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The Status of Administrative Agencies under the Georgia Constitution

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ARTICLE

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I. INTRODUCTION

Over half a century ago, Justice Robert Jackson observed that administrative agencies had "become a veritable fourth branch of the Government, which has deranged our three-branch legal theories."[1] Although Article I of the United States Constitution commits legislative power to Congress, Article II assigns executive power to the President, and Article III provides for judicial power and the courts, significant portions of these powers have been allocated to agencies rather than to the three branches[2] since the advent of the modern administrative state at the end of the nineteenth century.[3] Justice Jackson acknowledged this with his statement that "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than those of all the courts."[4]

The United States Supreme Court has often needed to explain how administrative agencies fit within our nation's three branches of government, to say why and how they can be given certain powers, and to dictate how those powers must be exercised.[5] The Court has considered the delegation doctrine[6] in many cases, including old standards like *Field v. Clark*[7] and *J.W. Hampton &*

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[1] FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952).

[2] ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 3 (2d ed. 2001).

[3] The Interstate Commerce Commission, created by Congress in the 1880s, is regarded as the first "modern" independent agency. *See* Jay S. Bybee, *Agency Expertise, ALJ Independence, and Administrative Courts: The Recent Changes in Louisiana's Administrative Procedure Act*, 59 LA. L. REV. 431, 437-38 (1999) (discussing creation and features of first national regulatory commission).

[4] *Ruberoid*, 343 U.S. at 487.

[5] *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574 (1984) ("For the past few years the Supreme Court has been struggling with issues of government structure so fundamental that they might have been thought textbook simple, yet with results that seem to imperil the everyday exercise of law—administration.").

[6] The rule against the delegation of legislative power is also called the nondelegation doctrine. Both terms are used in this Article.

[7] 143 U.S. 649 (1892).

Co. v. United States;[8] the New Deal era classics *Schechter Poultry*[9] and *Panama Refining*;[10] and more recently in *Industrial Union Department v. American Petroleum Institute*[11] (the Benzene case), *Mistretta*,[12] and *Whitman v. American Trucking Ass'ns*.[13] The assignment of adjudicatory authority to agencies instead of Article III courts was at issue in *Crowell v. Benson*,[14] *Northern Pipeline*,[15] and *CFTC v. Schor*.[16] Some of the cases involving statutory limitations on the executive branch's appointment and removal of governmental officers and members of boards and commissions include *Buckley v. Valeo*,[17] *Freytag v. Commissioner*,[18] *Myers*,[19] *Humphrey's Executor*,[20] and *Morrison v. Olson*.[21] The Court applied separation of powers principles and other doctrines to strike down the legislative veto in *Chadha*[22] and to rule against the Comptroller General's role in implementing the Graham-Rudman-Hollings Act's deficit reduction mechanism in *Bowsher v. Synar*.[23] Most of these decisions are standard fare in law school casebooks and courses on administrative law,[24] and many are staples in constitutional law casebooks and courses as well.[25] They make excellent reading for anyone interested in law, government, politics, and history.

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[8] 276 U.S. 394 (1928).
[9] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[10] Pan. Ref. Co. v. Ryan, 293 U.S. 388 (1935).
[11] 448 U.S. 607 (1980).
[12] Mistretta v. United States, 488 U.S. 361 (1989).
[13] 531 U.S. 457 (2001).
[14] 285 U.S. 22 (1932).
[15] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).
[16] 478 U.S. 833 (1986).
[17] 424 U.S. 1 (1976).
[18] 501 U.S. 868 (1991).
[19] Myers v. United States, 272 U.S. 52 (1926).
[20] Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).
[21] 487 U.S. 654 (1988).
[22] INS v. Chadha, 462 U.S. 919 (1983).
[23] 478 U.S. 714 (1986).
[24] *E.g.*, RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 18-127 (4th ed. 2002); JOHN M. ROGERS ET AL., ADMINISTRATIVE LAW 283-436 (2003); PETER L. STRAUSS, TODD D. RAKOFF, & CYNTHIA R. FARINA, GELLHORN AND BYSE'S ADMINISTRATIVE LAW 37-237 (rev. 10th ed. 2003).
[25] *E.g.*, DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 1107-87 (3d ed. 2003); LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 171-235 (4th ed. 2001); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 375-404 (13th ed. 1997).

Even though administrative law is generally regarded as a subject concentrating on, among other things, the role of federal agencies under the United States Constitution and the application of the Federal Administrative Procedure Act, the bulk of the nation's administrative law practice outside of Washington, D.C. occurs at the state and local level.[26] For example, the duties and obligations of workers' compensation boards, public service commissions, social services agencies, zoning commissions, highway departments, and school boards fall under the domain of state administrative law. The work of state agencies is pervasive. Most lawyers spend as much time dealing with state administrative processes as with federal agency processes.[27]

State agencies must operate within the bounds set by their state's constitution, just as their federal counterparts must comply with the U.S. Constitution. Some differences do exist, however:

> Many state constitutions . . . differ significantly from the federal constitution in the precise way in which they organize and structure their governments. Among the differences are the ways in which state constitutions create units within their governments and the extent to which they impose substantive and procedural limitations on those units.[28]

Accordingly, it is important to ask how a particular state's boards, commissions, and agencies fit under that state's constitution; to consider how a particular state's courts have handled separation of powers concerns; to see how the delegation doctrine has been

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[26] MODEL STATE ADMIN. PROCEDURE ACT 2 (1981) (discussing tremendous growth in state government and state administrative law between 1961 and 1981); WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES AND EXPLANATIONS 1920 (2d ed. 2006).

[27] Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 100-01 (1982).

[28] *Id.* at 131. For instance, article IV of the Georgia Constitution provides for the creation of the Public Service Commission in section 1, the State Personnel Board in section 3, and the State Transportation Board in section 4. Article VI, paragraph 1 assigns judicial power to the courts, but authorizes the General Assembly to vest agencies with quasi-judicial power. MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE 103-10, 122-24 (1994).

applied; and to ask whether there have been concerns about the assignment of judicial authority to administrative tribunals outside of the judicial branch. Are there decisions from the state's highest court paralleling *Schechter*, *Whitman v. American Trucking*, *CFTC v. Schor*, *Chadha*, and *Mistretta*?

This Article discusses the place of administrative agencies under the Georgia Constitution. The rulings of the Georgia Supreme Court on these issues, like the comparable rulings from the U.S. Supreme Court, make excellent reading for anyone interested in Georgia law, government, politics, and history. Most of the decisions surveyed in this Article are correct, but not necessarily for the reasons given by the Georgia Supreme Court. Some of the opinions offer comprehensive treatises on sections of the Georgia Constitution and aspects of administrative law, while others reach conclusions without much explanation. Some results are at odds with prior decisions that are not clearly or adequately distinguished. Sometimes the Georgia Supreme Court plays loose with how it categorizes or defines an agency's authority, and sometimes the court seems to defer too much to the General Assembly. These inconsistencies and tensions are inevitable given the Georgia Constitution's clear separation of powers provision and the performance of adjudicatory, legislative, and executive functions by many agencies, along with their administrative and ministerial duties.[29] Of course, the U.S. Supreme Court's decisions regarding the place of administrative agencies under the U.S. Constitution have likewise defined administrative functions loosely, are sometimes inconsistent, and often reflect a similar tension between the language of the Constitution and a recognition of the many powers exercised by modern administrative agencies.[30]

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[29] *See* Christopher M. Rosselli, Note, *Standards for Smart Growth: Searching for Limits on Agency Discretion and the Georgia Regional Transportation Authority*, 36 GA. L. REV. 247, 249-50 (2001) (explaining differing classifications of agency activities).

[30] *See generally* Lawson, *supra* note 5 (discussing constitutional tensions arising out of modern administrative state); Strauss, *supra* note 5 (evaluating U.S. Supreme Court action in developing administrative agencies and resulting place of those agencies in U.S. government).

II. THE DELEGATION DOCTRINE AND OTHER SEPARATION OF POWERS CONCERNS

Article I, Section 1 of the U.S. Constitution provides: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives."[31] Article I, Section 8, Clause 18 authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[32] It is gospel that Congress cannot abdicate or transfer its essential legislative functions.[33] The Supreme Court, however, has recognized that not every detail of every complex issue facing the nation can be addressed directly by the legislature; thus, it has never regarded the Constitution

> as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.[34]

At the same time, the Court has also cautioned that "the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."[35]

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[31] U.S. CONST. art. I, § 1.

[32] U.S. CONST. art. I, § 8, cl. 18.

[33] Pan. Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); Field v. Clark, 143 U.S. 649, 692-93 (1892); *see* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 81 (Liberal Arts Press 1952) (1690) ("[T]he legislative cannot transfer the power of making laws to any other hands . . . .").

[34] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935) (citing *Pan. Ref.*, 293 U.S. at 421).

[35] *Id.*

These cautionary words come from the only decisions in which the U.S. Supreme Court struck down legislation because Congress delegated legislative power to an agency without providing sufficient standards or adequate guidelines.[36] Even though Justice Rehnquist's concurring opinion in the Benzene case seemed to reinvigorate the nondelegation doctrine,[37] and Justice Thomas has questioned how far Congress can push the "intelligible principle" requirement to uphold broad delegations,[38] the Supreme Court has not struck down any statute on nondelegation grounds since the New Deal.[39] In a decision upholding guidelines promulgated by the U.S. Sentencing Commission, a dissenting Justice Scalia acknowledged that the scope of the delegation doctrine is largely uncontrolled by the courts.[40] He fully agreed with the majority's "rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority [had] been violated because of the lack of intelligible, congressionally prescribed standards to guide the Commission."[41] Several years

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[36] *Pan. Ref.*, 293 U.S. at 388 (the "Hot Oil" case), and *Schechter Poultry*, 295 U.S. at 495 (the "Sick Chicken" case) were both decided in 1935, during the New Deal era. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), can be included with this pair, but it is not a typical "unbridled delegation" case. Congress had delegated power to the National Bituminous Coal Commission (a private group) to regulate hours, wages, and working conditions of coal miners, and the Court ruled that this delegation of power to a private group was unconstitutional. *Id.* at 311-12. The Court had indicated in *Schechter* that this was also a problem with the National Industrial Recovery Act, which was at issue in that case. *Schechter Poultry*, 295 U.S. at 537.

[37] Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) ("We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority solely out of concern that we should thereby reinvigorate discredited constitutional doctrines of the pre-New Deal era.").

[38] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring). Justice Thomas stated:

> I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'

Id.

[39] *See* WILLIAM F. FOX, JR., UNDERSTANDING ADMINISTRATIVE LAW 31 (4th ed. 2000) (noting *Carter Coal* as last case in which Supreme Court overturned statute on nondelegation grounds).

[40] Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

[41] *Id.* at 416. He also stated that "the power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial

later in *Whitman*, the Court reversed a court of appeals decision that the Environmental Protection Agency's interpretation of its governing statute violated the delegation doctrine.[42] Justice Scalia, writing for the majority, noted that the Court has repeatedly said "that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.' "[43] Thus, the intelligible principle requirement is a low hurdle Congress must clear in order to grant substantial authority to an agency without offending the delegation doctrine.[44]

The Supreme Court has rarely unanimously decided cases involving the delegation doctrine and other separation of powers issues.[45] The constitutional issues are difficult, and the Justices sometimes disagree on how to categorize particular administrative actions or decisions. For example, in *INS v. Chadha*, Chief Justice Burger, writing for the majority, characterized the one-house legislative veto overruling INS's suspension of the deportation of an alien as "essentially legislative in purpose and effect."[46] In a concurring opinion, Justice Powell stated that "the House's action appears clearly adjudicatory."[47] In his dissent, Justice White noted that the Attorney General's decision to suspend an alien's deportation had been categorized as an exercise of executive power as well as a legislative act.[48] As this illustrates, whether a particular agency function is defined as legislative or quasi-

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power." *Id.* at 417. Accordingly, his problem with the Sentencing Commission was that it exercised lawmaking functions "divorced from any responsibility for execution of the law or adjudication of private rights under the law." *Id.* at 420.

[42] *Whitman*, 531 U.S. at 476.

[43] *Id.* at 472 (quoting Justice Taft's classic pre-New Deal opinion from *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 409 (1928)).

[44] *See* FOX, *supra* note 39, at 35-36 ("A modern court will likely bend over backward to discern some kind of standard, however slight, anywhere in the statute . . . .").

[45] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 654 (1988) (7-1); Commodity Features Trading Comm'n v. Schor, 478 U.S. 833, 833 (1986) (7-2); Bowsher v. Synar, 478 U.S. 714, 714 (1986) (7-2); INS v. Chadha, 462 U.S. 919, 919 (1983) (7-2); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 607 (1980) (5-4); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 388 (1935) (8-1).

[46] *Chadha*, 462 U.S. at 952.

[47] *Id.* at 964 (Powell, J., concurring).

[48] *Id.* at 988-89 (White, J., dissenting); *see also infra* notes 105-17 and accompanying text (discussing *Chadha*).

legislative, judicial or quasi-judicial, executive, administrative, or ministerial can make a difference in the outcome of litigation regarding that agency's status or constitutionality.

A. SEPARATION OF POWERS AND THE DELEGATION DOCTRINE IN GEORGIA

Article I, section 2, paragraph 3 of the Georgia Constitution provides: "The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided."[49]

Article III, section 1, paragraph 1 states: "The legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives."[50]

Notwithstanding these unambiguous provisions, the Georgia Supreme Court's approach to separation of powers issues and the delegation doctrine is similar to that of the U.S. Supreme Court. It has made strong statements about the need to strictly enforce the Georgia Constitution's separation of powers mandate and about the General Assembly's exclusive authority to enact laws. At the same time, the court has pointed out—often in the same case—that some blending of functions is allowed, recognizing that the legislature has authority "to enact laws of general application and then delegate to administrative officers or agencies the authority to make rules and regulations necessary to effectuate" those laws.[51]

The "wall of separation" between the branches is not absolute, and the Georgia Supreme Court has shown considerable pragmatism in determining the thickness and height of that wall on a case-by-case basis.[52] The court has stated that the "nondelegation doctrine is rooted in the principle of separation of powers, in that the integrity of our tripartite system of government mandates that

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[49] GA. CONST. art. I, § 2, ¶ 3.

[50] GA. CONST. art. III, § 1, ¶ 1.

[51] Dep't of Transp. v. Del-Cook Timber Co., 285 S.E.2d 913, 916 (Ga. 1982) (citing and discussing decisions from as early as 1883).

[52] *Cf.* HILL, *supra* note 28, at 53 (discussing "wall of separation" and how much branches may intertwine).

the General Assembly not divest itself of the legislative power granted to it by [the Georgia Constitution]," while recognizing that the legislative branch cannot find all facts and make all applications of legislative policy when responding to and dealing with the myriad problems facing the state.[53] The court has often deferred to the legislature,[54] "approv[ing] numerous delegations of legislative authority, provided the General Assembly has provided sufficient guidelines for the delegatee."[55] The Georgia Supreme Court's approach to the delegation doctrine "does not prevent the grant of legislative authority to some ministerial officer, board or other tribunal to adopt rules, by-laws, or other ordinances for its government, or to carry out a particular purpose."[56] Thus, the court has stated that "while it is necessary that a law, when it comes from the lawmaking power, shall be complete, still there are many matters as to methods or details which the Legislature may refer to some designated ministerial officer or board."[57]

In rendering these decisions, the Georgia Supreme Court, like the U.S. Supreme Court, has not always agreed on how to categorize or define a particular agency's function or decision. Notwithstanding its deference to the legislature and its pragmatism and tolerance for some blending of functions, the Georgia Supreme Court has shown a greater willingness than the U.S. Supreme Court to strike down legislation as violating the Georgia Constitution's separation of powers mandate or delegation doctrine.[58] Moreover, it is vital to understand that the Georgia Constitution, unlike the U.S.

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[53] Dep't of Transp. v. City of Atlanta, 398 S.E.2d 567, 571 (Ga. 1990).

[54] The Committee to Revise Articles IV and V of the 1976 Constitution believed that the General Assembly should have wide discretion in creating and altering the membership and powers of boards and commissions unless compelling reasons could be shown for giving a board constitutional sanction and status like that of the Public Service Commission and the Board of Regents. HILL, *supra* note 28, at 102.

[55] *City of Atlanta*, 398 S.E.2d at 571.

[56] Scoggins v. Whitfield Fin. Co., 249 S.E.2d 222, 223 (Ga. 1978).

[57] Bohannon v. Duncan, 196 S.E. 897, 899 (Ga. 1938).

[58] State supreme courts have tended to be more demanding of their legislatures on these issues than the U.S. Supreme Court has been of Congress. *See* 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 73-91 (1965) (analyzing eleven proposed factors used by state courts to determine validity of grant of power to agency). They have not been as deferential to legislative authority. *See* KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT 36-37 (3d ed. 1972) (noting that state legislatures are considered more irresponsible than Congress, so state courts have struck down more delegations than Supreme Court).

Constitution, expressly provides for the establishment of several governmental entities that fall within any standard definition of an administrative agency,[59] including the Public Service Commission,[60] the State Board of Education,[61] and the Board of Natural Resources.[62] The special status of these constitutional agencies is discussed in Part IV of this Article.[63]

The Georgia Supreme Court's pragmatic and deferential approach to the delegation doctrine can be seen as early as 1883 in *Georgia Railroad v. Smith*.[64] In carrying out its constitutional obligation to regulate freight and passenger tariffs and to enact laws to carry out this duty, the General Assembly established the Railroad Commission,[65] provided for the appointment of three commissioners, and empowered the agency to make reasonable and just rates. The law also provided that tolls and compensation had to be fair and reasonable. A railroad challenged this legislation by arguing that the legislature could not delegate these powers to the Railroad Commission because the General Assembly was obligated to set the rates and duties itself. The Court disagreed: "It was not expected that the legislature should do more than pass laws to accomplish the ends in view. When this was done, its duty had been

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[59] *See, e.g.*, MODEL STATE ADMIN. PROCEDURE ACT § 1-102(1) (1981). Section 1-102(1) of the Model State APA defines an "Agency" as "board, commission, department, officer, or other administrative unit of this State, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head." Georgia's Administrative Procedure Act defines "agency" to mean "each state board, bureau, commission, department, activity, or officer authorized by law expressly to make rules and regulations or to determine contested cases." O.C.G.A. § 50-13-2(1) (2004). This definition is certainly broad enough to cover many of the constitutional entities. The definition, however, goes on to exempt the State Board of Workers' Compensation, the State Financing and Investment Commission, and several other public entities. *Id.* The fact that the Act does not apply to a particular entity does not, however, mean that the entity is not an administrative agency. *See generally* Melvin B. Hill, Jr., *Forward* to EDWIN L. JACKSON & MARY E. STAKES, HANDBOOK OF GEORGIA STATE AGENCIES, at iii (2d ed. 1988) (using "agency" to refer to "any office, department, division, bureau, board, commission, committee, or other unit within the three branches of state government").

[60] GA. CONST. art. IV, § 1, ¶ 1.

[61] GA. CONST. art. VIII, § 2, ¶ 1.

[62] GA. CONST. art. IV, § 6, ¶ 1.

[63] *See infra* notes 290-311 and accompanying text.

[64] 70 Ga. 694 (1883).

[65] With the Constitution of 1945, the Railroad Commission in Georgia became the Public Service Commission. S. Bell Tel. & Tel. Co. v. Invenchek, 204 S.E.2d 457, 459 (Ga. 1974).

discharged."[66] The court further noted that legislative grants of power to officers to make rules and regulations having the force of law were common:

> The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great, and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst the latter would not.[67]

The Railroad Commission's powers were attacked again in *Southern Railway Co. v. Melton*.[68] The General Assembly passed legislation in 1905 giving the agency authority to prescribe penalties on railroads for failing to furnish freight cars to shippers.[69] In upholding the Commission's powers against a delegation doctrine challenge, the court recognized that there had been a great deal of litigation throughout the nation regarding the power of railroad commissions, stating that "[i]t is now firmly established by the decisions of the courts of this country, both state and federal, that such powers can be conferred without constituting an unconstitutional delegation of legislative power."[70] The court did not address the contention that the legislature had unlimited authority to delegate its power, but confined itself to the question of whether the particular powers at issue could be conferred to the agency without violating the general principle that laws are passed by the

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[66] *Smith*, 70 Ga. at 698.

[67] *Id.* at 699.

[68] 65 S.E. 665 (Ga. 1909).

[69] The statute gave the Commission "full power and authority to make, prescribe, and enforce, all such reasonable rules, regulations and orders" to effectuate the act's purposes, including rules for the furnishing of cars "and the penalty per day per car to be paid by said railroad company in the event such car or cars are not furnished as ordered." The act also provided for a hearing for carriers and stated that penalties could not exceed $250. *Id.* at 671.

[70] *Id.* at 666-67. The court also noted that the issue had been settled in the *Smith* case. *Id.*

General Assembly.[71] It looked at the historic role of departments of government; noted that lines between the duties of the branches of government were not clear; explained that all governmental bodies do things that are not strictly enacting law; talked about the need for agencies to fill up details and deal with contingencies; explained that the legislature cannot do everything; and discussed cases from other jurisdictions, including the U.S. Supreme Court, in which expansive delegations of power had been upheld.[72]

Most delegation attacks in Georgia have failed because of this pragmatic and deferential approach to the General Assembly's authority to delegate legislative power to boards and commissions. What the Georgia Supreme Court began with the Railroad Commission in the late nineteenth and early twentieth centuries has been continued into the twenty-first century with only a few interruptions. For example, in *Scoggins v. Whitfield Finance Co.*, a 1978 decision, borrowers contended that the Industrial Loan Act was unconstitutional because it gave the Georgia Industrial Loan Commissioner authority to make rules and regulations to carry out the purposes of the statute.[73] Noting that the nondelegation doctrine did not prevent the legislature from authorizing an agency or commission to adopt rules to carry out a particular purpose, the court held that the challenge was without merit. The court said very little about the Loan Commissioner's powers, other than noting that his authority was limited to promulgating rules necessary and appropriate and not inconsistent with the terms of the act.[74]

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[71] *Id.* at 668.

[72] *Id.* at 668-69, 671. *But see* Zuber v. S. Ry. Co., 71 S.E. 937, 939-40, 941-42 (Ga. App. 1911) (distinguishing *Melton* in striking down rules enacted by Railroad Commission that imposed penalties for matters not deemed punishable by legislature). The result in *Zuber* is consistent with other cases dealing with the General Assembly's power to delegate to an agency the authority to define what conduct can be penalized, as opposed to the authority to first specify that certain conduct can be penalized and then delegate the authority to set and impose the penalties.

[73] Scoggins v. Whitfield Fin. Co., 249 S.E.2d 222, 223 (Ga. 1978).

[74] *Id.*; *see also* State v. Moore, 376 S.E.2d 877, 880 (Ga. 1989) (holding that delegation of power to Department of Transportation to designate roads on which oversized vehicles can travel is not unconstitutional, but that distinctions between certain code exemptions regarding length of trucks lacked rational basis); Ward v. State, 281 S.E.2d 503, 505 (Ga. 1981) (noting that delegation to Board of Pharmacy authority to create list of dangerous drugs was proper because Board was required to consider and make findings based on certain factors).

Notwithstanding the constitution's vesting of legislative power in the General Assembly, substantial delegations of power to agencies are permissible so long as they are made with sufficient guidelines to direct the exercise of those powers by the agencies.[75]

There are, however, limits on the Georgia court's willingness to defer to the General Assembly's judgment on delegation matters. In *Mosley v. Garrett*, for example, the court invoked the delegation doctrine to strike down a 1931 statute authorizing the grand jury and the ordinary (probate court) to set salaries for solicitor generals.[76] Citing *Melton* and other decisions, the court recognized that the legislature could authorize administrative officers and bodies to perform quasi-legislative functions in the course of administering statutes, but that "those functions which are essentially legislative must be performed by the legislative body, and may not be delegated to executive or ministerial officers."[77] In this case, a constitutional amendment relating to the compensation of solicitors explicitly authorized the General Assembly to "prescribe" a salary in lieu of fees. The court reasoned that this made the setting of a solicitor's salary legislative in character, so those portions of the statute giving the grand jury and the ordinary (probate court) uncontrolled and unguided discretion to fix the salary were unconstitutional.[78]

It is plausible to argue that a constitutional amendment authorizing the General Assembly to "prescribe" salaries made the act of "prescribing" legislative in character, but it is also reasonable to define the act of setting a salary as executive or ministerial. It is also reasonable to ask whether it makes sense for the General Assembly to spend its time setting salaries. *Mosley* can be regarded as a decision in which the categorization of the administrative action or function made a difference in the outcome of the case.[79]

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[75] HILL, *supra* note 28, at 71.

[76] Mosley v. Garrett, 187 S.E. 20, 24-25 (Ga. 1936).

[77] *Id.* at 24.

[78] The suit was brought by a solicitor general to compel the ordinary to pay him the balance of salary allegedly due him for the years 1932 and 1934. *Id.* at 22.

[79] *See* Albert B. Saye, *Constitutional Law*, 8 MERCER L. REV. 24, 33 (1956) (discussing *Mosley*). *See generally* Rosselli, *supra* note 29 (arguing for simplification of Georgia courts' analysis of agency power and constitutional requirements through abandonment of classification test).

Georgia Franchise Practices Commission v. Massey-Ferguson is a standard delegation case in which the court struck down legislation because the General Assembly failed to provide sufficient guidelines to direct the agency in the exercise of its discretion.[80] Here, the Motor Vehicle, Farm Machinery, and Construction Equipment Franchise Practices Act authorized the Franchise Practices Commission to grant, deny, and revoke licenses. The court struck down provisions in the act for several reasons, including its lack of adequate standards to guide the Commission in violation of the Georgia Constitution.[81]

The Georgia Supreme Court has consistently stated that the legislature cannot delegate the authority to make penal laws concerning conduct not made illegal by the enabling statute.[82] It has emphasized that an agency's power to enact rules for policing a particular business should not be confused with the power to enact a criminal statute.[83] For example, in *Howell v. State*, an individual convicted of possessing a firearm in violation of regulations adopted by the Department of Natural Resources successfully challenged a statutory provision that violators of "any of the rules or regulations promulgated by the commission shall be guilty of a misdemeanor and upon conviction shall be punished."[84] The court ruled that this statute improperly delegated authority to the commission, because "any statute which leaves the authority to a ministerial officer to define the thing to which the statute is to be applied is invalid."[85]

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[80] Ga. Franchise Practices Comm'n v. Massey-Ferguson, 262 S.E.2d 106, 108 (Ga. 1976).

[81] *Id.*

[82] *See* Glustrom v. State, 58 S.E.2d 534, 537 (Ga. 1950) (construing rules and regulations of State Revenue Commissioner narrowly so as to avoid constitutional question); *see also* Morris B. Abram, *Constitutional Law*, 2 MERCER L. REV. 19, 26-27 (1950) (noting problems when delegation includes right to make regulations, violations of which are punishable as crimes); Maurice S. Culp, *Administrative Law*, 2 MERCER L. REV. 1, 4 (1950) (discussing *Glustrom*).

[83] *See* Flynn v. State, 76 S.E.2d 38, 40 (Ga. App. 1953) (upholding indictment for violation of regulations promulgated by Cobb County Planning Commission).

[84] Howell v. State, 230 S.E.2d 853, 853 (Ga. 1976).

[85] *Id.* at 854 (quoting 16 AM. JUR. 2D 506, *Constitutional Law* § 257, and *Sundberg v. State*, 216 S.E.2d 332, 333 (Ga. 1975)). *Howell* overruled *Briggs v. State*, which had upheld a similar provision in a statute delegating power to the Game and Fish Commission. Briggs v. State, 56 S.E.2d 802, 806 (Ga. App. 1949); *see also* Zuber v. S. Ry. Co., 71 S.E. 937, 940 (Ga. App. 1911) (striking down rules enacted by Railroad Commission that imposed penalties for matters not deemed punishable by legislature). *Zuber* is consistent with *Sundberg* and

This result, however, prompted a strong dissent from three members of the court, who questioned the wisdom of imposing on the legislature itself the burden of "determining the squirrel limit and season in each county, district or zone in this state annually."[86] The dissenters did not subscribe to uncontrolled bureaucratic lawmaking, but did question whether the General Assembly really was the only body capable of setting the necessary limits. Accordingly, the dissent would have upheld the legislation, as well as the defendant's conviction for possession of a firearm on a wildlife management area.

The *Howell* court relied on *Sundberg v. State*, which presented the question of whether the delegation of authority to the State Board of Pharmacy to define antidepressant and stimulant drugs violated the constitution.[87] Sundberg had been indicted for the possession and sale of certain drugs. The State acknowledged that there had been a delegation of power to the board, but argued that this authority was sufficiently restricted.[88] The court disagreed and stated that the code section under attack "says a depressant or stimulant drug is anything the State Board of Pharmacy says it is without any real guidelines . . . . [T]he subsection of the Act under attack attempted to delegate to the [agency] the authority to determine what acts (the possession of such substances) would constitute a crime."[89] This attempted delegation of legislative power violated the constitution because the legislature sought to authorize the agency to decide what shall and shall not be a violation of the law.[90]

Despite these examples, however, successful delegation doctrine challenges are the exception rather than the rule. Several administrative law doctrines, including the delegation doctrine, are

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Howell, which dealt with the General Assembly's power to delegate the authority to define what conduct can be penalized, as opposed to the authority first to specify that certain conduct can be penalized and then to delegate to an agency the authority to set and impose the penalties.

[86] *Howell*, 230 S.E.2d at 854 (Hill, J., dissenting).

[87] Sundberg v. State, 216 S.E.2d 332, 332 (Ga. 1975).

[88] *Id.* at 333.

[89] *Id.*

[90] *Id.* (citing Long v. State, 42 S.E.2d 729, 730-31 (Ga. 1947)); *see also* John Hinchey, *Administrative Law*, 29 MERCER L. REV. 1, 3-4 (1976) (discussing *Howell* and *Sundberg*).

discussed in almost treatise-like fashion in *Department of Transportation v. Del-Cook Timber, Inc.*, a 1982 decision with a unanimous opinion written by the late Chief Justice Thomas Marshall.[91] Del-Cook's tractor-trailer rigs had been cited several times for hauling loads of timber in excess of limits established by the Department of Transportation (DOT), and Del-Cook responded by arguing that certain sections of the code and DOT's implementing rules were unconstitutional on several grounds, including an overly broad delegation of enforcement authority and an improper delegation of legislative functions to the DOT.

The court did not accept Del-Cook's arguments. After noting that there had been wheel-weight, axle-weight, and gross-weight requirements for Georgia's highways since 1927, summarizing the authority granted to the DOT in the Georgia Code, and discussing DOT's enforcement and hearing procedures, the court stated that the "enforcement authority granted to the DOT by § 95A-303 is neither overbroad nor an illegal delegation of legislative functions."[92] It acknowledged the General Assembly's power to enact general laws and then delegate to agencies the authority to make rules and regulations needed to carry those laws into effect, discussing and quoting from several earlier delegation doctrine decisions. It concluded, without much analysis of the powers granted to and exercised by DOT, that the quasi-legislative and quasi-judicial "role which administrative agencies play has long been accepted in this State as being constitutionally permissible."[93]

Del-Cook's unequivocal acceptance of the constitutionality of the delegation of quasi-judicial and quasi-legislative authority to agencies was cited over twenty years later by the Georgia Court of Appeals in *Georgia Oilmen's Ass'n v. Department of Revenue*, a decision upholding regulations promulgated by the Department of Revenue concerning the distribution of malt beverages.[94] A trade association argued that the adoption of these regulations violated the Georgia Constitution's separation of powers provision because

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[91] Dep't of Trans. v Del-Cook Timber, Inc., 285 S.E.2d 913, 914 (Ga. 1982).
[92] *Id.* at 914-16.
[93] *Id.* at 917 (citing Bentley v. Chastain, 249 S.E.2d 38, 40 (Ga. 1978)).
[94] Ga. Oilmen's Ass'n v. Dep't of Revenue, 582 S.E.2d 549, 552 (Ga. App. 2003).

only the legislature is empowered to pass laws. The court first ruled that it had subject matter jurisdiction, notwithstanding the Georgia Supreme Court's exclusive appellate jurisdiction over cases in which a law's constitutionality is questioned.[95] The court explained that an agency's regulations "are not 'laws' under the meaning of the constitution."[96] The court continued this proposition when it ruled on the separation of powers challenge. Instead of discussing the delegation doctrine, it cited *Del-Cook* and held that the regulation did not conflict with the constitution "because it is not a new law, but merely an administrative rule authorized by and consistent with a duly passed statute."[97]

It is difficult to disagree with the result in *Georgia Oilmen's*, but the proposition that regulations are not law ignores statements in *Del-Cook* and many other decisions that rules and regulations adopted by agencies do have the force and effect of law.[98] Georgia's Administrative Procedure Act defines a "rule" as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure or practice requirements of any agency."[99] The Georgia Court of Appeals has said that it is required to take judicial notice of any rule or regulation adopted in conformity with the Administrative Procedure Act.[100] Moreover, the courts give great deference to an agency's interpretation of its enabling statute and the application of its own rules and regulations.[101] Instead of making the statement that a regulation is not law, it would have been better for the *Georgia Oilmen's* court to read *Del-Cook* more carefully and recognize that administrative agencies perform functions that are both legislative and judicial in nature and, subject

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[95] *Id.* at 550-51 (citing GA. CONST. art. VI, § 6, ¶ 2).

[96] *Id.* at 551 (citing Brosnan v. Undercofler, 138 S.E.2d 314 (Ga. 1964)).

[97] *Id.* at 552; *see* Martin M. Wilson, *Administrative Law*, 55 MERCER L. REV. 35, 50-51 (2003) (discussing court's analysis in *Georgia Oilmen's Ass'n*).

[98] *See, e.g.*, *Del-Cook*, 285 S.E.2d at 917; *see also* Maurice S. Culp, *Administrative Law*, 16 MERCER L. REV. 12, 17-18 (1964) (discussing decision by court of appeals approving trial court's jury charge that violation of regulation was negligence per se, thus recognizing that regulations have status equal to that of legislation enacted by General Assembly).

[99] O.C.G.A. § 50-13-2(6) (2004).

[100] Cullers v. Home Credit Co., 203 S.E.2d 544, 546 (Ga. App. 1973).

[101] Dep't of Cmty. Health v. Gwinnett Hosp. Sys., 586 S.E.2d 762, 766 (Ga. App. 2003).

to the requirements of the delegation doctrine, that this dual role of agencies has long been accepted in Georgia. Concerning the issue of subject matter jurisdiction, it would have been appropriate to simply state that the court of appeals has jurisdiction over cases challenging the constitutionality of rules and regulations, and drop the statement that rules and regulations are not laws. This would have been consistent with a 1950 opinion from the Georgia Supreme Court, which stated that "[w]here . . . an attack is made on the constitutionality of a rule . . . and no construction of any constitutional provision is directly involved, but merely the applicability of plain and unambiguous constitutional provisions to such rule, the Court of Appeals and not the Supreme Court has jurisdiction."[102]

Notwithstanding some inconsistencies in the treatment of rules and regulations by the Georgia Supreme Court and Court of Appeals, the long acceptance of the General Assembly's authority to enact laws of general application and authorize an agency to promulgate rules and regulations to implement that statute undermines any argument that the Georgia Constitution's separation of powers mandate is violated by the legislature's vesting of rulemaking authority in an agency. Moreover, the Georgia Supreme Court has stated that empowering the agency to enforce the rules and regulations it adopts does not improperly mix legislative and executive power.[103] Thus, agencies created by the General Assembly occupy a secure place under the Georgia Constitution.[104]

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[102] Atlanta-Asheville Motor Express v. Superior Garment Mfg. Co., 59 S.E.2d 382, 832 (Ga. 1950).

[103] Albany Surgical, P.C. v. Ga. Dep't of Cmty. Health, 602 S.E.2d 648, 651 (Ga. 2004).

[104] *See* Dep't of Transp. v. City of Atlanta, 398 S.E.2d 567, 571 (Ga. 1990) ("[W]e have approved numerous delegations of legislative authority, provided the General Assembly has provided sufficient guidelines for the delegatee.").

B. THE CONSTITUTIONALITY OF LEGISLATIVE CONTROLS ON AGENCY RULEMAKING

One of the many legislative responses to the growth of the administrative state is the legislative veto.[105] The veto can be a provision in a generic administrative procedure statute or in a specific agency's enabling statute requiring the agency to submit proposed rules to the legislature for review and approval or disapproval prior to going into effect. Ordinarily, the proposed rule becomes effective after the passage of a certain period of time if the legislature does nothing (acquiesces); disapproval of a proposed rule or regulation usually requires affirmative action such as the passage of a resolution of disapproval by one (unicameral) or both houses (bicameral) of the legislature. With many legislative veto schemes, the resolutions of disapproval are not submitted to the executive branch (President or Governor) for approval or veto. Prior to the *Chadha* decision in 1983, Congress had inserted legislative veto provisions in over 200 statutes.[106] Georgia's Administrative Procedure Act contains a complicated legislative oversight procedure that involves standing committees of both houses, resolutions passed by both houses, and approval or veto by the Governor in the event resolutions of disapproval are ratified by less than two-thirds of the votes in either branch.[107]

The U.S. Supreme Court struck down a federal legislative veto procedure as unconstitutional in *INS v. Chadha*.[108] In this case, an alien subject to deportation applied to the INS, an executive branch agency, for a suspension of his deportation.[109] The agency granted Mr. Chadha's suspension, but the statute that authorized the INS, acting through the Attorney General, to suspend deportations also contained a legislative veto mechanism allowing either the House or

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[105] FOX, *supra* note 39, at 48.

[106] *Id.* at 49; *see* INS v. Chadha, 462 U.S. 919, 1002 (1983) (White, J., dissenting) ("Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history."). *See generally* Harold Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetos*, 90 HARV. L. REV. 1369 (1977) (discussing legislative vetoes generally).

[107] O.C.G.A. § 50-13-4(e), (f) (2004).

[108] 462 U.S. 919, 959 (1983).

[109] *Id.* at 923.

the Senate to disapprove the suspension order by resolution.[110] The House of Representatives passed such a resolution in regard to Chadha, making him subject to deportation, but he successfully challenged the constitutionality of the legislative veto mechanism.[111] The Supreme Court held that the legislative veto violated both the Bicameralism Clause[112] and the Presentment and Veto Clause[113] and was thus unconstitutional.[114] The Court characterized the disapproval of Chadha's suspension by the House as being "essentially legislative in purpose and effect" and made clear that Congress must exercise legislative power in full accord with the Constitution's provisions for the enactment of laws.[115] The *Chadha* decision effectively struck down legislative veto mechanisms contained in over 200 federal statutes,[116] but it was not the death knell of the legislative veto in the states.[117]

The Georgia Supreme Court considered the constitutionality of procedures under which the Department of Community Health may adopt regulations in *Albany Surgical, P.C. v. Georgia Department of Community Health*.[118] Those procedures, found in the agency's

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[110] *Id.* at 925.

[111] *Id.* at 926-27, 959.

[112] U.S. CONST. art. 1, § 7, cl. 2 (requiring that every bill be approved by both houses before becoming law).

[113] U.S. CONST. art. 1, § 7, cl. 3 (requiring that all bills be presented to President for approval or veto).

[114] *Chadha*, 462 U.S. at 946-59.

[115] *Id.* at 952. Justice Powell argued that the House's disapproval of Chadha's suspension was judicial in character. *Id.* at 960 (Powell, J., concurring). The majority labeled the initial INS action suspending the deportation as executive in character. *Id.* at 953 n.16 (majority opinion); *see also* FUNK & SEAMON, *supra* note 26, at 46 (discussing Court's reasoning in *Chadha*); FOX, *supra* note 39, at 50-51 (same).

[116] *See supra* note 106 and accompanying text (discussing pre-*Chadha* use of legislative veto). Surprisingly, notwithstanding the *Chadha* decision, Congress has continued to enact laws with legislative veto provisions. *See* ROGERS ET AL., *supra* note 24, at 375-76 n.6 (noting that Congress has enacted over 400 legislative vetoes since *Chadha*).

[117] *See* MODEL STATE ADMIN. PROCEDURE ACT § 3-204 cmt. (1981) (noting that several states have expressly authorized legislative vetoes by statute).

[118] 602 S.E.2d 648, 650-51 (Ga. 2004). A surgery practice sought a declaratory judgment that regulations requiring a certificate of need for an ambulatory surgery center were invalid. *Id.* The trial court granted summary judgment for the agency, and the Georgia Court of Appeals affirmed and remanded. Albany Surgical, P.C. v. Dep't of Cmty. Health, 572 S.E.2d 638, 643 (Ga. App. 2002); *see* Wilson, *supra* note 97, at 46-47 (discussing court of appeals decision). The trial court again entered summary judgment for the agency and this appeal to the Georgia Supreme Court followed. *Albany Surgical*, 602 S.E.2d at 650. For a recent discussion of the Georgia Supreme Court decision, see generally Martin M. Wilson & Jennifer

enabling statute, require the agency to send proposed regulations to legislative counsel, who then forwards them to the House and Senate Health Committees. If both committees object within thirty days, the regulations cannot be adopted. If the committees do not object, the regulations go into effect; if only one of the committees objects, the legislature may override the regulation by a resolution passed by two-thirds of each house. If a majority, but less than two-thirds, approves the resolution overriding the regulation, then it is submitted to the Governor for approval or veto. If the Governor approves the resolution, the regulation is void.[119]

According to the appellants, this complicated review and approval/disapproval process violated the Georgia Constitution's separation of powers, enactment, bicameralism, and presentment provisions because it allowed a regulation to become effective by "legislative acquiescence," arguing that the silence of the House and Senate Health Committees is not the same as ratification of the proposed regulations by the entire General Assembly.[120]

The Georgia Supreme Court did not agree with these arguments. It noted that the long acceptance of the General Assembly's power to enact laws of general application and then delegate authority to an agency to make regulations implementing those laws undermined the argument that separation of powers was violated by vesting rulemaking authority in the Department.[121] The court also said that the statute did not improperly mix the legislative authority to enact regulations with the executive power to enforce them. Without much explanation, the court stated that "[t]hese powers remain, for all practical purposes, separate and distinct."[122] A better response would have been that the Georgia courts had long accepted this kind of blending of legislative and executive authority in administrative agencies.

A. Blackburn, *Administrative Law*, 57 MERCER L. REV. 1, 25-26 (2005).

[119] *Id.* (summarizing O.C.G.A. §§ 31-6-21.1(b)-(d)).

[120] *Id.* at 650-51. GA. CONST. art. III, § 5, ¶¶ 5, 11, 12, contain the Georgia Constitution's enactment, bicameralism, and presentment provisions.

[121] *Albany Surgical*, 602 S.E.2d at 651.

[122] *Id.* In light of the many Georgia Supreme Court decisions upholding legislative delegations of rulemaking authority to agencies, it is difficult to quarrel with this conclusion, notwithstanding the brevity of the court's response to the separation of powers arguments.

The court completely dodged the enactment, bicameralism, and presentment arguments that had been successful in *Chadha* by concluding that the procedure followed for adopting these rules did not enable the agency to make laws. The court explained that "the failure of the legislative committees to object to a proposed regulation creates a presumption that the regulation reflects the intent of the legislature," but it does not turn the proposed and adopted regulation into a law.[123] The court concluded that "[t]he bottom line is this: Regulations are not laws. Thus, they can be adopted without the procedural requirements necessary for the passage of legislation. They need not be presented to, and approved by a majority vote, of each legislative body."[124] After making this statement, the court cited the *Del-Cook* and *Georgia Oilmen's* decisions. It also cited an Idaho decision which stated that rules and regulations were not equivalent to statutory law.[125]

Perhaps the *Albany Surgical* court stated that agency regulations are not laws so it could avoid grappling with the difficult question of how an agency's regulations can have the same practical impact as a statute without following the exact steps the Georgia Constitution requires for the enactment of statutes. The Georgia Supreme Court, however, like the Georgia Court of Appeals in *Georgia Oilmen's*, disregarded statements in *Del-Cook* and other decisions emphasizing that rules and regulations adopted by agencies have the force and effect of law.[126] The court also ignored the Georgia Administrative Procedure Act's definition of a "rule."[127]

Although Georgia courts have addressed separation of powers concerns while acknowledging that administrative agencies perform functions that are both legislative and judicial in character, and that this dual role of agencies has long been accepted in Georgia subject to the requirements of the delegation doctrine, these acknowledgments do not respond directly to concerns about compliance with the Georgia Constitution's enactment,

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[123] *Id.*

[124] *Id.*

[125] *Id.* (citing Mead v. Arnell, 791 P.2d 410, 414 (Idaho 1990)).

[126] *E.g.*, Dep't of Transp. v. Del-Cook Timber Co., 285 S.E.2d 913, 917 (Ga. 1982); S. Ry. Co. v. Melton, 65 S.E. 665, 670 (Ga. 1909).

[127] *See supra* notes 96-97, 99 and accompanying text.

bicameralism, and presentment provisions. If the Georgia court had taken the pragmatic approach of Justice White's dissent in *Chadha*,[128] it could have a reasonably argued that the oversight process at issue in *Albany Surgical* was constitutional. Such a ruling would have been especially important because that specialized oversight process is similar to the general legislative review and oversight procedure required by Georgia's Administrative Procedure Act for the disapproval of proposed rules.[129]

III. THE CONSTITUTION AND THE MEMBERSHIP OF BOARDS AND COMMISSIONS

The U.S. Supreme Court has decided several important cases involving constitutional challenges to mechanisms for the appointment of persons to serve on boards and commissions, as well as landmark cases dealing with the constitutionality of limitations on the President's power to remove persons from high positions in agencies. With regard to appointments, Article II, Section 2, Clause 2 of the U.S. Constitution provides that the President:

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such

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[128] INS v. Chadha, 462 U.S. 919, 967 (White, J., dissenting).

[129] O.C.G.A. § 50-13-4(e), (f) (2004) (describing procedure for rule adoption). An agency that adopts a proposed rule over the objection of a standing House or Senate Committee must notify the presiding officers of the House and Senate, the chairmen of the House and Senate Committees to which the rule was initially referred, and legislative counsel. *Id.* If one of the houses enacts a resolution to override the rule, then that resolution is immediately transmitted to the other house for consideration. *Id.* Thus, bicameralism is arguably satisfied to block a rule from going into effect. If the resolutions are adopted by two-thirds of the votes of each house, then they are veto-proof and are not submitted to the Governor. *Id.* In the event that the resolution is ratified by less than two-thirds of the votes of either house, then the resolution is presented to the Governor for his approval or veto. *Id.* This procedure arguably satisfies the Georgia Constitution's presentment and veto provisions.

> inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[130]

The disputes most relevant to administrative law have concerned who is an "Officer of the United States," whose appointment must be made by the President with advice and consent of the Senate; who is an "inferior officer" who can be appointed, as Congress thinks proper, by the President, the courts, or department heads; and who is simply an employee whose appointment is not subject to the restrictions in the Appointments Clause.[131] There also has been litigation over what constitutes a "Court of Law" and who is the "Head of a Department" to whom the power to appoint an inferior officer can be assigned by Congress.[132]

Except for providing for removal from office by impeachment, the U.S. Constitution does not explicitly provide for the removal of officers serving on boards and commissions.[133] In striking down restrictions on the President's power to remove a postmaster first class in *Myers v. United States*, Justice Taft equated the power to remove with the appointment power. He acknowledged that Congress could provide some limitations on the authority of department heads to remove inferior officers, but concluded that Congress could not grant to itself, or to either house, the power to

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[130] U.S. CONST. art. II, § 2, cl. 2.

[131] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 671-73 (1988) (holding that independent counsel is inferior officer whose appointment can be vested in court of law—the Special Division—by Congress); Buckley v. Valeo, 424 U.S. 1, 139-40 (1976) (holding that eight members of Federal Election Commission are "officers of the United States," so that it is unconstitutional for four members to be appointed by President pro tempore of Senate and Speaker of House because neither is department head); Landry v. FDIC, 204 F.3d 1125, 1134 (D.C. Cir. 2000) (holding that administrative law judge for FDIC is not officer, but only employee, because he has no power to make final decisions).

[132] *See, e.g.*, Freytag v. Comm'r, 501 U.S. 868, 891 (1991) (holding that even though Tax Court is not Article III tribunal, it is still "Court of Law" for Appointments Clause purposes so that appointment of a Special Trial Judge—inferior officer—by Chief Judge is permissible); *id.* at 901-02 (Scalia, J., concurring) (disagreeing with majority and finding that Article I court, like Tax Court, is not "Court of Law" under the Appointments Clause, but upholding appointment of Special Judge by concluding that Tax Court's Chief Judge is department head as contemplated by Appointments Clause); *Buckley*, 424 U.S. at 126-27 (holding that President pro tempore of Senate and Speaker of House are not "Heads of Departments" in whom Congress can vest power to appoint officers of United States).

[133] Myers v. United States, 272 U.S. 52, 153 (1926).

remove or the right to participate in the exercise of that power.[134] *Humphrey's Executor v. United States* distinguished *Myers* in upholding limitations on the President's authority to remove a Federal Trade Commissioner,[135] as did *Morrison v. Olson* in upholding restrictions on the President's ability to remove independent counsel appointed by the Special Division under the Ethics in Government Act.[136] On the other hand, in *Bowsher v. Synar*, the Court struck down provisions of the Gramm-Rudman-Hollings Act because it gave executive powers to the Comptroller General of the United States, an officer subject to removal by Congress.[137]

The Georgia Supreme Court's decisions about who can be named to serve on boards and commissions are not as readily categorized as the U.S. Supreme Court's appointment and removal decisions.[138] In addition to the strong admonition in the separation of powers section that "no person discharging the duties of one [branch], shall at the same time exercise the functions of either of the others except as herein provided," several provisions of the Georgia Constitution are relevant to the membership of boards and commissions.[139] Article II, section 2, paragraph 3 provides:

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[134] *Id.* at 161.

[135] Humphrey's Ex'r v. United States, 295 U.S. 602, 625-26 (1935) (holding that FTC is considered "independent" agency, not executive branch agency); *see* Bybee, *supra* note 3, at 438-39 (describing era of great agency deference).

[136] *Olson*, 487 U.S. at 692-93. The Special Division is a "Court of Law," so the appointment of the Independent Counsel, an inferior officer, was also constitutional. *Id.* at 678-79.

[137] Bowsher v. Synar, 478 U.S. 714, 732 (1986).

[138] The Georgia Constitution, like the U.S. Constitution, is silent on who can remove members of boards and commissions before their terms expire, except for article III, section 7, paragraph 1, which provides that the House has the sole power to vote impeachment charges against any executive or judicial officer; and article III, section 7, paragraph 2, which provides that impeachments are tried by the Senate. GA. CONST. art. III, § 7, ¶¶ 1-2. Of course, depending on the agency's enabling statute, some members of boards and commissions do not hold office indefinitely because they are not reappointed or they are not reelected. In addition, officers may be removed for violations of the state code of ethics conflict of interest laws. O.C.G.A. §§ 45-10-3, 45-10-20 (2004). It is uncertain, however, whether the Governor has inherent power to remove board members because of his several constitutional powers and duties under article V, section 2. JACKSON & STAKES, *supra* note 59, at ix.

[139] GA. CONST. art. I, § 2, ¶ 3.

> No person who is not a registered voter or who has been convicted of a felony involving moral turpitude, unless that person's civil rights have been restored . . . or who is the holder of public funds illegally shall be eligible to hold any office or appointment of honor or trust in this state.[140]

Further, article III, section 2, paragraphs 4(b) and (c) provide:

> (b) No person holding any civil appointment or office having any emolument annexed thereto under the United States, this state, or any other state shall have a seat in either house.
> (c) No Senator or Representative shall be elected by the General Assembly or appointed by the Governor to any office or appointment having any emolument annexed thereto during the time for which such person shall have been elected unless the Senator or Representative shall first resign the seat to which elected; provided, however, that, during the term for which elected, no Senator or Representative shall be appointed to any civil office which has been created during such term.[141]

These provisions are intended to prevent the use of public office for private gain, and to prevent individuals from holding dual offices.[142] They are similar to the so-called "Ineligibility" and "Incompatibility" clauses contained in Article I, Section 6 of the U.S.

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[140] GA. CONST. art. II, § 2, ¶ 3.
[141] GA. CONST. art. III, § 2, ¶ 4(b), (c).
[142] Rowe v. Tuck, 99 S.E. 303, 304 (Ga. 1919).

Constitution,[143] which reflect the Framers' concerns regarding separation of powers.[144]

Georgia's Constitution also provides that "[a]ll government, of right, originates with the people, is founded on their will only, and is instituted solely for the good of the whole. Public officers are the trustees and servants of the people, and, at all times amenable to them."[145] The Georgia Supreme Court has construed this provision, coupled with another constitutional mandate that the people have "the inherent right" to regulate their government,[146] to mean that "public affairs [must] be managed by public officials who are accountable to the people."[147] Finally, it is important to note that under the Georgia Constitution, the Governor "shall" make such appointments as authorized by the constitution or by law[148] and that the Governor has the power to fill vacancies in public offices "unless otherwise provided by this Constitution or by law; and persons so appointed shall serve for the unexpired term unless otherwise provided by this Constitution or by law."[149] State law, however, is unclear on whether all appointments by the Governor must be confirmed by the Senate even if the pertinent statute is silent on the issue.[150]

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[143] U.S. CONST. art. 1, § 6, cl. 21 states:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during the Continuance in Office.

Id.

[144] Buckley v. Valeo, 424 U.S. 1, 124 (1976).

[145] GA. CONST. art. I, § 2, ¶ 1.

[146] GA. CONST. art. I, § 2, ¶ 2.

[147] Rogers v. Med. Ass'n of Ga., 259 S.E.2d 85, 87 (Ga. 1979); *see also Recent Decisions, Administrative Law*, 29 EMORY L.J. 1183, 1209 (1980) (stating that General Assembly may not delegate appointment power to private organization).

[148] GA. CONST. art. V, § 2, ¶ 9.

[149] GA. CONST. art. V, § 2, ¶ 8(a).

[150] JACKSON & STAKES, *supra* note 59, at ix. The authors note that Georgia Code section 45-12-54 appears to have superseded section 45-12-53, which states that no appointment by the Governor shall be subject to confirmation by the Senate unless the statute under which the appointment is made requires such confirmation. They also point out that the Attorney General opined that these two sections should be construed to allow each of the sections to stand.

A. DUAL OFFICE HOLDING, SEPARATION OF POWERS, AND BOARD MEMBERSHIP

Several of the most interesting decisions regarding membership on Georgia's boards and commissions involve legislation in which the General Assembly departed from the traditional administrative agency model and established a hybrid entity to deal with a particular issue or problem. In several of these cases, the basis for the constitutional challenge is that in establishing the special board, the General Assembly violated the constitution's separation of powers provision by retaining authority over the implementation of the statute through the placement of several legislators on the governing board.

Sheffield v. State School Building Authority, decided in 1952, resolved several challenges to the constitutionality of the State School Building Authority Act.[151] The enabling legislation created the Authority and gave it power to do a variety of things, including the power to issue revenue bonds for the construction, maintenance, and repair of building projects located on property owned or leased by the Authority.[152] Consistent with earlier delegation doctrine decisions in Georgia, the supreme court easily disposed of the argument that the General Assembly had unconstitutionally vested legislative powers in the Authority and the State Board of Education by saying the contention was "overwhelming refuted" by a long list of statutes and decisions.[153]

The court, however, paid closer attention to the fact that the enabling legislation provided that the Authority's seven members included the Chair of the State Board of Education, the State School Superintendent, the State Auditor, and three additional members appointed by the Governor.[154] One of the Governor's appointees was the Speaker of the House of Representatives. He had been serving as Speaker when the General Assembly created the Authority and

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[151] Sheffield v. State Sch. Bldg. Auth., 68 S.E.2d 590, 590 (Ga. 1952); *see also* Morris B. Abram & Robert B. McKay, *Constitutional Law*, 4 MERCER L. REV. 25, 27-28 (1952) (discussing *Sheffield*).

[152] *Sheffield*, 68 S.E.2d at 594.

[153] *Id.* at 595.

[154] *Id.* at 596-97.

was appointed during that term. This appointment appeared to be a blatant violation the constitution's article III, section 2 mandate against dual office holding; additionally, the service of the elected officials seemed to offend the separation of powers mandate against persons discharging the duties of one branch also exercising functions of another branch.[155]

The Georgia Supreme Court concluded that the Speaker's appointment did not offend the constitution's dual office holding provision because the statute creating the Authority "expressly declares that the members shall receive no compensation for their services," so that the office the Speaker held with the agency was not one "having any emolument annexed thereto."[156] The court also considered whether this position was a "civil office," as that term is used in the state constitution.[157] The enabling statute declared that the Authority's public purpose was to benefit the people, and that it would be performing a governmental function in the exercise of its powers.[158] Although this arguably made a position on the Authority's board a civil office, the court stated that it was not bound by the legislature's stated purpose of its own statute. Instead, it concluded that the Authority stood on par with the Board of Regents, which the Court had declared "was not a part of the State, and was not an agency of the State."[159] Accordingly, the Speaker's position on the Authority did not involve a governmental function and, thus, was not a "civil office" as contemplated by the Georgia Constitution.[160] The court did not consider the separation of powers issue.

Sheffield is a troubling decision and, in fact, may no longer be good law (although it has not been explicitly overruled). The Board of Regents is one of the several "agencies" enjoying explicit recognition in article VIII of the Georgia Constitution, along with

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[155] GA. CONST. art. I, § 2, ¶ 3; *see supra* notes 138-39 and accompanying text (discussing Georgia Constitution with regard to removal of board members).

[156] *Sheffield*, 68 S.E.2d at 596.

[157] GA. CONST. art. III, § 2, ¶ 4(b).

[158] *Sheffield*, 68 S.E.2d at 597.

[159] *Id.*

[160] *Id.*; *see also* Albert B. Saye, *Constitutional Law*, 6 MERCER L. REV. 32, 40-41 (1954) (discussing use of public authorities as way to circumvent debt limitations).

the State Board of Education,[161] and the constitution specifies how the members of these entities are selected. Accordingly, the Georgia Supreme Court's comparison of the Authority to the Board of Regents is flawed. Allowing a powerful legislator like the Speaker of the House to have a role on an agency raises, at a minimum, the appearance of impropriety. In the years since *Sheffield* the court has declared that the Board of Regents is an agency.[162] Moreover, notwithstanding the special constitutional status of entities like the Board of Regents, it seems obvious that the constitution's restrictions on holding dual offices should bar active members of the General Assembly from serving on a board or commission. In fact, in *Galer v. Board of Regents*, the Georgia Supreme Court upheld the constitutionality of a statute enforcing the constitution's separation of powers provision by declaring it unlawful for a member of the General Assembly to hold office or employment in the executive branch of government or any agency.[163] This decision required Mary Jane Galer, a tenured professor at a college within the University System of Georgia, to resign from her teaching position after she was elected to the House of Representatives.[164] In reaching this conclusion, the court necessarily found that the University System of Georgia was an agency of the executive branch.[165]

Even though the constitution's separation of powers provision appears to be a clear bar to an appointment like the one made in *Sheffield*, the *Sheffield* court did not address the question of whether that provision was violated by the Speaker of the House's role in the implementation of the Authority's arguably executive powers. The Georgia Supreme Court addressed this question over twenty years later in *Greer v. State*,[166] a case involving a challenge to the constitutionality of 1974 legislation that created the World Congress Center Authority. The statute at issue empowered this public corporation to oversee the planning, construction, operation,

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[161] GA. CONST. art. VIII, §§ 2, 3.

[162] Bd. of Regents v. Atlanta Journal, 378 S.E.2d 305, 305 (Ga. 1989).

[163] Galer v. Bd. of Regents, 236 S.E.2d 617, 619 (Ga. 1977).

[164] *Id.*

[165] *Id.* at 618. Ms. Galer was a tenured associate professor at Columbus College, now called Columbus State University.

[166] Greer v. State, 212 S.E.2d 836, 836-37 (Ga. 1975); *see also* Hinchey, *supra* note 90, at 2-3 (discussing *Greer*).

maintenance, repair, and expansion of the Georgia World Congress Center. The governing board consisted of twenty persons, including six from the General Assembly. The question for the court was whether placing these legislators on the board violated separation of powers. The trial court held that the provisions of the act pertaining to the Authority's membership were unconstitutional.[167] On appeal, the appellants argued that Georgia's separation of powers provision prevents any one of the three branches from usurping the powers and functions of any other branch, that the Authority was outside of the three branches, and that this entity performed "proprietary" instead of governmental functions.[168] Accordingly, having legislators on the governing board did not disturb the balance between the three branches.[169] In making this argument, the appellants relied on the *Sheffield* court's approval of the presence of the Speaker of the House on the School Building Authority.[170]

The Georgia Supreme Court did not accept the appellants' categorization of the Authority's function and distinguished *Sheffield*, which had not dealt with the pure and broader separation of powers issue of whether the members of the Authority's governing board were performing executive, as opposed to legislative, functions as proscribed by the constitution.[171] The court stated that the separation of powers principle is not rigid, that the separations are not total, and that mathematically precise lines cannot be drawn between different kinds of governmental actions:

> The separation of powers principle is sufficiently flexible to permit practical arrangements in a complex government, and though it is not always easy to draw a line between executive functions and legislative functions, it is quite plain to us in this case that the

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[167] *Greer*, 212 S.E.2d at 836-37.

[168] *Id.*

[169] *Id.* at 837.

[170] *Id.* at 837-38 (discussing Sheffield v. State Sch. Bldg. Auth., 68 S.E.2d 590, 590 (Ga. 1952)).

[171] *Id.* at 838.

> functions performed by the World Congress Center Authority are primarily, if not exclusively, executive.[172]

The court explained that the executive's function is to implement specific legislation, the legislation at issue assigned all details of the implementing function to the Authority, and the General Assembly retained control over implementation of this law by appointing legislators to the Authority's governing body. This made the legislation constitutionally infirm, because "a legislator who participates as a member of the governing body of a public corporation such as the World Congress Center Authority is performing executive functions."[173] Accordingly, the provisions of the act putting legislators on the governing board were declared unconstitutional.[174]

Because *Greer* confronted the constitutional issues directly, it is a much more satisfying opinion than *Sheffield*. As noted, the broad statements from *Sheffield* about the Board of Regents and the State School Building Authority being neither parts of the State nor agencies have been negated by later decisions of the Georgia Supreme Court.[175] In addition, the *Greer* court was candid in noting that the line between executive and legislative functions is not clear, and acknowledged that the characterization or definition of an administrative function can make a significant difference in the outcome of the case.[176] Fortunately, the court gave a relatively full explanation of why the World Congress Center Authority's duties to implement the statute were "executive" in nature and therefore could not be carried out by legislators.[177]

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[172] *Id.*

[173] *Id.*

[174] The court agreed with the trial court that these provisions could be stricken from the Act without rendering all of it unconstitutional. *Id.* at 839. See also *Fuller v. State*, 208 S.E.2d 85, 88-89 (1974), in which the constitutionality of the Executive Board of the World Congress Center was raised, but not decided, because the 1972 Act creating that board had been repealed. *Id.*

[175] *See supra* notes 161-65 and accompanying text.

[176] *See supra* note 172 and accompanying text.

[177] *See supra* notes 172-74 and accompanying text.

Murphy v. State presented the same issues as *Greer* and was decided the same way.[178] The legislation under attack, the State Properties Code, called for five legislators to serve on the eleven member State Properties Commission.[179] The commission was created as an agency within the executive branch; its primary function was to acquire property through condemnation; and it had broad authority to do a number of things, including manage property, settle and dispose of claims, deal with encroachments, and enter into rental agreements.[180] As in *Greer*, the court concluded that these duties were executive functions that must be performed by the executive branch, not legislators.[181] The court upheld the trial court's decision declaring unconstitutional those portions of the Act providing for legislators to serve on the commission. It disagreed, however, with the trial court on the severability of those provisions, concluding that the primary intent of the statute could not be effectuated by a commission comprised of only six members.[182]

The General Assembly learned a lesson or two from *Murphy* and *Greer*, because in *Caldwell v. Bateman*, the Georgia Supreme Court upheld the appointment scheme for the State Campaign and Financial Disclosure Commission.[183] The Commissioner of Labor, whose election campaign was being investigated by the agency, challenged the enabling statute on several grounds, including an assertion that its provision for the appointment of several commission members by the Speaker of the House and the Lieutenant Governor violated the constitution's separation of powers provision.[184] The court disagreed. It noted that in *Murphy*

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[178] Murphy v. State, 212 S.E.2d 839, 841 (Ga. 1975); *see also* Hinchey, *supra* note 90, at 2-3 (discussing *Murphy* and *Greer*).

[179] *Murphy*, 212 S.E.2d at 840.

[180] *Id.* at 841.

[181] *Id.*

[182] *Id.*; *see also* Galer v. Bd. of Regents, 236 S.E.2d 617, 619 (Ga. 1977) (upholding statute that made it unlawful for member of General Assembly to hold office or employment in executive branch or agency).

[183] Caldwell v. Bateman, 312 S.E.2d 320, 325-26 (Ga. 1984); *see* Stephanie B. Manis & Mark H. Cohen, *Administrative Law*, 38 MERCER L. REV. 17, 19 (1986) (noting that in upholding Act, court looked to plain language of constitution).

[184] *Caldwell*, 312 S.E.2d at 325. The Campaign Finance and Disclosure Act provided for a five-member commission, with one member appointed by the Speaker and another by the

and other cases, the same person was serving in the legislature and on the board or commission at the same time; in contrast, there was no dual service involved in this case.[185] The Georgia Constitution clearly prohibits the same person from simultaneously discharging the duties of more than one branch, but "the mere appointment, by a member of the legislative branch, of a non-legislator to an executive commission is not a simultaneous discharge of duties and functions against which our constitutional doctrine of separation of powers is directed."[186]

The Georgia Supreme Court seemed to back away from the principles announced in *Greer*, *Murphy*, and *Caldwell* in a 1990 decision, *Department of Transportation v. City of Atlanta*.[187] There were, however, two vigorous dissenting opinions. The litigation involved a constitutional challenge to the authority of the Commission on the Condemnation of Public Property and the Commission's efforts to condemn land for building the Presidential Parkway in Atlanta.[188] As in *Greer* and *Murphy*, this commission is not a typical administrative agency. Its membership includes elected, executive branch officials, all with considerable authority under the constitution: the Governor, the Lieutenant Governor, Secretary of State, State Auditor, and the Commissioners of Agriculture, Insurance, and Labor.[189] The legislation provided that if the DOT or another agency wanted to acquire property by condemnation, it first had to obtain approval from the Commission.[190] The Commission was not required to hold a hearing before approving an application, but once an application was

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Lieutenant Governor, who serves as President of the Senate and is thus arguably a member of the legislative branch. *Id.* The Commissioner of Labor argued that allowing members of the legislative branch to appoint members of the commission, an executive branch agency, violated the Constitution's separation of powers provision. *Id.* at 322.

[185] *Id.* at 325.

[186] *Id.*; *see also* Fuller v. State, 208 S.E.2d 85, 89-93 (Ga. 1974) (Hall, J., concurring) (discussing impropriety of having legislators sit on Executive Board of World Congress Center).

[187] 398 S.E.2d 567 (Ga. 1990).

[188] *Id.* at 569.

[189] *Id.* at 569-70.

[190] *Id.* at 570.

approved, the agency could then acquire the property by the procedures spelled out in the applicable condemnation laws.[191]

The court acknowledged that it had never addressed the question of whether the exercise of delegated powers by executive officials violated the prohibition in the constitution's separation of powers provision that "no person discharging the duties of one [branch] shall at the same time exercise the functions of either of the others except as herein provided."[192] It concluded that if there are sufficient guidelines, the executive official's exercise of delegated powers is not unconstitutional, because "in such cases, the executive official or commission is not 'exercis[ing] the functions of' the legislature, in that it is not making a purely legislative decision, but is acting administratively pursuant to the direction of the legislature."[193] The court concluded that the legislature provided sufficient guidelines by requiring the Commission to determine whether the taking of the property was in the public interest, and to consider whether the current use of the property is more in the public interest than the proposed use.[194]

The *City of Atlanta* majority was very deferential to the General Assembly and perhaps too pragmatic in seeking to justify this condemnation scheme. Justice Smith's dissent concluded that there had been an unconstitutional delegation of legislative power. He stated that, consistent with *Greer* and *Murphy*, the clear mandate of the separation of powers provision was that a member of the executive branch could not exercise the functions of the legislative branch.[195] He argued persuasively that "[t]he powers and duties granted to the members of the commission (all members of the executive branch) are legislative powers."[196] He also asserted that *Greer* and *Murphy* compelled the conclusion that members of the

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[191] *Id.*

[192] *Id.* at 571 (quoting GA. CONST. art. I, § 2, ¶ 3).

[193] *Id.*; *see also* Bedingfield v. Parkerson, 94 S.E.2d 714, 718 (Ga. 1956) (discussing plaintiffs' argument that legislation had delegated authority to local school boards without indicating definite course of action; court held that there was no delegation of legislative power, as reorganizing county's schools merely involved administrative acts).

[194] *City of Atlanta*, 398 S.E.2d at 572. On the basic delegation doctrine attack, the court found that the guidelines were sufficient under standards announced in prior cases. *Id.*

[195] *Id.* at 575 (Smith, J., dissenting).

[196] *Id.* at 574.

executive branch are "constitutionally prohibited from making final legislative decisions regarding the condemnation of public property."[197] Also in dissent, Justice Hunt argued that the delegation doctrine was offended because there were no guidelines realistically restricting the Commission's actions.[198]

City of Atlanta is another example of how the Georgia Supreme Court's categorization or definition of an agency's duties as legislative, executive, judicial, ministerial, quasi-legislative, or administrative can make a substantial difference in the outcome of litigation challenging an agency's structure on the ground that it violates the constitution's separation of power's mandate.[199] The elected executive branch officials named to the condemnation commission were asked to perform functions that did not fall within their statutorily prescribed duties. For the constitutionality of their roles to turn on the sufficiency of guidelines and the definition of their new duties as "administrative" disregards the nature of the governmental act of condemning property by eminent domain, as well as one of the important rationales for separation of powers: avoiding vesting too much power in the hands of too few people.[200]

B. DELEGATION OF APPOINTMENT AUTHORITY TO A PRIVATE GROUP

In addition to the dual office holding and separation of powers rulings of the Georgia Supreme Court, there are several important decisions involving appointments of board members to agencies and commissions that regulate professions like medicine, dentistry, and architecture. The central issue in these decisions concerns the exclusivity of the private organization that is authorized by statute

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[197] *Id.* at 575. Justice Smith discussed the *Galer* decision, *supra* notes 162-65, 182, which upheld legislation requiring a newly elected member of the House of Representatives to resign her position as a tenured professor at a college in the University System of Georgia. He also discussed *Fowler v. Mitcham*, 291 S.E.2d 515 (Ga. 1982), in which the Georgia Supreme Court held that a provision in the Georgia Code prohibited a person from serving in the dual capacities of alderman and policeman in the City of Ludowici, noting that the situation was analogous to *Galer*.

[198] *City of Atlanta*, 398 S.E.2d at 576 (Hunt, J., dissenting).

[199] *See* Rosselli, *supra* note 29, at 259-67 (discussing distinctions between and implications of classifications).

[200] *City of Atlanta*, 398 S.E.2d at 573, 575 (dissenting opinions).

to recommend people to the Governor for nomination to the licensing or regulatory board.

One of these decisions, *Bell v. Georgia Dental Ass'n*, was not litigated in the state courts of Georgia, but in the United States District Court for the Northern District of Georgia.[201] This 1964 case involved a constitutional challenge to statutes providing for appointments to the Board of Dental Examiners, among others.[202] Appointments were to be made from a list of nominees submitted by the Georgia Dental Association, a private organization that excluded blacks from its membership.[203] The Association's motion to dismiss the challenge was denied because the group's statutory right to make the nominations to the licensing boards made it an agency of the state subject to the state action doctrine.[204]

More than four decades later, this type of discrimination in the appointment of members of licensing boards and commissions seems archaic, but the interests of persons applying for or seeking to maintain a professional license remain the same as those of the plaintiffs challenging the makeup of the regulatory board in *Bell*. Both want an impartial tribunal to pass on applications, suspensions, and revocations, and they have an interest in fair competition—that is, they do not want to be subject to regulation by direct competitors who may have an interest in excluding them from the profession.[205]

Racial discrimination was not an issue in *Rogers v. Medical Ass'n of Georgia*, in which the Georgia Supreme Court struck down a statute requiring the Governor to make appointments to the Board of Medical Examiners solely from a list submitted by the Medical Association of Georgia.[206] A doctor who was not a member of that association brought the challenge,[207] and, in many respects, his

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[201] Bell v. Ga. Dental Ass'n, 231 F. Supp. 299 (N.D. Ga. 1964).

[202] *Id.* at 299-300.

[203] *Id.* at 299.

[204] *Id.* at 301; *see also Recent Decisions*, *supra* note 147, at 1195 (discussing *Bell* and state action doctrine).

[205] *See Recent Decisions*, *supra* note 147, at 1195 (discussing these interests in context of due process challenge to composition of appointed regulatory boards).

[206] Rogers v. Med. Ass'n of Ga., 259 S.E.2d 85 (Ga. 1979); *see also Recent Decisions*, *supra* note 147, at 1183 (discussing *Rogers*).

[207] *Rogers*, 259 S.E.2d at 86.

concerns were similar to those raised by the *Bell* plaintiffs—namely, the basic fairness of a professional being subject to regulation by a state agency whose governing members can be selected only from those who belong to a private organization that excludes some members of the regulated profession.[208] According to the court, several provisions of the constitution made clear

> that the power to appoint public officers remain[s] in the public domain. The General Assembly may, within constitutional limitations, establish qualifications for public office and designate a governmental appointing authority. But it cannot delegate the appointive power to a private organization. Such an organization, no matter how responsible, is not in the public domain and is not accountable to the people as our constitution requires.[209]

Because the statute vested the control over appointments in a private organization, the Medical Association of Georgia, it violated the constitution.[210]

Rogers had an immediate effect because the authorizing statutes of several other licensing and examining boards required the Governor to make appointments from a list of nominees provided by the professional association for the particular occupation or profession. The General Assembly removed these restrictions after *Rogers* so that any legally qualified person could be appointed to one of the occupational licensing and examining boards.[211]

Just two years after *Rogers*, the licensing and regulation of architects came under attack in *Wise v. State Board for Examination, Qualification & Registration of Architects*.[212] Georgia's

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[208] *Id.* at 87.

[209] *Id.* The court cited several provisions in the Georgia Constitution.

[210] *Id.* The court did not, however, oust the present members of the Board from office because the Governor may well have appointed them in the absence of the unconstitutional statutory requirement. *Id.* It mandated that future appointments did not have to be limited to those persons recommended by the medical association. *Id.*

[211] JACKSON & STAKES, *supra* note 59, at 253.

[212] 274 S.E.2d 544 (Ga. 1981). This agency is now called the State Board of Architects. JACKSON & STAKES, *supra* note 59, at 258.

state architecture board is a member of the National Council for Architectural Registration Boards (NCARB), a nonprofit entity whose membership consists of the architectural registration boards of all the states.[213] NCARB certifies architects who meet certain minimal standards, and that certification enables an architect to practice in Georgia without having to take this state's licensing exam. In this case, the state board denied an Illinois architect a Georgia license because he did not have NCARB certification or sufficient experience to qualify under the state board's rules and regulations.[214] The architect challenged the authority of the Georgia licensing board, but the Georgia Supreme Court ruled that there was not an unconstitutional delegation of legislative power to the state board and NCARB.[215]

The court expressed no reservations about NCARB's role in the licensing of Georgia's architects, even though this private entity, like the Medical Association in *Rogers*, appeared to exercise considerable authority, nor did the court make any attempt to distinguish *Rogers* and that opinion's strong reservations about giving authority to a private group. Instead, the court turned to the deferential and pragmatic 1978 holding in *Scoggins* to uphold this scheme for regulating a profession.[216] *Scoggins*, which upheld the delegation of authority to the Georgia Industrial Loan Commissioner to promulgate rules and regulations, is not on point, however, because it does not address the propriety of a private organization's role in controlling entry into a regulated profession.[217] It would have been better if the court had explained why the role of NCARB in the state certification process is not analogous to limiting the appointment of persons to a professional licensing board to the member of a specific nongovernmental professional association.

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[213] *Wise*, 274 S.E.2d at 545.
[214] *Id.*
[215] *Id.* at 546.
[216] *Id.*
[217] *See supra* notes 73-75 and accompanying text (discussing *Scoggins*).

IV. AGENCY ADJUDICATION AND SEPARATION OF POWERS

Congress has delegated considerable quasi-judicial authority to federal agencies for many years, and the primary concern of the U.S. Supreme Court has been that these delegations of adjudicatory authority to nonjudicial branch tribunals do not undermine the judiciary's powers under Article III of the U.S. Constitution.[218] In *Crowell v. Benson*, which involved a challenge to a workers' compensation scheme for maritime employees, the Supreme Court held that non-Article III tribunals could adjudicate "public rights"—rights that people have against the government, such as disputes over taxes, government licenses, and benefits.[219] In addition, the Court ruled that agency tribunals could serve as "adjuncts" to Article III judges and, therefore, like special masters, issue rulings on "private rights"—disputes between private parties—so long as an Article III court could assess the legal significance of the agency's factual determinations on judicial review.[220]

The *Crowell* justifications for agency adjudication seemed secure for fifty years, until the Supreme Court in *Northern Pipeline* struck down parts of the Bankruptcy Act of 1978 for delegating excessive judicial authority to federal bankruptcy judges, who do not have Article III status.[221] The effect of *Northern Pipeline* on standard agency adjudication was unsettled for several years, until the Supreme Court decided *Thomas v. Union Carbide Agricultural Products Co.*[222] and *CFTC v. Schor*.[223] In both of these cases, the Court took a practical approach to analyzing the statutory delegation of adjudicatory power, considering the purposes served by the delegation and the effect of the delegation on "the independent role of the judiciary in our constitutional scheme."[224] The Court declined to adopt any formalistic and unbending rules to

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[218] FUNK & SEAMON, *supra* note 26, at 34-35.

[219] Crowell v. Benson, 285 U.S. 22, 50-51 (1932).

[220] *Id.* at 51-52; *see also* FUNK & SEAMON, *supra* note 26, at 35 (discussing Supreme Court's "adjunct" theory).

[221] N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982).

[222] 473 U.S. 568 (1985).

[223] 478 U.S. 833 (1986).

[224] *Thomas*, 473 U.S. at 590.

decide whether the legislature's decision to have Article III business adjudicated in a non-Article III tribunal threatened the integrity of the judicial branch.[225] Instead, the Court weighed a number of factors:

> Among the factors upon which we have focused are the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[226]

The *Schor* Court concluded that an agency regulation allowing the Commodity Futures Trading Commission to adjudicate state law counterclaims arising out of the transaction or occurrence set forth in a customer's statutory reparations claim did not impermissibly intrude on the judiciary's powers under Article III or violate the federal separation of powers doctrine.[227]

A. ESTABLISHING ADMINISTRATIVE TRIBUNALS UNDER THE GEORGIA CONSTITUTION

Article VI of the Georgia Constitution provides for the judicial branch;[228] the provision was the source of great controversy during the 1977-82 constitutional revision effort, even though there was general agreement on the Committee to Revise Article VI that the state's judicial system was in terrible disarray.[229] The tensions that existed between the revision committee, the General Assembly, and

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[225] *Schor*, 478 U.S. at 851.

[226] *Id.* (citations omitted).

[227] *Id.* at 851-52; *see also* FUNK & SEAMON, *supra* note 26, at 37 (outlining Court's holding in *Schor*).

[228] *See* GA. CONST. art. VI, § 1, ¶ 1 (vesting judicial power of state in several classes of courts).

[229] HILL, *supra* note 28, at 122.

the judiciary over the independence of the judicial branch and the scope of the Georgia Supreme Court's rulemaking authority is beyond the scope of this Article. Fortunately, the Georgia Supreme Court does not have to grapple with issues like those that the U.S. Supreme Court faced in *Crowell* regarding the legislature's power to vest adjudicatory authority in administrative agencies. Section 1, paragraph 1 of article VI provides that the General Assembly may authorize agencies to exercise quasi-judicial powers:

> The judicial power of the state shall be vested exclusively in the following classes of courts: magistrate courts, probate courts, juvenile courts, state courts, superior courts, Court of Appeals, and Supreme Court. Magistrate courts, probate courts, juvenile courts, and state courts shall be courts of limited jurisdiction. In addition, the General Assembly may establish or authorize the establishment of municipal courts and may authorize administrative agencies to exercise quasi-judicial powers. Municipal courts shall have jurisdiction over ordinance violations and such other jurisdiction as provided by law. Except as provided in this paragraph and in Section X, municipal courts, county recorder's courts and civil courts in existence on June 30, 1983, and administrative agencies shall not be subject to the provisions of this article. The General Assembly shall have the authority to confer "by law" jurisdiction upon municipal courts to try state offenses.[230]

Even though the legislature's authority to vest administrative agencies with quasi-judicial power seems secure, the Georgia Supreme Court has been called upon to resolve a number of cases raising separation of powers concerns between the judiciary and the General Assembly. After all, under the Georgia Constitution, acts of the General Assembly in violation of the Georgia or the U.S. Constitution "are void, and the judiciary shall so declare them."[231]

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[230] GA. CONST. art. VI, § 1, ¶ 1.
[231] GA. CONST. art. I, § 2, ¶ 5.

The court's approach to such issues has been like its general approach to separation of powers questions and the delegation doctrine: pragmatic and often deferential to the legislature.

Board of Education of Long County v. Board of Education of Liberty County involved the Liberty County school board's efforts to recover funds from Long County's school board pursuant to an agreement for the purchase of desks and other school appliances.[232] In accordance with Georgia's school laws in effect at the time, the Liberty County board first petitioned for relief from the state school superintendent, who held that the Long County board was liable for the funds. Long County appealed to the State Board of Education, and that agency affirmed the state superintendent. Because there was no appeal from the agency's decision, the Liberty County board brought a mandamus action to compel Long County to pay for its share of the desks. The trial court granted relief, and the Georgia Supreme Court affirmed.[233] Regarding the authority of the superintendent and the state Board of Education to adjudicate this dispute between neighboring school districts, the court stated:

> There can be no question that the Legislature has authority to constitute this tribunal which is described in the act as one in the nature of a court. It is not necessary at this time to decide whether the jurisdiction which was conferred upon the school courts by the act of 1919 is exclusive or merely concurrent. Article 6, § 1, paragraph 1, of the Constitution of this state . . . declares that: "The judicial powers of this State shall be vested in a Supreme Court, a Court of Appeals, superior courts, courts of ordinary, justices of the peace, commissioned notaries public, and such other courts as . . . may be established by law."[234]

In view of the General Assembly's right to create courts that have exclusive jurisdiction to deal with matters involving the conduct of

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[232] Bd. of Educ. of Long County v. Bd. of Educ. of Liberty Co., 159 S.E. 712, 713 (Ga. 1931).
[233] *Id.*
[234] *Id.* at 715.

schools, except those matters that fall within the exclusive jurisdiction of the superior courts, the court concluded that the trial judge did not err in enforcing the state Board of Education's decision against Long County.[235]

In *Boatright v. Yates*, the court relied on *Board of Education of Long County v. Board of Education of Liberty County* in affirming the dismissal of an action filed in superior court seeking to enjoin the Carroll County Board of Education from establishing a high school.[236] The plaintiffs had not appealed the county education board's decision to the state Board of Education as provided in the Code, and because that adequate and complete remedy was available, there was no reason for a court of equity to intervene and assume jurisdiction.[237] The court recognized, as it had in *Board of Education of Long County* years earlier, that the legislation giving appellate jurisdiction to the state Board of Education in such matters was authorized by article VI, section 1, paragraph 1 of the constitution.[238]

B. USURPATION OF JUDICIAL POWER BY THE LEGISLATURE

Separation of powers questions arise in other contexts, as well. The Georgia Supreme Court, like the U.S. Supreme Court, has invoked the separation of powers doctrine to prevent the legislature from encroaching upon or usurping the judiciary's powers.[239] In the *Word* decision, the Georgia court stated:

> Although the legislature may not invest itself with judicial power, the three branches are coordinate parts of one government, and the legislature may invoke the action of the judicial branch so long as it does not assume the constitutional "field of action" of that branch. The [U.S.] Supreme Court has stated that in

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[235] *Id.* Justice Beck dissented, arguing that the superintendent and the state school board were without jurisdiction. *Id.* at 716 (Beck, J., dissenting).

[236] Boatright v. Yates, 84 S.E.2d 195, 197 (Ga. 1954).

[237] *Id.*

[238] *Id.*

[239] HILL, *supra* note 28, at 53.

> determining what the legislature may do in invoking assistance from the judiciary, "the intent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination."[240]

In *Word*, the trial court had ruled that a statute mandating income tax deduction orders in certain child support cases was an unconstitutional attempt by the legislature to deprive courts of their equitable injunctive power.[241] The Georgia Supreme Court disagreed because the statute did not require any court to decide cases a particular way, but simply dictated the consequences of a court's judgment as part of a plan based on a shared goal of alleviating the problem of delinquent child support payments.[242] In other words, the statute in question did not usurp judicial power in violation of separation of powers principles.

Pearle Optical of Monroeville, Inc. v. Georgia State Board of Examiners in Optometry involved a separation of powers challenge against 1956 legislation that denominated optometry a learned profession subject to regulation by the state.[243] The Board charged an individual optometrist and his employer, Pearle Optical, with violating several of the board's rules and regulations.[244] They, in turn, challenged the legislature's creation of the agency, citing a Georgia Supreme Court decision from the 1930s declaring that optometry was not a learned profession.[245] The court disagreed with the defendants, deferred to the legislature's lawmaking authority, and found ample support in the challenged statute for the classification of optometry as a learned profession.[246] Moreover, the

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[240] Ga. Dep't of Human Res. v. Word, 458 S.E.2d 110, 112-13 (Ga. 1995) (quoting J.W. Hampton & Co. v. United States, 276 U.S. 394, 406 (1928), and Keasling v. Keasling, 442 N.W.2d 118, 121 (Iowa 1989)).

[241] *Id.* at 112.

[242] *Id.*

[243] Pearle Optical of Monroeville, Inc. v. Ga. State Bd. of Exam'rs in Optometry, 133 S.E.2d 374, 379 (Ga. 1963).

[244] *Id.* at 376-78.

[245] *Id.* at 379 (citing Ga. State Bd. of Exam'rs in Optometry v. Friedman's Jewelers, 189 S.E.2d 238 (Ga. 1936)).

[246] *Id.* at 379-86.

court said that the constitution's separation of powers provision was not violated by this statute, which legislatively overruled the earlier court decision about optometry.[247]

Another decision discussing the General Assembly's power to enact legislation effectively repealing an earlier court holding is *Bedingfield v. Parkerson*.[248] The plaintiffs sought to enjoin actions by the Laurens County Board of Education by arguing that the 1953 School Reorganization Act violated the constitution by usurping powers vested exclusively in the judiciary.[249] This Act rendered inapplicable an earlier Georgia Supreme Court decision regarding the power of local school boards.[250] The court said that none of the authorities cited by the plaintiffs

> denied the legislative power to serve as a check upon the Executive and Judicial Departments. And this function is properly performed by enactment of laws. If the legislature wishes to have the law other than what the Judiciary construes it to be, it has the power and the duty to so write it within the limits of the Constitution.[251]

Some legislative actions have, however, invaded the province of the judicial branch in violation of Georgia's separation of powers mandate. *McCutcheon v. Smith*[252] provides an example of an unconstitutional usurpation of judicial power by the legislature. This case involved an employment dispute in Fulton County and a special amendment to the Civil Service Act of 1943 passed by the General Assembly in 1945.[253] The county had discharged an employee before June 1, 1943—the effective date of the 1943 Civil Service Act—and the 1945 amendment purported to declare her to

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[247] *Id.* at 379-80; *see also* Culp, *supra* note 98, at 17-18 (discussing *Pearle Optical* in context of delegation of legislative power to agencies).

[248] 94 S.E.2d 714 (Ga. 1956).

[249] *Id.* at 716-18.

[250] *Id.* at 716-17.

[251] *Id.* at 717; *see also* Albert B. Saye, *Constitutional Law*, 9 MERCER L. REV. 35, 47 (1957) (discussing *Bedingfield*'s holding).

[252] 35 S.E.2d 144 (Ga. 1945).

[253] *Id.* at 145-46.

be a county employee as of June 1, 1943, and thus subject to Civil Service protections.[254] The 1945 amendment directly contradicted a Georgia Supreme Court decision declaring that the person in question was not an employee of Fulton County on June 1, 1943.[255] In this subsequent suit, the court ruled that the 1945 amendment was unconstitutional because the General Assembly had performed an essentially judicial function when it passed the amendment.[256] The court stated that "[i]n the dividing line of power between these co-ordinate branches we find here the boundary – construction belongs to the Courts, legislation to the Legislature. We cannot add a line to the law, nor can the Legislature enlarge or diminish a law by construction."[257] In essence, in the first litigation regarding the employee's status under the 1943 Civil Service Act, the court construed the statute so that it did not cover that individual. The legislature then passed an act declaring that this statute covered that individual. It did not change the statute. The court later called this "a bold attempt by the legislature to usurp judicial functions by construing a law," so that this second enactment was void.[258]

Similarly, in *Carpenter v. State*, the court struck down legislation regulating attorney discipline and the practice of law.[259] The court held that such regulation fell within "the inherent and exclusive power of the Supreme Court of Georgia,"[260] and that the code sections in question offended separation of powers and thus were without constitutional authority and void.[261]

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[254] *Id.*

[255] *Id.* at 148.

[256] *Id.* at 149.

[257] *Id.* (quoting Calhoun v. McLendon, 42 Ga. 405, 407 (1871)); *see also* Bedingfield v. Parkerson, 94 S.E.2d 714, 717-18 (Ga. 1956) (distinguishing *McCutcheon* in holding that 1953 School Reorganization Act was not attempt by legislature to usurp judicial function).

[258] *Bedingfield*, 94 S.E.2d at 718.

[259] Carpenter v. State, 297 S.E.2d 16, 16 (Ga. 1982).

[260] *Id.* at 17.

[261] *Id.*; *see also* W. Tarver Rountree, Jr., *Constitutional Law*, 35 MERCER L. REV. 73, 84-85 (1983) (discussing separation of powers in context of disbarment). The regulation of the bar by the state supreme court instead of the legislature has been and will remain controversial. Normally, regulation of professions and occupations is a matter for the legislature through the establishment of licensing boards, but in the case of the State Bar of Georgia, the Georgia Supreme Court has exercised jurisdiction. *See* JACKSON & STAKES, *supra* note 59, at 357-58 (discussing Board of Bar Examiners and State Bar of Georgia and oversight by Georgia Supreme Court).

In *Fathers Are Parents Too, Inc. v. Hunstein*, the plaintiffs sought a declaration that the meetings of the Georgia Commission on Gender Bias in the Judicial System were subject to the Open Meetings Act.[262] This commission was created by order of the Georgia Supreme Court, and the trial court, relying on the separation of powers doctrine, ruled that the legislature could not restrict the proper exercise of judicial authority and concluded that the Open Meetings law did not apply to the judiciary.[263] Quoting an earlier decision, the Georgia Supreme Court stated: "As a principle flowing from the separation of powers doctrine, [the inherent judicial power] . . . arms the judicial branch with authority to prevent another branch from invading its province."[264] Undoubtedly, there will be other tests of this separation of powers principle in the future when the General Assembly enacts legislation that attempts to regulate aspects of the practice of law, such as lawyer discipline, admission to the bar, character and fitness, and other matters that seem to fall within the inherent judicial power.

C. THE JUDICIARY'S EXERCISE OF LEGISLATIVE AND EXECUTIVE POWERS

One of the questions presented in *Harrell v. Courson* was whether a statute permitting the surrender and dissolution of the municipal charter of West Green, Georgia, after a hearing before the Coffee County Superior Court, was an unauthorized delegation of legislative power to the judiciary.[265] It was undisputed that the town had not functioned for more than ten years, the referendum required by the challenged statute had occurred, and the trial court had ordered dissolution of the charter after a hearing.[266] The appellants argued that only the legislature can dissolve a municipality and that delegating this authority to the courts violated separation of powers.[267] The Georgia Supreme Court

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[262] Fathers Are Parents Too, Inc. v. Hunstein, 415 S.E.2d 322, 322 (Ga. 1992).
[263] *Id.* at 323.
[264] *Id.* (quoting McCorkle v. Judges, 392 S.E.2d 707, 708 (Ga. 1990)).
[265] Harrell v. Courson, 216 S.E.2d 105, 106 (1975).
[266] *Id.* at 106-07.
[267] *Id.* at 107.

acknowledged that "the legislature cannot delegate legislative power to the courts," and went on to say that:

> This does not mean, however, that the legislature is forbidden from conferring power on the courts to ascertain whether the statutory requirements for dissolution of a municipal charter have been satisfied in particular cases. "[D]elegation to a court of power to ascertain a state of facts under which a statute is applicable" is not an unlawful delegation of legislative power to the judiciary.[268]

Accordingly, the court held that the superior court was not exercising legislative power when it ordered dissolution of the charter, but was acting judicially as empowered by the challenged statute.[269]

Bentley v. Chastain[270] also concerned legislation that seemingly required courts to perform a nonjudicial function when reviewing an agency decision. The case raised questions about the constitutionality of a statute and ordinance authorizing de novo jury determinations of variance decisions rendered by a zoning board of appeals.[271] A company awarded a zoning variance in Cobb County argued that the powers of a zoning board of appeals are legislative in nature and, therefore, subject to a very limited review in which a jury was not just inappropriate, but unconstitutional. The parties challenging the board's decision argued that in granting a variance, the zoning board of appeals was acting in a quasi-judicial capacity and that de novo jury review was thus permissible.

The Georgia Supreme Court struck down the de novo jury review provision, but not on the grounds urged by the litigants. It first explained that the board is an agency with "powers . . . distinct from

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[268] *Id.* (quoting 2 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 4.12 (3d ed. 1996)).

[269] *Id.* The court noted that the Constitution of 1945 provided that the superior courts "shall have such other powers as are, or may be conferred on them by law." *Id.* at 107-08 (quoting GA. CONST. art. VI, § 4, ¶ 5).

[270] 249 S.E.2d 38 (Ga. 1978).

[271] *Id.* at 39.

the legislative and judicial powers established in the [state] [c]onstitution . . . . [It is] 'a governmental authority, *other than a court and other than a legislative body*, which affects the rights of private parties through either adjudication or rule making.' "[272] The court then embarked on a general discussion of agencies' performance of quasi-legislative and quasi-judicial duties, noted that this dual role was historically accepted as constitutionally permissible, and called for deference to the agency's expertise because allowing the judiciary to have overbroad review of agency determinations would

> nullify[ ] the benefits of legislative delegation to a specialized body. Since the agency is exercising neither judicial nor legislative, but administrative powers, the separation of powers doctrine along with this policy of respect must play a role in determining the nature of the review of agency decisions by the courts.[273]

The court explained that because of separation of powers principles, courts cannot take on nonjudicial functions like making an initial discretionary decision or perform such a nonjudicial function indirectly through the fiction of an appeal. This is what the challenged statute and ordinance attempted to do; by providing for de novo jury review of the zoning board's decisions, the statute and ordinance empowered the court to "readjudicate questions which have already been committed to the administrative discretion of the zoning board of appeals."[274] This unconstitutionally burdened the courts with a nonjudicial function.

Although the outcome of *Chastain* makes sense, the court's explanation is troublesome. Categorizing the agency's exercise of power as being neither legislative nor judicial, but administrative, was unnecessary. Such categorization is not unprecedented,[275] but

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[272] *Id.* at 39-40 (quoting 1 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 9 (2d ed. 1978)).

[273] *Id.* at 40.

[274] *Id.* at 41.

[275] *See supra* notes 120-29 and accompanying text (discussing *Albany Surgical*).

it could be a source of confusion and ambiguity.[276] It would have been sufficient to say that the de novo jury trial mechanism for judicial review of the zoning board's decision required the court to exercise nonjudicial authority in violation of the constitution's separation of powers mandate.

A judge's unconstitutional exercise of *executive* power was raised in *Stephens v. State*.[277] In this case, the trial judge sentenced the appellant on several criminal charges and, as a condition of any parole, required him to waive his Fourth Amendment search and seizure rights. The Georgia Court of Appeals said there was no authority for a trial judge to impose this type of parole condition as part of a sentence, quoted the separation of powers provision, and pointed out that "the Georgia Constitution establishes [the] State Board of Pardons and Paroles and . . . vests the board with the 'power of executive clemency.' "[278] The legislature had declared the powers of the Board of Pardons and Paroles to be executive in character, and the court held that "[a]ny attempt by a court to impose its will over [this] Executive Department" by attempting to impose conditions on parole would usurp the executive function and be a nullity.[279]

The court of appeals also addressed separation of powers tensions between the judiciary and the executive branch in *USA Payday Cash Advance Centers v. Oxendine*.[280] Payday lenders brought an action against the Industrial Loan Commissioner seeking a declaratory judgment that the agency lacked jurisdiction over such lenders as service providers connected with a Delaware chartered bank regulated by a federal statute.[281] The Commissioner moved for summary judgment on the ground that the lenders needed to exhaust remedies available to them before his agency. The trial

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[276] *See* Rosselli, *supra* note 29, at 263-65 (discussing effect of *Chastain* on *Jackson v. Spalding County*, 462 S.E.2d 361 (Ga. 1995), which interpreted *Chastain* to mean that variance hearings are quasi-judicial instead of administrative in nature); *see also* Mack II v. City of Atlanta, 489 S.E.2d 357, 359-60 (Ga. App. 1997) (discussing whether hearing officer's actions were administrative or judicial).

[277] 428 S.E.2d 661 (Ga. App. 1993).

[278] *Id.* at 662 (quoting GA. CONST. art. IV, § 2).

[279] *Id.* at 663.

[280] 585 S.E.2d 924 (Ga. App. 2003).

[281] *Id.* at 925.

court granted this motion, and the court affirmed, saying that "[l]ong-standing Georgia law requires . . . a party aggrieved by a state agency's decision" to raise all available issues and exhaust all remedies.[282] The court explained the exhaustion requirement not only in terms of efficiency and allowing the agency to exercise its expertise and maintain autonomy, but also in terms of separation of powers:

> Under the separation of powers under the Georgia Constitution, the judicial branch lacks jurisdiction to deal with an executive branch function until there has been an exhaustion of administrative remedies, i.e., the executive branch has no further remedy. The specific legislative empowerment for judicial review of executive action is strictly followed.[283]

The outcome of *USA Payday Cash Advance* makes sense, but constitutionalizing the exhaustion doctrine by saying that exhaustion is mandated by separation of powers was unnecessary and perhaps unwise.[284] The U.S. Supreme Court regards the exhaustion doctrine as a rule of judicial administration,[285] and it has been codified in the Federal Administrative Procedure Act.[286] The doctrine has never been absolute, however, and the U.S. Supreme Court and other federal courts have not required exhaustion in every situation.[287] By explaining the doctrine as warranted in part by separation of powers between the executive branch and the judiciary, the Georgia Court of Appeals has made it much more difficult to find exceptions to the requirement. It should have

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[282] *Id.* at 927 (quoting Cerulean Cos., Inc. v. Tiller, 516 S.E.2d 522, 523 (Ga. 1999)).

[283] *Id.*

[284] *See* Perkins v. Dep't of Med. Assistance, 555 S.E.2d 500, 502 (Ga. App. 2001) (discussing separation of powers in context of exhaustion).

[285] *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (noting that rule of judicial administration requires exhaustion of administrative remedies before resorting to courts for relief).

[286] 5 U.S.C. § 704 (2000); *see* Bowen v. Massachusetts, 487 U.S. 879, 903 (1988) ("[T]he primary thrust of § 704 was to codify the exhaustion requirement.").

[287] *See* AMAN & MAYTON, *supra* note 2, at 422-28 (discussing exhaustion doctrine generally).

simply cited the Georgia Supreme Court's decision in *Cerulean Cos. v. Tiller* for the proposition that Georgia law has long required "a party aggrieved by a state agency's decision [to] raise all issues before [the] agency and exhaust [all] available administrative remedies before seeking any judicial review of the agency's decision."[288] *Tiller* did not justify exhaustion in terms of separation of powers. Moreover, it is important to note that Georgia's Administrative Procedure Act requires exhaustion as a condition of judicial review, but the same section that requires exhaustion also states that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."[289]

V. THE GEORGIA CONSTITUTION'S BOARDS AND COMMISSIONS

During the process of revising Georgia's Constitution of 1976, the Committee looking at articles IV (constitutional boards and commissions) and V (the executive branch) believed that the legislature should have wide discretion in establishing boards and commissions, defining their powers, providing for the selection of board members, and amending enabling statutes, "unless a compelling reason could be shown for giving a particular board or commission constitutional sanction and status."[290] Notwithstanding this "zero-based constitution" philosophy with respect to article IV, only two boards appearing in the 1976 constitution were omitted from the 1983 constitution.[291] Accordingly, article IV still provides for the establishment of several constitutionally sanctioned boards and commissions, such as the Public Service Commission (PSC), the State Personnel Board, and the Board of Natural Resources.[292] In addition, article VIII, which deals with education, provides for the

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[288] Cerulean Cos. v. Tiller, 516 S.E.2d 522, 523 (Ga. 1999); *see also* Mark H. Cohen & David C. Will, *Administrative Law*, 51 MERCER L. REV. 103, 115-16 (1999) (discussing exhaustion requirement).

[289] O.C.G.A. § 50-13-19(a) (2004).

[290] HILL, *supra* note 28, at 103.

[291] *Id.* The omitted constitutional agencies were the Board of Offender Rehabilitation and the Board of Industry and Trade. *Id.* There also were recommendations to omit the Board of Natural Resources and the Veterans Service Board. *Id.*

[292] GA. CONST. art. IV, §§ 1, 3, 6.

establishment of the State Board of Education and the Board of Regents.[293] These entities should be regarded as administrative agencies.[294] Article IX concerns counties and municipalities, and although it can be argued that administrative law principles should be applied to the procedures followed by counties, cities, and towns in exercising their constitutional powers, this Article does not discuss the constitutional authority of counties and municipalities, leaving that subject to articles and treatises dealing with state and local government. Instead, it discusses two of Georgia's constitutionally sanctioned boards and commissions.[295]

Georgia's Public Service Commission, authorized by the Constitution of 1945, is a direct descendant of the Railroad Commission of the late nineteenth and early twentieth centuries.[296] The relevant provisions of the constitution are direct and to the point, stating simply that:

> There shall be a Public Service Commission for the regulation of utilities which shall consist of five members who shall be elected by the people. . . . [Members shall select the chair]. The commission shall be vested with such jurisdiction, powers, and duties as provided by law. The filling of vacancies and manner and time of election of members of the commission shall be as provided by law.[297]

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[293] GA. CONST. art. VIII, §§ 2, 4.

[294] *See, e.g.*, Azizi v. Bd. of Regents, 208 S.E.2d 153, 156-57 (Ga. App. 1974) (holding that Board of Regents is governmental agency performing governmental function).

[295] *See* GA. CONST. art. IX, § 2, ¶ 1(c)(5), (8) (discussing Public Service Commission and public school systems).

[296] S. Bell Tel. & Tel. Co. v. Invenchek, 204 S.E.2d 457, 458-59 (Ga. App. 1974); *see supra* notes 64-72 and accompanying text (discussing delegation doctrine decisions involving Railroad Commission).

[297] GA. CONST. art. IV, § 1, ¶¶ a, b, c. The Committee to Revise Articles IV and V of the 1976 constitution recommended that members of the PSC be appointed by the Governor with confirmation by the Senate in hopes of bringing more technical expertise to the agency and in view of concerns about political accountability and the willingness of many qualified persons to run for statewide office. The legislature continued with the elected membership instead. HILL, *supra* note 28, at 104.

This general and simple authorization delegates a great deal of authority to the General Assembly to flesh out the details of the PSC's powers and procedures. The General Assembly can, in turn, authorize the PSC to fill in the details, subject to the delegation doctrine. As explained by the Georgia Court of Appeals:

> [R]atemaking is a legislative function which the Constitution of this state has both authorized and required the Legislature to delegate to the members of the Commission. To this extent, and to this extent only, the Commission is constitutionally charged as a lawmaking body, and so long as it does not itself act in an unconstitutional manner the courts do not have any right to interfere.[298]

The court went on to say that rates must be just and reasonable in a constitutional sense, and that setting rates at a confiscatorily low level would be unconstitutional, but that the agency had authority to adopt a regulation limiting a utility's liability for negligence in curtailing service.[299]

What difference does this explicit constitutional recognition of the PSC make? The answer is very little. In 1949, the Georgia Supreme Court stated that:

> This provision of the Constitution does not change the character or nature of the office as to the powers, duties, and functions of the Public Service Commission. It simply makes the commission a constitutional agency of the State and not merely a creature of the General Assembly. The members of the commission in office continue with the same powers and duties as then provided by law, or that may be prescribed in the future. It does not clothe the commission or its members with the robe of the sovereign State nor immunize them from

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[298] *Ivenchek*, 204 S.E.2d at 459.
[299] *Id.* at 459-60.

> judicial process, in cases where their action is subject to judicial review.[300]

Thus, the status of a constitutional agency like the PSC is more secure than that of an agency created solely by the General Assembly, but that a secure place under the Georgia Constitution does not insulate the specific actions of the PSC and other constitutional agencies from judicial review and other forms of judicial challenge. Moreover, the court has stated that the PSC's authority to regulate public utilities to the exclusion of other executive branch agencies "does not mean that the General Assembly has divested itself of its constitutional power to regulate public utilities."[301] In short, the constitution provides for the PSC and authorizes the General Assembly to provide for the agency's powers and duties, but the agency must look to the General Assembly for its specific authority to act and for the procedures it is required to follow in carrying out its duties.[302] In this respect, it is no different from any other administrative agency.

Article VIII, section 4, paragraph 1 of the Georgia Constitution provides, in part, that "[t]here shall be a Board of Regents of the University System of Georgia which shall consist of one member from each congressional district in the state and five additional members from the state at large, appointed by the Governor and confirmed by the Senate."[303] The several parts of this section also include provisions for terms of office; filling vacancies; the board's authority over public colleges, junior colleges, and universities; appropriations for use by the board; the board's powers in regard to property; and for such other powers and duties as provided by law.[304] The Board of Regents was given this constitutional status in 1943 in response to the Governor's attempt to control it.[305] Accordingly, this section attempts to guarantee the independence of

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[300] Ga. Pub. Serv. Comm'n v. Atlanta Gas Light Co., 55 S.E.2d 618, 623 (Ga. 1949).

[301] Lasseter v. Ga. Pub. Serv. Comm'n, 319 S.E.2d 824, 827-28 (Ga. 1984).

[302] *See id.* at 829 (discussing applicability of Administrative Procedure Act and standard of judicial review for reasonableness of rates set by PSC).

[303] GA. CONST. art. VIII, § 4, ¶ 1(a).

[304] GA. CONST. art. VIII, § 4, ¶ 1.

[305] JACKSON & STAKES, *supra* note 59, at 101.

the Board of Regents from the political arms of the state government.[306]

Notwithstanding its protected status under the Georgia Constitution and language in some opinions about the authority of the Board of Regents to exercise any power usually granted to such corporations,[307] the Board of Regents, like the PSC, is still an agency of the state government that performs a governmental function.[308] For example, in *Board of Regents v. The Atlanta Journal*, the Georgia Supreme Court held that the Board of Regents is a state agency subject to the Open Records Act and affirmed a trial court order requiring the production of records pertaining to the presidential search at Georgia State University.[309]

In *Galer v. Board of Regents*, the court upheld a code section applying the constitution's separation of power provision that made it unlawful for a member of the General Assembly to hold office or employment in the executive branch of government or any agency.[310] The challenger, Mary Jane Galer, was a tenured professor and librarian at Columbus College who had just been elected to the House of Representatives. The challenged code section required her to resign from her teaching position. Seeking an unpaid leave of absence, she alleged that the application of this code section violated her First Amendment rights. The Georgia Supreme Court disagreed. It noted that Columbus College (now Columbus State University) was part of the University System of Georgia, and that the University System was an agency of the executive branch. Accordingly, she could not hold a position at the state college and serve in the legislature at the same time without violating the

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[306] HILL, *supra* note 28, at 175; *see also* McCafferty v. Med. Coll. of Ga., 287 S.E.2d 171, 173-76 (Ga. 1982) (discussing history of Board of Regents).

[307] *See* Villyard v. Regents of Univ. Sys. of Ga., 50 S.E.2d 313, 316 (Ga. 1948) (discussing whether Regents could operate laundry and dry-cleaning service at reduced prices at Georgia State College for Women).

[308] *See* Azizi v. Bd. of Regents, 208 S.E.2d 153, 157 (Ga. App. 1974) (holding that Board of Regents was immune from liability); *see also McCafferty*, 287 S.E.2d at 176 (holding that Board of Regents is immune from suit).

[309] Bd. of Regents v. Atlanta Journal, 378 S.E.2d 305, 306 (Ga. 1989).

[310] Galer v. Bd. of Regents, 236 S.E.2d 617, 618 (Ga. 1977).

separation of powers provision's dual functions clause and the code section implementing that prohibition.[311]

VI. CONCLUSION

Administrative agencies occupy a secure place in Georgia's constitutional law jurisprudence. The Georgia Constitution provides for the creation of several agencies, including the Public Service Commission and the Board of Regents of the University System of Georgia, and authorizes the General Assembly to delegate quasi-judicial power to agencies. Even though the Georgia Supreme Court has, at times, enforced the constitution's explicit separation of powers mandate or the delegation doctrine to strike down legislation establishing an agency, it has largely been pragmatic and deferential to the legislative branch in upholding generous grants of quasi-legislative, quasi-judicial, and quasi-executive powers to administrative agencies, so long as the General Assembly provided sufficient guidelines in the enabling statutes to direct the agencies in their exercise of discretion.

On the other hand, the Georgia Supreme Court and the Georgia Court of Appeals have, at times, inconsistently categorized or defined certain agency functions. In some cases, the categorization or definition has been wrong. Apart from wanting to avoid a constitutional question, there is no reason to say that a particular function is neither quasi-legislative nor quasi-judicial but administrative in character, especially when ample precedent exists for upholding the particular delegation or assignment of legislative or judicial authority to an agency. As noted several times in this Article, the categorization or definition of a particular agency action or function by the appellate court can significantly affect the outcome of a constitutional challenge to the agency's status.

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[311] *Id.*; *see supra* notes 162-65 and accompanying text. Although the Board of Regents fits easily within most definitions of "agency," the fact that the constitution states that the "government, control, and management of the University System of Georgia and all of the institutions in said system shall be vested in the Board of Regents . . .," GA. CONST. art. VIII, § 4, ¶ 1(b), means that the General Assembly is not able to treat it the same way as other state agencies.

The most troubling decisions in this respect are *Albany Surgical, P.C. v. Georgia Department of Community Health*[312] and *Department of Transportation v. City of Atlanta*.[313] In *Albany Surgical*, the Georgia Supreme Court avoided ruling on the constitutionality of a legislative override procedure for the Department's proposed regulations by saying that regulations are not laws, and therefore the Georgia Constitution's steps for the enactment of legislation did not have to be followed.[314] The court should have directly faced the challenger's argument about the applicability of the constitution's enactment, bicameralism, and presentment provisions and upheld the legislative override scheme. By tackling this issue in *Albany Surgical*, the court could have also resolved doubts about the constitutionality of the legislative override procedure in Georgia's Administrative Procedure Act.

The court's decision in *Department of Transportation v. City of Atlanta* was wrong, and the majority's explanation was flawed. Notwithstanding strong dissenting opinions, the court upheld the membership of the Commission on the Condemnation of Public Property against a separation of powers challenge, even though the Commission included seven officials from the executive branch.[315] These officials exercise considerable executive authority under the constitution, and even though the majority concluded that the legislation contained sufficient standards to guide this Commission in exercising its powers,[316] allowing executive branch officials to perform duties as members of this agency runs contrary to language in the separation of powers provision stating that "no person discharging the duties of one [branch] shall at the same time exercise the functions of either of the others except as herein provided."[317] The majority said that the executive officials on the Commission were not exercising the powers of the legislature, but acting administratively.[318] This categorization disregarded Justice

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[312] *See supra* notes 118-27 and accompanying text (discussing *Albany Surgical*).
[313] *See supra* notes 187-200 and accompanying text (discussing *City of Atlanta*).
[314] Albany Surgical, P.C. v. Ga. Dep't of Cmty. Health, 602 S.E.2d 648, 651 (Ga. 2004).
[315] Dep't of Transp. v. City of Atlanta, 398 S.E.2d 567, 569-70 (Ga. 1990).
[316] *Id.* at 572.
[317] GA. CONST. art. I, § 2, ¶ 3.
[318] *City of Atlanta*, 398 S.E.2d at 571.

Smith's dissenting argument that the Commission's duties were legislative in character.[319] Moreover, as pointed out by Justice Smith, *City of Atlanta* is inconsistent with *Greer*, *Murphy*, and *Caldwell*.[320]

Notwithstanding the deficiencies of *Albany Surgical*, *City of Atlanta*, and several other decisions, the Georgia Supreme Court has placed administrative agencies on a solid foundation under the Georgia Constitution. The court's pragmatic approach to separation of powers and delegation issues, as seen in the 1909 *Melton* decision,[321] continues to have a substantial impact almost a century later. The rise of administrative bodies has been a significant legal trend for Georgia, as agencies have become a fourth branch of state government. Their existence, however, has not significantly undermined the legal theories supporting our three branches of government under the Georgia Constitution.[322]

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[319] *Id.* at 575 (Smith, J., dissenting).

[320] *See supra* notes 195-97 (discussing points of Justice Smith's dissent).

[321] *See supra* notes 68-72 and accompanying text (discussing *Melton* decision).

[322] *Cf.* FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (relating Justice Jackson's observations about administrative branch under U.S. Constitution).