

THE POWER OF MUNICIPALITIES TO ENACT LEGISLATION GRANTING LEGAL RIGHTS TO NONHUMAN ANIMALS PURSUANT TO HOME RULE

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Nonhuman animals are “things” under the laws of all fifty states of the United States.¹ Subject to relevant regulations or statute, nonhuman animals may therefore be purchased, sold, used, exploited, and killed as the owner wishes. In 2013, the Nonhuman Rights Project filed its first groundbreaking common law habeas corpus cases in New York State on behalf of imprisoned chimpanzees and sought to persuade the courts to transform their status from legal things that lack the capacity for legal rights to legal persons capable of possessing their own legal rights.² This Article broadly explores whether a state’s political subdivisions may exercise home rule jurisdiction to enact ordinances or bylaws that grant a legal right to nonhuman animals. While this Article is not premised on the granting of a specific legal right to a specific species of nonhuman animal, as such a determination will be unique to the particular municipality, it discusses why an ordinance or bylaw that enacted a law granting the right to bodily liberty to appropriate nonhuman animals within its jurisdiction would be upheld if it were challenged.

I. THE BASICS OF HOME RULE

Local governments in the United States are municipal corporations.³ Generally, a municipal corporation is “a body politic⁴ and corporate, possessing a legal entity and name, a seal by which to act in solemn form, a capacity to contract and be contracted with, to sue and be sued, a *persona standi in judicio*, to hold and dispose of property, and thereby

1. SONIA S. WAISMAN, PAMELA D. FRASCH & BRUCE A. WAGMAN, *ANIMAL LAW, CASES AND MATERIALS* 56–57 (5th ed. 2014).

2. See Verified Petition, Nonhuman Rights Project Inc. *ex rel.* Tommy v. Lavery, No. 002051/2013 (N.Y. Sup. Ct. Fulton Cty. filed Dec. 3, 2013).

3. Municipal corporations are a type of public corporation “created for political purposes only, with political powers to be exercised for purposes connected with the public good in the administration of civil government, as distinguished from a private corporation which one created for purposes other than those of government.” 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 2:3 (3d ed. 2010) (footnote omitted).

4. The significance of being a “body politic” is that the incorporators of municipal corporations are “endowed with the right to exercise in their collective capacity a portion of political power of the state.” 1 MCQUILLIN, *supra* note 3, § 2:8.

acquire rights and incur liabilities, with power of perpetual succession, inhabitants and territory.”⁵ As the United States Constitution makes no mention of municipal governments, their creation and powers are left to the states.⁶ A municipality therefore has “no inherent right of self government” and “is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges, as it sees fit.”⁷ Municipal corporations are entities created by state legislatures⁸ to assist a state government as its agent, and to regulate and administer the local and internal affairs of the community within its boundaries for the benefit of its inhabitants.⁹

5. 1 *Id.*; see also *Evans v. Metro. Utils. Dist.*, 188 N.W.2d 851, 857 (Neb. 1971) (“A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. Municipal corporations as they exist in this country are bodies politic and corporate of the general character above described, established by law partly as an agency of the state to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated.”); *Lauterbach v. Centralia*, 304 P.2d 656, 659 (Wash. 1956) (“A municipal corporation is [defined as] a body politic established by law as an agency of the state—partly to assist in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the incorporated city, town, or district.” (citing *Columbia Irrigation Dist. v. Benton County*, 270 P. 813, 814 (Wash. 1928))).

6. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (“The number, nature a [sic] duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.” (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907))); see also *Williams v. Baltimore*, 289 U.S. 36, 40 (1933) (“A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” (citing *City of Trenton*, 262 U.S. at 187)).

7. *City of Trenton*, 262 U.S. at 187.

8. See *id.*; see also *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 664 (1978) (“[Municipal corporations are] the mere instrumentality for the administration of state law.” (quoting *Monroe v. Pape*, 365 U.S. 167, 190 (1961))); *Arques v. City of Sausalito*, 272 P.2d 58, 61 (Cal. Ct. App. 1954) (“Upon its incorporation in 1893 Sausalito became ‘but a department of the State organized for the more convenient administration of certain powers belonging to the State, and such corporations, in the management and control over streets . . . within their limits, and in actions for the vindication and preservation of the public rights therein, exercise a part of the sovereignty of the State.’” (quoting *People ex rel. Bryant v. Holladay*, 29 P. 54, 56 (Cal. 1892))); *People v. De Jesus*, 430 N.E.2d 1260, 1262 (N.Y. 1981).

9. See 1 McQUILLIN, *supra* note 3, § 2:13; see also *Cumnock v. City of Little Rock*, 243 S.W. 57, 57 (Ark. 1922) (“Municipal corporations are created to aid the State Government in the regulation and administration of local affairs.” (quoting *Ottawa v. Carey*, 108 U.S. 110, 121 (1883))). See generally *McClain v. City of South Pasadena*, 318 P.2d 199, 210 (Cal. Ct. App. 1957) (“The primary purpose of a municipal corporation is to contribute towards the welfare, health, happiness, and interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits.”); *Pueblo v. Flanders*, 225 P.2d 832, 833 (Colo. 1950) (addressing whether a municipality can furnish fire protection outside its city limits); *Texarkana v. Wiggins*, 246 S.W.2d 622, 627–28 (Tex. 1952) (finding ordinance void).

The elements of a municipal corporation are as follows: (1) incorporation under a state's constitution or statutes, (2) a charter, (3) a population and prescribed area within which the entity's governmental and corporate functions are exercised, (4) consent from those within the corporate entity's territory to that entity's creation, (5) a corporate name, and (6) the right of local self-government.¹⁰ Forty-five states provide certain municipal corporations the power "to frame and adopt their own charters," subject, of course, to the laws and policy of the state.¹¹ This is called "home rule" and its purpose is to give local communities the powers to regulate their municipal affairs.¹²

Unlike other municipal corporations, which are created and operate under the general laws of the state, with the state dictating the terms of their charters,¹³ home rule municipalities typically place their autonomy over local activity, whether carrying out or enforcing state law or municipal regulations, in the hands of municipal officers.¹⁴ The municipalities' creation of their own charters, tailored to regulate their affairs, is what sets home rule municipalities apart from other municipal corporations.¹⁵ Once a charter is adopted, it becomes the law of the municipality and, when that charter's laws relate purely to its municipal

10. See 1 MCQUILLIN, *supra* note 3, § 2:9.

11. Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin allow some form of home rule powers. See sources cited *infra* notes 19, 23, 30. Alabama, Mississippi, Vermont, West Virginia, and Wyoming are not home rule states. See also 1 MCQUILLIN, *supra* note 3, § 1:42.

12. *Butterworth v. Boyd*, 82 P.2d 434, 438 (Cal. 1938) ("The purpose of the constitutional [home rule] provisions was to make municipalities self-governing and free from legislative interference with respect to matters of local or internal concern."); *Caulfield v. Noble*, 420 A.2d 1160, 1163 (Conn. 1979) ("[H]ome rule legislation was enacted 'to enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way . . .'" (quoting *Fragley v. Phelan*, 58 P. 923, 925 (Cal. 1899))); *Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1975) ("[T]he intention of the framers of the [home rule] amendment was to grant [counties] power to rule their local affairs and government (other than to levy taxes), subject to the superior authority of the General Assembly." (citing Sam F. Scheidler, *Survey of Iowa Law: Implementation of Constitutional Home Rule in Iowa*, 22 DRAKE L. REV. 294, 297, 302, 304 (1973))); *City of Portland v. Welch*, 59 P.2d 228, 232 (Or. 1936) ("The purpose (referring to the home rule amendments) was to give local communities full power in matters of local concern.").

13. 1 MCQUILLIN, *supra* note 3, § 3:16.

14. 6 *Id.* § 1:44.

15. See, e.g., *Ringsred v. Duluth*, 828 F.2d 1305, 1308 (8th Cir. 1987); *Strode v. Sullivan*, 236 P.2d 48, 50 (Ariz. 1951); *Domar Electric, Inc. v. City of Los Angeles*, 885 P.2d 934, 938 (Cal. 1994); *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 212 (Mo. 1986) (en banc).

affairs, those laws supersede all conflicting general laws of the parent state.¹⁶

A. *Forms of Home Rule*

There are three forms of home rule: statutory, legislative, and constitutional. The weakest and most easily altered, removed, overridden, or undone by the state is statutory.¹⁷ This occurs when a state constitution is silent on home rule, but the legislature permits municipalities to govern its local affairs.¹⁸ These states include Arkansas, Indiana, Kentucky, Minnesota, Maine, Nevada, North Carolina, and North Dakota.¹⁹

Legislative home rule occurs when a state constitution authorizes home rule, but further action is required before a municipality may exercise home rule powers. For example, the state constitution may require a municipality to first adopt a home rule charter²⁰ or require the legislature to enact statutes delegating home rule authority to local governments.²¹ These constitutional provisions are not self-executing and bar all exercise of municipal power absent enabling legislation or creation of a charter.²² The majority of the states—Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Kentucky,

16. 1 MCQUILLIN, *supra* note 3, § 3:44.

17. See Ky. Licensed Beverage Ass'n v. Louisville-Jefferson Cty. Metro Gov't, 127 S.W.3d 647, 649 (Ky. 2004) (“[The] ordinance [regulating certain distributions of alcohol] is in conflict with state statutes on the subject and is not authorized pursuant to any home rule statute”); Region 10 Client Mgmt., Inc. v. Town of Hampstead, 424 A.2d 207, 209 (N.H. 1980) (“While it is obvious that New Hampshire has a long tradition of local home rule, plenary authority exists within the legislature to override local control when necessary for the greater good.” (citing Pub. Serv. Co. v. Town of Hampton, 411 A.2d 164, 167 (N.H. 1980))); Wagner v. Mayor of Newark, 132 A.2d 794, 802 (N.J. 1957) (“By permitting the Rent Control Act of 1953 . . . to expire the Legislature indicated that rent control was at an end in New Jersey except in those municipalities that qualified under the terms of the subsequent special act, chapter 146 of the Laws of 1956, by taking appropriate conforming action. The City of Newark did not take appropriate action by adopting a conforming ordinance and it had no power to legislate other than in the manner expressed in the special law. . . . [T]he ordinance of the City of Newark, here involved, is hereby declared to be void and of no effect.”); see also Municipality of Helena-West Helena v. Weaver, 286 S.W.3d 132, 136 (Ark. 2008) (citing Calibra v. City of Fayetteville, 644 S.W.2d 249, 252 (Ark. 1982)); Franklin County v. Fieldale Farms Corp., 507 S.E.2d 460, 461 (Ga. 1998).

18. FLA. STAT. § 166.021(1) (2016); KY. REV. STAT. ANN. § 83.420 (West 2006).

19. ARK. CODE ANN. § 14-43-502 (2013); IND. CODE § 36-1-3-2 (Repl. vol. 2012); KY. REV. STAT. ANN. § 82.082 (West 2006); ME. STAT. tit. 30-a § 3001 (2015); MINN. STAT. § 462.351 (2014); NEV. REV. STAT. § 266.010 (2015); N.C. GEN. STAT. § 160A-11 (2015); N.D. CENT. CODE § 40-05-01 (2006).

20. See, e.g., COLO. CONST. art. XX, § 6; WIS. CONST. art. XI, § 3.

21. See CONN. CONST. art. X, § 1.

22. DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 129 (4th ed. 1996); 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 4:2 (2d ed. 2012).

Louisiana, Maryland, Michigan, Missouri, New Hampshire, New York, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, and Wisconsin—fall into this middle category.²³

The strongest form of home rule occurs when the state constitution expressly permits municipalities to govern its local affairs, expressly delegates fields of power, and/or expressly curtails the state's ability to limit or intrude upon home rule power. These provisions are self-executing and can allow the exercise of municipal power with²⁴ or without²⁵ a charter.²⁶ These municipalities have a constitutional right to govern its local affairs²⁷ but are still subject to state regulation.²⁸ However, the state cannot prevent the valid exercise of municipal power without passing a constitutional amendment.²⁹ The fourteen constitutional home rule jurisdictions—Alaska, California, Illinois, Iowa, Kansas, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, and Tennessee—have the strongest home rule power, and thus are where an ordinance granting certain legal rights to nonhuman animals would be most likely to stand.³⁰

23. ARIZ. CONST. art. XIII, § 2; COLO. CONST. art. XX, § 6; CONN. CONST. art. X, § 1; DEL. CONST. ch. 8, subchapter I, § 802; FLA. CONST. art. VIII, § 6(e); GA. CONST. art. IX, § 2, para. 1; HAW. CONST. art. VII, § 2; IDAHO CONST. art. XII, § 2; KY. CONST. pt. II, § 156b; LA. CONST. art. VI, § 4; MD. CONST. art. XI-A; MICH. CONST. art. VII, § 22; MO. CONST. art. VI, § 19(a); N.H. CONST. pt. I, art. XXXIX; N.Y. CONST. art. IX, § 2; OKLA. CONST. art. XVIII, § 3(a); R.I. CONST. art. XIII, § 6; S.C. CONST. art. VIII, § 7; S.D. CONST. art. IX, § 2; TEX. CONST. art. XI, § 5(a); UTAH CONST. art. XI, § 5; WASH. CONST. art. XI, § 11; WIS. CONST. art. XI, § 3.

24. See, e.g., CAL. CONST., art. XI, §§ 3(a), 4(g), 5 & 6; N.M. Const. art. X., § 6.

25. See, e.g., MONT. CONST. art. XI, § 6.

26. See 1 MARTINEZ, *supra* note 22, § 4:16.

27. See 1 MCQUILLIN, *supra* note 3, § 1:44 (“Rights thus emanating by [state] constitutional grant are viewed as constitutional rights protected from invasion or interference by the people of the state in their representative legislative capacity.”).

28. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) (citing *Barnes v. District of Columbia*, 91 U.S. 540, 544–45 (1875)).

29. 2 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 4:79 (3d ed. 2014).

30. ALASKA CONST. art. X, § 1 (“The purpose of this article is to provide for maximum local self-government with a minimum of local government units, and to prevent duplication of tax-levying jurisdictions. A liberal construction shall be given to the powers of local government units.”); CAL. CONST. art. XI, § 5(a) (“It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.”); ILL. CONST. art. VII, § 6(i) (“Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State’s exercise to be exclusive.”); IOWA CONST. art. III, § 38A (“Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy

any tax unless expressly authorized by the general assembly. The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.”); KAN. CONST. art. XII, § 5(d) (“Powers and authority granted cities pursuant to this section shall be liberally construed for the purpose of giving to cities the largest measure of self-government.”); MASS. CONST. art. II, § 6 (“Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.”); MONT. CONST. art. XI, § 6 (“A local government unit adopting a self-government charter may exercise any power not prohibited by this constitution, law, or charter. This grant of self-government powers may be extended to other local government units through optional forms of government provided for in section 3.”); NEB. CONST. art. XI, § 2 (“Any city having a population of more than five thousand (5000) inhabitants may frame a charter for its own government, consistent with and subject to the constitution and laws of this state”); N.J. CONST. art. IV, § 7, para. 11 (“The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.”); N.M. CONST. art. X, § 6(E) (“A liberal construction shall be given to the powers of municipalities.”); OHIO CONST. art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”); OR. CONST. art. XI, § 2 (“Corporations may be formed under general laws, but shall not be created by the Legislative Assembly by special laws. 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, and the exclusive power to license, regulate, control, or to suppress or prohibit, the sale of intoxicating liquors therein is vested in such municipality; but such municipality shall within its limits be subject to the provisions of the local option law of the State of Oregon.”); PA. CONST. art. IX, § 2 (“Municipalities shall have the right and power to frame and adopt home rule charters. Adoption, amendment or repeal of a home rule charter shall be by referendum. The General Assembly shall provide the procedure by which a home rule charter may be framed and its adoption, amendment or repeal presented to the electors. If the General Assembly does not so provide, a home rule charter or a procedure for framing and presenting a home rule charter may be presented to the electors by initiative or by the governing body of the municipality. A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.”); TENN. CONST. art. XI, § 9 (“Any municipality after adopting home rule may continue to operate under its existing charter, or amend the same, or adopt and thereafter amend a new charter to provide for its governmental and proprietary powers, duties and functions, and for the form, structure, personnel and organization of its government, provided that no charter provision except with respect to compensation of municipal personnel shall be effective if inconsistent with any general act of the General Assembly and provided further that the power of taxation of such municipality shall not be enlarged or increased except by general act of the General Assembly.”).

B. Using Home Rule Powers

Municipalities govern through ordinances and resolutions. Some charters use words like “bylaws” or “measures” interchangeably with “ordinance.”³¹ An ordinance, under any name, is a local law that prescribes general, uniform, and permanent rules of conduct that relate to the corporate affairs of the municipality;³² it is a legislative act. In the municipal context, a resolution is an expression of local policy or opinion that a municipal corporation wishes to issue.³³ Accordingly, acts made in a ministerial capacity or done for a temporary effect may be accomplished by a resolution, whereas local legislation of a permanent, binding effect must be accomplished by ordinance.³⁴

Municipal ordinances are divided into four categories: (1) ordinances enacted under the municipality’s police powers,³⁵ (2) franchise or contract ordinances,³⁶ (3) public work or improvement

31. *Whitmore v. Carr*, 38 P.2d 802, 804 (Cal. Ct. App. 1934); *Township of North Bergen v. City of Jersey*, 556 A.2d 1255, 1257 (N.J. Super Ct. App. Div. 1989) (“Usually an ordinance is a legislative act (general or permanent in nature), and a resolution is ministerial in character (administrative, procedural, or temporary in nature or effect).” (citing *Albigese v. Jersey City*, 324 A.2d 577, 578 (N.J. Super. Ct. App. Div. 1974))); *Mayor of Rutherford v. Swink*, 35 S.W. 554, 555 (Tenn. 1896) (“The terms ‘by-laws,’ ‘ordinances,’ and ‘municipal regulations’ have substantially the same meaning, and are defined to be ‘the laws of the corporate district, made by the authorized body, in distinction from the general law of the state.’” (quoting *State v. Lee*, 13 N.W. 913, 914 (Minn. 1882))); 5 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 15:2 (3d ed. 2013).

32. *See Little v. City of North Miami*, 805 F.2d 962, 966 (11th Cir.1986) (“Florida law explicitly provides that an ordinance, and not a resolution is ‘enforceable as a local law.’” (citing FLA. STAT. § 166.041(1)(a) (1985))); *R&R Pool & Patio, Inc. v. Zoning Bd. of Appeals of Ridgefield*, 19 A.3d 715, 722 (Conn. App. Ct. 2011) (“[A]n ordinance is defined as ‘an authoritative law or decree.’” (quoting *Ordinance*, BLACK’S LAW DICTIONARY (9th ed. 2009))); *State ex rel. Streeter v. Mauer*, 985 S.W.2d 954, 956 (Mo. Ct. App. 1999) (“An ‘ordinance’ is defined as ‘a law enacted by a municipality or county.’” (quoting MO. R. CIV. P. 37.06(k))); 5 MCQUILLIN, *supra* note 31, § 15:1.

33. *See Valley Brook Dev., Inc. v. City of Bettendorf*, 580 N.W.2d 730, 731 (Iowa 1998) (“[A] city council resolution cannot undermine a city ordinance. The validity of an ordinance is not affected by a resolution; it is amended, repealed, or suspended only by an ordinance.” (citing *Massey v. City Council of Des Moines*, 31 N.W.2d 875, 881 (Iowa 1948))).

34. *See Little*, 805 F.2d at 966 (“Florida law explicitly provides that an ordinance, and not a resolution is ‘enforceable as a local law.’”); *Inlet Assocs. v. Assateague House Condo. Ass’n*, 545 A.2d 1296, 1303 (Md. 1988) (“An ordinance is distinctly a legislative act; it prescribes ‘some permanent rule of conduct or government, to continue in force until the ordinance is repealed.’” (quoting 5 MCQUILLIN, *supra* note 31, § 15:2)).

35. *See* 5 MCQUILLIN, *supra* note 31, § 15:9; 7A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24:490 (3d ed. 2015).

36. *See* 5 MCQUILLIN, *supra* note 31, §§ 15:9, 15:24, 15:36; *see also* *Los Angeles County v. S. Cal. Tel. Co.*, 196 P.2d 773, 775 (Cal. 1948); *Cmty. Telecomm., Inc. v. Heather Corp.*, 677 P.2d 330, 331 (Colo. 1984); *KTVB, Inc. v. Boise City*, 486 P.2d 992, 992 (Idaho 1971).

ordinances,³⁷ and (4) ordinances regulating municipal officers and administration of its municipal business.³⁸ As this Article discusses whether a home rule municipality could pass an ordinance granting a right to a nonhuman animal, only ordinances enacted under municipal police powers will be addressed.³⁹

The United States Supreme Court has stated that the “traditional police power of the States is defined as the authority to provide for the public health, safety, and morals.”⁴⁰ Generally, states have delegated this police power to municipal corporations, which permits them to create ordinances safeguarding “the public health, safety, morals, and general welfare” within its respective territory.⁴¹

A valid ordinance must (1) comport with the United States Constitution and treaties;⁴² (2) not be superseded by any laws of the

37. See *Russ Bldg. P’ship v. City of San Francisco*, 750 P.2d 324, 329 (Cal. 1988); *Collier County v. State*, 733 So. 2d 1012, 1017 (Fla. 1999); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 445 (Wis. 1966); 5 MCQUILLIN, *supra* note 31, § 15:9.

38. See 5 MCQUILLIN, *supra* note 31, § 15:9.

39. See 5 *id.*; 7A MCQUILLIN, *supra* note 35, § 24:490.

40. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991).

41. *McKay Jewelers, Inc. v. Bowron*, 122 P.2d 543, 546 (Cal. 1942). See generally *Carlin v. City of Palm Springs*, 92 Cal. Rptr. 535 (Ct. App. 1971) (“In the exercise of its police power, a city has broad discretion in determining what is reasonable in endeavoring to protect the public health, safety, morals, and general welfare.”); *Opyt’s Amoco, Inc. v. S. Holland*, 595 N.E.2d 1060 (Ill. 1992) (“Pursuant to its police power, a municipality has the power to restrict or prohibit the exercise of a legitimate trade where it is necessary for the protection of the public health, morals, safety, or welfare.”); *Figura v. Cummins*, 122 N.E.2d 162 (Ill. 1954) (holding the mere possibility of injury does not sufficiently fall within the scope of a state police power); *Fairmont Foods Co. v. Duluth*, 110 N.W.2d 155 (Minn. 1961) (“The court recognized the unquestioned power of a municipality to protect the health and safety of its people.”); *S. Burlington Cty. NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975) (“[A] zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare.”); *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. Ct. App. 2005) (“All municipalities have been granted certain powers by the legislature, including the so-called general welfare and police powers.”); *Streb v. Rochester*, 222 N.Y.S.2d 813 (Sup. Ct. 1961) (“A municipality, pursuant to a state grant of power, has recognized authority to enact, within its sphere, ordinances pointed toward securing the health, safety, and welfare of the public, usually under police power.”); *Jack’s Supper Club v. City of Norman*, 361 P.2d 291 (Okla. 1961) (“[T]he police power granted to the City of Norman by its Charter gave it the right to pass the ordinance in question to protect the public health, safety, morals and general welfare of society.”); *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980) (stating general welfare power grants local governments independent authority apart and in addition to police power).

42. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (“We have held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes. Also, for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.” (first citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 698–99 (1984); and then citing *City of Burbank v. Lockhead Air Terminal, Inc.*, 411 U.S. 624, 641 (1973))).

state;⁴³ (3) be reasonably related to the safety, morals, or general welfare of the municipality's inhabitants in both its means and its ends;⁴⁴ (4) have terms definite enough to guide or warn those to whom it applies;⁴⁵ (5) be uniform in application;⁴⁶ and (6) not unreasonably interfere with the rights of those it affects.⁴⁷ A municipal ordinance may, in some instances,

43. CAL. CONST., art. XI, § 7 (“A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”); N.M. STAT. ANN. § 3-17-1 (2013) (“The governing body of a municipality may adopt ordinances or resolutions not inconsistent with the laws of New Mexico.”); Crippen v. City of Cedar Rapids, 618 N.W.2d 562, 568 (Iowa 2000) (“In interpreting cities’ home rule power, this court has noted that ‘cities now have the authority to act unless a particular power has been denied them by statute.’” (quoting *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702, 703–04 (Iowa 1993))).

44. See *De Weese v. Town of Palm Beach*, 812 F.2d 1365, 1365 (11th Cir.1987) (“Because this prohibition . . . is not rationally related to any legitimate Town interest, we hold that the ordinance is unconstitutional.”); *Fisher v. City of Berkeley*, 693 P.2d 261, 307 (Cal. 1984) (en banc) (“[P]laintiffs cannot successfully contend that it is not rationally related to achieving compliance with the ordinance.”), *aff’d on other grounds*, 475 U.S. 260, 270 (1986); *Steffes v. City of Lawrence*, 160 P.3d 843, 852–53 (Kan. 2007) (“The City’s ordinance conveys sufficient definite warning and fair notice as to the prohibited conduct in light of common understanding The ordinance also conveys sufficient clarity to those who apply its standards to protect against arbitrary and discriminatory enforcement.” (first citing *Boyles v. City of Topeka*, 21 P.3d 974, 977 (Kan. 2001); and then citing *City of Wichita v. Hackett*, 69 P.3d 621, 627 (Kan. 2003))); *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831, 840 (Mich. 1984) (“It is precisely this rational relationship between the means used to achieve the legislative goals that must exist.”); *Kirsch Holding Co. v. Borough of Manasquan*, 281 A.2d 513, 518 (N.J. 1971) (“It is elementary that substantive due process demands that zoning regulations, like all police power legislation, must be reasonably exercised—the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.”).

45. Due process requires a lack of vagueness such that an ordinance supplies a “person of ordinary intelligence a reasonable opportunity to know what is prohibited” and “explicit standards for those who apply [it].” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). See also *Hubenthal v. County of Winona*, 751 F.2d 243, 246 (8th Cir. 1984) (holding that an ordinance prohibiting “junkyards” was not unconstitutionally vague); *Howard v. City of Lincoln*, 497 N.W.2d 53, 56 (Neb. 1993) (holding the ordinance’s use of the phrase “weeds or worthless vegetation” carried a common enough meaning and was not unconstitutionally vague, and the ordinance provided definitions that were not confusing to the average citizen).

46. *Walls v. City of Guntersville*, 45 So. 2d 468, 472 (Ala. 1950) (“These provisions [of an ordinance] are uniform in application, the standards set up are not so indefinite as to confer unlimited power and they relate directly to the health and public welfare.”); *Desert Outdoor Advert., Inc. v. County of San Bernardino*, 63 Cal. Rptr. 543, 548 (Ct. App. 1967) (upholding an ordinance which prohibited billboards, except in certain areas and under certain conditions, because it was uniform in application wherever equal conditions existed); *State v. Scoggin*, 72 S.E.2d 97, 102 (N.C. 1952) (“[A]n ordinance must be uniform and must have a reasonable relation to the evil sought to be remedied.”); 5 MCQUILLIN, *supra* note 31, § 18:8, 6A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24:54 (3d ed. 2015).

47. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (“[I]t must be said

encompass matters that are traditionally statewide concerns.⁴⁸

II. JUDICIAL REVIEW OF MUNICIPAL ORDINANCES

Courts may determine the validity of municipal ordinances.⁴⁹ When a court undertakes this determination, a rebuttable presumption exists that an ordinance is valid.⁵⁰ When an ordinance is claimed to exceed a

before the [zoning] ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” (citing *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917)); *De Weese*, 812 F.2d at 1365 (holding dress regulation prohibiting male joggers from jogging shirtless was unreasonable); *Wilson v. City of Waynesville*, 615 S.W.2d 640, 646 (Mo. Ct. App. 1981) (“The ordinance, if given its full scope, would prohibit the embarking or discharging of passengers on a privately owned lot in Waynesville even if the lot were as large as a football field.”).

48. See, e.g., *Goodell v. Humbolt County*, 575 N.W.2d 486, 489 (Iowa 1998); *Sandlands C&D, LLC v. County of Horry*, 716 S.E.2d 280, 282 (S.C. 2011). A Florida court acknowledged that “[t]he law of domestic relations is one matter reserved for the state alone,” but, it nevertheless upheld a municipal ordinance legislating domestic partnerships because the ordinance did not legislate within the domestic relations zone that was reserved for the state. *Lowe v. Broward County*, 766 So. 2d 1199, 1205 (Fla. Dist. Ct. App. 2000) (Cardozo, J., concurring) (citing *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929)). The court stated that “[t]he [county ordinance] does not curtail any existing rights incident to a legal marriage, nor does it alter the shape of the marital relationship recognized by Florida law.” *Id.*; see also *Vela v. People*, 484 P.2d 1204, 1205 (Colo. 1971) (upholding a conviction under statewide law prohibiting disturbances of the peace even though a municipality also passed valid ordinances on same subject); *Village of Palatine v. Regard*, 557 N.E.2d 898, 902 (Ill. 1990) (permitting a city ordinance regulating driving under the influence even though similar statewide laws governed the same area of law).

49. *Dobbins v. Los Angeles*, 195 U.S. 223, 236 (1904) (“[I]t is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.”); *In re Throop*, 145 P. 1029, 1031 (Cal. 1915) (quoting *Dobbins*, 195 U.S. at 236).

50. *La Salle Nat’l Bank v. County of Cook*, 145 N.E.2d 65, 69 (Ill. 1957) (“A zoning ordinance is presumptively valid, this presumption may be overcome only by clear and convincing evidence, and the burden of proof is on the plaintiff.” (first citing *Galt v. County of Cook*, 91 N.E.2d 395, 404 (Ill. 1950); then citing *Midland Elec. Coal Corp. v. County of Knox*, 115 N.E.2d 275, 278 (Ill. 1953); and then citing *Krom v. City of Elmhurst*, 133 N.E.2d 1, 3 (Ill. 1956)); *Kropf v. City of Sterling Heights*, 215 N.W.2d 179, 189 (Mich. 1974) (“It is a necessary corollary of the above that the ordinance comes to us clothed with every presumption of validity, and it is the burden of the party attacking to prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner’s use of his property.” (quoting *Brae Burn, Inc. v. City of Bloomfield Hills*, 86 N.W.2d 166, 170 (Mich. 1957)); *Montgomery County v. Woodward & Lothrop, Inc.*, 376 A.2d 483, 494–95 (Md. 1977) (“Suffice it to say that the record convincingly demonstrates that the rezoning was comprehensive and bore a substantial relationship to the public health, comfort, safety, convenience, morals and general welfare; as such it enjoys a strong presumption of validity.” (citing *Council for Montgomery Cty. v. Dist. Land Corp.*, 337 A.2d 712, 717 (Md. 1975)));

municipal corporation's legislative power, judicial review answers two important questions: (1) Does the local government have the power it seeks to exercise, and (2) is that power limited?⁵¹ A municipal ordinance is most likely to withstand judicial scrutiny in the fourteen states that adopt the broad construction of home rule power.⁵² It is imperative that in answering the questions posed, a reviewing court look to the municipalities' state-enabling laws for home rule power.⁵³

A. Does the Municipality Have the Power it Seeks to Exercise?

To answer this question, one must examine state constitutions and their home rule provisions, state enabling statutes, the purported municipal affair to be regulated and the judicial tests applicable to that determination, and the powers set forth in the municipal charter itself.

The fourteen states with constitutional home rule, in whole or in part, have the greatest power to self-regulate and contain explicit grants of local power, and explicit or implicit instructions to interpret that power broadly, or in favor of local rule.⁵⁴ For example, Indiana's statutes impart

Quick Chek Food Stores v. Township of Springfield, 416 A.2d 840, 845 (N.J. 1980) (“[O]rdinances are presumed valid and reasonable. The burden of proof to establish that they are arbitrary and unreasonable rests on the party seeking to overturn them.” (citing Hutton Park Gardens v. Town Council of W. Orange, 350 A.2d 1, 12 (N.J. 1975))); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984) (“The presumption favors the reasonableness and validity of the ordinance. An ‘extraordinary burden’ rests on one attacking a city ordinance.” (citing Hunt v. City of San Antonio, 462 S.W.2d 536, 539 (Tex. 1971))).

51. See 1 MARTINEZ, *supra* note 22, § 4:5.

52. See *supra* note 30.

53. Historically, judicial review of home rule ordinances rested on one of two foundations. The majority rule—commonly referred to as “Dillon’s Rule”—narrowly construes “municipal affairs,” and thus home rule powers. Dillon’s Rule, propagated by Iowa Supreme Court Justice John F. Dillon in 1868 restricts a municipality’s powers. See *City of Clinton v. Cedar Rapids & Missouri River R.R.*, 24 Iowa 455, 475 (1868). Under Dillon’s Rule, a municipality has the legislative powers it has been expressly granted and those fairly or necessarily implied as incidental to those express powers. *Id.* at 480. Doubt is resolved against the exercise of municipal power. See 6 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 20:56 (3d ed. 2007). By contrast, the Cooley Doctrine, from another nineteenth century judge, Thomas Cooley from Michigan, represented the minority rule and stated “local government is [a] matter of absolute right; and the state cannot take it away.” *People ex rel. Roy v. Hurlbut*, 24 Mich. 44, 108 (1871). In 1907, the Supreme Court, in *Hunter v. City of Pittsburgh*, expressly restricted any interpretation of *inherently* expansive municipal powers. 207 U.S. 161, 177 (1907). The Court reasoned that “[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.” *Id.* at 178. After *Hunter*, the Cooley Doctrine was no longer used. However, the *Hunter* court left open the possibility for states to attribute expansive home rule powers to municipalities if they so choose. *Id.* Therefore, courts must look to a municipality’s state-enabling laws to interpret how expansive a municipality’s powers can be.

54. See *supra* note 30.

home rule powers and mandate a liberal construction, even when the state's constitution is silent on home rule,⁵⁵ while Montana's and Pennsylvania's state statutes mandate a liberal construction of home rule powers while operating in conjunction with related constitutional provisions.⁵⁶

After examining the relevant constitutional provisions and any enabling statutes, a court must determine whether the municipal or home rule government's exercise of its power concerns a "municipal affair." Certain municipal affairs may be listed in state constitutions, although such lists may not be inclusive.⁵⁷ Municipal affairs may also be expressly

55. IND. CODE § 36-1-3-2 (Repl. vol. 2012) ("The policy of the state is to grant units all the powers that they need for the effective operation of government as to local affairs."); *id.* § 36-1-3-3 ("(a) The rule of law that any doubt as to the existence of a power of a unit shall be resolved against its existence is abrogated. (b) Any doubt as to the existence of a power of a unit shall be resolved in favor of its existence. This rule applies even though a statute granting the power has been repealed."); *id.* § 36-1-3-4 ("(a) The rule of law that a unit has only: (1) powers expressly granted by statute; (2) powers necessarily or fairly implied in or incident to powers expressly granted; and (3) powers indispensable to the declared purposes of the unit; is abrogated. (b) A unit has: (1) all powers granted it by statute; and (2) all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute. (c) The powers that units have under subsection (b)(1) are listed in various statutes. However, these statutes do not list the powers that units have under subsection (b)(2); therefore, the omission of a power from such a list does not imply that units lack that power."); *id.* § 36-1-3-5 ("(a) Except as provided in subsection (b), a unit may exercise any power it has to the extent that the power: (1) is not expressly denied by the Indiana Constitution or by statute; and (2) is not expressly granted to another entity.").

56. MONT. CODE ANN. § 7-1-106 (2015) ("The powers and authority of a local government unit with self-government powers shall be liberally construed. Every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority."); 53 PA. CONS. STAT. § 2961 (2013) ("A municipality which has adopted a home rule charter may exercise any powers and perform any function not denied by the Constitution of Pennsylvania, by statute or by its home rule charter. All grants of municipal power to municipalities governed by a home rule charter under this subchapter, whether in the form of specific enumeration or general terms, shall be liberally construed in favor of the municipality.").

57. *See, e.g.*, CAL. CONST. art. XI, § 5(b) ("It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."); KAN. CONST. art. XII, § 5(b) ("Cities are hereby empowered to determine their local affairs and government including the levying of taxes, excises, fees, charges and other exactions except when and as the levying of any tax, excise, fee, charge or other exaction is limited or prohibited by enactment of the legislature applicable uniformly to all cities of the same class . . .").

restricted by some state constitutions.⁵⁸ Whether an affair constitutes a municipal affair is often determined on a state-by-state and case-by-case basis.

Even if a charter or state constitution grants broad powers over municipal affairs, nothing can be a municipal affair if the municipality's power to regulate it is limited by state or federal law. For example, the California Supreme Court has "recognized that no exact definition of the term 'municipal affairs' can be formulated, and that what constitutes a municipal affair or matter of statewide concern may change over time in response to changing conditions in society."⁵⁹ Generally, "municipal action which affects persons outside of the municipality becomes to that extent a matter which the state is empowered to prohibit or regulate"⁶⁰ The Illinois Supreme Court has stated,

"Whether a particular problem is of statewide rather than local dimension must be decided not on the basis of a specific formula or listing set forth in the Constitution but with regard for the nature and extent of the problem, the units of government which have the most vital interest in its solution, and the role traditionally played by local and statewide authorities in dealing with it."

. . . [A] subject [is] off-limits to local government control only where the state has a vital interest and a traditionally exclusive role.⁶¹

Courts have designated as municipal affairs for the purposes of, at least partial, local government regulation activities like: gambling and

58. See, e.g., ILL. CONST. art. VII, § 6(d)–(e) (“(d) A home rule unit does not have the power (1) to incur debt payable from ad valorem property tax receipts maturing more than 40 years from the time it is incurred or (2) to define and provide for the punishment of a felony. (e) A home rule unit shall have only the power that the General Assembly may provide by law (1) to punish by imprisonment for more than six months or (2) to license for revenue or impose taxes upon or measured by income or earnings or upon occupations.”); N.M. CONST. art. X, § 6(D) (“A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor. No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.”).

59. *Comm. of Seven Thousand v. Super. Ct.*, 754 P.2d 708, 716 (Cal. 1988) (citing *Bishop v. City of San Jose*, 460 P.2d 137, 141 (Cal. 1969)).

60. *Id.* (quoting *Metromedia, Inc. v. City of San Diego*, 610 P.2d 407, 425 (Cal. 1980)).

61. *City of Chicago v. StubHub, Inc.*, 979 N.E.2d 844, 852 (Ill. 2011) (quoting *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 274 (Ill. 1984)).

public amusement;⁶² garbage, waste, and sanitation;⁶³ utilities;⁶⁴ immoral behavior;⁶⁵ land use and zoning;⁶⁶ and important for the purposes of this Article, nonhuman animals.⁶⁷

Finally, the question of whether a municipality may exercise a given power may largely rest on the powers set forth in the home rule municipality's charter. Many charters contain general welfare clauses or general grants of power clauses that expressly allow the given municipality incorporated thereunder to pass laws related to the health, safety, and general welfare of the municipality.⁶⁸

B. Is the Municipality's Home Rule Power Limited?

Once it is established that a municipality possesses the power to enact an ordinance, the court must determine whether federal or state law preempts this power.⁶⁹ Implied preemption occurs where state or federal

62. *Bonito v. Mayor of Bloomfield*, 484 A.2d 1319, 1322, 1327 (N.J. 1984) (citing *Trombetta v. Mayor of Atlantic City*, 436 A.2d 1349, 1360 (N.J. Super. Ct. Law Div. 1981)).

63. *Pleasure Bay Apartments v. City of Long Branch*, 328 A.2d 593, 596 (N.J. 1974) (citing *Marangi Bros. v. Bd. of Comm'rs of Vill. of Ridgewood*, 110 A.2d 131, 134 (N.J. Super. Ct. App. Div. 1954)); *Sandlands C&D, LLC v. County of Horry*, 716 S.E.2d 280, 291 (S.C. 2011).

64. *City of Pasadena v. Charleville*, 10 P.2d 745, 746–47 (Cal. 1932); *Apodaca v. Wilson*, 525 P.2d 876, 883 (N.M. 1974); *Pitts v. Allen*, 281 P. 126, 132 (Okla. 1928); *PacifiCorp v. City of Ashland*, 749 P.2d 1189, 1192 (Or. Ct. App. 1988).

65. *Kelley v. Clark County*, 127 P.2d 221, 223 (Nev. 1942) (citing *Phalen v. Virginia*, 49 U.S. 163, 168 (1850)); *Expo, Inc. v. City of Passaic*, 373 A.2d 1045, 1050 (N.J. Super. Ct. Law Div. 1977) (citing *Ajamian v. Township of North Bergen*, 246 A.2d 521, 527 (N.J. Super. Ct. Law Div. 1968)).

66. *Native Village of Eklutna v. Alaska R.R. Corp.*, 87 P.3d 41, 45 (Alaska 2004); *Merritt v. Peters*, 65 So. 2d 861, 862 (Fla. 1953); *People v. Stover*, 191 N.E.2d 272, 274–75 (N.Y. 1963); *Oregon City v. Hartke*, 400 P.2d 255, 263 (Or. 1965); *Town of Hilton Head Island v. Fine Liquors, Ltd.*, 397 S.E.2d 662, 663 (S.C. 1990).

67. *Simpson v. City of Los Angeles*, 253 P.2d 464, 469 (Cal. 1953) (citing *Hofer v. Carson*, 203 P. 323, 326 (Or. 1922)); *Gates v. City of Sanford*, 566 So. 2d 47, 49 (Fla. Dist. Ct. App. 1990); *City of Rolling Meadows v. Kyle*, 494 N.E.2d 766, 768 (Ill. App. Ct. 1986).

68. BALTIMORE, MD., CITY CHARTER art. II, § 47 (2016) (“To pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City and to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations.”); *Town of McIntyre v. Baldwin*, 6 S.E.2d 372, 373 (Ga. Ct. App. 1939); *State v. Kuhlman*, 729 N.W.2d 577, 580 (Minn. 2007) (citing MINN. STAT. § 410.015 (2006)); *Anderson v. City of Olivette*, 518 S.W.2d 34, 38 (Mo. 1975) (citing *City of St. Louis v. King*, 126 S.W. 495, 497 (Mo. 1910)); *Turner v. Kansas City*, 191 S.W.2d 612, 614 (Mo. 1945); *State v. Hutchinson*, 624 P.2d 1116, 1126–27 (Utah 1980) (citing *Thorpe v. Bamberger R.R. Co.*, 153 P.2d 541, 541 (Utah 1944)); *Nation v. Giant Drug Co.*, 396 P.2d 431, 433 (Wyo. 1964).

69. *Allen v. State*, 203 P.3d 1155, 1158 (Alaska 2009); *Weekes v. City of Oakland*, 579

regulation so fully occupies a field of law that it evidences a legislative intent to be the sole regulatory power in that field.⁷⁰ Most fatal to home rule is express preemption: when a state or federal government explicitly claims sole regulatory power in a field of law.⁷¹ Where no limitations exist, an ordinance passed by a municipality with home rule power to regulate an area will be a valid act of municipal power.

III. GRANTING RIGHTS TO NONHUMAN ANIMALS IN A HOME RULE JURISDICTION

The first step in determining whether a municipality has the power to pass such an ordinance is to determine if the legal rights of nonhuman animals are a municipal affair. The welfare of nonhuman animals has long been considered in the realm of municipal affairs, and municipalities have long been permitted to regulate them within their boundaries by themselves or as mixed affairs in conjunction with the state.⁷² Generally, police power permits localities to enact ordinances that promote or provide for the health, safety, and morals of a municipality's residents.⁷³ A municipal ordinance that grants rights to nonhuman animals will likely be a valid exercise of police powers in those municipalities with constitutional home rule.⁷⁴

P.2d 449, 452 (Cal. 1978) (citing *Bishop v. City of San Jose*, 460 P.2d 137, 140 (Cal. 1969)); *Chwick v. Mulvey*, 915 N.Y.S.2d 578, 584 (App. Div. 2d Dept. 2010) ("Under the doctrine of conflict preemption, a local law is preempted by a state law when a 'right or benefit is expressly given . . . by [] State law which has then been curtailed or taken away by the local law.'" (alteration in original) (omission in original) (quoting *Jancyn Mfg. Corp. v. County of Suffolk*, 518 N.E.2d 903, 906 (N.Y. 1987))).

70. *Fiscal v. City of San Francisco*, 70 Cal. Rptr. 3d 324, 329 (Ct. App. 2008) (quoting *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 536 (Cal. 1993)); *Bishop*, 460 P.2d at 146; *County of Cook v. John Sexton Contractors*, 389 N.E.2d 553, 555 (Ill. 1979); *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008); *Wein v. Town of Irvington*, 315 A.2d 35, 37 (N.J. Super. Ct. App. Div. 1974) (quoting *Township of Chester v. Panicucci*, 299 A.2d 385, 387-88 (N.J. 1973)).

71. *Am. Fin. Serv. Ass'n v. City of Oakland*, 104 P.3d 813, 826 (Cal. 2005); *Beverly Bank v. County of Cook*, 510 N.E.2d 941, 944 (Ill. 1987) (citing *City of Evanston v. Create, Inc.*, 421 N.E.2d 196, 199 (Ill. 1981)); *City of Davenport*, 755 N.W.2d at 538; *Dukes v. Sirius Constr. Inc.*, 73 P.3d 781, 785 (Mont. 2003); *R.F. v. Abbott Labs.*, 745 A.2d 1174, 1186 (N.J. 2000) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)); *Hoffman Mining Co. v. Zoning Hearing Bd. of Adams Twp.*, 32 A.3d 587, 592 (Pa. 2011) (citing *E.D.B. v. Clair*, 987 A.2d 681, 684 (Pa. 2009)).

72. See, e.g., *Simpson*, 253 P.2d at 469 (citing *Hofer*, 203 P. at 326); *Gates*, 566 So. 2d at 49; *Kyle*, 494 N.E.2d at 768.

73. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *Miller v. Bd. of Pub. Works*, 234 P. 381, 383 (Cal. 1925).

74. See 2 McQUILLIN, *supra* note 29, § 4:7.

A. Nonhuman Animals Are a Municipal Affair Permissibly Regulated by Local Police Power

Municipal police power has principally been used to create ordinances concerning animal welfare,⁷⁵ animal fighting,⁷⁶ and companion animal ownership, such as dog breed restrictions.⁷⁷ Ordinances regulating companion animals have been passed in several states with broad home rule powers.⁷⁸ But municipal regulation of wild and exotic animals is an established norm in the United States, with such regulations typically rooted in local police powers.⁷⁹ For example, an Indiana court upheld a county municipal ordinance that forbade the keeping of exotic animals.⁸⁰ The Seventh Circuit Court of Appeals has also said that a municipality is within its power to regulate the keeping of “wild animals.”⁸¹ Similarly, the Iowa Supreme Court upheld a city ordinance that regulated a private citizen’s ownership of an African

75. See, e.g., *Rio Grande Kennel Club v. City of Albuquerque*, 190 P.3d 1131, 1135 (N.M. Ct. App. 2008); see also *Cal. Veterinary Med. Ass’n v. City of West Hollywood*, 61 Cal. Rptr. 3d 318, 322 (Ct. App. 2007).

76. See, e.g., *Peck v. Dunn*, 574 P.2d 367, 368 (Utah 1978); see also *Savage v. Prator*, 921 So. 2d 51, 52 (La. 2006).

77. See, e.g., *State v. Peters*, 534 So. 2d 760, 761 (Fla. Dist. Ct. App. 1988); *Hearn v. City of Overland Park*, 772 P.2d 758, 759 (Kan. 1989); *Singer v. City of Cincinnati*, 566 N.E.2d 190, 191 (Ohio Ct. App. 1990).

78. *West v. Municipality of Anchorage*, 174 P.3d 224, 226 (Alaska 2007); *Simpson v. City of Los Angeles*, 253 P.2d 464, 466–67 (Cal. 1953); *Gates v. Sanford*, 566 So. 2d 47, 48–49 (Fla. Dist. Ct. App. 1990); *City of Rolling Meadows v. Kyle*, 494 N.E.2d 766, 767 (Ill. App. Ct. 1986); *Am. Dog Owner Ass’n v. Des Moines*, 469 N.W.2d 416, 417 (Iowa 1991); *Hearn*, 772 P.2d at 759; *Am. Dog Owners Ass’n v. City of Lynn*, 533 N.E.2d 642, 643 (Mass. 1989); *City of Choteau v. Joslyn*, 678 P.2d 665, 668 (Mont. 1984); *Wolf v. Omaha*, 129 N.W.2d 501, 504 (Neb. 1964); *Town of Nutley v. Forney*, 283 A.2d 142, 143 (N.J. Essex Cty. Ct. 1971); *Rio Grande Kennel Club*, 190 P.3d at 1135; *City of Toledo v. Tellings*, 871 N.E.2d 1152, 1157 (Ohio 2007); *State v. Johnson*, 628 P.2d 789, 790 (Or. Ct. App. 1981); *Baehr v. Commonwealth*, 414 A.2d 415, 416 (Pa. Commw. Ct. 1980); *Peoples Program for Endangered Species v. Sexton*, 476 S.E.2d 477, 479 (S.C. 1996); *City of Marion v. Schoenwald*, 631 N.W.2d 213, 215 (S.D. 2001); *Mayor of Knoxville v. King*, 75 Tenn. 441, 442 (1881); *Greenwood v. City of North Salt Lake*, 817 P.2d 816, 817 (Utah 1991).

79. See *Mitchell v. City of Roswell*, 111 P.2d 41, 43–44 (N.M. 1941) (citing *Miller v. Town of Syracuse*, 80 N.E. 411, 411 (Ind. 1907)); see also *Cal. Veterinary Med. Ass’n*, 61 Cal. Rptr. 3d at 337–38; *Litva v. Village of Richmond*, 874 N.E.2d 1243, 1246–47 (Ohio Ct. App. 2007) (quoting *Downing v. Cook*, 431 N.E.2d 995, 997 (Ohio 1982)).

80. See *Hendricks Cty. Bd. of Zoning Appeals v. Barlow*, 656 N.E.2d 481, 484 (Ind. Ct. App. 1995) (discussing how a local ordinance that prohibited housing of wild animals on residential property is a reasonable zoning law within the local government’s police power and was not preempted by either state or federal law).

81. See *DeHart v. Town of Austin*, 39 F.3d 718, 723–24 (7th Cir. 1994).

lion.⁸² Municipalities have been empowered to regulate nonhuman animals to the extent those regulations concern municipal affairs.⁸³ In states with broad, constitutional home rule powers, and even those with more restricted powers, there are countless examples of regulations of nonhuman animals at a local level.⁸⁴

B. Home Rule Municipalities Have the Legislative Power to Grant Legal Rights to Nonhumans Through Police Power

Municipal ordinances have long created new benefits and privileges in response to evolving societal interests and moral standards. Municipalities have extended benefits and privileges that go beyond both federal laws and those of the municipality's parent state.⁸⁵ For instance, despite the fact that, under Pennsylvania statute, "marriage" was defined as a "civil contract by which one man and one woman take each other for husband and wife,"⁸⁶ the Pennsylvania Supreme Court held that Philadelphia had the power to designate same-sex "life partnerships" and to extend employee benefits to same-sex "life partners."⁸⁷ Likewise, New York City's Domestic Partnership Law, which established "a registry for domestic partners and extend[ed] certain rights and benefits to domestic partners" of city employees and city residents who become domestic partners, did not "impermissibly legislate in the area of marriage."⁸⁸

Animal welfare has long been considered a municipal affair. Initially passed partially for the sake of morality, many anti-cruelty statutes were classified under the heading "Of Offenses Against Chastity, Decency and Morality."⁸⁹ Courts also recognized that nonhuman animals required legal protection to be free from unnecessary pain and suffering.⁹⁰

82. See *Kent v. Polk Cty. Bd. of Supervisors*, 391 N.W.2d 220, 226–27 (Iowa 1986).

83. See Martha Drouet, *Detailed Discussion of Exotic Pet Laws Update*, ANIMAL LEGAL & HIST. CTR. (2014), <https://www.animallaw.info/article/detailed-discussion-exotic-pet-laws-update>.

84. See *id.*

85. See *id.*

86. 23 PA. STAT. AND CONS. STAT. ANN. § 1102 (2016), *invalidated by* *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 412–24 (M.D. Pa. 2014).

87. *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1245 (Pa. 2004).

88. *Slattery v. City of New York*, 697 N.Y.S.2d 603, 604 (App. Div. 1999); see also *Crawford v. City of Chicago*, 710 N.E.2d 91, 99 (Ill. App. Ct. 1999); *Tyma v. Montgomery County*, 801 A.2d 148, 156–57 (Md. 2002); *Heinsma v. City of Vancouver*, 29 P.3d 709, 715 (Wash. 2001).

89. See CRUELTY TO ANIMALS AND INTERPERSONAL VIOLENCE: READINGS IN RESEARCH & APPLICATION 42 (Randall Lockwood & Frank R. Ascione, eds., 1998) (first citing N.H. REV. STAT. § 219.12 (1843); then citing MINN. STAT. § 96.18 (1858); then citing MICH. REV. STAT. § 8.22 (1838); and then citing PA. LAWS tit. IV, § 46 (1860)).

90. See *Stephens v. State*, 3 So. 458, 458–59 (Miss. 1888). The Court analyzed an anti-

Thus, legislation recognizing fundamental interests in nonhuman animals already exists.

Some municipalities have used their police powers to pass ordinances that expand the status and protections of nonhuman animals within their borders. For example, Albuquerque, New Mexico's Humane and Ethical Animal Regulations and Treatment (HEART) Ordinance regulated the ownership and care of certain animals within city limits.⁹¹ This ordinance stated that "the people of Albuquerque should treat animals as more than just lifeless inanimate chattel property and the relationship between human beings and animals is a special relationship

cruelty statute by stating the following:

This statute is for the benefit of animals, as creatures capable of feeling and suffering, and it was intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners. . . .

. . . [L]aws, and the enforcement or observance of laws, for the protection of dumb brutes from cruelty, are, in my judgment, among the best evidences of the justice and benevolence of men. Such statutes were not intended to interfere, and do not interfere, with the necessary discipline and government of such animals, or place any unreasonable restriction on their use or the enjoyment to be derived from their possession. The common law recognized no rights in such animals, and punished no cruelty to them, except in so far as it affected the right of individuals to such property. Such statutes remedy this defect To disregard the rights and feelings of equals, is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless, is mean and cowardly. Human beings have at least some means of protecting themselves against the inhumanity of man, that inhumanity which "makes countless thousands mourn,"-but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable, perhaps, of feeling as great physical pain or pleasure as ourselves, deserve, for these considerations alone, kindly treatment. The dominion of man over them, if not a moral trust, has a better significance than the development of malignant passions and cruel instincts. Often their beauty, gentleness, and fidelity suggest the reflection that it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better feelings of our race. But, however this may be, human beings should be kind and just to dumb brutes; if for no other reason than to learn how to be kind and just to each other.

Id.; see also *Grise v. State*, 37 Ark. 456, 458–59 (1881) ("[Anti-cruelty statutes] are not made for the protection of the absolute or relative rights of persons, or the rights of men to the acquisition and enjoyment of property, or the peace of society. *They seem to recognize and attempt to protect some abstract rights in all that animate creation.*" (emphasis added)). For a thorough discussion of the evolution of anti-cruelty jurisprudence, see David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws During the 1800's*, 1993 DET. C. L. REV. 1, 4 (1993). See also *Grise*, 37 Ark. at 458 ("[Anti-cruelty statutes] spring, originally, from tentative efforts of the New England colonists to enforce imperfect but well recognized moral obligations Such statutes appealed strongly to the instincts of humanity."); Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part I*, 19 ANIMAL L. 23, 46–47 (2012); Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part II*, 19 ANIMAL L. 347, 350 (2013).

91. ALBUQUERQUE, N.M., CODE ch. 9, art. 2 (2016).

that improves people's lives and reflects basic humanitarian beliefs."⁹² When the ordinance was challenged, the New Mexico Court of Appeals upheld the HEART Ordinance, finding that it was not preempted by state and federal law.⁹³ Implicit in that holding was that the City of Albuquerque had the power to pass an ordinance with a policy statement of viewing animals as something other than mere things.⁹⁴

Similarly, West Hollywood, California, passed an ordinance that banned feline declawing (onychectomy and flexor tendonectomy) because those procedures cause "unnecessary pain, anguish and permanent disability" to cats.⁹⁵ This ordinance was unsuccessfully challenged as preempted by state law, as the California Court of Appeals, Second District held that "[b]efore invalidating a local ordinance as preempted, a court must 'carefully insur[e] that the purported conflict is in fact a genuine one, unresolvable short of choosing between one enactment and the other.'"⁹⁶ Implicit in the court's opinion was the finding that West Hollywood had the power under its home rule charter to pass an ordinance respecting certain animals in ways that the federal and state governments did not.⁹⁷ Further, no language in this ordinance purports, or suggests, that it was passed for the benefit of humans; every provision talks about how it benefits the animals.⁹⁸ Thus, the "morality" regulated under West Hollywood's police powers is the ethical treatment of animals for their own benefit, as opposed to any benefits the human citizens of West Hollywood may receive inadvertently from passing the ordinance. Several surrounding cities followed West Hollywood's lead.⁹⁹

In 2010, Suffolk County in New York enacted the first animal abuse registry in the country by ordinance.¹⁰⁰ Rockland, Albany, Nassau, Orange, and Westchester County followed, as well as New York City.¹⁰¹

92. ALBUQUERQUE, N.M., CODE § 9-2-1-2(B).

93. *Rio Grande Kennel Club v. City of Albuquerque*, 190 P.3d 1131, 1143 (N.M. Ct. App. 2008).

94. *See id.* at 1140.

95. WEST HOLLYWOOD, CAL., CODE § 9.49.010(g) (2016).

96. *Cal. Veterinary Med. Ass'n v. City of West Hollywood*, 61 Cal. Rptr. 3d 318, 326–27 (Ct. App. 2007) (alterations in original) (citing *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916, 925 (Cal. 1991)).

97. *See Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 917.

98. *See* WEST HOLLYWOOD, CAL., CODE § 9.49.020.

99. *See* CULVER CITY, CAL., CODE § 9.01.600 (2016); LOS ANGELES, CAL., CODE § 53.72 (2016); SANTA MONICA, CAL., CODE § 4.04.275 (2016).

100. SUFFOLK COUNTY, N.Y., CODE ch. 299, art. IV (2010).

101. ROCKLAND COUNTY, N.Y., CODE §§ 230-4, -12 (2016); Albany County, N.Y., Local Law "K" for 2011 (Oct. 11, 2011); NASSAU COUNTY, N.Y., MISCELLANEOUS LAWS, tit. 78 (2016); Orange County, N.Y., Local Law No. 2 of 2015 (June 16, 2015); WESTCHESTER COUNTY, N.Y., CODE § 680 (2016); N.Y.C., N.Y., CODE, tit. 17, ch. 16 (2016).

Such ordinances are based on the municipality's ability to use its police power to (1) regulate morality and (2) pass local municipal legislation recognizing that some nonhuman animals have interests that need legal protection.¹⁰² If home rule powers can promote the policy that animals are not to be viewed as "things," or to prevent unnecessary pain in animals because of moral concerns for an animal's own well-being, it is legally permissible for a municipality to grant nonhuman animals legal rights.¹⁰³

Putting the preemption analysis¹⁰⁴ aside, a court adjudicating the issue of whether a constitutional home rule municipality has the power to grant legal rights to a nonhuman animal should rule that the municipality does. In such a jurisdiction, the home rule municipality has the legislative power to pass ordinances to regulate the morality of its municipal affairs—affairs that traditionally encompass animals—and passing ordinances that benefit animals is a permissible use of this power. Once it is established that a municipality may enact an ordinance, a court will determine whether state or federal law preempts the local ordinance.

1. Limitations on Home Rule Power Through Extraterritorial Impacts Are Avoidable

"A local government has no extraterritorial powers and cannot, without express authorization from the state, extend its regulations or the force of its laws outside its own boundaries."¹⁰⁵ Generally, extraterritorial

102. The legislative power covers every subject of legitimate legislation except as limited by constitutional provisions, and the legislature generally has the power to say what shall be permitted or forbidden. Accordingly, it may declare, and provide for, a public purpose, determine the rights of individuals, except as otherwise provided by the constitution and create new rights.

16 C.J.S. *Constitutional Law* § 281 (2015) (first citing *In re House Bill No. 145*, 237 P.2d 624, 626 (Okla. 1951); then citing *People v. Chi. Transit Auth.*, 64 N.E.2d 4, 9 (Ill. 1945); then citing *Modern Barber Colls. v. Cal. Emp't Stabilization Comm'n*, 192 P.2d 916, 920 (Cal. 1948); and then citing *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 136 (1947)); see also *Oklahoma*, 330 U.S. at 146; *Hobby v. Hodges*, 215 F.2d 754, 758 (10th Cir. 1954); *Harlow v. Ryland*, 78 F. Supp. 488, 493 (E.D. Ark. 1948), *aff'd*, 172 F.2d 784 (8th Cir. 1949); *Alameda Tank Co. v. Starkist Foods, Inc.*, 162 Cal. Rptr. 924, 926 (Ct. App. 1980); *Campbell v. City of Lincoln*, 240 N.W.2d 339, 344 (Neb. 1976).

103. See generally cases cited *supra* note 102 (holding that some animals require legal protection).

104. See *infra* Section III.B.2.

105. State *ex rel.* *Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 889 P.2d 185, 195 (N.M. 1994); see also *City of Sedalia ex rel. Ferguson v. Shell Petroleum Corp.*, 81 F.2d 193, 196–97 (8th Cir. 1936); *City of Galena v. Dunn*, 583 N.E.2d 616, 623 (Ill. App. Ct. 1991); *Hunsche v. Loveland*, 729 N.E.2d 393, 395 (Ohio Ct. App. 1999); 56 AM. JUR. 2D *Motions to Municipal Corporations* § 179 (2010).

impacts limit a municipality's power.¹⁰⁶ However, some extraterritorial effects may be permitted. For example, a California court of appeals rejected the claim of an out-of-state contractor that a San Francisco ordinance requiring that contractors within the city provide nondiscriminatory benefits to their employees who have registered domestic partners was invalid because it had the effect of regulating conduct outside city boundaries, holding that the ordinance was an exercise of the city's contracting power and not an attempt to exert extraterritorial control.¹⁰⁷ The City of Hayward was permitted to pass an ordinance that required employers with city contracts to provide employees with a living wage, and though some employees performed services outside the city, the court found no impermissible extraterritorial impact.¹⁰⁸

Extraterritorial impact was at issue where a group of restaurants challenged a Chicago ordinance banning the sale of foie gras.¹⁰⁹ Chicago's ordinance "reflect[ed] the City Council's judgment that banning the sale of foie gras would benefit the City and advance the morals of the community."¹¹⁰ The United States District Court, Northern District of Illinois, addressed the issue of extraterritorial impact by "consider[ing] whether the Chicago City Council is the unit of government with the most vital interest in solving the problem at the heart of the Ordinance" and stated that

[b]ecause the Ordinance regulat[ed] food which may be served in Chicago restaurants and sold in Chicago grocery stores, the Chicago City Council clearly [met] this standard. It [was] also the proper authority to address the problem because it [was] uniquely situated to govern the conduct of Chicago business establishments.

This [was] true even if Chicago's ban [had] effects outside the jurisdiction (such as reducing the national consumption of foie gras), because . . . [the] law's potential extraterritorial effects [did] not cancel out its local aspects and render Chicago powerless to address a perceived local problem.¹¹¹

106. See 56 AM. JUR. 2D, *supra* note 105, § 179.

107. S.D. Myers, Inc. v. City of San Francisco, 253 F.3d 461, 473–74 (9th Cir. 2001).

108. Amaral v. Cintas Corp. No. 2, 78 Cal. Rptr. 3d 572, 581, 585 (Ct. App. 2008).

109. Ill. Rest. Ass'n v. City of Chicago, 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007) (alteration in original), *vacated*, Ill. Rest. Ass'n v. City of Chi., No. 06 C 7014, 2008 U.S. Dist. LEXIS 123765 (N.D. Ill. Aug. 7, 2008).

110. *Id.* at 896 (alteration in original).

111. *Id.* at 896–897 (first citing Village of Bolingbrook v. Citizens Utils. Co., 632 N.E.2d 1000, 1002–03 (Ill. 1994); and then citing Kalodimos v. Village of Morton Grove, 470 N.E.2d 266, 275 (Ill. 1984)).

The court then held “that despite the Ordinance’s extraterritorial effects, it [was] a valid exercise of Chicago’s home rule powers under the Illinois Constitution because it [was] aimed at a sufficiently local problem.”¹¹²

Extraterritorial impacts may sometimes be too great for an ordinance to withstand. When the City of Des Plaines, Illinois used its home rule powers to pass a noise control ordinance aimed at reducing the disturbances caused by locomotives, the Supreme Court of Illinois invalidated the ordinance, in part, because of its extraterritorial impact, as the ordinance purported to regulate “noise emissions from trains in transit which may pass through numerous municipalities en route to their destination.”¹¹³ The court also noted that the attempt to regulate noise pollution emissions, which is not an environmental problem of local concern, was not within its home rule power.¹¹⁴ Likewise, the Colorado Supreme Court invalidated an ordinance regulating camera radar systems and red-light camera systems because of the extraterritorial impact of the traffic tickets generated under the system.¹¹⁵ The court noted the fact

that about 90% of tickets in Commerce City were issued to non-residents distinctively demonstrat[ed] the effect of its [automated vehicle identification systems] use on Colorado citizens in general. In fact, Commerce City, Westminster, Colorado Springs, and to a lesser degree, Fort Collins, [were] all located within busy commuter corridors. Without the unifying state legislation, a driver—simply by commuting to work on a typical day—could be subjected to a patchwork of rules and procedures by individual cities. Thus, the regulation of automated vehicle identification systems affect[ed] the residents of Colorado as a whole, as opposed to simply affecting local residents.¹¹⁶

Concerns of extraterritorial impact should not preclude a home rule municipality from adopting an ordinance granting rights to nonhuman animals valid only within its boundaries, and certainly not a nonhuman animal who resides there. Provided the ordinance makes efforts not to regulate nonhuman animals outside its boundaries, any extraterritorial impact should be sufficiently mitigated. The greater challenges to a

112. *Id.* at 897. Although this ordinance was subsequently repealed by the Chicago City Council. *See* CITY OF CHI., ILL., JOURNAL OF THE PROCEEDINGS OF THE CITY COUNCIL: MAY 14, 2008, Reg. Meeting, at 28,639–40 (2008), file://hd.ad.syr.edu/01/c13a9a/Documents/Downloads/051408VI.pdf (repealing CHI., ILL., CODE § 7-39). Nevertheless, that subsequent repeal does not change the ruling of the U.S. District Court which found that, as a matter of law, Chicago did have the power, under its home rule charter, to ban foie gras because of animal concerns, regardless of the extraterritorial impact created by that ban.

113. *City of Des Plaines v. Chi. & N.W. Ry. Co.*, 357 N.E.2d 433, 435 (Ill. 1976).

114. *Id.* at 436.

115. *City of Commerce City v. State*, 40 P.3d 1273, 1284–85 (Colo. 2002).

116. *Id.* at 1282.

municipality's power to pass such an ordinance arise from state and federal preemption.

2. The Municipality's Power to Grant Rights to Nonhuman Animals Is Not Preempted by State Law

Multiple municipalities already regulate nonhuman animals pursuant to their police power and such regulation is not preempted as a general rule, despite the fact that every state empowering municipalities by constitutional home rule power also has anti-cruelty and numerous other statutes pertaining to most nonhuman animals.¹¹⁷

None of the laws in these expansive, constitutional home rule states discussed above suggest that a state's law pertaining to nonhuman animals creates a mutually exclusive conflict with any municipal ordinance granting a nonhuman animal legal rights.¹¹⁸ A mutually exclusive conflict arises when an ordinance and one of its parent state's laws cannot both be applied concurrently without one violating the other.¹¹⁹ However, all of the laws in these states that regulate nonhuman animals may be enforced side-by-side with a local ordinance granting legal rights to nonhuman animals because none of these statewide laws pertains to the rights of nonhuman animals.¹²⁰

No state laws appear to implicitly preempt such a local ordinance.¹²¹ Implied preemption arises when a state legislature has evinced an intent to exclusively occupy an area of law that no local government is permitted to regulate.¹²² In the expansive constitutional home rule states, no laws demonstrate a legislative intent to exclusively occupy the field of rights for any nonhuman animals.¹²³

No laws in any of the constitutional home rule states expressly concern rights for nonhuman animals or preempt a municipality from

117. See cases cited *supra* note 69. ALASKA STAT. § 11.61.140 (2007); 510 ILL. COMP. STAT. 70/13 (2014); IOWA CODE §§ 717.1–2 (1993); MONT. CODE ANN. § 45-8-211(4) (2015); NEB. REV. STAT. § 28-1013 (2008); N.J. STAT. ANN. § 4:22-16 (West 1998); OHIO REV. CODE ANN. § 959.13(B) (West 2012); OR. REV. STAT. § 167.335 (2015); 18 PA. CONS. STAT. ANN. § 5511 (2015); S.C. CODE ANN. § 47-1-40(C) (Supp. 2014); TENN. CODE ANN. § 39-14-202(e)(1) (2014); UTAH CODE ANN. § 76-9-301(11)(b) (West 2016).

118. See statutes cited *supra* note 117.

119. *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

120. See statutes cited *supra* note 117.

121. See statutes cited *supra* note 117.

122. See *Fiscal v. City of San Francisco*, 70 Cal. Rptr. 3d 324, 329 (Ct. App. 2008) (quoting *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 537 (Cal. 1993)); *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008); *Wein v. Town of Irvington*, 315 A.2d 35, 38 (N.J. Super. Ct. App. Div. 1974).

123. See statutes cited *supra* note 117.

passing any ordinance granting rights to nonhuman animals.¹²⁴ Some state laws expressly govern certain municipal acts over some nonhuman animals.¹²⁵ For instance, Oregon expressly regulates a municipality's legislative powers over exotic animals and states,

Notwithstanding the provisions of ORS chapters 496, 497 and 498 relating to wildlife, and ORS 609.305 to 609.355 and 609.992 relating to exotic animals, a city or county may prohibit by ordinance the keeping of wildlife, as defined in ORS 496.004, and may prohibit by ordinance the keeping of exotic animals as defined in ORS 609.305.¹²⁶

Certainly some of the animals to whom a municipality may consider granting rights may be “exotic wildlife.”¹²⁷ However, this statute cannot reasonably be argued to preempt Oregon's local governments from granting rights to those animals, as the statute expressly permits local governments to prohibit the keeping of certain animals; it is therefore a *grant* of local power. Similarly, in Ohio, the Dangerous Wild Animal and Restricted Snakes chapter states, “A municipal corporation may adopt and enforce ordinances that are more stringent than the requirements established by this chapter and rules in order to control dangerous wild animals, restricted snakes, or both within the municipal corporation.”¹²⁸ The “requirements established by this chapter” mainly pertain to registration requirements for the animals, permits, cage requirements, and standards of care.¹²⁹ Therefore, arguably a municipal ordinance granting fundamental rights to nonhuman animals would create more stringent regulations than those of Dangerous Wild Animal and Restricted Snakes chapter. The more likely interpretation would be that like the other regulations discussed, the act does not recognize any rights of nonhuman animals and, therefore, does not affect a municipality's ability to create such rights, regardless of their stringency under the ordinance.

3. The Municipality's Power to Grant Rights to Nonhuman Animals Is Not Limited by Federal Law

Two federal laws may also relate to, and regulate, a number of the species of nonhuman animals covered by the municipal ordinance: (1)

124. See statutes cited *supra* note 117.

125. OHIO REV. CODE ANN. § 935.29 (West 2012); OR. REV. STAT. § 609.205 (2015); UTAH CODE ANN. § 23-14-1 (3)(a) (West 2015).

126. OR. REV. STAT. § 609.205.

127. OR. REV. STAT. § 609.305 (2015) (“As used in ORS 609.305 to 609.355 and 609.992, ‘exotic animal’ means . . . [a]ny nonhuman primate . . .”).

128. OHIO REV. CODE ANN. § 935.29.

129. *Id.* § 935.

the Animal Welfare Act (AWA) and (2) the Endangered Species Act (ESA).¹³⁰ Neither preempts a municipality's ability to grant rights to the nonhuman animal within its purview.

A. *The Animal Welfare Act*

The “purpose of the [AWA] is to foster humane treatment and care of animals and to protect the owners of animals from the theft of their animals.”¹³¹ It was passed in 1966¹³² and directs the Secretary of the U.S. Department of Agriculture (USDA) to “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors”¹³³ and to “promulgate standards to govern the transportation in commerce, and the handling, care, and treatment in connection therewith, by intermediate handlers, air carriers, or other carriers, of animals consigned by any . . . person . . . for transportation in commerce.”¹³⁴ The AWA regulates warm blooded animals used for testing, experimentation, exhibition, or as pets, including nonhuman primates, but excludes farm animals, livestock, mice, rats, and birds.¹³⁵ The Animal and Plant Health Inspection Service, within the USDA, pursuant to the AWA, has promulgated regulations concerning these animals.¹³⁶

Courts have made “clear that the [AWA] does not evince an intent to preempt state or local regulation of animal or public welfare. Indeed, the [AWA] expressly contemplates state and local regulation of animals.”¹³⁷ For example, in *DeHart v. Town of Austin*, the plaintiff, an exotic animal dealer, challenged a city ordinance forbidding the “possession” of any “wild animal or animal which is capable of inflicting serious physical harm or death to human beings”¹³⁸ on the ground that the ordinance was preempted by the AWA.¹³⁹ Under the ordinance, “wild animal” was broadly defined as “live vertebrate animals which are not normally domesticated, mammal animals found in the wild, venomous reptiles, birds of prey, protected species of birds and other dangerous

130. 7 U.S.C. §§ 2131–59 (2012); 16 U.S.C. §§ 1531–44 (2012).

131. *DeHart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994) (citing 7 U.S.C. § 2131 (1988)).

132. Act of Aug. 24, 1966, Pub. L. No. 89-544, § 1, 80 Stat. 350, 350 (1966).

133. 7 U.S.C. § 2143(a)(1) (2012).

134. *Id.* § 2143(a)(4).

135. *Id.* § 2132(g).

136. 9 C.F.R. §§ 3.75–92 (2016).

137. *DeHart v. Town of Austin*, 39 F.3d 718, 722 (7th Cir. 1994).

138. *Austin, Ind.*, Ordinance 1991-02 art. II, § 2-1 (Sept. 3. 1991).

139. *DeHart*, 39 F.3d at 721.

animals.”¹⁴⁰ After noting that “[t]he regulation of animals [had] long been recognized as part of the historic police power of the States,”¹⁴¹ the court held that the AWA does not impliedly preempt local governments from passing regulations governing the same subjects.¹⁴² The court further noted that the Secretary of the USDA was “authorized to cooperate with the officials of the various States or political subdivisions thereof in carrying out the purposes [the AWA]” and that the Secretary’s authority “shall not prohibit any State (or a political subdivision of such State) from promulgating standards in addition to those standards promulgated by the Secretary.”¹⁴³ Accordingly, the AWA does not preempt local government regulations and several other cases have affirmed this legal conclusion.¹⁴⁴ Finally, the AWA does not regulate the rights of animals; it is an animal welfare statute, not an animal rights statute.¹⁴⁵

B. The Federal Endangered Species Act

Passed in 1973, the purposes of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties¹⁴⁶ and conventions¹⁴⁷ set forth in subsection (a) of this section.”¹⁴⁸ The protections afforded under the ESA only apply to animals that are “endangered” or “threatened.”¹⁴⁹

The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its

140. Austin, Ind., Ordinance 1991-02 art. II, § 1(A).

141. *DeHart*, 39 F.3d at 722 (citing *Nicchia v. New York*, 254 U.S. 228, 231 (1920)).

142. *Id.* at 722.

143. *Id.* (quoting 7 U.S.C. §§ 2145(b), 2143(a)(8) (1988)).

144. *Kerr v. Kimmell*, 740 F. Supp. 1525, 1530 (D. Kan. 1990); *Hendricks Cty. Bd. of Zoning Appeals v. Barlow*, 656 N.E.2d 481, 484–85 (Ind. Ct. App. 1995); *Rio Grande Kennel Club v. City of Albuquerque*, 190 P.3d 1131, 1142 (N.M. Ct. App. 2008).

145. *Cf.* 16 U.S.C. § 1531(b) (2012) (stating the purpose of the statute is to conserve ecosystems upon which endangered species and threatened species depend and to conserve endangered species).

146. *Id.* § 1531(a)(4)(A)–(G) (“[P]ursuant to migratory bird treaties with Canada and Mexico; the Migratory and Endangered Bird Treaty with Japan; the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; the International Convention for the Northwest Atlantic Fisheries; the International Convention for the High Seas Fisheries of the North Pacific Ocean; the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and other international agreements.”).

147. *Id.*

148. *Id.* § 1531(b).

149. 16 U.S.C. § 1533(a)(1) (2012).

range

. . . .

The term “threatened species” means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.¹⁵⁰

“[T]he [ESA] cannot fairly be described as an attempt to preempt all state law related to conservation and the protection of endangered species.”¹⁵¹ The ESA specifically envisions the states to work in conjunction with the federal government to further its purposes.¹⁵² Further, the ESA outlines certain instances of preemption:

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. *Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.*¹⁵³

Preemption of state regulation of wildlife has been found only in cases where further regulation would harm other endangered species, where an express preemption existed, or where there was a Congressional intention to occupy that entire field. For instance, when California passed a law through voter initiative banning any person, including federal employees, from using leghold traps, except for the protection of human health or safety, the Ninth Circuit stated that the ESA preempted this law because the effect of the traps would be to conserve nonhuman animals who were not endangered while simultaneously jeopardizing other nonhuman animals who were listed as “endangered.”¹⁵⁴ In other words,

150. 16 U.S.C. § 1532 (6), (20) (2012).

151. *Sierra Club v. City of San Antonio*, 112 F.3d 789, 797 (5th Cir. 1997).

152. 16 U.S.C. § 1535(a)–(c) (2012).

153. *Id.* § 1535(f) (emphasis added).

154. *See Nat’l Audubon Soc’y v. Davis*, 307 F.3d 835, 852–53 (9th Cir. 2002) (holding that the ESA does not permit states to conserve “not endangered” animals when the conservation efforts would further endanger species listed under the ESA).

banning the traps would increase the survival rate of furbearing animals intended to be protected from the leghold traps, which would, in turn, decrease the survival rate of the species they hunted, some of which were endangered.¹⁵⁵

In another Ninth Circuit case, a plaintiff “filed suit . . . seeking a declaration that Cal. Penal Code § 653o (West Supp. 1981), which prohibit[ed] trade in elephant parts within the State of California,” was preempted by the ESA.¹⁵⁶ The ESA listed elephants as endangered, but federal permits would permit trade in elephant parts under certain conditions.¹⁵⁷ The court stated that “insofar as the state statute prohibits trade in elephant products by an authorized federal permittee,” it is preempted.¹⁵⁸ The court held that any federal permits which exempt the permittee from the prohibitions of the ESA are federal laws and, therefore, preempt state laws due to federal supremacy.¹⁵⁹ So, California was not free to make more restrictive laws for elephants if they conflicted with federal exceptions to the ESA.¹⁶⁰

Finally, one court found that the ESA and the AWA “occup[ied] the field of interstate commerce in gorillas.”¹⁶¹ In *Animals v. Cleveland Metropark Zoo*, the court turned away the challenge of animal protection groups regarding the move of a “lowland gorilla” from Cleveland to New York for mating purposes as the ESA occupied the field of *interstate commerce* of gorillas (an endangered species).¹⁶²

The ESA contains no provision or statement that suggests that states, or their local governments, cannot concurrently regulate the same areas of law.¹⁶³ In fact, both its statutory provisions¹⁶⁴ and agency regulations¹⁶⁵ call for cooperation with states to support conservation of endangered species, and it specifically permits states to pass stricter

155. *Id.* (“[T]he ESA . . . allows the state to pass laws and promulgate regulations that would conserve wildlife, but to do so only insofar as those law and regulations are consistent with the protection of endangered species . . .”).

156. *Man Hing Ivory & Imps., Inc. v. Deukmejian*, 702 F.2d 760, 761 (9th Cir.1983) (quoting CAL. PENAL CODE § 653o(a) (West 2016)). The court further quoted the California code at issue, which stated “[i]t is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or any part or product thereof, of any . . . elephant.” *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 765.

160. *Man Hing Ivory & Imps., Inc.*, 702 F.2d at 765.

161. *Animals v. Cleveland Metroparks Zoo*, 785 F. Supp. 100, 102 (N.D. Ohio 1991).

162. *Id.* at 101–03.

163. 16 U.S.C. § 1535 (2012).

164. *Id.*

165. 50 C.F.R. §§ 81.1–15 (2015).

laws.¹⁶⁶ An ordinance granting legal rights to a threatened or endangered species of nonhuman animal would complement the ESA because the ESA prohibits a taking of these animals, which means that it is illegal “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct” to them.¹⁶⁷ The ESA further defines “harass” as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”¹⁶⁸ Granting an endangered or threatened species such legal rights as bodily liberty and bodily integrity would further protect them from being harassed, harmed, wounded, trapped, captured, et cetera.¹⁶⁹ Thus, the ESA would not expressly preempt a local ordinance from granting rights to an endangered or threatened species because the effect of passing such rights would only increase conservation of these animals, which is consistent with the ESA’s purpose.

4. The Constitution Does Not Limit a Municipality’s Power to Grant Rights to Nonhuman Animals

A. Fifth Amendment Limitations

The Takings Clause of the Fifth Amendment provides, “[N]or shall private property be taken for public use, without just compensation.”¹⁷⁰ The Supreme Court has described two distinct classes of takings cases.¹⁷¹ First, “[w]here the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation.”¹⁷² Second,

[W]here the government merely regulates the use of property, compensation is required only if considerations¹⁷³ such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by

166. 16 U.S.C. § 1535(f).

167. 16 U.S.C. § 1532(19) (2012).

168. 50 C.F.R. § 17.3(c) (2015).

169. *See infra* app. § 2.

170. U.S. CONST. amend. V.

171. *Yee v. City of Escondido*, 503 U.S. 519, 522 (1982).

172. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

173. Considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property. *Id.*

the public as a whole.¹⁷⁴

The second type of taking is known as regulatory taking.

The Supreme Court has recognized that government regulation by definition involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”¹⁷⁵ Accordingly, “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property economically worthless.”¹⁷⁶

Further, a passage in a recent case concerning takings is especially relevant to the issues of this Article: “The keen observation in *Lucas* regarding personal property rings especially true as it relates to exotic animals owned as personal property because they are living creatures that pose unique threats to people, and thereby reasonably may be subject to onerous government regulation.”¹⁷⁷ The application of these principles has prevented several nonhuman animal owners from claiming a taking of their proprietary rights in the nonhuman animals. For instance, the Supreme Court held that regulations outlawing the sale of eagle feathers and other eagle parts was not a taking of personal property because it was “not clear that appellees [would] be unable to derive economic benefit from the artifacts; for example, they might [have] exhibit[ed] the artifacts for an admissions charge.”¹⁷⁸ Thus, the eagle artifacts were not “taken” because they maintained some value despite the law banning their sale.¹⁷⁹ More recently, a federal district court ruled that the Ohio Legislature was “within constitutional parameters, to decide whether and how best to

174. *Id.* at 522–23 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123–25 (1978)).

175. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

176. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

177. *Wilkins v. Daniels*, 913 F. Supp. 2d 517, 543 (S.D. Ohio 2012) (first citing *Sentell v. New Orleans & Carrollton R.R. Co.*, 166 U.S. 698, 704 (1897) (“[Dogs] would still be subject to the police power of the State, and might be destroyed or otherwise dealt with, as in the judgment of the legislature is necessary for the protection of its citizens.”); and then citing *Nicchia v. New York*, 254 U.S. 228, 230 (1920) (“Property in dogs is of an imperfect or qualified nature and they may be subjected to peculiar and drastic police regulations by the state without depriving their owners any federal right.”)).

178. *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

179. *Id.* at 65–66.

regulate such matters as the possession, care, and transfer of [exotic and inherently dangerous] animals” and that such regulation did not amount to a regulatory taking.¹⁸⁰ The court stated this after noting that regulation of animals, even exotic animals, is firmly grounded in the police power of the states.¹⁸¹ Likewise, when a municipal ordinance in Los Angeles, California, requiring all dogs and cats within the city to be spayed or neutered was challenged as a taking, the court stated that the ordinance was not a taking because it did not amount to a “physical invasion . . . nor [did] it deprive owners of all economically viable use.”¹⁸² The court further noted that the regulation was rationally related to legitimate government purpose (i.e., controlling pet population) and was squarely within the municipality’s police power.¹⁸³ Los Angeles has been a city on the front line of positive change for animals through city legislation. In 2013, Los Angeles became one of the first American cities to ban the use of bullhooks on elephants following a unanimous city council vote outlawing their use.¹⁸⁴

Los Angeles also banned the sale of commercially bred dogs, cats, and rabbits in any pet store or retail establishment in 2012.¹⁸⁵ Numerous other cities, in both constitutional home rule states and otherwise, have enacted similar bans.¹⁸⁶ Unfortunately for states without strong

180. *Wilkins*, 913 F. Supp. 2d at 543–44.

181. *Id.* at 543.

182. *Concerned Dog Owners of Cal. v. City of Los Angeles*, 123 Cal. Rptr. 3d 774, 787 (Ct. App. 2011).

183. *Id.* at 789.

184. Emily Alpert Reyes, *City Council Bans Use of Bullhooks on Circus Elephants in L.A.*, L.A. TIMES (Apr. 30, 2014, 11:42 AM), <http://www.latimes.com/local/lanow/la-me-ln-elephant-bullhooks-20140430-story.html>. However, the ban does not go into effect until 2017; the ban gave a three-year grace period for circuses to explore alternatives. *Id.*

185. LOS ANGELES, CAL., MUN. CODE, ch. 5, art. III, § 53.73 (2013).

186. ALISO VIEJO, CAL., CODE § 6.02.120 (2016); BEVERLY HILLS, CAL., CODE §§ 5-2-106, -107 (2016); BURBANK, CAL., CODE § 5-1-1439 (2016); CARLSBAD, CAL., CODE § 7.16.010 (2016); CATHEDRAL CITY, CAL., CODE § 10.10.190 (2016); CHINO HILLS, CAL., CODE § 6.03.020 (2016); CHULA VISTA, CAL., CODE § 6.08.108 (2016); COLTON, CAL., CODE § 7.02.060 (2016); DANA POINT, CAL., CODE § 10.10.140 (2016); ENCINITAS, CAL., CODE § 9.23.030 (2016); GARDEN GROVE, CAL., CODE § 6.04.080 (2016); GLENDALE, CAL., CODE § 6.10.020 (2016); HERMOSA BEACH, CAL., CODE § 6.16.020 (2016); IRVINE, CAL., CODE § 4-5-506 (2016); LA QUINTA, CAL., CODE § 5.82 (2016); LAGUNA BEACH, CAL., CODE § 6.12.160 (2016); LONG BEACH, CAL., CODE § 6.16.062 (2016); OCEANSIDE, CAL., CODE § 4.6.5 (2016); PALM SPRINGS, CAL., CODE § 10.24.021 (2016); RANCHO MIRAGE, CAL., CODE § 6.80.065 (2016); SAN DIEGO, CAL., CODE § 42.0706 (2013); SAN MARCOS, CAL., CODE § 6.32.030 (2016); SOLANA BEACH, CAL., CODE § 4.50 (2016); SOUTH LAKE TAHOE, CAL., CODE § 6.55.350 (2016); TURLOCK, CAL., CODE § 6-1-703 (2016); VISTA, CAL., CODE § 6.10.020 (2016); WEST HOLLYWOOD, CAL., CODE § 9.50.020 (2016); FOUNTAIN, COLO., CODE § 6.02.170 (2009); AVENTURA, FLA., CODE § 1-17(b) (2016); COCONUT CREEK, FLA., CODE § 5-12(b) (2016); CORAL GABLES, FLA., CODE § 10-33 (2016); CUTLER BAY, FLA., CODE § 4-102

constitutional home rule powers, those bans may be subject to being overturned.¹⁸⁷

B. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment states, in relevant part, “nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.”¹⁸⁸ The Equal Protection Clause applies to state and local governments, as well as to the Federal Government through the due process provisions of the Fifth Amendment.¹⁸⁹ Strict scrutiny is triggered where the individual alleging the denial of her fundamental rights belongs to a suspect class such as race, religion or alienage, or when there is an allegation of deprivation of fundamental rights.¹⁹⁰ Gender and legitimacy at birth are quasi-suspect

(2016); DANIA BEACH, FLA., CODE § 5-14 (2016); DEERFIELD BEACH, FLA., CODE § 10-19(a) (2016); FERNANDINA BEACH, FLA., CODE § 18-17(b) (2016); FLAGLER BEACH, FLA., CODE § 5-17(f) (2016); GREENACRES, FLA., CODE § 3-8(a)–(b) (2016); HALLANDALE BEACH, FLA., CODE § 6-12(b) (2016); HOMESTEAD, FLA., CODE § 4-122 (2016); HYPOLUXO, FLA., CODE § 22-180(b) (2015); JACKSONVILLE BEACH, FLA., CODE § 5-35(e) (2016); JUNO BEACH, FLA., CODE § 4-5(b) (2016); JUPITER, FLA., CODE § 5-18(b) (2016); LAKE WORTH, FLA., CODE § 6-9(b) (2016); LAUDERHILL, FLA., CODE § 4-41(b) (2016); MARGATE, FLA., CODE § 4-88(a) (2016); MIAMI BEACH, FLA., CODE § 10-18(b) (2016); NORTH BAY VILLAGE, FLA., CODE § 91.11 (2016); NORTH LAUDERDALE, FLA., CODE § 10-11(2) (2016); NORTH MIAMI BEACH, FLA., CODE § 6-9 (2016); NORTH PALM BEACH, FLA., CODE § 4-13 (2016); OPA LOCKA, FLA., CODE § 5-35 (2016); PALM BEACH, FLA., CODE § 10-46(b) (2016); PALM BEACH GARDENS, FLA., CODE § 14-37 (2016); PINECREST, FLA., CODE § 16-61 (2015); POMPANO BEACH, FLA., CODE § 90.39 (2016); SUNNY ISLES BEACH, FLA., CODE § 100-3(B) (2016); SURFSIDE, FLA., CODE § 90-41(d)(26) (2016); TAMARAC, FLA., CODE § 4-36 (2016); WELLINGTON, FLA., CODE § 14-2(c) (2016); WEST MELBOURNE, FLA., CODE § 14-3(b) (2016); WILTON MANORS, FLA., CODE § 4-6(b) (2016); CHI., ILL., CODE § 4-384-015(b) (2016); WAUKEGAN, ILL., CODE § 4-68 (2016); AUDUBON, N.J., CODE § 14-63 (2016); BRICK, N.J., CODE § 98-70 (2016); BROOKLAWN, N.J., CODE § 56-59 (2015); CHERRY HILL, N.J., CODE § 8-3.4 (2016); HOBOKEN, N.J., CODE § 93-15 (2016); MANASQUAN COUNTY, N.J., CODE § 5-12 (2015); NORTH BRUNSWICK, N.J., CODE § 387-5(G) (2015); OCEANPORT, N.J., CODE § 390-31.2 (2016); POINT PLEASANT BOROUGH, N.J., CODE § 5-18 (2016); RANDOLPH, N.J., CODE § 8-10 (2016); WATERFORD, N.J., CODE § 94-51 (2016); TOLEDO, OHIO, CODE § 1705.10 (2016); EAST PROVIDENCE, R.I., CODE § 3-68 (2015); AUSTIN, TEX., CODE § 3-2-3 (2016); EL PASO, TEX., CODE ch. 7.14 (2016); Casselberry, Fla., Ordinance 15-1430 (Nov. 9, 2015); Eastpointe, Mich., Ordinance 1126 (Sept. 1, 2015); Memphis, Mich., Resolution R15-140 (June 11, 2015); Merchantville, N.J., Ordinance 15-10 (Nov. 9, 2015); Voorhees, N.J., An Ordinance Banning the Sale of Dogs and Cats from Pet Shops (Oct. 13, 2015).

187. Two Arizona cities, Phoenix and Tempe, were overridden by a bill by the state legislature that removed the ability of the cities to enact such legislation. *See* PHX., ARIZ., CODE § 8-3.06 (2016); TEMPE, ARIZ., CODE § 6-54 (2016); S. 1248, 52d Leg., 2d Reg. Sess. (Ariz. 2016). This action highlights the great disparity of power in Home Rule versus non-Home Rule jurisdictions.

188. U.S. CONST. amend. XIV, § 1.

189. *See* *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

190. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 756 (2011).

classes subject to intermediate review.¹⁹¹ Otherwise, the courts apply rational basis review to determine whether the government's actions are rationally related to a legitimate government interest.¹⁹²

A municipality's grant of legal rights to a nonhuman animal would not violate the Equal Protection Clause because the challenging party, likely one purporting to own the chimpanzee (or other nonhuman animal), would not be a suspect class entitled to heightened scrutiny under that clause. Any court adjudicating an equal protection challenge by a non-suspect class would apply the rational basis test to the ordinance.¹⁹³ Because the ordinance would be rationally related to upholding the health and morals of the citizens of the municipality—an established legitimate purpose for municipal police powers—the ordinance would pass the rational basis test.

C. *Dormant Commerce Clause*

The Constitution expressly grants Congress the authority “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁹⁴ But the Supreme Court has interpreted the Commerce Clause to prohibit “certain state [regulation] even when Congress has failed to legislate on the subject”—this is known as the negative or “dormant” Commerce Clause.¹⁹⁵ If a law discriminates against out-of-state actors/commerce or favors in-state actors/commerce, strict scrutiny is applied.¹⁹⁶ If the law does not discriminate against out-of-staters on its face, but has the effect of impeding interstate commerce, courts apply the following balancing test: “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in

191. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy.”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616, 2599 (2015) (upholding a protected liberty interest for individuals to enter into same-sex marriages, but the Supreme Court did not identify a specific classification for sexual orientation).

192. Yoshino, *supra* note 193, at 760.

193. *Id.* at 759.

194. U.S. CONST. art. I, § 8, cl. 3.

195. *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (first citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992); then citing *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); then citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534–35 (1929); and then citing *Gibbons v. Ogden*, 22 U.S. 1, 9 (1824)).

196. See *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978).

relation to the putative local benefits.”¹⁹⁷

Opponents of an ordinance granting legal rights to nonhuman animals may argue it violates the “dormant” Commerce Clause by discriminating against out of state owners of a nonhuman animal.¹⁹⁸ However, a municipality’s ban on all exotic animals within its jurisdiction was held not to violate the dormant Commerce Clause, and the reviewing court noted that strict scrutiny did not apply¹⁹⁹ and that the ordinance “regulate[d] evenhandedly by imposing a complete ban on commerce in wild or dangerous animals within the [municipality] without regard to the origin of the animals”; therefore, it did not violate the dormant Commerce Clause.²⁰⁰ The court also concluded that the incidental burden imposed on interstate commerce by the ordinance was not “clearly excessive in relation to the putative local benefits”²⁰¹ and that the ordinance was a legitimate use “of the municipality’s traditional police powers”²⁰² When the City of Chicago banned foie gras, a group of restaurants brought a dormant Commerce Clause challenge.²⁰³ The reviewing court found that the ordinance did not “directly regulate or discriminate against extraterritorial commerce.”²⁰⁴ A similar result would follow if a municipality’s grant of legal rights was challenged under the dormant Commerce Clause, as any impact on commerce would be incidental.

D. The Privileges and Immunities Clause

The Privileges and Immunities Clause of the Constitution states that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²⁰⁵ This clause seeks to prevent discrimination between residents and nonresidents and often overlaps with the dormant Commerce Clause.²⁰⁶ But this clause also

197. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960)).

198. *See DeHart v. Town of Austin*, 39 F.3d 718, 721 (7th Cir. 1994).

199. *Id.* at 723–24 (strict scrutiny did not apply because the ordinance was not “simple protectionism”).

200. *Id.*

201. *Id.* (quoting *Pike*, 397 U.S. at 142).

202. *Id.* at 724.

203. *Ill. Rest. Ass’n v. City of Chicago*, 492 F. Supp. 2d 891, 892 (N.D. Ill. 2007), *vacated*, *Ill. Rest. Ass’n v. City of Chi.*, No. 06 C 7014, 2008 U.S. Dist. LEXIS 123765 (N.D. Ill. Aug. 7, 2008).

204. *Id.* at 901.

205. U.S. CONST. art. IV, § 2, cl. 1.

206. *See United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984) (“The two Clauses have different aims and set different standards for state conduct.”);

“protects the rights of citizens to ‘ply their trade, practice their occupation, or pursue a common calling.’”²⁰⁷ A challenge to an ordinance granting rights to nonhuman animals might be advanced on the grounds that the ordinance precludes certain occupations from practicing their trade, such as researchers or circuses restrained by the ordinance from doing certain things to their animals. However,

[t]he Privileges and Immunities Clause only precludes discrimination against nonresidents when the governmental action “burdens” one of the privileges and immunities protected under the clause, and the government does not have a “substantial reason” for the difference in treatment or the discrimination practiced against the nonresidents does not bear a “substantial relationship” to the government’s objectives.²⁰⁸

Thus, any violation of this clause requires “discrimination against nonresidents.” An ordinance that applies to all the covered nonhuman animals within its jurisdiction, whether owned by residents or nonresidents alike, would not violate the Privileges and Immunities Clause.

E. Contract Clause

The Constitution provides in pertinent part, “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”²⁰⁹ But “[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State ‘to safeguard the vital interests of its people.’”²¹⁰ Accordingly, “the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people . . . is paramount to any rights under contracts between individuals.”²¹¹

In 2004, after cockfighting was banned in Oklahoma, the Oklahoma Supreme Court ruled that the statewide ban on cockfighting did not violate the Contract Clause, despite the fact that the law impaired some of the parties’ contracts to sell fighting cocks.²¹² The court stated that

Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 860 (D. Wyo. 1994).

207. *McBurney v. Young*, 133 S. Ct. 1709, 1715 (2013) (quoting *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978)) (citing *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 280 (1985)).

208. *A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865, 870 (3d Cir. 1997) (first citing *Toomer v. Witsell*, 334 U.S. 385, 396 (1948); then citing *United Bldg. & Constr. Trades Council*, 465 U.S. at 218; and then citing *Piper*, 470 U.S. at 284).

209. U.S. CONST. art. I, § 10, cl. 1.

210. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434 (1934)).

211. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241–42 (1978) (quoting *Manigault v. Springs*, 199 U.S. 473, 480 (1905)).

212. *Edmondson v. Pearce*, 91 P.3d 605, 609–10 (Okla. 2004).

“[u]nquestionably, the people acting in their legislative capacity, were acting in furtherance of a legitimate and reasonable exercise of the police power to prevent animal cruelty and to end human involvement in such cruelty, by enacting the ban on cockfighting and related activities.”²¹³

The same result would be likely if a Contract Clause challenge was brought against a municipal ordinance granting nonhuman animal rights. Such an ordinance, as established previously, would be a valid exercise of local police power used to regulate morals and, therefore, would not be curtailed by the Contract Clause.

IV. THE VALIDITY OF A BODILY LIBERTY ORDINANCE

A municipality with strong home rule powers may enact an ordinance granting certain nonhuman animals the right to bodily liberty that should survive judicial scrutiny. As discussed above, home rule ordinances are vulnerable to challenge on three grounds: they exceed the home rule authority granted to the municipality, they conflict with or are preempted by state law, or they conflict with or are preempted by federal law.²¹⁴ An ordinance granting bodily liberty rights to nonhuman animals is an appropriate use of home rule authority and should not conflict with or be preempted by state or federal law.

When a home rule ordinance is challenged, a court must determine “what is or is not a [municipal] affair”:

No exact definition of the terms “municipal affairs” can be formulated and the courts have made no attempt to do so, but instead have indicated that judicial interpretation is necessary to give it meaning in each controverted case At the same time, however, we noted that “our decisions have also strived to confine the element of judicial interpretation by hedging it with a judicial procedure intended to bring a measure of certainty to the process”²¹⁵

As discussed in detail above, municipalities already regulate nonhuman animals pursuant to their police power, while their welfare has long been considered a municipal affair. Police power permits municipalities to enact ordinances that promote or provide for the health, safety, and morals of its residents; municipalities have long created new benefits and privileges that respond to evolving societal interests and moral standards. Municipalities have extended benefits and privileges that go beyond both

213. *Id.* at 622.

214. See *supra* Part II.

215. Lynn A. Baker & Daniel Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. UNIV. L. REV. 1337, 1350 (2009) (quoting *Johnson v. Bradley*, 841 P.2d 990, 995–96 (Cal. 1992)).

federal laws and those of its parent state.²¹⁶ An ordinance granting bodily liberty to nonhuman animals would fall most clearly into the category of furthering the morals of its residents.

Accordingly, a municipality granting the right to bodily liberty to a nonhuman animal is analogous to a municipality seeking to expand or protect civil rights. Even where the issue is one of mixed local and statewide concerns, “[i]n many of the modern home rule cases, the state courts manage to reconcile state and local law, and thereby uphold local civil rights laws, without needing to consider the question of whether the matter is one of purely local concern.”²¹⁷

When state and local law cannot be reconciled, states claim that their law is of general concern. In jurisdictions in which municipal corporations are controlled by the state legislature, a state statute will prevail.²¹⁸ However, in an area of mixed concern, when the conflict between a local ordinance and state statute “can be ameliorated with certain judicial constructions, the courts usually find that local law can rest alongside state law.”²¹⁹ Even when a municipal ordinance appears to conflict with a state statute, it is not necessarily invalid in municipalities with strong home rule powers:

The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.²²⁰

As noted above, none of the statewide laws of general application in the constitutional home rule states suggest that a state law pertaining to nonhuman animals would create a mutually exclusive conflict with any municipal ordinance granting a nonhuman animal legal rights.²²¹ At most,

216. See *supra* Part III.

217. Baker & Rodriguez, *supra* note 218, at 1362.

Viewed broadly, conflicts over local civil rights protection and state regulation are resolved by state courts on a theory of home rule that appears to privilege local creativity and initiative but, importantly, regards states as the principal in delineating and shaping civil rights protections. Ordinarily, states will not endeavor to displace local initiatives by declaring that certain groups are not protected—although there are noteworthy contrary examples . . . Rather, states will appeal to a general law that, they argue, is in conflict with specific local laws.

Id. at 1363.

218. *Hemphill v. Wabash R.R. Co.*, 209 F.2d 768, 769 (7th Cir. 1954) (citing *City of Chicago v. Chi. Great W. R.R. Co.*, 180 N.E. 835, 836 (Ill. 1932)).

219. Baker & Rodriguez, *supra* note 218, at 1363.

220. *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 2000).

221. See *supra* Section III.B.2.

courts would determine the ordinance to be operating in an area of mixed concern and would allow the act of local lawmaking to stand alongside state statutes. Further, the general analysis regarding federal preemption examined in detail above,²²² would apply equally to a grant of bodily liberty, and there is no reason to believe such an ordinance would fall under federal preemption.

Accordingly, at a minimum, the constitutional home rule municipalities (and with the power of the legislature behind them, legislature home rule municipalities as well) could enact an ordinance granting the right to bodily liberty to appropriate nonhuman animals within its jurisdiction. If challenged, the ordinance should survive judicial scrutiny, as such an ordinance is a valid exercise home rule authority regulating traditional areas deemed local concerns: the health, safety, and morals of its citizens and the nonhuman animals within its jurisdiction. Such ordinance would not conflict with state or federal law and would be an appropriate reflection of the municipality's moral concern with the status of nonhuman animals within its borders.

CONCLUSION

There is a growing movement to treat nonhuman animals as more than mere things. While cases are currently being fought in the courts to grant personhood to certain nonhuman animals under the common law, other tools may be available to achieve individual rights for nonhuman animals. A municipality, utilizing its power under home rule jurisdiction, may enact local legislation granting rights to nonhuman animals within its municipal borders. Although such local legislation has not yet been introduced, as no state or federal laws address such nonhuman animal rights, any local government legislating in this area of law should not be preempted by existing laws. Consequently, creation of new rights for nonhuman animals at the local level is a viable tool for substantive change in the lives of nonhuman animals, especially in municipalities with strong home rule powers, which currently includes municipalities in the states of Alaska, California, Illinois, Iowa, Kansas, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, and Utah.

222. *See supra* Section III.B.3.

APPENDIX

An Ordinance Ensuring Certain Rights of [Designated Nonhuman Animals] within the City of XXX

Section 1: Definitions

Bodily Integrity: Freedom from physical harm by any Entity, except when clearly in the best interest of the [Designated Nonhuman Animals].

Bodily Liberty: Freedom from the infliction of any action, or failure to act, by any Entity, that prevents the expression of [the Designated Nonhuman Animals'] natural behaviors, including the freedom to move about, or causes emotional, psychological, or mental harm, except when clearly in the best interest of [the Designated Nonhuman Animals].

Entity: Any individual, organization, partnership, corporation, trust, or other private group, or its agent or employee, and any officer, employee, agent, department or instrumentality of the Federal or State government that is subject to the jurisdiction of the City of [CITY], [STATE].

Section 2: Rights

Each [Designated Nonhuman Animal] within the city of [CITY], [STATE] shall have the rights to Bodily Liberty and Bodily Integrity.

Section 3: Enforcement

Any Entity may bring a complaint to the [XXX] Court alleging a violation of Section 2 of this Ordinance. Upon receipt of any such complaint, the Court shall appoint a Guardian Ad Litem to represent the best interests of the [Designated Nonhuman Animals]. Such Guardian Ad Litem shall possess a demonstrated commitment to advancing the legal rights of [Designated Nonhuman Animals]. Upon a finding of a violation of the rights set forth in Section 2, the Court shall order all necessary and appropriate remedies to ensure the Bodily Liberty and/or Bodily Integrity of the [Designated Nonhuman Animals].