

Constitutional Limits to Municipal Authority

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BACKGROUND

The Missouri Constitution



- **Missouri Constitution** is a *limitation* on legislative power only
- Unlike federal constitution -- a *grant* of power
- **Power of state legislature is unlimited and practically absolute**
- *Americans United v. Rogers*, 538 S.W.2d 711 (Mo. Banc 1976);
Kansas City v. Fishman, 362 Mo. 352, 241 S.W.2d 377 (1951).

Charter Cities

Article 6, § 19(a) Missouri Constitution

Any city which adopts or has adopted a charter ..., **shall have all powers which the general assembly** of the state of Missouri has authority to confer upon any city, *provided such powers are consistent with the constitution of this state* and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have **all powers conferred by law.**

Charter Cities

Art. 6, § 19(a) “clearly grants to a constitutional charter city all power which the legislature is authorized to grant. ... **even in the absence of an express delegation by the people of a home rule municipality in their charter, the municipality possesses all powers which are not limited or denied by the constitution, by statute, or by the charter itself.**”

City of Cape Girardeau v. Jett, 851 S.W.2d 114 (Mo. App. 1993)

BACKGROUND

The Missouri Constitution



- “A municipality derives its governmental powers from the state and exercises generally **only such governmental functions as are expressly or impliedly granted it by the state.**”

Century 21-Mabel O. Pettus, Inc. v. City of Jennings, 700 S.W.2d 809, 811 (Mo. banc 1985).

3RD & 4TH CLASS

POWERS

- "Statutory cities, acting without a constitutional home rule charter, cannot act without specific grants of power."

Cape Motor Lodge, Inc. v. City of Cape Girardeau, 706 S.W.2d 208, 212 (Mo. banc 1986), citing *State ex rel. Mitchell v. City of Sikeston*, 555 S.W.2d 281 (Mo. banc 1977).

**Constitution
of the State of
Missouri, 1875**

Missouri

**AS TO CITIES, THE MISSOURI CONSTITUTION
GIVETH AND IT TAKETH AWAY**

(loose paraphrase of Job 1:21)

Article 6: Local Government

§ 16. Cooperation by local governments with other governmental units.

- may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the **planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law.**”



Intergovernmental Cooperation

- **§70.220.1 RSMO** authorizes political subdivisions to contract and cooperate with any other municipality or political subdivision for the **planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service**; *provided, that* the subject and purposes shall be within the scope of the powers of such political subdivision

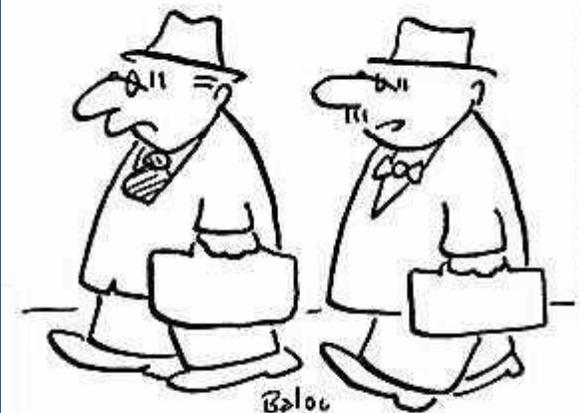
Article 6, § 23: Limitation on ownership of corporate stock, use of credit and grants of public funds by local governments

No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, *or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual*, except as provided in this constitution.



Article 6, § 25. Limitation on use of credit and grant of public funds by local governments—pensions and retirement plans for employees of certain cities and counties.

No county, city or other political corporation or subdivision of the state shall be authorized to *lend its credit or grant public money or property to any private individual, association or corporation* except as provided in Article VI, Section 23(a)...



"So much tax revenue to spend, so little time...."

Article 6, § 25.

Cont'd

...and **except** that general assembly may authorize any county, city or other political corporation or subdivision

- to provide for retirement or pensioning of officers and employees ... and
- provide for periodic cost of living increases in pension and retirement benefits



Article 6, § 23(a)

Cities may acquire and furnish industrial plants--indebtedness for

By 2/3 vote, “any county, city or incorporated town or village ... may become indebted for and may purchase, construct, extend or improve plants to be leased ... to private persons or corporations for manufacturing, warehousing and industrial development purposes, including the real estate, buildings, fixtures and machinery...”



Article 3 Limitations on State's use of funds and credit

- **Art. 3, § 38(a).** The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any *private person, association or corporation, excepting aid in public calamity, ...*
- **Art. 3, § 39.** The general assembly shall not have power:
(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to *any person, association, municipal or other corporation;*

No Lending of Credit...

Except where there is a **PUBLIC PURPOSE**

- No violation of §§ 23 or 25 occurs where the expenditure of public funds is for a public purpose. *State ex rel Mitchell v. Sikeston*, 555 S.W.2d 281 (Mo banc 1977) citing *State ex rel. Farm Elec. Coop., Inc. v. State Env. I.A.*, 518 S.W.2d 68 (Mo. banc 1975); *State ex rel. City of Boonville v. Hackmann*, 293 Mo. 313, 240 S.W. 135 (Mo. banc 1922).
- “It has long been recognized in Missouri ... that the constitutional prohibitions noted are not violated when money and property are expended or utilized to accomplish a 'public purpose'.” *Id.*

Public Purpose Exception

- “The public purpose doctrine again applies. This court has held in similar situations that such an exception or qualification to the prohibition does exist...” *Menorah Medical Center v. Health & Educational Facilities Authority*, 584 S.W.2d 73, 79-80 (Mo. 1979)
- “The presence of a legitimate ‘public purpose’ makes society or the people of this state the direct beneficiary of the expenditures.” *Americans United v. Rogers*, 538 S.W.2d 711 (Mo banc 1976)
- “the law is clear in Missouri that an overriding public purpose will not suffer **constitutional death** at the hands of incidental private benefit.” *Id.*



Make a NOTE OF THIS!

EXCEPTIONS!!



Donations by Local Governments

- Art. 6, § 25 prohibits expenditure of any public funds for a private purpose.
- City can accept gifts and donations but not **donate funds** to any non-public purpose.



Art. 10, §3: Limitation of Taxation to public purposes

- “Taxes may be levied and collected for **public purposes only ...**”
- *Actually uses “Public Purpose”; unlike Art. 6, §§ 23 and 25 which do not*
- “it is universally agreed that an attempt to raise money by taxation for private purposes is unconstitutional; that it is a taking of property without due process of law; that it violates fundamental principles inherent in free government” *Dysart v. St. Louis*, 321 Mo. 514, 521 (Mo. 1928)



LIMITATIONS RELATED TO RELIGION

**Art. 1, § 7. Public aid for religious purposes--
preferences and discriminations on religious grounds**

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any **church, sect or denomination of religion**, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.



Art. 9, § 8. Prohibition of public aid for religious purposes and institutions

Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything

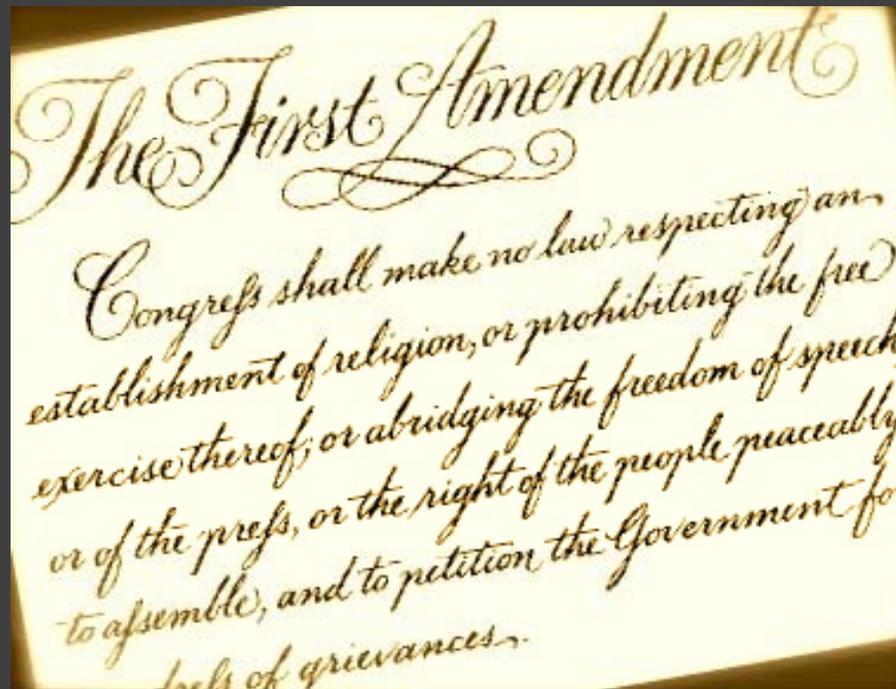
- in aid of any religious creed, church or sectarian purpose,
- or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning *controlled by any religious creed, church or sectarian denomination* whatever;

nor shall any **grant or donation of personal property or real estate** ever be made by the state, or any county, city, town, or other municipal corporation, for any **religious creed, church, or sectarian purpose** whatever. Mo. Const. Art. IX, § 8

U.S. Constitution

First Amendment

Congress shall make no law respecting an establishment of religion ...



U.S. Constitution

First Amendment



Lemon v. Kurtzman, 403 U.S. 602 (1971)

State aid must have a:

- 1) secular legislative purpose
- 2) a primary effect other than the advancement of religion, and
- 3) no tendency to entangle the state excessively in church affairs

Separation of Federal and State

- Missouri constitution is more 'restrictive' than the First Amendment to the United States Constitution in prohibiting expenditures of public funds
- Long established constitutional policy of the State of Missouri insists upon a degree of separation of church and state to probably a higher degree than that required by the First Amendment.
Luetkemeyer et al. v. Kaufmann et al., 364 F.Supp. 376 (W.D.Mo.1973), affirmed, 419 U.S. 888, 95 S.Ct. 167, 42 L.Ed.2d 134 (1974).

Article 6, § 26(a) Limitation on indebtedness of local governments without popular vote

- No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution.

Debt Limits

- Expenditure < Revenues of current year + any previous surplus
- Unless there is a vote
- Accordingly, long-term contracts (more than 1 year) usually contain “annual appropriation” clauses or other provisions that allow cancellation or otherwise satisfy the debt limitations

Debt Limits - Article 6, §26(a)



- Does NOT require political subdivision to measure entire contract obligation as a current expenditure if paid over time
- Only payments due in a particular fiscal year are considered expenditures for determining whether expenditure limitation is exceeded

Debt Limits

- City of Licking issued \$ 595,000 of Certificates of Participation
- \$ 55,130 annual payments for 15 years.
- Not required to measure entire \$ 595,000 as a current expenditure -- only \$ 55,130 payment was expenditure for current fiscal year
- “Therefore, by only considering the first year's payment as an expenditure, it is clear that Licking did not exceed the expenditure limitation”

*Burks v. City of Licking**, 980 S.W.2d 109, 115 (Mo. Ct. App. 1998)



*Texas County, Missouri, is now the geographic center of the U.S. population.



NEPOTISM

WE PROMOTE FAMILY VALUES HERE-
ALMOST AS OFTEN AS WE PROMOTE FAMILY MEMBERS.

Nepotism

Article VII, Section 6. Penalty for nepotism.

Any **public officer** or **employee** in this state who by virtue of his office or employment names or appoints to **public office** or **employment** any relative within the fourth degree, by consanguinity or affinity, **shall thereby forfeit his office or employment.**

Relations to the 4th Degree (Self or Spouse)

First Degree

Child

Parents

Second Degree

Grandchild

Brother/Sister

Grandparents

Third Degree

Great Grandchild

Niece/Nephew

Aunt/Uncle

Great Grandparents

Fourth Degree

Great Great Grandchild

Grand Niece/Nephew

First Cousin

Great Aunt/Uncle

Great Great Grandparents

Nepotism

1. A husband is related **by marriage (affinity)** to his wife's relatives in the same way that she is related to them **by blood (consanguinity)** and she to his family in the same way, but the kindred of the spouses are not related to one another (*e.g.*, a brother of the husband is not related to a brother of the wife, etc.).
2. Half relationship is the same as a whole relationship.
3. Step relationship is the same as a blood relationship.
4. A relationship by marriage (affinity) terminates if death or divorce occurs.

Nepotism

- Art. VII, Section 6 is “self-executing”
 - Unless the individual resigns, judicial action assuring due process is necessary
 - Proper mechanism for removal is *quo warranto* action
 - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. W.D. 2008); *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. banc 1994)

Harsh realities for nepotism violations...

- You can't retroactively "fix" the violation
 - Rescinding the appointment doesn't cure violation
 - Can't resign and be reappointed either
 - *State ex rel. Nixon v. Wakeman*, 271 S.W.3d 28 (Mo. App. W.D. 2008)
- Intent (or ignorance) is irrelevant
 - *State ex rel. Attorney Gen. v. Shull*, 887 S.W.2d 397 (Mo. banc 1994)
- Greater impact on small municipalities
- Be proactive
 - Educate public officials and employees

Right to hold office

Article VII, Section 12. Tenure of office.

Except as provided in this constitution, and subject to the right of resignation, all officers shall hold office for the term thereof, and until their successors are duly elected or appointed and qualified.

Article VII, Section 12

- Doesn't apply to removal cases
- What about an incumbent who loses at an election but the winning candidate fails to qualify for office?
 - The incumbent doesn't hold over and a vacancy is created.
 - However, if the incumbent does hold over under some claim of right, actions taken as de facto officer are considered valid as to the public or the rights of third persons, just as if they had been a de jure officer.
 - *State ex rel. Dalton v. Mouser*, 284 S.W.2d 473 (Mo. 1955)

Compensation

Article VII, Section 13. Limitation on increase of compensation and extension of terms of office.

The compensation of state, county and municipal officers shall not be **increased during the term of office**; nor shall the term of any officer be extended.

Specific statutory limitation

3rd Class -- **Compensation of officers and employees.** 77.440 RSMo. The council shall have power to fix the compensation of all officers and employees of the city.

4th Class -- **Salaries fixed by ordinance.** 79.270 RSMo. The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. *But the salary of an officer shall not be **changed** during the time for which he was elected or appointed.*

Villages -- **Trustees--power of appointment.** 80.240 RSMo. Such board of trustees shall have power to appoint an assessor, collector, marshal, treasurer, and such other officers, servants and agents as may be necessary, remove them from office, prescribe their duties and fix their compensation.



What about Bonuses?

Article III, Sec. 39(3) prohibiting retroactive “extra” compensation.

- prohibits the grant of “any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part”

- “Bonuses” are prohibited to the extent they are deemed compensation after the service has been rendered.
- What about the Christmas ham, the year-end gift card or the \$50 cash gift?



What can you do to recognize employees???

- Utilize cost of living adjustments
- Consider merit increases
 - So long as it is not given during the employee or officer's "term"
 - Increase at the time of reappointment



NEWEST ADDITION TO THE CONSTITUTION

Article X, Section 25. Sale or transfer of homes or other real estate, prohibition on imposition of any new taxes, when.

After the effective date of this section, the state, counties, and other political subdivisions are hereby **prevented from imposing any new tax, including a sales tax, on the sale or transfer of homes or any other real estate.**

- Adopted November 2, 2010

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