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The Georgia Supreme Court and Local Government Law: Two Sheets to the Wind

R. Perry Sentell Jr.
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R. Perry Sentell, Jr.†

INTRODUCTION

On a square-rigged sailing ship, a "sheet" is a line attached to
the lower corners of a squaresail, used for trimming it to the
wind. When sheets are allowed to run free, the sails lose their
wind and flap and flutter. The ship's forward motion stops, and
as she loses steerageway, she becomes impossible to control. A
person is said to be "three sheets to the wind" when in an
advanced state of inebriation, fluttering and wallowing around
out of control.¹

The above characterization seems somehow appropriate for
an area of law reacting to the unsettling evolution afforded it by
an innovating supreme court. From disguised affirmative
change to nuanced crucial omission, the court's refinements
bring a disquieting instability to the subject, impeding
confidence in its forward motion, and rendering its practice
impossible to control. In the ebb and flow of decisional steerage,
local government law falls wayward to the tides of transition.

Simply by way of example, the court has recently impacted
two of the subject's most historic facets. Neither impact was
explicit, and, over the course of time, neither may prove
revolutionary. Their disorienting implications, however, are no
less disconcerting. Each constitutes a fluttering doctrinal sheet
to the wind.

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of Georgia; LL.M., 1961, Harvard University; Member of the Georgia Bar. This Article
was originally published by the Georgia Municipal Association.
1. OLIVIA A. ISIL, WHEN A LOOSE CANNON FLOGS A DEAD HORSE THERE'S THE DEVIL
TO PAY 102 (1996).

361
I. SHEET ONE: THE TEST FOR INVALIDATING LOCAL STATUTES

Local governments are governed by all manner of legislative enactments. At the state level, there is the constitution as well as both general and local statutes. At the local level, there are ordinances and resolutions. On occasion, these various enactments may purport to deal differently with the same subject. Upon such an occurrence, the affected parties (including the local government) must determine which enactment controls the matter. Few determinations are more crucial to local government administration.2

The state constitution clearly ranks first in the hierarchy of authority. Beneath that plateau, however, the lines between general statutes and other enactments (local statutes as well as municipal or county measures) can blur. Although the general statute usually controls an instance of clear and direct conflict, the conflict is often neither clear nor direct. In such cases, nevertheless, the conclusion may differ radically if the local measure prevails. Accordingly, the parties involved may have much at stake, and litigation is likely. In that event, the issue promptly and decisively narrows to the judicial test for upholding or invalidating the local enactment. It is no surprise, therefore, that many state constitutions purport to address the point.

In 1861, the Georgia Constitution first devoted explicit attention to regulating the relation between general and local legislation: “[N]o general law shall be varied in a particular case by special Legislation; except with consent of all persons to be affected thereby.”3 By the Constitution of 1877, the prohibition had assumed the formulation it would retain for more than one hundred years: “[N]o special law shall be enacted in any case for which provision has been made by an existing general law.”4 It was this prohibition, therefore, that the Georgia Supreme Court

2. For more extensive treatments, from which this history is largely derived, see R. Perry Sentell, Jr., When is a Special Law Unlawfully Special?, 27 MERCER L. REV. 1187 (1976); R. Perry Sentell, Jr., Unlawful Special Laws: A Postscript on the Proscription, 30 MERCER L. REV. 319 (1978). Both articles are reprinted in R. Perry Sentell, Jr., Studies in Georgia Statutory Law 71, 91 (1987).
would subsequently seek to administer across the cascading decades of local government litigation.

As late as 1943, the court confessed "general confusion on the question" and launched an effort to clarify the constitution's proscription. The framers' intent, the court unanimously reasoned in City of Atlanta v. Hudgins, was "to [e]nsure that once the legislature entered a field by enacting a general law, that field must thereafter be reserved exclusively to general legislation . . ." It was not necessary that the general statute "exhaust" the field; even "superficial" treatment precluded local legislation in the subject area. It was not necessary that the general and local statutes "differ" or conflict: "[T]he constitution . . . expressly declares that if provision has been made by general law no special law shall be enacted." With its decision in Hudgins, therefore, the supreme court manifested a strict approach to the constitution's prohibition of local legislation. The court's unanimous resolve appeared calculated to invalidate the most, not the fewest, measures of local complexion.

Within six years, the resolve had dissolved. Lurching to a position of complete dissent in Irwin v. Torbert, a majority of the court upheld the validity of a city ordinance on subjects allegedly covered by general law. In a three-justice controlling opinion, the court, on the one hand, saw "no specific requirement" in the ordinance covered by general statutes. On the other hand, the court refused to "denominate [the measures] as being on the same general subject." Only a single justice's special concurrence saved the court's controlling opinion from a forceful three-justice dissent: "It is enough to prevent the

6. Id. Hudgins presented a general statute requiring ante litem notice for claims against municipalities, and a municipal charter provision requiring that the notice be provided within ninety days of injury. See id. Challengers maintained the charter provision to be invalid under the constitution's prohibition. See id.
7. Id. at 623, 19 S.E.2d at 511.
8. See id.
9. Id. at 626, 19 S.E.2d at 513. The court invalidated the municipal charter provision. See id.
10. 204 Ga. 111, 49 S.E.2d 70 (1948).
11. Both measures dealt with features of fire safety in public buildings. See id.
12. Id. at 119, 49 S.E.2d at 77.
13. Id.
14. See id., 49 S.E.2d at 83 (Jenkins, C.J., concurring specially) (indicating reliance upon a "preemption" type approach to the issue).
existence of a valid special law if the subject matter of that law has been dealt with even though superficially by a general law."15 With Irwin v. Torbert, therefore, the supreme court radiated an almost direct division between "conflict" and "subject-area" as the appropriate test for evaluating local legislation. In that division lay the fate of myriad local statutes, charter provisions, ordinances, and resolutions.

The supreme court's velocity of vacillation only accelerated over the following decades. In 1975, for instance, the court unanimously decided Powell v. Board of Commissioners of Roads & Revenues18 in the vein of "conflict." The case posited a county ordinance, prohibiting beer and wine sales within seventeen hundred feet of a school, against a general statutory prohibition of three hundred feet. Rejecting a local-law challenge to the ordinance, the court reasoned that the statute established only a "minimum distance" of prohibition.17 It did not preclude an ordinance prohibition of a greater distance. With its decision in Powell, therefore, the court—without any rationale on the point—unanimously sustained a local measure condemnable under either "subject-area" or "preemption."

Two years later, the court again unanimously oscillated in the opposite direction. Bussell v. Youngblood18 challenged the validity of a local statute designating the grand jury as arbiter of budgetary disputes between the county commissioners and the sheriff.19 Conceding that general statutes on grand juries made no mention of the matter,20 the court nevertheless invalidated the local measure: "The powers and duties of such bodies as stated in these general laws cannot be altered to enlarge, diminish, modify or change them by any special laws."21 With its decision in Bussell, therefore, the court—without any rationale on the point—unanimously

15. Id. at 129, 49 S.E.2d at 84 (Duckworth, J., dissenting).
17. Id. at 185, 214 S.E.2d at 907.
19. See id.
20. "There is no general law enacted by the General Assembly which designates the grand juries of the state as arbitrators in disputes involving the number and salaries of deputy sheriffs or the sheriff's fiscal budget." Id. at 555, 238 S.E.2d at 92.
21. Id.
invalidated a local measure assuredly sustainable under "conflict."

At the conclusion of 1977, therefore, the constitution's local-statute prohibition, unchanged in formulation, had experienced one hundred years of litigation in the Georgia Supreme Court. An assessment of that litigation yielded at least three distinct judicial approaches to testing the validity of local legislation. First, under the "subject-area" approach, once a general statute touches upon a subject, no matter how superficially, no local measure can be enacted in that area. Second, under the "preemption" perspective, when a general statute sufficiently deals with a matter, that matter is then preempted from treatment by local measures. Third, under the "conflict" cannon, a local measure is invalid when its provisions conflict with those contained in a general statute.

This was not to suggest that the court always neatly and precisely articulated its approach. Moreover, the approach stated was not always necessary to the court’s conclusion in the case. In rendering any assessment, therefore, much was derived from result rather than explication. It was nevertheless clear that neither local governments nor private parties could realistically predict in advance the outcome of legal challenges to local legislation. A test, consistently stated and consistently applied, begged the court’s attention.

As though on cue, 1978 brought City of Atlanta v. Associated Builders & Contractors of Georgia, Inc.22 to the fore. The case featured both a general statute and a municipal ordinance dealing with minimum wages, and the challenge to the ordinance was unmistakable: "Plaintiffs allege the ordinance is . . . in violation of the Georgia Constitution . . . which declares that no special law shall be enacted in any case for which provision has been made by an existing general law."23 Both the trial court and the court of appeals agreed with the challenges.

Taking the case on certiorari, the supreme court splintered into three factions as follows: a majority opinion by four justices, a specially concurring opinion by one justice, and a dissent by

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two justices. The result was a reversal of the lower courts and a validation of the municipal ordinance.

The majority opinion initially framed the "broader question" as "whether [the] constitutional provision merely prohibits conflicts between general and special laws or whether it prohibits altogether the enactment of a special law when there is preemption by the state in that area of regulatory activity." In the guise of Hamlet, the court reflected: "Conflict or Preemption? That is the question."

To its considerable credit, the court confessed that "[t]he prior cases in this area are irreconcilable...." Indeed, "if there is any common analytical thread running through them which can be extracted therefrom and used as the basis for rendering a decision in a subsequent case, it escapes this reader's detection." Following that rare and magnificent exhibition of analytical honesty, the court reverted for guidance to its "latest, and therefore controlling, pronouncement on this point," its ruling in Powell. The test of Powell, the court asserted, was "whether there is a genuine conflict between the special and general law...." In Associated Builders, no "conflict" existed, the court reasoned, because "[t]he local minimum wage law does not detract from or hinder the operation of the state law, but rather it augments and strengthens it."

On the one hand, the court's decision in Associated Builders left a good deal to be desired. As its latest foray into the morass of testing local legislation, the Georgia Supreme Court, at this late date, was far from one view. At best, it could muster but a bare majority opinion in undertaking clarification. Moreover,

24. See Associated Builders, 240 Ga. at 655, 242 S.E.2d at 139.
25. See id.
26. Id. at 658, 242 S.E.2d at 140.
27. Id.
28. Id.
29. Id.
30. Id.
31. See Powell v. Board of Comm'rs of Rds. & Revenues, 234 Ga. 183, 214 S.E.2d 905 (1975). See also infra Part III.
33. Id. at 657, 242 S.E.2d at 141, see also id. at 658, 242 S.E.2d at 141 (Hill, J., concurring specially) (appearing unconvinced that the two legislative measures dealt with the same subject). But see id., 242 S.E.2d at 141. (Bowles, J., dissenting) (viewing the ordinance as in direct conflict with the statute).
the majority itself appeared insufficiently focused—although featuring both “conflict” and “preemption,” it utterly ignored the “subject-area” test in formulating its Hamlet stand-off. Yet, “subject-area” had constituted a far more prominent exercise in the past cases than “preemption.” Finally, in selecting its “latest, and therefore controlling” precedent—a precedent from which it extracted “genuine conflict”—the court picked Powell. Yet, as previously noted, the court had decided Bussell a full two years after Powell, and in Bussell, the court unanimously invalidated a local measure which was clearly sustainable under “conflict”!

On the other hand, the court’s decision in Associated Builders answered the plea of a millennium: it confessed confusion, jettisoned past analytical errors, and formulated a test for the future. Articulating a clear choice between “conflict” and “preemption,” the court indisputably rejected the latter and selected the former as its approach to evaluating local legislation. Further, the court put into play a test for the test: “genuine conflict” turned upon whether the local measure “detracted” or “hindered” general law, as opposed to “augmenting” and “strengthening.”

34. Both “tests,” if consistently applied, would sustain far more local legislation over time than would “preemption.”

On the threshold of a new decade, therefore, a semblance of order threatened to rectify more than a century of chaos.

The 1980s opened on the exciting note of constitutional revision. Indeed, a considerable period of study, hearings, politics, legislating, and ratification ultimately yielded the “new” Georgia Constitution of 1983. Among that document’s omissions, additions, and outright changes, a reformulated proscription on local legislation emerged.

From 1877 through the Georgia Constitution of 1976, the prohibition on local legislation remained substantially unchanged: “[N]o special law shall be enacted in any case for

34. See id. at 857, 242 S.E.2d at 141.
which provision has been made by an existing general law." The Constitution of 1983 virtually repeated the traditional formulation but, for the first time since 1877, attached an addendum: "[N]o local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws."

The new constitution thus appeared to empower the General Assembly to permit local governments to adopt ordinances in "case[s] for which provision has been made by an existing general law." Under the addendum, the General Assembly must expressly include such permission in the general statute, and the subject must involve "police powers." Finally, even this expressly permitted local measure must not "conflict" with general statutes. Did this new addendum, expressly empowering the legislature's accommodation to local governments, signal any change in reading the preceding traditional proscription on local statutes? Did that proscription still operate on a "genuine conflict" test, or—now that "conflict" expressly controlled the exception—did the proscription's test revert to "subject-area?" Would this addendum, intended for the benefit of local governments, ironically result in more invalidated local statutes under the general proscription? These questions would hang tantalizingly in the air for the next fifteen years.

In the closing months of 1998, the supreme court decided Franklin County v. Fieldale Farms Corp. On one side of the case, plaintiff corporation applied for a county permit to place sludge on private farm land. Plaintiff showed compliance with the applicable general statute requiring State EPD approval; the statute also empowered local governments to assess reasonable

36. GA. CONST. of 1976, art. I, § II, ¶ VII.
37. GA. CONST., art. IX, § VI, ¶ IV (emphasis added).
38. GA. CONST., art III, § VI, ¶ IV(a).
39. For vintage 1983 conjecture on the issue, see Sentell, supra note 35, at 578.
41. Plaintiff proposed rendering the sludge from its wastewater treatment lagoons and applying it to 62 acres of agricultural land in defendant county. See id. at 273, 507 S.E.2d at 461.
monitoring fees. On the other side of the case, the county, acting under its own land disposal ordinance, denied plaintiff’s application. In resolving the stand-off, the court finally undertook analysis of the 1983 Constitution’s local-statute proscription.

By way of background, the court unanimously recalled, its decisions prior to 1983 reflected uncertainty over the proper test for local legislation—some tests employed “conflict,” and others “preemption.” To eliminate the confusion, the constitutional revisionists adopted the 1983 clause containing two provisions: first, the traditional proscription, and second, an express exception. The first provision, the court asserted, “follows the preemption rule of previous constitutions . . . .” “Under this provision, moreover, preemption may be express or implied.”

The second (new) provision creates “an exception to . . . preemption when general law authorizes the local government to act and the [ensuing] local ordinance does not conflict with general law.” The test for “conflict,” moreover, goes to whether the local statute “[i]mpairs the general law’s operation” or “rather augmented and strengthened it.”

Official interpretation in place, the court turned to execution. Under the clause’s first provision, the court held that the general statute “preempts the county’s ordinance by implication.” The court drew that implication from two sources: (1) the general statute’s express (and narrow)

43. The court summarized the county ordinance as requiring preparation of the application by a licensed professional engineer, the inclusion of detailed descriptions of land site and disposal processes, an application fee, an annual monitoring fee, the hiring of expert consultants, and a right of inspection. See Franklin County, 270 Ga. at 276, 507 S.E.2d at 483.
44. “Based on these differing interpretations, it was unclear whether the uniformity clause preempted any special or local law when the state had passed a general law on the subject or whether it merely prohibited conflicts between general and local laws.” Id. at 274, 507 S.E.2d at 482.
45. The court cited the records of the 1983 Constitutional Revision Commission. See id.
46. Id.
47. Id., 507 S.E.2d at 483.
48. Id.
49. Id.
50. Id. at 277, 507 S.E.2d at 464.
authorization of local monitoring fees,\textsuperscript{51} and (2) the general statute’s legislative history.\textsuperscript{52} This conclusion of implied preemption controlled the case “unless the county ordinance falls within the exception” established by the clause’s second provision.\textsuperscript{53} That exception depended upon the general statute’s express authorization of county legislation; here the general statute only granted the power to impose monitoring fees. That power fell far short of authorizing the county ordinance, an ordinance “establish[ing] a duplicate permit system . . . .”\textsuperscript{54} The county’s land disposal ordinance, therefore, found itself in desperate constitutional straits: it suffered “implied preemption” under the clause’s first provision, and it could not clear the “conflict” hurdle of the second provision. Accordingly, the court affirmed summary judgment for the plaintiff corporation.\textsuperscript{55}

The more things change, the more things change. With \textit{Franklin County v. Fieldale Farms Corp.}, the Georgia Supreme Court yet again changed its test for evaluating local legislation. Actually, the court now unanimously announced for the first time, the 1983 Constitution had done the deed fifteen years earlier. That document’s reformulated local-law proscription, apparently facilitating an accommodation to local governments, had instead imperilled more local legislation than ever. With the court’s retrospective interpretation, the abyss of “implied preemption” yawned ominously at the projected prospects.

As the most recent episode in a saga dating to 1861, and an event of high importance to local government law, the supreme court’s 1998 decision deserves rapt attention. Both its rationale and its likely results do disservice to the cause of local government administration.

\begin{itemize}
\item \textsuperscript{51} “By explicitly granting this narrow power to local governments, the statute by implication precludes counties from exercising broader powers.” \textit{Id.}
\item \textsuperscript{52} A county “veto provision” originally in the bill was deleted and an effort to reinstate the provision failed. \textit{See id.}
\item \textsuperscript{53} \textit{Id.}, 507 S.E.2d at 463. “As a result, the general preemption rule controls unless the county ordinance falls within the exception to the uniformity clause. Under that exception, the General Assembly must have authorized local governments to enact regulations and the local ordinance must not conflict with the state’s general law.” \textit{Id.}
\item \textsuperscript{54} \textit{Id.} at 250, 507 S.E.2d at 464.
\item \textsuperscript{55} Plaintiff corporation sought a declaratory judgment, an injunction, and a mandamus; the trial court granted its motion for summary judgment. \textit{See id.}, 507 S.E.2d at 460. Here, the supreme court affirmed the trial judge’s actions. \textit{See id.}
\end{itemize}
Preliminarily, Fieldale Farms appeared an awkward, if not inappropriate, setting for the court’s local-law confrontation. Thus, the case might more logically have been approached from the perspective of “power”—more specifically, the county’s lack of power per se to adopt the land disposal ordinance. That approach would emphasize the ordinance’s rather substantial substantive provisions, as well as the absence of express or implied authorization from general statutes. Given Georgia’s historic “strict construction” of local government power, the county’s basis for adopting the ordinance appeared weak indeed. From that familiar perspective, of course, the ordinance simply constituted an invalid exercise of county power—whether or not general statutes dealt with the matter.

As for the court’s actual approach to the case, several points call for comment. Although assuredly correct in recalling the earlier uncertainties of its local-law opinions, the court limited its prior tests to “conflict” and “preemption,” completely omitting any reference to “subject-area.” Additionally, the court failed even to mention its confession of confusion twenty years earlier in Associated Builders and its deliberate resolution of the issue. There, the court clearly articulated its choice between “conflict” and “preemption,” expressly rejected “preemption,” and explicitly embraced “conflict” as the controlling order of the future. How, then, in Fieldale Farms, could the court legitimately describe the 1983 clause’s first provision as “follow[ing] the preemption rule of previous constitutions?” In fact, Fieldale Farms terminated the expressly established rule of the previous constitution (at least since 1978). In fact, Fieldale Farms embraced the rule which the court had previously explicitly rejected. In fact, Fieldale Farms derailed every local government in Georgia from the track of “genuine conflict,” rerouting them to the disorienting siding of “preemption.” Belying its self-described consistency with the past, the court operated in direct opposition to established “law.”

Under the court’s legislative-history interpretation of Fieldale Farms, the constitution’s local-law proscription must now be approached by degrees. In evaluating a challenged local measure, several preliminary inquiries are in order. First, does the general statute at issue contain a statement expressly preempting the regulated subject from treatment by local laws? Typically, it will not. Second, does the general statute at issue
expressly permit the legislature to authorize local legislation on
the regulated subject? Typically, it will not. (If it does, then
examination diverts to whether the permitted local measure
“conflicts” with the permitting general statute.) Usually,
therefore, the evaluating exercise turns to whether an “implied
preemption” can be gleaned from the general statute. The
gleaner will require analytical fortitude—and a good measure of
luck. In adopting the test of “implied preemption,” therefore,
the supreme court conferred upon itself the most discretion
possible. The test is infuriatingly more vague than “subject-
area” and will potentially invalidate far more local legislation
than “genuine conflict.” In an era of heralded “home rule” and
increased “local autonomy,” Fieldale Farms takes an
unfortunate step.

II. SHEET TWO: BINDING CONTRACTS IN
LOCAL GOVERNMENT LAW

On the one hand, the law recognizes, the local government
must be able to make some contracts and agreements; its
operations could not otherwise succeed. On the other hand, the
law insists, the local government must be prohibited from
making some contracts and agreements; its operations could not
otherwise succeed. Obviously, the line between the permitted
contracts and the prohibited contracts is one of pivotal
importance—to the local government (including its citizens) and
to those who purport to deal with the local government. Drawing
that line has consumed untold amounts of judicial time and
energy.

The basic policy concern goes to the local government’s
freedom to “govern.” The nature of government itself (assuredly
local government) stands alien to the notion of contracted limits
upon that freedom. It condemns bargains by government’s
temporary caretakers that encroach upon their indispensable
discretion in providing for the health, safety, and general
welfare of the community. It is fundamentally opposed to a
governing authority’s efforts to limit its necessary power to deal
with the unforeseen or to confine the future exercise of its powers to predetermined modes.\textsuperscript{56}

The saga apparently began in 1882 when the Georgia Supreme Court decided \textit{Williams v. City Council of West Point}.\textsuperscript{57} In \textit{Williams}, the court invalidated an ordinance purporting to freeze the charge for retail liquor licenses.\textsuperscript{58} The court's cryptic opinion asserted that "one council cannot, by ordinance, bind itself and its successors to a given line of policy, or prevent free legislation by them in matters of municipal government."\textsuperscript{59} Accordingly, as early as 1882, the court excluded "lines of policy," and "matters of government," from the local government's contracting capacity.

Shortly thereafter in 1895, legislative framers acknowledged the \textit{Williams} opinion as their source for the following statute: "One council may not by an ordinance bind itself or its successors so as to prevent free legislation in matters of municipal government."\textsuperscript{60} Today, some 104 years later, the formulation is as follows: "One council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government."\textsuperscript{61} For more than a century, therefore, this prohibition has claimed unchanging and forceful presence in Georgia's statutory elaboration. Its import holds truly historic status in the law of local government.

In its formative treatment of the statute, the Georgia Supreme Court pulled no punches with contracts perceived to cross the line of prohibition. Near the century's inception, \textit{Horkan v. City of Moultrie}\textsuperscript{62} featured an agreement between a municipality and a landowner for laying sewer lines. In return

\begin{itemize}
\item \textsuperscript{56} For more extensive treatment, from which this history is largely derived, see R. Perry Sentell, Jr., \textit{Local Government and Contracts That Bind}, 3 Ga. L. Rev. 546 (1989), \textit{reprinted in} R. Perry Sentell, Jr., \textit{Studies In Georgia Local Government Law} 541 (3rd ed. 1977).
\item \textsuperscript{57} 68 Ga. 816 (1882).
\item \textsuperscript{58} The court rejected the complaint of an individual who, relying upon the ordinance, had paid a fee for a liquor license only to see the amount of the fee substantially reduced some ten days later. \textit{See id.}
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} 1 Ga. Code § 743 (1995).
\item \textsuperscript{62} 136 Ga. 561, 71 S.E. 785 (1911).
\end{itemize}
for the owner’s permission to lay the lines, the city agreed to furnish the owner with water and sewer services. When the municipality failed to abide by its agreement,\textsuperscript{63} the court evidenced little sympathy for the complaining landowner. If the statute prohibited the city from making such agreements “by an ordinance,” the court asserted, then “of course it could not be done by a contract.”\textsuperscript{64} Municipal power to make and change water rates was necessary to maintain sufficient revenue and to furnish the service “on equal terms and at reasonable rates.”\textsuperscript{65} It was “a legislative or governmental power, and therefore [could not] be legally bargained or bartered away . . . .”\textsuperscript{66} As an “ultra vires and void” endeavor, neither the contract, nor the city’s benefits under it supported plaintiff’s alternative arguments of ratification or estoppel.\textsuperscript{67}

The supreme court offered its most extensive policy rationale for the statute in \textit{Aven v. Steiner Cancer Hosp., Inc.},\textsuperscript{68} when it invalidated a municipal lease of land to a hospital in return for the hospital’s free cancer treatment of the poor.\textsuperscript{69} Whether and how they would aid the poor, the court reasoned, was “a matter for determination from time to time by the governing authorities”\textsuperscript{70} and demanded the exercise of discretion. This “public responsibility, relat[ed] to society in general, . . . may directly affect the peace, health, morals, and security of the public at large.”\textsuperscript{71} The controverted lease granted “the use of valuable property” and constituted “a continuing appropriation for the use of the poor.”\textsuperscript{72} It “would necessarily prevent free legislation in regard to all of these matters concerning care of the poor.”\textsuperscript{73} Consequently, the court concluded, “[t]he proposed

\textsuperscript{63} The municipality attempted to bill the plaintiff for sewer service after a two-year period of using the sewer lines. \textit{See id.}
\textsuperscript{64} \textit{Id.} at 563, 71 S.E. at 786.
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}, 71 S.E. at 785.
\textsuperscript{68} 189 Ga. 128, 5 S.E.2d 356 (1939).
\textsuperscript{69} \textit{See id.} The lease ran for a period of thirty-five years—“more than a third of a century, and half the allotted time of man.” \textit{Id.} at 144, 5 S.E.2d at 366.
\textsuperscript{70} \textit{Id.} at 140, 5 S.E.2d at 364.
\textsuperscript{71} \textit{Id.} at 141, 5 S.E.2d at 365.
\textsuperscript{72} \textit{Id.} at 142, 5 S.E.2d at 365.
\textsuperscript{73} \textit{Id.}
undertaking will not merely grant a lease on the city’s property; it will bargain away governmental discretion. 74

As judicially-formulated, legislatively-codified, and judicially-evolved, the binding-contracts prohibition assumed a primary prominence in Georgia local government law. The prohibition operated generally for legislative or governmental bodies; it applied generally to local governments (both counties and municipalities); and it extended generally to contract activities (whether or not reduced to ordinances). The principle steadfastly precluded members of a local governing authority from binding themselves or their successors by agreements regarding “governmental” functions.

The plight of the party contracting with the local government fairly glowed with judicial disdain. The courts legally presumed that party to know of any limitations upon the government’s contracting authority; he accordingly acted at his peril in entering the agreement. Violation of the binding-contracts prohibition rendered the agreement ultra vires, void from the inception, and an absolute nullity: the private party could not bring suit for breach of contract or for specific performance. The local government’s actions under the contract would not effect its ratification, nor would the government’s receipt of benefits under the contract estop it from later pleading the agreement’s invalidity. 75

By mid-century, therefore, the binding-contracts prohibition appeared solidly settled in Georgia local government law. This is not to suggest that the court decisions were automatic nor that all local government contracts fell to challenge. The prohibition itself featured explicit exceptions; for instance, it did not imperil agreements regarding non-governmental (or “proprietary”) functions. 76 Additionally, as with any legal principle, the prohibition’s coverage occasionally appeared ragged at the edges. Unaccountably, the courts sometimes seemed to perceive the principle as reaching only the governing authority’s successors, rather than the authority itself. On occasion, moreover, judicial emphasis somehow confusingly strayed to the length of the contract’s commitment as material

74. Id.
75. For a detailed discussion, see Sentell, supra note 2.
76. See id.
to the principle's coverage. Again, however, these were exceptions; the general rule invalidated the local government's binding contracts.

In 1970, everything changed. The catalyst was DeKalb County v. Georgia Paperstock Co., an action charging the county with breaching a contract to sell its waste paper corrugated boxes. In defense, the county argued the contract's invalidity, claiming it "unlawfully [bound] the commission and future commissions in the exercise of their legislative function." Once again, therefore, local government law's binding-contracts prohibition squarely confronted the supreme court.

Initially, the court accepted the county's characterization of its agreement as constituting "the exercise of a legislative function . . . ." That characterization, in turn, triggered applicability of the binding-contracts mandate. Applicability, however, only meant that the contract did not bind "any subsequent board of county commissioners," and was "not . . . enforceable beyond the year in which it was made . . . ." Yet, the court qualified, the agreement might remain enforceable if it received "continued approval of [the] board of commissioners." Approval might be demonstrated by the board's "formal resolution" or by "ratification." Ratification might be evidenced by "the board accepting the benefits [of the agreement] during . . . subsequent years."

These remarkable consequences of applicability led the court to even more striking conclusions. The plaintiff was entitled to recover damages "occurring in the calendar year in which the contract was entered into . . . ." Conversely, the plaintiff

77. See id.
79. Id. at 371, 174 S.E.2d at 886.
80. For more extensive treatment, from which this history is largely derived, see R. Perry Sentell, Jr., Binding Contracts in Georgia Local Government Law: Recent Perspectives, 11 GA. ST. B.J. 148 (1975), reprinted in R. PERRY SENTELL, JR., STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 579 (3d ed. 1977).
82. Id.
83. Id.
84. Id.
85. Id.
86. Id. at 372-73, 174 S.E.2d at 887.
received no damages sustained “in any subsequent years.” 87 Once again, however, there was a qualification: the plaintiff might recover damages of subsequent years by showing “a ratification or reaffirmance of the contract by the county commission in one or more such subsequent years.” 88

Almost nothing in the supreme court’s DeKalb County opinion reflected the prior law of binding contracts. Thus, the court appeared to hold, the local governing authority could bind itself in a legislative function, at least for the calendar year of the contract. The court clearly sustained plaintiff’s right to damages for that year. Although the contract did not initially bind the governing authority’s successors, even those successors could encounter liability by approval (“formal resolution”) or by ratification (“accepting benefits”).

It was difficult to comprehend a treatment so at odds with the previous law’s pervading historic principle of ultra vires contracts. Indeed, the court made no single mention of that principle in its entire opinion. Rather, the court cited four prior decisions for its conclusions and not one of those decisions involved—even mentioned—the prohibition against binding contracts. Instead, each case dealt with contentions of unlawful local government indebtedness. It was in that context that the one-calendar-year limitation was evolved to define a “debt.” That limitation had nothing to do with the prohibition against binding contracts. Indeed, throughout its entire analysis of DeKalb County, the Georgia Supreme Court failed to mention a single prior decision on binding contracts.

In 1970, everything changed.

After its decision in DeKalb County, the Georgia Supreme Court never again appeared entirely comfortable with the binding-contracts proscription. Only one year later, the court reversed a trial judge who invalidated a municipal lease of an athletic field. 89 The case encompassed two issues, the court held, not resolvable as a matter of law. First, if a hearing revealed evidence that the city held the property in a “proprietary”

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87. Id.
88. Id.
89. See Jonesboro Area Athletic Ass’n, Inc. v. Dickson, 227 Ga. 513, 181 S.E.2d 852 (1971) (reversing the trial judge’s ruling that invalidated the lease on explicit grounds of binding contracts).
capacity, then the lease completely escaped the binding-contracts prohibition. 90 Second, the period of the lease might be shown "reasonable," 91 if so, given the fact that it "did not obligate the city in any way financially," 92 the agreement could be upheld. Otherwise, should the binding-contracts proscription "be too rigidly applied, there would be few contracts which municipalities in this State could legally enter .... " 93 Indeed, the court concluded, "[i]t may be that legislative action is indicated to provide clearer guidelines for contracts with municipal governments .... " 94

In this highly innovative fashion, therefore, the supreme court mixed both old—and completely new—considerations into its binding-contracts jurisprudence. Moreover, its concern for additional flexibility in local government contracts, and its desire for clearer legislative guidelines, came extremely late in a saga notoriously impervious to both concepts.

By 1980, the supreme court openly conceded that "the parameters of this [binding contracts] section are now uncertain." 95 The case featured an action by police officers for city funding of an incremental pay increase mandated by a previous ordinance. The city contended that "one city council cannot bind future councils to fund pay increases." 96 Ultimately agreeing with that defense, the supreme court first traced the history of the binding-contracts proscription. 97 From its case-law genesis, and through "many years" of "strict construction," the principle frequently resulted in ultra vires nullities subject to neither ratification nor estoppel. 98 Although "some confusion has made its way into the application of the prohibition," 99 the

90. See id. at 518, 181 S.E.2d at 856.
91. Id. The court extracted the reasonableness concern from an earlier case, Horkan v. City of Moultrie, 136 Ga. 561, 71 S.E. 785 (1911). See Jonesboro, 227 Ga. at 518, 181 S.E.2d at 856.
92. Id.
93. Id.
94. Id. at 518, 181 S.E.2d at 856-57.
96. Id. at 913.
97. The court affirmed the trial court's grant of summary judgment for the municipality. See id.
98. See id. "A contract which restricts governmental or legislative functions of a city council has been traditionally held to be a nullity, ultra vires and void even though it may present a trap for the unwary in dealing with municipal corporations." Id.
99. Id. at 914.
court found a continuing "public policy": "[O]ne governing authority must not be allowed to impose a long term mortgage upon the taxable assets of a political subdivision without clear and valid enabling legislation."\textsuperscript{100} The court then employed that policy to reject plaintiffs' argument of vested rights: "since the ordinance being considered here is ultra vires and void, it cannot give birth to a right, and in the absence of such a right, there can be no vesting."\textsuperscript{101}

Even in cases deemed indisputably subject to the prohibition, therefore, the court took inordinate pains to evidence its sensitivity to the issue. Reflecting an almost apologetic tentativeness, the court acknowledged a doctrine originally forged by perceived necessity, subsequently weakened by insufficiently articulated moderation, and presently suffused in confusing uncertainty. Although the court's decision applied the binding-contracts prohibition, its opinion may have afforded a more accurate barometer of the prohibition's status.

Five years later in 1985, the court registered a similar crises of substantive confidence in reaching the opposite conclusion.\textsuperscript{102} There, a landowner had granted an easement for a municipal sewer line in return for the city's promise of access to the line.\textsuperscript{103} When the plaintiff subsequently sought enforcement, the city maintained its access promise to be "ultra vires and void" as a prohibited binding contract.\textsuperscript{104} The supreme court again characterized the subject area an "uncertain" one,\textsuperscript{105} and the "problems" of the binding-contracts statute as those "inherent in codification of court decisions."\textsuperscript{106} Beginning and ending with the issue of coverage,\textsuperscript{107} the court delineated between the easement and the easement's access promise: "We deal with the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 146, 288 S.E.2d at 915.
\item Id.
\item The landowner's deeds granting the easement expressly reflected the city's access promise as consideration. See id. at 754, 325 S.E.2d at 156.
\item Id. at 757, 325 S.E.2d at 157. After plaintiff had proceeded to develop the property, it "received a letter from the city informing it that the city council had adopted a policy restricting use of the sewer line to industrial uses only." See id. at 754, 325 S.E.2d at 156.
\item Id. at 754 n.1, 325 S.E.2d at 156 n.1.
\item Id. at 756, 325 S.E.2d at 157.
\item "It is clear that the prohibition is applicable to a municipality's governmental functions, not its proprietary functions." Id. at 758, 325 S.E.2d at 157.
\end{enumerate}
\end{footnotesize}
validity of the access clause alone."[108] Because that clause "[did] not impair a governmental function,"[109] the court (somehow) concluded that the city "had not bound itself so as to prevent free legislation in matters of municipal government."[110] Accordingly, the city’s access promise escaped coverage by the binding-contracts prohibition.[111]

Whether exacting or refusing applicability, therefore, the supreme court of the 1980s virtually advertised its confusion over the binding-contracts prohibition. Although solidly anchored in both case-law and statutory adoption, the proscription rained perplexing “uncertainty” upon the court. Indeed, the statute’s codifications origin somehow operated against clarity; and it counted for naught that the prohibition’s uncertainties arose purely from the court’s own past performances. When the court deemed applicability incontrovertible, it grudgingly made the call; when it could distinguish by the thinnest of delineations, it denied coverage. In this frustrating fashion, an “area of uncertainty” in local government law intensified into an impenetrable self-fulfilling prophecy.

Given the judicial drift, it is noteworthy that the supreme court did not seize upon an opportunity presented in 1990 to completely exclude counties from the binding-contracts proscription. The opportunity arose from a quandary of statutory codification effected by the 1982 Official Code of Georgia Annotated.[112]

Although the terminology of the binding-contracts proscription (“council,” “ordinance,” “municipal government”) appeared limited to municipalities,[113] the Georgia courts historically and routinely applied the statute to counties as

108. Id. at 757, 325 S.E.2d at 158. In this fashion, the court separated the access clause from the admittedly “governmental function” of “construct[ing] and maintain[ing] . . . a sewer system.” Id.
109. Id. at 758, 325 S.E.2d at 158.
110. Id.
111. The court thus affirmed the trial judge’s order that the city permit plaintiff access to the sewer line. See id. at 758, 325 S.E.2d at 159.
well.\textsuperscript{114} In arranging the 1982 Code, however, the codifiers withheld the statute from a subdivision entitled "Provisions Applicable to Counties and Municipalities." Instead, the statute appears in the subdivision, "Provisions Applicable to Municipal Corporations Only." In 1988, moreover, the first time the supreme court noted the point, it prefaced its opinion by "[p]retermitting the applicability of [the proscription] to counties."\textsuperscript{115} At that juncture, it was just a matter of time.

The time arrived in 1990 when the supreme court "granted certiorari to decide whether [the proscription] . . . is applicable to counties."\textsuperscript{116} Affording the issue the shortest of shrift, the court simply quoted an earlier admonition: "This rule is not of statutory origin, and is not peculiar to Georgia. It is a codification of a principle stated in Williams v. West Point, . . . which is applicable generally to legislative or governmental bodies."\textsuperscript{117} With that preface, the court declared that "the principle . . . applies to counties as fully as it applies to municipalities."\textsuperscript{118}

Even in its substantially deteriorated status, therefore, the binding-contracts proscription could not tolerate a complete suspension of coverage for one entire category of local government. Whatever the principle's eventual fate in Georgia local government law, it will befall both counties and municipalities.

Of all the fates conceivably contemplated, perhaps none encompassed the one most recently dispensed by the Georgia Supreme Court. That dispensation resolved \textit{City of Centerville v. City of Warner Robins},\textsuperscript{119} a case featuring a unique agreement


\textsuperscript{117} Madden, 260 Ga. at 531, 397 S.E.2d at 688, (quoting Aven v. Steiner Cancer Hosp., 189 Ga. 128, 140, 5 S.E.2d 356, 364 (1939)).

\textsuperscript{118} Id.

between two neighboring municipalities. In the contract, the two governments purported to agree upon their respective (and exclusive) water and sewer service areas; each municipality also agreed not to annex territory within the other’s “service area.” Upon mutual municipal consent, the superior court judge entered the agreement into a “Consent Order.”

Following subsequent disagreement between the municipalities, the judge entered a second order, which permanently enjoined defendant municipality from providing water and sewer service and from annexing territory in plaintiff municipality’s service area.

Reviewing defendant’s appeal, a five-justice majority of the supreme court found no error in the trial judge’s actions. The court rejected defendant’s position that the trial court “usurp[ed] for itself control over the legislative function of annexation.” Rather, annexation authority resided with the municipalities themselves, and defendant agreed not to exercise that authority within plaintiff’s area. “[T]he superior court,” the majority asserted, “merely enforced that agreement.” Thus, “[h]aving been granted these [annexation] powers, nothing prevented [the municipalities] from covenaniting in the 1995 Consent Order not to exercise them.”

120. “[B]oth municipalities were estopped from ‘entertain[ing], accept[ing], or approv[ing] of an annexation petition or request which includes territory or property within the water or sewer service area of the other party.’” Id. at 183, 508 S.E.2d at 163.

121. The supreme court variously termed the document a “consent agreement,” a “consent judgment,” and a “consent order.” See id.

122. The original “order” was entered in 1995 and the second in 1998. See id.

123. Justice Sears wrote the majority opinion. See id. at 183, 508 S.E.2d at 162.

124. Id. at 185, 508 S.E.2d at 164.

125. The court observed that general statutes delegate annexion power to municipalities to be exercised at the local level. Only this expressly delegated power was involved in the consent order: “We emphasize that neither the 1995 Consent Order nor the 1998 Order have any impact whatsoever on the General Assembly’s plenary authority to annex municipal property.” Id. at 185 n.8, 508 S.E.2d at 164 n.8.

126. “[B]oth municipalities stipulated their consent to all terms and conditions contained in the order …. None of the terms of the 1995 Consent Order were contested by either party.” Id. at 183-84, 508 S.E.2d at 163.

127. Id. at 185, 508 S.E.2d at 164. “In plain terms, [defendant] agreed in the 1995 Consent Order not to seek the annexation of property that rightfully was within [plaintiff’s] service area, and the superior court merely enforced that agreement in its 1998 Order.” Id.

128. Id. at 185 n.8, 508 S.E.2d at 164 n.8.
From the majority's perspective, therefore, the issue for decision focused exclusively upon the trial judge's interpretation and enforcement of the contractual terms. The majority devoted not a word of its opinion to the validity of the contract itself.

It was left to a forceful two-justice dissent to raise the issue of binding-contracts: "A contract restricting those functions of a city council which are not proprietary, but which are governmental or legislative, has been held to be a nullity, ultra vires, and void." 129 Because "[t]he annexation power is strictly legislative," the dissent contended, "an agreement between two municipalities for each to refrain from accepting annexation petitions without the consent of the other is null and void." 130 Neither estoppel 131 nor the agreement's inclusion in "a consent order regarding water service areas" operated against the defendant municipality. 132 Accordingly, nothing prevented the defendant "from asserting the invalidity, ab initio, of its alleged agreement not to annex . . . ." 133

_City of Centerville_ thus stands as the temporary terminus for the historic saga of the binding-contracts prohibition. With it, the Georgia Supreme Court has administered the proscription perhaps the most unkind cut of all. For a principle of such heritage, the court's total, complete, unadulterated, and unmitigated omission constitutes the ultimate analytical insult.

From any objective standpoint, it is difficult not to share some of the dissenting opinion's concerns in the case. Responses from the majority to at least three of those concerns would have been particularly helpful.

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129. _Id._ at 188, 508 S.E.2d at 166 (Carley, J., dissenting).
130. _Id._ (Carley, J., dissenting) "I believe that it is fundamental that a city council cannot deprive or restrict itself or its successors in the exercise of its annexation power by entering into a contract or agreement purporting to limit its authority to annex." _Id._ (Carley, J., dissenting).
131. "Neither municipality is estopped from challenging the legality of such an agreement." _Id._ (Carley, J., dissenting).
132. _Id._ at 189, 508 S.E.2d at 167. (Carley, J., dissenting). "[Defendant's] agreement not to annex property is not rendered valid merely because of its inclusion in a consent order regarding water service areas." _Id._, 508 S.E.2d at 167. (Carley, J., dissenting).
133. _Id._ Accordingly, the dissent found error in the trial judge's decision to enjoin the defendant municipality from annexing any property within plaintiff municipality's service area. See _id._ (Carley, J., dissenting).
Few legal issues are more settled than the binding-contracts prohibition's legendary applicability to "governmental or legislative" functions. Even fewer principles receive greater unanimity than municipal annexation's steadfast status as an exclusively "legislative function." A controversial meshing of those two legal absolutes called for thoughtful analytical consideration.

Second, there is the law's traditional overarching concern with government's "freedom to govern." That "freedom" appears fatally imperiled when two (temporary) municipal governing authorities can agree to permanently settle a matter that may prove crucial to the future of both municipalities. That is the precise peril, indeed, that traditionally accounts for an unusually harsh legal response: the disallowance of both estoppel and ratification in any efforts at salvaging undertakings entailing such devastating potential.

Finally, does it matter that the trial judge entered this particular agreement into a "consent order," a "consent agreement," or a "consent judgment"? If so, then explanation appears due on how such judicial enshrinement can snatch an absolute nullity, void ab initio, from the jaws of an ultra vires condemnation. That explanation is rendered particularly problematic in the face of the supreme court's adamant denial that the force of the agreement derives from the judge's actions. For, according to the court, the judge "merely" enforced what the municipal governing authorities—and only those authorities—had accomplished by virtue of their agreement.

This is not to maintain that the case can be correctly resolved only one way—in the law there are few of those. There is the point, however, that the dissent crafted a serious analysis of nullification. It expounded a reasoned view that the binding-contracts prohibition clearly invalidated the municipal contract not to annex. In failing even to acknowledge—much less address—that analysis, the majority displayed an unbecoming aloofness to an issue of crucial significance in local government law. That failure, moreover, far transcends the confines of this case. Rather, it accomplishes what many would have previously deemed impossible: it further confuses the "law" of local government's binding-contracts proscription.
CONCLUSION

The ship of local government law stands buffeted by the gales of judicial evolution. Recent tempests have impacted two of the subject's most hallowed foundations: local statutes and binding contracts. The change to the former was unacknowledged but affirmative. As for the latter, omission only increases uncertainty. Neither judicial flutter may claim graphic reflection on the nautical compass, but each slightly trims the squaresail.

On the legal horizon, the ever-changing cut of local government law's jib defies easy sighting.