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Why Do Cities Innovate in Public Health? Implications of Scale and Structure

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WHY DO CITIES INNOVATE IN PUBLIC HEALTH? IMPLICATIONS OF SCALE AND STRUCTURE

PAUL A. DILLER*

ABSTRACT

Big cities have frequently enacted public health regulations—especially with respect to tobacco use and obesity—that go beyond the state and federal regulatory floors. That cities innovate in public health at all is remarkable. They have less to gain financially from more stringent regulation than higher levels of government, which shoulder more of the burden of Medicare and Medicaid. Cities are supposed to fear mobile capital flight; if they regulate, businesses will leave. Moreover, because innovation is costly and likely to be copied by others when successful, a free-rider problem might inhibit local policy innovation generally.

Cities' prolific regulation in the public health sphere in spite of countervailing predictions thus demands an explanation. This Article aims to offer one, focusing on what makes local lawmaking unique from lawmaking at the federal and state levels. This Article argues that cities' smaller scale, concentrated political preferences, and streamlined lawmaking processes facilitate public health innovation. With respect to structure in particular, cities' unicameral legislatures and lack of a supermajority requirement allow affirmative regulatory legislation to proceed more expeditiously. Cities thus stand in contrast to the currently dysfunctional federal government, in which vested interest groups can more easily block regulatory legislation they dislike. In highlighting what is different about the local lawmaking process, this Article aims to better inform the debate about the extent of local power, which plays out in doctrinal areas like home rule and preemption.

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* Associate Professor, Willamette University College of Law. I thank participants in workshops at Marquette and Lewis & Clark, as well as Elaine Sharp and other members of my panel at the Midwest Political Science Association conference in Chicago for valuable comments. I also thank Adam Bonica, Annie Decker, Samantha Graff, and David Schleicher for closely reading drafts. Jennifer Evert provided exceptional proofreading, and Joanna Fluckey, Jacqueline Leung, Michael Tonn, and Daniel Vall-Llobera provided outstanding research assistance.

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INTRODUCTION

Obesity and tobacco use are two of the biggest public health problems in the United States, each causing 400,000 premature deaths annually and adding billions of dollars to healthcare and other economic costs.[1] As such, there is a compelling case for government regulation in these areas. While such regulation may be in the "public interest," however elusively defined, conventional public choice theory predicts that the American political system is likely to under-regulate given the political influence of "Big Tobacco"[2] and "The Food Industry."[3] These two interest groups and their allies frequently succeed at blocking regulations that would hurt their profits.[4] Despite the public choice narrative, and irrespective of whatever the "right" level of regulation is from the perspective of public health or economics, one trend is clear: many big cities fight tobacco use and obesity by adopting regulations that are *more stringent* than those emanating from the state and national political systems. This Article attempts to explain why.

Understanding why cities regulate public health more stringently can help inform a larger debate in local government law scholarship about why cities innovate with respect to public policy. Many scholars praise local lawmaking for its "innovative" power in areas like civil rights,

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1. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, TOBACCO USE: TARGETING THE NATION'S LEADING KILLER, AT A GLANCE (2011), *available at* http://www.cdc.gov/chronicdisease/resources/publications/aag/osh.htm ("Each year, an estimated 443,000 people die prematurely from smoking or exposure to second-hand smoke . . . ."); Jieyun Yin & Jiande D Z Chen, *Are We Fighting a Losing Battle Against Obesity?*, 2 INTERN. MED., Issue 4, at 1 (2012) ("[O]besity and its co-morbidity lead to over 400,000 deaths and cost more than $150 billion per year . . . .").

2. "Big Tobacco" is a common moniker for the top producers of tobacco products in the United States. *See* John J. Zefutie, Jr., Comment, *From Butts to Big Macs—Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 SETON HALL L. REV. 1383, 1383 n.1 (2004) (defining "Big Tobacco" to include American Brands, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; Batus, Inc.; Philip Morris Companies, Inc.; Lorillard Tobacco Company, Inc.; Loews Corporation; United States Tobacco Company; and Liggett Group, Inc.). Philip Morris is now called Altria Group, Inc. *See also* Karen C. Sokol, *Smoking Abroad and Smokeless at Home: Holding the Tobacco Industry Accountable in a New Era*, 13 N.Y.U.J. LEGIS. & PUB. POL'Y 81, 88–89 n.20 (2010).

3. The Food Industry is admittedly a motley crew, including agribusiness, fast food companies, soda producers, and others who stand to lose from heightened government regulation to prevent obesity. On any one issue, only some subset of this coalition's members may oppose regulation intensely.

4. For this reason, this Article is not particularly interested in "symbolic" local enactments. *See, e.g.*, Lori Riverstone-Newell, *Bottom-Up Activism: A Local Strategy for Higher Policy Change*, 42 PUBLIUS 401 (2012) (focusing on symbolic acts of dissent by local governments, or those that merely apply to local governments' internal operations, which are less likely to be opposed by industry groups).

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environmental protection, and campaign finance regulation.[5] This line of scholarship generally supports the use of local authority to further "progressive" goals, and protests state and federal interference therewith.[6] The legal-academic commentary supporting local innovation, however, appears "result-based" insofar as it merely defends the *outcomes* of that process. This Article focuses on what is different about the local government process as a first step in providing a normative defense of local policy outcomes.

Because this Article is most concerned with identifying why local governments are more eager to regulate than higher levels of government, it focuses on tobacco use and obesity because these problems are undoubtedly of national and statewide import. By addressing such issues at all, cities defy an increasingly discredited scholarly account that posits that cities legislate only with respect to the distribution of public goods like parks and schools, and ignore more ideological issues that higher levels of government are better able to address.[7] The local action identified in this Article challenges the notion that there is any inherent difference between "local" subjects best addressed by cities and "nonlocal" subjects best addressed by higher levels of government.[8] While there are some subjects and modes of regulation that more traditionally fall within a city's ambit—like, say, parking and zoning[9]—tobacco use and obesity are undeniably problems that could be, and sometimes are, addressed by state

5. *E.g.*, Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 375–82 (2008); Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114–17 (2007); Richard Briffault, *Home Rule for the Twenty-first Century*, 36 URB. LAW. 253, 259–60 (2004).

6. *E.g.*, Parlow, *supra* note 5, at 372. By "progressive," I intend the modern usage of this term in political parlance, which is more a replacement for "liberal"—that term having fallen out of favor in the 1990s—than a meaning rooted in the Progressive Era. *See* Brad Snyder, *The House That Built Holmes*, 30 LAW & HIST. REV. 661, 673–74 n.63 (2012) (noting the distinction between "liberal" and "progressive" during the Progressive Era).

7. *See infra* Part II.C.

8. Two exceptions might be national defense and Indian affairs, both of which are committed exclusively to the federal government by the Constitution. *See* U.S. CONST. art. I, § 8. Immigration and foreign affairs are also largely reserved to the federal government by the Constitution, but state and local governments have contested exclusive federal control in these areas. *E.g.*, Arizona v. United States, 132 S. Ct. 2492 (2012) (upholding parts of Arizona's 2010 immigration law); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (invalidating Massachusetts law that restricted state agency trade with Burma).

9. Even with respect to these modes and subjects, however, higher levels of government sometimes attempt to trump local authority. *E.g.*, Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2012) (preempting some zoning law
s that burden religion).

or federal government.[10] In other words, there is no obvious or natural reason why cities should seek to reduce obesity and tobacco use more than the state or federal governments.

National and state officials have frequently copied local action in the realm of public health after cities have regulated first. Some scholars have discussed this process of vertical policy migration in more detail, arguing that policy preferences of officials (and their constituents) at higher levels of government are not stable, and can be reshaped by the actions of lower levels of government.[11] This Article does not revisit the phenomenon of vertical policy migration in depth, but rather focuses on the crucial first step: cities enacting new public health policies that exceed the pre-existing regulatory floor.

To make this project more manageable, this Article generally focuses on policies enacted by the twenty-five most populous cities,[12] while considering less systematically the work of counties and less populous cities.[13] The focus on big cities follows an intuition that they are often, but not always, enacting the most innovative public health regulations. Even if this intuition is incorrect, homing in on large cities can still tell us much about what is different about local government generally, since some of the key characteristics of structure—and, to some degree, scale—common to big cities are shared by almost all cities and counties.

This Article proceeds as follows. Part I lays out the factual premise, demonstrating that big cities have regulated beyond the state and national

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10. Congress's power to "regulate commerce," U.S. CONST. art. I, § 8, is vast, and undoubtedly gives Congress broad authority to address smoking and many of the risk factors for obesity. *E.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (upholding Congress's authority under the Commerce Clause to ban small amounts of home-grown marijuana).

11. *E.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007); Charles R. Shipan & Craig Volden, *Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States*, 50 AM. J. POL. SCI. 825 (2006); *see also* Paul A. Diller, *Obesity Prevention Policies at the Local Level: Tobacco's Lessons*, 65 ME. L. REV. 459 (2013).

12. Since the twenty-five most populous cities have changed over time, I focus on the most populous from the census (1990, 2000, or 2010) closest to the specific policy's emergence. In doing so, I count as "cities" a handful of merged city-county governments (Indianapolis, Jacksonville, and Nashville). For the most part, the cities in the top twenty-five have remained constant; only three from 1990 fell out of the 2010 top twenty-five: Milwaukee, Cleveland, and New Orleans (replaced by Charlotte, Austin, and Ft. Worth; Denver made the top twenty-five in 2000 but not in other years). *See* App. 3.

13. I focus on cities rather than counties in part because cities as a class have a stronger tradition of regulatory policy innovation. In some states, however, counties exercise significant regulatory authority and have been at the vanguard of public health innovation. *See infra* Part V. In addition to the three, merged city-counties noted above, Philadelphia and San Francisco are both county and city (with one government for both), and New York City's government comprises five counties.

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floors to combat tobacco use and obesity. It highlights a handful of major regulations in each context, surveys each regulation's genesis, and notes major ensuing policy migration. Part II then explains why cities' innovative public health regulation is remarkable. It examines prior scholarly accounts that predict city inaction and analyzes why these narratives are wrong in the public health context. Part III then grapples with some prominent scholarly accounts, like communitarianism, that might predict innovation. I argue that these accounts are incomplete, but still helpful to some degree. In particular, the smaller scale of local government and concentrated political preferences may facilitate local innovation, although not necessarily in the ways other scholars have identified.

Part IV then offers an additional, heretofore undervalued structural explanation for local innovation, arguing that big cities are uniquely capable of innovating in the realm of public health because their method of lawmaking is significantly more streamlined than that of higher levels of government. This streamlined system, combined with the low salience and smaller scale of local elections discussed in Part III, allows relatively poorly funded interest groups to promote legislation more effectively than they do at the state and national levels. Part IV focuses only on local governments' political actors, assuming that any administrative action reflects elected officials' will. Finally, Part V takes a closer look at public health innovation *across* the most populous cities in an attempt to discern which aspects of local structure affect a city's proclivity to innovate.

I. THE FACTUAL PREMISE: HEIGHTENED LOCAL REGULATION TO COMBAT TOBACCO USE AND OBESITY

This Part establishes the factual premise that cities have enacted heightened, innovative regulations with respect to public health, focusing in depth on a handful of regulations in the tobacco and obesity contexts. The surveyed regulations are notable for exceeding the then-existent federal and state regulatory floors. In doing so, each regulation was likely to arouse significant opposition from the regulated industries. In preparation for the horizontal comparisons to be made in Part V, this Part notes the degree to which highlighted policies diffused to other cities ranking in the top twenty-five in population around the time of the regulation's emergence. Because court challenges and attempts to preempt at higher levels can greatly affect a regulation's potential for diffusion, this Part discusses such developments where relevant.

A. Local Tobacco Regulation

Cities' heightened regulation of tobacco use has coincided with increased public awareness of the risks of tobacco use and second-hand smoke exposure, as well as the revelation that most tobacco companies were privately aware of smoking's harms for years but consistently denied them in public.[14] While the federal and state regulatory regimes undoubtedly tightened from the 1970s through the 1990s, local governments have regulated tobacco use and availability more stringently in significant ways. This Section will focus on two local policies that substantially altered the national regulatory framework: restrictions on outdoor advertising by tobacco companies, and comprehensive indoor second-hand smoke laws. It will then also discuss other notable local regulations that apply to the sale, marketing, and flavoring of tobacco products.

The examples discussed herein are by no means exhaustive of local tobacco regulation. They are, however, prime illustrations of cities moving before states and the federal government in areas in which cities are free to regulate under their home-rule powers. The analysis excludes regulatory measures like taxes that many cities lack the legal authority to impose.[15] Moreover, because this Article is primarily concerned with cities' ability to enact regulatory policies that Big Tobacco would oppose, the analysis excludes measures that the major tobacco companies are legally estopped from thwarting. Pursuant to the Master Settlement Agreement ("MSA") of 1998, Big Tobacco may not lobby against or actively oppose regulations at any level of government that are specifically designed to restrict youth access to tobacco products.[16] Hence, while local governments have been at the vanguard of restricting cigarette vending machines in order to prevent

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14. *E.g.*, WORLD HEALTH ORG., THE TOBACCO INDUSTRY DOCUMENTS: WHAT THEY ARE, WHAT THEY TELL US, AND HOW TO SEARCH THEM, A PRACTICAL MANUAL 10–11 (2d ed. 2004) ("[I]ndustry scientists knew or strongly suspected as early as the 1950s that tobacco smoke caused disease [but] the industry tried to destroy the evidence of these findings . . . .").

15. Ann Boonn, *Local Government Cigarette Tax Rates & Fees*, CAMPAIGN FOR TOBACCO-FREE KIDS 1 (2013), *available at* http://www.tobaccofreekids.org/research/factsheets/pdf/0304.pdf (noting that "[m]ost counties and cities do not have their own cigarette tax rates because they are prohibited by state law, but there are major exceptions," including New York City and Chicago).

16. *See* MASTER SETTLEMENT AGREEMENT 29 (1998), *available at* http://www.naag.org/backpages/naag/tobacco/msa (precluding settling tobacco companies from opposing "state or local legislative proposals or administrative rules . . . intended by their terms to reduce Youth access to, and the incidence of Youth consumption of, Tobacco") [hereinafter "MSA"]; *id.* at F-1 (specifically listing "[l]imitations on Youth access to vending machines" as the kind of regulation the companies may not oppose).

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youth smoking,[17] they have done so, at least since 1998, without having to overcome the organized opposition of Big Tobacco.

1. Outdoor Advertising Restrictions

The federal government largely banned cigarette advertising from radio and television in 1970,[18] but said nothing about tobacco advertising in print media or on billboards.[19] Cigarette advertising thus continued largely unabated in such media, despite increased awareness of smoking's harms and the tobacco companies' intentional targeting of minors through aggressive marketing.[20] Responding to concern from public health organizations and community activists, Baltimore became the first government, at any level, to ban outdoor cigarette advertisements from broad swaths of its geographical jurisdiction in 1994.[21] Although billboard companies sued based on the First Amendment and federal preemption,[22] a large number of cities emulated Baltimore in short order. By 1998, nine of the twenty-five most populous cities—as well as numerous others—had enacted ordinances banning tobacco-related outdoor advertisements in much of the city, often by prohibiting them within a certain distance of schools, parks, playgrounds, or day-care centers.[23]

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17. *See, e.g.*, Allied Vending, Inc. v. City of Bowie, 631 A.2d 77 (Md. 1993) (considering implied preemption challenge to two cities' local tobacco vending machine restrictions).

18. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 79 Stat. 282 (1970) (codified as amended at 15 U.S.C. §§ 1331–40 (2012)).

19. Although the large cigarette companies have voluntarily ceased advertising in print media, *see* Stuart Elliott, *Once a Mainstay of Magazines, Cigarette Makers Drop Print Ads*, N.Y. TIMES (Nov. 29, 2007), http://www.nytimes.com/2007/11/29/business/media/29adco.html?pagewanted=all, and some media refuse to accept their ads, *see* Lyle Denniston, *Should Cigarette Ads Be Banned?*, AM. JOURNALISM REV. (Nov. 1994), http://ajrarchive.org/article.asp?id=3623 (last visited Jan. 29, 2014), some tobacco advertising in print media persists. *See* Samantha Felix, *Tobacco Ad Spending Is Plunging, Except in One Place*, BUS. INSIDER (Sept. 27, 2012, 11:57 AM), http://www.businessinsider.com/guess-which-magazine-has-the-most-tobacco-ads-2012-9.

20. *See, e.g.*, Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel*, 266 JAMA 3145, 3145 (1991) (finding that ninety-one percent of six-year-olds recognized Joe Camel).

21. *See* App. 1 (citing Baltimore ordinance); *see also* Eric Siegel & Joanna Daemmrich, *Council Favors Restrictions on Tobacco Billboards*, BALT. SUN (Feb. 1, 1994), http://articles.baltimoresun.com/1994-02-01/news/1994032090_1_billboards-tobacco-bill-ban (reporting on the Baltimore city council's preliminary approval of a bill that would "ban tobacco ads on billboards almost everywhere" in the city).

22. *See* Siegel & Daemmrich, *supra* note 21 (noting that a billboard company threatened to sue as soon as the council passed the bill); Penn Adver. of Balt., Inc. v. Mayor & City Council of Balt., 63 F.3d 1318, 1320–21 (4th Cir. 1995).

23. *See* App. 1; *see also* Daniel E. Troy, *Tobacco and Alcohol Billboards Hit Hard as Dozens of Cities Seek Restriction*, TMI—THE FIRST AMENDMENT AND THE MEDIA (1999), http://www.media

In 1997, in a paradigmatic instance of vertical policy migration, California enacted statewide prohibitions on outdoor cigarette advertising.[24] In 1998, forty-six state attorneys general settled their massive lawsuit against Big Tobacco that sought reimbursement for Medicaid and other expenses on the basis of consumer protection and antitrust laws.[25] In the MSA, the tobacco companies agreed to restrict their outdoor advertising, thus substantially mooting the impetus for localities to continue enacting tobacco billboard bans.[26] After the MSA, the Massachusetts Attorney General promulgated statewide regulations that, like many of the earlier local ordinances, included outdoor advertising prohibitions that swept more broadly than the settlement's terms.[27] In 2001, the United States Supreme Court ruled that federal law preempted the Massachusetts billboard regulations insofar as they applied to cigarette advertising,[28] a ruling that, by implication, largely preempted similar local ordinances.[29] The Court also held that the regulations, as applied to cigars and smokeless tobacco, violated the First Amendment.[30] Despite this negative ruling, in light of the MSA, tobacco-related billboards have remained essentially non-existent nationwide. Moreover, the ordinances

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institute.org/ONLINE/FAM99/Comspeech_B.html (last visited Jan. 6, 2014) (citing similar ordinances in nineteen other cities and one county).

24. *See* 1997 Cal. Stat. ch. 219 (A.B. 752), § 3 (codified at CAL. BUS. & PROF. CODE § 22961 (West 2012)).

25. Press Release, Wash. State Office of the Att'y Gen., Attorneys General announce Tobacco Settlement Proposal (Nov. 16, 1998), http://www.atg.wa.gov/pressrelease.aspx?id=4568. The MSA followed Big Tobacco's settlements with Mississippi, Florida, Texas, and Minnesota the preceding year. *See* Gregory W. Traylor, Note, *Big Tobacco, Medicaid-Covered Smokers, and the Substance of the Master Settlement Agreement*, 63 VAND. L. REV. 1081, 1092–98 (2010) (tracing states' litigation history against Big Tobacco in the 1990s).

26. *See* MSA, *supra* note 16, at 22–24. In theory, tobacco companies, not a party to the MSA, might still advertise on billboards. Moreover, the MSA does not directly apply to cigars. An outdoor advertising ban, therefore, if constitutionally valid, would apply to non-participant tobacco companies and cigars. However, in practice, numerous other tobacco companies have joined the MSA since the largest manufacturers entered it in 1998, thereby enlarging the scope of the MSA's advertising ban. *See Participating Manufacturers Under the MSA as of June 28, 2013*, http://www.naag.org/backpages/naag/tobacco/msa/participating_manu/2013-06-28%20PM%20List. pdf/ (last visited Jan. 31, 2014) (listing manufacturers participating in MSA and date of participation).

27. *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 534–35 (2001) (citing the Massachusetts regulations, and noting that they "reach[] advertising . . . and members of the tobacco industry not covered by the [MSA]").

28. *Id.* at 550–51.

29. Because local governments are sub-units of states, federal preemption of state law or regulation applies perforce to local law. *But see* Michael Clisham, *Commercial Speech, Federal Preemption, and Tobacco Signage: Obstacles to Eliminating Outdoor Tobacco Advertising*, 36 URB. LAW. 713, 739 (2004) (arguing that *Lorillard* could be distinguished if a local ordinance were aimed at discouraging youth access to tobacco, rather than at smoking and health generally).

30. *Lorillard*, 533 U.S. at 566.

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may have contributed to the decision of some private billboard companies, even before the MSA, to turn away tobacco advertisements although under no legal obligation to do so.[31]

Also lurking in the regulatory background was the federal Food and Drug Administration's ("FDA") attempt, in 1996, to regulate the sale and marketing of tobacco products by administrative rule, which included a provision banning outdoor advertising that resembled many of the local ordinances.[32] Big Tobacco immediately challenged the FDA's authority to issue the rules, arguing that they went beyond the scope of Congress's delegation.[33] The litigation halted implementation of the rules and, in 2000, the Supreme Court sided with the tobacco companies and invalidated the FDA's regulations in their entirety in *FDA v. Brown & Williamson*.[34] In 2009, Congress finally responded to *Brown & Williamson* by granting the FDA the authority to regulate tobacco through the Family Smoking Prevention and Tobacco Control Act ("TCA").[35] In doing so, Congress required the FDA to re-issue its outdoor advertising rules from 1996, subject to any "appropriate" "modifications" due to intervening First Amendment precedent.[36] Citing First Amendment concerns, however, the FDA has not yet issued a rule on outdoor advertising but is considering more narrowly tailored options that may better survive judicial scrutiny.[37]

In one sense, the fact that the FDA attempted to ban outdoor tobacco advertising (and regulate tobacco in other meaningful ways) as far back as 1996 demonstrates that there was significant federal interest in regulating tobacco more stringently around the time that many local outdoor advertising ordinances emerged. On the other hand, this federal action emanated from the executive branch alone in the face of a hostile

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31. *See, e.g.*, Glenn Collins, *Major Advertising Company to Bar Billboard Ads for Tobacco*, N.Y. TIMES, May 3, 1996, *available at* http://www.nytimes.com/1996/05/03/us/major-advertising-company-to-bar-billboard-ads-for-tobacco.html.

32. *See* 61 Fed. Reg. 44617–18 (Aug. 28, 1996). *See also* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 180–95 (2008) (discussing the FDA's proposed tobacco rules).

33. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 129–31 (2000) (tracing litigation history).

34. *Id.* at 161.

35. Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in various sections of Titles 5, 15, & 21 U.S.C.) [hereinafter, "TCA"].

36. *Id.* § 102(a)(2)(E) (codified at 21 U.S.C. § 387a-1 (2012)).

37. C. STEPHEN REDHEAD & TODD GARVEY, FDA FINAL RULE RESTRICTING THE SALE AND DISTRIBUTION OF CIGARETTES AND SMOKELESS TOBACCO, CONG. RES. SERV. 8 (2010), *available at* http://www.nacsonline.com/Issues/Tobacco/Documents/CRSReport.pdf.

Congress.[38] It took nine years for Congress to respond to *Brown & Williamson* (thirteen years after the FDA's original action) by authorizing the FDA to regulate tobacco, thus exemplifying how slowly the federal legislative process can move in the public health arena.

2. Reducing Second-Hand Smoke

Beginning in the 1970s, after the Surgeon General revealed that second-hand smoke could harm non-smokers,[39] many states and cities enacted a first round of restrictions on second-hand smoke.[40] Some of these laws banned smoking entirely in indoor public spaces like theaters, museums, buses, and government buildings, but often did not apply at all, or required only segregated smoking sections, in restaurants and bars.[41] In 1990, San Luis Obispo, California, became the first jurisdiction in the United States to enact a comprehensive smoking ban in indoor public places, prohibiting smoking entirely in restaurants and bars.[42] Despite being seen as radical at the time by some residents and commentators,[43] this second generation of comprehensive, smokefree workplace laws diffused around the nation, usually at the local level, over the next two decades.[44] Many cities in states with no or weak indoor smoking regulations, including thirteen of the top twenty-five cities, enacted such regulations.[45] In some instances, these ordinances were challenged as *ultra*

38. *See Brown & Williamson*, 529 U.S. at 146 (tracing the history of the FDA's interpretation of its authority under the organic Food, Drug, and Cosmetic Act); CROLEY, *supra* note 32, at 187–89 (noting Congressional opposition to the FDA's 1996 tobacco regulations).

39. U.S. DEP'T OF HEALTH, EDUC. & WELFARE, THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL 125–27 (1972).

40. *See* Patrick Kabat, Note, *"Till Naught But Ash Is Left to See": Statewide Smoking Bans, Ballot Initiatives, and the Public Sphere*, 9 YALE J. HEALTH POL'Y, L. & ETHICS 128, 133–34 (2009); Shipan & Volden, *supra* note 11, at 829 (reviewing widespread local adoption of restrictions on smoking in restaurants and government buildings).

41. Kabat, *supra* note 40, at 132–34 (discussing early "environmental tobacco smoke" laws).

42. *See* Miles Corwin, *Smokers Snuffed: San Luis Obispo Will Implement Nation's Toughest Tobacco Law Today*, L.A. TIMES, Aug. 2, 1990, *available at* http://articles.latimes.com/print/1990-08-02/news/mn-1350_1_san-1u1s-obispo-support.

43. *Id.* (quoting San Luis Obispo resident referring to the city council as "communists" for passing the ban).

44. BD. ON POPULATION HEALTH & PUB. HEALTH PRACTICE, INST. OF MED., ENDING THE TOBACCO PROBLEM: A BLUEPRINT FOR THE NATION 191 (Richard J. Bonnie et al. eds., 2007) (noting that as of 2006, hundreds of municipalities had completely banned smoking in bars and restaurants). In a handful of states, like California (1998) and Delaware (2002), the state legislature adopted comprehensive bans relatively early. *See* Kabat, *supra* note 40, at 134.

45. *See* App. 2; *see also* Kabat, *supra* note 40, at 134.

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vires or preempted,[46] but many survived appeals to the state judiciary or legislature to invalidate them.[47] States like Illinois, Maryland, New York, and Ohio enacted comprehensive bans soon after populous cities within the state had adopted their own bans.[48] Without local action, it is questionable whether second-hand smoke restrictions would have proliferated to the extent that they have.[49] In large part due to the extensive local action on this matter, tens of millions more Americans now live in jurisdictions with smokefree laws than did at the turn of the twenty-first century.[50]

In just the last few years, a number of cities have supplemented their second-generation regulations with bans on smoking in outdoor public spaces like parks and beaches.[51] Some others cities have instead, or in addition, banned smoking in shared living spaces like apartment buildings.[52] Because the scope of this third generation of restrictions on second-hand smoke is just emerging, it is not included in Part V's horizontal comparison.[53] Nonetheless, these third-generation ordinances,

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46. *E.g.*, Modern Cigarette, Inc. v. Town of Orange, 774 A.2d 969, 976 (Conn. 2001); Lexington Fayette Cnty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cnty. Gov't, 131 S.W.3d 745, 748 (Ky. 2004); Tri-Nel Mgmt., Inc. v. Bd. of Health of Barnstable, 741 N.E.2d 37, 40 (Mass. 2001); Amico's, Inc. v. Mattos, 789 A.2d 899, 901 (R.I. 2002).

47. *E.g.*, *Tri-Nel Mgmt., Inc.*, 741 N.E.2d at 40 (upholding local smoking ban).

48. *See* App. 2 (citing Illinois's law); Kabat, *supra* note 40, at App. A (citing statewide bans as of 2008); *see also id*. at 148–56 (noting that Ohio's statewide smoking ban was enacted by popular vote).

49. *See* Diller, *supra* note 11, at 461.

50. *See* Ctrs. for Disease Control & Prevention, *Comprehensive Smoke-Free Laws—50 Largest U.S. Cities, 2000 and 2012*, 61 MORBIDITY & MORTALITY WKLY. REP. 914, 914–15 (2012) (concluding that among the fifty largest cities in the United States, thirty cities, with a combined population of thirty-one million, are now covered by either a state or local comprehensive smokefree regulation, as compared to one such city in 2000). For some reason, the CDC study does not classify California's relatively strict smokefree statute as "comprehensive"; if it did, the number of cities and persons in smokefree jurisdictions would have been even higher (in both 2000 and 2012).

51. *See* James L. Repace, *Benefits of Smoke-Free Regulations in Outdoor Settings: Beaches, Golf Courses, Parks, Patios, and in Motor Vehicles*, 34 WM. MITCHELL L. REV. 1621, 1623–28 (2008) (reviewing such bans).

52. Most of these bans apply only to public housing, *see* Alvin L. Arnold et al., *Smoking Bans: Legal Considerations*, 37 REAL ESTATE L. REP., May 2008, at 7, 7, but at least one city has banned smoking in privately owned apartments and condominiums. *See, e.g.*, San Rafael, Cal., Ordinance 1908 (Oct. 15, 2012) (codified at SAN RAFAEL, CAL., CODE §§ 9.04.070–9.04.080) (banning smoking in private duplexes and multifamily residences); *see also* Will Jason, *San Rafael Officials Approve Tough New Smoking Rules*, MARIN INDEP. J. (Oct. 1, 2012), http://www.marinij.com/ci_216769741 san-rafael-officials-approve-tough-new-smoking-rules# (noting that San Rafael was the first city "to ban smoking in all apartments and condos").

53. In addition, many of these third-generation smokefree ordinances apply only to publicly owned spaces and are therefore less likely to incur the same degree of profit-based opposition (*e.g.*, from bars or restaurants) as second-generation laws. To the extent that they apply to private residences, like San Rafael's ordinance, it is not clear that intense profit-based opposition will be aroused either. *See, e.g.*, Joshua Sabatini, *Proposal Would Require Landlords to Designate Non-Smoking Apartments*,

as examples of cities regulating the public health to a greater degree than state or federal law, merit continued attention as they emerge.

3. Restrictions on Retail Practices and Flavoring

In addition to outdoor advertising restrictions and second-hand smoke regulations, cities have led in adopting a number of other tobacco control mechanisms, often focusing on preventing youth access to tobacco, whether directly or indirectly. To be sure, the federal and state governments have been active in this area as well. For instance, in 1992 Congress included the Synar Amendment in its comprehensive drug and substance abuse legislation.[54] The Amendment, which remains federal law, conditions the receipt of federal substance-abuse treatment funds on a state legally prohibiting minors from purchasing cigarettes, as well as other benchmarks aimed at reducing youth smoking.[55] The Synar Amendment ensured that every state would enact or retain a law requiring purchasers of tobacco products to be at least eighteen years old.[56] The FDA solidified this status quo as national policy in 2010 through a regulation promulgated pursuant to the TCA.[57] Also in 2010, the FDA restricted tobacco vending machines to locations where persons under eighteen are not permitted and significantly curtailed the offering of free samples of tobacco products.[58] The FDA's restriction on tobacco vending machines largely mirrored the

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S.F. EXAMINER (Nov. 15, 2012), http://www.sfexaminer.com/local/2012/11/proposal-would-require-landlords-designate-non-smoking-apartments (last visited Jan. 26, 2014) (noting that both landlord and tenant groups have advocated for smokefree housing ordinances).

54. Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, Pub. L. 102-321, 106 Stat. 323 (1992) (codified at 42 U.S.C. § 300x-26 (2012)). The popular name for this provision comes from its primary sponsor in the House, Representative Mike Synar of Oklahoma. *See Synar Program Factsheet*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. (Jan. 14, 2011), http:// www.samhsa.gov/prevention/synarFactsheet.aspx.

55. *See* 42 U.S.C. § 300x-26.

56. Although all states have required purchasers of tobacco to be eighteen at least since 1994, *see* INST. OF MED., GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS 201 (Barbara S. Lynch & Richard S. Bonnie eds., 1994) ("[A]ll states prohibit the sale of tobacco to minors . . . ."), it is unclear whether any state legislatures passed such laws directly in response to the Synar Amendment. *See id.* (noting that some states repealed their youth access laws in the 1960s, and counting forty-four states with youth access laws in 1990, but not identifying any states that passed youth access laws specifically in response to the Synar Amendment). Regardless, it is clear that states passed other measures in order to comply with the Amendment's provisions regarding youth access enforcement. *See* Shipan & Volden, *supra* note 11, at 831 (analyzing the Synar Amendment's impact on state legislation).

57. *See supra* text accompanying note 35 (discussing TCA); 21 C.F.R. § 1140.14(a) (2013) ("No retailer may sell cigarettes or smokeless tobacco to any person younger than 18 years of age . . . ."). As the FDA regulation does not apply to cigars or other non-cigarette smoked tobacco products, the Synar Amendment retains some bite.

58. 21 C.F.R. §§ 1140.1–1140.34.

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efforts many cities had taken in the prior two decades.[59] During the 1990s, a number of cities restricted or banned vending machines to a greater degree than restricted by state law,[60] with many states later following suit.[61]

The TCA expressly allows states and localities to continue to adopt more restrictive regulations regarding the sale and marketing of tobacco products.[62] Some states and cities have since taken additional action like raising the legal age for purchasing tobacco products to nineteen or higher.[63] Among top twenty-five cities, New York City joined a handful of smaller Massachusetts cities in raising the legal buying age to a nation-high of twenty-one.[64] Cities and states have also stiffened the storage and sale requirements for retailers.[65] Because these measures specifically aim to restrict youth access to tobacco products, Big Tobacco may be estopped from lobbying against them by the MSA.[66]

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59. *See, e.g.*, Jean L. Forster et al., *Survey of City Ordinances and Local Enforcement Regarding Commercial Availability of Tobacco to Minors in Minnesota, United States*, 5 TOBACCO CONTROL 46, 46 (1996) (noting that 25% of 222 Minnesota cities had enacted ordinances restricting cigarette vending machines).

60. *E.g.*, Allied Vending, Inc. v. City of Bowie, 631 A.2d 77, 78 (Md. 1993) (considering implied preemption challenge under state law to local tobacco vending machine restrictions).

61. *See* Julie A. Fishman et al., *State Laws on Tobacco Control—United States, 1998*, CDC MMWR, June 25, 1999, at 21, *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss4803a2.htm (listing state laws regulating vending machine placement as of 1998 in "table 8"). Some of the state laws focused on restricting tobacco vending machine locations in or near schools. *See id.*

62. Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, § 101, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 301 (2012)).

63. As of 2010, only four states (Alabama, Alaska, Utah, and New Jersey) required that purchasers of cigarettes be at least nineteen years of age. COUNCIL OF N.Y.C., COMMITTEE REPORT OF THE HUMAN SERVICES DIVISION, COMMITTEE ON HEALTH 10 (2013) [hereinafter, "N.Y.C. COMMITTEE REPORT"] (also noting that three New York counties outside of New York City raised the tobacco buying age to nineteen); *see also* Franklin Tucker, *Belmont to Up Tobacco Legal Age to 19*, BELMONT PATCH (May 2, 2012, 1:36 AM), http://belmont.patch.com/articles/belmont-to-up-tobacco-legal-age-to-19 (noting that Belmont, Brookline, and Needham, Mass., raised the tobacco-buying age to nineteen). Under the TCA, the FDA is prohibited from raising the tobacco-buying age above eighteen. TCA, 21 U.S.C. § 387f(d)(3) (2012).

64. *See* N.Y.C. Local Law 94, Int. No. 250-A (2013) (amending N.Y.C. ADMIN. CODE § 17-706); *see also* Press Release, The Council of N.Y.C., Speaker Quinn, Health Comm'r Farley, Council Members, Announce NYC Will Be First Big City in Nation to Raise Minimum Smoking Age from 18 to 21 (Apr. 22, 2013), http://council.nyc.gov/html/pr/042213smoking.shtml (noting that "[s]everal towns in the U.S. have raised the tobacco purchase age to 21," but citing only Needham and Canton, Mass.).

65. *E.g.*, N.Y. PUB. HEALTH LAW § 1399-cc(7) (McKinney 2012) (requiring retailers to keep tobacco products behind a counter accessible only to store personnel or in a locked container).

66. *See* MSA, *supra* note 16, at 29. On the other hand, these policies are not specifically mentioned in the MSA's list of policies that settling tobacco companies may not oppose. *Id.* at F-1. Moreover, allied industries like convenience stores are free to oppose such policies even if Big Tobacco's clout is missing.

Another tactic that is not specifically aimed at youth, but that restricts the public's access to tobacco generally is prohibiting the sale of tobacco products in health and educational settings. Most notably, cities have forbidden pharmacies from selling tobacco. Among the top twenty-five cities, San Francisco and Boston have adopted such policies; other jurisdictions include Richmond County, California, and many smaller Massachusetts cities.[67] Although legislators in six states have proposed similar statewide bans, none have yet passed.[68]

New York City's 2009 regulation requiring that retail vendors of cigarettes post prominently graphic warning signs near cigarette sale areas was an additional, significant local effort to change the tobacco retail environment.[69] Although federal legislation has required that cigarette packages include a warning label[70] (and, in doing so, has preempted state and local governments from imposing additional or different packaging requirements[71]), there is no such express preemption of the retail environment. By requiring graphic warning signs, New York City hoped to dissuade potential customers from buying tobacco.[72] Cigarette manufacturers and sellers immediately challenged the regulation as both a

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67. *See* S.F., Cal., Ordinance 194-08 (Aug. 7, 2008) (codified as amended at S.F., CAL., HEALTH CODE §§ 1009.91–.98 (2013)); Bos. Pub. Health Comm'n Regulation Restricting the Sale of Tobacco Products in the City of Boston, BOS. PUB. HEALTH COMM'N (2008), *available at* http://www.bphc.org/whatwedo/tobacco-free-living/documents/TobaccoRestrictionRegulation_12-08.pdf (applying ban to hospitals, doctors' offices, and educational institutions as well); *see also Local Legislative Efforts by State*, TOBACCO FREE RX, http://www.tobaccofreerx.com/local_efforts.html (last visited Jan. 31, 2014) (citing the ordinances and regulations adopted by Richmond County and Massachusetts cities). Opponents of the San Francisco ordinance challenged it in court as an unconstitutional violation of state and federal equal protection guarantees because it applied only to some pharmacies. After San Francisco's motion to dismiss plaintiffs' complaint was denied, *see* Walgreen Co. v. City & County of S.F., 110 Cal. Rptr. 3d 498 (Cal. Ct. App. 2010), the city amended the ordinance to apply to all stores with pharmacies in them. *See* S.F., Cal., Ordinance 245-10 (Oct. 6, 2010) (amending S.F., CAL., HEALTH CODE §§ 1009.91–98).

68. *See Local Legislative Efforts by State*, *supra* note 67 (citing bills introduced in Illinois, Massachusetts, New York, Rhode Island, Tennessee, and West Virginia).

69. *See* N.Y.C., N.Y., HEALTH CODE § 181.19 (2012).

70. Federal Cigarette Labeling and Advertising Act ("FCLAA"), Pub. L. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331–40 (2012)); Required Warnings for Cigarette Packages and Advertisements, 75 Fed. Reg. 69524 (proposed Nov. 12, 2010) (to be codified at 21 C.F.R. pt. 1141); *see also* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 513–15 (1992) (tracing history of federal labeling requirements).

71. *See* 15 U.S.C. § 1334(a) (2012); *see also Cipollone*, 505 U.S. at 513–15 (discussing the history of federal preemption of labeling).

72. *See* Micaela H. Coady et al., *Awareness and Impact of New York City's Graphic Point-of-Sale Tobacco Health Warning Signs*, 22 TOBACCO CONTROL e51, e55-e56 (2013) (concluding that a requirement like New York City's would be effective at reducing tobacco sales).

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First Amendment violation and as impliedly preempted by federal law.[73] In July 2012, the Second Circuit held that federal law preempted the City's regulation.[74] At least one other city—Philadelphia—considered adopting a similar regulation, but has not yet enacted one, perhaps due to the more pronounced threat of litigation following the appellate decision invalidating New York City's rule.[75]

Cities have recently adopted another indirect method to curb youth access to tobacco in particular, as well as tobacco use in general. A handful of cities have sought to ban *flavored* tobacco products, albeit on the heels of some action by the federal government and one leading state. According to public health organizations and government regulators, tobacco companies have flavored their products for years in large part to lure young users into addiction.[76] In response to this concern, Chicago passed an ordinance banning the sale of cigarettes and cigars with "sweet flavors" in 2005.[77] The Chicago city council quickly repealed the ordinance, however, upon realizing that the ban could be construed as applying to menthol cigarettes as well.[78] In 2007, Maine banned certain fruit and candy flavorings of cigars and cigarettes.[79] In the 2009 TCA, Congress banned all flavorings of cigarettes except menthol.[80] The federal ban, however, did not apply to smokeless tobacco products or non-

73. *See* 23–34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health, 685 F.3d 174, 180 (2d Cir. 2012). The plaintiffs included Big Tobacco companies R.J. Reynolds, Philip Morris USA, and Lorillard. *Id.* at 175.

74. *Id.* at 185–86. New York City did not seek a petition of certiorari from the Supreme Court from this decision, nor did it seek en banc review of the Second Circuit's panel decision.

75. *See* DEP'T OF PUB. HEALTH, CITY OF PHILA, FREQUENTLY ASKED QUESTIONS: PROPOSED TOBACCO POINT OF SALE WARNINGS (2011), *available at* http://www.phila.gov/health/pdfs/Frequently%20Asked%20Questions_8.5.11.pdf; *see also* Cnty. of L.A. Pub. Health, Press Release, Public Health News: First Ever Report Shows Smoking Rates by Local Community (June 22, 2010), http://www.publichealth.lacounty.gov/ha/reports/habriefs/2007/PressRelease.CitiesTobaccoUseReport.6-22-10.pdf (encouraging jurisdictions to adopt retail warning sign requirements).

76. *E.g.*, Carrie M. Carpenter et al., *New Cigarette Brands With Flavors That Appeal to Youth: Tobacco Marketing Strategies*, 24 HEALTH AFF. 1601, 1601 (2005).

77. *See* Chi., Ill., Amendment of Title 4, Chapter 64 of Municipal Code of Chicago by Addition of New Section 205 Prohibiting Flavored Tobacco Products Targeting Children (Nov. 1, 2005) (banning the sale of cigarettes and cigars with "sweet flavors"); *see also* Fran Spielman, *After Mix-up, City Panel Repeals Ban on Candy-Flavored Cigarettes*, CHI. SUN-TIMES, Jan. 27, 2006, available at LexisNexis.

78. *See* Spielman, *supra* note 77.

79. *See* 2007 Me. Legis. Serv. ch. 467 (West) (codified as amended at 22 ME. REV. STAT. § 1560-D (2009)). In 2010, perhaps in response to the federal action described below, Maine amended the ban to apply only to cigars, and not cigarettes. 2010 Me. Legis. Serv. ch. 606 (West) (amending 22 ME. REV. STAT. § 1560-D).

80. Family Smoking Prevention & Tobacco Control Act, Pub. L. No. 111-31, § 907, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387g (2012)) (banning "artificial" and "natural flavor" additives, except for menthol).

cigarette smoked tobacco products like cigars.[81] Since 2009, a handful of cities have sought to fill this regulatory void by banning all, or at least more, flavored tobacco products than prohibited by the TCA. These cities include New York,[82] alone among the top twenty-five, as well as Providence, Rhode Island.[83] Among counties, Santa Clara, California, adopted a similar ban,[84] and Miami-Dade, Florida, considered a ban but ultimately adopted a more limited measure.[85]

The examples of local action discussed in this Section are by no means exhaustive. Moreover, products that transmit nicotine are evolving to include electronic cigarettes, which emit vapor rather than smoke and may present a new threat to public health.[86] Nonetheless, the aforementioned examples illustrate the potential for cities to significantly change the regulatory framework surrounding tobacco use. Cities have encountered legal roadblocks in the form of the First Amendment and preemption, which have blunted the effect of some local regulations, and perhaps nipped in the bud the diffusion of such policies. Other regulations, however, like those mandating smokefree workplaces, have altered the

81. *Id.* (noting that the ban on flavored products is a "[s]pecial rule for cigarettes").

82. *See* N.Y.C., N.Y., ADMIN. CODE § 17-715. The Second Circuit recently upheld New York City's law against a preemption challenge brought by Altria Group subsidiaries that manufacture smokeless tobacco. *See* U.S. Smokeless Tobacco Mfg. Co. v. City of New York, 708 F.3d 428, 430 (2d Cir. 2013); U.S. SMOKELESS TOBACCO CO., http://www.ussmokeless.com/en/cms/home/default.aspx (last visited Feb. 2, 2014) (describing itself as an "Altria company").

83. *See* Providence, R.I., Ordinance 42 (Jan. 9, 2012) (codified at PROVIDENCE, R.I., MUN. CODE §§ 14-300–303; 14-308–310 (2012)). As with New York City's flavored tobacco ban, Big Tobacco attacked Providence's regulation as preempted by federal law, but the First Circuit recently upheld the ordinance. *See* Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, R.I., 731 F.3d 71, 74 (1st Cir. 2013).

84. Santa Clara Cnty., Cal., Ordinance NS-300.832 (Oct. 13, 2010) (to be codified at SANTA CLARA CNTY., CAL., ORDINANCE CODE § A18-369(h)).

85. *See* Memorandum from R.A. Cuevas, Jr., Cnty. Attorney, Miami-Dade Cnty, to Bd. of Cnty. Comm'rs, Miami-Dade Cnty. (Sept. 11, 2013) (discussing a proposed ordinance, introduced on May 1, 2012, to ban the sale of flavored tobacco products); Miami-Dade County, Fla., Ord. No. 13-07 (codified at 1 MIAMI-DADE COUNTY, FLA., CODE § 8A-8–8.4 (2013)) (restricting the retail placement of flavored tobacco products and their sale to minors).

86. *See* Sabrina Tavernise, *A Hot Debate Over E-Cigarettes as Path to Tobacco, or From It*, N.Y. TIMES (Feb. 22, 2014), http://www.nytimes.com/2014/02/23/health/a-hot-debate-over-e-cigarettes-as-a-path-to-tobacco-or-from-it.html. Some cities (and states) are expanding their smokefree indoor air laws to prohibit the use of e-cigarettes indoors, *see, e.g.*, N.Y.C. Local Law 152, Int. No. 1210-A (amending N.Y.C. ADMIN. CODE §§ 17-502 to 17-513.4) (expanding City's Smoke-Free Air Act to prohibit the use of electronic cigarettes in indoor public spaces), as well as restricting the sale of e-cigarettes to minors. *See* N.Y.C. Local Law 94, *supra* note 63 (amending N.Y.C. ADMIN. CODE §§ 17-702 & 706 (establishing a minimum sales age of twenty-one for electronic cigarettes).

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regulatory framework substantially, often propelling higher levels of government to adopt similar regulations.[87]

B. Local Obesity Prevention Strategies

As compared to tobacco, public awareness of the nation's obesity problem is more recent, having attracted the attention of policymakers only in the last decade or so.[88] Unlike tobacco use and second-hand smoke, which are linked directly to ailments like lung cancer and heart disease, the causal chain between the various causes of obesity and the negative health effects (such as diabetes, hypertension, and heart disease) is less direct. While the food environment is one causal agent of obesity, many other factors—such as physical activity, land-use planning, sleep, and breastfeeding—play a role.[89] In part for this reason, it has been much more difficult for obese persons to use the torts system to obtain compensation from the sellers of food products that contribute to obesity than it has been for smokers to obtain relief from cigarette manufacturers in tobacco tort litigation.[90] Relatedly, popular culture and the political system have often been less sympathetic to the obese, viewing them as suffering from a mere failure of willpower, as opposed to smokers ensnared by a chemically addictive product.[91] This attitude helps explain the passage in half the states of "cheeseburger bills" that insulate the food industry from obesity-related tort claims.[92]

Nonetheless, most public health experts and some public officials now recognize that while food products may not be *solely* or even primarily responsible for obesity, they play a significant causal role in the epidemic, and any comprehensive strategy to reduce obesity must address the

87. *See* Hills, *supra* note 11, at 28–39; Diller, *supra* note 11; *but see* Shipan & Volden, *supra* note 11, at 826 (finding that, under certain circumstances, local action can reduce the pressure on state legislatures to address an issue).

88. *See* Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 972 (2013).

89. *Id.* at 980–81.

90. *See, e.g.*, Pelman v. McDonald's Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003) (dismissing teen plaintiffs' claims against McDonald's brought under tort and consumer protection laws).

91. *See generally* Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) (showing that persons' food choices are strongly influenced by context and circumstance, and criticizing the industry narrative of "free will" that blames obesity on the consumer).

92. *See* Cara L. Wilking & Richard A. Daynard, *Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits*, 68 FOOD & DRUG L.J. 229, 230 & n.7 (2013) (citing the twenty-five state "commonsense consumption acts" that were passed between 2005 and 2012).

consumption side of the issue. In this regard, some public officials have focused on various steps to reduce the consumption of obesity-causing foods and drinks, as well as steps to promote the consumption of more nutritious foods. Some of these efforts—like reducing corn subsidies or changing the school lunch program—necessarily involve federal actors because they seek to change federal programs.[93] Other efforts to regulate the food supply have relied on regulatory methods that are traditionally within the realm of state or local governments, such as increased sales taxes for soft drinks or using zoning to limit the prevalence of fast-food restaurants.[94] With one exception, the measures discussed below are regulations that any level of government—local, state, or federal—could have enacted consistent with constitutional law and regulatory tradition, but instead cities took the lead. This Section highlights two regulations, in particular, in which city action propelled regulatory changes nationwide: trans fat bans and menu labeling. The Section then also discusses some other less widespread, but notable, efforts by cities to regulate the food environment to combat obesity.

1. Trans Fat Bans

About ten years ago, various scientific and medical organizations began to urge governments to reduce or ban the use of artificial trans fats,[95] an additive to processed foods that has no nutritional value and is

93. *See* Alicia Harvie & Timothy A. Wise, *Sweetening the Pot: Implicit Subsidies to Corn Sweeteners and the U.S. Obesity Epidemic* (Tufts Univ. Global Dev. & Envtl. Inst., Policy Brief No. 09-01, 2009), http://www.ase.tufts.edu/gdae/Pubs/rp/PB09-01SweeteningPotFeb09.pdf; Healthy, Hunger-Free Kids Act of 2010, Pub. L. 111-296, §§ 201–210, 124 Stat. 3183, 3214–16 (codified at 42 U.S.C. §§ 1753(b), 1758, & 1758b (Supp. IV 2011)); *see also* Lauren Kaplin, *A National Strategy To Combat the Childhood Obesity Epidemic*, 15 U.C. DAVIS J. JUV. L. & POL'Y 347, 367–79 (2011) (discussing changes to school lunch program mandated by the aforementioned Act).

94. *See* Leon Stafford, *Soda Wars: Cities Seek Restrictions, Taxes to Curb Obesity*, ATLANTA J.-CONST. (Nov. 12, 2012, 6:32 AM), http://www.ajc.com/news/news/local/soda-wars-cities-seek-restrictions-taxes-to-curb-o/nS4b2/ (noting that officials in Washington, D.C., and Cambridge, Mass., were considering emulating New York's policy); Mark Bittman, Op-ed, *The Food Movement Takes a Beating*, N.Y. TIMES (Nov. 10, 2012, 1:10 PM), http://opinionator.blogs.nytimes.com/2012/11/10/the-food-movement-takes-a-beating/ (noting that soda companies spent $3.5 million to defeat soda tax referenda in California cities Richmond and El Monte); L.A., Cal., Ordinance 180103 (Sept. 14, 2008), *available at* http://clkrep.lacity.org/onlinedocs/2007/07-1658_ord_180103.pdf (establishing one-year moratorium on new fast-food restaurants in an area of the city with "over-concentration" of same).

95. PUB. HEALTH LAW CTR., TRANS FAT BANS: POLICY OPTIONS FOR ELIMINATING THE USE OF ARTIFICIAL TRANS FATS IN RESTAURANTS 4–5 (2008), *available at* http://publichealthlawcenter.org/sites/default/files/resources/phlc-policy-trans-fat.pdf [hereinafter PHLC, TRANS FAT].

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linked to coronary heart disease and high cholesterol.[96] In the United States, New York City was the first jurisdiction to ban trans fats in restaurants in December 2006, with the ban going into effect in July 2007.[97] Other cities and counties followed suit; as of January 2013, three other top twenty-five cities (Baltimore, Boston, and Philadelphia) had adopted bans, as well as numerous other smaller cities.[98] Several counties banned trans fats as well, one of which, King County, Washington, includes top twenty-five city Seattle.[99] In July 2008, California became the first and only state to ban trans fats, with the ban going into effect in January 2010.[100] In November 2013, the FDA announced for the first time that it was considering an outright ban on trans fats in processed foods.[101]

2. *Menu Labeling*

Although the federal government has required packaged foods to bear a label that informs consumers of product and nutritional information since 1990,[102] this requirement did not apply to restaurants.[103] Hence, when eating outside the home, consumers often had little or no knowledge of the nutritional content of their food choices. In 2006, New York City became

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96. INST. OF MED., DIETARY REFERENCE INTAKES FOR ENERGY, CARBOHYDRATE, FIBER, FAT, FATTY ACIDS, CHOLESTEROL, PROTEIN, AND AMINO ACIDS 423 (2005), *available at* http://www.nap.edu/openbook.php?isbn=0309085373&page=423.

97. *See* Notice, Dep't of Health & Mental Hygiene, Bd. of Health, City of N.Y.C., Notice of Adoption of an Amendment (§ 81.08) to Article 81 of the New York City Health Code (Dec. 5, 2006), *available at* http://www.nyc.gov/html/doh/downloads/pdf/public/notice-adoption-hc-art81-08.pdf.

98. *See* BOS. PUB. HEALTH COMM'N, A REGULATION TO RESTRICT FOODS CONTAINING ARTIFICIAL TRANS FAT IN THE CITY OF BOSTON (2008), http://www.bphc.org/boardofhealth/regulations/Documents/Trans_Fat_Regulation.pdf; *See* Phila., Pa., Ordinance 060958 (Feb. 15, 2007) (codified as amended at PHILA., PA., MUN. CODE § 6-307 (2013)); Balt., Md., Ord. No. 08-0034 (Mar. 20, 2008) (codified at BALT., MD., HEALTH CODE § 6-507 (2013)); PHLC, TRANS FAT, *supra* note 95, at 9 (listing trans fat bans by cities, including Albany, New York, and Brookline, Mass.). Cleveland passed a trans fat ban in 2011 that the state legislature preempted soon after. *See* Cleveland v. State, 989 N.E.2d 1072, 1075 (Ohio Ct. App. 2013). Cleveland challenged the state's attempted preemption as an unconstitutional interference with its home-rule powers. *Id.* An intermediate appeals court ruled in Cleveland's favor, *id.*, and the state declined to appeal to the Ohio Supreme Court. *See* Press Release, The Office of Councilman Joe Cimperman, Trans Fat Legislation (May 22, 2013), *available at* http://www.joecimperman.com/sites/default/files/documents/news/press%20release_trans%20fat%20lawsuit_0.pdf.

99. *See* PHLC, TRANS FAT, *supra* note 95, at 7 (listing county trans fat bans).

100. 2008 Cal. Stat. ch. 207, § 1 (A.B. 97) (codified as amended at CAL. HEALTH & SAFETY CODE § 114377 (2013)).

101. *See* Tentative Determination Regarding Partially Hydrogenated Oils, 78 Fed. Reg. 67169 (proposed Nov. 8, 2013).

102. Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 2, 104 Stat. 2353–57 (codified as amended at 21 U.S.C. § 343 (2012)).

103. *See id.*

the first jurisdiction in the United States to require some subset of restaurants—primarily "chain" restaurants—to post calorie content information on their menus and menu boards.[104] After an industry preemption challenge and an ensuing revision to the rule, New York City's requirement took effect in 2008.[105] Within a relatively short period of time, numerous other jurisdictions, including three other top twenty-five cities, adopted similar regulations.[106] By 2010, five states had enacted menu labeling requirements.[107] In 2010, Congress included a menu labeling provision in the Patient Protection and Affordable Care Act ("ACA") that applies to chain restaurants and vending machines[108] and largely preempts state and local requirements.[109] When the FDA issues the final regulations that put the ACA's requirements into effect, menu labeling will have gone from a requirement in one city to national practice.

3. Other Local Regulatory Efforts to Combat Obesity

A handful of other regulatory efforts to combat obesity by local governments have achieved significant notoriety, even if they have not diffused to the extent of trans fat bans and menu labeling. The first such effort is San Francisco and Santa Clara County's restrictions on restaurants linking toy giveaways with meals of low nutritional quality,[110]

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104. *See* N.Y. State Restaurant Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 117 (2d Cir. 2009) (discussing the original N.Y.C. HEALTH CODE § 81.50, adopted in 2006).

105. *Id.* at 121–22.

106. These cities were Nashville, Philadelphia, and San Francisco. Jenny Upchurch, *Nashville Restaurants Ordered to Post Calories*, THE TENNESSEAN (Mar. 6, 2009), *available at* LexisNexis (noting that the city-county health department issued the rule); Phila., Pa., Ordinance 080167-A (Feb. 14, 2008) (codified at PHILA., PA., HEALTH CODE § 6-308 (2010)); S.F., Cal., Ordinance 40-08 (Mar. 18, 2008) (codified as amended at S.F., CAL., HEALTH CODE § 468.3 (2013)). San Francisco also required that chain restaurants disclose nutritional information through media other than menu boards. *See id.* § 468.4. San Francisco suspended its ordinance when California passed a menu labeling law later in 2008, *id.* § 468.9, and the Tennessee state legislature preempted Nashville's rule in 2010 by prohibiting unelected local agencies (like Nashville's health department) from promulgating such rules. 2010 Tenn. Pub. Acts ch. 614. It also bears noting that the Board of Health of King County, Washington, promulgated a menu labeling rule in 2007 that applied to top twenty-five city Seattle. *See* KING CNTY., WASH., BD. OF HEALTH CODE § 5.10.016 (2010).

107. *See Trans Fat & Menu Labeling Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 2013), http://www.ncsl.org/issues-research/health/trans-fat-and-menu-labeling-legislation.aspx.

108. *See* ACA, Pub. L. No. 111-148, § 4205, 124 Stat. 119, 573–77 (2010) (codified at 21 U.S.C. § 343(q)(5) (Supp. V 2011)).

109. *Id.* § 4205(c), (d) (codified at 21 U.S.C. § 343-1(a)(4); 21 U.S.C. § 343 note (2012)).

110. S.F., Cal., Ordinance 290-10 (codified as S.F., CAL., HEALTH CODE §§ 471.1–471.9 (2013)); SANTA CLARA CNTY., CAL., CODE OF ORDS. §§ A18-350 to A18-355 (2010). The nutritional standards include limits on calories, sodium, fat, saturated fat, trans fats, and sugar. *See id.*

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known pejoratively as "Happy Meal bans."[111] These ordinances aim to combat the scourge of youth obesity: in the last thirty years, the percentage of obese children has more than doubled while the rate of obese adolescents has quadrupled.[112] Many public health analysts attribute part of the rise in youth obesity increased consumption of food prepared outside the home, especially fast food.[113] Santa Clara County moved first, adopting its "Happy Meal" regulation by ordinance in 2010.[114] Because it applied only to the unincorporated part of the county, Santa Clara's act affected only "about a dozen fast-food outlets."[115] Later in 2010, the San Francisco Board of Supervisors enacted a similar ordinance with more practical bite that applied to many more restaurants.[116] The toy giveaway restrictions have been met by significant media criticism,[117] and fast food companies have sought to evade them by imposing a nominal charge for toys.[118] Nonetheless, the regulations have arguably brought unflattering attention to the nutritional shortcomings of fast food marketed toward children, which may have indirectly affected industry practices. In 2011, for instance, McDonald's added apple slices to its Happy Meals to improve their nutritional profile.[119]

Even more controversial than the toy giveaway restrictions was New York City's attempt to limit the portion sizes of sugar-sweetened

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111. *E.g.*, Sharon Bernstein, *Supporters of Happy Meal Ban Predict Movement Will Spread*, L.A. TIMES (Nov. 6, 2010), http://articles.latimes.com/2010/nov/06/business/la-fi-happy-meal-20101106. The ordinances do not ban toy giveaways with meals; they just require that the meals meet certain nutritional standards. *See id.*

112. *Childhood Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/obesity/data/childhood.html (last visited June 18, 2014).

113. *See, e.g.*, R. Rosenheck, *Fast Food Consumption and Increased Caloric Intake: A Systematic Review of a Trajectory Towards Weight Gain and Obesity Risk*, 9 OBESITY REVS. 535, 546 (2008) (reviewing sixteen studies and finding "strong evidence for the independent role of fast food consumption . . . hastening rates of weight gain or obesity").

114. *See* Bernstein, *supra* note 111.

115. *New Law: Hold the Fries or Hold the Toy*, KTVU (Aug. 9, 2010, 7:43 AM), http://www.ktvu.com/news/news/new-law-hold-the-fries-or-hold-the-toy/nKgsC/.

116. Madison Park, *Happy Meal Toys No Longer Free in San Francisco*, CNN (Dec. 1, 2011, 1:09 PM), http://www.cnn.com/2011/11/30/health/california-mcdonalds-happy-meals (noting that San Francisco's ordinance would affect approximately fifty fast food restaurants in the city).

117. *E.g.*, *San Francisco's Happy Meal Ban*, THE DAILY SHOW WITH JON STEWART (Jan. 3, 2011), http://www.thedailyshow.com/watch/mon-january-3-2011/san-francisco-s-happy-meal-ban.

118. *See* Douglas Stanglin, *McD, Burger King Outwit San Francisco's Happy Meal Rules*, USA TODAY (Dec. 1, 2011, 11:37 AM), http://content.usatoday.com/communities/ondeadline/post/2011/12/mcdonalds-burger-king-outwit-san-franciscos-happy-meal-rules/1#.USP31VfRFy5.

119. *See McDonald's: Apple Slices in Every Happy Meal*, USA TODAY (July 26, 2011, 6:28PM), http://usatoday30.usatoday.com/money/industries/food/2011-07-26-McDonalds-apples-happy-meal_n.htm. Perhaps unsurprisingly, McDonald's steadfastly denied that this new practice was a reaction to the toy giveaway regulations. *Id.*

beverages purchased in certain retail environments.[120] This regulation, promulgated by the City's board of health, took aim at soda's unique contribution to the obesity epidemic, among other health ills,[121] and for that reason became known, inaccurately, as a "soda ban."[122] The regulation would have prohibited restaurants, mobile food carts, delis, and concessionaires from selling sugary drinks like soda in containers larger than sixteen ounces.[123] Many media figures and politicians viciously mocked the rule as an unduly paternalistic interference with the supposedly "free" choices of consumers.[124] The rule spurred a million-dollar-plus industry advertising campaign in opposition.[125] Most significantly, an industry-led lawsuit challenging the rule as a violation of the state constitution's separation-of-powers doctrine ultimately, and surprisingly, led to the rule's invalidation.[126] No other city or state has adopted a portion-cap rule, but officials in a handful of cities expressed interest, at least initially.[127] Given the surprising success of the lawsuit challenging the rule, it is now questionable whether the rule will even survive in New York City, much less diffuse to other jurisdictions.

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120. *See* N.Y.C., N.Y, HEALTH CODE § 81.53 (2013).

121. *See* COMM. ON ACCELERATING PROGRESS IN OBESITY PREVENTION, INST. OF MED., ACCELERATING PROGRESS IN OBESITY PREVENTION: SOLVING THE WEIGHT OF THE NATION 167 (Dan Glickman et al. eds., 2012) (identifying sugary drinks as "the single largest contributor of calories and added sugars to the American diet"); Gail Woodward-Lopez et al., *To What Extent Have Sweetened Beverages Contributed to the Obesity Epidemic?*, 14 PUB. HEALTH NUTRITION 499, 505 (2010) (concluding that sweetened beverage intake "has made a substantive contribution to the obesity epidemic experienced in the USA in recent decades"); Vasanti S. Malik et al., *Intake of Sugar-Sweetened Beverages and Weight Gain: A Systematic Review*, 84 AM. J. CLINICAL NUTRITION 274, 274 (2006) ("The weight of epidemiologic and experimental evidence indicates that a greater consumption of [sugar-sweetened beverages] is associated with weight gain and obesity."); *see also* K.E. Heller et al., *Sugared Soda Consumption and Dental Caries in the United States*, 80 J. DENTAL RES. 1949, 1949 (2001) (finding significant associations between soda consumption and decayed, missing, or filled surfaces of teeth for persons over twenty-five years of age).

122. *E.g.*, Joe Coscarelli, *Fight Over Bloomberg's Soda Ban Gets a Little Bit Racial*, N.Y. MAG. (Jan. 23, 2013, 9:01 AM), http://nymag.com/daily/intelligencer/2013/01/naacp-hispanic-group-join-fight-over-soda-ban.html.

123. N.Y.C., N.Y., HEALTH CODE § 81.53.

124. *E.g.*, *Drink Different*, THE DAILY SHOW WITH JON STEWART (May 31, 2012), http://www.thedailyshow.com/watch/thu-may-31-2012/drink-different.

125. Michael M. Grynbaum, *Health Panel Approves Restriction on Sale of Large Sugary Drinks*, N.Y. TIMES (Sept. 13, 2012), http://www.nytimes.com/2012/09/14/nyregion/health-board-approves-bloombergs-soda-ban.html.

126. N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2014 N.Y. Slip. Op. at 8, 2014 WL 2883881 (N.Y. Ct. App. June 26, 2014). For more analysis of the lower court decisions that were affirmed by the New York Court of Appeals, see Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 41 FORDHAM URB. L.J. 1859 (2013).

127. *See* Stafford, *supra* note 94.

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In addition to the toy giveaway and portion-cap restrictions, cities have led in proposing other methods to combat obesity. For instance, in 2010 New York City requested that the USDA, which administers the supplemental nutrition assistance program ("SNAP"), exclude SNAP recipients in the city from using their benefits to purchase soda.[128] New York City could not implement this proposal unilaterally. Rather, given SNAP's structure, it needed state and federal permission to move forward with its policy proposal.[129] Although the state approved the change, the USDA declined to grant a waiver.[130] At least one state, Minnesota, proposed something similar, but was also denied permission.[131] While not ultimately successful, New York City's proposal received widespread media attention and may have spurred more interest in nutrition-focused SNAP reform among policymakers in other jurisdictions.[132] Indeed, the USDA has since conducted a pilot program in Hampden County, Massachusetts, in which SNAP participants were given financial incentives to buy fruits and vegetables.[133]

In sum, cities have a prolific record of enacting public health regulations beyond the state and federal regulatory floor. Part V will examine cities' adoptions of these policies comparatively, in an attempt to suggest which characteristics of cities may make them more likely to adopt such policies. As Part V will discuss, one such characteristic is the presence of an aggressive public health agency. Parts II through IV, however, focus primarily on differences between big city governments

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128. Anemona Hartocollis, *New York Asks to Bar Use of Food Stamps to Buy Sodas*, N.Y. TIMES (Oct. 6, 2010), http://www.nytimes.com/2010/10/07/nyregion/07stamps.html. New York City's request to adjust SNAP purchase eligibility was made by the executive branch alone; a proposed city council resolution to support the request never made it out of committee. *See* N.Y.C., N.Y., Council Res. No. 0768-2011.

129. *See* Hartocollis, *supra* note 128.

130. *See* Letter from Jessica Shahin, Assoc. Admin., SNAP, USDA, to Elizabeth R. Berlin, Exec. Deputy Comm'r, N.Y. State Office of Temporary & Disability Assistance (Aug. 19, 2011), *available at* http://www.foodpolitics.com/wp-content/uploads/SNAP-Waiver-Request-Decision.pdf.

131. Minnesota sought to exclude candy and soft drinks. *See* Letter from Ollice C. Holden, Reg'l Admin., Food Stamp Program, Food & Nutrition Serv., USDA, to Maria Gomez, Assistant Comm'r, Econ. & Cmty. Support Strategies, Minn. Dep't of Human Servs. (May 4, 2004), *available at* http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/15364.pdf.

132. Monica Eng, *Politicians, Health Advocates Seek Transparency Restrictions in Food Stamp* Program, CHI. TRIB. (June 20, 2012), http://articles.chicagotribune.com/2012-06-20/news/ct-nw-food-stamp-spending-20120620_1_food-stamp-junk-food-supplemental-nutrition-assistance-program (noting that "[l]awmakers in several states . . . have unsuccessfully pushed bills to make soda, chips, and candy ineligible for purchase with food stamps").

133. USDA, HEALTHY INCENTIVES PILOT (HIP): INTERIM REPORT 5 (2013), *available at* http://www.fns.usda.gov/sites/default/files/HIP_Interim.pdf (concluding that "HIP had positive impacts on targeted fruit and vegetable consumption of pilot participants").

(considered as a class) and the state and federal governments. In doing so, the Article will assume that administrative action is taken pursuant to the direction of elected actors, an assumption that Part V relaxes.

II. WHY HEIGHTENED LOCAL REGULATION IS REMARKABLE

That cities have regulated Big Tobacco and the Food Industry more stringently for the purpose of improving public health is remarkable for a number of reasons. Although the public health community has long identified local governments as a fertile venue for increased regulation,[134] prominent scholarly narratives in law, economics, and political science, by contrast, posit that cities are unlikely to adopt regulations that go beyond the state and national regulatory floors. This Part discusses those narratives, analyzing why they are incorrect in the context of public health. In assessing these accounts, this Part asks what, if anything, we might draw from them to explain why cities actually *are* innovating in the realm of public health. Before proceeding with the accounts specific to local government, this Part looks at public choice theory, which, as noted above, would generally predict under-regulation.

A. Public Choice Theory and Economic Incentives

Public choice assumes that government officials, like all people, "rationally" seek to maximize their utility,[135] thus rejecting the notion that legislatures or administrative agencies regulate for the "public good."[136] Although scholars have debated whether public choice is merely descriptive or necessarily normative,[137] this Article uses the theory descriptively to help determine why cities produce different governmental

134. *See, e.g.*, TOBACCO CONTROL RES. CTR., THE MULTISTATE MASTER SETTLEMENT AGREEMENT AND THE FUTURE OF STATE AND LOCAL TOBACCO CONTROL: AN ANALYSIS OF SELECTED TOPICS AND PROVISIONS OF THE MULTISTATE MASTER SETTLEMENT AGREEMENT OF NOVEMBER 23, 1998 § 8.1, at 61 (Graham Kelder & Patricia Davidson eds., 1999) (observing that local governments have "led the way in developing innovative, effective, and enforceable measures regulating the sale, distribution, and use of tobacco products").

135. *See, e.g.*, Dennis C. Mueller, *Rational Egoism Versus Adaptive Egoism as Fundamental Postulate for a Descriptive Theory of Human Behavior*, 51 PUB. CHOICE 3, 8 (1986); ANTHONY DOWNS, INSIDE BUREAUCRACY 2 (1967); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 31–39 (1962).

136. *See* BUCHANAN & TULLOCK, *supra* note 135, at 31–39; DOWNS, *supra* note 135, at 2; *see also* Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 6 (1991).

137. *See* JERRY L. MASHAW, GREED, CHAOS & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 25–27 (1997) (recounting debate).

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outputs than higher levels of government. According to classic public choice accounts, interest groups—organized collections of individuals who share an intense interest in a particular subject—influence the political process more than they would if all voters' policy preferences were weighted equally.[138] Given their uniquely intense interests, these groups invest substantial time, money, and effort in electing and lobbying public officials to achieve favorable governmental outputs like laws, regulations, tax rates, and subsidies.[139] In seeking to influence government, interest groups prey on the self-interest of public decisionmakers, such as lawmakers, their staffs, administrative agency personnel, and civil servants.[140] Public choice theorists generally work from the assumption that legislators are motivated most by re-election, but also allow for the possibility that other motivations—like post-elective office earnings, power, prestige, leisure, ideology, and a desire to act conscientiously—drive legislators and other governmental decisionmakers.[141]

According to conventional public choice theory, Big Tobacco, the Food Industry, and their allies on specific issues aim to block regulations that could hurt their profits.[142] Since the benefits to the general population from government regulation are diffusely spread, support for public health regulation will often be weak.[143] More recent versions of public choice theory—sometimes referred to as "neo-pluralist" accounts—acknowledge that there are, in fact, organized groups that at least purport to represent the diffuse interests of the public on certain issues.[144] Environmental and consumer groups, for instance, undoubtedly influence the lawmaking

138. Political scientist Mancur Olson was a notable proponent of this view, arguing that powerful interest groups dominate the process of lobbying public bodies. *See generally* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965); *see also* TODD SANDLER, COLLECTIVE ACTION: THEORY AND APPLICATIONS (1992); RUSSELL HARDIN, COLLECTIVE ACTION (1982).

139. OLSON, *supra* note 138, at 144.

140. *See* CROLEY, *supra* note 32, at 26–52.

141. *E.g.*, Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 320–24 (2002) (discussing "deep ambivalence within public choice scholarship about whether the interests that constitute self-interest . . . are limited to material matters, or whether they extend to such discarnate concerns as power, prestige, and leisure"); DOWNS, *supra* note 135, at 84–85 (listing motives of bureaucrats).

142. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34–41 (1998).

143. That is, unless there are other organized, discrete interest groups that stand to gain from regulation. *See* Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, 7 REG., May/June 1983, at 12, 12.

144. *See* Croley, *supra* note 142, at 57–60.

process to some degree.[145] With respect to tobacco use, groups like the American Lung Association and the American Cancer Society often lobby for more stringent regulations.

Despite the presence of opposing groups, until the 1980s, Big Tobacco exercised significant control over federal policy, routinely overpowering its organized public health opposition.[146] Although the federal government adopted some significant tobacco regulations at discrete political moments, the industry's political influence limited the scale and scope of such regulation. Big Tobacco's political power began to wane in the 1990s, however, after years of bad press from tort litigation and perceived obstinance to admitting tobacco's devastating health effects.[147] In addition, a significant reduction in the number of tobacco farmers, who allied with Big Tobacco on many issues, hurt the industry's clout.[148] Moreover, some elements of Big Tobacco began to realize that most of their profit and growth lay in overseas markets like China.[149] Hence, by the time Congress passed the TCA in 2009, one major tobacco company—the Altria Group—decided that the public relations benefits of supporting the legislation might outweigh the negative impact on its business in the United States.[150] (Reportedly, Altria also supported the legislation on the theory that increased regulation, particularly of advertising practices, would solidify its dominant position in the cigarette market).[151] While perhaps not the political juggernaut it once was, Big Tobacco still spends

145. *Id.* at 59; Hills, *supra* note 11, at 32–33 (distinguishing "special interest groups" from "public interest groups").

146. *See* Bruce Yandle et al., *Bootleggers, Baptists & Televangelists: Regulating Tobacco by Litigation*, 2008 U. ILL. L. REV. 1225, 1233 & nn.21–22 (observing that the relatively weak "health interest groups" did "not aggressively challenge[] tobacco interests in many instances"); *id.* at 1244–55 (tracing history of federal regulation of tobacco); Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 66–68 (1997) (describing the tobacco industry's influence over federal officials); *see also* CROLEY, *supra* note 32, at 181 (noting lack of significant federal regulation of cigarettes).

147. Yandle et al., *supra* note 146, at 1257–71; Duff Wilson, *Tobacco Regulation Bill Is Expected to Pass Senate*, N.Y. TIMES, June 6, 2009, at B4, *available at* http://www.nytimes.com/2009/06/06/business/06tobacco.html (noting that "[t]obacco regulation used to be a fight to the death in Congress," but no longer).

148. *The Shrinking Role of Tobacco Farming & Tobacco Product Manufacturing in the United States Economy*, CAMPAIGN FOR TOBACCO-FREE KIDS (May 22, 2013), http://www.tobaccofreekids.org/research/factsheets/pdf/0344.pdf.

149. *See* Sokol, *supra* note 2, at 120–23 (noting that the Altria Group spun off Philip Morris International so as to better capitalize on less regulated foreign markets).

150. Duff Wilson, *Senate Approves Tight Regulation Over Cigarettes*, N.Y. TIMES, June 12, 2009, at A1.

151. Douglas McIntyre, *Altria Wins Big with New FDA Regulation of Cigarettes*, DAILYFINANCE (June 11, 2009, 6:30 PM), http://www.dailyfinance.com/2009/06/11/altria-wins-big-with-new-fda-regulation-of-cigarettes/ (last updated Dec. 3, 2009, 12:00 PM).

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millions on campaign donations and lobbying, which undoubtedly allows it to retain substantial influence over public policy affecting it.[152]

The Food Industry constitutes a lobby as powerful as the Tobacco Industry in its heyday, if not more so.[153] At the federal level, the Food Industry has pushed Congress to overturn administrative regulations designed to reduce obesity,[154] and successfully objected to inter-agency efforts to regulate the industry more stringently.[155] It has opposed efforts to limit how SNAP benefits can be used.[156] The soda industry, in particular, has spent millions to defeat local soda taxes.[157] On the other side of the Food Industry are public health organizations like the Center for Science in the Public Interest ("CSPI"), which spends comparatively little on lobbying.[158] First Lady Michelle Obama has brought attention to the obesity epidemic without advocating for increased regulation of the Food Industry.[159]

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152. According to OpenSecrets, the Tobacco Industry spent $17 million on federal lobbying in 2011 alone. *Lobbying Spending Database Tobacco, 2011*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/indusclient.php?id=a02&year=2011 (last visited Jan. 30, 2014). Altria Group led tobacco companies with $1.7 million in campaign contributions in 2011–12. *Influence & Lobbying, Tobacco Summary*, OPENSECRETS.ORG, http://www.opensecrets.org/industries/indus.php?ind=a02 (last visited Jan. 30, 2014); *see also* Paul A. LeBel & Richard C. Ausness, *Toward Justice in Tobacco Policymaking: A Critique of Hanson and Logue and an Alternative Approach to the Costs of Cigarettes*, 33 GA. L. REV. 693, 784–85 (1999) (explaining Big Tobacco's successful resistance to federal regulatory legislation in the late 1990s in public choice terms).

153. *See* Duff Wilson & Janet Roberts, *Special Report: How Washington Went Soft on Childhood Obesity*, REUTERS (Apr. 27, 2012, 9:03 AM), http://www.reuters.com/article/2012/04/27/us-usa-foodlobby-idUSBRE83Q0ED20120427 (noting that the food industry has followed "Big Tobacco's playbook" in lobbying against federal regulation).

154. *E.g.*, Pub. L. No. 112-55, 125 Stat. 552, § 743 (Nov. 18, 2011) (blocking funding for implementation of school lunch nutrition programs); Ron Nixon, *Congress Blocks New Rules on School Lunches*, N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/us/politics/congress-blocks-new-rules-on-school-lunches.html (noting that major food companies lobbied Congress to block administrative regulations that would have tightened school lunch nutrition standards).

155. *See* Wilson & Roberts, *supra* note 153.

156. *See* Robert Pear, *Soft Drink Industry Fights Proposed Food Stamp Ban*, N.Y. TIMES (Apr. 29, 2011), http://nytimes.com/2011/04/30/us/politics/30food.html (noting opposition from major soft drink companies and distributors).

157. *E.g.*, Bittman, *supra* note 94.

158. In 2011, for instance, the CSPI spent $159,310 on lobbying, including grassroots lobbying. CSPI, TAX FORM 990 (2010), at 21 (on file with author). Coca-Cola, by contrast, spent over $5 million on lobbying in 2011, *see Lobbying Spending Database—Coca-Cola, 2011*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?id=D000000212&year=2011 (last visited Jan. 15, 2014). *See also* Wilson & Roberts, *supra* note 153 (noting that the CSPI spent as much on lobbying in one year as industry opponents of obesity-prevention regulations spent every thirteen hours).

159. *See* Wilson & Roberts, *supra* note 153 (noting Michelle Obama's shift, after intense Food Industry lobbying of the White House, "from criticizing foodmakers toward promoting exercise").

Public choice does not forestall the possibility that government will ever impose costly regulations on powerful industries at discrete political moments.[160] Rather, it predicts that it will be difficult politically to do so, and that if science or economics could prescribe an optimal amount of public health regulation, there are good reasons to expect the political system to under-regulate. *Ceteris paribus*, one would expect such regulation to be equally difficult at the local level. That cities regulate Big Tobacco and the Food Industry beyond the state and federal floor in many instances suggests that everything is not equal, and thus presses the question of why cities are more inviting "hosts" for the interest groups promoting public health regulation.[161]

The need for a compelling explanation of local regulatory activism is all the more pressing because cities, as compared to states and the federal government, likely have less to gain financially from lowering the rates of tobacco use and obesity. Federally funded Medicare, as well as Medicaid (funded mostly by the federal government), bear billions in long-term medical costs associated with tobacco and obesity.[162] Cities, by contrast, do not contribute any money to Medicare, and in most states, they contribute no or proportionally scant money to Medicaid.[163] In some

160. For instance, the groundbreaking TCA was enacted during the brief moment in which the Democratic Party controlled the House of Representatives, the presidency, *and* had a filibuster-proof margin in the Senate. *See* Mariano-Florentino Cuéllar, *Earmarking Earmarking*, 49 HARV. J. ON LEGIS. 249, 265 (2012) (noting the "cliffhanger cloture vote" in the Senate that allowed the TCA to pass).

161. *Cf.* GRAEME BOUSHEY, POLICY DIFFUSION DYNAMICS IN AMERICA 15 (2010) (arguing that the extent of a policy's diffusion depends in part on attributes of the "host" state's governmental system).

162. In 2009, for instance, combined state-federal Medicaid spending was $380.6 billion, of which the federal government paid sixty-six percent and states (or their sub-entities, *see infra* note 163) paid thirty-four percent. Kathryn Linehan, *The Basics: Medicaid Financing*, NAT'L HEALTH POLICY FORUM (Feb. 13, 2013), http://www.nhpf.org/library/the-basics/Basics_MedicaidFinancing_02-13-13.pdf; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012) ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs."). For more on how the 2010 Affordable Care Act will affect state Medicaid budgets, see *id.* at 2601–07 (invalidating ACA provision requiring states to expand Medicaid eligibility).

163. Federal law allows states to collect up to sixty percent of their Medicaid expenditures from local governments in order to receive matching funds. *See* 42 U.S.C. § 1396a (2012). In practice, twenty-two states do not require any local funding, while most others require localities to pay only administrative costs or other minor expenses. *See* CITIZENS BUDGET COMM'N OF N.Y., A POOR WAY TO PAY FOR MEDICAID: WHY NEW YORK SHOULD ELIMINATE LOCAL FUNDING FOR MEDICAID (2011), *available at* http://www.cbcny.org/sites/default/files/REPORT_Medicaid_12122012.pdf. Only six states—Arizona, California, Iowa, New Hampshire, New York, and North Carolina—require a local contribution that amounts to more than two percent of total state Medicaid spending, with New Hampshire (8.4 percent in 2008) and New York (thirteen percent) the only states to require a

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states, cities and counties run or help fund public hospitals, which treat a disproportionate share of low-income patients reliant on Medicaid (which often reimburses medical care at lower rates) or who lack health insurance entirely.[164] Cities and counties that fund public hospitals thus also have a long-term financial interest in reducing public health problems that may strain their public hospital budgets.[165] Nevertheless, in terms of consistent, ultimate liability for medical costs, the state and federal governments bear much more of the financial burden caused by obesity and tobacco.[166]

In one sense, state and federal officials' comparative nonchalance regarding the budgetary effects of tobacco use and obesity may seem consistent with public choice's skeptical view of legislators' interests. So long as no powerful interest group is hurt by these budgetary problems, legislators should not give a whit. However, some politicians may be motivated by concerns other than self-interest, and, moreover, there are organized interest groups devoted to reducing government spending, debt, or pursuing balanced budgets.[167] Thus, it may actually be in some or even most politicians' interests to pursue policies that promote the fiscal soundness of the level of government to which they are elected. If so, then it is even more remarkable that local governments, which have relatively less to gain financially from better public health, are at the vanguard of combating tobacco use and obesity.

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contribution greater than five percent. *Id.* at 11. New York State is moving toward reducing the local share of Medicaid spending. *Id.* at 12.

164. *See* TARESSA FRAZE ET AL., STATISTICAL BRIEF NO. 95: PUBLIC HOSPITALS IN THE UNITED STATES, 2008, at 3 (2010), *available at* http://www.hcup-us.ahrq.gov/reports/statbriefs/sb95.pdf (noting that 24.5 percent of patients in public hospitals are covered by Medicaid as compared to 17.3 percent in non-profit hospitals, and that public hospitals cover seventy-five percent more uninsured patients).

165. In part due to the strain they exert on city budgets, city ownership of public hospitals is steadily declining. *See* Dennis P. Andrulis & Lisa M. Duchon, *The Changing Landscape of Hospital Capacity in Large Cities and Suburbs: Implications for the Safety Net in Metropolitan America*, 84 J. URB. HEALTH 400, 400 (2007).

166. As compared to more than twenty percent for the average state budget, *see Sebelius*, 132 S. Ct. at 2604, Medicare and Medicaid consumed twenty-four percent of the federal budget in 2010. *See* KAISER FAMILY FOUND., MEDICARE CHARTBOOK 78 (4th ed. 2010), http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8103.pdf. By contrast, New York City, which shoulders a greater share of state-local Medicaid spending than any other large city, is projected to spend 12.5 percent of the city-funded portion of its budget on Medicaid in 2014. N.Y. Indep. Budget Office., Fiscal Brief, October 2013, at 3, http://www.ibo.nyc.ny.us/iboreports/medicaid2013.pdf.

167. *E.g.*, *About the Concord Coalition*, THE CONCORD COAL., http://www.concordcoalition.org/about-concord-coalition (last visited Jan. 27, 2014) ("a nationwide, non-partisan, grassroots organization advocating generationally responsible fiscal policy"); *About the Campaign*, FIX THE DEBT, http://www.fixthedebt.org/about-the-campaign (last visited Jan. 27, 2014) ("a non-partisan movement" with "the common belief that America's growing federal debt threatens our future and we must address it").

B. Numerosity and Free Ridership

Given that there are thousands of cities, as compared to a mere fifty states and one federal government, one might suspect, per Brandeis's famous dicta about laboratories of democracy, that a greater number of cities will inevitably lead to more innovation at the local level.[168] On the other hand, in her seminal article on the subject, Susan Rose-Ackerman argued powerfully that federalism actually decreases the possibility of policy innovation.[169] Assuming that elected officials are only interested in winning re-election, she notes that there is relatively little to gain from a "successful" policy innovation, whereas a failure can hurt a candidate's chances significantly.[170] Thus, a self-interested, lower-level, elected official has little incentive to innovate. Moreover, because information about innovation diffuses to other jurisdictions, other policymakers may "free ride" on the first-mover's innovation.[171] Because innovation is costly and its political return speculative, the free-rider effect leads to a collective action problem in which the many jurisdictions wait for others to innovate first, thus producing sub-optimal policy innovation.[172] One would expect the collective action problem to be greater when there are more jurisdictions; thus, cities should be less likely to innovate than states.[173]

Rose-Ackerman's theory relies on a number of stylized assumptions and recognizes that more innovation may occur in a two-tier federal system than in her hypothetical one-level, multijurisdictional system due to the possibility of lower-level officials seeking higher office.[174] In the absence of incentives to innovate provided to lower levels of government by the central government, however, Rose-Ackerman expects the effects of federalism on innovation by multiple jurisdictions to be "weak."[175] Rose-Ackerman's work has spawned dozens of empirical and theoretical offshoots in the last three decades. Brian Galle and Joseph Leahy commendably synthesize these works in a comprehensive review.[176] They

168. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

169. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980).

170. *Id.* at 595, 603–05.

171. *Id.* at 610–11.

172. *Id.*

173. *See* Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1398–99 (2009) (noting that the free-rider effect increases with the number of competing jurisdictions).

174. *See* Rose-Ackerman, *supra* note 169, at 614–15.

175. *Id.* at 615.

176. Galle & Leahy, *supra* note 173, at 1339.

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largely conclude that Rose-Ackerman's insight remains correct: large numbers of jurisdictions do not necessarily lead to more policy innovation, and, on the whole, the level of innovation to be expected will be "well below the socially optimal level."[177]

Cities' extensive innovation with respect to public health regulation thus defies Rose-Ackerman's negative view of decentralized government,[178] perhaps showing that local officials are more risk-seeking than she acknowledges. Galle and Leahy recognize that "policy evangelists" may be particularly well-suited to overcoming the free-rider problem because they generally want other jurisdictions to copy their innovations.[179] Perhaps, then, policy evangelism helps explain the local innovation in public health, but why evangelists achieve more success at the local level than at higher levels remains unanswered. Surely, the most evangelistic would prefer to impact the greatest number of people through their innovations, and thus should prefer to act at higher levels of government, everything being equal.

Scholars also note that more populous and wealthier jurisdictions—whether states or cities—are more likely to innovate given that they have more resources, including a larger bureaucracy, to devote to innovation.[180] As discussed in the next Section, more population density and greater wealth can also insulate cities from capital flight that regulation might otherwise precipitate. Relatedly, Graeme Boushey finds that at the state level, the more professional a legislature, the more receptive it is to regulatory policy innovation.[181] These factors may help explain *which* local governments are more receptive to public health regulation. But as an explanation for why cities are generally more receptive to heightened regulation, they fall short. States are always larger and more populous than the cities within them. Moreover, given their control over taxation and finances, states can lay claim to a wealthy city's revenue even if other

177. *Id.* at 1398.

178. Insofar as Rose-Ackerman and Galle-Leahy argue that innovation is sub-"optimal," *id.*, their claim is impossible to test empirically because the "optimal" level of innovation is unknown.

179. *Id.* at 1363, 1381.

180. *Id.* at 1367 & n. 153 (citing Shipan & Volden, *supra* note 11, at 24, for the proposition that large cities are the primary innovators among municipalities); BOUSHEY, *supra* note 161, at 96–97 (finding that the size and wealth of a state correlate to its receptiveness to regulatory innovation). In more populous cities, a larger bureaucracy may include more and better-staffed administrative agencies, *see infra* Part V, as well as a larger and more sophisticated legal counsel office that may be more competent at reviewing and defending proposals.

181. BOUSHEY, *supra* note 161, at 93.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss5/7

parts of the state are poorer.[182] In addition, state legislatures will usually be as professional as, if not more so than, constituent city councils.

C. Tiebout-ian Competition and Mobile Capital

Charles Tiebout famously postulated that cities compete with each other for consumer-voters on the basis of the tax-service mix offered by the jurisdiction.[183] Although Tiebout largely focused on more tangible public goods like schools and golf courses,[184] his theory can be extended to include public health policies as among the "goods" offered to residents of a jurisdiction.[185] Tiebout's insights might militate in favor of heightened public health regulation if such regulation appeals to enough residents. Tiebout might also suggest a more malign explanation for public health regulation: cities might seek residents who prefer restrictive public health regulations because such residents will cost the city less in medical (and other social service) expenditures in the long run, or because individual preference for public health regulation is a proxy for other characteristics that cities aim to maximize, like high levels of income and education. In other words, squeeze out McDonald's, and a city keeps out the poor people who work (and eat) there. For all of these reasons, the Tiebout theory may help explain heightened public health regulation, at least to the extent that it can explain any local action.[186]

Upon further examination, however, the Tiebout-ian case for local public health innovation weakens. First, among the public goods that residents consider when choosing a community, public health policies likely rank quite low to the extent that they are known and considered at all.[187] At the margins, there may be particularly ideological or sensitive

182. *See* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 76–87 (2008).

183. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956).

184. *Id.* at 418 (discussing also "beaches, parks, police protection, roads, and parking facilities").

185. *See* Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1071–73 (2007) (noting that residents might choose a jurisdiction on the basis of redistributive policies like a "living wage" ordinance).

186. Tiebout, of course, relies on many stylized assumptions that limit the theory's practical applicability. *See* Tiebout, *supra* note 183, at 419; *see also* Vicki Been, *"Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 516–17 (1991) (discussing criticisms of Tiebout and his assumptions).

187. Indeed, the empirical research "testing" the Tiebout theory generally focuses exclusively on consumer-voter response to municipal expenditures on public goods like schools, police protection, and parks. *See* Been, *supra* note 186, at 520–28 (surveying studies on the issue). Moreover, surveys indicate that residents consider schools, taxes, and public safety the most important factors in choosing neighborhoods or cities. *Id.* at 523.

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persons who rank these policies quite high,[188] but their numbers are probably relatively insignificant. Second, while Tiebout argued that competition among jurisdictions—at least for residents—would lead to greater efficiency, many other scholars argue that interlocal competition for businesses results in a "race to the bottom" in which cities offer more and more giveaways to mobile firms to the detriment of their tax bases and public services.[189] Paul Peterson theorized that the threat of mobile capital renders cities unwilling and unlikely to legislate on "redistributive" matters that might scare off businesses.[190] According to Peterson and his acolytes, city officials avoid ideological issues, concentrating instead on deciding how to allocate public goods.[191] Per this narrative, cities should be loath to enact public health regulations that might chase away certain industries, especially because businesses are likely more sensitive to local regulation than residents are in choosing location.[192]

As with residents, there is at least a plausible Tiebout-ian explanation of heightened public health regulations with respect to businesses. At least some cities might want to drive away the very businesses—e.g., fast-food outlets and convenience stores—that are among those to be hurt most by regulations to reduce tobacco use or obesity. Cities may be so motivated in part because the presence of these businesses negatively affects the public health (in a manner that may have fiscal implications for the city[193]), or because the city desires "better" businesses that provide higher-wage jobs and create a stronger tax base through higher earnings or higher real

188. For instance, residents with a particular dislike for secondhand smoke, perhaps for medical reasons, may value a strong smokefree workplace law when choosing a jurisdiction in which to live or work.

189. *See* Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 495 n.39 (2009); *see also* Louise Story, *As Companies Seek Tax Deals, Governments Pay High* Price, N.Y. TIMES (Dec. 1, 2012), http://www.nytimes.com/2012/12/02/us/how-local-taxpayers-bankroll-corporations.html (describing economic harm from local governments' competing for industry).

190. PAUL E. PETERSON, CITY LIMITS 120–21, 183 (1981); *see also* Schragger, *supra* note 189, at 483 ("The conventional economic story is that it is quite difficult (and counterproductive) for subnational governments to . . . engage in redistribution.").

191. *E.g.*, KAREN M. KAUFMANN, THE URBAN VOTER: GROUP CONFLICT & MAYORAL VOTING BEHAVIOR IN AMERICAN CITIES 18–19 (2004) ("Local governments . . . are principally service providers. . . . The majority of [their] decisions are less policy driven than they are allocational in nature."); *see also* WILLIAM A. NISKANEN, JR., BUREAUCRACY & REPRESENTATIVE GOVERNMENT 130 (1971) ("In our increasingly mobile age . . . local politics are increasingly irrelevant.").

192. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 421 (1990) (observing that "investors of capital and owners of businesses, rather than residents, are the prime beneficiaries of the system of multiple jurisdictions and ease of movement").

193. *See supra* note 165 and accompanying text.

property assessments.[194] A more sinister explanation of class bias might also be at work. If these motives truly explain city action, however, then cities are gambling on "better" businesses being available and willing to move in. Cities also risk being seen as less "business-friendly."

Alternatively, but also consistent with Tiebout, other, unaffected businesses in the city might support public health regulation because they stand to benefit from a healthier work force in a variety of ways, such as fewer sick days, heightened worker productivity, and lower health insurance costs. Thus, businesses might choose a jurisdiction on the basis of public health regulations, among other factors. Just as in the residential context, however, public health regulations are likely to rank low on the list of factors affecting the location of a business.[195] Moreover, the potential cost savings to an employer from public health regulations' impact on its work force are long-term and indirect, and thus difficult to factor into an employer's costs.

If Tiebout-ian competition and the mobile capital narrative do not provide a compelling explanation *for* heightened public health regulation by cities, the record of aggressive local public health regulation begs an explanation. Richard Schragger has offered one in a different realm: that of local "economic redistribution" like living wage ordinances and employer healthcare mandates. Schragger argues that, at least for certain place-dependent industries, capital is "sticki[er]" than commonly imagined.[196] Thus, Schragger concludes, cities have a freer hand to promote redistributive policies than the orthodox "mobile capital" narrative predicts.[197]

Much of Schragger's insight can be extended to the public health context, at least insofar as it explains why cities might be more resistant to mobile capital than previously thought. For instance, McDonald's did not abandon New York City after it banned trans fats and required menu labeling, despite opposing both policies.[198] Nor has McDonald's

194. *Cf.* Kelo v. City of New London, 545 U.S. 469 (2005). There is also the possibility that a city might exclude chain restaurants for aesthetic purposes. *See, e.g.*, Stacey Stowe, *Nantucket Votes to Ban Chain Stores from Downtown*, N.Y. TIMES (Apr. 12, 2006), http://www.nytimes.com/2006/04/12/realestate/commercial/12island.html?pagewanted=all.

195. The empirical work on what motivates business relocation decisions has not explored this specific point, even if it has looked at the "regulatory environment" more generally. *See* Wuyang Hu et al., *Understanding Firms' Relocation and Expansion Decisions Using Self-Reported Factor Importance Rating*, 38 REV. REGIONAL STUD. 67, 69 (2008).

196. Schragger, *supra* note 189, at 520–21.

197. *Id.* at 526.

198. *See* Erik Engquist, *McDonald's Readies for NYC Trans Fat Fight*, CRAIN'S NEW YORK BUSINESS (Nov. 14, 2006, 2:08 PM), http://www.crainsnewyork.com/article/20061114/FREE/

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threatened to depart the city *en masse* since the soda-size restrictions were announced.[199] Unlike manufacturers of moveable, durable goods, McDonald's must be physically proximate to potential customers. By leaving the New York City market, McDonald's would lose access to millions of potential consumers.[200] Thus, so long as its franchises can remain reasonably profitable, McDonald's is likely to comply with regulations it finds burdensome or annoying rather than flee the city entirely.[201] In this sense, the more populous cities (as well as those that are larger and more isolated geographically) are better positioned to resist capital flight. Their markets are simply too potentially profitable for certain businesses to ignore, even if they come with extra regulatory baggage. The "agglomeration" benefits that cities offer thus insulate them to some degree, particularly in the retail setting, from capital flight.[202] But agglomeration still cannot explain why cities are more likely than states or the federal government to adopt such regulations, since the federal government and most states should be just as resistant to capital flight as large cities, if not more so. In sum, the Tiebout and mobile capital narratives are largely a wash; they neither explain convincingly why cities should not be adopting heightened public health regulations, nor do they convincingly explain why cities are adopting such regulations.

III. INCOMPLETE, BUT PARTIALLY HELPFUL, EXPLANATIONS FOR LOCAL INNOVATION

A number of scholars have theorized that cities are uniquely capable of providing a more responsive and representative form of government, which could theoretically lead to more stringent public health regulation than found at higher levels of government. In addition to the Tiebout-ian narrative, discussed above, a separate strain of thought stresses the

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61114007 (noting that McDonald's was "preparing to go to war" over New York City's proposed ban); David B. Caruso, *Chains Refuse to Put Calories on Menus*, USA TODAY (June 26, 2007, 6:07 PM), http://usatoday30.usatoday.com/news/health/2007-06-26-1714835372_x.htm (stating that McDonald's planned "to defy" New York City's calorie count rule).

199. Of course, the McDonald's franchise business model complicates such decisions, since franchise owners have a vested interest in their specific locations. *See* ROBERT E. BOND, BOND'S FRANCHISE GUIDE 8–9 (23d ed. 2012) (describing franchise industry structure).

200. As of 2004, there were more than 250 McDonald's outlets in New York City. Mark Jacobson, *Supersize City*, N.Y. MAG. (May 10, 2004), http://nymag.com/nymetro/food/features/n_10341/.

201. Again, the franchise caveat. *See supra* note 199.

202. *See* Schragger, *supra* note 189, at 521 (agglomeration can make capital sticky); *see also* David Schleicher, *The City As a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1515–29 (discussing agglomerative benefits of cities).

"communitarian" advantages of local government. Unlike Tiebout and public choice, communitarianism is decidedly noneconomic in its approach. Instead of assuming rational, self-interested actors in public and private spheres, communitarianism draws on civic republican theory to posit that local democracy is peculiarly capable of transforming both the individuals who participate in it and what local government does. In other words, communitarians argue that public choice is less descriptively accurate at the local level than at higher levels of government. Communitarians theorize that the smaller scale of local government can smooth some of the coarser elements of national and state politics that thrive on public choice dynamics, like the naked pursuit of self-interest (by individuals and groups), the negative campaign attacks, and partisan warfare.[203] Indeed, public health advocates, in particular, have invoked communitarian themes in explaining why cities may be better venues for regulatory policy innovation.[204]

Reconciling the vast differences between communitarianism and public choice theory is beyond the scope of this Article. This Section wrestles only with those strands of communitarian theory that might help explain local public health innovation in public choice terms. To begin with, the Section focuses on that part of communitarianism that stresses the effect of local participation on government outputs or policies (the "utilitarian" strand of communitarianism),[205] as opposed to the "dignitary" strand of communitarianism, which emphasizes the participation's transformative effect on citizens.[206] Unless the dignitary benefits of communitarianism cycle back into the governmental process and affect local outputs, they are irrelevant to this Article's objective of assessing why different levels of government produce different policies.

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203. *See generally* Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000) (reviewing GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999)).

204. *See, e.g.*, Michael Siegel et al., *Preemption in Tobacco Control: Review of an Emerging Public Health Problem*, 278 J. AM. MED. ASS'N 858, 859 (1997) ("[L]ocal elected officials . . . represent their friends and neighbors and are highly accountable to their constituents, making them less inclined to serve tobacco industry interests.").

205. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1916 (2001) (dividing "[t]he leading scholarship on federalism" into two groups: those that describe "value of local participation" in "utilitarian" and "dignitary terms").

206. *E.g.*, JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT (1861); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 73 (Henry Reeve trans., A.S. Barnes & Co. 1856) (1835).

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A. Utilitarian Communitarianism: Its Limits and Insights

Communitarians argue that local government is more democratically responsive, in large part due to its smaller scale.[207] This smaller scale enables participants in local government to engage in more deliberative democracy that promotes the "public good" rather than mere interest-group politics.[208] As an explanation for local public health innovation, the utilitarian communitarian account proceeds from a premise that is difficult to defend. Many communitarians assume that citizens should and will care more about local than higher levels of government because of its closeness to them.[209] As measured by voting rates, however,[210] citizens care least about local government, and care much more about national government, the level from which, per communitarian theory, they should feel most removed.[211] David Schleicher's explanation for this relative disinterest is the lack of true ideological competition in local elections, and his proposed solutions might boost voter interest in local government.[212] Nonetheless, in smaller cities and those cities with more evenly split party registration among voters—where one might expect more ideological competition—turnout in local elections still lags behind state and national elections.[213]

Even if one is skeptical of communitarianism's premises and its foundational claims of civic republicanism, the smaller scale of local government may nonetheless impact the public choice narrative. In particular, the lower constituents-to-official ratio and the physical

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207. *E.g.*, BRIAN E. ADAMS, CAMPAIGN FINANCE IN LOCAL ELECTIONS: BUYING THE GRASSROOTS 5 (2010).

208. *E.g.*, *id.* (citing JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 23–35 (1980)).

209. *E.g.*, DE TOCQUEVILLE, *supra* note 206, at Book 2, 111 (citizens are likely to care more about local matters than "the destiny of the State").

210. Of course, there are other forms of civic participation, like attending local government board meetings and contacting public officials, *see* J. ERIC OLIVER, DEMOCRACY IN SUBURBIA 42 (2001), but the data for these are difficult, if not impossible, to compare across layers of government vertically given the impracticability of a citizen in, say, California, attending a Congressional hearing in Washington, D.C.

211. Donald P. Green et al., *Getting Out the Vote in Local Elections: Results from Six Door-to-Door Canvassing Experiments*, 65 J. POL. 1083, 1083 (2003) ("[T]he typical U.S. municipal election draws between one-fifth and one-half of the *registered* electorate.").

212. David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL. 419, 465–73 (2007).

213. OLIVER, *supra* note 210, at 42–52 (showing that voting rates decline from least populous cities to more populous ones, although rates increase somewhat for the most populous cities in large metropolitan areas); J. ERIC OLIVER ET AL., LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 55, 64–67 (2012). As Oliver notes, turnout for local elections varies wildly depending on when elections are held. When they are held in conjunction with federal or state elections, voting rates are significantly higher than when local elections occur on their own. *Id.* at 64–65.

proximity of government decisionmakers to their constituents may lower the costs of both campaigning and lobbying, key tools by which interest groups pursue their goals. The synergy between these factors may help explain why proponents of public health regulation have comparatively more influence at the local level than at the state and federal levels.

Although it varies widely among major cities, the constituents-to-official ratio is generally lower at the local level than at the federal and state levels.[214] The ratios vary from 50,000 to 250,000 per councilor at the city level,[215] whereas for federal senators, the ratio reaches into the multi-millions for large states (e.g., two senators for California's thirty-eight million people), while dipping to 300,000 or so in the least populous states.[216] The average city ratio is also lower than the average for the federal House of Representatives, which is 710,000 residents per member.[217] The degree to which local constituents-to-official ratios depart from their state counterparts fluctuates widely. Among state lower houses, only California has a ratio much higher than that of large city councils: more than 400,000 constituents per representative.[218] All other states' ratios are lower than 220,000.[219] Among state upper houses (usually "senates"), there are at least ten with ratios upwards of 200,000, including California with over 930,000; Texas with 811,000; Florida with 470,000; and Ohio with 349,000.[220] As compared to at least some large states' senates, therefore, populous cities offer a lower constituents-to-official ratio. As the following table shows, the comparison *within* states like New York and California makes this disparity more striking.

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214. *Compare* App. 3, *with 2010 Constituents Per State Legislative District Table*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/2010-constituents-per-state-legislative-district.aspx (last visited Feb. 17, 2014) [hereinafter "NCSL CHART"], based on 2010 data). Of course, state levels vary widely themselves. *See id.*

215. *See* App. 3.

216. *E.g.*, Wyoming, Vermont, North Dakota.

217. *Members of Congress*, GOVTRACK.US, http://www.govtrack.us/congress/members (last visited May. 25, 2014).

218. NCSL CHART, *supra* note 214.

219. *Id.*

220. *Id.*

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TABLE 1

City	**Constituents /U.S. Senator**[221]	**Constituents/ state senator**	**Constituents/ city councilor**
New York City	9,750,000	307,000	162,000
Los Angeles	19,000,000	930,000	255,000
San Francisco	19,000,000	930,000	73,000

Insofar as fewer constituents results in fewer inquiries and contacts, and assuming that legislators at all levels of government have an equal amount of time, fewer constituents allow a local legislator to devote more attention to the concerns of a particular constituent. Of course, accounting for staff greatly complicates this inquiry. If legislators at higher levels of government have more, and abler, staff members than those at local levels, and assuming the staff members serve as perfect agents of the legislator, the effect of the constituents-to-official ratio in this regard could be neutralized. To the extent that staffs are not perfect agents and that actual face-to-face time with legislators matters, the lower constituents-to-official ratio is more important. Moreover, the lower constituents-to-official ratio, in addition to greater geographical proximity, makes it more likely that legislators will have informal interactions with constituents, which might make their legislation more responsive to a broader base of constituents. To be sure, the mix of at-large and district representatives, which varies among cities, may affect the degree to which councilors interact with their constituents and the costs of campaigning. Presumably, races for at-large city council seats cost more than those for district seats.[222] I do not focus on these differences here but I recognize that they may affect local political dynamics.

Unfortunately, good comparative data regarding the costs of campaigning and lobbying at the local level are hard to find.[223] Even though local campaigns are sometimes *more* expensive on a per-vote basis

221. Because senators represent the entire state and run for office statewide, one might use the entire state population (double this number) as a basis for comparison instead.

222. *See* ADAMS, *supra* note 207, at 87 (noting that in two cities that had both, at-large elections were more expensive than district elections).

223. *See id.* at 1 (noting that "knowledge of local campaign finance pales in comparison to that on the federal and state levels, largely a result of a paucity of data"). Adams attempts to fill this void by studying election data in eleven cities from 1993 to 2005. *See id.* ch. 2.

than elections for higher-level offices,[224] the absolute costs of local campaigns appear to be lower than those at higher levels of government. City council races are substantially cheaper than those for Congress[225] and appear to be cheaper—at least usually—than those for state legislature.[226] Hence, it takes decidedly less money for candidates to reach the electability threshold at the local level as compared to the federal level, and usually considerably less money than at the state level. Lower constituents-to-official ratios likely explain these lower costs in part, as lower ratios make lower-cost methods of campaigning (i.e., knocking on doors rather than television ads) more effective.[227] The perceived lower stakes of local elections may also play a role in keeping costs lower. Finally, local campaign finance regulations, like caps on donations and public financing, may play a role in reducing the costs of local

224. *Id.* at 54 ("[C]ity elections are even more expensive than many state and federal elections, largely due to a lack of interest among voters, minimal media coverage, and off-cycle elections that lead to low turnout.").

225. Adams's comprehensive study of local campaign finance, *id.*, does not compare local to state or federal races systematically. Rather, it compares campaign costs *across* cities. I use one of Adams's measurements—the median amount of campaign money (in 2006 dollars) raised by victorious candidates who were in at least one competitive race—as a basis for comparison with federal and state data. *See id.* at 53 tbl. 2. Specifically, Adams provides this number for four cities considered in this study (I round numbers to the closest thousand): New York ($183,000), Los Angeles ($728,000), Chicago ($229,656), and San Francisco ($243,579). *Id.* Since Adams is using data from 1993–2005 (except for San Francisco, for which he uses 2000–06), but stated in 2006 dollars, I will compare to data from the approximate middle of that time frame—2000—and not adjust for inflation to 2006 dollars. On the other hand, because it is more easily available, I will use the amount *spent* in 2000, and because competitive elections are vastly more expensive than noncompetitive, I will include only those elections where the winner's opponent spent more than $100,000. I also include *only* House of Representatives elections, which are usually much cheaper than competitive Senate elections. In these ways, the data *understate* the higher expense of federal races. For California, the 2000 average is $1,377,000. *See Congressional Races in California, 2000 cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/races/election.php?state=CA&cycle=2000 (last visited Jan. 25, 2014). For New York, $1,009,000. *Congressional Races in New York, 2000 cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/races/election.php?state=NY&cycle=2000 (last visited Jan. 25, 2014). For Illinois, $1,463,000. *Congressional Races in Illinois, 2000 cycle*, OPENSECRETS.ORG, https://www.opensecrets.org/races/election.php?state=IL&cycle=2000 (last visited Jan. 25, 2014).

226. For state legislative races, I also use data from 2000. In California, the median state house winner *raised* $471,000, but this includes all races, even noncompetitive ones. Nat'l Inst. on Money in State Pol., *California 2000 Elections*, FOLLOW THE MONEY, http://followthemoney.org/database/graphs/meta/meta.phtml (select "California;" then select "2000;" and select "House") (last visited Jan. 25, 2014). Among winners, nineteen raised more than $1 million, five raised more than $2 million, and one raised more than $6 million. *Id.* The numbers are higher, as one would expect, for the state senate. *Id.* (median senate winner raised $762,000). In New York, the median Assembly winner won in 2000 with a mere $61,000, although fourteen (of 150) successful candidates raised more than $200,000. *Id.* For the state senate, the numbers are predictably higher, with a median of $141,000, and eight (of sixty-two) raising more than $500,000. *Id.* In Illinois, the numbers for 2000 are a median of $131,000 for the House (with eleven of 118 over $500,000), and $299,000 for the senate (with six of twenty-two raising more than $500,000). *Id.*

227. *Accord* Hills, *supra* note 203, at 2027.

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campaigns.[228] Excluding the handful of public financing schemes, however, the relevant caps for campaign contributions to local candidates will usually be the same as the caps for contributions to state candidates.

Of course, a lower financial electability threshold need not militate against well-funded interest groups. If there are no or weak limits on campaign contributions, as is the case in a number of big cities,[229] a candidate can more easily get to the electability threshold with a handful of donations from interest groups like Big Tobacco and the Food Industry at the local level than she can at a higher level with a higher electability threshold. Moreover, limits on independent expenditures by third parties and "issue advertisements" are generally weak.[230] On the other hand, the option of amassing many smaller contributions is more viable at the local level; at a higher level of government, it may be more difficult for candidates to run credible campaigns without attracting contributions from at least some well-funded donor groups.[231] Further, in the handful of big cities with public financing, small-donor participation is magnified.[232] Thus, there is usually a more plausible path to electability for a candidate with less campaign cash at the local level than at higher levels of

228. *See, e.g.*, ADAMS, *supra* note 207, at 167–91 (reviewing the impact of public financing schemes on local elections); *see also* Paul A. Diller, *The Brief History of "Voter-Owned Elections" in Portland, Oregon: If Public Financing Can't Make It There, Can It Make It Anywhere?*, 49 WILLAMETTE L. REV. 637 (2013) (discussing Portland's experiment with public financing for municipal candidates).

229. In some states, courts interpret the state constitution as prohibiting any limits on campaign contributions or spending, *e.g.*, Vannatta v. Kiesling, 931 P.2d 770 (Or. 1997) (interpreting OR. CONST. art. I, § 8), thus going beyond current federal First Amendment law. *E.g.*, Randall v. Sorrell, 548 U.S. 230 (2006). For more on the state constitutional background, see Kristine Cordier Karnezis, *State Regulation of the Giving or Making of Political Contributions or Expenditures by Private Individuals*, 94 A.L.R.3d 944 (1979 & Supp. 2011). In addition to state constitutional restrictions, state statutes may establish a minimal regulatory framework for campaign contributions and spending at the local level, *see* CHIP NIELSEN ET AL., STATE CAMPAIGN FINANCE LAWS 6 (2007) ("State laws usually apply to campaigns for state office . . . as well as to campaigns for local office."); *id.* App. A (offering state-by-state overview), and may also preempt the authority of cities to regulate further. *E.g.*, WASH. REV. CODE § 42.17.128 (2012) (preempting Seattle and King County's publicly financed campaign programs); *see also* Paul Ryan, *Beyond BCRA: Cutting-Edge Campaign Finance Reform at the Local Government Level*, 92 NAT'L CIV. REV. 3, 7 (2003).

230. *See infra* note 249.

231. For a description of who tends to donate to local campaigns, see ADAMS, *supra* note 207, at ch. 6.

232. New York City, for instance, matches with public funds donations of up to $175 for city council candidates by city residents at a six-to-one ratio. N.Y.C., N.Y., MUN. CODE §§ 3-701, 703 & 705 (2013) (optional public financing). Other top twenty-five cities with public financing include Austin, Los Angeles, and San Francisco. *See* Jessica A. Levinson & Smith Long, *Mapping Public Financing in American Elections*, CTR. FOR GOVERNMENTAL STUDIES 4–5 (2009).

government.[233] Assuming that campaign contributions affect politicians' stances,[234] this dynamic may reduce the relative influence of some well-funded interest groups at the local level, thereby enabling public health organizations to achieve comparatively greater influence.

It bears noting that the constituents-to-official ratio for mayors is also relevant due to the role of the mayor in the local legislative (and administrative) processes. Obviously, because mayors are elected at-large, the ratio is much higher than for councilors elected by district. In New York City, for instance, the ratio is more than eight million. The constituents-to-official ratio for mayors, however, will necessarily be far lower than the ratio for President or governor of the state in which the city is located. With respect to campaign finance, unlike city council races, mayoral races are more commonly high-profile and expensive.[235] As expensive as mayoral campaigns may be, however, they will always be cheaper than presidential races, and will usually lag gubernatorial races as well. Thus, even if mayors run more expensive campaigns than city councilors and represent far more people than councilors elected by district, the relevant comparison is to executive officials at higher levels of government.

Also stemming from local government's smaller scale are reduced lobbying costs for interest groups that are based within the city.[236] There is some evidence that lobbying expenditures have a greater influence on public policy than campaign contributions.[237] Clayton Gillette has shown why it is easier for interest groups to coalesce physically at the local level

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233. Adams finds that "the proposed benefits of public funding [have] fail[ed] to materialize," *see* ADAMS, *supra* note 207, at 189, but he is more hopeful about "full" public financing, which only Albuquerque and Santa Fe, New Mexico, currently have. *Id.* at 190; Levinson & Long, *supra* note 232, at 4–5; Tom Sharpe, *Campaign Financing Overhauled*, SANTA FE NEW MEXICAN, Oct. 15, 2009, at A-8, *available at* http://www.thefreelibrary.com/CAMPAIGN+FINANCING+OVERHAULED.-a02097 12548. Portland, Oregon, had public financing from 2006–10. *See* Diller, *supra* note 228.

234. *See infra* note 237.

235. *See* Schleicher, *supra* note 212, at 420; ADAMS, *supra* note 207, at 93 (concluding that big-city mayoral elections are "very expensive," with costs akin to races for Congress or governor).

236. Comprehensive data on the amount of money that interest groups spend lobbying local officials (as opposed to state and federal officials) are not readily available.

237. Whether campaign contributions buy legislative favors or merely reflect pre-existing ideological preferences of contributors is much-debated among political scientists. *See* Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives* 4–6 (Dec. 3, 2013) (unpublished manuscript) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2313232) (recounting debate). Recent findings, however, show that "returns on lobbying [expenditures] are far in excess (and more easily observed) than that expected on spending on elections." *Id.* at 13 (citing studies from 2006 and 2009).

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due to higher transportation costs to reach the state capital than city hall.[238] This assumes, of course, that each interest group is composed of members equally distributed around the city or state. It may be that certain interest groups—like public health organizations—are clustered in discrete cities and, therefore, may have an advantage in these cities over other groups. Assuming, however, that interest groups draw from at least some constituents within the jurisdiction whose government they are lobbying, it may be cheaper for a group to attend a city council meeting than a state legislative—or congressional—hearing.[239] Further, since city councils usually have fewer members, the costs of lobbying members one-by-one will be lower.[240] In sum, while the utilitarian communitarian account may not convincingly explain heightened local regulation to a public choice audience, its focus on smaller-scale governance provides useful clues. Clearly, more comprehensive empirical data, like time-stable vertical comparisons of campaign and lobbying costs, would be helpful.

B. Concentrated Political Preferences

One seemingly obvious explanation for heightened local public health regulation is that the residents of most large cities are notoriously politically "liberal" or "progressive." Cities, therefore, provide a concentrated political majority that is decidedly not available at the federal level, and that is rarely, if ever, available at the state level.[241] In New York City, for instance, 69% of registered voters are Democrats, as compared to a mere 11% Republican, a 58% advantage.[242] The closest state with such lopsided party registration is Rhode Island, in which Democrats enjoy a 37% advantage.[243] Presidential election results, which may be a more reliable indicator of voter ideology than party registration,[244] show a similar disparity. In 2012, for instance, Barack Obama defeated Mitt Romney 81% to 18% in New York City, 85% to 14% in Philadelphia, and

238. CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 121 (2011).

239. It is, of course, open to question how much physical presence matters to lobbying effectiveness.

240. GILLETTE, *supra* note 238, at 121.

241. *See* Jonathan Rodden, *The Geographical Distribution of Political Preferences*, 13 ANN. REV. POL. SCI. 321 (2010).

242. *New York State Voter Enrollment by County, Party Affiliation and Status*, BD. OF ELECTIONS (Apr. 1, 2012), http://www.elections.ny.gov/NYSBOE/enrollment/county/county_nov11.pdf (using "active" numbers only).

243. Jeffrey M. Jones, *State of the States: Political Party Affiliation*, GALLUP (Jan. 28, 2009), http://www.gallup.com/poll/114016/state-states-political-party-affiliation.aspx.

244. *See* Schleicher, *supra* note 212, at 441 n.77.

83% to 13% in San Francisco.[245] No state came close to such widespread support for either candidate,[246] and nationally, Obama won the popular vote by a modest margin of 51% to 47%.[247]

Assuming that politicians try to appeal to the median voter,[248] these numbers show just how far to the left, at least on "national" issues, voters in many of the most populous cities lean.[249] This concentrated political liberalism gives city officials more policy space on the left of the spectrum than that enjoyed by their counterparts at the state or federal levels. Since views on public health regulation may roughly correlate to overall political ideology, it is perhaps not surprising that big cities are comparatively more hospitable to such regulation. Compounding the partisan demographic concentration, big cities do not include within their geographic boundaries many of the agricultural interests—such as tobacco or corn farmers—that may be inclined to oppose some of the regulations discussed in Part I. In addition, only some cities have the concentrated business interests—e.g., Coca-Cola in Atlanta, the tobacco service industry in Charlotte, North Carolina—that are likely to directly oppose certain public health regulations. Of course, industry groups are free to influence the democratic process in all cities by donating to political campaigns and paying for independent expenditures.[250] As evidenced by the defeat of a handful of local soda taxes in the 2012 election, industry interests are willing to fight hard even at the local level.[251] Moreover, even if they are not directly represented, Big Tobacco and the Food Industry likely have surrogates

245. *Elections 2012*, N.Y. TIMES (Nov. 29, 2012), http://elections.nytimes.com/2012/results/president. Presidential election results within cities are not easy to find, as most states run their elections on a county level. The above-cited cities, however, either constitute their own counties or a collection of counties.

246. The greatest statewide spreads of victory for Obama were 67% to 31% in Vermont, 63% to 36% in Rhode Island, and 63% to 36% in New York, whereas for Romney they were 73% to 25% in Utah, 69% to 28% in Wyoming, and 67% to 33% in Oklahoma. *Id.*

247. *See 2012 Presidential General Election Results*, DAVID LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, http://uselectionatlas.org/RESULTS/ (last visited Jan. 25, 2012).

248. *See generally* Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON., Apr. 1957, at 135.

249. In 2012, for instance, the only three cities among the top fifty in population to prefer Romney to Obama were Phoenix (sixth in population); Ft. Worth, Tex. (sixteenth); and Oklahoma City (thirty-first). *See* Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, THE ATLANTIC (Nov. 30, 2012, 11:17 AM), http://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/.

250. Whether and the extent to which corporations can donate directly to campaigns varies by state, but state limits on corporate spending on independent expenditures are rapidly being dismantled under the federal First Amendment after Citizens United v. FEC, 558 U.S. 310 (2010). *See, e.g.*, Am. Tradition P'ship, Inc. v. Bullock, 132 S. Ct. 2490, 2492 (2012) (reversing Montana Supreme Court decision that had upheld state's ban on corporate spending on independent expenditures).

251. *See* Bittman, *supra* note 94.

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within populous cities to defend their interests, like convenience store owners and fast-food franchisees. Nonetheless, the Food and Tobacco Industries' reduced physical presence in many cities may diminish their influence.

There remain many reasons to be skeptical, however, of the value of political preference concentration as an explanation for local public health innovation. First, while concentrated political preferences and one-party dominance might explain residents' willingness to re-elect (or at least not reject) local officials who support heightened public health regulations, they still do not explain why such policies emerge from the local legislative process. After all, constituents might prefer a particular policy when responding to a survey, but without an organized interest group's support, that policy is unlikely to make it through the legislative process. Thus, while an ideological leaning in favor of public health policies might grease the wheels of the legislative process, the initial push behind a proposal will often emanate from an interest group, raising the question of why such interest groups seem capable of a stronger push at the local level.

Second, views on some of the specific local public health policies do not neatly track the divides at the national level between "liberal" and "conservative," or "Democrat" and "Republican." For instance, New York City's portion-cap rule for sugar-sweetened beverages has united Sarah Palin, Glenn Beck, and the NAACP in opposition.[252] Similarly, the city's proposal, rejected by the USDA, to prohibit using SNAP benefits to pay for sugar-sweetened soft drinks had supporters and opponents on both sides of the ideological and partisan spectra.[253] The pursuit of these programs thus cannot be explained credibly by simply pointing to New York City voters' preferences in national elections. A similar dynamic exists with respect to soda taxes, which are opposed by those who dislike

252. Sarah Palin USA, TWITTER (Mar. 11, 2013, 5:47 PM), https://twitter.com/SarahPalinUSA/status/311277308273115139 (hailing the trial court order enjoining the rule); Sal Gentile & Allison Koch, *NAACP President Comes Out Against Blocked NYC Soda Ban*, NBCNEWS (Mar. 16, 2013, 12:18 PM), http://www.nbcnews.com/id/51207127/t/naacp-president-comes-out-against-blocked-nyc-soda-ban/#. Ud3p5234Jvo; *Worst Mayor Ever: Bloomberg's Soda Ban Passes 9–0*, GLENN BECK (Sept. 13, 2012, 4:34 PM), http://www.glennbeck.com/2012/09/13/worst-mayor-ever-bloomberg%E2%80%99s-soda-ban-passes-9-0/.

253. Monica Eng, *Politicians, Health Advocates Seek Transparency, Restrictions in Food Stamp Program*, CHI. TRIB. (June 20, 2012), http://articles.chicagotribune.com/2012-06-20/news/ct-nw-food-stamp-spending-20120620_1_food-stamp-junk-food-supplemental-nutrition-assistance-program (noting that "[s]upporters and opponents of" such changes to SNAP "are remarkably diverse groups, with conservative fiscal hawks and liberal public health advocates tending to favor the idea," while "[o]n the other side are not only large food corporations and anti-regulation conservatives but groups working to feed the hungry").

higher taxes generally, as well as by advocates for the poor who consider such taxes regressive.[254] Moreover, issue preferences at the national and local levels are hardly stable. City initiatives, whether pushed by evangelizing public officials or public health interest groups, can *shape* public preferences that were either nonexistent or loosely formed before cities put certain issues on the public agenda.

Third, even if fluid, preference intensity for public health regulations among voters likely rank far lower than preferences for "bread-and-butter" issues like schools, public safety, affordable housing, and transportation.[255] If so, the concentrated political preferences and one-party dominance so often seen in big cities may help explain heightened public health regulation in a circuitous way. For Schleicher, concentrated political preferences—or, more precisely, concentrated political party registration—is reason to believe that cities will be "uncreative" in the policy realm, at least with respect to "local," as opposed to "national," issues.[256] As Part I demonstrates, cities are anything but "uncreative" in the realm of public health. Moreover, the prolific local regulation of tobacco and obesity challenges any dichotomy between "local" and "national" issues. On the other hand, the lack of competition in big-city council elections may help explain why the low-intensity issue of public health shoots to the top of the agenda for some city officials.[257] The relative political insulation enjoyed by city councils allows them to proceed with regulations that may, in fact, be somewhat unpopular among the general public. Schleicher, therefore, may be correct that the lack of competition in city council elections results in "unrepresentative" lawmaking, but the record of innovation demonstrates that this lawmaking is decidedly not "uncreative."[258]

IV. THE STRUCTURAL COMPONENT OF LOCAL PUBLIC-HEALTH INNOVATION

A significant, but heretofore undervalued, reason why local governments are more amenable to local health policy innovation is their streamlined legislative structure. This Section explains how the

254. *See* Christopher Bonanos, *Taxa-Cola*, N.Y. MAG. (Apr. 9, 2010), http://nymag.com/news/intelligencer/65373/.

255. *See supra* note 187.

256. Schleicher, *supra* note 212, at 424, 426.

257. *See id.* at 419–20. As Schleicher notes, even in big cities with formally nonpartisan election systems, there is still very little competition for council seats. *Id.* at 421.

258. *Id.* at 426.

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streamlined nature of local lawmaking, combined with the lower campaign and lobbying costs discussed above, provides a more favorable venue for public health interest groups to push for heightened regulation. For any interest group to succeed in creating law, it must overcome the inertia that is endemic to the legislative process. With a more streamlined legislative process, cities are more structurally inviting for the proponents of regulatory change than the more sclerotic state and legislative processes.

A. Cities' Streamlined Legislative Structure

Unlike the national and state governments, cities do not have bicameral legislatures. While most city charters allow for the mayor to veto bills, a supermajority of the city council can override a veto.[259] Because city councils are unicameral, a supermajority is needed in only one legislative body—rather than two—to overcome executive resistance. For instance, when Mayor Gavin Newsom vetoed the San Francisco Board of Supervisors' bill restricting fast-food toy giveaways linked to meals of low nutritional quality, the Board overrode his veto by an 8-to-3 vote.[260] Putting aside the potential veto threat, city councils generally do not require supermajorities to pass legislation. In Congress, by contrast, it is now almost standard that a bill must clear the sixty-vote filibuster threshold in the Senate to become law.[261] In many states, state constitutional provisions require supermajorities to enact certain kinds of laws, particularly those related to raising taxes or revenue.[262] City councils often also lack the extensive committee structures prevalent in state and national legislatures, which can easily bottle up a proposal's chance of becoming law.[263] The net result is that cities have fewer and less robust

259. *E.g.*, *Legislative Process*, THE N.Y.C. COUNCIL, http://council.nyc.gov/html/about/legislative.shtml (last visited Jan. 25, 2014) (requiring vote of two-thirds of council members to override mayoral veto); *see also U.S. Mayors*, CITYMAYORS, http://www.citymayors.com/ mayors/us-mayors.html (last updated Feb. 13, 2014). In the council-manager or commission systems, which are less common among big cities than they are among smaller-sized municipalities, the mayor may lack veto power. *See id.*; Victor S. DeSantis & Tari Renner, *City Government Structures: An Attempt at Clarification*, 34 ST. & LOC. GOV'T REV., Spring, 2002, at 95, 99.

260. *See* Rachel Gordon & Heather Knight, *Supes Override Meal-Toy Veto*, SFGATE (Nov. 24, 2010, 4:00 AM), http://www.sfgate.com/bayarea/article/supes-override-meal-toy-veto-3244821.php.

261. *See, e.g.*, Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 477–79 (2011).

262. *See* Max Minzner, *Entrenching Interests: State Supermajority Requirements to Raise Taxes*, 14 AKRON TAX J. 43, 55–57 (1999).

263. *See* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 n.5 (1992) (describing "veto players" in federal legislative process); *see also* GILLETTE, *supra* note 238, at 124 (noting that state legislatures have more and stronger "institutional safeguards," like committees, than local legislatures).

"vetogates"—that is, institutional obstacles to the passage of legislation. "Bicameral legislatures," on the other hand, "privilege the status quo," as Gillette notes, by making it harder to enact new legislation.[264]

Many municipal legislatures are nonpartisan. Congress, on the other hand, uses an extremely partisan system of selecting chamber and committee leadership, and every state legislature save Nebraska relies on partisan affiliation as well.[265] Even where cities use partisan elections, however, the overwhelming tilt toward one political party (Democratic) in the largest cities means that city councils are unlikely to be locked in a close partisan divide.[266] The party structure in Congress and some state legislative houses often requires that a bill have majority support of the majority caucus to move forward.[267] Thus, a bill that enjoys the support of a majority of members of Congress may easily die if it does not meet this threshold. The reduced role of partisanship at the local level thus lowers another barrier to legislative enactment.[268] Of course, there remain significant barriers to passing legislation at the local level. Powerful city councilors can bottle up legislation singlehandedly.[269] Intraparty "council wars" can be as debilitating as fierce partisan warfare.[270] The point here is simply comparative: city councils have fewer institutional bottlenecks.

Overcoming the various barriers to legislative enactment at any level of government requires that interest groups and policy evangelists expend time, effort, and money to place their issues prominently on the legislative agenda. Because the smaller scale of local government reduces both campaign and lobbying costs, cities are a more affordable venue for

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264. GILLETTE, *supra* note 238, at 181; *see also* Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 INT'L REV. L. & ECON. 145, 155 (1992) (describing "bicameralism . . . as a general status-quo-preserver").

265. LYNN HELLEBUST & KRISTEN HELLEBUST, STATE LEGISLATIVE SOURCEBOOK 2012: A RESOURCE GUIDE TO LEGISLATIVE INFORMATION IN THE FIFTY STATES 329 (2012). Nebraska is also the only state with a unicameral legislature. *Id.*

266. *See* Schleicher, *supra* note 212, at 419–20.

267. *See infra* note 352 and accompanying text (discussing the House of Representatives' "Hastert rule").

268. For more on the importance of one-party dominance in the legislative process, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2325–29 (2006).

269. For instance, for two and a half years, New York City Council Speaker Christine Quinn singlehandedly refused to allow a vote on a paid sick-leave bill that was certain to pass. *See* Michael Howard Saul, *Quinn Signs On to Paid Sick Leave*, WALL ST. J. (Mar. 28, 2013, 8:46 PM), http://online.wsj.com/article/SB10001424127887324000704578389031867416730.html?mod=WSJ_NY_LEFTTopStories.

270. *See, e.g.*, Dick Simpson & Tom Carsey, *Council Coalitions and Mayoral Regimes in Chicago*, 21 J. URB. AFF. 79, 88 (1999) (noting that "two large, diametrically opposed blocs" were "in perpetual conflict" during Chicago's mid-1980s "Council Wars" under Mayor Harold Washington).

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pushing regulatory change than states and the federal government. In combination with their affordability as a policymaking venue, therefore, cities' streamlined legislative process makes them especially inviting jurisdictions for public health policy change.

Of course, Big Tobacco, the Food Industry, and their local surrogates have just as much at stake in lobbying *against* public health proposals that may harm their business interests as proponents have in lobbying for such proposals. Because industry groups are often better-funded than the proponents of heightened regulation,[271] they too may benefit from the lower costs of lobbying local officials. It is also cheaper for them to lobby public officials at the local level than at higher levels, and they have more money to do so than the public health interest groups. Moreover, if local campaign contributions are unlimited, then Big Tobacco and the Food Industry are theoretically capable of overwhelming public health organizations with outsized, asymmetrical contributions.[272]

In addition, Big Tobacco and the Food Industry might, at least in theory, seek to capitalize on cities' streamlined legislative structure to achieve affirmative legislation that loosens the regulatory environment. At the state and federal level, for instance, the Food Industry has sought legislation conferring immunity from obesity-related tort suits.[273] In part because many state legislatures have a more streamlined legislative system than Congress, the Industry achieved success in twenty-five states,[274] while a federal "cheeseburger bill," although passed by the House of Representatives, was stymied by a Senate vetogate.[275] Thus, a more streamlined legislative process can sometimes benefit industry groups too.

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271. "Mom-and-pop" stores selling cigarettes and soda may have little money to spare on lobbying or litigation, but are likely to be supported by industry allies in opposing certain public health regulations. *E.g.*, 23–34 94th St. Grocery Corp. v. N.Y.C. Bd. of Health, 685 F.3d 174, 174 (2d Cir. 2012) (small grocery store joined by Big Tobacco in challenging New York City's graphic warning sign requirements); Verified Article 78 & Declaratory Judgment Petition at 7–8, N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, No. 653584/2012 (N.Y. Sup. Ct. Oct. 12, 2012) (noting that plaintiffs challenging New York City's soda serving size rule include representatives of hundreds of "small businesses" as well as national trade organizations).

272. As noted above, local campaign contributions are generally governed by the same standards that exist for state candidates. In some states, like Oregon, unlimited contributions to political candidates are permitted. *See* Diller, *supra* note 228, at 638.

273. *See, e.g.*, Pelman v. McDonald's, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).

274. *See supra* note 92.

275. *See* Personal Responsibility in Food Consumption Act of 2005, H.R. 494, 109th Cong. (2005) (passed House by vote of 306–120); Commonsense Consumption Act of 2005, S. 908, 109th Cong. (2005) (never moved out of Senate Judiciary Committee).

The key point here, however, is comparative: proponents of public health regulation are likely to be less overwhelmed by opposition spending at the local level than at higher levels of government, particularly when they are pushing for affirmative enactment of a new regulatory scheme. Moreover, since public health organizations are generally seeking more changes to the regulatory status quo, given the nature of the problems they are trying to address, they benefit disproportionately from local government's structure and lower costs. Big Tobacco and the Food Industry, by contrast, often prefer the status quo. When they seek to loosen the regulatory regime, they are unlikely to focus on the local level given cities' limited control over "private law" subjects like torts,[276] and cities' general inability, due to preemption, to enact a regulatory floor that is lower than the state or national standard.[277]

The lack of partisan competition for city council seats may also assist public health proponents insofar as it is difficult for opponents of their proposed legislation to seek out credible candidates in the next local election to run against supporters of heightened regulation.[278] Thus, even though local elections are cheaper, they may also be stickier—less price-sensitive—and therefore less likely to be disproportionately influenced by better-funded interest groups. In this regard, elections for local officials stand in contrast to local direct democracy, in which an interest group like the soda industry may achieve more success by spending millions of dollars to attack directly a regulation it opposes.[279]

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276. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109 (2012) (surveying the "private law exception" to municipal home-rule authority).

277. *See* Diller, *supra* note 5, at 1146 (noting that state courts frequently allow cities to pass ordinances "more stringent" than state law, but not less so, when assessing preemption claims).

278. If there is no partisan competition in the general election, one might expect primary elections to provide a better opportunity for ousting councilors. Malcolm E. Jewell & Lee Sigelman, *Voting in Primaries: The Impact of Intra- and Inter-Party Competition*, 39 W. POL. Q. 446, 452 (1986) (concluding that dominance in a jurisdiction by one party is likely to increase primary participation for that party). Schleicher is skeptical that intraparty primaries for city council seats can allow for serious ideological competition. Schleicher, *supra* note 212, at 461.

279. *See supra* note 157; *see also* Jamin B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform*, 1 N.Y.U. J. LEGIS. & PUB. POL'Y 21, 23–28 (1997) (explaining how corporate contributions to initiative campaigns are particularly effective at defeating proposed measures).

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B. Normative Implications

James Madison famously opined that the federal government would check factionalism more effectively than state governments.[280] Although Madison did not include local government in his analysis, his concern about state government applies perforce, and to a greater degree, to local governments that operate on a smaller scale. Consistent with Madison, therefore, the success of public health legislation at the local level may simply reflect "factional" dominance. Much recent scholarship, however, undermines "Madison's equation of small jurisdictional size with tendencies for a factional dominance."[281] Focusing on states, Boushey shows that different governmental systems ("hosts") are variously susceptible to the policy proposals of different interest groups.[282] While a state's population and wealth can be relevant, the state's lawmaking structure plays a very important, if not paramount, role.[283] Expanding the inquiry to the local level, Gillette argues that, in some ways, local governments may be less prone to capture than higher levels of government, at least by certain interest groups.[284]

Madison's faith in the federal government's resistance to faction capture was based more on the wider geographic base from which the federal government would draw than on any structural differences between the federal and state governments. As noted above, the fact that big-city officials represent a very small area of urbanized territory likely means that the interests of certain agricultural and other businesses are not represented to the same degree as they would be at the national or (some) state levels. The normative implications of this reduced representation depends on whether these interest groups exert "too much" influence at other levels of government, in part due to their superior financial ability to influence policy through lobbying and campaign contributions. An obvious way that the federal system amplifies the power of agricultural

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280. THE FEDERALIST NO. 10 (James Madison) ("The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority . . . the more easily will they concert and execute their plans of oppression.").

281. GILLETTE, *supra* note 238, at 25; Pranab Bardhan & Dilip Mookherjee, *Capture and Governance at Local and National Levels*, 90 AM. ECON. REV., May, 2000 at 135, 135 (rejecting Madisonian view that local governments are more prone to capture, and noting heterogeneity of factors that affect a level of government's susceptibility to capture).

282. *See generally* BOUSHEY, *supra* note 161.

283. *Id.* at 19 (postulating that a state's receptiveness to different types of policies will depend on differences across key state political actors and institutions).

284. GILLETTE, *supra* note 238, at 180–81.

interests is through the allocation of congressional seats, particularly in the Senate, which violates one-person, one-vote egregiously.[285] City councils, by contrast, are compelled to comply with one-person, one-vote.[286]

Although Gillette is not convinced that local governments are always more susceptible to factional capture, he worries that vested interest groups might sometimes manipulate city councils to pass "redistributive" ordinances like living wages for "malign" ends.[287] For Gillette, these policies are "malign" because they cannot credibly be reconciled with all constituents' expected interests at the time of enactment.[288] However valid Gillette's concerns regarding local government capture are in the context of "living wage" ordinances, they are largely inapposite to the public health context. The proponents of public health regulation do not seek to "redistribute" wealth for reasons that can credibly be called "malign." To be sure, industry profits may be reduced as a result of heightened regulation. For low-income and certain minority populations, better public health may, in the long-term, result in increased wealth. But the reasons for this "transfer," if it can be called that, are premised on the notion that a healthier life is a better life and should be enjoyed by all (or, at least more), rather than based on a desire to simply transfer a certain number of dollars from one group to another. Moreover, if effective, regulations that lower tobacco use and obesity will benefit federal and state taxpayers generally (and taxpayers in some cities to varying degrees), as well as private employers and private insurers.

V. HORIZONTAL COMPARISON OF CITY INNOVATION

This Part compares the recent records of public health innovation *across* the most populous cities. A cross-city comparison can help test the structural thesis of this Article, as well as reveal other factors that may play a role in local public health innovation. Table 2 lists which cities among the top twenty-five in population adopted each of nine prominent public health regulations discussed in Part I. Of the tabulated regulations, five target tobacco: bans on outdoor advertisements; comprehensive smokefree indoor air laws; limitations on which retailers may sell tobacco;

285. *See* U.S. CONST. art. I, § 3. The electoral college and the House of Representatives also violate one-person, one-vote, but to a much lesser degree *See id.* (guaranteeing each state at least one representative); *id.* art. II, § 1 (establishing the electoral college).

286. *See* Avery v. Midland County, 380 U.S. 474, 476 (1968).

287. Like Gillette, Schragger also explores heightened local regulation through the lens of "redistribution." *See* Schragger, *supra* note 189, *passim*.

288. GILLETTE, *supra* note 238, at 79.

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graphic warning sign requirements for retailers; and bans on flavored tobacco. Four regulations focus on obesity prevention: banning trans fats; menu labeling requirements; toy giveaway restrictions; and portion sizes for sugar-sweetened beverages. I compare these nine policies because they sought to change the regulatory status quo significantly, were likely to or in fact did arouse substantial industry opposition, and were adopted by at least one of the twenty-five most populous cities. These nine policies are by no means exhaustive of local innovation with respect to combating tobacco use and obesity. Moreover, crude cutoffs had to be made in amassing this data. For instance, I include only indoor smoking bans that applied to all bars and restaurants, which omits ordinances like San Francisco's and San José's that, while innovative for the early 1990s, did not go so far. Despite these limitations, the data in Table 2 provide at least a preliminary window through which to assess horizontally cities' records of public health regulation.

http://openscholarship.wustl.edu/law_lawreview/vol91/iss5/7

TABLE 2: SUMMARY OF INNOVATION FOR TOP-25 CITIES

	Tobacco					Obesity						
	outdoor ad restriction	smokefree workplace	place-of-sale restrictions	sign requirement	ban on flavored	trans fat ban	menu labeling	toy giveaway restriction	soft drink size limits	subtotal LO + VI	subtotal AR	total
New York City	LO	LO		AR	LO	AR	AR		AR	3	4	7
Los Angeles	LO	(early state)				(state)	(state)			1	0	1
Chicago	LO	LO								2	0	2
Houston	(state)	LO								1	0	1
Philadelphia		LO				LO	LO			3	0	3
San Diego	LO	(early state)				(state)	(state)			1	0	1
Detroit	LO	(PE)								1	0	1
Dallas	(state)	LO								1	0	1
Phoenix		(state)								0	0	0
San Antonio	(state)	LO								1	0	1
San Jose	(early state)	strict rule but exempted bars				(state)	(state)			0	0	0
Indianapolis		LO								1	0	1
Baltimore	LO	LO				LO				3	0	3
San Francisco	LO	strict rule but exempted bars	LO			(state)	LO	LO		4	0	4
Jacksonville		(PE)								0	0	0
Columbus		LO*								1	0	1
Memphis		(PE)					(state)			0	0	0
Washington, D.C.		LO								1	0	1
Boston		AR	AR			AR	(state)			0	3	3

	Tobacco					**Obesity**						
	outdoor ad restriction	smokefree workplace	place-of-sale restrictions	sign requirement	ban on flavored	trans fat ban	menu labeling	toy giveaway restriction	soft drink size limits	subtotal LO + VI	subtotal AR	total
Seattle	(county AR)	(state)				(county AR)	(county AR)			0	0	0
El Paso	(state)	LO								1	0	1
Nashville		(PE)					AR (but then PE) (state)			0	1	1
Milwaukee	LO		n/a	n/a	n/a	n/a	n/a	n/a	n/a	1	0	1
Cleveland	LO	n/a	n/a	n/a	n/a	LO, but n/a	n/a	n/a	n/a	1	0	1
New Orleans		n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	0	0	0
Denver	n/a		n/a	n/a	n/a	n/a	n/a	n/a	n/a	1	0	1
Austin	n/a	VI								1	0	1
Ft. Worth	n/a	n/a								0	0	0
Charlotte	n/a	n/a								0	0	0
Subtotal LO + VI												
Subtotal AR												
Total												
	Tobacco sum: 26 (22 LO; 3 AR; 1 VI)					Obesity sum: 10 (5 LO; 5 AR)						
	Total: 36 (27 LO; 8 AR; 1 VI)											
LO = legislative ordinance; AR = administrative regulation; VI = voter initiative; state = statewide law or regulation; PE = statewide preemption												
Cities in bold are in the top-25 in the 1990, 2000, and 2010 censuses.												
Cities in italics are in the top-25 in one census; underlined cities are in the top-25 for two censuses; *see* Appx. 3.												
"n/a" = not in top-25 for the particular time frame												
*Columbus's smoking ban was enacted by the city council, but affirmed by the voters in a referendum shortly thereafter.												
Because the Columbus council enacted it initially, I count it as "LO."												

Table 2 shows that New York City is the clear leader in innovation, adopting seven of the nine tabulated policies. The only other cities to have adopted at least three of the nine policies are Baltimore, Boston, Philadelphia, and San Francisco, the latter of which adopted four.[289] By contrast, Jacksonville, Memphis, Phoenix, San José, and Seattle stand out among top twenty-five cities for having adopted none, although Seattle's case is more complicated. Seattle is under the jurisdiction of the joint King County-Seattle Board of Health, which adopted three of the nine policies. Because Seattle jointly funds the Board and participates in its governance, it is inaccurate to include Seattle among the laggards.[290] In fact, one might even classify Seattle as an innovation leader, but its joint governance of public health with the county complicates comparing it to other cities.

A. Innovation Leaders: New York City, Baltimore, Boston, Philadelphia, and San Francisco

New York City, the undisputed innovation leader, enjoys a host of advantages that may help explain its record. It is by far the most populous city in the United States, and the largest city by far in the nation's largest metropolitan area.[291] Unlike some other big cities, its population has continued to grow in the last three decades.[292] It is the nation's unofficial capital of finance, art, and culture, thereby guaranteeing a steady flow of highly educated and prosperous residents. Real estate values are stratospheric.[293] As the most populous city, New York also has a

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289. Because Chicago banned flavored tobacco for such a brief period of time, *see supra* note 77 and accompanying text, I do not include it among the cities that have adopted three tabulated policies, even if it adopted two others. *See* Table 2, *supra*.

290. *See* KING CNTY., WASH., CODE ch. 2.35 (2013); SEATTLE, WASH., MUNICIPAL CODE § 3.30.010 (2013) (referring to 1981 agreement between Seattle and King County regarding joint health board composition and department funding).

291. *See* App. 3; *see Population Estimates, Metropolitan & Micropolitan Statistical Areas, Cumulative Estimates of Population Change for Metropolitan Statistical Areas and Rankings: April 1, 2010 to July 1, 2011*, U.S. CENSUS BUREAU, http://www.census.gov/popest/data/metro/totals/2011/ (last visited Jan. 25, 2014) (estimating the New York City metropolitan area population at nineteen million, with Los Angeles ranking second, at nearly thirteen million).

292. *See* Edward L. Glaeser, *Urban Colossus: Why Is New York America's Largest City?*, 4 tbl. 1 (Harv. Univ. A. Alfred Taubman Ctr. for State & Loc. Gov't, Working Paper No. 05-05, Apr. 2005), *available at* http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/taubman/working_papers/Glaeser_05_Colossus.pdf.

293. *See* Julie Zeveloff, *The Ten Most Expensive Cities in the United States*, BUS. INSIDER (Feb. 12, 2013, 8:39 PM), http://www.businessinsider.com/most-expensive-urban-areas-in-america-2013-2?op=1 (noting that the average home prices in Manhattan and Brooklyn were $1.3 million and $959,000, respectively).

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municipal government with a large and well-developed bureaucracy.[294] The city has a "strong mayor"[295] elected to four-year terms, and a full-time city council of fifty-one partisan members elected by district (for a 2011 constituents-to-official ratio of 162,000) every four years.[296] The city has an extensive, but necessarily optional, public financing system for council and mayoral candidates.[297] The city also pays a relatively large share of Medicaid expenses and subsidizes public hospitals, and thus has a fiscal incentive to improve public health.[298] With respect to formal authority, New York City enjoys broad regulatory home-rule powers but is subject to state legislative preemption.[299] The city's population is fairly homogenous politically, leaning strongly toward the Democratic party.[300]

It is notable that a relatively high percentage of New York City's policies have been adopted by administrative regulation rather than by legislative ordinance. Indeed, four of the seven tabulated policies that New York adopted were promulgated as rules by the Board of Health rather than enacted as ordinances by the council. Clearly, administrative rulemaking in New York is an important source of public health policy innovation. The success of the legal challenge to the Board's sugary beverage portion-cap rule now threatens the degree to which administrative rulemaking, rather than city council lawmaking, can be used to promote public health in New York City.[301]

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294. While good numbers are difficult to obtain, it appears that New York City employed more than 300,000 people as of 2002. *Bloomberg Budget Goes Easy on Headcount*, N.Y. FISCAL WATCH (Feb. 20, 2002), http://www.nyfiscalwatch.com/html/fwm_2002-04.html. That number is higher than that of every state except California, *see Government Employment & Payroll, 2011 State Government Excel Spreadsheet*, U.S. CENSUS, http://www.census.gov/govs/apes/ (last visited Jan. 25, 2014), although the City's total includes teachers and educational support staff, who make up the largest share of state *and* local employees, but are usually on the local payroll. *See* Elizabeth McNichol, *Some Basic Facts on State and Local Government Workers*, CTR. FOR BUDGET & POL. PRIORITIES (June 15, 2012), http://www.cbpp.org/cms/index.cfm?fa=view&id=3410.

295. In the "strong mayor" form of government, the mayor is an independently elected executive official who usually exercises veto power over acts of the council. *See* June Sager Speakman, *Urban Politics*, *in* 21ST CENTURY POLITICAL SCIENCE: A REFERENCE HANDBOOK 703 (John T. Ishiyama & Marijke Breuning eds., 2011)

296. *See* N.Y.C., N.Y. CHARTER chs. 1, 2 [hereinafter NYC CHARTER]. While the public advocate, elected citywide, is technically a member of the council, she lacks a vote. *Id.* §§ 22a, 24c(9)(e). Every twentieth year, two two-year terms replace the four-year term elections. *Id.* § 25.

297. *See* ADAMS, *supra* note 207, at 170–89 (reviewing New York City's public financing program).

298. *See supra* notes 163 & 166.

299. Erin Adele Scharff, Note, *Taxes as Regulatory Tools: An Argument for Expanding New York City's Taxing Authority*, 86 N.Y.U. L. REV. 1556, 1573–74 (2011).

300. *See supra* note 242 and accompanying text; *see also* App. 3 (ranking New York the 21st most "liberal" city in the nation).

301. *See supra* note 126 and accompanying text.

Given its unparalleled size and its cultural and financial importance, New York City may be *sui generis*. The other cities that have adopted at least three of the highlighted public health policies—Baltimore, Boston, Philadelphia, and San Francisco—may yield some more clues to urban innovation. Philadelphia's population is greater than 1.5 million, while Baltimore's, Boston's, and San Francisco's are below one million.[302] Boston and San Francisco have experienced at least some population growth in recent decades.[303] Baltimore and Philadelphia, by contrast, have just begun to stabilize their populations after losing hundreds of thousands of residents since the middle part of the twentieth century.[304] All four cities have lost manufacturing jobs in recent decades, but Boston and San Francisco have done better at replacing them with high-tech jobs.[305]

With respect to political demographics, all four cities overwhelmingly lean Democratic.[306] Each city has well-established home-rule powers, although all are subject to preemption by the state, and both Boston and Philadelphia may be subject to some additional, ill-defined limits on municipal legal authority in the "private" sphere.[307] With respect to their systems of government, all have strong mayors elected to four-year terms.[308] Baltimore's partisan city council comprises fourteen members elected by district, in addition to a council president elected at-large, to four-year terms, for a 41,000 constituents-to-official ratio;[309] Boston's non-partisan city council comprises thirteen members (nine from districts; four at-large) elected to two-year terms, for a 48,000 constituents-to-

302. San Francisco's population is 812,000; Boston's is 625,000; and Baltimore's is 619,000. *See* App. 3.

303. WILLIAM H. FREY, METRO. POLICY PROGRAM AT BROOKINGS, POPULATION GROWTH IN METRO AMERICA SINCE 1980: PUTTING THE VOLATILE 2000S IN PERSPECTIVE 17 App. A (2012), http://www.brookings.edu/~/media/research/files/papers/2012/3/20%20population%20frey/0320_population_frey.pdf.

304. *Id.*

305. Gerald Perrins & Diane Nilsen, *Industry Shifts Over the Decade Put Philadelphia on a New Road to Job Growth*, MONTHLY LAB. REV., Apr. 2010, at 4, *available at* http://bls.gov/opub/mlr/2010/04/art1full.pdf.

306. *See supra* note 245 and accompanying text; *see also Election Day 2012*, CITY OF BOS. (Nov. 5, 2012), http://www.cityofboston.gov/news/default.aspx?id=5845 (noting that 211,316 (or 55%) of Boston's 387,142 voters were registered Democrats, as compared to 25,903 (or 6.7%) Republicans). A 2005 study of the most politically "liberal" cities ranks San Francisco at nine, Philadelphia at eighteen, and Boston at twenty-four. *See* App. 3.

307. *See* Diller, *Private Right*, *supra* note 276, at 1127, 1167, 1169–70.

308. Speakman, *supra* note 295, at 703

309. BALT., MD., CITY CHARTER art. III, § 2.

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official ratio;[310] Philadelphia's partisan council comprises seventeen members (ten from districts; seven at-large) elected to four-year terms, for a 90,000 ratio;[311] and San Francisco's partisan board of supervisors comprises eleven members, all elected by district to four-year terms, for a 74,000 ratio.[312] Of the four cities, only San Francisco has a program of public financing for campaigns.[313]

Looking at the manner of enactment, Baltimore, Philadelphia, and San Francisco passed all of their public health policies legislatively. Boston, by contrast, implemented its three policies—smokefree workplace, a trans fat ban, and a tobacco place-of-sale restriction—by administrative rule. Boston's health agency—the Boston Public Health Commission—is technically a separate body corporate, unlike New York City's Board of Health, which sits within the executive branch of city government.[314] Boston's mayor and the city council appoint the BPHC's members.[315] Clearly, the records of Boston and New York demonstrate that administrative rulemaking plays an important role in public health innovation at the local level. Of the thirty-six instances of top twenty-five cities adopting any of the nine tabulated policies, eight were by administrative rule.[316] Among the subset of ten obesity policy adoptions, five were by legislative ordinance and five were by administrative rule. Why Boston and New York, in particular, have thus far relied more on administrative rulemaking to combat obesity than they have to regulate tobacco is hard to say. At least some of the explanation may be that because their health departments have long regulated the sanitation of restaurants, expanding this jurisdiction to include regulation of foods' nutritional content is a step seemingly consistent with established authority.[317]

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310. BOS., MASS., CITY CHARTER § 11 & n.2. The ratios are 2011 population estimates, *see* App. 3, divided by the number of councilors. In council-manager cities, I include mayors among councilors in making this calculation.

311. PHILA., PA., HOME RULE CHARTER § 2-100.

312. CHARTER OF THE CITY AND COUNTY OF S.F., CAL. § 2.100.

313. *See supra* note 232.

314. *See* Bos. Pub. Health Act of 1995, 1995 Mass. Acts ch. 147 (codified at MASS. GEN. LAWS ch. 111 app. §§ 2-3 (2013)) (establishing the BPHC as "a body politic and corporate").

315. *See id.* § 2-3(b) (providing that six of the seven members of the BPHC are to be appointed by Boston's mayor subject to city council confirmation).

316. *See* Table 2, *supra*. Including Seattle-King County would raise the total of administrative rule adoptions.

317. *E.g.*, Sonia Y. Angell et al., *Cholesterol Control Beyond the Clinic: New York City's Trans Fat Restriction*, 151 ANNALS INTERN. MED., July, 21, 2009, at 129, 130 (explaining how New York City built on its "food safety infrastructure" to enforce trans fat restrictions); *see also* Jennifer L. Pomeranz, *The Unique Authority of State and Local Health Departments to Address Obesity*, 101 AM.

More broadly, the emerging record of local administrative regulation may call for its own explanation separate from one that focuses on the lawmaking process. In a separate article, I endeavor to provide one, explaining how institutional design may enable local administrative agencies to engage in expert-based rulemaking that is less influenced by the political forces that affect rulemaking at the state and federal levels.[318] More on point to this Article's thesis, political actors at any level always exert at least some influence on the administrative process, if for no other reason than that they remain capable of overruling an administrative rule by legislation.[319] The notion that administrative agencies effectively do the bidding of their legislative masters is often referred to as "legislative dominance," and is a key claim of much public choice scholarship on administrative law.[320] While the existence of legislative dominance at any level of government is hotly disputed, if it does exist at the local level, then local administrative agencies might favor public health causes for at least the same scale- and political demographic-based reasons that local legislators do, as described in Part III. Similarly, to the extent that the decision-making of administrative agencies reflects the desires of the elected executives who often appoint the agencies' leaders, big-city mayors, like legislators, may also be more inclined to support public health causes for scale- and demographic-based reasons.

With respect to structure, on the other hand, the streamlined nature of municipal lawmaking might actually make it easier for Big Tobacco and the Food Industry to obtain a legislative override of administrative rules they oppose. At the federal level, the Food Industry has sometimes succeeded in prodding Congress to overrule USDA regulations that seek to promote nutrition.[321] At the local level, such overrides should be easier to obtain, at least as a structural matter. That there have been no formal attempts to overrule public health administrative regulations in Boston and

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J. PUB. HEALTH 1192, 1194–95 (2011). *But see* N.Y. Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 2014 N.Y. Slip. Op. at 16–17, 2014 WL 2883881 (N.Y. Ct. App. June 26, 2014) (distinguishing between permissible agency regulation of "toxic substances" and potentially impermissible regulations that interfere with "personal autonomy," like the soda portion cap).

318. *See* Diller, *supra* note 126.

319. *But see id.* at 1880 (asserting that it is "questionable" whether the Boston City Council can overrule a regulation promulgated by the BPHC). In defending the portion-cap rule, New York City argued that the Board of Health exercised authority delegated directly by state law, a claim which the New York Court of Appeals rejected. *N.Y. Statewide Coal.*, 2014 N.Y. Slip. Op. at 8, 2014 WL 2883881.

320. *See* CROLEY, *supra* note 32, at 47–48.

321. *See* Nixon, *supra* note 154.

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New York, therefore, may indicate that city councilors agree with the rules, or at least not enough disagree to overturn.[322] In New York City, Mayor Bloomberg has strongly supported the Board's rules; thus, the Council was aware that any attempt to overturn them was likely to incur a veto.[323] In Boston, given that the Public Health Commission is a separate body corporate, it is not even clear that the city council has the power to overrule its regulations.[324] In sum, in those cities with aggressive public health agencies, local lawmaking structure may explain less of the observed regulatory innovation to date than in other cities that have relied more on the legislative process to enact public health regulations.

B. Innovation Laggards: Jacksonville, Memphis, Phoenix, and San José

Now on to the innovation "laggards": Jacksonville, Memphis, Phoenix, and San José. The reasons for their apparent inaction vary widely, and are to some degree tied up with decisions made at the state or county levels. In both Memphis and Jacksonville, the respective state legislatures preempted the ability of any city in the state to adopt comprehensive smokefree workplace laws before such laws diffused widely.[325] Phoenix never adopted a smokefree workplace ordinance, but Arizona voters approved a statewide law in 2006, which is earlier than many other cities and states acted.[326] San José lies within a state that acted relatively early on three tabulated policies—smokefree workplaces, trans fat bans, and menu labeling—thereby voiding any perceived need for local action. Moreover, in the early 1990s, San José adopted one of the strictest clean indoor air ordinances to date.[327] The measure, however, stopped short of

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322. Although a majority of the New York City Council expressed opposition to the portion-cap rule by joining an amicus brief in the litigation before the Court of Appeals, *see* Brief of Amici Curiae New York City Council Members, *N.Y. Statewide Coal.*, No. APL-2013-00291, 2014 WL 2883881 (N.Y. Ct. App. Apr. 24, 2014) (brief opposing portion-cap rule submitted on behalf of thirty-three (of fifty-one) council members), there was no formal effort by the Council to overrule the regulation legislatively.

323. *See, e.g.*, Diller, *supra* note 126, at 1897, 1900 (discussing Mayor Bloomberg's involvement in the Board's promulgation of the portion-cap rule).

324. *See supra* note 319.

325. Florida preempted local control of smoking in 1985, 1985 Fla. Laws 257 § 9 (codified as amended at FLA. STAT. § 386.209 (2012)); Tennessee in 1994. 1994 Tenn. Act ch. 872, §§ 9, 12 (codified as amended at TENN. CODE ANN. § 39-17-1551 (2012)).

326. Proposition 201 (Ariz. 2006) (codified at ARIZ. REV. STAT. ANN. § 36-601.01 (2012)) (proposing "Smoke-Free Arizona Act" to prohibit smoking in public places).

327. *See* Nick Anderson, *Tough Smoking Ban Takes Effect Today But San Jose Won't Fine Violators of Law Until April 1*, SAN JOSE MERC.-NEWS, Dec. 30, 1993, at 1B (noting that San José's 1993 clean indoor air ordinance, which exempted bars, was then "believed to be the toughest of its kind for a major U.S. city").

banning smoke completely in bars and restaurants, thereby rendering the city a somewhat arbitrary "laggard" for the purposes of tallying regulations. San José has also enacted a strict third-generation smokefree ordinance banning smoking in outdoor public places,[328] which I exclude from Table 2's tabulation.[329]

With the caveats expressed above, what other characteristics might explain the relative inactivity of these four lagging cities? Their population sizes and trajectories reveal little. As of 2011, the four laggards rank sixth, tenth, eleventh, and twentieth, respectively.[330] All but Memphis have seen at least steady, if not significant, population growth in recent decades.[331] With respect to political demography, Jacksonville and Phoenix, in particular, are significantly less "liberal" than some other large cities.[332] As a consolidated city-county, Jacksonville includes suburban and rural areas.[333] (Two other "cities" in the top twenty-five of population—Indianapolis and Nashville—are also joint city-county governments and significantly less "liberal" than other top twenty-five cities,[334] yet each enacted one of the public health measures described above.[335]) All four cities have nominally non-partisan governments.[336] Jacksonville has a strong mayor with nineteen council members (fourteen from districts; five at-large) elected to four-year terms, for a constituents-to-official ratio of 46,000;[337] Memphis has a strong mayor with thirteen council members (seven from districts; six from two "super districts") elected to four-year terms, for a 50,000 ratio;[338] Phoenix has a council-manager form of government with an nine-member council elected from districts (except for the mayor, elected at-large) for four-year terms, for a very high ratio of

328. *See* San José, Cal., Ordinance 29053 (Apr. 17, 2012) (amending SAN JOSÉ, CAL., MUN. CODE ch. 9.44) (prohibiting smoking in outdoor dining areas and unenclosed common areas of multi-family residential properties).

329. *See supra* note 51 and accompanying text (explaining reason for exclusion).

330. *See* App. 3.

331. FREY, *supra* note 303, App. D.

332. *See* App. 3 (ranking Jacksonville and Phoenix as more "conservative" (thirty-seventh and seventy-sixth, respectively) than "liberal" (198th and 172nd) among cities with populations greater than 100,000; ranking San José as seventy-fourth most "liberal"; and Memphis as thirty-ninth).

333. *See* JACKSONVILLE'S CONSOLIDATED GOV'T, http://www.jaxhistory.com/journal11. html.

334. App. 3 (ranking Indianapolis and Nashville as more "conservative" than "liberal," with Indianapolis, 82nd and Nashville, 117th).

335. *See* Table 2, *infra*.

336. *Partisan vs. Nonpartisan Elections*, NAT'L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/partisan-vs-nonpartisan-elections (last visited Jan. 3, 2013).

337. CHARTER OF THE CITY OF JACKSONVILLE, FLA. § 5.01; Speakman, *supra* note 295, at 703.

338. Memphis, Tenn., Ordinance 1852 (1966) (amending city charter); Speakman, *supra* note 295, at 703.

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163,000;[339] and San José also has a council-manager form of government, with an eleven-member council elected from districts (except for the mayor, elected at-large) for four years, for a ratio of 88,000.[340]

The laggards, therefore, as compared to the leaders in public health innovation, have less "liberal" populations and are more nonpartisan in government structure. Just how much these two factors matter to policy innovation is unclear, as some more "liberal" cities (e.g., Detroit and Washington, D.C.[341]) have done relatively little, and other cities with formally nonpartisan governments (e.g., Los Angeles) have promulgated some significant policies. Two laggards—Phoenix and San José—have a council-manager system. While some commentators expect such systems to produce more innovation due to managers' supposed superior expertise,[342] it may be that, to the contrary, council-manager cities innovate less because managers are more risk-averse in policy selection.[343] Without a political base, an unelected manager may be reluctant to take risks that threaten to anger powerful interest groups. The risk aversion of the city manager may filter down to administrative rulemaking since managers usually appoint the heads of executive departments in council-manager cities.[344] Also, with respect to administrative departments, not every city has a bureaucratic organ akin to the public health agencies of New York and Boston.[345] In some areas, counties play a greater, and sometimes nearly exclusive, role in regulating the public health. The form, design, and funding of the relevant local public health agency, therefore, may significantly influence a particular jurisdiction's propensity for promoting public health.[346]

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339. PHX., ARIZ., CITY CHARTER ch. III, § 1.

340. *See Government*, SAN JOSÉ, CAL., http://www.sanjoseca.gov/index.aspx?NID=105.

341. Detroit has been ranked the most liberal city in the nation, and Washington, D.C., the fourth most liberal. App. 3.

342. See Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 848 (2008).

343. *E.g.*, Speakman, *supra* note 295, at 703 (noting that city manager is "not accountable to the public" and "politically neutral"); MORE THAN MAYOR OR MANAGER: CAMPAIGNS TO CHANGE FORM OF GOVERNMENT IN AMERICA'S LARGEST CITIES 13–14 (James H. Svara & Douglas J. Watson eds., 2010).

344. *E.g.*, *Organization Chart*, CITY OF PHX., http://phoenix.gov/webcms/groups/internet/@inter/@dept/@mgr/documents/web_content/016897.pdf.

345. Phoenix, for example, apparently has no such department, *see id.*, while the county in which it sits, Maricopa, has a vast Department of Public Health. *See About the Department*, MARICOPA CNTY. DEP'T OF PUB. HEALTH, http://www.maricopa.gov/publichealth/about/default.aspx (last visited Jan. 25, 2013).

346. *See* Pomeranz, *supra* note 317, at 1193 (discussing the extent to which local health departments have regulatory authority and whether they use it); *see also* Zhuo (Adam) Chen et al., *Obesity Prevention: The Impact of Local Health Departments*, 10 HEALTH SERVS. RES. 603, 605–06

A city's underlying legal authority is another relevant characteristic of institutional design. As "creatures of the state," local governments have long had their powers delegated—and limited—by state law. While expansive home-rule powers are now the norm for most populous cities, in some states home rule remains nonexistent or is still developing. For instance, while Memphis is technically a "home rule" city, it operates within a state that has a tradition of weak municipal authority.[347] By contrast, Phoenix, San José, and Jacksonville enjoy broad home rule powers that would pretty clearly encompass the authority to pass public health ordinances absent statewide preemption.[348]

CONCLUSION

If this paper is correct that partisan concentration, smaller scale, and a more streamlined legislative process are key reasons for heightened public health regulation at the local level, the implications for legal doctrine and normative debates regarding vertical division of power are significant. To the extent partisan concentration plays a role in promoting public health innovation, it is difficult to replicate this characteristic at higher levels of government. Similarly, many elements of the smaller scale of local government are difficult to replicate at higher levels. On the other hand, the lower cost of campaigns could be replicated to some extent with more stringent campaign finance reform, assuming judicial acquiescence.[349] Moreover, constituents-to-official ratios at higher levels of government could be reduced by adding more representatives to state legislatures and Congress.[350] Excluding potential changes to other levels of government, proponents of public health regulation should otherwise advocate for heightened local authority, whether on the basis of home rule, preemption,

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(2012) (reviewing research on public health agency efforts to combat obesity). For more on public health agencies, see Diller, *supra* note 126.

347. *See* Lon S. Felker et al., *Tennessee*, *in* HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK 391, 397 (Dale Krane et al. eds., 2001).

348. *See, e.g.*, *Jacksonville City Council*, CITY OF JACKSONVILLE, FLA., http://www.coj.net/city-council.aspx (noting that the Jacksonville city council "ha[s] almost unlimited power to enact legislation in order to provide for the needs of our community").

349. Obviously, in recent years a slim majority of the Supreme Court has been extremely skeptical of government campaign finance regulation, often viewing it as an infringement on First Amendment "speech" rights. *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011); Citizens United v. FEC, 558 U.S. 310 (2010).

350. *See, e.g.*, Gail L. Johnson, Letter to the Editor, *Sunday Dialogue: Is a Bigger House Better?*, N.Y. TIMES (Jan. 12, 2013), http://http://www.nytimes.com/2013/01/13/opinion/sunday/sunday-dialogue-is-a-bigger-house-better.html (proposing to limit congressional districts to 100,000 people and to increase size of House of Representatives to 3,100 members).

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or other doctrines. Proponents might even prefer a version of home rule—often referred to as "imperio"—that shields local governments from preemption by the state.[351] Contrarily, opponents of local public health innovation should prefer a system of vertical division of power that squelches local authority, or at least allows it to be easily overruled from above, whether legislatively or judicially.

With respect to structure, if a more streamlined legislative system allows advocates of changing the regulatory status quo a greater chance of success, proponents of such change should prefer similar streamlining at higher levels of government. While federal constitutional change like a unicameral Congress is fanciful, more modest changes are worth considering, like eliminating the de facto filibuster requirement in the Senate, or ending the House's custom of requiring a majority of the majority party to support a bill.[352] On the other hand, interest groups opposed to changing the regulatory status quo should generally prefer the sclerotic federal system. At the state level, constitutional change is more easily accomplished, and might include the elimination of supermajority requirements for passing certain kinds of legislation.

As the cheeseburger bill example demonstrates, sometimes an industry group uses a streamlined legislative process to pursue its goals. The cheeseburger bills were aided, however, by the larger scale of state (as opposed to local) politics and the potentially heightened influence of the Food Industry at such levels. From the standpoint of institutional design, local governments are likely to be more nimble at reacting to social and economic challenges that require changes to the status quo than legislatures at higher levels of government, even if their streamlined nature means that certain interest groups will be on the losing end. In doing so, however, local governments are less likely to be catering to the interests of well-funded groups. While this Article has used the public health sphere as a prism through which to reveal this dynamic, its account of local lawmaking and regulation enactment may also apply—to varying degrees—to other issues that cities have addressed ahead of state and national actors, like housing and employment discrimination, mandating paid sick leave, banning plastic bags, and immigration.

Many commentators have lamented the "broken" state of the federal political system, with near-routine use of the filibuster in the Senate and

351. *Cf.* City of Cleveland v. State, 989 N.E.2d 1072 (Ohio Ct. App. 2013) (invalidating state attempt to preempt local trans fat ban).

352. *See* Sotirios A. Barber, *Toward a More Responsible Congress? Congress and Responsible Government*, 89 B.U. L. REV. 689, 710 (2009).

other indicia of partisan gridlock. Local governments provide a counter-example to this tale of dysfunction, at least in the regulatory realm, as vividly demonstrated by records on public health. Whether local government's methods can be effectively replicated at higher levels of government is uncertain. In the meantime, however, big cities provide an especially inviting venue for proponents of public health regulation opposed by well-funded interest groups.

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APPENDIX 1
OUTDOOR TOBACCO ADVERTISING RESTRICTIONS

1990 census rank	Local action, if any	Other relevant information, including state action
New York City	N.Y.C., N.Y., Council Local Law 1998/003 (Jan. 14, 1998)	1,000 feet of schools, day cares and playgrounds; passed council 45–3 in Dec. 1997
Los Angeles	L.A., Cal., Ord. No. 172212 (creating L.A., Cal., Mun. Code art. 5.2.5) (September 1998)	1,000 feet of schools, parks, religious institutions, etc.; California already had law, passed in 1997, that prohibited tobacco advertising within 1,000 feet of schools and playgrounds but expressly allowed more stringent action by local governments. 1997 Cal. Legis. Serv. ch. 219 (codified at CAL. BUS. & PROF. CODE § 22961 (2013)).
Chicago	Chi., Ill., Mun. Code § 5.17 (1999) (adopted in Sept. 1997 and amended in Feb. 1998)	Prohibited all outdoor tobacco advertising with certain exceptions; invalidated by Fed'n of Adver. Indus. Reps. v. City of Chi., 189 F.3d 633 (7th Cir. 1999).
Houston		Texas had statewide law that *taxed outdoor* tobacco advertising as far back as 1993; in 2003, the legislature banned such advertising within 1,000 feet of a school or church. TEX. HEALTH & SAFETY CODE § 161.122.
Philadelphia		
San Diego	San Diego, Cal., Ord. No. 18597 (Oct. 20, 1998) (codified at San Diego, Cal., Mun. Code secs. 58.0301-58.0312 (2013))	1,000 feet of schools, playgrounds, child care centers, etc.
Detroit	Detroit, Mich., Ord. No. 28-99 (Aug. 1999) (codified at Detroit, Mich., City Code § 3-6-1 to 3-6-9 (2013)).	1,000 feet of any place likely to attract youth, including schools, playgrounds (also applies to alcohol)
Dallas		*see* Texas statewide action, *supra*
Phoenix		
San Antonio		*see* Texas statewide action, *supra*
San Jose		*see* California statewide action, *supra*
Indianapolis		
Baltimore	Balt. City, Md., City Ord. No. 307 (Council Bill No. 627) (1994)	First in the nation; included alcohol
San Francisco	S.F., Cal., Ord. No. 1-98 (Jan. 1998) (codified as amended at 10 S.F., Cal., Police Code § 674 (2013))	Banned all public outdoor tobacco advertising except for some highways
Jacksonville		

1990 census rank	Local action, if any	Other relevant information, including state action
Columbus		
Milwaukee	City passed ban in March 1998, but implementation was postponed indefinitely for fear of litigation. *See* Greg J. Borowski, *City Postpones Enforcement of Ban on Most Tobacco Billboards*, MIL. J.-SENT., Sept. 2, 1998, at 3.	
Memphis		
Washington, D.C.		
Boston		Massachusetts Attorney General promulgates regulation in 1999. 940 MASS. CODE REGS. §§ 21.01–22.06 (2000), *invalidated by* Lorillard v. Reilly, 533 U.S. 525 (2001).
Seattle		King County Board of Health adopts rule in 1997. *See* Code of the King Cnty., Wash., Bd. of Health § 19.08. The rule was suspended after a federal court invalidated a neighboring county's similar rule. *See* Lindsey v. Tacoma-Pierce Cnty. Health Dep't, 195 F.3d 1065 (9th Cir. 1999).
El Paso		
Nashville		
Cleveland	Cleveland, Ohio, Ord. No. 988-97 (codified at Cleveland Mun. Code § 680A.01 (2013)).	Banned "cigarette" (not tobacco) advertising generally, but with geographic exceptions.
New Orleans		
As these ordinances proliferated, so did litigation attacking them on preemption and First Amendment grounds, which culminated in *Lorillard* in 2001.		
No doubt the controlling precedent in a particular geographic area may have affected a city's desire to adopt such an ordinance. See *Lorillard*, 533 U.S. at 596–97 (discussing appellate cases).		
This list does not include bans on tobacco ads in public transit only, as in Washington, D.C., Boston, Philadelphia, and Indianapolis.		

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APPENDIX 2
COMPREHENSIVE SMOKEFREE WORKPLACE ORDINANCES

2000 census rank	Local action, if any	Preemption or other relevant information
New York City	N.Y.C., N.Y., Local Law No. 47 (Dec. 30, 2002) (codified as amended at New York City, N.Y., Admin. Code § 17-501 et seq. (2012))	
Los Angeles		In 1994, California enacted a statewide law that created uniform standards for indoor smoking. *See* 1994 Cal. Legis. Serv. ch. 310 (codified as amended at CAL. LAB. CODE § 6404.5 (2013)). The law delegated authority to administrative agencies to eliminate exemptions for bars and taverns. *Id.* In 1998, these exemptions were closed.
Chicago	Chi., Ill., Coun. J. 12-7-05, p. 62213 (Dec. 7, 2005) (codified as amended at Chi., Ill., Mun. Code ch. 7-32 (2011)).	Before going into effect, Illinois passed a statewide comprehensive ban. *See* 410 ILL. COMP. STAT. 82/1 to /75 (2013).
Houston	Hous., Tex., Ordinance 2006-1054 (Oct. 18, 2006) (codified as amended at Hous., Tex., Code of Ordinances §§ 21-236 to -248 (2012)).	
Philadelphia	Phila., Pa., Ordinance 050063-A (Sep. 14, 2006) (codified as amended at Phila., Pa., Code § 10-602 (2013))	Not quite as stringent as others; still allows smoking in bars where food is less than 10% of sales.
Phoenix		Arizona voters pass statewide law by initiative in 2007. ARIZ. REV. STAT. § 36-601.01 (2013).
San Diego		For statewide action, *see supra*.
Dallas	Dall., Tex., Ord. No. 27440 (Dec. 10, 2008) (codified as amended at Dall. City Code § 41-2 (2013))	
San Antonio	San Antonio, Tex., Ord. No. 2010-08-19-0697 (Aug. 19, 2010) (codified as amended at City Code of San Antonio Ch. 36 (2012))	
Detroit		Until the legislature passed a comprehensive smokefree workplaces law in 2009 (that took effect in 2010), 2009 Mich. Pub. Act 188 (codified at scattered sections MICH. COMP. LAWS § 333 (2013), Michigan courts had considered local authority in the area preempted on the basis of a 1986 statute. *See* Mich. Rest. Ass'n v. City of Marquette, 626 N.W.2d 418 (Mich. Ct. App. 2001); *but see* McNeil v. Charlevoix Cnty., 741 N.W.2d 27 (Mich. Ct. App. 2007) (distinguishing *Marquette* in upholding local health authority's smoking ban), *aff'd on other grounds*, 772 N.W.2d 18 (Mich. 2009).
San Jose		For statewide action, *see supra*.
Indianapolis	Indianapolis, Ind., City-County Gen. Ordinance No. 12 (Apr. 19, 2012) (codified as amended at Rev. Code of Consol. City and Cnty. § § 616-102, -204, -301, -401, Ch. 988; § 131-501 (2013)).	June 1, 2012 (goes beyond state law, which still exempts bars)

2000 census rank	Local action, if any	Preemption or other relevant information
San Francisco		For statewide action, *see supra*.
Jacksonville		The state had preempted the field since 1985. *See* 1985 Fla. Laws c. 85-257 (codified as amended at FLA. STAT. §§ 386.201-.2125 (2013)).
Columbus	Columbus, Ohio, Ord. No. 1095-2004 (Nov. 2, 2004) (codified as amended at Columbus, Ohio, City Code ch. 715 (2013)).	Survived effort to get overturned by voters in November 2004. Mark Ferenchik, *Indoor Smoking Ban Columbus: Supporters Take Deep Breath as Issue 12 Looks Like Winner*, COLUMBUS DISPATCH, Nov. 3, 2004, at 1B.
Austin	Austin, Tex., Ord. No. 050303-05 (May 7, 2005) (codified as amended at Austin, Tex., Mun. Code ch. 10-6 (2013)).	Enacted by voter initiative. *See* Roark & Hardee LP v. City of Austin, 522 F.3d 533, 538 (5th Cir. 2008).
Baltimore	Balt., Md., Rod. No. 07-392 (Feb. 28, 2007) (codified as amended at Balt., Md., City Health Code §§ 12-101 to -112 (2013)).	
Memphis		Local authority regarding smoking has been preempted since 1994. *See* TENN. CODE ANN. § 39-17-1551 (2013). In 2007, the state passed the "Non-Smoker Protection Act," which exempted bars from smoking restrictions. *See* 2007 Tenn. Pub. Acts ch. 410 (codified at TENN. CODE ANN. §§ 39-17-1801-1812 (2013)).
Milwaukee		State legislature passed a comprehensive smoking ban in 2009. *See* 2009 Wis. Legis. Serv. Act 12 (codified at WIS. STAT. § 101.123 (2013)).
Boston	Bos. Pub. Health Comm'n adopted administrative regulation in Dec., 2002, that took effect in May 2003. *See* GOODWIN PROCTER, CLIENT ALERT, THE NEW BOSTON SMOKING BAN (2003), *available at* http://www.goodwinprocter.com/~~/media/Files/Publications/Newsletters/Client%20Alert/2003/What_Employers_ and_Landlords_Need_to_Know_About_Bostons_Workplace_Smoking_ Restriction.ashx.	
Washington, D.C.	Washington, D.C., Department of Health Functions Clarification Amendment Act of 2006, 2006 D.C. LAWS 1690 (codified at D.C. Code § 7-742 (2013))	
El Paso	El Paso, Tex., Ord. No. 014878 (June 26, 2001) (codified as amended at El Paso, Tex., Mun. Code Ch. 9.50 (2013)).	
Seattle		Statewide law passed by voters in 2005. WASH. REV. CODE §§ 70.160.010-.900.
Denver		Statewide law enacted in 2006, Colorado Clean Indoor Air Act, 2006 Colo. Leg. Serv. ch. 22 (H.B. 06-1175) (codified at COLO. REV. STAT. §§ 25-14-201-209 (2013)); Denver City Council rejected a smoking ban in 2003. *See* Cindy Rodriguez, *Smoking Out a Cancer on Worker Safety*, DENVER POST, Sept. 28, 2004, at F1.
Nashville		*See* statewide preemption, *supra*

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APPENDIX 3
TOP-25 CITY DATA

	1990	2000	2010	2011 population of bold city	Number of councilors*	councilor-constituent ratio	Nonpartisan or partisan	strong-mayor or council-manager	Liberal-conservative ranking†	total # of innovations
1	New York City	New York City	**New York City**	8,244,910	51	161,665	P	SM	21	7
2	Los Angeles	Los Angeles	**Los Angeles**	3,819,702	15	254,647	NP	SM	37	1
3	Chicago	Chicago	**Chicago**	2,707,120	50	54,142	P	SM	17	2
4	Houston	Houston	**Houston**	2,126,196	16	132,887	P	SM	177 (62C)	1
5	Philadelphia	Philadelphia	**Philadelphia**	1,536,471	17	90,381	P	SM	18	3
6	San Diego	Phoenix	**Phoenix**	1,469,471	9	163,275	NP	CM	172 (76C)	0
7	Detroit	San Diego	**San Antonio**	1,359,758	11	123,614	NP	CM	175 (64C)	1
8	Dallas	Dallas	**San Diego**	1,326,179	9	147,353	NP	SM	119 (119C)	1
9	Phoenix	San Antonio	**Dallas**	1,223,229	15	81,549	NP	CM	32	1
10	San Antonio	Detroit	**San Jose**	967,487	11	87,953	NP	CM	74	0
11	San Jose	San Jose	**Jacksonville**	827,908	19	43,574	NP	SM	198 (37C)	0
12	Indianapolis	Indianapolis	**Indianapolis**	827,609	29	28,538	P	SM	155 (82C)	1
13	Baltimore	San Francisco	**San Francisco**	812,826	11	73,893	P	SM	9	4
14	San Francisco	Jacksonville	**Austin**	820,611	7	117,230	NP	CM	93	1
15	Jacksonville	Columbus	**Columbus**	797,434	7	113,919	NP	SM	78	1
16	Columbus	Austin	**Ft. Worth**	758,738	10	75,874	NP	CM	163 (75C)	0
17	Memphis	Baltimore	**Charlotte**	751,087	12	62,591	P	CM	125 (112C)	0
18	Washington, D.D.	Memphis	**Detroit**	706,585	9	78,509	NP	SM	1	1
19	Boston	Milwaukee	**El Paso**	665,568	9	73,952	NP	CM	116 (123C)	1

	1990	2000	2010	2011 population of bold city	Number of councilors*	councilor-constituent ratio	Nonpartisan or partisan	strong-mayor or council-manager	Liberal-conservative ranking†	total # of innovations
20	Seattle	Boston	**Memphis**	652,050	13	50,158	NP	SM	39	0
21	El Paso	Washington, D.C.	**Baltimore**	619,493	15	41,300	P	SM	14	2
22	Nashville	El Paso	**Boston**	625,087	13	48,084	NP	SM	24	3
23	Milwaukee	Seattle	**Seattle**	620,778	9	68,975	NP	SM	16	0
24	Cleveland	Denver	**Washington, D.C.**	617,996	13	47,538	P	SM	4	1
25	New Orleans	Nashville	**Nashville**	609,664	40	15,242	NP	SM	121 (117C)	1

Based on 2011 estimates, Austin has surpassed San Francisco; and Boston and Seattle have surpassed Baltimore.

Data on population from http://www.census.gov/popest/data/cities/totals/2011/

Data on whether city is council-manager or strong-mayor based on Political Science Handbook, *supra* note 298, at 703.

Data on partisan/non-partisan based on http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/partisan-vs-nonpartisan-elections

* Mayors are included as councilors in council-manager systems

† Ranking out of city with 100,000+ people in 2004; where "C" in parentheses, city ranked more "conservative" than "liberal" among sample set

BAY AREA CTR. FOR VOTING RES., THE MOST CONSERVATIVE AND LIBERAL CITIES IN THE UNITED STATES 10 (2005), http://alt.coxnewsweb.com/statesman/metro/081205libs.pdf

The Bay Area Ctr. study is based on the 2004 presidential election and, therefore, may overstate "conservatism" in George W. Bush's native Texas cities.

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