Comments

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Charming the Eight-Hundred-Pound Gorilla: How Reconsideration of Home Rule in Oregon Can Help Metro Tame Measure 37

In 1968, Professor Kenneth Vanlandingham wrote that "home rule begins at home; no constitutional provision alone can assure it. If home rule is to become more meaningful, cities must not only become more aggressive in exercising it, but they must remain on the alert . . . to advance and protect their proper interests."[1] Ten years after Professor Vanlandingham penned his call to arms, the Oregon Supreme Court gutted home rule as Oregonians knew it.[2] Home rule, which can be described as limited governance power that a state grants to its local governments, has raised many questions for state courts since Missouri passed the country's first home rule amendment in 1875.[3] Foremost among these questions is: Where does one draw the line

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[1] Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 314 (1968).

[2] *See* City of La Grande v. Pub. Employees Ret. Bd., 281 Or. 137, 576 P.2d 1204 (1978).

[3] *See* MO. CONST. of 1875, art. IX, § 16 (now MO. CONST. art. VI, § 19(a)); *see, e.g.*, Sho Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055, 1066-75 (1972) (describing conflicting case law following passage of California's home rule amendment).

between where state authority ends and local autonomy begins? Or, to borrow Professor Vanlandingham's phrasing, what should a home rule city's "proper interests" be? For their part, Oregon courts have swung dramatically between a narrow and broad interpretation of the extent of its cities' home rule power under Oregon's constitution, finally "settling" the law in *City of La Grande v. Public Employees Retirement Board*.[4] In *La Grande*, Justice Hans Linde wrote for the majority that when it comes to substantive laws, state law presumptively trumps a conflicting local rule or ordinance.[5] Accordingly, localities' home rule autonomy is limited to procedural matters where the state has no substantive interest.[6]

Justice Thomas Tongue, in a lengthy and passionate dissent, asked the million-dollar questions to the majority: Could the framers of Oregon's home rule amendments have intended to limit local power to purely local procedural matters? Could past decisions upholding local substantive laws be wrong? In light of past holdings and Oregon's current needs, should home rule for Oregon cities, counties, and regions be construed so narrowly?[7]

In light of Oregon's recent passage of Measure 37, these are some of the questions that Oregon's local governments, specifically Metro, may want to ponder. Oregon has a long, storied history of land use planning, seen by some as a model effort to preserve the state's natural beauty and farmland while encouraging controlled growth within its metropolitan areas.[8] In 1973, the Oregon legislature made a finding that "[u]ncoordinated use of lands within this state threatens the orderly development, the environment . . . and the health, safety, order, convenience, prosperity and welfare of the people."[9] Based in part on this finding, the legislature adopted nineteen planning goals that local governments were required to implement.[10]

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[4] 281 Or. 137, 576 P.2d 1204 (1978).

[5] *Id.* at 156, 576 P.2d at 1215.

[6] *Id.* at 156, 576 P.2d at 1215.

[7] *See id.* at 157-59, 576 P.2d at 1215-16 (Tongue, J., dissenting).

[8] Paul Boudreaux, *The Three Levels of Ownership: Rethinking Our Restrictive Homebuilding Laws*, 37 URB. LAW. 385, 400 (2005).

[9] OR. REV. STAT. § 197.005(1) (2005).

[10] *Id.* § 197.010. For details on the nineteen planning goals, see the Oregon Department of Land Conservation and Development web site, http://www.lcd.state.or.us/LCD/goals.shtml (last visited Jan. 10, 2007). Specifically, the newest version of Goal 14 provides that "[u]rban growth boundaries shall be established and maintained by cities, counties and regional governments to provide land

A well-known example of a locality implementing these state goals is Metro, a quasi-governmental regional body that manages, among other things, land use in the Portland area through maintenance of the urban growth boundary (UGB).[11] In essence, the UGB draws the line limiting how far Portland and its suburbs may grow in a given period of time. It designates land within the UGB for development and other city planning needs and designates land outside the UGB as farmland or other nondevelopable parcels.[12] Across the country, urban planners have credited Metro with creating a smart-growth model that has minimized sprawl and created one of the best-planned cities in the nation.[13]

However, Oregon's land use regime has also prompted loud criticism from those who see the state's regulations and Metro's implementation of them as a blatant infringement on private landowners' rights. Specifically, some critics contend that the UGB has visually divided the apparent "haves"—those who can realize higher value for their land—and the "have-nots"—those limited to unprofitable and untenable land uses.[14] As such, landowners' longstanding frustration with Oregon's land use regime took form in Measure 37, a 2004 voter initiative providing that when a land use provision results in a decrease in private property value, the regulatory body must supply compensation or waive the provision.[15] The sixty-one percent of voters[16] who sup-

for urban development needs and to identify and separate urban and urbanizable land from rural land." OR. ADMIN. R. 660-015-0000(14) (2006), *available at* http://www.lcd.state.or.us/LCD/docs/goals/goal14.pdf, at 1.

11 *See* Metro Home Page, http://www.metro-region.org (last visited Jan. 10, 2007).

12 *See* Metro, Urban Growth Boundary, http://www.metro-region.org/article.cfm?ArticleID=277 (last visited Jan. 10, 2007).

13 *See generally* CARL ABBOTT, GREATER PORTLAND: URBAN LIFE AND LANDSCAPE IN THE PACIFIC NORTHWEST 129-98 (2001) (providing a history of metropolitan planning in Portland); Heike Mayer & John Provo, *The Portland Edge in Context*, *in* THE PORTLAND EDGE 9, 9-10 (Connie P. Ozawa ed., 2004) (describing Portland's urban landscape).

14 *See, e.g.*, Elisabeth Hagans, Letter to the Editor, OREGONIAN (Portland), Mar. 5, 2006, at E3 (noting that her "farmland" is unfarmable and next to multimillion-dollar housing developments). Bill Moshofsky of Oregonians in Action, *infra* note 15, compared the UGB to the "Berlin Wall" and stated that as a result of the UGB, "[p]roperty rights have been swept under the rug. . . . [H]igh density is going to reduce the quality of life. People will be crowded together, living on small lots. The land supply will be so limited that housing costs will become unaffordable." Alan Katz, *Developing the Future*, DENVER POST, Feb. 10, 1997, at A1. **R**

15 OR. REV. STAT. § 197.352 (2005); s*ee infra* Appendix. Oregonians in Action, a nonprofit group devoted to fighting "excessive" land use regulations, authored Mea-

ported Measure 37 dropped an eight-hundred-pound gorilla on Metro's doorstep, leaving it with the Hobson's choice of either compensating land owners from unspecified or nonexistent funds or waiving the applicable land use provisions. Since waiver is the only real choice left to Metro, its carefully constructed and maintained UGB could collapse into urban sprawl, thanks to Measure 37.

Metro may not have to give the gorilla everything it wants, however. This Comment posits that Metro can provide a compelling answer to Professor Vanlandingham's call to arms by arguing for a reinterpretation of its home rule powers in a way that would ultimately neutralize Measure 37. Metro can achieve this by looking back to the home rule amendment's text, history, and framers' intent, along with the infirmities in *La Grande*. For introductory purposes, Part I provides background on the origins of Oregon's home rule amendment, including a brief look at the national movement to adopt home rule through state amendments and the debates surrounding these amendments. Part II discusses the ninety-plus-year debate in Oregon courts over what powers home rule provides local governments. In Part III, this Comment explores the origins of Metro and its current structure. It also examines Measure 37, its applicable provisions, and how Metro and the Oregon Supreme Court have responded to these provisions. Finally, based on the intent of the home rule amendment framers, Oregon case law, and the nature and needs of metropolitan land use planning, Part IV argues that a reevaluation of the rule in *La Grande* and a rethinking of Oregon's home rule amendment could permit Metro's home rule powers to expand beyond mere procedural matters and supersede Measure 37's requirements.

I

THE ORIGINS OF HOME RULE IN OREGON

Although it is a frequently used term, "home rule" cannot be boiled down to one simple definition.[17] As the National League of Cities describes it:

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sure 37. *See* Oregonians in Action, Background Information, http://www.oia.org/oia2.html (last visited Jan. 10, 2007).

16 *See* Or. Sec'y of State Election Div., General Election Official Results, Nov. 2, 2004, http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf.

17 *See* Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644-46 (1964).

> [H]ome rule is a delegation of power from the state to its subunits of governments (including counties, municipalities, towns or townships, or villages). That power is limited to specific fields, and subject to constant judicial interpretation. Home rule creates local autonomy and limits the degree of state interference in local affairs.[18]

In his often-cited 1964 law review article, Professor Terrance Sandalow described home rule as "a grant of power to the electorate of a local government unit to frame and adopt a charter of government."[19] In broad terms, a home rule grant from a state bestows autonomy to local governments to manage local matters. Further, like other legal concepts, home rule may be used as a sword or shield. When a local government undertakes acts pursuant to a grant of statutory or constitutional home rule power, that locality is using home rule as a sword, asserting what is called home rule initiative.[20] In contrast, local governments may use home rule as a shield by invoking home rule immunity, under which the locality has exclusive autonomy in purely local matters.[21] The balance between how a locality may exercise its home rule initiative and immunity can be shifting and contentious, as the following discussion will show.

An expansive notion of home rule initiative is ideal for several reasons. A broad grant of home rule initiative means that government power is exercised closest to the people it directly affects.[22] Home rule can permit localities to serve as "pilot projects" for experimental forms of government that can best be tested at a microcosmic level.[23] Home rule also allows localities to set policies that define their community character rather than to conform to blunt, ill-fitting edicts from a distant, centralized state government.[24] A broad grant of home rule also prevents a drain on a state legislature's resources by delegating local issues to localities.[25] In the context of urban planning and land use

[18] Nat'l League of Cities, About Cities: Home Rule, http://www.nlc.org/about_cities/cities_101/153.cfm (last visited Jan. 10, 2007).

[19] Sandalow, *supra* note 17, at 645. **R**

[20] *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2325-29 (2003) (describing the initiative and immunity functions of home rule).

[21] *Id.*

[22] *Id.* at 2259; Sandalow, *supra* note 17, at 655; Vanlandingham, *supra* note 1, at 270. **R**

[23] OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 35, at 98 (1982).

[24] Barron, *supra* note 20, at 2259-60. **R**

[25] Sandalow, *supra* note 17, at 655. **R**

management, expanded home rule initiative has been promoted to foster a metropolitan area's ability to combat sprawl and other unwelcome effects of suburbanization.[26]

Meanwhile, those who argue for limits on home rule, or a narrow conception of home rule immunity, posit that broader local control typically benefits privileged insiders. They argue that without strong state control on how land and services are distributed and designated within a region, poorer individuals end up segregated within urban centers while the wealthy spread to "exurbs," taking much of the region's resources with them.[27] According to these critics, the state government has a better perspective on how to address sprawl, inequities in education, affordable housing, environmental quality, and other issues that plague many urban centers.[28]

Underlying the debate on whether home rule solves or complicates metropolitan planning issues is the question of how much autonomy home rule provides local governments. The answer to this question depends upon whether the state has adopted home rule as a legislative or constitutional grant. Under a legislative grant, the state confers powers on local governments or allows them to adopt a home rule charter by statute.[29] In contrast, constitutional home rule—also referred to as an *imperium in imperio*[30] regime—stems from an amendment to a state constitution conveying governing powers to a city or region.[31] While both the legislative and constitutional grants confer governance powers on localities, under legislative home rule courts can divine legislative intent through the rules of statutory con-

[26] Barron, *supra* note 20, at 2327. R

[27] *Id.* at 2261-62. The theory is that if communities in a metropolitan area all have autonomy under home rule, local governments will compete with one another to attract the wealthiest residents and shut out poorer people who require more public services. In essence, home rule combined with zoning power creates a "white flight" from cities to suburbs and exacerbates the gap between wealthy suburbs and the core city. *See id.* at 2330-31 (describing the rise of metropolitan fragmentation).

[28] *See id.* at 2261-62.

[29] Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism*, 76 OR. L. REV. 909, 912 (1997).

[30] Vanlandingham, *supra* note 1, at 285. *Imperium in imperio* translates to "government within a government." Note that although Vanlandingham uses the construction *imperio in imperium*, this Comment adopts the more common construction *imperium in imperio*.

[31] Cumfer, *supra* note 29, at 912. Most early home rule systems in the late 1800s and early 1900s, including Oregon's, stem from constitutional grants. *Id.* R

struction.[32] As a result, localities in legislative home rule states generally find their autonomy clearly but narrowly defined by the legislature. In contrast, in constitutional home rule states, localities generally enjoy a broader grant of autonomy. Because constitutional amendments generally provide for a broader interpretation of local rights and responsibilities, courts, not legislatures, draw the line between where state supremacy ends and local autonomy begins.[33]

Oregon is an *imperium in imperio* state, having adopted home rule by amendment in 1906.[34] To better understand Oregon's grant and subsequent interpretation of home rule, Part I.A looks at the debates and history surrounding other states' adoption of home rule amendments to their constitutions. In Part I.B, this Comment then looks at the details surrounding the drafting and adoption of Oregon's home rule amendment.

A. Missouri, California, and the Other Home Rule Pioneers[35]

In 1875, Missouri became the first state to adopt home rule, granting two provisions: one to St. Louis and the other to all other large cities.[36] Article IX, section 16 provided that cities with a population over 100,000 could create and amend charters "consistent with but also 'subject to' the constitution and laws of this State."[37] While drafting the amendments, delegates debated over the meaning of its "consistent with" clause. A majority of the delegates interpreted the language as providing that the locality—in this case, St. Louis—was subject to all general state laws with the exception that the state legislature could not pass special laws affecting the locality.[38] In other words, the majority

[32] *Id.* The legal doctrine that states have strict control over cities is known as "Dillon's Rule" after John Dillon, a state and federal judge who wrote an 1872 treatise on municipal corporations. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1109-13 (1980). Dillon's Rule was pervasive in the late nineteenth century. The home rule movement was in part an effort to undo Dillon's Rule and provide cities with freedom from state interference in spheres of local concern. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990).

[33] *See* Cumfer, *supra* note 29, at 912. **R**

[34] OR. CONST. art. XI, § 2.

[35] This section is indebted to the exhaustive research in Cynthia Cumfer's article, *supra* note 29. **R**

[36] *Id.* at 92.

[37] MO. CONST. of 1875, art. IX, § 16 (now MO. CONST. art. VI, § 19(a)); *see also* Cumfer, *supra* note 29, at 920. **R**

[38] Cumfer, *supra* note 29, at 919. **R**

determined that general state laws established a floor, not a ceiling, for St. Louis' laws; beyond this floor, St. Louis could construct local laws and ordinances without state interference. In subsequent cases, the Missouri Supreme Court held that only in matters of statewide concern were charter provisions required to be consistent with and subject to Missouri's constitution and statutes; where a charter provision concerning purely local matters conflicted with state laws, the local provision prevailed.[39] The provision, as interpreted by the Missouri courts, "created an area within which cities, freed entirely from state control, could govern themselves[,]" or an *imperium in imperio*,[40] as Justice Brewer of the United States Supreme Court later described it.[41]

In 1879, California based its home rule amendment on Missouri's *imperium in imperio* model with a primary modification requiring that the state legislature approve or reject a local charter.[42] California courts, like Missouri courts, struggled with how to quantify their home rule amendment, a debate that played out compellingly in *Thomason v. Ashworth*.[43] In that case, the majority determined that a general state rule trumped a conflicting local ordinance providing for street maintenance regulations.[44] This ruling was controversial, especially because many saw these regulations as a purely local matter.[45] After the court's decision in *Thomason*, voters amended the constitutional home rule charter in 1896 to provide that the home rule was subject to and controlled by general laws "except in municipal affairs."[46]

In 1889, migrating Californians influenced Washington to adopt a home rule amendment for cities with populations over 20,000. It provided that home rule charters must be "consistent

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[39] *See* Vanlandingham, *supra* note 1, at 284-85 & n.85 (describing the Missouri Supreme Court's eventual conclusion).

[40] *Id.* at 285.

[41] *See* St. Louis v. W. Union Tel. Co., 149 U.S. 465, 467-68 (1893) ("The city of St. Louis occupies a unique position. . . . [I]t framed its own charter under express authority from the people of the state . . . . The city is in a very just sense an '*imperium in imperio*.'").

[42] CAL. CONST. of 1879, art. XI, §§ 8, 11; Cumfer, *supra* note 29, at 920-21. **R**

[43] 14 P. 615 (Cal. 1887).

[44] *Id.* at 616; Cumfer, *supra* note 29, at 921. **R**

[45] Cumfer, *supra* note 29, at 921. **R**

[46] CAL. CONST. of 1896, art. XI, § 6; Cumfer, *supra* note 29, at 922. Although the amendment "fixed" the *Thomason* result, California courts continued to vacillate in how they defined home rule powers. *See, e.g.*, Sato, *supra* note 3, at 1066-75 (summarizing judicial decisions after the 1896 amendment). **R**

with and subject to the constitution and laws of [the] state."[47] Further, the amendment gave localities power to make all local regulations "as are not in conflict with general laws."[48]

Minnesota's 1896 charter, the next home rule amendment to be passed, was unique in that it granted home rule to all cities, regardless of population.[49] Adopting language nearly identical to Missouri's, Minnesota Constitution article IV, section 36 (now article XII, section 4) authorized charters "consistent with and subject to [the] laws of the State."[50] However, the provision stated that the legislature should prescribe the general limits by which a city may frame a charter and required that general state laws supersede the same subject matter in a city charter.[51] The Minnesota Supreme Court, reading these provisions literally, determined that home rule powers were subject to state legislative control, in effect creating a model for states that later adopted legislative home rule and rejecting Missouri's *imperium in imperio* model.[52]

Fueled by a burgeoning national municipal reform movement and Denver's ongoing conflicts with the state, Colorado passed its home rule amendment in 1902.[53] Like Missouri, Colorado made two home rule grants: one to Denver and another to cities with a population of at least two thousand.[54] Unlike the amendments that other states had adopted, Colorado's extensive charter omitted specific provisions making home rule charters subject to general state laws.[55] Colorado courts have held that home rule municipalities enjoy autonomy in purely local concerns and mixed local and statewide concerns where there is no conflict with a state law.[56] However, local legislation regarding purely statewide matters is entirely preempted.[57]

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[47] WASH. CONST. of 1889, art. XI, § 10; *see also* Cumfer, *supra* note 29, at 922-23. **R**

[48] Cumfer, *supra* note 29, at 923. **R**

[49] *Id.*

[50] MINN. CONST. art. XII, § 4; Cumfer, *supra* note 29, at 923. **R**

[51] Vanlandingham, *supra* note 1, at 286. **R**

[52] *Id.* at 286 & n.93.

[53] Cumfer, *supra* note 29, at 927. **R**

[54] COLO. CONST. art. XX, §§ 1, 6.

[55] Cumfer, *supra* note 29, at 927. Cumfer noted, however, that the Colorado Constitution also requires local officers to perform duties as "required . . . by the constitution or by the general law." COLO. CONST. art. XX, § 2; Cumfer, *supra* note 29, at 927 n.118. **R** **R**

[56] Martin R. McCullough, *A Primer on Municipal Home Rule in Colorado*, 18 COLO. LAW. 443, 443 & n.5 (1989).

[57] *Id.* at 443.

While Colorado passed its amendment, home rule proponents in Oregon were drafting their own constitutional amendment to provide for local autonomy.

B. Oregon's Home Rule Amendments

In Oregon, William U'Ren[58] led the home rule movement by creating the People's Power League, an organization devoted to passing initiatives granting governance power to localities.[59] For the 1906 vote, the league redrafted a home rule proposal that years earlier had passed the Oregon Senate but never made it to popular vote.[60] The original draft matched Washington's amendment, except that it eliminated the provision requiring local regulations to not conflict with general laws and, like Minnesota's amendment, it allowed cities of any size to enact a home rule charter.[61] The new draft eliminated the necessity for legislative action to approve or reject a charter and changed the limitation on the grant of power from "consistent with and subject to the constitution and laws of this state" to "subject to the Constitution and criminal laws of the State of Oregon." In addition, the drafters eliminated a clause rendering charters "subject to and controlled by general laws."[62]

The People's Power League then distributed a pamphlet promoting the measure, claiming that

> [t]he adoption of these constitutional amendments will give COMPLETE HOME RULE to the voters of every county, city and town, through the local application of the initiative and referendum to all purely local business, including CITY CHARTERS to be enacted and amended by each city for itself, LOCAL LAWS AND FRANCHISES passed by the legislature, and ORDINANCES, RESOLUTIONS AND FRANCHISES passed by city councils and county courts.[63]

[58] William Simon U'Ren (1859–1949) was born in Wisconsin and lived in Colorado for roughly ten years where he studied law and became a newspaper editor. He later moved to Oregon where he became involved in the initiative and referendum movement. Cumfer, *supra* note 29, at 928-29. For more on U'Ren's influence on this movement, see David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'Ren and "The Oregon System*," 67 TEMP. L. REV. 947 (1994).

[59] Cumfer, *supra* note 29, at 930-31. **R**

[60] *Id.* at 928 (providing a brief explanation of the proposed amendment, which was modeled after Washington's home rule amendment).

[61] *Id.* at 927-28.

[62] *Id.* at 930-31.

[63] *Id.* at 931 (quoting THE PEOPLE'S POWER LEAGUE OF OREGON, 1906 CAMPAIGN LEAFLET 1 (1906) (available at the Oregon State Library, Salem, Or.)).

Most newspaper editorials supported (or simply described) the amendment as a welcome change that took power from the legislature and placed it in the people's hands to set local policy and regulations.[64] In June 1906, voters overwhelmingly passed the home rule amendment as the People's Power League drafted it, with 52,567 in favor and 19,852 opposed.[65]

Several factors in the above history suggest that the drafters intended Oregon's home rule to grant significant autonomy to localities. In light of the debates stemming from other states' provisions, the drafters' replacement of the language making charters "subject to and controlled by general laws" with "subject to the Constitution and criminal laws of the State of Oregon" is significant and suggests an effort to confer broader power to localities. Based on the founders' familiarity with other similar home rule amendments, their language setting the floor for localities' home rule initiative at "Constitutional and criminal laws" implicates the drafters' intention to convey localities more autonomy than the states that provided for a floor of "all general laws." That is, had the drafters intended general laws to supersede local ordinances, they easily could have left that language within the provision. Further, the language of the People's Power League Pamphlet emphasizing "complete home rule" suggests the framers had in mind a broad grant of home rule initiative to localities.[66] The newspaper accounts supporting the amendment further suggest that the voters' intent mirrored that of the framers. However, Oregon courts have not consistently adopted this interpretation.

II

Oregon Courts' Interpretation of Home Rule

Despite U'Ren and the People's Power League's efforts to draft a clear constitutional home rule charter, Oregon's home rule amendment bears the burden of nearly one hundred years of conflicting judicial decisions construing the tension between state

[64] *Id.* at 931-32.

[65] *Id.* at 932.

[66] As Cumfer explains, the framers of Oregon's home rule amendment were also familiar with the National Municipal League, a group that led the movement advocating for increased local power and the adoption of home rule amendments. *See id.* at 933-34. In fact, U'Ren and other members of the People's Power League participated in the National Municipal League's advisory and executive committees. *Id.* at 934.

law and local ordinances. In light of the copious case law interpreting the scope of Oregon's home rule amendment, Part II.A of this Comment focuses on the major cases leading up to the current rule in *La Grande*, while Part II.B looks at the majority and dissenting opinions in *La Grande* as well as subsequent case law regarding home rule in Oregon.

*A. The Great Push and Pull: Pre-*La Grande *Case Law*

Oregon's first real judicial test of home rule came in 1909 with *Straw v. Harris*.[67] The case arose when the state legislature created a locality, the Port of Coos Bay, within the boundaries of four coastal Oregon cities.[68] The mayor of Marshfield, one of the cities affected by the port, claimed that the legislature, by creating the port, amended his city's charter.[69] The court held that although the legislature could not *directly* amend a city charter, it could pass a charter, law, or rule that *indirectly* affected a city's charter.[70] Writing for the majority, Justice King explained that although the home rule amendment's text seemed to provide that incorporated cities had "exclusive control" over their own affairs to the point of excluding the state,

> it cannot be held that the State has surrendered its sovereignty to the municipalities to the extent that it must be deemed to have perpetually lost control over them. This no State can do. The logical sequence of a judicial interpretation to such effect would amount to a recognition of a state's independent right of dissolution. It would but lead to sovereigntial suicide. It would result in the creation of states within the state, and eventually in the surrender of all state sovereignty—all of which is expressly inhibited by Article IV, § 3, of our national constitution.[71]

Justice King went on to say that through general laws only, "the State, therefore, *regardless of any declarations in its constitution to the contrary,* may at any time revise, amend, or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental laws."[72] Under the *Straw* court's interpretation, the home rule amendment merely forbade the legislature from enacting special

[67] 54 Or. 424, 103 P. 777 (1909).
[68] *Id.* at 433, 103 P. at 781.
[69] *Id.* at 434, 103 P. at 781.
[70] *Id.* at 435, 103 P. at 781.
[71] *Id.* at 436, 103 P. at 782.
[72] *Id.* at 436-37, 103 P. at 782 (emphasis added).

laws directed at a municipality, greatly limiting local home rule sovereignty.

In 1914, however, the court took a dramatic swing toward a broader grant of *imperium in imperio* autonomy in *Branch v. Albee*.[73] In *Branch*, the court looked at a legislative measure requiring cities of 50,000 or more residents to pay a tax benefiting a local police pension fund.[74] Portland, which was then the only qualifying Oregon city, sued, claiming that the act amended its charter and thus violated the Oregon Constitution under the home rule provision.[75] Justice Ramsey, writing for the majority, construed article XI, section 2's provision that "[t]he legislative assembly shall *not* enact, amend or repeal any charter or act of incorporation for any municipality, city or town" as an "*absolute*" prohibition.[76] Responding to Justice King's dictum in *Straw*, Justice Ramsey declared that

> [t]he Constitution does *not* provide that the legislative assembly shall not enact, amend, or repeal a city charter *by special laws*. It declares that said body shall *not* enact, amend, or repeal a charter, and the meaning of this provision is that it shall not do that *in any manner. The inhibition is absolute*.[77]

According to Ramsey, the legislative act here, singling out the only Oregon city with a population of over 50,000 inhabitants, constituted a blatant attempt to legislate purely local matters and indirectly affect Portland's charter.[78]

The victory for local autonomy was short-lived, however. In *Rose v. Port of Portland*,[79] the Port of Portland, a legislative creation, wanted to use Portland city funds to improve its slough but had no provisions in its charter permitting the expenditure.[80] The plaintiff challenged the port's right to amend its charter by initiative.[81] Justice Harris wrote for a unanimous bench, holding that as an initial matter the constitution did not permit a port to

[73] 71 Or. 188, 142 P. 598 (1914).

[74] *Id.* at 190-93, 142 P. at 598-99.

[75] *Id.* at 190-93, 142 P. at 598-99.

[76] *Id.* at 195-96, 142 P. at 600.

[77] *Id.* at 199-200, 142 P. at 601. Justice Ramsey later qualified his strong language making sure to "not hold that cities can . . . extend their authority and jurisdiction over subjects that are not properly municipal and germane to the purposes for which municipal corporations are formed." *Id.* at 205, 142 P. at 603.

[78] *Id.* at 205, 142 P. at 603.

[79] 82 Or. 541, 162 P. 498 (1917).

[80] *Id.* at 545, 162 P. at 499.

[81] *Id.* at 545, 162 P. at 499. It is not clear from the text of the case or materials that discuss it who the plaintiff in *Rose* was. However, no city was a party or amicus

amend its own charter.[82] Justice Harris further wrote that even though the home rule provision allowed localities to amend their charters, if a local ordinance conflicted with a state law, the home rule amendment conferred supremacy to the state even if the locality passed its ordinance first.[83] As primary support for the court's decision, Harris produced a letter and tentative amendment draft circulated by the People's Power League and signed by one of its officers at the time, Thomas A. McBride, who was the *Rose* court's chief justice.[84] In part, the letter read, "Of what interest are the local laws of Portland to farmers of Klamath County, or the charter or ordinances of Lakeview to the fishermen of the Columbia River? This amendment is another step towards home rule in *home affairs*."[85] In light of this language and a corresponding independent declaration by McBride, Harris construed that McBride and the other framers intended to permit the legislature to retain authority to enact general laws binding upon home rule cities.[86]

In 1936, the court shifted yet again in *City of Portland v. Welch*.[87] At issue in this case was a statute providing for the "supervision, regulation, limitation and levy of taxes" on cities with a population of 100,000 or more.[88] The law also provided that the state tax commission could alter Portland's city budget.[89] The court recognized that local taxation might be a concern for the state and that the Oregon Constitution limited how much a municipality could levy taxes.[90] It reasoned that the legislature could, by general law, limit the tax levies a municipality could

curiae intervenor in this case. ORVAL ETTER, MUNICIPAL HOME RULE IN OREGON 260 (Sourcebook Version 1991) (available at the Univ. of Or. Law Library, Eugene).

[82] *Rose*, 82 Or. at 553-54, 162 P. at 502. The court in *Rose* also noted that in cases challenging the ability of a local government to amend its charter, article XI, section 2 was to be read in concert with article IV, section 1(a), which addresses the scope of initiative and referendum powers. *Id.* at 548, 162 P. at 500.

[83] *Id.* at 572-73, 162 P. at 508.

[84] *Id.* at 560, 162 P. at 504.

[85] *Id.* at 561, 162 P. at 504 (emphasis added).

[86] *Id.* at 572, 162 P. at 508. Although Harris did not indicate how or where Chief Justice McBride clarified the drafters' intent, later courts and writers found significance in the fact that McBride joined the unanimous *Rose* court and was also one of two dissenters in *Branch*. City of La Grande v. Pub. Employees Ret. Bd., 281 Or. 137, 143-44, 576 P.2d 1204, 1208-09 (1978); Cumfer, *supra* note 29, at 914. For a detailed discussion of *Rose*'s flaws, see ETTER, *supra* note 81, at 236-59. R

[87] 154 Or. 286, 59 P.2d 228 (1936).

[88] *Id.* at 289, 59 P.2d at 229.

[89] *Id.* at 291-92, 59 P.2d at 230-31.

[90] *Id.* at 298, 59 P.2d at 233.

impose, but that was "a far cry from [an enactment that] purports to authorize an appointive commission to 'approve, reject, or reduce the budget or any items therein,' even though the city has not exceeded any limitation fixed by the constitution or statute."[91] The court upheld the *Branch* court's *imperium in imperio* rule, holding that the law violated the home rule amendments to the extent that it authorized the commission to alter a locality's budget.[92]

Despite *Welch*, the next twenty-six years saw most courts following *Rose* and its predecessors[93] until 1962, when the Oregon Supreme Court yet again reinterpreted home rule in *State ex rel. Heinig v. City of Milwaukie*.[94] The main issue in *Heinig* was similar to that in *Branch*; namely, the city of Milwaukie challenged a legislative act requiring cities of a certain size to set up a civil service commission for its city firemen.[95] After citing a line of cases following the reasoning in *Branch*,[96] the court held that the legislative assembly did not have the authority to enact a law of general applicability relating to city government unless the subject matter of the enactment was of general concern to the state.[97] Justice O'Connell wrote for a unanimous court that judicial balancing was key and that "'[t]he real test is not whether the state or the city has an interest in the matter, for usually they both have, but whether the state's [or city's] interest . . . is paramount.'"[98]

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[91] *Id.* at 298, 59 P.2d at 233.

[92] *Id.* at 298, 59 P.2d at 233. The court further noted, "If such items of expenditure can be eliminated or reduced, in accordance with the judgment of members of a non-elective commission, then the right of local self government under the Home Rule Amendments of the constitution has become a hollow mockery." *Id.* at 298-99, 59 P.2d at 233.

[93] *E.g.*, Burton v. Gibbons, 148 Or. 370, 378-79, 36 P.2d 786, 789 (1934), *overruled in part by* State *ex rel.* Heinig v. City of Milwaukie, 231 Or. 473, 479, 373 P.2d 680, 683 (1962); City of Klamath Falls v. Or. Liquor Control Comm'n, 146 Or. 83, 93, 29 P.2d 564, 568 (1934); Tichner v. City of Portland, 101 Or. 294, 301, 200 P. 466, 468 (1921), *overruled in part by* City of Portland v. Welch, 154 Or. 286, 301, 59 P.2d 228, 234 (1936); Lovejoy v. City of Portland, 95 Or. 459, 471-74, 188 P. 207, 211-12 (1920); City of Portland v. Pub. Serv. Comm'n, 89 Or. 325, 334, 173 P. 1178, 1181 (1918); Colby v. City of Medford, 85 Or. 485, 534, 167 P. 487, 502 (1917).

[94] 231 Or. 473, 373 P.2d 680 (1962), *overruled by* City of La Grande v. Pub. Employees Ret. Bd., 281 Or. 137, 146-47, 576 P.2d 1204, 1210 (1978).

[95] *Id.* at 474, 373 P.2d at 681.

[96] *See id.* at 477 n.7, 373 P.2d at 683 n.7.

[97] *Id.* at 479, 373 P.2d at 683-84.

[98] *Id.* at 481, 373 P.2d at 684-85 (quoting AUSTIN F. MACDONALD, AMERICAN CITY GOVERNMENT AND ADMINISTRATION 79 (3d ed. 1941)).

Further, O'Connell squarely placed responsibility on the court to referee when two political agencies make conflicting claims of autonomy.[99] O'Connell advocated a balancing approach for the court in its role as referee, writing that "it is not necessary to regard all of the activities of a municipal department as either local or state-wide; some of the activities may be predominantly local, whereas others may be predominantly state-wide."[100] O'Connell, in dictum, also acknowledged that sovereignty emanated from the people, and nothing about that grant suggested

> a constructional preference for state legislation. In fact, there is reason to accept a contrary construction *favoring the charter over the statute* if we should take the view expressed by many that home rule is superior to state rule in carrying out the ideals of representative government. It has been urged that "Unless there is an imperative need that a service have statewide uniformity, it may be presumed that local agencies will perform it with greater public satisfaction, if not indeed with greater economy."[101]

Heinig was a victory for supporters of the expansive home rule initiative. Under the *Heinig* test, the court was designated to arbitrate the question of whether the issue involved was of predominantly local or state interest, creating a balancing test rather than the bright-line rule established in *Rose* and *Straw*. Although *Heinig* redefined the rule, that court did not rely on evidence of the home rule amendment founders' intent in reaching its decision.[102] This omission, whether intentional or not, may have proved to be *Heinig*'s Achilles' heel sixteen years later when the Oregon Supreme Court yet again reinterpreted Oregon's home rule amendment.

B. Home Rule, Interrupted: City of La Grande v. Public Employees Retirement Board

The court's ultimate reinterpretation of the home rule amendment came in *City of La Grande v. Public Employees Retirement Board*,[103] a case challenging a 1971 legislative enactment requiring all city, county, or district firefighters and police to be brought within the state's public employee retirement system un-

[99] *Id.* at 483-84, 373 P.2d at 686.

[100] *Id.* at 484-85, 373 P.2d at 686.

[101] *Id.* at 488, 373 P.2d at 688 (quoting Rodney L. Mott, *Strengthening Home Rule*, 39 NAT'L MUN. REV. 172, 175 (1950)) (emphasis added).

[102] Cumfer, *supra* note 29, at 914. R

[103] 281 Or. 137, 576 P.2d 1204 (1978).

less the public employer already provided equal or more extensive benefits.[104] Writing for a sharply divided court, Justice Linde construed the home rule amendments as mainly providing administrative shortcuts that "allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature."[105] Drawing back to the intent Justice Harris elucidated in *Rose*, Linde adopted an *Erie*-like test where the court looked to whether the state's regulatory effect on the locality was substantive or procedural.[106] If the effect was substantive, state law was superior; if the effect was on a locality's procedural policies, the local ordinance ruled. As Linde explained, "[e]xcept for limits on initiative and referendum . . . the [home rule] amendments do not purport to divide areas of substantive policy between the levels of government."[107] Accordingly, the four-justice majority held that where state law and local rule or ordinance conflicted, state law prevailed unless the ordinance pertained to local government structure or procedures.[108] In essence, the *La Grande* majority took a 180-degree turn from the *Heinig* balancing approach, advocating instead a test presuming legislative supremacy with virtually no judicial balancing.

In a vigorous and lengthy dissent, Justice Tongue claimed that the majority's decision drastically upset the balance of power between cities and states as to when home rule permits local autonomy over local interests.[109] Tongue cited several law review definitions of "home rule" that emphasized its basic purpose to stake out a limited area where local government could legislate for itself and further noted that "[a]lmost without exception, modern students of municipal affairs have urged the desirability of a broad grant of municipal initiative through the mechanism of home rule."[110] The crux of Tongue's argument was that a broader grant of home rule authority provides municipal govern-

[104] *Id.* at 139, 576 P.2d at 1206.

[105] *Id.* at 142, 576 P.2d at 1208.

[106] *Id.* at 142, 576 P.2d at 1208.

[107] *Id.* at 143, 576 P.2d at 1208.

[108] *Id.* at 156, 576 P.2d at 1215; *see also* Cumfer, *supra* note 29, at 914. **R**

[109] *La Grande*, 281 Or. at 157, 576 P.2d at 1215-16 (Tongue, J., dissenting).

[110] *Id.* at 160, 576 P.2d at 1217 (quoting Sandalow, *supra* note 17, at 652). **R**

ments the flexibility to govern themselves generally, without limiting their functionality and miring them in uncertainty.[111]

Tongue further accused the majority of substituting "legislative supremacy" for "local autonomy," noting the two types of state constitutional provisions for home rule: (1) local autonomy, in which a municipality is granted limited autonomy and the court decides the boundaries; or (2) legislative supremacy, in which legislative grace controls except in those purely local matters not preempted by state legislation.[112] In addition, Tongue contended that at the time voters adopted Oregon's amendment, California's and Missouri's home rule amendments favored local autonomy.[113] He observed that the language in Oregon's article XI, section 2 seemed to most closely resemble those states' home rule amendments with the differences in the text generally in accord with the notion of local autonomy.[114] Accordingly, Tongue concluded, it was more likely that the amendment framers favored local autonomy over legislative supremacy when they chose the words they did.[115]

Finally, Tongue charged the majority with overruling a line of what he characterized to be consistent decisions since *Welch*.[116] Although the court experienced an initial division between *Branch* and *Rose*, according to Tongue, the Oregon court had not ideologically budged from its decision readopting *imperium in imperio* in *Welch*.[117] Tongue then noted that *Heinig* upheld *Welch* and its "purpose . . . to make operative the concept that the closer those who make and execute the laws are to the citizens they represent[,] the better are those citizens represented."[118] By weakening home rule provisions, Tongue argued, the majority upset the balance between the state and its cities by presuming legislative supremacy, making a fundamental shift

111 *See id.* at 160 n.5, 576 P.2d at 1217 n.5.

112 *Id.* at 160, 576 P.2d at 1217 (quoting Kenneth E. Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 2 (1975)). Tongue was essentially describing home rule initiative and home rule immunity. *See supra* text accompanying notes 17-28. **R**

113 *La Grande*, 281 Or. at 161-63 & n.8, 576 P.2d at 1217-18 & n.8 (Tongue, J., dissenting).

114 *Id.* at 161-63 & n.8, 576 P.2d at 1217-18 & n.8.

115 *Id.* at 162, 576 P.2d at 1218.

116 *Id.* at 163, 576 P.2d at 1218.

117 *Id.* at 163, 576 P.2d at 1218.

118 *Id.* at 164, 576 P.2d at 1219 (quoting State *ex rel.* Heinig v. City of Milwaukie, 231 Or. 473, 481-82, 373 P.2d 680, 685 (1962)).

from the drafters' original intent.[119] As a parting shot, Tongue accused the majority of using *La Grande* as a "judicial *tour de force*," asserting that the court could have reached the same conclusion by applying the *Heinig* test, but instead legislated from the bench.[120]

Despite Tongue's vitriolic dissent, subsequent courts have followed *La Grande*,[121] and it remains the controlling law today. As a result, when a state law conflicts with a local regulation, generally the state law controls unless it affects the home rule's charter in procedural matters. For instance, to take an example provided by Linde in *La Grande*, a general state regulatory law imposing policy responsibilities or record-keeping, reporting, or negotiating requirements on individuals or entities contrary to their allocation under a local charter would not be valid under the home rule amendments.[122] Further, based on the substance–procedure divide and the narrow exceptions drawn in *La Grande*, arguably most—if not all—state laws or measures regarding land use will trump conflicting local ordinances or rules. This reality combined with the recent passage of Measure 37 spells bad news for those Oregon municipalities and regions applying their grant of home rule to control land use in an effort to combat metropolitan sprawl. Specifically, Metro, a quasi-governmental regional agency held up by urban planners as implementing a successful model of smart growth,[123] faces challenges in light of the *La Grande* rule and Measure 37.

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[119] *Id.* at 191-92, 576 P.2d at 1233.

[120] *Id.* at 191, 576 P.2d at 1233. Interestingly, Tongue's dissent provides some curious background on whether *Heinig* should have been revisited in *La Grande*. According to Tongue, none of the parties or amicus curiae contended in their briefs that *Heinig* should be overruled. *Id.* at 171-72, 576 P.2d at 1223. Prior to oral argument, the court requested the parties be prepared in oral argument to respond to questions regarding whether *Heinig* should be reconsidered. *Id.* at 172, 576 P.2d at 1223. At oral argument, counsel for a defendant suggested that *Heinig* be refined by substituting a "substantial or significant state interest" for "predominant state interest"; however, none of the parties advanced the theory that the court ultimately adopted. *Id.* at 172, 576 P.2d at 1223.

[121] *E.g.*, City of Portland v. Jackson, 316 Or. 143, 850 P.2d 1093 (1993); City of Portland v. Dollarhide, 300 Or. 490, 714 P.2d 220 (1986); City of Roseburg v. Roseburg City Firefighters Local No. 1489, 292 Or. 266, 639 P.2d 90 (1981); Springfield Util. Bd. v. Emerald People's Util. Dist., 191 Or. App. 536, 84 P.3d 167 (2004), *aff'd*, 339 Or. 631, 125 P.3d 740 (2005).

[122] *La Grande*, 281 Or. at 156 n.31, 576 P.2d at 1215 n.31. Justice Linde admitted that under the court's construction such a state and local conflict would be rare. *Id.* at 156 n.31, 576 P.2d at 1215 n.31.

[123] *See* sources cited *supra* note 13.

III

METRO AND MEASURE 37: IMMOVABLE OBJECT MEETS IRRESISTIBLE FORCE

"Keep Portland Weird" is a ubiquitous bumper sticker in the Portland area. Although the slogan refers to a movement to support local businesses, the sentiment might as well apply to Metro, the unique semigovernmental hybrid of home rule entity, regulatory enforcer, and special district covering Portland and parts of Multnomah, Clackamas, and Washington counties.[124] While most U.S. localities have constitutional or legislative grants of home rule autonomy,[125] Metro's scope of power is unusual, particularly concerning land use and controlled growth. Often called an "experiment," Metro has developed to provide a complex test case for many other cities throughout the country struggling to address sprawl and control growth.[126] However, this experiment faces what could be its downfall in Measure 37, a 2004 voter initiative penned by some of the most vocal critics of Oregon's land use planning regime.[127] Parts III.A and B of this Comment outline the history of land use planning in Oregon and Metro's origins and current structure. Part III.C then provides an overview of Measure 37's provisions, the debates surrounding its passage, and what it all may mean for Metro.

A. History of Metro

In 1973, in response to growing concerns regarding the loss of Oregon's farmland and natural resources to the state's growing cities, the legislature created a statewide comprehensive land use planning system through Senate Bills 100 and 101.[128] The bills, which called for a blend of centralized and decentralized regulation, created the Land Conservation and Development Commission (LCDC), an agency that enforces nineteen planning goals

[124] *See generally* Metro Home Page, *supra* note 11.

[125] The exceptions are Mississippi, Vermont, and Virginia, which are governed by Dillon's Rule. Darin M. Dalmat, Note, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 102-03, 138; *see supra* note 32 and accompanying text. R

[126] *See* Ethan Seltzer, *It's Not an Experiment: Regional Planning at Metro, 1990 to the Present*, *in* THE PORTLAND EDGE, *supra* note 13, at 59. R

[127] Oregonians in Action, *supra* note 15. R

[128] S.B. 100 & 101, 57th Or. Legis. Ass'y (1973); Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon's Measure 37*, 21 J.L. & POL. 397, 426-27 (2005).

that local governments must meet in formulating local comprehensive plans.[129] Goal 14 in particular requires localities to adopt expandable urban growth boundaries (UGBs), which include an estimated twenty-year land supply for expected residential, industrial, and commercial urban growth.[130]

In the decades preceding Senate Bill 100, Portland experienced gradual population decline, a recession, and an explosion in the number of "special districts" regulating services such as fire, water, zoning, sewers, and parks.[131] Mostly out of concern for consolidating these multitudinous districts, in 1963 the legislature established and funded the Portland Metropolitan Study Commission (PMSC) and charged it with preparing a "comprehensive plan for the furnishing of such metropolitan services as . . . desirable in the metropolitan area."[132] PMSC was also expected to consider a full range of options for regional governmental structures, such as annexation, intergovernmental agreements, consolidation of cities, or consolidation of cities and counties.[133] PMSC's initial recommendation to consolidate the governments in the Portland tri-county area was rejected by the state legislature in 1967.[134]

Meanwhile, in 1966, the United States Department of Housing

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[129] This setup is called a "two-tier" regionalist system by some writers. Barron, *supra* note 20, at 2382. In this system, regional governments set goals and manage matters affecting the region as a whole, freeing cities and municipalities within the region to make decisions on local matters. *Id.* at 2262, 2272-76. For the text of the nineteen comprehensive goals, see the LCDC web site, http://egov.oregon.gov/LCD/goals.shtml#Statewide_Planning_Goals (last visited Jan. 10, 2007). **R**

[130] OR. ADMIN. R. 660-015-0000(14) (2006), *available at* http://www.lcd.state.or.us/LCD/docs/goals/goal14.pdf, at 1; *see infra* text accompanying notes 164-73 (describing the UGB in Metro's region). **R**

[131] Aoki, *supra* note 128, at 427-28 & nn.149-50. Special districts are "pseudo-governments" created to provide services such as water, parks, sewers, and transportation outside of local government politics. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 375 (1990). Special districts can be problematic because positions within the districts are unelected and therefore unaccountable. Further, when one district devises a solution to a local need, that solution may not necessarily align with surrounding municipalities' policy interests. *Id.* at 376-77. **R**

Between 1941 and 1961, the number of special districts in the Metro tri-county area increased from 28 to 218, making Oregon, at the time, seventh in the nation for the number of special districts in a state. Carl Abbott & Margery Post Abbott, *Historical Development of the Metropolitan Service District*, METRO, May 1991, http://www.metro-region.org/article.cfm?articleID=2937.

[132] Abbott & Abbott, *supra* note 131, at Part II.

[133] *Id.*

[134] Aoki, *supra* note 128, at 428; Abbott & Abbott, *supra* note 131, at Part II.

and Urban Development required every metropolitan area in the country to form a "Metropolitan Planning Organization" to manage comprehensive regional planning.[135] PMSC responded by creating the Columbia Regional Association of Governments (CRAG).[136] Initially a voluntary-membership organization, CRAG was structured as a council of governments that represented area cities and counties.[137]

CRAG's efforts to create a comprehensive land use plan ran aground due to intergovernmental rivalries and other problems. Suburban delegates were part-time mayors and city council members who were already stretched too thin to effectively participate.[138] When delegates did participate, they were often torn between the needs of planning and protecting their communities and the possibility of compromising their local interests to the rest of CRAG's members.[139] Unstable funding also severely limited CRAG's ability to function. Although the group received some federal funding, it depended mainly on member jurisdictions for revenue.[140] Because membership was voluntary, members could threaten to leave CRAG and take their money with them.[141] In 1973, membership became mandatory for Multnomah, Clackamas, and Washington counties; this move stabilized funding, but partisanship still ran high, especially since Portland held roughly a quarter of CRAG's votes and was in a powerful position to define regional goals.[142] Further criticism plagued CRAG due to the distinct lack of public involvement in planning; although a 1976 ballot measure seeking to abolish CRAG failed, the group was never popular among Oregon voters.[143]

While CRAG floundered, PMSC formed the Metropolitan Service District (MSD) in 1970.[144] PMSC created MSD to be a governmental "box" that could contain all the tri-county service

135 Abbott & Abbott, *supra* note 131, at Part II.

136 *Id.*

137 *Id.*

138 *Id.* at Part V.

139 *Id.*

140 *Id.*

141 *See id.* The members' strong leverage was evident: in 1970, CRAG's "Interim Regional Land-Use Plan" was little more than the local jurisdictions' plans collated together with some open spaces "penciled in." CARL ABBOTT, PORTLAND: PLANNING, POLITICS, AND GROWTH IN A TWENTIETH-CENTURY CITY 242 (1983).

142 Abbott & Abbott, *supra* note 131.

143 *See* ABBOTT, *supra* note 141, at 242; Abbott & Abbott, *supra* note 131, at Part V.

144 Abbott & Abbott, *supra* note 131, at Part IV.

districts and their attendant responsibilities that voters or the legislature assigned to it.[145] In May 1970, voters approved MSD by a 95,753 to 82,400 vote.[146] MSD drew its seven-member board from local elected officials with its initial responsibilities encompassing waste management.[147] Unfortunately for the fledgling organization, voters rejected providing MSD with a tax base, leaving MSD with few resources to fulfill its existing and potentially new duties.[148]

Finally, in 1977, the legislature proposed combining CRAG's planning responsibilities with the functional scope of MSD.[149] The proposal showed up on the 1978 ballot as Measure 6 and passed by 20,000 votes, a surprising margin even to those who promoted the measure.[150] A reconstituted MSD began operating in January 1979.[151] Throughout the 1980s, MSD went through growing pains by fleshing out its functions and procedures, though it was still hampered by financial issues and unclear boundaries as to the extent of its powers.[152] In 1990, voters approved a measure that became a constitutional amendment granting MSD power to adopt a home rule charter.[153] Finally, in 1992, Portland metropolitan area voters adopted a home rule charter for MSD, which at this point changed its name to Metro.[154]

Today, Metro exercises centralized regulatory authority from its council[155] that in turn is checked by committees of local gov-

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145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*

149 Funded by a grant from the National Academy for Public Administration, the Tri-County Local Government Planning Commission developed the plan for combining CRAG and MSD. *Id.*

150 *Id.* Confusing ballot wording (i.e, "Reorganize Metropolitan Service District, Abolish CRAG") may have had something to do with the wide margin of victory. Voters hoping to eliminate the area's metropolitan planning agencies may have unwittingly voted to create a more powerful one. *Id.*

151 *Id.* at Part VII.

152 *See generally id.*

153 OR. CONST. art. XI, § 14; ABBOTT, *supra* note 13, at 160. **R**

154 ABBOTT, *supra* note 13, at 160. **R**

155 Nearly all regional home rule structures appoint their leaders; in contrast, Metro has an elected governing board, or council. Metro's council is made up of seven councilors, one of whom is elected president by popular vote and six of whom are nominated and elected by individual districts within the Metro area. Metro Charter § 16(2) (2003), *available at* http://www.metro-region.org/library_docs/about/charter.nov2000.may2002.clean.03.pdf. Each councilor serves a four-year

ernment representatives.[156] The 1992 home rule charter gave voters within Metro's districts the ability to make changes and improvements to Metro's structure and responsibilities.[157] By its home rule authority, Metro has any powers that could be granted by the United States or Oregon legislature.[158] Metro's charter construes its subjects of jurisdiction broadly as "matters of metropolitan concern."[159] On the whole, Metro may take on additional functions with the approval of the Metropolitan Policy Advisory Committee, a committee of twenty-eight members representing governing bodies of the counties, cities, and special districts within Metro.[160]

Metro's charter also lays out its scope of authority, which encompasses management and planning functions. Metro's management authority extends over the regional zoo, water sources and storage, parks, convention and recreation facilities, and waste.[161] Metro's current planning responsibilities encompass and realize CRAG's original purpose to create a regional framework plan as a basis for local government comprehensive land use plans and regulations.[162] Metro's regional framework plan addresses regional transportation and mass transit systems planning; management of the UGB; protection of natural resources on lands outside the UGB; assessment of housing density, urban design, and settlement patterns; acquisitions of parks, open spaces, and recreational facilities; water sources and storage; and other development and land use planning issues.[163]

The regional framework plan further mandates Metro to formulate, apply, and adapt the UGB.[164] As explained above, the LCDC requires regional land use governing bodies to create an expandable UGB that encompasses the area's estimated supply of developable land for the next twenty years.[165] Metro created

term. *Id.* § 16(3). Aside from the council president, an auditor is also elected regularly and serves Metro in a full-time capacity for a four-year term. The auditor, who has no executive power, is responsible for reviewing finances and making recommendations to the council for remedial actions. *Id.* § 17.

156 *Id.* §§ 7(2)(a), 26; *see* Aoki, *supra* note 128, at 429-30.

157 Aoki, *supra* note 128, at 429.

158 Metro Charter, *supra* note 155, § 9.

159 *Id.* § 4.

160 *Id.* §§ 7(2)(a), 26; Aoki, *supra* note 128, at 429-30.

161 Metro Charter, *supra* note 155, § 5(2)(b).

162 *Id.* § 5(2); Aoki, *supra* note 128, at 431.

163 Metro Charter, *supra* note 155, § 5(2)(b).

164 *See* Aoki, *supra* note 128, at 432.

165 *See supra* text accompanying notes 128-29. R

its first UGB in 1979, which embraced 236,000 acres and crossed city and county lines.[166] In 1988, Metro's councilors realized that they lacked a standard process for amending Metro's UGB.[167] In response, Metro developed its "Region 2040" plan to accommodate up to a million more residents in four core counties.[168]

Region 2040 started as an effort to determine how to expand the UGB and ended with a debate over how to constrain expansion.[169] Overall, the plan anticipates sharply increased density in central Portland in six regional growth centers and along transit corridors.[170] The intent of establishing the UGB is to prevent sprawl by providing for "an orderly and efficient transition from rural to urban use."[171] In effect, the UGB creates a dual land market that assigns different values to acreage inside and outside the boundary.[172] As an additional measure to avoid too much density, Metro added rural reserves within its UGB.[173]

Metro's Region 2040 plan and UGB are worth little if Metro lacks the power to enforce its provisions. Just as Metro's plans must comply with LCDC's nineteen planning goals, Metro's charter provides that counties and cities within the Metro district may engage in comprehensive planning and regulation as long as

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166 ABBOTT, *supra* note 13, at 162-63; Aoki, *supra* note 128, at 432. For a current map showing the UGB, see Map of the Urban Growth Boundary, May 2006, http://www.metro-region.org/library_docs/land_use/may06ugb.pdf. **R**

167 ABBOTT, *supra* note 13, at 166. **R**

168 *Id.* at 166-67.

169 *Id.* at 167.

170 *Id.* at 168.

171 *Id.* at 163 (quoting language from LCDC Goal 14 on urbanization). Abbott states that the UGB seems to have met its goals according to census data. *Id.* at 169. Since the UGB was created in 1979, the area of developed land within the UGB has increased more slowly than it had in the previous thirty years, and the previous downward trend in residential density has reversed. *Id.* Between 1980 and 1994, the metropolitan population increased by twenty-five percent but the land designated for urban use increased by just sixteen percent. *Id.* This trend contrasts other American metropolitan areas that, at the time, saw a much greater disparity between the rapid growth in urbanized land and slower growth in population. *See id.*

172 *Id.* at 163. Metro's UGB is particularly noteworthy in that it has served as a muse for performance artist Linda K. Johnson, who in 1999 camped in thirty-six-hour intervals at six points on the UGB, chatting with visitors. *Id.* at 167-68. The result, according to Johnson, was a new understanding of how the UGB affects "every single solitary aspect of the way we live . . . [including] traffic, education, taxes, our desires about housing and architecture." *Id.*

173 METRO, THE NATURE OF 2040: THE REGION'S 50-YEAR PLAN FOR MANAGING GROWTH (2000), *available at* http://www.metro-region.org/library_docs/land_use/2040history.pdf.

their plans comport with Metro's framework.[174] Though its charter seems to grant Metro this authority, the question still arises: if a city within Metro's district disagrees with the plan, can Metro require the city to comply? The next section addresses the answer to this question, courtesy of the Oregon Court of Appeals.

B. The Court's Interpretation of Metro's Home Rule Powers

In 2005, the Oregon Court of Appeals answered that question affirmatively in *City of Sandy v. Metro*,[175] holding that Metro has the power to require local governments to adopt specific provisions.[176] In this appeal from a Land Use Board of Appeals decision, Hillsboro disputed Metro's designation of a site that in effect required Hillsboro to restrict commercial uses to keep land available for industrial development.[177] Hillsboro argued that Metro, by mandating geographically and textually specific local legislation, exceeded its jurisdictional authority—in other words, Metro's provisions were so specific that they established an unconstitutional mandate.[178]

The court found that Metro's powers were conferred by statute and the constitution and therefore Metro's enactment fit within its authority.[179] Although Metro required Hillsboro to designate industrial zones, Hillsboro still had the freedom to choose the locations of these zones.[180] In its ruling, the court analogized to its reasoning in *La Grande*: just as general state laws prevail over conflicting local rules unless the state laws interfere with a locality's ability to choose its political form, Metro's provision regarding industrial zones prevailed because it did not interfere with Hillsboro's political form.[181] While the *Sandy* opinion acknowledged Metro's home rule authority over cities within its

[174] Metro Charter, *supra* note 155, § 5(2)(c), (e). In effect, a three-tier system is formed by the LCDC providing goals for Metro, which in turn provides goals for each member district. *See supra* note 129 and accompanying text.

[175] 200 Or. App. 481, 115 P.3d 960 (2005).

[176] *Id.* at 494, 115 P.3d at 967.

[177] *Id.* at 486, 115 P.3d at 963.

[178] *Id.* at 492-93, 115 P.3d at 966; Aoki, *supra* note 128, at 431.

[179] *Sandy*, 200 Or. App. at 494-96, 115 P.3d at 967-68.

[180] *See id.* at 495-96, 115 P.3d at 968.

[181] *Id.* at 495-96, 115 P.3d at 967-68 (citing City of La Grande v. Pub. Employees Ret. Bd., 281 Or. 137, 576 P.2d 1204 (1978)). Further, in his concurrence, Judge Schuman reiterated that state substantive law is superior to regional rules, citing the rule in *La Grande* that "[t]he state has presumptive and plenary authority in matters of 'substantive social, economic, or other regulatory policy' including land use regulation, and to the extent that cities have independent authority, it is conferred on

district, the specter of *La Grande* loomed with reminders that state substantive law prevails over Metro. This pertinent reminder became much more compelling for Metro when Oregon voters passed Measure 37, a coup de grace for critics of Oregon's land use system.

As mentioned above, Oregon's land use system employs a "two-tier" setup in which the state and LCDC set broad goals but grant localities a degree of autonomy in planning, implementation, governance, and oversight.[182] Although successful for controlling growth, this system also fuels the privatist movement, which sees the two-tier system as one of overregulation and trampled individual rights. A UGB by its nature creates disparate land values on either side of the line. One can imagine a property owner within a quickly growing portion of the UGB platting out her land, selling the plats to developers, and counting her proceeds as a subdivision rises. Her neighbor, looking in from designated farmland outside the UGB, can only plant,[183] sell his land at a fraction of what his neighbor on the other side of the UGB received, or do nothing. Based on scenarios like this, it is not surprising that many private landowners on the less viable side of the UGB, watching neighbors cash in on rapidly inflating land values, feel like they are taking an unreasonable and unfair financial hit for the greater good. This privatist frustration came to a head in the form of Measure 37.

C. Enter Kong: Measure 37[184]

In November 2004, Oregon voters passed Measure 37 with sixty-one percent of the vote.[185] In essence, Measure 37 provides that if a public entity enacts or enforces a land use regulation that results in a loss of land value, the entity must compensate the owner for the difference in value or waive the land use restriction.[186] While proponents promoted the initiative as a system

them by the state charter." *Id.* at 499, 115 P.3d at 970 (Schuman, J., concurring) (citation omitted).

[182] *See supra* note 129 and accompanying text. **R**

[183] That is, he can plant if the land actually supports crops. *See* Hagans, *supra* note 14. **R**

[184] Measure 37 is codified at ORS 197.352 (2005). See the Appendix, *infra,* for the full text.

[185] Or. Sec'y of State Election Div., *supra* note 16; *Election 2004: How Oregon Voted*, OREGONIAN (Portland), Nov. 4, 2004, at D6.

[186] OR. REV. STAT. § 197.352(1); *see infra* Appendix. The measure provides for exclusions where the regulation is required for prohibiting nuisances, ensuring pub-

creating just compensation for ordinary folks when government regulation constitutes a taking of private property,[187] the actual language creates civil claims when a land use restriction causes *any* loss in property value.[188] Further, the measure does not provide a source for funds from which the public body can compensate; in effect, the government has no real choice but to waive a challenged land use restriction.[189]

In October 2005, a judge on the Marion County Circuit Court ruled Measure 37 unconstitutional;[190] however, the Oregon Supreme Court quickly reversed.[191] Writing for a unanimous bench, Chief Justice Paul De Muniz declared the measure constitutional on all grounds, including two additional challenges that the plaintiffs renewed on review.[192] In his conclusion, De Muniz clarified the court's role, explaining that

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lic health or safety, complying with federal law, prohibiting nude dancing or selling pornography, or where the regulation was enacted prior to the landowner's (or a family member's) acquisition. § 197.352(3); *see infra* Appendix.

187 Measure 37 proponents garnered support through the stories of family farmers, such as elderly widow Dorothy English. In radio ads, English plaintively explained how land use laws prevented her from dividing and passing on to her children the forty acres she had owned for over fifty years. Blaine Harden, *Anti-Sprawl Laws, Property Rights Collide in Oregon*, WASH. POST, Feb. 28, 2005, at A1. "I'm 91 years old, my husband is dead and I don't know how much longer I can fight," she said. *Id.* According to a *Washington Post* investigation of state records, however, most of the money backing the measure came from timber companies and real estate interests likely to profit when large tracts of land are freed for development. *Id.*

188 Aoki, *supra* note 128, at 434.

189 *Id.* at 435. Notably, however, in August 2005, Metro's Measure 37 task force recommended a plan requiring property owners in rural areas tapped for urban growth to give the government part of their profits from property sales to pay for Measure 37 claims in areas where development is undesirable. Laura Oppenheimer, *Idea Shines Light on M37 Gloom*, OREGONIAN (Portland), Aug. 22, 2005, at B1. These funds also would finance building infrastructure (such as roads and sewers) in "desirable" areas. *Id.*

190 MacPherson v. Dep't of Admin. Servs., Civil No. 05C10444 (Cir. Ct. Marion County, Or., Oct 14, 2005), *available at* http://www.ojd.state.or.us/mar/documents/Measure37.pdf. The trial court held that Measure 37 violated the following Oregon Constitution sections: (1) article IV, section 1(1), (2)(a), and (3)(a) (granting plenary power to the legislature); (2) article I, section 20 (equal privileges and immunities clause); (3) article I, section 22 (prohibiting certain suspensions of laws); and (4) article III, section 1 (separation of powers clause). *Id.* at 23. The trial court also concluded that Measure 37 violated the Due Process Clause in the Fourteenth Amendment of the United States Constitution. *Id.* at 21-22.

191 MacPherson v. Dep't of Admin. Servs., 340 Or. 117, 130 P.3d 308 (2006).

192 *Id.* at 125, 141, 130 P.3d at 313-14, 322. Plaintiffs renewed challenges to Measure 37's constitutionality under (1) article IV, section 24 (sovereign immunity waiver clause) and (2) article III, section 1 (separation of powers clause). *Id.* at 125, 130 P.3d at 313-14.

> [w]hether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview. Our only function in any case involving a constitutional challenge to an initiative measure is to ensure that the measure does not contravene any pertinent, applicable constitutional provisions. Here, we conclude that no such provisions have been contravened.[193]

Although the plaintiffs did not raise—nor did the court explore—whether Measure 37 comported with article XI, section 2, the court's analysis of whether Measure 37 intruded on the plenary power to legislate provides some indication of how the court would look at such a challenge. In interpreting the plenary power clauses of the Oregon Constitution,[194] the court determined that the people and the legislature share the power to propose, enact, and reject laws.[195] Any limits on legislative power had to be grounded, either expressly or impliedly, within the provisions of the constitution.[196] In light of this principle, De Muniz wrote:

> [P]laintiffs cite no constitutional provision—and we know of none—that either expressly or impliedly limits the power of the Legislative Assembly or the people, exercising their initiative power, to authorize state or local entities to decide, in accordance with Measure 37, whether to pay just compensation or to modify, remove, or not apply certain land use regulations.
>
> . . . Nothing in Measure 37 forbids the Legislative Assembly or the people from enacting new land use statutes, from repealing all land use statutes, or from amending or repealing Measure 37 itself. Simply stated, Measure 37 is an *exercise* of the plenary power, not a *limitation* on it.[197]

In other words, because Measure 37 does not limit the legislature's ability to make laws, it does not violate the plenary power provision. Under this reasoning and considering the rule in *La Grande*, the question of whether Measure 37 limits Metro's home rule powers under article XI probably would prompt a similar answer—that is, because Measure 37 is a substantive, not procedural, state law and does not impact Metro's political structure, the measure is constitutional under the current state of home rule in Oregon. Should Metro persuade the court to revisit

193 *Id.* at 141, 130 P.3d at 322.
194 OR. CONST. art. IV, §§ 1(1), (2)(a), (3)(a).
195 *MacPherson*, 340 Or. at 126-28, 130 P.3d at 314-15.
196 *Id.* at 127, 130 P.3d at 314.
197 *Id.* at 128, 130 P.3d at 315.

La Grande, however, it may have a compelling argument that its land use planning is precisely the sort of power the home rule amendment drafters hoped to grant local governments.

IV

"GORILLA" TACTICS: METRO'S BEST RESPONSE TO MEASURE 37

In response to Measure 37, Metro revised its code and created procedures for responding to Measure 37 claims.[198] Overall, the code encourages compliance with filing procedures by ensuring that compliant claims get addressed first.[199] Further, section 2.21.050 sets up rules for hearings and requires that within 180 days of when a claim is filed, Metro will determine whether the claim qualifies under Measure 37's provisions.[200] If the claim qualifies, Metro will either provide relief in the form of compensation or waiver, or resolve to modify or remove the land use restriction at issue.[201] Section 2.21.070 of the code carves out some leeway for Metro, allowing it to place any conditions on its action, such as conservation easements and deed restrictions as Metro deems "appropriate to achieve purposes of this chapter."[202] Moreover, if Metro grants a waiver, the claimant cannot bring any further Measure 37 claims involving the subject property.[203]

The preceding paragraph provides a descriptive account of Metro's response to Measure 37. However, the real question is normative: what *should* Metro's response be as a home rule entity? As the law currently stands, Measure 37 likely will remain an irresistible—i.e., constitutionally sound—force for Metro in light of *MacPherson* and so long as *La Grande* continues to be controlling. However, just as the courts' interpretation of Oregon's home rule amendment dramatically shifted over its first ninety-odd years, the time may be ripe for the court to reexamine *La Grande* and revive local governmental autonomy under home rule.

As explained above, like other states with constitutional home

198 PORTLAND METRO. SERV. DIST., OR., METRO CODE ch. 2.21 (2006), *available at* http://www.metro-region.org/library_docs/about/chap221.pdf.

199 *Id.* § 2.21.050.

200 *Id.*

201 *Id.* § 2.21.060.

202 *Id.* § 2.21.070.

203 *Id.*

rule amendments, Oregon's *imperio in imperium* home rule power, by definition, creates a state within a state and grants local government power to initiate its own legislation, while giving ordinances regulating local matters immunity from state interference.[204] This principle is inherent in U'Ren and the other framers' intent, especially in light of the issues that arose from other states' charters at the time. As Justice Tongue wrote in his *La Grande* dissent:

> [I]t is significant that in Oregon the "home rule" amendments provided (in Art XI, § 2) not only that the voters of every city were granted the power to enact and amend their city charters "subject to the Constitution and *criminal* laws of the State of Oregon" but also provided (in Art IV, § 1(a), now § 1(5)) that the initiative and referendum powers as previously "reserved" to the people were extended to the voters of every city "as to *all local, special and municipal legislation of every character*."[205]

In other words, the specific changes the drafters made from other states' amendments strongly suggest that the framers intended a broader construction of local autonomy than other states had sanctioned and the *La Grande* majority endorsed. In effect, *La Grande* paralyzed localities by narrowly construing local powers to purely procedural matters and thus rendered home rule largely meaningless, particularly for those who believe that substantive urban planning is best left to local governments.

The solution, however, is not to adopt wholesale Tongue's reasoning in his *La Grande* dissent. Although Tongue forcefully elucidated the many weaknesses in the *La Grande* majority's holding, his call to look to the court as an arbitrator, as Professors Sandalow and Vanlandingham prescribed at the time, would not place Metro or other local governments in a significantly better position than they are under *La Grande*. Over decades, Oregon courts swung back and forth between curtailing and enriching local autonomy under home rule; should the court overrule *La Grande* and readopt *Heinig*, Metro and other localities may trade greatly limited home rule powers for uncertain powers constantly subject to litigation and invalidation by Oregon courts.

To prevent this potential uncertainty and increased caseload,

[204] *See supra* text accompanying notes 29-34. **R**

[205] City of La Grande v. Pub. Employees Ret. Bd., 281 Or. 137, 162, 576 P.2d 1204, 1218 (1978) (Tongue, J., dissenting).

the court should consider a position partway between *Heinig* and *La Grande*. This position would partially reimplement *Heinig*'s "predominant interests" tests by granting broad home rule initiative to specific substantive areas of law that have a predominantly local interest and accordingly benefit most from local decision-making. Metro's responsibilities for maintaining the UGB and designating its accompanying zoning and development provisions are substantive areas of law that primarily concern the locality. Accordingly, the court should grant Metro and other UGB-managing localities autonomy in their UGB management capacities. As a guide for the court in implementing this change, Professor David Barron provides a model for local autonomy in urban planning and explains why local antisprawl measures should enjoy greater home rule initiative.[206]

Barron's proposal begins with a model home rule provision advocated in the 1950s by the American Municipal Association in response to the influx of suburbanization in American metropolitan areas after World War II.[207] The provision presented a compelling balance of home rule initiative and immunity. In short, the provision permitted localities to act on an array of issues regardless of whether they were of local interest; however, the state retained unlimited preemption powers.[208] This framework purported to empower local governments to address the bad effects of suburbanization while retaining for the state power to "fashion the most sensible rules for the incorporation of new municipalities or the alteration of local boundaries, whether through annexation, consolidation, or dissolution."[209]

Like the American Municipal Association model, Barron proposes broadening the scope of home rule initiative beyond a local versus state interest framework to specifically grant localities autonomy to enact substantive laws to combat sprawl.[210] Barron's proposal, however, abrogates state preemption power; he argues

[206] Barron, *supra* note 20, at 2364-65. It is worth noting that Barron's article focuses more on changes to home rule by constitutional amendments than by common law, as this Comment prescribes. Accordingly, Metro may have another potential tool in its back pocket to protect the UGB: persuading Oregon voters to amend the constitutional home rule provision. Although this option falls outside of this Comment's scope, Barron's reasoning and proposal provide a compelling model for Metro and the court should Metro persuade it to reconsider *La Grande*. **R**

[207] *Id.* at 2325-26.

[208] *Id.* at 2326.

[209] *Id.* at 2327

[210] *Id.* at 2364-65.

this change is necessary in light of evidence that "the state often contributes to sprawl through judicial determinations that state statutes—such as zoning enabling acts—preempt certain local powers of initiative that might promote a more compact pattern of development."[211] Barron argues that clearly stated requirements for state preemption "would instruct courts to construe narrowly the scope of state preemption of local actions that serve the broad goals of anti-sprawl reform—namely, those that produce affordable housing, combat housing discrimination, or direct development toward already developed areas."[212]

Dispensing limitations based on whether the concern is statewide or local, Barron argues, and replacing them with general grants of power would provide a useful avenue for those closest to sprawl issues to develop creative solutions.[213] In this scenario, Barron further asserts, states also should curb their preemption power in order to allow localities to fully realize the substantive purposes that home rule authority confers and provide some assurance that localities' actions are unlikely to be later litigated or invalidated.[214] In support of his proposal, Baron writes that the early home rulers sought limits to local power

> to establish preconditions for cities themselves to respond more effectively to the problems they faced than had been possible under the prior legal structure. Thus, the limits that the early home rulers favored—and all of them favored some limits—were always accompanied by requests for the removal of prohibitions on the exercise of certain legal powers. . . . The purpose of reform, therefore, was not to disengage local power. It was . . . to give "new life" through a new package of grants and limitations that would transform local power.[215]

Should Oregon adopt Barron's proposal for redefining home rule, Metro stands to benefit in several ways. Obviously, Barron's proposal provides more certainty for Metro in that it could enforce its provisions without fear of state preemption. Further, by concurrently expanding home rule for the local governments within Metro's boundaries, Metro may see its UGB fortified. As Barron explains, Metro has an interest in maintaining housing affordability within the UGB, because if housing becomes too

211 *Id.* at 2365-66.
212 *Id.* at 2366.
213 *Id.* at 2365.
214 *Id.* at 2366.
215 *Id.* at 2368.

expensive, political pressure to expand the UGB may become substantial.[216] A Metro survey revealed that none of the region's municipalities have enacted zoning measures requiring affordable housing because state law expressly prohibits local governments from enacting such measures.[217] Accordingly, if localities like Hillsboro received a broader grant of home rule, they could arguably enact measures ensuring affordable housing, thus enhancing Metro's ability to retain the UGB.

Just as Metro could benefit from localities enjoying greater autonomy under a broader grant of home rule initiative, so might the state benefit from Metro's home rule power packing more substantive punch. As explained above, broad home rule initiative leaves substantive decision-making to those most affected by the consequences of local problems and solutions. Barron and Metro's findings on how limited home rule chokes local efforts to maintain affordable housing easily deflates the argument that a grant of state preemption is necessary to prevent "white flight." On the contrary, it is precisely the *lack* of home rule autonomy that Portland-area localities can exercise that promulgates the gulf between the wealthy and poor, the suburbs and the city. In essence, a broader grant of urban planning power through home rule can allow Metro to address these local problems with more individualized solutions while freeing the state to focus on the larger issues impacting the state as a whole.

Finally, expanded home rule initiative powers granted to Metro and localities may also benefit Measure 37's proponents. Granting Metro more autonomy allows it to devise local solutions and experiment with creative compromises for those unhappy with its land use designations and the UGB. This increased local home rule autonomy can go a long way in keeping housing affordable within the UGB. As housing costs are kept lower, land values within the UGB become less inflated, thus blurring the line dividing those inside and outside the UGB and making the need for Measure 37 claims less acute. Rather than bludgeon the UGB with the crude tool that is Measure 37, a broad grant of home rule can equip Metro with a surgeon's knife to carve out individualized solutions and more equitably disburse the benefits and burdens of specific land use provisions.

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[216] *Id.* at 2382.
[217] *Id.*

CONCLUSION

As Chief Justice De Muniz wrote in *MacPherson*, "Whether Measure 37 as a policy choice is wise or foolish, farsighted or blind, is beyond this court's purview."[218] To a degree, the same sentiment goes for this Comment. As a substantive matter, one may be hard-pressed to deny any Oregon resident—especially small family farmers and individual landowners—the maximum value their land could realize. However, one also can easily see how a broad, blunt instrument like Measure 37 could, like King Kong, sweep away the Portland region's meticulously scrutinized urban plan. Whether Measure 37 will truly eviscerate Metro's UGB or simply represent another element in Metro's "experiment" remains the topic of debate and discussion in legal, urban planning, and local government circles. What is certain about Measure 37 is its potential to reinvigorate the debate on what exactly home rule means in Oregon and, more specifically, how Metro should define its powers under Oregon's home rule provision. As Professor Vanlandingham wrote, home rule is not assured by a constitutional amendment but by localities aggressively seeking to "protect and advance their proper interests."[219] By arguing for another adjustment in the long line of shifts concerning what home rule means in Oregon, Metro may be able to charm the eponymous primate voters escorted to its front door.

[218] MacPherson v. Dep't of Admin. Servs., 340 Or. 117, 141, 130 P.3d 308, 322 (2006).

[219] Vanlandingham, *supra* note 1, at 314.

APPENDIX
TEXT OF MEASURE 37 (CURRENTLY ORS 197.352)

The following provisions are added to and made a part of ORS chapter 197:

(1) If a public entity enacts or enforces a new land use regulation or enforces a land use regulation enacted prior to December 2, 2004, that restricts the use of private real property or any interest therein and has the effect of reducing the fair market value of the property, or any interest therein, then the owner of the property shall be paid just compensation.

(2) Just compensation shall be equal to the reduction in the fair market value of the affected property interest resulting from enactment or enforcement of the land use regulation as of the date the owner makes written demand for compensation under this section.

(3) Subsection (1) of this section shall not apply to land use regulations:

(A) Restricting or prohibiting activities commonly and historically recognized as public nuisances under common law. This subsection shall be construed narrowly in favor of a finding of compensation under this section;

(B) Restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes, health and sanitation regulations, solid or hazardous waste regulations, and pollution control regulations;

(C) To the extent the land use regulation is required to comply with federal law;

(D) Restricting or prohibiting the use of a property for the purpose of selling pornography or performing nude dancing. Nothing in this subsection, however, is intended to affect or alter rights provided by the Oregon or United States Constitutions; or

(E) Enacted prior to the date of acquisition of the property by the owner or a family member of the owner who owned the subject property prior to acquisition or inheritance by the owner, whichever occurred first.

(4) Just compensation under subsection (1) of this section shall be due the owner of the property if the land use regulation continues to be enforced against the property 180 days after the owner of the property makes written demand for compensation

under this section to the public entity enacting or enforcing the land use regulation.

(5) For claims arising from land use regulations enacted prior to December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of December 2, 2004, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner of the property, whichever is later. For claims arising from land use regulations enacted after December 2, 2004, written demand for compensation under subsection (4) shall be made within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

(6) If a land use regulation continues to apply to the subject property more than 180 days after the present owner of the property has made written demand for compensation under this section, the present owner of the property, or any interest therein, shall have a cause of action for compensation under this section in the circuit court in which the real property is located, and the present owner of the real property shall be entitled to reasonable attorney fees, expenses, costs, and other disbursements reasonably incurred to collect the compensation.

(7) A metropolitan service district, city, or county, or state agency may adopt or apply procedures for the processing of claims under this section, but in no event shall these procedures act as a prerequisite to the filing of a compensation claim under subsection (6) of this section, nor shall the failure of an owner of property to file an application for a land use permit with the local government serve as grounds for dismissal, abatement, or delay of a compensation claim under subsection (6) of this section.

(8) Notwithstanding any other state statute or the availability of funds under subsection (10) of this section, in lieu of payment of just compensation under this section, the governing body responsible for enacting the land use regulation may modify, remove, or not to apply the land use regulation or land use regulations to allow the owner to use the property for a use permitted at the time the owner acquired the property.

(9) A decision by a governing body under this section shall not be considered a land use decision as defined in ORS 197.015(10).

(10) Claims made under this section shall be paid from funds, if any, specifically allocated by the legislature, city, county, or

metropolitan service district for payment of claims under this section. Notwithstanding the availability of funds under this subsection, a metropolitan service district, city, county, or state agency shall have discretion to use available funds to pay claims or to modify, remove, or not apply a land use regulation or land use regulations pursuant to subsection (6) of this section. If a claim has not been paid within two years from the date on which it accrues, the owner shall be allowed to use the property as permitted at the time the owner acquired the property.

(11) Definitions—for purposes of this section:

(A) "Family member" shall include the wife, husband, son, daughter, mother, father, brother, brother-in-law, sister, sister-in-law, son-in-law, daughter-in-law, mother-in-law, father-in-law, aunt, uncle, niece, nephew, stepparent, stepchild, grandparent, or grandchild of the owner of the property, an estate of any of the foregoing family members, or a legal entity owned by any one or combination of these family members or the owner of the property.

(B) "Land use regulation" shall include:

(i) Any statute regulating the use of land or any interest therein;

(ii) Administrative rules and goals of the Land Conservation and Development Commission;

(iii) Local government comprehensive plans, zoning ordinances, land division ordinances, and transportation ordinances;

(iv) Metropolitan service district regional framework plans, functional plans, planning goals and objectives; and

(v) Statutes and administrative rules regulating farming and forest practices.

(C) "Owner" is the present owner of the property, or any interest therein.

(D) "Public entity" shall include the state, a metropolitan service district, a city, or a county.

(12) The remedy created by this section is in addition to any other remedy under the Oregon or United States Constitutions, and is not intended to modify or replace any other remedy.

(13) If any portion or portions of this section are declared invalid by a court of competent jurisdiction, the remaining portions of this section shall remain in full force and effect.