Denver Law Review

Volume 51 | Issue 1 Article 5

January 1974

Constitutional Law - Pornography - Colorado Municipal Government Authority to Regulate Obscene Materials

C. Jean Stewart

Constitutional Law - Pornography - Colorado Municipal Government Authority to Regulate Obscene Materials

NOTE

CONSTITUTIONAL LAW—PORNOGRAPHY— Colorado Municipal Government Authority to Regulate Obscene Materials

> NEW BALTIMORE, Mich. (UPI)—This town of 4,132 found itself in an uproar Tuesday over an anti-pornography law that could make even bare baby bottoms obscene.
>
> "We made the law as strict as possible," said Mayor Herman Staffhorst, "and we intend to enforce it fully."
>
> The law, passed Oct. 23 by the City Council, lists buttocks as offensive and Police Chief Edward A. Reim said if applied strictly, it would mean banning all advertisements for baby powder.
>
> "I believe some of these ads show bare baby bottoms," he said.
>
> "That's silly," said Staffhorst. "What kind of mind would draw something dirty from a baby's bare bottom?"[1]

INTRODUCTION

In June of 1973 the United States Supreme Court handed down five decisions on obscenity which represent the Burger Court's attempt to formulate new standards for the regulation of pornographic materials.[2] In *Miller v. California,*[3] the first of the five decisions, the Supreme Court expressly rejected the frequently cited test of obscenity set forth in 1966 in *Memoirs v. Massachusetts*[4] and announced new criteria for regulating obscene materials. Under the new test the subject of prohibitory legislation must be limited to:

> [w]orks which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[5]

One of the most significant aspects of the *Miller* decision is

---

[1]Rocky Mountain News, Nov. 7, 1973, at 44, col. 2.

[2]Miller v. California, 93 S. Ct. 2607 (1973); Paris Adult Theatre I v. Slaton, 93 S. Ct. 2628 (1973); United States v. Twelve 200-foot Reels, 93 S. Ct. 2665 (1973); United States v. Orito, 93 S. Ct. 2674 (1973); Kaplan v. California, 93 S. Ct. 2680 (1973).

[3]93 S. Ct. 2607 (1973).

[4]A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).

[5]93 S. Ct. at 2615.

the Court's express abrogation of the argument stressed in *Jacobellis v. Ohio*[6] that "community standards" refers to a nationwide community. In approving the jury's application of California state standards to determine whether the materials were obscene under the California statute, the Court held that juries are not constitutionally required to apply a hypothetical national standard in determining whether materials are obscene as a matter of fact.[7]

What remains unclear from the *Miller* opinion is whether the decision is to be limited to a grant of authority for local juries to use *statewide* standards in evaluating material under a *state* statute or whether states may delegate to *local* governments the authority to express contemporary community standards by enacting municipal ordinances which may be interpreted and applied by local juries using the contemporary standards of *that* local community. Early reaction to the *Miller* decision indicates that at least some commentators and some municipal governments interpret the Supreme Court's emphasis on a "local" rather than a "national" standard as authorizing states to allow their local governments to *write* legislation for each local community. One newspaper editorial, commenting on the *Miller* opinion, remarked, "We find much to be said for regulating pornography through something like zoning laws."[8]

Two weeks after the *Miller* decision was announced, a new Denver municipal ordinance amending the provision prohibiting obscene materials was filed with the Denver City Council.[9] Following a public hearing the ordinance was adopted on July 23, 1973.[10] This note examines briefly the potential success of the new

---

[6]378 U.S. 184 (1964). *See* Manual Enterprises, Inc. v. Day, 370 U.S. 478, 488 (1961), in which Justice Harlan first suggested the need for a national standard. The *Jacobellis* decision produced a number of separate opinions rather than a majority opinion; only Justice Goldberg joined Justice Brennan in the opinion of the Court that held allegedly obscene materials must be judged on the basis of a national standard.

[7]Miller v. California, 93 S. Ct. 2607, 2619 (1973).

[8]Wall Street Journal, June 27, 1973, at 16, col. 1.

[9]Prior to its amendment section 823.7 of the *Revised Municipal Code* read as follows:

> Pornography: It shall be unlawful for any person knowingly to possess or exhibit for sale, or to circulate or distribute any indecent or lewd book, picture, or other thing whatever of an immoral or scandalous nature, or to exhibit, perform or present any indecent, immoral or lewd play, motion picture, lecture, demonstration, or other representation.

[10]DENVER, COLO., REV. MUNICIPAL CODE § 823.7 (1951) (Ord. 464, Series 1973).

> .7. *Obscene Material.*
>
> .7-1. It shall be unlawful for any person to possess obscene material except within such person's home.

Denver ordinance in two possible areas of litigation: first, whether local governments in Colorado have the authority to regulate obscene materials under Colorado law; and second, to what extent the *Miller* decision should be interpreted as authorizing municipal control of pornography.[11]

I. Municipal Government in Colorado

An initial question in determining the validity of the municipal ordinance is whether the City of Denver has the authority, under Colorado law, to prohibit obscene materials. This issue is compounded by the prior enactment of a Colorado state statute regulating obscenity.[12] The authority of the City of Denver to

---

.7-2. It shall be unlawful for any person to promote obscene material.

.7-3. Definitions.

.7-3(1). "Obscene" means that which appeals to the prurient interest in nudity, sex, sexual excitement, excretion, sadism, masochism, or sado-masochistic abuse, and which is patently offensive in describing, portraying, or dealing with such matters and which, taken as a whole, lacks serious literary, artistic, political, or scientific value.

.7-3(2). "Promote" means to produce, direct, perform in, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, or advertise or offer or agree to do any of these things.

[11]The first conviction under the amended ordinance occurred on October 29, 1973. City & County of Denver v. Menefee, No. 3-9140 (Denver County Ct. Gen. Sess., Oct. 29, 1973).

[12]Colo. Rev. Stat. Ann. § 40-7-101 (Supp. 1971):

(1) "Obscene" means that which, considered as a whole, predominantly appeals to prurient interest, i.e., a lustful or morbid interest in nudity, sex, sexual conduct, sexual excitement, excretion, sadism, masochism, or sado-masochistic abuse, and which goes substantially beyond customary limits of candor in describing, portraying, or dealing with such matters and is utterly without redeeming social value.

(2) "Predominant appeal", "customary limits of candor", and "redeeming social value" of a thing shall be judged by reference to the average adult in the community as a whole, except that where the thing appears to be designed for, or is made available to, minors, it shall be judged with reference ot the average minor in the age group for which the thing appears to be designed or to which it is made available.

(3) "Material" means any physical object used as a means of presenting or communicating information, knowledge, sensation, image, or emotion to or through the visual, aural, tactile, or olfactory senses of a human being.

(4) "Performance" means the presentation or showing to another person or for recording by any means, of:

(a) Any material, including the information, knowledge, sensation, image, or emotion which that material presents or communicates; or

(b) Any live physical presence or live physical activity, including vocal activity.

(5) "Promote" means to produce, direct, perform in, manufacture, issue,

control pornography and the validity of the ordinance in this context will depend upon whether a municipal government may pass an ordinance on a subject already covered by a state statute. Theoretically, there are three possible lines of analysis resulting from the existence of both a state statute and a local ordinance on the same subject: first, the local ordinance may supersede the state statute; second, the local ordinance and the state statute may operate concurrently within the same area; or third, the state statute may preempt the field of regulation and supersede the local ordinance. This section examines the operation of the Denver municipal ordinance under each of these three alternative approaches.

A. *Municipal Supersession*

Under the common law rule of state supremacy, statutes supersede conflicting ordinances in states where municipal corporations are totally controlled by the state legislatures. However, in states where the legislatures have enacted constitutional home rule amendments, ordinances may supersede statutes in home rule cities.

Denver is one of 45 home rule cities in Colorado whose municipal ordinances supersede state statutes in matters of local concern.[13] The Colorado constitution provides that in "local and

---

sell, give, provide, lend, mail, deliver, transfer, publish, distribute, circulate, disseminate, present, exhibit, or advertise, for pecuniary gain, or to offer or agree to do any of these things for pecuniary gain.

. . . .

§ 40-7-102 makes promoting obscenity a class 2 misdemeanor.

[13]COLO. CONST. art. XX, § 6 provides, in part:

> Home rule for cities and towns.—The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceeding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

A later amendment to article XX removed, along with other restrictions, the population requirement:

> [T]o afford to the people of all cities, cities and counties, and towns the right to home rule regardless of population, period of incorporation, or other limitation . . . .

COLO. CONST. art. XX, § 9(4) (adopted Nov. 3, 1970, effective Jan. 1, 1972).

Colorado's home rule cities are Alamosa, Arvada, Aspen, Aurora, Boulder, Burlington, Canon City, Cherry Hills Village, Colorado Springs, Commerce City, Cortez, Craig, Delta, Denver, Durango, Edgewater, Englewood, Evans, Fort Collins, Fort Morgan, Glendale, Glenwood Springs, Golden, Grand Junction, Greeley, Greenwood Village, Gunnison,

municipal matters" the municipal charter and ordinances made pursuant thereto "supersede within the territorial limits and other jurisdiction of said [home rule] city or town any law of the state in conflict therewith."[14] Additionally, Colorado case law reveals that when the matter is purely local or municipal, a home rule city "may exercise exclusive jurisdiction by passing ordinances which supersede state statutes."[15]

Generally a matter is deemed strictly local only when it is found to have no effect on state citizens living outside of the municipality.[16] In Colorado the interpretation of local and municipal affairs appears to be less restrictive. In *City and County of Denver v. Henry*[17] the regulation of traffic at intersections was found to be a local matter "because proper regulation is almost wholly dependent upon local conditions."[18] Under these definitions it seems clear that in order for a subject to be construed as strictly local, thereby permitting municipal supersession, an attempted state regulation must appear inappropriate because the condition is not shared by citizens of the state living outside of the municipality, or ineffective because different municipalities may have unique local conditions. A recent case dealing with municipal supersession reveals that "what is local and municipal as opposed to what is of statewide concern is frequently difficult to determine."[19] However, the Colorado Supreme Court disallowed municipal supersession of an ordinance on the right to resist arrest, observing that the matter was "not peculiarly municipal, but also concerns the public at large."[20]

The sheer weight of the cases and commentary on obscenity belies any argument that the matter is one of strictly local con-

---

Lafayette, La Junta, Lamar, Littleton, Longmont, Manitou Springs, Monte Vista, Montrose, Mountain View, Pueblo, Rifle, Sterling, Thornton, Vail, Westminster, Wray. COLORADO MUNICIPAL LEAGUE, 1973 DIRECTORY OF MUNICIPAL AND COUNTY OFFICIALS IN COLORADO 37 (1973). The city of Steamboat Springs adopted home rule on November 6, 1973.

[14]COLO. CONST. art. XX, § 6. Even in the absence of such a state constitutional provision granting exclusive jurisdiction to a home rule city there is usually a judicial interpretation favoring municipal supersession where purely local affairs are concerned. Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737, 740 (1959).

[15]Vela v. People, 174 Colo. 465, 466, 484 P.2d 1204, 1205 (1971). *Accord*, Davis v. City & County of Denver, 140 Colo. 30, 35, 342 P.2d 674, 676 (1959).

[16]Note, *supra* note 14, at 741.

[17]95 Colo. 582, 38 P.2d 895 (1934).

[18]*Id.* at 587, 38 P.2d at 897.

[19]Bennion v. City & County of Denver, 504 P.2d 350, 351 (Colo. 1972).

[20]*Id.*

cern. Whether municipalities have a sufficiently greater interest in the subject to justify added controls is a matter for another discussion,[21] but here at least the general public interest in the problem seems clearly to preclude a ruling in favor of municipal supersession by the Denver ordinance.

B. *Concurrent Regulation*

The second possible result of a state statute and a local ordinance on the same subject is that they may exist concurrently. An ordinance which regulates the same conduct as a statute and does so in substantially the same manner is usually held valid.[22] Presently, under Colorado case law, "[t]here is nothing basically invalid about legislation on the same subject by both a home rule city and the state, absent some conflict between the two regulations."[23]

This more recent view of concurrent regulation in areas of "mixed" state and local concern overruled the landmark case of *City of Canon City v. Merris*[24] decided by the Colorado Supreme Court in 1958. In *Merris* the court held that in matters of local concern a municipal ordinance displaces the state statute while in areas of statewide concern supersession does not take place. "Application of state law or municipal ordinance, whichever pertains, is mutually exclusive."[25] For several years the doctrine of mutual exclusion formulated in the *Merris* case marked Colorado as the single state where matters of local and municipal concern could not be regulated by statute even in the absence of municipal legislation.[26] Following the *Merris* decision, Colorado courts were forced to make a case-by-case determination of whether matters were statewide or local in nature.[27] Later decisions ques-

---

[21]*See* notes 48-51 *infra* and accompanying text.

[22]Note, *supra* note 14, at 747.

[23]City of Aurora v. Martin, 507 P.2d 868, 869 (Colo. 1973).

[24]137 Colo. 169, 323 P.2d 614 (1958).

[25]*Id.* at 180, 323 P.2d at 620.

[26]Note, *supra* note 14, at 740 & n.31. *See also* Scott, *Municipal Penal Ordinances in Colorado*, 30 ROCKY MT. L. REV. 267 (1958).

[27]Matters of statewide concern: Davis v. City & County of Denver, 140 Colo. 30, 342 P.2d 674 (1959) (driving under a suspended license); City & County of Denver v. Palmer, 140 Colo. 27, 342 P.2d 687 (1959) (driving under revoked license); City of Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958) (driving under the influence of liquor).

Matters of local concern: Roosevelt v. City of Englewood, 176 Colo. 576, 492 P.2d 65 (1971) (zoning); State Farm Mut. Auto. Ins. Co. v. Temple, 176 Colo. 538, 491 P.2d 1371 (1971) (assessment for local improvement district); City & County of Denver v. Thomas, 176 Colo. 483, 491 P.2d 573 (1971) (disposition of money received by a home rule city as

tioned the necessity and validity of this approach, and the doctrine of mutual exclusion was expressly overruled in Colorado in 1971.[28] Today, the concept of mutually exclusive authority survives only "as between the home rule city and the state where the subject matter is unquestionably and wholly local or is strictly state-wide."[29]

The cases which contributed most significantly to discrediting the doctrine of mutual exclusion recognized the need for concurrent regulation in areas of mixed state and local concern. Many of the cases acknowledged that "sometimes both the state and the city has [sic] a legitimate interest in the subject justifying legislation on the part of both."[30] The most obvious problem cases were those in which the state had expressly authorized the local governments to legislate in areas of apparent statewide concern, sometimes in areas where the state had also acted. *Woolverton v. City and County of Denver,*[31] a case involving a gambling offense, represents an early attempt to reconcile such a situation with the rule of mutual exclusion. A statute of the State of Colorado authorized cities and towns to regulate gambling and associated activities.[32] In addition, both the state and the City of Denver had enacted legislation providing penalties for gambling offenses. The defendants were charged with a violation of the city ordinance. They challenged the city's authority to legislate, claiming that it lacked legislative jurisdiction to enact the ordi-

---

reimbursement under the workmen's compensation act); Davis v. City of Pueblo, 158 Colo. 319, 406 P.2d 671 (1965) (revenue bonds); Berman v. People, 156 Colo. 538, 400 P.2d 434 (1965) (sales and use tax); Freeland v. Fife, 151 Colo. 339, 377 P.2d 942 (1963) (regulation of traffic at intersections); Dominguez v. City & County of Denver, 147 Colo. 233, 363 P.2d 661 (1961) (vagrancy); Retallick v. Police Court, 142 Colo. 214, 351 P.2d 884 (1960) (regulation of traffic at intersections); City & County of Denver v. Henry, 95 Colo. 582, 38 P.2d 895 (1934) (regulation of traffic at intersections).

[28]Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971). *Accord*, City of Aurora v. Martin, 507 P.2d 868 (Colo. 1973); Bennion v. City & County of Denver, 504 P.2d 350 (Colo. 1972).

[29]Woolverton v. City & County of Denver, 146 Colo. 247, 252, 361 P.2d 982, 984 (1961).

[30]*Id.* at 259, 361 P.2d at 987-88.

[31]146 Colo. 247, 361 P.2d 982 (1961).

[32]COLO. REV. STAT. ANN. § 139-32-1(52) (1963). This section provides that the governing bodies of cities and towns shall have the power:

> To suppress bawdy and disorderly houses, houses of ill fame or assignation, within the limits of the city or town, or within three miles beyond, except where the boundaries of two cities or towns adjoin the outer boundaries of the city or town; and also to suppress gaming and gambling houses, lotteries and fraudulent devices and practices, for the purpose of gaining or obtaining money or property, and to prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations.

nance because gambling was a statewide concern and the state had preempted the field.

The Colorado Supreme Court found that gambling was a matter of local as well as statewide concern. Launching a vigorous attack on the doctrine of mutual exclusion, the court stated, "We are of the opinion that such approach is arbitrary, highly impractical and not demanded by either the constitution or by our decisions."[33] The court concluded that "the state can validly consent to local exercise of authority even though the subject is predominantly state-wide."[34]

In response to the argument that the consent statute applied to non-home-rule cities only, the court observed:

> To hold that a statutory city has more power than a home rule city would be anomalous indeed. Yet a determination that gambling is state-wide and that a home rule city is powerless to act in that field, at once recognizes the superiority of the statutory city over a charter city under the XXth Amendment.[35]

The *Woolverton* case is particularly significant to the obscenity issue in that the Colorado statute which authorizes cities to regulate gambling also gives statutory cities, as well as home rule cities, authority to regulate obscenity. The statute empowers the governing bodies of both cities and towns to "prohibit the sale or exhibition of obscene or immoral publications, prints, pictures or illustrations."[36] Under the analysis of the consent principle in the *Woolverton* case the existence of this statute specifically authorizing cities to regulate obscene materials would constitute a valid delegation of authority to the city to enact concurrent regulations.

Until very recently Colorado case law revealed that where the subject matter was of general statewide concern and the state had not consented to the exercise of local authority, the municipal governments had no authority to act. However, more recent Colorado case law indicates that concurrent jurisdiction is possible even in the absence of statutory authorization.[37]

Even Colorado's statutory cities receive authority to regulate

---

[33]146 Colo. at 253, 361 P.2d at 984.

[34]*Id.* at 256, 361 P.2d at 986.

[35]*Id.* at 263, 361 P.2d at 990.

[36]COLO. REV. STAT. ANN. § 139-32-1(52) (1963).

[37]City of Aurora v. Martin, 507 P.2d 868 (Colo. 1973) (assault and battery); Bennion v. City & County of Denver, 504 P.2d 350 (Colo. 1972) (resistance to unlawful arrest); Quintana v. Edgewater Municipal Court, 498 P.2d 931 (Colo. 1972) (shoplifting).

obscenity by virtue of the consent statute cited in the *Woolverton* case. In regard to its statutory cities Colorado has adopted the doctrine of preemption. Non-home-rule cities are governed by the common law rule of state supremacy and may not enact any ordinance which supersedes a state statute.[38] "[W]hen the city's acts or regulations attempt to interfere with or cover . . . a field pre-empted by the state or which is of statewide concern . . . they must fail."[39] Although the power of Colorado's non-home-rule cities is usually preempted by a state statute on a matter of general concern, the presence of the consent statute gives these statutory cities authority to regulate obscenity concurrently with the state. The Colorado Supreme Court has held:

> [W]here the state has adopted a statute on a matter of statewide interest or concern . . . then the local governmental units are deprived of jurisdiction over such subjects. . . . [T]his is not so however where the state has delegated power . . . to cities also to join in regulation.[40]

Although home rule cities may regulate obscenity even in the absence of express statutory authority, the legislative jurisdiction of non-home-rule cities is dependent upon a consent statute.

In spite of the existence of a Colorado state statute on obscenity, and pending any future interpretation of the *Miller* case which might remove from local governments the authority to enact legislation on obscenity, the municipal governments of every city and town in Colorado have the authority, under present statutes and case law, to enact legislation on obscenity absent some conflict between the local legislation and the state statute.

C. *State Preemption*

As indicated by the discussion in the previous subsection, both the state and the City of Denver may enact legislation prohibiting obscene materials by virtue of the consent statute or, alternatively, under a theory of mixed state and local concern. However, when both the state and a municipality have enacted legislation on the same subject, a third possible result remains to be explored: whether the state legislation has preempted the city's legislative authority. Preemption may result from a finding

---

[38]Vanatta v. Town of Steamboat Springs, 146 Colo. 356, 361 P.2d 441 (1960).

[39]City of Golden v. Ford, 141 Colo. 472, 479, 348 P.2d 951, 954 (1960). *Accord*, Sierotta v. Scott, 143 Colo. 248, 352 P.2d 671 (1960); City of Aurora v. Mitchell, 144 Colo. 172, 437 P.2d 923 (1959).

[40]Sierotta v. Scott, 143 Colo. 248, 251-52, 352 P.2d 671, 673 (1960).

that a matter is strictly statewide and of no local concern, from an express or grammatical conflict between the terms of a statute and an ordinance, or by the implication that the nature and scope of a statute covers a particular field and permits no additional regulation. Colorado has thus far not applied the doctrine of preemption to the regulation of obscene materials by home rule cities. In cases such as this where there is statutory consent to local regulation, there is a presumption that the state did not intend to preempt the field, and local governments are free to legislate. As noted earlier, the lack of a statutory grant of power does not preclude home rule municipalities from regulating a matter of statewide concern:

> A statute specifically delegating the power of regulation to cities and towns would be useful in the deciding that the state did not intend to pre-empt that field of regulation. . . . The absence of such a statute is not determinative. . . .[41]

Nevertheless, another possible analysis may result in a finding of preemption by the state. The validity of a city ordinance depends upon whether there is a conflict between the city's legislation and a state statute. In Colorado, where there is an express conflict between an ordinance and a statute, the state act preempts the city ordinance.[42]

The definition of "conflict" in Colorado cases dealing with the issue is whether the ordinance authorizes what the state forbids, or forbids what the state has expressly authorized.[43] Conflict, and therefore preemption, is essentially a question of fact. There are only two express conflicts between the language of the Colorado statute and the Denver ordinance. First of all, the statute provides that obscene material is that "which goes substantially beyond customary limits of candor in describing, portraying, or dealing with [sexual] matters,"[44] while the ordinance defines obscene as that "which is patently offensive in describing, portraying, or dealing with [sexual] matters."[45] Also, the statute provides that the allegedly obscene material must be found to be "utterly without redeeming social value,"[46] while the ordinance requires a showing that the material "lacks serious literary, artis-

[41]City of Aurora v. Martin, 507 P.2d 868, 870 (Colo. 1973).
[42]Vick v. People, 166 Colo. 565, 445 P.2d 220 (1968), *cert. denied*, 394 U.S. 945 (1968).
[43]Ray v. City & County of Denver, 109 Colo. 74, 77, 121 P.2d 886, 888 (1942).
[44]COLO. REV. STAT. ANN. § 40-7-101(1) (Supp. 1971).
[45]DENVER, COLO., REV. MUNICIPAL CODE § 823.7-3(1) (1951) (Ord. 464, Series 1973).
[46]COLO. REV. STAT. ANN. § 40-7-101(1) (Supp. 1971).

tic, political, or scientific value."[47] The Colorado statute obviously reflects the formulation of the now discredited *Memoirs* test, while the ordinance incorporates the newer standards of the *Miller* decision. Although the *Miller* opinion provides that state legislatures are free to use whatever standards they choose, providing they are within the new guidelines, it is likely that the Colorado legislature will amend the existing statute to conform to the newer standards and to reflect the language of the *Miller* decision now utilized in the Denver ordinance. However, even with the language of the present statute there is no provision in the ordinance authorizing what the state forbids or forbidding what the state authorizes.

The city ordinance is stricter in its requirement that the material be shown to lack any serious literary, artistic, political, or scientific value as opposed to the statute's requirement that the material have some modicum of redeeming social value. Generally, in cases where the state statute is prohibitory in nature, most jurisdictions favor supplemental local ordinances which aid the statutory purposes.[48] In *Woolverton* the Colorado Supreme Court held that "in a field of both local and state interest the municipality has not a superseding authority . . . but an actual supplemental authority to deal with the added problems arising from municipal congestion."[49] Although it is clear that a municipal ordinance cannot make legal what a statute forbids,[50] in Colorado at least, stricter regulations imposed by a municipal government do not create a conflict.[51] Therefore, unless the Colorado state statute expressly authorizes certain conduct, a municipal government may impose any additional prohibitions on obscene materials which are in keeping with the statutory purposes and

---

[47]DENVER, COLO., REV. MUNICIPAL CODE § 823.7-3(1) (1951) (Ord. 464, Series 1973).

[48]Feiler, *Conflicts Between State and Local Enactments—The Doctrine of Implied Preemption*, 2 THE URBAN LAWYER 398, 402 (1970).

[49]146 Colo. 247, 254-55, 361 P.2d 982, 985 (1961).

[50]Vick v. People, 166 Colo. 565, 445 P.2d 220 (1968), *cert. denied*, 394 U.S. 945 (1968).

[51]Woolverton v. City & County of Denver, 146 Colo. 247, 265, 361 P.2d 982, 991 (1961). *Accord*, Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971); Kelly v. City of Fort Collins, 163 Colo. 520, 431 P.2d 785 (1967). *See also* Blackman v. City & County of Denver, 169 Colo. 345, 352, 455 P.2d 885, 888 (1969), in which the court permitted an ordinance less strict than the statute:

> It is not required that the regulations of the ordinance be co-extensive or identical with those enjoined by the statute. Here, the statute by its terms is broader in scope than the ordinance . . . . We do not infer that the broader scope of the statute renders it inconsistent with or in conflict with the ordinance.

which conform to the requirements of the *Miller* ruling.

In conclusion, a review of Colorado state and local governmental law reveals that the Denver city ordinance probably will not supersede the state statute on obscenity. However, the city does appear to have the authority to regulate obscene materials concurrently with the state unless and until a new state statute presents an express conflict between the two legislative acts.

II. AN ARGUMENT FOR PREEMPTION

The first conviction under the Denver ordinance has already occurred.[52] The appellate process will present to higher state courts the question of whether the local enactment is a valid exercise of municipal authority or whether it is *ultra vires* and void. Apart from the considerations discussed in section I which suggest that under present Colorado law the City of Denver has the authority to regulate obscenity, the courts will need to decide whether the state has nevertheless preempted the field. At least two other states, California[53] and New Jersey,[54] have already acted to preempt obscenity legislation from local control. This section presents an argument favoring a similar action in Colorado.

Those who argue against preemption suggest that state legislation should preempt the field to the exclusion of ordinances only when "the situation absolutely requires it . . . [since] state regulation which precludes supplementary municipal action may not serve the needs of a municipal area, which often has its own peculiar problems."[55] The word "peculiar" implies something which is unusual or unique to the locality, as opposed to being a concern to other residents of the state. In matters of zoning, for example, or regulation of intersection traffic, it is easy to see how municipalities may have an interest in the problem which would require city-by-city determinations of policy. Aside from considerations of morality, it is more difficult to imagine circumstances which would require a locality to cut back or expand the state

[52]City & County of Denver v. Menefee, No. 3-9140 (Denver County Ct. Gen. Sess., Oct. 29, 1973).

[53]*In re* Moss, 58 Cal. 2d 117, 373 P.2d 425, 23 Cal. Rptr. 361 (1962); Whitney v. Municipal Court, 58 Cal. 2d 907, 377 P.2d 80, 27 Cal. Rptr. 16 (1962); *In re* Lane, 58 Cal. 2d 99, 367 P.2d 673, 18 Cal. Rptr. 33 (1960); Spitcauer v. City of Los Angeles, 227 Cal. App. 2d 376, 38 Cal. Rptr. 710 (1964); People v. Marler, 199 Cal. App. 2d 889, 18 Cal. Rptr. 923 (App. Dep't Super. Ct. San Bernadino 1962).

[54]Dimor, Inc. v. City of Passaic, 122 N.J. Super. 296, 300 A.2d 191 (L. Div. 1973).

[55]Note, *supra* note 14, at 746.

regulation of obscenity in order to serve the needs of the municipal area. The state statute establishes a standard for Colorado residents, and to allow each municipality to enact a different standard would defeat the state policy and might cause substantial harm.

Customarily, preemption is applied to those matters which are best controlled by uniform legislation throughout the state. For example, one Colorado case held that Denver could not set telephone rates because to allow cities to act in this field would harm the well-being of the state by undermining the uniform system of state regulation and would infringe upon the equal rights of the citizens of the state.[56] In its decision to allow state preemption of the field of obscenity regulation a New Jersey court observed:

> It is clear that the matter of obscenity must be governed by a uniform mode of treatment. The affront against public morals, although of necessity a matter of local concern, is predominantly within the domain of the state. It must be so.[57]

The most compelling reason supporting an argument for state preemption of obscenity regulation in Colorado is the liberality with which the state now allows concurrent regulations. As noted earlier, local ordinances which are stricter than the state statute are permissible,[58] as are ordinances which are less restrictive than the state legislation.[59] This permissive approach will confound rather than contribute to uniform regulation of obscenity.

In California and New Jersey, state preemption of obscenity legislation occurs even where the statute and the ordinance are identical.[60] The California decisions reveal other policy reasons for preemption of obscenity legislation by the state:

> The denial of power to a local body when the state has preempted the field is not based solely upon the superior authority of the state. It is a rule of necessity, based upon the need to prevent

---

[56]People *ex rel.* Public Util. Comm'n v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952). Subsequently, all public utilities were removed from local control. COLO. CONST. art. XXV.

[57]Dimor, Inc. v. City of Passaic, 122 N.J. Super. 296, 302, 300 A.2d 191, 194 (L. Div. 1973).

[58]*See* note 51 *supra* and accompanying text.

[59]*See* note 51 *supra.*

[60]Pipoly v. Benson, 20 Cal. 2d 366, 370, 125 P.2d 482, 485 (1942); Dimor, Inc. v. City of Passaic, 122 N.J. Super. 296, 302-03, 300 A.2d 191, 195 (L. Div. 1973).

dual regulations which could result in uncertainty and confusion.[61]

Under present Colorado law, statutory cities through the consent principle and home rule cities through the doctrine of concurrent regulation may enact legislation on obscenity. With hundreds of statutory cities and towns and more than 40 home rule cities, the number of potential legislative enactments in Colorado is staggering. The uncertainty and confusion likely to result from this legislative overkill is obvious.

In an article concerning the doctrine of preemption in California, one commentator concluded:

> Only a standard of statewide uniformity can fully implement the values of free speech and due process, the rights of privacy, and other fundamental values. The doctrine of preemption by implication is necessary to their fulfillment.[62]

Although an argument can be made that local governments in Colorado have the authority to write legislation on obscenity and to use the contemporary standards of their town or city in prosecutions under the ordinance, the potential confusion of allowing local governments in some states to adopt municipal ordinances in addition to state statutes far outweighs the disadvantages of preemption.

III. CONSTITUTIONAL CONSIDERATIONS

Explicit in the *Miller* decision is the Court's approval of state legislation on obscenity. In states such as California where the authority to regulate obscenity has been preempted by the state legislature,[63] the application of the *Miller* criteria will be relatively simple. Defendants will be prosecuted under state statutes, and the triers of fact, the judge or a jury, will apply statewide standards. However, in states where the authority to regulate obscenity has not been lodged exclusively at the state level by legislation or preemption, problems of interpreting the *Miller* decision emerge. In New Mexico, for example, where the regulation of obscenity has been given exclusively to individual municipalities,[64] there is no statewide legislative scheme. The contrast

[61]Abbott v. City of Los Angeles, 53 Cal. 2d 674, 682, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960). "The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground." Pipoly v. Benson, 20 Cal. 2d 366, 371, 125 P.2d 482, 485 (1942).

[62]Blease, *Civil Liberties and the California Law of Preemption*, 17 HASTINGS L.J. 517, 569 (1966).

[63]*See* note 53 *supra* and accompanying text.

[64]N.M. STAT. ANN. § 14-17-14(c) (1968).

between these two approaches suggests a need for an interpretation by the Supreme Court of the *Miller* holding.

The Supreme Court may require that, following the *Miller* case, state governments alone exercise the authority to regulate obscenity. Alternatively, the Court may permit state legislatures to retain or delegate their authority so that states such as California (where the state legislature has preempted the field) will have statewide schemes, while states such as New Mexico (where the state legislature has delegated its authority to individual communities) will have local ordinances but no statewide scheme. In Colorado, absent a preemption of the field by the state legislature, there will be both a state standard and various local ordinances.

This section examines the *Miller* decision to determine what the Supreme Court intended to permit in terms of local authority to legislate, and examines some constitutional considerations which suggest a need for the Supreme Court to mandate state preemption of the field.

Prior to the *Miller* decision the Supreme Court has upheld state delegation of police power to municipal governments to regulate obscenity,[65] and struck down local ordinances which were vague[66] or overbroad in prohibiting or punishing protected activities.[67] However, under these prior legislative schemes, the courts were required to apply a national standard in the determination of obscenity. The abrogation of the nationwide standard by the *Miller* opinion leaves unclear the extent to which this delegation of legislative authority is permissible as an expression of "local community standards." References to statewide regulatory schemes are abundant throughout the *Miller* opinion,[68] and the thrust of the decision places the responsibility for legislation in

---

[65]Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961).

[66]Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Werner v. City of Knoxville, 161 F. Supp. 9 (E.D. Tenn. 1958).

[67]Smith v. California, 361 U.S. 147 (1959); Werner v. City of Knoxville, 161 F. Supp. 9 (E.D. Tenn. 1958). *See generally* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Herndon v. Lowry, 301 U.S. 242, 259 (1937); Stromberg v. California, 283 U.S. 359, 369 (1931).

[68]*E.g.*, "We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts." Miller v. California, 93 S. Ct. 2607, 2615 (1973). "People in different states vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." *Id.* at 2620. "Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the general welfare of its population . . . ." *Id.* at 2619 n.13.

the hands of state rather than local governments. Additionally, the *Miller* case involved a defendant charged with the violation of a state statute. During the trial the prosecution presented expert testimony by a police officer who specialized in obscenity offenses and "had conducted an extensive state-wide survey"[69] on the issue of California "community standards." In limiting *Miller* to its facts it would seem clear that states are authorized to legislate and juries are allowed to hear evidence on statewide community standards with no indication that local communities may legislate.

Following the *Miller* decision the Supreme Court has systematically remanded obscenity cases to the lower courts for further consideration in light of *Miller* and subsequent cases.[70] Although at least one case involved a conviction under a local ordinance,[71] the Court's remand is not conclusive on the issue of whether the Court will support an interpretation of the *Miller* ruling which permits local governments to legislate obscenity standards.

The confounding part of the *Miller* opinion is the Court's observation:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[72]

What is abundantly clear from this statement is that courts no longer need to use a national standard. What is confusing is the Court's mixture of states and cities. Does this mean that the *Miller* decision permits cities as well as states to legislate and to use their own contemporary community standards? Several constitutional arguments suggest that the better interpretation would be to allow only statewide standards of obscenity.

First, the Supreme Court notes that "[o]bscene materials may be validly regulated by a State . . . despite some possible incidental effect on the flow of such material across state lines."[73]

---

[69]*Id.* at 2619 n.12.

[70]Carlson v. Minnesota, 94 S. Ct. 263 (1973); Cherokee News & Arcade, Inc. v. Oklahoma, 94 S. Ct. 277 (1973); Groner v. United States, 94 S. Ct. 278 (1973); Harding v. United States, 94 S. Ct. 274 (1973); McCrary v. Oklahoma, 94 S. Ct. 275 (1973); Roth v. New Jersey, 94 S. Ct. 271 (1973); Trinkler v. Alabama, 94 S. Ct. 265 (1973); West v. Texas, 94 S. Ct. 268 (1973).

[71]Carlson v. Minnesota, 94 S. Ct. 263 (1973).

[72]Miller v. California, 93 S. Ct. 2607, 2619 (1973).

[73]*Id.* at 2619 n.13.

Obviously, the "incidental" effect on interstate commerce is greatly magnified in that not only states, but also thousands of smaller governmental units have the authority to interfere with the distribution of materials. Although the Court held that the *Miller* prosecution did not impose an "unconscionable [burden] on the free flow of interstate commerce,"[74] a realistic look at multiple local controls suggests a different result. For example, in the Denver metropolitan area alone the number of potential local ordinances reaches into the dozens.

One of the factors frequently contributing to state preemption of certain fields of regulation is "a serious impact on unwary transients passing through the enacting municipality."[75] One writer, relying on the Supreme Court's decision in *Lambert v. California,*[76] suggests a due process rationale for preemption by state legislatures:

> The transient Californian is no more likely to expect a non-statewide standard of sexual behavior than the ex-convict could expect a local registration ordinance.[77]

The problems of numerous varying local ordinances raises one of the most important considerations for denying local governments the authority to legislate, that is, the effect on first amendment freedoms in the form of self-censorship. A Washington attorney has predicted:

> The legitimate distributor, bookseller or movie theater owner is seldom ready to go to jail for selling a book or showing a movie. If there is a real risk that he may suffer the stigma and punishment of a criminal conviction, he will choose—as most ordinary citizens would—not to stock the book and not to run the movie.[78]

The *New York Times* reported, shortly after the *Miller* decision, that librarians and booksellers had already acted as self-censors out of fear of prosecution under vague local standards.[79] While the threat of prosecution may drive hardcore pornography underground, the expense of defending the seller or distributor against prosecution will surely affect attempts to produce or market marginal material.[80] If a book or film is permitted by some

---

[74]*Id.*

[75]Feiler, *supra* note 48, at 407.

[76]355 U.S. 225 (1957).

[77]Blease, *supra* note 62, at 551.

[78]Lewin, *Sex at High Noon in Times Square,* THE NEW REPUBLIC, July 7 & 14, 1973, at 21.

[79]N.Y. Times, June 25, 1973, at 46, col. 1.

[80]The distributors of *I Am Curious (Yellow),* which reportedly grossed $7

local ordinances it could not be categorically classified as beyond the protection of the first amendment. However, in a state where local governments are all permitted to legislate and prosecute, the legality of a book or film could be litigated again and again. The ultimate effect on legitimate expression will be to avoid prosecution by making all material fit for the locality with the strictest standards.

These considerations suggest that while the Supreme Court has placed "hardcore pornography" beyond the protection of the first amendment, the practical effect of allowing thousands of cities and towns to legislate their own definitions of pornography will be to place legitimate artistic expression in serious jeopardy, adversely affect the free flow of commerce, and potentially eliminate materials considered legitimate by many or even a majority of local ordinances.

IV. THE REQUIREMENTS OF THE *Miller* RULING

Apart from any considerations of whether local governments have the authority under the *Miller* ruling to legislate on obscenity, the question remains to what extent the language of the Denver ordinance conforms to the requirements of the *Miller* test. To some extent at least this answer will depend upon future cases interpreting the *Miller* decision as well as upon judicial construction of the Denver ordinance.

However, some indication of the form of legislation which the Supreme Court intended to follow the *Miller* ruling comes from the language of the opinion and two exemplary state statutes cited by the Court as satisfying the *Miller* criteria.[81] The opinion

---

> million in box office receipts but spent much of it in defending the film against scores of local proceedings, learned that it is a practical impossibility to market a film on a national basis if it can be threatened with prosecution in every local community.

Lewin, *supra* note 78, at 21.

[81] ORE. REV. STAT. § 167.060 (1971). The definitions in the Oregon statutes provide in part:

> (5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.
>
> (7) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have

itself, as well as the language of these two statutes, suggests that new legislation, whether enacted by states or smaller governmental units, should employ relatively specific definitions of prohibited conduct. The majority in *Miller* states:

> [W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct *must be specifically defined* by the applicable state law, as written or authoritatively construed.[82]

The new Denver municipal ordinance fails to meet this requirement. The terms "nudity," "sex," "sexual excitement," "excretion," "sadism," "masochism," or "sado-masochistic abuse" are left totally undefined by the ordinance. There is little authoritative construction of so recent an enactment.[83] Perhaps this hesitancy to define the relevant terms of the ordinance is reflective of the policy expressed in a comment to the Colorado statute on obscenity:

> Certain definitions contained in existing law have been omitted, namely, "nudity", "sexual conduct", and "sado-masochistic

---

no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

(9) "Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(10) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in the act of sexual stimulation or gratification.

(11) "Sexual excitement" means the condition of the human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

Act 9, pt. 2, 1972 HAWAII SESSION LAWS 126-29. The definitions in the Hawaii statutes provide in part:

(7) "Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse or physical contact with the person's clothed or unclothed genitals, pubic area, buttocks, or the breast or breasts of a female for the purpose of sexual stimulation, gratification, or perversion.

(8) "Sexual excitement" means the condition of the human male or female genitals when in a state of sexual excitement or arousal.

(9) "Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

[82]93 S. Ct. at 2615 (emphasis added).

[83]The jury instructions in the case of City & County of Denver v. Menefee, No. 3-9140 (Denver County Ct. Gen. Sess., Oct. 29, 1973) contained no definitions of the relevant terms. The trial judge read to the jury the definition of "obscenity" which is contained in the Denver ordinance.

abuse." Experience has demonstrated conclusively that these definitions have only served to create confusion and misunderstanding.[84]

Notwithstanding the Colorado policy on not providing specific definitions of prohibited conduct in this area, the Supreme Court's requirement in the *Miller* decision seems to indicate that the new Denver ordinance will be declared invalid because of vagueness.

CONCLUSION

One month after the Supreme Court decision in *Miller v. California* was handed down, the Denver City Council passed a new municipal ordinance on obscenity. At the present time Colorado statutes and case law amply support the authority of home rule cities to regulate obscenity concurrently with the state. Although Colorado has not acted to preempt municipal authority to regulate obscenity, the need for a uniform treatment of the subject on a statewide level suggests that Colorado should join those states which have legislatively or judicially preempted this field. In the absence of state action to preempt obscenity regulation, the effect on constitutional guarantees of allowing all local governments to regulate obscenity suggests that the Supreme Court should mandate statewide rather than multiple local legislation and standards.[85] These policy considerations present a strong argument that the Denver ordinance should be preempted by a statewide legislative scheme. Finally, the Denver ordinance itself appears to fall short of the requirements set out in *Miller v. California* for specific definitions of prohibited conduct. Ultimately, the validity of the Denver legislation and other local ordinances will be challenged to determine whether the standards used to regulate obscene materials must be those of a state or may be imposed by individual communities.

C. Jean Stewart

---

[84]COLO. REV. STAT. ANN. § 40-7-101, Comment (Supp. 1971).

A previously enacted Denver municipal ordinance, § 812.4, relating to exposure of minors to obscene materials, is considerably more specific and contains an almost exact duplication of the definitions set out in the Oregon statute cited by the Court in *Miller*.

[85]The Supreme Court has agreed to hear arguments in a case which may determine whether standards used to judge obscenity should be those of the state or of individual communities. Jenkins v. Georgia, *cert. granted*, 94 S. Ct. 719 (1973).