REPORT OF THE CALIFORNIA COMMISSION ON THE LAW OF PRE-EMPTION*

Section 11 of Article XI of the California Constitution provides:

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

We are not so much concerned here with the scope of power granted to local government by the words "local, police, sanitary and other regulations," as we are with the limitation placed on the exercise of

*On October 6, 1966 Governor Edmund G. Brown created this Commission and appointed thirteen members to it. Subsequently, a fourteenth Commissioner was appointed. The stated reason for the creation of this Commission was the Governor's belief that the time had arrived "to bring together representative leadership from local government and from our law schools to undertake a systematic and practically based analysis of the principle areas in which pre-emption-by-implication has been, or is likely to be, held by the courts to exist." The Commission was charged with the duty to study seventeen legislative areas and any others which, in the judgment of the Commissioners, ought to be examined. The Commission was asked to recommend to the Governor and to the Legislature in its 1967 session which of these legislative areas should be explicitly pre-empted by the State, which ones should be opened to additional regulation by local government, and in which cases the issue of pre-emption should be left to judicial determination. This Commission has drawn upon the broad experience of its own membership as well as upon the expert opinions of others. [The membership of this Commission is composed of: 2 County Supervisors, 2 City Councilmen, 2 Sheriffs, 1 Mayor, 1 District Attorney, 1 City Attorney, 1 Chief Assistant County Counsel, 3 Law Professors, and 1 attorney engaged in private practice.]. A number of persons interested in the matter have given us the benefit of their attendance and participation at our meetings. Furthermore, the Governor's office and the League of California Cities have, by letter, encouraged people interested in the problem to send us their views in writing. Many local government officials have responded to these requests.

The Commission first met on October 14, 1966. Altogether there have been eleven meetings of the Commission, two of which were held in San Francisco. The rest were held in Los Angeles. [Portions of this report have been omitted and footnotes have been edited and renumbered—Ed.]

that power by the words "as are not in conflict with general laws." The problem of pre-emption centers about this limitation. Thus, when a local government has enacted a regulation under the authority of this section, its validity necessarily depends on a determination that the regulation is not "in conflict with general laws." If it is in conflict with general (i.e., state) laws, the California Constitution requires the courts to declare the local regulation invalid.

The difficulty arises as to the scope of the "general laws" and the meaning of the term, "in conflict." In the performance of their duty to interpret and apply this less-than-crystal-clear Constitutional provision, the courts of California have handed down numerous decisions which have grappled with these terms. It is now clear that if the local legislation were to duplicate exactly the state law it would be held to be in conflict with general law. The same result would follow if the local regulation purported to permit that which state law forbids, or purported to forbid that which state law permits.

It is also clear that when the Legislature undertakes, or has undertaken, to regulate some activity, it may declare its intention "to occupy the field;" that is to say, to pre-empt the particular field of regulation. The effect of such a declaration reserving unto the State the sole power to regulate an activity is to put local regulation in the pre-empted field "in conflict with general laws."

The problem of implied pre-emption is presented when the Legislature has not made clear its intention with respect to pre-emption of the field, and when the local regulation does not duplicate general law, nor permit that which the general law forbids, nor forbid that which the general law permits. In 1962, the case of *In re Lane*[1] was decided by the California Supreme Court on the grounds of implied pre-emption. Although the doctrine of implied pre-emption did not originate in the *Lane* case,[2] the Court's decision touched raw nerve ends at the local government level when it held invalid a Los Angeles ordinance which made "resorting" (i.e., fornication) a crime.

A majority of the Court, in an opinion by Justice Marshall McComb, held that the Legislature had, by implication, pre-empted the field of the criminal aspects of sexual activity. Thus the local regula-

1. 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

2. *See e.g.*, Horwith v. City of Fresno, 74 Cal. App. 2d 443, 168 P.2d 767 (1946), and Abbot v. City of Los Angeles, 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960). For an excellent discussion of the history of the doctrine, see Blease, *Civil Liberties and the California Law of Preemption,* 17 THE HASTINGS L.J. 517 (1965).

tion was found to be in conflict with general law and therefore void. There was no express legislative declaration of intention to exclude local regulation, but the Court believed that it could ascertain from the extensive scope of the Penal Code sections covering the criminal aspects of sexual activity "an intention to adopt a general scheme for the regulation of this subject." Having thus found by implication an intention to pre-empt the field, the local regulation had to fall.

In the wake of the *Lane* case there have been a number of decisions dealing with the doctrine of implied pre-emption. Some highly publicized cases have held local ordinances invalid on this basis. Others, such as *In re Hubbard*,[3] have found no implied intent to occupy the field and thus have upheld local regulations.

In the five years since *In re Lane* was decided a considerable controversy has arisen over the doctrine of implied pre-emption. Unfortunately the controversy has often generated more heat than light. There has been much misunderstanding about the effect of the doctrine. For example, one misapprehension is that pre-emption somehow divests local government of its law enforcement powers, as distinct from its law-making powers. Thus it has erroneously been supposed that *In re Lane* prevents the local police agencies from enforcing state laws aimed at prostitution. This of course is not true. They can and do enforce such laws. What they cannot do under the *Lane* decision is enforce a local ordinance which makes "resorting" a crime.

In substance, the pre-emption question is concerned with deciding the proper division of regulatory powers between state and local government.[4] We believe that such decisions, whether legislative or judicial, should be based on factors pertinent to the issue whether it is necessary or desirable to have uniform regulation of given conduct within the state. Therefore, we now turn to an examination of the principles which we believe are involved and make our recommendations as to the implementation of these principles. Their application may not be altogether easy. They may lack that degree of certainty which many may desire. It has frequently been asserted that the doctrine of implied pre-emption has added a new dimension of uncertainty to an already uncertain area of the law. But it must be borne

3. 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964), involving the validity of a Long Beach Municipal Ordinance regulating certain kinds of gambling.

4. CAL. CONST. art. XI, § 7 deals with but a part of that question. Although the concept of "municipal affairs," which is dealt with in Sections 6 and 8 of Article XI has at times been brought into the discussion of pre-emption, we believe that the two matters are separate and distinct. Therefore, the concept of "municipal affairs" will not be dealt with in this Report.

in mind that the price of certainty is too high when it involves a failure to face the real policy questions involved.

II.

The Commission has attempted to identify the criteria which it believes the Legislature should consider in determining whether in a specific fact situation the power of local governments to regulate should be pre-empted. In the discussion which follows we set forth, first, these criteria. At that point we also appraise current proposals for legislative action with respect to pre-emption. Next we apply the criteria we have identified to make recommendations whether local power to regulate should be pre-empted in a number of specific fact situations. Finally, we set forth a draft bill of a "general law," which would provide these criteria for the courts in deciding cases in which no explicit legislative determination with respect to pre-emption has been made.

III.

The State Constitution is not neutral in the allocation of regulatory power between the State Legislature and local governments. It is true that cities and counties have been given constitutional authority to adopt regulatory measures, *but only* if the local measures do not conflict with general (i.e., state) laws. Thus, it rests with the State Legislature to determine whether it desires to regulate specific types of conduct, and, once having done so, whether it desires to permit any additional regulation of similar conduct by local governments. The latter function, it should be emphasized, calls for legislative judgment based upon a thorough consideration of competing policies. What are those policies?

The central inquiry implicit in the concept of pre-emption is whether there should be statewide uniformity in the regulation of specific conduct. If there is no need for statewide uniformity, there is no need for state law to pre-empt local power to regulate. If it appears desirable that there be statewide uniformity, the legislative decision to pre-empt or not pre-empt should be based on whether the need for statewide uniformity outweighs the need of local government regulation. We thus emphasize the need of local government to be permitted to respond quickly and adequately to the varied types of local problems which continually arise throughout the state; for, in general, a problem must be of statewide magnitude before it reasonably can be expected that the Legislature will respond to it. This is the core of the pre-emption question—to consider, on the one hand,

the need for statewide uniformity of regulation of a specific type of conduct, and, on the other hand, the need of local governments to be able to respond to local, as distinguished from statewide, problems.

There are two basic factors either of which creates a need for statewide uniformity of regulation of specific conduct:

(1) *The desirability of freedom of movement of persons or goods within the State.*

Multiplicity of local regulations affecting the movement of goods or persons generally will impede or burden commerce to the economic detriment of the State. Local regulations might seek to protect local business against outside competition, again causing serious adverse effect on the economy of the State. Varying local regulations may create a patchwork of standards which would tend to cause confusion, obstacles to the movement of a transient population, and imposition of regulatory sanctions on individuals who cannot reasonably be expected to know varying standards as they travel about the State.

(2) *The desirability of a statewide consensus.*

We refer here to an examination of the nature of the conduct sought to be regulated and the desirability that, if such conduct is to be regulated, the regulation be based upon a statewide rather than a local consensus. Thus regulation of some types of conduct should reflect a broader consensus than the regulation of other types of conduct which can more appropriately be left to a local viewpoint. For example, conduct which does not pose a substantial threat, direct or indirect, to the health, safety or welfare of others should be regulated on the basis of a statewide consensus. We refer here to such conduct as recreational gambling in one's home or wearing the attire of the opposite sex in public (where not done for the purpose of committing a crime), and describe such conduct in this report as conduct "within the realm of individual privacy." Similarity, freedom of expression should be regulated on a basis of a statewide consensus. Regulation of such conduct requires the making of delicate judgments concerning governmental control of individuals. For the protection of individuals against varying local pressures and sensibilities, these judgments, if to be made at all, should be made by the larger and more broadly based State legislative body. This would not be so with respect to regulation of, for example, the carrying or use of dangerous weapons. Regulation of this type of conduct might be left to local consensus to supplement general law.

If either or both of the above factors are present to a significant

degree in a given factual situation, local regulation should nevertheless be permitted *unless* the need for statewide uniformity outweighs the need to regulate at the local level. This requires consideration of:

(1) whether the nature and magnitude of the problem varies throughout the State, and

(2) the imminence and gravity of the harm associated with the conduct.

The Legislature should make the judgment, insofar as it is possible for it to do so, as to which of these competing needs—statewide uniformity or local power to regulate—should prevail when they are in conflict. This should be done, to the maximum feasible extent, with relation both to existing regulatory legislation and such legislation as may be enacted in the future. In addition, the Legislature should enact legislation which would provide in effect that any pre-emption issue which has not been explicitly dealt with by the Legislature should be resolved by having the courts consider the same factors which the Legislature presumably does when it explicitly deals with the issue.[5] The draft bill set forth in Part V of this Report would carry out this recommendation.

We should point out that the approach we recommend differs from the basic concept of a number of bills which have been introduced and are likely to be introduced in the Legislature dealing with the pre-emption question. Many such bills provide, in one way or another, that local regulation of conduct would not be pre-empted unless the Legislature specifically so declared by statute. In effect these bills would have the Legislature impose on itself a "duty" to resolve the pre-emption question every time it enacts a regulatory statute and to resolve that question for every regulatory statute it has enacted

5. A general observation should be made about the difficulty encountered in defining "the field" that has been pre-empted. This problem exists as much for the Legislature when it undertakes to state its intention to pre-empt, as it does for the court when it decides that a "field" has been pre-empted. For example, *In re Lane* held that the State has occupied the field with regard to the criminal aspects of sexual activity. 58 Cal. 2d 99, 372, P.2d 897, 22 Cal. Rptr. 857 (1962). This, we think, is much too broad. Under the sweep of this decision, it has been held that local regulation of "topless entertainment" is precluded, as being within the field of "the criminal aspects of sexual activity." An independent consideration of the need for statewide uniformity in the regulation of "topless entertainment" should be made rather than being swept under the label of "criminal aspects of sexual activity." Thus, it is imperative that all legislative or judicial decisions relating to pre-emption be prefaced by a careful attempt to define narrowly the "field" that is pre-empted. Conversely, if the Legislature proposes to pre-empt all but a portion of a "field," it is likewise imperative that the portion to be left open for possible local regulation be carefully defined.

in the past. We agree that it would be most desirable for the Legislature to carry out such a task. But if the Legislature does not do so, these bills provide that there would then be no pre-emption. Thus, failure to make an explicit decision about pre-emption in a given factual situation would create a conclusive presumption that the Legislature had decided that there should be no pre-emption. We believe that this approach, which these bills share, is unwise for two reasons:

(1) it rests on an unsupportable premise about the functioning of the legislative process; and

(2) it would produce *ad hoc* pre-emption doctrine, not based upon any consistently applied principles which are reasonably related to whether or not there should be pre-emption.

Because this approach, based upon the failure of the Legislature to express itself on the pre-emption question, is apparently widely held, we will here consider in greater detail our objections.

If the Legislature fails explicitly to resolve the question of pre-emption with respect to specific factual situations in which the pre-emption question can arise, it is unrealistic to proceed on the conclusive presumption that the reason it failed to do so was because it concluded there should be no pre-emption. There are a number of reasons why the Legislature might not resolve the pre-emption questions in a given factual situation.[6]

It is unsound to construct public policy on the assumption that the Legislature is ready, willing, and able to make a decision about any and every pre-emption issue which might be hypothesized, thereby giving unwarranted significance to the failure of the Legislature to act on a specific question. Such a view of the legislative process rests on what has been referred to as the "myth of an all-competent and indefatigable" legislature.[7] In view of the vast range of matters competing for the attention and action of the Legislature, as a factual matter and as a practical necessity, it is not at every moment ready, will-

6. For example:

(a) The Legislature not having considered the specific issue involved;

(b) Inability to reach a majority view either way on the issue of pre-emption;

(c) A determination that insistence upon resolving the pre-emption issue would jeopardize passage of the regulatory legislation itself;

(d) The difficulty and consequent inability to agree upon the scope of the "field" in which pre-emption would or would not occur.

7. H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 541 (tent. ed. 1958).

ing, and able to act and to express itself on every conceivable pre-emption question which might arise or which might have arisen when existing legislation was enacted.

Thus we do not think it wise to enact a statute that would provide that where the Legislature fails to declare that the power to regulate specific conduct has been pre-empted, it shall be conclusively presumed that the reason for the failure so to declare was a policy decision that there should be no pre-emption.

The second fundamental objection to the approach adopted in pending bills (that local power to regulate is not pre-empted unless the Legislature explicitly so declares) is that the pattern of pre-emption doctrine which would emerge would not be based upon any consistently applied principles. A random pattern of pre-emption, stemming from failure of the Legislature to declare itself (for any of a number of reasons which may have nothing to do with whether there should or should not be pre-emption) would be the result of adoption of the approach contained in pending bills. Since, as we have pointed out, the basis for pre-emption or non-pre-emption can rest upon definite, consistent principles, the effort should be made to have specific issues resolved in accordance with such principles rather than haphazardly.

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[Section IV concerning seventeen specific problem areas set out in the Governor's charge to the Commission has been omitted—Ed.]

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V.

In Part III we set forth the principles which should be adverted to in deciding the policy questions involved in pre-emption. We there urged the Legislature to use those criteria in deciding specific pre-emption problems. We believe that these criteria are equally valid and applicable to the court's decision when the Legislature has not explicitly expressed itself on pre-emption in a specific fact situation.

We need not repeat here our comments in Part III regarding the dubious wisdom of a conclusive presumption of non-pre-emption where the Legislature has not specifically articulated its determination on pre-emption in a given context.

We emphasize that the bill which we propose would, in all cases where the pre-emption issue can arise, give effect to the principles which we have suggested the Legislature should consider in making its pre-emption decisions.

We also emphasize that the enactment of this bill would bring no magic "certainty" into the law, but we repeat that "the price of certainty is too high when it involves a failure to face the real policy questions involved."

The following is the text of the statute which we recommend for adoption:

A local, police, sanitary or other regulation authorized by Section 11 of Article XI of the Constitution shall be permitted notwithstanding a state statute on the same or a related subject except only in the following cases:

1. When the regulation duplicates general law.

2. When the regulation authorizes that which is expressly prohibited by general law.

3. When the regulation prohibits that which is expressly permitted by general law.

4. When general law expressly prohibits that type of regulation.

5. When the need for statewide uniformity in regulation is greater than the need for the city or county to impose such regulation.

(a) There shall be considered to be a need for statewide uniformity in regulation of the conduct if

(i) the city or county regulation would have a significant adverse affect upon the movement of persons or goods within the state, or

(ii) the conduct involved poses no substantial threat, direct or indirect, to the safety, health or welfare of others, or

(iii) the city or county regulation is a regulation of speech or expression.

(b) In evaluating the need for the city or county to impose the regulation there shall be considered

(i) the degree to which the nature and magnitude of the harm which is sought to be prevented by the regulation vary from place to place within the State, and

(ii) the imminence and gravity of the harm which is sought to be prevented by the regulation.

DISSENT TO PORTIONS OF THE REPORT AND RECOMMENDATIONS OF THE COMMISSION

The members of the commission have sincerely attempted in many hours of give and take discussion to resolve divergent points of view which are based in large part upon individual experience. Fortunately, much progress has been made and the areas of disagreement have been substantially narrowed. The points of difference referred

to hereinafter simply reflect the difficulty in arriving at a consensus upon an extremely complex problem.

The commission has agreed upon the criteria which it believes the Legislature should consider in determining whether in a specific fact situation the power of cities and counties to regulate should be pre-empted.

The criteria are predicated upon the premise that the central inquiry implicit in the concept of pre-emption is whether there should be statewide uniformity in the regulation of specific conduct. If it appears desirable that there be statewide uniformity, the legislative decision to pre-empt or not pre-empt should be based on whether that need for statewide uniformity outweighs the need of local government to regulate.

Statewide uniformity would be considered to be desirable if:

(a) The local regulation of the conduct would have a significant adverse affect upon the movement of persons or goods within the State;
(b) The local regulation would affect conduct which poses no substantial threat, direct or indirect, to the safety, health or welfare of others;
(c) The local regulation is a regulation of speech or expression.

In evaluating the need for local regulation there would be considered:

(1) The degree to which the nature and magnitude of the harm which is sought to be prevented by the regulation vary from place to place within the State.
(2) The imminence and gravity of the harm which is sought to be prevented by the regulation.

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[The next portion of the text concerning gambling and topless waitresses has been omitted—Ed.]

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While we agree that the [above] criteria developed by the commission provide a proper basis for legislative consideration in determining whether to pre-empt, in our opinion the criteria are not adequate for use by our courts in determining legislative intent.

The decision as to whether or not general laws in any area should operate to the exclusion of local regulation is a political public policy decision that must be made by the Legislature.

For example, how is a court to determine the "need" for local regulation? Are the courts to substitute their independent judgment of

the relative need for local legislation for that of the local legislative body?

As has been pointed out before, Section 11 of Article XI is a constitutional delegation to local government to "make and enforce" regulations "not in conflict with general laws." The people have placed upon the Legislature the responsibility of resolving the question of pre-emption in those factual situations in which the pre-emption question can arise. If the Legislature does not choose to resolve the question, the Constitution establishes the right of cities and counties to regulate.

In our opinion the public interest is best served by an express declaration of legislative intent not to pre-empt the regulatory powers of cities and counties unless there is an actual conflict between State law and local regulation; or there is an express declaration of legislative intention to exclude local regulation of specifically described activity.

The following draft of a bill which was submitted to the members of the commission early in its deliberations will, if enacted into law, resolve the question of implied pre-emption in a manner consistent with Section 11 of Article XI of the State Constitution:

An act to add Section 9613 to the Government Code relating to construction of statutes.

The people of the State of California do enact as follows:

Section 1. Section 9613 is added to the Government Code to read:

9613. A statute shall not be construed to interfere with or preclude local, police, sanitary, and other regulations authorized by Section 11 of Article XI of the Constitution and local regulations shall be permitted notwithstanding a statute on the same or a related subject, except only in the following cases:

1. When the regulation duplicates general law.

2. When the regulation authorizes or purports to authorize that which is expressly prohibited by general law.

3. When the regulation prohibits or purports to prohibit that which is expressly permitted by general law.

4. When there is a comprehensive scheme of legislation on the same subject by general law, and such general law:

(a) Expressly provides that it has occupied the entire field of such legislation; or

(b) Expressly prohibits other and further regulations in the field of such legislation.