Mayor Michael R. Bloomberg in 2008 was unable to persuade the New York State legislature to approve a bill giving New York City the power to impose “congestion fees” within Manhattan’s central business district. It has been widely assumed that this political defeat in Albany spelled the end of the campaign to control traffic congestion with road and bridge tolls.

But what if the City had the power to impose such fees under existing State statutes, even without further action from Albany? Could the City’s political leadership press ahead with a local law to impose such fees without more State legislation? Such a view is inconsistent with conventional wisdom, but maybe conventional wisdom is wrong. To be sure, New York State Vehicle and Traffic Law (“VTL”) § 1604 does ban cities from enacting “any tax, fee, license or permit for the use of the public highways...except as authorized” by the VTL itself. My argument is that another section of the VTL does so authorize the City to impose such fees if it chooses to, and that no additional State legislation is required.

The other section of the VTL to which I refer is § 1642(a)(4), which provides that cities with over a million residents (i.e., New York City) may impose “tolls, taxes, [and] fees ... for the use of the highway or any of its parts where the imposition thereof is authorized by law” (emphasis added).

This seems to be the very authorization that the City needs to enact road fees. “Congestion fees” are simply “tolls, taxes, [or] fees” incident to the use of highways, including those parts of highways resting on bridges. The conclusion seems inescapable. If the New York City Council were to enact a law authorizing such imposition, then such fees would meet the test of being adequately “authorized by law” within the meaning of VTL § 1642(a)(4)).

The obvious rejoinder is that VTL § 1642(a)(4)’s requirement that fees be “authorized by law” means that they be authorized by State law, not a local law enacted by the City Council. Such a reading of the phrase “authorized by law,” however, is in tension with ordinary canons of statutory construction. Consider four such canons strongly implying that “authorized by law” means “authorized... (Continued on page 69)
Congestion Pricing (Cont’d from 49)

by either State or local law.”

Common Usage. “Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute.” New York Statutes § 236. Reading “law” in VTL § 1642(a)(4) to mean only “State law” is at odds with the definition of the term “law” in other New York statutes conferring powers on cities. N.Y. Municipal Home Rule Law § 2(6), for instance, specifically defines the word “law” to mean “a state statute, charter, or local law.”

The VTL itself contains no definition of the term “law,” but borrowing the definition from the related grant of power in another State statute makes the New York State code as a whole more coherent: Why read the term “law” in the VTL more narrowly than it is read in the Home Rule Law, given that both are laws conferring powers on cities? The broader reading is also consistent with common sense: When dealing with statutes conferring powers on local governments, one should presume that references to “law” refer to both local and State law, since both are ordinarily a source of power for local officials. By contrast, State statutes dealing with State institutions (for instance, New York’s Public Official Law § 92(6)) define “law” to refer exclusively to a “state or federal statute, rule or regulation.”

The VTL itself elsewhere uses the phrase “authorized by law” in a way strongly suggesting that it encompasses both State and local law. VTL § 1603(b), for instance, provides that the powers conferred by the VTL on “the legislative body of any city having a population in excess of one million ... may be exercised ... by any official, board or agency thereof authorized by law, immediately prior to the effective date of this section, unless and until any such power shall be transferred to any other official, board or agency of such city by local law or state statute” (emphasis added).

No one, to my knowledge, has suggested that, prior to 1960 (when the current VTL became effective) city officials normally responsible for traffic regulation could carry out the VTL only if they drew their authority from State statute rather than city charter. Such a position would be especially nonsensical, given that police commissioners were largely responsible for traffic regulation before 1960, and they drew much of their power from city charters. See Cherubino v. Meenan, 253 N.Y. 462, 465–66 (1930) (noting that the power of police commissioners to regulate traffic “is to be found in most of the city charters”).

Redundancy. It is a well-established canon that “the court must assume that the Legislature did not deliberately place in the statute a phrase intended to serve no purpose, but must read each word and give to it a distinct and consistent meaning.” N.Y. Statutes § 98, cmt. When the State legislature wanted the phrase “authorized by law” to refer only to “State law,” it expressly qualified the term “law” with the modifier “state,” as in New York Banking Law § 293 (“The banking board shall have no power to permit any insurance activities other than those expressly authorized under state law”) or New York Public Authority Law § 3651(12)(e) (defining “financeable costs” to mean, inter alia, those amounts necessary “to finance any county deficit to the extent authorized by state law”) (emphasis added). The canon against construing statutes to contain redundancies, therefore, suggests that the unqualified term “law” in VTL § 1642(a)(4) means what it implies—all law, State or local.

No Contrary Intent. It is also a well-established canon of statutory construction in New York that, “[i]f there is nothing to indicate a contrary intent on the part of the lawmakers, terms of general import in a statute ordinarily are to receive their full significance.” N.Y. Statutes § 114, cmt. One might reasonably conclude, therefore, that “authorized by law” ought to be read broadly to include both State and local laws.

Avoid Tautology. Significantly, reading VTL § 1642(a)(4) to authorize highway fees and tolls only if some other State statute provides such authority reduces VTL § 1642(a)(4) itself to an empty tautology. Such a reading construes VTL § 1642(a)(4) to mean that “New York City is authorized to impose highway fees if New York City is authorized to impose highway fees.” There is a heavy presumption against construing a provision to do nothing more than clutter the State code with such trivials. Reading an entire clause out of the VTL by adding an implicit and utterly gratuitous qualifier to an unqualified term in that clause is a daring feat of judicial activism, not a sober reading of a statute.

Habit. The common notion that the City lacks the power to impose congestion fees without Albany’s permission may be sheer force of habit. Prior to the enactment of VTL § 1642(a)(4) in 1959, the City made a habit of going to Albany for specific authorization to charge for the use of its roads (e.g., obtaining the power to impose metered parking under the Conrad-Crisona Act of 1946). This habit made sense, because VTL § 1604, prohibiting taxes or fees for use of a highway, was in force as early as 1929 (enacted by L. 1929 ch. 54, § 54), and there was no special State grant of tolling powers analogous to VTL § 1642(a)(4) prior to 1960. VTL § 1642(a)(4), originally enacted in 1957 and re-codified in 1959, arguably changed that status quo by expressly giving the City the power to charge for
the use of City-owned roads. But old habits die hard: Lawyers have overlooked this specific grant in the VTL because, in other contexts, the City’s taxing powers are generally narrowly construed by courts.

A quick look at the early history of the City’s experience with bridge tolls undermines a hyper-narrow reading of the City’s legal powers to charge for use of its transportation-related infrastructure. Between 1911 and 1931, City officials vigorously debated whether the City could rely on its Charter to impose tolls on bridges owned by the City. Mayor William Jay Gaynor abolished tolls on East River bridges in 1911 in part because he believed, on advice of the New York City Corporation Counsel, that the City lacked the power to impose tolls absent express authorization to do so. City to Abolish Tolls on City Bridges: Mayor Gaynor Believes There Is No Legal Warrant for Taxing Vehicle Traffic, N.Y. Times, July 7, 1911. This narrow view of City power was also invoked by the Corporation Counsel in 1927 when the City’s Board of Estimate debated whether to finance the Triborough Bridge through bonds secured by toll revenue. The New York Times on May 20, 1927 reported that Corporation Counsel George Nicholson took the position that the City lacked legal authority to create toll-charging and bond-selling authority.

After the Board of Estimate approved the financing of the Triborough Bridge through toll revenues, the Robia Holding Company challenged the Board’s decision. The New York State Court of Appeals, however, held that New York City’s Charter provisions authorizing the City to construct “revenue-producing improvements” implicitly conferred on the City the power to impose tolls on the Triborough Bridge. Any other reading of the Charter, the Robia Court held, would render the charter authority “illusory.” Robia Holding Company v. Walker, 257 N.Y. 431, 438 (1931).

Acknowledging that the City did not have express power to impose tolls on the bridge’s use, the Robia Court nevertheless held that Charter grants of power to the City to build “revenue-producing improvements” should not be so strictly construed as to limit by “arbitrary rule” the apparent legislative “intendment ... in light of all surrounding circumstances.” Id. at 438–39. Denying the power to impose tolls “would impute to the Legislature an intention to make its grant of authority [to build revenue-producing improvements] illusory,” a construction that Robia rejected because the Court had “no reason for imputing to the Legislature so extraordinary an intention.” Id. at 439.

After Robia, both Mayor John P. O’Brien (in 1933) and Mayor Vincent R. Impellitteri (in 1953) pressed (unsuccessfully) the Board of Estimate to reinstate tolls on East River bridges, apparently viewing Mayor Gaynor’s narrow view of City power as rendered obsolete after the Robia decision. See Sewall Chan, How East River Bridges Stayed Toll-Free, N.Y. Times (Nov. 11, 2008), http://cityroom.blogs.nytimes.com/2008/11/11/how-east-river-bridges-have-stayed-toll-free/.

The Council. Logic analogous to that used by the Robia Court suggests that, like the City’s Charter in 1931, VTL § 1642(a)(4) of 1960 ought not to be construed to be an empty tautology—in the Robia Court’s words, an “illusory” grant of power. There is simply no point to a State law declaring that a city may exercise a power if it is elsewhere authorized to exercise that power. By contrast, construing VTL § 1642(a)(4) to require authorization of fees by a local law serves a practical function: It guarantees that any congestion fee imposed by the City would be defined in advance by some local law enacted by the City Council. There is a long-held doctrine in New York that the State legislature cannot delegate taxing power to purely executive agencies. Greater Poughkeepsie Library District v. Town of Poughkeepsie, 81 N.Y.2d 574 (1993). By insisting that highway and bridge tolls be authorized by either a State or local law, VTL § 1642(a)(4) protects this traditional non-delegation doctrine regarding executive taxation uncabined by legislated standards.

I have stressed purely legalistic considerations in defending the City’s statutory power to impose congestion fees. Of course, one can also defend City power to act without Albany’s specific imprimatur as a matter of sound policy. The vast majority of the commuters affected by such a fee would be City residents—both those on the roads themselves and those forced to endure the fumes and accidents created by an endless stream of vehicles clogging City streets. Requiring representatives from Buffalo or Rochester to decide how to deal with Manhattan traffic jams seems bizarre, given that their constituents are only tenuously affected by such jams. By contrast, the City Council has ample incentives to ensure that non-discriminatory fees do not burden City residents and do not adversely affect the City’s economy, which depends upon region-wide transportation.

If the letter of the law prohibited the City Council from acting, then policy ought to yield to law. But the letter of the VTL, read according to the conventional canons and common sense, favors City power. At the very least, VTL § 1642(a)(4) is ambiguous. Is it not time to put these long-standing powers to the test with a local law? 🧐

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