Constitutional Law

by W. Tarver Rountree, Jr.*

Two overarching events in constitutional development during the past year have been the preparation of a newly drafted Georgia Constitution that was presented to the voters at the 1982 general election and the tension between the Georgia General Assembly and the federal courts concerning the boundaries of the Fourth and Fifth Congressional Districts.

There is yet time to digest the provisions of the new constitution in detail since it does not become effective until July 1, 1983.[1]. Its supporters rightly claim that it is shorter and provides a more flexible structure for state government. A state constitution by its purpose can never be as basic as the United States Constitution, which is a wonder in itself. The state organic law, besides embodying the fundamental limitations on state power, has a more elaborate structure to delineate and protect. Since all power theoretically is vested in the General Assembly and is not delegated in separate grants, one expects more detailed limitations. Confidence in the legislative process always has been low, and nothing in our present experience indicates this is changing or should change. This lack of confidence, coupled with the American respect for the written 'charter,' indicates that state constitutions always will have a tendency toward obesity. Since the state also must order local government structures and powers, the people probably always will want to place limits on this process. In short, a desire for a thin and flexible constitution is worthy, but keeping it that way is probably neither possible nor ultimately desirable. The diverse general and local amendments were a form of initiative and referendum that once seemed to most Georgians to be appropriate, especially on the state level.

The reapportionment matter, although it is only a statutory matter involving the far-reaching Voting Rights Act,[2] raises profound questions

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1. GA. CONST. of 1983 art. XI, § 1, para. 6.

2. Voting Rights Act of 1965, 42 U.S.C. § 1971 (1976 & Supp. IV 1980). The federal court has ruled that the drawing of the district lines in 1982 showed racial discrimination because

about state-federal relationships, or so it is perceived by legislator and citizen alike. The ultimate authority of Congress to enact the legislation is well-established;[3] the administration of its provisions can be and is being questioned seriously. Requiring the General Assembly to meet prescribed racial percentages as an indication of nondiscriminatory purpose is a gloss upon the statute that may presage proportional representation at least by race, which must surely push the fourteenth and fifteenth amendments[4] to impermissible limits and exceed the purpose of Congress in enacting the statute. The twenty years since *Baker v. Carr*[5] have not sufficed to elucidate the federal-state relationship in the political structuring of electoral districts. Those who thought the matter had simple mathematical solutions were not careful in their evaluation of the strength of legislative ingenuity and political perserverance.

Constitutional issues presented to the courts, aside from matters of the rights of the criminal defendant, covered a wide area from property rights to void for vagueness questions. Based on the cases that were decided during the survey period it appeared that cases dealing with property rights such as zoning, condemnation, and taxation were in the ascendancy. Sometimes property rights were hitched in tandem with hardier constitutional claims like freedom of speech.

I. Property and Free Speech

A case with a decidedly contemporary setting concerned the validity of a zoning ordinance that prevented the construction of a satellite antenna in the front yard of a Snellville, Georgia, resident. In *Gouge v. City of Snellville*,[6] the local zoning ordinance provided that "structures shall be permitted only in rear yards."[7] A structure was defined as "anything constructed or erected on the ground or attached to something on the ground."[8] The landowner erected the twelve-foot-wide, twelve-foot-high antenna in his front yard for personal and business purposes. The city

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the percentage of blacks in the Fifth District was too low. A special session of the General Assembly (August, 1982) has redrawn the lines to increase the black percentage in the district. Congressionsl elections were suspended in all districts until this objection was met, but the federal court has now approved the new plans in Busbee v. Smith, No. 82-0665 (D.D.C. July 22, 1982), and the elections have been held.

3. South Carolina v. Katzenbach, 383 U.S. 301, 327-28 (1966).

4. U.S. Const. amends. XIV & XV.

5. 369 U.S. 186 (1962).

6. 249 Ga. 91, 287 S.E.2d 539 (1982).

7. Snellville, Ga., Zoning Ordinance art. IV, § 600 (1972). *See also* 249 Ga. at 91, 287 S.E.2d at 540.

8. Snellville, Ga., Zoning Ordinance art. III (1972). *See also* 249 Ga. at 91, 287 S.E.2d at 540.

obtained a permanent injunction restraining the maintenance of the antenna in the front yard.

The court sustained a verdict for the city against constitutional claims of free speech, due process, and equal protection. In raising the free speech issue, the landowner claimed a denial of access to the information transmitted from the satellite.[9] Since the city was not regulating content or receipt of the communication, the court adopted a balancing test.[10] Interestingly, the court accepted as a rational and weighty interest the city's concern with aesthetics.[11] The case collapsed rather easily because the landowner's expert agreed that the antenna could be placed effectively in the rear yard with only slightly greater expense and inconvenience.[12]

The court also made short work of the zoning due process and equal protection claims. To prove an unconstitutional taking of property, the complainant must show by clear and convincing evidence that the zoning is significantly detrimental to him and not substantially related to the public health, safety, morality, or welfare of the community.[13] The court decided that although 'structures' may have many referents, plaintiff could not challenge the ordinance on the ground of vagueness because his conduct clearly fell within the ordinance's prescriptions.[14] Counsel for plaintiff produced pictures of other structures in front yards, but could not prove that these were not nonconforming uses, or approved by variances. Establishing unequal application of a police power measure requires considerable proof of discriminatory intent.[15]

In *Gouge*, the court relied in part on its decision in *H & H Operations, Inc. v. City of Peachtree City*.[16] In that case, the owner of a self-service gasoline station filed suit after the city denied his application to post gasoline prices on his sign. The court conceded that a city may regulate business signs under its police power in the interest of aesthetics.[17] These two cases definitely establish aesthetics within the general welfare. In the future, the court will not have to invent health and safety rationales to support clearly aesthetic regulations. In *H & H Operations*, however, plaintiff prevailed, with only one judge dissenting. The ordinance in question provided:

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9. 249 Ga. at 92, 287 S.E.2d at 541.

10. *Id.* The court balanced the city's interests against the impingement on plaintiff's first amendment rights.

11. Quaere, if this would be as weighty if the court were dealing with the location of political advertisements?

12. 249 Ga. at 92-93, 287 S.E.2d at 541.

13. *Id.* at 93, 287 S.E.2d at 542.

14. *Id.* at 93-94, 287 S.E.2d at 542.

15. *Id.* at 95, 287 S.E.2d at 543.

16. 248 Ga. 500, 283 S.E.2d 867 (1981).

17. *Id.* at 501, 283 S.E.2d at 868.

> Each individual commercial business site shall be entitled to display one free-standing and one wall sign per site entry (provided entries are not closer than 250 ft.). . . . These signs shall contain only the name of the person, business or activity occupying such premises, the standard business category of products and services available on such premises if not included in the name itself, or a registered logo or trademark which identifies the activity.[18]

While the court accepted the aesthetics rationale, it identified plaintiff's claim as protected commercial speech. The court found no substantial governmental interest in permitting commercial signs while prohibiting the posting of prices.[19] On balance, then, the value of price information to the public outweighed the community's insubstantial claim to visual affronts.[20] One wonders if Peachtree City could prohibit all commercial signs, or if the court has not recognized a reciprocal right of an owner to display and the consumer to have pertinent commercial information. No doubt, specifying one aspect of advertising for prohibition weakened the city's case.

II. Equal Protection

A substantial challenge was mounted against Georgia's means of support of public education in *McDaniel v. Thomas*.[21] Plaintiffs were parents, children, and school officials in relatively poor, low property tax base, school districts.[22] They based their attack on the equal protection provisions of the state constitution[23] and the adequate education guarantee.[24] The trial court agreed with the equal protection argument and declared that under the state constitution the existing school finance system was unconstitutional.[25] The parties agreed that *San Antonio School District v. Rodriguez*[26] foreclosed a claim based upon the fourteenth amendment[27]. The court, in overruling the trial court, adopted a rational basis test and denied that the Georgia Constitution considered education a

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18. *Id.* at 500-01, 283 S.E.2d at 868 (quoting Peachtree City, Ga., Ordinance to Regulate Commercial Business Signs (Oct. 23, 1980)).

19. *Id.* at 502, 283 S.E.2d at 869.

20. *Id.* at 503, 283 S.E.2d at 869.

21. 248 Ga. 632, 285 S.E.2d 156 (1981).

22. *Id.* at 632, 285 S.E.2d at 157.

23. Ga. Const. art. I, § 2, para. 3, Ga. Code Ann. § 2-203 (Harrison 1977); Ga. Const. art. I, § 2, para. 7, Ga. Code Ann. § 2-207 (Harrison 1977).

24. Ga. Const. art. VIII, § 1, para. 1, Ga. Code Ann. § 2-4901 (Harrison 1977); Ga. Const. art. VIII, § 8, para. 1, Ga. Code Ann. § 2-5601 (Harrison 1977).

25. 248 Ga. at 633, 285 S.E.2d at 157.

26. 411 U.S. 1 (1973).

27. 248 Ga. at 645, 285 S.E.2d at 165.

fundamental interest requiring strict scrutiny.[28] The court's analysis appeared irrelevant under the Georgia scheme. While the court felt that the state system did a poor job of equalization, the system did bear a rational relationship to legitimate state purposes.[29] The case documents the disparity in per pupil expenditures among the districts. Georgia has chosen to follow the United States Supreme Court's lead[30] and leave this question of resource allocation to the political process.

In *Robeson v. International Indemnity Co.*,[31] plaintiff attacked Georgia's doctrine of interspousal tort immunity. Plaintiff-wife had suffered injuries as the result of the negligence of the man who later became her husband.[32] The interspousal immunity doctrine arose from the common-law fiction that husband and wife were one and that the wife had no right against the husband for torts committed against her person or property by him, whether committed before or during coverture. No Georgia statutes have changed the common law regarding personal torts committed by one spouse against the other.[33] The court sustained the immunity against both an equal protection claim and a due process claim.[34] There seems to have been little federal law on interspousal immunity. The sole federal case that concerned this doctrine sustained it as having a reasonable relationship to the promotion of domestic tranquility.[35] The immunity, of course, applied both to husbands and wives, so the classification was not gender based; it was based on marital status. The due process claim was equally hopeless, because a spouse would not have a property interest in a cause of action neither recognized at common law nor created by statute.[36] The court discussed the policy grounds supporting this doctrine, and despite a well-reasoned dissent,[37] the court retained the immunity. This decision keeps Georgia out of step with a majority of jurisdictions.[38]

A gender based classification came under attack in *Fluker v. State*.[39]

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28. *Id.* at 647, 285 S.E.2d at 167.
29. *Id.* at 648, 285 S.E.2d at 167-68.
30. 411 U.S. at 58.
31. 248 Ga. 306, 282 S.E.2d 896 (1981).
32. *Id.* at 306, 282 S.E.2d at 896-97.
33. *Id.* at 307, 282 S.E.2d at 897. *See* Taylor v. Vezzani, 109 Ga. App. 167, 167-68, 135 S.E.2d 522, 523 (1964).
34. 248 Ga. at 307, 282 S.E.2d at 897.
35. Paiewonsky v. Paiewonsky, 446 F.2d 178 (3d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). For a survey of the law of other states on this subject, see Annot., 92 A.L.R.3D 901 (1979 & Supp. 1981).
36. 248 Ga. at 308, 282 S.E.2d at 897-98.
37. *Id.* at 310, 282 S.E.2d at 899 (Smith, J., dissenting).
38. 248 Ga. at 309, 282 S.E.2d at 898.
39. 248 Ga. 290, 282 S.E.2d 112 (1981).

Defendants in two consolidated cases were convicted on charges of pandering. The Georgia Code provides: "A person commits pandering when he solicits a female to perform an act of prostitution, or when he knowingly assembles females at a fixed place for the purpose of being solicited by others to perform an act of prostitution."[40] Appellants argued that since there was no similar offense for females, the statute was gender based and rested on outmoded stereotypes that portrayed males as sexually aggressive and females as embarrassed by sexual advances.[41]

The court rejected this attack on the basis of *Michael M. v. Superior Court*,[42] in which the United States Supreme Court upheld the gender based distinctions in statutory rape. The Georgia Supreme Court maintained that the legislature may provide for the special problems of women.[43] The court used the heightened scrutiny test now applied by the United States Supreme Court in gender based discrimination cases.[44] The Georgia court held that the pandering statute was substantially related to important governmental objectives.[45] Although it may be difficult to see why a gender neutral statute would not accomplish the same objectives as the pandering statute, the court said that the question is not whether the law is drawn as precisely as possible, but whether the classification is constitutionally permissible.[46]

An equal protection claim arose in *Barrett v. Carter*,[47] yet another tort situation in which a victim of an ice throwing prank sued her playful assailant and met an immunity to tort that was based on Georgia Code Ann. section 105-1806: "Infancy is no defense to an action for a tort, provided the defendant has arrived at those years of discretion and accountability prescribed by this Code for criminal offenses."[48]

The present age for criminal responsibility is thirteen.[49] In *Hatch v. O'Neill*,[50] the court had recognized immunity from a suit for tortious conduct against a minor under the age of thirteen. The court chose to maintain the immunity in *Barrett*. The equal protection claim attacked the

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40. GA. CODE ANN. § 26-2016 (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 16-6-12 (Michie 1982) (editorial changes only).

41. 248 Ga. at 291, 282 S.E.2d at 113.

42. 450 U.S. 464 (1981).

43. 248 Ga. at 291, 282 S.E.2d at 113; *see Michael M.*, 450 U.S. at 469.

44. Craig v. Boren, 429 U.S. 190, 197 (1976).

45. 248 Ga. at 291, 282 S.E.2d at 114.

46. *Id.* at 292, 282 S.E.2d at 114.

47. 248 Ga. 389, 283 S.E.2d 609 (1981).

48. GA. CODE ANN. § 105-1806 (Harrison 1968), OFFICIAL CODE OF GA. ANN. § 51-11-6 (Michie 1982) (editorial changes only).

49. OFFICIAL CODE OF GA. ANN. § 16-3-1 (Michie 1982), GA. CODE ANN. § 26-701 (Harrison 1977).

50. 231 Ga. 446, 202 S.E.2d 44 (1973).

classification on the irrationality of allowing a defendant to show the negligence of a plaintiff under thirteen in defense of a tort suit, while not allowing a plaintiff to show the negligence of a defendant under thirteen in pursuit of a tort claim.[51] The court's response amounted to little more than a statement that the law could treat defendants differently from plaintiffs. The level of scrutiny was "merest rationality"[52] in its least intrusive form.

III. Substantive Due Process in Zoning

Five zoning cases are worth noting. In *Jackson v. Goodman*,[53] plaintiffs, owners of an 8.8 acre tract, zoned R-4 (single family, detached four lots per acre), sought rezoning to O-I to construct office buildings. Officials of the City of Atlanta denied the request. Plaintiffs filed suit claiming the denial was arbitrary, unreasonable, and confiscatory.[54] The trial court agreed and ordered the property down zoned.[55] The city officials appealed. The court limited its role in such a situation to deciding whether plaintiff had carried the burden of showing that the zoning under attack was so detrimental to him and so insubstantially related to the public health, safety, morality, and welfare that it amounted to an unconstitutional "taking."[56] The court assessed the record and agreed that zoning this tract for single family residences was constitutionally unreasonable.[57] The city was embarrassed somewhat because its unenacted comprehensive plan for 1980 prescribed higher density residential zoning for the area. The supreme court sustained the trial court concerning the unreasonableness of the R-4 zoning, but would not endorse the rezoning to O-I.[58] The court left the decision to change to a higher density zoning to the municipal authorities.[59]

The court's conclusion rested on its assessment of the site. At least the court did not discuss plaintiff's deprivation, although it could have been considerable. It appears that the burden of proving the feasibility and economy of the R-4 zoning was shifted easily to the city. It also appears that the city, in view of its transitional plans for the area, could not meet such a burden. The supreme court was correct in not forcing a down zon-

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51. 248 Ga. at 390, 283 S.E.2d at 610.
52. *Id.*
53. 247 Ga. 683, 279 S.E.2d 438 (1981).
54. *Id.* at 683-84, 279 S.E.2d at 439.
55. *Id.* at 684, 279 S.E.2d at 439.
56. Guhl v. M.E.M. Corp., 242 Ga. 354, 355, 249 S.E.2d 42, 43 (1978). *See generally* Barrett v. Hamby, 235 Ga. 262, 219 S.E.2d 399 (1975).
57. 247 Ga. at 684, 279 S.E.2d at 440.
58. *Id.* at 685, 279 S.E.2d at 439-40.
59. *Id.* at 684, 279 S.E.2d at 439.

ing to O-I without further planning and legislative consideration.

In *DeKalb County v. Blalock Machinery & Equipment Co.*,[60] the corporate landowner lost, as well it should have, on the case presented. The company complained because the DeKalb County Board of Commissioners would not zone a 182-acre tract down from R-150, one-acre residential lots, to R-100, 15,000 square-foot residential lots, about 3 lots to the acre. The trial court held that the R-150 zoning was unconstitutional and ordered the county to consider "suitable zoning"[61] for the property. The supreme court concluded, however, that plaintiff was entitled to no relief. There was no evidence that plaintiff would suffer great economic hardship, that R-100 would be more profitable, or that any site pecularities restricted R-150 development.[62] In short, plaintiff simply did not carry his burden, and the facts probably would not have permitted him to do so. Apparently nothing could be made of the 'exclusivity' involved in R-150 zoning. In view of the population pressure and the diminishing stock of land in east DeKalb County, the owner may have a point; however, high costs of development and money work against that argument at the present. Also, there were nearby areas designated R-150 that were being developed.[63]

In *Village Centers, Inc. v. DeKalb County*[64] the posture of the case gave the supreme court an opportunity to detail some procedural problems in raising constitutional issues in zoning cases. In order to build a shopping center, plaintiff sought a change for 9.29 acres from RA, residential, 8.7 units per acre, to C-1 Conditional. The DeKalb County Board of Commissioners denied the application. Eighteen months later, plaintiff filed suit challenging the RA zoning. The trial court could have limited itself to evidence that existed at the time of the denial, but in the alternative it considered the evidence that existed at the time of the trial. Based on either evidence plaintiff would have lost.[65] The supreme court agreed and made two valuable points: (1) Filing for a rezoning application is a prerequisite to a suit in equity challenging the constitutionality of a zoning ordinance as applied to certain property; and (2) after an application for rezoning is denied, the challenge must be filed within thirty days of that decision.[66] In view of the latter point, plaintiff's case was moot. The court did not discuss the evidence presented at the trial upon the application for rezoning; therefore, the procedure must be started over in order

60. 247 Ga. 671, 278 S.E.2d 374 (1981).
61. *Id.* at 671, 278 S.E.2d at 374.
62. *Id.* at 673, 278 S.E.2d at 376.
63. *Id.* at 673-74, 278 S.E.2d at 375-76.
64. 248 Ga. 177, 281 S.E.2d 522 (1981).
65. *Id.* at 178, 281 S.E.2d at 523.
66. *Id.* at 180, 281 S.E.2d at 524.

to have the property rezoned.

In *Ohoopee Land Development Corp. v. Mayor of Wrightsville*[67] the court considered several constitutional issues. The owner obtained a zoning change from residential to commercial, and when commercial development of the entire 17.5-acre tract was not completed, he wanted to zone the property up to multifamily residential in order to make the tract suitable for federally funded public housing units. At a public hearing on the application for rezoning, neighbors wanted assurances that nonwhites would not occupy the housing units.[68] The mayor and council, after a reassessment of the situation, denied the rezoning application. The trial court, seeking safer waters, sustained the city, not on the racial objection, but on the ground that plaintiff had not carried the burden required by *Guhl v. M.E.M. Corp.*[69] There was no proof that the denial was confiscatory because the remaining parcel could be marketed for commercial uses.[70] The court recognized the wisdom of the trial court's interpretation. Undoubtedly, the decision was justified. How flexible and helpful the *Guhl* rule can be!

In *Flournoy v. City of Brunswick*,[71] the court also sustained the city's position in rejecting a down zoning from R-9 (residential use) to a limited medical use. Plaintiff showed economic deprivation, an appraised $21,000 loss, but could not show that there was no substantial benefit to the public.[72] In addition, the area appeared to be transitional. For these reasons the court sustained the city's defensive zoning.

IV. CONDEMNATION

An unusual question arose in *Earth Management, Inc. v. Heard County*,[73] in which Heard County attempted, by a rather transparent condemnation, to prevent the development of a hazardous waste disposal facility. Once the court had dealt with some procedural skirmishes,[74] it considered the question of whether a county's authorized exercise of eminent domain could be in violation of the landowner's rights if there were evidence of bad faith. The bad faith alleged in that case was that Heard County used its power nakedly as a maneuver to defeat the hazardous

67. 248 Ga. 96, 281 S.E.2d 529 (1981).
68. *Id.* at 96, 281 S.E.2d at 530.
69. 242 Ga. 354, 355, 249 S.E.2d 42, 43. *See supra* text accompanying note 56 for the rule used by the court in *Guhl*.
70. 248 Ga. at 97, 281 S.E.2d at 531.
71. 248 Ga. 573, 285 S.E.2d 16 (1981).
72. *Id.* at 573-74, 285 S.E.2d at 17-18.
73. 248 Ga. 442, 283 S.E.2d 455 (1981).
74. *Id.* at 443, 283 S.E.2d at 457.

waste facility.[75] This question goes beyond the wide latitude given to public entities on the question of necessity. The court found that Heard County used its constitutional power to block an activity in which the state also had an interest.[76] Somehow, this interest related to a state statute that suggested preemption.[77] It appears that the court, in order to find a state purpose, treated the potential private condemnee as if it were already an arm of the state. This assumption undoubtedly made the finding of bad faith easier, even if the assumption was not precisely true.

The court in *Wright v. MARTA*[78] gave an interpretation of the eminent domain section of the Georgia Constitution.[79] This section limits eminent domain: "Private property shall not be *taken*, or *damaged*, for public purposes without just and adequate compensation being first paid. . . ."[80] In *Wright*, the jury's determination of consequential damages was at issue. The precise question was the date on which these damages should be determined.[81] May the jury consider the damages at the time of taking or may they consider the damages after the condemnor's project has been built? The court stated that the damages should be determined as of the time of taking.[82] Since the trial court's instruction could have confused the jury, the supreme court reversed. This reversal was based on the rule that "[t]he proper measure of consequential damages to the remainder is the diminution, if any, in the market value of the remainder in its circumstance just prior to the time of the taking compared with its market value in its new circumstance just after the time of the taking."[83]

V. Due Process in Legislation

A city ordinance of Dallas, Georgia was the direct target of a constitutional challenge in *Bullock v. City of Dallas*.[84] The ordinance provided:

> No person shall remain or loiter upon any premises to which the public

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75. *Id.* at 447, 283 S.E.2d at 460.

76. *Id.*

77. Ga. Code Ann. § 43-2920 (Harrison Supp. 1982), Official Code of Ga. Ann. § 12-8-79 (Michie 1982) (editorial changes only). *See generally* Georgia Hazardous Waste Management Act, Official Code of Ga. Ann. tit. 12, ch. 8, art. 3 (Michie 1982) (formerly Ga. Code Ann. ch. 43-29 (Harrison Supp. 1982)).

78. 248 Ga. 372, 283 S.E.2d 466 (1981).

79. Ga. Const. art. I, § 3, para. 1, Ga. Code Ann. § 2-301 (Harrison 1977).

80. 248 Ga. at 373, 283 S.E.2d at 468 (quoting Ga. Const. art. I, § 3, para. 1, Ga. Code Ann. § 2-301 (Harrison 1977)) (emphasis added by the court).

81. 248 Ga. at 373, 283 S.E.2d at 467.

82. *Id.* at 375, 283 S.E.2d at 469.

83. *Id.* at 376, 283 S.E.2d at 469-70.

84. 248 Ga. 164, 281 S.E.2d 613 (1981).

> has access, including but not limited to such places as business and shopping area parking lots, where the person's presence upon such premises is unrelated to the normal activity, use or business for which such premises are made available to the public.[85]

Defendant was arrested for stopping her automobile in the parking lot of a vehicle and tire maintenance business that was closed at the time. She chatted with friends who were in another car. The arresting officer testified that she stayed there five minutes. Her conviction was affirmed by the superior court even though there was no evidence of any other criminal behavior.[86]

The court reversed and could have rested its decision on the simple proposition that there was no evidence of a violation of the ordinance. Instead, the court ripped the ordinance from the city code.[87] The ordinance was unreasonable in that it deemed perfectly normal, acceptable, lawful, innocent, and innocuous behavior to be criminal. The ordinance was vague; it failed to give a person of ordinary intelligence fair notice, encouraged arbitrary and erratic arrests, and placed unfettered discretion in the hands of the police.[88] The court, perhaps unnecessarily, challenged each phrase of the ordinance. Finally, the big guns were fired: the ordinance was overbroad in contravention of the first and fourteenth amendments.[89] One might say, shame, shame on Dallas, or at least, shame on the arresting officer.

The constitutional prohibition against retroactive laws applies only to those laws that affect or impair vested rights.[90] In *Bituminous Casualty Corp. v. United Services Automobile Association*,[91] the court held that a 1978 amendment to the Motor Vehicle Reparations Act[92] deleting the arbitration provision could be applied to a claim arising under a prior law. The court found that the claimants were objecting to a procedural change which did not affect any vested right regarding subrogation and, thus, the law could be retroactively applied.[93]

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85. DALLAS, GA., CODE § 6-112(a) (1975).

86. 248 Ga. at 165, 281 S.E.2d at 614.

87. *Id.* at 167, 281 S.E.2d at 615.

88. *Id.* at 166, 281 S.E.2d at 615.

89. *Id.* at 169, 281 S.E.2d at 616.

90. Bullard v. Holman, 184 Ga. 788, 193 S.E. 586 (1937).

91. 158 Ga. App. 739, 282 S.E.2d 198 (1981).

92. 1978 Ga. Laws 2075 (codified at OFFICIAL CODE OF GA. ANN. § 33-34-3 (Michie 1982), GA. CODE ANN. § 56-3404(b) (Harrison Supp. 1982) (editorial changes only)).

93. 158 Ga. App. at 740-41, 282 S.E.2d at 200.

VI. FREE SPEECH

In *Bergen v. Martindale-Hubbell, Inc.*,[94] plaintiff, objecting to his directory rating, sought to enjoin the publication of the directory. The trial court dismissed his suit. The supreme court had no difficulty in recognizing protection for defendant under the first amendment[95] and the Georgia Constitution.[96] Plaintiff contended that the Georgia Designation Plan[97] limits what may be published in attorney directories to certain types of information, not including ratings. He also argued that first amendment protection does not extend to forbidden attorney practices and, finally, that defendant's speech was entitled to less protection because it was commercial speech.[98] The court correctly recognized that these arguments were irrelevant in this case.[99]

A dentist in Savannah filed suit against a newspaper in *Georgia Gazette Publishing Co. v. Ramsey*[100] and alleged a violation of his right of privacy by the publication of articles saying that he was a suspect in a murder case. The superior court granted a protective order that required the newspaper to obtain permission of the court when printing any information obtained in discovery proceedings if plaintiff objected to the publication of that information. The newspaper brought an interlocutory appeal complaining about this "gag."[101]

The supreme court carefully described the nature of this action: not libel, not "free press versus fair trial," but a civil suit in which discovery proceedings could reveal relevant and interesting "news."[102] The court concluded that first amendment considerations were paramount: "[t]he newspaper is empowered to write and speak and publish on all subjects, '. . . being responsible for the abuse of that liberty' in the nature of an action for libel or malicious abuse of process, or for invasion of privacy."[103] The court found the restraining order to be unwarranted.[104] The carefully written dissent did not succeed in showing that the well-established limitations on prior restraint should be overruled.[105]

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94. 248 Ga. 599, 285 S.E.2d 6 (1981).

95. U.S. CONST. amend. I.

96. GA. CONST. art. I, § 1, para. 4, GA. CODE ANN. § 2-104 (Harrison 1977).

97. The Plan is part of the 1979 Amendments to the Rules and Regulations for the Organization and Government of the State Bar of Georgia. 243 Ga. 875-86 (1979).

98. 248 Ga. at 599, 285 S.E.2d at 7.

99. *Id.* at 599-600, 285 S.E.2d at 7.

100. 248 Ga. 528, 284 S.E.2d 386 (1981).

101. *Id.* at 529, 284 S.E.2d at 386.

102. *Id.*

103. *Id.* at 530, 284 S.E.2d at 387 (quoting Pavesich v. New England Life Ins. Co., 122 Ga. 190, 203, 50 S.E. 68, 73 (1905)).

104. 248 Ga. at 530, 284 S.E.2d at 387.

105. *Id.* (Smith, J., dissenting).

In *Sabel v. State*,[106] defendant was convicted after a paint-spraying spree that marred most of the buildings around the Georgia Capitol. Defendant sprayed black paint on the Capitol itself, as well as the State Health Building, the State Revenue Building, the Vietnam Memorial, and even the statute of Thomas Watson. The Judiciary Building was spared. The theme of the sprayings was May Day, 1980. Defendant was convicted of seven counts of criminal interference with government property.[107] On appeal, the court correctly held that the statute in question[108] proscribes conduct and condemns only the independent noncommunicative impact of conduct within its reach.[109] Though the painting did involve political expression, the state's interest in protecting public property by means of a narrowly drawn statute outweighed defendant's right to use this particular mode of expression.

VII. TENANTS' RIGHTS

The problem of the definition of property rights arose in *Williams v. Housing Authority*.[110] Mrs. Williams, a tenant, was evicted from a housing project that the Housing Authority owned and operated. Neither the state nor the federal government financially supported the project. She had been given written notice to vacate within thirty days, in accordance with the lease agreement.[111] When she did not, the Authority brought dispossessory proceedings against her as a tenant holding over. She responded, denying any misconduct and asserting that because her landlord was a publicly owned housing project, she could not be deprived, without a hearing, of her right to continued possession of an apartment in low income public housing. Thus, she argued that she could only be dispossessed following a showing of good cause for removal.[112] The trial court granted summary judgment to the Authority.

On appeal, the due process issue focussed on the interest Mrs. Williams had in continued occupancy. Clearly, state action was involved. Was her interest an entitlement that invoked fourteenth amendment protection, or was it simply a contractual claim limited to the clauses of the lease? The court found no state statute that granted occupants of low income housing a vested interest in continued occupancy.[113] The court relied on

106. 248 Ga. 10, 282 S.E.2d 61 (1981).
107. *Id.* at 10, 282 S.E.2d at 63.
108. GA. CODE ANN. § 26-2613 (Harrison 1977), OFFICIAL CODE OF GA. ANN. § 16-7-24 (Michie 1982) (editorial changes only).
109. 248 Ga. at 14, 282 S.E.2d at 66.
110. 158 Ga. App. 734, 282 S.E.2d 141 (1981).
111. *Id.* at 734, 282 S.E.2d at 143.
112. *Id.* at 735, 282 S.E.2d at 143.
113. *Id.*

Lindsey v. Normet,[114] which left the definition of landlord-tenant rights to state law. In *Williams*, the right depended upon the terms of the lease, and the Housing Authority had meticulously complied with the lease.[115]

The Georgia Court of Appeals did review the facts and circumstances of her eviction; thus, to some extent there was a review of the official action. The court found that her treatment was fair. The United States Supreme Court has not found that a need for decent shelter or the "right to retain peaceful possession of one's home"[116] are fundamental interests. In the absence of constitutional protections, summary procedures may be applied if agreed to in the lease.[117] A possible argument remains, however, that the tenant is not just another tenant, but a tenant confronted with a bureaucrat. What happens between two private citizens may not be exactly analogous to what happens between a citizen and the state, notwithstanding the contract. It may be too easy to limit the claim of due process to a situation in which the claimant must depend upon the categories of property law. Due process overrides the contractual agreement a citizen may make with the government. Some aspects of those agreements may concern rights so 'fundamental' that they are constitutionally vested. Georgia does not agree.

VIII. School Law

In *Dillard v. Fussell*,[118] plaintiff, claiming she was wrongfully suspended from school for three days, sought money damages and an apology from defendants, including the principal of Central High School, the Superintendent, and the members of the Carroll County School Board. The trial court dismissed plaintiff's claim.[119] Even assuming that the suspension was in error, the court held that the principal had met the requirements of *Goss v. Lopez*:[120]

> Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimen-

114. 405 U.S. 56 (1972).
115. 158 Ga. App. at 736-37, 282 S.E.2d at 144.
116. 405 U.S. at 73-74.
117. 158 Ga. App. at 736, 282 S.E.2d at 144.
118. 160 Ga. App. 382, 287 S.E.2d 96 (1981).
119. *Id.* at 382, 287 S.E.2d at 97.
120. 419 U.S. 565 (1975).

> tary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.[121]

The court recognized an immunity for an officer who is invested with discretion and is empowered to exercise his judgment in matters brought before him as a quasi-judicial official. Such an official has an immunity from liability to persons who may be injured as a result of an erroneous decision, provided the acts complained of are done within the scope of the officer's authority and are not done wilfully, corruptly, or maliciously.[122] Plaintiff in *Dillard* did not come forward with proof that would have overcome the immunity.

Does the annexation of territory into the corporate limits of a municipality operating an independent school system also extend the limits of the city school system? In an extensively argued case with a well-written opinion, the court in *Upson County School District v. City of Thomaston,*[123] said, "yes." The only exceptions would be if there were a legislative expression clearly to the contrary or a valid agreement between the school systems involved.[124] The question was of great practical importance to Upson County because the expansion of the City of Thomaston considerably eroded the county system's tax base.[125] The primary constitutional arguments were based on attacks against the local acts and ordinances annexing the territory. Plaintiff argued that these local statutes violated the Georgia Constitution's prohibition[126] against having more than one subject matter in a law or containing matter different from what is expressed in the title thereof.[127] The court correctly ruled that the county was complaining of the consequences of the annexation and not matters covered in either of the acts.[128] The county was not mentioned in the relevant acts.[129]

Next, the county argued that the local acts, which repealed the charters of Silvertown and Village of East Thomaston, were special laws at variance with a general law and, hence, in violation of the Georgia Constitution. A section of the constitution requires that "laws of a general nature shall have uniform operation throughout the State, and no special law shall be enacted in any case for which provision has been made by an

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121. *Id.* at 581.
122. 160 Ga. App. at 383, 287 S.E.2d at 97-98.
123. 248 Ga. 98, 281 S.E.2d 537 (1981).
124. *Id.* at 98, 281 S.E.2d at 539.
125. *Id.* at 99, 281 S.E.2d at 540.
126. GA. CONST. art. III, § 7, para. 4, GA. CODE ANN. § 2-1304 (Harrison 1977).
127. 248 Ga. at 99-100, 281 S.E.2d at 540.
128. *Id.* at 100, 281 S.E.2d at 540.
129. *Id.* at 100, 281 S.E.2d at 541.

existing general law."[130] The court found that the general law referred to was not applicable.[131]

The other important constitutional argument centered on the constitutional provision that authorized counties to establish and maintain public schools within their limits and to make provisions for mergers of school systems.[132] The court adopted the city's argument that this provision was not exclusive and was probably irrelevant.[133]

None of these constitutional arguments worked. The case is noteworthy and instructive for litigants in local government who must be prepared to corral all possible constitutional and statutory arguments.

IX. Parental Liability for Minor Children's Torts

In *Hayward v. Ramick*,[134] the court sustained Georgia's law that makes parents liable for certain torts of their minor children. At the time the tort in *Hayward* was committed, that statute provided: "Every parent . . . having the custody and control over a minor child or children under the age of eighteen shall be liable in an amount not to exceed five hundred dollars ($500.00) for the wilful or malicious acts of said minor child or children resulting in damage to the property of another."[135] This statute replaced an earlier one[136] that the court had held unconstitutional in 1971, because it imposed vicarous tort liability only on the basis of the parent-child relationship.[137] The earlier statute violated the parents' due process rights under the Georgia and the federal constitutions.[138] The present statute reflects a desire to make the law 'penal' to assist in controlling juvenile delinquency. Thus, the statute rationally relates to a legitimate governmental end and withstands the due process challenge.

The court proceeded to analyze the present statute under a due process analysis without reference to past legislative developments. It found that the statute related to a legitimate end of government. The legislature intended to aid in reducing juvenile delinquency. The court also found that the means were rationally related to this purpose.[139]

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130. Ga. Const. art. I, § 2, para. 7, Ga. Code Ann. § 2-207 (Harrison 1977).

131. 248 Ga. at 101, 281 S.E.2d at 541.

132. Ga. Const. art. VIII, § 5, para. 1, Ga. Code Ann. § 2-5301 (Harrison 1977).

133. 248 Ga. at 102-03, 281 S.E.2d at 542.

134. 248 Ga. 841, 285 S.E.2d 697 (1982).

135. 1976 Ga. Laws 511. This Act, as amended, is found at Official Code of Ga. Ann. § 51-2-3 (Michie 1982), Ga. Code Ann. § 105-113 (Harrison Supp. 1982) (new law adds a statement of legislative intent).

136. 1966 Ga. Laws 424.

137. *See* Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971).

138. *Id.* at 751, 182 S.E.2d at 770.

139. 248 Ga. at 843, 285 S.E.2d at 699.

X. State Taxation of National Banks

The Georgia Supreme Court revisited *McCulloch v. Maryland*[140] in a decision that turned primarily on the interpretation of certain federal statutes permitting states to tax bank shares. In *Bartow County Bank v. Bartow County Board of Tax Assessors*,[141] the court sustained the Georgia statute that authorized a tax upon the fair market value of the shares of the stockholders. This fair market value was determined by totalling the amount of capital stock, paid-in capital, and retained earnings minus certain authorized deductions.[142] The controversy turned on whether or not United States government securities held by the bank should be deducted from the capital account.[143] The banks claimed that, although the state statute did not exempt such securities, under the relevant federal statute,[144] the states could not include them in the basis for the tax on the shares.[145]

In a thorough review of the extensive history of the matter and a thoughtful interpretation of the relevant federal statute, the court concluded that Congress did not intend by its 1959 amendment to repeal the share tax authorization, including the value of government securities owned by the corporation.[146] In doing this, the court chose to follow a Texas decision[147] rather than a Montana case[148] that favored the bank's interpretation of the relevant act.[149] It appears that a federal interpretation will be required to reach uniformity.

Incidentally, *McCulloch* still rules: "[N]ational banks . . . pay no [state] income taxes, pay no tangible or intangible property taxes, and pay no franchise or business license taxes. Banks are taxed on their real property, real estate transfers and sales and uses, and their stockholders are taxed on the bank's shares."[150]

XI. Sovereign Immunity

The supreme court indicated concern over the implications of allowing

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140. 17 U.S. (4 Wheat.) 316 (1819).
141. 248 Ga. 703, 285 S.E.2d 920 (1982).
142. Ga. Code Ann. § 91A-3301 (Harrison 1980), Official Code of Ga. Ann. § 48-6-90 (Michie 1982) (editorial changes only).
143. 248 Ga. at 704-05, 285 S.E.2d at 922.
144. 31 U.S.C. § 742 (1976).
145. 248 Ga. at 705, 285 S.E.2d at 923.
146. *Id.* at 711, 285 S.E.2d at 926.
147. Bank of Texas v. Childs, 615 S.W.2d 810 (Tex. Civ. App. 1981).
148. Montana Bankers Ass'n v. Montana Dep't of Revenue, 177 Mont. 112, 580 P.2d 909 (1978).
149. 248 Ga. at 711-12, 285 S.E.2d at 927.
150. 248 Ga. at 703-04, 285 S.E.2d at 921.

sovereign immunity as a defense in a breach of contract suit. In *National Distributing Co. v. DOT*,[151] the court sustained the Department of Transportation's complete defense of sovereign immunity. The court's opinion recognized that sovereign immunity came to Georgia from the common law and was approved subsequently in a 1974 constitutional amendment.[152] The same amendment specifically authorized the General Assembly to provide for waiver, which the courts had recognized prior to 1974.[153] In the present case, the court determined that there had been no waiver and the State of Georgia could rely on the defense of sovereign immunity.[154] There was considerable concern over mutuality in contracts as a result of the immunity. Three of the dissenting justices declared that there had been a waiver.[155] The General Assembly in its 1982 session, possibly responding to the *National Distributing Co.* decision, repealed Georgia's sovereign immunity in all matters ex contractu.[156]

151. 248 Ga. 451, 283 S.E.2d 470 (1981).

152. GA. CONST. of 1945 art. VI, § 5, para. 1 (1974) (presently GA. CONST. art. VI, § 5, para. 1 (1978), GA. CODE ANN. § 2-3401 (Harrison 1977 & Supp. 1982)).

153. 248 Ga. at 453, 283 S.E.2d at 471-72.

154. *Id.* at 453-54, 283 S.E.2d at 472.

155. Justices Hill, Clarke, and Smith dissented. *Id.* at 455, 283 S.E.2d at 473-74.

156. OFFICIAL CODE OF GA. ANN. § 50-21-1 (Michie Supp. 1982), GA. CODE ANN. § 40-4901 (Harrison Supp. 1982). *See also* Martin, *Contracts, Annual Survey of Georgia Law, 1981-1982*, 34 MERCER L. REV. 71, 71-76 (1982).