

LEAGUE OF OREGON CITIES

HOME RULE IN OREGON CITIES

100 YEARS IN THE MAKING

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Home Rule in Oregon Cities 100 Years in the Making

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Introduction

"Local governments influence our lives in countless ways. They enhance public safety by employing thousands of police, prosecutors, parole and probation officers.....They build and repair city streets and county roads, and they operate water and sewer systems. They plan for local land use and transportation and provide zoning and development regulations. Local governments oversee solid waste disposal. They assess and tax local property and keep property records. They provide libraries, parks and recreation programs.....They provide various public health services, and, in some places ambulance service, clinics or hospitals. They control nuisances, everything from excessive noise to animals running at large. And they will do almost anything else that local citizens desire and are willing to fund."¹

In a complicated system of federal, state and local governments, what grants cities the authority to provide these services? Nationwide, the answer is home rule authority.

Home rule is a term that is frequently used but which has a multiplicity of definitions. The U.S. Bureau of the Census defines home-rule local governments as "those governments in which the form and the organization of the government is specified by a locally-approved charter rather than by a general or specific state law."² There are other definitions of home rule which allow for a broader use of local power. For instance, the now-defunct U.S. Advisory Commission on Intergovernmental Relations reaches beyond the powers of organization, adding to the definition of local discretionary authority the issues of self-function, employment conditions, taxing and finances.³

These two definitions of home rule, however, still do not take into account home rule's many complexities. Each state has different home rule provisions and independent court systems that interpret and give meaning to local authority. Despite the differences among states concerning home rule, all states and their localities share the struggle of finding a balance between state and municipal control. Oregon is no exception.

Oregon recently celebrated its 100th anniversary of home rule. The home rule amendments to the Oregon Constitution, passed by the voters in 1906, were unique compared with the many amendments passed in other states. One of the unique features of Oregon's home rule amendments is that Article XI § 2 (see p. 2 for full text) was written to protect cities from legislative control by making cities subject only to the constitution and criminal laws of the state.⁴ However, judicial opinions regarding this provision would narrow the scope of authority for Oregon cities. One hundred years later, the extent and meaning of this amendment is still being debated.

This report was first published in 2001 to help city officials understand how city home rule authority developed in Oregon and how it exists today; and to compare Oregon's experience with cities nationwide. Among its key sources are a previously-published home rule study by Orval Etter of the University of Oregon (1991), and studies published by the former U.S. Advisory Commission on Intergovernmental Relations (1981 and 1993).

Home Rule Amendment History

From its beginnings in the state Legislature to its approval by Oregon voters in 1906, the home rule amendments to the Oregon Constitution had a difficult journey to passage. At the turn of the 20th century, the Oregon Legislature made two unsuccessful attempts to pass a home rule amendment that could be referred to the voters. The first attempt occurred in 1901 when a home rule amendment was introduced which was almost identical to Washington's home rule amendment of 1889.⁵ Revisions were made to the home rule proposal, and the constitutional amendment was passed by both houses. The home rule provisions were never referred to the voters, however.⁶

In 1903, another attempt was made by the Legislature to refer a constitutional amendment. An amendment almost identical to the original 1901 amendment was proposed, and with a few adjustments the bill passed both houses. Once again, however, Oregon voters were not able to vote on this constitutional provision.⁷

There is no documentation explaining why these two legislatively-approved constitutional amendments were never referred to voters, other than references to many procedural errors during the home rule amendments' passage through the legislative process.⁸ Since the voters must approve any constitutional amendment that is proposed by the Legislature, an Oregon home rule constitutional amendment appeared to be a dead end.

In 1905, the People's Power League (PPL) took a new approach to passing a home rule amendment. The People's Power League was organized in 1892 and served as an advocate for the passing of the initiative and referendum provisions of the Oregon Constitution.⁹ The PPL decided to use the initiative power of the voters to bypass the Legislature and pass a home rule provision that was made for and by the citizens of Oregon. The PPL sent seven sample constitutional amendments out to over 1,000 Oregon voters.¹⁰ Even though one of the amendments was almost identical to the 1901 version, the PPL decided to move ahead with two amendments that were quite different from the original 1901 draft. Later that year, the People's Power League collected enough signatures to have the constitutional initiatives voted on in the next election. On June 4, 1906, two home rule amendments were approved by the voters of Oregon with an overwhelming majority.¹¹ The key provisions of the 1906 amendments stated:

.....The initiative and referendum powers reserved to the people by this constitution are hereby reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character, in or for their respective municipalities or districts..... (Oregon Constitution, Article IV § 1a, now § 1(5))

.....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. (Oregon Const., Article XI § 2)

Article IV § 1(5) grants the power to adopt home rule charters to the voters of municipalities, and Article XI, § 2, establishes immunity from legislative control and states that only voters have the power to enact, amend or repeal a charter. Although these are two different amendments granting separate powers, together they create home rule authority, and the courts have continuously ruled that they must be read together.¹²

The home rule amendments the voters approved were unique compared to the many amendments that had been passed in other states, including the Washington amendment that the Oregon Legislature had been trying to enact for five years. One of the unique features of Oregon's home rule amendments is that Article XI § 2 was written to protect cities from legislative control by making cities subject only to the constitution and *criminal* laws of the state.¹³ Judicial interpretation of this provision would change the future scope of home rule, but the initial intent of Oregon voters was to create "free cities" that could tend to the local needs of citizens and serve as units of governmental experimentation.¹⁴

Home Rule Legal History

Key Home Rule Cases: The Early Years

Home Rule Cases in Oregon Courts

Oregon court opinions held various views on the meaning of the home rule amendments, and the evolution of home rule in Oregon has taken place mostly in the courts. One of the first cases addressing the issue of home rule in Oregon was *Baxter v. State of Oregon* (1906).¹⁵ Shortly after the home rule amendment passed, Coquille amended its charter to include a provision authorizing the city to issue liquor licenses to saloons. At the time, Coos County had a local option law prohibiting the sale of alcohol within the county. A Coquille saloon owner named Baxter was charged with violating the county's local option law. Baxter's defense, which the Oregon Supreme Court rejected, was that the city's home rule charter is superior to the county local option law. The court's opinion stated that local option is a criminal law, therefore city governments are subject to it under Article XI § 2.

The first noncriminal home rule ruling was decided in *Straw v. Harris* (1909).¹⁶ The issue in this case was whether or not the Legislature could establish the Port of Coos Bay within the boundaries of a city, without approval from city voters. This port district included areas within the boundaries of four cities. Voters of three of the cities approved the port, while the fourth city, Marshfield, opposed creation of the port by a narrow majority. The mayor of Marshfield challenged the validity of the port on the basis that the Legislature's general law establishing the port changed the city charter, which is a violation of Article XI § 2. The court upheld the validity of the port, stating that the Legislature cannot *directly* amend or repeal a charter, but in this case the effect on the city charter was an *indirect* result of the port's creation.¹⁷

A drastic shift in the court's view of home rule in Oregon occurred with the decision in *Branch v. Albee* (1914).¹⁸ In 1903, the Legislature passed a special law creating a city pension system for the city of Portland. Portland adopted this system into its home rule charter, as authorized by the home rule amendments. In 1913, the Legislature established a new, more extensive plan for cities with populations over 50,000, a criteria that only Portland met. A Portland police officer filed suit against the city compelling the payment of his pension under the 1913 plan. The court sided in favor of the city, stating that under the constitution, the Legislature may not enact, amend or repeal a charter and charters are only subject to the constitution and criminal laws of the state. The power of voters to enact or amend their charter "is not made subject to the civil laws of the state."¹⁹

The court's decisions in *Straw* and *Branch* illustrate the competing conclusions Oregon's courts have reached in the interpretation and implementation of the home rule amendments, even in their earliest evaluations. These home rule theories would be present in the opinions and dissents of future home rule cases.

A pivotal, often-cited home rule case is *Rose v. Port of Portland* (1917).²⁰ In this unanimous decision, the Oregon Supreme Court upheld a ruling that the voters of a Port cannot amend a charter using initiative powers. The court held that the cities can amend their own charters, but other municipal governments must receive an "enabling act" from the Legislature to do so.²¹ Although this case did not involve any cities, the Oregon Supreme Court addressed the issue of city home rule by stating that city charters are subject to the constitution, and the constitution allows the Legislature to pass general laws affecting the state.²² Therefore, the Legislature can pass general laws affecting and preempting city charters.

After *Rose*, there were at least two cases where the court declared the home rule issue "settled." In *Lovejoy v. Portland* (1920),²³ the court stated that most of the preceding home rule cases, like *Straw v. Harris*, held that the Legislature can pass general laws that may affect city governance. Furthermore, "these decisions were free of dissent," while the cases holding an alternative opinion on home rule were not unanimous.²⁴

In *Burton v. Gibbon* (1934),²⁵ the court declared "it is now settled that, within the limits prescribed by the other provisions of the [Oregon] Constitution and of the [U.S.] Constitution, the power of Legislature can enact a general law applicable alike to all cities is paramount and supreme over any conflicting charter provision or ordinance of any....city." An ironic point to this case is that the general law in question gave cities the power to authorize refunding bonds, which cities needed during the Great Depression. This legislatively-granted authority overrode the debt limit provisions for some city charters. Several cities and the League of Oregon Cities joined suit in favor of defending this law, even though this is the type of case cities have been fighting since the home rule amendments passed in 1906.²⁶

A more home rule-friendly decision was made in *State ex rel. Heining v. City of Milwaukie* (1962).²⁷ In this case, the Oregon Supreme Court ruled that the state can enact general laws affecting cities if the issue is of "statewide concern."²⁸ A new test was created from

this ruling, and was meant to set a precedent for future home rule decisions. Previous home rule cases had used a state-versus-local interest test, but cases were usually decided in favor of the state if the state had any remote interest in the issue involved. The problem with this test is that most cases can be argued to have both state and local concern, which meant that the state's interests usually prevailed. *Heining* recognizes that strong local governments can be beneficial to citizens, while also recognizing the state's regulatory role. The *Heining* test tried to balance the issue of state and local concern by determining whether or not the interest at stake is *predominantly* of state or city concern, and then deciding cases based on this determination.²⁹

The biggest blow to home rule authority came in 1978 with the decision of *City of La Grande and City of Astoria v. Public Employees Retirement Board*.³⁰ In this case, La Grande and Astoria refused to comply with a state law requiring cities to offer certain insurance and retirement benefits to employees. The trial court and the Oregon Court of Appeals declared this case an issue of local concern, but the case was heard on appeal to the Oregon Supreme Court. In a 4-3 decision, The court established the following two-pronged test.

When a statute is addressed to a concern of the state with the structure and procedures of local agencies, the statute impinges on the powers reserved by the amendments to the citizens of local communities. Such a state concern must be justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.

Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community's freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.³¹

In *La Grande/Astoria*, the court found that because this case deals with an act of the Legislature and not of a city, the court must look at the restrictions and powers of the Legislature, and not of the cities. In the case of home rule, the Legislature may not enact or amend a city charter. Since the PERS requirements did not affect the charters of La Grande or Astoria, the court concluded that the Legislature did not exceed the scope of its powers. The court stated that cities have the power to frame and enact a city charter, but the charter is strictly a grant of procedural power and can only be given procedural protection from general legislation. Cities may grant themselves substantive powers within their charters, but these powers are not protected under home rule authority. For example, cities may choose their structure of government, but actions taken by the government are not protected under home rule authority. *La Grande /Astoria* was a split decision with a very strong dissent.³² This means the two home rule interpretations found in *Straw v. Harris* and *Branch v. Albee* are still present in the Oregon Supreme Court, and the future scope of home rule authority will continue to evolve.

Home Rule Cases in the Federal Courts

The federal courts have also played a role in home rule authority, but the effect of the U.S. Supreme Court's decisions reach much farther than Oregon. Dillon's Rule, which was upheld by the U.S. Supreme Court in 1903, established "state omnipotence."³³ Municipal corporations were the creation of states, therefore cities are subject to state control. In *Hunter v. City of Pittsburgh* (1907), the Supreme Court stated that "municipal corporations are political subdivisions of the state," therefore it is suitable that restrictions and limitations on cities would come from the state.³⁴ The court went on to say that the "state is supreme" and the U.S. Constitution cannot interfere.³⁵ The result of these court decisions was an increase in special laws regulating local governance.³⁶

In an attempt to shift authority back towards cities, a new rule came down from the federal courts stating that "some rights of local self-government are inherent in municipalities."³⁷ A few states, not including Oregon, tried using this rule, but Dillon's Rule ultimately prevailed in the adjudication of home rule cases in the federal courts.

Key Home Rule Cases: The New Millennium

Recent decisions of the Oregon appellate courts have diverted little from the principles enunciated in *La Grande/Astoria v. PERB*, which held that the constitutional home rule provisions permit the people of cities to determine for themselves the organization and powers of their local governments without the need to obtain authority from the state legislature, but that those powers may be limited or "preempted" by state or federal law.³⁸

Several recent cases have reaffirmed the expansive constitutional authority of Oregon cities to govern themselves. In the twin 2001 Eugene telecommunications cases, *AT&T v. City of Eugene* (2001)³⁹ and *Sprint Spectrum, L.P. v. City of Eugene* (2001),⁴⁰ the Court of Appeals had no difficulty affirming Eugene's broad powers charter (with language similar to chapter two of the Model Charter - see p. 15 for more information) and the authority of the city to impose registration fees on communications facilities, right-of-way license fees and taxes upon telecommunications providers.

In *Baker v. City of Woodburn* (2003), the court recognized Woodburn's home rule jurisdiction to adopt procedures for the financing of local improvements different than those provided by statute.⁴¹

In a very recent decision by the Oregon Supreme Court, *Springfield Utility Board v. Emerald PUD* (2005), however, the court would not recognize the authority of the city of Springfield to exclusively serve recently annexed territory with electricity through its Springfield Utility Board. The court held that the territorial allocation statutes "do nothing to affect the structure or the form of the city's government and, instead, merely provide a comprehensive, statewide system for allocating service territories to different utility providers."⁴²

Even more troubling was the decision in *City of Sandy v. Metro* (2005), where the Court of Appeals reiterated:

“When a challenge to a state statute under home rule provisions is made, the court's decision must be derived from a standard arising from the constitution itself and not from the court's own view of competing public policies that find their origin outside the language of the constitution. According to the Oregon Supreme Court, the appropriate analysis for interpreting provisions of the Oregon Constitution is to understand the wording in light of the way the wording would have been understood and used by those who created the provision and then to apply those principles as understood to modern circumstances as they arise.”⁴³

The concurring opinion in this case went even further by stating in a rather cavalier *dictum* that “No one runs for office in Oregon on the platform of Cities' Rights”⁴⁴ – a statement that could be interpreted as virtually ignoring decades of campaigning by local elected officials fighting the frustration experienced by cities since *La Grande/Astoria* was decided.

Measuring Home Rule Authority

Although Oregon's home rule amendment and subsequent court interpretations are unique, the Oregon experience of home rule is very similar to that of many other states. The struggle with balancing state and city interests is a shared experience, but the tipping of the scales varies from state to state. In 1980, the now-defunct U.S. Advisory Commission on Intergovernmental Relations (ACIR) conducted a survey to measure local discretionary authority among the 50 states.⁴⁵ ACIR did a follow-up report in 1993 in which two methods for analyzing the home rule authority of local governments were discussed.⁴⁶ These methods are (1) initiative and immunity, and (2) discretionary authority.

Initiative and Immunity

The first method of analysis is to use the measurements of initiative and immunity. The power of initiative describes a local government's ability to develop and enact laws that allow the city to govern and fulfill its duties and responsibilities. The power of immunity describes a local government's ability to enforce these laws without the interference or control of the state legislature.⁴⁷ Cities may possess both initiative and immunity powers, while other cities may possess the power for one, the other, or neither. However, “few state grants of home rule authority include or adequately address immunity.”⁴⁸

Oregon is included in this group of states that offer the freedom to govern, but do not protect municipalities from preemptions. Oregon cities possess and actively use initiative powers, but they are not completely immune to legislative preemption and interference. Oregon cities do experience immunity in terms of authority over political structure and

organization, but cities do face the threat of preemption when they exercise authority outside the realm of procedural power and move into the realm of substantive policy. Several of the current preemptions included in state law, are listed in Appendix A, p. 17.

A recent example of city initiative would be the development of local smoking ordinances, which prohibit smoking in all work places. In 1997, Corvallis was the first city to pass a smoking ordinance, thereby effectively banning smoking in all work places, including bars and taverns.⁴⁹ Cities such as Eugene, Baker City, Central Point, Lake Oswego, St. Helens and Tualatin followed suit, passing similar smoking ordinances. In 2001, several other cities, including Ashland, were considering smoke-free workplaces, as well.⁵⁰

During the 2001 session, the Oregon Legislature passed House Bill 2828, Oregon's Indoor Clean Air Act. This bill preempted cities' authority to pass local smoking ordinances and created a statewide ban on smoking in workplaces.⁵¹ There were some exclusions to this statewide ban, including bars, taverns and bowling alleys. Cities that passed smoking ordinances prior to July 1, 2001 were exempt from this new law. Cities such as Ashland, however, did not qualify for an exemption and now cannot exceed the statewide ban by passing an ordinance that would establish stricter regulations or allow for fewer exceptions.

Local smoking ordinances and the resulting statewide workplace smoking ban, illustrate how cities can be used as units of governmental experimentation. The initiative taken and created by Corvallis and other cities was then modeled, although not completely, into state law. Oregon has 240 city "think tanks" that can focus on better ways of governing and serving local citizens. Restricting the power of cities restricts the flow of ideas which could very well benefit citizens statewide.

Discretionary Authority under Home Rule

Looking at the degree of initiative and immunity powers does not take into full account the many areas of home rule that cities address. The second method of home rule analysis, which was used in the original ACIR 1980 survey, looked at the level of discretionary authority that cities in each state exercise over their structural, functional, fiscal and personnel affairs.⁵²

Structural Authority

Structural powers include choosing the structure of local government and the duties and responsibilities of officers. Although this a basic home rule authority, Arkansas, Georgia, Indiana and Vermont do not offer discretionary authority to cities in terms of their structure of government. On the other end of the spectrum, there are 20 states, including Oregon, in which cities have total authority over their structure of government.⁵³

Oregon city charters establish the form of government for each individual municipality and are drafted and passed by the officials and citizens of each city. Typically, Oregon cities have chosen a five to nine-member City Council. The most popular forms of government in Oregon are the “council-manager” and “weak mayor” forms of government, although there are a few cases of strong mayors, or commission-style governments.⁵⁴ Although there may not be too much variation among city forms of government, each Oregon city does have the power to choose the form that best fits the needs and resources of the city.

Functional Authority

A city must establish a government structure in order to regulate, protect and provide services to its citizens. This basic element of functional authority includes this power to exercise actions of local self-governance. This area of functional authority often falls right into the conflict between state and city interests. Sixteen states use broad language to describe city functional authority, for example regulating “municipal” or “local” affairs, which then leave cities more open to preemption. Several states’ constitutions have granted specific powers for certain functions.⁵⁵ For instance, the New York Constitution grants local governments the authority to own and run a transportation facility.⁵⁶ Granting specific home rule powers, however, can then create too narrow of an interpretation of what other powers a city may possess. Vague language, as well as specific grants of power, have both helped and hurt home rule in some states depending on the judicial interpretation of constitutional language.

Fiscal Authority

Fiscal authority means the power to “determine revenue sources, set tax rates, [and] borrow funds.”⁵⁷ In most states, home rule authority has been adversely affected by fiscal limitations placed on cities by state legislatures. There has not been much success in finding protection within state constitutions. Few states have specific grants of local authority over taxation and debt, and the constitutional provisions using broad grants of power have been subject to both broad and narrow legal interpretations.⁵⁸

In the ACIR survey, states listed debt limits, tax limitation and lack of revenue as the most prominent fiscal restraints on local governments. Considering that 48 states impose debt limits on cities, this fiscal restraint has become a serious problem for many cities.⁵⁹ Oregon does not have a constitutionally-imposed debt limit, but ORS §287.004 states that “no city shall issue or have outstanding at any one time bonds in excess of three percent of the real market value of all taxable property within its boundaries.”⁶⁰ Oregon’s debt limit, however, provides several exemptions. Therefore the impacts of debt limits on cities are not as universally significant as tax limitations and revenue preemptions have been in Oregon.

Property tax and revenue-raising limitations

In Oregon, the primary property tax limitations are citizen-imposed. Measure 5 in 1990 was a citizen-initiative that modified the Oregon Constitution, capping the tax rate for schools at \$5 per \$1,000 assessed value, and for all other local governments at \$10 per \$1,000 assessed value. It was followed in 1996 by Measure 47 and its 1997 legislative rewrite, Measure 50. The effect of this constitutional change was to roll back the assessed value of property to 1995-96 levels less 10 percent, and to limit its future growth to a maximum of three percent a year.

In addition to limitations on tax rates and assessed value, there are also legislatively-enacted property taxation exemptions. These range from exemptions for non-profit properties to those for farm animals. Prior to the enactment of Measure 50, these exemptions had little effect on city revenues because the resulting revenue loss could be shifted to other taxpayers; now the loss of revenue can cut funding for local services. The 2005-07 Tax Expenditure Report lists 120 property tax exemptions, which amount to an estimated statewide revenue loss of \$17.96 billion (approximately \$3.95 billion of which is attributable to city taxes) per year.⁶¹

Cities can increase property taxes to pay bonded debt, or to fund limited-duration capital or operating expenditures, but such actions are subject to a vote of the people and double majority requirements in certain elections.

However, apart from property taxes, which are controlled at the state level, Oregon cities have a broad range of revenue-raising options. A city can impose a personal income tax, a local sales tax (although not on real estate⁶²), or fees on various business and personal activities. Efforts are made by special-interest groups each legislative session to limit or preempt city revenue authority in certain areas. For instance, a law passed in the 2003 Legislature states that revenue raised by newly-passed or increased transient lodging taxes must be used for economic development purposes.⁶³

Expenditure mandates

Not only do cities experience fiscal restraints and loss of revenue, they also experience financial burdens. Most states impose various mandates upon city governments without lessening the restrictions on taxation or offering new revenue sources. In 1996, Oregon voters passed Measure 30, which created Article XI §15 of the Oregon Constitution.⁶⁴ This constitutional provision required the state to fund mandated programs. Before the passage of Oregon's unfunded mandates law, "the state was able to mandate new programs and requirements and pass the costs on to city and county taxpayers."⁶⁵ Measure 30 also stated that the Legislature could not pass, amend or repeal any law that might reduce state-shared revenue.

In the November 2000 election, Oregon voters made permanent this amendment to the Oregon Constitution, approving Measure 84, which removed the sunset from the unfunded mandates law. Since the amendment's original passage, the governor and the Legislature have incorporated into their deliberative processes consideration of whether or not a measure will constitute an unfunded mandate.

There are exceptions to Oregon's unfunded mandates law. First, the Legislature may enact an unfunded mandate or reduce state-shared revenue if the bill is passed by a three-fifths majority of both houses.⁶⁶ The state also does not have to pay for minimal costs, which are considered to be less than 1/100 of one percent of a local government's annual budget.⁶⁷ Furthermore, the state does not have to cover mandated costs for laws that affect the definition or sentencing of a crime, citizen information programs, resulting law made by judicial decisions, voter-approved initiatives or federally-mandated programs.⁶⁸

Oregon is not the only state to take on the issue of unfunded mandates. Similar laws have been passed by 12 other states, as well as by the federal government.⁶⁹ Oregon's unfunded mandates law now offers some financial relief to local governments from the burden of state mandated programs, but the Legislature can still mandate programs that preempt cities from governing certain aspects of local affairs.

Personnel Authority

The final area of home rule authority concerns the power to establish personnel rules and regulate working conditions. Many of the restrictions on personnel authority have come down from federal and state civil rights and worker protection acts.⁷⁰ In addition, many public employees are subject to collective bargaining requirements which impact wages, hours and conditions of employment.

Oregon's Public Employees Retirement System (PERS) is an example of a program whose terms and conditions are determined by the state, and that can carry a high price tag for the cities that participate. For example, if a city's police officers and firefighters are not members of PERS, the city must provide benefits equal-to-or-better-than those that they would receive under PERS.⁷¹

Significant cost increases were imposed on many PERS-participating employers in 1999, prompting a lawsuit by the city of Eugene and other public employers. In 2001, the Marion County Circuit Court decided in favor of Eugene, and the Oregon Supreme Court upheld this decision in 2005.⁷² This court decision, as well as the 2003 PERS legislative reform bills, has resulted in the reduction of employer contribution rates,⁷³ but the PERS retirement system is still a substantial unfunded mandate that the cities have no local control over.

Where Does Oregon Stack Up?

After ACIR conducted the survey in 1980 and analyzed the results, the commission published a 1981 report which listed the ranking of states based on their home rule authority. In this report, Oregon ranked quite favorably compared with the other 50 states. On a scale between 1 and 5, with 1 “indicating the greatest degree of freedom from state control,” Oregon received a 1 in structural authority, 1.5 in functional authority, 2 in finance, and 1.5 in personnel.⁷⁴ In an overall ranking, Oregon was ranked first in terms of county home rule authority and for the discretionary authority of all local governments. Oregon ranked sixth, however, in city home rule.⁷⁵

Oregon’s higher rankings show that in 1980, Oregon cities exercised a greater amount of home rule authority than many other cities in other states. Although Oregon cities were able to exercise this authority in 1980, the “blow” to home rule in Oregon occurred just two years earlier in the decision of *City of La Grande/Astoria v. PERB*. Under this decision, only structural authority is protected from Legislative interference, thereby opening the door to more legislative preemptions. Of the 14 preemptions listed in Appendix A, 10 were passed by the legislature after 1980.

Influences on Home Rule

Measuring local authority is a difficult task due to the various influences on home rule, which in turn affects the strength and effectiveness of local authority. Two of the major influences on home rule, which have already been discussed in this report, are the legislative and judicial branches of government, both state and federal. These branches create and interpret the laws which determine the scope of home rule authority for cities.

A nationwide reality has been that as state/local government relationships get more complicated the courts have increased their role in interpreting home rule provisions and settling state/city conflicts.⁷⁶ The increased role of the courts means an increase in the number of varying interpretations of constitutional language. In the case of Oregon home rule, the Oregon Supreme Court has narrowed the scope of interpretation from the broad protection of home rule authority from legislative control to the narrow protection of cities procedural powers.⁷⁷

There are other influences on home rule authority, which play a more subtle, and often overlooked role in home rule authority. The political culture of a state plays a significant role in the measure of home rule authority.⁷⁸ If the citizens of a state feel strongly toward local or state authority it will be difficult to make changes in the balance of authority in either direction. The passage of Oregon’s home rule amendment and unfunded mandates law by the voters in Oregon indicates that Oregon’s political culture tends to be home rule-friendly.

The length of the legislative session can also influence the strength of home rule authority. Some states have limits on the length of their sessions, including Kentucky whose biennial session limit is 60 days.⁷⁹ The Massachusetts Legislature, however, meets annually and the session usually runs through most of the year.⁸⁰ The longer a session continues, the more time a legislature has to pass preemptions, mandates and other bills limiting city authority. Although Oregon does not have a time limit on session length, legislative sessions are held only every other year, which can serve as a de-facto check on legislative control.

A potential influence on home rule is term-limits on state legislators. An important aspect of state/local relations is the relationship between city officials and their legislators. Term limits may weaken that relationship for many cities. Term limits could, however, move more city officials and home-rule supporters into the state legislature.

There are 15 states with term-limits, but Oregon is currently not one of those states.⁸¹ Oregon voters passed Measure 3 in 1992, which limited legislators to a total of 12 years in office, with no more than six years in the House and eight in the Senate. This measure was overturned by the Oregon Supreme Court in 2002 due to a violation of the "single subject" rule, meaning there was more than one subject amendment to the constitution being voted on in a single measure. A new term limits measure is on the 2006 Oregon General Election ballot, so term limits may become a factor again, but it is unclear what effect, if any, term limits will have on the home rule authority of Oregon cities.

The number of local government units also plays a significant role in home rule authority.⁸² The more cities a state has, the more difficult it is for that state to effectively regulate local affairs. Texas has the third highest numbers of local governments, nearly 4,800,⁸³ and was found to be the state with the strongest city home rule authority in ACIR's 1981 report.⁸⁴ Twenty-six states had fewer than 1,000 local government units. Oregon's 1,439 local government units is below the national average, and many of them are small special service districts.⁸⁵ Therefore, for Oregon, the number of local governments may not be as influential as some of the other factors.

Another influence is the "complexity and length of the state constitution and ease of the amendment process."⁸⁶ Vermont, for instance, has a very complicated process of amending the state constitution, which can take up to eight years to complete.⁸⁷ There are 17 states, including Oregon, that permit constitutional changes by initiative, which can help speed up the process and bypass some of the partisan gridlock.⁸⁸ As previously noted, Oregon voters have used their elective powers to pass the home rule amendment and to protect cities from unfunded mandates, but have also used it to pass property tax limitations, and other preemptions.

The last potential influence on home rule is the strength of local officials and municipal associations.⁸⁹ There are 49 state municipal leagues, whose primary purpose is to preserve and protect home rule and the interests of cities. The League of Oregon Cities was established more than 80 years ago. In order to continue preserving home rule, LOC

has taken an active role in the legislative process by fighting legislative mandates and preemptions, as well as working to pass legislation that benefits local governments and their constituents. During the 2005 Legislative session, LOC actively fought to prevent the preemption of city authority to implement fees and taxes, as well as protect a city right to provide telecommunication services to their citizens.

Strengthening Home Rule Authority

In order to increase local discretionary authority, the U.S. Advisory Commission on Intergovernmental Relations created several recommendations for state and local officials, and for the many other interested parties in the state-versus-city debate.⁹⁰ The first step is to increase, and most importantly clarify the structural, functional, fiscal and personnel powers home rule cities are granted under state constitutions. Since power is difficult to exercise without immunity, it is also important to create protection from legislative interference. The struggle between state and city interest will always exist, therefore municipal associations must also focus on creating an organized voice for the protection of home rule and immunity. The final recommendation made by ACIR is that state legislatures and courts look at alternative theories to home rule besides state supremacy. There has always been an underlying belief that there are inherent areas of local government sovereignty. If this belief were used by the courts, this theory could help clarify constitutional amendments and balance authority between states and cities.

These recommendations suppose an ideal situation where there are no conflicting interests between both parties of the state-city relationship. Cities and states must look at the situation realistically and take into account various issues before making any changes to the established city-state relationship. First, it must be decided if it is truly in the best interest of the state, cities, and their citizens to increase or decrease the limitation on home rule.⁹¹ There can be increased equality between communities with the statewide uniformity of various programs and services, but local governments are closer to citizens, can easily resolve certain local problems, and can get citizens more involved in government. Furthermore, cities can serve as bodies of experimentation for states if they are given the authority to create and enact various programs. Finding the balance and clarifying the difference between state and local interests are key elements to effective change.

Several attempts have been made by states and by national groups to define the present situation for home-rule cities. In 1948, the National Municipal League (now the National Civic League) issued the fifth edition of the Model State Constitution, which established a state within a state by placing home rule powers outside of the reach of state legislatures.⁹² This “self-executing” system was highly criticized because it placed a burden on the courts to settle the conflict between state and local interest.⁹³

In 1953, another model constitutional provision was created by the American Municipal Association (now the National League of Cities). Model Constitutional Provisions for Home

Rule was “founded on a broad devolution of powers to cities,” but “provides for almost complete legislative supremacy to delimit the exercise of these powers.”⁹⁴

Cities in several states have won battles in the struggle for local authority. In Massachusetts, “permissive statutes” do not apply to cities unless the city council or town meeting has approved the law, or if the law receives the approval of the governor and a 2/3 majority approval of the legislature.⁹⁵ The Wisconsin Legislature may enact a bill statewide only if the provisions of the bill will affect every city.⁹⁶ This helps prevent special legislation that regulates the local affairs of one or two cities, and therefore cannot be a statewide concern. In the matter of regulating mandates, Oregon has its unfunded mandates law and in Alaska, voters must approve any mandate before it is put into effect.⁹⁷ Although these actions made by states have helped preserve home rule authority, they have not done much to strengthen home rule or improve relationships between cities and states.

Strengthening Home Rule for Oregon Cities

Oregon has also been involved in the movement to strengthen home rule authority. The Bureau of Governmental Research and Service, the former public policy and public service bureau at the University of Oregon, created a model charter in 1947 and revised it in 1988.⁹⁸ In 2004, the League of Oregon Cities updated this document by publishing the Model Charter for Oregon Cities.⁹⁹ Cities in Oregon would be well advised to review their charters to ensure that they have adopted the broad power provisions in sections 4 and 5 of this model charter:

“Section 4. Powers. The city has all powers that the constitutions, statutes and common law of the United States and Oregon expressly or impliedly grant or allow the city, as fully as though this charter specifically enumerated each of those powers.

“Section 5. Construction The charter will be liberally construed so that the city may exercise fully all powers possible under this charter and under United States and Oregon law.”¹⁰⁰

While the existence of these broad powers provisions in city charters may not change the outcome of cases similar to *La Grande/Astoria*, they will preserve and protect a broad spectrum of powers cities need to operate in the new millennium.

The issue of strengthening home rule has come up at the legislature, as well. A constitutional amendment was drafted in 1999 by Oregon Rep. Bill Morrisette which stated:

A general or civil law may not preempt or restrict the right of a city or county that has adopted a charter under section 2, Article XI, or section 10, Article VI of this Constitution, to legislate on matters of predominantly local concern with the scope of the powers granted by the charter.¹⁰¹

The amendment did not receive much recognition and had little momentum in the 1999 or 2001 sessions. In 2003, LOC introduced another “preemption bill,” sponsored by now Sen. Morrisette, and other representatives and senators. This amendment was different than its predecessors in that it prohibited the preemption of local charters unless: 1) the law explicitly states the intent to preempt charter authority, and; 2) the bill was passed with a two-thirds majority in both the House and the Senate. The resolution did have a hearing, but did not get passed through the committee.¹⁰² Once again, the Oregon Legislature may not be the best instrument to change the course of home rule in Oregon.

Home Rule: Where do we go from here?

What is the definition of “local concern” and when does it become predominant over state interest? Both the State of Oregon and its municipalities are constantly changing, so these questions will continue to be asked, and the answers will continue to evolve.

In this 100th year anniversary of the constitutional amendment granting home rule authority to Oregon cities, a reexamination of its meaning and the holding in *La Grande/Astoria* is in order. A reexamination would be aided by recent decisions of the Oregon Supreme Court providing a better road map as to how those amendments are to be interpreted. The court is to “understand the wording in the light of the way that wording would have been understood and used by those who created the provision,” *Vannatta v. Keisling* (1997).¹⁰³ The focus is what the voters who approved the amendment in 1906 intended it to mean, *Ecumenical Ministries of Oregon v. Oregon State Lottery Commission* (1994)¹⁰⁴ and *Stranahan v. Fred Meyer* (2000).¹⁰⁵ The court is not to indulge its own views as to what it considers good public policy. *Stranahan*, 331 Or at 66.

While the court in *La Grande/Astoria* provided an extensive history of the amendment and its interpretations, greater scrutiny should be given to the intention of the voters in 1906. Not an easy task but not impossible either.

Ironically, Oregon’s initiative and referendum process may continue to be the key to changing the course of home rule in Oregon. Home rule was enacted by the people of Oregon and can be changed by the people. In the case of Oregon home rule, as in many other states, cities are constantly developing new ideas and addressing new issues only to find that in some cases their work is preempted by the state legislature. The struggle between states and local governments will not improve unless the influences and limitations of home rule are understood and clarified.

Furthermore, elected officials, both with state and local governments, must put other interests aside and use good judgement when deciding who can best serve the interests of the public. Home rule authority for Oregon cities will continue to change through court opinions and citizen attitudes, but there will always be an inherent struggle and conflicting interests between the state and local governments.

APPENDIX A

Preemptions and Limitations on Oregon City Home Rule Authority

Please note that this is not a comprehensive list, but rather highlights of current major limitations on home rule authority.

Reference	Preemption of Home Rule	Limitation on Home Rule
<i>Finance and Taxation</i>		
Const. Art. IX § 9	Taxation of certain benefits prohibited.	
Const. Art. XI § 11		Property Tax Limitations.
ORS § 221.410		Limitation on floating indebtedness.
ORS § 223.295		Limit on city indebtedness.
ORS C§ 223.297-314		Limitations on the implementation and use of System Development Charges.
ORS § 294.305-565		Local Budget Law.
ORS § 297.405-555		Municipal Audit Law.
ORS Chapters 306-312		Property Tax Laws (Assessment, Collection, Exemptions, etc.).
ORS § 306.815	Cities may not impose a tax or fee upon the transfer of real property.	
ORS § 320.300-350		Revenue from new/increased Transient Lodging Taxes must be used for tourism.
ORS § 323.030	State's exclusive right to tax cigarettes.	
ORS Chapter 457		Urban Renewal.
ORS § 473.190	State's exclusive right to tax liquor.	
ORS § 696.365	May not impose or collect a business license tax on a licensed real estate broker.	
ORS § 731.841	Cities may not tax insurers.	

Reference	Preemption of Home Rule	Limitation on Home Rule
General Governance and City Services		
Const. Art. XI § 9		Limitations on powers of county or city to assist corporations.
ORS Chapter 192		Public Records and Meetings Law.
ORS Chapter 221		Organization and Government of Cities.
ORS § 221.725		Notice publication and public hearing are required before city-owned real property is sold.
ORS Chapter 224		City Sewers and Sanitation.
ORS Chapter 225		Municipal Utilities.
ORS § 244.010		All public officials adhere to Oregon's Ethics Code.
Title 21		Oregon Election Laws.
ORS Chapters 279A-C		Public Contracting Code.
ORS § 682.062		Consolidation of 911 services by county.
Land Use and Development		
ORS § 197.250		Compliance with LCD Goals required.
ORS § 197.309		Ordinances may not establish housing sale price or designate class of purchasers.
ORS § 197.312		Limitation on charter authority to prohibit certain kinds of housing.
ORS Chapter 227		City Planning and Zoning.
Personnel		
ORS § 237.610-635		Mandatory PERS coverage for police and firefighters.
ORS § 243.650-782		Collective Bargaining Laws.
Title 51		Labor and Employment Laws.

Reference	Preemption of Home Rule	Limitation on Home Rule
<i>Regulatory Authority</i>		
ORS § 166.170	Preempted authority to regulate firearms.	
ORS § 167.404	Cities may not regulate tobacco vending machines.	
ORS § 203.090	Preemption of local laws relating to private security services and personnel.	
ORS § 433.863	Preemption on Smoke-Free Workplaces.	
ORS § 455.040	State Building Code preempts local ordinances.	
ORS § 221.420-515		Limitations on regulations, taxes, and charges for utilities.
ORS § 430.325		Cities may not adopt or enforce local laws concerning various liquor uses and consumption.
ORS § 467.136	Preemption of certain local regulations of shooting ranges.	
ORS § 471.045	Liquor laws supercede local charters and ordinances.	
ORS § 480.160		Local regulation and effect of state fireworks laws.
ORS § 634.057	Preemption of local pesticide regulation.	
ORS § 801.038	Cities may not regulate the use of cell phones in motor vehicles.	
ORS 801.040		Authority of local governments under the Oregon Vehicle Code.
ORS § 810.040		Limitation on the designation of truck routes.
ORS § 836.600-630		Local government regulation of airports.

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