

Oregon Municipal Handbook

CHAPTER 2: HOME RULE & ITS LIMITS



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Chapter 2: Home Rule and Its Limits

This chapter will explore in detail the “home rule” authority granted to cities by the Oregon Constitution and the limits placed on it by state and federal authority. Part I begins with the origins of Oregon’s home rule amendments. The majority of the chapter then focuses on preemption, which is the result of state or federal lawmakers passing a law and preventing local laws on the same subject. Part II covers the background and modern principles of Oregon’s state preemption doctrine, which is the displacement of local lawmaking authority by state statutes. Part III then turns to the basic principles of federal preemption, which is the displacement of local laws by federal statutes. Finally, Part IV briefly addresses how the sovereign rights of state and federal government passively restrain local authority, even when state and federal lawmakers are not actively preempting local authority.

I. ORIGINS OF HOME RULE

Federalism, or the division of power between states and the federal government, traces its origins to the U.S. Constitution.¹ The concept of home rule is new by comparison — the first efforts to establish it emerged in the late 1800s.² In essence, home rule is the ability for cities to create their own governments and adopt their own laws without the state’s approval. In Oregon, home rule was introduced in 1906 through a pair of amendments to the state constitution.³ The two amendments represented a fundamental rethinking of municipal authority.⁴

Around this time, the nation’s courts and legal scholars were wrestling with how to define the source and limits of municipal power. While cities and townships had existed for centuries, the home rule movement brought the issue to a head. In 1873, a treatise written by John F. Dillon posited that cities have no inherent powers other than those specifically delegated to them under state law.⁵ This principle, known commonly as Dillon’s Rule, also called on courts to narrowly construe any delegation of authority from a state to a city.⁶ In 1907, the U.S. Supreme Court endorsed this principle by holding that cities draw no authority from the U.S. Constitution and instead function as “convenient agencies” of their respective states.⁷

Nevertheless, the home rule movement unfolded across the country at the state level. At the turn of the century in Oregon, only the Legislative Assembly had the power to incorporate new cities or to establish and amend city charters.⁸ If a group of citizens wanted to incorporate a city, the legislature needed to pass special legislation creating the city and providing it with specified, limited powers.⁹ Beginning in 1901, the Oregon Legislature began to consider constitutional amendments that would redistribute power over local charters to their respective localities.¹⁰ Eventually, in 1906, consistent with a wave of home rule reform sweeping the

¹ See, e.g., US Const, Amend X.

² See Paul A. Diller, *The Partly Fulfilled Promise of Home Rule in Oregon*, 87 Or. L. Rev. 939, 943 (2008) (noting that the “first movement for home rule emerged in the late 1880s and early 1900s.”).

³ See LEAGUE OF OR. CITIES, THE ORIGINS, EVOLUTION AND FUTURE OF MUNICIPAL HOME RULE IN OREGON 1-2 (2017), <https://www.orcities.org/application/files/5315/6036/1714/WhitePaper-OriginsEvolutionFutureHomeRule6-15-17.pdf> (last accessed July 30, 2020).

⁴ *Id.*

⁵ Diller, *supra* at 942 (citing 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS, § 9b, at 93 (2d ed. 1873)).

⁶ *Id.*

⁷ See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907). The holding in *Hunter* remains a fundamental part of how federal courts rule on municipal authority, though there is room to argue that some “federal constitutional protection for local government decision-making” exists in Supreme Court case law. See Diller, *supra* at 942 n.13.

⁸ LEAGUE OF OREGON CITIES, THE ORIGINS, EVOLUTION AND FUTURE OF MUNICIPAL HOME RULE IN OREGON 2 (2017), <https://www.orcities.org/application/files/5315/6036/1714/WhitePaper-OriginsEvolutionFutureHomeRule6-15-17.pdf> (last accessed July 30, 2020).

⁹ *Id.* n.4.

¹⁰ *Id.* n.5.

nation, the voters of Oregon adopted one constitutional amendment that granted the people the right to make their own charters. Article XI, section 2, of the Oregon Constitution, provides:

The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the state of Oregon[.]” amend their own municipal charters, independent of special legislative approval.¹¹

In 1906, Oregon citizens also gave voters the power to vote on local initiatives and referendums, reserving these powers “to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district.”¹²

Taken together, these two changes to the Oregon Constitution — Article XI, Section 2, and Article IV, Section 1(5), respectively — guarantee cities a certain degree of local autonomy. The amendments do this in a peculiar fashion; unlike the powers of state and federal government, the powers of cities under the Oregon Constitution are not clearly enumerated.¹³ In fact, neither one of these 1906 amendments mentions the authority of *cities* at all — the amendments actually give power to city *voters*.¹⁴ However, with the power to “enact ... any charter” comes the ability to set the chartered government’s substantive authority.¹⁵ So, rather than conferring power on cities directly, Oregon’s home rule amendments leave it to the voters to decide what their city governments can do.¹⁶ For the most part, voter-approved charters grant broad power; the Eugene city charter, for instance, grants the city “all powers that the constitution or laws of the United States or of this state expressly or impliedly grant or allow cities, as fully as if this charter specifically stated each of those powers.”¹⁷ In addition, many charters demand that any ambiguity in its provisions be construed liberally in favor of their city.¹⁸

For the reasons above, Oregon’s home rule amendments provide cities — courtesy of each cities’ voters — with significant authority to adopt local laws and conduct local business. But cities do not exercise home rule authority in a vacuum. First, cities are subject to provisions of the U.S. and Oregon Constitutions because cities are political subdivisions of the state.¹⁹

¹¹ *Id.*

¹² *Id.* See also *Initiative, Referendum and Recall Introduction*, OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/state/elections/history-introduction.aspx> (last accessed July 30, 2020).

¹³ See generally Or Const, Art XI, § 2; see also Or Const, Art IV, § 1(5).

¹⁴ *Id.*

¹⁵ Diller, *supra* at 944-45 (noting that Article XI, § 2, grants cities “substantive lawmaking authority.”).

¹⁶ *Id.*

¹⁷ EUGENE, OR., CHARTER Ch. 2, § 4 (2019).

¹⁸ *Id.*

¹⁹ See, e.g., Or Const, Art I, § 46, which applies to “political subdivisions.” The federal Bill of Rights is incorporated against states and their cities by the 14th Amendment. See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

Second, the state and federal government exercise their own lawmaking authority that is superior to local government. So, even where a city has authority to adopt a local law under its charter, and even where it is otherwise constitutional, that law might be invalid due to a contravening state or federal statute. Third, the state and federal governments also are sovereign, which means that cities cannot exercise their home rule authority against their agents or property, at least not without their consent. This chapter will focus primarily on the second and third of these limits on municipal authority, beginning with the following section on state preemption.

II. STATE PREEMPTION

State preemption occurs when a court finds that a state law prevents local laws on the same subject. As explained later, the Oregon Supreme Court’s holding in *La Grande/Astoria* is the touchstone for most, but not all, matters of state preemption. Before reaching that ruling, it is important to cover some of the past approaches to state preemption. These early cases shaped the ruling in *La Grande/Astoria* and might shape future rulings.

A. Background

One of the earliest cases to address the relationship between state and local laws was *Straw v. Harris*, which found that state laws necessarily are superior to local laws.²⁰ In *Harris*, the plaintiff challenged the creation of the Port of Coos Bay under general laws adopted earlier that year by the state legislature.²¹ In part, the plaintiff argued that the creation of the port violated local city charters because the port incorporated property within the cities’ boundaries and imposed taxes and indebtedness on those properties that went “beyond the limitations prescribed” in the charters.²²

In resolving this issue, the Oregon Supreme Court first noted that the Port of Coos Bay had been created by general law of the state legislature, not by special law that is prohibited by Article XI, Section 2, of the Oregon Constitution.²³ The court next found that the state law authorizing the port’s creation did not directly amend the city charters and limited them only “to the extent that they may be in conflict or inconsistent with the general object or purpose” of the law that authorized the port.²⁴ Where there is a conflict, the court held that the state’s power to authorize local taxing districts “necessarily” rose above a city’s power to limit local taxes.²⁵

²⁰ See *Straw v. Harris*, 54 Or 424, 435 (1909).

²¹ *Id.* at 426.

²² *Id.* at 434-37.

²³ *Id.* at 431-32. A general law applies to all parts of the state; a special law applies only to one part of it. *Id.*

²⁴ *Id.* at 435.

²⁵ *Id.*

The court reached this holding by construing the home rule amendments together with all other part of the Oregon Constitution.²⁶ The court reasoned that the powers acquired by cities through the home rule amendments “do not rise higher than their source,” and that the Oregon Constitution also vested the Oregon Legislative Assembly with the power to adopt general laws throughout the state.²⁷ On this basis, the court concluded the following:

Incorporated cities and towns may change or amend their charters at any time in the manner provided by the Constitution. The power to do so, however, is derived from the people of the state, and is necessarily limited to the exercise of such powers, rights, and privileges as may not be inconsistent with the maintenance and perpetuity of the state....²⁸

Thus, the *Harris* Court held that local laws sometimes must give way to state laws, at least where the state law’s objectives are related to “the maintenance and perpetuity of the state.”²⁹

i. The Debate over ‘Matters of Local Concern’

Five years later, the Oregon Supreme Court took a new direction in *Branch v. Albee*.³⁰ In *Albee*, the court issued a sweeping opinion that found cities can “legislate for themselves” on all local matters.³¹ In *Albee*, the state legislature adopted a pension system in 1913 for cities with more than 50,000 inhabitants — the only such city being Portland.³² Portland already had such a system dating back to 1903.³³ The plaintiff in *Albee*, a police officer, sued the city alleging that the city was obligated to pay his pension under the 1913 plan, not the 1903 plan that was in the city’s charter.³⁴

The Oregon Supreme Court found that the law passed by the state legislature was an attempt to amend the pension system under Portland’s charter.³⁵ The court did not stop there, however. The court went on to broadly interpret municipal authority under the home rule amendments, describing them as “radical changes” that conferred upon cities “full power to legislate for themselves as to all local, municipal matters.”³⁶ The court also noted that the amendments subjected locally adopted municipal charters only to “the Constitution” and state

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See* *Branch v. Albee*, 71 Or 188, 188 (1914).

³¹ *Id.* at 197.

³² *Id.* at 190.

³³ *Id.* at 192 (noting that the 1903 charter remained in force in 1913).

³⁴ *Id.* at 189.

³⁵ *Id.* at 205. Interestingly, the existing pension system had been put in place by the Oregon legislature by special act in 1903 when such acts were still allowed. *Id.* at 192.

³⁶ *Id.* at 197.

“criminal laws.”³⁷ The court interpreted this reference to criminal laws to mean that home rule charters were not subject to any non-criminal laws, or “civil laws of the state.”³⁸

Clearly, the *Albee* Court’s distinction between civil and criminal laws never took hold. If it had, cities today would be free from all civil regulations, such as public records and meetings law, local budgeting laws, and statewide planning laws. But the *Albee* Court’s finding that cities “legislative for themselves as to all local, municipal matters” did resonate with future courts.³⁹

One example is *Kalich v. Knapp*.⁴⁰ In *Kalich*, a person injured in a car accident sued the driver of the vehicle, alleging in part that the driver had been speeding at the time of the crash.⁴¹ The case implicated both a city of Portland ordinance, which imposed a speed limit of 10 miles an hour, and a state statute that purported to “limit the authority of cities and towns on like subjects concerned with . . . vehicles.”⁴² The *Kalich* Court decided the case by distinguishing between “matters of local concern” and “matters of state concern.”⁴³ The court held that the home rule amendments granted cities “the *exclusive right* to exercise [powers] as legitimately belong to their local and internal affairs,” and that “beyond this the legislative assembly [occupies] a field of action *exclusively their own*.”⁴⁴ Ultimately, the court found Portland’s speed limit was a matter of local concern and therefore could not be nullified by state law.⁴⁵ Thus, as in *Albee*, the *Kalich* Court found that local matters are not subject to the general laws of the state.⁴⁶

Still, other Supreme Court decisions of the era found the opposite.⁴⁷ One early case, *Rose v. Port of Portland*, held that every part of a local charter is “subject to the right of the Legislature to pass a general law.”⁴⁸ Later, in *Burton v. Gibbons*, the court restated this holding, finding that laws of “general application throughout the state . . . supersede the provision of *any* charter or *any* ordinance in conflict therewith.”⁴⁹ The *Burton* Court even hinted that state laws do not need a statewide objective, observing that a general law of the state would be valid even where the subject matter was “of no concern except to the people who reside in the city.”⁵⁰

³⁷ *Id.* at 196.

³⁸ *Id.*

³⁹ *See, e.g.* State ex rel Heinig v. City of Milwaukie, 231 Or 473, 479 (1962); *see also* Kalich v. Knapp, 73 Or 558, 558 (1914).

⁴⁰ *Knapp*, 73 Or at 558.

⁴¹ *Id.* at 560.

⁴² *Id.* at 562.

⁴³ *Id.*

⁴⁴ *Id.* at 578 (Emphases added).

⁴⁵ *Id.* at 579.

⁴⁶ *Id.*

⁴⁷ *See* Rose v. Port of Portland, 82 Or 541, 568-69 (1917); *see also* Burton v. Gibbons, 148 Or 370, 378 (1934).

⁴⁸ *Rose*, 82 Or at 568-69.

⁴⁹ *Burton*, 148 Or at 378.

⁵⁰ *Id.* at 381.

Thus, for a time at least, the Oregon Supreme Court was inconsistent about the degree to which the legislature could supplant local laws with a state law. Like in *Burton*, the court held at times that state laws were valid even when they dealt with matters of local concern only.⁵¹

i. Balancing State and Local Concerns — *Heinig v. City of Milwaukie*

Finally, in 1962, the Oregon Supreme Court clarified its rulings.⁵² In *Heinig*, a lawsuit was filed against the city of Milwaukie to compel the city to establish a civil service commission and a civil service system for firefighters, as prescribed by state law.⁵³ The city’s charter did not require a civil service commission or system, and so the issue was whether the state law could require the city to adopt them, notwithstanding contrary charter provisions.⁵⁴

The *Heinig* Court decided the case by determining whether the state law at issue had addressed a significant statewide concern.⁵⁵ In holding this view, the Oregon Supreme Court sided with the view of municipal authority presented in *Albee* and *Kalich*.⁵⁶ In strong terms, the court found that the state “does not have the authority to enact a law relating to city government ... unless the subject matter of the enactment is of general concern to the state as a whole.”⁵⁷

In sum, the *Heinig* decision succeeded at solving the inconsistency of Oregon’s case law on whether the Oregon legislature could regulate municipal affairs regardless of a state interest or objective — the court answered no.⁵⁸ The court also introduced a balancing test for deciding when a state law should displace local lawmaking authority.⁵⁹ In it, courts were to ask “not whether the state or the city has an interest in the matter, for usually they both have, but whether the state’s interest or that of the city is paramount.”⁶⁰

In some ways, the *Heinig* test appeared to favor cities.⁶¹ But the balancing test also proved difficult to apply. In practice, compelling arguments typically exist for both sides about whether a particular subject is more of a local or state issue and, at the time of *Heinig*’s writing,

⁵¹ *Id.*; see also *State ex rel. Heinig v. City of Milwaukie*, 231 Or 473, 477 (1962) (noting that in “some of our cases the position is taken that [a statute is valid] even though the statute deals with a matter of local concern only.”).

⁵² *Heinig*, 231 Or at 479.

⁵³ *Id.* at 474.

⁵⁴ *Id.* at 475-77.

⁵⁵ *Id.*

⁵⁶ *Id.* at 479 (citing *Branch v. Albee*, 71 Or 188, 193 (1914)).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 481.

⁶⁰ *Id.*

⁶¹ See *Boyle v. City of Bend*, 234 Or 91, 98 n.6 (1963) (adding that a state law is “inoperative to the extent that it conflicts with an ordinance on a matter of local concern.”).

it had already led to “confusion and conflict in the cases.”⁶² Eventually, the Oregon Supreme Court took an opportunity to “refine” the *Heinig* test.⁶³

ii. The Modern Era — *La Grande/Astoria v. PERB*

In 1978, the Oregon Supreme Court again addressed the extent of municipal authority under the home rule amendments.⁶⁴ In *La Grande/Astoria v. PERB*, a state law required cities to establish certain insurance and retirement benefits for their employees — benefits that the cities of La Grande and Astoria did not provide.⁶⁵ The cities argued that providing insurance and benefits to city employees was primarily a matter of local concern under *Heinig* and so the state legislature was prohibited from interfering with its local provisions on employee benefits.⁶⁶ In response, the state argued that a statewide pension system represented “a substantial or significant state interest” that should prevail over conflicting local laws.⁶⁷

When the case reached the Supreme Court, the court reconsidered the *Heinig* test.⁶⁸ In a 4-3 decision authored by Justice Hans Linde, the court found that Article XI, section 2, of the Oregon Constitution was meant to protect the structure and form of local government but not the policy preferences of local government.⁶⁹ The court then developed a set of standards to determine under what circumstances state lawmaking authority may “displace” local policy:

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

“Conversely, a general law addressed primarily to substantive social, economic, or other regulatory objectives of the state prevails over contrary policies preferred by some local governments if it is clearly intended to do so, unless the law is shown to be irreconcilable with the community’s freedom to choose its own political form. In that case, such a state law must yield in those particulars necessary to preserve that freedom of local organization.”⁷⁰

⁶² *Heinig*, 231 Or at 480. For example, “taxation” is a local concern, *see* *Pearce v. Roseburg*, 77 Or 195 (1915), but then “setting utility rates” is a state concern. *See* *Woodburn v. Public Service Comm’n*, 82 Or 114 (1916).

⁶³ *See* *City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 140 (1978).

⁶⁴ *Id.*

⁶⁵ *Id.* at 139.

⁶⁶ *Id.*

⁶⁷ *Id.* at 172 (Tongue, J., dissenting).

⁶⁸ Diller, *supra* at 961 (noting that the court “distinguished *Heinig* on its facts and sharply reduce the scope.”).

⁶⁹ *Id.*

⁷⁰ *City of La Grande*, 281 Or at 156.

With these findings, the *La Grande/Astoria* Court determined that, in most cases, a state law backed by *any* state concern is a valid law.⁷¹ But the court found state laws can only displace local laws that are “incompatible” with state law, a finding that is difficult to make.⁷² The court also held that the state cannot displace a local law if it concerns “the freedom to choose [a] political form,” and will face a heightened standard if a local law concerns “the structure and procedures of local agencies.”⁷³

For the most part, the *La Grande/Astoria* ruling remains the law today.⁷⁴ The effect of the test in *La Grande/Astoria* is to “displace” local lawmaking authority in certain circumstances, the modern term for which is **state preemption**.⁷⁵ At first glance, *La Grande/Astoria* provides effective means for the state to preempt cities — for most issues, all the legislature needs to do is articulate “substantive social, economic, or other regulatory objectives” for the state law.⁷⁶ But when it comes to proving preemption, *La Grande/Astoria* actually makes it quite difficult.⁷⁷ The *La Grande/Astoria* ruling effectively established a presumption against preemption in the context of civil laws (criminal laws are another matter).⁷⁸ The ruling required clear legislative intent to preempt a local law; it also blocked the development of an implied preemption doctrine that would perhaps see local laws preempted anytime they “engender chaos and confusion,” or anytime state law addresses “the particular aspect of the field sought to be regulated.”⁷⁹ Unlike at the federal level and other states, preemption is only implied under *La Grande/Astoria* if state and local law cannot possibly “operate concurrently.”⁸⁰

Whatever one’s opinion of *La Grande/Astoria*, the case represents a novel approach to state preemption and one the National League of Cities recently encouraged other states to adopt, dubbing Oregon’s presumption against preemption and its protections for local political form as two “Principles of Home Rule for the 21st Century.”⁸¹ The following section explores in detail what state preemption looks like under *La Grande/Astoria* and subsequent case law.

⁷¹ *Id.* (noting that state laws with any “substantive...regulatory objectives” generally prevail over local law).

⁷² *Id.* at 148.

⁷³ *Id.* at 156. These last rules resemble the “matters of local concern” test under *Heinig*. *Heinig*, 231 Or at 479.

⁷⁴ *See, e.g.* *City of Portland v. Bartlett*, 304 Or App 580, 592 (2020) (citing holdings in *La Grande/Astoria*).

⁷⁵ *See, e.g.* *Sims v. Besaw’s Café*, 165 Or App 180, 204 n.4 (2000) (describing the test for “state preemption.”).

⁷⁶ *City of La Grande*, 281 Or at 156.

⁷⁷ *See, e.g.*, *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 454 (2015) (noting the “presumption against preemption” that applies to local government laws under *La Grande/Astoria*).

⁷⁸ *Id.*

⁷⁹ *See Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 299 (1993) (describing methods of implied preemption in Maryland).

⁸⁰ *Id.*; *see Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000); *City of La Grande*, 281 Or at 148.

⁸¹ NATIONAL LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 26-27 (2020), <https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20Principles%20ReportWEB-2.pdf> (last accessed July 30, 2020).

B. Categories of State Preemption

Courts today adhere to the preemption standards that were laid out in *La Grande/Astoria* for civil matters.⁸² Generally, state laws *can* preempt any local law as long as they are enacted pursuant to “substantive social, economic, or other regulatory objectives.”⁸³ However, state laws only *do* preempt local laws if the laws are “incompatible,” either because (1) the state legislature “unambiguously” expressed the intent to preempt the local law or (2) the state and local law conflict, meaning it would be “impossible” for a person to comply with both laws concurrently.⁸⁴ If neither of these conditions is met, then courts must assume that the state legislature did not intend to preempt local home rule authority.⁸⁵

Other standards apply for criminal matters. These standards emerged because local authority under the home rule amendments is “subject to the criminal laws” of the state, and therefore it makes less sense to assume the state legislature would not preempt local authority.⁸⁶ For the reasons explained below, the standards of preemption for criminal matters depend on the type of alleged conflict between state and local law. For instance, courts take one approach if plaintiffs challenge a local penalty and another if they challenge the crime itself.⁸⁷

Finally, the state cannot preempt local laws that prescribe a city’s “political form,” and may only preempt a city’s “structure and procedures” if it is to protect people affected by those local procedures.⁸⁸ Appellate courts have yet to uphold a local law on either of these grounds.

i. State Civil Laws

Under Article XI, section 2, cities are free to adopt home rule charters and, acting under the authority of those charters, enact their own substantive policies.⁸⁹ Sometimes, however, local policy choices are at odds with state policy choices. In that case, the courts will ask whether the local government has the authority to pursue its own policy goals.⁹⁰ Assuming a local substantive policy is permissible under the local charter, the courts then assess whether the local policy is preempted by state law, either expressly or because the local and state laws conflict.⁹¹ This analysis favors cities — it embodies a “presumption against preemption” of local law.⁹²

⁸² See, e.g., *Owen v. City of Portland*, 305 Or App 267, 273 (2020) (citing holdings in *La Grande/Astoria*).

⁸³ See *State ex rel Haley v. City of Troutdale*, 281 Or 203, 211 (1978).

⁸⁴ See *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010).

⁸⁵ *Id.*

⁸⁶ *City of La Grande*, 281 Or at 149 n.18 (noting the relevance of the amendment’s language on “criminal laws”).

⁸⁷ See *City of Portland v. Dollarhide*, 300 Or 490, 497 (1986), *City of Portland v. Jackson*, 316 Or 143, 149 (1993).

⁸⁸ *City of La Grande*, 281 Or at 156.

⁸⁹ See Or Const, Art XI, § 2 (emphasis added).

⁹⁰ *City of La Grande*, 281 Or at 142 (noting the local law “must be authorized by the local charter or by a statute.”).

⁹¹ *Id.* at 156.

⁹² See *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 454 (2015).

a. Express Preemption

In Oregon, any party claiming that a city’s home rule authority is preempted by state law must show that the state legislature “unambiguously expressed” an intent to preempt cities on the subject.⁹³ Courts consider the text, context, and legislative history of the state law.⁹⁴

On many civil matters, the state legislature has expressly preempted local laws.⁹⁵ The state legislature generally accomplishes this using a **preemption clause**.⁹⁶ For instance, cities cannot adopt local minimum wage laws because “the State of Oregon preempts all charter and statutory authority of local governments to set any minimum wage requirements.”⁹⁷ Cities cannot regulate drones, except as “expressly authorized” by the state, because “the authority to regulate the ownership or operation of unmanned aircraft systems is vested solely in the Legislative Assembly.”⁹⁸ And cities must annex territory under certain state-mandated circumstances, “notwithstanding a contrary provision of the city charter or a city ordinance.”⁹⁹

Of course, even with a preemption clause, it can be unclear if a local law falls within the scope of that clause. As noted, whether a preemption clause covers a specific local law must be “unambiguous.”¹⁰⁰ In *Owen v. City of Portland*, for example, the city adopted an ordinance requiring landlords to pay tenants for “relocation assistance” if the tenant’s lease was terminated without cause or if the tenant’s rent was increased by more than 10 percent in a year and they subsequently moved.¹⁰¹ Property owners sued the city and alleged that the ordinance was preempted by Oregon’s recently enacted rent control law.¹⁰² That law contains a preemption clause barring “any ordinance or resolution *which controls the rent* that may be charged for the rental of any dwelling unit,” but the city argued their law was not rent control.¹⁰³ The *Owen*

⁹³ See *State ex rel Haley v. City of Troutdale*, 281 Or 203, 211 (1978).

⁹⁴ *Rogue Valley*, 357 Or at 450-51.

⁹⁵ For more information, see LEAGUE OF OR. CITIES, LEGAL GUIDE TO OREGON’S STATUTORY PREEMPTIONS OF HOME RULE (2019), <https://www.orcities.org/application/files/4715/7904/6324/StatutoryPreemptionSummary02-10-19.pdf> (last accessed July 30, 2020).

⁹⁶ *Id.*

⁹⁷ ORS 653.017.

⁹⁸ ORS 837.385. However, effective January 1, 2024, SB 812 from the 2023 Legislative Session, grants cities and other park owners the authority to regulate or prohibit the take-off and landing of drones by resolution or ordinance. Prior to this change, a state preemption prevents cities from regulating drones generally, and a federal preemption prevents regulations once they have taken off. Under SB 812, cities will be able to determine which parks or portions of parks are appropriate for drone take-offs and landings. They will, however, be required to allow public safety and utility use and provide an affirmative defense for violations due to emergency landings.

⁹⁹ ORS 222.127. This statute was challenged in *City of Corvallis v. State*, 304 Or App 171, 180-81 (2020), in which Corvallis argued the law violated its home rule authority to hold a vote on annexation. *Id.* at 177-78. The court found the city’s charter was not “contrary” because it did not require a vote on state-ordered annexations. *Id.* at 177-78. Of course, the question remains whether ORS 222.127 applies constitutionally to charters that *are* in fact “contrary.”

¹⁰⁰ See, e.g., *Owen v. City of Portland*, 305 Or App 267, 277 (2020).

¹⁰¹ *Id.* at 269.

¹⁰² *Id.*

¹⁰³ *Id.* at 274 (quoting ORS 91.225(2)).

Court found in favor of the city.¹⁰⁴ The court acknowledged that “the legislature unambiguously intended to preempt “ordinances that regulate the amount that a landlord may charge in rent.”¹⁰⁵ But the court found the city’s ordinance requiring “relocation assistance” was itself not clearly “rent control.”¹⁰⁶ In other words, the court did not find “unambiguous” evidence that the preemption clause was meant to preempt “other types of restrictions.”¹⁰⁷

b. Implied Preemption

In the absence of express legislative intent, courts only will preempt local laws where the state and local laws “cannot operate concurrently.”¹⁰⁸ This standard is met only where “operation of the ordinance makes it impossible to comply with a state statute.”¹⁰⁹

For example, in *Owen*, the plaintiffs argued that Portland’s ordinance conflicted with the Oregon Residential Landlord and Tenant Act (ORLTA), which permits landlords to evict tenants without cause upon less than 90 days’ notice.¹¹⁰ The plaintiffs argued that the ORLTA provision did not include any requirement for “relocation assistance” and that ORLTA “reflects the legislature’s careful balancing of landlord and tenant’s rights and obligations with respect to termination of tenancies.”¹¹¹ Thus, the plaintiffs argued that Portland’s ordinance conflicted with the balancing decisions made by the legislature.¹¹² The *Owen* Court dismissed this argument, finding that the ORLTA provision set out “minimum requirements for no-cause termination” and that the city of Portland could add stricter requirements, such as “relocation assistance,” without conflicting with the state law.¹¹³ The court found that the laws could operate concurrently because the ORLTA provision “can still be complied with while complying with the ordinance requirements of a 90-day notice and payment of relocation assistance.”¹¹⁴

Another example of the conflict preemption analysis is *State ex rel. Haley v. Troutdale*, an Oregon Supreme Court case that upheld a local building standard against claims that it had been preempted by the Oregon Building Code.¹¹⁵ At the time, the state building code mandated single-wall construction, while the city of Troutdale enacted an ordinance that required double-wall building construction.¹¹⁶ The Oregon Supreme Court determined that Troutdale’s ordinance

¹⁰⁴ *Id.* at 269.

¹⁰⁵ *Id.* at 277.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *City of La Grande*, 281 Or at 148.

¹⁰⁹ *See Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010).

¹¹⁰ *Owen*, 305 Or at 279-80.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 285.

¹¹⁴ *Id.* at 283.

¹¹⁵ *See State ex rel Haley v. City of Troutdale*, 281 Or 203, 211 (1978).

¹¹⁶ *Id.* at 205.

did not conflict with the state building code because compliance with both sets of standards was not impossible.¹¹⁷ After all, a person can comply with a stringent set of local rules and a more relaxed set of state rules simultaneously. In sum, state and local law are only incompatible when compliance with both is impossible.¹¹⁸

ii. Local Concerns: Procedures, Structure, and Political form

State preemption under *La Grande/Astoria* also has unique standards that, at least in theory, prevent the state from intruding into certain matters of local concern. First, state law cannot preempt laws addressing a city’s “political form.” Second, state law may only preempt a city’s “structure and procedures” if it is to protect people affected by those local procedures.¹¹⁹

First, in *La Grande/Astoria*, the Oregon Supreme Court held that general state laws “addressed primarily to substantive social, economic, or other regulatory objectives of the state” will prevail over contrary local policies, “unless the law is shown to be irreconcilable with the local community’s freedom to *choose its own political form*.”¹²⁰ For example, a state law that directs elected officials to take certain actions is theoretically prohibited — at least as applied to a home rule city.¹²¹

Second, the *La Grande/Astoria* Court appeared to draw a distinction between local substantive laws and local procedural laws. Regarding the latter category, the court opined that whenever state law affects “the structure and procedures of local agencies,” the law violates the locality’s home rule authority unless the law is “justified by a need to safeguard the interests of persons or entities affected by the procedures of local government.”¹²² So, theoretically, even state laws that do not concern a city’s “political form” might be null and void if they reshape local structure and procedures and are not justified by a need to “safeguard” those affected.¹²³

Significantly, no appellate courts have upheld a local law on either of these grounds. As such, cities have little guidance on what constitutes a city’s “political form,” what laws are “structural and procedure,” or what “interest” might justify the state’s intrusion into those

¹¹⁷ *Id.* at 211.

¹¹⁸ *Id.*; see also *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010) (holding that city ordinance did not conflict with state laws on selling mobile home parks, even though city ordinance imposed more requirements than state law).

¹¹⁹ *City of La Grande*, 281 Or at 156.

¹²⁰ *Id.* (emphasis added).

¹²¹ *Id.*; see, e.g., *City of Sandy v. Metro*, 200 Or App 481, 484 (2005).

¹²² *City of La Grande*, 281 Or at 156.

¹²³ *Id.*

structures and procedures. Though the arguments have been made, courts often rule on them without much analysis.¹²⁴

In *McGee v. Civil Service Bd. of City of Portland*, the Oregon Court of Appeals found that the state legislature could not impose laws on the City of Portland Civil Service Board.¹²⁵ *McGee* involved the Civil Service for Firefighters Act, which the Oregon Supreme Court found in *Heinig* was inapplicable to home rule cities under the home rule amendments.¹²⁶ With little analysis, the court applied the holding from *Heinig* to the facts in *McGee*.¹²⁷ The court found that the case involved a matter of local concern but did not explain how it fit into the framework under *La Grande/Astoria* — whether it was the city’s procedures, structure, or political form.¹²⁸

Similarly, in *City of Sandy v. Metro*, several cities challenged Metro’s authority to require city councils to review local industrial zoning districts and “amend them if necessary.”¹²⁹ One of them, the City of Hillsboro, alleged that requiring the city to adopt an ordinance infringed on its “political form” because it took control of the city’s power to legislate.¹³⁰ The court dismissed this argument, holding that the state legislature authorized the creation of Metro, and that “the exercise of this authority by the legislature is not irreconcilable with Hillsboro’s freedom to chose [sic] its own political form because of Metro’s district-wide regulatory objectives.”¹³¹ In this short holding, the court suggested that a city’s power to adopt ordinances is, in fact, “political form,” but then found that Metro derived higher authority from the Oregon Constitution.¹³² Due to its outcome and the brevity of the court’s reasoning, this ruling on “political form” is at best dicta.

In practice, LOC recommends that cities view the protections for “political form” and “structural and procedural of local agencies” under *La Grande/Astoria* as academic matters, at least until an appellate court upholds a local law on these grounds.

iii. State Criminal Laws

State preemption applies differently in the context of criminal laws. The reason for this difference is found in Article XI, Section 2, of the Oregon Constitution, which provides:

¹²⁴ See *McGee v. Civil Service Bd. of Portland*, 211 Or App 149, 151 (2007); see also *City of Sandy v. Metro*, 200 Or App 481, 484 (2005).

¹²⁵ *McGee*, 211 Or App at 151.

¹²⁶ *Id.* at 154.

¹²⁷ *Id.* at 156-161.

¹²⁸ *Id.*

¹²⁹ *City of Sandy*, 200 Or App at 484.

¹³⁰ *Id.*

¹³¹ *Id.* at 495-96.

¹³² *Id.*

The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and *criminal laws* of the State of Oregon.¹³³

Significantly, the amendment makes local charters subject to state “criminal laws,” rather than “general laws” or “criminal and civil laws.”¹³⁴ While it is not clear why the amendment is worded this way,¹³⁵ courts have construed it to mean that criminal statutes must have a greater preemptive effect than civil statutes.¹³⁶ For instance, the *La Grande/Astoria* Court found that the specific reference to criminal laws should reverse the assumption against preemption that applies to civil laws.¹³⁷ Later, in *City of Portland v. Dollarhide*, the court restated this presumption as “the assumption that state criminal law displaces conflicting local ordinances which prohibit and punish the same conduct, absent an apparent legislative intent to the contrary.”¹³⁸

As a practical matter, most state crimes are codified under the Oregon Criminal Code.¹³⁹ This code authorizes cities to adopt a range of crimes; while cities are preempted from adopting felony-level offenses, cities may adopt and enforce any number of **misdemeanor** crimes, i.e., crimes punishable by up to one year in jail.¹⁴⁰ While courts at times cite the reverse assumption from *La Grande/Astoria*, in reality it has been modified into clearer standards of preemption for criminal laws.¹⁴¹ For the most part, conflicts tend to arise between local misdemeanors and state laws when they impose different **penalties** or when they criminalize different **conduct**.¹⁴² In these circumstances, courts have refined or refused to follow the reverse assumption introduced in *La Grande/Astoria*.¹⁴³ The following standards apply instead.

Note that the main takeaway for cities should be that the friendly standard of preemption for local civil laws does not apply for criminal matters. LOC recommends that cities seek legal counsel to adopt criminal ordinances and regularly review these ordinances to ensure they are not incompatible with state law.

¹³³ See Or Const, Art XI, § 2 (emphasis added).

¹³⁴ *Id.*

¹³⁵ See *City of Portland v. Dollarhide*, 300 Or 490, 497 (1986). In *Dollarhide*, the Court noted that fliers handed out by proponents of the amendment stated that cities would be “subject and controlled by general laws.” The court then observed that “[w]e have been unable to discern an explanation for the change from subject to ‘laws’ and ‘general laws’ to subject to the ‘criminal laws.’” *Id.*

¹³⁶ *Id.* (noting the “inescapable conclusion that the voters who adopted Article XI, section 2 envisioned a stricter limitation on lawmaking power than with regard to civil or regulatory measures.”); see also *City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 149 n.18 (1978).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See ORS 161.005.

¹⁴⁰ See ORS 161.525, ORS 161.505, and ORS 161.545.

¹⁴¹ *Id.*; see also *City of Portland v. Jackson*, 316 Or 143, 149-51 (1993).

¹⁴² *Jackson*, 316 Or at 149-51.

¹⁴³ See *City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 149 n.18 (1978).

a. Different Penalties

No conflict exists between a local misdemeanor and a state crime as long as the local penalty is less severe than the state’s penalty.¹⁴⁴ However, if the local penalty exceeds the state punishment, then the laws conflict and the local misdemeanor is subject to preemption.¹⁴⁵ This test is a bright-line rule for courts to apply when reviewing local penalties, not an assumption,

Notably, local misdemeanors that impose higher minimum penalties also conflict with state law, not just those that impose higher maximum penalties.¹⁴⁶ In *Dollarhide*, for example, the City of Portland adopted an ordinance that imposed a mandatory minimum sentence of \$500 or six months imprisonment for prostitution.¹⁴⁷ The minimum penalty under state law basically was no penalty, i.e., a “discharge.”¹⁴⁸ The court found that “city punishment of the same conduct made criminal by state law may be ‘lighter’ than that prescribed by state statute.”¹⁴⁹ At the same time, the court found that “a city ordinance cannot increase either the minimum or the maximum penalty that is authorized by state law for the same criminal conduct.”¹⁵⁰

b. Different Criminal Conduct

Sometimes, a local law criminalizes conduct that is not actually criminal under state law. Courts do not assume that the state legislature intended to preempt these local misdemeanors.¹⁵¹ Rather, courts apply the test under *City of Portland v. Jackson*: **(1)** interpret what conduct the local ordinance prohibits and **(2)** determine whether the state has allowed that conduct by an “express legislative decision, by a decision apparent in the legislative history, or otherwise.”¹⁵²

• Local misdemeanors v. State criminal law

Almost always, preemption of local misdemeanors involves a criminal law of the state.¹⁵³ Besides penalties, state and local laws mostly conflict on the exact definition of a crime — in other words, the criminal conduct.¹⁵⁴ For example, in *Jackson*, a defendant was charged with a crime under a Portland ordinance that prohibited all types of public exposure.¹⁵⁵ Separately, a state criminal law banned public exposure only if it was committed with “the intent of arousing

¹⁴⁴ *Dollarhide*, 300 Or at 499.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 502.

¹⁴⁷ *Id.* at 493.

¹⁴⁸ *Id.* at 502.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ See *City of Portland v. Jackson*, 316 Or 143, 149-51 (1993).

¹⁵² *Jackson*, 316 Or at 149-51. Note that, unlike for civil matters, “express preemption” by the state legislature for criminal matters does not need to be “unambiguous.”

¹⁵³ *Id.*; see also *City of Portland v. Lodi*, 308 Or 468, 472 (1989).

¹⁵⁴ *Jackson*, 316 Or at 145.

¹⁵⁵ *Id.*

sexual desire of the person or another person.”¹⁵⁶ The defendant argued that the narrow crime under state law preempted the broad crime for public exposure under local law.¹⁵⁷ The *Jackson* court analyzed the two laws to see if the ordinance was preempted.¹⁵⁸ First, the court found the state law did not *expressly* allow the defendant’s conduct.¹⁵⁹ Second, the court found it would be a mistake to assume the state, “by its silence,” intended to permit this form of public exposure, thereby preempting any local laws that punished it.¹⁶⁰ Instead of applying the reverse assumption from *La Grande/Astoria* and *Dollarhide*, the *Jackson* Court searched the legislative history and held that unless “legislative intent to permit that conduct is apparent, the ordinance is not in conflict.”¹⁶¹ In the end, the court upheld the ordinance.¹⁶²

- **Local misdemeanors v. State civil law**

On at least one occasion, a local misdemeanor has been preempted by a state civil law because the state law imposed civil penalties for slightly different conduct than the local law.¹⁶³ In *City of Corvallis v. Pi Kappa Phi*, the city of Corvallis adopted an ordinance that prohibited property owners from allowing or hosting parties where alcohol was consumed or possessed by a minor.¹⁶⁴ After being cited, the defendant sued, alleging that the Oregon Liquor Control Act (OLCA) preempted the ordinance.¹⁶⁵ Specifically, one OLCA provision punished serving minors as a civil violation, not a crime.¹⁶⁶ It also required the person to serve the minor “knowingly.”¹⁶⁷

The court found that the criminal preemption standards applied in this situation.¹⁶⁸ The court reasoned that the OLCA did criminalize other types of conduct, and the law as a whole “reflects the legislature’s intention to criminalize certain conduct and to not criminalize other conduct.”¹⁶⁹ The court then found that although the OCLA did not expressly preempt ordinances like the Corvallis ordinance, the legislative history indicated that state lawmakers had intended to protect individuals who did not “knowingly” serve minors from the OCLA violation.¹⁷⁰ As such, the court found that the OLCA impliedly permitted the “specified conduct” in the case; that is, it permitted a person to unknowingly serve a minor alcohol.¹⁷¹ Therefore, the civil violations under the OLCA preempted the city’s criminal ordinance.¹⁷²

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 146.

¹⁵⁹ *Id.* at 152.

¹⁶⁰ *Id.* at 149.

¹⁶¹ *Id.*

¹⁶² *Id.* at 152.

¹⁶³ *See City of Corvallis v. Pi Kappa Phi*, 293 Or App 319, 333 (2018).

¹⁶⁴ *Id.* at 320.

¹⁶⁵ *Id.* (citing ORS 471.410(3)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 323.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 326, 331.

¹⁷¹ *Id.*

¹⁷² *Id.*

- **Local civil laws v. State crime**

Theoretically, a local civil law could permit conduct that has been made a crime under state law.¹⁷³ While this has been described as “the classic conflict scenario” for local-state criminal laws, it certainly is not the norm.¹⁷⁴ As noted above, cities are much more likely to impose a stricter definition of a crime or a stricter criminal penalty than they are out to flout the criminal code.¹⁷⁵

At any rate, the reverse assumption of *La Grande / Astoria* and *Dollarhide* would apply to any local law that creates a “safe haven” against state crimes.¹⁷⁶ Under *Dollarhide*, state law preempts local law anytime an “ordinance . . . permits an act which the statute prohibits.”¹⁷⁷ So, absent an express authorization for the local law — like a state provision that allows local exceptions to a crime — courts will just assume the state intended to preempt the local law.¹⁷⁸

III. FEDERAL PREEMPTION

Just as state preemption is the displacement of local lawmaking authority by state laws, federal preemption is the displacement of local (or state) lawmaking authority by federal laws. The outcome for cities is the same, but state and federal preemption are two separate doctrines.

The preceding section explored at length the origins of Oregon’s preemption doctrine. That degree of detail is not necessary for federal preemption. For the purposes of this Handbook, simply note that federal preemption is rooted in the Supremacy Clause of the U.S. Constitution and is the result of more than 200 years of federal court case law.¹⁷⁹ It is far more important to understand the differences between preemption in Oregon and preemption in the federal system.

As an initial matter, federal laws obviously preempt state laws as well as local laws. This preemption occurs under the same principles; a local ordinance is not any more or less likely to be preempted by a federal law than a state law.¹⁸⁰

Courts are much less likely to err on the side of cities in a federal preemption dispute (federal statute v. local law) than in a state preemption dispute (state statute v. local law). Oregon’s state preemption doctrine is heavily influenced by the home rule amendments to the

¹⁷³ See *City of Portland v. Jackson*, 316 Or 143, 146 (1993).

¹⁷⁴ *City of Corvallis*, 293 Or App at 332.

¹⁷⁵ See, e.g., *City of Portland v. Dollarhide*, 300 Or 490, 492 (1986); see also *City of Corvallis*, 293 Or App at 320.

¹⁷⁶ *Jackson*, 316 Or at 146.

¹⁷⁷ *Dollarhide*, 300 Or at 502.

¹⁷⁸ *Id.*

¹⁷⁹ See US Const, Art VI, cl 2; see also *Altria Group, Inc. v. Good*, 555 US 70, 76 (2008) (explaining that state laws that conflict with federal laws are “without effect”)

¹⁸⁰ See *Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 713 (1985).

Oregon Constitution.¹⁸¹ Federal preemption is not: Oregon’s home rule amendments have no effect on federal lawmakers. None of the rules from *La Grande/Astoria* apply when a court is reviewing a federal statute — a local law can be preempted even if there is some ambiguity that is what Congress wanted, and even if it is possible for the two laws to operate concurrently.¹⁸²

For federal preemption claims, courts first look at the text of a federal statute to see if the “plain meaning” of the statute shows that Congress intended to preempt state and local laws — note the intention does not need to be “unambiguously expressed,” as in *La Grande/Astoria*.¹⁸³

If the plain meaning of a federal statute does not expressly preempt state or local laws, courts still may find that it *impliedly* preempts them under the doctrine of impossibility, field, or obstacle preemption.¹⁸⁴ Impossibility preemption is identical to Oregon’s conflict preemption analysis.¹⁸⁵ Field and obstacle preemption, on the other hand, preempt local laws on the basis of a federal law’s overall framework or “objectives.”¹⁸⁶

Like state preemption, federal preemption does assume that certain state or local laws are not preempted if they are in “field[s] of traditional state regulation.”¹⁸⁷ But this presumption only applies to claims of *implied* preemption; it does not apply in express preemption cases, which are the most common because most federal laws contain some clause relating to preemption.¹⁸⁸ Finally, even in implied preemption cases, courts often omit the presumption for state/local laws if there is a “history of significant federal presence” on the subject (trade, immigration, etc.).¹⁸⁹

¹⁸¹ See *City of La Grande v. Public Emp. Retirement Bd.*, 281 Or 137, 156 (1978).

¹⁸² See *Engine Mfrs. Ass’n v. South Coast Air Quality Management Dist.*, 541 U.S. 246, 252 (2004) (holding that courts do not need to find that preemption was the “clear and manifest” purpose of Congress; rather, preemption need only be the “plain meaning” of the text); see also *U.S. v. Locke*, 529 U.S. 89, 115 (2000) (holding “it is not always a sufficient answer ... to say that state [or local] rules supplement, or even mirror, federal requirements).

¹⁸³ See *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1945 (2016); *City of La Grande*, 281 Or at 156.

¹⁸⁴ FEDERAL PREEMPTION: A LEGAL PRIMER, CONGRESSIONAL RESEARCH SERVICE 17 (2018), <https://fas.org/sgp/crs/misc/R45825.pdf> (last visited July 30, 2020).

¹⁸⁵ Cf. *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963), with *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 474 (2010) (finding preemption where compliance would be impossible).

¹⁸⁶ See, e.g., *Locke*, 529 U.S. at 115; see also *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (finding that state tort claims against automobile manufactures were “obstacles” to a federal law regulating the industry).

¹⁸⁷ See *Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 715 (1985).

¹⁸⁸ *Id.*; *Puerto Rico*, 136 S. Ct. at 1945.

¹⁸⁹ See, e.g., *U.S. v. Locke*, 529 U.S. 89, 115 (2000).

A. Express Preemption

Express federal preemption occurs when a federal statute specifically precludes state or local laws on the subject.¹⁹⁰ Courts look to determine the “plain meaning” of the law based on its text and context of the law and, if necessary, the law’s legislative history.¹⁹¹

Many federal statutes use preemption clauses to displace state or local laws expressly.¹⁹² As noted in section II, preemption clauses are a common feature of state statutes as well. Unlike Section II, however, courts do not need to find that Congress “unambiguously expressed” its intent to preempt a local law.¹⁹³ At one time, courts needed to find that preemption was the “clear and manifest purpose of Congress” to displace state or local laws in a “field of traditional state regulation” — a presumption against preemption similar to what exists in Oregon — but the Supreme Court expressly disavowed this in 2016.¹⁹⁴

Many federal laws also use **savings clauses**; these are the opposite of preemption clauses because that they expressly “save” state or local lawmaking from preemption in certain areas.¹⁹⁵ The “plain meaning” of these clauses is not always clear because they protect “State” laws.¹⁹⁶ Depending on the statute, the term “State” laws may or may not include local ordinances, which are *laws of state* political subdivisions.

On a few occasions, the Supreme Court has found that a federal savings clause extends to local laws as well as state laws, even where the clause itself refers only to “State” laws.”¹⁹⁷ For example, in *Wisconsin Public Intervenor v. Mortier*, the Court found that a pesticides ordinance was not preempted by federal law due to a savings clause in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).¹⁹⁸ The savings clause under FIFRA provides that “State[s] may regulate” the sale and use of federally registered pesticides as long as that sale or use is not prohibited by federal law.¹⁹⁹ The *Mortier* Court found that under FIFRA at least, the term

¹⁹⁰ Caleb Nelson, *Preemption*, 86 Va. L. Rev 225, 226 (2000).

¹⁹¹ *South Coast*, 541 U.S. at 252. Plain meaning analysis sometimes relies on *textual* presumptions, also known as canons of construction. See STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, CONGRESSIONAL RESEARCH SERVICE 26 (2018), <https://fas.org/sgp/crs/misc/R45153.pdf> (last visited July 30, 2020).

¹⁹² See *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246, 252 (2004); see also *U.S. v. City and County of Denver*, 100 F.3d 1509, 1513 (10th Cir.1996).

¹⁹³ See *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1945 (2016); *City of La Grande*, 281 Or at 156.

¹⁹⁴ See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 533 (1992); see also *Puerto Rico*, 136 S. Ct. at 1945.

¹⁹⁵ FEDERAL PREEMPTION: A LEGAL PRIMER, CONGRESSIONAL RESEARCH SERVICE 17 (2018), <https://fas.org/sgp/crs/misc/R45825.pdf> (last visited July 30, 2020).

¹⁹⁶ *Id.*

¹⁹⁷ See *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601 (1991).

¹⁹⁸ *Id.* at 606-07.

¹⁹⁹ *Id.*

“State” means the states and their local governments, which federal courts have long considered to be the “convenient agencies” of states.²⁰⁰

In sum, whether a federal law expressly preempts local laws — or whether it “saves” local laws from preemption — will depend solely on the court’s interpretation of the text.²⁰¹ As it stands, courts are not required to find clear or “unambiguous” evidence that Congress intended to preempt a local law.²⁰² “Plain” evidence of that intent is enough.²⁰³

B. Implied Preemption

Even if a federal law does not expressly preempt state or local lawmakers, courts may find that it does so *impliedly* under certain circumstances. One is impossibility preemption, a familiar standard under *La Grande/Astoria* for state preemption. The other two circumstances are (1) field preemption and (2) obstacle preemption — both of which are uniquely federal.

i. Impossibility Preemption

The Supreme Court has held that federal law preempts state law when it is impossible to comply with both sets of laws.²⁰⁴ In *Florida Lime & Avocado Growers, Inc. v. Paul*, the Court described a hypothetical situation wherein a federal law prohibited the sale of avocados with more than 7% oil and a state law required all avocados to have at least 8% oil.²⁰⁵ In this scenario, it would be *impossible* for an avocado seller to meet both standards — the 7% federal maximum and the 8% state minimum. The court found that where a person would have to choose whether to comply with federal or state law, the state law is preempted out of necessity.²⁰⁶

Courts describe this as a “demanding” test for preemption and one that is rarely met.²⁰⁷ It also is identical to the only implied preemption permitted under *La Grande/Astoria*, occurring where it is “impossible” for a state law and local law to “operate concurrently.”²⁰⁸

²⁰⁰ *Id.*

²⁰¹ *See* Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1945 (2016).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *See* Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See* Wyeth v. Levine, 555 U.S. 555, 573 (2009).

²⁰⁸ *See* Thunderbird Mobile Club, LLC v. City of Wilsonville, 234 Or App 457, 474 (2010).

ii. Implied Field and Obstacle Preemption

Federal case law permits two other forms of implied preemption that are more common and easier for litigants to prove. Field preemption and obstacle preemption displace laws based on the “pervasiveness” of a statutory scheme or on a federal law’s “objectives.”²⁰⁹

Cities (and states) have some arguments at their disposal. First, if a federal statute contains a preemption clause and courts do *not* find that it expressly preempts local law, then a city can argue the preemption clause is the *extent* of Congress’s preemptive intent.²¹⁰ Second, if the federal statute is regulating a “field of traditional state regulation,” then the state or city can argue that the court must find preemption was the “clear and manifest purpose of Congress.”²¹¹ These arguments, while persuasive, have achieved mixed results.

a. Obstacle Preemption

Obstacle preemption occurs where a court finds that a state or local law is “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²¹² Obstacle preemption is similar to impossibility preemption in that it requires a clear conflict. Where it is not *technically* impossible for a federal and local law to operate, i.e. impossibility preemption, obstacle preemption is there to preempt state or local laws that would be counterproductive.²¹³

A recent example of obstacle preemption took place in Oregon. In *Emerald Steel Fabricators v. Bureau of Labor*, the Oregon Supreme Court held the Oregon Medical Marijuana Act (OMMA) was preempted by the Federal Controlled Substances Act (CSA).²¹⁴ The state law authorized the use of medical marijuana, whereas the CSA did not recognize a medical exception for marijuana, a Schedule I drug.²¹⁵ Applying the standards for federal preemption, the court held that the OMMA, by legalizing a substance that is illegal under federal law, stood as an obstacle to the CSA because it “authorizes what federal law prohibits.”²¹⁶

As this case illustrates, obstacle preemption usually applies when a state or local civil law promotes conduct that is prohibited by federal law.²¹⁷ A federal ban is a clear goal. Sometimes,

²⁰⁹ See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (finding that Congress preempted states from regulating grain warehouses).

²¹⁰ See *Atay v. County of Maui*, 842 F.3d 688, 703 (9th Cir. 2016).

²¹¹ See *Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 715 (1985).

²¹² See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000).

²¹³ *Id.*

²¹⁴ See *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or 159, 161 (2010).

²¹⁵ *Id.*

²¹⁶ *Id.* at 178-80 The court held the CSA did not preempt other sections of the OMMA that partly *decriminalized* the state crime for marijuana: the federal government cannot compel the state to make certain crimes. *Id.*

²¹⁷ *Id.* at 177.

however, parties base claims of obstacle preemption on congressional goals that are less clear.²¹⁸ Generally, courts are careful not to interpret Congress’s goals too broadly: as one court put it, obstacle preemption does “not justify a free wheeling judicial inquiry” into Congress’s goals.²¹⁹

For example, in *Atay v. County of Maui*, a Hawaiian county adopted an ordinance that banned residents from growing or testing genetically engineered (GE) plants.²²⁰ Existing federal law and regulations list many — but not all — GE plants as environmental threats and restrict their movement in commerce without a permit.²²¹ As an initial matter, the Ninth Circuit Court of Appeals found that any of the GE plants in the Maui ordinance that also are regulated by the federal government were expressly preempted by a clause in the Plant Protection Act (PPA).²²²

But the Maui ordinance also banned some GE plants that were not federally listed.²²³ The growers of GE plants argued that even the non-listed GE plants were preempted by the PPA because the ordinance frustrated a secondary objective of the PPA, which allegedly was “facilitating commerce in non-dangerous GE plants” like those listed in the ordinance.²²⁴

The *Atay* Court rejected this argument. First, the Court found that the PPA contained a preemption clause and that it was therefore reasonable to infer that “Congress did not intend to preempt state and local laws that do not fall within the clause’s scope.”²²⁵ In other words, the court began by assuming that Congress probably did not mean to preempt ordinances like the one in Maui County because the preemption clause in the PPA did not list these ordinances. Second, the court found that “land use” is one of the traditional fields occupied by states and local government and found that Congress, in enacting the PPA, did not clearly manifest their intent to prevent local governments from “exercising their traditional authority” over land use.²²⁶ For these reasons, the court rejected this claim of obstacle preemption.

b. Implied Field Preemption

Implied field preemption occurs where a court finds that federal laws and regulations on a subject are “so pervasive as to make reasonable the inference that Congress left no room for

²¹⁸ See *Atay v. County of Maui*, 842 F.3d 688, 704 (9th Cir. 2016).

²¹⁹ See *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88, 111 (1992).

²²⁰ *Atay*, 842 F.3d at 691.

²²¹ *Id.* at 700.

²²² *Id.* at 701.

²²³ *Id.* at 703.

²²⁴ *Id.* at 704.

²²⁵ *Id.*

²²⁶ *Id.*

states to supplement it.”²²⁷ It can also occur where a court finds that the subject is one where the federal interest is so dominant that Congress must have meant to preclude state or local laws.²²⁸

In *City of Burbank v. Lockheed Air Terminal*, the city adopted an ordinance that imposed an 11 p.m. to 7 a.m. curfew on jet flights at the local airport.²²⁹ Federal laws also regulated air traffic and set rules for noise at airports.²³⁰ Neither of these federal laws expressly preempted local ordinances on air traffic noise.²³¹ In addition, the Court did not find that compliance with the federal law and the local law was impossible. Instead, the Court found that the “pervasive nature of the scheme of federal regulation of aircraft noise” implied that Congress had intended to occupy the field and displace any state or local laws on the subject.²³² Along the way, the Court noted that it needed to find that preemption was the “clear and manifest purpose” of Congress because the city ordinance was a field — community curfews and noise control — traditionally regulated by states and state political subdivisions.²³³ The Court found this intent was clear based on extensive legislative history.²³⁴

Since *Burbank*, the Supreme Court has held that federal law occupies several other fields, including the regulation of tanker vessels and immigrant registration.²³⁵ In other situations, the Court has rejected claims of field preemption and sided with local ordinances.²³⁶

For example, in *Hillsborough County v. Auto Medical Labs*, the Court upheld a county ordinance that imposed standards for blood plasma donations.²³⁷ Specifically, the ordinance required donation centers to screen for hepatitis and required donors to pass a breathalyzer test.²³⁸ Meanwhile, the Food and Drug Administration (FDA) promulgates federal standards for blood plasma donations.²³⁹ A donation center filed a lawsuit arguing that the “pervasiveness” of the FDA rules preempted any state or local laws in the field.²⁴⁰ The Court held otherwise.²⁴¹ First, the Court drew a distinction between the comprehensiveness of a federal statutory scheme and the comprehensiveness of federal regulations.²⁴² The Court found that “no intent to preempt

²²⁷ See *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

²²⁸ *Id.*

²²⁹ *Id.* at 625

²³⁰ *Id.*

²³¹ *Id.* at 633.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* at 634-635.

²³⁵ See *U.S. v. Locke*, 529 U.S. 89, 115 (2000); See *Arizona v. United States*, 567 U.S. 387, 402 (2012).

²³⁶ See *Hillsborough County v. Auto Medical Labs*, 471 U.S. 707, 713-15 (1985).

²³⁷ *Id.*

²³⁸ *Id.* at 710.

²³⁹ *Id.*

²⁴⁰ *Id.* at 712.

²⁴¹ *Id.*

²⁴² *Id.* at 717.

may be inferred from the comprehensiveness of the federal *regulations...*” because federal regulations often *are* comprehensive, and a finding of field preemption on those grounds alone would take significant authority away from cities, counties, and states.²⁴³ The Court also held there was no dominant federal interest in the field of blood plasma regulation because regulation of “health and safety matters is primarily and historically a matter of local concern.”²⁴⁴

In conclusion, cities and states may sometimes mount a defense to claims of *implied* federal preemption by arguing that their law is in an area traditionally regulated by states (and by extension their cities). Cities and states may also point to the existence of a preemption clause as evidence that additional preemption is not implied. But these arguments are no guarantee and courts may infer preemption regardless from the statutory scheme or a well-stated objective.

IV. FEDERAL/STATE SOVEREIGN RIGHTS

State and federal preemption are the primary ways that municipal authority is restricted. It is not the only way. State and federal governments do not need to pass laws to limit what cities can do. In their nature as sovereign governments, they put passive restraints on local authority.

The sovereign rights of state and federal governments, and how cities tie into these rights, is a lengthy and convoluted topic that would be impractical to address in this Handbook. It also is not trivial — issues of sovereignty can arise in strange and unexpected ways and therefore cities should have a brief understanding of what this can mean for their operations.

In short, the State of Oregon and the U.S. government are not subject to local authority. These governments are “sovereign,” meaning they normally cannot be taxed, regulated, forced to turn over property, or subject in any other way to a city’s authority.²⁴⁵ The state also extends some of these to its political subdivisions — cities and other local governments.²⁴⁶

Of course, there are limits to these sovereign rights. First and foremost, state and federal governments may always consent to being taxed, regulated, forced to turn over property, or in some other way subject to local authority.²⁴⁷ Both the federal and state government do waive

²⁴³ *Id.*

²⁴⁴ *Id.* at 719.

²⁴⁵ *See, e.g.,* Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 181 (1988) (finding “federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides ‘clear and unambiguous’” consent). Note that tribal governments in Oregon also are sovereign; at a fundamental level, they are separate from the state and the United States. *See Introduction to Oregon’s Indian Tribes*, OR. BLUE BOOK, <https://sos.oregon.gov/blue-book/Pages/national-tribes-intro.aspx> (last accessed July 30, 2020).

²⁴⁶ *See, e.g.,* ORS 307.090(1).

²⁴⁷ *Id.*

their sovereign rights to a certain degree, notably for lawsuits.²⁴⁸ Second, as noted in Chapter 1, not every action that a city takes is an exercise of government authority. Some actions by a city are corporate in nature. To the extent a city is acting more as a corporation than as a government, an argument could exist for the state or federal government to comply with the city's demands.²⁴⁹

A. Eminent Domain

Oregon's eminent domain laws offer a good overview of these concepts. As a sovereign government, the State of Oregon generally cannot be subject to eminent domain by local governments.²⁵⁰ That said, this right is limited because the Oregon Legislature has consented to eminent domain actions under certain circumstances.²⁵¹ For example, under ORS 553.270, a water district may bring an eminent domain action against state-owned property if it can show that it would put it to a more necessary public use.²⁵²

Note that under ORS 553.270, the Legislature waives its own immunity to this category of eminent domain *as well as* the immunity of county governments.²⁵³ Arguably, the statute even applies to city property.²⁵⁴ While a city likely could not oppose a taking on grounds that it has sovereign status, a city would have some recourse in its corporate capacity.²⁵⁵ Under *City of Keizer v. Lake Labish Water Control Dist.*, the Oregon Court of Appeals found that a city could sue for just compensation after its property was taken (accidentally) by a water district.²⁵⁶ The court reasoned that city was a "corporation" and thus a "person" under the takings clause of the Oregon Constitution.²⁵⁷

²⁴⁸ See the Oregon Tort Claims Act, ORS 30.260 to ORS 30.300, and the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680.

²⁴⁹ See, e.g., *City of Keizer v. Lake Labish Water Control Dist.*, 18 Or App 425, 427 (2002).

²⁵⁰ See 21 Or Op Atty Gen 103, 1942 WL 38513 (1942) (noting that "A statute granting the general power to condemn land is not binding on the sovereign in the absence of an express provision or a necessary implication to that effect.").

²⁵¹ See ORS 553.270.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*; see also *City of Keizer v. Lake Labish Water Control Dist.*, 185 Or App 425, 432 (2002) (discussing ORS 553.270 in the context of city property).

²⁵⁵ *Id.* at 437-440.

²⁵⁶ *Id.* at 427.

²⁵⁷ *Id.* at 437-440.

B. Local Taxes and Fees

Another important example of these principles is utility fees. As sovereign governments, neither the U.S. government nor the state of Oregon may be taxed by a local government.²⁵⁸ The governments at times agree to make “payments in lieu of taxes,” and the state even authorizes cities to assess public property for certain public improvement costs.²⁵⁹ But, absent their express consent, neither the state or federal government can be compelled to pay local taxes.²⁶⁰

Yet here again, a corporate caveat exists for cities. Though taxation is off-limits, cities and local governments may charge the U.S. government “reasonable fees related to the cost of government services provided, such as payment for metered water usage” and other utilities or city-operated service.²⁶¹ Though it depends on the circumstances, cities might be able to charge a “user fee” if the payments are “given in return for a government-provided benefit.”²⁶² Similarly, the state and its local governments generally are exempt from paying property taxes but can be required to pay other types of fees, such as license fees or municipal utility fees.²⁶³

The reason for this is that the authority for a city to charge these rates flows not from its municipal authority but rather from “a municipality’s basic power to obtain some measure of profit from its utility enterprise.”²⁶⁴ However, cities should note that it can be difficult to say for certain whether a specific city charge on state or federal instruments will be found permissible, or if it will be found null and void as a tax.²⁶⁵ For example, courts everywhere appear split on whether stormwater discharge fees are “user fees” or taxes.²⁶⁶

In sum, cities are prevented from taking certain actions against the federal, state, and tribal governments because these governments possess varying measures of sovereign immunity.

²⁵⁸ See, e.g., ORS 307.090; see also *U.S. v. City of Detroit*, 355 U.S. 466, 469 (1958) (finding that states and local governments “cannot constitutionally levy a tax directly against the Government of the United States or its property without the consent of Congress.”).

²⁵⁹ *Payments in Lieu of Taxes*, U.S. DEPARTMENT OF THE INTERIOR, <https://www.doi.gov/pilt#:~:text=%22Payments%20in%20Lieu%20of%20Taxes,Federal%20lands%20within%20their%20boundaries.&text=PILT%20payments%20are%20one%20of%20good%20neighbor%20to%20local%20communities>. (last accessed July 30, 2020).

²⁶⁰ *City of Detroit*, 355 U.S. at 469.

²⁶¹ See *Novato Fire Protection Dist. V. U.S.*, 181 F.3d 1135, 1138-39 (9th Cir. 1999).

²⁶² See *U.S. v. City of Huntington*, 999 F.2d 71, 73-74 (8th Cir. 1993).

²⁶³ See, e.g., *Or Op Atty Gen OP-6091*, 1987 WL 278260 (1987) (finding in part that the City of Monmouth could rightfully charge state entities a fee based on “actual use,” but that a proposed “transportation utility fee” was not based on “actual use” and therefore would constitute an impermissible tax on a state college.).

²⁶⁴ See, e.g., *U.S. v. City of Columbia*, 914 F.2d 151 (8th Cir. 1990).

²⁶⁵ See *Or Op Atty Gen OP-6091*, 1987 WL 278260 (1987); see also *City of Huntington*, 999 F.2d at 73-74 (noting that courts must consider “all the facts and circumstances . . . and assess them on the basis of economic realities”) (quoting *U.S. v. City of Columbia*, 914 F.2d 151, 154 (8th Cir. 1990)).

²⁶⁶ Cf. *Norfolk Southern Railway Company v. City of Roanoke*, 916 F.3d 315, 319-320 (4th Cir. 2019) (finding that stormwater discharge fees are fees, *with Dekalb County v. U.S.*, 108 Fed. Cl. 681, 696-697 (2013) (finding the fees are taxes)).

That said, this avenue is open to cities if a sovereign government consents to local regulations. Additionally, depending on the circumstances, a city may find some recourse through its corporate status against an entity that is employing sovereign rights.