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## Preemption and Fiscal Authority

Erin Scharff

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# PREEMPTION AND FISCAL AUTHORITY

*By Erin Scharff\**

|   |      |
|---|------|
| INTRODUCTION .....  | 1269 |
| I. Local Autonomy and Local Dependence .....                                    | 1274 |
| A. Local Fiscal Constraints .....   | 1274 |
| B. States Can Limit Local Regulatory Authority Too.....                         | 1277 |
| C. Hyper Preemption’s Success Depends on Limited<br>Local Fiscal Authority..... | 1280 |
| II. Fiscal Constraints and the Progressive City.....                            | 1282 |
| A. Limited Autonomy Influences the Local Regulatory<br>Agenda .....             | 1283 |
| B. The Half-Empty Glass: Increasing Restrictions on<br>Fiscal Capital .....     | 1287 |
| III. Where Do We Go From Here? .....  | 1290 |
| CONCLUSION.....   | 1293 |

## INTRODUCTION

The Trump presidency has provided urban politicians a chance at national prominence, as urban leaders across the country assert their ability to implement progressive policies at the local level. For example, after President Trump’s decision to withdraw from the Paris Climate Accords, mayors of major U.S. cities vowed to meet the Paris goals on their own,<sup>1</sup> and the Climate Mayors, a group of municipal

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\* Associate Professor of Law, Sandra Day O’Connor College of Law, Arizona State University. I am honored to be among those participating in this symposium issue of the *Fordham Urban Law Journal* exploring a reimagined localism. It is an apt time to reconsider localism. I wish to thank Frank Kearl for organizing the symposium and inviting me to participate. I would also like to thank Frank, Traci Krasne, Miyoshie Lamothe-Aime for their thoughtful editorial suggestions, and Ruth Tziporah Scharff-Bendor, who came into being only slightly faster than this Essay got written.

1. See Press Release, Martin J. Walsh, Mayor of the City of Boston, Statement from Mayor Walsh on Paris Climate Agreement (June 1, 2017), <https://www.boston.gov/news/statement-mayor-walsh-paris-climate-agreement> [<https://perma.cc/3RBB-3LZ5>]; Press Release, Rahm Emanuel, Mayor of the City of

leaders pledging to take action on climate change, has swelled to 407 mayors, representing cities both large and small.<sup>2</sup> Similarly, urban leaders have opposed President Trump's efforts to deport undocumented immigrants. Boston mayor Martin Walsh declared that, "[i]f necessary, we will use City Hall itself to shelter and protect anyone who's targeted unjustly," and told reporters that those who fear deportation "can use my office, they can use any office in this building."<sup>3</sup> Several jurisdictions, including San Francisco and Santa Clara, filed a lawsuit challenging President Trump's Executive Order cutting federal funding for "sanctuary cities" — municipalities that attempt to limit federal immigration enforcement in their jurisdictions.<sup>4</sup>

Urban politicians have also sought to fill the void in progressive leadership at the state level. For example, mayors and local governments have tried to push state legislatures to allow more local regulation of guns.<sup>5</sup> They have also advocated for, and implemented,

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Chi., Statement from Mayor Emanuel on Paris Agreement (May 31, 2017), [https://www.cityofchicago.org/city/en/depts/mayor/press\\_room/press\\_releases/2017/may/ParisAgreement.html](https://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2017/may/ParisAgreement.html) [<https://perma.cc/U8R9-MT9D>]; Press Release, Megan Barry, Mayor of the City of Nashville, Mayor Barry Statement on Paris Agreement (June 1, 2017), <https://www.nashville.gov/News-Media/News-Article/ID/6458/Mayor-Barry-Statement-on-Paris-Agreement.aspx> [<https://perma.cc/YQ4X-GWBG>]; Press Release, Bill De Blasio, Mayor of N.Y.C., Statement from Mayor de Blasio on US Withdrawal from Paris Climate Agreement (June 1, 2017), <https://www1.nyc.gov/office-of-the-mayor/news/381-17/statement-mayor-de-blasio-us-withdrawal-paris-climate-agreement> [<https://perma.cc/L4MM-UQTF>]; Eli Watkins, *Pittsburgh Mayor Hits Back After Trump Invokes City in Climate Speech*, CNN POLITICS (June 2, 2017, 1:09 AM), <https://www.cnn.com/2017/06/01/politics/pittsburgh-mayor-donald-trump/index.html> [<https://perma.cc/6JYU-HZ9L>]; Press Release, Eric Garcetti, Mayor of the City of L.A., Mayor Garcetti Leads 'Climate Mayors' to Oppose U.S. Withdrawal from Paris Agreement (June 1, 2017), <https://www.lamayor.org/mayor-garcetti-leads-E28098climate-mayors-E28099oppose-us-withdrawal-paris-agreement> [<https://perma.cc/BLJ2-38R8>].

2. *Members*, CLIMATE MAYORS, <http://climatemayors.org/about/members/> [<https://perma.cc/FK8R-MMYE>].

3. Steve LeBlanc, *Boston Mayor Vows to Use City Hall to Shelter Immigrants*, WASH. TIMES (Jan. 25, 2017), <https://www.washingtontimes.com/news/2017/jan/25/boston-mayor-vows-to-use-city-hall-to-shelter-immi/> [<https://perma.cc/3NW5-YXS7>].

4. See Camila Domonoske, *Judge Blocks Trump Administration from Punishing 'Sanctuary Cities'*, NAT'L PUB. RADIO (Nov. 21, 2017, 12:48 PM), <https://www.npr.org/sections/thetwo-way/2017/11/21/565678707/enter-title> [<https://perma.cc/G2MY-5UXJ>].

5. See Andrew Gillum et al., *Opinion, Mayor Wants to Pass Gun Safety Laws, but the NRA and Our State Legislatures Won't Let Us*, USA TODAY (Mar. 23, 2018, 7:52 AM), <https://www.usatoday.com/story/opinion/2018/03/23/mayors-want-gun-control-but-blocked-nra-preemption-laws-column/450893002/>

policies on a range of issues of national concern, including efforts to curb obesity and related health issues,<sup>6</sup> protect the environment,<sup>7</sup> promote participatory democracy,<sup>8</sup> improve working conditions for low-income workers,<sup>9</sup> and safeguard civil rights protections.<sup>10</sup>

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[<https://perma.cc/6FN6-TLJY>]; Sarah Holder, *The Escalating City-State Battle over Guns*, CITYLAB (Apr. 18, 2018), <https://www.citylab.com/equity/2018/04/who-has-the-right-to-govern-your-guns/558119/> [<https://perma.cc/75A7-UHXU>].

6. See Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1237–41 (2014).

7. See Nadia S. Adawi, *State Preemption of Local Control over Intensive Livestock Operations*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10506, 10511 (2014). There is particularly voluminous literature on local fracking bans. See, e.g., Colin C. Deihl et al., *Tug of War over Colorado's Energy Future: State Preemption of Local Fracking Bans*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10524, 10525 (2014); Stephen Elkind, *Preemption and Home-Rule: The Power of Local Governments to Ban or Burden Hydraulic Fracturing*, 11 TEX. J. OIL GAS & ENERGY L. 415, 415–16 (2016); Roderick M. Hills, Jr., *Hydrofracking and Home Rule: Defending and Defining an Anti-Preemption Canon of Statutory Construction in New York*, 77 ALB. L. REV. 647, 648 (2014); Jamal Knight & Bethany Gullman, *The Power of State Interest: Preemption of Local Fracking Ordinances in Home-Rule Cities*, 28 TUL. ENVTL. L.J. 297, 297 (2015); Alex Ritchie, *Fracking in Louisiana: The Missing Process/Land Use Distinction in State Preemption and Opportunities for Local Participation*, 76 LA. L. REV. 809, 811–13 (2016); Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 U.C. DAVIS L. REV. 1111, 1113 (2015); David B. Spence, *The Political Economy of Local Vetoes*, 93 TEX. L. REV. 351, 351–52 (2014); Rachel A. Kitze, Note, *Moving Past Preemption: Enhancing the Power of Local Governments over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 386–87 (2013); Adam J. Loos, Comment, *When Prohibition Is Not Regulation: Analyzing the Court's Decision in Wallach v. Town of Dryden*, 16 N.E.3d 1188 (N.Y. 2014), 40 S. ILL. U. L.J. 121, 121–22 (2015); Bryan M. Weynand, Comment, *Placing the Seal on a Fractured Debate: How North Carolina Clarified Its Law of Hydraulic Fracturing and Can Strike the Right Balance with Preemption of Local Regulation*, 93 N.C. L. REV. 596, 597 (2015).

8. See Brian Wampler, *Power to Participate: Engaging Citizens in Urban Planning*, BLUE REVIEW (Sept. 18, 2013), <https://thebluereview.org/participatory-democracy-planning/> [<https://perma.cc/9JG7-7E7H>] (discussing local government agency in Idaho seeking to promote citizen involvement in public decision-making); Hollie Russon Gilman, *The Moment for Participatory Democracy, Three Civic Engagement Models that Can Help Bring the Voices of Everyday Citizens into Public Life*, STAN. SOC. INNOVATION REV. (Apr. 19, 2017), [https://ssir.org/articles/entry/the\\_moment\\_for\\_participatory\\_democracy#](https://ssir.org/articles/entry/the_moment_for_participatory_democracy#) [<https://perma.cc/V873-3W93>] (mentioning ways local governments are encouraging public participation).

9. E.g., Marni von Wilpert, *City Governments Are Raising Standards for Working People—and State Legislatures Are Lowering Them Back Down*, ECON. POL'Y INST. (Aug. 26, 2017), <https://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/> [<https://perma.cc/5S2T-SAZX>] (discussing ways local governments are responding to state preemption of local wage and labor standards ordinances).

10. E.g., Simon Davis-Cohen, *The States Are Attacking Local Civil Rights Law*, PROGRESSIVE (May 31, 2018), <http://progressive.org/dispatches/the-states-are-attacking-local-civil-rights-law/> [<https://perma.cc/4PUX-ZSRF>] (noting that local ordinances offer protections to LGBTQ persons in absence of state-wide

Reimagined localism reflects excitement about cities as laboratories for policy experimentation. These efforts paint the picture of increasingly active and powerful local governments and local officials. The picture, however, is more complicated than these anecdotes suggest.

As academic and political advocates of local power observe, efforts to implement progressive policies at the local level have drawn the ire of state legislatures and governors.<sup>11</sup> State legislators are both proposing and passing more laws preempting local authority.<sup>12</sup> Traditionally, state preemption laws simply took away local regulatory authority, but these new “hyper preemption” efforts go beyond that.<sup>13</sup> These new preemption laws increasingly seek to punish local governments and local officials for passing and enforcing regulations that exceed local authority and thereby directly threaten local regulatory innovation.<sup>14</sup> Traditional and hyper preemption statutes, however, are not the only constraints on local autonomy.

Fiscal constraints also significantly limit local autonomy.<sup>15</sup> State law restricts local governments’ abilities both to tax and to borrow.<sup>16</sup> Local governments may also face practical limits on their ability to raise taxes without inviting an exodus of local businesses or residents. For example, even jurisdictions with authority to set their own sales

protections); *see also* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148–50 (2005).

11. *See, e.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–2002 (2018); James G. Hodge, Jr. et al., *Public Health “Preemption Plus,”* 45 J.L. MED. & ETHICS 156 (2017); Erin A. Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1471–72 (2018) [hereinafter *Hyper Preemption*]; Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018); *see also* Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won’t Let Them.*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html> [https://perma.cc/XZ98-LEUQ]; *see generally* Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, AM. CONST. SOC’Y FOR L. & POL’Y ISSUE BRIEF (Sept. 2017), [https://www.acslaw.org/wp-content/uploads/2017/09/ACS\\_Issue\\_Brief\\_-\\_Preemption\\_0.pdf](https://www.acslaw.org/wp-content/uploads/2017/09/ACS_Issue_Brief_-_Preemption_0.pdf) [https://perma.cc/8BFN-FUST] [hereinafter *Troubling Turn*].

12. *See Hyper Preemption, supra* note 11, at 1471–72; *see also supra* notes 10 and 11.

13. *See Hyper Preemption, supra* note 11, at 1471–72.

14. *Id.* at 1473.

15. *See, e.g.*, GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 212 (2008).

16. DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 476–77 tbl. A1 (2001); *see generally* Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U.L. REV. 1241 (2009) [hereinafter *Fiscal Home Rule*].

tax rates face tax competition from neighboring jurisdictions, which limits the amount of revenue that could be collected by raising sales tax rates.<sup>17</sup> As a result, local governments often lack the independent resources necessary to pursue policies favored by local residents.

Hyper preemption efforts depend on fiscal constraints because the threat of fiscal sanctions dissuades localities from challenging state preemption legislation. Localities fear these sanctions because they would struggle to compensate for the considerable revenue loss that would result from the imposition of such sanctions.<sup>18</sup> But the relationship between fiscal constraints and hyper preemption runs even deeper.<sup>19</sup> Limits on local fiscal autonomy likely influence local interest in regulatory policy in the first place. For example, fiscal constraints may prevent local officials from expanding progressive spending programs, while in actuality, progressive regulatory policies may impose few direct costs on local government and may be a cheaper way of implementing a progressive policy agenda.

Fiscal constraints are likely to increase, at least in the near future. First, cities will face increasing pressure to spend more on public pensions and infrastructure maintenance to make up for earlier underinvestment in these areas. Second, cities will face pressure from changes in federal budget policies.

This Essay explores the relationship between local fiscal and regulatory authority in light of the changing landscape of regulatory preemption. Part I provides further background on local fiscal authority and the ways in which hyper preemption depends on limited local authority. Part II explores the ways in which limited fiscal authority may contribute to a renewed interest in local regulatory authority, and discusses the reasons these constraints are likely to

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17. Erin A. Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 325–26 (2016) [hereinafter *Powerful Cities*].

18. *E.g.*, Complaint at 5, *City of Tucson v. Arizona*, C20165733 (Ariz. Super. Ct. Dec. 12, 2016) (noting that state-share revenue is about 23.5% of Tucson's general revenue fund); Ari Shapiro & Jude Joffe Block, *Arizona Law Targets City Governments by Cutting off Funds*, NAT'L PUB. RADIO (Dec. 19, 2016, 4:36 PM), <https://www.npr.org/2016/12/19/506199963/arizona-law-targets-city-governments-by-cutting-off-funds> [<https://perma.cc/B5LN-TPYV>] (noting that Tucson faced losing all of its shared revenue from the State if found non-compliant with Arizona state law); Henry Graber, *Phoenix Has Beef with Arizona*, SLATE (Sept. 19, 2016), [http://www.slate.com/articles/business/metropolis/2016/09/phoenix\\_mayor\\_greg\\_stant\\_on\\_is\\_fed\\_up\\_with\\_arizona\\_pre\\_empting\\_his\\_city\\_s.html](http://www.slate.com/articles/business/metropolis/2016/09/phoenix_mayor_greg_stant_on_is_fed_up_with_arizona_pre_empting_his_city_s.html) [<https://perma.cc/9A46-LGV3>] (reporting Phoenix mayor's frustration with Arizona's preemption statute assertion, contending it has a chilling effect on liberal cities).

19. *See Troubling Turn*, *supra* note 11.

increase. Part III argues that these increasing fiscal constraints both limit local governments' ability to adequately address matters of traditional local concern and hinder local governments' ability to respond to leadership failures at the state and national levels.

## I. LOCAL AUTONOMY AND LOCAL DEPENDENCE

All states grant some authority to local governments. Most states provide for some version of home rule, at least for larger jurisdictions.<sup>20</sup> Home rule provides local governments with authority to act without prior state approval.<sup>21</sup> Moreover, even in traditional Dillon's Rule states, where local governments may exercise only those powers expressly granted by state law, municipalities have some implied authority to act in ways necessary to carry out those delegated powers.<sup>22</sup> Nevertheless, local governments are creatures of state law, and their legal authority to regulate, to tax, and even to exist, depends upon state law. Political and practical constraints limit this authority even further.

This Part first provides background on the fiscal constraints that local governments face. It then discusses in more detail the ways in which these constraints interact with emerging state efforts to restrict local regulatory authority.

### A. Local Fiscal Constraints

Local fiscal autonomy is limited both by state law restrictions on local revenue authority and by practical constraints on the ability to exercise this authority. Any discussion about local fiscal autonomy must acknowledge the significant role the state plays in funding local governments.

Cities receive funding through state aid and federal grant programs.<sup>23</sup> Data from 2010 suggests that, on average, state aid

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20. See generally KRANE ET AL., *supra* note 16 (providing descriptions of home rule authority (or lack thereof) in all fifty states).

21. See *Fiscal Home Rule*, *supra* note 16.

22. See Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law*, 67 CHI.-KENT L. REV. 959, 963 (1991) ("As formulated by its author — judge and treatise writer John F. Dillon — the doctrine limits localities to exercise of those powers expressly delegated to them by the state legislature or necessary to implement or necessarily implied from express legislative grants.").

23. See CONG. BUDGET OFFICE, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS (2013), [https://www.cbo.gov/sites/default/files/43967\\_FederalGrants.pdf](https://www.cbo.gov/sites/default/files/43967_FederalGrants.pdf) [<https://perma.cc/3GJ5-E9A3>] (describing federal grants to local governments); Erica

constituted slightly less than one-third of local government revenues.<sup>24</sup> This average, however, masks important differences between states and types of local governments.<sup>25</sup> For example, the same data also illustrates that local governments in Vermont received about sixty percent of their revenue from the state, while Nebraska only provided about eighteen percent of local government revenue.<sup>26</sup> Additionally, municipalities and townships are generally less reliant on state aid than local school districts.<sup>27</sup> Despite these variations, however, state grants provide an important source of local government funding for almost all jurisdictions.

States vary in the ways they contribute state dollars to local governments. Typically, states provide much of their funding through general aid, which allocates a percentage of state revenue to local government based on fixed distribution formulas.<sup>28</sup> Distribution formulas often consider factors like population size and local needs.<sup>29</sup> The formulas may also reflect a desire to return revenues to the jurisdiction where the tax dollars are earned, so a state may allocate some portion of the state sales tax to the jurisdiction in which the sale occurs.<sup>30</sup> States also use other methods. Arizona, for example, allocates its state shared revenue from the state sales tax using a formula that weighs a jurisdiction's property tax revenue.<sup>31</sup>

States also provide funding to local governments for specific programs in addition to general funding. For example, Arizona provides dedicated funding to county and municipal libraries,<sup>32</sup> and Arkansas' Historic Preservation Program provides funding to restore

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Michel, *State Aid to Local Governments*, NAT'L CONF. OF ST. LEGIS., <http://www.ncsl.org/research/fiscal-policy/state-aid-to-local-government-update.aspx> [<https://perma.cc/3ZDR-6ALZ>].

24. Michel, *supra* note 23.

25. *Id.*

26. *Id.*

27. *See, e.g.*, MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, A PUNISHING DECADE FOR SCHOOL FUNDING (Nov. 29, 2017), <https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding> [<https://perma.cc/8FWZ-5D9Z>] (highlighting K-12 schools' dependence on state funding and noting that, on average, school districts receive about forty-seven percent of their funding from the state).

28. *See* Michel, *supra* note 23.

29. *See id.*

30. *See id.*

31. *See* ARIZ. REV. STAT. ANN. § 42-5029 (2018).

32. *See, e.g.*, *State Grants-In-Aid (SGIA)*, ARIZ. ST. LIBR., ARCHIVES & PUB. REC., <https://azlibrary.gov/libdev/funding/sgi> [<https://perma.cc/4J7H-48SE>].

historic county courthouses.<sup>33</sup> In Indiana, local governments can apply for state aid to fund efforts to reduce water pollution.<sup>34</sup> Ohio's Attorney General's Office provides grants to local law enforcement to assist in combating the state's opioid epidemic.<sup>35</sup>

State influence on municipal budgets is not limited to direct support. States exercise significant influence over local governments' ability to raise revenue via taxes and their ability to borrow.<sup>36</sup> As a result, local governments often lack meaningful fiscal autonomy.

Generally, state law restricts municipal authority over fiscal affairs more than it does in other policy areas.<sup>37</sup> One leading survey of municipal home rule found that only twelve states provide local governments with fiscal control, but five of those states have only limited fiscal authority.<sup>38</sup> Beyond home rule, other constitutional restrictions may also restrict local budget choices.<sup>39</sup> Seattle's head tax on employees, for example, was developed in part because of the city's limited fiscal options.<sup>40</sup> It has already aggressively raised property taxes (and additional increases would likely exacerbate the

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33. *AHPP Accepting Applications for Courthouse, Restoration Grants*, ARK. HIST. PRESERVATION PROGRAM (Nov. 17, 2017), <http://www.arkansaspreservation.com/blog/ahpp-accepting-applications-for-courthouse-restoration-grants> [https://perma.cc/DC3X-L6M5].

34. *See Funding*, IND. DEP'T OF ENVIL. MGMT. (2018), <https://www.in.gov/idem/4103.htm> [https://perma.cc/6KRX-X7B6].

35. Press Release, Mike DeWine, Ohio Att'y Gen., Three Million in Grants for DART and QRT Teams Awarded to Address Opioid Epidemic (Sept. 6, 2017), <http://www.ohioattorneygeneral.gov/Media/News-Releases/September-2017/Three-Million-in-Grants-for-DART-and-QRT-Teams-Awa> [https://perma.cc/C9KQ-ZV9Q].

36. *See* Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 915–16 (2003) (discussing state constitutional limits on municipal borrowing authority); *see, e.g.*, Liz Green-Taylor, *Local Debt Limitations Primer – Washington State Department of Commerce*, WASH. STATE DEP'T OF COMMERCE (May 2014), <https://www.commerce.wa.gov/about-us/research-services/bond-users-clearinghouse/local-debt-limitations-primer/> [https://perma.cc/EKR2-DTB2] (discussing Washington State government's process to determine how much more debt a local government can assume).

37. *See* KRANE ET AL., *supra* note 16, at 474, 476–77 (categorizing the powers that states grant under home rule).

38. *See id.* at 471, 476–77 (listing extent of fiscal home rule authority in each state).

39. *See Fiscal Home Rule*, *supra* note 16, at 1246.

40. *See* Steven M. Rosenthal & Richard C. Auxier, *Seattle's Head Tax Is a Fine Idea, Given the Circumstances*, TAX POL'Y CTR. (May 11, 2018), <https://www.taxpolicycenter.org/taxvox/seattles-head-tax-fine-idea-given-circumstances> [https://perma.cc/8RHU-428Q] (stating that the head tax required companies to pay twenty-six cents for every hour an employee worked).

city's affordable housing problem), and the city lacks authority to impose an income tax under state law.<sup>41</sup>

Finally, horizontal and vertical tax competition imposes practical limits on a local government's ability to raise tax revenue by increasing tax rates. Horizontal tax competition is tax competition between neighboring jurisdictions.<sup>42</sup> For example, sales tax rates in neighboring suburbs will likely be relatively similar because greater differentials in tax rates would push shoppers to a neighboring jurisdiction.<sup>43</sup> In contrast, vertical tax competition is tax competition between overlapping levels of government.<sup>44</sup> For example, a state's sales tax rate limits a locality's ability to generate sales tax revenue from a tax increase. The state sales tax pushes up the overall level of sales tax, and thus affects consumer demand for products.

### B. States Can Limit Local Regulatory Authority Too

While states generally provide local governments with some authority to regulate as a way to protect the public welfare, the state's ability to preempt local ordinances often limits this authority. This section discusses the state's preemption authority, including reasons why states may want to limit local authority. It also describes the increasingly aggressive use of this preemption authority and concludes by discussing possible limits.

While local governments traditionally have had greater regulatory than fiscal authority, the state's preemption powers have always limited regulatory authority.<sup>45</sup> Even in jurisdictions granting relatively broad authority to local governments, states retain the right to preempt local regulations on matters of statewide concern.<sup>46</sup> Local regulation of activity often has spillover effects, so the state will have a persuasive argument that it is regulating on a matter of statewide concern.

Consider a law requiring a municipal living wage higher than minimum wage imposed by federal and state laws. While such a law could only apply to workers employed within the jurisdiction, the State can reasonably argue that wages are a matter of statewide

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41. *Id.*

42. See Timothy J. Goodspeed, *Tax Competition, Benefit Taxes, and Fiscal Federalism*, 51 NAT'L TAX J. 579, 581 (1998).

43. *Powerful Cities*, *supra* note 17, at 321–22.

44. See Goodspeed, *supra* note 42, at 581.

45. *Powerful Cities*, *supra* note 17, at 339–40.

46. See generally Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).

concern. First, the state can assert it has an interest in employment regulation uniformity, so that companies operating in multiple jurisdictions do not have to master multiple legal regimes, thereby increasing compliance costs, and thus, the cost of doing business in the state. Second, the state can argue that the wage rate in one jurisdiction will affect the wages employers must offer in neighboring jurisdictions as well; thus, it has an interest in limiting these spillover effects to ensure that high wages do not increase unemployment or make the state unattractive to business. State courts have usually been deferential to such arguments.<sup>47</sup>

In recent years, state preemption efforts have become even more aggressive. In the past, states found it sufficient to deny local governments the authority to act, rendering preempted local ordinances *ultra vires*.<sup>48</sup> Now, state legislatures are increasingly debating (and passing) bills that seek not only to limit local authority, but also to sanction local governments and local public officials that run afoul of state preemption laws.<sup>49</sup> Most of these sanctions are financial, with state law imposing fines on both governments that adopt ordinances preempted by state law and on local officials who enforce these ordinances.<sup>50</sup> However, some states have also sought additional authority, such as to remove local elected officials.<sup>51</sup>

Hyper preemption legislation often provides significant fiscal sanctions for local governments found to be in violation of state law. For example, Arizona enacted a law in 2015 that imposed significant fiscal sanctions on localities that adopt ordinances that state authorities find violate state law.<sup>52</sup> If Arizona's attorney general concludes that an ordinance violates state law, the law provides a short period for the jurisdiction to repeal the ordinance.<sup>53</sup> If the local government refuses to repeal the ordinance, the law directs the attorney general to instruct the state treasurer to withhold state shared revenue from the jurisdiction until the ordinance is repealed.<sup>54</sup> For Tucson, the sanction threatened about a quarter of its general

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47. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 16 (1990).

48. See *Hyper Preemption*, *supra* note 11, at 1476–79.

49. *Id.* at 1495.

50. *Id.*

51. FLA. STAT. § 790.33 (2018).

52. See S. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016); ARIZ. REV. STAT. ANN. § 41-194.01 (2016).

53. ARIZ. REV. STAT. ANN. § 41-194.01 (2016).

54. *Id.*

revenue fund.<sup>55</sup> Tucson tried to challenge the constitutionality of Arizona's preemption statute regarding a dispute over Tucson's policy of destroying certain guns seized by police officers.<sup>56</sup> State law required such guns to be sold to the public.<sup>57</sup> In adjudicating the challenge, the Arizona Supreme Court found Tucson's gun ordinance preempted, and it rejected many of the city's constitutional arguments.<sup>58</sup>

Other preemption bills impose fiscal sanctions only for specific conflicts with state law. For example, legislation seeking to restrict the local adoption of a "sanctuary city" policy often provides fiscal sanctions for adopting such policies. Arizona's S.B. 1070, for example, established civil fines of up to \$5,000 for each day that a locality was in violation of a state law requiring local law enforcement to cooperate with federal immigration officers and enforce immigration law.<sup>59</sup> Michigan's proposed legislation would have prohibited local governments from "enact[ing] or enforc[ing] any law . . . that limits or prohibits a[n] . . . officer . . . from communicating or cooperating with appropriate federal officials concerning the immigration status of an individual in this state."<sup>60</sup> The proposed Michigan law would have required the state treasurer to withhold state revenue sharing funds from local governments that fail to comply with this order.<sup>61</sup> Similar Florida legislation would impose a fine of at least \$1,000 a day for sanctuary policies adopted contrary to state law and would prohibit a locality from receiving any state grant funding for a five-year period beginning on the date the locality is adjudicated to be in violation of the statute.<sup>62</sup>

There may be both legal and political limits to the state's preemption authority. As several local government scholars note, some state constitutions limit state authority over certain aspects of local government regulation.<sup>63</sup> Additionally, various state political

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55. Complaint at 5, *City of Tucson v. Arizona*, No. C20165733 (Ariz. Super. Ct. Dec. 12, 2016).

56. *Id.* at 2, 14.

57. *Id.* at 14.

58. State *ex rel.* Brnovich v. *City of Tucson*, 399 P.3d 663, 669 (Ariz. 2017).

59. ARIZ. REV. STAT. ANN. § 11-1051 (2010).

60. H.R. 4105, 99th Leg., 1st Reg. Sess. (Mich. 2017).

61. *Id.* (stating that the treasurer "shall withhold the total annual payment amount that the local unit of government receives under the Glenn Steil state revenue sharing act of 1971 . . .").

62. S. 786, 119th Leg., Reg. Sess. (Fla. 2017).

63. See generally *Troubling Turn*, *supra* note 11.

process rules, like single-subject requirements,<sup>64</sup> may mean that certain preemption bills run afoul of state constitutional rules.<sup>65</sup> Further, current litigation challenges some state preemption efforts under the federal constitution.<sup>66</sup>

Political constraints may also limit state preemption efforts.<sup>67</sup> As Professor Richard Schragger observes, business interests worked to defeat bills copying North Carolina's controversial law, H.B. 2—which preempted local government anti-discrimination ordinances—and North Carolina itself faced considerable economic pressure to repeal its legislation.<sup>68</sup> This type of political pressure may be limited. In many cases, it is these same business interests pushing preemption legislation.<sup>69</sup>

### C. Hyper Preemption's Success Depends on Limited Local Fiscal Authority

While scholars have observed this punitive turn in preemption law,<sup>70</sup> the connection between hyper preemption and limited fiscal authority has not yet been a focus of this scholarship. Indeed, hyper preemption efforts are intimately intertwined with limits on local fiscal autonomy. The threat of sanctions limits local policy autonomy precisely because local governments lack the fiscal capacity to bear these sanctions. In this sense, hyper preemption leaves cities doubly vulnerable: the costs of litigation to deter local governments from acting, and the threat of sanctions, on top of those court costs, make resistance potentially self-defeating.

It is possible that hyper preemption policies have not yet reached the heart of state power over local finances. Current versions of these bills threaten to *remove* state funding when a city violates a state law

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64. *Id.* at 12–13. Single-subject requirements ensure that when the legislature votes on a particular bill, that bill only addresses on particular policy issue. For example, the same bill could not address both school funding and qualifications for elected office in the state.

65. *Id.*

66. *See, e.g.,* *El Cenizo v. Texas*, 264 F. Supp. 3d 744 (W.D. Tex. 2017), *aff'd in part, vacated in part*, 885 F.3d 332 (5th Cir. 2018) (involving claim that Texas preemption statute regarding immigration violated federal Constitution).

67. *Hyper Preemption*, *supra* note 11, at 1518–20; Schragger, *supra* note 11, at 1226–30.

68. Schragger, *supra* note 11, at 1228–30.

69. Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 *PUBLIUS* 403 (2017).

70. *See supra* note 12.

or creates fiscal sanctions (payable to the state) for such violations,<sup>71</sup> but states could also condition funding on cities adhering to a list of policies. At the federal level, restrictions to the congressional spending power might limit such conditional funding,<sup>72</sup> but there is no analog to this limit in most state constitutions.<sup>73</sup>

State governments can also threaten local government funding to retaliate against local policies. Such retaliation takes several forms. First, state governments could cut discretionary grants to local governments. For example, the State of Tennessee recently withdrew previously authorized financial support for the City of Memphis's bicentennial celebration.<sup>74</sup> State legislators voting in favor of the funding cut made it clear that they did so in response to Memphis's legal efforts to remove Confederate statues from city parks.<sup>75</sup> Because state law prevented the city itself from removing the statues, the city sold the statues and the land underneath to a not-for-profit, which subsequently removed them.<sup>76</sup> Legal theories challenging the state's actions are, at best, untested. The state's discretionary spending programs are precisely that, discretionary, and the legislature has broad authority to redirect such program funding.

Second, state governments could reduce local fiscal authority more generally. Such a move need not be retaliatory. In fact, state officials that support the deregulatory agenda of hyper preemption are also likely to support limited local taxing authority. Leaders in Texas' Republican Party, including Governor Greg Abbot and Lieutenant Governor Dan Patrick, have endorsed a plan to limit local property tax growth by making it far easier for local voters to limit a locality's ability to raise revenue.<sup>77</sup> While moderates defeated a similar plan in

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71. *See supra* text accompanying notes 52–55.

72. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

73. *See, e.g., Hyper Preemption*, *supra* note 11, at n.226.

74. Sheila Burke, *Tennessee Lawmakers Punish Memphis for Removing Statues*, ASSOCIATED PRESS NEWS (Apr. 18, 2018), <https://apnews.com/17ec9774415240b0a7b1ec41d923eb3c> [<https://perma.cc/GUB9-4WVZ>].

75. *Id.*

76. Daniel Connolly & Vivian Wang, *Confederate Statues in Memphis Are Removed After City Council Vote*, N.Y. TIMES (Dec. 20, 2017, 5:43 PM), <https://www.nytimes.com/2017/12/20/us/statue-memphis-removed.html> [<https://perma.cc/4MWU-W7B7>].

77. Phil Brazan, *Abbot, Patrick Throwing Weight Behind Property Tax Reform in GOP Primary*, KXAN (Feb. 12, 2018, 12:52 PM), [https://www.kxan.com/news/local/austin/abbott-patrick-throwing-weight-behind-property-tax-reform-in-gop-primary\\_20180312075734707/1031501913](https://www.kxan.com/news/local/austin/abbott-patrick-throwing-weight-behind-property-tax-reform-in-gop-primary_20180312075734707/1031501913) [<https://perma.cc/EM2X-4CQY>].

Texas's last legislative session,<sup>78</sup> the leader of the moderate wing of the Texas Republic Party, House Speaker Joe Straus, is not seeking reelection.<sup>79</sup> Local officials fear the proposal would make it much harder for them to balance their budgets.<sup>80</sup> While the Texas reform is not explicitly tied to the state's preemption agenda, it clearly targets urban areas. Like hyper preemption legislation, these state fiscal limits imply a distrust of local voters to decide for themselves how to regulate local revenue. Texas is not the only state considering limiting local property taxes; members of the Illinois legislature have introduced a bill that would allow more local voters to weigh in on property tax changes, creating an additional roadblock for city officials seeking to raise property taxes.<sup>81</sup>

## II. FISCAL CONSTRAINTS AND THE PROGRESSIVE CITY

Fiscal constraints also shape regulation. Regulatory ordinances are often cheaper to implement than other progressive policies, which require more direct government outlay. For example, consider the policy choices facing an urban leader who wants to improve the lives of working parents, especially the working poor. Providing those parents with additional childcare assistance would require a direct outlay of government revenue. On the other hand, there are few

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78. Morgan Smith & Patrick Svitek, *Texas Legislature Ends Special Session Without Passing Property Tax Measure*, TEX. TRIB. (Aug. 15, 2017), <https://www.texastribune.org/2017/08/15/texas-house-adjourns-sine-die> [<https://perma.cc/DN8U-D2LC>].

79. Matthew Watkins, *Texas House Speaker Joe Straus Says He Will Not Seek Re-Election*, TEX. TRIB. (Oct. 25, 2017), <https://www.texastribune.org/2017/10/25/speaker-house-joe-straus-wont-seek-reelection/> [<https://perma.cc/SLL7-6PAH>].

80. See generally Dagny Pruner, *Dallas Mayor, First Responders Speak Against Property Tax Bill at Heated Hearing*, DALL. NEWS (Mar. 15, 2017), <https://www.dallasnews.com/news/texas-politics/2017/03/14/dallas-mayor-first-responders-speak-property-tax-bill-heated-hearing> [<https://perma.cc/DPL6-XWPT>]; Clay Falls, *College Station Mayor Worried About Property Tax Changes*, KBRX-TV3 (July 18, 2017, 6:49 PM), <http://www.kbtx.com/content/news/College-Station-Mayor-worried-about-property-tax-changes-during-special-session-435263343.html> [<https://perma.cc/T3DL-F576>]; Dave Montgomery, *Local Leaders Decry Proposed Property Tax Overhaul*, STAR-TELEGRAM (Mar. 14, 2017, 10:17 PM), <https://www.star-telegram.com/news/state/texas/article138537823.html> [<https://perma.cc/H3HR-GUJL>]; Wes Rapaport, *Emergency Responders Announce Opposition to Property Tax Bill*, KXAN (Aug. 9, 2017, 2:48 P.M.), <https://www.kxan.com/news/emergency-responders-announce-opposition-to-property-tax-bill/994662380> [<https://perma.cc/6G28-5HWT>].

81. *Illinois Proposal Could Lead to More Property Tax Cuts*, CBS CHI. (Apr. 23, 2018, 12:08 PM), <https://chicago.cbslocal.com/2018/04/23/illinois-proposal-could-lead-to-property-tax-cuts/> [<https://perma.cc/3KAR-MVHS>].

direct costs to requiring local businesses to offer workers a predictable schedule (so that childcare is easier to arrange) and paid sick days (so that workers can afford to take time off to care for their children).

This Part discusses factors that shape urban leaders' interest in the creative use of their regulatory authority, including the role that fiscal constraints play. It then suggests that such constraints are likely to remain and argues that these constraints are likely to increase in the near term.

#### A. Limited Autonomy Influences the Local Regulatory Agenda

Local leaders have led the way on a variety of innovative regulatory efforts in recent years.<sup>82</sup> For example, local governments spearheaded efforts to improve nutrition by limiting soda sizes, taxing high sugar beverages, and adding calorie counts to restaurant menus.<sup>83</sup> Local governments have also sought to address the environmental effects of fracking and factory farming<sup>84</sup> and have been policy leaders on important issues of work-life balance, like predictable scheduling and paid sick days.<sup>85</sup> There are many explanations for this local regulatory innovation. This section considers several that have been offered. It then argues that legal constraints on local authority may nudge local leaders' interest in these policy areas. Other areas, like public pensions, that also require attention from urban leaders are harder to address because of existing constraints on local authority.

There are many reasons local leaders have been increasingly willing to experiment with progressive regulatory policies. Local leaders themselves often argue that they are stepping in because the

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82. See *supra* notes 6–11; see generally Richard C. Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91, 129–30 (2017) (discussing municipalities pushing for social welfare policies such as living wage movement and sanctuary cities).

83. See, e.g., Diller, *supra* note 6, at 1239; see generally Beverly Bird, *What Is the Soda Tax and Which Cities Have One?*, BALANCE (Mar. 12, 2018), <https://www.thebalance.com/soda-tax-and-which-cities-have-one-4151209> [<https://perma.cc/TLC5-VU6K>].

84. See *supra* note 8.

85. See von Wilpert, *supra* note 10, at nn.35, 39–40; see also Matt Crawley, *Paid Sick Leave Legislation Taking States, Municipalities by Storm*, MULTISTATE INSIDER (July 21, 2016), <https://www.multistate.us/blog/insider/2016/07/paid-sick-leave-legislation-taking-states-municipalities-by-storm> [<https://perma.cc/928Q-JRG3>].

state and national leadership is not responsive to their constituents.<sup>86</sup> According to Frank Sharry, a leading immigrant-rights advocate, mayors committing to the preservation of sanctuary cities, for example, “are not getting out in front of public opinion . . . but *reflecting* it.”<sup>87</sup> Or, as San Antonio mayor Ron Nirenberg put it, “[t]he fundamental truth about the whole debate over local control is that taking authority away from cities — preventing us from carrying out the wishes of our constituents — is subverting the will of the voter.”<sup>88</sup> Of course, the preferences of voters statewide may differ dramatically from the preferences of urban voters, and partisan gerrymandering may make this disjuncture more pronounced in state legislatures.<sup>89</sup>

Such political factors are not the only explanation for urban success in implementing innovative regulatory policies. Paul Diller points to the structure of local government to explain local innovations in public health, noting that the progressive public health agenda faces fewer “vetogates” at the local level than it would at state and federal levels.<sup>90</sup> As Diller observes, city councils are unicameral chambers, and super-majority requirements are rare with respect to local regulatory policy.<sup>91</sup> At the same time, Diller notes that special interest groups may have a harder time mobilizing opposition at the local level, given the number of local governments, which may help enact such policies.<sup>92</sup>

There are probably more factors at play here than merely those already discussed. Beyond these progressive regulatory policies, other local issues call out for innovative policy solutions. Looming pension problems represent a challenge to local governments as much

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86. Tim Dickinson, *Meet the Leaders of the Trump Resistance*, ROLLING STONE (Jan. 13, 2017, 7:36 P.M.), <https://www.rollingstone.com/politics/politics-features/meet-the-leaders-of-the-trump-resistance-124691/> [<https://perma.cc/5FW9-C3H5>] (noting that “America’s cities have emerged as centers of resistance to Trump’s deportation plans” and “[t]he reality is that undocumented immigrants are more popular in America’s cities than is the president”).

87. *Id.* (emphasis added).

88. Andy Duehren & Brandon Formby, *As Lawmakers Try to Curb Local Texas Governments, Big-City Mayors Left Out of Meetings with Abbott*, TEX. TRIB. (July 26, 2017), <https://www.texastribune.org/2017/07/26/lawmakers-curb-local-governments-abbott-ignores-big-city-mayors/> [<https://perma.cc/R99F-NK6J>].

89. Brentin Mock, *Where Gerrymandering Is Containing City Power*, CITYLAB (Jan. 10, 2017), <https://www.citylab.com/equity/2017/01/how-gerrymandering-is-containing-city-power/512621/> [<https://perma.cc/UE6V-45CF>].

90. Diller, *supra* note 6, at 1266–67.

91. *Id.*

92. *See id.* at 1267–69.

as state governments, and in many cases, state law restricts the ability of local governments to improve the situation.<sup>93</sup> In addition, cities, especially older cities, have consistently underinvested in infrastructure maintenance and improvement.<sup>94</sup> Needed improvements in municipal water systems have received even less attention.<sup>95</sup> And of course, in many jurisdictions, adaptations to climate change are both needed and not fully accounted for in current capital improvement plans.<sup>96</sup>

While these problems are well documented, they are not the kinds of problems that local leaders want to discuss. On pensions, for example, policymakers reveal a “remarkable degree of ignorance and unwillingness to talk about the pension problem.”<sup>97</sup> To illustrate this

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93. Of course, there is significant heterogeneity among pension programs, and there are also municipalities that do not face pension problems. See Joshua D. Rauh, *Hidden Debt, Hidden Deficits: 2017 Edition, How Pension Promises Are Consuming State and Local Budgets*, HOOVER INSTITUTION (June 14, 2018), [https://www.hoover.org/sites/default/files/research/docs/rauh\\_hiddendebt2017\\_final\\_webready.pdf](https://www.hoover.org/sites/default/files/research/docs/rauh_hiddendebt2017_final_webready.pdf) [<https://perma.cc/466X-PZH8>]; Mary Williams Walsh, *Dallas Stares Down a Texas-Size Threat of Bankruptcy*, N.Y. TIMES (Nov. 20, 2016), [https://www.nytimes.com/2016/11/21/business/dealbook/dallas-pension-debt-threat-of-bankruptcy.html?\\_r=0](https://www.nytimes.com/2016/11/21/business/dealbook/dallas-pension-debt-threat-of-bankruptcy.html?_r=0). [<https://perma.cc/E8NN-8RCR>]; see also Alicia H. Munnell, *After Shared Sacrifice, Dallas Police and Fire Pension Problems Addressed*, MARKETWATCH (Aug. 8, 2017, 11:04 AM), <https://www.marketwatch.com/story/after-shared-sacrifice-dallas-police-and-fire-pension-problems-addressed-2017-08-07> [<https://perma.cc/384A-MY95>].

94. See generally James Surowiecki, *System Overload*, NEW YORKER (Apr. 19, 2016), <https://www.newyorker.com/magazine/2016/04/18/inside-american-infrastructure-problem> [<https://perma.cc/SAF5-R4NH>]; Mary Beth Graebert et al., *Integrated Asset Management: Dealing with Neglected Infrastructure and Vacant Property in Legacy Cities*, INFORMING THE DEBATE, MICH. APPLIED PUB. POL’Y BRIEF (2015), [http://ippsr.msu.edu/sites/default/files/MAPPR/Integrated 20Asset 20Management 20.pdf](http://ippsr.msu.edu/sites/default/files/MAPPR/Integrated%20Asset%20Management%20.pdf) [<https://perma.cc/4M3W-GYRV>].

95. See *Lead Poisoning in Michigan Highlights Aging Water Systems Nationwide*, NAT’L PUB. RADIO (Jan. 2, 2016, 7:54 AM), <https://www.npr.org/2016/01/02/461735226/lead-poisoning-in-michigan-highlights-weakened-water-systems-nationwide> [<https://perma.cc/7XHY-9FD2>]; *2017 Infrastructure Report Card*, AM. SOC’Y OF CIV. ENGINEERS (June 14, 2018), <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Drinking-Water-Final.pdf> [<https://perma.cc/8TY5-WUEH>].

96. See Allison Chatrchyan, *Addressing Climate Change at the Municipal Level*, CORNELL CLIMATE CHANGE (June 14, 2018), <http://climatechange.cornell.edu/addressing-climate-change-at-the-municipal-level/> [<https://perma.cc/F4K9-UNZ8>]; see generally *Planning for Climate Change Adaptation*, U.S. ENVTL. PROT. AGENCY (June 14, 2018), <https://www.epa.gov/arc-x/planning-climate-change-adaptation> [<https://perma.cc/D3DX-TSE5>].

97. Patrick McGuinn, *Pension Politics: Public Employee Retirement System Reform in Four States*, BROWN CTR. ON EDUC. POL’Y AT BROOKINGS (Feb. 2014),

problem, consider the current, non-partisan Phoenix mayoral race. The non-profit group Truth-in-Accounting gave Phoenix a D grade when reviewing its financial health, largely because of the city's pension problems.<sup>98</sup>

Local leaders may be primed to focus on new regulatory areas in part because their ability to address these bread-and-butter issues of local governance is more limited by state law. For example, most states have constitutional provisions that protect pension benefits at both the state and local levels.<sup>99</sup> Such provisions make it much harder for local officials to pass meaningful pension reform. Similarly, placing limits on local fiscal autonomy significantly restricts a local government's ability to invest in infrastructure, as it consequently limits their ability to raise revenue. As local governments attempt to come into compliance with Clean Water Act requirements for storm water drainage, they have needed to find new sources of income.<sup>100</sup>

In this way, hyper preemption legislation may emerge in response to an urban regulatory agenda that has already been shaped by the constraints of traditional state preemption. Prior limits on local autonomy are now developing the policies that cities try to enact and may be pushing cities toward regulatory innovations that lead to the new preemption.

To be clear, these state-law imposed limits on fiscal authority affect local governments in both red and blue states. New York City's struggles to reform public pensions in the wake of state interference are at least as difficult as anything encountered in a more traditionally

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[https://www.brookings.edu/wp-content/uploads/2016/06/Pension-Politics\\_FINAL\\_225.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/Pension-Politics_FINAL_225.pdf) [https://perma.cc/9G4S-RNS6].

98. See Jessica Boehm, *Phoenix, Mesa Earn 'D' Grades in Financial-Health Review Due to Pension Debt*, ARIZ. REPUBLIC (Jan. 24, 2018, 5:01 PM), <https://www.azcentral.com/story/news/local/phoenix/2018/01/24/phoenix-mesa-tucson-bad-grades-financial-health-pension-crisis-truth-accounting/1054700001/> [https://perma.cc/8YAD-3WHR].

99. Alicia H. Munnell & Laura Quinby, *Legal Constraints on Changes in State and Local Pensions*, CTR. FOR RETIREMENT RES. AT B.C. (Aug. 2012), [http://crr.bc.edu/wp-content/uploads/2012/08/slp\\_25.pdf](http://crr.bc.edu/wp-content/uploads/2012/08/slp_25.pdf) [https://perma.cc/ZD3N-SXYX].

100. Theodore Scott, *Stormwater Utilities Offer Sustainable Funding Mechanism for MS4 Programs*, WATERWORLD (Aug. 2, 2013), <https://www.waterworld.com/articles/print/volume-29/issue-8/urban-water-management/stormwater-utilities.html> [https://perma.cc/Y3KS-ZVCJ]; Joseph Kane & Ranjitha Shivaram, *As Flood Risks Intensify, Stormwater Utilities Offer a More Resilient Solution*, BROOKINGS (Sept. 21, 2017), <https://www.brookings.edu/blog/the-avenue/2017/09/21/as-flood-risks-intensify-stormwater-utilities-offer-a-more-resilient-solution/> [https://perma.cc/7S44-GB99].

red state.<sup>101</sup> While California cities have significant independent revenue authority, they are subject to significant restrictions on their ability to use their property tax base because of Proposition 13.<sup>102</sup> Further, many of the infrastructure problems facing urban areas are regional in nature, and a legion of scholarship has documented the difficulties localism poses for challenging regional issues.<sup>103</sup>

### B. The Half-Empty Glass: Increasing Restrictions on Fiscal Capital

For all the excitement about progressive regulatory policies executed at the local level, fiscal constraints may make it much more difficult for a reimagined localism to thrive. In particular, new constraints on local finance are becoming an increasing challenge for local governance.

First, the 2017 tax reform bill limited the state and local tax deduction to \$10,000.<sup>104</sup> This limit places new pressure on local governments to keep tax bills low, especially in jurisdictions where many tax filers took the state and local tax (“SALT”) deduction. Because higher income earners disproportionately benefitted from the SALT deduction,<sup>105</sup> the cap may also put pressures on them to make more regressive changes to their tax structure. In New Jersey, estimates suggest that thirty percent of taxpayers would reach the \$10,000 cap based on their property taxes alone, while twenty percent of New Yorkers pay more than \$10,000 in property taxes.<sup>106</sup> Other states, including many New England states, California, Illinois, and Texas, also have significant populations whose property taxes exceed

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101. See Mary Williams Walsh & Karl Russell, *New York City Pensions Are Still in Crisis*, N.Y. TIMES (June 20, 2017), <https://www.nytimes.com/interactive/2017/06/20/business/dealbook/new-york-city-pensions.html> [<https://perma.cc/35GN-U6XH>].

102. ARTHUR O’SULLIVAN ET AL., PROPERTY TAXES AND TAX REVOLTS: THE LEGACY OF PROPOSITION 13 3 (1995).

103. See generally Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (providing a classic account of this criticism of local power).

104. See 26 U.S.C. §164(b)(6) (2018).

105. STAFF OF JOINT COMM. ON TAXATION, 114TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2015–2019 44–49 (1st Sess. 2015), [https://www.jct.gov/publications.html?func=download&id=4857&chk=4857&no\\_html=1](https://www.jct.gov/publications.html?func=download&id=4857&chk=4857&no_html=1) [<https://perma.cc/R7HT-TNLN>].

106. Michael Leachman, *House Tax Bill’s Changes to State and Local Tax Deductions Would Hurt States*, CTR. ON BUDGET & POL’Y PRIORITIES (Nov. 2, 2017, 3:45 PM), <https://www.cbpp.org/blog/house-tax-bills-changes-to-state-and-local-tax-deductions-would-hurt-states> [<https://perma.cc/N7QR-VA3P>].

\$10,000.<sup>107</sup> Moreover, this is before taxpayers consider their state (and local) income tax liability.

While much of the national media coverage has focused on the effect of the capped SALT deduction on blue, coastal states, local governments across the country have also expressed concern. For example, in Ohio, the mayors of nineteen Cleveland suburbs signed a letter opposing the limit.<sup>108</sup> The mayors argued that repealing the SALT deduction would “make it more burdensome and difficult for residents and communities to maintain local taxes that are needed to support police, fire, public works and public educational services for children” and rejected the argument that lower federal tax rates would counterbalance benefits to middle-class taxpayers.<sup>109</sup> The U.S. Conference of Mayors weighed in as well, arguing that changes to the SALT deduction disproportionately affect our cities, leaving large numbers of middle-class Americans paying more in taxes on dollars they will never see in the first place.<sup>110</sup> As Professor Matthew J. Rossman observed, the SALT deduction reduced the burden of higher taxes that middle- and upper-middle class taxpayers often face when they choose to live in older cities, with greater legacy costs as a result of aging infrastructure, among other issues.<sup>111</sup> As a result, he argues that “scaling back SALT in concert with doubling the

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107. *Id.*

108. Earl M. Leiken, Opinion, *Local Communities, Residents Will Suffer if GOP Tax Plan Wipes Out State and Local Tax Deductions*, CLEVELAND.COM (Nov. 29, 2017),

[http://www.cleveland.com/opinion/index.ssf/2017/11/local\\_communities\\_residents\\_wi.html](http://www.cleveland.com/opinion/index.ssf/2017/11/local_communities_residents_wi.html) [<https://perma.cc/5HJN-SUPG>] (reporting that the nineteen suburbs that signed the letter opposing the limit were Shaker Heights, Pepper Pike, Bedford Heights, Parma Heights, Garfield Heights, Parma, Olmsted Falls, Euclid, Brooklyn, University Heights, Bedford, Orange Village, Fairview Park, Moreland Hills, North Royalton, Cleveland Heights, Lakewood, Independence, and South Euclid).

109. *Id.*

110. See Sara Durr, *Mayors Urge Congress to Preserve State and Local Tax Deduction*, U.S. CONF. OF MAYORS (Sept. 27, 2017), <https://www.usmayors.org/2017/09/27/mayors-urge-congress-to-preserve-state-and-local-tax-deduction> [<https://perma.cc/TKA2-CUFY>]. The Mayors’ statement was issued in response to an earlier proposal to eliminate the SALT deduction entirely, but their point about the SALT deduction mattering more in urban areas remains.

111. Matthew J. Rossman, Opinion, *Cutback of State and Local Tax Deductions in GOP Tax Bill Would Harm Ohio’s Legacy Cities*, CLEVELAND PLAIN DEALER (Dec. 15, 2017), [https://www.cleveland.com/opinion/index.ssf/2017/12/gop\\_tax\\_bills\\_state\\_and\\_local.html](https://www.cleveland.com/opinion/index.ssf/2017/12/gop_tax_bills_state_and_local.html) [<https://perma.cc/MP7M-KM9C>].

standard deduction may very well choke demand for housing in legacy cities.”<sup>112</sup>

The deduction cap is an additional constraint on the ability of local governments to increase revenue and thus pay for needed local services. As a result, local governments may need to cut services. Of course, as the Center on Budget and Policy Priorities notes, states could raise other types of taxes, but “[t]hat would push more costs to middle- and low-income people, and make state and local tax systems even more regressive overall than they already are.”<sup>113</sup>

High-tax states are pursuing several policies to limit the effect on the SALT deduction.<sup>114</sup> The IRS recently issued guidelines suggesting that they will seek to limit such gamesmanship.<sup>115</sup> Thus, the outcome of many of these legislative fixes is far from clear, and local jurisdictions with high property taxes in lower tax states may face pressure to cut taxes while lacking support for state-level reforms that would relieve some of pressure of the SALT cap.

Second, the 2017 tax bill exacerbates the federal budget deficit and portends another round of federal budget cuts. The budget cuts will affect federal funding to both states and local governments.<sup>116</sup> In

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112. *Id.*

113. Michael Leachman & Iris J. Lav, *Eliminating State and Local Tax Deduction to Pay for Tax Cuts for Wealthy a Bad Deal for Most Americans*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 19, 2017), <https://www.cbpp.org/research/state-budget-and-tax/eliminating-state-and-local-tax-deduction-to-pay-for-tax-cuts-for> [<https://perma.cc/33V3-3RB7>].

114. *See, e.g.*, Joseph Bankman et al., *Deduct This: How States Can Undo One of the Most Potentially Destructive Elements of the Republican Tax Law*, SLATE (Jan. 11, 2018, 4:35 PM), <https://slate.com/news-and-politics/2018/01/how-states-can-undo-one-of-the-most-potentially-destructive-elements-of-the-new-tax-law.html> [<https://perma.cc/7YPS-JTPV>]; Joseph Bankman et al., *State Responses to Federal Tax Reform: Charitable Tax Credits*, ST. TAX NOTES (Apr. 30, 2018), <https://www.taxnotes.com/tax-notes/charitable-giving/state-responses-federal-tax-reform-charitable-tax-credits/2018/04/30/27y9x> [<https://perma.cc/V8RX-SUHS>]. New York State is also challenging the SALT cap in federal court. Katie Lobosco, *New York and Three Other States Claim Trump Tax Law Is Unconstitutional*, CNN (July 18, 2018, 9:29 AM), <https://www.cnn.com/2018/07/17/politics/new-york-tax-lawsuit/index.html> [<https://perma.cc/8BKM-FXNV>].

115. *See* INTERNAL REVENUE SERV., GUIDANCE ON CERTAIN PAYMENTS MADE IN EXCHANGE FOR STATE AND LOCAL TAX CREDITS: NOTICE 2018-54 (May 23, 2018), <https://www.irs.gov/pub/irs-drop/n-18-54.pdf> [<https://perma.cc/25UL-93HW>].

116. For example, the 2018 Trump budget included significant cuts in federal aid at both levels of government. Iris J. Lav & Michael Leachman, *The Trump Budget’s Massive Cuts to State and Local Services and Programs*, CTR. ON BUDGET & POL’Y PRIORITIES (June 13, 2017), <https://www.cbpp.org/research/state-budget-and-tax/the-trump-budgets-massive-cuts-to-state-and-local-services-and> [<https://perma.cc/6ZN8-YMKD>].

other words, the belt-tightening at the federal and state level often means that local governments are asked to do more with less money.

Third, additional state constitutional limits on local tax and revenue growth may inhibit the fiscal capacity of cities. In Texas, the governor endorsed a proposal to cap state property tax growth<sup>117</sup> in a way that almost suggests retribution for local government challenges to S.B. 4, the state's law that limits sanctuary city policies.<sup>118</sup> Considering how state regulatory preemption has quickly become a nationwide trend,<sup>119</sup> it would not be surprising if more restrictions on tax authority are in the works.<sup>120</sup>

### III. WHERE DO WE GO FROM HERE?

What do fiscal constraints mean for local government power? It is, of course, impossible to predict the future. As the old joke goes, economists have predicted nine of the last three recessions. Nevertheless, advocates of increased local autonomy should be thinking critically about the ways in which these constraints will shape the urban agenda in the coming decades. This Part first explores the ways these constraints will affect both traditionally local issues and the newer urban efforts to enforce progressive regulation. It will then consider the ways these fiscal constraints may shape the local-state relationship going forward.

Fiscal constraints have a direct impact on the amount of money available to be spent on local services. As discussed in Part II, local governments are facing both legal and practical constraints on their ability to generate higher revenue from taxes, and they may meet reductions in intergovernmental transfers from state and federal sources in the coming years.<sup>121</sup>

At the same time, there will be new demands on city budgets, including pension obligations and upgrading or replacing aging infrastructure. Advocates of pension reform have long warned of the

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117. Brandon Formby & Patrick Svitek, *Going Further Than Prior Proposals, Abbott Unveils a Plan to Slow Texas Property Tax Growth*, TEX. TRIB. (Jan. 16, 2018, 10:00 AM), <https://www.texastribune.org/2018/01/16/abbott-offers-plan-get-property-taxes-under-control/> [<https://perma.cc/RA2W-9AA2>].

118. *See generally* City of El Cenizo, Texas v. Texas, 890 F.3d 164 (5th Cir. 2018).

119. *See* Riverstone-Newell, *supra* note 69.

120. *See, e.g.*, Ana Ceballos, *Senate at Odds with House, Governor on Proposal that Limits Tax Hikes*, FLA. POL. (Jan. 29, 2018, 4:22 PM), <http://floridapolitics.com/archives/254807-senate-odds-house-governor-proposal-limits-tax-hikes> [<https://perma.cc/7BMN-JTYF>].

121. *See supra* Section II.B.

day when pension obligations would threaten the funding of bread-and-butter local services.<sup>122</sup> Pension problems affect cities of all sizes. For example, tiny Bisbee, Arizona (population 5312 in 2016) had the state's largest percentage of unfunded liability in the Pension Retirement System, owing \$10,115,918 to its retired firefighters and \$7,810,435 to its retired police officers as of January 2017.<sup>123</sup> Meanwhile, New York City (population 8,622,698 as of July 2017<sup>124</sup>) spent more than seventeen percent of its tax dollars on pension obligations in 2017 and still faced a significant shortfall.<sup>125</sup> There are heated debates over the amount of unfunded pension liability in the United States.<sup>126</sup> Estimates vary because there is considerable uncertainty about the rate of return governments can achieve on current assets.<sup>127</sup> Those most alarmed by the pension crisis fear that city projects rely on unreasonably rosy rates of return and thus unfunded liability is much greater than the amount that local governments report.<sup>128</sup> To close this gap, local governments must either cut pensions (a politically difficult task) or raise revenue (also problematic). Because pension funding does not increase currently provided local services, it is possible local taxpayers could face rising tax bills and shrinking service levels, which is a recipe for tax flight.

The potential for service cuts, tax increases, and the accompanying fiscal challenges are the most talked about consequences of urban fiscal constraints, but they are not the only consequences. Facing

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122. See generally Stephen D. Eide, *California Crowd-Out: How Rising Retirement Benefit Costs Threaten Municipal Services*, MANHATTAN (Apr. 16, 2015), <https://www.manhattan-institute.org/html/california-crowd-out-5878.html> [<https://perma.cc/G7D2-C9Z6>] (discussing this problem in California local governments).

123. See Eric Petermann, *Looming Pension Liabilities Threaten Local Governments*, HERALD/REV. MEDIA (Jan. 29, 2017), [https://www.myheraldreview.com/news/looming-pension-liabilities-threaten-local-governments/article\\_b7790442-e5d3-11e6-9082-c78f3ad18c90.html](https://www.myheraldreview.com/news/looming-pension-liabilities-threaten-local-governments/article_b7790442-e5d3-11e6-9082-c78f3ad18c90.html) [<https://perma.cc/5TK3-CXCM>].

124. U.S. Census Bureau, QuickFacts, New York City, New York, July 1, 2017, <https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork/PST045217> [<https://perma.cc/F6V2-GAU7>].

125. The exact size of the shortfall is disputed. Walsh & Russell, *supra* note 101.

126. See, e.g., *id.* (discussing issue with reference to New York City's pension obligations); Andrew Biggs, *U.S. State and Local Pensions Fund at Only Half the Levels of Some OECD Countries*, FORBES (May 10, 2016, 2:59 PM), <https://www.forbes.com/sites/andrewbiggs/2016/05/10/u-s-state-local-pensions-much-less-well-funded-than-government-employee-plans-in-oecd-countries/#365606b84e0d> [<https://perma.cc/8YZH-RFLM>].

127. Biggs, *supra* note 126; see Walsh & Russell, *supra* note 101.

128. See Biggs, *supra* note 126.

these challenges requires significant investments of policy resources and political capital address, and such efforts will necessarily compete with other kinds of local policy experimentation. For example, Houston's pension reform efforts have been heralded as a national model,<sup>129</sup> and these reforms took months of protracted negotiations between the public employee unions and city officials. The reform package then required approval from the state legislature,<sup>130</sup> and the legislature, in turn, required the city to seek approval for its proposed \$1 billion pension bond from city voters.<sup>131</sup> If voters had rejected the bond, the city would have been back where it started. But even after all that work, the city's fiscal problems are not entirely resolved. If the city's pension fund has a lower rate of return than expected or a better rate of return, that affects the city's contributions to the pension fund. If the contribution level must change by more than five percent in either direction, then the city and the public sector unions must go back to the table to renegotiate for a quicker pay down of debt or a reduction in benefits.<sup>132</sup> Moreover, these pension reforms do not affect the city's responsibility to pay for health care for its retirees.<sup>133</sup> Other cities facing significant pension problems may find even more stumbling blocks to success. As a result, these cities may either continue to drain political capital in an effort to solve the problem or face an increasingly dire fiscal situation, and city leadership will have less time and fewer resources to focus on other kinds of policy leadership. It is, after all, hard to implement a new regulatory agenda in a city facing severe fiscal problems.

At the same time, resource constraints can also fuel creative problem-solving. It was Houston's mayor Sylvester Turner's frank discussion of the prospect of municipal bankruptcy that brought the parties to the table to negotiate pension reform.<sup>134</sup> Already, for

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129. Kriston Capps, *The Great Texas Pension Fix*, CITYLAB (Jan. 18, 2017), <https://www.citylab.com/solutions/2017/01/the-great-texas-pension-fix/512060/> [<https://perma.cc/R8RZ-DU9L>].

130. Brandon Formby, *Houston Pension Bill Heads for Governor's Desk, but Firefighters Are Still Mad*, TEX. TRIB. (May 24, 2017), <https://www.texastribune.org/2017/05/24/house-approves-houston-pension-bill-firefighters-anger-remains/> [<https://perma.cc/5UR2-TWG2>].

131. See Capps, *supra* note 129.

132. *Id.*

133. See Chris B. Brown, Opinion, *After Pension Reform, Houston's Next Financial Challenge Looms*, HOUS. CHRON. (May 2, 2018, 9:17 AM), <https://www.houstonchronicle.com/opinion/outlook/article/After-pension-reform-Houston-next-financial-12879395.php> [<https://perma.cc/V7UJ-3YSV>].

134. See Capps, *supra* note 129.

example, the cap on the SALT deduction is driving renewed interest in municipal consolidation in New Jersey.<sup>135</sup>

More broadly, increasing fiscal problems may reinforce the justifications for limiting local power in the first place. States certainly have an interest in local finance distress as such distress influences the state economy and may also affect state tax collection. But one can imagine such arguments gaining purchase, especially in locales where the climate is already hostile to local policy autonomy. Of course, given states' own struggles with pensions, there is no reason to assume that states are better equipped to resolve these issues than cities. To the extent that cities face increasing fiscal problems, however, state officials are unlikely to blame themselves and the limited authority they granted local government to raise revenue. Rather, state officials may find it all too easy to push through more limits on local revenue to force local governments to spend wisely and thereby solve fiscal problems without increasing state aid to localities.

### CONCLUSION

Taken collectively, these fiscal constraints suggest that cities are uniquely vulnerable in our federalist system, saddled with significant, and perhaps increasing, responsibilities and limited in the revenue sources they have to pay for them. Advocates of a prominent regulatory role for cities must grapple with these fiscal constraints. These constraints drain city resources, making it more difficult for cities to pursue and expand their regulatory agenda.

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135. See generally Max Cohen, *Is Time Up for Tiny Towns in New Jersey? Some Say Mergers Would Save Money and Lower Taxes, but Skeptics Disagree*, PHILA. INQUIRER (July 3, 2018), [http://www.philly.com/philly/news/new\\_jersey/consolidation-new-jersey-small-town-taxes-municipal-mergers-20180703.html](http://www.philly.com/philly/news/new_jersey/consolidation-new-jersey-small-town-taxes-municipal-mergers-20180703.html) [https://perma.cc/B9DR-5JSA]; Chad Goerner, Opinion, *I Was the Last Mayor of Princeton Township: Consolidation Works and We Need to Stop Being Afraid of It*, NEWARK STAR-LEDGER (July 8, 2018), [https://www.nj.com/opinion/index.ssf/2018/07/i\\_was\\_the\\_last\\_mayor\\_of\\_princeton\\_to\\_wnship\\_consoli.html](https://www.nj.com/opinion/index.ssf/2018/07/i_was_the_last_mayor_of_princeton_to_wnship_consoli.html) [https://perma.cc/6ZQS-Q2BQ] (discussing the benefits of municipal consolidation in New Jersey).