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“Municipal Affairs” in California

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Under the original provisions of the 1879 California constitution, a city of a designated population was permitted to adopt a charter for its own government,¹ but significantly the charter was “subject

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1. CAL. CONST. art. XI, § 8 (1879). The section authorized the adoption of “a charter for its own government, consistent with and subject to the Constitution and laws of this State” The charter was adopted by a majority of the electors voting at the election and was subject to approval or rejection, without power of modification, by the legislature.

The special charters enacted by the legislature for the various cities prior to the 1879 constitution survived the adoption of the new constitution. Thus, it was appropriate to distinguish between a freeholders’ chartered city (charters adopted pursuant to the authority of article XI, section 8 of the 1879 Constitution) and the special chartered cities. But today it is doubtful that any special chartered city remains; therefore, all references to chartered cities in this Article refer to those adopted pursuant to the authority of the constitution. In a sense, the cities that have been organized under the general laws might be said to have a charter provided by the legislature, but these cities are referred to as general law cities in this Article.

There are numerous articles about “home rule” in a given state. The following list is representative and by no means exhaustive: Crummett, *City Home Rule in Kansas*, 9 WASHBURN L.J. 1 (1969); Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948); Hyman, *Home Rule in New York 1941-1965, Retrospect and Prospect*, 15 BUFF. L. REV. 335 (1965); Ice, *Municipal Home Rule in Indiana*, 17 IND. L.J. 375 (1942); Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964); Martin, *Home Rule for Kansas Cities*, 10 KAN. L. REV. 501 (1962); Merrill, *The Constitutional Rights of Oklahoma Cities*, 21 OKLA. L. REV. 251 (1968); Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEXAS L. REV. 682 (1959); Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 MO. L. REV. 45 (1968).

The following are more general articles: Bromage, *Home Rule—NML Model*, 44 NAT’L MUN. REV. 132 (1955); Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 KANS. L. REV. 367 (1964); Fordham, *Home Rule—AMA Model*, 44 NAT’L MUN. REV. 137 (1955); Mendelson, *Paths to Constitutional Home Rule for Municipalities*, 6 VAND. L. REV. 66 (1952); Sandalow, *The Limits of Municipal*

to and controlled by general laws."² In 1896 the constitution was amended to provide that a charter "except in municipal affairs shall be subject to and controlled by general laws."³ Until this amendment general laws prevailed over any inconsistent charter provision,⁴ but with the insertion of the words "except in municipal affairs" a city adopting a charter was freed from state legislative interference with those matters contained in the charter and that were under the protective umbrella of "municipal affairs."⁵ It is important to note that even under the 1896 amendment a city that had adopted a charter did not have complete autonomy from state legislative interference with its municipal affairs since a charter was an instrument conferring specific powers. Thus, as to matters about which a charter was silent, general laws applied even though the general laws dealt with municipal affairs.⁶ In 1914 the constitution was again amended to empower a city with a charter "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."⁷ Under this amendment, a city need only provide in its charter that it may "make and enforce all laws and regulations in respect to municipal affairs"⁸ to transform a charter from an instrument conferring specific powers to one granting broad, residual powers except as expressly limited by the

Power Under Home Rule: A Role for the Courts, 48 MINN. L. REV. 643 (1964); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968); Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571 (1955). References to older texts and articles are omitted from the above enumeration.

2. CAL. CONST. art. XI, § 6 (1879). See also *id.* § 8.

3. CAL. CONST. art. XI, § 6 (1896).

4. See text accompanying notes 28-37 *infra*. See H.L. MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 229-51 (1916); Jones, "Municipal Affairs" in *the California Constitution*, 1 CALIF. L. REV. 132 (1913).

5. See Jones, *supra* note 4, at 134-39. See the contrasting views of Justice Harrison, concurred in by two other justices, with those of Justice Temple in *Fragley v. Phelan*, 126 Cal. 383, 58 P. 923 (1899).

As of March 1971, 75 of the 406 cities in the state were chartered. LEAGUE OF CALIFORNIA CITIES, *CHARTER OR GENERAL LAW CITY?* 1 (1971). Of the cities with populations between 50,000 and 100,000, there were 26 chartered cities and 22 general law cities. *Id.* at iv (App. III). Of the cities with populations over 100,000, there were 18 chartered cities and one general law city. *Id.* In the decade 1960-70, only six cities were newly chartered. *Id.* at 6. Twenty-six cities have adopted charters in the past four decades, although during the same period the number of cities in the state doubled. *Id.*

6. *E.g.*, *City of Long Beach v. Lisenby*, 175 Cal. 575, 166 P. 333 (1917); *Clouse v. City of San Diego*, 159 Cal. 434, 114 P. 573 (1911).

7. CAL. CONST. art. XI, § 6 (1914). A corresponding amendment was made to section 8.

8. *Id.*

charter.⁹ There were two important consequences flowing from that provision in a charter. It was no longer necessary to enumerate the specific powers, and, equally important, a chartered city with such a broad grant of power was freed from general laws that dealt with municipal affairs irrespective of whether there existed any conflicting charter provision.¹⁰ The 1968 amendment of these provisions, although

9. *E.g.*, *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal. 2d 516, 95 P.2d 138 (1939). The proposed amendment to article XI, section 8 was explained to the voters as follows:

It permits a general grant of power, as to municipal affairs, to be made to a city government by charter instead of necessitating the enumeration of a long list of powers to be exercised, as has been done heretofore. The large numbers of charter amendments offered at each session of the legislature have been made necessary because important powers have been omitted from the original enumeration.

AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 16 (1914). McGoldrick criticized the decisions concluding that after the 1914 amendment the charter grants broad power as to "municipal affairs" unless limited by the charter [J. MCGOLDRICK, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE* 1916-1930, at 50-53 (1933)], but, although he noted the amendment to article XI, section 6, he seems to have overlooked the amendment to article XI, section 8 and the reason for the latter amendment.

10. The argument to the voters concerning the proposed amendment to article XI, section 6 stated:

[T]he words "except in municipal affairs," were inserted by amendment in 1896, with the intent and purpose to exempt municipalities from the operation of general legislation in strictly municipal matters. But the revision was so ill-phrased that the supreme court was compelled to hold that the only way for a city to gain the advantage intended by the amendment of 1896 was to incorporate each and every possible municipal affair in its charter. An illogical and impracticable task was set before the cities of the state, and the attempt to work it out has resulted in long and cumbersome charters.

The amendment now submitted proposes to relieve this situation and to apply a just and logical remedy. While reserving to the state legislature exclusive control over matters of general concern, it grants to cities and towns jurisdiction in all municipal affairs without need of specifying them in the charter. Of course, if a city should attempt to transcend the limits of a "municipal affair," its act will be declared void, for the determination of what are "municipal affairs" and what are "state affairs" will remain, as now, a matter for judicial construction.

AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME 25 (1914).

In *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745 (1932), the court held that it was not necessary for the charter to cover a subject specifically in order for a city to be free from the control of general laws; the city had only to incorporate into its charter an acceptance of the privilege extended to it by the constitution as amended in 1914. In a very recent case, however, a court of appeal held that the general laws specifying a 1-year residency requirement for city councilmen applied to a chartered city when the latter's 5-year requirement was held to be a denial of equal protection. *Lawrence v. Cleveland*, 13 Cal. App. 3d 127 (deleted), 91 Cal. Rptr. 863 (3d Dist. 1970) (the Supreme Court, having granted a hearing, dismissed the appeal as moot on March 8, 1971). The court did not cite *City of Pasadena v. Charleville*, *supra*, but relied upon a statement in *Bishop v. City of San Jose*, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969), that the legislature may "legislate with respect to the local municipal affairs of a home rule municipality" in the absence of any conflict with local regula-

shortening the provisions dealing with cities, did not alter this basic allocation of power between the state legislature and a chartered city.¹¹

Thus, in 1896 the voters made a fundamental reallocation of political powers between the legislature and a chartered city by adopting a deceptively simple standard embodied in the words "municipal affairs." Since no universal truth emerged from these words, the courts were required to assume the delicate task of allocating political powers between the legislature and a chartered city. Unfortunately the body of law that has developed does not provide reliable criteria for application of the municipal affairs standard.

*City of Santa Clara v. Von Raesfeld*¹² dramatizes the problem. The Santa Clara city charter provided that "the issuance of said revenue bonds shall be submitted to the electors at an election and the votes of a majority of all those voting on the proposition shall be required to authorize the issuance of the bonds."¹³ A revenue bond issue to finance Santa Clara's share of the cost of building a joint water pollution control facility to serve Santa Clara and several other cities was approved at an election held pursuant to this charter provision. The resolution of the city council calling for the election specified a maximum interest rate of 6 percent per annum. The bonds, however, could not be sold at the authorized interest rate because of an increase in interest rates in the municipal bond market. Subsequently the legislature¹⁴ enacted an urgency measure authorizing the sale of revenue bonds at a maximum interest rate of 7 percent per annum without the necessity of further election.¹⁵ The city council adopted a resolution ordering the sale of the previously authorized bonds with the maximum rate of interest increased to 7 percent without election. The city manager refused to allow sale of these bonds because the voters had not approved the increased interest rate. In the ensuing litigation, the Supreme Court of California held that the particular project was a matter of "statewide concern and therefore controlled by the applicable state law."¹⁶ It reasoned:

tion. The result in *Lawrence* demonstrates the emergence of bad law from an erroneous dictum in the *Bishop* case reflecting the law prior to the 1914 amendment.

11. The current provisions dealing with city charters are found in article XI, section 5; however, this Article continues to refer to sections 6 and 8 in order to avoid confusion, since the opinions cited herein generally refer to the old section numbers.

12. 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970).

13. 3 Cal. 3d at 243, 474 P.2d at 977, 90 Cal. Rptr. at 9.

14. The term "legislature" as used throughout this Article refers to the state legislature of California.

15. CAL. GOV'T CODE ANN. § 53541 (West Supp. 1972).

16. Although the court posed the issue as a conflict between municipal affairs and state concern, it is interesting to note that the city did not argue that it was entitled to rely upon the statute because of state concern. Instead, the city argued that the

Historically the treatment and disposal of city sewage is a municipal affair . . . , and bond issues to finance municipal sewer projects are therefore also municipal affairs As in the case of other municipal projects, however, sewer projects may transcend the boundaries of one or several municipalities. Such projects also may affect matters which are acknowledged to be of statewide concern; e.g., protection of navigable waters . . . and the public health In such circumstances the project ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state.¹⁷

The court continued:

In the present case the revenue bonds are to be issued to finance petitioner's share of a regional water pollution control facility involving the efforts of several cities acting in common. The total cost will be approximately \$30,000,000 and the facilities cannot be constructed without petitioner's participation in the payment of these costs. Furthermore, the sewage treatment facilities will protect not only the health and safety of petitioner's inhabitants, but the health of all inhabitants of the San Francisco Bay Area. Accordingly, the matter is not a municipal affair.¹⁸

The basic premise appears to be that municipal activities that have spillover costs thrust upon neighboring communities are a matter of statewide concern. Because municipal waste disposal has externalities, the court concluded that it was subject to supervision by the legislature. Having established that the state may control municipal waste disposal, the court concludes that the legislature may dictate the method of funding the waste disposal facility. This process of reasoning leaves many questions unanswered. Even if there were externalities associated with municipal waste disposal, does the court adequately explain why statewide concern should not be restricted to controlling the cost

charter permitted the city council to approve issuance of the bonds without a second election. The city contended that the charter did not require the interest rate to be submitted to the electorate, and therefore a prior election in which the electors approved a 6 percent interest revenue bond issue did not alter the basic authority of the city council to issue the bonds at whatever interest was necessary to market them. Petition for Hearing before the Supreme Court of California submitted by the City of Santa Clara, at 15. The city apparently relied upon the statute (permitting the issuance of a 7 percent interest revenue bond without further election) to buttress its argument that such bond issue will be entitled to coparity with earlier revenue bonds. Letter Brief to the Court submitted by the City of Santa Clara, Sept. 9, 1970, at 4. While the city was careful to avoid the argument that this was a matter of state concern, which argument might be detrimental to the interests of a chartered city in the long run, it did aid the court in using the state-concern solution to the lawsuit by alluding to externalities from its present sewer discharges into the bay. Petition for Hearing, *supra* at 2.

17. 3 Cal. 3d at 246, 474 P.2d at 979-80, 90 Cal. Rptr. at 11-12.

18. *Id.* at 247, 474 P.2d at 980, 90 Cal. Rptr. at 12.

spillovers? Is the method of funding the waste treatment facility (that is, by revenue bonds, general obligation bonds, or some other form of funding) such an integral part of spillover control that state law supercedes local desires? Even if the method of funding is an integral part of spillover control, is the procedure for approving such funding also an integral part? Does the rule in the present case apply only where there is a joint undertaking by several cities? Does it matter that the state law merely authorized rather than compelled the issuance of bonds without an election? Moreover, if the procedure for the issuance of bonds is a matter of statewide concern, is the procedure for entering into a contract for the construction of the facility (that is, by a contract let by competitive bidding or by negotiation) also a matter of statewide concern? And what about a state requirement for the payment of prevailing wages by contractors working on public projects?

One might expect that 75 years of experience would have produced criteria giving predictable meaning to the term "municipal affairs." A review of this history, however, reveals confusion, uncertainty, and unpredictability. The purpose of this Article is to discuss the concept of municipal affairs with the modest hope of eliminating some confusion and developing criteria to effectuate the constitutional mandate that a chartered city shall be autonomous with respect to its municipal affairs.

I

MUNICIPAL AFFAIRS AND ITS PROTECTIVE FUNCTION

A preliminary analysis is required to define the precise issue explored in this Article. As the earlier discussion of the history has shown, the 1914 constitutional amendment expanded the role of municipal affairs. By a provision in the charter generally authorizing the city to act upon municipal affairs, the city became empowered to act upon such affairs unless expressly restricted by the charter or the constitution.¹⁹ In addition, the same charter provision protected the city against legislative intrusion upon such matters.²⁰ Thus, municipal affairs has both an authority-granting function and a protective function.

The very early cases, even prior to the 1914 amendment, suggest that the scope of municipal affairs was coextensive in serving these dual functions. For example, in *Ex parte Braun*,²¹ the issue was whether a city charter authorizing the imposition of a license tax for

19. See text accompanying notes 7-9 *supra*.

20. See text accompanying note 10 *supra*.

21. 141 Cal. 204, 74 P. 780 (1903).

revenue purposes prevailed over a statute denying such power to counties and cities generally. In upholding the charter provision, the principal opinion in the case reasoned that, regardless of the precise meaning of the term "municipal affairs," the purpose of the amendment was to protect a chartered city in the maintenance of its charter provisions in municipal matters and against legislative interference in its government and management. The underlying principle, according to the court, was that the city knows best what it needs, and the amendment therefore gave it the exclusive privilege to satisfy such needs, using "words of wide import, broad enough to include all powers appropriate for a municipality to possess."²² The court had little difficulty deciding that a license tax for revenue purposes was a legitimate exercise of the taxing power and that the taxing power was appropriate for a municipality to possess. If the term "municipal affairs" in its protective function embraces "all powers appropriate for a municipality to possess," a chartered city with a broad grant of power over municipal affairs under the 1914 amendment would be protected from legislative interference in any matter over which a city may appropriately exercise power. The conclusion would necessarily follow that the authority-granting and the protective functions of municipal affairs are coextensive.

More recent history, however, reveals that such congruence no longer prevails,²³ if it ever did. A few examples will suffice to illustrate this point. There is no doubt that a chartered city, in the absence of any conflicting general law or a constitutional restriction, may regulate the labor activities of its employees under the broad grant of power over municipal affairs. A city should be able to determine whether it will recognize a union to act on behalf of city employees or whether it will participate in collective bargaining agreements. Yet, in a case involving a municipal regulation that conflicted with a statute conferring the right of employees to organize for certain purposes, the supreme court held that the general law controlled.²⁴ Moreover, prior to the recent case declaring the prohibition of alien employment on public projects to be unconstitutional,²⁵ it was held that a general law prohibiting the employment of aliens on public projects applied to

22. *Id.* at 209, 74 P. at 782.

23. The dichotomy of constitutional home rule provisions with respect to authority and protection is a problem in other states as well. See Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 MO. L. REV. 45 (1968).

24. *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

25. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) (holding a state prohibition of alien employment on public projects unconstitutional since it encroaches upon the exclusive power of Congress over immigration and naturalization and violates the equal protection clause).

a chartered city,²⁶ although in the absence of the general law a chartered city would have been able to hire aliens. In short, "municipal affairs" receives a liberal construction when the only issue is whether the city is authorized to exercise a given power and a limited construction when the issue is whether a chartered city or the legislature prevails in the event of a conflict in the assertion of their powers. This Article focuses upon the protective function of municipal affairs.²⁷

26. *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745 (1932).

27. A chartered city, despite the broad constitutional grant of authority, labors under restrictions even when there is no conflict with general laws. These restrictions arise from two sources: First, an explicit or implicit recognition in the constitution that the subject is within the exclusive jurisdiction of the legislature; second, constitutional limitations on the exercise of municipal authority.

One area of exclusive legislative jurisdiction is eminent domain. Even though municipal affairs might authorize a city to acquire property through gifts or purchases, it cannot condemn without legislative delegation because the right of eminent domain is a sovereign power of the state. *City and County of San Francisco v. Ross*, 44 Cal. 2d 52, 279 P.2d 529 (1955); *Wilson v. Beville*, 47 Cal. 2d 852, 306 P.2d 789 (1957); *Alexander v. Mitchell*, 119 Cal. App. 2d 816, 260 P.2d 789 (1st Dist. 1953).

Other matters about which the state has exclusive jurisdiction are the courts [CAL. CONST. art. VI, §§ 1-5] and public education [*id.* art. IX, § 5; *see Esberg v. Badaracco*, 202 Cal. 110, 259 P. 730 (1927)], although some discrete aspects of public education can be affected by a chartered city in the absence of conflict with general laws. *Butterworth v. Boyd*, 12 Cal. 2d 140, 82 P.2d 434 (1938) (establishment of a health plan for teachers); *Berkeley Unified School Dist. v. City of Berkeley*, 141 Cal. App. 2d 841, 297 P.2d 710 (1st Dist. 1956) (contribution to a school district). The constitution, however, expressly permits a chartered city to provide in its charter for the term, the manner of selection, qualification, compensation, removal, and number of members of a board of education. CAL. CONST. art. XXII, § 8.

It is very doubtful that a chartered city would be able to annex territory without legislative authority. *See People ex rel. Scholler v. City of Long Beach*, 155 Cal. 604, 609, 102 P. 664, 667 (1909). This is a moot issue today. Because general laws with respect to annexation exist and the courts have held that annexation is of statewide concern [*e.g.*, *County of San Mateo v. City Council*, 168 Cal. App. 2d 220, 335 P.2d 1013 (1st Dist. 1959)], a chartered city would not be able to regulate in this area.

One of the more important such areas is property taxation, which is the primary tax revenue source for the local entities. STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING CITIES OF CALIFORNIA, FISCAL YEAR 1970-71, at vii (undated) (during the fiscal year 1970-71, property tax revenue constituted 29.91 percent of the total revenues of California cities; the percentage would be much higher if only tax revenues were considered). Although many of the exemptions from the property tax are granted directly by the constitution [*e.g.*, CAL. CONST. art. XIII, §§ 1a, 1b, 1½], some of these are not self-executing and require legislative action. *E.g.*, CAL. CONST. art. XIII, §§ 1c, 1½a, 1½b. Moreover, the legislature is given the authority to classify and exempt personal property. CAL. CONST. art. XIII, § 14. Therefore, with respect to its primary source of tax revenue, a chartered city cannot determine what property is taxable.

Examples of the second type of limitation are the constitutional proscription against the incurring by any city of debt that exceeds the city's revenue provided for the year such debt is incurred, unless certain conditions are met [CAL. CONST. art. XIII, § 40; *but see City of Oxnard v. Dale*, 45 Cal. 2d 729, 290 P.2d 859 (1955); *City of Los Angeles v. Offner*, 19 Cal. 2d 483, 122 P.2d 14 (1942); *County of Los Angeles v. Byram*, 36 Cal. 2d 694, 227 P.2d 4 (1951) (cases excepting revenue bonds, lease-purchase arrangements, and mandatory obligations, respectively, from the debt

A. Pre-1896 Amendment

Initially, we shall examine the history of the constitutional amendments to trace the development of municipal autonomy. Article XI, section 6 of the original 1879 constitution provided that "cities . . .

limitation)] and the constitutional prohibition against a local government's granting extra compensation to a public officer, employee, or contractor after service has been rendered or a contract has been performed in whole or in part [CAL. CONST. art. XI, § 10].

Since the constitution expressly authorizes certain extraterritorial services by municipal corporations under specified conditions [CAL. CONST. art. XI, § 9(a)], it would seem that these entities would be able to purchase property outside the city incident to such services. *City of South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 P. 490 (1908) (purchase of water system located within and without the city); *Sawyer v. City of San Diego*, 138 Cal. App. 2d 652, 292 P.2d 233 (4th Dist. 1956) (acquisition of easement in land outside the city to lay water mains). Although this constitutional provision does not expressly authorize extraterritorial sewage service, the service may be so extended [*City of Ceres v. City of Modesto*, 274 Cal. App. 2d 545, 79 Cal. Rptr. 168 (5th Dist. 1969)], and probably a city would be able to acquire property extraterritorially incident to intraterritorial service. See *Southern Cal. Gas Co. v. City of Los Angeles*, 50 Cal. 2d 713, 718, 329 P.2d 289, 291 (1958). Whether a chartered city would have power to acquire property outside the city in other circumstances or provide other extraterritorial service remains an open question. Cf. *Harden v. Superior Court*, 44 Cal. 2d 630, 638-39, 284 P.2d 9, 14-15 (1955).

It has been held that a city may not regulate the conduct of persons outside the city without legislative authority [*compare City of Oakland v. Brock*, 8 Cal. 2d 639, 67 P.2d 344 (1937) (a city cannot require extraterritorial inspection of meat plant) with *Ebrite v. Crawford*, 215 Cal. 724, 12 P.2d 937 (1932) (city had general legislative authority to regulate use of airport, and city regulations over use of airport owned by it and partially located outside the city applied extraterritorially)]; and it would seem that city authority in this respect would not be enlarged by the adoption of a charter. See text accompanying notes 156-64 *infra*.

Other issues remain in doubt. For example, although one case states that the matter of setting penalties for violation of an ordinance of a chartered city is a municipal affair [*County of Los Angeles v. City of Los Angeles*, 219 Cal. App. 2d 838, 844, 33 Cal. Rptr. 503, 507 (2d Dist. 1963)]; *but cf. In re Shaw*, 32 Cal. App. 2d 84, 86, 89 P.2d 161, 162 (2d Dist. 1939) (prosecution under state felony statute valid although city ordinance provided for lesser penalty)], none holds that a chartered city is authorized to impose a penalty that could be characterized as punishment for a felony under state law. If, as argued later [see text accompanying notes 165-70 *infra*], a municipal regulatory ordinance, including the penalty, is subject to supersession by a general law, it is a moot question at the present time whether a city would have the authority to provide for punishment equivalent to that for a felony since Government Code section 36901 [CAL. GOV'T CODE ANN. § 36901 (West 1966)] prohibits a city's imposing a fine exceeding \$500 or imprisonment exceeding 6 months.

Also unclear is the extent to which a city, whether chartered or not, is able to legislate upon civil relationships within the private sector in the absence of legislative delegation of authority. There have been instances when a municipal ordinance has been given such effect. *E.g., Raisch v. Myers*, 27 Cal. 2d 773, 167 P.2d 198 (1946) (validity of a lien arising from street improvement held by a private party against private property determined under municipal ordinance despite conflicting general law); *Sapiro v. Frisbie*, 93 Cal. App. 299, 270 P. 280 (3d Dist. 1928) (action for damages by a private party against another private party allowed for a violation of a zoning ordinance that was silent as to criminal or civil enforcement). The rule that violation of a municipal ordinance may constitute negligence, [*e.g., Finnegan v. Royal Realty Co.*,

heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws."²⁸ Thus the constitution made the cities organized under the general laws, the cities with special charters, and the cities that adopted a freeholders' charter pursuant to article XI, section 8 of the constitution "subject to and controlled by general laws." The meaning of "general laws" was explained in several cases involving the City and County of San Francisco, which operated under a special charter until 1889, and several other cities operating under a freeholders' charter.

In *Staude v. Board of Election Commissioners*,²⁹ the issue was whether a statute providing for simultaneous election of officers in every county, city and county, and township superseded a conflicting provision in the special charter of the City and County of San Francisco. Holding the statute to be applicable, the court ruled that the "general laws" that controlled chartered cities were those having general application, even though they dealt with matters of local concern; it excepted, however, those laws that related to incorporation and organization. Subsequently, in *Thomason v. Ashworth*,³⁰ the court did not even inquire whether a statute dealing with street improvement was one dealing with incorporation or organization. Because the law was one of general application, it governed the City and County of San Francisco, still operating under a special charter. Justice McKinstry lodged a vigorous dissent. He pointed out that, although the charters adopted under section 8 were made subject to general laws by section 6, section 8 had carefully provided for voter approval of a charter and any amendment thereto. Thus, if any law operative only in cities would supersede the charter provision as adopted, the referendum power given to the people would be meaningless. To him a general law that would supersede a charter adopted under section 8 required more than general application to cities; it was a law that applied to those within and without the city as well; in other words, it had to have general geographical application as well.³¹

35 Cal. 2d 409, 416, 218 P.2d 17, 21 (1950)], may not be pertinent to the issue since the rationale for this result appears to be that the court chooses to use the legislative standard under common law principles. *Satterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 581, 595, 177 P.2d 279, 287 (1947) (Traynor, J., dissenting); see also 6 E. McQUILLIN, MUNICIPAL CORPORATIONS 304-06 (rev. ed. 1969) ("The well-established general rule is that a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves."); 9 OHIO ST. L.J. 152 (1948).

28. CAL. CONST. art. XI, § 6 (1879).

29. 61 Cal. 313 (1882).

30. 73 Cal. 73, 14 P. 615 (1887).

31. Justice McKinstry argued that

*People ex rel. Daniels v. Henshaw*³² involved a conflict between a statutory and a charter method of selecting a police judge. Again the majority was satisfied that the statute was "general" in application to cities within a population classification, and again Justice McKinstry dissented.³³ The majority holding in *Henshaw* was applied to a city that had adopted a freeholders' charter in *Ex parte Ah You*,³⁴ which again involved a police court. Justice Fox, in dissent, argued that section 8 of the constitution gave the inhabitants of the various cities a choice between organizing under the general laws, thereby being subject to periodic legislative amendment, and adopting a charter that could be amended only by themselves. Like Justice McKinstry, he felt that "general laws" did not refer to rules governing the administration of local affairs but only to laws affecting all of the people, such as the criminal laws and the rules of civil liability.³⁵ This split in the meaning of "general laws" was again exhibited in *Davies v. City of Los Angeles*,³⁶ the majority holding that a statute that dealt with assessment for street opening and widening superseded the provisions of a freeholders' charter.

To summarize, prior to the 1896 amendment there existed an anomalous situation whereby a city of given population was able to adopt its own charter,³⁷ but under the court's construction a general law (as opposed to a special law) superseded charter provisions even though the general law dealt only with municipal corporations. A vigorous dissent attempted to harmonize the chartermaking power under the constitution and the provisions of section 6 that made a charter subject to general laws by construing general laws to be those applicable geographically throughout the state or to "all the people of the state"—in contrast to local laws or laws that by their terms were applicable only to cities or to the "administration of local affairs." A degree of local autonomy was urged by Justices McKinstry and Fox,

[t]he very autonomy of the cities would seem to emphasize the statement that laws operative in the cities alone are *local laws*, as distinguished from laws operative everywhere within the territorial limits of the state, whether such local laws are enacted by the state legislature, or by the legislative body of the city within the powers conferred by its charter.

Id. at 91, 14 P. at 624 (emphasis in original).

32. 76 Cal. 436, 18 P. 413 (1888). The city involved had a special charter.

33. *Id.* at 453, 18 P. at 420-21.

34. 82 Cal. 339, 22 P. 929 (1890).

35. *Id.* at 345-46, 22 P. at 931.

36. 86 Cal. 37, 24 P. 771 (1890). Justice Fox concurred in the judgment but again disagreed regarding "what is said in support of the proposition that the act of 1889 is in force in the city of Los Angeles." *Id.* at 50, 24 P. at 775.

37. The charter was subject to legislative approval without power of modification, as is true today. CAL. CONST. art. XI, § 3 (article XI, section 8 before the 1970 amendment).

although the contours of that concept were not sharply defined in these early years. With this background, section 6 of article XI was amended to protect chartered cities against general laws in the area of municipal affairs, vindicating the dissenters.

B. Post-1896 Amendment: Early Developments

In one of the early cases to consider the impact of the 1896 amendment, *Popper v. Broderick*,³⁸ the court held the determination of policemen's and firemen's salaries to be a municipal affair, stating that the purpose of the constitutional amendment was "to prevent the constant tampering with matters which concern only or chiefly the municipality, under the guise of laws general in form."³⁹ Here was an expression of the purpose of the amendment rather than a standard to determine what is a municipal affair.

*Fragley v. Phelan*⁴⁰ was one of the first cases to explore in depth the impact of the 1896 amendment. One justice, with two colleagues concurring, argued that the meaning of "municipal affairs" was to be understood from the purpose of the amendment:

It [the amendment] was to prevent the existing provisions of charters from being frittered away by general laws. It was to enable municipalities to conduct their own business and control their own affairs to the fullest extent in their own way. . . . This amendment . . . was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws; and this internal regulation and control by municipalities comprise those "municipal affairs" spoken of in the constitution.

Municipal affairs, as those words are used in the organic law, refer to the internal business affairs of a municipality. It was the internal business affairs of municipalities then existing and those of municipalities to be hereafter created that the constitutional amendment was framed to meet.⁴¹

Three justices simply noted that the term "affairs" was much more comprehensive than "business."⁴² On the other hand, Justice Temple ar-

38. 123 Cal. 456, 56 P. 53 (1899).

39. *Id.* at 461, 56 P. at 55. An earlier case, *Morton v. Broderick*, 118 Cal. 474, 486-87, 50 P. 644, 648 (1897), simply held that a general law requiring the mayor to sign an ordinance was not applicable to a chartered city since the manner of enacting an ordinance was a municipal affair. There was no analysis of municipal affairs.

40. 126 Cal. 383, 58 P. 923 (1899). The issue before the court was whether the general laws pertaining to an election for adopting a freeholders' charter controlled. The principal opinion deemed the matter to be a state affair because the constitution had given the power of approval to the legislature.

41. *Id.* at 387, 58 P. at 925 (Garoutte, J., concurring).

42. *Id.* at 394, 58 P. at 928 (Harrison, J.).

gued that the term "municipal affairs" was unambiguous and that it included "all possible laws" pertaining to a municipality.⁴³

Three years later, the validity of a municipal board of health established by the charter of the City and County of San Francisco was before the court in *People ex rel. Lawlor v. Williamson*.⁴⁴ The board had the authority to determine the nature and character of nuisances and provide for their abatement, in addition to managing and controlling the city and county hospital, the ambulance service, and so forth. However, a statute had previously created a board of health for the city and county, and the duties of the two boards overlapped to some extent. Although the issue was very narrow—the court was required to determine only whether there were functions that could properly be performed by the charter board—the principal opinion by Justice Temple broadly sustained the validity of the charter board: "This board, with its functions, being in its nature an 'affair' appropriate for a municipality, and being actually contained in the charter, is a 'municipal affair,' within the meaning heretofore given to the phrase 'municipal affair.'"⁴⁵ Four other justices in three separate opinions made quite clear that the establishment of a board of health was a proper activity of the city and county but that this did not preclude the general laws from superseding local regulations in appropriate situations should there be a conflict. Only Justice McFarland was willing to declare that the subject of public health was a matter of state concern so that the state would prevail if there were a conflict.⁴⁶

In the next case of importance, *Ex parte Braun*,⁴⁷ the issue was whether a charter provision authorizing a revenue license tax was superseded by a general law prohibiting such taxes by counties and cities. Three justices held that the license tax for revenue purposes was a municipal affair on the ground that the words "municipal affairs" were broad enough "to include all powers appropriate for a municipality to possess . . ."⁴⁸ Perceiving the problem that remains with us today, one justice lamented, "The section of the constitution in question uses the loose, indefinable, wild words 'municipal affairs,' and imposes upon the courts the almost impossible duty of saying what they mean."⁴⁹ But he considered the license tax to be a matter of municipal affair because the tax was "levied for the support of a municipi-

43. *Id.* at 402, 58 P. at 931.

44. 135 Cal. 415, 67 P. 504 (1902).

45. *Id.* at 417, 67 P. at 504. Justice Temple had previously urged a broad reading of municipal affairs in *Fragley*.

46. *Id.* at 420, 67 P. at 506.

47. 141 Cal. 204, 74 P. 780 (1903).

48. *Id.* at 209, 74 P. at 782; see text accompanying notes 21-22 *supra*.

49. *Id.* at 214, 74 P. at 784 (McFarland, J., concurring).

pal government, and the ordinance appl[ie]d only to the territory of the city and the inhabitants thereof."⁵⁰

Two justices dissented. They argued that the purpose of the 1896 amendment was to protect chartered cities from laws binding only upon them and not upon the people of the state at large. They claimed that "municipal affairs" stood in opposition to "state affairs," and that matters susceptible of general regulation by laws binding all the people of the state became state affairs the moment the legislature chose to so regulate, even though they may previously have been municipal affairs.⁵¹ The dissent would distinguish between those laws that are applicable only to the cities and those applicable both within and without the cities; in the latter case, it perceived the legislative policy to be that "no man in the state, in city or county, shall be taxed upon his occupation."⁵²

It might be beneficial to review the development of the concept of municipal affairs up to this point. One case had propounded the standard that, if the subject matter concerned only or chiefly the municipality, it was a municipal affair. Subsequently, some of the justices adopted the view that municipal affairs meant "municipal business," whereas others accepted the broader interpretation that any power appropriate for a municipality to exercise was a municipal affair. Another formulation was similar to the first and regarded municipal affairs as referring to local as opposed to state concern; general laws that had applicability without as well as within the city were laws superseding the charter. Without more, these tests are too unanalytical. To phrase the test in terms of a subject matter concerning only or chiefly the city may furnish a benchmark, but it does not tell us what factors determine whether a matter concerns only or chiefly the city. Why is salary determination a matter that concerns only or chiefly the city? Is it because the city must pay? If so, is the tort liability of a city a municipal affair? Is it because the policemen and firemen are employees of the city? If so, is the workmen's compensation law inapplicable to city employees? Would a state prevailing wage or a minimum wage law govern a chartered city?

The next test, suggesting that municipal affairs means municipal business, only exchanges one ambiguity for another. The broader interpretation that municipal affairs includes all powers appropriate for a municipality to possess depends heavily upon the meaning of "appropriate"; if it means powers that might properly be exercised by

50. *Id.*

51. *Id.* at 217, 74 P. at 785 (Beatty, C.J. & Lorigan J., dissenting).

52. *Id.* at 219, 74 P. at 786.

a city without regard to conflicts with the general laws, a city charter will displace the general law with respect to any matter in which there might be both city and state concern. If this test were applied literally, the city sewage plant could with impunity pollute a stream to the detriment of its downstream neighboring cities, for it is surely appropriate for a city to control its sewage disposal. The city could prevent a telephone company from using its streets despite the impact upon the state as a whole, since it is appropriate for a city to exercise control over its streets. These examples can be multiplied to demonstrate that this test has only simplicity to commend it.

A test based on whether a general law has application within and without the municipal boundaries does not resolve the difficult problems of power allocation between the state and local entities. What difference does it make whether the state has denied the counties as well as the cities the power to levy a license tax? If the state denied such taxing power to the cities only, the general laws would be invalid, but if the state denied the power to the counties as well, the test would require that the general laws prevail. Does this mean that a general law requiring an ordinance to be adopted by a majority of those elected to the local legislative body would supersede a contrary charter provision if the general law is applicable to the counties as well as to the cities? Or does this rule operate only when the general law affects the inhabitants more directly? Suffice to say that these tests are rudimentary at best.⁵³

C. Post-1896 Amendment: Later Developments

The supreme court made another attempt to verbalize the municipal affairs test in 1940: "If the state statute affects a municipal affair only incidentally in the accomplishment of a proper objective of statewide concern, then the state law applies even as to 'autonomous' charter cities."⁵⁴ Even a superficial analysis reveals the flaws in this

53. It might be suggested that some of these tests were formulated by the court in light of the fact that a chartered city was deemed at this time to possess only those powers explicitly provided in the charter and that the legislature had a veto power over the granting of any charter power. In other words, if the legislature has approved an express power in the charter, it has knowingly "delegated" the power to the city. However, this overlooks the fact that the legislative veto power is restricted to a rejection of the charter as a whole, that the legislative review might be quite cursory since evidently no charter has ever been disapproved [see A. VAN ALSTYNE, *BACKGROUND STUDY RELATING TO ARTICLE XI: LOCAL GOVERNMENT* 231 California Constitution Revision Commission (1966)], and that the legislature cannot withdraw a charter power once granted, even if conditions change.

54. *Department of Water & Power v. Inyo Chem. Co.*, 16 Cal. 2d 744, 754, 108 P.2d 410, 416 (1940) (statute permitting a creditor to levy upon the amount owing to a debtor by a third party applicable to a chartered city in the role of a third party; city's obligation to the debtor arose from a tort liability).

test. If the general law is designed to further the objectives of a statewide concern, it would not matter that the state statute affected the chartered cities only incidentally; furthermore, the test leaves unanswered the critical question of what is a statewide concern.

In resolving the issue whether the state statute of limitation applied to a lien upon private property held by a private contractor, when the lien arose from street work done at the behest of a chartered city, a dissenting justice took the following position in 1946:

[The] matter of the continuation of the lien and the issue of the statute of limitation which is inseparably tied thereto is *between private individuals*, and whether it is substantive or procedural law, it is a matter of the general administration of justice which cannot be other than a state wide affair. That proposition is clearly demonstrated by the cases. The issue of the *tort liability of a city*, a matter of substantive law, is not a municipal affair.⁵⁵

Clearly, this test is not a comprehensive analysis of the allocation of powers, but it attempts to delineate an area in which the state laws would govern. However, like other formulations, it is difficult to decode. Is the test whether the general law is one that affects two private parties? If so, why the reference to the city's tort liability? Is the area of general law supremacy that which relates to the "general administration of justice," and what is the meaning of this phrase? Does the method of letting contracts come within the "general administration of justice," or does the phrase refer to substantive and procedural laws relating to dispute settlement? If the latter, will a chartered city be able to provide a claims presentation requirement with respect to contract claims against it? Or does this test reiterate the general rule that local entities cannot enact ordinances affecting the civil relationship of private parties?⁵⁶

Another approach to the problem is to characterize a field and all issues pertaining to that field as a municipal affair. Thus, the court in *Raisch v. Myers*⁵⁷ reasoned that street improvement and the collection of costs therefor were municipal affairs; therefore, an ordinance that related to such municipal affairs prevailed over general laws inconsistent therewith.⁵⁸ The shortcoming of this type of syllogistic analysis is demonstrated in *City of Pasadena v. Charleville*.⁵⁹ The case involved two issues: First, the general laws provided that any city awarding a contract for public work had to specify the prevailing

55. *Raisch v. Myers*, 27 Cal. 2d 773, 782, 167 P.2d 198, 202-03 (1946) (Carter, J., dissenting) (emphasis in original).

56. See note 27 *supra* (final paragraph).

57. 27 Cal. 2d 773, 167 P.2d 198 (1946).

58. *Id.* at 778-79, 167 P.2d at 201.

59. 215 Cal. 384, 10 P.2d 745 (1932).

wage rate in the locality in which the work was to be performed and include such rate in the call for bids. The chartered city had no such requirement. The second issue concerned the applicability of a statute that prohibited employment of aliens by any contractor on any public work done for a city. The project in question was the construction of a wire fence around a municipal water reservoir. As to the first issue, the court concluded that the improvement was a municipal affair⁶⁰ and that hiring and paying employees to perform work in connection with its municipal affairs was not subject to the general laws.⁶¹ If this deductive process were followed consistently, however, the statute against alien employment should likewise have been held inapplicable to a chartered city, but the court took a completely different tack on this issue, proceeding from the premise that "[a]ll public works and all public property in the state in a broad sense belong to all of the people of the state."⁶² The court discovered reciprocal obligations between the state and its citizens that did not exist with respect to aliens; it therefore concluded that a state policy preferring citizens over aliens was a matter of state concern.

In *Lossman v. City of Stockton*,⁶³ the issue was whether the general laws imposing liability upon a city for negligent operation of its vehicles were applicable to a chartered city. In sustaining its applicability, the court of appeal reasoned that the operation of vehicles by city employees on city streets endangers not only the inhabitants within the city but also visiting motorists and pedestrians as well; state regulation of municipal liability was therefore a matter of public concern subject to the general law. While the criterion used by the court points in the right direction, it is unfortunate that it was not fully developed. As the test stands, it seems that if city action affects nonresidents and residents alike, the matter is of state concern and subject to state supervision. Under this test, however, a chartered city could not determine whether its contract should be let by bid or by negotiation, nor could it set the fees for entry into its parking facilities should there be conflicting state regulations. A similar test led the attorney general to conclude that a general law requiring disclosure of campaign expenses by candidates for public office governed a chartered city election on the ground that the various elected municipal officials, of both chartered and nonchartered cities, exercise substantial executive and legislative power over the people of the state; therefore, the disclosure legislation aimed at obtaining elective officials undominated by self-

60. *Id.* at 389, 10 P.2d at 746-47.

61. *Id.*, 10 P.2d at 747.

62. *Id.* at 398, 10 P.2d at 750.

63. 6 Cal. App. 2d 324, 44 P.2d 397 (3d Dist. 1935).

seeking individuals or groups was in his opinion a matter of statewide concern.⁶⁴ If the attorney general is correct, the protective function of municipal affairs is extremely limited.

In one of the more masterful opinions obfuscating the issue of municipal affairs, *In re Hubbard*,⁶⁵ the court stated:

Of course, a particular subject may be both a municipal affair and of statewide concern. Since the question whether the subject is of state concern is often determined by whether or not the state has enacted legislation, preemption or full occupation of the field may become one, but only one, test of whether the given subject is a municipal affair. With these concepts in mind, it has been held that a chartered city or county may not legislate in regard to those matters covered by general law if (a) the local legislation attempts to impose additional requirements . . . or (b) the subject matter is one of state concern, and the general law occupies the entire field . . . or (c) the subject matter is of such statewide concern that it can no longer be deemed a municipal affair These rules may be somewhat confusing because they give no guide as to what is and is not a matter of state concern. . . . How then . . . shall a chartered city be advised whether a particular subject is of such statewide concern as to prevent it from being considered a municipal affair?

This question must be answered in the light of the facts and circumstances surrounding each case. This does not mean that there are no standards which a chartered city or county may apply when attempting to determine its right to legislate in a specific field. Analysis of the many prior decisions on this subject indicates that although the language differs from case to case, the rationales of all have one thing in common, that is, that chartered counties and cities have full power to legislate in regard to municipal affairs unless: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.⁶⁶

There are many criticisms of this opinion. First, it is wrong to say that a matter may be both a municipal affair and of statewide concern when the concept of municipal affairs is used in its protective function.⁶⁷ The constitution has made these areas mutually exclusive, so

64. 35 OP. CAL. ATT'Y GEN. 230, 231-32 (1960).

65. 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

66. *Id.* at 127-28, 396 P.2d at 814-15, 41 Cal. Rptr. at 398-99.

67. In this case, the validity of a municipal ordinance prohibiting gambling on

that if the subject matter is a municipal affair, state law cannot prevail. If the court is referring to a duality of interest in a given subject matter, it is ineptly using the term "municipal affair," which is a word of art implying the legal consequences indicated above. Second, whether the state has preempted the field is merely a question of whether a conflict exists between a state provision and a local provision. It does not answer the question whether a matter is of state concern to the exclusion of the municipality. Third, the three conditions enumerated in the first paragraph of the quotation are those that define when a conflict exists, and, even then, condition (a) is erroneous; the local legislation is not invalid simply because it seeks to impose additional requirements unless the state has occupied the field. The only illuminating portion of the first paragraph is the statement that the "rules may be somewhat confusing."

The second paragraph of the quotation erroneously refers to the municipal affairs of a county, a concept unknown in the constitution. Second, the situations labeled (1) and (2), defining matters of state concern, appear to rest this determination upon the existence or nonexistence of state legislation. In other words, the court would abdicate its function of allocating the powers between the state legislature and local entities by permitting the legislature to make this determination by simply enacting a comprehensive statute. Only situation (3) considers any of the various values involved; here the benefit to the municipality accruing from an ordinance is to be weighed against the detriment to the transient citizens. That these are relevant considerations cannot be denied, but one should bear in mind that they will be overridden should the legislature choose to preempt the field under situations (1) and (2). Moreover, the opinion in *Hubbard* should be accepted cautiously, since the court was dealing with a regulatory ordinance that the court had earlier in its opinion determined not to conflict with the general laws.⁶⁸

certain games of chance was in question. Because the court found that the legislature had not preempted the field and the ordinance did not conflict with general laws, the ordinance was valid under article XI, section 7 of the constitution. CAL. CONST. art. XI, § 7 (article XI, section 11 before the 1970 amendment). Any city or county, whether chartered or not, is authorized by article XI, section 7 to enact a police power measure in the absence of a conflict with the general laws, so there was no need for the court to discuss the authority granting function of municipal affairs. If the court was referring to the protective function of municipal affairs, it hardly advanced the analysis to say that the city was protected unless there was a conflict with the general laws. Moreover, there is some question as to whether the municipal affairs amendment was intended to affect police power measures dealt with in article XI, section 7. See text accompanying note 156-64 *infra*.

The confusion in *Hubbard* is repeated in *Lancaster v. Municipal Court*, 6 Cal. 3d 805, 494 P.2d 681, 100 Cal. Rptr. 609 (1972).

68. Justice Peters, the author of the opinion in *Hubbard*, later analyzed the

The *Hubbard* court appeared to make the legislature the arbiter of what was a municipal affair or a state concern, displacing the courts from this function.⁶⁹ This state of affairs was not to last long. Five years later, the *Hubbard* dictum on the issue of municipal affairs was overruled in a dictum in *Bishop v. City of San Jose*:⁷⁰

In exercising the judicial function of deciding whether a matter is a municipal affair or of statewide concern, the courts, will of course give great weight to the purpose of the legislature in enacting general laws which disclose an intent to preempt the field to the exclusion of local regulation . . . and it may well occur that in some cases the factors which influenced the Legislature to adopt the general laws may likewise lead the courts to the conclusion that the matter is of statewide rather than merely local concern. However, the fact, standing alone, that the Legislature has attempted to deal with a particular subject on a statewide basis is not determinative of the issue as between state and municipal affairs, nor does it impair the constitutional authority of a home rule city or county to enact and enforce its own regulations to the exclusion of general laws if the subject is held by the courts to be a municipal affair rather than of statewide concern; stated otherwise, the Legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern.⁷¹

Three dissenting justices argued that "the inquiry ends once a statewide concern is found, and there is no need to weigh the state and municipal concerns or to determine which should predominate." The dissenters were not willing to balance the interests of the state with those of the chartered cities.⁷² They frankly conceded that it would be a rare case in which a matter was so strictly of local concern that state legislation would not prevail.⁷³

The dissenting view is erroneous as a matter of history, since it would return us to the time of the pre-1896 constitution when all general laws prevailed over charter provisions. The past cases, with

validity of a chartered city's gun registration ordinance entirely under article XI, section 7 to determine whether there existed a conflict with the general laws, relying upon that portion of the *Hubbard* opinion that discussed municipal affairs. *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969).

69. See also *City of Redwood City v. Moore*, 231 Cal. App. 2d 563, 580-81, 42 Cal. Rptr. 72, 84 (1st Dist. 1965).

70. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

71. *Id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

72. *Id.* at 66, 460 P.2d at 144, 81 Cal. Rptr. at 472. The dissenters also thought that it would be equally rare for a matter to be wholly of state concern. Because most matters will involve both state and municipal concerns, according to the dissenters, and because state concern will be preferred, the dissenters would find little left of municipal affairs in its protective function.

73. *Id.* at 69, 460 P.2d at 146, 81 Cal. Rptr. at 474.

the exception of the *Hubbard* dictum, had never suggested that the mere enactment of a statute would indicate a state concern that would override the protective function of municipal affairs. The only virtue of the dissenting view is the ease of resolving the problem, but this would be accomplished at the expense of historical development and the clear import of the constitution.

This discussion should not be taken to suggest that the development of the law defining municipal affairs has been completely aimless. In *Pacific Telephone & Telegraph Co. v. City and County of San Francisco*,⁷⁴ the issue was whether the city could prevent a telephone company from using city streets for telephone lines unless the company obtained a franchise from the city. In one of the rare occasions for analysis, the court fully developed facts to show the impact on interstate and foreign communications of excluding the telephone company from the city. Because of the overriding state interest, the court overruled the prior law finding the matter of franchising the telephone company for the use of city streets to be a municipal affair. The court was concerned with the externalities of the city action and properly held that a city is not protected under the municipal affairs concept from state supervision of the externalities.

II

PROPOSED STANDARDS FOR MUNICIPAL AFFAIRS

The constitution has guaranteed a measure of home rule for chartered cities, but one may doubt whether a single rational principle of allocation of governmental powers satisfying to everyone can be formulated in an area so fraught with value judgments. Some may consider the problem from the viewpoint of efficiency in the allocation of resources. Others may worry about the distributional consequences. Still others may give primacy to local political determination. Some have argued that a vertical hierarchy of governments is obsolete in our contemporary society, which consists of a mobile population living among a cluster of municipalities and spawning problems beyond the capabilities of a single municipality to resolve. However, as long as the California constitution grants local autonomy to the chartered cities, recently reaffirmed in 1970, one cannot avoid searching for criteria to allocate the power, no matter how elusive.

The attempts by the courts have been only partially successful. On the whole, the approach has been ad hoc and has resulted in somewhat inconsistent resolutions. In fact, it has been said that no general

74. 51 Cal. 2d 766, 366 P.2d 514 (1959).

rule can be provided to define what is a municipal affair,⁷⁵ and one justice has even referred to the term as the "loose, indefinable, wild words."⁷⁶ Yet, the present process of "muddling through" is very unsatisfactory, since the result is confusion for both the state and chartered cities. Recognizing that perhaps only fools rush in where courts fear to tread, this Article nevertheless offers three standards that, hopefully, identify the substantial interest of the state and the chartered cities and thereby provide some consistency in approach.

Standard 1: State laws should prevail where such laws deal with substantial externalities of municipal improvements, services, or other activities, regardless of whether the general laws are directed only to the public sector.

This is hardly a novel proposition, inasmuch as the reason for the standard is evident. In the absence of any external institutional control, the municipal decisionmakers, because they are not responsible to those upon whom the burden is cast, would be subject to no restraint in exporting costs except, possibly, a fear of retaliation. Such a chaotic situation cannot be tolerated in an ordered society. While the courts under constitutional doctrines have policed certain extraterritorial costs, the legislature ought to have the power to adjust the conflicting interests of the city and the larger area that the constitution does not reach.

Two matters should be noted: First, it should be emphasized that the costs must be substantial, since it takes little imagination to identify some extraterritorial effect from almost any intraterritorial act. Second, a city, whether chartered or not, might not have the authority to exercise any power extraterritorially unless the legislature has granted such power, except in a very limited situation;⁷⁷ consequently, the effect of extraterritorial exercise of power, whether regulatory, property acquisition, or service, can perhaps initially be controlled by the legislature through the definition of delegation.

Standard 2: State laws should govern if their policies are made applicable to the public and private sectors.

This second standard is formulated upon the following two premises: First, the state is at least as concerned with the welfare of the people as is a chartered city. Second, a state policy is pervasive when manifested by its applicability to both the public and private sectors. When the state has indicated a deep concern for the welfare

75. *E.g.*, *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62, 460 P.2d 137, 141, 81 Cal. Rptr. 465, 469 (1969).

76. *Ex parte Braun*, 141 Cal. 204, 214, 74 P. 780, 784 (1903).

77. See note 27 *supra*.

of the people by adopting a pervasive policy, such policy ought not be frustrated by deference to local determination. The converse of this is that state policies directed only to the public sector, absent externalities, lack the strength to override the value of local determination; such policies seek to reach only the relationship between the governmental entity and the individual, and this relationship ought to be determined by the local electorate who have opted for autonomy.⁷⁸

Perhaps this is the standard urged by Justice McKinstry, who insisted in the latter part of the last century that the general laws that control a chartered city are those having application within and without the city, although it is as probable that he meant general applicability to city and county governments.⁷⁹ Closer to the mark was Justice Fox's argument that only "general laws as affect all the people of the state" would have the effect of supersession.⁸⁰

Standard 3: Matters of intracorporate structure and process designed to make an institution function effectively, responsively, and responsibly should generally be deemed a municipal affair.

The people look to the government for services and regulatory measures, and they have an interest in seeing that the government func-

78. Dyson has hinted at a similar proposal. Dyson, *Ridding Home Rule of the Local Affairs Problem*, 12 KAN. L. REV. 367, 381 (1964). He initially suggests that a city should be authorized to act upon all matters within its territorial jurisdiction. There are, however, two categories of exception. In the first category are those matters over which the city would not be able to act without legislative delegation of authority. In the second are those matters over which the city and the state would have concurrent jurisdiction; here, the state would prevail in the event of a conflict. Subject to these two types of exceptions, city legislation would prevail over all state legislation regulating cities.

Included within the area in which state preemption exists in the event of a conflict are "state uniform enactments establishing minimum standards of performance." However, Dyson is unclear as to whether he would permit state preemption even though a statute operates only within the public sector. He does argue that state preemption in minimum performance standards "applicable both to private persons and to municipal corporations" will meet the objection favoring municipal independence: "citizens of the state are entitled to equal treatment in basic areas such as education and public health." *Id.* at 384. Although he talks about minimum performance standards applicable to private persons and municipal corporations, the import is confused by this reference to education and public health. Moreover, if preemption exists only in "basic areas," it is necessary to determine what these "basic areas" are.

Dyson has suggested his proposal as a constitutional amendment. There have been other proposals for constitutional home rule. Two that have been discussed widely are those proposed by the National Municipal League and the American Municipal Association. See Broinage, *Home Rule-HML Model*, 44 NAT'L MUN. REV. 132 (1955); Fordham, *Home Rule-AMA Model*, 44 NAT'L MUN. REV. 137 (1955); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 685-92 (1964).

79. See text accompanying note 31 *supra*.

80. *Ex parte Ah You*, 82 Cal. 339, 346, 22 P. 929, 931 (1890); see text accompanying note 35 *supra*. See also *Professional Fire Fighters, Inc. v. City of Los*

tions efficiently, responsively, and responsibly as an institution providing services and enacting regulations. It appears that, at a minimum, the municipal affairs amendment was intended to give local autonomy with respect to the latter interest. The need to extend a state policy dealing with intracorporate structure and process to a chartered city, even if applicable to the public and private sectors, is usually not compelling.⁸¹ However, there are instances when state laws even with respect to the functioning of the institution ought to govern. These are matters that are integral parts of a substantive state policy, such as the claims procedure for tort liability,⁸² deemed to apply to a chartered city under the other standards.

The application of these standards will not always provide certainty in result. Judicial judgment is not removed. For example, the substantiality of the externalities must be determined. In addition, it is necessary to decide what policies are pervasive. The existence of a pervasive policy is not precluded merely because there are differences in the detailed application of a policy to the public and private sectors or within the private sector itself. Hopefully, however, these standards will focus the inquiry. The next part tests these standards in the context of various situations to determine the proper sphere of respective state and chartered city supremacy.

III

THE APPLICATION OF THE PROPOSED STANDARDS

Conflicts between the state and a chartered city have arisen with respect to manifold matters. This Article examines the areas of conflicts under five categories, categories that frequently overlap but are convenient for analysis since each represents differing considerations or varying degrees of state and local interests. Within each category,

Angeles, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963) (indicating statewide policy on labor relationship as a basis for holding general laws on labor relationship of firemen applicable to a chartered city).

81. Abuses by majoritarian rule in this area can be prevented by the federal constitutional doctrines of due process and equal protection or by their equivalents in the state constitution. *E.g.*, *Camara v. Mellon*, 4 Cal. 3d 714, 484 P.2d 577, 94 Cal. Rptr. 601 (1971); *Zeilenga v. Nelson*, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971) (cases invalidating a 3-year residency requirement for election to city council and a 5-year residency requirement for election to board of supervisors as a denial of equal protection). *See also* *Avery v. Midland County*, 390 U.S. 474 (1968) (applying the "one-man-one-vote" principle to a county); *compare* *Landes v. Town of North Hempstead*, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967) (invalidating property ownership qualification for local office) *with* *Schweitzer v. Clerk*, 381 Mich. 485, 164 N.W.2d 35 (1969), *cert. denied*, 397 U.S. 906 (1970) (upholding property qualification for local office).

82. *See* text accompanying notes 152-53 *infra*.

the results of representative past cases are first stated without an attempt to be exhaustive. This is followed by a discussion of how some of these problems as well as pending issues might be resolved by an application of the proposed standards.

The categories are: (A) Matters of intracorporate structure and process. This category includes the interest of the inhabitants in the efficiency, responsiveness, and responsibility of the institution. (B) The municipality and its officers and employees. This category is a refinement of the first, but a separate category is warranted to deal with an additional input—the personal interests of officers and employees. The employer city and its inhabitants have institutional interests in its officers and employees, and the state is concerned with them as inhabitants of the state. This category deals with the conflict of these interests. (C) Municipal services and improvements. A municipality is organized by its inhabitants to provide services, but the collective interests of the inhabitants in these services may conflict with interests of those outside the municipality as well as with the personal interests of the inhabitants within the city. (D) Regulatory measures. The state and a municipality have obvious interests in regulating the conduct of those within the territorial jurisdiction of a city. (E) Fiscal measures. These are treated separately because municipal financing is basic to the existence of a city as an institution and to its service and regulatory functions.

A. Matters of Intracorporate Structure and Process

1. Prior Decisional Law

Matters relating to a municipal election have generally been held to be municipal affairs. Thus, general laws dealing with registration of voters⁸³ or the method of electing municipal officers⁸⁴ have been held inapplicable to chartered cities. In fact, the constitution expressly grants "plenary authority" to a chartered city to provide for various matters pertaining to municipal officers and employees.⁸⁵ In addition,

83. *People v. Worswick*, 142 Cal. 71, 75, 75 P. 663, 664, (1904) (no conflicting general law indicated in the opinion) (dictum).

84. *Socialist Party v. Uhl*, 155 Cal. 776, 103 P. 181 (1909) (primary election). See also *Rees v. Layton*, 6 Cal. App. 3d 815, 86 Cal. Rptr. 268 (2d Dist. 1970) (identification of candidates on ballot); *Mackey v. Thiel*, 262 Cal. App. 2d 362, 68 Cal. Rptr. 717 (2d Dist. 1968) (election procedure for city councilmen deemed a municipal affair).

85. CAL. CONST. art. XI, § 5 (article XI, section 8½ before the 1970 amendment):

[P]lenary authority is hereby granted, subject only to the restrictions of this article, to provide [in the charter] or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the

it has been said that the mode of contracting is a matter of municipal affairs. For example, whether a contractor on a public project must file a materialmen's bond is determined by a chartered city.⁸⁶ Apparently it is not relevant whether the subject matter of the contract is otherwise classified as a statewide concern or a municipal affair.⁸⁷

Other matters indicated to be municipal affairs have included the information required in a recall petition;⁸⁸ the method of enacting an ordinance;⁸⁹ the procedure for the issuance of bonds for public park acquisition and the election with respect thereto;⁹⁰ the place of deposit of municipal funds;⁹¹ the use of sewer charges for sewer improvements;⁹² the establishment of a city board of health;⁹³ the procedure to be followed for municipal library site selection;⁹⁴ street opening procedure;⁹⁵ park abandonment procedures;⁹⁶ and specification of funding for street improvement.⁹⁷ On the other hand, the procedures for filing claims against the city for its tort⁹⁸ or inverse condemnation li-

several municipal 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.

86. *Loop Lumber Co. v. Van Loben Sels*, 173 Cal. 228, 159 P. 600 (1916); *Williams v. City of Vallejo*, 36 Cal. App. 133, 171 P. 834 (3d Dist. 1918) (cases holding legislative requirement for materialmen's bond in public works contract inapplicable to chartered cities).

87. *Dynamic Indus. v. City of Long Beach*, 159 Cal. App. 2d 294, 323 P.2d 768 (2d Dist. 1958) (purported contract dealing with tidelands granted in trust to the city).

88. *See Scheafer v. Herman*, 172 Cal. 338, 340, 155 P. 1084, 1085 (1916).

89. *Brougher v. Board of Pub. Works*, 205 Cal. 426, 271 P. 487 (1928).

90. *Fritz v. City and County of San Francisco*, 132 Cal. 373, 64 P. 566 (1901). *See also City of Santa Monica v. Grubb*, 245 Cal. App. 2d 718, 54 Cal. Rptr. 210 (2d Dist. 1966) (method of issuing revenue bonds deemed a municipal affair).

91. *Rothschild v. Bantel*, 152 Cal. 5, 91 P. 803 (1907); *see also Heilbron v. Sumner*, 186 Cal. 648, 200 P. 409 (1921) (which city body may expend funds for municipal water works is a municipal affair).

92. *Cramer v. City of San Diego*, 164 Cal. App. 2d 168, 330 P.2d 235 (4th Dist. 1958).

93. *People ex rel. Lawlor v. Williamson*, 135 Cal. 415, 67 P. 504 (1902).

94. *City of Pasadena v. Paine*, 126 Cal. App. 2d 93, 271 P.2d 577 (2d Dist. 1954).

95. *Byrne v. Drain*, 127 Cal. 663, 60 P. 433 (1900). But where public utilities may be affected, *see Pacific Tel. & Tel. Co. v. City and County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959) (maintenance of interstate and international telephone lines in streets not a municipal affair and a chartered city cannot exclude such lines from its streets); *Civic Center Ass'n v. Railroad Comm'n*, 175 Cal. 441, 166 P. 351 (1917) (grade crossings of railroads not a municipal affair).

96. *Wiley v. City of Berkeley*, 136 Cal. App. 2d 10, 288 P.2d 123 (1st Dist. 1955).

97. *See City of Los Angeles v. Oliver*, 102 Cal. App. 299, 283 P. 298 (2d Dist. 1929).

98. *Wilkes v. City and County of San Francisco*, 44 Cal. App. 2d 393, 112 P.2d 759 (1st Dist. 1941).

ability⁹⁹ have been deemed matters of state concern. An election concerning the adoption of a charter¹⁰⁰ and the availability of an initiative concerning parking meters¹⁰¹ were similarly treated.

2. Discussion

Most matters that fall within this category should be considered municipal affairs. How and by whom corporate powers shall be exercised are matters that ought to be controlled by the local electorate either directly or through its legislative body, since the determination and execution of these policies generally have no substantial externalities. Whether the city adopts a city manager or a strong mayor form of government; how the ordinances are enacted and who must sign them; what departments, boards, or agencies are created, who are to serve upon them, and what powers are to be exercised by them are matters of uniquely local concern.

One area of current uncertainty appears to be the applicability of the legislatively prescribed "open meeting" law¹⁰² to the chartered cities. The legislation makes the law expressly applicable to chartered cities,¹⁰³ and one case that noted the issue stated that the legislative counsel has two rulings reaching opposite conclusions.¹⁰⁴ The attorney general has issued an opinion saying that a chartered city is subject to the provisions of the open meeting law:

We recognize that the structure and method of operation of local governments have long been considered to be a matter of primary concern to the local level. There are, however, certain aspects to the meetings of city councils which are of state-wide concern.

The Secret Meeting Law was adopted by the 1953 Legislature after an investigation of practices of local agencies throughout the State. The incidents reported to the Committee, and the abuses which this legislation was designed to prevent, took place in all kinds

99. *Wilson v. Beville*, 47 Cal. 2d 852, 306 P.2d 789 (1957).

100. *Fragley v. Phelan*, 126 Cal. 383, 58 P. 923 (1899) (election of freeholders to draft a charter deemed a state affair because it was within legislative control to approve or reject a charter).

101. *Mervynne v. Acker*, 189 Cal. App. 2d 558, 11 Cal. Rptr. 340 (4th Dist. 1961). The court reasoned that traffic on the streets was a state concern; consequently, the legislature can delegate the authority to deal with parking meters, which are devices for traffic regulation, to the governing body of a city. The effect of this decision is to shift the availability of an initiative or a referendum regarding parking meters from the local to the state electorate.

102. CAL. GOV'T CODE ANN. §§ 54950-61 (West 1966), *as amended* (West Supp. 1972).

103. *Id.* § 54951 (West 1966).

104. *Adler v. City Council*, 184 Cal. App. 2d 763, 768 n.1, 7 Cal. Rptr. 805, 808 n.1 (2d Dist. 1960).

of public agencies The evil was not confined to nonchartered cities. The abuses were shown to have existed on a state-wide scale. They were and are a matter of state-wide concern. . . .

The right and ability of the people to have free and open access to all meetings of local legislative bodies is vital to the preservation of an informed electorate and constitutes an elemental safeguard to democratic government.¹⁰⁵

Thus, the attorney general has offered two reasons: First, the abuse was widespread, and, second, an open meeting is vital to the democratic process. Why these reasons are sufficient to permit legislative interference with local matters is difficult to comprehend. That many entities do not open their meetings to the public is interesting as a matter of statistics, but so may many cities prefer the city manager form of government. The basic reason for the attorney general's opinion must be that, as a matter of value judgment, open meetings are desirable. The open meeting, however, is not so fundamental to the democratic process as to be a constitutional requirement,¹⁰⁶ and one can legitimately ask why the local electorate, who are the primary beneficiaries of an open meeting policy, should not make this value judgment rather than the legislature.¹⁰⁷ These decisions are peculiarly governmental in nature and have no counterpart in the private sector. It is no answer that there is a greater public interest in a governmental agency, in contrast to private groups, that is designed to serve the public, since that same public is free to require open meetings through the local ballot box. It may be argued, however, that the public constituency is larger than the local electorate. For example, nonresidents are affected by the ordinances of a chartered city. This

105. 27 OP. CAL. ATT'Y GEN. 123, 130-31 (1956). *But cf.* 27 OP. CAL. ATT'Y GEN. 197 (1956) (partisan primary and designation of political affiliation in a municipal election deemed a municipal affair).

106. *But see* Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L. J. 209 (1952) (both presenting arguments that open meeting should be encompassed within the freedom of speech and press).

In *Schweitzer v. Clerk*, 381 Mich. 485, 164 N.W.2d 35 (1969), *cert. denied*, 397 U.S. 906 (1970), the majority, in upholding a property ownership qualification for local public office, argued, "But the issue is whether the courts, from the depths of their urbanity can impose upon the people of a home-rule city a 'purer' form of democracy than they choose for themselves." The above argument might be paraphrased to ask whether the legislature should impose a purer form of democracy than the people in the home-rule city choose for themselves. The legislature exercises its value judgment without any constitutional underpinnings whereas the court, at least, determines whether the constitution dictates a given result.

107. *See* Note, *Open Meeting Statutes: The Press Fights for the "Right to Know,"* 75 HARV. L. REV. 1199, 1200-03 (1962), which discusses the advantages and disadvantages of an open meeting requirement.

argument, however, carries one too far. Granted that nonresidents may be affected by the police power and other measures, it does not follow that their interest in the method of legislating at the local level outweighs the interest of the local electorate in self-determination of this matter. If this degree of nonresident interest is sufficient to convert a matter into a state concern, it is arguable that the number of councilmen, the appointment or election of officers, and other matters must similarly be treated as statewide matters. In short, there would be no local autonomy. Nor is the general interest of the state in good local government sufficient for state supremacy. This and the previous arguments, if followed, would make one hard pressed to find any matter within the protective function of municipal affairs, which is as the dissenting view in *Bishop v. City of San Jose*¹⁰⁸ would have it. Moreover, the self-interest of the local electorate can generally be trusted to protect the interests of the nonresidents with respect to these matters. However, even if one were to assume that there is no redeeming value in closed meetings, and even if those in power in any given locality may manipulate the electorate to preserve secrecy, the cure ought to be through a constitutional amendment expressing a statewide imperative. It is not an answer to argue that the legislative requirement for open meetings is the expression of a statewide minimal standard. To adopt this line of argument is effectually to deny the constitutional allocation of power between the legislature and a chartered city, and, more fundamentally, the need for any constitutional provision inhibiting the legislature.

The statute dealing with public access to public writings, which is also expressly made applicable to a chartered city,¹⁰⁹ raises similar issues. The analysis of this issue, however, is more complicated than the analysis of the open meeting requirement. To the extent that access allows surveillance of official action, the considerations are identical to those involving the open meeting statute, and therefore the conclusion should be that this is a municipal affair. To the extent that the statute is relevant in defining the privilege of withholding information in a lawsuit, however, the interests involved in the lawsuit should determine the applicability of the statute. If the suit involves vindication of a right cognizable under the state law, general laws regarding evidentiary matters should govern. Thus, if a suit involves a claim by a private party arising from a tort by the city, general laws defining tort liability¹¹⁰ as well as evidentiary rules necessary to vindi-

108. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969); see text accompanying note 72 *supra*.

109. CAL. GOV'T CODE ANN. §§ 6250-60 (West Supp. 1972).

110. Of course, in the case of public entities, liability is governed by the govern-

cate the right should be applicable. On the other hand, if the asserted claim deals with a matter within the protective function of municipal affairs, a chartered city's restriction on access to information should be harmonized with the asserted claim. For example, suppose that a city ordinance denies public access to intraoffice writings. Suppose also that a city taxpayer commences a suit to enjoin the disposition of property by a city officer who purports to act under a charter provision permitting disposition of surplus property, and the taxpayer seeks access to the intraoffice writing pursuant to a general law.¹¹¹ The taxpayer's claim relates to a matter that is a municipal affair—that is, a decision to dispose of property—and the institution's determination that it is important to its process that intraoffice writings remain confidential should be respected in the litigation. Neither the disposition nor decisional process with respect to the matter has any significant externality. This exercise, of course, merely illustrates the theoretical limits and does not touch upon many hard questions in the gray area; neither does it speak to whether a city should close its meetings or withhold information from the public.¹¹²

There may be some intracorporate organizational or procedural matters so integrally a part of a subject of statewide concern that the intracorporate matters also become a matter of statewide concern. Assume the nonexistence of the constitutional provision that permits the legislature to prescribe the procedure for presentation, consideration, and enforcement of claims against cities.¹¹³ As is shown later, the tort liability of municipalities, including chartered cities, has been properly deemed a matter of state concern.¹¹⁴ An overriding state concern is also found in the time, method, and form of presentation of a claim against the city for municipal liability, since the state policy for loss redistribution can be obstructed by a burdensome claims procedure. An extremely short period within which a claim must be filed, a burdensome requirement regarding information that must be submitted on the claims, or the confusion that might result from differing claims procedures, can thwart state policy. As a matter of fact, the claims procedure, not only for torts but also for contracts, was deemed to be of such importance that a constitutional amendment

mental tort liability sections of the Government Code [CAL. GOV'T CODE ANN. §§ 810 *et seq.* (West 1966)].

111. The California Public Records Act provides a qualified exemption from disclosure for intra-agency memorandums. CAL. GOV'T CODE ANN. § 6254 (West Supp. 1972). We assume that the Act would require disclosure in this hypothetical.

112. It may be wiser for the city to adopt the general laws on disclosure of public records if its own disclosure rules have only limited effectiveness.

113. CAL. CONST. art. XI, § 12 (article XI, section 10 before the 1970 amendment).

114. See text accompanying note 152 *infra*.

was adopted giving the legislature authority to provide a uniform procedure throughout the state.¹¹⁵

It is now time to turn our attention to *City of Santa Clara v. Von Raesfeld*,¹¹⁶ the facts of which were set forth at the beginning of this Article.¹¹⁷ In giving supremacy to a state enabling act that was in conflict with the city charter, the court reasoned as follows:

As in the case of other municipal projects, however, sewer projects may transcend the boundaries of one or several municipalities. Such projects also may affect matters which are acknowledged to be of statewide concern; e.g., protection of navigable waters . . . , tide-lands . . . , and the public health In such circumstances the project "ceases to be a municipal affair and comes within the proper domain and regulation of the general laws of the state."¹¹⁸

The court relied upon *City of Pasadena v. Chamberlain*,¹¹⁹ in which it was stated that the impracticability of any one of the involved municipalities' acting independently to acquire water from distant sources argued conclusively that in achieving the result by the means provided in the legislative act in question, namely, a metropolitan water district, the municipalities were not engaged in a municipal affair.¹²⁰ The *Von Raesfeld* court then pointed out that the participation of the City of Santa Clara was essential to the financing of the joint sewage treatment facility serving several participating cities and that the facilities would protect the health of the San Francisco Bay Area inhabitants. Consequently, the bonding procedure was held not to be a municipal affair.

In evaluating this opinion, one should initially consider the sewage disposal problems of a single city, so that the analysis will not be encumbered by considerations of joint facilities involved in the *Von Raesfeld* case. Sewage disposal is an activity that can affect those living outside the city, and under the first proposed standard¹²¹ the state should be able to prohibit or regulate the externalities. Even under standard 2, a pervasive state policy is expressed in the pollution control statute¹²² made applicable to the private and public sectors; thus,

115. CAL. CONST. art. XI, § 12 (article XI, section 10 before the 1970 amendment). The legislature has provided a claims procedure [see CAL. GOV'T CODE ANN. § 900 *et seq.* (West 1966)], but has granted a certain degree of local discretion in establishing the procedure. *E.g.*, CAL. GOV'T CODE ANN. §§ 935, 935.2, 935.4 (West 1966).

116. 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970).

117. See text accompanying notes 13-18 *supra*.

118. 3 Cal. 3d at 246, 474 P.2d at 980, 90 Cal. Rptr. at 12.

119. 204 Cal. 653, 269 P. 630 (1928).

120. *Id.* at 660, 269 P. at 633.

121. See text preceding note 77 *supra*.

122. CAL. WATER CODE ANN. §§ 13050(c), 13260-61 (West Supp. 1971).

the general law should prevail. The fact that pollution might be subject to state control, however, does not necessarily mean that the method of financing pollution control facilities is likewise a matter of state concern. The city could finance the facility through general obligation bonds, revenue bonds, or some other method, each of which might command a different interest rate in the market, and if the city electorate has reserved to itself the determination of this issue, such allocation of decisionmaking within a chartered city should be respected as a municipal affair. No substantial externality or pervasive state policy is manifested in the method of financing. The state interest, if any, appears extremely minimal, even as expressed by the legislature. There was no indication in the *Von Raesfeld* case that the city was under orders to stop pollution, and even if it were, the statute allowing the city to sell the bonds was merely enabling; the city council was still free to submit to the electorate the issuance of revenue bonds at a higher rate of interest or to consider general obligation bonds or some other form of financing.¹²³ If the city were causing serious health problems in the area because of a refusal to abide by a state order to take corrective measures, the state interest might prevail even to the extent of permitting the state to build a treatment facility and imposing the cost upon the city.¹²⁴ But an enabling act on financing cannot be construed to be such an imperative.

Neither does an overriding state interest arise because the funding was for a facility to be built jointly with other entities. The court in *Von Raesfeld* emphasized the joint undertaking, but the court's reliance upon *Chamberlain* was unfortunate; the statute involved in that case permitted the formation of a metropolitan water district that would include a municipality within its water service area only if the electorate in that municipality approved inclusion. Thus, the objection to intrusion upon municipal affairs in that case was the very narrow one that state

123. One might seriously question whether the legislature intended to include chartered cities within the purview of these enabling acts. A "local agency" to which the provisions in question are made applicable is defined to include a "city" without any further qualification. CAL. GOV'T CODE ANN. § 53540 (West 1966). This should be compared with section 54951 [*id.* § 54951]—the open meeting requirement—which defines a "local agency" to include a "city, whether general law or chartered." Moreover, if these enabling provisions are deemed to supersede charter restrictions in given situations, one should note that the California Government Code is replete with authorizing legislation where no distinction is made between a general law and a chartered city. *E.g., id.* §§ 45000, 45001, 53601, 53631.

124. Water Code section 13301 [CAL. WATER CODE ANN. § 13301 (West Supp. 1971)] permits the regional board to issue a cease and desist order to "restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order." Thus, the board should be able to prohibit additional sewer connections to a municipal sewer system of any offending city.

legislation cannot confer upon another entity the power to initiate the formation of a district and to impose the duty of holding an election in a chartered city. Once it is assumed that the creation and function of a water district that encompasses an area greater than a single municipality is a state affair, the procedure for its formation, designed to protect a municipality, can hardly be a ground for complaint.

The court's citation of *Wilson v. City of San Bernardino*¹²⁵ was closer to the mark. In *Wilson*, the territory within a chartered city was included in a municipal water district upon majority approval of the voters in the territory of the proposed district; there was no separate local determination for the city electorate as in *Chamberlain*. The argument that this was an intrusion into the municipal affairs of the city was rejected by the court. If, therefore, the legislature can authorize the formation of a special district encompassing incorporated areas with relationships between the district and its electorate different from those between a chartered city and its electorate, one might argue that the legislature should also be able to change the relationships between the chartered city and its electorate to deal with the same problem for which a special district could validly have been created.

In order to evaluate this argument, it is necessary to understand the reasons for permitting the creation of a special district that includes territory within and without a chartered city. The reasons appear to be that such a district may be able to provide services that might otherwise be difficult or impossible on a fragmented basis or that a special district benefits the entire territory because of economy of scale.¹²⁶ In the latter case, it appears that the problem is removed from the municipal to the state level because inaction or refusal to cooperate by one or more entities would impose extraterritorial opportunity costs. It is to be noted, however, that these costs are different from other types of extraterritorial costs. Where city *A* burns refuse

125. 186 Cal. App. 2d 603, 9 Cal. Rptr. 431 (4th Dist. 1960). The *Von Raesfeld* court cites this case, but it is difficult to determine whether it is cited for the proposition that projects transcending municipal boundaries are matters of state concern or that projects affecting state concerns, such as public health, are also to be similarly characterized.

126. *Id.* See also *City of Sacramento v. Southgate Recreation & Park Dist.*, 230 Cal. App. 2d 916, 41 Cal. Rptr. 452 (3d Dist. 1964) (annexation of portion of park district by a chartered city does not oust the district from control over the annexed territory; district function in the city does not violate municipal affairs because the scope of district project transcends municipal boundaries); *Gadd v. McGuire*, 69 Cal. App. 347, 231 P. 754 (2d Dist. 1924) (storm sewer crossing municipal boundary not a municipal affair; however, no conflict was involved because the city council, pursuant to statute, established an assessment district consisting of territory within and without the city; moreover, consent of each municipality or county in which improvement was to be made was required by statute); for further discussion of this case, see note 128 *infra*.

within its territorial limits and the smoke drifts into city *B* to the discomfort and annoyance of the inhabitants of city *B*, city *A* has cast extraterritorial costs reflected in decreased property values and adverse health conditions in city *B*.¹²⁷ Suppose, however, the issue concerns the construction of a sewage disposal plant. If a joint sewage plant to service both city *A* and city *B* would be much cheaper than the total costs of separate plants to service each city and if city *A* refuses to cooperate, city *A* has made it more expensive for city *B* to dispose of city *B*'s sewage. Rather than inflicting a direct cost, as in the smoke situation, city *A* by refusing to participate in the joint project has imposed extraterritorial opportunity costs, but they are costs nevertheless. Should the legislature be able to compel city *A* to cooperate or is its only alternative the creation of a special district to build a facility to service city *A* and city *B*? Can the legislature compel a chartered city to extend its services beyond city boundaries?

It can be argued that there is a distinction between creating a special district and ordering a chartered city to participate in regional solutions so as to realize economies of scale. The inhabitants of a chartered city are inhabitants of the state as well, and local autonomy does not inhibit the state from creating new relationships for those inhabitants with another governmental entity that has regional scope, just as the state may create new relationships between itself and its inhabitants. A special district creates new sets of relationships rather than displacing the existing legal relationships between a chartered city and its inhabitants, and the voters of a chartered city are arguably entitled to the integrity of the institution as they have shaped it.¹²⁸ On the other hand, if the legislature cannot act through a chartered

127. For the purposes of this discussion it is not necessary to determine which city should be "responsible" for the cost—the city that burns the refuse or the city that is the recipient of the pollution.

128. Numerous cases have rejected the argument that inclusion of city territory within a district encompassing incorporated and unincorporated area would violate the constitutional provision against legislative tax levy for municipal purpose found in article XIII, section 37 [CAL. CONST. art. XIII, § 37 (article XI, section 12 before the 1970 amendment)]. *E.g.*, *Pixley v. Saunders*, 168 Cal. 152, 141 P. 815 (1914). *Gadd v. McGuire*, 69 Cal. App. 347, 231 P. 754 (2d Dist. 1924), was a case, however, where a chartered city took advantage of a statute to form a storm sewer improvement district that included territory within and without the city. The primary issue was whether the city had the authority. The court had no difficulty in finding the authorization, because the charter expressly conferred upon the city the additional powers granted by the legislature. In the alternative ground, however, the court deemed the construction of sewers transcending the municipal boundary to be a state affair. Whether the court would have permitted the city to act under the statute even if there were contrary charter provisions was not answered, of course. With respect to another issue, the court spoke in terms of the local entity as an agent of the state in making these improvements. Whether the electorate of the city can determine that the city may not be an "agent" where not compelled to do so is the issue in question.

city, the consequence may be a proliferation of governmental entities. When the rival considerations are so balanced, a decision is difficult; but where economies of scale are the only extraterritorial considerations, local autonomy should probably be favored, and reliance should be on the mutual self-interest of the cities in a cooperative solution or, alternatively, a special district should be created by the legislature. Whether or not one agrees with this analysis, one should note that in the *Von Raesfeld* case the legislature had merely authorized the issuance of revenue bonds by the city council of a chartered city without voter approval. The legislature evidently did not perceive any serious extraterritorial problem necessitating compulsion. At a minimum the electorate ought to be able to control the options in the means of financing available to the city council.

A case that perhaps is relevant but was not cited by the *Von Raesfeld* court is *City of Oakland v. Williams*.¹²⁹ In the *Williams* case, the City of Oakland had, under the Joint Exercise of Powers Act,¹³⁰ entered into an agreement with several other cities to have a survey of sewage problems conducted by the City of Berkeley. It was argued that the agreement violated the Oakland charter, which required a city contract to be let by bid. The court rejected this objection stating, "If the conceivably conflicting charter provisions of all the contracting cities were held to be applicable and relevant, the effect would be to vitiate the statute authorizing joint and cooperative action." Does the court mean that a statute permitting joint action by cities can authorize the city council of a chartered city to act in violation of the charter restrictions? The language quoted above from the *Williams* case is, however, susceptible of a different interpretation. The court might have meant only that a charter provision requiring

129. 15 Cal. 2d 542, 103 P.2d 168 (1940).

130. CAL. GOV'T CODE ANN. §§6500-14 (West 1966). The Joint Exercise of Powers Act permits the contracting parties to create a separate entity to exercise joint powers. *Id.* § 6507. "Such power is subject to the restrictions upon the manner of exercising the power of one of the contracting parties, which party shall be designated by the agreement." *Id.* § 6509. Several interesting issues arise from these provisions. First, one may question whether a chartered city must have legislative authority to enter into a joint powers agreement in which no new entity is created. Second, making the exercise of the power by a separate entity created by the joint agreement subject to the restrictions upon the manner of exercising the power of one of the contracting parties does not necessarily mean that charter restrictions may be avoided with impunity. Where a separate entity is created, there are constructional problems as to whether the governing body of a chartered city is authorized to enter into such agreement and to agree to the manner of exercise of power different from that provided in the charter. If the charter explicitly provides that any such agreement shall be subject to a referendum, will a court hold that the governing body may ignore the charter restrictions because of the contrary authority under the Joint Exercise of Powers Act? See *id.* § 6502 (authority granted to governing bodies to enter into the agreement). Of course, this is another facet of the issue decided in *Von Raesfeld*.

the letting of contract by bid was not intended to apply where compliance was impossible or served no useful purpose.¹³¹ The *Von Raesfeld* case illustrates the ease with which questionable decisions can be reached by following a syllogistic reasoning process from an overly broad premise.

B. *The Municipality and Its Officers and Employees*

1. *Prior Decisional Law*

The salary,¹³² pension,¹³³ and discipline¹³⁴ of municipal officers and employees have been said to fall within municipal affairs. On the other hand, the general laws have prevailed in cases involving workmen's compensation,¹³⁵ employee labor relationships with the city,¹³⁶ employment of veterans by a city,¹³⁷ garnishment of employee wages,¹³⁸ and employment of aliens on public projects.¹³⁹

2. *Discussion*

While the constitution¹⁴⁰ explicitly gives "plenary authority" to a city to provide in its charter for many personnel matters, such as the method by which, the times at which, and the terms for which its officers and employees are to be elected or appointed, as well as the com-

131. There is ample support for this conclusion. See, e.g., *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 291 P. 839 (1930); *Hodgeman v. City of San Diego*, 53 Cal. App. 2d 610, 128 P.2d 412 (4th Dist. 1942).

132. *Popper v. Broderick*, 123 Cal. 456, 56 P. 53 (1899).

133. *Cohn v. Henderson*, 19 Cal. App. 89, 124 P. 1037 (1st Dist. 1912) (ambiguous as to precise ground).

134. *Shewbridge v. Police Comm'n*, 64 Cal. App. 2d 787, 149 P.2d 429 (1st Dist. 1944).

135. *Healy v. Industrial Acc. Comm'n*, 41 Cal. 2d 118, 258 P.2d 1 (1953) (noting state concern and also relying upon article XX, section 21 [CAL. CONST. art. XX, § 21] which confers authority to establish a workmen's compensation system upon the legislature but which makes no specific reference to local public entities).

136. *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

137. *Cunningham v. Hart*, 80 Cal. App. 2d 902, 183 P.2d 75 (1st Dist. 1947) (relying upon article XX, section 3.5 [CAL. CONST. art. XX, § 3.5 (now repealed)], which authorized the legislature to provide for reinstatement of veterans in public employment, including local public entities, and upon the state concern concept).

138. See *Wilson v. Walters*, 19 Cal. 2d 111, 119 P.2d 340 (1941). Cf. *Department of Water & Power v. Inyo Chem. Co.*, 16 Cal. 2d 744, 108 P.2d 410 (1940).

139. *City of Pasadena v. Charleville*, 215 Cal. 384, 10 P.2d 745 (1932). Note that public entities in California can no longer establish a flat prohibition against alien employment in public works. *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

140. CAL. CONST. art. XI, § 5(b) (article XI, section 8½ before the 1970 amendment). For a history of this provision, see A. VAN ALSTYNE, BACKGROUND STUDY RELATING TO ARTICLE XI: LOCAL GOVERNMENT 278-81 (prepared for the California Constitution Revision Commission; undated).

pensation, qualification, tenure, and removal of deputies, clerks, and other employees, what about matters that are not dealt with? Why is workmen's compensation or employee labor organization a state matter? The answer lies in the existence of a pervasive state policy applicable to the private and public sectors with respect to these matters. On the other hand, a statute that requires prevailing wages to be paid by contractors on public projects or a statute that prohibits the employment of aliens by public entities or on public projects should not apply to a chartered city. Such statutes cover only the public sector and lack a pervasive state policy. Had the criteria suggested here been applied in *City of Pasadena v. Charleville*,¹⁴¹ the court would not have reached inconsistent results—namely, that the state requirement of paying prevailing wages on public projects did not apply to a chartered city but the prohibition against alien employment did.

One may ask why matters relating to employee labor representation do not fall within the category of institutional process and thus be treated as a municipal affair even if there were a pervasive state policy. The difference between those matters previously discussed under institutional structure and process and employee labor representation is that in the former each voter has an equal stake in the matter with equal vote to affect decisionmaking, whereas in the latter the city employees do not have a similar power to affect their personal interests.

Questions of conflict of interest, dual officeholding, and similar matters dealing with institutional integrity ought to be left for local determination, since these are institutional management issues with no significant externalities.¹⁴²

C. Municipal Services and Improvements

1. Prior Decisional Law

Many of the local autonomy issues dealing with municipal services and improvements have involved procedural matters, and they have been discussed under the category of intracorporate structure and process. Various other matters dealing with local services and improvements are treated here.

In an interesting case where state policy and municipal interest

141. 215 Cal. 384, 10 P.2d 745 (1932).

142. These questions fall within standard 3 dealing with institutional organization and process and could have been discussed in the previous section except that conflict of interests does impinge upon the personal interests of the officer. Even if there were a pervasive state policy on conflict of interests, this should still be a matter for local determination since the state policy is directed towards maintaining institutional integrity rather than promoting the welfare of the officer.

conflicted, the court held that a milk seller was not exempt from the state requirements for price posting prior to sale even though the sale was made to a chartered city through a contract let by competitive bidding. The decision thereby effectively eliminated competitive bids.¹⁴³ The state interest in maintaining minimum prices prevailed over the city's desire to purchase milk at the lowest possible price.

The duration of a private lien on private property arising from public street improvement work was deemed a municipal affair by the supreme court.¹⁴⁴ On the other hand, although the court was at one time of the opinion that a street franchise to a telephone company was a municipal matter,¹⁴⁵ this view no longer prevails.¹⁴⁶ And to the extent that the constitution has delegated control over public utilities to the Public Utilities Commission, a chartered city is ousted from control over them even with respect to its streets¹⁴⁷ or its operation of common carriers.¹⁴⁸

That the municipality's responsibility for injury to the person and property of others is governed wholly by state law has been determined by a long line of cases, and, concomitant with this state supremacy, the state prescribed claims procedure has prevailed.¹⁴⁹ And a chartered city cannot provide its own recording system to protect its interest.¹⁵⁰ Finally, although the courts have frequently stated that matters pertaining to municipal services are primarily of local concern as a premise to the conclusion that contracts or funding relating to municipal services are to be governed by local provisions, a chartered city is

143. *Dairy Belle Farms v. Brock*, 97 Cal. App. 2d 146, 217 P.2d 704 (1st Dist. 1950).

144. *Raisch v. Myers*, 27 Cal. 2d 773, 167 P.2d 198 (1946).

145. *Sunset Tel. & Tel. Co. v. City of Pasadena*, 161 Cal. 265, 118 P. 796 (1911).

146. *Pacific Tel. & Tel. Co. v. City and County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959).

147. *Compare City of San Mateo v. Railroad Comm'n*, 9 Cal. 2d 1, 68 P.2 713 (1937) with *Civic Center Ass'n v. Railroad Comm'n*, 175 Cal. 441, 166 P. 351 (1917) (both cases involving regulatory measures but also the use of city streets).

148. *Cf. Los Angeles Met. Transit Auth. v. Public Util. Comm'n*, 59 Cal. 2d 863, 382 P.2d 583, 31 Cal. Rptr. 463 (1963) (legislature conferring jurisdiction to PUC with respect to "safety rules and other regulations governing the operation" of public transportation service of the authority).

149. *Eastlick v. City of Los Angeles*, 29 Cal. 2d 661, 177 P.2d 558 (1947); *Helbach v. City of Long Beach*, 50 Cal. App. 2d 242, 123 P.2d 62 (2d Dist. 1942); *Wilkes v. City and County of San Francisco*, 44 Cal. App. 2d 393, 112 P.2d 759 (1st Dist. 1941); *Lossnan v. City of Stockton*, 6 Cal. App. 2d 324, 44 P.2d 397 (3d Dist. 1935); *see Rafferty v. City of Marysville*, 207 Cal. 657, 280 P. 118 (1929); *but cf. Armas v. City of Oakland*, 135 Cal. App. 411, 27 P.2d 666 (1st Dist. 1933) (state traffic regulations do not apply to emergency vehicles of a chartered city because operation of a municipal fire department is a municipal affair) (alternative holding).

150. *See Cralle v. City of Eureka*, 136 Cal. App. 2d 808, 289 P.2d 509 (3d Dist. 1955).

not insulated from provision of those services by a special district that encompasses a service area within and without the city.¹⁵¹

2. Discussion

Municipal tort liability is an obvious matter of state supremacy. This is justified by the loss allocation policies of the state, applicable to the public and private sectors alike. The proposed standard does not insist that identical statutory provisions be applicable to the public and private sectors. The liability scheme in the public sector may have to depart from private tort law because differing interests are involved.¹⁵² There are activities that are exclusively or predominantly performed by public entities, such as maintenance of penal institutions or sewage disposal, but it would be a mistake to say that the legislature cannot provide for their standard of operation because there is no counterpart in the private sector. If the legislature is to fashion a scheme of compensation for a party who has suffered loss to his person or property, it must take into account the degree to which there may be interference with institutional operation, the expertise of decisionmakers, judgmental decisions, and so forth. This is information available to the legislature in elaborating upon the basic consideration of loss allocation, just as ultrahazardous activity in the private sector may justify departure from the usual manner of loss allocation.

Because the basic policy of municipal responsibility for a tort is a matter of state regulation, it likewise follows that the claims procedure is also a statewide matter. An unduly short claims presentation period, differing time periods, or differing informational requirements can lead to confusion, which might effectively abort the remedial policy of the state.

The same is true with respect to contract matters. There are statewide policies relating to various aspects of contract formation, such as performance and cancellation, which are designed to facilitate efficiency in consensual relationships. To the extent that the state has made them applicable to both the private and public sectors, the state policies should govern contractual relationships of a chartered city.

151. See text accompanying notes 125-28 *supra*.

152. Generally, the governmental tort liability act imposes no greater liability upon a public entity than is imposed upon a private person under similar circumstances. This statement does not encompass the scheme whereby the public entity must defend its employees and be responsible for payment of judgment against the employees in certain cases. See CAL. GOV'T CODE ANN. §§ 825-25.6 (West 1966); Van Alstyne, *A Study Relating to Sovereign Immunity*, in 5 CALIFORNIA LAW REVISION COMMISSION, STATE OF CALIFORNIA, REPORTS, RECOMMENDATIONS AND STUDIES 1, 267-83 (1963).

If state law prohibits forfeitures, there is no rational basis for exempting the contracts of a chartered city.¹⁵³ On the other hand, it should be noted that in *Raisch v. Myers*¹⁵⁴ the court held that state provisions limiting the period within which a lien securing street improvement bonds could be enforced did not apply where there was a contrary ordinance. The court, although cryptic, must have reasoned that improvement of city streets was a municipal affair, and the method of financing it was to be characterized similarly.¹⁵⁵ Thus, a chartered city was able to determine the period during which a lien to secure the assessment would be valid. Although the lien was created to protect the private contractor who had made the improvements, the lien was an integral part of the assessment method of financing. Viewed in this fashion, one might agree with the court's result. If, on the other hand, one approaches the problem in terms of alienability of property and the legislature is deemed to have provided a pervasive policy that liens, whether created from private or public transactions, should be of limited duration, one might opt for state supremacy.

Finally, since there is neither a pervasive state policy regarding what contracts must be let by competitive bidding nor a substantial externality with respect to local decision on this matter, it would seem that this is a municipal affair.

D. Police Power Measures

1. Prior Decisional Law

Before a review of the cases in this category is undertaken, it is necessary to determine whether the municipal affairs concept in its protective function encompasses regulatory measures—that is, ordinances that provide a standard of conduct for those within the jurisdiction of the city, that are intended for the protection of health, safety, and morals, and that might be enforced by penal sanctions or by injunction.

153. In *M.F. Kemper Constr. Co. v. City of Los Angeles*, 37 Cal. 2d 696, 235 P.2d 7 (1951), a provision in the notice inviting bids stated that the bond submitted with the bid would be forfeited if the successful bidder did not enter into a contract. The court, on equitable grounds, refused to construe the provision as permitting a forfeiture when there was a clerical mistake in submitting a bid.

154. 27 Cal. 2d 773, 167 P.2d 198 (1946).

155. The court did not fully appreciate the protective function of municipal affairs. If the lien subsisted because street improvement was a municipal affair, the court was inconsistent in applying the state statute of limitations to the bonds while holding that the ordinance applied to the lien of the underlying assessment. It is immaterial that there was an ordinance providing for the continuance of the lien until the assessment was paid while there apparently was no comparable ordinance with respect to the bond. If a matter is a municipal affair in its protective function, it remains so regardless of whether there is any express charter or ordinance provision thereon. See text accompanying note 10 *supra*.

The problem arises because since the adoption of the constitution in 1879 there has been a constitutional grant of power to all cities and counties to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."¹⁵⁶ Whatever may be the scope of this constitutional delegation,¹⁵⁷ it is clear that the counties and cities were authorized to adopt certain police power measures and that such measures were valid only if they did not conflict with the general laws. The issue is whether the subsequent amendments to the constitution protecting the chartered cities from legislative interference with municipal affairs was intended to modify the earlier delegation of the police power. This constructional issue should be carefully divorced from the issue whether any given police power measure is a municipal affair, since this latter question does not arise if the amendments of 1896 and 1914 immunizing chartered cities from general laws with respect to municipal affairs were not intended to expand the police power grant for the chartered cities.

The history leading up to the amendment of 1896 and immediately thereafter shows the ambiguity. If the amendment was designed to reverse the judicial construction of the pre-1896 provision, which was that any general law, even one applicable only to municipalities, superseded charter provisions,¹⁵⁸ one might forcefully argue that the municipal affairs amendment was not intended to affect the police power provisions in article XI, section 11, since the original provisions of the 1879 constitution that had authorized a charter for a city of a given size had treated the police power measures separately in article XI, section 11.

What is surprising is that there seems to be no case facing this issue. Professor William Carey Jones, writing in 1913 argued:

There is ever present in the minds of the lawyers of the State, especially of such as are concerned in the drafting of charters, the question whether a police or health regulation by being explicitly provided for in the charter may not be taken over into the category of "municipal affairs" and so placed beyond the possibility of being superseded by general laws. Cases which have been adverted to already seem to lend countenance to such a view. If such is not a fact, then no police or health measures can be municipal affairs—a result which seems absurd.¹⁵⁹

156. CAL. CONST. art. XI, § 7 (article XI, section 11 until 1970 amendment).

157. See Peppin, *Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution*, 32 CALIF. L. REV. 341 (1944), for a comprehensive discussion of local police power granted by the constitution.

158. See text accompanying notes 28-37 *supra*.

159. Jones, "Municipal Affairs" in the *California Constitution*, 1 CALIF. L. REV.

Just why placing police power measures in the ultimate control of the legislature would be absurd was not explained by Professor Jones.

Much later, Professor John C. Peppin, writing in 1944, stated that an exception to the rule that a general law would supersede local police power measures under article XI, section 11 would be those measures respecting municipal affairs, but he noted that "this exception has so far been declared by dicta only."¹⁶⁰ As Professor Peppin has indicated, many cases have considered the assertion by a chartered city that its police power measure prevailed over a state regulation, but the courts have generally rejected the contention on the ground that the particular subject matter of regulation was of state concern, assuming without discussion that this was a viable issue.¹⁶¹ Recently the supreme court, in *In re Hubbard*,¹⁶² accepted the proposition that the police power measure in question, an ordinance prohibiting certain types of gambling within the city, was a municipal matter. However, even this contention is dictum, because the court had initially concluded that there was no conflict between the state regulation and the local ordinance, and since there was no conflict, the local ordinance was valid even under article XI, section 11. There was no need to determine the validity of the local ordinance under the municipal affairs concept. Moreover, as in every other decision, the court did not discuss whether the municipal affairs amendment cast an exception to article XI, section 11; the court assumed that it did.

There have been, however, two court of appeal decisions sustaining local regulatory measures that conflicted with the general laws. In one very early case, the court had to resolve the applicability of a statute providing for exclusive state licensing of a business that supplied private guards. It was held that licensing of private guards was a municipal affair because the guards had to work harmoniously with the

132, 144 (1913). Professor Jones argued further that sections 6 and 11 should be read together so that all municipal matters, including regulatory measures, would be protected by section 6, while section 11 would go further and authorize municipalities to exercise police powers in matters that may be of state concern but where the state has not acted. *Id.* at 145.

Even if Professor Jones were correct, however, he does not indicate what health and police measures are municipal affairs.

160. Peppin, *supra* note 157, at 371.

161. *Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942); *Ex parte Daniels*, 183 Cal. 636, 192 P. 442 (1920); *Horwith v. City of Fresno*, 74 Cal. App. 2d 443, 168 P.2d 767 (4th Dist. 1946). In *City of San Mateo v. Railroad Comm'n*, 9 Cal. 2d 1, 68 P.2d 713 (1937), the court apparently concluded that there are police power measures that would be municipal affairs. On the other hand, *May v. Craig*, 13 Cal. App. 368, 109 P. 842 (2d Dist. 1910), seems to have held that all police power measures of a chartered city were subject to the general laws.

162. 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

municipal police force.¹⁶³ In another case, the state had licensed boxing while a chartered city had prohibited it. The court, without inquiring whether there was a conflict between the two measures, held that regulation of boxing was a municipal affair because different localities may have differing views about boxing.¹⁶⁴

2. Discussion

Since the legislative history is unclear and it has been assumed by default that there may be regulatory measures of private conduct that are matters of local autonomy, the issue emerges as to which regulatory measures are municipal affairs. Applying the standards proposed here, the answer is that there is no room for local autonomy in the event of a conflict between state and local enactments since general state regulatory measures applicable to the private sector embody pervasive state policies. The legislature in its concern for the people has promulgated behavioral standards for them, and it cannot be said that a chartered city has a greater concern. This means that the legislature must decide whether its regulatory measures should be uniform throughout the state or whether there are sufficient differences in local conditions that local entities ought to deal with them.¹⁶⁵ The court will need to determine only whether a local regulation is in conflict with the general laws, although this is an issue that is not without its own difficulty.¹⁶⁶ In making that determination, a court should consider various policy factors,¹⁶⁷ but where the legislature has spoken clearly that there shall be no additional regulation, the court need not be further concerned with the validity of a regulation adopted by a chartered city as a municipal affair.

One might question whether the conclusion offered here in the abstract should be extended even to land use regulations. The answer is in the affirmative.¹⁶⁸ While it might not be a wise legislative policy

163. *Ex parte Hitchcock*, 34 Cal. App. 111, 166 P. 849 (1st Dist. 1917).

164. *Porter v. City of Santa Barbara*, 140 Cal. App. 130, 35 P.2d 207 (2d Dist. 1934).

165. The Ohio constitution distinguishes between complete local autonomy in the cities with respect to nonregulatory activities and of limited autonomy over regulatory measures; local regulatory measures are valid only insofar as they do not conflict with general laws. OHIO CONST. art. XVIII, § 3. See Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L. J. 18, 25 (1948), for a discussion of this section.

166. The court has not distinguished itself in formulating standards for deciding the issue of implied preemption by the legislature. Compare *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962) with *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

167. See generally GOVERNOR'S COMMISSION ON THE LAW OF PREEMPTION, Report to the Governor, the President of the Senate, and the Speaker of the Assembly (undated report on file with the author) for a suggested standard.

168. See *May v. Craig*, 13 Cal. App. 368, 109 P. 842 (2d Dist. 1910), in which the

to engage in precise zoning generally,¹⁶⁹ there may be instances in which the legislature is impelled to establish new bodies to regulate land use to serve state interests, such as regulating to protect scenic and ecological values.¹⁷⁰ At any rate, this is a matter of legislative judgment, and if the legislature so dictates, a city would be bound.

E. Taxes

1. Prior Decisional Law

Taxation is one of the problems most difficult of resolution because of the numerous conflicting interests between the chartered cities and the state. The holding of *Ex parte Braun*,¹⁷¹ decided soon after the 1896 amendment, that a statutory prohibition against local license tax did not prevail over a contrary charter provision, remained in good standing for many decades, but the recent case of *Century Plaza Hotel Co. v. City of Los Angeles*¹⁷² has begun a new ball game.

court sustained a general law building regulation that conflicted with chartered city ordinance. The court apparently reasoned that all local police power measures, even of chartered cities, were subject to the general laws.

Cases such as *Brougher v. Board of Pub. Works*, 205 Cal. 426, 271 P. 487 (1928), *Lima v. Woodruff*, 107 Cal. App. 285, 290 P. 480 (1st Dist. 1930) (cases holding that the manner of enacting a zoning ordinance is a municipal affair), and *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 310, 144 P.2d 4, 8-9 (1943) (procedure for issuing building permits is a municipal affair) (dictum), are not authority for the proposition that land use regulation itself is a municipal affair in its protective function. Although the broad statement that "zoning is a 'municipal affair' over which a charter city has supreme control and which lies beyond the scope of legislative action" is found in *Fletcher v. Porter*, 203 Cal. App. 2d 313, 324, 21 Cal. Rptr. 452, 458 (1st Dist. 1962), the issue in that case was whether an ordinance requiring a planning commission to recommend a general plan to the city council and freezing existing zoning until such time was subject to the initiative power. Although no contrary general law was mentioned, the court, in distinguishing many cases, dealt with the municipal affair issue and concluded that initiative power does so extend. This case, of course, deals with the method of enacting an ordinance.

169. The constitutional prohibition against special laws [CAL. CONST. art. IV, § 16 (article IV, section 25 until the 1966 amendment)] should not prevent the enactment of a precise zoning law inasmuch as zoning districts cannot be established by general laws.

170. The California Tahoe Regional Planning Agency has been created pursuant to a compact with Nevada in order to regulate land use in the Lake Tahoe basin. CAL. GOV'T CODE ANN. §§ 67000-130 (West Supp. 1972). The governing body includes members appointed by two counties and a city. *Id.* § 67041. The validity of the agency has been sustained. *People ex rel. Younger v. County of El Dorado*, 5 Cal. 3d 480, 487 P.2d 1193, 96 Cal. Rptr. 553 (1971).

The San Francisco Bay Conservation and Development Commission is another legislative creation; it generally regulates bay filling. CAL. GOV'T CODE ANN. §§ 66601-61 (West Supp. 1972).

171. 141 Cal. 204, 74 P. 780 (1903). See text accompanying notes 21-22 *supra* for a more extended discussion of this case.

172. 7 Cal. App. 3d 616, 87 Cal. Rptr. 166 (2d Dist. 1970).

In the *Century Plaza* case, the city imposed a 5 percent excise tax on the purchase price of alcoholic beverages sold by a retailer for consumption on the premises. The legislature had declared, however, that the state had preempted the field of sales and use taxes by the enactment of the state Sales and Use Tax Law¹⁷³ and the Bradley-Burns Uniform Local Sales and Use Tax Law¹⁷⁴ and that the tax imposed under the Alcoholic Beverage Tax Law¹⁷⁵ was to be in lieu of all county, municipal, and district taxes on sales of alcoholic beverages. The court held that a municipal sales tax was not a "purely municipal affair" after considering the numerous reasons offered by the legislature for preemption and also noting that regulation and taxation of alcoholic beverages were intertwined.¹⁷⁶

2. Discussion

The *Century Plaza* case merits careful consideration since it will undoubtedly be urged as a precedent when the validity of the legislature's preemption of income tax¹⁷⁷ is litigated. The first reason given by

173. CAL. REV. & TAX CODE ANN. §§ 6001-7176 (West 1970).

174. *Id.* §§ 7200-09. The Uniform Local Sales and Use Tax Law provides a scheme by which cities and counties may enter into a contract with the state to have the latter collect the taxes on their behalf. A county must give a credit against its own tax to the extent that a city has imposed a tax. The authorized rate is $1\frac{1}{4}$ percent of the gross receipts for a county and a maximum of 1 percent for the city. Thus, the tax cannot exceed $1\frac{1}{4}$ percent in an incorporated area even if the city and the county have adopted the uniform scheme. Moreover, the statute prevents double taxation—that is, both a sales tax and a use tax—on the same transaction. Thus, although the scheme is voluntary, chartered cities are coerced to adopt the scheme. Otherwise, the retailers in a city having its own gross receipts tax would be required to pay the city and the county taxes and the purchasers from another city can be subjected to a use tax in the other city. This scheme was probably devised because the legislature had thought, at the time of its enactment, that it could not preempt a chartered city with respect to tax matters. The Uniform Local Sales and Use Tax Law was adopted in 1955 [ch. 1311, § 1, [1955] Cal. Stat. 2381], but preemption was not declared until 1968 [ch. 1265, § 2, [1968] Cal. Stat. 2388-89].

175. CAL. REV. & TAX CODE ANN. § 32010 (West 1970).

176. 7 Cal. App. 3d at 625, 87 Cal. Rptr. at 172.

177. CAL. REV. & TAX CODE ANN. § 17041.5 (West 1970). This section prohibits the imposition of "any tax upon the income, or any part thereof, of any person, resident or nonresident" even by a chartered city. The attorney general of California has ruled that this section prohibits a municipal occupation tax upon persons employed within the taxing city based upon a percentage of the salary or other forms of compensation. 53 OP. CAL. ATT'Y GEN. 270 (1970). This conclusion appears erroneous for several reasons. First, Government Code section 50026 [CAL. GOV'T CODE ANN. § 50026 (West Supp. 1972)] prohibits a privilege tax on earning a livelihood by an employee or any other tax measured by his earnings "when such employee is not a resident of the taxing jurisdiction, unless exactly the same tax . . . is imposed on the earnings of all residents of the taxing jurisdiction who are employed therein." Although this section states that it does not authorize a tax prohibited by Revenue and Taxation Code section 17041.5, it seems

the legislature for preemption of sales and use taxes is the need of the state to rely upon these taxes as the chief source of state revenue, since an increase in the income tax, when combined with the federal tax, would make that tax prohibitive, and imposition of a general property tax by the state would cause "consternation among the property owners."¹⁷⁸ The argument of the legislature appears to be that an increase in the local sales and use taxes might prejudice state collection. The state will be prejudiced, however, only if the taxpayers object to the combined high rate, making an increase in the state rate difficult, or if they bring pressure upon the legislature to lower the state rate. The possibility of such taxpayer objection against the state tax should not convert the matter into a state affair, for whether resistance will occur is highly speculative and, even if there should be some, it might just as easily be against the local tax by the local taxpayers. That the legislators might not like the political pressure is not sufficient reason to characterize the local taxes as a state affair.

The second reason given for state preemption is the difficulty of compliance with different local taxes faced by retailers, and this is more substantial. Undoubtedly, a retailer engaged in a multicity business will have an increase in his cost of doing business if he must comply with differing tax provisions of numerous cities as compared to a uniform provision among the taxing cities. The proper inquiry, however, is not whether it would be more economical were there uniform provisions but whether the burden is any different from that faced by a person doing wholly intracity business. For example, a city tax measured by gross receipts imposes the same burden upon a person who does business entirely within that city and another who does business in that city as well as others but whose transactions do not have intercity contacts. The burden of hiring extra accountants to prepare different tax returns is no different in kind from the burden of paying water bills or sewage charges to many cities. On the other hand, if a multicity business is taxed upon intercity transactions, the burden can be different. If the cities having jurisdiction over inter-

implicitly to confer authority to impose a tax measured by earnings of an employee if there is no discrimination between resident and nonresident employees. The attorney general has completely ignored this section. Second, the prohibition against a local income tax appears in the part dealing with state personal net income tax, and the part is entitled Personal Income Tax Law." CAL. REV. & TAX CODE ANN. § 17001 (West 1970). The inference is strong that the legislature was referring to a net income rather than a gross income tax in section 17041.5.

See Comment, *The Municipal Income Tax and State Preemption in California*, 11 SANTA CLARA LAWYER 343 (1971), for an extended discussion of the validity of section 17041.5.

178. Ch. 1265, § 2, [1968] Cal. Stat. 2388, quoted in 7 Cal. App. 3d at 624 n.6, 87 Cal. Rptr. at 171 n.6.

city transactions should have differing apportionment formulas, it is possible that more than 100 percent of the gross receipts can be used as the cumulative measure of the multiple city taxes.¹⁷⁹ Or if a multicity business is required to pay a sales tax at the place of sale and collect another consumption tax at the place of delivery, the multicity business does face a substantially different burden than a business without intercity transactions. The burden upon intercity commerce is apparent in these situations. These are externalities that the legislature ought to be able to control by providing for a uniform method of apportionment or permitting the imposition of a consumption tax either at the place of sale or delivery. Thus, the legislature may be able to intrude upon chartered city taxes with respect to discrete aspects, but a flat prohibition against certain types of municipal tax is not warranted simply because of added administrative burdens of compliance.

The legislature also claims that "the differences in the amount of sales tax levied among the various communities of the state . . . created fiscal problems for the cities and counties."¹⁸⁰ It is difficult to imagine what problems were faced by counties prior to the enactment of the Uniform Local Sales and Use Tax Law in 1955, since the counties were without authority to levy sales tax prior to the enactment of the uniform act.¹⁸¹ In contrast, even prior to the uniform act cities had the authority to levy the tax,¹⁸² and the fiscal problem faced by them might have been their inability to levy a sales tax for fear of placing the retailers within the city at a competitive disadvantage in comparison to retailers located in neighboring cities without a sales tax. This situation, however, could conceivably arise even under the Uniform Local Sales and Use Tax Law, since the imposition of the tax by a county or a city is not mandatory.¹⁸³ Beyond this, although

179. *Compare* Carnation Co. v. City of Los Angeles, 65 Cal. 2d 36, 416 P.2d 129, 52 Cal. Rptr. 225 (1966), with *City of Los Angeles v. Moore Business Forms, Inc.*, 247 Cal. App. 2d 353, 55 Cal. Rptr. 820 (2d Dist. 1966).

180. Ch. 1265, § 2, [1968] Cal. Stat. 2388. The legislature also felt that recent amendments to the state Sales and Use Tax Law pertaining to prepayments and the taxing of certain occasional sales and leases, which amendments are incorporated into local laws under the Uniform Local Sales and Use Tax Law, have made the law extremely complex and a return to conflicting local sales taxes would be disastrous. *Id.* This reason is another facet of increased compliance costs upon the retailers.

181. See Sato, *Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce*, 53 CALIF. L. REV. 801, 809 (1965).

182. A chartered city derived its authority to levy a consumption tax from the constitution granting authority over municipal affairs. See *West Coast Advertising Co. v. City and County of San Francisco*, 14 Cal. 2d 516, 95 P.2d 138 (1939); cf. *City of Glendale v. Trondsen*, 48 Cal. 2d 93, 308 P.2d 1 (1957). A general law city had statutory authority. See Sato, *supra* note 181, at 810.

183. This hypothesis is highly theoretical, since as a practical matter a city is un-

failure of a neighboring city to impose a tax does affect a city contemplating a tax, such competitive advantages and disadvantages are inherent in the existence of separate local entities, just as the differences in property tax rates may have such consequences. Moreover, taxes are not the only factors that affect business location. The comparative quality of services offered by cities in comparison to the tax burdens may be a more important determinant.¹⁸⁴ Thus, not only does the substantiality of externality need to be explored more carefully but restricting the city's authority to tax seems like an odd solution. If the problem mentioned by the legislature is a city's practical inability to increase the tax rate because of its retailers' competitive disadvantage, the proper response might be an increase in the tax rate under the carrot of Uniform Local Sales and Use Tax Law.

The fourth reason given by the legislature is that the larger metropolitan areas have shown an interest in imposing sales and use taxes, and it is within those areas that poor and minority groups who are least able to pay the increased consumer taxes are located.¹⁸⁵ It is not at all clear that the sales taxes are always or completely passed on to the consumers,¹⁸⁶ but, even assuming that they are, one should realize that any tax on the poor is a hardship. And if the burden on the poor is a sufficient reason for state supremacy, the legislature by a parity of reasoning can regulate other city charges even if the legislature has not sought to regulate the private sector.

A further argument might be that the legislature ought to be able to assure the welfare of state inhabitants by regulating the total tax imposition. A chartered city is subject to a state tort liability act;¹⁸⁷

likely to forgo this source of revenue, especially if a county has imposed the tax. If the county has imposed the tax, the tax would be effective within incorporated areas, and therefore a city would not be aiding its residents by forgoing municipal sales and use taxes. See note 174 *supra*. For the fiscal year 1970-71, the state controller reported that all counties had levied a sales and use tax [STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING COUNTIES OF CALIFORNIA, FISCAL YEAR 1970-71, Table 4, at 12-30 (undated)] (the report indicates 57 counties with a sales tax, but with the inclusion of the City and County of San Francisco, the total becomes 58), and all cities had a sales tax [STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING CITIES OF CALIFORNIA, FISCAL YEAR 1970-71, at ix (undated)]. It is interesting to note that the largest amount shared by a city with the county was 20 percent while there were many cities that did not share at all [*id.* at x].

184. See Netzger, *Federal, State, and Local Finance in a Metropolitan Context*, in ISSUES IN URBAN ECONOMICS 435, 445 (H. Perloff & L. Wingo eds. 1968).

185. Ch. 1265, § 2, [1968] Cal. Stat. 2388-89.

186. CAL. ASSEM. INTERIM COMM. ON REV. AND TAX., THE SALES TAX 24-25 (1964). This report also has a comprehensive discussion on the regressivity or progressivity of a sales tax. *Id.* at 31-71. See also J. DUE, SALES TAXATION 8-29 (1957); J. MAXWELL, FINANCING STATE AND LOCAL GOVERNMENTS 96-100 (rev. ed. 1969).

187. See text accompanying notes 141, 152 *supra*.

therefore, one may ask why the legislature cannot similarly restrict the taxing power of the city. The answer is that tort liability is expressive of pervasive state policy applicable to both the private and public sectors, whereas a tax levy is uniquely a governmental function. If the welfare of the inhabitants were to be accepted as sufficient state policy permitting state intervention in municipal matters, there is nothing left to local autonomy, since a city exists to promote the welfare of its inhabitants.

The legislature has advanced several additional arguments that can be disposed of summarily. One is that the imposition of taxes in metropolitan areas will accelerate the movement of business to suburban areas. This should not concern the state, however, since there are no spillover costs. The cities will be restrained by self-interest not to kill the goose.¹⁸⁸ The legislature also stated that "varying and conflicting sales tax rates . . . have an adverse effect on the general business climate in California."¹⁸⁹ Nevertheless, a general observation such as this, without further explanation, is difficult to analyze and should not afford a reason for state preemption. The court finally relied upon the claim that state regulation of liquor might be made more difficult by higher local taxes since the higher taxes might lead to illegal traffic. But the tax involved was an "on-sale" liquor tax, and whether the tax increase will lead to bootlegging remains speculative.

In short, when the *Century Plaza* opinion is examined carefully, the reasons given by the legislature and the court do not persuade independently or in combination. It is not profound to state that no city acts in isolation and that there are external consequences in whatever a city does. The issue is one of substantiality, and the court has not demonstrated the need for legislative supersession.

What, then, of the state rule that a local entity, including a chartered city, cannot levy an income tax? Unless the legislature has under the constitution been granted the exclusive power to control the

188. Moreover, there are many ways for the legislature to attack this problem without preempting local decisionmaking. The legislature can increase the maximum tax rate that can be levied under the Uniform Local Sales and Use Tax Law so as to alleviate the financial plight of the central cities. It can make categorical grants to the central cities to help them provide services with external benefits. Third, it can engage in additional revenue sharing. The legislature may wish to make any one of the above choices conditional upon the local entity sacrificing certain tax sources.

Irrespective of legislative preemption of the sales and use taxes, the legislature arguably had intended that any city taking advantage of the Uniform Local Sales and Use Tax Law would not be able to impose an additional tax on sales. See Sato, *supra* note 181, at 816-18.

189. Ch. 1265, § 2, [1968] Cal. Stat. 2389.

levy of income tax in the state,¹⁹⁰ a flat prohibition of a local income tax levy by a chartered city appears to violate the protective function of municipal affairs. This is not to say that the state should not be able to control the substantial externalities arising from a local tax levied upon a multicity business.¹⁹¹ Thus, as in the analysis of the *Century Plaza* case, the state ought to be able to provide for a uniform apportionment formula.

The above prohibition on local income tax should be compared

190. See CAL. CONST. art. XIII, § 11. This provision was adopted in the original 1879 Constitution. Its purpose appears to have been to ensure that the legislature would have the authority to levy an income tax. As explained by Mr. Ayers, a delegate to the constitutional convention:

It is a question among the lawyers of this Convention whether, if it [section 11] is not declared in this Constitution, that the Legislature has power to impose such tax—whether it would have such a power. The reasons given are that the various taxes will be enumerated in this Constitution which the Legislature shall impose, and this being left out, the argument will be that they have no right to impose any other taxes than those enumerated in the Constitution.

2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 947 (1878-79). There is no discussion as to whether the legislature was to be given the *exclusive* authority [see also 3 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1470-71 (1878-79)], an issue that was not a real one in light of the status of cities at that time. Compare *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E.2d 250 (1950) (home-rule city has authority to levy income tax until legislature, pursuant to constitutional authority, has preempted) with *City and County of Denver v. Sweet*, 138 Colo. 41, 329 P.2d 441 (1958) (constitutional authorization to the legislature to impose an income tax deemed to preempt local income tax by home-rule cities). The latter decision is criticized in Hartman, *Municipal Income Taxation*, 31 ROCKY MTN. L. REV. 123, 143-49 (1959).

191. One commentator asserts that California cases would prohibit the city of residence from imposing a tax on income earned extraterritorially. Comment, *supra* note 177, at 358. The cases cited to support the proposition are *City of Los Angeles v. Belridge Oil Co.*, 42 Cal. 2d 823, 271 P.2d 5, *appeal dismissed*, 384 U.S. 907 (1954), and *Ferran v. City of Palo Alto*, 50 Cal. App. 2d 374, 122 P.2d 965 (3d Dist. 1942). Neither case is conclusive upon whether the resident city would be able to impose a net income tax on income wherever earned. As the commentator indicates, the *Belridge* case involved an excise tax on the privilege of selling, measured by gross receipts. In *Ferran*, the excise tax was on the business of laundering, measured by the total number of employees. In both cases, it was held that the measure of the tax must be related to the extent of activities that were the subject of the tax conducted within the taxing city.

Residence has been deemed a sufficient nexus to reach all income with respect to a state income tax. *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937). See also *Thompson v. City of Cincinnati*, 2 Ohio St. 2d 292, 208 N.E.2d 747 (1965) (city of residence permitted to reach income outside the city). For more recent cases dealing with a tax measured by gross receipts, where the California supreme court may be more stringent than the United States Supreme Court on apportionment requirements, compare *General Motors Corp. v. City of Los Angeles*, 5 Cal. 3d 229, 486 P.2d 163, 95 Cal. Rptr. 635 (1971), with *General Motors Corp. v. Washington*, 377 U.S. 436 (1964). See also *City of Los Angeles v. Shell Oil Co.*, 4 Cal. 3d 108, 480 P.2d 953, 93 Cal. Rptr. 1, *cert. denied*, 404 U.S. 831 (1971). It would be risky to conclude that gross receipts cases have determined the net income issue.

with another statute that permits the imposition of a tax on the privilege of earning a livelihood by an employee or any other tax on or measured by the earnings of an employee only if the identical tax is imposed upon residents and nonresidents alike.¹⁹² The statute was probably designed to prohibit discriminatory taxes upon those who are without a voice in the taxing entity. Such a discriminatory tax might have spillovers by making it more burdensome to earn a livelihood for those located outside the city, the effect of which might be a tendency to discourage seeking residence outside the taxing city or to cause the commuting workers to seek employment elsewhere.¹⁹³

CONCLUSION

The proposed standards will not unduly impede solutions to pressing problems of urbanization. A problem that has been receiving much current attention has been that of the metropolitan areas in which there is a proliferation of local governmental units, many overlapping each other, with disparate revenue sources and varying service demands and quality. In this situation described as "chaos loosely organized,"¹⁹⁴ one might ask whether standards that grant a measure of home rule to chartered cities disrupt an efficient allocation of our resources, prevent realization of economies of scale, and forestall consumer choices for different kinds and qualities of services offered among various cities by placing too much stress upon local political choice.

Efficiency can be achieved where the entire benefit can be appropriated by the person who bears the cost. Personal preferences will dictate the allocation of resources. This would be true whether the services are furnished by a public or a private body.¹⁹⁵ How-

192. CAL. GOV'T CODE ANN. § 50026 (West Supp. 1972).

193. Before a city imposes a discriminatory tax against commuters, it should seriously consider the following observation:

For example, if an income tax is imposed simply on nonresident wages and salaries in the central city, *ceteris paribus* there will be at least some incentive for commuters to seek employment in the suburbs. Similarly, there would also be an incentive for firms to relocate or locate initially in the suburbs since they may be able to pay lower gross wages to their employees or be more attractive at the same wage rates. Of course, these effects are reduced insofar as the burdens of those taxes are shifted to central city site owners, but this would in turn negate part of the reason for the taxes. Furthermore, the smaller the recognized benefits corresponding to these tax payments, the greater the incentive to escape these highly visible taxes. Naturally, the new situation for the firm is complicated if property taxes are reduced upon a switch to heavy reliance on sales or income taxes.

Vincent, *The Fiscal Impact of Commuters*, in *FISCAL PRESSURES ON THE CENTRAL CITY* 41, 113 (W. Hirsch ed. 1971).

194. G. BREAK, *INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES* 174 (1967).

195. The market mechanism would be depended upon to allocate our resources.

ever, the services performed by municipalities are not always subject to those conditions. For example, police or fire protection cannot be priced on the market so as to sell units of police protection. With respect to many governmental services, consumer-voter preference might be a substitute measure or the governing body might make that determination.¹⁹⁶ But even consumer-voter preference would be an inadequate allocator of resources to the extent that there are spillover benefits and costs.¹⁹⁷ If there are substantial extraterritorial benefits with respect to a given function, such services are apt to be undersupported, inasmuch as it is unlikely that the consumer-voter in one municipality will bear the cost of benefits enjoyed by the inhabitants of another city.¹⁹⁸ By the same token, if part of the costs are external and the benefits are internal, inefficiency results because consumer preference is skewed to the extent that the consumer is not paying the full cost.

The problem becomes more complex when, as in metropolitan areas where people residing in one city work in another, commuter preference in the city of employment will not be adequately represented at the ballot box. In turn there may be spillovers due to commuters.¹⁹⁹ Moreover, metropolitan economies of scale can often be realized with respect to many services such as water and sewage treatment.²⁰⁰

If the government should provide services, preferences can be expressed through payment of user's fees.

196. See Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), for a thesis that the consumer-voter may select that community offering public goods to his satisfaction, criticized in Brazer, *Some Fiscal Implications of Metropolitanism*, in METROPOLITAN ISSUES: SOCIAL, GOVERNMENTAL, FISCAL 61, 65-67 (G. Birkhead ed. 1962). Perhaps consumer-voter preference should not be overstressed since one commentator has observed:

Voting processes reveal individual preferences imperfectly and only in the vaguest of outlines. Questions concerning the nature, composition, and magnitude of expenditures and the type and magnitude of taxes are left largely unresolved. Tax and expenditure decisions on various alternatives are settled by policymakers' hunches, intuition, and desires along with a mysteriously obtained reading of the electorate's demands.

Davies, *Financing Urban Functions and Services*, 30 L. & CONTEMP. PROB. 127, 131 (1965).

197. G. BREAK, *supra* note 194, at 177.

198. *Id.* at 63-64.

199. A recent study states:

The conclusion, on that aspect of the central city exploitation thesis treated in this study—the impact of suburban workers and shoppers who commute to the central city—is that central city residents as a whole are not being exploited, particularly when the relationship of commuting to the personal incomes of central city residents is taken into account. From the viewpoint of the municipal government alone, it also seems possible that the outcries of government officials over services provided to suburban residents with little or no compensation may not have a factual basis, given the revenue patterns of central governments across the country in 1960.

Vincent, *supra* note 193, at 112.

200. See generally ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS,

These considerations point to a larger unit of government. But pulling in the other direction is the value of local preferences that would be subordinated by one large unit of government with respect to services that may have a minimum of extraterritorial effects or that do not realize economies of scale.²⁰¹ Counterbalanced against this observation is the fact that there are impediments to mobility of our population through restrictive zoning ordinances, racial discrimination, and employment considerations, so that individuals in any given city might not be able to seek out the level of service that best suits their needs.²⁰²

The purpose here is not to analyze which functions are properly performed at the city level and which should be assigned to a larger unit or whether the larger unit should be multi- or single purpose;²⁰³ rather, the objective is to demonstrate that the proposed standards will not be a serious impediment to flexibility in the governmental structure necessary to accommodate the conflicting values.

In the situations where a larger governmental entity is desirable to realize efficiency or economies of scale, the courts have already held that the creation of such districts to provide services on a regional basis does not impinge upon "municipal affairs."²⁰⁴ These larger units have assumed significant roles as purveyor of services in Cali-

PERFORMANCE OF URBAN FUNCTIONS: LOCAL AND AREAWIDE (1963); Hirsch, *Local Versus Areawide Urban Government Services*, 17 NAT. TAX. J. 331 (1964).

201. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *supra* note 200, which has analyzed which services should be provided on a local, intermediate, or areawide basis. In this analysis, seven criteria were used: (1) minimizing benefit and cost spillover, (2) realization of economies of scale, (3) effective performance, (4) necessary legal and administrative ability, (5) sufficient functions to be performed so that priorities can be weighed, (6) control by and accessibility to the residents, and (7) citizen participation. As the report recognizes, some of the criteria may pull in opposite directions.

202. As one writer views the problem:

The problem may be fruitfully approached, perhaps, by drawing a distinction between those public services with respect to which taste differentials may be expected to be relatively unimportant, and for which narrowly construed economic efficiency criteria may be allowed to predominate, and those with respect to which purely local preferences will exhibit wide variations, with only minor spillover effects. What is wanted, of course, is a voluntary solution that can be achieved through voting or the political process. A solution that may be called for on grounds of economic efficiency may be rejected if members of local communities place a high value upon their ability to influence policy in the functional area involved. And, contrary to the views of those who are among the more extreme advocates of consolidation in metropolitan areas, there is no *prima facie* reason for insisting that the "efficient" solution be pursued.

Brazer, *supra* note 196, at 64.

203. See Brazer, *supra* note 196, for a detailed analysis of this problem. See also Hirsch, *supra* note 200.

204. See text accompanying note 125 *supra*.

fornia. For example, the East Bay Regional Park District provides open space recreational facilities for a region that encompasses several cities and two counties;²⁰⁵ the East Bay Utility District is engaged in distribution of water, diverted from the foothills of the Sierra Nevada, to many cities;²⁰⁶ and the San Francisco Bay Area Rapid Transit District is about to commence intercity transit operations.²⁰⁷

Besides these service entities, there are regulatory bodies that seek to restrict the imposition of costs external to a city. The Bay Area Air Pollution Control District²⁰⁸ and the Bay Area Regional Water Quality Control Board²⁰⁹ are examples of regulatory bodies. If the legislature should desire to consolidate some or all of these functions into one governmental body, the municipal affairs concept does not place any obstacle to such accomplishment.

If the establishment of a new entity is not feasible for one reason or another, an alternative is to make certain that the local units can freely contract with each other.²¹⁰ The Joint Exercise of Powers Act is another method of facilitating cooperation.²¹¹

205. Cf. CAL. PUB. RES. CODE ANN. §§ 5500 *et seq.* (West 1956) (enabling act to form a regional park district).

206. Cf. CAL. PUB. UTIL. CODE ANN. §§ 11501 *et seq.* (West 1965) (enabling act to form a municipal utility district). Among the services such a district is empowered to provide are the following: light, water, power, heat, transportation, telephone service, or other means of communication, or means for the collection, treatment, or disposition of garbage, sewage, or refuse matter." *Id.* § 12801.

207. Cf. *id.* §§ 28500 *et seq.* (legislative creation of the San Francisco Bay Area Rapid Transit District).

208. Cf. CAL. HEALTH & SAFETY CODE ANN. §§ 24345 *et seq.* (West 1967) (legislative creation of the Bay Area Air Pollution Control District).

209. Cf. CAL. WATER CODE ANN. §§ 13200, 13201 (West Supp. 1971) (establishing nine regional water quality control boards).

210. Article XI, section 9(a) [CAL. CONST. art. XI, § 9(a)] authorizes a municipal corporation to serve light, water, power, heat, transportation, or means of communication and may do so extraterritorially except within another municipal corporation which furnishes the same service and does not consent." Article XI, section 8(a) provides that the legislature may authorize a county to perform municipal functions at the request of cities within it, and section 8(b) permits chartered counties and cities, if authorized in their charters, to contract to have the county provide municipal services within the city. The Government Code [CAL. GOV'T CODE ANN. § 51301 (West 1966)] provides:

A board of supervisors may contract with a city, governed under general laws or charter, within the county, and the city legislative body may contract with the county for the performance by its appropriate officers and employees, of city functions.

Contracting for services have given rise to problems in the Los Angeles area. Where a county provides certain services to unincorporated areas only, but finances the services in part from countywide taxes, or where a county contracts to provide services to city but at less than cost, there are subsidies from the incorporated areas that do not receive those services to the areas that do. See a recent study of this problem, Shoup & Rosett, *Fiscal Exploitation by Overlapping Governments*, in *FISCAL PRESSURES ON THE CENTRAL CITY* 241 (W. Hirsch ed. 1971).

211. CAL. GOV'T CODE ANN. §§ 6500 *et seq.* (West 1966).

However, where the externalities are absent, the court ought to sustain the value of local political participation by rejecting the supremacy of those general laws without a pervasive policy. Because the proposed standards permit the legislature to eliminate local restrictions that impede the mobility of our population, the legislature can promote consumer preference for those localized services that might be provided by the cities. Where the benefits are external, so that there might be a danger of underinvestment, the 1968 constitutional amendment²¹² has freed the legislature in making grants to local entities from general funds, so the legislature need no longer fear that a subvention is a prohibited gift of public funds and may alleviate such inefficiencies. While the proposed standards might not allow complete legislative freedom in the rearrangement of local governmental units, as, for example, compelling consolidation of a chartered city with another city or county, considerable flexibility will exist.

This Article does not attempt to suggest any model or ideal allocation of political power between the state and the chartered cities by disregarding the existing constitutional provisions. It takes the constitution as it exists and seeks to provide standards for resolving conflicts between the legislature and chartered cities. The standards will not provide easy answers; they can provide only an analytical framework; and even this undertaking might be too ambitious, for the difficulties inherent in the problem may defy reduction in this fashion. If this attempt has been unsuccessful, the author hopes that he has at least exposed the unsatisfactory state of the law and that the courts will give serious consideration to enunciating their criteria.

212. CAL. CONST. art. XIII, § 12.

APPENDIX

PRUNING "MUNICIPAL AFFAIRS"

The constitution employs the term "municipal affairs" only in connection with a chartered city to define its constitutional grant of power and protection from legislative interference. Thus, the concept should be confined in its usage to issues dealing with local autonomy, but, because the term readily connotes matters of general municipal interest, it has been used in other contexts. These uses should be identified in order to avoid confusion.

A. Legislative Power to Classify

Prior to the 1970 amendment, article XI, section 6 provided: "Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities" ²¹³ The above provision was designed to prohibit the pre-1879 practice whereby the legislature enacted a special charter for each city, a practice that permitted the most minute intermeddling by the legislature in city matters. ²¹⁴ The 1879 constitution, in which the above provision first appeared, required the legislature to provide by general laws for the incorporation and organization of cities but still permitted the latitude of classification. However, other provisions prohibited the legislature from enacting special laws, either by a positive prohibition or by a negative direction that the legislature must act by general laws. For example, under the pre-1970 form of article XI, section 12 the legislature was authorized "by general laws" to vest the power of taxation in the local governmental units. There was also a general prohibition upon the legislature against adoption of special laws "where a general law can be made applicable." ²¹⁵ Thus, on the one hand, the constitution permitted the legislature to classify, but, on the other, there were provisions requiring the legislature to act by general laws.

213. CAL. CONST. art. XI, § 2 (article XI, section 6 before the 1970 amendment). Section 2(a) provides, "The Legislature shall prescribe uniform procedure for city formation and provide for city powers." It would appear that the requirement of uniformity applies to the procedure for city formation and not to city powers, and therefore the legislature appears to have the power to classify cities except as limited by article IV, section 16: "A local or special statute is invalid in any case if a general statute can be made applicable".

214. See Peppin, *Municipal Home Rule in California I*, 30 CALIF. L. REV. 1, 6-34 (1941), for a review of the status of cities vis-a-vis the legislature prior to the 1879 California constitution.

215. CAL. CONST. art. IV, § 25(33) (1879).

This seeming conflict was an issue in *Ex parte Jackson*,²¹⁶ in which the court had to determine the validity of a statute conferring the authority to levy a license tax for revenue upon sixth-class cities only.²¹⁷ In sustaining the statute, the court stated that the purpose of article XI, section 6 was to require the legislature to provide for the government of the municipalities incorporated under the procedure set forth by the legislature and to permit differences in those laws made necessary by variations in population:

It was left entirely to the legislature to determine what differences in the laws relative to the *municipal affairs* of the corporations to be organized under the general laws of the state were made necessary by differences in population.²¹⁸

And in referring to the general laws for the incorporation and organization of the cities, the court stated:

As to such matters—i.e. matters coming within the proper scope of a municipal charter, or, in other words, *municipal affairs*,—there is a distinction recognized by the constitution between the various classes of municipal corporations, which justifies the varying legislation.²¹⁹

References to municipal affairs are found in several other places in the opinion. The anomalous feature of the opinion is that the problem of classification is one that relates primarily to the general law cities (cities incorporated under the provisions of the statute as opposed to cities that have adopted a charter under the constitutional authority), and yet the language of municipal affairs was employed. By the time of this case, the constitution had been amended to except the municipal affairs of a chartered city from the control of general laws, but the court relied upon three cases involving chartered cities and concluded that a license tax for revenue purposes was a municipal affair. Because the cases dealing with municipal affairs in connection with the classification of general law cities were concerned with whether a given power is one that might appropriately be exercised by a city, they are instructive only as to the scope of the authority-

216. 143 Cal. 564, 77 P. 457 (1904).

217. Prior to 1955 the legislature had enacted a Classification Act, which originally had started with six classes but by 1955 had many more. In addition, the original Municipal Incorporation Bill provided six legislative charters for cities organizing under the general laws, but many were later repealed. The confusion that developed is explained in Peppin, *Municipal Home Rule in California II*, 30 CALIF. L. REV. 272 (1942). In 1955 the legislature repealed the Classification Act and reduced the classification to chartered cities and general law cities. CAL. GOV'T CODE ANN. §§ 34100-02, 34101, 34102 (West 1966).

218. 143 Cal. at 568-69, 77 P. at 459 (emphasis added).

219. *Id.* at 569, 77 P. at 459 (emphasis added).

granting function of municipal affairs with respect to a chartered city; they are not authority for the protective function of municipal affairs.

*B. Prohibition Against Gift of Public Funds to
Municipal Corporations*

The constitution prohibits the legislature from making "any gift . . . of any public money or thing of value to any . . . municipal or other corporation whatever" ²²⁰ In *Mallon v. City of Long Beach*, ²²¹ the issue was whether that portion of the revenue, derived from oil and gas extraction on lands previously conveyed from the state to the city, that had been freed by statute from further use for "navigation, commerce and fisheries" was to revert to the state or to be given to the city for certain local uses. As one of the reasons for prohibiting the city from using this money locally, the court argued that a transfer to the city would violate the prohibition against making a gift of public funds to municipal corporations:

[W]e 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 statewide interest that state funds could properly be expended thereon. Such expenditures are for purely "municipal affairs" within the meaning of section 6 of article XI of the Constitution. . . . Moreover, they are normal expenditures for a municipal corporation to make, and to hold that a grant of public monies from the state to defray such expenditures is not a gift within the meaning of section 31 of article IV of the Constitution would render meaningless the express prohibition therein against gifts to "municipal corporations." ²²²

There are several fascinating features of this case. First, there is nothing in the constitution with respect to the prohibition in question that distinguishes between a general law city and a chartered city; it forbids gifts to either. Therefore, it is somewhat puzzling why the opinion characterizes the various improvements in question as "purely 'municipal affairs' within the meaning of section 6 of article XI of the Constitution." Second, the issue in this case was whether the state

220. CAL. CONST. art. XIII, § 25 (article IV, section 31 prior to the 1966 amendment). The prohibition of state gifts to counties and cities has been considerably emasculated by the addition of article XIII, section 12 in 1968. This section permits the legislature to allocate money from general funds to counties and cities for local purposes.

221. 44 Cal. 2d 199, 282 P.2d 481 (1955).

222. *Id.* at 211-12, 282 P.2d at 488-89.

would derive any benefit from the proposed expenditures by the city,²²³ so it was unnecessary for the court to discuss the concept of municipal affairs. But because the court did rely upon municipal affairs, how is the reader to interpret this opinion? If the court has decided that a certain monetary grant for municipal improvement or activity is a prohibited gift of public funds, can one assume that a chartered city is protected from legislative interference with respect to that activity?

In fact, the underlying policies behind the two constitutional provisions—namely, the prohibition of gifts of public funds and local autonomy for chartered cities—are quite different; therefore, the cases dealing with municipal affairs for the two different provisions should not be confused with each other or, at least, should be employed very circumspectly. One might be tempted to argue that, because the court has held that a grant of state funds for a local sewer project is a prohibited gift, it must mean that there is no state benefit to be derived from such grant; if there is no state benefit, there are no externalities, and a chartered city should be protected from legislative interference with respect to its sewer enterprise. The analysis may or may not be correct. In imposing the prohibition, the court might find externalities from a municipal sewer project but yet conclude that the costs the city is seeking to impose on its neighbor are more properly the responsibility of the city; in that case the state cannot assume such a burden even though elimination of the external costs would benefit the surrounding area.²²⁴ If this were the rationale, the court can consistently

223. It had previously been held that there is no prohibited gift of public funds if the donor derives a benefit even though the donee may also do so. *E.g.*, *City of Oakland v. Garrison*, 194 Cal. 298, 228 P. 433 (1924) (sustaining a county grant to a city to improve a city street); *Allied Architects' Ass'n v. Payne*, 192 Cal. 431, 221 P. 209 (1923) (county construction of a building to be used by veterans' associations valid as promoting patriotism).

224. The cases cited by the *Mallon* court to identify the projects and activities that are "municipal affairs" were generally concerned with issues other than gifts of public funds. Surprisingly, the one case that dealt with this issue, *Perez v. City of San Jose*, 107 Cal. App. 2d 562, 237 P.2d 548 (1st Dist. 1951), sustained the city's contribution to improve a state highway because of the benefit to the city. Three cases [*City of Pasadena v. Paine*, 126 Cal. App. 2d 93, 271 P.2d 577 (2d Dist. 1954) (general law prescribing procedure for locating city improvement held inapplicable to a chartered city); *Alexander v. Mitchell*, 119 Cal. App. 2d 816, 260 P.2d 261 (1st Dist. 1953) (initiative to deny city council of a chartered city the power to exercise eminent domain for off-street parking held invalid since it was a power delegated by the legislature—a dubious conclusion); *Armas v. City of Oakland*, 135 Cal. App. 411, 27 P.2d 666 (1st Dist. 1933) (holding, in an alternative ground, that state traffic regulations do not apply to emergency vehicles of a chartered city—a questionable decision)] dealt with state interference with city matters. Other cases involved a variety of issues.

Perhaps the rationale of *Mallon* is best explained by the court's statement:

hold that there is a gift of public funds and still conclude that the state can regulate the externalities despite the protective function of municipal affairs.

*C. Restricting Municipal Expenditures
to Public Purposes*

Whereas in the two previous situations the term "municipal affairs" was employed in the context of issues that involved the authority of the legislature, the third situation in which municipal affairs has been used by the courts does deal with the power of the chartered cities, but like the other situations the issue involved is not unique to chartered cities.

In *Bank v. Bell*,²²⁵ the question was whether a chartered city had the power "to acquire, establish, maintain, own, and operate a municipal market." The charter not only had a broad provision permitting the exercise of power over municipal affairs but also had a specific provision authorizing the city to own and operate markets.²²⁶ Thus, there was no issue whether the charter authorized the acquisition and operation of the public market, and there was no issue concerning conflict with general laws. Although almost half of the opinion is devoted to tracing the development of autonomy in chartered cities in California, the critical issue before the court was whether the market served a public purpose—that is, although not mentioned in the opinion, whether the activity violated the due process clause of the fourteenth amendment of the Federal Constitution. The issue concerning the expenditure of public funds for public purposes or for private purposes is certainly not unique to a chartered city. In fact, one of the cases on which the court relied dealt with state involvement in the business of manufacturing and marketing farm products.²²⁷

Moreover, they are normal expenditures for a municipal corporation to make, and to hold that a grant of public monies from the state to defray such expenditures is not a gift within the meaning of section 31 of article IV of the Constitution would render meaningless the express prohibition therein against gifts to "municipal corporations."

44 Cal. 2d at 212, 282 P.2d at 489. If this rationale is transposed to determining the areas within which a chartered city is free from legislative interference, it would be reminiscent of the test employed in *Ex parte Braun*, 141 Cal. 204, 74 P. 780 (1903), which used a similar criterion to determine "municipal affairs" for the purposes of article XI, section 6 [CAL. CONST. art. XI, § 6]. See text accompanying notes 21-22 *supra*.

225. 62 Cal. App. 320, 321, 217 P. 538, 538 (1st Dist. 1923).

226. *Id.* at 323-24, 217 P. at 539-40.

227. *Green v. Frazier*, 253 U.S. 233 (1920). A case similar to *Bell* is *Butterworth v. Boyd*, 12 Cal. 2d 140, 82 P.2d 434 (1938). In *Boyd* the charter was amended to provide for health insurance for city employees and their families. Again the court analyzed this problem under the concept of municipal affairs, although the underlying issue was whether the health scheme served a governmental purpose.

These cases do not aid the present inquiry. The most that they teach us is that the activities that were deemed municipal affairs were properly public in nature.

D. "*Municipal Affairs*" of Counties

One of the more confusing allusions to municipal affairs occurs in *In re Hubbard*.²²⁸ "The exclusive right of a chartered city or county to regulate turns on whether or not the subject matter is a *municipal affair*" ²²⁹ At another point in the opinion the court stated that "chartered counties and cities have full power to legislate in regard to *municipal affairs*".²³⁰ What is patently absurd about these remarks is that nowhere in the constitution is there a reference to the municipal affairs, much less the county affairs, of a chartered county. While the matter of local autonomy of a chartered county has been explored elsewhere,²³¹ it is unlikely that a chartered county enjoys the same degree of autonomy as a chartered city. At least there is enough doubt about the matter to make one wary of accepting the dictum thrown out so casually in *In re Hubbard*.

228. 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

229. *Id.* at 127, 396 P.2d at 814, 41 Cal. Rptr. at 398 (emphasis added).

230. *Id.* at 128, 396 P.2d at 814-15, 41 Cal. Rptr. at 398-99 (emphasis added).

231. See Sato, *supra* note 181, at 805-10.