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An Analysis of Proposed Statewide Amendments to the Alabama Constitution: 2018



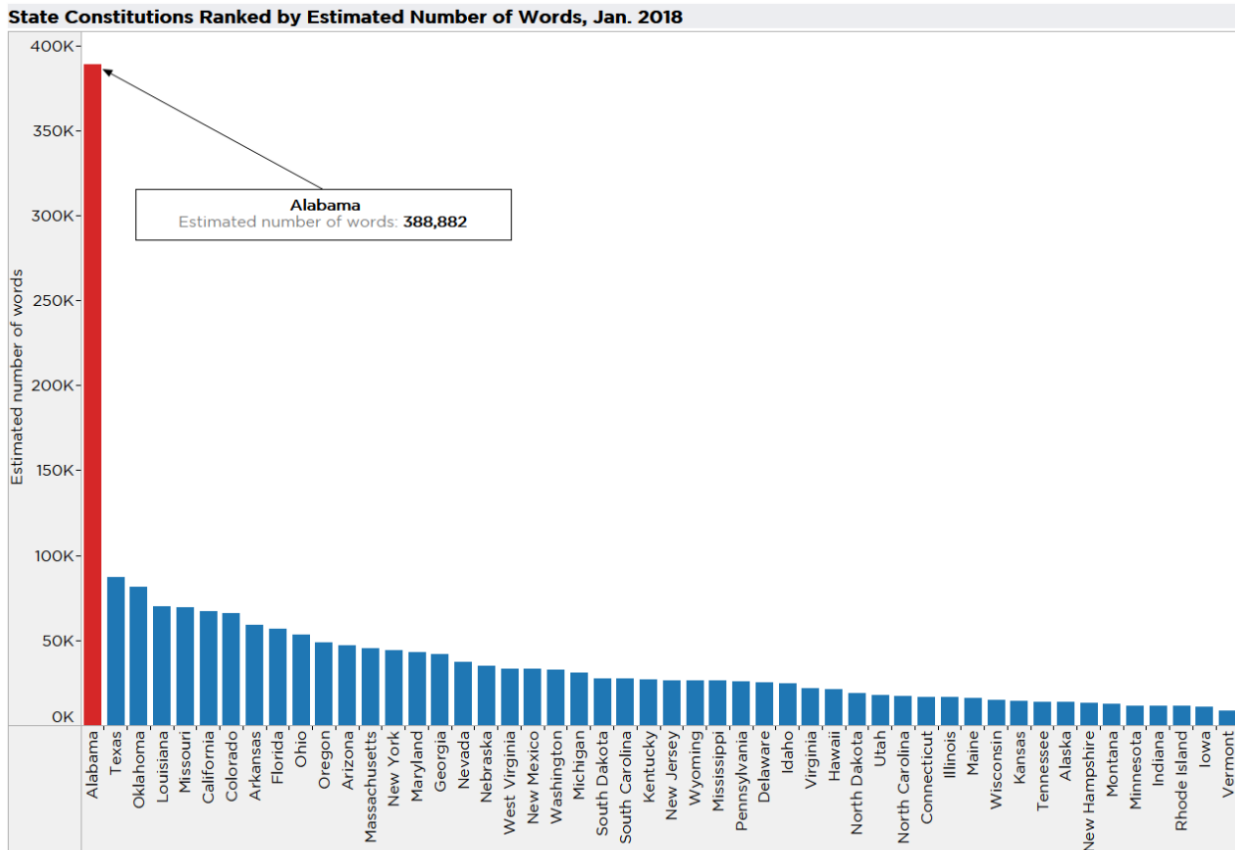
Public Affairs Research Council of Alabama

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When voters go to the polls on November 6, they'll not only be electing a governor, legislators, and other state and local officials, they'll also be asked to vote on 19 new amendments to the Alabama Constitution of 1901. Voters statewide will decide whether to add four proposed amendments that will apply throughout the state. In addition, 15 local amendments will be voted on only in the counties in which they would apply.

The Alabama Constitution is unusual. It is the longest and most amended constitution in the world. There are currently 928 amendments to the Alabama Constitution. Most state and national constitutions lay out broad principles, set the basic structure of the government, and impose limitations on governmental power. Such broad provisions are included in the Alabama Constitution. Alabama's constitution delves into the minute details of government, requiring constitutional amendments for basic changes that would be made by the Legislature or by local governments in most states. Instead of broad provisions applicable to the whole state, about three-quarters of the amendments to the Alabama Constitution pertain to particular local governments. Amendments establish pay rates of public officials and spell out local property tax rates. A recent amendment, Amendment 921, grants municipal governments in Baldwin County the power to regulate golf carts on public streets.

Until serious reforms are made, this practice will continue and the Alabama Constitution will continue to swell.



Source: John Dinan and the Council of State Governments, with research assistance from Wake Forest students Bradley Harper and Alec Papovich. Published in CSG's 2018 *Book of the States*.

Statewide Amendment 1

"Proposing an amendment to the Constitution of Alabama of 1901, providing for certain religious rights and liberties; authorizing the display of the Ten Commandments on state property and property owned or administrated by a public school or public body; and prohibiting the expenditure of public funds in defense of the constitutionality of this amendment."

Amendment 1 and Amendment 2 are proposed amendments to the Alabama Constitution, but they both concern rights and protections that are governed by the U.S. Constitution and the U.S. Supreme Court's interpretation of federal law and the Constitution.

Since the U.S. Constitution supersedes state law and the state Constitution, both these proposed amendments would not have any immediate legal effect. They are more like statements of opinion. However, considering the recently altered composition of the U.S. Supreme Court, those Alabama amendments could become operative as the new court addresses cases that may alter established precedent.

Amendment 1, proposed by [Act 2018-389](#), restates principles of the separation of church and state that currently exist in Section 3 of the Alabama Constitution of 1901 which reads:

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.

The new proposed amendment adds to that by specifically authorizing the display of the Ten Commandments on public buildings, public property, and public schools, as long as that display is made in conformity with Constitutional principles.

As interpreted by the U.S. Supreme Court, a display of the Ten Commandments on public property is allowed, but only if it is not a specific endorsement of a religion. Displays of the Commandments are permitted when they are contained in a secular context, surrounded by other educational and historical displays. For example, the display might include other historical documents, like the Code of Hammurabi, the Magna Carta, the Declaration of Independence, the U.S. Constitution or historical documents or personalities associated with the development of law.

The proposed amendment also specifies that no public funds may be expended in defense of the constitutionality of the amendment. That prohibition of public funding for the defense of the amendment would not prevent public funds being expended to defend a challenge to the constitutionality of a specific display of the Ten Commandments created by any agency or local jurisdiction.

Statewide Amendment 2

"Proposing an amendment to the Constitution of Alabama of 1901, as amended; to declare and otherwise affirm that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, most importantly the right to life in all manners and measures appropriate and lawful; and to provide that the constitution of this state does not protect the right to abortion or require the funding of abortion."

Amendment 2, proposed by [Act 2017-188](#), concerns the state's position on abortion rights and the rights of "unborn children."

It would add an amendment to the Alabama Constitution that would specify that it is the "public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life." The proposed amendment does not define at what point a fertilized embryo or developing fetus would be considered an unborn child. The amendment also specifies that "nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion."

The right to an abortion is currently protected by the Supreme Court's 1973 *Roe v. Wade* decision. In *Roe*, the Court ruled that governments, federal, state, and local, could not prohibit a woman from having an abortion during the first trimester and placed limitations on state regulation of abortion in subsequent trimesters. The Court held that a woman's right to an abortion fell within the right to privacy (recognized in *Griswold v. Connecticut*) protected by the Fourteenth Amendment. As summarized by *Oyez*, a compendium of information on the Supreme Court compiled by Cornell's Legal Information Institute, Justia, and Chicago-Kent College of Law, the *Roe* decision gave a woman total autonomy over the pregnancy during the first trimester and defined different levels of state interest for the second and third trimesters.¹

In subsequent Supreme Court cases, the Court preserved the right to an abortion but allowed states to regulate abortion and to ban it after the fetus had reached viability, the point at which the fetus could survive outside of the womb. Other restrictions on abortion throughout pregnancy were permissible, the Court ruled, if those restrictions did not put an "undue burden" on a woman's ability to obtain an abortion.

In Alabama, abortion is prohibited when the pregnancy reaches 20 weeks, except in cases of life or health endangerment to the mother. Alabama has also passed numerous regulations pertaining to all abortions. In Alabama, abortions must be performed by a licensed physician. Abortion providing facilities must meet multiple requirements. If the fetus is deemed viable, the abortion must be necessary to preserve the life and health of the mother, a second physician must participate, and it must be performed at a hospital.

Public funding can only be used for an abortion in the case of life endangerment or rape or incest. Alabama requires pre-abortion counseling and a 48-hour waiting period after counseling. If a minor is involved, a parent must give his or her written consent before the procedure can occur.

¹ "Roe v. Wade." *Oyez*, 3 Oct. 2018, www.oyez.org/cases/1971/70-18.

A 2016 Alabama law would have criminalized the dilation and evacuation (D&E) procedure, a procedure used throughout pregnancy and the most common method of second-trimester abortions. In August of 2018, the 11th U.S. Circuit Court of Appeals in Atlanta upheld a lower court ruling blocking the law, finding that the ban would create an undue burden on the right to end a pregnancy before the fetus is viable.² Alabama also has not repealed its law that was in place before *Roe v. Wade*.³ That law makes it a crime to perform an abortion and contains no exceptions for the life or health of the mother.

Passage of the proposed amendment to the Alabama Constitution would not have any practical effect under current law. However, if the Supreme Court were to overturn *Roe vs. Wade* and turn abortion regulation back to the states, the language in the Alabama Constitution would potentially have an effect. Any attempt to alter restrictions on abortions could be challenged on the grounds that it would harm the right to life of unborn children. If states were granted the full authority to regulate abortion, the rights to life and liberty guaranteed to individuals (the mother, in this case) in Section 1 of the Alabama Constitution would have to be weighed against the right to life of an unborn child contained in this amendment, if it is adopted.

Abortion rights groups, like Planned Parenthood, and anti-abortion groups, like the Eagle Forum of Alabama, agree that Amendment 2 would lay the groundwork for an abortion ban in Alabama if *Roe v Wade* is overturned.

² Stempl, Jonathan. *U.S. appeals court finds Alabama abortion law unconstitutional*. Reuters. August 22, 2018. <https://www.reuters.com/article/us-alabama-abortion/us-appeals-court-finds-alabama-abortion-law-unconstitutional-idUSKCN1L71ZP>

³ Ala. Code § 13A-13-7

Statewide Amendment 3

"Proposing an amendment to the Constitution of Alabama of 1901, relating to the Board of Trustees of the University of Alabama, to specify that the congressional districts from which members are appointed continue to reflect those as constituted on January 1, 2018, to remove the State Superintendent of Education from membership, and to delete the requirement that members vacate office at the annual meeting of the board following their seventieth birthday."

Under current law, the University of Alabama Board of Trustees is composed of 16 people: three members from the congressional district in which the Tuscaloosa campus is located, two members from each of the other six congressional districts in the state, the Governor, and the State Superintendent of Education. If the number of congressional districts in Alabama increased or decreased in the future, the number of trustees would also increase or decrease. Additionally, other than the Governor and the State Superintendent of Education, current law requires a trustee to retire from the board following his or her seventieth birthday.

Amendment 3, proposed by [Act 2018-132](#), does three things:

First, it provides that the board will be composed of members from congressional districts as those districts existed on January 1, 2018. This eliminates the need to make changes based on the number of congressional districts in Alabama. It does not impact the number of board members. Based on population trends, Alabama is at risk of losing a congressional seat in the U.S. House of Representatives.⁴ Second, it removes the State Superintendent of Education from automatically having a seat on the board. The Superintendent currently serves on the Auburn University Board of Trustees.⁵ The State Superintendent was removed by statute from the board of the University of North Alabama in 2018 but remains on the board of the University of West Alabama.⁶ Third, it allows a trustee to serve after his or her seventieth birthday.

Composition of the governing boards for SEC universities varies. Currently, in addition to the University of Alabama System, the Universities of Arkansas, Missouri, and South Carolina also have a state superintendent on the boards.⁷ The Universities of Florida, Kentucky, and Tennessee include seats for faculty members on the governing boards, with the University of Florida having two such positions and the University of Tennessee Board of Trustees rotating the position to each of its four instructional institutions.

Along with the Universities of Arkansas and Georgia, both Auburn University and the University of Alabama System rely on congressional districts for apportioning seats on their boards, while the Mississippi State Institutions of Higher Learning apportion seats by each

⁴ Cason, Mike. "Amid Census Controversy, Alabama Launches 'Maximum Participation' Effort," Tribune News Services, <http://www.governing.com/topics/politics/tns-alabama-ivey-census.html>

⁵ A member of the State Board of Education sits, ex officio, on the Alabama College System Board of Trustees for the two-year college system. See <https://www.accs.cc/index.cfm/board-of-trustees/>

⁶ See <https://www.billtrack50.com/BillDetail/914457>; University of West Alabama Board of Trustees, <https://www.uwa.edu/about/boardoftrustees>

⁷ In Arkansas, the Superintendent of Public Instruction is the board president and votes as a tie breaker, like U.S. Vice President does in the Senate.

of its supreme court districts, and the University of South Carolina recruits board members from each of its 16 judicial districts through a College and University Trustee Screening Commission.⁸

Tennessee requires that the governor appoint at least two residents from each of the state's three grand divisions, with at least five of the members being alumni of the University of Tennessee, and at least seven must be residents of Tennessee.⁹ Missouri requires that board members be U.S. citizens and residents of the state for at least two years. Missouri also prohibits more than five members being from one party.

If a majority of voters vote "Yes" on Amendment 3, future changes to the number of congressional districts in Alabama will not change the number of University of Alabama System board members. The State Superintendent of Education will no longer be an ex-officio member of the board, and trustees will be allowed to serve on the board after their seventieth birthday.

If a majority of voters vote "No" on Amendment 3, future changes to the number of congressional districts in Alabama will have an impact on the number of board members, the State Superintendent of Education will continue to have an ex-officio seat on the board, and trustees will not be allowed to serve on the board after their seventieth birthday.

⁸ College and University Trustee Screening Commission

<https://www.scstatehouse.gov/CommitteeInfo/Universities&CollegesScreeningCommittee/Univ&CollScreening.php>

⁹ HB 2115 <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2115>

Statewide Amendment 4

“Proposing an amendment to the Constitution of Alabama of 1901, to provide that, if a vacancy in either the House of Representatives or the Senate occurs on or after October 1 of the third year of a quadrennium, the seat would remain vacant until a successor is elected at the next succeeding general election.”

Every four years, all members of the Alabama State Senate and House of Representatives stand for election. The subsequent four-year term for which those Senators and Representatives are elected is called a quadrennium.

Currently, if a seat in either house of the Legislature becomes vacant during the quadrennium, a special election must be conducted in order to fill the vacant seat. The Governor must call for a special election if the vacancy happens before the next scheduled general election. The governor has discretion in setting the date of the election along with the nominating deadlines. This special election to fill vacancies can be held at any time during the four-year cycle, and the winner fills the term until the next general election.

When a special election is held, all costs and expenses incurred are paid from funds in the State Treasury not otherwise appropriated. Each legislative special election costs the state roughly \$120,000.¹⁰

Alabama is one of twenty-five states in the U.S. that fill vacancies in the state legislature through special elections. Twenty-two states fill vacancies through appointments and three states fill vacancies through a hybrid system that uses both appointments and special elections.¹¹

Amendment 4, proposed by [Act 2018-276](#), would keep the current procedures for calling a special election in place but would change the current law so that when a vacancy occurs in the Senate or House of Representatives on or after October 1 of the third year of the quadrennium, the seat will remain vacant until the next general election – approximately 14 months or less.

The Governor would no longer have the power to schedule a special election to fill a vacancy in these circumstances, and public funds that would have been spent on the special election would be saved.

This amendment would not apply to U.S. Congressional or Senate seats.

If a majority vote "Yes" on Amendment 4, state legislative seats that become vacant within the final 14 months of the four-year term of office will remain vacant until the general election.

If a majority vote "No" on Amendment 4, the Governor will continue to be required to schedule a special election whenever a vacancy occurs in the state legislature.

For more information, see the analysis provided by the Alabama Fair Ballot Commission at <https://sos.alabama.gov/alabama-votes/voter/ballot-measures/statewide>.

¹⁰ Gattis, Paul. "'No logic' to Alabama's special elections, which may be outlawed anyway." AL.com March 2, 2018. https://www.al.com/news/huntsville/index.ssf/2018/03/no_logic_to_alabamas_special_e.html

¹¹ *How vacancies are filled in state legislatures*, Ballotpedia.com https://ballotpedia.org/How_vacancies_are_filled_in_state_legislatures



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