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Strumsky And the Source of California Chartered City Powers

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In Strumsky v. San Diego County Employees Retirement Association, the California Supreme Court effected a profound revision of the standard for judicial review of local administrative agency decisions which substantially affect fundamental vested rights. In reaching its decision the supreme court posited a rationale which identifies the legislature as the sole source of a chartered city's powers. The court's rationale, which serves as the focal point of this comment, may prove detrimental to the autonomy of chartered cities in the area of municipal affairs. The author relies on previous supreme court decisions and an analysis of relevant provisions of the California Constitution to conclude that the true source of a chartered city's powers is the constitution and not the legislature. The author also analyzes an abortive attempt by the legislature to countermand the Strumsky ruling, which, the author contends, would have done little to settle the existing confusion concerning the actual source of a chartered city's powers.

On March 25, 1974, thirty-eight years of "veritable gospel" was reversed by the California Supreme Court in *Strumsky v. San Diego County Employees Retirement Association.*[1] The immediate impact of the *Strumsky* decision was to effectively withdraw judicial power from local agencies and to impose an additional decision-making burden on reviewing courts. A less obvious aspect of *Strumsky* is its potential for infringement on the autonomy of chartered cities.

Prior to *Strumsky*, judicial review of a local agency decision was restricted to a determination of whether the findings were supported by substantial evidence in light of the whole record.[2] In a 4-3 decision the *Strumsky* court held that when a local agency decision substantially affects a fundamental vested right,[3] the reviewing court must make an independent judgment on the evidence.[4] Noting that the substan-

1. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974).
2. Savage v. Sox, 118 Cal. App. 2d 479, 258 P.2d 80 (1953).
3. In Bixby v. Pierno, 4 Cal. 3d 130, 144-47, 481 P.2d 242, 252-54, 93 Cal. Rptr. 234, 244-46 (1971), the court stated that in determining whether a right is fundamental, the "courts do not alone weigh the economic aspect of it but the effect of it in human terms and the importance of it in the life situation." The court seemingly acknowledged the vagueness of this definition when it held that the analysis must proceed on a case-by-case basis. *Id.*
4. 11 Cal. 3d at 44, 520 P.2d at 40, 112 Cal. Rptr. at 816.

tial evidence test is applied only when a court is reviewing the decisions of administrative bodies which possess judicial powers,[5] the court grounded its holding on the determination that local agencies are no longer vested with such powers[6] since the legislature, which can neither exercise nor delegate judical power, is now the only source of power for local agencies, including those of chartered cities.[7]

In response to the *Strumsky* decision, a proposed constitutional amendent was introduced during the 1973-74 session of the California Legislature.[8] This amendment, which would have allowed the legislature to vest judicial powers in local agencies,[9] failed to survive Senate Judiciary Committee deliberations.[10] In light of *Strumsky's* significant impact upon judicial review of local agency decisions, it is reasonable to expect future legislative action similarly aimed at counterbalancing the *Strumsky* ruling. Although such legislative response may mitigate *Strumsky's* effect on the power of local agencies, the fundamental question of the source of a chartered city's powers will remain. This comment explores the *Strumsky* court's premise that the only powers of a chartered city are those delegated to it by the legislature. The potential impact of this premise is great since it provides a possible avenue through which the legislature may withdraw from the ambit of municipal control matters in which the legislative acts of chartered cities have traditionally been given great deference.[11]

Judicial Review of Administrative Decisions

Traditionally, judicial review of administrative decisions was available on a writ of certiorari.[12] In *Standard Oil Co. v. State Board of Equalization*,[13] decided in 1936, the California Supreme Court restricted the use of the writ of certiorari to review of decisions of administrative agencies which were entitled to exercise judicial power. The court found that two types of agencies were vested with judicial powers: those specified in the California Constitution[14] and those limited to local jurisdic-

5. *Id.* at 35, 520 P.2d at 34, 112 Cal. Rptr. at 809.
6. *Id.* at 41, 520 P.2d at 37, 112 Cal. Rptr. at 813.
7. *Id.* at 40-42, 520 P.2d at 37-39, 112 Cal. Rptr. at 813-15.
8. Senate Constitutional Amendment 52, 1973-74 Regular Session.
9. See text accompanying note 97 *infra*.
10. Weekly History of the California Senate 660 (Oct. 4, 1974).
11. The matters that could be withdrawn under this rationale would be those in which there is both a state and municipal concern. See text accompanying note 95 *infra*.
12. Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 165, 232 P. 140, 143 (1924); Osborne v. Baughman, 85 Cal. App. 224, 225, 259 P. 70, 71 (1927).
13. 6 Cal. 2d 557, 559, 59 P.2d 119 (1936).
14. *E.g.*, Department of Alcoholic Beverage Control (Cal. Const. art. XX, §22); State Personnel Board (Cal. Const. art. XIV, §3).

tion.[15] Agencies of the latter category were thought to have judicial power because article VI, section 1 of the California Constitution allowed the legislature to establish local inferior courts, and local agencies could be considered inferior courts for this purpose.[16]

The factual determinations of administrative agencies vested with judicial powers are "entitled to all the deference and respect due a judicial decision,"[17] and due process therefore requires only a substantial evidence review of the decisions of these agencies. Since local and constitutional agencies were vested with judicial powers, review of their decisions was limited to the substantial evidence test,[18] which limits a reviewing court to a determination of whether any substantial evidence which supported the agency's findings was presented at the administrative hearing.[19]

The *Standard Oil* decision did not delineate a method for reviewing decisions of agencies that could not exercise judicial power. This uncertainty was soon resolved in *Drummey v. State Board of Funeral Directors*,[20] in which the California Supreme Court extended the use of the writ of mandamus to judicial review of the discretionary determinations of state-wide, nonconstitutional agencies.[21] In 1945, the California Legislature codified this principle in section 1094.5 of the Code of Civil Procedure, which provides that a claimed abuse of discretion by any administrative agency is judicially reviewable through a writ of mandamus. Two mutually exclusive scopes of review are set forth in section 1094.5:

> In cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; in all other cases abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record.

These two scopes of review are referred to as the "independent judg-

15. 6 Cal. 2d at 560, 59 P.2d at 120.
16. Greif v. Dullea, 66 Cal. App. 2d 986, 1008-09, 153 P.2d 581, 593-94 (1944); Nider v. City Comm'n, 36 Cal. App. 2d 14, 28, 97 P.2d 293, 300 (1939).
17. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 36, 520 P.2d 29, 34, 112 Cal. Rptr. 805, 810 (1974).
18. Goldberg v. Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 874, 57 Cal. Rptr. 463, 468 (1967); Aluisi v. Fresno County, 159 Cal. App. 2d 823, 826, 324 P.2d 920, 922 (1958). *See also* Kleps, *Certiorarified Mandamus Reviewed, The Courts and California Administrative Decisions—1949-1958*, 12 STAN. L. REV. 554, 556 (1960).
19. Savage v. Sox, 118 Cal. App. 2d 479, 258 P.2d 80 (1953).
20. 13 Cal. 2d 75, 82-84, 87 P.2d 848, 852-53 (1939).
21. *Id.* Prior to *Drummey*, the writ of mandamus had been used mainly as a device to compel nondiscretionary acts of administrative boards and agencies. Larson v. City of Redondo Beach, 27 Cal. App. 3d 332, 336, 103 Cal. Rptr. 592, 594 (1972).

ment test" and the "substantial evidence test," respectively.[22]

The question of which test to apply in a given situation was partially answered in *Bixby v. Pierno*.[23] In reviewing the decision of a state-wide, nonconstitutional agency, which lacked judicial power, the California Supreme Court held that section 1094.5 empowers it to determine when to exercise the independent judgment test,[24] and that this form of review must be used when a state-wide, nonconstitutional agency's decision substantially affects a fundamental vested right.[25] The *Bixby* court refrained from reconsidering the proper scope of review for decisions of local agencies.[26]

The *Strumsky* court addressed the issue left unresolved in *Bixby* and held that local agency decisions which substantially affect fundamental vested rights must be subjected to the independent judgment test upon judicial review.[27] The rationale began with the fact that a 1950 amendment[28] to the California Constitution had terminated the legislature's ability to delegate judicial power to local courts. Since the *Strumsky* court reasoned that the only source of a chartered city's powers is the legislature, it concluded that this constitutional amendment divested local agencies of judicial powers.[29] Local agencies were thus placed on a par with state-wide, nonconstitutional agencies, which the court had previously found to be without judicial power.[30]

Though the *Strumsky* rationale appears logical in the abstract, its application to agencies of chartered cities appears improper since it relies on the premise that the powers of chartered cities derive only from the legislature. In order to explore the apparent inaccuracy of this premise, a brief synopsis of the development of chartered cities is necessary.

History of Chartered Cities

The California Constitution of 1849 delegated to the legislature the duty to provide for the "organization of cities and incorporated villages."[31] However, it also provided that municipal corporations, but not

22. Continuing Education of the Bar, California Administrative Mandamus §5.52 (1966).
23. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).
24. *Id.* at 140, 481 P.2d at 249, 93 Cal. Rptr. at 241.
25. *Id.* at 143-44, 481 P.2d at 251-52, 93 Cal. Rptr. at 243-44.
26. *Id.* at 137, 481 P.2d at 246, 93 Cal. Rptr. at 238.
27. 11 Cal. 3d 28, 44, 520 P.2d 29, 40, 112 Cal. Rptr. 805, 816 (1974).
28. Cal. Stats. 1949, c. 153, at 3291.
29. 11 Cal. 3d at 41, 520 P.2d at 37, 112 Cal. Rptr. at 813.
30. Standard Oil Co. v. State Bd. of Equalization, 6 Cal. 2d 557, 559-60, 59 P.2d 119, 120 (1936).
31. Cal. Const. art. IV, §37 (1849). Currently, the provisions respecting formation and powers of local governmental units are contained in article XI. For an in-

other types of corporations, could be created by special acts of the legislature.[32] The use of special acts to create municipal corporations paved the way for extensive legislative interference with municipalities.[33] Indeed, a unanimous decision of the California Supreme Court in 1872 declared municipal corporations to be mere subdivisions of the state government, "which may be created, altered or abolished, at the will of the Legislature, which may enlarge or restrict their powers, direct the mode and manner of their exercise; and may define what acts they may or may not perform . . . ."[34] This concept was abandoned in 1879 when a new state constitution was adopted which prohibited the use of special legislation respecting cities[35] and directly vested in cities and towns the power to make and enforce, within their limits, "all such local, police, sanitary and other regulations as are not in conflict with general laws."[36] It also gave cities of 100,000 or more people the power to frame a freeholder's charter for local city government.[37] All such charters, however, were "subject to and controlled by general laws."[38]

The potential significance of the constitutional provision for self-government of chartered cities was diminished in *Staude v. Board of Election Commissioners*.[39] There the court construed the language, "shall be subject to and controlled by general laws," to mean that a law which was generally applicable to all cities was also controlling as to chartered cities, even if it dealt with subjects of strictly local governmental concern.[40] To free chartered cities from this potential for legislative interference, article XI, section 6 of the constitution was amended in 1896 to provide that a charter was subject to and controlled by general laws, *except in the area of municipal affairs*.[41] Unfortunately, this amend-

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depth consideration of article XI, see Peppin, *Municipal Home Rule in California: I*, 30 CAL. L. REV. 1 (1941); Peppin, *Municipal Home Rule in California: II*, 30 CAL. L. REV. 272 (1942); Peppin, *Municipal Home Rule in California: III*, 32 CAL. L. REV. 341 (1944); Peppin, *Municipal Home Rule in California: IV*, 34 CAL. L. REV. 644 (1946) [hereinafter cited as Peppin *I, II, III, IV*, respectively].

32. CAL. CONST. art. IV, §31 (1849).

33. Peppin *I*, *supra* note 31, at 15, 22.

34. City of San Francisco v. Canavan, 42 Cal. 541, 557 (1872).

35. CAL. CONST. art. XI, §6; art. IV, §25 (1879).

36. CAL. CONST. art. XI, §11 (1879) (now CAL. CONST. art. XI, §7). This provision has received questionable treatment from the courts. The courts have disregarded the comma between "local" and "police" and have persisted in a de-emphasis of "sanitary" and "other," leaving "police" as the only functional term. "Police" has been further construed as limited solely to enactment of penal ordinances. *See Ex parte* Cheney, 90 Cal. 617, 27 P. 436 (1891); *In re* Sic, 73 Cal. 142, 14 P. 405 (1887); Hill v. Eureka, 35 Cal. App. 2d 154, 94 P.2d 1025 (1939).

37. CAL. CONST. art. XI, §8 (1879).

38. CAL. CONST. art. XI, §6 (1879).

39. 61 Cal. 313 (1882).

40. *Id.* at 320-21.

41. The term "municipal affairs" was itself susceptible to various interpretations. Several justices believed that the term was concerned solely with the municipalities' in-

ment was not completely effective, since a charter was considered to grant only those powers enumerated within it.[42] This meant that if the charter did not grant powers to a city in a certain area of municipal affairs, that particular area was susceptible to legislative interference.[43] Consequently, in 1914 section 6 was again amended to provide that a chartered city is empowered to "make and enforce all laws and regulations in respect to municipal affairs," subject only to the restrictions and limitations provided in its charter.[44] The effect of this amendment was to change the nature of a charter from a *grant* of powers to a *limitation* of the powers which a chartered city could exercise.[45] To exercise its newly found powers, a chartered city had only to provide in its charter that the city could make and enforce all laws with respect to municipal affairs.[46] With respect to nonmunicipal affairs, a chartered city received its powers from the legislature and was controlled by general laws.[47] The result of the 1914 amendment was a broad constitutional grant of powers which accomplished the long-sought autonomy of chartered cities in the area of municipal affairs.[48]

STRUMSKY AND THE POWERS OF CHARTERED CITIES

In order to establish that local agencies lack judicial power, the *Strumsky* court analyzed a series of California cases which dealt with the problem of identifying the source of judicial powers in local agencies. *Strumsky* first considered *Standard Oil Co. v. State Board of Equalization,*[49] in which the "local court" theory was born. In *Standard Oil* the California Supreme Court held that the legislature could not vest judicial powers in agencies of state-wide jurisdiction.[50] The court's holding was based upon article VI, section 1 of the California Constitution, which at that time provided:

> The judicial power of the State shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, district court of appeal, superior courts, such municipal courts as may be estab-

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ternal business affairs. Fragley v. Phelan, 126 Cal. 383, 387, 58 P. 923, 925 (1899). In a later case the court indicated that the term was broad enough to "include all powers appropriate for a municipality to possess." *Ex parte* Braun, 141 Cal. 204, 209, 74 P. 780, 782 (1903). For an excellent analysis of past attempts to define "municipal affairs," and a suggested standard for use in future cases, see Sato, *"Municipal Affairs" in California,* 60 CAL. L. REV. 1055 (1972) [hereinafter cited as Sato].

42. Sato, *supra* note 41, at 1056.

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

44. CAL. CONST. art. XI, §§6, 8 (1914) (now CAL. CONST. art. XI, §5).

45. Sato, *supra* note 41, at 1056.

46. West Coast Advertising Co. v. City & County of San Francisco, 14 Cal. 2d 516, 521, 95 P.2d 138, 142 (1939).

47. CAL. CONST. art. XI, §6 (1914) (now CAL. CONST. art. XI, §5).

48. Sato, *supra* note 41, at 1060.

49. 6 Cal. 2d 557, 59 P.2d 119 (1936).

50. *Id.* at 559, 59 P.2d at 119.

> lished in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county.

The court in *Standard Oil* reasoned that "[*e*]*xcept for local purposes* [article VI, section 1] disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposition of the Legislature."[51] As *Strumsky* pointed out, the phrase "except for local purposes" in the *Standard Oil* quotation was seized upon by later cases as the basis for a different rule with respect to local agencies.[52] The rationale of these later cases, *Strumsky* explained, was that

> article VI, section 1, while forbidding the exercise of judicial powers by legislatively created agencies of statewide jurisdiction, *permitted* the Legislature to vest such powers in such "inferior courts" as it might establish on the local level—and . . . "local agencies" could be considered to be such "inferior courts."[53]

The first important case to address the question of an administrative agency's judicial power after *Standard Oil* was *Drummey v. State Board of Funeral Directors.*[54] This case, like *Standard Oil,* involved the decision of a legislatively created agency of state-wide jurisdiction. *Drummey* approved of the result in *Standard Oil,* but restated its theory:

> [I]f the legislature attempted to confer judicial or *quasi*-judicial power on statewide administrative boards, the statutes would be unconstitutional as in violation of section 1 of article VI of the state Constitution, which vests the entire judicial power of the state in the courts, except as to local boards, and the railroad and industrial accident commissions, which are governed by special constitutional provisions.[55]

In *Dierssen v. Civil Service Commission*[56] the court of appeal lent special significance to the quoted language from *Drummey.* The *Dierssen* court, *Strumsky* explained, seized upon the language in *Drummey* and erroneously concluded that the judicial power of local boards was governed by "special constitutional provisions," and that these provisions must have been "the broad provisions of article XI, section 6, of the Constitution dealing with the powers of chartered cities."[57] *Dierssen* then went on to examine other provisions of article XI and conclud-

51. *Id.* at 561, 59 P.2d at 120 (emphasis added).
52. 11 Cal. 3d at 37, 520 P.2d at 35, 112 Cal. Rptr. at 811.
53. *Id.* at 38, 520 P.2d at 35, 112 Cal. Rptr. at 811.
54. 13 Cal. 2d 75, 87 P.2d 848 (1939).
55. *Id.* at 81, 87 P.2d at 852.
56. 43 Cal. App. 2d 53, 110 P.2d 513 (1941).
57. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d at 39, 520 P.2d at 36, 112 Cal. Rptr. at 812.

ed therefrom that "a chartered city . . . may lawfully confer *quasi* judicial power on boards or commissions dealing strictly with municipal affairs . . . ."[58]

The final case in the *Strumsky* court's analysis was *Savage v. Sox*,[59] a court of appeal decision handed down shortly after the 1950 amendment to article VI, section 1 of the constitution, which removed the clause dealing with local inferior courts. In *Savage* the court adopted the rationale of the *Dierssen* decision as primary support for the existence of local judicial power,[60] though it was argued that the amendment had removed the basis for this rationale.

Though the *Dierssen* holding "gave birth to a rationale which has been relied upon since the [1950] amendment [of article VI, section 1] . . . ."[61] to support the theory that local agencies exercise judicial power, *Strumsky* rejected it. *Strumsky* determined that the new constitutional support discovered by the *Dierssen* court was largely the result of a grammatical misunderstanding of the "special constitutional provisions" language of *Drummey*.[62] This language, *Strumsky* reasoned, was meant to modify the immediately antecedent term in the *Drummey* quotation, which referred to railroad and industrial accident commissions and not to local boards.[63] As the *Strumsky* court stated, "The only 'special constitutional provisions' which *Standard Oil* had related to local boards was article VI, section 1 itself, a section which . . . was amended in 1950 . . . to remove the support which *Standard Oil* had found in it."[64]

Thus *Strumsky* acknowledged that the 1950 constitutional amendment made it necessary for the *Savage* court to find "new constitutional justification" for the distinction in standards of judicial review of administrative agency decisions,[65] but determined that the *Savage* court's reliance on *Dierssen* for this justification was erroneous since *Savage* failed "to appreciate the relationship between article VI and article XI, and in doing so it totally misapprehend[ed] the comprehensive effect of the 1950 amendment on [article VI]. Article XI does not and cannot stand alone."[66] The *Strumsky* court considered article XI of the constitu-

58. 43 Cal. App. 2d at 60, 110 P.2d at 517.
59. 118 Cal. App. 2d 479, 258 P.2d 80 (1953).
60. *Id.* at 487, 258 P.2d at 85.
61. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d at 38, 520 P.2d at 35, 112 Cal. Rptr. at 811.
62. *Id.* at 39, 520 P.2d at 36, 112 Cal. Rptr. at 812.
63. *Id.* at 40, 520 P.2d at 36, 112 Cal. Rptr. at 812.
64. *Id.*
65. *Id.* at 40, 520 P.2d at 37, 112 Cal. Rptr. at 813.
66. *Id.*

tion not to be an independent grant of power but merely the conduit through which the legislature vests in local agencies whatever powers it is competent to grant to them.[67]

Does Article XI Serve as a Grant of Power?

Article XI was interpreted by the *Strumsky* court to merely vest "the Legislature with the authority to bestow powers upon, and set up procedures for, governmental bodies below the state level."[68] Section 2 of article XI does require the legislature to "prescribe uniform procedure for city formation and provide for city powers," but section 2 is followed by other sections dealing specifically with the authority for, and certain powers of, *chartered* cities.[69] Since a basic maxim of legal construction is that the specific controls the general,[70] these subsequent provisions should control the general provisions requiring city powers to be provided by the legislature.

Section 7 of article XI provides that "any . . . city . . . shall make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." This section is applicable to both chartered and general law cities and has been held to be a direct constitutional grant of powers to the cities.[71] However, reliance on section 7 as an independent source of powers for chartered cities would be of limited usefulness in light of judicial decisions which have so emasculated section 7 that even prior to *Strumsky* it served solely as the source of city power to enact penal ordinances.[72]

Article XI, section 5 lists several provisions which may be included in a city charter. For example, the charter may include a provision authorizing the city to "make and enforce all ordinances and regulations in respect to municipal affairs."[73] This phrase was added in 1914 and has been viewed as a grant of authority to chartered cities in the area of municipal affairs and consequently as protection for chartered cities against what had been pervasive legislative interference.[74] Any doubt as to the source of this municipal affairs power was resolved in

67. *Id.* at 41, 520 P.2d at 37, 112 Cal. Rptr. at 813.
68. *Id.* at 40, 520 P.2d at 37, 112 Cal. Rptr. at 813.
69. Cal. Const. art. XI, §§3, 5, 7.
70. *In re* Mascolo, 25 Cal. App. 92, 97, 142 P. 903, 904 (1914); 14 Ops. Att'y Gen. 149, 154 (1949).
71. *In re* Pfahler, 150 Cal. 71, 88 P. 270 (1906); McCafferty v. Board of Supervisors, 3 Cal. App. 3d 190, 83 Cal. Rptr. 229 (1969); *In re* Junqua, 10 Cal. App. 602, 103 P. 159 (1909).
72. *See, e.g., Ex parte* Pierce, 12 Cal. App. 319, 107 P. 587 (1909); *In re* Newell, 2 Cal. App. 767, 84 P. 226 (1906); Peppin *I*, *supra* note 31, at 38. See note 36 *supra*.
73. Cal. Const. art. XI, §5(a). Prior to a 1920 constitutional amendment, this provision appeared in article XI, section 6. See text accompanying notes 41-48 *supra*.
74. Sato, *supra* note 41, at 1056-57, 1060. See text accompanying notes 33-48 *supra*.

West Coast Advertising Co. v. City & County of San Fransisco,[75] a 1939 decision in which the California Supreme Court stated,

> We therefore conclude that the Constitution and not the charter is the source of the city's power to levy taxes; that pursuant to the *Constitutional grant* which has been accepted by the city, it has acquired complete control over the municipal affairs, including the power to levy license taxes for revenue purposes; that the restrictions on the exercise of that power are only the limitations and restrictions appearing in the Constitution and in the charter itself . . . .[76]

The language of *West Coast Advertising* strongly suggests that the *Strumsky* court erred in concluding that article XI is not a grant of power.

In the 1964 case of *Berggern v. Moore,*[77] the California Supreme Court rejected the contention that a local agency was without judicial power. To support its decision the court cited *Savage v. Sox,* which had concluded that "under these provisions [now article XI, section 5(a)] a chartered city . . . may lawfully confer *quasi* judicial power on boards or commissions dealing strictly with municipal affairs."[78] The *Berggern* court's reliance upon *Savage* is significant because the *Savage* decision followed by three years the 1950 amendment to article VI, section 1 of the constitution, which abrogated the legislature's authority to delegate judicial power. As *Strumsky* acknowledged, the *Savage* court did not regard article XI as "the conduit through which the Legislature vested in 'local agencies' whatever powers it was entitled to vest in them,"[79] but perceived in the language of section 5(a) of article XI "a direct constitutional grant" of power.[80] The *Berggern* court's adoption of the cited language from *Savage* signified that as of 1964, the California Supreme Court continued to recognize the constitution as a direct source of chartered city powers.

The broad interpretations of a chartered city's powers over municipal affairs contained in the *Savage* and *Berggern* decisions seem consistent with the theory that California municipal corporations have implied powers in the area of local civil government,[81] but these

75. 14 Cal. 2d 516, 95 P.2d 138 (1939).
76. *Id.* at 526, 95 P.2d at 144 (emphasis added).
77. 61 Cal. 2d 347, 349, 392 P.2d 522, 523-24, 38 Cal. Rptr. 722, 723-24 (1964).
78. 118 Cal. App. 2d 479, 487, 258 P.2d 80, 85 (1953), *quoting* Dierssen v. Civil Service Comm'n, 43 Cal. App. 2d 53, 60, 110 P.2d 513, 517 (1941).
79. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d at 41, 520 P.2d at 37, 112 Cal. Rptr. at 813.
80. *Id.* at 43 n.16, 520 P.2d at 39 n.16, 112 Cal. Rptr. at 815 n.16.
81. See Whitmore v. Brown, 207 Cal. 473, 279 P. 447 (1929); Salinas v. Pacific Tel. & Tel. Co., 72 Cal. App. 2d 494, 164 P.2d 905 (1946); E. McQUILLIN, MUNICIPAL CORPORATIONS §10.12 (3d rev. ed. 1965).

interpretations are directly contrary to the *Strumsky* court's construction of the scope of a chartered city's powers under article XI, section 5 (a).[82] The *Strumsky* rationale identifies the legislature, rather than the constitution, as the source of a chartered city's power, and resurrects the potential for pervasive legislative interference—a result which clearly contravenes the intent of the people, as expressed in a series of constitutional amendments which were designed to protect the autonomy of chartered cities in the area of municipal affairs.[83]

Expansion of the Strumsky Rationale

Comprehension of the threat posed to chartered city autonomy by the *Strumsky* rationale requires familiarity with the reasoning which underlies a judicial determination that a matter is either of municipal concern and within the province of a chartered city,[84] or of state-wide concern and within the province of the legislature.[85]

In *Bishop v. City of San Jose,*[86] the California Supreme Court dealt with the issue of whether the state prevailing wage statute applied to San Jose, a chartered city. The court noted that interpretation of the term "municipal affairs" is a judicial function[87] and indicated that what had previously been a municipal concern could at a later time become a matter of state-wide concern.[88] However, the existence of legislative action in an area, although a significant factor, would not be determinative of the issue.[89] In other words, the legislature is empowered neither to determine what constitutes a municipal affair nor to change such an affair into a matter of state-wide concern.[90]

The apparent rationale underlying the *Bishop* court's assumption of the duty to interpret "municipal affairs," and thus protect each body's jurisdiction from encroachments by the other, was that both the legislature and chartered cities are vested with independent constitutional grants of power to act in separate and distinct areas.[91] This interpretation of the *Bishop* rationale derives from analysis of the supreme court's decision in *Berggern v. Moore,*[92] in which the court implicitly recognized a constitutional source of powers for chartered cities by adopting the reasoning of *Savage.*[93] Since the *Berggern* and *Savage*

82. *See* 11 Cal. 3d at 44, 520 P.2d at 39, 112 Cal. Rptr. at 815.
83. See text accompanying notes 33-48 *supra.*
84. Cal. Const. art. XI, §5.
85. Cal. Const. art. IV, §1.
86. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).
87. *Id.* at 62, 460 P.2d at 141, 81 Cal. Rptr. at 469.
88. *Id.* at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.
89. *Id.*
90. *Id.*
91. *See id.* at 61-62, 460 P.2d at 140, 81 Cal. Rptr. at 468.
92. 61 Cal. 2d 347, 392 P.2d 522, 38 Cal. Rptr. 722 (1964).
93. See text accompanying notes 77-80 *supra.*

decisions remained undisputed when *Bishop* was decided in 1969, it would appear that the supreme court's holding in *Bishop* was similarly grounded on the recognition of a constitutional source of powers for chartered cities.

The *Strumsky* rationale, by virtue of its evisceration of the doctrine that a chartered city's powers in municipal affairs derive from a direct constitutional grant, may drastically alter the method by which a court will determine whether a particular matter involves a "municipal affair." If a chartered city no longer legislates in the area of municipal affairs pursuant to a direct constitutional grant of power, as the *Strumsky* rationale maintains, a court would not be constrained to balance two constitutionally separate sources of power in determining whether state or municipal concern predominates in any given subject area, but could instead develop a doctrine along these lines:

> The constitution grants legislative power to only one body, the legislature, but allows that body to delegate legislative power to chartered cities in the limited area of municipal affairs. Since the legislature can delegate legislative power in this area, it can also limit or retract the power delegated.[94] Therefore, when the legislature acts in an area in which there is *some* state concern, it has also impliedly retracted from chartered cities any legislative powers formerly granted to them in the particular subject matter.[95]

The result of adoption of such a doctrine would be a significant expansion of the legislature's authority and a consequent narrowing of a chartered city's autonomy in apparent contravention to the final clause of article XI, section 5(a) of the California Constitution: "City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith."

LEGISLATIVE RESPONSE

Senate Constitutional Amendment 52, which was introduced in response to the *Strumsky* decision during the 1973-74 legislative session, failed to progress beyond Senate Judiciary Committee deliberations.[96] The proposed amendment would have enabled the legis-

94. California State Employees' Ass'n v. Flournoy, 32 Cal. App. 3d 219, 234, 108 Cal. Rptr. 251, 262 (1973).

95. The court could possibly harmonize *Strumsky* and *Bishop* by concluding that once the legislature has delegated to a chartered city the power to legislate in the area of municipal affairs, that power is constitutionally vested in the chartered city. Thus, it would still be a function of the judiciary to determine what is a municipal affair in each instance.

96. WEEKLY HISTORY OF THE CALIFORNIA SENATE 660 (Oct. 4, 1974).

lature to vest local agencies with judicial powers. To accomplish this result, the constitutional amendment would have augmented article VI, section 1 of the California Constitution to provide,

> The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, justice courts, *and such local agencies and state agencies of limited territorial jurisdiction as the Legislature may establish.* All courts except justice courts are courts of record.[97]

This amendment would have effectively overruled *Strumsky* by establishing the substantial evidence test, rather than the independent judgment test, as the standard of review for *all* local agency decisions.[98] Although the legislature's initial attempt to counterbalance the *Strumsky* decision proved short-lived, the import of the *Strumsky* court's pronouncement on judicial review of local agency decisions suggests that a similar legislative response can be expected in the future. While such legislative action may mitigate the immediate impact of the *Strumsky* decision, it will do little to remedy the apparent flaw in the *Strumsky* rationale. In fact, such legislation may serve to bolster this rationale by providing, in essence, that local agencies may exercise judicial power *if it is delegated to them by the legislature.* Future legislative response similar to Senate Constitutional Amendment 52 may thus indirectly confirm the *Strumsky* court's position—that chartered cities are mere delegatees of those powers which the legislature chooses to grant them.

CONCLUSION

From the time of the 1896 addition of the municipal affairs provisions to article XI of the California Constitution to the date of the California Supreme Court's ruling in *Strumsky,* it appeared settled that the California Constitution served as the source of chartered city powers over municipal affairs. The *Strumsky* court's rationale rejected this position and ruled instead that the legislature is the source of all chartered city powers. *Strumsky's* impact on judicial review of local agency decisions which substantially affect fundamental vested rights may prove short-lived if legislative response similar in purpose to the ill-fated Senate Constitutional Amendment 52 is forthcoming. However, such constitutional amendment would leave intact the *Strumsky* court's rationale, whose apparent misconception of the source of powers may work to severely constrict chartered cities' autonomy in local affairs.

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97. Senate Constitutional Amendment 52, 1973-74 Regular Session (emphasis added).
98. See text accompanying notes 17-18 *supra.*