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SPECIAL CONTRIBUTION

The Georgia Home Rule System

by R. Perry Sentell, Jr.

I. INTRODUCTION

Few doctrines attract more universal acclaim than local government "home rule"; even fewer possess a more convoluted heritage or content.¹

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1. The literature is multifaceted, all-encompassing, overwhelming, and legendary. Only a sub-set of the offerings includes the following: HOWARD L. MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916); JOSEPH D. MCGOLDRICK, *THE LAW AND PRACTICE OF HOME RULE 1916-1930* (1933); OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* (1982); 1 CHESTER ANTIEAU, *ANTIEU ON LOCAL GOVERNMENT LAW* (2d ed. 1997); C. DALLAS SANDS, ET AL., *LOCAL GOVERNMENT LAW* (2d ed. 1997); DANIEL R. MANDELKER, ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* (4th ed. 1996); GERALD E. FRUG, *LOCAL GOVERNMENT LAW* (2d ed. 1994); JEFFERSON B. FORDHAM, *LOCAL GOVERNMENT LAW* (1949); Gary Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 *UCLA L. REV.* 671 (1973); Gerald Frug, *The City As A Legal Concept*, 93 *HARV. L. REV.* 1057 (1980); Kenneth Vanlandingham, *Municipal Home Rule in the United States*, 10 *WM. & MARY L. REV.* 269 (1968); Jefferson Fordham & Joe Asher, *Home Rule Powers in Theory and Practice*, 9 *OHIO ST. L.J.* 18 (1948); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *MINN. L. REV.* 643 (1964).

As for heritage, difficulty inheres in locating a point of origin, for "home rule has roots deep in Anglo-American political history."² As for content, imprecision begins with terminology itself, for "in point of fact the term has never been given legal definition and can scarcely be regarded as a term of our law at all."³

Despite these preliminary obstacles, scholars generally perceive the home rule concept as a product of the eternal tension between local governments and the state.⁴ Historically, that tension manifested itself in a doctrinal stand-off of epic proportions championed by American legal giants. Leading one charge Thomas M. Cooley proclaimed for municipalities an "inherent right" of local self-government, an "absolute right" beyond the control of the state legislature.⁵ In counterattack John Dillon strongly denied the existence of any local autonomy, insisting that

2. 1 ANTIEU, *supra* note 1, § 21.01:

"The principle of home rule, or the right of self-government as to local affairs, existed before we had a constitution. Even prior to Magna Charta some cities, boroughs and towns had various customs and liberties, which had been granted by the crown, or had subsisted through long user, and among them was the right to elect certain local officers from their own citizens and, with some restrictions, to manage their own purely local affairs."

Id. (quoting Metropolitan St. R.R. v. Tax Comm'rs, 67 N.E. 69, 70-71 (N.Y. 1903)).

3. McBain, *supra* note 1, at v. Likewise:

It is very difficult to formulate a precise definition of home rule, inasmuch as there exists no unanimity of agreement among authorities concerning its meaning. In a sense, the term represents a metaphor which excites strong emotions and with some truth Thomas H. Reed has called it a "state of mind" [I]t may be considered a device for allocating powers and functions between the state and its municipalities. It may also be considered both a legal and a political concept; legal in the sense that the allocation of powers and functions rests upon law; and political in the sense that it involves exercise of political judgment.

Vanlandingham, *supra* note 1, at 279-80.

4. *E.g.*, "As a legal doctrine, by contrast, home rule does not describe the state or condition of local autonomy, but a particular method for distributing power between state and local governments, *i.e.*, a grant of power to the electorate of a local governmental unit to frame and adopt a charter of government." Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 645 (1964). Similarly, "It was thus that the legislatures of the several states came into possession of a power, the exercise of which presented at a later period of our history the most serious problem that the American city has encountered in the working out of its salvation." MCBAIN, *supra* note 1, at 4.

5. Judge Cooley staked out his position in a concurring opinion in a Michigan case, *LeRoy v. Hurlbut*, 24 Mich. 44, 93 (1871). The strongest academic support accorded the inherent right doctrine came from 1 EUGENE MCQUILLIN, *MUNICIPAL CORPORATIONS* § 246 (1911). The most forceful rejection of the inherent-right doctrine came from Howard L. McBain, *The Doctrine of An Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 299 (1916).

all municipal power derived solely from the state legislature.⁶ Moreover, as Dillon's famous "rule" mandated, "any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the [municipal] corporation, and the power is denied."⁷

Dillon's eventual triumph over Cooley's inherent right theory solidified the American doctrine of "plenary" state legislative power.⁸ Under the plenary precept, or the doctrine of legislative supremacy, the local government exists as a mere creature of the state, dependent upon the state legislature for any powers possessed or exercised.⁹ It was from

6. 1 JOHN DILLON, MUNICIPAL CORPORATIONS 448-55 (1872). It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable.

7. *Id.* Again: The extent of the powers of municipalities, whether express, implied, or indispensable, is one of construction. And here the fundamental and universal rule, which is as reasonable as it is necessary, is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any ambiguity or fair, reasonable, substantial doubt as to the extent of the power is to be determined in favor of the State or general public, and against the State's grantee. *Id.* Professor Frug maintains that Dillon's strong position emanated from his belief that local governments were poorly managed:

Most troubling of all to Dillon, cities were not managed by those "best fitted by their intelligence, business experience, capacity and moral character." Their management was "too often both *unwise* and *extravagant*." A major change in city government was therefore needed to achieve a fully public city government dedicated to the common good. But how could this be achieved? To Dillon, the answer seemed to lie in state control of cities and in judicial supervision of that control. State control, though political, was purely public, and the "best fitted" could more likely be attracted to its government.

Frug, *supra* note 1, at 1111.

8.

The doctrine of plenary state legislative power means that the state legislature possesses full authority to provide for the organization and allocation of power to local government units. Legislative plenary power is limited only by particular provisions of the state constitution and, of course, by the federal constitution, notably the equal protection and due process clauses.

MANDELKER, *supra* note 1, at 37. Again, "[S]tate legislatures have plenary power over local governments These doctrines mean that local governments, in some way, must receive all the powers they exercise from the state." *Id.* at 103.

9.

Municipal corporations are political subdivisions of the state, and in the absence of constitutional restrictions, the legislature has absolute control over the number, nature, and duration of the powers conferred, and the territory over which they shall be exercised, and may qualify, enlarge, abridge, or entirely withdraw at its pleasure the powers of a municipal corporation.

CHARLES S. RHYNE, MUNICIPAL LAW 61 (1957). Similarly,

this subservient status that local governments sought alternatives: "[I]s there any other doctrine in our legal system that gives municipalities independence and control as to their own affairs?"¹⁰ In response, "[y]es, there is the doctrine of municipal home rule, not perceived as an inherent right, but granted by constitution and/or statute in well over half the states."¹¹ Indeed, "[h]ome rule . . . is seen as a full delegation of autonomy to local government that can overcome Dillon Rule restrictions."¹² Finally, "[f]rom its inception municipal home rule has been primarily directed at freeing cities from irksome legislative control."¹³

America dates its modern home rule development from 1875, the year in which Missouri included a home rule provision in its state constitution.¹⁴ From that point of origin, many states have since infused their

[M]unicipalities in the United States are subject to the complete control of the states in which they are located except as such control is limited by constitutional provisions. State control of cities and towns has been described as "plenary" Thus, the state may take away the powers of municipalities, may transfer their functions to other governmental units, and may turn their property over to other governmental entities without making compensation.

REYNOLDS, *supra* note 1, at 75.

10. *Id.* at 95.

11. *Id.*

12. MANDELKER, *supra* note 1, at 128. Again: "Home rule has been said to be intended to allow localities to decide for themselves the form of local government that they desire and the scope of its powers." REYNOLDS, *supra* note 1, at 97.

13. MCGOLDRICK, *supra* note 1, at 299.

14. Professor McBain, in the first book ever published on American local government home rule, celebrated the event as follows:

It may have been that the members of the Missouri constitutional convention of 1875 analyzed the situation in some such manner as this when they decided to grant charter-making powers to St. Louis and other cities of more than 100,000 inhabitants. Or it may have been that they were influenced by the analogy of the relation between the national government and the states. It is to be regretted that the debates and proceedings of this convention were not published and that so little is known of the origin of this proposal. Suffice it to say that it marked the most important step ever taken in the United States in the direction of securing home rule to cities through the medium of a constitutional provision. The plan originated, moreover, not in an Eastern state, where with respect to important cities the problem of legislative control had been slowly evolving aggravating symptoms, but in a Middle-Western state with a single important city—and that a city of fairly recent metropolitan growth. To say the least, in spite of Missouri's thirty-five years of standing as a state, it certainly exemplified something of a pioneer's daring originality of spirit in the matter of political institutions.

MCBAIN, *supra* note 1, at 113. Others, although less enthusiastically, also noted the occasion. "The principle of home rule, or the right of local self-government as to local affairs, had its beginning in the United States when the people of Missouri in 1875 adopted a constitutional amendment providing for home rule for its municipalities." RHYNE, *supra*

constitutions with home rule systems—systems structured in one guise or another, falling into one category or another, and operating to one extent or another. Thus, the official home rule hallmark boasts the absence of an official home rule hallmark.¹⁵

Students of the subject commonly define home rule systems as authorizing local governments to legislatively frame and adopt their own organizational structures.¹⁶ If the state constitution directly vests that power in the local government, observers categorize the system as one of “constitutional home rule.”¹⁷ If, contrarily, the constitution empowers the state legislature to effect the authorization, the system falls into the “legislative home rule” category.¹⁸ Even within those respective

note 9, at 62. “Modern American home rule dates from the adoption of the first constitutional home rule amendment by Missouri in 1875.” 1 ANTEAU, *supra* note 1, § 21.01. “But the codified form of home rule as we today know it in the United States is usually said to have started with a Missouri constitutional amendment in 1875.” REYNOLDS, *supra* note 1, at 95.

15. “Because of the diverse wording of the home-rule legislation in the various jurisdictions, few generalizations concerning the intended ambit of grants of power over ‘municipal affairs’ or ‘municipal functions’ can be made.” 2 SANDS, *supra* note 1, § 13.03. “There are considerable variations in the constitutional language and home rule statutes.” 1 ANTEAU, *supra* note 1, § 21.01.

16. “It has been customary to confine the municipal and county home rule terminology somewhat arbitrarily to the local framing and adoption of charters of government.” FORDHAM, *supra* note 1, at 74. Similarly,

[t]he procedure by which a municipality may obtain home rule is commonly set forth in considerable detail in constitutional or statutory provisions. Fundamental to the process is the drafting of a document usually called a “city charter” or “home rule charter,” which becomes the organic law of that municipality and is often considered analogous to a constitution.

REYNOLDS, *supra* note 1, at 98.

17. Some authorities further subdivide “constitutional home rule”: “Constitutional home rule clauses take two forms. The original form, dubbed ‘imperium in imperio’—a ‘state within a state’—grants a defined scope of power to local governments. This form of home rule usually grants local governments powers over ‘municipal’ affairs, or over their ‘property, affairs and government.’” MANDELKER, *supra* note 1, at 128. Under “a more recent form of constitutional home rule . . . the constitution grants local governments all powers the legislature is capable of delegating, but the legislature is authorized to withdraw or limit home rule powers by statute.” *Id.* at 129.

18. “If the charter-making power comes directly from the constitution, . . . it is called constitutional home rule. If enabling legislation is necessary, . . . the pattern is legislative home rule.” FORDHAM, *supra* note 1, at 74.

The effect of home rule as a source of local power varies greatly within the home rule states. The basic source of this power is either (1) constitutional, the self-executing state constitutional provision directly conferring home rule authority upon the local governments; or (2) legislative, the so-called “home rule laws” passed by the legislature pursuant to constitutional mandate.

1 ANTEAU, *supra* note 1, § 21.02.

classifications, moreover, the systems may assume a variety of shaping characteristics.

Typical evaluations of a home rule system, whatever its category, focus upon an assortment of facets. Illustratively, some systems expressly purport to reverse the "strict construction" mandate of Dillon's Rule by providing that grants of home rule powers are to be liberally interpreted.¹⁹ Additionally, many systems direct their home rule delegations to counties as well as municipalities.²⁰ Finally, the system may formulate its authorization in any number of descriptions: as conveying powers relating to "local affairs," powers of "local self-government," or powers over "local matters."²¹

Whatever the system's category and features, a two-pronged ramification inevitably emerges from its operation over a period of time in a given jurisdiction. Ironically, reflection upon that ramification reverts to the fundamental tension of origin: (1) to what extent the home rule system serves as a source of power for local governments; and (2) to what extent the home rule system serves as a source of limitation upon the state.²²

19. "In a number of legislative home rule states, there are constitutional clauses or amendments stating that grants of power to home rule cities are to be liberally construed . . . Even absent such a provision, grants of power in home rule acts should be liberally construed." 1 ANTIEAU, *supra* note 1, § 21.04.

20. "Within a home rule state, only a limited number of local governments in a state may actually be exercising home rule powers. One important development is that a substantial number of the nation's larger urban counties have home rule charters." MANDELKER, *supra* note 1, at 129.

Especially notable, so far as home-rule expansion is concerned, has been the authorization in close to half the states of home rule by the counties. Such rule in the counties clearly changes their traditional status as little more than sub-agencies of the states, and it may aggravate problems of overlapping governments and division of authority.

REYNOLDS, *supra* note 1, at 100.

21. "The language used to define the sphere of self-determination under home-rule provisions . . . varies from jurisdiction to jurisdiction, but either 'local' or 'municipal' usually appears, as in provisions granting 'powers relating to municipal affairs,' 'powers of local self-government,' or power over 'local and municipal matters.'" 1 SANDS, *supra* note 1, § 4.07.

22.

Analysis suggests that, broadly speaking, constitutional provisions increasing local independence might have modified the "common law" of municipal corporations in either of two ways: (1) by granting municipalities the authority to exercise certain powers without prior authorization from the legislature, or (2) by limiting the legislature's power to legislate concerning municipal government.

Sandalow, *supra* note 1 at 648. "Home rule is important to local governments in two principal ways. First, it is a source of local power. Second, it is a limitation upon legislative control." 1 ANTIEAU, *supra* note 1, § 21.02. "The codified form of home rule serves both

II. FORMULATION OF THE GEORGIA SYSTEM

Few jurisdictions equaled Georgia's adamant resistance to the home rule movement. The state's historic devotion to legislative supremacy held strong for many centuries. Eventually, however (some ninety years following Missouri's bold experiment), a rather unique home rule system took its place in the corpus of Georgia local government law. That system, and its operation now for more than three decades, reflects a substantial transition in both legal and political philosophy. It is a transition worthy of account and analysis.

A. Origin

Following a history of failure in attempting to bring legislative home rule to fruition for local governments,²³ the 1954 General Assembly proposed (and the people ratified) an amendment to the Georgia Constitution:

The General Assembly is authorized to provide by law for the self-government of municipalities and to that end is hereby expressly given the authority to delegate its powers so that matters pertaining to municipalities upon which, prior to the ratification of this amendment, it was necessary for the General Assembly to act, may be dealt with without the necessity of action by the General Assembly. Any powers

as a grant of power to cities and as a limitation on state control of these same cities." REYNOLDS, *supra* note 1, at 95. "Much of the litigation regarding home rule has centered on situations of conflict between state and city law." REYNOLDS, *supra* note 1, at 104.

23. That history encompassed a 1945 constitutional provision mandating the General Assembly to provide for optional "uniform systems of county and municipal government," and "a method by which a county or municipality may select one of the optional uniform systems or plans or reject any or all proposed systems or plans." GA. CONST. art. XV, § 1, para. 2 (1945) (amend. 1954). Pursuant to that mandate, the General Assembly enacted a measure designated as "The Municipal Home Rule Act of 1947" (1947 Ga. Laws 1118), a statute of both selective applicability and questionable validity. In 1951, the legislature repealed the 1947 statute and replaced it with "The Municipal Home Rule Law" (1951 Ga. Laws 116), a statute vesting assorted powers in municipalities electing to avail themselves of its provisions. Included in the 1951 delegations were powers to frame and adopt municipal charters, to adopt charter amendments, to incorporate adjacent territories, and to enjoy "all the power necessary, requisite or proper for the government and administration of . . . local and municipal affairs . . ." (1951 Ga. Laws at 123). In 1953, in *Phillips v. City of Atlanta*, 210 Ga. 72, 77, 77 S.E.2d 723, 727 (1953), the Georgia Supreme Court held that the 1951 statute did not sufficiently follow the optional uniform charter mandates of the 1945 constitutional provision. Accordingly, the court declared the statute invalidly delegated legislative power to municipalities and was, in its entirety, unconstitutional. *Id.*

granted as provided herein shall be exercised subject only to statutes of general application pertaining to municipalities.²⁴

Eleven years later,²⁵ the General Assembly put the amendment's authority in play by enacting "The Municipal Home Rule Act of 1965" ("the Act").²⁶ Simultaneously, the legislature proposed yet another amendment to the constitution, a provision setting out a similar home rule system for Georgia counties.²⁷ The ratification of that amendment in 1966 completed an intriguing local government formulation: a system of indirect ("legislative") home rule for municipalities and a system of direct ("constitutional") home rule for counties. These are the Georgia systems presently in place.²⁸

24. GA. CONST. art. XV, § 1, para. 1 (amended 1954). The provision appears in the present constitution in the following terms: "The General Assembly may provide by law for the self-government of municipalities and to that end is expressly given the authority to delegate its power so that matters pertaining to municipalities may be dealt with without the necessity of action by the General Assembly." GA. CONST. art. IX, § 2, para. 2 (1983).

This provision serves as the constitutional basis not only for the home rule statute, but also for the legislature's delegations of territorial boundary adjustment powers to municipalities as well. For treatment of those delegations, see R. Perry Sentell, Jr., *The Law of Municipal Annexation in Georgia: The Evolution of a Concept?*, 2 GA. L. REV. 35 (1967); R. Perry Sentell, Jr., *Municipal Annexation in Georgia: Nay-Sayers Beware*, 5 GA. L. REV. 499 (1971); R. Perry Sentell, Jr., *Municipal Annexation in Georgia: The Contiguity Conundrum*, 9 GA. L. REV. 167 (1974); R. Perry Sentell, Jr., *Municipal De-Annexation: The Ins and the Outs*, 27 GA. ST. B.J. 118 (1991).

25. During those intervening years, in 1964, a commission prepared and the legislature adopted a resolution proposing a new constitution for Georgia. That document contained express home rule provisions for both counties and municipalities, including the power to adopt ordinances relating to local government affairs and to amend or repeal local government charters. 1964 Ga. Laws Ex. Sess. 234, 315. A federal district court held that because this document had been proposed by a malapportioned general assembly, it could not be submitted to Georgia voters for ratification in the November, 1964, general election. *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962). Although the district court's order was eventually vacated by the United States Supreme Court in *Fortson v. Toombs*, 379 U.S. 621 (1965), the 1964 constitutional draft was never revived in Georgia.

26. 1965 Ga. Laws 298. This statute, including its subsequent amendments, presently appears as O.C.G.A. section 36-35-1 through section 36-35-8.

27. 1965 Ga. Laws 752. This provision, as subsequently amended, presently appears in GA. CONST. art. IX, § 2, para. 1 (1983).

28. For early treatments of the systems, see R. Perry Sentell, Jr., *Home Rule Benefits or Homemade Problems for Georgia Local Governments?*, 4 GA. ST. B.J. 317 (1968); R. Perry Sentell, Jr., "Home Rule": *Its Impact on Georgia Local Government Law*, 8 GA. ST. B.J. 277 (1972); R. Perry Sentell, Jr., *Local Government "Home Rule": A Place to Stop?*, 12 GA. L. REV. 805 (1978); R. Perry Sentell, Jr., *The Express Exclusions From Home Rule Powers*, URB. GA. MAG. 13 (Feb. 1978). For perspective on Georgia's home rule systems in a distinctive federal context, see R. Perry Sentell, Jr., *The United States Supreme Court as Home Rule Wrecker*, 34 MERCER L. REV. 363 (1982).

B. Content

1. The Municipal Home Rule Act. The Home Rule Act expressly delegates a number of specific powers to municipalities. These include the power to fix salary and expenses of employees and members of the governing authority²⁹ and the power to provide insurance, retirement and pension benefits, federal program benefits, hospitalization benefits, and workers' compensation benefits for employees and their dependents.³⁰ Additionally, the Act empowers the governing authority to reapportion municipal election districts following each decennial census³¹ and requires reapportionment to provide newly annexed electors substantially equal voting power.³²

The Home Rule Act is also emphatic in reserving to the General Assembly the power over incorporation, dissolution, merger, consolidation, and other municipal boundary changes.³³ Additionally, the statute expressly excludes from its home rule delegations power over any matters which the General Assembly preempts by general statute,³⁴ and power over the following "matters":³⁵ (1) composition, form, and procedures for electing or appointing members of the municipal

29. O.C.G.A. § 36-35-4 (1993 & Supp. 1998). Such increases may not become effective until those elected at the next regular municipal election take office. Covered elective members of the governing authority include "a mayor, vice-mayor, president or chairman of a municipal council, member of a municipal council, member of a board of aldermen, or member of a board of commissioners," or "any person who is appointed to fill a vacancy in any such elective office." *Id.* § 36-35-4(b). Additionally, "salary or compensation" includes "any expense allowance or any form of payment or reimbursement of expenses, except reimbursement for expenses actually and necessarily incurred by members of a municipal governing authority in carrying out their official duties." *Id.* § 36-35-4(c).

30. *Id.* § 36-35-4(d). "[R]etirement' and 'pension' shall mean termination from municipal service with the right to receive a benefit based upon all or part of such municipal service in accordance with the terms of the ordinance or contract pursuant to which the municipality provides for payment of such benefits." *Id.*

31. *Id.* § 36-35-4.1. Reapportioned districts must be formed of contiguous territory and variations in district populations must comply with federal one person-one vote requirements. *Id.* § 36-3-4.1(b)(1)-(2).

32. *Id.* § 36-35-4.1(a). This reapportionment is "limited to making only those adjustments in district boundary lines as may be reasonably necessary to include the newly annexed territory within such districts." *Id.* § 36-35-4.1(c).

33. O.C.G.A. § 36-35-2 (1993 & Supp. 1998). Boundaries can not be changed "except by local Act of the General Assembly or by such methods as may be provided by general law." *Id.* § 36-35-2(a).

34. *Id.* § 36-35-6(a). "[S]uch matters shall be the subject of general law or the subject of local Acts of the General Assembly" *Id.*

35. *Id.*

governing authority;³⁶ (2) state criminal offenses;³⁷ (3) taxation;³⁸ (4) eminent domain;³⁹ (5) businesses regulated by the Public Service Commission;⁴⁰ (6) court jurisdictions;⁴¹ (7) independent school systems;⁴² and (8) civil laws governing private or civil relationships.⁴³

The foundational essence of the Home Rule Act consists of two "legislating" delegations. First, the governing authority may "adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision"⁴⁴ On the one hand, this delegation does not restrict the General Assembly's power, by general law, to refine, broaden, limit, or otherwise regulate the municipal power exercise.⁴⁵ On the other hand, the legislature cannot, by local statute, "repeal, modify, or supersede" municipal action under the delegation.⁴⁶

The Act's most dramatic delegation⁴⁷ authorizes the municipality, "as an incident of its home rule power, [to] amend its charter by following either of . . . [two] procedures."⁴⁸ First, the governing authority may accomplish the charter amendment "by ordinances duly adopted at two regular consecutive meetings"⁴⁹ following specified notice of the ordinance⁵⁰ and its availability to the public.⁵¹

36. *Id.* § 36-35-6(a)(1).

37. O.C.G.A. § 36-35-6(a)(2)(A) (1993 & Supp. 1998). Additionally, actions providing for confinement in excess of six months, and actions providing for fines and forfeitures in excess of \$1,000. *Id.* § 36-35-6(a)(2)(B), (C).

38. *Id.* § 36-35-6(a)(3). *I.e.*, "any form of taxation beyond that authorized by law or by the Constitution." *Id.*

39. *Id.* § 36-35-6(a)(4).

40. *Id.* § 36-35-6(a)(5). *I.e.*, "expanding the power of regulation over any business activity." *Id.*

41. O.C.G.A. § 36-35-6(a)(6) (1993 & Supp. 1998).

42. *Id.* § 36-35-6(a)(7).

43. *Id.* § 36-35-6(b). *I.e.*, "the power to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power." *Id.*

44. O.C.G.A. § 36-35-3(a) (1993 & Supp. 1998).

45. *Id.*

46. *Id.*

47. Indeed, this is the delegation—the power of charter amendment—which goes to define the substance of "home rule" itself.

48. *Id.* § 36-35-3(b).

49. *Id.* § 36-35-3(b)(1). Those meetings must be held "not less than seven nor more than 60 days apart." *Id.*

50. This notice must provide a synopsis of the proposed charter amendment and must be published in the available local newspaper "once a week for three weeks within a period of 60 days immediately preceding . . . final adoption." *Id.* The notice must also state that a copy of the amendment is in the office of the municipal clerk and in the office of the clerk

The second procedure is initiated by a petition filed with the governing authority by a requisite percentage of the municipality's population⁵² and stating the proposed charter amendment's "exact language."⁵³ The governing authority must determine the petition's validity within fifty days and either call for an election⁵⁴ or publish "reasons why such petition is not valid."⁵⁵ The governing authority must publish notice of the election in the available local newspaper "once a week for two weeks immediately preceding such date."⁵⁶ The notice must also provide a synopsis of the proposed amendment and state a copy is on file for public examination.⁵⁷ In the election, the charter amendment prevails upon approval of "more than one-half of the votes cast";⁵⁸ in the event of failure, no referendum may be held on the amendment "more often than once each year."⁵⁹

of superior court and may be there examined by the public. O.C.G.A. § 36-35-3(b)(1) (1993 & Supp. 1998).

51. *Id.* "The recording officer of the municipal governing authority shall furnish anyone, upon written request, a copy of the proposed amendment." *Id.* The statute prohibits use of this type of charter amendment by the governing authority to change or repeal a charter amendment accomplished by referendum (described *infra*), or to change or repeal "a local Act of the General Assembly ratified in a referendum by the electors of the municipal corporation unless at least 12 months have elapsed after such referendums." *Id.* Finally, "[n]o amendment [by the governing authority] shall be valid if provision has been made therefor by general law." *Id.*

52. *Id.* § 36-35-3(b)(2)(A). *I.e.*, 25% of the registered voters of a municipality with a population of 5,000 or less; 20% of the registered voters of a municipality with a population from 5,000 to 100,000; and 15% of the registered voters of a municipality with a population of more than 100,000. *Id.*

53. O.C.G.A. § 36-35-3(b)(2)(A) (1993 & Supp. 1998).

54. *Id.* The call for the election "shall be issued within one week after the determination of the validity of the petition." *Id.*

55. *Id.* § 36-35-3(b)(2)(B). The governing authority must publish the reasons in the available local newspaper in the week following the date on which the petition is declared invalid. *Id.*

56. *Id.* § 36-35-3(b)(2)(A).

57. *Id.* *I.e.*, in the office of the municipal recording officer and in the office of the clerk of the superior court. The recording officer "shall furnish anyone, upon written request, a copy of the proposed amendment." *Id.*

58. O.C.G.A. § 36-35-3(b)(2)(A) (1993 & Supp. 1998). The municipality must bear the cost of the election, and the governing authority must canvass the returns and declare the results. Finally, "[n]o amendment [by voter petition] shall be valid if provision has been made therefor by general law." *Id.*

59. *Id.*

Whether accomplished by the governing authority or via voter petition, the municipal charter amendment is not effective until filed with the Secretary of State and in the office of the clerk of the superior court.⁶⁰

2. The County Home Rule Constitutional Provision, When the General Assembly enacted the 1965 Home Rule Act for municipalities, it possessed no constitutional power to include counties.⁶¹ In order to provide for counties, rather, the legislature was limited to proposing a constitutional amendment.⁶² With the voters' ratification of that amendment in 1966, counties drew their home rule status directly from the constitution itself.⁶³

The county constitutional provision's structure is highly similar to that of the municipal statute. The provision expressly empowers the county governing authority to fix the salary, compensation, and expenses of its employees.⁶⁴ Additionally, the governing authority may "establish and maintain retirement or pension systems, insurance, workers' compensation, and hospitalization benefits for [those] employees."⁶⁵

The provision is likewise emphatic in excluding from its delegations matters preempted by the General Assembly by general statute,⁶⁶ as well as power over the following "matters":⁶⁷ (1) elective county offices, their salaries and personnel;⁶⁸ (2) composition, form, procedure for election or appointment, compensation, and expenses and allowances of the governing authority;⁶⁹ (3) criminal offenses or punishment;⁷⁰ (4)

60. *Id.* § 36-35-5. The file must also contain a copy of the requisite notice of publication and an affidavit of a newspaper representative that the notice received the prescribed publication. "The secretary of state shall provide for the publication and distribution of all such amendments and revisions at least annually." *Id.*

61. GA. CONST. art. XV, § 1, para. 1 (amended 1976): "The General Assembly is authorized to provide by law for the self-government of municipalities . . ." *Id.* The provision presently appears in GA. CONST. art. IX, § 2, para. 2. See the discussion of this provision *supra*.

62. 1965 Ga. Laws 752.

63. The provision presently appears in GA. CONST. art. IX, § 2, para. 1.

64. GA. CONST. art. IX, § 2, para. 1(f).

65. *Id.*

66. GA. CONST. art. IX, § 2, para. 1(c).

67. *Id.* These matters "shall be the subject of general law or the subject of local acts of the General Assembly . . ." *Id.*

68. GA. CONST. art. IX, § 2, para. 1(c)(1): "Action affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority." *Id.*

69. GA. CONST. art. IX, § 2, para. 1(c)(2).

70. GA. CONST. art. IX, § 2, para. 1(c)(3).

taxation;⁷¹ (5) businesses regulated by the Public Service Commission;⁷² (6) eminent domain;⁷³ (7) public school systems;⁷⁴ and (8) civil laws governing private or civil relationships.⁷⁵

As for its crucial "legislating" delegations, the provision authorizes the county governing authority to "adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law"⁷⁶ This authorization does not restrict the General Assembly's power, by general law, to further define the power delegated or to broaden, limit, or otherwise regulate its exercise.⁷⁷ The legislature cannot, however, by local statute, "repeal, modify, or supersede" county action under the delegation.⁷⁸

Finally, the provision authorizes the county, "as an incident of its home rule power," to amend or repeal "the local acts applicable to its governing authority by following either of [two] procedures"⁷⁹ First, the governing authority may accomplish the amendment or repeal "by a resolution or ordinance duly adopted at two regular consecutive meetings"⁸⁰ following specified notice of the measure⁸¹ and its availability to the public.⁸²

71. GA. CONST. art. IX, § 2, para. 1(c)(4). "Action adopting any form of taxation beyond that authorized by law or by this Constitution." *Id.*

72. GA. CONST. art. IX, § 2, para. 1(c)(5). "Action expanding the power of regulation over any business activity regulated by the Georgia Public Service Commission beyond that authorized by law or by this Constitution." *Id.*

73. GA. CONST. art. IX, § 2, para. 1(c)(6).

74. GA. CONST. art. IX, § 2, para. 1(c)(8).

75. GA. CONST. art. IX, § 2, para. 1(d). "[A]ny action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power." *Id.*

76. GA. CONST. art. IX, § 2, para. 1(a). Such local statutes shall remain effective until amended or repealed by the governing authority or by voter petition as described *infra*. *Id.*

77. *Id.*

78. *Id.*

79. GA. CONST. art. IX, § 2, para. 1(b).

80. GA. CONST. art. IX, § 2, para. 1(b)(1). Those meetings must be held "not less than seven nor more than 60 days apart." *Id.*

81. *Id.* The notice must contain a synopsis of the proposed amendment or repeal and be published in the official county organ "once a week for three weeks within a period of 60 days immediately preceding its final adoption." *Id.*

82. *Id.* The notice must state that a copy of the proposed amendment or repeal is in the office of the clerk of the superior court for public examination. The clerk "shall furnish anyone, upon written request, a copy of the proposed amendment or repeal." *Id.* The provision prohibits use of this type of amendment or repeal by the governing authority to

The second procedure is initiated by a petition filed with the county probate judge by a requisite percentage of the county's population,⁸³ stating the "exact language" of the proposed amendment or repeal.⁸⁴ The probate judge must determine the petition's validity within sixty days and either call an election⁸⁵ or publish "reasons why such petition is not valid."⁸⁶ The judge must publish notice of the election in the county organ "once a week for three weeks immediately preceding such date."⁸⁷ The notice must also provide a synopsis of the proposed amendment or repeal and state a copy is on file for public examination.⁸⁸ At the election, the amendment or repeal carries if approved by "more than one-half of the votes cast";⁸⁹ in the event of failure, no referendum may be held on the measure "more often than once each year."⁹⁰

Whether accomplished by the governing authority or via voter petition, an amendment to or repeal of a local statute is not effective until filed with the Secretary of State.⁹¹

change or repeal an amendment accomplished by referendum (described *infra*), or to change or repeal "a local act of the General Assembly ratified in a referendum by the electors of such county unless at least 12 months have elapsed after such referendum." *Id.* Finally, "[n]o amendment [by the governing authority] shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law." *Id.*

83. GA. CONST. art. IX, § 2, para. 1(b)(2). *I.e.*, 25% of the registered voters of a county with a population of 5,000 or less; 20% of the registered voters of a county with a population of 5,000 to 50,000; and 10% of the registered voters of a county with a population of more than 50,000. *Id.*

84. *Id.*

85. *Id.* The call for the election "shall be issued not less than ten nor more than 60 days after the date of the filing of the petition." *Id.*

86. GA. CONST. art. IX, § 2, para. 1(b)(2). The probate judge must publish the reasons in the county organ in the week immediately following the date on which the petition is declared invalid. *Id.*

87. *Id.*

88. *Id.* *I.e.*, in the office of the probate judge. The judge "shall furnish anyone, upon written request, a copy of the proposed amendment or repeal." *Id.*

89. *Id.* The county must bear the cost of the election and the judge must canvass the returns and declare the results. Finally, no amendment or repeal by either the governing authority or by voter petition shall deal with matters "which the General Assembly by general law has preempted or may hereafter preempt, but such matters shall be the subject of general law or the subject of local acts of the General Assembly . . ." GA. CONST. art. IX, § 2, para. 1(c).

90. GA. CONST. art. IX, § 2, para. 1(b)(2).

91. GA. CONST. art. IX, § 2, para. 1(g). The file must also contain a copy of the requisite notice of publication and an affidavit of a newspaper representative that the notice received the prescribed publication. "The Secretary of State shall provide for the publication and distribution of all such amendments and revisions at least annually." *Id.*

C. The Constitution's Supplementary Powers Provision ("Amendment 19")

In 1972, the voters ratified an amendment to the Georgia Constitution typically characterized as the "supplementary powers" provision, or "Amendment 19."⁹² Although not technically a part of the "home rule" systems (it does not authorize the local government to change its charter or local statutes), the provision deserves mention in this context.

In exceedingly expansive fashion, Amendment 19 declares itself "[i]n addition to and supplementary of all powers possessed by or conferred" upon local governments.⁹³ The provision asserts that "any county, municipality, or any combination thereof may exercise the following powers and provide the following services."⁹⁴ At that juncture the provision summarily enumerates a broad array of functions and services: police and fire; garbage and solid waste; public health facilities; streets and roads; parks; water collection and disposal; water treatment and distribution; public housing; public transportation; libraries; terminals, docks, and parking; codes; air quality control; and retirement or pension systems.⁹⁵

The provision concludes by sketching its impact upon the General Assembly's continuing power to treat the enumerated subjects. Thus the legislature "shall act upon the subject matters listed . . . only by general law."⁹⁶ Those general statutes, moreover, may only regulate, restrict, or limit "the [local government's] exercise of the powers listed"; they "may not withdraw any such powers."⁹⁷

D. In Summary

In 1965, the Georgia General Assembly finally utilized authority provided by a 1954 constitutional provision to enact the Municipal Home Rule Act. In 1966, Georgia voters ratified a constitutional amendment conveying highly similar home rule powers to counties. Both systems expressly delegate several specified powers to local governments; both systems also emphatically exclude from their delegations a host of enumerated subjects.

92. 1972 Ga. Laws 1552. The reference derived from the amendment's position on the 1972 general election ballot. The provision presently appears in GA. CONST. art. IX, § 2, para. 3.

93. GA. CONST. art. IX, § 2, para. 3(a).

94. *Id.*

95. GA. CONST. art. IX, § 2, para. 3(a)(1)-(14).

96. GA. CONST. art. IX, § 2, para. 3(d).

97. GA. CONST. art. IX, § 2, para. 3(c).

Far more indigenous to historic "home rule," the systems authorize local governments to legislate generally on unspecified subjects. This two-tiered delegation includes, first, the governing authority's adoption of "clearly reasonable" measures not covered by general or existing local statutes. Second, the local government is empowered to change pertinent local statutes by either of two procedures. One procedure vests the amending or repealing power in the local governing authority. The other process encompasses change by voter petition and referendum approval. Measures adopted under both procedures must be filed with the Secretary of State who provides for their annual publication.

Finally, a 1972 constitutional amendment, although not technically a component of the home rule system, authorizes local government action over a range of expansively enumerated subjects. Moreover, those subjects may not be treated by local statutes, nor even by general statutes which withdraw local government power.

Since 1965, therefore, students of local government law have observed with intrigue the continuing evolution of Georgia's home rule system.

III. LITIGATION UNDER THE SYSTEM

In place for over three decades, the Georgia home rule system has drawn its share of litigation. Although contrasting in origins, and differing in details, the municipal and county home rule measures contain many similar features. Both the differences and the similarities have generated issues for judicial determination.⁹⁸

A. *Municipal and County Home Rule in the Courts*

1. Specifically Delegated Powers. As described, both home rule systems make express grants of several specific powers to local governments. On occasion those grants precipitate legal quandaries

98. A fundamental legal issue underlying the two systems is whether, because of their contrasts in origin, the systems should receive different judicial constructions. As noted, municipalities derive their home rule status indirectly by legislative implementation of constitutional authorization. In contrast, counties obtain home rule status directly, without legislative participation, under a delegation from the constitution itself. For the early suggestion that these contrasting origins might indeed support differing judicial treatments, and that the difference might augur in favor of the "direct" county system, see R. Perry Sentell, Jr., *Home Rule Benefits or Homemade Problems for Georgia Local Government?*, 4 GA. ST. B.J. 317, 326 (1968). For the similar indication that the contrasts in origins justify distinct interpretations, but that the distinction works in favor of the "indirect" municipal system, see the controlling opinion in the Georgia Supreme Court's treatment of *Plantation Pipe Line Co. v. City of Bremen*, 227 Ga. 1, 7, 178 S.E.2d 868, 873 (1970) (involving the issue of municipal annexation rather than municipal home rule).

whose resolutions may, in turn, draw legislative reaction. Illustratively, the county home rule constitutional provision originally included among its specific delegations the power to enact planning and zoning ordinances for unincorporated areas.⁹⁹ In the early case of *Johnston v. Hicks*,¹⁰⁰ the Georgia Supreme Court held that grant to work an "implied repeal";¹⁰¹ accordingly, the legislature "no longer [has] the power to enact local laws concerning planning and zoning for unincorporated areas."¹⁰² Whether or not prompted by *Johnston*, the specific grant of the zoning power subsequently suffered deletion from the home rule constitutional provision.¹⁰³

The supreme court's approach in *Johnston* carried over to the later case of *Richmond County v. Pierce*,¹⁰⁴ in which there was a controversy over a county employee's retirement payments.¹⁰⁵ In resolving *Pierce* the court isolated the home rule constitutional provision's specific authorization of retirement or pension systems.¹⁰⁶ That express grant, the court asserted, vested "sole authority" in the county governing body and "divested the General Assembly of authority to enact a retirement Act for [the] County."¹⁰⁷ Once again, therefore, the provision's specific grant of power illustrated the dual-pronged ramifications of "home rule": (1) increasing the local government's power to deal with issues of local

99. 1965 Ga. Laws 752, 757, GA. CONST. art. XV, § 2, para. 1 (1945). The provision expressly vested that power in the governing authority of each county.

100. 225 Ga. 576, 170 S.E.2d 410 (1969).

101. The court reasoned that "the earlier constitutional provisions were impliedly repealed by the Home Rule Amendment." *Id.* at 581, 410 S.E.2d at 413.

102. *Id.*

103. No longer a part of the home rule provision, the matter receives the following treatment by the present constitution: "The governing authority of each county and of each municipality may adopt plans and may exercise the power of zoning. This authorization shall not prohibit the General Assembly from enacting general laws establishing procedures for the exercise of such power." GA. CONST. art. IX, § 2, para. 4.

104. 234 Ga. 274, 215 S.E.2d 665 (1975).

105. The county rejected the claim of a former county attorney, contending that a local statute amending the county retirement system was invalid "because said Act is proscribed by virtue of the 'County Home Rule Amendment' to the Georgia Constitution." *Id.* at 276, 215 S.E.2d at 667.

106. *Id.* at 281, 215 S.E.2d at 670. "The governing authority of each county is authorized to fix the salary, compensation, and expenses of those employed by such governing authority and to establish and maintain retirement or pension systems, insurance, workers' compensation, and hospitalization benefits for said employees." GA. CONST. art. IX, § 2, para. 1(f).

107. 234 Ga. at 280-81, 215 S.E.2d at 670. Thus, the court held the former employee in error in relying upon the local statute which purported to amend the county's retirement plan. *Id.* at 281, 215 S.E.2d at 671.

concern; and (2) decreasing the state legislature's control over local issues.

Litigation under the municipal system's specific delegations may likewise prompt legislative response. The Municipal Home Rule Act empowers the governing authority to increase the salary, compensation, and expenses of its members, but limits those increases to members elected at the next election.¹⁰⁸ *Savage v. City of Atlanta*¹⁰⁹ featured a taxpayer challenge to ordinances providing instant monthly expense payments to council members and increasing the present compensation of both the mayor and the council president.¹¹⁰ Holding neither salary increase subject to the statutory limitation, the supreme court reasoned that neither the mayor nor the president was a member of "the municipal governing authority."¹¹¹ Under the municipal charter, the court held neither official possessed "legislative power,"¹¹² and each was free to receive the immediate compensation increases.¹¹³ The court did, however, invalidate the expense payments to the council: those payments were "tantamount to the payment of compensation rather than the reimbursement of expenses";¹¹⁴ as such, they triggered the home rule prohibition against the governing authority's increasing its own salary.¹¹⁵

In an immediate response to *Savage*, the General Assembly broadened the postponement limitation of the Home Rule Act: "[E]lective members of the municipal governing authority' . . . specifically includ[e] a mayor, vice-mayor, president or chairman of a municipal council, member of a

108. O.C.G.A. § 36-35-4(a)(a)(1) (1993 & Supp. 1998). "Any such increase shall not be effective until after the taking of office of those elected at the next regular municipal election which is held immediately following the date on which the action to increase the compensation was taken." *Id.* § 36-35-4(a)(1).

109. 242 Ga. 671, 251 S.E.2d 268 (1978).

110. *Id.* at 671, 251 S.E.2d at 269. All the increases were enacted by the municipal council and became effective by operation of law without the mayor's signature. *Id.* at 672-73, 251 S.E.2d at 270.

111. *Id.* at 675, 251 S.E.2d at 271.

112. *Id.* "In determining whether a municipal officer is part of the governing authority of the municipality, the question is whether that municipal officer possesses legislative power." *Id.* As for the mayor, he was vested with "all executive and administrative powers of the city"; as for the council president, the city charter expressly provides that he is not to be a council member. *Id.* at 677, 251 S.E.2d at 272.

113. *Id.* at 676, 271 S.E.2d at 272.

114. *Id.* at 679, 251 S.E.2d at 273. "We arrive at this conclusion, particularly because the council members are still reimbursed for other expenses upon submission of documentation that the expenses were actually incurred by them." *Id.*

115. *Id.* "The ordinance is invalid under [the Home Rule Act], because this . . . statute mandates that any increase in the compensation of the elective members of the municipal governing authority shall not be effective until the term after it is voted on." *Id.*

municipal council, member of a board of aldermen, or member of a board of commissioners.”¹¹⁶ The legislature also perfected its perception of “salary or compensation”: those words “include any expense allowance or any form of payment or reimbursement of expenses, except reimbursement for expenses actually and necessarily incurred by members of a municipal governing authority in carrying out their official duties.”¹¹⁷

From the beginning, therefore, the specific authorizations contained in Georgia’s home rule systems have attracted controversy. Judicial resolution of that controversy serves to illuminate the essential contours of the home rule concept. Those resolutions may also provoke system “corrections” in formulation.

2. Express Exclusions. As recounted, both home rule measures emphatically reserve to the General Assembly—thus expressly excluding from local government control—a host of enumerated “matters.”¹¹⁸ It is no surprise that these “express exclusions” account for a major portion of home rule litigation. In each instance the appellate courts place an asserted home rule power on one side or the other of the exclusionary lines. This evolving body of decisional law etches in sharp relief a pulsating profile of Georgia’s home rule system.

a. The Governing Authority. As previously sketched, each home rule measure expressly excludes from its delegation purview the power over foundational facets of the local governing authority. Such elements as composition, form of government, and election procedures, for example, all constitute “matters” expressly posted outside the home rule preserve.¹¹⁹ These exclusions claimed linchpin significance in the case of *Jackson v. Inman*,¹²⁰ a challenge to a local statute enacting a new charter for an existing municipality.¹²¹ Such charter changes, challenger maintained, fell within exclusive municipal control under the Home Rule Act.¹²² Rejecting that position, the supreme court focused

116. O.C.G.A. § 36-35-4(b) (1993 & Supp. 1998). This is true, “notwithstanding any terminology or designation of a municipal governing authority or governing body contained in any municipal charter . . .” *Id.*

117. *Id.* § 36-35-4(c).

118. *See supra* text accompanying notes 67-75.

119. O.C.G.A. § 36-35-6(a), (1)(a); GA. CONST. art. IX, § 2, para. 1(c)(2).

120. 232 Ga. 566, 207 S.E.2d 475 (1974).

121. *Id.* at 566, 207 S.E.2d at 476. The challenger, the municipal police chief, protested his change in status under the new charter and hence the legislature’s authority to enact the charter via local or special statute. *Id.*

122. *Id.* at 569, 207 S.E.2d at 477. “The essential question we face in reviewing the constitutionality of [the] ‘New Charter’ Act is whether this special act was necessary to authorize the City to make the changes made in its government or whether these changes

upon the Act's express exclusions: "The General Assembly has reserved the legislative power to enact new charters for existing cities when such charters include drastic changes in the composition and form of city government and the election and terms of office of the members of the governing authority . . ." ¹²³ Consequently, the court sustained the validity of the special act, for "the power to adopt [this] entirely new charter . . . cannot be found in . . . the present home rule statutes."¹²⁴

Three years later in *Bruck v. City of Temple*,¹²⁵ the court moved to distance its decision in *Jackson*. *Bruck* featured an attack upon a home rule ordinance broadening municipal election districts to encompass newly annexed territory.¹²⁶ The challengers relied squarely upon the Home Rule Act's express exclusion regarding composition, form, and procedure for electing members of the governing authority.¹²⁷ The ordinance's change of city election districts, challengers contended, flew in the teeth of that exclusion. In response the court posted *Jackson* as its settled construction of the "governing authority" exclusion. There it was held "that such fundamental and substantive changes in city government could not be made by the municipality under general home rule laws."¹²⁸ That construction did not reach the *Bruck* ordinance, the court insisted, because it is an ordinance "merely" implementing an annexation effected by local statute, and thus "not an unauthorized exercise of home rule power."¹²⁹ If *Jackson* stood at one extreme on

could be made by the City under the general home rule laws." *Id.*

123. *Id.* at 569-70, 207 S.E.2d at 478. The court stressed the magnitude of the changes effected by the new charter: "[T]he city government has been changed drastically from a strong commission form of government . . . to a new form of government . . . requiring a classic separation of powers not contained in the old form of government." *Id.* at 569, 207 S.E.2d at 478.

124. *Id.* at 570, 207 S.E.2d at 478. "Consequently, this legislative power still resides in the General Assembly under the Constitution." *Id.*

125. 240 Ga. 411, 240 S.E.2d 876 (1977).

126. *Id.* at 411, 240 S.E.2d at 877-78. The annexation had been effected by a local statute which made no provision for election district accommodation for the new municipal citizens. The subsequent ordinance constituted an amendment to the municipal charter; it was properly adopted, the court held, under the Home Rule Act's authorization for charter amendments by the municipal governing authority. *Id.* at 412, 240 S.E.2d at 878.

127. O.C.G.A. § 36-35-6(1) (1993 & Supp. 1998). Challengers were residents of a previously unincorporated area annexed into the municipality by the local statute. 240 Ga. at 411, 240 S.E.2d at 817.

128. 240 Ga. at 416, 240 S.E.2d at 880. The court described the changes at issue in *Jackson* as "a vast administrative reorganization of city government." *Id.*

129. *Id.* The court employed the same rationale to reject challengers' argument that the ordinance ran afoul of the home rule statute's command that "[n]o amendment hereunder shall be valid to change or repeal . . . a local Act of the General Assembly ratified in a referendum by the electors of such municipality unless at least 12 months

the "governing authority exclusion" continuum, the court indicated, then *Bruck* stood at the other.¹³⁰

County ordinances likewise suffered challenge under the "governing authority" exclusion; again, the supreme court found itself structuring demarcations of coverage. *Guhl v. Williams*¹³¹ featured home rule ordinances amending a local statute to increase the commissioners' power over county personnel.¹³² In opposition, the commission chairman tendered the exclusion:¹³³ "[T]he proposed ordinances would drastically alter the form of [county] government"¹³⁴ Responding only by way of conclusion, the court simply denied that the ordinances "would . . . bring about a change in the 'form' of the government of [the] [c]ounty as the word 'form' is used in" the home rule provision's exclusion.¹³⁵

Similar intragovernmental conflicts crossed the line. *Gray v. Dixon*¹³⁶ presented a commission chairman's challenge to two home rule ordinances.¹³⁷ In assessing that challenge, the court first focused upon an ordinance removing the chairman as chief executive officer of the county. That measure, the court asserted, "would be action . . . changing the form of county government which, under the County Home Rule Amendment, a county is not permitted to take."¹³⁸ The second ordi-

have elapsed after such referendums." *Id.* at 415, 240 S.E.2d at 880 (citing O.C.G.A. § 36-35-3(b)(1)). The court responded as follows: "The appellants' reliance on this Code provision is misplaced because the municipal ordinance did not 'change or repeal,' but rather implemented, the local annexation Act." *Id.* at 415, 240 S.E.2d at 880.

130. *Id.* at 416, 240 S.E.2d at 880. Four years after the supreme court's decision in *Bruck*, the General Assembly amended the municipal home rule statute to expressly empower the governing authority to amend its charter in order to reapportion the municipal election districts following each decennial census and following the annexation of additional territory to the corporate boundaries. O.C.G.A. § 36-35-4.1(a), (c).

131. 237 Ga. 586, 229 S.E.2d 382 (1976).

132. *Id.* at 586-87, 229 S.E.2d at 383. "The net result of the two proposed ordinances would diminish the power of the Chairman, as provided for in the 1956 Local Act, and increase the power of a majority of the Board of Commissioners with respect to the employment and discharge of non-merit system employees of the county." *Id.*

133. GA. CONST. art. IX, § 2, para. 1(c)(2).

134. 237 Ga. at 588, 229 S.E.2d at 384.

135. *Id.* The court thus affirmed the trial judge's decision that the home rule ordinances would validly repeal the local statute. *Id.*

136. 249 Ga. 159, 289 S.E.2d 237 (1982).

137. *Id.* at 160, 289 S.E.2d at 239. The commissioners sought to adopt the ordinances under their home rule authority in order to amend previously controlling local statutes. *Id.*

138. *Id.* at 164, 289 S.E.2d at 241.

nance, although purportedly a less drastic measure, fared no better.¹³⁹ By conferring "executive powers' on the office of county manager," that ordinance as well suffered exclusion as "action affecting the . . . form . . . of the county governing authority."¹⁴⁰

In summary, the matter of the governing authority stands expressly excluded by both systems from their home rule delegations to local governments. This matter constitutes, the litigated controversies manifest, a matter of degree.

b. Taxation. Another subject expressly excluded from the home rule authorizations is "[a]ction adopting any form of taxation."¹⁴¹ The supreme court first employed this exclusion in *Richmond County Business Ass'n v. Richmond County*¹⁴² to invalidate an ordinance fixing an "annual and specific occupation tax and licenses."¹⁴³ Finding the ordinance concerned primarily with revenue rather than regulation,¹⁴⁴ the court termed it a tax rather than a scheme of licensing.¹⁴⁵ So characterized, the measure could find no authorization in the constitution's home rule provision: "[T]his Amendment specifically negatives authority to impose taxes and declares that such authority must be found elsewhere in the laws or the Constitution."¹⁴⁶

The court remained equally unreceptive to the county's second effort, a reformulated ordinance admittedly more regulatory in nature and self-designated a "license fee."¹⁴⁷ Unconvinced, however, that the county's purpose was not "primarily revenue-producing,"¹⁴⁸ the court again condemned the ordinance: "[T]he Home Rule Amendment . . . clearly prohibits action in the areas of . . . additional forms of taxation."¹⁴⁹

139. *Id.* "Likewise, the only difference in the two ordinances proposing the creation of the office of county manager is that the first purported to make the county manager the 'chief executive officer' of the county." *Id.*

140. *Id.*

141. GA. CONST. art. IX, § 2, para. 1(c)(4); O.C.G.A. § 36-35-6(a)(3).

142. 224 Ga. 854, 165 S.E.2d 293 (1968).

143. *Id.* at 854, 165 S.E.2d at 294.

144. "Nowhere in the ordinance are there any provisions that regulate the conduct of the businesses and professions." *Id.* at 856, 165 S.E.2d at 295.

145. *Id.* at 855, 165 S.E.2d at 294. "The distinction between a tax and a license is not one of names but of substance. A tax is primarily intended to produce revenue, while a license is primarily intended for regulation under the police power." *Id.* at 856, 165 S.E.2d at 295.

146. *Id.* at 857, 165 S.E.2d at 295.

147. *Richmond County v. Richmond County Bus. Ass'n*, 225 Ga. 568, 170 S.E.2d 246 (1969).

148. *Id.* at 571, 170 S.E.2d at 248. The court reasoned that ability to pay was strongly suggested as the basis for the ordinance. *Id.* at 570-71, 170 S.E.2d at 248.

149. *Id.* at 571, 170 S.E.2d at 248.

*Dekalb County v. Brown Builders Co.*¹⁵⁰ featured a slightly different county approach: an ordinance imposing an additional charge upon applicants for building permits and allocating the resulting funds to county schools.¹⁵¹ Because the measure constituted “a tax or a charge imposed for . . . collecting revenue,”¹⁵² the court undertook the search for authorization. Focusing upon the county home rule provision’s express exclusion of taxation, the court invalidated the ordinance.¹⁵³

The court held firm in reviewing the challenged measure of *Chanin v. Bibb County*,¹⁵⁴ an ordinance imposing a charge upon wholesale beer deliveries. Rejecting the county description of the ordinance as “regulatory,”¹⁵⁵ the court ferreted “purpose” from effect. The ordinance’s effect was to raise revenue via “a tax imposed upon certain wholesale purchases of beer.”¹⁵⁶ “[N]othing,” the court emphasized, “in the Home Rule for Counties amendment to the Georgia Constitution . . . grants to counties any new power to tax.”¹⁵⁷

The court of appeals followed a similar approach in *City of Tunnel Hill v. Ridley*,¹⁵⁸ presenting a challenge to a municipal occupation tax. There the municipality sought to defend the tax by arguing the delegation of power it professed to receive from the Municipal Home Rule Act.¹⁵⁹ The court rejected the defense: “By the clear and unambiguous terms of that statute, if a particular *form of* taxation is not authorized by law or by the Constitution, municipal corporations may not adopt it.”¹⁶⁰

150. 227 Ga. 777, 183 S.E.2d 367 (1971).

151. *Id.* at 777, 183 S.E.2d 368. The county argued the charge would constitute a fee. *Id.*

152. *Id.* at 778, 183 S.E.2d at 368. “Obviously the funds are not for the purpose of regulation and control of the building industry.” *Id.*

153. *Id.* at 778-79, 183 S.E.2d at 369. “Neither do we find authority for [the] county’s action in . . . the Georgia Constitution providing home rule for counties . . .” *Id.* at 779, 183 S.E.2d at 369.

154. 234 Ga. 282, 216 S.E.2d 250 (1975).

155. *Id.* at 285, 216 S.E.2d at 253. The ordinance imposed the charge upon wholesalers’ deliveries of beer to retailers, declared its purpose to be regulatory, and provided that the revenue produced would go entirely to county uses outside municipalities. *Id.* at 283, 216 S.E.2d at 252.

156. *Id.* at 285, 216 S.E.2d at 253. The measure “was not a license fee or tax imposed as a condition precedent to engaging in business.” *Id.*

157. *Id.* at 287, 216 S.E.2d at 254.

158. 183 Ga. App. 486, 359 S.E.2d 184 (1987).

159. *Id.* at 487, 359 S.E.2d at 184. “While that is, indeed, a broad delegation of legislative power, O.C.G.A. § 36-35-6 contains a limitation on Home Rule powers which controls the resolution of this case . . .” *Id.*, 359 S.E.2d at 185.

160. *Id.* at 487, 359 S.E.2d at 185. “Appellant’s apparent error is to equate a lack of specific prohibition with authorization, i.e., to assume that because a particular form of

The appellate courts have stood firm, therefore, on the "taxation" exclusion of the home rule systems. Over time blatant efforts at raising revenue, as well as more sophisticated formulations of "regulation," have drawn judicial displeasure under the exclusionary focus.

c. *Businesses Regulated by the Public Service Commission.* Both home rule systems exclude from their provinces of delegation the expansion of "the power of regulation over any business activity regulated by the Public Service Commission beyond that authorized by charter [or local statutes] or general law or by the Constitution."¹⁶¹ This express exclusion came into play in the fairly early case of *City of Doraville v. Southern Railway*,¹⁶² a city's action to enjoin construction within its limits of a railroad switching yard.¹⁶³ In assessing the strength of plaintiff's claim, the supreme court emphasized two points: the Public Service Commission had approved the expansion under state law;¹⁶⁴ and municipal powers are strictly construed.¹⁶⁵ In this case the court observed that the municipality had been granted no power to regulate the switching yard,¹⁶⁶ and the Home Rule Act expressly excluded such power.¹⁶⁷ On those grounds the court sustained a decision adverse to the municipality.¹⁶⁸

taxation is not prohibited, it is permitted. In light of the language of O.C.G.A. § 36-35-6(a)(3), we find that equation to be invalid." *Id.*

161. O.C.G.A. § 36-35-6(a)(5) (1993 & Supp. 1998); GA. CONST. art. IX, § 2, para. 1(c)(5).

162. 227 Ga. 504, 181 S.E.2d 346 (1971).

163. *Id.* at 504, 181 S.E.2d at 346. Plaintiff municipality alleged that the switching yard would be located in a highly populated and travelled portion of the city and that it would create fire and traffic hazards. *Id.* at 504-05, 181 S.E.2d at 346-47.

164. *Id.* at 508, 181 S.E.2d at 348. In framing the issue for decision, the court stated that "the Georgia Public Service Commission acting under the laws of this State, granted to defendants, a common carrier by rail, authority to condemn specific property for the necessary expansion of its facilities to serve the public . . ." *Id.*

165. *Id.* at 510, 181 S.E.2d at 350. "A municipality, being a creature of the State, has only such direct power as is granted to it by the State and if there is a reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative." *Id.* at 510-11, 181 S.E.2d at 350.

166. *Id.* at 510, 181 S.E.2d at 350. "The City of Doraville under its charter has not been granted the power to regulate the construction or operation of a railroad switching yard within its city limits, nor have we found any general law which grants to it such authority." *Id.*

167. *Id.* at 511, 181 S.E.2d at 350. The court quoted the language of O.C.G.A. section 36-35-6(a)(5).

168. *Id.* at 513, 181 S.E.2d at 351.

d. Crimes. Each home rule provision excludes from its local government delegations any action defining state criminal offenses.¹⁶⁹ In the early case of *Richmond County v. Richmond County Business Ass'n*,¹⁷⁰ the supreme court pierced a county-designated "license fee" to hold the measure a revenue-producing "tax."¹⁷¹ As such, the court concluded, the exaction not only ran afoul of the home rule provision's "taxation exclusion,"¹⁷² but the "crime exclusion" as well.¹⁷³ "The attempt of the ordinance to make the failure to pay the so-called 'license fee' punishable 'as for a misdemeanor,' is void and in violation of the Home Rule Amendment of the Constitution"¹⁷⁴

A decade later the court returned to the exclusion in the municipal home rule context of *Lambert v. City of Atlanta*.¹⁷⁵ The court deemed the ordinance there in issue, a prohibition against solicitation for prostitution or sodomy, precluded by the existence of general statutes.¹⁷⁶ "Additionally," the court asserted, "the ordinance must fall because of the mandate of [the Home Rule Act] which limits the power of municipalities to enact ordinances defining criminal offenses and providing for their punishment when the state has preempted the field."¹⁷⁷

The home rule "crime exclusion" not only negatives authorization; it also carries the positive thrust of invalidation.

e. Courts. Each home rule system excludes from its parameter of local government delegation matters affecting courts. In framing the exclusion, the municipal provision specifies "[a]ction affecting the jurisdiction of any court";¹⁷⁸ the county provision specifies "[a]ction

169. GA. CONST. art. IX, § 2, para. 1(c)(3); O.C.G.A. § 36-35-6(a)(2).

170. 225 Ga. 568, 170 S.E.2d 246 (1969).

171. *Id.* at 571, 170 S.E.2d at 248. "However a tax for a license as a condition precedent for engaging in the occupation is distinguished from other taxes, it is still a tax." *Id.*

172. *See supra* text accompanying notes 141-60 for a discussion of this facet of the decision.

173. 225 Ga. at 571, 170 S.E.2d at 248.

174. 225 Ga. at 569, 170 S.E.2d at 247. "The Home Rule Amendment . . . clearly prohibits action in the areas of criminal offenses or punishment and additional forms of taxation." *Id.* at 571, 170 S.E.2d at 248.

175. 242 Ga. 645, 250 S.E.2d 456 (1978).

176. *Id.* at 647, 250 S.E.2d at 458. The court reversed defendant's conviction for violation of the ordinance, holding the ordinance to violate "the uniformity clause of the Constitution of Georgia." *Id.*, 250 S.E.2d at 457-58.

177. *Id.*, 250 S.E.2d at 458.

178. O.C.G.A. § 36-35-6(a)(6) (1993 & Supp. 1998).

affecting any court or the personnel thereof.”¹⁷⁹ The substantive difference intended by those formulations, if any, is unclear. Moreover, the case law is uninformative on the point—the decisions treat the matter only in the county context.

Typically, the issue arises on complaint by a superior court clerk to actions taken by the county governing authority. The court of appeals confronted the matter in *Price v. Fulton County Commission*,¹⁸⁰ a clerk’s challenge to the validity of a county contract authorizing a private company to extract public records and make them available to others for a fee. Relying upon the home rule exclusion, plaintiff charged the county commissioners with an illegal “contractual invasion” of her office.¹⁸¹ Initially, the court registered conceptual difficulty with plaintiff’s position: it found no “ordinance, resolution, or regulation” as contemplated by the home rule provision,¹⁸² but “merely . . . a contract concerning county affairs.”¹⁸³ The contract “does not ‘affect’ the manner in which the Clerk . . . performs her duties”¹⁸⁴ and “[t]he clerk will remain the official custodian of [county] records.”¹⁸⁵ Although the agreement contemplated the clerk’s cooperation with the private company, “such cooperation is no more than would be required of the clerk toward any other member of the public seeking to utilize or photocopy these records.”¹⁸⁶ Accordingly, the court held the contract clear of the express “court” exclusion.¹⁸⁷

Several years later the issue presented itself to the supreme court in the context of *Stephenson v. Board of Commissioners of Cobb Coun-*

179. GA. CONST. art. IX, § 2, para. 1(c)(7).

180. 170 Ga. App. 736, 318 S.E.2d 153 (1984).

181. *Id.* at 736, 318 S.E.2d at 154. “Appellant contends that the contract is an illegal attempt to control the manner in which the Clerk of the [county] Superior Court performs her duties.” *Id.* at 736-37, 318 S.E.2d at 154.

182. *Id.* at 737, 318 S.E.2d at 155.

The “Home Rule” provisions concern the power of a county to adopt ordinances, resolutions, or regulations relating to its property, affairs and local government for which no provision has otherwise been made by general law. Subparagraph (c) in turn prohibits a county from exercising the legislative powers granted to it so as to affect any court or the personnel thereof.

Id.

183. *Id.*

184. *Id.* The court described the manner in which the clerk controlled and worked with the county records. “The contract at issue in no way ‘affects’ these duties of the Clerk of [the county] Superior Court, but contemplates that those duties shall continue to be performed in exactly the same manner.” *Id.* at 738, 318 S.E.2d at 155.

185. *Id.*, 318 S.E.2d at 156.

186. *Id.*, 318 S.E.2d at 155.

187. *Id.* at 739, 318 S.E.2d at 156.

ty.¹⁸⁸ There the court held the commissioners possessed exclusive power to employ counsel for the superior court clerk.¹⁸⁹ To the clerk's reliance upon the home rule "court" exclusion, the court reflected upon the meaning of that exclusion. The exclusion might well preclude county action that "negatively impacted on the ability of the . . . court or the personnel thereof to perform their jobs."¹⁹⁰ Even so, the employment of counsel "does not by itself negatively impact on the ability of [the clerk] or his personnel to carry out their duties."¹⁹¹ This analytical set-off augured against the clerk's position in the case.¹⁹²

Finally, in *Gwinnett County v. Yates*,¹⁹³ the supreme court declared an instance within the exclusion. The issue in *Yates* went to whether the superior court clerk was subject to the county merit system,¹⁹⁴ an issue the court resolved in the negative.¹⁹⁵ As a primary component of its analysis, the court relied upon the county home rule provision.¹⁹⁶ That provision's "court" exclusion, the court held, read in harmony with

188. 261 Ga. 399, 405 S.E.2d 488 (1991).

189. *Id.* at 400, 405 S.E.2d at 489. The clerk had employed an attorney to defend against an inmate's action and later sought to mandamus the board of commissioners to pay the attorney fees. The court held the clerk without power to hire counsel, and that the board of commissioners possessed implicit power to employ counsel based upon its legislative grant of authority to "control the fiscal affairs of the county." *Id.* at 401, 405 S.E.2d at 490.

190. *Id.* The court provided no examples of the type of negative impact envisioned.

191. *Id.* at 402, 405 S.E.2d at 490. The court also rejected the clerk's argument that the board's attorney had a conflict of interests in the matter: "This argument fails because [the clerk] did not demonstrate a conflict of interest that would have prohibited the attorney employed by the board from representing him in the inmate's mandamus action." *Id.*

192. *Id.* The court affirmed the trial judge's denial of the clerk's mandamus petition. *Id.*

193. 265 Ga. 504, 458 S.E.2d 791 (1995).

194. *Id.* at 504, 458 S.E.2d at 792. The clerk had discharged a deputy clerk and then maintained that the county merit board had no authority to consider the deputy's appeal. When the attorney appointed by the county to represent the clerk refused to take that position, the clerk employed his own attorney and prevailed on the issue in the trial court. *Id.*

195. *Id.* The county obtained its merit system by local statute under a local amendment to the constitution. The court held that later constitutional provisions (art. IX, § 1, para. 4) and general statutes (O.C.G.A. § 36-1-21) preserved the distinction between county employees and employees of elected county officials. *Id.* at 505-07, 458 S.E.2d at 793-94.

196. *Id.* at 507, 458 S.E.2d at 794. "[W]e note that Art. IX, sec. 2, para. 1(c) of the Georgia Constitution dealing with home rule for counties states that the power granted to counties does not extend to . . . (7) Action affecting any court or the personnel thereof." *Id.* at 507-08, 458 S.E.2d at 794.

general statutes,¹⁹⁷ and dictated that the county merit board could take no action affecting the clerk and his employees.¹⁹⁸

At this juncture, and only in the county context, the "court" exclusion serves primarily to referee intragovernmental conflict between the governing authority and the clerk of the superior court. Whether the exclusion will similarly serve municipal government, in light of what appears a more narrowly formulated "court" exclusion, remains unsettled.

f. Private or Civil Relationships. The home rule provisions are identical in their treatment of the "relationships" exclusion: "The power granted . . . shall not include the power to take any action affecting the private or civil law governing private or civil relationships, except as is incident to the exercise of an independent governmental power."¹⁹⁹ Although the Georgia Supreme Court has characterized this formulation as "ambiguous,"²⁰⁰ the exclusion has figured prominently in two major controversies.

*City of Atlanta v. McKinny*²⁰¹ featured municipal ordinances purporting to extend employee benefits to "domestic partners," and defining "partners" as a "family relationship" comparable to that of "a spouse."²⁰² Reviewing a challenge to those ordinances, the court first construed the "relationships" exclusion of the Home Rule Act: "At a minimum, it means that cities in this state may not enact ordinances defining family relationships."²⁰³ Although the Home Rule Act itself specifically empowers cities to provide insurance benefits for employees' "dependents,"²⁰⁴ it "does not define the term 'dependent.'"²⁰⁵ Rather,

197. *I.e.*, O.C.G.A. § 36-1-21 (1993 & Supp. 1998).

198. 265 Ga. at 508, 458 S.E.2d at 794. The court thus affirmed the trial judge's decision on this issue but reversed the lower court's refusal to order the county to pay the clerk's attorney fees. The court distinguished *Stephenson* in which the county had provided counsel to assert the clerk's position. *Id.* at 508-09, 458 S.E.2d at 795.

199. GA. CONST. art. IX, § 2, para. 1(d); O.C.G.A. § 36-35-6(b).

200. The court provided that characterization in the course of its opinion in *City of Atlanta v. McKinny*, 265 Ga. 161, 164, 454 S.E.2d 517, 520 (1995). See *infra* notes 210-13 and accompanying text.

201. 265 Ga. 161, 454 S.E.2d 517 (1995).

202. *Id.* at 162, 454 S.E.2d at 519 (quoting ATLANTA, GA., ORDINANCE 93-0-1057, § 3 (1993)). Other "ordinances . . . prohibit[ed] discrimination on the basis of sexual orientation, [and] establish[ed] a domestic partnership registry for jail visitation . . ." The court sustained the validity of these latter measures. *Id.*

203. *Id.* at 164, 454 S.E.2d at 520. "The Georgia General Assembly has provided for the establishment of family relationships by general law." *Id.*

204. O.C.G.A. § 36-35-4(a) (1993 & Supp. 1998).

205. 265 Ga. at 164, 454 S.E.2d at 521. "The issue here is whether the city impermissibly expanded the definition of dependent to include domestic partners." *Id.*

general statutes define a dependent as “one who relies on another for financial support,”²⁰⁶ and, the court held, “domestic partners” did not meet that definition.²⁰⁷ Accordingly, “[w]e conclude that the city exceeded its power to provide benefits to employees and their dependents by recognizing domestic partners as ‘a family relationship’ and providing employee benefits to them ‘in a comparable manner . . . as for a spouse.’”²⁰⁸

The second controversy followed the municipality’s effort to correct its previous error. The reformulated benefits ordinance litigated in *City of Atlanta v. Morgan*²⁰⁹ defined a “dependent” as one “who relies on another for financial support.”²¹⁰ Additionally, the ordinance provided tests for determining when a domestic partner “shall be dependent.”²¹¹ Those tests “clearly [do] not expand the State law definition of ‘dependent,’”²¹² the court asserted, and the ordinance had eliminated “any language recognizing any new family relationship similar to marriage.”²¹³ Accordingly, the ordinance “defines ‘dependent’ consistent with State law and, therefore, . . . it is not in violation of either the Georgia Constitution or the Municipal Home Rule Act”²¹⁴

Although judicially branded as ambiguous, the meaning eventually established for the “relationships” exclusion will presumably be identical

206. *Id.* (citing an assortment of general statutes).

207. *Id.* at 164-65, 454 S.E.2d at 521. “Domestic partners do not meet any of these statutory definitions of dependent.” *Id.*

208. *Id.* at 165, 454 S.E.2d at 521. “Since it is beyond the city’s authority to define dependents inconsistent with state law, we affirm the trial court’s ruling invalidating the benefits ordinance as ultra vires under the home rule act and the Georgia Constitution.” *Id.*

209. 268 Ga. 586, 492 S.E.2d 193 (1997).

210. *Id.* at 587, 492 S.E.2d at 195. The court recounted that “[t]he issue in McKinney, as in this appeal, was whether the City acted within its authority to provide benefits to its employees and their dependents by defining ‘dependent’ consistent with State law.” *Id.*, 492 S.E.2d at 194. The trial court had declared the second ordinance unconstitutional as well. *Id.* at 586, 492 S.E.2d at 194.

211. *Id.* at 587-88, 492 S.E.2d at 195. The tests included whether the employee made contributions of cash and supplies which the domestic partner relied upon for support, and whether the contributions had existed for six months and were continuing. ATLANTA, GA., ORDINANCE 96-0-1018(a)(1)(B) (1996).

212. 268 Ga. at 589, 492 S.E.2d at 195. “It is within the City’s discretion as a governing authority to determine whether to provide such benefits to all, some, or none of its employees’ dependents.” *Id.*

213. *Id.* at 588, 492 S.E.2d at 195. The court said that the municipality had thus followed the court’s holding in McKinney. *Id.*

214. *Id.* at 590, 492 S.E.2d at 196. A dissenting opinion for two justices argued that the ordinance was in direct conflict with state law and thus beyond the city’s authority under the constitution or the Home Rule Act. *Id.* (Carley, J., dissenting).

for cities and counties. Thus far the exclusion has provided only a minimal barrier which the municipality hurdled with legislative alacrity. There, it appeared, the substance of the home rule ordinance fell within the authorization of the Home Rule Act; the ordinance must, however, avoid expanding definitions appearing in state law. It required little municipal effort simply to track the general statute's definition and accomplish the municipality's original purpose. The "relationships" exclusion, it appeared, required only an exercise in municipal draftsmanship.

g. Elective County Office. Unlike its municipal counterpart, the county home rule provision enumerates an exclusion for "[a]ction affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority."²¹⁵ Directed to relations between the governing authority and other county officers and personnel, this exclusion claims judicial attention with predictable regularity. It frequently serves as the supreme court's legal buffer in delineating the respective strands of county government administration.

The early controversy of *Warren v. Walton*²¹⁶ appropriately illustrated both the context for and the application of the "elective office" exclusion. *Warren* featured a sheriff's claim under a local statute requiring county commissioners to supply police cars and to pay the salaries of deputy sheriffs.²¹⁷ In response the commissioners contended the local statute conflicted with their authority under the county home rule provision.²¹⁸ In resolving the stand-off,²¹⁹ the supreme court immediately engaged the provision's exclusion for "any elective county office."²²⁰ Said the court: "The office of sheriff is elective," and "a sheriff is a county officer."²²¹ Accordingly, the local statute "is not in

215. GA. CONST. art. IX, § 2, para. 1(c)(1).

216. 231 Ga. 495, 202 S.E.2d 405 (1973).

217. *Id.* at 496, 202 S.E.2d at 406-07. The local statute, 1973 Ga. Laws 3237, empowered the sheriff to appoint deputy sheriffs at specified salaries payable from county funds and directed the commissioners to supply the sheriff with two radio-equipped automobiles. *Id.*

218. *Id.*, 202 S.E.2d at 407. The commissioners claimed the power to repeal the local statute under their home rule authorizations. *Id.*

219. "The controlling issue in these two appeals is whether a local Act is unconstitutional because it is in violation of the Home Rule Amendment to the Georgia Constitution." 231 Ga. at 495, 202 S.E.2d at 406.

220. *Id.* at 499, 202 S.E.2d at 409. "In our view, the office of sheriff is specifically exempt from Home Rule under [the home rule provision]." *Id.*, 202 S.E.2d at 408.

221. *Id.*, 202 S.E.2d at 409. "Moreover, deputy sheriffs are personnel of the sheriff as contemplated by the . . . constitutional provision." *Id.*

violation of the Home Rule Amendment to the Georgia Constitution,²²² and the sheriff's personnel and equipment "are not subject to the jurisdiction of the county governing authority."²²³ The court thus affirmed the trial judge's mandamus against the commissioners.

On occasion, the conflict arises within the governing authority. In *Guhl v. Williams*,²²⁴ it emerged between the chairman of the board of commissioners and the commissioners themselves. Specifically, the chairman challenged the commissioners' adoption of home rule ordinances repealing local statutes and increasing the commissioners' power over county employees.²²⁵ Essentially, the chairman contended, those ordinances violated the "elective county office" exclusion for salaries and personnel.²²⁶ Rejecting that contention, the court emphasized the exclusion's exception for "personnel subject to the jurisdiction of the county governing authority."²²⁷ "Employees of the county are 'personnel subject to the jurisdiction of the county governing authority,'"²²⁸ the court asserted, "and action affecting them in the form of a 'home rule ordinance' is constitutionally permissible."²²⁹

222. *Id.* at 498, 202 S.E.2d at 408.

223. *Id.* at 500, 202 S.E.2d at 409. The court rejected the commissioners' argument that they possessed specifically granted power to fix sheriff salaries: "The key language in the constitutional provision relied upon . . . is 'authorized to fix the salary, compensation and expenses of those employed by such governing authority.'" *Id.* Finally, [i]t follows that the salary and expenses of the sheriff, the salaries of the deputies and the radio-equipped automobiles for their use constitute 'action affecting [an] elective county office, the salaries thereof, or the personnel thereof,' and that as such they are not subject to the jurisdiction of the county governing authority.

Id.

224. 237 Ga. 586, 229 S.E.2d 382 (1976).

225. *Id.* at 587, 229 S.E.2d at 383-84. That power included the employment and discharge of nonmerit system county employees. "The basic issue," the court reasoned, "was one of law: whether the proposed Home Rule ordinances could repeal provisions of the 1956 Local Act that had been enacted by the General Assembly." *Id.* at 587, 229 S.E.2d at 383.

226. *Id. I.e.*, "[A] 'home rule ordinance' cannot be passed 'affecting any elective county office, the salaries thereof, or the personnel thereof, except the personnel subject to the jurisdiction of the county governing authority.'" *Id.* at 587-88, 229 S.E.2d at 384 (quoting GA. CONST. art. IX, § 2, para. 1(c)(1)).

227. *Id.* at 588, 229 S.E.2d at 384.

228. *Id.*

229. *Id.* "Therefore, the two ordinances . . . could be enacted as proposed, and they would supersede the specified provisions of the 1956 Local Act." *Id.*

The supreme court followed *Guhl* in a later case, *Gray v. Dixon*, 249 Ga. 159, 289 S.E.2d 237 (1982), sustaining the county commissioners' power to adopt a home rule ordinance divesting the chairman of the commissioners of power to hire, supervise, or discharge personnel subject to the jurisdiction of the county governing authority. The court held this ordinance "authorized by the County Home Rule Amendment as it concerns hiring and

Contrarily, the exclusion does apply to employees of the county tax commissioner. *Mobley v. Polk County*²³⁰ presented the salary claim of a "deputy tag agent" who refused to comply with work regulations adopted by county commissioners "for all employees paid from county funds."²³¹ Relying squarely upon the "elective office" exclusion,²³² the court held the commissioners without home rule authority "to establish work regulations for employees of another elected county officer."²³³ Because the tag agent was an employee of the tax commissioner and the commissioner constituted an "elective county office," the agent could enforce the county commissioners' payment of her salary.²³⁴

Even conceding the commissioners' actions may affect another county official, they may not rise to the level of the "elective office" exclusion. In *Stephenson v. Board of Commissioners of Cobb County*,²³⁵ the court found the commissioners possessed exclusive authority to employ counsel for the superior court clerk.²³⁶ Admittedly, therefore, the commissioners' exercise of that power affected another elective county official. However, the court delineated, the "effect" was not of the type denied the commissioners by the "elective office" exclusion.²³⁷ First, the counsel employed "is not a part of the clerk's staff";²³⁸ and second, employment

firing of 'personnel subject to the jurisdiction of the county governing authority' and clearly falls within the ambit of the exception to [the elective office exclusion]." *Id.* at 163, 289 S.E.2d at 241.

230. 242 Ga. 798, 251 S.E.2d 538 (1979).

231. *Id.* at 799, 251 S.E.2d at 540. Regulations included punching a time clock, a forty-hour work week, delivery of time cards to the payroll department, and limited vacation periods. Plaintiff tag agent refused to comply with the regulations and sought mandamus against the commissioners for payment of her salary. *Id.* at 798-99, 251 S.E.2d at 539-40.

232. "Powers of county commissioners are strictly limited by law, and they can do nothing except under authority of law." *Id.* at 802, 251 S.E.2d at 541.

233. *Id.* This was true, "[n]o matter how desirable uniformity of work regulations of various employees, of various county offices in the seat of government may be . . ." *Id.*

234. *Id.* "Mandamus will lie to compel payment of a salary of an official who has performed his duties and which salary has previously been approved for payment by the proper fiscal authority where the only reason for non-payment is the non-compliance with work regulations not authorized by law." *Id.* In contrast, the court held that under general statutes the tax commissioner could be required to observe working hours established by the county commissioners. *Id.* at 803-04, 251 S.E.2d at 542.

235. 261 Ga. 399, 405 S.E.2d 488 (1991).

236. *Id.* at 400, 405 S.E.2d at 489. The court first found the clerk to possess no such authority; it then reasoned that "[b]ecause the board has the exclusive authority to control the fiscal affairs of the county and has the power to defend county officers, we conclude the board has the implicit power to employ counsel for county officers." *Id.* at 401, 405 S.E.2d at 490.

237. *Id.* at 401, 405 S.E.2d at 490.

238. *Id.* The court said that "the board is not 'affecting' the clerk's office in [the excluded] sense by employing counsel to represent the clerk, as the attorney is not part of

of counsel did not “negatively impact” upon the clerk’s ability to do his job.²³⁹ Accordingly, the court concluded, “[w]e find no such impermissible ‘effect’ in the instant case.”²⁴⁰

The clerk of superior court did prevail on the exclusion in the somewhat different case of *Gwinnett County v. Yates*.²⁴¹ There the controversy turned upon whether the clerk was subject to the county merit system, an issue the supreme court resolved in the negative.²⁴² Under general statutes, the court explained, a county merit system does not cover employees of elected county officials unless the official requested coverage.²⁴³ Under the county home rule provision, the court added, the powers granted to counties do not extend to actions affecting elective county offices.²⁴⁴ Reading the general statutes and the home rule exclusion “in harmony,” the court held that “a county merit board can take no action affecting the clerk of the superior court and his employees unless, pursuant to [general statutes], the clerk” has requested coverage.²⁴⁵

The supreme court thus continues, via the “county office” exclusion, to resolve the differences inevitably arising between those who carry out the administration of county government. Given the frequency of the disagreements, as well as their intensity, the exclusion’s “peace keeping”

the clerk’s staff.” *Id.*

239. *Id.* “The board’s employment of counsel does not by itself negatively impact on the ability of [the clerk] or his personnel to carry out their duties.” *Id.* at 402, 405 S.E.2d at 490.

240. *Id.* at 402, 405 S.E.2d at 490. The court affirmed the trial court’s denial of the clerk’s effort to mandamus the commissioners to pay attorney fees for counsel employed by the clerk. *Id.* at 400, 405 S.E.2d at 489. The court thus rejected the clerk’s contention that the commissioners’ selection of counsel violated the prohibition of the “elective county office” exclusion in the county home rule provision. *Id.* at 402, 405 S.E.2d at 490.

241. 265 Ga. 504, 458 S.E.2d 791 (1995).

242. *Id.* at 504, 458 S.E.2d at 792. The case arose when the clerk discharged a deputy clerk who appealed to the county merit board, and the attorney appointed by the commissioners to represent the clerk refused to argue that the clerk was not subject to merit system coverage. The clerk then employed his own counsel, prevailed in the lower court on the issue, and sought to mandamus the commissioners to pay his attorney fees. *Id.* at 504-05, 458 S.E.2d at 792.

243. *Id.* at 505-07, 458 S.E.2d at 793-94. The court relied upon O.C.G.A. section 36-1-21(b) (1993 & Supp. 1998).

244. *Id.* at 507-08, 458 S.E.2d at 794. The court relied upon GA. CONST. art. IX, § 2, para. 1(c)(1).

245. 265 Ga. at 508, 458 S.E.2d at 794. The court reversed the trial court’s refusal to mandamus the commissioners to pay the clerk’s attorney, distinguishing its prior decision in *Stephenson* (discussed *supra*) in which the county did appoint counsel to assert the clerk’s legal position. *Id.* at 509, 458 S.E.2d at 795.

function illumines an added dimension of the county home rule provision.

3. Preemption by General Statutes. Both home rule systems couch their delegations of legislating power, in part, as follows: "The governing authority of each municipal corporation [county] shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law" ²⁴⁶ Likewise, each system expressly declares that "[t]he power granted to municipal corporations [counties] . . . shall not be construed to extend to . . . any . . . matters which the General Assembly by general law has preempted or may hereafter preempt" ²⁴⁷ Each exercise of home rule power, therefore, stands subject to yet another potential of futility: can the legislating venture withstand the threatening peril of preemption?

Although the supreme court's opinions reveal routine and passing references to the threat, the court's decision in *Commissioners of Wayne County v. Smith* ²⁴⁸ early instanced the potential's full fruition. There, taxpayers sought to enjoin county commissioners from changing the method of appointing members to the county hospital authority. ²⁴⁹ Defendants grounded their legislating efforts in "the 'home rule' provisions of the Constitution." ²⁵⁰ Resolving the controversy the supreme court emphasized that present hospital authority appointments were made "[p]ursuant to a general law." ²⁵¹ Moreover, the constitution's home rule provision "explicitly disallows any . . . attempt by a local governing authority to change or to interfere with the operation of provisions of general law" ²⁵² That limitation, the court summari-

246. O.C.G.A. § 36-35-3(a); GA. CONST. art. IX, § 2, para. 1 (a).

247. O.C.G.A. § 36-35-6(a); GA. CONST. art. IX, § 2, para. 1(c).

248. 240 Ga. 540, 242 S.E.2d 47 (1978).

249. *Id.* at 540, 242 S.E.2d at 47.

The obvious purpose of the ordinance and resolution . . . is to terminate abruptly the appointment of new members in accordance with the general law . . . , pursuant to which the board of the hospital authority has a voice in the selection of its membership, and to substitute in lieu thereof a procedure that is similar to, if not identical with, the procedure by which the membership of the authority board was selected prior to enactment of [the general law]—that is, by decision of the board of commissioners alone.

Id. at 541-42, 242 S.E.2d at 48.

250. *Id.* at 541, 242 S.E.2d at 48.

251. *Id.* at 540, 242 S.E.2d at 47.

252. *Id.* at 542, 242 S.E.2d at 48.

ly concluded, foreclosed the county commissioners' efforts at legislating new appointment procedures.²⁵³

4. The System's First Legislating Delegation: "Clearly Reasonable Ordinances." As previously described, both home rule systems confer two "legislating" powers upon local governments. The distinction between the two grants, although appearing as one of degree, goes to the heart of the home rule corpus. At the first tier, the governing authority is empowered to adopt measures for its municipality or county that do not rise to the level of affecting state legislation. Second, the systems also authorize the governing body's adoption of measures that amend or repeal charters or local statutes.²⁵⁴

As for the first delegation, the systems' grants are identically formulated: "The governing authority of each municipal corporation [county] shall have legislative power to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government . . ."²⁵⁵ When controversy arises over the first-tier delegation, the governing authority is seeking to function within its existing charter or local statutes and to utilize this additional grant of power. On those "home rule" occasions, analytical attention rivets upon specific facets of the first-tier formulation.

Judicial focus upon those facets found illustration in the case of *Jackson v. Gasses*.²⁵⁶ There, county commissioners sought to relocate the county jail facility to a former state prison.²⁵⁷ In opposition, plaintiff challenged the commissioners' power to move the jail outside the limits of the county seat.²⁵⁸ Upon the trial court's agreement with plaintiff,²⁵⁹ the supreme court surveyed the existing authority structure.²⁶⁰ In particular, the court emphasized the absence of jail-location

253. *Id.* The court thus affirmed the trial judge's order enjoining the commissioners' adoption of the proposed ordinance. *Id.*

254. See the discussion of the system's formulation, *supra* notes 44-60, 76-91.

255. O.C.G.A. § 36-35-3(a); GA. CONST. art. IX, § 2, para. 1(a).

256. 230 Ga. 712, 198 S.E.2d 657 (1973).

257. *Id.* at 712, 198 S.E.2d at 658. The commissioners alleged that the present jail was in bad repair and unsafe, that renovation costs would be prohibitive, and that they had access to the facilities at the former state prison camp for the sum of one dollar per year. They alleged they were saving "hundreds of thousands of dollars of the taxpayers money." *Id.*

258. *Id.* Plaintiff sought injunctive relief against the relocation of the jail facilities beyond the limits of the municipality which served as the county site. He alleged that the commissioners' action was "contrary to the Constitution and laws of this state." *Id.*

259. *Id.* The trial court enjoined the relocation. *Id.*

260. *Id.* at 713, 198 S.E.2d at 658-59.

restrictions from the local statute originally creating the county.²⁶¹ Finding no existing prohibitions,²⁶² the court turned to the first-tier home rule delegation: “[W]hat we regard as controlling is the Home Rule Amendment of 1966 . . . giv[ing] the governing authority the power to adopt reasonable ‘regulations relative to its property’”²⁶³ The court declared that delegation “broad enough to give the . . . Commissioners discretion to locate administrative facilities and services,”²⁶⁴ and designated the jail relocation “authorized and reasonable action.”²⁶⁵

In terms of first-tier delegation facets, *Jackson* plumbed the particulars: The commissioners’ actions “relat[ed] to its property”; those actions effected the “clearly reasonable”; and they sufficed, consequently, as “authorized” administration.

As formulated, the first-tier delegation is subservient to the existing charter or local statutes. The supreme court confirmed that result two years after *Jackson* in the somewhat similar setting of *Brewster v. Houston County*.²⁶⁶ *Brewster* involved county commissioners who maintained offices in a municipality other than the county seat.²⁶⁷ Reviewing a challenge to that practice, the court immediately seized upon the language of the local statute creating the county: “[P]ublic business of said county shall be conducted at the public site.”²⁶⁸ That mandate overrode the home rule delegation and dictated the commissioners’ conduct of their “official county business” at the county seat.²⁶⁹ As for “administrative” actions, the court delineated, *Jackson* permitted their “home rule” exercise outside the official site.²⁷⁰

The Georgia Court of Appeals paid passing reference to the first-tier delegation in its disposition of *City of Commerce v. Duncan & Godfrey*,

261. *Id.*, 198 S.E.2d at 659. The court cited 1827 Ga. Laws 65.

262. *Id.* “We have found no law or decision of this court and none has been called to our attention, which restricts the Board of Commissioners . . . in determining where the jail should be located.” *Id.*, 198 S.E.2d at 658-59.

263. *Id.*, 198 S.E.2d at 659.

264. *Id.* The court included such facilities as “jails, correctional camps, health clinics, hospitals, public housing and the like.” *Id.*

265. *Id.* at 714, 198 S.E.2d at 659. Two justices dissented.

266. 235 Ga. 68, 218 S.E.2d 748 (1975).

267. *Id.* at 68, 218 S.E.2d at 749. Plaintiffs were residents of the county seat; they alleged that “during the last two years the commissioners have gradually moved the county offices from [the county seat] to [the other municipality], and that only a token office is maintained at the county site.” *Id.*

268. *Id.* at 71, 218 S.E.2d at 750 (quoting 1823 Ga. Laws 172).

269. *Id.* The court reasoned that “official business” included “decision making process of the board which includes deliberation and voting on any issue of county business.” *Id.*

270. *Id.* at 70, 218 S.E.2d at 750.

*Inc.*²⁷¹ The case featured a municipal electric consumer's complaint that the city failed to inform it of an alternative billing procedure that would have significantly lowered plaintiff's rates.²⁷² Rejecting the municipality's defense under the home rule power to adopt clearly reasonable measures,²⁷³ the court was adamant: "The city's authority to establish rates for electrical service is not at issue here; rather, what is at issue is the city's obligation to make available sufficient information about those rates to enable its customers to take advantage of the options available to them."²⁷⁴ A local government's authority to perform a function, therefore, does not minimize legal obligations reasonably arising from that function. That the authority may derive from the home rule provision's first-tier delegation, moreover, does not diffuse the obligation.

The court of appeals likewise holds the charter to dominate the delegation. *City of Buchanan v. Pope*²⁷⁵ presented a police chief's wrongful termination claim, based on dismissal provisions of a city police manual.²⁷⁶ Defending, the municipality relied upon its nonrenewal authority, contained in the municipal charter.²⁷⁷ Denominating the documents "in direct conflict,"²⁷⁸ the court relied for resolution upon the home rule provision: "[M]unicipal corporations have the power to adopt only 'clearly reasonable' measures "which are not inconsistent with . . . any charter provision."²⁷⁹ That first-tier formulation, the court asserted, serves "to invalidate municipal ordinances inconsistent

271. 157 Ga. App. 337, 277 S.E.2d 266 (1981).

272. *Id.* at 338-39, 277 S.E.2d at 268. Plaintiff alleged that it complained of its rates over a course of some three years during which period the city repeatedly checked the accuracy of plaintiff's meter, but never informed plaintiff of an alternative meter for large consumers. When plaintiff finally became aware of the alternative meter, its bills dropped significantly. Plaintiff's expert testified to a loss of some ten thousand dollars by virtue of plaintiff's ignorance of the alternative billing methods. *Id.*

273. *Id.* at 340, 277 S.E.2d at 269. "Similarly inapplicable is [the home rule provision]." *Id.*

274. *Id.*, 277 S.E.2d at 270. The court thus affirmed a jury verdict in favor of the plaintiff. *Id.* at 341, 277 S.E.2d at 270.

275. 222 Ga. App. 716, 476 S.E.2d 53 (1996).

276. *Id.* at 716, 476 S.E.2d at 54. Plaintiff "claims a right of continuing employment constituting a property interest under the terms of the police department 'policies and procedures' manual" allegedly adopted by the municipality. *Id.*

277. *Id.* The charter authorized the council to employ police officers "who shall be elected for such term not exceeding twelve months as the council may see fit." *Id.*, 476 S.E.2d at 55 (quoting 1908 Ga. Laws 475).

278. *Id.* at 718, 476 S.E.2d at 56. "The issue of whether the City's charter or the personnel manual controls [plaintiff's] employment is also a question of law." *Id.* at 717, 476 S.E.2d at 55.

279. *Id.* at 718, 476 S.E.2d at 56, (quoting O.C.G.A. § 36-35-3(a)).

with a city's charter."²⁸⁰ The formulation operates, therefore, to condemn as well as to condone.

5. The System's Second Legislating Delegation: Changing State Laws. The second-tier delegation constitutes the system's most extensive grant of local "legislating" power; it comprises, no less, the essence of Georgia's home rule complex. The formulations themselves assume slightly different structures. The Municipal Home Rule Act effects the authorization as follows: "[A] municipal corporation may, as an incident of its home rule power, amend its charter by following either of the following procedures."²⁸¹ The county constitutional provision declares that "a county may, as an incident of its home rule power, amend or repeal the local acts applicable to its governing authority by following either of the procedures hereinafter set forth."²⁸²

Under these delegations, therefore, local governments are empowered to change existing state law. The change envisioned for municipalities is that of amending the municipal charter. For counties, the anticipated modifications are amendments or repeals of local statutes "applicable to [the] governing authority."²⁸³ Whatever the substantive distinctions intended, if any, the change must take one of two specified approaches. The approaches are generally the same for municipalities and counties. Under the first elaborated procedure, the local governing authority makes the change; under the second procedure, the change is effected by the people of the local government. Those procedures, their content and compliance with them, prove pivotal to the Georgia home rule system's second-tier delegation.

a. Changes Effected by the Governing Authority. The first procedure, that by which the governing authority changes local statutes, prescribes that the change be effected by an ordinance adopted at two regular consecutive meetings,²⁸⁴ following publication of a specified notice.²⁸⁵

280. *Id.* The court ordered summary judgment for the municipality. *Id.* at 722, 476 S.E.2d at 58.

281. O.C.G.A. § 36-35-3(b) (1993 & Supp. 1998).

282. GA. CONST. art. IX, § 2, para. 1(b).

283. *Id.*

284. GA. CONST. art. IX, § 2, para. 1(b)(1); O.C.G.A. § 36-35-3(b)(1). The county provision specifies that the change be made by an ordinance or resolution. Both systems require that the consecutive meetings be held not less than seven nor more than sixty days apart. GA. CONST. art. IX, § 2, para 1(b)(1); O.C.G.A. § 36-35-3(b)(1).

285. GA. CONST. art. IX, § 2, para. 1(b)(1); O.C.G.A. § 36-35-3(b)(1). The notice is published in the county legal organ once a week for three weeks during sixty days immediately preceding final adoption of the ordinance. The notice must contain a synopsis of the proposed ordinance and state that a copy is available for public inspection. The clerk

After adoption, a copy of the ordinance (and supporting information)²⁸⁶ must be filed with the Secretary of State and (for municipal ordinances) with the appropriate clerk of the superior court.²⁸⁷ The Secretary of State must publish and distribute these ordinances annually.²⁸⁸

Preliminarily, the obvious but crucial distinction between the legislating delegations bears reemphasis. First-tier delegations are subservient to local statutes. Second-tier delegations (by either procedure) are employed to change local statutes. As fundamental as this distinction may be to the home rule system, the ease with which it can be blurred is illustrated by the supreme court's disposition of *Forbes v. Lovett*.²⁸⁹ The result in *Forbes* is unremarkable: the court sustained the validity of a county ordinance which, repealing a prior local statute, established a new civil service system.²⁹⁰ The court's opinion, however, is unhelpful: it first set out the county home rule provision's first-tier authority for the governing body "to adopt legislation 'relating to its property, affairs and local government.'"²⁹¹ It was "[p]ursuant to the above section," the court asserted, that the county "passed the 1971 ordinance specifically repealing the 1956 local Act."²⁹² If, however, the ordinance repealed the statute, that action could be sustained only under the second-tier delegation,²⁹³ a provision completely omitted from the court's opinion. The case, in any event, stands as a caution against confusing the delegations.

As observed, several administrative requirements condition the governing authority's power to change local statutes. Both county and municipal governing authorities must file the ordinance with the Secretary of State. Additionally, the municipality must file its ordinance

of the superior court must furnish a copy of the proposed ordinance in response to a written request. GA. CONST. art. IX, § 2, para 1(b)(1); O.C.G.A. § 36-35-3(b)(1).

286. GA. CONST. art. IX, § 2, para. 1(g); O.C.G.A. § 36-35-5. The supporting information is a copy of the required notice and an affidavit of a newspaper representative stated that the notice was properly published. GA. CONST. art. IX, § 2, para 1(a); O.C.G.A. § 36-35-5.

287. GA. CONST. art. IX, § 2, para 1(a); O.C.G.A. § 36-35-5.

288. GA. CONST. art. IX, § 2, para 1(a); O.C.G.A. § 36-35-5. Changes made by the governing authority may not amend or repeal changes made by the people, or local statutes approved in a referendum, unless twelve months have elapsed. GA. CONST. art. IX, § 2 para. 1(b)(1); O.C.G.A. § 36-35-3(b)(1).

289. 227 Ga. 772, 183 S.E.2d 371 (1971).

290. *Id.* at 744, 183 S.E.2d 373. Accordingly, the court held the appointment of plaintiffs to the civil service board, accomplished under the local statute, ineffective. *Id.*

291. *Id.*, 183 S.E.2d at 373 (quoting GA. CONST. art. IX, § 2, para. 1(a)).

292. 227 Ga. at 775, 183 S.E.2d at 373. "As a result of the adoption of this ordinance a new Civil Service System was created and established in [the] County providing the procedures for the appointment of a Civil Service Board in accordance with its terms." *Id.*

293. *I.e.*, GA. CONST. art. IX, § 2, para. 1(b)(1).

with "the clerk of the superior court of the county of the legal situs of the municipal corporation."²⁹⁴ The effect of a failure to meet this latter requirement arose as the issue for decision in *Jackson v. Fraternal Order of Police*.²⁹⁵ Assessing the legal significance of the filing omission, the supreme court first emphasized the procedural steps which the municipality actually took.²⁹⁶ These included proper advance advertisement, regular enactment, and subsequent deposit with the Secretary of State. "In these circumstances," the court reasoned, the municipality had substantially complied with "the legal requirements necessary to effect a charter change under the . . . Home Rule Act."²⁹⁷ The court declared itself "unwilling" to invalidate the ordinance after "many months of operation" under it.²⁹⁸

As previously described, the system's second-tier formulations differ slightly in several respects. The municipal authorization applies to the amendment of the municipal "charter",²⁹⁹ the county authorization includes the amendment or repeal of "local acts."³⁰⁰ The former authorization's reference to the "charter," moreover, is unrestricted. The county authorization's reference to "local acts," however, specifies "local acts applicable to its governing authority."³⁰¹ This latter variation, it turns out, constitutes a distinction with a difference.

*Wood v. Gwinnett County*³⁰² featured a county resolution purporting to amend a local statute that created the "County Public Facilities Authority."³⁰³ The litigation's "single issue" pivoted upon whether the county home rule provision authorized the amendment.³⁰⁴ The supreme court's analysis first emphasized the formulation's limitation:

294. O.C.G.A. § 36-35-5 (1992 & Supp. 1998).

295. 234 Ga. 906, 218 S.E.2d 633 (1975). The case involved the status of municipal employees as determined by an ordinance of the city governing authority. The court held the ordinance to constitute a charter amendment and thus found it subject to the requirements of the municipal home rule statute. *Id.* at 913, 218 S.E.2d at 638.

296. *Id.* at 912-13, 218 S.E.2d at 637-38. The court observed that the "new city government complied with all legal requirements except one. That one exception was the failure to file the duly enacted ordinance with the clerk of superior court as required by [the home rule statute]." 234 Ga. at 912, 218 S.E.2d at 637.

297. *Id.* at 913, 218 S.E.2d at 638.

298. *Id.*

299. O.C.G.A. § 36-35-3(b) (1993 & Supp. 1998).

300. GA. CONST.-art. IX, § 2, para. 1(b).

301. *Id.*

302. 243 Ga. 833, 257 S.E.2d 258 (1979).

303. *Id.* at 833, 257 S.E.2d at 258. The local statute had been enacted four years earlier. 1975 Ga. Laws 4463.

304. "This appeal presents the single issue whether [the] County under its home rule power has authority to amend a local Act of the legislature creating the . . . County Public Facilities Authority." 243 Ga. at 833, 257 S.E.2d at 258.

“[T]he county is empowered to ‘amend or repeal the local acts *applicable to its governing authority*’ only, and not other local Acts.”³⁰⁵ A “strict construction” of that delegation mandated inquiry into the nature of the county “Public Facilities Authority.”³⁰⁶ That entity, the inquiry revealed, was not “a mere creature or arm of the county governing authority,”³⁰⁷ but rather “a public corporation” and a “political subdivision of the State of Georgia.”³⁰⁸ Separate from the county governing authority “in membership, powers, and duties,”³⁰⁹ the entity lacked power to create a county obligation.³¹⁰ Accordingly, the local act creating the public facilities authority was not a local act applicable to the county’s governing authority.³¹¹ Consequently, the court declared the measure exempt from amendment under the county’s home rule power.³¹²

b. Changes Effected by Citizen Initiative. The second home rule procedure for changing state laws originates with a petition from the local government’s “electors.”³¹³ As previously described, a specified percentage of the local voters must file the petition with the governing authority (municipality) or probate judge (county).³¹⁴ The petition must state the “exact language” of the proposed measure, and the recipient determines its validity.³¹⁵ Following prescribed publication of notice, the election is held and the proposed amendment or repeal carries if approved by more than one-half of the votes cast.³¹⁶ Before it becomes effective, the measure must first be filed with the Secretary of State and (for municipalities) with the clerk of superior court.³¹⁷ In

305. *Id.* at 834, 257 S.E.2d at 259. The court emphasized that “[t]he governing authority, of course, is the county commission.” *Id.*

306. *Id.* “Counties are creatures whose limited powers must be strictly construed.” *Id.*

307. *Id.*

308. *Id.* The authority was “not an arm of the county which could be controlled by the commissioners.” *Id.*

309. *Id.*

310. *Id.* The court noted that the original local statute had created the public facilities authority to build and finance fire stations, and that the amendment in issue “would add numerous other types of buildings and facilities,” and “authorize the use of other funds for certain structures.” *Id.* at 833, 257 S.E.2d at 258.

311. *Id.* at 834-35, 257 S.E.2d at 259. “[T]he Authority is not an extension of the county . . .” *Id.*

312. The court reversed the trial court’s decision upholding the amendment. *Id.*

313. GA. CONST. art. IX, § 2, para. 1(b)(2); O.C.G.A. § 36-35-3(b)(2) (1993 & Supp. 1998).

314. *Id.*; O.C.G.A. § 36-35-3(b)(2).

315. *Id.*; O.C.G.A. § 36-35-3(b)(2).

316. *Id.*; O.C.G.A. § 36-35-3(b)(2).

317. O.C.G.A. § 36-35-5.

this fashion, therefore, changes to charter and local statutes may occur without adoption by the governing authority.

The supreme court provided a general analysis of the initiative procedure in the 1983 case of *Sadler v. Nijem*,³¹⁸ an action to mandamus the municipal governing authority to call an election upon a proposed charter amendment.³¹⁹ The governing authority contended that the proposed amendment, requiring a full-time compensated fire department,³²⁰ would conflict with general statutes and the constitution. In its review of the issues, the court first rejected defendants' reliance upon Amendment 19 to the constitution.³²¹ Although that amendment authorized municipalities to provide fire protection,³²² it did not prevent municipal voters from agreeing by petition and referendum to accept and implement that authority.³²³ Second, the court likewise disputed defendants' position that a 1962 general statute vested fire department maintenance in the municipal "governing body."³²⁴ This grant of power ran simply to the municipality, the court reasoned, and did not exclude governing authorities from deciding how the power is to be exercised.³²⁵ "[N]or does it prohibit the citizens of

318. 251 Ga. 375, 306 S.E.2d 257 (1983).

319. *Id.* at 376, 306 S.E.2d at 258. The plaintiff, a registered municipal voter had presented the petition, signed by a percentage of city voters, to municipal officials; the petition specified the language of the proposed charter amendment; the city officials had responded with a notice that the proposed amendment would conflict with existing general statutes and the constitution; the plaintiff sought mandamus to compel defendants to call an election on the petition. *Id.*

320. *Id.* The proposed charter amendment provided that "the City . . . shall continue to provide and maintain professional firefighting and prevention services, through the City's Municipal Fire Department, which shall be composed of full-time paid personnel who are and shall be employees of the City." *Id.*

321. *Id.* at 377, 306 S.E.2d at 259.

322. *Id.* "The use of the word 'may' means that the powers and services are permissible rather than mandatory." *Id.*

323. *Id.* "Amendment 19 was a grant of authority from the General Assembly to municipalities (and counties) and the proposed charter amendment merely accepts such grant of authority . . . Amendment 19 does not prevent municipal governing authorities from agreeing to provide fire protection nor does it prevent municipal voters from so agreeing by petition and referendum." *Id.*

324. *Id.* at 378, 306 S.E.2d at 260. "In addition to the other powers which it may have, the governing body of any municipal corporation shall have the following powers, under this chapter, relating to the administration of municipal government: . . ." O.C.G.A. § 36-35-2 (1993 & Supp. 1998). The municipality argued that "a charter provision requiring it to maintain a municipal fire department would contravene this section by taking these powers away from the 'governing body,' here the mayor and council." 251 Ga. at 378, 306 S.E.2d at 260.

325. *Id.* "That act was intended to allow municipalities to exercise certain powers themselves, . . . not to define the means by which the cities would and could manage their

a municipality from choosing, by charter amendment based upon petition and referendum, how such powers shall be exercised."³²⁶ Accordingly, the court held the home rule initiative procedure applicable³²⁷ and declared the plaintiff entitled to an election upon the proposed charter amendment.³²⁸

With the supreme court's decision in *Sadler*, therefore, the initiative procedure's validity and general sphere of operation appeared well settled. More recently, litigation has confronted the court with confusing details of the procedure's legislative structure.

The ambiguity arose from the Municipal Home Rule Act's pivotal two-tier delegation provision.³²⁹ Subsection (a) of that provision empowers the governing authority to adopt "ordinances, resolutions, or regulations relating to its property, affairs and local government."³³⁰ Subsection (b) takes up the separate matter of how the municipality, via either of two procedures, may "amend its charter."³³¹ In elaborating the initiative procedure, however, the language refers both to "amendments to charters,"³³² and to "amendments to or repeals of ordinances, resolutions, or regulations adopted pursuant to subsection (a)."³³³ Does this latter reference empower voters to change by initiative and referendum those noncharter "ordinances, resolutions, or regulations" that the governing authority adopts under subsection (a)?³³⁴

affairs." *Id.*

326. *Id.* "In short, the 1962 act was intended to delegate power, not to regulate its exercise." *Id.*

327. *Id.* "The rights of the 'governing body' to choose how the powers of the City shall be exercised should not exceed the rights of the voters to so choose." *Id.* The 1962 general statute "does not proscribe the proposed charter amendment." *Id.*

328. *Id.* at 378-79, 306 S.E.2d at 260. The court thus reversed the trial judge's refusal to issue the mandamus. *Id.*

329. *Id.* § 36-35-3(a)(b).

330. *Id.* § 36-35-3(a).

331. *Id.* § 36-35-3(b): "[A] municipal corporation may, as an incident of its home rule power, amend its charter by following either of the following procedures: § 36-35-3(b)(1), (b)(2)(A)."

332. *Id.* § 36-35-3(b)(2)(A).

333. *Id.* § 36-35-3(b)(2)(A): "Amendments to charters or amendments to or repeals of ordinances, resolutions, or regulations adopted pursuant to subsection (a) of this Code section may be initiated by a petition, filed with the governing authority of the municipal corporation"

334. The county home rule constitutional provision appears to contain the same ambiguity. In elaborating the initiative procedure, that provision also refers to "[a]mendments to or repeals of . . . local acts or ordinances, resolutions, or regulations adopted pursuant to subparagraph (a) hereof"

GA. CONST. art. IX, § 2, para. 1(b)(2).

*Kemp v. City of Claxton*³³⁵ originated with the municipal governing authority's adoption of resolutions closing two railroad grade crossings in the city.³³⁶ Residents and owners of businesses sought to file petitions to repeal those resolutions by referendum.³³⁷ The municipal clerk refused to accept the petitions on the ground that the resolutions effected no charter changes. The initiative procedure, the municipality maintained, applied only to changes affecting the city charter.³³⁸ Upon trial the superior court granted a mandamus requiring the clerk to accept and approve the petitions.³³⁹

The supreme court initiated its analysis by delineating between the Act's "spirit and intent" and its "literal language."³⁴⁰ As for intent, the Home Rule Act's "primary purpose" was "to authorize municipalities to amend their charters by their own actions."³⁴¹ As for language, the court emphasized the initiative delegation's reference to charter amendments over its inclusion of ordinances, resolutions, and regulations.³⁴² "This also shows that the petition and referendum provision is intended to be available only when the proposed amendment is intended to affect a city charter."³⁴³ Finally, the court observed that subsection (a) granted the power to adopt ordinances, resolutions, and regulations to "the governing authority."³⁴⁴ The requisite "strict construction" of that delegation precluded the electorate from exercising the "general legislative power" of "petition[ing] for a referendum on all

335. 269 Ga. 173, 496 S.E.2d 712 (1998).

336. *Id.* at 173, 496 S.E.2d at 713-14. The resolution noted that the crossings "presented an unreasonable danger to the public and resolved to close those two crossings in the interest of public safety." *Id.* at 173, 496 S.E.2d at 714.

337. *Id.* Plaintiffs claimed "that closing the crossings will reduce customer access to various businesses by disrupting traffic flow on [the involved streets]." *Id.*

338. *Id.* They argued that the initiative provision "authorizes a referendum only if it affects the city charter, and because the resolutions enacted by the mayor and council did not affect the city charter, no petition for referendum could lie." *Id.*

339. *Id.* at 174, 496 S.E.2d at 714.

340. *Id.* at 175, 496 S.E.2d at 715. The court said that "a statute is to be read as a whole, and the spirit and intent of the legislation prevails over a literal reading of the language." *Id.* at 175-76, 496 S.E.2d at 715.

341. *Id.* at 175, 496 S.E.2d at 715. "The two procedures of OCGA § 36-35-3(b) were enacted to relieve the General Assembly of its earlier burden of separately amending each and every city charter in the state." *Id.*

342. *Id.* at 176, 496 S.E.2d at 715. "The legislative intent will be effectuated even if some language must be eliminated." *Id.*

343. *Id.*

344. *Id.* "O.C.G.A. § 36-35-3(a) (1993 & Supp. 1998) specifies that the delegation of legislative power is to 'the governing authority,' which is the Mayor and Council." *Id.*, 496 S.E.2d at 716.

ordinances and resolutions.³⁴⁵ In sum, “[t]he petition procedure of [the initiative delegation] applies only to amendments to municipal charters.”³⁴⁶ Because the municipality’s street-closing resolutions did not constitute charter amendments, the court held, plaintiffs possessed no right to a repeal referendum.³⁴⁷

B. Amendment 19 in the Courts

The Georgia Supreme Court has also confronted several issues arising under the constitution’s 1972 “supplementary powers” provision.³⁴⁸ As previously described,³⁴⁹ this provision expansively authorizes local governments to exercise a large number of enumerated “powers” and “services.”³⁵⁰ Concomitantly, the provision expressly restricts the General Assembly’s power to act upon the listed subjects: it may do so only by general statute.³⁵¹ Moreover, although such general statutes may “regulate, restrict, or limit” the exercise of granted powers, the statutes may not “withdraw” the powers from the local government.³⁵²

Although Amendment 19 is not technically a component of Georgia’s home rule system, its evolving litigation should be noted in passing.

345. *Id.* “As we must strictly construe the grant of legislative power to the governing authority, we must reject plaintiffs’ argument that the electorate can directly exercise such general legislative power.” *Id.*

346. *Id.*

347. *Id.* “Consequently, the superior court erred in granting mandamus and requiring that the City Clerk accept and approve the petitions at issue.” *Id.*

348. GA. CONST. art. IX, § 2, para. 3.

349. See *supra* text accompanying notes 92-97.

350. GA. CONST. art. IX, § 2, para. 3(a). These are set forth in some fourteen broadly couched enumerations.

351. GA. CONST. art. IX, § 2, para. 3(d).

352. GA. CONST. art. IX, § 2, para. 3(c). The distinction between regulating, restricting, or limiting on the one hand, and withdrawing on the other, did not appear in Amendment 19’s original version, but was foreshadowed in *City of Atlanta v. Myers*, 240 Ga. 261, 240 S.E.2d 60 (1977). There a municipality employed the provision’s power over police and fire protection to enact an ordinance requiring that police and fire officers be municipal residents. Under Amendment 19, the city argued its ordinance to prevail in the face of a general statute prohibiting local governments from requiring officers and employees to be city residents. Holding the ordinance to bow to the general statute, the supreme court reasoned as follows:

There is no indication in the 1972 amendment to the 1945 Constitution . . . that the grant of powers to counties and municipalities to provide certain services, and to enact ordinances to effectuate the powers given, was intended to preclude the General Assembly from enacting general laws affecting the manner in which the powers would be exercised.

Id. at 264, 240 S.E.2d at 63. Thereafter, the general-statute distinction made its way into Amendment 19. For brief treatment of *Myers* see R. Perry Sentell, Jr., *Local Government “Home Rule”: A Place to Stop?*, 12 GA. L. REV. 905 (1978).

The supreme court has elaborated the provision's purpose as follows:

This paragraph of the constitution is designed to supplement the powers specifically conferred by local law upon each municipality and county in order to make such powers uniform and to reduce the need for special legislation to enable these entities to act, independently or together, in their own best interests.³⁵³

In the spirit of these envisioned aspirations, the court has employed the provision across a substantive spectrum of local government settings. The exercise found early illustration in a controversy over county power to design and draft plans for constructing a fire station.³⁵⁴ Denoting a challenge to the endeavor "clearly without merit,"³⁵⁵ the court hoisted Amendment 19's authorization "to provide fire protection."³⁵⁶ The county thus possessed power "to do whatever [is] necessary to carry out this goal,"³⁵⁷ the court asserted, and although "not in the architecture business," the county "may use its own employees to provide the engineering services needed to accomplish its purposes."³⁵⁸

The court subsequently drew power from the provision in the strikingly diverse settings of sanitary landfills and privatization of governmental services. The former controversy encompassed a municipality's challenge to charges for use of the county landfill, charges that the city had paid for a period of two years.³⁵⁹ Rejecting that challenge, the court reflected that under Amendment 19, a county "may provide services for garbage collection and disposal . . . ; may enact ordinances and contract with cities to provide such service; and

353. *Coweta County v. City of Newnan*, 253 Ga. 457, 459, 320 S.E.2d 747, 749-50 (1984).

354. *Georgia Ass'n of the American Inst. of Architects v. Gwinnett County*, 238 Ga. 277, 233 S.E.2d 142 (1977). Here the architectural association contested the design and supervision of the building of a fire station by a professional engineer employee of the county. The supreme court concluded that the county and its employees had not unlawfully practiced architecture. *Id.* at 277, 233 S.E.2d at 142.

355. "The second contention by the architects that [the] County does not have the constitutional power to design or draft plans and specifications or to erect a fire station is clearly without merit." *Id.* at 280, 233 S.E.2d at 144.

356. *Id.* "The Georgia Constitution enables the counties to provide fire protection." *Id.*

357. *Id.*

358. *Id.* The court thus affirmed the trial judge's rejection of the architect association's challenge. *Id.*

359. *City of Covington v. Newton County*, 243 Ga. 476, 254 S.E.2d 855 (1979). The municipality dumped its garbage in the county landfill, and "[t]he rates charged were set out in a county ordinance establishing fees for commercial haulers which included all municipalities who choose to use the county's landfill rather than maintain their own." *Id.* at 476, 254 S.E.2d at 856.

determine and fix reasonable charges and fees for the service.”³⁶⁰ Finding an “implied contract” between the parties,³⁶¹ the court deemed both the county’s landfill and its fee schedule constitutionally authorized.³⁶²

The privatization face-off featured an agreement by county commissioners to “employ a private corporation to procure, manage, supervise and direct the personnel in the fire protection delivery service.”³⁶³ Appraising an attack upon the agreement by taxpayers and employees of the county fire department,³⁶⁴ the court immediately engaged Amendment 19.³⁶⁵ That provision’s enumeration of the “fire protection” service “clearly authorizes a county to decide to provide its citizens with fire protection services, and then to implement that decision.”³⁶⁶ “In particular,” the court reasoned, “counties are authorized to enter contracts to provide fire protection, even though that particular contractual power is not expressly conferred.”³⁶⁷ The court adamantly refused to second guess the agreement’s appropriateness: “The discretion to choose among lawful means is given by law to the Commissioners, not to the court.”³⁶⁸

Amendment 19’s exceptions may feature as prominently as its authorizations. For example, the provision declares that “[u]nless

360. *Id.*

361. *Id.*

362. *Id.* The court affirmed the trial court’s judgment for the county. *Id.*

363. *Smith v. Board of Comm’rs of Hall County*, 244 Ga. 133, 134, 259 S.E.2d 74, 75 (1979). The commissioners adopted a resolution terminating the county funding of the county fire department and subsequently entered into a contract for the service with a private corporation. *Id.* at 733-34, 259 S.E.2d at 75.

364. *Id.* at 134, 259 S.E.2d at 75. “Plaintiffs challenge the contract for various reasons as being beyond the Commissioners’ authority, the principal reason proffered being that the Commissioners lack authority to cease funding and effectively dissolve the current Fire Department and lack authority to replace it with a private corporation.” *Id.*

365. *Id.* at 137, 259 S.E.2d at 77.

The Constitution of Georgia . . . provides in pertinent part that “in addition to and supplementary of any powers now conferred upon and possessed by any county, municipality, or any combination thereof, any county, any municipality and any combination of any such political subdivisions may exercise the following powers and provide the following services: (1) . . . fire protection”

Id.

366. *Id.* at 138, 259 S.E.2d at 77. “In implementing that decision, counties are authorized to do whatever [is] necessary to carry out this goal.” *Id.* (quoting *Georgia Ass’n of the American Inst. of Architects v. Gwinnett County*, 238 Ga. 277, 280, 233 S.E.2d 142 (1977)).

367. *Id.*

368. *Id.*, 259 S.E.2d at 78. The court affirmed the trial court’s judgment upholding the validity of the county contract. *Id.* at 144, 259 S.E.2d at 81.

otherwise provided by law," a local government may not exercise or provide the authorized "powers and services" inside the boundaries of another government except by contract with that government.³⁶⁹ On occasion, therefore, the contract requirement looms large in Amendment 19 litigation. On one occasion, for instance, a county urged the requirement to prevent the city's expansion of water service into the county.³⁷⁰ Reviewing the city's demand for county right-of-way permits, the supreme court noted a local statute empowering the city's extraterritorial distribution of water.³⁷¹ That local statute "is a 'law' within the meaning of [Amendment 19's] phrase 'unless otherwise provided by law.'"³⁷² Indeed that phrase "allows for individual variations among [local governments] which have already been provided by law."³⁷³ In this case, the court held, the prior-existing "law" trumped Amendment 19's contract requirement³⁷⁴ and entitled the municipality to county right-of-way permits.³⁷⁵

The court employed the same rationale in appraising a landowner protest to municipal condemnation of property for purposes of sewer expansion.³⁷⁶ The landowners relied squarely upon Amendment 19's contract requirement.³⁷⁷ Absent a contract between the two governments, they argued, the municipality lacked power to extend its operations into the county. Again, the court's first analytical focus fastened upon a local statute authorizing municipal condemnation "*in or*

369. GA. CONST. art. IX, § 2, para. 3(b)(1)(2).

370. *Coweta County v. City of Newnan*, 253 Ga. 457, 320 S.E.2d 747 (1984). Upon request of citizens in the unincorporated area of the county, the municipality sought right-of-way permits from the county for locating its water lines. The county denied the city's request "because there was no contract between the city commission and the county concerning supplying these services in the county . . ." *Id.* at 458, 320 S.E.2d at 749. Subsequently, the municipality petitioned for mandamus. *Id.*

371. 1973 Ga. Laws 3690. "The 1973 Act clearly empowers the city commission to extend its services beyond the city limits." 253 Ga. at 458, 320 S.E.2d at 749.

372. *Id.* at 459, 320 S.E.2d at 750.

373. *Id.*

374. *Id.* at 459-60, 320 S.E.2d at 750. "Thus, there is no merit to the county's contention that the constitution requires a contract between [the] County and the city commission in order for the commission to supply water in the county because here such authority is provided by law." *Id.*

375. *Id.* at 461, 320 S.E.2d at 751. The court thus affirmed the trial judge's grant of a mandamus absolute against the county. *Id.*

376. *Kelley v. City of Griffin*, 257 Ga. 407, 359 S.E.2d 644 (1987). Plaintiffs argued "that since their land lies beyond the city limits of [the municipality], the city may not condemn absent a written agreement with the county to provide for such services." *Id.* at 407, 359 S.E.2d at 645.

377. *Id.* "In arguing that the city cannot condemn land outside the city limits, the landowners rely on [Amendment 19]." *Id.*

out of said city.”³⁷⁸ Under the “Amendment relied upon by the land-owners,” the court reasoned, “the power to condemn outside the city limits is . . . ‘otherwise provided by law’ and a contract between the city and the county is not required.”³⁷⁹

C. In Summary

For slightly more than three decades, the Georgia Supreme Court has labored at evolving the state’s home rule system, translating the nuances of legislative exposition into the practicalities of local government administration. Familiarity with this litigational corpus is essential, therefore, to an adequate understanding of the system itself.

A review of the corpus yields preliminary surprise over a case volume somewhat smaller than logically expected. In a jurisdiction traditionally committed to “legislative supremacy,” any proposal savoring of local autonomy typically encountered historic and unrelenting resistance. When, in strikingly modern times, the home rule system did eventually emerge, its supporters were surely entitled to anticipate a veritable hailstorm of legal antagonism. Overall, however, the reactionary foundational challenges never materialized.

Some of the earliest cases arising from the system’s specific grants of authority prompted legislative perfections of the system itself. These initial episodes evidenced an adjustment period during which existing local government law accommodated the system’s induction.

The bulk of the litigation has emanated from the system’s express exclusions, as in each instance the court assigns asserted powers either within or without the home rule preserve. Necessarily, these controversies rivet judicial focus to details of legislative terminology, with little or no consideration paid to overarching doctrine. Thus, the occasions are fairly unhelpful for formulating basic evaluational impressions.

The system’s two-tiered delegation structure captures the essence of Georgia’s home rule creation. Authorizing the local government to legislate at dual but distinctive levels, the structure’s dichotomy dominates analytical appraisal. The foundational distinction turns upon legislating within existing state law and legislating to change existing state law. In reviewing efforts at the first level, the court pays cognizance to such controlling statutory standards as “clearly reasonable,” and “relating to property or affairs.” The court is also clear that first-tier legislating ranks subservient to local statutes.

378. *Id.* at 408, 359 S.E.2d at 645.

379. *Id.* The court affirmed the trial court’s refusal to set aside the condemnation. *Id.* at 409, 359 S.E.2d at 646.

The second-tier delegation represents the Georgia system's most potent projection of local autonomy. It is under this delegation, tailored respectively to cities and counties, that the local government actually changes statutes previously enacted by the General Assembly. The changes may come through two elaborated procedures, the first vested in the local governing authority. In dealing with this procedure, the court has manifested a degree of maneuverability on clerical requirements but none on substantive applicability.

The other second-tier procedure vests the power of initiative and referendum in the voters of the locality. Under this procedure, when exercised as intended, the voters may mandamus legislative change over the opposition of the governing authority itself. Whether the procedure is exercised as intended depends upon the court's perception of legislative spirit and purpose, rather than literal statutory language.

Accordingly, at least three impressions arise from observing Georgia's home rule system in litigation. First, the system's modern advent has precipitated no change in Georgia's ancient law on local government power. Thus, the precept holds firm that Georgia local governments possess only expressly granted and clearly implied powers. Although home rule may provide an additional source for the judicial power search, the search itself remains restricted to express or implied authority. Consequently, the system affords no basis for an assertion of inherent local government power.

Second, home rule's appearance on the Georgia local government scene has diluted in no degree the court's traditional approach to legislative grants of authority. That approach proceeds with single-minded devotion to the interpretational technique of strict construction. In considering the legislature's grant of local governmental power, the court adamantly rejects a perspective of accommodation. Rather, the delegation's language receives a strict construction which, in the event of doubt on the issue, resolves that doubt against the local government. Home rule has thus failed generally to diminish the intensity of strict construction; on the contrary, the court applies the technique in full measure to the home rule system itself.

Finally, Georgia's home rule arrangement stands largely devoid of definitive judicial elaboration. The first three decades of the system's existence leave unresolved an astonishing assortment of pivotal doctrinal issues. Until some amount of resolution occurs, by litigation or otherwise, the ultimate overall success or failure of Georgia home rule remains an open question.

IV. UTILIZATION OF THE SYSTEM

With the Georgia home rule system's formulation elaborated, and its judicial treatment reviewed, inquiry now shifts to the issue of impact. The impact issue in turn focuses primarily upon two considerations. The first consideration goes to the tangible volume of utilization. To what numerical extent do Georgia local governments actually employ the system in dealing with their governmental needs and concerns? To what extent, concomitantly, does the General Assembly, by local legislation, continue to address those uniquely local affairs? Answers to those inquiries will go far to reflect the system's practical worth in the daily administration of local government.

The second consideration deals with the objects impacted. What precise needs and concerns are addressed by local governments under the power they derive from the home rule system? What facets of governmental administration do local governments deem most appropriate (or inappropriate) for home rule disposition? Answers to those inquiries will isolate the subjects of home rule impact. They are the subjects which, in the absence of home rule, would have experienced different treatment over the past three decades of local government administration. Those subjects figure prominently in calculating the substantive value of Georgia's home rule system.

For reflection upon both considerations, it is necessary to recall (yet again) the Georgia system's two-tier delegations. At the first level, the local government is empowered to adopt "clearly reasonable" measures dealing with its local affairs but not changing state law.³⁸⁰ The system does not require local governments to report these measures to any outside source nor does it mandate their state-wide distribution. Consequently, except within the local government itself, these measures are generally unavailable for analysis.³⁸¹ Under the second-tier delegation, in contrast, the local government legislates to change existing local statutes.³⁸² Under either procedure for effecting those changes (governing authority or voter initiative), the system requires that the adopted measure be filed with and annually published by the Secretary of State.³⁸³ These are the measures available, therefore, for determining the impact of Georgia's home rule system.

380. GA. CONST. art. IX, § 2, para. 1(a); O.C.G.A. § 36-35-3(a).

381. Virtually the only exception is when such measures result in litigation that goes to the Georgia Supreme Court. That litigation has received discussion, *supra*.

382. GA. CONST. art. IX, § 2, para. 1(b)(1)(2); O.C.G.A. § 36-35-3(b)(1)(2).

383. GA. CONST. art. IX, § 2, para. 1(g); O.C.G.A. § 36-35-5.

A. *County Utilization*

1. Numerical Utilization. The period of utilization here examined begins with the Georgia home rule system's origin mid-way through the 1960 decade (1966) and continues through most of the 1990 decade (through 1998). Thus, the 33 years studied fall within four different decades, which in turn provide appropriate periods for measurement. Both independently, and as contrasted, utilizations within these four periods exude meaningful chronological guides for gauging system impact.³⁸⁴

a. Getting Started: (1966 to 1970). As earlier described, the 1966 amendment to the Georgia Constitution extended home rule authority directly to counties without the necessity of implementing legislation from the General Assembly.³⁸⁵ That amendment empowered counties (under the second-tier delegation) to adopt ordinances and resolutions amending or repealing local statutes affecting the governing authority.³⁸⁶ For virtually the last half of the 1960 decade, therefore, counties enjoyed a power theretofore unknown in the annals of Georgia local government law.

Perhaps counties were slow to receive the word on home rule availability. Perhaps, although aware of availability, a healthy respect for history cautioned against precipitant county utilization. Whatever the reason(s), Georgia counties moved with extreme hesitancy to embrace the new order. Indeed, the reports reveal that only one county adopted one home rule measure from the time of the system's origin until the end of the 1960 decade.

Table I indicates the period's lack of county home rule activity.

384. All the information here reported regarding local government measures adopted under home rule comes from the actual examination of Volume II of the session laws ("Georgia Laws") of each session of the Georgia General Assembly. Any discrepancies that may appear between the figures reported here and those in the actual volumes are the result of human error. Hopefully, such errors have been held to the minimum.

385. GA. CONST. art. IX, § 2, para. 1.

386. GA. CONST. art. IX, § 2, para. 1(b)(1)(2).

TABLE I
County Home Rule Measures 1966 to 1970

<u>Year</u>	<u>No. of County Measures</u>	<u>No. of Counties Effecting Measures</u>
1966	0	0
1967	0	0
1968	1	1
1969	0	0
TOTAL:	1	1

b. Settling In: (1970 to 1980). With the turn of the decade, counties cautiously felt their way into the new legal regime. Still in relatively small numbers per year, but finally reflecting cognizance of availability, county governing authorities ventured into the procedural labyrinth prescribed by the home rule system. Utilizing those procedures, a number of counties reported the adoption of measures amending or repealing their local statutes. Indeed, during the ten-year period of scrutiny, some 26 different counties registered the adoption of a total of 38 such measures.

Table II reflects the yearly activity of the decade.

TABLE II
County Home Rule Measures 1970 to 1980

<u>Year</u>	<u>No. of County Measures</u>	<u>No. of Counties Effecting Measures</u>
1970	3	1
1971	1	1
1972	1	1
1973	1	1
1974	5	4
1975	5	3
1976	4	3
1977	3	3
1978	12	6
1979	3	3
TOTAL:	38	26

c. Up and Running: (1980 to 1990). As they entered the decade of the 1980s, counties broke the shackles of parliamentary reticence and entered as full participants in the home rule legislating scenario. Reflecting a governmental confidence heretofore lacking, more counties

addressed more concerns via home rule than ever before. In numbers approaching one-half of all Georgia counties, reports reflected home rule adoptions on a range of local matters. A new comfort level obviously pervaded county government, a mood signaling at least conditional acceptance of modern home rule conveniences. By the conclusion of the decade, some 69 different counties had adopted a total of 110 home rule amendments or repeals. It assuredly was no sea change, but it was the closest Georgia county government had yet come to a "new day" in the exercise of delegated legislative authority.

Table III presents the annual developments throughout the decade.

TABLE III
County Home Rule Measures 1980 to 1990

<u>Year</u>	<u>No. of County Measures</u>	<u>No. of Counties Effecting Measures</u>
1980	12	6
1981	7	5
1982	7	6
1983	14	8
1984	10	8
1985	8	6
1986	13	6
1987	10	9
1988	26	12
1989	3	3
TOTAL:	110	69

d. Continuing On: (1990 through 1998). Developments during the first nine years of the present decade put counties on a pace roughly holding their own. Reports reflect a continuing modest but persistent pattern of legislating actions under home rule auspices. Although by no means a landslide, a number of counties view the home rule system as a convenient means for accomplishing at least some governmental needs that require the change of existing local statutes. From 1990 through the 1998 report, some 49 counties utilized their home rule authority to adopt a total of 81 measures.

Table IV reflects the decade's activity thus far.

TABLE IV
County Home Rule Measures 1990 through 1998

<u>Year</u>	<u>No. of County Measures</u>	<u>No. of Counties Effecting Measures</u>
1990	8	6
1991	5	4
1992	12	7
1993	10	5
1994	9	6
1995	7	5
1996	3	3
1997	12	5
1998	15	8
TOTAL:	81	49

e. Multiple Utilizations. As indicated by each year's report, some counties adopt more than one home rule measure. For this reason, of course, each decade's summary reflects fewer numbers of counties than total measures. There may be interest, therefore, in the precise number of counties within each decade that make multiple utilizations of their home rule authority.

Table V reflects the number of counties that adopted three or more home rule measures during the span of each decade.

TABLE V
Multiple County Utilization: A 33-Year Tabulation

<u>Decade</u>	<u>No. of Multiple Utilizations</u>
1966 to 1970	0
1970 to 1980	1 County: 15 Amendments
	4 Counties: 3 Amendments Each
1980 to 1990	1 County: 25 Amendments
	1 County: 13 Amendments
	1 County: 7 Amendments
	1 County: 6 Amendments
	3 Counties: 4 Amendments Each
1990 to 1999	4 Counties: 3 Amendments Each
	1 County: 16 Amendments
	1 County: 15 Amendments
	1 County: 14 Amendments
	1 County: 6 Amendments
	1 County: 5 Amendments
	1 County: 3 Amendments

These tabulations reveal, therefore, that during the 1970 decade 5 counties were responsible for a total of 18 (47%) of the 38 county home rule amendments adopted; that during the 1980 decade, 11 counties adopted 58 (53%) of the 110 amendments reported; and that during the 1990 decade 6 counties accounted for 59 (73%) of the 81 amendments adopted. When considered in this light, the total home rule utilizations for each decade bode less impressive.

f. In Summary. These reports on tangible volume of utilization reflect a general home rule aloofness on the part of Georgia counties. Manifesting extreme caution at the point of origin, numerical utilization increased only modestly during the system's first full decade of existence. Experiencing a slight surge of activity around the turn of the 1980 decade, utilizations evidence a steady but unremarkable pace through most of the 1990s. In sum, numerical utilizations of the past 33 years—an overall average of only 7 home rule measures each year—constitute a disappointment. Although a number of counties routinely employ the system to amend or repeal local statutes, a vast majority of Georgia's 159 counties continue their annual trek to the General Assembly. In 1998, for example, a year during which counties adopted a total of 15 home rule measures, the General Assembly enacted 256 local statutes for specifically designated counties. Although some of these statutes are assuredly still necessary for treating some governmental matters, a number of the needs addressed could likely have been handled under the second-tier delegation of the county home rule system.

Table VI presents a composite of numerical county home rule utilizations from the system's inception to the present.

TABLE VI
County Home Rule Measures: A 33-Year Composite

<u>Years</u>	<u>No. of County Home Rule Measures Adopted</u>	<u>Average No. of Measures Per Year</u>
1966 to 1970	1	0.25
1970 to 1980	38	4
1980 to 1990	110	10
1990 to 1999	81	9
33 Years	230	7

2. Subject Utilization. With numerical utilization in place, the impact focus shifts to subject matter coverage. This focus fixes those facets of government affording the home rule system its substantive

character. In mass, they manifest county home rule content over Georgia's past three decades.

The impossibility of detailing the precise subjects of 230 measures mandates broad classifications of governmental topics. Although even these cannot include every subject treated, the categories will assist in forming meaningful substantive impressions. They accurately illustrate home rule's reach into the context of Georgia county government.

a. Decade 1960. With only one home rule measure reported by counties within the first four years of the system's existence, the substantive reach was limited indeed.

Table VII, simply for the sake of completeness, observes the subject treated.³⁸⁷

TABLE VII
County Home Rule Subjects 1966 to 1970

<u>Most Popular Home Rule Subjects</u>	<u>No. of Measures Treating Subjects</u>
Personnel	1

b. Decade 1970. As counties took their first tentative steps into home rule government, their scope of operations necessarily expanded. Although the resulting 38 measures treated a range of governmental needs and concerns, most fell within generally structured subject areas.

Table VIII reflects the subjects treated by home rule measures during the decade.³⁸⁸

387. A measure pertaining to the clerk of the county commissioners.

388. "Governing Authority" includes measures dealing with such matters as the time of meetings of the body, bonds for service, and prohibitions upon nepotism; "Pensions and Retirement" includes measures dealing with such matters as changes in the pension act, pension board investments, retirement amounts; "Merit System and Civil Service" includes measures dealing with such matters as merit system councils, and changes in the civil service system act; "Personnel" includes measures dealing with such matters as executive assistants, county attorneys, and the establishment of a personnel board; "Finances" includes measures dealing with such matters as auditors, and depositories of county funds; "Purchasing" includes measures dealing with such matters as increasing the ceiling on purchases. Classifications employed in further Tables are of the same nature and will not be separately elaborated.

TABLE VIII
County Home Rule Subjects 1970 to 1980

<u>Most Popular Home Rule Subjects</u>	<u>No. of Measures Treating Subjects</u>
Governing Authority	10
Pensions and Retirement	9
Merit System and Civil Service	7
Personnel	3
Finances	3
Purchasing	2

c. Decade 1980. With the surge of county home rule activity at the inception of the 1980 decade, the subject matter encompassed a spectrum of governmental functions. By virtue of these home rule legislating ventures, numerous aspects of county administration received attention and change.

Table IX indicates the system's more impressive reach during this decade.

TABLE IX
County Home Rule Subjects 1980 to 1990

<u>Most Popular Home Rule Subjects</u>	<u>No. of Measures Treating Subjects</u>
Pension and Retirement	19
Governing Authority	16
Personnel	12
Merit System and Civil Service	10
Finances	8
Development	8
Purchasing	7
Taxation	7
Franchises and Licensing	5
Planning and Zoning	3
Streets	2
Utilities	2

d. Decade 1990. County home rule activity in the present decade reveals greater concentration in relatively few subject areas. Indeed, two general classifications ("Pensions and Retirement" and "Governing Authority") account for more than half the total 81 home rule measures adopted.

Table X reflects the relatively narrow reach of 1990 home rule endeavors.

TABLE X
County Home Rule Subjects 1990 to 1999

<u>Most Popular Home Rule Subjects</u>	<u>No. of Measures Treating Subjects</u>
Pensions and Retirement	33
Governing Authority	11
Finances	8
Merit System and Civil Service	7
Purchasing	7
Personnel	4
Judicial Matters	3

e. In Summary. Although numerically disappointing, county home rule utilizations have touched a fairly broad range of governmental functions. Even a rough effort at categorizing those functions provides helpful insight into the process. The groupings isolate rather decisively pivotal points within the governmental spectrum most impacted by the shaping influences of the home rule phenomenon. For example, they reveal Georgia county governments feel most comfortable in utilizing home rule to reward the services of their officers and employees. Indeed, measures dealing with "Pensions and Retirement" and "Merit System and Civil Service" account for well over one-third of the total home rule output. Other impressively impacted topics include the "Governing Authority" itself, as well as "Personnel," "Finances," and "Purchasing." In total, the focused topics realistically characterize Georgia's county home rule content for the past three decades.

Table XI offers a composite of that characterization.

TABLE XI
County Home Rule Subjects 1966 through 1998

<u>Subject</u>	<u>No. of Measures</u>	
Pensions and Retirement	61	(26%)
Governing Authority	37	(16%)
Merit System and Civil Service	24	(10%)
Personnel	20	(9%)
Finances	19	(8%)
Purchasing	16	(7%)
Development	9	(4%)
Taxation	8	(3%)
Franchises and Licensing	5	(2%)
Planning and Zoning	5	(2%)
Judicial Matters	4	(2%)
Other	22	(11%)
TOTAL:	230	(100%)

B. *Municipal Utilization*

Generally the approach previously employed to depict county home rule utilization will be followed for municipalities as well. Both treatments are, of course, necessary for a complete evaluation of Georgia's home rule system. Additionally, the parallel utilization structures should facilitate revealing comparisons and contrasts within the system. As previously described, although the county and municipal components bear overwhelming similarities, distinctions do punctuate their origins and their details of formulation. Whether these distinctions carry over into facets of utilization warrants analytical consideration.

Again, therefore, perusal begins at the beginning (1966) and ends at the end (1998). Focused upon four periods comprising the years within the four relevant decades, attention first devolves to municipal numerical practices.

1. Numerical Utilization. Upon the General Assembly's enactment of the Municipal Home Rule Act in 1965,³⁸⁹ the first report on employment of the statute appeared in 1966. As with counties, therefore, the remainder of the 1960 decade provides the point of departure for reviewing municipal utilization.

a. Getting Started: (1966 to 1970). Perhaps Georgia's municipalities are by nature a bit more curious than its counties. Perhaps that curiosity prompts a slightly more adventuresome spirit. Or perhaps the primary distinction goes simply to numbers—there are so many more cities than counties. Whatever the reason(s), municipalities reported adoptions of home rule charter amendments from the system's inception. Although the numbers scarcely overwhelmed, and a sense of governmental caution clearly prevailed, seven municipalities registered amendments in 1966. Moreover, a total of 45 measures materialized in the first four years of the system's existence.

Table XII indicates the period's total municipal home rule activity.

TABLE XII

Municipal Home Rule Measures 1966 to 1970

<u>Year</u>	<u>No. of Municipal Measures</u>	<u>No. of Municipalities Effecting Measures</u>
1966	7	7
1967	8	5
1968	16	7
1969	14	4
TOTAL:	45	23

389. O.C.G.A. § 36-35-1 to -8 (1993 & Supp. 1998).

b. Settling In: (1970 to 1980). During the first full decade in which they possessed home rule powers, municipalities employed their authority in a gradually escalating pattern. Yearly utilizations ranged from a low of 4 measures in 1972 to a high of 31 measures in both 1978 and 1979. As awareness of their home rule status expanded, municipalities exemplified a general willingness to experiment with charter changes on a variety of fronts. By the conclusion of the 1970 decade, a total of 115 municipalities registered total adoptions of 212 charter amendments.

Table XIII reflects the yearly home rule activity of the decade.

TABLE XIII
Municipal Home Rule Measures 1970 to 1980

<u>Year</u>	<u>No. of Municipal Measures</u>	<u>No. of Municipalities Effecting Measures</u>
1970	12	6
1971	18	7
1972	4	3
1973	22	12
1974	26	11
1975	25	13
1976	21	13
1977	22	16
1978	31	16
1979	31	18
TOTAL:	212	113

c. Up and Running: (1980 to 1990). With the inception of the 1980 decade, municipal utilization leveled out to some degree of numerical consistency. Although some fluctuations still occurred (from a low of 18 amendments in 1987 to a high of 54 amendments in 1988), the general emerging pattern hovered at roughly 30 utilizations per year. By the decade's conclusion, a total of 177 municipalities had reported the adoptions of 305 charter amendments. Home rule, it appeared, claimed a steadily increasing presence throughout the world of municipal government.

Table XIV presents the decade's chronological history of utilizations.

TABLE XIV
Municipal Home Rule Measures 1980 to 1990

<u>Year</u>	<u>No. of Municipal Measures</u>	<u>No. of Municipalities Effecting Measures</u>
1980	26	15
1981	24	16
1982	33	16
1983	33	19
1984	30	19
1985	30	20
1986	25	14
1987	18	12
1988	54	24
1989	32	22
TOTAL:	305	177

d. Continuing On: (1990 through 1998). Municipal utilizations during the first nine years of the present decade have slowed. At their current pace, adoptions will revert to a rate roughly comparable to that of the 1970 decade. That result would in turn distinguish the 1980 decade as the one (of the four here surveyed) most hospitable to municipal home rule utilization. Whether the present decade's experience constitutes an aberration or rather a forerunner of the future remains to be seen.

Table XV reflects the decade's activity thus far.

TABLE XV
Municipal Home Rule Measures 1990 through 1998

<u>Year</u>	<u>No. of Municipal Measures</u>	<u>No. of Municipalities Effecting Measures</u>
1990	22	12
1991	13	12
1992	23	16
1993	14	11
1994	32	21
1995	24	16
1996	4	4
1997	16	12
1998	39	29
TOTAL:	187	133

e. Multiple Utilizations. As with counties, some municipalities adopt more than one home rule measure, thus causing each decade's summary

to reflect fewer numbers of municipalities than total measures. There may be merit, therefore, in indicating the precise number of municipalities in each decade that make multiple utilizations of their home authority.

Table XVI reflects the number of municipalities adopting three or more home rule measures during the span of each decade.

TABLE XVI
Multiple Municipal Utilizations: A 33-Year Tabulation

<u>Decade</u>	<u>No. of Multiple Utilizations</u>
1966 to 1970	1 Municipality: 21 Measures
	1 Municipality: 7 Measures
	1 Municipality: 3 Measures
1970 to 1980	1 Municipality: 54 Measures
	1 Municipality: 17 Measures
	1 Municipality: 15 Measures
	1 Municipality: 14 Measures
	1 Municipality: 8 Measures
	1 Municipality: 7 Measures
	1 Municipality: 6 Measures
	5 Municipalities: 5 Measures Each
	1 Municipality: 4 Measures
	1 Municipality: 3 Measures
1980 to 1990	1 Municipality: 31 Measures
	1 Municipality: 24 Measures
	1 Municipality: 23 Measures
	1 Municipality: 17 Measures
	1 Municipality: 14 Measures
	2 Municipalities: 12 Measures Each
	2 Municipalities: 8 Measures Each
	2 Municipalities: 7 Measures Each
	2 Municipalities: 6 Measures Each
	3 Municipalities: 5 Measures Each
	2 Municipalities: 4 Measures Each
2 Municipalities: 3 Measures Each	
1990 to 1999	1 Municipality: 19 Measures
	1 Municipality: 10 Measures
	2 Municipalities: 9 Measures Each
	1 Municipality: 7 Measures
	1 Municipality: 6 Measures
	2 Municipalities: 4 Measures Each
	4 Municipalities: 3 Measures Each

These tabulations reveal, therefore, that during the 1960 decade, 3 municipalities were responsible for 31 (69%) of the 45 municipal home rule charter amendments adopted; that during the 1970 decade, 14 municipalities were responsible for 153 (72%) of the 212 amendments adopted; that during the 1980 decade, 20 municipalities were responsible for 204 (67%) of the 305 amendments adopted; and that during the 1990 decade, 12 municipalities accounted for a total of 80 (43%) of the 187 amendments adopted. Once again, when considered in the light of these multiple adoptions, total municipal utilizations per decade lose a measure of their luster.

f. In Summary. Georgia municipalities accepted with alacrity the invitation tendered by the 1965 Home Rule Act for a degree of autonomy in their local affairs. Although relatively few in number, and clearly cautious in the exercise, municipalities reported home rule activity from the system's inception. Amending their charters under the statute's second-tier delegation, some 23 Georgia cities employed this unprecedented authority by the conclusion of the 1960 decade.

Although somewhat erratic, municipal home rule utilizations assumed a gradually escalating pattern in succeeding years, displaying both awareness of opportunity and receptiveness to experimentation. Through the 1970's and at the conclusion of the 1980 decade, municipal charter changes under the auspices of home rule authorization proceeded apace. Although the present decade reflects a slowing of the activity, its import is necessarily unclear. The experience may foretell the tapering off of a movement never fully in gear; contrarily, it may represent only a temporary lull between eras of home rule maturation.

To be sure, the municipal utilization record leaves a great deal to be desired. During even its most impressive decade (1980-1990), only a fraction of existing Georgia municipalities (177 of more than 400) employed home rule authority to effect charter amendments. Moreover, the General Assembly continues to enact local statutes covering all manner of municipal concerns. In 1998, for example, a year during which municipalities adopted a total of 39 charter amendments, the General Assembly enacted 148 local statutes applying to specifically designated municipalities. Accordingly, it appears evident that Georgia's municipalities, like its counties, fail to fully exploit their home rule status.

Table XVII presents a composite of numerical municipal home rule utilizations from the system's inception until the present.

TABLE XVII
Municipal Home Rule Measures: A 33-Year Composite

<u>Years</u>	<u>No. of Municipal Home Rule Measures Adopted</u>	<u>Average No. of Measures Per Year</u>
1966 to 1970	45	11
1970 to 1980	212	21
1980 to 1990	305	30.5
1990 to 1999	187	21
33 Years	749	23

2. Subject Utilization. Accompanying the account of municipal numerical practices, analysis now shifts to the subjects of those utilizations. As with the counterpart consideration of the county experience, broad classifications of governmental topics facilitate the review. These categories, admittedly arbitrary, provide a necessary handle for exploring home rule's substantive impact upon Georgia municipal government.

a. Decade 1960. Municipal activity at the system's inception touched a striking array of governmental functions. This fairly expansive spectrum stood in considerable contrast to the early years of county utilizations.

Table XVIII portrays the system's substantive reach into municipal government during the first four years of its existence.³⁹⁰

390. Simply to afford illustration of some of the classifications established, "Personnel" covers measures dealing with such topics as director of public works and planning director; "Elections" covers measures dealing with such topics as annual elections and election districts; "Pensions and Retirement" covers measures dealing with such topics as employees' retirement, and pension systems; "Taxation" covers measures dealing with such topics as ad valorem taxation, sewer assessments, and sanitary assessments; "Police" covers measures dealing with such topics as board of public safety, police uniforms, and fines; "Judicial Matters" covers measures dealing with such topics as recorder and recorder's court; "Merit System and Civil Service" covers measures dealing with such topics as merit system and classified service; "Streets" covers measures dealing with such topics as streets and parking and transit; "Purchasing" covers measures dealing with such topics as purchasing agent and purchase price of motor fuel; "Finances" covers measures dealing with such topics as appropriations and director of finance. Other classifications apply to similarly selected topics and will not be enumerated for each period reported.

TABLE XVIII
Municipal Home Rule Subjects 1966 to 1970

<u>Most Popular Home Rule Subjects</u>	<u>No of Measures Treating Subjects</u>
Personnel	10
Elections	5
Pensions and Retirement	4
Taxation	4
Police	4
Judicial Matters	3
Merit System and Civil Service	2
Streets	2
Purchasing	2
Finances	2

b. Decade 1970. The first full decade of the municipal home rule experience substantially broadened its sphere of operations. Accordingly, the magnitude of the resulting 212 charter amendments renders summarization more difficult. Nevertheless, an arrangement of the more popular subject areas will afford an impression of the era's substantive coverage.

Table XIX reflects subjects treated by home rule measures during the decade.

TABLE XIX
Municipal Home Rule Subjects 1970 to 1980

<u>Most Popular Home Rule Subjects</u>	<u>No. of Measures Treating Subjects</u>
Personnel	34
Pensions and Retirement	31
Governing Authority	22
Judicial Matters	21
Police	13
Merit System and Civil Service	11
Elections	11
Utilities	10
Finances	9
Taxation	8
Purchasing	7
Streets	5
Fire	5

c. Decade 1980. The 1980 decade encompassed the largest number of municipal home rule measures for any period reported. With 305 charter amendments adopted by 177 different municipalities, the classifications can indicate little more than the diversity of subjects

treated. Those subjects stood in the front lines of the municipal home rule evolution.

Table XX presents the arrangement of covered subjects for the 1980 decade.

TABLE XX

Municipal Home Rule Measures 1980 to 1990

<u>Most Popular Home Rule Subjects</u>	<u>No. of Measures Treating Subjects</u>
Governing Authority	70
Pensions and Retirement	45
Judicial Matters	40
Personnel	26
Police	18
Elections	12
Development	12
Taxation	11
Utilities	11
Streets	9
Purchasing	8
Franchises and Licensing	7
Merit System and Civil Service	5
Finances	5

d. Decade 1990. The apparent slackening of municipal home rule charter changes during the present decade likewise worked a slight reduction in subject diversity. The subjects receiving the most attention, however, generally remained the same as those of previous decades.

Table XXI reflects the topical coverage of municipal home rule in recent years.

TABLE XXI

Municipal Home Rule Measures 1990 to 1999

<u>Most Popular Home Rule Subjects</u>	<u>No. of Measures Treating Subjects</u>
Governing Authority	46
Elections	23
Pensions and Retirement	20
Personnel	18
Judicial Matters	15
Utilities	11
Finances	10
Purchases	8
Taxation	7
Franchises and Licensing	6
Development	6
Streets	4

e. In Summary. Municipal home rule's reach into the corpus of municipal government, as effected by charter changes for the past 33 years, reveals an impressive expanse. The subject matter groupings, however tenuous or arbitrary, indicate that few basic governmental functions remained beyond coverage. Exercising the home rule system's unprecedented grant of authority, municipal governments legislated where only the General Assembly previously trod. Although perhaps numerically disappointing, the experience nevertheless stands in remarkable contrast to Georgia's historic and ingrained aversion to local government autonomy.

The groupings themselves expose subject areas of intense home rule concentration. For example, the general topics of "Governing Authority" and "Pensions and Retirement" draw roughly one-third of the total charter changes. Indeed the top five objects of municipal attention account for some 62% of the amending endeavors. The subjects observed thus provide a compelling profile of Georgia's three-decade experiment with municipal home rule.

Table XXII offers a substantive composite of that experiment.

TABLE XXII
Municipal Home Rule Subjects 1966 through 1998

<u>Subject</u>	<u>No. of Measures</u>	
Governing Authority	139	(19%)
Pensions and Retirement	100	(13%)
Personnel	88	(12%)
Judicial Matters	79	(11%)
Elections	51	(7%)
Police	38	(5%)
Utilities	33	(4%)
Taxation	30	(4%)
Finances	26	(3%)
Purchasing	25	(3%)
Development	21	(3%)
Merit System and Civil Service	20	(3%)
Streets	20	(3%)
Franchises and Licensing	14	(2%)
Fire	10	(1%)
Other	55	(7%)
TOTAL:	749	(100%)

C. Comparisons and Contrasts

Although anchored in distinctive legal foundations and couched in differing details of formulation, the Georgia county and municipal home rule systems are also highly similar. They emerge from a heritage of decisional law which treats the local government entities in almost identical fashion.³⁹¹ Additionally, the systems have operated over precisely the same period of time. With their separate utilization histories elaborated, perhaps there is value in concluding comments on commonality.

1. Numerical Utilization. As previously recounted, counties responded somewhat less enthusiastically than municipalities to home rule's arrival on the Georgia local government scene. During the first four years of the system's existence (1966 to 1970), only one county employed its authorization to amend local statutes. Over the same period, in contrast, some 45 municipalities utilized the power of changing their charters. In succeeding years, however, county utilization substantially increased. Indeed, considering the extent to which municipalities outnumber counties, utilization records differ less than they initially appear.

Table XXIII consolidates the two composites.

TABLE XXIII
Local Government Home Rule Measures: A 33-Year Comparison

<u>Years</u>	<u>County</u> <u>Measures</u>	<u>Average</u> <u>Per Year</u>	<u>Municipal</u> <u>Measures</u>	<u>Average</u> <u>Per Year</u>
1960 Decade	1	0.25	45	11
1970 Decade	38	4	212	21
1980 Decade	110	10	305	31
1990 Decade	81	9	187	21
33 Years	230	7	749	23

2. Subject Utilization. In utilizing their home rule powers to amend and repeal local statutes, counties and municipalities have touched fairly broad spectrums of governmental functions. These can be depicted only by arbitrary groupings of general subject areas. The tabulations locate rather decisively, however, those facets of local government administration most affected by the home rule experience.

391. Judicial treatment of the systems themselves appears *supra*.

They thus supply substantive content to the most intriguing development in Georgia local government law over the past three decades.

Table XXIV presents a composite of the six most popular subjects for county and municipal home rule treatment during the past 33 years.

TABLE XXIV
Local Government Home Rule's Most Popular Subjects:
1966 through 1998

<u>County Subjects</u>	<u>No. of Measures</u>	<u>Municipal Subjects</u>	<u>No. of Measures</u>
Pensions and Retirement	61 (26%)	Governing Authority	139 (19%)
Governing Authority	37 (16%)	Pensions and Retirement	100 (13%)
Merit System & Civil Service	24 (10%)	Personnel	88 (12%)
Personnel	20 (9%)	Judicial Matters	79 (11%)
Finances	20 (9%)	Elections	51 (7%)
Purchasing	16 (7%)	Police	38 (5%)

V. CONCLUSION

In 1875, in routine revision of its state constitution, Missouri introduced the concept of "home rule" to American local government law. With the ascendancy of Dillon's legislative supremacy "rule," Missouri's innovation eventually claimed "next best thing" status to an "inherent right" of local self-government. Now granted or authorized by most state constitutions, home rule represents local government's best hope for organizational independence. It is a hope, however, formulated in as many fashions as the number of adopting jurisdictions.

In 1965, finally utilizing a 1954 constitutional authorization, Georgia emerged on the home rule scene. Albeit in unique fashion, Georgia's system encompassed both municipalities and counties; it also declared numerous governmental matters beyond home purview. The system effected its core grant of legislating power via an intriguing two-tier delegation. At the vaguely structured first level, the local government could deal with its property and affairs within the confines of existing state law. The second-tier authorization empowered the local government to actually change state law.

As of 1966, therefore, the first year of its operation, the Georgia home rule system raised expectations on two fronts: first, hopefully, utilization; and second, assuredly, litigation.

For slightly more than three decades, the litigation has (somewhat surprisingly) largely failed to plumb Georgia's home rule essence.

Focusing, in the main, upon the system's specific grants and express reservations, the cases present mere issues of inclusion or exclusion. Accordingly, the Georgia Supreme Court simply locates the challenged exercise within or without home rule coverage. The instances afford the court virtually no opportunity for crafting or elaborating a judicial home rule philosophy. The result is an ominous void in Georgia local government law.

The report is similarly incomplete for home rule utilizations. Because actions under the first-tier delegation receive no centralized publication, their extent goes untabulated. Fortunately local government's second-tier legislating must be annually published. An analysis of those reports yields a striking profile of Georgia home rule in action. Utilization touched an impressive range of local government concerns, and (at least until lately) the volume of utilization continued to increase. Although too few local governments make full use of the system (old local statute habits die hard), the potential is clearly present for change in the fabric of Georgia local government law.

Whatever the ultimate fate of Georgia's home rule system, its two-pronged issue of impetus will, both legally and politically, remain indomitable: (1) to what extent home rule empowers the local government; and (2) to what extent home rule represses the state.

