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The Partly Fulfilled Promise of Home Rule in Oregon

In 1906, Oregon voters approved the “Home Rule Amendment” to the Oregon Constitution.¹ Enshrined in article XI, section 2, the amendment allows cities to claim extensive lawmaking authority through their municipal charters.² Unlike many other states’ home-rule provisions, article XI, section 2 has proved remarkably durable.³ Deft judicial interpretations of its broad, general language have facilitated a run of 103 years and counting. During this time, Oregon’s cities have enjoyed a fair amount of autonomy over social and economic policy. But in recent years the legislature and the voters—through initiative—have undercut that autonomy in important ways. In part due to a propensity for subject-specific preemption,

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¹ *City of Portland v. Jackson*, 316 Or. 143, 151, 850 P.2d 1093, 1097 (1993). Interestingly, “home rule” as such is not mentioned in article XI, section 2. See *City of La Grande v. Pub. Employees [sic] Ret. Bd.*, 281 Or. 137, 140 n.2, 576 P.2d 1204, 1201 n.2 (1978), *aff’d on reh’g*, 284 Or. 173, 586 P.2d 765 (1978). Although “home rule” is susceptible to many definitions, *id.*, I use it to mean the state’s delegation to cities of the power to engage in substantive policymaking. See Paul Diller, *Intrastate Preemption*, 87 B.U.L. REV. 1113, 1114 (2007).

² *City of La Grande*, 281 Or. at 140, 576 P.2d at 1207. After fifty-two years of municipal home rule, in 1958, Oregon voters extended the privilege of home rule to counties, enacting by referendum article VI, section 10. Since then, nine counties have availed themselves of the opportunity to exercise home-rule powers. See Oregon State Archives, Oregon Historical County Records Guide: County Government Development, available at <http://www.sos.state.or.us/archives/county/cpctygov.html> (last visited May 6, 2009).

³ *City of La Grande*, 281 Or. at 160–61, 576 P.2d at 1217 (Tongue, J., dissenting).

Oregon's cities and counties have not led the nation in enacting trendsetting municipal policy.

This Article discusses some of the strengths and weaknesses of Oregon's home-rule system. It posits that a particular advantage of Oregon's home-rule system is its unique "reverse assumptions" of validity for local civil and criminal enactments.⁴ Oregon courts have consistently read the Home Rule Amendment as establishing a strong presumption that civil ordinances are valid and not impliedly preempted by state law. Although this strong presumption does not protect cities from express preemption by state law, it otherwise ensures that cities have broad authority with respect to policies they seek to enforce through civil means. Conversely, in the criminal realm Oregon courts have reversed the assumption of validity, reading article XI, section 2 as establishing a rebuttable presumption that state law preempts local ordinances.⁵ Although the Oregon courts have unevenly applied this presumption against local criminal authority, as an abstract proposition, the presumption wisely discourages a statewide patchwork of criminal law. A franker and fuller judicial recognition of the functional value served by the Home Rule Amendment's presumption against local criminal lawmaking would help clarify the confused jurisprudence in this area.

While Oregon's article XI, section 2—and its "reverse assumptions" jurisprudence, in particular—establish a sound structural framework for the vertical distribution of power between the state and its cities, it is a framework that can be altered by state legislators and voters. In its seminal opinion in 1978, *City of La Grande v. Public Employes [sic] Retirement Board*,⁶ the Oregon Supreme Court made clear that the Home Rule Amendment does not protect cities from statewide preemption on matters of substantive policy. In recent years, the state legislature has with some frequency exercised its power to preempt local regulatory authority on significant matters of public policy, often at the behest of well-funded interest groups. The state legislature's propensity to preempt has stunted the ability of Oregon's cities and counties to serve as "proving

⁴ *City of Portland v. Dollarhide*, 300 Or. 490, 501, 714 P. 220, 227 (1986).

⁵ The reverse "assumptions" operate like legal presumptions. See, e.g., *Denton Plastics v. City of Portland*, 105 Or. App. 302, 306, 804 P.2d 1199, 1201 (1991). I therefore use "assumption" and "presumption" interchangeably throughout this Article when describing Oregon's home-rule system.

⁶ 281 Or. 137, 576 P.2d 1204.

grounds” for new social and economic policies.⁷ In addition, a succession of voter-approved state constitutional amendments has limited the fiscal autonomy of local governments, and a handful of referenda have preempted city authority on important matters of substantive policy. The upshot is a “Swiss cheese” of home rule, with certain large holes of regulatory and fiscal authority carved out by state law. This “Swiss cheese” regime has stunted local policy experimentation to some degree, and may be partly responsible for the somewhat tepid exercise of municipal regulatory authority by Oregon cities, as compared to other cities nationwide.

Part I of this Article assesses the background constitutional principles from which Oregon’s Home Rule Amendment emerged and discusses the history and text of the provision. Part II assesses the “reverse assumptions” doctrine that flows from the amendment. It argues that the doctrine is functionally sound, but that the jurisprudence on the criminal side needs clarification. Part II suggests clarifying the jurisprudence by recognizing the functional values served by the presumption against local criminal lawmaking authority. Part III then explores the ways in which legislative and voter-approved preemption have undercut cities’ broader local autonomy on the civil side. Part III takes count of a series of constitutional amendments that have limited the fiscal authority of local governments and offers potential demographic and political explanations for why Oregon cities are rarely trendsetters in municipal policymaking.

I

BACKGROUND AND DEVELOPMENT OF OREGON’S HOME RULE AMENDMENT

The federal Constitution does not formally recognize local governments, nor does it bestow any political power upon them.⁸ Although cities, townships, boroughs, and counties have existed in

⁷ *Sims v. Besaw’s Café*, 165 Or. App. 180, 200 n.3, 997 P.2d 201, 213 n.3 (2000) (Linder, J., concurring).

⁸ *But see* David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999); David J. Barron, *The Promise of Tribe’s City: Self-Government, The Constitution, and a New Urban Age*, 42 TULSA L. REV. 811, 812 (2007); Richard C. Schragger, *Cities As Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005) (arguing for recognition of “local constitutionalism”).

America since well before independence from Great Britain,⁹ the prevailing constitutional view has been that cities and counties are mere “convenient agencies” that the state legislature may abolish or reorganize at any time for almost any reason.¹⁰ This view, promoted by John F. Dillon, a prominent Iowa Supreme Court (and later federal circuit) judge, in his seminal treatise on municipal law in the late 1800s,¹¹ was wholeheartedly embraced by the U.S. Supreme Court in its 1907 decision of *Hunter v. City of Pittsburgh*,¹² and remains a fundamental principle of federal constitutional law.¹³

In addition to the principle of state supremacy embraced by the U.S. Supreme Court in *Hunter*, a related legal doctrine, also promoted by Judge Dillon, gained wide acceptance in American law in the late 1800s. This principle, known as Dillon’s Rule, posits that cities have no inherent powers and possess only those powers specifically delegated to them by state law.¹⁴ As a corollary, Dillon’s Rule requires that courts, when interpreting a delegation from state to city, resolve against the city any doubt regarding whether it possesses a particular power.¹⁵ From this background of municipal weakness,¹⁶

⁹ Gerald E. Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1059, 1095–99 (1980). In his mid-nineteenth century observations on American life, Alexis de Tocqueville famously extolled the virtues and importance of township governments, particularly in New England. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 181 (Henry Reeve trans., 1961).

¹⁰ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907).

¹¹ 1 JOHN F. DILLON, *THE LAW OF MUNICIPAL CORPORATIONS*, § 9b, at 93 (2d ed. 1873).

¹² 207 U.S. at 178–79.

¹³ See *Ysursa v. Pocatello Educ. Ass’n*, 129 S. Ct. 1093, 1100 (2009) (referring to local governments as “subordinate governmental instrumentalities” from which the state may “withdraw powers and privileges as it sees fit”) (internal citations omitted); *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978) (citing *Hunter*, 207 U.S. at 178). But see *Ysursa*, 129 S. Ct. at 1107 (Stevens, J., dissenting) (noting that “[r]elationships between state and local governments are more varied . . . than the majority’s analysis admits”); Barron, *The Promise of Cooley’s City*, *supra* note 8, at 560–95 (discerning “traces” of federal constitutional protection for local government decisionmaking in Supreme Court case law, despite formal doctrine to the contrary).

¹⁴ DILLON, *supra* note 11, at 93 (“[Municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them . . .”).

¹⁵ *Id.* § 55, at 173.

¹⁶ See *Eberth v. County of Prince William*, 637 S.E.2d 338, 342 (Va. App. 2006). In theory, Dillon’s Rule need not result in city powerlessness, for the state legislature could grant broad powers—perhaps even the “police power” *in toto*—to a city or cities throughout the state. In practice, however, before the home-rule movement began in earnest, few state legislatures’ grants of power were so broad, and cities frequently found their attempts to

the first movement for home rule emerged in the late 1800s and early 1900s. In an effort to provide cities with some degree of organic policymaking authority,¹⁷ five states—California, Colorado, Minnesota, Missouri, and Washington—added home-rule provisions to their constitutions by 1906.¹⁸ These early provisions, unlike their more modern counterparts, empowered cities to adopt their own charters, which, in turn, would define the limits of municipal power.¹⁹

Oregon passed article XI, section 2 in 1906, toward the end of this first wave of home-rule reform. Interestingly, unlike similar provisions adopted in other states, Oregon’s Home Rule Amendment was not primarily aimed at altering Dillon’s Rule’s constricted view of local authority, for it is not clear that Oregon courts had fully embraced the rule by 1906. While some pre-1906 decisions cited Dillon in restricting local power,²⁰ others took a rather expansive view of municipal authority, despite the absence of a home-rule provision in the state constitution.²¹ Instead, the specific “evil” toward which the Home Rule Amendment appears to have been directed was the need for special legislative enactment of new or amended municipal charters,²² as evidenced by the amendment’s text:

The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon . . .²³

address social problems frustrated by Dillon’s anti-localist interpretive principle. *E.g.*, *Early Estates, Inc. v. Housing Bd. of Rev. of Providence*, 174 A.2d 117 (R.I. 1961). *But see* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2291–2300 (2003) (arguing that Dillon’s Rule enabled more local autonomy than “home rule” regimes that immediately followed).

¹⁷ *But see* Barron, *supra* note 16.

¹⁸ *See* *City of La Grande v. Pub. Employees Ret. Bd.*, 281 Or. 137, 157, 576 P.2d 1204, 1217 (1978), *aff’d on reh’g*, 284 Or. 173, 586 P.2d 765 (1978) (Tongue, J., dissenting).

¹⁹ *E.g.*, MO. CONST. art. IX, § 6 (1875) (providing cities with populations over 100,000 the power to “frame a charter for [their] own government, consistent with and subject to the Constitution and laws of this State”).

²⁰ *See, e.g.*, *City of Corvallis v. Carlile*, 10 Or. 139, 141, 1882 WL 1417, *2–3 (1882).

²¹ *E.g.*, *Wong v. City of Astoria*, 13 Or. 538, 11 P. 295 (1886); *see also* *City of La Grande*, 281 Or. at 144–45, 576 P.2d at 1209 (“[I]t is a noteworthy fact that most of the general municipal legislation [before 1906] was . . . meritorious . . .”) (quoting *Rose v. Port of Portland*, 82 Or. 541, 558, 162 P. 498, 504 (1917) (discussing the example of the Bancroft bonding act)).

²² *City of La Grande*, 281 Or. at 144–45, 576 P.2d at 1209.

²³ OR. CONST. art. XI, § 2.

The Home Rule Amendment makes no mention of “home rule.” Rather, the amendment’s text focuses on the drafting and amending of municipal charters. In removing the power to change city charters from the legislature and vesting it squarely within the city’s voters, the amendment nonetheless strengthened municipal autonomy, relieving cities of the substantial burden of seeking approval from the state legislature for changes to their charters.²⁴ The amendment also sought to relieve the state legislature from having to concern itself with city charter matters.²⁵

If the Home Rule Amendment’s effect on a city’s control over its charter was clear, the amendment more indirectly affected cities’ substantive powers. On its own, Oregon’s Home Rule Amendment did not confer any new municipal authority. Rather, if a pre-1906 city charter staked a claim to broad powers, the amendment simply ensured that the state legislature would not impose upon the city a charter revision that limited those powers. Indeed, unlike more recent home-rule provisions from other states, the amendment does not delegate something akin to the “police power” to municipalities.²⁶ Hence, if an Oregon city were to enact a charter with limited municipal powers, presumably, municipal action that falls outside those limited powers would be *ultra vires*.²⁷ The charters of most Oregon cities, however, now include language vesting broad powers in the city. Portland’s charter, for instance, grants the city “all governmental powers except such as are expressly conferred by law upon other public corporations . . . and subject to the limitations prescribed by the constitution and laws of the State.”²⁸ The charters of Ashland, Beaverton, Keizer, and Salem, among others, use even

²⁴ *City of La Grande*, 281 Or. at 143–44, 576 P.2d at 1208. Some Oregon cities, such as Portland, incorporated and adopted charters before statehood. See *Sims v. Besaw’s Café*, 165 Or. App. 180, 206, 997 P.2d 201, 216 (2000) (Edmonds, J., dissenting) (discussing Portland’s 1851 charter).

²⁵ *City of La Grande*, 281 Or. at 143–44, 576 P.2d at 1208–09. In serving this function, the Home Rule Amendment is similar to the ban on special legislation found in many state constitutions. See, e.g., OR. CONST. art. IV, § 23 (prohibiting “certain local and special laws”). They both prevent the legislature from using its time and resources in a manner deemed wasteful or unworthy. See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 970 (1988).

²⁶ See, e.g., UTAH CONST. art. XI, § 5, discussed in *State v. Hutchinson*, 624 P.2d 1116, 1122 (Utah 1980).

²⁷ See *Adams v. Toledo*, 163 Or. 185, 189, 96 P.2d 1078, 1080 (1939) (city’s action not “ultra vires” if within charter authority).

²⁸ PORTLAND, OR., CODE § 1-102 (1962), <http://www.portlandonline.com/auditor/index.cfm?c=28223&a=13412>.

broader language. Salem's charter, for instance, stakes claim to "all powers" that state and federal law "expressly or impliedly grant or allow the city" to exercise.²⁹ Therefore, as a practical matter, the Home Rule Amendment ensures that Oregon cities can exercise a broad range of substantive lawmaking authority. This authority, however, is vulnerable to preemption by the state, as Part III will explain.

Interestingly, Oregon's Home Rule Amendment mentions neither municipal ordinances nor noncriminal state law. Rather, it refers only to "municipal charter[s]" as being "subject to the Constitution and criminal laws of the State of Oregon." Under a hyper-literal interpretation, one might conclude that only charter provisions, and not municipal ordinances, need conform to the constitution and criminal laws of Oregon. This argument is perhaps so self-evidently absurd that it has not been seriously argued.³⁰ Additionally, one might conclude that charter provisions must conform only to the state's constitution and its criminal laws, but not to the state's civil laws.³¹ While this argument has also never been seriously pressed, the amendment's specific mention of "criminal laws"—and the absence of any specific mention of "civil laws"—has led to an important distinction in Oregon local government law: the amendment establishes a rebuttable presumption that municipal criminal ordinances are invalid, whereas civil ordinances are presumed valid.³²

What little is known about the Home Rule Amendment's "meager" history³³ is that earlier drafts stated that charters be "consistent with and subject to the constitution and laws of this state," without specifically mentioning the state's criminal laws as a constraint on

²⁹ SALEM, OR., CHARTER, CH. 2, § 4 (1996), <http://www.cityofsalem.net/Departments/Legal/Pages/CityCharter.aspx#section4>; *see also* ASHLAND, OR., CHARTER, art. II, § 1 (2006), <http://www.ashland.or.us/Page.asp?NavID=156>; BEAVERTON, OR., CHARTER, ch. II, § 4 (1981), <http://www.codepublishing.com/OR/beaverton/html/beavertonch.html#Section%204>; KEIZER, OR., CHARTER, ch. II, § 4 (1985), <http://www.keizer.org/action=page&name=City%20Charter%20Chp%202>.

³⁰ *Cf. City of La Grande*, 281 Or. at 150, 576 P.2d at 1211–12 (noting that the 1906 amendments were "not designed to exalt form over substance").

³¹ Cynthia Cumfer, *Original Intent v. Modern Judicial Philosophy: Oregon's Home Rule Case Frames the Dilemma for State Constitutionalism*, 76 OR. L. REV. 909, 913 (1997).

³² *See City of Portland v. Dollarhide*, 300 Or. 490, 501, 714 P.2d 220, 227 (1986).

³³ *Dollarhide*, 300 Or. at 497, 714 P.2d at 224–45.

city power.³⁴ Whatever the reasons for this textual change,³⁵ the Oregon Supreme Court has assumed that the voters who approved the final version of the amendment “envisioned a stricter limitation on the lawmaking power of cities in respect of criminal laws than with regard to civil or regulatory measures.”³⁶

Oregon’s dual approach to local criminal and civil lawmaking authority is unique among home-rule states. Most states treat local criminal and civil ordinances similarly, although many states confine local governments’ power to criminalize conduct to misdemeanors only,³⁷ and at least one state appears to prohibit local criminal lawmaking entirely.³⁸ Even in those states that limit local authority to misdemeanors only, however, challenges to local misdemeanor ordinances are not generally afforded a presumption of validity any different from that which applies to civil ordinances.³⁹

³⁴ *Id.*

³⁵ Compare *City of Portland v. Jackson*, 316 Or. 143, 166, 850 P.2d 1093, 1106 (1993) (Fadeley, J., dissenting) (“Little is recorded about the precise reason for the change from the more general limitation of ‘general laws’ to the specific ‘criminal laws’ limitation.”), with *Cumfer*, *supra* note 31, at 939–43 (suggesting that change was made to prevent cities in “dry” counties from going “wet”—i.e., legalizing liquor).

³⁶ *Dollarhide*, 300 Or. at 497, 714 P.2d at 225.

³⁷ See, e.g., LA. CONST. art. VI, §§ 5, 9; see also Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1435 n.162 (2001) (citing EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 23.06, at 512 (3d ed. Rev. 1997 & Supp. 2000)).

³⁸ See S.C. CONST. art. VIII, § 14; *Martin v. Condon*, 478 S.E.2d 272, 274 (S.C. 1996) (“[L]ocal governments may not criminalize conduct that is legal under a statewide criminal law.”); *Connor v. Town of Hilton Head Island*, 442 S.E.2d 608, 609–10 (S.C. 1994). To be precise, the South Carolina Supreme Court has interpreted the state constitution as prohibiting municipalities from defining any new crimes, *id.* at 609, but not necessarily from punishing conduct already criminalized by state law so long as the municipal penalty is not greater than that allowed by state law. See also *City of N. Charleston v. Harper*, 410 S.E.2d 569 (S.C. 1991).

³⁹ A few state courts, however, while not purporting to treat local criminal lawmaking differently from local civil law under state constitutional law, have struck down local criminal ordinances on federal constitutional grounds like equal protection and vagueness. E.g., *Seattle v. Hogan*, 766 P.2d 1134 (Wash. Ct. App. 1989); *Pierce v. Commonwealth*, 777 S.W.2d 926 (Ky. 1989); *People v. Llewellyn*, 257 N.W.2d 902 (Mich. 1977). These cases recognize functional concerns regarding local criminal authority similar to those discussed below. E.g., *Pierce*, 777 S.W.2d at 928 (expressing concern that local criminal ordinance may lead to “abusive arrest and prosecution”); *Llewellyn*, 257 N.W.2d at 907 (recognizing that “uncertainty and confusion” would be created if each municipality in state could define its own obscenity law).

II

THE “ASSUMPTION” AGAINST LOCAL CRIMINAL LAWMAKING
AUTHORITY

Oregon courts have generally couched the presumption against local criminal ordinances in terms of fealty to the Home Rule Amendment’s text and largely overlooked the presumption’s functional benefits.⁴⁰ This Part urges Oregon courts to recognize the functional advantages of the amendment’s presumption against local criminal lawmaking. By doing so, the courts could clarify the currently murky doctrine in this area.

A. Functional Benefits of the Presumption Against Local Criminal Lawmaking Authority

Like local authority to enact civil ordinances, local authority to legislate in the criminal realm can lead to a patchwork set of rules throughout the state.⁴¹ Because it is axiomatic in America that ignorance of the law is no defense to a criminal prosecution,⁴² however, a balkanized set of criminal laws varying by municipality is likely to ensnare unwitting defendants whose conduct would be perfectly legal in another part of the state. In today’s highly mobile society, the concerns raised by Harvard Law Professors Francis Bohlen and Harry Shulman more than eight decades ago regarding municipal criminal lawmaking authority are even more salient:

People no longer live their whole lives in the village in which they were born. They pass freely from place to place, and in transit go through innumerable towns and villages. The risk of being arrested on sight, because one’s conduct contravenes some regulation . . . is appalling to any thinking person. . . . Even that outworn and discredited fiction that every man knows the law has never been pushed to such an extreme as to justify imposing such consequences upon an ignorance of the local ordinances of the myriads⁴³ of small communities through which modern men constantly pass.

⁴⁰ See *Jackson*, 316 Or. at 165–68, 850 P.2d at 1105–07 (Fadeley, J., dissenting).

⁴¹ *Dollarhide*, 300 Or. at 502 n.9, 714 P.2d at 227 n.9.

⁴² Logan, *supra* note 37, at 1461 n.282.

⁴³ *Id.* at 1463 (quoting Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 491–92 (1927)); see also *Jackson*, 316 Or. at 159 n.9, 850 P.2d at 1102 n.9 (Fadeley, J., dissenting) (recognizing “destructive effect” of “a patchwork pattern of local criminal ordinances”) (citing *Winters v. Bisailon*, 152 Or. 578, 54 P.2d 1169 (1936)).

The less likely a defendant is to know the criminal law, the more criminal sanctions become unmoored from their justification in retributive theory, and, to a lesser degree, in deterrence: One cannot be held morally responsible for breaking a law of which he was not aware, and the fewer persons who are aware⁴⁴ of a particular law, the less deterrent value that law will have.⁴⁵

Criminal ordinances, with their arrest and detention enforcement mechanisms, are clearly heavier handed than civil ordinances, which usually depend upon monetary fines for their enforcement.⁴⁶ A criminal conviction, however minor, can have serious collateral consequences beyond the sentence imposed.⁴⁷ Moreover, an arrest for even a relatively minor criminal offense allows police to search a suspect and gain evidence of other crimes, thereby providing cities with an incentive to over-criminalize in an attempt to crack down on certain crimes.⁴⁸ For instance, in *State v. Tyler*, the Oregon Court of Appeals considered the case of a defendant arrested under a Portland ordinance that criminalized the crossing of a street at a nonright angle.⁴⁹ The officer who arrested the alleged jaywalker admitted that he apprehended her for the pedestrian offense as a pretext to search for contraband.⁵⁰ The officer found cocaine on the defendant's person, and she was subsequently charged with possession.⁵¹ The court dismissed the charges because state law, which evinced a clear preference for not criminalizing minor traffic violations, impliedly preempted the offense underlying the initial arrest.⁵²

⁴⁴ See Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1200 (2007) (noting that under retributive theory "only blameworthy defendants" should be punished for their crimes).

⁴⁵ *Id.* at 1210 (explaining deterrence function of criminal law). Of course, if the courts upheld a local criminal ordinance, more outsiders might eventually learn about it through word-of-mouth, media coverage of arrests and prosecutions, and signs posted by the enacting city on its borders.

⁴⁶ To be sure, the line between a "criminal" and "civil" ordinance is not always a bright one. See *Brown v. Multnomah County Dist. Ct.*, 280 Or. 95, 101–03, 570 P.2d 52, 57–59 (1977) (discussing factors relevant to categorizing an offense as a "crime" rather than an "infraction").

⁴⁷ See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006).

⁴⁸ Logan, *supra* note 37, at 1441–42.

⁴⁹ 168 Or. App. 600, 602, 7 P.3d 624, 626 (2000).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

1. The Presumption Against Local Criminal Authority As a Default Rule

Oregon's assumption against local criminal lawmaking authority operates as a default rule of statutory interpretation. The state legislature may overcome the default presumption against local criminal lawmaking authority by expressly empowering cities to pass criminal laws in a certain subject area. In the absence of such an express grant, the authority of an Oregon city to legislate in the criminal realm is more suspect. To be sure, default-rule theories of statutory interpretation are subject to a number of criticisms.⁵³ My primary aim here, however, is not to engage those criticisms but to explain why, under the logic of viewing statutory presumptions as default rules, the Home Rule Amendment's presumption against local criminal lawmaking authority is a good choice.

Working from the assumption that judicial canons operate like default rules, Professor Einer Elhauge has urged courts to choose a "penalty-default" rule when an interest group arguing for a particular interpretation of an ambiguous statute is likely to have superior access to the legislature than its opponents and the interim costs of an "erroneous" decision—that is, a decision that inaccurately estimates the current legislature's political preference—are relatively low.⁵⁴ Elhauge argues that a decision adverse to the better-organized interest group is likely to spur that interest group to seek a "legislative correction" of the decision.⁵⁵ Building upon Elhauge's theory, Professor Roderick Hills argues that use of a penalty-default rule in the context of preemption can enhance the democratic process. By siding with the weaker interest group, Hills argues, courts force the stronger interest group to turn to the legislature for relief from the judicial decision it dislikes.⁵⁶ While the legislature may ultimately grant the better-organized interest group the legislative override that it seeks, the court's ruling in favor of the weaker interest group will force the legislature to confront an issue that it would have otherwise

⁵³ For more on the pros and cons of default-rule theory of statutory interpretation, compare Diller, *supra* note 1, at 1146–48 (recognizing limitations), with Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142 (2002) (arguing in favor).

⁵⁴ Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2178 (2002).

⁵⁵ *Id.* at 2173.

⁵⁶ Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007).

avoided had the courts not applied the penalty-default rule.⁵⁷ Moreover, the weaker interest group will have a better chance at defending its position if the judiciary interprets an ambiguous statute in its favor, thereby placing legislative inertia on its side.⁵⁸

In another article I have argued that the penalty-default rule advocated by Elhauge and Hills should cut against the business community's frequent claims of implied preemption against local regulatory ordinances they dislike.⁵⁹ The business community is likely to have more clout in lobbying the state legislature to "correct" a court's denial of its implied preemption claim than the cities defending their lawmaking authority.⁶⁰ Criminal defendants, on the other hand, are likely to constitute a weaker interest group as compared to cities, at least when the defendants are, as in most cases, a motley collection of individuals rather than corporations or wealthy,

⁵⁷ *Id.*

⁵⁸ See Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 301 (2008) (explaining difficulty of overcoming inertia in legislative process). To be sure, Elhauge's "penalty-default rule" is open to a number of criticisms. First, it is not always clear how many and which interest groups have a stake in the court's interpretation of an ambiguous statute in a legal dispute that involves a discrete number of parties. While amicus briefs may provide a clue to the interest-group lineup, few are filed at the initial stages of litigation. Even if all of the potentially affected interest groups were readily identifiable, it is not always clear who is "weaker" or "stronger" politically. Indeed, identifying and assessing the relative political strength of interest groups is not a traditional judicial function and may not be within the judiciary's institutional competence. Moreover, the relative strength and weakness of interest groups can change quickly depending on the partisan makeup of the legislature and the executive branch. For instance, when the Supreme Court, in the case of *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), interpreted Title VII of the Civil Rights Act as prohibiting claims for sex-based wage discrimination arising before the 180-day charging period, one might have thought that the majority had sided with the "stronger" interest group: the businesses likely to be defendants in such suits. Democrats in Congress denounced the decision immediately, and sought to override it legislatively. After being stymied by a Senate filibuster (and facing a certain veto by President George W. Bush) before the 2008 elections, see Carl Hulse, *Republican Senators Block Pay Discrimination Measure*, N.Y. TIMES, Apr. 24, 2008, at A22, Congress, with the help of an expanded Democratic majority in the Senate and the support of President Barack Obama, overturned *Ledbetter* in January 2009 with the passage of the Lilly Ledbetter Fair Pay Act, Pub. L. No. 111-2 § 181, 123 Stat. 5 (2009); see also Sheryl Gay Stolberg, *Obama Signs Equal Pay Legislation*, N.Y. TIMES, Jan. 30, 2009, available at <http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html>. The episode indicates that by 2009, plaintiffs' lawyers, women's rights organizations, and civil rights groups constituted the "stronger" interest group than the business lobby, at least on the issue of employee pay raised by the Court's *Ledbetter* decision, whereas a year or two before, business groups who supported the decision had superior lobbying clout.

⁵⁹ Diller, *supra* note 1, at 1149–51.

⁶⁰ *Id.* at 1150–51.

white-collar criminals. Such individual criminal defendants have no institutional interest in the legal regime that affects them, and the few organized interest groups that sometimes push for positions advantageous to criminal defendants, such as state chapters of the ACLU and the criminal defense bar, are generally politically weak.⁶¹ Moreover, the interim costs of an “erroneous” decision that an ordinance is not preempted—thus upholding a criminal conviction based on local law—is much higher than an “erroneous” decision regarding preemption in the civil context. Indeed, the potential costs in the criminal context are unquantifiable, as they may include the deprivation of the defendant’s liberty and the stigma of a criminal record.⁶²

The Oregon Supreme Court’s decision in *City of Portland v. Lodi* illustrates well the functional value served by the Home Rule Amendment’s assumption against local criminal lawmaking.⁶³ In *Lodi*, defendants were charged with violating Portland’s penal ordinance against carrying a concealed pocketknife with a blade beyond a specified length.⁶⁴ Concluding that Portland could not overcome “the assumption that state *criminal* law displaces conflicting local ordinances,” the Oregon Supreme Court invalidated Portland’s ordinance.⁶⁵ The *Lodi* defendant’s conduct would likely have been perfectly legal if it took place in a neighboring municipality because state law did not criminalize the concealed carrying of pocketknives on the basis of length. Nor did Portland assert that neighboring municipalities had similar bans.⁶⁶ Merely crossing the border into Portland made the defendants’ conduct illegal, whether they knew of Portland’s more restrictive ordinance or not, thereby subjecting them to arrest, search, detention, and, had the ordinance been upheld, criminal prosecution and a likely criminal record.

⁶¹ See *id.* at 1137 n.107.

⁶² But see Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004) (arguing that constitutional liberty interests should, in certain circumstances, be protected only by a “liability rule” entitlement).

⁶³ 308 Or. 468, 782 P.2d 415 (1989).

⁶⁴ *Lodi*, 308 Or. at 471, 782 P.2d at 415.

⁶⁵ *Lodi*, 308 Or. at 472, 782 P.2d at 416 (quoting *City of Portland v. Dollarhide*, 300 Or. 490, 501, 714 P.2d 220, 227 (1986) (emphasis in original)).

⁶⁶ *Lodi*, 308 Or. at 473, 782 P.2d at 417 (discussing OR. REV. STAT. § 166.240(1)).

2. *Objections to the Presumption Against Local Criminal Lawmaking Authority as an Appropriate Default Rule*

There are sometimes good reasons why Oregon cities seek to regulate through criminal, rather than civil, enforcement. While cities may impose hefty civil fines for violations of ordinances in an effort to spur compliance with some new regulation, the threat of criminal sanctions may be more effective in certain circumstances. It must be recognized, therefore, that the assumption against local criminal lawmaking comes with a potential cost that might not be outweighed by concerns about potential defendants in all circumstances.

Not all those who might be prosecuted under a local criminal law are as sympathetic as the defendants in *Lodi*. For instance, when the defendants are long-term residents, property owners, or sophisticated business enterprises that receive professional legal advice on a consistent basis, attributing knowledge of the local law to them may seem more reasonable. Moreover, while the average cohort of criminal defendants likely possesses little legislative clout, there may be certain discrete groups of criminal defendants—such as businesses and wealthy, white-collar criminals—who have significant influence with legislators and therefore are less deserving of a “penalty default rule” that works in their favor.⁶⁷

Another potential objection to Oregon’s presumption against criminal lawmaking authority is that it can prevent an Oregon city from filling an interstice of state criminal law to address a serious problem that is unique to that city, at least not without lobbying the legislature for express permission, a potentially costly and time-consuming process. To be sure, the city could attempt to address whatever problem it is seeking to solve exclusively through civil means.⁶⁸ If the city attempts to pass a criminal ordinance in an area in which the state has legislated—and particularly in areas in which the state has legislated extensively—Oregon courts applying the default rule against local criminal authority are likely to find such an ordinance preempted. For instance, in *Tyler*, the Oregon Court of Appeals invalidated a municipal ordinance criminalizing jaywalking

⁶⁷ Insofar as a soon-to-be corrected statutory interpretation sustains a criminal prosecution of an individual, however, that individual may lose his liberty or suffer the stigma of other criminal punishments, which means that the interim costs of the interpretation may be quite high.

⁶⁸ *Dollarhide*, 300 Or. at 503, 714 P.2d at 228.

in large part because the state legislature had comprehensively rewritten the Oregon Vehicle Code in a way that evinced a “conscious decision” not to criminalize minor traffic infractions such as jaywalking.⁶⁹ Similarly, in *Lodi*, the Oregon Supreme Court relied on the state legislature’s revisions to concealed weapons laws to deduce that the legislature made “a political decision” not to criminalize the concealed possession of knives—such as the pocketknife defendant carried—not mentioned in the statute.⁷⁰ Also, in *City of Portland v. Dollarhide*, the Oregon Supreme Court invalidated Portland’s mandatory minimum sentences for prostitution convictions in light of the extensive state regulation and Portland’s inability to point to anything abnegating the presumption that the state law, which had no minimum sentences, trumped the local ordinance.⁷¹ Although the courts’ decisions in these cases may have been justified for the functional reasons explained above, they prevented, at least theoretically, a city from filling some void in criminal enforcement left open by state law.

B. Doctrinal Inconsistency

Rather than using the functional value of the Home Rule Amendment’s assumption against local criminal authority as a guiding principle when ruling on challenges to local ordinances, the Oregon Supreme Court has often engaged in an unhelpful search for legislative “intent.” This misguided focus on intent has resulted in confused and inconsistent applications of the amendment to local criminal laws. At the root of the recent confusion are two dicta from *Dollarhide* and *Lodi*, decided in 1986 and 1989, respectively, that are in significant tension with each other. In *Dollarhide*, Justice Carson wrote that the Home Rule Amendment’s “assumption . . . that the legislature intended to displace conflicting local criminal ordinances, absent apparent legislative intent to the contrary, does not apply when there is no state criminal law on the subject.”⁷² In *Lodi*, by contrast, Justice Linde remarked that the question of preemption should be resolved by looking for a “political decision” of the legislature—“for what the state’s lawmakers either did or considered and chose not to

⁶⁹ *State v. Tyler*, 168 Or. App. 600, 605–06, 7 P.3d 624, 628 (2000).

⁷⁰ *Lodi*, 308 Or. at 474, 782 P.2d at 417.

⁷¹ *Dollarhide*, 300 Or. at 501, 714 P.2d at 227.

⁷² *Dollarhide*, 300 Or. at 502 n.9, 714 P.2d at 227 n.9.

do.”⁷³ Hence, according to Justice Linde’s dictum, were the state legislature to consider, but vote down, a law criminalizing a previously unregulated subject—say, the serving of trans fats in restaurants—that “political decision” would counsel in favor of finding a later municipal attempt to criminalize trans fats preempted.⁷⁴ Per Justice Carson’s *Dollarhide* dictum, however, the lack of a state law on the subject—apparently, regardless of the reasons for the void—would mean that there is no presumption against the validity of a later municipal ordinance on the same subject.

While the distinction between Justices Linde’s and Carson’s dicta may seem minor and technical, it proves increasingly significant when the “subject” of a municipal criminal law is defined narrowly. For instance, in *City of Portland v. Jackson*, decided in 1993, the Oregon Supreme Court upheld a Portland ordinance that criminalized indecent exposure committed *without* intent to arouse, whereas state law criminalized only exposure *with* such intent.⁷⁵ The court rejected the defendant’s argument that the legislature’s 1971 replacement of the prior indecent exposure statute, which “[a]rguably” applied to both sexually motivated and nonsexually motivated exposure, with a version that contained an intent-to-arouse requirement, evinced “a legislative political decision to permit non-sexually motivated public nudity.”⁷⁶ Under Justice Linde’s approach, the legislature’s revision of the statute in 1971, without more, might be enough of a “political decision” to preempt future local lawmaking on the “subject” of indecent exposure with no intent to arouse. Under Justice Carson’s dictum, however, the absence of state law on the more narrowly defined “subject” of “indecent exposure with no intent to arouse” means that the presumption against local criminal lawmaking does not apply, an approach embraced by the *Jackson* majority.⁷⁷ The *Jackson* majority attempted to distinguish *Lodi* by stating that the legislature was “silent” as to its reasons for amending the indecent exposure statute, whereas the court in *Lodi* had invoked the legislative

⁷³ *Lodi*, 308 Or. at 474, 782 P.2d at 417.

⁷⁴ On the other hand, Justice Linde noted in *Lodi* that “mere inaction on a bill or other proposal”—as distinct from active “rejection of a proposal by vote after debate”—would not amount to the kind of “collective,” “political decision” necessary to infer an intent to permit certain behavior. *Lodi*, 308 Or. at 474, 782 P.2d at 417.

⁷⁵ *City of Portland v. Jackson*, 316 Or. 143, 850 P.2d 1093 (1993).

⁷⁶ *Jackson*, 316 Or. at 153, 850 P.2d at 1098.

⁷⁷ See also *City of Dallas v. Sullenger*, 111 Or. App. 266, 826 P.2d 34 (1992).

history of a “political decision” not to criminalize concealed pocketknives.⁷⁸ In fact, the *Lodi* court did not cite the reasons for the legislature’s rejection of the criminalization of pocketknives; the rejection itself—without additional explanation—served as sufficient evidence for the court to infer a decision by the legislature.

Dollarhide, *Lodi*, and *Jackson* demonstrate that the judicial search for a “political decision” by the legislature not to criminalize some “subject” of conduct is highly manipulable. The “subject” covered by the criminal law at issue can be expanded and contracted like an accordion. Additionally, the search for whether the legislature made a sufficiently “conscious” decision *not* to criminalize certain conduct presses the judiciary to analyze the murky, Sphinx-like reasons for legislative inaction.⁷⁹ A better approach would incorporate some consideration of the functional concerns articulated above. That is, the courts might look at whether the criminal law is likely to apply to defendants, such as property and business owners, for whom notice is less of a concern, rather than to individuals who may have no connection to the community and are likely to be ensnared by a rule they could not reasonably anticipate.⁸⁰ Courts might also analyze whether criminal sanctions are the first method of ordinance enforcement, or merely a more severe punishment for repeat offenders who were earlier punished with civil penalties. Additionally, Oregon courts might assess the extent to which a particular municipality has publicized its unusual laws, whether through television advertising or signs posted at city limits. In all, an incorporation of these functional concerns—rather than a purported focus on whether the state legislature has made a “political decision”—would offer a better, or at least another useful, guidepost for assessing the validity of local criminal laws under Oregon’s Home Rule Amendment.⁸¹

⁷⁸ *Jackson*, 316 Or. at 149, 850 P.2d at 1096.

⁷⁹ Cf. Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENT. 395, 396 n.8 (1986) (“Interpreting what [the legislature] means when it has spoken is often difficult enough; to determine what [the legislature] means when it has said nothing at all is impossible.”).

⁸⁰ See *Pierce v. Commonwealth*, 777 S.W.2d 926, 928 (Ky. 1989) (invalidating local law criminalizing sodomy solicitation because it might result in the “abusive arrest and prosecution” of persons for “inadvertent act[s]” not included within the state’s criminal law).

⁸¹ Although it is beyond the scope of this Article, an oddity of Oregon’s home-rule criminal jurisprudence is that Oregon cities may pass criminal laws that prohibit exactly the same conduct proscribed by state law. *E.g.*, *Jackson*, 316 Or. at 169, 850 P.2d at

III

UNDERCUTTING HOME RULE ON THE CIVIL SIDE

While the Oregon Home Rule Amendment's assumption against criminal lawmaking authority offers functional benefits, its assumption in favor of local authority on the civil side promises to enable local governments to serve as "proving grounds" for policies that have yet to win acceptance at the state and national levels.⁸² Indeed, cities serve as crucial policy innovators in identifying and attempting to solve social problems, often in response to perceived inaction or insufficient action by the state and federal governments.⁸³ Once a city's new policy on a certain subject "works" (e.g., it is politically popular, economically feasible, or reasonably effective at addressing the social problem it purports to help solve) other cities, and eventually states, around the country will often adopt an identical

1107–08 (Fadeley, J., dissenting) ("Local criminal ordinances which duplicate state criminal law . . . are to be tolerated and even encouraged . . ."); *City of Portland v. Dollarhide*, 300 Or. 490, 499, 714 P.2d 220, 226 (1986) ("local ordinances may punish the same criminal conduct [as] state law"). In many other states, by contrast, such as California, duplicative local ordinances that penalize conduct already criminalized by state law are prohibited. *E.g.*, *Sherwin-Williams Co. v. Los Angeles*, 844 P.2d 534, 536 (Cal. 1993). To be sure, Oregon cities are prohibited from imposing penalties greater than state law for the same crime. *Dollarhide*, 300 Or. at 499, 714 P.2d at 226. Additionally, since the Supreme Court held in 1970, in the case of *Waller v. Florida*, 397 U.S. 387, that states and municipalities are not separate sovereigns for the purposes of double jeopardy, prosecutors cannot constitutionally charge a defendant with a municipal and state crime covering precisely the same criminal conduct. The availability of duplicative local laws, therefore, would seem to provide prosecutors with no real advantage. In practicality, however, Oregon's encouragement of duplicative local criminal ordinances may provide state prosecutors in circuit court with more charging leverage against defendants. Even if, in theory, charging a defendant with a state and local crime criminalizing the same conduct violates *Waller*, it is the rare defendant who will raise the Double Jeopardy challenge rather than plea out. *Cf.* Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 937–38 (2007). The most likely explanation for the persistence of local duplicative lawmaking authority, an anachronism of pre-*Waller* days, appears to be its link to Oregon's continued use of municipal, justice, and county courts. These courts, which are separate from the circuit court system of the state's judiciary, *see* OR. REV. STAT. § 1.855 (2007), <http://www.ojd.state.or.us/courts/othercourts/index.htm>, offer municipalities a chance to reap fines from those who have violated local ordinances, *see* George M. Platt, *An Odd Couple: The Criminal Sanction and the Municipal Ordinance*, 7 WILLAMETTE L.J. 43, 59 n.63 (1971).

⁸² *Sims v. Besaw's Café*, 165 Or. App. 180, 200 n.3, 997 P.2d 201, 213 n.3 (2000) (Linder, J., concurring).

⁸³ *See* Diller, *supra* note 1, at 1117–22.

or similar proposal.⁸⁴ This process of policy percolation enriches our political system by allowing cities to conduct smaller-scale policy experiments that may ultimately prove instructive to other cities, states, and the federal government. Recent examples of this phenomenon are myriad, ranging from New York City's ban of trans fats to combat obesity—which has since been adopted by a number of other local governments as well as one state (California)⁸⁵—to cities and counties outlawing private discrimination on the basis of sexual orientation, a policy which has now been adopted by approximately twenty states, including Oregon in 2007.⁸⁶ Even when there is little or no policy percolation resulting from a particular municipality's action, local innovation is still useful because the action taken by a single municipality may improve the quality of life for the residents of that municipality, perhaps by solving a social problem that is unique to the community.⁸⁷

For cities to engage in meaningful policy innovation, state law must guarantee two things. First, because cities, according to *Hunter*, lack any inherent authority under federal law, the state must delegate them substantive lawmaking authority. In the vast majority of (but not all) states, cities now have broad lawmaking powers by virtue of home-rule provisions in the state constitution or statutes.⁸⁸ In Oregon, the Home Rule Amendment, despite its unusual, charter-specific language, has been construed to solidify this authority, providing Oregon cities with reasonable assurance that their actions will not be deemed *ultra vires*, at least on the civil side.⁸⁹ Second, even if cities have the organic authority to make law, preemption of their enactments—whether in implied or express form—by the state legislature looms as a threat over their ability to serve as policy

⁸⁴ See *Besaw's Café*, 165 Or. App. at 200 n.3, 997 P.2d at 213 n.3 (Linder, J., concurring); Diller, *supra* note 1, at 1117–19.

⁸⁵ CAL. HEALTH & SAFETY CODE § 114377 (2009); Jennifer Steinhauer, *California Bars Restaurant Use of Trans Fats*, N.Y. TIMES, July 26, 2008, at A1.

⁸⁶ See Act of May 9, 2007, ch. 100, § 29, 2007 Oregon Laws (to be codified at OR. REV. STAT. § 659.850 (2007)); Press Release, Chip Alfred, Equal. Forum, 94.4% of the 2008 Fortune 500 Provide Sexual Orientation Nondiscrimination: Senator Obama and Senator McCain Take Opposite Positions on Sexual Orientation Workplace Protection (Aug. 27, 2008), http://www.equalityforum.com/newsite/news_item.cfm?id=2.

⁸⁷ See Diller, *supra* note 1, at 1128–29.

⁸⁸ See *id.* at 1127 n.65.

⁸⁹ See *supra* text accompanying notes 26 to 29; *Besaw's Café*, 165 Or. App. at 184 n.4, 997 P.2d at 204 n.4.

“proving grounds.”⁹⁰ All other things being equal, cities will be more likely to adopt new and innovative policies if fewer substantive areas have been preempted by the state. In many states with home rule, municipal authority has been eroded not just by legislative express preemption, but also by the judicial doctrine of implied preemption.⁹¹

In Oregon, by contrast, the courts interpreting the Home Rule Amendment have articulated a strong presumption—or assumption—against implied preemption in the civil realm.⁹² This presumption encourages local autonomy and discourages opponents of local regulation—often businesses and public-sector labor unions—from running to the courts to challenge local ordinances that they argue conflict with state law or invade a field that state law has completely “occupied.”⁹³ On the other hand, at least since *City of La Grande*, the Oregon Supreme Court has interpreted the Home Rule Amendment as providing no immunity to cities from *express* preemption on “substantive social, economic, or regulatory” matters.⁹⁴ As this section will explore, Oregon’s legislature and voters (through statewide initiatives) have frequently enacted laws expressly preempting municipal authority, thereby limiting the ability of Oregon’s cities to serve as policy “proving grounds.” This phenomenon has prevented Oregon cities from adopting innovative responses to different social and economic problems, thereby limiting their ability to lead the nation in municipal policymaking.

⁹⁰ GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND* 70 (2008) (observing from interviews with local officials that preemption and the threat of litigation related to preemption constrain local authority); Barron, *supra* note 16, at 2357 (“[C]ourts . . . have adopted an expansive view of state preemption [of anti-discrimination ordinances], which makes it particularly difficult for municipal officials to be confident that their innovative antidiscrimination measures will survive judicial challenge.”); Richard Briffault, *Home Rule for the Twenty-First Century*, 36 *URB. LAW.* 253, 264 (2004); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 *RUTGERS L.J.* 627, 639–40 (2001).

⁹¹ Rodriguez, *supra* note 90, at 639–40 (referring to the prospect of implied preemption of municipal authority as a “dilemma for local governments”).

⁹² *Denton Plastics, Inc. v. City of Portland*, 105 Or. App. 302, 305, 804 P.2d 1199, 1201 (1991); *Haley v. City of Troutdale*, 281 Or. 203, 209–11, 576 P.2d 1238, 1242–43 (1978); *Or. Rest. Ass’n v. City of Corvallis*, 166 Or. App. 506, 999 P.2d 518 (2000); *Besaw’s Café*, 165 Or. App. at 191, 997 P.2d at 191; *Covey Drive Yourself & Garage v. City of Portland*, 157 Or. 117, 123, 70 P.2d 566, 569 (1937). *But see* *Fischer v. Miller*, 228 Or. 54, 55, 363 P.2d 1109, 1110 (1961); *Thunderbird Mobile Home LLC v. Wilsonville, No. cv-05-110027*, slip op. (Clack. Cty. Cir. Ct. Jan. 31, 2007).

⁹³ *See* Diller, *supra* note 1, at 1134–37.

⁹⁴ 281 Or. 137, 576 P.2d 1204 (1978), *aff’d on reh’g*, 284 Or. 173, 586 P.2d 765 (1978).

A. Express Preemption

As a federal constitutional matter, under *Hunter*, the state legislature may preempt any action of a local government. To promote local autonomy, however, many of the earliest home-rule regimes preserved, through the state constitution, some residuum of exclusive authority over “local” affairs for cities.⁹⁵ Concomitantly, many of these systems limited the lawmaking power of cities to this “local” realm.⁹⁶ Thus, these early regimes created a protected “local” realm that the state legislature could not invade as a matter of state constitutional law. This early form of home rule became known as “imperio” because it established essentially separate—and exclusive—realms in which a city and state might legislate, thereby making a city an “imperium” within the “imperio” of a state.⁹⁷ In an imperio home-rule system, which a handful of states retain today in some form,⁹⁸ state courts serve as the ultimate arbiter of city power because they decide which subjects are “local” and which are not.⁹⁹ Over time, most states have revised or replaced their imperio home-rule systems because courts often interpreted “local” quite narrowly, which constricted the subject areas in which a city could legally legislate.¹⁰⁰

Most states that replaced imperio home rule, and other states that adopted home rule later in the twentieth century, adopted a “legislative” or “legislative supremacy” system of home rule.¹⁰¹ In a legislative home-rule system, the state constitution grants cities extensive lawmaking power that is not limited to the “local” realm.¹⁰²

⁹⁵ Diller, *supra* note 1, at 1124–25.

⁹⁶ *Id.*

⁹⁷ *St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893); *City of New Orleans v. Bd. of Comm’rs of Orleans Levee Dist.*, 640 So. 2d 237, 241–42 (La. 1994) (reviewing the “imperio” model of home rule); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 660–61 (1964).

⁹⁸ It is difficult to offer a precise count of “imperio” states due to a certain amount of ambiguity in states’ constitutions, laws, and judicial decisions on the matter. Nonetheless, estimates of “imperio” regimes range from “very few,” David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 392 (2001), to nineteen. Timothy D. Mead, *Federalism and State Law: Legal Factors Constraining and Facilitating Local Initiatives*, in HANDBOOK OF LOCAL GOVERNMENT ADMINISTRATION 31, 36 (John J. Gargan ed., 1997).

⁹⁹ Barron, *supra* note 16, at 2325–26; Sandalow, *supra* note 97, at 660.

¹⁰⁰ Sandalow, *supra* note 97, at 660.

¹⁰¹ Diller, *supra* note 1, at 1125–26.

¹⁰² *Id.*

At the same time, this grant of municipal power is usually conditioned upon cities not taking any action inconsistent with or preempted by state law.¹⁰³ In a legislative home-rule system, therefore, the legislature can deprive cities of authority to regulate in any area the legislature chooses, even if the subject area is one that would be considered “local” in an imperio system.

Whether Oregon’s Home Rule Amendment established an imperio or legislative regime was in some doubt until 1978 when a sharply divided state supreme court, in the landmark case of *City of La Grande*, interpreted the amendment as establishing something more akin to a legislative system.¹⁰⁴ The case arose when two cities, La Grande and Astoria, challenged a 1971 state law that required all municipal police officers and firemen to be brought within the state’s retirement system unless the city provided equal or better retirement benefits.¹⁰⁵ Similarly, the law mandated that cities pay premiums on a state-administered life insurance policy for these employees’ job-related deaths unless the city provided equal or better benefits.¹⁰⁶ La Grande and Astoria claimed that the state law amounted to an unfunded mandate in violation of the cities’ powers under the Home Rule Amendment. More specifically, La Grande and Astoria argued that the law, by affecting a municipality’s relationship with its own employees, invaded a protected “local” domain that the amendment exclusively reserved to cities.¹⁰⁷ In support of their argument, La Grande and Astoria relied heavily on the 1962 case of *State ex rel. Heinig v. City of Milwaukie*, in which the Oregon Supreme Court read the Home Rule Amendment as establishing an imperio-like regime, at least with respect to municipal employees.¹⁰⁸ *Heinig* also declared

¹⁰³ *Id.*

¹⁰⁴ 281 Or. 137, 576 P.2d 1204, *aff’d on reh’g*, 284 Or. 173, 586 P.2d 765 (1978).

¹⁰⁵ *City of La Grande*, 281 Or. at 139, 576 P.2d at 1206 (citing Or. Laws 1971, ch. 692, codified at OR. REV. STAT. §§ 237.610–237.640).

¹⁰⁶ *Id.* (citing Or. Laws 1971, ch. 692, codified at OR. REV. STAT. §§ 243.005–243.055 (2007)).

¹⁰⁷ *Id.*

¹⁰⁸ 231 Or. 473, 479, 373 P.2d 680, 684 (1962) (“[W]e hold that the people of a city are not subject to the will of the Legislature in the management of purely local, municipal business in which the state at large is not interested”) (internal citations and quotations omitted).

that the state legislature could not legislate in areas of “local concern” without a “discernible pervading state interest.”¹⁰⁹

In an opinion authored by Justice Linde, the *City of La Grande* majority did not purport to overrule *Heinig*. Rather, the court distinguished *Heinig* on its facts and sharply reduced its scope.¹¹⁰ After tracing the history of the Home Rule Amendment, as well as judicial interpretations of it, Justice Linde concluded that the provision, as evidenced by its charter-specific language, was designed to protect “the structure and procedures of local agencies” from state interference.¹¹¹ By contrast, the court concluded that the amendment allows state legislation to trump conflicting municipal policies when the state action is directed toward “substantive social, economic, or other regulatory objectives,” like the 1971 employee benefits law at issue.¹¹² Only when “the [state] law is shown to be irreconcilable with the local community’s freedom to choose its own political form” would a conflict between city and state law be resolved in favor of the city.¹¹³ In addressing the dissent’s reading of the amendment, under which city decisions regarding “local” affairs—even those involving substantive social or economic goals—would be immune from preemption by the state, Justice Linde rejected the notion that the judiciary was well-suited to determine whether a subject of regulation was appropriately “local” or “statewide.” Believing that this inquiry was more political than judicial, Justice Linde opined that it was better suited to the legislature.¹¹⁴ Justice Linde noted that were the court to agree that matters involving “local personnel” were reserved only to cities, as the plaintiff cities argued, it would “raise doubt whether local employees must also be excluded from all state occupational qualifications or state protective laws,” such as wage and hour standards and nondiscrimination.¹¹⁵

¹⁰⁹ *Heinig*, 231 Or. at 684, 373 P.2d at 684; see also *Boyle v. Bend*, 234 Or. 91, 98 n.6, 380 P.2d 625, 629 n.6 (1963) (“[A] statute is inoperative to the extent that it conflicts with an ordinance on a matter of local concern.”) (quoting *Heinig*).

¹¹⁰ *City of La Grande*, 281 Or. at 146–47, 576 P.2d at 1210 (concluding “that the *Heinig* formula should [not] be extended beyond the context . . . in which it was formulated”).

¹¹¹ *City of La Grande*, 281 Or. at 156, 576 P.2d at 1215.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *City of La Grande*, 281 Or. at 153–54, 576 P.2d at 1213–14; see also *City of La Grande v. Pub. Employes Ret. Bd. (City of La Grande II)*, 284 Or. 173, 184–86, 586 P.2d 765, 771–72 (1978).

¹¹⁵ *City of La Grande*, 281 Or. at 153, 576 P.2d at 1213. For further discussion of whether the Home Rule Amendment prohibits a state law from affecting a city’s

The majority opinion invited two dissents, including a sharp dissent authored by Justice Tongue who accused the one-vote majority of overturning the “long-established concept” that Oregon cities had “exclusive power to legislate as to all matters of ‘local interest’ . . . free from intervention by the state legislature.”¹¹⁶ Whether the *City of La Grande* majority or dissents showed more fealty to the precedents interpreting the Home Rule Amendment between 1906 and 1978 is hard to say.¹¹⁷ Although the majority’s holding exposed local action to more potential subject-matter preemption than the dissent’s proposed holding, even the majority embraced a modified version of an imperio system: Local charter provisions and ordinances that govern the “structures and procedures” or “form” of local government are immune—or at least nearly immune—from meddling by the state legislature.¹¹⁸ On the other hand, in matters of substantive social and economic policy, the Oregon legislature—as well as the state’s voters—may preempt any municipal action¹¹⁹ for any reason not otherwise prohibited by law.¹²⁰

relationship with its employees, see *City of Roseburg v. Roseburg City Firefighters*, 292 Or. 266, 273–84, 639 P.2d 90, 95–101 (1981) (upholding state’s Public Employee Collective Bargaining Act as applied to city employees); *City of Roseburg*, 292 Or. at 298–99, 639 P.2d at 109 (Linde, J., concurring) (noting that state legislation dealing with municipal employment practices “meets the strongest ‘home rule’ objections and causes the most difficult legal issues”).

¹¹⁶ *City of La Grande*, 281 Or. at 157, 576 P.2d at 1216.

¹¹⁷ See Randy Sterns, Comment, *Home Rule in Oregon After La Grande v. Public Employment Retirement Board*, 15 WILLAMETTE L. REV. 311, 323 (1979) (arguing that the *City of La Grande* majority departed from home-rule precedent).

¹¹⁸ *City of La Grande* leaves some room for state laws to override local provisions related to municipal structure and procedure when “justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.” *City of La Grande*, 281 Or. at 156, 576 P.2d at 1215.

¹¹⁹ *Id.* Despite the fact that home-rule counties are governed by a different provision of the Oregon constitution than cities, the Oregon Court of Appeals has assumed, without any extensive analysis, that the *City of La Grande* framework applies to counties as well. *E.g.*, *GTE Nw. Inc. v. Or. Pub. Util. Comm’n*, 179 Or. App. 46, 52 n.4, 39 P.3d 201, 205 n.4 (2002); see also *GTE Nw.*, 179 Or. App. at 64–65, 39 P.3d at 211 (Armstrong, J., concurring); *Pac. Nw. Bell Tel. Co. v. Multnomah County*, 68 Or. App. 375, 378 n.2, 681 P.2d 797, 798 n.2 (1984) (“The parties did not brief or argue whether there is any substantive difference between county and city home rule charter provisions in the constitution. . . . For the purposes of this opinion, we assume that there is not.”). This is a curious assumption in light of the textual differences between article XI, section 2, and the county home-rule provision—article VI, section 10. *Buchanan v. Wood*, 79 Or. App. 722, 731 n.1, 720 P.2d 1285, 1290 n.1 (1986) (Joseph, C.J., dissenting) (“I do not necessarily agree that *LaGrande/Astoria v. PERB* has anything to do with a county home rule charter under Article VI, section 10.”) (citations omitted). For an extensive discussion of county

This partial imperio system immunizing local decisions regarding government form and procedure is unique to Oregon and has been suggested by local government scholars as a template for other states.¹²¹

As discussed above, Oregon courts have applied a rather stringent standard for claims of implied preemption, at least on the civil side. Since *City of La Grande*, therefore, interest groups are most apt to look to the state legislature or the initiative process for relief from local regulation they oppose.¹²² The legislature, and somewhat less frequently, the voters, have at times lent a sympathetic ear to such interest groups and hastily preempted areas in which Oregon cities were just beginning to tread. For instance, in the 1990s, municipalities around the country began enacting ordinances banning smoking in indoor public spaces, including bars and restaurants, which had previously been exempt or partially exempt from state and local laws on the issue.¹²³ In 1998, California became the first state to adopt such a smoking ban statewide. Many other cities, counties, and some states around the nation followed in a paradigmatic example of policy percolation.¹²⁴ In Oregon, Corvallis first enacted a comprehensive smoking ban in 1998.¹²⁵ Eugene and Philomath

home rule in Oregon, see Orval Etter, *County Home Rule in Oregon Reaches Majority*, 61 OR. L. REV. 3 (1982).

¹²⁰ To be sure, federal law—particularly, federal constitutional guarantees like equal protection—remain a constraint on the state’s ability to preempt local enactments, particularly where the federal courts detect an impermissible motive for the preemption. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating, on equal protection grounds, a statewide initiative preempting city ordinances prohibiting discrimination on the basis of sexual orientation); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (invalidating, on equal protection grounds, a statewide initiative that prohibited Seattle from engaging in voluntary school busing).

¹²¹ Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 28–29 (2006).

¹²² Diller, *supra* note 1, at 1133.

¹²³ The first municipalities to ban smoking in all public buildings, including bars and restaurants, were San Luis Obispo and Lodi, California, as well as Aspen, Colorado, all in 1990. See Robert Reinhold, *Los Angeles Journal*; *In a Smoking Ban, Some See Ashes*, N.Y. TIMES, Aug. 15, 1990, at A22.

¹²⁴ See James Rosen, *Tobacco Is a Loser on Various Fronts*, SACRAMENTO BEE, Nov. 27, 2003, at D1 (noting that, by 2003, four states (Connecticut, Delaware, Maine, and Massachusetts) had followed California in extending their workplace smoking bans to include bars).

¹²⁵ *Or. Rest. Ass’n v. City of Corvallis*, 166 Or. App. 506, 508, 999 P.2d 518, 519 (2000).

adopted similar bans shortly thereafter.¹²⁶ The bar and restaurant lobby first turned to the courts to stop the bans, arguing that the Corvallis ban conflicted with the preexisting, less stringent statewide laws regulating indoor smoking.¹²⁷ After its preemption argument was rejected by the courts, the bar and restaurant lobby turned to the state legislature and lobbied for a law expressly preempting local authority to adopt such bans.¹²⁸ Bowing to the pressure from these well-funded interest groups, the state legislature passed such a bill in 2001, although the law exempted the few preexisting municipal bans.¹²⁹

The state legislature's quick preemption of the antismoking ordinances, an area into which Oregon municipalities were just beginning to tread, almost certainly halted the spread of Corvallis-type ordinances to other cities and counties in the state, including populous Portland and Multnomah County. Although the state legislature eventually passed a statewide comprehensive smoking ban that took effect in 2009,¹³⁰ the legislature's express preemption ensured that Portland, which has been hailed as one of the most "health-conscious" cities in America,¹³¹ would lag behind other major American cities by years in requiring smoke-free workplaces. Given the serious health risks associated with exposure to indoor second-hand smoke, and the likelihood that more Oregon cities would have adopted smoking bans in the absence of the 2001 state law, the state's express preemption of the field for almost eight years likely caused serious, preventable harm to thousands of Oregonians.¹³²

¹²⁶ See Dave Hogan & Ryan Kost, *Smoking Has Left the Building*, OREGONIAN, June 16, 2007, at A1.

¹²⁷ *Or. Rest. Ass'n*, 166 Or. App. at 508, 999 P.2d at 519.

¹²⁸ *Panel OKs Bill to Prohibit Outlawing Smoking in Bars*, OREGONIAN, Apr. 17, 2001, at B7.

¹²⁹ OR. REV. STAT. § 433.863 (2003).

¹³⁰ 2007 Or. Laws Ch. 602. Despite passing the ban in June 2007, the state legislature allowed bars and restaurants an eighteen-month compliance period before the law took effect on January 1, 2009. *Id.* § 13. This eighteen-month delay in the smoking ban's implementation was much longer than implementation delays for similar laws in other jurisdictions. In Washington, for instance, the statewide smoking ban adopted by initiative took effect within a mere thirty days. See Julie Davidow, *Smoking Ban Sails to Victory*, SEATTLE POST-INTELLIGENCER, Nov. 9, 2005, at A18.

¹³¹ Angie Chuang, *Portland Second on List of Healthy Cities*, OREGONIAN, Jan. 4, 2007, In Portland, at 3 (noting that a national magazine, *Cooking Light*, had rated Portland the second-healthiest city in America).

¹³² The harms from second-hand smoke are well documented, and the level of harmful air particles in bars that allow smoking is generally much higher than in those that do not.

The smoking ban is just one recent example of the Oregon legislature preempting a field in which it was possible—in some cases, highly probable—that cities and counties might enact more stringent regulation, spurring the interest groups opposed to such regulation to seek relief from the statehouse. Other areas in which the state legislature has significantly limited local authority include: rent control,¹³³ condominium conversion restrictions,¹³⁴ minimum wage,¹³⁵ bans on talking on a cell phone while driving,¹³⁶ mobile-home closure restrictions,¹³⁷ and impact fees on new development.¹³⁸ In addition, the voters have approved statewide initiatives aimed at depriving local governments of authority to regulate in particular areas, such as Measure 36 in 2004, which was placed on the ballot in

See Associated Press, *Smoking Ban Leads to Big Drop in Heart Attacks*, Dec. 31, 2008, available at <http://www.msnbc.msn.com/id/28450513> (discussing the three-year study of the smoking ban in Pueblo, Colorado, which concluded that the ban led to a “dramatic drop in heart attack hospitalizations”) (discussing RN Alsever et al., *Reduced Hospitalizations for Acute Myocardial Infarction after Implementation of a Smoke-Free Ordinance, City of Pueblo, Colorado, 2002–2006*, 57 MORBIDITY & MORTALITY WEEKLY REP. 1373 (Jan. 2, 2009), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5751a1.htm>); U.S. DEPT. OF HEALTH & HUM. SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL* ch. 1, at 11–12 (2006) (concluding that second-hand smoke causes “premature death,” “immediate adverse effects on the cardiovascular system,” “coronary heart disease and lung cancer,” and “that there is no risk-free level of exposure to secondhand smoke”); see also Richard Pérez-Peña, *So a Guy Walks Into a Bar With an Air Monitor*, N.Y. TIMES, Apr. 25, 2004, at N35 (discussing study finding that atmosphere in smoke-free bars has “less than one-tenth as many fine particles and other harmful chemicals as in cities where smoking is still allowed”).

¹³³ OR. REV. STAT. § 91.225 (2007).

¹³⁴ *Infra* note 145.

¹³⁵ OR. REV. STAT. § 653.017 (2007) (enacted in 2001 to prevent local municipalities from adopting minimum wages for private employers—“living wage” ordinances—higher than the level set by state law). See Legis. Admin. Committee Services, 2001 SUMMARY OF MAJOR LEGISLATION, at 7, available at <http://www.leg.state.or.us/comm/commsrvs/2001sml.pdf> (discussing HB 2744); see also Jeff Mapes, *House Curbs Local Wage Rules*, OREGONIAN, June 21, 2001, at B1 (describing bill prohibiting local governments from enacting a higher minimum wage as “sought by the Oregon Restaurant Association,” “a big contributor to Republicans,” who controlled the legislature at that time).

¹³⁶ OR. REV. STAT. § 801.038 (2007).

¹³⁷ OR. REV. STAT. § 90.660 (2007).

¹³⁸ Oregon allows municipalities to impose impact fees—called “system development charges,” or SDCs—only for the portion of capital (but not operating) expenditures attributable to new development. OR. REV. STAT. §§ 223.297–223.314 (2007). Moreover, Oregon law allows cities and other local districts to impose SDCs for water, transportation, parks, OR. REV. STAT. § 223.299—and, since 2007, schools (for which the equivalent of SDCs are called “construction taxes”), see 2007 Or. Laws ch. 829, codified in OR. REV. STAT. § 320.170–189 (2007)—but not for library services, fire protection, or police costs.

reaction to Multnomah County's attempt to recognize gay marriage.¹³⁹

The interest groups pushing for express preemption provisions are often well-funded and well-organized, such as the restaurant industry that lobbied for the smoking ban and minimum wage preemption provisions and the public-sector labor unions that lobbied for the law upheld in *City of La Grande*. Such groups' lobbying clout is often bolstered by their large campaign contributions, particularly given the laissez-faire approach to campaign finance that the Oregon Supreme Court has consistently stated is required by the Oregon Constitution.¹⁴⁰ Moreover, Oregon's relatively lax ethics laws, which allow the state's part-time and poorly paid legislators to use campaign contributions to pay a wide variety of expenses associated with holding office, may make the legislature particularly susceptible to influence by generous interest groups.¹⁴¹

Interests groups favoring local autonomy on a particular issue are sometimes less well-funded, and, on occasion, view local autonomy as a readily expendable bargaining chip in the pursuit of larger goals. For instance, in the recent campaign to increase protections for renters in buildings being converted to condominiums, affordable housing activists initially planned to lobby Portland to improve its protection of tenants.¹⁴² To facilitate this effort, they planned to lobby the state legislature to clarify that Oregon cities had the authority to legislate in the area of condominium conversions.¹⁴³ Indeed, the initial version

¹³⁹ OR. CONST. art. XV, § 5a (adopted by voter initiative in November 2004). Although the text of Measure 36 does not expressly preempt local governments, the Oregon Supreme Court interpreted the measure as intending to do so. *Li v. State*, 338 Or. 376, 389, 110 P.3d 91, 98 (2005).

¹⁴⁰ *E.g.*, *Vannatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997); *see also* OREGON LAW COMMISSION, REPORT ON GOVERNMENT ETHICS 7 (2007), available at http://legacy.lclark.edu/faculty/gchaimov/objects/OLC_07_Ethics_Report.pdf.

¹⁴¹ OREGON LAW COMMISSION, *supra* note 140, at 7 (noting the "unequal access to political decision-makers that large campaign contributors may provide").

¹⁴² Nick Budnick, *Renters Find Laws Don't Protect Them*, PORTLAND TRIB., Dec. 12, 2006, at A1; *see generally* Lori Tobias, *Condo Conversions Put Renters in Bind*, OREGONIAN, Mar. 11, 2007, at C1; Erin Hoover Barnett, *Renter Roulette*, OREGONIAN, Aug. 23, 2007, at A10.

¹⁴³ Affordable housing advocates felt that such a nonpreemption provision was necessary in light of a decision from Clackamas County Circuit court striking down Wilsonville's mobile-home ordinance on preemption grounds, *Thunderbird Mobile Home LLC v. Wilsonville*, no. cv-05-110027, slip op. (Clack. Cty. Cir. Ct. Jan. 31, 2007); *see also* Budnick, *supra* note 142. This decision is highly questionable in light of Oregon's strong presumption against implied preemption on the civil side. *See supra* note 92 and accompanying text.

of the bill that later passed during the 2007 session included a provision expressly allowing local governments to enact condominium conversion requirements more stringent than state law.¹⁴⁴ In the course of the horse trading necessary to produce a final bill that included minor improvements in protections for renters statewide, affordable housing activists traded their express permission provision for a statute that, with narrow exceptions, preempted local authorities from legislating in the area of condominium conversions.¹⁴⁵ While affordable housing activists may have viewed this as a necessary and worthwhile sacrifice to improve conditions statewide, it will block Portland and other cities in Oregon from serving as potential proving grounds for more tenant-protective condominium conversion policies in the future.¹⁴⁶

Like the affordable housing advocates seeking condominium-conversion legislation, other interest groups may undervalue local autonomy when they sacrifice it to obtain a statewide compromise on a particular issue. When pitted against organized and well-funded interest groups like business associations or labor unions, Oregon cities and counties likely have relatively weak lobbying clout.¹⁴⁷ They do not make campaign contributions to candidates for state office. While a few individual cities, as well as groups like the Oregon League of Cities, hire lobbyists to represent them in Salem, these lobbyists likely have less clout than those lobbying on behalf of groups actively and generously contributing to campaigns. Efforts to reform Oregon's ethics and campaign finance laws, therefore, may help level the playing field somewhat for Oregon's cities and counties in lobbying to retain local authority, as well as for the interest groups that want to preserve local authority on particular issues.

¹⁴⁴ HB 3186, § 7, available at <http://www.stoel.com/webfiles/hb3186.intro.pdf> (last visited June 3, 2009) (initial version of bill).

¹⁴⁵ See Or. Rev. Stat. §§ 91.225, 100.305, 100.315 (2007).

¹⁴⁶ Residents in Seaside, for instance, have expressed concern about condominium conversions displacing affordable housing. See Tobias, *supra* note 142.

¹⁴⁷ When not pitted against well-funded interest groups, Oregon's cities and counties may enjoy more lobbying clout. For instance, it is likely Oregon cities have more lobbying clout than interest groups representing individual criminal defendants. See *supra* Part II. In a separate context, Oregon cities have recently demonstrated some lobbying clout in their efforts to press the 2009 legislature to revise the ethics disclosure legislation passed in 2007. See Janie Har, *Oregon Legislators Consider Changes to Ethics Laws*, OREGONIAN, Mar. 10, 2009, available at http://www.oregonlive.com/news/index.ssf/2009/03/oregon_legislators_consider_ch.html.

The frequency with which local autonomy is bargained away in the legislative process suggests that the “political safeguards” that arguably protect state governments from the federal may not protect local governments in Oregon from state interference.¹⁴⁸ State legislators represent districts that do not necessarily conform to municipal boundaries. The governor is elected by a straight popular vote, rather than by an electoral college composed of representatives of cities or counties.¹⁴⁹ In a battle over any particular substantive issue, legislators and voters likely consider local authority an abstract and tangential matter.

Despite the state constitution’s seemingly broad recognition of home rule, the instances of express preemption doubtless have limited the range of subjects in which Oregon’s cities and counties might serve as proving grounds. It is possible that the legislature’s propensity to preempt has undercut the confidence of Oregon cities and counties to innovate in areas not yet preempted. In other words, perhaps the threat of express preemption looms so large over cities and counties that they fear if they push the envelope too far, they will provoke a preemption backlash from the state legislature or the voters.¹⁵⁰ While speculative and difficult to measure, this apprehension may be one reason why Oregon’s cities and counties are not often at the forefront of local policy change.¹⁵¹

From the standpoint of local autonomy, would Oregon cities have been better off had *City of La Grande* come out the other way? Not necessarily. Indeed, the imperio-like system embraced by the *City of La Grande* dissent may have constricted local authority more. The common criticism of the old imperio regimes was that they limited local authority to an often narrow realm determined by the judiciary.¹⁵² Outside of this realm, cities and counties were powerless to act. Such an approach could result in judicial invalidation of new local policies by interest groups opposed to them

¹⁴⁸ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

¹⁴⁹ *Id.* at 553–58.

¹⁵⁰ *Cf.* FRUG & BARRON, *supra* note 90, at 35 (“In thinking about innovative policy responses to new conditions or problems, it will be the rare local official that will not be concerned about the possibility that their [sic] preferred course of action will run into legal problems . . . because of [preemption].”).

¹⁵¹ *Id.* at 70.

¹⁵² Sandalow, *supra* note 97, at 661 nn.77–79.

even before they have a chance to go into effect, rather than the possibility of eventual legislative preemption in a *City of La Grande* regime. On the other hand, if, under a system like that pressed by the *City of La Grande* dissent, Oregon courts were to define municipal authority broadly, perhaps there would be more local policy innovation in substantive areas.¹⁵³ Indeed, perhaps one reason Portland embarked on its bold, and controversial, experiment of offering public financing for city campaigns¹⁵⁴ is a belief that the program could not constitutionally be preempted by state law, as per *City of La Grande*, because it concerns the structures and procedures of the city's government.

While the assessment from the perspective of local innovation might be inconclusive, jurisprudential concerns counsel against reconsidering *City of La Grande*. Asking courts to place a certain subject matter in a local or statewide box is a categorical exercise that smacks of legal formalism.¹⁵⁵ It is rarely self-evident whether a particular policy concern—say, banning smoking or prohibiting discrimination on the basis of sexual orientation—is a local or statewide matter. Requiring courts to make this judgment is, as Justice Linde stated in *City of La Grande*, asking them to make a judgment that is often of a “political” nature.¹⁵⁶ Although at least one prominent scholar has defended the legitimacy of this judicial role,¹⁵⁷ most states moved away from this view decades ago.¹⁵⁸

To be sure, *City of La Grande* does not completely eliminate the courts' role in deciding questions of state-local power distribution. Oregon courts must decide claims of express and implied preemption as well as whether certain ordinances and laws concern the structures and procedures or form of local government (in which the state may not legislate, at least without a compelling interest); these categorical determinations are also prone to the critique of being overly

¹⁵³ *City of La Grande v. Pub. Employes Ret. Bd.*, 281 Or. 137, 157, 576 P.2d 1204, 1215 (1978) (Tongue, J., dissenting), *aff'd on reh'g*, 284 Or. 173, 586 P.2d 765 (1978).

¹⁵⁴ See generally CITY OF PORTLAND, OREGON, PUBLICLY FINANCED CAMPAIGNS IN PORTLAND (March 2005), <http://www.portlandonline.com/Auditor/Index.cfm?c=37740&a=80234>.

¹⁵⁵ See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

¹⁵⁶ *City of La Grande*, 281 Or. at 157, 576 P.2d at 1215.

¹⁵⁷ See Sandalow, *supra* note 97.

¹⁵⁸ David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 391–92 (2001).

formalistic.¹⁵⁹ Nevertheless, *City of La Grande* frees the Oregon courts from having to decide whether a wide range of substantive social and economic policy would be better regulated at the state or local level. Reading the Home Rule Amendment as establishing an imperio home-rule regime in which ordinances on local matters are protected from legislative preemption would be a clumsy method by which to prevent the loss of local autonomy that has occurred through legislative preemption.

B. Revenue Sources

In addition to the threat of express preemption, local governments, as well as school districts,¹⁶⁰ in Oregon have seen their available sources of revenue restricted in recent years. A trio of statewide initiatives passed in the 1990s, Measures 5 (1990), 47 (1996), and 50 (1997), imposed constitutional and statutory caps on local property taxes.¹⁶¹ While the details are complicated and have been discussed thoroughly elsewhere,¹⁶² Oregon's "property tax revolt" shifted much of the burden for funding education from local school districts to the state.¹⁶³ The kinds of services funded by general-service local governments—police, fire, parks, libraries, and, in some cases, public

¹⁵⁹ See *City of La Grande v. Pub. Employes Ret. Bd. (City of La Grande II)*, 284 Or. 173, 186, 586 P.2d 765, 779 (1978) (Tongue, J., dissenting) (criticizing majority's "procedure-substance" dichotomy" as "an exercise in semantics").

¹⁶⁰ Oregon recognizes school districts as separate "bodies corporate" from the cities or counties they serve. OR. REV. STAT. § 332.072 (2007).

¹⁶¹ Measure 5 became article XI, section 11b of the Oregon Constitution. Because the 1997 legislature found Measure 47 unworkable, it referred replacement Measure 50 to the people, who passed it in 1997 as article XI, section 11 of the Oregon Constitution. *Waldo Block Partners v. Dep't of Revenue*, 16 Or. Tax. 33, 36, 2002 WL 759633, *3 (2002). See David H. Angeli, *The Oregon Legislature's Constitutional Obligation to Provide an Adequate System of Public Education: Moving from Bold Rhetoric to Effective Action*, 42 WILLAMETTE L. REV. 489, 493 (2006).

¹⁶² See Angeli, *supra* note 161, at 493–95; see also OREGON DEPARTMENT OF REVENUE, HOW MEASURE 50 CHANGED THE PROPERTY TAX SYSTEM (1998), available at <http://www.oregon.gov/DOR/STATS/docs/303-405-98/pg6-11.pdf> [hereinafter DOR REPORT].

¹⁶³ *Pendleton Sch. Dist. 16R v. State*, 345 Or. 596, 609, 200 P.3d 133, 141 (2009); see also Cindy Hunt, *Senate Bill 100: Creating Public School Choice Through Charter Schools*, 36 WILLAMETTE L. REV. 265, 298 n.203 (2000). Article VIII, section 8 of the Oregon Constitution requires that the state legislature appropriate money for education sufficient to meet "quality goals established by law." OR. CONST. art. VIII, § 8 (2008). The Oregon Supreme Court recently ruled, however, that this provision does not authorize the courts to award an injunction requiring the legislature to allocate funds. *Pendleton School Dist. 16R*, 345 Or. at 609, 200 P.3d at 141.

transportation—have also been constrained by Measures 5 and 50. Even after Measure 50, however, Oregon’s cities and counties have retained some ability to increase property taxes to pay for local services under a “local option levy.”¹⁶⁴ Since 1997, cities, counties, and other local service districts have used this tool a number of times to fund local services.¹⁶⁵ By requiring a majority vote of a majority of registered voters, however, the local option has proved a more difficult way of raising revenue for local governments than the pre-Measure 5 system.¹⁶⁶ In November 2008, Oregon voters repealed the “double majority” requirement of Measure 47, which may make it easier for local governments to raise revenue in the future.¹⁶⁷

The limitations imposed by Measures 5 and 50 have likely prevented cities and counties in Oregon from adopting or even considering new policies that come with a higher price tag. For this reason, one might see these measures as undercutting local authority. On the other hand, although the measures have imposed substantial limits on the traditional method of raising local revenue, cities and counties retain other methods for raising revenue, such as imposing a general sales tax,¹⁶⁸ a gasoline tax,¹⁶⁹ or an income tax,¹⁷⁰ that are not subject to the same requirements as local option levies. While competitive pressures may make it more difficult for Oregon communities to sustain sales or income taxes than higher property

¹⁶⁴ See DOR REPORT, *supra* note 162, at 8.

¹⁶⁵ *Id.*

¹⁶⁶ Prior to Measure 5, local governments could raise property taxes by up to six percent annually without the voters’ authorization. *Id.* at 1. For an example of the efforts to which local governments must now resort to persuade voters to approve tax increases, see Marion County Voter Pamphlet, Special Election, Measure 24-09, Arguments in Favor, Sept. 15, 1998, available at http://apps.co.marion.or.us/co/elections/votepamp/vpsep98/a24_09a.asp.

¹⁶⁷ See Oregon Ballot Measure 56 (2008).

¹⁶⁸ Ashland has a five-percent sales tax on prepared food and beverages, but it is the only city in Oregon with anything close to a retail sales tax. See City of Ashland, Food and Beverage Tax, available at <http://www.ashland.or.us/Page.asp?NavID=9180> (last visited May 6, 2009).

¹⁶⁹ The Tigard City Council, for example, approved a three-cent gasoline tax in 2007. See Barbara Sherman, *Tigard Gas Tax Revenues Sputter*, TIMES (Tigard), Jan. 10, 2008, at A16.

¹⁷⁰ Although Multnomah County voters approved a three-year income tax levy in 2003, see Multnomah County Measure No. 26-48 (2003); Sam Dillon, *Portland Voters Approve Oregon’s Only County Income Tax, Aiding Schools*, N.Y. TIMES, May 22, 2003, at A16, a local income tax does not necessarily require voter approval in Oregon.

taxes,¹⁷¹ few Oregon municipalities have attempted to use such methods to raise revenue since 1997. Perhaps some local governments have retained adequate funding—or even increased funding—for programs since 1997 through local option levies. But in other circumstances, local officials have apparently chosen to accept a cut in revenues—and, therefore, services—rather than seek a new revenue source that they fear will be politically unpopular. This choice may reflect some failure of local officials to adequately represent their constituents' tax-service preferences. Alternatively, many Oregonians may simply prefer lower local expenditures and lower taxes to higher expenditures funded some other way.¹⁷² Hence, Oregonians may be content that Oregon cities are not leading the nation in adopting trendsetting local policies that come with a hefty price tag.

C. Demographic and Political Factors

A final reason why Oregon's cities and counties are not at the vanguard of local policy innovation is fairly simple: Oregon is not a particularly populous state,¹⁷³ and it has only one city—Portland—among the most populous cities in America, and only thirtieth at that.¹⁷⁴ Besides Portland, with approximately 550,000 people, only two other Oregon cities—Salem and Eugene—comprise more than 100,000 persons.¹⁷⁵ It is America's largest cities that generally lead the nation in adopting new and noteworthy policies that percolate out to other cities and up to the state level. New York City, for instance, America's most populous city, first enacted a trans fat ban, and was the first local government to require franchise restaurants to post

¹⁷¹ Cf. Julie M. Cheslik et al., *The Supreme Court Report 2005–06*, 38 URB. LAW. 737, 788 (2006) (discussing “race to the bottom” in taxation among competing governmental entities).

¹⁷² Those residents with divergent preferences might “vote with their feet” and leave low tax, low revenue cities or Oregon altogether. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

¹⁷³ As of 2007, Oregon ranked twenty-seventh out of fifty states. See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO, available at <http://www.census.gov/popest/states/NST-ann-est.html> (last visited May 6, 2009).

¹⁷⁴ Top Fifty Cities in the U.S. by Population and Rank, <http://www.infoplease.com/ipa/A0763098.html> (as of 2005) (last visited May 6, 2009).

¹⁷⁵ See U.S. CENSUS BUREAU, OREGON POPULATION ESTIMATES (as of 2007), available at <http://quickfacts.census.gov/qfd/states/410001k.html> (click “Population Estimates: Places in Oregon Listed Alphabetically”). Gresham is close, with 99,000 residents, and both Beaverton and Hillsboro have more than 90,000. *Id.*

calorie counts on their menus.¹⁷⁶ Los Angeles, the country's second most populous city, recently became the first city to adopt a moratorium on fast-food restaurants in certain areas in an effort to combat obesity.¹⁷⁷ San Francisco, fourteenth in population, has in recent years enacted a number of "firsts": requiring city contractors to provide domestic partnership benefits to gay employees,¹⁷⁸ attempting to provide health care to all city residents,¹⁷⁹ and banning plastic bags provided by retailers.¹⁸⁰

While some "firsts" have emanated from smaller cities and towns,¹⁸¹ there are institutional reasons why larger cities tend to use their home-rule powers more aggressively. In contrast to towns and smaller cities, larger cities usually have full-time, salaried mayors and council members, as well as a much larger and a better compensated corps of civil servants.¹⁸² Large cities often also have larger city councils that function like mini-state legislatures, with specialized committees and professional staff.¹⁸³ Populous municipalities have large staffs of city attorneys with specialized knowledge in state and local government law who advise elected officials on the legality of

¹⁷⁶ Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1; N.Y. State Rest. Ass'n v. N.Y. City Bd. of Health, 509 F. Supp. 2d 351, 352 (S.D.N.Y. 2007).

¹⁷⁷ Molly Hennessy-Fiske & David Zahniser, *Council Bans New Fast-Food Outlets*, L.A. TIMES, July 30, 2008, at B1.

¹⁷⁸ See SAN FRANCISCO, CAL., ADMINISTRATIVE CODE ch. 12B, § 12B.1 (effective June 1, 1997); see also SAN FRANCISCO HUMAN RIGHTS COMMISSION, THE EQUAL BENEFITS ORDINANCE: A SIX-MONTH REPORT (1998).

¹⁷⁹ SAN FRANCISCO, CAL., ADMINISTRATIVE CODE § 14.3(a) ("San Francisco Health Security Ordinance of 2006"); see also *Golden Gate Rest. Assoc. v. San Francisco*, 512 F.3d 1112 (9th Cir. 2008) (upholding ordinance against ERISA challenge).

¹⁸⁰ Plastic Bag Reduction Ordinance, SAN FRANCISCO, CAL., ADMINISTRATIVE CODE §§ 1701-09; Jesse McKinley, *San Francisco Board Votes to Ban Some Plastic Bags*, N.Y. TIMES, Mar. 28, 2007, at A16.

¹⁸¹ San Luis Obispo, California, for instance, was the first city to adopt a comprehensive indoor smoking ban. Gene Borio, *Tobacco Timeline: The Twentieth Century 1950-1999—The Battle Is Joined*, available at http://www.tobacco.org/resources/history/Tobacco_History20-2.html (last visited May 6, 2009).

¹⁸² New York City, for instance, employs more than 300,000 people at more than seventy agencies. See City of New York, Working for NYC, available at <http://www.nyc.gov/portal/site/nycgov/menuitem.62e273bb0ef1f307a62fa24601c789a0> (last visited May 6, 2009).

¹⁸³ The average number of city councilmen in America's top ten cities is just under twenty, see Diller, *supra* note 1, at 1138 n.113, whereas the average council membership for all cities nationwide is seven, *id.*

new policies and represent them in court when sued.¹⁸⁴ The larger cities' legal offices are often considered prestigious places of employment doing interesting work, thereby attracting some of the best and brightest legal minds.¹⁸⁵

In Oregon, full-time, salaried elected officials lead few cities or counties. Portland has a full-time mayor and city council ("commission"), although its council consists of only four other elected commissioners. Portland's five-person council stands in contrast to city councils of fifty-one in New York City and eight and thirteen, respectively, in similar-sized Oklahoma City and Denver.¹⁸⁶ A handful of Oregon counties, such as Multnomah and Lane, have a slate of five full-time, salaried commissioners.¹⁸⁷ Otherwise, part-time volunteers largely govern Oregon's cities and counties. Many Oregon cities, including its second, third, and fourth most populous—Salem, Eugene, and Gresham—operate under a city manager form of government in which the citizens elect volunteer or part-time mayors and councilors to set policy for the city,¹⁸⁸ but appoint a professional city manager to supervise the city's government.¹⁸⁹ The city-manager form of government stresses technical competence in the provision of bread-and-butter services and, not surprisingly, de-

¹⁸⁴ The New York City Law Department, for instance, has 690 lawyers and seventeen legal divisions. See New York City Law Dept., About the Law Dept., <http://www.nyc.gov/html/law/html/about/about.shtml> (last visited June 2, 2009).

¹⁸⁵ See, e.g., Jeffrey D. Friedlander, *Recruiting City Attorneys Despite Necessary Salary Limitations*, 234 N.Y.L.J. 3 (2005) (explaining New York City Law Department's success at recruiting lawyers with impressive credentials).

¹⁸⁶ See PORTLAND, OR. CHARTER, art. I, § 2-102, <http://www.portlandonline.com/Auditor/index.cfm?c=28237&a=13468> (last visited June 18, 2009); Diller, *supra* note 1, at 1138 n.113.

¹⁸⁷ E.g., MULTNOMAH COUNTY CHARTER § 3.10, http://www.co.multnomah.or.us/counsel/charter.shtml#_Toc145994935 (last visited June 18, 2009).

¹⁸⁸ SALEM, OR. CHARTER ch. VI, § 26, <http://www.cityofsalem.net/Departments/Legal/Pages/CityCharter.aspx#section6> (last visited June 18, 2009); EUGENE, OR. CHARTER ch. VI, sec. 18; GRESHAM, OR. CHARTER ch. III, § 10, <http://greshamoregon.gov/city/city-departments/city-attorneys-office/city-charter/> (last visited June 18, 2009) (Eugene pays its city councilors a "stipend" of \$1000 per month and its mayor a "stipend" of \$1500 per month, while Gresham pays only its appointed officials).

¹⁸⁹ SALEM, OR. CHARTER ch. V, § 23, <http://www.cityofsalem.net/Departments/Legal/Pages/CityCharter.aspx#section5> (last visited June 18, 2009); EUGENE, OR. CHARTER ch. IV, § 16; GRESHAM, OR. CHARTER ch. V, sec. 20, <http://greshamoregon.gov/city/city-departments/city-attorneys-office/city-charter/> (last visited June 18, 2009).

emphasizes politically risky policymaking at the local level.¹⁹⁰ This is not to say that Oregon's cities need more salaried officials, but it is likely a significant reason why Oregon cities are rarely at the forefront of municipal policymaking nationwide.

Another likely reason why many of the most newsworthy policies have emerged from America's most populous cities is the concentration of political preferences in those cities. Large cities lean disproportionately to the left in their politics, at least as measured by voting in national elections and levels of party identification.¹⁹¹ This political concentration plays a role in cities adopting policies that statehouses and the federal government, which represent a broader, more politically diverse electorate, might be hesitant to embrace. In Oregon, Portland and Multnomah County have a concentrated, heavily Democratic electorate,¹⁹² yet both have hesitated to embrace newsworthy policies that other cities or counties with similar political profiles have recently enacted. For instance, since 2007, a number of cities around the country, following San Francisco's lead, have either banned or taxed retail stores' use of plastic bags in an effort to combat pollution and global warming.¹⁹³ After considering the issue publicly, the Portland City Council declined to take action on the issue.¹⁹⁴ Likewise, after New York City and some other local governments adopted trans fat bans, Multnomah County Commissioners considered enacting a similar proposal, but ultimately backed off after a wave of hyperbolic opposition.¹⁹⁵ Although the

¹⁹⁰ One recent exception was Gresham's adoption of the first rental housing inspection program in the state. See Robin Franzen, *Cracking Down on Substandard Rentals*, OREGONIAN, Dec. 18, 2008, available at http://www.oregonlive.com/portland/index.ssf/2008/12/cracking_down_on_substandard_r.html; Editorial, *A City, and a Mayor, on the Move*, OREGONIAN, Dec. 26, 2007, at B3.

¹⁹¹ John Nichols, *Urban Archipelago*, NATION, June 2005, at 13.

¹⁹² In 2004, for instance, John Kerry defeated George W. Bush by a margin of 72% to 27% in Multnomah County, November 2, 2004 General Election Results, <http://www.co.multnomah.or.us/dbcs/elections/2004-11/results.shtml>, and in 2008, Barack Obama defeated John McCain by a margin of 77% to 21%, November 4, 2008 General Election Results, <http://www.co.multnomah.or.us/dbcs/elections/2008-11/results.shtml> (last visited May 6, 2009).

¹⁹³ Jennifer Steinhauer, *In San Francisco, Subtle Variations in Voters' Politics*, N.Y. TIMES, Oct. 2, 2008, at A19.

¹⁹⁴ James Mayer, *Adams Puts Grocery Bag Tax Idea on Hold: Citing the Bad Economy, the Portland Mayor Shelves His Plan*, OREGONIAN, Feb. 4, 2009, available at <http://www.oregonlive.com/news/oregonian/index.ssf?/base/news/123371971015600.xml&coll=7>.

¹⁹⁵ E.g., Brittany Schaeffer, *No Fries for You!*, WILLAMETTE WEEK, Oct. 25, 2006, at 18.

state legislature preempted municipalities' authority to enact comprehensive smoking bans in 2001, Portland and Multnomah County might have been exempted from the preemption had they—like Corvallis, Eugene, Philomath, and many other cities and counties around the country—enacted a ban before then.

To be sure, Portland and Multnomah County have engaged in some policy innovation of note in recent years. Portland has established a controversial day laborer center for immigrant workers,¹⁹⁶ adopted a system of public financing for municipal elections,¹⁹⁷ become the first city in the nation to establish a noncontiguous urban renewal district,¹⁹⁸ and gained national notoriety by opting out of cooperation with the FBI's antiterrorism task force.¹⁹⁹ Moreover, Portland engaged in a prominent, fifteen-year policy experiment—the now-defunct exclusion zones for prostitution and drug offenders—that could hardly be described as politically liberal.²⁰⁰ For its part, Multnomah County was one of a handful of local governments around the nation that sought—albeit unsuccessfully—to recognize gay marriage.²⁰¹ Recently, the county followed New York City's lead and adopted an ordinance requiring franchise restaurants to publicly post calorie counts.²⁰² The mix of policies put forward by Portland and Multnomah County may simply reflect residents' preferences for certain policies over others. Indeed, one explanation for some of the resistance in Portland and Multnomah County to policies embraced by other politically liberal local governments—such as banning trans fats or taxing plastic bags—might be Oregon's vaunted

¹⁹⁶ Anna Griffin, *Day Labor Center Opens, but Few Jobs to Be Had*, OREGONIAN, June 17, 2008, at A1.

¹⁹⁷ PUBLICLY FINANCED CAMPAIGNS IN PORTLAND, *supra* note 154.

¹⁹⁸ See *Friends of Urban Renewal v. Portland*, LUBA No. 2008-116, Jan. 2, 2009, available at <http://oregon.gov/LUBA/docs/Opinions/2009/01-09/08116.pdf>.

¹⁹⁹ Anna Griffin, *Joy in Galley as Portland Quits FBI Task Force*, OREGONIAN, Apr. 29, 2005, at A1.

²⁰⁰ See *State v. Lhasawa*, 334 Or. 543, 55 P.3d 477 (2002) (discussing Portland ordinances establishing exclusion zones); see also Andy Dworkin, *Expiring Drug-Free Zones End a City Era*, OREGONIAN, Sept. 29, 2007, at B1 (describing end of Portland's "15-year experiment").

²⁰¹ See *Li v. State*, 338 Or. 376, 110 P.3d 91 (2005).

²⁰² Arthur Gregg Sulzberger, *County Requires Calories on Menu*, OREGONIAN, Aug. 1, 2008, at A1.

libertarianism, which runs deep even in otherwise politically liberal areas.²⁰³

On the other hand, the threat of express preemption remains a threat to Portland's and Multnomah County's efforts to adopt innovative local policies. The state's voters expressly preempted Multnomah County's gay marriage policy by passing Measure 36 in 2004. Whether the legislature will overrule Portland's satellite urban renewal district remains to be seen.²⁰⁴ Just before this Article's printing, the state legislature passed a menu-labeling bill that largely mimicked Multnomah County's substantive approach to the subject, although the state law would not take effect until 2011,²⁰⁵ whereas the Multnomah County ordinance was to be implemented by the end of 2009.²⁰⁶ The state bill preempts all local laws on the subject, thereby delaying the implementation of a menu-labeling requirement in the Oregon's most populous county for more than a year.²⁰⁷

CONCLUSION

After 103 years, home rule in Oregon is a qualified success. Oregon's cities enjoy a broad amount of power to regulate in substantive areas, at least through civil enforcement mechanisms, and virtually unfettered power to control their own forms of government. Oregon's cities' authority to regulate criminally is appropriately limited, although the judicial doctrine in this area is in need of clarification. Further, the state legislature has been quick to intervene and preempt cities' authority to address social problems in new and innovative ways. This propensity for express preemption has carved out a number of substantive social and regulatory areas in which cities may not tread, thereby stunting policy innovation by local governments throughout the state. A greater respect for the value of cities as policy proving grounds by the state's legislators and its

²⁰³ See, e.g., IAN DOWBIGGIN, *A MERCIFUL END: THE EUTHANASIA MOVEMENT IN MODERN AMERICA* 171 (Oxford University Press 2003) (discussing Oregon's "culture of libertarianism").

²⁰⁴ At the time of printing, some state legislators had proposed a bill that would allow cities to create limited noncontiguous urban renewal districts. See S.B. 744, 75th Or. Legis. Ass'y (2009 Sess.).

²⁰⁵ See H.B. 2726, 75th Or. Legis. Ass'y (May 1, 2009); Bill Graves, *Oregon Attacks Menu Fat*, OREGONIAN, June 2, 2009, a A1.

²⁰⁶ Multnomah County Health Dept., Chronic Disease Prevention Program, <http://www.co.multnomah.or.us/health/chronic/labeling.shtml> (last visited June 11, 2009).

²⁰⁷ *Id.*

voters is necessary before the promise of home rule in Oregon can be more completely fulfilled.