

# Cities Taxing New Sins: The Judicial Embrace of Local Excise Taxation

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*The past decade has witnessed an unprecedented expansion in the number and reach of local excise taxes. Though excise taxes have always formed part of the American fiscal system, they have traditionally been largely state, or even federal, level taxes. Therefore, contemporary excise taxes that have received much attention—soda taxes, plastic bag taxes, gun taxes, and more—are innovative not only in the products they target, but also in the identity of the government imposing them: a city or county government. From a legal perspective, the most striking—and heretofore, largely unacknowledged—feature of this development is the wholehearted legal embrace of this turn to the local. This Article demonstrates that when confronting the new local excise taxes, courts have completely reversed their typically hostile attitude towards local action. Usually courts insist that a locality identify a source of authority for any act it adopts. But when the contested local act is an excise tax, courts will only strike it down if an explicit state preempting law is shown—and, when present, they will interpret such a law narrowly. This result is achieved through the manipulation of a series of doctrines that are at play when local excise taxes are challenged, including doctrines pertaining to the interpretation of enabling acts, to home rule initiative powers, to implied preemption, to home rule immunity powers, to uniformity in taxation clauses, and more. The justifications courts provide for these moves draw on a formalistic, and rather unpersuasive, distinction between taxation and regulation. Still, this Article argues that courts’ resultant permissive attitude towards local excise taxation is worthwhile for other, substantive, reasons: local decision-making in this specific field promotes the political and economic normative values normally ascribed to localism.*

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## I. INTRODUCTION

For almost a decade now, the defining characteristic of the state–local relationship has been the reassertion of state supremacy. Owing to the widening divide between the nation’s politically progressive big cities and the much more conservative politicians controlling many state capitols, the power of local governments to initiate policies—innovative policies but also traditional ones—has been harshly curtailed. Most blatantly, state legislative preemption of local ordinances has grown much more pervasive—and significantly more aggressive. In a series of recent articles, some of the most prominent scholars of local government law have investigated this contemporary unbalancing of the state–local relationship.<sup>1</sup> These authors stress the threat these new practices pose to the standing of local governments and, consequently, to the normative value attributed to localism in the American scheme of government.

Yet, at the same time that their policymaking powers have generally been under attack, local governments’ presence in one highly conspicuous field has actually grown dramatically more pronounced. Excise taxation is now, more than ever before, a sphere where local governments are hectically active. Plastic bags, soda, guns, high salaries, marijuana, large employee counts,<sup>2</sup> and in one

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<sup>1</sup> See generally Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (discussing the emergence and rapid spread of novel, and particularly harsh, forms of state preemption of local government action); Nestor Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. (forthcoming 2019) (arguing that the recent surge in state preemption requires the development of a more principled approach to the vertical allocation of authority between the state and the city); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) (discussing the attack by state legislatures on municipal ordinances).

<sup>2</sup> See *infra* Part II.A.

proposal, human-replacing robots,<sup>3</sup> have all become targets for special, new, municipal taxes. Most striking from a legal perspective has been the fact, heretofore largely ignored by commentators, that courts throughout the land have, almost unanimously, tended to embrace this form of local action—even when faced with contradictory state-level legislative dictates.<sup>4</sup>

The turn to local excise taxes thus not only bucks the current political dynamic in the local–state relationship; it also unsettles the traditional legal attitude towards cities’ standing in that relationship. Ever since the nineteenth century, the dominant theme in the judicial regulation of the state–local relationship has been an overall preference for consolidation of power on the state level. Federal and state courts famously refer to the city as a “creature” of the state.<sup>5</sup> Accordingly, they tend to adopt in most cases a restrictive approach, insisting that local governments pinpoint a state authorization for each and every one of their actions and interpreting such authorizations narrowly.<sup>6</sup> Even legislative and constitutional reforms adopted to overrule this approach have, more often than not, confronted judicial intransigence and have, as a result, largely failed to dislodge anti-city legal attitudes. The recent legislative attacks on cities are arguably unprecedented in their ferocity, but courts have, throughout our modern legal history, paved the way for them and handicapped cities’ ability to resist. Much of local government scholarship—in law, but also in economics, political science, sociology, and philosophy—is a lament about this modern legal attitude and a call for reforms that would unleash city power and chip away at the state’s supremacy.<sup>7</sup>

Local excise taxation, as this Article will show, is a field in which courts have actually heeded this call to nurture municipal action. They have endorsed cities’ moves to adopt new excise taxation schemes.<sup>8</sup> Indeed, they have actively incentivized local governments to turn to excise taxation. Without stating so explicitly, and through the manipulation of diverse doctrines, courts have

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<sup>3</sup>Emily Price, *Bill Gates’ Plan to Tax Robots Could Become a Reality in San Francisco*, FORTUNE (Sept. 5, 2017), <http://fortune.com/2017/09/05/san-francisco-robot-tax/> [<https://perma.cc/PF4Q-68C3>].

<sup>4</sup>See *infra* Part III.

<sup>5</sup>See, e.g., *New Orleans v. Clark*, 95 U.S. 644, 654 (1877); *Comm’rs of Laramie Cty. v. Comm’rs of Albany Cty.*, 92 U.S. 307, 308 (1875); *W. Saving Fund Soc’y v. City of Philadelphia*, 31 Pa. 175, 182 (Pa. 1858) (“[A] municipal corporation . . . may be created and destroyed by the state at pleasure”). The attitude is most famously associated with the decision in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907), where the Supreme Court refused to entertain a challenge by residents to a state’s decision to disband their city and annex it to another.

<sup>6</sup>See, e.g., *Hunter*, 207 U.S. at 178–79; *Clark*, 95 U.S. at 654.

<sup>7</sup>E.g., HANNAH ARENDT, *ON REVOLUTION* 283 (1963); GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 8–9 (1999); RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE* 15–17 (2016); RICHARD SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY & CITY LIFE* 190–94 (1970); Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 967 (1967).

<sup>8</sup>See *infra* Part III.

adopted an approach for local excise taxes that reverses the traditional, state-centric, legal test for local action (and for other, non excise-based, forms of local taxation).<sup>9</sup> When a city resorts to excise taxes, rather than require that it identify explicit state authorization for its action (as is common elsewhere), courts require that the challenging state identify an unambiguous state-level prohibition on the city's action.<sup>10</sup> Courts, that is, refuse to independently interpose on behalf of the state, forcing the state legislature to take active legislative steps to stop the local excise tax. They thereby greatly expand the grounds for local action.<sup>11</sup>

The permissive attitude towards excise taxation revealed in this Article is particularly intriguing since excise taxes combine fiscal powers with regulatory ones. As fiscal measures, these taxes represent a vehicle for local governments to expand their revenue base at a time when many American cities are confronted with mounting financial distress. Financial struggles are a defining element of contemporary American localism.<sup>12</sup> Over the past half-decade, Detroit entered bankruptcy;<sup>13</sup> Chicago's bonds were downgraded to junk grade;<sup>14</sup> and many local governments have been contending with pension liabilities universally deemed unsustainable.<sup>15</sup> The need to replenish local coffers is thus acute. The law further compounds the problem since local governments are severely hampered in their legal ability to address their pecuniary need. State supremacy in American law has largely been established through the undermining of local financial independence.<sup>16</sup> States strictly limit

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<sup>9</sup> See *infra* Part III.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> A recent, and valuable, article implored courts to adopt this approach to local taxation. Erin Adele Scharff, *Powerful Cities? Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 334 (2016). Since that article mostly does not distinguish excise taxes from other municipal taxes, it cannot note the fact—to be established here—that courts have actually been acting in this fashion, with respect to that one group of taxes.

<sup>12</sup> For a comprehensive account of cities in fiscal distress and the reasons leading to that distress, see Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1130–51 (2014).

<sup>13</sup> See *In re City of Detroit*, No. 13-53846, 2013 WL 4761053, at \*1 (Bankr. E.D. Mich. 2013).

<sup>14</sup> In May 2015, the rating agency Moody's dropped Chicago's debt to "junk bond" status. See Aaron Kuriloff, *Moody's Cuts Chicago's Debt to Junk: Ratings Firm Drops City's Debt Two Notches to BAI from BAA2*, WALL ST. J. (May 12, 2015), <https://www.wsj.com/articles/moodys-cuts-chicagos-debt-to-junk-1431470944> [<https://perma.cc/K3DC-PSG7>].

<sup>15</sup> See Alexis Stephens, *Which Cities Should Be Most Worried About Pension Funds?*, NEXT CITY (Sept. 3, 2014), <http://nextcity.org/daily/entry/cities-pension-funds-worries> [<https://perma.cc/RJ3R-VHCX>] (discussing municipal pension-funding shortfalls and responses).

<sup>16</sup> Nadav Shoked & Daniel Rodriguez, *Financing Local Governments in Times of Recession: Financial and Legal Innovation in the Face of the 2008 Crisis*, in THE LEGAL

cities' ability to raise debt<sup>17</sup> and enter bankruptcy;<sup>18</sup> they closely regulate local taxation powers and taxing practices;<sup>19</sup> they mostly render the most important tax on which governments, such as the state itself, rely—the income tax—legally unavailable to American localities;<sup>20</sup> and finally, over the past forty years, state constitutions and laws have increasingly limited property taxes, cities' chief form of taxation.<sup>21</sup> With many other financial avenues thereby curtailed, the judicial move to throw wide-open the doors for local excise taxation is bound to substantially impact local fiscal behavior.

The legal approach toward local excise taxes is noteworthy not solely due to such actual and potential fiscal effects. Excise taxation is a special form of taxation. These are taxes that carry an explicitly regulatory component. All taxes, naturally, represent a form of regulation: altering activities' costs inevitably affects market choices. Excise taxes are perhaps the most extreme illustration of this fact; they single out specific goods, say alcohol or tobacco, and render them more expensive to consume. They, in other words, decrease those goods' availability. Empowering cities to engage in excise taxation thus empowers them to engage in the regulation of individual behavior whose policing might otherwise be reserved to the state.

The practical importance of this shift in the city–state relationship might extend still further in our current age of political polarization between cities and their host states. Excise taxes are a potent tool in the hands of cities seeking to pursue, or to make a statement regarding, social and economic goals, particularly those that are hotly contested. They enable cities whose population is of one political persuasion to defy the preferences of their larger home state where the majority of the population may be of the other persuasion. Many local excise taxes have, therefore, been driven by certain cities' beliefs regarding controversial environmental, cultural, and health concerns—beliefs not shared with their state's leadership.<sup>22</sup>

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POWER OF CITIES: GLOBAL PERSPECTIVES IN URBAN LAW (Nestor Davidson ed., forthcoming 2018).

<sup>17</sup> See Nadav Shoked, *Debt Limits' End*, 102 IOWA L. REV. 1239, 1251–52 (2017).

<sup>18</sup> See Anderson, *supra* note 12, at 1152.

<sup>19</sup> See, e.g., LA. CONST. art. VI, § 29 (limiting a local government's use taxes and sales, taxes to 3% unless a higher rate is authorized by the state legislature and approved by a majority of local voters); MO. CONST. art. X, § 22 (requiring that increases in local taxes be subject to voter approval and banning them from exceeding any increase in the consumer price index for all urban consumers); LA. STAT. ANN. § 33:2711 (2002) (limiting local sales taxes); N.Y. TAX LAW § 1201(a) (McKinley 2017) (restricting local sales taxes).

<sup>20</sup> See NAT'L LEAGUE OF CITIES, *Cities and State Fiscal Structure* 16 tbl.1A (2015), [http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/NLC\\_CSFS\\_Report\\_WEB.PDF](http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/NLC_CSFS_Report_WEB.PDF) [<https://perma.cc/3225-TU57>] (summarizing available municipal taxing authority).

<sup>21</sup> See, e.g., CAL. CONST. art. XIII A, § 1(a) (limiting local real estate tax levels); N.Y. CONST. art. VIII, § 10 (same); IDAHO CODE § 63-1313(1)(a) (2015) (same); LA. STAT. ANN. § 33:2711 (limiting local sales taxes).

<sup>22</sup> See *infra* Part II.B.

The new local excise taxes therefore cry out for attention. As an important and expanding policy tool for local revenue-raising and regulation, their legal standing ought to be described and analyzed. As a deviation from the regular patterns of the legal policing of the state–local relationship, at a time when that relationship is particularly strained, the legal standing of local excise taxes offers a convenient vehicle for normatively assessing the position of local governments in the local–state interface.

To fulfill these tasks—descriptive and normative—this Article proceeds as follows. Part II provides a brief overview of current city practices respecting excise taxes. It lists the goods and activities that cities have been recently subjecting to excise taxation, and the motivations that breed such taxes. Part III presents the legal framework within which these taxes are adopted, by summarizing the litigation that has surrounded local excise taxes. It concludes that, in tandem, courts’ decisions under the different doctrinal headings used to attack local excise taxes unsettle the traditional formula for balancing state and city powers—in favor of local action. Part IV normatively assesses this mode of resolving the state–local battle over excise taxation. It finds that, in light of the rationales for excise taxation identified in Part II, the reasoning courts provide for their permissive approach toward local excise taxation outlined in Part III is unpersuasive. Still, Part IV argues that normatively this judicial attitude is desirable, since local excise taxation—while not categorically different from other forms of local regulation as courts contend—tends to serve the goals normally associated with localism without raising the concerns that usually justify the wielding of state authority to restrain local regulation.

## II. LOCAL EXCISE TAXATION

### A. *The New Local Excise Taxes*

Excise taxes are an amount of money paid to the government whenever a specific good is purchased, or when a specific activity is engaged in.<sup>23</sup> As such, these taxes are a variant of the sales tax—a duty imposed on purchases. Unlike normal sales taxes, which are general and apply to all goods (often with some exceptions), excise taxes are a special, additional tax imposed only on the sale of certain products. The earliest, and longest-running, excise taxes are those imposed on alcohol and tobacco.<sup>24</sup> Fuel (gas and diesel) taxes are another

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<sup>23</sup> *Excise Tax*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/excise-tax> [<https://perma.cc/LKJ9-8GTC>] (last updated Apr. 13, 2018).

<sup>24</sup> A federal alcohol tax was adopted as early as 1791 (inciting the Whiskey Rebellion). TUN YUAN HU, *THE LIQUOR TAX IN THE UNITED STATES, 1791–1947*, at 19–33 (1950). The tax was abolished in 1802 and reintroduced during the war of 1812. *Id.* at 33. It was then imposed on a long-term basis during the Civil War. During the early 19th century, the federal government had, at times, an excise tax applied to tobacco. SUSAN WAGNER, *CIGARETTE*

instance of excise taxation with which most individuals are acquainted. These examples highlight the extent to which excise taxes have always been a part of the American fiscal state. They also highlight a key legal attribute about excise taxes in the American fiscal system: by and large, excise taxes—unlike other taxes imposed on goods, such as property or sales taxes—have primarily been state, or even federal, taxes.<sup>25</sup>

Recently, however, a noticeable trend has emerged: local governments have entered the field of excise taxation much more forcibly than ever before. In so doing, they have not only expanded the number of governments engaged in excise taxation in America, but also expanded the number of goods and services subject to excise taxation in America. While cigarettes, the traditional target for any excise tax, might also be the earliest example for a local excise tax (six hundred local governments still have cigarette excise taxes),<sup>26</sup> local governments now tax an array of other products, enlarging the sphere of goods subject to excise taxation well beyond its historical domain.

Several examples for the products that have become the most popular targets for local excise taxation can illustrate this phenomenon. In 2005, San Francisco was the first city to propose an excise tax on plastic shopping bags, and though the legislative effort there fizzled,<sup>27</sup> dozens, if not hundreds, of local governments now impose such taxes on plastic or paper bags.<sup>28</sup> In addition, since 2008, Chicago has been imposing a separate tax on bottled water.<sup>29</sup> Across the Bay from San Francisco, Berkeley became the first local government to impose an excise tax on sugar-sweetened beverages in 2014.<sup>30</sup> Since January

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COUNTRY: TOBACCO IN AMERICAN HISTORY AND POLITICS 119 (1971). The Civil War made such taxes both more substantial and permanent. *Id.*

<sup>25</sup> On the early taxes being federal, see discussion in *supra* note 24. In 1921, Iowa became the first state to tax tobacco. WAGNER, *supra* note 24, at 119. North Carolina was the last state to tax cigarettes when it added a two cent tax per cigarette pack in 1969. INSTITUTE OF MEDICINE (US) COMMITTEE ON PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS, GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 178 (Barbara S. Lynch & Richard J. Bonnie eds., 1994), <https://www.ncbi.nlm.nih.gov/books/NBK236771/#ddd00127> [https://perma.cc/3RHE-8A6M].

<sup>26</sup> See Ann Boonn, *Local Government Cigarette Tax Rates & Fees*, CAMPAIGN FOR TOBACCO-FREE KIDS (June 25, 2018), <https://www.tobaccofreekids.org/assets/factsheets/0304.pdf> [https://perma.cc/3JF6-G94T].

<sup>27</sup> Andy Keller, *History of the Plastic Bag (Updated 11/2016)*, BAGMONSTER (Nov. 11, 2016, 12:00 AM), <https://www.bagmonster.com/2016/11/history-of-the-plastic-bag.html> [https://perma.cc/N7V2-DGMB].

<sup>28</sup> Even when an ordinance aims to ban plastic bags, to be effective, it must include a tax on paper bags, for otherwise consumers are unlikely to turn to reusable bags. *Plastic Bag Bans and Fees*, SURFRIDER FOUND., <http://www.surfrider.org/pages/plastic-bag-bans-fees> [https://perma.cc/J4VT-7HRE].

<sup>29</sup> See CHI., ILL. MUN. CODE § 3-43-030 (2008) (the rate is \$0.05 per bottle of water).

<sup>30</sup> See Vauhini Vara, *There's Now a Soda Tax in Philadelphia, but Not Because Sugar Is Bad for You*, NEW YORKER (June 16, 2016), <https://www.newyorker.com/business/curr>

2017, Philadelphia is the largest city in the country with such a tax,<sup>31</sup> a title it had to forego for a few brief months during the summer of 2017 when Cook County, Illinois, had the tax (the Cook County tax was repealed in October 2017—as will be discussed in Part IV).<sup>32</sup> Cook County still enforces, ever since 2013, a tax on the sale of firearms,<sup>33</sup> which was also adopted in 2015 by Seattle where it also applies to the sale of ammunition<sup>34</sup> (Los Angeles considered replicating that model).<sup>35</sup> In states, such as California and Colorado, where the sale of marijuana has been legalized, many cities have proceeded to devise special excise taxes for it.<sup>36</sup>

The new local excise taxes do not only, as in these examples, apply to products—the customary realm of excise taxation. Excise taxes can be imposed on activities, rather than sales, as in the few localities that tax video gambling and slot machines,<sup>37</sup> or as in the case of congestion taxes (repeatedly suggested in New York City) that charge those who drive into downtown at certain times.<sup>38</sup> Further indicating the expansion of the realm of excise taxation—emblematic of the tax’s local turn—is a nascent movement among localities to create special categories within the non-sales-based components of their tax systems (as noted, excise taxes are traditionally taxes imposed on the sale of goods) that mimic, in their operation, the logic of excise taxation. On the property tax front, some

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ency/theres-now-a-soda-tax-in-philadelphia-but-not-because-sugar-is-bad-for-you [https://perma.cc/864Q-LLQ4]. Earlier such taxes were adopted on the state level and were rather low. See Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 855–56 (2000).

<sup>31</sup> See PHILA., PA., CODE § 19-4103 (2017); John Bacon, *Push for Soda Taxes Across the USA Notches Win in Philly*, USA TODAY (July 18, 2018), <https://www.usatoday.com/story/news/nation/2018/07/18/philly-soda-tax-survives-court-challenge/796104002/> [https://perma.cc/YTS8-WGQC].

<sup>32</sup> See *infra* note 164.

<sup>33</sup> COOK COUNTY, ILL. CODE OF ORDINANCES, §§ 74-665 to 677 (2015).

<sup>34</sup> SEATTLE, WA. MUN. CODE ch. 5.50 (2015). Twenty-five dollars on every firearm sold and up to five cents on a round of ammunition. *Id.* The revenue is to be used for gun violence related research. Lynsi Burton, *Seattle’s Gun Tax Revenue Falls Well Short of Forecast*, SEATTLEPI (Aug. 15, 2017), <https://www.seattlepi.com/local/article/Seattle-s-gun-tax-falls-well-short-of-forecast-11821674.php> [https://perma.cc/CET9-FRJX].

<sup>35</sup> See Paul Koretz & Paul Krekorian, *Motion to Consider Sales Tax on Firearm & Ammunition Sales*, CITY OF L.A. (Oct. 6, 2015), [http://clkrep.lacity.org/onlinedocs/2015/15-1188\\_misc\\_10-6-15.pdf](http://clkrep.lacity.org/onlinedocs/2015/15-1188_misc_10-6-15.pdf) [https://V5KL-LLCW]; Dakota Smith, *Los Angeles Gun Tax under Consideration by City Hall*, L.A. DAILY NEWS (Oct. 10, 2015), <https://www.dailynews.com/2015/10/10/los-angeles-gun-tax-under-consideration-by-city-hall/> [https://perma.cc/7CX7-A4TS].

<sup>36</sup> See, e.g., BOULDER, COLO., MUN. CODE tit. 3, ch. 14 (2013); DENVER, COLO., CODE OF ORDINANCES §§ 53-83 to 87 (2013); PORTLAND, OR., CITY CODE & CHARTER ch. 6.07 (2016); SAN JOSE, CAL., CODE OF ORDINANCES ch. 4.66 (2010).

<sup>37</sup> See, e.g., DETROIT, MICH., CODE OF ORDINANCES art. XIV, § 18-14 (1999).

<sup>38</sup> Jim Dwyer & Winnie Hu, *Driving a Car in Manhattan Could Cost \$11.52 Under Congestion Plan*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/ny-region/driving-manhattan-congestion-traffic.html> [on file with *Ohio State Law Journal*].

cities impose special taxes on vacant, or merely underdeveloped, lots.<sup>39</sup> Others may be tempted to follow the model set in Canada by Vancouver's empty home tax, that applies to residences that do not serve as the owner's or a renter's primary residence.<sup>40</sup> On the income tax front, in July 2017, Seattle adopted a special tax applicable only to those earning high incomes.<sup>41</sup> The measure purported to be a tax on the "privilege" of receiving certain amounts of pay.<sup>42</sup> The following May, the city further adopted a business tax (or employer's tax) that assumed the form of an excise tax.<sup>43</sup> Seattle's Employee Hours Tax, more popularly dubbed the "Amazon Tax," required businesses making at least \$20 million in gross revenue to pay a tax of \$275 per full-time worker per year.<sup>44</sup> Revenues were dedicated to building or preserving affordable housing and providing wraparound services for the homeless.<sup>45</sup> Seattle's council almost immediately thereafter repealed the tax<sup>46</sup>—as will be discussed in Part IV—but in Mountain View, California (home to Google) such a measure was approved by the council for a November 2018 referendum,<sup>47</sup> and other Bay Area cities—San Francisco, East Palo Alto, Cupertino (where Apple is located)—are similarly exploring such an employee head tax.<sup>48</sup>

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<sup>39</sup> See, e.g., Elaine S. Povich, *Can Extra Taxes on Vacant Land Cure City Blight?*, PEW CHARITABLE TR. (Mar. 7, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/03/07/can-extra-taxes-on-vacant-land-cure-city-blight> [https://perma.cc/W2WD-8E4K] (discussing Washington, D.C., and municipalities in Connecticut and Pennsylvania); see also 8 D.C. CODE § 47-813 (2012); CHI., ILL., MUN. CODE § 13-12-125(a)(1) (2011).

<sup>40</sup> See Vancouver, B.C., Vacancy Tax By-Law No. 11674 (Nov. 16, 2016) (consolidated July 11, 2017).

<sup>41</sup> SEATTLE, WASH., MUN. CODE ch. 5.65 (2017).

<sup>42</sup> Defined, for individuals, as annual earnings of above \$250,000. *Id.* The tax was struck down by the lower court. For a discussion, see *infra* notes 45–48 and accompanying text.

<sup>43</sup> SEATTLE, WASH., ORDINANCE 125578 (May 16, 2018) (repealed by SEATTLE, WASH., ORDINANCE 125592 (June 13, 2018)).

<sup>44</sup> See Nick Wingfield, *Seattle Scales Back Tax in Face of Amazon's Revolt, but Tensions Linger*, N.Y. TIMES (May 14, 2018), [https://www.nytimes.com/2018/05/14/technology/seattle-amazon-headquarterstax.html?dlbk=&emc=edit\\_dk\\_20180515&nl=dealbook&nid=30788195\\_dk\\_20180515&te=1](https://www.nytimes.com/2018/05/14/technology/seattle-amazon-headquarterstax.html?dlbk=&emc=edit_dk_20180515&nl=dealbook&nid=30788195_dk_20180515&te=1) [on file with *Ohio State Law Journal*].

<sup>45</sup> *Id.*

<sup>46</sup> SEATTLE, WASH., ORDINANCE 125592 (June 13, 2018).

<sup>47</sup> Mark Noack, *Council Backs Employee Tax That Would Cost Google Millions*, MOUNTAIN VIEW VOICE (June 7, 2018, 11:11 AM), <https://www.mv-voice.com/news/2018/06/07/council-backs-employee-tax-that-would-cost-google-millions> [https://perma.cc/KR5W-JGQR]. Revenue from the annual \$150 per-employee tax on big businesses will be used to fund transit projects and alleviate transportation pressures generated by, according to the council, the invasion and growth of these businesses. *Id.*

<sup>48</sup> George Avalos, *Silicon Valley Tsunami? Tax Plans Aimed at Apple, Google Could Start a New Wave, City Leaders Say*, MERCURY NEWS (May 29, 2018), <https://www.mercurynews.com/2018/05/29/apple-google-headcount-taxes-three-silicon-valley-cities-just-the-start/> [https://perma.cc/Z532-34JP].

### B. *The Motivations for Adopting Excise Taxes*

Clearly, local excise taxes are on the upswing: more local governments are adopting more types of excise taxes. Why? Why do governments turn to this form of taxation? In order to assess these diverse new taxes as this Article aims to do, the motivations drawing municipalities to excise taxes must be identified.

Excise taxes can be said to serve four distinct, often conflicting, goals. First, and perhaps most obviously, like any other tax, an excise tax is a measure for raising revenue: by charging, for example, a levy on every cigarette sold, the local government is bound to enrich its coffers. As such, localities' recent penchant for excise taxation can be ascribed to the financial distress many of them are experiencing. Cook County, for example, is strapped for resources, and thus its attempts to introduce new excise taxes are hardly surprising.<sup>49</sup>

Second, an excise tax may serve as a Pigouvian tax: a levy that forces buyers or users of a product to internalize the full social costs of the product's consumption.<sup>50</sup> Some behaviors—say the smoking of a cigarette—generate externalities for the surrounding community and government—say harms to others through passive smoking or increased expenditures on public health services. Through the tax, the government forces the consuming actor to account for those social effects.<sup>51</sup> Seattle's Amazon Tax, for instance, was conceived as a mechanism forcing big corporations to experience (and in that case, fund) the costs of the city's measures to alleviate the housing shortages allegedly generated by the influx of those corporations' affluent employees.<sup>52</sup>

Third, excise taxes can be used not as Pigouvian levies forcing actors to take account of costs they generate to others, but rather as levies forcing them to take account of costs they generate to themselves ("internalities"). In other words, excise taxes may aim to divert actors not from uses that might hurt the public, but from uses that might hurt the actors themselves.<sup>53</sup> Excise taxes can be born of a paternalistic concern, grounded in the assumption that an actor's choice is not fully informed—say she is unlikely to understand the risk smoking poses to her own well-being—and thus external intervention in the form of a tax is necessary to deter her from making the choice. The recent drive to tax soda

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<sup>49</sup> Hal Dardick, *Preckwinkle: Tax Hike, Budget Cuts on Table as County Faces \$174M Shortfall*, CHI. TRIB. (June 30, 2016), <http://www.chicagotribune.com/news/local/politics/ct-cook-county-budget-shortfall-met-0631-20160630-story.html> [<https://perma.cc/89MD-R588>].

<sup>50</sup> See generally A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1962) (arguing that the existence of externalities justifies government intervention to discourage the activity producing the externalities).

<sup>51</sup> See James R. Hines, Jr., *Taxing Consumption and Other Sins*, 21 J. ECON. PERSP. 49, 64 (2007).

<sup>52</sup> The Robot tax was also presented as pursuing after an externality: the displacement of workers. See Price, *supra* note 3.

<sup>53</sup> See Ted O'Donoghue & Matthew Rabin, *Optimal Sin Taxes*, 90 J. PUB. ECON. 1825, 1826 (2006).

draws much of its force from the alleged health and lifestyle harms these drinks inflict on their unknowing consumers.<sup>54</sup>

Fourth, excise taxes can be grounded not in an economic notion that the actor's choice will be harmful—to others or to herself—and should thus be made to reflect said cost, but rather in a moralistic, or political, judgment respecting that choice.<sup>55</sup> Adam Smith famously wrote: “Sugar, rum, and tobacco, are commodities which are no where necessities of life, which are become objects of almost universal consumption, and which are therefore extremely proper subjects of taxation.”<sup>56</sup> A tax on cigarettes can be a product of a harsh valuation of cigarettes' moral and aesthetic worth or of that of the individuals smoking cigarettes. Gun taxes in cities with very few gun stores—such as Seattle—are probably much more concerned with making a political statement than with raising revenue or affecting behavior.<sup>57</sup> Plastic bag fees also increasingly function as political symbols: a mark of environmental resistance for progressives, an assault on personal choice and freedom for conservatives.<sup>58</sup>

These different goals local excise taxes are set to serve almost inevitably conflict among themselves. Partially as a result, these local taxes, also almost inevitably, generate conflicts with the state's interests.

Consider the local cigarette tax. If the tax effectively promotes the alleged goal of depressing the consumption of the product deemed harmful (for Pigouvian or paternalistic reasons), then the number of cigarettes purchased will decline, and the revenue raised through the tax—an excise tax's first goal—will decrease. Not only the local taxing authority, but also the state, which imposes

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<sup>54</sup> See *supra* note 30.

<sup>55</sup> See Bruce G. Carruthers, *The Semantics of Sin Tax: Politics, Morality, and Fiscal Imposition*, 84 *FORDHAM L. REV.* 2565, 2566 (2016) (exploring the “negative social meanings [that] can be projected through public revenue systems”).

<sup>56</sup> ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 1016 (Edwin Cannan ed., 1994).

<sup>57</sup> See Dan Springer, *Seattle Gun Tax Failure? Firearm Sales Plummet, Violence Spikes After Law Passes*, FOX NEWS (June 15, 2017), <http://www.foxnews.com/politics/2017/06/15/seattle-gun-tax-failure-firearm-sales-plummet-violence-spikes-after-law-passes.html> [<https://perma.cc/HFW9-4GRC>] (noting that only one large gun retailer operated in the city at the time of writing, and that when the ordinance was passed another was still in town); Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 241, 253 (Eyal Zamir & Doron Teichman eds., 2014) (discussing the practice of adopting, for symbolic reasons alone, local regulations banning activities that do not take place within the relevant locality).

<sup>58</sup> See Henry Grabar, *When Did the Freedom to Use Plastic Bags Become a GOP Priority?*, SLATE (June 9, 2016, 8:00 AM), [http://www.slate.com/blogs/moneybox/2016/06/09/plastic\\_bag\\_bans\\_are\\_being\\_replaced\\_by\\_plastic\\_bag\\_ban\\_bans.html](http://www.slate.com/blogs/moneybox/2016/06/09/plastic_bag_bans_are_being_replaced_by_plastic_bag_ban_bans.html) [<https://perma.cc/Y83K-GYVW>]. A bill introduced in Texas immediately after the city of Austin adopted a plastic bag ban was appropriately titled the Shopping Bag Freedom Act. H.R. 2416, 83rd Leg. Reg. Sess. (Tex. 2013). The Bill failed. Local plastic bag bans were later struck down by the state's supreme court interpreting an existing state law. *City of Laredo v. Laredo Merchs. Org.*, No. 16-0748, 2018 WL 3078112, at \*9 (Tex. June 22, 2018).

a sales tax of its own on all products (and on cigarettes, its own excise tax),<sup>59</sup> will lose funds due to the reduction in sales the local excise tax brings about.<sup>60</sup>

The local cigarette tax generates still other conflicts with the state. If imposed to supposedly compensate the city, as a Pigouvian tax, for the social costs the city bears due to residents' consumption of cigarettes, the state may believe that it, not the city, actually sustains those costs—as the state carries most of the burden of funding social and health services.<sup>61</sup> Even if those costs are borne locally, the state may believe the locality experiencing those costs is not necessarily the taxing locality: Berkeley residents might be buying their cigarettes in Oakland and smoking them in San Francisco.

Finally, if the cigarette tax expresses the city's paternalistic or moral assessment of the value of consuming cigarettes, the state might not share that assessment. Scientific opinion might differ on the alleged health harms the taxed product inflicts on its user. Even if all concur on these harms, researchers might disagree on the supposedly beneficial effects of the product's taxation. The city might find one scientific viewpoint more persuasive, while the state prefers the other. These conflicts can, and often are, still more bitter since not only science might be at stake. The excise tax might draw on political or ideological motivations, which may color the choice of sides in the scientific debate about harms the good inflicts, or even independently justify—or delegitimize—the tax. Support or opposition to the cigarette tax might be, for example, a function of the level of dedication to libertarian ideas of unbridled individual freedom. Local officeholders (and voters) might be less dedicated to such principles than their state level counterparts. As already noted, they often clearly are.

Since local excise taxes can therefore conflict with the state's economic or political stances, courts are often asked to distribute excise taxing powers between the state and the locality. They must answer the question: can the city enact an excise tax, despite a potential conflict with state interests?

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<sup>59</sup>Forty-five states collect statewide sales tax. Megan Trimble, *The 10 States That Collect the Most Sales Tax*, U.S. NEWS (Oct. 23, 2017), <https://www.usnews.com/news/best-states/articles/2017-10-23/these-10-states-collect-the-most-in-sales-tax-per-capita> [<https://perma.cc/2YC3-7LQM>]. All states have a cigarettes tax. INSTITUTE OF MEDICINE, *supra* note 25, at 178.

<sup>60</sup>As many have noted, tobacco taxes create a perverse incentive by which states become dependent on continued smoking. *See, e.g.*, Andrew J. Haile, *Sin Taxes: When the State Becomes the Sinner*, 82 TEMP. L. REV. 1041, 1044 (2009). Consequently, many states regulate local cigarette taxes. *See U.S. Local Tobacco Tax Authority: A 50-State Review*, TOBACCO CONTROL LEGAL CONSORTIUM, <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-tobacco-tax-authority-50-state-review-2016.pdf> [<https://perma.cc/HCL8-UP23>].

<sup>61</sup>*See* Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1248 (2014) (“[I]n terms of consistent, ultimate liability for medical costs, the state and federal governments bear much more of the financial burden caused by obesity and tobacco.”).

### III. THE LEGAL TREATMENT OF LOCAL EXCISE TAXATION

Almost all local excise taxes enacted so far, and described in the preceding Part, have faced legal challenges. Any excise tax has a built-in, and moneyed, interest group arrayed against it, and that group will bring a lawsuit challenging, as a matter of course, its enactment. The taxed industry—the producers of the product being subject to an excise tax or its sellers—would rather see the tax not introduced and will ask a court to strike the tax down once locally enacted.

In seeking a remedy against local action from courts, such plaintiffs will make a claim on behalf of state power and point at the city's subservient status.<sup>62</sup> American law aids them in their pursuit of this claim, as local government law's basic tenet is that, unlike the state, the city is not a government of plenary powers.<sup>63</sup> From this basic principle, two relevant, and key, doctrinal ramifications ensue. Any city action can be challenged as, first, unauthorized by the state to begin with, and, second, even if authorized, as preempted by the state's own action in the relevant field. This Part reviews, in turn, courts' treatment of both these types of claims as they have been raised against local excise taxation. It finds that courts have—surprisingly—shown themselves to be unreceptive both to the claim that cities lack the power to initiate an excise tax and to the claim that a city's excise tax is preempted by other state acts. The cumulative effect of these two strands of decisions—coupled with decisions, to be reviewed last, dealing with claims against local excise taxes emanating from constitutional rules applicable specifically to local taxation—is that, as far as local excise taxation goes, courts have reversed their attitude towards the city's impotence in its interactions with the state

#### A. *The Local Power to Initiate an Excise Tax*

As a government of limited powers and as a creature of the state, the city can only act if the state authorizes it to act. The source of power for a city action can assume two forms. First, a specific state statute may grant the city a particular power (e.g., a state law specifically empowering municipalities to adopt cigarette taxes).<sup>64</sup> Second, even in the absence of a specific enabling statute, the city can be authorized to act under its general, often constitutional, home rule powers (assuming the specific city is a home rule municipality). Home rule powers typically dispense with the city's need for a specific enabling act by authorizing the city to initiate policies pertaining to "local" affairs.<sup>65</sup>

Cities' ability to act under both these empowerment tools has been severely curbed through restrictive judicial interpretation. Some courts still resort to local

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<sup>62</sup>Challengers may, of course, make other, additional claims against the tax—claims not relying on the locality's subservience to the state—but those are not of interest here.

<sup>63</sup>*See supra* note 5.

<sup>64</sup>GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS 147–48 (6th ed. 2015).

<sup>65</sup>*Id.* at 174–76.

government law's traditional "Dillon's Rule," which mandates that judges construe narrowly individual enabling acts granting powers to cities.<sup>66</sup> Similarly, through interpretation, courts constrict the type of affairs characterized as "local" and thus falling within cities' home rule initiative powers.<sup>67</sup>

In the specific context of local excise taxation, however, courts have abandoned these twin interpretive conventions that tightly delimit the space available for local policy initiatives under either state enabling acts or home rule powers. If anything, when considering local excise taxes, courts have reversed the twin conventions.

The reversal of attitude is most apparent in courts' dealings with state enabling acts. When a city argues that the excise tax it has adopted is authorized by a specific state enabling act, the ensuing litigation centers on the interpretation of that act. Much of the excise tax litigation has dealt with this question, as challengers contend that a contested local excise tax does not fall within the lawmaking authorization contained in a state statute enabling the enactment of local taxes. Such claims are particularly cogent in light not only of Dillon's Rule, but also due to the specific rule of interpretation applicable to tax laws. That rule requires that these laws be construed narrowly and against the taxing authority.<sup>68</sup>

Nonetheless, courts analyzing enabling acts in the specific context of local excise taxes have rejected this line of reasoning and decisions. Indeed, they appear to have adopted the exact opposite view whereby—at least when at issue is the power to enact an excise tax—statutes enabling local taxation should be interpreted broadly.<sup>69</sup> The consequence is that a law generally empowering a local government to adopt taxes suffices to legitimize any local excise tax. To wit, courts have embraced city claims that a tax enabling act validates all local excise taxes—even those, as the ones litigated in some such cases, not specifically endorsed, or even contemplated, by the state legislature.<sup>70</sup> Courts

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<sup>66</sup> See JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911). Dillon's Rule allows local government exercises of power in three situations: (1) when granted in express words; (2) when necessarily or fairly implied in or incidental to the powers expressly granted; and (3) when essential to the accomplishment of the declared objects and purposes of the [municipal] corporation—not simply convenient, but indispensable. *Id.*

<sup>67</sup> See David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2349 (2003).

<sup>68</sup> See, e.g., *City of Birmingham v. Orbitz, LLC*, 93 So. 3d 932, 936 (Ala. 2012); DENNIS JENSEN & GAIL A. O'GRADNEY, THE LAW OF MUNICIPAL CORPORATIONS § 44.13 (Eugene McQuillan ed., 2003) ("The grant of any power to tax, made by the state to municipal corporations, will be, according to the rule accepted by virtually all the authorities, construed strictly.")

<sup>69</sup> E.g., *Fannon v. Matanuska-Susitna Borough*, 192 P.3d 982, 989 (Alaska 2008) (holding that the state act enabling local taxes grants a broad authority); *Puget Sound Energy, Inc. v. City of Bellingham*, 259 P.3d 345, 348 (Wash. Ct. App. 2011).

<sup>70</sup> E.g., *Fannon*, 192 P.3d at 988 (failing to find any support for the claim that because no statute makes an express delegation of authority to levy the contested excise taxes, the

have also read the carveouts from tax enabling statutes in a narrow fashion to further promote local excise taxation.<sup>71</sup> They have similarly insisted that an excise tax is not a sales tax when the enabling act allowed for local taxes other than the sales tax.<sup>72</sup> To allow for excise taxes' introduction, courts even generated their own exceptions to provisions of tax enabling acts banning the initiation of local taxes in certain circumstances.<sup>73</sup>

This judicial result—by which a general tax enabling act can almost always count as the basis for any local excise tax—contains another interpretive maneuver, one that is necessary for the outcome of the cases but is hardly acknowledged. Even if a tax enabling act is construed broadly to allow any local tax, an excise levy could be conceived as authorized by it only if that levy were held to actually be a “tax.”<sup>74</sup> As a general rule, courts define taxes as measures to raise revenue.<sup>75</sup> But, as noted in Part II.B., excise taxes are often not wholly—and at times not at all—measures to raise revenue.<sup>76</sup> Sometimes they are better described as regulatory or political measures, motivated by the goal of disincentivizing a behavior due to its externalities, paternalistic concerns, or a community's ideological aversion.<sup>77</sup> Court decisions appear to disregard this characteristic of excise taxes. Courts seldom think twice before, at least implicitly, conceiving excise levies as conventional revenue-raising measures that thus automatically meet the legal definition of a tax (and are hence

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local government lacks the authority to enact it); *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 123 P.3d 88, 93 (Wash. 2005) (same with motor registration tax).

<sup>71</sup> *E.g.*, *Williams v. City of Phila.*, 188 A.3d 421, 431 (Pa. 2018) (holding that a statutory limitation on the taxing power should be read narrowly in light of “the legislative design of an expansive delegation of taxing power”).

<sup>72</sup> *E.g.*, *Fannon*, 192 P.3d at 988–89 (holding that since it was an excise tax rather than a sales tax, a local government could enact a tobacco tax without submitting it for voter approval); *see also Blair Candy Co. v. Altoona Area Sch. Dist.*, 613 A.2d 159, 161 (Pa. Commw. Ct. 1992). Though the case's factual settings were slightly different, the practical result was the same: a school district was able to enforce a levy on a cigarette seller because the court labeled the cigarette tax an excise tax and as such characterized it as distinct from the sales tax. *Id.*

<sup>73</sup> *E.g.*, *Cal. Cannabis Coal. v. City of Upland*, 401 P.3d 49, 65–66 (Cal. 2017). The court held that the term “local government” in a constitutional provision limiting the power of local governments to impose general taxes did not cover a decision through local initiative. *Id.* Perhaps not unrelatedly, commentators have noted that cities adopting a soda tax through popular initiative—all of them located in California—did not see those taxes challenged in court. Sarah A. Roache et al., *Big Food and Soda Versus Public Health: Industry Litigation Against Local Government Regulations to Promote Healthy Diets*, 45 *FORDHAM URB. L.J.* 1051, 1084 (2018).

<sup>74</sup> *See Wheeler v. Charter Township of Shelby*, 697 N.W.2d 180, 186–87 (Mich. Ct. App. 2005) (discussing the categorization of an ordinance by the local legislature as either an allowable fee or a tax).

<sup>75</sup> *E.g.*, *id.* at 186 (“A ‘tax’ . . . is designed to raise revenue.” (quoting *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998))).

<sup>76</sup> *See Carruthers*, *supra* note 55, at 2567.

<sup>77</sup> *See id.* at 2567–68.

allowable under tax enabling acts).<sup>78</sup> Courts casually note that an excise tax naturally falls within the contours of the category of “tax.”<sup>79</sup> One court nonchalantly admitted that almost all levies are legally described as such.<sup>80</sup>

Courts are accordingly willing to ignore indicators that a given excise tax was not devised simply as a random revenue-raising measure.<sup>81</sup> In one rather striking example, a city’s gun excise tax was upheld as a tax although the ordinance’s legislative history was laden with city council members’ pro-gun control statements, and although the levy’s revenues were to be segregated from the city’s general revenue fund—and dedicated to specific gun safety purposes.<sup>82</sup> In light of such holdings, it is hardly surprising that no challenges have been raised against the alleged “tax” nature of excise taxes highly unlikely to ever meaningfully generate revenue,<sup>83</sup> or of those with respect to which the adopting city explicitly stated that low tax receipts were indicative not of the tax’s failure but rather of its success (in suppressing the taxed activity).<sup>84</sup>

One single, recent exception to this judicial pattern of mechanically categorizing excise levies as taxes can be found. Earlier this year, a Colorado court concluded that an excise tax—a plastic bag levy—was not a tax, seeing that its primary purpose was unrelated to revenue-raising.<sup>85</sup> That conclusion was reached, however, precisely in order to salvage the tax: in that case the city

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<sup>78</sup> *E.g.*, *Congregation v. Mayor of Balt.*, 183 A.3d 845, 849 (Md. Ct. Spec. App. 2018) (holding a charge, although named a fee, to be a tax because the “only obligation under the statute is to pay the charge”).

<sup>79</sup> “Under the Sterling Act, the city has broad powers to levy taxes for revenue purposes.” *Blauner’s, Inc. v. City of Phila.*, 198 A. 889, 891 (Pa. 1938) (citation omitted).

<sup>80</sup> *Callaway v. City of Overland Park*, 508 P.2d 902, 907–08 (Kan. 1973) (holding that practically all levies could count as an excise tax).

<sup>81</sup> *E.g.*, *Centex Real Estate Corp. v. City of Vallejo*, 19 Cal. App. 4th 1358, 1363 (Cal. Ct. App. 1993) (holding that since it was set to raise revenue, a property excise tax was a tax under the state enabling act—although that levy was specifically adopted to replace local development fees the city’s advisors suggested might not be authorized by state law).

<sup>82</sup> *Watson v. City of Seattle*, 401 P.3d 1, 8–9 (Wash. 2017).

<sup>83</sup> Though the Seattle gun tax was assailed for its legislative history and for the uses to which the funds collected were to be applied, revenue projections—rather low to begin with and mostly undisclosed to plaintiffs by the city—were not litigated. The court simply noted it was a measure to raise revenue. *Id.* at 10. When the city finally disclosed the revenue projections, they were indeed strikingly low. When adopted, the city finance agency predicted an annual revenue of \$300,000 to \$500,000. *Burton*, *supra* note 34. The actual intake in the tax’s first year, 2016, was only \$103,766.22. *Id.*

<sup>84</sup> Amanda Svachula, *Bag Tax Missing Revenue Goal but City Touts Drop in Use of Disposables*, CHI. SUN-TIMES (July 5, 2017, 8:38 AM), [https://chicago.suntimes.com/business/bag-tax-falling-short-of-revenue-goal-but-is-decreasing-bag-use/\[https://perma.cc/7T7T-3VRJ\]](https://chicago.suntimes.com/business/bag-tax-falling-short-of-revenue-goal-but-is-decreasing-bag-use/[https://perma.cc/7T7T-3VRJ]) (reporting that a spokeswoman for Chicago’s Department of Finance, discussing the city’s plastic bag tax, “said [that] though the revenue collection is ‘below what we expected,’ the city hoped to discourage bag use with the tax, and ‘it’s a benefit that residents are responding’”). The city “aimed to raise \$9.2 million from the 7-cents-a-bag fee in its first year.” *Id.* In its first five months, the tax raised only \$2.4 million. *Id.*

<sup>85</sup> *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 514 (Colo. 2018).

lacked the power to enact any tax.<sup>86</sup> By treating the bag levy as regulatory, the court validated the local power to enact the excise tax nonetheless.<sup>87</sup> Evidently, in striking contrast to their practice elsewhere with respect to local action, courts are endeavoring to detect, through almost any possible interpretation, statutory authority for the adoption of local excise taxes.<sup>88</sup>

Consequently, cities do not often have to call upon their general home rule initiative powers when acting in the field. But when they have appealed to those powers—in those cases where no enabling act was available or could, even under the most liberal of constructions, be read as allowing the local excise tax—courts have shown similar latitude.<sup>89</sup> As noted, home rule powers enable their holders to initiate an action even in the absence of a specific state enabling act if that action is “local.”<sup>90</sup> Despite constrictive readings of the term “local” in other home rule cases—including cases involving other forms of local taxation<sup>91</sup>—courts have been willing to read the scope of local affairs subject to home rule broadly to include any local excise tax.<sup>92</sup> They often characterize in such cases the power to tax for local purposes as clearly a privilege accorded by home rule constitutional provisions.<sup>93</sup> Since the power is thereby grounded directly in the state constitution, no need for a specific act enabling a contested excise tax is necessary.<sup>94</sup> The fact that the local excise tax is not, unlike the traditional property tax, a tax on inherently local property and can apply to non-local residents does not change the analysis: the excise tax is still held to be a proper exercise of home rule municipal authority upon a local matter.<sup>95</sup> As the Illinois court approving Cook County’s soda tax recently concluded: “Home rule taxing power has been challenged many times, and a review of dozens of

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<sup>86</sup> *Id.* at 509.

<sup>87</sup> *Id.* at 515.

<sup>88</sup> *Id.* at 514.

<sup>89</sup> See, e.g., *Ill. Retail Merchants Ass’n v. Cook Cty. Dep’t of Revenue*, No. 17 L 50596, 2017 WL 3318078, at \*2 (Ill. Cir. Ct. 2017).

<sup>90</sup> See *Midwest Gaming & Entm’t, LLC v. Cty. of Cook*, 39 N.E.3d 286, 302 (Ill. App. Ct. 2015).

<sup>91</sup> See Scharff, *supra* note 11, at 300.

<sup>92</sup> See, e.g., *Midwest Gaming & Entm’t*, 39 N.E.3d at 317; *Ill. Retail Merchants Ass’n*, 2017 WL 3318078, at \*14.

<sup>93</sup> E.g., *Weekes v. City of Oakland*, 579 P.3d 449, 452 (Cal. 1978); *Franklin v. Peterson*, 197 P.2d 788, 791 (Cal. Dist. Ct. App. 1948) (“That taxation for municipal purposes is a municipal affair and that the power to levy such a tax stems directly from the Constitution is no longer open to question.”); *Exec. Aircraft Consulting, Inc. v. City of Newton*, 845 P.2d 57, 60 (Kan. 1993) (“Home rule empowers the defendants to levy any type of exaction unless the legislature preempts the field by uniform enactment.”).

<sup>94</sup> E.g., *Deluxe Theatres, Inc. v. City of Englewood*, 596 P.2d 771, 772 (Colo. 1979) (stating that the power to impose a local excise tax is “essential to the full exercise of the right to self-government granted to home rule cities by Article XX”). *Ex parte Braun*, 74 P. 780, 783–84 (Cal. 1903).

<sup>95</sup> See, e.g., *City of Englewood v. Wright*, 364 P.2d 569, 574 (Colo. 1961).

relevant cases can lead one to conclude that government's ability to tax is only limited by its creative reasonableness."<sup>96</sup>

### B. *The State's Power to Preempt a Local Excise Tax*

Even if, thanks to the courts' broad interpretation of a state enabling statute or of the city's home rule powers, a city enjoys the power to initiate a given policy, the state still enjoys the power to overrule the specific policy the city has adopted.<sup>97</sup> Since in the American legal scheme cities are subservient to the state, the city always operates under the threat of state preemption.<sup>98</sup> While this power of the state is unquestionable (other than in the few states that recognize home rule immunity—as will be discussed below), the question often arises whether in a given case the state legislature has actually exercised the preemption power.<sup>99</sup> Specifically, when there is no clear statutory statement that local action is prohibited, courts must determine whether the local action was still prohibited by some state statute—implicitly.<sup>100</sup>

Traditionally, courts have been rather willing to find such implied preemption.<sup>101</sup> Even if no state statute states that the specific action the city initiated is prohibited, courts will strike down that action if they discern a contradictory intention on the state's part.<sup>102</sup> Courts have thus ruled that if the city bans an activity the state has not banned when dealing with a similar subject matter, the local ban might be preempted—as the state implicitly allowed the activity.<sup>103</sup> For example, the Pennsylvania court, in this fashion, struck down a city ordinance barring drug paraphernalia not covered by the state statute that otherwise regulated drug dealing and use.<sup>104</sup> Following a similar logic, courts block any city action in policy fields they regard as occupied by the state.<sup>105</sup> For example, the Maryland court invalidated a city ordinance prohibiting the placement of cigarette vending machines in areas accessible to minors although no state law prevented such a local ordinance.<sup>106</sup> The court explained that: "In view of the General Assembly's long and exclusive control of [the sale of cigarettes] in this State, the Legislature's failure to foresee and take action expressly to prevent future local government trespass in this area of exclusive state legislative authority is no support for the validity of the . . . ordinances."<sup>107</sup>

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<sup>96</sup> *Ill. Retail Merchants Ass'n*, 2017 WL 3318078, at \*2.

<sup>97</sup> Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1157 n.215.

<sup>100</sup> *Id.* at 1116.

<sup>101</sup> *See id.* at 1174 n.310.

<sup>102</sup> *See id.* at 1156–57.

<sup>103</sup> Diller, *supra* note 97, at 1142–45.

<sup>104</sup> *Holt's Cigar Co. v. City of Phila.*, 10 A.3d 902, 913 (Pa. 2011).

<sup>105</sup> *See* Diller, *supra* note 97, at 1153.

<sup>106</sup> *Allied Vending, Inc. v. City of Bowie*, 631 A.2d 77, 78, 87–88 (Md. 1993).

<sup>107</sup> *Id.* at 88 (quoting *Cty. Council v. Montgomery Ass'n, Inc.*, 333 A.2d 596, 600 n.5 (1975)).

That is, though no conceivable conflict existed between the local ordinance and state laws, the local government was prohibited from curbing the trade in cigarettes simply because the state had been regulating that trade.<sup>108</sup>

This reigning judicial approach embracing implied preemption should not have bode well for local excise taxation. Excise taxation, by definition, adds to, if not interferes with, the state's own sales tax covering the relevant products.<sup>109</sup> Furthermore, because, as noted in Part II.B., they entertain regulatory goals, excise taxes focus on such fields (e.g., the consumption of cigarettes) that are heavily regulated by the state.<sup>110</sup> Excise taxes are often labelled "sin taxes" and sinning tends to be policed by the state.<sup>111</sup>

Surprisingly, however, courts have largely refused to attribute to state sales taxes or state regulatory measures an implicit intention to preempt the local imposition of excise taxes on the activity those state laws tax and regulate.<sup>112</sup> A local excise tax, courts hold, will not be preempted just because a state sales tax is present—the fact that the two tax the same subject notwithstanding.<sup>113</sup> While

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<sup>108</sup>In another example, a federal court of appeals struck down a regulation adopted by New York City in 2009 requiring that retail vendors of cigarettes post prominent, graphic warning signs near cigarette sale areas as preempted by a federal statute requiring that cigarette packages include a warning label. *94th St. Grocery Corp. v. N.Y.C. Bd. of Health*, 685 F.3d 174, 177, 181–82 (2d Cir. 2012). The court found that in adopting that statute, the federal government preempted other governments from imposing additional or different packaging requirements. *Id.*

<sup>109</sup>*Williams v. City of Phila.*, 188 A.3d 421, 432 (Pa. 2018) (discussing the claim that an excise tax was preempted since the beverages subjected to it are also subject to the state sales tax).

<sup>110</sup>*Williams v. City of Phila.*, 164 A.3d 576, 588 n.19 (Pa. Commw. Ct. 2017) (citing *Blair Candy Co. v. Altoona Area Sch. Dist.*, 613 A.2d 159, 161–62 (Pa. Commw. Ct. 1992)), *aff'd*, 188 A.3d 421 (Pa. 2018).

<sup>111</sup>*See Haile, supra* note 60, at 1042.

<sup>112</sup>*But see Commonwealth v. Wilsbach Distributors, Inc.*, 519 A.2d 397, 402 (Pa. 1986). In that case, the court held that the state legislature had adopted a scheme of regulation of the alcoholic beverage industry so pervasive that it had preempted the field and a city was prohibited from taxing a malt and brewed beverage distributor. *Id.* at 402–03. The court focused on the exceptional nature of the regulation of alcoholic beverages, rendering it a special case. *Id.* at 400. It stressed that there is no other field "within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages." *Id.* It noted, for example, that the state scheme not only included a state excise tax, but actually mandated that the tax be paid to the locality in which the seller was located. *Id.* at 401. The Pennsylvania court relied on this distinguishing factor when in subsequent cases it refused to expand the case's holding and preempt local taxes in other fields. *Rieders v. City of Williamsport*, 578 A.2d 618, 619–20 (Pa. Commw. Ct. 1990); *City of Phila. v. Tax Review Bd. ex rel. Scott*, 601 A.2d 875, 878 (Pa. Commw. Ct. 1992). Even with respect to the specific issue of taxing liquor, the reach of the holding has been limited. *City of Phila. v. Clement & Muller, Inc.*, 715 A.2d 397, 397–98 (Pa. 1998).

<sup>113</sup>*Cincinnati Bell Tel. Co. v. City of Cincinnati*, 693 N.E.2d 212, 217 (Ohio 1998) (overruling earlier precedents and holding that the fact that the state has a pertinent tax does not prevent a municipality from enacting an excise tax in the field—there will be no implied preemption); *Williams v. City of Phila.*, 188 A.3d 421, 437 (Pa. 2018).

the general argument respecting the preemptive power of the sales tax thus normally fails, those recently challenging, in a closely followed lawsuit, Philadelphia's soda tax as preempted by the state's sales tax appeared to stand on firmer grounds.<sup>114</sup> A Pennsylvania statute explicitly bars the city from taxing a "subject" also taxed by the state.<sup>115</sup> The beverages to which the city tax applies are also, naturally, covered by the state sales tax.<sup>116</sup> The soda tax thus appears duplicative of the state sales tax and thus not only implicitly preempted by that state tax, but also explicitly preempted by the state statute.<sup>117</sup> Nonetheless, the court rejected the preemption claim.<sup>118</sup> For the state supreme court's majority, the fact that the city's soda tax was designed to be charged on the beverages' distributors, rather than on the individual purchasers, sufficed to render it non-duplicative of the state sales tax.<sup>119</sup> That the city tax applied only to distributors providing the beverages for retail purposes in the city, that it required actual dealers in the city to pay the tax if the distributor they received the beverages from had not done so, and that the mayor and council consistently debated and presented the tax as a tax on sweetened-beverages' buyers—factors leading a dissenting justice to tersely note "[a] rose by any other name smells just as sweet"—were all facts the majority deemed irrelevant.<sup>120</sup> This ruling underscores the general observation: courts are reluctant to find that a state sales tax preempts a local excise tax.

Likewise, a state's regulatory scheme will also be insufficient to imply preemption of a local excise tax imposed on the regulated good or activity.<sup>121</sup> Courts' pronouncements to this effect have been forceful. The California court declared: "That the state has preempted a field of statewide concern for purposes of regulation does not itself prevent local taxation of the persons or activities regulated."<sup>122</sup> When plaintiffs argued that a local amusement admission tax imposed on a racetrack was preempted by the state's own policing of horse racing, the Illinois court answered: "the power to regulate and the power to tax are separate and distinct powers."<sup>123</sup> The reason is that the latter power, unlike the former, is "essential" to cities and is thus "intended . . . to be broad," as explained by a court applying this rule to reject the claim that a local gambling machine tax was preempted by the state's extensive regulation of gambling.<sup>124</sup>

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<sup>114</sup> *Williams*, 164 A.3d at 581–82, *aff'd*, 188 A.3d 421 (Pa. 2018).

<sup>115</sup> 53 PA. STAT. ANN. § 15971(a) (West 1961).

<sup>116</sup> *Williams v. City of Phila.*, 188 A.3d 421, 425 (Pa. 2018).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 437.

<sup>119</sup> *Id.* at 434.

<sup>120</sup> *Id.* at 445–46 (Wecht, J., dissenting).

<sup>121</sup> *Pines v. City of Santa Monica*, 630 P.2d 521, 524 (Cal. 1981).

<sup>122</sup> *Id.* at 522.

<sup>123</sup> *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 357 N.E.2d 1118, 1120 (Ill. 1976).

<sup>124</sup> *Midwest Gaming & Entm't, LLC v. Cty. of Cook*, 39 N.E.3d 286, 303 (Ill. App. Ct. 2015) (quoting *Mulligan v. Dunne*, 338 N.E.2d 6 (Ill. 1975)).

A Washington decision from the summer of 2017 provides the most extreme illustration for this attitude.<sup>125</sup> The state’s supreme court had to rule on the fate of Seattle’s gun excise tax, described in Part II. A Washington state statute provides that:

The state of Washington hereby *fully occupies and preempts the entire field of firearms regulation* within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer, discharge, and transportation of firearms. . . . Cities, towns, and counties or other *municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law.*<sup>126</sup>

Stronger, clearer preemption language could hardly have been imagined. Yet the court decided that the statute did not explicitly—or even implicitly—preempt the city gun excise tax.<sup>127</sup> The statute, the court explained, only preempted police action in the field of firearms, not taxation.<sup>128</sup> A tax on the sale of firearms is not a regulation of the sale of firearms, the court insisted.<sup>129</sup> If the state wants to preempt a local excise tax on guns, it must state explicitly its opposition to local gun *taxes*.<sup>130</sup>

Thus, unlike the general rule respecting preemption, “the preemption or restraint of municipal taxing authority may be accomplished only through specific, express statutory language.”<sup>131</sup> The local excise tax must be “in direct and immediate conflict with a state statute or statutory scheme.”<sup>132</sup> Courts, accordingly, tend to read state statutes very narrowly, shielding city excise taxes from implied preemption.<sup>133</sup> For example, the Colorado court, confronted with a state constitutional clause preserving to the state the power to tax self-propelled construction equipment, insisted that the clause preempted only local ad valorem taxes, not excise taxes, and then strained to define a Denver tax on

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<sup>125</sup> *Watson v. City of Seattle*, 401 P.3d 1, 14 (Wash. 2017).

<sup>126</sup> WASH. REV. CODE § 9.41.290 (1994) (emphasis added).

<sup>127</sup> *Watson*, 401 P.3d at 12.

<sup>128</sup> *Id.* at 13.

<sup>129</sup> *Id.* at 4.

<sup>130</sup> *Id.* at 12; *see also* *ERP, Inc. v. Ali*, No. 13 CH 07263, slip op. at 3–4 (Ill. Cir. Ct. 2014) (holding that an Illinois statute preempting local “regulation, licensing, possession, registration, and transportation” of firearms did not preempt the Cook County gun excise tax since “[t]axes are conspicuously absent from the list of measures that are preempted”).

<sup>131</sup> *Commonwealth Title Ins. v. City of Tacoma*, 502 P.2d 1024, 1026 (Wash. 1972) (“In general, a city or municipality may define its taxation categories as it sees fit unless it is restrained by a constitutional provision or legislative enactment.”); *Enter. Leasing, Inc. v. City of Tacoma*, Fin. Dep’t, 970 P.2d 339, 342 (Wash. Ct. App. 1999) *aff’d sub nom*, *Enter. Leasing, Inc. v. City of Tacoma*, 988 P.2d 961, 966 (Wash. 1999).

<sup>132</sup> *Weekes v. City of Oakland*, 579 P.2d 449, 452 (Cal. 1978).

<sup>133</sup> Restraints on taxing authority will be found only if there is “specific, express statutory language.” *Enter. Leasing*, 970 P.2d at 342 (citing *Commonwealth Title*, 502 P.2d at 1026), *aff’d*, 988 P.2d 961.

the equipment as an excise tax.<sup>134</sup> The Nebraska court held that the state statute limiting the overall rate of local sales taxes did not apply to local excise taxes—and thus allowed a local excise tax on restaurants and drinking places.<sup>135</sup>

Courts' sympathy to local excise taxes in the preemption context extends still further. A few states supplement cities' home rule power to initiate policies—discussed above in Part III.A.—with the power of immunity extending over some of those local actions.<sup>136</sup> That is, in those states, state laws cannot preempt certain local acts home rule cities adopt.<sup>137</sup> As commentators note, courts have proven very reluctant to actually apply such constitutional protections.<sup>138</sup> The Colorado court, for example, will only recognize immunity for home rule city acts that are purely local, i.e., involve no statewide interest whatsoever.<sup>139</sup> Since practically any local act may be said to portend some, at least minimal, effects on some state concern, the state's courts have refused to extend immunity to most forms of local regulation.<sup>140</sup> At the same time, however, those same courts have declared that excise taxes are a matter solely of local and municipal concern.<sup>141</sup> Thus, home rule immunity protected local excise taxes from even explicit attempts by the state legislature to displace them or to exempt certain entities from their reach.<sup>142</sup> In similar cases, the California courts have also been inclined to view excise taxes as purely local and thus shielded by home rule immunity—though the California view in this regard is less uniform.<sup>143</sup> California's home rule immunity has also served to protect and simplify the procedure for adopting local excise taxes: invoking the city's home rule immunity, a court held that a city council could decide in a simple majority to submit a new local excise tax—on guns—to voter approval, despite a state

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<sup>134</sup> *Winslow Constr. Co. v. City of Denver*, 960 P.2d 685, 690–92 (Colo. 1998).

<sup>135</sup> *Anthony, Inc. v. City of Omaha*, 813 N.W.2d 467, 475–78 (Neb. 2012).

<sup>136</sup> Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1049 (2017).

<sup>137</sup> *Id.* at 1066.

<sup>138</sup> See e.g., Briffault, *supra* note 1, at 2012; Schragger, *supra* note 1, at 1221.

<sup>139</sup> E.g., *Webb v. City of Black Hawk*, 295 P.3d 480, 492–93 (Colo. 2013).

<sup>140</sup> See Diller, *supra* note 136, at 1069.

<sup>141</sup> E.g., *Town of Avon v. Weststar Bank*, 151 P.3d 631, 634 (Colo. App. 2006).

<sup>142</sup> *Security Life & Accident Co. v. Temple*, 492 P.2d 63, 64 (Colo. 1972); see also *Winslow Constr. Co. v. City of Denver*, 960 P.2d 685, 692 (Colo. 1998) (statute of limitations established by state statute cannot be applied to home-rule municipalities).

<sup>143</sup> An early decision announced that: “No doubt is entertained upon the proposition that the levy of taxes by a municipality for revenue purposes, including license taxes, is strictly a municipal affair.” *W. Coast Advert. Co. v. City of S.F.*, 95 P.2d 138, 143 (Cal. 1939). The more recent pronouncement is somewhat more qualified: “levy of taxes for city purposes is generally a municipal affair.” *City of San Bernardino Hotel/Motel Ass'n v. City of San Bernardino*, 59 Cal. App. 4th 237, 242 (Cal. Ct. App. 1997). In practice, the courts appear to be in the habit of distinguishing taxes, deciding which are of some statewide concern and can thus be preempted, e.g., *Cal. Fed. Sav. & Loan Assn. v. City of L.A.*, 812 P.2d 916, 930 (Cal. 1991) (taxation of financial institutions), and which are purely local and cannot be preempted, e.g., *Fielder v. City of L.A.*, 14 Cal. App. 4th 137, 146, 635 (Cal. Ct. App. 1993) (a property transfer tax).

law that required a two-thirds majority.<sup>144</sup> The shielding of local excise taxes from simple legislative preemption is even possible at least in one state that does not recognize home rule immunity at all. The Illinois Constitution holds that only a law approved by the vote of three-fifths of the members of each house of the state legislature may deny or limit the local power to tax.<sup>145</sup>

### C. Restrictions Applicable to Local Taxing Powers

Apart from the two central hurdles standing in the way of any local action—which inevitably affect the local power to adopt an excise tax—there are legal impediments specific to the adoption of a tax measure. At least two merit a brief discussion since on their face they present a true threat to the legality of local excise taxes: state constitutions' uniformity in taxation clauses and the federal preemption of state and local taxes.

In all states but two, a constitutional uniformity clause requires that local taxation be unvarying throughout the taxing local jurisdiction, and in the other two states court decisions have adopted the requirement.<sup>146</sup> The uniformity requirement invalidates classifications that treat similar taxpayers, or taxed properties, differently.<sup>147</sup> Excise taxes by definition create classifications: they apply to some products but not others. Hence they appear to run afoul of uniformity restrictions, especially in cases where they rely, for principled or practical reasons, on subcategorizations even among the one group of products that is taxed.

Still, uniformity clauses hardly ever lead courts to strike down local excise taxes. Most courts have simply held that constitutional uniformity clauses flat out do not apply to local excise taxes.<sup>148</sup> To the extent courts provide a reasoning, the rationale appears to be that it is impossible to apply a uniformity requirement to excise taxes,<sup>149</sup> or, perhaps due to similar thinking, that the

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<sup>144</sup> *Traders Sports, Inc. v. City of San Leandro*, 93 Cal. App. 4th 37, 49 (Cal. Ct. App. 2001).

<sup>145</sup> ILL. CONST. art. VII, § 6(g).

<sup>146</sup> John M. Payne, *Intergovernmental Condemnation as a Problem in Public Finance*, 61 TEX. L. REV. 949, 970 n.79 (1983).

<sup>147</sup> Laurie Reynolds, *Uniformity of Taxation and the Preservation of Local Control in School Finance Reform*, 40 U.C. DAVIS L. REV. 1835, 1846 (2007).

<sup>148</sup> *E.g.*, *In re Hunter's Estate*, 49 P.2d 1009, 1012 (Colo. 1935); *Jersey Cent. Power & Light Co. v. City of Asbury Park*, 24 A.2d 526, 529 (N.J. 1942), *aff'd sub nom. Jersey Cent. Power & Light Co. v. Monmouth Cty. Bd. of Taxation*, 29 A.2d 139, 139 (N.J. 1942); *H.G. Hill Co. v. Whitice*, 258 S.W. 407, 409 (Tenn. 1924); *In re Estate of Hambleton*, 335 P.3d 398, 403, 413–14 (Wash. 2014); *Jordan v. Village of Menomonee Falls*, 137 N.W.2d 442, 451 (Wis. 1965); *Ludwig v. Harston*, 197 P.2d 252, 256–57 (Wyo. 1948).

<sup>149</sup> *Belcher Oil Co. v. Dade Cty.*, 271 So. 2d 118, 123 (Fla. 1972); *Unemployment Comp. Comm'n v. Renner*, 143 P.2d 181, 185 (Wyo. 1943).

constitutional requirements had in mind the property tax—not the categorically distinct excise tax.<sup>150</sup>

A few states do subject local excise taxes to uniformity clauses,<sup>151</sup> but even there, local excise taxes have fared surprisingly well. When interpreting constitutional uniformity clauses courts generally insist that the “mandate [of a uniformity clause] generally applies only *within* classes, not *between* classes.”<sup>152</sup> As long as the division of different properties or taxpayers into different classes is somewhat rational, the tax will be upheld as uniform and in compliance with the constitutional clause.<sup>153</sup> This highly deferential approach is particularly hospitable to a classification regime an excise tax creates—seeing that, as Part II.B. showed, that classification almost always has some rationale—economic, health-based, or philosophical—underlying it. Courts deem these different rationales more than sufficient.<sup>154</sup> Thus, for example, a court found reasonable a classification for tax purposes of amusements into three categories: motion pictures, operas, and plays; racing and mechanical or animal contests; and dance halls, night clubs, and skating rinks.<sup>155</sup>

In a similar manner soda taxes have recently survived uniformity analysis. A Pennsylvania court held that creating a separate class of distributors of certain beverages and taxing them based on volume with total disregard to the value of the beverages they sold was rational.<sup>156</sup> An Illinois court rejected a uniformity challenge to an even more minute classification: between “ready-to-drink, pre-made sweetened beverages,” such as a bottled Frappuccino, that would be taxable, and “on-demand, custom-made sweetened beverages,” such as a hand-made Frappuccino, that would not.<sup>157</sup> Since ready-to-drink beverages are more

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<sup>150</sup> *Ogrinz v. James*, 524 A.2d 77, 85 (Md. 1987); *State v. Galyen*, 378 N.W.2d 182, 186 (Neb. 1985); see also *In re Hunter’s Estate*, 49 P.2d at 1012 (excluding excise taxes since the requirement only applies to direct or ad valorem taxes).

<sup>151</sup> *Amidon v. Kane*, 279 A.2d 53, 58 (Pa. 1971) (holding that all taxes are subject to the uniformity clause).

<sup>152</sup> *Hegar v. Tex. Small Tobacco Coal.*, 496 S.W.3d 778, 785 (Tex. 2016), *reh’g denied*, (Sept. 23, 2016).

<sup>153</sup> *Allegheny Pittsburgh Coal Co. v. Comm’n of Webster Cty.*, 488 U.S. 336, 344 (1989); *Estate of Kosakowski v. Dir., Div. of Taxation*, 26 N.J. Tax 21, 36–37 (N.J. Tax Ct. 2011).

<sup>154</sup> See *Wittenberg v. Mutton*, 280 P.2d 359, 363 (Or. 1955) (holding that despite uniformity requirements a city “may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto” (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 583, 584 (1937))); *Dancetown, U.S.A., Inc. v. State*, 439 S.W.2d 333, 336 (Tex. 1969) (“Differences in the commodities sold or services rendered are generally regarded as a proper basis for classification in the absence of any showing to the contrary.”).

<sup>155</sup> *Dancetown*, 439 S.W.2d at 336–37.

<sup>156</sup> *Williams v. City of Phila.*, 164 A.3d 576, 596 (Pa. Commw. Ct. 2017), *aff’g*, No. 1452, 2016 WL 7422362, at \*5 (Pa. Com. Pl. 2016), *aff’d*, 188 A.3d 421 (Pa. 2018).

<sup>157</sup> *Ill. Retail Merchants Ass’n v. Cook Cty. Dep’t of Revenue*, No. 17 L 50596, 2017 WL 3318078, at \*4 (Ill. Cir. Ct. 2017).

readily available, and since the costs of administering the tax to such drinks are much lower, the classification was pronounced reasonable.<sup>158</sup>

Convenience in imposing an excise tax and in pursuing its policy goals thus suffices to justify its non-uniform character. Arguments that the class subjected to the excise tax is under-inclusive given the excise tax's purposes—e.g., that a bottled water tax is irrational since it does not tax other bottled drinks, including carbonated water—are irrelevant since the sole question is whether a reasonable relationship exists between the product taxed and the justification for the tax.<sup>159</sup> Such a relationship can almost always be found, and thus despite an excise tax's inherently limited reach, uniformity clauses present little to no threat to a local excise tax.

Like state constitutional limitations on the power of taxation, federal constitutional limits on such powers have been mostly circumvented to enable the proliferation of local excise taxes. Federal laws, preempting state and local laws through the Constitution's Supremacy Clause, preclude a government from imposing a tax on items bought using federally issued food stamps (Supplemental Nutritional Assistance Program, or SNAP, benefits).<sup>160</sup> Soda taxes in particular have been challenged as preempted by this ban: the local tax will apply to federally issued benefits when shoppers purchase soda with food stamps—the eventuality federal laws prohibit.<sup>161</sup> Cities have been able, however, to rely on an easy workaround.<sup>162</sup> The Pennsylvania court approved Philadelphia's soda tax since it was collected from the distributors of the beverages, not from the food stamp beneficiaries upon purchase (although, naturally, the tax was embodied in the beverage's price, so the purchasers ended up paying at least part of it).<sup>163</sup> Cook County similarly hoped to subvert the prohibition on the taxation of SNAP benefits by forcing retailers to fold the excise tax into the selling price of the products, instead of tacking it on at checkout.<sup>164</sup> Cities can thus indirectly apply an excise tax to SNAP beneficiaries that federal preemption supposedly shields—as long as the tax does not appear as a separate charge at the register.<sup>165</sup>

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<sup>158</sup> *Id.* at \*7.

<sup>159</sup> *Am. Beverage Ass'n v. City of Chi.*, 937 N.E.2d 261, 270 (Ill. App. Ct. 2010).

<sup>160</sup> 7 U.S.C.A. § 2013(a) (West 2010).

<sup>161</sup> *Williams*, 164 A.3d at 582–83.

<sup>162</sup> *Id.* at 594.

<sup>163</sup> *Id.*

<sup>164</sup> The plan was torpedoed by the state's Department of Revenue which warned that that approach would constitute an "overcollection" from taxpayers because the higher selling price would then be subject to sales tax. Greg Trotter, *Cook County Reversal: Soda Tax Won't Apply to Food Stamp Purchases After All*, CHI. TRIB. (June 9, 2017), <http://www.chicagotribune.com/business/ct-soda-tax-food-stamps-exemption-0610-biz-20170609-story.html> [<https://perma.cc/2ZWK-PTDG>]. The County therefore announced it will not tax purchases made with SNAP benefits. *Id.*

<sup>165</sup> *Id.*

D. *Summary: The Legal Incentive for Local Excise Taxation*

A common thread connects all the diverse doctrinal challenges to local excise taxes reviewed in this Part: courts interpret the disparate relevant elements in constitutions, statutes, and the common law in particularly lax ways so as to facilitate those taxes' adoption. Some of these moves amount to no less than a reversal of the general rules of local government law. The convergence of courts' decisions with respect to the city's power to initiate excise taxation and those dealing with the state's power to preempt such local taxation has generated a legal reality whereby cities are free to enact excise taxes as long as the state does not actively move to strike down the specific excise tax. This is the reverse image of the rule generally applicable when cities choose to regulate an activity—in which case they are prohibited from acting unless allowed by the state. Given this fact, and since the restrictions that apply to taxation but not to regulation have been largely sidestepped in the context of excise taxation, cities are actively incentivized to turn to excise taxation over other forms of regulation.

This incentive is further reinforced by the effects of several other doctrines that courts apply rather aggressively to more traditional manners of local regulation of consumer activities—but not to their taxation. Courts readily enforce the private law exception to home rule initiative powers, recognized in many states, to hold local regulations of market transactions unauthorized under home rule clauses.<sup>166</sup> They often subject some forms of sales regulation, particularly requirements that sellers and producers warn purchasers of a product's effects, to rather demanding First Amendment freedom of speech scrutiny.<sup>167</sup> These restrictions are rendered irrelevant when cities interfere with the same market activities through excise taxation rather than through other regulatory tools.

In stark contrast to their approach towards other forms of local action—including other forms of local taxation<sup>168</sup>—courts leave the regulation of local excise taxation to explicit and specific action by the state legislature. Courts do not insert themselves as the protectors of state interests. They require state legislators to muster the necessary political capital to blunt local action.

Both cities and states appear to have internalized this legal message whereby excise taxes are different as far as the city–state power relationship is

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<sup>166</sup> See generally Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1111 (2012) (surveying the “private law exception” to municipal home-rule authority).

<sup>167</sup> E.g., *Am. Beverage Ass'n v. City of S.F.*, 871 F.3d 884, 897 (9th Cir. 2017), *reh'g en banc granted*, 880 F.3d 1019 (9th Cir. 2018) (holding that a municipal ordinance requiring certain types of fixed advertisements for sugar-sweetened beverages to contain warnings about the health effects of those beverages violates First Amendment free speech rights).

<sup>168</sup> Scharff, *supra* note 11, at 334 (suggesting that the law be reformed to embrace a “presumptive taxing authority” for localities, arguing such a move will expand local taxing authority in almost all states).

concerned. In their research into cities' regulatory actions, David Barron, Gerald Frug, and Rick Su found that cities are deterred from acting to address local concerns even when they formally have the legal power to adopt a policy.<sup>169</sup> Uncertainty, bred of the long tradition of judicial hostility to local action, is sufficient to generate a local tendency towards inaction.<sup>170</sup> Conversely, recent city practices suggest that local officials have few qualms when proceeding with excise taxation plans despite potential doubts surrounding the legality of the specific excise tax proposed.<sup>171</sup> States, for their part, have moved to explicitly preempt specific excise taxes—perhaps realizing that courts will not block those local taxes on their behalf, as they do with respect to other local acts and taxes.<sup>172</sup>

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<sup>169</sup> DAVID J. BARRON ET AL., *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON* 9 (2004).

<sup>170</sup> *Id.* at 9–12.

<sup>171</sup> See e.g., Hal Darick, *One Portion of Emanuel's Anti-Tobacco Effort Up in Smoke*, CHI. TRIB. (Feb. 1, 2017), <http://www.chicagotribune.com/news/local/politics/ct-rahm-emanuel-tobacco-tax-met-0202-20170201-story.html> [<https://perma.cc/ST7F-FL4Y>] (reporting that the alderman who sponsored a new Chicago tobacco tax ordinance expected the court to strike it down and that city council, acknowledging it lacked the power to adopt such taxes, had before petitioned the state legislature to be awarded the power; the ordinance was indeed struck down in *Iwan Ries & Co. v. City of Chicago*, No. 16 L 50356, slip op. at 1 (Ill. Cir. Ct. Jan. 20, 2017)); Lewis Kamb & Sandi Doughton, *Seattle's Income Tax on the Wealthy Is Illegal, Judge Rules*, SEATTLE TIMES (last updated Nov. 23, 2017, 10:24 AM), <https://www.seattletimes.com/seattle-news/politics/seattles-income-tax-on-the-wealthy-is-illegal-judge-rules/> [<https://perma.cc/C4C7-AAUS>] (“Opponents of Seattle’s so-called ‘wealth tax’ immediately hailed the ruling as proof that the city long has known the tax was legally flawed, but nonetheless pushed it into law.”).

<sup>172</sup> E.g., New York passed a law to stop New York City’s plastic bag fee. Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html> [on file with *Ohio State Law Journal*]. Minnesota, Maine, and Pennsylvania passed similar acts but they were vetoed by governors. Jared Paben, *Court Ruling Throws Florida Bag Law in Limbo*, PLASTICS RECYCLING UPDATE (May 23, 2017), <https://resource-recycling.com/plastics/2017/05/23/court-ruling-throws-florida-bag-law-limbo/> [<https://perma.cc/BZ3M-84DT>] (noting Minnesota and Maine’s vetoed legislation); *Wolf Vetoes Bill to Outlaw Local Plastic-Bag Bans*, U.S. NEWS (June 30, 2017), <https://www.usnews.com/news/best-states/pennsylvania/articles/2017-06-30/wolf-vetoes-bill-to-outlaw-local-plastic-bag-bans> [<https://perma.cc/WTB8-RQ2X>] (reporting Pennsylvania governor’s veto). In Kansas, a state statute explicitly bans all local excise taxes (with few enumerated exceptions). KAN. STAT. ANN. § 12-194 (2008). Twenty-one states explicitly prohibit local governments from imposing an excise tax on tobacco products. *U.S. Local Tobacco Tax Authority: A 50-State Review*, TOBACCO CONTROL LEGAL CONSORTIUM (Jan. 1, 2016), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-tobacco-tax-authority-50-state-review-2016.pdf> [<https://perma.cc/E6JV-L8M6>]. In 2016, Governor Brown of California vetoed a bill that would have repealed the state’s preemptive law, noting that it would leave taxation to the full discretion of cities on a blanket basis. Veto Message from Governor Edmund G. Brown Jr. to the Members of the California State Assembly (May 4, 2016), [https://www.gov.ca.gov/wp-content/uploads/2017/09/ABX2-10\\_Veto\\_Message.pdf](https://www.gov.ca.gov/wp-content/uploads/2017/09/ABX2-10_Veto_Message.pdf) [<https://perma.cc/8AUM-RLZT>].

The legal appeal of excise taxes also manifests itself in cities' efforts to package other taxes—income taxes, business taxes,<sup>173</sup> or impact fees<sup>174</sup>—as excise taxes. While the most blatant efforts are not always successful,<sup>175</sup> courts do not seem to police this definitional borderline too stringently.<sup>176</sup>

The legal attitude towards local excise taxation is remarkable. As scholars have noted, other local fiscal choices—particularly, the overall shift from taxes to fees—have been driven by legal restraints placed on one policy option (taxes) but not the other (fees).<sup>177</sup> The case of the shift to excise taxes is even more extreme. The empowerment of cities to adopt this one policy tool unless explicitly blocked by the state undermines the typical rules of American local government law. Since courts much more easily find that cities lack the power to regulate the sale of a specific product, as opposed to the power to tax it, cities are forcefully pushed towards the latter option. A sequence of two Maryland cases provides an extreme illustration. Following the striking down of its development impact fee as an unpermitted use of the local regulatory power,<sup>178</sup> Montgomery County reenacted the same levy as a development excise tax.<sup>179</sup> The court gave its blessing to the maneuver—and to the local excise tax's retroactive application to ratify the imposition of the fees the court itself had blocked before.<sup>180</sup>

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<sup>173</sup> For example, in Arizona, a regional transportation authority adopted a transportation excise tax calculated as a one-half percent levy of the gross income from the business activity upon every person engaging in retail to fund transportation improvements. *Vangilder v. Ariz. Dep't of Revenue*, No. TX2017-000663, slip op. at 2–3 (Ariz. Tax Ct. July 18, 2018). The tax has been struck down. *Id.* at 3.

<sup>174</sup> In *Congregation v. Mayor of Balt.*, 183 A.3d 845, 869 (Md. Ct. Spec. App. 2018), the city adopted a storm water system charge based on the amount of the property's impervious surface. An impact fee in all but name, the court could not approve it as such—due to its own precedence—and thus the levy had to count as a tax. *See id.* at 869–70. Had it been a property tax and not an impact fee though, the congregation—as a religious institution—would have been exempt. *See id.* at 872. The court thus agreed to characterize it as an excise fee—which the city could adopt and charge the congregation. *Id.* at 845.

<sup>175</sup> A lower court in Washington has rejected Seattle's income tax. *Kunath v. City of Seattle*, No. 17-2-18848-4 SEA, at 26 (Wash. Super. Ct. 2017). At court the city argued the tax was an excise tax. *Id.* at 14–16. The court was not persuaded: first, the ordinance itself called the tax an income tax—not an excise tax, and second, the court refused to embrace the argument that receiving income in Seattle or choosing to live there was a privilege (that as such can be subjected to an excise tax). *Id.* at 14, 16.

<sup>176</sup> *See, e.g., Wellington River Hollow, LLC v. King Cty.*, 54 P.3d 213, 221 (Wash. Ct. App. 2002) (declining to determine whether the County had disguised an excise tax as an impact fee).

<sup>177</sup> *See Laurie Reynolds, Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 395 (2004); *see also* GERALD FRUG & DAVID BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 89 (2008) (discussing California).

<sup>178</sup> *See E. Diversified Props., Inc. v. Montgomery Cty.*, 570 A.2d 850, 855 (Md. 1990).

<sup>179</sup> *Waters Landing Ltd. P'ship v. Montgomery Cty.*, 650 A.2d 712, 716 (Md. 1994).

<sup>180</sup> *Id.* at 716, 720.

To the list of motivations for a local excise tax, provided in Part II.B., another important motivation must therefore be added: the emerging structure of the law.<sup>181</sup>

#### IV. A NORMATIVE ASSESSMENT OF THE LEGAL TREATMENT OF LOCAL EXCISE TAXATION

Is this legal approach sensible? Is the judicial embrace of local excise taxation—privileging it over many other forms of local action—justified? This final Part of this Article addresses that question. After presenting the rationale courts provide for their move and finding it somewhat lacking, it offers other normative justifications for the move, and concludes by chronicling two examples that bolster the normative argument suggested here.

##### *A. Courts' Rationale: The Distinction Between Regulation and Taxation*

The decisions reviewed in Part III that set the legal attitude toward local excise taxation apart from the judicial attitude toward other local action fail to provide much by way of explanation. As noted, oftentimes courts content themselves with noting that taxation is different from regulation—and thus the rules applicable to the latter need not apply to the former.<sup>182</sup> In those rare occasions when courts elaborate on this distinction's grounding, they ascribe it to the supposed "inherent" or "essential" nature of taxation.<sup>183</sup> The claim may appear striking seeing that, as a matter of formal default in American law, the power to tax is vested in the state legislature (which can then choose to delegate it to local governments).<sup>184</sup> But the claim might be a recognition of the fact that no government could exist without funding. As the Supreme Court explained in an early, unrelated case, cities are tasked with providing some of the most important public services.<sup>185</sup> Doing so requires the expenditure of money.<sup>186</sup> Therefore, when creating cities and empowering them to execute such tasks

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<sup>181</sup> See also *Mount Airy #1, LLC v. Pa. Dep't of Revenue*, 154 A.3d 268, 280 (Pa. 2016). In that case, the court denied the state the ability to vary the rate of a state excise tax in accordance with the location of the retailer taxed: applying one rate in one municipality and another in others. *Id.* The court in essence held that a varying excise tax must be adopted locally. *Id.*

<sup>182</sup> See, e.g., *Town of Cicero v. Fox Valley Trotting Club, Inc.*, 357 N.E.2d 1118, 1120 (Ill. 1976) ("The power to regulate and power to tax are separate and distinct powers.").

<sup>183</sup> See *supra* notes 93–94, 124.

<sup>184</sup> *Murray v. City of Phila.*, 71 A.2d 280, 283 (Pa. 1950) ("[I]t is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon inhabitants, or their property, unless the power be plainly and unmistakably conferred." And the grant of such right is to be strictly construed, and not extended by implication." (citations omitted)); JOHN MARTINEZ, 4 LOCAL GOVERNMENT LAW § 23:1 (2018); 71 AM. JUR. 2D, STATE AND LOCAL TAXATION § 56 (2012).

<sup>185</sup> *United States v. City of New Orleans*, 98 U.S. 381, 393 (1878).

<sup>186</sup> *Id.*

states must have also—at least implicitly—granted cities the power to tax.<sup>187</sup> “A municipality without the power of taxation would be a body without life, incapable of acting, and serving no useful purpose.”<sup>188</sup>

At times like ours, when cities’ financial states are extremely, and notoriously, dire,<sup>189</sup> courts might be particularly accommodating to cities’ attempts at innovative fundraising. Especially since courts are well aware that state constitutions and legislatures have come to aggressively curtail cities’ ability to turn to, or augment, traditional modes of funding (through new restrictions on debt issuance and property or sales taxation)<sup>190</sup> they might be more accepting of local efforts at establishing innovative fundraising measures not explicitly blocked by the legislature, such as excise taxes.

The problem, however, is that excise taxes are not—as Part II.B. highlighted—solely, or even mostly, tools for raising funds.<sup>191</sup> They can equally constitute regulatory measures—thereby rendering the regulation/taxation distinction courts draw on a formalistic artifact. Hardly any tax could function as purely a measure for raising revenue: the choice of what and whom to tax is inevitably a form of regulation.<sup>192</sup> Any tax determines which actors will contribute to the government, how much, and when. That determination must affect individual economic and social behavior. It renders some activities more expensive, and thus diverts investments into other activities. This is doubly true with respect to excise taxes. These are taxes that single out specific goods or behaviors—and not other, similar ones—for special treatment. Choosing to tax certain products but not others—sweetened beverages but not unsweetened ones, plastic bags but not reusable ones—by definition involves a judgment call respecting products’ relative worth and interferes with relevant market actors’ future behavior. This judgment call and interference might well represent the original spur for the enactment of a given excise tax, as seen in Part II.B.<sup>193</sup>

Especially when analyzing excise taxes, therefore, attempts to categorically separate government’s function as a collector of revenue from its function as a regulator are—as far as sound economic thinking goes—futile. The enacting local officials often do not even attempt to do so themselves.<sup>194</sup> And for the

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See TRUTH IN ACCOUNTING, FINANCIAL STATE OF THE CITIES 4 (Jan. 2018), <https://www.statedatalab.org/library/doclib/2016-Financial-State-of-the-Cities-Booklet-FINAL-.pdf> [<https://perma.cc/94Q2-T2K9>] (compiling data on the financial state of cities).

<sup>190</sup> See *supra* notes 16–21 and accompanying text.

<sup>191</sup> See *supra* Part II.B.

<sup>192</sup> See AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, 30 (2013) (showing that the introduction of a federal income tax was not solely geared toward achieving immediate economic goals, but also toward laying the foundations for the new activist state).

<sup>193</sup> See *supra* Part II.B.

<sup>194</sup> See, e.g., Andy Grimm, *Preckwinkle: Soda Tax Was All About Money, and the County Needs It*, CHI. SUN-TIMES, (Oct. 4, 2017), <https://chicago.suntimes.com/>

retailer or consumer, the tax renders the product more expensive—just as a regulation of modes of selling, of packaging, of the seller’s employment practices, or of the producer’s tort liability to consumers could have.

The Washington court’s claim made in the Seattle gun excise tax case—echoing a general line of reasoning—that the tax is not a regulation since it does not “limit . . . the number or type of firearms and ammunition that [retailers] can sell”<sup>195</sup> is hence spurious. Choosing to tax certain products is choosing to police certain products. A tax will probably increase the price of firearms and ammunition and could thus reduce sales. That is, as noted, precisely the goal of such an excise tax.<sup>196</sup> Courts’ notion that excise taxes are merely tools for raising revenue, and, therefore, markedly different from regulation, is contradicted by the economics of excise taxes and the politics of their enactment.

The courts’ insistence on the regulation/taxation distinction as grounding for a relaxed judicial attitude toward local excise taxation thus materializes as bafflingly formalistic. It is perhaps in line with courts’ similar tendency to “read [constitutional fiscal limits] narrowly, technically, and formalistically.”<sup>197</sup> Maybe it is not unrelated to an admission made by one justice of the Pennsylvania Supreme Court that “[o]f all the provisions of the Constitution, the interpretation and application of those provisions which pertain to taxes . . . present the most difficulties.”<sup>198</sup> The courts’ stance toward local excise taxes emerges as highly unprincipled—and hardly persuasive.

### B. *The Normative Standing of Local Excise Taxes*

The formalistic distinction between regulation and taxation on which courts rely provides a rather hollow justification for the overall lenient judicial treatment of local excise taxes. That does not mean, however, that a more robust normative justification cannot be found for this doctrinal attitude. Such a substantive justification must be sought not in some abstract form of categorical thinking, but rather in the normative values that serve to vindicate the embrace of local action. In American law and thinking, localism is associated with at

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chicago-politics/preckwinkle-soda-tax-was-all-about-money-and-the-county-needs-it/  
[<https://perma.cc/F5YD-C5JB>] (quoting the following statement made by Toni Preckwinkle, Cook County Board President, with respect to the county’s soda tax: “We chose as a revenue generator a sweetened beverage tax, which had been enacted around the country, both for the revenue and for the health benefits . . .”). The ordinance itself cited data and evidence on the health impacts of consumption of sugary drinks from the World Health Organization, the Centers for Disease Control, and the American Medical Association, among others. COOK COUNTY, ILL., ORDINANCE 16-5931 (Nov. 10, 2016) (repealed 2017).

<sup>195</sup> *Watson v. City of Seattle*, 401 P.3d 1, 7 (Wash. 2017).

<sup>196</sup> *See supra* Part II.B.

<sup>197</sup> Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 910 (2003).

<sup>198</sup> *Amidon v. Kane*, 279 A.2d 53, 64 (Pa. 1971).

least two major values: democracy and efficient provision of public services.<sup>199</sup> Both of these are indeed promoted by empowering cities to adopt excise taxes—taxes which will therefore emerge from the analysis that follows as a rather non-threatening form of local action.

Local lawmaking is generally recognized as serving democracy by opening additional avenues for citizen participation.<sup>200</sup> These avenues are particularly promising since the local level is the closest to the citizen and thus it is often easier to meaningfully engage the citizen in decision-making done on this level.<sup>201</sup> The result, closely associated with Tocquevillian notions of American democracy,<sup>202</sup> is that policies adopted on the local level—as opposed to the state or federal levels—better reflect residents’ political preferences, all the while generating an active citizenry.<sup>203</sup>

Unfortunately, enhanced participation and better political processes are not a given on the local level—and small-scale democracy is not without its risks. The assumption that residents will participate in local politics—more than they would in state or federal politics—often does not hold true.<sup>204</sup> Especially on the local level, many policy issues strike citizens as low stakes affairs that hardly merit active involvement.<sup>205</sup> Issues may not be salient enough to affect individuals’ voting decisions.<sup>206</sup> Local action will not only therefore fail to entice participation, it might actually lead to government decisions that do not reflect the preferences of the inattentive majority. A highly interested minority group can capture the local decision-making process pressing policies dear to it but not beneficial to the majority of residents.<sup>207</sup> Conversely, the embrace of localism could be counterproductive to democracy as it facilitates the tyranny of a majority.<sup>208</sup> As James Madison warned, small scale politics, where the limited number of participants caps the range of competing groups and decreases the need to construct a diverse governing coalition, are peculiarly

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<sup>199</sup> See Dahl, *supra* note 7, at 967; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422–24 (1956).

<sup>200</sup> See ARENDT, *supra* note 7, at 283; see also Dahl, *supra* note 7, at 967 (“The city has at least one more advantage: it has great potentialities as a unit for educating citizens in . . . political socialization.”).

<sup>201</sup> See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7–8 (2010).

<sup>202</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 331 (Arthur Goldhammer trans., 2004) (noting that “local institutions . . . foster a taste for liberty among the people and teach them the art of being free”).

<sup>203</sup> *E.g.*, ARENDT, *supra* note 7, at 114–15 (describing how American people attend town meetings where they were involved in the decision-making processes of local government, thereby sparking the revolution).

<sup>204</sup> Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1379–81 (2014).

<sup>205</sup> *See id.*

<sup>206</sup> *See id.*

<sup>207</sup> *Id.* at 1386–87.

<sup>208</sup> *See* THE FEDERALIST NO. 10 61, 63–64 (James Madison) (Jacob E. Cooke ed., 1961).

prone to absolute control by a majority group.<sup>209</sup> With few political checks on its dominance, that group can proceed to adopt policies that wholly ignore the preferences of the minority—that may even oppress a discrete minority.<sup>210</sup>

These features and perils that generally lessen the democratic appeal of local decision-making are, luckily, greatly reduced when the local policy considered is the one relevant here. Empowering local governments in the field of excise taxation serves interests in democracy for two reasons. First, unlike other forms of regulation, taxation tends to be incredibly salient in local (and other) political debates and elections. Since the 1970s, taxes have been some of the most prominent—arguably, the most prominent—issues in American local (and sometimes state) politics.<sup>211</sup> Taxes excite political passions, and thus residents will get involved when a local tax is contemplated or changed. Those local tax decisions tend to become major campaign issues. Tax policies adopted through the local political process, therefore, are often likelier, as compared to many other regulatory policies, to reflect the true preferences of most residents.<sup>212</sup>

Second, excise taxation specifically is a policy field in which the risk of tyranny of the majority—the Madisonian concern<sup>213</sup>—is, in relative terms, minimized. A city’s capacity to abuse the governmental power in adopting an excise tax on behalf of one group is limited through several external factors. Perhaps most prominently, as noted in Part III and indicated by the well-funded litigation initiatives challenging all local excise taxation, those affected by excise taxation are far from a forlorn group.<sup>214</sup> Excise taxes are not, unlike for example impact fees, imposed as part of an individualized decision-making process that is amendable to abuse and likely to disfavor individual, non-repeat players who are legally unsophisticated, politically unconnected, and of limited economic means.<sup>215</sup> As a tax an excise tax is a general levy applied to a broad group. The composition of that group further alleviates—if not fully annuls—most concerns of abuse. Retailers, manufacturers, and major corporations—the

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<sup>209</sup> *Id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See* Michael J. New, *The Tax Revolt Turns* 25, CATO INST. (May 29, 2003), <https://www.cato.org/publications/commentary/tax-revolt-turns-25> [<https://perma.cc/A2MF-EW8X>]. The 1970s are associated with the “tax revolt” whose crowning achievement was the passage of California’s Proposition 13 in 1978. *See* Conor Friedersdorf, Opinion, *After 40 Years, Proposition 13’s Failures Are Evident*, L.A. TIMES, (June 4, 2018), <http://www.latimes.com/opinion/op-ed/la-oe-friedersdorf-prop-13-20180604-story.html> [<https://perma.cc/H26B-VRS5>]. In the ensuing decades efforts to restrict local—and state—taxation through popular initiative were pursued, often successfully, in multiple states. New, *supra* note 211.

<sup>212</sup> *See* Shoked, *supra* note 17, at 1265–66 (explaining that financial decisions—even those pertaining to debt, allegedly a much less salient policy tool—are salient and affect voter behavior).

<sup>213</sup> *See supra* notes 208–210 and accompanying text.

<sup>214</sup> *See supra* Part III.

<sup>215</sup> I am grateful to Vicki Been for highlighting to me the importance of the distinction with impact fees.

actors almost always prone to experience the brunt of an excise tax<sup>216</sup>—are somewhat unlikely to constitute a discrete and insular minority (even if the taxed products they peddle are consumed mostly by members of such a minority group). They are a well-funded, influential business group that can effectively guard its interests against local overreach. As such, these market actors can, relatively easily, conscript the state legislature to their aid against local action.<sup>217</sup>

Existing experience with local excise taxes bears out this prediction: many industries have been able to attain rapid (sometimes even preemptory) redress against local excise taxation of their products, in the form of explicit, and specific, state preemptive statutes.<sup>218</sup> When the California legislature voted, following intense lobbying and threats of retaliatory ballot initiative campaigns by the taxed industry, to preempt future local soda taxes, one senator observed that the beverage companies had successfully held the state “hostage.”<sup>219</sup> The Senate majority leader noted that “Big soda [was] blackmailing the state legislature.”<sup>220</sup>

This eventuality represents the quintessential case where local power is relatively unthreatening to democratic values. An interest group’s dominance of a local government is not troublesome if its influence can be countered on another governmental level.<sup>221</sup> Thus even if the local level is particularly hospitable to pro-excise tax interests (itself a debatable proposition) the likelihood that the local government will overreach in its excise taxation policies is exceptionally low. Other levels of government are simply too amenable to the influence of the opposing interests. Those interests allegedly disfavored by local governments do not require, therefore, judicial protection to fend off risks of

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<sup>216</sup> See, e.g., *Williams v. City of Phila.*, 188 A.3d 421 (Pa. 2018) (naming “consumers, retailers, distributors, producers, and trade associations” as the group that brought civil action against Philadelphia’s soda tax).

<sup>217</sup> See David A. Dana & Janice Nadler, *Soda Taxes as a Legal and Social Movement*, 13 *Nw. J. L. & Soc. POL’Y* 84, 106–07 (2018).

<sup>218</sup> See, e.g., *id.* David Dana and Janice Nadler have shown that soda tax preemption laws are adopted as part of political debates about those specific taxes led by the relevant stakeholders. *Id.* These are not theoretical, principled debates about the place of localism in American law, but rather a response on the part of legislatures to the pressure of the effected industries. See *id.*

<sup>219</sup> Anahad O’Connor & Margot Sanger-Katz, *California, of All Places, Has Banned Soda Taxes. How a New Industry Strategy Is Succeeding*, *N.Y. TIMES* (June 27, 2018), <https://www.nytimes.com/2018/06/27/upshot/california-banning-soda-taxes-a-new-industry-strategy-is-stunning-some-lawmakers.html> [on file with *Ohio State Law Journal*].

<sup>220</sup> *Id.*

<sup>221</sup> See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 92 (1990) (arguing that the “problem with interest-group pluralism is not . . . that people promote their own interests,” but that “inequality of resources, organization, and power allows some interests to dominate”).

abuse. Local majoritarian democracy should function relatively well when the policy considered is excise taxation.<sup>222</sup>

Like democracy, the other normative value local decision-making is set to promote—economic efficiency—is also well served by empowering local officials to adopt excise taxation; more than it often is by empowering them to pursue many other regulatory (or tax) policies.<sup>223</sup> As famously explained by Charles Tiebout, localism advances economic efficiency by generating a competition over residents between many local governments.<sup>224</sup> Once a public service is provided by a plethora of local governments within the state—rather than solely by the one state—individuals can shop with their feet for the service.<sup>225</sup> They can move between localities in pursuit of the public service levels and pricing they desire.<sup>226</sup> The likelihood that they obtain the service that best fits their preferences thereby increases.

But this beneficial inter-local competition over residents is effective only if certain conditions are met. The Tiebout Model must assume, for example, that individuals can easily move between municipalities and have information respecting municipalities' competing policies (so that residents actually, and meaningfully, shop with their feet);<sup>227</sup> those policies, in turn, must not generate negative effects on outsiders that those shopping individuals do not experience—i.e., externalities.<sup>228</sup> Such assumptions, many commentators have noted, are exceptionally unrealistic in the case of many local regulatory, tax, and service provision policies.<sup>229</sup>

The case of excise taxation, though, is one where the Tiebout Model's assumptions respecting mobility, knowledge, and lack of externalities, are rather likely—in relative terms—to be valid. Tax rates are readily discernable,<sup>230</sup> and

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<sup>222</sup> I apply here to the local-state dynamic an argument similar to the one developed by Roderick Hills with respect to the state-federal dynamic. Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 28 (2007) (“[W]here a statute is ambiguous [respecting its preemptive reach], a court ought to interpret the preemptive force of federal statutes to burden interest groups favoring preemption, on the assumption that these pro-preemption groups are more capable of promoting a vigorous debate in Congress than their opponents.”). Similarly, the argument echoes Einer Elhauge's suggestion that a when interpreting a statute, a court opt for the interpretation that goes against the preferences of the interest group more likely to be able to persuade Congress to reverse the court's decision. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2165–66 (2002).

<sup>223</sup> See Tiebout, *supra* note 199, at 422–24.

<sup>224</sup> *Id.*

<sup>225</sup> See *id.* at 422.

<sup>226</sup> See *id.*

<sup>227</sup> *Id.* at 419.

<sup>228</sup> *Id.* at 423.

<sup>229</sup> E.g., Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 AM. ECON. REV. 93, 93 (1981) (The Tiebout Model is grounded in “a set of assumptions so patently unrealistic as to verge on the outrageous”).

<sup>230</sup> See generally Raj Chetty, Adam Looney & Kory Kroft, *Saliency and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145, 1158–66 (2009) (finding that an excise tax

retailers subjected to an excise tax can move outside city lines to avoid them. Even more easily, residents can similarly often adjust their shopping trips: while in order to avoid many regulatory policies (say school or police quality)—and many local taxes (say property or income taxes)—residents must actually relocate, to avoid an excise tax they need only shop for goods or services elsewhere. Since the resident need not necessarily relocate if she is to shop with her feet for desirable local excise tax levels, Tiebout's mobility is not a far-fetched assumption here; or at least not as far-fetched an assumption as it is in the case of many other local policies.

The model can accordingly operate rather smoothly as competition will govern local government behavior.<sup>231</sup> The dynamics are straight-forward. Individuals' alteration to their shopping habits in light of the local excise tax pressures the local government adopting the tax. As shoppers and potentially retailers flee the taxing city, that government's property and sales tax intake decreases. When contemplating an excise tax, therefore, cities must consider market pressures and thus their behavior can often generate efficient results.

Additionally, this Tieboutian competition among municipalities, each employing its own excise tax, does not produce grave externalities—another important assumption whose presence is necessary for the Tiebout Model to function effectively.<sup>232</sup> No strong state interest in uniformity is threatened by local excise taxes. Diverse excise and sale tax rates, unlike diverse regulations of business practices (for example, distinct local standards of tort liability or of product packaging) can hardly be said to be too onerous for businesses to accommodate.<sup>233</sup> Thanks to their salience and straight forward nature, differences in excise tax rates between municipalities do not generate uncertainty. Their administration is relatively cheap, as retailers are already charged with collecting a sales tax—whose rate also already often varies among the state's different municipalities. Tax variation among a state's municipalities should not inhibit business operations and drive businesses to leave the state. Thus a local excise tax's effects on other communities within the same state should largely be positive—as those communities stand to gain shoppers and businesses escaping the locality's tax (and if those other municipalities deem the relevant businesses undesirable, they can adopt their own excise tax or use their zoning powers to divert the incoming retail uses).

With its assumptions rather firmly satisfied in this specific context, the Tiebout Model can predict economic efficiency gains through the empowerment

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on alcohol affects consumer behavior—more so than a sales tax, since the former is included in the product's price the consumer views).

<sup>231</sup> See Tiebout, *supra* note 199, at 422–24.

<sup>232</sup> See *id.* at 423.

<sup>233</sup> See Joseph Zelasko, Note, *The Reverse-Commandeering System: A Better Way to Distribute State and Local Authority*, 112 NW. U. L. REV. 83, 94 (2017) (noting that a major cause for the curtailment of local regulatory initiatives is “[t]he general fear . . . that a proliferation of different regulatory regimes would make doing business in a state excessively difficult”).

of localities to adopt excise taxes. These gains might not be attainable through other local regulatory policies with respect to which the presence of the model's assumptions is not as marked. This preference for local excise taxation over local regulation, suggested here based on Tieboutian analysis, is further in line with the more general bias many economists often express for corrective taxes over direct regulation of harmful activities.<sup>234</sup>

The curbs American law places on local government actions are not random. They are born of the normative unease with certain potential results of local power.<sup>235</sup> Localism promises benefits in terms of democracy and efficiency.<sup>236</sup> Localism also, however, poses grave risks to these and other values.<sup>237</sup> Both the benefits of localism and its threats vary across different policy fields. Excise taxation is a policy field in which localism's risks are, in relative terms, minimalized, as a city's capacity to abuse governmental power is limited through several factors—political and economic. Excise taxes are probably as likely as any other local policy to effectively reflect residents' preferences, and thus they should be embraced as a worthwhile exercise in localism.

### C. *Tocqueville, Tiebout, Soda, Amazon*

Inarguably, the rosy normative assessment of local excise taxation just developed relies on certain hypotheses and predictions respecting local political processes and economic dynamics. Fortunately, these hypotheses and predictions are borne out not only by the related experiences and general empirical findings suggesting them, but also by recent events surrounding prominent local excise taxes. Specifically, the stories of Cook County's soda tax and Seattle's Amazon tax, both unfolding over the past year and mentioned in Part II.A., highlight the minimal need for court intervention to curtail local action in the excise taxation field.<sup>238</sup>

Cook County's soda tax was adopted by the Board of Commissioners in November 2016<sup>239</sup> and it took effect, having been approved by a court, on August 2, 2017.<sup>240</sup> An intense political campaign followed.<sup>241</sup> Can the Tax Coalition, an anti-tax group funded by the American Beverage Association, spent more than \$3.2 million on TV and radio ads.<sup>242</sup> Advocates also paid

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<sup>234</sup> See, e.g., Louis Kaplow & Steven Shavell, *On the Superiority of Corrective Taxes to Quantity Regulation*, 4 AM. L. & ECON. REV. 1, 1–2 (2002).

<sup>235</sup> See Dahl, *supra* note 7, at 967; Tiebout, *supra* note 199, at 422–24.

<sup>236</sup> See TOCQUEVILLE, *supra* note 202, at 331.

<sup>237</sup> See Shoked, *supra* note 204, at 1386–87.

<sup>238</sup> See *supra* Part II.A.

<sup>239</sup> COOK COUNTY, ILL., ORDINANCE 16-5931, § 74-852(a) (repealed 2017).

<sup>240</sup> See Hal Dardick, *How Preckwinkle's Pop Tax Backfired*, CHI. TRIB. (Sept. 25, 2017), <http://www.chicagotribune.com/news/local/politics/ct-toni-preckwinkle-soda-tax-backfire-met-20170922-story.html> [https://perma.cc/2HZ4-5A8G].

<sup>241</sup> See *id.*

<sup>242</sup> *Id.*; Caitlin Dewey, *Why Chicago's Soda Tax Fizzled After Two Months—and What It Means for the Anti-Soda Movement*, WASH. POST (Oct. 10, 2017), <https://www.washin>

constituents of target electoral districts within the county eleven dollars per hour to circulate anti-tax petitions.<sup>243</sup> Individual county commissioners were lobbied—and repeatedly reminded that the following year was an election year.<sup>244</sup> Coca-Cola and Pepsi donated to some pro-repeal commissioners via a political action committee.<sup>245</sup> On the other side, Michael Bloomberg, the former New York City mayor and a pro-health policies crusader, “spent more than \$10 million on radio and ad campaigns, and an unknown amount on lobbyists and mailers.”<sup>246</sup> In addition, he verbally committed to back county commissioners who supported the tax’s cause in the following year’s elections.<sup>247</sup> Still, with public pressure mounting, several commissioners, citing the public outrage, switched their positions,<sup>248</sup> and the Board voted fifteen to one to repeal the tax on October 11, 2017, effective December 1.<sup>249</sup> Cook County’s soda tax lasted for four months.<sup>250</sup>

Seattle’s Amazon tax, imposing a \$275 per-employee levy on big corporations to fund affordable housing, was unanimously adopted by the city council on May 14, 2018.<sup>251</sup> Immediately thereafter a committee was created to put a referendum on the local ballot to repeal the head tax.<sup>252</sup> Amazon gave the No Tax On Jobs committee \$25,000, as did Starbucks, Kroger, Albertsons, and Vulcan, the privately owned company founded by Microsoft’s Paul Allen.<sup>253</sup> Unions and progressive groups started a “decline to sign” campaign urging people not to sign the petitions.<sup>254</sup> Before its enactment, polls indicated a strong majority in favor of the Amazon tax, and public opinion remained rather anti-corporate: 69% of people approved of unions, and many had a low regard for

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gtonpost.com/news/wonk/wp/2017/10/10/why-chicagos-soda-tax-fizzled-after-two-months-and-what-it-means-for-the-anti-soda-movement/?utm\_term=.44c10713c0c5 [https://perma.cc/PL6Z-GRLX].

<sup>243</sup> Dewey, *supra* note 242.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*; Rachel Hinton, *Cook County Soda Tax to be Repealed Next Week*, CHI. SUN-TIMES (Oct. 6, 2017), <https://chicago.suntimes.com/news/cook-county-soda-tax-to-be-repealed-next-week/> [https://perma.cc/K7F6-5LSY].

<sup>249</sup> Dewey, *supra* note 242.

<sup>250</sup> *See id.*

<sup>251</sup> Jonathan O’Connell, *After Amazon Opposition, Seattle Passes Compromise Tax to Fund Homeless Services*, WASH. POST (May 14, 2018), [https://www.washingtonpost.com/business/economy/after-amazon-opposition-seattle-passes-compromise-tax-to-fund-homeless-services/2018/05/14/2a7732a2-57b6-11e8-8836-a4a123c359ab\\_story.html?no-redirect=&utm\\_term=.08195732b069](https://www.washingtonpost.com/business/economy/after-amazon-opposition-seattle-passes-compromise-tax-to-fund-homeless-services/2018/05/14/2a7732a2-57b6-11e8-8836-a4a123c359ab_story.html?no-redirect=&utm_term=.08195732b069) [https://perma.cc/4CKN-7268].

<sup>252</sup> Alana Semuels, *How Amazon Helped Kill a Seattle Tax on Business*, ATLANTIC (June 13, 2018), <https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/> [https://perma.cc/SNP9-ABK3].

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

corporations.<sup>255</sup> Nonetheless, support for the tax itself was waning: pro-tax groups' internal polls showed that by this point 55% of residents objected to the tax.<sup>256</sup> The concern driving down support centered on potential business relocations.<sup>257</sup> Most prominent (and effective) was Amazon's announcement that it was halting construction on a new downtown Seattle tower.<sup>258</sup> The company suggested it was considering subleasing space instead—implying that the company might leave Seattle if the head tax came into effect.<sup>259</sup> The Building and Construction Trades Council expressed concern that the tax would kill construction jobs.<sup>260</sup> Local governments neighboring the city to the south, namely Tacoma and Pierce County, announced a \$275 tax credit per new employee to lure businesses from the city.<sup>261</sup> Bellevue, Kirkland, and Redmond, located just east of Seattle, also eagerly expected a boost to their business recruitment efforts.<sup>262</sup> Seattle city council members began worrying that not only would they lose the tax referendum, but they would also lose their seats come November.<sup>263</sup> On June 12, 2018, less than a month after it had passed, the council voted seven to two to repeal the Amazon tax.<sup>264</sup> Originally only scheduled to go into effect January 1, 2019, it would be somewhat inaccurate to describe Seattle's Amazon tax as short-lived.<sup>265</sup>

The similar trajectories of the soda tax in Cook County and the Amazon tax in Seattle reinforce the normative assessment of local excise taxation developed in the preceding Section.<sup>266</sup> In Cook County, a vibrant political debate erupted surrounding the local excise tax, with money pouring from both sides and with individual residents making their voices heard even before polling stations opened.<sup>267</sup> In Seattle, the local excise tax stimulated not only local political

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Semuels, *supra* note 252.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Kate Martin, *Now Will You Come to Tacoma? New Tax Credit Takes Aim at Seattle's New Head Tax*, NEWS TRIB. (May 21, 2018), <https://www.thenewstribune.com/latest-news/article211626494.html> [<https://perma.cc/8HNZ-G4BV>].

<sup>262</sup> See Greg Copeland, *Eastside Looks to Lure Businesses Amid Head Tax Fight*, KING 5 (May 11, 2018), <https://www.king5.com/article/news/local/eastside-looks-to-lure-businesses-amid-head-tax-fight/281-551455447> [<https://perma.cc/567R-SFE2>].

<sup>263</sup> Semuels, *supra* note 252.

<sup>264</sup> David Streitfeld & Claire Ballentine, *Seattle Officials Repeal Tax That Upset Amazon*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/technology/seattle-tax-amazon.html> [on file with *Ohio State Law Journal*].

<sup>265</sup> Paul Shukovsky, *Amazon Not Happy with Seattle's New Compromise Head Tax*, BLOOMBERG TAX (May 15, 2018), <https://www.bna.com/amazon-not-happy-n73014475997/> [<https://perma.cc/RS2E-3TKH>].

<sup>266</sup> See *supra* Part IV.B.

<sup>267</sup> See, e.g., Dardick, *supra* note 240.

action<sup>268</sup> but also, and perhaps more crucially, inter-local competition.<sup>269</sup> Neighboring local governments attempted to position themselves to accommodate actors that were pondering—or purporting to ponder—a move in reaction to the city’s policy.<sup>270</sup> Seattle itself was keenly aware of those actors’ maneuvers and adjusted its policies in accordance.<sup>271</sup>

Opinions can of course differ on the social merits of the end result of the struggles surrounding Cook County’s soda tax and Seattle’s Amazon tax. Some surely lament the taxes’ demise. But the story of the two ill-fated taxes shows that local political and economic dynamics effectively police local excise taxation. Those burdened by local excise taxation are not incapable of protecting their position through the democratic process or the market; if anything, local excise tax supporters are often at a disadvantage as they might find themselves arrayed against powerful business interests. No need thus normally exists to extend court protection against local excise taxation. The judicial reluctance to curb local action in the domain of excise taxation—incoherent in its stated justifications—emerges as normatively sound from this contemplation of contemporary examples.

## V. CONCLUSION

Local excise taxation offers great insights into the evolving state–local relationship in American law. These taxes represent a rather rare occasion where local power is rising in meaningful ways. Cities are increasingly, almost incessantly, adopting excise taxes.<sup>272</sup> Courts facilitate this move by applying to local excise taxation a rule that is the reverse of the normal rule respecting local action: cities can adopt these taxes, as long as the state does not specifically opt to block them. Though this rule is often grounded in a mostly senseless formalistic distinction between taxation and regulation, it is normatively desirable. Local excise taxes promote the promise of localism whilst limiting localism’s threat.

This argument developed in this Article on behalf of local excise taxes is an argument in support of localism—not an argument in support of the specific excise taxes growing prevalent over the past few years, nor even necessarily an argument in support of the benefits of excise taxation as a policy tool. The debate over the worth of the individual excise taxes cities have recently adopted—soda taxes, plastic bag taxes, etc.—hinges, for many, on the firmness of the scientific evidence respecting the dangers posed by the taxed products or

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<sup>268</sup> See Semuels, *supra* note 252.

<sup>269</sup> See Copeland, *supra* note 262.

<sup>270</sup> See *id.*

<sup>271</sup> See Streitfeld, *supra* note 264.

<sup>272</sup> See TUFTS UNIV., *Spread of Local Taxes on Sugar-sweetened Beverages is Likely*, SCIENCE DAILY (June 7, 2017), <https://www.sciencedaily.com/releases/2017/06/170607142602.htm> [<https://perma.cc/CP9Z-4CLM>] (discussing how seven cities have adopted excise taxes on sugar-sweetened beverages since 2014).

activities.<sup>273</sup> This Article has no pretenses of engaging such debates; and those debates, in turn, have no bearing on this Article. This Article’s argument for local decision-making respecting the adoption of an excise tax is as valid when the relevant tax is based on undisputed science—as in the case of a cigarette tax—as when it is based on no science at all—as in the case of a hypothetical condom tax.

The debate over the desirability of excise taxation as a general policy tool, for its part, focuses on questions touching upon, for example, excise taxes’ incidence (i.e., which group bears excise taxes’ burden) and their often regressive effects.<sup>274</sup> The answers economists provide to these questions should, inarguably, impact policymaking and legal attitudes towards excise taxes. For the purposes of this Article they are, however, of limited relevance—given the specific question the Article tackled. The Article asked not whether excise taxes should be adopted, but rather whether they should be adopted by local, as opposed to solely state, governments.

The answer to that question is that courts should not—and do not—on their own initiative block local governments, because they are local governments, from adopting excise taxes. Of course, some local excise taxes should still be struck down without awaiting specific preemptive action by the state legislature. Local excise taxes can target historically disempowered groups (consider the “tampon tax”<sup>275</sup>). In addition, “an unlimited power to tax involves, necessarily, a power to destroy,”<sup>276</sup> and a local excise tax could through an exceptionally high rate bar behaviors the state has explicitly sought to promote (for instance, marijuana dispensaries could be banished from a city through exorbitant excise taxation).<sup>277</sup> But other than in such exceptional cases, courts are right to demand

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<sup>273</sup> For example, on soda taxes, see generally Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599 (2009); Caroline Franck et al., *Taxing Junk Food to Counter Obesity*, 103 AM. J. PUB. HEALTH 1949 (2013); Jason Fletcher, David Frisvold & Nathan Tefft, *Substitution Patterns Can Limit the Effects of Sugar-Sweetened Beverage Taxes on Obesity*, 10 PREVENTING CHRONIC DISEASE (Feb. 7, 2013), [https://www.cdc.gov/pcd/issues/2013/12\\_0195.htm](https://www.cdc.gov/pcd/issues/2013/12_0195.htm) [<https://perma.cc/C2ZZ-FQ86>].

<sup>274</sup> E.g., Dana & Nadler, *supra* note 217, at 91; Jacob Goldin & Tatiana Homonoff, *Smoke Gets in Your Eyes: Cigarette Tax Salience and Regressivity*, 5 AM. ECON. J. ECON. POL’Y 303 (2013).

<sup>275</sup> “Tampon taxes” is the term affixed by reformers to the phenomenon whereby state and local governments exclude from their sales taxes medical products that are primarily used by men such as hair growth products, but not menstrual hygiene products—that are used by women. See Christopher Cotropia & Kyle Rozema, *Who Benefits from Repealing Tampon Taxes? Empirical Evidence from New Jersey*, 15 J. EMPIRICAL LEGAL STUD. 620, 620 (2018); see also Dana & Nadler, *supra* note 217, at 91 (suggesting that people experiencing poverty bear the burden of excise taxes for soda).

<sup>276</sup> *McCulloch v. Maryland*, 17 U.S. 316, 327 (1819).

<sup>277</sup> A Nevada bill seems to foresee this possibility: it caps the licensing fee local boards can charge from marijuana dispensaries in the same clause where it blocks them from adopting requirements respecting marketing and such that are stricter than those found in the statute. S. 487, 79th Leg., 2017 Sess. (Nev. 2017); see also *City of Northglenn v. Bd. of Cty.*

that the state act explicitly if it seeks to overcome a local excise tax. The judicial endorsement of local excise taxation—no matter how shaky its doctrinal grounding and stated reasoning—is a laudable embrace of localism.

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Comm'rs, 411 P.3d 1139, 1144–45, *cert. denied sub nom.* Bd. of Cty. Comm'rs v. City of Northglenn, No. 17SC67, 2017 WL 2664204 (Colo. June 19, 2017) (“Under the County’s argument, it could impose a special retail marijuana sales tax at such a level that it would essentially prohibit the sale of marijuana in home rule cities, whose citizens had voted to permit the sale of marijuana. That result would violate the constitutional structure created by Amendment 64 [legalizing recreational marijuana]”); *see also* Hill v. Wallace, 259 U.S. 44, 66 (1922) (striking down an early federal Future Trading Act since the prohibitive tax it imposed on certain trades amounted to a regulatory ban); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and A Research Agenda*, 56 UCLA L. REV. 1443, 1542 (2009) (discussing the Second Amendment’s potential implications for gun taxes).