state pay reparations? What is fair? Is it fair to do nothing? The 1901 Constitution dishonors every Alabamian. Its retention implies that Alabama is still dedicated to white supremacy.

Knox proceeded to explain how the vote could be denied African Americans, not on the basis of race, but rather on the basis of property, education, or literacy requirements. The Convention President had found a legal loophole that he proposed to employ to drive a stake in African American political power, rebuilding the State's color-line. Knox acknowledged that the delegates would need to decide if those requirements would apply to poor, illiterate whites, but that other states had avoided that problem through exceptions, such as grandfather clauses. Poor whites were pawns in the delegates' chess game to stifle African Americans. The delegates arrogantly presumed they were entitled to sacrifice the rights of some Alabamians and privilege themselves.

On the seventh day of the Convention, delegates had read into the record a letter from Mr. Booker T. Washington and two dozen other African Americans on behalf of the colored people of the state. Again, the following excerpts convey the group's beliefs:

The negro is not seeking to rule the white man. In this state the negro holds not a single elective office. Whenever he votes, he usually votes for some white man and is learning more and more to vote for the best white man . . .

³ *Id.*

The negro does ask, however, that since he is taxed, works the roads, is punished for crime, is called upon to defend his country, that he have some humble share in choosing those who shall rule over him, especially when he has proven his worthiness by becoming a taxpayer and a worthy, reliable citizen. . . .

Any law which will merely change the name and form of fraud, or can be interpreted as meaning one thing when applied to one race and something else when applied to another race, will not in our opinion improve our present condition, but may unsettle the peace and thrift of our people and decrease the wealth and prosperity of Alabama.⁴

Washington's letter directly addressed Knox's assertion regarding Negro rule. The clear aim was political equality, not Negro rule. But Washington made clear that a plan for white rule would decrease the prosperity of our state. His prophetic words ring loudly a century later.

On the sixteenth day of the Convention, delegates heard an extensive oration by Miss Francis Griffin relative to the power of white women to vote. Griffin spoke on behalf of the Woman Suffrage Association of the State of Alabama. She stated:

Thousands of years of bitter arguments and bloody wars were required to evolve the principle that "Governments derive their just powers from the consent of the governed." This thought is the guaranty of liberty of the American Republic—it is the watchword of every people striving for political freedom. Now comes the declaration that women as well as men belong to the governed and upon that belief, I ground my demand to the application of the principle to citizens regardless of sex.

The man without a vote is a subject, not a citizen; the woman without a vote is an inferior, not an equal.

. . .

Disenfranchisement is no kindness to women; it is cruelly unjust and makes their burdens heavier.

. . .

She does not ask from the law any special protection. She only asks for the means to protect herself.

. . .

So long as laws affect both men and women, men and women together should make those laws.⁵

⁴ *Id.* at 191.

⁵ *Id.* at 464-71.

The above excerpts make clear that the 1901 Convention delegates had the choice to extend equal rights to all Alabamians, including white women and colored citizens. They chose another road and it has made a tremendous difference in the lives of all Alabamians. We will never know what Alabama could have become over the last century had we valued all our people. We owe it to future generations to correct our past and restore dignity to our State.

As the Citizen's Commission undertakes its reform work, it cannot lose sight of the fact that the 1901 Alabama Constitution was written to establish white supremacy by law. That goal alone for me provides sufficient reason to draft a new organic charter based on the principles of equal citizenship and fairness. A new constitution offers Alabamians a chance to repudiate white supremacy by law. I doubt that there is a greater legacy we could give our children.

B. Alabama's Current Preamble and Declaration of Rights

The 1901 Constitution is Alabama's sixth state charter. In 1938, Thomas E. Skinner of Birmingham completed Skinner's Alabama Constitution Annotated, a comprehensive treatise comparing the textual provisions of the 1819, 1861, 1865, 1868, 1875, and 1901 Constitutions.⁶ Anyone seeking to compare or interpret provisions of the 1901 Constitution must consult Skinner's exceptional work.⁷ In addition to consulting Skinner's treatise, I have traced the 1901 Preamble and Declaration of Rights provisions as they evolved in Committee Reports set out in the Official Proceedings.

Observers will note immediately that earlier in the state's history Alabamians were not reluctant to revise their constitution. In its first sixty years, Alabama altered the original constitution four times. Thus, those who argue that drafting a new constitution will threaten the state have neither history nor logic on their side. Even worse, they defend a document that is infused with insidious aims. There is simply nothing sacrosanct or sacred about holding on to a particular version of a state constitution. Because the 1901 Constitution

⁶ THOMAS E. SKINNER, ALABAMA CONSTITUTION ANNOTATED: A COMPLETE DIGEST OF ALL DECISIONS BY THE SUPREME COURT OF ALABAMA CONSTRUING THE CONSTITUTION OF ALABAMA AS AMENDED (1938).

⁷ For relevant comparisons of the Preamble and the Declaration of Rights and annotations, see *id.* at 34-224.

was overtly racist and sexist, because it centralized power among wealthy, special interests in Montgomery, because it impedes effective tax reform and local government, it is time to draft a new one.

I. Preamble

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:

II. Article I of the 1901 Alabama Constitution contains thirty-six sections that declare rights protected under the state constitution. Briefly those sections are:

Section:

1. Equality and rights of men.⁸
2. People source of power.⁹
3. Religious freedom.¹⁰
4. Freedom of speech and press.¹¹
5. Unreasonable search and seizure; search warrants.¹²

⁸ ALA. CONST. art. I, § 1 (1901). "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." *Id.*

⁹ ALA. CONST. art. I, § 2.

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. *Id.*

¹⁰ ALA. CONST. art. I, § 3.

That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this state; and that the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles. *Id.*

¹¹ ALA. CONST. art. I, § 4. "That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that liberty." *Id.*

¹² ALA. CONST. art. I, § 5. "That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation." *Id.*

6. Rights of persons in criminal prosecutions generally; self-incrimination; due process of law; right to speedy, public trial; change of venue.¹³

7. Accusation, arrest and detention; punishment limited to laws established prior to offense;¹⁴

8. Proceeding against person by information; grand jury not required in misdemeanor cases.¹⁵

9. Double jeopardy; discharge of juries from cases.¹⁶

10. Right to prosecute civil cause.¹⁷

¹³ ALA. CONST. art. I, § 6 (1901).

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement. *Id.*

¹⁴ ALA. CONST. art. I, § 7. "That no person shall be accused or arrested, or detained, except in cases ascertained by law, and according to the form which the same has prescribed; and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied." *Id.*

¹⁵ ALA. CONST. art. I, § 8.

That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established. *Id.*

¹⁶ ALA. CONST. art. I, § 9. "That no person shall, for the same offense, be twice put in jeopardy of life or limb; but courts may, for reasons fixed by law, discharge juries from the consideration of any case, and no person shall gain an advantage by reason of such discharge of the jury." *Id.*

¹⁷ ALA. CONST. art. I, § 10. "That no person shall be barred from prosecuting or defending before any tribunal in this state, by himself for counsel, any civil cause to which he is a party." *Id.*

- 11. Right to trial by jury.¹⁸
- 12. Prosecutions for libel or for publication of papers investigating official conduct of public officers.¹⁹
- 13. Courts to be open; remedies for all injuries; impartiality of justice.²⁰
- 14. State not to be made defendant.²¹
- 15. Excessive fines; cruel or unusual punishment.²²
- 16. Right to bail; excessive bail.²³
- 17. Suspension of habeas corpus.²⁴
- 18. Treason against the state.²⁵
- 19. Bills of attainder of treason by legislature prohibited; conviction not to work corruption of blood or forfeiture of estate.²⁶
- 20. Imprisonment for debt.²⁷
- 21. Suspension of laws.²⁸

¹⁸ ALA. CONST. art. I, § 11. "That the right of trial by jury shall remain inviolate." *Id.*

¹⁹ ALA. CONST. art. I, § 12.

That in all prosecutions for libel or for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and that in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court. *Id.*

²⁰ ALA. CONST. art. I, § 13. "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." *Id.*

²¹ ALA. CONST. art. I, § 14. "That the State of Alabama shall never be made a defendant in any court of law or equity." *Id.*

²² ALA. CONST. art. I, § 15. "That excessive fines shall not be imposed, nor cruel or unusual punishment inflicted." *Id.*

²³ ALA. CONST. art. I, § 16. "That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great; and that excessive bail shall not in any case be required." *Id.*

²⁴ ALA. CONST. art. I, § 17. "That the privilege of the writ of habeas corpus shall not be suspended by the authorities of this state." *Id.*

²⁵ ALA. CONST. art. I, § 18. "That treason against the state shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and that no person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or his own confession in open court." *Id.*

²⁶ ALA. CONST. art. I, § 19. "That no person shall be attainted of treason by the legislature; and no conviction shall work corruption of blood or forfeiture of estate." *Id.*

²⁷ ALA. CONST. art. I, § 20. "That no person shall be imprisoned for debt." *Id.*

²⁸ ALA. CONST. art. I, § 21. "That no power of suspending laws shall be exercised except by the legislature." *Id.*

22. Ex post facto laws; impairment of obligations of contracts; irrevocable or exclusive grants of special privileges or immunities.²⁹

23. Eminent domain.³⁰

24. Navigable waters declared free public highways; taxes, tolls, etc., for use of shores or wharves.³¹

25. Right to peaceably assemble and petition for redress of grievances, etc.³²

26. Right to bear arms.³³

27. Standing army; military subordinate to civil power.³⁴

²⁹ ALA. CONST. art. I, § 22. "That no ex post facto law, nor any law, impairing the obligations of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the legislature; and every grant or franchise, privilege, or immunity shall forever remain subject to revocation, alteration, or amendment." *Id.*

³⁰ ALA. CONST. art. I, § 23.

That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the legislature may by law secure to persons or corporations the right of way over the lands of other persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall, in all cases, be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association. *Id.*

³¹ ALA. CONST. art. I, § 24.

That all navigable waters shall remain forever public highways, free to the citizens of the state and the United States, without tax, impost, or toll; and that no tax, toll, impost, or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters of any navigable streams, unless the same be expressly authorized by law. *Id.*

³² ALA. CONST. art. I, § 25. "That the citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address, or remonstrance." *Id.*

³³ ALA. CONST. art. I, § 26. "That every citizen has a right to bear arms in defense of himself and the state." *Id.*

³⁴ ALA. CONST. art. I, § 27.

That no standing army shall be kept up without the consent of the legislature, and, in that case, no appropriation for its support shall be made for a longer term than one year; and the military shall, in all cases, and at all times, be in strict subordination to the civil power. *Id.*

- 28. Quartering of soldiers in houses.³⁵
- 29. Titles of nobility, hereditary distinction, etc.; restriction on appointments to office.³⁶
- 30. Immigration, emigration and exile.³⁷
- 31. Residence not forfeited by temporary absence from state.³⁸
- 32. Slavery prohibited; involuntary servitude.³⁹
- 33. Protection of suffrage.⁴⁰
- 34. Property rights of aliens.⁴¹
- 35. Objective of government.⁴²
- 36. Construction of Declaration of Rights.⁴³

I have reviewed the Bill of Rights Articles from all fifty states. Alabama's Declaration of Rights compares favorably to most other states. It contains many of the same provisions, although it is one of the longer Articles. Most states have twenty to twenty-five provisions in their Bill of Rights and many of the state provisions track similar federal provisions.

³⁵ ALA. CONST. art. I, § 28. "That no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor, in time of war, but in a manner to be prescribed by law." *Id.*

³⁶ ALA. CONST. art. I, § 29. "That no title of nobility or hereditary distinction, privilege, honor, or emolument shall ever be granted or conferred in this state; and that no office shall be created, the appointment to which shall be for a longer time than during good behavior." *Id.*

³⁷ ALA. CONST. art. I, § 30. "That immigration shall be encouraged; emigration shall not be prohibited, and no citizen shall be exiled." *Id.*

³⁸ ALA. CONST. art. I, § 31. "That temporary absence from the state shall not cause a forfeiture of residence once obtained." *Id.*

³⁹ ALA. CONST. art. I, § 32. "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." *Id.*

⁴⁰ ALA. CONST. art. I, § 33. "The privilege of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult, or other improper conduct." *Id.*

⁴¹ ALA. CONST. art. I, § 34. "Foreigners who are, or may hereafter become, bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens." *Id.*

⁴² ALA. CONST. art. I, § 35. "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." *Id.*

⁴³ ALA. CONST. art. I, § 36.

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. *Id.*

Thus, the good news is that the 1901 Declaration can be revised and many of its provisions could remain as written.

The existing Declaration of Rights could be revised for clarity and accessibility. First, there should be no ambiguity regarding whether the State Constitution guarantees equal protection of the laws. Some courts and advocates cite Sections 1, 6, and 22 as implicitly guaranteeing equality under the law. There is no reason to have such ambiguity in our charter. Likewise, does the due process clause set out in the criminal procedure provisions include substantive protections for privacy? Such ambiguity leaves the Declaration of Rights to judicial officials, rather than to the people, the source of all governmental power. State constitutions need clarification and revision from time to time. Alabama's is no different.

Second, our charter, especially when coupled with over seven-hundred amendments, is simply not accessible to most Alabamians to either read or understand. A good revision of the Declaration of Rights would reduce the complexity and make the charter accessible to the citizens of Alabama. For example, while many states set out four or five provisions denoting the rights of the criminally accused, Alabama's charter includes nearly twice as many separate provisions. A careful revision could combine some of those rights into fewer provisions.

What would remain are the hundreds of amendments, which increase substantially every year. Alabamians have no control of the Constitution. They are forced to amend it to accomplish the most basic local goals. With sixty-seven counties, and many more municipalities, it is simply impractical to continue to subject local autonomy to statewide elections or capitol politics. The Alabama Constitution should only outline state powers and individual rights. Local measures on revenues, planning, and schools should be designed locally, consistent with principles of equality and fairness. We should amend our constitution for important reasons that impact the whole state, not to decide if sheep and goat farmers can tax themselves to promote their industry. At the current rate, our Constitution will surpass 1,000 amendments in the next decade or so. That may benefit a few self-serving politicians and lawyers, but it will disserve the interests of most Alabamians.

C. *What's Missing From the 1901 Alabama Constitution?*

I do not propose to discard all of the current provisions of Article I. Many of the provisions are standard provisions appearing in almost every other state's constitution. Moreover, the Alabama Supreme Court has interpreted some of the existing sections of Article I and those interpretations often provide important protections of rights or restraints on government. I do not agree with reform opponents who claim too much will be lost by drafting a new document. Much has been lost already under the 1901 Constitution. I can think of no real downside to drafting a new constitution. And it is not necessary to start with an empty slate. To the contrary, I will propose to only add, combine, or clarify a few provisions.

The most glaring textual omission in the State Constitution is an explicit reference to equal protection of the laws. Both Alabama courts and commentators have noted that an equal protection clause is implicitly contained in Article I, Sections 1, 6, 22, and perhaps others. Albert P. Brewer & Robert R. Maddox, *Equal Protection Under the Alabama Constitution*, 53 ALA. L. REV. 31 (2001); Martha I. Morgan & Neal Hutchens, *The Tangled Web of Alabama's Equality Doctrine After Melof: Historical Reflections on Equal Protection and the Alabama Constitution*, 53 ALA. L. REV. 135 (2001). Given the State's history, I would make this guarantee explicit in its own section or insert it textually in Section 1.

Ironically, even the 1901 convention delegates considered including a section on equal civil and political rights. As set out in Appendix A, the Committee on the Preamble and Declaration of Rights initially set forth an explicit clause that included both a privileges and immunities clause and an equal protection clause. The section read in part,

this state shall not make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall it deny to any person within its jurisdiction the equal protection of the laws.⁴⁴

⁴⁴ OFFICIAL PROCEEDINGS, app. A, at 168. This clause paralleled similar language set out in Section 1 of the 14th Amendment.

Later, the Committee had two clauses under consideration:

Section 1. That all men are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness.

Section 2. That all persons resident in the State, born in the U.S., or naturalized, or who have legally declared their intention to become citizens of the U.S., are hereby declared to be citizens of the State of Alabama, possessing equal civil and political rights.⁴⁵

The Committee on Consistency and Harmony eliminated the equal rights guarantee because it was inconsistent with other Articles, namely education and suffrage provisions intended to discriminate against African Americans. Convention records make it absolutely clear that the 1901 delegates acknowledged their intent to eliminate any provisions in the 1901 Constitution that would prevent the establishment of white supremacy by law.

One illustration of how convention delegates considered the consistency and harmony of separate Articles is set out in the Official Proceedings where delegates debate whether an equality guarantee in the Article I, Section 2 will conflict with a draft Section before the Committee on Suffrage. For some delegates, the power to vote was a privilege, not a right. Therefore, an equality guarantee would not extend voting rights to all. The potential conflict was sufficient to cause the Committee on Consistency and Harmony to eliminate the equality provision from later drafts.⁴⁶

III.

A. *What Have Other States Done*

The table set out below illustrates how many states include several key provisions in their Declaration of Rights. It also reveals that Alabama is one of the few states today that does not explicitly set out an equal protection clause in their Declaration of Rights. The omission makes sense in light of the primary aim of the 1901 delegates. But I can posit no legitimate reasons to omit an equal protection clause today. It is a cornerstone of federal constitutional law. It is the best hope to

⁴⁵ OFFICIAL PROCEEDINGS, app. B, at 786-91.

⁴⁶ See OFFICIAL PROCEEDINGS, app. C, at 2254-59, and app. D, at 4673-77 (containing a fuller discussion of the omission of an equality under the law provision).

B. What Policies are Served by the Different Options?

Alabamians have lived the consequences of not adopting a guarantee of equal protection of the laws. The law in Alabama has not been the same for all Alabamians without regard to race, sex, religion, and ancestry, among other bases for discrimination. The results have carved deep fissures among our people. We have wasted our most precious resource by not developing each Alabamian to his or her fullest.

Nearly forty states have concluded that their Declaration of Rights provisions were incomplete without a textual commitment to equal protection of the law. An equality guarantee should not depend on the whim of the legislature or local politics. Finally, if the State is not dedicated to equal protection of the law, why should all Alabamians support the government?

The following excerpts illustrate how various states set out explicit equal protection guarantees in their Declaration of Rights.

Alaska, Art. I, Sec. 1:

Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Arkansas, Art. 2, Sec. 3:

Equality before the law. The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition.

Florida, Art. I, Sec. 2:

Basic rights. All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Georgia, Art. I, Sec. 1:

Protection to person and property; equal protection. Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

Hawaii, Art. I, Sec. 5:

Due process and equal protection. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Illinois, Art. I, Sec. 2:

Due process and equal protection. No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Louisiana, Art. I, Sec. 3:

Right to individual dignity. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

Maine, Art. I, Sec. 6-A:

Discrimination against persons prohibited. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of that person's civil rights or be discriminated against in the exercise thereof.

Montana, Art. II, Sec. 4:

Individual dignity. The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

New Hampshire, Art. I, Sec. 2:

Natural rights. All men have certain natural, essential, and inherent rights - among which are, the enjoying and defending of life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness.

Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

New Mexico, Art. II, Sec. 18:

Due process; equal protection; sex discrimination. No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, (date)

Wyoming, Art. I, Sec. 97-1-002 & 97-1-003:

Equality of all. In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.

Equal political rights. Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual competency, or unworthiness duly ascertained by a court of competent jurisdiction.

It is difficult to quantify the costs of eliminating the equality guarantees from the 1901 Constitution. One can never know what our State might have become had we valued all Alabamians. My guess is that poverty, illiteracy, and racial and class divisions would not be so devastating to so many citizens. If we had declared that all members of the human race have dignity and deserve equal opportunities and if we had enforced that principle, I suspect that Alabama would be on all lists of leading indicators at or near the top.

Today our challenge is not only to clarify the State's Declaration, but also to address the cumulative inequality resulting from those before us who applied the law to promote white supremacy. We must ask what should be done to dismantle the legacy of discrimination caused by the 1901 Constitution. What is fair to African Americans, to white women, and to poor whites? A new Constitution is our best hope for a brighter future with fair laws for all.

IV.

A New Preamble and Declaration of Rights Article

Below I sketch the major outlines of a revised Preamble and Declaration of Rights. I have tried to retain all the

provisions of the 1901 Preamble and Declaration, with specific modifications regarding equality, due process, and sovereign immunity.

DRAFT: CONSTITUTION OF THE STATE OF ALABAMA

We, the people of the State of Alabama, in order to establish [equality and] justice [for all], insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:

ARTICLE 1.

Declaration of Rights.

That the great, general and essential principles of liberty [, equality,] and free government may be recognized and established, we [the people,] declare:

1. That all men [and women] are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness. [That no person shall be deprived of life, liberty, or property without due process of law; nor shall any person be denied equal protection of the laws. No law shall discriminate against a person because of birth, status, age, race, sex, physical condition, religion, ancestry, sexual orientation, or any circumstance or conditions whatsoever other than individual competency determined by a court of competent jurisdiction.] (adding equal protection, due process, nondiscrimination clauses)

My proposal would expand constitutional protections against many forms of discrimination. I include sexual orientation, noting that the Supreme Court has indicated that animus against gays and lesbians is unconstitutional. My intent is to place the burden on the government to defend its discrimination.

2. 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.

[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.] (adding § 35 to § 2)

My draft simply combines two current, related sections of Article I.

3. That no religion shall be established by law; that no preference shall be given by law to any religious sect or society, denomination or mode of worship; that no one shall be compelled by law to attend any place of worship or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust under this State; and that the civil rights, privileges and capacities of any citizen shall not be, in any manner, affected by his religious principles. (No change)

4. That no law shall ever be passed to curtail or restrain the liberty of speech or of the press and any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty. [That the citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address or remonstrance.] (adding § 25 to § 4)

My draft combines two current, related sections. There is no reason to separate free speech, free assembly, and the petition clauses.

5. That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizures or searches; and that no warrant shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation. (No change)

6. That in all criminal prosecutions the accused has the right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases in his own behalf, if he elects so to do; and in all prosecutions by indictment, a speedy public trial by an impartial jury of the county or district in which the offense was

committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, except by due process of law; but the Legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some other legal place of confinement. (No change)

7. That no person shall be accused, or arrested, or detained, except in cases ascertained by law, and according to the forms which the same has prescribed, and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied. [That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident for the presumption great, and that excessive bail shall not in any case be required.]

My proposal simply combines two current, related sections.

8. That no person shall for an indictable offense be proceeded against criminally by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or by leave of the court, for misfeasance, misdemeanor, extortion and oppression in office; otherwise than is provided in this Constitution; provided, that in cases of misdemeanor, the Legislature may by law dispense with a Grand Jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established. (No change)

9. That no person shall, for the same offense, be twice put in jeopardy of his life or limb; but courts may, for reasons fixed by law, discharge juries from the consideration of any case, and no person shall gain any advantage by reason of such discharge of the jury. (No change)

10. That no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party. [That all courts

shall be open; and that every person, for any injury done him, in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.] (adding § 13 to § 10)

My proposal simply combines two current, related provisions.

11. That the right of trial by jury shall remain inviolate. (No change)

12. That in all prosecutions for libel or for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and that in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court. (No change)

13. That the State of Alabama shall never be made a defendant in any court of law or equity [, except in cases where the State expressly consents.] (adding express waiver clause)

My proposal adds a waiver clause to the sovereign immunity provision. For many of the reasons expressed by my colleague Susan Randall, I do not support blanket sovereign immunity.⁴⁷

14. [No person shall be imprisoned for debt.] That excessive fines shall not be imposed, nor cruel or unusual punishments inflicted. [That the privilege of the writ of habeas corpus shall not be suspended by the authorities of this State.] (combining § 15, § 17, and § 20)

My proposal simply combines current, related provisions.

15. That treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and that no person shall be convicted of treason, except on the testimony of two witnesses to the overt

⁴⁷ Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1 (2002).

act, or his own confession in open court. [That no person shall be attained of treason by the Legislature; and no conviction shall work corruption of blood or forfeiture of estate.] (combining § 18 and § 19)

My proposal combines current, related provisions.

16. That no power of suspending laws shall be exercised except by the Legislature. (No change)

17. That no ex post facto law, nor any law impairing the obligation of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and every grant of a franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment. (No change)

18. That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the Legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the Legislature may by law, secure to persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the right herein reserved; but just compensation shall in all cases be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association. (No change)

19. That all navigable waters shall remain forever public highways, free to the citizens of the State and the United States, without tax, impost or toll; and that no tax, toll, import or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any

wharf erected on the shores, or in or over the waters, of any navigable stream, unless the same be expressly authorized by law. (No change)

20. That every citizen has a right to bear arms in defense of himself and the State. (No change)

21. That no standing army shall be kept up without the consent of the Legislature, and, in that case, no appropriation for its support shall be made for a longer term than one year; and the military shall, in all cases and at all times, be in strict subordination to the civil power. (No change)

22. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor, in time of war, but in manner to be prescribed by law. (No change)

23. That no title of nobility or hereditary distinction, privilege, honor or emolument, shall ever be granted or conferred in this State; and that no office shall be created, the appointment to which shall be for a longer time than during good behavior. (No change)

24. That immigration shall be encouraged; emigration shall not be prohibited, and no citizen shall be exiled. (No change)

25. That temporary absence from the State shall not cause a forfeiture of residence once obtained. (No change)

26. 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. (No change)

27. The [right] of suffrage shall [not be denied to citizens,] [shall] be protected by [equal] laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult or other improper conduct. (making suffrage a right)

My proposal makes voting a right protected by equal laws. It is designed to prevent the government from discriminating among adult voters.

28. Foreigners who are, or who may hereafter become, bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens. (No change)

29. That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against and 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. (No change)

30. Rights guaranteed by this Constitution are not limited to or dependent on those guaranteed by the United States Constitution. (New provision)

My proposal seeks to make clear that the Alabama Constitution is not limited to interpretations of the federal Constitution. The state law has independent scope and meaning.

I applaud the grassroots movement to reform the 1901 Constitution. I support these efforts unequivocally. Alabama cannot afford to lose this contest. We must reform our basic charter.

APPENDIX A

1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21 - SEPT. 3, 1901, AT 168 (1940).

Ordinance No. 81, by Mr. Case: Ordinance to amend Article I of the Constitution - Declaration of Rights.

Be it ordained by the people of Alabama in Convention assembled, That Article I of the Constitution be amended so as to read as follows:

That the great, general and essential principles of liberty and free government may be established, we declare:

First - That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that the sole object and only legitimate end of government is to protect the citizen in the enjoyment of these principles; and when the government assumes other functions, it is usurpation and oppression, and that this State shall not make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall it deny to any person within its jurisdiction the equal protection of the laws:

Referred to Committee on Preamble and Declaration.

APPENDIX B

1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL
CONVENTION OF THE STATE OF ALABAMA, MAY 21 -
SEPT. 3, 1901, AT 320 - 21 (1940).

An Ordinance adopting a preamble and Declaration of Rights for the Constitution of the State of Alabama.

Be it ordained by the people of the State of Alabama in convention assembled that the following shall be the Preamble and Declaration of Rights of the Constitution of this State:

PREAMBLE.

We, the people of the State of Alabama, in convention assembled, in order to establish justice, ensure domestic tranquility and secure the blessings of liberty to ourselves and our posterity - invoking the favor and guidance of Almighty God - do ordain and establish the following Constitution and form of government for the State of Alabama:

ARTICLE 1.

Declaration of Rights.

That the great, general and essential principles of liberty and free government may be recognized and established, we declare

1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

2. That all persons resident in this State, born in the United States, or naturalized, or who shall have legally declared their intention to become citizens of the United States, are hereby declared citizens of the State of Alabama, possessing equal civil and political rights.

3. 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.

4. That no religion shall be established by law; that no preference shall be given by law to any religious sect, society,

denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor pay any tithes, taxes or other rate for the building or repairing of any place of worship, or for maintaining any minister or ministry; that no religious test shall be required as a qualification to any office or public trust, under this State; and that the civil rights, privileges and capacities of any citizen shall not be in any manner affected by his religious principles.

5. No law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

6. That the people shall be secure in their persons, houses, papers and possessions, from unreasonable seizures or searches, and that no warrant shall issue to search any place, or to seize any person or thing without probable cause, supported by oath or affirmation.

7. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either: to demand the nature and cause of the accusation; to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and that he shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due process of law; but the General Assembly may by a general law provide for a change of venue for the defendant in all prosecutions by indictment, and that such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor.

8. That no person shall be accused of, arrested, or detained, except in case ascertained by law, and according to the forms which the same has prescribed; and no person shall be punished, but by virtue of a law established and promulgated prior to the offense, and legally applied.

9. That no person shall, for any indictable offense, be proceeded against criminally by information except in cases arising in the militia and volunteer forces when in actual service, or by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in this Constitution; Provided, that in cases of

misdemeanor, the General Assembly may, by law, dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace, or such other inferior courts as may be by law established.

10. That no person shall, for the same offense, be twice put in jeopardy of life, or limb; but courts may, for reasons fixed by law, discharge juries from the consideration of any case, and no person shall gain any advantage by reason of such discharge of the jury.

11. That no person shall be barred from prosecuting or defending, before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

12. That the right of trial by jury shall remain inviolate.

13. That in all prosecutions for libel or for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and that in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court.

14. That all courts shall be open, and that every person, for any injury done him, in his land, goods, person or reputation, shall have a remedy by due process of law; and rights and justice shall be administered without sale, denial or delay.

15. That the State of Alabama shall never be made a defendant in any court of law or equity.

16. That excessive fines shall not be imposed, nor cruel or unusual punishments inflicted.

17. That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great; and that excessive bail shall not in any case be required.

18. That the privilege of the writ of habeas corpus shall not be suspended by the authorities of this State.

19. That the treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and that no person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or his own confession in open court.

20. That no person shall be attainted of treason by the General Assembly; and that no conviction shall work corruption of blood or forfeiture of estate.

21. That no person shall be imprisoned for debt.

22. That no power of suspending laws shall be exercised, except by the General Assembly.

23. That no ex post facto law, or any law, impairing the obligation of contracts, or making any irrevocable or excessive grants of special privileges, or immunities, shall be passed by the General Assembly; and every grant of a franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment.

24. That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies, and subjecting them to public use the same as individuals; but private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, that the General Assembly may, by law, secure to persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved, but just compensation shall in all cases be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.

25. That all navigable waters shall remain forever public highways, free to the citizens of the State, and of the United States, without tax, impost or toll; and that no tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity, for the use of the shores, or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same are expressly authorized by law.

26. That the citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the power of government for redress of grievances, or other purposes by petition, address or remonstrance.

27. That every citizen has a right to bear arms in defense of himself and the State, and it shall be the duty of the General Assembly to define by law small arms, and regulate the bearing of same.

28. That no standing army shall be kept up without the consent of the General Assembly, and in that case no appropriation for its support shall be made for a longer term than one year, and the military shall, in all cases, and at all times, be in strict subordination to the civil power.

29. That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

30. That no title of nobility or hereditary distinction, privilege, honor or emolument shall be granted or conferred in this State; and that no office shall be created the appointment to which shall be for a longer time than during good behavior.

31. That immigration shall be encouraged, emigration shall not be prohibited and that no citizen shall be exiled.

32. That temporary absence from the State shall not cause a forfeiture of residence once obtained.

33. 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.

34. The privilege of suffrage shall be protected by laws regulating elections, and prohibiting, under adequate penalties, all undue influences from power, bribery, tumult or other improper conduct.

35. Foreigners who are or may hereafter become bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property, as native born citizens.

36. That the sole object and only legitimate end of government is to protect the citizens in the enjoyment of life, liberty and property, and when the government assumes other functions it is usurpation and oppression.

37. That no restraint upon the privilege of suffrage on account of race, color, or previous condition of servitude, shall be made by law.

38. In the government of this State, except in the instance in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive or judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers; or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.

39. 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.

The undersigned member of the Committee on Preamble and Declaration of Rights concurs in the majority of said report save as to portions of Section 7 and he offers as amendment to portions of Section 7 the following:

And in all prosecutions by indictment the place in the County or district in which the crime was committed shall be stated with reasonable certainty as to enable the defendant to know the particular place where the criminal act is alleged to have been committed.

Respectfully submitted,
J.H. Barefield.

The undersigned members of the Committee on Preamble and Declaration of Rights do not concur in the foregoing report of the Committee so far as it relates to Section 12, Article I for the following reasons:

In every relation of life in Alabama where the result is dependent upon the opinions and decisions of a number of persons, the principal of a majority rule governs, with the single exception of a verdict of a jury. Why should a unanimous verdict on a question of fact be required and enforced from a jury? A majority of one vote in this Convention either puts a proposition in the organic law or rejects it. A majority of one vote in each House of the General Assembly creates, repeals or modifies a positive law, regardless of the magnitude of the interests involved. A majority of the Senate of the United States ratifies or refuses to consent to a treaty with a foreign power. A majority of a single vote in a half a million in a pivotal State may elect a President of the United States, change the policy of government and bring prosperity or ruin to seventy millions of people. And yet the majority of the Committee deny this principal to a verdict of a jury in a civil suit at law. When a judgment is entered on a unanimous verdict, if an appeal it taken to the Supreme Court of the State it can be then finally adjudicated by a bare majority

of the justices. So in the Supreme Court of the United States five of the Justices against four held the income tax unconstitutional; and in the same Court five of the Justices held that Porto Rico was not under the Constitution, and four that it was. Again in all ministerial and executive bodies the majority rules, and the will of the minority when lawfully expressed. For these reasons we think that the provision authorizing three-fourths of a jury to render a verdict in a civil case should become a part of our Constitution as it is of several other important States of the Union.

We therefore recommend as a substitute for Section 12, Article I as reported by the Committee, the following:

Art. I, Sec. 12. The right of trial by jury as heretofore enjoyed, shall remain inviolate, but in civil actions three-fourths of the jury may render a verdict.

APPENDIX C

2 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL
CONVENTION OF THE STATE OF ALABAMA, MAY 21 -
SEPT. 3, 1901, AT 2254 - 59 (1940).

The Convention met pursuant to adjournment, there being 125 delegates present upon the call of the roll.

Leave of absence was granted to Mr. Long of Butler for tomorrow.

Mr. Lomax - Mr. President, I move that the Article on Preamble and Declaration of Rights be now read a third time and put upon its passage.

There being no objection, the article was read by the Clerk as follows:

An ordinance adopting a Preamble and Declaration of Rights for the Constitution for the State of Alabama.

Be it ordained by the people of the State of Alabama in Convention assembled, that the following shall be the Preamble and Declaration of Rights of the Constitution of this State:

PREAMBLE.

We, the people of the State of Alabama, in order to establish justice, ensure domestic tranquility and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.

ARTICLE I.

Declaration of Rights.

That the great, general and essential principles of liberty and free government may be recognized and established, we declare

1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

2. 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.

3. That no religion shall be established by law; that no preference shall be given by law to any religious sect, society, denomination or mode of worship; that no one shall be compelled by law to attend any place of worship, nor pay tithes, taxes or other rate for building or repairing any place of worship, or for maintaining any minister or ministry; that no religious tests shall be required as a qualification to any office or public trust under this State; and that the civil rights, privileges and capacities of any citizen shall not be in any manner, affected by his religious principles.

4. That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; and any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

5. That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizures or searches; and that no warrant shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.

6. That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and that he shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by due process of law; but the General Assembly may, by a general law, provide for a change of venue for the defendant in all prosecutions by indictment, and that such change of venue on application of the defendant may be heard and determined without the personal presence of the defendant so applying therefor; Provided, that at the time of the application for the change of venue the defendant is imprisoned in jail or some legal place of confinement.

7. That no person shall be accused, or arrested, or detained, except in cases ascertained by law, and according to the forms which the same has prescribed; and no person shall be punished, but by virtue of a law established and promulgated prior to the offense and legally applied.

8. That no person shall, for an indictable offense, be proceeded against criminally, by information except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in this Constitution; Provided, that in cases of misdemeanor, the General Assembly, may by law dispense with a grand jury and authorize such prosecutions and proceedings before Justices of the Peace or such other inferior courts as may be by law established.

9. That no person shall, for the same offense be twice put in jeopardy of life or limb; but courts may, for reasons fixed by law, discharge juries from the consideration of any case, and no person shall gain any advantage by reason of such discharge of the jury.

10. That no person shall be barred from prosecuting or defending, before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

11. That the right of a trial by jury shall remain inviolate.

12. That in all prosecutions for libel or for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and that in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court.

13. That all courts shall be open; and that every person, for any injury done him, in his land, goods, person or reputation shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.

14. That the State of Alabama shall never be made a defendant in any court of law or equity.

15. That excessive fines shall not be imposed, nor cruel or unusual punishments inflicted.

16. That all persons shall, before conviction, be bailable by sufficient securities, except for capital offences, when the proof is evident or the presumption great, and that excessive bail shall not, in any case be required.

17. That the privilege of the writ of habeas corpus shall not be suspended by the authorities of this State.

18. That treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and that no person shall be convicted of treason, except on the testimony of two witnesses to the same overt act, or his own confession in open court.

19. That no person shall be attainted of treason by the General Assembly; and that no conviction shall work corruption of blood, or forfeiture of estate.

20. That no person shall be imprisoned for debt.

21. That no power of suspending laws shall be exercised, except by the General Assembly.

22. That no ex post facto law, or any law, impairing the obligation of contract, or making any irrevocable or exclusive grants of special privileges, or immunities, shall be passed by the General Assembly, and every grant of a franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment.

23. That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the General Assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as individuals, but private property shall not be taken or applied for public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner. Provided, however, that the General Assembly may, by law, secure to persons or corporations the right-of-way over the lands of other persons or corporations and by general laws provide for and regulate the exercise by persons and corporations of the rights herein reserved; but just compensation shall in all cases be first made to the owner; and provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporation other than municipal; or for the benefit of any individual or association.

24. That all navigable waters shall remain forever public highways free to the citizens of the State and of the United States, without tax, impost or toll; and that no tax, toll, impost or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters of any navigable stream, unless the same be expressly authorized by law.

25. That the citizens have a right, in a peaceable manner to assemble together for the common good, and to apply to those invested with the power of government for redress of grievances, or other purposes by petition, address or remonstrance.

26. That every citizen has a right to bear arms in defense of himself and the State.

27. That no standing army shall be kept up without the consent of the General Assembly, and in that case, no appropriation for its support shall be made for a longer term than one year, and the military shall in all cases and at all times be in strict subordination to the civil power.

28. That no soldier shall, in time of peace, be quartered in any house without the consent of the owner nor in time of war but in a manner to be prescribed by law.

29. That no title of nobility or hereditary distinction, privilege, honor or emolument shall be granted or conferred in this State: and that no office shall be created, the appointment to which shall be for a longer time than during good behavior.

30. That immigration shall be encouraged, emigration shall not be prohibited and that no citizen shall be exiled.

31. That temporary absence from the State shall not cause a forfeiture of residence once obtained.

32. 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.

33. The privilege of suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties, all undue influences from power, bribery, tumult or other improper conduct.

34. Foreigners who are, or may hereafter become bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens.

35. 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.

36. In the government of this State, except in the instances in this Constitution hereinafter expressly directed or permitted, the Legislative Department shall never exercise the executive or judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative or executive powers, or either of them; to the end it may be a government of laws and not of men.

37. 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.

THE PRESIDENT - The question now is on the passage of the article, which under the rules will be submitted to an aye and nay vote. As many as favor its adoption as read will say aye and those opposed no as your names are called.

APPENDIX D

4 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL
CONVENTION OF THE STATE OF ALABAMA, MAY 21 -
SEPT. 3, 1901, AT 4673 - 77 (1940).

CONSTITUTION OF THE STATE OF ALABAMA

We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama:

THE PRESIDENT – The Clerk will read Article 1.

MR. WHITE – I think the rules require that we should adopt it section by section.

THE PRESIDENT – The rule was reported by the Committee on Rules and adopted that the Constitution should be taken up article by article.

MR. WHITE – Very well.

Article I was read as follows:

ARTICLE 1.

Declaration of Rights.

That the great, general and essential principles of liberty and free government may be recognized and established, we declare:

1. That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

2. 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.

3. That no religion shall be established by law; that no preference shall be given by law to any religious sect or society, denomination or mode of worship; that no one shall be compelled by law to attend any place of worship or for maintaining any minister or ministry; that no religious test

shall be required as a qualification to any office or public trust under this State; and that the civil rights, privileges and capacities of any citizen shall not be, in any manner, affected by his religious principles.

4. That no law shall ever be passed to curtail or restrain the liberty of speech or of the press and any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.

5. That the people shall be secure in their persons, houses, papers and possessions from unreasonable seizures or searches; and that no warrant shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation.

6. That in all criminal prosecutions the accused has the right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases in his own behalf, if he elects so to do; and in all prosecutions by indictment, a speedy public trial by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty or property, except by due process of law; but the Legislature may, by a general law, provide for a change of venue at the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some other legal place of confinement.

7. That no person shall be accused, or arrested, or detained, except in cases ascertained by law, and according to the forms which the same has prescribed, and no person shall be punished but by virtue of a law established and promulgated prior to the offense and legally applied.

8. That no person shall for an indictable offense be proceeded against criminally by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or by leave of the court, for misfeasance, misdemeanor, extortion and oppression in office; otherwise than is provided in this Constitution; provided, that in cases of misdemeanor, the Legislature may by law dispense with a

Grand Jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established.

9. That no person shall, for the same offense, be twice put in jeopardy of his life or limb; but courts may, for reasons fixed by law, discharge juries from the consideration of any case, and no person shall gain any advantage by reason of such discharge of the jury.

10. That no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

11. That the right of trial by jury shall remain inviolate.

12. That in all prosecutions for libel or for the publication of papers investigating the official conduct of officers or men in public capacity, or when the matter published is proper for public information, the truth thereof may be given in evidence; and that in all indictments for libel the jury shall have the right to determine the law and the facts under the direction of the court.

13. That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial or delay.

14. That the State of Alabama shall never be made a defendant in any court of law or equity.

15. That excessive fines shall not be imposed, nor cruel or unusual punishments inflicted.

16. That all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great, and that excessive bail shall not in any case be required.

17. That the privilege of the writ of habeas corpus shall not be suspended by the authorities of this State.

18. That treason against the State shall consist only in levying war against it, or adhering to its enemies, giving them aid and comfort; and that no person shall be convicted of treason, except on the testimony of two witnesses to the overt act, or his own confession in open court.

19. That no person shall be attained of treason by the Legislature; and no conviction shall work corruption of blood or forfeiture of estate.

20. No person shall be imprisoned for debt.

21. That no power of suspending law shall be exercised except by the Legislature.

22. That no ex post facto law, nor any law impairing the obligation of contracts, or making any irrevocable or exclusive grants of special privileges or immunities, shall be passed by the Legislature; and every grant of a franchise, privilege or immunity shall forever remain subject to revocation, alteration or amendment.

23. That the exercise of the right of eminent domain shall never be abridged nor so construed as to prevent the Legislature from taking the property and franchises of incorporated companies, and subjecting them to public use in the same manner in which the property and franchises of individuals are taken and subjected; but private property shall not be taken for, or applied to, public use, unless just compensation be first made therefor; nor shall private property be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner; provided, however, the Legislature may by law, secure to persons or corporations, and by general laws provide for and regulate the exercise by persons and corporations of the right herein reserved; but just compensation shall in all cases be first made to the owner; and, provided, that the right of eminent domain shall not be so construed as to allow taxation or forced subscription for the benefit of railroads or any other kind of corporations, other than municipal, or for the benefit of any individual or association.

24. That all navigable waters shall remain forever public highways, free to the citizens of the State and the United States, without tax, impost or toll; and that no tax, toll, import or wharfage shall be demanded or received from the owner of any merchandise or commodity for the use of the shores or any wharf erected on the shores, or in or over the waters, of any navigable stream, unless the same be expressly authorized by law.

25. That the citizens have a right, in a peaceable manner, to assemble together for the common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address or remonstrance.

26. That every citizen has a right to bear arms in defense of himself and the State.

27. That no standing army shall be kept up without the consent of the Legislature, and, in that case, no appropriation for its support shall be made for a longer term than one year; and the military shall, in all cases and at all times, be in strict

subordination to the civil power.

28. That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor, in time of war, but in a manner to be prescribed by law.

29. That no title of nobility or hereditary distinction, privilege, honor or emolument, shall ever be granted or conferred in this State; and that no office shall be created, the appointment to which shall be for a longer time than during good behavior.

30. That immigration shall be encouraged; emigration shall not be prohibited, and no citizen shall be exiled.

31. That temporary absence from the State shall not cause a forfeiture of residence once obtained.

32. 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.

33. The privilege of suffrage shall be protected by laws regulating elections and prohibiting, under adequate penalties, all undue influence from power, bribery, tumult or other improper conduct.

34. Foreigners who are, or who may hereafter become, bona fide residents of this State, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens.

35. 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.

36. 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.

