

# TAXES AS REGULATORY TOOLS: AN ARGUMENT FOR EXPANDING NEW YORK CITY'S TAXING AUTHORITY

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*This Note explores the regulatory role of tax policy in New York City and argues that the City's power to tax independently should be increased. Currently, New York City must seek permission from the New York State Legislature to impose new taxes or change the structure of existing taxes. This restriction is justified primarily by the revenue-raising function of tax policy—an analysis that ignores the important role tax policy plays in creating effective regulatory regimes. The first Part of this Note sorts out the tangled relationship between fiscal policy tools such as taxation, regulation, user fees, and spending, and suggests factors relevant to determining which tool is most appropriate to use in a given situation. The Note next discusses New York State's scheme for distributing authority over taxation and regulation, and provides an overview of local government law. The concluding Part of this Note argues that New York City should be given more independent taxing authority and directly addresses arguments against the granting of greater municipal taxing power.*

## INTRODUCTION

New York City Mayor Michael Bloomberg's 2007 congestion pricing plan, the centerpiece of his initiative to upgrade New York City's infrastructure and reduce the City's environmental footprint, would have charged drivers eight dollars to enter an area of Manhattan designated the "Central Business District" during peak hours.<sup>1</sup> The proposed program, modeled on London's successful con-

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<sup>1</sup> See CITY OF N.Y., PLANYC: A GREENER, GREATER NEW YORK 88–90 (2007) [hereinafter PLANYC], available at [http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/full\\_report\\_2007.pdf](http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/full_report_2007.pdf) (outlining a proposal for the pilot congestion pricing plan); see also Sam Schwartz et al., *A Comprehensive Transportation Policy for the 21st Century: A Case Study of Congestion Pricing in New York City*, 17 N.Y.U. ENVTL. L.J. 580, 594 (2008) (discussing the original proposal by Mayor Bloomberg).

gestion pricing scheme,<sup>2</sup> was widely praised by good government organizations,<sup>3</sup> business groups,<sup>4</sup> and environmental activists.<sup>5</sup> The state law-created Traffic Congestion Mitigation Commission endorsed the proposal, with some modifications.<sup>6</sup> The State of New York even had access to \$354 million in U.S. Department of Transportation grant money to fund a pilot of the congestion pricing scheme.<sup>7</sup> In March 2008, the New York City Council voted to send a home rule message<sup>8</sup> to Albany requesting that the State Legislature adopt the proposal.<sup>9</sup> A month later, the State Legislature in Albany rejected the proposal without even calling for a vote.<sup>10</sup>

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<sup>2</sup> For more information about London's program, see generally TODD LITMAN, VICTORIA TRANSP. POLICY INST., *LONDON CONGESTION PRICING: IMPLICATIONS FOR OTHER CITIES* (2004), available at <http://www.vtpi.org/london.pdf>, and Jonathan Leape, *The London Congestion Charge*, 20 J. ECON. PERSP. 157 (2006).

<sup>3</sup> Civic groups that endorsed the proposal included the Citizens Union and the Citizens Budget Commission. See Press Release, Citizens Union of the City of N.Y., Citizens Union Urges New York State Legislature To Enact Congestion Pricing Plan (Apr. 2, 2008), available at [http://www.citizensunion.org/www/cu/site/hosting/news\\_release/04\\_02\\_08.html](http://www.citizensunion.org/www/cu/site/hosting/news_release/04_02_08.html) (endorsing the proposal); Letter from Elizabeth Lynam, Deputy Research Dir., Citizens Budget Comm'n, to N.Y. Assembly Members (Apr. 7, 2008), available at [http://www.cbcny.org/sites/default/files/letter\\_04072008.pdf](http://www.cbcny.org/sites/default/files/letter_04072008.pdf) (same).

<sup>4</sup> Congestion pricing supporters in the business community included the Partnership for New York City, whose membership consists of the CEOs of some of the City's most important businesses. See Press Release, Kathryn S. Wylde, President & CEO, P'ship for N.Y.C., Statement on Traffic Congestion Mitigation Commission's Report (Jan. 31, 2008) (on file with the *New York University Law Review*) (endorsing the proposal).

<sup>5</sup> Both national environmental groups and local grassroots organizations endorsed the proposal. See, e.g., Press Release, Entvl. Def. Fund, New Ad Campaign Urges Commuters To Speak Out for Mass Transit Improvements and Congestion Pricing (Feb. 25, 2008), available at <http://www.edf.org/pressrelease.cfm?contentID=7683> (endorsing the proposal).

<sup>6</sup> The Commission made several changes to the mayor's plan. The most significant changes included reducing the size of the Central Business District (the area of congestion pricing enforcement) by moving the northern boundary from 86th Street to 60th Street, eliminating proposed "intra-zonal" charges for those who lived within the Central Business District, and allowing tolls for E-ZPass users on MTA and Port Authority bridges and tunnels to offset the congestion charge. REPORT TO THE TRAFFIC CONGESTION MITIGATION COMMISSION & RECOMMENDED IMPLEMENTATION PLAN 63-65 (2008), available at <https://www.nysdot.gov/programs/repository/TCMC-Final-Report.pdf>.

<sup>7</sup> William Neuman, *New York To Get U.S. Traffic Aid, but with Catch*, N.Y. TIMES, Aug. 15, 2007, at A1; see also Schwartz et al., *supra* note 1, at 589-90, 593 (discussing the Department of Transportation's Congestion Initiative and Urban Partnership program to support congestion reduction in American cities and New York City's participation in the grant process).

<sup>8</sup> A home rule message is a message sent by a local government asking the state legislature to pass "special legislation" that affects only that local government. See *infra* note 96 (discussing special legislation).

<sup>9</sup> N.Y. City Council Res. 1346 (N.Y.C. 2008), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=448185&GUID=91218ECA-AE03-4A90-BBE9-5C4F86FF9210>.

<sup>10</sup> Nicholas Confessore, *\$8 Traffic Fee for Manhattan Fails in Albany*, N.Y. TIMES, Apr. 8, 2008, at A1.

In the rush to explain the defeat, few commentators challenged the structure of home rule power that required New York City to get approval from the State to put tolls on city roads.<sup>11</sup> But the question remained: Why does the State have final authority over what New York City charges to drive cars on its own streets? More fundamentally, should the State have this power?

This Note explores New York City's lack of independent taxing authority, a major obstacle preventing the City's implementation of a congestion pricing program,<sup>12</sup> and argues that New York City should have broader taxing authority. The failure of congestion pricing is but one example of policymakers hamstrung by the City's limited taxing authority.<sup>13</sup> Limited taxing authority means city policymakers may never even consider tax-based policies, even when such policies would be optimal. Alternatively, policymakers may take tax-based policies off the table before ever approaching the State with a request for taxing authority because they know that the chance of obtaining state approval is low. By limiting the City's ability to pursue tax-based solutions to policy problems, the State distorts public policy decisions.<sup>14</sup>

There is broad agreement that different tools for implementing policy—such as regulation, taxing, user fees, and direct spending—offer advantages and disadvantages in terms of effectiveness, costs, and the amount of political capital necessary for policy enactment.<sup>15</sup> New York City officials should be able to weigh these competing factors in designing policy and should not be limited in their choice of policy tools. Expanding New York City's taxing authority would provide the City with more flexible policy choices.<sup>16</sup>

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<sup>11</sup> See, e.g., Charles Komanoff, *Ten Reasons NYC's Congestion Pricing Plan Went Belly Up*, GRIST (Apr. 8, 2008, 2:58 AM), <http://www.grist.org/article/machiavelli-meets-the-big-apple> (blaming various institutions and political leaders for the failure of the congestion pricing pilot).

<sup>12</sup> To be clear, the reason New York City needed the State's approval to move forward was that it was a requirement for participation in the federal grant program. Neuman, *supra* note 7. Further, the State preempted the City's adoption of congestion pricing through legislation that prohibits the imposition of tolls or licensing fees for the use of public streets. See *infra* notes 93–95 and accompanying text (discussing relevant state law).

<sup>13</sup> See *infra* Part III.B (discussing other examples of policy goals New York City might want to address through taxation).

<sup>14</sup> See, e.g., *infra* notes 112–13 and accompanying text (discussing the New York City Mayor's abandonment of a plastic bag tax when he realized implementation required state legislative approval).

<sup>15</sup> See *infra* Part I.B (discussing the differences between policy tools).

<sup>16</sup> This Note focuses on the specific issue of municipal taxing authority in New York City. While many arguments for expanding New York City's taxing authority apply to other cities as well, those considerations are beyond the scope of this Note. This does not suggest that this analysis applies only to New York City, but rather that any conclusion about other municipalities would require an independent evaluation of the applicable local

This Note's argument unfolds in three Parts. The first Part defines the policymaker's toolkit—taxation, regulation, spending, and user fees—and demonstrates that these tools are not perfect substitutes for one another; the proper one should be chosen to achieve a given policy goal. The second Part describes the current policy authority of New York City under state and local government law, underscoring the constraints that New York City officials currently face when designing municipal policies. The third Part directly addresses critics' concerns about expanding local taxing authority and counters that these concerns overstate the dangers of extending local taxing authority to New York City. Part III concludes with a positive case for extending taxation authority to city policymakers by pointing out the inefficiencies created by the denial of full taxation authority to the City. To correct these distortions of policymaking, we should not require the City to seek affirmative approval from the State Legislature before passing any taxing measures. Instead, the State should have the power to veto only those city taxes it deems objectionable through its preemption power.

## I

### CHOOSING A POLICY TOOL

In theory, taxation, regulatory policy, user fees, and spending can advance the same policy goal. Consider, for example, the ways that

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government law. Much of the analysis in this Note can be applied to the study of other jurisdictions.

Within New York State, New York City is clearly *sui generis*. Over forty percent of New York State residents live within the City's limits. *See State and County QuickFacts: New York (City)*, New York, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3651000.html> (last visited Sept. 17, 2011) (listing the populations of New York State and City). In fact, with over eight million people, New York City's population is larger than that of all but eleven states. *Compare id.*, with *United States—States: Population Estimates*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=01000US&-\\_box\\_head\\_nbr=GCT-T1-R&-ds\\_name=PEP\\_2009\\_EST&-format=US-40S](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2009_EST&-format=US-40S) (last visited Sept. 17, 2011). Additionally, as the capital of the financial services industry and the economic hub of the United States, New York City has a large tax base. Its businesses account for about a tenth of the GDP of the United States, a figure larger than the entire GDP of Canada. *Compare* JOHN HAWKSWORTH, THOMAS HOEHN & ANMAL TIWARI, PRICEWATERHOUSECOOPERS, WHICH ARE THE LARGEST CITIES IN THE WORLD AND HOW MIGHT THIS CHANGE BY 2025?, at 23 (2009), *available at* <https://www.ukmediacentre.pwc.com/imagelibrary/downloadMedia.aspx?MediaDetailsID=1562> (estimating the 2008 GDP of New York City and Canada to be \$1.406 and \$1.206 trillion, respectively), with *Data: United States*, WORLD BANK, <http://data.worldbank.org/country/united-states> (last visited Sept. 17, 2011) (estimating the 2010 GDP of the United States to be \$14.58 trillion). The City's unique economic and demographic characteristics make it unsuitable for comparison to other municipalities in New York State.

New York City could confront its congestion problem.<sup>17</sup> The typical response to congestion, building more roads, is not feasible in the City due to the density of development in Manhattan, downtown Brooklyn, and other heavily congested areas.<sup>18</sup> Instead, the City must combat congestion by reducing the number of drivers—that is, increasing the cost of driving relative to other transportation options. Policy options to raise the relative cost of driving include: (1) adopting a congestion pricing system;<sup>19</sup> (2) creating a system of tradable driving permits under which only permit-holders may drive into New York City;<sup>20</sup> (3) controlling traffic into the City through a license plate rationing program;<sup>21</sup> (4) decreasing the supply of parking by reducing the amount of garage space available through zoning; (5) increasing the hassle of driving by closing certain streets or areas to traffic; (6) charging more for street parking or otherwise changing metered parking regulations;<sup>22</sup> (7) increasing capacity on subway lines or

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<sup>17</sup> While this Note is not about congestion problems, congestion provides a convenient example for a variety of the ideas discussed and is used numerous times.

<sup>18</sup> See Jonathan Remy Nash, *Economic Efficiency Versus Public Choice: The Case of Property Rights in Road Traffic Management*, 49 B.C. L. REV. 673, 694–705 (2008) (explaining the popularity of an increased road capacity through a public choice model and discussing its shortcomings as a solution to congestion problems).

<sup>19</sup> See *supra* notes 1–10 and accompanying text (describing a congestion pricing system).

<sup>20</sup> The permits could be auctioned off to companies that would sell them to individual commuters. Such a system could be based on cap-and-trade models developed for climate change. In the 1990s, the United States adopted a sulfur dioxide trading program that rapidly decreased acid rain in the Northeast. See OFFICE OF POLICY, ECON., & INNOVATION, U.S. ENVTL. PROT. AGENCY, *THE UNITED STATES EXPERIENCE WITH ECONOMIC INCENTIVES FOR PROTECTING THE ENVIRONMENT* 76–82 (2001) [hereinafter *EXPERIENCE WITH ECONOMIC INCENTIVES*], available at [http://yosemite.epa.gov/ee/epa/eeerm.nsf/vwAN/EE-0216B-13.pdf/\\$file/EE-0216B-13.pdf](http://yosemite.epa.gov/ee/epa/eeerm.nsf/vwAN/EE-0216B-13.pdf/$file/EE-0216B-13.pdf) (describing the trading program and characterizing the results as “exceed[ing] expectations”). A similar proposal addressing carbon dioxide was adopted by the House of Representatives in the summer of 2009. See American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. §§ 721–728, 791–792 (2009) (detailing the rules and auction procedures of the proposed emissions allowances and trading program).

<sup>21</sup> Such a program would “restrict[ ] a set of vehicles from entering a specified area on certain days based on the last digit of the vehicle’s license plate.” CAMBRIDGE SYSTEMATICS, INC., CONGESTION MITIGATION COMMISSION TECHNICAL ANALYSIS: LICENSE PLATE RATIONING EVALUATION, at ES-1 (2007) [hereinafter *LICENSE PLATE RATIONING*], available at <https://www.nysdot.gov/programs/repository/Tech%20Memo%20on%20License%20Plate%20Rationing.pdf>. Such schemes are in place in Mexico City, Bogotá, and São Paulo. *Id.*

<sup>22</sup> San Francisco is currently considering a parking management approach to congestion issues that will increase the hours metering is in effect and decrease the time available at metered parking from six to four hours in areas with congestion and parking problems. See S.F. MUN. TRANSIT AGENCY, *EXTENDED METER HOURS STUDY* 23–24 (2009), available at <http://www.sfmta.com/cms/rextendedhours/documents/SFMTAExtendedParkingMeterHoursStudy10-13-09.pdf> (detailing the hours and locations to be affected by the proposal).

building new stations or lines to increase ease of access to the subways; and (8) investing in other modes of public transit (e.g., express bus service).

Option one is a tax-based market-incentive approach.<sup>23</sup> Option two is a regulatory market-incentive approach. Options three, four, and five are variations on zoning regulations. Option six involves a user fee,<sup>24</sup> and options seven and eight require municipal spending. Each proposal addresses the congestion problem with a variation on the same solution: increasing the cost of driving relative to the cost of alternative forms of transportation. The City could even choose to implement multiple policies to address this problem. For example, the City planned to use revenues from the congestion pricing fee to repair, maintain, and improve mass transit service.<sup>25</sup>

Although these policy tools can work in tandem with one another to produce a common regulatory goal, they are not equivalent. Each tool has different administrative costs and allocates benefits differently among constituent groups. This will often make one policy tool more popular than others among voters. For these reasons, a specific tool may be necessary to address a particular situation.<sup>26</sup>

The following Subparts define and consider four policy tools: spending, regulation, taxation, and user fees. The first shows that taxation can be used to achieve the same goals as direct spending, regulation, and user fees. The next highlights differences between these policy tools, providing two examples to illustrate that, in some instances, taxation can be the best option available for policy implementation.

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<sup>23</sup> Option one is a tax rather than a user fee because the congestion fee would not be designed to repay the City for the marginal cost of building and maintaining the road. Instead, the fee would be set to reduce driving and its social costs (i.e., congestion and pollution). See *infra* notes 114–16 and accompanying text (discussing New York State court cases that recategorize user fees as taxes when payment was unrelated to the cost of providing service).

<sup>24</sup> A user fee can be defined as the “price[ ] a governmental agency charges for a service or product whose distribution it controls.” Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 796 (1987).

<sup>25</sup> See PLANYC, *supra* note 1, at 77, 90 (describing the repairs and maintenance that would be achieved with funds raised from congestion pricing and noting that “[a]ll net revenues will be dedicated 100% to transportation investments”).

<sup>26</sup> For one suggestion about how to combat congestion effectively, see *infra* notes 42–44 and accompanying text.

## A. Multiple Tools, Multiple Options

### 1. Taxes and Spending

Imagine that New York City is concerned that its residents are not eating enough cheddar cheese, the consumption of which carries significant health benefits.<sup>27</sup> The City Council wants to take action to stop this underconsumption. One option for the City would be to give every resident a voucher for a free wedge of cheddar once a month. This would be an obvious spending program. Alternatively, the City could create a tax credit for the purchase of cheese, so that the tax savings from purchasing a wedge of cheddar offset the cost of the purchase. If the credit were refundable (i.e., the taxpayer would get money back from the government if her tax liability were less than the credit earned by the purchase of the wedge of cheese), then the two policies would cost the government the same amount.<sup>28</sup> Under the spending program, the taxpayer gets a free wedge of cheese; under the tax program, the taxpayer has to pay for the cheese but gets to reduce her taxes by the cost of the wedge. Our cheddar cheese tax credit is essentially no different than a spending program because, under either program, the taxpayer gets a free wedge of cheese. However, because it is implemented via the tax code, the cheddar cheese tax credit is known as a tax expenditure.<sup>29</sup>

Since 1989, New York City's Charter has required the Department of Finance to publish an annual list of tax expenditures.<sup>30</sup>

<sup>27</sup> At least in this hypothetical policy world, cheese can be good for you! This illustration is derived from an example Professor Deborah Schenk presented to her Federal Income Tax class in the Spring of 2009 at New York University School of Law.

<sup>28</sup> However, most tax incentives are deductions (which reduce taxable income), rather than credits (which reduce tax liability). Under a progressive tax regime, the value of such deductions varies by income tax bracket. To get a similar effect on the spending side, the cheese subsidy would have to be greater with higher incomes. Because of this inverse incentive structure, many have expressed skepticism at the equity and efficiency of tax deductions. See generally Lily L. Batchelder, Fred T. Goldberg & Peter R. Orzag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23 (2006) (arguing that many tax deductions should be restructured as refundable credits).

<sup>29</sup> "Tax expenditures are revenue losses attributable to tax provisions that often result from the use of the tax system to promote social goals without incurring direct expenditures." Lily Batchelder, *Tax Expenditures: What Are They and How Are They Structured?*, in TAX POLICY CTR., TAX POLICY BRIEFING BOOK: A CITIZENS' GUIDE FOR THE 2008 ELECTION AND BEYOND, at I-8-1, I-8-1 (2009), available at <http://www.taxpolicycenter.org/upload/Background/I-8TaxExpenditures.final.pdf>.

<sup>30</sup> N.Y.C. CHARTER § 240. New York City's Department of Finance defines a tax expenditure as "a revenue loss attributable to a provision of the tax law that allows a special exclusion, exemption, or deduction or that provides a special credit, preferential rate of tax, or deferral of tax liability." 2009 N.Y.C. ANN. REP. ON TAX EXPENDITURES 3 [hereinafter 2009 TAX EXPENDITURES], available at [http://www.nyc.gov/html/dof/html/pdf/09pdf/ter\\_2009\\_final.pdf](http://www.nyc.gov/html/dof/html/pdf/09pdf/ter_2009_final.pdf). The Department of Finance considers a provision a tax expenditure if it meets three criteria: (1) "[t]he tax expenditure derives from a tax administered by

Seventy-eight percent of the City's tax expenditures are property tax abatements (credits against property taxes owed) and property tax exclusions (reductions in a property's assessed value for tax purposes).<sup>31</sup> These real property tax expenditures are worth \$3.7 billion, almost a third of the amount raised by property taxes.<sup>32</sup> The largest share of these tax expenditures go to residential developers.<sup>33</sup>

New York City offers dozens of abatement and exclusion programs affecting the property tax, each of which has specific eligibility criteria. For instance, the City offers an exclusion for crime victims and Good Samaritans who suffer a permanent disability as a result of a crime, whereby home improvements related to accommodating such a disability are exempt from property tax.<sup>34</sup> This is a deviation from the standard measurement of a property tax base; generally speaking, home improvements causing an increase in a property's value lead to increased property tax assessments, no matter the reason for the improvement. In effect, the City provides a subsidy for the cost of these improvements necessitated by disability.<sup>35</sup> Other provisions are significantly broader in scope, like the J-51 program, which offers a combination of abatements and exemptions over a thirty-four year period for the renovation of property for residential use.<sup>36</sup>

Any of these tax expenditures could instead be administered as a direct subsidy to either developers or individual homebuyers and

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the City;" (2) "[t]he tax provision is 'special' in that it is targeted to a narrow class of transactions or taxpayers;" and (3) "[t]he tax provision constitutes a clear exception to a general provision of the tax laws." *Id.*

<sup>31</sup> See 2009 TAX EXPENDITURES, *supra* note 30, at i–ii (showing the revenue loss from property, business income, sales, and personal income tax expenditures).

<sup>32</sup> Local property taxes were expected to raise \$13.8 billion in 2009. They are the City's largest source of revenue, accounting for 27% of total revenue and 40% of total tax revenue. *Id.* at 5; see also 2011 N.Y.C. EXEC. BUDGET: FISCAL YEAR 2012, at i, available at [http://www.nyc.gov/html/omb/downloads/pdf/erc5\\_11.pdf](http://www.nyc.gov/html/omb/downloads/pdf/erc5_11.pdf) (tabulating revenue sources).

<sup>33</sup> See 2009 TAX EXPENDITURES, *supra* note 30, at 5 (stating that residential programs comprise forty-seven percent of property tax expenditures).

<sup>34</sup> *Id.* at 37.

<sup>35</sup> The amount of the subsidy is equal to the increase in property value that results from the improvement multiplied by the tax rate. For example, if the necessary improvements resulted in a \$20,000 increase in a home's value, and single-occupancy homes in New York are taxed at 16.787%, *id.* at 143, then the exemption is worth \$3,357.40. New York could provide the same subsidy by writing a \$3,357.40 check toward the improvements.

<sup>36</sup> *Id.* at 14. I was an indirect beneficiary of this program. In 2010, the apartment building I lived in received a property tax exemption worth \$3,027,974. As a condition of eligibility, my apartment was subject to rent stabilization, and I paid rent below the market rate. See *Property Tax Benefit Information*, N.Y.C., <https://a836-propertyportal.nyc.gov/> (enter "Brooklyn" for "Borough," "02075" for "Block," and "0012" for "Lot"; then click "J51 Exemption") (last visited Sept. 17, 2011) (showing the benefit amount and providing a link to the calculation method).



tenants.<sup>37</sup> If an agency administers a subsidy program, it is considered spending; if the Department of Finance provides the money by lowering the otherwise applicable tax rate or by changing the tax base, it is a tax—and the City must seek prior approval from the State before implementing the change.

## 2. *Taxes and Regulation*

Of course, taxes do not serve as indirect subsidies only to encourage specific behavior. Sometimes, the reverse occurs, with tax provisions operating as penalties. For example, income tax provisions can distort the proper measure of net income by disallowing certain deductions for the cost of doing business. By requiring taxpayers to pay more in taxes than they should based purely on their net income, such tax penalties operate as a regulatory tool to curb targeted behavior.<sup>38</sup> One can also describe the cost of regulatory compliance as a tax on regulated industry.<sup>39</sup>

Governments can also design taxes that address negative externalities such as pollution and congestion. Such taxes force agents to consider the “uncompensated cost[s] that [they] impose[] on others.”<sup>40</sup> Economists call such taxes Pigovian taxes, after the English economist Arthur Pigou who first developed the idea of imposing a tax equal to the magnitude of the harm caused by the externality.<sup>41</sup>

Congestion pricing is one example of a Pigovian tax. Generally, public roads are nonrival goods; without congestion, one car’s enjoyment of a roadway is not hindered by additional cars. However, when

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<sup>37</sup> Daniel Shavito has argued that “[t]he distinction between taxes and spending depends on pure form.” Daniel N. Shavito, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 191 (2004).

<sup>38</sup> See Eric M. Zolt, *Deterrence via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 343–44 (1989) (pointing out a tax/regulatory penalty equivalency and criticizing the tax approach as a “crude” regulatory tool).

<sup>39</sup> The distinction between a fine and a tax can be conceptually confusing. Gerald Prante illustrates this point by asking whether the penalty for speeding in the park should be considered a fine or a tax. See Gerald Prante, *What Is a Tax?*, TAX FOUND. (Sept. 29, 2009), <http://www.taxfoundation.org/blog/show/25245.html> (“Most would say it’s a fine. But what if the fine is in excess of its optimal amount and being used as a way to raise revenue as opposed to merely serve as a deterrent for speeding (and to compensate society for their costs)?”). Since fines are frequently set without regard to optimal deterrence, this scenario is not hard to imagine. Optimal deterrence is the idea of creating a disincentive to behavior just great enough that people engage in only the socially optimal amount of that behavior. In other words, people should continue engaging in a behavior until its social cost exceeds its social benefit, and policies should be set so as to deter such behavior beyond that point. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 575 (2004) (defining optimal deterrence).

<sup>40</sup> PAUL KRUGMAN & ROBIN WELLS, MICROECONOMICS 437 (2d ed. 2009).

<sup>41</sup> *Id.* at 443–44.

the number of cars on a road exceeds capacity, a road can become a “congestible public good[ ].”<sup>42</sup> Congestion impedes the normal flow of traffic, imposing costs on other drivers measured in time delays and the increased wear-and-tear on vehicles in stop-start traffic.<sup>43</sup> While drivers experience the costs congestion imposes on them directly, they do not internalize the cost of their presence on others.<sup>44</sup> Taxing cars on the road, then, is one way to counter this problem. It forces drivers to partially internalize this cost, which, in turn, decreases the number of cars on the streets.

Another example of a tax penalty is an excise tax, a tax that is paid with the purchase of a good or service.<sup>45</sup> Excise taxes can force people to reconsider certain decisions or behaviors that are undesirable to society. Gasoline taxes, for example, partially internalize driving externalities (including congestion and pollution).<sup>46</sup> “Sin taxes” on products like cigarettes and alcohol are enacted partly as behavioral controls. These taxes reduce consumption through both changes in price and by signaling communal behavior norms through pricing.<sup>47</sup> In the cigarette context, taxes have been thought to reduce

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<sup>42</sup> Nash, *supra* note 18, at 686.

<sup>43</sup> P'SHIP FOR N.Y.C., GROWTH OR GRIDLOCK?: THE ECONOMIC CASE FOR TRAFFIC RELIEF AND TRANSIT IMPROVEMENT FOR A GREATER NEW YORK 3–4 (2006), *available at* <http://www.pfnyc.org/publications/Growth%20or%20Gridlock.pdf> (finding that the time delay cost of congestion was between \$5 billion and \$6.5 billion and finding that fuel and wear-and-tear costs added an additional \$2 billion to the cost of congestion).

<sup>44</sup> Nash, *supra* note 18, at 685–86 (quoting Tirza S. Wahrman, *Breaking the Logjam: The Peak Pricing of Congested Urban Roadways Under the Clean Air Act To Improve Air Quality and Reduce Vehicle Miles Traveled*, 8 DUKE ENVTL. L. & POL'Y F. 181, 196 (1998)). The best way to understand this is to think about two drivers. One driver, Jane, is a plumber, and she drives because her tools are too heavy for her to carry on the subway. Her customers prefer that she come before or after work, so she makes more money going to their homes during rush hour. The more homes she visits during these peak periods, the more money she earns. Not only does Jane have no easy substitute for driving, the delays cost her and her clients. The other driver, Joe, is a Manhattan office worker who lives in the Bronx. In the mornings, he could take the subway to Manhattan from the Bronx, or he can drive to work, which takes longer due to rush hour congestion. He likes driving, however, and has his routine. The congestion certainly is an opportunity cost for Joe since he could be using the extra time on the road to sleep for an extra hour or meet with clients. However, he does not lose any business as a result of being on the road. When Joe chooses to drive during rush hour, he considers only his own costs (in terms of time and gas) in the calculation; he does not take into account that his presence on the road costs Jane and her clients.

<sup>45</sup> KRUGMAN & WELLS, *supra* note 40, at 168.

<sup>46</sup> See N. Gregory Mankiw, Op-Ed, *Raise the Gas Tax*, WALL ST. J., Oct. 20, 2006, at A12 (arguing for higher gas taxes in part on Pigovian tax grounds, pointing to externalities of road congestion, environmental harm, and national security costs of foreign oil dependence).

<sup>47</sup> See Michael J. Licari & Kenneth J. Meier, *Regulation and Signaling: When a Tax Is Not Just a Tax*, 62 J. POL. 875, 882–83 (2000) (showing that a post-tax reduction in cigarette

smoking, especially among teens.<sup>48</sup> All of the above examples illustrate that taxes can serve a regulatory function; both regulations and taxes can be used to curb or prevent undesirable behaviors.

### 3. *Taxes and User Fees*

A user fee is typically thought of as a quid pro quo payment for a service provided by the government.<sup>49</sup> Tax liability, in contrast, is not a direct payment for a benefit; governments determine taxes owed based on the ability of the taxpayer to pay.<sup>50</sup> User fees may also include payments for benefits that are difficult to measure. Impact fees, for instance, are charges levied against real estate developments that supposedly represent the costs imposed by the development on local governments due to increases in population density.<sup>51</sup> However, these fees are frequently assessed before accurate predictions can be made about the economic impact of the new development. As a result, such user fees can begin to resemble taxes.

#### *B. Choosing a Policy Tool*

As the preceding discussion suggests, the uses for these policy tools naturally overlap. Subsidies can be delivered as tax credits or through direct spending. Regulations can be imposed either directly or through taxation. Despite the availability of multiple options, a particular tool often stands out as a better choice in a given situation. For example, one tool may be able to accomplish a particular policy goal more efficiently by generating lower administrative costs and by better targeting intended benefits. In some instances, a policy tool might be better because it is simply more politically viable.

This Subpart highlights the factors that are most relevant in choosing a policy instrument by focusing on two policy goals: reducing

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consumption is explained partly by price changes and partly by the tax's role in communicating the danger of cigarette use).

<sup>48</sup> See Christopher Carpenter & Phillip J. Cook, *Cigarette Taxes and Youth Smoking: New Evidence from National, State, and Local Youth Risk Behavior Surveys*, 27 J. HEALTH ECON. 287, 297 (2008) ("[S]tate cigarette tax increases of the past 15 years were effective at reducing smoking participation and frequent smoking by high school students. . . . [A]n increase in the state cigarette tax reduces the probability a youth reports past 30 day smoking and frequent smoking.").

<sup>49</sup> E.g., Gillette & Hopkins, *supra* note 24, at 796.

<sup>50</sup> See JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 536–39 (3d ed. 2011) (discussing methods for determining individuals' taxable income based on individuals' ability to pay taxes).

<sup>51</sup> See Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U. J. URB. & CONTEMP. L. 55, 64 (1990) (defining land use exaction as a payment "assessed as a condition to the issuance of a building permit . . . pursuant to local government powers to regulate new growth and development").

carbon emissions and combating poverty among low-income workers. These two case studies are commonly cited in literature discussing policy instruments.<sup>52</sup> While these examples are culled from federal rather than state or municipal policy debates, they illustrate that picking the right policy tool is critical for achieving a desired policy goal and that taxation offers advantages that other options do not. The same analysis can be applied to the choice of policy tools at the state and local level.

### 1. *Reducing Carbon Emissions*

In the late 1970s, environmental economists and policymakers began to question the command-and-control model of pollution control that was then in vogue. These policies sought to regulate emissions by setting “source-specific emissions limits, product specifications, and pollution-control guidelines.”<sup>53</sup> Command-and-control models, where the government dictates strict standards for firms, are usually not the most effective way to cut emissions. As Professor Robert Stavins writes, “command-and-control regulations tend to force firms to shoulder similar shares of the pollution-control burden, regardless of the relative costs to them.”<sup>54</sup> Such standards fail to recognize that some firms or industries may be able to abate emissions much more cheaply than other firms or industries. By forcing all firms to reach the same benchmark, a command-and-control emissions reduction effort is not focused on the cheapest abatement opportunities. Such policies also fail to provide incentives to reduce emissions more than required, even when such additional reductions are relatively cheap for a given firm or industry. As a result, “command-and-control regulations tend to freeze the development of technologies that might otherwise result in greater levels of control.”<sup>55</sup>

Market-based or incentive tools, by contrast, allow companies to profit from their innovation and encourage the greatest abatement activity in the firms and sectors where pollution reductions are most cost-effective. Under an emissions tax, for instance, firms pay a per-

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<sup>52</sup> See, e.g., Nathaniel O. Keohane, Richard L. Revesz & Robert N. Stavins, *The Choice of Regulatory Instruments in Environmental Policy*, 22 HARV. ENVTL. L. REV. 313, 313–18 (1998) (discussing the choice of policy tools in designing policies to combat pollution); David Neumark & William Wascher, *Using the EITC To Help Poor Families: New Evidence and a Comparison with the Minimum Wage*, 54 NAT’L TAX J. 281, 311–13 (2001) (comparing the EITC to the minimum wage).

<sup>53</sup> EXPERIENCE WITH ECONOMIC INCENTIVES, *supra* note 20, at i.

<sup>54</sup> Robert N. Stavins, *Market-Based Environmental Policies*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 31, 32 (Paul R. Portney & Robert N. Stavins eds., 2d ed. 2000).

<sup>55</sup> *Id.*

unit fee for emissions. An ideal emissions tax sets this fee equal to the marginal cost of producing an additional unit of emissions at the socially optimal amount of production, so firms are forced to internalize the social harms that their emissions-producing activities create.<sup>56</sup> In other words, under an emissions tax system, the government partially regulates price. Under a cap-and-trade, or marketable permit, system, the government instead regulates emissions quantity, setting a maximum amount of emissions and then either allocating or auctioning permits that allow companies to emit pollutants up to that quantity. By allowing firms to trade permits, the government creates a situation in which firms facing a high cost of abatement can purchase permits from firms with a lower abatement cost.<sup>57</sup> Both approaches encourage cost-effective emissions abatement.<sup>58</sup> Whether a permit system or a tax is the optimal policy depends upon “case-specific factors.”<sup>59</sup>

While the specifics of how to choose among such programs are beyond the scope of this Note, the broader point is clear. For many types of pollutants, market-based approaches, including taxes, are preferable to command-and-control models of regulation.<sup>60</sup> Policy-makers should be able to choose the policy option—including a tax-based option—that best fits their policy objectives.

## 2. *Combating Poverty Among Low-Income Workers*

Tax-based solutions are also a preferred tool for fighting poverty among low-income workers. Consider comparisons between the Earned Income Tax Credit (EITC) and minimum wage laws. The federal minimum wage sets a price floor for workers, preventing employers from paying less even if they could find willing workers at

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<sup>56</sup> KRUGMAN & WELLS, *supra* note 40, at 442.

<sup>57</sup> See CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: POLICIES TO REDUCE GREENHOUSE GAS EMISSIONS 1–2 (2010), available at [http://www.cbpp.org/files/PolicyBasic\\_CapTrade.pdf](http://www.cbpp.org/files/PolicyBasic_CapTrade.pdf) (providing a basic description of the cap-and-trade program).

<sup>58</sup> See EXPERIENCE WITH ECONOMIC INCENTIVES, *supra* note 20, at ii–iii (identifying advantages of market-based approaches to pollution control).

<sup>59</sup> Keohane et al., *supra* note 52, at 316. As Keohane, Revesz, and Stavins write, “[w]ith perfect information, tradable permits sold at auction have the same effect as a tax.” *Id.* at 316 n.17. Absent this information, however, the success of tradable permits depends on knowledge of the optimal quantity of pollution, while the success of a tax program depends on knowledge of the social cost of a unit of pollution.

<sup>60</sup> To be sure, emissions taxes or tradable permits probably do not make sense at a local level. *But see* Jonathan Remy Nash & Richard L. Revesz, *Markets and Geography: Designing Marketable Permit Schemes To Control Local and Regional Pollutants*, 28 *ECOLOGICAL L.Q.* 569 (2001) (discussing regional permit programs). Nevertheless, the insights offered by this literature are relevant to local externalities, like the distribution of taxi medallions and congestion.

that wage.<sup>61</sup> The EITC is a wage subsidy implemented through the tax code.<sup>62</sup> The credit offsets tax liability for low-income workers and, because it is refundable, provides a refund for workers who are eligible for credits larger than their tax liability.<sup>63</sup> Both policies aim to increase the take-home pay of low-income workers, but the EITC has drawn praise from politicians and economists of all political stripes over the course of the program's existence,<sup>64</sup> while minimum wage laws are frequently criticized as inefficient government intervention in the labor market.<sup>65</sup>

The federal EITC is the nation's largest poverty program, having lifted 6.6 million Americans out of poverty in 2009.<sup>66</sup> The EITC increases labor market participation among low-income workers.<sup>67</sup> Additionally, as a tax credit, the EITC carefully targets its work subsidy. Eligibility for the EITC and the size of its benefit varies with both household income and with the number of dependent children in the household, so that the subsidy increases based on family size.<sup>68</sup> As a result of this tailoring, the benefits of the EITC are concentrated exactly where policymakers want: working families who are at the

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<sup>61</sup> 29 U.S.C. § 206 (Supp. I 2007) (establishing a federal minimum wage of \$7.25 per hour).

<sup>62</sup> See 26 U.S.C. § 32 (2006) (codifying the EITC program).

<sup>63</sup> See CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT 1 (2009) [hereinafter POLICY BASICS: THE EITC], available at <http://www.cbpp.org/files/policybasics-eitc.pdf> (discussing refundability).

<sup>64</sup> See Robert Greenstein & Isaac Shapiro, *New Research Findings on the Effects of the Earned Income Tax Credit*, CTR. ON BUDGET & POLICY PRIORITIES (Mar. 11, 1998), <http://www.cbpp.org/cms/index.cfm?fa=view&id=1649> (noting Reagan's support for similar policy proposals and other examples of conservative support, including the expansion of the EITC under both Presidents Reagan and Bush).

<sup>65</sup> See, e.g., Greg Mankiw, *Working at Cross Purposes*, GREG MANKIW'S BLOG (Dec. 26, 2006), <http://gregmankiw.blogspot.com/2006/12/working-at-cross-purposes.html> (describing the minimum wage as functioning in part as a tax on the low-wage market).

<sup>66</sup> POLICY BASICS: THE EITC, *supra* note 63, at 2; see also STEVE HOLT, BROOKINGS INST., TEN YEARS OF THE EITC MOVEMENT: MAKING WORK PAY THEN AND NOW 1 (2011), available at [http://www.brookings.edu/~media/Files/rc/papers/2011/0418\\_eitc\\_holt/0418\\_eitc\\_holt.pdf](http://www.brookings.edu/~media/Files/rc/papers/2011/0418_eitc_holt/0418_eitc_holt.pdf) (“[The EITC] has grown to be called the nation's largest federal anti-poverty program.”).

<sup>67</sup> See ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, THE EARNED INCOME TAX CREDIT: BOOSTING EMPLOYMENT, AIDING THE WORKING POOR 1–2 (2005), available at <http://www.cbpp.org/archiveSite/7-19-05eic.pdf> (describing several studies showing the EITC increases the labor participation of single mothers). In fact, a recent study suggests that this initial boost in labor market participation also means that EITC beneficiaries receive increasing earnings over time, as the labor market rewards them for their experience. See Molly Dahl, Thomas DeLeire & Jonathan Schwabish, *Stepping Stone or Dead End?: The Effect of the EITC on Earnings Growth*, 62 NAT'L TAX J. 329, 343 (2009) (concluding that EITC beneficiaries often return to the labor force for jobs with earnings-growth potential rather than for “dead-end” jobs).

<sup>68</sup> POLICY BASICS: THE EITC, *supra* note 63, at 1. Only a very small subsidy is available for very low-income single adults without children. *Id.*

bottom of the income distribution.<sup>69</sup> Further, because the EITC is administered based on information already collected by the Internal Revenue Service, the program has very low administrative costs.<sup>70</sup>

The minimum wage, a regulatory policy, is not nearly as effective at combating the poverty of low-income workers. Economists frequently note that minimum wage laws restrict the demand for low-wage workers, harming the intended beneficiaries of the policy.<sup>71</sup> Further, the minimum wage is not a well-targeted subsidy. It applies equally to all low-skilled workers, regardless of their total household income or the number of children in the worker's household. As a result, its beneficiaries include not only low-skilled heads of households but also low-skilled teenagers and young adults who are not necessarily members of households living at or near the poverty line.<sup>72</sup> For these reasons, most researchers believe that the EITC is a better tool for fighting poverty than the minimum wage.<sup>73</sup>

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<sup>69</sup> See STEVE HOLT, BROOKINGS INST., *THE EARNED INCOME TAX CREDIT AT AGE 30: WHAT WE KNOW 7–10* (2006), available at [http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies\\_holt/20060209\\_Holt.pdf](http://www.brookings.edu/~media/Files/rc/reports/2006/02childrenfamilies_holt/20060209_Holt.pdf) (discussing the characteristics of EITC-eligible and EITC-beneficiary populations).

<sup>70</sup> See DEP'T OF TREASURY, INTERNAL REVENUE SERV., *IRS EARNED INCOME TAX CREDIT (EITC) INITIATIVES: ADDENDUM TO THE REPORT ON QUALIFYING CHILD RESIDENCY CERTIFICATION, FILING STATUS, AND AUTOMATED UNDERREPORTER TESTS 2* (2008), available at [http://www.irs.gov/pub/irs-utl/poc\\_summary\\_addendum\\_121708\\_final.pdf](http://www.irs.gov/pub/irs-utl/poc_summary_addendum_121708_final.pdf) (comparing the administrative costs of the EITC—less than one percent of the program's budget—to those of other federal benefits programs, which can run as high as twenty percent of program costs).

<sup>71</sup> See Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulation*, 93 Nw. U. L. REV. 351, 356–63 (1999) (discussing the minimum wage as an unfunded mandate); Shaviro, *supra* note 37, at 190 (discussing the minimum wage as a tax on low-income work). But see KRUGMAN & WELLS, *supra* note 40, at 132 (“Most economists believe, however, that the minimum wage has relatively little effect on the job market in the United States, mainly because the floor is set so low.”). Some empirical work has questioned the assumption that minimum wages necessarily decrease labor demand. See, e.g., David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 90 AM. ECON. REV. 1397, 1419 (2000) (“The increase in New Jersey's minimum wage probably had no effect on total employment in New Jersey's fast-food industry, and possibly had a small positive effect.”).

<sup>72</sup> See Richard B. Freeman, *The Minimum Wage as a Redistributive Tool*, 106 ECON. J. 639, 643, 646 (1996) (suggesting that the primary beneficiaries of the minimum wage are “teenagers and young adults” and that they are primarily part-time workers). While the EITC does not have an age requirement, teenagers living in households that are not low income will typically be claimed as dependents on their parents' tax returns and thus be ineligible for the EITC because total household income will exceed the EITC threshold.

<sup>73</sup> See generally, e.g., CONG. BUDGET OFFICE, *RESPONSE TO A REQUEST BY SENATOR GRASSLEY ABOUT THE EFFECTS OF INCREASING THE FEDERAL MINIMUM WAGE VERSUS EXPANDING THE EARNED INCOME TAX CREDIT* (2007), available at <http://www.cbo.gov/ftpdocs/77xx/doc7721/01-09-MinimumWageEITC.pdf> (comparing the effects of an increased federal minimum wage to an expanded EITC); Neumark & Wascher, *supra* note 52 (arguing that the EITC is significantly more effective at combating poverty than minimum wage policies).

As the preceding examples show, the choice of a policy tool determines how efficiently a policy goal will be achieved. Because many different tools can tackle similar problems and picking the right tool can be the difference between success and failure, city policymakers should have as many policy instruments at their disposal as possible. This flexibility is lacking for local governments in New York State, including New York City's.<sup>74</sup>

## II

### NEW YORK CITY'S HOME RULE AUTHORITY

New York local government law makes it more difficult for the City to implement policy through taxation. As demonstrated above in Part I, this creates inefficiencies in situations where taxation is the best option for achieving a policy objective. This Part describes the policymaking authority given to New York City under state law. The first Subpart provides a general introduction to the legal framework of local government law. The second Subpart examines New York State's home rule provisions in detail, noting the discrepancy between taxation authority, which cities are restricted from exercising, and spending and regulatory authority, which are much more liberally granted.

#### A. *The Concept of Home Rule*

Home rule provisions are state laws that give local governments independent lawmaking authority over local affairs.<sup>75</sup> Without such provisions, every action of a local government would require the explicit authorization of its corresponding state government. Local governments are creations of the state; as a consequence, their powers are limited to those enumerated in their state's constitution and laws.<sup>76</sup>

Although the specific powers conferred by states to local governments via home rule laws and constitutional provisions vary from state to state,<sup>77</sup> the National League of Cities identifies four general types of home rule authority that may be granted: structural, functional,

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<sup>74</sup> See *infra* Part II.B (discussing New York City's limited powers, especially its limited taxing authority, under state home rule laws).

<sup>75</sup> See BLACK'S LAW DICTIONARY 802 (9th ed. 2009) (defining home rule as "[a] state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms").

<sup>76</sup> See generally David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (discussing the history of home rule).

<sup>77</sup> See generally HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK (Dale Krane, Platon N. Rigos & Melvin B. Hill, Jr. eds., 2001) [hereinafter HOME RULE IN AMERICA] (surveying home rule authority in fifty states).



fiscal, and personnel authority.<sup>78</sup> Structural authority allows a local government to design its own form of government. For example, structural authority gives a local government the ability to choose how to allocate power between the mayor and members of the city council. Functional authority gives a local government the ability to pass laws and, more generally, the “power to exercise local self government in a broad or limited manner.”<sup>79</sup> Fiscal authority gives a local government the ability to raise revenue, either through taxation or borrowing. Personnel authority gives a local government the ability to set employment policies for government employees.

Local governments have the greatest authority over structural and personnel decisions.<sup>80</sup> Functional authority varies considerably.<sup>81</sup> Most local governments, however, have very limited fiscal authority.<sup>82</sup> According to one recent summary of municipal home rules, only twelve states have laws that give local governments any amount of fiscal control.<sup>83</sup> Of those twelve, the survey classified five, including New York, as granting only limited fiscal authority.<sup>84</sup>

Even in states like Iowa, Tennessee, and Illinois, which grant more expansive fiscal authority to local governments, “state constitutional provisions . . . restrict the set of fiscal policy choices and the set of fiscal tools [local governments] are able to employ.”<sup>85</sup> And in Colorado and California, where state law explicitly allows local governments to preempt state action on matters of local concern, laws significantly limit local taxing authority.<sup>86</sup> Generally speaking, municipalities have less authority over taxation than over other policy areas.

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<sup>78</sup> *Local Government Authority*, NAT'L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-networks/resources/cities-101/local-government-authority> (last visited Sept. 17, 2011).

<sup>79</sup> *Id.*

<sup>80</sup> See HOME RULE IN AMERICA, *supra* note 77, at 476 tbl.A1 (listing, by state, subjects under municipal home rule power).

<sup>81</sup> See *id.*

<sup>82</sup> See Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 102–06 (1996) (observing limited fiscal authority as a characteristic of home rule).

<sup>83</sup> See HOME RULE IN AMERICA, *supra* note 77, at 476 tbl.A1 (listing states with fiscal home rule authority).

<sup>84</sup> See *id.* (listing the extent of fiscal home rule authority in each state).

<sup>85</sup> Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241, 1246 (2009).

<sup>86</sup> See CTR. ON BUDGET & POLICY PRIORITIES, POLICY BASICS: TAXPAYER BILL OF RIGHTS (TABOR) 1–2 (2008), available at <http://www.cbpp.org/files/policybasics-tabor.pdf> (describing Colorado's limits on local taxing authority); Les Picker, *The Lock-in Effect of California's Proposition 13*, NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/digest/apr05/w11108.html> (last visited Sept. 17, 2011) (describing California's limits on local taxing authority).

### B. Home Rule Under New York Law

New York State's home rule provisions govern New York City, affecting the City's ability to implement taxes and influencing regulatory policy, spending programs, and user fees. The basis of New York City's home rule authority is article nine of the state constitution, which defines the basic rights and powers of local government.<sup>87</sup> In order for the State to revoke any previously granted municipal authority, the constitution requires two successive, separate calendar year votes on the proposal.<sup>88</sup> Building on this constitutional framework, New York Municipal Home Rule Law delegates additional authority to local governments.<sup>89</sup>

The New York State Constitution gives local governments the power to pass and implement legislation that secures "government, protection, order, conduct, safety, health and well-being of persons or property."<sup>90</sup> In theory, this authority is expansive and gives cities broad authority to regulate in the public interest,<sup>91</sup> but this authority is subject to supervision by New York State, which can preempt local regulations.<sup>92</sup> For example, New York's Vehicle and Traffic Laws deny local governments the power "to pass, enforce or maintain any ordinance, rule or regulation requiring from any owner of a motor

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<sup>87</sup> See N.Y. CONST. art. IX.

<sup>88</sup> *Id.* § 2(b)(1).

<sup>89</sup> See N.Y. MUN. HOME RULE LAW § 10 (Consol. 2010) (detailing subject matter within local legislative authority).

<sup>90</sup> N.Y. CONST. art. IX, § 2(c)(ii)(10). Such authority has, however, been narrowly construed. *See, e.g.,* Good Humor Corp. v. City of New York, 49 N.E.2d 153, 157 (N.Y. 1943) (finding that New York City's desire to limit street peddling was not related to public health concerns).

<sup>91</sup> For example, under its authority to secure the health and well-being of persons, New York City's Department of Health passed the nation's first ban on restaurant use of trans fats. N.Y.C. HEALTH CODE § 81.08 (N.Y. Legal Publ'g Corp. 2008); *see also* N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, THE REGULATION TO PHASE OUT ARTIFICIAL TRANS FAT IN NEW YORK CITY FOOD SERVICE ESTABLISHMENTS (n.d.), *available at* <http://www.nyc.gov/html/doh/downloads/pdf/cardio/cardio-transfat-bro.pdf> (summarizing the trans fat ban and providing answers to questions about the ban); Thomas J. Lueck & Kim Severson, *New York Bans Most Trans Fats in Restaurants*, N.Y. TIMES, Dec. 6, 2006, at A1 (suggesting the ban, as the first of its kind, may become a model for other cities). The Department of Health also required that chain restaurants make calorie counts more prominent. HEALTH § 81.50 (Supp. II 2011). The regulation applies to restaurants that serve food standardized by both portion size and content and that are part of a chain of at least fifteen restaurants. N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, THE REQUIREMENT TO POST CALORIE COUNTS ON MENUS IN NEW YORK CITY FOOD SERVICE ESTABLISHMENTS 1 (n.d.), *available at* [http://www.nyc.gov/html/doh/downloads/pdf/cdp/calorie\\_compliance\\_guide.pdf](http://www.nyc.gov/html/doh/downloads/pdf/cdp/calorie_compliance_guide.pdf).

<sup>92</sup> See N.Y. CONST. art. IX, § 2(c)(i) ("[E]very local government shall have power to adopt and amend local laws *not inconsistent* with the provisions of this constitution or any general law relating to its property, affairs or government . . . ." (emphasis added)).

vehicle . . . any . . . permit for the use of the public highways.”<sup>93</sup> Among other things, this law prohibits residential parking permit programs,<sup>94</sup> and, as a result, New York municipalities with such programs have had to seek specific legislative dispensation.<sup>95</sup> Although a literal reading of the statute suggests that the State’s preemptive authority is limited when it seeks to restrict the activities of a particular jurisdiction,<sup>96</sup> New York courts have interpreted this restriction so narrowly that, in practice, almost any legislation passed by New York City can be preempted by state legislative action.<sup>97</sup>

New York municipalities’ taxing authority is an order of magnitude weaker than their regulatory authority. The New York State Constitution declares that “[t]he power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law.”<sup>98</sup> The constitution allows the legislature to delegate its taxing authority but requires the legislature to specify in that delegation “the types of taxes which may be imposed thereunder and provide for their review.”<sup>99</sup> In other words, the Municipal Home Rule Law reasserts that New York State retains the power to review actions taken under the authority delegated to local

<sup>93</sup> N.Y. VEH. & TRAF. LAWS § 1604 (Consol. 2011).

<sup>94</sup> See *People v. Speakerkits*, 633 N.E.2d 1092, 1093 (N.Y. 1994) (holding that section 1604 prevents cities from imposing residential parking permit schemes).

<sup>95</sup> See VEH. & TRAF. §§ 1640-b to -m (authorizing residential parking programs in various jurisdictions). Residential parking permits were a component of the congestion pricing program that would have addressed concerns about traffic coming through the City. See Annie Karni, *Residential Parking Permits May Accompany Congestion Tax*, N.Y. SUN, May 7, 2007, at 4 (describing details of parking and congestion plans).

<sup>96</sup> The New York State Constitution places limits on “special legislation,” i.e., laws that affect only a particular jurisdiction. Special legislation can be passed only at the request of the local government under a home rule message or in emergency situations. N.Y. CONST. art. IX, § 2(b)(2). Home rule messages must be passed by a majority of a municipality’s legislature and endorsed by the city’s mayor or must be passed with the support of two-thirds of the municipality’s legislature. *Id.* § 2(b)(2)(a); see also Laura D. Hermer, *Municipal Home Rule in New York: Tobacco Control at the Local Level*, 65 BROOK. L. REV. 321, 333 n.53 (1999) (“A home rule request is a message from the governing body of an affected municipality giving the legislature the municipality’s consent to enact the legislation.”). And even this emergency exemption does not apply to laws applicable only in New York City. N.Y. CONST. art. IX, § 2(b)(2)(b). For an example of the specific content of such a home rule message, see *supra* note 9 (citing a home rule message on congestion pricing).

<sup>97</sup> In practice, however, these restrictions on special legislation are limited by the judiciary’s willingness to defer to legislative judgments as to what constitutes an issue of statewide concern and therefore qualifies as general, and not special, legislation. For example, in *Patrolmen’s Benevolent Ass’n v. City of New York*, 767 N.E.2d 116 (N.Y. 2001), the court held that the safety of New York City residents was an issue of statewide concern, and, as a result, the State Legislature had authority to pass laws affecting New York City’s contract with its police union, limiting the City’s bargaining power and preempting the City’s own mediation laws for negotiating with public employee unions.

<sup>98</sup> N.Y. CONST. art. XVI, § 1.

<sup>99</sup> *Id.*

government. In contrast, more general legislative authority on a range of local issues remains primarily under local control.<sup>100</sup>

This system obviously limits local fiscal autonomy. Richard Briffault, for example, suggests that local autonomy requires local control over local government, local control over issues of local concern, and fiscal resources that enable local governments to address these issues.<sup>101</sup> He argues that New York State adequately meets the first criterion, has a mixed record on the second, and, with respect to the third, “utterly fails to provide local governments with fiscal autonomy.”<sup>102</sup> Even though cities have spending authority equal to the State Legislature, this authority is limited in practice by state restrictions on revenue raising. As Briffault notes, taxing is simply not considered a home rule power under the constitution.<sup>103</sup> As a result, any time a local authority wants to levy any kind of tax, it must possess explicitly delegated authority from the State.<sup>104</sup>

Of course, the Legislature can delegate taxing authority such that local governments can make adjustments without constantly seeking state approval. For example, New York City can change its property tax rates without state approval, but state law governs the structure of the tax base (i.e., what parts of the property are taxed).<sup>105</sup> Since tax expenditures are frequently implemented as changes to the property tax base, this limitation on municipal power prevents the City from implementing property tax expenditures without prior approval by the State.<sup>106</sup> In fact, all but one of the property tax expenditures listed in New York City’s *Annual Report on Tax Expenditures* for fiscal year

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<sup>100</sup> See N.Y. MUN. HOME RULE LAW § 10 (Consol. 2011) (listing legislative subjects delegated to local authority).

<sup>101</sup> Briffault, *supra* note 82, at 83.

<sup>102</sup> *Id.* These restrictions on fiscal autonomy are not just limits on New York City’s fiscal resources. As economists and other students of public policy have increasingly come to recognize, the power to tax is both a regulatory and a fiscal tool. See *supra* Part II.A (discussing the use of taxation as a fiscal tool).

<sup>103</sup> Briffault, *supra* note 82, at 102 (“Home rule concepts do not apply to local taxation and borrowing.”).

<sup>104</sup> See, e.g., N.Y. GEN. CITY LAW § 20(4) (Consol. 2010) (providing general authorization for municipalities to “levy and collect taxes on real and personal property for any public or municipal purpose”); N.Y. TAX LAW §§ 1201–1206 (Consol. 2010) (authorizing a variety of taxes for individual cities in New York State); *id.* § 1301 (authorizing a municipal personal income tax in all cities with a population over one million people—i.e., only New York City).

<sup>105</sup> See OFFICE OF REAL PROP. TAX SERVS., N.Y. STATE DEP’T OF TAXATION & FIN., HOW THE PROPERTY TAX WORKS (2011) (describing the state-regulated process of assessment and the power of localities to determine the tax rate).

<sup>106</sup> See *supra* Part I.A.1 (discussing the importance of tax expenditures in changing New York City’s property tax base).

2011 had to be authorized by the State Legislature.<sup>107</sup> The State also dictates many of the details of the municipal Personal Income Tax (PIT),<sup>108</sup> and the budget agreement reached in 2010 between Mayor Bloomberg and City Council Speaker Christine Quinn included several revenue proposals—including an increase in the sales tax and an elimination of a specific exemption for clothing purchases under \$110—that required state approval.<sup>109</sup>

In practice, the State does not often veto New York City's proposed requests.<sup>110</sup> This does not mean that the State simply rubber-stamps all of New York City's proposals. City policymakers do not want to waste time and energy on proposals that they know have little chance of success,<sup>111</sup> so the State does not actually need to use its veto power in order to exert its influence. For example, Mayor Bloomberg suggested imposing a bag fee as part of his fiscal year 2010 budget<sup>112</sup>

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<sup>107</sup> See 2011 N.Y.C. ANN. REP. ON TAX EXPENDITURES 9–57, available at [http://www.nyc.gov/html/dof/html/pdf/11pdf/ter\\_2011\\_final.pdf](http://www.nyc.gov/html/dof/html/pdf/11pdf/ter_2011_final.pdf) (discussing property tax exemptions program by program and providing state statutory authority for each exemption). The one exception is the exemption of the land owned by Cooper Union upon which the Chrysler Building was built. See *id.* at 42 (discussing the unique situation of Cooper Union's tax exemption); see also *New York ex rel. Cooper Union for the Advancement of Sci. & Art v. Sexton*, 6 N.E.2d 404, 404 (N.Y. 1936) (rejecting attempts to levy local property taxes on Cooper Union).

<sup>108</sup> See N.Y. TAX LAW § 1301 (Consol. 2011) (outlining the city Personal Income Tax).

<sup>109</sup> See Press Release, Office of the Mayor, Mayor Bloomberg and Council Speaker Quinn Announce Agreement on New Revenue Package To Help Balance FY 2010 Budget (Jun. 1, 2009), available at <http://www.nyc.gov/html/om/html/2009a/pr247-09.html> (describing budget proposals).

<sup>110</sup> Congestion pricing is a rare exception.

<sup>111</sup> The tax limitation resembles the modern operation of the U.S. Senate's filibuster. Rarely does the filibuster involve a *Mr. Smith Goes to Washington*-style, night-long protest. Instead, legislation without a filibuster-proof majority simply does not make it to the senate floor. No studies document empirically the frequency with which the State Legislature rejects New York City tax proposals or (more relevantly) the number of city tax proposals that do not even make it to Albany. However, only a little more than seven percent of bills introduced in the New York State Senate between 1997 and 2001 became law, suggesting the general difficulties of the legislative process. JEREMY M. CREELAN & LAURA M. MOULTON, BRENNAN CTR. FOR JUSTICE, *THE NEW YORK STATE LEGISLATIVE PROCESS: AN EVALUATION AND BLUEPRINT FOR REFORM*, at vii, 37 (2004), available at [http://www.brennancenter.org/page/-/d/albanyreform\\_finalreport.pdf](http://www.brennancenter.org/page/-/d/albanyreform_finalreport.pdf) ("New York State's legislative process is broken. . . . Neither the U.S. Congress nor any other state legislature so systematically limits the roles played by rank-and-file legislators and members of the public in the legislative process."); cf. Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures*, 112 HARV. L. REV. 379, 401 (1998) (noting that the federal "legislative process is not costless; time and man-hours devoted to one piece of legislation are not available for others; by expending political capital on one law, a legislator has less to expend on others; even routine legislation can absorb significant amounts of legislative time, energy, and decisionmaking capacity").

<sup>112</sup> See David W. Chen, *In Mayor's Plan, the Plastic Bag Will Carry a Fee*, N.Y. TIMES, Nov. 7, 2008, at A1 (discussing Mayor Bloomberg's endorsement of a bag tax for New York City); Dan Amira, *Bloomberg's 'Bag Tax' To Include More than Just Grocery Stores*,

but quickly realized that his proposal was actually a tax that required approval from Albany. As a result, the proposal did not make it out of committee.<sup>113</sup>

In contrast to its limited ability to impose taxes, New York City has broad authority to enact fees that are quid pro quo payments for services provided. Under New York State law, local governments are given presumptive authority to assess usage fees.<sup>114</sup> Localities can, for example, charge for municipal utility services, impose licensing fees, and otherwise pay for services on a cost-of-provision basis.

Generally, such user fees are limited to the cost of providing a service. For example, in determining whether or not the State University Agricultural and Technical College of Canton, a generally tax-exempt government institution, could be subject to a water assessment fee imposed by the Village of Canton, the court distinguished between a water tax, which would have been imposed whether or not the University used the local water system, and a water fee, which was levied based on the amount of water the institution used.<sup>115</sup> The line between a user fee and a tax, however, is not statutorily defined in New York, and it can be difficult to tell user fees apart from taxes.<sup>116</sup>

### III

#### THE CASE FOR GREATER MUNICIPAL TAXING POWER

One can think of these four powers wielded by government—regulation, spending, taxes, and user fees—as the tools used to implement policy. The State Legislature sets the rules that define how and when the local government can use these tools. While the imposition

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N.Y. MAG.: DAILY INTEL (Feb. 2, 2009, 12:30 PM), [http://nymag.com/daily/intel/2009/02/bloombergs\\_bag\\_tax\\_expansion.html](http://nymag.com/daily/intel/2009/02/bloombergs_bag_tax_expansion.html) (noting uncertainty about whether the plan required approval from Albany).

<sup>113</sup> See David W. Chen, *Mayor Lacks Power To Block \$400 Rebates*, N.Y. TIMES, Nov. 18, 2008, at A1 (discussing a policy reversal in the Mayor's office over the fee). Since the proposed fee was not related to the cost the City incurred in disposing of the bags, it could not be classified as a user fee that was within the City's authority to impose. See JOSH BARRO, TAX FOUND., NYC MAY SEE HIGHER INCOME, SALES AND PROPERTY TAXES 2 (2008), available at <http://www.taxfoundation.org/files/ff155.pdf> ("The Bloomberg administration maintains this proposal isn't a tax, despite the fact that the proceeds do not defray costs for the government to provide a specific service but rather provide general revenue.").

<sup>114</sup> N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(9-a) (Consol. 2011); see also Jason Burge, Note, *Rethinking Fees and Taxes in Light of the New York City Health Care Security Act*, 61 N.Y.U. ANN. SURV. AM. L. 679, 695–96 (2006) (observing that there is no need for enabling legislation from the State to impose a fee).

<sup>115</sup> See State Univ. of N.Y. v. Patterson, 346 N.Y.S.2d 888, 891 (N.Y. App. Div. 1973) (holding that the water charge, having no relation to the quantity of water used, was a tax).

<sup>116</sup> See Burge, *supra* note 114, at 697–702 (discussing inconsistent New York jurisprudence).

of a new tax requires prior authorization from the State, municipal regulation does not. City officials considering whether to tax or regulate know that, if they choose regulation, their fate is in their own hands, but if they try to tax, they must spend political capital for an uncertain outcome. As a result, policymakers may frequently take a tax option off the table when formulating policy options.<sup>117</sup>

Public finance literature typically assumes that, from a normative perspective, this inability of local government to exercise significant tax authority is appropriate; for numerous reasons, such as the likelihood of city corruption and competition between the state and local taxing authorities, municipalities' use of taxation should be curtailed. Part III of this Note first addresses these and other concerns and suggests that they overstate the case for restricting New York City's taxing authority. A normative argument is then offered in favor of expanding New York City's taxing authority, focusing on examples where taxation might be a more efficient or effective policy alternative. While real costs underlie concerns about local taxing authority, the benefits of efficient and effective city taxes are much more significant.<sup>118</sup>

### A. *A Response to Critics*

Those concerned about municipal taxing authority generally make four arguments for restricting it: (1) municipalities cannot be trusted to use revenues appropriately; (2) distributive tax policy is better accomplished at the state and federal level; (3) giving cities taxing authority places them in vertical tax competition with the state and limits state revenue; and (4) cities will use their taxing authority to unfairly impose taxes on nonresidents. Each of these critiques can be countered.

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<sup>117</sup> See *supra* notes 112–13 and accompanying text (discussing failed efforts to implement a bag tax because of anticipated state inaction).

<sup>118</sup> In arguing for a more expansive taxing authority, this Note assumes that the State would have the power to preempt local taxation just as it currently has preemptive authority over local regulation. In other words, this Note argues merely that regulatory and taxing authority should be equivalent and not that the City's taxing authority should be completely unchecked. While this proposal would lessen the State's control over taxing authority, retention of state supervision through the preemption power could still serve as a break on truly excessive spending. Further, this proposal leaves untouched state-imposed local debt limitations, which prevent local authorities from borrowing to finance excessive spending. State supervision of user fees is minimal, but as discussed in *supra* Part II.B, state law defines user fees narrowly, preventing the wholesale replacement of a local government's tax base with user fees.

## 1. Local Corruption

The first concern, local corruption, stems from a longstanding historical practice of states granting municipalities only limited taxing authority because state officials feared city governments would waste tax revenues on illicit payoffs and pork barrel projects.<sup>119</sup> While municipal corruption has not disappeared,<sup>120</sup> it is a weak justification for perpetuating current limits on New York City's taxing authority.<sup>121</sup> Continually embarrassing corruption scandals in Albany suggest that the New York State government is no less vulnerable to corruption than its municipal counterparts.<sup>122</sup> In fact, New York City may now be a more responsible fiscal steward than the State.

Of course, the corruption pendulum eventually may swing back. But if corruption is equally possible at state and municipal levels, there seems to be little reason to premise limits on New York City's taxing power on its presumed greater propensity to misspend public funds.<sup>123</sup> Further, if the City's revenue and regulatory authorities were equalized, the State would retain its supervisory, preemptive authority over taxation, thus maintaining a check on local corruption.

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<sup>119</sup> As David Barron has discussed, home rule was crafted to "restore the idealized small-scale, low-tax, low-debt, highly privatized (and thus incorruptibly public) ideal of local government." Barron, *supra* note 76, at 2294; see also Lewis A. Grossman, *James Coolidge Carter and Mugwump Jurisprudence*, 20 LAW & HIST. REV. 577, 595–601 (2002) (discussing concerns about political corruption in New York City).

<sup>120</sup> See, e.g., Christine Hauser, *Mob Infiltration Is Seen in Agency*, N.Y. TIMES, Oct. 2, 2009, at A1 (discussing indictments of officials in the New York City Buildings Department on charges ranging from "taking bribes to grant building permits, expedite inspections and overlook building violations" to "gambling, drug trafficking, extortion and loan sharking"); Ray Rivera, *Slow-Moving Scandal Speeds Up for Council*, N.Y. TIMES, Jul. 16, 2009, at A22 (describing the federal investigation and indictments of council members and aides for misusing and embezzling funds designated for nonprofits).

<sup>121</sup> At least two observers have suggested that New York City's campaign finance laws are better at curbing corruption than state efforts. See Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 ALB. GOV'T L. REV. 194, 227 (2008) ("New York City provides a useful point of comparison to New York State because New York City's campaign finance system is battle-tested, well structured and large-scale.").

<sup>122</sup> For an overview of the corruption scandals plaguing the New York State Legislature, including a listing of ten members of the State Legislature who have been investigated, indicted, convicted, or have pled guilty to criminal charges within the preceding five years, see Editorial, *The Fog of Ethics in Albany*, N.Y. TIMES, Oct. 28, 2009, at A32.

<sup>123</sup> An ideal division of local and state power could attempt to divide policymaking authority based on propensity for capture. If hospitals and healthcare workers' unions could more easily capture state than local legislatures, then Medicaid reimbursement rates might best be set at the local level. If developers could more easily capture local planning boards, then state bureaucrats should have more planning responsibilities. Such a division, however, would be difficult to accomplish, even theoretically, and crafting laws that could enforce such separation of power by issue seems a Sisyphean task. Cf. *supra* note 116 and accompanying text (discussing the difficulties in defining user fees doctrinally).



## 2. *Problems with Redistribution*

The second concern with expanding local taxing authority is that such an expansion would tend to increase local redistribution. While this Note argues for increased taxing authority by focusing on the regulatory role of tax policy and does not argue that New York City should necessarily engage in greater redistribution,<sup>124</sup> expanding taxing authority would, admittedly, make it easier for New York City to redistribute income, and basic public finance theory suggests that redistribution should happen at the broadest possible level to prevent wealthier, more productive citizens from exiting the local market.<sup>125</sup> Since it is easier to exit a city than a state, and far easier to leave a state than to leave the United States, the larger the jurisdiction imposing a redistributive tax base, the more costly the choice to exit.<sup>126</sup> Thus, concerns about redistribution at the local level are rooted in the relatively low costs of exit.

However, there are several reasons to question this conventional wisdom, especially as applied to New York City. First, these concerns may apply with less force to New York City and other “superstar cities,” where high-income earners are willing to pay a significant premium to live near other high-income earners.<sup>127</sup> This premium seems attributable to the clustering of high-income households and not to specific gains in worker productivity, increased amenities, or other traditional explanations of growth.<sup>128</sup> That is, New York City’s superstar status might allow it to impose higher tax rates simply because people are willing to pay a premium to live in New York City.<sup>129</sup>

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<sup>124</sup> See *infra* Part III.B (identifying situations where the City would benefit from increased taxing authority).

<sup>125</sup> See, e.g., Andrew Reschovsky, *The Progressivity of State Tax Systems*, in *THE FUTURE OF STATE TAXATION* 161, 161 (David Brunori ed., 1998) (“[Economists] argue that efforts by state and local governments to levy higher taxes on high-income residents . . . will be ineffective because high-income individuals can migrate to political jurisdictions with more favorable fiscal climates.”). But see Timothy J. Goodspeed, *A Reexamination of the Use of Ability To Pay Taxes by Local Governments*, 38 J. PUB. ECON. 319, 340 (1989) (showing, under some theoretical assumptions, that redistribution at a local level through income tax does not lead to a misallocation of resources).

<sup>126</sup> See Andrew Reschovsky, *Residential Choice and the Local Public Sector: An Alternative Test of the “Tiebout Hypothesis,”* 6 J. URB. ECON. 501, 518 (1979) (finding evidence of movement in response to local fiscal factors in a study of the Minneapolis–St. Paul metropolitan area).

<sup>127</sup> Joseph Gyourko, Christopher Mayer & Todd Sinai, *Superstar Cities 2* (Nat’l Bureau Econ. Research, Working Paper No. 12355, 2006) (discussing the clustering of high-income earners in a limited number of attractive urban areas).

<sup>128</sup> *Id.* at 33.

<sup>129</sup> Other superstar cities might likewise benefit from the phenomenon and its capacity to expand their revenue base. This Note makes no broad normative claims about the

While this superstar status does not completely allay concerns about local redistribution, it does minimize them.<sup>130</sup>

Second, there may be variance in redistribution preferences at the local level, and in some jurisdictions (including New York City), taxpayers may actually want more redistribution.<sup>131</sup> Under the Tiebout model of local government, a variety of local governments exists to match individual preferences for specific bundles of government services, and individuals sort themselves into communities of shared preferences.<sup>132</sup> This Tieboutian sorting is thought to maximize welfare by creating choice among bundles, thus providing individual taxpayers the opportunity to sort themselves into their ideal communities. Some local taxpayers would prefer to pay more in taxes and ensure better schools; others would rather keep their money.

To the extent redistribution can be thought of as a government service that a segment of taxpayers is willing to pay for, uniform rules restricting local redistribution limit the ability of local governments to match taxpayers' redistribution preferences.<sup>133</sup> Such preferences may be economically rational. As Professor Gillette has noted, "[t]hose of us who experience the joys of New York understand that the predicate for the diversity of culture, restaurants, and intellectual stimulation that the City offers depends heavily on attracting both national and international immigrants, many of whom will require redistributive services in the short run."<sup>134</sup> Local governments should be allowed to

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authority that should be granted to municipal governments because local government law, and thus the structure of municipal taxing authority, varies by state.

<sup>130</sup> Of course, New York City may not always be a superstar. It arguably was not in the 1970s. See generally VINCENT J. CANNATO, *THE UNGOVERNABLE CITY: JOHN LINDSAY AND HIS STRUGGLE TO SAVE NEW YORK* (2001) (describing New York City Mayor John Lindsay's efforts to prevent white flight). Even now, superstar status does not prevent high tax rates from pushing city residents to the suburbs. However, it may change the tax "price" those residents are willing to pay for living in New York City.

<sup>131</sup> See Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1071–81 (2007) (discussing reasons for heterogeneous preferences toward distribution).

<sup>132</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures* (1956), reprinted in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES*, at i, xiv–xv (William A. Fischel ed., 2006) (listing the assumptions of the model); cf. John Douglas Wilson, *Theories of Tax Competition*, 52 NAT'L TAX J. 269, 269 (1999) (noting concerns about the Tiebout model since "local officials will supplement the conventional measures of marginal costs with those costs arising from the negative impact of taxation on business investment" and thus underinvest in public goods).

<sup>133</sup> See generally Mark V. Pauly, *Income Redistribution as a Local Public Good*, 2 J. PUB. ECON. 35 (1973) (discussing redistribution as a public good and arguing that given heterogeneous distribution preferences, local redistribution might be efficient).

<sup>134</sup> Gillette, *supra* note 85, at 1248.

honor these other preferences of their residents alongside preferences for, e.g., good schools or colonial-style architecture.<sup>135</sup>

Again, this Note does not argue that New York City should use its increased taxation authority to engage in greater redistribution.<sup>136</sup> Rather, the Note concedes that if the City were given increased taxing authority, it might engage in more redistributive taxation. Nevertheless, concerns about local redistributive taxation are overstated when applied to New York City. In a superstar city like New York, redistribution is less likely to result in a mass exodus. Moreover, a blanket restriction on the City's taxing power may actually prevent the City's ability to honor the preferences of the City's residents.

### 3. *Vertical Tax Competition*

A third concern with expanding local taxing authority is that expansion will limit the State's own ability to raise revenues due to vertical tax competition. Vertical tax competition is tax competition between two concurrent taxing jurisdictions (e.g., state and local governments) that seek to tax the same, or an overlapping, revenue base.<sup>137</sup> In contrast, horizontal tax competition is competition between two jurisdictions at the same level, such as two different states.<sup>138</sup>

A simplified example illustrates the vertical tax competition concern.<sup>139</sup> Assume New York State wants to levy a five percent tax on retail sales. If New York City decides to implement an additional local sales tax of three percent, the total tax rate on retail goods becomes eight percent. If combined state and local retail tax rates in New Jersey are only six percent, consumers are going to shift some of their purchase of retail goods to New Jersey, thus depriving New York State of revenue. New York State may find that it has to reduce its tax rate in order to increase revenue collection from the tax, a result that limits its ability to raise taxes because of New York City's policy choice.

The argument that vertical tax competition harms state revenues ignores the fact that cities can already use other policy tools (like reg-

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<sup>135</sup> See, e.g., *State ex rel. Stoyanoff v. Berkeley*, 458 S.W.2d 305, 310 (Mo. 1970) (recognizing the local government's interest in aesthetic architectural uniformity as protected under the Missouri Constitution).

<sup>136</sup> See *infra* Part III.B (discussing appropriate situations for an expanded taxing authority).

<sup>137</sup> Timothy J. Goodspeed, *Tax Competition, Benefit Taxes, and Fiscal Federalism*, 51 NAT'L TAX J. 579, 581 (1998) (discussing the difference between vertical and horizontal tax competition).

<sup>138</sup> *Id.*

<sup>139</sup> For another example, one that discusses vertical tax competition with respect to implementing a commuter tax, see Clayton P. Gillette, *Who Should Authorize a Commuter Tax?*, 77 U. CHI. L. REV. 223, 244–45 (2010).

ulation) to distort state tax collection.<sup>140</sup> For example, the citywide ban on cigarette smoking in public spaces has reduced cigarette sales,<sup>141</sup> and thus reduced revenue from state tobacco taxes, though the City implemented the ban without prior approval from the State. More generally, New York City's ability to regulate business increases the cost of doing business in the City, and thus reduces the State's revenue base by reducing sales and income.<sup>142</sup> In other words, municipal regulations theoretically could result in revenue reductions similar to those caused by municipal taxation.

Moreover, in cases where taxes are more efficient than regulation, imposing municipal regulations could have an even more severe revenue-reducing effect than vertical tax competition.<sup>143</sup> In these cases, granting localities greater taxing authority could actually mitigate this negative effect on state revenues by increasing efficiency in business transactions. In situations where the regulation causes a greater loss of economic activity than a tax promoting the same policy objective, the State also loses the ability to tax that lost economic activity. For example, imagine that a city wants to reduce the number of strip clubs in a given area. It could ban them outright, and then neither the city nor the state could collect a tax on the revenue generated by the clubs. Or it could impose a surcharge tax on the revenues of strip clubs in the area. Such a tax would reduce strip club profits, making them a less viable economic investment, but the strip clubs that managed to turn a profit could still be taxed by the state.

Finally, as a backstop to concerns about vertical tax competition, under this Note's proposal for expanded taxing authority, the State would retain its authority to veto taxes implemented by New York City. If the State is concerned about losing revenue, it could prevent the City from implementing a tax or revoke the City's authority in that specific instance.

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<sup>140</sup> See *supra* notes 90–97 and accompanying text (discussing New York City's broad regulatory authority under state constitutional and statutory home rule provisions).

<sup>141</sup> See Ed Pilkington, *Times Square Becomes Smoke Free as New York Extends Ban Outdoors*, GUARDIAN (London), Feb. 4, 2011, at 26 (attributing the dramatic reduction in smoking in New York City, in part, to smoking bans implemented in 2002); see also William N. Evans, Matthew C. Farrelly & Edward Montgomery, *Do Workplace Smoking Bans Reduce Smoking?*, 89 AM. ECON. REV. 728, 745 (1999) (concluding that workplace smoking bans reduce smoking significantly).

<sup>142</sup> See Michael H. Schill, *Removing Regulatory Barriers: One City's Experience* 6–7, 18 (Furman Ctr. for Real Estate & Urban Policy, Working Paper No. 04-05, 2004), available at <http://furmancenter.org/files/publications/RemovingRegulatoryBarrierscombined0504.pdf> (noting that in the late 1990s, New York City building costs were between 3.5% and 9.5% higher than the costs in Los Angeles and between 21.7% and 29.3% more expensive than the costs in Dallas and blaming this discrepancy on New York City regulations).

<sup>143</sup> See *supra* Part I.B (providing examples of the efficiency of tax-based solutions).

#### 4. *Taxing Nonresidents*

A fourth reason presented by critics to restrict New York City's taxing authority is the fear that the City will use this taxing authority to impose taxes on nonresidents. While this argument applies to a variety of taxes borne by tourists (like hotel and rental car taxes), it carries special force in the context of taxes borne solely or disproportionately by commuters (like the commuter tax and congestion pricing).<sup>144</sup> If tourists do not like the taxes in New York City, they can always choose to travel to a different city. Commuters, however, cannot change their travel plans so easily.<sup>145</sup> In effect, this argument suggests that taxes can force nonresidents to bear increased costs of working in New York City that were imposed solely by the City's voters.<sup>146</sup>

However, the strength of this argument depends on whether or not we think that the State would do a better job of treating nonresidents fairly. Professor Gillette, in a recent article, has questioned the assumption that the State Legislature is a better forum for managing this type of city-suburban dispute. While New York City representatives may strongly favor a commuter tax, representatives of the New York suburbs are likely to oppose it. As Gillette notes, "the bulk of state legislators likely represent neither group, so that most legislators' votes may depend on logrolling with respect to unrelated items or affinities to those more intensely interested in the issue rather than on a careful balancing of the net effects of commuting."<sup>147</sup> By logrolling, representatives from New York City's suburbs could secure opposition to the commuter tax from rural elected officials by promising to vote with the rural communities on an issue that is important to them.<sup>148</sup>

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<sup>144</sup> See generally Gillette, *supra* note 139 (discussing the commuter tax problem specifically); Kirk J. Stark, *The Right To Vote on Taxes*, 96 Nw. U. L. REV. 191, 216-36 (2001) (discussing taxation of nonresidents generally).

<sup>145</sup> See Robert J. Firestone, *Does a Commuter's Choice of Where To Reside Implicate the Dormant Commerce Clause*, 49 N.Y.L. SCH. L. REV. 943, 958-63 (2004) (discussing concerns raised by the New York Court of Appeals in striking down New York City's commuter tax as violating the Dormant Commerce Clause); see also *City of New York v. State* (The Commuter Tax Case), 730 N.E.2d 920, 923 (N.Y. 2000) (holding New York City's commuter tax unconstitutional as applied to Connecticut and New Jersey residents).

<sup>146</sup> Of course, nonresident commuters also may impose uncompensated costs on the City. See, e.g., Stark, *supra* note 144, at 229 (noting the significant cost imposed by commuters on a city).

<sup>147</sup> Gillette, *supra* note 139, at 234.

<sup>148</sup> Gillette argues that New York City representatives are probably less likely to logroll to obtain the commuter tax than suburban representatives are to use their promised votes on other issues to oppose it. See *id.* ("The positive revenue effects of a commuter tax for

Of course, New York City could also engage in this type of logrolling. But an evenhanded ability to engage in logrolling does not solve this process problem. The existence of logrolling means that the vote of the New York State Legislature may not accurately represent the interests of New York State residents on issues that affect only subregions, suggesting that the State has no greater claim of representation in deciding such issues. New York City, on the other hand, is more likely to internalize the suburbanites' distaste for both taxes and congestion since the City benefits from commuters and does not want to create incentives for businesses to relocate elsewhere.<sup>149</sup>

### *B. The Case for More Taxing Authority: Freeing Policy Space*

Concerns about expanding local taxing authority overstate the dangers of extending such authority to New York City. More importantly, such concerns ignore the potential benefits of taxation as a tool of policy implementation. In some situations, a tax-based approach may be the best policy choice, but current limits on the City's taxing authority strongly discourage city officials from pursuing such solutions. Tax-based approaches risk rejection by the State, and politicians and policymakers do not want to waste time and political capital on proposals when success is beyond their control.<sup>150</sup> As a result, policymakers may take tax-based solutions off the table despite their potential efficacy and efficiency. This Subpart identifies situations when taxation should strongly be considered as a policy option. When taxation is the right tool, policymakers should be able to tax. These situations suggest the need for expanding New York City's taxation authority, subject to the State's right to veto taxation measures.

When the City chooses to subsidize certain products, investments, or behaviors, policymakers should ask whether that subsidy is better administered through New York City's Finance Department (i.e., as a tax) or through another agency.<sup>151</sup> Administrative costs and other

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any city recipient may be too minor for the tax to receive the same salience, so that city representatives may reserve their logrolling opportunities for [other] issues.”).

<sup>149</sup> As noted in *supra* Part III.A.2, high-income earners living in New York City may be willing to pay more in taxes for the privilege of living in New York City. This is consistent with the idea that taxes drive location choice for taxpayers. These are all incremental arguments about how much relocation will result from given tax increases.

<sup>150</sup> See *supra* note 111 and accompanying text (discussing hurdles facing local politicians attempting to pass tax legislation via state approval).

<sup>151</sup> See generally David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955 (2004) (arguing that the question of “institutional design”—i.e., how the government compartmentalizes its functions—should dominate the decision of how best to implement a subsidy policy).

issues of “institutional design” should affect this policy choice.<sup>152</sup> Scholars have also noted that tax-based solutions may be preferable in certain situations at the federal level.<sup>153</sup>

There are at least two situations in which New York City policy-makers should strongly consider implementing a policy via taxation. First, a tax solution makes sense when combating a local externality.<sup>154</sup> Second, a tax often makes sense as a policy to curb undesirable behavior that may not be a purely local externality, but is nevertheless amenable to local control.<sup>155</sup> While these situations may not be the only ones in which New York City should consider tax-based solutions, an examination of these two categories highlights the cost of denying such taxing authority to the City.

When confronting a local externality, New York City should be able to decide whether cost internalization is better accomplished through regulation or taxation. Regulations, if not tailored perfectly, can fail and sometimes exacerbate the problem that they are supposed to solve. For example, primarily to reduce air pollution, Mexico City restricted access to a central business corridor to cars with certain license plate numbers during peak travel hours each weekday.<sup>156</sup> Policymakers implemented this restriction to reduce the number of cars on the road. However, the plan backfired, as wealthier drivers responded to these regulations by buying additional cars with alternate license plate numbers.<sup>157</sup> Many of these newly purchased cars were older models with significantly worse emissions controls, exacerbating Mexico City’s longstanding air pollution problems.<sup>158</sup> As Mexico City’s experience suggests, regulations often fail to solve

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<sup>152</sup> *Id.*

<sup>153</sup> See, e.g., Eric J. Toder, *Tax Cuts or Spending—Does It Make a Difference?*, 53 NAT’L TAX J. 361, 368–69 (2000) (suggesting situations in which tax provisions might be better than direct spending).

<sup>154</sup> See N. Gregory Mankiw, *Smart Taxes: An Open Invitation To Join the Pigou Club* 5–6 (2008) (unpublished manuscript), available at [http://www.economics.harvard.edu/files/faculty/40\\_Smart%20Taxes.pdf](http://www.economics.harvard.edu/files/faculty/40_Smart%20Taxes.pdf) (discussing the role of Pigovian taxation in combating market failure due to an externality problem).

<sup>155</sup> One example is smoking. Sin taxes like cigarette taxes are not trying to force smokers to internalize the cost of their smoking to society but rather raise the cost of smoking to make more salient their own costs of smoking. See *supra* text accompanying note 46–47 (discussing behavior-modifying function of sin taxes).

<sup>156</sup> So, for example, license plate numbers ending in two or five could not enter the corridor on Wednesdays.

<sup>157</sup> See LICENSE PLATE RATIONING, *supra* note 21, at ES-2 (“Mexico City became a net importer rather than net exporter of used vehicles from the rest of the country, meaning that residents sought to evade the restrictions by becoming multi-vehicle households (with variably coded license plates) . . .”).

<sup>158</sup> *Id.*

externality problems.<sup>159</sup> Experts affirm that a congestion tax, coupled with increased investment in public transportation, is often the best way to deal with traffic problems.<sup>160</sup>

Congestion pricing is not the only policy initiative responsive to local externalities that the State quashed by exercising its veto power over New York City's taxing authority. Bag fees have proven successful in promoting the reuse of bags in several cities,<sup>161</sup> but New York City abandoned efforts to impose such a tax because of the state approval requirement.<sup>162</sup> Of course, the City independently could impose a ban on plastic bags.<sup>163</sup> Such a comprehensive ban, however, would be overbroad. For example, a complete ban on plastic bags would prove disastrous for restaurant takeout orders, as reusable and paper bags cannot always contain sauces that spill from food containers.<sup>164</sup> In contrast, the tax option, if it had been available, could have been uniformly and efficiently applied to all uses of plastic bags.<sup>165</sup> New York City, given its size and wealth,<sup>166</sup> pursues such regulatory policies more frequently than other municipalities, compounding the problem of its lack of taxing authority.<sup>167</sup>

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<sup>159</sup> See *supra* Part I.B.1 (discussing a preference for tax-based and other market-oriented approaches over regulatory approaches for dealing with carbon pollution).

<sup>160</sup> See, e.g., Mankiw, *supra* note 154, at 14–15 (expressing support for congestion pricing); see also *supra* notes 2–5 and accompanying text (discussing broad support for the New York City congestion tax proposal).

<sup>161</sup> In Washington, D.C., for example, consumer use of reusable bags increased so significantly that revenue estimates were off by fifty percent. Associated Press, *D.C. Bag Tax Nets \$2 Million*, WASH. POST: BREAKING NEWS BLOG (Jan. 5, 2011, 11:23 AM), <http://voices.washingtonpost.com/local-breaking-news/dc/dc-bag-tax-nets-2m.html>; see also *Irish Bag Tax Hailed Success*, BBC NEWS (Aug. 20, 2002, 12:36 PM), <http://news.bbc.co.uk/2/hi/europe/2205419.stm> (reporting that the Irish bag tax decreased plastic bag usage by more than ninety percent).

<sup>162</sup> See *supra* notes 112–13 and accompanying text (discussing failed efforts to implement a citywide bag tax).

<sup>163</sup> Santa Monica and Mexico City have already implemented such a ban. See Martha Groves, *Santa Monica Bans Plastic Bags*, L.A. TIMES, Jan. 27, 2011, at AA.1 (discussing the Santa Monica ban); Elisabeth Malkin, *Unveiling a Plastic Bag Ban in Mexico City*, N.Y. TIMES: GREEN BLOG (Aug. 21, 2009, 12:02 PM), <http://green.blogs.nytimes.com/2009/08/21/unveiling-a-plastic-bag-ban-in-mexico-city> (discussing the Mexico City ban).

<sup>164</sup> The Santa Monica ban, for example, excludes restaurants, while Washington, D.C.'s five-cent bag tax applies to take out and requires restaurants to use paper. See Groves, *supra* note 163 (describing the Santa Monica ban); Sara Murray, *In Washington, a Lesson in Bureaucracy Comes in Every Bag*, WALL ST. J., Jan. 25, 2010, at A1 (discussing the implementation of Washington, D.C.'s bag tax).

<sup>165</sup> See Bridget M. Warner, *Sacking the Culture of Convenience: Regulating Plastic Shopping Bags To Prevent Further Environmental Harm*, 40 U. MEM. L. REV. 645, 678–80 (2010) (comparing efforts to ban and tax plastic bags and concluding a tax is better).

<sup>166</sup> See *supra* note 16 (discussing the ways that New York City is unique).

<sup>167</sup> This regulatory authority has been used in many policy areas. One example is the N.Y.C. Department of Health's "long tradition of innovation and public health leadership, particularly in controlling infectious diseases." Thomas R. Frieden et al., *Public Health in*



Taxes also often serve as a policy tool to curb undesirable behaviors that are not purely externality problems.<sup>168</sup> For example, many scholars believe that soda taxes will promote healthier eating habits.<sup>169</sup> The consumption of high-sugar beverages is a leading cause of the United States' obesity epidemic.<sup>170</sup> Both New York State and New York City have considered imposing soda taxes. Governor Paterson initially showed interest in the idea at the state level, then quickly dropped the proposal when it became clear that it lacked political support in Albany.<sup>171</sup> In 2010, Mayor Bloomberg suggested that a soda tax could make financial sense for the City while also promoting healthy eating, though the idea has had little traction because of a lack of state interest.<sup>172</sup> Of course, New York City could ban soda, just as it has already banned trans fats.<sup>173</sup> A ban, however, seems like a drastic step. While there are reasons to be skeptical of soda taxes,<sup>174</sup> New York's experimentation with such a policy could offer lessons for the nation as a whole about the effectiveness of soda taxes in combating obesity, given growing national interest in the idea.<sup>175</sup>

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*New York City, 2002–2007: Confronting Epidemics of the Modern Era*, 37 INT'L J. EPIDEMIOLOGY 966, 967 (2008) (attributing the agency's innovation to "having the combination of much of the resources and regulatory authority of a state public health agency as well as direct implementation capacity and access to a large population"). Another example lies in Mayor Giuliani's initiatives to combat organized crime, which included "the creative use of regulatory authority, especially licensing," and, in doing so, "expanded the domain of local government to deal with a criminal syndicate that, until recently, had seemed omnipotent." James B. Jacobs & Alex Hortis, *New York City as Organized Crime Fighter*, 42 N.Y.L. SCH. L. REV. 1069, 1070 (1998) (describing Giuliani's commitment and methods "to purge Cosa Nostra from New York City's economy by using the powers of [c]ity government").

<sup>168</sup> See *supra* notes 46–47 and accompanying text (discussing taxes as tools to incentivize behavior outside of an externality context).

<sup>169</sup> See, e.g., RUDD CTR. FOR FOOD POLICY & OBESITY, *SOFT DRINK TAXES: A POLICY BRIEF* 2–3 (2009), available at <http://www.yaleruddcenter.org/resources/upload/docs/what/reports/RuddReportSoftDrinkTaxFall2009.pdf> (discussing the role of soft drink taxes in promoting healthier eating).

<sup>170</sup> See MICHAEL F. JACOBSON, *LIQUID CANDY: HOW SOFT DRINKS ARE HARMING AMERICANS' HEALTH* 9–12 (2005), available at [http://www.cspinet.org/new/pdf/liquid\\_candy\\_final\\_w\\_new\\_supplement.pdf](http://www.cspinet.org/new/pdf/liquid_candy_final_w_new_supplement.pdf) (discussing the role of increased consumption of soft drinks in weight gain and citing several studies linking such consumption to an increase in obesity).

<sup>171</sup> See A. G. Sulzberger, *Bloomberg Says a Soda Tax 'Makes Sense,'* N.Y. TIMES, Mar. 8, 2010, at A18 (mentioning Paterson's abandonment of the soda tax proposal).

<sup>172</sup> See *id.* (describing Bloomberg's radio address discussing the proposal).

<sup>173</sup> See *supra* note 91 (discussing the trans fat ban).

<sup>174</sup> See, e.g., John Cawley, *The Economics of Childhood Obesity*, 29 HEALTH AFF. 364, 369 (2010) (questioning whether soda taxes can be imposed at high enough rates to change consumption patterns).

<sup>175</sup> See Mark Bittman, *A Sin We Sip Instead of Smoke?*, N.Y. TIMES, Feb. 14, 2010, at WK1 (discussing the President's proposal for a national soda tax and growing popular support for the idea).

Further, critics' concerns about local taxing authority apply with much less force in the context of sin taxes like soda taxes. A tax on soda sold in the City, like any sales tax, would primarily affect city residents, who are more likely than commuters to purchase their soda within New York City.<sup>176</sup> This minimizes concerns, discussed in Part III.A.4, that the City will attempt to shift its tax burden to commuters. Soda taxes, like all food taxes, are already regressive,<sup>177</sup> which may be problematic for other reasons but poses minimal concerns with respect to local redistribution.

As the preceding discussion indicates, in confronting externalities and in seeking to curb unhealthy personal behavior, taxes may offer New York City better policy solutions than traditional regulation.<sup>178</sup> However, in order for New York City to pursue such policies, it needs to have expanded taxing authority.

## CONCLUSION

New York State's restrictive grant of taxing authority to municipalities hurts the residents of these cities. New York State's own citizens must bear the increased economic cost of regulation when cities cannot use a tax to achieve a policy objective and instead resort to more expensive, and less effective, approaches. Expanding New York City's policy toolbox to include broader taxation authority will make its government more efficient and increase the size of the social pie available to everyone. This, in turn, will lead to increases in revenue for both state and local government, and a better quality of life for all city dwellers. As academics and reformers consider municipal government in the twenty-first century, they should expand the use of taxation as a tool of regulatory policy.

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<sup>176</sup> Cf. *supra* Part III.A.3 (discussing problems associated with imposing taxes on residents).

<sup>177</sup> See NICHOLAS JOHNSON & IRIS J. LAV, CTR. ON BUDGET & POLICY PRIORITIES, SHOULD STATES TAX FOOD?: EXAMINING THE POLICY ISSUES AND OPTIONS 6 (1998), available at <http://www.cbpp.org/files/stfdtax98.pdf> (describing the regressivity of food taxes generally). Of course, the regressivity of a particular tax may be an issue that New York City policymakers should consider when determining whether the tax is in the best interest of city residents.

<sup>178</sup> There may be other times when tax-based policies make sense. For example, the City might decide to regulate in an area where regulatory taxes are more effective than other types of regulations, either because of the efficiency losses of regulatory alternatives or because of administrative advantages associated with regulating through the tax system.