

STILL AFRAID OF “NEGRO DOMINATION?”: WHY COUNTY HOME RULE LIMITATIONS IN THE ALABAMA CONSTITUTION OF 1901 ARE UNCONSTITUTIONAL

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Every few years, Alabama voters confront a baffling array of proposed amendments to their state constitution. While some deal with the weighty issues of the day, a far greater number pertain to tedious matters of local administration. In a recent election, for example, Alabamians throughout the state considered¹—and rejected²—a proposed constitutional amendment to reduce the probate judge’s salary in tiny Crenshaw County. This uniquely Alabama phenomenon is the result of the state constitution’s stinginess with local power. As this Comment illustrates, Alabama counties operate under severe restrictions on their ability to make their own decisions.³

In the past several years, groups such as Alabama Citizens for Constitutional Reform have brought Alabamians the beginnings of a meaningful debate about their now-notorious constitution.⁴ At the center of this discus-

1. See SEC’Y OF STATE, STATE OF ALA., CERTIFICATION OF NOVEMBER 2, 2004 ELECTION RESULTS (2004), available at <http://sos.state.al.us/election/2004/index.cfm> (follow pdf-file link entitled “Official Election Results—certified by State Canvassing Board, 11/24/2004”; then scroll to page 205 and look at the results for Statewide Amendment 6).

2. See *id.*

3. See *infra* Part II.

4. See generally A CENTURY OF CONTROVERSY: CONSTITUTIONAL REFORM IN ALABAMA (Bailey Thomson ed., 2002) (providing a collection of essays edited by founder and former chairman of Ala-

sion have been the efforts of critics to highlight the constitution's excessive length and racist origins.⁵ For example, the would-be reformers point out that:

▪ The document was adopted at a convention whose purpose, according to its president, was “within the limits imposed by the Federal Constitution, to establish white supremacy in this State.”⁶

▪ At more than 315,000 words, Alabama's constitution of 1901 is almost forty times longer than the United States Constitution and twelve times longer than the average state constitution.⁷ The document is three times longer than the constitutions of the state's four neighbors—Florida, Georgia, Mississippi, and Tennessee—combined.⁸

▪ More than 500 of the approximately 772 amendments to the 1901 constitution pertain to a specific county or municipality.⁹

While gaining “home rule” for counties has been a centerpiece of reform efforts,¹⁰ reformers have largely looked past the connection between the constitution's obstacles to local decision-making and the document's racist beginnings. But there *is* such a connection. Referring to blacks as having the “lowest . . . intelligence and moral preceptitions [sic] of all the races,”¹¹ constitutional convention president John B. Knox confidently commenced the 1901 constitutional convention by proclaiming that “[t]here is in the white man an inherited capacity for government, which is wholly wanting in the negro.”¹² This well-documented sentiment that blacks were somehow inherently unsuited for democratic participation—and *particularly* unsuited for the exercise of governmental power as officeholders—undoubtedly informed the delegates' restriction of local government power. Indeed, that racist sentiment touched every part of Alabama's 1901 constitu-

bama Citizens for Constitutional Reform).

5. See, e.g., Ala. Citizens for Constitutional Reform, What's Wrong: It's the Longest Known Constitution in the World, <http://www.constitutionalreform.org/whatswrong5.shtml> (last visited Jan. 14, 2006); Ala. Citizens for Constitutional Reform, What's Wrong: It has Undemocratic Origins, <http://www.constitutionalreform.org/whatswrong6.shtml> (last visited Jan. 14, 2006).

6. 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21-SEPT. 3, 1901, at 8 (1940) [hereinafter OFFICIAL PROCEEDINGS].

7. Joe A. Summers, *Missing: Local Democracy, in A CENTURY OF CONTROVERSY: CONSTITUTIONAL REFORM IN ALABAMA*, *supra* note 4, at 67, 70.

8. *Id.*

9. *Id.* at 71.

10. See, e.g., Ala. Citizens for Constitutional Reform, So What's Wrong with Alabama's Constitution?, <http://www.constitutionalreform.org> (listing restrictions on local democracy as the first thing “wrong with Alabama's constitution”); see also ALA. CITIZENS' FOR CONSTITUTIONAL REFORM, REPORT OF ALABAMA CITIZENS' COMMISSION ON CONSTITUTIONAL REFORM (2003), <http://accr.constitutionalreform.org/graphics/CommissionReport.pdf> (where “Local Democracy” is the first substantive chapter); Governor Don Siegelman, Joint Address on Government Accountability (Aug. 28, 2001), available at <http://accr.constitutionalreform.org/graphics/gov08282001.pdf> (arguing, among other things, that it makes no sense for Alabamians to beg their state legislator to improve their local schools).

11. OFFICIAL PROCEEDINGS, *supra* note 6, at 12.

12. *Id.*

tion,¹³ and has, accordingly, served as the basis for several successful challenges to its provisions under the United States Constitution.¹⁴

In the spirit of such challenges, this Comment argues that the racially motivated home rule limitations in Alabama's constitution are similarly subject to invalidation under the Fourteenth Amendment's Equal Protection Clause. As background to such an argument, Part I will examine the legal reasons for county governments' minimal ability to self-govern. Next, Part II will set out the constitutional law governing the invalidation of statutes that do not overtly appear to be racist. Part III will outline the historical evidence documenting the racist motivation behind home rule limitations. Finally, Part IV will examine evidence suggesting that the home rule limitations have had a racially disproportionate impact, before Part V offers a brief conclusion. Given the historical evidence, the Supreme Court's Equal Protection cases require the removal of the home rule limitations from the state constitution.

I. CONSTITUTIONAL OBSTACLES TO HOME RULE FOR COUNTIES¹⁵

Among the hundreds of amendments Alabama voters have made to their constitution, the more colorful ones include:

- Amendment 502, which allows Morgan County to have a sheriff's posse;¹⁶
- Amendment 351, which gives Mobile County the ability to provide for mosquito and rodent control;¹⁷
- Amendment 482, which enables Lauderdale County to dispose of dead farm animals;¹⁸
- Amendment 497, which bans the storage of certain junk, motor vehicles, and litter in Jefferson County;¹⁹

13. See, e.g., WILLIAM H. STEWART, *THE ALABAMA STATE CONSTITUTION: A REFERENCE GUIDE 5* (G. Alan Tarr ed., 1994) ("One cannot presume to understand the Constitution without an understanding of the politics of race."); William H. Stewart, *The Alabama Constitution*, in *ALABAMA POLITICAL ALMANAC 62* (Stovall et al. eds., 2d ed. 1997) ("Race was the paramount reason for the 1901 Constitution.").

14. See, e.g., *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating a provision disenfranchising persons convicted of crimes involving moral turpitude because the provision's motivation and its impact were racially discriminatory).

15. This Comment focuses on counties because the legislature may give—and *has* given—municipalities far greater authority to control their own affairs. See, e.g., ALA. CODE § 11-45-1 (1989) (giving municipalities the power "to provide for the safety, preserve the health, promote the prosperity and improve the morals, order, comfort and convenience of [their] inhabitants").

16. ALA. CONST. amend. 502, *cited in* Sumners, *supra* note 7, at 71. Note that, pursuant to ALA. CODE § 29-7-11 (2003), the State of Alabama has issued an official recompilation of the state constitution, which groups local amendments by the locality to which they apply. *Id.* For example, an alternative citation for Amendment 502 is ALA. CONST. MORGAN COUNTY § 11. For simplicity and analytical clarity, this Comment uses the pre-recompilation citation scheme.

17. ALA. CONST. amend. 351, *cited in* Sumners, *supra* note 7, at 71.

18. ALA. CONST. amend. 482, *cited in* Sumners, *supra* note 7, at 71.

19. ALA. CONST. amend. 497, *cited in* Sumners, *supra* note 7, at 71.

- Amendment 520, empowering Madison County to excavate human graves;²⁰ and
- Amendment 34, which allows Limestone County to impose a tax to pay for malaria control.²¹

Why, one might reasonably ask, must Lauderdale County seek a change in the state constitution to dispose of dead farm animals? Why does Madison County need a constitutional “permission slip” to excavate human graves? The answer lies at the intersection of a legal doctrine known as Dillon’s Rule²² and several provisions of the Alabama constitution of 1901.

A. *Dillon’s Rule*

In a broad sense, Alabama voters’ obligation to consider local minutiae for inclusion in the state’s constitution is grounded in a legal doctrine that Iowa Supreme Court Justice John F. Dillon articulated in the 1860s which “casts local governments as ‘creatures of the state.’”²³ Unlike states, which are themselves sovereign, under Dillon’s Rule, local governments “owe their origin to, and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control.”²⁴

Prior to the Constitution of the State of Alabama of 1901, the Alabama Supreme Court gave effect to this doctrine in cases such as *Hare v. Kennerly*.²⁵ In that case, a taxpayer challenged a temporary tax enacted by the legislature to pay off the City of Mobile’s debt,²⁶ as the tax was concededly higher than the Alabama constitution of 1875 permitted the legislature to enact generally.²⁷ The taxpayer argued that a constitutional provision allowing the City of Mobile to levy a tax for the disposition of debt (“Mobile tax provision”) was grounds only for the City of Mobile to enact such a tax, not the legislature.²⁸ The court disagreed, citing the Dillon-esque principle that “municipal corporations are the mere creatures of legislative power, established as political agencies for the more convenient administra-

20. ALA. CONST. amend. 520, *cited in* Sumners, *supra* note 7, at 71.

21. ALA. CONST. amend. 34, *cited in* Sumners, *supra* note 7, at 71.

22. Jim Williams & Randolph Horn, *Local Self Government in Alabama*, 33 CUMB. L. REV. 245, 246 (2003).

23. *Id.*

24. Sumners, *supra* note 7, at 68 (quoting Elliot C. McLaughlin, *Officials: Home Rule Makes Government More Efficient*, OPELIKA-AUBURN NEWS, Mar. 19, 2000, at A1).

25. 3 So. 683 (Ala. 1888). Although *Hare v. Kennerly* involved a city, Dillon’s principles apply equally to counties. *See, e.g.,* Askew v. Hale County, 54 Ala. 639, 641 (1875) (“All the powers with which the county is entrusted, are the powers of the State . . .”). For cases applying Dillon’s Rule *after* ratification of the Alabama Constitution of 1901, *see* Ligon v. City of Gadsden, 107 So. 733 (Ala. Ct. App. 1926), and Ward v. Markstein, 72 So. 41 (Ala. 1916).

26. *Hare*, 3 So. at 683.

27. *Id.* at 684.

28. *Id.*

tion of local government.”²⁹ Thus, the Mobile tax provision was not an exclusive grant of taxing power to Mobile; it instead was a geographic limitation on the general taxation power of the State vested in the legislature—“the depository (sic) of *all* authority.”³⁰ Thus, the practical effect of Dillon’s Rule is that local government subdivisions of a state have only those powers that are delegated to them and are susceptible to state interference in their affairs at any time.³¹ Applying these principles, it follows that a county may act either (1) under an explicit constitutional grant of authority or (2) under a valid grant of authority by the legislature. If neither of these two legal avenues are available to authorize a county’s action, the county must then seek a constitutional amendment.

B. Provisions in the Alabama Constitution of 1901

With Dillon’s Rule in effect, a host of provisions in the Alabama constitution of 1901 operate to deny counties local autonomy. Together, these provisions inhibit local decisionmaking by (1) failing to grant (and in some cases explicitly denying) counties powers necessary for such decisionmaking and (2) prohibiting the legislature from authorizing counties to act in many contexts.³² This Subpart attempts to address the main constitutional provisions hindering local democracy.³³

As a fundamental matter, section 44 of the constitution’s legislative article deposits all of the state’s legislative power in the legislature.³⁴ While such a provision is seemingly straightforward, the section has triggered considerable litigation over the extent to which the legislature can delegate its powers to counties.³⁵ In this area, the Alabama Supreme Court has concluded that “the Legislature cannot delegate its legislative powers, save as authorized by the Constitution itself.”³⁶ Obviously, such a rule has wide-ranging consequences for county self-government.

29. *Id.* at 685.

30. *Id.* (emphasis added).

31. Williams & Horn, *supra* note 22, at 247.

32. *See id.* at 259.

33. This Subpart does not cover *all* constitutional provisions relating to local government authority, just several that, in the author’s opinion, are notable. For instance, section 96 of the Constitution’s legislative article—not discussed in the main text—operates to prevent counties from “regulating costs and charges of courts, or fees, commissions or allowances of public officers.” *See* ALA. CONST. art. IV, § 96. The addition of approximately one-hundred constitutional amendments altering section 96 means that the original provisions of the section apply to only one county today. *See* Summers, *supra* note 7, at 69. This Comment also does not discuss a major area for which constitutional amendments are frequently needed: the Constitutional limits on local debt. *See* ALA. CONST. art. IV, §§ 222, 224.

34. ALA. CONST. art. IV, § 44 provides that “[t]he legislative power of this state shall be vested in a legislature, which shall consist of a senate and a house of representatives.” ALA. CONST. art. IV, § 44.

35. *See, e.g.*, Standard Oil Co. v. Limestone County, 124 So. 523, 527 (Ala. 1929) (“The implied limitation on the delegation of legislative power by vesting the same in the Legislature under section 44 has been the subject of innumerable decisions. . . . Whether this rule applies to counties . . . is a question not free from great difficulty.”).

36. Wallace v. Bd. of Educ., 197 So. 2d 428, 434 (Ala. 1967).

Within this constitutional framework, the constitutional provisions that most directly limit “home rule” are those that have denied the legislature—and in some instances, counties themselves—the power to act in certain ways. Section 94, for instance, forbade the legislature from authorizing counties to lend their credit or grant any “thing of value” to “any individual, association, or corporation whatsoever.”³⁷ Such a prohibition has greatly hampered counties’ ability to conduct economic development activities,³⁸ and it has necessitated amendments allowing counties to create tax incentive districts,³⁹ develop land for economic development purposes,⁴⁰ and even recruit new industry.⁴¹ Section 215, for another example, constitutionally set a limit on the amount of property taxes a county may levy and, at the time it was passed, specified that the revenue resulting from the taxes could only be used to pay for Reconstruction debt or the construction of public buildings, bridges, or roads.⁴² Consequently, a county wishing to increase funding for its local schools⁴³ or even fund malaria control⁴⁴ has had to seek an amendment to the state constitution.

Other constitutional limitations are seemingly less significant but, in fact, have presented similar obstacles to local autonomy. Section 98 prevented the legislature from paying a pension to public officials.⁴⁵ To get around this provision, the legislature has created positions, called “super-numerary” positions, in which counties can hire retired county officials and pay them a salary for merely being “available for service.”⁴⁶ This *de facto* retirement program, however, has proved to be an expensive one,⁴⁷ and many counties have had to attain a constitutional amendment to allow their retired officials to join the state employees’ retirement system—a less costly option from the counties’ perspective.⁴⁸ Additionally, the constitution as originally adopted, endowed local governments with only rudimentary powers (such as maintenance of public infrastructure, road-building, election procedures, etc.).⁴⁹ Counties must therefore seek constitutional amendments

37. ALA. CONST. art. IV, § 94; *see also* ALA. CONST. art. IV, § 93 (forbidding the State from engaging in works of internal improvement or borrowing for such purposes). These provisions are identical to provisions in the 1875 Constitution. *See* ALA. CONST. of 1875, art. IV, §§ 54-55. These provisions, however, contrast starkly with provisions in the 1868 Constitution that allow the State, upon approval from two-thirds of the General Assembly, to fund internal improvements by borrowing money and extending credit. *See* ALA. CONST. of 1868, art. IV, §§ 32-33.

38. Williams & Horn, *supra* note 22, at 272.

39. *See* ALA. CONST. amend. 475 (empowering the legislature to give *all* counties such power).

40. *See id.*

41. *See, e.g.*, ALA. CONST. amend. 217 (enabling Clarke County to “[p]romote local industrial, commercial, or agricultural development and the location of new industries or businesses therein”).

42. ALA. CONST. art. IV, § 215.

43. *See, e.g.*, ALA. CONST. amend. 204 (Special School Taxes in Walker County).

44. *See, e.g.*, ALA. CONST. amend. 34 (Malaria Control Tax in Limestone County).

45. ALA. CONST. art. IV, § 98.

46. Williams & Horn, *supra* note 22, at 275.

47. *Id.*

48. *See, e.g.*, ALA. CONST. amend. 625 (Bibb County; Employees’ Retirement System).

49. Williams & Horn, *supra* note 22, at 258.

to create special-purpose local governments to handle such functions as fire protection,⁵⁰ garbage disposal,⁵¹ and drainage control.⁵²

On top of all of these “direct” restrictions, there is a final, significant roadblock to county action: the constitution made it illegal for the legislature to enact “local laws” on many subjects.⁵³ Specifically, section 104 forbade the legislature from enacting local laws relating to thirty-one enumerated areas,⁵⁴ including such areas as the assessment or collection of taxes,⁵⁵ the issuance of bonds or securities,⁵⁶ the establishment of separate school districts,⁵⁷ and the regulation of public officers’ fees and allowances.⁵⁸ Section 105 also bans the legislature from enacting local laws “in any case which is provided for by a general law.”⁵⁹ The legislature has found ways to minimize the seemingly sweeping nature of this section,⁶⁰ but sections 104 and 105, when combined with the more direct restraints on county-level decisionmaking, often require counties contemplating action to resort to the cumbersome process of amending the state constitution.

As seen, the Alabama constitution of 1901 substantially frustrates decisionmaking at the county level.⁶¹ As will be shown,⁶² this constitutional regime disproportionately affects Alabama’s “black” counties. But because none of the constitutional provisions generating such frustration is racist on its face, this Comment examines the Supreme Court’s Equal Protection Clause jurisprudence in the context of facially race-neutral statutes.

II. EQUAL PROTECTION CLAUSE CHALLENGES TO FACIALLY RACE-NEUTRAL STATUTES

The Fourteenth Amendment to the United States Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁶³ While the Supreme Court will invalidate legislative enactments challenged under the Fourteenth Amendment’s Equal Protection Clause only if they lack some rational basis,⁶⁴ the Court requires

50. See, e.g., ALA. CONST. amend. 358 (Tuscaloosa County Fire Protection).

51. See, e.g., *id.* (Tuscaloosa County Garbage and trash Disposal).

52. See, e.g., ALA. CONST. amend. 45 (Colbert County Drainage Control).

53. ALA. CONST. art IV, § 104.

54. *Id.*

55. ALA. CONST. art. IV, § 104(15).

56. ALA. CONST. art. IV, § 104(17).

57. ALA. CONST. art. IV, § 104(22).

58. ALA. CONST. art. IV, § 104(24).

59. ALA. CONST. art. IV, § 105.

60. See *Standard Oil Co. v. Limestone County*, 124 So. 523, 526 (Ala. 1929) (noting that a local law on the same subject of a general law does not violate section 105 of the Alabama constitution if “there is a substantial difference between the general and the local law”).

61. See *supra* notes 32-60 and accompanying text.

62. See *infra* Part IV.

63. U.S. CONST. amend. XIV, § 1.

64. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988). Under the rational basis standard, laws pass constitutional muster if they are reasonably related to some legitimate state interest. *Id.*

laws creating a racial classification to undergo “strict scrutiny.”⁶⁵ The Court will apply this heightened level of scrutiny to a facially race-neutral statute if the statute “had a discriminatory effect and . . . was motivated by a discriminatory purpose.”⁶⁶

Usually, the difficult task for those challenging facially race-neutral statutes lies in establishing the requirement of showing a discriminatory purpose behind the passage of the law.⁶⁷ The Supreme Court has adopted a narrow definition of discriminatory intent, requiring, in essence, a showing of a governmental *desire* to discriminate.⁶⁸ As the Court stated in *Personnel Administrator v. Feeney*,⁶⁹ “[d]iscriminatory purpose’ . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action *at least in part ‘because of,’* not merely ‘in spite of,’ its adverse effects upon an identifiable group.”⁷⁰

Helpfully, in *Arlington Heights v. Metropolitan Housing Development Corp.*,⁷¹ the Court outlined several ways one can prove discriminatory purpose. First, the Court can subject a law to heightened scrutiny if it is “so clearly discriminatory as to allow no other explanation than that it was adopted for impermissible purposes.”⁷² This method of showing a discriminatory purpose is largely irrelevant to the problem of the home rule limitations because non-discriminatory motivations for such restrictions are at least plausible. Second, the Court emphasized the relevance of a particular legislative action’s historical context: “The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes. The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.”⁷³ Finally, the Court reminded the parties of a seemingly obvious source of evidence of discriminatory purpose, writing that

65. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279-80 (1986). See generally ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 9.3 (2d ed. 2002) (discussing classifications based on race and national origin). “Under strict scrutiny the means chosen to accomplish the State’s asserted purpose must be specifically and narrowly framed to accomplish that purpose.” *Wygant*, 476 U.S. at 280.

66. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wyate v. United States*, 470 U.S. 598, 608 (1985)); see also CHERMERINSKY, *supra* note 65, § 9.3.3.2, at 686.

67. See CHERMERINSKY, *supra* note 65, § 9.3.3.2, at 685.

68. *Id.* at 687.

69. 442 U.S. 256 (1979).

70. *Id.* at 279 (internal citation omitted) (emphasis added).

71. 429 U.S. 252 (1977), *superseded by statute*, Voting Rights Act of 1965, Pub. L. No. 97-205, 96 Stat. 131 (codified at scattered sections of 42 U.S.C.).

72. CHERMERINSKY, *supra* note 65, § 9.3.3.2, at 687.

73. *Arlington Heights*, 429 U.S. at 267 (citations omitted). For examples of decisions in which historical context has supplied the necessary evidence of discriminatory purpose for purposes of invalidating a statute that was racially neutral on its face, see *Guinn v. United States*, 238 U.S. 347, 367 (1915) (invalidating Oklahoma law imposing a literacy requirement for voting, but exempting those who were eligible to vote in 1866); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (invalidating a further Oklahoma voting restriction enacted in response to the *Guinn* decision); and *Griffin v. County School Board*, 377 U.S. 218, 232 (1964) (invalidating the school board’s decision to close public schools and instead pay for students to attend segregated private schools).

“[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”⁷⁴ Given the abundance of documentation available regarding both the historical context in which the delegates of the 1901 convention operated and, more specifically, the actual floor debate and other actions of its members, these latter two methods will be clearly relevant to proving a discriminatory purpose behind the home rule limitations.

Demonstration of a discriminatory purpose, however it is done, does not end the analysis. Instead, under the Court’s decision in *Hunter v. Underwood*,⁷⁵ “[o]nce racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.”⁷⁶ *Hunter* is important to an equal protection challenge of home rule restrictions for both its legal substance and its historical relevance. In *Hunter*, the Court invalidated a provision of the 1901 Alabama constitution disenfranchising anyone previously convicted of a misdemeanor.⁷⁷ Although the plaintiffs satisfied the discriminatory-impact prong by establishing that the provision disproportionately disenfranchised African Americans,⁷⁸ their showing that the delegates to the 1901 convention had a discriminatory purpose was not enough to overturn the law.⁷⁹ Rather, the Court could not strike down the provision until it concluded that the law’s defenders failed to show that the law would have been enacted without racial discrimination as a substantial or motivating factor.⁸⁰

To summarize, someone challenging the home rule restrictions within the Alabama constitution must show (1) a discriminatory purpose behind their passage and (2) a discriminatory effect in their application.⁸¹ Even assuming this challenger makes such showings, the restrictions will undergo mere rational basis review if the government persuades the Court that the convention would have taken the same action even if racial discrimination had not been a factor in their initial passage.⁸² But if the government cannot so persuade the Court, the Court must invalidate these provisions.⁸³ Application of strict scrutiny will be “unnecessary because persuading the Court that the purpose behind the [home rule limitations] is discriminatory forecloses the government’s ability to show a compelling purpose for [them].”⁸⁴

74. *Arlington Heights*, 429 U.S. at 268.

75. 471 U.S. 222 (1985).

76. *Id.* at 228.

77. *Id.* at 233.

78. *Id.* at 227.

79. *Id.* at 227-28.

80. *Id.* at 228.

81. CHEMERINSKY, *supra* note 65, § 9.3.3.2, at 690.

82. *Id.*

83. *Id.*

84. *Id.*

With these principles in mind, this Comment now turns to documenting the home rule restrictions' racist purpose and racially disparate effects.

III. THE RACIAL ASPECT OF HOME RULE

Alabama's 1901 Constitutional Convention commenced with an invocation of the belief that blacks were responsible for the problems plaguing Alabama's government and economy. Specifically, the convention's president, John Knox, lamented:

After the war, by force of Federal bayonets, the negro was placed in control of every branch of our Government. Inspired and aided by unscrupulous white men, he wasted money, created debts, increased taxes until it threatened to amount to confiscation of our property. While in power, and within a few years, he increased our State debt from a nominal figure to nearly thirty million dollars.⁸⁵

More than showing direct evidence of the racist impulse to restrict local autonomy, Knox's statement provides a window into the political climate that gave rise to severe home rule restrictions and other constitutional anomalies. Many of the home rule limitations that made their way into the state's 1901 constitution⁸⁶ actually first appeared in the 1875 constitution, which was adopted to escape the more "Negro"-friendly 1868 constitution that the "carpetbaggers" and "scalawags" had imposed during Reconstruction. Thus, inclusion of home rule limitations in the 1901 constitution is most properly seen as a continuation of then long-existing sentiments. To understand how the current home rule restrictions were racially motivated, one must consider the adoption of the 1875 constitution, the years between the 1875 convention and the 1901 convention, and the 1901 convention itself.

A. *The 1875 Convention and Constitution*

Before examining the home rule limitations of the 1875 constitution, it is important to note that the environment in which that constitution was adopted certainly suggests that its framers had racist motivations. Reconstruction was the period following the Civil War during which federal troops occupied Southern states and, in the process, attempted to ensure blacks' new political rights. As "[n]o whites of any class believed [at the time] that blacks should participate fully in government or society,"⁸⁷ the endowment of blacks with basic political rights "shook [whites'] assump-

85. OFFICIAL PROCEEDINGS, *supra* note 6, at 10.

86. *See supra* Part I.B.

87. WAYNE FLYNT, ALABAMA IN THE TWENTIETH CENTURY 4 (2004).

tions to their foundations.”⁸⁸ Accordingly, white Alabamians developed a deep disdain for the Republican “Reconstruction Government,” comprised of blacks and white “carpetbaggers” and “scalawags,”⁸⁹ and their 1868 constitution. That constitution, in the opinion of the *Montgomery Daily Mail*, would “force all white children, to go into . . . the free public schools upon terms of social equality with all sorts of negro children or . . . surrender the schools as a monopoly to the negroes”⁹⁰ and “place[] to a great extent the property of the country at the mercy of non-property holders.”⁹¹ By 1874, however, under the slogan of “white supremacy,”⁹² the Democratic Party was able to put together a small margin of victory and reclaim state government.⁹³ Members of this government, known as the “redeemers” for having saved the State from black control,⁹⁴ moved quickly to replace the 1868 Reconstruction constitution with a new one.⁹⁵ They pursued the “only way to win,”⁹⁶ which was, according to the *Mobile Register*, to “draw the ‘color line’ and rally the whites to overthrow the Negro.”⁹⁷ Calling Republicans “Jacobins and niggers,”⁹⁸ the Democrats prevailed in the convention call.⁹⁹

In this period, two pieces of evidence suggest a specific scorn for black control of county governments. The first piece of evidence relates to a proposal during the run-up to the 1875 convention to separate state and federal elections.¹⁰⁰ As a means of reducing the potential for federal “interference” in state elections, some Democrats were in favor of moving the state elections from November to August.¹⁰¹ The only opposition to this proposal was an editorial in the *Mobile Register*, which asserted that many white citizens were on vacation during August and that without those people voting, “Mobile might again fall under Negro-Carpetbag rule.”¹⁰² A second piece of evidence, occurring during the 1875 convention, related to the removal of the state capital from Montgomery.¹⁰³ Although they later retreated for strategic purposes, Democrats had proposed removing the capital from Montgomery to escape “Radical”¹⁰⁴ influences.¹⁰⁵ Undoubtedly, the *Mobile Reg-*

88. *Id.*

89. *Id.* at 5.

90. MALCOLM COOK McMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA, 1798-1901: A STUDY IN POLITICS, THE NEGRO, AND SECTIONALISM 160 (The Reprint Co. 1978) (1955).

91. *Id.* at 161.

92. *Id.* at 175.

93. *Id.* at 160.

94. Samuel L. Webb, *The Populist Revolt in Alabama: Prelude to Disfranchisement*, in A CENTURY OF CONTROVERSY: CONSTITUTIONAL REFORM IN ALABAMA, *supra* note 4, at 1, 6.

95. McMILLAN, *supra* note 90, at 175.

96. *Id.* at 177.

97. *Id.*

98. *Id.* at 187.

99. *Id.*

100. *Id.* at 182.

101. *Id.*

102. *Id.*

103. *Id.* at 197.

104. That the term “Radical” refers to Republicans and has racial connotations is well-documented. See WALTER L. FLEMING, CIVIL WAR AND RECONSTRUCTION IN ALABAMA 505-06 (The Reprint Co. 1978) (1905) (account written in the years following the adoption of 1901 Constitution discussing for-

ister's warning that if Montgomery wanted to "retain the State capital . . . she better get rid of the negro, carpetbag, municipal and county government which she has had since 1868"¹⁰⁶ accurately captured the sentiment behind the proposal.

Finally, there is evidence directly connecting the 1875 constitution's county home rule limitations to a racist motivation. After the 1874 "redemption" election, many Democrats cited limitation of county and municipal taxation authority as the main justification for a new constitutional convention.¹⁰⁷ In support of this cause, the *Mobile Register* opined:

[T]he experience of the last few years shows that there must be a greater restriction upon the authority of the legislature to plunge the State into debt, and the way in which Montgomery, Dallas, and other Radical counties have been plundered by rascally officials, makes it clear that counties must be restrained in like manner.¹⁰⁸

When read in context with the other evidence from the time period, statements like that of the *Mobile Register* furnish the "historical background" that, as the Supreme Court has recognized,¹⁰⁹ can establish a racist motivation behind the home rule restrictions that appeared in the 1875 constitution.¹¹⁰ Furthermore, because many of the 1901 home rule restrictions are merely holdovers from the 1875 constitution, the same racist motivation extends equally to them.

B. *The Interim Years, 1875-1901*

Despite its stifling restrictions on local governments' ability to conduct economic development and fund local improvements,¹¹¹ the 1875 constitution was only a first step toward fulfilling the Democrats' promise to restore "white supremacy," as the convention delegates could not yet simply strip blacks of their voting rights for fear of "federal intervention."¹¹² Thus, because blacks still had the right to vote, the period spanning from 1875 to the adoption of the 1901 constitution featured continued hostility to black influence over local government.¹¹³

mation of the "Radical Party" in Alabama).

105. MCMILLAN, *supra* note 90, at 197.

106. *Id.*

107. *Id.* at 181.

108. *Id.*

109. *See supra* text accompanying note 73.

110. *See* MCMILLAN, *supra* note 90, at 210 (summarizing provisions "against . . . county . . . aid to corporations," promoting "partial abandonment of the public school system" and "numerous restrictions which provided for a minimum of government"); *see also supra* note 37 and accompanying text.

111. *See* MCMILLAN, *supra* note 90, at 210.

112. *Id.* at 217.

113. *See id.* at 218-19.

During the late 1870s, the legislature abolished at least nine courts of county commissioners or city councils in the Black Belt.¹¹⁴ The affected counties included Dallas, Montgomery, and Wilcox counties,¹¹⁵ all counties where blacks constituted a majority of voters.¹¹⁶ In place of the elected local governments, the legislature gave the Governor the power to appoint commissioners.¹¹⁷ According to the court in *Dillard v. Crenshaw County*,¹¹⁸ this “gubernatorial appointment system is widely understood to have been designed to prevent the election of black county commissioners.”¹¹⁹ James Jefferson Robinson, a member of the state legislature during the 1870s, explained:

Dallas [County] asked us to strike down the officials they had elected in that county, one of them a Negro that had the right to try a white man for his life, liberty and property. Mr. Chairman, that was a grave question to the Democrats who had always believed in the right of the people to select their own officers, but when we saw the life, liberty and property of the Caucasians were at stake, we struck down in Dallas county the Negro and his cohorts.¹²⁰

As whites in the Alabama Black Belt fraudulently manipulated blacks’ votes to avoid “negro domination,”¹²¹ and as national conditions became more favorable for the wholesale disfranchisement of blacks,¹²² pressure mounted in Alabama for a new constitution that would strip blacks of their voting rights.¹²³ Though some Democrats sought to use the opportunity to dismantle some of the limitations on local autonomy from the 1875 constitution,¹²⁴ the party’s platform statement that “[a]fter an experience of thirty

114. *Id.* at 222. Although “Black Belt” is a geographic term for the “major portion of the Coastal Plain stretching east to west across the south central part of Alabama. . . . [And is characterized by its] rich, black soils,” JAMES D. THOMAS & WILLIAM H. STEWART, ALABAMA GOVERNMENT AND POLITICS 5 (1988), it has also generally been used as a proxy for the “black counties”—those counties having significant black populations. *See* FLEMING, *supra* note 104, at 795-800 (1905-era maps identifying the “Black Counties” in the elections of 1874 through 1902).

115. MCMILLAN, *supra* note 90, at 222.

116. *See* FLEMING, *supra* note 104, app. at 806-07 (showing Dallas County as having 9,871 black males of voting age compared to its 2,360 white males of voting age; Montgomery County as having 11,429 black voters, but 5,087 white voters; and Wilcox County as having 5,967 black voters, but 1,686 white voters).

117. MCMILLAN, *supra* note 90, at 222.

118. 640 F. Supp. 1347 (M.D. Ala. 1986).

119. *Id.* at 1358.

120. MCMILLAN, *supra* note 90, at 222 n.31.

121. *Id.* at 225. For a meticulous account of the tactics that Black-Belt whites used to control the black vote, see *id.* at 217-21.

122. *Id.* at 230-31.

123. *Id.* at 232.

124. *Id.* at 235-36. The editor of the *Mobile Register* specifically acknowledged:

[T]he right to tax himself for needed public improvements ought to belong to the citizen. This is withheld from him, no matter how able and willing he may be to pay the additional taxation. He should have the privilege of establishing schools, building roads, obtaining wholesome water, and disposing of refuse by means of sewers, if he is willing and able to pay for these essentials to human progress and happiness.

years . . . it has been demonstrated that as a race [the Negro] . . . is incapable of self-government”¹²⁵ did not bode well for the loosening of home rule restrictions in a new constitution.

C. *The 1901 Constitutional Convention*

Because most of the home rule limitations in the 1901 constitution were identical to those in the 1875 constitution,¹²⁶ the evidence of racism behind the earlier-enacted limitations should satisfy the *Hunter v. Underwood*¹²⁷ “discriminatory purpose” prong. Nonetheless, several examples reveal that the racist impetus behind home rule restrictions was still at work during the 1901 Constitutional Convention.

The convention delegates not only re-affirmed the elaborate system of restraints constructed by the 1875 convention in a racially charged environment,¹²⁸ but they also rejected a provision that would stem the persistent need for “local legislation” that was then preventing the legislature from focusing on issues of statewide concern.¹²⁹ The provision could have made hundreds of constitutional amendments to Alabama’s current constitution wholly unnecessary:

The General Assembly may by general law confer upon courts of County Commissioners, Boards of Revenue or other courts, such power of local legislation and administration, touching all matters and things not provided for by general law, and not inconsistent with the provisions of this Constitution as the General Assembly may from time to time deem expedient.¹³⁰

Leading the charge against inclusion of such an amendment was delegate Thomas L. Bulger who asserted that “[n]o gentleman on this floor will contend that his Commissioners’ Court at home is more capable of legislating for the people of his county than the General Assembly of Alabama, comprised of 100 select men.”¹³¹ Similarly, former Governor William C. Oates criticized county officials as incompetent.¹³² As recounted above,¹³³ there is evidence suggesting that people like Bulger and Oates associated county government with blacks and their “Radical” sympathizers. An author of the

Id. at 235 (quoting Erwin Craighead, Editor of the Mobile Register, *The State Must Not Stop Its Progress*).

125. *Id.* at 259 n.76 (brackets and second ellipsis in original).

126. *See, e.g., supra* note 37 and accompanying text.

127. 471 U.S. 222 (1985).

128. *See supra* Part III.A.

129. MCMILLAN, *supra* note 90, at 331.

130. Williams & Horn, *supra* note 22, at 291.

131. Sumners, *supra* note 7, at 68 (quoting John Peck, *Study: Legislature Deep in Local Issues*, HUNTSVILLE TIMES, June 21, 2000, at B1).

132. MCMILLAN, *supra* note 90, at 333.

133. *See text* accompanying notes 101, 105, 107, 112, and 119.

era further reflects this idea by recalling Reconstruction-era county officials as being “imported” from the North, “scalawags,” illiterate, and, most importantly, “Negro.”¹³⁴ As constitutional historian Malcolm Cook McMillan concluded, the convention’s failure to make basic alterations to the 1875 document “was the old story of using the Negro issue to prevent change or reform.”¹³⁵

Additionally, evidence regarding two “direct” restrictions on home rule—the county debt and taxation limits—affirms the continuing link between race and home rule limitations. First, when delegates proposed strict limitations on county debt, they cited the “strangulated counties” which were at the time heavily indebted due to their endorsement of railroad bonds.¹³⁶ Four of the five “strangulated” counties cited by debt-limitation proponents were counties with substantial black populations.¹³⁷

Second, racist reasons informed both the inclusion and the structure of the local tax limits.¹³⁸ Although interest in increased funding for public schools had driven support for the constitutional convention as much as black disfranchisement in many “white” counties,¹³⁹ whites from Black Belt counties (which in contrast had large black populations) dominated the convention’s education committee.¹⁴⁰ Because of their entrenched control of local government spending, these committee members had no reason to support counties’ increased ability to raise school taxes,¹⁴¹ and they ultimately secured inclusion of a meager, local option property tax of only one-tenth of one percent.¹⁴² Put simply, committee members’ geographic background and presumed confidence in their ability to manipulate tax money for the advantage of white school children, supports the inference that the tax limit was merely a pragmatic compromise to their overall goal of deny-

134. See FLEMING, *supra* note 104, at 742-43.

135. MCMILLAN, *supra* note 90, at 338.

136. *Id.* at 328 n.134.

137. See FLEMING, *supra* note 104, app. at 806-07 (showing Lee and Pickens counties as majority black, Chambers County as almost evenly divided among males of voting age, and Tallapoosa County as having a nearly one-third black population).

138. For a thorough examination of the racist intimations surrounding the debate over tax limits, see the court’s findings of fact in *Knight v. Alabama*, No. CV-83-M-1676-S, slip op. at 19-22, 47-49 (N.D. Ala. Oct. 5, 2004) (on file with author). The court found: “The historical fears of white property owners, particularly those residing in the Black Belt, that black majorities in their counties would eventually become fully enfranchised and raise their property taxes motivated the property tax provisions in the 1901 Constitution” *Id.* at 47. The court also noted: “Black Belt and urban industrial interests successfully used the argument that it is unfair for white property owners to pay for the education of blacks to produce all the state constitutional barriers to property taxes” *Id.* at 49.

139. MCMILLAN, *supra* note 90, at 317.

140. *Id.* at 320.

141. *Id.* at 317-18. Under the Apportionment Act of 1891, state school funds were distributed to counties on the basis of each county’s population of school age children. *Id.* Pursuant to language of the Act entrusting local officials with the distribution of such funds “as they may deem just and equitable,” *id.* at 318 (quoting 1890-91 Ala. Acts 554), the Black Belt officials funneled the state money primarily to white children. *Id.* For instance, the officials used the funds to subsidize white children’s attendance at private academies or colleges while paying black teachers less and spending less on school buildings and equipment for black children. *Id.*

142. *Id.* at 321.

ing black county leaders the ability to raise additional money. Allowing the possibility of local taxes at all was aimed only at securing support of the white counties of North Alabama, where Black Belt leaders most needed support to accomplish the convention's main goal of disfranchisement.¹⁴³ The local tax limit was thus included "at least in part"¹⁴⁴ for racist reasons.

The structure of the local tax limit also reveals how that provision was at least partially motivated by a discriminatory purpose. To ensure local, white control of any school funds resulting from the tax, the convention included language in the constitution giving local officials—who would be white after the new constitution's ratification—wide discretion in the distribution of any resulting funds.¹⁴⁵ Also, insertion of a local voter referendum requirement into the optional county school tax—a first in Alabama history—ensured that, due to the constitution's disfranchisement of blacks, only whites would determine whether a given county would enact such a tax.¹⁴⁶

Finally, race partially motivated the local tax limit for another reason. Specifically, while many in the convention advocated a provision requiring the division of local school funds according to the taxes each race paid,¹⁴⁷ the convention ultimately enacted only the optional, local tax to salvage the state's national image.¹⁴⁸ Adopting the racial apportionment of local school taxes would serve to *reduce* the share of school revenues Black Belt whites could control, as they would no longer be able to channel money disproportionately to educational services for white children.¹⁴⁹ Reflecting the spirit of the convention, the *Mobile Register* characterized the racial division of local school taxes as "a political mistake of the first order. We must not disenfranchise the Negro on account of his ignorance and then refuse him help to escape from his ignorance. That would reflect upon our motive."¹⁵⁰ Certainly, the history of the debt and tax issues and the various political calculations at work in the 1901 convention reflect upon the delegates' "motive" in approving these provisions.

Thirteen years after the 1901 convention had completed its work, Emmet O'Neal, a convention member who had become Governor, began campaigning for yet another new state constitution.¹⁵¹ O'Neal suggested that the 1875 and 1901 Constitutional Convention delegates had disregarded several "wise" provisions of the 1868 constitution due to an "intense" partisan feeling.¹⁵² While O'Neal did not explicitly implicate racist elements of that "feeling," the historical context in which the delegates worked and the re-

143. *Id.* at 322.

144. *Pers. Adm'r v. Feeney*, 442 U.S. 256, 279 (1979).

145. MCMILLAN, *supra* note 90, at 322.

146. *Knight v. Alabama*, No. CV-83-M-1676-S, slip op. at 20 (N.D. Ala. Oct. 5, 2004).

147. MCMILLAN, *supra* note 90, at 322-23.

148. *Id.* at 323-25.

149. *See supra* note 142; *see also Knight*, No. CV-83-M-1676-S, slip op. at 20.

150. MCMILLAN, *supra* note 90, at 323 (quoting MOBILE REG. (June 7, 1901)).

151. *Id.* at 339.

152. *Id.* at 326.

ports of the conventions themselves indicate that convention-goers adopted the home rule limitations “at least in part ‘because of’” a desire to discriminate.¹⁵³

IV. RACIALLY DISPARATE EFFECTS OF HOME RULE LIMITATIONS¹⁵⁴

Having established that the conventions of 1875 and 1901 included the rigid restrictions on home rule at least partly for racist reasons, the only task that remains is to show that these provisions have had a “discriminatory effect.”¹⁵⁵ To do this, this Comment looks to either the quantity or sequence of local constitutional amendments for which counties have been able to secure passage over the life of the 1901 constitution. The premise is that a local constitutional amendment represents relief from some onerous constraint on the county’s self-government capacity. Because amendments require both local initiative and successful navigation of the state legislature,¹⁵⁶ a given county’s ability to secure such relief seems to be a logical indicator of that county’s political power under the current constitution. For purposes of this Comment, analysis has been narrowed to consideration of local constitutional amendments in four areas: (1) increased tax authority;¹⁵⁷ (2) authority to engage in basic economic development functions;¹⁵⁸ (3) increased authority to perform basic governmental functions;¹⁵⁹ and (4) authority efficiently to provide for county officials’ retirement.¹⁶⁰ Taken as a whole, the evidence reveals that the “black” counties—those counties in which the majority of eligible voters were black in 1900¹⁶¹—have either secured disproportionately fewer amendments than white counties or, alter-

153. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979). A plaintiff challenging home rule restrictions with the evidence presented in this Part would fulfill the “discriminatory purpose” requirement of *Hunter v. Underwood* and the other facially race-neutral Equal Protection cases. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). But, as indicated in Part II, fulfillment of that requirement would shift the burden to the defender of the home rule limitations to show that they would have been enacted even despite a racially discriminatory purpose. *Id.* In the context of challenges to the 1901 Constitution, *Hunter* effectively forecloses this possibility. *See id.* at 230. In that case, discussing the state’s attempt to show that the convention would have disenfranchised misdemeanants absent a racially discriminatory motivation, the Court explicitly acknowledged that “the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks” and that no party could “seriously dispute the claim that this zeal for white supremacy ran rampant at the convention.” *Id.* at 229.

154. This section should be read in conjunction with the table appended after the conclusion of this Comment.

155. *See supra* note 66 and accompanying text.

156. ALA. CONST. art. XVIII, § 284.

157. *See infra* app. n.2.

158. *See infra* app. n.1.

159. *See infra* app. n.4.

160. *See infra* app. n.3.

161. *See FLEMING, supra* note 104, app. at 806-07 (comparing the number of black- and white-voting-age males in each county in 1900). As the appendix below reveals, the counties that were “black” in 1900 are, by-in-large, “black” today in that most of them still have substantial black populations ranging from 40% to 85% of the county’s total population. *See infra* app. In this Comment, Lee County will be treated as a “white” county. In 1900, it had only 500 more eligible black voters than eligible white voters. *See FLEMING, supra* note 104, app. 1 at 806-07. Today, its black population has dwindled to slightly more than 20%. *See infra* app.

natively, have secured amendments only *after* the white counties have first secured them.¹⁶²

In the four areas of analysis, the evidence confirms that the limited home rule regime has a racially disparate impact. First, in regards to local tax authority, one court has already found that the local option property tax for schools¹⁶³ had a racially disproportionate effect. According to the court in *Knight v. Alabama*, “by 1914, of the forty-six counties in Alabama that had levied a local school tax, only one (Marengo) was in the Black Belt.”¹⁶⁴ Similarly, black counties received increased power to engage in economic development at a slower rate than white counties.¹⁶⁵ Only three of the first twelve counties to get relief from the restraint embodied in section 94 were black counties.¹⁶⁶ Next, more than half of white counties have secured constitutional amendments allowing them to carry on such government functions as drainage control, fire protection, and sewage removal; meanwhile, only one third of black counties have secured similar authority.¹⁶⁷ Finally, of the first twenty-one counties to receive constitutional permission regarding county officials’ retirement plans, only two were black.¹⁶⁸

Furthermore, over the lifespan of the 1901 constitution, a white county has, on average, been able to secure two more constitutional amendments (in the four areas analyzed in this Comment) than a black county.¹⁶⁹ Given other restrictive measures left unanalyzed here (such as the county debt limits and limits on changing local fees),¹⁷⁰ it is unclear just how far evidence of racial disparity reaches. What is clear from this data, however, is an insight of high constitutional relevance: Black counties secure local constitutional amendments less frequently and less quickly than white counties.

V. CONCLUSION

The delegates who went to Montgomery in 1901 to guarantee white supremacy and relieve Black Belt whites from conditions “forcing” them to perpetrate wide-scale voter fraud were efficient in accomplishing their task. While their intent to disenfranchise blacks has been widely cited in the recent debate over constitutional reform, such racist motivations also guided their imposition of heavy limits on the ability of citizens to govern their

162. *See infra* app.

163. *See supra* notes 131-143 and accompanying text.

164. *Knight v. Alabama*, No. CV-83-M-1676-S, slip op. at 22 (N.D. Ala. Oct. 5, 2004).

165. *See infra* app.

166. This information is gleaned from the table in the appendix; the amendments are numbered in the order in which they were adopted.

167. Twenty-four of the forty-six white counties have secured such amendments, while similar amendments have been secured in only seven of the twenty-one black counties. *See infra* app. (detailing information in column labeled “Basic Government Functions?”).

168. The two counties were Clarke County (ALA. CONST. amend. 631) and Chambers County (ALA. CONST. amend. 663). *See infra* app. tbl.

169. Information in the table shows that white counties have on average secured some 4.9 constitutional amendments, while black counties have secured an average of only 3 constitutional amendments.

170. *See supra* note 30.

local affairs. The “zeal for white supremacy [that] ran rampant at the convention”¹⁷¹ included not only a fear of what would happen if blacks could vote, but also a fear of what blacks would do if they again had control of local governments. Such a sentiment as a motivating factor in the adoption of Alabama’s home rule restrictions is constitutionally impermissible. And because these restrictions have had a discriminatory effect, they violate the equal protection guarantee of the Fourteenth Amendment.¹⁷²

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171. *Hunter v. Underwood*, 471 U.S. 222, 229 (1985).

172. To be sure, the effect of this Comment’s conclusions is limited. Even if its arguments persuaded a court that the various restrictions on home rule were unconstitutional, this Comment makes no suggestion that a court could affirmatively “amend” the state constitution to explicitly grant the home rule authority counties might want (such as a higher [or unlimited] taxing power or economic development authority). Instead, the invalidation of the various home rule limitations would likely constitute a constitutional “crisis” as counties would have even fewer powers than they do today. The hope, however, is that such a crisis would finally prompt comprehensive constitutional reform through the political process to remedy the “home rule” problem once and for all.

APPENDIX: LOCAL AMENDMENTS TO THE
ALABAMA CONSTITUTION OF 1901

County	Economic Dev. Authority? ¹⁷³	Increased Tax Authority? ¹⁷⁴	Retirement Provisions? ¹⁷⁵	Basic Gov. Functions? ¹⁷⁶	FLEMING "Black County" in 1900? ¹⁷⁷	2000 % Black ¹⁷⁸
Autauga	ALA. CONST. amend. 183		ALA. CONST. amend. 626		Yes	17.11%
Barbour		ALA. CONST. amend. 143			Yes	46.32%
Bullock	128, 429	163	676	ALA. CONST. amend. 128	Yes	73.11%
Butler	719	131			Yes	40.81%
Chambers	678	102, 554,721	663	476	Yes	38.11%
Choctaw		167, 527			Yes	44.13%
Clarke	217	168	631	464	Yes	43.02%
Dallas	429				Yes	63.26%
Greene	188		685		Yes	80.34%
Hale	313	603			Yes	58.95%
Lee	642	147, 309, 324, 498	641	392, 498, 570	Yes	22.86%
Lowndes			673		Yes	73.37%
Macon	429	420	693		Yes	84.64%
Marengo	308, 468, 624, 646	610	733		Yes	51.71%
Monroe		86		501	Yes	40.07%

173. These amendments give counties the power to lend credit or grant a "thing of value" to private entities—an important power for economic development. ALA. CONST. art. IV, § 94. This power was denied counties in section 94 of the Constitution, ALA. CONST. art. IV, § 94, and was originally included in the 1875 Constitution. *See supra* note 37.

174. These amendments authorize counties to levy taxes greater than their minimal tax authority under section 215 of the 1901 Constitution. *See* ALA. CONST. art. XI, § 215.

175. These amendments allow counties to get out of an expensive, *de facto* retirement program for retired county officials, which was necessary under the 1901 Constitution's prohibition against counties paying former officials pensions. *See supra* note 45 and accompanying text.

176. These amendments allow counties to provide for such services as fire protection and drainage control. *See supra* note 49 and accompanying text.

177. A county is defined as a "black county" in this column if it had more black males of voting age in 1900 than white males of voting age. *See* FLEMING, *supra* note 104, app. at 806-07.

178. These percentages are based on data from the 2000 U.S. Census. U.S. CENSUS BUREAU, <http://www.census.gov> (select "American Fact Finder"; then select "Data Sets"; then select "Census 2000 Redistricting Data (P.L. 94-171) Summary File" and select "Graphic Comparison Tables"; pull down and select "State" as the geographic type; chose "Alabama" as the state and "state --county" for the table format; select "GCL-PL Race & Hispanic or Latino: 2000" under show result and select "show result").

County	Economic Dev. Authority? ¹⁷³	Increased Tax Authority? ¹⁷⁴	Retirement Provisions? ¹⁷⁵	Basic Gov. Functions? ¹⁷⁶	FLEMING "Black County" in 1900? ¹⁷⁷	2000 % Black ¹⁷⁸
Montgomery	713	63, 551, 711, 712		379	Yes	48.58%
Perry		593	698		Yes	68.38%
Pickens	302	649, 521, 522			Yes	42.96%
Russell	737	124	702	381	Yes	40.84%
Sumter	250	653	675		Yes	73.17%
Wilcox		461	742		Yes	71.90%
Baldwin	716	162, 230, 319, 471, 599		365	No	10.29%
Bibb	312		625		No	22.20%
Blount	95		718	561	No	1.19%
Calhoun	415, 563	68, 291, 335, 583, 720	629		No	18.54%
Cherokee		78, 584	630		No	5.54%
Chilton	679	166, 402, 680	704		No	10.61%
Clay	682	169, 585	671		No	15.70%
Cleburne		123, 586	632		No	3.70%
Coffee	429, 723	206	633		No	18.37%
Colbert	247	130, 45, 293, 294		45	No	16.62%
Conecuh		435, 528	635	528	No	43.55%
Coosa	429	145, 724	602		No	34.19%
Covington	725	292, 564	636		No	12.35%
Crenshaw	727				No	24.79%
Cullman					No	0.96%
Dale		295	683		No	20.36%
De Kalb		65, 146, 637, 728			No	1.68%
Elmore		567	638	466	No	20.64%
Escambia		70, 536			No	30.79%
Etowah	429	67, 235, 296, 587, 684		432,445	No	14.68%
Fayette	94			517, 518	No	11.93%
Franklin	186, 247	173, 211, 262	639	519	No	4.21%
Geneva	263, 429		640		No	10.65%
Henry	729	604	687		No	32.30%
Houston	429		589		No	24.60%
Jackson		174, 203	730	436, 519	No	3.74%

County	Economic Dev. Authority? ¹⁷³	Increased Tax Authority? ¹⁷⁴	Retirement Provisions? ¹⁷⁵	Basic Gov. Functions? ¹⁷⁶	FLEMING "Black County" in 1900? ¹⁷⁷	2000 % Black ¹⁷⁸
Jefferson	429	82, 175, 316, 539		239, 314	No	39.36%
Lamar	189	176	689	516	No	11.98%
Lauderdale	243	177, 404	690		No	9.85%
Lawrence	190, 429	20, 32, 79, 311	691, 731	99, 545	No	13.36%
Limestone	243	34, 311, 546	645	371, 499	No	13.33%
Madison	191	149, 304, 455, 608		378	No	22.78%
Marion	84, 247	69, 205, 329	705	490, 695	No	3.63%
Marshall		66, 101		439	No	1.47%
Mobile	338	16, 179, 195, 275, 301, 351	648	532	No	33.38%
Morgan	303	52, 106, 311, 318, 484, 573, 574, 575, 576	592, 734		No	11.24%
Pike		458	699, 700	503	No	36.60%
Randolph	701	156, 180, 594	651		No	22.24%
Shelby	429	343, 595	708	343, 370, 707	No	7.40%
St. Clair	197	77, 652, 523			No	8.13%
Talladega		98, 181, 252, 310, 614, 504	654	614	No	31.55%
Tallapoosa	739, 429	129, 198	703	572	No	25.36%
Tuscaloosa	333	71, 164, 333		358	No	29.31%
Walker	596	19, 204, 276	658		No	6.17%
Washington		182, 199		470, 505	No	26.89%
Winston	247	153, 254		515	No	0.38%