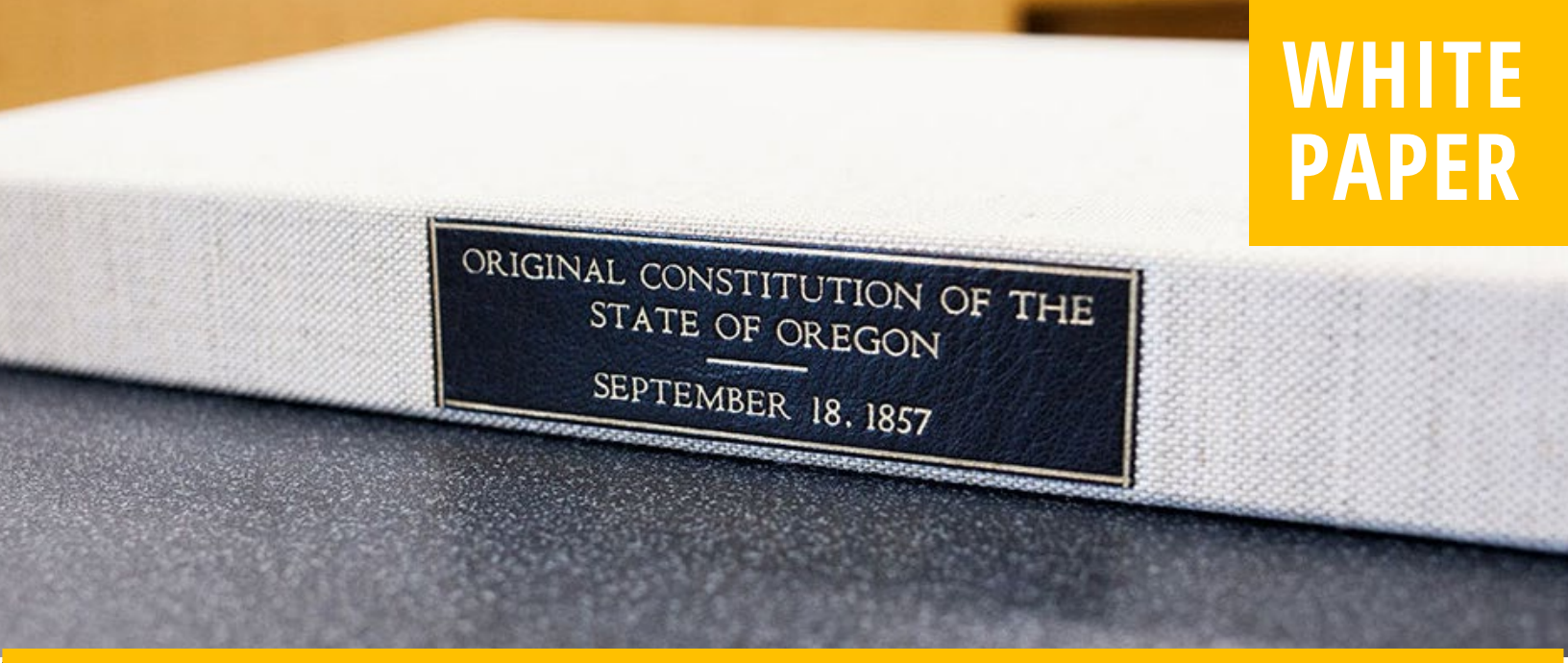

WHITE PAPER

League of Oregon Cities

The Origins, Evolution and Future of Municipal Home Rule in Oregon

JUNE 2017

Last Updated by LOC Attorneys March 2023

I. Introduction

Where do Oregon city governments derive their power? What authority does a city possess to operate a police force or collect franchise fees from an electric utility? The answers to those questions have changed over time. Today, municipal corporations derive their legal authority from home rule charters. This report examines the origin of the Oregon "home rule" doctrine, how that doctrine has changed over time, and the current legal fight over the proper meaning of Oregon's home rule provisions.

II. Origins of Home Rule in Oregon

In the nineteenth and early twentieth centuries, courts and legal scholars took the view that municipal corporations derived all power from the state government. Indeed, the federal constitution does not explicitly recognize units of local government as distinct political entities, nor does it expressly confer any power on local governments. Drawing on that lack of textual recognition, the United States Supreme Court concluded that cities are "convenient agencies" of their respective states and, therefore, the states can abolish or reorganize cities at any time.[1] Because cities were treated as creatures of the state, courts took the view that cities also lacked inherent powers and possessed only those powers delegated to them by state law. That principle is known as "Dillon's Rule."[2]

Until the early twentieth century, therefore, state legislatures had to affirmatively grant cities the authority to carry out their municipal functions. The local population could not simply vote to enact a new policy to address a local problem at the local level, but had to seek the approval of the state legislature. Further, if there was any doubt whether the state had conferred power on a city, the doubt would be resolved against the city. Dillon's Rule dominated legal scholarship and

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[1] *Hunter v. City of Pittsburgh*, 207 US 161, 178-79 (1907). That does not mean that local governments lack other legal protections vis-à-vis state government, most notably through state constitutional law.

It should be noted that some scholars reject the analysis of *Hunter* and argue that the federal constitution does indeed offer substantive protections for cities qua cities. They typically find that protection in the Tenth Amendment, which reserves all power not otherwise granted to the federal government to the states "or to the people." *See* Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE LJ, 1935 (2003) (arguing that the Tenth Amendment can support federal constitutional protections for local government); *see also* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE LJ 377 (2001) (setting out federalism versus localism); Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV JL & PUB POL'Y 551 (2000) (exploring ways in which to understand the Tenth Amendment in the context of American federalism).

[2] "Dillon's Rule" is named after Iowa Supreme Court justice, and later federal judge, John F. Dillon. Dillon wrote an influential treatise on municipal law in which he argued that cities lacked inherent lawmaking powers. *See* 1 John F. Dillon, THE LAW OF MUNICIPAL CORPORATIONS, § 9(b), at 93 (2d ed 1873).

jurisprudence in the nineteenth and early twentieth centuries. Indeed, the Oregon Supreme Court adopted the Dillon's Rule theory of local-state relations in 1882.[3]

Thus, in nineteenth-century Oregon, only the Legislative Assembly had the power to incorporate new cities and to establish and amend city charters.[4] If a group of citizens wanted to incorporate a city, the Legislature had to pass special legislation that both created the city and provided the new city with specified, limited powers.[5] The populist movement of the late nineteenth and early twentieth centuries, however, led to fundamental changes in city-state relationships across the country, including in Oregon. Beginning in 1901, the Legislature began to consider constitutional amendments that would redistribute power over local charters to their respective localities.[6] That effort coincided with the push for an initiative and referendum amendment to the Oregon Constitution.[7] Eventually, in 1906, consistent with a wave of home rule reform sweeping the nation, the voters of Oregon adopted a constitutional amendment that granted the people the right to draft and amend their own municipal charters, independent of special legislative approval.[8] Article XI, section 2, of the Oregon Constitution, provides in part:

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[3] See *City of Corvallis v. Carlile*, 10 Or 139 (1882).

[4] Although the Oregon Supreme Court endorsed Dillon's Rule in 1882, some late nineteenth-century Oregon cases took a more expansive view of municipal authority. *See* Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 OR L REV 939, 943 & nn 20-21 (2008). It is true, however, that only the state legislature had the power to incorporate new cities and amend city charters.

[5] Some examples of cities created by special legislation include the City of Adams, *see* Act of Feb. 5, 1903 (SB 76), the City of Ontario, *see* Act of Feb. 13, 1903 (HB 236), and the City of Stayton, *see* Act of Feb. 2, 1903 (SB 28).

[6] At the time, amendments to the Oregon Constitution had to be approved by two successive sessions of the Legislature before being referred to the voters. *See* Or Const, Art XVII, § 1 (1857). A home rule amendment was proposed during the 1901 legislative session. *See* Senate Joint Resolution (SJR) 3 (1901). The amendment was again proposed during the 1903 session, but because the two proposals had slight grammatical and syntactical variations, the amendment never made it to the ballot.

[7] The populist drive in Oregon was largely led by William Simon U'Ren. U'Ren was instrumental in establishing the "Oregon System" of popular democratic participation through initiative and referendum processes, local home rule, and, later, popular election of U.S. Senators. *See generally* Steven L. Piott, GIVING VOTERS A VOICE: THE ORIGINS OF THE INITIATIVE AND REFERENDUM IN AMERICA (1995); Lincoln Steffens, UPBUILDERS (1st ed 1905). Interestingly, Oregon was the first state to select its U.S. senators via popular election.

For a comprehensive look at the populist sentiments that led to the ratification of the 17th Amendment in 1913, see Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR L REV 1007 (1994).

[8] In 1953, the people of Oregon adopted a separate constitutional amendment that guaranteed home rule authority for county governments. *See* Or Const, Art VI, § 10. Today, nine counties operate under home rule charters. In 1973, the state Legislature passed a law that effectively granted all counties home rule authority, regardless of whether they adopted a home rule charter. *See* Or Laws 1973, ch 282, § 2, *currently codified at* ORS 203.035.

> "The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon[.]"[9]

In the same 1906 election, the people voted to amend the initiative and referendum provision of the Oregon Constitution to reserve those powers "to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district."[10]

Taken together, Article XI, Section 2, and Article IV, Section 1(5), guarantee each locality the right to draft, amend, and vote on municipal charters and ordinances. Note, however, that those constitutional amendments do not use the term "home rule" and do not specifically confer *substantive* lawmaking authority on cities or their citizens. Rather, the amendments prevent the Legislature from enacting or amending municipal charters and ordinances and free cities from the burden of seeking state approval before enacting substantive policies tailored to the needs of the locality. Thus, in general terms, cities and counties possess substantial lawmaking authority independent of the state. The precise nature of the local-state relationship, however, has evolved over the last 100 years. The following section examines key judicial interpretations of the home rule, initiative, and referendum amendments. The overview highlights the fact that the home rule amendments did not end the debate over local authority versus state oversight—rather, the amendments opened a new chapter in the history of state and local relationships.

III. Evolution of Home Rule

The debate over the scope of local government authority vis-à-vis state authority did not end with the enactment of the home rule amendments. On the contrary, the passage of Article XI, Section 2, and Article IV, Section 1(5), catalyzed a century-long process of interpreting, refining, reconsidering, and applying those amendments—a process that continues today. As the following overview demonstrates, jurists and attorneys have disagreed over the intent of the framers who crafted the amendments, the understanding of the voters who ratified the amendments, and the proper application of the amendments to struggles between state and local authority. The overview is by no means exhaustive.[11] Rather, it highlights some of the key

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[9] Or Const, Art XI, § 2.

[10] Or Const, Art IV, § 1(5).

[11] For a truly exhaustive look at home rule in Oregon through the late-1980s, see Orval Etter, MUNICIPAL HOME RULE ON AND OFF: "UNCONSTITUTIONAL LAW IN OREGON" (1st ed 1991). Further, a law review article written in 1920 by Portland attorney Richard Montague offers a good picture of home rule doctrine to that point. *See* Richard Montague, *Law of Municipal Home Rule in Oregon*, 8 CAL L REV 151 (1920).

judicial opinions, characters, and philosophies that have contributed to the evolution of the home rule doctrine in Oregon.

A. The First Twenty Years: Local Government Authority Subject to General Laws

In one of the first appellate cases to examine the meaning of the home rule amendments, *Acme Dairy Company v. Astoria*,[12] the Oregon Supreme Court affirmed local government authority in the face of a challenge to an amendment to Astoria's charter. In 1906, the Astoria city council passed an ordinance that prescribed the method of using the initiative and referendum process to amend the city's charter. Later that year, the council referred to the voters an amendment to a provision of the city charter that set a limit on special assessments. Following that amendment, the council passed an ordinance to repair a city street. The ordinance also imposed a special assessment on the benefitted property owners, including the plaintiff. The plaintiff argued that the new assessment exceeded the previous limit in the original city charter and the city council lacked authority to refer charter amendments to the voters. The Supreme Court disagreed. Importantly, the court recognized that prior to 1906, all charter amendments were made by the state Legislature through special legislation.[13] The passage of Article XI, Section 2, and Article IV, Section 1(5), however, revealed that the voters intended "to vest an incorporated city or town with authority to provide the manner of exercising the initiative and referendum powers as to amendments of a charter[.]"[14] Thus, the Astoria council had the authority to seek charter amendments via referendum.

Two years after *Acme Dairy*, the Supreme Court decided another case that touched on the nature of local government authority. In *Straw v. Harris*,[15] the Legislature enacted a statute that incorporated a new municipality called the Port of Coos Bay. After the port was formed, the plaintiff challenged the constitutionality of the state law that established the port. Of interest here, the plaintiff argued that the legislative enactment violated Article XI, Section 2, because it amounted to a "special law" and because it indirectly amended the municipal charters of the cities within the new port district. The Supreme Court rejected both arguments. First, the court explained the difference between a general and a special law. A general law "is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights, and privileges conferred."[16] By contrast, a special law "is one conferring upon certain individuals or citizens of a certain locality rights and powers or liabilities not granted or imposed upon others

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[12] 49 Or 520 (1907).

[13] *Id.* at 524.

[14] *Id.* at 525.

[15] 54 Or 424 (1909).

[16] *Id.* at 432.

similarly situated[.]"[17] The court stated—with little analysis—that the legislative act creating the port district was a general law.[18]

The court then turned to the issue regarding municipal charters. The court acknowledged that creation of the port district might indirectly affect the liabilities and privileges of the cities within the port district, perhaps in contravention of their respective charters, but explained that such a result was permissible because the local charters were subservient to general state laws. The court explained that the state law did not directly amend the local charters, and in the event of an indirect amendment, the general law "may only affect the charters and ordinances of such cities and towns to the extent that they may be in conflict or inconsistent with the general object and purpose for which the port may be organized."[19] In other words, a general law may have the indirect effect of amending a local charter, but the local charter must yield to the extent that the charter conflicts with the overall purposes of the general law.

Five years after the court decided *Straw v. Harris*, the court decided a case that significantly changed the judiciary's view of the home rule amendments. In *Branch v. Albee*,[20] the court issued a sweeping opinion and concluded that local charters are not subject to any state civil laws. The case began in 1903 when the Legislature passed a special law that established a pension system for the city of Portland. Portland later incorporated that pension system into its home rule charter. In 1913, the Legislature created a new pension system for cities with more than 50,000 inhabitants—the only such city being Portland. A Portland police officer sued the city, arguing that the city was obligated to pay his pension under the terms of the 1913 plan, not the 1903 plan in the city's charter. The court disagreed. The court explained that under the constitution, the Legislature may not enact, amend, or repeal any city charter. Further, local charters are only subject to the constitution and *criminal* laws of the state, not civil laws. Thus, the court rejected the special/general civil law distinction that formed the basis of the decision in *Straw v. Harris*. The apex of local authority under the home rule amendments is represented in *Branch v. Albee*. The court, however, would soon cut back on that authority.

The same year it decided *Branch v. Albee*, the court issued a decision in *Kalich v. Knapp*.[21] *Kalich* involved a dispute between a person injured by a motor vehicle and the driver of the vehicle. Part of the case concerned the speed limit for the road on which the accident occurred. The city of Portland had established certain speed limits under its charter, but a state law arguably preempted those limits by setting statewide speed limits. The court explained that the

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[17] *Id*.

[18] *Id*. (citing *Farrell v. Port of Columbia*, 50 Or 169 (1907)).

[19] *Id.* at 435.

[20] 71 Or 188 (1914).

[21] 73 Or 558 (1914).

home rule amendment in Article XI, Section 2, prohibits the Legislature from amending or repealing local charter provisions, although the court did not use the same sweeping language as that found in *Branch v. Albee*. The court drew an important distinction, however, between general civil laws of statewide concern and civil laws of local concern—presumably, civil laws of statewide concern could preempt local laws on the same subject.[22] In *Kalich*, however, the court concluded that the speed limit of a municipal street was a matter of local concern, and the statewide speed limit law was unconstitutional insofar as it attempted to amend Portland's charter.

B. *Rose v. Port of Portland* and the Rise of General Law Dominance

Just eleven years after the passage of the home rule amendments, the Oregon Supreme Court was well on its way to restricting local authority and making local charters subject to general state laws. In *Rose v. Port of Portland*,[23] the court was asked to decide whether the voters within a port district can amend the port's charter under the initiative power. The court explained that cities can amend their own charters under Article XI, Section 2, but other municipal governments must receive an "enabling act" from the Legislature to do so. Rather than stopping there, the court went on to express its views on city home rule. The court stated that city charters are subject to the constitution, under Article XI, Section 2, and the constitution permits the Legislature to pass general laws that affect the whole state. Thus, city charters are subject to general laws of statewide concern. *Rose* marks the establishment of the idea that local home rule is subject to general state law, so long as the general law concerns a statewide interest.

Following *Rose*, the court declared that the home rule issue was "settled." In *Lovejoy v. Portland*,[24] the court explained that its prior home rule cases stood for the proposition that the Legislature could pass general laws that affected local charters. Later, in *Burton v. Gibbons*,[25] the court declared that "it is now settled that, within the limits prescribed by the other provisions of the [Oregon] Constitution and of the [U.S.] Constitution, the power of the Legislature to enact a general law applicable alike to all cities is paramount and supreme over any conflicting charter provision or ordinance of any municipality, city, or town."[26] With that, the court appeared to

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[22] Subsequent cases highlighted the difficulty in drawing a line between local and statewide concern on subjects that are arguably a matter of both local and statewide concern. For example, taxation is a matter of local concern, *Pearce v. Roseburg*, 77 Or 195 (1915), while setting utility rates is a matter of general concern, *Woodburn v. Public Service Comm'n*, 82 Or 114 (1916).

[23] 82 Or 541 (1917).

[24] 95 Or 459 (1920).

[25] 148 Or 370 (1934).

[26] *Id.* at 379. Ironically, the law at issue in *Burton v. Gibbons* gave cities the power to authorize refunding bonds, thereby permitting some cities to carry a level of debt beyond the limits in their charters. The League of Oregon

fully endorse the theory that local charters were subject to statewide general laws, regardless of whether those general laws advanced a statewide concern.

C. Balancing State and Local Interests: *Heinig v. City of Milwaukie*

Following *Rose*, *Lovejoy*, and *Burton*, the Oregon Supreme Court held to the view that local charters were subject to statewide laws of general applicability for the next 30 years. That view changed in *State ex rel. Heinig v. City of Milwaukie*.[27] In *Heinig*, firefighters sued the city of Milwaukie and argued that the city was obligated to establish a civil service commission and a civil service system for firefighters, as prescribed by state law. The Milwaukie charter did not require a civil service commission or system, so the issue was whether the state law required the city to establish a civil service system, notwithstanding contrary charter provisions. In the court's view, the question was not whether the state law was generally applicable to all cities—no one disputed that it was. Rather, the question was whether the state law was generally applicable *and* advanced a statewide concern. If so, then the city had no authority under Article XI, Section 2, to establish a contrary charter provision. In resolving that question, the court revived the reasoning of *Branch v. Albee* and rejected the reasoning of *Rose*. Specifically, the court held that "the legislative assembly does not have the authority to enact a law relating to city government *even though* it is of general applicability to all cities in the state unless the subject matter of the enactment is of general concern to the state as a whole, that is to say that it is a matter of more than local concern to each of the municipalities purported to be regulated by the enactment."[28]

Following *Heinig*, the test for determining whether a state law improperly intruded into municipal lawmaking authority was whether the state law was generally applicable to all cities, *and* whether the law primarily advanced statewide interests, rather than local interests. As the cases following *Heinig* demonstrate, that balancing test proved difficult to apply in practice, because most laws touch on matters of both statewide and local concern. Thus, the courts were left trying to determine whether state or local interests predominated.

D. La Grande/Astoria

In 1978, the Oregon Supreme Court again addressed the proper interpretation of Article XI, Section 2. In *La Grande/Astoria v. Public Employees Retirement Board*,[29] the court rejected *Heinig*'s balancing of state and local interests in favor of a more straightforward test—one that arguably saw a reduction in the scope of local lawmaking authority. In *La Grande/Astoria*, a

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Cities joined the case in favor of the state law, even though the law conflicted with city authority over their own debt limits.

[27] 231 Or 473 (1962).

[28] *Id.* at 479 (emphasis added).

[29] 281 Or 137 (1978), *aff'd on recons*, 284 Or 173 (1978).

state law required cities to establish certain insurance and retirement benefits for their employees—benefits the cities of La Grande and Astoria did not provide. The cities argued that, under *Heinig*, providing insurance and benefits to city employees was primarily a matter of local concern, and thus the Legislature was prohibited from interfering with the local charter provisions regarding employee benefits. When the case reached the Supreme Court, the court disagreed and rejected *Heinig*'s balancing test between statewide and local concern. Instead, in a 4-3 decision authored by Justice Hans Linde, the court declared that the home rule provision of Article XI, Section 2, was meant to protect the structure and form of local government, not the policy preferences of local government. Specifically, the court crafted a two-part test to determine where local authority ended and state authority began:

> "When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of person or entities affected by the procedures of local government.
>
> "Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization."[30]

The majority drew an important distinction between acts of the Legislature and acts of a city. Because the dispute in *La Grande/Astoria* involved an act of the Legislature, the proper question was what powers and restrictions applied to the Legislature. Under the home rule amendments, the Legislature was prohibited from enacting or amending a city charter, but was free to enact contrary substantive policies addressed to social, economic, or regulatory objectives. The *La Grande/Astoria* court's reading of Article XI, Section 2, essentially reduced home rule authority to a city's power to frame and enact a city charter and decide on a form of city government. Substantive powers under the charter, however, are subject to legislative preemption so long as the Legislature is addressing a social, economic, or regulatory objective. As the following section demonstrates, the *La Grande/Astoria* decision shifted the debate in home rule disputes to whether the Legislature meant to preempt a city's substantive lawmaking authority, not whether the Legislature is *permitted* to do so. The following sections summarize the state of the home rule doctrine today, with a focus on preemption doctrine.

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[30] *Id.* at 156.

IV. Home Rule Today

All of Oregon's 241 incorporated cities operate under home rule charters. Although the language varies, those charters broadly confer on each city all powers permissible under state and federal law.[31] A home rule charter, however, does not give Oregon cities carte blanche lawmaking authority. Instead, the courts have developed a two-step test to determine whether a city action is a valid exercise of home rule authority. The first step requires an examination of the city's charter, and the second step involves a search for conflicting state or federal law. As the Oregon Supreme Court articulated the test: "[T]he validity of local action depends, first, on whether it is authorized by the local charter or by a statute[, and] second, on whether it contravenes state or federal law."[32] Assuming that a local action is authorized by a city's charter, the courts will then ask whether the local action is "incompatible" with state law, either because the Legislature intended to preempt local lawmaking authority (*i.e.*, "express preemption") or because state and local law cannot operate concurrently (*i.e.*, "implied preemption").[33] The following section examines express and implied preemption in more detail. It bears noting, however, that the courts presume that the Legislature does *not* mean to preempt local authority.[34]

V. Preemption

The question whether a local action "contravenes" state or federal law is commonly called "preemption." If state or federal law preempts local action, the local action is invalid. This section briefly describes the preemption doctrine in Oregon and explores the tests used by the courts to determine when state law preempts local criminal and civil laws.[35]

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[31] *See, e.g.*, City Charter for the City of Vale, ch II, § 5 ("The City shall have all powers which the Constitution, state statutes, and common law of the United States and of this state expressly or impliedly grant or allow municipalities"); City of Port Orford Charter, ch II, § 4 ("The city shall have all powers which the constitutions, statutes, and common law of the United States and of this state expressly or impliedly grant or allow municipalities"); City of Klamath Falls Revised Charter of 1972, § 4 (same); City of Prineville Charter, ch II, § 4 (same).

[32] *La Grande/Astoria v. PERB*, 281 Or 137, 142 (1978) *aff'd to on recons*, 284 Or 173 (1978).

[33] *La Grande/Astoria*, 281 Or at 148.

[34] *See Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450 (2015).

[35] A detailed analysis of federal law preemption is beyond the scope of this article. In short, under the Supremacy Clause of the US Constitution, federal constitutional guarantees and statutory rights preempt contrary state and local laws. *See* US Const, Art VI, cl 2; *see also Altria Group, Inc. v. Good*, 555 US 70, 76 (2008) (explaining that state laws that conflict with federal laws are "without effect"). To take two obvious and uncontroversial examples, a city cannot operate a racially segregated municipal transit system or require segregated seating at public restaurants, because doing so violates the Fourteenth Amendment to the United States Constitution. *See Gayle v. Browder*, 352

A. Preemption of Local Criminal Laws

Article XI, Section 2, of the Oregon Constitution provides, in part: "The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and *criminal laws* of the State of Oregon[.]" (Emphasis added.) Note that Article XI, Section 2, makes local charters subject to state "criminal laws," rather than "general laws" or "criminal and civil laws." Does the specific reference to state criminal law mean that local charters are only subject to the constitution and criminal laws, but not state civil laws? One could argue that because the constitutional amendment only identifies state criminal laws, local laws are not subject to state civil laws.[36] That argument has never been embraced by the courts. However, largely due to the specific reference to state criminal law, the courts have determined that state criminal law presumptively preempts local criminal law.

Because Article XI, Section 2, specifically mentions state criminal law, the courts take the view that the amendment imposes stricter limits on city lawmaking power in the criminal context than in the civil or regulatory context.[37] In fact, the courts presume that municipal legislation that imposes criminal penalties is preempted by state law, and ambiguities are resolved in favor of preemption. To overcome that presumption, a city must show that a local ordinance or charter provision does not criminalize conduct that state law allows, or permit conduct that state law makes a crime.[38] For example, state law would preempt a local ordinance that criminalized the use of marijuana within the city, because state law grants users of marijuana immunity from criminal prosecution.[39] Most fights over preemption, however, concern local civil and regulatory laws.

B. Preemption of Local Civil Laws

According to the Oregon Supreme Court, the primary purpose of the home rule amendments was "to allow the people of the locality to decide upon the organization of their government and the

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US 903 (1956) (operating a segregated municipal bus system is unconstitutional); *Turner v. City of Memphis*, 369 US 350 (1962) (striking down local law that required segregation in public restaurants).

[36] That argument illustrates the *expressio unius est exclusio alterius* canon of construction (or, "the expression of one thing implies the exclusion of others"). *See Crimson Trace Corp. v. Davis Wright Tremaine, LLP*, 355 Or 476, 497 (2015) (explaining the canon). The *expressio unius* canon of construction is merely an inference, and is generally stronger when the list of items is longer and more specific. *See* Antonin Scalia & Brian A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 108 (2012) (so stating). Thus, just because Article XI, Section 2, specifically mentions criminal laws does not necessarily mean that local legislation is *not* subject to state civil laws. Indeed, a brief review of the case law refutes that argument. *See, e.g.*, *La Grande/Astoria*, 281 Or at 142.

[37] *City of Portland v. Dollarhide*, 300 Or 490, 497 (1986).

[38] *Id.* at 501-02.

[39] *See Emerald Steel Fabricators, Inc. v. BOLI*, 348 Or 159 (2010).

scope of its powers under its charter without having to obtain statutory authorization from the legislature[.]"[40] Because local governments are free to pursue their own policy goals separate from state oversight, local and state laws often address the same subject. For example, a city code and state statutes may both address a wide range of overlapping subjects, including utility regulation, building codes or land use restrictions. But, if the home rule amendments were designed to allow local governments to adopt substantive policies without the need for state authorization, what happens if the state and a local government adopt two competing policies on the same subject? Does the state law trump the city's policy choice? Does the city's home rule power shield it from state interference? Like many things in law, the outcome depends on the precise nature of the state and local laws at issue. First, the outcome may depend on whether the state and local laws address substantive policies, procedural processes or the structures of government. Second, the outcome may depend on whether state and local law are in *conflict*.

In the preemption analysis, a "conflict" means that state and local law are incompatible, for one of two reasons: (1) the state Legislature explicitly stated that it intended to preempt local laws on the subject (often called "express preemption"); or (2) it is impossible to comply with state and local law simultaneously (often called "conflict preemption"). The following sections will examine the preemption analysis in more detail, for three types of civil law: substantive, procedural, and laws that dictate the form of city government.

1. Substantive Civil Laws

Under Article XI, Section 2, cities are free to adopt home rule charters and, acting under the authority of those charters, enact their own substantive policies. Sometimes, however, local policy choices and state policy choices do not coincide. In that case, the courts will ask whether the local government has the authority to pursue its own policy goals. Assuming a local substantive policy is permissible under the local charter, the courts will then determine whether the local policy is preempted by state law, first by asking whether the state law expressly preempts the local policy choice, and second by examining whether the state law and local policy conflict.

a. Express Preemption

Sometimes, the Legislature enacts a law that specifically prohibits contrary local policy choices on the same subject. When the Legislature does so, it is said to have "expressly preempted" local law. Over time, the Legislature has expressly preempted local policy choices in many different regulatory areas, including the authority to tax cigarettes,[41] the authority to tax liquor,[42]

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[40] *La Grande/Astoria*, 281 Or at 142.

[41] ORS 323.030.

[42] ORS 473.190.

the designation of smoke-free workplaces,[43] pesticide regulations,[44] and the regulation of the use of cell phones in motor vehicles.[45] Every time the Legislature expressly preempts a local policy, Oregon cities lose some of their ability to address local problems in their own way, thereby lessening city government autonomy. Perhaps for that reason, the courts presume that the Legislature does not mean to preclude local legislative power. Specifically, the courts refuse to determine that the Legislature expressly preempted local law unless "the text, context and legislative history of the statute 'unambiguously expresses an intention to preclude local governments from regulating' in the same area that is governed by the statute."[46] Thus, ambiguity in the law is resolved in favor of local policy choice.[47]

b. Conflict Preemption

Even when the Legislature does not expressly preempt local policy choices, the courts may find that a local law is impliedly preempted because local law and state law are in "conflict." Conflict, as that word is used in the context of preemption, does not just mean that the two laws regulate in the same area, or even that local law imposes stricter standards than does state law. Rather, "conflict" between state and local law means that compliance with both state and local law is impossible. Thus, just because the state has "occupied the field" in a substantive area does not mean that local laws on the same subject conflict with state law.[48] And, as noted, local laws that impose stricter standards than state law do not necessarily conflict with state law. For example, a prior state law provided that the state building code was to be uniform throughout the state and municipalities were not permitted to enact ordinances that conflicted with the state building code.[49] The state building code mandated single-wall construction, but the city of Troutdale enacted an ordinance that required double-wall building construction. The Oregon Supreme Court determined that Troutdale's ordinance did not conflict with the state building

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[43] ORS 433.850 [repealing ORS 433.863].

[44] ORS 634.057.

[45] ORS 801.038.

[46] *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450-51 (2015) (quoting *Gunderson LLC v. City of Portland*, 352 Or 648, 663 (2012) (emphasis in *Rogue Valley*)).

[47] *See Gunderson*, 352 Or at 660 (examining a state law "to determine whether it unambiguously preempts the city from regulating" in a different manner).

[48] *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474, *rev den*, 348 Or 524 (2010) (explaining that "the occupation of a field of regulation by the state has no necessary preemptive effect on the civil or administrative laws of a chartered city.")

[49] *Formerly* ORS 456.775; *renumbered* 455.040 (1987).

code, because compliance with both sets of standards was not impossible.[50] After all, a person can comply with a stringent set of local rules and a more relaxed set of state rules simultaneously.[51] State and local law are only incompatible when compliance with both is impossible.

2. Procedural Civil Laws

In *La Grande/Astoria*, the Supreme Court appeared to draw a distinction between local substantive law and local procedural law. Regarding the latter category, the court opined that when state law affects "the structure and *procedures* of local agencies," the law violates the locality's home rule authority unless the law is "justified by a need to safeguard the interests of persons or entities affected by the procedures of local government."[52] It is not clear what "interests" justify the state's intrusion into local procedures, and no appellate case has addressed that issue.

It may be that the *La Grande/Astoria* court was simply stating a truism that local procedural laws must always respect the due process rights of local citizens, and state laws can override local laws to ensure compliance with due process. In any event, the passage regarding local procedural laws is probably best viewed as *dictum*, because the local and state laws at issue in *La Grande/Astoria* concerned the substantive policies of providing public employees with a pension.[53] Until an appellate court confronts the proper resolution of a conflict between state and local procedural laws, the matter is academic.

3. Structural Law

In *La Grande/Astoria*, the Oregon Supreme Court also stated that general state laws "addressed primarily to substantive social, economic, or other regulatory objectives of the state" will prevail over contrary local policies, "*unless* the law is shown to be irreconcilable with the local community's freedom to choose its own political form."[54] In other words, even substantive state laws that would otherwise preempt contrary local laws—either because the Legislature

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[50] *State ex rel. Haley v. City of Troutdale*, 281 Or 203, 211 (1978) (explaining that state building code did not preempt city from adopting a more stringent building code).

[51] *See Thunderbird Mobile Club*, 234 Or App at 474 (stating that city ordinance did not conflict with state laws on selling mobile home parks, even though city ordinance imposed more requirements than state law).

[52] *La Grande/Astoria*, 281 Or at 156 (emphasis added).

[53] "*Dictum*," when used to describe language in judicial opinions, "commonly refers to a statement that was not necessary to the court's decision." *Engweiler v. Persson*, 354 Or 549, 558 (2013) (citing *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 621 n 19 (1997)). Statements that are *dictum* lack precedential effect. *Mastriano v. Board of Parole*, 342 Or 684, 692 n 8 (2007).

[54] *La Grande/Astoria*, 281 Or at 156 (emphasis added).

unambiguously intended to preempt contrary local laws or because compliance with state and local law is impossible—have no effect when the state law interferes with a locality's ability to "choose its own political form." That type of law would best be characterized as a "structural" law, because it affects the structure of local government. Note that the court speaks of laws that are "shown to be irreconcilable" with local structures, not laws that are *meant* to be irreconcilable with the local structures. Thus, a substantive state law that preempts local laws might theoretically violate home rule protections if the state law has the *effect* of interfering with the local political form. As with local procedural laws, no appellate decision has ever held that a state law was irreconcilable with a local community's freedom to choose its political form.

VI. Recent Home Rule Cases

In the past decade, the Oregon Court of Appeals and Oregon Supreme Court have issued several important decisions on municipal home rule. This section summarizes the facts of those cases, the issues involved, and the court's application of the home rule doctrine.

A. *Thunderbird Mobile Club v. City of Wilsonville*

The issue in *Thunderbird Mobile Club v. City of Wilsonville* [55] was whether a city could impose more stringent standards on mobile home park operators than those imposed by state law. Under the state Residential Landlord and Tenant Act, the owner of a mobile home park who intends to sell or close the park must fulfill certain prerequisites. The city of Wilsonville went further and adopted an ordinance that imposed additional requirements on mobile home park owners. For example, the city required owners of mobile home parks who wished to close the park to obtain a "closure permit" from the city, file a closure impact report, and develop a relocation plan for the park residents. The owner of a mobile home park in Wilsonville who wished to sell the park challenged the legality of the city ordinance, arguing that the ordinance was preempted by the state law.

The Oregon Court of Appeals disagreed with the mobile home park owner. To reach that conclusion, the court applied the preemption test outlined above: (1) whether the city charter authorized the local action; and (2) whether the local action conflicted with state law. The court first explained that the city ordinance was authorized by the city charter and then turned to the question whether the city ordinance conflicted with state law. The court answered in the negative.

First, state law did not *expressly* preempt the city ordinance, because the Oregon Legislature did not unambiguously express an intent to preempt all local legislation on the subject. The court also explained that state law did not *impliedly* preempt the city's requirements, because state law and local law were not incompatible. Even though Wilsonville's ordinance imposed more

[55] 234 Or App 457 (2010), *rev den*, 348 Or 524 (2010).

requirements on the mobile home park owner than state law did, complying with both sets of requirements was not impossible, and thus the local law was not preempted.[56]

Thunderbird illustrates an important principle: implied preemption requires truly incompatible sets of requirements. Just because a city chooses to impose greater burdens on a business or individual than state law imposes, the city's legislation is not preempted by state law unless complying with both is impossible.

B. *Rogue Valley Sewer Services v. City of Phoenix*

While *Rogue Valley Sewer Services v. City of Phoenix*,[57] is slightly more complicated than *Thunderbird Mobile Club*, the analysis is similar. In 2006, the citizens of Phoenix, Oregon, voted to annex the city into the area serviced by Rogue Valley Sewer Services (RVSS). Under state law, RVSS is considered a unit of local government. After the annexation vote, the Phoenix city council passed an ordinance that levied a five (5) percent franchise fee on RVSS. Importantly, the ordinance declared that money from the fee would be used to reimburse the city for its costs associated with RVSS—in other words, the fee was not meant to raise revenue. RVSS filed a complaint and argued that the city lacked authority to impose the fee. The case eventually made it to the Oregon Supreme Court.

At the Supreme Court, RVSS advanced a few different arguments as to why the city's franchise fee was unlawful. Two arguments are relevant here: (1) the city could not impose a franchise fee on another unit of government, and (2) the city's authority to impose the fee was preempted by state law. The court rejected both arguments and held that Phoenix had the authority to impose the fee.

The court first explained that although the city was prohibited from *taxing* RVSS, the franchise fee at issue was not a tax because the city was using the money from the fee to reimburse the costs associated with RVSS. The court then turned to the preemption argument. The court explained that the city's charter granted it authority to impose the fee. The question turned on whether state law preempted that authority. The court determined that state law did not expressly preempt the city's franchise fee, and that the statutory scheme did not prevent the state law and local ordinance from operating concurrently (*i.e.*, state and local law did not conflict). Even though state law regulated less extensively than the local ordinance, compliance with both sets of requirements was not impossible. Therefore, the franchise fee on RVSS was a permissible exercise of the city's home rule authority.

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[56] *Thunderbird Mobile Club*, 234 Or App at 474; *see also Springfield Utility Board v. Emerald PUD*, 191 Or App 536, 541-42 (2004), *aff'd*, 339 Or 631 (2005) ("A local ordinance is not incompatible with state law simply because it imposes greater requirements than does the state, nor because the ordinance and the state law deal with different aspects of the same subject.").

[57] 357 Or 437 (2015).

C. *Northwest Natural Gas v. City of Gresham*

In *Northwest Natural Gas, Co. v. City of Gresham*[58] the court confronted several complicated issues. For the purposes of this paper, the focus will be on the home rule aspects of the case. The city of Gresham adopted a resolution that raised utility "license fees" from five (5) to seven (7) percent of a utility's gross sales within the city. The increased license fee affected a number of different utilities operating within the city, including both publicly-owned and investor-owned utilities. Importantly, the resolution that raised the license fee stated that the increased revenue would be used to fund police, fire, and parks. NW Natural, Portland General Electric, and Rockwood People's Utility District all challenged the City's increased fee. The case eventually reached the Oregon Supreme Court.

The Supreme Court first determined that the ostensible "license fees" were in fact privilege taxes under state law, because the city resolution stated that revenue from the increased fees would be used to fund city services. In that sense, the license fee at issue in this case differs from the fee at issue in *Rogue Valley Sewer Services*, because income from that fee was used to pay for costs associated with the utility. Having determined that Gresham's fee was in fact a privilege tax, the question then became whether ORS 221.450—which imposes a five (5) percent ceiling on privilege taxes—preempted the city's ability to impose a seven percent privilege tax on the utilities.[59]

The court determined that the city could impose a seven (7) percent privilege tax on the investor-owned utilities—NW Natural and Portland General Electric—but not on Rockwood PUD. The court explained that state law did not preempt the city from imposing a higher privilege tax on the private utilities, because nothing in the law unambiguously expressed an intention to limit privilege taxes on private utilities to five (5) percent of gross revenue. Second, the state law and local ordinance were not incompatible. In other words, a seven (7) percent privilege tax on private utilities did not conflict with state law.

The court reached a different conclusion in regards to Rockwood PUD. Recall that the court determined that the seven (7) percent "franchise fee" was in fact a privilege tax. As a general matter, municipalities lack authority to impose taxes on other municipalities (so-called

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[58] 359 Or 309 (2016).

[59] Specifically, ORS 221.450 states that "Except as provided in ORS 221.655, the city council or other governing body of every incorporated city may levy and collect a privilege tax from * * * every electric cooperative, people's utility district, privately owned public utility, telecommunications carrier as defined in ORS 133.721 or heating company. The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a franchise from the city and is actually using the streets, alleys or highways, or all of them, in such city for other than travel on such streets or highways. The privilege tax shall be for the use of those public streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the cooperative, utility, district or company currently earned within the boundary of the city."

"intergovernmental taxation"). Thus, the city lacked home rule authority to impose a privilege tax greater than the five (5) percent tax allowed under state law, and the city's seven (7) percent privilege tax on Rockwood PUD was preempted by state law.

VII. Conclusion

Home rule is an important aspect of city governance. Since the passage of the home rule amendments in 1906, cities are free to pursue their own policy objectives without state approval. City powers under the home rule doctrine are not limitless, however, because the state can and does preempt substantive lawmaking authority. The League continues to advocate on behalf of cities to resist the erosion of home rule authority and preserve city autonomy.