# Unlawful Special Laws: A Postscript on the Proscription

By R. Perry Sentell, Jr.*

## I.

In 1976 there appeared in the pages of this *Review*[1] a brief historical sketch of the Georgia Constitution's famous proscription that "no special law shall be enacted in any case for which provision has been made by an existing general law."[2] Having flourished in that formulation since 1877, the proscription has left a twisting trail of litigation in both appellate courts. A survey of that litigation yielded at least three distinct judicial approaches to determining precisely when the constitution's proscription invalidates a special statute. First, there is the "subject-area" approach; *i.e.*, once a general statute touches upon a subject, no matter how superficially, no special statute can be enacted in that "area." Second, there is the "pre-emption" perspective; *i.e.*, when a general statute sufficiently deals with a matter, that matter is then pre-empted from treatment by special statute. Third, there is the "conflict" test; *i.e.*, a special statute is invalid when its provisions conflict with those contained in a general statute. Obviously, the determination on validity can differ dramatically according to the approach adopted.

The 1940's witnessed an unsuccessful struggle by the Georgia Supreme Court to settle upon the controlling approach.[3] In *City of Atlanta v. Hudgins*,[4] the court unanimously invalidated special legislation which arguably did not conflict with, but only supplemented, a general statute.[5] Confessing "general confusion on the question,"[6] the court appeared to proclaim a pure "subject-area" precept: "The terms of the constitution do

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1. Sentell, *When is a Special Law Unlawfully Special?*, 27 MERCER L. REV. 1167 (1976), reprinted in R. P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 177 (3d ed. 1977).

2. This proscription appeared in the Georgia Constitution of 1945, art. I, §4, ¶1 GA. CODE ANN. §2-401 (1945). In the constitution of 1976 it appears at art. I, §2, ¶7 GA. CODE ANN. §2-207.

3. The 1976 sketch surveyed illustrative cases of the last four decades.

4. 193 Ga. 618, 19 S.E.2d 508 (1942).

5. The general statute required the giving of ante litem notice to municipalities, and the special legislation was a municipal charter provision requiring that the notice be given within 90 days of injury.

6. 193 Ga. at 624, 19 S.E.2d at 512.

not limit this rule to those fields and subjects which have been completely exhausted by a general law. It embraces every field and subject which has been covered, though superficially, by a general law."[7] Only six years later, however, *Irwin v. Torbert*[8] found the court in utter dissention on the point. By virtue of one opinion for three justices—indicating reliance upon a "conflict" approach[9]—and a specially concurring opinion for one justice—appearing to employ "pre-emption"[10]—the court upheld the special statute in issue.[11] A forceful dissent for the remaining three justices argued invalidity under the "subject-area" rationale of *Hudgins*.[12]

Over the following decades, both the supreme court and the court of appeals consumed untold hours in confrontation with the special-law prohibition. How little had been settled was well illustrated by a decision from each court in 1975, at the conclusion of the survey period. In *Powell v. Gwinnett County Board of Commissioners*,[13] the supreme court unanimously sustained the validity of a county ordinance prohibiting the issuance of beer and wine licenses within 1700 feet of a school, in the face of a general statute forbidding the sale of beer and wine within 300 feet of any school.[14] Without citation to a single authority, the court eschewed completely a "subject-area" perspective and viewed the general statute to establish "only a 'minimum distance' for the retail sale of wine and beer from a school or schoolhouse."[15] "We do not," the court concluded, "interpret this statutory restriction to mean that a local governing authority cannot establish, pursuant to its police power authority, a distance restriction that is greater than three hundred feet."[16]

At virtually the same time, the court of appeals was deciding *Pace v. City of Atlanta*,[17] a challenge to a municipal ordinance prohibiting commercial agreements for illicit sexual relations. Condemning the ordinance

7. *Id.* at 623, 19 S.E.2d at 511. The court expressly refused to follow its previous "conflict" rationale of Parrish v. Savannah, 185 Ga. 828, 196 S.E. 721 (1938).

8. 204 Ga. 111, 49 S.E.2d 70 (1948).

9. "We can see no specific requirement in the terms of the city ordinance for which provision has already been made by the general law . . . ." *Id.* at 119, 49 S.E.2d at 77.

10. "Surely the legislature did not mean to thus completely tie the hands of the local governing authorities so as to prevent their future functioning in this wide domain of legislation, however dire the necessity might be." *Id.* at 133, 49 S.E.2d at 83.

11. The special statute was a municipal ordinance requiring certain buildings to have protected vertical openings or to be equipped with automatic sprinklers or alarms; the general statute authorized municipalities to require more than one way of egress from multi-story buildings and to impose standards as to the location and construction of stairways and doors.

12. "It is enough to prevent the existence of a valid special law if the subject-matter of that law has been dealt with even though superficially by a general law." 204 Ga. at 129, 49 S.E.2d at 84.

13. 234 Ga. 183, 214 S.E.2d 905 (1975).

14. GA. CODE ANN. §58-724.1 (1968).

15. 234 Ga. at 185, 214 S.E.2d at 907.

16. *Id.*

17. 135 Ga. App. 399, 218 S.E.2d 128 (1975).

because of general statutes defining specific illicit sexual relations,[18] the court relied upon *Hudgins* for the following principle: "Even though a special law deals with some remote subject matter embraced in the general law, which segment or element is not dealt with by the general law, does not alter the fact that such a special law is enacted in a case where provision has been made by an existing general law."[19]

The 1976 sketch thus evaluated the courts to be in tension among their members and between each other as to the precise thrust of the proscription, and concluded with the following plea:

> The problem is not one which is likely to go away. It is inherent, basic, and crucial in local government law. If the supreme court could yet again grapple with the essence of the matter and attempt once more to formulate a definitive approach for the future, it would be rendering high service. The need is great and the hour is late.[20]

The purpose of this postscript is to describe developments since that plea.[21]

## II.

Over the next two years, generally, it was business as usual in the court of appeals. On a number of occasions the court invalidated special statutes under the constitution's proscription.[22] *Evans v. City of Tifton*,[23] for instance, featured an ordinance which denominated it a municipal offense "to resist or obstruct any policeman while in the discharge of his duties."[24] The question for decision was the status of that ordinance in light of a state statute declaring that "a person who knowingly and wilfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor."[25] With a minimum of analytical fan-

18. The court enumerated various criminal statutes prohibiting sodomy, adultery, fornication, prostitution, and the like.

19. 135 Ga. App. at 400, 218 S.E.2d at 129.

20. Sentell, *When is a Special Law Unlawfully Special?*, 27 MERCER L. REV. 1167, 1182 (1976).

21. No suggestion is intended that the developments were prompted by the plea.

22. An exception was Goldstein v. City of Atlanta, 141 Ga. App. 701, 234 S.E.2d 344 (1977), where the court upheld a municipal ordinance which penalized intoxication on the public streets. The court conceded that general statutes also dealt with the matter, but pointed to express authorization in those statutes for "a municipal corporation to reduce the offense to a mere violation of a municipal ordinance, less than a misdemeanor." 141 Ga. App. at 702, 234 S.E.2d at 345. That authorization, the court held, saved the ordinance from invalidation under the constitution's proscription. For a discussion of the General Assembly's power to expressly save local statutes in this fashion, *see* Sentell, *Selected Oddities in Georgia Local Government Law*, 9 GA. L. REV. 783 (1975), reprinted in R. P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW 751 (3d ed. 1977).

23. 138 Ga. App. 374, 226 S.E.2d 471 (1976),

24. *Id.* at 375, 226 S.E.2d at 472. The court said that "a municipal ordinance is nothing more than a special law limiting its application to the particular municipality."

25. GA. CODE ANN. §26-2505 (1971).

fare, the court said that "the State of Georgia has pre-empted the field in this respect as to the obstruction of an officer or resisting arrest."[26] Citing both *Hudgins* and *Pace,* the court pronounced the ordinance "clearly null and void."[27]

Municipal traffic was the focus of controversy in *Thompson v. Hill,*[28] litigation arising from an intersection collision.[29] Both the ordinance and general statute in issue commanded left-turning drivers to yield the right of way to an immediately approaching vehicle. Both measures also provided that having thus yielded and given a signal, the left-turning driver could then execute the turn. The general statute specified that at this point approaching vehicles must yield to the left turn.[30] The municipal ordinance merely directed that the turn was to be made with reasonable safety and without creating a hazard to other traffic.[31] Again issuing an edict of invalidity, the court deemed the ordinance "contrary to and more strict in its provisions than" the general statute.[32] Indeed, the ordinance "would nullify that portion of the general law which required on-coming vehicles to yield the right of way to left-turning vehicles."[33] Citing *Hudgins,* the court asserted that "[s]uch a modification of the general law is proscribed by the Constitution."[34]

During the same period of time, and more surprisingly, the supreme court afforded similar summary disposition to a considerably weaker factual situation in *Bussell v. Youngblood.*[35] In issue there was the validity of special statutes designating the grand jury as the final arbitrator in specified budgetary disputes between the county commissioners and the sheriff.[36] The court conceded that general statutes made no mention of the matter: "There is no general law enacted by the General Assembly which designates the grand juries of the state as arbitrators in disputes involving

26. 138 Ga. App. at 375, 226 S.E.2d at 472.

27. *Id.*

28. 143 Ga. App. 272, 238 S.E.2d 271 (1977).

29. The action was for personal injuries, and one of the points on appeal concerned the trial judge's charge of the general statute rather than the municipal ordinance.

30. ". . . the driver of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the vehicle making the left turn." 1953 Ga. Laws 556, 590. The court noted the subsequent repeal of this statute by the "Uniform Rules of the Road Act," GA. CODE ANN. §68A-402 (1965).

31. ". . . such driver . . . may make such left turn when he can do so with reasonable safety and without creating a hazard to other traffic moving lawfully within the roadway." 143 Ga. App. at 273, 238 S.E.2d at 272-73.

32. *Id.* at 273, 238 S.E.2d at 273.

33. *Id.*

34. *Id.* The court said it had previously held no error in charging a jury to disregard a municipal ordinance which "conflicted" with a general statute. Thus, the trial judge's action in this case was affirmed.

35. 239 Ga. 553, 238 S.E.2d 89 (1977).

36. 1960 Ga. Laws 2073, 2200. The sheriff was to submit certain recommended budgets to the commissioners and upon the commissioners' disagreement, the grand jury was to resolve the matter.

the number and salaries of deputy sheriffs or the sheriff's fiscal budget."[37] Nevertheless, the court continued, state statutes did deal with the general subject of grand juries: "The grand juries of the state have specific duties, uniform throughout the state, set forth in Code Ann. Chapters 59-2 through 59-5."[38] Thus, under the constitution's proscription, the court unanimously concluded that "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."[39] The court cited no prior decisions on the point.[40]

Continuing through 1977, therefore, the judicial performance remained consistently unedifying. The court of appeals maintained its course of invalidation, professing to rely upon *Hudgins* but employing the language of both pre-emption and conflict. Perhaps this was because the situations generally confronting the court rather clearly presented elements of legislative overlap and tension, thereby rendering unnecessary the more extreme analysis of "subject-area." In any event, the pronouncements of invalidity themselves were in character for the court, as was its steadfast devotion to *Hudgins* rather than to some of the supreme court's later and more permissive soundings.

Somewhat out of character, therefore, was the supreme court's interpretation in *Bussell v. Youngblood.* Presenting almost nothing connoting "conflict," and little which could be likened to "pre-emption," the case appeared an improbable candidate for a declaration of invalidity by the court which had groped its way through *Irwin* and then unanimously decided *Powell.* Just as unanimously, however, the supreme court did invalidate the special statutes in *Bussell.* Powers and duties having been treated by general law, the court instructed, they could not be enlarged, diminished, modified, or changed by special statute. Whether the analysis was a conscious reversion to the "subject-area" approach of *Hudgins,* the court did not say—indeed, it referred to no decisional compass at all.

Still, it appeared, the courts were in tension with themselves and with each other. Would the twain never twine?

37. 239 Ga. at 555, 238 S.E.2d at 92. Indeed, the court relied upon that very point to strengthen its alternative condemnation of the special statutes as violative of the constitution's command that "whatever tribunal, or officers, may be created by the General Assembly for the transaction of county matters, shall be uniform throughout the state, and of the same name, jurisdiction, and remedies . . . ." GA. CONST. art. IX, §1, ¶6, GA. CODE ANN. § 2-5806. The court held the grand jury to be a covered "tribunal" and thus not amenable to particularized treatment by the special statutes. The court might well have terminated its opinion at that point, but it did not; it specifically proceeded to an investigation and condemnation of the statutes as also violative of the constitution's special-law proscription.

38. 239 Ga. at 555, 238 S.E.2d at 92.

39. *Id.*

40. The conclusion was that the superior court and not the grand jury was the appropriate tribunal for resolving disputes between the commissioners and the sheriff's department.

## III.

In 1978, the day finally arrived: The Georgia Supreme Court and the Georgia Court of Appeals at last passed upon precisely the same predicament under the Georgia Constitution's special-law proscription. The occasion was *City of Atlanta v. Associated Builders & Contractors of Georgia, Inc.*,[41] and it concerned the payment of wages to employees by private contractors with the municipality. The case presented the proscription conundrum in classic context. On the one hand, a general statute—the "Georgia Minimum Wage Law"—mandated that "every employer . . . whether a person, firm or corporation, shall pay to all covered employees a minimum wage which shall be not less than $1.25 per hour for each hour worked in the employment of such employer."[42] On the other hand, a municipal ordinance—the "Equal Employment Opportunity Ordinance"—commanded that "where a construction project exceeds $10,000, the minimum wage paid shall correspond to the prevailing wage prescribed in the Federal Davis-Bacon Act . . . ."[43] The challenge was unmistakable: "Plaintiffs allege the ordinance is unconstitutional and void 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."[44]

In the trial court, the challengers' contentions carried the day, the ordinance was pronounced proscriptively infirm, and the municipality appealed.[45] The court of appeals sought to set to one side matters not material. Thus, the case did not fall within enumerated exceptions in the general statute,[46] noted the court, nor, as presented, was it one directly subject to wage provisions of a federal statute.[47] Rather, the ordinance simply adopted for specified municipal construction contracts the prevailing wage scale applied by the federal statute to other situations.[48]

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41. Actually, the court of appeals' decision was rendered in 1977, 143 Ga. App. 115, 237 S.E.2d 601 (1977); but the supreme court did not decide the case until February 7, 1978, 240 Ga. 655, 242 S.E.2d 139 (1978).

42. 1970 Ga. Laws 153, GA. CODE ANN. §54-1202 (1970).

43. This section of the ordinance is set forth by the dissenting opinion in the supreme court, discussed *infra* in the text accompanying note 64. 240 Ga. at 658, 242 S.E.2d at 141-42.

44. City of Atlanta v. Associated Builders & Contractors of Ga., Inc., 143 Ga. App. 115, 237 S.E.2d 601 (1977).

45. The appeal had apparently first gone to the supreme court which then transferred the case to the court of appeals.

46. *E.g.*, farm owners, sharecroppers, or land renters. GA. CODE ANN.§ 54-1202 (1970).

47. Indeed, the Georgia Minimum Wage Law itself expressly excepts "any employer who is subject to the minimum wage provisions of any Act of Congress as to employees covered thereby . . . ." GA. CODE ANN. §54-1206 (1970).

48. The court said that "the plaintiff were contractors in the ordinary course of business who bid on City of Atlanta construction projects and the prevailing wages created by the Davis-Bacon Act incorporated by reference in the city ordinance are substantially higher than

The court also rejected the municipality's argument that "the state has not pre-empted the field" of "prevailing" wages, because the state statute dealt only with "minimum" wages.[49] Instead, the court affirmed the trial judge's decision that "a 'prevailing wage' to employees of contractors performing City of Atlanta construction projects amounts to a minimum wage law."[50]

Preliminaries thus aside, the court of appeals wasted little effort in confirming the invalidity of the ordinance.[51] Noting the trial judge's reliance upon the supreme court's decision in *Hudgins,* the court merely declared that the municipality "by adopting a 'prevailing wage' has adopted a minimum wage which is unconstitutional, null and void as a special law in conflict with the general law of statewide operation . . . ."[52]

Taking the case on certiorari, the supreme court splintered into three factions—a majority opinion for four of the justices, a specially concurring opinion for one justice, and a dissenting opinion for two justices.[53] The result was a reversal of both the trial judge and the court of appeals, and a decision of validity for the municipal ordinance.

The majority opinion opened by focusing two questions for determination: the "specific question" regarding the status of the ordinance, and the "broader question" concerning the construction of the special-law proscription.[54] "Had Hamlet been the writer of this opinion," fantasized the court, "he might have framed this latter issue for decision thusly: Conflict or Pre-emption? That is the question."[55] Less dramatically, clarified the court, "the question is whether that 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."[56]

In the next scene, Hamlet appeared somewhat uncertain. "The prior cases in this area are irreconcilable," confessed the court, "and 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."[57] Having confessed, the court could not avoid; rather, it reverted for guidance to "the latest, and

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the wages paid by plaintiff-contractors to their employees." 143 Ga. App. at 116, 237 S.E.2d at 602.

49. *Id.* at 117, 237 S.E.2d at 603.

50. *Id.*

51. "It is clearly shown here that the city by adopting this procedure has created a minimum wage which it does not have authority to do." *Id.*

52. *Id.*

53. City of Atlanta v. Associated Builders & Contractors of Ga., Inc., 240 Ga. 655, 242 S.E.2d 139 (1978).

54. The majority opinion was written by Mr. Justice Marshall.

55. 240 Ga. at 656, 242 S.E.2d at 140.

56. *Id.*

57. *Id.* The court cited, as an example, City of Atlanta v. Hudgins, 193 Ga. 618, 19 S.E.2d 508 (1942).

therefore controlling, pronouncement on this point"[58]—*Powell v. Gwinnett County Board of Commissioners.* The test which the court then extracted from *Powell* was "whether there is a genuine conflict between the special and general law."[59]

Having resolved to its satisfaction the "broader" question, the court then turned to the "specific" one. Under the test of *Powell,* the majority declared, "there is no unconstitutional conflict in this case between the state minimum wage law and the city ordinance."[60] The rationale yielding that determination, the court elaborated as follows: "The local minimum wage law does not detract from or hinder the operation of the state law, but rather it augments and strengthens it."[61]

Traversing a different path to validity of the ordinance, the specially concurring opinion consisted entirely of the following "view":[62] "[I]n the absence of a general law prescribing municipal contracting requirements, a municipality is free to impose conditions upon those who would contract with it without violating the special law prohibition."[63]

Finally, the two-justice dissenting opinion condemned the ordinance as being "in direct conflict" with the general statute.[64] "The right and power to set a minimum wage has been undertaken by the legislature of this State for the State as a whole," maintained the dissent, "and having done so, a municipal ordinance cannot be enacted increasing the minimum set by the legislature."[65] Emphasizing the extraterritorial grasp of the ordinance, the dissenters noted its application to employees of all contractors and subcontractors furnishing materials and equipment no matter where located. "Thus, the City of Atlanta has attempted to legislate by ordinance what must be paid to such employees everywhere."[66] Neither was the ordinance appropriate within the municipality itself: "Where the state has entered the field and adopted statewide law on the subject, I do not think the City of Atlanta in fairness to all of its citizens can do so."[67]

The dissenting opinion also took issue with the majority's perception of the *Powell* decision. That case "is clearly distinguishable," asserted the dissent, for there "the state was not setting standards for granting licenses or for sale of beer and wine, but was setting criminal standards for the

58. *Id.*

59. *Id.* at 656-57, 242 S.E.2d at 141.

60. *Id.*

61. *Id.*

62. Mr. Justice Hill was the writer.

63. 240 Ga. at 658, 242 S.E.2d at 141.

64. *Id.* at 659, 242 S.E.2d at 142. Mr. Justice Bowles was the author of the dissenting opinion.

65. *Id.* The dissent conceded that the minimum wage set by the state statute "appears to be strikingly low," but emphasized "that is not the point."

66. *Id.* "It matters not, if there is a supplier to any contractor on the projects he must comply with the Davis-Bacon Act minimum wage provisions."

67. *Id.* at 660, 242 S.E.2d at 142-43. The dissent cited City of Atlanta v. Hudgins, 193 Ga. 618, 19 S.E.2d 508 (1942).

illegal sale of beer and wine within a certain distance of any school."[68] Thus, the county ordinance in regard to licensing "really has nothing to do with the criminal sanctions imposed by the state,"[69] and there was no conflict between the two.[70] Accordingly, concluded the dissent, "to hold that where the state has entered an area of the law and has set a minimum, a municipality may set a higher minimum" was not the principle of *Powell*.[71]

*City of Atlanta v. Associated Builders & Contractors of Georgia, Inc.*, was thus the most notoriously noteworthy special statute episode in many years. Since it finally elicited decisions from both Georgia appellate courts, the litigation was particularly instructive, as it confirmed several points of prior conjecture.

Primarily, the case graphically demonstrated the differences in modern judicial opinion over proper application of the constitution's historic proscription. Of the eleven judges passing on the problem presented, six deemed the municipal ordiance to be invalid as an unconstitutional special statute.[72] The five justices who determined otherwise, however—because of their concentration in the supreme court—had the final word; and they sustained the ordinance.[73] Regardless of who was "right"—however that might be divined—the point of despondency is the spectacle presented by such continuing basic judicial disagreement over langauge which has appeared in the constitution, in precisely the same formulation, for more than 100 years. How can state and local legislative bodies logically be expected to legally or consistently conduct their affairs on the basis of such judicial nuances?

As noted, the factual setting seemed classic: A general statute requiring payment of a specified minimum wage in all but expressly excepted cases, and a "special statute" requiring a different minimum wage in nonexcepted cases. Indeed, with one possible exception, all the judges themselves appeared to agree with that description. The court of appeals summarily rejected a proffered distinction between "minimum" and "prevailing" wages in this context, and even the supreme court's majority

68. *Id.* at 661, 242 S.E.2d at 143. "Indeed," said the dissent, "the county could have elected not to license beer and wine at all in the county should its citizens have decided to do so."

69. *Id.*

70. There, said the dissent, the court "points out that the state law does not set any regulatory distance for the sale of beer and wine with respect to churches, and therefore, that part of the ordinance relating to churches is not in conflict with any general law . . . . For example, the governing authority of Gwinnett County could have restricted the licensing of sale of beer and wine to any reasonable area it chose to so designate." *Id.*

71. *Id.* "In my opinion, the judgment of the trial court, and the decision of the Court of Appeals were both fundamentally sound and correct, and I would affirm."

72. That total included the trial judge, the three judges in the court of appeals, and the two dissenting justices in the supreme court.

73. That total included the four justices of the supreme court's majority opinion, and the justice who specially concurred.

opinion viewed both measures as dealing with "minimum wages." Thus, it will be difficult to argue in retrospect that the case actually did not involve legislative measures dealing with the same subject matter.

In the tradition of its recent decisions in *Pace, Evans,* and *Thompson,* the court of appeals encountered virtually no analytical difficulty in routinely condemning the ordinance. Although it expressly held *Hudgins* in readiness, the court deemed neither "subject-area" nor even "pre-emption" necessary for administering the lethal blow. Rather, it considered the case a simple situation of "conflict." True, the court continued to ignore some of the more recent and permissive leanings of the supreme court, but even those would probably have presented no problem.

The supreme court's performance was also in tradition, that of its erratic movement from *Hudgins* to *Irwin* to *Powell* to *Bussell.* Nevertheless, the court's exercise at least confirmed two prior evaluations: the court was in tension with its own previous decisions, and it was in tension with the court of appeals. In addition, it developed that the court was also divided internally.

To its credit, the four-justice majority opinion did not attempt to gloss the court's prior inconsistency. Slightly regrettable was Hamlet's temporary lapse in limiting the possible alternative approaches to two—"conflict" and "pre-emption"—and his omission altogether of "subject-area."[74] Considerably more regrettable was the majority's bland willingness to settle merely for the "latest"—rather than to ferret out the "best"—model of authority. There were at least two problems with this course of least resistance. First, *Bussell* was a "later" treatment of the problem than *Powell;* and second, the precept of stare decisis loses most of its desirable meaning when the trail of precedents is as winding as this one. The majority would have rendered great service by an explicit and detailed study of those precedents and a deliberately announced choice of the ones which it deemed most faithful to the meaning of the constitution.

Regrets aside, the majority opinion must be taken for what it professed to establish. *Powell,* it held, was the controlling decision, and the approach for the future was that of "genuine conflict." Moreover, genuine conflict does not exist as long as the special statute only "augments" or "strengthens" the general statute rather than "detracts" from or "hinders" its "operation." How that characterization fit the facts of this case, the majority did not elaborate.

The special concurrence was perhaps the one opinion which refused to concede that the two legislative measures dealt with the same subject matter. Forsaking any reference to wages, minimum or otherwise, the concurrence appeared to cast "municipal contracting requirements" as the subject in issue. Because, in that view, no general statutes existed on the subject, special statutes were permissible. Under that conception of the

74. Hamlet was somewhat prone to such impatience; recall his expression in exasperation of "Words, words, words." Act 2, Scene 2.

case, moreover, even a more attentive Hamlet would have served to no avail. If the situation fails even arguably to enter the domain of the constitution's proscription, it is both unnecessary and meaningless to ponder over the correct approach to administering that proscription.

Although apparently not precluding other possibilities, the two dissenting justices agreed with the majority that the case could be treated via the "conflict" approach.[75] To the dissenters, however, conflict was patent: the general statute established one minimum wage for certain employees, and the ordinance established a different minimum wage for some of the same employees. More helpful than the majority, the dissent elaborated considerations for determining the existence of conflict. Of assistance, it suggested, was attention to the ramifications of the ordinance both internally and extraterritorially. *Powell,* the dissent declared, was not in point. Not only were the legislative measures there not in conflict, they actually had nothing to do with each other. In order to urge that conclusion, the dissent was forced to consider the *Powell* subjects as two—licensing and criminal sanctions—rather than one—distance regulations on the sale of beer and wine. In any event, concluded the dissenters, minimum wages constituted one subject.

## IV.

In the illuminating language of Hamlet, "tis very strange."[76]

As predicted in 1976, the problem of the Georgia Constitution's special law proscription has not gone away. Since the unedifying decisions at the conclusion of the previous survey period, a number of controversies have confronted both appellate courts. Thus, the subject remains one of continuing confusion in Georgia local government law.

The judicial pattern presented by the past 35 years—during which period the language of the proscription remained precisely the same—is a perplexing one. In 1942, the Georgia Supreme Court confessed "general confusion on the question," and purported to clarify.[77] In 1978, the court confessed that "prior cases in this area are irreconcilable," and purported to clarify.[78] In 1948, the court found itself in complete dissention on the point and splintered into three distinct factions.[79] Again in 1978, the court found itself in complete dissension on the point and splintered into three distinct factions.[80]

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75. The dissent also talked of the state's having entered "the field" and "an area of the law." Moreover, Justice Bowles, the author of the dissent, had also been the author of the court's unanimous opinion in *Bussell.*

76. Act I, Scene 2.

77. City of Atlanta v. Hudgins, 193 Ga. 618, 19 S.E.2d 508 (1942).

78. City of Atlanta v. Associated Builders & Contractors of Ga., Inc., 240 Ga. 655, 242 S.E.2d 139 (1978).

79. Irwin v. Torbert, 204 Ga. 111, 49 S.E.2d 70 (1948).

80. City of Atlanta v. Associated Builders & Contractors of Ga., Inc., 240 Ga. 655, 242 S.E.2d 139 (1978).

In at least two respects, perhaps, the 1978 performance was slightly clearer. First, the expressed difference between the majority and dissent centered less upon the approach to be employed in construing the proscription, and more upon the application of the same approach to the facts of the case. To the majority, there was no "genuine conflict"; to the dissent, the "direct conflict" was patent. This is not to suggest, however, that had the conflict appeared less apparent to them, the dissenters would not have urged either a "subject-area" or "pre-emption" approach.

The second element of increased enlightenment was the majority's explicit announcement of the "genuine conflict" approach for the future. That approach was extracted from what the court designated its "latest and therefore controlling" decision, and thus serves to alert future litigants as to the jargon in which their arguments might be framed. If the approach itself is no more stable than the basis for its extraction, however, litigants may still be wise to exercise much caution. For inspection reveals that the court's "latest" decision may not have been its latest decision; whether it was "controlling" was the very question in issue.

Still in desperate demand, therefore, is the supreme court's sustained analytical attention to the special law proscription. Assuredly, the hour becomes even later; and, virtually as certain, the need grows greater.