

A REVOLUTION IN LOCAL GOVERNMENT LAW: RECOGNIZING THE HOME RULE IMPLICATIONS OF MUNICIPALITY SUITS AGAINST GUN MANUFACTURERS

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INTRODUCTION

The tobacco litigation and subsequent settlement was the beginning of a revolutionary change in the manner in which public health is regulated in this country.¹ State governments across the nation used the judicial branch in an attempt to achieve widespread reforms in the manufacture, marketing, and regulation of tobacco.² The success of the litigation efforts against big tobacco led public officials to think of other ways to achieve needed reforms against industries that posed a public health risk.³ Thus, following closely on the heels of the to-

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1. See, e.g., Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 355 (2000) (describing tobacco litigation and settlement as “most prominent example of this pattern of government suing injurious industries”); Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897 (1998) (focusing on way in which litigation drastically changed political relationship between tobacco and its foes); Wendy E. Parmet, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 HOUS. L. REV. 1663 (1999) (discussing how public health litigation has become proactive, representing fundamental change in role of judiciary in regulating public health); *When Lawsuits Make Policy*, ECONOMIST, Nov. 21, 1998, at 17 (discussing how tobacco settlement opened door to other public health lawsuits).

2. See *When Lawsuits Make Policy*, *supra* note 1; Press Release, Commonwealth of Pennsylvania Office of Attorney General, Fisher, AGs Announce Potential National Settlement of Tobacco Litigation (Nov. 16, 1998) (on file with the *New York University Journal of Legislation and Public Policy*).

3. See Fox Butterfield, *Results in Tobacco Litigation Spur Cities to File Gun Suits*, N.Y. TIMES, Dec. 24, 1998, at A1; David E. Rosenbaum, *Echoes of Tobacco Battle in Gun Suits*, N.Y. TIMES, Mar. 21, 1999, at A32; Leslie Wayne, *Gun Makers Learn From Tobacco Fight*, N.Y. TIMES, Dec. 18, 1997, at A18.

bacco settlement, a local government filed the first suit against a gun manufacturer.⁴ As was the case with big tobacco, the proponents of the gun suits focused more on safety and regulatory change than on financial gain.⁵ Mayors of cities that had filed suits called for the courts to impose a wide array of changes in the manufacture, sale, and marketing of firearms.⁶

The gun manufacturer suits, however, posed new and different problems from the ones faced in the tobacco experience. In the gun manufacturer litigation, municipalities were leading the charge, often in opposition to state legislatures.⁷ Several of these suits were quickly dismissed by trial courts. However, suits by Atlanta and New Orleans survived motions to dismiss at the trial court level.⁸ These two home rule municipalities are governed by state law that has been very restrictive of the way in which matters of statewide concern are regulated on the local level, particularly in cases where laws governing the

4. See Fox Butterfield, *New Orleans Seeks Millions in Gun Suit*, N.Y. TIMES, Nov. 4, 1998, at A16.

5. See sources cited *supra* note 1; discussion *infra* Parts I.A.1, I.B.1.

6. See, e.g., Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1255–57 (2000) (discussing manufacturer supervision of retail gun sales and compulsory installation of safety features as two goals sought by complainants in gun litigation).

7. See Pamela Brogan, *NRA Takes Aim Against Congress, State Legislatures in Fight Against Lawsuits*, GANNETT NEWS SERVICE, Feb. 16, 1999 (on file with the *New York University Journal of Legislation and Public Policy*) (discussing how National Rifle Association planned to lobby state legislatures in effort to block gun suits); *Gunmakers' First Volley in War on Suits: State Lends Its Support*, CHI. TRIB., Feb. 9, 1999, at 6 (discussing Georgia Senate's passage of bill intending to block municipality lawsuits against gun manufacturers).

8. See *City of Atlanta v. Smith & Wesson Corp.*, No. 99VS0149217J (Ga. State Ct. Oct. 27, 1999) (order denying in part and granting in part motion to dismiss) (granting defendants' motion to dismiss claims sounding in strict product liability while denying their motion to dismiss claims based on negligence), http://www.firearmslitigation.org/content/pdf/atlanta/atlanta_order_writ_21800.pdf; *Morial v. Smith & Wesson Corp.*, No. 98-19578 (La. Civ. Dist. Ct. Feb. 28, 2000) (order denying defendants' peremptory exceptions of no right of action and no cause of action) (denying all claims in defendants' motion to dismiss), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_order_deny_peremptexcept_22800.pdf; see also *GA Judge Sustains Atlanta's Negligence Claim Against Gun Manufacturers*, CONSUMER PRODUCT LITIG. REP., Nov. 1999, at 10, LEXIS, Lglpub File; Pam Belluck, *Chicago Gun Suit Fails, but California's Proceeds*, N.Y. TIMES, Sept. 16, 2000, at A9. The Atlanta lower court decision was challenged by the defendants, who petitioned the Superior Court of Fulton County for a writ of mandamus, seeking to force the lower court judge to dismiss the case. This petition was denied. *Smith & Wesson Corp. v. City of Atlanta*, No. 1999CV17108 (Ga. Super. Ct. Feb. 18, 2000) (order denying plaintiffs' petition for a writ of mandamus) (denying extraordinary remedy of writ of mandamus due in part to availability of appeals), http://www.firearmslitigation.org/content/pdf/atlanta/atlanta_order_writ_21800.pdf.

regulation of a product explicitly expressed the statewide concern.⁹ Despite the restrictions on local legislation, courts in Georgia and Louisiana permitted local governments to achieve otherwise prohibited regulatory goals through litigation.

The inconsistent approach used by state trial courts in Georgia and Louisiana may have a lasting effect on the law of local government in each state. Instead of acquiescing to restrictions placed on its ability to legislate to achieve regulatory change, a municipality may opt to use litigation as a tool to skirt restrictions on home rule authority.¹⁰ This newfound power is immune from state interference, as the position of the individual litigant affords the city constitutional protections that it could never have in its role as a political subdivision of the state.¹¹

Parts I.A and I.B of this Note will focus on the complaints filed by Atlanta and New Orleans, as well as the law of local government in each state, in order to show that trial courts in Georgia and Louisiana, in allowing the regulation of firearms through litigation, have taken an inconsistent approach toward state and local government law. In addition, these Parts will address the progress of the litigation in the Louisiana and Georgia supreme courts.

Part I.C analyzes retroactive legislation that the state governments of Georgia and Louisiana passed intending to bar the municipal suits. This Part points out how the trial courts' approach toward the retroactive statutes further obscures the law of local government in each state and fundamentally expands the power of municipalities vis-à-vis the state.

Part II of the analysis looks at consistent approaches by other state trial courts in judging municipality suits against gun manufacturers. Specifically, this Part focuses on the litigation by Bridgeport, Connecticut, which was dismissed at the trial court level.

Part III of this Note highlights some issues that are unearthed by examination of the inconsistency in allowing regulatory change through litigation but prohibiting it in the form of municipal legislation. These issues are extremely broad and cannot be definitively covered in this analysis. However, regardless of the outcome of the debate over these issues, the inconsistent approach used by state trial courts in examining the gun manufacturer litigation in Georgia and

9. See discussion *infra* Parts I.A, I.B.

10. See discussion *infra* Part I.

11. See discussion *infra* Part I.C.

Louisiana may have a long-lasting effect on the future of home rule in each state.

I

INCONSISTENT APPROACHES TO HOME RULE POWERS BY STATE TRIAL COURTS IN THE GUN MANUFACTURER LITIGATION

In Georgia and Louisiana, two trial courts allowed lawsuits by municipalities seeking broad regulatory change from gun manufacturers to survive motions to dismiss, despite the existence of common and statutory law in these states that reserves the right to regulate firearms to the state.¹² A closer look at the home rule powers granted to municipalities in these states, particularly those powers affecting firearms and firearm manufacturers, is needed to judge the current lawsuits and their effect on home rule powers. This Part will focus on the home rule powers of Atlanta and New Orleans and the way in which differentiating between litigation and legislation in judging the regulation of firearms fundamentally alters these powers.

A. Atlanta

1. *The Focus of Atlanta's Suit Against the Firearm Industry Is to Achieve Widespread Regulatory Reform of the Way in Which Guns Are Manufactured and Marketed*

Atlanta filed suit on February 4, 1999, against fourteen firearm manufacturers and three trade associations.¹³ The suit claimed that Atlanta had suffered harm and had incurred significant expenses “associated with the manufacture, distribution, marketing, promotion, and sale of firearms which are defective, unreasonably dangerous and negligently designed under Georgia law.”¹⁴ Atlanta based its power to sue upon the city’s responsibility to act for the “health, safety and welfare of its citizens” under the Georgia Municipal Home Rule Act.¹⁵ The lawsuit survived a motion to dismiss on the negligent design and

12. See *supra* note 8.

13. See Plaintiff’s Complaint, *City of Atlanta v. Smith & Wesson Corp.*, No. 99VS0149217J, (Ga. State Oct. 27, 1999), http://www.firearmslitigation.org/content/pdf/atlanta/atlanta_complaint_2499.pdf; see also Will Anderson, *Gun Maker Takes Aim at Cities’ Lawsuit*, ATLANTA J. & CONST., Feb. 14, 1999, at D5.

14. Plaintiff’s Complaint at 7, ¶ 25, *City of Atlanta v. Smith & Wesson Corp.* (No. 99VS0149217J).

15. *Id.* at 7, ¶ 24; see also GA. CODE ANN. § 36-35 (2000).

warnings theories.¹⁶ This success marked the first lawsuit by a municipality to survive a motion to dismiss.¹⁷

Neither the complaint nor the amended complaint filed by the City of Atlanta specifies the damages sought.¹⁸ However, in pursuing the city's lawsuit, Mayor Bill Campbell of Atlanta has shown that he is primarily concerned with changing the way that gun manufacturers produce their product as opposed to financial gain. Mayor Campbell included Atlanta in the settlement agreement between the Department of Housing and Urban Development (HUD) and Smith & Wesson, in which Atlanta agreed to drop Smith & Wesson from its lawsuit in return for certain specified manufacturing changes.¹⁹ These changes included placing a second set of serial numbers on all new guns, installing safety locks on all new guns, developing smart-gun technology within three years, establishing a code of conduct for dealers and distributors of Smith & Wesson guns, and even requiring Smith & Wesson to submit to compliance inspections by a committee comprising city, county, and state officials as well as company representatives.²⁰ Mayor Campbell agreed to drop any gun manufacturer from Atlanta's lawsuit if the manufacturer signed on to the requirements of

16. See *City of Atlanta v. Smith & Wesson Corp.*, No. 99VS0149217J (Ga. State Ct. Oct. 27, 1999) http://www.firearmslitigation.org/content/pdf/atlanta/atlanta_order_writ_21800.pdf.

17. See, e.g., Ben Schmitt, *Lawyers Fill in Blanks in Atlanta Gun Suit Ruling*, FULTON COUNTY DAILY REP., Oct. 29, 1999, at 1.

18. The amended complaint reads as follows:

Wherefore, Plaintiff demands a trial by jury and requests that this Court:

- (a) grant Judgment for Plaintiff and against Defendants on all counts of the Complaint;
- (b) grant Plaintiff an award of damages representing the sums of money paid and to be paid by Plaintiff on account of the Defendants' wrongful conduct;
- (c) grant Plaintiff an award of punitive damages in such amount as will sufficiently punish the Defendants for their conduct and prevent a repetition of such conduct in the future;
- (d) grant Plaintiff an award of attorney fees;
- (e) tax all costs against Defendants;
- (f) grant any and all relief this Court deems just; and
- (g) grant Plaintiff such additional relief as this Court deems just.

Plaintiff's First Amendment to Complaint at 10, *City of Atlanta v. Smith & Wesson Corp.*, No. 99VS0149217J (Ga. State Ct. Oct. 27, 1999), http://www.firearmslitigation.org/content/pdf/atlanta/atlanta_firstamend_91599.pdf; see also Plaintiff's Complaint, *City of Atlanta v. Smith & Wesson Corp.*, (No. 99VS0149217J).

19. See James Dao, *Under Legal Siege, Gun Maker Agrees to Accept Curbs*, N.Y. TIMES, Mar. 18, 2000, at A1; Julie B. Hairston, *Gun Maker's Safety Pledge Wards off Wave of Lawsuits*, ATLANTA J. & CONST., Mar. 18, 2000, at A1; Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000, at A10.

20. See Dao, *supra* note 19; Richmond Eustis, *Gunmakers Study Smith & Wesson's Settlement*, FULTON COUNTY DAILY REP., Mar. 21, 2000, at A1.

the agreement with Smith & Wesson.²¹ These manufacturing and regulatory changes are an extraordinary victory for Atlanta, considering the limitations that the city would face in imposing such changes through the legislative process.²²

If Atlanta were to pass an ordinance through the city council that was written to achieve the same regulatory and manufacturing changes that the city was able to accomplish through its settlement with Smith & Wesson, it is likely that such an ordinance would be struck down by a Georgia court as a violation of Atlanta's home rule powers.²³ As the following discussion will show, the court would find a conflict between such legislation and statewide statutory and common law that reserves the regulation of firearms to the State of Georgia. However, a trial court in Atlanta allowed the suit to proceed, based upon the power of the City of Atlanta to sue for recovery of injuries sustained under its charter. It is important to examine the home rule power of Atlanta to regulate firearms in order to determine whether a court should view legislation and litigation differently under the law of local government in Georgia.

2. *The Home Rule Powers of Municipalities in Georgia Are Narrowly Construed*

The Municipal Home Rule Act of 1965, enacted by the Georgia General Assembly, sets out the powers of home rule cities, including Atlanta, in the official state code.²⁴ The Act gives municipal corporations the power "to adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government."²⁵ In 1972, Amendment Nineteen to the Georgia Constitution was passed.²⁶ This general home rule provision expanded on local powers,

21. See Pamela Brogan, *Gun Control Battles Rage at City, State, Federal Levels*, GANNETT NEWS SERVICE, Apr. 19, 1999 (on file with the *New York University Journal of Legislation and Public Policy*).

22. The original Smith & Wesson agreement including the federal government might be dead (due in no part to the actions or wishes of Atlanta), but another deal including regulatory changes is being negotiated between Boston and Smith & Wesson. Regardless of the state of the settlement, the willingness of Mayor Campbell to sign on to the agreement is proof that the city's main focus in bringing a lawsuit against the gun manufacturers is to achieve manufacturing and marketing changes that would make guns safer. See Matt Bai, *A Gun Deal's Fatal Wound*, NEWSWEEK, Feb. 5, 2001, at 30-31.

23. See discussion *infra* Parts I.A.2-3.

24. GA. CODE ANN. § 36-35-3 (2000).

25. *Id.* § 36-35-3(a).

26. See R. Perry Sentell, Jr., *The Georgia Home Rule System*, 50 MERCER L. REV. 99, 113 (1998).

granting municipalities the right to exercise power over police and fire functions and service, garbage and solid waste, public health facilities, and various other local matters.²⁷ Such provisions give home rule cities like Atlanta the power to act in furtherance of the general welfare of the city on local issues.²⁸ These general welfare clauses do not, however, give municipalities the authority to act as autonomous entities operating within Georgia borders. Local power has been interpreted narrowly by the courts in Georgia, such that local actions are subject to defeasance by the state legislature.²⁹

The reason for the limited scope of authority wielded by home rule cities in Georgia is the unwillingness of the Georgia courts to completely depart from the legacy of Dillon's Rule, which supports a strict construction of municipal power that severely limits the ability of municipalities to act without express authorization from the state.³⁰ Just six years ago, the Supreme Court of Georgia provided an example

27. *Id.*; see also GA. CONST. art. IX, § 2, ¶ 3.

28. See GA. CODE ANN. § 36-35-3.

29. See *Little v. City of Lawrenceville*, 528 S.E.2d 515, 517 (Ga. 2000) (holding that powers that legislature sets out in city charters are subject to limitations and preemptions imposed by general law); *Kemp v. City of Claxton*, 496 S.E.2d 712, 715 (Ga. 1998) (stating that “[m]unicipal corporations are creations of the state, possessing only those powers that have been granted to them, and allocations from the state are strictly construed.” The Court limited home rule powers further, noting that “[m]unicipal home rule power is a delegation of the General Assembly’s legislative power to the municipalities”); *City of Atlanta v. McKinney*, 454 S.E.2d 517, 521 (Ga. 1995) (holding that “powers of cities must be strictly construed, and any doubt concerning the existence of a particular power must be resolved against the municipality”); *City of Mountain View v. Clayton County*, 249 S.E.2d 541, 543–44 (Ga. 1978) (reiterating common law view in Georgia that “[m]unicipalities are creatures of the legislature, and their existence may be established, altered, amended, enlarged or diminished, or utterly abolished by the legislature” (quoting *Troup County Elec. Membership Corp. v. Ga. Power Co.*, 191 S.E.2d 33, 37 (1972))). The *City of Mountain View* court did not believe that the home rule provisions of the Georgia Constitution and general law operated to vest municipalities with autonomy and thereby remove the ability of the General Assembly to withdraw powers granted by the constitution.

30. John Dillon believed that a municipal corporation “‘possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.’” CLAYTON P. GILLETTE & LYNN A. BAKER, *LOCAL GOVERNMENT LAW*, 275–76 (2d ed. 1999) (quoting JOHN F. DILLON, *1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS*, 448–51 (5th ed. 1911)). As a rule of construction of municipal power, Dillon’s Rule has been surpassed in most jurisdictions by the doctrine of home rule. For a look at the continued vitality of Dillon’s Rule, see the discussion among Clayton Gillette, Richard Briffault, and Gary Schwartz during the University of Virginia School of Law’s John M. Olin Foundation Symposium on Law and Economics of Local Government. Richard Briffault, *Home Rule, Majority Rule, and Dillon’s Rule*, 67 CHI-KENT L. REV. 1011 (1991); Clayton P. Gillette, *In Partial Praise of Dillon’s Rule, or, Can Public Choice*

of this unwillingness in *City of Atlanta v. McKinney*.³¹ The court in *McKinney* defined municipal corporations as “‘creations of the state’” which “‘possess only those powers that have been expressly or impliedly granted to them.’”³² The court, continuing in a Dillon’s Rule tradition, concluded that “[t]he powers of cities must be strictly construed, and any doubt concerning the existence of a particular power must be resolved against the municipality.”³³ Thus, in determining whether a municipality in Georgia has the authority to enact an ordinance, the courts will look, in a very strict fashion, at whether the city has the power to act and whether the action is reasonable.³⁴ Even if municipal authority to act is found, the courts will still reject the ordinance if there is a possible conflict with state law.³⁵

The courts of Georgia have also interpreted the Municipal Home Rule Act in a way that has given the state wide room in acting or preventing action by localities. Examining the language in the Home Rule Act that prevents local action if there is “any general law” or that allows the state legislature to “broaden” or “limit” local power, the courts of Georgia have only allowed localities to act if the state has not preempted local action on the issue.³⁶ However, Georgia law does not limit the preemption examination to a search for express preemptive statements in the Georgia code. The courts have looked at whether any “implied preemption” can be gleaned from the general statutes passed by the state legislature.³⁷ This test of implied preemption is highly subjective and highly restrictive on local action.³⁸

Theory Justify Local Government Law?, 67 CHI-KENT L. REV. 959 (1991); Gary Schwartz, *Reviewing and Revising Dillon’s Rule*, 67 CHI-KENT L. REV. 1025 (1991).
31. 454 S.E.2d 517 (1995).

32. *Id.* at 520 (quoting *Porter v. City of Atlanta*, 384 S.E.2d 631 (Ga. 1989)). For similar language and expressions of the limited power of local governments, see *Sentell*, *supra* note 26.

33. *McKinney*, 454 S.E.2d at 521.

34. *See id.*; *see also Kemp*, 496 S.E.2d at 716 (stating that court “must strictly construe the grant of legislative power to the governing authority”); *Monticello v. City of Atlanta*, 499 S.E.2d 157, 159 (Ga. Ct. App. 1998) (“‘[A]ll municipal charters are strictly construed, and . . . powers which are not expressly, or by necessary implication, conferred upon the corporation can not be exercised by it.’” (quoting *City of Macon v. Walker*, 51 S.E.2d 633 (Ga. 1949))).

35. *See, e.g.*, *Little v. City of Lawrenceville*, 528 S.E.2d 515 (Ga. 2000); *Kemp*, 496 S.E.2d 712; *McKinney*, 454 S.E.2d 517; *City of Mountain View v. Clayton County*, 249 S.E.2d 541 (Ga. 1978).

36. *See, e.g.*, *Sentell*, *supra* note 26, at 132–33; *see also* R. Perry Sentell, Jr., *The Georgia Supreme Court and Local Government Law: Two Sheets to the Wind*, 16 GA. ST. U. L. REV. 361, 371 (1999) [hereinafter *Sentell*, *Two Sheets*].

37. *See Sentell*, *Two Sheets*, *supra* note 36, at 371–72.

38. *See id.* at 370–72 (discussing Georgia Supreme Court’s treatment of *Franklin County v. Fieldale Farms Corp.*, 507 S.E.2d 460 (Ga. 1998), in which Georgia Su-

3. *Statutory and Common Law in Georgia Reserve the Right to Regulate Firearms to the State*

Looking specifically at the statutes governing firearms in Georgia, there is no doubt that the state legislature intended for firearms regulation to take place on the state level. Prior to the initiation of the lawsuit against gun manufacturers by Atlanta, the state code section governing firearms expressly reserved action on the issue to the state. Section 16-11-184 of the 1998 Official Code of Georgia Annotated stated:

- (a) It is declared by the General Assembly that the regulation of firearms is properly an issue of general, state-wide concern.
- (b) No county or municipal corporation, by zoning or by ordinance, resolution, or other enactment, shall regulate in any manner gun shows, the possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms, components of firearms, firearms dealers, or dealers in firearms components.³⁹

The only action on firearms that was delegated to municipalities in the Code was the ability to prohibit the discharge of firearms within the boundaries of the municipal corporation.⁴⁰ This express limitation

preme Court held that general statute on local monitoring fees preempted county's attempt to deny plaintiff's application to place sludge on private land under its own land disposal ordinance. *Fieldale Farms* established two-part test of preemption. First, court looks at whether general statute expressly preempts regulated subject from regulation under local law. Then, court looks to implied preemption.). According to one commentator, in this case, "the supreme court conferred upon itself the most discretion possible. The test is infuriatingly more vague than 'subject-area' and will potentially invalidate far more local legislation than 'genuine conflict.'" *Id.* at 372.

39. GA. CODE ANN. § 16-11-184 (1998), LEXIS, GA1998 File. This Note analyzes the Official Code of Georgia Annotated before the fundamental changes made to the Code with the passage of GA. CODE ANN. § 16-11-184 (1999) (effective Feb. 9, 1999) (revising original section of Code governing regulatory authority of political subdivisions concerning firearms). Section (b)(2) of revised Code states that:

The authority to bring suit and right to recover against any firearms or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit created by or pursuant to an Act of the General Assembly or the Constitution, or any department, agency, or authority thereof, for damages, abatement, or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition to the public shall be reserved exclusively to the state.

Id. This legislation, as will be discussed later, was designed to alter the Code such that lawsuits by municipalities against gun manufacturers would be expressly prohibited by general law. Under the rewritten Code, it is obvious that localities have neither the power to legislate nor to litigate on the issue of gun regulation. This analysis uses the 1998 clause in order to examine whether judges should have dismissed the lawsuits in Georgia based upon the original code.

40. GA. CODE ANN. § 16-11-184(b)(2)(e) (1998).

on municipal authority concerning firearms showed the state's unwillingness to grant municipalities permission to regulate the manufacturing process of the firearm industry.

The courts of Georgia have also dealt with the specific question of the level of government at which the regulation of firearms should take place. In *Rhodes v. R.G. Industries*,⁴¹ the Georgia Court of Appeals rejected an individual claim for breach of implied warranty of merchantability and strict liability due to unreasonably dangerous design against a gun shop, gun manufacturer, and a parts supplier.⁴² The court of appeals, quoting the Georgia Constitution, held that the right of individuals to keep and bear arms "shall not be infringed, but the General Assembly shall have the power to prescribe the manner in which arms may be borne."⁴³ Although the case did not deal with the question of home rule, the court did provide an answer for those who wondered how the courts in Georgia would decide a conflict between state and local laws in the context of firearms. The court stated that the comprehensive scheme of regulation and licensing of firearms passed by the Georgia General Assembly showed the intent of the state to fully cover the issue of firearms regulation.⁴⁴ Furthermore, the comprehensive nature of the regulations showed that the General Assembly had passed all of the regulations that it intended to pass and no more. Any regulation not expressly mentioned could therefore be assumed to have been rejected by the General Assembly.

The enactment of comprehensive licensing provisions for suppliers and purchasers of handguns is indicia that the legislature is not inclined to ban the use of such weapons, and that legislators do not feel that the marketing of handguns to the public is an unreasonably dangerous or socially unacceptable activity. We must conclude that the General Assembly does not intend to control further the manufacture, distribution or use of handguns. This court is prohibited from altering the status quo since the legislature's present posi-

41. 325 S.E.2d 465 (Ga. Ct. App. 1984).

42. *Id.* at 466. Plaintiff's daughter tragically shot and killed a ten-year-old friend after the daughter's brother discovered his aunt's gun. Both the trial court and the court of appeals found that there was no proximate cause between the cause of death and the defendants' actions, there was no defect in the gun, and that the warranty of merchantability only insures that the product is fit for the ordinary purposes for which the product is used. *Id.* at 466-68.

43. *Id.* at 467 (quoting GA. CONST. art. I, § I, ¶ VIII (2000)).

44. *See id.* ("[T]he General Assembly has created a regulatory scheme for the distribution and use of firearms. 'What is important here is the fact that the [Georgia] legislature has neither enacted a statute banning the sale of handguns to the general public nor adopted a joint resolution to amend the Constitution to that effect.'") (quoting *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 198 (E.D. La. 1983)).

tion is within constitutional limits. We cannot change laws, we can only interpret them.⁴⁵

The court in *Rhodes* felt that firearms regulation was a matter that should be left to the state. Even though the court did not explicitly address the issue of preemption in the case, it follows from the decision that the General Assembly has impliedly preempted the field of gun control and licensing. Considering the general attitude of the courts of Georgia in limiting local action through implied preemption, it would be hard to look at the language in *Rhodes* and find that the state has not displayed an intent to fully inhabit the field of firearms regulation.⁴⁶

The result of the highly restrictive law of local government in Georgia, combined with the statutory and common law prohibitions against local regulation of firearms, require courts in Georgia to narrowly construe firearm regulation by municipalities.⁴⁷ Mayor Campbell and the City of Atlanta, recognizing the minimal municipal power to regulate firearms, have turned to litigation as a loophole in the law.⁴⁸ The regulatory changes sought by the city directly conflict with statutory and common law in Georgia.⁴⁹ Allowing Atlanta's lawsuit to continue on the basis of a difference that exists in method only contravenes the intent of the state and drastically alters the power balance between the state and its home rule municipalities.

4. *The Georgia Supreme Court Adds Momentum to Atlanta's Lawsuit*

The suit against gun manufacturers by the City of Atlanta was given additional momentum by the recent decision of the Georgia Supreme Court concerning the city's lawsuit. After a superior court judge in Georgia denied a writ of mandamus to compel the presiding judge to dismiss Atlanta's lawsuit, the gun manufacturers appealed directly to the Georgia Supreme Court.⁵⁰ The court denied the appeal on procedural grounds.⁵¹ This decision was one of the first to allow

45. *Id.* (citation omitted).

46. See Sentell, *Two Sheets*, *supra* note 36, at 370–72 (discussing “implied preemption” doctrine generally).

47. See *supra* Part I.A.2–3.

48. See *supra* Part I.A.1.

49. See *supra* Part I.A.1–3.

50. Bill Rankin, *Ruling Jump-Starts Atlanta's Gun Lawsuit*, ATLANTA J. & CONST., Feb. 17, 2001, at A1; see also *Smith & Wesson Corp. v. City of Atlanta*, 543 S.E.2d 16, 19 (Ga. 2001).

51. *Smith & Wesson Corp. v. City of Atlanta*, 543 S.E.2d at 19 (arguing that writ of mandamus is extraordinary remedy that could only be applied to correct “a clear

discovery to proceed in a municipality's case against gun manufacturers.⁵² It now appears that the home rule issues underlying the firearm litigation in Georgia will not be resolved until the completion of the trial and the exhaustion of all appeals.

B. *New Orleans*

1. *The Focus of New Orleans's Suit Against the Firearm Industry Was to Achieve Widespread Regulatory Reform of the Way in Which Guns Are Manufactured and Marketed*

The City of New Orleans, like the City of Atlanta, decided to sue gun manufacturers to achieve changes in the way that guns are manufactured. Over thirty manufacturers, dealers, and trade associations were included in the city's suit.⁵³ New Orleans's suit was based on ten theories of liability, including negligent marketing, nuisance, inadequate warning, and unreasonably dangerous design.⁵⁴ The suit claimed as damages unspecified amounts of money spent on services to address the criminal and medical consequences of firearm use, as well as "other and further extraordinary equitable, declaratory and/or injunctive relief as permitted by law as necessary to assure that plaintiffs have an effective remedy"⁵⁵ Judging from the comments and actions of Marc Morial, mayor of New Orleans, it is evident that the "extraordinary remedy" was the focus of the suit.⁵⁶ The suit's main contention was that firearms could have been made safer by the addition of certain safety devices, the existence of which had been known by gun manufacturers.⁵⁷ A successful suit by the city would have required gun manufacturers to include these devices on their

abuse of discretion, where a duty imposed by law has been violated and where there is no adequate remedy by appeal. Extraordinary writs can only issue when the official act sought to be compelled is purely ministerial, not judicial in nature." (citations omitted)). Because it is possible for the defendants to appeal the lower court's ruling at the end of the trial, the Georgia Supreme Court thought it unwise to resort to such an extraordinary remedy.

52. See Rankin, *supra* note 50.

53. Amended Petition, *Morial v. Smith & Wesson Corp.*, No. 98-19578 (La. Civ. Dist. Ct. Feb. 28, 2000), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_amend_petition_9799.pdf.

54. *Id.*

55. *Id.* at 23.

56. Marc H. Morial, Letter, *Morial Emphasizes Quest for Safer Handguns*, NEW ORLEANS TIMES-PICAYUNE, Feb. 3, 1999, at B6; Bruce Alpert, *Morial Targets Guns on Washington Trip*, NEW ORLEANS TIMES-PICAYUNE, Mar. 25, 1999, at A19. Morial has stated that he does not want to bankrupt the gun industry. He just wants gun manufacturers to make safe products. See *Newsstand: CNN & TIME* (CNN television broadcast, May 23, 1999), Transcript #99052300V55, LEXIS, Allnws File.

57. See Amended Petition, *Morial v. Smith & Wesson Corp.* (No. 98-18578).

weapons. A trial court in Louisiana ruled in favor of the city in denying summary judgment.⁵⁸

As in Georgia, the legality of an ordinance passed through the New Orleans City Council requiring gun manufacturers to place safety devices on all firearms sold in the city would be difficult to justify. Requiring manufacturing changes of the gun manufacturers would, as explained below, conflict with Louisiana law banning localities from passing laws more restrictive than state laws concerning the sale and regulation of firearms and firearm components.⁵⁹ However, a trial court allowed the exact same regulation to occur in Louisiana on the local level due to the power of New Orleans to sue and be sued.⁶⁰ It is necessary to examine the home rule power of New Orleans concerning gun regulation in order to see if there is, or should be, a difference between legislation and litigation under the law of local government in Louisiana.

2. *The Law of State and Local Government in Louisiana Reserves the Right to Regulate Firearms to the State*

The powers granted to municipalities in Louisiana are much broader than those granted to municipalities in Georgia, particularly for those cities that adopted a home rule charter prior to the adoption of the 1974 Louisiana Constitution. For those cities without home rule charters prior to 1974, the constitution provides for these municipalities and localities to adopt home rule charters.⁶¹ These charters grant municipalities control over “the exercise of any power and performance of any function necessary, requisite, or proper for the management of its affairs, not denied by general law or inconsistent with this constitution.”⁶² This general welfare provision sounds similar to the one adopted in Georgia, and for post-1974 charter cities, the power to act is subject to defeasance by the state legislature.⁶³

For those municipalities whose charters predate the 1974 constitution, New Orleans included, the deference given by the state to the cities is quite broad. In fact, the constitutional provision defining the

58. See *Morial v. Smith & Wesson Corp.*, No. 98-19578 (La. Civ. Dist. Ct. Feb. 28, 2000), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_order_deny_peremptexcept_22800.pdf.

59. See discussion *infra* Part I.B.2.

60. See *Morial v. Smith & Wesson Corp.* (No. 98-19578).

61. G. Roth Kehoe II, Recent Development, *City of New Orleans v. Board of Commissioners: The Louisiana Supreme Court Frees New Orleans from the Shackles of Dillon's Rule*, 69 TUL. L. REV. 809, 814–15 (1995).

62. LA. CONST. art. VI, § 5(E) (1996); see also Kehoe, *supra* note 61, at 814–15.

63. See Kehoe, *supra* note 61, at 815.

home rule power of pre-1974 charter cities merely outlines the limited number of actions such cities are prohibited from taking, rather than requiring an express grant of authority from the state in order to act.⁶⁴ The 1974 Louisiana Constitution provides that a municipality whose home rule charter was in force prior to the adoption of the constitution retains legislative powers consistent with the constitution.⁶⁵ According to the Supreme Court of Louisiana, a preexisting charter is limited only by the 1974 constitution, state statutes permitted by the constitution to govern such charters, and the charter itself.⁶⁶ New Orleans and other pre-1974 charter cities also have the dual powers of initiative and immunity.⁶⁷ The city government can initiate laws without express grants of authority from the state government, and the city has immunity from legislative preemption by the state.⁶⁸ Therefore, the powers held by New Orleans in many ways approach the greatest possible powers held by home rule municipalities. Nonetheless, this expansive home rule power does not expand to the exercise of the police power.

The Louisiana judiciary has had a difficult time helping pre-1974 charter municipalities break completely free of the shackles of Dillon's Rule in the area of police powers. The 1974 Constitution of Louisiana lists as one of the limitations on local governments the principle that "[n]otwithstanding any provisions of this Article, the police power of the state shall never be abridged."⁶⁹ In *Polk v. Edwards*,⁷⁰ the Supreme Court of Louisiana interpreted this provision to mean that "the autonomy of local governmental subdivisions with home rule charters is limited by general legislation enacted under the State's police power.' . . . Although the legislature may delegate the exercise of police power, the power belongs to the state and its delegation can be recalled, abrogated, or modified."⁷¹ Not only does this language make

64. Wayland R. Walker, Jr., Recent Development, *City of Baton Rouge v. Williams: The Louisiana Supreme Court Expands Home Rule Police Power*, 70 TUL. L. REV. 1751, 1753 (1996); Kehoe, *supra* note 61, at 818.

65. LA. CONST. art. VI, § 4.

66. Walker, *supra* note 64, at 1757.

67. Kehoe, *supra* note 61, at 818.

68. *See id.*

69. *See* LA. CONST. art. VI, § 9(B).

70. 626 So. 2d 1128 (La. 1993).

71. *Id.* at 1142 (citations omitted) (quoting *New Orleans v. State*, 426 So. 2d 1318, 1321 (La. 1983)). *Polk* is one of the most extreme expressions of the police power held by the Louisiana legislature. Broad definitions of general laws and the police power were applied to judge the state's gambling laws. While the Supreme Court of Louisiana backed away from this extreme expression of state power in *City of New Orleans v. Bd. of Comm'rs*, the supreme court did not rule that *Polk* was overturned. In fact, the court stated that "[t]he holdings of all other prior decisions of this court are

clear that the state law prevails where there is a conflict between state and local laws that regulate the police power, it also allows the state to invalidate a local law through general legislation in order to preserve the police power of the state.⁷²

The language in *Polk*, however, was limited by the decision of the Louisiana Supreme Court in *City of New Orleans v. Board of Commissioners*.⁷³ In *City of New Orleans*, the supreme court determined that Article VI of the 1974 constitution, in describing the powers of pre-1974 charter municipalities, “strikes a balance in favor of home rule that calls for a corresponding adjustment in judicial attitude.”⁷⁴ The court noted in its interpretation of the constitutional convention in Louisiana in 1974, that the drafters intended “to vest in home rule municipalities and parishes the powers of immunity and initiation as provided for . . . subject to a reservation to the state of that residuum of the police power required to enact and enforce laws necessary to protect and promote the lives, health, morals, comfort, and general welfare of its people as a whole.”⁷⁵ The court noted that there are conditions in which the state legislature will be required to “enact legislation that, despite its conflict with a valid local law, is necessary to protect the vital interests of the state as a whole and thus be found to be within the range of the reserved power of the state.”⁷⁶ This test could have been interpreted as mere lip service to state power, while actually gutting any state control over preexisting charter cities in Louisiana. However, as seen below, the courts in Louisiana have recently interpreted this test in such a way that the state government remains supreme in the exercise of the police power.

Cases decided in the past two years in Louisiana have re-established the dominance of the state government in the exercise of the police power. In *Merritt McDonald Construction v. Parish of East Baton Rouge*,⁷⁷ the Court of Appeals of Louisiana, First Circuit, found a conflict between a state law that prohibited localities from requiring contractors to obtain local licenses and a local law that required con-

consistent with our rationale and conclusions in the present case”. See *City of New Orleans v. Bd. of Comm’rs*, 640 So. 2d 237, 256 (La. 1994); Walker, *supra* note 64, at 1755. As explained later on, this language did indeed preserve the Dillon’s Rule era cases such as *Polk*. Such cases continue to be cited by the Louisiana Supreme Court and court of appeals. See *infra* notes 77–84 and accompanying text.

72. See *Polk*, 626 So. 2d at 1142–43.

73. 640 So. 2d 237.

74. *Id.* at 252.

75. *Id.* at 251.

76. *Id.*

77. 742 So. 2d 564 (La. Ct. App. 1999).

tractors working in the parish to have a local license.⁷⁸ The court withdrew from the expansive interpretation of home rule in *City of New Orleans*, noting that “an absolute grant of power has not been provided to any local government, even those whose Home Rule Charters pre-date the 1974 Constitution.”⁷⁹ The court even went so far as to allow the state to deny or revoke the initial delegation of home rule powers and functions of a municipality in order to prevent abridgement of a reasonable and valid exercise of the state’s police power.⁸⁰ The court noted that cases upholding the preeminence of local legislation are generally limited to the exercise of historical preservation, taxing, and zoning authority under a pre-1974 home rule charter.⁸¹ In finding a conflict with state law and striking the local ordinance down, the court used the test of preemption in *City of New Orleans*: “[A] conflicting state law is not preemptive unless it is ‘necessary to protect the vital interest of the state as a whole.’”⁸² This test seemed like mere lip service in *City of New Orleans*, but the *Merritt McDonald Construction* court interpreted it as one with bite. Standard licensing regulations were found to be vital to the interest of the state as a whole.⁸³

Merritt McDonald Construction is not a unique case in resurrecting the language of *Polk* and re-establishing the supremacy of the state’s exercise of the police power. Other cases decided by the Louisiana Supreme Court and the courts of appeals over the past two years have established that the state is generally supreme in the exercise of general laws concerning its police power.⁸⁴

78. *Id.* at 570–71.

79. *Id.* at 568 (citing *Polk v. Edwards*, 626 So. 2d 1128, 1128 (La. 1993)). This use of cases such as *Polk*, ignored during the *City of New Orleans* period, shows the shift in Louisiana law in favor of state preeminence.

80. *See id.* (citing *Francis v. Morial*, 455 So. 2d 1168, 1169 (La. 1984)). Again, the court quotes from a pre-*City of New Orleans* decision, reflecting its willingness to abandon that case’s logic.

81. *See id.* at 570.

82. *Id.* (quoting *City of New Orleans v. Bd. of Comm’rs*, 640 So. 2d 237, 252 (La. 1994)).

83. *See id.* at 570–71.

84. *See Al’s Trucking, Inc. v. State Farm Fire & Cas. Co.*, 735 So. 2d 833, 835 (La. Ct. App. 1999) (holding that state statute concerning livestock on highways preempts conflicting local ordinance. “Preemptions can either be express or implied. While our state constitution does not include the general supremacy clause of the federal constitution, there are prohibitions against local regulation in areas reserved to the state legislature.”); *see also City of New Orleans v. Bd. of Dir. of the La. State Museum*, 739 So. 2d 748 (La. 1999) (holding that requiring state entity to obtain permit before it could act impermissibly interfered with state police power).

The question of preemption on police power issues is important to an understanding of the consistency of the state judiciary regarding suits by municipalities against gun manufacturers. The general law of the State of Louisiana includes a preemption statute on firearm regulation similar to the one adopted in Georgia. Louisiana Revised Statute 40:1796 provides that, “No governing authority of a political subdivision shall enact after July 15, 1985, any ordinance or regulation more restrictive than state law concerning in any way the sale, purchase, possession, ownership, transfer, transportation, license, or registration of firearms, ammunition, or components of firearms or ammunition.”⁸⁵ The language of the statute, in prohibiting local laws “more restrictive” than state law, shows an intent to reserve to the state the power to regulate firearms in Louisiana. This state law is a general law that fits within the definition of police power found in Louisiana common law.⁸⁶ Therefore, it appears that a locality would have difficulty in passing local ordinances regulating firearms due to the express prohibition against such action. However, a New Orleans trial court felt there was no tension in allowing the very same regulation through litigation.⁸⁷

3. *The Text of the Louisiana Trial Court Opinion in Morial v. Smith & Wesson Corp. Does Not Clear Up the Apparent Inconsistency in Its Approach*

The text of the New Orleans trial court’s opinion is helpful in attempting to understand why the court felt it should differentiate between legislation and litigation in deciding questions of home rule power. The defendants in the New Orleans suit filed a motion to dismiss, and the plaintiff’s Memorandum in Opposition to Defendants’ Peremptory Exceptions and Defenses illustrates the city’s opinion as

85. LA. REV. STAT. ANN. § 40:1796 (West 2001).

86. See, e.g., *State v. Hamlin*, 497 So. 2d 1369 (La. 1986) (upholding constitutionality of state firearms registration law). “Unquestionably, the statute challenged in the instant case was passed in the interest of the public and as an exercise of the police power vested in the legislature.” *Id.* at 1371. The district court in *Morial v. Smith & Wesson Corp.* acknowledged that *Hamlin* stands for the proposition that “the regulation of firearms has been considered to be in the interest of the public and as an exercise of the police power vested in the legislature.” *Morial v. Smith & Wesson Corp.*, No. 98-19578, at 7 (La. Civ. Dist. Ct. Feb. 28, 2000), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_order_deny_peremptexcept_22800.pdf. The only question for the court was whether the new provision passed by the state attempting to bar the city’s lawsuit satisfied the reasonableness test under this interpretation. Therefore, the issue was settled as to whether the original statute reserving the right to regulate firearms to the state fit into the definition of police power under Louisiana law.

87. See *Morial v. Smith & Wesson Corp.* (No. 98-19578), at 7.

to how the court should view the city's power to regulate firearms.⁸⁸ In the Memorandum, New Orleans's main difficulty in convincing the court that it had the power to sue was getting around the legislature's express preemption of local ordinances that attempt to regulate firearms. The city drew a strict construction of state preemption of local action. The city argued that "when Section 1796 purports to preempt political subdivisions from enacting 'any ordinance or regulation,' it is *only* ordinances and regulations that are preempted."⁸⁹ When the city sues to recover damages, as it has the power to do under its home rule act, then it is litigating, not legislating.⁹⁰ The city argued that this distinction gave it the authority to do through the judiciary what it was preempted from doing through the legislature.

The New Orleans trial court agreed with the city in finding a distinction between litigation and legislation.⁹¹ The court read the plain language of section 1796 of the laws of the State of Louisiana as expressly prohibiting ordinances or regulations more restrictive than state law.⁹² However, as the court noted, "[t]here was no express prohibition against a political subdivision from *suing* a gun manufacturer at the time this suit was filed in 1998."⁹³ The trial court justified this strict interpretation of the ordinance by citing *Chapman v. Bordelon*,⁹⁴ in which the Louisiana Supreme Court defined "ordinance" to mean a "legislative act of a municipality,"⁹⁵ arguably exempting legal action. However, the quote referred to in *Chapman* went further in defining ordinance. The court noted that the definition of ordinance as legislative act

is not necessarily so in all cases . . . '[O]rdinance' is often used as a generic term Thus it will be seen that the word 'ordinance' can have a very broad or quite a narrow meaning; that it can refer to all of the legislative enactments of a municipality . . . or can simply mean a permanent rule of action commonly known as a law.⁹⁶

88. Incorporated Memorandum, and Order, *Morial v. Smith & Wesson Corp.*, No. 98-18578 (La. Civ. Dist. Ct. Feb. 28, 2000), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_oppose_peremptexcept_121099.pdf.

89. *Id.* at 6.

90. *See id.*

91. *See Morial v. Smith & Wesson Corp.* (No. 98-19578).

92. *Id.* at 5.

93. *Id.* (emphasis added).

94. 138 So. 2d 1 (La. 1962).

95. *Id.* at 5.

96. *Id.* (citation omitted). Generally, the Supreme Court of Louisiana has urged a broad interpretation of the meaning of "ordinance." *See Melancon v. State Bd. of Educ.*, 188 So. 2d 419 (La. 1966) (holding that resolution of Board of Education is ordinance).

This quoted language seems to be anything but dispositive of the clear distinction between a legislative ordinance and a judicial action with similar regulatory effect. Under the interpretation of the Louisiana Supreme Court, it is quite possible to see that a “rule of action commonly known as a law” could include the equitable remedy of a court of law.⁹⁷

It can be argued that, under Louisiana Revised Statute 40:1796, the City of New Orleans was expressly prohibited from litigating to achieve regulatory reform in the way that firearms are manufactured. The statute forbids “regulation more restrictive than state law.”⁹⁸ If regulatory reform is the result of a municipal action (regardless of the nature or form of the particular action), it seems to stretch credulity to argue that the action cannot be classified as a “regulation.” This argument is given more weight when one considers that the word “regulation” was inserted into the statute by the Louisiana legislature in addition to the word “ordinance.”⁹⁹ Interpreting “regulation” as the equivalent of “ordinance” makes the term duplicative and effectively reads it out of the statute.

However, even if a narrow reading of the language of the statute is proper, it still seems to be an abuse of municipal power in Louisiana to take such a technical approach. Allowing the City of New Orleans to avoid the intent of the state legislature substantially weakens state control over an area of the law that is fundamental to the exercise of the police power: firearm regulation.¹⁰⁰ Such an approach ignores the dictates of the 1974 Louisiana Constitution and reverses the current direction of Louisiana local government law.¹⁰¹

97. The court is not the only party involved that is confused about how to articulate a difference between the city’s lawsuit and an ordinance passed by the city. In the city’s Memorandum in Opposition, the city conflates legislation and the power to sue. The city argued that “it is clear that legislation does *not* constitute the entirety of the City’s broad home rule powers. . . . Therefore, the City’s power to *initiate litigation*—like its power to initiate legislation—is protected against State interference.” Incorporated Memorandum, and Order, *Morial v. Smith & Wesson Corp.*, No. 98-18578, at 11–12 (La. Civ. Dist. Ct. Feb. 28, 2000), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_oppose_peremptexcept_121099.pdf. The city argued that the state could not have passed legislation that retroactively invalidated a local ordinance, and because legislation and litigation are so similar in terms of the city’s power to act, the same immunity should be applied to litigation. It is hard to see why legislation and litigation are so similar in protecting the city from retroactive preemption by the state, yet so distinct when the express preemption power of the state is involved.

98. LA. REV. STAT. ANN. § 40:1796 (West 2001).

99. *See id.*

100. *See* sources cited *supra* note 86.

101. *See* LA. CONST. art I, § 9; *see also supra* Part I.B.2.

4. *The Louisiana Supreme Court's Recent Reversal of the Decision of the New Orleans Trial Court Has Corrected the Misinterpretation of Home Rule Power Concerning Firearms Regulation*

The Louisiana Supreme Court, in an apparent attempt to restore order to the law of home rule in Louisiana, recently overturned the trial court's decision to deny the defendant gun manufacturers' motion to dismiss.¹⁰² The court found, first, that the City of New Orleans, "as a political subdivision of the state rather than a 'person,'" is without the constitutional protections of Article I of the Louisiana Constitution and the Fourteenth Amendment.¹⁰³ Second, the Louisiana Supreme Court understood that litigation by the City of New Orleans against gun manufacturers should be analyzed using home rule principles consistent with those used in analyzing municipal legislation regulating firearms: "[T]his lawsuit constitutes an indirect attempt to regulate the lawful design, manufacture, marketing and sale of firearms. As such, it squarely conflicts with a reasonable exercise of the state's police power and must be dismissed on the grounds that the city lacks a right of action to pursue this suit."¹⁰⁴

The Louisiana Supreme Court's decision was appealed to the United States Supreme Court by lawyers for the City of New Orleans. On October 9, 2001, the United States Supreme Court denied certiorari, ending the city's attempt to regulate gun manufacturers through litigation.¹⁰⁵

While the Louisiana Supreme Court's decision to step in at an early stage in the lawsuit prevented a fundamental change in the law of local government in the state, the mere possibility that other state supreme courts will wait until after the case has been litigated to step in places an enormous burden on lower level state courts to rule consistently in the first instance.¹⁰⁶ The costs to gun manufacturers, trade

102. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001); see also Susan Finch, *N.O. Gun Suit Shot Down*; *Top La. Court Applies 2 Laws Retroactively*, NEW ORLEANS TIMES-PICAYUNE, Apr. 4, 2001, at 101; Joe Gyan Jr., *Court Denies N.O. Gun Suit: Ruling Says La. Law Constitutional*, ADVOCATE (Baton Rouge, La.), Apr. 4, 2001, at A1.

103. *Morial v. Smith & Wesson Corp.*, 785 So. 2d at 13.

104. *Id.* at 16-17 (footnote omitted).

105. *Morial v. Smith & Wesson Corp.*, 70 U.S.L.W. 3257, 3267, 2001 LEXIS 9491 (U.S. Oct. 9, 2001).

106. One example has already been mentioned. The Georgia Supreme Court paved the way for discovery by refusing to order a writ of mandamus forcing the dismissal of the case. The Georgia Supreme Court felt that the possibility of appeal after a ruling in the case allowed it to wait until the lawsuit had been completed before acting. See *Smith & Wesson Corp. v. City of Atlanta*, 543 S.E.2d 16 (Ga. 2001).

associations, and gun dealers of defending against lawsuits filed by heavily financed municipalities is extremely high.¹⁰⁷ This high cost of litigation places enormous pressure on companies to settle rather than fight the lawsuits.¹⁰⁸ One example of the pressure to settle is the agreement reached between the federal and municipal governments and Smith & Wesson, described above in Part I.A.1.¹⁰⁹ The company chose to accept widespread manufacturing changes rather than face a known loss of millions of dollars in defense costs.¹¹⁰ The pressure to settle makes municipal litigation an even greater threat to home rule, as a lawsuit does not even have to be successful in order to achieve some sort of regulatory change.

The pressure to settle makes trial court decisions vitally important to issues of home rule in the gun manufacturer context. A trial court, in prolonging a lawsuit by ruling inconsistently with home rule law governing firearms regulation by municipalities, risks increasing the pressure to settle by prolonging the time and amount of money required to defend the lawsuit. In Atlanta, for example, gun manufacturers are now faced with the extraordinary expense of discovery due to the trial court's denial of the motion to dismiss.¹¹¹ The Georgia Supreme Court has decided not to intervene until there is a final ruling on the merits.¹¹² However, if the gun manufacturers decide to settle with the City of Atlanta before trial, the Georgia Supreme Court will have little to review. Therefore, trial court decisions regarding motions to dismiss and motions for summary judgment will be key in determining the future of local government law in the states.

107. See Lytton, *supra* note 6 (describing enormous pressure on gun manufacturers to settle, particularly since entrance of municipalities into fray); Ed Dawson, Note, *Legigation*, 79 TEX. L. REV. 1727, 1748–50 (2001) (arguing that pressure on gun manufacturers to settle is greater than pressure levied against big tobacco); Philip C. Patterson & Jennifer M. Philpott, Note, *In Search of a Smoking Gun: A Comparison of Public Entity Tobacco and Gun Litigation*, 66 BROOK L. REV. 549, 551 (2000) (calling pressure on tobacco companies and gun manufacturers to settle “legalized blackmail”).

108. See Lytton, *supra* note 6; Dawson, *supra* note 107; Patterson & Philpott, *supra* note 107.

109. See *supra* Part I.A. The pressure is even greater on smaller manufacturers and dealers. A gun dealer in Gary, Indiana, chose to go out of business rather than fight the city's lawsuit. See *Nation Briefs*, SAN ANTONIO EXPRESS-NEWS, Dec. 3, 1999, at 14A.

110. See *supra* Part I.A.

111. See Rankin, *supra* note 50.

112. *Smith & Wesson Corp. v. City of Atlanta*, 543 S.E.2d 16 (Ga. 2001).

C. *Invalidation of Retroactive Laws by the States of Louisiana and Georgia*

The National Rifle Association (NRA) viewed the initial wave of lawsuits by municipalities across the nation with understandable fear.¹¹³ The potential economic impact on gun manufacturers marked this litigation as the beginning of a downward spiral that the industry was determined to prevent.¹¹⁴ To remedy this situation, the legislatures in several states where the municipality lawsuits had survived a motion to dismiss passed laws designed to retroactively and proactively prevent localities from bringing suit against gun manufacturers.¹¹⁵ The legislatures of Louisiana and Georgia were in the forefront of this fight.¹¹⁶

The Louisiana legislature passed a new law that preempts ongoing suits by municipalities against gun manufacturers and prevents a municipality from filing any future suit.¹¹⁷ The Georgia General Assembly amended its previous law on firearms to include the same pro-

113. See Roberto Suro, *In Policy Shift, NRA Will Lobby for Gun Makers*, WASH. POST, Jan. 15, 1999, at A2 (mentioning how NRA's shift in policy in deciding to lobby for gun manufacturers shows fear of organization toward lawsuits by municipalities).

114. See Francis X. Clines, *Statehouse Journal: Ban on Suing Gun Makers Is Gaining Steam*, N.Y. TIMES, Feb. 17, 2000, at A16 (describing how city lawsuits have become one of NRA's top priorities); James Dao & Don Van Natta Jr., *NRA Is Using Adversity to Its Advantage*, N.Y. TIMES, June 12, 1999, at A10 (discussing NRA's recent adversity and positive effect that it has had on mobilization).

115. See Brogan, *supra* note 21; Clines, *supra* note 114; David Firestone, *Gun Lobby Begins Concerted Attacks on Cities' Lawsuits*, N.Y. TIMES, Feb. 9, 1999, at A1; Sharon Walsh, *NRA Moves To Block Gun Suit: Bills in 10 States Would Bar Action by Local Officials*, WASH. POST, Feb. 26, 1999, at A1.

116. See Firestone, *supra* note 115; *Legislature Bans Cities from Suing Gun Manufacturers*, CHI. TRIB., June 4, 1999, at 6.

117. See LA. REV. STAT. ANN. § 40:1799 (West 2001). Section 40:1799(A) states as follows:

The governing authority of any political subdivision or local or other governmental authority of the state is precluded and preempted from bringing suit to recover against any firearms or ammunition manufacturer, trade association, or dealer for damages for injury, death, or loss or to seek other injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition. The authority to bring such actions as may be authorized by law shall be reserved exclusively to the state.

Id. at (A); see also LA. REV. STAT. ANN. § 9:2800.59 (West 2001). Section 9:2800.59(A) states that the legislature finds and declares that the Louisiana Products Liability Act was not designed to impose liability on a manufacturer or seller for the improper use of a properly designed and manufactured product. *Id.* This Note focuses on the first revision because it intended to rewrite the law in the area of local government. The revisions to § 9:2800.59 focused on the products liability law of the state rather than the law of local government.

hibition.¹¹⁸ These laws explicitly stated that firearms were a matter for state regulation and that lawsuits interfered with this regulatory scheme.¹¹⁹ Because the enactment of the laws prohibited the lawsuits by Atlanta and New Orleans, the cities were forced to argue that the retroactive provisions were unconstitutional.¹²⁰ These arguments were obviously successful at the early stages of the litigation, as neither state trial court decided to invalidate the power of the cities to sue.¹²¹ Although the Georgia trial court's decision to deny the defendants' motion to dismiss says little about the retroactive provision passed by the General Assembly,¹²² the Louisiana trial court ruled that the retroactive provision passed by the state legislature was an unconstitutional violation of the City of New Orleans's constitutional rights as an individual litigant.¹²³

If a trial court in Louisiana or Georgia were to examine a law passed by the legislature that purported to overturn a municipal ordinance, the court would decide the issue under theories of local government.¹²⁴ In Georgia, the common law on local government gives the state broad room to act retroactively to withdraw powers from locali-

118. See GA. CODE ANN. § 16-11-184(b)(2) (1999). The statute provides: The authority to bring suit and right to recover against any firearms or ammunition manufacturer, trade association, or dealer by or on behalf of any governmental unit created by or pursuant to an Act of the General Assembly or the Constitution, or any department, agency, or authority thereof, for damages, abatement, or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition to the public shall be reserved exclusively to the state.

Id.

119. See *id.*; LA. REV. STAT. ANN. § 40:1799.

120. See Brogan, *supra* note 21.

121. See *City of Atlanta v. Smith & Wesson Corp.*, No. 99VS0149217J (Ga. State Ct. Oct. 27, 1999), http://www.firearmslitigation.org/content/pdf/atlanta/atlanta_order_writ_21800.pdf; *Morial v. Smith & Wesson Corp.*, No. 98-19578 (La. Civ. Dist. Ct. Feb. 28, 2000), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_order_deny_peremptexcept_22800.pdf.

122. See *City of Atlanta v. Smith & Wesson Corp.* (No. 99VS0149217J).

123. *Morial v. Smith & Wesson Corp.* (No. 98-19578), at 7–10. The Louisiana Supreme Court reversed the holding of the trial court and upheld the retroactive statute. See *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 9–13 (La. 2001). However, a discussion of the trial court's handling of the issue is still important in portraying the inconsistency of the trial court's decision. Other state trial courts debating the constitutionality of retroactive statutes prohibiting lawsuits by municipalities should be careful to avoid the same mistaken reasoning used by the trial court in Louisiana.

124. See *supra* Parts I.A.1–3, I.B.1–2. In Georgia or Louisiana, a challenge to a municipal ordinance regulating firearms would force the court to look at whether the municipality had the authority to pass such an ordinance and whether the municipal action is preempted by state action. Regardless of how the issue came out in such a hypothetical situation, a resolution of the issue would clearly revolve around questions of local government law.

ties.¹²⁵ In Louisiana, the state power is limited by the previously discussed immunity power of pre-1974 charter cities such as New Orleans.¹²⁶ However, the ability of the state to act to prevent the abridgment of its police powers might lead a judge to decide in favor of the state provision.¹²⁷ Regardless of the ultimate resolution of the issue, an important decision would be handed down in either state as to the home rule powers of localities.

However, as the trial court opinion on the retroactive provision passed by the Louisiana legislature shows, regulation in the form of litigation provides new protections for localities and muddles the home rule debate.¹²⁸ Because the city is regulating through litigation, the city has recourse to its position as an individual litigant.¹²⁹ When viewed as an individual litigant, the City of New Orleans has a vested right to sue under Louisiana law when “the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest.”¹³⁰ This present interest vests immediately upon the filing of a suit.

The fact that the city enjoyed a vested right was an essential finding for the trial court in Louisiana, because the trial court seemed willing to allow the state to withdraw powers retroactively from municipalities in the absence of litigation. Under Louisiana law, a law is given retroactive application if there is an express intent by the state legislature to do so.¹³¹ The statute passed by the legislature to prevent municipality lawsuits, Louisiana Revised Statute 40:1799, meets this intent requirement. The implementing section of this law states: “The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions

125. See sources cited *supra* note 29.

126. See *supra* text accompanying notes 67–68.

127. See, e.g., *City of New Orleans v. Bd. of Dir. of the La. State Museum*, 739 So. 2d 748 (La. 1999) (holding that requiring state entity to obtain permit before it could act impermissibly interfered with police power of state); *Merritt McDonald Constr., Inc. v. Parish of East Baton Rouge*, 742 So. 2d 564 (La. Ct. App. 1999) (allowing states to deny or revoke initial delegation of home rule powers and functions of municipality in order to prevent abridgment of reasonable and valid exercise of state’s police power); *Al’s Trucking, Inc. v. State Farm Fire & Cas. Co.*, 735 So. 2d 833, 835 (La. Ct. App. 1999) (holding that state statute concerning livestock on highways preempts conflicting local ordinance).

128. *Morial v. Smith & Wesson Corp.* (No. 98-19578).

129. See *id.* at 2–3.

130. *Id.* at 3 (quoting *Rico v. Vangundy*, 461 So. 2d 458, 462 (La. Ct. App. 1984)).

131. See *id.* at 10; see also *Cole v. Celotex Corp.*, 599 So. 2d 1058 (La. 1992) (discussing additional concerns to be addressed in determining whether statute should have retroactive effect).

filed on and after its effective date.”¹³² As the trial court noted, the inquiry should come to an end when the court finds such intent.¹³³ However, an exception to this rule of construction exists when a retroactive application would affect vested rights.¹³⁴ Because of this exception, the court found that the retroactive provision banning suits against gun manufacturers was unconstitutional.¹³⁵ Thus, the trial court granted regulatory powers and home rule protections to the City of New Orleans through litigation, which the city would not have had through legislation.

The protections for the city as litigant were further increased by the trial court’s application of federal constitutional protections to the city. The trial court decided that the vested rights of New Orleans as an individual litigant have federal constitutional implications, as retroactive application of the revised statute would violate the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause.¹³⁶ Thus, the Louisiana legislature acted unconstitutionally in retroactively depriving the city of its right to sue.¹³⁷

The trial court did not have to bring the question of vested rights into its decision. The trial court could have viewed the retroactive provision as a clarification of the legislature’s intent in enacting the original statute, Louisiana Revised Statute 40:1796, reserving to the state the right to regulate firearms. As noted above, the original statute in Louisiana concerning firearms regulation was somewhat vague in stating that a municipality could not pass “any ordinance or regulation” more restrictive than those at the state level.¹³⁸ It is possible that the term “regulation” could encompass lawsuits as well as municipal ordinances. If the trial court had read “regulation” to include litigation, the court could have labeled the bar on lawsuits as a mere interpretation of the full extent of the previous state law reserving the regulation of firearms to the state. Such a reading would have kept a discussion of individual constitutional rights out of the important home rule discussion.

132. See LA. REV. STAT. ANN. § 40:1799 (West 2001).

133. See *Morial v. Smith & Wesson Corp.* (No. 98-19578), at 10 (“Based on the test established in *Cole*, our inquiry should end.”).

134. See *id.* at 10.

135. See *id.* at 10–11.

136. *Id.* at 13 (“The right to file a damage suit in tort is a vested property right protected by the guarantee of due process.”).

137. *Id.*

138. LA. REV. STAT. ANN. § 40:1796 (West 2001); see also *supra* text accompanying notes 94–99.

The result of the trial court opinion in Louisiana is to give greater protection to regulatory action where it is in the form of a tort as opposed to a municipal ordinance. The debate between the City of New Orleans and the State of Louisiana over immunity and the police power is a difficult one. The answer of a court in resolving this debate will have far reaching and clear effects on the future of home rule in the state. These home rule powers should be decided in a context that is clear as to the issues involved. When these issues are obscured with the language of vested rights, home rule questions are given answers that might not be consistent with the previous decisions of the courts of the state.

II

CONSISTENT APPLICATIONS OF HOME RULE LAW IN THE GUN MANUFACTURER CONTEXT: THE CONNECTICUT EXAMPLE

Several other municipalities across the nation have filed lawsuits similar to those filed by Atlanta and New Orleans; however, those lawsuits have been treated by state courts in a manner more consistent with the home rule powers of the municipalities involved than that observed in the Atlanta and New Orleans cases. The suits fall into two main areas: (1) suits dismissed by state courts that interpreted the home rule power of the municipality narrowly;¹³⁹ and (2) suits that have survived motions to dismiss due to the expansive interpretation of home rule powers by state courts.¹⁴⁰ The courts that have faced

139. In addition to the Connecticut example explored later in this Part, there are other examples of state courts that have dismissed lawsuits by cities where the cities have been preempted from passing legislation on the local level regulating firearms. The decision by a Pennsylvania trial court concerning the city of Philadelphia's lawsuit is one example of this consistency. Pennsylvania passed the Uniform Firearms Act in response to a 1993 ordinance passed by Philadelphia banning the possession of assault weapons within city limits. Philadelphia council members brought suit, contesting the constitutionality of the state's action, and the Pennsylvania Supreme Court upheld the power of the state to preempt local action in the context of firearms regulation. *See Ortiz v. Commonwealth*, 681 A.2d 152 (Pa. 1996). In direct contrast to the spirit of this decision, Philadelphia decided to follow the lead of cities like Atlanta and New Orleans in suing gun manufacturers. The Pennsylvania District Court recognized that Philadelphia's suit was an attempt to regulate in violation of the Uniform Firearms Act. *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882 (E.D.Pa. 2000). The court stated that "[w]hat the City cannot do by act of the City Council it now seeks to accomplish with a lawsuit. The United States Supreme Court has recognized that the judicial process can be viewed as the extension of a government's regulatory power." *Id.* at 889.

140. A California court has rejected a motion to dismiss suits brought by Los Angeles, San Francisco, and several other municipalities. *See California Court Denies Motion to Dismiss Los Angeles, San Francisco Suits*, GUN INDUSTRY, Oct. 2000, at 3 [hereinafter *California Court Denies Motion to Dismiss*]. This decision seems en-

these suits and ruled consistently with the home rule power of the municipality have recognized the regulatory nature of the suits and thus judged whether the municipalities had the power to regulate in the first instance.¹⁴¹

The lawsuit filed by Mayor Joseph P. Ganim and the City of Bridgeport, Connecticut, falls into the first category of consistent action by state courts. The city's lawsuit was dismissed by the Connecticut Superior Court due to the preemption of local gun control regulation by the state.¹⁴² An examination of Connecticut's home rule power and the decision by the trial court will show that the dismissal was consistent with previous interpretations of Bridgeport's home rule powers.

The importance of this consistent ruling at the trial court level was described earlier in Part I.B. Because of the pressure to settle, state trial courts become pivotal battle grounds for the players in the gun manufacturer litigation. Many defendants will not wait for the state supreme court to step in after trial. Thus, denying a motion to dismiss could have the effect of granting a municipality the power to effect regulatory change through settlement. State trial courts need to act consistently with home rule law in order to prevent a municipality from achieving regulatory reform that exceeds its home rule powers.

A. *The Home Rule Powers of Municipalities in Connecticut Are Limited*

Connecticut has a very strict interpretation of the home rule powers of its municipalities. Municipalities in Connecticut do not have the power to initiate legislation unless the action is enumerated by the state constitution, enumerated in the state's general statutes enacted pursuant to the home rule provision, or is judicially construed as implied by the legislative intent of a state law.¹⁴³ Thus, rather than look-

tirely consistent with the broad police powers given to municipalities in California and prior decisions by the courts in California allowing the regulation of firearms by municipalities through municipal legislation. See Eric Gorovitz, *California Dreamin': The Myth of State Preemption of Local Firearm Regulation*, 30 U.S.F. L. REV. 395 (1996), for an analysis of the authority of local governments to regulate firearms through legislation.

141. See *Ortiz*, 681 A.2d 152; *Beretta*, 126 F. Supp. 2d 882; *California Court Denies Motion to Dismiss*, *supra* note 140.

142. See *Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330 (Conn. Super. Ct. Dec. 10, 1999), *aff'd*, 780 A.2d 98 (Conn. 2001).

143. Roni Stutman Bruskin, Note, *Secession as a Connecticut Story: The Feasibility of an Intramunicipal Secession in New Haven*, 14 QUINNIPIAC L. REV. 781, 789 (1994) (citing Timothy S. Hollister, *The Myth and Reality of Home Rule Powers in*

ing for an express prohibition against action by the municipality, the municipality must find a grant of power from the state in order to act.¹⁴⁴ In addition, the Connecticut General Assembly may impinge upon authorized municipal home rule powers if the matter is one of statewide concern.¹⁴⁵

The common law of state and local government in Connecticut also includes the language of express and implied preemption discussed earlier in the context of Georgia's state and local government law.¹⁴⁶ This notion of implied preemption requires a court to decide whether there is an implied intent by the state legislature to fully occupy a field of regulation, thereby preempting municipal action.¹⁴⁷ In making this determination, the courts in Connecticut have been highly deferential to the state.¹⁴⁸

B. Connecticut Law Reserves the Right to Regulate Firearms to the State

In the area of gun regulation, the Connecticut courts have determined that local ordinances regulating gun manufacturers or sellers in a manner that is stricter than the laws passed by the state are invalid. In the case of *Dwyer v. Farrell*,¹⁴⁹ the City of New Haven had passed an ordinance regulating the way that guns could be sold.¹⁵⁰ The ordinance was more restrictive than the state laws, but it did not expressly

Connecticut, 59 CONN. B.J. 389, 394 (1985)); *see also* *Waterbury Homeowners Ass'n v. City of Waterbury*, 259 A.2d 650, 653 (Conn. Super. Ct. 1969) ("Our Connecticut courts do not recognize the existence of general inherent powers of municipalities, which are limited to those expressly granted by the constitution, statutes and charter and those necessarily implied from such express provisions.").

144. *See* Bruskin, *supra* note 143, at 788; *see also* *Simons v. Canty*, 488 A.2d 1267, 1270 (Conn. 1985) ("[W]e do not search for a statutory prohibition against . . . an enactment; rather, we must search for statutory authority for the enactment." (quoting *Avonside, Inc. v. Zoning & Planning Comm'n*, 215 A.2d 409, 411 (Conn. 1965))); *City Council of West Haven v. Hall*, 429 A.2d 481, 484 (Conn. 1980) (citing *Pepin v. Danbury*, 368 A.2d 88, 94 (Conn. 1976), for proposition that municipality has no inherent powers of its own, but rather, derives any and all power from express grant by state).

145. Bruskin, *supra* note 143, at 792.

146. *Id.* at 791; *see also* *Manchester Sand & Gravel Co. v. South Windsor*, 524 A.2d 621, 626 (Conn. 1987) ("When the state has . . . demonstrated an intent to occupy a field of regulation, . . . a local ordinance that conflicts with or frustrates the purpose of the legislature . . . cannot stand." (citing *Shelton v. Comm'r*, 479 A.2d 208, 214 (Conn. 1984); *Dwyer v. Farrell*, 475 A.2d 257 (Conn. 1984)).

147. Bruskin, *supra* note 143, at 791.

148. *See id.*

149. 475 A.2d 257.

150. *Id.* at 258–59. Section 18-12.1 of the New Haven Code of Ordinances provides (in part):

conflict with any state provision.¹⁵¹ However, the Supreme Court of Connecticut decided that the absence of more restrictive regulations on the state level evinced an intent to allow all action that it did not regulate.¹⁵² Thus, the locality had exceeded its home rule powers in passing the ordinance.¹⁵³ The court used language that showed the strict construction of local power in Connecticut: ““There is attached to every ordinance, charter or resolution adopted by or affecting a municipality the implied condition that these must yield to the predominant power of the state when that power has been exercised.’”¹⁵⁴ In *Dwyer*, however, the state had not even exercised its power on the level at which the locality was attempting to act.¹⁵⁵ The court viewed inaction as the equivalent of action.

*C. The District Court’s Opinion in Ganim v. Smith & Wesson
Was Consistent with Connecticut Local Government Law
Concerning Firearm Regulation*

When Bridgeport decided to sue gun manufacturers and trade associations, it modeled its lawsuits on the ones filed by Atlanta and

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- (a) No person shall advertise, sell, offer or expose for sale, or have in his possession with intent to sell, any pistol or revolver at retail unless such person shall have obtained:
- (1) A federal license as a dealer in firearms or ammunition from the bureau of alcohol, tobacco and firearms;
 - (2) A state permit for the sale at retail of pistols and revolvers within the city [of New Haven]; and
 - (3) A state permit to engage in or conduct business as a seller within the State of Connecticut for the place of business in which such a sale of any pistol or revolver at retail shall occur from the state tax commissioner.

NEW HAVEN, CONN., CODE OF ORDINANCES tit. III, ch. 18, §§ 18-12.1(a)(1)–(3) (2001).

151. See *Dwyer*, 475 A.2d at 261. Connecticut General Statutes §§ 29-28 and 29-28a provide that a person cannot advertise for sale or sell at retail a pistol or revolver without first obtaining a permit, issued only after the applicant has furnished information pertaining to his character and identity as prescribed by the commissioner of public safety. See CONN. GEN. STAT. ANN. §§ 29-28 to -28a (West 1990 & Supp. 2001). It is possible to argue that the city ordinance actually strengthens the state ordinance by increasing the number of restrictions. However, the court looked critically at the municipal ordinance in finding that the state statute permitted all that it did not prohibit: “The fact that a local ordinance does not expressly conflict with a statute enacted by the General Assembly will not save it when the legislative purpose in enacting the statute is frustrated by the ordinance.” *Dwyer*, 475 A.2d at 261.

152. *Dwyer*, 475 A.2d at 261.

153. *Id.*

154. *Id.* at 260 (quoting *Bencivenga v. Milford*, 438 A.2d 1174, 1177 (Conn. 1981)).

155. See *id.* at 261.

New Orleans.¹⁵⁶ The city sought compensatory and punitive damages as well as injunctive relief.¹⁵⁷ This request for permanent injunctive relief would have required manufacturers to take affirmative steps to prevent the harm to Bridgeport.¹⁵⁸ Included in these steps would have been warnings on all handguns and the creation of standards to eliminate the illegal secondary handgun market.¹⁵⁹

Unlike the courts in Georgia and Louisiana, the trial court in Connecticut remained consistent in its approach to home rule by viewing the litigation by the City of Bridgeport as similar to a municipal ordinance regulating handguns. The plaintiffs argued, in a manner akin to the arguments of Atlanta and New Orleans, that they had the power to sue to recover damages under Connecticut's Home Rule Act.¹⁶⁰ Bridgeport argued that there was no language in the Home Rule Act that would limit this power to sue.¹⁶¹ The district court thought that this interpretation by the city misstated the law:

In determining whether a municipality has authority for certain action pursuant to the Home Rule Act, . . . 'We do not search for a statutory prohibition against [what is sought]; rather, we must search for a statutory authority for the enactment.' Again, this rule logically results from the fact that a municipality has no inherent powers of its own; it is merely a creation of the state and its actions must be authorized by the state.¹⁶²

The trial court looked at laws that were passed at the state level to regulate firearms. Several statutes regulating firearms dealers had stated permit requirements.¹⁶³ The existence of these statutes, as in

156. See Plaintiff's Complaint, *Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S (Conn. Super. Ct. Dec. 10, 1999) (No. CV99 036 1279), http://www.firearmslitigation.org/content/pdf/bridgeport/bridgeport_complaint_12799.pdf.

157. See *id.* at 42.

158. *Ganim v. Smith & Wesson Corp.*, No. X06 CV 990153198S, 1999 Conn. Super. LEXIS 3330, at 3 (Conn. Super. Ct. Dec. 10, 1999).

159. *Id.* at 3-4.

160. See *id.* at 15-16. Connecticut's Home Rule Act in General Statutes Annotated § 7-148(c)(1) provides that "any municipality shall have the power to . . . sue and be sued, and institute, prosecute, maintain and defend any action or proceeding in any court of competent jurisdiction." CONN. GEN. STAT. ANN. § 7-148(c)(1) (West Supp. 2001).

161. See *Ganim*, 1999 Conn. Super. LEXIS 3330, at 16.

162. *Id.* at 17 (alteration in original) (citation omitted) (quoting *Avonside, Inc. v. Zoning & Planning Comm'n*, 215 A.2d 409, 411 (1965)).

163. *Id.* at 20 n.8. The court in *Ganim* cites:

Connecticut General Statutes 29-28 (permit for sale at retail of pistol or revolver and permit to carry pistol or revolver; qualification for permit); 29-31 (record of sales of pistols and revolvers; waiting period); 29-33 (sale, delivery or transfer of pistols and revolvers; waiting period); 29-37a (sale of other firearms; waiting period); 29-37b (retail dealer to equip

Dwyer, showed the intent of the state legislature to regulate up to a certain point and no further. Even if there was no direct conflict with language in a state statute, the court found the state's few actions in the area of firearm regulation sufficient to preempt the local action.¹⁶⁴ The court recognized that the mere ability of a locality to sue or be sued under the Home Rule Act does not confer upon it the ability to do through litigation that which it is barred from doing through legislation. Indeed, the district court noted explicitly that "[n]o ordinance has been passed by the Bridgeport City Council to achieve the remedies sought by this lawsuit."¹⁶⁵ The district court was not willing to buy into the fiction that identical regulations could somehow be made different based upon the method by which a locality attempted to adopt them.

The Bridgeport example shows that it is not a settled issue that litigation and legislation should necessarily be distinct under the law of local government in a state. By viewing litigation that has the same regulatory goals as legislation as a regulatory action of the municipality, the Connecticut court ruled in a manner consistent with Connecticut state and local government law. Bridgeport, tightly controlled by express and implied prohibitions on its authority to regulate guns, was not able to circumvent these restrictions by filing suit.

III

THE IMPLICATIONS OF INCONSISTENT DECISIONS IN GUN MANUFACTURER LITIGATION

With the litigation against tobacco companies on the state and federal level, and the litigation against gun manufacturers on the local level, it is apparent that regulation is becoming less and less a purely legislative effort. Great advances in the area of public health are being achieved through lawsuits that force manufacturers to settle with the government.¹⁶⁶ It is likely that this regulation will not only continue, but will become a major force in the area of public health in the near future.¹⁶⁷

pistols and revolvers with gun locking device and provide written warning at time of sale); 29-37d (firearms dealer to install burglar alarm system on premises); and 29-37i (responsibility re: storage of loaded firearms).

Id.

164. *Id.* at 38.

165. *Id.* at 37.

166. See Parmet, *supra* note 1.

167. See Dagan & White, *supra* note 1, at 355 (noting that several industries are in line for similar treatment to guns and tobacco, including lead paint makers, brewers,

There are several issues demonstrated by the inconsistent decisions of trial courts in the gun manufacturer litigation that should be analyzed more comprehensively. One such issue is whether the regulation of firearms should occur at the state or local level. Centralists argue that the regulation of firearms is a statewide issue because of the negative externalities to all residents of a state from local regulation.¹⁶⁸ Proponents of the cause of the municipalities argue that municipalities should be free to regulate on the local level because of the unique problems posed by gun use for each locality.¹⁶⁹

Because this issue will not be resolved in favor of municipalities soon, another issue becomes prominent. Localities are prevented from legislating by the state, and some argue that inconsistent decisions by the courts are simply an effective response to the capture of the state legislatures by special interests such as the NRA.¹⁷⁰ On the other hand, it is possible to argue that removing the debate over firearms restrictions from a general legislative forum to the local courts is an undemocratic action.¹⁷¹

distillers, and producers of fatty foods); Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 203 (2000) (identifying specific industries at risk of being targeted by government for suit in public health sector, including HMO's, insurance companies, and hospital/physician consortia).

168. See, e.g., Lytton, *supra* note 6, at 1250 (describing the negative and positive externalities of gun ownership and gun regulation); George Kuempel, *State Legislators To Ask Federal Judge To Halt Cities' Suits Against Gun Makers*, DALLAS MORNING NEWS, Nov. 15, 2000, at 27A (explaining common viewpoint by state legislators that local regulation will affect Second Amendment rights of all state residents).

169. See, e.g., Brian Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247, 250-53 (1999) (discussing various studies showing high costs of gun violence); Frank J. Vandall, *O.K. Corral II: Policy Issues in Municipal Suits Against Gun Manufacturers*, 44 VILL. L. REV. 547, 549 (1999) (describing enormous costs of gun violence faced by each municipality).

170. See Lytton, *supra* note 6, at 1251 (describing view that state legislatures are attempting to ban lawsuits because they are in pocket of NRA). For an overview of capture and public choice theory, see Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183 (1991); Gillette, *supra* note 30; Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

171. See H. Sterling Burnett, *Guns and Lawsuits; Suing Companies Is No Solution*, RECORD (Bergen, N.J.), Mar. 24, 1999, at L11 (claiming that enactment of lawsuit preemption legislation defends "democracy, the economy, and the public"); Michael D. Green, *The Road Less Well Traveled (And Seen): Contemporary Lawmaking in Products Liability*, 49 DEPAUL L. REV. 377 (1999) (discussing way that courts continue to be principal force in "making" product liability law); Lytton, *supra* note 6, at 1252 (giving gun industry credit for occasionally representing views of most Americans); see also Bill Walsh, *Littleton Sparks Shakeup in Gun Debate*, NEW ORLEANS TIMES-PICAYUNE, May 17, 1999, at A1 (describing political fallout of Littleton shoot-

Regardless of the outcome of these debates, the precedent established in the gun manufacturer suits by Atlanta and New Orleans is not a precedent that is healthy for courts across the nation facing similar issues to follow. If the inconsistency of the Louisiana and Georgia trial court approaches could be confined to the firearm context, then they might be justifiable as result-oriented decisions. However, as the Georgia and Louisiana examples prove, allowing a municipality to ignore restrictions on home rule through litigation threatens to fundamentally change the law of local government in a state. In Georgia, for example, firearm regulation was classified as an important, state-wide issue that should be regulated at the state level. However, the gun lawsuit by Atlanta shows that localities will be able to eviscerate that power merely by suing an industry. Filing suit removes the issue from the restrictions of home rule. A state could only protect against the evisceration of its powers if it is able to predict those issues that could possibly be involved in a tort suit, and then proactively prohibit such suits. Based on the diversity of issues being discussed as targets of lawsuits, it is doubtful that a state could catch every issue.¹⁷² Thus, the balance of home rule shifts drastically toward home rule municipalities. A situation could develop in which, rather than debating the merits of local versus statewide regulation of particular issues, states and localities battle over such fundamental issues as the power to sue and be sued. States could retaliate over the litigation by attempting to eviscerate these fundamental home rule powers.

In Louisiana, the Louisiana Supreme Court stepped in at an early stage to correct the trial court's inconsistent approach. However, the Louisiana model is a dangerous one for other states facing these issues to follow. A trial court decision that is inconsistent with a state's home rule law threatens to pressure gun manufacturers into agreeing to regulatory change before the state supreme court can step in. State trial courts should rule in the first instance in a manner consistent with principles of home rule in order to prevent regulatory change through settlement.

ings as important, but not transformative, in terms of way that NRA dominates majority of state of Louisiana politically).

172. This problem is made worse by the fact that a state government which waits to pass a law forbidding localities from suing until it hears about the development of such a suit could face problems under the prohibition against special or local laws. Most state constitutions, including Georgia and Louisiana, prohibit laws that, due to geographic constraints or size limits in the law, could only affect one particular locality. The district court in *Morial v. Smith & Wesson* gives credence to this fear. See *Morial v. Smith & Wesson Corp.*, No. 98-19578 (La. Civ. Dist. Ct. Feb. 28, 2000), http://www.firearmslitigation.org/content/pdf/neworleans/neworleans_order_deny_peremptexcept_22800.pdf.

It is arguable whether localities should be allowed to regulate firearms. It is also arguable whether they should be able to achieve reform through litigation, while being prohibited from doing so through legislation. However, it is important to realize that local government law is being fundamentally affected by these developments. If the courts are attempting to free localities in Georgia and Louisiana from the legacy of Dillon's Rule, they should be forced to admit they are doing so. Such a drastic change demands discussion and analysis. Affecting such a change through indirect means prevents such discussion, and throws states and localities into a troublesome relationship in an era where the powers of localities and states to regulate through litigation will become more and more important.

CONCLUSION

The law of local government throughout the country continues to evolve. At the same time, the regulation of public health issues through litigation continues to gain in popularity. State and local officials should be able to work together to resolve these issues, and, if there is no agreement, the level at which such regulation is allowed to take place should at least be clear. The actions of the trial courts in allowing the lawsuits by Atlanta and New Orleans to survive motions to dismiss increases the distrust between state and local officials while threatening to fundamentally change the law of home rule in each state. In an era of such fundamental change in the area of public health, distrust and uncertainty is not a positive situation for the courts to encourage.