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The New York City Carbon Charge ("NY3C"): Unlocking Localities' Power to Fight Climate Change

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THE NEW YORK CITY CARBON CHARGE (“NY3C”): UNLOCKING LOCALITIES’ POWER TO FIGHT CLIMATE CHANGE

Jeremy M. Vaida

“We were called here . . . to systematically address the danger of climate change with every tool we have. And it’s increasingly clear that we, the local leaders of the world, have many tools – more than we may have in fact realized – and . . . we must use them boldly, even as our national governments hesitate.”¹

- New York Mayor Bill de Blasio

INTRODUCTION

Climate change, many argue, is this generation’s greatest challenge.² Caused principally by the accumulation of carbon dioxide in the atmosphere, climate change will eventually increase the surface temperature of the Earth, melt the polar ice caps, raise sea levels, acidify the oceans, and generally transform the ecology of the Earth beyond anything humanity has encountered since the dawn of civilization.³

To combat this accelerating threat, nations and states have implemented policies to curb the unrelenting release of carbon

1. Transcript: Mayor de Blasio Delivers Remarks at “Modern Slavery and Climate Change: The Commitment of the Cities” at the Pontifical Academy of Sciences, Bill de Blasio, *available at* www1.nyc.gov/office-of-the-mayor/news/502-15/transcript-mayor-de-blasio-delivers-remarks-modern-slavery-climate-change-commitment [<https://perma.cc/6GV6-LHAL>].

2. “CLIMATE CHANGE 2014, SYNTHESIS REPORT,” Intergovernmental Panel on Climate Change, p. v, *available at* http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf [<https://perma.cc/999G-G9HK>].

3. *Id.* at 39-54.

dioxide into the atmosphere.⁴ Carbon markets⁵ and carbon taxes⁶ are currently the most widely adopted carbon fighting tools. In both instances, governments put a price on the release of carbon dioxide into the atmosphere and thereby discourage those activities that result in carbon emissions.

Unfortunately, to date, these carbon-pricing mechanisms have had only limited efficacy in reducing overall carbon output. While growth in carbon emissions is slowing, they continue to rise year after year.⁷ In order to arrest, and eventually remediate, the effects of climate change, greater efforts must be made to limit the amount of carbon released into the atmosphere.⁸

In the United States, the Obama administration has used its executive authority to increase fuel economy in motor vehicles, and thus has successfully decreased the overall carbon footprint of Americans' primary mode of transportation.⁹ More recently, the administration has sought to aggressively regulate carbon under the

4. "Carbon dioxide emissions," "carbon emissions," and "carbon" will be used interchangeably throughout.

5. THE CARBON BRIEF, <http://www.carbonbrief.org/blog/2014/05/the-state-of-carbon-pricing-around-the-world-in-46-carbon-markets/>, *last visited* December 5, 2015 ("carbon markets" refer principally to cap-and-trade regimes wherein governments cap the overall amount of carbon that can be emitted in a given jurisdiction or group of jurisdiction and then issue a limited number of permits to emit up to the cap on yearly basis. Permit holders can then buy or sell permits on a secondary market).

6. CARBON TAX CENTER, <http://www.carbontax.org/where-carbon-is-taxed/#Other>, (carbon taxes impose a direct cost on carbon emissions, usually a fixed rate on a per metric ton of carbon dioxide basis), *last visited* December 5, 2015 [<https://perma.cc/4U62-UKF4>].

7. "Global CO₂ Emissions Increase to New All-Time Record, But Growth is Slowing Down," The European Commission, Joint Research Centre, <https://ec.europa.eu/jrc/en/news/global-co2-emissions-increase-new-all-time-record-growth-slowing-down>, *last visited* December 5, 2015 [<https://perma.cc/J53J-PAHQ>].

8. "CLIMATE CHANGE 2014, SYNTHESIS REPORT," Intergovernmental Panel on Climate Change, p. 77, *available at* http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full.pdf [<https://perma.cc/7JTK-FN6B>].

9. OBAMA ADMINISTRATION FINALIZES HISTORIC 54.5 MPG FUEL EFFICIENCY STANDARDS, The White House Office of the Press Secretary, <https://www.whitehouse.gov/the-press-office/2012/08/28/obama-administration-finalizes-historic-545-mpg-fuel-efficiency-standard>, *last visited* December 5, 2015 [<https://perma.cc/XX8D-NC3X>].

Clean Air Act by limiting the amount of carbon dioxide that can be released from power plants.¹⁰ Some states have also attempted to limit carbon emissions through carbon markets, like the Regional Greenhouse Gas Initiative and the Western Climate Initiative.¹¹ Despite this considerable progress, an oppositional Congress¹² and political polarization have made a comprehensive national carbon reduction solution unlikely.

Nevertheless, significant local action is possible. Today, cities are the largest contributors to climate change.¹³ An astonishing 75% of all human-generated carbon dioxide emissions are sourced from urban areas.¹⁴ Interestingly, though, in the United States, urban dwellers are significantly more concerned about, and motivated to address, climate change relative to other constituencies.¹⁵ Localities are also generally more nimble and experimental as compared to state or federal governments. Therefore, even though cities are the largest contributors to climate change, they might be the best able to combat it.

This paper seeks to provide a blueprint for unlocking municipalities' latent power to regulate carbon emissions within their jurisdictions through the use of a carbon charge. Using New York City as a case study, this paper argues that municipalities could immediately impose strict climate pricing, guided by market principles, by imposing such a levy. Part I provides the legal justification for a New York City specific carbon charge while Part II discusses how such a regime might operate in practice.

10. "FACT SHEET: PRESIDENT OBAMA TO ANNOUNCE HISTORIC CARBON POLLUTION STANDARDS FOR POWER PLANTS," August 03, 2015, <https://www.whitehouse.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards>, *last visited* December 5, 2015 [<https://perma.cc/6MXS-5GTV>].

11. REGIONAL GREENHOUSE GAS INITIATIVE, <http://www.rggi.org>, *last visited* December 5, 2015 [<https://perma.cc/YW2C-5LFP>].

12. *Id.*

13. CITIES AND CLIMATE CHANGE, UNITED NATIONS ENVIRONMENT PROGRAMME, <http://www.unep.org/resourceefficiency/Policy/ResourceEfficientCities/FocusAreas/CitiesandClimateChange/tabid/101665/Default.aspx>, *last visited* December 5, 2015 [<https://perma.cc/LF5V-3HKF>].

14. *Id.*

15. YALE PROJECT ON CLIMATE CHANGE COMMUNICATION, <http://environment.yale.edu/poe/v2014/> [<https://perma.cc/S842-2XTP>].

I. LEGAL JUSTIFICATION

Localities are generally restricted by state and federal law in their ability to raise revenue. Thus, in order for a locality to legally impose a levy like a carbon charge, it must thread the needle of local, state, and federal jurisprudence. The following section discusses each level of authority in turn, building a legal foundation for a locally enforceable carbon charge.

A. STATE AND LOCAL AUTHORITY

The source of all local authority, in the state of New York and elsewhere, is derived from state constitutions and statutes.¹⁶ Beginning with Article IX of the New York state constitution, localities are generally empowered to make laws.¹⁷ Cities and towns are given greatest latitude with regard to laws pertaining to local “property, affairs or government.”¹⁸ However, municipal governments¹⁹ are also permitted to enact laws with respect to local “protection, order, conduct, safety, health and well-being of persons or property” in their territorial jurisdiction.²⁰ The aforementioned powers, as well as a few others, are also codified in New York State’s “Municipal Home Rule Law” and the “Statute on Local Governments.”²¹

Assuming a locality is generally authorized to enact a particular ordinance, local laws may nevertheless be preempted by state law. If a more particular state statute expresses intent to supersede local law, is practically in conflict with local law, or generally occupies a particular field of regulation, local ordinances will yield to the state

16. “Adopting Local Laws in New York State,” James A. Coon Local Government Technical Series, p. 1, *reprinted* 2015, *available at* http://www.dos.ny.gov/lg/publications/Adopting_Local_Laws_in_New_York_State.pdf [<https://perma.cc/NVL7-ALRV>].

17. N.Y. Const. art. IX, § 1(a).

18. N.Y. Const. art. IX, § 2(b)(2).

19. “Local governments,” “municipal governments,” and city, town, and village governments are all used interchangeably.

20. N.Y. Const. art. IX, § 2(c)(10).

21. N.Y. Mun. Home Rule Law § 1, *et seq.* (McKinney 2016); N.Y. Stat. Law § Loc. Govts § 10, *et seq.* (McKinney 2016).

law.²² Silence in the law, though, will often counsel in favor of local control.

As previously discussed, New York City is expressly permitted to enact laws related to the “health and well-being of persons” within its jurisdiction.²³ Pursuant to that authority, New York City enacted the “New York City Air Pollution Control Code”²⁴ (the “Code”) to “promote health, safety and welfare, prevent injury to human, plant and animal life and property, foster the comfort and convenience of its inhabitants and, to the greatest degree practicable, facilitate the enjoyment of the natural attractions of the city.”²⁵ The Code permits New York City’s Commissioner of Environmental Protection to

take such action as may be necessary to control the emission of air contaminant which causes or may cause, by itself or in combination with other air contaminant, detriment to the safety, health, welfare or comfort of the public or to a part thereof, injury to plant and animal life, or damage to property or business. The commissioner may exercise or delegate any of the functions, powers and duties vested in him or her or in the department by this code. The commissioner may adopt such rules, regulations and procedures as may be necessary to effectuate the purposes of this chapter.²⁶

“Air contaminant” is broadly defined as “any particulate matter or any gas or any combination thereof in the open air, other than uncombined water or air.” New York’s Air Pollution Control Code “is to be liberally construed so as to effectuate its stated purpose, i.e., controlling and reducing air pollution.”²⁷

Carbon dioxide emitted into the atmosphere through the burning of fossil fuels or the use of electricity is not “uncombined water or air” and has, in fact, been explicitly labeled an air pollutant by the Supreme Court of the United States.²⁸ Furthermore, the Code asserts its authority to regulate “any products of combustion or incomplete

22. *Albany Area Builders’ Assn. v. Town of Guilderland*, 74 N.Y.2d 372,379 (N.Y. 1989); *Monroe-Livingston v. Town of Caledonia*, 51 N.Y.2d 679, 684-85 (N.Y. 1980).

23. N.Y. Const. art. IX, § 2(c)(10).

24. N.Y.C. Admin. Code § 24-101.

25. N.Y.C. Admin. Code § 24-102.

26. N.Y.C. Admin. Code § 24-105.

27. *Liberty Lines Exp., Inc. v. N.Y.C. Env’tl Control Bd.*, 160 A.D.2d 295, 296 (N.Y. App. Div. 1990).

28. *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007).

combustion resulting from the use of fuel burning equipment or refuse burning equipment.”²⁹ Consequently, New York City almost certainly has the statutory and constitutional authority necessary to regulate carbon dioxide emissions within the city limits. To date, none have challenged this authority.³⁰

New York City’s authority to regulate air pollution, however, does not necessarily permit it to levy a charge against carbon emitters. While New York City is provided great latitude in enacting local legislation related to health and welfare, its ability to impose taxes is limited. New York City, like all the other municipalities of New York State, may only levy taxes that are “authorized by the [state] legislature.”³¹ The full constraints on localities’ power to tax are found under Article 29 of New York State’s tax statute.³² While New York City is authorized to impose a number of different types of taxes, the City is not permitted to levy a tax on carbon emissions.³³

Nevertheless, New York City may be allowed to enact a carbon charge under state law if the levy is considered a fee as opposed to a tax. Fees, unlike taxes, are not constrained by the state’s limitations on taxes.³⁴ When determining whether a particular levy is a tax or a fee, courts first look to the legislative intent.³⁵ Simply naming a

29. N.Y.C. Admin. Code § 24-102.

30. See Kizzy M. Charles-Guzman, “Air Pollution Control Strategies in New York City: A Case Study of the Role of Environmental Monitoring, Data Analysis, and Stakeholder Networks in Comprehensive Government Policy Development,” p. 29, December 2012, *available at* <http://deepblue.lib.umich.edu/bitstream/handle/2027.42/94532/Kizzy%20Charles-Guzman%20practicum%20120312.pdf?sequence=1>.

31. N.Y. Const. art. IX, § 2(c)(8).

32. N.Y. Tax Law art. 29 (McKinney 2015).

33. Under N.Y. Tax Law art. 29, New York City is authorized to impose taxes on: §1201(a) - occupations and privileges, holding or occupying property, possessing or exercising a franchise, sales and gross receipts; § 1201(b) – transfers of real estate; § 1201(c) and (l) – coin operated amusements; § 1201(d) – beer, wine, and spirits; § 1201(e) and (g) – motor vehicles and motor vehicle registration; § 1201(f) – certain types of containers; § 1201(i) – movie theatre admissions; § 1201(j) – taxicab licenses.

34. *Am. Sugar Ref. Co. of New York v. Waterfront Comm. of N.Y. Harbor*, 432 N.E.2d 578, 583 (N.Y. 1982), *appeal dismissed N.Y. Shipping Assn. Inc. v. Waterfront Com’n of N.Y. Harbor*, 458 U.S. 1101 (1982).

35. *Id.* at 25.

charge one or the other is insufficient.³⁶ Instead, a court must conduct an extensive fact-sensitive examination and balance a number of competing factors.

For instance, levies that are imposed predominantly for the purpose of raising general revenue are typically considered taxes.³⁷ Likewise, charges imposed for the purpose of defraying the cost of government services in general are also considered taxes.³⁸ If a charge is implemented by the legislature then it is typically considered a tax.³⁹

By contrast, fees are considered "a visitation of the costs of special services upon the one who derives a benefit from them"⁴⁰ and are used to defray the cost of particular, as opposed to general, services.⁴¹ Additionally, if a levy's primary purpose is to regulate, as opposed to raise revenue, then it will more often be considered a fee.⁴² Regulatory intent can be demonstrated if the levy is implemented by an administrative agency as opposed to the legislature.⁴³ In any event, fees "should be assessed or estimated on the basis of reliable factual studies or statistics."⁴⁴

In an effort to more easily identify fees, some commentators break such charges down into three broad categories: user fees, also known as "commodity charges,"⁴⁵ inspection, processing, and licensing fees,⁴⁶ and "burden-offset charges."⁴⁷

36. *Franklin Soc'y for Home Bldg. & Sav. v. Bennett*, 282 N.Y. 79, 84 (N.Y. 1939).

37. *N.Y. Tel. Co. v. City of Amsterdam*, 200 A.D.2d 315, 317 (N.Y. App. Div. 1994).

38. *Am. Sugar Ref. Co.*, 432 N.E.2d at 583; *Joslin v. Regan*, 406 N.Y.S.2d 938, 941-42, (N.Y. App. Div. 1978) *affd.* 48 N.Y.2d 746.

39. *Am. Ins. Ass'n v. Lewis*, 50 N.Y.2d 617, 623-24 (N.Y. 1980).

40. *Joslin*, 406 N.Y.S.2d at 941 (quoting *Jewish Reconstructionist Synagogue of the N. Shore, Inc. v. Inc. Vill. of Roslyn Harbor*, 352 N.E.2d 115, 117 (N.Y. 1976)).

41. *Hanson v. Griffiths*, 124 N.Y.S.2d 473, 476 (Sup. Ct. 1953).

42. *Am. Sugar*, 55 N.Y.2d at 26-27; *see also Radio Common Carriers of N.Y., Inc. v. State*, 601 N.Y.S.2d 513, 515 (Sup. Ct. 1993) (citing *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336 (1974)).

43. *Am. Ins. Ass'n*, 50 N.Y.2d at 623-24.

44. *Jewish Reconstructionist Synagogue*, 40 N.Y.2d at 163.

45. Eben Albert-Knopp, *The California Gas Charge and Beyond: Taxes and Fees in a Changing Climate*, 32 VT. L. REV. 217, 223 (2007); Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335, 343-44 (2003).

46. Albert-Knopp, *supra* note 45, at 227; Spitzer, *supra* at 349.

User fees/commodity charges are typically imposed when the government acts like a private sector business and provides a specific good or service to ratepayers, such as water or electricity.⁴⁸ Generally, such fees can only be imposed on those receiving a benefit from the fee's payment.⁴⁹ Additionally, the rate must often mirror the government's costs in providing the good or service.⁵⁰

Inspection, processing, or licensing fees⁵¹ are generally used to cover the cost of regulating licensees, such as those for motor vehicle operators or professionals, processing applications, like building permits, or conducting inspections, such as health or building inspections.⁵² Like user fees, inspection, processing, and licensing fees may not exceed the cost of regulation and can only be imposed on persons who benefit in some way from the fee.⁵³

Burden-offset charges are unlike the prior two fees in that the ratepayer does not have to obtain a benefit for the fee to be valid.⁵⁴ Instead, burden-offset charges attempt to counteract the costs the ratepayer's actions impose on society at large.⁵⁵ Such fees typically include garbage and wastewater fees or fees related to the cost of pollution.⁵⁶

While according to the above rubric a carbon charge would likely qualify as a burden offset charge, shorthand alone is insufficient to determine whether a carbon charge would be considered a fee or a tax under New York state law. Instead, careful consideration of the

47. Albert-Knopp, *supra* note 45, at 226; Spitzer, *supra* note 45, at 345-46.

48. Albert-Knopp, *supra* note 45, at 223; Spitzer, *supra* note 45, at 343-44.

49. *See, e.g., Massachusetts v. United States*, 435 U.S. 444, 454 (1978); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-23 (1981).

50. *See, e.g., Massachusetts*, 435 U.S. at 454 (though a rough approximation can be sufficient); *Commonwealth Ed. Co.*, 453 U.S. at 622-623 (1981).

51. Albert-Knopp, *supra* note 45, at 227; Spitzer, *supra* note 45, at 349.

52. Albert-Knopp, *supra* note 45, at 227; Spitzer, *supra* note 45, at 349.

53. Spitzer, *supra* note 45, at 349-50. *See* Albert-Knopp, *supra* note 45, at 227.

54. *See* Albert-Knopp, *supra* note 45, at 226; Spitzer, *supra* note 45, at 345.

55. Albert-Knopp, *supra* note 45, at 226; Spitzer, *supra* note 45, at 345.

56. Albert-Knopp, *supra* note 45, at 226; Spitzer, *supra* note 45, at 346-47.

particular facts and circumstances surrounding the putative levy, and comparison to applicable case law, is required.

New York State has wrestled with the distinction between taxes and fees since at least 1896.⁵⁷ In the case of *People ex rel. Einsfeld v. Murray*, the New York Court of Appeals considered a fee imposed by the state legislature as part of a liquor traffic control regime.⁵⁸ The fee operated by adding a surcharge to liquor trafficking licenses provided by local jurisdictions.⁵⁹ Only persons who obtained the requisite liquor trafficking license, and paid the applicable fee, could peddle in liquors and other spirits.⁶⁰ The fee was challenged on the basis that it was a tax that did not garner the requisite two-thirds majority for passage.⁶¹

The court dismissed the challengers' arguments, finding that the levy was clearly a fee and not a tax because the charge's principle purpose was to regulate the behavior of liquor traffickers.⁶² In fact, the fee aimed to discourage the traffic of liquors generally.⁶³ The fee served "a double purpose, to discourage the business [of liquor trafficking] and to secure indemnity in part to the public from the losses and burdens which the business is likely to entail."⁶⁴

At the time, it was thought that trafficking in liquors was "a business dangerous to public morals [and which involved] public burdens."⁶⁵ Consequently it was appropriate to levy an exaction to discourage the activity.⁶⁶ This so called "excise tax"⁶⁷ was "for the protection of the community and not for the protection of the person

57. See *People ex rel. Einsfeld v. Murray*, 44 N.E. 146, 149 (N.Y. 1896).

58. *Id.* at 146.

59. *Id.* at 148.

60. *Id.*

61. *Id.* at 146.

62. *Id.* at 149.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Excise taxes today no longer carry this definition. It is clear from the context that what the court here calls an "excise tax" would now be considered a burden-offset charge.

from whom [the fee] [was] exacted.”⁶⁸ Thus the “tax” was really a fee.⁶⁹

Taxes and fees were later compared in the case of *American Sugar Refining Co. of New York v. Waterfront Commission of New York Harbor*. There, the state’s highest court examined a fee established by the Waterfront Commission Compact, an interstate agreement between New York and New Jersey that, among other things, required steamship companies, and other businesses related to the operation of the New York Harbor, to pay 2% of their gross payroll into a fund, which financed vacation and pension benefits to the longshoreman who worked in the Port of New York.⁷⁰ The Commission levied the fee because while longshoremen worked on an hourly basis for a variety of different companies depending on the day, no single company provided health and other benefits.⁷¹ Nevertheless, the longshoremen effectively worked for the entire New York Harbor⁷² and so the Commission found it was appropriate for the whole industry to bear part of the cost of providing for the longshoremen’s benefits.⁷³

A number of steamship companies, and others, challenged the fee, in part, on the basis that it was an impermissibly enacted tax.⁷⁴ The

68. *People ex rel. Einsfeld*, 44 N.E. at 149.

69. It should be noted that the holding in the case of *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), a case invalidating Hawaii’s 20% excise tax which effectively only affected out of state liquor distributors, should not serve to undermine the holding of *People ex rel. Einsfeld*, despite the fact that *People ex rel. Einsfeld* concerns the regulation of intoxicating liquors. Ultimately, the Court in *Bacchus Imports* found that the broad powers to regulate alcohol provided to the Several States by Clause 2 of the Twenty-First Amendment did not permit the states to enact legislation violative of the dormant commerce clause. *Bacchus Imports*, 468 U.S. at 276. *Bacchus Imports* should not be read to undermine earlier cases on the sole basis that they discuss the regulation of alcohol. At its most basic, *People ex rel. Einsfeld* stands for the proposition that levies that serve a predominantly regulatory purpose by deterring a social ill should be considered fees and not taxes. See *People ex. rel. Einsfeld*, 44 N.E. 146. This holding is not disturbed by the *Bacchus Imports* commerce clause analysis.

70. *Am. Sugar*, 432 N.E.2d at 583.

71. *Id.* at 582.

72. *Id.*

73. *Id.*

74. *Id.* at 579-80.

Court of Appeals disagreed and found that the levy was a permissible assessment, within the ambit of the Waterfront Commission Compact's regulatory authority.⁷⁵

In discussing why the levy was a fee and not a tax, the court noted that its primary purpose was to regulate.⁷⁶ The fee sought to "eliminate[] the evils in employment and employment practices and the adverse effect of those practices on the commerce of the port" by effectively standardizing the benefits for longshoremen.⁷⁷ Without this program, longshoremen could be abused by unfair employment practices.⁷⁸ Interestingly, the court found that the benefits of this fee actually redounded to the employers by "correct[ing] the evils" of exploitive business practices, even though the money collected was ultimately paid to the longshoremen.⁷⁹

A carbon charge, like the fees described in *People ex rel. Einsfeld* and *American Sugar Refining Co.*, would similarly attempt to regulate behavior by curbing carbon emissions. To fall within the confines of the case law, its principal purpose could not be to raise revenue, but rather to regulate behavior. Furthermore, any revenue it did generate would have to be directed to a special fund, as opposed to the general budget.

Both *People ex rel. Einsfeld* and *American Sugar Refining Co.*, however, only discussed state level levies. Therefore, based on the above, it is unclear whether a carbon charge could survive on the local level. However, in *Torsoe Brothers Construction Corp. v. Board of Trustees of Inc., Monroe*, the Second Department of the Appellate Division touched on whether a local "tap-in" fee was so onerous and far reaching as to be considered a tax.⁸⁰ There, the Village of Monroe enacted an ordinance requiring buildings that wished to tap into the municipality's water system to pay a fee, which escalated in price depending on the size of the tap.⁸¹ Monroe

75. *Id.* at 583.

76. *Id.* at 585 ("A license fee has for its primary purpose the regulation or restriction of a business deemed in need of public control, the cost of such regulation being imposed upon the business benefited or controlled, whereas the primary purpose of a tax is to raise money for support of the government generally.") (citation omitted).

77. *Id.*

78. *Id.*

79. *Id.*

80. 375 N.Y.S.2d 612 (N.Y. App. Div. 1975).

81. *Id.* at 614.

then passed a resolution authorizing a \$1,840,000 bond for municipal water improvements, which was financed by the tap-in fee.⁸²

The court conceded that Monroe had the requisite legal authority to impose a fee for connecting to the village's water system,⁸³ but was troubled by the fact that the levy was used to fund general water improvements.⁸⁴ In the court's view, the charge could only be as high as the reasonable cost of regulating the current water system.⁸⁵ To the extent that the fee was used to fund a general public works project, like water improvements, the levy would be considered a tax.⁸⁶

In a similar case, *New York Telephone Co. v. City of Amsterdam*, the Third Department considered a \$13 per square foot "excavation fee" levied against persons who dug into municipal right-of-ways, sidewalks, or greenbelts.⁸⁷ There, two telephone utilities sued the City of Amsterdam to invalidate the fee on the basis that it was an unauthorized tax.⁸⁸ The court found that while the levy was named a "fee," the revenue generated was placed into the town's general fund and the \$13 per square foot greatly exceeded the cost of "issuing the excavation permit and subsequent inspections and enforcement."⁸⁹ Consequently, the levy was struck down as an unauthorized tax.⁹⁰

These two Appellate Division cases are instructive because they place a potential ceiling on a local fee's cost. Once a local fee begins to exceed the reasonable cost of regulation, which the courts generally define as the cost of issuing permits, inspection, and enforcement, the levy ceases to look like a fee and begins to look like a tax. Consequently, in order for a hypothetical carbon charge to be considered a fee, its revenue must be restricted to regulation and cannot be used to fund infrastructure projects, such as citywide efficiency upgrades or renewable energy projects.

Based on the above, it seems that New York City would likely be permitted to levy a carbon charge. New York City is authorized to

82. *Id.* at 615.

83. *Id.* at 616.

84. *Id.* at 617.

85. *Id.*

86. *Id.*

87. *N.Y. Tel. Co. v. City of Amsterdam*, 613 N.Y.S.2d 993, 994-95 (N.Y. App. Div. 1994).

88. *Id.* at 995.

89. *Id.* at 995-96.

90. *Id.* at 996.

regulate air quality and has drafted the appropriate enabling legislation to regulate carbon emissions. No state statute appears to preempt local carbon regulation and the case law does not explicitly prohibit a carbon charge. Consequently, New York City should be permitted to enact such a fee, so long as it is: (1) expressly regulatory; (2) does not exceed the cost of issuing permits, conducting inspections, and enforcing the levy; and (3) is not used to fund public works or the City's general revenue fund.

B. FEDERAL LIMITATIONS

Even if a hypothetical carbon charge fully complied with all applicable state and local laws, such a charge could still potentially be stricken down under federal law. Before determining whether a New York City carbon charge could be legally imposed, the levy must also be examined under federal principles.

Of the various federal limitations on state and local government, there is perhaps none more important and far-reaching than the dormant commerce clause. The Constitution empowers Congress "[t]o regulate Commerce . . . among the several States."⁹¹ This affirmative grant of power to Congress has been interpreted by the Supreme Court to also limit the states' ability to pass laws that burden interstate commerce.⁹² This doctrine, known as the dormant commerce clause, is meant to protect against "state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent."⁹³

State and local laws that facially discriminate against foreign jurisdictions are considered virtually *per se* invalid⁹⁴ and can only survive scrutiny if the jurisdiction can demonstrate a "legitimate local purpose[] that [cannot] adequately be served by available

91. U.S. Const., art. I, § 8, cl. 3.

92. See *Gibbons v. Ogden*, 22 U.S. 1 (1824); see also *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

93. *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (quoting *The Federalist* No. 22, pp. 143–145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, *Vices of the Political System of the United States*, in 2 *Writings of James Madison* 362–363 (G. Hunt ed. 1901)).

94. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), *Hunt v. Washington State Apple Adver. Comm.*, 432 U.S. 333 (1977).

nondiscriminatory alternatives.”⁹⁵ If, however, a state or local law is “directed to legitimate local concerns, with effects upon interstate commerce that are only incidental,” courts will take a more flexible view.⁹⁶ Under the so-called Pike test, non-facially discriminatory local laws will be upheld “unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”⁹⁷ When determining whether the local benefits of an ordinance outweigh the burdens imposed on interstate commerce courts consider “the nature of the local interest involved, and . . . whether it could be promoted as well with a lesser impact on interstate activities.”⁹⁸

A broad based charge on all carbon dioxide emitted within a local jurisdiction is not facially discriminatory as it is applied equally against visitors and residents. Therefore, were New York City to impose such a charge, it would likely only have to satisfy the less rigorous *Pike* test in order to withstand a dormant commerce clause analysis.

While no court has considered whether a local carbon charge violates the dormant commerce clause, the case of *Minnesota v. Clover Leaf Creamery Co.* is illustrative.⁹⁹ There, the Supreme Court considered a state statute that banned certain non-reusable milk cartons while permitting reusable ones.¹⁰⁰ The purpose of the law was to mitigate what the state had identified as a solid waste management problem by encouraging the use of reusable containers and thus reduce the amount of garbage taken to land fill.¹⁰¹ Milk producers challenged the law, in part, on the basis that it unreasonably burdened interstate commerce.¹⁰² The Supreme Court disagreed and found that the law’s incidental impact on interstate commerce paled in comparison to the state’s legitimate interest in

95. *Maine v. Taylor*, 477 U.S. 131, 151(1986); see also *Brown-Forman Distillers v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

96. *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 346 (2007) (quoting *Philadelphia v. New Jersey*, 437 U.S. at 624).

97. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, (1970).

98. *Id.*

99. 449 U.S. 456 (1981).

100. *Id.* at 458.

101. *Id.*

102. *Id.* at 474.

regulating a historically local area, like the environment.¹⁰³ Furthermore, the law treated both in state and out of state retailers equally by preventing all of them from selling the non-reusable containers in Minnesota.¹⁰⁴

Similarly, a local carbon charge would not burden visitors over residents and would likewise regulate a local environmental concern. Therefore, even though *Clover Leaf Creamery* considered a statewide and not a local levy, the Court would likely be inclined to treat a local carbon charge the same way. If anything, the Court may be even more likely to permit a carbon charge because such a levy would simply discourage carbon emissions instead of outright banning them.

In addition to comports with dormant commerce clause jurisprudence, a local carbon charge must also not offend the Supremacy Clause. Similar to state preemption, local laws can be invalidated under the doctrine of federal preemption in three circumstances: (1) when a federal statute expressly states its intent to preempt a local law, (2) when the local law directly conflicts with federal law, and (3) when localities attempt to legislate in an area occupied by federal law.¹⁰⁵

Local ordinances are often found preempted by federal law when they are classified as “Not in My Back Yard,” or NIMBY, legislation.¹⁰⁶ An example of NIMBY legislation occurred in the case of *Jersey Cent. Power & Light Co. v. Township of Lacey* when an ordinance passed by the Township of Lacey sought to prohibit the transportation and storage of nuclear material within its territorial jurisdiction.¹⁰⁷ In finding that Lacey’s ordinance was field preempted, the Third Circuit was particularly troubled by the fact that the law operated as an “outright ban on . . . radioactive materials.”¹⁰⁸ A nearby nuclear power plant was authorized under federal law, so

103. *Id.* at 471-72.

104. *Id.* at 472.

105. U.S. Const. art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. 1 (1824) (discussing “conflict” preemption); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (discussing “field” preemption).

106. James R. May, *Principles of Constitutional Environmental Law*, ed., 2011, Ch. 7, p. 181, available at <http://www.rwglaw.com/pdf/Dupont-09-11.pdf> [<https://perma.cc/W4RJ-7WGE>].

107. *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986).

108. *Id.* at 1104-05.

Lacey could not unilaterally frustrate the utility by banning nuclear material in its jurisdiction.¹⁰⁹

While the federal courts are generally apprehensive in authorizing NIMBY laws, courts have been more flexible in permitting local laws related to air pollution.¹¹⁰ The reason being that while the Clean Air Act, the United States's marquee air pollution control legislation, is broad and national in scope, the statute expressly recognizes that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments[.]"¹¹¹ In fact, "[a] primary goal of [the law] is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of [the Clean Air Act], for pollution prevention."¹¹² Simply stated, far from precluding local action, the Clean Air Act encourages localities to enact air pollution controls, as long as they are no "less stringent than the [federal] standard."¹¹³

Despite the Clean Air Act's express policy of local involvement, a consortium of taxicab companies invoked the statute in their suit against a New York City regulatory regime that sought to encourage taxicabs to purchase hybrid and other low carbon impact vehicles through monetary inducements in the case of *Metro. Taxicab Bd. of Trade v. City of N.Y.*¹¹⁴ In that case, a New York City ordinance permitted taxicab fleet owners to charge more money for hybrid and clean diesel taxis as compared to the older, less fuel efficient models, encouraging them to lease out the cleaner cars.¹¹⁵

While the Second Circuit did ultimately strike down the regime, finding that the law was preempted by the Energy Policy Conservation law's motor fuel standards provisions, the court did not opine on whether the ordinance was preempted by the Clean Air Act.¹¹⁶ Interestingly, the United States government, in an amicus brief, argued that the regulation was permissible under the Clean Air

109. *Id.*

110. *C.f.* S.E. Oakland County Res. Recovery Auth. v. City of Madison Heights, 5 F.3d 166 (6th Cir. 1993).

111. 42 U.S.C. § 7401(a)(3).

112. 42 U.S.C. § 7401(c).

113. 42 U.S.C. § 7416 01(c).

114. *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152 (2d Cir. 2010).

115. *Id.*

116. *Id.* at 158.

Act.¹¹⁷ In a similar case before the Northern District of Texas, the court held that the Clean Air Act would not serve to preempt a Dallas ordinance that gave preferential treatment to taxicab drivers that operated vehicles powered by natural gas over those powered by ordinary gasoline and diesel engines.¹¹⁸

Therefore, even though the federal courts have not considered the efficacy of a carbon charge under the Clean Air Act, recent cases, and the opinion of the United States government, seem to suggest that localities have some latitude in enforcing air quality regulations without offending preemption principles. Were New York City to enact a levy on carbon emissions, case law suggests its should be broad in scope rather than limited to a single sector, such as motor vehicles, to shield it from a preemption suit. One of the weaknesses the court found in the regime discussed in *Metro. Taxicab* was its apparent regulation of fuel standards specifically.¹¹⁹ The court suggested, however, that had the regime applied to fuel costs more broadly, and did not attempt to regulate motor vehicle fuel economy in particular, the scheme would have had a greater chance of surviving scrutiny.¹²⁰ Consequently, were New York City to levy a carbon charge that impacted motor vehicles, it should consider tying it to fuel usage more broadly, rather than have it relate to a car's fuel efficiency.

For these reasons, were New York City to impose a local carbon charge, it is possible, if not likely, that it would survive the various federally inspired challenges. At its most basic, the carbon charge discussed here seeks to regulate an area of truly local concern, health and the environment. As a result, the courts would likely take a forgiving view of such a fee, especially if it were broadly based. While it is impossible to judge the legality of any statute in advance, current law suggests that a carbon charge is at least theoretically permissible.

117. Brief for the United States as Amicus Curiae at 9–12, *Metro. Taxicab Bd. of Trade v. City of N.Y.*, No. 09-2901 CV (2d Cir. July 27, 2010).

118. *Ass'n of Taxicab Operators, USA v. City of Dallas*, 760 F.Supp.2d 693, 697-98 (N.D. Texas 2010).

119. *Metro. Taxicab Bd. of Trade*, 615 F.3d at 158.

120. *Id.*

II. THE NEW YORK CITY CARBON CHARGE (“NY3C”)

Assuming that New York City is legally permitted to impose a burden-offset fee aimed at having persons internalize the costs of emitting carbon dioxide into the atmosphere, the question remains how such a fee regime would operate in practice. A so-called New York City Carbon Charge (“NY3C”)¹²¹ should be broad-based so as to place all emitters on equal footing, regardless of industry or special interest, and to reduce the fee to the lowest possible cost. That being said, total regulation of all carbon emissions would likely be administratively and economically impossible. Therefore, the NY3C should begin with the largest emitters and aim to regulate smaller sources of carbon only after the program has proved successful.

The largest sources of carbon emissions in New York City are, in descending order, buildings, transportation, and carbon released from waste, also known as “fugitive” emissions.¹²² In 2013, buildings represented approximately 70% of total emissions, at 33.8 million tons of carbon dioxide equivalent (hereinafter “tCO₂e”).¹²³ Transportation represented 24% of emissions at 11.4 million tCO₂e.¹²⁴ Finally, fugitive emissions accounted for 6% of total emissions at 2.8 million tCO₂e.¹²⁵ Considering all of the sources together, 64.8% of emissions came from burning various fuels,¹²⁶ 32.8% from the consumption of electricity, and 2.4% from the release of steam.¹²⁷

To create an effective carbon charge regime, levies should be narrowly tailored to address specific sources. For instance, with respect to buildings, approximately 52% of carbon emissions are

121. Pronounced “en-why-try-see.”

122. Inventory of New York City of New York, Greenhouse Gas Emissions, November 2014, by Cathy Pasion, Mikael Amar, and Michael Delaney, Mayor’s Office of Long-Term Planning and Sustainability, New York, 2014, *available at* www.nyc.gov/html/planyc/downloads/pdf/NYC_GHG_Inventory_2014.pdf [<https://perma.cc/DR4F-5CHU>].

123. *Id.* at 10.

124. *Id.*

125. *Id.*

126. Fuel oil, natural gas, diesel, ethanol, gasoline, methane, sulfur hexafluoride, and nitrous oxide.

127. Inventory of New York City Greenhouse Gas Emissions at 10.

generated from burning fuels, such as natural gas, biofuels, and heavy oils, 44% from electricity consumption, and the rest from steam.¹²⁸ Buildings are ideal candidates for the imposition of a carbon charge because they are stationary and thus cannot migrate to other jurisdictions to avoid regulation. Consequently, imposing the NYC3C on buildings should be as simple as adding a surcharge to all electricity and fuels purchased by buildings. The fee could operate like a sales tax, imposed on the purchaser, but reported and remitted by the seller. Such piggybacking could drive down the administrative cost of collection and increase compliance. Furthermore, the relatively small number of electricity and fuel suppliers could ease enforcement.

One concern with an electricity surcharge is that not all electricity is created equal. Electricity derived from coal-fired power plants generates substantially more carbon dioxide than electricity created from wind and solar utilities. Thus ideally the NYC3C would reflect these differences by imposing a higher cost on the price of coal-derived electricity versus other, less carbon intensive, sources of electricity. Electricity generated by wind, solar, and other carbon neutral sources could be exempt from the charge. Such a regime would more accurately reflect a building's actual environmental impact and would have the additional effect of encouraging building owners to switch from more carbon intensive sources of electricity to less intensive ones. To survive a legal challenge, the fee would not likely have to perfectly capture the impact of each type of electricity, but rather would need to only be reasonable and based on reliable factual studies and statistics.¹²⁹

While the NYC3C may be relatively simple to impose on buildings, tailoring it to transportation-related emissions would be substantially more difficult. Unlike buildings, transportation sources are mobile and thus inherently more difficult to regulate. Vehicles emit carbon only when they are turned on and then do so at multiple locations during a given time period. Consequently, without some form of invasive monitoring, the NYC3C could not easily account for the exact amount of carbon emitted by a particular vehicle.¹³⁰ Furthermore,

128. *Id.* at 12.

129. *Jewish Reconstructionist Synagogue*, 40 N.Y.2d at 163.

130. New York City could likely impose such a monitoring system on all city-owned transportation sources without offending any privacy concerns, but could not likely conduct such monitoring on private citizens.

many of the vehicles that contribute to New York City's transportation-related emissions come from outside of the city's territorial jurisdiction, raising potential dormant commerce clause concerns. In spite of these difficulties, imposing the NY3C on transportation sources is possible.

Of the carbon dioxide emitted from transportation sources within the city, 87% comes from the burning of fuel by vehicles.¹³¹ One way to capture the cost of these emissions would be to impose the charge at the point of sale of gasoline and diesel purchased at fueling stations throughout the city. Fueling stations, unlike the vehicles that purchase the fuel, are stationary. One problem with this method, however, is that not all of the fuel purchased by motorists in New York City is consumed entirely within the city limits. As a result, imposing the NY3C this way might offend the dormant commerce clause by allowing New York City to effectively impose a fee on carbon dioxide emitted outside of its jurisdiction. However, a court may find that the impact to foreign residents is sufficiently incidental to have the charge survive a Pike analysis.

Another possibility would be to charge a flat fee whenever vehicles entered the five boroughs – a kind of carbon toll. An iteration of this idea, congestion pricing, was first proposed by former mayor Michael Bloomberg in 2010. Under Mayor Bloomberg's proposed congestion pricing regime, vehicles were to be charged an \$8 daily fee if they traveled within Manhattan's core in Midtown and lower Manhattan.¹³² The fee was to be collected when entering Manhattan through any of its bridges or tunnels.¹³³ If a vehicle managed to enter Manhattan without traversing a toll bridge or tunnel, the fee was to be paid via the E-ZPass electronic tolling system or through cash and credit card payment channels at retail stores, telephone and web-based systems.¹³⁴ The NY3C could be similarly imposed at toll bridges or through the other means identified in the Bloomberg Congestion Pricing regime.

131. Inventory of New York City Greenhouse Gas Emissions at 14.

132. New York City's Congestion Pricing Experience and Implications for Road Pricing Acceptance in the United States, Transport Policy 17 (2010) 266-273, Bruce Schaller, p. 3, available at http://www.nyc.gov/html/dot/downloads/pdf/schaller_paper_2010trb.pdf [<https://perma.cc/J3WF-BF7W>].

133. *Id.*

134. *Id.*

Even if New York City were to employ all the collection methods identified in Mayor Bloomberg's congestion pricing proposal, the city would still have to devote substantial resources to enforcement and infrastructure. EZ-Pass cameras would have to be set up throughout Manhattan and personnel would have to be devoted to policing vehicles that do not contain EZ-Pass hardware. Additionally, a single flat rate would not accurately reflect the variable carbon footprints of different vehicle types. This shortfall, however, could be easily ameliorated by imposing different rates on different types of vehicles, as is currently done for four-wheeled cars and sixteen-wheeled trucks on Manhattan's toll bridges. An even more refined NY3C would levy varying charges depending on whether the vehicle was a standard automobile, hybrid, or all electric. However, if the charge was levied in this way it could be found to be preempted by the Energy Policy Conservation law.¹³⁵

Fees on so-called fugitive emissions would be comparatively simple to impose because, like buildings, such sources are stationary or follow predictable paths. In New York City, 72.6% of fugitive emissions are generated from solid waste, 15.8% from utilities, and 7.9% from wastewater treatment.¹³⁶ Because most of these sources do not move, the city could audit water utilities and waste management facilities on a yearly basis. Fees would reflect the amount of carbon dioxide emitted. The fee could then be paid in the subsequent year, on a quarterly basis. The increased cost paid by such facilities would then likely be shifted to consumers in the form of higher prices for waste disposal.

Alternatively, the city could impose a charge on each pound of trash delivered to landfill and on each cubic centimeter of wastewater discharged into the sewage system. The benefit of such a system would be to impose a direct cost on waste generators, encouraging them to conserve or otherwise change their behavior. However, implementing such a system would likely require large investments in new monitoring infrastructure. Given that fugitive sources of emissions account for only 6% of the city's total carbon footprint, implementing such a regime would likely be too costly relative to its benefit.

135. See *Metro. Taxicab Bd. of Trade v. City of N.Y.*, 615 F.3d 152 (2d Cir. 2010).

136. Inventory of New York City Greenhouse Gas Emissions at 15.

In order for any New York City carbon charge to survive scrutiny, it must not only be imposed in a way that rationally relates to the activity being regulated, but the funds derived must be sequestered from the city's general revenue and restricted to registration, inspection, and enforcement activities related to the NY3C. Even if the monies collected are diverted towards clean energy infrastructure projects, like subsidizing efficiency upgrades for buildings and vehicles or the building of utility-scale renewable energy power plants, the charge could be struck down as an impermissible tax used to fund general improvement projects.¹³⁷ It is unclear whether the revenue could be spent on relevant education, outreach, and programing or on grants to universities and climate change related non-profits.

CONCLUSION

Carbon dioxide, while harmless in limited quantities, has become toxic to our way of life. As a result, governments from Toronto to Tokyo have begun taking measures to limit their carbon dioxide emissions. Due to the peculiarities of the United States federalist system, and the politicization of the climate change debate, a comprehensive and durable national response to climate change has remained elusive. In spite of this, the ability of local subdivisions to enact aggressive climate-related policies may be simpler than previously imagined.

As has been demonstrated, localities hold great power to combat climate change if they rely on their historic authority to regulate the health and welfare of their citizens within their jurisdiction. Because large urban areas are the principal drivers of carbon dioxide emissions in the United States, municipalities are uniquely suited to combat this phantom menace.

This paper has shown that New York City could likely implement a market-oriented fee regime that would dramatically dampen carbon emissions. State and local laws throughout the country similarly provide localities with great latitude to regulate air-borne pollution, like carbon dioxide. As a result, while this paper has focused

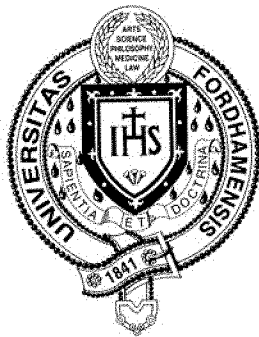
137. See *Torsoe Bros. Const. Corp. v. Board of Trustees of Inc. Village of Monroe*, 375 N.Y.S.2d 612 (2d Dep't 1975).

exclusively on New York City and New York state law, its reach potentially extends far beyond the Big Apple.

The populations of large urban areas have been the most receptive to arguments concerning climate change and are the most motivated to address its ills.¹³⁸ Thus today power and politics are aligned in cities to implement aggressive and comprehensive climate policies. Cities need only recognize their incredible influence in order to help steer this country, and even the world, onto a more sustainable path.

138. Yale Project on Climate Change Communication, *available at* <http://environment.yale.edu/poe/v2014/> [<https://perma.cc/43XH-GWUB>].

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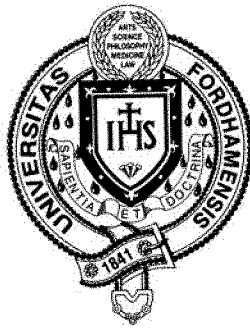
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