

COMMENTS

Of Lawyers, Guns, and Money: Preemption and Handgun Control

Recently, renewed efforts have been made to control handguns. An ordinance which prohibits possession of handguns is one well-publicized approach. This comment examines the legal obstacles that confront this type of ordinance, focusing on state preemption. It concludes that an ordinance banning handguns should be held valid under state law.

INTRODUCTION

Intense political controversy surrounds the issue of gun control.¹ Advocates of gun control condemn handguns as a cause of the rise in violent crime.² A growing trend to repeal national gun control legislation or block its enforcement,³ together with a recognition of the inefficacy of

¹ Gun control refers to all legal methods used to regulate, limit, or prohibit the use of guns. "Gun" refers to a device designed to be used as a weapon "from which is expelled a projectile by the force of any explosion," including pistols, revolvers, rifles, and shotguns: See CAL. PENAL CODE § 12001 (West 1982). "Handgun" usually refers to a firearm with a barrel of less than 12 inches. *Id.* Many gun control laws provide for stricter regulation of handguns than of long guns. See, e.g., CAL. PENAL CODE § 12025 (West 1982), note 54 *infra*. This comment focuses on handgun control; the terms "gun" and "gun control" are used when case law or statutes refer to the broader area of guns.

² Corbett, *Living Without Handguns*, 16 J. OF CUR. SOC. ISSUES 20 (1977); Seiden & Conklin, *Gun Deaths: Biting the Bullet on Effective Control*, 22 PUBLIC AFFAIRS REPORT, INSTITUTE OF GOVERNMENTAL STUDIES (University of Calif., Oct. 1981) (copy on file at U.C. Davis Law Review office) [hereafter Seiden & Conklin].

³ One attempt at curtailing national legislation is the McClure-Volkner Bill, S. 1030, 97th Cong., 1st Sess., 127 CONG. REC. S4126 (daily ed. Apr. 29, 1981), H.R. 3300, 97th Cong., 1st Sess., 127 CONG. REC. H1566 (daily ed. Apr. 29, 1981), recently passed by the Senate Judiciary Committee. If enacted, it would lift most prohibitions on gun sales across state lines, permit sales through the mail between individuals who have met previously, relax licensing requirements, and require proof of intent in order to establish any violation of the Act. See 40 CONG. Q. WEEKLY REP. 922, Apr. 24,

national legislation,⁴ have led gun control proponents to adopt new strategies which focus on local legislation⁵ and tort litigation.⁶

A well-publicized attempt at local gun legislation was the Morton Grove, Illinois, ordinance which prohibited possession of handguns.⁷

1982; *Gun Control Proponents Face Battles in Congress*, The Christian Science Monitor, Jan. 28, 1982, at 10, col. 1. The Reagan administration is also dismantling the Bureau of Alcohol, Firearms and Tobacco, which is responsible for enforcing federal firearm laws, and transferring the responsibility to the Secret Service. See 40 CONG. Q. WEEKLY REP. 730, Apr. 3, 1982; Graves, *The Fastest Gun in Town Draws a Blank*, Common Cause 16 (Feb. 1982).

⁴ Knapp & Stoffel, *Gun Control: Shot Full of Holes*, 24 STATE GOV'T NEWS 3 (May 1981). The authors argue that since the current Congress is unlikely to act in this area, regulation of guns rests with states and localities. *Id.*

Gun control proponents have long argued that gun lobbies such as the National Rifle Association (NRA) have prevented Congress from enacting effective laws and have limited federal regulation of guns to such an extent that national legislation is virtually nonexistent. See Beard, *Showdown with the Gun Gang at Gun Control Corral*, 23 BUS. SOC. REV. 67 (1977). The effectiveness of the gun lobby can be attributed both to its ability to rally "single interest" voters and to collect vast amounts of money which the lobby is able to spend opposing gun control legislation. See note 12 *infra*.

⁵ See *Gun Control Backers Press Their Efforts at the Local Level*, The Christian Science Monitor, Jan. 22, 1982, at 11, col. 1. Another approach at the statewide level was California's Proposition 15 (defeated in the Nov. 1982 election) which sought to establish a gun registration system, limit the number of concealable weapons in California to the number in circulation on April 30, 1983, and prohibit the legislature from banning possession or ownership of handguns.

⁶ There are eleven suits pending which are aimed at handgun manufacturers based on a strict liability theory. The attorney handling the suits argues that a handgun is inherently dangerous and poses an unacceptable risk of injury and harm to society when marketed to the general public. See Fisher, *Are Handgun Manufacturers Strictly Liable in Tort?*, 56 CAL. ST. B.J. 16 (Jan. 1981); Podgers, *Tort Lawyers Take Aim at Handguns*, 11 THE BRIEF 5 (Nov. 1981). But see *Crime Victims Attempt to Hold Handgun Manufacturers Liable for Damages*, The Christian Science Monitor, Mar. 30, 1982, at 5, col. 1 (discussing unsuccessful attempts to hold handgun manufacturers liable on a products liability theory). A second approach seeks liability based on negligent storing of guns. The NRA was held liable in *Estate of Gonzales v. National Rifle Ass'n*, No. 80-2576 (D.D.C., Feb. 11, 1982), *appeal docketed*, No. 82-1881 (D.C. Cir. Aug. 8, 1982), a suit brought by the family of a robbery victim killed by a weapon stolen from NRA headquarters. See *NRA Tied to Murder Gun, Is Ordered to Pay \$2 Million*, L.A. Times, Feb. 12, 1982, at 1, col. 1.

⁷ MORTON GROVE, ILL., CODE OF CITY ORDINANCES, ch. 132 (1981) states in part: "No person shall possess, in the village of Morton Grove . . . any handgun . . ." The ordinance was enacted because trustees found that "the easy and convenient availability of certain types of firearms and weapons have increased the potentiality of firearms related deaths and injuries, and that handguns play a major role in the commission of homicide, aggravated assault, armed robbery and accidental injury and death." *Id.*

According to one village trustee, the purpose of the ordinance was to convey "a message to the country stemming from our deep conviction that something must be done."⁸ The village's success in defending the ordinance has prompted other localities to consider these bans.⁹ Recently, San Francisco enacted a similar ordinance banning handguns.¹⁰ The Morton Grove "message" has also produced considerable negative reaction.¹¹

The legality, wisdom, and effect of gun control legislation has generated large expenditures of money¹² and produced numerous critical dis-

⁸ *A Message for the Country*, L.A. Times, Jan. 4, 1982, § II, at 4, col. 1.

⁹ *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), *aff'd*, No. 82-1045 (7th Cir. Dec. 6, 1982) (ordinance prohibiting possession of handguns held proper under the police power and not an infringement on the rights guaranteed by the United States Constitution). Voters in Marin County, California, recently approved gun registration in the June 8, 1982 election; and handgun ban proposals were considered in Palo Alto, California, and Berkeley, California. The Christian Science Monitor, June 30, 1982, at 4, col. 1. Voters in Sunnyvale, California, turned down a handgun banning ordinance in the November, 1982 election. See *Suburban Election Results*, The San Francisco Chron., Nov. 3, 1982, at 4, col. 4.

¹⁰ SAN FRANCISCO, CAL., POLICE CODE art. 35 § 3503 (1982) states in part: "[I]t shall be unlawful for any person to possess, within the City and County of San Francisco, any handgun." This ordinance was passed because the Board of Supervisors found that:

[I]n order to promote and protect the health and safety and welfare of the public, it is necessary to regulate the possession of handguns. The easy and convenient availability of handguns has been a principal factor in firearm related deaths in the City and County of San Francisco. Handguns which are possessed by law abiding citizens are frequently stolen and used in criminal activities. Handguns play a major role in the commissions of crimes of homicide, robbery, assault and in many instances of accidental death and injuries.

Id. § 3500(A)-(E). The San Francisco ordinance was held invalid in *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1st Dist. 1982). See notes 49-57 and accompanying text *infra*.

¹¹ Kennesaw, Georgia, enacted a mandatory gun ownership law in reaction against the Morton Grove ordinance. See *A Man's Home is His Foxhole*, The Sacramento Bee, June 2, 1982, § A, at 6, col. 1. A challenge to the ordinance was dismissed because the plaintiff, as a conscientious objector, fell into one of the exceptions of the ordinance. *Butler v. City of Kennesaw*, Georgia, No. C-82-1143-A (N.D. Geo. July 23, 1982).

The San Francisco ordinance has also generated negative reaction. In Bellevue, Washington, the Citizens Committee to Keep and Bear Arms has begun an "I Hate San Francisco" campaign. The purpose of the campaign is to urge conventions and tourists to boycott San Francisco and to raise funds to defeat San Francisco supervisors who voted for the ban. See *San Francisco's Gun Control Takes Effect Amid Challenges*, The Sacramento Bee, July 28, 1982, § I, at 3, col. 1.

¹² For example, a progun group spent more than \$4.5 million to defeat California

cussions.¹³ It is not the intent of this comment to revive the debate over the advisability of an ordinance banning the possession of handguns. Rather, it identifies obstacles facing a California city ordinance banning handguns. The comment briefly discusses whether either the United States Constitution or the California Constitution guarantees the right to bear arms and concludes for the purposes of analysis that an ordinance banning handgun possession is constitutional. Next the comment discusses the source of municipal power to enact an ordinance in California. It concludes that although the power over municipal affairs is not broad enough to include banning handguns, cities may enact an ordinance banning handguns under the police power.

The major question addressed is whether an ordinance banning handguns is preempted by state law. Under the doctrine of preemption, if a local measure directly or impliedly conflicts with a state statute, the ordinance is invalid. The comment examines relevant state statutes and concludes that an ordinance banning handguns would not be in direct conflict with general law; nor should the doctrine of implied preemption prevent a city from enacting an ordinance banning the possession of handguns.

I. CONSTITUTIONAL ISSUES

Opponents of gun control claim that the second amendment¹⁴ guarantees an individual citizen the right to bear arms.¹⁵ There are few United States Supreme Court decisions addressing the meaning of the second amendment. In *United States v. Cruikshank*¹⁶ and *Presser v. Illinois*,¹⁷ the Court held that the second amendment applies only to the

Proposition 15. See *Proposition 15: More Crime, Or Less?*, The Sacramento Bee, Oct. 25, 1982, § A, at 6, col. 4. The NRA spent \$171,000 to help President Reagan's presidential campaign, 40 CONG. Q. WEEKLY REP. 730, Apr. 3, 1982, and \$653,000 in Congressional campaigns in 1980. Graves, note 3 *supra*, at 16.

¹³ See, e.g., Benenson, *A Controlled Look at Gun Controls*, 14 N.Y.L.F. 718 (1968); Edwards, *Commentary: Murder and Gun Control*, 18 WAYNE L. REV. 1335 (1972); Kates, *Some Remarks on the Prohibition of Handguns*, 23 ST. LOUIS U.L.J. 11 (1979); Mosk, *Gun Control Legislation: Valid and Necessary*, 14 N.Y.L.F. 694 (1968); Comment, *Shooting to Kill the Handgun; Time to Martyr Another American "Hero,"* 51 J. URB. LAW 491 (1974).

¹⁴ "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. Amend. II.

¹⁵ See generally A. GOTTLIEB, *THE RIGHTS OF GUN OWNERS* (1981); W. GARRISON, *BIBLIOGRAPHY OF PRO-GUN LITERATURE* (1981).

¹⁶ 92 U.S. 542 (1875).

¹⁷ 116 U.S. 252 (1885).

federal government and is not binding on the states.¹⁸

In *Quilici v. Village of Morton Grove*,¹⁹ the plaintiffs claimed the ordinance banning handguns constituted a taking and thus violated the fifth amendment. The court found that the fifth amendment's just compensation provision was inapplicable because handgun owners had the opportunity to dispose of their handguns outside the city or store them at gun clubs.²⁰ The plaintiffs also claimed the ordinance violated a fundamental right to bear arms in self-defense which they claimed was guaranteed by the ninth amendment. The court dismissed this argument on the ground that the ninth amendment furnished no support for the fundamental right to bear arms in self-defense.²¹

The California Constitution contains no provision analogous to the second amendment of the United States Constitution.²² The California Supreme Court addressed the absence of such a provision in *Ex parte Rameriz*,²³ concluding the legislature was entirely free to deal with the

¹⁸ *Presser v. Illinois*, 116 U.S. 252, 265 (1885); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). Gun control opponents argue that *Presser* and *Cruikshank* are no longer valid because the holdings preceded the incorporation doctrine, under which many of the rights enumerated in the first eight amendments were applied to the states. The district court in *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169 (N.D. Ill. 1981), rejected this argument:

The Supreme Court has never reconsidered its holding in *Presser*. Consequently, that opinion stands as the Supreme Court's most recent pronouncement on the issue of whether the Second Amendment was incorporated into the Fourteenth Amendment so as to limit the power of the states. It is a truism that the district court is bound by the holdings of the Supreme Court to the extent that they bear on questions before the district court. That rule applies irrespective of the age of the Supreme Court opinion, the district judge's personal opinion of the validity of the Supreme Court's action, or whether he believes the Supreme Court would rule as it did if the issue were again before it.

Id. at 1181.

Even if the Supreme Court reverses the *Presser* ruling, it is not clear that the second amendment will be interpreted as guaranteeing individuals the right to bear arms. In *United States v. Miller*, 307 U.S. 174 (1939), the Court held that the second amendment does not guarantee the right to possess firearms with barrels of less than 18 inches because the weapons have no reasonable relationship to the preservation and efficiency of a well-regulated militia.

¹⁹ 532 F. Supp. 1169 (N.D. Ill. 1981).

²⁰ *Id.* at 1183-84.

²¹ *Id.*

²² See, for example, McKenna, *The Right to Keep and Bear Arms*, 12 MARQ. L. REV. 138, 138 n.5 (1927-28), and Note, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423 (1976-77), which analyze state constitutions and the right to bear arms.

²³ 193 Cal. 633, 226 P. 914 (1924), *overruled on other grounds*, *People v. Rappard*,

subject of gun regulation.²⁴ California now has many provisions restricting the possession and use of guns.²⁵ State statutes restricting or prohibiting the possession of guns in certain situations have been routinely upheld by California courts.²⁶ The California Constitution apparently does not guarantee the right to bear arms.²⁷

Assuming for the purposes of analysis that the federal and California constitutions would permit a local ban on the possession of handguns,²⁸ a more difficult issue is state preemption of local regulations.²⁹ The re-

28 Cal. App. 3d 302, 325, 104 Cal. Rptr. 535, 537 (2d Dist. 1972) (*Rappard* held that a statute prohibiting aliens from possessing concealed weapons violated equal protection).

²⁴ *Ex parte Rameriz*, 193 Cal. 633, 652, 226 P. 914, 922 (1924).

²⁵ See, e.g., CAL. PENAL CODE § 417 (West 1982) (prohibiting brandishing of weapons); *id.* § 467 (West 1970) (prohibiting possession of deadly weapons with intent to commit an assault); *id.* § 12020 (West 1982) (prohibiting blackjacks and cane guns); *id.* § 12021 (West 1982) (prohibiting ex-felons and narcotics addicts from possessing concealable weapons); *id.* § 12021.5 (West 1982) (prohibiting minors from possessing concealable weapons without parental permission); *id.* § 12022 (West 1980) (increasing the penalty for possession of concealed weapons in the commission of a felony); *id.* § 12025 (West 1982) (prohibiting concealed weapons on one's person or in a vehicle without a license); *id.* §§ 12050-12054 (West 1982) (setting state licensing procedure).

²⁶ See, e.g., *People v. Scott*, 24 Cal. 2d 774, 151 P.2d 517 (1944) (upholding the prohibition of possession of a firearm that has a tampered identification mark); *People v. DuBose*, 42 Cal. App. 3d 847, 117 Cal. Rptr. 235 (1st Dist. 1974) (upholding ban on the possession of weapons by ex-felons); *People v. Favalora*, 42 Cal. App. 3d 988, 117 Cal. Rptr. 291 (1st Dist. 1974) (upholding the prohibition of possession of sawed-off shotguns); *People v. Seale*, 274 Cal. App. 2d 107, 78 Cal. Rptr. 811 (1st Dist. 1969) (upholding ban on carrying firearms while near a jail); *People v. Billon*, 266 Cal. App. 2d 537, 72 Cal. Rptr. 198 (1st Dist. 1968) (upholding ban on the possession of all firearms by those convicted of a felony and who used a firearm in the commission of that felony).

²⁷ A statement by a California court of appeal in 1924 is therefore correct today: "It is clear that in the exercise of the police power of the state . . . rights [to possess guns] may be either regulated or, in proper cases, entirely destroyed." *People v. Camperlingo*, 69 Cal. App. 466, 473, 231 P. 601, 604 (2d Dist. 1924).

²⁸ For a comprehensive history of the second amendment and its relevance today, see generally Levin, *The Right to Bear Arms: The Development of the American Experience*, 48 CHI. KENT L. REV. 148 (1971); Comment, *The Right to Keep and Bear Arms*, 26 DRAKE L. REV. 423 (1976-77). The issue of whether the California or federal constitution guarantees a right to possess a handgun was not addressed in *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1st Dist. 1982).

²⁹ The San Francisco handgun control ordinance has already been challenged on this ground. *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1st Dist. 1982). See notes 49-57 *infra*. See generally 65 Op. Cal. Att'y Gen. 457 (1982) (state law has preempted the field); Opinion of the Legislative Counsel of California (Mar. 2, 1982) (released to the public at the request of Senator H. L. Rich-

mainder of the comment addresses this problem and concludes that a local handgun ban is not preempted by state law.

II. MUNICIPAL AUTHORITY TO BAN POSSESSION OF HANDGUNS

The California Constitution provides two sources of municipal power: the power over "municipal affairs,"³⁰ and the police power which cities share with the state.³¹ Ordinances enacted under the municipal affairs power are valid even if they conflict with general law; ordinances enacted under the police power are invalid if they conflict with state law. Characterization of the regulated subject matter as a municipal affair may determine the legality of the ordinance.

A. *The Municipal Affairs Power*

The municipal affairs power seeks to make municipalities self-governing and free from state legislative interference in matters of local or internal concern.³² Since a chartered city has exclusive power over municipal affairs, an ordinance regulating municipal affairs will not be preempted by general law.³³ Under this doctrine a chartered city may

ardson) (state law has preempted the field) (copy on file at U.C. Davis Law Review office); Opinion of the City Attorney of the City and County of San Francisco, No. 82-3 (Feb. 23, 1982) (San Francisco may enact an ordinance banning the possession of handguns) (copy on file at U.C. Davis Law Review office).

³⁰ CAL. CONST. art. XI, § 5, provides:

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 . . . City charters adopted pursuant to this Constitution shall supersede any existing charter and with respect to municipal affairs shall supersede all laws inconsistent therewith.

³¹ CAL. CONST. art. XI, § 7, provides: "A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."

³² *Butterworth v. Boyd*, 12 Cal. 2d 140, 147, 82 P.2d 434, 438 (1938).

³³ See, e.g., *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 315, 591 P.2d 1, 12, 152 Cal. Rptr. 903, 914 (1979) (wages of county employees are a municipal affair and not subject to general laws); *Bishop v. City of San Jose*, 1 Cal. 3d 56, 62, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969) (salaries for city employees are a municipal affair to which general law is inapplicable); *Vial v. City of San Diego*, 122 Cal. App. 3d 346, 347, 175 Cal. Rptr. 647, 648 (4th Dist. 1981) (state wage law does not apply to municipal affairs public works projects); *Brown v. Berkeley*, 57 Cal. App. 3d 223, 236, 129 Cal. Rptr. 1, 7 (1st Dist. 1976) (organization, maintenance, and operation of police and fire department by chartered city is a municipal affair and not subject to the control of the legislature); *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 467, 133 Cal. Rptr. 721, 728 (2d Dist. 1976) (park regula-

regulate municipal affairs even if the subject is already covered by general law, and an ordinance may be valid even though inconsistent with general law.³⁴

"Municipal affairs" is a judicially defined term,³⁵ and therefore legislative intent is relevant but not conclusive.³⁶ Courts look to the facts of each case, considering the consequences of labeling an activity or subject area a municipal affair.³⁷ Generally, municipal affairs powers are limited to purely local concerns, especially issues of internal governance.³⁸

tion is a municipal affair and city can regulate parks free from interference by general laws).

³⁴ See note 33 *supra*. But see *Bishop v. City of San Jose*, 1 Cal. 3d 56, 65, 460 P.2d 137, 143, 81 Cal. Rptr. 465, 471 (1969) (Peters, J., dissenting); *Bellus v. City of Eureka*, 69 Cal. 2d 336, 346, 444 P.2d 711, 717, 71 Cal. Rptr. 135, 141 (1968) (if the legislature has adopted general laws on the subject with the intent to preempt the field, municipal ordinances on that subject are invalid even though they might otherwise be considered "municipal affairs"); *City of Redwood City v. Moore*, 231 Cal. App. 2d 563, 580, 42 Cal. Rptr. 72, 82 (1st Dist. 1965). For a criticism of this approach, see Sato, "Municipal Affairs" in California, 60 CALIF. L. REV. 1055, 1074-75 (1972) [hereafter Sato].

³⁵ *Bishop v. City of San Jose*, 1 Cal. 3d 56, 63, 460 P.2d 137, 143, 81 Cal. Rptr. 465, 469 (1969). "[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." *Id.*

³⁶ *Id.*

³⁷ See, e.g., *Pacific Tel. and Tel. Co. v. City and County of San Francisco*, 51 Cal. 2d 766, 773, 336 P.2d 514, 518 (1959) (construction and maintenance of telephone lines is not a municipal affair because if the telephone lines were removed from the streets in the city, the people throughout the state who can now communicate with residents in the city could no longer do so); *CEED v. California Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 323, 118 Cal. Rptr. 315, 327 (4th Dist. 1974) (although planning and zoning have traditionally been deemed municipal affairs, when the ecological and environmental impact of land use affect the people of the entire state, they can no longer remain matters of purely local concern).

³⁸ See generally Sato, note 34 *supra*. For examples of subject matter held to be municipal affairs see *Simons v. City of Los Angeles*, 63 Cal. App. 3d 455, 467, 133 Cal. Rptr. 721, 728 (2d Dist. 1976) (regulation of municipal parks); *Gourley v. City of Napa*, 48 Cal. App. 3d 156, 163, 121 Cal. Rptr. 290, 294 (1st Dist. 1975) (municipal personnel policies); *City of Santa Monica v. Grubb*, 245 Cal. App. 2d 718, 726, 54 Cal. Rptr. 210, 216 (2d Dist. 1966) (financing of municipal activities); *Hunter v. Adams*, 180 Cal. App. 2d 511, 4 Cal. Rptr. 776 (1st Dist. 1960) (issuing of building permits). For examples of subject matter held not to be municipal affairs, see *Southern Cal. Roads Co. v. McGuire*, 2 Cal. 2d 115, 121-22, 39 P.2d 412, 415 (1934) (state highways); *CEED v. California Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 323, 118 Cal. Rptr. 315, 327 (4th Dist. 1974) (regional land use). See also Note, *Municipal Corporations: Home Rule Charters; Application of the Workmen's*

The current interpretation of municipal affairs is too narrow to include the area of gun control. Indeed, a California court of appeal has stated that gun control is not a municipal affair.³⁹ If gun control were found to be a municipal affair, the gun-related statutes in the Penal Code could be invalidated.⁴⁰ Therefore, the municipal affairs power could not be used as a source of local power to regulate the possession of handguns.

B. The Police Power

The California Constitution grants cities police power co-extensive with the state police power.⁴¹ Since the regulation of guns is within the state's police power,⁴² cities also have the power to regulate guns.⁴³

Compensation Act to Charter Cities, 15 CALIF. L. REV. 60, 62-63 (1926) (workers' compensation, traffic, judicial systems, public utilities rates, annexation of territory, eminent domain, health problems of general concern).

³⁹ In *Long Beach Police Officers Ass'n v. City of Long Beach*, 61 Cal. App. 3d 364, 371, 132 Cal. Rptr. 348, 352 (2d Dist. 1976), the court held that a city ordinance relating to the display and discharge of firearms by city police is not a municipal affair:

Just as the use of city streets by police and fire vehicles affects not only the municipality's citizens but also transients, and is thus a matter of state-wide concern . . . , so also the firing of guns by Long Beach police officers and the apprehension or escape of felons in Long Beach affects the people of the state generally.

The facts in *Long Beach* are distinguishable from the issues arising out of an ordinance banning handguns because *Long Beach* concerned use of guns by police officers. Municipal affairs are generally limited to aspects of local governance. See note 38 and accompanying text *supra*. Police activities can be regulated under the municipal affairs power. Therefore, if police use of guns is not a municipal affair, certainly use of guns by the general populace is not a municipal affair. See also *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 513, 186 Cal. Rptr. 380, 381 (1st Dist. 1982) (holding gun control is not a municipal affair).

⁴⁰ See note 25 *supra* (list of gun-related statutes); notes 32-34 and accompanying text *supra*.

⁴¹ *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976) (municipal rent control ordinance within the police power of the city under CAL. CONST. art. XI § 7).

⁴² See, e.g., *People v. Smith*, 36 Cal. App. 88, 171 P. 696 (1st Dist. 1918) (upholding statute which prohibits ex-felons from possessing firearms).

⁴³ See, e.g., *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969) (ordinance requiring registration of firearms upheld); *In re Cheney*, 90 Cal. 617, 27 P. 436 (1891) (ordinance requiring permit to carry concealed weapon upheld); *Yuen v. Municipal Court*, 52 Cal. App. 3d 351, 125 Cal. Rptr. 87 (1st Dist. 1975) (ordinance prohibiting loitering while carrying a concealed weapon upheld); *Olsen v. McGillicuddy*, 15 Cal. App. 3d 897, 93 Cal. Rptr. 530 (1st Dist. 1971) (ordinance prohibiting possession of BB gun by minor upheld); *People v. Jenkins*, 207 Cal. App.

However, local regulations cannot conflict with general laws.⁴⁴ The type of regulation a city may enact thus depends on the meaning of "conflict."

1. Direct Conflict

An ordinance is invalid if it directly conflicts with state law.⁴⁵ Direct conflict exists if an ordinance duplicates state law,⁴⁶ prohibits what state law authorizes,⁴⁷ or authorizes what state law prohibits.⁴⁸

In *Doe v. City and County of San Francisco*,⁴⁹ the First District

2d Supp. 904, 24 Cal. Rptr. 410 (1962) (ordinance prohibiting carrying of concealable weapons upheld); *People v. Commons*, 64 Cal. App. 2d Supp. 925, 148 P.2d 724 (1944) (ordinance prohibiting carrying of concealable weapons upheld).

⁴⁴ See note 31 *supra*.

⁴⁵ See note 31 and accompanying text *supra*.

⁴⁶ This kind of conflict is termed "jurisdictional conflict." See, e.g., *In re Mingo*, 190 Cal. 769, 214 P. 850 (1923) (ordinance prohibiting possession of liquor, which prescribes greater maximum penalties, invalid when state law prohibited same act). An ordinance banning handguns is not invalid on the ground of jurisdictional conflict because no state statute exists prohibiting handgun possession. The Attorney General of California has concluded that because state law prohibits possession of firearms by certain classes of persons, see CAL. PENAL CODE § 12021 (addicts and felons) (West 1982); and CAL. PENAL CODE § 12021.5 (West 1982) (minors), an ordinance banning handguns directly conflicts with state law. See 65 Op. Cal. Att'y Gen. 457 (1982). However, the fact that one portion of an ordinance as applied may conflict with state law does not invalidate the entire ordinance. It is well settled that municipalities may enact additional regulations if they are consistent with state law. See *In re Hoffman*, 155 Cal. 114, 118, 99 P. 517, 519 (1909) ("If the state should pass a law declaring it unlawful to erect a chimney of a height exceeding 150 feet, would anyone seriously contend that a city . . . within the earthquake zone might not by ordinance, in the clear exercise of the police power, for the benefit of its citizens, still further restrict the height of chimneys?"). The effect of the overlap between an ordinance and a state law is not to invalidate the entire ordinance; the duplicative portions of the statute are simply ignored. See *People v. Commons*, 64 Cal. App. 2d Supp. 925, 148 P. 2d 724 (1944). Thus, an ordinance banning handguns is not in jurisdictional conflict with state law. Persons who are prohibited by state law from possessing firearms must be prosecuted under state law, not local law.

⁴⁷ Although routinely included as one of the three types of direct conflict, this type of conflict is rarely found because state law generally is prohibitory in nature. However, courts have inferred that an activity is therefore authorized under state law from the lack of any state regulation. This reasoning is discussed in the implied preemption analysis, notes 67-89 and accompanying text *infra*.

⁴⁸ See, e.g., *Farmer v. Behmer*, 9 Cal. App. 773, 100 P. 901 (3d Dist. 1909) (ordinance regulating "boarding houses" in "red light" district by requiring license and maintenance of "guest list" open to police inspection invalid because state prohibits prostitution).

⁴⁹ 136 Cal. App. 3d 509, 186 Cal. Rptr. 380 (1st Dist. 1982).

Court of Appeal held that the San Francisco handgun ordinance, which prohibits possession of handguns,⁵⁰ conflicts with California Penal Code Section 12026.⁵¹ Section 12026 states that “[n]o permit or license to purchase, own, possess or keep any . . . firearm at the place of residence or place of business shall be required of [the owner].”⁵² The court reasoned that the ordinance constituted a permit requirement and thus conflicted with Section 12026.⁵³

Under state law, carrying a concealed handgun without a license is prohibited.⁵⁴ Penal Code Section 12050, however, provides that a county sheriff or city police chief may issue a permit to carry a concealed weapon to persons of good moral character who show good cause for carrying a concealed weapon.⁵⁵ The San Francisco ordinance exempts from the general ban on handgun possession those persons who are authorized to carry handguns under Section 12050.⁵⁶

⁵⁰ See note 10 *supra*.

⁵¹ 136 Cal. App. 3d 509, 518, 186 Cal. Rptr. 380, 384 (1st Dist. 1982).

⁵² CAL. PENAL CODE § 12026 (West 1982).

The first portion of CAL. PENAL CODE § 12026 states: “Section 12025 shall not be construed to prohibit any citizen of the United States over the age of 18 . . . from owning, possessing, or keeping within their places of residence or place of business any . . . firearms.” CAL. PENAL CODE § 12026 (West 1970 and Supp. 1982). The court in *Doe* held that the ordinance did not conflict with the first portion of Penal Code § 12026 because it was intended only as a limitation on the construction of Penal Code § 12025 (see note 54 *infra*). *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 517, 186 Cal. Rptr. 380, 385 (1st Dist. 1982).

⁵³ *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 518, 186 Cal. Rptr. 380, 384 (1st Dist. 1982).

⁵⁴ [A]ny person who carries concealed within any vehicle which is under his control or direction . . . any pistol . . . without having a license to carry such firearm as provided in this Chapter is guilty of a misdemeanor
[A]ny person who carries concealed upon his person any pistol . . . without having a license to carry such firearm . . . is guilty of a misdemeanor

CAL. PENAL CODE § 12025 (West 1982).

⁵⁵ CAL. PENAL CODE § 12050 (West 1982).

⁵⁶ SAN FRANCISCO, CAL., POLICE CODE art. 35 § 3507(F) (1982). An unresolved issue is whether the court’s holding; that an ordinance banning handguns conflicts with state law, is limited to the situation in which such an ordinance explicitly exempts persons holding licenses under state law. An ordinance which banned all handguns without mentioning the state licensing system would not be invalid because an overlap of coverage is not fatal to an ordinance; the portions of the ordinance that duplicate state law can simply be ignored and the remainder of the ordinance upheld. See note 46 *supra*. As a result, the ordinance would be enforceable except as to those persons holding licenses under the state licensing scheme. Although the court did not discuss the consequences of enacting an ordinance with no mention of the state licensing scheme,

Acknowledging that the San Francisco ordinance does not mention the word "license" or "permit" and does not establish a licensing procedure of any kind, the court nevertheless held that the ordinance constituted a licensing requirement:

[I]ts effect is to create a new class of persons who will be required to obtain licenses in order to possess handguns. Persons presently possessing handguns in their homes who are not licensed to carry their weapons must obtain licenses or relinquish their handguns. Persons who could have purchased handguns for home possession under prior law are required under the San Francisco ordinance to enter the permit system.⁵⁷

The court's holding that an ordinance banning handguns is a licensing requirement distorts the commonly held meaning of "license."⁵⁸ The San Francisco ordinance is not a licensing requirement in the strict sense, because it is prohibitory and does not grant permission to do anything. Whereas the ordinance prohibits possession of handguns,⁵⁹ state permits authorize carrying concealed weapons.⁶⁰ There is an overlap between carrying concealed weapons and possessing a handgun in a residence because a person licensed to carry a concealed weapon presumably can keep the handgun at home when not in use. However, simply prohibiting nonlicensees from having a handgun at home does not create a license requirement for carrying concealed weapons: the license requirement for carrying concealed weapons already exists at the state level.

In determining that the San Francisco ordinance constituted a licensing scheme, the *Doe* court framed the issue as whether the ordinance "merely regulates possession," which presumably a city can do,⁶¹ or "constitutes a licensing ordinance," which would be in direct conflict with state law.⁶² The court acknowledged that not all aspects of hand-

because the legal effect of either ordinance is substantially the same, the court's holding would probably apply in either case.

⁵⁷ *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 517, 186 Cal. Rptr. 380, 384 (1st Dist. 1982).

⁵⁸ "License" means "the permission by competent authority to do an act which, without such permission, would be illegal, a trespass, or a tort." BLACK'S LAW DICTIONARY 829 (rev. 5th ed. 1979).

⁵⁹ SAN FRANCISCO, CAL., POLICE CODE art. 35, § 3503 (1982).

⁶⁰ CAL. PENAL CODE § 12025 (West 1982).

⁶¹ *People v. Jenkins*, 207 Cal. App. 2d Supp. 904, 24 Cal. Rptr. 410 (1962) (ordinance prohibiting carrying of concealed weapons upheld); *People v. Commons*, 64 Cal. App. 2d Supp. 925, 148 P.2d 724 (1944) (ordinance prohibiting carrying of concealed weapons upheld).

⁶² *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 516, 186 Cal. Rptr. 380, 384 (1st Dist. 1982). Licensing has been identified as a subfield of gun

gun possession are outside the city's regulating power.⁶³ Many cities have ordinances that prohibit the possession of firearms in airports and city buildings and regulate the use of weapons within the city limits.⁶⁴ The San Francisco handgun ordinance only seeks to take this type of permitted regulation one step further. The ordinance resembles ordinances that regulate possession more than it does the state licensing statutes. Therefore, an ordinance prohibiting handgun possession would be better characterized as regulating possession than as constituting a licensing scheme.

The *Doe* court also expressed its concern that the practical effect of the San Francisco ordinance would be to create a licensing requirement.⁶⁵ However, an examination of the practical effect of the ordinance reveals that local residents who wish to keep guns in their homes may not be able to enter the state permit system. State permits are issued only to persons desiring to carry concealed weapons,⁶⁶ and it is unlikely that persons who wish to keep guns in their homes will be able to demonstrate good cause as required by the licensing statute.⁶⁷ Simi-

control. See note 105 *infra*. Regulation of possession of handguns as a subfield is discussed in note 115 *infra*.

⁶³ *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 516, 186 Cal. Rptr. 380, 384 (1st Dist. 1982).

⁶⁴ See, e.g., CONTRA COSTA COUNTY, CAL., CODE § 1106-2.614 (1973) ("No person shall carry firearms . . . in the airport without written permission of the airport manager"); SACRAMENTO, CAL., CITY CODE § 46.4 (prohibits carrying or possession of firearms at airports); *id.* § 48.4 (prohibits loitering with concealed weapons in place where liquor is sold); SAN DIEGO, CAL., CITY CODE § 33.109(a) ("No firearm shall be brought into or possessed within any premises owned or leased by the County in which public business is conducted without written permission of the chairman of the Board of Supervisors . . ."); *id.* § 26.42 (prohibits discharging firearms on public grounds except with a permit from city manager); SAN BERNARDINO COUNTY, CAL. CODE, § 22.011 (prohibits discharging firearms in specified areas); *id.* § 22.014 (prohibits night shooting). These ordinances generally exempt persons holding valid permits. See, e.g., SACRAMENTO, CAL. CITY CODE § 48.1; SAN DIEGO, CAL., CITY CODE § 33.109(c). The court in *Doe* did not indicate whether these types of ordinances were valid and did not state where the line should be drawn between various types of ordinances regulating possession. The court held that some regulations regarding possession constitute licensing requirements and some do not, but failed to distinguish the types that would be invalid. *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 517, 186 Cal. Rptr. 380, 384 (1st Dist. 1982).

⁶⁵ *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 517, 186 Cal. Rptr. 380, 384 (1st Dist. 1982).

⁶⁶ CAL. PENAL CODE § 12050 (West 1970 and Supp. 1982).

⁶⁷ Although the determination to grant or not to grant a license must be made on an individual basis, and not according to preestablished guidelines, see *Salute v. Pitchess*, 61 Cal. App. 3d 557, 132 Cal. Rptr. 345 (2d Dist. 1976), statistics demonstrate that

larly, there is no local mechanism that would issue permits to persons desiring to keep handguns in their homes.⁶⁸ Indeed, the San Francisco ordinance was enacted to prohibit this activity. The practical effect of the ordinance is not to create a licensing requirement because the state issues permits only for the carrying of concealed weapons, not for keeping a handgun in one's home.

An ordinance banning handgun possession should not be held invalid on the grounds of direct conflict. To find a direct conflict distorts the commonly held meaning of "license." An ordinance prohibiting handgun possession is better characterized as regulating possession of handguns, and not as a permit requirement. The practical effect of an ordinance prohibiting handgun possession is not to force people to enter the state permit system.

2. Implied Preemption

a. *Introduction and Historical Background*

Even if there is no express conflict, an ordinance may be invalid under the doctrine of implied preemption.⁶⁹ Local ordinances may be enacted if they merely supplement and are consistent with the general law.⁷⁰ However, if a field has been preempted by state law, no local regulation will be allowed, regardless of its consistency with state law.⁷¹

permits to carry concealed weapons are actually granted in very few cases, particularly in urban areas. *See Lowe's Hidden Weapon Policy Challenged*, The Sacramento Bee, Oct. 25, 1982, § B, at 1, col. 2. In Los Angeles County 535 permits were issued among the 2 million residents, only 35 of which were issued to nonlaw enforcement personnel. In 1981, only five permits were issued in San Francisco. Additionally, the standards used to grant permits will not lead to a great number of persons receiving licenses. For example, the Sacramento Police Department's written policy states, "The mere desire for increased self-protection capability shall not constitute sufficient justification for the issuance of a concealed weapon permit. Nor shall the fact that a permit has been issued in the past justify the renewal of a concealed weapon permit." In Los Angeles County permits are issued "only with convincing evidence of clear and present danger to life or the possibility of great bodily harm to the applicant." *Id.*

⁶⁸ Although state permits for concealed weapons are issued by local law enforcement officials, this procedure is carried out under state law and is done at the local level for administrative reasons.

⁶⁹ *See, e.g.,* *Gluck v. County of Los Angeles*, 93 Cal. App. 3d 121, 131, 155 Cal. Rptr. 435, 440 (2d Dist. 1979) (ordinance restricting location of newsstands upheld because state had not impliedly preempted the field); *Ex parte Smith*, 26 Cal. App. 116, 146 P. 82 (3d Dist. 1914) (ordinance setting maximum speed of vehicles held invalid because state law had impliedly preempted the field).

⁷⁰ *See* notes 41-44 and accompanying text *supra*.

⁷¹ *Lancaster v. Municipal Court*, 6 Cal. 3d 805, 494 P.2d 681, 100 Cal. Rptr. 609 (1972) (ordinance prohibiting massage parlors invalid because regulation of sexual con-

A field is preempted by state law if the legislature intended to occupy the field fully to the exclusion of local regulation.⁷² Two basic questions are involved in preemption analysis. First, one must define the scope of the field. Second, one must determine the legislative intent.

The initial characterization of the scope of the field which an ordinance purports to regulate may determine whether the ordinance is upheld.⁷³ If the definition is narrow, preemption may be circumscribed; if it is broad, "the sweep of preemption is expanded."⁷⁴ How a court defines the field depends on the nature of the subject matter and on the language of both the statute and the ordinance. Generalizations are difficult because of the broad range of facts involved in preemption cases. If it is possible to characterize the subject matter of the ordinance both broadly and narrowly, the ordinance should be analyzed on both levels.⁷⁵

Determining legislative intent cannot be properly decided upon the basis of any single precise test.⁷⁶ An early implied preemption case, *Ab-*

duct is a field fully occupied by state law); *Ex parte Smith*, 26 Cal. App. 116, 146 P. 82 (3d Dist. 1914).

⁷² See, e.g., *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); *Ex parte Smith*, 26 Cal. App. 116, 146 P. 82 (3d Dist. 1914). See generally Blease, *Civil Liberties and Preemption*, 17 HASTINGS L.J. 517 (1966) (discussion and historical analysis of the doctrine of implied preemption) [hereafter Blease].

⁷³ See *California Water & Tel. Co. v. County of Los Angeles*, 253 Cal. App. 2d 16, 27, 61 Cal. Rptr. 618, 626 (2d Dist. 1967) ("One of the clouds in the crystal ball [of implied preemption] is the definition of the field which may be ultimately adopted in any particular case").

⁷⁴ *Id.* at 27-28, 61 Cal. Rptr. at 626. For example, the entire area of sexual activities has been preempted by state law. *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962). An ordinance regulating activity which is arguably sexual in nature must avoid this characterization to be upheld. See, e.g., *People v. Kukkanen*, 248 Cal. App. 2d Supp. 899, 903, 56 Cal. Rptr. 620, 623 (1967) (local ordinance prohibiting topless waitresses upheld because not within field of sexual activities but was "live entertainment").

When the broad field is not preempted by state law, characterization of the subject matter as within that field does not solve the problem since a narrow area within the broad category may be preempted. For example, the field of gambling has not been preempted by state law. *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964). However, the more limited area of horseracing has been preempted. *Ex parte Loretizo*, 59 Cal. 2d 445, 380 P.2d 656, 30 Cal. Rptr. 16 (1963).

⁷⁵ The scope of the field of gun control is discussed in notes 103-111, and 113-115 and accompanying text *infra*.

⁷⁶ *In re Lane*, 58 Cal. 2d 99, 110, 372 P.2d 897, 903, 22 Cal. Rptr. 857, 863 (1962) (Gibson, J., concurring); see also *Gluck v. County of Los Angeles*, 93 Cal. App. 3d 121, 131-32, 155 Cal. Rptr. 435, 440-41 (2d Dist. 1979) ("Decisional law furnishes no precise test of implicit state preemption of a legislative field by the enactment of a

bott v. City of Los Angeles,⁷⁷ attempted to articulate a test to determine legislative intent to fully occupy a field. *Abbott* dealt with a Los Angeles city ordinance requiring convicted criminals to register upon arriving in the city. State law required only sex offenders to register. The court held that state law had preempted registration of criminals.⁷⁸ The reasoning underlying *Abbott* is not clear and has been criticized as "sadly muddled."⁷⁹ The court stated that although the statute had been amended many times, the types of criminals included had never changed.⁸⁰ Therefore, the court reasoned, the legislature must have intended state law to be exclusive of local regulations in the field of registration of criminals.⁸¹ The court failed to recognize that other inferences could be made from the subject's limited coverage at the state level. The legislature may have thought it most important that sex offenders register, but either neglected to consider registration of other criminals or, having considered it, deemed it best regulated on the local level.⁸² The court's stronger rationale for its conclusion is that registration of criminals is an area requiring uniformity of treatment.⁸³

The next major preemption case, *In re Lane*,⁸⁴ served only to add to the confusion. In *Lane*, an ordinance regulating sexual conduct was held to be preempted by general law.⁸⁵ The court listed the Penal Code statutes addressing sexual conduct, and concluded their coverage was so extensive that preemption had been accomplished solely by the quantity of statutes.⁸⁶ The *Lane* holding has been described as "a rule of construction that specific reference to certain items in a general field over

comprehensive statutory scheme The decisional language is not so much a standard of decision to determine the presence or absence of state preemption as a means of rationalization"); *California Water and Tel. Co. v. County of Los Angeles*, 253 Cal. App. 2d 16, 27, 61 Cal. Rptr. 618, 626 (2d Dist. 1967) ("No exact formula exists upon which to forecast precisely the application of implied legislative preemption").

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

⁷⁸ *Id.* at 685, 349 P.2d at 981-82, 3 Cal. Rptr. at 165-66.

⁷⁹ See Blease, note 72 *supra*, at 546.

⁸⁰ *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, 686, 349 P.2d 974, 982, 3 Cal. Rptr. 158, 166 (1960).

⁸¹ *Id.*

⁸² See Note, *Municipal Corporations: Ordinances in Conflict with General Laws*, 10 U.C.L.A. L. REV. 440 (1963).

⁸³ See Blease, note 72 *supra*, at 543-48, for a discussion of constitutional rights and preemption. The author argues that *Abbott* was correctly decided because the ordinance implicated a constitutional right to travel, which is best dealt with at the statewide level. *Id.* See notes 134-36 and accompanying text *infra*.

⁸⁴ *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

⁸⁵ *Id.* at 105, 372 P.2d at 900, 22 Cal. Rptr. at 860.

⁸⁶ *Id.* at 103-04, 372 P.2d at 899-900, 22 Cal. Rptr. at 859-60.

many years of legislative treatment implicitly excludes all matters not mentioned."⁸⁷ However, determining legislative intent by examining the quantity of statutes in the field is similar to the *Abbott* approach of looking at the number of opportunities the legislature had to change a statute.⁸⁸ Neither approach is a reliable indication of legislative intent.⁸⁹

b. *The Hubbard Tests*

Two years after *Lane*, the California Supreme Court, in *In re Hubbard*,⁹⁰ established what is now the most widely used approach to the issue of implied preemption.⁹¹ The court held that a local ordinance prohibiting certain types of gaming was valid, stating that the field of gambling had not been preempted by state law although there was extensive state regulation of the subject.⁹² The court set forth three alter-

⁸⁷ Note, *Municipal Corporations: Ordinances in Conflict with General Laws*, 10 U.C.L.A. L. REV. 440, 443 (1963).

⁸⁸ Justice Gibson's concurring opinion in *Lane* rejected the majority's quantitative approach and argued that legislative intent is properly determined both by looking at the extensiveness of regulation and inquiring whether the subject matter involved needs to be addressed at a statewide level. *In re Lane*, 58 Cal. 2d at 106, 372 P.2d at 901, 22 Cal. Rptr. at 861 (Gibson, J., concurring).

⁸⁹ See notes 82-83 and accompanying text *supra*.

The *Lane* opinion caused considerable controversy. See generally Note, *Municipal Corporations: Ordinances Invalid Where Legislature Has Pre-empted the Field*, 50 CALIF. L. REV. 740 (1962); Comment, *The California City v. Preemption by Implication*, 17 HASTINGS L.J. 603 (1966); Note, *Municipal Corporations: Ordinances in Conflict with General Laws*, 10 U.C.L.A. L. REV. 440 (1963).

The controversy over the *Lane* opinion led in 1966 to the creation by California Governor Edmund G. Brown of the Commission on the Law of Preemption to study areas of legislation and recommend which areas should be explicitly preempted, which areas should be opened to additional regulation by local government, and in which areas the issue of preemption should be left to judicial determination. The Commission recommended that the legislature pass a statute which would clarify the law of implied preemption. The proposed statute was never enacted. The California State Bar Association's Special Committee on Preemption proposed a similar statute. See REPORT OF SPECIAL COMMITTEE ON PRE-EMPTION OF THE STATE BAR OF CALIFORNIA (Jan. 1967).

Although *Lane* has never been overruled, its reasoning has since been disapproved. See note 92 *infra*.

⁹⁰ 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964), *overruled on other grounds*, *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). *Hubbard* used the term "municipal affairs" to describe activities not preempted by general law, and thus implied that the legislature can define municipal affairs. (See notes 33-37 and accompanying text *supra*.) It was this implication that was overruled in *Bishop*.

⁹¹ See note 93 *infra*.

⁹² *In re Hubbard*, 62 Cal. 2d at 127, 396 P.2d at 814, 41 Cal. Rptr. at 398. The

native tests to determine whether a field is preempted by state law. If the subject matter of the ordinance fits into any one of these tests, the field is preempted and the ordinance is invalid.⁹³

The first test determines "whether the subject matter has been so fully covered by the general law as to clearly indicate that it has become a matter of state concern."⁹⁴ The second test states that the field is preempted "if the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action."⁹⁵ The third test inquires whether "the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality."⁹⁶

Application of the *Hubbard* tests is difficult. In most cases, courts

supreme court in *Hubbard* refused to use the *Lane* approach to determine whether a field is fully occupied. The court said the field of gambling would not be fully occupied unless

we adopt the negative type of argument inherent in defendant's contention, that is, that by making specific acts illegal the Legislature intended all other acts of similar character to be of such innocent character that no local authority might adopt a contrary view. To adopt such a view . . . would be to fly in the face of the well-settled doctrine that the use of specific words and phrases connotes an intent to exclude that which is not specifically stated. 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.

Id. at 126-27, 396 P.2d at 814, 41 Cal. Rptr. at 398.

⁹³ *In re Hubbard*, 62 Cal. 2d 119, 128, 396 P.2d 809, 815, 41 Cal. Rptr. 383, 399 (1964). Since *Hubbard*, courts have consistently used the *Hubbard* tests, either by setting forth the exact language of each test, or by applying the tests in substance without using the precise language. Courts which have used the exact language include: *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969); *Bamboo Bros. v. Carpenter*, 133 Cal. App. 3d 116, 183 Cal. Rptr. 748 (2d Dist. 1982) (local ordinance prohibiting all sales of drug paraphernalia not preempted by state Health and Safety Code section prohibiting sale to minors); *Wells Fargo Bank v. Town of Woodside*, 127 Cal. App. 3d 338, 179 Cal. Rptr. 555 (1st Dist. 1982), *hrg. granted*, Mar. 11, 1982 (S.F. 22408) (local ordinance establishing procedures for division, sale and transfer of land not preempted by Probate Code); *In re Bartha*, 63 Cal. App. 3d 584, 134 Cal. Rptr. 39 (2d Dist. 1976) (local ordinance prohibiting fortune-telling not preempted by state law forbidding fraudulent fortune-telling for money). In *Long Beach Police Officers Ass'n v. City of Long Beach*, 61 Cal. App. 3d 364, 372, 132 Cal. Rptr. 348, 352 (2d Dist. 1976), the court applied the *Hubbard* test in substance without using the exact language.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

have avoided critical analysis and instead have applied the test in conclusory language, without examining the factors leading to the result.⁹⁷ Used in this way, the test for implied preemption becomes one of judicial fiat and the law governing preemption is not clarified. This comment attempts to draw together the factors courts consider in their determination of implied preemption issues. These factors are derived both from cases that expressly and implicitly follow *Hubbard*.

(1) Local Regulations Are Preempted by State Law If the Field Is Fully Covered by General Law so as to Clearly Indicate that It Has Become Exclusively a Matter of State Concern

Under the first of the alternative *Hubbard* tests, determining whether a field is fully covered by general law requires more than the "statutory nose-count"⁹⁸ of *Lane*: one must determine whether the statutes are sufficiently logically related so that a court or local legislative body can detect a patterned approach to the subject.⁹⁹ The test decides whether the local needs have been adequately recognized and comprehensively dealt with at the state level,¹⁰⁰ and whether the state's regulatory scheme would be undermined if additional local regulations were allowed.¹⁰¹ The cases indicate courts are reluctant to find preemption

⁹⁷ See, e.g., *People v. Johnson*, 61 Cal. App. 3d Supp. 1, 132 Cal. Rptr. 645 (1976) (ordinance requiring gasoline dealers to post prices upheld); *People v. Butler*, 252 Cal. App. 2d Supp. 1053, 59 Cal. Rptr. 924 (1967) (ordinance prohibiting consumption of alcohol in specified areas upheld).

⁹⁸ *Galvan v. Superior Court*, 70 Cal. 2d 851, 861, 452 P.2d 930, 937, 76 Cal. Rptr. 642, 649 (1969).

⁹⁹ *Id.*; see also *Long Beach Police Officers Ass'n v. City of Long Beach*, 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (2d Dist. 1976).

¹⁰⁰ *Robins v. County of Los Angeles*, 248 Cal. App. 2d 1, 9, 56 Cal. Rptr. 853, 860 (2d Dist. 1966) (ordinance requiring bars which employ topless waitresses to obtain license from county tax collector not in conflict with state regulation of liquor).

¹⁰¹ *Id.* at 9, 56 Cal. Rptr. at 859. Prior to *Hubbard*, courts used this rationale to hold that licensing of professionals and businesspersons is fully occupied by state law. See, e.g., *Agnew v. City of Los Angeles*, 51 Cal. 2d 1, 330 P.2d 385 (1958) (ordinance regulating contractors held invalid because state fully occupied field by enacting Commissioners License Act); *Collins v. Priest*, 95 Cal. App. 2d 179, 212 P.2d 269 (4th Dist. 1949) (ordinance requiring plumbers to pass exam to obtain city permit held invalid because state fully occupied field by issuing state licenses); *Horwith v. City of Fresno*, 74 Cal. App. 2d 443, 168 P.2d 767 (4th Dist. 1946) (ordinance requiring electrical contractors to pass exam to obtain a business license held invalid because state has fully occupied the field by issuing licenses).

Since *Hubbard*, this first alternative test has invalidated few ordinances. See note 102 *infra*. The first *Hubbard* test is used only in situations in which the state has set up a regulatory system which cannot feasibly be supplemented by local laws and still accom-

under the first *Hubbard* test.¹⁰²

(A) *Galvan and Gun Control*

The California Supreme Court addressed the question of whether

plish its purpose. See, e.g., *Younger v. City of Berkeley Council*, 45 Cal. App. 3d 825, 119 Cal. Rptr. 830 (1st Dist. 1975) (city ordinance establishing procedure by which residents can obtain access to state arrest records invalid because state law established comprehensive scheme and pattern of criminal records). See Feiler, *Conflicts Between State and Local Enactments*, 2 URB. LAW 398, 404-05 (1970) ("The question is properly whether the scheme can work effectively in the face of local intervention").

¹⁰² In the following fields, courts have held that the subject matter is not fully occupied under the first *Hubbard* test: *gambling*, e.g., *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 2d 393 (1964) (ordinance prohibiting certain types of gaming upheld although state statutes extensively regulated gambling); *Shermet v. Municipal Court*, 253 Cal. App. 2d 165, 61 Cal. Rptr. 112 (2d Dist. 1967) (ordinance prohibiting dice games upheld because the field of gambling is not fully occupied); *trespass*, e.g., *Sports Comm. Dist. 37 AMA v. County of San Bernardino*, 113 Cal. App. 3d 155, 169 Cal. Rptr. 652 (4th Dist. 1980) (ordinance requiring written permission from landowner prior to issuing permit to engage in motorcycle racing on desert property upheld; state statutes regarding trespass do not address desert problem and therefore do not fully occupy field); *health*, e.g., *People v. Tufts*, 97 Cal. App. 3d Supp. 37, 159 Cal. Rptr. 163 (1979) (ordinance prohibiting maintaining property in such condition as to harbor rodents not preempted by state law which obligated property owners to try to exterminate rodents, because the state has not fully occupied the field); *alcohol regulation*, e.g., *People v. Butler*, 252 Cal. App. 2d Supp. 1053, 59 Cal. Rptr. 924 (1967) (ordinance prohibiting drinking in public upheld because although the state has exclusive right and power to license, and regulate manufacture, sale, purchase, possession, and transportation of alcohol, state law does not cover consumption and is therefore not fully occupied); *labor relations*, e.g., *Alioto's Fish Co. v. Human Rights Comm'n of San Francisco*, 120 Cal. App. 3d 594, 174 Cal. Rptr. 763 (1st Dist. 1981), *cert. denied*, 455 U.S. 944 (1982) (city ordinance requiring non-discrimination provision in all city contracts upheld because although state fully occupied field of the regulation of discrimination, it did not intend to preclude municipalities from including these provisions in their leases); *landlord/tenant relations*, e.g., *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 130 Cal. Rptr. 465, 530 P.2d 1001 (1976) (rent control ordinance not preempted because state statutes do not fully occupy the field; ordinance invalidated on other grounds).

A line of cases, starting with *In re Lane*, has held that the field of sexual activities is fully occupied by state law. Although the *Lane* reasoning has been disapproved (see notes 79-83 and 88-90 and accompanying text *supra*), its holding has never been overruled. Many cases involving sexual activity do not apply the *Hubbard* analysis but instead look to *Lane* as precedent. See, e.g., *Lancaster v. Municipal Court*, 6 Cal. 3d 805, 494 P.2d 681, 100 Cal. Rptr. 609 (1972) (local ordinance prohibiting massage parlors invalid); *Whitney v. Municipal Court*, 58 Cal. 2d 907, 377 P.2d 80, 27 Cal. Rptr. 16 (1962) (ordinance prohibiting lewdness invalid); *In re Moss*, 58 Cal. 2d 117, 373 P.2d 425, 23 Cal. Rptr. 361 (1962) (ordinance prohibiting "peep shows" invalid); *Carl v. City of Los Angeles*, 61 Cal. App. 3d 265, 132 Cal. Rptr. 365 (2d Dist. 1976)

the field of gun control is fully occupied by state law in *Galvan v. Superior Court*.¹⁰³ Using the *Hubbard* approach, the court upheld a local ordinance requiring the registration of handguns.¹⁰⁴ After identifying five sub-fields of weapons statutes,¹⁰⁵ the court analyzed both the broad field of gun control and the narrow areas of gun registration and licensing.

Following earlier cases,¹⁰⁶ the court held that the broad field of gun control was not fully occupied under the first *Hubbard* test.¹⁰⁷ The court rejected the contention that a large number of statutes on a subject establishes that a field is fully occupied.¹⁰⁸ The court reasoned that the statutory treatment of gun control established no pattern of legislation¹⁰⁹ and the varied approach to guns did not demonstrate a legislative intent to fully occupy the field.¹¹⁰ The statutory scheme has not been

(ordinance prohibiting the sale of newspapers containing nudity held invalid). However, a better analysis is that the field of sexual activities is only partially occupied and that the balancing test of *Hubbard* favors the state interests (see notes 128-41 and accompanying text *infra*).

¹⁰³ 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969).

¹⁰⁴ *Id.* at 866, 452 P.2d at 940, 76 Cal. Rptr. at 652. San Francisco, Ordinance No. 175-68 (July 1968) provided in part: "It shall be unlawful for any person within San Francisco to own, possess or control an unregistered firearm." *Id.* at 855 n.1, 452 P.2d at 932 n.1, 76 Cal. Rptr. at 644 n.1. The ordinance also established a local procedure for registration. *Id.*

¹⁰⁵ The court identified five sub-areas within the broad field of gun control. *Galvan v. Superior Court*, 70 Cal. 2d 851, 861 n.4, 452 P.2d 930, 936 n.4, 76 Cal. Rptr. 642, 648 n.4 (1969). The Penal Code statutes cited by *Galvan* may be classified as involving crimes and punishments involving the use of firearms (e.g., Cal. Penal Code §§ 171c, 171d, 417, 467, 12022, 12560); prohibited types of weapons (e.g., *id.* §§ 12020, 12029, 12220, 12420); prohibited classes of weapons users (e.g., *id.* §§ 12021, 12021.5); licensing provisions (e.g., *id.* §§ 12026, 12050-12054, 12423-12426), and registration provisions (e.g., *id.* §§ 12073-12079).

¹⁰⁶ See, e.g., *People v. Commons*, 64 Cal. App. 2d Supp. 925, 148 P.2d 724 (1944). In *Commons*, an ordinance prohibiting the carrying of *concealable* weapons on one's person or in a car was upheld against a challenge that it was preempted by the state Dangerous Weapons Act, which prohibited the carrying of dangerous weapons *concealed* on the person or in a vehicle under one's control. *Id.* at 928, 148 P.2d at 726. The court held the ordinance invalid only insofar as it prohibited the same acts prohibited by state law, that is, prohibiting those concealable weapons which actually were concealed. *Id.* at 933, 148 P.2d at 729. The *Commons* holding was followed in *People v. Jenkins*, 207 Cal. App. 2d Supp. 904, 24 Cal. Rptr. 410 (1962) (ordinance prohibiting possession of concealed weapon upheld).

¹⁰⁷ *Galvan v. Superior Court*, 70 Cal. 2d 851, 452 P.2d 930, 76 Cal. Rptr. 642 (1969).

¹⁰⁸ *Id.* at 861-62, 452 P.2d at 937, 76 Cal. Rptr. at 649.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* Other states have also concluded that weapons statutes do not occupy the

substantially revised since *Galvan* and the California Supreme Court's holding that gun control is not fully occupied by state law remains the law.¹¹¹ Addressing the narrower issue of gun registration, the court concluded that because the state statutes on gun registration cover a limited area, it was not fully occupied by state law.¹¹²

(B) Handgun Possession

To determine whether handgun possession is fully occupied by state law requires the same analysis as is used in the broad field of gun control:¹¹³ whether the statutes are sufficiently logically related so that a court or local legislative body can detect a patterned approach to the

entire field of weapons control so as to preclude local regulations. See, e.g., *Brown v. City of Chicago*, 42 Ill. 2d 501, 250 N.E.2d 129 (1969); *Junction City v. Lee*, 216 Kan. 495, 532 P.2d 1292 (1975); *City of Detroit v. Recorder's Court Judge*, 56 Mich. App. 224, 223 N.W.2d 722 (1974); *Township of Chester v. Panicucci*, 62 N.J. 94, 299 A.2d 385 (1973); *Grimm v. City of New York*, 289 N.Y.S.2d 358, 56 Misc. 2d 525 (1968).

¹¹¹ *But see Sippel v. Nelder*, 24 Cal. App. 3d 173, 101 Cal. Rptr. 89 (1st Dist. 1972) (San Francisco ordinance requiring a permit from the police department prior to buying a concealable weapon held invalid). The *Sippel* court also held that the broad field of gun control was fully occupied by state law. *Id.* at 177, 101 Cal. Rptr. at 91. This holding was unnecessary and should be regarded as dicta for two reasons: First, the court held that the ordinance directly conflicted with Penal Code § 12026 (see note 52 and accompanying text *supra*), making it unnecessary to discuss the preemption issue. Second, the *Sippel* court interpreted Government Code § 53071 too broadly. In response to *Galvan*, the legislature enacted GOVERNMENT CODE § 53071 (West Supp. 1982) (formerly GOV'T CODE § 9619), which provides: "It is the intention of the Legislature to occupy the whole field of regulation of the *registration or licensing* of . . . firearms as encompassed by the provisions of the Penal Code, and such provisions shall be exclusive of all local regulations relating to registration or licensing of . . . firearms" [emphasis added]. With the enactment of this statute, the legislature provided the statutory expression of intent required by the second *Hubbard* test (see notes 123-24 and accompanying text *infra*). Therefore, the *Sippel* court could have held that the limited area of gun registration and licensing, the subject of the ordinance at issue, was preempted by state law. The statement that the broad field of gun control is preempted by state law is thus dicta because the question was not before the court.

Although *Galvan* could have been decided solely on the narrower field of gun registration, the *Galvan* holding on the broader field of gun control is not dicta because supreme court holdings which might otherwise be characterized as dicta should be accepted as law by courts of appeal. See *Rosenthal v. City of Los Angeles*, 193 Cal. App. 2d 29, 32, 13 Cal. Rptr. 824, 826 (2d Dist. 1961); 16 CAL. JUR. 3d § 139 (1974).

¹¹² *Galvan v. Superior Court*, 70 Cal. 3d 851, 866, 452 P.2d 930, 940, 76 Cal. Rptr. 642, 652 (1969). This holding probably does not survive the enactment of Government Code Section 53071. See note 111 *supra*.

¹¹³ See notes 98-102 and accompanying text *supra*.

subject.¹¹⁴ An ordinance prohibiting handgun possession can be interpreted either as regulating the classes of persons who may use handguns or as regulating use of handguns.¹¹⁵ The statutory scheme in both areas will be analyzed below.

In California the classes of persons prohibited from possessing handguns include convicted felons, narcotics addicts, and minors.¹¹⁶ Other states have included mental incompetents, habitual drunkards, fugitives from justice, nonresidents, and persons adjudged unfit to possess a pistol.¹¹⁷ Therefore, the limited coverage of prohibited users by California state law cannot in any sense be defined as comprehensive.

Similarly, state statutes regarding handgun use do not fully occupy the field. Statutes require persons to obtain permits before carrying concealable weapons¹¹⁸ and prohibit concealed weapons altogether in some places.¹¹⁹ Local ordinances, too, may prohibit possession of concealable weapons by persons in specified situations.¹²⁰ Additionally, the

¹¹⁴ *Galvan v. Superior Court*, 70 Cal. 2d 851, 862, 452 P.2d 930, 937, 76 Cal. Rptr. 642, 649 (1969).

¹¹⁵ Handgun possession is not one of the five subfields identified in *Galvan* (see note 105 *supra*) but rather carries with it aspects of two fields, prohibited users and prohibited use of handguns. In *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 518, 186 Cal. Rptr. 380, 384 (1st Dist. 1982), the court held that although not all regulation of handgun possession constitutes a licensing system, a total ban of handguns does constitute a licensing system. See notes 49-68 and accompanying text *supra*.

¹¹⁶ CAL. PENAL CODE § 12021 (West 1982) states in part: "Any person who has been convicted of a felony . . . or who is addicted to the use of any narcotic drug, who owns or has in his possession . . . any pistol . . . capable of being concealed upon the person is guilty of a public offense" CAL. PENAL CODE § 12021.5 (West 1982) states in part: "A minor may not possess a concealable firearm unless he or she has the written permission of his or her parent"

¹¹⁷ Other prohibited users may include members of criminal syndicates, emotionally unstable persons, persons of unsound mind, persons with a physical defect which would make it unsafe for them to have a firearm, mentally retarded persons, illegal aliens, persons engaged in subversive activities, and persons who should not, in the public interest, have a firearm. For listings of firearms laws in all states, see *HANDGUN LAWS OF THE U.S.* (1974) (Barnes Co.).

¹¹⁸ See note 54 *supra*.

¹¹⁹ See, e.g., CAL. PENAL CODE § 171c (West 1982) (prohibits loaded firearms within government offices); *id.* § 171d (prohibits loaded firearms within constitutional officer's residence); *id.* § 4574 (prohibits bringing weapons into prisons).

¹²⁰ See note 64 *supra*; see, e.g., *Yuen v. Municipal Court*, 52 Cal. App. 3d 351, 125 Cal. Rptr. 87 (1st Dist. 1975) (ordinance prohibiting loitering while carrying concealed weapon not preempted by general law); *Olsen v. McGillicuddy*, 15 Cal. App. 3d 897, 93 Cal. Rptr. 530 (1st Dist. 1971) (ordinance prohibiting minors from possessing or firing BB gun in city not preempted by general law); *People v. Jenkins*, 207 Cal. App. 2d Supp. 904, 24 Cal. Rptr. 410 (1962) (ordinance prohibiting carrying weapon in

legislature has explicitly permitted local legislation on discharging weapons within cities.¹²¹ Both the varied statutory treatment of gun use and users and the court's reluctance to find full occupation under the first *Hubbard* test¹²² make it unlikely that a court would hold the fields of prohibited users or use fully occupied so as to preclude additional local regulation.

(2) Local Regulations Are Preempted by State Law If the Subject Matter Is Partially Covered by General Law Couched in Such Terms as to Indicate Clearly that a Paramount State Concern Will Not Tolerate Further or Additional Local Action

This second alternative test is particularly unclear. The phrases "couched in such terms" and "paramount state concern" provide courts with much latitude in determining whether local law is preempted under this test. The following discussion identifies the general approach to the second *Hubbard* test and applies it to handgun control.

Cases decided under this test first examine whether statutory language reveals a legislative intent to preempt a field.¹²³ An expression of legislative intent to preempt a field can exist within a substantive statute, or can stand alone as a declaration of intent regarding a certain field.¹²⁴

Legislative intent to preempt the field of gun control has been limited to the specific areas of registration and licensing.¹²⁵ The other expression of intent is a rule of construction and cannot be interpreted as

vehicle not preempted by general law); *People v. Commons*, 64 Cal. App. 2d Supp. 925, 148 P.2d 724 (1944); see also *Long Beach Police Officers Ass'n v. City of Long Beach*, 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (2d Dist. 1976).

¹²¹ CAL. GOV'T CODE § 25840 (West 1968) states: "The board of supervisors may prohibit and prevent the unnecessary firing and discharge of firearms on or into the highways and other public places and may pass all necessary ordinances regulating or forbidding such acts."

¹²² See note 102 and accompanying text *supra*.

¹²³ See, e.g., *Long Beach Police Officers Ass'n v. City of Long Beach*, 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (2d Dist. 1976). The court applied the second *Hubbard* test by analyzing "the pattern of legislation, the language used in the relevant Penal Code provisions and the nature of the subject matter." *Id.* at 372, 132 Cal. Rptr. at 352.

¹²⁴ See, e.g., CAL. GOV'T CODE § 53071 (West Supp. 1982), discussed in note 111 *supra*.

¹²⁵ *Id.* Accord 65 Op. Cal. Att'y Gen. 457 (1982). But see *Doe v. City and County of San Francisco*, 136 Cal. App. 3d 509, 518, 186 Cal. Rptr. 380, 384 (1st Dist. 1982) (holding San Francisco gun ordinance preempted by state law because ordinance constituted a licensing system) (see notes 49-68 and accompanying text *supra*).

legislative intent to preempt the field.¹²⁶ Therefore, there is no statutory expression of intent to preempt the area of possession of handguns.

When statutes in a particular field reveal no legislative intent to preempt the field, courts determine on a case by case basis whether preemption by state law is warranted. Two major approaches can be identified.¹²⁷ The first approach requires balancing state interests against local interests. The second approach determines whether the purpose of state regulation is consistent with local regulation.

(A) *The Balancing Approach*

Under the balancing approach, courts first examine whether local legislators are more aware of, and better able to regulate appropriately, the particular problems of their areas,¹²⁸ and whether substantial geographic, economic, ecological, or other distinctions compel local control.¹²⁹ Cities may have an interest in banning handguns because the need for regulation of weapons differs greatly in different areas of the state.¹³⁰ For example, urban areas experience problems unknown in rural areas,¹³¹ and these problems require local legislative treatment. Laws enacted for the benefit of the entire state cannot meet the unique

¹²⁶ See note 52 and accompanying text *supra*.

¹²⁷ Courts have not expressly articulated these two approaches, but an analysis of numerous cases in many fields demonstrates that courts repeatedly apply principles of balancing and purpose.

¹²⁸ See, e.g., *Robins v. County of Los Angeles*, 248 Cal. App. 2d 1, 9, 56 Cal. Rptr. 853, 859 (2d Dist. 1966).

¹²⁹ *Id.*; see also *In re Cox*, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970) (trespass ordinance not preempted because trespass laws may involve special local problems which are better regulated at local level); *Sports Comm. Dist. 37 AMA v. County of San Bernardino*, 113 Cal. App. 3d 155, 169 Cal. Rptr. 652 (4th Dist. 1980) (ordinance regulating trespass on isolated desert property not preempted because state law does not address this problem); *People v. Deacon*, 87 Cal. App. 3d Supp. 29, 151 Cal. Rptr. 277 (1978) (local ordinance prohibiting riding motorcycle in open space easement on Catalina Island not preempted by state laws regulating traffic because of special need of unique area).

¹³⁰ *Galvan v. Superior Court*, 70 Cal. 2d 851, 864, 452 P.2d 930, 938, 76 Cal. Rptr. 642, 650 (1969) ("That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority"); *In re Cheney*, 90 Cal. 617, 620, 27 P. 436, 437 (1891) (ordinance prohibiting carrying of concealed weapons upheld); *People v. Commons*, 64 Cal. App. 2d Supp. 925, 932, 148 P.2d 724, 728 (1944) (ordinance prohibiting carrying of concealable weapons upheld).

¹³¹ *Gleason v. Municipal Court*, 226 Cal. App. 2d 584, 38 Cal. Rptr. 226 (2d Dist. 1964) (ordinance prohibiting loitering in tunnels and pedestrian subways held not preempted because it addressed problem peculiar to urban areas).

needs of different areas. Thus, local legislators are better able to judge the type of gun control necessary in their local community and, thereby, legislate accordingly.

However, the state has an interest in requiring uniformity of laws to protect individual freedom¹³² and to insure that mobility is not unreasonably burdened.¹³³ The state interest in uniformity is especially strong in areas of free speech, due process, the right of privacy, and other fundamental freedoms.¹³⁴ Local regulations may restrict these freedoms, allowing certain segments of the local population to determine the rights of all.¹³⁵ However, fundamental freedoms can be distinguished from gun control. It is not likely there is a constitutional right to bear arms,¹³⁶ so any ordinance banning the possession of handguns would not infringe, directly or indirectly, upon constitutionally guaranteed fundamental freedoms. Therefore, the need for state uniformity to protect individual freedoms does not override the local need to regulate firearms.

The state has an interest in insuring that mobility is not unreasonably burdened.¹³⁷ For example, regulation of statewide commercial activities and conduct of transient individuals requires statewide uniformity.¹³⁸ An ordinance banning handguns would not infringe on the state interest in insuring mobility because under current state law an individual can carry a gun only in very limited circumstances.¹³⁹ Furthermore, ordinances banning handguns routinely allow for their voluntary surrender without penalty.¹⁴⁰ Thus, any restriction imposed by a locality would not unduly restrict mobility. The need to confront special

¹³² Blease, note 72 *supra*, at 569.

¹³³ *Robins v. County of Los Angeles*, 248 Cal. App. 2d 1, 9, 56 Cal. Rptr. 853, 859 (2d Dist. 1966).

¹³⁴ Blease, note 72 *supra*, at 569. The author argues that only statewide uniformity can protect fundamental rights from municipal "balkanization" and that the doctrine of preemption by implication is necessary to protect these rights. *Id.*

¹³⁵ *Id.*

¹³⁶ See notes 14-27 and accompanying text *supra*.

¹³⁷ *Robins v. County of Los Angeles*, 248 Cal. App. 2d 1, 56 Cal. Rptr. 853 (2d Dist. 1966).

¹³⁸ *Id.*; see also *Robillwayne Corp. v. City of Los Angeles*, 241 Cal. App. 2d 57, 50 Cal. Rptr. 1 (2d Dist. 1966) (ordinance regulating fire insurance solicitors preempted by state law because of need for uniformity in regulation of business); *Horwith v. City of Fresno*, 74 Cal. App. 2d 443, 168 P.2d 767 (4th Dist. 1946) (licensing of contractors is statewide concern and local regulations will be preempted).

¹³⁹ See CAL. PENAL CODE § 12025 (West 1982), set forth in note 54 *supra*.

¹⁴⁰ See, e.g., SAN FRANCISCO, CAL., POLICE CODE art. 35 § 3508, which allows for voluntary delivery of handguns to police department.

problems would outweigh the state's interest in uniformity.¹⁴¹ Therefore, an ordinance banning the possession of handguns would not be preempted under the balancing approach.

(B) The Purpose Approach

If state interests do outweigh local needs, some courts analyze the purpose of both the state statute and the local regulation before determining whether the ordinance is preempted. These purposes may either be explicitly stated¹⁴² or implicitly drawn by the courts from the language of the statute and ordinance.¹⁴³ If the statute and the ordinance attempt to regulate the same behavior for the same ends, the state statute will supersede the local ordinance.¹⁴⁴ If, however, the goals of the two laws differ, local regulation is allowed. For example, in a recent case using this approach,¹⁴⁵ a city ordinance requiring a deposit on non-refundable containers was held not preempted by the exclusive statutory power of the state to regulate the sale of alcoholic beverages. The purpose of the local ordinance was to regulate containers, not alcoholic beverages.¹⁴⁶

Relevant handgun statutes fall into two categories, prohibited users and prohibited use.¹⁴⁷ The purpose of statutes regulating persons using handguns is to prevent possession of handguns by certain segments of

¹⁴¹ In a borderline case, the local ordinance should be upheld: "[I]f there is a significant local interest to be served which may differ from one locality to another then the presumption favors the validity of the local ordinance against an attack of state preemption." *Gluck v. County of Los Angeles*, 93 Cal. App. 3d 121, 133, 155 Cal. Rptr. 435, 441 (2d Dist. 1979) (ordinance restricting location of newsstands upheld).

¹⁴² See, e.g., *Eckl v. Davis*, 51 Cal. App. 3d 831, 124 Cal. Rptr. 685 (2d Dist. 1975). In *Eckl* an ordinance prohibiting nudity on local beaches was upheld notwithstanding California Penal Code Section 314 which prohibited indecent exposure. The court reasoned that the express purpose of the local ordinance was to maintain the beaches for the use of all citizens, whereas the purpose of California Penal Code Section 314 was to control sexually motivated conduct. *Id.* at 836 n.1, 124 Cal. Rptr. at 687 n.1.

¹⁴³ See, e.g., *People v. Mueller*, 8 Cal. App. 3d 949, 88 Cal. Rptr. 157 (2d Dist. 1970). In *Mueller*, an ordinance which prohibited throwing live bait unattached to a hook into a harbor was upheld notwithstanding California Fish and Game Code regulations regarding fishing. By examining other sections of the ordinance, the court found that the implied purpose of the local ordinance was to prevent pollution. *Id.* at 954, 88 Cal. Rptr. at 160.

¹⁴⁴ *Id.*

¹⁴⁵ *Park and Shop Markets, Inc. v. City of Berkeley*, 116 Cal. App. 3d 78, 172 Cal. Rptr. 515 (1st Dist. 1981).

¹⁴⁶ *Id.*

¹⁴⁷ See notes 105 and 116 *supra*.

the population.¹⁴⁸ The purpose of statutes regulating handgun use is to prevent crimes and dangerous use of weapons.¹⁴⁹

A local ordinance prohibiting the possession of handguns does not seek to achieve the same ends as the state statutes. Eliminating handguns from the total population may accomplish goals beyond the purpose of the statutes. For example, proponents of gun control contend that elimination of handguns in the general population would result in fewer accidental gun-related deaths,¹⁵⁰ curb suicides effected by handguns,¹⁵¹ and prevent the seemingly easy access by criminals to guns by theft.¹⁵² Therefore, under the purpose test, a local ordinance banning possession of handguns will not be superseded by state law.

(3) Local Regulations Are Preempted by State Law If the Adverse Effect of a Local Ordinance on Transient Citizens Outweighs the Possible Benefit to the Municipality

An ordinance banning handguns would not be preempted by the third alternative *Hubbard* test.¹⁵³ A local ban on possession of handguns would have a negligible effect on transients. Under state law, it is

¹⁴⁸ See, e.g., *People v. DuBose*, 42 Cal. App. 3d 847, 117 Cal. Rptr. 235 (1st Dist. 1974) (ex-felon); *People v. Walsley*, 245 Cal. App. 2d 383, 53 Cal. Rptr. 877 (1st Dist. 1966) (ex-felon); *People v. Washington*, 237 Cal. App. 2d 59, 46 Cal. Rptr. 545 (2d Dist. 1965) (drug addict).

¹⁴⁹ See, e.g., CAL. PENAL CODE §§ 171c, 171d (West 1982) (prohibit loaded firearms within government offices and constitutional officer's residence); § 417 (prohibits brandishing of weapons); § 467 (prohibits possession of deadly weapons with intent to commit an assault). Two other relevant statutes are CAL. PENAL CODE § 12026 (West 1982) and CAL. GOV'T CODE § 53071 (West Supp. 1982). The express purpose of Section 12026 is to prevent the courts from incorrectly construing Section 12025. See text accompanying notes 54 *supra*. The express purpose of Government Code Section 53071 is to prevent local legislation in the area of registration and licensing of firearms. See note 111 *supra*.

¹⁵⁰ See notes 7 and 10 *supra*.

¹⁵¹ See Seiden & Conklin, note 2 *supra*, at 5; see also *USA Today*, Nov. 15, 1982, § A, at 11, col. 3 (interview with San Francisco Mayor Feinstein, who stated, "More and more we are finding guns are the weapons of suicide. I was very taken a couple of weeks ago by a note left by a young woman who committed suicide. She said, 'I would have used drugs, but a handgun was easier to get.'").

¹⁵² Corbett, *Living Without Handguns*, 16 CUR. SOC. ISSUES 20 (1977).

¹⁵³ The few cases which have turned on the third *Hubbard* test have upheld the ordinance. See *Yuen v. Municipal Court*, 52 Cal. App. 3d 351, 125 Cal. Rptr. 87 (1st Dist. 1975) (ordinance prohibiting loitering while carrying concealed weapon does not adversely affect transients); *Davis v. Justice Court*, 10 Cal. App. 3d 1002, 89 Cal. Rptr. 409 (1st Dist. 1970) (ordinance establishing curfew during disasters does not adversely affect transients).

unlawful to carry handguns without a license.¹⁵⁴ Ordinances banning handguns generally exempt license-holders,¹⁵⁵ and allow persons moving into a city to voluntarily dispose of their handguns without penalty.¹⁵⁶ Thus, an ordinance banning handguns would be no more burdensome on nonresidents of municipalities than is current state law.¹⁵⁷

In summary, the three alternative *Hubbard* tests provide a proper approach to preemption issues. Under the first *Hubbard* test, the field of handgun control and possession is not fully covered by state law. It is not as clear whether an ordinance banning handguns would be preempted under the second *Hubbard* test, but research and logic lead to the conclusion that state law does not indicate clearly that a paramount state concern will not tolerate further local regulation in the field of handgun possession. Under the third test, an ordinance banning handguns would not adversely affect transient citizens. Therefore, an ordinance banning handguns would not be preempted by state law.

CONCLUSION

Currently, proponents of handgun control are focusing their efforts on local legislation. Morton Grove's success in upholding its ordinance prohibiting the possession of handguns has prompted other cities to consider similar bans.

¹⁵⁴ CAL. PENAL CODE § 12025 (West 1982).

¹⁵⁵ See, e.g., SAN FRANCISCO, CAL., POLICE CODE art. 35 § 3507 (E), (F).

¹⁵⁶ *Id.*

¹⁵⁷ Conceivably, an ordinance banning handguns could also be attacked on due process grounds. The third *Hubbard* test might be interpreted as imposing due process requirements on local regulations, or the fourteenth amendment could be applied independently of the *Hubbard* tests. Although ignorance of the law is no excuse for affirmative criminal action, due process problems may arise if punishment is imposed for mere passive conduct. See *Lambert v. California*, 355 U.S. 225 (1957) (ordinance making it unlawful for any convicted criminal to remain in Los Angeles for more than five days without registering held unconstitutional). However, possession of a handgun cannot be interpreted to be mere passive conduct. Guns, and especially handguns, are not only extensively regulated (see note 25 *supra*), but are objects that a person of ordinary intelligence could reasonably expect to be regulated, even at the local level. See *City of University Heights v. O'Leary*, 68 Ohio St. 2d 130, 429 N.E.2d 148 (1981) (ordinance requiring a non-resident to possess firearm owner's identification card before bringing firearm into municipality did not violate due process because owning a gun is not merely passive conduct but suggests the possibility of governmental regulation). Knowledge of the illegality of handgun possession would not be necessary to punish someone for violating an ordinance banning handguns; knowledge of the character of the object possessed is sufficient. See *Galvan v. Superior Court*, 70 Cal. 2d 851, 868, 452 P.2d 930, 941-42, 76 Cal. Rptr. 642, 653-54 (1969).

This comment has assumed that the federal and California constitutions pose no significant problem to a city that enacts a handgun ban. The First District Court of Appeal in California has held that the San Francisco ordinance, which prohibits handgun possession, is invalid because it is in direct conflict with state law. It reached this conclusion by characterizing the ordinance as a licensing system. However, a better approach views such an ordinance not as a permit requirement but as regulating possession of handguns, and therefore not in conflict with state law.

The doctrine of implied preemption restricts the power of cities to enact legislation in a field occupied by state law. Although California courts have used different analyses to determine whether a field is occupied, the approach currently used by courts is the three alternative tests enunciated by the California Supreme Court in *Hubbard*.¹⁵⁸ Analysis of the field of handgun control under the *Hubbard* tests suggests that an ordinance banning handguns would not be preempted by state law. Therefore, it appears that there is no legal barrier to a California city enacting an ordinance banning handguns.

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¹⁵⁸ *In re Hubbard* 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).