

Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule

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Economic inequality in America has increased dramatically in the last four decades. A significant portion of this rising inequality can be attributed to the deterioration in the real value of federal and state minimum wage laws. Local governments throughout the country are beginning to develop home-grown solutions to ensure that workers in their communities can afford the local costs of living. Yet, the legal authority of local governments to adopt local wage standards is not always clear. This Note develops a method of analysis for determining whether local wage standards are legally viable. The analysis first examines the scope of regulatory power under home rule provisions across the states. It then examines the preemption regimes across the states. After assessing the relevance of the economics of wage standards and of the private law exception to legislative home rule powers, this Note concludes that local governments in approximately three-quarters of the states have a fairly strong legal basis for enacting local wage standards.

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I. INTRODUCTION

Economic inequality in America has increased dramatically since the 1970s. Over the same period, the real value of the federal minimum wage has crumbled continuously, leaving minimum wage earners with incomes that increasingly fall below the federal poverty line.¹ Even in the fifteen states that have adopted minimum wages higher than the federal minimum of \$5.15 per hour,² too many people working full time at minimum wage jobs cannot cover the costs of living. Of course, the costs of living within a state often vary dramatically: housing in Atlanta costs nearly double what it does in Dahlonega, Georgia,³ just as housing in New York City commands nearly double the price of housing in Binghamton, New York.⁴ To make minimum wages adequate for local costs of living, many cities have taken it upon themselves to regulate wages at the local level. Most of these local wage regulations, termed “living wage” laws,⁵ cover only employers who have contracts with the city or receive grants from the city. A handful of cities, however, are beginning to see these living wage laws as too restricted in their coverage, opting instead to apply local minimum wage regulations to all businesses within the city’s jurisdiction. While these local minimum wage

1. ALAN MANNING, MONOPSONY IN MOTION 333-38 (2003) (attributing the increasing inequality among the bottom half of the distribution of U.S. wages from 1979 to 2000 to the crumbling value in real dollars of the applicable minimum wage).

2. U.S. DEPT OF LABOR, MINIMUM WAGE LAWS IN THE STATES – JANUARY 1, 2005 (2004), <http://www.dol.gov/esa/minwage/america.htm>.

3. Schedule B(1) – Fair Market Rents 2005 for Existing Housing, 69 Fed. Reg. 59,011, 59,018-19 (Oct. 1, 2004) (compare housing costs in metropolitan Atlanta, Georgia with those in Lumpkin County, Georgia), available at http://www.huduser.org/Data-sets/FMR/FMR2005F/Final_FY2005_SCHEDULEB1.pdf (last visited Aug. 16, 2005).

4. *Id.* at 59,045 (compare housing costs in the county of New York, New York with those in Tompkins County, New York).

5. The term “living wage” may, in one sense, refer to a method of determination based on wages adequate to support a family, whereas the “minimum wage,” to modern ears, may connote something even stingier — i.e., those wages necessary to keep the wage-earner just above the brink of poverty. This Note, however, will use the terms in a more technical sense: “living wage ordinance” herein refers to an ordinance that restricts coverage to businesses that contract with, or receive subsidies from, the government, whereas “minimum wage ordinance” herein refers to those ordinances that are generally applicable, with exceptions only for small businesses or other specialized categories of business. See Mark D. Brenner, *The Economic Impact of Living Wage Ordinances*, in LIVING WAGE MOVEMENTS: GLOBAL PERSPECTIVES 191-95 (Deborah M. Figart ed., 2004) (discussing differences in the wage rates and scope of coverage between minimum wage and living wage ordinances).

regulations seem to be a fully natural response to the inadequacy of state and federal minimum wages, municipal power may prove more limited than state power to enact this sort of regulation.

This Note analyzes the ability of municipalities, under home rule powers, to enact local minimum wage regulations and to avoid preemption by state wage regulation. This analysis involves two inquiries. First, given the particular delegation of power by a state to its local governments, does a municipality enjoy sufficient authority to regulate wages? Second, if the state regulates minimum wages,⁶ does the state regulation conflict with the municipal regulation in a way that preempts local regulation? To frame this discussion, Part II discusses the history of minimum wage regulation, highlighting the roles of innovation at the state and local levels of government. Part III analyzes the varieties of municipal home rule powers and preemption regimes, focusing in particular on their implications for minimum wage regulation. Part IV assesses the legal viability of local minimum wage regulations in light of the different home rule and preemption regimes, with particular attention to economic arguments. Part V concludes, finding that local minimum wage regulation is strongly viable in approximately half of the states, probably impossible in about a quarter of the states, and indeterminate in the remaining quarter. The Note ends with an Appendix summarizing the relevant legal regime of each state, giving advocates a platform for analysis.⁷

II. THE ROLE OF LOCAL INITIATIVE AND BACKSTOPPING IN THE HISTORY OF MINIMUM WAGE REGULATION

The twentieth century frames the history of the minimum wage, highlighting the role of state and local policy innovation. At the opening of the century, employers and workers bargained

6. All but six states regulate minimum wages. The six that do not are Alabama, Arizona, Louisiana, Mississippi, South Carolina, and Tennessee. See *infra* Appendix; see also U.S. DEP'T OF LABOR, *supra* note 3.

7. A note to advocates: the Appendix is based on the author's reading of the constitutional and statutory home rule delegations, as well as the statutory minimum wage law. A detailed consultation of the cases interpreting these provisions for every state is beyond the scope of this Note. Therefore, advocates should use the Appendix primarily as a starting point, not as a substitute for more thorough analysis of the legal framework operating in any particular state.

for wages without any government regulation of the process. By 1919, over a dozen states regulated minimum wages. After judicial intervention and constitutional crisis, the middle of the century saw the federal government assert dominance in protecting workers' wages. The federal government abandoned this role in the final decades of the twentieth century, however, leaving states and local governments with the burden of filling the gaps and restoring crumbling wage standards.

A. LOCAL INNOVATION, PART I: EARLY STATE REGULATION

Before the U.S. Supreme Court found minimum wage laws to be unconstitutional in 1923,⁸ fourteen states, as well as the District of Columbia and Puerto Rico, had enacted minimum wage statutes.⁹ These regulations fared well in early litigation.¹⁰ But in *Adkins v. Children's Hospital*, the U.S. Supreme Court held that D.C.'s minimum wage law violated the Fifth Amendment's protection against deprivations of property without due process because it interfered with that provision's guarantee of liberty of contract.¹¹ After 1924, many state minimum wage regulations fell under the authority of *Adkins*,¹² although some courts distinguished *Adkins* in order to uphold minimum wages for children

8. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

9. WILLIS J. NORDLUND, *THE QUEST FOR A LIVING WAGE* 11-14 (1997) (describing three regulatory models: (a) wage boards that set industry-specific wage floors, without enforcement mechanisms; (b) wage boards that set industry specific wage floors tied to the cost of living rather than to industry needs, with enforcement powers; and (c) statutorily set flat-rates applicable to all industries, with enforcement powers).

10. See *Simpson v. O'Hara*, 141 P. 158 (Or. 1914) (upholding constitutionality of Oregon's minimum wage law), *aff'd by an equally divided Court* 243 U.S. 629 (1917), and *Stettler v. O'Hara*, 139 P. 743 (Or. 1914); *Spokane Hotel Co. v. Younger*, 194 P. 595 (Wash. 1920) (upholding Washington's minimum wage law and private right of recovery); *Larsen v. Rice*, 171 P. 1037 (Wash. 1918) (upholding Washington's minimum wage law on the authority of *Simpson*).

11. *Adkins*, 261 U.S. 525. See also *infra* Part IV.B.3 for a discussion of the public/private distinction and the development of the constitutional jurisprudence with respect to economic regulations.

12. *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927) (striking down an Arkansas minimum wage law for women); *Murphy v. Sardell*, 269 U.S. 530 (1925) (striking down Arizona's minimum wage law for women); *Folding Furniture Works, Inc. v. Indus. Comm'n*, 300 F. 991 (D. Wis. 1924) (striking down Wisconsin's minimum wage law as applied to women based on *Adkins*, but without reaching its applicability to children); *Topeka Laundry Co. v. Court of Indus. Relations*, 237 P. 1041 (Kan. 1925) (striking down a Kansas minimum wage law on the authority of *Adkins*).

who truly needed paternalistic protection.¹³ Following a decade of economic depression, political crisis, and jurisprudential revolution,¹⁴ the Court finally reversed itself in *West Coast Hotel Co. v. Parrish*,¹⁵ recognizing wage regulation as a valid exercise of the states' police powers. As Professor Cushman has noted, *West Coast Hotel* "formally announc[ed] the last breath of a moribund body of jurisprudence."¹⁶ Since 1937, the Court has never again held that regulation of minimum wages violates the Constitution.¹⁷ State policy innovation in labor market interventions not only provided relief to women and children suffering from starvation wages, but also helped ring the death knell of a constricting strand of jurisprudence, thereby opening constitutional space for broadly based federal intervention.

B. FEDERAL LEADERSHIP AND ITS DEMISE

Congress wasted no time in making use of its newly recognized powers, passing the Fair Labor Standards Act (FLSA) in 1938.¹⁸ FLSA has three main components: it prohibits covered employers from paying workers less than the statutory minimum wage, it requires covered employers to pay time-and-a-half for overtime hours worked above the statutory maximum, and it prohibits child labor.¹⁹ The minimum wage is currently set by statute at \$5.15 per hour for covered employees.²⁰ It rose to this

13. *Stevenson v. St. Clair*, 201 N.W. 629 (Minn. 1925) (striking down Minnesota minimum wage provisions as applied to women on the authority of *Adkins*, but affirming such provisions as applied to children). Still working within a jurisprudence that required an affirmative empirical demonstration of how a regulation promoted the health, safety, welfare or morals of its intended beneficiaries, many cases from this period cited the newly adopted Nineteenth Amendment as support for why women deserved less paternalistic treatment than courts had previously given them. No state regulated men's wages during this period.

14. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 45-105 (1998).

15. 300 U.S. 379 (1937).

16. CUSHMAN, *supra* note 14, at 105.

17. *But cf.* *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (finding extensions of the Fair Labor Standard Act's coverage to state and local government employees violated state sovereign immunity), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

18. 29 U.S.C. §§ 201-219 (2000).

19. 29 U.S.C. § 206 (2000) (minimum wages); § 207 (maximum hours); § 212 (child labor).

20. 29 U.S.C. § 206(a)(1) (2000).

level after starting at \$0.25 per hour in 1938, with phased-in increases in 1939 and 1945. Congress has since amended the statute eight times to raise the minimum wage, usually in phases, with the most recent amendment occurring nearly a decade ago, in 1996.²¹ Moreover, two amendments significantly expanded the domain of workers FLSA covers.²² In 1989, under the first Bush administration, Congress added the “training” wage provision — the final major structural change. The training wage allows employers to pay workers under twenty years old a special minimum wage that is less than the generally applicable minimum.²³

Congress acted fairly dependably between the first FLSA amendments, in 1949, and the amendments of 1977 to increase the minimum wage whenever, due to inflation, it fell below the federal poverty line for a family of three.²⁴ However, in 1982, the minimum wage dropped to 90% of the poverty line for the first time since 1960.²⁵ Rather than acting to correct the crumbling value of the minimum wage, Congress allowed it to continue to fall throughout Reagan’s administration until it reached 70% of the poverty line in 1989.²⁶ While the statutory increases in 1989, 1991, 1996, and 1997 helped slow this precipitous fall, they have failed to boost the federal minimum up to the current poverty threshold for a family of three. In short, a worker earning minimum wages for full-time employment throughout the year lives in poverty if supporting two others; indeed, even if that worker supports only himself, he earns just below poverty wages.²⁷

21. Congress amended the minimum wage in 1949, 1955, 1961, 1966, 1974, 1977, 1989, and 1996. NORDLUND, *supra* note 9, at 226-28 (but note that the amendments of 1989 and 1996 are not reflected in these tables). See Pub.L. No. 101-157, 103 Stat. 938 (1989); Pub.L. No. 104-188, 110 Stat. 1755 (1996).

22. In 1961, under the Kennedy administration, Congress extended FLSA to cover significant numbers of workers in the retail, service, and construction industries. NORDLUND, *supra* note 10, at 105-06. In 1966, under the Johnson administration, Congress further expanded coverage to public employees, hospitals, educational institutions, and laundries.

23. 29 U.S.C. § 206(g) (2000).

24. See OREN M. LEVIN-WALDMAN, THE CASE OF THE MINIMUM WAGE 122-23 (2001) (providing a table with comparable information).

25. *Id.*

26. *Id.* at 123.

27. Incomes of minimum wage earners have also fallen relative to the average hourly wage since the 1950s. In the 1950s, the minimum wage hovered at about 55% of the average hourly wage, where it held steady in the 1960s; in the 1970s, this dropped slightly to about 45% of the average hourly wage; in the 1980s, it dropped further to around 37%, where it stayed in the 1990s, oscillating between 40% and 30% of the average hourly

Although the federal minimum wage provided sufficient safeguards throughout most of FLSA's history to protect workers from starvation-level wages, since the 1980s the statutory provisions have proved inadequate to this task. Not surprisingly, during the period when the federal minimum tracked the poverty line fairly closely, states that regulated minimum wages at all tended simply to adopt the federal minimum.²⁸ Until 1979, only Alaska's minimum wage exceeded the federal minimum.²⁹ Today, however, fifteen states and the District of Columbia demand minimums above the federal floor.³⁰

C. LOCAL INNOVATION, PART II: MUNICIPAL RESPONSES

Despite the initiative many states showed in backstopping the crumbling federal minimum wage, state regulation has proven inadequate for many communities, both in states with minimum wages above the federal level and in those with minimums at or below the federal level. Since 1994, over 120 communities (municipalities and counties) have chosen to demand more of their employers than do the state and federal minimums.³¹ There are two main reasons for doing so: a municipality may want to restore the real value of the minimum wage to the poverty-line level, or it may want to tackle a particularly high local cost of living.

The vast majority of municipal wage regulations are so-called "living wage" laws. Rather than covering all employers within the geographical boundaries of the local government, living wage laws regulate only those businesses, and often their subcontractors, that receive government contracts or subsidies, or that oper-

wage. ECONOMIC POLICY INSTITUTE, THE MINIMUM WAGE RELATIVE TO THE AVERAGE HOURLY WAGE, 1973-2003, <http://www.epinet.org/issueguides/minwage/figure2.gif> (last visited Aug. 16, 2005); LEVIN-WALDMAN, *supra* note 24, at 122-23.

28. The initial purpose behind state regulation of the minimum wage was to ensure coverage for employees whose work is unrelated to interstate commerce.

29. Jeff Chapman, *States Move on Minimum Wage*, 195 EPI ISSUE BRIEF 1, 3-4 (June 11, 2003), available at <http://www.epinet.org/issuebriefs/ib195/ib195.pdf>. Connecticut, however, did provide a minimum one penny higher than the federal minimum in 1979.

30. These are Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Maine, Massachusetts, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. See U.S. DEPT OF LABOR, *supra* note 3.

31. ACORN, *Living Wage Successes*, <http://livingwagecampaign.org/index.php?id=1958> (last visited Aug. 16, 2005).

ate on public land.³² A handful of local governments, however, have enacted minimum wage regulations that apply generally to all businesses within the municipal boundaries, exempting only small businesses and (sometimes) nonprofit organizations.³³ These municipalities include San Francisco, California;³⁴ Berkeley, California;³⁵ New Orleans, Louisiana;³⁶ Santa Fe, New Mexico;³⁷ Washington, D.C.;³⁸ and Madison, Wisconsin.³⁹ Some of these ordinances include provisions that automatically tie the minimum wage to an index that tracks inflation, such as the Consumer Price Index (CPI), to ensure that the wages of the working poor are not subject to the political shifts of legislatures.⁴⁰

Thus, the history of minimum wage regulation has come full circle. States led the charge early in the twentieth century. The

32. See generally David B. Reynolds, *The Living Wage Movement Mushrooms in the United States*, in LIVING WAGE MOVEMENTS 69 (Deborah M. Figart ed., 2004).

33. Regulations from the 1960s in New York City, New York and Baltimore, Maryland presaged the contemporary local minimum wage laws. See *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 17 A.D.2d 327 (N.Y. App. Div. 1962) *aff'd* 189 N.E.2d 623 (N.Y. 1963) (state minimum wage law preempts local regulation); *City of Baltimore v. Sitnick*, 254 Md. 303 (1969) (upholding the municipal ordinance as a proper exercise of police powers, not preempted by the state law).

34. S.F., CAL., ADMIN. CODE §§ 12R.1 – 12R.13 (2005), available at <http://www.amlegal.com/library/ca/sanfrancisco.shtml> (last visited Aug. 16, 2005).

35. BERKELEY, CAL., MUN. CODE §§ 13.27.010 – 13.27.100 (2005), available at <http://www.ci.berkeley.ca.us/bmc/> (last visited Aug. 16, 2005). *But see id.* at 13.27.030(E) (generally applicable wage regulation applies only within the marina zone).

36. NEW ORLEANS, LA, CITY CHARTER §§ 9-501 – 9-507 (2005), available at http://library7.municode.com/gateway.dll/LA/louisiana/319?f=templates&fn=default.htm&nusername=10040&npassword=MCC&npac_credentialspresent=true&vid=default (last visited Aug. 16, 2005). *But see* *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So.2d 1098 (La. 2002) (finding the minimum wage charter amendment preempted by state law).

37. SANTA FE, N.M., CITY CODE §§ 28-1 – 28-10 (2004), available at http://68.15.49.6/santafe_nm/lpext.dll?f=templates&fn=site_main-j.htm&2.0 (last visited Aug. 16, 2005). See also *New Mexicans for Free Enterprise v. City of Santa Fe*, No. D-0101-CV-2003-468, slip op. (D.N.M. June 24, 2004) (upholding the ordinance).

38. D.C. CODE ANN. §§ 32-1001 – 32-1015 (LexisNexis 2001).

39. MADISON, WIS., GEN. ORD. 3.45 (2005), available at http://library10.municode.com/gateway.dll/1?f=templates&fn=default.htm&vid=nextpage:500000&nusername=50000&npassword=MCC&npac_credentialspresent=true (last visited Aug. 16, 2005).

40. See, e.g., SANTA FE, N.M., CITY CODE 28-1.5(B), *supra* note 37. Congress specifically contemplated a similar indexing feature during the debates leading up to the 1949 FLSA amendments and again as part of the 1981 Minimum Wage Study Commission; however, indexing never made it into the federal law. NORDLUND, *supra* note 9, at 74, 169.

federal government protected workers across the country during the middle of the century, but abandoned this role as the century reached its closing decades. Today, at the beginning of the twenty-first century, progressive economic reform must come from states and local governments. While the only obstacle preventing the federal government and the states from restoring wage protections is a lack of political will, local governments often face the additional burden of demonstrating that they enjoy sufficient authority to enact these regulations, and that such regulations are not preempted by state law.⁴¹ The remainder of this Note assesses the legal standing of these ordinances.

III. THE VARIETIES OF HOME RULE AND PREEMPTION REGIMES

Unlike states, local governments do not have inherent sovereign powers.⁴² Rather, whatever powers local governments⁴³ may have, they have by virtue of delegations of power by the state, either by constitution, statute, or common law.⁴⁴ Because each state confers its own delegation of power to local governments, there is no generally applicable answer as to whether local governments have the legal authority to adopt minimum wage ordinances. Rather, the viability of such ordinances depends on a number of factors, including (a) the nature and extent of the delegation of power by the state to the municipalities, (b) the factors that allow state law to preempt local law, and (c) the actual relationship between the municipal ordinance and any state legislation in the same field of regulation. Municipal powers take one of three main forms: the traditional range of powers under Dillon's

41. Compare *New Mexicans for Free Enterprise v. City of Santa Fe*, No. D-0101-CV-2003-468, slip op. (D.N.M. June 24, 2004) (Santa Fe has sufficient authority to regulate wages and is not preempted) with *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So.2d 1098 (La. 2002) (state law preempts New Orleans from regulating wages).

42. See *Hunter v. City of Pittsburg*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State.").

43. This Note focuses primarily on municipalities, although much of the analysis will apply straightforwardly to counties, which may also be interested in regulating wages.

44. RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT* 268-69 (West 6th ed., 2004).

Rule, local regulatory powers under an *imperio in imperium* (i.e., government within a government) regime, and broad legislative powers under a legislative regime.⁴⁵ Each of these forms of municipal power involves different relationships to state law and policy, resulting in different degrees of viability for local ordinances.

A. MUNICIPAL POWERS UNDER DILLON'S RULE

Until 1875, when Missouri amended its constitution to create the first home rule regime in America, most local governments were subject to the common law rule, expressed succinctly by Judge Dillon:⁴⁶

A municipal corporation possesses and can exercise only the following powers: (1) those granted in *express words*; (2) those *necessarily or fairly implied* in or incident to the powers expressly granted; (3) those *essential* to the accomplishment of the declared objects and purposes of the corporation — not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.⁴⁷

Mississippi still operates entirely under this regime, and a few other states incorporate aspects of this regime into their delegation of municipal powers.⁴⁸ Under this rule, a state must specifically enumerate a grant of municipal power in order for a local government to be able to enact an ordinance exercising it. Courts interpret such grants narrowly, presuming that a municipality

45. These classifications are merely ideal models or types of home rule powers. Any particular state may devolve a range of powers somewhere between these models.

46. This rule is named after Judge John F. Dillon of the Iowa Supreme Court, who authored the rule in his *Commentaries on the Law of Municipal Corporations* shortly after the Civil War. See *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868).

47. BRIFFAULT & REYNOLDS, *supra* note 44, at 266.

48. See *infra* Appendix. Although Connecticut, New Jersey, and North Carolina give their municipalities a broad range of statutory powers, they still delegate powers by enumeration; Mississippi clearly is subject to Dillon's rule; and Vermont and Virginia have something akin to it. *But see* BRIFFAULT & REYNOLDS, *supra* note 44, at 268 (characterizing forty-eight states as providing "a measure of home rule for at least some of their cities").

lacks the power to regulate in a particular field unless a state statute explicitly provides to the contrary.⁴⁹

This policy of limiting municipal powers reflects a distrust of local governments. Indeed, the jurisdictions that employ Dillon's Rule have often viewed it as "the only possible alternative by which extensive governmental powers may be conferred upon [their] municipalities, with a measurable limit upon their abuse."⁵⁰ Under these regimes, a municipality can regulate wages only if a state statute explicitly grants specific municipal authority over wage regulation. California is the only state in the union that explicitly gives statutory authority to local governments over minimum wage regulation,⁵¹ and it has rejected Dillon's Rule. Therefore, no municipality in a state with Dillon's Rule will likely be able to enact local minimum wage regulations, for want of municipal power.⁵²

B. THE DEVELOPMENT AND FORMS OF HOME RULE POWERS

The stranglehold on municipal power under Dillon's Rule frustrated many citizens' aspirations for stronger local self-governance and more direct democracy. Advocates of the home rule movement agree with Tocqueville's recognition that "the strength of free peoples resides in the local community [because] [l]ocal institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it."⁵³ Seeking to improve grassroots participation in government, harness local knowledge in solving local problems, and

49. BRIFFAULT & REYNOLDS, *supra* note 44, at 266.

50. *State v. Hutchinson*, 624 P.2d 1116, 1119 (Utah 1981) (quoting Tooke, *Construction and Operation of Municipal Powers*, 7 TEMPLE L.Q. 267, 273-74 (1933)).

51. CAL. LABOR CODE § 1205(b) (West 2003). *See also infra* Appendix.

52. While few states have adopted Dillon's Rule for their major cities, many allow municipalities to adopt home rule powers only after they reach a certain population threshold. Therefore, Dillon's Rule may prevent "statutory cities" — small cities and towns in many states that lack home rule powers — from regulating wages. *See* BRIFFAULT & REYNOLDS, *supra* note 44, at 269 ("[I]n many states, home rule extends to only some cities (usually the more populous ones) and counties (usually the more urbanized ones), not to all. For the remaining localities, Dillon's Rule may continue to shape the interpretation of local powers.").

53. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55 (George Lawrence, trans.; J.P. Mayer & Max Lerner eds., Harper & Row 1966) (1835).

accommodate a statewide diversity of policy preferences by allowing local variation,⁵⁴ the vast majority of states, beginning with Missouri in 1875,⁵⁵ have adopted home rule, typically following either the “*imperio*” or the “legislative” model.

1. *The Imperio Model*

Until the American Municipal Association proposed model constitutional provisions for home rule powers in the 1950s,⁵⁶ most states with home rule powers adopted the so-called “*imperio in imperium*” (government within a government) regime.⁵⁷ While, in theory, states could adopt *imperio* home rule through statutory enactment, most chose to amend their constitutions in order to avoid a narrow judicial construction of the newly devolved municipal powers. California’s constitutional delegation provides a typical example of *imperio* powers. In California, home rule cities can “make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws.”⁵⁸

The idea behind the *imperio* model is to render to the state what properly belongs to the state, and to render to local governments what properly belongs to local governments. In so doing, the *imperio* model balances two powers. First, it restricts a local government’s power to initiate legislation to those subjects that are municipal in nature.⁵⁹ Simultaneously, it gives ordinances that regulate purely local affairs immunity from state preemption.⁶⁰

54. Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 392-435 (describing the participatory and efficiency arguments for localism, as well as their tensions).

55. MO. CONST. art. VI, § 19; *see also infra* Appendix.

56. JEFFERSON FORDHAM, *AMA’S MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE* (1953).

57. *See* BRIFFAULT & REYNOLDS, *supra* note 44, at 282-83; Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 661-65 (1964); *City of New Orleans v. Bd. of Comm’rs of the Orleans Levee Dist.*, 640 So. 2d 237 (La. 1994) (reviewing the experience of states that adopted the *imperio* model).

58. CAL. CONST. art. XI, § 5(a).

59. *But see* Sandalow, *supra* note 57, at 652 (observing that judicial limits on municipal legislation are rare in the absence of state legislation in the same field).

60. The actual scope of immunity, however, may be quite small if courts broadly interpret the range of state concerns. *See* BRIFFAULT & REYNOLDS, *supra* note 44, at 282.

While the *imperio* model, taken abstractly, seems to strike the right balance between state and local power, many jurisdictions have found it difficult to implement because the provisions rarely provide precise definitions of the range of “municipal” or “local” affairs.⁶¹ Without a clear guide as to which subjects are properly of statewide concern and which are more local in nature, the courts bear the heavy burden of fleshing out that distinction in common law fashion. Moreover, for many regulatory fields, especially uncharted ones, it is difficult to predict whether a court will characterize the regulation as primarily of state or local concern. This unpredictability causes municipalities to remain uncertain of the scope of their powers and hesitant to innovate with new policies. In short, the *imperio* model has partially undermined its own goals insofar as municipalities can practice only limited self-governance when they are uncertain of the scope of their powers over many fields of regulation.⁶² Despite these difficulties, about a quarter of the states continue to use the *imperio* model of home rule powers, or a close variant thereof.⁶³

2. *The Legislative Model*

The majority of states seeking home rule powers have rejected the *imperio* model. By far, the most popular alternative has been the “legislative” model proposed by the American Municipal Association (AMA) in 1953 and drafted by Jefferson Fordham.⁶⁴ This model devolves a broad range of powers to municipalities; it

C.f., e.g., Jefferson v. State, 527 P.2d 37, 42 n. 26 (Alaska 1974) (discussing *imperio* home-rule as composed of powers of a sword and of a shield, where the “shield” powers require “a court’s determination of whether an exercise of municipal power is statewide or local in nature” in order to determine whether the municipal ordinance is immune from preemption, whereas the “sword” powers to initiate legislation may be inconsistent with “preemption-by-state-occupation-of-the-field”).

61. See *supra* note 57.

62. See Sandalow, *supra* note 57, at 661-65; George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 845, 867-69, 889-91 (1991).

63. See *infra* Appendix. These include Arizona, Arkansas, Colorado, Florida, Hawaii, Kansas, Maine, Maryland, Nebraska, Nevada, New Hampshire, Rhode Island, and Tennessee.

64. See FORDHAM, *supra* note 56. The American Municipal Association later became known as the National League of Cities. The National Municipal League, a similar organization, proposed substantially similar provisions a few years later. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (6th ed. 1963).

gets the name “legislative” because local governments in this model have regulatory powers nearly as broad as the state legislature. New Mexico’s home rule provisions provide a typical example:

A municipality which adopts a [home rule] charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter. This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power, nor shall it include the power to provide for a penalty greater than the penalty provided for a petty misdemeanor

The purpose of this section is to provide for maximum local self-government. A liberal construction shall be given to the powers of municipalities.⁶⁵

About thirty states follow this legislative model of home rule powers, or some variant thereof.⁶⁶ Recognizing the difficulties of the *imperio* model’s state/local distinction, the legislative model “rejects the assumption that governmental powers and functions are inherently of either general or local concern . . . since [t]imes change and what may at one time be considered a clearly local problem may be as readily labeled a state concern at a later juncture.”⁶⁷ Instead, the legislative model grants municipalities the entire range of state regulatory power, withholding only those powers and functions “expressly denied by general law or charter.”⁶⁸ Thus, this model carries a strong presumption that a municipality has the power to enact any ordinance, subject to normal constitutional limits on state legislative power. Reversing the presumption in Dillon’s Rule, the municipality will lack the authority to exercise the power in question only if a court finds a specific denial of that power in the municipal charter, or in state or federal law.

65. N.M. CONST. art. X, §§ 6(D), 6(E).

66. See *infra* Appendix.

67. FORDHAM, *supra* note 56, § 6, cmt 3.

68. See, e.g., N.M. CONST. art. X, § 6(D).

C. STATE PREEMPTION OF LOCAL LEGISLATION

While the *imperio* and legislative models of home rule determine the scope of a local government's power to enact regulation, local regulation must additionally avoid preemption by state law in order to be legally viable. A state statute preempts a local ordinance when the two come into conflict and the statute is legally entitled to preclude the operation of the local ordinance in that particular kind of conflict.⁶⁹ States typically recognize one or more of the three main grounds for preemption: express denial, direct conflict, and implied preemption.⁷⁰

Preemption by express denial occurs when the state statute specifically and expressly denies municipalities the power to act in a certain field of regulation. Louisiana, for example, provides that "no local government subdivision shall establish a minimum wage rate which a private employer would be required to pay employees."⁷¹ When a state legislature in a legislative home rule state does expressly deny localities the power to act in a field, the state denial of local power is conclusive and successfully preempts the local ordinance, unless that prohibition itself is somehow unconstitutional.

Direct conflict, on the other hand, occurs when it would be impossible to comply simultaneously with both the state and the local law. Direct conflict can be textual (e.g., if a state statute imposes a speed limit of 65 miles per hour while a local ordinance allows its residents to drive at 75 miles per hour) or operational (e.g., if a local licensing regime interferes with the operation of a state licensing regime⁷²). Courts will typically find direct conflict when the ordinance prohibits behavior affirmatively permitted by

69. See generally BRIFFAULT & REYNOLDS, *supra* note 44, at 345-82.

70. See BRIFFAULT & REYNOLDS, *supra* note 44, at 361-65. Because most law on when and how state legislation preempts municipal ordinances is judicially created, rather than grounded in constitutional or statutory text, it is beyond the scope of this Note to provide a full account of how preemption works in any particular jurisdiction. More fruitfully, this section discusses different forms of preemption regimes and how they relate to the policies behind different models of home rule.

71. LA. REV. STAT. ANN. § 23:642(B) (1998). Colorado, Florida, Georgia, Louisiana, and Utah all expressly deny local governments the power to enact local minimum wages. Oregon denies local governments the power to enact generally applicable local minimum wages, but expressly permits local governments to adopt local living wage laws that are tied to city contracting and subsidies. See *infra* Appendix.

72. Goodell v. Humboldt County, 575 N.W.2d 486, 502-07 (Iowa 1998).

the statute, or when the ordinance permits behavior prohibited by the statute.⁷³ In order to preserve home rule, many states apply this test narrowly, finding conflict only when the statute and ordinance irreconcilably conflict.⁷⁴ For instance, many courts do not find conflict between an ordinance and a statute when the ordinance pursues the same policies as the statute but demands higher standards, as many statutory standards impose merely a “floor rather than a ceiling.”⁷⁵

Conflict alone does not completely settle the question of pre-emption. A court must additionally determine which regulation — state or local — survives the conflict. In a legislative home rule regime, the state statute will always be superior to the local ordinance in cases of conflict.⁷⁶ In an *imperio* regime, however, state statutes are supreme in areas of statewide concern whereas local ordinances are supreme in areas of local concern.⁷⁷ Courts in *imperio* regimes typically use three overlapping tests to determine whether a matter is of state, local, or mixed state-and-local concern. First, courts look to a need for statewide uniformity in the particular field of regulation; second, courts examine the extent of external effects from local regulations; and, third, courts determine whether regulation of the particular field has traditionally occurred at the state or local level.⁷⁸ As discussed in Part III.B.1, *supra*, the judicial determination that a certain field of regulation is predominantly a matter of state, local, or mixed concern can be unpredictable, even when courts apply these three tests. In close cases, the policy of self-governance underlying home rule implies that advocates of statewide concern should have the burden to persuade the court that the matter at bar

73. See, e.g., *Modern Cigarette v. Town of Orange*, 774 A.2d 969, 978 (2001); *Goodell*, 575 N.W.2d at 493; *Amico's Inc. v. Mattos*, 789 A.2d 899, 907 (R.I. 2002).

74. E.g., *Modern Cigarette*, 774 A.2d at 977-78; *Goodell*, 575 N.W.2d at 500.

75. See, e.g., *Amico's Inc.*, 789 A.2d at 907; accord *Modern Cigarette*, 774 A.2d at 978 (“merely because a local ordinance, enacted pursuant to the municipality’s police power, provides higher standards than a statute on the same subject does not render it necessarily inconsistent with the state law.”); *Goodell*, 575 N.W.2d at 501 (“When a state law merely sets a standard, a local law setting a higher standard would not conflict with the state law”); *City of Cleveland Heights v. Woods*, 669 N.E.2d 281, 282 (Ohio Ct. App. 2002).

76. See, e.g., *ACLU of New Mexico v. City of Albuquerque*, 128 N.M. 315 (1999).

77. See, e.g., *City of Northglenn v. Ibarra*, 62 P.3d 151 (Colo. 2003).

78. See, e.g., *City of Northglenn*, 62 P.3d at 155-56; *Marran v. Baird*, 635 A.2d 1174, 1178 (R.I. 1994); *Town of East Greenwich v. O'Neil*, 617 A.2d 104 (R.I. 1992); *Fraternal Order of Police, Colo. Lodge #27 v. City and County of Denver*, 926 P.2d 582 (Colo. 1996).

truly does require statewide uniformity. Otherwise, local self-government will yield too easily to statewide control in the face of preemption by direct conflict.⁷⁹

Finally, some states allow statutes to preempt local ordinances impliedly through occupation of the field. Courts typically look to legislative intent to determine whether a particular statute or set of statutes regulates a field so comprehensively, exclusively, and thoroughly that the legislature must have meant the state to exhaust all regulation of that field, thereby preempting local governments from regulating the field any further.⁸⁰ Because lenient requirements for finding preemption by occupation of the field could easily vitiate home rule, courts often require more than the mere existence of “a state law, or even a multitude of state laws on a subject,” to demonstrate legislative intent to occupy a field.⁸¹ Rather, they require a more searching inquiry of legislative purposes, how the statutory scheme advances those purposes, and whether local regulations would undermine those purposes.⁸² A few states have gone further and rejected preemption by occupation of the field entirely, finding it to be inconsistent with the policies behind home rule.⁸³

These different forms of preemption by express denial, direct conflict, or implied preemption through occupation of the field do map onto the *imperio* and legislative home rule regimes, if imperfectly. Both *imperio* and legislative states could expressly deny local governments regulatory power in a given field, but the two

79. Tocqueville recognized long ago that “[o]f all forms of liberty, that of a local community, which is so hard to establish, is the most prone to the encroachments of authority.” TOCQUEVILLE, *supra* note 53, at 37.

80. See, e.g., N.C. GEN. STAT. § 160A-174(b)(5) (2003); *Modern Cigarette*, 774 A.2d at 977-78; *School Comm. of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993); *Bloom v. City of Worcester*, 293 N.E.2d 268, 280-81 (Mass. 1973); *Amico's Inc.*, 789 A.2d at 907.

81. *Town of York*, 626 A.2d at 941.

82. See *supra* note 80.

83. See, e.g., *Municipality of Anchorage v. Repasky*, 34 P.3d 302, 311 (Alaska 2001) (“In general, for state law to preempt local authority, it is not enough for state law to occupy the field. Rather, [i]f the legislature wishes to “preempt” an entire field, [it] must so state.” (quoting *Jefferson v. State*, 527 P.2d 37, 43 (Alaska 1974))); *City of Ocala v. Nye*, 608 So.2d 15, 17 (Fla. 1992) (implying, without deciding, that Florida does not recognize field preemption); *Schillerstrom Homes v. City of Naperville*, 762 N.E.2d 494, 499-500 (Ill. 2001) (statutory scheme must expressly declare exclusive state control over a subject in order to preempt local regulation); *Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212, 218 (Ohio 1998) (“[T]here is no constitutional basis that supports the continued application of the doctrine of implied preemption.”).

regimes treat occupation of the field very differently. Because the grant of municipal power in a legislative home rule state is limited to matters “not expressly denied by general [state] law or charter,” an express denial in a legislative home rule state completely preempts local ordinances in that field.⁸⁴ In an *imperio* state, however, municipalities have immunity from state regulation in areas of local concern; therefore, even an express denial of municipal power may not effectively preempt a local ordinance if a court finds it to govern an area of exclusive local concern.⁸⁵

Both legislative and *imperio* states are likely to recognize preemption by direct conflict: no court can countenance irreconcilable conflict between statutes and ordinances, whether textual or operational.⁸⁶ While states uniformly recognize preemption by irreconcilable conflict, they differ in their understandings of when demanding local regulations merely set higher standards than state law and when they become unacceptably inconsistent with it.⁸⁷ The interpretation of statutory standards as floors, which allow higher local standards, rather than ceilings, which do not, depends primarily on a court’s general willingness to defend home rule, not on whether it finds itself in an *imperio* or legislative home rule state.⁸⁸ The main difference, then, between preemption by direct conflict in legislative and *imperio* home rule regimes is that once a court finds a direct conflict in a legislative regime, it can immediately conclude that the state statute preempts the local ordinance. In such a case, the court will normally reason that the direct conflict, if irreconcilable, requires an interpretation of the statutory language as “tantamount or equivalent

84. See, e.g., N.M. CONST. art. X, § 6(D).

85. See, e.g., *Fraternal Order of Police*, 926 P.2d 582.

86. Compare *Chapman v. Luna*, 678 P.2d 687 (N.M. 1984) (a statutory prohibition, in a legislative home rule state, on local imposition of fees on motor vehicles preempts a local registration fee to finance a local motor vehicle inspection program) with *State v. Pascale*, 134 A.2d 149, 152 (R.I. 1957) (local traffic ordinance, in an *imperio* home rule state, punishing any refusal to comply with order of police officer was preempted by state statute punishing willful refusal to comply with police order).

87. *Goodell v. Humboldt County*, 575 N.W.2d 486, 501 (Iowa 1998) (“Any distinction between a local ordinance that is inconsistent with state law and one that merely sets a higher standard or requirement is at best subtle.”).

88. See BRIFFAULT & REYNOLDS, *supra* note 44, at 364 (discussing non-regulation versus permission).

to” an express denial of local power in a field.⁸⁹ In an *imperio* state, however, after finding a conflict between a statute and an ordinance, the court must further determine whether the subject concerns a state, local, or mixed matter in order to determine which regulation survives the conflict.

Finally, both legislative and *imperio* regimes may recognize preemption by occupation of the field. Structural differences between the home rule models, however, lead courts to employ this form of preemption differently depending on whether they are in an *imperio* or legislative regime. Because municipalities in legislative home rule states have no immunity powers at all, inconsistent state statutes always defeat local ordinances. Therefore, courts in legislative home rule states use preemption by occupation of the field sparingly, if at all. As the Illinois Supreme Court has noted, if local regulations become so varied as to threaten important state interests, the structure of legislative home rule itself provides the proper remedy by allowing the state to demand local uniformity simply by expressly denying local governments the power to act in the relevant field.⁹⁰ Unlike *imperio* regimes, the complete lack of immunity powers in legislative home rule states imposes an additional obligation on courts in those states to require especially convincing evidence of legislative occupational intent before allowing preemption by occupation of the field, if they do allow anything short of express preemption.

The availability of immunity powers in *imperio* regimes, however, does not imply that courts should easily find ordinances preempted by occupation of the field. The general importance of self-governance recognized by *imperio* home rule requires that courts impose demanding scrutiny to find legislative intent to occupy a field before they conclude that the legislature has preempted local action, and many states do engage in such demanding scrutiny.⁹¹

89. State *ex rel.* Haynes v. Bonem, 845 P.2d 150, 157 (N.M. 1992) (interpreting the possibility for direct conflict narrowly by allowing local governments to adopt eight-member commissions where state statute requires five-member commissions).

90. Paper Supply Co. v. City of Chicago, 317 N.E.2d 3, 13 (Ill. 1974) (responding to plaintiffs’ “nightmare” scenario where 1356 local governments could harm business throughout the state with heterogeneous tax regulation).

91. See *supra* note 80.

IV. THE LEGALITY OF LOCAL MINIMUM WAGE LAWS UNDER HOME RULE

Defenders of challenged municipal minimum wage ordinances have to tailor their arguments to the particular models of home rule and preemption applicable to their jurisdiction. In either regime, the defense will typically involve two stages. First, the defender must show that the municipality has the power to enact municipal minimum wage laws; second, the defender must show that no state law, especially the state minimum wage law (if there is one), preempts the ordinance.⁹²

A. VIABILITY IN AN *IMPERIO* REGIME

1. *Imperio Home Rule Powers to Enact Wage Regulation*

In an *imperio* state, municipalities have power over local affairs. Therefore, to demonstrate municipal power the defender should argue that minimum wage laws address local needs and concerns. Indeed, the local costs of living often vary dramatically within a state — an average three bedroom apartment rents for \$1018 per month in New York City but only \$524 in Binghamton, New York.⁹³ Thus, a statutory flat-rate minimum wage is unlikely to accommodate the needs of local residents throughout the state, because it is politically implausible that the statutory rate will reflect the cost of living in the most expensive parts of the state. Insofar as local minimum wage laws directly address the health and well-being of local residents by ensuring that wages can adequately cover local costs of living, these ordinances do serve municipal purposes and benefit local affairs. As a result, *imperio* municipalities are quite likely to enjoy sufficient power to enact municipal minimum wage laws.

92. In fact, duly enacted municipal ordinances often carry a presumption of validity and constitutionality, which means that the challenger of the ordinance must persuade the court that an ordinance is constitutionally infirm. *See, e.g., Meyer v. Collins*, 717 A.2d 771, 773 (Conn. App. Ct. 1998). This discussion, however, focuses primarily on defenders' substantive arguments, rather than on their burdens of proof.

93. *See* Schedule B(1) – Fair Market Rents 2005 for Existing Housing, *supra* note 4, at 59,045.

2. Imperio Preemption Tests

The harder question in an *imperio* regime is whether state minimum wage laws preempt local ordinances. Unless a local government can show that minimum wage regulation concerns purely local affairs, but not areas of statewide concern, *imperio* states that expressly deny local governments the ability to regulate wages will effectively preempt any such regulation. Indeed, even the strongest advocates of local wage regulation would be hard-pressed to argue that wage regulation concerns local affairs exclusively: states clearly have significant interests in regulating wages. Therefore, local wage regulations probably would not be viable in *imperio* states that expressly deny local governments the ability to regulate wages, such as Arizona and Colorado.⁹⁴

In the *imperio* states that do not expressly forbid local governments from regulating wages, municipalities have to avoid preemption by direct conflict and by implied preemption through occupation of the field. Defenders of the ordinances can overcome the argument from direct conflict. Municipal minimum wage ordinances that impose higher wage floors than are demanded by state statute clearly do not permit what the statutes prohibit: for example, businesses that comply with a local ordinance requiring a minimum wage of \$8.50 are, a fortiori, in compliance with a state minimum of \$5.15. Challengers may argue that the ordinances nevertheless prohibit what the statute permits, namely the payment of wages in the range between the state minimum (e.g., \$5.15) and the local minimum (e.g., \$8.50). Because most states recognize that statutory standards usually impose a floor rather than a ceiling, this argument should fail, at least where the main purpose of the state statute is to ensure that workers make wages adequate to maintain their health and welfare.⁹⁵

94. COLO. CONST. art. XX, § 6 (constitutional grant of *imperio* home rule power); COLO. REV. STAT. ANN. § 8-6-101(3)(a) (West 2004) (express denial of local power to regulate wages); ARIZ. CONST. art. XIII, §§ 1, 2 (constitutional grant of *imperio* home rule power); ARIZ. REV. STAT. ANN. § 23-362 (1995) (express denial of local power to regulate wages).

95. *But see* Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 17 A.D.2d 327, 330 (N.Y. App. Div. 1962) (“The local law forbids a hiring at a wage which the state law permits and so prohibits what the state law allows.”), *aff’d*, 189 N.E.2d 623 (N.Y. 1963) (state minimum wage law preempts local regulation). New York has subsequently rejected this theory of state standards as both floors and ceilings. *People v. Cook*, 34 N.Y.2d 100, 109 (1974) (rejecting the argument that “a locality may not enact a local law which

Indeed, at least one state has codified the rule that local standards do not conflict with state standards simply by being more stringent.⁹⁶

The challengers may have a stronger argument if the state minimum wage law expressly establishes a policy of balancing the interests of employers and low-wage workers in setting its minimum wage rate.⁹⁷ In such a case, challengers may argue that because wage regulation policy directly accommodates employer interests, the state legislature has done more than leave wages above the state minimum unregulated through its prohibition on sub-minimum wages; rather, they would argue that the state has affirmatively authorized employers to pay any wage above the state minimum. If courts find this argument convincing, then they may conclude that ordinances imposing a higher minimum directly conflict with the legislature's affirmative authorization of super-minimum wages. Very few states, however, incorporate the protection of employer interests directly into the policy behind its minimum wage statute.⁹⁸ Therefore, whatever its merits, this argument has no teeth in the vast majority of *im-perio* states.

To demonstrate that state minimum wage laws evince an intent to occupy the field of wage regulation that preempts local action, challengers must show that the legislature has regulated wages so exhaustively and completely as to preclude local action. Defenders of minimum wage ordinances will usually be able to defeat this argument as well by pointing out that minimum wages do not require jurisdictional uniformity. FLSA, for example, explicitly recognizes the need for variety in minimum wages

prohibits conduct which is permitted by State law.' This statement of the law is much too broad. If this were the rule, the power of local governments to regulate would be illusory."); *accord*, *Jancyn Mfg. Corp. v. County of Suffolk*, 518 N.E.2d 903 (N.Y. 1987); *New York State Club Ass'n, Inc. v. City of New York*, 505 N.E.2d 915 (N.Y. 1987).

96. IOWA CODE ANN. § 364.3(3) (West 1999) ("A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but *may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.*") (emphasis added).

97. *See, e.g.*, N.C. GEN. STAT. § 95-25.1(b) (2003).

The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry.

98. *Id.*

by contemplating higher state and municipal minimums.⁹⁹ Moreover, the theoretical and empirical evidence about the effects of the minimum wage, discussed in Part IV.C, *infra*, strongly suggests that moderate increases in the minimum wage have negligible effects on the labor market, and can either increase or decrease employment. Therefore, as long as local variations in the minimum wage remain within moderate bounds, local heterogeneity should have no adverse effect on the state labor market.

Defenders can also emphasize that many state minimum wage statutes explicitly include a “savings clause” that maintains any wage standards in effect prior (and, occasionally, subsequent) to the adoption of the state statute.¹⁰⁰ Some go further and adopt wage boards that can recommend increases in the minimum wage for certain localities.¹⁰¹ In these cases, the state policy supporting minimum wages clearly contemplates variation in the minimum wages applicable within a state in such a way that the legislature cannot have meant to occupy the field of wage regulation exclusively.

In short, while certain features of particular state minimum wage policies may preempt local minimum wage ordinances by direct conflict or by occupation of the field, the vast majority of *imperio* states should allow them. Local minimum wage ordinances further — rather than conflict with — most state policies of supporting adequate wages, especially because there is neither legal nor economic need for uniformity.

B. VIABILITY IN A LEGISLATIVE REGIME

1. *Legislative Home Rule Powers to Enact Wage Regulation*

The analysis of regulatory power is simpler in a legislative regime than in an *imperio* regime, although the preemption analysis in a legislative regime adds a few wrinkles to the analysis just offered for *imperio* regimes. Legislative home rule municipalities enjoy the full range of state police power. Because courts have understood minimum wage regulations to be within states’ police powers since 1937, legislative home rule municipalities have long

99. 29 U.S.C. § 218(a) (2001).

100. See *infra* Appendix.

101. *E.g.*, CONN. GEN. STAT. ANN. § 31-61 (West 2003).

enjoyed sufficient regulatory power to regulate wages.¹⁰² Preemption poses the more significant obstacle for minimum wage ordinances in legislative regimes.

2. Legislative Preemption and the Private Law Exception

Unlike *imperio* regimes, legislative home rule regimes typically enjoy constitutional and statutory provisions that define the applicable preemption standards quite precisely. Because local governments have no immunity against conflicting state regulation in legislative regimes, these provisions generally require state legislative action to deny a power to local governments expressly, explicitly, and specifically before a statute can preempt an ordinance.¹⁰³ As a corollary to the requirement that the legislature expressly deny a power to local governments in order to preempt them, courts in legislative home rule states usually reject implied preemption by state occupation of a field, and require the legislature to express its intent explicitly in order to reserve the field exclusively to the state before finding it occupied.¹⁰⁴

In addition to express denial and express intent to occupy a field, legislative home rule regimes also often recognize preemption by direct conflict. The test for direct conflict is normally the same in legislative states as in *imperio* states: an ordinance cannot forbid what a statute affirmatively permits, nor can it permit

102. *E.g.*, *City of Baltimore v. Sitnick*, 255 A.2d 376, 378 (Md. 1969) (“Baltimore City, as a municipal corporation, ha[s] the authority *under its police powers* to establish by ordinance minimum wage regulations.”) (emphasis added, citations omitted).

103. *See, e.g.*, ALASKA CONST. art. X, § 11 (local governments can “exercise *all legislative powers not prohibited* by law or by charter”) (emphasis added); FLA. STAT. ANN. § 166.021 (West 2005) (home rule governments “*may exercise any power for municipal purposes, except when expressly prohibited by law*”) (emphasis added); ILL. CONST. art. VII, § 6(i) (“Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit *to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.*”) (emphasis added); N.M. CONST. art. X, § 6(D) (“A municipality which adopts a [home rule] charter may exercise all legislative powers and perform all functions *not expressly denied by general law or charter.*”) (emphasis added).

104. *See, e.g.*, *Rubey v. City of Fairbanks*, 456 P.2d 470, 475 (Alaska 1968) (“[T]here would have to be some additional factor from which the intent of the legislature to prohibit local regulation in this area could be reasonably inferred.”); *Goodell v. Humboldt County*, 575 N.W.2d 486, 493 (Iowa 1998) (when analyzing implied preemption by field occupation, “Iowa law requires some legislative expression of an intent to preempt home rule authority, or some legislative statement of the state’s transcendent interest in regulating the area in a uniform manner.”).

what the statute forbids. Indeed, courts in legislative states usually seek to avoid irreconcilable conflict between state and local law wherever possible by harmonizing the two.¹⁰⁵ Thus, as in *imperio* states, direct conflict normally causes no problem for municipalities that impose wage floors above the state minimum, because compliance with a higher minimum automatically entails compliance with the lower one.

In short, the primary grounds on which local minimum wage laws face preemption in states with legislative home rule occur when states expressly deny localities the power to regulate wages, or expressly reserve the field of wage regulation to the state. Because only four legislative home rule states specifically deny municipalities the power to enact local minimum wage laws,¹⁰⁶ the remaining legislative home rule states would seem to be able to enact municipal minimum wage laws.

Unfortunately, local wage regulations face one more hurdle in the analysis of their viability because the AMA model builds one specific denial of municipal power into the home rule grant itself. In the eight states with the so-called “private law exception,”¹⁰⁷ municipalities lack the power “to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power.”¹⁰⁸ Therefore, while the non-preempted states that lack the private law exception should have little problem enacting local municipal wage regulation, the viability of local minimum wage regulation in the remaining eight depends on the meaning of the private law exception.

105. *E.g.*, *City of Council Bluffs v. Cain*, 342 N.W.2d 810, 812 (Iowa 1983) (“[U]nder home rule, a city has the power to enact an ordinance on a matter which is also the subject of statute if the ordinance and statute can be harmonized and reconciled.”).

106. These are Georgia, Louisiana, Oregon (with respect to generally applicable minimum wages, but not living wages tied to city contracting), and Utah. Arizona, Colorado, Florida, and South Carolina also specifically deny local governments the power to enact minimum wage laws. Because these states have a different home rule regime, the relevant analysis is different. Moreover, Missouri attempted to deny such power to local governments, but its denial was found unconstitutional. *See infra* Appendix.

107. These are Delaware, Georgia, Indiana (by case law, especially strong), Iowa, Louisiana, Massachusetts (by case law, especially strong), Montana (especially strong), and New Mexico. *See infra* Appendix.

108. *See, e.g.*, N.M. CONST. art. X, § 6(D).

3. *The Private Law Exception*

The AMA model of legislative home rule explicitly denies municipalities “the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power.”¹⁰⁹ Only two cases have ever considered the application of this so-called “private law exception” to minimum wage ordinances. The first, *New Orleans Campaign for a Living Wage v. City of New Orleans*,¹¹⁰ did not decide the question because Louisiana is one of the six legislative home rule states that specifically denies municipalities the power to regulate minimum wages.¹¹¹ Therefore, the court found the municipal ordinance preempted, without needing to resolve the applicability of the private law exception.¹¹² The second, *New Mexicans for Free Enterprise v. City of Santa Fe*, upheld the minimum wage ordinance on the narrower ground that a statutory devolution of police powers to New Mexican municipalities provides the “inde-

109. *Id.*

110. 825 So. 2d 1098 (La. 2002).

111. LA. REV. STAT. ANN. § 23:642 (1998). The text is instructive due to its strong ideological position, unsupported by economic evidence (*see* discussion *infra* Part IV.C for a review of such evidence):

(2) The legislature further finds that wages comprise the most significant expense of operating a business. It also recognizes that neither potential employees nor business patrons are likely to restrict themselves to employment opportunities or goods and services providers in any particular parish or municipality. Consequently, local variation in legally required minimum wage rates would threaten many businesses with a loss of employees to areas which require a higher minimum wage rate and many other businesses with the loss of patrons to areas which allow for a lower wage rate. The net effect of this situation would be detrimental to the business environment of the state and to the citizens, businesses, and governments of the various local jurisdictions as well as the local labor market.

(3) The legislature concludes from these findings that, in order for a business to remain competitive and yet to attract and retain the highest possible caliber of employees, and thereby to remain sound, an enterprise must work in a uniform environment with respect to minimum wage rates. The net impact of local variation in mandated wages would be economic instability and decline and a decrease in the standard of living for the citizens of the state. Consequently, decisions regarding minimum wage policy must be made by the state so that consistency in the wage market is preserved.

(B) Therefore, pursuant to the police powers ultimately reserved to the state by Article VI, Section 9 of the Constitution of Louisiana, no local governmental subdivision shall establish a minimum wage rate which a private employer would be required to pay employees.

112. *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1108.

pendent municipal power” needed to avoid the private law exception.¹¹³ Therefore, no court has truly decided whether the private law exception should ban local minimum wage laws. A robust account of public and private law in American jurisprudence, however, suggests that it should not.

a. A Robust Account of the Distinction between Public and Private Law.

There are few well-developed accounts in the legal literature of the distinction between public and private law as it relates to the legislative home rule model. Most discussions can be characterized as intuitive accounts of the distinction. A fuller understanding of the private law exception requires a functional and a conceptual account in addition to these intuitive accounts.

In an article containing perhaps the most thorough analysis of the subject, Gary Schwartz suggests that, in the context of the private law exception, private law “clearly is intended to refer to private law in the rough sense that contracts, property, and torts are private law.”¹¹⁴ On this account,

[p]rivate law consists of the substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another. The complement of private law is thus “public law” — the substantive law defining the legal obligations of private individuals or entities to the gov-

113. No. D-0101-CV-2003-469, slip op. at 6 (D.N.M. June 24, 2004) (interpreting the minimum wage ordinance as “incident to an exercise of an independent municipal power,” namely the statutory police power).

114. Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 687 (1973). See also, FORDHAM, *supra* note 56, § 6 cmt. 5.

One aspect of home rule which has not been given adequate thought is the matter of city enactment of private law. Traditionally, the states have not given local units any independent legislative power of this character for obvious reasons. Few would want a system under which the law of contracts and of property varied from city to city. At the same time, the exercise of municipal powers has a more or less direct bearing upon private interests and relationships. This is true, for example, of tax measures, regulatory measures and various utility and service activities. It is the theory of the draft that a proper balance can be achieved by enabling cities to enact private law only as an incident to the exercise of some independent municipal power.

ernment, and also establishing their liberties and opportunities in relation to the government.¹¹⁵

Under this explanation, minimum wage regulations fall on the public side of the divide. Prior to 1938, in states that didn't regulate wages, the only "regulation" of the labor market was through private contracting. Minimum wage laws clearly involved a public intervention into these private negotiations, enforceable in lawsuits brought by the state Attorney General rather than private individuals. Indeed, it was exactly this public determination of minimum wages to which adherents to the sacrosanct liberty of private contract objected.¹¹⁶ Thus, the intuitive account makes a prima facie case that minimum wage laws are not subject to the private law exception.

Moving beyond the intuitive account to a more functional analysis, Terrance Sandalow suggests that the AMA framers worried that "if each of the thousands of cities and villages entitled to exercise home rule powers were thereby empowered to adjust contract, property, and the host of other legal relationships between private individuals, chaos would ensue."¹¹⁷ Yet Sandalow does not explain why chaos would ensue from locally heterogeneous contract and property law but not from locally heterogeneous public law. Transaction costs might explain the difference. Procedurally, heterogeneous local private law could impose far greater transaction costs than heterogeneous public law in two ways: first, by imposing greater costs of learning the applicable law, and, second, by imposing greater costs of enforcing the applicable law.¹¹⁸ Of course, the costs of discovering the applicable law may not always be smaller for public than for private law.

115. Schwartz, *supra* note 114, at 688. See also Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1343 (1994).

116. *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

117. Sandalow, *supra* note 57, at 678-79.

118. Public law is often, but not always, far easier to learn of than is private law. Speed limits, for example, clearly satisfy Schwartz's notion of the obligations that private individuals owe to the government, or the public at large. See Schwartz, *supra* note 114, at 688. Drivers traveling from county to county exert little effort in learning the applicable law; they simply read the signs that the government has posted. If, however, comparative negligence governed in one county while contributory negligence applied in the next, drivers would likely have to turn to the casebooks to discover the liabilities they faced in each county.

But they are likely to be smaller for local minimum wage laws than they would be for local contract laws because cities that adopt local minimum wage laws often bear affirmative obligations to inform businesses of the relevant wage rates.¹¹⁹

Substantively, because private law — torts, contracts, family law, and the like — affects so many aspects of everyday life, whereas public law tends to focus on a narrower range of conduct affecting a narrower range of people, most commentators argue that a multiplicity of private law would be far more costly than a multiplicity of public law.¹²⁰ Of course, determining the actual change in transaction costs following any particular modification to public or private law is an empirical matter. The economic evidence discussed in Part IV.C, *infra*, however, suggests that moderate increases in the local minimum wage will have negligible employment effects, which could be either positive or negative. Such negligible effects will not disrupt the labor market so severely as to interfere with the ability of business to recruit and hire workers. Therefore, both procedurally and substantively, a variety of public laws, like the minimum wage laws, will not impose costs so heavy as to undermine the nature of the private and civil relationships they may touch.

Finally, the jurisprudential revolution that led up to *West Coast Hotel* offers a third, more conceptual account of the relationship between minimum wage regulations and private law. Sixty years of jurisprudential development,¹²¹ culminating in

119. See, e.g., S.F., CAL., ADMIN. CODE § 12R-5(a), available at <http://www.amlegal.com/library/ca/sanfrancisco.shtml> (last visited Aug. 16, 2005); MADISON, WI. GEN. ORD. § 3.45(24), available at http://library10.municode.com/gateway.dll/1?f=templates&fn=default.htm&vid=nextpage:500000&npusername=50000&nppassword=MCC&npac_credentialspresent=true (last visited Aug. 16, 2005).

120. See, e.g., Richard Briffault, *supra* note 115, at 1343; Schwartz, *supra* note 114, at 750-56; Sandalow, *supra* note 57, at 679-80.

121. See generally CUSHMAN, *supra* note 14, at 45-105; see also *Munn v. Illinois*, 94 U.S. 113, 126 (1877) (upholding the first law regulating prices because the price of grain is “cloaked” with a use in which the public has an interest); *Holden v. Hardy*, 169 U.S. 366, 397 (1898) (upholding maximum hours regulation because the state’s police power includes the power to regulate health, especially where private parties have unequal bargaining power); *Atkins v. Kansas*, 191 U.S. 207 (1903) (upholding a state statute that regulated working hours of public employees, including municipal employees); *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a state statute regulating the working hours of bakers as violative of the Fourteenth Amendment’s due process clause because the state did not convince the Court that there was a close connection between the regulation and the pursuit of health); *Muller v. Oregon*, 208 U.S. 412 (1907) (upholding maximum hours regulation for women without a particularized showing that such regulation furthers

West Coast Hotel,¹²² suggests that the health and excesses of an economy benefit or burden the public as a whole and, therefore, producing a well-functioning economy is always in the public interest. Because that end is legitimate and the best means of doing so are often uncertain and contested, “the legislature is entitled to its judgment”¹²³ so long as it avoids unreasonable, arbitrary, and capricious means.¹²⁴ This position rejects the prior view that public economic regulation of private relationships is appropriate only when the state can affirmatively demonstrate to the court that the regulated business has cloaked itself with a public interest which the regulation narrowly advances.¹²⁵

The contemporary understanding, crystallized in *West Coast Hotel*, is that public interest is neither monolithic nor natural and unchanging. Rather, it must be determined deliberatively in legislative bodies, which are better suited than courts to determine the contours and content of public economic needs. Because legislatures across the country have recognized for nearly seventy years that minimum wage regulations advance important public interests,¹²⁶ courts should characterize these regulations — at the

women’s health and safety); *Bunting v. Oregon*, 243 U.S. 426, 438 (1917) (upholding a state statute regulating maximum hours through overtime payments without a particularized showing that such regulation furthers workers’ or the public’s health; indeed, granting broad deference to legislative judgment); *Wilson v. New*, 243 U.S. 332 (1917) (upholding Congressional regulation of wages and hours of railroad workers because the avoidance of labor disputes is a sufficient public interest to support the regulation); *Block v. Hirsh*, 256 U.S. 135, 155 (1921) (upholding a D.C. rent control ordinance in the recognition that circumstances can clothe an otherwise private transaction with a public interest); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 554, 557 (1923) (striking down D.C.’s minimum wage law for women because wage regulation touches the “heart of the contract” and accounts for the needs of “only one party to the contract”); *Charles Wolff Packing Co. v. Court of Indus. Relations of Kan.*, 267 U.S. 552 (1925) (allowing public regulation of private businesses when those businesses are clothed with a public interest by (a) carrying on a public grant of authority, (b) operating in traditionally public categories, or (c) developing a public interest through circumstance); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding price regulation of health in recognition of the interpenetration of private rights and public interests which allows legislative intervention in the public interest so long as no constitutional right is violated); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (uttering the last, dying breath of substantive due process review of minimum wage regulation).

122. 300 U.S. 379, 396-99 (1937).

123. *Id.* at 399.

124. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

125. *See supra* note 121.

126. Minimum wage regulations help equalize bargaining power between workers and employers, preventing workers from becoming the “ready victims of those who would take advantage of their necessitous circumstances.” *West Coast Hotel Co.*, 300 U.S. at 398.

federal, state, and local level — as public rather than private law. Therefore, municipalities seeking to regulate wages should not be subject to the private law exception in so doing.

Together, the intuitive, functional/transaction cost, and conceptual accounts of public law combine powerfully to support the ability of municipalities to adopt minimum wage regulations as public law, without suffering condemnation by the private law exception.

b. Judicial Misinterpretation of the Private Law Exception

Very few courts have interpreted the private law exception. While deciding a challenge to a municipal rent control ordinance in *Marshall House v. Rent Review and Grievance Board of Brookline*,¹²⁷ Massachusetts became the first state to construe the exception. Here, the court recognized that the rent control ordinance serves public purposes. The court, however, found the ordinance barred by the private law exception because “the method [it] adopted is primarily civil in that it affords to the board power in effect to remake . . . the parties’ contract creating a tenancy.”¹²⁸ Although the private law exception, by its terms, does allow municipal private law when it is “incidental to the exercise of an independent municipal power,”¹²⁹ the court held that this clause does not save the “primarily civil” method of enforcing rent control, even when it effectuates the admittedly public purposes of maintaining affordable housing, because doing so would allow cities to bootstrap private law onto public programs. Subsequent cases in Massachusetts and Indiana have affirmed this logic.¹³⁰

They encourage fair competition among businesses, preventing companies from profiting from exploitative labor practices. *Id.* They promote the health and well being of the workers. *Id.* at 399. Moreover, in practical terms, they reduce the need for social services for underpaid workers, thereby shifting the costs of unfair labor practices from taxpayers to “unconscionable employers.” *Id.*

127. 260 N.E.2d 200 (Mass. 1970).

128. *Id.* at 205-06.

129. *See, e.g.*, N.M. CONST. art. X, § 6(D).

130. *See* *CHR General, Inc. v. City of Newton*, 439 N.E.2d 788 (Mass. 1982); *Bannerman v. City of Fall River*, 461 N.E.2d 793 (Mass. 1984); *City of Bloomington v. Chuckney*, 331 N.E.2d 780, 783 (Ind. Ct. App. 1975) (rent control ordinances “so directly affect the landlord-tenant relationship, . . . they cannot be upheld as an incident to the exercise of an independent municipal power”). *But cf.* *City of Evanston v. Create*, 421 N.E.2d 196 (Ill. 1981) (rejecting the argument that local rent control law is an unconstitutional interfer-

While no court has specifically reversed these precedents, their errors are significant and obvious. These cases rest primarily on two arguments: first, public law strikes at the heart of private relationships and interferes too directly with them, thereby becoming private law subject to the exception; second, municipalities cannot enlist private enforcement to facilitate public policy without being condemned by the private law exception.

Sixty years of jurisprudential evolution, from *Munn*¹³¹ through *Bunting*¹³² and *Nebbia*¹³³ to *West Coast Hotel*,¹³⁴ demonstrate that these arguments lack merit.¹³⁵ While the amount of rent no doubt is a central characteristic of a contract between landlord and tenant, there is nothing sacrosanct about the prices of commodities, the rent charged in leases, or the wages offered by employers that shields these hearts of the contract from governmental regulation.¹³⁶ Private economic relationships have no sacred hearts immune from government regulation. If an aspect of a private economic relationship gives rise to problems that affect the public, states can use their police power to regulate that aspect, no matter how central it may be to the economic relation-

ence with private law); *Birkenfeld v. City of Berkeley*, 550 P.2d 1001 (Cal. 1976) (same); *Sims v. Besaw's Café*, 997 P.2d 201 (Or. 2000) (same, for antidiscrimination law). Note, though, that Illinois, California, and Oregon do not have constitutional private law exceptions to their home rule regime, which means that these cases do not directly refute the line of cases in Massachusetts and Indiana.

131. *Munn v. Illinois*, 94 U.S. 113 (1877).

132. *Bunting v. Oregon*, 243 U.S. 426 (1917).

133. *Nebbia v. New York*, 291 U.S. 502 (1934).

134. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

135. See *supra* note 121.

136. *Munn* settled this principle in 1877 with respect to prices, explicitly dismissing this very argument. 94 U.S. at 133 ("If they did not wish to submit themselves to [price regulation], they should not have clothed the public with an interest in their concerns."). See also *id.* at 134 ("We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."). *Block* reaffirmed the principle with respect to rents in 1921. *Block v. Hirsh*, 256 U.S. 135, 157 (1921) ("But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since *Munn v. Illinois*"). *Nebbia* generalized it in 1934. 291 U.S. at 492 ("The thought seems nevertheless to have persisted that there is something peculiarly sacrosanct about the price one may charge for what he makes or sells, and that, however able to regulate other elements of manufacture or trade, with incidental effect upon price, the state is incapable of directly controlling the price itself. This view was negated many years ago. *Munn v. Illinois*, 94 U.S. 113."). And *West Coast Hotel* finally applied it to wages in 1937. 300 U.S. at 399 ("The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection.").

ship.¹³⁷ When states delegate legislative power to their municipalities, that legislative power to enact public regulations is just as broad as the state power, unless and until the state specifically denies such a power.¹³⁸

Indeed, the AMA model adds the “independent municipal power” clause to the private law exception precisely to make this clear. Under this model, municipalities *can* enact private law — or enlist private enforcement of public law — when such provisions are “incident to the exercise of an independent municipal power.”¹³⁹ There is no illegitimate bootstrapping here. If a court recognizes a rent control ordinance as public law, as the Massachusetts Supreme Judicial Court did in *Marshall House*,¹⁴⁰ the municipality derives its power to enact that regulation from the home rule delegation of legislative power. It is this *exercise* of municipal power that saves the private right of action from the private law exception.¹⁴¹ *Marshall House* is simply wrong. To the extent that the adoption of a private right of action may be considered bootstrapping, it is bootstrapping explicitly permitted by the AMA model of legislative home rule. They are entirely unpersuasive and should not be followed.

Therefore, the Massachusetts and Indiana cases that condemn rent control ordinances as unauthorized exercises of municipal private lawmaking seriously misconceive the distinction between public and private law while simultaneously misunderstanding the role of private enforcement in public law that the AMA model

137. Of course, there may be constitutional limits to economic regulation, such as those imposed by the Fifth Amendment’s Takings Clause. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

138. This argument does not vitiate the private law exception. While the private law exception may impose no constraint on public economic regulation, there are many private relationships that are not primarily economic. Consider, for example, how substantive due process has enjoyed a rebirth protecting social relations from government intrusion without bringing *Lochner*’s ghost back to life. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003). It is the longstanding judicial recognition that private economic relationships can lead to public problems that subjects those relationships (at least in their economic aspects) to government regulation, thereby shielding them from the private law exception. Public intervention into family law, for example, may require a different analysis.

139. FORDHAM, *supra* note 56, § 6.

140. *Marshall House v. Rent Review and Grievance Board of Brookline*, 260 N.E.2d 200, 205 (Mass. 1970).

141. Sandalow, *supra* note 57, at 676-77 (“[T]he most likely construction of the model provisions is that private law may be enacted only if it is in aid of some municipal policy or program which is expressed, at least in part, by means other than the regulation of purely civil relationships.”).

specifically contemplated and sought to facilitate.¹⁴² They further rely on antiquated understandings of a sacrosanct “heart” of a private economic relationship immune from government regulation.

Because the private law exception, properly interpreted, does not preempt local wage regulation, municipalities in states with legislative home rule can avoid preemption in all but the six states that specifically deny local governments the ability to regulate wages.¹⁴³ Therefore, municipalities in just over twenty legislative states can enact minimum wage ordinances.¹⁴⁴

C. THE LEGAL RELEVANCE OF THE ECONOMICS OF THE MINIMUM WAGE

As discussed above, the legal viability of local minimum wage laws often depends on the extent to which wage regulation has significant extraterritorial effects or requires statewide uniformity. If a court perceives severe extraterritorial effects or a need for statewide uniformity, it will be more likely to (a) designate the regulation as a matter of statewide concern, thereby entitling an *imperio* state to preemption in case of conflict; (b) find that the state minimum wage law has impliedly occupied the field of wage regulation, in either an *imperio* or legislative regime; or (c) interpret the private law exception to deny local governments the power to regulate wages in states with legislative home rule. The viability of local wage regulation depends critically on the judiciary’s appreciation of the economic effects of minimum wage regulation, generally, and of multiple wage regulations more particularly.

The judiciary may initially worry that increasing the minimum wage in some parts of the state might cause businesses in

142. FORDHAM, *supra* note 57, § 6, cmt. 5 (“At the same time, the exercise of municipal powers has a more or less direct bearing upon private interests and relationships. This is true, for example, of tax measures, regulatory measures and various utility and service activities. It is the theory of the draft that a proper balance can be achieved by enabling cities to enact private law only as an incident to the exercise of some independent municipal power.”).

143. These are Florida, Georgia, Louisiana, Oregon, South Carolina, and Utah. But note that Florida, Oregon, and South Carolina expressly allow living wage ordinances even while forbidding minimum wage ordinances. *See infra* Appendix.

144. *See infra* Appendix.

that locality to pack up and leave in order to escape rising labor costs, thereby severely disrupting local industry and jobs. Minimum wage regulations, however, do not affect all industries equally. Restaurants, hotels, grocery stores, variety stores, and department stores employ the majority of minimum wage workers.¹⁴⁵ Whatever economic model best reflects the low-wage labor market, it is at least clear that the industries employing the vast majority of low-wage workers are exactly those industries least likely to forum-shop in order to avoid regulations. Unlike manufacturing plants or call-centers, the retail enterprises enumerated above all need to be geographically close to their customers in order to sell their wares.

Given that capital flight is an unlikely consequence of minimum wage regulation, what are the likely effects of this kind of regulation? A sufficient answer to this question requires both a theory about how the low-wage labor market works and facts supporting that theory. The intuitions of some policy-makers to the contrary,¹⁴⁶ economists agree neither on a model that fits the low-wage labor market nor on the facts that best describe that market. They agree on only one effect of increasing the minimum wage: covered workers will earn more income. Beyond that, much remains disputed. The lack of uncontested evidence, theoretical or empirical, of the need for uniform wage regulation implies that local governments should have broad discretion in adopting local minimum wage regulations under home rule powers.

145. DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 315-17 (1995).

146. For example, Governor George Pataki claimed that

raising the minimum wage unilaterally at the state level would align New York with the minority of states that have placed themselves at a competitive disadvantage in creating and retaining jobs. Moreover, raising New York's minimum wage independent of Congressional action could place us at a distinct competitive disadvantage with our neighbors in New Jersey and Pennsylvania, where the minimum wage is at the federal level of \$5.15 per hour. Simply put, jobs lost in New York as the result of a raise in the minimum wage would be the gain of employers in New Jersey and Pennsylvania.

Governor George Pataki, Veto Message on Assembly Bill Number 11760-A, July 29, 2004 (on file with the *Columbia Journal of Law and Social Problems*).

1. *Contested Models of the Low-Wage Labor Market*

The leading economic models of the low-wage labor market tend to fall into one of two main camps: the standard model and the “critical” models. The standard model claims that the low-wage labor market is a classically competitive market, just like a commodity market. While the critical models (e.g., old institutionalist, revisionist, and new institutionalist) are more varied, they share a common theme: power disparities between workers and employers — derived from critical assumptions about individual behavior, information processing, market structure, or governance of the employment relationship — imply that the low-wage labor market is not classically competitive and, therefore, employers can exercise some discretion in determining wages. Economists describe this kind of market, where employers have power over workers and can exercise discretion in setting wages, as a “monopsony.”¹⁴⁷

The standard model employs the familiar upward-sloping supply curves and downward-sloping demand curves, positing that the labor market reaches equilibrium when wages equal the marginal product of labor.¹⁴⁸ Given these assumptions, a binding minimum wage¹⁴⁹ leads to a reduction in the employment demanded. Like any theory, the standard model develops its supply and demand curves based on a number of simplifying assumptions. Behaviorally, the standard model assumes that people and firms are “rational” individuals, meaning that they have well-defined preferences¹⁵⁰ and act in order to maximize utility,¹⁵¹ subject to budget constraints. Moreover, information is costless, and

147. See generally MANNING, *supra* note 1.

148. A formal treatment of the competitive model is beyond the scope of this Note. For such treatment, see CARD & KRUEGER, *supra* note 145, at 355-69 (including competitive models that relax assumptions about homogenous labor, that account for differences between sectors that are covered or not covered by the law, and that distinguish between long-run and short-run effects). See also WALTER NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 505-07 (3d ed. 1985) (applying the standard competitive model to minimum wage laws, predicting that increasing wages above the competitive market equilibrium will result in unemployment).

149. A minimum wage is “binding” when it is legally mandatory and higher in value than the equilibrium wage given by the competitive market.

150. By “well-defined,” the theory requires preferences to be complete (between any two goods, an individual prefers one to the other, or equally) and transitive (if A is preferred to B, and B to C, then A is preferred to C). NICHOLSON, *supra* note 148, at 78-79.

151. *Id.* at 83.

if it is not, then individuals take the cost of information into account when maximizing utility just as they would any other cost.¹⁵² Structurally, the standard model assumes that wages internalize all relevant social costs; that market power is primarily, if not exclusively, a function of the number of market actors;¹⁵³ that where there are many market actors, no single actor has any power to negotiate over the price of a good but must take the market price as given;¹⁵⁴ that the factors of production are costlessly mobile (again, if not, individuals take that into account); that homogeneous goods (including labor) will trade at one price;¹⁵⁵ and, that labor behaves in a competitive market just like any other commodity would.¹⁵⁶ While adherents to the standard model need not demand that each of these assumptions actually holds true in the real world, they do claim that they are “true enough” to generate reliable predictions based on the competitive model.¹⁵⁷

The standard model makes a variety of forecasts about the operation of the low-wage labor market. Most obviously, it predicts that increasing the minimum wage raises the income of low-wage workers and makes them more costly to employers. More subtly,

152. Bruce E. Kaufman, *The Evolution of Thought on the Competitive Nature of Labor Markets*, in LABOR ECONOMICS AND INDUSTRIAL RELATIONS: MARKETS AND INSTITUTIONS 175 (Clark Kerr and Paul D. Staudohar eds., 1994); George Stigler, *Information in the Labor Market*, 70(2) JOURNAL OF POLITICAL ECONOMY 94 (1962).

153. NICHOLSON, *supra* note 148, at 351-54. See also Charles Brown, *Comment, Review Symposium on Myth and Measurement*, 48 INDUS. & LAB. REL. REV. 828 (1995) and Finis Welch, *Comment, Review Symposium on Myth and Measurement*, 48 INDUS. & LAB. REL. REV. 842, 848 (1995) (“I direct [Card and Krueger’s] attention to the ‘mono’ in monopsony,” criticizing Card and Krueger for using a model of the low-wage labor market that allows employers of low-wage labor to have market power when there are many such employers in the restaurant market, thereby assuming that such employers have no source of power other than numerical domination).

154. NICHOLSON, *supra* note 148, at 348.

155. *Id.* at 349.

156. See Donald R. Deere, Kevin M. Murphy, & Finis R. Welch, *Examining the Evidence on Minimum Wages and Employment*, in THE EFFECTS OF THE MINIMUM WAGE ON EMPLOYMENT 26 (Marvin H. Koster ed., 1996) (“Beginning about forty years ago there was a revolution in labor economics; what was once labor became economics.”).

157. Bruce E. Kaufman, *Labor Markets and Employment Regulation: The View of the “Old” Institutionalists*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 171 (Bruce E. Kaufman ed., IRRR Series 1997) (“The contention of the Chicago School, however, is that these imperfections, while very real, are nevertheless relatively unimportant in the sense that the actual outcomes of labor markets, such as the pattern of wage differentials among occupations or employment levels among firms, correspond fairly closely to the levels that would be predicted by the perfectly competitive model . . .”).

the model predicts that increasing the minimum wage reduces employment; wages disperse uniformly based on skill and seniority of workers (proxies for their marginal product), rather than clustering them around the minimum; if employers lawfully can use subminimum wages, they will; firms “pass through” the costs of increased minimum wages to consumers in the form of higher prices; and employers’ profits shrink after labor costs rise due to an increased minimum.¹⁵⁸ A priori, the low-wage labor market does satisfy many of the assumptions of the standard competitive model. Principally, there are many employers competing in the low-wage market (in the fast food industry, for example, McDonald’s, Burger King, Wendy’s, KFC, and Taco Bell all crowd the market). Moreover, low-wage workers tend to be less skilled and, therefore, relatively homogenous. By satisfying the standard model’s assumptions, the low-wage labor market provides a particularly good test of that model’s relevance to labor economics in general.¹⁵⁹

In contrast to standard economists, critical economists tend to be thoroughgoing empiricists. Rather than starting with an elegant economic theory and hunting for confirmation in actual labor markets, the critical economists start with detailed observations of these markets in operation. Such rich empiricism invariably leads them to question the adequacy of the standard model and many of its behavioral and structural assumptions. The old institutionalists, for example, began by observing “labor problems”: employee turnover, long hours, industrial accidents, poverty-level wages, excessive work speeds, irregular work schedules, workplace autocracy, industrial strife, and unemployment.¹⁶⁰ Careful observation of these labor problems led the old institutionalists to develop models of the labor market based on two behavioral and structural observations that differed dramati-

158. CARD & KRUEGER, *supra* note 145, at 370-71.

159. *Id.* at 396-97 (“[T]he minimum wage provides a simple and direct test of the kind of theoretical reasoning that economists routinely apply to other, more complicated phenomena, and to many policy questions. Irrespective of the exact parameters determining supply and demand behavior, the standard model makes the unambiguous prediction that an increase in the minimum wage will lead to a reduction in employment.”).

160. Bruce E. Kaufman, *Labor Markets and Employment Regulation: The View of the “Old” Institutionalists*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 11, 20 (Bruce E. Kaufman ed., 1997); RICHARD A. LESTER, *ECONOMICS OF LABOR* 93-538 (1947).

cally from the standard model. First, they found that people rarely act like the rational, maximizing economic agents driving the standard model; rather, their choices are “heavily influenced by underlying emotional states (e.g., anger, envy, lust, greed) and constrained by people’s limited ability to think through problems and acquire the relevant information to make an informed decision.”¹⁶¹ (These cognitive constraints were later termed “bounded rationality.”) Second, they found that the market contains “defects,” as compared to the perfectly competitive market, because employers rarely pay wages that fully internalize social costs,¹⁶² workers have limited information about available jobs, and their mobility to transfer even when they are aware of an opening is limited by social and family ties.¹⁶³

Viewing legal and informal institutions, rather than market forces per se, as the primary determinants of wages,¹⁶⁴ the old institutionalists proposed legally enforceable wage and labor standards to bring about macroeconomic stabilization.¹⁶⁵ In this model, wage standards shift power from employers to workers, and promote efficiency by counteracting the market defects that allow employers to pay sub-optimal wages; indeed, shifting power gives employers incentives to manage their human resources more effectively and efficiently.¹⁶⁶

161. Kaufman, *supra* note 159, at 22.

162. For example, workers require enough compensation to keep them healthy and vigorous so that they can perform productively the next day. Wages that were inadequate to provide sufficient food, health care, or shelter would impose costs on the workers while the employer received the full benefit of their labor. (While Marx may have characterized all wage labor as exploitive, labor whose wages are insufficient even to reproduce the means of production warrants that critique all the more so.) Similarly, if a particular job required skilled work, workers’ wages rarely accounted for the costs of education and training acquired prior to taking up that job.

163. *Id.* at 22-24.

164. *Id.* at 29-31.

165. *Id.* at 37-39.

166. *Id.* at 38. Responding to the neoclassical critique that labor standards have unintended consequences, the institutionalists argue

that keeping marginal, low-productivity jobs is myopic social policy. The better approach is to accept that companies will reduce employment in marginal jobs, use private and social forms of investment (e.g., education and training programs) to raise the productivity of the majority of the displaced workers who are employable, and accept that a minority of the displaced are unemployable at reasonable wages and must be supported through state welfare programs. In effect, the institutionalists see raising the plane of competition as a method to promote continuous quality improvement in the nation’s work force.

Id. (citations omitted).

Revisionist models follow the institutionalists' insights into bounded rationality and market defects, while bringing more rigorous analytical tools to bear on their study.¹⁶⁷ For example, these models clarify the notion of limited mobility by developing formal theories of the costs of job searches, based on the importance of information, the uncertainties in the search, the idea of reservation wages (that workers might be willing to accept less than their marginal product simply in order to meet their immediate needs and survive), and the idea of incomplete contracting.¹⁶⁸ The latter, incomplete contracting, makes labor markedly different from the typical commodity traded in competitive markets. Whereas owners can exert complete dominion over commodities and employ them however they please in the production process, employers cannot exert such dominion over labor. Even if employers have autocratic power in the workplace, they still need to worry about motivating workers not to shirk. Because employers can sometimes use super-competitive wages as incentives both to motivate workers and to make the workers' current jobs more valuable than the alternatives so as to make discharge especially costly (the "efficiency wage theory"), the revisionists also questioned the direct link between minimum wage increases and reduced employment.

The New Institutional Economics (NIE) model adds to this picture formal treatments of the governance issues that arise from transaction costs more generally, including the costs of conducting a transaction (including search costs), the costs of implementing a transaction (including monitoring costs), and the costs of enforcing a transaction (including legal costs, if necessary).¹⁶⁹ Informational asymmetries between employers and workers as to the working conditions and job-specific investments in training and learning complicate the picture even further, giving far less clear predictions of the likely effects of a minimum wage increase.

167. Clark Kerr, *The Social Economics Revisionists: The "Real World" Study of Labor Markets and Institutions*, in LABOR ECONOMICS AND INDUSTRIAL RELATIONS 66 (Clark Kerr and Paul D. Staudohar eds., 1994).

168. *Id.* at 77-81.

169. Gregory K. Dow, *The New Institutional Economics and Employment Regulation*, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 57-90 (Bruce E. Kaufman ed., 1997).

In short, economic theory does not provide a unitary prediction about the effects of the minimum wage. By bracketing concerns with market power and making simplifying assumptions about human behavior, the standard model makes the strongest, least equivocal, predictions. In the standard model, wage regulation leads inevitably to job loss; therefore, heterogeneous local wage regulation leads inevitably to a chaotic labor market. Critical models, however, suggest that the standard model is at best incomplete, and at worst fundamentally flawed. These models recognize that power disparities and market defects vary with the local institutional context. Unlike the standard model, critical models suggest that wage standards adapted to local conditions could very well be efficiency-enhancing in addition to being fairer.

Just as “[t]he 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics” when analyzing due process economic liberties,¹⁷⁰ home rule powers and preemption standards should not enact the standard neoclassical economic model of the low-wage labor market. They certainly should not do so when alternative models are rational and may prove better suited to promoting local needs. Were courts to constrain municipal powers to regulate wages or were they to allow excessive preemption based on assumptions about the need for statewide uniformity or the prevalence of extraterritorial effects, they would be imposing the assumptions of the standard neoclassical economic model onto the legal regimes governing home rule. Doing so would revive at the local level the long-interred theory of substantive due process review of economic policy.¹⁷¹ To avoid this long-rejected mode of jurisprudence, advocates of local wage regulations need not prove that the critical model is right. Local governments have sufficient regulatory authority under home rule to experiment with rational economic policy choices suited to local needs, at least until the state preempts them from doing so.

170. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

171. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (interring, after long last, substantive due process for economic policy).

2. *Contested Evidence of Minimum Wage Law Effects*

Discord among economists over the actual, empirical effects of the minimum wage on the low-wage labor market echoes the discord over its theoretical models, further strengthening the case for local discretion in wage regulation. For a while, it appeared as though economists were reaching consensus about the minimum wage. In their 1982 paper, *The Effect of the Minimum Wage on Employment and Unemployment*,¹⁷² Charles Brown et al., review this apparent consensus. A comprehensive review of the time-series studies conducted through the 1970s

indicates a reduction of between one and three percent in teenage employment as a result of a 10 percent increase in the federal minimum wage. [The authors] regard the lower part of this range as most plausible because this is what most studies, which include the experience of the 1970s and deal carefully with minimum-wage coverage, tend to find. The other consistent finding is a notable withdrawal from the labor force by teenagers in response to an increased minimum, to the extent that unemployment effects of the higher minimum are considerably weaker than the disemployment effects.¹⁷³

Because these results were relatively rigorous, especially compared to prior studies, for a little over a decade economists seemed to agree that minimum wage increases would (a) increase the wages of covered workers,¹⁷⁴ (b) without substantial effects on adult workers,¹⁷⁵ but (c) with small, but statistically significant, reductions in teenage employment, (d) that would primarily take the form of slowed growth in employment opportunities, rather than discharges or reductions in hours of currently employed

172. Charles Brown et al, *The Effect of the Minimum Wage on Employment and Unemployment*, 20 J. ECON. LITERATURE 487 (1982).

173. *Id.* at 508. Time-series studies track a single location over time in order to determine the effects that follow minimum wage increases.

174. Marvin H. Kusters, *Introduction and Overview*, in *THE EFFECTS OF THE MINIMUM WAGE ON EMPLOYMENT 1* (Marvin H. Kusters ed., 1996) (“The most obvious direct effect of increasing the minimum wage is to raise the incomes of low-wage workers with jobs . . .”).

175. Brown et al., *supra* note 172, at 524 (“The direction of the effect on adult employment is uncertain in the empirical work, as in the theory.”).

teenagers.¹⁷⁶ While the policy implications of these results remained contested, at least throughout the 1980s they seemed to vindicate the advocates of the application of the standard model to the low-wage labor market. Their political effect was to shift the burden of the debate onto the advocates of the minimum wage to demonstrate that the minimum wage was beneficial overall, despite these marginal dampers on teenage employment.¹⁷⁷

While the time-series data from the 1970s convinced many economists of the relevance of the standard model for the low-wage labor market, they did not settle the question for everyone. An ideal test of the theory, like that used in the natural sciences and in medicine, would randomize the test subjects and “treat” the experimental group with a minimum wage increase while withholding that treatment from the control group. Of course, practically and perhaps ethically, such randomized experiments are impossible in economic policy. However, a number of fortuities around the 1989 and 1991 state and federal increases allowed Lawrence Katz, David Card, and Alan Krueger to conduct a series of “natural experiments” that approximated the randomized experiments used in the hard sciences.¹⁷⁸ The first experiment involved a comparison of the effects of a minimum wage increase that covered New Jersey fast-food restaurants, but not those in Pennsylvania. This study also compared low-wage employers in New Jersey with high-wage employers. Card and Krueger conducted similar internal comparisons of low- and high-wage employers in Texas and California. Additionally, they conducted a series of cross-state studies to capture the effects of the 1989 and 1991 federal increases on low-wage workers in general, on workers in the retail industries, and on workers in the restau-

176. *Id.* at 505 (“Implicitly or explicitly, studies finding disemployment effects but little or no unemployment impacts are finding labor-force withdrawal in response to minimum wage increases.”).

177. LEVIN-WALDMAN, *supra* note 24, at 163-87 (arguing for a shift in the political debate from the currently perceived trade-off between poverty alleviation and full employment to the conception of the minimum wage as part of a larger package of macroeconomic stabilization and social justice).

178. CARD & KRUEGER, *supra* note 145. A full and careful study of this book will reward the interested reader. It is rich with insights on empirical methodology for economic studies, and meticulous in its analysis of its own and prior research. A full review of the book, however, is beyond the scope of this Note.

rant industries. In each study, they found either no statistically significant effect on employment outcomes or, occasionally, a small increase in employment following the minimum wage increase.¹⁷⁹ Because these findings challenged the neoclassical consensus and, therefore, warranted skepticism, the authors also reassessed prior studies based on time-series data and on cross-sectional data, finding that many of these studies were either methodologically flawed or driven by publication bias.¹⁸⁰ Finally, they reviewed international evidence, finding that many studies of foreign labor markets are consistent with their results that increases in the minimum wage either do not affect employment at all, or slightly increase employment.¹⁸¹

In many respects, these studies are widely regarded as methodologically superior to the studies that generated the neoclassical consensus in the 1980s.¹⁸² While they leave strict adherents to the standard model unconvinced,¹⁸³ they have persuaded many others.¹⁸⁴ At a minimum, Card and Krueger's results have

179. *Id.* at 1-19, 386-99.

180. *Id.* at 178-239.

181. *Id.* at 240-75.

182. Paul Osterman, *Comment, Review Symposium on Myth and Measurement*, in 48(4) *INDUS. & LAB. REL. REV.* 828, 839 (1995) ("David Card and Alan B. Krueger . . . have written a book that represents a phenomenal amount of careful and honest research and that will be a classic in the minimum wage literature and also in the broader field of empirical labor economics. At the same time, this book is a damning indictment of how labor economics has been practiced over the past three decades . . .").

183. *See, e.g.*, Donald R. Deere, et al., *Examining the Evidence on Minimum Wages and Employment*, in *THE EFFECTS OF THE MINIMUM WAGE ON EMPLOYMENT* (Marvin H. Koster ed., 1996); David Neumark & William Wascher, *Reconciling the Evidence on Employment Effects of Minimum Wages — A Review of our Findings*, in *THE EFFECTS OF THE MINIMUM WAGE ON EMPLOYMENT* 55 (Marvin H. Koster ed., 1996); John Kennan, *The Elusive Effects of the Minimum Wage*, 33(4) *J. ECON. LITERATURE* 1950 (1995); David Neumark & William Wascher, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 90(5) *AM. ECON. REV.* 1362 (2000).

184. *See, e.g.*, Paul Osterman, *Comment, Review Symposium on Myth and Measurement*, in 48(4) *INDUS. & LAB. REL. REV.* 828, 839 (1995); Richard Freeman, *Will a 10% . . . 50% . . . 100% Increase in the Minimum Wage Do? Review Symposium on Myth and Measurement*, 48(4) *INDUS. & LAB. REL. REV.* 828, 830 (1995); V. Bhaskar & Ted To, *Minimum Wages for Ronald McDonald Monopsonies: A Theory of Monopsonistic Competition*, 109 *ECON. J.* 190 (1999) (developing a monopsony model for the low-wage labor market); Richard Dickens et al., *The Effects of Minimum Wages on Employment: Theory and Evidence from Britain*, 17(1) *J. LABOR ECONOMICS* 1 (1999) (same); David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90(5) *AMER. ECON. REV.* 1397 (2000); MANNING, *supra* note 1, at 338 (characterizing Card and Krueger as "coming off better" in their debate with Neumark and Wascher); Brenner, *supra* note 5, at 188.

changed the terms of the debate, which is now “over whether modest minimum wage increases have ‘no’ employment effect, modest positive effects, or small negative effects. It is *not* about whether or not there are large negative effects.”¹⁸⁵ Furthermore, recent empirical and theoretical research supports their characterization of the low-wage market as monopsonistic and seems to be generating a new consensus among economists about the minimal — and occasionally positive — impact that moderate increases in the minimum wage have on employment.¹⁸⁶

Whether or not the emerging consensus supporting the monopsonistic picture of the low-wage labor market eventually solidifies among the economics profession, there remains much uncertainty about the precise effects of the minimum wage on employment. The only thing known with certainty about the minimum wage is that it increases incomes for covered low-wage workers.¹⁸⁷ In particular, there is no uncontested evidence that moderate increases in the minimum wage substantially, or even marginally, disrupt labor markets. Nor is there adequate evidence indicating which increases are “moderate” such that the monopsonistic effects will likely occur. Without such evidence, local legislatures with home rule powers should have broad discretion to adopt the economic policy best suited to the needs of their communities.¹⁸⁸ The opponents of such legislation should have the burden to demonstrate “chaos” or a particular need for statewide uniformity in economic policy.¹⁸⁹ Based on the best contemporary theoretical and empirical evidence, they cannot meet this burden.

185. Freeman, *supra* note 184, at 833.

186. Telephone Interview with Mark Brenner, Assistant Research Professor at the University of Massachusetts’s Political Economy Research Institute (Mar. 11, 2005). See also MANNING, *supra* note 1, at 338-347 (providing a detailed application of the monopsony model of the low-wage labor market to the effect of minimum wage increases).

187. Additionally, most economists agree that substantial increases would reduce employment. They do not, however, agree on what constitutes a substantial increase.

188. MANNING, *supra* note 1, at 347 (“[A] well-chosen minimum wage is not beyond the reach of good policy. The impact of minimum wages on employment should primarily be an empirical issue and the results of the empirical studies should be used to inform policy.”).

189. See discussion *supra* Parts IV.D and IV.E.

V. CONCLUSION

Applying the analysis developed in this Note, local minimum wage ordinances should be strongly viable in the legislative states that have not expressly denied local governments the power to regulate wages — about half of the states. (These estimates are rough estimates, because the classifications in this Note involve ideal types, rather than detailed analyses of the regime in any particular state.) These ordinances should fare poorly in both *imperio* and legislative states that have expressly denied local governments such power — about a quarter of the states. The viability of these ordinances in the remaining quarter of the states — *imperio* states that have not expressly denied localities power over wages — is less determinate, and will depend on how receptive courts are to the policy arguments offered throughout this Note. If courts are receptive to these arguments, municipalities in about three-quarters of the states have at least a decent chance to bring economic justice closer to home by enacting local minimum wage laws carefully tailored to their local costs of living. These municipalities can, if they so choose, ensure that no worker will earn starvation-level wages within their borders, even when the federal and state standards are inadequate to the task. If they do so, they will be continuing a long tradition of policy innovation and backstopping at the local and state level. It is up to them to seize the legal opportunity.

VI. APPENDIX: FEATURES OF STATE REGIMES RELEVANT TO THE LEGAL VIABILITY OF MUNICIPAL MINIMUM WAGE REGULATIONS

All of the following designations are based primarily on the author's reading of the constitutional and statutory provisions, without extensive consultation of the cases that interpret them. Therefore, these determinations should be taken as initial assessments, subject to refinement and revision upon additional research.

SUMMARY OF RELEVANT FACTORS:

Dillon's Rule (3 states): MS, VT, VA

Imperio (13 states): AZ, AR, CA, CO, HI, KS, ME, MD, NE, NV, NH, RI, TN

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Legislative (28 states): AK, DE, FL, ID, IL, IN, IA, KY, LA, MA, MI, MN, MO, MT, NM, NY, ND, OH, OK, OR, PA, SD, TX, UT, WA, WV, WI, WY

- Private Law Exception (8 states): DE, GA, IN*, IA, LA*, MA*, MT*, NM

Mixed Regime/Difficult to Classify (6 states): AL, CT, GA, NJ, NC, SC

Specific Denials (8 states): AZ, CO, FL, GA, LA, OR, SC, UT

*These states have unusually strong versions of the private law exception.

State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
AL	None. <i>Compare</i> ALA. CONST. art. XII, §§ 220-228 with ALA. CODE § 11-45-1 (1975).	Weak legislative.	N/A.	None.	N/A.
AK	ALASKA CONST. art. X, §§ 1, 2, 11.	Legislative.	No.	ALASKA STAT. §§ 23.10.050 to 23.10.150 (2004).	No.
AZ	ARIZ. CONST. art. XIII, §§ 1, 2.	Charter based. Imperio style.	No.	None. But see ARIZ. REV. STAT. §§ 23-311 to 23-329 (LexisNexis 1995) for Minimum Wage Regulation for Minors.	ARIZ. REV. STAT. § 23-362 (LexisNexis 2004) (preempting "minimum wage" ordinances, but not "living wage" ordinances).
AR	ARK. CONST. art. 12, §§ 3, 4. ARK. CODE ANN. § 14-42-307 (West 1998).	Imperio at best.	N/A or no. Unclear.	ARK. CODE ANN. §§ 11-4-201 to 11-4-219 (West 2002).	No. <i>But see</i> ARK. CODE ANN. § 11-4-204 (savings clause).
CA	CAL. CONST. art. XI, §§ 5(a), 7.	Imperio.	No.	CAL. LAB. CODE §§ 1171 to 1205 (West 2003).	No. <i>See</i> CAL. LAB. CODE § 1205(b) (West 2003) (expressly allowing local regulation).

State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
CO	COLO. CONST. art. XX, § 6.	Imperio.	No.	COLO. REV. STAT. ANN. §§ 8-6-101 to 8-6-119 (West 2004).	COLO. REV. STAT. ANN. § 8-6-101(3)(a) (West 2003).
CT	CONN. CONST. art. X, § 1. CONN. GEN. STAT. ANN. §§ 7-148(c)(7), (c)(10) (West 1999).	None. Common law with broad statutory delegations.	No.	CONN. GEN. STAT. ANN. §§ 31-58 to 31-69b (West 2003).	No.
DE	No constitutional provision of municipal power in general. DEL. CODE ANN. tit. 22 § 802 (1997).	Legislative.	Yes.	DEL. CODE ANN. tit. 19 §§ 901 to 914 (1995).	No. <i>But see</i> DEL. CODE ANN. 19 § 912 (1995) (savings clause).
DC	N/A.	N/A.	N/A.	D.C. CODE ANN. §§ 32-1001 to 32-1015 (LexisNexis 2001).	N/A.
FL	FLA. CONST. art. VIII, § 2(b). FLA. STAT. § 166.021 (2005).	Imperio.	No.	FLA. CONST. art. X, § 24.	FLA. STAT. § 218.077(2) (2005) (allows "living wage" style, but not "minimum wage" style).
GA	GA. CONST. art. IX, § 2. GA. CODE ANN. §§ 36-35-3(a), 36-35-6 (2000).	Between imperio and legislative.	Yes.	GA. CODE ANN. §§ 34-4-1 to 34-4-6 (2004).	GA. CODE ANN. § 34-4-3.1(b)(2) (2004) (preempts both "living wage" and "minimum wage" ordinances).
HI	HAW. CONST. art. VIII, §§ 2, 6.	Imperio.	No.	HAW. REV. STAT. ANN. § 387-2 (LexisNexis 2004).	No.

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State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
ID	IDAHO CONST. art. XII, § 2. IDAHO CODE ANN. §§ 50-301, 302 (2000).	Legislative.	No.	IDAHO CODE ANN. §§ 44-1501 to 1509 (2003).	No.
IL	ILL. CONST. art. VII, §§ 6(a), 6(i), 6(m). 5 ILL. COMP. STAT. ANN. 70/7 (West 2005).	Legislative.	No.	820 ILL. COMP. STAT. ANN. 105/1 to 105/15 (West 1999).	No. <i>But see</i> 820 ILL. COMP. STAT. ANN. 105/14 (West 1999) (savings clause).
IN	No constitutional provisions. IND. CODE ANN. §§ 36-1-3-3, -4, -5 (LexisNexis 2000).	Weak legislative.	Yes — unusually strong form.	IND. CODE ANN. §§ 22-2-2-1 to 22-2-2-4 and 22-2-2-8 to 22-2-2-13 (LexisNexis 1997).	No. <i>See</i> IND. CODE ANN. § 22-2-2-10 (LexisNexis 1997).
IA	IOWA CONST. art. III, §§ 38A, 39A. Iowa Code Ann. §§ 364.1, 364.2, 364.3 (West 1999).	Legislative.	Yes.	IOWA CODE ANN. § 91D.1 (West 1996).	No.
KS	KAN. CONST. art. XII, §§ 5(b), 5(c)(1), 5(d).	Imperio.	No.	KAN. STAT. ANN. §§ 44-1201 to 1213 (2000).	No. <i>But see</i> KAN. STAT. ANN. § 44-1212 (2000) (savings clause).
KY	KY. CONST. § 156b. KY. REV. STAT. ANN. § 83.520 (West 1995).	Legislative.	No.	KY. REV. STAT. ANN. §§ 337.275 to 337.405 (LexisNexis 2001).	No. <i>But see</i> KY. REV. STAT. ANN. § 337.395 (savings clause).
LA	LA. CONST. art. VI, §§ 5(A), 5(E), 5(F), 6, 7, 9.	Legislative.	Yes.	None.	LA. REV. STAT. ANN. § 23:642 (1998) (strong form of local preemption).
ME	ME. CONST. art. VIII, Pt. 2, § 1.	Imperio.	No.	ME. REV. STAT. ANN. tit. 26, §§ 661 to 672 (1988).	No.

State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
MD	MD. CONST. art. XI-A, § 2 MD. CONST. art. XI-E, §§ 1, 2, 6. MD. ANN. CODE art. 25A, § 5 (2001).	Imperio.	No.	MD. CODE ANN., LAB. & EMPL. §§ 3-401 to 428 (West 1999).	No.
MA	MASS. CONST. amend. art. II, §§ 1, 2, 6, 7(5).	Legislative.	Yes, with adverse interpretations.	MASS. ANN. LAWS ch. 151, §§ 1-22 (LexisNexis 1999).	No.
MI	MICH. CONST. art. VII, § 22. MICH. COMP. LAWS ANN. § 117.4i(d) (West 1991). MICH. COMP. LAWS ANN. § 117.4j(3) (West 1991).	Legislative.	No.	MICH. COMP. LAWS ANN. §§ 408.381 to 408.398 (West 1999).	No. <i>See</i> MICH. COMP. LAWS ANN. § 408.394 (West 1999) (consonance clause).
MN	MINN. CONST. art. XII § 4. MINN. STAT. ANN. § 401.07 (West 2001).	Imperio.	No.	MINN. STAT. ANN. §§ 177.21 to 177.44 (West 1993).	No. <i>But see</i> MINN. STAT. ANN. § 177.34 (West 1993) (savings clause).
MS	No constitutional provision. <i>See</i> MISS. CONST. Art. IV, § 80. Municipal powers delegated from MISS. CODE ANN. §§ 21-1-1 to 21-47-1 (2001). <i>See</i> MISS. CODE ANN. §§ 21-17-5, 21-19-1(1), 21-19-15 (2001).	Common law, statutory delegation.	N/A.	None.	N/A.
MO	MO. CONST. art. VI, § 19.	Legislative.	No.	MO. ANN. STAT. §§ 290.500-530 (West 2005).	MO. ANN. STAT. § 67.1571 (West 2005) (preempts "minimum wage," but not "living wage" ordinances).

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State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
					<i>But see</i> Missouri Hotel & Motel Ass'n v. City of St. Louis, 7 Wage & Hour Cas. 2d (BNA) 218 (Mo. Cir. Ct. July 18, 2001) (holding § 67.1571 unconstitutional).
MT	MONT. CONST. art. XI, §§ 4(1), 4(2), 6. MONT. CODE ANN. §§ 7-1-101, -102, -106, -111, -113 (2004).	Legislative.	Yes. MONT. CODE ANN. § 7-1-111(2) denies municipal power to regulate minimum wages.	MONT. CODE ANN. §§ 39-3-401 to 39-3-409 (2004).	No.
NE	NEB. CONST. art. XI, § 2.	Imperio.	No.	NEB. REV. STAT. §§ 48-1201 to 48-1209 (2004).	No. <i>But see</i> NEB. REV. STAT. § 48-1208 (2004) (savings clause).
NV	NEV. CONST. art. VIII, § 8. NEV. REV. STAT. § 267.120 (2005).	Imperio.	No.	NEV. REV. STAT. §§ 608.250 to 608.290 (2000, 2003 Supp.).	No.
NH	N.H. CONST. Pt. 1, art XXXIX. N.H. REV. STAT. ANN. §§ 49-B:1 (1991 & Supp. 2004), 49-B:8 (1991), 31:1 to 31:129 (1998 & Supp. 2003).	Limited imperio.	No.	N.H. REV. STAT. ANN. §§ 279:1 to 279:29 (1999 & Supp. 2004).	No.
NJ	N.J. CONST. art. IV, § 7, par. 11. N.J. STAT. ANN. § 40:42-4 (West 1991), § 40:48-1, 40:48-2 (West 2005).	None — But broad enumeration of powers.	No.	N.J. STAT. ANN. §§ 34:11-56a to 34:11-56a30 (West 2000 & Supp. 2005)	No. <i>But see</i> N.J. STAT. ANN. § 34:11-56a28 (West 2000 & Supp 2005) (savings clause).

State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
NM	N.M. CONST. art. X, §§ 6: (D), (E) N.M. STAT. ANN. § 3-17-1 (West 1999).	Legislative.	Yes.	N.M. STAT. ANN. §§ 50-4-19 to 50-4-309 (West 2000).	No. <i>But see</i> N.M. STAT. ANN. § 50-4-29 (West 2000) (savings clause).
NY	N.Y. CONST. Art. IX, §§ 2(c), 3(c). N.Y. MUN. HOME RULE LAW § 10 (McKinney 1994).	Legislative over enumerated subjects, including wage regulation of municipal workers and contractors, and police powers.	No.	N.Y. LAB. LAW §§ 650 to 665 (McKinney 2002).	No. <i>But see</i> Wholesale Laundry Bd. of Trade, Inc. v. City of New York, 17 A.D.2d 327 (N.Y. App. Div. 1962) <i>aff'd by</i> 189 N.E.2d 623 (N.Y. 1963).
NC	N.C. CONST. art. VII, § 1. N.C. GEN. STAT. §§ 160A-4, -11, -174 (2003).	None — common law. But police powers are delegated and get a broad construction.	No.	N.C. GEN. STAT. §§ 95-25.1 to 95-25.5 (2003).	No. <i>But see</i> N.C. GEN. STAT. § 95-25.25 (2003) (clause providing for liberal construction for the welfare of adult and minor workers).
ND	N.D. CONST. art. VII, § 6. N.D. CENT. CODE § 40-05.1-06 (1983).	Strong legislative.	No.	N.D. CENT. CODE §§ 34-06-01 to 34-06-20 (2004).	No.
OH	OHIO CONST. art. XVIII, § 3.	Legislative.	No.	OHIO REV. CODE ANN. § 4111 (West 2001).	No. <i>But see</i> OHIO REV. CODE ANN. § 4111.11 (West 2001) (savings clause).
OK	OKLA. CONST. art. XVIII, §§ 2, 3.	Legislative.	No.	OKLA. STAT. ANN. tit. 40, §§ 197.1-199 (West 2005).	No.

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State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
OR	OR. CONST. art. XI, § 2.	Legislative.	No.	OR. REV. STAT. §§ 653.010-.261 (2003).	OR. REV. STAT. § 653.017 (2003) (pre-empts "minimum wage" ordinances but allows "living wage" ordinances).
PA	PA. CONST. art. IX, § 2. 53 PA. STAT. ANN. § 13131 (West 1998). 53 PA. STAT. ANN. § 13133 (West 1998). 53 PA. CONS. STAT. ANN. § 2961 (West 1994). 53 PA. CONS. STAT. ANN. § 2962 (West 1994).	Legislative.	No.	43 PA. STAT. ANN. §§ 333.101 to 333.115 (West 1992).	No. <i>But see</i> 43 PA. STAT. ANN. § 333.114 (West 1992). (repealing prior minimum wage act regulating wages by job classification).
RI	R.I. CONST. art. XIII, §§ 1, 2.	Imperio.	No.	R.I. GEN. LAWS §§ 28-12-1 to 28-12-24 (2003).	No, <i>but see</i> R.I. GEN. LAWS § 28-12-21 (2003) (savings clause).
SC	S.C. CONST. art. VIII, §§ 9, 11, 14, 17. S.C. CODE ANN. § 5-7-30 (2004).	Mostly legislative, but with some limits as to powers over subjects of state-wide concern.	No.	None.	S.C. CODE ANN. § 6-1-130 (2004) (pre-empts "minimum wage," but not "living wage" ordinances).
SD	S.D. CONST. art. IX, § 2.	Legislative.	No.	S.D. CODIFIED LAWS §§ 60-11-3 to 60-11-7 (2004).	No.
TN	TENN. CONST. art. XI, § 9.	Imperio.	No.	None.	N/A.

State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
TX	TEX. CONST. art. XI, § 5. TEX. LOC. GOV'T CODE ANN. §§ 51.001, 51.072 (Vernon 1999).	Legislative.	No.	TEX. LAB. CODE ANN. §§ 62.001 to 62.205 (Vernon 1996).	No.
UT	UTAH CONST. art. XI, § 5.	Legislative.	No.	UTAH CODE ANN. §§ 34-40-101 to 34-40-205 (2004).	UTAH CODE ANN. § 34-40-106 (2004) (preempts both "minimum wage" and "living wage" style ordinances).
VT	No constitutional provisions. Statutory powers enumerated in Vt. STAT. ANN. tit. 24, §§ 2001 to 2299k (1992). No general police power.	None.	N/A.	Vt. STAT. ANN. tit. 21, §§ 381 to 396 (2003).	N/A.
VA	VA. CONST. art. VII, § 3. Enumeration of statutory powers in VA. CODE ANN. §§ 15.2-900 to 15.2-974 (2003). No general police power.	None.	N/A.	VA. CODE ANN. §§ 40.1-28.8 to 40.1-28.12 (2002).	N/A.

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State	Municipal Powers and Home Rule Provisions	Home Rule Type	Private Law Exception?	State Minimum Wage Law	Denial/ Express Preemption?
WA	WASH. CONST. art. XI, § 11.	Legislative.	No.	WASH. REV. CODE ANN. §§ 49.46.005 to 49.46.920 (West 2002).	No. <i>But see</i> WASH. REV. CODE ANN. § 49.46.120 (West 2002) (by its own terms the chapter is “in addition to and supplementary to any other federal, state, or local law or ordi-
WV	W. VA. CONST. art. VI, § 39(a). W. VA. CODE ANN. § 8-1-17, § 8-12-2(a) (LexisNexis 2003).	Legislative.	No.	W. VA. CODE ANN. §§ 21-5C-1 to 21-5C-11 (LexisNexis 2002).	No. <i>But see</i> W. VA. CODE ANN. § 21-5C-10 (LexisNexis 2002) (savings clause).
WI	WIS. CONST. art. XI, § 3(1) See also WIS. STAT. ANN. §§ 66.0101 to 66.0143 (West 2003) (formation of home rule charters), §§ 66.0401 to 66.0435 (West 2003) (regulatory powers under home rule).	Legislative.	No.	WIS. STAT. ANN. §§ 104.01 to 104.12 (West 2002).	No.