



United States of America

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Municipalities in the United States (US), particularly those in its largest metropolitan areas, drive economic growth and innovation and are home to the majority of the nation's population, but their political status under the federal constitutional system of divided government is relatively weak. That does not mean US cities lack political power; it means that the federalist structure weakens, rather than enhances, city power.

US cities and metropolitan areas were home to 85.9 per cent of the nation's population and 91.1 per cent of real gross domestic product (GDP) in 2018.¹ The New York metropolitan area continues to be the world's single largest economy. It would seem self-evident that such economically powerful, densely populated metropolitan engines would have concomitant political power. Yet the US Constitution does not even mention cities, and the US federal structure has not evolved to reflect 'city power'.

¹ Sara Durr, 'New Report: U.S. Metro Areas Continue to Drive Nation's Economic Growth, Post Fifth Consecutive Year of Increase', *The United States Conference of Mayors* (2019), <https://bit.ly/3Ic4oVI> (accessed 21 June 2021).

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There is a mismatch between the rise of cities on the global stage and their role in the constitutional and federal structure of the US. The formal status of US cities in the constitutional scheme is unchanged after 250 years. Indeed, the past 50 years have seen a growing disjuncture between city growth, in both population and share of GDP, and the political influence of cities on the national stage.²

The tension between localism, regionalism, and nationalism has growing salience in US political discourse. This chapter will focus on how local governments exercise power most effectively, whether internally or through a complex matrix of intergovernmental relationships, private-sector dealings, and civil society organisations.

1 COUNTRY OVERVIEW

The United States of America is a large, populous, and diverse nation. More than 328 million people live in a land mass of over nine million km². While 76.3 per cent of the American population identify as white alone, the balance are African-American, Latino, or Asian/Asian Pacific, and the proportion of people of colour is growing as a total population. Thirteen point six per cent of the population identify as foreign-born.³ In a geographically and topographically various nation, Americans cluster in cities: in the coastal megacities of New York and Los Angeles, but so too in cities such as Seattle, San Francisco-Silicon Valley, Houston, Phoenix, and Miami, along with cities like Detroit and Cleveland in the shrinking and financially challenged Rust Belt interior.

Despite the impact of Covid-19, the US still has the largest economy in the world, with a gross domestic product (GPD) in 2019 of USD 21.43 trillion. Nonetheless, the debt of the federal government is expected to reach 104 per cent of GDP in 2021, and 107 per cent of GDP in 2023—the highest such ratio in American history.⁴

The US is a union of 50 separate states, each with its own governor, state legislature, and court system. Each state has its own constitution,

² Richard C Schragger, *City Power: Urban Governance in a Global Age* (Oxford University Press, 2016).

³ United States Census Bureau, 'QuickFacts United States' (2019), www.census.gov/quickfacts/fact/table/US/PST045219 (accessed 28 June 2021).

⁴ International Monetary Fund, 'World Economic Outlook Database' (2020), <https://bit.ly/3t8Yy3j> (accessed 28 June 2021).

but where state statutes or constitutional provisions conflict with the US Constitution, the latter is supreme.

The Constitution of the US establishes a federal, representative, democratic republic. The government is federal in that the states and national governments are dual sovereigns. In Congress, two senators represent each state in the Senate, and members of the House of Representatives are selected by district. These districts correlate, but are not identical, to districts in state legislative elections, and redistricting for both occurs every 10 years, following the decennial census. Population growth and loss in different areas often lead to gains and losses in the number of congressional districts, as well as political shifts in state legislative districts.

The US President is elected every four years by an electoral college in conformity with the results of a popular partisan election held in each state. Each state's slate of presidential electors is then certified by its respective governor.

The President nominates federal judges, who are then confirmed by the US Senate. State judicial selection methods vary. In 39 states, some or all judges are elected, a unique feature of American judicial federalism.⁵ The Supreme Court of the US hears selected cases from both the lower federal courts and state courts, although state supreme courts have 'the last word' on matters of their own state's constitutional law, unless there is a conflict with federal law.

The Founders of the US system were not content with those checks, however. Under the Tenth Amendment to the US Constitution, powers not delegated to the central government are reserved to the states. This is the formal basis for US federalism. By contrast, states hold plenary power. That is why the US constitution is sometimes called a 'constitution of grant', while state constitutions are 'constitutions of limitation'.

The first half of the twentieth century brought changes that shifted the balance of power away from the states to the federal government. The Sixteenth Amendment created a federal income tax; the Seventeenth Amendment provided that Senators were to be elected by popular vote, whereas previously they had been selected by state legislatures. The influx of funds to the central government enhanced the growth of infrastructure and saw the beginnings of welfare programmes that accelerated during the Great Depression and New Deal, leading to the rise of what is sometimes

⁵ Brennan Center for Justice, 'Judicial Selection: Significant Figures' (2015), <https://bit.ly/3w15Qb2> (accessed 29 June 2021).

termed the administrative state—one in which executive agencies exercise powers delegated from Congress.⁶

A final defining element of American politics is the hegemony of a two-party political system comprising Democrats and Republicans. While other parties and non-party affiliations exist, all are minor factors in elections, both locally and nationally.

Each state has its own constitution, and all but one (Nebraska) have bicameral legislatures with an upper and lower house. Members of state legislatures are elected by district, with districts representing geographically compact areas—rural, urban, or suburban—and, often, relatively homogeneous populations. Each state has a popularly elected governor. Unlike the federal government, every state except one has a balanced-budget requirement. This is a significant ratchet incentivising states to accept federal funding, as well as creating pressure to utilise funding tools for major projects that evade the balanced-budget restrictions.

State constitutions are generally easier to amend than the federal constitution. The bill-of-rights provisions of some state constitutions often contain positive rights, among them the right to a thorough and efficient education, and the right to clean air and water. The ‘new judicial federalism’ entails that the bundle of rights and liberties vary from state to state.⁷

The US has a three-tier system of subnational government. The nation is composed of states (50 in all), and the states, of counties; in turn, counties generally encompass municipalities, albeit that in some large metropolitan areas the county is smaller than the municipal entity. Cities, villages, towns, boroughs, and townships are the basic, and the most ‘local’, of the general-purpose governments.

In addition, a number of US states have tribal lands—more than 55 million acres of such lands are concentrated in the central and western states. Tribal citizens are also US citizens. Tribal governments have considerable autonomy over tribal lands, analogous to state governments, but their officials do not have a governance role beyond the geographical boundaries of the tribal land.

⁶ Harry N Scheiber, ‘From the New Deal to the New Federalism, 1933–1983’, in Harry N Scheiber (ed) *The New Deal Legacy and the Constitution: A Half Century Retrospect* (University of California, 1984) 1–10.

⁷ Jeffrey S Sutton, *Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford University Press, 2018).

Each state has its own state statutes which order its affairs, unless preempted by federal law. State law governs almost exclusively in matters of contract, tort, domestic relations, criminal justice, and trusts and estates, and is interpreted, generally, in the courts of the same state. States have regulatory bodies as well, with delegated authorities from their governors and legislators. The power of governors to override decisions by state agencies is stronger than the same power at the federal level, and the separation of powers in the states is less rigorous than at the federal level. Unless a federal constitutional or statutory issue is involved, most cases involving local government are tried under state law and in the court of the state in which the local government is situated.

2 HISTORY, STRUCTURES, AND INSTITUTIONS OF LOCAL GOVERNMENT

Local general-purpose governments⁸ have existed in the US throughout its history, and have been providers of goods and services to citizens and residents. Today, they possess substantial autonomy over their administrative and fiscal affairs, and are politically accountable to voters—both property owners and renters—within their boundaries. The degree of functional responsibility that a local government possesses varies from state to state, based on rules defined at the state level and developed over time.

In 2012, the US Census Bureau counted 90,106 state and local governments, as well as 38,910 general-purpose local governments—the latter consisted of 19,519 municipal governments, 16,360 town and township governments, and 3031 county governments. There were 51,146 special-purpose governments (including independent school districts)—merely five years later, in 2017, interim figures showed marked growth in the number of special districts providing public safety and utility services.⁹ In the US, these structures overlap: people receive

⁸ A subnational government is any unit below the federal government; thus, ‘local’ refers to that level of subsidiarity. See Kenneth R Thomas, ‘Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power’, *Congressional Research Service* (2015), <https://fas.org/sgp/crs/misc/RL30315.pdf> (accessed 15 July 2021).

⁹ United States Census Bureau, ‘Table 2. Local Governments by Type and State: 2012’ (2012), www.census.gov/data/tables/2012/econ/gus/2012-governments.html (accessed 28 June 2021).

services from, and frequently pay taxes to, a combination of general- and special-purpose entities.

Operating within the states, as of 2018, were 19,495 incorporated places—cities, towns, and villages. Of the incorporated places, 76 per cent have fewer than 5,000 residents; of those, over 40 per cent have fewer than 500 residents. Ten have populations over a million, and 310 have populations over 100,000.¹⁰ These are the major metropolitan areas of the US.

There are also areas that operate outside of local control in every American state and in many of its cities. Federal lands and facilities include military bases, US courthouses, federal buildings, and national parklands. State land and facilities are also located under state control inside the boundaries of local municipalities.

The US capital, Washington, DC, is a city and not a state, but has a hybrid structure combining limited home rule and congressional oversight. It includes the geographically compact federal enclave housing the US Capitol and other essential government buildings. No city-states are present in the US.

As of 2020, there are 3142 counties and county equivalents in the 50 states.¹¹ Counties are the largest unit of subnational government beneath the state structure. County governments are general-purpose local governments. County officials are selected by direct election. They adopt budgets, raise revenues, and enact local ordinances. They exercise powers assigned by the state, including powers over social welfare, prisons, courts, parks, refuse removal and roads, and have some health-care responsibilities, especially with respect to public health, public hospitals, and health-care services for the indigent. Most cities are subsidiary to their counties, and in some densely populated areas like New York, city and county governments are merged entities.

¹⁰ Amel Toukabri and Lauren Medina, 'Latest City and Town Population Estimates of the Decade Show Three-Fourths of the Nation's Incorporated Places have fewer than 5,000 People', *United States Census Bureau* (2020), <https://bit.ly/3JfCfyA> (accessed 29 June 2021); United States Census Bureau, 'Ten U.S. Cities Now Have 1 Million People or More; California and Texas Each Have Three of These People' (2015), www.census.gov/newsroom/press-releases/2015/cb15-89.html (accessed 15 July 2021).

¹¹ United States Census Bureau, 'Annual Estimates of the Resident Population for Counties in the United States: April 1, 2010 to July 1, 2019' (2020), <https://bit.ly/3JaF9Vd> (accessed 15 July 2021).

More typically, though, the county is the larger entity with the larger population, and cities exist inside the geographical limits of the county. Here is one example: Middlesex County, New Jersey. With a population of about 800,000 people, it contains several cities with populations of more than 50,000—among them are Edison and Woodbridge, as well as New Brunswick, which is home to the state’s university. Middlesex County also contains suburban communities such as Highland Park, a suburban borough contiguous to New Brunswick with a population of about 14,000, along with additional, unincorporated areas that contract for services with the county or other cities.¹² Each city and borough has a mayor, and the county has its own governance structure, the board of freeholders. The county provides public safety and utility services, keeps land and title records, issues licences and permits, and authorises general obligation bonds for capital repairs and improvement backed by its own faith and credit. There is a county level of court, as well as local limited jurisdiction courts for each municipality.

Continuing with New Jersey as our illustration, another structure of governance is the township—Middlesex County’s Monroe Township is an example. Townships exist in 20 states. In some of them, townships can assume general government powers, as with municipalities, but in other states, they have limited powers to provide specific services such as roads, bridges, and police services, for which they charge a fee or tax.

Municipal corporations are the cities, towns, villages, and boroughs of the US, the structures most often associated with the idea of ‘local government’. They are general-purpose governments and are governed by an elected mayor—the executive official—and/or elected councils. Some cities have a city-manager system, in which the elected council hires a professional manager; even in such city-manager structures, there may be a mayor, albeit that his or her function is ceremonial or in other respects quite limited. The commission form of government is adopted in some cities (as well as counties). In this system, council members serve as commissioners for a specific portfolio of local services. In a few New England towns, a form of direct democracy—the town meeting—persists, with elected officials hearing from constituents and votes being taken there on budgets and ordinances.

¹² ‘Middlesex County, NJ’, www.middlesexcountynj.gov/Pages/Main.aspx (accessed 30 June 2021).

Special-purpose districts are the most common form of government, and overlap with general-purpose governments. The most numerous are independent school districts. Public education districts are funded by a combination of local property taxes and state-wide funding that varies within each state and is most often allocated by formula.

Other special-purpose districts are growing in number. Independent ‘special districts’ numbered 38,266 in 2012.¹³ The vast majority provide a single service such as fire protection, water supply, housing and community development, flood control, and soil and water conservation. Unlike voting in general-purpose governments, which follows the typical one-person-one-vote rule prevalent in the US, voting in special-district governments may be confined to users of, or ratepayers for, the service the district provides, and voting rights may be allocated proportionally.¹⁴

Special-purpose districts have both top-down and bottom-up characteristics. Often, they are created by the state, under state legislative authority, to facilitate the delivery of certain services on a regional basis. In the best case, this is to provide efficiencies of service delivery. States may also require local governments to hive off certain services like parks, hospitals, and schools to a quasi-autonomous entity responsible for that service. Some special-purpose districts, if authorised by the legislatures of both states, may even cross state lines. In some cases, such interjurisdictional special-purpose districts also require the approval of Congress—such as the Port Authority of New York and New Jersey, which manages ground, marine, and airport facilities in the New York metropolitan region. This Port Authority is the oldest interjurisdictional special-purpose district in the US.¹⁵

Special districts may also be created by local governments under enabling legislation by their states. This occurs for several reasons. Because all but two US states and most local governments have a balanced-budget requirement while special districts do not, a special district coterminous with the sub-state government can escape the burden of a balanced budget and take on debt subject to fewer restrictions,

¹³ United States Census Bureau, ‘Table 9. Special District Governments by Function and State: 2012’ (2012), www.census.gov/data/tables/2012/econ/gus/2012-governments.html (accessed 28 June 2021).

¹⁴ *Ball v James*, 451 US 355 (1981).

¹⁵ Richard Briffault and Laurie Reynolds, *Case and Materials on State and Local Government Law* (West Academic Publishing, 2016) 13–16.

including accessing the bond market.¹⁶ In other cases, two sub-state governments may determine that efficiencies can be achieved by cooperating to create a special district—in some instances, this is called ‘regionalisation’ of services.

While the number of county governments in the US has remained relatively stable over time, the 60-year period between 1952–2012 saw a 16 per cent increase in the number of municipal governments, that is, in the ‘incorporation’ of new municipalities.¹⁷ In addition, municipal boundaries may be changed by the ‘annexation’ of previously separately incorporated areas or of previously unincorporated areas (as when they shift from being part of a county general government to forming part of a specific municipality inside the county). By contrast, de-annexation or secession is the removal of a territory from an existing municipality. State law—either statutory or constitutional—provides the rules, which vary from state to state.

Annexation is the most common form of boundary change, and may occur by state legislative enactment; by municipal resolution or ordinance; by petition by residents or landowners in the area to be annexed; by judicial determination; or by a regional or state-wide boundary review commission. Often, there is a combination of requirements for annexation. Annexation may be motivated by the need for expanding cities to acquire new land to house their growing population, or by the desire to acquire a particularly desirable parcel (such as a riverfront property).

Depending on state law, annexation may require consent from both jurisdictions, but—particularly so in the American south and west—state law may allow it by unilateral application, subject to judicial review. Annexation comes with the service benefits that accrue from joining a wealthier governance unit, but at the cost of diluting the political power of the absorbed community.

Incorporation of a new municipal entity is governed by similar rules, and may also involve de-annexation or secession from a county as part of

¹⁶ National Conferences of State Legislatures, ‘State Balanced Budget Requirements’ (1999), www.ncsl.org/research/fiscal-policy/state-balanced-budget-requirements.aspx (accessed 15 July 2021).

¹⁷ United States Census Bureau, ‘Table 1. Government Units by State: Census Year 1942 to 2012’, www.census.gov/data/tables/2012/econ/gus/2012-governments.html (accessed 28 June 2021).

the process. Incorporation consolidates political power within a community, yet also entails the financial burden of having to support additional municipal services. One other form of boundary change is city-county consolidation.

While state legislative enactments set out the rules for incorporation, annexation, and secession, varying degrees of state court judicial review are required to ascertain the fairness of boundaries even where they have been approved by the voters of one or both communities or by a boundary commission. Questions of need, capacity, and local preference are all involved.¹⁸

3 CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

The US Constitution is silent on cities, even though cities such as New York, Boston, and Philadelphia were powerful both economically and politically in the early years of the republic. Using this silence, states throughout the nineteenth century sought to assert control over local governance. The legal structure of local autonomy thus moved towards a predominant, if not uniform, understanding of local governments as legally subordinate to the states.

That notion is embodied in Dillon's Rule, named after John F Dillon, who served as an Iowa Supreme Court justice and a US circuit judge. Judge Dillon argued that local governments, as administrative conveniences of the states, have no inherent law-making authority and possess only those powers that are expressly delegated to them by the state or which are indispensable to the purposes of their incorporation. The US Supreme Court endorsed this view in *Hunter v Pittsburgh*.¹⁹

However, even in the nineteenth century, advocates of local autonomy persuaded some states to amend their constitutions to bar or impose procedural constraints on 'special' legislation that adversely affected cities and served to limit the different forms of local government; similarly, these advocates targeted so-called 'ripper' legislation through which states displaced specific local institutions and responsibilities, or even removed local officials from office. The doctrine of an inherent but constitutionally

¹⁸ Briffault and Reynolds (n 16) 222–252.

¹⁹ 207 US 161, 178–179 (1907).

permitted right to local self-determination—a notion contrary to Dillon’s Rule—was advocated by scholars such as, and notably, Thomas Cooley of the Michigan Supreme Court. While the Dillon-Cooley debate remains confined to the realm of legal theory, the issues at stake have implications for local government authority that are of ongoing concern.

As new states began to join the Union after the Civil War, most of them included some degree of home-rule authority for at least their larger cities. The most limited form of home rule was ‘initiative’ authority, which enabled cities to enact their own rules as to purely local matters. More broadly, some states enacted ‘*imperio*’ authority, giving cities immunity from state interference in their function unless in specific contradiction to state law and rules.²⁰ After advocacy in the 1950s, states began to grant more extensive plenary authorities to city governments, except to the extent that these authorities were preempted by state law; today, states retain the power to preempt city rules.²¹

Thirty-nine states employ Dillon’s Rule; 31 apply it to all local governments and eight only to certain municipalities. A few states have constitutions that do not directly delegate (or direct their legislatures to delegate) police power to local governments, leaving the scope of local authority to state legislatures. Twenty states enshrine home rule in their constitutions for at least some of their local governments.²²

Even in a home-rule state, limitations are imposed on the ability of cities to levy taxes, change boundaries, and issue debt, and thus act as a constraint on sovereignty. While home rule provides greater formal power to those cities which possess it, that power is limited to governance of the city itself—it does not give cities power in intergovernmental negotiation or in regard to boundaries.

²⁰ Briffault and Reynolds (n 16) 346–351, 396–397.

²¹ National League of Cities, ‘Principles of Home Rule for the 21st Century’ (2020) 9–12.

²² Jesse J Richardson, Jr, Meghan Zimmerman Gough, and Robert Puentes, ‘Is Home Rule the Answer: Clarifying the Influence of Dillon’s Rule on Growth Management’, *Brookings Institution* (2003); Dale A Krane, Platon N Rigos, and Melvin B Hill, *Home Rule in America: A Fifty State Handbook* (CQ Press, 2001).

4 GOVERNANCE ROLE OF LOCAL GOVERNMENT

As noted earlier, local governments operate either under either Dillon's Rule, which requires county and local government to secure permission for newly sought governance authorities, or under home rule, which secures broader power to initiate legislative authority. County officials and city or town mayors are elected, often on party-political lines. City councils, too, are elected, and in some cities it is the council that selects one of its members to serve as mayor. Large cities and counties may have their own court system, particularly for criminal cases and for high-volume matters like traffic, domestic relations, and landlord-tenant disputes; such courts are under the appellate supervision of the state intermediate, appellate, and state supreme courts. Counties and municipalities also have an administrative structure that issues licences and permits as well as reviews land use, zoning, and environmental programming. Large cities have their own health and hospital systems, be it independently or in coordination with private providers.

While in the late twentieth century there was a trend to 'professional' management of cities through the use of a city manager, in recent years the pendulum has begun to swing back, with a 'strong-mayor' movement that has transcended state and even national borders. Advocates of the strong-mayor model point to examples such as former New York City Mayor Michael Bloomberg and former Denver Mayor (later Governor) John Hickenlooper as visionaries and innovators who exercised not only formal power, but excelled at negotiating with other levels of government and the private sector to maximise social goods in the face of budgetary limitations.²³

5 FINANCING LOCAL GOVERNMENT

American subnational governments are key economic actors. Their shares in GDP and public spending are above OECD averages, although slightly below the OECD federal countries at 18.6 per cent of GDP and 48.1 per

²³ Arguments for 'strong mayors' as an antidote to weak cities are made in Benjamin Barber, *If Mayors Ruled the World* (Yale University Press, 2013); Bruce Katz and Jennifer Bradley, *The Metropolitan Revolution: How Cities and Metros are Fixing our Broken Politics and Fragile Economy* (Brookings Institution Press, 2013); Richard C Schragger, 'Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System' (2006) 115(9) *The Yale Law Journal* 2542–2578.

cent of government expenditures. Subnational governments are also key public employers, accounting for more than 75 per cent of total public-employee spending. Of that, the local government is estimated to account for 11 per cent of GDP.²⁴

State and local governments look to a mix of revenue sources. While federal tax dollars return as grants-in-aid to state and local governments, the federal portion of aid to local governments remained relatively static until the injection of short-term emergency Covid-19 relief aid. Deficit spending for operating purposes is not an option for state or local governments, due to balanced-budget constraints. This means that when expenses rise, additional funding sources must be secured.

Tax policy varies greatly between states. Nine do not have an income tax. Most allow local governments to levy property taxes which underwrite a portion of local services. This is especially important for education, although the general revenue share for education from state-level budgets is growing. States can continue to levy taxes on city residents burdened at the same by home-rule authorised municipal taxes. Cities may be permitted by state law to raise revenues through local option taxes; many also charge fees or fines.

States with relatively high numbers of wealthier residents, such as New York, California, Virginia, and Maryland, receive almost one-third of their tax revenues from individual income taxes. Seventeen states allow municipalities, counties, school districts, and special districts to impose additional local income taxes. For example, New York City residents pay 3.078 per cent to 3.876 per cent income tax over and above the 4 per cent to 8.82 per cent state tax rate.²⁵

Other states look less to their residents and more to visitors. Nevada and Louisiana—both major tourist destinations—rely heavily on sales taxes, while cities like Las Vegas and New Orleans impose their own city or county sales taxes on top of that.

²⁴ OECD, 'United States', <https://bit.ly/3i5rkeB> (accessed 24 June 2021).

²⁵ Tonya Moreno, 'New York City Income Tax-Rates and Available Credits', *The Balance* (2021), www.thebalance.com/new-york-city-income-tax-3193280 (accessed 15 July 2021).

5.1 *Public Education and Fiscal Federalism: A Key Case*

Public education is required by every state law or state constitution, at least from first through twelfth grade and increasingly at the kindergarten and pre-kindergarten level. Even though there is no federal right to education,²⁶ congressional enactments authorise spending for some public education programmes and set certain benchmarks for minimum achievement. Education spending is one of the most contentious areas of policy conflict in the US, generating inter-local disputes over school district boundaries, state-local conflicts over the allocation of state-wide funding formulas to correct for inequalities, and federal litigation over civil rights issues. Conflicting interpretations of what a ‘right to education’ means in a given state, and how it is to be funded, have sparked more than 30 years of litigation in state and federal courts.²⁷

That conflict provides insight into the tensions of fiscal federalism in action in the US. The differing ability of high- and low-income communities to generate adequate revenue has led states to devise equalisation formulas to distribute additional state aid to underperforming districts, to districts with a poor property tax base due to low valuations, and to districts with a high proportion of special-needs students. State aid to local school districts is the fastest-growing stream of revenue transfer to a lower level of government. For this reason, it is often a flashpoint for tensions between rural and suburban state legislative districts and densely populated urban centres.

5.2 *Borrowing by Local Governments*

Local governments can borrow funds to build infrastructure and fix assets. Long-term debt for local government capital facilities is restricted by states, usually by capping the amount of debt a local government can issue or by capping its total amount of outstanding debt. When a local government pledges its taxing power to retire debt by guaranteeing its full faith

²⁶ *San Antonio Indep. School Dist. v Rodriguez*, 411 U.S. 1 (1973).

²⁷ Emily Parker, ‘50-State Review: Constitutional Obligations for Public Education’, *Education Commission of the States* (2016), <https://bit.ly/3MWABEc> (accessed 30 June 2021). Notwithstanding these controversies, school spending at the elementary and secondary level compares favourably to that in other OECD nations. See National Center for Education Statistics, ‘Education Expenditures by Country’, <https://nces.ed.gov/programs/coe/indicator/cmd> (accessed 21 June 2021).

and credit, it is referred to as a ‘general obligation debt’. Local governments can also issue revenue debt if the asset created is likely to generate an income stream. The risk of revenue debt rests with the investor, but since it is not backed by the full faith and credit of the local government, which can affect pricing, either positively or negatively.

Local governments also try to circumvent limitations on their ability to raise revenues (whether through home-rule charter or by petition to the state legislature) by entering the bond market in conjunction with development of special projects or business improvement districts. Historically, municipal bonds have been low-risk, low-yield instruments, but municipalities increasingly push the limits of governance constraints to participate in risky financing regimes. While these creative financing strategies can be successful in creating jobs and infrastructure, for many local governments defaults have led to financial instability and even municipal bankruptcy.

5.3 *Property Tax Relief and Tax-Parity Issues*

As the cost of services increases, local governments face pressure to increase the tax rate to maintain current levels or to improve quality to attract newer, younger residents. Older homeowners, sometimes on fixed incomes, and commercial property owners, resist these tax increases; meanwhile, mobile capital may threaten to shift its location to secure a preferable package. The result can spill into the political arena at the local or state level. In the last 30 years, a series of measures—including the Taxpayer’s Bill of Rights in Colorado, Tax and Expenditure Limits (TELs) in Colorado, Oklahoma, and Oregon, and constitutional amendment by initiative, such as Proposition 13 in California—have all sought to limit local property taxes. Between 1978 and 1980, 43 states implemented some form of property tax relief.²⁸

Recent social pressure to create tax parity between commercial property owners and residential owners, to break open communities to newer residents including younger first-time home buyers and communities of colour, and to fund education adequately, has fostered efforts to repeal these measures. The results have been mixed. In California in 2020, an effort to repeal Prop 13 was narrowly defeated; in the same year,

²⁸ Daniel R Mullins and Bruce A Wallin, ‘Tax and Expenditure Limitations: An Introduction and Overview’ (2004) 24(4) *Public Budgeting and Finance* 2–15.

Colorado's Gallagher Amendment, its version of a TEL, was repealed, but only after tax limitation legislation was passed in the state legislature.²⁹

State-wide limits to local property taxes create greater pressure on local governments to raise revenue from alternate sources. Many local governments generate income through fines and fees levied on individuals and businesses seeking professional and operating licences, or issue tickets for minor vehicular or lifestyle offences.

States seeking additional revenue sources have also turned to creative sources, among them taxation of online purchases, marijuana legalisation, and commuter taxes.³⁰ The latter were exacerbated by the Covid-19 pandemic of 2020–2021. The question of where local taxes are paid is governed either by interstate compact or by a rule that taxes are due where the service is performed. But what happens when a nation is forced to telecommute due to a pandemic—and when that practice becomes a norm? This is of keen interest in cities such as New York, with a tri-state workforce. In 2021, the US Supreme Court declined to decide this issue, leaving it for state and local governments to sort out.

5.4 *Local Government and Federal Government*

In the nineteenth century, there was a relationship between the federal government and large cities through shared authority over waterways and ports, at the time the primary internal pathway of interstate commerce. Municipal governments remained largely autonomous from the federal government until the Great Depression of the 1930s, when federal aid programmes poured millions of dollars into local governments. That direct relationship has continued, although it has waxed and waned under different federal administrations.

²⁹ Legislative Analyst's Office, 'Common Claims about Proposition 13' (2016), <https://lao.ca.gov/Publications/Report/3497> (accessed 8 July 2021); Iris J Lav and Erica Williams, 'A Formula for Decline: Lessons from Colorado for States Considering TABOR' *Center on Budget and Policy Priorities* (2010), <https://bit.ly/3w3bhX1> (accessed 1 August 2021).

³⁰ Janelle Cammenga and Jared Walczak, 'States Sales Taxes in the Post-Wayfair Era', *Tax Foundation* (2019), <https://bit.ly/3vYlnIJ> (accessed 1 August 2021); Eric Pandey, 'Telework's Tax Mess', *Axios* (2021), <https://bit.ly/3tPdXF3> (accessed 8 July 2021); Ulrik Boesen, 'How High are Taxes on Recreational Marijuana in Your State?', *Tax Foundation* (2021), <https://bit.ly/3q0e3Iy> (accessed 8 July 2021).

Though the federal government has reduced direct per capita aid to local governments since the 1980s, the Catalog of Federal Domestic Assistance in 2016 identified 824 programmes with local governments or communities as beneficiaries. Federal aid to local governments comes in three main forms: (1) categorical grants, which are awarded either based on a formula or through a competitive, project-based application; (2) block grants, which are allocated based on a formula, restrict funding to broad goals but allow localities to decide how to spend the money to meet those goals; (3) general revenue-sharing, which directs largely unrestricted funds from federal or state governments to localities based on a formula.³¹

Federal influence over local policy has grown apace with federal aid to local government. Grants-in-aid are a primary mechanism the federal government uses to extend its influence into state and local affairs. In this process, the federal government extends aid to states to finance areas of domestic public spending or to provide swift fiscal relief when severe, unforeseen economic conditions arise. From 1960 to 2016, grant-in-aid spending grew from USD 7 billion to USD 660 billion dollars. Although a portion of this is spending on physical infrastructure, the largest, and largest-growing portion, are social welfare payments to individuals and health-care-insurance coverage, including the Medicaid programme—the latter provides health insurance to Americans whose income is at or near the poverty line. Medicaid requires a state-spending share to complement the (increasingly large) federal share, and is the biggest single component of every state budget in the US.³²

‘Preemption’ is the term for federal assumption of regulatory responsibility in fields such as the environment, immigration, fiscal affairs, and service delivery. While federal preemption is in most areas supported by the Commerce Clause of the US Constitution, Congress often imposes requirements, codified through federal regulation, that entail financial

³¹ Megan Randall, Sarah Gault, and Tracy Gordon, ‘Federal Aid to Local Governments’, *Urban Institute* (2016), <https://urban.is/3w6Ofyq> (accessed 1 July 2021).

³² Mercatus Center, ‘Grants’, George Mason University (2020), www.mercatus.org/system/files/Federal-grant-aid-state-and-local-chart-analysis-pdf.pdf (accessed 15 July 2021); Congressional Research Service, ‘Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues’ (2019), <https://fas.org/sgp/crs/misc/R40638.pdf> (accessed 15 July 2021).

costs for lower levels of government, yet does so without funding those costs.

While formalistic federalism requires the federal government to regulate local governments only through the fifty state-level governments, in practical terms, direct federal regulation of US local governments, especially municipal governments, has vastly expanded in the twentieth and twenty-first centuries. Thus, preemption by the federal government touches all subnational government.

Mayors and governors have bridled at the burden placed on their operating budgets, deriding them as ‘unfunded mandates’. From 1994 to 1998, USD 54 billion in unfunded mandates were imposed on state and local budgets by actions of Congress, with environmental laws and laws on access for disabled persons creating the most costs. Since 2006 alone, 167 laws passed by Congress created unfunded mandates to state and local governments.³³

Unfunded mandates are the most oppressive when they impose direct costs. In theory, federal grants-in-aid for programmes like Medicaid do not constitute an unfunded mandate, since a right to refuse the grant alleviates the obligation to pay a local share. However, given that the health-insurance coverage that Medicaid provides is such a basic need for those who cannot afford to pay, and is such a large part of their budgets—one in every six dollars in US health-care costs are paid by Medicaid—federal regulatory requirements present a forced choice for local and state governments.

The increasing burden of unfunded mandates is indicative of a shift from ‘cooperative’ to ‘coercive’ fiscal federalism.³⁴ States are forced to share programme costs with a federal government that, unlike them, is not under the constraint of a balanced-budget requirement. Federal regulatory agencies oversee the use of federal funds to state and local programmes, and may impose financial sanctions on or delay disbursement to local governments that violate regulatory provisions.

³³ Congressional Research Service, ‘Unfunded Mandates Reform Act: History, Impact, and Issues’ (2020), <https://fas.org/sgp/crs/misc/R40957.pdf> (accessed 26 June 2021).

³⁴ John Kincaid, ‘From Cooperation to Coercion in American Federalism: Housing, Fragmentation and Preemption 1780–1992’ (1992) 9(2) *Journal of Law and Politics* 333–433; Paul L. Posner, ‘Mandates: The Politics of Coercive Federalism’, in Timothy J. Conlan and Paul L. Posner (eds) *Intergovernmental Management for the 21st Century* (Brookings Institution Press, 2008) 287.

Local governments labour under a double burden of unfunded mandates. Not only can federal-mandate costs be passed through from states to local governments, but states themselves may impose funding mandates on local governments by statute. To limit those state mandates, two devices have been adopted in some states. The first, fiscal noting, requires state legislation to contain an analysis of its impact on local governments; most states have adopted this practice, which emphasises transparency but not accountability. The second device, mandate reimbursement, requires states to internalise the costs of mandates, but has been adopted in only 14 states.³⁵ Organisations such as the National League of Cities, the US Conference of Mayors, and the National Association of Counties—national coalitions of locally elected leaders that act as interest groups in intergovernmental relations—oppose unfunded mandates by means of intergovernmental lobbying and research reports.

6 SUPERVISING LOCAL GOVERNMENT

State governments monitor the fiscal status of local governments, thereby performing a fiduciary role. An insolvent local government may go under state supervision or monitorship. This occurred in, among others, New York City in 1976, Miami, Florida in 1996, and Buffalo, New York in 2003. Federal bankruptcy protection is also available under Chapter IX of the US Tax Code.³⁶ Until the 2007–2008 subprime mortgage crisis, municipal bankruptcy in the US was almost non-existent, but over the following 10 years, a number of cities defaulted on their financial obligations, the most spectacular being the bankruptcy in 2013 of Detroit, Michigan. Other municipal bankruptcies are related to public-employee union pension defaults (San Bernardino and Stockton, California), near-bankruptcy in gaming hub Atlantic City (as a result in part of bankruptcies by casinos in the holdings of Donald Trump), and insolvency issues in

³⁵ Michael A Pagano, ‘United States of America’, in Nico Steytler (ed) *Local Government and Metropolitan Regions in Federal Systems* (McGill-Queen’s University Press, 2009) 378–379.

³⁶ L Owen Kirkpatrick, ‘The New Urban Fiscal Crisis: Finance, Democracy, and Municipal Debt’ (2016) 44(1) *Politics & Society* 45–80; Jeff Chapman, Adrienne Lu, and Logan Timmerhoff, ‘By the Numbers: A Look at Municipal Bankruptcies over the Past 20 Years’, *Pew* (6 July 2020), <https://bit.ly/3CFdaKP> (accessed 1 July 2021).

major American cities including Chicago, New York City, San Diego, and Colorado Springs.³⁷

While federal bankruptcy allows for a restructuring of debt, states do not assume the debt of local governments, and neither the federal nor the state government backs local debt. Local governments rely on their own full faith and credit when they issue general obligation bonds, or rely on a portion of the revenue stream from an income-producing facility when issuing revenue (non-guaranteed) bonds.

State supervision of local government, outside of fiscal supervision, varies from state to state and depends on the degree of home rule accorded to particular municipal governments. Preemption operates within each US state, as well as vertically between federal government and subsidiary government levels. Thus, a state legislature may deprive a local government of the ability to govern specific areas.³⁸ If a local government challenges that preemption for an area of law which it claims is within its home-rule authority, the state courts often will be the venue for redress.

Punitive preemption, or ‘the new preemption’ is one of the most significant issues of the US.³⁹ Historically, states have preempted local law on issues of policy that require uniformity or a comprehensive state-wide approach. However, in recent years, the pace of preemption has accelerated. States have preempted local efforts to ban fracking, protect lesbian, gay, bisexual, and transgender (LGBT) rights, ban plastic bags, and construct more affordable housing. In 1999, only two states limited the ability of local governments to set minimum wages, but by 2017 new laws meant that half of the states in the US—25—had such a law. The same applies to local laws regarding sick leave.⁴⁰ During the Covid-19 pandemic, the Texas governor prohibited, by executive order, local governments from enforcing mask mandates. In California, the City of

³⁷ Jamie Peck, ‘Transatlantic City, Part I: Conjunctural Urbanism’ 54(1) *Urban Studies* 4–30.

³⁸ See Paul Diller, ‘Intrastate Preemption’ (2007) 87(5) *Boston University Law Review* 1113–1176.

³⁹ Richard Briffault, ‘The Challenge of the New Preemption’ (2018) 70(6) *Stanford Law Review* 1995–2027.

⁴⁰ Lori Riverstone-Newell, ‘The Rise of State Preemption Laws in Response to Local Policy Innovation’ (2017) 47(3) *Publius: The Journal of Federalism* 403–425; Lauren Phillips, ‘Impeding Innovation: State Preemption of Progressive Local Regulations’ (2017) 117(8) *Columbia Law Review*.

Santa Cruz ended its effort to tax sugar-sweetened beverages (SSBs) citywide when a new state law threatened to withhold local sales tax revenues as punishment for a local tax on SSBs. What these conflicts have in common is that there is a political valence associated with them—in most cases, preemption appears to be a contest between progressive metropolitan areas and conservative state governments. Studies have linked advocacy around these preemptions to business and conservative political interests.⁴¹

In an effort at remediation, the National League of Cities recently published ‘Principles of Home Rule for the 21st Century’. This sets out principles and model language for strengthening home rule and asserts that judge-made doctrine should validate local law in the absence of clear and convincing arguments for state-wide uniformity.⁴²

7 INTERGOVERNMENTAL RELATIONS

In the US, the intergovernmental relations of local governments are mediated both formally and informally, with the structural characteristics of US federalism limiting the influence of local government.

Horizontal federalism manifests itself at the local level when local governments compete against one another or strike inter-local agreements. Although it is generally regarded in the US as a means for local governments to compete with each other for talent and investment, horizontal federalism also involves local governments observing, and adopting best practices from, other local governments.⁴³ However, vertical factors such as taxation, transportation investment, housing, and land-use policy are subject to rules set at the state or even federal level. This thick regulatory environment affects the capacity of large cities to compete with small ones, rural areas to compete with megacities, and municipalities to

⁴¹ Luke Fowler and Stephanie L Witt, ‘State Preemption of Local Authority: Explaining Patterns of State Adoption of Preemption Measures’ (2019) 49(3) *Publius: The Journal of Federalism* 540–559.

⁴² National League of Cities, ‘Principles of Home Rule for the 21st Century’ (2020), www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf (accessed 30 June 2021).

⁴³ Katherine Levine Einstein, David M Glick, and Maxwell Palmer, ‘City Learning: Evidence of Policy Information Diffusion from a Survey of U.S. Mayors’ (2018) 72(1) *Political Research Quarterly* 243–258.

compete with contiguous suburbs. Thus, horizontal federalism propels, at one and the same time, a race to excellence and a race to the bottom, given the pressure that local governments are under to cut costs.⁴⁴

Vertical federalism also operates at the local level. While it can serve to shift burdens downward from states to local entities, thus enabling higher-level orders of government to evade costs and accountability, vertical federalism also facilitates negotiation between cities and states to the extent that they can bypass the state and collaborate directly with federal agencies and elected officials. This creates a ‘federalism all the way down’.⁴⁵

7.1 *City Power—Or State Dominance*

Political factors can stack the deck against city power in two key respects. First, the 100 senators in the US Senate are elected state-wide, meaning that rural and less-densely populated states in the US are disproportionately represented in Congress’s upper house. Secondly, even in the US House of Representatives, whose members are selected by first-past-the-post contests by population-defined districts within the states, the process of redistricting is controlled by the then-majority party in the state legislature such that districts at both the state and federal level are set after the decennial census every 10 years. Redistricting strategies employed by both parties have tended to favour incumbents, meaning that there are few swing races.

The agglomeration in the largest cities of younger, productive workers, newer Americans, and racial minorities tends to concentrate their vote in a limited number of districts; meanwhile, out-migration from cities to suburbs, which tends to turn Red (Republican) districts ‘purple’ by mixing them with Blue (Democratic) voters, is not happening in great enough numbers in most places to create truly competitive districts. Notable exceptions are large counties in the south and west like Harris County, Texas (home to Houston), Fulton County, Georgia (home to

⁴⁴ For some of the rich conversation on this topic, see Allan Erbsen, ‘Horizontal Federalism’ (2008) 93(2) *Minnesota Law Review* 493–584, 495; Ann O’M Bowman, ‘Horizontal Federalism, Exploring Interstate Interactions’ (2004) 14(4) *Journal of Public Administration Research and Theory* 535–546.

⁴⁵ Heather K Gerken, ‘Forward: Federalism All The Way Down’ (2010) 124(1) *Harvard Law Review* 4–74.

Atlanta), and Maricopa County, Arizona (home to Phoenix). Not coincidentally, this is where major controversies arose about the integrity of the vote after the 2020 presidential election.⁴⁶

There is a second significant dilution of city power. Because urban dwellers are represented both by local government officials and by representatives sent to their state capital and Congress, the voices of local officials are forced to compete with those of representatives to the state legislature and the Congress. These rivalries, not trivial, can involve inter-party conflict, yet even when they do not, the priorities of a mayor and a congresswoman representing a congressional district within her city may be quite different, with the mayor a ‘generalist’ and the congressional member relying on one or two salient issues or constituencies.

As one partial antidote to this, mayors, county officials, and local officials engage in direct lobbying for their interests. Some maintain their own offices in the nation’s capital; others work through organisations such as the US Conference of Mayors, the National League of Cities, and the National Association of County Officials on common issues, often rallying together in resistance to unfunded mandates or out of concerns relating to wage and hour law, federal health-insurance-programme rules, aid to the needy and elderly, emergency prevention and response, environmental regulation, preemption, transportation, and climate change. These informal networks of influence vary in their effectiveness. Major city and county governments seek to influence state legislatures and administrative agencies through similar techniques.⁴⁷

7.2 *The Special Case Of Washington, DC*

As mentioned, the seat of the federal government is located in Washington, DC. Although DC is a rapidly growing city with a population of 689,545, it has no voting representation in Congress—indeed, until 1963, when an amendment to the US Constitution granted it three seats in the electoral college, its residents were not even able to vote in a presidential election. Washington, DC was granted limited home rule by an Act of Congress in 1973, and now has its own elected mayor, city council,

⁴⁶ Jonathan Bydlak, et al., ‘Partisan Election Review Efforts in Five States’, *Brennan Centre for Justice* (2021), <https://bit.ly/35MBJcR> (accessed 15 July 2021).

⁴⁷ Rebecca Goldstein and Hye Young You, ‘Cities as Lobbyists’ (2017) 61(4) *American Journal of Political Science* 864–876.

and education system. Congress may preempt legislative action by the District and, until 2005, had total veto power over its proposed budget. It continues to have control over select budget lines.

DC residents have waged an ongoing campaign for statehood, and in non-binding referenda have overwhelmingly supported statehood. However, DC statehood would require, at a minimum, an Act of Congress, and, some argue, a constitutional amendment. Because this could shift the balance of power in Congress, the chance of this happening is low.

8 POLITICAL CULTURE OF LOCAL GOVERNANCE

The US federalist system in an era of polarisation privileges vertical alliances based upon party affiliation. Two parties predominate—the Republican Party and the Democratic Party. In a number of populous states there are upstate-downstate or urban-suburban divides in party dominance, with Democrats prevalent in large urban settings that are home to younger voters, racial minorities, and educated elites, and Republicans dominating rural communities and small towns. Suburban voters are often the elusive ‘swing votes’ that in an increasing number of cases determine elections by razor-thin margins.

In a number of America’s largest cities, the Democratic Party has such overwhelming control that local elections are determined at the party primary phase, with the general election a mere formality. Since political parties select the primary candidates through their internal processes, this means that the party is enormously influential in local races and that the real contest is between the progressive and moderate wings of the Democratic party.

At the level of states, by contrast, Republican candidates have ‘trifectas’ (control of the governorship and both houses of the state legislature) in 23 of the 50 US states; it is the same case with Democrats in 15 states, while the remaining 12 states are divided.⁴⁸ With a more fiscally conservative and rural outlook, and increasingly influenced by the identity politics of the ‘Trump wing’ of the Republican Party, Republican governors and legislatures use tools such as state preemption to limit the policy agenda of the largest Democrat-controlled cities within their states.

⁴⁸ National Conference of State Legislatures, ‘State Partisan Composition’, www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx (accessed 1 July 2021).

In some municipalities, especially smaller ones, local elections for the executive office or governing council are formally non-partisan; council and governing board elections for special-purpose districts are frequently non-partisan—many local judges are elected, and those elections often do not list the party affiliation of a candidate.

US political parties do not impose minimum numbers of candidates for office on their ticket by gender or by race. As of May 2021, of the 1621 mayors of US cities with populations of 30,000 and above, 407, or 25.1 per cent, were women. Of those women, 91, or 25.6 per cent, were mayors of the 356 cities with populations of 100,000 or above.⁴⁹ As of 2020, mayors of more than one-third of US cities were African-American. In 2018, 10 per cent of newly elected mayors were Latino.⁵⁰

Voter turnout in local races is low. In 2016, the average voter turnout in mayoral races was a mere 15 per cent. The number has been steadily sinking.⁵¹ This contrasts with record turnouts in the 2020 national elections in the US, and could presage a turnaround after years of voter indifference to local races.⁵² Some state and local elections have begun to adopt ranked-choice voting. For example, the 2021 New York City Democratic mayoral primary, which is likely to determine the choice of mayor in that city, used ranked-choice voting for the first time.⁵³

⁴⁹ Center for American Women and Politics, ‘Women Mayors in U.S. Cities 2021’ *Rutgers, Eagleton Institute of Politics*, <https://cawp.rutgers.edu/women-mayors-us-cities-2021> (accessed 1 July 2021).

⁵⁰ Bloomberg Cities, ‘America’s Newest Mayors Are Younger, More Diverse’ (2018), <https://bit.ly/3wa4878> (accessed 1 July 2021).

⁵¹ Kriston Capps, ‘In the U.S., Almost No One Votes in Local Elections’ (2016) *Bloomberg City Lab*, <https://bloom.bg/3wa4bzQ> (accessed 1 July 2021); Thomas M Holbrook and Aaron C Weinschenk, ‘Campaigns, Mobilization, and Turnout in Mayoral Elections’ (2014) 67(1) *Political Research Quarterly* 42–55.

⁵² William H Frey, ‘Turnout in 2020 Election Spiked Among Both Democratic and Republican Voting Groups, New Census Data Shows’, *Brookings Institute* (2020), <https://brook.gs/3JbwyRZ> (accessed 1 July 2021); Scott Clement and Daniela Santa-mariña, ‘What We Know about the High, Broad Turnout in the 2020 Election’ *The Washington Post* (2021), <https://wapo.st/3pXvauU> (accessed 1 July 2021).

⁵³ Ester Fuchs and Nicholas Stabile, ‘Ranked-Choice Voting: Coming to a Ballot Box Near You’ (2021) *Cityland, New York Law School, Center for New York City Law*, www.citylandnyc.org/ranked-choice-voting-coming-to-a-ballot-box-near-you/ (accessed 1 July 2021).

9 COVID-19'S IMPACT ON THE ROLE OF LOCAL GOVERNMENT

As the Covid-19 pandemic in the US unfolded in 2020–2021, effective mitigation measures in these large metropolitan areas shifted the locus of impact to areas in the south and west that resisted stay-at-home, social-distancing, and masking orders. The pandemic also disproportionately impacted communities of colour, with the rate of illness and death highest in urban areas that are home to black and Latino Americans, especially those at or below the poverty line.⁵⁴ While several factors contributed to this disparity, a significant one is that many of these Americans were unable to telecommute during the pandemic; their overall vaccination rates were also lower.

Police powers, including public-health emergency powers, are matters of state law under the US Constitution, with charter cities and county health departments possessing significant concurrent jurisdiction. However, the Center for Disease Control (CDC), a federal agency, historically has played a substantial role in coordinating public-health emergency responses, providing technical support and equipment, and assisting local procurement of countermeasures during emergencies in the past, such as the H1N1 flu outbreak, and in US surveillance of the West Africa Ebola outbreak of 2014–2016.⁵⁵

The Covid-19 pandemic broke historic norms. The CDC was constrained in its response efforts in the early months, and then President Trump encouraged state and local authorities to compete on the open market for personal protective equipment (PPE), ventilators, test kits, and other critical supplies. State and local response was uneven: some states imposed near-complete lockdowns or stay-at-home protocols, whereas others remained largely 'open for business' throughout 2020 and the early months of 2021.

In many respects, the pandemic was an even greater fiscal shock than the recession of 2008 in that it decreased both consumer demand and

⁵⁴ Adelle Simmons, et al., 'Health Disparities by Race and Ethnicity during the Covid-19 Pandemic: Current Evidence and Policy Approaches', *Assistant Secretary of Planning and Evaluation, Health & Human Services* (2021), <https://aspe.hhs.gov/system/files/pdf/265206/covid-equity-issue-brief.pdf> (accessed 15 July 2021).

⁵⁵ Lawrence O Gostin and Lindsay F Wiley, 'Governmental Public Health Powers during the Covid-19 Pandemic' (2020) 323(21) *The Journal of the American Medical Association* 2137–2138.

labour supply.⁵⁶ By July 2020, economic activity was down 11 per cent nationally. A National League of Cities survey of 900 cities revealed that 70 per cent reported negative fiscal effects from Covid-19, with 90 per cent reporting revenue losses of 21 per cent on average.⁵⁷

In addition, subnational government responses took on partisan tones in a highly polarised election year. Conflicts emerged vertically between mayors and state-wide officials. In some cases, states preempted more rigorous mandates by mayors and county officials—particularly mandatory mask and social-distancing requirements—by defaulting to less rigorous, but uniform, state-wide procedures. Horizontal federalism also was in evidence: in a positive development, states on both the east and west coasts developed compacts to assure uniform requirements for the testing and quarantine of travellers on interstate highways. In a more ominous development, in the early weeks of the pandemic governors and local officials set up checkpoints to turn back interstate travellers.

After vaccination became available, local governments in major cities launched mass campaigns to encourage public acceptance and offered free vaccination at both public and private sites. Republican-led local governments were more muted in their endorsement, but nonetheless generally supported vaccination. By 2021, vaccination was not mandatory in the US, although the Biden administration has made inroads in making it mandatory for federal workers and those in some regulated industries.

The federal government stepped in with relief packages to state and local governments. The largest of these were the Families First Act, the CARES Act of 2020, the Covid relief bill, HR 133, and the American Rescue Plan Act of 2021. Under the CARES Act, 36 of the nation's largest municipalities received about USD 7.9 billion, with additional funds reallocated from money flowing to state governments. Notwithstanding this aid, local governments were forced to cut budgets, with the majority of cities reporting revenue shortfalls in 2020 as well as intensified demand for emergency services. The American Rescue Plan added

⁵⁶ Mariely López-Santana and Philip Rocco, 'Fiscal Federalism and Economic Crises in the United States: Lessons from the Covid-19 Pandemic and Great Recession' (2021) 51(2) *Publius: The Journal of Federalism* 365–395.

⁵⁷ National League of Cities, 'Cities Are Essential: The Covid-19 Recession' (2020), <https://bit.ly/3MWD0NI> (accessed 15 July 2021); Laura Hallas, et al., 'Variation in US States' Responses to Covid-19' *Blavatnik School of Government, Oxford University*, <https://bit.ly/3vWP110> (accessed 15 July 2021).

USD 65.1 billion in direct aid to American cities, towns, villages, and local tribal governments.

A number of state and local governments postponed individual and business tax payments for 2020 due to economic distress in communities. State and local authorities in a number of locations, and then the CDC nationally, imposed moratoriums on eviction for non-payment of rent by tenants in financial distress. Direct payment cheques to individuals and support for businesses were issued by the federal government under all three of the major legislative enactments.

One issue under US federalism that will require examination after Covid-19 is the degree of authority that local governments possess in a public-health emergency, with respect to their relationship both to the state government and to the federal government.⁵⁸ Mayors have argued for greater autonomy and flexibility in resource allocation and more robust public-health emergency authority.

10 EMERGING ISSUES AND TRENDS

Two prevailing trends in contemporary American federalism are polarisation and punitiveness.⁵⁹ Specific examples illustrate the trends. The Trump administration's withholding of grant funds to so-called 'sanctuary' jurisdictions is one example of punitive federalism. Sanctuary jurisdictions are local governments that decline to share information or cooperate with federal authorities in enforcing federal immigration law. The local governments justify their position on the grounds that they privilege trust and transparency in order to encourage undocumented individuals to work with government authorities, seek medical care, engage in labour, educate their children, and participate productively in their communities. New federal grant conditions in 2017 required state

⁵⁸ Bipartisan Policy Center, 'Positioning America's Public Health System for the Next Pandemic', <https://bipartisanpolicy.org/report/preparing-for-the-next-pandemic/> (accessed 30 June 2021).

⁵⁹ Greg Goelzhauser and David M Konisky, 'The State of American Federalism 2019–2020: Polarized and Punitive Intergovernmental Relations' (2020) 50(3) *Publius: The Journal of Federalism* 311–343; J Mitchell Pickerill and Cynthia J Bowling, 'Polarized Parties, Politics, and Policies: Fragmented Federalism in 2013–2014' (2014) 44(3) *Publius: The Journal of Federalism* 369–398.

and local governments to share data or lose funds.⁶⁰ Local governments filed court challenges and, in most cases, prevailed; at the inception of the Biden Administration, the US Department of Justice dropped legal defences to the challenged federal rules and reversed the policies. What remains uncertain is whether the new administration will seek to use the same forms of punitive federalism but in support of different policy goals.

Another significant development for federalism at the local level has been the elimination for middle- to high-income brackets of the ‘SALT’—state and local tax—deduction for individual taxpayers. SALT deductions were provided in federal revenue acts as a protection to local and state governments against federal monopolisation of the tax base. The tax plan signed by President Trump in 2017, called the Tax Cuts and Jobs Act, instituted a cap on the SALT deduction. Starting with the 2018 tax year, the maximum SALT deduction available was USD 10,000; previously, there was no limit. Elimination of the deduction had a disproportionate impact on high local tax states, which tended to be coastal and predominantly Democratic.⁶¹

Democrats in the 2021 Congress vowed to eliminate the SALT cap. One interesting and perhaps unintended consequence of the elimination of the SALT tax deduction is that it could serve as a driver of mobility, as residents of high-tax states move to states with lower taxes, potentially causing partisan political shifts.

The boom in telecommuting that commenced during the Covid-19 pandemic also has the potential to alter residential patterns in the US, although it is too early to know if the shifts during the emergency period will become permanent.⁶² According to one survey, during the pandemic, 71 per cent of workers whose job could be performed from home reported doing it from home all or most of the time as opposed to 20 per cent before the pandemic—more than half said that, given a choice, they

⁶⁰ Congressional Research Service, ‘“Sanctuary” Jurisdictions: Federal, State, and Local Policies and Related Litigation’ (2019), <https://fas.org/sgp/crs/homesec/R44795.pdf> (accessed 1 July 2021).

⁶¹ Government Finance Officers Association, ‘The Impact of Eliminating the State and Local Tax Deduction’ (2017), <https://bit.ly/315zBKb> (accessed 28 June 2021).

⁶² Amanda Barroso, ‘About Half of Americans Say their Lives will Remain Changed in Major Ways when the Pandemic Is Over’ *Pew Research Center* (2020), <https://pewrsr.ch/3CB0d4J> (accessed 27 June 2021).

would want to keep working from home even after the pandemic.⁶³ High commercial real estate vacancy rates in US cities could have a significant impact on the economy of major American cities; tensions are already evident over the tax jurisdiction entitled to tax wages of telecommuting workers; and large cities are reporting reduced sales tax revenues as well.

Notwithstanding the negative impact on cities of Covid-19 and the ‘Trump interlude’ in American federalism, there are positive developments in horizontal federalism.⁶⁴ Local governments have emulated innovations by their peer cities on tobacco use, nutrition and public health, and environmental regulation. At the international level, US mayors have become engaged in efforts that draw on their local experience and at the same time impact on the global commons. Several US mayors play leading roles in the Strong Cities Network to build resilience and combat violent-extremist recruitment.⁶⁵ The Global Parliament of Mayors works on common approaches to health, migration, and security.⁶⁶ Through the C-40 Cities programme, US mayors committed with their international counterparts to honour the Paris Climate Accords even as the US formally withdrew from them.⁶⁷

A bill in the US Congress, S. 4426, The City and State Diplomacy Act, would establish an office in the US State Department to support the initiatives of major American cities to engage in direct outreach to accomplish trade, sustainable development, and climate goals, among others.⁶⁸

In conclusion, while US local governments continue to be weak as a formal matter, US municipalities are home to nearly two-thirds of the country’s population, generate an overwhelming majority of GDP, and are the level of government with the highest degree of accountability and

⁶³ Kim Parker, Juliana Horowitz, and Rachel Minkin, ‘How the Coronavirus Outbreak Has — and Hasn’t — Changed the Way Americans Work’, *Pew Research Center* (2020), <https://pewrsr.ch/3MXBXi7> (accessed 27 June 2021).

⁶⁴ John Kincaid, ‘Introduction: The Trump Interlude and the States of American Federalism’ (2017) 49(3) *State and Local Government* 156–169.

⁶⁵ The Strong Cities Network, ‘Strong Cities’ (2021), <https://strongcitiesnetwork.org/en/> (accessed 15 July 2021).

⁶⁶ ‘Global Parliament of Mayors’ (2021), <https://globalparliamentofmayors.org/> (accessed 15 July 2021).

⁶⁷ The C40 Group, ‘C40 Cities’ (2021), www.c40.org/ (accessed 15 July 2021).

⁶⁸ City and State Diplomacy Act, Sect. 4426, 116th Congress (2020).

responsiveness. Political polarisation and punitive federalism have negative effects on the autonomy of large and diverse US cities; preemption has a negative impact when states interfere with local legislative and regulatory choice. In the US, local governments are at the zenith of their power when operating within their home-rule authority and when leveraging their economic and human capital. The Covid-19 pandemic has again illustrated how important local government is in delivering essential services.

Horizontal federalism may manifest competition among states but also allows local governments to share best practices, and intergovernmental lobbying helps local governments amplify their voice at the state and federal levels. Vertical federalism can be damaging where states punish innovation or privilege the needs of rural and suburban communities, and when the federal government takes corresponding actions. At the international level, major US cities are becoming increasingly networked with their counterparts to address problems affecting the global commons

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