The California City versus Preemption by Implication

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CALIFORNIA cities, desiring to regulate local matters, are confronted with a number of recent preemption decisions which both restrict their power to regulate and offer little guidance as to which subjects they may properly regulate. Consequently, the application of the doctrine of preemption by the California courts has been criticized by local officials, who contend that, as a result of these cases, much of their local law is of questionable validity. One city attorney has pointed out that uncertainty in the law not only hampers enforcement officers, administrators, attorneys, and judges, but also confuses most of the public who no longer know how much of their conduct is regulated by local laws.

The factors responsible for most of this criticism include the judicially-introduced doctrine of preemption by implication and the seemingly inconsistent treatment of the doctrine in the two recent cases of In re Lane and In re Hubbard. The response to the problem has taken the form of proposed statutes and constitutional amendments which are intended to set out preemption guidelines for the court and to restore apparently lost regulatory power to the cities. In order to evaluate the proposed solutions, one must first acquire an understanding of preemption and its purpose.

BACKGROUND: THE DEVELOPMENT OF THE PREEMPTION DOCTRINE

The basis for that part of the doctrine of preemption which is the subject of this comment is found in section 11 of article XI of the
California constitution. This section provides: “Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.” When this provision was written into the constitution in 1879, it was unique, and the California courts had to interpret the section “unaided by anything that went before.” For a short time after 1879 the section was considered a charter in itself, but since then, it has been limited to the power to make and enforce “rules of conduct to be observed by citizens.” While section 11 involves a broad grant of home rule, it also contains the limitation that regulations enacted by the municipalities are not to “conflict with general laws.” The scope of this limitation is the problem involved in a preemption case.

In determining the limitation on municipal power, the courts must decide what is meant by “conflict with general laws.” Generally, the courts have followed three guidelines in recognizing the existence of a conflict between State law and a municipal ordinance. First, the courts will find a conflict when there is express conflict. This occurs when the legislature expressly provides that there shall be no local

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5 This comment is not concerned with a discussion of the concept municipal affairs, Cal. Const. art. XI, §§ 6, 8, but it should be mentioned here that certain problems arise when the courts overlap Cal. Const. art. XI, §§ 6, 8 with Cal. Const. art. XI, § 11 in a preemption case. See note 52 infra.


7 Ex parte Campbell, 74 Cal. 20, 26, 15 Pac. 318, 321 (1887).

8 Von Schmidt v. Widber, 105 Cal. 151, 161, 38 Pac. 682, 686 (1894) (city's power to purchase land not derived from Cal. Const. art. XI, § 11); cf. Merced County v. Helm, 102 Cal. 159, 36 Pac. 399 (1894) (revenue ordinance not enacted under power derived from Cal. Const. art XI, § 11).

9 Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 3 Cal. Rptr. 158, 163, 349 P.2d 974, 979 (1960); In re Sic, 73 Cal. 142, 148, 14 Pac. 405, 408 (1887); Agnew v. City of Los Angeles, 110 Cal. App. 2d 612, 615, 243 P.2d 73, 74-75 (1952).
regulation on a particular subject or when a statute prohibits what an ordinance authorizes and vice versa. Secondly, a conflict arises when a municipal ordinance duplicates State law, i.e. when the ordinance regulates the same act which is regulated by the State. In In re Sic, the court pointed out that if a conflict did not exist when an ordinance duplicates State law, a defendant would be exposed to double jeopardy. Finally, the courts will recognize a conflict when a municipality imposes additional regulation in a field which is fully occupied by the State.

Twenty-two years ago, when this elusive guideline was an infant in the mind of the court, Professor Peppin asked: "How far may cities or counties make and enforce police regulations in a field in which the legislature has already made extensive regulation of its own?" His answer then was that, in spite of comprehensive regulation by the State, the courts were reluctant to hold that the legislature had occupied the field and to condemn on that ground additional municipal ordinances which did not directly conflict with State law. Since that time this guideline has been greatly modified. And, today, anyone who is familiar with In re Lane knows that this reluctance on the part of the court is an attitude of the past.

The guideline of full occupation requires separate analysis in order to give it meaning. This analysis involves the discussion of two questions. First, what kind of additional or supplementary regulation is allowed? In certain cases where the legislature has not fully occupied the field, additional or supplementary regulation is permitted. Some

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10 In re Murphy, 190 Cal. 286, 212 Pac. 30 (1923); Ex parte Daniels, 183 Cal. 636, 192 Pac. 442 (1920). Cf. City of Bakersfield v. Miller, 64 A.C. 95, 48 Cal. Rptr. 889, 410 P.2d 393 (1966).
11 In re Iverson, 199 Cal. 582, 250 Pac. 681 (1926); Ex parte Daniels, 183 Cal. 636, 192 Pac. 442 (1920); People v. Commons, 64 Cal. App. 2d Supp. 925, 929-30, 148 P.2d 724, 727 (App. Dep't Super. Ct. Los Angeles, 1944) (dictum).
13 In re Sic, 73 Cal. 142, 148, 14 Pac. 405, 408 (1887).
15 Peppin, supra note 6, at 382.
16 Id. at 387-88.
18 In re Portney, 21 Cal. 2d 237, 131 P.2d 1 (1942); In re Iverson, 199 Cal. 582, 250 Pac. 681 (1926); Mann v. Scott, 180 Cal. 550, 182 Pac. 281 (1919); In re Hoffman, 155 Cal. 114, 99 Pac. 517 (1909); Gleason v. Municipal Court, 226 Cal. App. 2d 584, 38 Cal. Rptr. 226 (1964).
courts have said, however, that an additional regulation must not only be reasonable but it must be appropriate to the needs of a particular locality. Furthermore, it has been held that the additional regulation must be "in aid and furtherance of the purpose of the general law." In any event, while stricter conditions might be imposed by the municipality, regulations which are less stringent than the State law are in conflict therewith.

A second question involves the meaning of full occupation of the field. In Tolman v. Underhill, the court said:

Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme.

The California courts have generally used this measure of "legislative scheme." The legislature need not declare a scheme in so many words, and whether a particular legislative scheme indicates an intention fully to occupy a field depends upon a number of factors: "Whether a particular statute or group of statutes is sufficiently comprehensive to show an intent to occupy the entire field is a matter which cannot properly be decided upon the basis of any single precise test." One factor considered is the detail of the legislation. In some cases courts have said that detailed State regulation indicates an intent fully to occupy the field; in other cases courts have said

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23 Natural Milk Producers Ass'n v. City & County of San Francisco, 20 Cal. 2d 101, 124 P.2d 25 (1942); In re Hoffman, 155 Cal. 114, 99 Pac. 517 (1909).
27 Id. at 712, 249 P.2d at 283. (Emphasis added.)
that the mere fact that State law contains detail does not of itself establish such an intent.\(^{28}\) Quantity of legislation is also an apparent consideration.\(^{29}\) It has been said, however, that the legislative intent can be evidenced either by a multiplicity of statutes or a single enactment.\(^{30}\) Also, there has been criticism when a preemption decision is apparently based solely on quantity.\(^{31}\) After the court has found sufficient comprehensiveness in a legislative scheme to constitute full occupation, it will hold that by inference or by implication the legislature intended to preempt the field. This doctrine of preemption by implication, whereby the court invalidates a supplementary local regulation, has introduced much of the uncertainty into the law of preemption.

**THE PUZZLE OF LANE AND HUBBARD**

It is apparent from this brief discussion of preemption by full occupation of the field that there are few fixed concepts which guide the court in reaching a conclusion. On the contrary, it would appear that each case is determined on the basis of the subject matter involved and the needs of present-day society,\(^{34}\) which may lead to an apparent conflict between successive decisions. No better example can be put forward than the two recent cases of *Lane*\(^{35}\) and *Hubbard*.\(^{36}\) In both cases the State legislation was silent in regard to the specific act which the municipality outlawed, and yet the supreme court apparently reached opposite conclusions. In 1962 Carol Lane was convicted of violating a Los Angeles ordinance which prohibited “resorting” (e.g. to any residence, apartment house, hotel, etc.) for the purpose of having sexual intercourse.\(^{37}\) The supreme court examined the Penal Code sections covering criminal aspects of sexual activity and concluded


\(^{29}\) In re Lane, 58 Cal. 2d 99, 103, 22 Cal. Rptr. 857, 859-60, 372 P.2d 897, 899 (1962).

\(^{30}\) In re Martin, 221 Cal. App. 2d 14, 17, 34 Cal. Rptr. 299, 301 (1963).


\(^{35}\) *Supra* note 34.

\(^{36}\) 63 Cal. 2d 119, 41 Cal. Rptr. 393, 396 P.2d 809 (1964).

that they were so extensive in their scope that there was clearly an intention by the legislature to adopt a general scheme for the regulation of the subject.\textsuperscript{38} Because mere forication was not outlawed by the Penal Code, the court said that by implication the legislature had decided not to make such conduct criminal in the State.\textsuperscript{39} Therefore, the court held, the resorting ordinance was in conflict with general law.\textsuperscript{40} Two years later Horace Hubbard was convicted of playing the game of pangungun in violation of the Long Beach Municipal Code which outlaws the playing of games of chance.\textsuperscript{41} The supreme court recognized the extensive scope of the Penal Code sections dealing with gambling but concluded that “they were far from being all inclusive.”\textsuperscript{42} The court held that since the Penal Code enumerated specific games,\textsuperscript{43} the legislature had only partly occupied the field\textsuperscript{44} and did not intend to prevent local authority from regulating those subjects in regard to which the Penal Code was silent.\textsuperscript{45} The \textit{Hubbard} court apparently rejected the concept of preemption by implication, the basis of the \textit{Lane} decision. In \textit{Hubbard}, Justice Peters said:

Since the general laws do not make illegal all forms of gambling, or even all forms of gaming, they cannot be said to occupy either field to the exclusion of the exercise of local police power, unless we adopt the negative type of argument that by making specific acts illegal the Legislature intended all other acts of similar character to be of such innocent character that no local authority might adopt a contrary view.\textsuperscript{46}

This “negative type of argument,” however, appears to constitute the reasoning behind the \textit{Lane} decision. How, then, can \textit{Lane} and \textit{Hubbard} be reconciled?

It would seem that the cases can be reconciled upon a principle stated in \textit{Mann v. Scott}.\textsuperscript{47} In that case the court said:

The question whether the legislature has undertaken to occupy exclusively a given field of legislation is, we think, to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate.\textsuperscript{48}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{38} 58 Cal. 2d at 103, 22 Cal. Rptr. at 859, 372 P.2d at 899.
\item \textsuperscript{39} 58 Cal. 2d at 104, 22 Cal. Rptr. at 860, 372 P.2d at 900.
\item \textsuperscript{40} 58 Cal. 2d at 105, 22 Cal. Rptr. at 860, 372 P.2d at 900.
\item \textsuperscript{41} \textit{LONG BEACH, CAL. MUNICIPAL CODE} § 4140.7 (1955).
\item \textsuperscript{42} 62 Cal. 2d at 125, 41 Cal. Rptr. at 397, 396 P.2d at 813.
\item \textsuperscript{43} \textit{CAL. PEN. CODE} § 330.
\item \textsuperscript{44} 62 Cal. 2d at 125-26, 41 Cal. Rptr. at 397, 396 P.2d at 813.
\item \textsuperscript{45} 62 Cal. 2d at 127, 41 Cal. Rptr. at 398, 396 P.2d at 814.
\item \textsuperscript{46} 62 Cal. 2d at 129, 41 Cal. Rptr. at 398, 396 P.2d at 814.
\item \textsuperscript{47} 180 Cal. 550, 182 Pac. 281 (1919).
\item \textsuperscript{48} \textit{Id.} at 557-58, 182 Pac. at 284. (Emphasis added.)
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This analysis of the facts and circumstances is a well-recognized proposition in the preemption cases, and apparently includes a consideration of the relevant policy factors involved.

Both Lane and Hubbard discuss relevant policy considerations, and when the particular subject matter of each case is applied to the policy factors discussed, the cases can be reconciled. In Lane, the subject matter was sexual activity, and Chief Justice Gibson, in his concurring opinion, spoke of the need for uniform treatment throughout the State because of the development of numerous cities within a continuous urban community. He concluded by saying: "The subject is not one affecting only an isolated group of citizens but is one involving the concerns of people generally, and it should be legislated upon accordingly." In Hubbard, the subject matter was gambling, and Justice Peters concluded that the subject was properly regulated by the municipality as a municipal affair. In other words, he rejected the contention that gambling was exclusively a matter of statewide concern because (1) the subject had not been completely covered by State law, (2) there was nothing in the general law indicating a State concern regarding the regulation of games not expressly prohibited, and (3) the regulation of gambling establishments was not a matter in which transient citizens were peculiarly concerned. From this comparison it would seem that when the court analyzes the facts and circumstances upon which a statute is intended to operate, it will balance the special needs of a particular locality against the need for uniform State treatment in order to reach a proper result from a policy standpoint.

If Lane and Hubbard are to be reconciled, the question is whether Hubbard rejected the Lane doctrine of preemption by implication. Chief Justice Gibson anticipated this question in Lane when he said:

49 Tolman v. Underhill, 39 Cal. 2d 708, 712, 249 P.2d 280, 283 (1952); Eastlick v. City of Los Angeles, 39 Cal. 2d 661, 666, 177 P.2d 558, 562 (1947); In re Iverson, 199 Cal. 582, 586-87, 250 Pac. 681, 682 (1926); In re Lane, 58 Cal. 2d 99, 110, 22 Cal. Rptr. 857, 863, 372 P.2d 897, 903 (1962) (concurring opinion).

50 58 Cal. 2d at 111, 22 Cal. Rptr. at 864, 372 P.2d at 904 (1962).

51 Ibid.

52 62 Cal. 2d at 128, 41 Cal. Rptr. at 399, 396 P.2d at 815 (1964). There are problems which arise when the courts overlap Cal. Const. art. XI, §§ 6, 8 with Cal. Const. art. XI, § 11 in a preemption case. Since only chartered cities are allowed "to make and enforce all laws and regulations in respect to municipal affairs," Cal. Const. art. XI, § 6, while all cities "may make and enforce regulations as are not in conflict with general laws," Cal. Const. art. XI, § 11, Hubbard raises the question whether the State has preempted the field of gambling, as discussed in the case, in regard to cities other than chartered cities.

53 62 Cal. 2d at 128, 41 Cal. Rptr. at 399, 396 P.2d at 815. Perhaps the last clause discussed by Justice Peters is the real distinction between the field of sexual activity and the field of gambling.

54 See also Note, 50 CALIF. L. REV. 740, 743 (1962).
Whether the state has fully occupied the field with respect to any given subject depends upon considerations which will necessarily vary and must therefore be determined in every case without pre-judging the result as to subjects not before the court. We should not attempt to determine here whether gambling is a proper subject for local regulation.  

The Hubbard court did not reject the doctrine of preemption by implication, but rather it merely said that in the field of gambling the legislative silence did not indicate an intent to preempt, and thus pre-emption by implication did not apply.

In Lane, however, Chief Justice Gibson also said that “a comprehensive and detailed general plan or scheme with respect to a subject serves, without more, to occupy the field.” As a practical test, consideration restricted only to the subject matter of a given statute, without more, offers little guidance for reasonable prediction in preemption cases. The concept of subject has received widely varying treatment in the courts. It has been described in sweeping terms as the criminal aspects of sexual activity based on sixty Penal Code sections. At the other extreme, subject has been narrowly limited to the criminal aspects of intoxication in a place open to the public view, based on only one subsection of the Penal Code. Obviously, the court has wide discretion in determining the extent of the general law necessary to comprise a legislative scheme with respect to a subject so that it can conclude that by implication the subject has been preempted. For a more meaningful comprehension of preemption by implication, the attempt will be made to demonstrate that the relative concepts of legislative scheme and subject cannot be evaluated apart from the various policy factors which influence the court.

PREEMPTION BY IMPLICATION

The court apparently applies a process of balancing a variety of policy factors, weighing each with due regard to the facts and circumstances of the particular case. For example, special consideration to local needs may be given where the ordinance is intended to solve a particular local problem. An illustration is found in People v. Jen-

55 58 Cal. 2d at 110 & n.2, 22 Cal. Rptr. at 864 & n.2, 372 P.2d at 904 & n.2 (1962) (concurring opinion). (Emphasis added.)
56 Id. at 109, 22 Cal. Rptr. at 863, 372 P.2d at 903. (Emphasis added.)
57 Id. at 103-04, 22 Cal. Rptr. at 859, 372 P.2d at 899.
where the ordinance made it "unlawful for any person to have in his possession, in any automobile any dangerous or deadly weapon." Riding in the back seat with a loaded revolver concealed under the floor of the car, the defendant was not in violation of State law, as the gun was not concealed on his person nor was the vehicle under his control. Upholding the ordinance as necessary for a special local situation, the court concluded:

Los Angeles is a densely populated municipality. The danger from gunmen in a large city is far greater than in a sparsely settled rural area and is a more frequent occurrence. It is unthinkable that the Legislature intended to deny the public in Los Angeles the protection which the ordinance gives.

On the other hand, an ordinance is disfavored to the extent that it attaches special regulations to a subject that is best regulated by a uniform State standard. An obvious example is found in *Lane*, where the criminal aspects of sexual activity comprised such a subject. The concurring opinion noted:

The subject under consideration here requires uniform treatment throughout the state. Modern methods of transportation have led people to travel from one location to another more frequently than in the past. Under these circumstances much unnecessary confusion and uncertainty would result if each locality were to enforce different rules with respect to the subject involved here.

Another factor the court seems to consider is the serious problem raised concerning local law enforcement and civil liberties. Because the legislature in a comprehensive scheme failed to mention a particular act, the court has held that not only has the legislature itself not prohibited the act, but it has also taken away the power of the city to forbid it. This effect of preemption by implication has been


*Cal. Penal Code* § 12025, which prohibits carrying weapon concealed on one's person or concealed within a vehicle under one's control.

People v. Jenkins, 207 Cal. App. 2d Supp. 904, 907, 24 Cal. Rptr. 410, 412 (App. Dep't Super. Ct. Los Angeles, 1962). Compare People v. Bass, 225 Cal. App. 2d Supp. 777, 33 Cal. Rptr. 365 (App. Dep't Super. Ct. Los Angeles, 1963). Less than one year later, the same court that decided *Jenkins* held that the ordinance making it unlawful to carry a concealed knife with a blade three inches or more in length was invalid. The field was found preempted by the Dangerous Weapons Control Act, *Cal. Penal Code* §§ 12000-12094, the same legislation which did not preempt the field in *Jenkins*.

58 Cal. 2d at 111, 22 Cal. Rptr. at 864, 372 P.2d at 904 (1962) (concurring opinion).

criticized as imposing an unnecessary stumbling block in the path of local police efforts.66

Although preemption may make the task of local law enforcement more difficult, the result might be explained on the ground that the ordinances invalidated tended to restrict individual liberties with unnecessary harshness. Indeed, in Abbott v. City of Los Angeles,67 one of the earliest cases where the court applied preemption by implication, the court avoided passing on the contention that the ordinance was unreasonable and deprived the defendant of due process of law by holding that general law impliedly preempted the field.68 The same tendency is apparent in People v. Cole,69 where the ordinance prohibited possession of a lottery ticket. In holding that the suppression of lotteries is a field preempted by State law, the court cited seven Penal Code sections70 which provided penalties for one who actively participates in holding a lottery, rather than the individual who comes into possession of a single ticket.71 In the intoxication

66 Address by Long Beach City Attorney Leonard Putnam: “State Preemption—Past and Future,” City Attorneys’ Department, Spring Conference, League of California Cities (1964), on file at office of League of California Cities, Berkeley, Cal. Los Angeles County Supervisor Warren Dom contends that the Lane case is “the most destructive single case ever handed down in California, and has done more to deteriorate local law enforcement practices than anything else.” San Francisco Chronicle, Sept. 25, 1965, p. 6, col. 2. For Mr. Dom’s response to this aspect of the preemption problem see note 93 infra and accompanying text.

67 53 Cal. 2d 674, 3 Cal. Rptr. 158, 349 P. 2d 974 (1960).

68 53 Cal. 2d at 689, 3 Cal. Rptr. at 168, 349 P.2d at 984. See also Lambert v. California, 355 U.S. 225 (1957). Quaere: Would much of the preemption problem have been avoided, at least in the regulatory field, had the court decided Abbott and subsequent preemption cases squarely on the constitutional ground of denial of due process, i.e., lack of notice to the defendant so that there is no “wilfulness” in the violation? Generally, the court will avoid decision on a constitutional question where there are adequate alternative grounds, because a premature and unnecessary constitutional ruling might have widespread and unpredictable results, “rendering rights uncertain and insecure.” Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947). But has preemption as a basis of decision rendered rights any less uncertain than would the constitutional basis of decision?


70 The following sections of the California Penal Code were held to comprise a comprehensive scheme for the suppression of lotteries: § 320 (setting up or drawing a lottery); § 321 (sale of chances); § 322 (aiding or assisting in a lottery); § 323 (keeping or advertising lottery offices); § 324 (insuring lottery tickets); § 325 (forfeiture of money or property offered for lottery); and § 326 (letting or permitting use of any building or vessel for lottery purposes).

71 Similar ordinances outlawing passive conduct were invalidated through preemption by implication in In re Loretizo, 59 Cal. 2d 445, 30 Cal. Rptr. 16, 380 P.2d 656 (1963) (ordinance prohibiting possession of wagering material; state law applies to one who makes or receives bets) and People v. Franks, 226 Cal. App. 2d 123, 37 Cal. Rptr. 800 (1965) (ordinance prohibiting visiting a gambling house; state law provides punishment for one who prevails upon another to visit a gambling house, but does not forbid mere attendance there).
cases, the defendants were cited under ordinances prohibiting drunkenness in a place open to public view, including private premises. State law, fully occupying the field, provided penalties for one "found in any public place under the influence of intoxicating liquor in such condition he is unable to exercise care for his own safety, or the safety of others, or interferes with the free use of any street" In *People v. DeYoung* the ordinance prohibited drunkenness on private premises to the annoyance of any other person. Finding the field preempted, the court did not discuss the question whether the subjective state of mind of another person is a constitutionally valid test of criminal guilt.

The conflict between local efforts to facilitate law enforcement and the court's disfavor of ordinances unduly restricting individual liberties is even more apparent in *Spitcuer v. County of Los Angeles*, where the ordinance prohibited the operation of studios "wherein models pose for the purpose of being sketched, painted, photographed, or purportedly photographed by persons who pay a fee for the right or opportunity so to depict the model or for admission to the premises." Admittedly a measure to control pornography, perversion, and prostitution, where such acts were difficult to prove, the ordinance was invalidated as an additional proscription in the area of the criminal aspects of sexual activity, a field preempted by general law. State law, the court noted, already regulated such studios, punishing one who procures another to take part in any model exhibition which is adapted to excite lewd thoughts or acts, or one who keeps houses of prostitution. The ordinance, requiring no wrongful purpose, would greatly facilitate police arrests, but at the expense of curtailing legitimate activity which may not warrant such interference. In view of the modern trend away from imposing strict liability offenses, the court's practice of invalidating

73 CAL. PEN. CODE § 647(f).
75 Even though the parties did not raise this question, the lower appellate court mentioned the possibility that such subjective standard of guilt might be unconstitutional. However, the court did not undertake to decide the issue once the field was found preempted by State law. *People v. DeYoung*, 226 A.C.A. 421, 39 Cal. Rptr. 593 (App. Dep't Super. Ct. Santa Barbara, 1964).
77 Los Angeles County, Cal., Ordinance No. 8253, § 8.
79 CAL. PEN. CODE §§ 314(2), 315-16.
ordinances which require less evidence of a wrongful motive may be the basis of the preemption doctrine in the regulatory field. Still, in the other direction, the court recognizes the situation where the need for public safety outweighs any need to protect individual liberties. In *Gleason v. Municipal Court* the ordinance prohibiting loitering in any tunnel or pedestrian subway was properly held to supplement State law which prohibited loitering in other instances. The court concluded that the ordinance dealt with a problem not common to the State generally, but peculiar to urban areas where pedestrian tunnels are provided for school children and others in need of the ordinance’s protection.

Basically, then, it would seem that according to the various policy factors, the court will balance the peculiar needs of the municipality against the general benefits of uniform statewide treatment. When faced with the propriety of a municipal ordinance on a subject not expressly covered by State law, the court will determine the relative merits of a geographically limited regulation, weighing benefits to the municipality against any adverse effect on the citizenry as a whole. Also taken into account in the balancing process are the intangible factors of individual liberties, law enforcement, and public safety.

RESPONSE TO THE PREEMPTION PROBLEM: STATUTES AND CONSTITUTIONAL AMENDMENTS

The apparently uncertain nature of preemption by implication, as well as opposition to its effect on the scope of local regulatory power, has stimulated various efforts for some type of clarifying enactment. Statutes and constitutional amendments were proposed without success in the 1963 and 1965 general sessions of the State legislature.

The statutory approach has included bills which may be classified as “general grant of permission,” “code construction,” and “specific subject” types. The “general grant of permission” statutes would provide that no legislative scheme shall be construed to interfere with local regulations on the same or related subject, unless there is direct grammatical conflict or express prohibition of further local enactments. The expectation would be to confer general authority on the
municipality to regulate an activity free from judicial application of the preemption by implication doctrine. The "code construction" bills make similar provisions for construing the effect of specific State codes on local ordinances. Finally, the "specific subject" proposals would declare that it is not the intent of the legislature to preempt a particular subject (e.g., gambling) covered or touched upon by State statutes.

The purpose of the statutory approach is to provide the court with rules of interpretation for the concept "conflict with general law." Assuming no duplication or grammatical conflict, the practical result would be that there must be express legislative foreclosure of further local regulation before the court could apply the preemption doctrine. Yet this conclusion may be questioned by an analysis of the constitutional concept of "conflict with general law." A mere prohibition by the legislature of local regulation in a specified field, without the legislature itself occupying the field with affirmative provisions, would be in violation of express constitutional authority granted to the municipality to enact local regulations. As "conflict with general law" is determined by the affirmative provisions of general law, it would seem that a general grant of permission, or even a limited permission applying only to one State code, to enact local regulations would be equally ineffective against a judicial finding that the legislature had in fact fully occupied the field with affirmative regulations. These statutes would be only one factor the court might consider to determine the extent of general law. Clearly, by enacting

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(1) there is a general scheme of state legislation in such field and (2) legislation expressly provides that the state has preempted such field or expressly prohibits other and further regulation in such field.

Other similar proposals in the 1965 general session of the California Legislature were S.B. 469 and S.B. 642, and the more detailed A.B. 23.

E.g., S.B. 346, relating to construction of the Penal Code. The opposite alternative for code construction enactments is illustrated by Cal. Vehicle Code § 21. Uniformity of Code. Except as otherwise expressly provided, the provisions of this Code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this Code unless expressly authorized therein.


CAL. CONST. art. XI, § 11.

E.g., Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482 (1942); Ex parte Danels, 183 Cal. 636, 192 Pac. 442 (1920); Wallace v. Regents of University of California, 75 Cal. App. 274, 242 Pac. 872 (1926).
these statutes the legislature could not perform the court's function of interpreting the laws.\textsuperscript{90}

The constitutional approach has been an attempt to expand article XI, section 11 of the California constitution to furnish a constitutional definition of "conflict with general law." Constitutional requirements for a finding of "conflict" would be (1) duplication, (2) grammatical conflict, or (3) a comprehensive scheme which \textit{expressly} precludes further local regulation.\textsuperscript{91} The immediate effect would be to abrogate the doctrine of preemption by implication in California law. In other words, the court would be constitutionally required to focus its attention only on express provisions in the statutes, ignoring relevant policy considerations. Indeed, there would ensue a process of "preemption in reverse" whereby the court would be precluded from defining "conflict with general law," even where there was an obvious need for uniform State regulation. In this manner, the responsibility for deciding what subjects are best regulated by a uniform standard throughout the State is squarely placed on the legislature, which must take positive steps to preclude local regulation. As a practical matter, however, the legislature will seldom expressly foreclose municipal regulation of a subject, as it is especially difficult to foresee matters arising in the future which may require special, local treatment. Municipalities, on the other hand, are clothed with expansive authority, with few internal pressures to protect the interests of transient citizens or the State itself from adverse local enactments.\textsuperscript{92} Should lack of general law on a subject leave the field completely available for local laws, one might expect that the varying degree of control that each city might place on the subject would require our highly mobile population to conform to a new standard of conduct with every crossing of a city line. By providing a legal

\textsuperscript{90} CAL. CONST. art. III, § 1 (separation of powers).
\textsuperscript{91} A.C.A. 13, proposed in the 1965 general session of the California legislature, would amend article XI, section 11, of the constitution to provide:
Any county, city, city and county, or town may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.
Such regulations shall be in conflict with general law only in the following cases:
1. When the regulation duplicates general law.
2. When the regulation authorizes or purports to authorize that which is expressly prohibited by general law.
3. When the regulation prohibits or purports to prohibit that which is expressly permitted by general law.
4. When there is a comprehensive scheme of legislation on the same subject by general law, and such general law:
   (a) Expressly provides that it has occupied the entire field of such legislation, or
   (b) Expressly prohibits other and further regulation in the field of such legislation.
\textsuperscript{92} See Note, 72 Harv. L. Rev. 737, 746-47 (1958).
solution to the preemption problem (to the extent that uncertainty would be eliminated) the amendment would seem to restrain the court with undue harshness. A more desirable approach would permit the discretionary balancing process reflecting the relative benefits of local regulation and statewide uniformity.

Another response to the preemption problem following the constitutional approach is the proposed “decency” initiative submitted by a Los Angeles County Supervisor. This proposal would have the same constitutional effect described above, but only as to enumerated moral offenses. Obviously a direct reaction to the Lane case, the initiative would effectively reverse the rule of Lane regarding preemption of the criminal aspects of sexual activity, but would leave intact the basic principle of Lane: preemption by implication. Municipalities might again regulate the criminal aspects of sexual activity, but by negative inference there would be constitutional approval of the doctrine of preemption by implication on all subjects not within the narrow coverage of the initiative. As it appears that the court in the preemption cases will consider the subject matter involved in light of relevant policy factors, the initiative, dealing with only a few selected subjects, would seem to be a wholly inadequate response to the preemption problem.

CONCLUSION

Preemption by implication, as developed in the Abbott and Lane cases, is a recent innovation in California law. The doctrine has not been the basis of decision in a large number of cases, although the relatively few cases where it has been applied have evoked much controversy. The proposed solutions, it would seem, have been framed with reference only to the specific subjects that have reached the

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93 The initiative would add section 11.5 to article XI of the California constitution as follows:

The people of the State being gravely concerned over the spread of obscenity, prostitution, pornography, public indecent exposure, venereal disease, physical attacks on women and children, and the lack of respect for law and order, do hereby express their desire to restore to local governments the right to establish and enforce local standards of decency supplemental to those set by the State, to take more effective action to protect the health and safety of their citizenry and to insure greater respect for law and order. This section shall be liberally construed to effectuate this purpose.

Any regulation made pursuant to section 11 of this Article by any county, city, city and county, or town, respecting prostitution and other criminal aspects of sexual activity, public indecent exposure, obscenity, pornography, loitering with respect to the protection of persons from molestation is not to be construed to be in conflict with general laws as used in Section 11 of this Article except as follows:

(The amendment continues with the same four instances contained in A.C.A. 13 (1965) as set forth in note 91 supra.)

94 Letter From Richard Carpenter, Executive Director and General Counsel, League of California Cities, to City Attorneys, August 27, 1965, on file at office at League of California Cities, Berkeley, Cal.
courts. For this reason it would appear that any statutory or constitutional change in the law would be premature. Adequate time ought to be allowed for the development of case law and for the completion of committee studies of the State legislature. Indeed, one may question whether there is any necessity for a statute or constitutional amendment. The value of judicial discretion permitted by policy considerations ought not to be discounted; the unlimited forms of human conduct which a city might regulate give rise to an infinite variety of possible preemption cases.

If any immediate enactment is required at all, a constitutional amendment would seem most appropriate, but it would seem best to limit the amendment to a codification of the general guidelines as established by case law. In its definition of "conflict with general law," this amendment would permit preemption by implication within prescribed limits. In this respect, the recommended amendment sets out two guidelines. First, regarding legislative scheme, it is not intended to make quantity a test, but rather it would dissuade the court from finding preemption by implication in a scheme where quantity is minimal. Second, the amendment would allow the court to consider the need for local regulation as opposed to the need for uniform state treatment. Although this measure would not completely eliminate the uncertainty as to the existence of a "conflict," the need for certainty may be outweighed by the need to reach a result harmonious with the legitimate expectations of the majority of members of our dynamic and mobile society.

APPENDIX

Proposed Constitutional Amendment

Section 11. Any county, city, city and county, or town may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

Such regulations are in conflict with general law only in the following instances:

1. When the regulation duplicates general law.
2. When the regulation authorizes that which is expressly prohibited by general law or prohibits that which is expressly permitted by general law.
3. When general law expressly provides that it has occupied the entire field of such regulation, or expressly prohibits other and further regulation in the field of such regulation.
4. When the subject of such regulation is fully covered by general law, and the subject is of such a nature that the adverse effect of the local ordinance on the transient citizens of the state, or on the citizens of the State generally, outweighs any possible benefit to the county, city, city and county, or town.

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95 See Appendix for the constitutional amendment that the authors would propose.