

# THE BURDEN OF FRAUD ON ALABAMA’S LEGACY

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## INTRODUCTION

Alabamians carry a unique burden—the longest constitution in the world.<sup>1</sup> The Alabama Constitution of 1901 was illegally ratified and was the offspring of decades of undemocratic politics. Alabama’s constitution was motivated by race in an effort to strip blacks of their right to vote, and since blacks were still voting, they were manipulated into endorsing their own disfranchisement.<sup>2</sup> Instead of rewriting the constitution and freeing the state of its ancestral regimen, Alabama has found itself in the habit of amending its constitution to the point of absurdity.<sup>3</sup> While the “era of using the Constitution and laws of Alabama to foster and protect a particular, white-dominated system”<sup>4</sup> came to an end in the 1960s,<sup>5</sup> by simply patching its wounds through amendments, Alabama continues to create laws in its undemocratic shell.

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1. Alabama has the longest constitution in the world, with single amendments longer than the entire U.S. Constitution. *See, e.g.,* J. Michael Allen III & Jamison W. Hinds, *Alabama Constitutional Reform*, 53 ALA. L. REV. 1, 4 (2001).

2. WILLIAM H. STEWART, *THE ALABAMA STATE CONSTITUTION: A REFERENCE GUIDE* 6 (1994).

3. *Id.* at 2 (“[The] piecemeal constitutional change Alabama has experienced since 1901 has been facilitated because of the ease with which the document may be formally amended.”).

4. *Id.* at 7.

5. The federal Voting Rights Act of 1965 ruled disfranchisement practices illegal and gave everyone the right to vote without discrimination. *See* 42 U.S.C. § 1973 (2006). However, Alabama’s Article VIII on suffrage was not officially changed until 1996. ALA. CONST. amend. 579.

This Note will explore Alabama's constitutional history, explain why disfranchisement happened throughout the South, and explicate why Alabama deserves a new constitution. First, Part I will briefly explain the history of Alabama's constitutions with a more in-depth analysis of two constitutions arising after the Civil War: the constitutions of 1868 and 1901. These two constitutions present the evolution of corruption through one-party systems, with similar suffrage provisions. Next, Part II will address the federal government's indifference towards Alabama and other southern states' disfranchisement efforts. Part II will also explore the U.S. Supreme Court's reluctance to protect the civil rights of African-Americans under the Fourteenth and Fifteenth Amendments. Because of the federal government's apathy, Alabama created a corrupt government, which continues to haunt the state. Finally, Part III examines recent cases concerning Alabama's constitution, explaining why a new constitution is imperative, and offering democratic solutions to correct the mistakes of Alabama's past.

## I. THE FRAUDULENT ROAD TO 1901

Malcolm McMillan has observed that "from 1819 to 1901, constitution making in Alabama was a never-ending process."<sup>6</sup> In eighty-three years, Alabama organized six constitutional conventions, and it has not convened one since.<sup>7</sup> In less than 100 years, Alabama would be transformed from "one of the most democratic states in 1819 to one of the least democratic a century later."<sup>8</sup>

### A. *The Build-Up to a Failed Democracy: The 1901 Constitution's Predecessors*

On July 5, 1819, delegates convened in Huntsville, Alabama, to write the first constitution of the state, the constitution of 1819.<sup>9</sup> The convention was led by the developing aristocrats, the planters, but was balanced out by the "plain men" to create an honest and democratic constitution.<sup>10</sup> One of the major controversies that began the divide between northern and southern Alabama regarded the apportionment of the legislature: whether

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6. MALCOLM COOK McMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798–1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM, at vii (The Reprint Co. 1978) (1955).

7. *Id.*

8. Wayne Flynt, *Alabama's Shame: The Historical Origins of the 1901 Constitution*, 53 ALA. L. REV. 67, 76 (2001).

9. McMILLAN, *supra* note 6, at 31.

10. *Id.* at 46 ("[T]o the 'plain men,' those who came mostly from the 'white counties,' must go the credit for amending the document into an even more democratic constitution.").

representation should include letting five slaves equal three white men.<sup>11</sup> This disagreement was the predecessor of what would become an all-out political war centered on which party could manipulate the black vote to its advantage.<sup>12</sup>

With the purpose to garner one-party control, this manipulation began during the Reconstruction Period. The Reconstruction Act of 1867, and later, the Fourteenth and Fifteenth Amendments, extended civil liberties to blacks, including the cherished right to vote. The Reconstruction Act of 1867 required an “iron-clad” oath be taken before Alabamians could vote, swearing that one had “never been disfranchised for participation in the rebellion.”<sup>13</sup> Thus, more black Alabamians registered than whites, and they were being courted by the Republican Party.<sup>14</sup> A constitutional convention was proposed in 1867, and for the first time, African-Americans were able to exercise their newly acquired right to vote on it.<sup>15</sup> A total of 71,730 African-Americans voted in favor of the convention, while only 18,553 whites voted affirmatively.<sup>16</sup> Interestingly, there were allegations that these black votes were manipulated into favoring the convention.<sup>17</sup>

Consequently, a convention was called made up of a most unusual group of delegates.<sup>18</sup> This was the only convention where the delegates were mostly laymen with little property; it was not a lawyer's convention.<sup>19</sup> There were also a number of black delegates and Northerners, but the most

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11. *Id.* at 36–37. This ratio of three-fifths was introduced by the United States Constitution in 1787. U.S. CONST. art. I, § 2, cl. 3.

12. See HARVEY H. JACKSON III, *INSIDE ALABAMA A PERSONAL HISTORY OF MY STATE* 113 (2004) (“Whoever controlled the black vote won the election.”).

13. MCMILLAN, *supra* note 6, at 110 n.2 (“One had to swear that he had never been disfranchised for participation in the rebellion and had never been a state or federal official who had taken an oath of loyalty to the United States and later engaged in the rebellion.”); see also *Lynch v. State*, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at \*757 n.952 (N.D. Ala. Nov. 7, 2011).

14. See MCMILLAN, *supra* note 6, at 113 (explaining that before the election for a convention, 104,518 blacks were registered and 61,295 whites were registered). Many whites were disfranchised by the oath requirement, and many who were not disfranchised “chose not to participate . . . because they believed that the federally-mandated government under congressional reconstruction in Alabama was illegitimate.” *Lynch*, 2011 U.S. Dist. LEXIS 155012, at \*757 (quoting Transcript of Testimony of Dr. Robert J. Norrell at 21–24, *Lynch*, 2011 U.S. Dist. LEXIS 155012); *id.* at \*757 n.955 (quoting William Warren Rogers & Robert David Ward, *Radical Reconstruction*, in *ALABAMA: THE HISTORY OF A DEEP SOUTH STATE* 241, 244 (1994)) (explaining that as many as 53,409 whites did not register, “either because they made no effort to register or because they were rejected and disfranchised for wartime activity”).

15. MCMILLAN, *supra* note 6, at 112–13.

16. *Id.* at 113.

17. *Id.* at 113 n.21 (quoting the N.Y. HERALD, Nov. 10, 1867) (“The day before election, Radical agents travelled through Montgomery County and summoned the blacks to come to the city and vote, telling them that General Swayne had ordered them to do so, and would punish them if they did not . . . [T]hey acted simply in obedience [sic] to the instructions of the Bureau agents; and without the faintest glimmering of an idea of what they were doing.”).

18. *Id.* at 114–22.

19. *Id.* at 116.

compelling statistic is that there were ninety-six Republican delegates and only four of the “rebel influence,” who had supported secession.<sup>20</sup> For the delegates, “the real issue in the convention was the disfranchisement of more whites.”<sup>21</sup> White disfranchisement was not what the blacks necessarily promoted, but it was what the white Republican delegates required.<sup>22</sup>

The constitution of 1868 was also never legally ratified.<sup>23</sup> The Second Reconstruction Act required that state constitutions be ratified in an election where at least half of the voters participated.<sup>24</sup> In an attempt to ratify this constitution by an electorate, the requisite half was not met and ratification failed.<sup>25</sup> A total of 70,812 voted for the constitution, and 1,005 voted against it.<sup>26</sup> The constitution needed 85,000 votes to satisfy the requirement.<sup>27</sup> However, the Fourth Reconstruction Act became law a month later, March 11, 1868, which changed the requirement to a majority vote.<sup>28</sup> Therefore, under this new law, the constitution could have been ratified. The United States Congress, over President Johnson’s veto, readmitted Alabama into the Union with its new constitution, and thus, the constitution of 1868 came into being essentially under a retroactive law.<sup>29</sup>

Many Bourbon Democrats<sup>30</sup> blamed the carpetbaggers and scalawags<sup>31</sup> for the problems facing the South,<sup>32</sup> and maybe the Bourbons were partially right in this respect. The Republicans, at both the state and federal level, set

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20. *Id.* at 114.

21. *Id.* at 124.

22. According to McMillan, “[O]n the issue of further proscription of the whites [blacks] were victims of circumstances—forced in the final vote into a coalition with their Carpetbag superiors and extreme Scalawags.” *Id.* at 132.

23. MCMILLAN, *supra* note 6, at 169–74; *Constitution of 1868: Ratification*, ALA. STATE LEG. <http://www.legislature.state.al.us/misc/history/constitutions/1868/1868rat.html> (last visited Feb. 26, 2014).

24. MCMILLAN, *supra* note 6, at 169.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 171–72.

29. *Id.* at 174.

30. Democrats preferred the nickname “Redeemers.” However, they became known as “Bourbons” after the French ruling family whose members worked to restore the “Old Regime” following their revolution. JACKSON, *supra* note 12, at 122.

31. I first remember learning the word “carpetbagger” in my fourth grade Alabama History class. It’s a traditional Southern word used to reference Northerners who came down after the Civil War “with all they owned stuffed into a carpetbag.” *Id.* at 109. Some “carpetbaggers” did come down to exploit the black vote and take advantage of a defeated state. *Id.* However, Professor Jackson explains that most came to invest. *Id.* “Scalawag” is also a commonly understood word in Alabama that refers to the white Alabamians who supported black suffrage. MCMILLAN, *supra* note 6, at 133. Alabama history, especially as told by McMillan, uses these words as descriptive terms without negative connotation. *See id.*

32. *See* JACKSON, *supra* note 12, at 107.

an example of how to develop laws that could subtly prevent members of a race from exercising their voting rights, and there is evidence that Alabama's Republicans manipulated the black vote.<sup>33</sup> The constitution of 1868 was the first to enact a poll-tax requirement,<sup>34</sup> and its suffrage clauses were vague.<sup>35</sup> Prohibited from registering were those who "violated the rules of civilized warfare"; those who had been disqualified under the Fourteenth Amendment or the Reconstruction Act of 1867; and those convicted of "treason [regardless of whether they had been pardoned], embezzlement of public funds, malfeasance in office, crime punishable by law with imprisonment in the penitentiary, or bribery."<sup>36</sup> Also, all "idiots or insane" persons were not allowed to vote.<sup>37</sup>

Of course, if individuals had simply taken the oath to honor black suffrage, more whites would have been able to vote. Nevertheless, Bourbon Democrats might not have felt the need to disfranchise members of the opposing party were it not for the fear of radical disfranchisement of themselves. Therefore, in many ways, the Democrats were acting on the defensive side to protect themselves.<sup>38</sup>

And so, in retaliation to the Republicans, the Bourbon Democrats did everything within their power to win back "their" state. They believed it was necessary for them to come into power to redeem Alabama from the black and carpetbagger Republican empire.<sup>39</sup> As mentioned above, the Republican constitution of 1868 made this easier. Alabamians were living under a constitution that had been ratified contrary to current law. It was a constitution ratified primarily by blacks, and this opened the door for the Bourbon Democrats to create a platform based on white supremacy.<sup>40</sup>

With Klan violence<sup>41</sup> and the fall of the Republican Party, the Bourbon Democrats were able to gain power.<sup>42</sup> The Bourbon Democrats were aware

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33. MCMILLAN, *supra* note 6, at 113–14.

34. ALA. CONST. of 1868, art. XI, § 12.

35. *See id.* art. VII.

36. *Id.* art. VII, § 3; *see* MCMILLAN, *supra* note 6, at 125 n.78.

37. ALA. CONST. of 1868, art. VII, § 3.

38. However, the need for redemption may have been more a facet of Southern folklore than fact because many white Alabamians had begun to switch to the Republican party. JACKSON, *supra* note 12, at 106–07, 109.

39. *See id.* at 107 (emphasizing that the idea of redemption must be understood "if anything else is to make sense").

40. *See* Harvey H. Jackson III, 'White Supremacy' 1901 Battle Cry the Bourbon Democrats Solidified Their Power with the Highly Suspicious Vote Approving a New Constitution, MOBILE REG., Dec. 11, 1994, at 110 ("Branding native Alabama Republicans as 'scalawags,' condemning outsiders as 'carpetbaggers' and issuing dire warnings about 'black rule,' Democrats offered themselves as true Southerners who would end corruption in Montgomery . . .").

41. *See* JACKSON, *supra* note 12, at 114. The "Klan" refers to the Southern terrorist organization, the Ku Klux Klan, which used violence and fear to "keep things as they had been in the South through slavery." S. POVERTY LAW CTR., KU KLUX KLAN 5 (5th ed. 1997). The Klan was used to help white

that they needed to compose a new constitution to secure their power, and thus, they constructed the constitution of 1875. The constitution of 1875 aimed to reduce the size of government and curtail the newly acquired political power of blacks.<sup>43</sup> Like the Convention of 1868, the 1875 convention was dominated by a single party.<sup>44</sup>

Now in power, the Bourbon Democrats employed an endless array of corruptive tactics to maintain their dominance:

[Such tactics included] ballot box stuffing; theft of ballot boxes; removal of polls to unknown places; burning ballots before elections; illegal arrests on election day; importation of voters who did not live in the precinct; calling off names wrongly; fabricating reasons to refuse to hold elections in precincts populated with blacks; the voting of dead or fictitious persons; ensuring that poll watchers and ballot counters became drunk while votes were counted; and, organizing “disorderly demonstrations” to intimidate voters.<sup>45</sup>

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Southerners regain control of the government. *Id.* at 14. One of the Klan’s strengths was its respectable members, including editors, ministers, former Confederate officers and political leaders. *Id.* at 12.

42. After the economic recession of 1873, Republican “carpetbaggers” returned to the North, and the Republican party fell apart in Alabama. 9 C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH: 1877–1913*, at 30 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1999).

43. However, the delegates refrained from disfranchising voters because they feared the federal government would intervene. Flynt, *supra* note 8, at 68.

44. The convention was composed of eighty Democrats, twelve Republicans, and seven “Independents.” MCMILLAN, *supra* note 6, at 188.

45. *Lynch v. State*, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at \*828–31 (N.D. Ala. Nov. 7, 2011). Professor Wayne Flynt testified at this case about the methods used to control the black vote before the Kolb-Jones election of 1892:

One is basically simply returning [a] total vote count that is no relation whatsoever to the number of people who voted. So, for instance, no matter how an African-American may vote, whoever counts the votes and turns in the electoral returns to the secretary of state is the one who’s going to determine the total head count in that county.

So just simply misrepresenting the count is one easy way to do it. Another easy way of doing it is to simply tell sharecroppers on your plantation that if Rueben Cobb, [sic: Kolb] the populist candidate in 1890’s carries the counties there’s no point in showing up because he is not going to renew your contract. That’s another way to do it.

Another way is to haul everybody from your plantation in, in a single wagon and putting them all in one precinct, so you can know how that precinct goes and how it should go. That’s another way of doing it.

So there are all sorts of unethical and illegal methods of controlling the ballot. The most extreme examples actually had ballots of different colors. You might have a Republican of one color and Democrat of another color. That really sealed the issue.

*Id.* at \*831 n.1118; *see also* MCMILLAN, *supra* note 6, at 219 (explaining that in the late seventies and eighties methods to control the vote had moved from intimidation and violence to clever practices such as “[t]heft, exchange of ballot boxes, removal of polls to unknown places, false certification, illegal arrests on the day of election, importation of voters, purloining of ballots, the use of fictitious names, and the systems of ‘counting out’ and ‘counting in’”). However, my personal favorite was “refusing to

But the most disheartening evidence were the 177 lynchings committed in Alabama during the 1890s, more than in any other state.<sup>46</sup>

*B. Creating Alabama's Current Constitution:  
The Constitution of 1901*

By the 1890s, Alabama citizens were well aware of what was going on in their state. They knew that their vote was not being counted correctly, and the government itself knew it needed to reform its behavior. The solution was a new constitution, but this time the primary purpose would be to disfranchise African-Americans and poor whites.<sup>47</sup> Both of these groups were a threat to Democratic supremacy.<sup>48</sup>

On April 23, 1901, after a decade of discussion, 70,305 votes were cast for a convention and 45,505 against.<sup>49</sup> In the twenty-one Black Belt<sup>50</sup> counties, which were predominately African-American, the convention won by 32,202 to 5,273—a margin of 26,929.<sup>51</sup> In the counties where white voters were in the majority, the convention lost by 40,232 to 38,103—a margin of 2,129.<sup>52</sup> Because the Democrats had made it well known that the goal of the convention would be to disfranchise black voters,<sup>53</sup> it is highly unlikely that blacks would have voted in the majority for this convention. Consequently, it is reasonable to assume that the vote was thwarted again

hold an election in precincts where the opposition vote was heavy because of a case of smallpox.” *Id.* at 220.

46. Flynt, *supra* note 8, at 70.

47. See William H. Stewart, *The Tortured History of Efforts to Revise the Alabama Constitution of 1901*, 53 ALA. L. REV. 295, 296 (2001) (“[I]t could be argued that Alabama has not had comprehensive constitutional reform since 1875 because, except for the black disenfranchising provisions, the 1901 Constitution is so similar to the one adopted a quarter-century earlier.”); Bailey Thomson, *Conceived in Fraud*, MOBILE REG., Dec. 11, 1994, at C2 (“The great industrialists of Birmingham and the mighty planters of the Black Belt wrote a constitution that was even more perniciously devoted to protecting their interests than had been the 1875 predecessor, itself a product of reaction and white supremacy.”).

48. See MCMILLAN, *supra* note 6, at 259–60. Poorer whites were skeptical of the Democrats’ disfranchising campaign: “No doubt, it was the opposition of the poor whites, especially of North Alabama, which proved to be the greatest barrier to a constitutional convention.” *Id.* at 254.

49. *Id.* at 261.

50. The Black Belt is a section of Alabama made up of approximately nineteen counties in the middle to southern part of the state. It is known for its rich soil, and during the 1800s, planters, or mostly their black slaves, made up the population of this area.

51. Joseph H. Taylor, *Populism and Disfranchisement in Alabama*, 34 J. NEGRO HIST. 410, 422 (1949).

52. *Id.*

53. The Democrats made the convention a party issue and believed it their duty to campaign for the convention’s favor “by raising the Negro issue and by assuring the whites of the hill counties that no white man would be denied the franchise.” *Id.* at 420. According to the Bourbons, honest elections would be “possible only if ‘corruptible voters’ . . . were removed from the rolls.” JACKSON, *supra* note 12, at 135. In other words, “whites would stop stealing only when blacks had nothing to steal.” *Id.*

by the political parties. If the numbers are not themselves telling,<sup>54</sup> two weeks before the election, members of the Democratic Party admitted to each other that they intended to manipulate the black vote.<sup>55</sup>

Ironically, the President of the Convention, John Knox,<sup>56</sup> reiterated that fraud was not the answer, but if it were not for fraud, the constitution of 1901 and its predecessors might have never emerged. Nevertheless, President Knox explicitly stated that white supremacy must be established by “law—not by force or fraud.”<sup>57</sup> Because corruption and fraud were known problems, President Knox addressed the issue with the justification that “whatever manipulation of the ballot that has occurred in this State has been [in response to] the menace of negro domination.”<sup>58</sup> And thus, he reaffirmed the idea that had it not been for the “Radicals,”<sup>59</sup> disfranchisement would not be necessary; the manipulation of the ballot would not be necessary; and the manipulation of the ballot to ensure that disfranchisement resulted would be justified because of what those “Radicals” did, or at least, this is how the Democrats would see it.

Like the conventions of 1868 and 1875, the 1901 delegates were politically biased. For example, the Convention consisted of 155 white delegates: 141 Democrats, seven Populists, six Republicans, and one Independent.<sup>60</sup> Sixty-three of the delegates were from the Black Belt counties,<sup>61</sup> and, “[t]o the everlasting shame of [the] profession,” the convention has been termed a “lawyer’s convention.”<sup>62</sup> President Knox had

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54. See MCMILLAN, *supra* note 6, at 262. Two Black Belt counties give a great visual of the value of the black vote. Dallas County had 45,372 blacks and 9,285 whites living in the county at the time of the election. In Dallas County, 5,668 votes were cast for the convention and only 200 against. In Lowndes County, there were 5,500 black voters and 1,000 white voters, but the convention won with 3,226 votes in favor and 338 against. *Id.*

55. *Id.* at 261 n.93 (“In the privacy of the State Democratic Executive Committee meeting, about two weeks before the election, some Democratic leaders frankly admitted they intended ‘to vote’ or ‘count out’ the Negro.”).

56. In a speech by President Knox’s Secretary, Niel Sterne, Knox was described as a kind man who loved blacks, exemplified by his substantial bequests to “an old colored draymen who had been his friend since boyhood,” a faithful servant, and “a hospital ward for colored patients.” Niel Sterne, John B. Knox: Address Before the Survivors of the Constitutional Convention of Alabama of 1901, at 7 (Nov. 4, 1937) (transcript available in the W.S. Hoole Special Collections Library). Sterne expressed his wish that Northerners “could read the lesson to be found in the life of this leader of Southern thought who bore the foremost role in taking suffrage from the negroes, because they were not qualified to exercise it, but who, throughout his life, was unceasingly their friend and benefactor.” *Id.* at 8.

57. JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 8–12 (1901) [hereinafter JOURNAL OF PROCEEDINGS].

58. *Id.* at 12.

59. The term Radical referred to the carpetbaggers and scalawags who made up the 1868 convention and regime. See MCMILLAN, *supra* note 6, at 362.

60. Flynt, *supra* note 8, at 72.

61. Taylor, *supra* note 51, at 422.

62. Lynch v. State, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at \*895 (N.D. Ala. Nov. 7, 2011) (explaining that ninety-six of the members were lawyers).



the power to appoint all committees, and the Suffrage and Elections Committee would be made up of twenty-five members.<sup>63</sup> This “all powerful” committee was composed entirely of Democrats.<sup>64</sup> After much debate, the Suffrage Committee settled on a smorgasbord of disfranchising clauses, some of which resembled the 1868 suffrage clauses.<sup>65</sup>

### C. Ratification of the Constitution of 1901: Fraud's Final Victory

Based on the returns, it seemed blacks were in favor of returning their new independence back to their old white superiors.<sup>66</sup> In fact, this constitution owes its very existence to those willing blacks who endorsed their own disfranchisement. The Black Belt counties returned a vote of 36,224 to 5,471 for ratification,<sup>67</sup> and they were late in reporting their vote.<sup>68</sup> For the rest of the state and the majority of whites, it was a close question, but the constitution was rejected by 76,263 to 72,389.<sup>69</sup> In these counties, blacks voted against the constitution.<sup>70</sup> The *Bessemer Weekly* cried that a “‘fraud of the grossest character’ had been committed . . . and the explanation that the ‘colored voters through ignorance voted for ratification . . . is . . . far from plausible or correct.’”<sup>71</sup> Recently, Judge Lynwood Smith stated that “[t]hose numbers stink like rotten fish.”<sup>72</sup> Why the outrage? Many of the purported voters were never seen: “[In] some

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63. RULES OF THE CONSTITUTIONAL CONVENTION, 1901, at 14 (1901).

64. Taylor, *supra* note 51, at 423 (explaining the composition of the Suffrage and Elections Committee). Further, the Black Belt counties had one more representative than the predominately white counties (thirteen versus twelve). *Id.*

65. For example, the Constitution of 1901 also included vague suffrage clauses, a poll tax requirement, and the exclusion of “idiots and insane persons.” ALA. CONST. art. VIII, §§ 177–196. However, the constitution of 1901 was tailored more towards excluding a different class, poor whites and blacks, and its disfranchising clauses reflected this goal. The constitution of 1901 included a “descendants clause,” residency requirements, “good character” clause, understanding clause, property requirements, and the exclusion of individuals charged with any crime involving “moral turpitude.” *Id.*

66. In Dr. Bailey Thomson’s words, “What an irony that the planters stole votes from the very black men that the convention proposed to disfranchise.” Thomson, *supra* note 47, at C2.

67. R. VOLNEY RISER, *DEFYING DISFRANCHISEMENT: BLACK VOTING RIGHTS ACTIVISM IN THE JIM CROW SOUTH, 1890-1908*, at 137 (2010). In the Black Belt counties of Dallas, Hale, and Wilcox, with only 5,623 white male voters combined, 17,475 votes were cast for the constitution and only 508 against it. McMILLAN, *supra* note 6, at 350.

68. McMILLAN, *supra* note 6, at 350.

69. RISER, *supra* note 67, at 137.

70. Lynch v. State, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at \*952 (N.D. Ala. Nov. 7, 2011).

71. RISER, *supra* note 67, at 136–37 (quoting BESSEMER WKLY., Nov. 16, 1901).

72. Lynch, 2011 U.S. Dist. LEXIS 155012, at \*951.

counties almost every eligible Negro was ‘voted’ although thousands never appeared at the polls.”<sup>73</sup> The result was disfranchisement en masse.<sup>74</sup>

## II. DISFRANCHISEMENT AFFIRMED

In 1868, the United States Congress ratified the Fourteenth Amendment, and in 1870, the Fifteenth Amendment was ratified.<sup>75</sup> Both amendments purported to guard the rights and privileges of Americans, including the right to vote.<sup>76</sup> Yet, the federal branches permitted southern governments to thwart the entire purpose of these novel amendments.

For example, the Fourteenth Amendment makes it a political crime to withhold the right to vote from any male over twenty-one.<sup>77</sup> If a state is found in violation of this rule, its representation is cut.<sup>78</sup> Despite a Republican federal government, Alabama’s representation was not curtailed, and thus, calls into question the power of the Fourteenth Amendment.<sup>79</sup> President Knox noted in his opening speech to the Constitutional Convention that the federal government, particularly United States President William McKinley, was “fast yielding to reason” and had not cut Alabama’s representation, implying that such would be warranted under the United States Constitution.<sup>80</sup> Unfortunately, it was America’s highest Court that “made a clear path for the Southern doctrine of a white man’s government.”<sup>81</sup>

Several Supreme Court cases were cited during discussions of the Suffrage and Elections Committee. These cases would give the committee comfort that their actions would not be dismantled by the federal courts. For example, *Minor v. Happersett* was cited for the proposition that the “Constitution of the United States does not confer the right of suffrage

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73. MCMILLAN, *supra* note 6, at 351; *see also* JACKSON, *supra* note 12, at 139 (“If you didn’t know better, it would seem that nearly 12,000 black Alabamians had gone to the polls, some unseen by anyone, and voted for their own disfranchisement.”).

74. In 1900, there were approximately 181,315 eligible black voters, but by 1903, only 2,980 black males were registered. MCMILLAN, *supra* note 6, at 352.

75. U.S. CONST. amend. XIV–XV.

76. *Id.*

77. U.S. CONST. amend. XIV, § 2.

78. *Id.* (“But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”).

79. *See* MCMILLAN, *supra* note 6, at 232, 290–91.

80. JOURNAL OF PROCEEDINGS, *supra* note 57, at 10.

81. Alfred Russell, *Three Constitutional Questions Decided by the Federal Supreme Court During the Last Four Months*, 37 AM. L. REV. 503, 503 (1903).

upon any one [sic].”<sup>82</sup> In this case, a woman attempted to claim her right to vote under the Fourteenth Amendment's Privileges and Immunities Clause, and the Court held that while women were citizens, citizenship did not necessarily make them voters.<sup>83</sup>

Likewise, in *United States v. Reese*, the Court stated that the Fifteenth Amendment also “does not confer the right of suffrage upon any one [sic].”<sup>84</sup> In this case, the Court struck down two sections of the 1870 Civil Rights Act for being overly broad because they protected suffrage beyond race discrimination and exceeded the scope of the Fifteenth Amendment.<sup>85</sup> Consequently, as the statutes were deemed limitless, the Court dismissed the charges against two white election officials in Kentucky for refusing to count the vote of a black citizen.<sup>86</sup>

On the same day *Reese* was decided, the Court came down with an even narrower decision in *United States v. Cruikshank*.<sup>87</sup> In this case, nine members of a white mob had been convicted for murdering over a hundred black men after a disputed gubernatorial election in Louisiana.<sup>88</sup> The Court reversed the convictions for a number of reasons, including that the indictments had not explicitly stated that they were motivated by race, an apparent requirement of the 1870 Civil Rights Act.<sup>89</sup> In response to the allegation that defendants had hindered the black citizens' voting rights, the Court held that these rights derive from state power.<sup>90</sup> “Concerned with congressional efforts to expand the powers of the federal government,”<sup>91</sup> the Court observed that states have separate powers from the nation, and after summing up the aforementioned cases, the Court concluded that the right to vote does not derive from United States' citizenship and is not secured by the United States Constitution.<sup>92</sup>

These three cases fueled President Knox's conclusion that discrimination would not be scrutinized under any sort of reasonableness standard. Knox stated before the Suffrage Committee:

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82. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874).

83. *Id.* at 173–74.

84. *United States v. Reese*, 92 U.S. 214, 217 (1875).

85. *Id.* at 215.

86. *Id.* at 220–22; see also BRENT J. AUCOIN, A RIFT IN THE CLOUDS 10 (2007) (explaining that the Court's decision to allow these “racist” election officials to go free sent a message that it was “determined to find ways to avoid sanctioning the spirit of the Reconstruction amendments and laws”).

87. 92 U.S. 542 (1875).

88. See generally *id.*; see also AUCOIN, *supra* note 86, at 10–11.

89. *Cruikshank*, 92 U.S. at 555.

90. *Id.* at 556.

91. Robert Volney Riser II, *Between Scylla and Charybdis: Alabama's 1901 Constitutional Convention Assesses the Perils of Disfranchisement* 110 (Nov. 14, 2000) (unpublished M.A. thesis, University of Alabama) (on file with Gorgas Library, University of Alabama).

92. *Cruikshank*, 92 U.S. at 555–56.

It seems clear to me, both upon principle and authority, that while the State cannot discriminate against the voter on account of his race, color or previous condition of servitude, it may discriminate against him on any other ground, and it is not material whether the discrimination made is reasonable or unreasonable.<sup>93</sup>

However, the paramount decision that freed the convention of its federal fears was *Williams v. Mississippi*.<sup>94</sup> When Mississippians convened in 1890 to create their disfranchising constitution, they made clear, like Alabamians, that they wanted “to eliminate as many black voters as possible.”<sup>95</sup> Also, like Alabama, Mississippi had targeted “illiteracy, poverty, and criminal proclivities,” with the result that both blacks and whites were essentially disfranchised.<sup>96</sup> Consequently, the Supreme Court ruled that Mississippi’s constitution did not target blacks, because it “reach[es] weak and vicious white men as well as weak and vicious black men, and whatever is sinister in [the constitution’s] intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime.”<sup>97</sup> Essentially, the Court was blaming the victim, and it concluded that Mississippi’s constitution and its statutes “do not on their face discriminate between the races, and it has not been shown that their actual administration was evil; only that evil was possible under them.”<sup>98</sup> The Court left unnoted what evidence might have proven racial discrimination or an “evil administration.”<sup>99</sup>

Because Alabama had the audacity to hire a stenographer to record verbatim the convention’s proceedings, the delegates must have been confident that they were not going to be punished for their actions.<sup>100</sup> While *Minor*, *Reese*, *Cruikshank*, and *Williams* influenced the delegates’

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93. Hon. John B. Knox of Calhoun County, Remarks In Support of the Majority Report of the Committee on Suffrage and Elections 7 (Jul. 26, 1901) (pamphlet available at W.S. Hoole Special Collections Library) (5,000 copies were printed in pamphlet form).

94. 170 U.S. 213 (1898); see JOURNAL OF PROCEEDINGS, *supra* note 57, at 14. In his opening speech, President Knox identified Mississippi as the “pioneer State in this movement.” *Id.* at 13. Mississippi had a poll tax requirement, registration requirement, and an understanding clause that was exclusively determined by registrars. *Id.* at 13–14. While he warned that adopting the understanding clause would pervert the goal of eliminating corruption, Knox acknowledged that *Williams v. Mississippi* understood Mississippi to discriminate against the characteristics of blacks and not of their race. *Id.* at 15.

95. RISER, *supra* note 67, at 70.

96. *Id.*

97. *Williams*, 170 U.S. at 222.

98. *Id.* at 225.

99. See RISER, *supra* note 67, at 71.

100. *Id.* at 112–14. However, delegates, such as John Ashcraft, warned that the convention might be judged, possibly by the Supreme Court, “‘by the bitterness which the sense of our ever pressing injury will be seen to infect our debates.’” *Id.* at 113. Delegate Thomas Long begged for a “‘record of what we do’ but not ‘a record of what we say.’” *Id.*

confidence to establish the 1901 constitution, the U.S. Supreme Court affirmed their creation in *Giles v. Harris*.<sup>101</sup> Petitioner, Jackson Giles, filed a petition to require the Montgomery Board of Registrars to allow him and others to register as voters.<sup>102</sup> Giles also petitioned the Court to invalidate the constitution's suffrage provisions under the Fourteenth and Fifteenth Amendments.<sup>103</sup> While the Court admitted it had jurisdiction over this case, a newly appointed Justice Oliver Wendell Holmes conceded "relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States."<sup>104</sup> But how does one influence a legislature when he or she has no right to vote?

### III. CORRECTING A CENTURY OF FRAUD: CHALLENGING THE 1901 CONSTITUTION

With the aid of the U.S. Supreme Court, delegates to the 1901 constitution took advantage of their power. They undemocratically brought into existence an iniquitous constitution declaring that "all men are equally free and independent."<sup>105</sup> While scholars, politicians, and others often cite various problems with the law itself,<sup>106</sup> Alabama's essential setback is that its constitution is historically tainted by fraud. No amendment can add justice.

While the Supreme Court over time reversed its acceptance of the disfranchising clauses and invalidated the essential purpose of the 1901 constitution,<sup>107</sup> it has never considered the validity of the 1901 constitution. Alabama was the only state to submit its disfranchising constitution to its citizens for ratification.<sup>108</sup> While some other southern states continue to survive under their disfranchising constitutions,<sup>109</sup> Alabamians have a unique basis for a challenge. The Alabama constitution is invalid because there is clear evidence that election fraud created a constitution that most voters did not desire. At the very least, Alabamians should finally be given the opportunity to adequately vote on their laws. Unfortunately, as the early

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101. 189 U.S. 475 (1903).

102. *Id.* at 482.

103. *Id.*

104. *Id.* at 488.

105. ALA. CONST. art. 1, § 1.

106. *See, e.g.,* Susan Pace Hamill, *Constitutional Reform in Alabama: A Necessary Step Towards Achieving a Fair and Efficient Tax Structure*, 33 CUMB. L. REV. 437 (2002-2003).

107. *See generally* *Hunter v. Underwood*, 471 U.S. 222 (1985); *Smith v. Allwright*, 321 U.S. 649 (1944).

108. *See* RISER, *supra* note 67, at 133.

109. *See e.g.,* MISS. CONST.; S.C. CONST.

Supreme Court cases were a barrier, recent cases considering Alabama's constitution could also inhibit an ending to Alabama's burden.

Recently, in 2010, a group of plaintiffs did challenge the validity of the 1901 constitution. Their injury was cited as an "Invalid Constitution," the result of deprivation of the right to vote under the Fifteenth Amendment and a denial of procedural due process under the Fourteenth Amendment.<sup>110</sup> Plaintiffs sought, under 42 U.S.C. §1983, either a proper election on the 1901 constitution or complete replacement.<sup>111</sup> However, the Alabama Supreme Court denied their claim based on standing.<sup>112</sup> The Court stated that in order to have standing to bring the case, the plaintiffs must have been voters at the time of ratification.<sup>113</sup>

Nevertheless, Judge Lynwood Smith invites such a case to be brought in federal court.<sup>114</sup> In one of his recent cases, *Lynch v. State*, plaintiffs were not challenging the legitimacy of the 1901 ratification election, but they were challenging the property tax structure of Alabama, alleging that it had a racially-discriminatory intent and racially-disproportionate effect on the state's public school system.<sup>115</sup> Precedent and the rational basis standard of review required Judge Smith to rule against the plaintiffs, but instead of simply stating the law, Judge Smith wrote an 804-page opinion, fully explaining the fraudulent history and evolution of Alabama's constitution.<sup>116</sup> Because the plaintiffs did not base their challenge on the legitimacy of the constitution, Judge Smith stated that the issue is left "for another day, and another forum."<sup>117</sup>

Judge Smith is not alone in his distaste for the fraudulent constitution,<sup>118</sup> but *Lynch* proves that a judge's personal opinion cannot overcome the law. As indicated by *King*, challenging the validity of a century-old constitution is no simple task. Arguing violations of the Fourteenth and Fifteenth Amendments, which the plaintiffs in *King* did, is difficult due to justiciability hurdles and the reluctance, at the time of ratification, of the Supreme Court to recognize voter rights as a federal

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110. *Ex parte King*, 50 So. 3d 1056, 1060 (Ala. 2010) (quoting Amended Complaint at 2–3, *Ex parte King*, 50 So. 3d 1056 (Ala. 2010) (No. CV 2009-139)).

111. *Id.* at 1057.

112. *Id.* at 1062.

113. *Id.*

114. *Lynch v. State*, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at \*956 (N.D. Ala. Nov. 7, 2011); *see also* 1901 Constitution Fraudulent, 'Criminal,' and Ours, [blog.al.com/bblalock](http://blog.al.com/bblalock) (Oct. 30, 2011, 05:43 CST), [http://blog.al.com/bblalock/2011/10/bob\\_blalock\\_1901\\_constitution.html](http://blog.al.com/bblalock/2011/10/bob_blalock_1901_constitution.html) ("Smith practically begs for a federal lawsuit that challenges the validity of the Alabama Constitution because, as has been well-documented, supporters stole the referendum that approved it.")

115. *Lynch*, 2011 U.S. Dist. LEXIS 155012, at \*1194.

116. *See generally id.*

117. *Id.* at \*956.

118. *See generally* Justice J. Gorman Houston, Jr., *A Justice Looks at a Constitution*, 30 CUMB. L. REV. 1 (2000).

issue. Alternatively, pursuing criminal charges of voter fraud is impossible because the would-be alleged criminals are dead.

Nevertheless, there may still be a solution under the Equal Protection Clause. In *Hunter v. Underwood*, the United States Supreme Court held that Section 182 of Alabama's constitution violated the Equal Protection Clause because it had a racially discriminatory impact.<sup>119</sup> Section 182 withheld the right to vote from anyone who had been involved in a crime of moral turpitude.<sup>120</sup> The Court looked to historical evidence to discover that Section 182 was designed primarily to disfranchise black voters.<sup>121</sup> Could a court also find the entire 1901 constitution was built on this premise, and thus, it violates the Equal Protection Clause?

Such a challenge is a stretch. However, the Court in *Hunter* looked to legislative intent—the intent of the delegates at the 1901 constitution—to determine that Section 182 was created with the purpose to secure white supremacy.<sup>122</sup> If up to 1985 the Supreme Court was finding that individuals were disfranchised under the 1901 constitution, there would possibly be plaintiffs with standing to challenge the constitution. While these plaintiffs may not be an ideal class because they cannot necessarily challenge the validity of the entire constitution, they can challenge the validity of all amendments enacted during their period of disfranchisement. For a 100-year-old plaintiff, this could be around fifty-five years. For a constitution with over 800 amendments such a challenge could eradicate large portions of the 1901 constitution, and thus, force either a re-vote or a new constitution.

## CONCLUSION

In 1915, Governor Emmet O'Neal met before the legislature to beg for a new constitution.<sup>123</sup> He had been a delegate at the 1901 convention, and his father, Edward, had been a delegate at the 1875 convention. Governor O'Neal explained to the legislature that the 1875 constitution had been adopted to prevent the recurrence of the conditions of Reconstruction.<sup>124</sup> In 1901, when “the danger of federal interference no longer existed,” reforming suffrage was the “paramount issue” and “little consideration was

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119. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985).

120. ALA. CONST. art. VIII, § 182.

121. *Hunter*, 471 U.S. at 228–33.

122. *Id.* at 229.

123. See Emmet O'Neal, Governor, State of Ala., Message to the Legislature of Alabama, Constitutional Convention: Necessity for New Constitution (Jan. 15, 1915) (transcript available in the W.S. Hoole Special Collections Library).

124. *Id.* at 3.

given to other matters of reform.”<sup>125</sup> Therefore, the constitution of 1875 had essentially been readopted.<sup>126</sup> Almost 100 years ago, before Alabama’s lawmakers, Governor O’Neal made the bold statement that the law was “antiquated.”<sup>127</sup> How would he define our law now?

While there may not be a court willing to invalidate the constitution, through an informed public, Alabama’s constitutional history can have persuasive force. As Thomas Jefferson cleverly pointed out, “history . . . informs us of what bad government is.”<sup>128</sup> Thus, history must also explain what good government is and how it can be formulated. Alabama’s constitutional history serves this purpose.

Primarily, it proves that one-party systems cannot work. As indicated by Alabama’s constitutional history, one-party systems create a domino-effect by influencing weaker parties to use stratagem and corruption to overpower the dominant party. To have a democratic constitution, a bipartisan convention is necessary to ensure that competing interests are balanced and the best interests of the state preserved. Constitutional reformers would be wise to follow the lead of their oldest constitution-makers, those who created the constitution of 1819, which effectively balanced competing interests by using a bipartisan convention. Furthermore, it might be preferable that any claim challenging the constitution’s validity is brought in federal court.<sup>129</sup> While one hopes that judges would be objective, Alabama’s Supreme Court is run by elected judges that are currently all of a single party.<sup>130</sup>

Some judges, perhaps Judge Smith, might gladly accept such a case. After writing at length to explain the constitution that Alabamians survive under, its history and its setbacks, Judge Smith concluded with the words of folk singer Bob Dylan in his famous song, “Blowin’ in the Wind”:

How many times can a man turn his head, and pretend that he just doesn’t see? . . . And how many ears must one man have, before he can hear people cry? . . . The answer my friend is blowing in the wind, the answer is blowing in the wind.<sup>131</sup>

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125. *Id.* at 4.

126. *Id.*

127. *Id.* at 3.

128. ENCARTA BOOK OF QUOTATIONS 479 (Bill Swainson ed., 2000).

129. See Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409, 1415 (1999) (“State court experience, in fact, has demonstrated the unfortunate, but unsurprising, truth that elected judiciaries have difficulty protecting individual rights against majoritarian forces.”).

130. *Alabama Supreme Court*, JUDGEPEdia, [http://judgepedia.org/index.php/Alabama\\_Supreme\\_Court](http://judgepedia.org/index.php/Alabama_Supreme_Court) (last visited Mar. 5, 2014).

131. Lynch v. State, No. 08-S-450-NE, 2011 U.S. Dist. LEXIS 155012, at \*1204; (quoting BOB DYLAN, *Blowin’ in the Wind*, on THE FREEWHEELIN’ BOB DYLAN (Sony Records 2005) (1963)).



Because of Judge Smith's advocacy, to cite another Bob Dylan song, there is hope that "the times they are a-changin'."<sup>132</sup> Only when Alabamians understand the history of their forefathers, the writers of their laws, will they be able to rid themselves of an "antiquated" burden.

*Courtney Cooper\**

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132. BOB DYLAN, *The Times They Are A-Changin'*, on *THE TIMES THEY ARE A-CHANGIN'* (Sony Records 2005) (1964).

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