

September 7, 2021

Committee on the Recompilation of the Constitution
Alabama Statehouse
11 S. Union Street
Montgomery, AL 36130

RE: Public comment on recompilation efforts

Committee members:

We applaud the efforts your committee is undertaking to remove the racist language in our state's constitution. Recognizing that voters twice rejected such an opportunity in recent decades, we hope that the support shown by voters in 2020 to do so will inspire a deep investigation into both the content of the text and the motivations for same, as well as meaningful recommendations for reparative language.

We submit the following written comment outlining the history and impact of the 1901 Constitution, as well as a few critical remedies for the committee's consideration.

Sixth Constitution in 82 years

Between 1819 and 1901, Alabama organized six constitutional conventions: in 1819 (converting Alabama Territory into a State), 1861 (the "Secession Constitution"), 1865 (allowing Alabama's readmission into the Union), 1868 (Reconstruction), 1875 (the "Redeemer Constitution," ending Reconstruction), and 1901 (the current document).¹ In the 120 years since, we've offered only patches by adopting nearly 1,000 amendments. And, in doing so, produced a document 12 times longer than the average state constitution and 51 times longer than the U.S. Constitution.²

The 1901 Constitution was Born in the Heart of Jim Crow

To fully grasp the weight of our current constitution's text, one must understand the foundation, circumstances, and intentions of its drafting. The Alabama Department of Archives summarizes, as follows:

As the 20th century dawned in Alabama, demands to redraw the basic framework of state government grew. The "Redeemer Constitution" of 1875 had effectively wrested political control from the coalition of Republican "scalawags" (native Republicans), "carpetbaggers" (Northern opportunists), and newly freed blacks who had briefly held power during Reconstruction. However, its limits on state support for commercial development through river improvement and railroad construction, and its low tax ceilings which kept schools poor increasingly drew criticism from reform-minded Alabamians.

¹ <https://alabama200.org/educators/primary-sources/constitutions-and-citizenship/>

² https://en.wikipedia.org/wiki/Constitution_of_Alabama

Of greater importance to the politically powerful was the need to better control who voted in the state, a legacy of the tumultuous 1890s when the conservative Democrats were challenged by the Farmers' Alliance/Populist movement. The entrenched "Bourbons" had maintained control during that period through a combination of intimidating African Americans, raising the specter of "black rule" to keep whites within the party, and fraudulently counting votes for conservative candidates when all else failed. Uncomfortable with the turmoil and subterfuge of these campaigns, many leaders of the conservative Democrats embraced calls for a new constitution as a way to ensure "honest elections" — by legally taking the vote away from blacks so that they would not have to be stolen.

Closely contested elections saw a convention assembled and a new Constitution adopted in 1901. Generally supported by the conservative "Bourbon" planters of the Black Belt counties and their allies in the rapidly industrializing Birmingham area, both the convention and the proposed Constitution had significant opposition from poor farmers and African Americans afraid of losing their already tenuous political identities.

The resulting 1901 Constitution fulfilled their fears as a host of stringent suffrage restrictions effectively denied great numbers of both classes the right to vote. Accurately described by present-day historians as "designed to freeze change in desirable channels," the 1901 Constitution not only restricted suffrage but also did little to make government more responsive to the challenges of a new century. The 1901 Constitution was more a code of laws than a framework for government, as the Legislature retained near complete control over local affairs, making necessary hundreds of amendments over the succeeding decades.³

The 1901 Constitution Sought to Establish White Supremacy and Legal Segregation as the Law

Records from the Constitutional Convention of 1901 show the resulting document, written entirely by white men, was intentionally drafted to disenfranchise Black men and suppress the political power of communities of color and poor white residents. The framers made no secret of their purpose: to formally enshrine white supremacy as the law and to deny Black residents a voice in government.

"[W]hat is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State," declared Constitutional Convention Chair John M. Knox as the convention opened.⁴ The front page of the *Montgomery Advertiser* on November 12, 1901, stated, "The

³ Alabama Department of Archives and History, "[The Alabama Constitution of 1901 Unit — Introduction](http://www.archives.alabama.gov/teacher)," *Using Primary Sources in the Classroom*, <http://www.archives.alabama.gov/teacher> (last visited Sept. 1, 2021).

⁴ The Alabama Legislature, Official Proceedings at the 1901 Alabama Constitutional Convention 8, http://www.legislature.state.al.us/aliswww/history/constitutions/1901/proceedings/1901_proceedings_vol1/day2.html (last visited Sept. 1, 2021).

Citizens of Alabama Declare for White Supremacy and Purity of Ballot. The Putrid Sore of Negro Suffrage Is Severed From the Body Politic of the Commonwealth.”⁵

Because the Fourteenth Amendment prohibited race-based disenfranchisement, the framers knew that discriminatory provisions intending to maintain white supremacy had to appear race-neutral.

To accomplish this, the delegates adopted a series of voter registration provisions – including a poll tax, a literacy test, the empowerment of local election officials, property requirements, and a felony and “moral turpitude” provision that targeted select felonies the framers believed Black Alabamians were more likely to commit. This was meant to disenfranchise Black men, who made up 45 percent of the state’s population and were threatening the white wealthy class’s political dominance by aligning their votes with those of low-income white men.

The impact of disenfranchisement was immediate and severe. In 1900, more than 180,000 Black men were eligible to vote. By 1903, fewer than 3,000 were able to register.⁶ But Alabama’s new constitution also “would remove [from voter registration rolls] the less educated, less organized, more impoverished whites as well.”⁶

For more information about Alabama’s disenfranchisement, visit our report at https://www.splcenter.org/sites/default/files/splc_alabama_voting_rights_report_with_exhibits_final.pdf.

Diluting Political Power in Rural and Communities of Color Required Centralizing Power

To disempower rural voters and voters of color, the 1901 Constitution also removed home rule from cities and counties, stripping them of their ability to make decisions within their jurisdiction without threat of interference from the state legislature. Though municipal corporations are provided for in Article XII, Sections 220-28, via such powers delegated by the legislature, counties have no general grant of power in the Constitution or from the legislature.⁷ In limiting local government power, the framers established a system in which many local decisions, even those most logically handled by local officials, require legislative approval.

In addition to the local constitutional amendments, the state legislature approves dozens of local bills applying to specific counties or municipalities during each session. Such obligations detract from time allotted for matters of interest to the entire state. But, more importantly, undermining the ability of cities and counties to self-govern dilutes the power of local voters to seek remedies affecting their interests. This is even more evident in communities of color that are unable to elect representatives of their choice, affecting their interests.

⁵ Alabama Bicentennial, “The Citizens of Alabama declare for white supremacy and purity of ballot,” <https://alabama200.org/educators/primary-sources/constitutions-and-citizenship/1901-constitution/detail/the-citizens-of-alabama-declare-for-white-supremacy-and-purity-of-ballot> (last visited Sept. 2, 2021).

⁶ Glenn Feldman, *The Disfranchisement Myth: Poor Whites and Suffrage Restriction in Alabama*, Athens: University of Georgia Press, 2004, pp. 135-36

⁷ <http://encyclopediaofalabama.org/article/h-1153#:~:text=Home%20Rule%20is%20the%20power,to%20run%20their%20own%20affairs.&text=The%20limited%20grant%20is%20known,Constitution%20or%20from%20the%20legislature>.

Relying on the adoption of local amendments also creates disparate opportunities across the state for school funding, economic development, and infrastructure projects, to name a few. Two particularly egregious examples are the reliance on local bills to increase local court fees and ad valorem taxes to support public schools; the former grow more frequent as the state avoids its obligations to adequately fund the state courts and the latter are often opposed by legislators in neighboring, competing school districts and special interests, alike.

Involuntary Servitude Exception Prohibits the Realization of Freedom Guaranteed by the Thirteenth Amendment

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.

Ala. Const., art. 1, Section 32 (emphasis added).

First adopted in the 1865 Constitution,⁸ modeling the language of the Thirteenth Amendment, this criminal exception to slavery's abolishment was designed to preserve the economic and social conditions embedded in the pre-Civil War South and the subsequent 'black codes'⁹ designed to limit the freedom of Black people and ensure continued cheap labor. The intent was obvious.

Days before the ratification of the Thirteenth Amendment, *Chicago Tribune* reporter Sydney Andrews met with a politically connected Georgia lawyer who warned Andrews of what was to come: "[T]here'll be private talk this session, even if there isn't open effort, to make the penal code take [Black Southerners] back into the condition of slavery. It'll be called 'involuntary servitude for the punishment of a crime' but it won't differ much from slavery."¹⁰

The "abolition loophole" or "punishment clause" is linked by those who study the issue to the growth of prison labor and the rise of mass incarceration. As Bryan Stevenson, founder of the Equal Justice Initiative, said, "Slavery didn't end in 1865, it just evolved."

"These various types of slaveries transformed from one to another and back again," wrote University of California, Irvine Professor Michele Goodwin. "Debt peonage morphed into convict labor, convict labor turned into convict leasing, and these transformed to chain gangs."¹¹ The Alabama Department of Corrections currently operates prison industries program at 17 different facilities across the state where inmates make furniture (like that found in the Alabama Senate chambers) or license plates. Most of the inmates who work inside facilities receive no wages, while others who work outside are compensated only 35-50 cents per hour.¹²

Ava DuVernay's documentary *13th* and Michelle Alexander's *The New Jim Crow* document the history and evolution of the antebellum slave system and how mass incarceration – fueled by the War on Drugs

⁸ [Article I, § 34](#), Alabama Constitution of 1865

⁹ <https://www.history.com/topics/black-history/black-codes>

¹⁰ <https://www.theusconstitution.org/news/the-war-over-the-13th-amendment-and-modern-day-slavery/>

¹¹ Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 Cornell L. Rev. 899 (2019) Available at: <https://scholarship.law.cornell.edu/clr/vol104/iss4/4>

¹² <https://www.msnbc.com/the-last-word/alabama-inmates-stage-prison-protest-free-labor-msna310641>

and profitable prison labor – has purposely been used to redesign racial caste in modern-day America. Exploitation of prison labor also harms working class white residents because fewer “free world” jobs are available when prison labor —a \$1 billion industry nationwide - produces at lower costs.

In November 2020, voters in Utah (80%) and Nebraska (68%) approved the removal of similar language from their state constitutions.¹³ Following recent approval by the state legislature, Tennessee voters will have the opportunity to approve removal in November 2022.¹⁴ We must acknowledge Alabama’s attempt to retain a symbolic connection to systems of oppression and remove this provision.

A Constitutional Right to Education

Despite numerous federal court decisions to the contrary, our constitution provides for racially segregated public schools.

The legislature shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years. The public school fund shall be apportioned to the several counties in proportion to the number of school children of school age therein, and shall be so apportioned to the schools in the districts or townships in the counties as to provide, as nearly as practicable, school terms of equal duration in such school districts or townships. **Separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race.**

Ala. Const., art. XIV, Section 256 (original text) (emphasis added).

Alabama revised its “separate schools” provision in 1956, two years after the U.S. Supreme Court’s decision in *Brown v. Board of Education of Topeka*, to wit:

It is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student, but **nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order.**

The legislature may by law provide for or authorize the establishment and operation of schools by such persons, agencies or municipalities, at such places, and upon such conditions as it may prescribe, and for the grant or loan of public funds and the lease, sale or donation of real or personal property to or for the benefit of citizens of the state for

¹³ <https://thehill.com/homenews/state-watch/524469-utah-nebraska-voters-approve-measure-stripping-slavery-language-in>

¹⁴

[https://ballotpedia.org/Tennessee_Remove_Slavery_as_Punishment_for_Crime_from_Constitution_Amendment_\(2022\)](https://ballotpedia.org/Tennessee_Remove_Slavery_as_Punishment_for_Crime_from_Constitution_Amendment_(2022))

educational purposes under such circumstances and upon such conditions as it shall prescribe. Real property owned by the state or any municipality shall not be donated for educational purposes except to nonprofit charitable or eleemosynary corporations or associations organized under the laws of the state.

To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extent as the legislature may provide.

Ala. Const., art. XIV, Section 256 (as amended by Amendment 111) (emphasis added).

This blatant, racially motivated defiance of the Supreme Court's ruling made two things clear: Alabama wanted to maintain segregated schools and the State did not want to be obligated to provide, or pay for, the education of Black children. In Associated Press accounts from the time, the 1956 amendment is described as a measure that would allow the state to abolish public schools as an alternative to integrating them.

Fortunately, Alabama courts have held that students in our state continue to have a right to an education. After the Alabama Supreme Court's 2002 decision in the "Public School Equity Funding Case," then-Alabama Attorney General Bill Pryor proclaimed:

*The Court refused to revisit the liability order, which established that the children of Alabama enjoy a constitutional right to an education. ... I am pleased that the constitutional right of Alabama children to an education has been upheld.*¹⁵ (emphasis added.)

Yet, although the "minors shall attend schools provided for their own race" provision has not been enforceable for decades, its inclusion in our state's constitution – the supreme law of Alabama -- continues to influence perceptions of Alabama and support the realities of the educational inequities we face today. Alabama schools remain deeply separate and unequal: Among the State's list of "failing" schools from November 2019 (the most recent data), 31 of the state's 76 "failing" public schools were located in the Black Belt and served majority Black student populations.¹⁶

Some would argue that because the segregation language is not enforceable, it no longer matters. But words have meaning, especially at a time when public schools are more segregated than at any time since the 1960s and the racial achievement gap is staggering – between 20 and 30 percentage points in any subject area.

¹⁵ See John Herbert Roth, *Education Funding and the Alabama Example: Another Player on a Crowded Field*, 2003 BYUELJ 739, n 90 (2003) (emphasis added).

¹⁶ <https://www.al.com/news/2021/05/on-anniversary-of-brown-v-board-these-alabama-schools-remain-segregated.html>

When removal of the provision was last before Alabama voters in 2012, Senator Arthur Orr (who sponsored the enabling legislation) said, “It’s important to address this issue and show that Alabama is a much different place than it was in the past. ... [After the vote failed in 2004 to strike the language], the national news reported that Alabama had failed to reject segregation. It played into all the negative stereotypes of our state.”¹⁷

We agree. But to properly address this problem, we must remove the segregation language in Section 256, *and* we must refuse to add language to the Constitution that would limit a child’s right to an education, including language that would make this right unenforceable. As Bill Pryor stated, students in Alabama have a right to an education, and to make that right meaningful – just like any other right provided in the Constitution – it must be enforceable.

Our Constitution Should Represent All Alabamians

Even within your limited mandate, this committee, and your peers in the Alabama Legislature, can remove the lingering vestiges of racial segregation and legalized oppression of Alabama’s Black residents. The language in the state Constitution matters; it’s a stated commitment to ourselves and our operations with one another. It also is a public projection of our values to those who seek to do business here or to one day make Alabama their home.

We encourage you to strive even further than Chair Coleman’s directive to “bring the Alabama Constitution into the 21st Century and be more reflective of who we are as a state now.” Help us create an inclusive Constitution for all Alabamians. We might not have another chance for 100 years.

Respectfully,

Shay M. Farley, JD
Regional Policy Director
SPLC Action Fund

¹⁷https://web.archive.org/web/20130531151701/http://www.annistonstar.com/view/full_story/20488879/article-Alabama-segregation-amendment-could-put--voters-in-a-bind?instance=home_news