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Note

Reconsidering Home Rule and City-State Preemption in Abandoned Fields of Law

Franklin R. Guenther*

INTRODUCTION

Phoenix, Arizona, is stuck. In 2015, the city of over one million people¹ recognized the growing impact of climate change,² and the need for sound energy policy at a municipal level.³ Local officials considered passing local energy benchmarking legislation, whereby buildings above a certain size would report their energy consumption, allowing tenants to choose whether to support a building's carbon footprint.⁴ Before lawmakers could even propose the ordinance, however, the state legislature passed a law prohibiting any city in the state, including Phoenix, from passing such laws.⁵

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1. *QuickFacts: Phoenix city, Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/phoenixcityarizona/PST045216> (last updated July 1, 2016).

2. For an overview of municipal contributions and responses to the growing climate crisis, see generally Harriet Bulkeley, *Cities and the Governing of Climate Change*, 35 ANN. REV. ENV'T & RESOURCES 229 (2010).

3. In a recent interview, the Mayor of Phoenix, Greg Stanton, explained that “[c]limate change is affecting Phoenix, Arizona, as much as any other big city in the United States of America right now[,] [n]ot in the future,” thus spurring the conversation for local laws that could tackle the problem. Henry Grabar, *Phoenix Has Beef with Arizona*, SLATE (Sept. 19, 2016) http://www.slate.com/articles/business/metropolis/2016/09/phoenix_mayor_greg_stanton_is_fed_up_with_arizona_pre_empting_his_city_s.html.

4. ASU ENERGY POLICY INNOVATION COUNCIL, ARIZONA'S PROHIBITION ON REQUIREMENT OF ENERGY MEASURING AND REPORTING 1 (2015).

5. ARIZ. REV. STAT. ANN. § 9-500.36 (2016). There is skepticism at the municipal level whether this bill has any motivations beyond the purely political. Stanton believes that “[j]ust the conversation about adopting the policy spurred

This practice—states passing laws that block local governments from enacting ordinances—is commonly referred to as preemption,⁶ and Phoenix is not the only city feeling its effects. As large cities around the country comprise larger proportions of their states' populations, they face new challenges in climate change and energy,⁷ paid sick leave,⁸ LGBT rights,⁹ and access to basic services,¹⁰ to name a few. But rather than empower their political subdivisions to tackle these issues on their own, the parent states of many cities are passing laws that prohibit them from doing just that,¹¹ even where no state statutes on those issues may yet exist.¹² In North Carolina, the state legislature has passed a series of laws that nullify a Charlotte ordinance banning LGBT discrimination and creating transgender bathroom accommodations.¹³ In Minnesota, recent court decisions have overturned municipal charter amendments to raise the minimum wage and require police officers to carry personal liability

the Legislature to ban cities from engaging in it.” Grabar, *supra* note 3. In other words, the state bill was not motivated by the need to exact statewide policy. The state simply prohibited the regulation and walked away. Arizona has yet to pass similar legislation regarding even market-based energy bills like the Phoenix ordinance.

6. See NICOLE DUPUIS ET AL., NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2017) (defining preemption as “the use of state law to nullify a municipal ordinance or authority”).

7. See Grabar, *supra* note 3. The same law that prohibits energy benchmarking also prohibits municipalities from regulating the use of disposable bags, in response to an attempt to pass a local ordinance in Tempe banning the use of plastic bags in grocery and other retail stores. See Mike Sunnucks, *Arizona Legislature Approves Ban on Plastic Bag Bans, Energy Mandates (Again)*, PHX. BUS. J. (Mar. 14, 2016), <http://www.bizjournals.com/phoenix/news/2016/03/14/arizona-legislature-approves-ban-on-plastic-bag.html>.

8. MINNEAPOLIS, MINN., ORDINANCES, ch. 40, art. I–III (2016).

9. See Steve Harrison, *Charlotte City Council Approves LGBT Protections in 7–4 Vote*, CHARLOTTE OBSERVER (Feb. 22, 2016), <http://www.charlotteobserver.com/news/politics-government/article61786967.html>.

10. See Alia Beard Rau, *Republican Bill Would Halt Phoenix Plan to Issue IDs to Undocumented Immigrants, Others*, ARIZ. REPUBLIC (Jan. 13, 2016), <http://www.azcentral.com/story/news/arizona/politics/2016/01/13/legislation-would-handcuff-phoenix-id-card-efforts/78748916.html>.

11. See DUPUIS ET AL., *supra* note 6, at 4 (mapping the numerous states and wide range of areas of law where states currently preempt cities from acting).

12. See Grabar, *supra* note 3.

13. See 2017 N.C. Sess. Laws 2017-4. The 2017 law repealed a 2016 statute that also preempted all city ordinances regarding public accommodations, but was more widely criticized for requirements it imposed on government restrooms. See 2016 N.C. Sess. Laws 2016-3.

insurance.¹⁴ And in Arizona, a new law is attempting to make state preemption against *all* local legislation the status quo. That law allows any legislator to propose to the Arizona Attorney General that a local ordinance has violated state law.¹⁵ If the Attorney General agrees, that city loses its state funding for the entire fiscal year.¹⁶

Preemption as a legislative tool is not a novel legal concept. Just as the federal government can preempt state law that directly conflicts with it,¹⁷ states have long been able to pass their own uniform laws that bind all localities to one statewide policy.¹⁸ The legal trend in the cities discussed above, however, has been toward parent political bodies passing preemptive laws without prescribing affirmative policies to replace the newly defunct ordinances, effectively abandoning the field of law and nullifying it at the local level.¹⁹ The consequence is a signal to cities across these states that they are powerless to find their own solutions to issues that directly impact them—and, in extreme cases, to chill future local legislation altogether.²⁰

This Note explores the limits of city-state preemption when states abandon the field in a particular area of law. Looking at the city-state relationships outlined above in Arizona, Minnesota, and North Carolina, it argues that the traditional boundaries of local power need to be reconsidered in light of the evolving challenges modern cities are facing. It also evaluates the legal

14. See *Vasseur v. City of Minneapolis*, 887 N.W.2d 467 (Minn. 2016) (per curiam); Order Dismissing Petition, *Bicking v. City of Minneapolis*, No. 27-CV-16-11839 (Dist. Ct. Minn. Aug. 22, 2016); Order Dismissing Petition for Writ of Mandamus, *Mann v. Minneapolis City Council*, No. 27-CV-13-13029 (Dist. Ct. Minn. Nov. 12, 2013).

15. ARIZ. REV. STAT. ANN. § 41-194.01 (2016).

16. *Id.*

17. See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)) (reiterating that “[s]tate action may be foreclosed by express language in a congressional enactment”).

18. As discussed in Part I, *infra*, city-state preemption became a matter of federal constitutional law in the landmark decision of *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

19. See, e.g., § 9-500.38 (prohibiting cities from imposing taxes or fees on the use of disposable bags, but further prohibiting any legislation regarding the use of reusable containers made out of various materials such as cloth, and not proposing any positive policies to address environmental concerns raised in the local bill that prompted the preemptive bill in the first place); see also Grabar, *supra* note 3.

20. See Grabar, *supra* note 3 (discussing the “chilling effect” that preemptive laws have on “cities’ abilities to be laboratories of experimentation about big public policy”).

doctrine of home rule immunity and shows how constitutional charter authority can shield cities from preemptive state legislation that does not itself demonstrate a legitimate state interest in a preempted area of law. Part I outlines the history of home rule amendments and the specific characteristics in them that allow cities to be immune from certain state interference. Part II analyzes the effectiveness of home rule immunity where a state government has abandoned the field within the context of the states listed above. Part III reexamines these examples to prescribe the legal framework that cities should advance in challenging various preemptive statutes. Ultimately, this Note proposes that, in home rule cities where state preemptive statutes do not sufficiently demonstrate a pressing statewide concern over areas of law already occupied at the local level, courts should adopt a rebuttable presumption that the parent political body has abandoned the field, and that local law controls.

I. TRACING THE HISTORY OF HOME RULE IMMUNITY

Modern American cities owe much of their defined legislative powers to a single Supreme Court decision that, ironically, declared them essentially powerless unless a state gives them plenary legislative abilities.²¹ The backlash against this decision provoked many states to adopt home rule amendments, whereby cities could pass their own local legislation in certain enumerated areas. This Part discusses the extent to which these amendments also *protect* a city's ability to pass legislation that is purely local. Section A explores the effect of the landmark decision in *Hunter v. Pittsburgh* on the modern city-state relationship. Sections B and C discuss Dillon's Rule and special legislation, respectively, and how these provided legal context for the decision in *Hunter*. Section D outlines the home rule movement as a response to these legal concepts, and the extent to which the framers of such provisions intended to protect purely local activities from state interference.

A. *HUNTER V. PITTSBURGH* AND THE CITY AS A "CREATURE OF THE STATE"

Before 1907, the Supreme Court had not established a clear power structure between cities and states. Since the Revolution, courts had regarded American cities as quasi-private corpora-

21. See *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

tions. While maintaining the democratic characteristics of governments through elected representation, cities still allowed citizens to protect local interests beyond the power of a state or federal government. Still, courts were confused on how to fully define the rights of cities in relation to other organizations.²² In 1819, the Supreme Court decided, in *Trustees of Dartmouth v. Woodward*, that the distinction between “public” and “private” corporations rested largely on the scope of property rights.²³ This holding still left cities in a somewhat undefined constitutional category, however.²⁴ The Court held that public corporations “are such only as are founded by the government for public purposes, where the whole interests belong also to the government,” thus leaving the private corporation label a possibility for cities that did not meet this definition.²⁵ This uncertainty created a blank slate on which the Supreme Court could imbue cities with whatever level of independence it saw fit.

The Supreme Court finally crafted a bright line definition for city-state relations in *Hunter v. Pittsburgh*.²⁶ In *Hunter*, the town of Allegheny, Pennsylvania, challenged a state law that allowed consolidation of two adjoining localities on a majority vote of the populations of both towns.²⁷ The combined majority of both localities had voted for the measure to consolidate, even though the majority of voters in Allegheny had voted against it.²⁸ Allegheny argued that the state law allowing the vote deprived them of their property without due process, as their tax burden would increase after the town was folded into the larger municipality.²⁹

The Supreme Court affirmed the lower court’s decision to compel the consolidation. While acknowledging that the public-private distinction in defining municipal corporate power was ambiguous, the Court did not feel it necessary to rehash prior decisions delineating the full list of the rights of cities and their

22. See GERALD FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 38–45 (1999).

23. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 668–69 (1819) (“Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests . . .”).

24. See FRUG, *supra* note 22 (noting the ambiguity of the holding in *Woodward*).

25. See *id.*

26. *Hunter*, 207 U.S. 161 (1907).

27. *Id.*

28. *Id.*

29. *Id.* at 176.

“citizens and creditors.”³⁰ Instead, the Court found it sufficient to proclaim that “[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”³¹ Because of this relationship, the Court reasoned, “[t]he number, nature, and duration” of all of a municipality’s powers “rests in the absolute discretion of the State.”³² While the precise contours of a municipality’s rights and powers had not been fully articulated after *Hunter*, it was at least clear that cities would henceforth be considered “creatures of the state” as a matter of federal constitutional law.³³

B. DILLON’S RULE AND THE TRADITIONAL CITY-STATE RELATIONSHIP

The pivotal decision in *Hunter* was the culmination of a long battle at the state court level over how to frame the relationship between municipalities and their parent governments. By the late nineteenth century, the popular view among state courts was that cities should at most serve “as a limited coordinating mechanism through which property owners could secure their investments from public interference, rather than as a public agent through which the people could collectively plan a new society.”³⁴ The rejection of a model that treated cities as public entities capable of broad autonomy necessitated a clear expression of how states could limit municipal power.³⁵ First published in 1872, John Dillon’s *Municipal Corporations* became the most popular articulation of the traditional, or “state creature,” city-state model.³⁶ While not every jurisdiction has officially adopted Dillon’s Rule, its passing approval in the Supreme Court’s decision in *Hunter*³⁷ demonstrates its relevance in understanding the modern city-state relationship.

Dillon’s Rule established two important tenets of local government power. First, a municipality could exercise only those

30. *Id.* at 178.

31. *Id.*

32. *Id.*

33. *See, e.g.,* *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978); *City of Herriman v. Bell*, 590 F.3d 1176 (10th Cir. 2010).

34. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2283 (2003).

35. *See id.*

36. *See* JOHN DILLON, *MUNICIPAL CORPORATIONS* 448 (5th ed. 1911).

37. *See* *Hunter v. Pittsburgh*, 207 U.S. 161, 179 (1907).

powers that were either: (1) granted in express words; (2) “necessarily or fairly implied in or incident to” those express grants of power; or (3) “essential” to the goals of the municipal corporation.³⁸ Second, these powers, when granted, were to be narrowly construed by courts, thus minimizing city power beyond only the clearest of intent on the part of the state.³⁹ When read in conjunction with the holding in *Hunter*, Dillon’s Rule has since provided a legal framework in which a city can only pass certain ordinances if it has received express authority from its state legislature. State legislatures nationwide capitalized on this fully articulated framework. The drafting of Dillon’s Rule and its adoption into many state constitutions led to a wave of special legislation that targeted the affairs of specific cities.⁴⁰ Yet even as this device promoted a traditional city-state model in a powerful way, it also spawned the movement that pushed back against it.

C. THE RISE OF SPECIAL LEGISLATION

Dillon’s Rule and *Hunter* created a prohibitive framework that allowed state legislatures to pass laws targeting cities individually.⁴¹ As the acceptance of the state creature view of cities gained hold over American jurisprudence, urban reformers became increasingly concerned with attempts by state legislators to interfere with local issues.⁴² The system that was designed to create defined and separate roles for state and city in fact led to a power imbalance in favor of the state *over* city.

The premise that cities were mere creatures of the state legislature seemed only to encourage state legislators to think of local power as an extension of their own power. It also encouraged those local factions seeking a more interventionist local governmental climate to look to the state legislature for assistance at home. Even if Dillon’s Rule could check city governments’ independent efforts to grant franchises to certain private interests, for example, it could not stop the state legislature from validating such local actions. . . . Thus, a strong legal presumption of state supremacy could easily be understood to entwine local matters ever more deeply with state legislative politics and thus

38. DILLON, *supra* note 36, at 448.

39. *See id.* at 455.

40. *See* FRUG ET AL., LOCAL GOVERNMENT LAW 166 (6th ed. 2015) (“[The state creature model] encouraged state legislators to intervene in the affairs of municipalities, not only as a class, but also individually. As urban centers began to grow in the nineteenth century, legislators increasingly began to enact special laws that targeted particular cities.”).

41. *Id.*

42. *See* Barron, *supra* note 34, at 2286.

to assist the state legislative grab for political and economic spoils that urban growth precipitated.⁴³

This newfound state power over cities resulted in an increase in state legislatures passing special legislation that, rather than applying to all municipalities in a jurisdiction, targeted individual cities, effectively displacing municipal decisions to the state level.⁴⁴ Urban reformers who saw this new device as a problem pushed for, and in many cases achieved, state constitutional bans on such laws.⁴⁵ Limiting state legislative power by requiring them to pass general legislation was thus seen as an attempt to “preserve the idealized and limited local sphere that Dillon hoped to protect.”⁴⁶

Even these constitutional limits, however, ultimately proved insufficient to protect against the state-creature model. In response to the bans on special legislation, state lawmakers passed artfully worded laws that had the appearance of a general provision, but in practice still targeted individual localities.⁴⁷ Meanwhile, state courts were mostly willing to approve of such legislative ingenuity.⁴⁸ By the time the Supreme Court legitimized the state-creature model of American cities in 1907, there was a growing sense among those who wanted to preserve a local sphere of governance to cities that new constitutional schemes would be needed.⁴⁹ The ensuing debate would be over whether these frameworks should preserve a private role for cities, or create a new avenue of local self-governance.

43. Barron, *supra* note 34, at 2286–87.

44. *See id.*

45. *See id.* at 2287–88.

46. *Id.* at 2288.

47. Some of these laws were less targeted at individual localities than others. *See* N.Y. GEN. MUN. LAW § 101 (McKinney 2008) (requiring construction projects above three million dollars in certain counties in New York to “prepare separate specifications” for various “subdivisions” involved in the project, but lowering the dollar amount threshold for such specifications in projects that take place in other counties). The constitutionality of this law was challenged and upheld in *Empire State Chapter of Associated Builders & Contractors, Inc. v. Smith*, 992 N.E.2d 1067 (N.Y. 2013).

48. *See* Barron, *supra* note 34, at 2288 (citing Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1108–13 (1980)); *see also, e.g.*, *Chi. Nat’l League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245 (Ill. 1985) (approving a general law that subjected all stadiums “in a city with more than 1,000,000 inhabitants, in a stadium in which . . . nighttime events were not played prior to July 1, 1982,” to noise pollution regulations, even though it in effect could only be applied to one municipality and stadium in the state).

49. *See* Barron, *supra* note 34, at 2288.

D. THE HOME RULE MOVEMENT

At the same time that *Hunter* and Dillon's Rule were entrenching the state creature model as the consensus view on city power, city populations were doubling in size every decade.⁵⁰ With this new reality came new challenges. Reformers had to find ways to address issues in taxing, housing, sanitation, and other administrative concerns, in spite of a model that deprived them of the flexibility to act without express permission from a parent political body.⁵¹ Home rule amendments ultimately emerged as a method for preserving the local sphere of power for the modern city.⁵² This Section explores this movement in municipal government reform in further detail.

1. Theoretical Underpinnings and Defining Local Concern

Missouri became the first state to institute a home rule amendment to its constitution in 1875.⁵³ The amendment allowed any city with a population of more than 100,000 residents to "frame a charter for its own government, consistent with and subject to the Constitution and laws of [the] State."⁵⁴ Thus, the charter allowed cities for the first time to structure themselves by a "foundational governing document," without an express grant from a state legislature.⁵⁵ The divergent motivations for this new grant of municipal authority, however, were not solely focused on "local power for its own sake."⁵⁶ Rather, the overriding desire to achieve good government meant that the push for home rule created different theories on what local concern should look like.⁵⁷ This division led to an array of actual home rule amendments that could allow courts to reach different conclusions about what belonged to municipal governance, and what belonged to the state.

50. See *id.* at 2289 (citing ROBERT E. FOGLESONG, *PLANNING THE CAPITALIST CITY: THE COLONIAL ERA TO THE 1920S* 60 (1986); ARTHUR MEIER SCHLESINGER, *THE RISE OF THE CITY, 1878-1898*, at 64, 68 (1933)).

51. *Id.* (citing DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 112-208 (1998)).

52. See FRUG ET AL., *supra* note 40, at 175 (noting that Missouri became the first state to adopt a home rule provision in 1875).

53. MO. CONST. OF 1875, art. IX, § 16.

54. *Id.*

55. Barron, *supra* note 34, at 2290.

56. *Id.* at 2291.

57. *Id.*

a. *The McBain Nine and the Conservative Approach*

Many reformers who supported the home rule movement did so not because they thought it would usher in a new wave of expansive municipal power. Rather, they saw it as a way of preserving the limited functionality of cities that had been legitimized by Dillon's Rule, while also curbing expanding state interference that threatened to undermine this traditional relationship.⁵⁸ The simultaneous concern that: (1) the great cities were gaining too much power over taxing and spending, rather than protecting private property interests as cities had traditionally been responsible for; and (2) state legislative influence would corrupt the local self-determination that had made such protection possible in the first place, required a new model to preserve the status quo.⁵⁹ Thus, home rule amendments were to be limited to charter-making abilities, with states only able to confer authority over what was considered "of traditionally 'local' concern" as prescribed by what Dillon had termed the "usual range."⁶⁰ The role of state courts would be to "police th[e] boundar[ies]" between state and local in their interpretations of constitutional home rule amendments.⁶¹ Furthermore, provisions requiring any additional grants of power be general would limit state legislatures' abilities to either alter or expand these powers, in some cases wholly removing local matters from consideration at the state level.⁶²

There are few indicators of what exactly this usual range was intended to entail. As some commentators have noted, leaving the power of interpreting what was appropriately local and what belonged exclusively to state consideration in the hands of state courts did not prevent "an adventurous city" from "assert[ing] home rule authority in unanticipated ways."⁶³ It also

58. *Id.* at 2294.

59. *See id.* at 2294–95.

60. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 91, at 148 (4th ed. 1890) ("The rule of strict construction of corporate powers is . . . applicable to grants of powers to municipal and public bodies which are out of the usual range, or which may result in public burdens, or which, in their exercise, touch the right to liberty or property or, as it may be compendiously expressed, any common-law right of the citizen or inhabitant.").

61. Barron, *supra* note 34, at 2294–95.

62. *Id.*

63. *Id.*; *see also* JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900, at 116–22 (1984) (discussing the difficulties of home rule cities in nineteenth century Missouri and California in structuring their own governments, a quintessential homerule function, in light of state supreme court rulings that limited the powers of state legislatures).

did little to stop a court from rubber-stamping that assertion of power as sufficiently local if it felt like doing so.⁶⁴ However, when considering the underlying motivations behind these traditional conceptions of home rule, there are, at minimum, certain areas that could be considered definitively beyond local government concern. In his expansive treatise, *The Law and the Practice of Municipal Home Rule*,⁶⁵ Howard Lee McBain demarcates nine areas that he considered well outside the scope of a home rule city's authority:

The [subject matters] that have given rise to this problem are those that are commonly dealt with in charters of legislative origin. No city has ever attempted to draw unto itself the complete powers of the state. By common understanding such general subjects as . . . *domestic relations, wills and administration, mortgages, trusts, contracts, real and personal property, insurance, banking, corporations*, and many others have never been regarded by any one, least of all by the cities themselves, as appropriate subjects of local control. No city has been so foolhardy as to venture generally into any one of these fields of law. It has simply been universally accepted that these matters are strictly of "state concern."⁶⁶

The thrust of McBain's treatise was to argue for a more logical and clear understanding of home rule power.⁶⁷ Later commentators have referred to this list of areas of law that cities would be "foolhardy" to explore as the McBain Nine, or the private law exception.⁶⁸ And while McBain himself was not necessarily a conservative home ruler, his matter-of-fact dismissal of these areas as of "strictly 'state concern'" speaks to a common belief among conservative urban reformers: home rule should limit city power as much as it expanded it. In attempting to articulate why exceptions like the McBain Nine are "appropriate and even nec-

64. Barron, *supra* note 34, at 2294–95. The Supreme Court's struggle, or even disinterest, in *Hunter* to clearly define the public versus private nature of municipal corporations further demonstrates the difficulty of drawing clear lines between areas of law that belong to one area of government over another. *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

65. HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916).

66. *Id.* at 673 (emphasis added).

67. *See id.* at vii ("No constitutional provision granting home rule powers should be drafted without an accurate and detailed knowledge of the origin and nature of [home rule's ambiguities]. It is unjust that the courts should be compelled to give precise definition to terms which have no precision of meaning and be forced to determine complicated questions of public policy which the framers of constitutions have either lightly ignored or deliberately dodged.").

68. Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 690 (1973).

essary,” scholars have examined areas of law that are “inefficient” in application at the municipal level.⁶⁹ Because the success of certain areas of law depend upon uniformity and minimal burdens upon state schemes of administration, the traditional view of home rule favored city power that did not interfere, or have the potential to interfere, with state-level schemes that could be applied evenly.⁷⁰ Local concern, then, was limited to areas that did not depend upon such uniformity. This view informed the construction of home rule charters that focused on extending city power only to those areas that state legislatures could not manage at a general level.

b. *The Progressive Approach*

Unlike the traditional perspective, the progressive reformers comprised a broader spectrum of opinions regarding how cities best fit into a relationship with their parent states.⁷¹ The one area on which they were unified, however, was their disapproval of the state creature model.⁷² Despite the varying beliefs regarding what a city could or should be in a growing urban America,⁷³ the home rule amendments that came out of these progressive approaches nevertheless demonstrated the belief in preserving separate spheres of municipal power in order for local concern to encompass new challenges.

One such progressive approach to home rule was what David J. Barron has coined the administrative city.⁷⁴ Under this perspective, cities needed to be protected from state interference, but not because of the fear that such usurpation would divert cities from their traditional functions. Rather, progressive reformers like Frank J. Goodnow believed that modern cities

69. *See id.* at 753 (“If the conclusion thus is that undue burden and extreme inefficiency do function as predicates for home rule exceptions, it is important to note that the private law component of a city ordinance will often significantly add to the overall magnitude of its burden or the extent of its inefficiency.”).

70. *Id.*

71. *See* Barron, *supra* note 34, at 2300–20. Barron distinguishes between those who saw cities as administrative tools through which local technocrats could implement local policies, and still more progressive reformers, who saw the city as being truly political bodies and capable of functioning as self-sufficient governmental bodies.

72. *Id.*

73. *See id.* at 2323; *see also* JON C. TEAFORD, CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850–1970, at 8 (1979) (discussing the correlation between liberalized incorporation laws and the increase in new municipalities).

74. *See* Barron, *supra* note 34, at 2300.

needed to be nimble enough to face challenges that the traditional model of city-state sovereignty was too rigid to regulate.⁷⁵ Part of this shifting attitude was a practical understanding that the “accelerating interdependence of a nationalizing industrial economy” required cities to embrace new definitions of local concern that the “anachronistic” traditional model did not contemplate.⁷⁶ The other motivating factor was the growing belief that the “larger social realm beyond one’s private life” that existed in modern cities required them to function as more than “facilitators” of private property interests.⁷⁷ For Goodnow and other progressives, the solution was to push for a home rule that allowed cities to function with broad police powers, without having to juggle the competing interests of state politics.⁷⁸ Doing so would allow technical experts, rather than political interests, to operate local governments as quasi-private administrative agencies.⁷⁹

Other progressive reformers felt that cities should oppose the traditional “culture of privatism” through “collective action.”⁸⁰ This view, which Barron terms the social city approach, placed value in city power that was “public and political, rather than quasi-private or administrative.”⁸¹ Much like Goodnow, these progressives believed that home rule was critical for preserving city power from state interference. Unlike Goodnow, however, these reformers hoped that home rule could be used not for “administration all the way down,”⁸² but rather to unleash a political “city sense” that “would attract to its service big, far-sighted men no longer willing to leave urban politics to the petty grafters and bosses.”⁸³ Thus, the social goals of a city should be protected under home rule because of the unrealized potential

75. *See id.* at 2301.

76. Michael H. Frisch, *Urban Theorists, Urban Reform, and American Political Culture in the Progressive Period*, 97 POL. SCI. Q. 295, 307 (1982).

77. Barron, *supra* note 34, at 2301.

78. *See id.* at 2301–02.

79. This view of the city as administrative agency was a popular progressive belief at that time. *See* FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 84 (1914) (“[M]unicipal government is very largely a matter of administration in the narrow sense of the word. This is the truth at the bottom of the claim which is so often made, that municipal government is a matter of business.”).

80. Barron, *supra* note 34, at 2309.

81. *See id.*

82. *Id.* at 2308.

83. DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 141 (1998).

cities had to implement useful change, even beyond the administrative managing model that Goodnow had envisioned.

Both of these views were bold departures from the traditional state creature model of cities contemplated by Dillon's Rule and *Hunter*. Regardless of motive, progressive home rulers hoped to create amendments that would empower cities to play important roles, wholly separate from the state agenda. To be sure, there was still a belief that cities should be limited in their capacities, either because the administrative city was too "scientific" to safely harbor notions of "local autonomy,"⁸⁴ or because such limits were "necessary preconditions for the city's realization of its full potential as a social institution."⁸⁵ But even without strong convictions for "local autonomy for its own sake," these visions of home rule gave states rationales to create provisions that expanded the understanding of local concern beyond what Dillon had ever contemplated. In the progressive home rule view, the collective understanding of what constituted local concern needed to be flexible to meet the evolving needs of cities, as well as protected from state interference in order to ensure that those needs could be met uninhibited.⁸⁶ Ultimately, both the traditional and progressive perspectives inform the reach of home rule. The motivations that led to the plain language of these amendments can also provide courts with proper context to either uphold new municipal efforts as necessary expansion, or to strike them down as beyond the scope of local concern.

2. Home Rule Initiative

The home rule movement was primarily concerned with two objectives: (1) imbuing local governments with spheres of power in which they could "operate under a general grant of authority from the state"; and (2) giving cities "an area of autonomy immune from state control, even by general legislation."⁸⁷ The second aspect of this concern is often referred to as home rule immunity,⁸⁸ and is the primary concern of this Note. It is nevertheless important to understand the mechanics of the other half, or home rule initiative, first.

84. See Frisch, *supra* note 76 (describing the danger proponents of the administrative city saw in "[d]elusions of autonomy" that "could only produce a net loss in civic capacity, putting effective power into the hands of a local business elite or the state legislature, and most likely both in corrupt tandem").

85. Barron, *supra* note 34, at 2311.

86. See *id.* at 2310–21.

87. FRUG ET AL., *supra* note 40, at 174.

88. See, e.g., *id.* at 174–75.

a. Defining the Scope of Home Rule Initiative

Home rule initiative became the chosen solution to the constraints placed on cities after *Hunter*. Constitutional amendments providing for the formation of city governments allowed localities to pass their own laws without seeking express permission from their parent states every time a new ordinance needed to be passed. For example, the Arizona Constitution allows “[a]ny city containing, now or hereafter, a population of more than three thousand five hundred” to “frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state.”⁸⁹ Courts in Arizona have even interpreted the ability of a city to “frame a charter for its own government” as conferring positive powers of local authority that “render the cities adopting such charter provisions as nearly independent of state legislation as . . . possible.”⁹⁰ Even without grants of authority as broad as Arizona, home rule states that allowed cities of a certain size to pass charters created at least a limited level of local autonomy.⁹¹ Typically, the only outer limit of such grants is that they be of local or municipal concern, the “source of city power . . . depend[ing] in many cases on the particular terms of the home rule grant or on judicial determinations concerning the kinds of actions that are properly understood to concern ‘local’ or ‘municipal’ affairs.”⁹² Once this initiative power has been imbued into a state’s constitution, state courts become important tools in defining not only its limits, but the existence of other implied negative powers often not fully articulated in the constitutional text.

b. The Role of the Courts in Shaping Home Rule

As discussed further in Parts II and III, courts also play an important role in defining the boundary between local authority

89. ARIZ. CONST. art. 13, § 2.

90. *City of Tucson v. Walker*, 135 P.2d 223, 226 (Ariz. 1943) (quoting *Axberg v. City of Lincoln*, 2 N.W.2d 613, 614 (Neb. 1942)).

91. *But see Hunter v. Pittsburgh*, 207 U.S. 161, 178–79 (1907) (“[A state] at its pleasure may modify or withdraw all [of a city’s] powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.”). The significance of this language, and whether it may simply obfuscate any hope for home rule immunity, is discussed in Part III.D, *infra*.

92. FRUG ET AL., *supra* note 40, at 176.

and state policy.⁹³ In ruling on cases involving home rule initiatives, a court's holding on the constitutionality of a particular ordinance will often boil down to whether that local law has exceeded the scope of a local concern or otherwise interferes with a state-created legal scheme.⁹⁴ Many commentators argue that this archetypal framework can lead to broader home rule provisions that eschew the state versus local distinction, which can ironically hamper a city's ability to pass its own legislation.⁹⁵ If a city has a grant to "exercise any legislative power or perform any function" of a state legislature, for example, the capacity of a court to intervene and interpret what powers constitute local or municipal concern may be severely limited, leaving the scope of local power to be fully defined through state legislative action (or lack thereof).⁹⁶

The tension courts often face in defining the boundary between state and local power was on full display in *McCrorry Corp. v. Fowler*.⁹⁷ In that case, a Maryland county ordinance creating a private cause of action for employment discrimination was found to exceed the county's home rule authority.⁹⁸ Maryland's constitution, which grants to all of its counties "full power to enact local laws . . . upon all matters covered by the express powers granted as above provided," effectively barred the creation of a new private cause of action at the county level in the area of employment discrimination.⁹⁹ The *McCrorry* court reasoned that this area of law, "which heretofore had been the province of state agencies," was too far beyond the scope of the county's home rule

93. See *infra* Part II.B.2., Part III.

94. See, e.g., Order Dismissing Petition at 5–10, *Bicking v. City of Minneapolis*, No. 27-CV-16-11839 (Dist. Ct. Minn. Aug. 22, 2016).

95. FRUG ET AL., *supra* note 40, at 176.

96. There is a considerable amount of disagreement on the extent to which a broad or narrow conception of home rule matters more for local government power. Some proponents of narrow home rule provisions argue that well-defined categories of local authority give courts the freedom to permit important powers at a local level, while holding in check municipal legislative actions that threaten statewide policies. See Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964). Meanwhile, other commentators point out that express limitations on local issues can just as easily allow courts to deem issues of pressing societal need outside the scope of local concern, creating an easy out from further consideration of whether certain areas of law are, or need to be, legislated at a state level. See Barron, *supra* note 34, at 2349–50.

97. *McCrorry Corp. v. Fowler*, 570 A.2d 834 (Md. 1990).

98. *Id.* at 834–35.

99. *Id.* at 836.

initiative to be deemed constitutional.¹⁰⁰ The next question is then whether, just as the municipality interfered with protected state powers in *McCrary*, states can be deemed to have gone too far in their intrusion on protected *municipal* matters.

3. Home Rule Immunity

Embedded within the limiting of city power to local issues is the possibility that, while cities cannot exceed the outer limits of such authority, states similarly cannot impinge on a city's ability to remain autonomous in areas that are truly local in nature. The implied negative power of home rule amendments is a limit on state control over local affairs that many have identified as home rule immunity.¹⁰¹ Frug et al. describe a basic dichotomy in understanding home rule immunity: (1) immunity in the face of interference in areas where cities more likely do *not* have plenary initiative power from a state government; and (2) immunity in the face of interference in areas where they *do* have authority from state governments to enact such provisions.¹⁰² The authors use this basic categorization in order to demonstrate that home rule immunity, "to the extent it exists at all, depends on state law."¹⁰³ Pushing the boundaries of home rule immunity, then, depends on how judicial interpretations of it vary across different categories of local concern, whether a court's conception of local is flexible, and the extent to which state law has previously attempted to regulate those areas.

Some judicial interpretations of home rule immunity are made in a context under which a city may not have had plenary authority to enact legislation in the first place. In *New Orleans Campaign for a Living Wage v. City of New Orleans*, the New Orleans city council placed a provision to establish a minimum wage by amending the city charter on the ballot.¹⁰⁴ The charter amendment was adopted, then was swiftly followed by a declaratory judgment proceeding on (1) the validity of the amendment;

100. *Id.* at 838.

101. See, e.g., William R. Andersen, *Resolving State/Local Governmental Conflict—A Tale of Three Cities*, 18 URB. L. ANN. 129, 131 (1980).

102. FRUG ET AL., *supra* note 40, at 198.

103. *Id.*

104. *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1101–03 (La. 2002) (quoting *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 14 (La. 2001)) (“[I]n affairs of local concern, a home rule charter government possesses ‘powers which within its jurisdiction are as broad as that of the state, except when limited by the constitution, laws permitted by the constitution, or its own home rule charter.’”).

and (2) the unconstitutionality of a prior Louisiana state law that “prohibit[ed] local governmental subdivisions from establishing a minimum wage.”¹⁰⁵ The Supreme Court of Louisiana ruled that the charter amendment violated state law.¹⁰⁶ While recognizing that “Article VI [of the Louisiana Constitution] protects home rule governments from unwarranted interference by the state in their internal affairs” through the requirement that local control only be revoked or changed by a “reasonable exercise of the state’s police power,” the state law at issue here was clearly intended to do just that.¹⁰⁷ The state law, the *Living Wage* court held, had been passed based on reasonable policy findings that issues of wages were a statewide issue, and thus the prohibition against passing parallel ordinances at the local level did not infringe on the power of immunity granted to Louisiana municipalities.¹⁰⁸ While acknowledging the existence of home rule immunity, the court seemed to place an emphasis on whether an arguably local issue overlapped with a previously established statewide concern, even in attempting to regulate that concern on a small scale.¹⁰⁹

Juxtaposed against these cases are instances where a state legislature attempts to revoke or alter a municipality’s power where it may already have been granted. In *City of Tucson v. State*, the Arizona legislature amended state law to alter the process by which city council members in cities could be elected.¹¹⁰ The city brought suit, citing the home rule provision of the Arizona Constitution. That amendment gave eligible cities the ability to adopt charters, and the power to “frame its own organic law, including the power to determine ‘who shall be its governing officers and how they shall be selected.’”¹¹¹ The Supreme Court of Arizona ruled in the city’s favor. Despite a state legislative finding that “the conduct of elections . . . is a matter of statewide concern,” the *City of Tucson* court reasoned that Arizona’s home

105. *Id.* at 1101.

106. *Id.* at 1108.

107. *Id.* at 1103–07.

108. *See id.* at 1108.

109. *See id.*; see also *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30, 39 (Colo. 2000) (finding that the issue of local rent control “[is] not so discretely local that all state interests are superseded,” thus invalidating the local ordinance where it conflicted with broader state policy).

110. *City of Tucson v. State*, 273 P.3d 624 (Ariz. 2012).

111. *Id.* at 625 (quoting *Strode v. Sullivan*, 236 P.2d 48, 54 (Ariz. 1951)).

rule provisions were clearly intended, at least in the area of local elections, to insulate home rule cities from state interference.¹¹²

These cases paint a picture of home rule immunity that is dependent on: (1) the permissiveness of the home rule language; and (2) the extent to which the state has staked out a legitimate interest in the area of law. Some home rule amendments allow cities to perform the same functions of a state “unless [striking down the ordinance] is necessary to prevent an abridgement of the reasonable exercise of the state’s police power,”¹¹³ while others leave the determination as to what activity is state or local in nature open to court interpretation.¹¹⁴ But even in states where cities do not have the power to enact laws with the same functional power as the state, the factors mentioned above allow courts to carve out some exceptions whereby municipal governments are protected from state interference. The decision in *Living Wage* is a prime example of this power. The court’s determination turned, at least in part, on the reasonableness of the state’s prohibitive measure;¹¹⁵ without a well-grounded rationale on which to deem the minimum wage law a matter of statewide concern, it is unlikely that the measure would have been able to penetrate the otherwise broad leeway that court gave to its home rule amendment. In the current climate of city-state relations, then, a showing of a lack of an actual state interest in the face of a preemptive law may well be the line past which a state may *not* intrude on local governance, provided home rule exists to validate a recognition of local power.

II. THE NEED FOR HOME RULE IMMUNITY WHEN STATE GOVERNMENTS ABANDON THE FIELD

As discussed in Part I, home rule may only be a practical tool to the extent it: (1) is sufficient in scope to allow cities to act upon granted powers; and (2) protects cities from state interference, depending on courts’ interpretations of issues that are sufficiently local.¹¹⁶

112. *See id.* at 630–32.

113. *Living Wage*, 825 So. 2d at 1103 (quoting *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 14 (La. 2001)).

114. *See* COLO. CONST. art. XX, § 6; *Town of Telluride* 3 P.3d at 37.

115. *See Living Wage*, 825 So. 2d at 1103 (quoting *Smith & Wesson Corp.*, 785 So. 2d at 14) (“Article VI also serves to foster local self-government by allowing home rule entities to utilize their powers and functions on the local level without revocation, change, or affect by law unless it is necessary to prevent an abridgement of the reasonable exercise of the state’s police power.”).

116. *See supra* Part I.

Traditionally, states can challenge these powers when legislating programs that have a statewide impact, or when a city ordinance is otherwise in direct conflict with state law.¹¹⁷ This Part explores the impact of home rule immunity on situations where state legislatures have either *neglected* or *chosen not to* address a particular area that localities deem worthy of new legislation. Section A defines this situation as abandoning the field, and discusses the difference between active and passive abandonment. Part B looks at three examples of home rule amendments (or their equivalents) to see how courts can reframe the reach of local power in the face of this abandonment. Ultimately, this Part proposes that when states abandon a particular area of law, courts are more likely to look at a variety of factors to find justification for ruling in favor of a city's attempt to fill a legislative void.

A. DEFINING ABANDONING THE FIELD

The energy benchmarking legislation in Arizona discussed above fashions a unique brand of preemption.¹¹⁸ First, it explicitly prohibits any city or town from “requir[ing] an owner, operator or tenant of a business, commercial building or multifamily housing property to measure and report energy usage and consumption, including energy consumption benchmarking and building facility energy efficiency audits.”¹¹⁹ Second, and more notably, it does not purport to *actively* preempt any of these banned practices with any legislation of its own; while it technically preempts local ordinances in a literal sense, it does not replace local ordinances with any functional policy in that field of law.¹²⁰ The legislation essentially tells cities and counties that they are forbidden from acting in an area that the state considers

117. See FRUG ET AL., *supra* note 40, at 218.

118. See *supra* note 5 and accompanying text.

119. ARIZ. REV. STAT. ANN. § 9-500.36 (2016).

120. See *id.* (prohibiting cities from passing energy benchmarking bills at the municipal level without proposing any additional legislative measures that actually “preempt” such ordinances). The same bill also was meant to block cities from passing ordinances that would impose taxes, fees, or deposits on local businesses that use disposable bags. This was similarly passed in response to cities like Tucson, Flagstaff, and Tempe that were considering such measures. See Howard Fischer, *PLASTIC BAGS: Plastic Bag Preemption Enacted*, ARIZ. DAILY SUN (MAR. 15, 2016), http://azdailysun.com/news/local/plastic-bag-preemption-enacted/article_e2146ff3-c4cf-5f79-8fc6-9c5b2a67949a.html.

“particularly sensitive,”¹²¹ without proposing any alternative scheme to regulate that area.

Legislation like the energy benchmarking bill that forbids cities from passing certain ordinances without actively preempting them with any replacement legislation is one way a state can actively abandon a field of law. Unlike examples of state preemption where courts determine that a state legislature has occupied the field by passing their own general laws that impact all of its political subdivisions,¹²² this unique brand of preemption simply prohibits a city from acting without actually addressing the extent to which it is a statewide concern. In states like Arizona, this active abandonment of a field may occur *after* and even in *reaction to* a city ordinance, thus attempting to unwind local legislation in a targeted fashion not unlike the special legislation of the pre-home rule movement.¹²³

Other, less overt examples of state inaction still raise similar questions regarding the limits of city-state preemption. It may be the case that a city is simply acting ahead of a state on a certain issue, and legal challenges arise as to whether such action exceeds the scope of a home rule amendment. In Minnesota, for example, a recent suit challenging a referendum to amend the Minneapolis charter and raise the local minimum wage centered on whether the issue was simply *permissible* as a home rule charter amendment, not whether it conflicted with state minimum wage laws.¹²⁴ While the issues in Minnesota do not involve outright prohibitions of local legislation, cities (or, in this case, citizens of cities) may nevertheless become unsure of how to bridge a legislative void on issues that can have a significant impact at the local level.

121. H.B. 2130, 52d Leg., 2d Sess. (Ariz. 2016). The bill’s session law explains that the decision to prohibit municipal ordinances regarding energy benchmarking is based on the conclusion “that small businesses are particularly sensitive to costs and expenses incurred in complying with regulatory actions of a city [or] town.”

122. *See, e.g., Am. Fin. Servs. v. City of Oakland*, 104 P.3d 813, 820 (Cal. 2005) (finding that an ordinance regulating predatory lending practices was preempted because a prior state law “impliedly fully occupied the field of regulation . . . and hence the Ordinance is preempted on this ground”).

123. *See supra* Part I.C.

124. *See Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 469 (Minn. 2016) (per curiam) (framing the city’s argument against the minimum wage referendum as an issue of the permissive language of the state’s home rule amendment, not as whether the state had passed a statute directly in conflict with the measure).

Both of these contexts are quite different from cases like *Living Wage*.¹²⁵ While the exercise of home rule power in that case was struck down because the state legislature had made determinations that employment issues should be governed at the state level,¹²⁶ here, cities are attempting to pass ordinances in a legislative vacuum and being challenged on similar grounds. Such challenges are flawed assertions of preemption, however, because they ignore previously recognized spheres of power that should be allowed to adapt to an evolving city-state relationship. As argued in Part III, this type of preemption should be reconsidered, because it restricts local power based on technical statutory construction rather than a practical understanding of where home rule should start and end.¹²⁷ When attempts to pass new local legislation demonstrate that potential conflicts at the state level do not serve a legitimate state purpose, courts should be more willing to recognize that a city's home rule immunity powers should outweigh considerations of the state creature model.¹²⁸

B. CASE STUDIES OF LOCAL GOVERNMENTS LEGISLATING IN ABANDONED FIELDS

Cities in states with varying degrees of home rule protections have recently faced challenges to their abilities to legislate on local issues. This Section examines these situations in turn, and evaluates the relative strengths and weaknesses of each of these cities' delegated powers. In so doing, it frames the difficulties each locality faces in passing laws on issues that their respective states will not act on, in order to provide context to the possible solutions outlined in Part III.¹²⁹

125. *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098 (La. 2002).

126. *Id.* at 1106 (concluding that “[i]n enacting La. R.S. 23:642, the [state] legislature determined the policy of the State of Louisiana with respect to minimum wage requirements”).

127. *See infra* Part III.D.

128. *But cf.* Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 253–60 (2016). Stahl argues that current conceptions of home rule are outdated and that new models that reject the traditional notions of liberalism are needed to make meaningful change in a globalizing economy. This Note argues within the framework of traditional conceptions of home rule, and argues that these models are flexible enough to allow courts to make meaningful determinations over whether a local government should be granted power to act legislatively.

129. *Infra* Part III.

1. North Carolina

On February 22, 2016, the Charlotte City Council passed Ordinance No. 7056 in a seven to four vote.¹³⁰ The legislation was designed as a broad prohibition against discrimination based on, among other immutable characteristics, sexual orientation and gender identity.¹³¹ The ordinance specifically targeted discrimination in the use of public accommodations, as well as in city contracting and the use of for-hire vehicles.¹³²

Just one month later, the North Carolina General Assembly convened a special legislative session specifically to pass the Public Facilities Privacy & Security Act, known more colloquially as HB2 or the bathroom bill (hereinafter HB2).¹³³ The legislation specifically targeted Ordinance No. 7056's anti-discriminatory measures relating to public accommodations by specifically requiring any "multiple occupancy bathroom or changing facility [to] be designated for and only used by persons based on their biological sex."¹³⁴ The bill also included preemptive language, declaring that the provision "supersede[s] and preempt[s] any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement pertaining to the regulation of discriminatory practices in places of public accommodation."¹³⁵

The reaction to HB2 was largely negative, both commercially¹³⁶ and politically.¹³⁷ The mounting criticism that the law

130. See Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016); Harrison, *supra* note 9.

131. See Harrison, *supra* note 9.

132. See *id.*

133. 2016 N.C. Sess. Laws 2016-3.

134. N.C. GEN. STAT. ANN. § 115C-521.2 (West 2016).

135. *Id.* § 143-422.11.

136. See, e.g., Alex Kotch, *North Carolina's Anti-LGBT Law Has Cost the State More Than \$560 Million So Far*, INST. FOR SOUTHERN STUD.: FACING SOUTH (Jan. 6, 2017), <https://www.facingsouth.org/2017/01/north-carolinas-anti-lgbt-law-has-cost-state-more-560-million-so-far> (detailing the companies that refused to do business in the state as a result of the law's social policies). Some researchers estimated that the consequences could have been even more dire when the bill was first passed. See Katherine Peralta, *House Bill 2 Could Cost N.C. \$5 Billion a Year, Report Says*, CHARLOTTE OBSERVER (May 11, 2016), <http://www.charlotteobserver.com/news/business/article76997927.html>.

137. See, e.g., *Hundreds Protest HB2 in Downtown Raleigh*, ABC 11 EYEWITNESS NEWS (Apr. 8, 2016), <http://abc11.com/politics/hundreds-protest-hb2-in-downtown-raleigh/1273762>; Sarah Krueger, *More Than 700 People Attend Anti-House Bill 2 Rally in Greensboro*, FOX 8 (Apr. 3, 2016), <http://myfox8.com/2016/04/03/more-than-700-people-attend-anti-house-bill-2-rally-in-greensboro>;

constituted “blatant discrimination” that “ma[de] it public policy to harass, bully, humiliate, target, and punish LGBT people,”¹³⁸ and the resulting commercial consequences of that criticism, eventually led to a repeal of HB2.¹³⁹ On March 30, 2017, the North Carolina legislature passed a revised public accommodation bill, House Bill 142 (hereinafter HB142).¹⁴⁰ HB142 repealed HB2 in its entirety, but, in a compromise with advocates of the 2016 bill, enacted two significant preemptive measures. First, HB142 explicitly prohibits “[s]tate agencies, boards, offices, departments, institutions, branches of government, . . . and *political subdivisions of the State*” from regulating access to public facilities, including restrooms.¹⁴¹ Second, it prohibits all local governments from enacting or amending any ordinances “regulating private employment practices or regulating public accommodations.”¹⁴²

Ultimately, while the state has rolled back the explicit targeting of HB2 toward LGBT citizens, the preemptive spirit of that law has been maintained in HB142. Meanwhile, the legal challenges to HB2 when it was enacted focused mostly on allegations that the restrictions on public accommodations based on gender identity violated the Equal Protection and Due Process Clauses of the United States Constitution.¹⁴³ There was never pushback from the local level as to whether HB2 impermissibly violated state law governing the city-state relationship.¹⁴⁴

Bill O’Neil, *Petitions Filed to Repeal HB2*, WXII NEWS (Apr. 25, 2016), <http://www.wxii12.com/article/petitions-filed-to-repeal-hb2/1932259>.

138. *Repeal North Carolina’s Anti-LGBT Law*, ACLU ACTION (Apr. 24, 2016), <https://action.aclu.org/secure/NC-repeal-HB2>.

139. See Richard Fausset, *North Carolina Strikes a Deal to Repeal Restrictive Bathroom Law*, N.Y. TIMES (Mar. 29, 2017), <https://www.nytimes.com/2017/03/29/us/north-carolina-lawmakers-reach-deal-to-repeal-so-called-bathroom-bill.html>.

140. 2017 N.C. Sess. Laws 2017-4.

141. *Id.* (emphasis added).

142. *Id.*

143. See, e.g., Complaint for Declaratory and Injunctive Relief, *Carcaño v. McCrory*, No. 1:16-cv-236, 2016 WL 1213004, at *33–38 (M.D.N.C. Mar. 28, 2016).

144. HB142 was passed just prior to the completion of this Note. Legal challenges to the new bill, which have already been intimated in correspondence from opponents of the statute, may invoke interference with local initiative power, in addition to the equal protection arguments raised against HB2. See Letter from Sarah M. Gillooly, Policy Dir., ACLU, to Roy Cooper, Governor of N.C. (Mar. 30, 2017), <https://www.aclu.org/letter/letter-governor-cooper-requesting-veto-hb-142>.

North Carolina is not a home rule state per se.¹⁴⁵ It has, however, passed broad statutory grants of initiative authority that contain three important characteristics. First, section 160A-4 of the state code provides that “cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law.”¹⁴⁶ The statute concludes that the provisions of this power-granting statute and that of city charters “shall be broadly construed . . . to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect,” so long as they are “not . . . contrary to State or federal law or to the public policy of this State.”¹⁴⁷ Second, another provision of the same section of the state code grants broad and general regulatory authority: “[a] city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances.”¹⁴⁸ It further requires that such ordinances “be consistent with the Constitution and laws of North Carolina and of the United States,” but otherwise does not contain any particular limitations.¹⁴⁹ However, other more specific state statutes outline various areas where cities and counties may or may not pass local legislation. While some laws grant the regulation of firearm use¹⁵⁰ and “sexually oriented businesses,” within city limits,¹⁵¹ others place limits on certain administrative functions, including property disposal¹⁵² and voting procedures of local governing bodies.¹⁵³ Finally, the North Carolina Constitution contains no prohibition against special legislation.¹⁵⁴ Without this restriction, a local government may request a special local law from the state legislature to extend powers not yet conferred to new areas, so long as such ordinances do not otherwise violate state law.¹⁵⁵

145. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1985 (2006).

146. N.C. GEN. STAT. ANN. § 160A-4 (West 2016).

147. *Id.*

148. *Id.* § 160A-174.

149. *Id.*

150. *Id.* § 160A-189.

151. *Id.* § 160A-181.1.

152. *See Id.* § 160A, art. 12.

153. *Id.* § 160A-75.

154. *See generally* N.C. CONST. (failing to prohibit special legislation).

155. *See* Bluestein, *supra* note 145, at 2006.

North Carolina's statutory structure establishes a complicated delegation of local authority between cities and states based on a laundry list of specific grants and prohibitions of initiative power.¹⁵⁶ Because the state constitution does not contain a home rule amendment, courts have instead focused their analysis of this relationship on the extent to which the principles of Dillon's Rule apply in the state. While courts have intermittently applied Dillon's Rule to cases where local ordinances have been challenged, the landmark decision of *Homebuilder's Ass'n of Charlotte v. City of Charlotte* pushed back on the prevalence of Dillon's Rule.¹⁵⁷ That case, which centered on whether Charlotte could impose fees in connection with regulatory services and use of public facilities, held that a statutory regime allowing for city powers to be "broadly construed" should usurp narrower delegations of authority based on Dillon's Rule and *Hunter*.¹⁵⁸

Since the decision in *Homebuilder's Ass'n*, Dillon's Rule continues to be invoked in North Carolina, but typically only in situations "where the plain meaning of the statute is without ambiguity."¹⁵⁹ In *BellSouth Telecommunications, Inc. v. City of Laurinburg*, the state appellate court applied the rationale of *Homebuilder's Ass'n* to conclude that the statutory grant of authority applied in situations of "extending powers to a municipality where there is an ambiguity in the authorizing language, or the powers clearly authorized reasonably necessitate 'additional and supplementary powers' 'to carry them into execution and effect.'"¹⁶⁰ If the statute and its grant of authority were not ambiguous, the *BellSouth* court concluded, application of the narrow grants under Dillon's Rule was more appropriate.¹⁶¹

North Carolina, therefore, seems to sit somewhere between a home rule state and one that is purely beholden to the state creature model, at least when it is unclear whether the state has clearly limited its authority. In situations where cities wish to pass new legislation for issues that may have a local impact,

156. *See id.* at 2000–12.

157. *Homebuilder's Ass'n of Charlotte v. City of Charlotte*, 442 S.E.2d 45 (N.C. 1994).

158. *See id.* at 50 (finding it "unnecessary to decide" the question of whether application of Dillon's Rule was necessary to decide the "proper rule of construction" because section 160A-4 was more relevant).

159. *BellSouth Telecomms., Inc. v. City of Laurinburg*, 606 S.E.2d 721, 726 (N.C. Ct. App. 2005).

160. *Id.* (quoting *Homebuilders Ass'n*, 442 S.E.2d at 50).

161. *See id.*

such as Ordinance No. 7056, courts are likely to focus on the existence of limiting language in state law. Without a home rule amendment to provide immunity from interference from the state level, however, even broad *statutory* grants of authority may not provide sufficient space in which cities can operate, despite retaliatory preemption at the state level.

2. Minnesota

Unlike North Carolina, Minnesota is a home rule state; the Minnesota Constitution provides that “[a]ny local government unit when authorized by law may adopt a home rule charter for its government.”¹⁶² Nevertheless, the ability to locally legislate in an abandoned field has faced recent challenges. In 2016, two advocacy groups obtained enough signatures to place two proposed amendments to the Minneapolis City Charter on an upcoming ballot: one that would have, over a course of years, increased the minimum wage to fifteen dollars an hour;¹⁶³ and one that would have required all police officers in the city to carry their own personal liability insurance.¹⁶⁴ When the Minneapolis City Council voted against including the provisions on the ballot, the advocacy groups sued in state court, arguing that blocking the measures from reaching a vote constituted “error[s] with regard to the preparation of a ballot.”¹⁶⁵ Ultimately, both of these challenges failed.¹⁶⁶ Ignoring the plaintiff’s challenge to the vote itself, the state district court ruled in *Bicking v. City of Minneapolis* that state law preempted the proposed ballot measure regarding police liability insurance, because the state had already passed “extensive regulation” regarding “the city’s obligation to completely indemnify” its police officers, thus prohibiting a conflicting requirement that officers also carry their own insurance.¹⁶⁷

162. MINN. CONST. art. XII, § 4.

163. See *Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 468 (Minn. 2016) (per curiam).

164. Order Dismissing Petition at 3, *Bicking v. City of Minneapolis*, No. 27-CV-16-11839 (Dist. Ct. Minn. Aug. 22, 2016).

165. *Id.*

166. See *id.* at 2; *Vasseur*, 887 N.W.2d at 474. Ironically, the city of Minneapolis was the challenging party in both cases. But, as discussed *infra*, these decisions ultimately did not *curb* the city’s ability to pass their own ordinances on these issues because of Minnesota’s strong home rule protections.

167. Order Dismissing Petition at 5–10, *Bicking*, No. 27-CV-16-11839 (Dist. Ct. Minn. Aug. 22, 2016).

The minimum wage proposal was also defeated, in the case *Vasseur v. City of Minneapolis*. The Minnesota Supreme Court held that the language of the Minneapolis Charter placed “general legislative authority” squarely within the province of the City Council, and prohibited passing of legislative acts through referenda.¹⁶⁸ Eschewing a discussion of whether the proposed referendum fell within the permissible range of *subject matters* that could be incorporated into local legislation,¹⁶⁹ the court held that the wage amendment, by effectively allowing normal citizens to pass legislative acts rather than the City Council, would “conflict[] with the permissible form of government adopted in the Minneapolis City Charter.”¹⁷⁰ This conclusion was based on section 1.4(a) of the Minneapolis charter, which allows the city “through the boards, commissions, committees, departments, and officers” to “exercise any power that a municipal corporation can lawfully exercise at common law.”¹⁷¹

While neither of the attempts at grassroots local legislation in *Bicking* and *Vasseur* were successful,¹⁷² the decisions both explore the limits of home rule in Minnesota. First, the district court ruling in *Bicking* demonstrates the extent to which a state’s intent to preempt city ordinances in a particular area of law overrides concerns of whether a particular issue is sufficiently local. Indeed, the district court found that: (1) state law was intended to occupy the field of tort liability at the municipal level through language that claimed that the relevant statutes were “exclusive of and supersede[d] all home rule charter provisions . . . on the same subject heretofore and hereafter adopted”; and (2) the proposed charter amendment directly conflicted with

168. *Vasseur*, 887 N.W.2d at 471.

169. *See id.* at 473 (concluding that the court “d[id] not need to define the precise meaning of the phrase ‘local municipal functions’” within the meaning of the state’s statute regarding acceptable subject matter for home rule charters).

170. *Id.* at 471.

171. MINNEAPOLIS, MINN., CITY CHARTER § 1.4(a) (2017). The court also noted in its decision that section 4.1(a) of the charter grants the City Council the “City’s general legislative and policymaking authority.” *See Vasseur*, 887 N.W.2d at 470–71 (citing MINNEAPOLIS, MINN., CITY CHARTER § 4.1(a) (2017)).

172. In 2017, the Minneapolis City Council passed a minimum wage ordinance that largely aligned with the original proposal at issue in *Vasseur*. *See City Council Passes Municipal Minimum Wage Ordinance*, MINNEAPOLISMN.GOV (June 30, 2017), <http://news.minneapolismn.gov/2017/06/30/city-council-passes-municipal-minimum-wage-ordinance/>. *Vasseur* may therefore best be understood as a debate on division between city and citizen implementation of home rule power, rather than whether that area of law properly fell within home responsibilities in general.

state law, including provisions that regulated the responsibility of municipalities to purchase insurance and represent police officers in all tort cases.¹⁷³ Thus, the pervasiveness of existing regulation at the state level was sufficient to obviate any discussion of whether, in general, the area of municipal liability fell within the substantive scope of Minnesota's home rule.

Second, and more significantly, the district court decision in *Vasseur* discussed at length the limits of acceptable subject matters that might appear in a Minnesota home rule charter.¹⁷⁴ The decision highlighted section 410.07 of the Minnesota Statutes, which allows cities to go beyond simply establishing the *structure* of local government.

Subject to the limitations in this chapter provided, [a home rule charter] may provide for any scheme of municipal government not inconsistent with the constitution, and may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal functions, as fully as the legislature might have done before home rule charters for cities were authorized by constitutional amendment in 1896.¹⁷⁵

As the district court discussed, city power is encapsulated in the phrase “may provide for the establishment and administration of all departments of a city government.”¹⁷⁶ The court held that the second clause of that sentence, “may provide for . . . the regulation of all local municipal functions,” demonstrates a broad delegation of *legislative* home rule power.¹⁷⁷ A state's delegation of the ability to craft a charter to a home rule city in turn gives that city the power to confer legislative power to either a city council (in the form of an ordinance) or its citizens (in the form of a referendum to amend the charter, if the city chooses to include that power in the charter).¹⁷⁸ In other words, the only limiting factors on what can be included in a city ordinance under Minnesota law is: (1) the extent to which it conflicts with state law;¹⁷⁹ and (2) the legislative procedures a city elects to confer

173. Order Dismissing Petition at 5–10, *Bicking v. City of Minneapolis*, No. 27-CV-16-11839 (Dist. Ct. Minn. Aug. 22, 2016).

174. Order Granting Petition at 9–10, *Vasseur v. City of Minneapolis*, No. 27-CV-16-11794 (Minn. Dist. Ct. Aug. 22, 2016).

175. MINN. STAT. § 410.07 (2017).

176. See Order Granting Petition at 10, *Vasseur*, No. 27-CV-16-11794 (Minn. Dist. Ct. Aug. 22, 2016).

177. See *id.*

178. See *id.*

179. See MINN. STAT. § 410.07 (allowing for legislative acts in charters so long as they are “not inconsistent with the constitution”); see also Order Dismissing Petition at 4, *Bicking v. City of Minneapolis*, No. 27-CV-16-11839 (Dist.

upon its citizens.¹⁸⁰ As discussed in Part III, the Minnesota Supreme Court's decision overturning the district court may have only further highlighted the changing expectation of the areas of law that can constitute a local concern.¹⁸¹

These two cases demonstrate both the relative strength of home rule in Minnesota, and the extent to which judicial interpretation can have a profound impact on defining the malleable boundaries of home rule authority. By recognizing that the relevant statutes governing home rule are permissive in a given state, courts are more inclined to in turn set broad standards for what can constitute a local concern. The failure to amend the Minneapolis Charter in no way diminished, and actually brought to light, the understanding that Minnesota home rule cities may legislate on "any subject appropriate to the orderly conduct of municipal affairs."¹⁸² As discussed in Part III, such broad statutory language can create revised expectations of the areas of law that are suitable for legislation at the local level.¹⁸³ When coupled with a lack of affirmative policies in that area at the state level, courts should also embrace a new default presumption that allows cities to step up and fill these legislative voids, even in the face of retaliatory preemption.

3. Arizona

Arizona's recent difficulties, as outlined above,¹⁸⁴ are arguably more extreme than the challenges unfolding in North Carolina and Minnesota.¹⁸⁵ In those states, cities have been trying to carve out more power based on legislative silence at the state level in certain areas of law.¹⁸⁶ In Arizona, attempts to interfere with local legislation bear more of a resemblance to the aggressive overextension of the state creature model that originally led

Ct. Minn. Aug. 22, 2016). As the district court explained in that decision, the clear pervasiveness of state preemption was dispositive for striking down the charter amendment; the court did not see it necessary to discuss the same issues raised in *Vasseur* because the preemption was a threshold issue. *Id.* at 7–8.

180. *See Vasseur v. City of Minneapolis*, 887 N.W.2d 467, 471 (Minn. 2016) (per curiam).

181. *See infra* Part III.B.

182. *Vasseur*, 887 N.W.2d at 473 (quoting *Markley v. City of St. Paul*, 172 N.W. 215, 216 (Minn. 1919)).

183. *See infra* Part III.B.

184. *See supra* notes 1–6, 15–16, and accompanying text.

185. *Supra* Parts II.B.1, II.B.2.

186. In North Carolina, although the state legislature eventually implemented explicitly preemptive statutory language, it had been silent on the issue before the passing of HB2.

to the pushback from home rule reformers.¹⁸⁷ In addition to the energy benchmarking bill that strictly prohibits local governments from passing new legislation on related issues,¹⁸⁸ the recent bill that gives any state lawmaker the power to recommend to the State Attorney General that an ordinance violates state law, SB1487, goes a step further: it not only preempts particular local concerns, but potentially all *future* local concerns, in a way that circumvents judicial review entirely.¹⁸⁹

Home rule cities in Arizona are in the early stages of responding to these preemptive laws. In Tucson, a state legislator reported to the Attorney General that a local ordinance providing for the destruction of confiscated firearms, codified as section 2-142 of the Tucson Code in 2005,¹⁹⁰ violated a 2013 state law that explicitly prohibited and preempted such practices.¹⁹¹ The Attorney General filed a report, in compliance with SB1487, that (1) the ordinance “may violate” state law; and (2) that SB1487’s preemptive proscriptions could be retroactively applied, thus triggering SB1487’s procedures regarding potential withholding of state funding.¹⁹² In response, the city filed a lawsuit in state district court, challenging the constitutionality of SB1487, which was then removed to a special hearing in front of the Arizona Supreme Court.¹⁹³ At oral argument, the discussion of SB1487 focused on whether the power to occupy any field being regulated at the local level through this new preemption law effectively “nullif[ies] the charter authority” set forth in the state constitution.¹⁹⁴ Especially because the city ordinance had predated both the state’s 2013 law and SB1487, the parties and the court appeared to struggle with when to preserve local power in the face of reactive preemption.¹⁹⁵

The more deliberate nature of Arizona’s recent preemptive legislation, therefore, presents a unique challenge for cities:

187. See *supra* Part I.C.

188. ARIZ. REV. STAT. ANN. § 9-500.36 (2016).

189. *Id.* § 41-194.01.

190. TUCSON, ARIZ., CODE OF ORDINANCES § 2-142 (2005).

191. See Complaint for Declaratory, Injunctive, and Special Relief ¶ 56, City of Tucson v. State, No. C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

192. See OFFICE OF ARIZ. ATT’Y GEN., INVESTIGATIVE REP. NO. 16-002 (2016).

193. See Order, State *ex rel.* Brnovich v. City of Tucson, No. CV-16-0301-SA (Ariz. Aug. 17, 2017).

194. Oral Argument at 25:28, State *ex rel.* Brnovich v. City of Tucson, No. CV-16-0301-SA, (Ariz. Jan. 18, 2017) http://supremestateaz.granicus.com/MediaPlayer.php?view_id=2&clip_id=2109#.

195. See *id.* at 13:02–15:04, 18:13–29:20, 41:23–42:15, 45:07–45:40.

where the intent of the state legislature is clearly geared toward active preemption, there is a temptation to fall back on the state creature framework and declare that any occupied field belongs to state law. But Arizona cities are afforded unusually strong home rule immunity that complicates the debate. Arizona's home rule amendment allows any city of more than 3500 people to "frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state."¹⁹⁶ As noted in Part I,¹⁹⁷ courts have held that "[t]he purpose of the home rule charter provision . . . was to render the cities adopting such charter provisions as nearly independent of state legislation as was possible."¹⁹⁸ This emphasis on municipal protections was further articulated with respect to municipal elections in *City of Tucson v. State*.¹⁹⁹ In that case, the Supreme Court of Arizona looked at the language not just of the Arizona constitution allowing for home rule charters, but the language of the city's charter as well, which provided that "[t]he provisions of the general laws of the State of Arizona, governing the elections of state and county officers, *not inconsistent with the provisions of this Charter*, shall govern the said elections."²⁰⁰ It then held that preemptive state statutes aimed at displacing the city's election laws did not fall into this category of "general laws."²⁰¹ Thus, the court found that the combination of: (1) a clear legislative intent to generally give cities autonomous power; (2) the unique, and thus local, nature of each city's election procedures; and (3) the lack of a preference for a statewide scheme from state legislature rendered, at least in the field of local elections, certain city ordinances immune from state interference.²⁰²

Rather than presuming that the *Hunter* model dictates the interaction between state and locality, decisions like *City of Tucson* read the state's home rule amendment as starting from the proposition that the state cannot meddle with local affairs. By creating an original intent in the state constitution that favors city power, this new default nullifies preemptive measures that do not sufficiently demonstrate a strong state interest *before* the

196. ARIZ. CONST. art. XIII, § 2.

197. See *supra* Part I.D.2.a.

198. *City of Tucson v. Walker*, 135 P.2d 223, 226 (Ariz. 1943) (quoting *Axberg v. City of Lincoln*, 2 N.W.2d 613, 614–15 (Neb. 1942)).

199. *City of Tucson v. State*, 273 P.3d 624 (Ariz. 2012).

200. TUCSON, ARIZ., CHARTER Ch. XVI, § 7 (emphasis added); *City of Tucson*, 273 P.3d at 629.

201. *City of Tucson*, 273 P.3d at 629.

202. See *id.* at 632.

ordinance in question is preempted. As discussed below, this deference reduces the headwinds cities face in order to pass local laws in new areas in the future.²⁰³ The abandoning of a field of law at the state level at this point becomes more relevant to a court than perfunctory preemptive language in a state law.

III. RECONSIDERING LOCAL POWER WHERE STATE LAW HAS ABANDONED THE FIELD

When a home rule state abandons a field of law, the cases above indicate that a court can step in and interpret an issue as a local concern in ways that the original home rulers may have not contemplated.²⁰⁴ This Part reexamines the legal challenges in each of the states discussed, and highlights the relevant factors that might lead to an outcome favoring greater protection from state interference. Section A revisits the litigation in North Carolina, and considers how, even with strong initiative statutory grants, the lack of home rule sets a baseline for the potency of state preemption. Section B analyzes the recent court decisions in Minnesota and the extent to which permissive home rule language can allow courts to eschew concerns that the given area might encroach on an area of law traditionally reserved for statewide regulation. Section C applies these principles to the preemptive legislation in Arizona and argues that the clear abdication of any legitimate state interest likely makes recent state preemption laws untenable in a home rule state. Section D uses these examples to discuss the model of local power that courts should consider going forward in home rule states. Ultimately, this Part concludes that the combination of permissive home rule amendments and an abdication of legitimate state interest in a particular area of law has given courts the incentive to recalibrate traditional limits of local power. It further argues that courts in home rule states should adopt a rebuttable presumption to review state preemption in an abandoned field of law, and consider allowing city ordinances to operate in that field barring a demonstration of legitimate statewide concern.

203. See *infra* Part III.C.

204. See *supra* Part II.B.

A. NORTH CAROLINA AND THE PROBLEM OF PREEMPTION
WITHOUT HOME RULE

As set forth in Part II, the North Carolina constitution does not contain a home rule provision.²⁰⁵ While state laws have to some extent given the municipalities of North Carolina broad initiative power,²⁰⁶ the lack of home rule there indicates a strong legislative intent to specifically *not* confer special spheres of power protected from state interference. And while cases like *Homebuilder's Ass'n* push back on the notion that North Carolina is purely governed by the tenets of Dillon's Rule,²⁰⁷ even broad statutory grants of initiative authority leave municipalities relatively beholden to the state creature model.

The limited litigation over HB2 confirms just how important the presence of a home rule amendment is for municipal protection, even if there are other schemes in place that confer local power expansively. In the fight over the original bathroom bill, there seemed to be little dispute that the preemptive language of HB2 definitively ruled out invoking arguments of local autonomy. Indeed, the main challenges to the bill were based not on whether the state could preempt the city on that issue, but rather whether the state law itself violated federal law.²⁰⁸ The strong preemptive language of HB2 focused on the state proclaiming that it was “protect[ing] and safeguard[ing] the right and opportunity of all individuals within the State to enjoy equally . . . public accommodation free of discrimination,” and that the “regulation of discriminatory practices in places of public accommodation is properly an issue of general, statewide concern” as a result.²⁰⁹ Invoking public concern harkened back to the statute granting broad local powers, which required that local legislation be “not contrary to State or federal law or to the *public policy* of this State.”²¹⁰ This rationale allowed the state legislature to “supersede and preempt any ordinance, regulation,

205. See *supra* Part II.B.1.

206. See *supra* notes 146–53 and accompanying text.

207. See *Homebuilder's Ass'n of Charlotte v. City of Charlotte*, 442 S.E.2d 45, 50 (N.C. 1994).

208. See Complaint at 1–2, *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C. May 10, 2016) (raising questions of whether HB2 violates federal law, but *not* disputing whether the state law controls over Charlotte Ordinance No. 7056).

209. N.C. GEN. STAT. ANN. § 143-422.11 (West 2016).

210. *Id.* § 160A-4 (emphasis added).

resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State” through HB2.²¹¹ While the substantive policy of HB2 was completely repealed with the passing of HB142, the strong preemptive language has been replaced with something just as forceful. Indeed, even the title of the new provision, “Preemption of Regulation of Access to Multiple Occupancy Restrooms,” makes clear that the state legislature is now (and perhaps always was) concerned mostly with blocking progressive social policy at the local level.

As discussed below,²¹² simply asserting that an issue is of statewide concern does not appear to be enough to make it so, *unless* home rule does not govern municipal affairs, as is the case in North Carolina. If no home rule amendment is in place to confer power on a municipality, courts are less likely to look for any intent or legitimate statewide concern claimed by a state legislature, or to give a locality any more autonomous powers than those explicitly outlined. For North Carolina, perfunctory preemption language not based on actual findings on a particular issue, but which labels an issue as a general statewide concern, is likely sufficient to totally preempt local legislation. Even arguments that purely social issues such as LGBT rights are sufficiently within a municipality’s powers granted under state law are likely to become moot in the face of clear preemptive intent.²¹³

B. MINNESOTA AND THE ROLE OF PERMISSIVE HOME RULE AMENDMENTS IN DEFINING LOCAL CONCERN

Minnesota’s home rule provisions portend a much more positive outlook for future challenges to local legislation in home rule states. Unlike North Carolina, Minnesota has broad grants of home rule authority; simply the act of allowing “[a]ny local government unit when authorized by law [to] adopt a home rule charter for its government”²¹⁴ suggests a presumption in Minnesota that home rule cities should have a certain amount of protection from state interference. This deference is reflected in precedent broadly construing home rule authority to “embrace[] any subject appropriate to the orderly conduct of municipal affairs.”²¹⁵ With such interpretations in place, it is less likely that

211. *Id.* § 143-422.11.

212. *See infra* Parts III.B, III.C.

213. *See* N.C. GEN. STAT. ANN. § 160A-4; *see also supra* note 144.

214. MINN. CONST. art. XII, § 4.

215. *Markley v. City of St. Paul*, 172 N.W. 215, 216 (Minn. 1919).

an ordinance will be subject to scrutiny if it attempts to chart new territory for local concern, because courts will understand that the state legislature intended its cities to have flexibility when the home rule amendments were passed.²¹⁶

The issue of where Minnesota courts should draw the distinction between local and statewide concern was largely obviated in the Supreme Court's decision in *Vasseur*.²¹⁷ While acknowledging that the "all local municipal functions" clause of section 410.07 "may be broad" in the relevant *subject matters* it could encompass, the Supreme Court felt it sufficient to resolve the issue on the extent to which the charter had conferred legislative authority in a *structural* sense to its citizens.²¹⁸ But in so doing, the Minnesota Supreme Court's holding in *Vasseur* at least allowed for the possibility that traditional social issues like the minimum wage conceivably serve a local municipal function. The district court ruling was primarily concerned with defining the outer limit of an acceptable piece of local legislation, regardless of its form,²¹⁹ and the higher court was content to settle the matter on a threshold issue. Had the Minnesota Supreme Court addressed the district court's findings more directly, it likely would have had to reconcile *Vasseur* with its first case involving section 410.07, which held that the power delegated to the cities in Minnesota allows a city to "embrace[] any subject appropriate to the orderly conduct of municipal affairs."²²⁰ Instead, the *Vasseur* court framed the reach of local power as a question of

216. Cf. Order Granting Petition, *Vasseur v. City of Minneapolis*, No. 27-CV-16-11794 (Minn. Dist. Ct. Aug. 22, 2016) (declining to analyze whether the state minimum wage laws preempt the proposed charter amendment in any way).

217. *Vasseur v. City of Minneapolis*, 887 N.W.2d 467 (Minn. 2016).

218. See *id.* at 470–72.

219. See Order Granting Petition at 6, *Vasseur*, No. 27-CV-16-11794 (Minn. Dist. Ct. Aug. 22, 2016) ("This dispute centers upon what can be the subject of a charter amendment.").

220. *Markley*, 172 N.W. at 216. But see *Vasseur*, 887 N.W.2d at 473. The *Markley* decision was concerned with whether a charter amendment providing for municipal employees to receive workers' compensation was still enforceable in light of a more recent state statute on the same subject. The Minnesota Supreme Court tried to distinguish the proposed amendment in *Vasseur* from *Markley* on the grounds that the new proposed amendment governed the relations "to which the municipality is not a party." *Id.* But, as the district court noted in its ruling, the Minneapolis Charter actually governs many issues between private citizens that still rationally fall under the umbrella of a municipal function, including rules regarding alcohol consumption. See Order Granting Petition at 11–12, *Vasseur*, No. 27-CV-16-11794 (Minn. Dist. Ct. Aug. 22, 2016) (citing MINNEAPOLIS, MINN., CITY CHARTER § 4.1(f)). Even the Supreme Court's passing attempt at circumscribing local rule to certain subject matters, therefore, will likely be subject to future scrutiny.

form, and left the question of acceptable *subjects* of home rule open to further interpretation.²²¹

Permissive home rule language certainly still matters when there are alleged conflicts with state law. In those cases, Minnesota courts have preferred that the state adhere to explicit terms when attempting to overturn a local ordinance.²²² The district court decision in *Bicking* illustrates the extent to which strong and pervasive preemption influences a court to decide against a city.²²³ If such language is not present, however, *Bicking* and *Vasseur* suggest that courts are more likely to recognize how an ordinance and state law might coexist, even if they discuss the same issue. In *Vasseur*, there was never a question as to whether there was a state law governing minimum wage.²²⁴ In cases like *Living Wage*, this would potentially be enough to rule out the existence of minimum wage law at the local level outright.²²⁵ But in Minnesota, and states with similar home rule amendments, stronger *implied* delegations of local power allow instead for courts to start from the presumption that local interests can govern a wide range of subjects conceivably tied to the proper governance of a locality, such as promoting general welfare through increased minimum wages. Courts then require an *explicit* and *deliberate* indication from the state that it (1) either intends to occupy the field of law at issue; or (2) has at minimum passed a state law that is incompatible with the ordinance at issue. Where a state has not indicated a strong interest through an affirmative policy, or otherwise appears to be passing a preemptive law in a retaliatory manner, courts should recognize that abdication as an opportunity to expand the understanding of boundaries at which home rule cities can operate.

221. *Vasseur*, 887 N.W.2d at 472.

222. *See, e.g.*, *State v. Dailey*, 169 N.W.2d 746, 748 (Minn. 1969) (rejecting the notion that, regarding prohibitions against prostitution, “the legislature contemplates its own regulation to exclude municipal regulation, without most clear manifestation of such intent”).

223. *See* Order Dismissing Petition at 5–10, *Bicking v. City of Minneapolis*, No. 27-CV-16-11839 (Dist. Ct. Minn. Aug. 22, 2016) (outlining the various ways in which the proposed charter amendment is preempted, and the strength of the statutory language that does so).

224. *See* Order Granting Petition, *Vasseur*, No. 27-CV-16-11794 (Minn. Dist. Ct. Aug. 22, 2016).

225. *See* *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098 (La. 2002); *see also supra* notes 104–08 and accompanying text.

C. ARIZONA AND ABDICATION OF LEGITIMATE STATE PURPOSE

As discussed above, cities in Arizona often face deliberate challenges to their ability to pass local laws, but they also enjoy heightened home rule immunity that other states do not.²²⁶ Cases like *City of Tucson v. State* demonstrate, furthermore, that Arizona courts are willing to rule in favor of cities facing preemptive measures in certain situations.²²⁷ In general, having a permissive home rule may not be enough to fully overcome attempts at preemption.²²⁸ However, case law addressing preemption issues in Arizona recognizes that declarations of statewide interest cannot summarily snuff out local ordinances originally intended to be “as nearly independent of state legislation as . . . possible.”²²⁹ In the context of potential legal challenges to the more recent brand of preemptive state laws, such interpretations bode well for arguments that emphasize the importance of existing local control at the time of preemption, even where that preemptive intent is overt.

In *City of Tucson v. State*, the state was careful to distinguish its attempt at preemption from prior holdings that protected local control over elections.²³⁰ The state argued that the inclusion of specific language in the statute citing a need to govern local elections uniformly was sufficient to justify the conclusion that “the conduct of elections . . . is a matter of statewide concern.”²³¹ The court found that this statutory language was not dispositive.²³² Because the state’s home rule charter was clear in its intention to confer inherently local issues to cities, the mere inclusion of this perfunctory preemptive language was not enough to overcome previously recognized home rule immunity.²³³ Even the inclusion of special language pointing to “findings [made] by the legislature” was insufficient to override the

226. See *supra* Part II.B.3.

227. See *City of Tucson v. State*, 273 P.3d 624, 630–31 (Ariz. 2012).

228. See Order Dismissing Petition at 5–6, *Bicking*, No. 27-CV-16-11839 (Dist. Ct. Minn. Aug. 22, 2016); Vasseur 887 N.W.2d at 474.

229. *City of Tucson v. Walker*, 135 P.2d 223, 226 (Ariz. 1943) (quoting *Axberg v. City of Lincoln*, 2 N.W.2d 613, 614–15 (Neb. 1942)).

230. See *City of Tucson v. State*, 273 P.3d at 629.

231. *Id.* at 630.

232. See *id.*

233. *Id.*

presumption toward favoring the city's autonomy under Arizona's home rule amendment.²³⁴ Using tactics similar to those used by the drafters of HB2 in North Carolina,²³⁵ here state legislators attempted to graft claims of statewide concern to the preemptive statute without any *demonstration* that this was the case, and only in response to a city action in a particular area of law. Unlike North Carolina, however, courts in Arizona have recognized a constitutional presumption in favor of local authority that rejects the tenets of Dillon's Rule.²³⁶ And while the decision in *City of Tucson* focused on a narrow area of state law—the structuring of local governments through elections—the court's *willingness* to flatly reject the state's superficial claims of statewide concern indicates that more is needed from a state to preempt local issues.

Arizona state legislators' more recent attempts to undermine local action make similar claims that certain fields are suddenly of general concern. But the state, in passing both the energy benchmarking bill, as well as SB1487, only attempted to demonstrate a statewide interest in passing the laws *after* the local ordinance attempts to fill a legislative void. In the case of the energy bill, the Arizona legislature appears to have abdicated any interest in legislating on issues of energy usage.²³⁷ Its claim, therefore, that "small businesses are particularly sensitive to costs and expenses incurred in complying with regulatory actions of a city or town," as a justification for complete prohibition of any local regulation, rings hollow in that context.²³⁸ Furthermore, the state law governing the destruction of confiscated firearms only came eight years *after* Tucson had passed its own ordinance on the issue and been engaged in regulation at the local level.²³⁹ Such retroactive measures call into question the extent to which home rule can push back against statewide concern that appears as concerned with undermining city action as occupying a field for statewide regulation.

234. *See id.* ("Although we respect findings by the legislature, whether state law prevails over conflicting charter provisions under Article 13, Section 2 is a question of constitutional interpretation.")

235. *See* N.C. GEN. STAT. ANN. § 143-422.11 (West 2016) (citing the need to "protect and safeguard the right and opportunity of all individuals within the State to enjoy fully and equally" the fields being preempted, thus labeling them "statewide" concerns).

236. *See* ARIZ. CONST. art. XIII, § 2.

237. *See supra* note 5.

238. H.R. 2444, 52d Leg., 2d Reg. Sess. (Ariz. 2016).

239. *See supra* notes 190–95 and accompanying text.

All of these preemptive laws are likely at odds with *City of Tucson v. State* for two important reasons. First, building off the understanding from Minnesota's home rule regarding the types of subject matter that can be contemplated as local issues,²⁴⁰ as well as Arizona precedent that recognizes the intent to create "independent" localities through the charter provision,²⁴¹ it can certainly be argued that regulation of areas ranging from gun safety to climate and energy regulation may be characterized as local issues. In the recent challenge to SB1487, the city of Tucson argued it was unlikely that the legislature had contemplated that home rule would only extend to limited areas like elections and real property.²⁴² Therefore, although the ruling in *City of Tucson* dealt exclusively with the area of local elections, concluding based on that decision that home rule immunity only functions in narrow fields of law, such as municipal elections is at odds with fluid understandings of what is required to operate a local government.²⁴³

Second, and more importantly, the preemptive laws, especially SB1487, signal an intent to occupy potentially *every* field of law, but only in a reactionary sense, after the locality has chosen to pass affirmative legislation in that area. The court in *City of Tucson v. State* was skeptical of language in that case's preemptive statute because it did not make any showing of statewide interest in that field beyond boilerplate language.²⁴⁴ Here, too, state preemption laws that attempt to occupy a field,

240. See *supra* Part III.B.

241. See *City of Tucson v. Walker*, 135 P.2d 223, 226 (Ariz. 1943) (quoting *Axberg v. City of Lincoln*, 2 N.W.2d 613, 614–15 (Neb. 1942)).

242. See Oral Argument at 25:32, *State ex rel. Brnovich v. City of Tucson*, No. CV-16-0301-SA, http://supremestateaz.granicus.com/MediaPlayer.php?view_id=2&clip_id=2109#.

243. Climate change is a prime example of an area of law that may have once been considered off-limits for local regulation, but has more recently seen cities enact policies where either state or federal governments will not. Compare Bulkeley, *supra* note 2 (outlining the ability of cities to address climate issues at the local level), with Coral Davenport, *Counseled by Industry, Not Staff, E.P.A. Chief Is Off to a Blazing Start*, N.Y. TIMES (July 1, 2017), <https://www.nytimes.com/2017/07/01/us/politics/trump-epa-chief-pruitt-regulations-climate-change.html> (pointing to the federal government's withdrawal from the field of climate change). As this field is further abandoned at the state and federal level, courts may recognize that climate science can be reframed as a local concern because urban population centers have the largest numbers of people who are affected by, and who contribute to, the harmful environmental side effects of climate change.

244. See *City of Tucson v. State*, 273 P.3d 624, 630 (Ariz. 2012).

after a city has already filled that void, will likely have to demonstrate that there is an actual state interest that goes beyond pushing back against local power in general. This showing will certainly be required in the case of the energy benchmarking bill,²⁴⁵ where sponsors of the state law seemed to signal that its underlying purpose was to block city regulation in general, rather than preserve the area for implementation of a statewide scheme.²⁴⁶ In the case of SB1487, the state's attempt to unilaterally make conclusions of law regarding conflicts between state and local law push too far past the protective shield of home rule immunity. It removes the role of the judiciary in interpreting the boundaries between state and local power,²⁴⁷ and it indicates a desire to chill future local legislation by the prospect of defunding a locality based on the findings of only the Attorney General.²⁴⁸ Like in *City of Tucson v. State*, such attempts to occupy a field either retroactively or in perpetuity restrict the reach of home rule far more than was ever intended, and should make courts skeptical of the constitutionality of the state's attempt to preempt an already-occupied field. Thus, it is through cases like *City of Tucson v. State* that cities can also find an opportunity to reframe the debate: where home rule language has been interpreted to confer broad and even independent authority on a state's subdivisions, a demonstrable abdication of any legitimate state interest in a particular area of law should be sufficient to recognize and favor home rule immunity on that issue.

D. A NEW STANDARD FOR LOCAL POWER IN ABANDONED FIELDS

The cases discussed in the preceding Sections demonstrate the challenges cities face where a state preempts local law. They also highlight the relevant factors courts may start examining more carefully in determining whether those preemptive measures should be upheld when a state has effectively abandoned a field of law. In future cases involving home rule and local preemption, lawyers advocating on behalf of localities should take note of permissive home rule language and the precedent

245. ARIZ. REV. STAT. ANN. § 9-500.36 (2016).

246. See Dustin Gardiner, *Arizona Bill Would Block Bans on Plastic Bags*, AZ CENTR. (Mar. 26, 2015), <http://www.azcentral.com/story/news/arizona/politics/2015/03/27/arizona-bill-block-bans-plastic-bags/70529702> (noting that one of the bill's sponsors was concerned with "economic freedom" and "individual rights" but not protection of statewide concern over the issue of energy regulation).

247. See ARIZ. REV. STAT. ANN. § 41-194.01B.

248. See *Id.* § 41-194.01B1(a) (2016).

that informs its interpretation, as well as signs of state legislatures abdicating concern for an issue at the state level, to argue that home rule considerations outweigh the state creature model of *Hunter*.²⁴⁹ Doing so can establish sound legal bases for either distinguishing or overruling state laws that purport to preempt a city ordinance, without offering a substantive policy to take its place.

The current state of preemption law where the state has abandoned the field is untenable and needs to be reconsidered. The roles of cities have dramatically expanded from the days since Dillon's Rule and *Hunter* set restrictive limits on the areas in which they could govern. As cities grow in size and significance, they need to be able to respond to the concerns of their citizens in a meaningful way,²⁵⁰ whether in areas of more purely social interest, like civil rights,²⁵¹ or in areas that blur the line between social concern and municipal administration, such as minimum wage.²⁵² Yet the current model of city-state preemption has used these outdated principles to push back against local power in a way that is based on technical statutory construction, rather than meaningful balance between state and local power. This imbalance is most stark where state preemption is reactive to local ordinances, and does not forward affirmative policies as a justification. Cities are left wondering how to respond to their citizens' concerns when their parent political bodies are unwilling to step up to the plate, and, at the same time, are telling them they cannot fashion their own remedies.

The potential for overreach in state preemption, therefore, warrants a new standard where the state has previously abandoned the field of law at issue. This Note proposes that, in home rule states where the state government has abandoned a field of law, but then attempts to preempt a local ordinance, courts should adopt a rebuttable presumption to review whether a legitimate state interest can actually be gleaned from the statute. Where a state can demonstrate that it is preempting an ordinance because it is attempting to implement its own statewide scheme and thus occupy that field, courts should find that the typical preemption analysis applies, whereby state law controls

249. See *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

250. See RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 78–103 (arguing that the tenets of “vertical federalism” have constrained city growth and advocating for reforms to this framework).

251. See *supra* Part III.A.

252. See *supra* Part III.B.

if it cannot coexist with the ordinance.²⁵³ But where it appears that a state is attempting to circumvent home rule powers and pass the preemptive statute without forwarding an affirmative policy, courts in home rule states should presume that home rule protections allow cities to govern in that area. This model closely mirrors the underlying logic of *City of Tucson v. State*,²⁵⁴ but is likely applicable to most home rule states. A recognition, at the state constitutional level, that local power should be protected should be sufficient for courts to justify that: (1) local concern can be expanded on a subject-by-subject basis; and (2) preemptive laws that restrict local power, without filling that void, are at odds with constitutional intent. By looking toward the underlying *motivations* of these preemptive statutes, a more balanced evaluation of these preemptive laws should emerge and allow cities to govern in abandoned fields, without the chilling effects of over-extensive state interference.

A model that redefines the limits of legislative power inevitably faces potential pitfalls. The first concern implicates the strong legal notions of federalism that underpin the entire municipal legal regime. The Supreme Court's holding in *Hunter* was premised in large part on the need to clearly separate spheres of power.²⁵⁵ A push toward expanding local power beyond the dictates of a state, then, would seem to fly in the face of the legal wisdom organizing the relationship between city and state legislatures. It also would appear to argue in direct contradiction of clear legal precedent holding that cities are essentially powerless and thus subject to any expansions or restrictions of power a state chooses to impose upon them.²⁵⁶

But what distinguishes these modern statutes from more traditional instances of preemption is the lack of *substantive* law underlying them. Again, the absence of any real demonstration of intent to occupy the fields at issue creates a stronger rationale for courts to find that preemption without an underlying state interest is not in line with the type of top-down delegation of power envisioned by Dillon. Furthermore, the model proposed does not envision that courts are likely (or willing) to overrule Dillon's Rule in places like North Carolina, where home rule has not been implemented in a more than de facto manner. Because there is no *constitutional* recognition of local power in those

253. See *supra* notes 104–08 and accompanying text.

254. 273 P.3d 624 (Ariz. 2012).

255. See *supra* note 91.

256. See *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

states, there is no reason for a court to infer that the state ever intended to delegate local power beyond what lies in its statutes. In this way, the state creature model will be preserved in the states that never abdicated that structural power. Otherwise, an emphasis on the illusory nature of the preemptive language of statutes in home rule states should allay fears that *Hunter*, or the integrity of a state legislature's power, is in any real danger.

The other, perhaps more important concern, is whether a lack of affirmative policy is truly a type of legislative abandonment, and whether a presumption in favor of local power cedes too much power in a precarious balance between state and city. Indeed, both conservative and even more progressive home rulers were concerned with either a preservation of that traditional role of local government, or of a rather *measured* expansion of local power, because they feared that too much power at the local level would upset the balance needed to run political bodies larger than the cities they sought to protect.²⁵⁷ Similarly, scholars of home rule have felt the need to push back against notions that home rule should be used to champion local autonomy.²⁵⁸ Therefore, modern conceptions of home rule need to be mindful that the original theories that motivated home rule reform were all united by the understanding that “[h]ome rule, like the state creature concept that preceded it, was a way to structure city power, not simply unleash it.”²⁵⁹

It is true that a return to home rule immunity, and thus enhanced local power, requires measured consideration. States that have not enacted an affirmative policy in a certain area may still be doing so by *choice*, and argue that this choice *not* to act does not lessen the field's relevance to statewide concern. But two points are relevant here. First, as noted above, the decision to enact home rule signals, at some level, an intent to push legislation down to the local level to the extent it is possible. Therefore, if home rule amendments are to be given their true effect, a state's legislative choice must start at the constitutional level. Second, the model proposed does not suppose that every instance of legislative abandonment at the state level will result in a city being able to effectively become autonomous in that area of law. Rather, it emphasizes the importance of courts of law to weigh that abandonment as a *rebuttable* presumption in favor of local

257. See *supra* Part I.D.1.

258. See GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 35–36 (2008).

259. *Id.* at 38.

power that can nevertheless be limited or restricted. A state could pass a preemptive law not unlike the ones discussed above as a device to challenge an ordinance, and then explain why the decision *not* to occupy that area of field truly has an underlying rationale. In other words, a recalibrated default in favor of local power in certain situations is no more than a starting point. In this model, then, courts will play the same role they always have in determining boundaries between local and state concern, as well as the legitimacy of the underlying interests in those concerns.

The benefits of this model, meanwhile, are clear. It allows cities a renewed opportunity to enact meaningful reform and remain the laboratories of democracy that urban reformers have always envisioned them to be.²⁶⁰ In areas of law that have been truly abandoned at the state level, cities should be allowed to step up and attempt to resolve issues that courts have increasingly contemplated to be local in nature.²⁶¹ In the same vein, this model also restores the role of courts in making determinations on the reach of state constitutions, rather than relying on statutes that preempt ordinances based on their technical construction. As cities evolve, so too should the legal system's understanding of their needs, and the ways in which the law has already recognized that those needs should be protected. This model strikes a balance between those needs while still allowing for meaningful preemption when a state can demonstrate legitimate interest.

CONCLUSION

The purpose of this Note has been to redefine and apply home rule immunity to modern instances of municipal legal preemption. It advocates for a focus on the language of home rule amendments, the underlying purpose of those amendments, and

260. See FRUG & BARRON, *supra* note 258, at 50–51, 143; SCHRAGGER, *supra* note 250, at 255–59.

261. Recent scholarship argues that cities may be equally to blame for the erosion of home rule's effectiveness. See Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 210–13 (2017) (discussing the important role cities play in preserving home rule through concerted and coordinated litigation). In cases like North Carolina's bathroom bill, the seeming lack of ability or desire to push back against overreaching state law on preemption grounds indeed demonstrates that cities must remain active players in this debate in order for local governance to endure in any state. See discussion *supra* Part III.A. This Note argues, however, that courts must remain vigilant referees in the push and pull between states and cities in order to create a space where such legal challenges are at least viable, if not ultimately successful.

the extent to which a state has abandoned the preempted field of law as a way to balance city-state relations and redefine local power. And it proposes a standard of a rebuttable presumption as the device by which courts can play a pivotal role in determining when state action has violated constitutionally recognized home rule immunity.

Preemption should always be about balancing state and city power. The current state of preemption at the local level, however, jeopardizes both the meaning of that balance, as well as the significance of localities in a modern democracy. Over time, the purposes of cities have been redefined; from constrained corporate entities, to recognized but ultimately subservient political subdivisions, to modern laboratories of democracy with sophisticated structures and public policies, the trend has been toward recalibrating the rules, decisions, and statutes that have defined what it means to be a body of local government. Because the needs of cities have paralleled this change, courts should recognize with more frequency that reliance on traditional rules organizing city-state relations needs to be reevaluated from time to time. And because of the power of home rule, there is a sound legal basis on which that realization can allow cities to regain a modern sense of local power, and pivot toward solving modern challenges in the face of legislative voids.