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Local Government Litigation: Some Pivotal Principles

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SPECIAL CONTRIBUTION

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by R. Perry Sentell, Jr.*

I. INTRODUCTION

The legal sage, Oliver Wendell Holmes, Jr., once observed that "[f]acts do not often exactly repeat themselves in practice; but cases with comparatively small variations from each other do."[1] Although Holmes employed the observation in a specific litigation context,[2] his insight

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1. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 124 (1881).

2. Students of tort law (and whom among us is not?) will fondly remember Holmes's employment of the observation in urging a larger role for the trial judge in negligence cases. They will recall that some forty-six years after espousing this development, Justice Oliver Wendell Holmes, Jr. put the principle into play via his famous decision of *Baltimore & Ohio Railroad v. Goodman*, 275 U.S. 66 (1927). Seven years later, the Supreme Court (per Justice Cardozo) purported to "limit" the *Goodman* principle in the case of *Pokora v. Wabash Railway Co.*, 292 U.S. 98 (1934).

obviously possesses a broader relevance. At other junctures as well, that is to say, law's continuity bears emphasis as a fundamental feature of complete juridical synthesis.

This notion may initially appear unpersuasive in particular settings. In the pervasive realm of local government law, for example, novel issues continually confront the appellate courts with daunting questions of first impression. In that sphere, and peculiarly so, the tensions are intensely personal. There, the community's increasingly encroaching collectivism threatens the individual's perceptively receding uniqueness in matters unparalleled at other governmental levels. The conflicts are further fueled, moreover, by the sheer numbers of overlapping entities in the local government complex, each advancing its own jurisdictional cause. The nature of the beast, therefore, seemingly bodes discouragingly for any semblance of a recurring legal "order."

The appearance is, however, somewhat deceiving. For in local government litigation as well, it turns out, what goes around comes around. Even there, the present frequently, and undeniably, reflects the past. Particular principles work themselves into the evolving legal corpus; they assume pivotal status as analytical points of departure. They are the principles of "go to" significance when foundational conflicts arise; they are the principles that must be applied, distinguished, rejected, or ignored in moving to resolution.

The phenomenon periodically manifests itself to a degree deserving attention from those who appreciate case law's historical component. This brief account seeks to provide illustrative focus. It assembles a small assortment of modern instances in which Georgia's appellate courts retreat to the past to craft for the future. Thereby, the instances reconfirm the enduring nature of "pivotal" legal principles. Although by no means unfolding a "seamless web," the episodes do portray local government litigation's pulsating character of continuity.

II. VIGNETTES OF CONTINUITY

As indicated, the epochs of illustration are scattered throughout the corpus of Georgia local government law. Aside from the point in emphasis, they possess little else in common. Each, however, represents a tile in the mosaic here under scrutiny—a mosaic of litigational continuity. Each selected principle requires a brief sketch of both origin and modern sighting.

A. Reapportionment and Local Government

1. Background. By 1964 the United States Supreme Court had virtually completed evolution of its "one person, one vote" requirement

for both Congress and state legislatures.[3] Three more years elapsed, however, before the Court considered the principle's applicability to local governments.[4] Even then, moreover, the Court rendered three decisions in rapid-fire succession, expressly refusing to declare applicability[5] and postponing the inevitable by yet one additional year.[6] The Supreme Court thus approached local government reapportionment via a reversal of the normal order: It first declared exceptions and only later adopted the requirement.[7]

Perhaps the most interesting of the exceptions emerged from the Court's 1967 decision in *Sailors v. Kent County Board of Education,*[8] involving the membership of a Michigan county school board.[9] The challenged system featured a procedure under which the people of each unequally populated county district elected their district's school board. Subsequently, delegates from the district boards met biennially to elect a county school board. Plaintiffs alleged that the second election (by the delegates from the unequal districts) constituted discrimination and violated the one person, one vote requirement.[10] A divided three-judge

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3. This occurred in *Reynolds v. Sims*, 377 U.S. 533 (1964) and its companion cases: *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Maryland Commission for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964); *Lucas v. Forty-Fourth General Assembly of Colorado*, 377 U.S. 713 (1964).

4. For treatment of the local government reapportionment cases during these three years in both the state and federal courts, see R. Perry Sentell, Jr., *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967), *reprinted in* R. PERRY SENTELL, JR., STUDIES IN GEORGIA LOCAL GOVERNMENT LAW (3d ed. 1977).

5. Moody v. Flowers, 387 U.S. 97, 104 (1967); Sailors v. Bd. of Educ., 387 U.S. 105, 111 (1967); Dusch v. Davis, 387 U.S. 112, 114 (1967). For treatment of these cases, see Sentell, *supra* note 4, at 604, 632, 636.

6. Avery v. Midland County, 390 U.S. 474, 479 (1968). For treatment of this case, see R. Perry Sentell, Jr., Avery v. Midland County: *Reapportionment and Local Government Revisited*, 3 GA. L. REV. 110 (1968), *reprinted in* R. PERRY SENTELL, JR., STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 61 (3d ed. 1977).

7. *See Moody*, 387 U.S. at 104; *Sailors*, 387 U.S. at 111; *Dusch*, 387 U.S. at 114; *Avery*, 390 U.S. at 479.

8. 387 U.S. 105 (1967).

9. "No constitutional question is presented as respects those elections." *Id.* at 106.

10. *Id.* at 106-07.

> The alleged constitutional questions arise when it comes to the county school board. It is chosen, not by the electors of the county, but by delegates from the local boards. Each board sends a delegate to a biennial meeting and those delegates elect a county board of five members, who need not be members of the local boards, from candidates nominated by school electors.

Id.

district court dismissed plaintiffs' action,[11] and the Supreme Court affirmed the dismissal.[12]

The Court's opinion initially struck the note of a conditional assumption.[13] Even assuming the equal-population mandate's applicability to elective local officials,[14] the Court denied the precept's relevance to an appointive process.[15] That point augured pivotal to the case, for "[t]he Michigan system for selecting members of the county school board is basically appointive rather than elective."[16] Secondly, the Court deemed the appointive process completely appropriate for "administrative" officials.[17] That point likewise proved decisive, for the county school board "performs essentially administrative functions; and while they are important, they are not legislative in the classical sense."[18] Accordingly, the Court concluded, "[s]ince the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."[19]

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11. Sailors v. Bd. of Educ., 254 F. Supp. 17, 17-29 (W.D. Mich. 1966).

12. *Sailors*, 387 U.S. 111.

13. Justice Douglas wrote the Court's opinion, with Justices Harlan and Stewart concurring in the result but without separate opinions. *Id.* at 106, 111.

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> If we assume *arguendo* that where a State provides for an election of a local official or agency, the [equal population] requirements . . . must be met, we are still short of an answer to the present problem and that is whether Michigan may allow its county school boards to be appointed.

Id. at 109.

15. *Id.* at 109-110.

16. *Id.*

> The delegates from the local school boards, not the school electors, select the members of the county school board. While the school electors elect the members of the local school boards and the local school boards, in turn, select delegates to attend the meeting at which the county board is selected, the delegates need not cast their votes in accord with the expressed preferences of the school electors . . . . It is evident, therefore, that the membership of the county board is not determined, directly or indirectly, through an election in which the residents of the county participate.

Id. at 109-10 n.6.

17. *Id.* at 111. The Court expressly reserved the question of "whether a State may constitute a local legislative body through the appointive rather than the elective process." *Id.* at 109-10.

18. *Id.* at 110. Rather than discussing any tests by which "administrative functions" were so classified, the Court simply listed the powers possessed by the Michigan county school board: appointing school superintendents, preparing budgets, levying taxes, distributing delinquent taxes, employing teachers, establishing schools for children in juvenile homes, and transferring areas from one school district to another. *Id.* at 110 n.7.

19. *Id.* at 111.

Exuding its "exceptions before the rule" approach to local government reapportionment, the Supreme Court's treatment of *Sailors*—both its omissions and commissions—raised intriguing points for ponder. The "omissions," from several perspectives, counseled caution in hasty appraisal. For instance, the Court in *Sailors* did not impose the equal population requirement generally upon local governments. Nor did the Court expressly declare the requirement applicable to "elective" local government officials. Nor did the Court permit a state's evasion of the mandate by selecting local "legislative" officials via an "appointive" process. Nor did the Court tender more than the sketchiest rationale for distinguishing "elective" and "appointive" local offices. Nor did the Court proffer even an analytical hint for classifying "legislative" and "administrative" functions. As for its "commissions," the Court in *Sailors* seized upon two primary facets of modification.[20] First, it approved employment of an "appointment" process for selecting an "administrative" local government official.[21] Second, the Court worked an exemption of that "appointed" "administrative" official from the "one person, one vote" requirement.[22] With *Sailors*, therefore, the Supreme Court crafted an "exception" of indefinite dimensions, an uncertain previous restraint upon the Court's subsequently declared "rule" of local government reapportionment.

2. Recent Sighting. Over the years following the United States Supreme Court's initial confrontations with local government apportionment, the issue received virtually no attention from the Georgia courts.[23] This fact, of course, constituted no cause for inordinate surprise. With federal rights and responsibilities commonly considered consigned to the federal judiciary, the matter of legislative representation was not one ordinarily anticipated for state court dispensation.

Rare occasions, nevertheless, provoked tantalizing reflections. In 1976 the Georgia Supreme Court considered the case of *Rich v. State*,[24] a multi-faceted constitutional challenge to a state authority established to promote low income housing.[25] The creating statute provided for a

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20. *Id.* at 109-11.

21. *Id.* at 111.

22. *Id.*

23. This is not to indicate that matters of Georgia local government voting representation were not actively considered in the federal courts. *See* Rogers v. Lodge, 458 U.S. 613 (1982); Holder v. Hall, 512 U.S. 874 (1994).

24. 237 Ga. 291, 227 S.E.2d 761 (1976).

25. *Id.* at 291, 227 S.E.2d at 763. The authority sought to issue revenue bonds thereby drawing plaintiff's challenge as an intervenor. *Id.*

membership consisting of four state officials and two public appointees.[26] That membership afforded lesser populated areas and businesses disproportionate representation, plaintiff charged, urging a violation of "one person, one vote."[27] In response, a unanimous supreme court disposed of plaintiff's position with a single sentence: "It is clear from Sailors v. Board of Education . . . that the one-man, one-vote mandate of the Constitution applies only to elected officials, and is thus inappropriate where, as here, members of a clearly administrative authority are appointed."[28] In this fashion, therefore, focusing both upon the entity's "administrative" nature and its "appointive" selection, the court brought the *Sailors* exception into play. What the federal courts had evolved for local governments, the Georgia court thus extended to the state authority.

Aside from the most minimal of blips, Georgia's judicial radar screen thereafter remained clear. Local government apportionment savored of the distant past, the matter had received settled resolution, and the issue remained at rest.

Not so. Bursting onto the modern scene, *Ramsbottom Co. v. Bass/Zebulon Roads Neighborhood Ass'n*[29] unsealed local government apportionment history. The case brought to litigation the method employed for selecting members of a municipal-county joint planning and zoning commission.[30] A joint municipal-county ordinance created the commission as a body of five county residents, three of whom must be city residents as well.[31] Further, "[t]he City and County governing bodies alternate[d] appointing a Commission member for a five-year term, with one position turning over each year."[32] Challengers maintained that the process disproportionately favored the municipality, and the trial judge declared the ordinance in violation of "one person, one vote."[33] The Georgia Supreme Court granted discretionary appeal.[34]

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26. The two public members were appointed by the Governor with the state senate's confirmation. *Id.* at 295-96, 227 S.E.2d at 766.

27. *Id.* at 297, 227 S.E.2d at 766.

28. *Id.*, 227 S.E.2d at 767.

29. 273 Ga. 798, 546 S.E.2d 778 (2001).

30. *Id.* at 798, 546 S.E.2d at 779. The case arose as a result of the zoning commission's approval of a rezoning proposal. Plaintiffs challenged both the approval and the method of selecting commission members. *Id.*

31. *Id.* at 799, 546 S.E.2d at 779. "Other than the residency requirement, there are no other restrictions set forth in the ordinance regarding qualifications to serve as a Commission member and appointment lies within the discretion of each appointing body." *Id.*

32. *Id.*

33. *Id.* at 799, 801, 546 S.E.2d at 779.

34. *Id.* at 798, 546 S.E.2d at 779.

A unanimous supreme court reversed the trial court's decision.[35] In an opinion of analytical contrasts, the court stamped its imprimatur upon the legacy of *Sailors*. On the one hand, the court posited, the "true nature" of the challenged selection process was "definitely appointive."[36] Just as in *Sailors*, the zoning commission's membership "'is not determined, directly or indirectly, through an election in which the residents of the county participate.'"[37] On the other hand, the court paid far less deference to *Sailors*'s additional point of emphasis, i.e., limiting the "appointment" process to officials who perform "essentially administrative functions."[38] In justification of the deviation, the court explained that plaintiffs in *Ramsbottom* challenged only the ordinance creating the zoning commission; they failed to challenge the local constitutional amendment authorizing that ordinance.[39] The failure proved fatal, the court reasoned, because it was that amendment that "represents the State's choice to allow the Commission to be selected by appointment rather than election."[40] With that "choice" going unchallenged in the case, the court subscribed to language from a New York federal case:[41] "[O]nce it is determined that the members . . . are not selected by popular election, there is no need to determine whether they perform functions that may be better defined as 'legislative' or 'administrative.'"[42] Bringing that expression to bear in *Ramsbottom*,[43] the

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35. *Id.* at 801, 546 S.E.2d at 781.

36. *Id.*, 546 S.E.2d at 780.

37. *Id.* (quoting *Sailors*, 387 U.S. at 110 n.6).

38. *Sailors*, 387 U.S. at 110.

39. 273 Ga. at 799, 546 S.E.2d at 779. That provision "authorized the two governing authorities to 'promulgate zoning or planning laws, . . . and administer the same, and/or appoint agencies or agency for adopting zoning and planning laws, rules, and regulations, and for administering the same . . . .'" *Id.* (quoting 1947 Ga. Laws 1240).

40. *Id.* Plaintiffs "raised no constitutional challenge to Ga. L. 1947, p. 1240, which represents the State's choice to allow the Commission to be selected by appointment rather than election. Instead, [plaintiffs] challenge only the provisions of the joint ordinance regarding the criteria for filling the appointed positions." *Id.*

41. *Id.* at 800, 546 S.E.2d at 780; Rosenthal v. Bd. of Educ., 385 F. Supp. 223 (E.D.N.Y. 1974), *aff'd without opinion*, 420 U.S. 987 (1975).

42. 273 Ga. at 800, 546 S.E.2d at 780 (quoting *Rosenthal*, 385 F. Supp. at 226).

43. The court employed the same approach to escape the Supreme Court's language in *Hadley v. Junior College District*, 397 U.S. 50 (1970), declaring the "one person, one vote" principle applicable "whenever a state or local government decides to select persons by popular election to perform governmental functions . . . ." *Id.* at 56. The court in *Ramsbottom* stated, "[W]e need not decide here whether this Court's recognition of the Commission's unique creation and the legislative functions it performs, which distinguishes it from other statutorily-constituted zoning commissions . . . means that the Commission performs 'governmental functions.'" 273 Ga. at 800-01, 546 S.E.2d at 780 (citation omitted).

court held that "the one person, one vote principle is not applicable to the [municipal-county zoning] Commission."[44]

3. Reflection. Lying virtually dormant for more than one-third of a century, the issue of apportionment suddenly surged to prominence in Georgia local government litigation. Confronted with that issue, the Georgia Supreme Court found itself immersed in principles federally fashioned in the mid-1960s and receiving scant additional attention since that time. Those principles, themselves intriguingly crafted as exceptions before the rule, yielded only imperfectly to present requirements, forcing the court further afield for resolution.

In deciding *Ramsbottom*, the Georgia Supreme Court reverted specifically to the United States Supreme Court's 1967 resolution of *Sailors v. Board of Education*.[45] Finding the *Sailors*'s exception to offer the desired result, the Georgia court struggled with *Ramsbottom*'s factual deviations.[46] The court's analytical exercise seized upon the zoning commission's "unique" creation, as well as the challengers' failure expressly to question that creation.[47] The emerging and uncontested "state choice" enabled the court to avoid *Sailors*'s deviations and yet embrace its result. Accordingly, the local government's planning and zoning commission escaped the rule of reapportionment and survived by way of the "appointment" exception.[48]

In the "law" of local government apportionment, both the historical background and the modern confrontation offer much for reflection and debate. The episode's intrigue, however, derives simply from the example provided for witnessing pivotal principles from "the past," some thirty-four years in retrospect, "retouched."

B. Local Government's Protection from the State

1. Background. The history of American local government is in large part the history of the state-local government relationship.[49] Indeed, local government law owes its genesis to the eternal tensions inherent in that relationship.[50] Those tensions found early manifestation through a doctrinal standoff between two of America's most famous

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44. 273 Ga. at 801, 546 S.E.2d at 780.
45. *Id.* at 800, 801, 546 S.E.2d at 780.
46. *Id.*
47. *Id.* at 799, 801, 546 S.E.2d at 779-80.
48. *Id.* at 801, 546 S.E.2d at 780.
49. See the discussion in R. Perry Sentell, Jr., *The Georgia Home Rule System*, 50 MERCER L. REV. 99 (1998).
50. *Id.*

legal figures. Of one persuasion, Judge Thomas M. Cooley proclaimed the existence of an "inherent right" of local self-government, an "absolute right" independent of state legislative control.[51] In opposition, Judge John Dillon denied local governments any autonomy, declaring that all their powers necessarily derived from and controlled by state legislatures.[52]

Dillon's eventual triumph over Cooley's inherent right theory solidified the precept of "plenary" state legislative power.[53] Under that precept, the local government exists as a mere creature of the state, dependent upon the state legislature for any powers possessed or exercised.[54] This "creature concept" also serves to limit the local government's capacity to protest perceived mistreatment by the state.[55] In several respects, it was established early that the "creature" lacked legal standing to claim constitutional protection from the "creator."[56]

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51. Judge Cooley is commonly said to have staked out his position via a concurring opinion in a Michigan case, *LeRoy v. Hurlbut*, 24 Mich. 44, 92 (1871) (Cooley, J., concurring). For the strongest academic support accorded the inherent right theory, see I EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 246 (1911).

52. I JOHN DILLON, MUNICIPAL CORPORATIONS § 55 (1872). As Dillon reasoned,

> [i]t 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 declared objects and purposes of the corporation–not simply convenient, but indispensable.

Id. For the strongest academic rejection of the inherent right theory, see Howard L. McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 299 (1916).

53. *See, e.g.*, DANIEL R. MANDELKER, et al., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 37 (4th ed. 1996) ("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").

54. *See, e.g.*, OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 75 (1982), which states:

> [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.

Id. (citations omitted).

55. For discussion, see R. Perry Sentell, Jr., *When A Mother Hurts Her Young: Local Government Constitutional Protection Against the State (Part I)*, URBAN GA. MAG., May 1981, at 31 and R. Perry Sentell, Jr., *When A Mother Hurts Her Young: Local Government Constitutional Protection Against the State (Part II)*, URBAN GA. MAG., June 1981, at 33, *reprinted in* R. PERRY SENTELL, JR., ADDITIONAL STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 1 (1983).

56. *See generally* sources cited *supra* note 55.

The United States Supreme Court weighed in upon the issue in a fairly decisive fashion. By its famous 1923 decision in *City of Trenton v. New Jersey*,[57] the Court denied municipal power to protest the state's taking of city property without due process of law.[58] There, the Court characterized the municipality as "a political subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the State as may be entrusted to it."[59] Accordingly, the city possessed no federal due process protection against the State's imposition of a controverted fee.[60] In a companion case, *City of Newark v. New Jersey*,[61] the Court extended the precept to equal protection as well.[62] The regulation of municipalities fell "peculiarly within the domain of the State;"[63] that regulation stood beyond the city's challenge founded upon the Equal Protection Clause of the Fourteenth Amendment.[64]

A decade later, *Williams v. Mayor & City Council of Baltimore*[65] tested the Court with a city's attack upon a state statute exempting a railroad from municipal taxation.[66] Rejecting the challenge, a unanimous Supreme Court left no doubt on the issue.[67] "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."[68]

The Supreme Court's pronouncement in *Williams* found almost immediate acceptance in the local government law of Georgia. *Ellington Co. v. City of Macon*[69] featured a municipal challenge to a statute

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57. 262 U.S. 182 (1923).

58. *Id.* at 188. The municipality sought to challenge a state fee imposed for the city's diversion of water from streams. *Id.* at 183.

59. *Id.* at 185-86.

60. *Id.* at 192. "[T]he City cannot invoke these provisions of the Federal Constitution against the imposition of the license fee or charge for diversion of water specified in the state law here in question." *Id.*

61. 262 U.S. 192 (1923).

62. *Id.* at 196.

63. *Id.*

64. *Id.*

65. 289 U.S. 36 (1933).

66. *Id.* at 37.

67. *Id.* at 40.

68. *Id.* Thus, the Court concluded, "[t]here is error in the holding of the [lower court] that the statute of Maryland creating this exemption is a denial to the respondents of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States." *Id.*

69. 177 Ga. 541, 170 S.E. 813 (1933).

prohibiting local governments from taxing motor common carriers.[70] The city attacked the statute as "contrary to the equal protection clauses of the State and Federal constitutions."[71] Rebuffing the city's position, the Georgia court first quoted *Williams* on a local government's impotency under the federal constitution to assert privileges or immunities against the state.[72] "The same principle," the Georgia Supreme Court posited, "would be applicable as to provisions of the State constitution."[73]

Over intervening years, the supreme court reiterated its approach in *Ellington Co.* and, on occasion, rejected efforts to broaden that approach. By 1978 the court was prepared to restate both the principle and its exceptions. *City of Atlanta v. Spence*[74] presented the city's constitutional challenge to a general statute terminating the municipality's exemption from county property taxes.[75] Treating defendant's lack-of-standing argument, the court fashioned a litigational line of demarcation.[76] First, the court adumbrated the principle: "A county or municipal corporation, created by the legislature, does not have standing to invoke the equal protection and due process clauses of the State or Federal Constitution in opposition to the will of its creator."[77] Second, the court indicated the exceptions: "This does not mean that the city does not have standing to raise other constitutional questions concerning the statute attacked by them."[78] The court in *Spence* proceeded to illustrate the exceptions by considering city arguments on the constitution's public property exemption as well as its requirement of tax uniformity.[79]

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70. *Id.* at 541, 170 S.E. at 814. The municipality argued that the statute unconstitutionally distinguished between motor common carriers and all other carriers for hire. *Id.* at 544, 170 S.E. at 815.

71. *Id.* at 544, 170 S.E. at 815.

72. *Id.*

73. *Id.*

74. 242 Ga. 194, 249 S.E.2d 554 (1978).

75. *Id.* at 195, 249 S.E.2d at 555. Pursuant to that statute, the county taxing officials had assessed the municipality's property for ad valorem taxes. *Id.* at 194, 249 S.E.2d at 555.

76. *Id.* at 195-96, 249 S.E.2d at 556.

77. *Id.* at 195, 249 S.E.2d at 556.

78. *Id.* at 196, 249 S.E.2d at 556.

79. *Id.* at 196-97, 249 S.E.2d at 556-57. The court sustained the statute against both constitutional attacks. *Id.* For further discussion of exceptions, see R. Perry Sentell, Jr., *When A Mother Hurts Her Young: Local Government Constitutional Protection Against the State*, URBAN GA. MAG., May 1981, at 33, *reprinted in* R. PERRY SENTELL, JR., ADDITIONAL STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 1 (1983).

With the recorded triumph of the "plenary precept," early law took a decisive first step in accommodating the tensions indigenous to the state-local government relationship. The resulting "creature concept" stands as a forceful reminder of historic conceptual confrontations. That concept, in turn, also operates to strip the local government of "standing" to raise due process and equal protection objections to perceived mistreatment by the state. This legal incapacity, fashioned in both federal and state spheres, represents yet another guiding star in the constellation of local government law.

2. Recent Sighting. The historic principle could scarcely have been catapulted into a more contemporary orbit than that touching society's current controversial efforts to regulate firearms. The "no standing" principle's appearance in that explosive context exemplifies in compelling fashion local government law's penchant for conscripting ancient concepts into modern service.

Sturm, Ruger & Co. v. City of Atlanta[80] featured a classic power standoff between city and state.[81] Five days after the municipality filed its action against gun manufacturers and providers,[82] the state legislature enacted a general statute expressly prohibiting such suits.[83] Additionally, the statute expressly declared its applicability to "any action pending" on the statute's effective date.[84] Defendant manufacturers and providers relied upon the explicit statutory prohibition.[85] In response, the municipality urged that prohibition to encroach upon its vested rights in a retroactively unconstitutional fashion.[86] The city's

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80. 253 Ga. App. 713, 560 S.E.2d 525 (2002).

81. *Id.* at 713, 560 S.E.2d at 527. The litigation itself was between the municipality and gun manufacturers and providers, but defendants depended exclusively upon the state statute, thus providing a direct conflict between the city's lawsuit and the state's prohibitory enactment. *Id.*

82. The city maintained that the manufacturing and distribution of the guns was foreseeably dangerous and alleged damages in being "forced to pay out large sums of money to provide police and emergency services, police pension benefits and related expenditures, as well as losing substantial tax revenues because of lost productivity." *Id.* at 714, 560 S.E.2d at 527.

83. 1999 Ga. Laws 2; O.C.G.A. § 16-11-184 (1999). "The authority to bring suit and right to recover against any firearms or ammunition manufacturers . . . shall be reserved exclusively to the state." *Id.* § 16-11-184(b)(2).

84. 1999 Ga. Laws 3. "This Act shall apply to any action pending on or brought on or after the date this Act becomes effective." *Id.*

85. "The State and the gun manufacturers argue that the City's claims are also prohibited under amended Code section 16-11-184." 253 Ga. App. at 719, 560 S.E.2d at 530.

86. *Id.* at 714, 716, 560 S.E.2d at 527-28. "The City argues that in spite of the clearly expressed legislative intent, this Court may not apply the statute to bar the suit because

argument thus exposed the venerable "creature concept" (and its "lack of standing" appendage) to full frontal examination.

Reversing the trial court's refusal to dismiss the action, the Georgia Court of Appeals adamantly rejected the municipality's argument of unconstitutional retroactivity.[87] Although retrospective statutes can not "injuriously affect the vested rights of *citizens*,"[88] the court delineated, "[m]unicipal corporations are not citizens."[89] Rather, "[a]s creations of the State,"[90] municipalities stand legally unprotected against state legislative excesses.[91] As in the United States Supreme Court, so in the Georgia Court of Appeals, the "plenary precept" continued its dominating influence over those tensions characterizing the state-local government relationship.[92] As the Georgia court decisively detonated the standoff, "powers of home rule cities may be constitutionally and retrospectively limited by the General Assembly."[93]

3. Reflection. It would be difficult to conceive of issues more fundamental to American local government law than those recently reflected by *Sturm, Ruger & Co.* Those issues savored, no less, of the system's genesis: the fabled "creature concept," and its concomitant appendages of "plenary power" and "lack of standing." Those principles have served the ages in monitoring the tensions pervading the state-local

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it would deprive the City of constitutional and vested rights." *Id.* at 720, 560 S.E.2d at 530-31.

87. *Id.* at 720, 560 S.E.2d at 530-31. The court initially held that the state expressly preempted the field of firearms regulation. *Id.* at 717, 560 S.E.2d at 529. Next, the court turned to the city's argument on unconstitutional retrospectivity. *Id.* at 720, 560 S.E.2d at 530-31.

88. *Id.* at 720, 560 S.E.2d at 531. "We agree that the retroactive or retrospective application of a statute is unconstitutional if it affects the vested rights of citizens, . . . but we find no authority to support the City's contention that it has a vested right to pursue this lawsuit." *Id.* (citation omitted).

89. *Id.*

90. *Id.*

91. *See id.* "'Municipal corporations are creations of the law.'" *Id.* (quoting Pierce v. Powell, 188 Ga. 481, 484, 4 S.E.2d 192, 194 (1939)).

92. The court cited *City of Trenton v. New Jersey*, 262 U.S. 182 (1923). *Id.* at 720, 560 S.E.2d at 531.

93. *Id.* "[T]he City's suit in this case 'is, in reality, an application of power which has been primarily entrusted to the state, and which the state may reclaim at its discretion.'" *Id.* at 720-21, 560 S.E.2d at 531 (quoting City of Philadelphia v. Beretta U.S.A. Corp., 126 F. Supp. 2d 882, 892 (E.D. Pa. 2000)). "[T]he City's complaint and amended complaint should have been dismissed in their entirety. No claims survive because of the legislature's clear directive that municipalities may not attempt to regulate the gun industry in any way except in the limited manner prescribed in [the general statutes]." *Id.* at 722, 560 S.E.2d at 532.

government relationship, and they anchor the subject's juristic orientation.

"Lack of standing," in particular, provides defining cast to the local government's position in the process, as well as the point of departure for appraising any modern legal crises. Itself arising from a doctrinal standoff of historic proportions, the principle renders the local government defenseless against a domineering state. It found early service in both the United States Supreme Court and the Georgia Supreme Court to stymie local efforts at resistance. Under neither a federal nor a state constitution, employing neither due process nor equal protection, could a local government assert privileges or immunities against the state. The inferior governmental entity (the "creature") suffered abject subserviency to the superior entity (the "creator").

In its 2002 confrontation with *Sturm, Ruger & Co.*, the Georgia Court of Appeals boarded an analytical time machine. In a modern-to-the-minute factual context, a context freighted with pressing political intrigue, the court drew upon legal principles fashioned in a far different environment. Although forged from historic philosophical standoffs, and crafted by courts of non-clairvoyant perspectives, those principles operated without pause across the ages. They operated to deny legal "citizenship" to municipal corporations (even "home rule cities") and to denigrate those entities as "creations of the State." So positioned, such entities possessed no "vested rights" constitutionally protected from the General Assembly's retroactive abolition.

Governmental problems, therefore, frequently change; governing principles, however, often do not.

C. Municipal Zoning of County Property

1. Background. In 1926 the United States Supreme Court sustained local government zoning as a constitutional exercise of the police power.[94] Since that milepost, zoning has laid forceful claim to centerpiece prominence in local government jurisprudence. In virtually all jurisdictions, local governments have adopted ordinances classifying the uses of property and restricting those uses to specified zones of operation. Zoning thus sets individual rights against community collectivism in a fashion assuring the likelihood of litigation. More intriguingly, it may also pit government against government.

A persistently recurring issue in the zoning litigation milieu queries whether local government's land uses are themselves subject to local

94. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

government's zoning restrictions.[95] Specifically, when local government proposes a land use at odds with a zoning ordinance, is the former subservient to the latter? Over time, that issue has drawn considerable attention from quarters both academic and judicial.

According to the authorities,[96] courts have evolved a number of "tests" to resolve the standoff between governmental land use and governmental zoning prohibition. First, there is the "eminent domain" test: If the local government possesses power to condemn the land, then it may use the land in violation of the zoning ordinance. Second, there is the "governmental-proprietary" test: Governmental uses are excepted from zoning prohibitions and proprietary uses are not. Finally, there is the "superior sovereign" test: The preference nod goes to the interest (use or prohibition) deemed to savor of the higher sovereignty. About these tests, the authorities appear generally to concur on two points. First, courts typically employ the tests to excuse use from prohibition; and second, they (both tests and courts) are wrong.[97]

Rather, the writers maintain, courts should eschew conclusive tests and revert instead to analyzing the proper order of governmental priorities.[98] The zoning prohibition encompasses the local government's overriding concern with land utilization for the collective good; it deserves prominence over a conflicting land use. When litigation arises, a basic judicial presumption against the violation would force attention to the broader (more deserving) concerns. In essence, the authorities argue for a reversal of judicial approaches: Local government land use should be subject to, not exempt from, local government zoning.

Two versions of the issue arrived before the Georgia Supreme Court in 1954. In *West v. Housing Authority of Atlanta*,[99] municipal citizens challenged the housing authority's condemnation of land on grounds that the proposed housing project did not conform to city zoning ordinances.[100] Brushing the challenge aside, the supreme court took its stand in adamant fashion: "The fact that the property sought to be condemned

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95. This brief description is drawn from R. Perry Sentell, Jr., *Local Government Exposure to Local Government Zoning*, 25 GA. ST. B.J. 180 (1989).

96. *See, e.g.*, OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW 414 (2d ed. 2001); James B. Sales, *The Applicability of Zoning Ordinances to Governmental Land Use*, 39 TEX. L. REV. 316 (1961); George R. Wolff, *The Inapplicability of Municipal Zoning Ordinances to Governmental Land Uses*, 19 SYRACUSE L. REV. 698 (1968); Comment, *Governmental Immunity From Local Zoning Ordinances*, 84 HARV. L. REV. 869 (1971). The following observations attempt a synthesis of the above materials.

97. *See generally* sources cited *supra* note 96.

98. *See generally* sources cited *supra* note 96.

99. 211 Ga. 133, 84 S.E.2d 30 (1954).

100. *Id.* at 135, 84 S.E.2d at 32.

has not been zoned by the municipality for the use contemplated by the Authority is not a valid ground or reason to enjoin the Authority from proceeding with the project."[101]

The second case presented an even cleaner instance of the standoff. *Mayor of Savannah v. Collins*[102] featured an effort by municipal homeowners to prevent the city's construction of a fire station on land "zoned for other and different uses."[103] Here, therefore, the land use prohibited by municipal zoning ordinances was a use by the municipality itself (rather than by an authority). Additionally, the municipality in *Collins* had obtained the subject land by purchase (rather than by eminent domain).[104] Neither distinction mattered to the supreme court:

> Since a municipality unquestionably . . . has the right to condemn private property for a necessary governmental use, though it be located in an area which has been zoned for other and different uses, it necessarily follows that it may likewise use property for a necessary governmental use which it has acquired previously by purchase.[105]

Allowing the city's zoning power to prohibit the city's use of its property "for a necessary governmental purpose," the court reasoned, "would offend that provision of our Constitution which declares that the right of eminent domain shall not be abridged."[106] Hoisting use over prohibition, therefore, the supreme court's opinion in *Collins* conscripted two analytical justifications: first, the city's power (not its actual exercise) of eminent domain, and second, the subject land's devotion to "a necessary governmental use."[107]

Almost a decade later, *Pearson v. County of Tift*[108] added a further complication to the scenario—an additional local government. There, the land use challenged as controverting municipal zoning was the *county's* erection of a commercial building.[109] Once again, however, the distinction counted for naught. Drawing upon the county's creating local

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101. *Id.* The court relied upon its decision almost thirty years earlier in *Tift v. Atlantic Coast Line Railroad*, 161 Ga. 432, 131 S.E. 46 (1925), a case involving neither local government land use nor local government zoning.

102. 211 Ga. 191, 84 S.E.2d 454 (1954).

103. *Id.*

104. *Id.*, 84 S.E.2d at 454-55.

105. *Id.*, 845 S.E.2d at 455.

106. *Id.* The court cited no Georgia authority. *Id.*

107. *Id.* In *Collins*, that "use" was for a fire station. *Id.*

108. 219 Ga. 254, 132 S.E.2d 710 (1963).

109. *Id.*

statute, the supreme court found the power to erect "public buildings"[110] and presumed the county "to have acted within the scope of [its] authority."[111] Under its prior decision in *Collins*, the court asserted, "the county could either condemn property or use property it owns for governmental purposes, even though such use violates a zoning ordinance of a municipality in said county . . . ."[112] Consequently, the violation of city zoning could not stand as "a valid reason for enjoining the county from using its property for governmental purposes."[113] With its rationale in *Pearson*, therefore, the court retained "eminent domain" and "governmental purpose" as operative analytical facets and completely ignored the complications introduced by dueling local governments.

In following years, the court's decisions evidenced that county zoning was to fare no better than municipal zoning against governmental land use violations. In *Evans v. Just Open Government*,[114] the court held that "property owned by the state for governmental purposes is immune from [county] zoning ordinances."[115] That was not the case, the court delineated in *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Commission*,[116] for land used by "a nonprofit corporation . . . even if the corporation is performing services which are governmental in nature."[117] Additionally, in *Macon Ass'n* the court took note of the "tests" employed in other states for weighing zoning as against governmental violation and expressly disapproved the "balancing-of-interests test."[118]

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110. *Id.*

111. *Id.* The court refused to take judicial notice of what the county meant by its allegation that the purpose of the building was "'an ASC Committee office.'" *Id.*

112. *Id.*

113. *Id.*

114. 242 Ga. 834, 251 S.E.2d 546 (1979).

115. *Id.* at 837-38, 251 S.E.2d at 549. The court thus rejected an action by county citizens to prevent the location of state prisons in the county in violation of county zoning ordinances. *Id.* at 838, 251 S.E.2d at 549-50.

116. 252 Ga. 484, 314 S.E.2d 218 (1984).

117. *Id.* at 490, 314 S.E.2d at 223. The court thus denied the corporation's petition for exemption from the county's zoning prohibitions so that it might operate personal care homes for the mentally retarded. *Id.* at 484, 314 S.E.2d at 219.

118. *Id.* at 490, 314 S.E.2d at 223. That test, the court asserted, was "too nebulous and judicially unmanageable." *Id.* The court noted that "[i]n Georgia, it has been held that property owned by the state or county, and used for a governmental purpose, is exempt from municipal zoning regulation, whether or not the property is acquired by eminent domain or by bargain and sale." *Id.* at 489, 314 S.E.2d at 222.

More recent cases directly pitted county zoning against county violation. In *Concerned Citizens v. Douglas County*,[119] landowners opposed the county's purchase and development of an adjoining tract as a sanitary landfill. The landowners challenged the county zoning ordinance's explicit exemption of the county from zoning and permit requirements applicable to other applicants.[120] Rejecting the challenge, the court deemed it settled that "a county may use its property for a necessary governmental use even though the property may be located in an area which has been zoned for other and different uses."[121]

Finally, *Board of Commissioners v. Chatham Advertisers*[122] featured an effort by county commissioners to invalidate a contract by their immediate predecessors, which permitted defendant to place benches bearing advertising signs at various public locations. Plaintiffs charged that the agreement violated a sign prohibition contained in the county zoning ordinance.[123] Spurning the attack, the court restated its familiar principle that "[a] county may use property it owns for a necessary governmental purpose, even though such use violates a zoning ordinance."[124] Moreover, the court insisted, the "grant of the right to place these benches on public property, even with advertising on them, was a use 'for a necessary governmental purpose.'"[125] In a footnote, the court further elaborated as follows: "The use of 'governmental purpose' in this [zoning] context embraces all aspects of governmental

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119. 256 Ga. 82, 344 S.E.2d 641 (1986).

120. *Id.* at 82-83, 344 S.E.2d at 642-43. Those zoning requirements were applicable only to privately operated landfills. *Id.* at 83, 344 S.E.2d at 642-43.

121. *Id.* at 83, 344 S.E.2d at 643. The court thus affirmed the trial judge's dismissal of plaintiffs' complaint. *Id.* at 84, 344 S.E.2d at 850-51.

122. 258 Ga. 498, 371 S.E.2d 850 (1988).

123. *Id.* at 498-99, 371 S.E.2d at 850-51. Plaintiffs also attacked the contract as violating the historic statutory prohibition against a governing authority binding itself or its successors in matters of government. *Id.* at 499, 371 S.E.2d at 851; O.C.G.A. § 36-30-3 (2000). The court rejected that attack on grounds that the subject of the contract in issue was a "proprietary or ministerial" matter and thus not covered by the prohibition. 258 Ga. at 499, 371 S.E.2d at 851. For extended treatment of that statute and the evolving case law, see R. Perry Sentell, Jr., *Local Government and Contracts That Bind*, 3 GA. L. REV. 546 (1969); R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Goverment Law: Recent Perspectives*, 11 GA. ST. B.J. 148 (1975). Both articles are reprinted in R. PERRY SENTELL, JR., STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 541, 579 (3d ed. 1977). *See also* R. Perry Sentell, Jr., *The Georgia Supreme Court and Local Government Law: Two Sheets to the Wind*, 16 GA. ST. U. L. REV. 361 (1999).

124. 258 Ga. at 499, 371 S.E.2d at 851.

125. *Id.* (quoting Juhan v. City of Lawrenceville, 251 Ga. 369, 306 S.E.2d 251 (1983)).

functions, whether interpreted as governmental or as proprietary (ministerial)."[126]

2. Recent Sighting. Against this background, there arose the confrontation recently presented in *City of Decatur v. DeKalb County*.[127] There, the county sought to enjoin municipal enforcement of "zoning, building, and other ordinances" against the county's constructing a courthouse and renovating a building within the city limits.[128] Entirely receptive to the county's position, the trial judge characterized all the subject ordinances as zoning measures[129] and reasoned as follows: "[M]unicipal [zoning] ordinances do not control county construction, where the county is performing an essential function of government such as the construction, remodeling or modification of a courthouse or court facilities."[130] For the trial judge, therefore, the controversy unfolded a modern instance clearly controlled by a pivotal principle of local government law.

Upon the city's appeal, the Georgia Court of Appeals acknowledged the principle but immediately proceeded to confine its sphere of operation.[131] The court specified that zoning ordinances, "'are those which regulate by classifying property into separate districts.'"[132] They must be distinguished "'from other regulations with which a developer must comply, such as requirements for a building permit.'"[133] Additionally,

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126. *Id.* at 499 n.1. In this fashion, the court purported to distinguish its classification of the contract as dealing with a "proprietary" function for purposes of precluding its invalidation by the binding contracts prohibition of O.C.G.A. section 36-30-3. *Id.*

127. 256 Ga. App. 46, 567 S.E.2d 376 (2002). The case is not to be confused with *City of Decatur v. DeKalb County*, 255 Ga. App. 868, 567 S.E.2d 332 (2002), the subject of yet another "pivotal principle" analysis. *See infra* text accompanying notes 192-201.

128. 256 Ga. App. at 46, 567 S.E.2d at 377. The county had decided to build its new courthouse and renovate a building on land that it owned within the municipality and had proceeded to accept a contractor's bid to commence construction before obtaining any city permits. Upon the city's "threats" to enforce its zoning and building ordinances, the county sought both declaratory and injunctive relief. *Id.* at 46-47, 567 S.E.2d at 377-78.

129. The trial court reasoned that "all of the ordinances that would necessarily apply to the construction project (i.e., building codes for plumbing, electrical, heating and air conditioning, sanitary sewer, storm water drainage, etc.) fell under the broad category of 'zoning.'" *Id.* at 47, 567 S.E.2d at 378.

130. *Id.* The court permanently enjoined the city from enforcing its ordinances. *Id.*

131. *Id.* at 47-48, 567 S.E.2d at 378.

132. *Id.* at 48, 567 S.E.2d at 378 (quoting Fairfax MK, Inc. v. City of Clarkston, 274 Ga. 520, 521, 555 S.E.2d 722, 724 (2001)).

133. *Id.* (quoting *Fairfax MK*, 274 Ga. at 520, 555 S.E.2d at 723). The court noted that "under the Georgia Constitution, municipal powers relating to 'zoning' are included in an entirely separate section from supplementary municipal powers relating to the enforcement of '[c]odes, including building, housing, plumbing, and electrical codes' and those involving

the court instanced, "fire safety standards"[134] and "land-disturbing activities"[135] are both areas "where the legislature has expressed an intent for municipalities to have some authority to regulate the building activities associated with county construction within [municipal] boundaries."[136] Accordingly, the ordinances in controversy required careful delineation, and the trial court had erred in holding that the county "was not subject to regulation through *any* [city] ordinances."[137]

For the present, however, there could be no further appraisal in the case, for the county had failed to introduce into evidence any of the controverted ordinances.[138] Thus, the court could specify no precise municipal regulations with which the county must comply.[139] The most the court could offer was an identification of the measures to which the county was immune: "The Supreme Court of Georgia has held that county-owned property that is used for governmental purposes is not subject to municipal zoning regulations."[140] Ironically, the court's only cited authority was *Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Commission*,[141] in which the supreme court decided that "property owned by a nonprofit corporation is not immune from local zoning regulations, even if the corporation is performing services which are governmental in nature."[142] In any event, the court expressly affirmed the trial judge's decision that the county's courthouse and building "were not subject to [the city] zoning requirements."[143]

3. Reflection. For better than a half-century, zoning litigation has queried whether local government land use is subject to local government zoning. The writers, eschewing conclusive tests, respond with a

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'[s]torm water and sewage collection and disposal systems.'" *Id.* at 48, 567 S.E.2d at 378. The court cited GA. CONST. art. IX, § 2, para. 4 (zoning), and art. IX, § 2, para. 3(a)(6), (12) (supplementary powers).

134. 256 Ga. App. at 48, 567 S.E.2d at 378-79. The court cited O.C.G.A. section 25-2-12(a)(1) (1981 & 2002 Supp.). *Id.*, 567 S.E.2d at 379.

135. *Id.* at 49, 567 S.E.2d at 379. The court cited O.C.G.A. section 12-7-4 (2001). *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 47, 567 S.E.2d at 378.

141. *Id.* (citing Macon Ass'n for Retarded Citizens v. Macon-Bibb County Planning & Zoning Comm'n, 252 Ga. 484, 314 S.E.2d 218 (1984)); *see also supra* notes 95-97.

142. 252 Ga. at 490, 314 S.E.2d at 223.

143. *Decatur*, 256 Ga. App. at 47, 567 S.E.2d at 378. "We hold that county government building projects are not subject to city zoning regulations, but that they are subject to other municipal regulation (as indicated by the Georgia legislature)." *Id.* at 46, 567 S.E.2d at 377.

presumptive "yes." The courts, adopting an assortment of tests, respond with a presumptive "no." The Georgia Supreme Court eschews a "balancing-of-interests" test and employs an analysis founded upon two analytical facets: "eminent domain" and "governmental purpose."[144] Both facets, however, assume a term-of-art countenance: "eminent domain" can operate where there is no eminent domain,[145] and "governmental purpose" overrides the traditional governmental-proprietary dichotomy.[146] Ironies aside, the facets undergird a "pivotal principle" of Georgia local government law: Local government land use trumps local government zoning, and county land use trumps municipal zoning.[147] As evidenced by the Georgia Court of Appeals in *City of Decatur*, those adages hold firm in today's jurisprudence.[148]

D. Local Government Legislative Procedure

1. Background. As the government closest to the citizen, local government constitutes that citizen's initial point of contact with legislative law. The local government's legislative process bodes basic, therefore, to the entity's effective operation.[149] It is through enactment of ordinances, resolutions, and the like that the municipal or county governing authority accomplishes what it must to serve its purpose for being. When so engaged, this legislating body frequently functions under predetermined forms of procedure. Those forms may appear in statutes enacted by the General Assembly or in ordinances previously adopted by the local government itself. On occasion, this point of location assumes linchpin litigational significance.

The Georgia Supreme Court's most famous consideration of the matter occurred in its 1929 decision of *South Georgia Power Co. v. Baumann*.[150] There, plaintiffs attacked the validity of a municipal franchise ordinance on grounds that it "was not read twice in accordance with the provisions of an ordinance contained in the City Code."[151] In rejecting that position, the court drew a sharp distinction between enactment requirements contained in "charter provisions" and those

144. *Macon Ass'n*, 252 Ga. at 488, 314 S.E.2d at 222.
145. *Collins*, 211 Ga. at 191, 84 S.E.2d at 455.
146. *Chatham*, 258 Ga. at 499, 371 S.E.2d at 851.
147. *Id.*
148. *Decatur*, 256 Ga. App. at 47, 567 S.E.2d at 378.
149. For extensive treatment of the subject, see R. Perry Sentell, Jr., *The Legislative Process in Georgia Local Government Law*, 5 GA. L. REV. 1 (1970), *reprinted in* R. PERRY SENTELL, JR., STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 295 (3d ed. 1977).
150. 169 Ga. 649, 151 S.E. 513 (1929).
151. *Id.* at 651-52, 151 S.E. at 514.

found in the city council's own "rules of order and proceeding."[152] The former, "required by statute," are "mandatory," and "the courts have a right to inquire whether they have been complied with."[153] The latter, however, are mere "parliamentary rules" with which "the courts have no concern," and may thus be "waived or disregarded by the [local government's] legislative body."[154] Accordingly, the municipal governing authority's violation of the two-reading ordinance could not be employed to invalidate the franchise ordinance.[155]

With its analysis of *South Georgia Power Co.*, the supreme court relegated to a status of legal impotence legislative enactment requirements contained in municipal ordinances. As opposed to statutory requirements, ordinance mandates stood only at the pleasure of the local governing authority.[156] The authority's exercise of its pleasure in ignoring those mandates claimed no part of the judiciary's concern.[157] The governing body's discretion to adopt the procedures implied a like discretion to change them, and violation constituted but a valid form of change.[158] To require that the body expressly change the rule prior to violating it held no legal appeal for the court.[159] Municipal citizens and others dealing with the city would discover in due course that ordinance rules of procedure applied only to them, not to the governing body itself.

Two decades later, the supreme court perpetuated its statute-ordinance delineation into the realm of county legislative process as well. In *Ellis v. Stokes*,[160] the court focused upon a county rezoning ordinance adopted at a meeting held twenty-nine days after published

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152. *Id.* at 655, 151 S.E. at 515.

153. *Id.*

154. *Id.*

> "Mere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members have agreed to a particular measure. So the council may abolish, modify or waive its own rules. . . . Hence, where an ordinance is enacted in compliance with the charter, it will not be held void because in its passage one of the parliamentary rules of the council was violated."

Id., 151 S.E. at 515-16 (quoting 2 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS 1332 (1911)).

155. *Id.* at 655, 151 S.E. at 526. "So we are of the opinion that the grant of the franchise by the mayor and council to the South Georgia Power Company can not be held to be void, as insisted, because . . . [it] was not read a second time before its passage . . . ." *Id.*

156. *Id.*, 151 S.E.2d at 515.

157. *Id.*, 151 S.E.2d at 515-16.

158. *Id.*

159. *Id.*

160. 207 Ga. 423, 61 S.E.2d 806 (1950).

notice.[161] A local statute required an interval of "at least 3 weeks" between notice and meeting,[162] and the court emphasized that "there is no contention that the [29-day] period . . . did not comply with the statute."[163] Additionally, however, a county ordinance required "a lapse of 30 days" between notice and meeting.[164] It was the commissioners' violation of this thirty-day mandate that the challengers advanced to condemn the rezoning ordinance.[165] In rebuffing plaintiffs' attack, the court drew liberally from its opinion in *South Georgia Power Co.*[166] The lessons of that opinion coalesced to govern *Ellis* as follows: "When the [county] commissioners fixed a period of 30 days after the date of the notice, they did so as a rule of their own procedure, which was subject to change at any time by them . . . ."[167] Indeed, the court emphasized, "[t]he commissioners could set any time, so long as the interval between the date of the notice and the date of the [meeting] was at least 3 weeks."[168] Accordingly, the court "[could] not say that the [rezoning] action of the commissioners was a nullity."[169]

The supreme court's mid-century resolution of *Ellis* appeared to signal the entrenched authority of two highly significant principles in the "law" of local government legislation. Initially, the distinction between statutory procedures and ordinance procedures loomed large. Any first effort at appraising a charge of enactment deficiencies must identify the

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161. *Id.* at 430, 61 S.E.2d at 810. The date of the notice of the meeting was given on June 2, and the meeting was held on July 2. Challengers contended that only twenty-nine days had elapsed, and the court conceded without deciding the correctness of the contention. *Id.* at 426, 430, 61 S.E.2d at 807, 810.

162. *Id.* at 427, 61 S.E.2d at 808; 1939 Ga. Laws 584.

163. *Ellis*, 207 Ga. at 429, 61 S.E.2d at 809.

164. *Id.* This was an ordinance adopted in 1946 by the county commissioners, and the contested rezoning meeting was held in 1947. *Id.* at 426, 61 S.E.2d at 808.

165. *Id.* at 427, 61 S.E.2d at 808.

166. *Id.* at 429-30, 61 S.E.2d at 810.

> "Rules of procedure passed by one legislative body are not binding upon a subsequent legislative body operating within the same jurisdiction. Courts ordinarily will not invalidate an ordinance enacted in disregard of parliamentary usage, provided the enactment is made in the manner provided by statute. A municipal legislative body can not divest its successor of its legislative powers by passing ordinances or resolutions which deprive their successor of the power to exercise fully their legislative discretion. Charter provisions are structural, and must be strictly complied with. 'Rules of parliamentary practice are merely procedural, and not substantive.'"

Id. (quoting *S. Ga. Power Co.*, 169 Ga. at 655, 151 S.E. at 515).

167. *Id.* at 429, 61 S.E.2d at 809.

168. *Id.*

169. *Id.* at 430, 61 S.E.2d at 810. At least, this was true, the court said, "in the absence of a showing that the plaintiffs were misled to their hurt and injury." *Id.*

precise location of the requirement allegedly violated. Second, the legal irrelevance of requirements imposed by ordinance (or resolution) assumed a position of impressive prominence. The municipal or county governing authority could establish any procedural "rule" it wished (within statutory bounds) and then proceed to "change" that rule at will. Disconcertingly, the authority's outright violation of the requirement sufficed as a legally sanctioned "change." Challengers of the violation, in turn, received little solace by way of judicial recourse.

Two more decades elapsed before the court returned, in a fashion both forceful and puzzling, to its disposition of *Ellis*. The occasion, *Save the Bay Committee v. Mayor & Council of Savannah*,[170] presented yet another protest against yet another rezoning ordinance.[171] In controversy over a proposed commercial development,[172] plaintiffs challenged the ordinance's validity on a variety of grounds.[173] Procedurally, they argued, the municipality enacted the measure in disregard of an ordinance requiring both a five-day notice period and written notice to adjoining landowners.[174] That contention drew a judicial response both conceding violation[175] and declaring the result: "For these reasons the action of the governing authority . . . in rezoning the tract was void."[176] As authority, the court asserted that it "[had] repeatedly held that the notice requirements embodied in zoning ordinances . . . must be strictly complied with in any rezoning action taken by the governing authorities of a municipality."[177] As for reconciling this decision with those in *South Georgia Power Co.* and *Ellis*, the court ignored the former and condemned the latter: "If there be anything in the case of *Ellis v. Stokes* . . . contrary to that which we now rule, that case, being less than a full-bench decision, must yield to earlier full-bench decisions . . . ."[178]

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170. 227 Ga. 436, 181 S.E.2d 351 (1971).

171. *Id.* at 439-42, 181 S.E.2d at 355-57.

172. Defendant developers proposed to erect an apartment complex in the disputed area. *Id.* at 439, 181 S.E.2d at 355.

173. *Id.* at 438, 181 S.E.2d at 354. "The complaint . . . alleges a number of violations of the zoning ordinances of the City . . . in the rezoning proceeding." *Id.*

174. *Id.* at 447, 181 S.E.2d at 360.

175. *Id.* at 447-48, 181 S.E.2d at 360. "[T]he record shows without dispute that the publication was had only four days before the hearing," and "[i]t is undisputed that [the landowner] was not afforded the written notice to which she was entitled under the ordinance." *Id.*

176. *Id.* at 448, 181 S.E.2d at 360.

177. *Id.* at 447, 181 S.E.2d at 360 (citing Jennings v. Suggs, 180 Ga. 141, 178 S.E. 282 (1935) and Atl. Ref. Co. v. Spears, 214 Ga. 126, 103 S.E.2d 547 (1958)).

178. *Id.* at 448, 181 S.E.2d at 360 (citing *Jennings*, 180 Ga. 141, 178 S.E. 282).

As of 1971, therefore, the supreme court cast a pall of uncertainty over a pivotal principle of local government legislative law. That principle—the fabled ineffectiveness of ordinance procedural requirements—appeared suddenly limited by the court's disposition of *Save the Bay Committee*. Indeed, *Save the Bay Committee* did invalidate a rezoning measure enacted in disregard of an ordinance imposing a specified means of notice.[179] Clearly, *Ellis* had refused to invalidate a rezoning measure enacted contrary to such a requirement.[180] *Ellis*, the court announced in *Save the Bay Committee*, must "yield" to earlier "full bench" decisions.[181] However, those cited decisions, *Jennings v. Suggs*[182] and *Atlantic Refining Co. v. Spears*,[183] likewise involved (in the most summary of contexts) noncompliance with ordinances mandating notice for the enactment of zoning measures.[184] Did those decisions, as wielded by *Save the Bay Committee*, overrule *Ellis* only on their common facts (ordinance *notice* requirements for *zoning* measures) or on the far broader principle that *Ellis* had extracted from *South Georgia Power Co.*? That is to ask, after *Save the Bay Committee*, did the local government's violation of an ordinance procedural requirement (other than a *notice* requirement for *zoning*) operate to invalidate the adopted measure? That is to persist, did *Save the Bay Committee* overturn the pivotal principle of *South Georgia Power Co.*? Because *South Georgia Power Co.* dealt with neither notice nor zoning (but rather with an ordinance imposing a three-reading requirement), and because *South Georgia Power Co.* was an earlier "full-bench" decision than both *Jennings* and *Atlantic Refining Co.*, and because *Save the Bay Committee* conspicuously omitted any reference to *South Georgia Power Co.*, the inquiry was far from academic.

2. Recent Sighting. Precisely thirty years following the confusion of *Save the Bay Committee*, the supreme court granted discretionary

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179. *Id.*

180. 207 Ga. at 430, 61 S.E.2d at 810.

181. 227 Ga. at 448, 181 S.E.2d at 360.

182. 180 Ga. 141, 178 S.E. 282 (1935).

183. 214 Ga. 126, 103 S.E.2d 547 (1958).

184. *Jennings*, 180 Ga. at 142, 178 S.E. at 283; *Atl. Ref. Co.*, 214 Ga. at 128, 103 S.E.2d at 548. In *Jennings* the municipality violated an ordinance requiring notice of the time and place of the rezoning hearing, and the court summarily held that "[i]n these circumstances, and in view of the conflict in the evidence upon several points, the [lower] court properly granted an interlocutory injunction" against operations under the rezoning measure. 180 Ga. at 142, 178 S.E. at 283. In *Atlantic Refining Co.*, the court reasoned that "[u]nder the ruling in *Jennings* . . . the purported [rezoning measure] (which was based solely on the illegal and void notice given by the zoning commission), is without any legal force or effect." 214 Ga. at 128, 103 S.E.2d at 548.

appeal in the case of *Fairfax MK, Inc. v. City of Clarkston*.[185] The court's 2001 disposition of the latter litigation dramatically revived intriguing inquiries of yore. Once again, the law of local government legislative process stood revealed as the crucial issue that it is. Once again, the local government legislature's violation of its own procedures called for judicial attention. Decades of doubt awaited the court's answer to the call.

Fairfax MK featured a controversy resulting from municipal denial of plaintiff's application for a service station permit. The city rested its action on a provision of its "Gasoline Service Station Ordinance," requiring a minimum distance of 500 feet between service stations and day care centers.[186] Plaintiffs in turn challenged that provision's validity, charging its enactment in violation of an ordinance mandating that "the order of business at City Council meetings be as specified on the agenda prepared beforehand."[187] Prior to considering that challenge, the supreme court first determined the service station ordinance constituted an ordinance of regulation rather than zoning.[188] With that determination, the court crafted the case to analytically exciting dimensions: The ordinance under attack constituted a regulatory measure and not a zoning ordinance;[189] and the city's enactment of that ordinance allegedly violated an agenda requirement and not a notice mandate.[190] Did municipal violation of this ordinance procedural requirement operate to invalidate the adopted regulatory measure? As the issue materialized, realization dawned: It was the precise issue

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185. 274 Ga. 520, 555 S.E.2d 722 (2001).

186. *Id.* at 520, 555 S.E.2d at 723.

187. *Id.* at 522, 555 S.E.2d at 724.

188. *Id.* at 521-22, 555 S.E.2d at 724. The court reached that conclusion in response to challenger's contention that the ordinance violated the Zoning Procedures Law (O.C.G.A. §§ 36-66-1 to 36-66-5 (2000)). *Id.* at 520-22, 555 S.E.2d at 723-24. The court said that "'zoning ordinances' are those which 'regulate by classifying property into separate districts.' *Id.* at 521, 555 S.E.2d at 724 (quoting City of Lilburn v. Sanchez, 268 Ga. 520, 521, 491 S.E.2d 353, 355 (1997)). The court asserted that plaintiffs

> [W]ere not prevented from building a service station because of the property's zoning. The City denied a building permit because the proposed facility would be close to a day care center. The fact that a licensing ordinance somewhat concerns location does not make it a zoning ordinance. . . . If a local ordinance applies to a particular activity wherever it is carried out in the town and does not suspend or limit the zoning ordinance, it "is not a zoning law merely because it touches the use of land."

Id. at 521-22, 555 S.E.2d at 724 (quoting Town of Islip v. Zalak, 82 A.D.2d 83, 566 N.Y.S.2d 306, 311 (N.Y. App. Div. 1991)). Accordingly, the court held that the Zoning Procedures Law did not apply to the ordinance. *Id.* at 522, 555 S.E.2d at 724.

189. *Id.* at 521, 522, 555 S.E.2d at 724.

190. *See id.* at 522, 555 S.E.2d at 724-25.

hauntedly hanging in daunting uncertainty for the past thirty years! To what extent indeed had the pivotal principle of *South Georgia Power Co.* "yielded" to the limiting vicissitudes of *Save the Bay Committee*?

The supreme court unanimously rejected plaintiff's procedural attack on the service station ordinance but tendered dueling rationales.[191] First, the court observed, the record did not contain a copy of the agenda ordinance which the city allegedly violated.[192] That omission was fatal, the court implied, because the "'appellate courts of this state do not take judicial notice of a municipal ordinance.'"[193] Not satisfied to conclude the matter on a purely technical note, however, the court then elaborated an independent alternative analysis: "[A]lthough it is within the province of courts to inquire into compliance with statutory charter provisions, the observance of parliamentary and other procedural rules enacted by a municipal corporation is not a matter of judicial concern."[194] Even assuming the agenda ordinance properly before it, the court thus implied, the city's alleged violation failed to draw judicial condemnation of the service station ordinance.[195] As authority for this second rationale, the court cited two of its prior decisions:[196] *Ellis v. Stokes* and *South Georgia Power Co. v. Baumann*.

With the supreme court's disposition of *Fairfax MK*, law's continuity was affirmed anew.

3. Reflection. From 1929 to 1971, it appeared settled that a local government ordinance was not invalid although adopted in violation of a prior procedural ordinance. First in *South Georgia Power Co.*, and again in *Ellis*, the Georgia Supreme Court relegated the matter to the local government's complete discretion.[197] Unlike statutory procedures,

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191. *Fairfax MK*, 274 Ga. at 522-23, 555 S.E.2d at 724.

192.

> [Plaintiffs] also urge that the trial court erred in failing to strike the amendments to the [Gasoline Service Station Ordinance] for noncompliance with the requirement of [section] 2-26 of the City Code. They contend that that ordinance provides that the order of business at City Council meetings be as specified on the agenda prepared beforehand, but the record does not contain any copy of [section] 2-26.

Id. at 522, 555 S.E.2d at 724.

193. *Id.* (quoting Police Benevolent Ass'n v. Brown, 268 Ga. 26, 27, 486 S.E.2d 28, 29 (1997)).

194. *Id.*, 555 S.E.2d at 725. This single sentence constituted the court's entire treatment of the issue.

195. *See id.*

196. *Id.*

197. *Ellis*, 207 Ga. at 429, 61 S.E.2d at 809; *S. Ga. Power Co.*, 169 Ga. at 655, 151 S.E. at 515.

ordinance mandates existed at the local legislature's pleasure and stood subservient to violation ("change") at any time.

In 1971, however, the court in *Save the Bay Committee* invalidated a rezoning measure enacted in violation of an ordinance's notice requirement.[198] There, the court omitted any reference to *South Georgia Power Co.*, advising only that *Ellis* must "yield" to the extent it was "contrary."[199] Did the court's apparent reversal of position apply only to notice requirements for zoning measures, the specific concerns of both *Save the Bay Committee* and *Ellis*?

Perhaps, thirty years later, *Fairfax MK* has finally answered the question. There, in a context involving neither notice nor zoning, the court reverted to its historical position: it refused to invalidate an ordinance presumably adopted in disregard of a prior ordinance's procedural requirement.[200] By its express and unqualified reliance upon both *South Georgia Power Co.* and *Ellis*, the court may indeed have limited *Save the Bay Committee* to its facts. If so, the "pivotal principle" now stands in revised form: The local government's own rules of order and proceeding, other than notice requirements regarding zoning, are merely parliamentary, with which the courts have no concern, and may be waived or disregarded by the local government's legislative body.

E. County Tax Disbursements to the Benefit of Municipalities

1. Background. The local government's power to tax largely controls its power to spend or disburse.[201] Through Georgia's first six constitutions, no distinction was drawn in this respect between municipalities and counties. Rather, as authorized by the Constitution of 1868, "[t]he General Assembly may grant the power of taxation to county authorities and municipal corporations, to be exercised within their several territorial limits."[202] Over the following years, however, the legislature "had used this power very freely,"[203] and "many coun-

198. *Save the Bay Comm.*, 227 Ga. at 447-48, 181 S.E.2d at 360.

199. *Id.* at 448, 181 S.E.2d at 448.

200. *Fairfax MK*, 274 Ga. at 522, 555 S.E.2d at 724.

201. This brief description is drawn from two articles: R. Perry Sentell, Jr., *The County Spending Power: An Abbreviated Audit of the Account*, 16 GA. L. REV. 599 (1982), *reprinted in* R. PERRY SENTELL, JR., ADDITIONAL STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 231 (1983); and R. Perry Sentell, Jr., *Local Government Law and the Constitution of 1983: Selected Shorts*, *reprinted in* ADDITIONAL STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 565 (1983).

202. GA. CONST. of 1868, art. 1, § 28.

203. Adair v. Ellis, 83 Ga. 464, 467, 10 S.E. 117, 117 (1889).

ties, cities and towns in the State were heavily in debt."[204] Concerns with prevailing conditions yielded a constitutional convention determined to curtail existing extravagances.[205]

The Georgia Constitution of 1877 contained a number of innovative financial restrictions,[206] including a prohibition aimed exclusively at counties: "The General Assembly shall not have power to delegate to any county the right to levy a tax for any purpose,"[207] except for twelve specifically enumerated subjects.[208] Without counterpart for municipalities, this prohibition focused unique attention upon county taxing and spending. To levy a tax, a county must possess a two-tier authorization: (1) there must be explicit statutory permission for the levy, and (2) the object of the tax must be one specifically enumerated in the constitution.[209] Negative in thrust, forbidding in nature, and mandatory in effect, the provision exuded the stringency of post-reconstruction desperation.[210]

The 1877 constitutional prohibition provided impetus for a historic line of decisions by the Georgia Supreme Court.[211] In case after case, the court laid tax purpose beside constitutional enumeration and viewed history to dictate literal interpretation. "Let us adhere to a strict construction of the constitution," counseled the court, "at least so far as taxing the people is concerned."[212] Turning a deaf ear to arguments of hardship and irrationality, the court assured that "these restrictions which are now so much complained of will then be a shield to the property-owners of the State, and a barrier against those who desire to

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204. *Id.* at 467, 10 S.E. at 117.

205. *See id.* at 466-67, 10 S.E. at 117.

206. *See id.* at 466, 10 S.E. at 117.

> The provision now under consideration, and several others in the present constitution in regard to the taxing power, are new ones. No such restrictions as are now contained in the constitution were ever before thrown around the counties, cities and the legislature. It is a matter of public history that when the convention met in the year 1877, the counties, towns and cities of the State were largely in debt.

Id.

207. GA. CONST. of 1877, art. VII, § 6, para. 2.

208. *Id.*, *e.g.*, educational purposes, bridges, prisoners, jurors, litigation, quarantine, roads, and courts. *Id.*

209. *Id.*

210. *See* WALTER MCELREATH, A TREATISE ON THE CONSTITUTION OF GEORGIA 169 (1912).

211. See a full discussion of these cases in R. Perry Sentell, Jr., *The County Spending Power: An Abbreviated Audit of the Account*, 16 GA. L. REV. 599, 601 (1982).

212. *Adair*, 83 Ga. at 470, 10 S.E. at 118.

put their hands in the public treasury."[213] The court thus treated the prohibition with utmost gravity, structuring whatever tests were necessary to discover and thwart county violations. "Inasmuch as the power of the counties to raise funds for public expenses is restricted to these subject-matters, payments of such funds must necessarily be restricted to the same subject-matters . . . ."[214] By the dawn of the new century, therefore, the Georgia county's power to tax and spend stood contained and constrained.

Over time, sporadic amendments added enumerated tax exceptions to the constitutional prohibition, and these were included in the Constitution of 1945.[215] Otherwise, that constitution forcefully perpetuated the two-tier authorization as the pervading prerequisite for the Georgia county's power to tax and spend.[216] The first indicated break with that order occurred some twenty years later with the ratification of two 1966 constitutional amendments. One amendment affirmatively empowered counties to tax for those purposes previously enumerated as exceptions to the tax prohibition.[217] The other amendment authorized the General Assembly to delegate the county power of taxation for "such other public purposes as may be authorized by the General Assembly."[218] With these amendments, it appeared that the two-tier obstacle to county taxation had been substantially leveled.

Not so. In 1979, *City Council of Augusta v. Mangelly*[219] confronted the supreme court with the constitutionality of the 1975 Local Option Sales Tax Act.[220] There, the court adumbrated the "central issue" as "whether the Georgia Constitution is violated by the Act's scheme of allowing counties to tax and to distribute a portion of the tax proceeds to cities."[221] Steadfastly retaining its historic restrictive approach, the court first searched the tax authorizations enumerated in the 1966 constitutional amendment: "[T]axation by counties for the purpose of sharing the resulting revenue with cities does not appear in that list."[222] The court was equally unyielding on the other amendment's permission for the General Assembly to delegate the county tax power for any "public purpose[] as may be authorized by the General Assem-

213. *Id.*
214. Howard v. Early County, 104 Ga. 669, 671, 30 S.E. 880, 881 (1898).
215. GA. CONST. of 1945, art. VII, § 4, para. 1.
216. *Id.*
217. GA. CONST. of 1976, art. IX, § 5, para. 1.
218. GA. CONST. of 1976, art. IX, § 5, para. 2.
219. 243 Ga. 358, 254 S.E.2d 315 (1979).
220. *Id.* at 358-59, 254 S.E.2d at 317; 1975 Ga. Laws 984.
221. *Mangelly*, 243 Ga. at 360, 254 S.E.2d at 318.
222. *Id.* at 361, 254 S.E.2d at 318-19.

bly."[223] As the court adamantly insisted, "it can never be a valid county purpose to provide revenue to a municipality, because municipalities are not citizens of nor creatures of counties–they are an entirely different form of government."[224]

Given the intransigence of the Georgia Supreme Court on county taxation, the Constitution of 1983 reflects intriguing policy changes.[225] Foremost, that constitution declares, "the governing authority of any county, municipality, or combination thereof may exercise the power of taxation as authorized by this Constitution or by general law."[226] Reverting to the pre-1877 pattern, therefore, the present constitution treats the tax power of municipalities and counties precisely the same. Moreover, for the first time since 1877, the constitution contains no specific list of enumerated subjects, either as exceptions or authorizations, regarding county taxation. Finally, the 1983 constitution expressly empowers local governments "to expend public funds to perform any public service or public function as authorized by this Constitution or by law."[227]

In summary, the history of a Georgia county's power to tax (and spend) constitutes a saga of legal accommodation. The state's experience with reconstruction nurtured an ingrained constitutional animosity to governmental extravagance at the expense of property owners. Finding exuberant acceptance in the supreme court, this mindset of constraint held county taxation to centuries of rigid accountability. Even upon signs of constitutional moderation, the court adamantly stayed its course of limitation, taking particular umbrage at county tax disbursements to municipalities. Providing revenue to noncitizen cities, the court vigorously proclaimed, "can never be a valid county purpose."[228] Whether this judicial sentiment could survive the subsequent tax-liberating theme of the present constitution promised continued intrigue on the subject of local government taxation.

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223. *Id.* at 362, 254 S.E.2d at 319.

224. *Id.* Following this decision of unconstitutionality, the General Assembly reenacted the local option sales tax statute in 1979, 1979 Ga. Laws 446, and the supreme court sustained the enactment in *Board of Commissioners v. Cooper*, 245 Ga. 251, 260, 264 S.E.2d 193, 199-200 (1980). The court held that the statute was authorized by the constitution's "Supplementary Powers" provision of 1972. *Id.* at 253-54, 264 S.E.2d at 196; 1972 Ga. Laws 1551.

225. For a full discussion, see R. Perry Sentell, Jr., *Local Government Law and the Constitution of 1983: Selected Shorts*, *reprinted in* R. PERRY SENTELL, JR., ADDITIONAL STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 565 (1983).

226. GA. CONST. art. IX, § 4, para. 1.

227. GA. CONST. art. IX, § 4, para. 2.

228. *Mangelly*, 243 Ga. at 362, 254 S.E.2d at 319.

2. Recent Sighting. Breaking a considerable period of silence on the point, *City of Decatur v. DeKalb County*[229] raised the historic issue in the most modern of governmental contexts. There, county voters approved the county levy of the Homestead Option Sales and Use Tax ("HOST") statute.[230] That statute required that the resulting revenue was to be used for a special district (whose boundaries were coterminous with the county), that the proceeds be distributed to the county, and that "a portion of such proceeds shall be expended for the purpose of funding capital outlay projects."[231] In arranging to distribute these latter funds for capital outlay projects within the incorporated areas, the county entered into the following agreement with several municipalities: "[The] county . . . shall disburse on an annual basis to each Municipality a proportionate amount of [the tax funds] dedicated for capital outlay projects."[232] Subsequently, when dissatisfied with the amount of funds received, several municipalities charged the county's breach of the agreement. In response, the county denied the contract's validity, a position accepted by the trial court, which granted the county's motion for judgment on the pleadings.[233]

Upon de novo review, the Georgia Court of Appeals affirmed the trial court's decision.[234] Initially, the court appraised the tax statute to require that "the county bears the responsibility for expending the tax proceeds for capital outlay projects."[235] By virtue of the intergovernmental agreement, the court asserted, the county "seeks to shift that responsibility to the municipalities."[236] In the absence of legislative authority, "it is inappropriate for a county to simply give its tax revenue to a municipality and allow that municipality to control what is done

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229. 255 Ga. App. 868, 567 S.E.2d 332 (2002).

230. *Id.*, 567 S.E.2d at 333; O.C.G.A. §§ 48-8-100 to 48-8-122 (2002).

231. 255 Ga. App. at 870, 567 S.E.2d at 334; O.C.G.A. § 48-8-104 (2002).

232. 255 Ga. App. at 869, 567 S.E.2d at 333. The local governments entered into this agreement pursuant to the "Intergovernmental Agreement" authorization of the constitution, art. IX, § 3, para. 1. *Id.* at 868, 567 S.E.2d at 333.

233. *Id.* at 869, 567 S.E.2d at 333.

234. *Id.* at 868, 567 S.E.2d at 333.

235. *Id.* at 870, 567 S.E.2d at 334. The court quoted the following provision of the statute: "The sales and use tax levied pursuant to this article shall be exclusively administered and collected by the commissioner for the use and benefit of each county whose geographical boundary is coterminous with that of a special district." *Id.*; O.C.G.A. § 48-8-104.

236. 255 Ga. App. at 870, 567 S.E.2d at 334. "Contrary to the structure set forth in the statute, the county has little power under the agreement to control what is done with the tax proceeds once they are given to the municipalities." *Id.*

with the revenue."[237] For authority, the court quoted the supreme court's famous language in *Mangelly*: "'[I]t can never be a valid county purpose to provide [its tax] revenue to a municipality, because municipalities are not citizens of nor creatures of counties–they are an entirely different form of government.'"[238] That authority demanded an invalid contract: "If the legislature had intended for counties to share HOST proceeds with cities in the manner described in the Intergovernmental Agreement, it could have so stated."[239]

3. Reflection. *City of Decatur* thus balanced one of local government's most modern taxing techniques against one of its most historic constraints. In one corner, there appeared the local option sales tax, local government's recently advanced alternative to increasing property taxes. In the opposite corner, there emerged an agreement triggering the law's traditional fears of unrestrained county tax disbursements. Once again, the constraints prevailed.

Admittedly, the issue was no longer the ancient one of absolute prohibition, for all acknowledge the liberating constitutional and statutory changes of more recent times. At a minimum, however, the court insisted that any effort to effect those changes be explicit, and was prepared to subject such an effort to strictest scrutiny. In administering that scrutiny, moreover, the court relied solely upon (indeed quoted) case authority from the restrictive days of yore. Once the statute failed that

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237. *Id.*

238. *Id.* (quoting *Mangelly*, 243 Ga. at 362, 254 S.E.2d at 319). The court's citation was as follows: "See *City Council of Augusta v. Mangelly*, 243 Ga. 358, 362(1), (254 SE2d 315) (1979) . . . superceded by statute on other grounds as noted in *Nielubowicz v. Chatham County*, 252 Ga. 330, n.1 (312 SE2d 802)." *Id.*

239. 255 Ga. App. at 870-71, 567 S.E.2d at 334. "The agreement here is contrary to the express language of the HOST statute, is not authorized by law, and therefore cannot stand." *Id.* at 871, 567 S.E.2d at 334.

As this Article went to press, the Georgia Supreme Court reversed the court of appeals decision. City of Decatur v. DeKalb County, No. S02G1617, 2003 WL 22532528 (Ga. Nov. 10, 2003). The supreme court by no means disagreed with local government law's historic caution over county tax purposes, not with the correctness of the decision in *City Council of Augusta v. Mangelly*, 243 Ga. 358 (1979). Rather, the supreme court held that the court of appeals reliance on *Mangelly* had been "misplaced." *Decatur*, 2003 WL 22532528, at *1. "The statute at issue in *Mangelly* was not enacted pursuant to the special district provision of the Constitution, which is currently found at Article IX, Section II, Paragraph VI." *Id.* The HOST statute was expressly based on that provision, the court reasoned, and thus HOST "implements a district tax under the 'special district' Constitutional provision. It does not violate *Mangelly*'s proscriptions on *county* taxes, and the Court of Appeals erred in so holding." *Id.* at *2. The statute thus authorized the intergovernmental contract between the county and its municipalities. Accordingly, the supreme court's decision in no way detracts from the historical significance of the "pivotal principle" under discussion.

analysis, the county tax disbursement contract stood no chance of success.

As it was in 1877, therefore, so it was in 1979; and as it was in 1979, so it was in 2002.

III. CONCLUSION

Justice Holmes's famous emphasis on case continuity finds striking exemplification in the corpus of Georgia local government law. As the legal order touching the citizen's first-stage exposure to the "government" experience, the subject takes only its origins from constitutional and statutory outlines. The tailoring of those outlines to the uniqueness of both citizen and government frequently occurs in litigation presented to the appellate courts. The courts seek to resolve those controversies in a manner encouraging the perception of judicial proficiency—an assurance of orderly disposition.

In its recurring efforts at accommodation, the common law process formulates principles sufficiently narrow to resolve the case at hand but adequately broad to serve future variations. As those principles work themselves into the legal fabric, they evidence a controlling presence and, over time, assume the mantle of "pivotal principles." Such constructs are valuable: They provide a richer texture to the system and afford an additional dimension for reflective appraisal. They encompass law's historical component, thereby fostering an abiding sense of the inevitable.

The effort here is one merely of illustration. It assembles litigational episodes from five highly diverse areas across the expanse of Georgia local government law. Each account features formulation of a pervading legal principle and an abbreviated description of the precept's traditional setting. Focus then shifts to the principle's judicial employment in resolving the most modern of controversies. Each of these new millennium exercises captures a remarkably current vignette of continuity. In mass, they attest in graphic fashion to the persistent presence of the past in the likely law of the future.