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# State-Local Conflicts under the New Missouri Home Rule Amendment

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### VII. Conclusion

This comment has examined the rights of a person accused of a crime to appear before the jury as a free and innocent man. This group of rights has been characterized as the garb of innocence and consists chiefly of the right to appear free of unnecessary physical restraints, in civilian clothes, and without an undue guard. Where appropriate, cases have been criticized for failing to recognize the underlying interests involved. In the prison clothes cases, it is the conclusion here that there should be an absolute prohibition against trying a defendant dressed in a manner which identifies him as a prisoner, because no significant interest of the state can outweigh the resulting prejudice. In the case of guards and physical restraints, a balancing test must be applied. In the handcuffing area, only the most dangerous and desperate defendant would warrant trial in handcuffs. In all other situations where security is needed, an inconspicuous guard should be used. The guard's size, uniforms, visible armaments and physical location in the courtroom should be limited in proportion to the amount of security needed. Ideally, these principles should be laid out by the high courts in clear and concise language, so that the trial courts will have operating guidelines and be able to conduct trials properly the first time, avoiding waste of judicial time and energy, and expense to defendants. The hoped-for result would be a trial with these prejudicial influences minimized, yet consistent with the interests of the state in protecting the court and the community.

Robert G. Neds

## STATE-LOCAL CONFLICTS UNDER THE NEW MISSOURI HOME RULE AMENDMENT

### I. Introduction

In some jurisdictions, municipal corporations are completely controlled by the state legislature. This means that a state statute always prevails over a conflicting municipal ordinance.[1] However, in a state that has adopted a constitutional home rule amendment, a state statute might not always prevail over a conflicting ordinance. Missouri has been such a state. The city attorney in a Missouri constitutional charter city has always been faced with the difficult task of determining the specific instances when an ordinance will prevail over a conflicting statute. Now, the city attorney is in the unenviable position of making this decision while interpreting a new Missouri constitutional amendment on home rule. The following hypothetical is but one illustration of a problem which the Missouri city attorney might face:

You are city attorney for a Missouri constitutional charter city with a population of 100,000. The city manager asks for an opinion on a proposed ordinance which will be considered at the next meeting of the city council. After carefully reading the proposed ordinance, you find that the city wishes to issue bonds to finance the acquisition of land in the downtown business

1. *See, e.g.*, Hemphill v. Wabash R.R., 209 F.2d 768 (7th Cir. 1954).

area and construct on the land a large parking garage. The bonds are to be paid off by a combination of revenues generated by the project and the proceeds of special assessments levied against all property in the city which will be particularly benefited by the new parking facilities. The city manager states that he believes the proposed action is within the scope of the city's powers and the charter will allow such an action. However, he is concerned about a statutory provision, relating to the same matter, with which the proposed ordinance might conflict. This statutory provision states:

> 71.360. Parking facilities, how financed.—
> Any . . . incorporated city, town or constitutional charter county may finance and pay for the planning, designing, acquisition, construction, equipment and improvement of property for parking motor vehicles by any one or combination of the following methods:
>
> (1) General revenue funds, including any proceeds derived from the operation of such parking facilities.
>
> (2) General obligation bonds within legal debt limitations.
>
> (3) Negotiable interest-bearing revenue bonds, the principal and interest of which shall be payable solely from the revenue derived from the operation of such parking facilities, and from the proceeds, or any part thereof, from on-street parking meter receipts of any city or town, which proceeds or any part thereof may be pledged by the city, town or constitutional charter county to the retirement of negotiable interest-bearing revenue bonds, which revenue bonds many be issued and sold by such municipality or constitutional charter county when authorized by the city council, board of aldermen, county council or other legislative authority of the city, town or county.[2]

The city manager's question is this: Does the statutory financing provision limit, or conflict with, the proposed ordinance because the statute does not mention special assessments as a method of financing parking facilities? If there is a conflict, which prevails?

After a review of the law, you find that an important change has occurred in Missouri's constitutional home rule provision. Prior to October, 1971, the home rule provision in the state constitution read:

> Article VI, Section 19—
> Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state . . . .[3]

However, the Missouri home rule provision now reads:

> Article VI, Section 19 (a)—
> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the Constitution of this State and are not limited or denied either by the charter so adopted or by

2. § 71.360, RSMo 1969.
3. Mo. CONST. art. VI, § 19.

statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.[4]

You as city attorney, must determine how this new home rule provision will be interpreted when a potential conflict arises between a state statute and municipal ordinance, and whether or not the Missouri courts will decide a conflict actually exists.[5] This comment will present suggestions which might aid in this determination.

## II. State-Local Conflicts Under the Former Missouri Home Rule Provision

In 1875, Missouri became the first state to authorize home rule constitutionally.[6] Missouri adopted a new constitution in 1945, specifically retaining the provision of the 1875 constitution that home rule charters had to be "consistent with and subject to the Constitution and laws of the State . . . ."[7] This provision appeared to mean that a conflict between a valid state statute and a municipal ordinance would always be resolved in favor of the statute, and the Missouri Supreme Court so held in its early decisions.[8] However, due to a premise that certain statutes should be inferior to municipal ordinances in order to allow meaningful home rule,[9] the court developed tests which set apart areas in which home rule municipalities were to be free from legislative intrusion. These tests created areas of local autonomy, which the United States Supreme Court later termed an *"imperium in imperio."*[10] The result was that in the event of a conflict between a statute and an ordinance, the statute prevailed if the court labeled the activity in question "governmental," "of statewide concern," or "of general concern." Ordinances prevailed over conflicting statutes if the court labeled the activity in question "proprietary," "corporate," "purely municipal," "local" or "essentially appertaining to city government."[11] In these instances the statutes were not invalidated, but only declared inapplicable to the particular home rule city.[12]

The use of the classic state-local or governmental-proprietary tests have caused difficulty not only in Missouri, but also in the other states which use them to solve potential conflict situations. The tests suffer from vagueness and the inability on the part of the courts to apply consistently a fixed formula as to what, in fact, is a "state," "local," "governmental," or

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4. Mo. Const. art. VI, § 19 (a).

5. For the purposes of this comment, the term "ordinance" will be used when referring to either a city ordinance or charter provision.

6. *See* Mo. Const. art. VI, §§ 18 (a), 19, 31 (1875).

7. *Compare* Mo. Const. art. IX, § 16 (1875) *with* Mo. Const. art. VI, § 19.

8. *See, e.g.,* Ewing v. Hoblitzelle, 85 Mo. 64 (1884).

9. *See* Schmandt, *Municipal Home Rule In Missouri,* 1953 Wash. U.L.Q. 385, for a discussion of the development of this premise.

10. St. Louis v. Western Union Tel. Co., 149 U.S. 465, 468 (1893).

11. *See* Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience,* 33 Mo. L. Rev. 45, 59 (1968), for a comprehensive survey of Missouri case law and a discussion of state-local conflicts under the original Missouri home rule provision.

12. *Cf. In re* East Bottoms Drainage & Levee Dist., 305 Mo. 577, 259 S.W. 89 (1924).

"proprietary" matter.[13] In fact, a California court has maintained that no fixed test exists and what is now labeled a local concern may in the future be designated a statewide concern.[14] Additionally, it is generally recognized that both the state and the municipality have a valid interest in any public affair and a matter cannot be classified as solely within the province and interest of one entity.[15] The result has been (1) confusion among courts, city attorneys and municipal leaders, (2) dissatisfaction with the tests, and (3) a tendency on the part of the courts to struggle with the tests, rather than concentrating on the more important issue of whether a conflict actually exists.[16]

## III. Hypothetical-Solution Under Former Missouri Home Rule Provision

The hypothetical posed at the outset might best illustrate the traditional problems which confront the city attorney when he attempts to determine whether a proposed ordinance conflicts with or is limited by a state statute. He must forecast how a court would decide the issue, but, due to the fact that the classical state-local test is vague and confusing, he can only speculate.

The court might first compare the statute and the ordinance. It would find that the ordinance, although partially duplicating the statute, proposes a method of financing which is not covered by the statute. The court would then apply its interpretation of the classic state-local test. It might find that municipal parking facilities are primarily a matter of local concern, and thus the ordinance provision relating to their financing by a special assessment is valid.[17] On the other hand, the court might hold that the proposed ordinance involves a form of tax, and taxes, especially the manner in which they are levied, are generally considered matters of statewide concern.[18] With this conclusion, the ordinance would probably be deemed invalid as conflicting with the state statute.

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13. *See* Westbrook, *supra* note 11, at 59-66, for an evaluation and critique of the manner in which the Missouri courts have formulated and applied the state-local or governmental-proprietary tests.

14. Pacific Tel. & Tel. Co. v. San Francisco, 51 Cal. 2d 766, 771, 336 P.2d 514, 517 (1959), *discussed in* Comment, *The State v. The City: A Study In Preemption,* 36 S. Cal. L. Rev. 430, 431 (1963).

15. "[P]ublic affairs are not inherently either local or general in nature." Fordham & Asher, *Home Rule Powers in Theory and Practice,* 9 Ohio St. L.J. 18, 25 (1948).

16. *See* Report of Missouri Governor's Advisory Council on Local Government Law, Constitutional Charter Cities 2 (1968) [hereinafter cited as 1968 Report], where a Council subcommittee analyzed 55 cases decided by the Missouri Supreme Court between 1879 and 1965. The subcommittee concluded that in 21 cases, no conflict actually existed, yet the court found conflict by using the classical tests.

17. Missouri courts have held that municipal enactments regarding special assessments and procedures for their enforcement prevail over state statutes. *See, e.g.,* Good v. Johnson, 299 Mo. 186, 252 S.W. 368 (1923); Stanton v. Thompson, 234 Mo. 7, 136 S.W. 698 (1911); Corrigan v. Kansas City, 211 Mo. 608, 111 S.W. 115 (En Banc 1908).

18. Missouri courts have held that taxes are a matter of statewide concern, and that statutes therefore prevail with respect to the manner in which taxes may

Presented with the dilemma of forecasting a court's decision, the typical city attorney plays it safe and *assumes* that the statute prevails over the proposed ordinance. Accordingly, he advises the city manager that the city's only recourses are to (1) seek authorizing legislation from the state legislature, or (2) finance the parking facilities by one of the means expressly allowed by the statutory provision. If none of the statutory methods of financing is feasible for this particular municipality, construction of a needed facility will be precluded or needlessly delayed. Whatever the result, the significant point is that both the city attorney and a court would initially struggle with the vague state-local or governmental-proprietary tests without really reaching the critical issue of whether a conflict between the statute and proposed ordinance *actually* existed.

## IV. The New Missouri Home Rule Amendment

The voters of the State of Missouri, at a special election held October 5, 1971, adopted a new constitutional amendment on home rule.[19] This amendment, proposed by the Governor's Advisory Council on Local Government after careful deliberation and planning, is based on the American Municipal Association's model constitutional provision for municipal home rule.[20] Under the amendment, constitutional charter cities are to have "all powers which the general assembly of the State of Missouri has authority to confer upon any city . . . ."[21] This gives Missouri home rule municipalities a broad basis of power for self government, limited only by the following language:

> . . . provided such powers are consistent with the Constitution of this State and are not limited or denied . . . by statute of the State of Missouri.[22]

The drafters' intent was to eliminate judicially-created areas of local autonomy where municipal enactments are deemed superior to state statutes. This is to be accomplished by providing that the legislature can override any substantive provision in a local enactment. Presumably, the amendment will eliminate the courts' struggle with the determination of whether a given function is of statewide or local concern, for the courts need no longer worry about the distribution of power between the state and local governments. Now, the amendment's intent is to make it clear that both the Missouri Constitution and state statutes *always* prevail over conflicting local enactments. Conflicts between statutes and ordinances are to become matters of statutory construction. This frees the courts to determine the critical issue of whether a conflict actually exists.[23]

However, the mere act of adopting this home rule amendment is not a panacea for all municipal problems. The desirability of the home rule

be levied and collected. *See, e.g.*, Kansas City v. J. I. Case Threshing Mach. Co., 337 Mo. 913, 87 S.W.2d 195 (En Banc 1935).

19. Mo. Const. art. VI, § 19 (a).

20. *See* J. Fordham, Model Constitutional Provisions For Municipal Home Rule (Am. Mun. Ass'n, 1953), and 1968 Report 2.

21. Mo. Const. art. VI, § 19 (a).

22. *Id.*

23. The 1968 Report sets out the subcommittee's findings, proposals and intent in drafting the new amendment.

provision Missouri has adopted by this amendment has been debated in other jurisdictions. A home rule provision's practical value to a municipality depends to a large extent on court interpretation of that provision. California's initial home rule provision maintained that all charter provisions were subject to and controlled by general laws.[24] The California Supreme Court interpreted this to mean that all ordinances and charter provisions which conflicted with the state's general laws were invalid.[25] California cities maintained that this provision and its subsequent interpretation severely diminished their powers, and the provision was amended to remove local affairs from control by general laws.[26] This means that when a potential conflict arises, California municipal ordinances which pertain to a local or municipal function prevail over state statutes speaking to that same function. California municipal leaders and courts are now back to struggling with the question whether a given function is primarily of statewide or local concern.

The State of Washington borrowed its home rule provision from the original California provision.[27] It has been left virtually intact since its passage. Under this provision, all municipal ordinances and charter provisions are deemed to be subordinate to state statutes in the event of a conflict.[28] This has generated a good deal of criticism and debate concerning the adequacy of this type of constitutional provision and court interpretation. At least one author has maintained that this provision withdraws most powers from home rule cities and has urged the adoption of a constitutional amendment in order to switch to the state-local test to determine whether a statute or conflicting ordinance prevails.[29] Still another writer has suggested that the Washington home rule provision is workable because the courts have favorably interpreted municipal ordinances when the issue of a potential conflict with a state statute arises.[30]

One authority has suggested that home rule enjoys its greatest amount of success, if measured by the number of charter adoptions, in states whose courts hold that statutes prevail over all conflicting local enactments.[31] Included among these successful states are Texas,[32] Michigan,[33] and Minnesota.[34] Minnesota's home rule provision, and its subsequent court interpretation, are interesting. It contains language very similar to the original Missouri home rule provision, yet the courts, without changing

24. CAL. CONST. art. XI, § 6 (1879).
25. People *ex rel.* Daniels v. Henshaw, 76 Cal. 436, 18 P. 413 (1888). The topic is discussed in Jones, *"Municipal Affairs" in the California Constitution,* 1 CALIF. L. REV. 132 (1913).
26. *See* CAL. CONST. art. XI, § 6 (1896).
27. *See* WASH. CONST. art. XI, § 10 (1889).
28. One of the earliest court decisions interpreting the Washington home rule provision was *In re* Cloherty, 2 Wash. 137, 27 P. 1064 (1891).
29. Comment, *Home Rule In Washington—At the Whim of the Legislature,* 29 WASH. L. REV. 295 (1954).
30. *See* Trautman, *Legislative Control of Municipal Corporations In Washington,* 38 WASH. L. REV. 743 (1963).
31. Vandlandingham, *Municipal Home Rule In the United States,* 10 WM. & MARY L. REV. 269, 295 (1968).
32. TEX. CONST. art. XI, § 5 (1912).
33. MICH. CONST. art. VIII, § 21 (1908).
34. MINN. CONST. art. IV, § 36 (1896).

position over the years as did the Missouri courts, have held that statutes always override conflicting local ordinances.[35]

A primary reason for the success of these states appears to be the attitude of their respective courts toward municipal corporations. If the home rule amendment is to succeed in Missouri, a great deal will depend on a favorable judicial climate, with emphasis by the courts on a more liberal attitude toward city power and an unwillingness to construe statutes to find a conflict when none exists. The Missouri courts could ignore the intent of the amendment and retain the confusing state-local or governmental-proprietary tests. However, it is hoped that the courts have grown weary of struggling with the tests they have created. Hopefully, the courts will interpret the new amendment literally and free themselves to focus solely on the issue of whether a conflict between a statute and ordinance truly exists.

## V. Suggested Solutions to Determine the Existence of an Actual Conflict

The Missouri General Assembly, after careful review, could enact affirmative statutory limitations on the broad powers granted to home rule cities by the amendment. These limitations could be embodied in a statutory Code of Restrictions on Home Rule Cities' Power.[36] The quality of this Code would be superior to that of the many existing statutes relating to municipal corporations, and the Code would prohibit municipal regulation in specified areas. Any enactment by the municipality in one of the specified areas would be deemed a conflict, and the statute would prevail. At least one state has been able to adopt such a code. In 1967, the Alaska Legislature enacted an article in its municipal code termed "Limitations of Home Rule Powers."[37] This article was designed to cite specific provisions of the municipal code which superseded and preempted existing and future local enactments.

The more probable result, however, is that the Missouri General Assembly will not enact a comprehensive code of restrictions.[38] One reason is that a review of existing laws governing municipal corporations in Missouri might take a great amount of time. For example, Alaska, a relatively new state with less legislative history in the municipal corporations field than Missouri, took four years of review before codifying its restrictions.[39]

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35. The Minnesota home rule provision was amended by Minn. Const. art. XI, § 3 (1958), but is still regarded as subordinating local enactments to conflicting statutes.

36. *See* 1968 Report 5, and Westbrook, *supra* note 11, at 78, both of which encourage such a code of restrictions based on a proposal in 1967 State Legislative Program of the Advisory Commission on Intergovernmental Relations 475 (1966).

37. Alaska Stat. §§ 29.08.010-.220 (Supp. 1971).

38. In 1967, New York voters rejected a proposed constitution containing a provision in the local government section which would have required the legislature to enact a statute of restrictions. *See* Proposed N.Y. Const. art. XI, § 2(b) (1967).

39. Letter from Page Ingrebaur, senior analyst of the Advisory Committee on Intergovernmental Relations, to Prof. James E. Westbrook, University of Missouri—Columbia School of Law, July 18, 1968.

Missouri, with a large number of legislative enactments pertaining to municipal corporations, would presumably take much longer.[40] In addition, the Missouri General Assembly might not be willing to appropriate the money essential to accomplishing meaningful research. Finally, municipalities, fearing extensive legislative encroachment on their powers, might oppose the enactment of codified limitations.

Assuming no code of restrictions is enacted, Missouri courts are faced with the task of interpreting the myriad of existing statutes in order to determine if an ordinance conflicts with a particular statute. The following are some suggested solutions and illustrations of what other states have done in interpreting various statutes and determining whether a conflict with a municipal ordinance actually exists.

### A. *Determination of Direct Conflicts*

The court should initially compare the words of the statute with those of the ordinance to determine if the statute *expressly* prohibits or permits a certain activity and, if so, whether the ordinance falls within that express prohibition or permission. If the statute expressly prohibits a specified activity, while the ordinance expressly permits the same activity, a conflict exists and the statute overrides the ordinance. For example, in *Young v. City of Seagoville*[41] the state statute expressly prohibited the operation of pool halls in the state of Texas. The city had passed an ordinance which provided that a pool parlor could be operated within the city limits upon payment to the city of an annual license fee of 10 dollars. The Texas court held that the ordinance was void *"ab initio"*[42] because it was in direct conflict with the state statute. This would be an appropriate decision under the new Missouri home rule amendment.

A second situation that might create a direct conflict is where the local enactment expressly prohibits what the state statute permits. In *City of Harlan v. Scott,*[43] a state statute provided that the operation of movie theaters did not come within the auspices of the state's Sunday closing law. However, the city passed an ordinance that made Sunday operation of movie theaters unlawful after six o'clock in the evening. The court held that the ordinance prohibited what the statute permitted, and the ordinance fell.[44] Again, this would be an appropriate decision under the new Missouri amendment.

If either of the above type of situation exists, there is a direct conflict, and the court should have no problem in invalidating the local enactment. However, in the majority of cases there may be no clear difference between the statute and ordinance. In this type of case, the court must proceed to a second step before determining whether a conflict exists.

### B. *Statutory Construction and Legislative Intent*

When no clear difference between the statute and ordinance is readily apparent, the court must first give a fair reading to the statute in order

40. *See* chs. 70-100, RSMo 1969.
41. 421 S.W.2d 485 (Tex. Civ. App. 1967).
42. *Id.* at 486.
43. 290 Ky. 585, 162 S.W.2d 8 (1942).
44. *Id.* at 586, 162 S.W.2d at 9.

to determine the legislature's intent, and the objective or purpose behind the statute, before it can determine whether a conflict exists. The following is a list of possible conclusions which the court could reach after reading and researching the statute.

1. The Possibility of Preemption—Preemption Distinguished From Conflict

A court's finding of preemption of a field by the legislature is not the determination that a conflict between the statute and ordinance exists. The preemption doctrine is used when a court determines that a state statute has covered or occupied an entire field so that no municipal legislation is permitted in that field.[45] In resolving the problem of possible preemption, the court should first determine if the statute manifests a legislative intent to occupy the field. If it does, then local enactment pertaining to that field is invalid. If the legislature does not manifest its intent to preempt, then the municipality should be able to enact ordinances which are not in conflict with any statute on the same subject matter.

There are differing views in the states that have considered the issue of what constitutes "preemption" by the state legislature. Some states favor use of the preemption doctrine even when the legislature has not expressed an intention to occupy the field. For example, *In re Lane*[46] involved a Los Angeles municipal ordinance which made it a crime for persons not married to each other to engage in sexual intercourse, or for such persons to perform or participate in any lewd act with each other. This crime was termed "resorting." The California Supreme Court held the municipal ordinance invalid on the grounds that the state legislature, by implication, through extensive legislation by the state penal code in the area of sexual relations, had preempted the field. The decision can be interpreted to mean that once the state enters a field, all local enactments fall. The court's view of preemption by implication has been severely criticized by California writers.[47]

A much different judicial philosophy prevails in Alaska. In *Rubey v. City of Fairbanks*,[48] the defendant was charged, under a city ordinance, with the offense of "assignation"—the making of an appointment for prostitution or lewdness or any act in furtherance of such an appointment. The Alaska Legislature had regulated by statute the criminal aspects of sexual activity in 26 instances but had not included assignation. Defendant, relying on the *Lane* decision, contended that the legislature's extensive regulation of sexual behavior evidenced its intent to preempt the field, so that local enactments in this field were invalid. The Alaska Supreme Court, refusing to follow *Lane*, held that Alaska had no legislative enactment that expressly prohibited a home rule city from making assignation a criminal offense.[49] Thus, the court found no preemption despite the fact that the Alaska Legislature had extensively legislated in the field of sexual

45. *See* 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.38 (1958).
46. 18 Cal. Rptr. 33, 367 P.2d 673 (1961), *vacated*, 22 Cal. Rptr. 857, 372 P.2d 897 (1962).
47. *See, e.g.*, Comment, *supra* note 14. The author covers the history of the California courts' fascination with preemption by implication.
48. 456 P.2d 470 (Alas. 1969).
49. *Id.* at 475.

offenses. Thus, it appears that the preemption doctrine only applies in Alaska if the legislature expressly states that a municipality cannot act within a specified field.

Minnesota's courts view the preemption doctrine in a similar manner. In *G.E.M. of St. Louis, Inc. v. Bloomington*,[50] plaintiff sought to have a city ordinance that prohibited certain business activities on Sunday declared invalid on the alternative grounds that it conflicted with a state statute, or regulated business in a field preempted by state law. The Minnesota Supreme Court acknowledged that "commercial warfare" and "a checkerboard of conflicting regulations"[51] might result, but upheld the city's Sunday closing ordinance by stating:

> If the Minnesota Legislature determines that local regulation of commercial activity by ordinances of this type is creating economic confusion, the problem can be corrected by a clear expression of the legislative will that regulation of such commercial activity be uniform throughout the state.[52]

An argument could be made to the courts that Missouri should adopt the *Lane* rule and allow preemption by implication under the new home rule amendment. Such a holding could be justified by reference to a change made in the original draft of the amendment prior to its passage by the Missouri General Assembly. The original draft read as follows:

> . . . provided such powers are consistent with the Constitution of the State and are not *'expressly'* limited or denied . . . by statute of the State of Missouri.[53]

The final version did not contain the word "expressly." It would be a mistake, however, to assume automatically that the framers of the amendment deliberately sought to endorse the concept of implied preemption. The amendment was first introduced in the 75th General Assembly. Although it was passed by the House, the Senate did not consider the measure prior to adjournment. An article appeared in the *Saint Louis University Law Journal* in 1969 in which inclusion of the word "expressly" was criticized.[54] This article precipitated debate and discussion among some of those who had participated in the drafting of the amendment. The authors of the article pointed out that, since the meaning of "expressly" would not be clear in all situations which might arise, the word might be a source of uncertainty.[55] In addition, it was asserted that preemption would be desirable in those areas in which uniform state control is needed.[56]

The framers of the amendment had indicated some misgivings in their report on regulation by municipalities of rates charged by private utilities and had suggested that the courts would find a way to hold that

50. 274 Minn. 471, 144 N.W.2d 552 (1966).
51. *Id.* at 473, 144 N.W.2d at 554.
52. *Id.* at 474, 144 N.W.2d at 554-55.
53. *See* 1968 REPORT 3.
54. *See* Salsich & Tuchler, *Missouri Local Government: A Criticism of a Critique*, 14 ST. LOUIS U.L.J. 207 (1969).
55. *Id.* at 213-14.
56. *Id.* at 214.

Public Service Commission regulations take precedence over conflicting local regulations.[57] The authors of the *Saint Louis University Law Journal* article interpreted these misgivings as indicative that the framers merely sought to write a presumption against preemption into the constitution.[58] On the other hand, some of those who participated in the drafting of the amendment insisted that the word "expressly" was necessary because of the negative attitude toward municipal power expressed by many courts in the past. It was difficult to find an alternative draft which satisfied both points of view. The principal sponsor of the amendment, Representative Jack Schramm, finally decided to delete the word "expressly" because of the questions being raised and the absence of an alternative which was acceptable to all concerned. Thus, when House Joint Resolution 24 was introduced, it did not contain the word "expressly."

Perhaps the only thing that is clear is that, while some of the amendment's drafters were seeking a means of writing into the constitution some protection against what they perceived as a bias against municipalities on the part of the courts, the sponsor of the measure came to the conclusion that there was no acceptable way of limiting the judicial role in dealing with alleged conflicts between state and local law.[59]

Thus, the way seems open for the courts to play a constructive role in mediating between state and local enactments. This responsibility will not be discharged, of course, by the use of labels such as "statewide concern." Presumably, the courts will resort to accepted techniques of statutory construction and will seek to develop an approach which will give maximum freedom to home rule municipalities. Whether this can best be done by a judicious use of a limited preemption doctrine will have to be decided on a case by case basis. It is submitted, however, that the courts should either (1) not find preemption by implication under the new amendment, or (2) find it only in limited instances, for its use would simplify extensive encroachment on municipal legislative power. One approach could be that used by the Alaska and Minnesota courts. This approach holds that unless the state legislature has expressly stated that a field is preempted, a city can act in that field, regardless of prior statutes relating to the same area. The city's enactment is only invalidated if it actually conflicts with the statute. What is an actual conflict will be discussed later in this comment.

The best approach that a Missouri court might adopt to determine whether there has been legislative preemption in an area is a limited use of preemption by implication. Preemption by implication should not be eliminated entirely, but should be used only in selected situations. In instances where the legislature has not expressly stated that its legislation preempts the field, the court should erect a presumption against preemption. The presumption would be rebuttable in instances where a state statute contains a broad delegation of power to a separate state agency or

57. *See* 1968 REPORT 6.

58. *See* Salsich & Tuchler, *supra* note 54, at 213-14.

59. This account of the legislative history is based upon conversations with Prof. James E. Westbrook of the University of Missouri—Columbia School of Law, who was an active participant in the drafting of the amendment.

commission to deal with the state as a whole.[60] When the legislature does this, it is a good indication that it intends regulation to be uniform in that area. For example, the Public Service Commission in Missouri regulates rates charged by privately owned utilities. If a municipality attempted to enact an ordinance to regulate these rates, the court should use the preemption doctrine to invalidate the ordinance. Limited use of the preemption doctrine in these instances will adequately protect legitimate state interests while preserving the grant of power to municipalities.

2. Determination of Indirect Conflict

If the legislature has expressed its intent to preempt a field, an ordinance in that field is invalid, and the court need proceed no further. However, in the majority of cases, the legislature will not have expressed such an intent, and the court will be unwilling to find that preemption by implication is intended by the legislature. At this point, the court must face the crucial issue of whether a conflict between the state and local enactment exists.

By dealing initially with the possibility of preemption, the court has determined the purpose and effect of the statute. A fair reading of the ordinance should also disclose the same. The court should now determine whether the purpose or effect of the ordinance is repugnant to the purpose or effect of the statute. For example, in *Yett v. Cook*,[61] a Texas statute required poll taxes to be paid by midnight of January 31 and tax lists to be in the hands of precinct election judges at least three days before the election. The Austin Charter authorized a special election to be held on February 2, 1925. The Texas Supreme Court found that the tax collector could not properly prepare the poll tax list between the time authorized for final payment of poll taxes and the morning of the election. The charter provision was invalidated as conflicting with the state statute. This was a proper determination of conflict between the two enactments, for, as a practical matter, the effect of the charter provision prevented compliance with the statute.[62]

After reading an ordinance, a court might find that its purpose or effect was to duplicate or complement a state statute. Generally speaking, an ordinance which duplicates or regulates the same conduct in the same manner as a statute is held valid.[63] However, a few state courts find conflict when there is duplication, especially in the field of criminal law. For example, the traditional California view, based on California court interpretation of the rule against double jeopardy, is that an ordinance is void to the extent it duplicates a statute. For example, in *People v. Commons*,[64] defendant, arrested under a city ordinance for possession of a dangerous weapon without a permit, contended that the ordinance was

60. *See* Seattle Elec. Co. v. Seattle, 78 Wash. 203, 138 P. 892 (1914), *discussed by* Trautman, *supra* note 30, at 779-80. The Washington court used this procedure.
61. 115 Tex. 205, 281 S.W. 837 (1926).
62. *Id.* at 214, 281 S.W. at 839. The *Yett* decision is discussed in Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEXAS L. REV. 682, 697 (1959).
63. 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.35 (1958).
64. 64 Cal. App. 2d 925, 148 P.2d 724 (1944).

in conflict with a state statute which prohibited the same act. The California court held that an ordinance was void when it prohibited the same acts forbidden by state law. Another view is that no conflict exists when an ordinance and statute punish the same acts. Under the new home rule amendment, Missouri courts should find no conflict in these situations, since they already have determined that a municipality may adopt ordinances duplicating state criminal statutes,[65] and prosecution under one will be no bar to a subsequent prosecution under the other.[66]

Some states find conflict when local enactments duplicate statutes in fields other than criminal law. In *Boyle v. Campbell*,[67] a city ordinance designed to implement the Kentucky Sunday closing law partially duplicated the state statute. The Kentucky Court of Appeals held the ordinance invalid for several reasons, but stated that "to the extent it duplicated the state statute, it accomplished no purpose."[68] This would be an improper determination of a conflict under the new amendment. In either the field of criminal law or some other area, permitting a local enactment to duplicate a statute will likely allow better enforcement by local officials. Presumably, the legislature intended to have its laws enforced fully, and this would help accomplish that purpose.[69]

When an ordinance in question does not duplicate a state statute, the court might find that it is either more or less rigorous than a statute which regulates the same conduct. Ideally, the legislature would express its intention of whether or not the function in question could be the subject of such complementary regulation by municipalities.[70] However, in practice this is seldom the case. In the absence of legislative expression, the court must determine whether an ordinance which is more or less rigorous than a statute regulating the same conduct is in conflict with that statute. These are the difficult cases in potential conflict situations, and a hard and fast rule may be impossible to formulate. However, the court should keep the intent of the amendment's drafters in mind. That intent is to insure the supremacy of the legislature while at the same time putting only minimal and necessary limitations on the power of municipalities. To do this, the court should make all reasonable efforts to harmonize the two enactments, allowing them to exist side by side if possible. Only when the two enactments are totally irreconcilable should a conflict be found.

When the ordinance in question is less rigorous than a statute regulating the same conduct, the court could properly find a true conflict. In

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65. Missouri courts allow duplication because ordinance prosecutions are considered civil, rather than criminal, matters. *See, e.g.*, City of Kansas v. Clark, 68 Mo. 588 (1878); City of Clayton v. Nemours, 237 Mo. App. 167, 164 S.W.2d 935 (St. L. Ct. App. 1942).

66. State v. Garner, 360 Mo. 50, 226 S.W.2d 604 (En Banc 1950); State v. Muir, 164 Mo. 610, 65 S.W. 285 (1901); State v. Jackson, 220 S.W.2d 779 (St. L. Mo. App. 1949); and Lauer, *Prolegomenon To Municipal Court Reform In Missouri*, 31 Mo. L. Rev. 69, 77-83 (1966).

67. 450 S.W.2d 265 (Ky. Ct. App. 1970).

68. *Id.* at 269.

69. *See* Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 Harv. L. Rev. 737 (1959), for a discussion on the favorable aspects of duplication.

70. *See* 1968 Report 5, for a discussion on the code of restrictions.

*Boven v. City of St. Petersburg*,[71] a municipal ordinance authorized establishments which sold alcoholic beverages to open for business at six o'clock in the morning. The state statute provided that the opening hour for such businesses should be eight o'clock in the morning. The Florida Supreme Court found a conflict existed, holding that the less rigorous ordinance impliedly permitted the violation of the stricter statute. A Missouri court, under the new home rule amendment, should reach the same result.

However, when an ordinance is more rigorous than a statute regulating the same conduct, but does not expressly prohibit what the state permits so as to be in direct conflict,[72] the court should not immediately find a conflict. In fact, the majority of courts hold that in the absence of statutory prohibition, a municipal ordinance can impose greater regulations.[73] This is the situation in which the court should use all available means to harmonize the two enactments. Each municipality has distinct individual problems and conditions. The municipality might need more rigorous regulations in order to control its distinct problem. If the purpose behind the more rigorous ordinance is to solve a city's individual problem, both the statute and ordinance should be allowed to stand together, even though the ordinance, in effect, prohibits what the statute permits. However, if the municipality has no reasonable purpose behind the ordinance, and its effect is to prohibit what the statute permits, the court should find that an irreconcilable conflict exists. In any event, any doubts as to the existence of a conflict should be resolved in favor of the validity of the ordinance.[74] If the legislature disagrees, it has the opportunity to express its displeasure by specifically making its wishes known as to whether or not complementary regulations can be achieved.[75]

## VI. Interpretation of Statutes Which Grant Power

Although the amendment does not speak to the issue, constitutional charter cities presumably will be subject to statutes that were enacted before the adoption of the new home rule amendment. This means that the numerous statutes which now govern constitutional charter cities might operate as limitations on the cities, assuming they are otherwise applicable. Many of these statutes were adopted to grant powers to municipalities and direct how that power was to be exercised. Some of these statutes apply to all cities. In construing these statutes, the court should keep in mind the fact that detailed enabling legislation was thought to be necessary at the time of their enactment. In construing other statutes which apply only to constitutional charter cities, the court should keep in mind that many were enacted under the old home rule provision because of doubts as to the scope of home rule powers.

The use of the hypothetical posed at the outset might best illustrate

71. 73 So. 2d 232, 233 (Fla. 1954).

72. *See* the discussion on direct conflicts in pt. V, § A of this comment, (to distinguish from indirect conflicts).

73. 1 C. Antieau, Municipal Corporations Law § 5.35 (1958).

74. This would carry out the intent of the amendment's drafters. *See* 1968 Report 16.

75. *See* Trautman, *supra* note 30, at 783.

how a city attorney should approach the issue of determining whether an actual conflict exists between a pre-amendment statute and an ordinance. In order to determine if the proposed ordinance is invalid, the city attorney must approach the issue in the same manner as a court. A comparison of the statute's words with those of the proposed ordinance shows that the statute does not expressly prohibit an activity which the ordinance expressly permits. Nor does the statute expressly permit what the ordinance expressly prohibits. Since no direct conflict exists, the attorney must proceed to further analyze the two enactments.

A fair reading of the statute indicates that the legislature's intent was to grant both statutory and home rule municipalities and counties the power to build and finance public parking facilities. According to its language, the statute was designed to set out various methods of accomplishing this task. The ordinance was proposed to build and finance parking facilities. It duplicates one of the statutory financing methods, but also proposes a method not covered by the statute, namely using the proceeds of special assessments levied against all property specially benefited by the facilities.

The issue now becomes: Under Missouri's new home rule amendment, will a statute which authorizes a power, and specifies how it is to be exercised, operate as a limitation on the home rule power?[76] If this issue is answered affirmatively in all cases, the intent and purpose behind the new amendment will be defeated.

An answer to the question can be achieved by following the previously suggested solutions. The city attorney must first determine the possibility of legislative preemption. The statute contains no expression that the legislature meant to preempt. The statute also contains no expression that the legislature meant these to be the only methods of financing parking facilities. In addition, the statute makes no broad delegation of power to a state agency or commission to oversee municipal financing of public parking facilities. This would have indicated the legislature's intent to have uniform methods of financing. Since no express or implied intent is apparent, the preemption doctrine is inapplicable.

The city attorney must then determine if an indirect conflict exists. The purpose of the ordinance is not repugnant to that of the statute. Both are designed to promote the construction and financing of parking facilities. The ordinance partially duplicates the statute, but no conflict is to be found when this occurs. The ordinance cannot be interpreted to be more or less rigorous than the statute, for it only provides an alternative method of financing which the statute did not mention.

The city attorney should determine that the two enactments can be harmonized and stand together. If the legislature had meant this grant of power to be the only method of financing parking facilities, it could have so stated. The ordinance proposes a method of financing which, after

76. Under the old Missouri home rule provision, one Missouri court, when discussing whether provisions between ordinances and statutes conflicted, said: "If either is silent where the other speaks, there can be no conflict between them." City of St. Louis v. Klausmeier, 213 Mo. 119, 127, 112 S.W. 516, 518 (En Banc 1908). Isn't this the situation in the hypothetical?

careful consideration, was deemed to be the most practical and economic method for this particular municipality. Certainly the legislature could not have intended for municipalities to be precluded from financing parking facilities in the most practical and economic manner.

Accordingly, the city attorney's advice should be that this state statute, authorizing power and specifying how it is to be exercised, neither preempts nor conflicts with the proposed ordinances. Thus, there is no legal obstacle to the enactment of the proposed ordinance.

## VII. Conclusion

Under the new Missouri home rule amendment, the possibility exists that the courts might retain the traditional state-local test when the issue of a potential conflict between a statute and an ordinance arises. Hopefully, this will not occur, and the courts will turn to statutory construction and legislative intent in determining if a conflict actually exists.

By using proper analysis in all cases, the court might find only two instances where the legislative powers of the municipality are limited because of an applicable statute. The first instance is under the application of the preemption doctrine. This doctrine should be used only where the legislature expressly states that the statute is intended to occupy the field. If no such expression exists, the courts should create a presumption against preemption. This presumption would be rebuttable in instances where a statute renders a broad delegation of power to a separate state agency or commission which deals with the state as a whole. The establishment of this agency or commission would indicate that uniform regulation is needed in that area.

The second instance in which a court might find an ordinance invalid is where that ordinance conflicts with a statute regulating the same subject matter. In order to determine the existence of a conflict, a court should: (1) Compare the wording of the statute with that of the ordinance; (2) look to the intent and purpose behind the respective enactments and determine their effect; and (3) make every attempt possible to harmonize the statute and ordinance so that they can stand together. Any doubt as to the existence of a conflict should be resolved in favor of the ordinance. A court should determine that a conflict exists only when there is no possibility of harmony, and when it is convinced that the local enactment: (1) Expressly prohibits what the statute expressly permits or expressly permits what the statute expressly prohibits; or, (2) is less rigorous than the statute on the same subject; or, (3) is more rigorous than the statute and has the effect of prohibiting what the statute permits without a reasonable municipal purpose.

The success or failure of the new Missouri home rule amendment depends upon the courts. If the Missouri courts retain the traditional state-local tests in determining conflicts, rather than using statutory construction and seeking legislative intent, the value of the new amendment will be seriously undermined. However, if the courts accept the intent and purpose behind the amendment, existing confusion can be greatly lessened.

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