TOWARD PRINCIPLES OF STATE RESTRAINT UPON THE EXERCISE OF MUNICIPAL POWER IN HOME RULE

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PART II

I. SUPERIORITY OF POWER STATE CONTROL: SEVERITY — AN INTRODUCTION

States should afford legislative superiority over municipal regulations in the resolution of conflicts resulting from the sharing of power where it is necessary to protect the interests of state citizens generally by adopting the following proposal:

> A municipal corporation may exercise any legislative power or perform any function within its borders that is not in conflict, i.e., incompatible with the terms or clear regulatory purpose of state police power regulations applied to individuals, private groups, or private corporations statewide.

The organization of this study, begun in earlier articles, has proceeded from a consideration of the allocation of power to initiate action between the state and municipalities[1] to a determination of the superiority of power.[2] Most recently, the study considered the degree of state control evidenced by legislative denial and preemp-

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1. George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule, Part I: Allocation of Governmental Power*, 20 STETSON L. REV. 5 (1990).

2. George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule, Part II: Superiority of Power, State Control: Application and Scope*, 20 STETSON L. REV. 845 (1991).

tion of municipal power.[3] This Article concludes the study with a consideration of state control by examining conflict in regulations and the particular problems involved in dealing with municipal fiscal matters.

Earlier treatment concluded that denial of municipal power and preemption of municipal regulations were unacceptable methods of state control over the exercise of municipal power because they involve the manipulation of municipal power.[4] The methods are based on legislative intent either to preclude all regulations or to make state regulations exclusive. They do not directly affect state citizens in general and therefore are not subjected to the same degree of political restraint that self-interested citizens are likely to demand.[5]

Even where required to be made express, legislative denials of municipal power reduce municipal autonomy to legislative grace. However, such a requirement tends to create greater clarity in the law by reducing the role of the courts. By failing to reject implied preemption, those states which have adopted modern reform home rule proposals of the National Municipal League and the National League of Cities (formerly the American Municipal Association), which reserve legislative denial authority, have largely lost even the advantage of greater clarity.

This Article continues to treat the experience of traditional home rule states — those states that adopted provisions between 1915 and 1931 that broadly but vaguely granted power to municipalities subject to limited state control. It does so by examining Ohio and California court decisions and distinguishing the experience of those states from that of states which have adopted modern reform constitutional proposals or a hybrid variation of them. The need for states to make flexible responses to state problems, the protection of municipal interests, the roles the legislature and the courts are to play, and the clarity and predictability each can bring to the law of state/local relations continue to shape the consideration here.

As proposed in this study, states need to prevail when superior state interests are involved, i.e., when making decisions which most

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3. George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule, Part II: Superiority of Power, State Control: Severity, Denial and Preemption*, 22 STETSON L. REV. 643 (1993).

4. *See* Vaubel, *supra* note 3.

5. *See id.* at 656–57, 683.

affect state citizens generally. The proposals made here stress that textual conflict in regulations and *clearly established* conflict in the purposes of regulations are acceptable state control tests because these are both necessary and adequate grounds for preserving state interests.

Treating conflict between state and municipal regulations as the basis for superseding municipal measures bears a close resemblance to state preemption of municipal regulations. But such conflict is distinguishable from both state denial of municipal power and its preemption of municipal regulations. Unlike denial or preemption, a conflict test, when properly applied, provides significant political restraint upon legislative control. It also has a limiting effect upon judicial discretion. A conflict test involves the adoption of state regulations which directly affect state citizens in general and requires to a greater degree an analysis of relatively concrete facts.

Such conflict provides an irreducible minimum of protection in maintaining the superiority of state interests. It is, then, a necessary element in state/local relations. Yet if states are to avoid undue curtailment of municipal immunity by either legislative action or judicial decision, this conflict is also the maximum of protection states should afford superior state interests. The discussion of conflict in this Article includes a consideration of direct conflict, i.e., "head-on collision." It also explores the dangers to municipal power that states present if they adopt supersession based on implied conflict[6] and the gain in flexibility in protecting state interests that states' acceptance of conflict in purpose affords.[7]

The same theme of providing and protecting municipal power while insuring the effectiveness of state government runs through the consideration of state/local fiscal relations. The discussion in this Article on that topic concludes that states need to replace archaic and overly restrictive constitutional limits on municipal taxing and borrowing powers with carefully tailored provisions enabling the state legislature to prevent municipal profligacy and to rescue municipalities from fiscal distress when it occurs. States need to

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6. GEORGE D. VAUBEL, MUNICIPAL HOME RULE IN OHIO §§ 65–69 (1978); Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 748–49 (1959); Recent Case, 14 U. CHI. L. REV. 297 (1947).

7. WILLIAM D. VALENTE & DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW 162–64 (4th ed. 1992).

reject, as in the regulatory field, legislative authority to deny municipal fiscal powers and to preempt expressly municipal taxes. Importantly, states should also insure that courts are prevented from raising an implication of preemption.

II. CONFLICT

A. Significance and Limitations

No doubt a legislature wishes to preclude municipalities from supplanting state regulations when local regulations are in conflict. But conflict as used by most courts is more clearly a matter of incompatibility than a matter of legislative intent, a matter of regulation and not of power manipulation. It stems simply from state superiority over municipalities.

Conflict, when accepted in this light, should apply wherever state interests are superior, regardless of what form of home rule the state has adopted. As stressed here, the most notable characteristic of conflict is that, while it is a device for state control of municipal power, it serves to curtail both legislative and judicial actions as well. Neither simple legislative intention to preclude municipal regulation nor judicial suppositions of such intention are determinative.

In the latter regard, although courts are deeply involved in identifying a true conflict of interest, the factual basis giving rise to a potential conflict channels the interpretative process. Unlike a determination of state or local interest, policy considerations are not controlling in a conflict case.[8] Thus, if strictly applied, a conflict concept can strongly aid in guiding the form of state/local relations away from dependency upon legislative or judicial determination of municipal power to a clearer and sounder accommodation of interests.

In the development of state/local relations in the United States, state superiority over municipalities has never been doubted. State superiority has its origins in John Dillon's pre-home rule theory that local governments are creatures of the state.[9] Insofar as states have

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8. Richard B. Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 KAN. L. REV. 367, 383 (1964).

9. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 55, 237 (5th ed. 1911).

not granted municipalities complete autonomy,[10] and none has,[11] state superiority continues under all the various forms of municipal home rule. As creatures of the state, municipalities could not exceed the grant of authority made to them by the state. But courts have also held that implicit in every grant of municipal authority was the limitation that municipalities not use the authority granted to conflict with the state's exercise of power.[12]

With traditional home rule, states curtailed state superiority by providing vaguely for limited municipal immunity from state control. Yet states retained legislative superiority in sharing power with municipalities over matters of state concern. Explicit constitutional provisions either prohibited "conflict" with state laws[13] or used similar language that precluded municipal exercise of authority that was "inconsistent" with the laws of the state.[14]

In more recent years, model reform constitutional proposals of the National Municipal League and the National League of Cities (formerly the American Municipal Association) reserve broad control authority in the state legislature over shared power by providing for the legislature to "limit" municipal power or to effect "denial" of this power.[15] This state control likely envisions invalidating conflicting

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10. VALENTE & MCCARTHY, *supra* note 7, at 2–3. Historically, even partial immunity from state control under limiting constitutional home rule provisions was only achieved in Missouri by court interpretation and in California by further constitutional amendment. Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269, 284–85 (1968).

11. *See generally* FRANK I. MICHELMAN & TERRANCE SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 351 (1970).

12. *E.g.*, City of Canton v. Nist, 9 Ohio St. 439, 442 (1859).

13. Vaubel, *supra* note 1, at 34 n.141.

14. TEX. CONST. art. XI, § 5 (amended 1991). Iowa and Massachusetts have similar yet more modern provisions. *See* IOWA CONST. art. III, § 38A; MASS. CONST. art. II, § 6.

15. MODEL STATE CONSTITUTION § 8.02 (National Mun. League, 6th ed. 1963, rev. 1968); MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (American Mun. Ass'n 1953) ("[c]harter provisions with respect to municipal executive, legislative and administrative structure, organization, personnel and procedure are of superior authority to statute" subject to certain requirements). *See infra* apps. I, II. From the scope of the literal grant of municipal power, the following states more clearly fit the National League of Cities formula: Delaware, DEL. CODE ANN. tit. 22, § 802 (1987); Maine, ME. CONST. art. VIII, pt. 2, § 1 (as a consequence of broadening legislation); ME. REV. STAT. ANN. tit. 30A, § 3001 (Supp. 1993); Massachusetts, MASS. CONST. art. II, § 6; Missouri, MO. CONST. art. VI, § 19(a); Texas, TEX. CONST. art. XI, § 5. However, only Massachusetts adopts limits on state control authority. *See* Vaubel, *supra* note 2, at 859 n.63. The following states fit the National Municipal League pattern in the grant of authority and, except for South Dakota, in the extent of state control authority: Alaska, ALASKA CONST.

municipal regulations,[16] although the provisions do not make this meaning entirely clear.[17]

Courts have narrowly described conflict as "opposition," "collision,"[18] and "head-on clash."[19] Conflict exists when an ordinance "permits or licenses that which the statute forbids and prohibits, and vice versa"[20] or where "to obey or carry out one would either be to disobey the other, or tend to defeat the purpose of the other."[21] Thus, there is conflict when two regulations cannot stand together. The thrust of most of these attempts at definition is, clearly, literal incompatibility between state and local regulation. One author calls this quantitative conflict, i.e., conflict in "the actual terms and coverage of" related state and local measures.[22]

Clearly, conflict, unlike preemption, is not based simply upon legislative intent to preclude regulation. Because it is based on incompatibility, conflict is the extreme case beyond which courts

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art. X, § 11; Florida, FLA. CONST. art. VIII, § 2(b); FLA. STAT. § 166.021 (1993); Montana, MONT. CONST. art. XI, § 6; New Mexico, N.M. CONST. art. X, § 6D; Pennsylvania, PA. CONST. art. IX, § 2; South Dakota, S.D. CONST. art. IX, § 2.

Hybrid provisions adopted by some states include the model provisions' reservation of broad control authority while making vague grants of municipal power to initiate action in traditional form. *See* HAW. CONST. art. VIII, § 2; IOWA CONST. art. III, § 38A; LA. CONST. art. VI, § 5(E); IND. CODE ANN. § 36-1-3-4 (Burns 1993). Iowa and Indiana have adopted the National Municipal League approach by providing for no municipal immunity from state power, but Hawaii and Louisiana provide for an area of immunity from state control authority. *See* HAW. CONST. art. VIII, § 2 ("executive, legislative and administrative structure and organization shall be superior to statutory provisions"); LA. CONST. art. VI, § 6 ("structure and organization or . . . distributions . . . of powers").

16. *See generally* Christopher C. Schwabacher, *The Seamless Web*, 44 N.D. L. REV. 370, 385–87 (1968).

17. Gerald L. Sharp, *Home Rule in Alaska: A Clash Between Constitution and the Court*, 3 UCLA-ALASKA L. REV. 1, 18 (1973); Kenneth E. Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 14 n.45 (1975) (stating that it is too simplistic to accept all municipal regulations that have not been forbidden).

18. Village of Struthers v. Sokol, 140 N.E. 519, 521 (Ohio 1923), *reconfirmed*, City of Niles v. Howard, 466 N.E.2d 539 (Ohio 1984).

19. Jefferson B. Fordham & Joe F. Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18, 26 (1948).

20. *Sokol*, 140 N.E. at 520.

21. Dyson, *supra* note 8, at 381. See Millard H. Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEX. L. REV. 682, 693 (1959), for a definition of conflict. Iowa defines constitutional inconsistency as "irreconcilable." IOWA CODE ANN. § 364.2(3) (West 1976).

22. VALENTE & MCCARTHY, *supra* note 7, at 163; *see* J. Scott Smith, Comment, *State and Local Legislative Powers: An Analysis of the Conflict and Preemption Doctrines in Maryland*, 8 U. BALT. L. REV. 300, 308 (1979).

cannot sustain municipal ordinances without sacrificing state superiority in the exercise of shared power.[23] Thus, conflict is part of the determination of state superiority and is necessary to maintain state superiority. In turn, within the framework of state superiority, conflict is an approach to state/local relations that protects municipal interests from undue state intrusion. As a consequence, states must not only concede that conflict, when properly found, is a viable state control device within this framework, but they should promote it as a mutually beneficial one as well.[24]

In spite of the liberal protection that applying "conflict" to state/local relations affords municipal authority, it is not a balancing approach. It does not take into consideration, at least not directly, the value or weight that is to be given to competing interests.[25] Once a court determines that a matter is within the area of shared power, the fact that an ordinance conflicts with a state statute or regulation is enough, regardless of relative values, to invalidate the ordinance. Otherwise, if the ordinance is not in conflict, it is valid.

1. Quantitative Conflict

Quantitative conflict is literal conflict.[26] It encompasses the permit-forbid test, i.e., a municipal regulation is explicitly in conflict

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23. Judicial protection of state interests cannot be limited to express preemption. Note, *supra* note 6, at 747.

24. Courts often support the conflict approach by liberally construing statutes in favor of municipal home rule and resolving doubts in favor of municipalities. Thomas N. Sterchi, Comment, *State-Local Conflicts Under the New Missouri Home Rule Amendment*, 37 MO. L. REV. 677, 683, 690 (1972). Courts endeavor to reconcile state statutes and municipal ordinances. *See* City of Houston v. Reyes, 527 S.W.2d 489 (Tex. Civ. App. 1975); Wagstaff v. City of Groves, 419 S.W.2d 441 (Tex. Civ. App. 1967); Michael K. Euston & Steven B. Johnson, *The Status of Municipal Home Rule Charters in Missouri: Analysis of the Effect of the 1971 Constitutional Amendment*, 30 MO. B.J. 281, 291 (1974). Courts will find conflict only after applying a "reasonable construction" to avoid it. *See* City of Beaumont v. Jones, 560 S.W.2d 710 (Tex. Civ. App. 1977) (construing statutory permission to add to existing cemeteries to apply only in absence of municipal prohibition).

25. Compare Note, *Application of Local Zoning Ordinances to State-Controlled Public Utilities and Licensees: A Study in Preemption*, 1965 WASH. U. L.Q. 195, 214, 218–19, which suggests that there be a balancing of interests where municipalities attempt to preclude state liquor permit-holders from designated zoning districts, in the absence of a true conflict. A balancing approach is suggested because state actions are based on limiting the number of permits in an area and the municipal objective is land use management. *See infra* text accompanying notes 84–87.

26. *See supra* note 22 and accompanying text.

if it permits what a state regulation forbids, or vice versa.[27] The invalidation of an ordinance in quantitative conflict with a state statute or regulation is based on the disruption the ordinance causes to the state regulatory scheme developed in furtherance of state concerns. Strictly applying conflict, courts should not invalidate municipal ordinances where they are on the same subject,[28] are merely parallel, are identical to, or are more[29] or less strict than state statutes or regulations. Nor should courts find municipal ordinances in conflict where they impose the same, different, lesser,[30] or greater penalties[31] than their statutory counterparts.

With respect to penalty provisions, there literally is nothing being permitted; both governments are only penalizing that which they have forbidden.[32] However, in spite of their logic, courts do not by any means uniformly reach these conclusions. Rather, a minority of states[33] invalidate ordinances that are identical to statutes,[34] and

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27. *E.g.*, Rothville Grosvenor, Inc. v. Montgomery County, 422 A.2d 353 (Md. 1980) (finding that county's two-year prohibition on development, which state expressly permits, constitutes a conflict).

28. *See* City of Cleveland v. Raffa, 235 N.E.2d 138, 141 (Ohio), *cert. denied*, 393 U.S. 927 (1968); *Ex parte* Hoffman, 99 P. 517 (Cal. 1909), *overruled in part by In re* Lane, 372 P.2d 897 (Cal. 1962).

29. *See* Junction City v. Lee, 532 P.2d 1292 (Kan. 1975).

30. John P. Ronchetto & Wayne Woodmansee, *Home Rule in Oregon*, 18 OR. L. REV. 216, 227 (1939). There are contrary holdings, *e.g.*, Davis v. City of Denver, 342 P.2d 674 (Colo. 1959), *noted in* Morton E. Schneider, *Municipal Corporations — The Power of a Home Rule Municipality to Pass an Ordinance on a State-wide Subject*, 6 WAYNE L. REV. 266 (1966).

31. Village of Struthers v. Sokol, 140 N.E. 519 (Ohio 1923), *reconfirmed*, City of Niles v. Howard, 466 N.E.2d 539 (Ohio 1984); Note, *The Concurrent State and Local Regulation of Marijuana: The Validity of the Ann Arbor Marijuana Ordinance*, 71 MICH. L. REV. 400, 414 (1972). *Contra* George R. Lawrence & Maurice E. Cook, Note, *Pre-Emption by State over Penal Ordinances*, 38 N.D. L. REV. 509, 513 (1962).

The Oregon Supreme Court, because of the specific language of the Oregon Constitution, has applied a stricter test for conflict than that established in civil cases with respect to criminal statutes. The stricter test includes the presumption that the legislature intended to displace conflicting municipal ordinances absent clear evidence of a contrary intent. This resulted in the invalidation of a municipal minimum penalty which was harsher than that imposed by statute. City of Portland v. Dollarhide, 714 P.2d 220 (Or. 1986). *But see* City of Portland v. Jackson, 850 P.2d 1093 (Or. 1993) (holding mere repeal of statutory prohibition alone is not sufficient evidence of legislative intent to permit).

32. Conflict "is not determined by the penalties prescribed." *In re* Calhoun, 94 N.E.2d 388, 389 (Ohio Ct. App. 1949).

33. *See* 1 CHESTER J. ANTIEAU, LOCAL GOVERNMENT LAW § 5.40 (1993); Note, *supra* note 6.

34. *See In re* Portnoy, 131 P.2d 1 (Cal. 1942). The California rule is limited to pun-

there is considerable support for invalidating less restrictive municipal regulations.

Certainly, the enforcement of municipal regulations which are identical to state restrictions does not interfere with state regulatory interests.[35] This should adequately answer questions raised over the validity of the municipal measures.[36] From a municipality's standpoint, an identical ordinance is helpful because municipal officials are likely to enforce municipal regulations more readily than state statutes.[37] Perhaps more significantly, the enforcement of municipal ordinances identical to state provisions helps to preserve the permit-forbid test for general application where preservation of municipal autonomy might be considerably more important.

It is difficult to justify the supposition, even when codified,[38] that municipal regulations less restrictive than state measures, or those with lesser or different penalties, interfere with state regula-

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ishment of "precisely" the same acts so that prosecution under one would bar, as a consequence of the protection against double jeopardy, prosecution under the other and thus would supplant state jurisdiction. *See Ex parte* Hoffman, 99 P. 517 (Cal. 1909), *overruled in part by In re* Lane, 372 P.2d 897 (Cal. 1962); *In re* Sic, 14 P. 405 (Cal. 1887); People v. Stone, 236 Cal. Rptr. 140 (App. Dep't Super. Ct. 1987); Leon T. David, *California Cities and the Constitution of 1879: General Laws and Municipal Affairs*, 7 HASTINGS CONST. L.Q. 643, 650 (1980); John C. Peppin, *Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution*, 32 CAL. L. REV. 341, 380–81 (1944). Slight differences in the ordinance will preserve its validity. *Ex parte* Simmons, 250 P. 684 (Cal. 1926); *Ex parte* Borah, 208 P.2d 405 (Cal. Ct. App. 1949) (noting ordinance forbade use of abusive language over telephone while state forbade it in presence of women and children); *Ex parte* Snowden, 107 P. 724 (Cal. Ct. App. 1910) (noting ordinance imposed penalty for exceeding 30 miles-per-hour while statute did not). But courts have not limited the California approach strictly to penal ordinances, thus making it a rule of conflict in jurisdictions. Coleman Blease, *Civil Liberties and the California Law of Preemption*, 17 HASTINGS L.J. 517, 524 (1960). Ordinances which parallel statutory provisions have been found not to conflict in Kansas, David E. Pierce, *Home Rule and Municipal Environmental Regulation in Kansas*, 26 U. KAN. L. REV. 535, 537 (1978), or in Oregon, Ronchetto & Woodmansee, *supra* note 30, at 227.

35. The issue of double jeopardy is the exception to this rule. Barkley Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 KAN. L. REV. 631, 672–73 (1972); *see infra* text accompanying notes 41–45.

36. *See* MICHELMAN & SANDALOW, *supra* note 11, at 396–97.

37. Sterchi, *supra* note 24, at 689; Note, *supra* note 6.

38. See MONT. CODE ANN. § 7-1-113(2) (1993), which bars municipal measures inconsistent with state statutes or regulations and defines inconsistency as an exercise of power establishing standards which are less stringent than those imposed by the state. *See also* IOWA CODE ANN. § 364.3(3) (West 1976); S.D. CODIFIED LAWS ANN. § 6-12-5 (1993). For a similar bar with respect to the location of adult entertainment establishments in municipalities with populations under 50,000, see DEL. CODE ANN. tit. 22, § 110 (1987).

tions.[39] Unless there is something to prevent enforcement of both regulations, there simply is no interference. Enforcing the municipal regulation does not detract from the state's ability to enforce its more restrictive regulation or to impose its penalties.[40] In the modern setting, however, a qualifying consideration intrudes.

It is clear from the United States Supreme Court decision in *Waller v. Florida* that two prosecutions for the violation of state and municipal regulations raises problems of double jeopardy.[41] However, double jeopardy only exists with respect to the double prosecution of precisely the same criminal offense.[42] It is therefore an appropriate consideration when dealing with identical municipal regulations. It hardly justifies a state's invalidating all municipal regulations less restrictive (or more restrictive) than those imposed by the state.

Moreover, a state need not lose control of the prosecution by a municipality's acting first. Rather, where the state considers its control to be significant, it can reach practical accommodations with local prosecutors,[43] permitting state intervention in municipal proceedings.[44]

Courts generally agree that municipal regulations more restrictive than state regulations are not in conflict with the state provisions.[45] Any other result would severely restrict municipal autono

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39. *See* Clark, *supra* note 35, at 670; *cf.* Note, *supra* note 6, at 748 (supporting invalidation of municipal measure on grounds that it reduces danger of misinterpretation).

40. *See generally* MICHELMAN & SANDALOW, *supra* note 11, at 397. It is difficult to see how, for example, a less restrictive municipal speed limit could be given the effect of recognizing greater speed as lawful and thus thwart state policy. JEFFERSON B. FORDHAM, LOCAL GOVERNMENT LAW 90 (2d rev. ed. 1986).

41. Waller v. Florida, 397 U.S. 387 (1970). Some courts, like those in California and Michigan, had reached this result earlier. *E.g.*, *In re* Sic, 14 P. 405 (Cal. 1887); Note, *supra* note 31, at 422.

42. *See* State v. Foy, 401 So. 2d 948 (La. 1981), *noted in* Kenneth M. Murchison, Developments in the Law, 43 LA. L. REV. 461 (1982); *cf. supra* note 34.

43. Note, *supra* note 31, at 425. One author suggests that Colorado courts in matters of mixed interest would find the municipal penalty invalid if less severe than the state's, either because of state preemption or lack of state consent; if more severe, either could prosecute. Howard C. Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321, 345 (1964).

44. Note, *supra* note 6, at 748.

45. *See* IOWA CODE ANN. § 364.3(3) (West 1976); S.D. CODIFIED LAWS ANN. § 6-12-5 (1993); *Ex parte* Hoffman, 99 P. 517 (Cal. 1909), *overruled in part by In re* Lane, 372 P.2d 897 (Cal. 1962); Pierce, *supra* note 34, at 538; Sam F. Scheidler, *Implementation of*

my with respect to police power or functional matters. Municipal authority to enact identical or less restrictive regulations than the state is not of significant aid in adapting a scheme of regulations to meet local needs. However, authority to impose regulations which local citizens deem necessary where there are no state regulations, or where state regulations are inadequate, is a different matter.[46] After all, variety of regulation is the very hallmark of home rule.

Regardless of the interests of municipal citizens and the fact that there is no literal conflict between state regulations and stricter municipal provisions, the superiority of state interests demands that courts invalidate municipal regulations that frustrate state interests. This occurs where the state legislature intends for its regulation to be exclusive. Interpretive difficulties in ascertaining intent immediately arise. The legislature may express its intention, or courts can infer it from the circumstances.

These are the bases for expansive state control evident in express or implied preemption, matters already discussed in an earlier article.[47] If the state legislature's regulatory purpose or objective can only be achieved by precluding additional regulations, qualitative conflict results — a subject for examination later in this Article. If, in order to exclude further municipal regulations, courts simply resort to the theory that what the state has not forbidden is permitted, they are finding implied conflict.

2. Implied Conflict

Conflict based upon the proposition that what the state does not forbid it permits can be disastrous to municipal interests. It overprotects state interests and increases the uncertainties of court discretion. Certainly, if courts endorsed implied conflict generally, there would be no place for municipal regulations that were stricter than those imposed by the state.[48] Even a limited application of implied

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Constitutional Home Rule in Iowa, 22 DRAKE L. REV. 294, 311–13 (1973); Philip R. Cockerille, Note, *Defining "Municipal or Internal Affairs:" The Limits of Power for Indiana Cities*, 49 IND. L.J. 482, 493 (1974); Note, *supra* note 6, at 749; Sterchi, *supra* note 24, at 690.

46. *See* State *ex rel*. Haley v. City of Troutdale, 558 P.2d 1255, 1258 (Or. Ct. App.) (Fort, J., dissenting), *rev'd*, 576 P.2d 1238 (Or. 1977); MICHELMAN & SANDALOW, *supra* note 11, at 397; Note, *supra* note 6, at 749; Recent Case, *supra* note 6, at 303.

47. *See* Vaubel, *supra* note 3.

48. Fordham & Asher, *supra* note 19, at 50.

conflict would create serious interpretive problems stemming from the need to draw distinctions between acceptable and unacceptable implications.[49]

Significantly, as one observer has pointed out, implied conflict is analytically unsound.[50] In his view, the protection of state interests is not really involved because the legislature, by regulating, does not intend to grant a privilege against further regulation.[51] Rather, prohibitions tend to invite supplementary regulations.[52] As a consequence, most commentators object to conflict by implication.[53] It relies, like implied preemption, largely upon judicial judgment. It is, then, in essence an exercise of judicially determined home rule.

Fortunately, courts do not often find implied conflict.[54] Rather, they limit their finding that a municipal regulation is invalid to situations where state interests are clearly violated. This occurs when circumstances surrounding statutory provisions and the purpose of the statute make clear that the legislature intended to permit that which was not forbidden.[55] Where permissive intent is clear, courts should give it effect.

It is not an easy task to determine legislative intent: How clearly must the legislature express its permission? When the legis-

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49. MICHELMAN & SANDALOW, *supra* note 11, at 397 (raising question of whether implication of state permission from regulations of identical conduct is more plausible than merely in regulation of related conduct).

50. Recent Case, *supra* note 6, at 300.

51. *Id*.

52. Michael H. Feiler, *Conflict Between State and Local Enactments — The Doctrine of Implied Preemption*, 2 URB. LAW. 398, 402 (1970).

53. *See* Clark, *supra* note 35; Fordham & Asher, *supra* note 19, at 50; Note, *supra* note 6, at 748–49; Smith, *supra* note 22, at 310–11 (result reached with respect to county home rule in Maryland); Recent Case, *supra* note 6, at 300. For a contrary suggestion, see Richard N. Janney, Comment, *Home Rule Charters in Nebraska*, 5 CREIGHTON L. REV. 98, 107 n.47 (1971).

54. For example, implied conflict was rejected in City of Baltimore v. Sitnick, 255 A.2d 376 (Md. 1969). *See* State *ex rel.* Schellberg v. Everett Dist. Justice Court, 594 P.2d 448 (Wash. 1979) (en banc) (holding that legislative intent must be clearly and expressly stated).

55. This conclusion is more readily reached if there is positive regulation, such as the creation of centralized control by vesting authority in a state agency, than it would be from criminal law prohibitions. Feiler, *supra* note 52, at 403. Implication is derived from the language used and should not be based on policy considerations of what state/local relations should be. *Id*. Others would limit implication to situations where there is no other reasonable explanation, Dyson, *supra* note 8, at 383–84, or where it is necessary as a removal of a previous prohibition, John J. Duffey, *Non-Charter Municipalities: Local Self-Government*, 21 OHIO ST. L.J. 304, 328 n.65 (1961).

lature intends to prohibit, it usually expresses itself in such a way that there is little need for interpretation.[56] Regulatory bodies tend to express themselves most often in terms of limitation. They usually define regulations in such terms. Police power, the power most commonly exercised through regulation, has as its objective securing the general welfare "by restraint and compulsion."[57] Expressing permission is another matter.[58]

Moreover, even when permission is clear, one can contend that a grant of power or permission is not a regulation at all, at least not unless it has negative effect. For example, permissive provisions are true regulations only where they are necessary to remove a previous prohibition imposed by common law or where they are accompanied by newly imposed prohibitions, as in the imposition of licensing requirements.[59]

3. Licensing

Licensing as an example of legislative permission still presents troublesome interpretive problems. Both state and municipal governments commonly require that persons or entities obtain a license in order to pursue a profession, engage in an occupation, conduct a business, or undertake a wide variety of other activities.[60] A license once issued is a permit to act.[61] Although licensing requirements

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56. *See generally* Feiler, *supra* note 52, at 401.

57. Fitzgerald v. City of Cleveland, 103 N.E. 512, 517 (Ohio 1913) (quoting ERNST FREUND, THE POLICE POWER § 3 (1904)).

58. *Cf.* Retail Credit Co. v. Dade County, 393 F. Supp. 577 (S.D. Fla. 1975) (determining legislative history suggested legislative intent not to subject sources of information in consumer report to disclosure as demanded by ordinance).

59. VAUBEL, *supra* note 6, § 84. Somewhere between express permission and implied permission is a state regulatory measure containing an express exception. Legislative intent to permit the excepted activity, or its need to do so in order to achieve its objective, ought to be determinative. *Id.* § 62. The view has been expressed that a state exemption is not a regulation, and therefore, the matter is open to municipal regulation. City of Baltimore v. Sitnick, 255 A.2d 376, 385–86 (Md. 1969), *noted in* Smith, *supra* note 22, at 310–11; *accord* Mr. Fireworks, Inc. v. City of Dayton, 548 N.E.2d 984 (Ohio Ct. App. 1988); People v. Commons, 148 P.2d 724 (Cal. App. Dep't Super. Ct. 1944).

60. 3 ANTIEAU, *supra* note 33, §§ 24.00, 24.02; VALENTE & MCCARTHY, *supra* note 7, at 446.

61. Mayor of Forest Heights v. Frank, 435 A.2d 425 (Md. 1981) (holding that municipal prohibition of county-licensed activity constitutes a conflict); *cf.* Tipco Corp. v. City of Billings, 642 P.2d 1074 (Mont. 1982) (holding that licensing statute does not legalize an activity otherwise prohibited).

raise a number of legal issues,[62] the most troublesome problems are posed by a duplication of state and local requirements or a municipality regulating a matter licensed by the state.

Considering the second problem first, courts usually find that the mere fact that the state licenses some activity does not preclude all further municipal regulation of the licensee or of the matter involved.[63] Courts readily accept relatively dissimilar provisions as not conflicting.[64] Consequently, conflict requires at least some coincidence of subject matter and state and local purposes. There is a coincidence when the state establishes qualifications for obtaining a license and a municipality imposes its own. The municipal requirement cannot contradict state-imposed requirements because a permit-forbid conflict would then result.

Whether a municipality could add to state qualifications is a more difficult problem. Commentators suggest that neither the state's requiring affirmative action from its licensee nor its imposing license requirements automatically excludes additional municipal requirements.[65] However, at other times, courts treat state licensing requirements as exclusive.[66] Ultimately, the solution to licensing problems must come from applying the broad proposition that the legislature must intend to preclude further qualifications and that it must clearly need to do so in order to accomplish its regulatory purpose.

Double licensing — the imposition of two licensing requirements — is different (in theory at least) from a municipality's regulation of state licensees. A license, by permitting an activity upon certain conditions, expressly or impliedly prohibits that activity if those conditions are not met. Therefore, theoretically, double-licensing prohibits a licensee of one government from acting unless he gets an

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62. Examples include delegation of authority, 3 ANTIEAU, *supra* note 33, §§ 24.09–.11; the discretion of issuing officers; interference with First Amendment liberties, *id*. § 24.06; and distinctions between regulatory license fees and revenue raising taxes, *id*. § 24.24.

63. For a discussion of complementary regulations, see 1 ANTIEAU, *supra* note 33, § 5.38.

64. For example, a state-issued license to engage in the occupation of auctioneering on the basis of qualifications met and municipally imposed limitations upon auctioning jewelry at night, as an anti-fraud measure, would not conflict. Holsman v. Thomas, 147 N.E. 750 (Ohio 1925).

65. MICHELMAN & SANDALOW, *supra* note 11, at 398–99.

66. Feiler, *supra* note 52, at 402.

additional permit or license. This is a classic permit-forbid conflict.[67] As a practical matter, however, the issue of conflict might not be so simple. Rather, it ought to turn on whether the municipal provisions suppress a state interest. This would ordinarily be true, in the absence of conflicting qualification requirements, only if the process of obtaining the municipal license was accompanied by unacceptable delays or other onerous circumstances.

4. Qualitative Conflict

Conflict is the cornerstone of state/municipal relations in the sharing of power. It provides clarity and predictability to those relations when applied with literal, quantitative, permit-forbid standards. But these advantages come at the risk of too much rigidity. Forcing the legislature to always speak in terms of permission or prohibition is not realistic.

When the legislature seeks important objectives or purposes that would be impeded by further regulation, state interests in promoting these purposes must be protected. Accommodating these state interests requires consideration of qualitative conflict: the adverse functional impact that municipal regulations have on the operation and purpose of the state's regulation.[68] Thus, there is a conflict in regulations where "to obey or carry out one would either be to disobey the other, or tend to defeat the *purpose* of the other."[69]

Qualitative conflict extends literal quantitative conflict, but only to a limited degree. It should not include simple state exclusion of municipal regulations. Although this is easily stated, applying qualitative conflict poses obvious risks to home rule.[70] Determining the

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67. Anderson v. Brown, 233 N.E.2d 584 (Ohio 1968); Auxter v. City of Toledo, 183 N.E.2d 920 (Ohio 1962); *see* Ohio Ass'n of Private Detective Agencies, Ltd. v. City of North Olmsted, 602 N.E.2d 1147 (Ohio 1992).

68. VALENTE & MCCARTHY, *supra* note 7, at 163; *see* Blease, *supra* note 34, at 531; Ruud, *supra* note 21, at 697 (interference with legislative scheme or plan); Smith, *supra* note 22, at 308.

69. Dyson, *supra* note 8, at 381 (emphasis added) (proposing draft constitutional amendment); *see* School Comm. v. Town of York, 626 A.2d 935 (Me. 1993); *cf.* ME. REV. STAT. ANN. tit. 30A, § 3001 (West Supp. 1993) ("The [l]egislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.").

70. Sharp, *supra* note 17, at 31. Sharp stresses the dangers of judicial erosion of home rule through the utilization of less than the strictest conflict even in reform states. *Id.*

frustration of a state purpose can reintroduce interpretative problems nearly as troublesome as those involved in determining legislative intent to preclude and preempt municipal regulations. Consequently, the legislature must at least make its regulatory purpose clear.[71] That would help ensure that reconciliation of state and local interests would not face the judicial erosion of local interests[72] which the rejection of implied preemption and implied conflict attempt to avoid.

Even more fundamentally, legislative purpose must be clear so that judicial scrutiny can uncover the overprotection of state interests that results from legislative manipulation of municipal power through its denial or preemption. Thus, even when made clear, the legislative purpose must be tested. Courts cannot merely assume that the legislative purpose will be impeded by a municipal regulation, nor can they simply defer to legislative judgment that it will. Rather, home rule should rest solidly on furthering the goal of protecting municipal power until it is clearly established that its exercise will frustrate the state's regulatory purpose.[73] Yet, it is equally evident that the superiority of state interests demands acceptance of the fact that in establishing such a frustration all risks to municipal interests cannot be removed.

Limiting conflict of purpose to situations in which the legislature clearly expressed itself is not new to the consideration of intergovernmental relations.[74] It is of particular importance both where the establishment of legislative intent is important and where the determination of whether that intent conforms to the constitutional

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71. Joanna B. Jerison, *Home Rule in Massachusetts*, 67 MASS. L. REV. 51, 59 (1982). Jerison cautions that courts should retain the power to resolve unforeseen conflicts for overriding reasons. *Id*.

72. Vaubel, *supra* note 3, at 686–87. This view is not subscribed to by Coleman Blease. *See* Blease, *supra* note 34. However, California decisions amply illustrate the deteriorating effects that the departure from requiring a clear legislative purpose has upon home rule through the endorsement of "implied legislative purpose" as a restraint upon municipal policy making. *See* Vaubel, *supra* note 3, at 696–703.

73. Vanlandingham, *supra* note 17, at 31.

74. The need for a clearly stated purpose has been recognized by the United States Supreme Court with respect to congressional abrogation of the states' Eleventh Amendment immunity from suit. Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare, 411 U.S. 279 (1973). Observers suggest that Congress be required to make its purpose clear in order for the courts to find congressional preemption if the protection of state interests by Congress, as envisioned in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), is to be viable.

parameters of municipal home rule is also of concern.[75] Requiring a clear expression of legislative regulatory purpose advances a more literal interpretation of legislation than does a variety of other approaches to statutory interpretation that are currently the subject of lively debate.[76]

An expansive role for courts in the interpretative process undoubtedly has its place in modern jurisprudence. However, the history of legislative control and of judicial inroads upon municipal autonomy suggest, if they do not compel, the establishment of a policy against judicial craftsmanship in implementing the allocation of superior power between the state and municipalities.

B. Problem Areas

It is, then, of primary importance to determine legislative purpose in order to separate legislative intent to preclude or preempt municipal regulations from a purpose to control private conduct. The line between protecting local interests from power manipulation and protecting state interests in regulation should then be drawn. Discussion of several problem areas should provide further clarity.

1. Speed Regulations

A stricter municipal speed limit — one lower than that imposed by the state — is not in conflict with the state measure.[77] There is no literal conflict as each regulation is a prohibition. Nor should a court assume that the statute permits lesser speeds because it does not prohibit them. This is an unacceptable conclusion broadly based on conflict by implication.[78]

Moreover, there is no conflict in purpose in imposing different speed limits because the ostensible reason for state limits is to promote traffic safety by reducing accidents. A stricter municipal speed limit does not frustrate that state purpose.

However, if legislative purpose is to advance the flow of traffic,

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75. Disclosure of legislative purpose can help determine if a state measure is regulatory in nature or is merely a manipulation of municipal power. *See* Vaubel, *supra* note 3, at 687 & n.219.

76. *E.g.*, Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982).

77. Dyson, *supra* note 8, at 383.

78. Deviations do occur, however. *See* Schneiderman v. Sesanstein, 167 N.E. 158 (Ohio 1929).

courts should give that purpose effect when it is clearly indicated.[79] Here a legislative declaration that there should be no further regulations of speed or that speed regulations are to be uniform throughout the state raises several concerns.[80] To the extent that preemption is overprotective of state needs and is, therefore, unduly harmful to local autonomy,[81] these terms should simply be rejected as being beyond legislative power. But if treated as legislative statements that provide information and direction, they suggest that the legislature may have other purposes than simply requiring the reduction of speed. One purpose might be to prevent the slowing of traffic to such a degree that its flow is impeded. Or, it may be that uniform regulations are necessary to prevent confusion among intercity travelers.[82]

If the legislature had either of these intentions, preemptive statutory language would aid courts in discovering them. To the extent that it is necessary to bar municipal regulations in order to prevent their impeding or frustrating these purposes, the municipal regulations fail as being in conflict with state law.

2. Minimum Wage Regulations

Minimum wage laws have also provided troublesome conflict problems. Insofar as state and municipal purposes in enacting these measures are the same — protection of employees from inadequate wages — municipal provisions do not disrupt state interests. Consequently, courts should find no conflict, even if the municipal standard is higher than the state's.[83] There is no literal conflict be

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79. Dyson, *supra* note 8, at 383. Of course, the opposite is true where the state authorizes reasonable variation. *See* State *ex rel*. Indiana State Bd. of Accounts v. Town of Roseland, 383 N.E.2d 1076 (Ind. Ct. App. 1978).

80. A uniformity requirement, OHIO REV. CODE ANN. § 4511.06 (Anderson 1990), originally enacted as part of the Uniform Motor Vehicles Act, withdrawn in 1943, was found not to be a "general law" with which constitutional provisions require municipalities not to conflict. City of Columbus v. Molt, 304 N.E.2d 245 (Ohio 1973), *noted in* Ronald L. Haldy, City of Columbus v. Molt: *What Is a General Law?*, 1 OHIO N.U. L. REV. 553 (1974). *But cf.* State *ex rel.* Ohio Motorists Ass'n v. Masten, 456 N.E.2d 567 (Ohio Ct. App. 1982); CAL. VEH. CODE § 21 (West 1987). For further discussion, see Vaubel, *supra* note 3, at 690, 696–97.

81. *See* Vaubel, *supra* note 3, at 678–82.

82. This purpose might be achieved more directly by notice requirements. *See id*. at 688.

83. City of Baltimore v. Sitnick, 255 A.2d 376 (Md. 1969); Smith, *supra* note 22, at

tween these measures and, as postulated, there is no conflict in purpose. But if statutory statements or preemptive language, supported by other evidence, provided that the state's objective, for example, is to prevent increased unemployment caused by imposing a higher minimum wage, a higher municipal minimum would be invalid as frustrating this purpose.

3. State Licensed Facilities

Courts have closely scrutinized municipal regulations imposed upon state licensees for conflict, with varying results.[84] In the absence of explicit statutory determination of priorities, some courts find that holders of state liquor licenses are exempt from municipal zoning restrictions.[85] Courts base this finding upon the comprehensive nature of state liquor regulations and the need to keep municipalities from interfering with them. But as viewed by one commentator, state licensing of retail liquor outlets and local zoning regulations are not actually in conflict.[86]

The commentator reached this conclusion because the interests of the state and the municipality are different, and consequently, each employs different criteria for taking action. A state agency seldom issues a license because of the location of the outlet, a consideration of utmost importance in a municipal zoning determination. Rather, the state is usually more concerned with the number of licenses issued and the qualifications and character of applicants. Thus, in this view, courts should narrow the broad term "permit" encompassed in the issuance of a state license to reflect more clearly what the state's interests actually are.[87]

Other observers contend that courts should balance local zoning interests and those of the state licensee, rather than resolve priority on the basis of conflict. This approach seeks to avoid the otherwise

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309–10; *cf*. Wholesale Laundry Bd. of Trade v. City of New York, 189 N.E.2d 623 (N.Y. 1963), *discussed in* Frank J. Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. URB. L. 335, 344 (1971); J.D. Hyman, *Home Rule in New York 1941–1965, Retrospect and Prospect*, 15 BUFF. L. REV. 335, 354–60 (1965).

84. DANIEL R. MANDELKER, LAND USE LAW § 4.36 (1982).

85. *Id*.; *see* Annotation, *Zoning Regulations in Respect of Intoxicating Liquors*, 9 A.L.R. 2d 877 (1950).

86. Note, *supra* note 25, at 214.

87. *Id*. at 219. This applies both to liquor licensees and utility permit holders. *Id*. at 218.

mechanical application of preemption.[88] Just the same, the likelihood of a court invalidating the application of municipal zoning regulations to state liquor licensees on the basis of either preemption or conflict remains strong.[89]

Courts also generally uphold state determinations when similar problems arise concerning environmentally related facilities, the location of privately owned public utilities, and the location of private care centers. These decisions are acceptable even in the absence of explicit legislative statement,[90] provided the facts clearly disclose a substantial interference with state concerns. These concerns include control of the environment,[91] providing utility servic

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88. *See* Vaubel, *supra* note 3, at 684–86. For a view that would go even further and suggest a balancing of interests even where there is a conflict with state efforts to promote competition, see Julian H. Levi et al., *Application of Municipal Ordinances to Special Purpose Districts and Regulated Industries: A Home Rule Approach*, 12 URB. L. ANN. 77, 110 (1976). Still another approach for avoiding outright legislative preemption is the suggestion that courts view municipal actions more strictly than usual. Harold H. Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 MINN. L. REV. 669, 702 (1976).

89. MANDELKER, *supra* note 84, § 4.32. However, when statutory provisions prohibit issuance of a liquor license in violation of zoning ordinances, no conflict exists. Ridgley, Inc. v. Board of Zoning Appeals, 503 N.E.2d 1036 (Ohio 1986). The legislature subsequently approved the statutes. *See* City of Westlake v. Mascot Petroleum Co., 573 N.E.2d 1068 (Ohio 1991).

90. For examples of such statements, see OHIO REV. CODE ANN. § 4905.65 (Anderson 1991) (limiting municipal regulation of high voltage lines); *id*. § 4906.13 (stating issuance of state siting commission permit for locating utility facilities precludes municipal permits).

91. Clermont Envtl. Reclamation Co. v. Wiederhold, 442 N.E.2d 1278 (Ohio 1982) (applying OHIO REV. CODE ANN. § 3734.05(E)(3) (Anderson Supp. 1993) to bar municipal permits and zoning prohibitions with respect to location of hazardous waste disposal facilities); MANDELKER, *supra* note 84, § 4.33; Barbara H. Anderson, Comment, *Municipal Home Rule in Ohio: A Mechanism for Local Regulation of Hazardous Waste Facilities*, 16 U. TOL. L. REV. 553 (1985). *But see* Fondessy Enters., Inc. v. City of Oregon, 492 N.E.2d 797 (Ohio 1986) (limiting *Clermont Envtl.* treatment of statutory prohibition to conflict approach). *See also* Desormeaux Enters., Inc. v. Village of Mermentau, 568 So. 2d 213 (La. Ct. App. 1990) (discussing state preemption of location of disposal wells); Township of Little Falls v. Bardin, 414 A.2d 559 (N.J. Super. Ct. App. Div. 1979) (discussing state preemption of location of solid waste disposal facilities); Vaubel, *supra* note 3. In a series of Illinois decisions involving non-home rule units of government, some courts found state preemption. *See* County of Kendall v. Avery Gravel Co., 463 N.E.2d 723 (Ill. 1984), *superseded by* ILL. REV. STAT. ch. 111.5, para. 1039(c) (1987); American Smelting & Refining Co. v. County of Knox, 324 N.E.2d 398 (Ill. 1974); Village of Hillside v. John Sexton Sand & Gravel Corp., 434 N.E.2d 382 (Ill. App. Ct. 1982); Union Nat'l Bank & Trust v. Board of Supervisors, 382 N.E.2d 1382 (Ill. App. Ct. 1978) (holding that state strip mining regulation evidences preemption of county regulations); County of McHenry v. Sternaman, 380 N.E.2d 540 (Ill. App. Ct. 1978). In a pre-home rule case, County of

es if municipal constraints were to force a utility to find a site for facilities which is less acceptable than a state agency-approved location,[92] or an established policy of providing treatment for patients in care centers located in residential zones.[93]

4. Building Codes — Limits of State Permission

Finally, building codes serve to illustrate several difficult problems evident in state control generally. As discussed earlier with respect to preemption,[94] courts should refrain from giving exclusionary

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DuPage v. Harris, 231 N.E.2d 195 (Ill. App. Ct. 1967), statutory recognition of county zoning power permitted the county to prohibit the extension of a nonconforming airport. But no preemption was found in cases involving home rule units. *See* County of Cook v. John Sexton Contractors Co., 389 N.E.2d 553 (Ill. 1979), *aff'd in part, rev'd in part*, Cosmopolitan Nat'l Bank v. County of Cook, 469 N.E.2d 183 (Ill. 1984); Beverly Bank v. Cook County, 510 N.E.2d 941 (Ill. App. Ct. 1987). Statutory changes now make clear that local zoning ordinances of both home rule and non-home rule municipal corporations are not preempted by the state's environmental protection act. Village of Carpentersville v. Pollution Control Bd., 553 N.E.2d 362 (Ill. 1990); *see* Palermo Land Co. v. Planning Comm'n, 561 So. 2d 482 (La. 1990) (discussing expansion of solid waste landfill when difference in state and local purposes was emphasized); Hulligan v. Columbia Township Bd. of Zoning Appeals, 392 N.E.2d 1272 (Ohio Ct. App. 1978). Although state superiority was acknowledged, consideration of local interests was required to avoid an abuse of discretion in Garden State Farms, Inc. v. Bay, 390 A.2d 1177 (N.J. 1978); *cf.* O'Connor v. City of Rockford, 288 N.E.2d 432 (Ill. 1972) (applying state EPA regulations to municipal sanitary landfill facilities and superseded non-home rule county zoning regulations), *superseded by* ILL. REV. STAT. ch. 111.5, para. 1039(c) (1987); Town of Oronoco v. City of Rochester, 197 N.W.2d 426 (Minn. 1972) (holding that municipal location of solid waste facility under state license prevailed, in balance, against township zoning interests).

92. Union Elec. Co. v. City of Crestwood, 499 S.W.2d 480 (Mo. 1973), *noted in* Patricia L. Wilson, Recent Case, 39 MO. L. REV. 658 (1974) (finding that ordinance forbidding overhead construction of high voltage electric lines was preempted by state regulation); MANDELKER, *supra* note 84, § 4.34. In Pennsylvania cases where no home rule issue was raised, it was held that a zoning ordinance requiring a building permit for railway construction was preempted. *E.g.*, Commonwealth v. Delaware & Hudson Ry., 339 A.2d 155 (Pa. Commw. Ct. 1975). Conflict between a township ordinance and a statutory allocation of zoning approval authority within the township government was found in Cohen v. Ford, 339 A.2d 175 (Pa. Commw. Ct. 1975). Pennsylvania now expressly limits zoning and planning by home rule municipalities. PA. STAT. ANN. tit. 53, § 1-302(a)(10) (Supp. 1994); *see* Harbor Carriers, Inc. v. City of Sausalito, 121 Cal. Rptr. 577 (Dist. Ct. App. 1975) (involving conflict with general laws concerning location of ferry terminal). The use of differing criteria reduces the creation of conflict. For the view that differing criteria are more likely to be used in a state utility license and zoning restraint case than in a liquor license case, see Note, *supra* note 25, at 198.

93. MANDELKER, *supra* note 84, § 4.35; *cf.* Berger v. State, 364 A.2d 993 (N.J. 1976) (concerning balancing of interests based on legislative expression of intent where municipal zoning regulations were found not to apply to state operated facility).

94. *See* Vaubel, *supra* note 3, at 691–92.

effect to language in state building regulations without supporting evidence of the state's need to preempt municipal regulations. However, much depends upon careful interpretation of the statutory language. At times, the state legislature may only intend its building regulations to protect limited state interests by setting minimum construction standards. Consequently, courts should sustain stricter municipal regulations.[95]

Still other state regulations may have a permissive meaning. Those regulations allow contractors to undertake construction anywhere in the state upon meeting stated standards. Added municipal restraints would then conflict on the classical permit-forbid basis.[96] However, as considered with respect to state licensing in general,[97] courts should not give overbroad meaning even to clear state permissive language. In interpreting the extent of the permit encompassed within the state license, courts need to establish state interests as protected by the state licensing procedures[98] in order to determine whether the municipal regulations are actually in conflict with them.

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95. State *ex rel*. Haley v. City of Troutdale, 576 P.2d 1238 (Or. 1978).

96. Courts should not accept permissive language as automatically creating a permit-forbid conflict any more readily than they accept preclusionary language as having a preemptive effect. If they do, semantics becomes all controlling. Thus, a state ought not to be able to achieve a broad preclusion of municipal regulations simply by changing its statutory language from preemption and uniformity to permission and license. In order to avoid this, a permit should be a true regulation by removing a common law prohibition or should be accompanied by a prohibition of stated criteria. VAUBEL, *supra* note 6, § 84. For examples of the range of decisions, compare City of Springdale v. Ohio Bd. of Bldg. Standards, 570 N.E.2d 268 (Ohio 1991) (stating local requirements are precluded from being implemented when they are in conflict with state statute) and City of Eastlake v. Ohio Bd. of Bldg. Standards, 422 N.E.2d 598 (Ohio) (finding stricter municipal regulations invalid because they conflicted with permissive statutory language and evident state interest in uniformity), *cert. denied*, 454 U.S. 1032 (1981) with City of Middleburg Heights v. Ohio Bd. of Bldg. Standards, 605 N.E.2d 66 (Ohio 1992) (stating that state minimum standards do not preclude stricter local fire safety requirements) and Clipson v. Ohio Dep't Indus. Relations, 591 N.E.2d 1260 (Ohio Ct. App. 1990) (upholding stricter local sprinkler installation requirements). *See* Danville Fire Protection Dist. v. Duffel Fin. Constr. Co., 129 Cal. Rptr. 882 (Ct. App. 1976) (preemption); Baum Elec. Co. v. City of Huntington Beach, 109 Cal. Rptr. 260 (Ct. App. 1973) (involving municipal regulations found to be consistent).

97. *See supra* text accompanying notes 60–66.

98. For example, in the case of sale and installation of industrial housing, state permits based on construction standards should not act to preclude all regulation by municipalities, including zoning.

C. Judicial Development of Conflict

The previous discussion of conflict with respect to several troublesome subjects stresses the preservation of municipal interests to the greatest extent that is compatible with protecting superior state interests. This contemplates that courts will invalidate municipal measures only when both state and municipal requirements cannot possibly be met or when following municipal directives would defeat clearly expressed state objectives. Guidelines for achieving these objectives can be summarized: courts should (1) subject literal quantitative conflict to careful examination in order to determine the scope of state prohibitions; (2) prevent literal statutory "permissions" from being used as a means for manipulating municipal power; (3) limit implications to those based on fact; (4) accept qualitative conflict as necessary for the protection of state interests; and (5) require clear evidence of legislative regulatory purpose as a prerequisite to determining qualitative conflict.

Judicial development of a conflict test in traditional home rule states has been somewhat short of ideal. Its application in modern reform reserve power states is only beginning to take form. The following discussion first assesses the extent to which courts in traditional states have caused the erosion of municipal home rule by loosely applying conflict. The discussion then directs attention to the question of whether, in the absence of express legislative denial of municipal power, courts in reform states are applying conflict in order to protect state interests. Finally, it will examine whether or to what extent courts in reform states apply conflict to extend legislative denial authority beyond the protection of state needs.

1. Ohio

Traditional home rule states readily apply the "conflict with general laws" limitation upon municipal regulations in areas of shared but superior state power. They do so either because of explicit constitutional provision[99] or because of the logic that sup

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99. OHIO CONST. art. XVIII, § 3 ("Municipalities shall have authority . . . to adopt . . . such local police, sanitary and other similar regulations, as are not in conflict with general laws."); *see* CAL. CONST. art. XI, § 11; IDAHO CONST. art. XII, § 2; WASH. CONST. art. XI, § 11. Compare "inconsistent" language used in the hybrid constitutional

ports state superiority.

Ohio courts reject state authority to deny municipal power[100] and nearly uniformly preclude state preemptive power over municipal police regulations.[101] Consistent with this protective attitude toward home rule, the Ohio Supreme Court early defined the use of "conflict" in constitutional municipal home rule provisions as requiring strict incompatibility, i.e., direct contradiction or "head-on collision."

> In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.
>
> . . . A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance.[102]

Ohio courts have deviated from this literal, or quantitative, definition of conflict only to a very limited extent. They have endorsed what is essentially conflict by implication in a few cases.[103] State interests, on the other hand, have received little protection from the adoption of a conflict in policy or qualitative meaning. Ohio courts have suggested a policy intended only to prevent municipalities from reclassifying state-defined felonies as misdemeanors.[104] In

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provisions of Iowa, IOWA CONST. art. III, § 38A, and reform provisions in Massachusetts, MASS. CONST. art. II, § 6, and Texas, TEX. CONST. art. XI, § 5.

100. *See* Vaubel, *supra* note 3, at 670–71.

101. *See id*. at 695–96.

102. Village of Struthers v. Sokol, 140 N.E. 519, 519–20 (Ohio 1923) (syllabus by the court).

103. This is particularly true in cases involving liquor control. *See* Neil House Hotel Co. v. City of Columbus, 58 N.E.2d 665 (Ohio 1944); *cf*. City of Maryville v. Wood, 216 S.W.2d 75 (Mo. 1949). Ohio rejects conflict by implication in criminal prohibitions, Pentco, Inc. v. Moody, 474 F. Supp. 1001 (S.D. Ohio 1978); Benjamin v. City of Columbus, 146 N.E.2d 854 (Ohio 1957), *cert*. *denied*, 357 U.S. 904 (1958), where it is least sustainable. Feiler, *supra* note 52, at 402–03. Of course, this does not mean that implied conflict cannot be expanded into other areas. *See* VAUBEL, *supra* note 6, §§ 68, 69; *see also* City of Springdale v. Ohio Bd. of Bldg. Standards, 570 N.E.2d 268 (Ohio 1991); City of Lorain v. Tomasic, 391 N.E.2d 726 (Ohio 1979).

104. VAUBEL, *supra* note 6, § 73; *see* City of Fort Worth v. McDonald, 293 S.W.2d

general, though, Ohio courts have protected both state and local interests in finding conflicts between state and local regulations.

2. California

California decisions are more representative of the traditional home rule approach to legislative control authority than are Ohio's. Through a long history of applying conflict principles, California courts have, unfortunately, been only moderately accommodating to municipal interests. Their willing acceptance of preemption with respect to matters of statewide concern has, no doubt, influenced this result.[105]

As noted with respect to identical state and municipal regulations, California courts have adopted a minority approach by finding conflict when a municipal ordinance makes illegal an act already forbidden by statute.[106] Because of double jeopardy protections, such duplication presents the possibility of depriving the state of enforcement jurisdiction.[107] Coupled with this restriction is an early suggestion that municipal regulations less strict than those imposed by the state are invalid.[108]

On the other hand, as is generally true, California courts have upheld stricter municipal regulations.[109] The usual quantitative con-

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256 (Tex. Civ. App. 1956); *see also* Vaubel, *supra* note 3, at 694 n.254.

105. *See* Vaubel, *supra* note 3, at 696–97, 701–03. *But cf.* Bravo Vending v. City of Rancho Mirage, 20 Cal. Rptr. 2d 164 (Ct. App. 1993) (stating express preemption does not preclude municipal regulation which seeks to discourage unlawful conduct and does not attempt to expand or reduce degree to which activity is criminally proscribed by statute). Matters of local concern remain free from this type of state control. Johnson v. Bradley, 279 Cal. Rptr. 881 (Ct. App. 1991) (involving public financing of municipal candidates); *see* Vaubel, *supra* note 2, at 883–87.

106. *See* Blease, *supra* note 34; David, *supra* note 34; Peppin, *supra* note 34.

107. *In re* Sic, 14 P. 405 (Cal. 1887), *overruled in part by In re* Lane, 372 P.2d 897 (Cal. 1962).

108. *Ex parte* Hoffman, 99 P. 517 (Cal. 1909), *overruled in part by In re* Lane, 372 P.2d 897 (Cal. 1962); *Ex parte* Smith, 146 P. 82 (Cal. Dist. Ct. App. 1914) (invalidating less strict speed ordinance). *But see Ex parte* Snowden, 107 P. 724 (Cal. Dist. Ct. App. 1910) (sustaining less strict speed ordinance).

109. *See* Fisher v. City of Berkeley, 693 P.2d 261 (Cal. 1984) (involving ordinance creating additional defense for evicted tenant), *aff'd*, 475 U.S. 260 (1986); Natural Milk Producers Ass'n v. City of San Francisco, 124 P.2d 25 (Cal. 1942) (requiring pasteurization of two state grades of milk), *vacated as moot*, 317 U.S. 423 (1943), *aff'd on remand*, 148 P.2d 377 (Cal. 1944) (en banc); *Ex parte* Hoffman, 99 P. 517 (Cal. 1909) (involving stricter butter fat content of milk), *overruled in part by In re* Lane, 372 P.2d 897 (Cal. 1962); Miller v. Murphy, 191 Cal. Rptr. 740 (Ct. App. 1983) (concerning added informa-

flict result of barring a municipality from licensing what the state prohibits,[110] or prohibiting what the state authorizes,[111] applies in California.

California apparently rejects conflict by implication. However, an analysis of an early California decision serves to illustrate the pitfalls inherent in drawing a distinction between the broad concept of implied conflict and the narrower concept of frustrating a legislature's regulatory purpose. In *Ex parte Daniels*, the California Supreme Court initially rejected a simple denial of municipal power as not being a general law that municipalities needed to heed.[112] The court also indicated that a state speed maximum of twenty miles per hour prevented municipalities from imposing a lower limit on the basis of a permit-forbid conflict.[113]

But the remaining features of the statute involved in *Daniels* broadened the court's consideration to include preemption.[114] The court interpreted statutory no conflict language as making its restraints exclusive and prohibiting unreasonable speed. The legislature attempted to cover the field and had thus impliedly permitted

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tion requirement of pawnbrokers' transactions to state minimums); *cf.* Rue-Ell Enters., Inc. v. City of Berkeley, 194 Cal. Rptr. 919 (Ct. App. 1983) (stating rent reduction for renters is not "inconsistent" with constitutional tax relief for property owners); City of Weslaco v. Melton, 308 S.W.2d 18 (Tex. 1958). *Contra* Abbott v. City of Los Angeles, 349 P.2d 974 (Cal. 1960) (en banc); Hunter v. Adams, 4 Cal. Rptr. 776 (Dist. Ct. App. 1960) (concerning statute that required notice of presence of building site in redevelopment project and ordinance that rejected building permits for period of time). Compare the above cases with instances in which the state has occupied the field, Agnew v. City of Los Angeles, 243 P.2d 73 (Cal. Dist. Ct. App. 1952).

110. Farmer v. Behmer, 100 P. 901 (Cal. Dist. Ct. App. 1909). Courts have struck down added municipal licensing requirements, *see* Horwith v. City of Fresno, 168 P.2d 767 (Cal. Dist. Ct. App. 1946), as they have added grounds for terminating or suspending a license, *see* Verner, Hilby & Dunn v. City of Monte Sereno, 53 Cal. Rptr. 592 (Dist. Ct. App. 1966).

111. Harbor Carriers, Inc. v. City of Sausalito, 121 Cal. Rptr. 577 (Dist. Ct. App. 1975) (invalidating zoning ban against downtown ferry terminal found to be authorized by state in meeting tourist needs). But note that California forecloses its legislature from avoiding a conflict by suspending state law. *See Natural Milk Producers*, 124 P.2d at 25; *Farmer*, 100 P. at 901.

112. *Ex parte* Daniels, 192 P. 442 (Cal. 1920).

113. A stricter municipal speed limit was upheld in Ham v. Los Angeles County, 189 P. 462 (Cal. Dist. Ct. App. 1920); *see* People v. Commons, 148 P.2d 724 (Cal. App. Dep't Super. Ct. 1944) (rejecting implied permission in criminal statute).

114. This approach has been made explicit by legislation. *See* CAL. VEH. CODE § 21 (West 1987), *construed in* Pipoly v. Benson, 125 P.2d 482 (Cal. 1942); Rumford v. City of Berkeley, 645 P.2d 124 (Cal. 1982), *noted in* Christopher E. Schumb, Note, 23 SANTA CLARA L. REV. 331 (1983); *see also* Vaubel, *supra* note 3, at 684.

the use of a reasonable speed. Moreover, the statute provided that a jury would determine what speed was reasonable. An "arbitrarily" specified lower municipal speed limit was in material conflict with the statute.[115]

A careful view of conflicting interests questions the result in *Daniels* because of the court's reliance upon preemption and implied conflict. The court was on surer ground in finding conflict between the maximum speed established by ordinance and the statutory provision calling for a jury determination of reasonable speed.[116] The court was also responsive to practical needs of motorists when it stressed the difficulty in knowing a variety of local regulations. However, the court did not identify this as a distinct legislative purpose, nor did it explore possible means of notification. Yet, by this analysis, the court focused attention on state purposes which were not simply exclusionary of municipal authority.

The concurring opinion in *Ex parte Daniels* concluded that the state-established maximum speed of twenty miles per hour coupled with the statutory exclusion of municipal regulations meant that the state legislature intended to permit all speeds up to twenty miles per hour.[117] This interpretation is difficult to refute. The judge did not base his conclusion solely on the state setting a maximum speed; therefore, it was not simply a finding of conflict by implication. Furthermore, the judge did not merely give effect to a denial of municipal power. Rather, the combination of these two terms in the statute led the judge to conclude that the legislature impliedly permitted motorists to operate up to twenty miles per hour.

In spite of the concurring opinion's strength, the conclusion reached is not free from objection. Courts could misapply this interpretation to allow a finding of conflict by implication based on the

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115. *Daniels*, 192 P. at 446–47.

116. *See* City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978) (precluding suspension of ten-day minimum sentence imposed by ordinance was in irreconcilable conflict with statutory provision which called for court discretion in suspending a sentence), *noted in* John Havelock, *The Supreme Court of Alaska 1978–79*, 9 UCLA-ALASKA L. REV. 1, 14 (1979); Wright v. Municipality of Anchorage, 590 P.2d 425 (Alaska 1979); *cf.* Schwartz v. Badila, 14 N.E.2d 609 (Ohio 1938) (involving conflict between statute which made driving under stated speed *prima facie* lawful and ordinance which made it *prima facie* unlawful upon showing of certain conditions). However, observers have noted the *Schwartz* decision did not involve an inevitable conflict, but only one that shifted the evidentiary burden. Fordham & Asher, *supra* note 19, at 54–55.

117. *Daniels*, 192 P. at 448 (Olney, J., concurring).

enactment of less strict state regulations.[118] More significantly, the conclusion reached is still an exclusionary result. Permission is a device to achieve exclusion. It is not necessary for a motorist to have the state's permission to drive up to twenty miles per hour whether that permission is given indirectly or even directly.[119] Further, permission serves only to exclude municipal regulation because the municipality does not frustrate the state's ostensible purpose of promoting safety by imposing a stricter maximum speed limit.[120]

When contrasted with the shortcomings of the concurring opinion, the majority's conclusion in *Daniels* gains strength. Its bases are an acceptance of the state's desire to allocate power to a jury to make individual adjustments of speed maximums and a recognition of motorists' need for notice of speed regulations.[121] To the extent that the court's interpretation accurately represented the legislature's true purposes, stricter municipal speed regulation frustrated those purposes, and conflict indeed existed.[122]

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118. An Ohio court relied upon *Ex parte Daniels*, and particularly upon the concurring judge's opinion, to find conflict where a similar combination of statutory provisions was involved. *See* Schneiderman v. Sesanstein, 167 N.E. 158 (Ohio 1929). But overtones of conflict by implication were evident in this decision. Application of this approach where no statutory language prohibited municipal regulation has reappeared in later decisions. *E.g.*, Neil House Hotel Co. v. City of Columbus, 58 N.E.2d 665 (Ohio 1944), *noted in* Recent Case, *supra* note 6, at 297. With respect to municipal speed regulations, Ohio solved the problem of conflict by implication by merely rephrasing the statute in affirmative terms. *See* 1929 Ohio Laws 283. Much later, Ohio courts did not give implied meaning to statutory requirements of uniformity and prohibition against conflicting municipal traffic regulations. Rather, the courts determined the statutes were not general laws. City of Columbus v. Molt, 304 N.E.2d 245 (Ohio 1973). *But cf.* State *ex rel.* Ohio Motorists Ass'n v. Masten, 456 N.E.2d 567 (Ohio Ct. App. 1982); Vaubel, *supra* note 3, at 695–96.

119. *See supra* note 96 and text accompanying note 59.

120. *See supra* text accompanying notes 77–82.

121. Presumably a motorist's sense of a jury-applied standard of reasonableness is more clear to the motorist than is an unknown municipal ordinance establishing the same, but a dissenting judge in *Schneiderman*, 167 N.E. at 165–66 (Allen, J., dissenting) (quoting 1 DEWITT C. BLASHFIELD, BLASHFIELD'S CYCLOPEDIA OF AUTOMOBILE LAW 238–39 (1927)), suggested that safety ought to be uppermost in a motorist's mind in any event.

122. *See supra* text accompanying notes 77–82; *see also* Blease, *supra* note 34, at 525–26. In addition, two early cases suggest a conflict in purpose approach. *Ex parte* Inverson, 250 P. 681 (Cal. 1926) (determining ordinance did not impede state's purpose to prevent evasion of liquor laws where state limited prescription liquor bottles to 16 ounces and the ordinance to 8 ounces); Mann v. Scott, 182 P. 281 (Cal. 1919) (finding state's requirement of stops necessary for street car passenger safety and ordinance's requirement of ten-foot clearance both furthered safety).

3. Illinois

The emphasis the Illinois Constitution places upon legislative authority to expressly deny or preempt[123] and "specifically limit"[124] municipal power suggests the rejection of conflict concepts.[125] Statutory provisions support this view.[126] Certainly rejection of literal conflict would promote the significance of the legislative role in determining superiority of interests. Yet, it would at times come at the price of underprotecting state interests.

4. Reserve Power and Hybrid States

A problem similar to the one posed in Illinois presents itself in the reserve power constitutional provisions and in hybrid provisions. Hybrid provisions combine traditional broad grants of power with

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123. ILL. CONST. art. VII, § 6(g), (h); *see* Vaubel, *supra* note 3, at 678–79, 708–09.

124. ILL. CONST. art. VII, § 6(i).

125. County of Cook v. John Sexton Contractors Co., 389 N.E.2d 553 (Ill. 1979) (requiring, seemingly, an express legislative statement), *aff'd in part, rev'd in part*, Cosmopolitan Nat'l Bank v. County of Cook, 469 N.E.2d 183 (Ill. 1984). State appellate courts have found concurrent municipal power despite conflict in the absence of an express statutory statement of exclusive state power or of the limiting of municipal power. *See* Aurora Pizza Hut, Inc. v. Hayter, 398 N.E.2d 1150 (Ill. App. Ct. 1979); Carlson v. Briceland, 377 N.E.2d 1138 (Ill. App. Ct. 1978), *modified*, 401 N.E.2d 1390 (Ill. 1979); *see also* Kadzielawski v. Board of Fire & Police Comm'rs, 551 N.E.2d 331 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 377 (Ill. 1990). Yet Stryker v. Village of Oak Park, 343 N.E.2d 919 (Ill.), *cert. denied*, 429 U.S. 832 (1976), suggests that an ordinance would be invalid for conflict, as in the case of environmental regulations, if the state had established a uniform system of regulation. A constitutional committee example suggests what appears to be conflict is a feature of state control authority under provisions of article VII, section 6(i) of the Illinois Constitution. David C. Baum, *The Scope of Home Rule: The Views of the Con-Con Local Government Committee*, 59 ILL. B.J. 814, 830 (1971) [hereinafter Baum, *The Scope of Home Rule*]; *see* Richard A. Michael & Jerry E. Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559. These authors favor a finding of conflict at least when both the state and municipality are regulating third parties. They also recognize the strength of the argument for forcing the legislature to be explicit, which was developed in David C. Baum, *A Tentative Survey of Illinois Home Rule (Part II): Legislative Control, Transition Problems, and Intergovernmental Conflict*, 1972 U. ILL. L.F. 559, 572–73. These authors also suggest that conflict is one factor in determining if a municipal regulation with extraterritorial impact is in fact within municipal power over "government and affairs." Michael & Norton, *supra*, at 582; Vaubel, *supra* note 1, at 50.

126. ILL. COMP. STAT. ch. 5, act 70, § 7 (1993) (formerly ILL. REV. STAT. ch. 1, para. 1106 (1991)), enacted in 1979, provides that legislation since January 13, 1977, only denies or limits municipal power if it is explicit in purpose and extent.

the reservation of state legislature denial authority. These provisions delineate legislative authority in terms of the "limit" or "denial" of municipal power.[127] While this emphasis on expanding legislative authority over traditional provisions contemplates legislative action, it should not preclude a role for the courts even as it provides a vehicle for limiting it. At least, strict quantitative conflict[128] ought to be applied by reserve power and hybrid state courts. In fact, acceptance of conflict is becoming clearer as case law develops in these states. What remains uncertain is whether courts recognize the importance of limiting conflict strictly to state needs. The Alaska experience is particularly informative in considering the development of the law in this regard.

a. Alaska

Alaska courts experienced the difficulties of fitting conflict into a constitutional interpretative pattern which emphasizes explicit use of control power by the state legislature. They worrisomely edged toward coupling total legislative denial authority with an erosive, judicially devised conflict approach, but have pulled back from this "worst" kind of home rule.[129]

Although constitutional provisions do not require explicit use of legislative control authority, observers conclude that was the intent of the Alaska Constitutional Convention. The observers suggest that courts were not to come to the rescue of the legislature's oversight through interpretive devices based on implied preemption or anything less than irreconcilable conflict.[130]

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127. MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (American Mun. Ass'n 1953); MODEL STATE CONSTITUTION § 8.02 (National Mun. League, 6th ed. 1963, rev. 1968); *see infra* apps. I and II.

128. FORDHAM, *supra* note 40, at 90; Euston & Johnson, *supra* note 24, at 290; Schwabacher, *supra* note 16, at 385–87; Cockerille, *supra* note 45, at 493; Susan B. Rivas, Note, *The Indiana Home Rule Act: A Second Chance for Local Self-Government*, 16 IND. L. REV. 677, 688 (1983) (stating elimination of preemption does not preclude conflict); Sterchi, *supra* note 24, at 688.

129. Sharp, *supra* note 17, at 53.

130. *Id*. at 28, 31, 37–38. Nor were they to limit municipal power. The Alaska Constitutional Convention deliberately sought to exceed even the American Municipal Association (now National League of Cities) model constitutional provisions both in the extent of power granted to municipalities and in the authority vested in the state legislature to control that power. *Id*. at 25. The resulting constitutional provisions succinctly state: "A home rule borough or city may exercise all legislative powers not prohibited by

The state supreme court, in *Chugach Electric Ass'n v. City of Anchorage*, simultaneously rejected preemption and departed from an earlier strict legislative control theory.[131] In this case, the court adopted an inconsistency or conflict approach to reconcile state and local differences in all but purely local matters.[132] Criticized as opening up Alaska home rule to judicial erosion,[133] the court modified its opinion in *Jefferson v. State*.[134] Here, the court turned away from mere inconsistency in regulations as invalidating municipal measures:

> A municipal ordinance is not necessarily invalid in Alaska because it is inconsistent or in conflict with a state statute. The question rests on whether the exercise of authority has been prohibited to municipalities. The prohibition must be either by express terms or by implication such as where the statute and ordinance are so substantially irreconcilable that one cannot be given its substantive effect if the other is to be accorded the weight of law.[135]

The state legislature has now specified which provisions of the state municipal code it intends to limit the authority of home rule municipalities in Alaska.[136] Thus, the original plan of the constitutional convention regained acceptance. The convention sought to protect municipal autonomy, not by limiting legislative authority to control municipal exercise of power, but by avoiding judicial erosion of that power by mandating the legislature to exercise its control authority in the clearest manner. Unfortunately, the line of distinction between an ordinance being irreconcilable with a state statute, rather than being merely inconsistent or in conflict, was left unclear. However, the courts have gradually developed a pattern of decisions which suggest a strict approach to conflict.[137]

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law or by charter." ALASKA CONST. art. X, § 11; *see* Vaubel, *supra* note 1, at 44 n.184; Vaubel, *supra* note 3, at 704.

131. Chugach Elec. Ass'n v. City of Anchorage, 476 P.2d 115 (Alaska 1970).

132. *See* Macauley v. Hildebrand, 491 P.2d 120 (Alaska 1971); Sharp, *supra* note 17, at 43, 47.

133. Sharp, *supra* note 17, at 48.

134. Jefferson v. State, 527 P.2d 37 (Alaska 1974).

135. *Id.* at 43.

136. ALASKA STAT. § 29.10.200 (1992 & Supp. 1993).

137. City of Anchorage v. City of Anchorage, 544 P.2d 1024 (Alaska 1976) (requiring higher percentage of voters to sign petition for referendum than state required was held not to be "prohibited"); *see* DeHusson v. City of Anchorage, 583 P.2d 791 (Alaska 1978)

In spite of these judicial efforts, inconsistency remains a significant part of Alaska municipal law. Alaska courts have logically accepted less than total legislative prohibitions as valid, i.e., statutes which only forbid inconsistent ordinances and municipal regulations. In light of the *Jefferson* phraseology, we can seriously question whether this statutory term is equivalent to the court-adjudged constitutional test of irreconcilability. Perhaps it is a legislative invitation to the courts to erode strict conflict by using a lesser standard. If so, it is, of course, subject to continuing legislative direction.

The courts have given a mixed response to these statutes. One decision seems to have adopted a conflict in purpose approach even though it defined statutory inconsistency as a lack of uniformity.[138] In another case, the court suggested that statutory inconsistency might involve a strict permit-forbid approach.[139] However, an Alaska appellate court has freely accepted a statutory prohibition against inconsistency in advancing uniform regulation as a lesser standard than that imposed by the Alaska Constitution.[140]

(requiring notice of claim against city within 120 days of event conflicted with state's two-year statute of limitations), *noted in* John Havelock, *The Supreme Court of Alaska 1978–79*, 9 UCLA-ALASKA L. REV. 1, 23 (1979); *accord* City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982) (stating refusal to disclose names of chief-of-police applicants and to allow inspection of city manager applications was in irreconcilable conflict with statutory disclosure provisions which only permitted exemptions based on need); Johnson v. City of Fairbanks, 583 P.2d 181 (Alaska 1978), *overruling* Maier v. City of Ketchikan, 403 P.2d 34 (Alaska 1965).

Other decisions clearly reject conflict by implication. Municipality of Anchorage v. Afualo, 657 P.2d 407 (Alaska Ct. App. 1983) (finding no encouragement of that which is not forbidden); Municipality of Anchorage v. Richards, 654 P.2d 797 (Alaska Ct. App. 1982) (finding there was at most only toleration of that which is not forbidden).

138. *See* Cremer v. Municipality of Anchorage, 575 P.2d 306 (Alaska 1978) (involving statutory requirement that only licensed drivers operate vehicle on public highway that was expanded by ordinance to include private property). There was no direct or indirect impediment to the implementation of the statute because it did not deviate from the state's purpose.

139. *See* Adkins v. Lester, 530 P.2d 11 (Alaska 1974) (finding ordinance was "incompatible" with state exemption of emergency vehicles from observance of traffic rules and under specified circumstances from use of flashers and sirens when ordinance imposed requirement that emergency vehicles emit audible signals).

140. *See* Simpson v. Municipality of Anchorage, 635 P.2d 1197 (Alaska Ct. App. 1981). The court added to the prohibition against impeding the implementation of a statute and the permit-forbid approach of *Cremer* and *Adkins* by raising suggestions of implied preemption of municipal regulations. *Id*. at 1203–04. The court reasoned that the state was not encouraging driving by those with a blood alcohol content of .10% when it made that amount presumptive of being under the influence of alcohol, but it was only tolerating their driving. *Id*. at 1206. But the court went on to rely upon earlier cases

b. North Dakota

North Dakota goes a step further than Alaska in curtailing the courts' application of conflict as a means for exercising state control over municipal power by making conflict a limit on state power instead. A 1982 amendment to the North Dakota constitutional home rule provisions retained the thrust of legislatively controlled home rule (established in 1966),[141] but now municipalities have such "power as provided by law."[142] The North Dakota Legislature responded by providing a broad grant of power to home rule municipalities through statutory enumeration.[143] The legislature further limited state interference with municipalities' exercise of power by making municipal measures superior to conflicting state laws and regulations.[144]

Of course, the legislature is not precluded in the future from contracting municipal power, nor is it prevented from extending its control authority. But as of now, given the scope of municipal power conferred and the legislature's self-imposed limit on control, North Dakota may well overprotect municipal interests. At least the legislature should deny the supersession of state law by municipal ordinances where state interests in police power matters warrant superiority.[145]

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based on implied prohibition of municipal regulations. The court cited City of Springfield v. Stovall, 192 N.E.2d 72 (Ohio Ct. App. 1962), a decision with implied conflict overtones. *Simpson*, 635 P.2d at 1206 n.14. In *Stovall*, the court found conflict between an ordinance which required motorists to stop for a yellow traffic signal and a statute which did not expressly require it. *Stovall*, 192 N.E.2d at 74. The *Simpson* court finally concluded, though, that an ordinance which forbade driving with a .10% blood alcohol content was in conflict with the statute in overall purpose and because it negated the state's rebuttable presumption by preventing a defendant from introducing evidence relevant to impairment. *Simpson*, 635 P.2d at 1208; *accord* Cooley v. Municipality of Anchorage, 649 P.2d 251 (Alaska Ct. App. 1982); *cf.* sources cited *supra* note 116.

141. N.D. CONST. art. VII, § 1 (1966) (amended 1982); Schwabacher, *supra* note 16, at 374, 388–89. *But cf.* Case Comment, 57 N.D. L. REV. 655 (1981).

142. N.D. CONST. art. VII, § 2.

143. N.D. CENT. CODE § 40-05.1-06 (Supp. 1993).

144. *Id.*

145. The state has taken this action generally as to state penal laws, *id.* § 12.1-01-05 (1985); City of Dickinson v. Mueller, 261 N.W.2d 787 (N.D. 1977), and for a time with respect to obscenity regulations, since removed. N.D. CENT. CODE § 12.1-27.1-12 (1985); Olson v. City of West Fargo, 305 N.W.2d 821 (N.D. 1981); City of Grafton v. Four G's, Inc., 252 N.W.2d 879 (N.D. 1977); *see* City of Minot v. Central Avenue News, Inc., 308 N.W.2d 851 (N.D.), *appeal dismissed*, 454 U.S. 1117 (1981).

c. Other Reserve Power States

Other reform states have evidenced a varied willingness to limit the application of conflict, as a vehicle for state control of municipal power, strictly to the protection of state interests. This is not surprising in light of the suggestion of Dean Fordham, author of the National League of Cities proposal, that the overall magnitude of conflict problems in reform states depends not upon constitutional provisions, but upon the clarity with which the legislature expresses itself.[146]

Requiring that the state legislature be explicit in denying municipal power could have led to the repudiation of conflict or, preferably, to its strict application as in Alaska. However, the failure of most states to impose this requirement by constitutional or statutory provisions enhances the possibility of applying a less protective approach.[147] Varied results are all the more likely due to a lack of generally accepted guidelines as to what constitutes conflict.

Some reform constitutional provisions directly raise the conflict issue and the possibility of judicial abuse by prohibiting municipal regulations that are inconsistent with state law,[148] rather than sim-

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146. FORDHAM, *supra* note 40, at 90.

147. Only New Mexico imposes an express denial requirement by constitutional provision. N.M. CONST. art. X, § 6(D). However, several states do so by statute. *See* FLA. STAT. § 166.021 (1993); IND. CODE ANN. § 36-1-3-5(1) (Burns 1993 & Supp. 1994–95); IOWA CODE ANN. § 364.2 (West 1976); MONT. CODE ANN. § 7-1-102 to -103 (1993) ("specifically applicable" to elective functions and services). *But see* City of Miami Beach v. Rocio Corp., 404 So. 2d 1066 (Fla. 3d Dist. Ct. App.) (finding statute did not preclude invalidity because of conflict), *rev. denied*, 408 So. 2d 1092 (Fla. 1981). Maine statutorily provides for denial either expressly or by "clear implication." ME. REV. STAT. ANN. tit. 30A, § 3001 (West Supp. 1993); *see* Vaubel, *supra* note 3, at 679. For cases rejecting implied denials of authority, see *id*. at 679 n.176.

148. *See* IOWA CONST. art. III, § 38A; MASS. CONST. art. II, § 6; TEX. CONST. art. XI, § 5. Montana and New Mexico have statutory prohibitions. *See* MONT. CODE ANN. § 7-1-113 (1993); N.M. STAT. ANN. § 3-17-1 (Michie Supp. 1993). Montana defines inconsistency in terms of municipal requirements less stringent than state law or administrative regulation when power is vested in a state agency to establish regulations or enforce state standards. MONT. CODE ANN. § 7-1-113(2) (1993); Billings Firefighters Local 521 v. City of Billings, 694 P.2d 1335 (Mont. 1985) (finding ordinance with no standards inconsistent with statute which sets minimums). For the suggestion that the court misapplied this code requirement because no state agency had been authorized to act on the subject, see James J. Lopach, *Local Government Under the 1972 Montana Constitution*, 51 MONT. L. REV. 458, 480 (1990). *See also* Diefenderfer v. City of Billings, 726 P.2d 1362 (Mont. 1986). Compare State *ex rel*. Swart v. Molitor, 621 P.2d 1100 (Mont. 1981), for another

ply authorizing legislative denial of municipal power. Texas courts' interpretation of inconsistency has a long history. It includes a considerable number of decisions that are less than ideally protective of municipal interests.[149]

Constitutional provisions in Massachusetts are of much more recent origin.[150] Massachusetts courts have not been notably successful in restricting legislative control to explicit denials of municipal power and to irreconcilable conflict.[151]

Iowa, on the other hand, has by statute limited inconsistency to irreconcilable provisions. Iowa has also accepted as valid municipal regulations that are stricter than state provisions, but it has invalidated less strict regulations.[152]

5. Comparative Decisions

A brief review of conflict decisions in reserve power reform states generally confirms a willingness of the courts to couple a conflict approach with constitutionally conferred legislative denial authority. They further reflect, when compared with relatively strict Ohio conflict decisions, a tendency to apply conflict strictly as well.[153] Unfortunately, the picture is not uniformly favorable. There are recurring indications that the courts in reform states have not

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claimed misapplication.

Compare Montana with Pennsylvania, PA. STAT. ANN. tit. 53, § 1-302(b)(v) (Supp. 1993) (barring "inconsistent" measures dealing with subdivision employee rights and benefits); Langan v. City of Scranton, 465 A.2d 729 (Pa. Commw. Ct. 1983) (applying statute with respect to state civil service provisions); Gill v. Devlin, 17 Pa. D. & C. 3d 295 (C.P. 1981). See Vaubel, *supra* note 3, at 671 n.129, 694 nn.251–52, for a discussion of Pennsylvania provisions denying and preempting municipal power and imposing requirements of uniformity.

149. Sharp, *supra* note 17, at 16.

150. Texas provides for no municipal immunity from state control; Massachusetts does, but only as to special laws concerning local matters. *See* MASS. CONST. art. II, § 8.

151. Jerison, *supra* note 71, at 59.

152. IOWA CODE ANN. §§ 364.2(3), 364.3(3) (West 1976). "Irreconcilable" is accepted by the state supreme court because it is stricter than the constitutional term. Green v. City of Cascade, 231 N.W.2d 882 (Iowa 1975). An ordinance resting outside the ambit of the statute is not irreconcilable with state law and therefore is not "inconsistent" with it. Airport Comm'n v. Schade, 257 N.W.2d 500 (Iowa 1977). A municipal anti-nepotism policy is not inconsistent with state statutes establishing qualifications for employment. Sioux City Police Officers' Ass'n v. City of Sioux City, 495 N.W.2d 687 (Iowa 1993).

153. *See, e.g.*, Colorado Springs Amusements, Ltd. v. Rizzo, 524 F.2d 571 (3d Cir. 1975), *cert. denied*, 428 U.S. 913 (1976).

entirely avoided the erosive effect of broad findings of conflict.[154] Thus, the courts have at times created the worst of both worlds[155] for municipal autonomy: legislative denial authority coupled with expansive judicial restrictions.

There is no marked difference between traditional home rule and reform state decisions with respect to conflict principles.[156]

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154. *See* Rivas, *supra* note 128, at 692–94 (discussing implied preemption).

155. Sharp, *supra* note 17, at 48.

156. In Ohio, courts are "reluctant" to find conflict, State *ex rel.* Wynne v. Urban, 107 N.E.2d 637, 640 (Ohio Ct. App. 1952), unless it is "manifestly apparent." City of Cincinnati v. Luckey, 87 N.E.2d 894, 894 (Ohio Ct. App. 1949), *aff'd on other grounds*, 91 N.E.2d 477 (Ohio 1950). Ohio courts use reasonable rules of construction to harmonize a statute and ordinance where possible. City of Coshocton v. Saba, 8 N.E.2d 572 (Ohio Ct. App. 1936). Reform states also favor reconciling provisions, City of Houston v. Reyes, 527 S.W.2d 489 (Tex. Ct. App. 1975); Wagstaff v. City of Groves, 419 S.W.2d 441 (Tex. Ct. App. 1967), and reaching harmonious results, Boston Police Patrolmen's Ass'n v. City of Boston, 326 N.E.2d 314 (Mass. 1975), including the use of reasonable construction, *see* City of Albuquerque v. Chavez, 577 P.2d 457 (N.M. Ct. App.) (interpreting specific authorization to enact traffic regulations not in conflict with state traffic code as overcoming general statutory bar against sentencing for attempted misdemeanor), *cert. denied*, 577 P.2d 1256 (N.M. 1978); City of Beaumont v. Jones, 560 S.W.2d 710 (Tex. Ct. App. 1977); *see also* Evans v. San Francisco Unified Sch. Dist., 258 Cal. Rptr. 15 (Ct. App. 1989); Wilson v. Board of Supervisors, 328 A.2d 305 (Md. 1974) (construing charter provision to avoid conflict with state constitution).

Conflict can arise between constitutional provisions and municipal ordinances. *E.g.*, State *ex rel.* Corbello v. Bond, 441 So. 2d 742 (La. 1983) (holding that more extensive municipal efforts to suppress gambling were inconsistent with LA. CONST. art. XII, § 6); City of Shreveport v. Kaufman, 353 So. 2d 995 (La. 1977), *noted in* Kenneth M. Murchison, *Local Government Law*, 39 LA. L. REV. 843, 853–60 (1979); State *ex rel.* Board of County Comm'rs v. Montoya, 575 P.2d 605 (N.M. 1978) (finding diversion of bond funds from their stated purpose conflicted with N.M. CONST. art. IX, § 9).

Before there can be a conflict, the statute and ordinance must relate to the same matter. *Boston Police Patrolmen's Ass'n*, 326 N.E.2d at 314; Forwood v. City of Taylor, 214 S.W.2d 282 (Tex. 1948); Janus Films v. City of Fort Worth, 354 S.W.2d 597 (Tex. Ct. App. 1962). If they are not related, constitutional issues are avoided, MICHELMAN & SANDALOW, *supra* note 11, at 396, thus providing municipalities with more flexibility. VAUBEL, *supra* note 6, § 61; *see* San Francisco Int'l Yachting Ctr. Dev. Group v. City of San Francisco, 12 Cal. Rptr. 2d 25 (Ct. App. 1992) (involving statute related to use of harbor revenue and city charter providing for board of supervisor's approval of port leases); Flynn v. Bledsoe Co., 267 P. 887 (Cal. Ct. App. 1928) (holding municipal regulation of parking on city streets did not conflict with statute regulating vehicles stopping on highway); Northeast Ohio Regional Sewer Dist. v. City of Brooklyn, 580 N.E.2d 796 (Ohio Ct. App. 1989) (determining statute did not involve use of explosives which ordinance totally banned); *cf.* City of Portland v. Duntley, 203 P.2d 640 (Or. 1949) (holding state-permitted pari-mutuel betting at race tracks did not preclude municipal ban against bookmaking), *noted in* John C. Caldwell, Recent Cases, 28 OR. L. REV. 395 (1949).

If a statute is not yet effective, or is unconstitutional, no conflict can exist. *See* Stange v. City of Cleveland, 114 N.E. 261 (Ohio 1916); Disabled American Veterans Chapter No. 2 v. O'Neill, 43 Ohio L. Abs. 479 (C.P. Mahoning County, 1944). However,

However, the subjects to which conflict applies vary depending on the nature of the home rule provisions.[157] Traditional home rule provisions frequently immunize some matters from state control. Although the National League of Cities constitutional proposals expressly designate certain municipal measures as superior to statute,[158] depending upon subject matter, National Municipal League provisions do not. Consequently, in states which have adopted National Municipal League-type provisions, analogous hybrid provisions, or National League of Cities provisions without control limitations, courts apply conflict to a much wider range of subjects[159]

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if an ordinance is invalid when enacted, it is not revived by a later amendment of a statute permitting municipal regulation. Young v. City of Seagoville, 421 S.W.2d 485 (Tex. Ct. App. 1967). An ordinance valid when enacted becomes invalid when it conflicts with a subsequently enacted statute. Morrow v. Kansas City, 788 S.W.2d 278 (Mo. 1990).

Municipalities are free to act on matters excluded from statutory control. Chemline, Inc. v. City of Grand Prairie, 364 F.2d 721 (5th Cir. 1966); Interstate Circuit, Inc. v. City of Dallas, 247 F. Supp. 906 (N.D. Tex. 1965), *aff'd*, 366 F.2d 590 (5th Cir. 1966), *vacated on other grounds*, 391 U.S. 53 (1968); *Janus Films*, 354 S.W.2d at 597. A statute which permits municipal regulation obviates any conflict. Houston Crane Rentals v. City of Houston, 454 S.W.2d 216 (Tex. Ct. App. 1970).

Statutes which are conditioned upon municipal acceptance preclude conflicting ordinances once they have been accepted. Chief of Police v. Town of Westford, 313 N.E.2d 443 (Mass. 1974).

In Texas, it is not settled whether the legislature has the authority to authorize conflicting municipal ordinances. City of Baytown v. Angel, 469 S.W.2d 923 (Tex. Ct. App. 1971) (rejecting city ordinance as contrary to TEX. CONST. art. I, § 28); Alpha Enters., Inc. v. City of Houston, 411 S.W.2d 417 (Tex. Ct. App.) (upholding ordinance prohibiting fireworks while statute allowed them), *cert. denied*, 389 U.S. 1005 (1967). In Ohio, there is no clear holding on this matter. VAUBEL, *supra* note 6, § 98. However, the following states permit state waiver of conflict: California, Farmer v. Behmer, 100 P. 901 (Cal. Ct. App. 1909); Peppin, *supra* note 34, at 382; Illinois, Village of Carpentersville v. Pollution Control Bd., 553 N.E.2d 362 (Ill. 1990); Massachusetts, John Donnelly & Sons, Inc. v. Outdoor Advertising Bd., 339 N.E.2d 709 (Mass. 1975). Accepting legislative definition of constitutional inconsistency as meaning "irreconcilable" results in a waiver of constitutional conflict. Green v. City of Cascade, 231 N.W.2d 882 (Iowa 1975).

157. For a discussion of this concept, see Vaubel, *supra* note 2.

158. MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (American Mun. Ass'n 1953); *see infra* app. I.

159. *E.g.*, Tibiero v. Town of Methuen, 307 N.E.2d 302 (Mass. 1974) (stating minor procedural errors in charter's adoption do not constitute conflict with statute). *See supra* note 15 for a list of states adopting National Municipal League, National League of Cities, or hybrid provisions.

Courts have applied conflict to civil service matters. Board of Pub. Safety v. State *ex rel.* Benkovich, 388 N.E.2d 582 (Ind. Ct. App. 1979) (noting conflict results from municipality imposing additional residency requirement for promotion); Filippone v. Mayor of Newton, 467 N.E.2d 182 (Mass. 1984) (involving reimbursement of attorney

fees to mayor as a party in civil rights suit); Chief of Police v. Town of Westford, 313 N.E.2d 443 (Mass. 1974) (involving conflict in vacation provisions); Yetman v. City of Cambridge, 389 N.E.2d 1022 (Mass. App. Ct. 1979) (finding no conflict in purpose); City of Wichita Falls v. Harris, 532 S.W.2d 653 (Tex. Ct. App. 1975) (finding of conflict when examination not required as prerequisite to appointment); City of Houston v. Reyes, 527 S.W.2d 489 (Tex. Ct. App. 1975) (finding no conflict where promotion or new classifications are distinguishable from transfer). Stricter municipal civil service requirements are permitted in Iowa. IOWA CODE ANN. § 364.3(3) (West 1976); Bryan v. City of Des Moines, 261 N.W.2d 685 (Iowa 1978). Adding a municipal anti-nepotism qualification for civil service employees is not inconsistent with statute. Sioux City Police Officers' Ass'n v. City of Sioux City, 495 N.W.2d 687 (Iowa 1993); *see* Airport Comm'n v. Schade, 257 N.W.2d 500 (Iowa 1977); *cf.* Lexington Educ. Ass'n v. Town of Lexington, 448 N.E.2d 1271 (Mass. App. Ct. 1983) (finding conflict in ordinance setting higher standards for employee health benefits).

Courts have applied conflict to election matters. Socialist Workers Party v. Welch, 334 F. Supp. 179 (S.D. Tex. 1971) (holding statutory one-year residency requirement prevailed over municipal five-year requirement); Area Dispatch, Inc. v. City of Anchorage, 544 P.2d 1024 (Alaska 1976) (involving percentage of voters needed to petition for referendum); Kelley v. Mayor of Dover, 300 A.2d 31 (Del. Ch. 1972) (finding statute did not repeal by implication municipal charter provisions); Town of Indian River Shores v. Richey, 348 So. 2d 1 (Fla. 1977) (involving voter qualifications); Fasi v. City of Honolulu, 439 P.2d 206 (Haw. 1968) (involving earlier constitutional provisions imposing no subject matter restraint on state control authority and finding conflict between charter prohibiting salary increases and statute providing for fixed salaries by ordinance); School Comm. v. Town of York, 626 A.2d 935 (Me. 1993) (determining statutory provisions are only models, and municipal deviations are valid unless they frustrate the statutory purpose); Zachry v. City of San Antonio, 305 S.W.2d 558 (Tex. 1957) (involving need for voter approval of disposal of municipal property); City of Tyler v. Television Cable Serv., 493 S.W.2d 322 (Tex. Ct. App. 1973) (deciding statutory grant of exclusive franchise authority to municipalities prevailed over municipal charter provisions requiring referendum vote for grant of franchise).

Compare Ohio's results: State *ex rel.* Lentz v. Edwards, 107 N.E. 768 (Ohio 1914) (stating municipal civil service is matter of local self-government, free from state control); Fitzgerald v. City of Cleveland, 103 N.E. 512 (Ohio 1913) (determining election procedures are matters of local self-government free from state control); Northern Ohio Patrolmen's Benevolent Ass'n v. City of North Olmsted, 476 N.E.2d 689 (Ohio Ct. App. 1984) (finding city whose municipal charter adopted statutory provisions cannot deviate from those provisions); Loux v. City of Lakewood, 193 N.E.2d 710 (Ohio Ct. App. 1963) (determining that raising salaries of councilmembers during their term of office need not conform to state law), *appeal dismissed*, 198 N.E.2d 68 (Ohio 1964). Ohio's constitution confers local referendum power upon municipalities, free from state restraint. OHIO CONST. art. II, § 1f; Dillon v. City of Cleveland, 158 N.E. 606 (Ohio 1927).

Courts have applied conflict to procedural matters. Rayco Inv. Corp. v. Board of Selectmen, 331 N.E.2d 910 (Mass. 1975) (holding zoning ordinance invalid because it was not adopted according to state procedure). The MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 6 (American Mun. Ass'n 1953), exempts procedure from state control as does Ohio. Beacon Journal Publishing Co. v. City of Akron, 209 N.E.2d 399 (Ohio 1965); Morris v. Roseman, 123 N.E.2d 419 (Ohio 1954). *But see* City of Kenai v. Kenai Peninsula Newspapers, Inc., 642 P.2d 1316 (Alaska 1982) (open record provisions); Corcoran v. Parish of Jefferson, 405 So. 2d 667 (La. Ct. App. 1981) (determining hearing procedures are subject to conflict); Bartels v. Roussel, 303 So. 2d 833 (La. Ct. App. 1974)

than do courts in states having the other types of home rule provisions.

Generally, in the exercise of police power, both traditional and reform states apply a conflict test. Yet, it is difficult to discover sufficient uniformity within either group to provide a clear basis for making comparisons. Apparently, then, reform states are experienc-

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(treating open record provisions as power or function of government over which state has control and not matter of "structure, organization, [or] distribution of powers" where municipality would prevail under LA. CONST. of 1921, art. XIV, § 3(c) (1956)). Sunshine laws are not applied to municipal commission executive meetings because they are a matter free from state control. City Comm'n v. Piqua Daily Call, 412 N.E.2d 1331 (Ohio Ct. App. 1979). *See* Sho Sato, *"Municipal Affairs" in California*, 60 CALIF. L. REV. 1055, 1082–83 (1972), for the suggestion that courts should reach a similar result in California.

Courts have applied conflict to notice of claims. Johnson v. City of Fairbanks, 583 P.2d 181 (Alaska 1978) (holding 120-day municipal requirement irreconcilable with state two-year statute of limitation), *overruling* Maier v. City of Ketchikan, 403 P.2d 34 (Alaska 1965); Scavella v. Fernandez, 371 So. 2d 535 (Fla. 3d Dist. Ct. App. 1979) (finding 60-day county requirement in conflict with three-year statutory notice period); Heater v. Burt, 769 S.W.2d 127 (Mo. 1989) (involving conflict between 90-day municipal notice requirement and five-year statute of limitation); Kansas City v. St. Paul Fire & Marine Ins., 639 S.W.2d 903 (Mo. Ct. App. 1982) (involving conflict under earlier traditional home rule provisions which apply if municipal charter was adopted under them); Wagstaff v. City of Groves, 419 S.W.2d 441 (Tex. Ct. App. 1967) (holding notice provision not subject to state workmen's compensation law when applied to municipality's common law liability); City of Austin v. Clendennen, 323 S.W.2d 158 (Tex. Ct. App. 1959) (finding 45-day notice period in conflict if applied to municipality's liability under state workmen's compensation provisions); *cf.* City of Akron v. Smith, 237 N.E.2d 396 (Ohio 1968) (holding that statute of limitations of shorter duration than a municipal one was matter of court jurisdiction under exclusive state control); Wilson v. City of East Cleveland, 167 N.E. 892 (Ohio 1929) (holding law invalid that prescribes a condition to individual rights created by state police power measure); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 672–74 (1964) (arguing unfair notice ordinances constitute abuse of municipal power based on self interest).

Courts have applied conflict to court jurisdiction. Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771 (Iowa 1978) (finding inconsistency and frustration of legislative purpose where ordinance called for initial court decision, but statute called for administrative action); Cedar Rapids Human Rights Comm'n v. Cedar Rapids Community Sch. Dist., 222 N.W.2d 391 (Iowa 1974) (finding conflict where statute provided for judicial review of municipal Human Rights Commission action and municipality did not); Lovequist v. Conservation Comm'n, 393 N.E.2d 858 (Mass. 1979) (finding no conflict where statute provided for judicial review of environmental decisions and municipality added administrative review); *cf.* Dietz v. Dubuque Human Rights Comm'n, 316 N.W.2d 859 (Iowa 1982); French v. State, 546 S.W.2d 612 (Tex. Crim. App. 1977) (finding no conflict where ordinance provided for additional temporary judge and statute, since amended, did not). *But cf.* VAUBEL, *supra* note 6, § 6 (noting Ohio court jurisdictional matters are within exclusive state control). Expanded scope of conflict is also a result of an expansion of power from local and municipal matters to include educational budget matters. *School Comm.*, 626 A.2d at 935.

ing the same difficulty as traditional states in adhering to strict conflict criteria.

The clearest examples of this difficulty are the cases in which courts have struck down municipal regulations that were stricter than their statutory counterparts.[160] However, the protection afforded municipal home rule by interpreting conflict to constitute legislative denial only where it is clearly necessary to protect state interests is undergoing considerable strain in a number of other reform state decisions.

a. Legislative Action and Coincidence of Regulation

The legislatures in several reform states, while well within their authority, have overstated state needs by defining less strict municipal regulations as conflicting with statutory provisions.[161] Furthermore, the mere presence of statutory regulation of a particular matter does not create a conflict.[162] Some reform state court decisions suggest, with varying degrees of clarity, the application of qualitative conflict or a conflict with a state purpose approach.[163]

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160. Even in Ohio, the pattern of sustaining stricter municipal regulations is not as clear as it might be. VAUBEL, *supra* note 6, § 62. Failure to limit carefully the language used by the court in City of Eastlake v. Ohio Bd. of Bldg. Standards, 422 N.E.2d 598 (Ohio), *cert. denied*, 454 U.S. 1032 (1981), which suggested that more restrictive municipal standards are "ipso facto" in conflict, can further undercut municipal power to impose regulations stricter than those of the state. *See* Families Against Reily/Morgan Sites v. Butler County Bd. of Zoning Appeals, 564 N.E.2d 1113 (Ohio Ct. App.) (holding that more restrictive local ordinance regarding landfills was invalid), *appeal dismissed*, 546 N.E.2d 944 (Ohio 1989).

161. *See supra* note 38; *see also* City of Richmond v. S.M.O., Inc., 333 N.E.2d 797 (Ind. Ct. App. 1975) (suggesting in dictum that less stringent requirements may be invalid).

162. *E.g.*, Boston Police Patrolmen's Ass'n v. City of Boston, 326 N.E.2d 314 (Mass. 1975); Billings Associated Plumbing, Heating & Cooling Contractors v. State Bd. of Plumbers, 602 P.2d 597 (Mont. 1979); *see* City of Cleveland v. Raffa, 235 N.E.2d 138, 141 (Ohio) (observing that both state and city may regulate same matter), *cert. denied*, 393 U.S. 927 (1968).

163. Colorado Springs Amusement v. Rizzo, 524 F.2d 571 (3d Cir. 1975) (holding that massage parlor licensing penalties supplement state sex crime provisions), *cert. denied*, 428 U.S. 913 (1976); Cremer v. City of Anchorage, 575 P.2d 306 (Alaska 1978); State v. Redner, 425 So. 2d 174 (Fla. 2d Dist. Ct. App. 1983) (finding no conflict where ordinance requiring registration of employees working where liquor is sold implemented statutory prohibition against employment of bartenders with criminal record); Yater v. Hancock County Planning Comm'n, 614 N.E.2d 568 (Ind. Ct. App. 1993) (finding municipal restrictions on highway access supplements safety objectives of state), *cert. denied*, 114 S. Ct. 1401 (1994); Palermo Land Co. v. Planning Comm'n, 561 So. 2d 482 (La.

b. Stricter Municipal Regulation

A Texas court stated that a municipality cannot prohibit what the state regulated,[164] and an Indiana appellate court found that a stricter municipal residency requirement imposed upon firefighters conflicted with state law.[165] Contrary suggestions appear in Missouri, Pennsylvania, and Massachusetts decisions.[166] Florida has ap-

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1990) (sustaining zoning limitations on expansion of solid waste disposal sites where state regulations sought to control process of disposal); Take Five Vending, Ltd. v. Town of Provincetown, 615 N.E.2d 576 (Mass. 1993) (holding that ordinance prohibiting sale of cigarettes by vending machines does not interfere with state's purpose of licensing vending machines as one means for collecting cigarette tax); Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605 (Mass.) (finding that local ban on coin-operated amusement devices did not frustrate statutory purpose of permitting local licensing merely to remove devices from gambling designation), *appeal dismissed*, 464 U.S. 987 (1983); Rogers v. Town of Provincetown, 424 N.E.2d 239 (Mass. 1981) (holding that by-law making mopeds less available frustrated purpose of statute which authorized use on any public way); Grace v. Town of Brookline, 399 N.E.2d 1038 (Mass. 1979) (holding that ordinance discouraging condominium conversions by imposing six-month waiting period for occupancy did not frustrate purpose of state statutes to further ownership, but merely postponed statutes' application); Lovequist v. Conservation Comm'n, 393 N.E.2d 858 (Mass. 1979); Anderson v. City of Boston, 380 N.E.2d 628 (Mass. 1978) (forecasting frustration of purpose of general state regulations of election contributions and expenditures if not applied to actions of municipal corporations), *appeal dismissed*, 439 U.S. 1060 (1979); Taunton Greyhound Ass'n v. Town of Dighton, 364 N.E.2d 1234 (Mass. 1977); Town of Milton v. Attorney Gen., 363 N.E.2d 679 (Mass. 1977) (sustaining ordinance prohibiting self-service gas stations even though state permitted them); City of Revere v. Aucella, 338 N.E.2d 816 (Mass. 1975), *appeal dismissed sub nom.*, Charger Invs., Inc. v. Corbett, 429 U.S. 877 (1976); Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393 (Mass. 1973) (interpreting state purpose to overturn local zoning limits on low-income housing where they are unnecessary to meet local needs); Holland Enters., Inc. v. Joka, 439 A.2d 876 (Pa. Commw. Ct. 1982) (finding unnecessary and unreasonable ordinance requiring added security for installation of on-site sewage disposal approved by state); Cannon v. City of Dallas, 263 S.W.2d 288 (Tex. Ct. App. 1953).

164. *See* City of Fort Worth v. McDonald, 293 S.W.2d 256 (Tex. Ct. App. 1956) (involving a state tax). Nor can a municipality impose a five-year residency requirement on municipal candidates when the state law sets a one-year requirement. Socialist Workers Party v. Welch, 334 F. Supp. 179 (S.D. Tex. 1971). *But see* City of Weslaco v. Melton, 308 S.W.2d 18 (Tex. 1958) (sustaining city's pasteurization requirement when state provided for nonpasteurized class). In South Dakota, a stricter ordinance was invalidated as a permit-forbid conflict in State v. Eidahl, 495 N.W.2d 91 (S.D. 1993).

165. Board of Pub. Safety v. State *ex rel*. Benkovich, 388 N.E.2d 582 (Ind. Ct. App. 1979). *Benkovich* was criticized for relying on implied preemption in Rivas, *supra* note 128, at 693–94; *see* Vaubel, *supra* note 3, at 684–86 (discussing implied preemption). But added burdens imposed by local regulations restricting state highway access that supplement and further state goals by reducing traffic congestion have been upheld. Yater v. Hancock County Planning Comm'n, 614 N.E.2d 568 (Ind. Ct. App. 1993), *cert. denied*, 114 S. Ct. 1401 (1994).

166. *E.g.*, Lovequist v. Conservation Comm'n, 393 N.E.2d 858 (Mass. 1979); *accord*

plied a strict "cannot co-exist" rule to sustain an ordinance with broader application than the statute.[167]

As is generally the case, a municipal ban against a state licensee locating within a particular zone of the municipality has failed in reform states[168] and in Ohio.[169] However, courts neglected in each of these cases to examine whether state interest extended to the ap-

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Marshfield Family Skateland, Inc. v. Town of Marshfield, 450 N.E.2d 605 (Mass.) (holding that municipal ban of what statute permitted to be licensed locally was not inconsistent with state purpose), *appeal dismissed*, 464 U.S. 987 (1983); Town of Milton v. Attorney Gen., 363 N.E.2d 679 (Mass. 1977); Golden v. Board of Selectmen, 265 N.E.2d 573 (Mass. 1970); *see* Kansas City v. LaRose, 524 S.W.2d 112 (Mo. 1975) (finding no conflict without mentioning home rule); Kansas City v. Troutner, 544 S.W.2d 295 (Mo. Ct. App. 1976) (involving extension of state prohibition). *But see* Miller v. City of Manchester, 834 S.W.2d 904 (Mo. Ct. App. 1992) (finding that ordinance requiring steel traps conflicted with statute requiring metal traps); State *ex rel*. Mayfield v. City of Joplin, 485 S.W.2d 473 (Mo. Ct. App. 1972) (holding that city failed to overcome finding of conflict or to raise issue of whether consistency under former traditional constitutional provisions might be affected by reserve power provisions in MO. CONST. art. VI, § 19(a) (amended 1971)); Fantastic Plastic, Inc. v. City of Pittsburgh, 377 A.2d 1051 (Pa. Commw. Ct. 1977). For appellate decisions where home rule was not discussed, but added township regulations were accepted, and no conflict with statutory purposes or policies was found, see also *In re* Atlantic Richfield Co., 468 A.2d 1208 (Pa. Commw. Ct. 1983); Holland Enters., Inc. v. Joka, 439 A.2d 876 (Pa. Commw. Ct. 1982); Open Pantry Food Marts v. Commonwealth *ex rel*. Township of Hempfield, 391 A.2d 20 (Pa. Commw. Ct. 1978); Kavanagh v. London Grove Township, 382 A.2d 148 (Pa. Commw. Ct. 1978), *aff'd by an equally divided court*, 404 A.2d 393 (Pa. 1979), *appeal dismissed*, 444 U.S. 1401 (1980).

167. Laborers' Int'l Union v. Burroughs, 541 So. 2d 1160 (Fla. 1989) (finding no conflict where employment discrimination statute applied to employers with more than 14 employees and county ordinance applied to employers with more than four employees). In an earlier appeals court holding, longer municipal time periods for expiration of tenancy and cancellation of leases in condominium conversions were invalidated. City of Miami Beach v. Rocio Corp., 404 So. 2d 1066 (Fla. 3d Dist. Ct. App.), *rev. denied*, 408 So. 2d 1092 (Fla. 1981).

168. Framingham Clinic, Inc. v. Board of Selectmen, 367 N.E.2d 606, 612 (Mass. 1977) (Hennessey, C.J., concurring) (involving abortion clinic); New England LNG v. City of Fall River, 331 N.E.2d 536 (Mass. 1975) (involving permit to liquify and store natural and propane gas); Board of Appeals v. Housing Appeals Comm., 294 N.E.2d 393 (Mass. 1973) (involving application to locate low income housing subject to state-created committee review); *cf*. City of Beaumont v. Jones, 560 S.W.2d 710 (Tex. Ct. App. 1977) (construing statutory permission for existing cemeteries to use additional land as applicable only in absence of municipal prohibition). Courts have also freed state instrumentalities from the application of municipal zoning regulations. County Comm'rs v. Conservation Comm'n, 405 N.E.2d 637 (Mass. 1980) (stating municipal zoning ordinance impeded statutorily authorized construction of county jail); Town of Freetown v. Zoning Bd. of Appeals, 600 N.E.2d 1001 (Mass. App. Ct. 1992) (involving state operation of sanitary landfill); Inspector of Bldgs. v. Salem State College, 546 N.E.2d 388 (Mass. App. Ct. 1989) (involving construction of state college dormitory).

169. City of Lyndhurst v. Compola, 169 N.E.2d 558, 560 (Ohio Ct. App. 1960); City of Canton v. Imperial Bowling Lanes, Inc., 220 N.E.2d 151, 159 (Canton Mun. Ct. 1966).

proval of a precise location.[170]

c. Implied Conflict and Statutory Exceptions

A Texas decision applied implied conflict[171] and a Louisiana court suggested it,[172] but other state courts have rejected it.[173] Decisions in Florida and Massachusetts have held that municipal ordinances conflict with statutory exceptions to regulation,[174] but a South Dakota court reached an opposite result.[175]

d. Licensing

Courts in Massachusetts and Texas have found that licensing by both state and municipality does not constitute a conflict.[176] The opposite result was reached in an apparent application of permit-forbid conflict in Ohio.[177] In Maine, municipal licensing requirements which were additional to those established by statute have been struck down.[178] Courts in reform states have invalidat

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170. This failure is not uncommon. *See* Note, *supra* note 25, at 195. See also *supra* text accompanying notes 84–93 for views about municipal regulations imposed upon state licensees.

171. *See* Royer v. Ritter, 531 S.W.2d 448, 450 (Tex. Ct. App. 1975).

172. *See* City of Shreveport v. Curry, 357 So. 2d 1078, 1080 (La. 1978), *criticized in* Kenneth M. Murchison, *Local Government Law*, 39 LA. L. REV. 843, 857 (1979). The Louisiana Constitution employs denial language for state control in its Home Rule Charter. LA. CONST. art. VI, § 5(e); *see also* Scavella v. Fernandez, 371 So. 2d 535 (Fla. 3d Dist. Ct. App. 1979).

173. *See* Illinois Liquor Control Comm'n v. City of Joliet, 324 N.E.2d 453, 455 (Ill. App. Ct. 1975); *see also* Laborers' Int'l Union v. Burroughs, 541 So. 2d 1160, 1181 (Fla. 1989); Snow Land, Inc. v. City of Brookings, 282 N.W.2d 607, 609 (S.D. 1979) (using "cannot co-exist" test for conflict). But see *supra* text accompanying notes 112–22 for a California decision which relies on implied conflict.

174. Rinzler v. Carson, 262 So. 2d 661, 667–68 (Fla. 1972) (involving statute which excepted from regulation firearms lawfully possessed under federal regulations); New England Tel. & Tel. Co. v. City of Lowell, 343 N.E.2d 405, 407 (Mass. 1976) (finding ordinance that required utility to use registered engineers frustrated purpose of statutory exemption from registration of engineers employed by public utilities). *See supra* note 59 for more on legislative intent to except an activity from regulation.

175. *Snow Land*, 282 N.W.2d at 607.

176. Barlow v. Town of Wareham, 517 N.E.2d 146 (Mass. 1988) (involving positive indication of legislative intention not to preclude municipal licensing); Gordon v. State, 757 S.W.2d 496 (Tex. Ct. App. 1988); Utter v. State, 571 S.W.2d 934 (Tex. Crim. App. 1978); *cf.* Combined Am. Ins. Co. v. City of Hillsboro, 421 S.W.2d 488, 489–91 (Tex. Ct. App. 1967) (invalidating municipal license fee where statute barred such fees).

177. Auxter v. City of Toledo, 183 N.E.2d 920 (Ohio 1962).

178. Driggin v. Town of Wells, 509 A.2d 1171 (Me. 1986); Ullis v. Inhabitants of

ed municipal licensing of that which the state forbids[179] and municipal regulation forbidding what the state licenses[180] or taxes.[181] Courts have also upheld municipal regulation of a state licensee.[182]

e. Penalties

Florida courts have invalidated municipal penalties greater than those provided by statute.[183] In Texas, a lesser penalty was in conflict.[184] Courts in Pennsylvania and Ohio have sustained both greater and lesser penalties,[185] except in one case where the state made the offense a felony.[186]

Boothbay Harbor, 459 A.2d 153 (Me. 1983). In Schwanda v. Bonney, 418 A.2d 163 (Me. 1980), state licensing criteria were found exclusive on a combination of grounds including preemption, no municipal power, and legislative denial, after the lower court had found conflict. For suggestions that municipal licensing of plumbers would only be invalid if it conflicted with state licensing, see Billings Associated Plumbing, Heating & Cooling Contractors v. State Bd. of Plumbers, 602 P.2d 597 (Mont. 1979).

179. Young v. City of Seagoville, 421 S.W.2d 485 (Tex. Ct. App. 1967).

180. City of Dallas v. Southwest Airlines Co., 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974); Northeast Ohio Regional Sewer Dist. v. City of Brooklyn, 580 N.E.2d 796 (Ohio Ct. App. 1989); Alpha Enters., Inc. v. City of Houston, 411 S.W.2d 417, 422 (Tex. Ct. App.) (making exception for savings provision found in statute), *cert. denied*, 389 U.S. 1005 (1967); Ruud, *supra* note 21, at 700. *But see* Take Five Vending, Ltd. v. Town of Provincetown, 615 N.E.2d 576 (Mass. 1993) (holding that local ordinance forbidding vending machines sales within the town did not interfere with state licensing of vending machines as means for collecting state excise tax on cigarettes).

181. City of Fort Worth v. McDonald, 293 S.W.2d 256 (Tex. Ct. App. 1956). However, these courts have not invalidated municipal regulation forbidding what the state taxes when there is statutory authority for such municipal regulation. Cannon v. City of Dallas, 263 S.W.2d 288 (Tex. Ct. App. 1953).

182. Taunton Greyhound Ass'n v. Town of Dighton, 364 N.E.2d 1234 (Mass. 1977) (holding municipal regulation requiring specified number of police officers to promote good order applicable to state-licensed dog track); City of Revere v. Aucella, 338 N.E.2d 816 (Mass. 1975) (involving state liquor licensee), *appeal dismissed sub nom.* Charger Invs., Inc. v. Corbett, 429 U.S. 877 (1976); Gordon v. State, 757 S.W.2d 496 (Tex. Ct. App. 1988). *But see supra* note 168 and accompanying text.

183. *See* Wyche v. State, 619 So. 2d 231 (Fla. 1993); Edwards v. State, 422 So. 2d 84 (Fla. 2d Dist. Ct. App. 1982); *see also supra* note 31 and accompanying text.

184. *See* Young v. State, 267 S.W.2d 423 (Tex. Crim. App. 1954); *Ex parte* Goldburg, 200 S.W. 386 (Tex. Crim. App. 1918) (invalidating municipal penalty that was less than statutory penalty). But see Ruud, *supra* note 21, at 699–700, for criticism of the rule.

185. Brown v. Pornography Comm'n, 620 F. Supp. 1199 (E.D. Pa. 1985); Village of Struthers v. Sokol, 140 N.E. 519 (Ohio 1923); Matthews v. Russell, 95 N.E.2d 696 (Ohio Ct. App. 1949); Commonwealth v. Rich, 437 A.2d 516 (Pa. Commw. Ct. 1981).

186. City of Cleveland v. Betts, 154 N.E.2d 917 (Ohio 1958). However, a Louisiana court, in a pre-home rule decision, upheld the municipal ordinance. State v. Suire, 319 So. 2d 347 (La. 1975). The Indiana Constitution bars local penal laws. IND. CONST. art. IV, § 22; City of Indianapolis v. Sablica, 342 N.E.2d 853 (Ind. 1976); Setser v. City of

D. Conclusions

The application of strict, literal quantitative conflict to resolve state/local disputes which arise from the sharing of power provides the broadest protection to municipal interests and also best advances certainty in the law.[187] Practical pressures, however, mili

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Fort Wayne, 346 N.E.2d 642 (Ind. Ct. App. 1976) (holding municipal modification or extension of state criminal statute invalid). By statute, Indiana prohibits municipalities from penalizing conduct made criminal by statute, or imposing a penalty of imprisonment. IND. CODE ANN. § 36-1-3-8(8), (9) (West 1983 & Supp. 1994); *see* Vaubel, *supra* note 1, at 46; Vaubel, *supra* note 3, at 672 n.131; *cf.* City of Indianapolis v. Wright, 371 N.E.2d 1298 (Ind.) (holding criminal statute does not preclude municipal civil regulations), *appeal dismissed*, 439 U.S. 804 (1978).

187. The following cases present little difficulty in preserving both legislative control and municipal interests. They involve relatively clear literal conflict on a permit-forbid basis. Adkins v. Lester, 530 P.2d 11 (Alaska 1974) (involving ordinance requiring emergency vehicles to use audible signals at all times and statute permitting omission at times); State *ex rel.* Burnau v. Valley Park Fire Protection Dist., 477 S.W.2d 734 (Mo. Ct. App. 1972) (involving fire protection district prohibiting sale of fireworks and statute permitting sale of certain fireworks); City of Wichita Falls v. Abell, 566 S.W.2d 336 (Tex. Ct. App. 1978) (involving ordinance forbidding sale of liquor within 300 feet of school measured from building lines and statute permitting prohibition within 300 feet measured along property lines); Beverly v. City of Dallas, 292 S.W.2d 172 (Tex. Ct. App. 1956) (involving ordinance prohibiting employees from joining labor unions and statute proscribing denial of public employment because of membership in labor organization); *cf.* Abilene Distribs., Inc. v. City of Abilene, 712 S.W.2d 644 (Tex. Ct. App. 1986) (sustaining different municipal method of measurement in zoning ordinance because statute authorized higher municipal zoning standards), *superseded by* TEX. ALCO. BEV. CODE ANN. § 109.57 (West 1957); Young, Wilkinson & Roberts v. City of Abilene, 704 S.W.2d 380 (Tex. Ct. App. 1985) (finding no conflict between ordinance and statute where ordinance imposed distance limitation between liquor licensees and residential lot while statute mentioned only church, public school, and public hospital), *superseded by* TEX. ALCO. BEV. CODE ANN. § 109.57 (West 1987). Conflict was found in Missouri in a case involving pre-home rule amendment facts. *See* Crackerneck Country Club, Inc. v. City of Independence, 522 S.W.2d 50 (Mo. Ct. App. 1974) (involving ordinance prohibiting liquor sales on Sundays and statute providing for license to sell on Sundays); *see also* City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972) (involving ordinance rejecting eviction and statute permitting terminating tenancy at will); Donisi v. Trout, 415 So. 2d 730 (Fla. 4th Dist. Ct. App. 1981) (holding municipality could not extend limits placed on state waiver of municipal sovereign immunity), *rev. denied*, 426 So. 2d 29 (Fla. 1983); City of Miami Beach v. Rocio Corp, 404 So. 2d 1066 (Fla. 3d Dist. Ct. App.) (involving statute permitting conversion to condominiums and ordinance prohibiting conversion for 90 days), *rev. denied*, 408 So. 2d 1092 (Fla. 1981); City of Hammond v. N.I.D. Corp., 435 N.E.2d 42 (Ind. Ct. App. 1982) (involving ordinance permitting sale of fireworks statute prohibited and restricting sales statutorily permitted, with court emphasizing state preemption of field); Lexington Educ. Ass'n v. Town of Lexington, 448 N.E.2d 1271 (Mass. App. Ct.) (involving statute requiring health insurance coverage for municipal employees working no less than 20 hours and ordinance setting coverage at 25

tate against strict application of this approach. State needs require that states broaden conflict to include frustration of state purpose, even though such a qualitative view of conflict increases interpretive dangers to home rule. At the same time, the course of traditional home rule decisions suggests that courts ought to apply quantitative conflict principles more strictly, in order to avoid judicial over-protection of state interests.

States with reserve power home rule provisions, while evidencing some improvement, have not consistently seized the opportunity to apply these principles. The proposal offered at the beginning of this Article provides a basis for states to focus on more effectively balancing state and local interests in resolving the tensions that exist in the exercise of overlapping governmental authority.

III. MUNICIPAL FISCAL POWERS

State control over the exercise of municipal power is nowhere more significant than with respect to fiscal powers. As discussed elsewhere with regard to the grant of municipal powers,[188] municipal power to raise revenue either by taxation or by borrowing is essential to any meaningful local autonomy. Yet, on no other subject are control provisions greater. The significance of this control upon state/local relations and the unique form this control takes under-

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hours), *rev. denied*, 451 N.E.2d 1167 (Mass. 1983); State *ex rel.* Missouri Highway & Transp. Comm'n v. Alexian Bros., Inc., 848 S.W.2d 472 (Mo. 1993) (involving statute forbidding erection of signs permitted by ordinance). But see Bennett M. Lifter, Inc. v. Metropolitan Dade County, 482 So. 2d 479 (Fla. 3d Dist. Ct. App. 1986) (finding administrative regulations designed to discover violations in parking space requirements could not bar condominium conversions in conflict with statutory provisions permitting them); State v. Lewis, 406 A.2d 886 (Me. 1979) (finding no conflict where term "unregistered automobile" used in the ordinance was given same meaning as an "unserviceable automobile" in the statute); Commonwealth v. Rich, 437 A.2d 516 (Pa. Commw. Ct. 1981) (finding no material conflict where Philadelphia ordinance restricting obscenity was tested with respect to community standards), *followed in* Brown v. Pornography Comm'n, 620 F. Supp. 1199 (E.D. Pa. 1985) (finding no conflict as to difference in penalty, but finding conflict with respect to ordinance permitting sale of certain material in industrial zone which was illegal under statute), for examples of no conflict.

In the absence of conflict, a municipal ordinance may still fail the constitutional test of reasonableness. *E.g.*, *In re* Atlantic Richfield Co., 468 A.2d 1208 (Pa. Commw. Ct. 1983); Holland Enters., Inc. v. Joka, 439 A.2d 876 (Pa. Commw. Ct. 1982). *Contra* Open Pantry Food Marts v. Commonwealth *ex rel.* Township of Hempfield, 391 A.2d 20 (Pa. Commw. 1978).

188. Vaubel, *supra* note 1, at 34 n.142.

score the need for the separate treatment of state/local fiscal dealings.

A. Nature of Control

State constitutional restraints upon municipal fiscal powers are of two kinds: specific limitations and provisions for extensive state legislative control. These restraints are more common than denials of municipal regulatory power.[189] They are often derived from specific constitutional limitations upon fiscal powers of government in general, or they are the result of special treatment of these matters within municipal home rule constitutional provisions. Restraints upon municipal fiscal powers are analogous to the approach a number of states have taken in making the grant of taxing power dependent upon legislative action. In addition, courts often curtail municipal taxing power, as they do municipal regulatory power, by applying implied preemption, at times even more rigorously than in the regulatory field.

What has been said with respect to the failure in some states to insure municipal home rule power to tax or borrow money bears repeating here.[190] State legislative control of municipal finances belies local autonomy.[191] True, where state authority is limited to control of the exercise of municipal fiscal powers as distinguished from control over their grant, municipalities enjoy the power to initiate fiscal measures until the legislature acts to limit what they have done. But the skeleton of municipal home rule that exists if fiscal powers are subject to legislative denial,[192] and the impediments to effective home rule that result from these denials, ultimately are little different from outright municipal dependency upon the state legislature for a grant of power.

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189. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, MEASURING LOCAL DISCRETIONARY AUTHORITY 49 (1981). The least prevalent denials relate to matters of governmental structure.

190. Vaubel, *supra* note 1, at 34 n.142.

191. Rubin G. Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U. L. REV. 27, 29 (1956); Ilene S. Lieberman & Harry Morrison, Jr., *Warning: Municipal Home Rule Is in Danger of Being Expressly Preempted by . . .* , 18 NOVA L. REV. 1437, 1444, 1463 (1994); Frank J. Macchiarola, *Local Government Home Rule and the Judiciary*, 48 J. URB. L. 335, 341 (1971). But this view is not universally held. *See* Vanlandingham, *supra* note 10, at 273.

192. Baum, *The Scope of Home Rule*, *supra* note 125, at 826.

The danger of at least interfering with responsible fiscal decisions,[193] if not crippling[194] municipal government, by either approach is evident. But in spite of these concerns, extensive state legislative control authority over municipal fiscal power is common,[195] and constitutional limitations upon fiscal powers of government, including municipalities, are frequent and onerous.[196] Although of questionable effectiveness, current efforts to resort to constitutional limitations as a means of dissuading abuse of these important powers have been extended even to include proposed limits upon congressional authority.[197]

In view of this continuing pattern, it is not surprising to find that even early proponents of traditional home rule frequently coupled their concern for municipal autonomy over fiscal matters with the recognition of possible municipal abuse of power.[198] These initial home rule discussions included statements reflecting concern over the need to curtail the effect that run-away municipal taxes or borrowing might have upon state interests.

The states' need to coordinate taxes and to achieve equitable distribution of tax burdens and benefits received attention.[199] Moreover, these early observers viewed possible municipal taxing abuses as posing the problem of interference with state tax administration and collection.[200] They usually did not elaborate on how these disruptions might occur, nor did they endorse the opposing considerations concerning the desirability of releasing municipalities from

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193. Charles W. Goldner, Jr., *State and Local Government Fiscal Responsibility: An Integrated Approach*, 26 WAKE FOREST L. REV. 925, 937–38 (1991) (involving debt and expenditure controls).

194. David, *supra* note 34, at 691–92.

195. *E.g.*, OHIO CONST. art. XVIII, § 13; *see* VALENTE & MCCARTHY, *supra* note 7, at 141.

196. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM 91 (1969). This is the perception of government officials as well. *See* ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 189, at 29.

197. For example, consider the continuing efforts to call a constitutional convention in order to adopt a requirement to balance the federal budget and the efforts of former Presidents Reagan and Bush to achieve the same purpose.

198. WILLIAM B. MUNRO, THE GOVERNMENT OF AMERICAN CITIES 65 (1912); *see* Russell M. Story, *Local Self-government for Cities and Counties*, 2 ILL. L. BULL. 339, 347 (1919).

199. Jefferson B. Fordham, *The West Virginia Municipal Home Rule Proposal, Part II*, 38 W. VA. L.Q. 329, 337 (1932).

200. MUNICIPAL ASS'N OF CLEVELAND, CONSTITUTIONAL HOME RULE FOR OHIO CITIES 29–30 (1912); MUNRO, *supra* note 198.

constitutional restraint or the possible use of control measures less extensive than state denial authority.[201]

States presumably recognized the impelling need for municipalities to possess broad fiscal powers, but they rarely provided protective devices to preserve such power in traditional home rule states. The ready acceptance of concurrent taxing power based on need and compatibility[202] at the federal/state level was neither evident in the thinking of home rule enthusiasts nor in their efforts to achieve municipal autonomy during the traditional home rule period. It can only be suggested that this lack of aggressiveness in asserting municipal fiscal independence resulted from a feeling that such concessions to state authority were politically necessary. Perhaps trust in the state legislature, or even more likely, fear of irresponsibility at the local level, also played a role.

Whatever their historical basis, the rigid constitutional limitations that burden municipalities today include quantitative limitations on the power to tax, or limits upon the sources of revenue, and often a limitation on the amount that municipalities can borrow.[203] The recent introduction of home rule — otherwise broadly conceived — has not freed municipalities from extensive state legislative power to control municipal fiscal needs.

The current trend among states to increase rigid restrictions on raising revenue and making expenditures started with California's Proposition Thirteen. California places an absolute lid on local property taxes,[204] while Missouri has severely restricted the amount of municipal taxes and fees.[205] Texas has repealed the property tax entirely and has adopted somewhat less restrictive restraints on the amount of taxes that municipalities can impose.[206] These measures

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201. For a detailed analysis which questions some of the presumed disadvantages of dual taxation by the state and municipality and the extraterritorial effect of the latter, see Sato, *supra* note 159, at 1099–1104.

202. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 198–99 (1824).

203. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 196, at 91–92; JOHN M. WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS 36–38 (1961); Jefferson B. Fordham, *Local Government Law*, 39 OHIO ST. L.J. 679, 685, 687–88 (1978); Goldner, *supra* note 193, at 927–38.

204. *See generally* Ronald Hansen, Comment, *The Municipal Income Tax and State Preemption in California*, 11 SANTA CLARA LAW. 343 (1971).

205. MO. CONST. art. X, § 22. Increases in local taxes are subject to voter approval and cannot exceed any increase in the consumer price index for all urban consumers. *Id*.

206. TEX. CONST. art. VIII, §§ 1-e, 21; TEX. TAX CODE ANN. §§ 26.06–.08 (West 1992 & Supp. 1994) (subjecting tax increases of more than eight percent within one year to

endanger municipal growth, or at least the making of responsible governmental fiscal decisions.[207]

This pattern of restraint does not protect only state interests. Rather, the measures devised by states often are designed to protect municipal citizens from their own actions, and the actions of local government officials, through constitutionally imposed limits not subject to popular waiver. The measures evidence a distrust of popular referendum requirements and the effectiveness of ordinary electoral reaction against municipal officials who risk popular disapproval of excessive taxation. Admittedly, this distrust stems from a period in the late nineteenth century when the risk of effective popular disapproval was slim because of political bossism and the corruption of local government.[208] However different the circumstances are today, such protective devices remain a significant factor in the operation of municipal government.

Protection of nonresidents' interests from municipal income taxes has more support than general electoral restraints.[209] To one observer, protection of nonresidents justifies reserving restricted state authority to deny municipal taxing power adopted in modern Illinois home rule provisions.[210] Yet, however real the danger to the limited interests of nonresidents, their protection alone hardly justifies vesting a state legislature with broad denial control authority over municipal taxing power in general.[211]

Another deep-seated concern involves protecting municipal citi-

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voter rollbacks). See Robert H. Freilich et al., *Undermining Municipal and State Initiative in an Era of Crisis and Uncertainty*, 11 URB. LAW. 547, 576–83 (1979), for a review of the acceptance of this type of restriction in other states.

207. Goldner, *supra* note 193, at 955–62.

208. JOSEPH D. MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916–1930, at 338–40 (photo. reprint 1967) (1933).

209. Ohio municipalities are not required by legislative restraints upon municipal income taxes — or otherwise — to provide a credit to nonresidents who have paid such a tax to their city of residence. OHIO REV. CODE ANN. § 718 (Anderson 1991 & Supp. 1993); Thompson v. City of Cincinnati, 208 N.E.2d 747, 751–52 (Ohio 1965).

210. *See* Baum, *The Scope of Home Rule*, *supra* note 125. The legislature can exercise this authority only by a 60% vote of each house. ILL. CONST. art. VII, § 6(g).

211. Denial of authority to impose a municipal income tax is not justified when a more limited control over the apportionment formula and the prevention of discrimination are available to the state to protect the interests of nonresidents. Sato, *supra* note 159, at 1104. For similar views, see Weekes v. City of Oakland, 579 P.2d 449, 456–63 (Cal. 1978) (per curiam) (Richardson, J., concurring). *See also* William R. Andersen, *Resolving State/Local Governmental Conflict — A Tale of Three Cities*, 18 URB. L. ANN. 129, 131 (1980).

zens from excessive borrowing by their own municipal government. Fear that a municipality might borrow itself into bankruptcy has an early origin.[212] One solution to this problem is popular control — placing the ultimate power to borrow in the hands of the people through referendum provisions. This has often been done. Nevertheless, states have imposed additional constitutional safeguards restricting the purposes for which, or amounts that, municipalities can borrow as limits upon home rule authority.[213] No doubt drafters of these restraints thought them necessary, because even the most responsible citizens tend to become less so when faced with the choice between paying now or paying later. Yet, the rigidity of the restraints and their insensitivity to local needs have invited evasion and made them largely ineffective.[214]

Constitutional restraint upon municipal borrowing also represents an attempt to prevent municipalities from overburdening themselves with debt, thus effecting a loss of revenue for the state.[215] Modern circumstances underscore still another reason for constitutional restraints upon municipal borrowing power: with overburdening, the state will need to "bail out" financially distressed municipalities.[216]

In general then, state/local fiscal relations present an obvious dilemma. In theory, the need to advance local autonomy in fiscal matters is strong, but in practice, taxpayers and bondholders need protective devices. On the other hand, where uniform state legislation might provide this protection, in practice, special concerns make general legislation a delusion.[217]

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212. MUNRO, *supra* note 198, at 66.

213. MCGOLDRICK, *supra* note 208, at 342–43.

214. Goldner, *supra* note 193, at 935–36.

215. MUNICIPAL ASS'N OF CLEVELAND, *supra* note 200, at 30.

216. For example, New York City's recent need to seek federal aid is well known. Only slightly less well known is the actual default of the City of Cleveland which led the Ohio legislature to adopt general "bail out" provisions in 1979. *See* OHIO REV. CODE ANN. § 118 (Anderson 1990 & Supp. 1993). To Professor Charles Goldner, the principal deficiency in state supervision in these cases was the failure to establish and enforce sound accounting procedures and to require frequent fiscal reports to the state. Goldner, *supra* note 193, at 943, 946.

217. MCGOLDRICK, *supra* note 208, at 339–40. Compare the National Municipal League's approach to state borrowing authority which, in support of the responsibility of elected officials, would eliminate rigid constitutional restraints and the need for popular referendum as well. *See* MODEL STATE CONSTITUTION § 7.01 and cmt. (National Mun. League, 6th ed. 1963, rev. 1968); *see infra* app. II.

B. Suggested Reforms

Modern studies shift the point of emphasis in state/local fiscal relations. Rather than stressing the need for state constitutional control of municipal taxing and borrowing power — for the protection of the state, municipal citizens, or nonresidents — they emphasize the obvious need municipalities have for expanded sources of revenue.[218] The curtailment of municipal fiscal resources leads to a variety of difficulties. Municipalities lose independence, and municipal governments lose effectiveness[219] and often are required to surrender powers to state-created special governmental units.[220] Municipalities otherwise become dependent upon state[221] and federal aid programs,[222] a dependency that is becoming ever less stable, at least with respect to federal assistance.

Clearly, it is not the purpose of this Article even to attempt to resolve the fiscal problems of cities as they relate to the ever larger and more complex problems of state and federal governments. Yet, if such a study were undertaken, it could well start with the significant suggestions of the Advisory Commission on Intergovernmental Relations (ACIR).

1. Proposals of the Advisory Commission on Intergovernmental Relations

The commission proposes, in an overall approach, that municipal interests should be more within the control of municipalities and

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218. However, variety in measures is no gain unless those used are productive. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, LOCAL NONPROPERTY TAXES AND THE COORDINATING ROLE OF THE STATE 7, 54 (1961) [hereinafter LOCAL NONPROPERTY TAXES]; ADVISORY COMM'N ON INTERGOVTL. RELATIONS, THE ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS 51 (1968) [hereinafter ADVISORY COMMISSION].

219. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 196, at 91; Harvey Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U. L. REV. 571, 583–85 (1955).

220. W. DONALD HEISEL & IOLA O. HESSLER, STATE GOVERNMENT FOR OUR TIMES 44–45 (1970).

221. *See* Paul W. Wager & Harvey Walker, *Centralization Vs. Home Rule*, 36 NAT'L MUN. REV. 447 (1947).

222. *See* ADVISORY COMM'N ON INTERGOVTL. RELATIONS, STATE LIMITATIONS ON LOCAL TAXES & EXPENDITURES 5 (1977); Carol O'Cleiracain, *A Case Study in Fiscal Federalism: New York City and New York State*, 19 FORDHAM URB. L.J. 727, 730 (1992).

not be unnecessarily submerged by state interests.[223] The commission makes no exception to its support for general state legislative control over municipal power for municipal fiscal matters.[224] However, it does urge greater municipal fiscal flexibility through the liberalization of rigid restraints upon levying municipal property taxes and borrowing.[225]

The ACIR suggests that states remove limitations on municipal property taxes entirely.[226] Or, if states retain limitations temporarily, states should liberalize the limitations by making them subject to removal by the electorate and by refusing to apply them to home rule municipalities.[227] States might need to retain property tax limitations in order to stabilize rates and prevent usurpation of state tax relief by increased local property rates. In that event, states should open up nonproperty tax sources to municipalities, or they should share state revenue with them.[228]

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223. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 222, at 6.

224. This control power in the model constitutional proposals consists of reserving to the legislature authority to deny municipal power. It is looked upon with misgivings. *See* Cohn, *supra* note 191, at 51.

225. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, IMPROVING URBAN AMERICA: A CHALLENGE TO FEDERALISM 55 (1976); ADVISORY COMMISSION, *supra* note 218, at 51–53. Dean Fordham also subscribes to this view, but with the suggestion that municipal actions be subject to legislative, not popular, limitation instead. Jefferson B. Fordham, *Ohio Constitutional Revision — What of Local Government?*, 33 OHIO ST. L.J. 575, 586 (1972). While government officials appear to be in agreement with the liberalization of restraints on property taxes, they do not agree about tax and debt limits in general. ADVISORY COMM'N ON INTERGOVTL. RELATIONS *supra* note 189, at 37, 42.

226. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, CHANGING PUBLIC ATTITUDES ON GOVERNMENTS AND TAXES 1 (1991); ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 225, at 55; ADVISORY COMMISSION, *supra* note 218, at 52–53; ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 196, at 91–92. The suggestions are made even though the property tax is currently perceived as the most unfair tax. It is also declining as a source of revenue. Goldner, *supra* note 193, at 930–31.

227. In addition, the ACIR has suggested that states rehabilitate the property tax to make it more equitable and more serviceable as a basic source of revenue which is necessary to promote municipal autonomy. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 225, at 57 (suggesting adjustments for the elderly and low-income families); 1 ADVISORY COMM'N ON INTERGOVTL. RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX 70 (1963).

Ohio provides for charter limits as a substitute for constitutional ones, which in turn are subject to electoral waiver. *See* OHIO REV. CODE ANN. § 5705.18 (Anderson 1991 & Supp. 1993) (implementing OHIO CONST. art. XII, § 2).

228. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 222, at 6. This view of the acceptability of property tax limits represents a modification of the position taken in ADVISORY COMMISSION, *supra* note 218, at 52.

In general, the ACIR suggests that states, in providing new sources of revenue to municipalities,[229] should subject the levying of taxes to permissive referendum. Initially, the ACIR suggested that states empower municipalities to assess a sales tax or an income tax only as a *supplement* to such state taxes,[230] until states assume the fiscal burden of extraterritorial benefits now paid for by municipalities, or until metropolitan governments are formed.[231] Now the ACIR views municipal sales and income taxes more favorably.[232] At the same time, the ACIR suggests that states should limit municipal levy of nonproductive taxes and the diversification of nonproperty taxes in smaller municipalities.[233]

Liberalizing constitutional debt limitations is also on the list of ACIR recommendations. The ACIR proposals reduce the emphasis upon popular control of abuse by suggesting that proposals for incurring a municipal debt be subject to a simple majority vote in permissive, rather than mandatory, referendums.[234] The ACIR would have states replace debt limits based upon the local property tax with a formula that takes into consideration interest costs for preferred municipal borrowing. When marketplace transactions exceed this state-established standard, municipal borrowing would be ill-advised and therefore would be barred.[235]

One author, commenting upon this ACIR approach, would shift the control device even more to the local community.[236] He sug

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229. These sources are especially important for distressed municipalities. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, THE STATES AND DISTRESSED COMMUNITIES: 1983 UPDATE 243 (1985).

230. LOCAL NONPROPERTY TAXES, *supra* note 218, at 6; ADVISORY COMMISSION, *supra* note 218, at 51, 54, 68; *see* Fordham, *supra* note 225.

231. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, THE COMMUTER AND THE MUNICIPAL INCOME TAX 20 (1970).

232. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, LOCAL REVENUE DIVERSIFICATION, LOCAL INCOME TAXES 29 (1988).

233. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 218, at 7; ADVISORY COMMISSION, *supra* note 218, at 51. But, for the suggestion that municipalities pay for what they do without limits on taxing, borrowing, or administration, see Walker, *supra* note 219, at 583–84.

234. ADVISORY COMMISSION, *supra* note 218, at 52; ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 196, at 93. To compare the suggestions of the National Municipal League to eliminate referendum requirements for contracting state debt, see MODEL STATE CONSTITUTION § 7.01 and cmt. (National Mun. League, 6th ed. 1963, rev. 1968); *see also infra* app. II.

235. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 196, at 93.

236. Robert H. Bowmar, *The Anachronism Called Debt Limitation*, 52 IOWA L. REV.

gests that states authorize municipal borrowing, provided municipalities give notice to the electorate which, if the specific debt limits were met, could veto the borrowing through a permissive referendum.[237] However, if the market interest rate on the proposed bonds was higher than acceptable, the proposal would be subject to a mandatory referendum. Individual market conditions, not rigid constitutional limits or legislatively imposed criteria, would thus trigger the use of popular control measures by an informed electorate.

By way of comparison, Professor Charles Goldner's proposals would strike a different balance in response to the traditional ineffectiveness of constitutional debt limits and the current trend to limit taxes and expenditures.[238] His goal is for municipalities to avoid endangering their growth and their ability to make responsible fiscal decisions. He suggests that states establish a constitutional limit upon the amount of debt all units of government may incur, subject to legislative implementation.[239] The legislature should provide for a referendum for all forms of municipal debt over a stated amount.

By this method, popular action establishes the constitutional concept which, in turn, can be adjusted by the legislature without vote of the people. Municipal authorities would have the flexibility of using voted or unvoted forms of debt to meet municipal needs. In Goldner's view, the result would be a balanced protection of state interests, local determination, the representational functions of the legislative body, and the electorate's legitimate desire to influence the imposition of future burdens.[240]

These various proposals suggest that the modern thesis still emphasizes control to prevent possible municipal abuse. Concern for control of abuse, however, now more clearly accommodates a realistic consideration of the needs of interested groups and sound decisionmaking. It reflects less the speculative fear that municipal fiscal actions will interfere with the state's fiscal program. And, although awareness of the need to protect nonresidents continues,

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863, 896–900 (1967).

237. *Id*. at 899.

238. *See* Goldner, *supra* note 193, at 946–51.

239. *Id*. at 947.

240. *Id*. at 946–51.

the need to protect nonresidents alone does not justify adoption of broad restraints on municipal power.[241]

The proposals place increased emphasis on meeting the needs of municipal citizens for broader fiscal resources, by lessening rigid constitutional and legislative mandates and moving more to citizen control. Adequate revenue, the greatest need of municipalities today, may not be achieved by this shift of emphasis, but, at least, the need for revenue would not be exacerbated by its implementation.

2. Further Difficulties

Two developments in recent years suggest caution in proposing municipal fiscal reforms. One involves modern recommendations, including those of the ACIR, that would increase reliance upon direct popular restraints rather than upon constitutional or legislative limitations on municipal fiscal powers. At the same time, the recommendations suggest vesting more authority in local officials who must answer to the local electorate. The ACIR would resort to the electorate as a means of removing temporary limits on property taxes imposed by constitutional provisions and would make nonproperty tax rates subject to permissive referendums. The ACIR also suggests retaining permissive referendums in the debt-incurring process, even though it would remove mandatory referendums.

Goldner, while retaining a role for constitutional and legislative restraints on municipal debt, would include partial popular control over the process. However, he finds serious difficulties with

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241. Nonresident property taxes, at least without state authorization, are rejected. Louis F. Bartelt, Jr., *Extraterritorial Zoning: Reflections on Its Validity*, 32 NOTRE DAME L. REV. 367, 381–84 (1957). A municipal income tax assessed against nonresidents who work within a municipality is not an extraterritorial assessment but an intramural exercise of power with extraterritorial effects. This distinction does not alter the fact that those subject to the tax are not represented in the municipal decisionmaking process. Yet, although not without difficulty, this lack of representation ought not to prevent municipalities from collecting a tax designed to make nonresidents pay for services rendered to them by the municipality within which they work. *See* Vaubel, *supra* note 1, at 65–72. Barring such taxes would not remove all municipal power to tax incomes, and protection would be afforded to a distinct nonresident group. Yet fairness to this group does not demand unfairness to residents. State control over external effects of administrative conflicts and prevention of municipal discrimination should be adequate. Sato, *supra* note 159, at 1104. Pennsylvania has withdrawn municipal power to fix income tax rates upon nonresidents contrary to state law. *See* PA. STAT. ANN. tit. 53, § 1-302(a)(7) (Supp. 1994).

Missouri's plan to subject all municipal tax increases to popular vote.[242] This latter view supports those who have misgivings about the emphasis on popular control. They urge that Missouri remove this limitation so that local government officials can avoid being made dependent upon the rigidity of popular vote to meet pressing municipal needs. The people, all too often, are reluctant to vote the necessary funds.[243]

There are many examples of this type of voter irresponsibility. One frequently cited example is the electorate's failure to meet repeated requests for funds by impoverished school districts.[244] However, proposals not to extend — or even to reduce — popular control may just replace one form of rigidity with another. The absence of constitutional and popular restraints invites resort to a legislatively imposed "policy choice" that quite possibly is unsympathetic to local interests.[245]

Moreover, it is possible that efforts to reduce popular control may rest on a false premise. The conclusion that the electorate is not likely to meet public needs suggests that the critic knows better than the people what is in their best interest. This is at best a risky proposition in a democracy. Can it really be said that popular sentiment over a period of time will act to the detriment of the public's best interests? Despite the frequency of the charges of popular irresponsibility, the best that can be said in defense of the charges is the Scottish verdict "unproved."

There remain, of course, practical difficulties to effective government through popular control due to the wait involved for popular support and delays occasioned by the cumbersome nature of the election process. However, a middle position is possible. Goldner finds in Texas provisions a more acceptable popular participation

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242. Goldner, *supra* note 193, at 961–62.

243. The National Municipal League's view is that popular vote requirements for incurring debt by the state are an ineffective restraint on the furtherance of elective officials' responsibility. MODEL STATE CONSTITUTION § 7.01 cmt. (National Mun. League, 6th ed. 1963, rev. 1968); *see infra* app. II; *see also* Fordham, *supra* note 225; *cf.* Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381 (1984) (discussing zoning by popular vote).

244. Proposition 13, now article XIII A of the California Constitution, is an example of a popularly approved restraint upon local government assessment of property taxes. CAL. CONST. art. XIII A. Resort to assessments instead of ad valorem taxes provides no relief. City Council v. South, 186 Cal. Rptr. 276 (Ct. App. 1982).

245. *See generally* Fordham, *supra* note 225, at 576–77.

which calls for a permissive referendum for the rollback of excessive taxes, rather than as a condition for enactment.[246]

Lack of municipal resources presents an allied, but essentially different, problem with respect to municipal fiscal authority. In such a situation, a state solution is warranted. This is particularly true in many cases where the state created or accentuated the financial problems by mandating that municipalities carry out various programs.[247]

C. Examples of Control

1. Reserve Power Proposals

The ACIR's suggestion that states place less emphasis on rigid, constitutional fiscal restraints parallels the position taken in modern constitutional reform proposals of the National Municipal League at the state government level.[248] The proposals do not directly address restraints on municipal fiscal powers. Both the National Municipal League and the National League of Cities proposals provide broad fiscal power for municipalities.[249] The proposals of the National League of Cities also suggest that the state should provide the resources to municipalities to meet increased expenses from state-mandated programs.[250]

However, these reform proposals do not include provisions for popular control through referendum as a check upon municipal

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246. Goldner, *supra* note 193, at 963.

247. *See* MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 10 (American Mun. Ass'n 1953); *infra* app. I. State-imposed restraints, of course, accentuate the problem. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 222, at 5.

248. MODEL STATE CONSTITUTION §§ 7.01–.03 (National Mun. League, 6th ed. 1963, rev. 1968); *see infra* app. II.

249. As adopted by the states, exceptions exist. For example, Massachusetts makes municipal taxing power dependent upon legislative grant. MASS. CONST. art. II, § 7(2).

250. MODEL CONSTITUTIONAL PROVISIONS FOR MUNICIPAL HOME RULE § 10 (American Mun. Ass'n 1953); *see infra* app. I. Alternative funds need not be provided by the state if the measure is approved by the legislative body of the municipal corporation, or if the state legislature passed it by a two-thirds vote of the membership of each house. *Id*. Florida and Louisiana have adopted variations of this provision. FLA. CONST. art. VII, § 18; LA. CONST. art. VI, § 14 (amended 1991). California reimburses municipalities for mandated expenses; New Jersey and Minnesota exclude such expenses from debt limitation provisions. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, *supra* note 222, at 5. The ACIR recommends requiring state governments to append a local, fiscal impact statement to any legislation affecting local revenue or expenditures. *Id*. at 7.

abuse.[251] Rather, the proposals continue to emphasize state correction, i.e., the protection of state interests through broad legislative authority to deny municipal power. This emphasis is consistent with the approach the proposals adopt for state supervision of municipal regulatory power in general.[252]

Trust in legislative good faith is the only limit on this control power, because the scope of authority vested in the state legislature by both model proposals far exceeds the establishment of protective safeguards. Neither proposal excludes authority to deny municipal taxing power altogether, to preclude subjects from taxation or even, presumably, to limit the purposes for which a municipal corporation can raise revenue. In fact, some states with constitutions patterned on the reform proposals have withdrawn municipal taxing authority from home rule grants.[253]

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251. See *supra* note 243 and sources cited for a discussion of the NML's views against popular vote on debt measures at the state level. New Mexico limits the effectiveness of local taxes to those approved by the electorate unless they have been authorized by general law. N.M. CONST. art. X, § 6(D).

252. The authority to deny municipal taxing power is designed to erect safeguards and coordinate state and local fiscal affairs and policies. Jefferson B. Fordham, *Home Rule: AMA Model*, 44 NAT'L MUN. REV. 137, 142 (1955).

253. Alaska prohibits use of home rule powers other than those provided in listed statutes. ALASKA STAT. § 29.10.200 (Supp. 1993). These involve placing limits upon sale and use taxes, making inapplicable limitations on municipal taxes when raised to pay bonds, and authorizing the municipal assembly without referendum to levy general property taxes. Predecessor provisions were found to invalidate a proposed charter amendment prohibiting the raising of municipal taxes without prior approval of the electorate. Whitson v. City of Anchorage, 608 P.2d 759 (Alaska 1980). Under home rule, the legislature of Kansas restricted municipal taxing power. Clark, *supra* note 35, at 678. These limitations included an initial prohibition, and now limitations, on the assessment of income tax. KAN. STAT. ANN. § 12-140 (1982). Professor Richard Dyson, who proposes that state legislatures have no denial authority, nonetheless would make state control over municipal fiscal process optional. Dyson, *supra* note 8, at 385. Massachusetts never granted municipalities the power to tax. *See* MASS. CONST. art. II, § 7(2); *see also* FORDHAM, *supra* note 40, at 86–87. While still under traditional home rule constitutional provisions, a state limit on the rate of municipal income taxes was upheld in Missouri, as was limiting a state authorized tax on earnings. State *ex rel*. Ogard v. Riederer, 448 S.W.2d 577 (Mo. 1969); Grant v. Kansas City, 431 S.W.2d 89 (Mo. 1968). In Pennsylvania, statutes place limitations upon municipal authority to fix subjects of taxation, to fix rates of nonproperty taxes for nonresidents, and to make assessments of property for taxes so that municipal actions must be entirely consistent with statutory authorization, but municipalities are not limited as to rates they impose upon residents. PA. STAT. ANN. tit. 53, § 1-302 (Supp. 1994), *noted in* Gary E. French, Comment, *Home Rule in Pennsylvania*, 81 DICK. L. REV. 265, 287–89 (1971); *see supra* note 241. New Mexico and Texas also have withdrawn municipal taxing authority. N.M. STAT. ANN. § 3-18-2 (Michie 1985); Apodaca v. Wilson, 525 P.2d 876 (N.M. 1974) (dictum); *see* City of Alamogordo v. Walker

2. Ohio Provisions

Ohio, in contrast to its restriction of state control of municipal power over other matters[254] and its liberal constitutional grant of taxing power to municipalities as a matter of local self-government,[255] nonetheless strictly limits municipal autonomy in fiscal matters. Because of specific constitutional provisions, the state is authorized to control municipal taxes and debt.[256] This has resulted in court interpretations that the state can "limit" but not "annul" municipal power.[257]

The legislature can limit the amount of a municipal tax,[258] as well as preempt subjects of taxation, even by negative implication.[259] However, the legislature cannot wield the extraordinarily constricting device[260] of restricting the purposes for which municipalities can raise money.[261] Ohio continues to apply constitutional limits upon property tax rates and upon borrowing, but these limits are subject to waiver by home rule charter or mandatory referendum provisions.[262]

Motor Co., 616 P.2d 403 (N.M. 1980) (drawing no distinction between home rule and non-home rule cities); City of Jacksonville v. Entex, Inc., 538 S.W.2d 250 (Tex. Ct. App. 1976) (holding that barring taxes and other charges beyond state's two percent occupation tax applied to municipalities seeking reimbursement for attorney fees in rate investigations).

254. *See* Vaubel, *supra* note 3, at 670.

255. *See* State *ex rel*. Zielonka v. Carrel, 124 N.E. 134 (Ohio 1919); Cohn, *supra* note 191, at 43.

256. OHIO CONST. art. XIII, § 6; *id*. art. XVIII, § 13. For an example of the use of this power, see OHIO REV. CODE ANN. § 718 (Anderson 1991) (limits on municipal income taxes).

257. State *ex rel*. City of Toledo v. Weiler, 128 N.E. 88, 90 (Ohio 1920).

258. State *ex rel*. City of Dayton v. Bish, 135 N.E. 816, 818 (Ohio 1922).

259. Haefner v. City of Youngstown, 68 N.E.2d 64, 66 (Ohio 1946); *cf*. Village of Northfield v. Northeast Ohio Harness, 468 N.E.2d 911 (Ohio Ct. App. 1983) (holding statute barring another license, excise tax, or fee on state harness track permitholder did not preclude tax on parking and admission fee payable by track patrons).

260. The use of such a power could defeat all home rule. James W. Farrell, Jr., *Municipal Public Utility Powers*, 21 OHIO ST. L.J. 390, 395 (1960).

261. *Weiler*, 128 N.E. at 90; *accord* City of Portland v. Welch, 59 P.2d 228, 233 (Or. 1936).

262. OHIO CONST. art. XII, § 2 (amended 1990) (10-mill limit); *id*. art. XII § 11 (providing annual tax must be levied to service any debt incurred).

3. California Provisions

In spite of the recent increase in constitutional limitations, California ostensibly affords municipalities the broadest degree of fiscal independence from legislative control.[263] Home rule provisions include the taxing power as a municipal affair.[264] Commentators conclude that the state cannot deny this municipal authority,[265] nor does the conflict theory of state supremacy apply.[266]

However, the suggestion in an appellate court decision that preemption does apply where state interests predominate[267] gained support in a recent state supreme court decision.[268] The court concluded that the levy of a municipal tax as a municipal affair can reach statewide importance when the legislature supports its expressions of preemption with evidence that a municipal tax will substantially affect state taxing and regulatory policy.[269] Thus, the court strongly qualified municipal fiscal independence. However, the court's willingness to uphold a state bar against the imposition of municipal license taxes upon financial institutions does not directly implicate the more general and highly criticized[270] effort of the California legislature to preclude all municipal income taxes.[271]

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263. Cohn, *supra* note 191, at 41. However, a 1974 amendment to the California Constitution authorizes the legislature to provide for maximum property tax rates and bonding limits. CAL. CONST. art. XIII, § 20. Section 1 of article XIII A, as part of Proposition 13, imposes a one percent limit on ad valorem taxes on real property. *Id*. art. XIII A, § 1. Article VIII A, § 4, imposes a two-thirds voter approval limitation for the imposition of special taxes. *Id*. art. VIII A, § 4, *interpreted in* Fenton v. City of Delano, 208 Cal. Rptr. 486 (Ct. App. 1984).

264. City of Glendale v. Trondsen, 308 P.2d 1 (Cal. 1957); *Ex parte* Braun, 74 P. 780 (Cal. 1903); David, *supra* note 34, at 691; Hansen, *supra* note 204, at 345.

265. David, *supra* note 34, at 685–92; Sato, *supra* note 159, at 1103–04.

266. David, *supra* note 34, at 686.

267. *See* Century Plaza Hotel Co. v. City of Los Angeles, 87 Cal. Rptr. 166 (Ct. App. 1970); *see also* Hansen, *supra* note 204, at 348.

268. California Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916, 918–21 (Cal. 1991).

269. The legislature demonstrated the need to control the competitive position of savings and loans; the repeal provisions for set-offs against state tax after payment of municipal tax interfered with needed state supervision of the financial institutions. *Id*. The court hastened to add that the legislature would not cripple municipal government "while this court sits." *Id*. at 924.

270. *See* Weekes v. City of Oakland, 579 P.2d 449 (Cal. 1978) (per curiam); David, *supra* note 34, at 691–92; Sato, *supra* note 159, at 1103–04.

271. CAL. REV. & TAX. CODE § 17,041.5 (West 1994).

4. Illinois Provisions

Illinois, in 1970, formulated its home rule constitutional amendments to achieve a moderate position. It seeks to protect municipal taxing authority, state interests, and the interest of nonresidents through legislative control authority.[272] The Illinois Constitution expressly grants municipal power to tax and to incur debt.[273] However, it makes municipal power to impose local income taxes and related occupation taxes dependent upon state legislative grants.[274] Moreover, state authority to deny municipal fiscal powers apparently could be extended to limit the purposes for which a municipality can raise funds.

The exercise of legislative denial authority, however, must be passed by a sixty percent vote of each house of the state legislature.[275] As will be seen, this constitutional restraint has apparently served to foreclose implied preemption of municipal taxes.[276] Court decisions since the adoption of the home rule provisions have also refused to apply limiting statutes which predate home rule. The courts have reasoned that statutes, in order to be effective, must win the support of sixty percent of the legislature and be intended to limit municipal home rule authority.[277] The legislature, in post-constitution legislation, must be specific in its denial of municipal

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272. Baum, *The Scope of Home Rule*, *supra* note 125.

273. ILL. CONST. art. VII, § 6(a).

274. *Id*. art. VII, § 6(e)(2); *see* Vaubel, *supra* note 1, at 34 n.142.

275. ILL. CONST. art. VII, § 6(g).

276. *See infra* note 315. In the case of debt, the 60% vote requirement is limited to debt not payable from property taxes. ILL. CONST. art. VII, § 6(j). The legislature is empowered to restrict debt payable from property taxes and to require a referendum above a sliding scale of percentages of assessed valuation according to the population of the municipality. *Id*. art. VII, § 6(k).

277. Sommer v. Village of Glenview, 403 N.E.2d 258 (Ill. 1980); Rozner v. Korshak, 303 N.E.2d 389 (Ill. 1973); Kanellos v. County of Cook, 290 N.E.2d 240 (Ill. 1972) (county debt referendum provisions).

power.[278]

D. Control of Municipal Taxing Power by Preemption

1. Express

Preemption is both a common and troublesome form of state control over municipal taxing power. When based on a state's authority to deny municipal power, the legislature's express preemption of municipal taxes is little different from express denial of municipal taxing power. Express preemption, as used here, is simply legislative denial of municipal power either to impose a particular tax that is the same or similar to a tax imposed by the state, or to impose a tax on a particular class of taxpayers that the state is taxing. Express preemption can create interpretive problems, but it is essentially an effort on the part of a state legislature to avoid double taxation.

Taxation by more than one jurisdiction or imposition of more than one tax by a single jurisdiction is not uncommon. Federal/state relations[279] and state/local relations provide examples.[280] In fact, double taxation really is not involved when two different units of government impose taxes.[281] Furthermore, the nature of the injury to the state taxing system that might result from duplicate state and local taxes has not been clearly resolved.[282] Yet state legisla

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278. The legislature must pass a specific measure by 60% vote after adoption of home rule in order to limit the amount of municipal tax. City of Rockford v. Gill, 388 N.E.2d 384, 385 (Ill. 1979); *Rozner*, 303 N.E.2d at 392; Village of Hoffman Estates v. Union Oil Co., 370 N.E.2d 1304, 1307 (Ill. App. Ct. 1977). For a case upholding post-constitutional denial, see Prudential Ins. Co. v. City of Chicago, 362 N.E.2d 1021 (Ill. 1977). *See also* Baum, *The Scope of Home Rule*, *supra* note 125, at 830 (constitutional convention committee example).

279. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (presenting examples of overlapping and accommodation of income taxes imposed at the federal and state levels); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

280. *See, e.g.*, Leader v. Glander, 77 N.E.2d 69 (Ohio 1948); *see* C. Emory Glander & Addison E. Dewey, *Municipal Taxation: A Study of the Pre-emption Doctrine*, 9 OHIO ST. L.J. 72, 90–91 (1948).

281. Glander & Dewey, *supra* note 280; CHARLES S. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS § 28.3 (1980).

282. Lakelands Racing Ass'n v. Fairview Township, 320 A.2d 391 (Pa. Commw. Ct. 1974) (noting that municipal tax on same thing taxed by state might diminish activity taxed and that it might increase costs of collection by state); *cf.* Vaubel, *supra* note 2, at 892 (discussing state power to control when there are substantial external effects of taxation); Sato, *supra* note 159, at 1099–1102 (arguing added administrative burden does

tures have not been deterred from frequently expressly precluding municipal taxes.

Several states provide examples. In Pennsylvania, although the constitutional home rule provisions modeled after those of National Municipal League were not directly involved, courts construed the previously enacted 1965 Local Tax Enabling Act[283] as reserving to the state legislature the power to use preemption as a means of controlling local taxation.[284] A Texas decision found a statute disclaiming any authorization of local taxes on an occupation or business taxed under the statute barred a municipal tax on gasoline sell-

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not justify complete denial of municipal power to tax).

283. PA. STAT. ANN. tit. 53, § 6902 (Supp. 1994).

284. *Lakelands Racing Ass'n*, 320 A.2d at 393–95 (interpreting PA. STAT. ANN. tit. 53, § 6903 (1972)). The state had enacted an admission tax in order to invalidate a similar township tax. The court determined the legal incidence and subject of the state and township taxes were the same and that the state's preemptive language effectively terminated the municipal tax.

Where the subject and measure of the tax were different, for example, a municipal gross receipts tax upon the rental income of an insurance company and a state tax on premium income, there was no preemption. Prudential Ins. Co. v. City of Pittsburgh, 391 A.2d 1326 (Pa. Commw. Ct. 1978); *see* Wilsbach Distribs., Inc. v. Commonwealth, 473 A.2d 1123 (Pa. Commw. Ct. 1984) (finding no preemption where municipal tax was levied on privilege of doing business and state measures included sales tax and import tax), *rev'd*, 519 A.2d 397 (Pa. 1986); *see also* Middletown Township v. Alvereno Valley Farms, 524 A.2d 1039 (Pa. Commw. Ct. 1987); Meitner v. Township of Cheltenham, 460 A.2d 1235, 1237 (Pa. Commw. Ct. 1983) (finding fee paid to disciplinary board of supreme court did not preclude local tax on business, trade, or profession under state provisions barring local taxes on "occupation or personal property which is now or does hereafter become subject to a state tax or license fee"); Wightman v. Office of Treasurer, 430 A.2d 717 (Pa. Commw. Ct. 1981) (holding that mere payment of license fee that was not revenue-producing exercise of taxing power did not preempt local business privilege tax); Hanek v. City of Clairton, 354 A.2d 35 (Pa. Commw. Ct. 1976) (determining state-directed tax for school districts did not preclude township tax on same subject). *See generally* Aronson v. City of Pittsburgh, 485 A.2d 890 (Pa. Commw. Ct. 1985) (involving state income tax and local net profits tax and holding that there is no preemption of local taxes where state disclaims any preemptive intent).

In an apparent deviation from the "sameness" rule criticized in Stewart Dalzell, *The State Preemption Doctrine: Lessons from the Pennsylvania Experience*, 33 U. PITT. L. REV. 205, 225–28 (1971), a state tax on the transaction between the state and retailers of liquor was held to be sufficiently the same under the analogous Serling Act, PA. STAT. ANN. tit. 53, § 15,971 (Supp. 1994), as to preempt a Philadelphia sales tax imposed on the transaction between the retailers and purchasers of liquor. United Tavern Owners v. School Dist., 272 A.2d 868 (Pa. 1971). Pennsylvania constitutional provisions expressly preempt local property taxes imposed on public utilities if the revenue from a state-imposed gross receipts tax on such utilities is returned to municipalities. American Tel. & Tel. Co. v. Board of Property Assessment, 337 A.2d 844 (Pa. 1975) (interpreting PA. CONST. art. VIII, § 4).

ers within the municipality.[285]

California provides several examples of legislative efforts to preclude municipal taxes. Two statutes, one preempting municipal sales and use taxes[286] and the second superseding all taxes assessed against financial institutions,[287] received court approval based on the statewide effect of the local taxes.[288] Meanwhile, the general prohibition against municipal income taxes[289] has not as yet been upheld.

However, narrowing decisions also exist. A Delaware court found that state preemption of taxes upon insurance businesses and agents' incomes did not bar municipalities from taxing the income of insurance agents along with that of other residents.[290] In a similar vein, the express preemption of an occupation tax by the Texas legislature did not bar a municipal license fee[291] or a property tax.[292]

In addition to express legislative preemption, courts frequently infer a legislative intent to preempt municipal taxes. Courts may even develop their own policy against duplicate taxation by state and local government.[293]

2. Implied

Finding that the state legislature has exercised its control authority by implicitly preempting a municipal tax is particularly troublesome to municipal autonomy. Implied preemption raises the

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285. City of Lubbock v. Magnolia Petroleum Co., 6 S.W.2d 80 (Tex. Civ. App. 1928); *see* Maine Cent. R.R. v. Town of Dexter, 588 A.2d 289 (Me. 1991) (applying preemptory language of state excise tax to preclude imposition of municipal property tax).

286. CAL. REV. & TAX. CODE § 32,010 (West Supp. 1994).

287. *Id*. § 23,182 (West 1992).

288. California Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916 (Cal. 1991); Century Plaza Hotel Co. v. City of Los Angeles, 87 Cal. Rptr. 166 (Ct. App. 1970) (discussing Alcoholic Beverage Tax); *see* Hospital Serv. v. City of Oakland, 101 Cal. Rptr. 800 (Ct. App. 1972) (strictly construing state exemption of nonprofit hospital service corporation funds to allow collection of municipal tax). *But see* John Tennant Memorial Homes, Inc. v. City of Pacific Grove, 103 Cal. Rptr. 215 (Ct. App. 1972).

289. CAL. REV. & TAX. CODE § 17,041.5 (West 1994).

290. Kumpf v. City of Wilmington, 383 A.2d 292 (Del. 1978).

291. Utter v. State, 571 S.W.2d 934 (Tex. Crim. App. 1978).

292. City of Fort Worth v. Southwestern Bell Tel. Co., 80 F.2d 972 (5th Cir. 1936). If a state has no power to levy a tax, a court will not read statutory preemption provisions to include that tax. Mallard v. Tele-Trip Co., 398 So. 2d 969 (Fla. 1st Dist. Ct. App. 1981).

293. *See* East Ohio Gas Co. v. City of Akron, 218 N.E.2d 608 (Ohio 1966). The Ohio Supreme Court has admitted this approach. *Id*. at 611.

problem of properly interpreting legislative intent. Does the legislature with authority to deny municipal taxing power, by enacting a state tax, intend to preclude municipalities from enacting or enforcing the same or a similar tax? All too often the answer to this question rests on judicial discretion. The uncertainties of judicial erosion of municipal taxing power result.[294]

The effect of implied preemption upon municipalities increases as the state's taxing base expands. At a minimum, municipalities are forced to seek out unusual types of taxes — which are frequently regressive and inadequate — to prevent a contraction of their resources.[295] This, in turn, leads to an increase in municipal dependence upon state and federal aid.

Implied preemption undercuts broad grants of taxing power to municipalities. It requires municipalities to seek legislative help to reacquire power lost through the application of implied preemption. The parallel to the evils of pre-home rule days, including lobbying, logrolling, and buckpassing, is evident, as is the acceleration of the trend toward centralized government[296] through this "rather crude operation" of implied preemption.[297]

a. Reserve Power States

The record of courts applying implied preemption under the reserve power home rule provisions is fragmentary. In a case involving a non-home rule borough, the Alaska Supreme Court suggested that preemption applies with respect to municipal taxation.[298] However, the court held that "in the absence of an express legislative direction or a direct conflict with a statute, only where an ordinance substantially interferes with the effective functioning of a state statute or regulation or its underlying purpose" is the ordinance preempted, and not simply because the state and borough have the

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294. *See id*.

295. Jefferson B. Fordham & W.T. Mallison, Jr., *Local Income Taxation*, 11 OHIO ST. L.J. 217, 218–19 (1950); Paul J. Hartman, *Municipal Income Taxation*, 31 ROCKY MTN. L. REV. 123, 124 (1958). This is a trend the ACIR would like to limit. *See* LOCAL NONPROPERTY TAXES, *supra* note 218, at 7, 54; ADVISORY COMMISSION, *supra* note 218, at 51.

296. Glander & Dewey, *supra* note 280, at 75.

297. FORDHAM, *supra* note 40, at 488. State implied preemption is devoid of studied coordination. *Id*.

298. Liberati v. Bristol Bay Borough, 584 P.2d 1115, 1121 (Alaska 1978).

same tax.[299]

After reaching similar results in Pennsylvania,[300] the state supreme court, in a badly splintered opinion, concluded that state regulation of the liquor business precluded municipalities from assessing privilege taxes measured by gross receipts.[301] That result paralleled the result in a previous case regarding a Pittsburgh privilege tax as it applied to the city's banking business.[302] There the court found a legislative intent to preserve banking regulations.[303] The court believed a municipal tax would impinge upon this intent.[304] Other reserve power states have considered implied preemption.[305]

b. California and Illinois

There are suggestions in California and Illinois that the application of implied preemption of municipal taxes has been curtailed. Because the power to tax is so fundamental, California courts have stressed that state intent to preempt must be express or at least

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299. *Id*. at 1122.

300. *See* United Tavern Owners v. School Dist., 272 A.2d 868, 871 (Pa. 1971); Wilsbach Distribs., Inc. v. Commonwealth, 473 A.2d 1123 (Pa. Commw. Ct. 1984), *rev'd*, 519 A.2d 397 (Pa. 1986).

301. Commonwealth v. Wilsbach Distribs., Inc., 519 A.2d 397, 402 (Pa. 1986).

302. City of Pittsburgh v. Allegheny Valley Bank, 412 A.2d 1366 (Pa. 1980); *accord* Liberty Bell Racing Ass'n v. Philadelphia Tax Review Bd., 483 A.2d 1063 (Pa. Commw. Ct. 1984) (harness horse racing). But, underscoring the difficulties in applying implied preemption based on legislative intent, the *Liberty Bell* court expressed reluctance to extend its application by rejecting preemption in the securities field because the state's pervasive regulations related to ethical standards and not to the issue of taxation. *See* City of Philadelphia v. Tax Review Bd. *ex rel*. Scott, 601 A.2d 875, 878 (Pa. Commw. Ct. 1992); *see also* Rieders v. City of Williamsport, 578 A.2d 618 (Pa. Commw. Ct. 1990) (finding no preemption of taxation of attorneys by supreme court regulation).

303. *Allegheny Valley Bank*, 412 A.2d at 1369.

304. *Id*. at 1370.

305. In the absence of statutory authorization of the local tax, general legislation for the licensing of vehicles acted to preempt local motor vehicle license taxes in Florida. City of Tampa v. Carolina Freight Carriers Corp., 529 So. 2d 324 (Fla. 2d Dist. Ct. App. 1988). But another Florida appellate court failed to find that state regulations concerning reimbursement for municipal beach improvement preempted a municipal charter provision which called for a referendum prior to the expenditure of municipal funds on such a project. Sexton, Inc. v. City of Vero Beach, 555 So. 2d 444 (Fla. 4th Dist. Ct. App. 1990). A Louisiana court found no implied preemption of the inheritance tax field because of a lack of a pervasive state death tax system. The area had no inherent need for either pervasive action or statewide uniformity. Hildebrand v. City of New Orleans, 549 So. 2d 1218 (La. 1989), *cert. denied*, 494 U.S. 1028 (1990).

clear.[306] One author has urged that implied preemption based on state enactment of the same or a similar tax is incompatible with the constitutional taxing power of municipalities.[307] But with the intrusion of state concerns into areas of municipal affairs, the author also suggests[308] that courts apply parts of the California test for implied preemption — the presence of a paramount state interest and an adverse effect on transients' interests[309] — to sustain state efforts to preempt municipal taxes.

The California Supreme Court has enhanced the potential difficulty raised by the prevalent use of implied preemption, with respect to statewide regulatory matters, by applying the distinction between statewide and municipal affairs regulations to state and local tax concerns.[310] A California appellate court supported its finding that the external effects of a municipal tax justified an express statutory prohibition by holding that the municipal tax could interfere with the state regulatory scheme.[311] Therefore, the court determined the tax was a statewide matter that could be preempted by the state.[312]

The situation in Illinois is much clearer. The Illinois Constitu-

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306. Pines v. City of Santa Monica, 630 P.2d 521 (Cal. 1981).

307. Hansen, *supra* note 204, at 348.

308. *Id*. Hansen suggests that municipal interest in imposing an income tax outweighs those of the state. *Id*. at 359; *see* David, *supra* note 34, at 692.

309. *See* Vaubel, *supra* note 3, at 697–98.

310. California Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916 (Cal. 1991). This decision extends the trend, evident in regulatory cases, of resolving doubts in favor of legislative determination that a matter of statewide concern is involved. It specifically rejected a "static" or "compartmentalized" analysis of the distinction between municipal affairs and matters of statewide concern. *Id*. at 925–26. At the same time, the court recognized its enhanced role in applying this distinction based on an ad hoc, fact-intensive determination by suggesting that courts confine their interpretation "by hedging it with a decisional procedure intended to bring a measure of certainty" to the analysis. *Id*. at 925. For a discussion of California's approach to distinguishing between state and local matters before the *Federal Savings* decision, and a general discussion of both a court-initiated restriction of municipal power and a judicial interpretation of a legislative denial of municipal power, see Vaubel, *supra* note 1, at 65–72; Vaubel, *supra* note 2, at 885; Vaubel, *supra* note 3, at 659–60.

311. Century Plaza Hotel Co. v. City of Los Angeles, 87 Cal. Rptr. 166, 173 (Ct. App. 1970); *cf*. Pines v. City of Santa Monica, 630 P.2d 521 (Cal. 1981) (holding state's preemption of regulatory subject does not preclude municipal tax imposed solely for raising revenue and does not impose any regulatory requirements); Rivera v. City of Fresno, 490 P.2d 793 (Cal. 1971); Marsh & McLennan, Inc. v. City of Los Angeles, 132 Cal. Rptr. 796 (Ct. App. 1976).

312. *Century Plaza*, 87 Cal. Rptr. at 173.

tion, by providing for express denial of municipal taxing power only with a sixty percent favorable vote in each house of the legislature,[313] precludes express preemption of municipal taxing power.[314] It would appear implied preemption is also precluded.[315]

c. Ohio

Ohio dispels California's doubts about implied preemption in tax matters. Although Ohio rejects regulatory preemption, circumstances are different with respect to fiscal matters. As noted earlier,[316] despite granting broad taxing and debt-incurring authority to municipalities by constitutional provision, further constitutional provisions specifically place these powers under state control.[317] While this control does not enable the legislature to annul municipal power nor to limit the purposes for which municipalities may raise and spend money,[318] it does include the authority to deny municipal authority to tax a particular subject.[319]

Moreover, courts could find implied denial from the legislature's enactment of the same tax or one similar to a tax a municipality seeks to enforce.[320] The test for preemption is sufficiently vague and the courts' application of it so broad, even to the point of negative implication,[321] that it poses a serious threat to municipal autonomy

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313. ILL. CONST. art. VII, § 6(g).

314. *Id*. art. VII, § 6(h).

315. *See* Town of Cicero v. Fox Valley Trotting Club, Inc., 357 N.E.2d 1118 (Ill. 1976); Board of Educ. v. City of McHenry, 390 N.E.2d 551 (Ill. App. Ct. 1979); David C. Baum, *A Tentative Survey of Illinois Home Rule (Part I): Powers and Limitations*, 1972 U. ILL. L.F. 137, 156; Baum, *The Scope of Home Rule*, *supra* note 125, at 830 (constitutional convention committee example); *see also* City of Evanston v. County of Cook, 291 N.E.2d 823 (Ill. 1972) (county tax not preempted by similar municipal tax).

There are suggestions that some traditional states have rejected implied preemption. Herman Kehrli & James Mattis, *The Authority of Home Rule Cities and Counties in Oregon to Levy Sales and Income Taxes: An Affirmative View*, 5 WILLAMETTE L.J. 183, 196 (1969). However, Oregon courts have not ruled on it. *Id*.

316. *See supra* text accompanying notes 254–62.

317. OHIO CONST. art. XVIII, § 13.

318. State *ex rel*. City of Toledo v. Weiler, 128 N.E. 88, 90 (Ohio 1920); *cf*. City of Portland v. Welch, 59 P.2d 228 (Or. 1936). Nor does a similarity in purpose for raising revenue for which state and municipal tax measures are imposed bar a dissimilar municipal tax. Towne Properties, Inc. v. City of Fairfield, 364 N.E.2d 289, 291 (Ohio 1977).

319. *See* State *ex rel*. McElroy v. City of Akron, 181 N.E.2d 26 (Ohio), *appeal dismissed*, 371 U.S. 35 (1962).

320. *See* East Ohio Gas Co. v. City of Akron, 218 N.E.2d 608 (Ohio 1966).

321. Haefner v. City of Youngstown, 68 N.E.2d 64 (Ohio 1946).

in the taxing field in Ohio.[322]

However, in spite of the breadth of state authority, the state supreme court has preserved municipal power to impose income taxes. It refused to find that the grant of constitutional authority to the state to impose an income tax served to prevent municipalities from enacting such measures.[323] Later, the legislature avoided the preemptive effect of its adoption of a state income tax by including a disclaimer of any intention to disturb municipalities' imposition of an income tax.[324] The legislature has also proven itself to be accommodating to county government needs by authorizing counties to impose an added tax to a state license fee for automobile owners[325] and to add one percent to the state sales tax.[326]

Ohio, then, rather than illustrating municipal fiscal autonomy, better exemplifies state legislative control that is reasonably attentive to local government needs. Yet, even with this accommodating spirit of the legislature, it cannot be said that individual municipalities are meeting their fiscal needs as readily as they would if municipal fiscal initiative were not restrained by implied preemption.

D. Conclusions

This brief consideration of state/local fiscal relations helps illustrate that these matters have historically involved a complex intertwining of interests, which are reflected in varied state constitutional provisions. Today, no distinct line divides the treatment of fiscal relations in traditional and reserve power home rule states. States in general remain suspicious of popular control through their retention of rigid constitutional restraints.

The ACIR's proposal to liberalize constitutional restraints upon municipal property taxes by promoting popularly approved limitations, and its begrudging acceptance of legislatively imposed restraints, set objectives that the model constitutional proposals fall

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322. C. Emory Glander, *Analysis and Critique of State Pre-emption of Municipal Excise and Income Taxes Under Ohio Home Rule*, 21 OHIO ST. L.J. 343, 361 (1960).

323. Angell v. City of Toledo, 91 N.E.2d 250 (Ohio 1950). *Contra* City of Denver v. Sweet, 329 P.2d 441 (Colo. 1958).

324. OHIO REV. CODE ANN. § 5747.02 (Anderson Supp. 1993). See Glander & Dewey, *supra* note 280, at 96, for development of the logical basis for the authority to adopt a disclaimer.

325. OHIO REV. CODE ANN. § 4504.02.

326. *Id*. § 5739.021.

short of achieving. These model proposals provide for municipal power to initiate tax and debt measures, and the National League of Cities suggests that states provide funds for state-mandated expenditures. However, the model proposals rely entirely upon legislative control by providing for broad state authority to deny municipal fiscal power. Initial interpretations of constitutional provisions of reserve power states do not suggest the rejection of implied preemption of municipal taxes. Thus, municipalities are left insecure in meeting their fiscal needs.

The advantages afforded by the Illinois provisions are clearer. Although they limit municipal taxing initiative, the Illinois provisions curtail legislative control authority. The Illinois Constitution directly rejects express preemption, and the courts' rejection of implied preemption is apparently established. Moreover, while providing for denial authority itself, Illinois imposes the general requirement that the legislature act by a sixty percent majority vote of each house.

California has also moved toward a limited acceptance of express preemption, but the qualifications it imposes and its suggestion for implied preemption are fraught with uncertainties. On the other hand, Ohio is clear in its acceptance of broad legislative authority to preclude municipal taxes by either express or implied preemption. Yet experience in that state suggests that preemption, although likely disruptive of municipal fiscal decisions, need not be fatal if the legislature proves to be accommodating to municipal needs for revenue.

At the risk of oversimplification, it should be evident that states need to reduce certain restraints upon municipal fiscal powers. Reform that addresses the modern concerns of the different interests involved should include strengthening municipal fiscal initiative power and eliminating, not increasing, rigid constitutional quantitative restraints upon the power to tax. Moreover, states should abolish broad, unlimited legislative control authority, particularly implied preemption. Municipal interests would be better-served if the protection of municipal citizens fell to the citizens themselves through an orderly referendum procedure.

With respect to municipal debt, states could adequately meet their concerns by restricting state legislative control of municipalities to providing flexible limits. States should mandate accounting

standards and annual financial reporting to forestall fiscal abuse.[327] States should also establish parameters for intervention when the economic condition of local governments necessitate it and procedures for remedial state action.[328] Finally, state legislative control should include authority to supervise the external effect of municipal taxes for the protection of nonresident interests, in order to promote equitable administration and insure against unfair discrimination.

IV. SUMMARY

The material presented in this Article concludes a study which was begun and developed in several earlier articles. This study has sought to identify certain significant propositions which should structure the improvement of state and municipal government relations as a dynamic element of democratic government in the United States.

The study started with the acceptance of the view that the sharing of power through its areal allocation promotes liberty, equality, and welfare services. Allocation of power inhibits the concentration of power, advances participation of citizens in the governmental process, and makes the delivery of services more effective.

Allocation of power to municipalities establishes autonomy insofar as these units have the power of initiation (the capability to carry out their rightful duties) and the power of immunity (the power to act without fear of the supervisory authority of higher tiers of the state). The ideal degree to which municipalities should possess such power depends upon their interrelationship with liberties of individuals and the interests of state citizens as a whole.

In examining the impact municipal government can have on individual liberties, the dangers of majority abuse of government by factions, particularly by smaller units of government (as presented by James Madison with respect to federal/state relations) is of sig-

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327. Goldner, *supra* note 193, at 952. Included within these recommendations is the continuation by constitutional or statutory provisions of the customary public purpose for taxes and expenditures, balanced budget, and no lending of credit requirements. *Id*. at 963. Adequate supervision requires effective sunshine laws, taxpayers suits, and a state fiscal monitoring agency. *Id*.

328. ADVISORY COMM'N ON INTERGOVTL. RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 7 (1973).

nificant importance. The need to protect against possible abuse suggests that limits be placed upon local power.

Determining the proper vehicle for enforcing such limits is crucial not only to the liberties of individuals, but to the viability of local autonomy as well. As a consequence, providing unlimited protective authority either in the state legislature or in a broad conception of judicial discretion is not satisfactory. Rather, this study offers the application of generally developed federal and state constitutional principles as construed by the courts as a practical reconciliation of the interests of individuals and municipal governments.

This concern over the proper role for the legislature and the courts to play in limiting local autonomy carries over into the study of state and local interests and is, in fact, of primary importance throughout the remainder of the study. The preferred vehicle offered here for the reconciliation of these interests is a constitutional one: states should adopt clear constitutional provisions which delineate the desired limitations.

In order to have a true sharing of power and thus establish municipalities with an effective power of initiation, municipalities must be empowered to act with respect to a wide range of matters which are of interest to local citizens. Municipalities should not be dependent upon the legislature for the authority to act, nor upon excessive court interpretation, including the application of a principle which would foreclose local power that has an unsatisfactory impact outside the territorial jurisdiction. Rather, state constitutional provisions should broadly devolve power upon municipalities, as provided by the National Municipal League proposals. At the same time, the state's interest in protecting its citizens should be insured through constitutional provisions granting legislative authority over the formation and territorial changes of local units, leaving to the legislature the role of arbitrator in granting and controlling extraterritorial powers.

It is evident that there are interests common to all state citizens. It is equally evident that state interests must be treated as superior to those of municipal residents. However, if state interests are considered universal, no local autonomy is possible, or at least no municipal power of immunity can exist.

Determination of which are superior state interests and which are local interests should be made by constitutional provisions. The terms used should be as clear as possible in order to circumscribe

legislative and municipal actions as well as court interpretations. At the same time, these provisions must be flexible to accommodate inevitable changes in circumstances faced by each level of government. While historically difficult, defining superiority by subject matter, as Ohio has done with respect to state authority over police power matters, can serve a useful purpose in providing a practical accommodation of interests.

Of even greater importance in achieving satisfactory state/local relations than clarifying subject matter superiority is affording superiority only to those legislative actions which affect state citizens generally. These "general laws" are properly superior because state interests are more immediately involved than they are in state measures which are simply directed at contracting local power of immunity. Moreover, municipal power manipulations are less representative of the interests involved because they are not exposed to the same degree of practical political restraint that results from decisionmakers' self-regulation.

In the sharing of power, compatible state and local regulations are each enforceable. But when they conflict, the "inferior" regulation should be superseded with respect to subjects over which the other government has superiority. Courts ought to find conflict only where necessary to protect the legitimate interests of both levels of government. Literal permit-forbid, quantitative conflict is the most objectively clear case. However, municipal interference with clearly defined legislative regulatory purposes should also give rise to conflict and the supersession of local regulations.

Establishing that "general laws" are needed for the supersession of local regulations and that conflict must be carefully applied for the protection of both state and local interests forces the conclusion that states should reject legislative authority to deny local power expressly or to preempt it. States should reject implied preemption for an additional reason; it places too much interpretive authority in the courts. These curtailments of state authority will not seriously affect state interests.

As just reviewed, furthering municipal fiscal independence is essential to securing municipal autonomy. Municipalities should have broad powers independent of legislative denial or preemption. Recent trends toward imposing additional constitutional restraints upon municipal taxes and expenditures exacerbate rather than mitigate the disruptive effect earlier constitutional restraints have had

upon municipal growth and the ability of municipalities to make responsible fiscal decisions. Coupling reporting procedures with the testing of flexible restraints upon borrowing, in order to protect both the well-being of municipal citizens and the interests of the state, has become even more important.

In viewing various approaches to local autonomy as implemented by municipal home rule provisions, this study finds a need to improve all of them. Traditional home rule is generally successful in allocating a broad power of initiation to municipalities. It is weakest in delineating the areas of state superior control, in protecting municipalities in their sharing of power from implied preemption, and in the courts' lenient findings of conflict.

The trade-off made in the model reform home rule proposals of reserving broad state legislative denial authority in exchange for the broad devolution of municipal power of initiation presents a real and continuing threat to overall municipal autonomy. This danger is only partially mitigated by lessening the role of the courts through provisions which would require that legislative denials of power be express. These provisions leave the scope of denial and preemptive powers intact. States have not fully or consistently implemented them to prevent courts from applying implied preemption, or to limit courts to findings of conflict where there is disruptive municipal interference.

States which developed a hybrid of traditional and reform home rule provisions have essentially perpetuated the shortcomings of both. They reintroduce and perhaps reinforce the vagueness of the power allocation of the traditional approach. In addition, they endorse the overriding control of the legislature through provision for the denial of municipal power.

Illinois constitutional provisions have the deficiencies evident in hybrid states. However, Illinois mitigates the extent of state legislative control by requiring supermajority legislative action, lessens court discretion by rejecting implied preemption, and may even overprotect municipal interests by rejecting conflict tests.

The recognition that no system is foolproof, the long history of municipal home rule struggles, the varied success of often well-planned forms of home rule, and, in no small measure, personal hesitancy all militate against making still another proposal for structuring municipal home rule. But the Author's faith in popular government and the manifest need for restraints on power in order

to preserve autonomy — whether the power be legislative, judicial, or popular — have provided the impetus for suggesting principles of restraint in this study. Consequently, the following constitutional proposal is offered for adoption by states for their practical implementation:

> The legislature shall provide by general law for methods and procedures for considering all interests involved in incorporating, merging, consolidating, and dissolving municipal corporations, and in altering their boundaries; the legislature may provide for the creation of special units of government to carry out governmental functions subject to home rule provisions except in the case of the establishment of a metropolitan government with the consent of the citizens of the metropolitan area affected. A municipal corporation may exercise any legislative power or perform any function within its boundaries that is not in conflict, i.e., incompatible with the terms or clear regulatory purpose of state police power regulations applied to individuals, private groups, or private corporations statewide.