The Traffic Congestion Bottleneck: City Police Power, Municipal Affairs and Tax Solutions

THE TRAFFIC CONGESTION BOTTLENECK: CITY POLICE POWER, MUNICIPAL AFFAIRS AND TAX SOLUTIONS explores the basic doctrines of California charter and general law city power in the context of traffic congestion control. The article proposes congestion pricing, a charge for creating traffic congestion, as a solution to the problem of too many cars on city streets.

The environmental and psychological effects of traffic congestion are apparent to anyone caught in a downtown district at peak morning and afternoon traffic hours. Traffic tie-ups on city streets impede mobility. Automobiles that continually stop and start emit more noxious fumes and consume more fuel than automobiles traveling in through traffic. City dwellers must endure the noise of accelerating engines and the ill-effects of a polluted environment. Heavy traffic, especially in residential areas, endangers the safety of drivers, pedestrians and playing children.

The federal government recognizes that traffic congestion is a serious problem[1] and has provided money to fund innovative solutions.[2] State governments can take advantage of the federal funding

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[1] "The Congress hereby finds and declares it to be in the national interest that each State shall have a continuing program designed to reduce traffic congestion and facilitate the flow of traffic." Federal-Aid Highway Act of 1976 § 123(a), 23 U.S.C.A. § 135(a) (West Supp. 1977).

[2] Federal regulations require that each urbanized area develop a transportation plan as a condition to receipt of federal funds. 23 C.F.R. §§ 450.100, 450.116 (1976). Supplementary guidelines suggest actions which urbanized areas should consider in developing their plans:

> a. Actions to ensure the efficient use of existing road space through
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> (1) Traffic operations improvements to manage and control the flow of motor vehicles such as:
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> Chanelization of traffic . . .
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> Metering access to freeways . . .
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> (2) Preferential treatment for transit and other high-occupancy vehicles, such as:
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> Reserved or preferential lanes on freeways and city streets . . .
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> Conversion of selected downtown streets to exclusive bus use . . .

available through the Federal-Aid Highway Act [3] and the National Mass Transportation Assistance Act.[4] The California Legislature has adopted statutes enabling cities to take advantage of this federal funding.[5] California statutes also allow local governments to establish priority lanes for high occupancy vehicles[6] and the State Trans-

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(3) Appropriate provision for pedestrians and bicycles . . .
(4) Management and control of parking through:
. . .
Favoring parking by short-term users over all-day commuters
Provisions of fringe and transportation corridor parking to facilitate transfer to transit and other high-occupancy vehicles . . .
(5) Changes in work schedules, fare structures and automobile tolls to reduce peak-period travel and to encourage off-peak use of transportation facilities and transit services, such as:
. . .
Reduced transit fares for off-peak transit users
Increased peak-hour commuter tolls on bridges and access routes to the city
b. Actions to reduce vehicle use in congested areas through:
Encouragement of carpooling and other forms of ride sharing
Diversion, exclusion and metering of automobile access to specific areas
Area license, parking surcharges and other forms of congestion pricing
Establishment of car-free zones and closure of selected streets to vehicular traffic or to through traffic
Restrictions on downtown truck delivery during peak hours . . .

Planning Assistance and Standards Regulations, UMTA & FHWA joint guidelines, 23 C.F.R. § 450 app., at 77-78 (1976).

[3] Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, 90 Stat. 425 (codified in scattered sections of 23, 49 U.S.C.A. [West Supp. 1977]).

[4] National Mass Transportation Assistance Act of 1974, Pub. L. No. 93-503, 88 Stat. 1565 (codified in scattered sections of 42, 49 U.S.C.).

[5] The Streets and Highways Code specifically authorizes cities to do all things necessary to secure and expend federal highway aid funds:

> The Federal Aid Highway Act of 1973 has authorized appropriations for expenditures within urbanized areas for comprehensive transportation planning purposes . . . . The State Transportation Board, the commission, the department, appropriate regional and local planning agencies, boards of supervisors, and city councils are authorized to do all things necessary in their respective jurisdictions to secure such federal funds in accordance with the intent of the federal act and of this chapter.

CAL. STS. & HY. CODE § 2231 (West Supp. 1977). A similar provision authorizes cities to obtain funds under the federal Highway Safety Act of 1973. CAL. STS. & HY. CODE § 2331 (West Supp. 1977). Cities may also contract directly with the federal government. The California Government Code provides:

> A county or city may do all acts necessary to participate in . . . [any] . . . federal program whereby federal funds are granted to the county or city . . . for purposes of health, education, welfare . . . including, without limitation thereto, contracting and cooperating with the federal government . . . .

CAL. GOV'T CODE § 53703 (West Supp. 1977). Cities may also accept federal grants for public works. CAL. GOV'T CODE § 53701 (West 1966).

[6] The Department of Transportation and local authorities with respect to highways under their respective jurisdictions may authorize or permit exclusive or preferential use of highway lanes for high occupancy vehicles. . . . It is the intent of the Legislature in amending

portation Board has adopted the statewide transportation goal of decreasing private automobile use.[7] With one minor exception,[8] the state has not otherwise acted to reduce local traffic congestion.

City governments have become aware of the problems traffic congestion creates and have been looking for solutions. Berkeley, in California's densely populated San Francisco Bay Area, is an example of a city currently concerned with traffic congestion problems. In 1975, pursuant to its Traffic Management Plan, the city installed traffic diverters to channel traffic away from residential neighborhoods.[9] Berkeley also considered becoming a demonstration city under the federal Urban Mass Transportation Administration (UMTA).[10] The proposed demonstration plan called for road use charges at certain locations during limited hours to raise revenue for expanded mass transit services.[11] In addition to raising funds, Berkeley's demonstration plan would have reduced traffic congestion because the road use charges would have discouraged automobile use. "Automobile use disincentives," a high priority item for UMTA demonstration grants, are difficult to implement because of the

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> this section to stimulate and encourage the development of ways and means of relieving traffic congestion in California highways and, at the same time, to encourage individual citizens to pool their vehicular resources and thereby conserve fuel and lessen emission of air pollutants.

CAL. VEH. CODE § 21655.5 (West Supp. 1977).

[7] CALIFORNIA TRANSPORTATION BOARD, CALIFORNIA TRANSPORTATION PLAN: RECOMMENDED STATEWIDE TRANSPORTATION GOALS POLICIES AND OBJECTIVES, I-1 - I-23 (Feb. 1977) (Draft plan: the California Transportation Board adopted the plan on March 17, 1977, adopted draft unavailable at time of publication).

[8] One statute allows the City of Avalon on Catalina Island to regulate traffic:

> Notwithstanding any other provisions of law, local authorities of any city which is on a natural island with an area in excess of 20,000 acres and which is within a county having a population in excess of 4,000,000 may . . . adopt rules and regulations by ordinance or resolution on the following matters:
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> (a) Regulating the size of vehicles used on streets . . . .
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> (b) Regulating the number of vehicles permitted on streets . . . .
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> (c) Prohibiting the operation . . . of designated classes of vehicles.
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> (d) Establishing noise limits, which are different from those prescribed by this code . . . .
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> (e) Establishing a maximum speed limit lower than that which the local authority otherwise permitted by this code to establish.

CAL. VEH. CODE § 21100.5 (West Supp. 1977).

[9] The Berkeley City Council adopted its Traffic Management Plan in 1975. Berkeley City Council Res. 47,351-N.S. (July 9, 1975). For details of the plan see, BERKELEY CITY COUNCIL, FINAL REPORT CITY OF BERKELEY NEIGHBORHOOD TRAFFIC STUDY (July 1974). For a report documenting objective measurement of the Plan's impact, e.g., noise levels, daily traffic volume, accidents, see BERKELEY CITY COUNCIL, SIX MONTH EXPERIENCE: BERKELEY TRAFFIC MANAGEMENT PLAN (undated).

[10] The Urban Mass Transportation Administration was established in 1968. 49 U.S.C. § 1608 note (1970) (Urban Mass Transportation Administration).

[11] Berkeley City Council Res. 48,345-N.S., Sept. 28, 1976.

general public's allegiance to the automobile.[12] In response to public pressure, the Berkeley City Council abandoned congestion pricing to seek alternative funding for public transportation.[13]

As Berkeley has discovered, a city may devise different means to mitigate its traffic and transportation problems. It might use traffic diversion methods, as Berkeley has, to confine traffic to certain main streets and direct it away from residential areas. It might also rebuild existing roads or open new ones. But these means do not reach the heart of the problem: too many automobiles on city streets. Any attempt by a city to discourage automobile use altogether by, for example, imposing a charge for the privilege of creating traffic congestion, may not only provoke public opposition but raise legal problems as well.

This article explores the city's power to control traffic congestion.[14] It first examines the general sources and limitations of a city's power. It then analyzes the police power, "municipal affairs" power and tax power as means of regulating traffic congestion and raising revenue for mass transit. The final part describes a successful congestion control plan designed to discourage automobile use and analyzes the legal problems California cities would face if they sought to adopt the plan.

I. SOURCES AND LIMITATIONS OF A CITY'S POWER

A. Sources of a City's Power

California has one of the strongest systems of home rule[15] by local government in the United States.[16] This state policy in favor of local self-determination allows cities to initiate their own solutions to local problems. In a non-home rule state, the city attorney must determine whether a general statute expressly authorizes a particular ordi-

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[12] Letter from Stuart Eurman, UMTA Senior Regional Transportation Representative, to the authors, Feb. 4, 1977 (on file with U.C. Davis L. Rev.).

[13] Berkeley City Council Res. 48,453-N.S., Dec. 7, 1976.

[14] Once a city establishes its power to regulate traffic congestion, it must consider the federal interstate commerce clause, the constitutionally protected right to travel, and equal protection when fashioning its ordinance. This article does not address these issues. The article also does not address the national fuel shortage problem which may compel the federal government to enact automobile use disincentives. See Address by President Jimmy Carter, printed in S.F. Chronicle, April 19, 1977, at 14, col. 1-4.

[15] The term "home rule" describes both the political philosophy of local self-determination and the means by which cities obtain their power to govern. *See* Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 644-45 (1964).

[16] CALIFORNIA GOVERNOR'S COMMISSION ON THE LAW OF PRE-EMPTION, REPORT & RECOMMENDATIONS, Exhibit A, 1 (1967) [hereinafter cited as CALIFORNIA GOVERNOR'S COMMISSION ON THE LAW OF PRE-EMPTION].

nance.[17] In contrast, in California the constitutional grant of home rule power obviates the need for enabling statutes.[18] A city attorney operating under California's constitutional home rule provisions need only determine whether a desired ordinance conflicts with state law. If it does conflict, the city attorney must determine whether the constitution nevertheless protects the ordinance from preemption by state law.[19]

Two state constitutional provisions grant home rule power.[20] Article XI, section 7[21] confers upon every city, whether charter or general law,[22] the police power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations

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[17]Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 U.C.L.A. L. REV. 671, 675 (1973).

[18]The California State Legislature does expressly authorize city regulatory power in certain areas. For some examples, *see* text accompanying notes 106-16 *infra*.

[19]For a discussion of California Constitution article XI, section 5 which protects some charter city ordinances from preemption by general law, *see* text accompanying notes 51-83 *infra*.

[20]CAL. CONST. art. XI, § 7; CAL. CONST. art. XI, § 5. In one case, the California Supreme Court stated in dictum that the legislature, not the constitution, vests power in local governmental bodies. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 41, 520 P.2d 29, 37, 112 Cal. Rptr. 805, 813 (1974). According to this case, the legislature through the conduit of California Constitution article XI bestows power on general law cities by enacting general law and on charter cities by approving the charter. This dictum, if law, would destroy home rule in California. The opinion suggests that article XI, section 7, the police power grant, merely permits the legislature to pass statutes enabling cities to enact police power regulations. Similarly, the opinion suggests that article XI, section 5, the municipal affairs power grant, does not directly grant charter cities the power to regulate municipal affairs. Instead, the section permits the legislature to define "municipal affairs" and thereby to enable charter cities to regulate matters within the scope of the legislature's definition. *But see* Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969) (court, not legislature, defines "municipal affairs") discussed in text accompanying notes 71-72 *infra*.

Strumsky dealt only with the legislature's grant of judicial power. The court held that when local agency judicial decisions substantially affect a fundamental vested right, the trial court may not defer to the agency decision but must exercise its independent judgment in determining abuse of discretion. The narrow holding did not require reconsideration of the constitutional origins of city legislative power, nor is the opinion well reasoned on this point. No court has yet found that the *Strumsky* dictum overrrules established precedents on this issue. The dictum is a threat to city autonomy, however, since it suggests that charter cities are mere delagatees of those powers which the legislature chooses to give them. *See* Comment, *Strumsky and the Source of California Chartered City Powers*, 6 PAC. L.J. 85 (1975).

[21]CAL. CONST. art. XI, § 7.

[22]A city may govern its internal affairs independent of the state legislature by adopting a charter and thus becoming a charter city. Adopting a charter requires a majority vote of all electors. The charter is effective when filed with the Secretary of State. CAL. CONST. art. XI, § 3. As of April, 1977, there were seventy-seven charter cities in California. LEAGUE OF CALIFORNIA CITIES, CHARTER OR GENERAL LAW CITY? (1971) (amended 1977). The alternative is to remain a general law city governed by the general law of the state. CAL. GOV'T CODE § 34102 (West 1968).

not in conflict with general laws."[23] The scope of a city's police power is as broad as the police power of the state legislature itself.[24] Cities operating under a charter have an additional general grant of power. Article XI, section 5[25] confers power on charter cities over "municipal affairs."[26] Charter city ordinances which regulate "municipal affairs" supersede[27] conflicting state laws.[28]

The extent to which these powers authorize cities to control traffic congestion is uncertain. Courts will analyze the police power and the municipal affairs power to determine whether state law limits city power in this area. If a court determines that the control of traffic congestion is an exercise of the police power, any conflicting state statute will preempt both general law and charter city ordinances. Both charter and general law city attorneys must, therefore, be aware of potential conflicts with state law. If state law conflicts, a general law city ordinance will be invalid. A charter city attorney can try to shield the conflicting ordinance from preemption by persuading a court that traffic congestion is a municipal affair. If the court determines that congestion control is a municipal affair, conflict with general law will not invalidate a charter city's ordinance. Courts must make this analysis in evaluating any city ordinance, whether it regulates or imposes a revenue raising tax.

B. Police Power

If a local exercise of the police power conflicts with state law, the local ordinance must yield.[29] This doctrine, preemption, is a consequence of the supremacy of state law.[30] Courts have found that the

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[23] CAL. CONST. art. XI, § 7.

[24] Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 140, 550 P.2d 1001, 1009, 130 Cal. Rptr. 465, 473 (1976).

[25] It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

CAL. CONST. art. XI, § 5(a).

[26] The courts interpret the meaning of the constitutional grant of municipal affairs power. The power is not the equivalent of the police power. *See* text accompanying notes 56-66 *infra*.

[27] This article uses "supersede" to describe the preemption of state general law by a charter city ordinance regulating a municipal affair. The article uses "preemption" only to describe preemption of local ordinances by state general law.

[28] CAL. CONST. art. XI, § 5.

[29] CAL. CONST. art. XI, § 7, *set forth in* text accompanying note 23 *supra*.

[30] Absent constitutional or legislative grants of power to localities, they have none. A. VAN ALSTYNE, CALIFORNIA CONSTITUTION REVISION COMMISSION

state preempts local regulations when the state statutes and local ordinances directly conflict, when state legislation contains an express intent to preempt, or when state legislation contains an implied intent to preempt.

State law most clearly preempts when the language of a local ordinance and the language of a state statute directly conflict.[31] A city ordinance which is not contrary to but which duplicates a state statute also directly conflicts with state law. Such an ordinance creates a conflict of jurisdiction[32] and the danger of prosecution by both state and city.[33]

If there is no direct conflict with or duplication of the language in a state statute, courts may still find the local ordinance preempted if it operates in a field occupied by the state legislature. The legislature occupies the field when it intends its regulations in a certain area to be exclusive of all others. A court may find that the legislature has either expressly[34] or impliedly[35] preempted a field. The mere expression of an intent to preempt, however, is not sufficient to preclude local regulation. The California Supreme Court has found that a blanket prohibition of local regulation without state law on the subject violates the cities' broad constitutional grant of police power.[36] An express statement of intent to preempt is, therefore, effective only to the extent that the legislature accompanies it

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BACKGROUND STUDY RELATING TO ARTICLE XI: LOCAL GOVERNMENT 17 (prepared for the California Constitution Revision Commission, undated).

[31] *E.g.*, *Ex parte* Daniels, 183 Cal. 636, 192 P. 442 (1920) (local maximum speed limit lower than that set by state struck down).

[32] Pipoly v. Benson, 20 Cal. 2d 336, 371, 125 P.2d 482, 485 (1942).

[33] *E.g.*, *In re* Murphy, 190 Cal. 286, 290, 212 P. 30, 31-32 (1923) (reckless driving ordinance).

[34] *E.g.*, Sippel v. Nelder, 24 Cal. App. 3d 173, 176-77, 101 Cal. Rptr. 89, 90 (1st Dist. 1972) (ordinance requiring a permit to purchase a gun conflicted with Penal Code).

[35] *E.g.*, *In re* Lane, 58 Cal. 2d 99, 104, 372 P.2d 897, 900, 22 Cal. Rptr. 857, 860 (1962) (extensive regulation of sexual activity in the Penal Code implied legislative intent that no other sexual activities be illegal).

[36] The court set forth this rule in *Ex parte* Daniels, which held that the state legislature could not prohibit local speed limits without setting a speed limit itself:

> It must, of course, be conceded that a mere prohibition by the state legislature of local legislation upon the subject of the use of the streets, without any affirmative act of the legislature occupying that legislative field, would be unconstitutional and in violation of the express authority granted by the state constitution to the municipality to enact local regulations. In other words, an act by the state legislature in general terms that the local legislative body would have no power to enact local, police, sanitary or other regulations, while in a sense a general law, would have for its effective purpose the nullification of the constitutional grant, and therefore, be invalid.

183 Cal. 636, 641, 192 P. 442, 445 (1920); *accord*, Abbott v. City of Los Angeles, 53 Cal. 2d 674, 683-84, 349 P.2d 974, 980-81, 3 Cal. Rptr. 158, 164-65 (1960); Pipoly v. Benson, 20 Cal. 2d 366, 372, 125 P.2d 482, 485 (1942).

by general law on the subject. It follows that a court may only find an implied intent to occupy the field if a state statute regulates the same subject as that of the local ordinance.

The decisions based on a finding of implied intent to preempt seem largely result oriented.[37] When examining state law for evidence of implied legislative intent to preempt, courts appear to engage in an unarticulated balancing process which weighs the value of local regulation against the need for statewide uniformity. One factor which weighs heavily against the exercise of city police power is the possibility that the local ordinance will impose a burden on transient citizens.[38] For example, the California Supreme Court found that a city ordinance requiring felons to register deprived them of freedom to move freely between localities.[39] Another unexpressed factor weighing in favor of statewide regulation is the need to protect values deeply embedded in our legal system.[40] Courts have held, for example, that the state preempts the areas of loyalty oaths[41] and criminalization of sexual activity.[42] These holdings exemplify the concern that municipalities with more homogeneous populations than the state as a whole not be allowed to impose sanctions on minorities.[43]

Against the state interest in uniform regulation, courts weigh the local interests underlying the challenged ordinance.[44] Recently, the

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[37] In some cases, courts have found that state statutes listing certain prohibited conduct imply an intent by the legislature to permit all unlisted conduct. *E.g.*, *In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962)(extensive regulation in the Penal Code of sexual activity). Such a judicial finding leaves no room for local regulation. On the other hand, courts have also found that statutes listing certain prohibited conduct imply an intent by the legislature to allow local regulation to prohibit unlisted conduct. *E.g.*, *In re* Hubbard, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964) (extensive regulation in the Penal Code of gambling games) *disapproved on other grounds in* Bishop v. City of San Jose, 1 Cal. 3d 56, 63 & n.6, 460 P.2d 137, 141 & n.6, 81 Cal. Rptr. 465, 469 & n.6 (1969).

[38] *E.g.*, Galvan v. Superior Court, 70 Cal. 2d 851, 864-65, 76 Cal. Rptr. 642, 651, 452 P.2d 930, 939 (1969); Abbott v. City of Los Angeles, 53 Cal. 2d 674, 688, 3 Cal. Rptr. 158, 167, 349 P.2d 974, 983 (1960); Yuen v. Municipal Court, 52 Cal. App. 3d 351, 357, 125 Cal. Rptr. 87, 91 (1st Dist. 1975).

[39] Abbott v. City of Los Angeles, 53 Cal. 2d 674, 688, 349 P.2d 974, 983, 3 Cal. Rptr. 158, 167 (1960).

[40] *See* Sandalow, *supra* note 15, at 708-17.

[41] Tolman v. Underhill, 39 Cal. 2d 708, 249 P.2d 280 (1952) (University of California Regents could not require employees to take loyalty oaths in addition to those required by the state).

[42] *In re* Lane, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

[43] Sandalow, *supra* note 15, at 710. *See generally* CALIFORNIA GOVERNOR'S COMMISSION ON THE LAW OF PRE-EMPTION, *supra* note 16, at 8-10. The Commission recommended to the legislature two criteria useful in deciding whether to preempt local regulation: 1) the desirability of freedom of movement of persons or goods within the state; and 2) the desirability of statewide consensus regulating conduct which does not threaten other persons or conduct relating to freedom of expression.

[44] *E.g.*, People v. Johnson, 61 Cal. App. 3d Supp. 1, 132 Cal. Rptr. 645 (App.

California Supreme Court recognized that a local exercise of the police power in the form of rent control could prevent exploitation of Berkeley's housing shortage.[45] The court found that even though many state statutes regulate the landlord/tenant relationship, no state law imposes rent control.[46] Because the city charter amendment also had a different purpose, the local regulation did not conflict with general law. In another case, a densely populated city showed that it had a greater need than other areas for gun control. The court found that state occupation of the field of gun *licensing* did not preempt a local gun *registration* ordinance.[47] The court narrowly defined the subject of the local ordinance to avoid conflict with state law. Similarly, the California Supreme Court found the local interest in identifying and assessing the affluence and power of groups seeking to influence city government weighed in favor of an ordinance requiring registration of lobbyists.[48] The court avoided potential conflict with state statutes by narrowly defining the scope of the State Bar Act. In these cases the court could have found that the multiplicity of state statutes on the subject of the local ordinance indicated a comprehensive scheme of state regulation occupying the

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Dep't Super. Ct. 1976) (adverse effect on transient citizens did not outweigh benefit of sign ordinance to municipality). In *In re* Hoffman, 155 Cal. 114, 99 P. 517 (1909), the California Supreme Court approved local regulations on the sale of milk that were stricter than those imposed by state law. The court stated,

> [t]he state in its laws deals with all of its territory and all of its people. The exactions which it prescribes operate (except in municipal affairs) upon the people of the state, urban and rural, but it may often, and does often happen that the requirements which the state sees fit to impose may not be adequate to meet the demands of densely populated municipalities; so that it becomes proper and even necessary for municipalities to add to state regulations provisions adapted to their special requirements.

Id. at 118, 99 P. at 519. The court affirmed this principle in Galvan v. Superior Court, 70 Cal. 2d 851, 864, 452 P.2d 930, 939, 76 Cal. Rptr. 642, 651 (1969), discussed at text accompanying note 47, *infra*. The California Governor's Commission on the Law of Pre-emption also suggested that the legislature permit local regulation unless the need for statewide uniformity outweighs the need to regulate at the local level. CALIFORNIA GOVERNOR'S COMMISSION ON THE LAW OF PREEMPTION, *supra* note 16, at 10.

[45] Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 140-47, 550 P.2d 1001, 1009-14, 130 Cal. Rptr. 465, 473-78 (1976). The court found Berkeley's rent control charter amendment a valid exercise of the police power. But because pre-eviction procedures conflicted with state law, and rent adjustment provisions denied landlords due process, the court struck down the amendment. *See* Comment, *Towards a Definable Body of Legal Requisites for Rent Control*, this volume.

[46] Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 141-42, 550 P.2d 1001, 1010-11, 130 Cal. Rptr. 465, 474-75 (1976).

[47] Galvan v. Superior Court, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969) (authority of police chief to revoke gun registration "for cause" did not transform the ordinance into a licensing law).

[48] Baron v. City of Los Angeles, 2 Cal. 3d 535, 469 P.2d 353, 86 Cal. Rptr. 673 (1970).

field. By not finding an implied intent to preempt, the court found the local interest outweighed any state need for uniformity.

In balancing state and local interests, some courts have based a finding of intent to preempt in part upon a further finding that the subject of the local ordinance was better suited to statewide control.[49] But a court's proper function in preemption analysis is not to allocate power between state and local governments by deciding which subjects are proper for state and local regulation. Instead, the court's function is to determine whether the local ordinance conflicts with general law. In the absence of conflicting state law, the constitution permits a local exercise of the police power on matters of statewide concern.[50]

In sum, the outcome of preemption analysis often depends on how a court characterizes the subject and purpose of both state and local regulations. It is difficult to reconcile preemption cases without identifying the state and local policies upon which the courts base their decisions. If a city's need for regulation is great, a court may be willing to characterize the subject and purpose of the local ordinance as different from state law. On the other hand, if a court finds the policy of statewide uniformity more persuasive, a court may characterize the subject and purpose of the local law in a manner that brings the ordinance into conflict with state general law. If a city can successfully minimize the state need for uniformity and convince a court that its ordinance furthers legitimate police power goals, a court may adopt a city's characterizations.

C. Municipal Affairs

A charter city's municipal affairs[51] power augments the police power common to both charter and general law cities. It is the primary distinguishing feature between the two types of cities. The California constitutional grant of power over "municipal affairs" serves two purposes. First, it gives the charter city a general grant of power over matters of local or internal concern.[52] Second, by pro-

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[49] *E.g.*, Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960).

[50] Bishop v. City of San Jose, 1 Cal. 3d 56, 62, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969); Pipoly v. Benson, 20 Cal. 2d 366, 370, 125 P.2d 482, 484 (1942); Weekes v. City of Oakland, 64 Cal. App. 3d 907, 929, 134 Cal. Rptr. 858, 871 (1st Dist. 1976), *hearing granted*, No. 77-27 (Cal. Feb. 11, 1977). *Contra*, Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960).

[51] This article uses "municipal affairs" to refer to those matters over which charter cities have a constitutional grant of power paramount to that of the state legislature. CAL. CONST. art. XI, § 5(a), *set forth in* note 25 *supra*.

[52] Prior to 1914, the charter was an instrument granting specific powers. General law governed any matters over which the charter was silent. Sato, *"Municipal Affairs" in California*, 60 CALIF. L. REV. 1055, 1056 (1972).

tecting municipal affairs from preemption by general law, it frees the charter city from legislative interference in certain limited areas.[53] The only restrictions on a charter city's power over municipal affairs are in the federal and California constitutions[54] and in the charter itself.[55]

The California Constitution offered no guidelines to aid the courts in defining "municipal affairs" until the 1970 adoption of article XI, section 5(b) which lists areas of local authority.[56] The list does not seem to be exclusive,[57] but it does clearly free municipal governmental functions from state level interference. Courts have not formulated a precise definition of "municipal affairs" but instead resolve each case according to its particular facts.[58] They have found ordinances governing aspects of city construction,[59] operation of police and fire departments[60] and taxation for city revenues[61] to be

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[53] *Id.*

[54] A. VAN ALSTYNE, *supra* note 30, at 236.

[55] City of Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 598-99, 212 P.2d 894, 896 (1949); A. VAN ALSTYNE, *supra* note 30, at 236.

[56] Section 5(b), adopted in 1970, provides:

> It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several 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.

CAL. CONST. art. XI, § 5(b).

[57] Ector v. City of Torrance, 10 Cal. 3d 129, 132, 514 P.2d 433, 434-35, 109 Cal. Rptr. 849, 850-51 (1973) (by implication) (because of a specific constitutional directive, ordinance requiring city employees to reside within city was "not the usual case in which courts are without constitutional guidance in resolving the question of whether a subject of local regulation is a 'municipal affair'" within the meaning of California Constitution article XI, section 5); *see* A.B.C. Distrib. Co. v. City & County of San Francisco, 15 Cal. 3d 566, 571, 542 P.2d 625, 627, 125 Cal. Rptr. 465, 467 (1975) (dictum) (although not expressly authorized by article XI, section 5, the power of charter city to tax is within broad scope of "municipal affair").

[58] CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 320-21, 118 Cal. Rptr. 315, 325-26 (4th Dist. 1974).

[59] City of Pasadena v. Charleville, 215 Cal. 384, 10 P.2d 745 (1932) (charter city need not provide for prevailing wages in bid requests); Smith v. City of Riverside, 34 Cal. App. 3d 529, 110 Cal. Rptr. 67 (4th Dist. 1973) (city council allowed to extend or develop utilities without competitive bidding).

[60] Brown v. City of Berkeley, 57 Cal. App. 3d 223, 237, 129 Cal. Rptr. 1, 8 (1st Dist. 1976).

[61] Ainsworth v. Bryant, 34 Cal. 2d 465, 469, 211 P.2d 564, 566 (1949) *quoted in* note 90 *infra.*

municipal affairs. Matters which are not municipal affairs are generally matters having an impact beyond a city's borders.[62] Courts have found, for example, that communications[63] and municipal airports[64] are not municipal affairs. Nor have courts found that cities may regulate personal liberties[65] or interfere with state governmental functions.[66]

Judicial determinations of whether matters are municipal affairs appear to depend upon the outcome of balancing the advantages of local autonomy against the need for statewide uniformity.[67] Courts weigh the state's concerns for transient citizens and personal liberties against the city's concern for local autonomy. These concerns are the same interests courts weigh when determining whether state legislation preempts a local ordinance.[68] In determining whether a matter is a municipal affair, however, the courts' function is not to resolve conflicts between subordinate and superior levels of government. Instead, the court allocates power. Regardless of any conflicting state law or legislative intent to preempt, the constitution grants charter city autonomy over matters of local or internal concern.

The similarity between municipal affairs analysis and preemption analysis causes some courts to confuse them.[69] There is a danger in

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[62] *E.g.*, City of Santa Clara v. Von Raesfeld, 3 Cal. 3d 239, 474 P.2d 976, 90 Cal. Rptr. 8 (1970) (interest rate of bonds for regional water pollution facility subject to state regulation).

[63] Pacific Tel. & Tel. v. City & County of San Francisco, 51 Cal. 2d 766, 336 P.2d 514 (1959).

[64] Trans World Airlines v. City & County of San Francisco, 228 F.2d 473 (9th Cir. 1955), *cert. denied*, 351 U.S. 919 (1956) (lease of municipal airport space not a municipal affair).

[65] *See In re* Lane, 58 Cal. 2d 99, 106, 372 P.2d 897, 901, 22 Cal. Rptr. 857, 861 (1961) (criminal aspects of sexual intercourse); *cf.* Tolman v. Underhill, 39 Cal. 2d 708, 249 P.2d 280 (1952) (loyalty oaths are a matter of statewide concern).

[66] Younger v. Berkeley City Council, 45 Cal. App. 3d 825, 119 Cal. Rptr. 830 (1st Dist. 1975) (ordinance establishing procedures for citizen access to state arrest records was beyond the municipal affairs power).

[67] *E.g.*, City of Los Angeles v. California Dep't of Health, 63 Cal. App. 3d 473, 479-80, 133 Cal. Rptr. 771, 774 (2d Dist. 1976). A city zoning ordinance conflicted with a state statute. The statute declared the use of property for the care of mentally disordered persons a residential use for zoning purposes. The court acknowledged that if it treated the scheme as classical zoning, it might have been a municipal affair. But it chose instead to characterize the statute as a scheme relating to the placement of handicapped persons. "The consequences of placement, treatment, and, hopefully, return of the handicapped to a productive and respected place in society is a subject that transcends municipal boundaries." *Id.* at 480, 133 Cal. Rptr. at 774.

[68] *See* text accompanying notes 37-50 *supra*.

[69] In *In re* Hubbard, 62 Cal. 2d 119, 127-28, 396 P.2d 809, 814-15, 41 Cal. Rptr. 393, 398-99 (1964) *disapproved in* Bishop v. City of San Jose, 1 Cal. 3d 56, 63 & n.6, 460 P.2d 137, 141 & n.6, 81 Cal. Rptr. 465, 469 & n.6 (1969), the California Supreme Court found that occupation of the field was one test by which a court could determine whether a given subject was a municipal affair. According to the court's analysis, a matter is not a municipal affair if the subject is (1) fully covered by general law indicating an exclusive state concern; (2) par-

not distinguishing the fundamentally different purposes of the two analyses. Courts may allow the outcome of the municipal affairs analysis to depend on whether the state legislature intended to preempt local regulation in the field. But a state intent to preempt theoretically does not prevent a matter from being a municipal affair. If courts make the legislature's intent determinative, they abdicate their responsibility to enforce the protective function of the constitutional grant of municipal affairs power.[70] The California Supreme Court recognized this danger when it said, "[t]he legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of statewide concern."[71] The legislature's disclosed intent to preempt is merely one factor that weighs in favor of finding that the matter is not a municipal affair.[72]

If there is any doubt whether a regulation is a municipal affair, courts generally defer to the state's sovereignty.[73] The courts often cite this rule of construction, Dillon's Rule,[74] to buttress a holding that a matter is not a municipal affair.[75] But strict adherence to Dillon's Rule seems at odds with California charter cities' constitutionally granted protection from state level interference with local concerns. Automatically weighting the scales in favor of state legislation diminishes the protective function of municipal affairs.

If past decisions have found that a certain matter is not a municipal affair, changed circumstances may necessitate a reevaluation of the issue. Municipal affairs is not a static doctrine, but changes with changing conditions.[76] Thus, prior cases are of less precedential value in municipal affairs analysis than in other areas of the law. For example, in 1959, the California Supreme Court held that a charter

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tially covered by general law indicating that further local action will not be tolerated; or (3) partially covered by general law and of such nature that the adverse effect on transient citizens outweighs the municipal benefit.

These three factors are so like the factors the courts use to find express and implied preemption that courts have cited them in their preemption discussion. *See, e.g.*, Galvan v. Superior Court, 70 Cal. 2d 851, 860, 452 P.2d 930, 936, 76 Cal. Rptr. 642, 648 (1969); Yuen v. Municipal Court, 52 Cal. App. 3d 351, 354, 125 Cal. Rptr. 87, 89 (1st Dist. 1975).

[70] Sato, *supra* note 52, at 1073.

[71] Bishop v. City of San Jose, 1 Cal. 3d 56, 63 & n.6, 460 P.2d 137, 141 & n.6, 81 Cal. Rptr. 465, 469 & n.6 (1969) *disapproving In re* Hubbard, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

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

[73] Trans World Airlines v. City & County of San Francisco, 228 F.2d 473, 475 (9th Cir. 1955), *cert. denied*, 351 U.S. 919 (1956) (airport leasing); *Ex parte* Daniels, 183 Cal. 636, 639, 192 P. 442, 444 (1920) (speed limits); Younger v. Berkeley City Council, 45 Cal. App. 3d 825, 830, 119 Cal. Rptr. 830, 832 (1975) (establishing procedures for citizen access to state records).

[74] 1 J. DILLON, MUNICIPAL CORPORATIONS §§ 237, 239 (5th ed. 1911).

[75] Sandalow, *supra* note 15, at 652.

[76] Pacific Tel. & Tel. Co. v. City & County of San Francisco, 51 Cal. 2d 766, 771, 336 P.2d 514, 517 (1959).

city did not have the power to deny a telephone company a franchise[77] despite an earlier decision[78] holding that the placing of telephone lines on city streets was a municipal affair. The court discussed the expansion of the communications industry since 1909 and the increased need for uniformity in 1959.[79] There is no reason why changed circumstances could not weigh in the charter city's favor. In a California Supreme Court case extending the municipal affairs power, the court stated, "it is recognized that [the concept of municipal affairs] is not fixed but fluctuates in scope, and that changes in conditions make necessary new and broader applications thereof."[80] Courts should, therefore, be willing to reweigh the relevant state and local interests because "novelty should impose no veto"[81] upon solutions to new municipal problems.

As a practical matter, courts rarely uphold a charter city's ordinance on the basis that the municipal affairs power supersedes a conflicting state law. Courts appear reluctant to insulate local regulations from further state legislation. Instead courts prefer to uphold local ordinances by finding that they are valid exercises of the police power not in conflict with general law.[82] A finding of no conflict allows a court to avoid the sensitive problem of allocating power between the state and charter city legislative bodies.

The courts' traditional reluctance to define matters as municipal affairs means that a charter city should not depend solely on its municipal affairs argument to shield its ordinance from state preemption. The charter city should prepare a strong argument that the ordinance does not conflict with state general law. In the event that a court is unwilling to define an activity as a municipal affair, a charter city can argue that the constitutional municipal affairs power at the very least states a constitutional preference for charter city autonomy over local matters. The court should take this preference into account when making its preemption analysis by interpreting

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[77] Pacific Tel. & Tel. Co. v. City & County of San Francisco, 51 Cal. 2d 766, 336 P.2d 514 (1959).

[78] Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796 (1911).

[79] Pacific Tel. & Tel. Co. v. City & County of San Francisco, 51 Cal. 2d 766, 775-76, 336 P.2d 514, 519-20 (1959).

[80] Butterworth v. Boyd, 12 Cal. 2d 140, 147, 82 P.2d 434, 438 (1938).

[81] Bank v. Bell, 62 Cal. App. 320, 330, 217 P. 538, 542 (1st Dist. 1923) (city market is within municipal affairs power).

[82] For examples of cases in which courts discuss the validity of a local ordinance in terms of the charter city's municipal affairs power but uphold the ordinance because it does not conflict with state general law, see A.B.C. Distrib. Co. v. City & County of San Francisco, 15 Cal. 3d 566, 542 P.2d 625, 125 Cal. Rptr. 465 (1975); Rivera v. City of Fresno, 6 Cal. 3d 132, 490 P.2d 793, 98 Cal. Rptr. 281 (1971); Bishop v. City of San Jose, 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969); *In re* Hubbard, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964), *disapproved in* Bishop v. City of San Jose, 1 Cal. 3d 56, 63 & n.6, 460 P.2d 137, 141 & n.6, 81 Cal. Rptr. 465, 469 & n.6 (1969).

state legislation narrowly to avoid, if possible, conflict with a charter city ordinance.[83]

D. A City's Tax Power

A tax may be the most effective tool to accomplish a city's goals. A city can tax to raise revenue to further a regulatory scheme by creating incentives or disincentives to public actions. The preemption and municipal affairs principles discussed above apply to all city ordinances, including tax ordinances. If a city wishes not only to raise revenue but to regulate through an exercise of the tax power, the principles will apply twice: first to the tax; and second to the underlying regulation.[84]

Cities derive their power to tax for revenue[85] from two sources, the state legislature and the constitution. The legislature has specifically authorized[86] general law cities to levy business license,[87] property,[88] and sales and use taxes.[89] Charter cities, on the other hand, are not dependent on the legislature for their tax power. The constitutional grant of autonomy over municipal affairs is the source of a charter city's power to impose revenue raising taxes.[90]

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[83] Los Angeles raised this argument in a recent case. City of Los Angeles v. California Dep't of Health, 63 Cal. App. 3d 473, 480, 133 Cal. Rptr. 771, 775 (2d Dist. 1976). The court said that "[t]he argument implies a restriction on the power of the Legislature over matters of statewide concern that does not exist."

[84] *See* text accompanying notes 95-97 *infra*.

[85] Both charter and general law cities may tax only for a municipal purpose. Bank v. Bell, 62 Cal. App. 320, 217 P. 538 (1st Dist. 1923). Since cities generally use their tax power to finance municipal government services, the municipal purpose requirement does not impose an important limitation upon cities' tax power. The amount of revenue necessary to finance the services is within the city's sole discretion. Rancho Santa Anita, Inc. v. City of Arcadia, 20 Cal. 2d 319, 323, 125 P.2d 475, 477-78 (1942) (tax rates to create a surplus).

[86] The legislature derives its power to authorize cities to tax from the constitution. CAL. CONST. art. XIII, § 24 (legislature prohibited from imposing taxes for local purposes, but permitted to authorize local governments to impose them).

[87] CAL. GOV'T CODE § 37101 (West Supp. 1977).

[88] CAL. GOV'T CODE § 43000 (West 1966). The legislature is also empowered to provide maximum property tax rates and bonding limits for local governments. CAL. CONST. art. XIII, § 20.

[89] CAL. REV. & TAX. CODE §§ 7200-7209 (West 1970 & Supp. 1977).

[90] The California Supreme Court has said,

> [i]t is well settled that the power of a municipal corporation operating under a freeholders' charter . . . to impose taxes "for revenue purposes, including license taxes, is strictly a municipal affair" pursuant to the direct constitutional grant of the people of the state . . . , and that "the restrictions on the exercise of that power are only the limitations and restrictions appearing in the Constitution and in the charter itself."

Ainsworth v. Bryant, 34 Cal. 2d 465, 469, 211 P.2d 564, 566 (1949) (citations omitted); *accord, e.g.*, A.B.C. Distrib. Co. v. City & County of San Francisco, 15 Cal. 3d 566, 571, 542 P.2d 625, 627, 125 Cal. Rptr. 465, 467 (1975); City of Glendale v. Trondsen, 48 Cal. 2d 93, 98, 308 P.2d 1, 3 (1957); West Coast Advertising v. City & County of San Francisco, 14 Cal. 2d 516, 524, 95 P.2d 138,

Courts seldom interfere with cities' revenue raising taxes.[91] They refuse to infer any constitutional limitations on cities' tax power when the constitution contains no express statement to that effect.[92] Courts should also refuse to infer state legislative tax limitations on city tax power. While the state legislature may expressly deny general law cities revenue raising tax power, courts should not deny cities sources of revenue in the absence of express legislative preemption.[93] Because courts have recognized that charter cities' revenue raising is a municipal affair, a charter city's tax theoretically supersedes even an express legislative limitation.[94]

If a city has both the power to tax and the power to regulate the subject of the tax, an ordinance which regulates by means of a tax should be valid. A charter city's municipal affairs tax power in combination with the police or municipal affairs regulatory power authorizes a charter city to regulate by means of a tax.[95] Similarly,

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143 (1939); *Ex parte* Braun, 141 Cal. 204, 74 P. 780 (1903). *But see* Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 41, 520 P.2d 29, 37, 112 Cal. Rptr. 805, 813 (1974), discussed at note 20 *supra*.

[91] Courts go to great lengths to uphold city tax ordinances. *See, e.g.*, Weekes v. City of Oakland, 64 Cal. App. 3d 907, 134 Cal. Rptr. 858 (1st Dist. 1976), *hearing granted*, No. 77-27 (Cal. Feb. 11, 1977). In *Weekes* the court upheld a charter city's employees' license fee requiring employers to withhold a percentage of employees' income despite California Constitution article XIII, section 26 empowering state to tax income, and California Revenue & Taxation Code section 17041.5, prohibiting charter and general law cities from taxing income. *See also* Comment, *The Municipal Occupational Tax: A Source of Revenue for the Central City*, this volume.

[92] Ainsworth v. Bryant, 34 Cal. 2d 465, 472, 211 P.2d 564, 568 (1949). *Compare* City of Los Angeles v. A.E.C. Los Angeles, 33 Cal. App. 3d 933, 939-40, 109 Cal. Rptr. 519, 523 (2d Dist. 1973) which seems to have extended *Ainsworth* to say that the state legislature preempts municipal taxation only by language expressing such a purpose. This could even mean that there is no implied preemption of the tax power.

[93] The United States Supreme Court has said,

> [w]hen such a municipal corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise be in express terms prohibited. . . . A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.

United States v. New Orleans, 98 U.S. 381, 393 (1878) *quoted in* Ainsworth v. Bryant, 34 Cal. 2d 465, 469, 211 P.2d 564, 566 (1949) and *Ex parte* Braun, 141 Cal. 204, 209, 74 P. 780, 782 (1903).

[94] For example, in *Ex parte* Braun, 141 Cal. 204, 74 P. 780 (1903), the court found that a state statute which abrogated the power to license for revenue did not invalidate a charter city revenue license because the collection of a license tax for revenue was a municipal affair superseding state law.

[95] The California Supreme Court said of a charter city tax which regulated in furtherance of the police power,

> [t]he city has powers of taxation except as limited by its charter and the Constitutions, state and federal. While the ordinance has many police regulations as above shown, there is no obstacle to it performing both functions, taxation and regulation, and it may be upheld as valid under either or both powers.

City of Glendale v. Trondsen, 48 Cal. 2d 93, 103, 308 P.2d 1, 6 (1957) (because

if a general law city has both an express grant of tax power and the police power to regulate the subject of the tax, its regulatory tax should be valid. It is unclear, however, whether a general law city can regulate by means of a tax in the absence of an express state legislative grant of tax power. Although a tax designed to promote the public health, safety and welfare would seem to flow naturally from the broad constitutional grant of police power,[96] case precedent neither affirmatively establishes nor forecloses the police power as a source of city regulatory tax power.[97]

If a city does not have the power to regulate a certain matter directly, it may not regulate indirectly by means of a tax. As with all other ordinances, state general law may preempt charter or general law regulatory tax ordinances by direct conflict, express intent to occupy the field, or implied intent to occupy the field. To avoid state preemption of the entire tax ordinance, the underlying regulation must be a valid exercise of either the municipal affairs power or the police power.

Although the legislature may have preempted the power to *regulate* in a field, cities may still impose a *revenue* tax on matters within the field.[98] Even a revenue raising tax regulates to some degree, because it burdens continuation of the taxed activity.[99] As long as the regulatory effect remains incidental to the revenue raising function, it will not invalidate a revenue raising tax.[100] To determine whether a tax's primary purpose is to raise revenue or to regulate, courts look

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taxation is a municipal affair, the court found no need to identify specific authority for charter city excise tax on privilege of accumulating rubbish and having rubbish collection available).

[96] Because a city's police power is as broad as the state legislature's, Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 140, 550 P.2d 1001, 1009, 130 Cal. Rptr. 465, 473 (1976), a Ninth Circuit decision finding that California Vehicle Fees were in furtherance of *state* police power, Ingles v. Boteler, 100 F.2d 915, 919 (9th Cir. 1938), *aff'd on other grounds*, 308 U.S. 57 (1939), indicates a city might be able to tax in furtherance of *city* police power.

[97] *See* Sato, *Municipal Occupation Taxes in California: The Authority to Levy Taxes and the Burden on Intrastate Commerce*, 53 CALIF. L. REV. 801, 805-10 (1965). *See also* Merced County v. Helm, 102 Cal. 159, 36 P. 399 (1894) (court implied collection of county tax was not within police power because tax was not a prohibitory measure); *Ex parte* Mount, 66 Cal. 448, 6 P. 78 (1885) (court implied that constitutional grant of police power was source of city power to tax). *See also* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, § 202 at 4175 (8th ed. 1974).

[98] *In re* Groves, 54 Cal. 2d 154, 156, 351 P.2d 1028, 1030, 4 Cal. Rptr. 844, 846 (1960).

[99] Any tax may tend to discourage the pursuit of the taxed activity, but a revenue raising tax with this incidental regulatory effect is still valid. "[T]he mere fact that a tax has a collateral effect of regulating an activity does not make that tax any less a revenue-raising measure." Oakland Raiders v. City of Berkeley, 65 Cal. App. 3d 623, 628, 137 Cal. Rptr. 648, 651 (1st Dist. 1976) (charter city business license tax on professional sports events).

[100] *Id.*

to the substance of the ordinance.[101] Courts examine whether the tax ordinance interferes with state regulation[102] or imposes additional or conflicting requirements in a preempted field.[103] If the tax does interfere with state regulation, the local tax ordinance will fail unless the revenue raising function is separable from the regulatory function.[104] But a city may tax an activity which it has no power to prohibit, if its tax does not interfere with a state regulatory scheme. For example, in the area of business license taxes, courts distinguish between the state's exclusive power to license, meaning "permit to operate," and the city's power to impose a business license tax for the purpose of raising revenue only.[105]

Either a regulatory or a revenue raising tax may be a useful tool when a city seeks to discourage an activity without prohibiting it. Cities may wish, however, to characterize their ordinance's purpose as primarily revenue raising because a revenue tax avoids preemption by state occupation of the field of regulation. Such a tax would retain the incidental regulatory effect of discouraging the taxed activity. But if the regulatory effect is more than incidental, a city must design its tax ordinance to regulate either a municipal affair or within a field the legislature does not occupy.

II. City Power to Implement Traffic Congestion Control

Cities differ in geography, street layout, numbers of privately owned vehicles, and distribution of residences, shopping areas, and work places. These differences make local control of traffic congestion desirable. A city will want to tailor its traffic congestion control plan or automobile use disincentive to fit its own characteristics. Before a city can devise an ordinance which will successfully meet its traffic congestion control needs, it must consider the basic principles of city power. Because past cases have held that the state preempts the area of traffic regulation, a city must use the basic police, municipal affairs and tax powers to establish a field of traffic congestion control which is not the exclusive province of the state.

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[101] "[I]n determining the type of ordinance in question, it is the duty of the courts to look at its substance and not merely its form." City & County of San Francisco v. Boss, 83 Cal. App. 2d 445, 450, 189 P.2d 32, 35 (1st Dist. 1948); *accord*, Arnke v. City of Berkeley, 185 Cal. App. 2d 842, 847, 8 Cal. Rptr. 645, 648 (1st Dist. 1960).

[102] *E.g.*, Agnew v. City of Los Angeles, 190 Cal. App. 2d 820, 12 Cal. Rptr. 507 (2d Dist. 1961) (revenue licensing ordinance did not interfere with state regulation of electrical contractors).

[103] *E.g.*, Agnew v. City of Los Angeles, 51 Cal. 2d 1, 330 P.2d 385 (1958) (tax ordinance prescribed qualifications in addition to those the state required in licensing electrical contractors and was, therefore, invalid).

[104] City & County of San Francisco v. Boss, 83 Cal. App. 2d 445, 452, 189 P.2d 32, 36-37 (1st Dist. 1948).

[105] Ainsworth v. Bryant, 34 Cal. 2d 465, 470, 211 P.2d 564, 568 (1949).

A. *Examples of Express Authorization in the Vehicle Code*

State general law expressly permits some local regulation of traffic. This section illustrates how cities can use some of the authorized regulations to solve traffic congestion problems.[106]

Under Vehicle Code section 21101(a),[107] a city may close a highway to through traffic when, in the opinion of the city, the highway is no longer needed.[108] Acting pursuant to this code section, one city closed off a residential street which had become a thoroughfare for non-residents.[109] The court found that closing the street was within the city's power to protect the health, safety and general welfare of its citizens.[110] The neighboring city objected to the closure, arguing that the word "needed" in section 21101(a) should be strictly construed: if more cars than ever were using the street, then it was still "needed." The court disagreed and said it would liberally construe the section.[111] The plaintiff's challenge failed because the court found that the city was acting as the legislature intended.

Vehicle Code section 21101(b)[112] authorizes cities to enact ordinances requiring all vehicles to stop or to observe traffic control devices before entering an intersection.[113] Placement of traffic control devices such as stop signs is an important element of traffic control planning. Cities use placement to promote residential area safety by slowing or diverting traffic. If each automobile must stop

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[106] This article does not discuss the alternative of special legislation. The objections, however, to forcing cities to go to the legislature for special statutes are inefficient use of legislative time, lack of legislative responsiveness, inadequate city bargaining power and the unresponsiveness of the local delegation itself to local needs. *See* Sandalow, *supra* note 15 at 654-55. Many of the same problems are involved when cities seek general enabling legislation. One city may wish to tackle a local problem which is not yet shared by other cities. The political climate may not permit enactment of the desired statute as state-wide general law. *Id.* at 654.

[107] "Local authorities may adopt rules and regulations by ordinance or resolution on the following matters: (a) Closing any highway to vehicular traffic when in the opinion of the legislative body having jurisdiction the highway is no longer needed for vehicular traffic." CAL. VEH. CODE § 21101(a) (West 1971).

[108] Procedures in the California Streets & Highways Code govern abandonment or vacation of city streets. CAL. STS. & HY. CODE §§ 8300-8374 (West 1969).

[109] Snyder v. City of South Pasadena, 53 Cal. App. 3d 1051, 126 Cal. Rptr. 320 (2d Dist. 1975) (since the street remained open to some traffic, its closure was not "vacation" or "abandonment" subject to procedures in the Streets & Highways Code).

[110] *Id.* at 1056-57, 126 Cal. Rptr. at 323-24.

[111] *Id.* at 1058, 126 Cal. Rptr. at 325.

[112] CAL. VEH. CODE § 21101(b) (West 1971).

[113] Such a city ordinance does not affect highways not under the exclusive jurisdiction of the local authority unless approved by the Department of Transportation. CAL. VEH. CODE § 21104 (West Supp. 1977). Traffic control devices must be uniform throughout the state. CAL. VEH. CODE §21400-21401 (West Supp. 1977). State law requires local authorities to place certain devices and allows them to place others. CAL. VEH. CODE § 21351 (West 1971).

at every sign on every block, drivers tend to select other routes.[114]

Vehicle Code section 21101(c)[115] permits the city to prohibit the use of particular highways by certain vehicles. This code section may allow the city to restrict the routes of the loudest vehicles.[116]

These are only some examples of how a city may use the existing code sections to alleviate traffic congestion problems. If a city wishes to go beyond solutions specifically authorized by general law, it must show that its regulation is a valid exercise of either the police or municipal affairs power.

B. Police Power to Implement Traffic Congestion Control

Both charter and general law cities may exercise their police power to solve traffic congestion problems if they can overcome the barrier of state preemption. The Vehicle Code is the primary source of any potential conflicts with a city traffic congestion control ordinance. The key to avoiding preemption is convincing a court that the Vehicle Code does not address congestion control or automobile use disincentives. A city must demonstrate that its ordinance has a purpose and subject distinct from any in the Vehicle Code. It must also show that the ordinance does not regulate in an area of paramount state concern. If the city is successful, a court should construe the local ordinance to avoid conflict with state law.

Many traffic regulation cases involve literal conflict between state and local ordinances. For example, a local speed limit different from the state limit failed to survive a preemption challenge.[117] Similarly, state law preempted a city truck weight limit set lighter than the state limit.[118] Courts have found a conflict of jurisdiction arising from dual state and local regulations prohibiting reckless driving[119] and requiring pedestrians to cross only in a crosswalk.[120] In each of

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[114] The stop and start nature of such traffic increases pollution, however. *See generally* Grad, Rosenthal, *et. al.*, *The Automobile and the Regulation of Some of Its Non-exhaustive Impacts on the Environment*, 1 COLUM. J. OF ENVT'L L. 187, 190-91 (1975).

[115] CAL. VEH. CODE § 21101(c) (West 1971).

[116] 55 CAL. OP. ATT'Y GEN. 178 (1972). Additional Vehicle Code sections provide a comprehensive scheme for noise control which may preempt other more direct city attempts to control vehicular noise levels. CAL. VEH. CODE §§27200-27205 (West Supp. 1977) (noise limits with which vehicles must conform before their sale in California); CAL. VEH. CODE §§ 23130-23130.5 (West Supp. 1977) (noise limits for categories of vehicles).

[117] *Ex parte* Daniels, 183 Cal. 636, 645-46, 192 P. 442, 446-47 (1920) (also express intent to preempt).

[118] Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 664-65, 262 P. 334, 336-37 (1927) (also express prohibition of local regulation).

[119] *In re* Murphy, 190 Cal. 286, 290, 212 P. 30, 31 (1923).

[120] Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482 (1942).

these cases, the courts also found that the legislature occupies the field of traffic regulation, thus precluding any local traffic regulation.[121]

Courts have found in the Vehicle Code an expression of legislative intent to occupy the entire field of traffic regulation.[122] An express statement of intent to preempt appears in Vehicle Code section 21:

> Except as otherwise expressly provided, the provisions of this Code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the *matters covered by the code* unless expressly authorized herein.[123]

Section 21 appears to be a general law which would conflict with, and thus preempt, unauthorized local traffic regulations. The California Supreme Court has said, however, that the legislature must accompany any blanket prohibition of local regulation with general law on the subject.[124] Unless the legislature acts affirmatively to occupy the field of traffic congestion control, the blanket prohibition in section 21 violates the broad constitutional grant of city police power and creates a no man's land in which neither the locality nor the state has legislated.[125] Most traffic cases have, in fact, involved matters clearly covered by state statutes.[126]

Section 21 aside, the Vehicle Code is so vast and comprehensive a scheme of regulation that courts may find an implied intent to preempt a local traffic congestion control ordinance. Courts have held that the code is a general scheme for the control of motor vehicles

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[121] In traffic regulation cases, courts accompany a finding of either implied or express legislative intent to occupy the field with a finding of direct conflict between state and local ordinances. Because additional local regulations in furtherance of state law are valid, Pipoly v. Benson, 20 Cal. 2d 366, 370, 125 P.2d 482, 484 (1942), and because defining conflict is not an easy task, Bacich v. Russell, 192 Cal. App. 2d 435, 437, 13 Cal. Rptr. 459, 460 (1st Dist. 1961), courts buttress decisions they might have made on the basis of direct conflict alone with findings that the state occupies the field. It is often difficult to determine the true basis of the decision.

[122] Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482 (1942); Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334 (1927); *Ex parte* Daniels, 183 Cal. 636, 192 P. 442 (1920); People v. Moore, 229 Cal. App. 2d 221, 40 Cal. Rptr. 121 (2d Dist. 1964); Biber Elec. Co. v. City of San Carlos, 181 Cal. App. 2d 342, 5 Cal. Rptr. 261 (1st Dist. 1960); James v. Myers, 68 Cal. App. 2d 23, 156 P.2d 69 (2d Dist. 1945).

[123] CAL. VEH. CODE § 21 (West 1971) (emphasis added).

[124] *Ex parte* Daniels, 183 Cal. 636, 641, 192 P. 442, 445 (1920). *See* note 36 *supra.*

[125] Peppin, *Municipal Home Rule in California III: Section 11 of Article XI of the California Constitution,* 32 CALIF. L. REV. 341, 369-71 (1944).

[126] *E.g.*, Pipoly v. Benson, 20 Cal. 2d 366, 125 P. 2d 482 (1942) (laws regulating pedestrian behavior); Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334 (1927) (truck weight limits); *Ex parte* Daniels, 183 Cal. 636, 192 P. 442 (1920) (speed limits); People v. Moore, 229 Cal. App. 2d 221, 40 Cal. Rptr. 121 (2d Dist. 1964) (driver licensing); James v. Myers, 68 Cal. App. 2d 23, 156 P.2d 69 (2d Dist. 1945) (motorcycle riding).

on public highways.[127] Therefore, the state occupies the field of traffic regulation and leaves no room for local supplementary legislation.[128] These traffic decisions usually involve rules of the road governing motorist and pedestrian behavior. The state's interest in uniform control of these matters is paramount to any local interest in regulation. But the legislature cannot and did not foresee every possible local need when it enacted the Vehicle Code. If the subject of the local ordinance is not yet within the field covered by the Vehicle Code, additional local regulation is proper.[129] To allow an implied legislative intent to preempt a matter outside the code is to allow the legislature to do by implication what it may not do expressly: deprive cities of their police power without enacting general law on the subject.[130] If the Vehicle Code impliedly preempts local traffic congestion control ordinances without regulating the subject itself, cities have no solution to the traffic congestion problems they face.

In finding that the state occupies the field of traffic regulation, courts have neglected to identify and distinguish the purposes underlying local ordinances from the purposes of the Vehicle Code. They have also neglected to determine whether an ordinance would interfere with the state's paramount interest in uniformity by adversely affecting transient citizens. Rather, courts have automatically characterized any ordinance dealing with vehicles as a "traffic regulation." Once a court has so characterized a local ordinance, it almost invariably finds that precedent requires that the ordinance fail. But automobile use has changed dramatically since the original 1920 California Supreme Court holding[131] that the state occupies the field of traffic regulation. Today, there are 13 million automobiles in California.[132] In the face of worsening traffic congestion problems, courts should re-examine cases whose holdings effectively thwart local initiative in regulating vehicles. Courts need to look closely at the purpose and subject of a local traffic congestion control ordi-

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[127] For example, the court in Atlas Mixed Mortar v. City of Burbank said,

> [w]henever the state of California sees fit to adopt a general scheme for the regulation and control of motor vehicles upon the public highways of the state, the entire control over whatever phases of the subject are covered by state legislation ceases in so far as municipal or local regulation is concerned.

202 Cal. 660, 663, 262 P. 334, 336 (1927).

[128] Pipoly v. Benson, 20 Cal. 366, 371, 125 P.2d 482, 485 (1942).

[129] Mecchi v. Lyon Van & Storage Co., 38 Cal. App. 2d 674, 681, 102 P.2d 422, 425 (1st Dist. 1940) (state law covered parking on state highways; the court upheld local regulation of parking on city streets). The California Supreme Court cited *Mecchi* with approval. Pipoly v. Benson, 20 Cal. 2d 366, 374, 125 P. 2d 482, 487 (1942).

[130] *See* note 36 & accompanying text *supra*.

[131] *Ex parte* Daniels, 183 Cal. 636, 192 P. 442 (1920).

[132] CALIFORNIA TRANSPORTATION BOARD, *supra* note 7, at I-4 - I-7.

nance to determine whether the regulated matter lies outside the scope of the Vehicle Code. Courts must also weigh any state need for uniformity against the need for local regulation that reflects the uniquely local aspects of traffic congestion problems.

The primary purpose of the Vehicle Code seems to be the promotion of statewide driving safety and convenience through uniform regulation.[133] The purpose of a local traffic congestion control plan or automobile use disincentive, on the other hand, would be to eliminate localized traffic congestion, improve the city environment, and protect citizens from the hazards of excessive traffic. The Vehicle Code does not address the subject of local traffic congestion control plans or automobile use disincentives. Some code sections concern traffic congestion, but they are limited in their scope.[134] None addresses automobile use disincentives. Because the local ordinance would not seek to change existing rules of the road, the paramount state need for uniformity in matters of speed limits, traffic light color, roadway markings, etc., should not be a barrier to a city's ordinance. A local automobile use disincentive might conflict with the tacit state goal of making driving easy and convenient. State policy is changing, however, toward recognition of the need for decreased automobile use and increased use of transportation alternatives.[135]

The police power possessed by both charter and general law cities is the probable source of city power to regulate the number of cars within city borders. The manner in which a city characterizes its traffic congestion control plan or automobile use disincentive may well decide the outcome of a court's preemption analysis. Section 21 can constitutionally prohibit only local regulation of matters covered by the Vehicle Code.[136] Therefore, if a city can distinguish the purpose and subject of its ordinance from matters in the Vehicle Code, state law will not expressly preempt the ordinance. If a city is able to demonstrate that its traffic congestion ordinance does not interfere with a paramount state need for uniformity, a court will not find implied preemption by state law.

C. Municipal Affairs Power to Implement Traffic Congestion Control

A charter city may try to characterize its traffic congestion control ordinance or automobile use disincentive plan as a municipal af-

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[133]The original purpose of the Vehicle Code was to promote safety and orderly traffic through uniform regulation. Helmer v. Superior Court, 48 Cal. App. 140, 142, 191 P. 1001, 1001-02 (3d Dist. 1920).

[134]CAL. VEH. CODE § 21655.5 (West Supp. 1977), *set forth in* note 6 *supra* and CAL. VEH. CODE § 21100.5 (West Supp. 1977), *set forth in* note 8 *supra.*

[135]CALIFORNIA TRANSPORTATION BOARD, *supra* note 7 at I-1 - I-23.

[136]CAL. VEH. CODE § 21 (West 1971), *set forth in* text accompanying note 123 *supra.*

fair. The protective function of the municipal affairs power would then preserve it from a preemption challenge and give it precedence over state law. Before a court recognizes any local ordinance as a municipal affair, a city must establish that the subject of its ordinance is a purely local matter and not one of statewide concern.

A charter city dealing with the multifaceted problems which traffic causes can make a strong argument that internal traffic congestion problems should be regulated locally. A city's traffic congestion problem may be confined to certain streets at certain hours of the day or certain days of the week. A city may find that excessive automobile use has converted its residential streets into major thoroughfares. By identifying the uniquely local impact of traffic congestion problems, a charter city can argue that the need for local autonomy in this narrow area of traffic regulation outweighs any state need for uniformity.

Early decisions holding that "traffic regulation" is not a municipal affair may frustrate the charter city's argument.[137] In 1920, the California Supreme Court, when confronted with conflicting state and local speed limits, held that traffic regulation was not a municipal affair.[138] The court said that the streets of a city belong to the people of the state. Control over street traffic was, therefore, part of the state's sovereign power. Despite the special interest the municipality might have in local traffic regulations, and despite earlier cases holding that traffic regulation was a local matter, the court said that any doubt whether traffic was a municipal affair must be resolved in favor of the state.[139]

Since 1920, no court has found that traffic regulation is a municipal affair. When faced with a challenged charter city vehicle ordinance, the courts restate, without re-examining, the original holding that traffic regulation is not a municipal affair.[140] This reluctance to examine charter city traffic regulations critically may stem from a concern that finding a particular traffic ordinance regulates a municipal affair will insulate the entire field of traffic regulation from future state control. Another concern may be transient citizens'

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[137]Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482 (1942); *In re* Murphy, 190 Cal. 286, 212 P. 30 (1923); *Ex parte* Daniels, 183 Cal. 636, 192 P. 442 (1920); Bacich v. Russell, 192 Cal. App. 2d 435, 13 Cal. Rptr. 459 (1st Dist. 1961); Lossman v. City of Stockton, 6 Cal. App. 2d 324, 44 P.2d 397 (3d Dist. 1935); Helmer v. Superior Court, 48 Cal. App. 140, 191 P. 1001 (3d Dist. 1920).

[138]*Ex parte* Daniels, 183 Cal. 636, 641, 192 P. 442, 445 (1920).

[139]*Id.* at 639, 193 P. at 444. For a discussion of this rule of construction, Dillon's Rule, *see* text accompanying note 74 *supra.*

[140]*E.g.*, Pipoly v. Benson, 20 Cal. 2d 366, 369, 125 P.2d 482, 484 (1942); Bacich v. Russell, 192 Cal. App. 2d 435, 437, 13 Cal. Rptr. 459, 460 (1st Dist. 1961).

need for uniform statewide traffic laws.[141] Courts often articulate this concern in the preemption analysis which follows rejection of a charter city's municipal affairs argument.[142]

The early rules of the road cases do not require that a court today automatically reject city regulation of traffic congestion. A traffic congestion control ordinance differs from early city attempts to regulate traffic. For example, an automobile use disincentive such as a charge for entering a congested area would not pose a safety hazard to drivers unfamiliar with the area. On the other hand, a city traffic regulation providing that a left hand turn signal be an upraised arm would pose a significant hazard.[143] Thus, a city could distinguish earlier cases on their facts. In addition, a city could ask a court to apply the doctrine of changed circumstances.[144] The facts which made "traffic regulation" a statewide concern over half a century ago have changed. Today, uniformity in the rules of the road aspects of driver and vehicle regulation is established. A decision that traffic congestion control or automobile use disincentives are municipal affairs would not insulate charter cities from statewide road use regulations.

In embarking upon a fresh analysis of traffic congestion control as a municipal affair, courts must weigh the need for local control of the matter against the need for statewide uniformity. A court may examine the policies behind the legislature's decision to preempt expressly matters covered in the Vehicle Code[145] as an aid in determining whether it should deny the matter municipal affairs status. A finding of express legislative intent to preempt does not foreclose a court from determining on its own whether a matter is a local or

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[141] One appellate court, in a case preceding *Ex parte* Daniels, stressed the compelling need for uniform traffic rules:

> If the ordinance in question were the paramount law, then the city of Sacramento could provide that the signal for, say, a left-hand turn, should be an uplifted arm. It is needless to say that such a regulation would be a great danger to thousands of residents and non-residents every day in the year.

Helmer v. Superior Court, 48 Cal. App. 140, 142, 191 P. 1001, 1002 (3d Dist. 1920) (local ordinance made drunk driving a misdemeanor, state law made it a felony).

[142] Pipoly v. Benson, 20 Cal. 2d 366, 125 P.2d 482 (1942) (local regulation of pedestrian conduct conflicted with state law); *In re* Murphy, 190 Cal. 286, 212 P. 30 (1923) (reckless driving ordinance); Bacich v. Russell, 192 Cal. App. 2d 435, 13 Cal. Rptr. 459 (1st Dist. 1961) (traffic control signals); Lossman v. City of Stockton, 6 Cal. App. 2d 324, 44 P.2d 397 (3d Dist. 1935) (police and fire vehicles).

[143] Helmer v. Superior Court, 48 Cal. App. 140, 142, 191 P. 1001, 1002 (3d Dist. 1920).

[144] For discussion of changed circumstances doctrine, *see* text accompanying notes 76-81 *supra*.

[145] CAL. VEH. CODE § 21 (West 1971), *set forth in* text accompanying note 123 *supra*.

statewide concern.[146] But if the ordinance unduly inconveniences transient citizens, or mandates a change in traffic patterns unreasonably burdensome on thoroughfares outside city borders, the ordinance does not regulate a municipal affair.

Courts should re-examine the traffic regulation cases to comply with their responsibility to protect matters of local concern from legislative interference. The local impact of traffic congestion requires that cities be able to regulate at the municipal level. Courts must return to the principle underlying municipal affairs, the constitutional mandate of local control over local matters,[147] if cities are to control the number of cars within their borders.

D. Tax Power to Solve Congestion Problems

A city may attempt to use its tax power to reduce traffic congestion problems. Taxes may provide funds for a mass transit alternative to automobile travel. A city may also regulate traffic congestion by using its tax power to discourage automobile use. Preemption and municipal affairs principles apply to any city tax, whether it raises revenue or regulates conduct. To the extent a tax regulates conduct, general law addressing that same conduct may preempt the tax ordinance.[148] With the exception of a charter city's "municipal affairs" tax, city taxes must also avoid conflict with state tax statutes.

Every tax ordinance has three distinct elements, a subject, a measure, and a purpose, any one of which may potentially conflict with state tax schemes. The characterization of each element plays an important role when courts determine whether state tax law conflicts with a tax ordinance.[149] This section discusses three possible munici-

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[146] *See* text accompanying note 71 *supra*.

[147] The California Supreme Court in Butterworth v. Boyd discussed the concept of municipal affairs:

> The purpose of the constitutional provisions [municipal affairs power] was to make municipalities self-governing and free from legislative interference with respect to matters of local or internal concern. . . . It was enacted upon the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.

12 Cal. 2d 140, 147, 82 P.2d 434, 438 (1938) (footnote omitted) (health service system for charter city employees is a municipal affair).

[148] For a discussion of whether the Vehicle Code preempts city regulation of traffic congestion and whether traffic congestion control is a municipal affair, *see* text accompanying notes 117-147 *supra*.

[149] *See* Pesola v. City of Los Angeles, 54 Cal. App. 3d 479, 126 Cal. Rptr. 580 (2d Dist. 1975). A racehorse owner challenged the city's tax on horses, arguing that the state had expressly preempted the tax by imposing a fee in lieu of any property tax on racehorses. By characterizing the *subject* of the city's tax as the privilege of keeping horses rather than property, the *measure* of the tax as other than by value, and the *purpose* as primarily regulatory rather than revenue raising, the court was able to distinguish the tax from the state's prohibition and the general law implementing it.

pal taxes, a property tax on vehicles, a business license tax on commercial vehicles, and an excise tax on the privilege of creating traffic congestion. Each tax varies in its ability to raise revenue, to regulate traffic congestion and to withstand potential preemption by state tax provisions.

1. *Ad Valorem* Property Tax on Vehicles

A city seeking to raise revenue to fund transportation alternatives to the private automobile may wish to levy an *ad valorem*[150] property tax on vehicles. A tax measured by the value of the vehicle would be strictly a revenue raising tax. The increased expense might discourage a few people from owning automobiles, but the tax would not be an effective means of regulating traffic congestion problems. A city would be unable to apportion its tax to the amount of congestion each vehicle creates since the measure of the tax would be a percentage of the vehicle's value. A city would also be unable to tax the automobiles of drivers who live outside city borders,[151] even though the traffic they create is a major source of city traffic congestion problems.

An *ad valorem* property tax on vehicles could raise the funds cities need to mitigate the environmental effects of automobile pollution and fund alternatives to automobile transportation. It may not, however, be a legal source of city revenue. State law preempts a general law city's *ad valorem* property tax on vehicles,[152] and the constitutional prohibition of double taxation may preclude a charter city from levying such a tax.[153]

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[150] "*Ad valorem*" means according to value. BLACK'S LAW DICTIONARY 58 (rev. 4th ed. 1968).

[151] The California Constitution provides that "[a]ll property taxes by local government shall be assessed in the county, city and district in which it is situated." CAL. CONST. art. XIII, § 14. *See generally* 16 E. MCQUILLAN, THE LAW OF MUNICIPAL CORPORATIONS § 44.87 (rev. vol. 1972).

[152] The chief problem with a property tax measured by a percentage of the vehicle's value is that the legislature has preempted this measure. The legislature grants general law cities the power to tax property, CAL. GOV'T CODE § 43000 (West 1966); but the Vehicle License Fee Law prohibits cities from taxing according to value vehicles that are subject to registration under the Vehicle Code, CAL. REV. & TAX. CODE § 10758 (West Supp. 1977). A general law city, therefore, may not enact an *ad valorem* tax on state registered vehicles. If the vehicles are not actually registered, cities may tax them. Bigge Crane Rental Co. v. County of Alameda, 7 Cal. 3d 414, 498 P.2d 193, 102 Cal. Rptr. 513 (1972). The legislature's express preemption of vehicle taxes measured by value should not affect charter cities because the purpose of the city tax would be to raise revenue, a municipal affair superseding general law. Ainsworth v. Bryant, 34 Cal. 2d 465, 469, 211 P.2d 564, 566 (1949). For further discussion *see* note 90 & accompanying text *supra*.

[153] Courts have interpreted the constitution's requirement that property be taxed in proportion to its full value to prohibit double taxation of property. CAL. CONST. art. XIII, § 1 *construed in* Fox Bakersfield Theatre Corp. v. City of Bakersfield, 36 Cal. 2d 136, 140, 222 P.2d 879, 882 (1950); Flynn v. City &

2. Business License Tax on Commercial Vehicles

Both charter and general law cities could levy a business license tax on commercial vehicles to help raise revenue for their transit services. The tax, however, would not discourage private vehicles' use of city streets. In addition, a city would want to avoid setting such a tax so high that it harms the city's economy by discouraging commercial use of city streets.

A city must carefully design its business license tax not to interfere with the regulatory purpose of state business legislation.[154] State business legislation will not preempt a revenue raising license tax if the tax's measure is directly related to its subject, the amount of business the vehicle conducts within the city.[155] The reason for this requirement is that a city has no power to tax business transacted beyond city borders.[156] A tax not apportioned or measured by the taxing event within the city unfairly burdens intercity businesses; each city in which the business operated could potentially impose a comparable tax. The California Supreme Court has said that the basic policy underlying the federal commerce clause, preserving the free flow of commerce, applies equally to intercity commerce within the state even in the absence of a state constitutional equivalent.[157]

A city could avoid these problems by apportioning its business license tax on vehicles. Apportioning the tax measure to actual business conducted within the city should not be difficult. For example, a license tax measured by the average number of employees within

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County of San Francisco, 18 Cal. 2d 210, 215, 115 P.2d 3, 6 (1941); Pesola v. City of Los Angeles, 54 Cal. App. 3d 479, 486, 126 Cal. Rptr. 580, 584 (2d Dist. 1975). The Vehicle License Fee Law taxes in proportion to the vehicle's value, CAL. REV. & TAX. CODE § 10752 (West Supp. 1977), as would a city's property tax on vehicles. But the courts characterize the state's Vehicle License Fee as an excise on the use of public highways rather than as a property tax. Ingels v. Riley, 5 Cal. 2d 154, 53 P.2d 939 (1936). It is not clear whether courts would construe the constitution's prohibition against couble taxation of property to invalidate a city's tax merely because it duplicates the measure of a state tax.

[154] *See* text accompanying notes 102-05 *supra*.

[155] City of Los Angeles v. Belridge Oil Co., 42 Cal. 2d 823, 831-32, 271 P.2d 5, 10-11 (1954), *appeal dismissed*, 348 U.S. 907 (1955); Security Truck Line v. City of Monterey, 117 Cal. App. 2d 441, 453-54, 256 P.2d 366, 374 (1st Dist. 1953).

[156] City of Los Angeles v. Shell Oil Co., 4 Cal. 3d 108, 126, 480 P.2d 953, 964-65, 93 Cal. Rptr. 1, 12-13 (1971), *cert. denied*, 404 U.S. 831 (1971).

[157] *Id.* at 119, 480 P.2d at 959-60, 93 Cal. Rptr. at 7-8 *quoting* Sato, *supra* note 97 at 818:

> The basic policy underlying the commerce clause of the Federal Constitution [art. I, § 8, par. 3]—to preserve the free flow of commerce among the states to optimize economic benefits—is equally applicable to intercity commerce within the state. If fifty independent economic units within the United States are undesirable, 387 economic enclaves within California would be intolerable. A tax burden which places intercity commerce at a disadvantage in comparison to a wholly intracity business may have such an effect.

the city would be valid[158] as would a license tax graduated according to annual freight tonnage transported into the city.[159] Both measures are directly related to business operations within the city.

A tax which is not apportioned also potentially conflicts with the Vehicle Code's Registration Fee Law which measures its fee by a flat sum per vehicle.[160] One court has found a sufficiently close resemblance to rule that the Vehicle Code preempts such a local ordinance.[161] A city, however, could avoid Vehicle Code preemption by distinguishing the license's subject and measure from those contained in the Vehicle Code. If the subject of the city's tax is business the vehicle conducts within the city, rather than the use of city streets, and if the measure of the tax is the amount of business the vehicle conducts within the city, rather than a flat charge per vehicle, the tax would be a valid city business license tax.[162]

3. Congestion Pricing Excise Tax

When a city devises its congestion control plan, it should consider levying an excise tax on the privilege of creating traffic congestion.[163] A tax such as congestion pricing could provide a city with revenue for mass transit alternatives to automobile use. It also has advantages over business and property taxes. Congestion pricing could reach all vehicles. It could regulate the traffic flow within a city because it would encourage drivers to avoid areas where pricing was in effect or to choose alternative means of transportation. A city could also design its excise tax to reflect the traffic congestion problems each vehicle creates.[164] Several barriers, however, may frustrate a city's efforts to impose congestion pricing.

The first barrier is the uncertainty of the source of city power to impose congestion pricing. In California, neither general law nor case law expressly authorizes cities to impose automobile use related

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[158] Arnke v. City of Berkeley, 185 Cal. App. 2d 842, 847, 8 Cal. Rptr. 645, 648 (1st Dist. 1960).

[159] California Fireproof Storage Co. v. City of Santa Monica, 206 Cal. 714, 275 P. 948 (1929).

[160] CAL. VEH. CODE § 9250 (West Supp. 1977).

[161] Biber Elec. Co. v. City of San Carlos, 181 Cal. App. 2d 342, 5 Cal. Rptr. 261 (1st Dist. 1960).

[162] Willingham Bus Lines, Inc. v. Municipal Court, 66 Cal. 2d 893, 428 P.2d 602, 59 Cal. Rptr. 618 (1967) (charter city tax on bus line measured by 2% of the gross receipts attributable to the portion of the trip traveled within city limits was a valid business license tax).

[163] "Congestion pricing" is making people pay more for journeys that result in congestion. Watson & Holland, Congestion Pricing—the Example of Singapore (International Bank for Reconstruction and Development Study of Traffic Restraints in Singapore, Technical Memorandum No. 13) [hereinafter cited as Watson & Holland] (on file with U.C. Davis L. Rev.).

[164] A city could measure its tax by vehicle or engine size, length of time the vehicle is present in a congested area, or the amount of noise the vehicle makes. These measures would reflect the traffic problems each vehicle creates.

taxes.[165] The charter city municipal affairs tax power allows charter cities to tax for revenue. It can also be the source of charter city power to impose congestion pricing if the underlying regulation of traffic congestion control is either a municipal affair or a valid exercise of the police power not in conflict with general law.[166]

Because general law cities do not share the municipal affairs power to tax and because state statutes do not authorize a congestion excise, the general law city must rely on its police power when it seeks to impose congestion pricing.[167] A tax that furthers a regulatory scheme and is itself a valid exercise of the police power should be within the broad constitutional grant of police power. If a court finds that congestion pricing is not a valid exercise of the municipal affairs tax power, a charter city must also resort to the police power as the source of its power to levy a congestion excise tax.

Assuming the police power is the source of authority to impose congestion pricing, the second barrier to a traffic congestion excise is the possibility that a general tax law preempts the local tax. Because both the Vehicle Code[168] and the Revenue and Taxation Code[169] contain extensive state taxing schemes related to automobile use, a court may find that the legislature preempts a city's attempt to tax traffic congestion.[170]

To avoid state tax preemption, a city should design its congestion pricing ordinance to differ from the state taxing schemes in subject, measure and purpose. The Revenue and Taxation Code's Vehicle License Fee[171] and the Vehicle Code's Registration Fee[172] are a single excise tax, the subject of which is the privilege of operating vehicles on state highways.[173] The city's tax would be an excise on the privilege of creating traffic congestion, and thus would differ in subject from the state tax.[174]

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[165] The Revenue and Taxation Code does allow counties to raise revenues for a county expressway system. CAL. REV. & TAX. CODE §§ 11101-11108 (West 1970). In addition, counties may impose license fees for the purpose of funding a rapid transit system. CAL. REV. & TAX. CODE §§ 36020-36025 (West 1970).

[166] The California Supreme Court upheld a charter city excise on the privilege of accumulating rubbish and having city rubbish collection available. The court said that there was no obstacle to the ordinance performing both taxation and regulation functions. City of Glendale v. Trondsen, 48 Cal. 2d 93, 101-06, 308 P.2d 1, 5-8 (1957). Fur further discussion *see* text accompanying note 95 *supra*.

[167] For discussion of the police power as the source of power to tax, *see* text accompanying notes 96-97 *supra*.

[168] CAL. VEH. CODE §§ 9250-9269 (West 1971 & Supp. 1977).

[169] CAL. REV. & TAX. CODE §§ 10701-11108 (West 1970 & Supp. 1977).

[170] For discussion of Vehicle Code preemption of traffic regulation, *see* text accompanying notes 117-136 *supra*.

[171] CAL. REV. & TAX. CODE §§ 10701-11108 (West 1970 & Supp. 1977).

[172] CAL. VEH. CODE §§ 9250-9269 (West 1971 & Supp. 1977).

[173] Ingels v. Riley, 5 Cal. 2d 154, 159, 53 P.2d 939, 942 (1936).

[174] A court may be unwilling to accept a city's characterization of its excise tax as a congestion charge rather than a road use charge. One appellate court

The measure of the state tax has two forms. The measure of the license fee is a percentage of the vehicle's value.[175] The measure of the registration fee is a flat charge per vehicle.[176] To avoid preemption, a city must choose a measure other than value or a flat fee.[177] A tax measure reflecting the city goals of eliminating urban traffic congestion, improving the city environment, and promoting safety would not necessarily conflict with the state tax measure. A city could base its measure on a vehicle's presence in a particular area at a time when safety hazards and congestion are at their peak. No state taxes are time and location specific. With this time/location measure, the city's tax should not conflict with the state measure.

Finally, the purpose of congestion pricing must not conflict with the purpose of the state excise tax. The constitution permits use of the state registration fees to fund mass transit guideways,[178] administer and enforce vehicle laws, and mitigate the environmental effects of vehicle operation.[179] The Vehicle License Fee Law directs the Controller to disburse funds to cities and counties, to be used for city and county purposes or for purposes of "general interest to the state."[180] A city's congestion excise tax would have two general purposes: raising revenue and regulating traffic congestion. The revenue raising purpose of congestion pricing would be compatible with state law because congestion pricing could fund activities not covered under state tax statutes or it could augment those which are.[181] Furthermore, the regulatory purpose of congestion pricing

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rejected a city's argument that a set charge per commercial vehicle was a business license tax. Rather, the court found that it was an excise on the use of city streets and thus an attempt to levy an additional license fee in a field occupied by the Vehicle Code. Biber Elec. Co. v. City of San Carlos, 181 Cal. App. 2d 342, 5 Cal. Rptr. 261 (1st Dist. 1960).

[175] CAL. REV. & TAX. CODE § 10758 (West Supp. 1977).

[176] CAL. VEH. CODE § 9250 (West Supp. 1977).

[177] The measure the Revenue and Taxation Code specifically disallows is *ad valorem:* "The license fee imposed under this part is in lieu of all taxes according to value levied for state or local purposes on vehicles of a type subject to registration under the Vehicle Code whether or not the vehicles are registered under the Vehicle Code." CAL. REV. & TAX. CODE § 10758 (West Supp. 1977). A court could interpret this section to imply that the legislature permits forms of local vehicle taxes other than *ad valorem* taxes. The California Supreme Court has said, "By limiting the general statutes to regulation or prohibition of specifically enumerated activities, the Legislature did not intend to prevent local authority from legislating on those subjects in regard to which the former are silent." *In re* Hubbard, 62 Cal. 2d 119, 127, 396 P.2d 809, 814, 41 Cal. Rptr. 393, 398 (1964) *disapproved on other grounds in* Bishop v. City of San Jose, 1 Cal. 3d 56, 63 & n.6, 460 P.2d 137, 141 & n.6, 81 Cal. Rptr. 465, 469 & n.6 (1969).

[178] "Guideways" are fixed paths for mass transit vehicles.

[179] CAL. CONST. art. XXVI, § 2.

[180] CAL. REV. & TAX. CODE § 11003.3 (West Supp. 1977).

[181] The city could use congestion pricing revenues to fund mass transit vehicles, mass transit power systems, and passenger facilities. This would supplement the constitutionally authorized expenditure of registration fees for mass transit

distinguishes it from the state excise tax since the state tax was not designed to discourage automobile use, an important goal of congestion pricing.

Another potential barrier to a city's excise on the privilege of creating traffic congestion is California Streets and Highways Code section 30800[182] which vests the California Department of Transportation with jurisdiction over toll roads. If California courts were to consider congestion pricing a toll, cities would need Department of Transportation authorization before imposing their tax. California courts have not yet defined the statutory use of the word "toll." Courts have interpreted the federal prohibition against tolls on all highways constructed with federal funds[183] to proscribe only a method of tax collection. Collecting a tax by means of a tollbooth is objectionable because it interrupts the free flow of traffic.[184] Thus, if California courts interpret "toll" as courts have interpreted the federal toll statute, only the tollbooth and not the tax is objectionable.[185] A city collecting its traffic congestion charge by means other than a tollbooth should not need Department of Transportation authorization.

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guideways. The constitution does not allow registration fees to be spent for these other mass transit uses. CAL. CONST. art. XIX, § 2(b).

[182] CAL. STS. & HY. CODE § 30800 (West 1969).

[183] While tolls are forbidden on all highways constructed with federal funds, 23 U.S.C. § 301 (1970), few city streets are federally funded. Coit, *Legal Issues Surrounding Roadway Pricing on City Streets and Bridges*, in PROBLEMS IN IMPLEMENTING ROADWAY PRICING 1, 3 (Transportation Research Board 1974). Federal regulations suggesting that urban areas use tolls to solve traffic problems cast doubt on the federal prohibition. Planning Assistance and Standards Regulating UMTA & FHWA joint guidelines, 23 C.F.R. § 450 app., at 77 (1976) *set forth in* note 2 *supra*.

[184] The Fifth Circuit interpreted the federal prohibition against tolls, writing,

> [i]n the past, when a road was paved or a bridge built, it was usual to erect gates, and collect from each vehicle or person passing a charge for passage, which went to the owner of the franchise. These clearly were tolls, and intended to be abolished as a nuisance to travel. But, since the entire cost of maintaining the federal-aid roads was put upon the states, it can hardly be thought Congress intended to exclude all taxation for that purpose which has any reference to the use of the road, or is measured by the extent of the use.

Johnson Transfer & Freight Lines v. Perry, 47 F.2d 900, 904 (N.D. Ga. 1931). *See also*, Sanger v. Lukens, 24 F.2d 226 (S.D. Idaho 1927) (state excise on commercial use of roadway is not a toll); Anthony v. Kozer, 11 F.2d 641 (D. Ore. 1926) (license tax on dealers selling motor vehicle fuel is not a toll); County of Los Angeles v. Southern California Gas Co., 184 Cal. App. 2d 169, 7 Cal. Rptr. 471 (2d Dist. 1960) (rental charged for use of a bridge to support utility pipelines is not a toll).

[185] *But see In re* Smith, 33 Cal. App. 161, 164, 164 P. 618, 619 (2d Dist. 1917). The court said in dictum that while a city could regulate use of its streets, it could not convert them into toll roads. The court invalidated a general law city's business license tax levied on commercial carriers which made no stops within the city. The city did, however, have the authority to tax business actually transacted within the city.

To avoid having a court characterize congestion pricing as a toll, a city should explore alternative means of collection. One possibility is a time-calibrated self-cancelling ticket.[186] A city could sell these tickets at locations such as gas stations where their sale would not interrupt the flow of traffic. One proponent of this method explains that "[t]he motorist would activate a time-ticket before reaching the checkpoint . . . . The activated ticket showing fluorescent red would be displayed in the windshield where it can easily be spotted as cars move past the checkpoint."[187] Since the tickets change color after a preset period of time, city police would be able to recognize those who remain too long in the congestion pricing area. A second alternative to the traditional tollbooth is "automatic vehicle identification" (AVI).[188] AVI requires a device on each vehicle which sends information by optical technology, low power radio frequency, or microwave energy to a unit which records the vehicle's actual road use. AVI systems are probably too experimental and expensive for wide-scale use, but self-cancelling tickets may offer a feasible alternative to tollbooth tax collection.

A further element a city should consider when it designs its congestion pricing scheme is a need for fairness. Congestion pricing is potentially vulnerable to an equal protection challenge.[189] The tax is most apt to discourage from driving those persons least able to pay. A city should be able to avoid discriminating on the basis of wealth by taking care to accompany any congestion pricing plan with alternative forms of transportation, bypass routes around the congestion pricing zone, and reduced charges for vehicles carrying several passengers or causing less pollution.[190] If a city can demonstrate the severity of its traffic congestion problems and that congestion pricing effectively reduces congestion, it should be able to justify congestion pricing as a reasonable exercise of the police power.[191]

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[186] The ticket works in this way:

> The timer-ticket, when bent or scratched, changes color immediately to red to show that the ticket has been activated. It also starts a chemical reaction that results in a second change, to blue after a preset time. The blue shows that time is up. The ticket has cancelled itself.

Myers, *Collection Problems and the Promise of Self-cancelling Tickets*, in PROBLEMS IN IMPLEMENTING ROADWAY PRICING 21 (Transportation Research Board 1974).

[187] *Id.* at 23.

[188] R. Foote, *Collection Problems and the Promise of Automatic Vehicle Identification*, in PROBLEMS IN IMPLEMENTING ROADWAY PRICING 14 (Transportation Research Board 1974).

[189] *See generally* Serrano v. Priest, 18 Cal. 3d 728, 768, 557 P.2d 929, 952-53, 135 Cal. Rptr. 345, 368-69 (1976) (local financing of public schools discriminated on the basis of wealth).

[190] *See* CALIFORNIA TRANSPORTATION BOARD, *supra* note 7 at II-16 - II-17.

[191] *See* Hamrick v. City of Berkeley, No. 489575-8 (Alameda County, Cal., Super. Ct., filed Feb. 22, 1977) (unreasonable exercise of police power: traffic

A California city may encounter difficulties if it seeks to enact a congestion pricing scheme. But a city should consider this novel solution when it attempts to control its traffic congestion problems. One city has enacted a congestion pricing scheme with extraordinary results: it has reduced traffic volume by forty percent during the hours of the scheme's operation.[192]

III. A Sample Traffic Congestion Solution—The Singapore Area License Scheme

The Southeast Asian city of Singapore has adopted a form of congestion pricing[193] to control the problem of rapidly growing traffic congestion. The Singapore Area License Scheme requires all vehicles entering a restricted zone, the congested inner city area, to display a license. Drivers may purchase the licenses at post offices and other locations throughout the city. The restricted zone is in operation only during the morning peak hours between 7:30 a.m. and 10:15 a.m.[194] The city provides routes bypassing the restricted zone so that through traffic can escape the license fee. Higher parking rates within the restricted zone discourage people from driving into the inner city.

Because the city did not wish to hurt the downtown district's economy, it sought to reduce traffic congestion without curtailing access to the inner city. The Area License Scheme was, therefore, coupled with a plan for improving mass transit services to provide an alternate means of entering the restricted zone. For example, it exempted buses, commercial vehicles, motorcycles and automobiles carrying four or more persons because they cause significantly less congestion than the single occupant vehicle. The city also implemented a park and ride plan at rates below the area license fee. In order not to discourage brief shopping and business trips, the city set the higher parking rates within the restricted zone progressively, with the first hour the least expensive. The scheme is a succussful traffic congestion control device that provides alternative transportation for those drivers who leave their automobiles at home.

Singapore did not attempt to solve its traffic problem solely by imposing congestion pricing. The city enacted the area license scheme in conjunction with exclusive bus lanes, taxation to inhibit car ownership, and promotion of staggered work hours and car pools.[195] The city changed its zoning ordinances to allow industry in

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barriers did not increase safety but did increase traffic congestion on adjoining streets).

[192] Watson & Holland, *supra* note 163, at 22.

[193] *Id.* at 20.

[194] The city thought that discouraging commuters from driving to the city in the morning would result in reduced evening congestion. *Id.* at 21.

[195] *Id.* at 21.

residential areas, thereby lessening workers' need to commute. The city hopes its comprehensive plan will not only reduce the immediate congestion problem but also encourage greater acceptance of public transportation.[196]

California cities may accomplish several elements of the Singapore Area License Scheme pursuant to express statutory authority. For example, cities should be able to institute park and ride systems. The Vehicle Code[197] permits localities to establish preferential use lanes for high occupancy vehicles. Numerous code provisions empower cities to establish parking lots[198] and cities may operate bus lines.[199] These express authorizations allow cities to implement some of the traffic control elements of the Singapore plan, but do not reach the goals of discouraging automobile use or raising revenue.

Although California cities possess broad police power, the limitations of state preemption may prevent cities from enacting an automobile use disincentive patterned on Singapore's Area Licensing Scheme. The key to overcoming preemption is to design the local ordinance to regulate a subject not covered by state law, for a purpose distinct from state law, without interfering with a paramount state concern. If courts accept this characterization of traffic congestion control, they may find in the police power the cities' authority to impose congestion pricing.

A charter city may try to establish that a congestion pricing scheme such as Singapore's is a proper exercise of the municipal affairs power. If a plan with the primary purpose of funding transportation alternatives such as mass transit or a park and ride system also has the merely incidental effect of regulating or changing driving habits, it may well be a proper exercise of the municipal affairs revenue raising power. If the city's primary purpose is regulatory, and regulating traffic congestion is a valid exercise of the police power, the municipal affairs tax power may still be the source of charter city power to impose congestion pricing. A charter city may also try to persuade a court that the local nature of traffic congestion makes its regulation a municipal affair. A plan which has no impact beyond city borders and which solves local traffic congestion problems may be a proper exercise of the municipal affairs power over local or internal matters.

IV. CONCLUSION

Traffic congestion creates serious environmental, health, and safety hazards. Cities struggling with these problems may attempt to

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[196] *Id.* at 21.
[197] CAL. VEH. CODE § 21655.5 (West Supp. 1977).
[198] *E.g.*, CAL. STS. & HY. CODE § 35108 (West 1969).
[199] CAL. CONST. art. XI, § 9.

fashion traffic congestion control ordinances to meet their local needs. Because California is a home rule state, neither state preemption nor narrow court interpretations of municipal affairs should defeat experimental local traffic solutions.

The state legislature has not acted to reduce urban congestion, nor is a uniform statewide traffic congestion plan appropriate. California cities are simply too diverse. In order to accommodate the differences, a statewide plan necessarily would be too general to solve the peculiarly local traffic problems of each city. In addition, novel solutions such as congestion pricing may be politically impossible to enact on a statewide basis.

Singapore's congestion pricing scheme illustrates that a local government can reduce congestion and its accompanying ill-effects by charging drivers for entry into congested areas. If local citizens are willing to reject the automobile in favor of an improved environment and a quieter, safer city, they should be able to use city home rule powers to enact a traffic congestion solution, such as congestion pricing, that suits their city's own unique needs.

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