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LOUISIANA

I. Summary of Home Rule in Louisiana

- Home rule localities have broad authority to legislate. Cities with pre-1974 charters have some protection against state preemption, and are only limited by the state constitution and federal law. Localities with post-1974 charters still have broad authority, but they are also limited by general laws.

- Since the state constitution says the state's police power cannot be abridged, the state can override even a pre-1974 charter city's enactment using its police power.

- Louisiana protects legislator speech and debate, prohibits unfunded mandates with certain exceptions, and prohibits special or local laws on specific subjects.

II. Source of Home Rule Authority

Louisiana's 1974 state constitution guarantees home rule authority for "local government subdivision[s]," a term that Louisiana courts construe as covering both parishes and municipalities.[1] Article IV, § 4 addresses home rule charters that existed when the state constitution was adopted, while Article IV, § 5 addresses adoption of home rule charters after 1974.[2] Article VI, § 9 places some limitations on home rule authority.

III. Scope of Home Rule Authority

The ratification of the 1974 state constitution created a two-tiered structure for home rule in Louisiana.

Pre-1974 charters of local government subdivisions retain legal effect and may provide extra, albeit limited, protection from preemption by the state legislature. The 1974 constitution "essentially constitutionalized" pre-existing city charters.[3] Cities with pre-1974 charters, which include New Orleans and Baton Rouge,[4] exercise broad initiative powers that are limited only by

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[1] *Savage v. Prator*, 2004-2904, p. 5 (La. 1/19/06); 921 So.2d 51, 54 (La. 2006) (citing Kenneth M. Murchison, Local Government Law, 64 LA. L. REV. 275, 279 (2004)).
[2] LA. CONST. art. VI, §§ 4, 5.
[3] *New Orleans Campaign for a Living Wage v. City of New Orleans*, 2002-0991, p. 6 (La. 9/4/02); 825 So.2d 1098, 1103.
[4] Baton Rouge has consolidated its government with the surrounding parish of East Baton Rouge. *See* City-Parish Gov't, Baton Rouge Gov't Website, *available at* http://www.brgov.com/govt/.

the state constitution and federal law.[5] The Louisiana supreme court has observed that although "'home rule' does not entail complete autonomy . . . in 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.'"[6]

Charters passed after 1974, by contrast, "may include the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution."[7]

IV. Preemption

Louisiana courts recognize express, implied, and conflict preemption. Courts generally analyze state preemption of local law the same way they would analyze federal preemption of state law.[8]

A. Preemption Generally

The state may expressly preempt certain matters.[9] It must be the "clear and manifest purpose" of the legislature to preempt local power.[10]

A court can also find implied preemption by "examining the pervasiveness of the state regulatory scheme, the need for state uniformity, and the danger of conflict between the enforcement of local laws and the administration of the state program."[11] For example, an appeals court found the combination of a statute stating that a state agency "shall" regulate plus pervasive regulations indicated that the state had preempted a field.[12] Louisiana courts may emphasize pervasive regulation even when there is an express preemption clause.[13]

Ordinances of any local government will also be invalidated if they conflict with state law. Louisiana courts recognize the longstanding jurisprudence that prohibits a municipality from enacting ordinances inconsistent with or in contravention of state law.[14] However, a municipal

[5] *Campaign for Living Wage*, 825 So.2d at 1103.
[6] *Id.* (citing Miller v. Oubre, 96–2022, p. 9 (La.10/15/96), 682 So.2d 231, 236, and Morial v. Smith & Wesson Corp., 00–1132, p. 16 (La.4/3/01), 785 So.2d 1, 14).
[7] LA. CONST. art. VI, § 5(E).
[8] *United States Aircraft Ins. Grp. v. Global Tower, LLC*, 2019-844, p.19 (La. App. 3 Cir. 5/20/20); 298 So.3d 214 (citing *Hildebrand v. City of New Orleans*, 549 So.2d 1218 (La. 1989)).
[9] *See City of Baton Rouge v. Ross*, 94-0695 (La. 4/28/95); 654 So.2d 1311 (finding express preemption permissible against pre-1974 charter city because it was necessary to protect vital interests of state).
[10] *Palermo Land Co. v. Planning Comm'n of Calcasieu Parish*, 561 So.2d 482, 497 (La. 1990).
[11] *Id.*; see also *Hildebrand v. City of New Orleans*, 549 So.2d 1218, 1228 (La. 1989) (applying this analysis to conclude local inheritance tax was not impliedly preempted).
[12] *Desormeaux Enterprises, Inc. v. Village of Mermentau*, 568 So.3d 213, 215 (La. App. 1990).
[13] *St. Tammany Parish Gov't v. Welsh*, 2015-1152, pp. 7–8 (La. App. 1 Cir. 3/9/16); 199 So.3d 3.
[14] *Restivo v. City of Shreveport*, 566 So.2d 669, 671 (La. 1990).

ordinance which goes further in its prohibitions than a state statute is valid so long as it does not forbid what the Legislature has expressly or implicitly authorized.[15]

B. Limited Immunity from Preemption for pre-1974 Charter Municipalities

To some extent, the constitutionalization of pre-1974 charters insulates "home rule governments from unwarranted interference by the state in their affairs."[16] For instance, in a case concerning New Orleans's method of appointing the members of its aviation board, the state supreme court held that the state's intervention in the charter's distribution of powers and functions was invalid.[17] Similarly, the court held that a state statute delegating power to a levee district could not constitutionally override the zoning power reserved to New Orleans under its charter.[18]

There are exceptions to charter immunity, however. Under Article VI, § 9(B), "the police power of the state shall never be abridged." Hence, if the state passes a statute pursuant to its police power, it may override even a pre-1974 charter city's enactment if the state's act is "necessary to protect the vital interests of the state as a whole."[19] This power extends to depriving a pre-1974 city of a right of action to sue.[20] Similarly, pre-1974 charter cities are forbidden from enacting ordinances governing civil and private relationships, although the supreme court has shied away from relying on this "imprecis[e]" category to invalidate ordinances.[21] In addition, the state constitution contains numerous restrictions on city taxing authority.[22] If a pre-1974 charter or an ordinance passed pursuant thereto conflicts with one of these constitutional provisions, the courts will hold it invalid.[23]

While a 1994 Louisiana Supreme Court case embraced a robust vision of the immunity provided by Article VI,[24] the court embraced a decidedly more modest view of immunity in a 2002 case concerning New Orleans's attempt to increase the minimum wage in the face of an expressly preemptive state statute. In that case, the Louisiana Supreme Court held that the state law trumped New Orleans's charter provision that raised the minimum wage because the state statute was passed pursuant to § 9(B)'s reservation of the police power.[25] The court inquired as to whether the state really was protecting a "vital interest" by preempting the minimum wage

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[15] *Id.* (upholding regulation of plumbers by Shreveport that exceeded that imposed by state law).
[16] *Id.*
[17] *Francis v. Morial*, 455 So.2d 1168 (La. 1984).
[18] *City of New Orleans v. Bd. of Comm'rs of the Orleans Levee Dist.*, 93-0690 (La. 7/5/94); 640 So.2d 237.
[19] *Id.* at 251.
[20] *Morial v. Smith & Wesson Corp.*, 2000-1132 (La. 4/3/01); 785 So.2d 1.
[21] *Campaign for Living Wage*, 825 So.2d at 1113 (Weimer, J., concurring) (noting that only two Louisiana cases have addressed the provision, although arguing that it was reason to invalidate New Orleans's minimum wage).
[22] *See* LA. CONST. art. VI, §§ 26-37.
[23] *Fransen v. City of New Orleans*, 2008-0076, p. 12 (La. 7/1/08); 988 So.2d 225, 235 (holding that New Orleans ordinance for collecting delinquent taxes conflicted with state constitution – art. VII, § 25 – that limited methods for collecting delinquent taxes).
[24] *E.g., Orleans Levee Dist.*, 640 So.2d at 246 (noting that pre-1974 charter local "government's power of immunity prevents the legislature from reversing, withdrawing, or denying an exercise by that city or parish of its power to enact and enforce that local law").
[25] *Campaign for Living Wage*, 825 So.2d at 1108.

statewide, but ultimately the majority largely deferred to the state legislature's findings.[26] Parsing the somewhat inconsistent precedents, one might conclude that structural matters receive more immunity under the constitution than pure regulatory matters.

V. Emergency Powers

Under the Louisiana Homeland Security and Emergency Assistance and Disaster Act, local governments have specific powers to respond to an emergency, which is defined as a condition created by a disaster,[27] any act damaging or disrupting utilities, or a national or state-declared emergency.[28] Local governments are also immune from liability from deaths or injuries resulting from emergency preparedness activities, except in the case of "willful misconduct," and for any claim based on failure to carry out discretionary duties.[29] Courts have held that this constitutes total immunity for local governments for emergency preparedness activities.[30] However, the activities must be directed at a specific emergency; the act does not provide immunity for general flood protection work.[31]

Parish presidents may declare local emergencies.[32] The parish president has several emergency powers, including to "[s]uspend the provisions of any regulatory ordinance prescribing the procedures for conduct of local business, or the orders, rules, or regulations of any local agency, if strict compliance . . . would in any way prevent, hinder, or delay necessary action in coping with the emergency."[33] The parish president may also transfer personnel or functions from local departments, commandeer private property (subject to compensation requirements), compel evacuation, control movement to and from the affected area, and limit sale of alcohol and firearms if necessary to address the local disaster or provide emergency services.[34] The Act also dictates that parish presidents should establish local homeland security and emergency preparednesss departments, as well as a parish emergency management advisory committee.[35] It cautions that nothing shall be construed to give a parish president control over any statewide agency.[36]

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[26] *Id.* at 1107-08 (holding that the state law "is reasonably necessary . . . to promote economic stability and growth of the state, and thereby to promote the welfare of Louisianans," and also "necessary to protect the vital interest of the state as a whole" and "a reasonable exercise of the state's police power").
[27] "the result of a natural or man-made event which causes loss of life, injury, and property damage, including but not limited to natural disasters . . . and man-made disasters." La. Stat. Ann. § 29:723(4).
[28] *Id.* § 29:723(5).
[29] *Id.* § 29:735.
[30] *Cooley v. Acadian Ambulance*, 2010-1229, p. 9–10 (La. App. 4 Cir. 5/4/11); 65 So.3d 192, 197–98 (citing *Freeman v. State of Louisiana*, 2007–1555, pp. 5–6 (La. App. 4 Cir. 4/2/08), 982 So.2d 903, 908).
[31] *Banks v. Parish of Jefferson*, 08-27, p. 13–16 (La. App. 5 Cir. 6/19/08), 990 So.2d 26, 32–34.
[32] Id. § 29:727(D). The Act states that only parish presidents can declare local emergencies, except as otherwise provided in the chapter, which also appears to allow the governor to declare an emergency (though it does not specify local emergencies). La. Stat. Ann. § 29:724(B)(1).
[33] *Id.* § 29:727(F)(1).
[34] *Id.* §§ 29:727(F)(2)–(8).
[35] *Id.* §§ 29:727(B)–(C), (I).
[36] *Id.* (E).

The mayor or chief executive officer of a municipality is authorized to take action "whenever a situation develops which [they] determine[] . . . requires immediate action to preserve the public peace, property, health, or safety within the municipality or to provide for continued operation of municipal government."[37] In such a situation, the municipal chief executive can take measures similar to those a parish president may take in the event of a disaster.[38] Municipalities are also directed to provide resources as determined necessary by the parish president.[39]

Louisiana also has a statute specifically addressing health emergencies. Most of the powers in this act are designated to the governor's office. The statute does specify that the governor should exercise these powers "in consultation with . . . state, regional and local public health emergency agencies."[40]

VI. Local Legislative Immunity

Forty-three state constitutions have some sort of "speech or debate" clause, which essentially provides absolute immunity to state legislators for their legislative acts. Federal legislators enjoy the same immunity. These constitutional provisions ensure that legislators cannot be held liable for their actual speech or debate on the legislative floor, nor for other legislative acts such as voting and participating in committee meetings. Unfortunately, this legislative immunity generally does not explicitly extend to local legislators. As a result, states can punish local legislators for the exact kinds of actions for which state officials themselves are immune from liability.

Louisiana has a constitutional provision immunizing the speech of its state legislators. La. Const. art. III, § 8 ("No member shall be questioned elsewhere for any speech in either house."). This provision has been held to be an "absolute bar to interference" with legislators "acting within the legitimate legislative sphere."[41] Courts of appeal have held that this prohibition extends to local legislative bodies, including parish and city governments. In *Ruffino v. Tangipahoa Parish Council*, a landowner sought an injunction to stop the parish council from discussing a contract the landowner had made on his property. The appellate court reversed the injunction, finding that it was "clearly in violation" of the speech or debate clause and that "[t]he prohibition extends not only to the Louisiana legislature but also other legislative bodies such as the legislative bodies of parish and city governments."[42] The Third Circuit Court of Appeal followed *Ruffino* and stated that the clause protected local legislators in two defamation suits against a city alderman.[43] These

[37] *Id.* § 29:737(A).
[38] *Id.* § 29:737(B).
[39] *Id.* § 29:730.2.
[40] *Id.* § 29:769.
[41] *Parish of Jefferson v. SFS Construction Group, Inc.*, 01–CA–1118, p. 4 (La. App. 5 Cir. 2/13/02); 812 So.2d 103, 105 (citing *Copsey v. Baer*, 593 So.2d 685 (La. Ct. App. 1991)).
[42] 06–2073, p. 4 (La. App. 1 Cir. 6/8/07); 965 So. 2d 414, 417.
[43] *Cormier v. Perry*, 2018-95, p. 3 (La. App. 3 Cir. 06/06/2018); 2018 WL 2731206; *Johnson v. Perry*, 2018-93, p. 2 (La. App. 3 Cir. 6/6/18); 2018 WL 2731237.
The court found that in each case, the alderman had made out a prima facie case that his statements were made in his role as alderman and in furtherance of his right of free speech on a public issue. *Cormier*, 2018 WL 2731206 p. 3; *Johnnson*, 2018 WL 2731237 p. 5.

cases specifically look to legislative speech and suggest fairly strong protection for legislative statements.

VII. Private Law Exception

An additional consideration in assessing whether a local government has the authority to adopt a particular policy is whether state law recognizes a "private law exception." Private law can generally be defined as law that "establishes legal rights and duties between and among private entities."[44] Some states, either by constitutional provision, statute, or case law, prohibit municipalities from regulating private law. This can take the form of a "subject-based" exception prohibiting any regulation of "private law" or a narrower exception prohibiting private rights of action.[45]

Louisiana does recognize a private law exception. Its constitution provides that "No local governmental subdivision shall . . . except as provided by law, enact an ordinance governing private or civil relationships."[46] This language is fairly broad. It does not include an exception for when local governments are exercising an "independent municipal power," as is found in several other state constitutions.[47]

The Louisiana Supreme Court has hesitated to rely on this language to invalidate local legislation.[48] For example, the Louisiana Supreme Court held New Orleans' minimum wage law invalid because it was an unconstitutional exercise of the police power, without reaching the claim that it altered private or civil relationships.[49] Louisiana courts have also held that certain measures do not govern private or civil relationships in violation of this provision. The Louisiana Supreme Court held that a local inheritance tax did violate the provision because it did not regulate or govern any relationships established by the legislature, specifically that between a property owner and a legatee.[50] The court seemed to suggest that imposing a tax is different than regulating a private or civil relationship.[51] Similarly, an appellate court found that an ordinance allowing registration of domestic partnerships did not violate the provision, since it merely allowed registration of these partnerships and did not affect the state's rights to regulate civil relationships between domestic partners.[52] The ordinance did not "rule[] domestic partnerships

[44] Gary T. Schwartz, The Logic of Home Rule and the Private Law Exception, 20 UCLA L. Rev. 671, 688 (1973).
[45] Paul Diller, The City and the Private Right of Action, 64 Stan. L. Rev. 1109 (2012).
[46] La. Const. Art. VI, § 9.
[47] Diller, The City and the Private Right of Action, at 1165 n.85.
[48] *Id.*
[49] *Campaign for Living Wage*, 825 So. 2d at 1108. Two judges did express in concurring opinions that they believed New Orleans' statute violated art. VI, § 9. *Campaign for Living Wage*, 825 So. 2d at 1108–09 (Calogero, C.J., concurring in part); id. at 1111 (Weimer, J., concurring).
[50] *Hildebrand v. City of New Orleans*, 549 So.2d 1218, 1223–24 (La. 1989).
[51] Id. at 1224 n.8 (noting that "[t]he Civil Code governs the ownership of property, but the Constitution permits a local service charge on owners of immovables" and that "[t]he Civil Code also regulates sales, but the Constitution permits local sales taxes" (citations omitted)).
[52] *Ralph v. City of New Orleans*, 2008-0767, p. 13–17 (La. App. 4 Cir. 1/15/09); 4 So.3d 146, 155–56.

by right or authority, exercise[]s a directing or restraining influence over the partnerships, or guide[] them" and therefore did not "govern" in violation of the provision.[53]

These cases suggest that imposing a tax may not "govern" private or civil relationships in contravention of the Louisiana constitution. Similarly, ordinances that do not initiate, direct, guide, or terminate private relationships are likely acceptable. However, ordinances that do regulate in this manner are more likely to "govern" and possibly run afoul of the constitutional prohibition. It is also worth noting that regulating private or civil relationships may be closely related to an exercise of police power, and therefore laws that regulate such relationships may also draw challenges claiming that they abridge the state's police power in violation of the state constitution.[54]

Finally, it may also be worth noting that New Orleans has a human rights commission which enforces an antidiscrimination law that protects more groups than the state's law does, but that local nondiscrimination ordinance does not include a private right of action.[55]

VIII. State Procedural Constraints on Enacting Preemption Laws

A. Single Subject Rule

The Louisiana constitution provides that bills must be confined to a single subject, except for appropriations bills and recodification or rearrangement of a system of laws.[56]

B. Limits on Local or Special Laws

Louisiana has a constitutional provision prohibiting a variety of types of local and special laws.[57] The Louisiana courts give distinct meanings to local and special laws. A prohibited local law is one that operates only in a particular locality without the possibility of extension,[58] unless the conditions under which it operates do not exist in other localities.[59] For example, a law imposing a population classification fixed on the 1990 census was a local law, since this law could not

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[53] *Id.*

[54] See *Campaign for Living Wage*, 825 So.2d at 1108 (finding New Orleans' minimum wage law invalid because it abridged the police power of the state).

[55] Diller, The City and the Private Right of Action, at 1165; New Orleans, La. Municipal Code § 86-22 (prohibiting discrimination on the basis of "race, creed, national origin or ancestry, color, religion, gender or sex, sexual orientation, gender identification, marital status, age, physical condition or disability"); La. Stat. Ann. § 23:332 (prohibiting discrimination on the basis of "race, color, religion, sex, or national origin"). New Orleans has, however, created a private right of action for taxpayers to sue for a refund. New Orleans, La. Municipal Code § 150-756.

[56] [56] LA. CONST. art. III, § 15(A).

[57] LA. CONST. art. III, § 12. Such laws may not be passed "except as otherwise provided in this constitution." Id.

[58] *Deer Enter. LLC v. Parish Council of Washington Parish*, 2010-0671, p. 6 (La. 1/19/11); 56 So.3d 936, 942 (citing *Kimball v. Allstate Ins. Co.*, 97–2885 (La. 4/14/98); 712 So.2d 46, 51) ("When the operation of a law is limited to certain parishes, it is immediately suspect as a local law.")).

[59] *Id.* ("[A] law is not local, even though its enforcement may be restricted to a particular locality or localities, where the conditions under which it operates simply do not prevail in other localities.").

extend its coverage.[60] A law may also be permissible if it operates on a matter of statewide interest. A prohibited special law is one that "confers special privileges or imposes peculiar disabilities or burdensome conditions" on a group that is "arbitrarily selected" from those to whom the law would otherwise apply,[61] in order to "secure some private advantage."[62] For example, the Louisiana supreme court found a law applying only to one athletic association, but not to others operating in Louisiana, to be a special law.[63]

Topics on which the state legislature may not enact a special or local law include: conducting elections; changing names or authorizing adoptions; civil or criminal procedure; creation or maintenance of roads, ferries, or bridges; regulation of labor, trade, or manufacturing; exempting property from taxation; creating or amending corporate charters; management of schools; legalizing unauthorized acts of a state or political subdivision officer; and defining a crime.[64] Additionally, the legislature may not enact a special law indirectly "by the partial repeal or suspension of a general law."[65]

Louisiana courts apply a two-prong approach to determine constitutionality under this section. First, the court asks whether a law is a prohibited local or special law.[66] Upon determination that a law is a prohibited local or special law, the court determines whether the law concerns a prohibited subject matter listed in Article III, § 12. If it does, the law will constitute a prohibited special or local law in violation of the Louisiana Constitution.[67]

In addition to the prohibition on certain types of local and special laws, the state constitution provides that no local or special law shall be passed at all unless notice is published in the affected jurisdiction's official journal at least twice, at least 30 days before the law is introduced.[68] For a local law to create a special crime prevention district, notice must be posted in the official journal for at least three days, and must specify the substance and any new fee authorization.[69]

C. Prohibition Against Unfunded Mandates

Louisiana has a constitutional provision that prohibits the state from imposing certain unfunded mandates on local governments.[70] A state law requiring increased expenditures of a locality only becomes effective when the locality approves it by ordinance or resolution, or when the

[60] *State v. Brazley*, 2000-0923, p. 5 (La. 11/28/00); 773 So.2d 718, 721.
[61] *La. High School Athletics Ass'n*, 107 So.3d at 601.
[62] *Deer Enter.*, 56 So.3d at 944.
[63] *La. High School Athletics Ass'n*, 107 So.3d at 601.
[64] *Id.* § 12(A)(1)–(10).
[65] *Id.* § 12(B).
[66] *Louisiana High Sch. Athletic Ass'n v. State*, 2012-1471, p. 20 (La. 1/29/13); 107 So.3d 583, 599.
[67] *Id.* at 603 (finding a special law unconstitutional because it amended the bylaws of a private entity, which is prohibited under La. Const. art. III, § 12(A)(7).
[68] LA. CONST. art. III, § 13(A).
[69] *Id.* § 13(B).
[70] LA. CONST. art. VI, § 14.

legislature appropriates funds to the affected locality.[71] However, this rule does not apply to several types of laws: laws requested by the subdivision, definitions of new crimes, laws enacted before 1991, laws or executive orders promulgated to comply with a federal mandate, laws providing for benefits for municipal policemen or firemen, laws enacted with a two-thirds majority, or laws with "insignificant fiscal impact."[72] Similar conditions are placed on laws that increase financial impact on school boards, and similar exceptions apply, plus two additional exceptions related to educational requirements.[73]

[71] *Id.* § 14(A)(1).
[72] *Id.* § 14(A)(2).
[73] *Id.* § 14(B).