California Cities and the Constitution of 1879: General Laws and Municipal Affairs

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Introduction

The extent of the powers conferred upon counties and cities by the Constitution of 1879 to enact legislation and to enforce it within its limits, and the degree of autonomy conferred upon chartered cities in municipal affairs are questions which have previously been considered by this author.[1] Such legislation was shown to be valid if not "in conflict with general laws." Charter provisions and legislation thereunder in "municipal affairs" were shown to prevail over general laws.

In the last half century, the legislature has created a host of state administrative agencies, as well as quasi-municipal corporations or authorities whose functional or territorial parameters have jostled those conferred upon cities and counties by the constitution.[2] In addition, the tremendous population growth and proliferation of cities,[3] with

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1. *See* David, *Our California Constitutions: Retrospections in the Bicentennial Year*, 3 Hastings Const. L.Q. 716, 718, 719, 730-39 (1976).

2. *Id.* at 730.

3. In 1852, San Francisco was the 22nd largest city in the nation, with a population of 34,776. In 1960, it was the 11th with 742,835 people, but Los Angeles had become third with 2,479,015 people.

Ranked according to population, 21 California cities are among the 160 cities of the United States over 100,000 population:

	1950	1975
(3) Los Angeles	1,970,358	2,727,399
(9) San Diego	334,387	774,489
(16) San Francisco	775,357	664,520
(22) San Jose	95,280	555,707
(43) Long Beach	250,767	335,602
(45) Oakland	384,375	330,651
(67) Anaheim	14,566	193,616
(77) Santa Ana	45,533	177,304
(78) Fresno	91,699	176,528

their mosaic contiguity, have created new administrative and jurisdictional relationships. In considering these potential or actual jurisdictional conflicts involving constitutional powers of cities, the California Supreme Court, despite fifty years of its own decisions, has effectively relied upon the doctrine of state legislative supremacy. It has done so by redefining the phrase "in conflict with general laws" and by limiting the term "municipal affairs." The following pages discuss the baffling and sometimes amazing course of decisions which have accomplished this result. Whether "home rule" has been brought to extinction by this redefinition is an open and debated question.

Discussed also are other constitutional provisions relating to municipal powers and relationships.

The framers of the 1879 constitution stated in what was then section 11 of article XI, (currently section 7) that "[a]ny county, city, town,

(99) Riverside	84,332	150,612
(100) Huntington Beach	11,492	149,706
(116) Torrance	22,241	139,776
(113) Glendale	95,702	132,360
(125) Garden Grove	*	118,454
(127) Fremont	*	117,862
(129) Stockton	70,853	117,600
(138) Berkeley	113,805	110,465
(143) Pasadena	104,577	108,220
(154) Sunnyvale	9,829	102,462
(156) San Bernardino	63,058	102,076

* not in existence, in 1950

The State capital, (57) Sacramento, expanded from 137,532 persons in 1950 to 260,822 in 1975. (The expanding bureaucracy?) U.S. BUREAU OF THE CENSUS, tabulated, THE WORLD ALMANAC AND BOOK OF FACTS 221-23 (1979).

It may be significant that whereas in 1890 the population was considered almost evenly balanced between urban and rural populations, in 1970 it was considered approximately 90% urban in California. The great population explosion in 1950-70 was largely absorbed in the cities from 3,500 to 100,000 population. Besides the cities listed above, the population increase for other cities included: Cypress City, 669%; La Palma, 1000%; El Monte 430.6%; Arroyo Grande, 125.5%; Cupertino, 397.3%; Dana Point, 300%; Fountain Valley, 439%; Davis, 163.6%; Fairfield, 194.9%; Palo Alto, 25.2%; Santa Rosa, 62.1%; Half Moon Bay, 105.6%; Corona, 106.4%; Los Altos Hills, 101%; Los Gatos, 162.7%; Martinez, 71.9%; Milpitas, 313%; Morgan Hill, 105.8%; Newark, 174.7%; Seal Beach, 249.5%. CITY AND COUNTY DATA BOOK (CALIFORNIA) 1972. The percentage of increase for the entire state in that period was 27%. Perhaps also revealing is that seven of the top 39 U.S. Standard Metropolitan areas, according to the Bureau of the Census, are in California:

(3) Los Angeles-Long Beach, 7,004,400 population
(7) San Francisco-Oakland, 3,158,900 population
(19) Anaheim-Santa Ana-Garden Grove, 1,755,600 population
(20) San Diego, 1,623,400 population
(29) Riverside-San Bernardino-Ontario, 1,255,500 population
(31) San Jose, 1,198,900 population
(39) Sacramento, 903,200 population

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*."[4] In 1896, an amendment to former article XI, section 6 (currently section 5) provided that cities may prepare and adopt charters which allow them to "make and enforce all laws and regulations *in respect to municipal affairs*, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to and controlled by general laws."[5] For the past century, the state's jurists have been concerned with the application of the term "general laws," substantially redefining it during this period. For sixty-five years, the California courts have been faced with the related problem of determining the plenary limits of "municipal affairs." As a practical matter, such determinations require policy judgments, a matter normally reserved for the state legislature. In the context of state-local relations, however, there are both state and local legislative bodies, each vested with constitutional power, whose jurisdictional boundaries depend upon the definition of *municipal affairs*. To some degree, the term "municipal affairs" is not a free-floating concept. Other direct constitutional grants of power[6] to cities and charter counties, as well as prohibitions upon the state legislature, help to establish the parameters of *municipal affairs*, and *ex pro vigore* provide some insulation from intervention by the state.

One hundred years ago, when the Constitution of 1879 was being drafted, one of the main social and political factors it reflected was the revolt of the principal California cities—San Francisco, Sacramento and San Jose—against domination by the state legislature.[7] This revolt focused on fiscal management and city property, and was a response to the legislature's direct intervention in taking over the management of city funds and property.[8] Aghast at the rise of municipal indebtedness and determined to restrain it, the legislature overruled the municipal authorities, entertained claims on behalf of city creditors which had been rejected by the cities, and ordered them paid from municipal funds. This practice had a direct effect on local tax rates.

4. CAL. CONST. art. XI, § 11 (amended and adopted as art. XI, § 7 in 1970) (emphasis added).

5. CAL CONST. art. XI, § 6 (amended and adopted as art. XI, § 5 in 1970) (emphasis added).

6. For a discussion of these constitutional grants of power, see notes 94-99 and accompanying text *infra*.

7. *See generally* David, *Our California Constitutions: Retrospections in this Bicentennial Year*, 3 HASTINGS CONST. L.Q. 697, 718-25, 730-39 (1976).

8. With respect to San Francisco, see 1851 Cal. Stats. 387; 1855 Cal. Stats. 285.

The state's meddling in municipal affairs prior to 1879 was not without a constitutional foundation. The Constitution of 1849, in article IV, section 37, had commanded the state legislature, in reference to cities, "to restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent abuses in assessments, and in contracting debts, by such municipal corporations."[9] In fact, between 1849 and 1879, municipal finance in the three largest cities, San Francisco, Sacramento and San Jose, was in a state of chaos, a state in which politics, nature and venality all played their part. For example, conflicting grants, surveys and dealings in pueblo lands ceded by the state resulted in controversies that were not resolved in the law courts until well into the twentieth century.[10] In addition, a scramble for development of other land, outright gifts of funds and economic advantages, and stock subscriptions for railroad and other private transportation companies made further inroads upon municipal finance.[11]

The state legislature also intervened in municipal fiscal affairs through the creation of sinking fund commissioners.[12] As receivers for each of the three main cities, the commissioners were vested with all municipal properties, including lands and funds, and with the power and duty to receive and act on claims. Such actions outraged both the municipalities whose fiscal powers were suspended, and the creditors whose claims were scaled down or disallowed. The creditors' complaints, however, were tempered at least until ratification of the Constitution of 1879. Disappointed claimants could take the boats or trains to

9. CAL. CONST. art. IV, § 37 (repealed 1966).

10. *See, e.g.*, H. BANCROFT, HISTORY OF CALIFORNIA 271 (1970), Hart v. Burnett, 15 Cal. 530 (1860).

11. *See, e.g.*, 1869-1870 Cal. Stats. 551, wherein the City of Stockton was directed to aid specified railroad construction. Stockton & V.R.R. v. Common Council, 41 Cal. 147 (1871). *See also* People *ex. rel.* Central Pacific R.R. v. Board of Supervisors, 27 Cal. 655 (1865). Such actions are now forbidden, CAL. CONST. art. XVI, § 6 and art. XI, § 10.

12. The San Francisco Consolidation Act set up the system, People *ex. rel.* Tallant v. Woods, 7 Cal. 579 (1857), and took control of some elements from the board of supervisors. *See* People *ex rel.* Tallant v. Board of Supervisors, 12 Cal. 300 (1859). The charter of San Francisco did not permit the city to set up its own board, Smith v. Morse, 2 Cal. 524 (1852), and sales made by the board set up by the legislative act came into question. *Cf.* Dunham v. Angus, 145 Cal. 165, 78 P. 557 (1904); Board of Educ. v. Fowler, 19 Cal. 11 (1861), Heydenfelt v. Hitchcock, 15 Cal. 514 (1860); People *ex rel.* Davis v. Middleton, 14 Cal. 540 (1860); Leonard v. Darlington, 6 Cal. 123 (1856).

As to Sacramento, see Bates v. Porter, 74 Cal. 224, 15 P. 732 (1887) (taking over the water rates); Board of Comm'rs v. Board of Trustees, 71 Cal. 310, 12 P. 224 (1887); Meyer v. Brown, 65 Cal. 583, 4 P. 25 (1884); Ellis v. Eastman, 32 Cal. 447 (1867) (determining necessity for sale). *See also* 1871-1872 Cal. Stats. 546 (requiring tax levy at demand of commission).

Sacramento and, with political inducements to sweeten the equity of their claims, secure special bills directing the city to pay from its funds.[13]

In the thirty years following the drafting of the 1849 constitution, there was little occasion to contest the power of cities to regulate persons and property by municipal ordinances. The special charters under which they operated were specific as to subject matter.[14] Under the usual rules of statutory construction, such specific provisions prevailed over any general legislation on such subjects, including the provisions for the organization and operation of the cities themselves. In the main, the state legislature was content to leave the cities in control of police and sanitary regulation.

13. In the 1875-76 session, according to the statutory index, there were 91 laws which directly legislated for the City and County of San Francisco, including directions to determine and pay specified claims against the city and county government. The number of such items swelled to some 170 in the 1877-78 session. Sixteen related to the improvement of particular streets. There were also acts for the relief of specified persons, which the Supervisors were "authorized and required" to pay. By An Act for the Relief of John J. Conlin, 1871-1872 Cal. Stats. 861, the auditor was directed to audit and the treasurer directed to pay from the city and county general fund the sum of $2983.07 to Conlin, for the planking of Kearny Street.

Legislative control was the corollary of the prevailing doctrines for municipal power. For example, as early as 1871, it was held that the legislature had direct control of municipal funds. Creighton v. Board of Supervisors, 42 Cal. 446, 450-51 (1871). *Cf.* Creighton v. Manson, 27 Cal. 613 (1865) (attempt of the same contractor to collect $13,000 on a special assessment defeated because the Resolution of Intention had not been presented to the president of the board for signature, and there was no city liability). *See also In re* Market Street, 49 Ca. 546 (1875). In 1852, the legislature directly empowered the erection of a powder magazine in the City of San Francisco. Harley v. Heyl, 2 Cal. 477 (1852). *See also* People v. Lynch, 51 Cal. 15 (1875), where the supreme court denied the power of the legislature to levy a special assessment, and discussed the problem of relationships. As a result, the legislature enacted art. IV, §§ 31 & 32 of the Constitution of 1879. *See also* Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753 (1893); Conlin v. Board of Supervisors, 114 Cal. 404, 46 P. 279 (1896), holding such orders for payment were made illegal by art. IV, §§ 31 & 32 of the 1879 constitution. In the first case, Conlin sought $54,015.37 for principal and interest under the act of 1891 Cal. Stats. 513. Under the act of 1895 Cal. Stats. 348 in the second case, he sought $61,577.00. People *ex rel.* O'Donnell v. Board of Supervisors, 11 Cal. 206, 210 (1858), held the legislature could compel payment of a judgment creditor, and said its general power over municipal finance was an "interesting question" which did not arise in this case.

14. In Herzo v. City of San Francisco, 33 Cal. 134 (1867), the court stated: "A municipal corporation is a creature of the statute, invested with such power and capacity only as conferred by the statute, or passes by necessary implication from the statutory grant. All powers outside of those limits are as much beyond her reach as if she had never been created. Her artifical existence is absolutely bounded and circumscribed by those limits. She has not all the powers of a natural person except as restricted by the statute, but she possesses none except such as are imparted to her by the charter of her existence." *Id.* at 143.

Cities had to act in the prescribed mode, or the power was nonexistent. "The mode is the measure of the power." Zottman v. City of San Francisco, 20 Cal. 96, 109 (1862).

Under the 1879 constitution, however, the power of the cities was increased by restricting the powers of the state legislature to promulgate special laws or to interfere with city business.[15] The constitution specifically declared in the former section 11 of article XI, (currently section 7) that the municipal police power was to be restricted only to the extent that "all such local, police and sanitary" regulations were "in conflict with general laws."[16] Municipal jurisdiction over such matters

15. It was stated in *In re* Guerrero, 69 Cal. 88, 10 P. 261 (1886), that the main municipal objectives accomplished in the enactments of the 1879 constitution were that (1) municipal corporations were made more independent of legislative control; (2) passage of special laws for any municipality was prohibited; (3) the legislature was prohibited from levying taxes for any municipal purpose; and (4) art. XI, § 11 was adopted. *See* text accompanying note 4 *supra*.

It should be noted that from 1879 to date this authorization of police power has applied to all cities in the state, whether chartered or not. The authorization is not equivalent to the grant of power found in the former art. XI, § 6 (currently art. XI, § 5) permitting freeholders' charter cities "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to and controlled by general laws." Such a grant of power would not have been necessary in 1914 had the then art. XI, § 11 sufficed. This grant will be considered at notes 144-45 and accompanying text *infra*, but we note the present 1970 version is set forth in art. XI, § 5 (a) of the constitution, concluding, "City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." Article XI, § 11 was held to grant the same quantum of police power to counties. *See, e.g.*, People v. Velarde, 45 Cal. App. 520, 524, 188 P. 59, 61 (1920). In this article the doctrinal application to counties is not separately considered.

16. The word "all" means without exception or exclusion. In Dalton v. Baldwin, 64 Cal. App. 2d 259, 148 P.2d 665 (1944), the court stated, "To us the word 'all' means not only 'any right' or 'every right' but the entire inclusiveness of the word excludes no right whatsoever." *Id.* at 263, 148 P.2d at 667.

Giving meaning to every word or phrase, it would appear that the word "local" was a tautological equivalent of the phrase "within its limits." "Local" was used to distinguish this class of authorized special legislation applicable to only one county or city from general laws by which the legislature is required to legislate. *See* Earle v. Board of Educ., 55 Cal. 489, 498 (1880) (Sharpstein, J., dissenting).

The term "regulation" is synonymous with rules, by-laws or ordinances. In *Ex parte* Mount, 66 Cal. 448, 6 P. 78 (1884), it was held the power to regulate or make regulations includes the power to pass an ordinance. The special charters of cities from 1849 to 1879 used the term "by-laws" (familiar to English municipal corporation law), "regulations," "orders" and "laws" indiscriminately in reference to passage of the local, police, sanitary or other regulations authorized in their charters. *Cf.* Markleeville, 1863-1864 Cal. Stats. 441; San Buenaventura, 1865-1866 Cal. Stats. 216; San Mateo County, 1863-1864 Cal. Stats. 48. In San Jose, the empowering clause used the phrase, "ordinances, resolutions, and by-laws for the regulation of the police and entire government." 1865-1866 Cal. Stats. 246. In the charters of Redwood City and Brooklyn, "All ordinances and laws" and "by-laws" were used. 1867-1868 Cal. Stats. 411, 413; 1869-1870 Cal. Stats. 680. The Vallejo charter referred to "ordinances," 1865-1866 Cal. Stats. 431, 438, 439. Finally, in the Santa Clara and Santa Cruz charters, the power was granted to make and enforce "by-laws and ordinances" for "regulation of the police of said town." 1865-1866 Cal. Stats. 493, 547. Though no police power was vested in the counties at that time, the special act relating to San Mateo County,

was not new. The special charters granted from 1849 to 1879 were numerous, but the express grants of powers were almost identical. The 1879 constitution's general act of municipal incorporation substantially followed the format of the original city charters thereby formalizing the limits of municipal powers.[17] Thus, article XI, section 11 of the constitution was a summary characterization of the existing statutory powers, now given constitutional status. It was a direct grant of state police powers to the cities, to be shared with the legislature but not dependent upon it, subject to supersession only by *general laws*.[18]

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provided that "The Board of Supervisors of the County of San Mateo shall have power to establish such general rules and regulations not contrary to law as they may deem necessary for carrying the provisions of this act into effect." 1863 Cal. Stats. 800. Likewise, the general act creating boards of supervisors and defining their duties contemplated that they had power to make "orders" to carry out the powers vested in them. 1855 Cal. Stats. 51, § 9. The San Francisco Consolidation Act lists various powers of the Board of Supervisors in this phraseology: "The Board of Supervisors shall have further power by regulation or order" to exercise a long list of powers. 1856 Cal. Stats. 145.

17. *See, e.g.*, COMPILED LAWS OF CALIFORNIA, 103 (1850-53): "Sec. 11. The said city council shall have power to make by-laws and ordinances not repugnant to the constitution and laws of the United States, or of this state; to prevent and remove nuisances; to provide for licensing, regulating, and restraining theatrical and other amusements within the city; to provide for licensing any or all business not prohibited by law; to fix the amount of license tax for the same; to regulate and establish markets; to establish a board of health; to cause the streets to be cleaned and repaired; to establish a fire department, and to make regulations to prevent and extinguish fires; to regulate the inclosure of any common field belonging to or within the limits of the city; to provide for supplying the city with water; to impose and appropriate fines, penalties, and forfeitures for breaches of their ordinances: Provided, that no fine shall be imposed of more than five hundred dollars, and no offender be imprisoned for a longer term than ten days; to levy and collect taxes; to lay out, extend, alter, or widen streets or alleys; to establish and regulate a police; to make appropriations for any object of city expenditures; to erect maintain poor-houses and hospitals; to prevent the introduction and spreading of diseases; and to pass such other by-laws and ordinances for the regulation of the policy of such city as they shall deem necessary; which by-laws and ordinances shall be published in the manner to be prescribed by the city council." The term "not repugnant to" appeared in many legislative charters, including: Sacramento, 1850 Cal. Stats. 71, § 5; Marysville, 1851 Cal. Stats. 333, § 6; Benicia, *id.* at 351, § 6; Sonora, *id.* at 378, § 6; San Jose, 1857 Cal. Stats. 115; § 8; Brooklyn, 1869-1870 Cal. Stats. 682, § 8; San Diego, 1871-1872 Cal. Stats. 288, § 10; San Leandro, *id.* at 460, § 9; Vallejo, *id.* at 568, § 10; Stockton, *id.* at 598, § 14; Redwood City, 1873-1874 Cal. Stats. 948, § 7. Other legislative charters using the term "not repugnant to" are found in 1869-1870 Cal. Stats.: Chico, Colusa, Gilroy; 1871-1872 Cal. Stats.: Antioch, Chico, Ft. Jones, Cloverdale, Napa, Santa Rosa, Wilmington; 1873-1874 Cal. Stats.: Healdsburg, Menlo Park, Salinas, San Rafael, Sutter Creek, Visalia, Wheatland, Woodland, Santa Barbara, Watsonville; 1875-1876 Cal. Stats.: Hayward, Martinez, Livermore, Colusa, Ukiah, Red Bluff, St. Helena; 1877-1878 Cal. Stats.: Dixon, Felton, Yuba City.

From the year 1875 onward, there was an upsurge in municipal activities. In the 1875-76 session of the legislature, for example, some 28 acts were passed incorporating cities or towns, or amending or supplementing existing special charters. In the 1877-78 session, there were 34 similar acts.

18. The state supreme court, in *In re* Ackerman, 6 Cal. App. 5, 91 P. 429 (1907), stated:

The constitutional grant of police power under section 11 of article XI engendered little controversy in regard to the supersession by general laws provision. Essentially, the term as applied to control or supersession demanded literal conflict.[19] The idea that conflict in the constitutional sense could arise from the general tenor of legislation or "public policy," was specifically rejected by the state supreme court[20] as

"But counties, cities and towns are not required to seek in any legislative enactment for the source of their power to make and enforce within their respective limits all local, police, sanitary and other regulations which they may deem needful and requisite for their welfare and that of their inhabitants. The constitution has, by direct grant, vested in them plenary power to provide and enforce such . . . regulations as they may determine shall be necessary for the health, peace, comfort and happiness of their inhabitants, provided such regulations do not conflict with general law. (Const., art. XI, sec. 11). And the legislature has no authority to limit the exercise of the power thus directly conferred upon cities, counties and towns by the organic law. The only test is, therefore, do such regulations conflict with any general law of the state? If they do not, then they have binding authority upon all inhabitants of the city or county or town for which they are established upon all the subjects to which they relate and which legitimately come within the scope of the power granted by the constitution." *Id.* at 9-10, 91 P. at 431 (citation omitted).

Article IV, § 1 of the constitution invests all legislative power of the state in the legislature, subject to the initiative and referendum. This 1966 revision omitted the phraseology of the previous section of that number, "nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities, or cities and counties, having charters adopted under the provision of Section 8 [currently § 5] of Article XI of the Constitution." That text probably was thought unnecessary, in view of the provisions of art. XI, §§ 5 & 7.

The quantum of power conferred was first defined in Odd Fellows' Cem. Ass'n. v. City of San Francisco, 140 Cal. 226, 230-31, 73 P. 987, 989 (1903). *Accord*, Chavez v. Sargent, 52 Cal. 2d 162, 176, 339 P.2d 801, 809 (1959); McKay Jewelers, Inc. v. Bowron, 19 Cal. 2d 595, 600, 122 P.2d 543, 546 (1942); Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225 (1926). *Cf. Ex parte* Roach, 104 Cal. 272, 37 P. 1044 (1894). *In re* Lane, 58 Cal. 2d 99, 367 P.2d 673, 18 Cal. Rptr. 33 (1962), overrules any inference "that where the state has 'fully occupied the field' there is room for additional requirements by local legislation." *Id.* at 105, 367 P.2d at 674, 18 Cal. Rptr. at 34. *See* notes 86-91 and accompanying text *infra*.

19. In *Ex parte* Campbell, 74 Cal. 20, 15 P. 318 (1887), the court held: "There is nothing in these acts inconsistent with the constitutional authority vested in the municipalities to make and enforce such local regulations . . . . Section 11 [currently § 7] of article 11 is itself a charter for each county, city, town and township in the state, so far as its local regulations are concerned; and nothing less than a positive and general law upon the same subject can be said to create a conflict within the meaning of that section . . . . In determining the question whether there is a conflict, we look only at the law itself, which is the best and only evidence of the policy of the state on the question before use." *Id.* at 26-27, 15 P. at 321. In a dissent, Justice McFarland declared: "Whatever is inconsistent or inharmonious or at variance with or contradictory of or repugnant to the general policy of the state, as expressed in its general laws, is 'in conflict' with those laws." *Id.* at 28, 15 P. at 321 (McFarland, J., dissenting). His view was rejected by the court for over sixty years.

20. The doctrine of preemption by "occupying the field," or that there was a "conflict with general laws" where the local enactment conflicted only with policies deduced from other general enactments, was first proposed and definitely rejected in *Ex parte* Campbell, 74 Cal. 20, 15 P. 318, (1887). In 1887, acting under art. XI, § 11 (currently § 7), Pasadena prohibited the maintenance within the city limits of any tippling-house, dram-shop or bar

new applications of the cities' police power were sustained. Although it seemed clear that cities, towns and counties had the right to make and enforce local laws not geared to the external police power, the supreme court indicated that local legislation was to be restricted to the control of persons, rather than such areas as purchase and sale of real estate.[21] Any fears that local entities would be precluded from developing internal organizations of county and city business were dispelled, however, by later court decisions.[22] Nevertheless, in 1896 sections 6 and 8 of article XI were amended to expressly establish local autonomy over "municipal affairs."

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room, where vinous, spiritous, malt, or mixed liquors were sold or given away. The legislature had not at that time enacted such a "dry" measure for the state as a whole, although it had prohibited sales to minors and in certain public buildings.

21. The supreme court upheld the municipal power of Pasadena, stating that "[i]t has the same power over its own local police and sanitary affairs as were formerly granted by the Legislature, and unless the exercise thereof will conflict with the operation of general laws, it may make and enforce the same through its local governments." *Id.* at 23, 15 P. at 320. *See also Ex parte* Daniels, 183 Cal. 636, 192 P. 442 (1920), wherein the court conceded that "a mere prohibition by the state legislature of local legislation upon the subject of the use of the streets, without any affirmative act of the legislature occupying that legislative field, would be unconstitutional and in violation of the express authority granted by the state constitution to the municipality to enact local regulations. In other words, an act by the state legislature in general terms that the local legislative body would have no power to enact local, police, sanitary or other regulations, while in a sense a general law, would have for its effective purpose the nullification of the constitutional grant, and, therefore, be invalid." *Id.* at 641, 192 P. at 445.

In Von Schmidt v. Widber, 105 Cal. 151, 38 P. 682 (1894), the question was whether or not the City and County of San Francisco had power to purchase a site for a smallpox hospital. The court held that former art. XI, § 11 did not authorize such a purchase. The court stated: "The 'regulations' which the Board of Supervisors is thus authorized to make are rules of conduct to be observed by the citizens, and cannot by any construction of language be held to include the purchase of real estate; nor can the powers to make such purchase be implied from the authority to make the regulations." *Id.* at 161, 38 P.2d at 685. This decision was an inducing cause for the 1896 amendments to art. XI, §§ 6 & 8 to establish the municipal affairs autonomy of cities.

22. One year after its decision in *Von Schmidt*, the supreme court found in DeBaker v. Southern Cal. Ry., 106 Cal. 257, 39 P. 610 (1895), that Los Angeles was authorized by former art. XI, § 11 (currently § 7) to improve the banks of the Los Angeles River. The court stated: "In other words, the corporate authorities were not only by act of the legislature but by the direct mandate of the people expressed in the organic law, authorized to exercise the police power of the state for local purposes." *Id.* at 279, 39 P. at 615. The grant of power in art. XI, § 11 also was held sufficient authority for the creation of offices: *see, e.g.*, Scott v. Boyle, 164 Cal. 321, 128 P. 941 (1912); Millikin v. Meyers, 25 Cal. App. 510, 144 P. 321 (1914) (sealer of weights and measures); Valle v. Shaffer, 1 Cal. App. 183, 81 P. 1028 (1905) (medical expert as officer). It was also sufficient authority for the manufacture of squirrel poison for use by a county, Farley v. Stirling, 70 Cal. App. 526, 233 P. 810 (1925); caring for needy in county hospital, Goodall v. Brite, 11 Cal. App. 2d 540, 54 P.2d 570 (1936). Grant of franchises was sustained under this section, until jurisdiction passed to the Railroad, now Public Utilities, Commission: Galvin v. Board of Supervisors, 195 Cal. 686, 692, 235 P. 450, 452 (1925); City of San Diego v. Kerckhoff, 49 Cal. App. 473, 482, 193 P. 801, 803 (1920).

There have been varied interpretations of the pertinent events, doctrines and cases highlighting the development of the home rule concept.[23] As the state has grown in population, the concept of home rule has undergone corresponding changes. Today, as was true one hundred years ago, the principal conflicts are developing over problems of finance; the state supreme court's most recent discussion of home rule has involved the addition of article XIIIA to the constitution, with its restrictions upon real property taxation.[24] This article will serve as an historical commentary on and an evaluation of the home rule doctrine as it has developed since enactment of the 1879 constitution. It reflects the observations, conclusions and biases of one who has been professionally identified with the course of municipal affairs for five decades.[25]

In tracing the history of home rule from the developing stage of California's legal and political philosophy to the current waves of public outrage against the legislature, no attempt will be made to present a full panoply of police power cases. The purpose of this article is to indicate the drift of the tide, beginning with early judicial definitions and limitations on the local police power and progressing to consideration of a few recent cases. It will be suggested that a subject matter analysis not be used to preclude necessary promulgation and enforcement of local laws.

I. Limiting Municipal Constitutional Power by Redefinition of "General Laws"

During the first three-quarters of a century following adoption of

23. *See generally* David, *Home Rule in California*, LEG. NOTES ON LOCAL GOVT. 125 (1940); Peppin, *Municipal Home Rule in California: Part I*, 30 CAL. L. REV. 1 (1942); *Part II*, 30 *id.* 272 (1943); *Part III*, 32 *id.* 341 (1944); *Part IV*, 34 *id.* 644 (1944); Sandalow, *The Limits of Municipal Power under Home Rule: a Role for the Courts*, 48 MINN. L.R. 643 (1964); Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055 (1972); *Is Municipal Home Rule a "Dead Duck?"* 36 WESTERN CITY MAG. 13 (1960), 37 TAX DIGEST 140 (1959). One must note that in most states, "Home rule" may begin and end with a provision like CAL. CONST. art. XI, § 7, without a municipal affairs grant, as in CAL. CONST. art XI, § 3. *See also* Januta, *The Municipal Revenue Crises: California Problems and Possibilities*, 56 CAL. L. REV. 1525 (1968).

24. CAL. CONST., art. XIIIA was upheld in Amador County v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

25. M.S. and Ph.D., Pub. Adm; Faculty, School of Public Administration, Civic Center Division, 1936-41, 1947-65; Faculty, School of Law, Univ. So. Calif., 1931-41, 46-50; Special Counsel, Los Angeles Harbor Department, 1939-41; Deputy City Attorney, Palo Alto, Ca., 1927-31; President, City Attorneys' Dept., League of California Muncipalities, 1930-31; member, Bd. Directors of California Municipalities, 1934; Assistant City Attorney, 1934-41 and Senior Assistant, 1945-50, City of Los Angeles, Ca.

article XI, section 11 (currently section 7), the California Supreme Court, imbued with a concept of the sovereign power of the state legislature, was opposed to the home rule concept on principle, and committed to establishing a uniformity in laws that had been negated by local action under that constitutional section.

Eventually, however, as both state and local government structures became increasingly complex, the court was confronted with a myriad of problems: the task of delineating jurisdiction *inter se* of counties and cities, each sharing the same power over the same territory; the impact upon business and upon governmental functions of a mosaic of cities with mutual boundaries, forming a patchwork quilt of separate entities;[26] and the resolution of conflicts between local police power and the rules and regulations of administrative bodies in the state's executive department. In addition, the court was perhaps perplexed by the impact of rules and regulations of quasi-municipal corporations, whose powers were unspecified in the constitution.

The California Supreme Court could not repeal the constitution, but through a process of judicial redefinition of what constitutes a "conflict with general laws," it soon came to limit a construction of the former article XI, section 11 which had been adhered to for the previous seventy some years. In determining the respective boundaries of municipal and state jurisdiction the court was forced to deal with two complicating developments which the framers of the constitution barely contemplated and for which scant provision was made.

The first of these was the creation of functional districts, invested with many of the attributes of municipal corporations. For example, initially, levee and reclamation districts had been formed to control the river waters from flowing over adjacent land. Then, irrigation districts were established to accomplish a similar purpose. In the case of *In re Madera Irrigation District*,[27] the supreme court sustained the power of

26. On July 1, 1975, the total population of the State of California was estimated at 21,113,000. CALIFORNIA STATISTICAL ABSTRACT 7 (1975). As of that date, there were 407 California cities. As of 1976-77, there were 411. CALIFORNIA COUNTY FACT BOOK 2 (1976-1977). As of 1976-77, chartered counties included Alameda, Butte, Fresno, Los Angeles, Sacramento, San Bernardino, San Diego, San Francisco City and County, San Mateo, Santa Clara, and Tehama. *Id.*

In 1976-77, the state controller, reporting the financial transactions of governmental agencies, reported that in California there were 4,650 special districts, of which 1,270 were school districts. *Id.* Analysis of the number and types revealed 55 categories, plus 23 non-enterprise activities, and 7 enterprise activities in the fiscal year 1974-75. In these, the governing body was the Board of Supervisors in 1,872; city councils in 100; and other boards in 2,678, plus the school districts governed by boards of education. *Id.* at 11-13.

27. 92 Cal. 296, 28 P. 272 (1891).

the legislature to create such agencies, whose territorial districts and taxing functions intruded upon city territory and competing municipal powers.

The second significant development was the growth of administrative agencies within the executive branch of the state government. Many of these agencies, which now number in the hundreds, were given not only rule-making powers but enforcement powers as well. It was the supreme court's task to determine whether, in local application of agency rules, they were to be treated as "general laws" invalidating local legislation and whether, absent any exercise of the agencies' jurisdiction, a city was barred from exercising its constitutional grant of jurisdiction.

Beginning some thirty years ago, the attitude of certain members of the state supreme court, theretofore generally favorable to the home rule powers, underwent a change. Both Chief Justice Gibson and Justice Peek came to the court from service as state administrators.[28] From his judicial opinions,[29] it is clear that the chief justice rejected the idea that the police power of the state was shared by the legislature and the local governments in their local sphere; the local bodies were subordinate and should be subservient to the legislature. In the Chief Justice's view, the legislature represented the sovereignty of the state, and local governments could neither share nor could they challenge it by presumptuously attempting any regulation affecting state agencies.

Chief Justice Philip Sheridan Gibson came to his office with a strong background as an administrator, having become familiar with state government from his service as State Director of Finance. As head of the Judicial Council,[30] he bent his energies to the adoption and implementation of the Uniform Rules of Court,[31] designed largely to displace the rules adopted individually by the superior courts in the state's fifty-eight counties. A few years later, he personally led the fight for reformation of the inferior court system, with its complex combinations of municipal courts, justice courts, recorder's courts and police courts. Order and uniformity were sought, but the campaign pitted him against various local autonomies that wished to preserve their own local court systems.

28. 2 J. JOHNSON, HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA 172 (1966).

29. *See, e.g., In re* Lane, 58 Cal. 2d 99, 106, 372 P.2d 897, 901, 22 Cal. Rptr. 857, 861 (1962) (Gibson, C.J., concurring).

30. 2 J. JOHNSON, HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA 179 (1966).

31. CAL. RULES OF COURT (West). *See also* 33 Cal. 2d 1 (1949).

A proposal was made that the chief justice and the Judicial Council should name the presiding judges in each of the several courts; appointments to serve in the appellate department of the superior courts had been controlled in a similar fashion. However, the judges throughout the state successfully resisted the centralization proposal. One forward-looking proposal, successfully put into operation in some of the metropolitan courts, was the state-wide institution of pretrial procedures. Pretrial rules, it was insisted, should be uniform in all of the state's courts. The proposal for implementing such a procedure on a state-wide basis was doomed, however, because the locales of litigants and attorneys were frequently at some distance from the county seat and county involved, thus making a mandatory procedure impractical in many rural communities.

In the same period, there was an increase in the number of administrative agencies within both state and local governments. Their disparate handling of their quasi-judicial functions was anathema to the courts; what business had they to perform judicial functions? Apparently in response to this situation, the chief justice personally pushed for the adoption of California Code of Civil Procedure section 1094.5,[32] which provided for superior court review of administrative orders.[33] Initially, this section was directed at curbing the state agencies, but it was soon used to review municipal action as well.[34]

In view of the supreme court's stance against municipal autonomy, further attempts to concentrate power locally were not well received during the second half of the life of the 1879 constitution, which by that time was, itself, battered by amendment and revision. The power of the ever-increasing administrative government was curbed somewhat by the Administrative Procedure Act,[35] which left the supreme court free to determine the jurisdictional boundaries of non-constitutionally based agencies.[36] Here, the supreme court enlarged its powers of re-

32. 1945 Cal. Stats. c. 868, § 1 (current version at CAL. CIV. PROC. CODE § 1094.5 (West Supp. 1980)).

33. *See generally* Kleps, *Certiorarified Mandamus: Court Review of California Administrative Decisions 1939-49*, 2 STAN. L. REV. 285 (1950).

34. *See* Greif v. Dullea, 66 Cal. App. 2d 986, 153 P.2d 581 (1945). *See also* Strumsky v. San Diego City Emp. Ret. Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974). *See generally* Henke, *Judicial Review of Local Governmental Administrative Decisions in California*, 10 U.S.F. L. REV. 361 (1976).

35. 1947 Cal. Stats. c. 1425, §§ 1-20 (current version at CAL. GOV'T CODE §§ 11370-528 (West 1979)). For its history, see Clarkson, *The History of the California Administrative Procedure Act*, 15 HASTINGS L.J. 237 (1964).

36. *See, e.g.*, Temescal Water Co. v. Department of Pub. Works, 44 Cal. 2d 90, 280 P.2d 1 (1955).

view by reaching out and extending the concept of "jurisdiction."[37] But the most significant changes in the concept of home rule were to come about through the court's construction of the language of article XI, section 11 (currently section 7) of the California Constitution.

By its specific terms, article XI, section 11 (currently section 7) has operated to enlarge municipal powers. It has granted to a county or a city the right to "enforce all local, police, sanitary and other ordinances," with the proviso that such regulation must not conflict with general laws.[38] Whether or not a conflict exists, however, has largely been left to the courts' determination. As the California Supreme Court's attitude towards local government power has fluctuated, so has its definition of conflict.

It is well established that the state courts will recognize conflict between state law and a municipal ordinance where it is express, that is, when the legislature has explicitly preempted local regulation in a specific area,[39] when a state legislative enactment expressly authorizes that which a municipal ordinance prohibits, or where the state law prohibits that which the municipality would permit.[40] Likewise, courts recognize a conflict where a local law duplicates a state provision.[41] The most difficult problem of state-local preemption exists when a municipality attempts to regulate an area which the state has thoroughly occupied but without explicit preemption.[42] It is on this gray area that courts have focused their attention.

The California Supreme Court has given varied interpretations as to what constitutes a state expression of intent to occupy a given field.

37. *See, e.g.*, Boren v. State Personnel Bd., 37 Cal. 2d 634, 234 P.2d 981 (1951). Reversing long-standing concepts of administrative autonomy and accepting the fact that many administrative determinations were quasi-judicial in nature, the court of appeals provided for de novo determinations in trial courts upon review under CAL. CIV. PROC. CODE § 1094.5. *See* Le Blanc v. Swoop, 16 Cal. 3d 741, 548 P.2d 704, 129 Cal. Rptr. 304 (1976); Merrill v. Department of Motor Veh., 71 Cal. 2d 907, 458 P.2d 33, 80 Cal. Rptr. 89 (1969).

38. CAL. CONST. art. 11, § 7 (as amended).

39. *See, e.g., In re* Murphy, 190 Cal. 286, 212 P. 30 (1923).

40. *See, e.g., In re* Iverson, 199 Cal. 582, 250 P. 681 (1926) (lawful prescriptions for intoxicating liquor); Pasadena v. Fox, 16 Cal. App. 2d 584, 61 P.2d 332 (1936) (local requirement for building permit fee conflicted with state law forbidding all such fees except where legislature so provided); Farmer v. Behmer, 9 Cal. App. 773, 100 P. 901 (1909) (municipality could not license bawdy houses when state law prohibited them).

41. *See, e.g.*, Pipoly v. Benson, 20 Cal. 2d 366, 370, 125 P.2d 482, 485 (1942); *In re* Sic, 73 Cal. 142, 148, 14 P. 405, 408 (1887). *See also In re* Portnoy, 21 Cal. 2d 237, 131 P.2d 1 (1942), wherein the court invalidated a municipal ordinance that only partially duplicated state law.

42. *See generally* Peppin, *Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution*, 32 CAL. L. REV. 341, 380-90 (1944). *See also* Comment, *The California City versus Preemption by Implication*, 17 HASTINGS L.J. 603 (1966).

In *Chavez v. Sargent*[43] and *In re Porterfield*,[44] the court declared that even in the absence of a direct conflict, a "conflict with general laws" could be found when there was a conflict with a state "policy" as deduced by the court.[45] In those two cases, the views of Justice McFarland, who had bitterly opposed prior extensions of municipal power,[46] prevailed posthumously against the views of a solid phalanx of justices who for many years had rejected his ideas.[47]

It is significant that during this period of active redefinition of the term "conflict with general laws," the *Chavez* court indicated that "decisional law, on a subject of state-wide concern,"[48] may come within the meaning of the former section 11 of article XI. Thus, in order to determine whether the state had preempted a particular area, the court seemed to examine whether an ordinance conflicted with decisional law on a subject of general statewide concern.[49]

In *Pipoly v. Benson*,[50] in which the court held void an ordinance prohibiting jaywalking,[51] the term "conflict with general laws" was defined not as a conflict between the express terms of the respective statutes, but as a matter of state action indicating an intent to "occupy the field." The ordinance was deemed invalid due to a provision of the Vehicle Code[52] prohibiting local regulation in areas covered by that particular division. One such area dealt with pedestrians' rights and duties.[53] The chief justice stated that "[o]nly by such a broad definition

43. 52 Cal. 2d 162, 339 P.2d 801 (1959).

44. 28 Cal. 2d 91, 168 P.2d 706 (1946).

45. In *In re* Porterfield, 28 Cal. 2d 91, 168 P.2d 706 (1946), the court invalidated a license tax upon solicitors for union membership, finding this to be an impediment to the state's labor policies. In Chavez v. Sargent, 52 Cal. 2d at 162, 339 P.2d at 801 (1959), the court held invalid a "right to work" ordinance, finding the local provision conflicted with both the legislatively declared general labor policy of the state and certain specific implementations thereof.

46. *See, e.g., In re* Pfahler, 150 Cal. 71, 93, 88 P. 270, 279 (1906) (McFarland, J., dissenting).

47. *See* notes 43-44 *supra*.

48. 52 Cal. 2d at 177, 339 P.2d at 810.

49. This approach probably can be said to have emerged in *Ex parte* Daniels, 183 Cal. 636, 192 P. 442 (1920).

50. 20 Cal. 2d 366, 125 P.2d 482 (1942).

51. LOS ANGELES, CAL., MUN. CODE § 80.38 (repealed by Ord. No. 111, 239, effective May 24, 1958).

52. CAL. VEH. CODE § 458. (West 1956) (current version at CAL. VEH. CODE § 21 (West 1971)). This section of the code stated: "The provisions of this division are applicable and uniform throughout the State and in all counties and municipalities therein and no local authority shall enact or enforce any ordinance on the matters covered by this division unless expressly authorized herein."

53. CAL. VEH. CODE §§ 560-64 (West 1956) (current version at CAL. VEH. CODE §§ 21950-57 (West 1971)).

of 'conflict' is it possible to confine local legislation to its proper field of *supplementary* regulation."[54] In the context of the facts presented in *Pipoly*, this approach did not seem revolutionary. It portrayed the municipal corporation as but another state administrative agency, whose legislative power was not coordinate, but rather interstitial. The view was entirely consistent with the rule of supremacy of the legislature as it had existed before the establishment of the former article XI, sections 6, 8 and 11 of the constitution.

Due to the lack of case law discussion within the opinion it was not clear whether the *Pipoly* court's analysis was based on federal constitutional concepts or prior California cases. However, any analogy between action of the state legislature with respect to legislative authority of municipalities and federal congressional action under the commerce clause to set up agencies, such as the National Labor Relations Board, with complete jurisprudential supremacy is an imperfect one. Nevertheless, the California Supreme Court imported the "occupation of the field" concept into resolution of state-municipal legislative collisions.

The determination of whether state or local power should prevail has also been resolved through consideration of "sovereignty" concepts. An early example of such an approach is the case of *In re Means*,[55] which examined a City of Sacramento ordinance that prescribed qualifications for the licensing of plumbers.[56] At the time, there was no state law establishing qualifications for plumbers, but the court held that local interests must bow to those of the state:

> If one who has been employed by the state may not work on state property within a municipality without the consent of the municipality obtained after examination, the city has, in effect, added to the requirements for employment by the state, *and restricted the rights of sovereignty*.[57]
>
> . . . .
>
> *Although the legislature has enacted no statute regulating*

54. 20 Cal. 2d at 371, 125 P.2d at 485 (emphasis in original).

55. 14 Cal. 2d 254, 93 P.2d 105 (1939).

56. Means, the plumber who contested the ordinance, was employed by the state on state property. The question of who controls a state building depends upon whether the state has consented to local control rather than resolution of a conflict over jurisdiction. *See* City of Santa Ana v. Board of Educ., 255 Cal. App. 2d 178, 62 Cal. Rptr. 863 (1967). All state agencies, however, must comply with city and county building codes. *See* CAL. HEALTH & SAFETY CODE §§ 33000-37964 (West 1973); Kehoe v. City of Berkeley, 67 Cal. App. 3d 666, 135 Cal. Rptr. 700 (1977); Teachers Management & Inv. Corp. v. City of Santa Cruz, 64 Cal. App. 3d 438, 134 Cal. Rptr. 523 (1976); San Diego Bldg. Contractors Ass'n. v. City Council of San Diego, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1975).

57. 14 Cal. 2d at 258, 93 P.2d at 107 (emphasis added).

> *plumbing*, if the city's ordinance is a valid exercise of power, then one whom the state has examined and found eligible for employment as a plumber and who has later entered the state civil service may be unable to work on state property because he cannot pass the examination of a city health officer or licensing board. The result is a direct conflict of authority. Either the local regulation is ineffective *or the state must bow to the requirement of its governmental subsidiary*. Upon fundamental principles, that conflict must be resolved in favor of the state.[58]

This pronouncement as to a "governmental subsidiary" indicates that, conceptually, the 1879 partnership of the state legislature and local governing bodies was being judicially dissolved and the prior 1849 vintage legal relationship akin to that of master and servant restored.

This same concept of sovereignty surfaced again years later in connection with construction of public schools. The supreme court for many years had found no difficulty in upholding local regulations affecting school districts and their personnel. Though the shift in responsibility for public school education from local to state authorities was under way, many aspects of local control continued. In *Pasadena School District v. City of Pasadena*,[59] the state supreme court found nothing incongruous in sustaining the applicability of Pasadena building regulations to school construction. The court rejected the contention that the city could not control the action of the state created school district; rather, the court based its decision on the idea that public agents or agencies are not governed by the terms of a statute absent specific inclusion.[60] The court went on to explain that if a city or county has the same legislative power as the state legislature, in the absence of a controlling general law, such a designation validly could be made in a local building regulation.[61]

In another school construction case, however, the supreme court ruled that article XI, section 11 (currently section 7) should not be interpreted to confer such power on a city or county. In *Hall v. City of Taft*,[62] the local building regulations[63] were held invalid as applied to school construction and the contractor was relieved of the obligation to comply with the regulations imposed by the district. Surprisingly, the

58. *Id.* at 260, 93 P.2d at 108 (emphasis added).

59. 166 Cal. 7, 134 P. 985 (1913).

60. *Id.* at 11, 134 P. at 986. The court stated that if such a power were included, "it is no different as a power from what is possessed under the corporation laws of this state by private corporations as far as controlling corporate property and the right to erect structures thereon is concerned." *Id.*

61. *Id.* at 12, 134 P. at 986-87.

62. 47 Cal. 2d 177, 302 P. 574 (1956).

63. Taft, by ordinance, had adopted the Uniform Building Code, 1952 edition.

court held the local ordinances void despite the fact that the state's Division of Architecture had given its consent to the building plans,[64] and that the Government Code provided that such compliance was permissible.[65]

Hall is a clear example of lawmaking by judicial fiat. The court's legal justification was based on a view of legislative supremacy that had only been asserted prior to the Constitution of 1879. But the *Hall* court did not rely on California cases. Rather, the court quoted *Kentucky Institution for Education of Blind v. City of Louisville*,[66] in which the Kentucky court stated:

> The municipal government is but an agent of the state—not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of the government even within the municipality, which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. How can the city have ever a superior authority to the state over the latter's own property, or in its control and management? From the nature of things it cannot have.[67]

By adopting the view expressed in the Kentucky case, the court overruled *City of Pasadena School District v. City of Pasadena*;[68] the earlier case was summarily distinguished on the ground that it "fails to consider the factors above mentioned."[69]

If the pronouncements of *Pipoly v. Benson*,[70] a private civil suit, did not alert local government attorneys to a radical shift in constitutional doctrine, three cases decided approximately two decades later certainly gave such notice. *Agnew v. City of Los Angeles*[71] and *Abbott v. City of Los Angeles*[72] gave clear indication that the California Supreme Court was more than willing to resolve questions of state versus local supremacy in favor of the legislative authority of the state. It was left

64. 47 Cal. 2d at 179, 302 P.2d at 576.

65. CAL. GOV'T CODE §§ 38601 & 38660 provided that a city had the power to regulate the construction of buildings within its limits.

66. 123 Ky. 767, 97 S.W. 402 (1906).

67. *Id.* at 774-75, 97 S.W. at 404.

68. 166 Cal. 7, 134 P. 985 (1913).

69. 47 Cal. 2d at 184, 302 P.2d at 579. The briefs in the *Pasadena* case had urged that this very Kentucky case be followed, but the doctrine was not adopted at that time. The appropriateness of the *Hall* court's use of the Kentucky case is questionable; the Kentucky case was based merely on a legislative act, whereas the California case involved a constitutional provison that granted police power to cities.

70. 20 Cal. 2d 366, 125 P.2d 482 (1942).

71. 51 Cal. 2d 1, 330 P.2d 385 (1958).

72. 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).

to a later case, *In re Lane*,[73] to make the final change in preemption analysis by overruling a whole line of prior cases and setting out fairly detailed rules of construction with respect to former article XI, section 11.

Simply stated, *Agnew* held that since the state's Business and Professions Code provided a statewide system of licensing electrical contractors,[74] the city might not impose upon the applicant its own requirements for registration, permit issuance and licensing.[75] The court determined that with the adoption of the state system, the legislature had preempted the field of regulation of contractors.[76] At that time it was not evident that the State License Board utilized any comprehensive examinations to determine qualifications or that the local requirements were unreasonable in light of the volume of requisite licensing work. Moreover, the Los Angeles Municipal Code sections in question duplicated the state act in only one respect: they provided that the local license would be revocable if applicable building laws were not followed by the contractor.[77] The Business and Professions Code, on the other hand, vested power in the State License Board to revoke or suspend a certificate of registration for the same cause.[78]

Apparently, the point was not urged, nor has it since been determined, that a regulation of a state administrative board is, in fact, a "general law" as that term is used in article XI, section 11 (currently section 7), and hence paramount to a conflicting local ordinance. Rather, the cases assume that regulations are evidence of a broader intent on the part of the legislature to preempt the field.

Abbott v. City of Los Angeles[79] involved the validity of a Los Angeles ordinance[80] requiring those previously convicted of felonies and certain misdemeanors dealing with sex offenses to register with the chief of police; failure to do so was a misdemeanor. Abbott appealed a conviction under this ordinance, contending in part that the local requirement was invalid because state legislative enactments had "occupied the field." The California Supreme Court agreed, finding that

73. 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

74. CAL. BUS. & PROF. CODE §§ 7000-7145 (West 1975).

75. The local ordinances challenged in *Agnew* were LOS ANGELES, CAL., ELECTRICAL CODE §§ 93.0201, 93.0204, 93.0205(2), 93.0501, 93.0504, 93.0505; LOS ANGELES, CAL., MUN. CODE §§ 11.00, 21.03, 21.06, 21.08, 21.09, 21.12(a), 21.12(b), 21.188, 21.190.

76. 51 Cal. 2d at 7, 330 P.2d at 388.

77. LOS ANGELES, CAL., MUN. CODE § 98.00.

78. CAL. BUS. & PROF. CODE §§ 7090-7122 (West 1975).

79. 53 Cal. 2d 674, 349 P.2d 974, 3 Cal. Rptr. 158 (1960).

80. LOS ANGELES, CAL., MUN. CODE §§ 52.38-52.53.

through the state penal system,[81] the legislature had provided a statewide scheme for crime prevention and criminal apprehension.[82] The scope of the "occupation," however, was scant indeed. Penal Code section 290 provided for the registration of sex offenders; by applying such a requirement to only one designated class, the court declared, the legislature intended to exclude registration requirements for all others.[83]

Another example of occupation of a given field arose in *Tolman v. Underhill*,[84] which involved the loyalty oath prescribed by the Regents of the University of California for faculty members. The rule was held invalid on the ground that the state legislature had preempted the field by statutes respecting oaths and qualifications.[85] Just why a loyalty oath required uniform state standards was far from clear. In its interpretation of the "home rule" concept—which, as originally envisioned, had the virtue of permitting each community to set its own local standards—the court in *Tolman* required very little evidence to find an implied intent to preempt.

Finally, in *In re Lane*,[86] the court gave its broadest interpretation to state preemption. In that case, a woman had been arrested for violating Los Angeles Municipal Code section 41.07[87] which prohibited unmarried persons from "resorting" to various designated locations (including one's personal residence) for the purpose of having sexual intercourse. The court, in an opinion by Justice McComb, determined the sole issue to be whether state law had preempted the local regulation. The court cited numerous provisions of the Penal Code dealing with criminal aspects of sexual activity and declared that they were "so extensive in their scope that they clearly show an intention by the Leg-

81. *See, e.g.*, CAL. PENAL CODE, Part IV: "Prevention of Crimes and Apprehension of Criminals." Title 1 of Part IV deals with "Investigation and Control of Crimes and Criminals." CAL. PENAL CODE § 11000-460 (West 1970).

82. *See* 53 Cal. 2d at 684-88, 349 P.2d at 981-84, 3 Cal. Rptr. at 165-68.

83. *Id.* at 686, 349 P.2d at 982, 3 Cal. Rptr. at 166.

84. 39 Cal. 2d 708, 249 P.2d 280 (1952).

85. *See, e.g.*, CAL. GOV'T CODE §§ 1360, 18150-58 (West 1966).

86. 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

87. Section 41.07 provides: "No person shall resort to any office building or to any room used or occupied in connection with, or under the same management as any cafe, restaurant, soft-drink parlor, liquor establishment or similar businesses, or to any public park or to any of the buildings therein or to any vacant lot, room, rooming house, lodging house, residence, apartment house, hotel, housetrailer, street or sidewalk for the purpose of having sexual intercourse with a person to whom he or she is not married, or for the purpose of performing or participating in any lewd act with any such person."

The defendant in *Lane* was charged with "resorting" to the bedroom of her own home to engage in sexual activities with a man to whom she was not married. 58 Cal. 2d at 102, 372 P.2d at 898, 22 Cal. Rptr. at 858.

islature to adopt a general scheme for the regulation of this subject."[88] Although the Penal Code did not deal with the specific subject matter of the Los Angeles ordinance, the court maintained that "[i]n determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation we may look to the 'whole purpose and scope of the legislative scheme' and are not required to find such an intent solely in the language used in the statute."[89]

In his concurrence in *Lane*, Chief Justice Gibson expanded on this theme. In his view, the word "conflict," as used in article XI, section 11 (currently section 7) "is to be given a broad construction; there may be a conflict even though there is no actual grammatical conflict between the statute and the ordinance."[90] Further, Chief Justice Gibson felt that the determination would have to be made, not on the basis of any hard and fast rule, but rather on the facts of each case. Thus, even in cases where the legislature was silent on a particular point, other considerations were relevant:

> In order to hold that the field has been occupied, it is not necessary that the Legislature has specifically declared the scheme or policy in so many words, and the general intent may be found in a multiplicity of statutes taken together. . . . One of the factors stressed in the decisions is whether or not the subject calls for uniform treatment throughout the state.[91]

Uniformity was Chief Justice Gibson's credo. Although the word was not mentioned in the provisions of article XI, section 11, it became a guiding light in the court's efforts to find an implied intent to preempt.

In each preemption case the court took it upon itself to divine a legislative intent and determine on that basis the validity of the local law. The obvious impracticality of administration under these criteria lends support to the rule of the earlier decisions that the exclusive method of determining legislative intent was that specified by article XI, section 11 (currently section 7). The language, as well as the history, of this section, declares that the legislature should affirmatively speak by enactment of specific general laws, thereby determining the exact extent to which the state policy or legislative scheme supercedes local legislation. The holdings of the supreme court as to the "implied intent" of the legislature apparently discount the overwhelming number of general laws which indicate a policy establishing only mini-

88. *Id.* at 103, 372 P.2d at 899, 22 Cal. Rptr. at 859.

89. *Id.* (citation omitted).

90. *Id.* at 106, 372 P.2d at 901, 22 Cal. Rptr. at 861 (Gibson, C.J., concurring).

91. *Id.* at 110, 372 P.2d at 903-04, 22 Cal. Rptr. at 863-64 (Gibson, C.J., concurring) (citation omitted).

mum standards as to matters with which cities and counties are greatly concerned.

Whatever lawyers may think of the historical and logical infirmities, or the degree of judicial fiat, which entered into *In re Lane*, the case remains the basic construction of article XI, section 11 (currently section 7). In recent supreme court decisions reviewing this doctrine, the term "occupation of the field" is retained, but one senses a trend towards a more discrete definition of "field."[92] The adoption of "occupation of the field" and the other phrases that evolved during the judicial redefinition of "conflict" has required definition and delimitation. The fact remains, that a return to a doctrine requiring literal conflict between a state law and a municipal ordinance in order for the former to supersede the latter may in fact be the most practicable rule. If a local law needs to be superseded by a general law, would not the quickest way to alert the legislature to the general public need be by enactment of local legislation? Inaction by the legislature might be an indication that the local legislation does not impinge on any important item of state concern. Such an approach would seem to be at least as viable as one that declares that the legislature, through its failure to act, has consented to the court's divination of the legislature's unexpressed intention.

II. Constitutional Grants of and Restrictions on Municipal Authority

While the former article XI, section 11 of the California constitution insured the state's plenary power to make general laws, other constitutional provisions dealt with local control over "municipal affairs."[93] Just as redefinition of the phrase "general laws" has provided the basis for a changing preemption concept, "municipal affairs" has been variously defined to justify fluctuations in the balance between local and state power.

Article XI, section 5(b) grants municipalities plenary power to include in the city charter all matters relevant to the election or appointment of city officials or employees other than those specifically

92. *See, e.g.*, Birkenfield v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) (city's power to provide for rent control by initiative amendment to its charter); Associated Homebuilders, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (exercise of municipal police power in regulating land use must be reasonably related to the welfare of those persons it affects, *i.e.*, those without the city's boundaries). *See also* Galvan v. Superior Court, 70 Cal. 2d 851, 863-64, 452 P.2d 930, 938-39, 76 Cal. Rptr. 642, 650-51 (1969).

93. *See, e.g.*, CAL. CONST. art. XI §§ 5, 9, 11.

authorized by the constitution or state law.[94] Article XI, section 9 authorizes municipal corporations to "establish, purchase and operate" public utilities, or to regulate those utilities that are privately owned.[95] Article XI, section 11(a) generally protects corporate municipal control over property, money, assessments, taxes and municipal functions.[96] The purpose of this section is to prevent the legislature from interfering with local governments by appointment of its own special commission for control of purely local matters, and to free local governments from authority and control by the legislature. Finally, the powers of initiative and referendum are reserved for the electorate of all non-charter cities and counties under procedures that the legislature shall provide. For charter cities, their established initiative and referendum schemes are elevated to constitutional status by section 11 of article XI. For other municipalities, the legislature is empowered to develop appropriate procedures.[97]

In other areas, the constitution has provided municipalities with somewhat more limited powers. In the field of law enforcement, the

94. CAL. CONST. art. XI, § 5(b) provides: "It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several muncipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

95. CAL. CONST. art XI, § 9 reads: "(a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries except within another municipal corporation which furnishes the same service and does not consent. (b) Persons or corporations may establish and operate works for the supplying of those services upon conditions and under regulations that the city may prescribe under its organic law." Article XII provides for the Public Utilities Commission which does not generally control city utilities. However, the regulation of public utilities and the grant of franchises has been greatly affected by the powers granted to the Public Utilities Commission and the plenary power of the legislature that serve to augment them. CAL. CONST. art. XII, § 5. *See* Northwestern P.R.R. v. Superior Court, 34 Cal. 2d 454, 211 P.2d 571 (1949); Bay Cities Transit Co. v. City of Los Angeles, 16 Cal. 2d 772, 108 P.2d 435 (1940); Los Angeles Ry. Corp. v. City of Los Angeles, 16 Cal. 2d 779, 108 P.2d 430 (1940) (holding that the city could not require the operation of two-man street cars).

96. CAL. CONST. art. XI, § 11(a) provides: "The Legislature may not delegate to a private person or body power to make, control, appropriate, supervise or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions."

97. CAL. CONST. art II, § 11 (formerly art IV, § 25). *See* Birkenfeld v. City of Berkeley, 17 Cal 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976).

constitution grants to the state's attorney general the power to "direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices."[98] Though the state is clearly the primary force behind the administration of criminal justice, this grant of jurisdiction poses delicate questions of administrative policy. Theoretically, if the attorney general was provided with sufficient personnel, a complete takeover of all law enforcement functions might be possible. Yet, the attorney general's broad powers must be construed in light of the constitution's grants to cities and counties, wherein their charters may provide for the establishment, compensation, duties and qualifications of law enforcement personnel.[99] Thus, in practice, the responsibility for local law enforcement has rested with local jurisdictions. Active intervention by the state has been reserved for those special situations in which local officers cannot or will not act.

Lastly, there are many areas wherein the constitution has reserved far-reaching powers to the legislature. For instance, the constitution has granted the legislature plenary power to provide for workers compensation,[100] alcoholic beverage control,[101] welfare assistance[102] and for the disposition of legal claims against counties and cities.[103] The

98. CAL. CONST. art. V, § 13.

99. *Id.* at art. XI, §§ 4 & 5. However it should be noted that the attorney general has charge of the Bureau of Criminal Identification, and the numerous records on file. CAL. GOV'T CODE § 6255 provided that state agencies had power to control their own records; whereunder they are classed as confidential, even when provided to local police agencies in performing their duties. The city council of Berkeley by resolution purported to allow citizens to have access to, and to challenge the accuracy of, the state criminal arrest records. The chief of police was caught between the state agency and the city council. It was held that the resolution was void. Younger v. Berkeley City Council, 45 Cal. App. 3d 825, 119 Cal. Rptr. 830 (1975).

100. CAL. CONST. art. 19, § 4. Hence, Labor Code provisions prevail over a charter, relative to payments to be creditied to a municipality in computing death benefits for an industrially-caused death of an employee. City of San Francisco v. Workmen's Comp. Appeals Bd., 36 Cal. App. 3d 412, 111 Cal. Rptr. 387 (1973). *Cf.* City of San Francisco v. Workmen's Comp. Appeals Bd., 2 Cal. 3d 1001, 472 P.2d 459, 88 Cal. Rptr. 371 (1970).

Charter provisions respecting an employee's pension rights are part of the contract of employment, but do not bind the employee to accept their application if there is conflict with the compensation provisions of the Labor Code, which will prevail. Symington v. City of Albany, 5 Cal. 3d 23, 485 P.2d 270, 95 Cal. Rptr. 206 (1971).

101. CAL. CONST. art XX, § 22. *See* Century Plaza Hotel Co. v. City of Los Angeles, 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (1970).

102. CAL. CONST. art. XVI, § 11.

103. *Id.* at art. XI, § 12. Liability and payment for tort liability are not municipal affairs. Department of Water & Power v. Inyo Chemical Co., 16 Cal. 2d 744, 108 P.2d 410 (1940).

Sovereign immunity having been the rule in relation to government and its agencies, the constitution provides: "Suits may be brought against the state in such manner and in such courts as shall be directed by law." CAL. CONST. art III, § 5. In the controversy be-

legislature also has the power to establish limits on tax rate special assessments and bonded indebtedness.[104] Such constitutional sanctions and legislative power may intrude upon municipal functions in many ways. For instance, local government bodies are forbidden to grant extra compensation to any public employee or contractor after such services have already been rendered.[105] The legislature has been granted the power to regulate "horse races and horserace meetings and wagering on the results."[106] The legislature even has the power to select a temporary seat of county government in the event of a war caused or enemy caused disaster.[107]

State impact on municipal government can be clearly seen in implementation of affirmative action programs. Article I, section 8 of the constitution, which provides that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation or employment because of sex, race, creed, color, or national or ethnic origin,"[108] has provided a fertile field for litigation directed at local governments and their hiring policies. Qualifications established for positions that serve to preclude disparate numbers of a particular class have frequently been challenged as being unrelated to the necessities of a given job and hence suspect under this section. The absence of a significant number of "minority" members in municipal employment has led to the imposition of hiring quotas despite civil service requirements established by local charters and ordinances.

In another area, the California Supreme Court has redefined the powers of review of administrative action under California Code of Civil Procedure 1094.5 to require de novo consideration by a court of all quasi-judicial determinations by administrative boards. The provisions of article VI of the constitution, according to the court, forbids the vesting of judicial functions in administrative bodies.[109] To the extent that municipalities act through administrative boards, such as in plan-

tween the supreme court, which declared abrogation of immunities, and the legislature, the present public liability statute resulted. CAL. CONST. art I, § 19 provides that private property shall not be taken or damaged for public use without the payment of just compensation.

104. CAL. CONST. art. XIII, § 20: "The Legislature may provide maximum property tax rates and bonding limits for local governments."

105. CAL. CONST. art. XI, § 10(a) provides: "A local government body may not grant extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law."

106. CAL. CONST. art. IV, § 19(b).

107. *Id.* at art. IV, § 21(e).

108. *Id.* at art. I, § 8.

109. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).

ning decisions, judicial review directly bears on the "municipal affairs" problem.

On several occasions, disputes arising over the scope of the respective powers of the state legislature and various municipalities have only been resolved by amendment to the constitution. The restrictions set up in the Constitution of 1879 in the then article IV, section 31—forbidding the legislature to make gifts of public money or anything of value to any individual, municipal or other corporation, and to lend the state's credit to the same, and forbidding the legislature to authorize the giving or lending of credit of any political subdivision of the state—has been continued in amended article XVI, section 6.[110] The section also prohibits the state or any political subdivision of the state from becoming a stockholder in a corporation.[111]

Of necessity, an exception has been made in respect to irrigation districts, permitting stock ownership for the purpose of acquiring water and water rights, canals, water works, franchises or concessions.[112] Another exception has been made in reference to veterans' farm and home loans.[113] A third allows the temporary transfer of state treasury funds to meet the cash requirements of a city or county, to be repaid from incoming taxes before any other obligation is paid.[114]

Constitution article XVI, section 17 expands section 6, by allowing any political subdivision to acquire and hold shares of stock in any mutual water company or corporation, where such stock is so acquired or held for the purpose of furnishing a supply of water for public, municipal or governmental purposes.[115] Further, the legislature may authorize the investment of public pension or retirement fund money in any common or preferred stocks which meet specified constitutional requirements.[116]

The early fiscal crises in San Francisco, Sacramento and San Jose which had forced the legislature to put the cities' property and funds

110. CAL. CONST. art. XVI, § 6 (amended 1974).

111. The subvention system, and the "bail out" money afforded municipalities after passage of CAL. CONST. art. XIIIA, are nevertheless authorized under the further provisions of CAL. CONST. art. XIII, § 24, which provides that money appropriated from state funds to a local government for its local purposes may be used as provided by law. Money subvented to a local government to compensate it for the loss of revenues from general property levies by reason of the householders' exemption may be used for state or local purposes. CAL. CONST. art. XIII, §§ 3(k) & 25.

112. *Id.* at art. XVI, § 6.

113. *Id.*

114. *Id.*

115. *Id.* at art. XVI, § 17.

116. *Id.*

under control of the Sinking Fund Commissioners were not forgotten when the 1879 constitution was drafted. In its current form, the constitution still imposes restrictions on municipalities incurring long-term indebtedness: article XVI, section 18 requires the approval of two-thirds of the voters and the borrowing period is limited to 40 years. An annual tax must be levied sufficient to pay the interest as it falls due and a sinking fund for retiring the indebtedness upon bond maturity must be established.[117] However, where the bond funds are sought for repairing, reconstructing or replacing public school buildings determined to be structurally unsafe for school use, only a majority is required.[118] Since section 18 applies only to indebtedness or liability incurred which exceeds the income and revenue for that year, the term "incur" has been construed to be volitional and not to include payment of "obligations imposed by law"; or involving revenue-producing activities, where the bonds are to be repaid from the revenues and not from general taxes.

From 1930 to 1940, the court of appeal and the supreme court were confronted with tort liability cases in which charter cities attempted to bar actions through application of various inconsistent municipal claims provisions. These provisions were in opposition to the 1931 claims statutes. The resulting controversies centered on the status of fiscal management in charter cities and whether it constituted a municipal affair. While the cases served to influence the California Supreme Court in its expansion of the "in conflict with general law" concept, the matter was not resolved until 1970 by the adoption of article XI, section 12 of the California Constitution which provides that: "The Legislature may prescribe procedure for presentation, consideration, and enforcement of claims against counties, cities, their officers, agents, or employees."[119]

Finally, the 1879 constitution, in article IV, section 32, provided

117. *Id.* at art. XVI, § 18.

118. *Id.* Within the past several years, proposed bond issues have very consistently failed to secure the necessary authorization, to the great distress of school districts. Asserting that we now were under 20th and not 19th century standards, the California Supreme Court overturned the 2/3 vote requirement, because it violated equal protection guarantees, and was no longer necessary to assure solvency or to serve any legitimate state interest. The invalidity attached to all statutory provisions to implement the 2/3 requirement. Obviously, many historical factors were not presented or considered, nor the effect of the requirement on the salability of bonds, or the interest rates which would be bid. The United States Supreme Court did not agree. Westbrook v. Mihaly, 2 Cal. 3d. 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970), *vacated*, 403 U.S. 915 (1970), *cert. denied*, 403 U.S. 922 (1970).

The legislature cannot authorize violation of art. XVI, § 18. City of Saratoga v. Huff, 24 Cal. App. 3d 978, 101 Cal. Rptr. 32, 102 Cal. Rptr. 376 (1972).

119. CAL. CONST. art. XI, § 12.

that the legislature could not grant extra compensation to employees or contractors for services already done.[120] Judicial decisions under this section held that it served as a limitation only on the legislature and had no bearing on county or municipal authorities.[121] As a result, the legislature finally responded by repealing the section in 1966 and enacting article XI, section 10(a),[122] which specifically applies to local governments, as well as article IV, section 17[123] which applies only to the legislature.

The review of existing constitutional provisions demonstrates that "municipal affairs" are defined not only by the constitution itself but also by judicial interpretation. Decisions based upon the constitutional plenary or exclusive grants to the legislature have sometimes been employed to support the general view that in situations where a "pervasive state interest" can be found, local legislation cannot be sustained as a "municipal affair." But any pervasive state concern is in essence an aggregate of municipal concerns. Thus, at least until there has been affirmative state legislation, the municipal power to act to meet the situation should not be negatived.

III. The Rise of Special Districts and their Legal Status

Regional districts are becoming more and more prevalent throughout the state. These districts serve various purposes: some have blanket authority for the performance of municipal functions, others are confined to more specific fields of activity, while still others have regional authority. Since regional districts and the governmental functions that they serve are not generically established by the constitution, determination of their legal status has had great consequences for the development of local government.

Unquestionably as a matter of practical public administration, there are growing problems created by the urbanization of California. The patchwork quilt pattern of so many contiguous and independent jurisdictions has created special problems, and this "Balkanization," as

120. *Id.* at art. IV, § 32 (1879) (repealed 1966).

121. Tevis v. City and County of San Francisco, 43 Cal. 2d 190, 272 P.2d 757 (1954) (grant of vacation rights); Social Workers Union v. County of Los Angeles, 270 Cal. App. 2d 65, 75 Cal. Rptr. 566 (1969) (one-time bonus granted to county employees staying on the job during a strike).

122. CAL. CONST. art. XI, § 10(a). Section 10(a) has been held not to prohibit an increase in benefits payable to a city pensioner. Pensions were regarded as deferred compensation; the heart may have prevailed. Nelson v. City of Los Angeles, 21 Cal. App. 3d 916, 98 Cal. Rptr. 892 (1971).

123. CAL. CONST. art. IV, § 17.

some have termed it, may militate against too many autonomies. The problem is not created solely by the plethora of cities, chartered and otherwise, but also by the concurrent impact of special districts and statewide boards and commissions, operating in the same territory and authorized to perform municipal functions.

Beginning in 1879, the constitution authorized counties to discharge municipal functions where their charters so authorized.[124] Property assessment and collection of taxes were almost uniformly the subject of such arrangements.[125] When the growth of cities threatened to affect county functions and personnel, the so-called "Lakewood Plan" was developed, whereby all administrative functions, except for land use planning and general legislative functions, were contracted out to the county. This pattern was followed widely in Los Angeles county. Thus, the statewide agencies themselves, with legislative approval where necessary, have worked out some of their major problems by entering into contractual agreements.

In a key decision, *In re Madera Irrigation District*,[126] the supreme

124. CAL. CONST. art. XI, § 8(b) is the current provision.

125. Where such arrangements are made, the entire county system for collection of taxes must be utilized, including the provisions for refund or invalidation. County of Los Angeles v. Superior Court, 17 Cal. 2d 707, 112 P.2d 10 (1941); Brill v. County of Los Angeles, 16 Cal. 2d 726, 108 P.2d 443 (1940).

126. 92 Cal. 296, 28 P. 272 (1891). The power of the legislature to create such districts, embracing all or parts of cities or counties themselves having police power and the taxing power, has been consistently maintained.

While generally the question of sanitation is a municipal affair, in many instances it is a matter of broader scope which cannot be handled by a single entity. An example on point is the outfall sewer system of the City of Los Angeles, which by contract serves a number of cities in the Los Angeles Basin. The authorities over a period of years have held that for such expanded systems, the legislature could competently provide governmental agencies or districts by general laws. This is permitted because more than a "local" or "municipal affair" is involved. Stuckenbruk v. Board of Supervisors, 193 Cal. 506, 225 P. 857 (1924); Pixley v. Saunders, 168 Cal. 152, 141 P. 814 (1914). The constitutional provision was not violated when the legislature created the Benicia Reclamation District, which embraced a part of Benicia, a non-chartered city. Peterson v. Board of Supervisors, 65 Cal. App. 670, 225 P. 28 (1924). Upon the same principle, a similar holding was made in reference to the taxing powers of a Joint Highway District. Joint Highway Dist. No. 13 v. Hinman, 220 Cal. 578, 32 P.2d 144 (1934).

One of the latest and most far-reaching decisions regarding special districts involved an interstate compact designed to control growth of the Lake Tahoe Basin. This compact was necessitated in the manifest inability of the individual governmental agencies to deal with the problem. (The interstate compact between the states of California and Nevada involved five county subdivisons, two municipalities, more than ten general improvement districts, three public utility districts, several sewer and sanitation districts, plus many entities for schools, fire protection, soil conservation and varied other public services.) The California Supreme Court held that CAL. CONST. ART. XI, §§ 7 & 11, and art. XIII (which restated §§ 11, 12, & 13 of the former art. XI) were not violated, "since the matter is of regional, rather than local, concern." The supreme court held that CAL. GOV'T CODE § 66801 "which

court held that the legislature was not limited to establishing cities and counties for municipal purposes. The irrigation district was classified as a municipal corporation. It was declared that the legislature was empowered to either pass general laws, which by their nature could apply to a particular locality, or authorize the organization of municipal corporations which would pertain only to certain portions of the state. Further, the court held that the legislature had discretionary power under general law to provide for the organization of as many species of municipal corporations as were required, based on considerations of the protection, security and benefit of the people, and the general welfare of the state. This power was subject only to the limitations of the constitution.

At a later date, the status of the special districts was further refined. Reclamation districts, for instance, were held to be neither municipal corporations nor corporations organized for municipal purposes within the contemplation of former article XI, section 6.[127] Rather, the term "municipal corporation," as used in the constitution, was held to be synonymous with "cities" and "towns."[128] Special districts were held to be public corporations with a quasi-municipal character, formed by general law and delegating authority to a particular board or commission.[129] The impression is that the courts, by definition and redefinition, have made a place for these children of the legislature, offspring unsupported by specific constitutional underpinning.

Where united action of communities is required, combinations of counties and cities have developed. Since the structure and operations are not indigenous to any one entity, it has given rise to judicial statements that general law must prevail.[130] However, in the united effort of two cities, the general interest of the whole state may be fictitious. The real point is that something other than individual charters may be necessary to delineate the rights and duties of the entities involved. They

constitutes the enactment by the California Legislature of the Tahoe Regional Planning Compact, is constitutional. The Compact imposes on respondent counties a clear and present duty to pay to the Tahoe Regional Planning Agency the sums heretofore and hereafter allotted to them by the Agency as representing their respective shares of the amount of money necessary to support the Agency's activities." People *ex rel* Younger v. County of El Dorado, 5 Cal. 3d 480, 507, 487 P.2d 1193, 1210-11, 96 Cal. Rptr. 553, 570-71 (1971). A peremptory writ of mandate issued to compel the payment.

127. People *ex rel.* Sells v. Reclamation Dist. No. 551, 117 Cal. 114, 48 P. 1016 (1897).

128. Turlock Irrigation Dist. v. White, 186 Cal. 183, 198 P. 1060 (1921).

129. *In re* Orosi Pub. Util. Dist., 196 Cal. 43, 235 P. 1004 (1925).

130. Thus, the incorporation of annexation of territory depends upon constitutional or legislative enactments. People *ex rel.* Scholler v. City of Long Beach, 155 Cal. 604, 609-11, 102 P. 664, 667 (1909); People *ex rel.* Peck v. City of Los Angeles, 154 Cal. 220, 225-26, 97 P. 311, 313 (1908).

may, and often do, settle such matters by contract among multiple agencies,[131] but only the legislature can make a law which would apply to all of the agencies. Yet here again, there may be a failure to recognize that not all elements of the arrangement need be dictated by the state. A joint public utility enterprise may be undertaken under a state statute. But if some individual performance is required under the arrangement, such as providing funds, there is no reason to declare that such element is controlled by the state legislature; how the money is provided certainly would seem to be a purely municipal affair.[132]

IV. Public Officers and Employees

Control over public officials and employees has been another ripe area for conflict between the state and the municipalities. Article XI, section 5(b) of the constitution enumerates certain duties delegated by the state to charter cities. Charter cities can, among other things, create and regulate their own police force, conduct city elections, and set the terms and rates of compensation for city employees and officers. However, the exact extent of section 5(b)'s grant of power is far from clear.

In *Ector v. City of Torrance*,[133] the California Supreme Court held that a residence requirement for employees in a city charter prevailed over California Government Code sections 50001 and 50083 which prohibit such a requirement. The court likened the residence requirement to the qualifications of age, health, experience, education and performance on civil service examinations. The requirement was thus upheld against Fourteenth Amendment arguments. In 1974, article XI, section 10.5 was adopted to provide that neither a city nor county (including any chartered city or county) nor public district may require that its employees be residents of such city, county or district; such employees may only be required to reside within a reasonable and specific distance of their place of employment or other designated location. This section, however, does not apply to public officials.[134]

Professional Fire Fighters, Inc. v. City of Los Angeles[135] involved

131. CAL. GOVT. CODE, §§ 6500 et seq. (West 1966).

132. In City of Santa Clara v. Von Raesfeld, 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 15 (1970), this distinction was not recognized, but logically it should have been.

133. 10 Cal. 3d 129, 514 P.2d 433, 109 Cal. Rptr. 849 (1973).

134. Charter provisions prescribing periods of residence as qualification for office were held to violate the equal protection clauses of the constitution. *See* Martinez v. Newton, 8 Cal. 3d 756, 505 P.2d 529, 106 Cal. Rptr. 105 (1973) (Santa Barbara, four years); Camara v. Mellon, 4 Cal. 3d 714, 484 P.2d 577, 94 Cal. Rptr. 601 (1971) (Santa Cruz, three years).

135. 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963). In the field of labor relations, the "public policy" has been used to negative local ordinances, denying power under art. XI,

the conflict between the fire department regulations in that city's charter, and California Labor Code sections 1960-1963. The Board of Fire Commissioners had insisted the firemen's union comply with its rules. Government Code sections 3500-3599, however, gave collective bargaining rights to labor organizations including those representing employees of chartered cities. The trial court held the Labor Code sections inapplicable under the former sections 6, 8, 8-1/2 and 13 of article XI. The California Supreme Court forced the basic issue to be whether the matter involved essentially municipal affairs. The court did not recognize the constitutional provision[136] which made city control of employment matters plenary.[137] Rather, it concluded that where the dispute involves a matter of state concern, including as in this case fair labor practices, limited impingement on local control is justified.[138]

Professional Fire Fighters announced the doctrine that general law prevails over local enactments of a chartered city, even in regard to matters which would otherwise be strictly municipal matters, where the subject matter of the general law is of statewide concern. The court followed this position in *Healy v. Industrial Accident Commission*,[139] in which the compensation provisions of the Labor Code were held to prevail over the city charter's pension provisions. It was clearly speci-

§ 7 (formerly § 11). *Cf.* Stephenson v. City of Palm Springs, 52 Cal. 2d 407, 340 P.2d 1009 (1959) (right to work ordinance).

The *Professional Fire Fighters* decision has been followed both in general law and charter city personnel management, despite the California Supreme Court's decision in *Bishop v. City of San Jose*. *See* Fire Fighters' Union Local 1186 v. City of Vallejo, 12 Cal. 3d 608, 526 P.2d 791, 116 Cal. Rptr. 507 (1974); San Francisco Fire Fighters Local 798 v. City and County of San Francisco, 68 Cal. App. 3d 896, 137 Cal. Rptr. 607 (1977); Long Beach Police Officers' Ass'n. v. City of Long Beach, 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (1976); Huntington Beach Police Officers' Ass'n v. City of Huntington Beach, 58 Cal. App. 3d 492, 129 Cal. Rptr. 893 (1976).

136. Then designated CAL. CONST. art. XI, § 8 1/2.

137. CAL. CONST. art. XI, § 5(b)(4).

138. 60 Cal. 2d at 295, 384 P.2d at 169, 32 Cal. Rptr. at 841. *See also* Crowley v. City and County of San Francisco, 64 Cal. App. 3d 450, 134 Cal. Rptr. 553 (1976), where the court held that a requirement that city employees take an oath that they would not strike was invalid. While oaths beyond those constitutionally ordained have been in disfavor, there would seem to be no reason to hold that as a condition of employment, over which a charter city has plenary power, an agreement to that effect should be sustained. Not only do the exigencies of the public service demand such assurance, but public policy might very well demand legislation that those who go out on an illegal strike should not be given amnesty when they return to work.

139. 41 Cal. 2d 118, 258 P.2d 1 (1953). Many of the supporting cases cited in the opinion related to the police power under CAL. CONST. art. XI, § 11 (currently § 7), wherein the general law was paramount, or other preemptive constitutional provisions had their play. And this, despite the fact that a note to the *Professional Fire Fighters* opinion proclaims that the preemption doctrine is only applicable to municipal action under art. XI, § 11. 60 Cal. 2d at 292, n. 11, 384 P.2d at 168, n. 11.

fied, however, that the result was due to the plenary authority given the legislature by the constitution:

> The legislature is hereby expressly vested with plenary power, unlimited by any provision of this constitution, to create, and enforce, a complete system of workers' compensation by appropriate legislation. . . .[140]

The *Healy* decision equated the power over municipal affairs with that granted by article XI, section 11 (currently section 7) for the exercise of the police power. Decisions arising under that section were therefore cited to support the premise that the power over "municipal affairs" was similarly subject to contrary general legislation. Because the various sections of article XI failed to define municipal affairs, the courts were compelled to decide on a case-by-case basis whether the subject matter under discussion was of municipal or statewide concern. Thus, the courts had to determine the legislative purpose in each individual instance.

The principal error in *Healy* arose in two ways. First, the court equated the legislative power over *municipal affairs* with the police power granted to all cities subject to and controlled by the general laws. If followed, this logic would destroy the constitutional power granting charter cities the right to be free from general laws in municipal affairs. The second problem was the court's failure or refusal to recognize that the constitutional grant to chartered cities of *plenary* power over municipal offices and employment made this a *municipal affair* beyond the control of the legislature, and the court's failure to recognize that cities are subject to constitutional provisions which restrict municipal powers on one hand, but directly confer powers which necessarily become municipal affairs on the other.

The erosion of local control over municipal affairs, the epitome of which perhaps was *Professional Fire Fighters*,[141] was reconsidered in *Bishop v. City of San Jose*[142] which summarized the applicable doctrines developed by the supreme court. The case involved a suit instituted against the City of San Jose alleging that it had paid its electricians less than the hourly rate required by California Labor Code section 1770 (the prevailing wage law). The electricians were paid monthly salaries on a full-time basis, plus overtime and fringe benefits. The trial court denied plaintiffs' prayer for damages and injunctive relief,[143] and ruled that the setting of salaries of municipal

140. CAL. CONST. art. XIV, § 4.
141. 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).
142. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).
143. *Id.* at 59, 460 P.2d at 139, 81 Cal. Rptr. at 467.

employees was purely a municipal concern to which the Labor Code provisions were not applicable under the home rule provisions of article XI of the constitution. The supreme court affirmed, recognizing the autonomy of the city in governing municipal affairs and finding that the legislature did not intend the Labor Code provisions to apply to the setting of city employees' salaries, either in chartered or general law cities.

After citing the constitutional provisions granting autonomy in municipal affairs and acknowledging the power of any city to make and enforce within its limits all local, police, sanitary and other regulations not in conflict with general laws,[144] the court explained these doctrines. A city which added home rule amendments to its charter thereby gained exemption, with respect to its municipal affairs, from the "conflict with general laws" restrictions of the former section 11 of article XI.[145] Had the City attempted to control the general public in matters of labor relations, general law would have prevailed.

The court recognized that general state laws govern home rule charter cities as to matters of statewide concern if the intent and purpose of such general laws is to occupy the field and thereby exclude municipal regulation.[146] It noted, however, that local governments are not forbidden to legislate upon non-local matters, nor is the state legislature forbidden to legislate on local affairs of a home-rule municipality.[147] Only when a conflict arises between state and local regulation or where the legislature intends to preempt the field to the exclusion of local regulation does the issue of superiority or predominance of state laws over local regulations arise.

Justice Peters dissented in *Bishop* and took the position that notwithstanding the autonomy given by the constitution to cities with respect to municipal affairs, California cities are still subject to the operation of general laws.[148] If Justice Peters' construction were adopted

144. *Id.* at 61, 460 P.2d at 140, 81 Cal. Rptr. at 468.

145. *Id.*

146. *Id.*, at 62, 460 P.2d at 140, 81 Cal. Rptr. at 468 (citing Pipoly v. Benson, 20 Cal. 2d 366, 369-70, 125 P. 2d 482, 484 (1942)).

147. *Id.*

148. "Rather than weigh whether local or statewide concerns should predominate, I would adhere to the rule of *Professional Fire Fighters*, that even in regard to matters which would otherwise be deemed to be strictly municipal affairs, general law prevails where the subject matter of the general law is of statewide concern." Bishop v. City of San Jose, 1 Cal.3d at 70, 460 P.2d at 146, 81 Cal. Rptr. at 474 (Peters, J., dissenting). The dissent attempted to list the categories that form the conceptual framework within which the court must make its determinations:

(1) solely state concerns where the subject matters of the municipal regulation and the state statute do not affect municipal affairs, *e.g.*, a charter claims provision inapplicable to a

and maintained, the municipal affairs clause of the constitution would be nugatory since the legislative powers of cities wouuld be relegated entirely to the grant of the current article XI, section 7, thus making all local legislation subject to general law.

Although *Bishop* is the later determination, *Professional Fire Fighters* still is cited. In *City of Santa Clara v. Von Raesfeld*,[149] several cities collaborated in the construction of a water pollution control facility intended to protect the health of the residents of the San Francisco Bay Area. Although it was conceded that the treatment and disposal of sewage, as well as the issuance of revenue bonds by a city, were municipal affairs, the state law as to issuance of revenue bonds applied because the project involved the joint extra-territorial efforts of several cities. Bonds were issued by the City of Santa Clara to pay its share of the costs. The court treated this as a matter of general law, likening the legal issues to those involved in the Metropolitan Water District development case, *City of Pasadena v. Chamberlain*.[150] While provision for the joint exercise of powers required a unifying procedure established by the state statute, neither the people of the state nor of the San Francisco Bay Area had any special concern as to how the City of Santa Clara would pay its share. This, rather than the project itself, was the real issue; and it would seem that it was a municipal affair in every sense. Still, the case uncritically quoted the language of *Professional Fire Fighters, Inc. v. City of Los Angeles*:

> As to matters which are of statewide concern, however, home rule charter cities remain subject to and controlled by applicable state laws, regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the

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suit in inverse condemnation (this is now reserved to the legislature by CAL. CONST. art. XI, § 12).

(2) subject matter involving both state and local concern, but one that does not constitute a municipal affair, *e.g.*, gambling. Chartered cities and counties have full power to legislate unless the general law so occupies the field as to clearly indicate it has become exclusively a matter of state concern (this actually relates to the police power under art. XI, § 7; a confusion which frequently creeps into discussions of this subject).

(3) the subject is a matter of state and local concern and it is a municipal affair, *e.g.*, *Professional Fire Fighters*.

(4) the subject is solely a municipal affair so that the enactment of the legislature cannot be held applicable. The case of *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745 (1932), was cited as the most recent case in which a legislative act was held preempted by the municipal affairs clause.

The dissenter's statement is particularly revealing in that it accurately reflected the attitude of several members of the court who had been approaching the question for the past 35 years.

149. 3 Cal.3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970).

150. 204 Cal. 653, 659-60, 269 P. 630, 633 (1928).

exclusion of municipal regulation . . .[151]

As has been emphasized, the attempt to equate the municipal affairs clause of the constitution to the rules applicable to the police power under article XI, section 7 is tantamount to the repeal of the former constitutional provision. It would, in effect, permit the legislature to declare what are and are not municipal affairs.

V. Control of Municipal Property as a Municipal Affair

Article XI, section 3 of the California Constitution provides that "a county or a city may adopt a charter by majority vote," and that the Charter shall "supersede. . . all laws inconsistent therewith." On its face this provision seems to clearly establish the charter as the supreme law of the city or county. But such is not always the case.

In *Harman v. City and County of San Francisco*,[152] a taxpayer unsuccessfully contended that the sale of vacated public streets was governed by procedures delineated in the State Street and Highways Code, rather than by the city and county charter. The California Supreme Court ruled that although the charter constituted the "supreme law of the City and County of San Francisco,"[153] it was subordinate "to conflicting provisions in the United States and California Constitutions, and to *preemptive state law*."[154] However, here, the court found no legislative preemption and determined that the legislature had left regulation of vacated streets to the municipalities. Any statewide interest was manifested only in the intent to protect public access to dedicated streets.[155] The power to establish protections for local economic and property interests in dedicated streets was left as a matter to be governed by the city or county charter.[156] The *Harman* Court found no policy reason to support a statewide preemption of the subject matter, nor any interest to compel procedural uniformity. Instead it found that "the interest in preventing fiscal waste in the disposition of municipal assets is obviously one of local concern."[157] But the case presents an

151. 60 Cal.2d at 294, 384 P.2d at 169, 32 Cal. Rptr. at 841 (1963).

Revenue bonds do not come within the restrictions concerning general obligation bonds imposed by CAL. CONST. art. XIII, § 40; no election is required to authorize their issuance, or to increase the interest rate to be paid on them, as stated in the *Von Raesfeld* case.

152. 7 Cal. 3d 150, 496 P.2d 1248, 101 Cal. Rptr. 880 (1972).

153. *Id.* at 161, 496 P.2d at 1255, 101 Cal. Rptr. at 887.

154. *Id.* (emphasis added).

155. *Id.* at 162, 496 P.2d at 1256, 101 Cal. Rptr. at 887, (citing People v. City of Oakland, 96 Cal. App. 488, 496-97, 274 P. 438, 442 (1929)).

156. *Id.* (citing Armas v. City of Oakland, 183 Cal. App. 2d 137, 139-40, 6 Cal. Rptr. 750, 752 (1960)).

157. 7 Cal. 3d at 164, 496 P.2d at 1257, 101 Cal. Rptr. at 889.

interesting problem: how can the charter, as the "supreme law of the city or county," be both supreme *and* preemptable?

It is well established that cities and counties may acquire property by eminent domain, but the mode for exercising the power is not a municipal affair; the general laws govern such actions.[158] If a charter city or county attempts to acquire property for public use or public improvement, and if the cost is to be paid in whole or in part from special assessments or special assessment property taxes, its actions are limited by the provisions of article XVI, section 19, the incorporated general law, and the Special Assessment Investigation, Limitation and Majority Protest Act of 1931, as amended. However, the council of a chartered city can proceed, despite these limitations, if it finds by no less than a four-fifths vote of all its members that public convenience and necessity require such improvements or acquisitions.

This dichotomy creates other conflicting situations. For example, when a city holds park lands that are unencumbered by a private trust, an interdepartmental transfer for special uses is not subject to the environmental impact report filing requirements of the National Environmental Policy Act.[159] Yet, the power of a city to regulate the operation and management of county property when it is held for public use has been questioned.[160] Publicly-owned property in public use is impliedly exempt from special assessments, absent positive legislative authority to impose them.[161]

Over the last fifty years, the State of California has taken primary control over its waters and tidelands. Occasionally, serious constitutional questions have arisen as to whether the state or the federal government enjoys sovereignty over the tidelands. The littoral cities of California that have been granted tidelands by the state have been both peripherally and, in some cases, directly involved with this question. These grants were subject to certain trusts whereby the lands were to be made available for commerce, navigation and fisheries. As tidelands were reclaimed and harbors developed, the legislature relinquished the

158. City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604 (1891); City of Los Angeles v. Koyer, 48 Cal. App. 720, 192 P. 301 (1920).

159. 42 U.S.C. § 4331 et seq. (1970). *See* Simons v. City of Los Angeles, 63 Cal. App. 3d 455, 133 Cal. Rptr. 721 (1976). The *Simons* court held that "[t]he power of a charter city over exclusively municipal affairs is all embracing, restricted and limited only by the city's charter, and free from any interference by the state through the general laws." *Id.* at 408, 133 Cal. Rptr. at 728 (citing City of Redwood City v. Moore, 231 Cal. App. 2d 563, 571, 42 Cal. Rptr. 72, 78 (1965).

160. County of Santa Barbara v. City of Santa Barbara, 59 Cal. App. 3d 364, 130 Cal. Rptr. 615 (1976).

161. City of Saratoga v. Huff, 24 Cal. App. 3d 978, 988, 101 Cal. Rptr. 32, 40 (1972).

servitudes with the clear intention that the cities acquire a fee title.[162] This practice accorded with article XII, section 13 of the constitution, which prohibited the legislature from giving any commission the power to interfere with or control municipal property, whether held in trust or otherwise. (The provision was later amended to substitute "private person" for "commission.")

In 1955 the California Supreme Court considered the propriety of the state's actions in the case of *Mallon v. City of Long Beach*.[163] In *Mallon*, by a 4-3 decision with a torrid dissent, the court largely jettisoned a long line of cases which had held that grants of tidelands were proprietary, subject only to public use for commerce, navigation and fisheries. The legislature had released the public property from its trust and had thereby conveyed to the City of Long Beach for municipal purposes up to 50% of the oil revenues. The court held that grants of tideland to municipalities are made subject to a public trust and that revocation of the trust works a reversion of the trust corpus to the state. Even if the state's conveyance to a municipal corporation is considered a contract or as creating property interests in the city, the court continued, "the state acting through the Legislature has the power to alter contractual or property rights acquired by the municipal corporation from the state for governmental purposes."[164] With respect to the constitutional issues, the court held that "[a] municipal corporation has no privileges or immunities under the United States Constitution that it can invoke against the will of the state . . . and under the California Constitution a free holder city, such as the City of Long Beach, is exempt from legislative control only as to 'municipal affairs.' "[165] The Court went on to hold:

> It is clear in the present case that any interest of the city of Long Beach in the tidelands was acquired not as a "municipal affair," but subject to a public trust to develop its harbor and navigation facilities for the benefit of the entire state, and [is] therefore subject to the control of the Legislature.[166]

Finally, the *Mallon* court considered whether the state grant of tidelands to the City of Long Beach constituted a gift to a municipal corporation which is prohibited under former article IV, section 31 of the constitution. That section reads in pertinent part: "[t]he legislature

162. For example, the City of San Francisco received such grants, and a substantial portion of the city's financial district today—from Montgomery Street to the bay—was filled in, and passed into private ownership.

163. 44 Cal. 2d 199, 282 P.2d 481 (1955).

164. *Id.* at 209, 282 P.2d at 487.

165. *Id.*

166. *Id.*

shall have no power . . . to make any gift . . . of any public money or anything of value to any . . . municipal or other corporation whatever."[167] Previously the supreme court had ruled that as long as a "public purpose" was served and the state was deriving some benefit from the granted land, no gift was made in the constitutional sense.[168] This interpretation allowed the legislature to grant lands to the cities without running afoul of the state constitution. In *Mallon*, however, the court quietly abandoned its former interpretation by holding that a "public purpose" connotes a matter of "general statewide interest."[169] Any expenditures of funds derived from these grants must also serve a "public purpose." Expenditures for municipal affairs were suddenly suspect. Thus, the court stated:

> We cannot hold that the construction and establishment by the city of Long Beach of storm drains, a city incinerator, a public library, public hospitals, public parks, a fire alarm system, off-street parking facilities, city streets and highways, and other expenditures that have been authorized to be made from the "Public Improvement Fund," are of such general state-wide interest that state funds could properly be expended thereon. Such expenditures are of purely "municipal affairs" within the meaning of section 6 of article XI of the Constitution.[170]

Accordingly, the court ruled that the grant to the City of Long Beach constituted a gift and was therefore void under the terms of article IV, section 31 of the state constitution.

In 1976, article 10, section 3 was added to the state constitution.[171]

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167. CAL. CONST. art. IV, § 3 (currently art. XVI, § 6).

168. County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal. 2d 378, 196 P.2d 733 (1948); County of Alameda v. Jannsen, 16 Cal. 2d 276, 106 P.2d 11 (1940); American Co. v. City of Lakeport, 220 Cal. 548, 32 P.2d 622 (1934); City and County of San Francisco v. Collins, 216 Cal. 187, 13 P.2d 912 (1932); City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433 (1924); Veterans' Welfare Bd. v. Jordan, 189 Cal. 124, 208 P. 284 (1922).

169. 44 Cal. 2d at 211, 282 P.2d at 489.

170. *Id.* The court cited numerous cases wherein such activities had been deemed "municipal affairs." *See* City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 212 P.2d 894 (1949) (sewer); Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225 (1926) (isolation hospital); Stege v. City of Richmond, 194 Cal. 305, 228 P. 461 (1924) (city library); Alexander v. Mitchell, 119 Cal. App. 2d 816, 260 P.2d 261 (1953) (off-street parking facilities); Perez v. City of San Jose, 107 Cal. App. 2d 562, 237 P.2d 548 (1951) (city highways); Beard v. City & County of San Francisco, 79 Cal. App. 2d 753, 180 P.2d 744 (1947) (public hospital); Armas v. City of Oakland, 135 Cal. App. 411, 27 P.2d 666 (1933) (fire protection).

171. CAL. CONST. art. 10, § 3 states: "All tidelands within two miles of any incorporated city, city and county, or town in this State, and fronting on the water of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations; provided, however, that any such tidelands, reserved to the State solely for street purposes, which the Legislature finds and declares are not used for navigation purposes and are not necessary for such purposes may be sold to any town, city, county, city and county, municipal corporations, private persons, partnerships or

This section allows the legislature to sell tidelands to towns, cities, counties and other groups as long as the tidelands are found not to be in use for navigation purposes. Under this provision, an arrangment similar to that in *Mallon* might be upheld, the state's 50% share of the oil revenues constituting the consideration for the sale.

VI. Acquisition and Operation of Public Utilities; Control of Private Utilities

Article XI, section 9 of the California Constitution constitutes one of the most important grants of municipal power. It permits the acquisition, establishment and operation of public utilities by municipal corporations. Section 9 also authorizes municipalities to regulate persons providing basic services in conformity with the city's organic law.[172] Municipal experience with private utilities occasioned considerable concern between 1850 and 1911.[173] Article XI, section 19, the forerunner of present section 9, was designed to promote competition and thereby produce lower rates and better service. The first spur to more responsible production of basic services arose from the municipalities' ability to enter into direct competition with private utilities. The second derived from the fact that even when direct competition was eschewed, the city might acquire the private utility or its facilities by eminent domain.

The municipal powers granted by section 9 are not without limit. They must be exercised consistently with the municipalities' organic law.[174] Municipal authority is further circumscribed by the powers vested in the Public Utilities Commission.[175] Article XI, section 9 must

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corporations subject to such conditions as the Legislature determines are necessary to be imposed in connection with any such sales in order to protect the public interest."

172. CAL. CONST. art. XI, § 9 (formerly § 19) states: "(a) A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.

(b) Persons and corporations may establish and operate works for supplying these services upon conditions and under regulations that the city may prescribe under its organic law."

173. Dvorin, *Politics and the Constitution*, in CALIFORNIA POLITICS AND POLICIES 95 (1966).

174. CAL. CONST. art. XI, § 9(b).

175. The Public Utilities Commission was originally created as a result of the 1946 reorganization of the Railroad Commission, but it did not initially alter the relationship between the state and local governmental units. These relationships were established at the time of the 1911 restructuring of the Railroad Commission, which, pursuant to article XII, section 8, called upon cities to vote on whether to retain local control of public utilities. The PUC has basic powers to regulate the operation of public utilities by persons and private corporations.

be read together with article XII, section 8, which states in part: "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission."[176]

Furthermore, municipal power does not extend to services whose general importance to the state as a whole compels a uniform rule or statewide application.[177] This reasoning applies to resources whose fundamental importance to the state as a whole outweighs the benefits of local control. An obvious illustration is water. In the field of water rights, a subject of crucial concern to California,[178] the state has assumed paramount jurisdiction. Article X, section 5 declares that "[t]he use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State. . . ."[179] Section 6 of the present article X further limits private and municipal control over water by providing that "[t]he right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."[180]

The state has delegated much of its granted authority to local water districts, which are allowed by statute to acquire and control water rights.[181] Local districts may then sell this water, at whatever rates they deem proper to all similarly situated buyers within the district.[182] The districts also have power to sell surplus water outside the district.[183]

As a general proposition, the Commission is not empowered to require that certificates of convenience or necessity be procured by municipal utilities. *See* Hughes v. City of Torrance, 77 Cal. App. 2d 272, 175 P.2d 290 (1946); Los Angeles Gas & Elec. Corp. v. Department of Pub. Serv., 52 Cal. App. 27, 197 P. 962 (1921). It is also prohibited from interfering with a municipality's regulatory power over its own public utilities. *See* Stagg v. Municipal Court, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (1969).

176. *Id.* at art. XII, § 8. The basic powers conferred upon the Public Utilities Commission are set out in CAL. CONST. art. XII, § 5, which states: "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain."

177. *See, e.g.*, Pacific Tel. & Tel. Co. v. San Francisco, 197 Cal. App. 2d 133, 17 Cal. Rptr. 687 (1961) (city cannot regulate telephone service).

178. *See generally* Wood, *Politics and Policies or Natural Resources*, in CALIFORNIA POLITICS AND POLICIES (1966). *See also* Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 8 (1964), for an interesting treatment of state-federal clashes in this area.

179. CAL. CONST. art. X, § 5.

180. *Id.* at art. X, § 6.

181. CAL. WATER CODE § 71610 (West 1966).

182. *Id.* at § 71614.

183. *Id.* at § 71612.

Paramount jurisdiction of the state with respect to water supply has, however, permitted a municipality to exercise authority over water outside its boundaries. Thus, the authorization and construction of the Feather River, Central Valley and State Water projects guaranteed the southern counties of the state an adequate and stable supply of water. Still, the anomaly of one municipality owning public utility facilities outside its own borders was bound to generate novel questions about the extent of the municipal taxing power. Article XIII, section 3(b) states the general rule: Property owned by a local government, except as otherwise provided in section 11(a), is exempt from property taxation.[184] That latter section states that lands owned by a local government that are outside its boundaries are taxable in either of two situations. The first is when the land is located in Inyo or Mono County (the points of origin for most of the water piped to the southern counties) and subject to the assessments of those counties in 1966 or 1967 respectively.[185] The second situation where taxation is permissible arises when extra-territorial city lands are located outside Inyo or Mono County and were taxable when acquired.[186]

Prior to adoption of article XIII, a muncipality, while barred from taxing another unit of local government, could levy an assessment as compensation for benefits rendered by the taxing government.[187] Article XIII continues this interpretation, with the exception that

> No tax, charge, assessment, or levy of any character, other than those taxes authorized by Section 11(a) to 11(d), inclusive, of this Article, shall be imposed upon one local government by another local government that is based or calculated upon the consumption or use of water outside the boundaries of the government imposing it.[188]

The assessments upon real property situated within one county, but owned by another, are made by county boards of equalization[189] subject to review by the State Board of Equalization.[190] The latter is also vested with the power to assess the property of utilities subject to state regulation.[191]

184. CAL. CONST. art. XIII, § 3(b).

185. *Id.* at art. XIII, §§ 11(a)-11(a)(1)(a). Section 11(a)(1)(b) states that lands acquired subsequent to these dates are taxable when assessed to a prior owner as of that lien date.

186. CAL. CONST. art. XIII, § 11(a)(2).

187. County of Santa Barbara v. City of Santa Barbara, 59 Cal. App. 3d 364, 380, 130 Cal. Rptr. 615, 625-26 (1976).

188. CAL. CONST. art. XIII, § 11(e).

189. *Id.* at art. XIII, § 16.

190. *Id.* at art. XIII, § 11(a).

191. *Id.* at art. XIII, § 19.

VII. Taxation: Limitations Upon the Legislature and Municipal Powers

A municipality does have a well established power to tax within its territorial boundary. The California Constitution, at article XIII, section 24 (formerly article XI, section 12), provides that "[t]he Legislature may not impose taxes for local purposes but may authorize local governments to impose them." The supreme court has long held that a chartered city's power to levy taxes, being constitutionally vested, proceeds independently of legislative authorization.[192] Thus, the taxing power of a municipality is subject only to the restraints of its own charter. It is notable, however, that "may" and "may not" are mandatory, and not permissive, in the context of article XIII, section 24, constitutional provisions being mandatory and prohibitory unless expressly declared otherwise.[193]

The ever increasing pressures of taxation did, however, provoke one constitutional limitation on the municipal taxing power. The constitution accords the legislature the power to "provide maximum property tax rates and bonding limits for local governments."[194] Further, the adoption on June 6, 1978 of article XIIIA limited the maximum ad valorem tax on real property to one per cent of the property's full cash value as adjusted annually;[195] although article XIIIA mandates collection by counties and apportionment by districts within counties,[196] the language of the amendment suggests that "districts" may include cities as well as counties.[197] The character of the "special taxes" which may be levied pursuant to article XIIIA,[198] and the impact of that amendment on the municipal power, have yet to be determined. Apparently, all cities receive this grant of power independently of the legislative authorization contemplated by article XIII, section 24.

Although the very existence of a city depends upon its power to

192. Security Sav. Bank & Trust Co. v. Hinton, 97 Cal. 214, 32 P. 3 (1893). *Cf.* United States v. New Orleans 98 U.S. 381, 393 (1878): "When [a municipal] . . . corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited."

193. *See* CAL. CONST. art. I, § 26 (formerly § 22).

194. *Id.* at art. XIII, § 20 (adopted Nov. 5, 1974).

195. *See id.* at art. XIIIA, §§ 1 & 2.

196. *See id.* at art. XIIIA, § 1.

197. *Cf. id.* at art. XIIIA, § 4, providing for the imposition of "special taxes" on such districts by "[c]ities, [c]ounties and special districts."

198. *See id.*

raise funds for municipal purposes, case law distinguishes between taxes for purposes of raising revenue and taxes "for regulation."[199] But historically—and indeed, legally—all municipal levies have been imposed for revenue, under the power to tax. To be sure, regulations promulgated under the police power are subject to general laws in all cases.[200] However, the distinction between the police power and the taxing power is not to be blurred. Every tax is to some degree a regulation, whether it be a license, an excise or a general levy. It must not be forgotten, however, that a municipal government is by nature dual, at times performing specifically local functions and at other times acting as a surrogate of the state. Since operations conducted in either capacity must be financed and since the legislature is prohibited from levying taxes for municipal purposes,[201] a city's enforcement of state laws must be financed from local funds exclusively.

It has been recognized that while the power of regulatory taxation rests exclusively in the state, a city may tax for revenue.[202] The supreme court has avoided tackling the distinction between municipal and state tax legislation, preferring to reconcile local and state actions by means of fine distinctions. In *Rivera v. City of Fresno*,[203] for example, utility users in Fresno attacked the validity of a tax imposed upon resident consumers of intrastate telephone service and city-delivered gas and electricity. Each supplying utility collected five percent of its total service charges pursuant to normal billing procedure, and paid the amounts collected over to the city. The user-plaintiffs had questioned the validity of the tax, alleging that the State Retail Sales Tax and Use Tax Acts had declared a legislative intent to preempt the field.[204] In sustaining the tax, the supreme court did not reach the preemption issue.[205] Instead, the court held that the Fresno tax was a "substantially different tax authorized by the Constitution of California or by statute or by the charter of any charter city" under the Revenue and Taxation Code.[206]

The plaintiffs further contended that the tax invaded the field of

199. *See* note 202 and accompanying text *infra*.

200. *See* CAL. CONST. art. 11, § 7.

201. *See* CAL. CONST. art. 11, § 5.

202. *See In re* Groves, 54 Cal. 2d 154, 351 P.2d 1028, 4 Cal. Rptr. 844 (1960); *Ex parte* Braun, 141 Cal. 204, 74 P. 780 (1903); Century Plaza Hotel Co. v. City of Los Angeles, 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (1970).

203. 6 Cal. 3d 132, 490 P.2d 793, 98 Cal. Rptr. 281 (1971).

204. 1968 Cal. Stats. 2388.

205. 6 Cal. 3d at 138, 490 P.2d at 796, 98 Cal. Rptr. at 284 (quoting 1968 Cal. Stats. 2380, § 2).

206. CAL. REV. & TAX. CODE, § 7203.5 (West Supp. 1979).

utility regulation confined to the Public Utility Commission. In response, the court stated that "whether or not the state has occupied the field of regulation, cities may levy fees or taxes solely for revenue purposes. . . . [T]he requirement that the utility company supplying a particular utility service collect the utility users' tax and remit to the city does not constitute forbidden or conflicting regulation of the utility."[207] The court distinguished a Los Angeles "tippler's tax," imposed upon consumers of alcoholic beverages, which was held invalid in *Century Plaza Hotel Co. v. City of Los Angeles*,[208] as involving "certain constitutional and statutory provisions not present in the instant case"—more particularly the interrelationship of taxation and the regulation of alcoholic beverages.[209] Finally, the court pointed out that the State Board of Equalization had administratively determined that the utility sales and use tax ordinances of numerous cities were compatible with state legislation.[210]

The adoption of article XIIIA, the so-called Jarvis-Gann initiative, has severely limited the means by which municipal governments may raise revenue to conduct local operations. Even before its adoption, state legislation restrained chartered cities from imposing taxes on net income.[211] However, notwithstanding statutory prohibitions against municipal taxes "upon income,"[212] the supreme court upheld, in *Weekes v. City of Oakland*,[213] a levy upon all persons employed within the city. The *Weekes* "fee" was measured according to compensation received from employers and the majority of the court concluded that

> the fee is what it purports to be, namely, an occupation tax substantially resembling the type of municipal license fee long approved by us and expressly authorized by the final paragraph of section 17041.5 [of the Revenue and Taxation Code]. In view of our conclusion in this regard, we need not, and do not, reach the further question whether the Legislature is prevented by the home rule provision of the California Constitution from imposing an absolute ban upon revenue-raising measures of this nature enacted by chartered cities.[214]

The court further acknowledged "the long standing principle that the power to raise revenue for local purposes is not only appropriate but,

207. 6 Cal. 3d at 139, 490 P.2d at 797, 98 Cal. Rptr. at 285.

208. 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (1970).

209. 6 Cal. 3d at 140, 490 P.2d at 797, 98 Cal. Rptr. at 285. The *Century Plaza* case is discussed at notes 220-23 and accompanying text *infra*.

210. *Id.*

211. *See, e.g.*, CAL. REV. & TAX. CODE, § 17041.5 (West 1970).

212. *See* CAL. REV. & TAX. CODE, § 17041.5 (West 1970).

213. 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978).

214. *Id.* at 391, 579 P.2d at 451, 146 Cal. Rptr. at 560.

indeed, absolutely vital for a municipality. Moreover, the power to tax for local purposes is clearly one of the privileges accorded chartered cities by the home rule provision of the California Constitution."[215]

In his concurring opinion in *Weekes*, Justice Richardson would have upheld "the tax upon the additional ground that, in any event, the Legislature lacks power to proscribe municipal income taxes. . . . Stated concisely, the issue is whether the enactment of a revenue-raising tax based upon the income of persons within a city's jurisdictional reach is a municipal affair, insulated from legislative interference by article XI, section 5, subdivision (a) of the California Constitution."[216] The California Constitution provides that "[t]axes on or measured by income may be imposed on persons, corporations, or other entities as prescribed by law,"[217] and that "[t]he Legislature shall pass all laws necessary to carry out the provisions of this article."[218] However, Justice Richardson did not agree that this indicated a constitutional intent to vest the power to levy income taxes exclusively in the state legislature, noting that such constitutional exclusions have customarily been expressed.[219]

As mentioned above, the California Supreme Court, in *Century Plaza Hotel Co. v. City of Los Angeles*,[220] invalidated a municipal "tippler's tax," measured by the purchase price of alcoholic beverages sold at retail for on-premises consumption. Perhaps surprisingly, no reliance was placed upon article XX, section 22, which vests the state with the exclusive power to regulate the sale of alcoholic beverages. Instead, the tax was held invalid under the Revenue and Taxation Code which imposes taxes "in lieu of all county, municipal, or district taxes on the sale of beer, wine or distilled spirits."[221]

The court interpreted this language as voicing an intent to displace all local taxes on the sale of alcohol.[222] The court further concluded that the legislature had completely preempted taxation of the sale and use of such substances.[223]

It would seem that since the taxing power is crucial to the orderly

215. *Id.* at 392, 579 P.2d at 451-52, 146 Cal. Rptr. at 560 (citations omitted).
216. *Id.* at 398-99, 579 P.2d at 456, 146 Cal. Rptr. at 565 (Richardson, J., concurring).
217. CAL. CONST. art. XIII, § 26.
218. *Id.* at art. XIII, § 33.
219. 21 Cal. 3d at 401, 579 P.2d at 458, 146 Cal. Rptr. at 567 (Richardson, J., concurring).
220. 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (1970).
221. CAL. REV. & TAX. CODE § 32010 (West 1979).
222. 7 Cal. App. 3d at 622, 87 Cal. Rptr. at 170 (citing Southern Pac. Co. v. Levee Dist. No. 1, 172 Cal. 345, 350-54, 156 P. 502, 504-05 (1916) and Carey v. Retirement Bd., 131 Cal. App. 2d 739, 745, 281 P.2d 25, 30 (1955)).
223. 7 Cal. App. 3d at 622-23, 87 Cal. Rptr. at 169-70. The problem of legislative pre-

conduct of municipal affairs, limitations upon that power are to be strictly construed. Accordingly, license taxes have been sustained, even upon inter-city businesses, provided such taxes are fairly apportioned so as not to burden business activities carried on outside the taxing jurisdiction.[224] An "equine tax" has been sustained.[225] A license tax on the construction of dwellings, as prerequisite to the issuance of a building permit, has been held valid.[226] Notably, state agencies are immune from local taxation only where governmental functions are concerned: a circus performing on property leased from a state college was held not exempt from a locally-imposed license tax,[227] but a license tax upon the solicitation of union memberships was invalidated as inconsistent with state labor policy.[228]

In large metropolitan areas, the imposition of sales and use taxes by several adjacent municipalities, or, in non-incorporated areas, by a county once led to confusing results for both merchants and shoppers. The obvious burden was compounded by the imposition of state sales and use taxes on the same subjects. Legislation mandated state collection of these local sales taxes.[229] Today, however, "[t]he Legislature may authorize . . . cities and counties . . . to enter into contracts to apportion between them the revenue derived from any sales or use tax imposed by them which is collected for them by the State. Before any such contract becomes operative, it shall be authorized by a majority of those voting on the question in each jurisdiction at a general or direct primary election."[230]

Municipal gross receipt taxes have also produced considerable liti-

emption was also dealt with in Rivera v. City of Fresno, 6 Cal. 3d 132, 420 P.2d 793, 98 Cal. Rptr. 281 (1971). *See* notes 203-07 and accompanying text *supra*.

224. *See, e.g.*, City of Los Angeles v. Shell Oil Co., 4 Cal. 3d 108, 480 P.2d 953, 93 Cal. Rptr. 1 (1971); Marsh & McLennan of Cal., Inc. v. City of Los Angeles, 62 Cal. App. 3d 108, 132 Cal. Rptr. 796 (1976).

225. *See* Pesola v. City of Los Angeles, 54 Cal. App. 3d 479, 126 Cal. Rptr. 580 (1975).

226. Associated Homebuilders of Greater East Bay, Inc. v. City of Newark, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971). This tax is authorized also by CAL. GOVT. CODE § 37101 (West 1979).

227. Board of Trustees v. City of Los Angeles, 49 Cal. App. 3d 45, 122 Cal. Rptr. 361 (1975).

228. *In re* Porterfield, 28 Cal. 2d 91, 168 P.2d 706 (1946). This holding is of dubious authority, however, when viewed against the background of cases involving organized labor. *Cf., e.g.*, A.B.C. Distrib. Co. v. City and County of San Francisco, 15 Cal. 3d 566, 542 P.2d 625, 125 Cal. Rptr. 465 (1975) (upholding municipal excise tax imposed on employees in the liquor distributing business, despite the state's plenary power over liquor traffic); *In re* Nowak, 184 Cal. 701, 195 P. 406 (1921) (upholding a municipal license tax on attorneys already licensed to practice by the state).

229. *See* CAL. CONST. art. XIII, § 29.

230. *Id.*

gation in California. Paralleling the federal cases,[231] the major focus has been upon the fairness of the apportionment formula as an accurate reflection of the quantity of business actually conducted within the taxing jurisdiction. A general rule has developed from the cases that gross receipt taxes, measured by the amount of business directly attributable to activities within the municipality, are valid and within the scope of article XI, section 5(a)'s "home rule" grant to municipalities to tax for "municipal affairs."[232]

Accordingly, a 2% tax upon the gross receipts of a common carrier apportioned to the amount of travel done within the taxing city was upheld,[233] while a commuter tax upon the income of nonresidents working within the municipality was struck down.[234] Taxes have also been invalidated if they are deemed unreasonably discriminatory,[235] or if they act as restraints of trade favoring local commerce,[236] or if they are "arbitrary" because they have no relation to the level of taxable activities conducted within the taxing jurisdiction.[237]

The ceiling upon the amount of ad valorem taxes on real property imposed by Proposition 13 should serve to re-focus attention upon the issue of the municipal power to levy an income tax. Article XIII, section 26(a) of the California Constitution provides that "[T]axes on or measured by income may be imposed on persons, corporations, or other entities as prescribed by law." It would seem self-evident that

231. *See, e.g.*, Standard Pressed Steel Co. v. Department of Rev., 419 U.S. 560 (1975); General Motors Corp. v. Washington, 377 U.S. 436 (1964); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940).

232. *Compare* City of Los Angeles v. Belridge Oil Co., 42 Cal. 2d 823, 831-32, 271 P.2d 5, 10-11 (1954), *appeal dismissed* 348 U.S. 907 (1955) (municipal business license tax could utilize extraterritorial elements or activities) *with* City of Los Angeles v. Shell Oil Co., 4 Cal. 3d 108, 124, 480 P.2d 953, 963-64, 93 Cal. Rptr. 1, 11-12 (1971) (state constitutional ban on extraterritorial application of local laws and state and federal constitutional equal protection provisions conjoin to prohibit local taxes which operate to unfairly discriminate against intercity businesses by subjecting them to taxation not fairly apportioned to the amount of business actually done within the taxing jurisdiction). *See generally*, Sato, *Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce*, 53 CAL. L. REV. 801, 818-37 (1965).

233. Willingham Bus Lines, Inc. v. Municipal Court, 66 Cal. 2d 893, 428 P.2d 602, 59 Cal. Rptr. 618 (1967).

234. County of Alameda v. City and County of San Francisco, 19 Cal. App. 3d 750, 97 Cal. Rptr. 175 (1971).

235. Ferran v. City of Palo Alto, 50 Cal. App. 2d 374, 122 P.2d 965 (1942); *Ex parte* Hines, 33 Cal. App. 45, 164 P. 339 (1917).

236. La Franchi v. City of Santa Rosa, 8 Cal. 2d 331, 65 P.2d 1301 (1937).

237. City of Los Angeles v. California Motor Transp. Co., 195 Cal. App. 2d 759, 15 Cal. Rptr. 917 (1961); Security Truck Line v. City of Monterey, 117 Cal. App. 2d 441, 256 P.2d 336, 257 Cal. Rptr. 775 (1953).

municipal corporations imposing such a tax pursuant to charter powers or powers implied in the constitutional grant or charter status are "prescribing by law." For constitutional purposes, a municipal ordinance is a "law" of the state,[238] but section 17041.5 of the Revenue and Taxation Code seems to have denied this power to local governments by declaring in pertinent part: "Notwithstanding any statute, ordinance, regulation, rule or decision to the contrary, no city, county, city and county. . . whether chartered or not, shall levy or collect or cause to be levied or collected any tax upon the income, or any part thereof, of any person, [whether] resident or nonresident."[239] The issue is to what extent this statute supersedes the rule that municipal taxation for revenue to implement municipal policies is a "municipal affair" within the meaning of the constitution's "home rule" provision.[240] This grant of authority, being constitutional in origin, would seem to be the one power superior to section 17041.5. It may not be set aside by a mere legislative declaration to the contrary, and should such an attempt be made, the judiciary retains the final authority to determine whether a matter is a "municipal affair."[241] A legislative assertion of state supremacy which seeks to preclude an authoritative judicial decision as to the validity of the attempted preemption would violate the constitutional separation of powers.[242]

The supreme court has not conclusively ruled upon the power, or lack of power, of chartered municipalities to levy an income tax. The passage of time should bring before the court additional municipal laws seeking to tap this source of revenue. The municipalities will try to persuade the court to adopt the view expressed by Justice Richardson in *Weekes v. City of Oakland*.[243] It is quite predictable that the state will seek to keep to itself all possible sources of revenue, but such

238. *Ex parte* Johnson, 47 Cal. App. 465, 467, 190 P. 852 (1920); Rothschild v. Bantel, 152 Cal. 5, 9, 91 P. 803, 805 (1907).

239. CAL. REV. & TAX. CODE § 17041.5 (West 1970).

240. Ainsworth v. Bryant, 34 Cal. 2d 465, 469, 211 P.2d 564, 566 (1949); West Coast Advertising Co. v. City and County of San Francisco, 14 Cal. 2d 516, 524, 95 P.2d 138, 143-44 (1939); *Ex parte* Braun, 141 Cal. 204, 209-10, 74 P. 780, 782 (1903).

241. Bishop v. City of San Jose, 1 Cal. 3d 56, 63, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969).

242. One student commentator has suggested that the criteria for a judicial finding that a matter of local taxation has been preempted by the state should be analogous to those announced by the supreme court in *In re* Hubbard, discussed at notes 245-46 and accompanying text, *infra*. *See* Comment, *The Municipal Income Tax and State Preemption in California*, 11 SANTA CLARA LAW. 343, 348 (1971). On preemption in general, see Comment, *The California City versus Preemption by Implication*, 17 HASTINGS L.J. 603 (1966).

243. 21 Cal. 2d 386, 399-409, 579 P.2d 449, 456-63, 146 Cal. Rptr. 558, 565-72 (1978) (Richardson, J., concurring). *See* notes 213-19 and accompanying text, *supra*.

a policy will ultimately prove self-defeating. There is no benefit in the state crippling municipal authority to tax in order that the state's power to generate revenues be correspondingly enhanced. Given that the power to tax for local purposes is a matter of vital importance to all units of local government,[244] it is certain that the court will have to answer the question it avoided in *Weekes*.

When that case presents itself, the court could sustain a municipal income tax on either of two grounds. The first is the constitutional construction advanced by Justice Richardson. The second is to analyze the issue along the lines of the formula announced by the California Supreme Court in *In re Hubbard*.[245] In that case the court specified that state preemption of local taxation should be considered in light of two factors: (1) whether there exists a general law indicating a paramount state interest not admitting of additional local taxation, and (2) whether the potential benefits to the municipality are outweighed by the tax's adverse effect on transient citizens.[246] Based on this criteria, the objections to a municipal income tax are not insurmountable.[247] The alternative is that the increasingly desperate search for sources of revenue will produce a patchwork quilt pattern of local taxes as municipalities struggle to remain solvent. The inevitable result of an adverse decision by the court would be the evisceration of the crucial municipal power to raise revenue and a severe impairment of effective local government.[248]

VIII. Home Rule in Cities of California

Commentators watching the advancing tide of the state legislative control over chartered municipalities have written numerous articles dealing with the chartered cities' plenary power over municipal affairs.[249] With the urbanization of the state and the growth of adminis-

244. "A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose. . . . When such a corporation is created, the power of taxation is vested in it, as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. For the accomplishment of these purposes, its authorities, however limited the corporation, must have power to raise money and control its expenditures." United States v. New Orleans, 98 U.S. 381, 393 (1878), *quoted in* Ainsworth v. Bryant, 34 Cal. 2d 465, 469, 211 P.2d 564, 566 (1949).

245. 62 Cal. 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

246. *Id.* at 128, 396 P.2d at 814-15, 41 Cal. Rptr. at 398-99.

247. *See generally*, Comment, *The Municipal Income Tax and State Preemption in California*, 11 SANTA CLARA LAW. 343, 350-61 (1971).

248. *Id.* at 351-52.

249. These articles have focused upon the plenary power of chartered cities over municipal affairs, and upon the grant by the California Constitution of the power to make all local police, sanitary and other ordinances "not in conflict with general laws." CAL. CONST. art.

trative government, the complexity of the bureaucracy has tended to alienate the government from the influence of the citizenry. Municipal home rule was a popular doctrine when the Constitution of 1879 was framed, nurtured by the excesses of legislative control which had been experienced of legislative control which had been experienced by cities under the Constitution of 1849. A century later, however, the tide has shifted. "Why are the legislators at Sacramento any less competent than the five to fifteen councilmen on a local city council?" it is asked; "Do they not represent the same people?"

One answer is that those at the local level are better able to respond to their constituents than those in Sacramento. A second answer is that the city governments are legally nonpartisan, leaving them free to act legislatively and administratively without concern for "party loyalty" or the rendering of "party favors." Article II, section 6 of the constitution states specifically that "[j]udicial, school, county and city offices shall be nonpartisan." When the cities become enmeshed in state legislation, their affairs are exposed to a political forum. The needs and desires of individual cities may become the pawns of legislative horsetrading with other regions. In a closely parallel situation, the University of California at Berkeley's budget request to the legislature was not satisfied until comparable provisions were made for the expansion of U.C.L.A. In addition, prior to the standardization of judges' salaries, an attempted increase in one county could not be achieved until concessions were made to other counties.

Since 1913, and earlier in chartered cities, the tradition of political independence has prevailed, and local officials are elected on a nonpartisan basis.[250]

In order to protect civil service systems, counties and cities have established restrictions upon political activities on the part of employees. These restrictions have been under attack in recent years, as has

XI, §§ 3 & 7. *See, e.g.*, ANTIEN, MUNICIPAL CORPORATION LAW (1978) c. 3; H. MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE; J. MCGOLDRICK, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930 (1933); A. MCDONALD, AMERICAN CITY GOVERNMENT AND ADMINISTRATION 76 (3d ed. 1944).

250. Thus, in 1979 we have a United States senator from each party; in 1978 the people reelected a democrat as governor, and elected republicans as lieutenant governor and as attorney general. The national parties also hit this irreversible trend in the 1978 election. California would be a big prize, if either could capture its votes; but neither can predictably "deliver" the California vote. Without grass roots patronage at the local level, a California machine is not possible, and there still is a movement to return municipal government to the partisan status. One argument used is that without the deliverance of some partisan advantage, support cannot be expected from a partisan national administration.

the Hatch Act,[251] imposing similar restrictions on officials of the federal government and its agencies.

Insulation from partisan party politics in most cities has made an effective merit system for employment possible. The ensuing stability has engendered a high degree of municipal performance, a level not achieved anywhere in the country under partisan systems. Certainly, contests for office often evoke particular political ideologies in respect to local issues. But, except for one major California city, there has been a consistent attempt to follow the constitutional mandate of nonpartisanship.

For over half of the existence of the 1879 constitution, the legislature was content to give the cities and counties wide leeway in enacting local legislation under California Constitution article XI, section 11 (currently section 7). Where statewide concerns demanded legislative action on a statewide basis, the constitution was easily amended to establish the legislature's plenary jurisdiction, as in regard to workmen's compensation, control of liquor traffic, welfare, limitation of special assessments, and the like.

It is somewhat anomalous that the supreme court has led the way back towards state control over municipal police power and other municipal affairs, a supremacy that the 1879 constitution itself had vitiated by the series of constitutional provisions reviewed earlier. The imperfections in the supreme court's oracular divination of legislative intent to "occupy the field" have been highlighted by the legislature's own disclaimers after the fact, in the form of "permissive" statutes. In numerous instances, these statutes only serve to remove the bars that preclude full operation of the constitutional powers granted to cities under article XI, sections 7 and 3(a).

The state legislature, deluged by over 5,000 bills each legislative session, cannot possibly consider every matter of concern to every city or group of cities. The burden of the legislature should not be increased by forcing it to revalidate local laws that the supreme court has invalidated on preemption grounds, especially where the legislature has not acted affirmatively. The specific conflict with general laws contemplated in article XI, section 7 had much to commend it as a rule of decision.

The enactment of general laws, frequently extensions of local municipal experience, but with statements of powers and procedures, have often benefited the general law cities. The issue then becomes whether

251. 18 U.S.C. § 594 et seq. (1976).

local municipalities can enact legislation which has the same objective as the general law but which covers the subject in more detail or adds more stringent restrictions. Are such laws preempted by the legislature's prior enactments?

State legislation on a subject about which there are civic, cultural or other differences may reflect the lowest common denominator of general concern. There is a wide gulf between the mores acceptable on Broadway Street in San Francisco or the Sunset Strip in Los Angeles, and those of the cities of Concord, Lodi, San Marino, Carmel, Pasadena or Santa Ana. Any state legislation is apt to be a compromise, built upon some common consensus. In most matters of police power regulation, the communities should be free to adopt and adhere to their own standards.

As an example, jurisdiction over liquor control was transferred to the state by constitutional amendment.[252] Cities were generally glad to be rid of the local battles over licensing and policing, with their attendant unsavory political practices. In the "interest of temperance," as the preamble of the act stated, a limit on the number of licenses to be issued was established by the state. The state authorities, however, soon granted licenses up to the statutory limit and issued some of them in cities which on their own part had always banned such establishments. San Marino was a classic example. The low common denominator of the general law thereby subverted a legitimate local interest.

In *In re Lane*,[253] the supreme court held that the entire field of regulation of sexual conduct was removed from local legislative control, and based its decision on "subject matter preemption" grounds. The rationale was that despite the absence of state legislation on the subject, there was, nonetheless, a legislative intent that there be no local regulation in that field. This reasoning ignored the fact that the subject had been adequately covered for eighty years by municipal legislation in the absence of state legislation. The judgment spawned a host of local control problems.[254]

Reflection indicates that, when any power or duty is included in a municipal charter, performance thereunder is a muncipal affair. Further, the very fact that there has been municipal legislation on the subject shows *pro tanto* that it is not a matter of concern only to the people of the state as a whole. The real issue, then, is whether the special

252. *See* note 101 *supra*.

253. 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

254. Certainly, however, a charter cannot be repealed by a general law, thereby rendering nugatory the power of autonomy in municipal affairs.

interests of the people of the state as a whole, or all members of the regulated class in the state as a whole, have been adversely affected. Uniformity for its own sake is not a special virtue; the theory of self-government is that decisions should be made by those primarily affected.

There is evidence in the more recent cases that the courts have veered away from mere "subject matter preemption," and returned to an analysis of whether, in fact, a tangible conflict with the general law exists. In *Olsen v. McGillicuddy*,[255] the court emphasized that consideration must be given to the whole purpose of the legislative scheme in determining whether a conflict exists between a statute and an ordinance. Thus, the court held that an ordinance prohibiting parents from allowing children to possess or fire BB guns did not conflict with state statutes controlling weapons.

In Baron v. City of Los Angeles,[256] Los Angeles, a chartered city, adopted an ordinance requiring lobbyists to register as municipal legislative advocates. The supreme court found the ordinance to be a valid exercise of the police power of the city, and held that it applied to attorneys except when performing activities not covered by the State Bar Act regulating the "practice of law." The Court adopted the view that the State Bar Act preempted the field of regulation of attorneys only insofar as they were "practicing law" as defined by the act:

> Superficially, the ordinance would appear to be a regulation of a mere municipal subject: the registration and control of local lobbyists. One is hard pressed to divine any statewide concern in a local procedure by means of which a local legislative body and the people within its jurisdiction may learn the identity, affluence and power of the interests seeking to influence action on municipal legislation. Indeed, the state's interest in lobbying would seem to be limited to the efforts of lobbyists to affect measures pending before the state Legislature. (See Gov.Code § 9900 et seq.)[257]

However, the ordinance's definition of activities for which registration was required was so broad, the court said, that it conceivably embraced the "practice of law" as defined in the State Bar Act, and to that extent was preempted.

The *Baron* style retreat from a liberal application of "subject matter" preemption, which holds there is a "conflict" whenever the subject

255. 15 Cal. App. 3d 897, 93 Cal. Rptr. 530 (1971). *See also* Galvan v. Superior Court, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); People v. Mueller, 8 Cal. App. 3d 949, 88 Cal. Rptr. 157 (1970).

256. 2 Cal. 3d 535, 469 P.2d 353, 26 Cal. Rptr. 673 (1970).

257. *Id.* at 540, 469 P.2d at 355-56, 86 Cal. Rptr. at 675-76 (footnotes omitted).

matter is included in any part of a legislative scheme[258] is becoming increasingly evident. For instance, the constitution grants plenary authority to the legislature to legislate in the field of industrial relations; the workers compensation laws were passed under this grant. It has been held that amplification of this system by Los Angeles did not conflict with the general law.[259] Further, the statewide adoption of building codes was held not to preclude the city of Huntington Beach from adopting additional restrictions regarding electric wiring in order to safeguard persons and property.[260] However, it still remains to be seen how far the retreat will go.

Conclusion

Matters do not cease to be of local concern when they are found to be common to a great number of municipalities, even when the cooperative effort of several jurisdictions is required to meet a common problem. Permitting diversity to meet local needs has promoted and aided development of all levels of government. For example, early efforts at planned urban development first came to fruition in Los Angeles zoning ordinances. The use of revenue bonds to finance municipal enterprise was also born in the cities. The first public housing in California was established as a public function under the Los Angeles city charter. The construction of an artificial harbor in Los Angeles was accomplished as a local project, although it was to benefit the people of the state as a whole. Street improvement procedures were first developed in San Francisco. The development of water supply systems and utilities was made possible through municipal enterprise.

There has been a trend to meet the growing metropolitan problems by formation of multi-municipal districts, uniting municipalities in a common procedure or objective. Since no given municipality has jurisdiction over the whole matter, it has become necessary to provide a common procedure for power allocation. The legislature has the power to create special joint venture districts. Alternatively joint enterprises can be created under the Joint Exercise of Powers Act, whereby two or more cities possessing common powers may contract for the performance of a common function, with the parties determining which charter provisions and procedures shall apply. The problem with the first

258. *See also* Verner, Hilby & Dunn v. City of Monte Sereno, 245 Cal. App. 2d 29, 53 Cal. Rptr. 592 (1966).

259. Gilbert v. City of Los Angeles, 33 Cal. App. 3d 1082, 1087, 109 P.2d 622, 626 (1973).

260. Baum Elec. Co. v. City of Huntington Beach, 33 Cal. App. 3d 573, 109 Cal. Rptr. 260 (1973).

method is that the decision whether to enter into such an arrangement involves a determination by the state of a matter of municipal concern. Since achievement of the desired objective is a matter of utmost municipal concern, the specifics of participation in multi-municipal districts should be left to the judgment of the municipalities involved. However, once the voters elect to participate in a joint enterprise for which all terms and conditions are specified in the procedural statute, they have consented to the application of the general laws, even if they relate to a municipal concern. Thus, joint efforts on the part of municipalities tend to centralize authority, not only at a regional level, but on a statewide level as well.

Regional compacts, such as the one at Lake Tahoe, involving multiple agencies, are illustrative of this trend toward centralization. More statewide or regional authorities,[261] such as the Control Environmental Protection agencies, can be expected to superimpose upon and supersede local autonomies. The power and influence of California cities, however, is such that any substantial move towards generally centralized government would be heatedly contested.[262] Perhaps it was a mistake in the past to have lowered the population requirement for the establishment of a chartered city, as today the likelihood of consolidation of smaller municipalities is negligible. Although a legal possibility, it is not a political reality in most areas. The Los Angeles area provides a good example. The incentive to consolidate in Los Angeles ended with the creation of the Metropolitan Water District, as the lure of the Los Angeles water supply system was lost. Even today, the Los Angeles basin would benefit from the creation of a central police authority; such a move would be resisted, however, not only by the chartered cities involved, but also by others concerned with any movement towards centralization.

The same type of resistance towards centralization has been en-

261. England, with an area somewhat comparable to California, but with twice the California population, provides an example of the future. There the proliferation of town and borough charters, particularly in reference to trade privileges, impeded national development. Thus, superseding privileges or monopolies were granted by the Crown.

262. Cities organized the League of California Municipalities (now the League of California Cities) in 1896, and have maintained a strong legislative presence ever since. Other associations of public officials are well organized, such as the associations of the boards of supervisors, constables and marshalls, district attorneys, public defenders and public employees' associations and unions.

Councilmen or boards of supervisors may validly lobby for legislation, and no injunction will be issued to prevent payment of dues to the League of California Cities, though the league may support legislation opposed by an objecting taxpayer. Lehane v. City and County of San Francisco, 30 Cal. App. 3d 1051, 204 P.2d 92 (1972), *appeal dismissed*, 410 U.S. 962 (1973).

countered in northern California. Proposals for a Bay Area regional government, even on a limited basis, have been consistently defeated despite the existence of several regional agencies.[263] The problems of creation of multiple jurisdictions in metropolitan areas cannot be effectively dealt with by the *ad hoc* determinations of the courts in individual cases. Rather, constitutional amendments which specify the respective jurisdictions and plenary powers are required. Such amendments should specifically designate those organizational areas in which city charters and local legislation are plenary, and reserve the remaining power to the legislature. As was originally intended, a charter should prevail over general laws, although the legislature should, as was the former practice, have a veto power over any charter or amendment thereto.[264] Contrary to California constitutional jurisprudence, failure to veto the proposed charter power or procedure of a single municipality or regional authority could be, and should be, construed as a legislative declaration that there is no preemptive interest on the part of the legislature that the general laws should prevail.

The present constitutional procedure, whereby the local adoption of a charter makes it a state law without the benefit of any legislative surveillance, has yielded the present *ad hoc* approach to preemption by the courts, with the attendant need to rationalize or justify decisions in the constitutional terms of "general laws" and "municipal affairs." As Justice Peters has advocated, the current system may well support the argument that the general laws should prevail in all instances.

In summary, "home rule" has played an important role in the development of California, both in the development of the means and methods of self-government and in the physical development of the state. Unfortunately, its usefulness has been severely limited by the California Supreme Court. This *ad hoc* and *ex post facto* method of determination by the court, however, is not a satisfactory method of public administration for either those at the state level or those charged with taking action under municipal legislation. Constrictions as to the power of "home rule", whether under the constitution or on an *ad hoc* basis, will continue to be fought by the municipalities, and relinquished only when practical considerations demand new methods of organization to solve common problems.

263. These include the Bay Area Rapid Transit District, the San Francisco Bay Conservation and Development Commission and the Bay Area Air Quality Control District.

264. Such a veto, of course, would be followed by resubmission upon some agreeable basis.