ANDREW APPLEBY*

Targeted Taxes: Localities Take Aim at Large Employers to Solve Homelessness and Transportation Challenges

* Assistant Professor of Law at the Stetson University College of Law. Thanks to all those who have offered their time, energy, and insight to help improve this Article, especially Walter Hellerstein, Leandra Lederman, and the participants in the 2019 Junior Tax Scholars Conference.

Many localities are facing unprecedented challenges—such as a dramatic rise in homelessness and insufficient transportation infrastructure—that have reached crisis levels. These localities are in a precarious position. If they do not solve these problems quickly, or if they impose overbearing and poorly designed taxes, there will be dire economic and social repercussions.

In response to these challenges, several localities recently enacted or proposed taxes targeted directly at large businesses, with revenues allocated explicitly for a designated purpose. Localities are gravitating toward targeted taxes for several reasons. Some assert that the success of large employers within the locality contributed to, or even directly created, these challenges. Perhaps most importantly, targeted tax laws serve a clear expressive function. Depending on the locality's primary objective, targeted taxes may be problematic and counterproductive.

This Article begins by examining the recent local targeted tax provisions, which have crucial distinctions in motivations and mechanics. The Article then undertakes a tax policy and constitutional analysis of these targeted taxes and considers whether they are properly characterized as a tax or a fee. The Article concludes with several proposed alternatives that will generate the requisite revenue, and may serve an expressive function, more effectively than targeted taxes.

INTRODUCTION

Many localities are facing unprecedented challenges, such as a dramatic rise in homelessness and insufficient transportation infrastructure. In response, several localities recently enacted or proposed taxes targeted directly at large businesses, with revenues designated for a specific purpose. Depending on the locality's primary objective, targeted taxes may be problematic and counterproductive.

Targeted taxes are potentially problematic for several reasons, including the very limited and specific targeted taxpayers, the activity being taxed, and the mechanics of the taxes themselves. Many of these taxes are a flat amount per employee located within the locality. Imposing a direct tax on job creation within a locality will disincentivize creating jobs within that locality—generally an undesirable result.

So why are localities suddenly gravitating toward targeted taxes? First, challenges such as rampant homelessness and overwhelmed transportation infrastructure have reached crisis levels for many localities. Some assert that the success of large employers within the locality contributed to, or even directly created, these challenges. Second, localities face significant constraints as to the methods they can use to raise revenue. Third, and perhaps most importantly, targeted tax laws serve a clear expressive function.

The stakes are quite high for localities. Tax migration is a very real concern at the local level, particularly with localities competing to lure tech companies' expansion efforts. Many of these localities rely on just one large employer to support their existing tax bases. If that employer migrates out of the locality—either in whole or in part—the locality jeopardizes not only the new targeted tax revenue but also its existing property tax, sales tax, business tax, and personal income tax revenues.

If a locality's primary aim is virtue signaling, then an overwhelming barrage of targeted taxes, like San Francisco's recent approach, accomplishes that objective effectively. But if a locality's primary aims are to disincentivize the root cause of the problem, and generate additional revenue to mitigate that problem, there are several better alternatives to targeted taxes.

This Article begins in Part I by examining the recent local targeted tax provisions, which have crucial distinctions in motivations and mechanics. Part II undertakes a tax policy and constitutional analysis of these targeted taxes and considers whether they are properly characterized as a tax or a fee. Part III concludes with alternatives that may accomplish the localities' goals without the drawbacks of these targeted tax provisions.

I
TARGETED TAX LANDSCAPE

Most localities that have considered targeted taxes thus far are tech-heavy cities on the West Coast of the United States.[1] Seattle kindled the trend with what was essentially a per-employee tax proposal with revenues earmarked to combat escalating homelessness in the city. Although Seattle subsequently repealed its tax, several California cities embraced the concept.

San Francisco has now spearheaded the targeted tax movement. Like Seattle, San Francisco enacted a targeted tax to combat homelessness. San Francisco structured its tax as an additional gross receipts tax instead of a per-employee tax. San Francisco also proposed several new or increased targeted taxes, including a commercial rents tax with revenues earmarked for childcare and early education; an Initial Public Offering (IPO) tax with revenues earmarked for income inequality mitigation programs; and an excessive CEO compensation tax with revenues earmarked for mental health programs.

Localities on both coasts have advanced targeted taxes to fund transportation infrastructure development. In California, Cupertino proposed, and Mountain View voters enacted, per-employee taxes to fund transportation. Localities on the East Coast have flirted with targeted taxes to fund transportation infrastructure, but the proposed

1 The targeted tax movement is most prevalent at the U.S. local level, but it has started to reach the international stage. France was the first country to enact a targeted tax as to imposition, aimed at large U.S.-based tech companies. France imposes a 3% tax on gross "digital" revenue if a business has digital revenue of at least €750 million worldwide and €25 million in France. The tax will impact approximately thirty businesses, and the U.S. government has asserted that the new digital tax discriminates impermissibly. Isabel Gottlieb, *Big Tech Takes Fight over French Digital Tax to EU*, BLOOMBERG L. (July 25, 2019, 10:14 AM), https://www.bloomberglaw.com/document/XFU0HKR4000000?bna_news_filter=daily-tax-report-international&jcsearch=BNA%25200000016c299cddf2afee299dd6810001#jcite [https://perma.cc/FTT2-9679]; Bertrand Hermant, *INSIGHT: France Taxes the Digital Economy*, BLOOMBERG L. (Aug. 8, 2019, 12:00 AM), https://www.bloomberglaw.com/product/tax/document/X9A8NJ4G000000?bna_news_filter=daily-tax-report-international&jcsearch=BNA%25200000016c43e0da9aad6f63e61f2d0001#jcite [https://perma.cc/P9ND-MBF3]. Unlike U.S. local targeted taxes, France's digital tax does not have a specific spending designation. *Id.*

target of the tax tends to be "millionaire" individuals rather than large employers.

The most innovative targeted tax approach belongs to Portland, Oregon. Portland is the first locality generating tax revenue to address climate change. Portland enacted a targeted retail gross receipts tax with revenues earmarked for clean energy projects. Portland is also the first locality to enact an excessive CEO compensation tax.

Because these taxes have important distinctions—and motivations—it is instructive to analyze each in detail. The structure of each tax, and the locality's justifications, are critical to avoid constitutional infirmities and to develop more efficient and effective solutions to each locality's pressing challenges.

A. Seattle Homelessness Tax

Seattle's homelessness tax garnered significant national attention due to its novelty and the fervent corporate backlash it produced. Seattle enacted the tax on May 16, 2018, but repealed it just a month later.[2]

Although there were many iterations of the proposed homelessness tax, Seattle enacted an "employee hours tax" that essentially functioned as a per-employee tax.[3] The provision included two options for businesses subject to the tax: (1) pay a tax that totaled $275 annually for each full-time employee working in Seattle, or (2) pay tax at a rate of $0.14323 per hour worked by each employee in Seattle.[4] Importantly, the tax applied only to large businesses operating in Seattle. Seattle imposed the tax on businesses that generated greater than $20 million of taxable gross income in Seattle.[5] The city estimated that only 3% of Seattle business taxpayers would be subject to the new

---

2 Council B. 119250 (Seattle, Wash. 2018) (enacting Seattle, Wash., Ordinance 125578 (May 16, 2018)) (codified as SEATTLE, WASH., MUN. CODE tit. 5, ch. 5.37, 5.38 (2018)); Council B. 119280 (Seattle, Wash. 2018) (enacting Seattle, Wash., Ordinance 125592 (June 13, 2018)) (repealing Seattle, Wash., Ordinance 125578 (June 13, 2018)).

3 SEATTLE, WASH., MUN. CODE tit. 5, ch. 5.37 (repealed 2018).

4 *Id.* § 030 (repealed). The initial proposed bills imposed tax at an annual rate of $500 per full-time employee, but that rate was cut almost in half after the Seattle business community's overwhelmingly negative reaction. *See* Council B. 119250 (enacting Ordinance 125578); Matt McIlwain, *Open Letter—Business Leaders Speak Out on the Seattle "Head Tax,"* MEDIUM (May 8, 2018), https://medium.com/@mattmcilwain/no-on-seattle-head-tax-846f7a9dd655 [https://perma.cc/6PEJ-S2PY].

5 SEATTLE, WASH., MUN. CODE tit. 5, ch. 5.37, § 050(A)(1), ch. 5.45 (repealed 2018).

tax.[6] Revenue projections varied, but the final estimate was that the tax would generate $47.4 million annually.[7] The tax would have been effective January 1, 2019, through December 31, 2023.[8]

The tax appeared to be aimed primarily at Amazon, which would have paid an estimated $12 million annually—over 25% of the total annual revenue the tax would have generated.[9] Just a handful of large businesses based in Seattle, namely Starbucks, Expedia, and Alaska Air, would have generated the majority of the tax revenue.[10] Seattle designed the tax as a per-employee tax, and used gross income instead of net income for the application threshold, to ensure that large businesses would pay tax even if they were not profitable. Such an approach is understandable, particularly with Seattle's primary target being Amazon, which has paid minimal U.S. federal corporate net income tax.[11] One major flaw with this tax structure, however, is that it disproportionally affects low-margin businesses, especially those with significant lower-wage employee bases, such as local grocery store chains.[12]

---

6 Memorandum from Dan Eder, Cent. Staff Deputy Dir., Seattle City Council, & Erik Sund, Budget & Fin. Coordinator, Seattle City Council, to Fin. & Neighborhoods Comm. (Apr. 25, 2018), http://seattle.legistar.com/View.ashx?M=F&ID=6211937&GUID=00E43D6F-6488-4FBF-B898-626D12BE0B44 [https://perma.cc/RAC8-RZEU] [hereinafter Dan Eder Memorandum]. The 3% of Seattle business taxpayers equates to approximately 585 businesses. *Id.*

7 SEATTLE CITY COUNCIL, SUMMARY AND FISCAL NOTE, https://seattle.legistar.com/View.ashx?M=F&ID=6235882&GUID=ED4AEEC8-907E-428A-987E-A3CDEE590C81 [https://perma.cc/HZE2-WRSV] (discussing Council Bill 119250).

8 SEATTLE, WASH., MUN. CODE tit. 5, ch. 5.37, § 030(G) (repealed 2018).

9 *Economic Implications of Taxing Employment*, ECONORTHWEST (last visited Jan. 20, 2020), https://static1.squarespace.com/static/597fb96acd39c34098e8d423/t/5c5b0aa341920276d92d528a/1549470382831/Economic+Implications+of+Taxing+Employment.pdf [https://perma.cc/UM45-W46B] [hereinafter ECONORTHWEST].

10 *See* Travis H. Brown, *How Seattle's New Tax to Fight Homelessness Could Ruin Its Economy*, FORTUNE (May 17, 2018, 12:15 PM), https://fortune.com/2018/05/17/head-tax-in-seattle-amazon-starbucks/ [https://perma.cc/S8JZ-48LL].

11 *See* Stephanie Denning, *Why Amazon Pays No Corporate Taxes*, FORBES (Feb. 22, 2019, 7:16 PM), https://www.forbes.com/sites/stephaniedenning/2019/02/22/why-amazon-pays-no-corporate-taxes/#2071985654d5 [https://perma.cc/WHF4-ABRD]; Danny Westneat, *Amazon Puts the Smile in Federal Income Taxes — by Not Paying Any*, SEATTLE TIMES (Feb. 15, 2019, 7:58 PM), https://www.seattletimes.com/seattle-news/politics/amazon-puts-the-smile-in-federal-income-taxes-by-not-paying-any/ [https://perma.cc/HNS6-FC2T].

12 *See* Benjamin Romano, *Not Just an 'Amazon Tax': Other Seattle Businesses Join Head-Tax Fight*, SEATTLE TIMES (May 8, 2018, 3:41 PM), https://www.seattletimes.com/business/wide-range-of-seattle-businesses-speak-out-against-head-tax-proposal/ [https://perma.cc/9L9X-BB3P].

All concede that homelessness has reached epidemic levels in Seattle.[13] Seattle has been in a state of civil emergency related to homelessness since 2015.[14] Homelessness is estimated to cost the Seattle-area economy $1.1 billion due to extra policing, lost tourism and business, and frequent homeless hospitalization.[15] A McKinsey & Company report concluded that King County, Washington, needed to spend from $360 million to $410 million annually to effectively combat homelessness, which would approximately double the current annual expenditure.[16] Seated in King County, Seattle's proportional contribution to that additional spending would be $70 million annually.[17]

The primary cause of Seattle's homelessness epidemic and how best to combat it divides the city and its large businesses. A survey concluded that almost one-third of homelessness in King County, Washington, is caused by job loss, which was the single largest reported cause of homelessness.[18] Only 6% reported that not being able to afford rent increases was the cause of their homelessness.[19] McKinsey, however, pointed to the correlation between homelessness increasing and market rents increasing.[20] Others respond that homelessness has decreased in many other major cities even as market rents have increased.[21]

---

13 *See, e.g.*, Council B. 119250 (Seattle, Wash. 2018) (enacting Seattle, Wash., Ordinance 125578 (May 16, 2018)); Mcllwain, *supra* note 4; Christopher F. Rufo, *Seattle Under Siege*, CITY J. (2018), https://www.city-journal.org/seattle-homelessness [https://perma.cc/64JH-MJGC]; Maggie Stringfellow & Dilip Wagle, *The Economics of Homelessness in Seattle and King County*, MCKINSEY & COMPANY (May 2018), https://www.mckinsey.com/featured-insights/future-of-cities/the-economics-of-homelessness-in-seattle-and-king-county [https://perma.cc/5KNZ-DE3K]. The Seattle City Council also recognized that a solution requires a "collaborative effort." Council B. 119250 (enacting Seattle, Wash., Ordinance 125578).

14 Council B. 119250 (enacting Seattle, Wash., Ordinance 125578).

15 Stringfellow & Wagle, *supra* note 13.

16 *Id.*; Matt Day & Noah Buhayar, *Amazon Led a Tax Rebellion. A Year Later, Seattle Is Gridlocked*, BLOOMBERG L. (June 9, 2019, 4:00 PM), https://www.bloomberg.com/news/articles/2019-06-09/after-amazon-led-tax-rebellion-seattle-s-homeless-aid-stalls [https://perma.cc/9ARR-FQZC].

17 Memorandum from Michael Maddux, Legislative Aide & Policy Researcher, Seattle City Council, to Teresa Mosqueda, Councilmember, Seattle City Council (May 10, 2018), https://seattle.legistar.com/View.ashx?M=F&ID=6247405&GUID=887FA391-72BE-4563-B1C1-07D96F32EB1B [https://perma.cc/7G4C-LP5F] [hereinafter Mosqueda Memorandum].

18 ECONORTHWEST, *supra* note 9.

19 Rufo, *supra* note 13.

20 Stringfellow & Wagle, *supra* note 13.

21 Rufo, *supra* note 13.

As for the Seattle City Council's motivations for the tax, the bill itself contained a four-page explanation. The bill recognized that Seattle's "growth and prosperity has directly contributed to the rapid increase in the number of individuals and families experiencing homelessness."[22] The bill also recognized a "correlation between increasing rent and homelessness."[23] Members of Seattle's City Council traveled to New York City to encourage New York City to pass legislation to fund the resultant housing and transportation problems that Amazon's expansion would create there.[24] The City Council's belief that economic prosperity and the resultant increased housing costs are the primary cause of homelessness in the city explains why the City Council would target Seattle's successful large businesses to remedy the problem.

Even if large businesses were to concede that their success created Seattle's homelessness epidemic, there are fundamental disagreements regarding the remedy and who should coordinate it. Substantively, the primary debate is whether to focus more on building affordable housing or building shelters.[25] Administratively, businesses prefer to fund programs directly. Amazon and Microsoft are currently building homeless shelters in King County.[26] Microsoft set aside $500 million for affordable housing, including $25 million earmarked specifically for homelessness mitigation programs.[27] Amazon founder Jeff Bezos created the Bezos Day One Fund with a commitment of $2 billion to assist homeless families and create preschools in low-income communities.[28] The fund has already contributed $97.5 million in

---

22 Council B. 119250 (Seattle, Wash. 2018) (enacting Seattle, Wash., Ordinance 125578).

23 *Id.*

24 Krista Gmelich & Spencer Soper, *Seattle City Council Members Visit NYC to Warn About Amazon HQ2*, BLOOMBERG L. (Jan. 7, 2019, 8:47 AM), https://www.bloomberglaw.com/product/tax/document/XA49T6EC000000?bna_news_filter=daily-tax-report&jcsearch=BNA%2520000001682922d327a7fcfdff92d70000#jcite [https://perma.cc/K3WM-XP6Z].

25 *See* Mosqueda Memorandum, *supra* note 17; Brown, *supra* note 10; Michael Hiltzik, *Column: Mountain View's Proposed 'Google Tax' Reminds Us That Big Employers Bring Not Just Jobs, But Problems*, L.A. TIMES (May 11, 2018, 7:30 AM), https://www.latimes.com/business/hiltzik/la-fi-google-tax-20180510-story.html [https://perma.cc/KS9V-UEUB]; Rufo, *supra* note 13; Stringfellow & Wagle, *supra* note 13.

26 Day & Buhayar, *supra* note 16.

27 *Id.*

28 BEZOS DAY ONE FUND, https://www.bezosdayonefund.org/ [https://perma.cc/E5HA-ZTJH] (last visited Jan. 17, 2020).

grants to organizations combating homelessness nationwide, although only a small portion has been directed to the Seattle area.[29]

Because of these fundamental disagreements, and the per-employee nature of the tax, Seattle businesses opposed the homelessness tax vehemently.[30] Amazon publicly threatened to abandon a planned Seattle expansion project, which could have accommodated 7,000 new jobs worth an estimated $3.5 billion in total additional economic output.[31] But Amazon was not alone. Over 100 CEOs of Seattle-based businesses, representing tens of thousands of Seattle jobs, signed a letter opposing the tax.[32] CEOs opposed the per-employee tax

> because of the message it sends to every business: if you are investing in growth, if you create too many jobs in Seattle, you will be punished. Sending this message to entrepreneurs, investors, and job creators will cause far greater damage to Seattle's growth prospects than the direct impact on the businesses being taxed.[33]

The letter suggested that instead of a "head tax," the better approach is "collaboration and dialogue to come up with innovative solutions to maintain a thriving economy in [Seattle]."[34] The CEOs offered to "join forces to make a plan that sustains the growth our city is proud of, while also addressing the problems of housing, homelessness and infrastructure."[35] The Seattle Metropolitan Chamber of Commerce commissioned an economic analysis of the tax that concluded the tax would be counterproductive and "may disproportionately impact lower wage earners and exacerbate the root causes of homelessness."[36]

---

29 Rebecca Aydin, *Jeff Bezos Donated $100 Million to Fighting Homelessness — and in an Unusual Move, He's Letting the Charities Control How It's Spent*, BUS. INSIDER (Aug. 12, 2019, 2:07 PM), https://www.businessinsider.com/jeff-bezos-donation-fighting-homelessness-hands-off-approach-2019-8 [https://perma.cc/QVF2-ZDW7]; Lauren Feiner, *Jeff Bezos' Day One Fund Gives $97.5 Million to 24 Groups Helping the Homeless*, CNBC (Nov. 20, 2018, 9:31 AM), https://www.cnbc.com/2018/11/20/bezos-day-one-fund-gives-97point5-million-to-help-the-homeless.html [https://perma.cc/S5AL-TQWV]. Bezos is allowing each recipient organization to spend the funds with minimal oversight, requiring only an annual report. Aydin, *supra*.

30 *See, e.g.*, Alana Semuels, *How Amazon Helped Kill a Seattle Tax on Business*, ATLANTIC (June 13, 2018), https://www.theatlantic.com/technology/archive/2018/06/how-amazon-helped-kill-a-seattle-tax-on-business/562736/ [https://perma.cc/QX6L-85CV].

31 ECONORTHWEST, *supra* note 9.

32 Mcllwain, *supra* note 4.

33 *Id.* (emphasis added).

34 *Id.* ("This is like telling a classroom that the students who do the most homework will be singled out for detention.").

35 *Id.*

36 ECONORTHWEST, *supra* note 9.

Seattle repealed the homelessness tax because there were tens of thousands of signatures gathered to repeal the tax via referendum, and Seattle wanted to avoid election-related costs to defend the tax provision.[37]

Further explaining Seattle businesses' opposition to another tax regime are the myriad taxes they face already in Washington. Seattle has an existing Business & Occupation tax, and Washington recently enacted a host of new state-level business tax measures.[38] To expand its tax regime, Washington enacted a payroll tax that will generate approximately $1 billion annually to fund long-term care,[39] increased its Business & Occupation tax by approximately $450 million annually to fund job training and education,[40] increased its Business & Occupation tax as applied to financial institutions by an estimated $100 million annually,[41] and enacted a graduated real estate excise tax rate for commercial property that will generate $175 million annually.[42]

Although the per-employee homelessness targeted tax initiative was a failure in Seattle, the city will likely be monitoring San Francisco's efforts to combat homelessness. As discussed below, San Francisco's anticipated approach going forward is one that Seattle can likely adopt without as much business opposition.

---

[37] SEATTLE CITY COUNCIL, *supra* note 7.

[38] *See* Garry G. Fujita, *Possible Surprises for Washington Taxpayers After the 2019 Session*, TAX NOTES (July 1, 2019), https://www.taxnotes.com/tax-notes-state/legislation-and-lawmaking/possible-surprises-washington-taxpayers-after-2019-session/2019/06/17/29jyw [https://perma.cc/YM9X-VG3R].

[39] H.B. 1087, 66th Leg., Reg. Sess. (Wash. 2019); Paul Jones, *Washington Governor Signs $1 Billion Payroll Tax for Long-Term Care*, TAX NOTES (May 15, 2019), https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/washington-governor-signs-1-billion-payroll-tax-long-term-care/2019/05/15/29hnf [https://perma.cc/8WMD-T4RS].

[40] H.B. 2158, 66th Leg., Reg. Sess. (Wash. 2019); James Nani, *Wash. Hikes Biz Taxes to Fund Job Training, Education*, LAW360 (May 23, 2019), https://www.law360.com/tax-authority/articles/1162406/wash-hikes-biz-taxes-to-fund-job-training-education [https://perma.cc/D5DP-6JFT].

[41] H.B. 2167, 66th Leg., Reg. Sess. (Wash. 2019); Brett Durbin & Scott Edwards, *Wash. Companies Should Brace for New Law's Major Tax Hit*, LAW360 (May 7, 2019, 4:57 PM), https://www.law360.com/articles/1155483/wash-companies-should-brace-for-new-law-s-major-tax-hit [https://perma.cc/H5JN-34HK].

[42] S.B. 5998, 66th Leg., Reg. Sess. (Wash. 2019); Durbin & Edwards, *supra* note 41.

B. San Francisco Business Taxes

To understand the current state of San Francisco business taxes, one must examine recent history.[43] In 2011, San Francisco offered tax incentives, most notably a payroll tax exclusion aimed at Twitter, to encourage tech growth and hiring in the recession's aftermath.[44] In 2012, San Francisco enacted a gross receipts tax to replace its payroll expense tax, which had arguably driven tech companies out of the city.[45] San Francisco planned to phase out the payroll expense tax.[46] San Francisco had intentionally created a pro-business-taxpayer environment that helped accomplish the city's objective to retain and attract growing tech companies.[47] San Francisco has added an average of 24,000 new jobs annually from 2010 to 2017.[48] In 2017, tech accounted for 24% of total private wages in San Francisco, up from 7% in 2008.[49]

When the gross receipts tax did not generate as much revenue as anticipated, however, San Francisco retained the payroll expense tax that it had planned to phase out.[50] Starting in 2018, San Francisco enacted and proposed a barrage of targeted taxes, alienating many in

---

43 Justice Oliver Wendell Holmes once famously remarked in a tax opinion that "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

44 *See, e.g.*, Gregory Barber, *No More Deals: San Francisco Considers Raising Taxes on Tech*, WIRED (July 16, 2019, 9:00 AM), https://www.wired.com/story/no-more-deals-san-francisco-considers-raising-taxes-tech/ [https://perma.cc/AK2D-4JEF]; Joyce E. Cutler, *'Twitter' Tax Break in San Francisco Ends Amid Push for New Funds*, BLOOMBERG L. (May 15, 2019, 1:46 AM), https://www.bloomberglaw.com/document/X9L121VO000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016aa3f2dbe3a3eeabff a8290000#jcite [https://perma.cc/32SG-GNHX] [hereinafter *'Twitter' Tax Break*]; Katy Steinmetz, *What the Twitter Tax Break Means for San Francisco*, TIME (Feb. 28, 2014), https://time.com/14335/twitter-tax-break-san-francisco/ [https://perma.cc/L683-EN5E].

45 *See* Joyce E. Cutler, *The Uber Tax? Stock-Based Compensation Faces New Local Levy*, BLOOMBERG L. (May 9, 2019, 11:01 AM), https://www.bloomberglaw.com/document/X84HR6I8000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016a99 c8dbeea57afbc8012e0000#jcite [https://perma.cc/H27N-MUHB] [hereinafter *The Uber Tax?*].

46 *See id.*

47 *'Twitter' Tax Break*, *supra* note 44. Tenderloin Housing Clinic Executive Director Randy Shaw stated, "The tax break brought more investment to the area from 2012-2019 than in the preceding fifty years combined." *Id.*

48 *Id.*

49 *Id.*

50 *See The Uber Tax?*, *supra* note 45; Dominic Fracassa, *SF Launches Sweeping Review of City's Business Taxes*, S.F. CHRON. (July 3, 2019, 9:26 AM), https://www.sfchronicle.com/bayarea/article/SF-launches-sweeping-review-of-city-s-business-14068142.php?psid=crEI3 [https://perma.cc/RS38-9DRQ] [hereinafter *SF Launches Sweeping Review*].

the San Francisco business community who grew their businesses, and invested in the community, based on the understanding that the gross receipts tax would be the sole general business tax in the city.[51]

1. San Francisco Homelessness Tax

Seattle's homelessness epidemic is dwarfed only by San Francisco's, so it was no surprise when San Francisco emulated Seattle's targeted tax approach.[52] San Francisco voters enacted a new tax targeted at large businesses within the city with the revenue expressly designated to combat homelessness.[53] The official bill recognized that "San Francisco is experiencing a housing crisis of historic proportions that has led to a major humanitarian and public health crisis in large-scale homelessness for which the City has insufficient resources to address."[54] Importantly, San Francisco's tax differs from Seattle's in that it generally imposes an additional tax on large businesses' gross receipts rather than on their number of employees.[55]

San Francisco voters enacted the new homelessness tax in November 2018.[56] The new provision imposes an additional tax of 0.175% to 0.69%, depending on business classification, on taxable gross receipts totaling over $50 million.[57] The tax is estimated to generate $250 million to $300 million annually, which will be

51 *SF Launches Sweeping Review*, *supra* note 50.

52 San Francisco's homelessness epidemic is jeopardizing its vital tourism industry that generates $9 billion a year, employs 80,000 people, and generates more than $725 million in local taxes. *See, e.g.*, S.F., CAL., BUS. & TAX REGS. CODE art. 28, § 2802(i) (2019); Matier & Ross, *SF's Appalling Street Life Repels Residents — Now It's Driven Away a Convention*, S.F. CHRON. (July 3, 2018, 7:58 AM), https://www.sfchronicle.com/bayarea/matier-ross/article/SF-s-appalling-street-life-repels-residents-13038748.php [https://perma.cc/SG77-BAXQ].

53 S.F., CAL., BUS. & TAX REGS. CODE art. 28.

54 *Id.* § 2802(a).

55 Many businesses, however, may fall within an alternative tax based on a percentage of payroll expense within the city. For these businesses, they will face an aggregate payroll tax of 3.28% (consisting of 1.4% administrative office tax, 1.5% homelessness tax, and 0.38% payroll expense tax). S.F., CAL., BUS. & TAX REGS. CODE art. 28, § 2804(d); S.F., CAL., BUS. & TAX REGS. CODE art. 28, 12-A-1, § 953.8(a); *Payroll Expense Tax (PY)*, TREASURER & TAX COLLECTOR, http://sftreasurer.org/business/taxes-fees/payroll-expense-tax-py [https://perma.cc/4AUV-XNBV] (last visited Jan. 19, 2020).

56 S.F., Cal., Ordinance 01317218 (Jan. 1, 2019) (codified as S.F., CAL., BUS. & TAX REGS. CODE art. 28 (2019)).

57 S.F., CAL., BUS. & TAX REGS. CODE art. 28 § 2804 (2018).

deposited in the "Our City, Our Home Fund."[58] Businesses subject to the homelessness tax comprise approximately 15% to 20% of the city's job base and pay 40% of the city's existing business taxes.[59]

The San Francisco Board of Supervisors did not officially assert that the large businesses in San Francisco caused the homelessness problem, but rather that these businesses are best able to bear the costs to remedy it.[60] The bill also recognized that large businesses were the beneficiaries of a significant corporate tax rate cut under the federal Tax Cuts and Jobs Act of 2017, and that San Francisco should reap a portion of those savings.[61]

One City Supervisor, Gordon Mar, blamed large businesses for the city's problems much more directly. Mar said, "A lot of these problems have been exacerbated by the tech boom, from affordability and gentrification to homelessness and gridlock on our streets."[62] Mar elaborated, "We've seen growing traffic congestion and gridlock on our streets due to the huge influx of new workers here in our city. We've seen a growing . . . housing affordability crisis . . . our homelessness crisis . . . due just to the growing economic divide here in our city."[63] Finally, unusual for a local politician, Mar expressly supported *limiting* job growth: "We can't just keep supporting job creation and growth unchecked."[64]

As for the business community reaction, there was a high-profile debate between San Francisco-headquartered tech companies, with the Salesforce CEO supporting the tax, and the Twitter/Square CEO[65] and Stripe CEO opposing it.[66] Other opponents argued that spending would

---

58 S.F., CAL., BUS. & TAX REGS. CODE art. 28, § 2802(b) (2019); Letter from Ben Rosenfield, S.F. City Controller, to John Arntz, S.F. Dep't of Elections (Aug. 13, 2018) [hereinafter Letter from Ben Rosenfield to John Arntz].

59 Letter from Ben Rosenfield to John Arntz, *supra* note 58.

60 *See* S.F., CAL., BUS. & TAX REGS. CODE art. 28, § 2802(c).

61 *Id.*

62 Barber, *supra* note 44.

63 Ailsa Chang, *San Francisco Supervisor Talks About Impact of Big Tech*, NPR (May 9, 2019, 4:07 PM), https://www.npr.org/2019/05/09/721828933/san-francisco-supervisor-talks-about-impact-of-big-tech [https://perma.cc/E7QG-K3FE].

64 *Id.*

65 Molly Kissler, *Jack Dorsey Sees 'Unfairness' in San Francisco Homeless Tax*, BLOOMBERG (Oct. 19, 2018, 9:20 AM), https://www.bloomberg.com/news/articles/2018-10-19/square-s-dorsey-sees-unfairness-in-san-francisco-homeless-tax [https://perma.cc/5QB9-RA44].

66 Jon Zieger, *Vote No on Prop. C — More Spending Without a Plan Won't Address Homelessness*, S.F. CHRON. (Sept. 25, 2018, 5:12 PM), https://www.sfchronicle.com/

not actually fix the homelessness problem, given how much San Francisco spends already and the lack of progress.[67] And others asserted that blaming big tech companies for the homelessness crisis in San Francisco is counterproductive because it obfuscates the true causes and potential solutions.[68]

There are several interesting ancillary aspects of San Francisco's targeted homelessness tax. Before implementing and enforcing the tax, San Francisco preemptively filed an action to determine its validity.[69] The tax's overall validity is in question due to supermajority approval requirements, which San Francisco's new targeted taxes failed to satisfy—garnering around 60% of voter approval.[70] A San Francisco County trial court concluded that the supermajority requirement does not apply to voter initiatives like the one that created the homelessness tax, but a Fresno County trial court subsequently concluded the opposite, and these conflicting cases are being appealed.[71] Because of the lingering question regarding the new tax's validity, San Francisco designed a creative voluntary contribution alternative.[72] Businesses

opinion/openforum/article/Vote-no-on-Prop-C-Taxing-business-to-help-13257616.php [https://perma.cc/5HX4-8HB9].

67 *Id.*

68 Adam Rogers, *Big Tech Isn't the Problem with Homelessness. It's All of Us*, WIRED (June 21, 2018, 7:00 AM), https://www.wired.com/story/big-tech-isnt-the-problem-with-homelessness-its-all-of-us/?verso=true [https://perma.cc/TQ9M-EVYE] (asserting that true causes of homelessness include resistance to affordable housing in more affluent neighborhoods, drug addiction, and mental health issues; potential solutions include "supportive housing," free and accessible primary medical care, right-to-shelter laws, and most importantly, dispersed affordable housing).

69 Dominic Fracassa, *Judge Says SF Correct in Passing Two Tax Measures on Simple Majority Vote*, S.F. CHRON. (July 5, 2019), https://www.sfchronicle.com/bayarea/article/Judge-says-SF-correct-in-passing-two-tax-measures-14074436.php [https://perma.cc/8VGE-7KHN]; Paul Jones, *California Judge Says Simple Majority Vote OK for Many Special Taxes*, TAX NOTES (July 10, 2019), https://www.taxnotes.com/tax-notes-today-state/legislation-and-lawmaking/california-judge-says-simple-majority-vote-ok-many-special-taxes/2019/07/10/29q1t?highlight=%22California%20Judge%20Says%20Simple%20Majority%22 [https://perma.cc/7UX5-DN38].

70 Jones, *supra* note 69.

71 Howard Jarvis Taxpayers Ass'n v. San Francisco, No. CHC-18-568657 (Cal. App. Dep't Super. Ct. S.F. Cnty. July 5, 2019), *on appeal*; San Francisco v. Proposition C, No. CGC-19-573230 (Cal. App. Dep't Super. Ct. S.F. Cnty. July 5, 2019), *on appeal*; City of Fresno v. Fresno Bldg. Healthy Cmtys., No. 19CECG00422 (Cal. App. Dep't Super. Ct. Fresno Cnty. Sept. 5, 2019), *on appeal*. Each trial court interpreted a recent California Supreme Court case differently to reach their respective conclusions. *See* California Cannabis Coal. v. Upland, 401 P.3d 49 (Cal. 2017).

72 S.F., CAL., BUS. & TAX REGS. CODE art. 28, § 2805.1 (2019); Joyce E. Cutler, *San Francisco Board OKs Credit for High-Earner Business Tax 'Gift*,*'* BLOOMBERG L. (Apr. 16, 2019, 2:12 PM), https://news.bloomberglaw.com/daily-tax-report-state/san-francisco-

may pay the homelessness tax voluntarily pending the final resolution of the legal challenge to the tax.[73] Those businesses will receive a 110% credit toward their homelessness tax liability, but they must agree to forgo any potential refund if the tax is struck down.[74] San Francisco also enacted a similar tax credit provision that allows gifts to the "Our City, Our Home Fund."[75] However, the tax credit provision for gifts to the fund expires either when the legal challenge is resolved or 2024, whichever is earlier.[76]

2. San Francisco IPO Tax Proposal

In response to Uber's initial public offering in May 2019, the San Francisco Board of Supervisors proposed an "IPO tax" that would target publicly traded San Francisco-based tech companies.[77] San Francisco would impose a substantial tax on stock-based compensation, and the tax would be retroactive to capture the Uber IPO.[78] The proposal would increase taxes on stock-based compensation within San Francisco to 1.5% from the current general payroll tax rate of 0.38%.[79] The tax revenue would be dedicated to a "shared prosperity fund," which would support affordable housing and other low-to-moderate-income support programs.[80]

The stated purpose of the IPO tax was to "tax the wealth generated by IPOs to fund programs to address income inequality."[81] City Supervisor Mar stated, "We know corporate IPOs alone did not cause

gives-credit-for-paying-homeless-tax?context=search&index=0 [https://perma.cc/UBR4-L3QW] [hereinafter *San Francisco Board OKs*].

73 S.F., CAL., BUS. & TAX REGS. CODE art. 28, § 2805.1; *San Francisco Board OKs*, *supra* note 72.

74 City of S.F., Ordinance 73-19 (amending S.F., CAL., BUS. & TAX REGS. CODE art. 28) (effective May 1, 2019), https://sfgov.legistar.com/View.ashx?M=F&ID=7144785&GUID=A93FEB87-740D-4777-8D83-8C96FCD61B3C [https://perma.cc/6C7E-ZWSC].

75 *Id.* § 2805.2.

76 *Id.* § 2805.1.

77 *The Uber Tax?*, *supra* note 45.

78 *Id.*

79 Romy Varghese, *San Francisco IPO Tax Won't Be on November's Ballot After All*, BLOOMBERG L. (July 17, 2019, 5:27 PM), https://www.bloomberglaw.com/product/tax/document/XAT07AJ0000000?bna_news_filter=daily-tax-report&jcsearch=BNA%25200000016c0271d36aadef4377b55d0000#jcite [https://perma.cc/D5LD-NDJ4].

80 *The Uber Tax?*, *supra* note 45.

81 Josh Eidelson, *Uber Faces Proposed 'IPO Tax' in a Divided San Francisco*, BLOOMBERG L. (Apr. 24, 2019, 5:41 AM), https://www.bloomberglaw.com/document/XAGQG24000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%252000000016a4f2adcdea1feef7b51020000#jcite [https://perma.cc/7378-PCNA].

income inequality and our social crises, . . . [b]ut they have, and will, exacerbate it."[82] While Supervisor Sandra Lee Fewer more directly declared, "San Francisco can no longer afford to give these corporations a tax cut."[83]

As discussed above, San Francisco repealed a similar tax in 2012 in response to large businesses migrating out of the city, and instead created a gross receipts tax.[84] In response to the IPO tax proposal, the San Francisco Chamber of Commerce asserted,

> Fifteen years ago companies were leaving San Francisco because they were told to pay a 1.5% payroll tax on stock options. If you want to drive San Francisco companies out of the city when they go public, you only have to look at the history of stock-based payroll tax to see that it's an ineffective solution.[85]

Although San Francisco initially planned to present the IPO tax as a special tax during the November 2019 election, the city postponed the measure until 2020 and plans to design the tax as a general tax instead, or to incorporate it into a gross receipts tax revamp.[86]

3. Additional San Francisco Proposed and Enacted Taxes

Another reason San Francisco tabled the IPO tax proposal was to focus on a new ride-share tax proposal.[87] San Francisco, with support from Uber and Lyft, will place a ride-share tax proposal on the ballot in November 2019, with revenues dedicated to transit improvements.[88]

---

[82] In a more robust statement, Mar said,

> San Francisco has the highest housing costs in the country, the largest income gap in the country, and the most billionaires per-capita anywhere in the world. The record number of upcoming IPOs will exacerbate each of these forms of inequality—so we're taking action to end tax breaks for big tech to invest in small businesses; mental health services; affordable housing; vulnerable youth, families, seniors; and low and moderate income workers across this City.

Supervisor Gordon Mar – Newsletter, S.F. BOARD OF SUPERVISORS (July 18, 2019), https://sfbos.org/supervisor-gordon-mar-newsletter [https://perma.cc/ZV82-QBX8].

[83] *The Uber Tax?*, *supra* note 45.

[84] *Id.*

[85] *Id.*

[86] Varghese, *supra* note 79.

[87] Paul Jones, *Sponsor Postpones San Francisco IPO Tax Measure*, TAX NOTES (July 23, 2019), https://www.taxnotes.com/tax-notes-today-state/employment-taxes/sponsor-postpones-san-francisco-ipo-tax-measure/2019/07/23/29rl5 [https://perma.cc/X8AH-4FCW] [hereinafter *Sponsor Postpones*].

[88] Joyce E. Cutler, *Uber, Lyft Tax Headed for San Francisco Ballot in November*, BLOOMBERG L. (July 23, 2019, 4:56 PM), https://www.bloomberglaw.com/product/tax/document/X5O5UPH8000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%2

The proposal would impose a tax on the customer for rides within San Francisco at a general 3.25% rate, with a preferential 1.5% rate for pooled rides and rides in zero-emission vehicles.[89] If voters approve, the new tax would generate an estimated $32 million annually.[90]

The San Francisco Board of Supervisors also proposed an "Excessive CEO Salary Tax," with revenues dedicated to funding mental health services.[91] The tax would mirror Portland, Oregon's excessive CEO compensation tax, discussed below, although the tax base and rates would be much higher.[92] San Francisco's tax would impose an additional gross receipts tax on applicable businesses at rates ranging between 0.1% and 0.6%.[93] The tax would generate an estimated $100 million annually.[94] The proposal, like the IPO tax proposal, may appear on the November 2020 ballot individually or as part of the revised gross receipts tax proposal.[95]

San Francisco also enacted two additional new taxes. The city enacted a new commercial rents tax in June 2018 to fund early childcare education.[96] The new commercial rents tax imposes an additional gross receipts tax at a rate of 1% to 3.5% of the gross receipts a business receives for commercial rents.[97] Finally, San Francisco enacted a real estate parcel tax on property owners to fund increased wages for teachers.[98] The new tax is a flat $298 per parcel within the

---

5200000016c1fddd5f8abfdfffd747d0000#jcite [https://perma.cc/WBP3-95ZK] [hereinafter *Uber, Lyft Tax*].

89 Joyce E. Cutler, *Uber, Lyft Rides Could Be Taxed in San Francisco*, BLOOMBERG L. (May 21, 2019, 11:52 AM), https://www.bloomberglaw.com/document/XBO5A97G000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016adb86d65ca77adbaee36e0000#jcite [https://perma.cc/39UQ-74W4].

90 *Uber, Lyft Tax*, *supra* note 88.

91 Joyce E. Cutler, *San Francisco Proposed Excessive CEO Tax to Fund Mental Health*, BLOOMBERG L. (June 12, 2019, 7:45 AM), https://www.bloomberglaw.com/document/X3O8G6H0000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016b48ccd1c7a5ef78efb6000000#jcite [https://perma.cc/EYQ8-BY6V] [hereinafter *San Francisco Proposed Excessive CEO Tax*].

92 *See infra* Section I.G.

93 *San Francisco Proposed Excessive CEO Tax*, *supra* note 91.

94 *Id.*

95 Varghese, *supra* note 79.

96 S.F., CAL., BUS. & TAX REGS. CODE art. 21 (2019); *Commercial Rents Tax*, TREASURER AND TAX COLLECTOR, https://sftreasurer.org/business/taxes-fees/early-care-and-education-commercial-rents-tax-cr [https://perma.cc/8KA4-5CG3].

97 S.F., CAL., BUS. & TAX REGS. CODE art. 21 (2019). Gross receipts that are subject to the commercial rent tax are exempt from the homelessness gross receipts tax. *Id.*

98 S.F., CAL., BUS. & TAX REGS. CODE art. 16.

city, indexed for inflation.[99] The tax is estimated to generate $50 million annually.[100]

4. A Comprehensive Business Tax Plan for San Francisco?

Business groups have been advocating for a comprehensive review of San Francisco's "complex patchwork" of business taxes, which currently generate more than $1 billion annually.[101] Businesses have expressed frustration with "new one-off tax measures each election cycle."[102] A City Supervisor acknowledged the issues with the current tax regime, and stated, "You want the business community to have something that is stable and predictable and something that people can plan for."[103] A San Francisco business executive offered, "[San Francisco] may propose new taxes on businesses, which we're not opposed to if part of a comprehensive plan."[104]

San Francisco Mayor London Breed and Board of Supervisors President Norman Yee announced that they are working on such an approach in conjunction with the City Controller.[105] Together they plan to create one "comprehensive" tax regime for the November 2020 ballot that will reflect substantial input from businesses, city officials,

---

99 *Id.* Several other California cities had real estate taxes on recent ballots. Oakland voters passed a $198 parcel tax that is currently being challenged because it passed by only a simple majority. Joyce E. Cutler, *Oakland, Calif., Council Votes Not to Collect Disputed Parcel Tax*, BLOOMBERG L. (Apr. 17, 2019, 3:07 AM), https://www.bloomberglaw.com/product/tax/document/XGE854C000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016a22c5d821a1eba7e74e570000#jcite [https://perma.cc/LA57-KKB3]. Los Angeles voters rejected a real estate tax that would have provided additional education funding. Romy Varghese, *Los Angeles Voters Reject School-Tax Deal That Ended Strike*, BLOOMBERG L. (June 5, 2019, 8:00 AM), https://www.bloomberglaw.com/product/tax/document/X84OMEIK000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016b2822dcbdad6be86e3f360000#jcite [https://perma.cc/JDS5-H5ZR].

100 Fracassa, *supra* note 69.

101 *See, e.g.*, *SF Launches Sweeping Review*, *supra* note 50; Zieger, *supra* note 66.

102 *SF Launches Sweeping Review*, *supra* note 50.

103 *Id.*

104 Zieger, *supra* note 66. Others are skeptical given the Board of Supervisors' recent history of creating additional taxes beyond what businesses thought to be a comprehensive gross receipts tax regime that became effective in 2014. *SF Launches Sweeping Review*, *supra* note 50.

105 Letter from Ben Rosenfield to John Arntz, *supra* note 58; Romy Varghese, *San Francisco Voters to Decide on Business Taxes in Nov. 2020*, BLOOMBERG L. (July 3, 2019, 9:20 AM), https://www.bloomberglaw.com/product/tax/document/XERNGRF8000000?bna_news_filter=daily-tax-report&jcsearch=BNA%25200000016bb899d252a96ffcb9dba20000#jcite [https://perma.cc/9YJR-Y2DB] [hereinafter *San Francisco Voters*]; *SF Launches Sweeping Review*, *supra* note 50.

and community leaders.[106] Other City Supervisors have delayed targeted tax proposals, such as the IPO and excessive CEO compensation tax proposals, to accommodate the comprehensive analysis.[107]

San Francisco's focus is to revise the current gross receipts tax regime, with several laudable goals. The first stated goal is to "[c]reate a more efficient tax system that allows businesses in San Francisco to thrive, add jobs, and support the economic vibrancy. . . ."[108] San Francisco hopes that its comprehensive tax proposal will ease administrative burdens, generate additional and more stable revenue, provide tax regime stability for business taxpayers, and avoid inhibiting economic growth in the city.[109] The proposal will likely be a general, not special, tax to avoid any question about supermajority requirements. Localities and businesses will watch San Francisco's progress closely, as San Francisco is likely to establish the tax trend for tech-heavy localities, especially in California.[110]

C. Mountain View Transportation Infrastructure Tax

While Seattle and San Francisco are focused on combating the homelessness epidemic, other localities are focused on transportation infrastructure. The success of large businesses, primarily tech giants in Silicon Valley, resulted in exponential job growth within many localities. This job growth is overwhelming each respective locality's existing transportation infrastructure.

---

106 Letter from London Breed, S.F. Mayor, & Norman Yee, President, S.F. Bd. of Supervisors, to Ben Rosenfield, S.F. Controller (July 2, 2019); *SF Launches Sweeping Review*, *supra* note 50.

107 *Sponsor Postpones*, *supra* note 87; Varghese, *supra* note 79. City Supervisor Haney stated that there needs to be additional funding for mental health programs sooner than November 2020, so the targeted tax trend may not be completely suspended in San Francisco. *SF Launches Sweeping Review*, *supra* note 50.

108 Letter from Ben Rosenfield to John Arntz, *supra* note 58; *San Francisco Voters*, *supra* note 105.

109 Letter from Ben Rosenfield to John Arntz, *supra* note 58. Stable revenues are crucial for localities. As business organizations caution, the economy is cyclical and if a downturn occurs, having high tax regimes is dangerous for cities. *See, e.g.*, '*Twitter' Tax Break*, *supra* note 44.

110 Joyce E. Cutler, *The More, the Better: San Francisco Leads New Kind of Tax Revolt*, BLOOMBERG L. (July 10, 2019, 1:46 AM), https://www.bloomberglaw.com/product/tax/document/XCNI1BVK000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016bb8d4ddc5a1fbbedead610000#jcite [https://perma.cc/E65X-BGRH].

Mountain View, California—home to Google—enacted a substantial per-employee tax targeted at large employers to fund transportation infrastructure needs.[111] The tenor of the Mountain View targeted tax movement contrasted dramatically with those of Seattle and San Francisco. There are two primary reasons for the less confrontational experience in Mountain View. First, the locality's primary motivation for the targeted tax was to generate revenue to mitigate the undisputed problem with projects that were identified and noncontroversial.[112] There was much less public shaming and blame aimed at the large businesses throughout the process.[113] Second, and likely more powerful, is that Mountain View does not have an existing gross receipts tax, unlike Seattle and San Francisco[114] Thus, the per-employee tax was not a new tax regime and compliance burden added to an already substantial local business tax regime. In fact, businesses supporting the Mountain View per-employee tax may have effectively preempted a local gross receipts tax, which would present an exponentially greater tax cost for the businesses.

---

111 *Information on November 2018 City Revenue Ballot Measures*, CITY OF MOUNTAIN VIEW, https://www.mountainview.gov/depts/manager/2018_potential_general_revenue_measures.asp [https://perma.cc/BV3V-F8MF] (last visited Jan. 22, 2020); *November 6, 2018, General Election, Official Final Results*, SANTA CLARA COUNTY, CAL., https://www.redwoodcity.org/departments/administrative-services/finance/taxes-assessments/business-licensing [https://perma.cc/RF2M-Q4AB] (last updated Dec. 28, 2018). Other California cities have per-employee business licenses taxes, although they are generally nominal compared to Mountain View's and capped at low annual amounts. *See, e.g.*, *Business License Tax Application*, CITY OF SUNNYVALE, https://sunnyvale.ca.gov/civicax/filebank/blobdload.aspx?t=45462.68&BlobID=25972 [https://perma.cc/WV5C-ATXB] (last visited Mar. 9, 2020); *Business License Tax, Tax Schedule*, CITY OF REDWOOD CITY, https://www.redwoodcity.org/home/showdocument?id=18452 [https://perma.cc/P6CJ-2CYD] (last visited Mar. 9, 2020); *Business Tax Rates*, SAN JOSE, CAL., https://www.sanjoseca.gov/your-government/departments/finance/business-tax-registration/business-tax-rates [https://perma.cc/7LMF-9Y5Q] (last visited Mar. 9, 2020); *see also Council Report, Potential Revenue Measures for 2018 General Election*, CITY OF MOUNTAIN VIEW (June 5, 2018), https://mountainview.legistar.com/MeetingDetail.aspx?ID=603912&GUID=19EEFFF7-0DDD-4CAA-BFB7-9AECEEC8F59A&Options=info&Search= [https://perma.cc/WE4J-BVQH] [hereinafter *Potential Revenue Measures*]; CITY MANAGER'S OFFICE/FIN. & ADMIN. SERVS, REVENUE MEASURE OPTIONS FOR POTENTIAL TRANSPORTATION OR OTHER CAPITAL PROJECTS (2017), https://files.acrobat.com/a/preview/3f2d84bd-13ac-42de-8d7b-9f93454ea4b6 [https://perma.cc/Q327-NP5A] [hereinafter REVENUE MEASURE OPTIONS].

112 *See* CITY OF MOUNTAIN VIEW, RESOLUTION NO. 18239 (2018), https://www.mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=26681 [https://perma.cc/U3NJ-Y7RB] [hereinafter RESOLUTION]; CITY OF MOUNTAIN VIEW, BUSINESS LICENSE TAX MEASURE P FACT SHEET (2018), https://www.mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=27147 [https://perma.cc/RFL4-3PBV] [hereinafter FACT SHEET].

113 *See* Hiltzik, *supra* note 25; *Potential Revenue Measures*, *supra* note 111.

114 *See* MOUNTAIN VIEW, CAL., MUN. CODE CHS. 18, 29; RESOLUTION, *supra* note 112.

Mountain View voters passed the tax on November 6, 2018, with over 70% of voters supporting the tax.[115] The tax is estimated to generate $6 million per year, with Google paying $3.3 million of that total.[116] The Mountain View City Council indicated that it plans to direct 80% of the tax revenue to funding the city's transportation infrastructure, although there is no explicit spending provision because the measure was designated as a general tax instead of a special tax to avoid California's supermajority requirement.[117] The City Council did, however, pass a resolution to direct 80% of the business license tax revenues to "transportation and innovative transit solutions to improve traffic congestion in the City of Mountain View."[118] Mountain View has been planning specific transportation infrastructure projects. For example, the Automated Guideway Transit project "is estimated to cost between $50 and $130 million per mile for the approximately 4–6 miles of transit being considered."[119] Mountain View would need an annual revenue stream of $4 million to service a $50 million bond if the city borrows to fund major projects.[120] Mountain View designated the tax as a "business license tax."[121] The existing business license tax was a

---

115 SANTA CLARA COUNTY, CAL., *supra* note 111.

116 FACT SHEET, *supra* note 112; *Voters in Google's Hometown to Decide Employee 'Head Tax*,*'* WASH. POST (June 27, 2018, 3:43 PM), https://www.washingtonpost.com/business/technology/voters-in-googles-hometown-to-decide-employee-head-tax/2018/06/27/7b019a92-7a5b-11e8-ac4e-421ef7165923_story.html [https://perma.cc/KJ9R-D8SR].

117 RESOLUTION, *supra* note 112; FACT SHEET, *supra* note 112. Mountain View intends to direct 10% of the revenue to affordable housing programs and the resulting 10% to general operations. FACT SHEET, *supra* note 112; MOUNTAIN VIEW CITY COUNCIL, PRIMARY ARGUMENT AGAINST MEASURE P, https://www.mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=27123 [https://perma.cc/3P5T-WKZJ].

118 RESOLUTION, *supra* note 112.

119 REVENUE MEASURE OPTIONS, *supra* note 111.

120 *Id.*

121 MOUNTAIN VIEW, CAL., CITY CODE ch. 18, art. I (2019) [hereinafter Enacted Business License Tax Ordinance], https://www.mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=27111 [https://perma.cc/R3SG-NL9M]; FACT SHEET, *supra* note 112.

Although not targeted taxes, a few localities have longstanding per-employee "business occupation" or "local services" taxes. For example, Denver, Colorado, imposes on all businesses a $4 per month ($48 annually) tax per employee working in the city (and an additional $5.75 per month tax on the employee). DENVER, COLO., MUN. CODE art. VI, § 53-296, art. V, § 53-241 (2019). Pittsburgh, Pennsylvania, imposes on all employees working in the city a $52 annual tax. PITTSBURGH, PENN., MUN. CODE § 252.02 (2019).

These taxes differ from the targeted taxes discussed in this Article in several important ways. First, the taxes apply equally regardless of business size. *See, e.g.*, DENVER, COLO., MUN. CODE art. VI, § 53-292 (describing the intent of the tax to be "uniform and nondiscriminatory"). Second, the revenue has no specific, narrow spending designation.

flat $30 annually for most businesses, which had not increased since 1954.[122] The new tax is effective January 1, 2020, although it is being phased in over a three-year period for businesses with more than fifty employees in Mountain View.[123] The provision imposes an initial $75 flat fee on each business in Mountain View and then per-employee taxes at graduated rates ranging from $5 per employee to $150 per employee.[124] The highest per-employee rate applies to businesses that have more than 5,000 employees in Mountain View, which affects only one taxpayer, Google.[125] There are three other businesses—Symantec, Intuit, and Synopsys—that each have between 2,000 and 3,000 employees in the city.[126] The Mountain View City Council recognized that only seven companies report more than 1,000 employees, each of which would face an average cost per employee of $84 annually.[127] The $5 per-employee rate will apply to 94% of the businesses in Mountain View.[128] The per-employee tax amounts are indexed for inflation.[129]

Rather, the revenue is used to fund the general operation and welfare of the locality. *See, e.g.*, DENVER, COLO., MUN. CODE art. VI, § 53-292; PITTSBURGH, PENN., MUN. CODE § 252.02(a). Third, the tax imposition amounts are much lower under these taxes than under the targeted taxes proposed recently. Although the elasticity of these taxes is unclear, the original Seattle per-employee tax amount would have been ten times the tax amounts that Denver or Pittsburgh imposes on employers. Finally, these taxes have been in place for decades. Denver's business occupational privilege tax became effective in 1969. Pittsburgh's original occupation privilege tax became effective in 1965 and was replaced with the local services tax in 2005. Because they have been in place for so long, businesses—particularly tech businesses—were aware of these taxes before making substantial capital investments in their respective localities.

122 CITY MANAGER'S OFFICE/CITY CLERK'S OFFICE/CITY ATTORNEY'S OFFICE, CONSIDERATION OF TWO COUNCIL-INITIATED BALLOT MEASURES REGARDING CANNABIS GROSS RECEIPTS TAX AND THE BUSINESS LICENSE (2018), http://mountainview.legistar.com/gateway.aspx?M=F&ID=68e19980-c209-4497-a88c-0e66d7d61d92.pdf%20 [https://perma.cc/VXH3-C3SK] [hereinafter TWO COUNCIL-INITIATED BALLOT MEASURES].

123 MOUNTAIN VIEW, CAL., MUN. CODE § 18.16(c) (2019); Enacted Business License Tax Ordinance, *supra* note 121; FACT SHEET, *supra* note 112.

124 MOUNTAIN VIEW, CAL., MUN. CODE § 18.16(a); Enacted Business License Tax Ordinance, *supra* note 121.

125 *See* Wendy Lee, *The $5 Million Google Tax That Could Fix Every Silicon Valley Problem*, S.F. CHRON. (May 6, 2018, 11:32 AM), https://www.sfchronicle.com/business/article/The-5-million-Google-tax-that-could-fix-every-12889554.php [https://perma.cc/Q39M-F684]. Google would face an average per-employee tax of $117 annually. TWO COUNCIL-INITIATED BALLOT MEASURES, *supra* note 122.

126 Lee, *supra* note 125.

127 TWO COUNCIL-INITIATED BALLOT MEASURES, *supra* note 122.

128 FACT SHEET, *supra* note 112.

129 MOUNTAIN VIEW, CAL., MUN. CODE § 18.17; Enacted Business License Tax Ordinance, *supra* note 121.

In advance of the vote, Mountain View's Mayor, Lenny Siegel, declared that the city had "too many good jobs" and that "[e]mployment is growing faster than we can house people and provide transportation for them."[130] He stated that "[t]he reason we have so many people on the freeway is because our companies are hiring, and hiring rapidly. They're externalizing their costs by having the community pay for their transportation improvements and suffering their impacts."[131] On a softer note, Mayor Siegel deemed the transportation issue "perils of prosperity," and recognized that Mountain View is "blessed with too many good jobs for the housing and transportation we have."[132] Mayor Siegel also expressly stated that Google has been a good corporate citizen for Mountain View.[133] A survey of Mountain View voters in advance of the election showed that support for the measure was motivated by the sense that businesses should pay their fair share, while opposition was driven by concerns about hurting local businesses and general opposition to taxes.[134] Voters expressed that a lower tax for smaller businesses and a higher tax for larger businesses was the most appealing element of the measure.[135]

Overall, there was very little opposition to the tax. Google was publicly silent, and there were some Chamber of Commerce comments, although mostly focused on smaller businesses.[136] The City Council reported, "In general, members of the business community are not explicitly supporting or opposing the revenue measures but, rather, raised concerns and want to know more and understand the proposals. Most acknowledge that some increase is appropriate, given [that] the [business license tax] has not increased in decades."[137]

Google appears to acknowledge its impact on Mountain View's transportation infrastructure and has made some effort to mitigate those

---

130 Lee, *supra* note 125.

131 Mark Noack, *Council Backs Employee Tax That Would Cost Google Millions*, MOUNTAIN VIEW VOICE (June 7, 2018, 11:11 AM), https://www.mv-voice.com/news/2018/06/07/council-backs-employee-tax-that-would-cost-google-millions [https://perma.cc/9NEN-CP6Q].

132 Hiltzik, *supra* note 25.

133 *Id.*

134 TWO COUNCIL-INITIATED BALLOT MEASURES, *supra* note 122.

135 *Id.* Leading up to the vote, Mayor Siegel suggested that Google pushed smaller businesses out of Mountain View. Lee, *supra* note 125.

136 *See* Lee, *supra* note 125.

137 *Potential Revenue Measures*, *supra* note 111.

issues. Google has funded the free Mountain View Community Shuttle since 2015, at a cost of approximately $2 million per year.[138] The shuttle served over 200,000 passengers in 2018, and Google has committed to funding it through at least 2024. As part of Google's recent office expansion in Mountain View, Google agreed to build 10,000 housing units in the neighborhood, with 1,600 qualifying as "affordable housing."[139] Google also released a plan to build 20,000 housing units in the Bay Area with at least 5,000 qualifying as "affordable housing."[140]

D. Cupertino Transportation Infrastructure Tax

For several years, Cupertino has been considering a targeted tax similar to Mountain View's.[141] The Cupertino targeted tax proposal would restructure the city's "business license tax" to generate revenue more than ten times greater than does the current tax.[142] Cupertino's goal is "to generate $10 million annually to fund transportation projects to improve the City's transportation infrastructure and alleviate local traffic congestion."[143]

---

138 Mark Noack, *Google to Fund Free Shuttles Through 2024*, MOUNTAIN VIEW VOICE (July 2, 2019, 12:41 PM), https://www.mv-voice.com/news/2019/07/02/google-to-fund-free-shuttles-through-2024 [https://perma.cc/L8J7-BCAT].

139 Melia Robinson, *Silicon Valley Might Get Some Relief from High Housing Prices—Google Will Build Nearly 10,000 Homes Near Its New Campus*, BUS. INSIDER (Dec. 13, 2017, 10:54 AM), https://www.businessinsider.com/google-is-building-homes-in-mountain-view-2017-12 [https://perma.cc/X8SH-5NK3]; Melia Robinson, *Google Said It Would Build 10,000 Units of Desperately Needed Housing in Silicon Valley—but There's a Catch*, BUS. INSIDER (Sept. 28, 2017, 4:06 PM), https://www.businessinsider.com/google-standoff-with-mountain-view-city-council-2017-9 [https://perma.cc/83K3-E9V7]; Ethan Baron, *Google Demands More Office Space, Threatens to Block North Bayshore Housing*, MERCURY NEWS (Sept. 27, 2017, 1:33 AM), https://www.mercurynews.com/2017/09/27/google-demands-more-office-space-threatens-to-block-north-bayshore-housing/ [https://perma.cc/4ZZ7-SXK9].

140 Roland Li & Melia Russell, *Google Wants to Build 20,000 Homes. It May Need More Than $14 Billion*, S.F. CHRON. (July 1, 2019, 6:35 AM), https://www.sfchronicle.com/business/article/Google-wants-to-build-20-000-homes-It-may-need-14062529.php?psid=crEI3 [https://perma.cc/7Z3G-RJMT].

141 *See, e.g.*, Wendy Lee, *Cupertino Mayor Pitches Business Tax, Not Afraid of Apple*, S.F. CHRON. (Mar. 9, 2016, 7:17 PM), https://www.sfchronicle.com/business/article/Cupertino-mayor-pitches-business-tax-not-afraid-6880870.php [https://perma.cc/4V5D-YWED] [hereinafter *Cupertino Mayor*].

142 *Proposed Business License Tax Measure*, CITY OF CUPERTINO, https://www.cupertino.org/our-city/city-news/proposed-business-license-tax-measure [https://perma.cc/76YF-N7CK] (last visited Jan. 18, 2020) [hereinafter *Proposed Business License Tax Measure*].

143 *Id.*

Cupertino released two potential tax proposals.[144] Under each, businesses with fewer than 100 employees would pay only a flat fee ranging between $150 and $500 annually.[145] Businesses with 100 employees or more would pay the $500 flat fee plus an incremental tax for every employee above the ninety-nine employee threshold, the rate of which increases progressively as the employee count increases.[146] The annual per-employee tax would begin at $50 per employee annually and increase to either $325 or $425 per employee.[147]

The proposal with the $425 per-employee top rate would generate just over $10 million annually, although $9.4 million would be paid by just one business.[148] Apple is the only business in Cupertino that has more than 600 employees in the city, with approximately 24,000 employees.[149] Approximately thirty-two businesses have more than 100 employees and would be subject to the per-employee tax to some degree.[150] Roughly 99% of Cupertino businesses have fewer than 100 employees and would pay only a nominal flat fee.[151]

The atmosphere in Cupertino has been a bit more confrontational than in Mountain View, although a recent mayoral change may have eased the tension a bit. In 2016, when asked about Apple potentially migrating away from Cupertino in reaction to a new and significant targeted tax, former mayor Barry Chang stated, "If that happens, something better may come up."[152]

Complicating the situation in Cupertino, the city entered into an agreement with Apple in 1997 to entice Apple to stay and expand in the city, under which the city has paid Apple $70 million over the past twenty years.[153] Cupertino pays Apple a portion of the sales tax

---

144 *Id.*

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.*; *A Resolution of the City Council of the City of Cupertino*, CUPERTINO CITY COUNCIL (July 3, 2018), https://cupertino.legistar.com/View.ashx?M=F&ID=6334131&GUID=159507E5-ADBE-4B1F-AC04-D97CC4176ADA [https://perma.cc/6AX4-FVQK].

149 *Proposed Business License Tax Measure*, *supra* note 142.

150 *Id.*

151 *Id.*

152 *Cupertino Mayor*, *supra* note 141. Former mayor Chang did not address the potential difficulty of attracting new employers if the city's largest employer claimed, accurately or not, that Cupertino's excessive tax regime and hostile business environment drove the top employer out of the city.

153 Laura Mahoney, *Apple's Hometown Pays $70 Million, and Counting, to Keep HQ*, BLOOMBERG L. (June 13, 2019, 1:46 AM), https://www.bloomberglaw.com/product/tax/

revenue the city collects related to Apple's sales that are sourced to Cupertino, which includes all Apple sales to California businesses.[154] Initially 50%, the percentage was reduced to 35% in 2013 as part of Apple's agreement to build a 2.8-million square foot campus in Cupertino.[155] The payments have been between approximately $4 million and $6 million annually in recent years.[156] When negotiating the agreement, former Apple CEO Steve Jobs told the City Council,

> We're the largest taxpayer in Cupertino, so we'd like to continue to stay here and pay taxes . . . If we can't then we have to go somewhere like Mountain View and we take our current people with us and we give up and over years sell the land here and the largest tax base would go away.[157]

Despite the agreement, and in some ways because of it, the sales tax revenue generated by Apple's sales account for nearly two-thirds of Cupertino's overall sales tax revenue.[158] The agreement will automatically renew until 2033, assuming Apple continues to complete specified construction projects in Cupertino.[159] As part of building its new campus in Cupertino, Apple agreed to help fund road improvements to reduce traffic and agreed to traffic levels that the new development would generate.[160] Current mayor Steven Scharf has credited Apple for not asking for additional incentives.[161]

---

document/XEHF96H4000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016b19b7d83da3fbdff704f50002#jcite [https://perma.cc/UW34-QV6N] [hereinafter *Apple's Hometown*]. These agreements are common in California, with about 10% of California cities using them to attract or retain large businesses headquartered in the city. *See, e.g.*, Laura Mahoney, *Apple's 22-Year Tax Break Part of Billions in California Bounty*, BLOOMBERG L. (Apr. 24, 2019, 8:05 AM), https://www.bloomberglaw.com/product/tax/document/XCVQRBDO000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016a09a6dcf2a97b99bf7d200002#jcite [https://perma.cc/ZT5M-G5ZV] [hereinafter *Apple's 22-Year Tax Break*]; Laura Mahoney, *Lawyer Reaping Millions Over Decades as a Cut of Tax Incentives*, BLOOMBERG L. (May 8, 2019, 1:45 AM), https://www.bloomberglaw.com/document/X66DM4UO000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016a044fdce2a97b37cfb4ca0002#jcite [https://perma.cc/KET4-DSTX]; Editorial, *A Very Modern Waste of Tax Dollars*, N.Y. TIMES (May 2, 2019), https://www.nytimes.com/2019/05/02/opinion/california-sales-tax.html [https://perma.cc/QR2C-RM5D].

154 *Apple's Hometown*, *supra* note 153; *Apple's 22-Year Tax Break*, *supra* note 153.

155 *Apple's Hometown*, *supra* note 153.

156 *Id.*

157 *Id.*

158 *Id.* The agreement includes a sourcing provision that very generously sources certain Apple sales to Cupertino. *Id.*

159 *Id.*

160 *Cupertino Mayor*, *supra* note 141.

161 *Apple's Hometown*, *supra* note 153.

Cupertino ultimately suspended the per-employee tax proposal. In response to the proposal, Apple sent a letter to the Cupertino Mayor and City Council on July 30, 2018, offering to partner to work toward a mutually beneficial solution.[162] The following day, Cupertino delayed presenting the tax proposal to voters until 2020 so the city could continue working with stakeholders to address the city's transportation issues.[163] Both parties appear to be working "as partners to create new transportation solutions."[164] Mayor Scharf wants to take a measured approach to a new per-employee tax because "[n]o city wants to be at a disadvantage."[165] As part of these discussions, Apple recently offered $9.7 million to fund five bicycle and pedestrian transportation projects, although Cupertino Vice Mayor Liang Chao expressed frustration with Apple, rather than the city, choosing the projects.[166] As with the efforts in San Francisco, localities will be closely monitoring the progress of the tax discourse in Cupertino.

E. New York City Transit Taxes

Unlike most West Coast tech cities, New York City's transit system requires a massive capital influx largely due to decades of neglect and underfunding, not because of the meteoric growth of one employer in the city.[167] The Metropolitan Transportation Authority (MTA), which

162 Letter from Kristina Raspe, Vice President, Apple Inc., to Darcy Paul, Mayor, Cupertino, Cal., & Members of the City Council (July 30, 2018), https://www.cupertino.org/home/showdocument?id=21886 [https://perma.cc/K8SW-DQCP] [hereinafter Letter from Kristina Raspe to Darcy Paul]. The letter pointed out that in constructing its headquarters in Cupertino, Apple was "glad to have invested more than $70M on public benefits." *Id.*; *see also Proposed Business License Tax Measure*, *supra* note 142.

163 *Approved Minutes Cupertino City Council*, CITY OF CUPERTINO, CAL. (July 31, 2018), https://cupertino.legistar.com/View.ashx?M=M&ID=613660&GUID=A1C18901-B3F0-4281-A2D5-6AECF2523A69 [https://perma.cc/8AZS-ARX2].

164 Letter from Kristina Raspe to Darcy Paul, *supra* note 162.

165 Joyce E. Cutler, *San Francisco Bay Area Cooking Up Taxes for Upcoming Ballots*, BLOOMBERG L. (June 5, 2019, 12:18 PM), https://www.bloomberglaw.com/document/X2LETTF4000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%252000000016b25c3d4f4a16f3fff84a70000#jcite [https://perma.cc/WFU3-XVGE] [hereinafter *San Francisco Bay Area*].

166 *Apple's Hometown*, *supra* note 153.

167 *See, e.g.*, Paul Berger, *New York's Subway, Bus Overhaul Will Take 15 Years, Cost $43 Billion*, WALL ST. J. (May 23, 2018, 4:19 PM), https://www.wsj.com/articles/new-yorks-subway-bus-overhaul-will-take-15-years-cost-43-billion-1527106797 [https://perma.cc/9V5W-XC64]; Henry Goldman, *NYC Subway Chief Warns of 'Death Spiral' Without $40 Billion Fix*, BLOOMBERG L. (Dec. 17, 2018), https://www.bloomberg.com/news/articles/2018-12-17/nyc-subway-chief-warns-of-death-spiral-without-40-billion-fix [https://perma.cc/K5RC-5RSQ] [hereinafter *NYC Subway*]; Aaron Gordon, *The MTA's Plan*

operates New York City's public transit system, is facing an operating deficit in 2022 of almost $1 billion.[168] MTA Chief Andy Byford declared that either $40 billion must be invested in the transit system over the next decade or it will descend into a "death spiral."[169]

In 2019, New York State considered several tax proposals to help fund the MTA.[170] Ultimately, New York State enacted two of the new proposals.[171] First, New York City will be the first U.S. city to impose congestion pricing for vehicles entering certain areas of the city.[172] The congestion pricing regime will commence sometime between December 15, 2020, and January 30, 2021, and will generate an estimated $1 billion annually that will be used to fund the MTA.[173] The congestion pricing amounts are not yet determined, but estimates are between $11 and $25 to enter the congestion zone in Manhattan.[174]

New York State also enacted a supplemental "mansion tax"[175] on purchasers of residential real property in New York City, effective July

---

to Fix the Subway Will Cost a Fortune. Doing Nothing Will Cost Even More, GOTHAMIST (June 5, 2018, 10:32 AM), https://gothamist.com/2018/06/05/subway_fast_foward_cost.php [https://perma.cc/M8EH-Z7D8].

168 *NYC Subway*, *supra* note 167.

169 *Id.*; Berger, *supra* note 167.

170 New York State considered a "pied-à-terre tax," which would have imposed a new tax on nonresident property owners in New York City if the residence was valued at more than $5 million. The tax would have generated an estimated $665 million annually. Prashant Gopal & Henry Goldman, *NYC Brokers Say Pied-a-Terre Tax Is 'Class Warfare' on Rich*, BLOOMBERG L. (Mar. 15, 2019, 2:24 AM), https://www.bloomberg.com/news/articles/2019-03-15/nyc-brokers-see-new-threat-to-luxury-market-in-pied-a-terre-tax [https://perma.cc/L3R6-XAM8]; Henry Goldman, *N.Y. Considers Taxing Non-Resident Owners of Luxury Apartments*, BLOOMBERG L. (Mar. 7, 2019, 1:05 PM), https://www.bloomberg.com/news/articles/2019-03-07/n-y-considers-taxing-non-resident-owners-of-luxury-apartments [https://perma.cc/99F4-85PP]; *see infra* Section III.C.2.

171 S. 1509, S. Assemb. (N.Y. 2019) (enacted Apr. 12, 2019).

172 Greg Clark, *New York's Congestion Pricing Plan May Be Stuck in Traffic*, FORBES (May 16, 2019, 12:06 PM), https://www.forbes.com/sites/debtwire/2019/05/16/new-yorks-congestion-pricing-plan-may-be-stuck-in-traffic/#66a56224d105 [https://perma.cc/4UM4-GS6T]; *see also* N.Y. COMP. CODES R. & REGS. tit. 20, § 700.1 *et al.* (2019), https://www.tax.ny.gov/pdf/rulemaking/aug0219/congestionsurchargepa/text.pdf [https://perma.cc/7CMT-SWH3].

173 S. 1509, S. Assemb. (N.Y. 2019) (enacted Apr. 12, 2019); Clark, *supra* note 172.

174 Clark, *supra* note 172.

175 Although colloquially called "mansion" taxes, they often apply to modest housing in many high-cost areas such as New York City, where the median real estate sales price is approximately $1 million. *See, e.g.*, DOUGLAS ELLIMAN REAL ESTATE, THE ELLIMAN REPORT: Q4-2018 MANHATTAN SALES (2019), https://www.elliman.com/pdf/6f02159fcaceff02d939a530048e75d6476cc739 [https://perma.cc/6KMT-V3ZX] [hereinafter THE ELLIMAN REPORT]; Emily Myers, *Mansion or Not, You May Not Escape That So-Called Mansion Tax*, BRICK UNDERGROUND (Apr. 25, 2019, 12:00 PM), https://www.brick

1, 2019.[176] The existing mansion tax is triggered when the sales price exceeds $1 million.[177] In such a case, New York State imposes a 1% tax on the entire sales price.[178] The new supplemental mansion tax is triggered when the sales price exceeds $2 million.[179] In such a case, New York State imposes an additional tax, the rate of which depends on the overall sales price. The rates range from 0.25% to 2.9% of the overall sales price.[180] The supplemental mansion tax is estimated to apply to over 25% of residential real property sales in Manhattan and generate $365 million that will be used to fund the MTA.[181]

Neighboring Connecticut also recently expanded its mansion tax by creating an additional marginal rate.[182] The tax was 0.75% on the first $800,000 of a residential property's sales price, and then 1.25% on the sales price above $800,000.[183] Effective July 1, 2020, Connecticut will impose a 2.25% tax on the sales price of residential property that exceeds $2.5 million.[184] Interestingly, Connecticut included a corresponding tax credit for the amounts paid under the new mansion tax if the seller maintains Connecticut residency for several years,

underground.com/blog/2012/04/mansion_or_not_you_might_not_escape_paying_that_so_called_mansion_tax [https://perma.cc/SPB5-LUML].

176 N.Y. TAX LAW § 1402-b(a) (2019). The revised mansion tax applies only to real estate sales in New York City. A group of Chicago Aldermen recently proposed an increased mansion tax to combat homelessness. The resolution would increase the real estate transfer tax on home sales greater than $1 million to 1.95% of the purchase price from the current rate of 0.75% of the purchase price. The additional revenue would be dedicated to the Homeless Transfer Tax Fund to provide resources for housing and services to combat homelessness. J. COMM. OF COMM. ON COMM. & RULES & COMM. ON FIN. R2019-595 (Ill. 2019).

177 N.Y. TAX LAW § 1402-a(a) (2019). New York tax law also imposes a broad "base," and now "additional base," real property conveyance tax, but at much lower rates than the mansion tax. *See id.* § 1402.

178 *Id.* § 1402-a(a).

179 *Id.* § 1402-b(a).

180 *Id.* For example, if a residential property sold in New York City for $25 million, New York State would impose combined mansion taxes of 3.9%, or nearly $1 million, in addition to base and additional base conveyance taxes.

181 Josh Barbanel, *New Real-Estate Tax Hits Industry, $2 Million Homes*, WALL ST. J. (Apr. 3, 2019, 10:58 AM), https://www.wsj.com/articles/new-more-broad-based-real-estate-tax-hits-developers-11554303511 [https://perma.cc/7GQ9-LCDD].

182 Lauren Loricchio, *Connecticut Enacts Budget with 'Mansion Tax,' Nexus Changes*, TAX NOTES (June 28, 2019), https://www.taxnotes.com/tax-notes-today-state/budgets/connecticut-enacts-budget-mansion-tax-nexus-changes/2019/06/28/29nss [https://perma.cc/6Q9T-U3JG]; H.B. 7424, Pub. Act No. 19-117 § 337 (Conn. 2019).

183 Loricchio, *supra* note 182.

184 *Id.*

which effectively functions as an "exit tax."[185] The expanded mansion tax is estimated to generate just $6.3 million annually for the state.[186]

F. "Millionaire" Taxes

The targeted tax focus on the East Coast has been "millionaire" individuals rather than large employers.[187] New York City Mayor Bill DeBlasio unsuccessfully proposed a "millionaire tax" to fund the city's more than $400 million commitment for short-term transit maintenance and improvements.[188] Mayor DeBlasio proposed increasing New York City's highest marginal income tax rate from 3.876% to 4.41% for individuals with taxable income greater than $500,000 and estimated the tax would generate $700 million to $820 million annually.[189]

Several states have more successfully advanced millionaire tax proposals recently.[190] The Massachusetts legislature voted to present a constitutional amendment to voters that would impose an annual 4% surtax on individuals whose taxable income exceeds $1 million; the estimated $2 billion in annual revenue would be expressly earmarked for public education and transportation initiatives.[191]

---

185 H.B. 7424, Pub. Act No. 19-117 § 337 (Conn. 2019).

186 Keith M. Phaneuf & Maya Moore, *House Adopts $43B Budget, Senate Approval Expected Tuesday*, CT MIRROR (June 3, 2019), https://ctmirror.org/2019/06/03/house-begins-debate-on-43-billion-two-year-budget/ [https://perma.cc/RN53-MDCZ].

187 Although not a targeted tax because it applies equally to businesses of all sizes, Jersey City, New Jersey, recently enacted a 1% payroll tax on compensation paid to nonresident employees that perform services in the city or are supervised in the city. *See* Jersey City, N.J., Ordinance 18-133 (Jan. 1, 2019), https://www.jerseycitynj.gov/UserFiles/Servers/Server_6189660/File/City%20Hall/Tax%20Collections/Payroll%20Tax%20FAQ/Ord%2018-133%20Payroll%20Tax.pdf [https://perma.cc/TG9Z-GYSH]. The New Jersey Superior Court upheld the tax, which was estimated to generate $70 million annually that would fund education, as constitutional. Mack-Cali Realty Corp. v. New Jersey, No. HUD-L-004903-18 (N.J. Super. Ct. Mar. 15, 2019).

188 Madina Toure, *What Will Save New York City's Subways—Millionaires Tax or Congestion Pricing?*, OBSERVER (Mar. 27, 2018, 12:17 PM), https://observer.com/2018/03/new-york-subway-millionaires-tax-congestion-pricing/ [https://perma.cc/L4PH-FHCV].

189 *Id.*

190 Although colloquially called millionaire taxes, they often affect individuals with annual taxable income well below $1 million, and they are not based on wealth.

191 Paige Jones, *Massachusetts Legislature Approves Millionaire's Tax*, TAX NOTES (June 14, 2019), https://www.taxnotes.com/state-tax-today/legislation-and-lawmaking/massachusetts-legislature-approves-millionaires-tax/2019/06/14/29lxy [https://perma.cc/KM3V-HD7U] [hereinafter *Massachusetts Legislature*]; S. DOCKET NO. 1709, S. NO. 16 (Mass. Jan. 18, 2019) (presented by Jason M. Lewis) (proposing a legislative amendment to the Constitution to provide resources for education and transportation through an additional tax on incomes in excess of $1 million).

Several procedural hurdles exist before the proposal can appear on a ballot, likely in November 2022.[192]

The Illinois legislature voted to present a constitutional amendment to voters that would permit progressive income tax rates, and a corresponding pending bill would increase the current flat tax rate of 4.95% to 7.75% for individuals with taxable income that exceeds $250,000.[193]

Effective in 2018, New Jersey enacted a millionaire tax that imposed a 10.75% marginal income tax rate for individuals with taxable income exceeding $5 million.[194] New Jersey Governor Phil Murphy unsuccessfully pushed to lower the threshold from $5 million to $1 million in 2019, which would have generated an estimated $447 million annually.[195] Governor Murphy's initial plan was to use the additional tax revenue to fund property tax relief for middle-income New Jersey residents who were affected by the federal, state, and local tax deduction cap.[196]

Although individual millionaire taxes are not the focus of this Article, they share many characteristics with targeted business taxes, including the tax policy deficiencies discussed below.[197] The threat of taxpayer migration may be greater with individuals than with businesses, particularly with wealthy individuals who have the means

192 S. DOCKET NO. 1709, S. NO. 16 (Mass. 2019) (presented by Jason M. Lewis).

193 S.B. 0687, 101st Gen. Assemb. (Ill. 2019).

194 N.J. STAT. ANN. § 54A:2-1 (2018).

195 Joseph De Avila, *No Millionaire's Tax in New Jersey Lawmakers' Proposed Budget*, WALL ST. J. (June 17, 2019, 6:49 PM), https://www.wsj.com/articles/no-millionaires-tax-in-new-jersey-lawmakers-proposed-budget-11560807574 [https://perma.cc/7ESE-F9LN].

196 Lauren Loricchio, *New Jersey Proposal Would Take from Millionaires, Give to Middle-Income Earners*, TAX NOTES (June 5, 2019), https://www.taxnotes.com/tax-notes-today-state/tax-cuts-and-jobs-act/new-jersey-proposal-would-take-millionaires-give-middle-income-earners/2019/06/05/2%25e2%2580%25a6 [https://perma.cc/YS4K-K532].

197 *See infra* Section II.A.

to migrate.[198] And the migration threat is exacerbated significantly by the recent state and local tax deduction caps for federal tax purposes.[199]

G. Portland Clean Energy and Excessive CEO Compensation Taxes

Portland voters enacted a targeted tax with a unique revenue directive and tax structure.[200] Portland's tax targets large retailers selling goods into the city by imposing a gross receipts tax on Portland-sourced retail sales. The tax revenue is expressly earmarked for clean energy projects and clean energy job training.[201] Portland created this tax to effectuate its ambitious Climate Action Plan, which sets a goal of 100% of Portland's electricity being derived from clean renewable sources by 2035.[202]

---

198 *See* Cristobal Young et al., *Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data*, 81 AM. SOC. REV. 421, 439 (2016) ("[State level] millionaire tax flight is occurring, but only at the margins of statistical and socioeconomic significance."). Importantly, many of the factors preventing millionaire migration (e.g., owning a business in the state) may disappear as those millionaires approach retirement age. The results of this notable study, which analyzed 1999–2011, may also be much different now that the state and local tax deduction is capped for federal tax purposes beginning in 2018. And migration may actually be greater for individuals just below the millionaire tier that was analyzed, where the incremental tax savings (particularly considering the state and local tax deduction cap) may be much more meaningful. *See also Many People Are Moving from California to Texas*, ECONOMIST (June 20, 2019), https://www.economist.com/special-report/2019/06/20/many-people-are-moving-from-california-to-texas [https://perma.cc/44UC-MDH6] [hereinafter ECONOMIST] (observing that 2.5% of California's population—particularly the middle class—migrated out of the state between 2007 and 2016, with a quarter of those individuals migrating to Texas because of lower housing costs and taxes).

199 *See, e.g.*, Lee Miller & Wei Lu, *Migration's Biggest Loser Is Connecticut as Florida Profits*, BLOOMBERG L. (May 24, 2019, 8:30 AM), https://www.bloomberg.com/news/articles/2019-05-24/migration-s-biggest-loser-is-connecticut-as-florida-profits [https://perma.cc/LB9C-CYEP] (finding states losing the most net AGI were New York, Illinois, New Jersey, Pennsylvania, Connecticut, and California; while the states gaining the most net AGI were Florida, Texas, Washington, and South Carolina).

200 PORTLAND CLEAN ENERGY COMMUNITY BENEFITS INITIATIVE 2018 (2018), https://www.portlandoregon.gov/auditor/article/674246 [https://perma.cc/62VZ-8B8H]. Just over 65% of Portland voters approved the clean energy tax. MULTNOMAH COUNTY ELECTION RESULTS – UPDATE #17 FINAL SUMMARY: NOVEMBER 2018 GENERAL ELECTION, https://multco.us/file/76594/download [https://perma.cc/5GL4-DC9D].

201 Portland, Or., Ordinance 189389, Ordinance 189390 (Feb. 21, 2019) (codified at PORTLAND, OR., CITY CODE chs. 7.02, 7.07, 5.04 (2019)); *About the Portland Clean Energy Community Benefits Fund*, PORTLAND.GOV, https://www.portlandoregon.gov/bps/article/713039 [https://perma.cc/P9YE-R3P4] (last visited Jan. 22, 2020).

202 PORTLAND, OR., CITY CODE § 7.07.010(A) (2019); *History and Key Documents of Climate Planning and Action in Portland*, PORTLAND.GOV, https://www.portlandoregon.gov/bps/article/531984 [https://perma.cc/P7CV-LJ8Z] (last visited Jan. 22, 2020).

Portland's clean energy tax is designated as a surcharge but functions as a gross receipts tax.[203] The clean energy tax became effective January 1, 2019, and is in addition to Portland's net income business license tax.[204] The tax applies only to "large retailers," which the Portland City Code defines as a business that has (1) at least $1 billion in annual gross income from retail sales worldwide and (2) at least $500,000 in annual gross income from retail sales sourced to Portland.[205] For businesses subject to the tax, the rate is 1% of Portland-sourced retail sales gross revenue.[206] Revenue estimates for the clean energy tax vary widely, from $30 million to $79 million per year.[207]

Large retailers mounted a campaign against the tax, but proponents such as the Green Advocacy Project and Sierra Club effectively supported it.[208] One of the most significant concerns was whether the tax incidence would ultimately fall on Portland consumers instead of the targeted large businesses—acting like a regressive sales tax. The provision itself contemplates retailers passing the tax through to consumers, and there is some early evidence of this pass-through occurring with certain sales.[209]

Additional controversy surrounds the clean energy tax because the Portland Revenue Division proposed amendments to the tax provision that the Portland City Council adopted.[210] Some of these amendments

---

203 PORTLAND, OR., CITY CODE § 7.02.500(F) (2019).

204 *Id.*

205 *Id.* § 7.02.100(N). One of the Portland City Council's substantive amendments was to expand the threshold from $1 billion in retail sales *nationwide* to *worldwide*, thus expanding the tax net significantly. *See* Jennifer Young & Nikki Dobay, *INSIGHT: Portland's New Gross Receipts Tax Comes with Questions and Challenges*, BLOOMBERG L. (May 22, 2019, 6:00 AM), https://www.bloomberglaw.com/document/X89JIK6O000000?bc=W1s…OoP5C1L4MmiqISYdyiYe6z1GbUaO6YVqxO1i_CCPn_QN1Xq_30t2w%3D%3D [https://perma.cc/E52Z-H9RT].

206 PORTLAND, OR., CITY CODE § 7.02.500(F)(2) (2019).

207 Young & Dobay, *supra* note 205.

208 Paul Shukovsky, *Clean Energy Tax Gets Thumbs Up from Portland, Ore., Voters*, BLOOMBERG L. (Nov. 7, 2018, 2:04 PM), https://news.bloombergtax.com/daily-tax-report-state/clean-energy-tax-gets-thumbs-up-from-portland-ore-voters?utm_source=twitter&utm_medium=taxdesk&utm_campaign=9am [https://perma.cc/4EY2-TDD3].

209 PORTLAND, OR., CITY CODE § 7.02.500(F)(2) (2019); Rachel Monahan, *Will the Portland Clean Energy Tax Be Passed on to Consumers? Check Your Trash Bill*, WILLAMETTE WEEK (June 26, 2019), https://www.wweek.com/news/city/2019/06/26/will-the-portland-clean-energy-tax-be-passed-on-to-consumers-check-your-trash-bill/ [https://perma.cc/DA9J-26CW].

210 Portland, Or., Ordinance 189389, Ordinance 189390 (2019); PORTLAND CLEAN ENERGY COMMUNITY BENEFITS INITIATIVE 2018 (2018), https://www.portlandoregon.gov/

are substantive and broaden the scope of the tax significantly.[211] There is uncertainty as to whether the city council had the authority to adopt the amendments because the amendments reflected substantive changes to the provisions that voters originally approved.[212]

Portland was also the first locality to enact an excessive CEO compensation tax to combat income inequality, effective January 1, 2017.[213] The tax applies only to publicly traded companies that are subject to U.S. Securities and Exchange Commission pay-ratio reporting requirements and that are also subject to Portland's business license tax.[214] The provision operates as a surtax to Portland's base net income business license tax.[215] Businesses must pay an additional 10% if their CEO-to-median worker compensation ratio is equal to or above 100:1 and 25% if their CEO-to-median worker compensation ratio is equal to or above 250:1.[216]

Portland expects to collect approximately $2.5 million to $3.5 million annually from its excessive CEO compensation surtax, with revenues used to fund general city operations.[217] In its first year, the average payment for businesses subject to the surtax was just $15,800.[218] Portland's former mayor Charlie Hales stated, "Income inequality is real, it is a national problem and the federal government isn't doing anything about it. . . . We have a habit of trying things in Portland; maybe they're not perfect at the first iteration. But local

auditor/article/674246 [https://perma.cc/2MST-FDKJ]; Letter from Nikki E. Dobay, Senior Tax Counsel, Council on State Taxation, to Thomas Lannom, Dir., City of Portland Revenue Div., (Jan. 18, 2019) [hereinafter Letter from Nikki E. Dobay]; Young & Dobay, *supra* note 205.

211 Portland, Or., Ordinance 189389, Ordinance 189390; PORTLAND CLEAN ENERGY COMMUNITY BENEFITS INITIATIVE, *supra* note 210; Letter from Nikki E. Dobay, *supra* note 210; Young & Dobay, *supra* note 205.

212 Letter from Nikki E. Dobay, *supra* note 210.

213 PORTLAND, OR., CITY CODE § 7.02.500(E) (2019); Gretchen Morgenson, *Portland Adopts Surcharge on C.E.O. Pay in Move vs. Income Inequality*, N.Y. TIMES (Dec. 7, 2016), https://www.nytimes.com/2016/12/07/business/economy/portland-oregon-tax-executive-pay.html [https://perma.cc/ZEH7-Z2LN]; Mike Rogoway, *Portland Expects Up to $3.5 Million from Unique CEO Tax*, OREGONIAN (Feb. 2, 2019), https://www.oregonlive.com/business/2019/02/portland-expects-up-to-35-million-from-unique-ceo-tax.html [https://perma.cc/X226-AMX9].

214 PORTLAND, OR., CITY CODE § 7.02.500(E) (2019); *Business Tax Administrative Rule 500.17-1*, CITY OF PORTLAND, https://www.portlandoregon.gov/revenue/article/656905 [https://perma.cc/CH4S-8YSW] [hereinafter *Business Tax Administrative Rule*] (last visited Jan. 22, 2020).

215 PORTLAND, OR., CITY CODE § 7.02.500(E) (2019).

216 *Id.*; *Business Tax Administrative Rule*, *supra* note 214.

217 Rogoway, *supra* note 213; Morgenson, *supra* note 213.

218 Rogoway, *supra* note 213.

action replicated around the country can start to make a difference."[219] Former city councilmember Steve Novick acknowledged, "It's nice to have the money but the ultimate goal was not to raise money but get a precedent other jurisdictions would follow."[220]

Although this Article addresses local targeted taxes, it is important to note that Oregon recently enacted a state-level corporate activity tax targeted at large businesses.[221] The controversial tax is estimated to generate $1 billion annually, although there are already calls to amend or repeal the tax.[222] Thus, large businesses with sales into Portland, Oregon, are going to face two new significant gross receipt taxes, which may ultimately get passed on to consumers.

II
THE TROUBLE WITH TARGETED TAXES

Targeted taxes have several tax policy and practical disadvantages. Most importantly, targeted taxes will likely have a negative economic impact. These taxes are unlikely to generate the anticipated additional revenue, and they will have an unintended distributional impact. The salience and incidence of these taxes will diminish their expressive effect. Large businesses will oppose targeted taxes because these provisions complicate tax regimes and the business environment and may be unconstitutional. In addition, targeted taxes raise the difficult question of whether they are more accurately characterized as a fee

---

219 Morgenson, *supra* note 213.

220 Rogoway, *supra* note 213.

221 H.B. 3427, 2019 Leg., Reg. Sess. (Or. 2019); Paul Jones, *Oregon Governor Signs New Gross Receipts Tax*, TAX NOTES (May 20, 2019), https://www.taxnotes.com/tax-notes-today-state/gross-receipts-tax/oregon-governor-signs-new-gross-receipts-tax/2019/05/20/29j1w [https://perma.cc/QA66-77MZ]. Revenues are earmarked for education. *Id.*

222 Paul Jones, *Oregon Group Ends Gross Receipts Tax Referendum Effort*, TAX NOTES (July 22, 2019), https://www.taxnotes.com/tax-notes-today-state/gross-receipts-tax/oregon-group-ends-gross-receipts-tax-referendum-effort/2019/07/22/29r70 [https://perma.cc/S5RS-3SYB]; Paul Jones, *Oregon Lawmakers Mull Changes to Gross Receipts Tax*, TAX NOTES (June 11, 2019), https://www.taxnotes.com/tax-notes-today-state/exemptions-and-deductions/oregon-lawmakers-mull-changes-gross-receipts-tax/2019/06/11/29lfm [https://perma.cc/RPH5-RBZE]; Paul Jones, *Oregon Lawmakers Mandate January Gross Receipts Tax Referendum*, TAX NOTES (July 9, 2019), https://www.taxnotes.com/tax-notes-today-state/budgets/oregon-lawmakers-mandate-january-gross-receipts-tax-referendum/2019/07/09/29pws [https://perma.cc/2VQ4-DBLZ]; Paul Shukovsky, *$1.2 Billion Business Tax Facing Repeal Drive in Oregon*, BLOOMBERG L. (June 24, 2019, 2:07 PM), https://news.bloombergtax.com/daily-tax-report-state/1-2-billion-business-tax-facing-repeal-drive-in-oregon [https://perma.cc/EFC2-XN3U].

rather than a tax. Fortunately, there are several alternatives to targeted taxes, discussed below, which minimize these concerns.[223]

A. Negative Economic Impact

The overwhelming tax policy, and practical, drawback with targeted taxes is the negative economic impact. The locality—and its residents—have the most at stake. These taxes will fail to raise the desired revenue and may drive economic growth away from the locality, resulting in reduced revenue compared to the status quo. In addition, targeted taxes will likely have an undesired distributional impact. Employees are likely to bear the incidence of per-employee taxes, and residents are likely to bear the incidence of retail gross receipts taxes.

1. Per-Employee Targeted Taxes

Business tax migration is much more practical at the local level than at the state or federal levels.[224] These localities are targeting at most a handful of large businesses. The Mountain View and Cupertino taxes would primarily affect just one business in each locality, Google and Apple, respectively.[225] Such narrow targeting leaves the locality vulnerable, especially given the recent trend of large tech companies soliciting incentive offers from localities for headquarter expansion and relocation.

Although a large business migrating out of a locality entirely is a possibility, the much more realistic threat is a business choosing to expand outside the locality. Not only does this type of migration sacrifice additional tax revenue and economic production directly but it also sends a powerful message to other businesses that may consider migrating into that locality. Amazon's recent HQ2 expansion garnered widespread attention, but expansion is common and businesses consider many location options deliberately. Amazon initially chose to split its new headquarters, and 50,000 new workers, between New York City and northern Virginia.[226] The New York City expansion plan drew

---

[223] *See infra* Section III.

[224] *See* Richard M. Bird, *A New Look at Local Business Taxes*, 30 TAX NOTES INT'L 695 (2003).

[225] *See supra* Sections I.C, D.

[226] *See, e.g.*, Spencer Soper, *Amazon Scraps Plan to Build a Headquarters in New York City*, BLOOMBERG L. (Feb. 14, 2019, 9:07 AM), https://www.bloomberg.com/news/articles/2019-02-14/amazon-says-it-won-t-build-a-headquarters-in-new-york-city [https://perma.cc/32MH-ZJUT].

significant local opposition.[227] When it appeared a New York State senator would block the agreed-upon incentive package, Amazon withdrew its planned New York City expansion.[228] New York City's messaging has dissuaded some businesses from expanding or relocating there.[229] Amazon decided to distribute the 25,000 jobs planned for New York City to other cities, including Austin, Texas.[230] Amazon still plans to hire 25,000 workers in northern Virginia.[231] Google recently announced a $600 million expansion of its Oklahoma data center, where Google has already invested $2.5 billion and created 400 jobs.[232] Google is investing $13 billion in expansion across fourteen states.[233] Apple is planning to invest $30 billion and "hire 20,000 employees in the U.S. over the next five years" and is considering northern Virginia and North Carolina as sites for expansion.[234] Uber is considering Dallas, Texas, for a $110 million expansion.[235]

---

227 *Id.*

228 *Id.* New York State Senator Michael Gianaris represented Long Island City, the location of Amazon's planned New York City expansion. Senator Gianaris was an outspoken opponent of the expansion and voiced his commitment to prevent it. He was subsequently appointed to New York State's Public Authorities Control Board, which would have had to approve the Amazon project unanimously. *Id.*

229 *See, e.g.*, Katia Porzecanski & Hema Parmar, *Griffin Says Amazon Exit Curbed Interest in NYC Headquarters*, BLOOMBERG L. (Mar. 14, 2019, 9:30 AM), https://news.bloombergtax.com/daily-tax-report-state/griffin-says-amazon-exit-curbed-interest-in-nyc-headquarters-1 [https://perma.cc/UP7G-ZG6A].

230 Matt Day, *Amazon to Hire 800 Tech Engineers in Texas in Latest Expansion*, BLOOMBERG L. (Mar. 28, 2019, 6:12 AM), https://www.bloomberg.com/news/articles/2019-03-28/amazon-to-hire-800-tech-engineers-in-texas-in-latest-expansion [https://perma.cc/HK68-HMJE].

231 Amanda Albright, *Armed with Amazon HQ2, Arlington County to Tap Muni-Bond Market*, BLOOMBERG L. (May 29, 2019, 8:46 AM), https://www.bloomberglaw.com/product/tax/document/X9R4HV4S000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016b0439d49aa76f567dff580000#jcite [https://perma.cc/KZ8F-U7JU] (suggesting Amazon's expansion into Arlington County is generating benefits for the county's municipal bond issuance).

232 Paul Stinson, *Google Expands Oklahoma Data Center with $600 Million Investment*, BLOOMBERG L. (June 13, 2019, 3:43 PM), https://www.bloomberglaw.com/product/tax/document/X8C4VMH0000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016b5288d721adebffff36130002#jcite [https://perma.cc/AC6A-JZQ3].

233 *Id.*

234 Jessica Guynn & Mike Snider, *It's Not Just Amazon, Northern Virginia Also Wants a Bite of Apple*, USA TODAY (May 16, 2018, 12:45 PM), https://www.usatoday.com/story/tech/2018/05/16/apple-considering-northern-virginia-campus-20-000-employees/615729002/ [https://perma.cc/E68K-BD7V].

235 Paul Stinson, *Dallas Approves $9.3 Million in Incentives to Lure Uber Hub*, BLOOMBERG L. (Aug. 15, 2019, 3:34 PM), https://www.bloomberglaw.com/product/tax/

Even if the large businesses do not migrate their existing or expanded presence out of the locality, the targets are likely to mitigate their tax costs—thus reducing the locality's tax revenues drastically—using very simple techniques. First, although not publicized sufficiently, these large businesses already contribute significant funding to the targeted causes voluntarily.[236] If the locality imposes a new tax earmarked for the respective cause, the large businesses may simply shift their existing voluntary contributions toward paying the tax, resulting in no net benefit.

Second, per-employee taxes distort hiring behavior in the jurisdiction. Increasing per-employee costs serves a very clear deterrent effect. If a locality imposes a direct tax on employment, businesses will be deterred from creating new jobs, which may directly contradict state-level messaging and incentives.[237] Additionally, per-employee taxes result in lower-wage workers becoming proportionally more expensive relative to higher-wage workers. A $500 per-employee tax may represent a 2% increase in the cost of hiring a new janitor, but only a 0.2% increase in the cost of hiring a new software engineer. Providing a disincentive for these large businesses to hire lower-wage workers is counterproductive to reducing homelessness issues, particularly if job loss is indeed a significant cause. If localities want to incentivize hiring low-wage workers and disincentivize hiring high-wage workers, a payroll tax would be much more effective, although the highest earners tend to be the executives who control business relocation decisions.[238]

---

document/X4T1DG6O000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016c96f9deaea97ff6ff32930001#jcite [https://perma.cc/JM2P-LYWX].

236 *See supra* Sections I.A, C.

237 *See, e.g.*, Patrick Clark, Carlyann Edwards & Henry Goldman, *Amazon Friction Rises in Virginia as Cuomo Woos Bezos to Return*, BLOOMBERG L. (Mar. 1, 2019), https://www.bloomberg.com/news/articles/2019-03-01/amazon-friction-rises-in-virginia-as-cuomo-woos-bezos-to-return [https://perma.cc/4QQW-VMGW] ("In New York, Governor Andrew Cuomo begged Amazon.com Inc. to reconsider its decision to back out of plans to bring 25,000 jobs to Queens after public criticism. . . ."); Kaitlin Lewis, *California GO-Biz Approves Nearly $56 Million in Corporate Tax Credits*, TAX NOTES (June 13, 2019), https://www.taxnotes.com/tax-notes-today-state/corporate-taxation/california-go-biz-approves-nearly-56-million-corporate-tax-credits/2019/06/14/29m4b [https://perma.cc/8VLV-VNAS] (announcing tax credits to bring nearly 7,000 new jobs to California). *See also* Erin Scharff, *Preemption and Fiscal Authority*, 45 FORDHAM URB. L.J. 1270, 1273 (2018) [hereinafter *Preemption and Fiscal Authority*] ("[E]fforts to implement progressive policies at the local level have drawn the ire of state legislatures and governors.").

238 San Francisco moved away from its higher payroll tax in 2012 for exactly this reason.

Third, per-employee taxes encourage a workforce shift away from employees. Businesses can shift to independent contractors, outsourcing, or automation. The workforce shift could eviscerate projected tax revenues and affect current employees adversely if businesses substitute for the employment relationship. Those most likely to be replaced by independent contractors—or outsourcing arrangements or automation—are lower-wage workers, again exacerbating the problem the taxes are designed to alleviate. In addition, to prevent per-employee tax revenue decline resulting from a shift to automation, localities may have to impose complementary automation or "robot taxes," further complicating the local tax landscape.[239] And depending on the tax provision's precise language, large businesses may be able to structure around the tax. For example, a business may be able to use affiliated entities as the formal employer to fall below application or rate increase thresholds. Seattle's per-employee tax encompassed affiliates, but only if they were a "paymaster."[240] At the very least, localities and businesses will waste resources disputing notoriously thorny worker classification issues.

Finally, even if a business retains its existing employee workforce composition, the targeted tax will likely have a negative distributional impact. Businesses can easily shift the tax incidence to employees through lower wages or reduced benefits.[241] Ultimately, the employees may bear the marginal tax costs.

2. Gross Receipts-Based Targeted Taxes

Targeted taxes based on gross receipts derived in the locality will likely increase the cost of goods and services for residents. For example, Portland imposes its gross revenue tax on retail sales into

---

[239] *See, e.g.*, Orly Mazur, *Taxing the Robots*, 46 PEPP. L. REV. 277, 280 (2019). Chicago has already started considering "robot taxes." Michael J. Bologna, *Chicago Plan Could Curb Incentives for Tech Companies like Amazon*, BLOOMBERG L. (Feb. 14, 2019, 3:20 PM), https://www.bloomberglaw.com/product/tax/document/X69U9R3O000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%252000000168eddcd863a57eefdfdef60000#jcite [https://perma.cc/S5KD-36B8].

[240] SEATTLE, WASH., MUN. CODE tit. 5, ch. 5.37, § 020 (2018) (repealed).

[241] Wiji Arulampalam et al., *The Direct Incidence of Corporate Income Tax on Wages*, 56 EUR. ECON. REV. 1038 (2012) (concluding that approximately 50% of a corporate income tax increase is passed on to employees in the long run directly through lower wages, and an additional amount may be passed on indirectly); Clements Fuest et al., *Do Higher Corporate Taxes Reduce Wages? Micro Evidence from Germany*, 108 AM. ECON. REV. 393 (2018) (concluding that 67% of a local business tax increase is passed on to employees directly through reduced wages).

Portland. Retailers may respond in several ways, all of which would be detrimental. Retailers could charge the additional tax amount to Portland consumers directly, or increase prices for sales into Portland, both of which would shift the tax incidence directly to Portland residents.[242] Retailers could avoid selling into Portland altogether, which would likely increase prices due to reduced competition. Or retailers could increase the cost of goods universally to offset the Portland tax costs, resulting in retailers' global customer bases subsidizing Portland's spending.

Of these potential responses, the direct pass-through to customers is most likely.[243] The pass-through approach increases tax salience. It allows businesses to demonstrate very clearly the additional tax costs and that residents ultimately bear those costs. Residents may initially direct their disapproval toward the business, but if businesses adopt this approach universally, residents' only viable response may be blaming the local politicians who created the tax. Businesses quickly adopted this pass-through approach in response to France's recent targeted digital tax, which functions similarly to Portland's retail gross receipts tax.[244] Almost immediately after France enacted the tax, Amazon announced that it would pass the 3% gross receipts tax through to its French customers.[245] Because of gross receipts-based targeted taxes' distributional impact and salience, these taxes will likely produce negative economic and political ramifications.

In addition, with any gross receipts-based tax, businesses have an incentive to source the receipts outside the taxing jurisdiction. Even with a shift to market-based sourcing, determining source is complex and is one of the most disputed issues in state and local taxation. If the gross receipts tax is substantial enough, it may be worthwhile for businesses and their consumers to structure transactions so that the transactions are properly sourced outside the taxing jurisdiction. This structuring is easier to effectuate at the local level than the state level

---

242 Portland's tax code expressly contemplates retailers separately stating the tax amount on customer invoices. PORTLAND, OR., CITY CODE § 7.02.500(F)(2) (2019).

243 Many businesses are accustomed to separately stating taxes that they pass through to customers, as many states have statutory requirements to do so for sales and use tax purposes.

244 Todd Buell, *Amazon Raising Fees on French Sellers After Digital Tax*, LAW360 (Aug. 1, 2019, 1:12 PM), https://www.law360.com/articles/1184355/amazon-raising-fees-on-french-sellers-after-digital-tax [https://perma.cc/JYM4-UPS6]. In this case, Amazon's customers are retailers, so the new 3% fee places these French retailers at a competitive disadvantage compared to retailers in other countries. *Id.*

245 *Id.*

and would likely result in sourcing the transaction outside the locality for sales tax purposes as well.

The potential negative economic impact alone should dissuade localities from pursuing targeted taxes if their primary goal is to generate additional revenue. Importantly, negative economic impact is much more likely if the tax regime is overly complex and presents substantial administrative and compliance burdens.

B. Complicating Tax Regimes and the Business Environment

Certainty is the paramount tax concern for large businesses, followed closely by managing administrative and compliance obligations.[246] Actual tax liability is a much less significant concern, especially if the tax is equally applicable to its competitors and the tax can be passed through to consumers.

These priorities help explain the large businesses' reactions to local targeted tax proposals. The strongest opposition arose in Seattle and San Francisco, each of which already has at least one business tax regime. The targeted businesses already pay tens of millions of dollars under the existing regime—or regimes, in San Francisco's case—and incur significant administrative and compliance costs associated with each tax regime.[247]

In contrast, the targeted businesses in Mountain View and Cupertino did not launch fervent public campaigns opposing the targeted tax. There are several reasons underlying their reaction, but a major factor is that neither city has an existing business gross receipts or payroll tax. Thus, the proposed tax would be the first real business tax imposed on the large businesses in each respective city. It is still advisable to take a mindful approach to designing that tax properly at the outset, as Cupertino and Apple are attempting, to avoid the situation in San Francisco that can create mistrust and acrimony between the locality and the businesses.

---

246 *See generally* David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749, 751 (2010) ("[Economists] typically agree that unstable tax policies . . . are economically harmful" and that even Adam Smith recognized the intrinsic value of tax certainty, declaring that it was a "matter of so great importance that a very considerable degree of inequality . . . is not near so great an evil as a very small degree of uncertainty.").

247 A San Francisco tech executive stated that it is "easier to do business in Cuba than San Francisco." ECONOMIST, *supra* note 198.

San Francisco and its large businesses came together just seven years ago to fix its complex patchwork of counterproductive tax regimes, most notably the city's significant payroll tax. The solution was a gross receipts tax—itself complicated—that would replace the payroll tax and leave businesses to comply with just one primary business tax. San Francisco, however, did not phase out the payroll tax as agreed. The city not only retained it but enacted an additional gross receipts tax and proposed at least three more business taxes. The city and its businesses had an understanding, which gave the businesses tax certainty, and the city was reneging. San Francisco appears to have reset the dialogue, and ideally one revised comprehensive business tax regime will emerge as a result. Nevertheless, the experience in San Francisco provides a valuable lesson.

Businesses are concerned not just with new additional targeted tax regimes within one jurisdiction, but also on a broader scale across the country.[248] As discussed below, the objectives of Portland's excessive CEO compensation tax are to signal its condemnation of income inequality and provide a blueprint for other states and localities to do the same.[249] Indeed, San Francisco proposed a tax that mirrored Portland's, but with much higher rates.[250] If every locality adopted just one targeted tax, large businesses could face compliance obligations for thousands of new complicated taxes. The administrative and compliance burden associated with a novel targeted tax regime may cost millions and require a business to reengineer its internal systems.[251] These compliance costs, and possibly even the tax costs, are likely to be passed on to employees or consumers.[252] Cumulative

---

248 *See* Erin Adele Scharff, *Powerful Cities: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 331 (2016) ("The more the tax laws of these jurisdictions differ from each other, the more costly it is for multijurisdictional taxpayers to comply.").

249 *See infra* Section II.D.

250 As another example, many U.S. cities are observing Vancouver's vacant home tax experience with thoughts of adopting a similar provision. *See infra* Section III.C.2.

251 *See, e.g.*, Isabel Gottlieb, *Big Tech Frets over French Digital Tax Compliance Headaches*, BLOOMBERG L. (Aug. 15, 2019, 1:45 AM), https://www.bloomberglaw.com/document/X4CT0QO000000?bna_news_filter=daily-tax-report-international&jcsearch=BNA%25200000016c8c42da22a7ffac431c150001#jcite [https://perma.cc/39W3-VUTJ]; Isabel Gottlieb, *Facebook Must 'Reengineer' to Comply with French Digital Tax*, BLOOMBERG L. (Aug. 12, 2019, 3:31 PM), https://www.bloomberglaw.com/document/XFBNUUSO000000?bna_news_filter=daily-tax-report-international&jcsearch=BNA%25200000016c8765db91ad7df76d31dd0001#jcite [https://perma.cc/M3EY-QAD9].

252 Somebody must bear these additional costs, whether it be consumers, employees, or shareholders. *See* Bird, *supra* note 224. Based on ability-to-pay principles, shareholders are

tax compliance burdens may even justify striking down targeted tax provisions under the Dormant Commerce Clause.[253]

These targeted taxes present unique complexities that will create administration costs for the locality and compliance costs for the taxpayers—costs that could be better used actually combating the reason for the tax.

C. Constitutional Considerations

Targeted taxes may also violate both the U.S. Constitution and the respective state's constitution, depending on how the taxes are structured. The most pertinent constitutional restriction is uniform taxation. Most state constitutions include some type of tax uniformity clause.[254] These uniformity clauses vary considerably across the states, and many apply only to property taxes.[255] State courts tend to interpret uniformity clauses broadly, and although taxpayers may also raise state and federal Equal Protection Clause challenges, taxpayers are more likely to be successful with a state uniformity challenge to these targeted taxes.[256] The overarching uniformity and equal protection inquiries are whether the taxing jurisdiction properly determined each taxpayer class, and whether it applies the tax uniformly across that class.[257]

Most relevant to the targeted taxes discussed above, it is unclear whether a taxing jurisdiction can justify disparate tax treatment based on taxpayer size without violating the state constitution's uniformity clause.[258] Both Georgia and Pennsylvania, which have broad uniformity provisions that apply beyond property taxes, have addressed

---

generally the group best suited to bear these costs. With tech companies, however, there is a significant working-class population that falls into two or even three of these categories.

253 *See infra* Section II.C; Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, MD. LAW REV. (forthcoming 2019) (manuscript at 38).

254 JEROME R. HELLERSTEIN ET AL., STATE TAXATION ¶ 2.01 (3d ed. 2019). Neither New York nor Connecticut have constitutional tax uniformity provisions. *Id.*

255 *Id.* ¶¶ 2.01, 2.06. Importantly, some courts have characterized net income taxes as a type of property tax. Kunath v. City of Seattle, 444 P.3d 1235 (Wash. Ct. App. 2019) (citing Culliton v. Chase, 25 P.2d 81 (Wash. 1933)).

256 *See* HELLERSTEIN ET AL., *supra* note 254, ¶ 3.04[1][c].

257 *Id.* ¶ 2.06; Arangold Corp. v. Zehnder, 787 N.E.2d 786, 793 (Ill. 2003).

258 The New Hampshire Supreme Court issued an advisory opinion to the New Hampshire legislature concluding that imposing different property tax rates based on taxpayer size would violate the state's uniformity clause unless there was a "valid reason" justifying the disparate treatment. *See* Opinion of the Justices, 386 A.2d 1273, 1275 (N.H. 1978).

the issue.[259] The Georgia Supreme Court held that a business license tax violated the state constitution's uniformity provision because the tax imposed a greater flat charge if a business reached a certain employee threshold.[260] The court did, however, recognize that a reasonable justification for a size-based class is that larger businesses have greater ability to pay and produce greater regulatory costs for the locality.[261] Both the Georgia Supreme Court and the Pennsylvania Supreme Court struck down business license taxes because the provisions exempted taxpayers that had gross receipts below a certain threshold.[262]

These decisions are most relevant to Oregon's targeted taxes because Oregon has a similarly broad uniformity provision.[263] Portland's clean energy tax applies only to retailers, not to other types of businesses such as manufacturers. The tax also applies only to large businesses, based on retail gross income. Portland's only stated justifications for these distinctions were that "[l]arge retail businesses . . . generat[e] a substantial portion of the City's overall greenhouse gas emissions," and that large retailers have both the "inherent responsibility and the financial capacity" to pay the tax.[264] Portland may find it difficult to defend the tax provision's uniformity based on these justifications. It is doubtful that Portland could assert, for example, that a manufacturer located in Portland contributes less to the city's carbon footprint than an out-of-state retailer that merely sells

---

259 GA. CONST. art. VII, § 1, ¶ III(a); PA. CONST. art. VIII, § 1. These broad provisions require that taxes be imposed uniformly upon the same class of *subjects*, rather than property.

260 Pharr Road Inv. Co. v. City of Atlanta, 162 S.E.2d 333, 335–36 (Ga. 1968). The court suggested that a tax that imposed a certain rate per employee up to a threshold, and then a higher amount per employee that exceeds that threshold, would pass muster. *Id.*; *see also* Ping v. City of Cortez, 342 P.2d 657, 659 (Colo. 1959) (holding a uniform per-employee business license tax did not violate the Equal Protection Clause).

261 *Pharr Road Inv. Co.*, 162 S.E.2d at 335.

262 *Id.*; *see* Saulsbury v. Bethlehem Steel Co., 196 A.2d 664 (Pa. 1964); *cf.* City & County of Denver v. Duffy Storage & Moving Co., 450 P.2d 339, 344 (Colo. 1969) (determining that under the Equal Protection Clause a similar exemption "is not arbitrary and is reasonable").

263 OR. CONST. art. I, § 32. Notably, California and Washington have uniformity provisions that are limited to property tax (although Washington defines "property" broadly). CAL. CONST. art. XIII, § 1; WASH. CONST. art. VII, §§ 1–2. New York, by contrast, does not have a uniformity provision.

264 PORTLAND CLEAN ENERGY COMMUNITY BENEFITS INITIATIVE 2018 (2018), https://www.portlandoregon.gov/auditor/article/674246 [https://perma.cc/Q334-WGA7].

products to Portland customers.[265] Thus, there may be forthcoming uniformity challenges to Portland's recently enacted targeted tax.

The Equal Protection Clause prohibits states from making unreasonable tax classifications, which is a fairly lenient standard for taxing jurisdictions.[266] The U.S. Supreme Court will generally analyze whether "the State's classification is 'rationally related to the State's objective.'"[267] If the taxing jurisdiction presents a reasonable justification, the U.S. Supreme Court will generally sustain the tax even if it is discriminatory.[268] Although there is some mixed precedent, a modern U.S. Supreme Court would likely uphold an Equal Protection Clause challenge of a tax distinction based on a business's number of locations or amount of gross receipts.[269]

With that said, state courts have been more likely than the U.S. Supreme Court to find that taxes violate the state or federal Equal Protection Clause.[270] A state court may be more comfortable analyzing the state constitution rather than the U.S. Constitution, which also allows the state court to deviate from U.S. Supreme Court Equal Protection Clause precedent.[271] And, although some state courts may assert that uniformity clause and Equal Protection Clause standards are essentially identical, it appears taxpayers may have more success with state uniformity clause challenges.[272]

Of course, no contemporary constitutional analysis is complete without at least a brief Commerce Clause discussion. The U.S.

---

265 The comparison could be even more stark if that out-of-state retailer sold expensive products, such as pianos or artwork. That retailer may make only a handful of sales into Portland but exceed the $500,000 threshold because of the high per-item price.

266 *See* HELLERSTEIN ET AL., *supra* note 254, ¶ 3.02.

267 Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (quoting Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 315 (1976)).

268 Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526–27 (1959).

269 *See* HELLERSTEIN ET AL., *supra* note 254, ¶ 3.03[5], [6].

270 *See id.* ¶ 2.06[2]. Hellerstein recognizes that "some state courts appear to be more sympathetic than the U.S. Supreme Court to equal protection challenges to state tax classifications." *Id.* ¶ 3.04[1].

271 State courts are bound by U.S. Supreme Court precedent while applying the U.S. Constitution but are not so bound when applying the state's constitution. *Id.* ¶ 3.04[1]; *see generally* Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1985).

272 *See* HELLERSTEIN ET AL., *supra* note 254, ¶ 3.04[1][c]; Arangold Corp. v. Zehnder, 787 N.E.2d 786, 793 (Ill. App. Ct. 2003) ("The uniformity clause was intended to be a broader limitation on legislative power to classify for nonproperty tax purposes than the limitation of the equal protection clause . . . ."). If the state or local charge is a tax and not a fee, the challenge must be litigated in state, not federal, courts. *See infra* Section II.E.2.

Supreme Court established the Dormant Commerce Clause analytical framework for state and local taxes in *Complete Auto Transit v. Brady*.[273] The four-prong test provides that the tax must (1) be applied to an activity that has a substantial nexus with the jurisdiction, (2) be fairly apportioned to activities carried on by the taxpayer in the jurisdiction, (3) not discriminate against interstate commerce, and (4) be fairly related to services provided by the jurisdiction.[274] The substantial nexus prong has been the subject of considerable dispute in the past. Regarding the targeted taxes discussed above, however, the U.S. Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, reduces the likelihood of substantial nexus challenges.[275]

There are plausible arguments that each of the targeted taxes violates the discrimination prong, but Portland's clean energy tax is again the most suspect constitutionally. Because of the tax's application threshold, over $1 billion in global retail gross income and $500,000 in Portland-sourced retail gross income, it will apply primarily to large national or international businesses and not to local Portland-based businesses.[276] In effect, the tax will apply only to businesses engaged in interstate commerce and not to businesses engaged solely in intrastate commerce.[277] Thus, Portland's tax arguably discriminates against interstate commerce.

Portland's clean energy tax may also violate the "fairly-related" prong. Successful challenges under *Complete Auto*'s fourth prong are rare.[278] The U.S. Supreme Court does not look to the *amount* of the tax, or the *value* of the benefits provided.[279] Rather, the Court looks to "whether the *measure* of the tax [is] reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the

---

273 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 277–78 (1977).

274 *Id.* at 277–79. Fittingly, the Court recognized that "[a] tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce." *Id.* at 289.

275 South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018). Given certain facts, a taxpayer may be able to challenge the targeted taxes under the "substantial nexus" or "fairly apportioned" prongs. However, this Article focuses on the "discrimination" and "fairly related" prongs, as they present broader constitutional concerns in the context of the targeted taxes discussed above.

276 The distinction between retailers and non-retailers may also present as applied discrimination challenges.

277 For example, the tax would apply to large online booksellers such as Amazon, but not to local independently owned bookstores (which, contrary to popular belief, do still exist).

278 *See* HELLERSTEIN ET AL., *supra* note 254, ¶ 4.18[2][d].

279 Commonwealth Edison Co. v. Montana, 453 U.S. 609, 625 (1981).

state that may properly be made to bear a 'just share of state tax burden.'"[280] This framework incorporates the fundamental assumption that the "measure of a tax is reasonably related to the taxpayer's activities or presence in the state—*from which it derives some benefit* such as the substantial privilege of [doing business]."[281] Crucially, the Court designed this standard in the context of general taxes.[282] To date, Commerce Clause jurisprudence has categorized levies as general revenue measures or as user charges, but the targeted tax movement may necessitate a third category for special taxes, such as Portland's clean energy tax.

Portland imposes a general business license tax, the revenues from which fund general municipal infrastructure that affords businesses the privilege of deriving economic benefit in the city. In contrast, the new Portland clean energy tax is not a general tax but a separate, special tax with revenues dedicated to clean energy projects in Portland.[283] Many businesses subject to the tax—primarily out-of-state retailers—could reasonably assert that they derive no discernible benefit from clean energy projects in Portland. Unlike the Portland general business license tax, the Portland clean energy tax may not be fairly related to the services and benefits Portland provides to those businesses subject to the tax.[284]

Finally, each of the targeted taxes discussed above may unduly burden interstate commerce under the reinvigorated *Pike* balancing test.[285] Although the *Wayfair* Court suggested that the *Pike* balancing test may play a larger role in Dormant Commerce Clause challenges moving forward, it has traditionally been eschewed in state and local tax jurisprudence and diminished generally.[286] In *Pike*, the Court

[280] *Id.* at 626 (quoting W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)) (emphasis in original).

[281] *Id.* at 628–29 (emphasis added).

[282] *Id.* at 622–24. The purpose of the general taxes at issue were to provide "police and fire protection" and other "advantages of civilized society." *Id.* at 627 (quoting Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207, 228 (1980)).

[283] *See supra* Section I.G.

[284] The primary benefit Portland provides to large out-of-state retailers is the infrastructure to deliver goods to customers in the city. The costs associated with this benefit are already reimbursed through Portland's general business license tax.

[285] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[286] Walter Hellerstein & Andrew Appleby, *Substantive and Enforcement Jurisdiction in a Post*-Wayfair *World*, 90 ST. TAX NOTES 283, 292 (2018); Brannon P. Denning, *Reconstructing the Dormant Commerce Clause Doctrine*, 50 WM. & MARY L. REV. 417, 493–94 (2008).

established the following balancing framework to analyze Commerce Clause challenges:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[287]

Each of the targeted taxes discussed above has a local purpose that is at least legitimate. Indeed, many of their respective purposes are crucial. Thus, the resulting inquiry is twofold: whether the burdens imposed on taxpayers outweigh the respective purpose; and if not, whether the locality's purpose could be accomplished just as well in a less burdensome manner.[288]

In the context of targeted business taxes, the most significant and realistic burden relates to compliance. As discussed above, the compliance burdens for novel targeted taxes can be immense and cost millions.[289] These burdens are compounded when taxpayers must comply with multiple targeted taxes, whether within one jurisdiction or across many.[290] The cumulative compliance burdens could potentially outweigh the local benefits, although that argument is tenuous, especially for large multinational businesses.[291] However, the localities may be able to accomplish their stated purpose just as well with a lesser impact on interstate commerce, as this Article proposes below.[292] For example, San Francisco could simply increase the rate of its existing gross receipts tax instead of creating several new taxes.[293] Based on

[287] *Pike*, 397 U.S. at 142 (citation omitted).

[288] Assuming targeted business taxes are applied even-handedly, and the interstate commerce effects are merely incidental.

[289] *See supra* Section II.B.

[290] *See* Holderness, *supra* note 253 (manuscript at 38–40) (discussing cumulative compliance burden theory).

[291] One could also argue that the effect of these cumulative compliance burdens on interstate commerce is beyond "incidental." For example, if out-of-state retailers were to withdraw from the Portland market because of the compliance burdens associated with the targeted tax, there would be a significant effect on interstate commerce.

[292] *See infra* Sections III.A, B.

[293] A locality could also reduce taxpayers' compliance burdens by conforming to state-level tax regimes. For example, Portland could conform its clean energy tax to Oregon's commercial activity tax structure.

longstanding judicial reluctance to apply the inherently nuanced *Pike* balancing framework in the tax context, it may be difficult for a taxpayer to succeed on this basis. Regardless, targeted taxes present legitimate constitutional concerns, particularly as to uniformity and equal protection.

D. Additional Policy Considerations: Crises and Revenue-Raising Constraints

Despite targeted taxes' myriad deficiencies, there are policy considerations that explain why localities have recently gravitated toward them. As an overarching matter, the problems that the localities are targeting have reached crisis levels in many cases.[294] In San Francisco, residents, tourists, and the tech talent pool are being repelled by the escalating homelessness condition.[295] Infectious diseases, particularly hepatitis A and medieval-era typhus, are spreading at an alarming rate for those experiencing homelessness on the West Coast.[296] The localities are in a precarious position. If they do not solve these problems quickly, or if they impose overbearing and poorly designed taxes, there will be dire economic repercussions.

Making matters more difficult for localities, state constitutions and statutes restrict localities' abilities to raise revenue. For example, California imposes several property tax limitations and a supermajority approval requirement for local, special taxes.[297] Washington's constitution generally prohibits income taxes, although a uniform

294 *See* Jeremy Pilaar, *Starving the Statehouse: The Hidden Tax Policies Behind States' Long-Run Fiscal Crises*, 37 YALE L. & POL'Y REV. 345, 353–55 (2018) (describing the past forty years as a "Retrenchment Age" of transportation infrastructure expenditures at the state level).

295 *See, e.g.*, Matier & Ross, *supra* note 52; S.F., CAL., BUS. & TAX REGS. CODE art. 28, § 2802(i) (2019).

296 *See* Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, ATLANTIC (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/ [https://perma.cc/CU2M-LFKC].

297 California voters have not shown sufficient support to remove property tax limitations for commercial properties. Romy Varghese, *California Bid to Change Business Taxes Drawing Mixed Reviews*, BLOOMBERG L. (Feb. 7, 2019, 9:39 AM), https://www.bloomberglaw.com/product/tax/document/XC4I0JBK000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%252000000168c8fbd052a5edfeffd9020000#jcite [https://perma.cc/R9RB-U6KP].

income tax may be a possibility for Seattle in the future.[298] And Oregon's constitution includes a broad tax uniformity requirement.[299] Despite these limitations, there are viable options that accomplish the localities' revenue-raising goals without targeted taxes' practical and policy drawbacks, as discussed below.[300]

If a locality's primary goal is not to raise revenue, but to recognize a latent issue and present a blueprint for a potential nationwide solution, targeted taxes may be an effective approach. Portland has openly adopted this approach, particularly with its surtax on excessive CEO compensation.[301] The surtax generates nominal revenue, but clearly signals Portland's commitment to mitigating income inequality.[302] Portland's goal is for other jurisdictions to adopt a similar provision.[303] If the movement reaches critical mass, large businesses may begin to prioritize the issue. This local-to-national signaling strategy has been successful in other contexts recently, notably with bans on single-use plastic bags and foam food containers and cups.[304] This approach sacrifices additional revenue, and possibly even the locality's economic health. But that sacrifice actually amplifies the message, signaling that the locality values certain principles more than economic prosperity.

E. Blurring the Tax Versus Fee Distinction

The nature of these targeted taxes, particularly the revenue hypothecation to a specific program or fund, necessitates a tax versus

---

298 *See* Kunath v. City of Seattle, 444 P.3d 1235 (Wash. Ct. App. 2019) (holding that Seattle had authority to impose a net income tax that is actually a property tax but that the Washington Constitution requires the tax to be uniform).

299 OR. CONST. art. I, § 32.

300 *See infra* Section III.

301 *See Preemption and Fiscal Authority*, *supra* note 237, at 1273 ("Reimagined localism reflects excitement about cities as laboratories for policy experimentation.").

302 *See supra* Section I.G.

303 *Id.*

304 *See, e.g.*, Adrianne Appel, *Foam Takeout Containers Banned in Maine*, BLOOMBERG L. (May 1, 2019, 5:41 AM), https://news.bloombergenvironment.com/environment-and-energy/foam-takeout-containers-banned-in-maine [https://perma.cc/KNK2-SVCG]; Adrianne Appel, *Maine, Vermont Join Plastic Bag-Ban Bandwagon*, BLOOMBERG L. (June 17, 2019, 3:35 PM), https://www.bloomberglaw.com/document/XB00SNI0000000?bna_news_filter=environment-and-energy&jcsearch=BNA%25200000016b6736db3fa5ef67b7c3290000#jcite [https://perma.cc/F6E5-VC3Z]; Andrew M. Ballard, *Maryland Foam Packaging Ban, Energy Bills to Become Law*, BLOOMBERG L. (May 24, 2019, 12:50 PM), https://www.bloomberglaw.com/document/XBH2OGM8000000?bna_news_filter=environment-and-energy&jcsearch=BNA%25200000016ae514dfa3a7fbedbe90390002#jcite [https://perma.cc/9YBC-YEQM].

fee analysis. Some of these localities even expressly designate their targeted taxes as "surcharges" rather than "taxes."[305] And many fall within the locality's "business license" regime. If the targeted taxes are more likely fees than taxes, there are several important implications. In some cases, localities may even want to consider structuring certain revenue-raising measures as fees instead of taxes.

1. Tax or Fee?

Courts analyze multiple factors to determine if a government levy constitutes a tax or a fee.[306] A primary factor is whether the proceeds are used for general government support or to further the specific regulatory purposes of the law.[307] Courts also analyze whether the payor receives some specific benefit beyond those received by non-payors and whether the levy exceeds the government's regulatory costs.[308]

The California Constitution incorporates these principles in its definition of fees that are not subject to the local tax supermajority approval requirement, including:

> (1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of conferring the benefit or granting the privilege to the payor.
>
> (2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the State of providing the service or product to the payor.
>
> (3) A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.[309]

---

[305] *See, e.g.*, PORTLAND, OR., CITY CODE § 7.02.500(F) (2019).

[306] *See* HELLERSTEIN ET AL., *supra* note 254, ¶ 2.01[1].

[307] *See* First Baptist Church of St. Paul v. City of St. Paul, 884 N.W.2d 355 (Minn. 2016); Covell v. City of Seattle, 905 P.2d 324 (Wash. 1995); Heavens v. King Cty. Rural Library Dist., 404 P.2d 453 (Wash. 1965).

[308] *First Baptist Church of St. Paul*, 884 N.W.2d at 355; *Covell*, 906 P.2d at 324; *Heavens*, 404 P.2d at 453.

[309] CAL. CONST. art. XIII C, § 1(e). California courts have also established factors to determine whether a levy is a tax or fee. *See* Sinclair Paint Co. v. State Bd. of Equalization, 64 Cal. Rptr. 447 (1997); Morning Star Co. v. Bd. of Equalization, 135 Cal. Rptr. 457 (2012).

The targeted tax provisions addressed above contain elements of both a tax and a fee. Many of the targeted taxes fall with the locality's business license provisions. Thus, the targeted tax is arguably the charge for the privilege of doing business in the locality. Some provisions even use the term "surcharge" or "charge" instead of "tax."[310] The inherent structure of a per-employee business license levy lends toward a fee designation. The business receives the specific benefit of having each incremental employee generating revenue within the locality. Non-payors are not allowed to have employees, and thus do not obtain the specific benefit. Regarding the regulatory purpose, a locality could argue that each employee creates additional administrative and regulatory costs. Additionally, some assert that the large businesses upon which the charge is imposed contribute to homelessness by hiring high-wage employees, which escalates housing costs. Thus, the targeted tax provisions could arguably serve the purpose of regulating employment levels and housing costs within the locality.

Most of the targeted taxes also have an explicit revenue designation. San Francisco's homelessness tax, for example, expressly hypothecates the revenue to a specific fund that is dedicated to funding a homelessness mitigation program. Seattle's homelessness tax proceeds were to be deposited into the city's general fund, but the bill that created the tax included a companion resolution that adopted a specific spending plan for the resulting revenue.[311]

The primary argument against fee characterization is that the amounts exceed the reasonable costs the locality incurs to provide the privilege, benefit, or regulatory environment. Challenges on these grounds are common and often result in the levy being characterized as a tax rather than a fee.[312] However, the targeted tax provisions present unique considerations. The novel argument that the provision regulates employment levels and housing costs may justify the significant revenue the homelessness tax would generate. The locality creating affordable housing, which would cost millions annually, could arguably fall within this regulatory scope. Regarding per-employee

310 *See, e.g.*, PORTLAND, OR., CITY CODE § 7.02.500(F) (2019).

311 SEATTLE CITY COUNCIL, *supra* note 7; City Council Res. 31810, 2018 Leg. (Seattle, Wash. 2018).

312 *See, e.g.*, Mich. Ass'n of Home Builders v. City of Troy, No. 156737 (Mich. July 11, 2019) (determining building inspection charges were a tax and not a fee because the revenue exceeded the actual costs to administer the inspection program, so the charges did not "bear a reasonable relation" to the costs of the government service provided).

business license charges, one could viably argue that even $500 per employee is a reasonable cost to regulate a business operating in the locality, particularly if the regulatory regime was defined broadly and skillfully. Depending on the context, either the locality or the business may find it advantageous to argue that the levy is a fee rather than a tax.

2. Tax Versus Fee Implications

One of the most important implications of the tax versus fee distinction relates to procedural constraints on local taxation, as discussed above.[313] Specifically, several states—including California and Oregon—have a supermajority requirement for new or increased taxes, the precise wording of which may encompass or exclude fees.[314] Because targeted taxes are controversial and likely to be challenged, determining their proper character is crucial to establish their validity under specific supermajority requirement constraints—as San Francisco is tackling currently. California also has a constitutional provision that precludes voters from challenging tax levies and appropriations using the referendum process.[315] The California Supreme Court is considering whether that provision applies to fees, such as a water fee instituted to fund infrastructure repair.[316] Fee characterization may also circumvent constitutional uniformity clauses, discussed above.[317] Uniformity requirements generally apply only to taxes, not fees.[318] Many localities also face substantive constraints on local taxation, which can potentially be obviated with a fee rather than a tax. For example, if a locality such as New York City or Washington, D.C., is not permitted to impose an income tax on nonresidents, the locality may be able to accomplish similar revenue generation and distributional impact with a services "fee" instead.

---

313 *See supra* Section II.D.

314 *Compare* CAL. CONST. art. XIII C, § 1(e) (excluding fees expressly from the supermajority approval requirement), *with* FLA. CONST. art. VII, § 19 (including fees expressly in the supermajority approval requirement).

315 CAL. CONST. art. II, § 9.

316 Paul Jones, *California High Court to Vet Whether Fees Are Subject to Referendum*, TAX NOTES (Feb. 14, 2019), https://www.taxnotes.com/tax-notes-today-state/local-taxation/california-high-court-vet-whether-fees-are-subject-referendum/2019/02/14/294kr [https://perma.cc/68WS-B78K]; *see also* CAL. CONST. arts. II, § 9, XIII C, & XIII D, § 6 (proposing Proposition 218).

317 *See supra* Section II.C.

318 HELLERSTEIN ET AL., *supra* note 254, ¶ 2.01[1].

Businesses may also want to characterize a levy as a fee rather than a tax, particularly if the business is challenging the provision. A key implication of the tax versus fee distinction is whether the federal Tax Injunction Act applies. If the levy is a tax, the Tax Injunction Act essentially precludes federal courts from adjudicating any challenges to the tax.[319] If the levy is a fee, however, businesses may challenge it in a federal court, which many perceive as a fairer forum.[320] Thus, if a locality enacts a targeted tax, it will likely be accompanied by the tax versus fee complication.

III
SUPERIOR ALTERNATIVES TO TARGETED TAXES

Despite local revenue-raising constraints, there are several alternative approaches that will generate the requisite revenue—and may serve an expressive function—more effectively than targeted taxes. The optimal alternative is to foster a voluntary contribution program. Businesses can contribute to these programs to effectuate an agreed-upon objective, such as homelessness mitigation or transportation infrastructure improvement. If a voluntary contribution program is not feasible, the next best alternative is using one comprehensive local business tax regime—ideally an existing regime.[321] And if a locality demands a targeted tax approach, perhaps because it desires stronger virtue signaling through its tax regime, the locality should target the most direct cause of the given problem.[322]

A. Partnering to Foster Voluntary Contributions

A cooperative partnership between localities and large businesses, in which they work together to achieve a mutually beneficial result, is the optimal approach to effectively address the problems discussed above. Through voluntary contribution programs, the locality can generate the requisite revenue and both the locality and large businesses can express their commitment to solving the community's most pressing challenges. Although taxes essentially allow only for

---

319 28 U.S.C. § 1341 (2018).

320 *See, e.g.*, Hellerstein & Appleby, *supra* note 286.

321 For a detailed discussion of tax instrument choice generally, see David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1 (2014).

322 Although a more direct targeted approach may be superior to the targeted tax approaches discussed above, even the most direct targeted taxes still present tax policy and constitutional concerns.

unilateral governmental virtue signaling, voluntary contribution programs allow for multilateral virtue signaling.

To effectuate that virtue signaling and effectively incentivize participation, the most important aspect of a voluntary contribution program is for the locality to publicly laud large businesses' contributions. Many of these large businesses already contribute significantly to the particular cause at issue, but the adversarial relationship between the locality and the large businesses obfuscates those contributions and disincentivizes additional contributions. If there is a clear and robust publicity campaign, these large businesses can easily justify multimillion-dollar contributions as productive public relations outlays. A highly publicized list of the amounts each business contributed also benefits localities by serving a soft shaming function that further incentivizes businesses to contribute.

Voluntary contribution arrangements as alternatives to taxation have been successful in many cases. The most common arrangement is a payment in lieu of taxes (PILOT) agreement, in which a locality and an entity agree upon an established payment amount in lieu of a specified tax imposition.[323] PILOTs are most common with tax-exempt entities that receive benefits from a locality but do not pay taxes to fund those benefits, notably transportation infrastructure.[324] The PILOT arrangement is thus a tax alternative that compensates the locality relative to the benefit it provides to the entity. Although PILOTs have been implemented most frequently in northeastern localities, and usually involve tax-exempt universities and hospitals, they are applicable broadly.[325] Indeed, many jurisdictions have used PILOTs as an incentive to attract or retain for-profit businesses.[326] With these

---

323 *See* Daphne A. Kenyon & Adam H. Langley, *Payments in Lieu of Taxes: Balancing Municipal and Nonprofit Interests*, LINCOLN INST. LAND POL'Y (2010), https://www.lincolninst.edu/sites/default/files/pubfiles/payments-in-lieu-of-taxes-full_0.pdf [https://perma.cc/75DG-6UV9]; Eric A. Lustig, *A Continuing Look at Boston's Revised Payment in Lieu of Taxes (PILOT) Program: Updated Version 2.0*, 50 NEW ENG. L. REV. ON REMAND 1 (2015); Maria Di Miceli, *Drive Your Own PILOT: Federal and State Constitutional Challenges to the Imposition of Payments in Lieu of Taxes on Tax-Exempt Entities*, 66 TAX LAW. 835 (2013); Theodore C. Sorensen, *Payments in Lieu of Taxes: A Development in American Law*, 30 NEB. L. REV. 86 (1950).

324 Between 2000 and 2010, at least 117 municipalities in at least eighteen states used PILOT arrangements. Kenyon & Langley, *supra* note 323, at 43.

325 *See id.* at 7.

326 *See, e.g.*, Frederic Sautet & John Shoaf, Commentary, *Local Tax Incentives in Action: The Payment-in-Lieu-of-Tax Program in Memphis, Tennessee*, MERCATUS POL'Y SERIES (2006).

incentive arrangements, the locality agrees to accept less revenue than an existing tax regime would generate. But it is also possible, and preferable, for the locality to receive greater revenues from voluntary contributions than taxes. As discussed above, some localities assert that large businesses receive benefits that exceed their current tax payments. Many businesses do not dispute these assertions. PILOTs can be used to account for that additional benefit without complicated new tax regimes and serve a multilateral expressive function.[327]

There are some concerns with PILOT agreements, however. In some cases, especially in the incentive context, the PILOT agreement may be concealed and the payment amounts may be arbitrary or nonuniform.[328] In such a case, PILOTs may violate both horizontal and vertical equity.[329] These concerns can be minimized through transparency, which serves several purposes. As discussed above, broad disclosure incentivizes participation and serves an expressive function.[330] Transparency also mitigates equity concerns by providing all parties sufficient information to act accordingly within the realm of these voluntary programs. Businesses may have another significant concern with PILOTS, particularly in the context of the homelessness epidemic. With PILOTs, the locality generally controls how the revenues are directed. If there is fundamental disagreement as to how to remedy a problem—for example, spending on shelters versus affordable housing to combat homelessness—PILOTs will be more difficult to effectuate. However, there are methods to alleviate this tension, as discussed below. And this fundamental disagreement is not as strong in many cases, such as with transportation infrastructure development.

If a large business is unwilling to relinquish spending control, an alternative is a services in lieu of taxes (SILOT) arrangement.[331] SILOTs generally shift the decision-making function from the locality

---

327 Localities can also tie zoning approvals to contribution agreements, which may incentivize businesses further. However, localities must proceed delicately to avoid perceptions of extortion that can undermine the cooperative relationship.

328 *See* Julia A. Quigley, *Payments in Lieu of Trouble: Nonprofit Pilots as Extortion or Efficient Public Finance?*, 26 N.Y.U. ENVTL. L.J. 272, 273 (2018); Kenyon & Langley, *supra* note 323, at 32.

329 A PILOT could violate vertical equity if a smaller, less successful business pays a greater amount than a larger, more successful business. A PILOT could violate horizontal equity if similarly situated businesses pay different amounts. Both scenarios are quite common with incentive PILOTs.

330 *See, e.g.*, Lustig, *supra* note 323, at 11 (stating that a "very strong public push for increased participation" was effective at increasing PILOT contributions in Boston).

331 *See* Kenyon & Langley, *supra* note 323, at 41.

to the businesses. For example, a large business could agree to build and operate homeless shelters within the locality in exchange for the locality not imposing any new or increased targeted taxes. Localities are likely to resist SILOTs, particularly with for-profit entities. Shifting the decision-making function away from the locality jeopardizes a cohesive strategy and certain collective benefits, such as economies of scale. For example, a business may spend in just one particular neighborhood, or may spend in ways that do not reflect the priorities of the locality as a whole. And SILOTs may not be feasible to address certain issues, such as constructing transportation infrastructure.

Both PILOT and SILOT arrangements require a detailed agreement between the locality and the business. There are several aspects of the agreement that can increase the likelihood of success. The agreement should incorporate a multiyear term, which provides the business with payment certainty and the locality with revenue stability. The agreement should contain some degree of spending direction, which can range from very general to very specific, depending on the circumstances. The spending direction is less likely to be of concern with transportation infrastructure development than with homelessness mitigation. The most complicated aspect is the payment amount. In some cases, a flat amount based on anticipated costs for certain projects may suffice.[332] In other cases, particularly with multiple diverse businesses participating, the program can use an easily verified proxy to estimate each business's benefit received or ability to pay.[333]

Importantly, businesses should be able to deduct the PILOT and SILOT payments for federal tax purposes. These payments should constitute ordinary and necessary business expenses under Internal Revenue Code (IRC) section 162.[334] Alternatively, they may constitute deductible state and local taxes under IRC section 164.[335]

---

332 For example, if a city (such as Mountain View or Cupertino) with one primary employer determined that it needed $50 million over five years to adequately expand its transportation infrastructure, the primary employer may agree to fund that amount in lieu of new or increased targeted taxes.

333 If a locality has an existing gross receipts tax, the business's gross receipts may be a practical proxy. If a locality uses employees as a proxy, it should use the employee count as of a static past date to minimize hiring distortion. If the basis of the payment is ability to pay, financial accounting net profit may be an appealing proxy.

334 I.R.C. §§ 162, 164 (2018); Rev. Proc. 2019-12.

335 I.R.C. § 164; Treas. Reg. § 1.164-4 (2019); Rev. Rul. 71-49, 1971-1 C.B. 103; Rev. Rul. 61-152, 1961-2 C.B. 42; I.R.S. Priv. Ltr. Rul. 200926023, 2009 WL 1817277 (June 26, 2009); I.R.S. Priv. Ltr. Rul. 201516007, 2015 WL 1743638 (Apr. 17, 2015); Rev. Proc. 2019-12. The standard for deductibility of payments in lieu of taxes under I.R.C. § 164 is

Charitable contributions to specified charities are another option, although this option has several disadvantages compared to PILOTs and SILOTs. With charitable contributions, both the locality and the large businesses relinquish direct decision-making control. The locality can maintain a list of approved charities to which businesses may contribute and can provide oversight. Businesses can avoid a certain charity if it is not adequately directing the contributed funds. But these indirect tools reduce efficiency, as do added layers of bureaucracy and administrative costs. This option also presents limitations on federal income tax deductions. The payments would likely fall within charitable contribution deduction limitations under IRC section 170, which would affect businesses with low or no federal taxable income.[336] But businesses may prefer the charitable contributions regardless of tax deductions, the value of which has decreased significantly due to the reduced corporate income tax rate, because nongovernmental entities may be more agile and flexible than governments.[337]

A related option is for a locality to provide local-level tax credits for charitable contributions. The Seattle City Council considered a tax credit for charitable contributions to nonprofit organizations that provide services to those experiencing homelessness, although the tax credit mechanism did not make it into the enacted homelessness tax bill.[338] And, at least temporarily, San Francisco is providing a tax credit for contributions made to its homelessness mitigation fund.[339] The fundamental flaw with the tax credit approach is that to generate additional revenue the locality still needs to create or increase a tax on businesses. There are no real benefits to such an approach beyond those

whether the payment is "an enforced contribution, exacted pursuant to legislative authority in the exercise of the taxing power, and imposed and collected for the purpose of raising revenue to be used for public or governmental purposes." Rev. Rul. 71-49, 1971-1 C.B. 103. However, if the corporate contribution "serves a business purpose," it will be deductible under I.R.C. § 162 to the extent disallowed under I.R.C. § 164. Rev. Proc. 2019-12. This distinction is likely immaterial for the large businesses discussed in this Article. *See also* Di Miceli, *supra* note 323 (analyzing whether traditional PILOTs are better characterized as a tax or fee for tax purposes).

336 I.R.C. § 170(c)(2). If a business has no federal taxable income, additional deductions do not provide any current-year tax benefit. The deductions may provide future-year benefits, however.

337 *See* I.R.C. § 11. Cisco Systems, Inc. recently committed $50 million over five years to a Silicon Valley homelessness mitigation nonprofit organization because of these perceived benefits. Rogers, *supra* note 68.

338 Dan Eder Memorandum, *supra* note 6.

339 *See supra* Section I.B.1.

of a PILOT or SILOT arrangement, and almost all the tax policy and practical drawbacks of targeted taxes would remain or be exacerbated. Thus, PILOT or SILOT arrangements are the preferred mechanism to effectuate local voluntary contribution programs.

Avoiding an adversarial relationship between a locality and its largest employer is beneficial for many reasons. A cooperative partnership is likely to maximize additional revenue and serve a strong, positive expressive function. From a practical perspective, both localities and businesses will conserve considerable resources that they would otherwise expend through administration, compliance, and challenges related to new targeted taxes. Voluntary contribution programs must be implemented thoughtfully and in the genuine spirit of cooperation. If implemented properly, voluntary contribution programs are the most effective and efficient solution in the current environment.

B. One Comprehensive Local Business Tax

If a voluntary contribution program is not a viable alternative, the locality's business tax regime should minimize practical and tax policy disadvantages. The next best alternative is to increase the rate of an existing, less controversial tax base, without an accompanying specified spending directive.[340] Avoiding explicit revenue hypothecation will reduce opportunities for ideological disagreement and minimize supermajority approval hurdles.[341]

Determining that existing, less controversial tax base will vary by locality, depending on the locality's historical experience and applicable revenue-raising constraints.[342] Some West Coast cities, notably Seattle and San Francisco, have an existing comprehensive gross receipts tax regime. Gross receipts taxes have benefits and drawbacks.[343] Many localities prefer gross receipts taxes because they are easier to administer than net income taxes, and localities tend to have limited audit and administrative resources. Gross receipts taxes also reduce manipulation and instability concerns that mire corporate

---

340 *Cf.* Darien Shanske, *Revitalizing Local Political Economy Through Modernizing the Property Tax*, 68 TAX L. REV. 143, 144 (2014) ("But why create new taxes when an old and proven tax is available?").

341 This approach does, however, reduce the tax law's expressive effect.

342 Broad-based tax regimes are preferred over "narrow-based" taxes for many reasons. *See, e.g.*, Gamage, *supra* note 246, at 751–52.

343 *See* Bird, *supra* note 224.

net income taxes.[344] Gross receipts taxes reduce business migration concerns, particularly compared with direct per-employee taxes.[345]

However, gross receipts taxes are an imprecise measure of ability to pay.[346] Using gross receipts as a proxy for ability to pay disproportionately affects businesses with greater transactional turnover, particularly those in low profit margin industries. Many gross receipts tax regimes implement different tax rates for different industries, but this approach complicates the regime significantly, creates areas for dispute, and is still an imprecise mechanism to determine ability to pay.[347] Gross receipts taxes, particularly retail-focused taxes like Portland's, are also easier for businesses to pass through to customers due to their inherent transactional nature.[348] Businesses are less likely to pass through broad-based gross receipts taxes to consumers directly, but businesses may still effectuate an indirect pass-through of the additional tax costs by increasing prices, either universally or for customers located in the respective locality. Despite these concerns, gross receipts taxes may be the only practical business tax option for many localities.

Business taxpayers are generally less resistant to slightly increased existing taxes than an entirely new tax regime—or several. Experience has demonstrated that large businesses value certainty and consistency far more than actual cash tax liability. By using an existing tax regime,

344 *See generally* Gamage, *supra* note 246 (discussing subnational government fiscal volatility).

345 With the rise of economic presence nexus, businesses cannot escape a locality's jurisdiction to tax by migrating its physical presence outside the locality. The primary migration concern with gross receipts taxes is a seller withdrawing from the particular market. This response is possible but much less realistic, particularly as applied to large localities. *See supra* Section II.A.2. The more likely response is the business passing the gross receipts tax costs to buyers. *See supra* Section II.A.2.

346 If a locality does not have an existing gross receipts tax regime, a "real corporate profits tax" based on financial accounting rather than tax accounting is an interesting option. *See, e.g.*, Richard Rubin, *Elizabeth Warren Proposes New Corporate Tax*, WALL ST. J. (Apr. 11, 2019, 9:00 AM), https://www.wsj.com/articles/elizabeth-warren-proposes-new-corporate-tax-11554987601 [https://perma.cc/UCJ7-MGMC]. However, there are many concerns with this novel approach that would be exacerbated at the local level. Others have suggested a "Business Value Tax," which has many appealing features but may be too novel for U.S. localities. *See* Bird, *supra* note 224.

347 The common gross receipt tax structure would likely violate uniformity provisions if a state has a constitutional provision that applies broadly to all tax types (e.g., Oregon). *See supra* Section II.C; *see also* Scharff, *supra* note 248, at 332 ("[If localities each impose] different tax rates on different types of business activity . . . the opportunities for tax planning, record keeping, and compliance costs for businesses engaged in multiple business lines across multiple jurisdictions, and enforcement costs within each jurisdiction, all rise.").

348 *See supra* Section II.A.2.

the locality avoids additional administrative costs, and taxpayers avoid additional compliance costs. Both parties avoid significant costs associated with challenges to the tax regime's validity and application. Localities must still be cognizant, however, of the tax rate and understand the elasticity of the tax, or the new tax may suffer from the drawbacks discussed above.[349]

The preferred tax alternative for most localities is solely a broad-based gross receipts tax regime. Cities such as San Francisco and Seattle that already have this type of regime can increase rates to generate additional revenue, at least to a degree. These localities will avoid costly and lengthy legal challenges to the validity and application of a new tax. If a tax regime has different tax rates depending on industry classification, any rate increases should be proportionally uniform across all classifications to avoid discrimination and practical challenges. Notably, localities should avoid increasing the tax rate only for the tech industry, which could lead to migration and other negative outcomes discussed above.[350]

Broad-based gross receipts taxes are suitable for many localities that are considering their initial business tax regime as well. These localities can use other localities' existing gross receipts tax regimes as a blueprint, which is more efficient and promotes uniformity. For cities like Cupertino, there is also a clearer nexus between broad-based gross receipts taxes and transportation infrastructure than with homelessness mitigation. A locality generating tax revenue for its general fund that it will spend to develop and maintain transportation infrastructure should not be overly controversial. It is well accepted that transportation infrastructure development is a primary governmental function; one that provides the necessary physical setting for a business to operate and grow—which the business should fund. Although voluntary contribution programs may be more effective and may provide a more

---

349 *See, e.g.*, Gamage, *supra* note 246, at 791 ("The degree to which taxpayers are likely to relocate across state lines or play timing games across tax years in response to tax hikes is an important factor in determining the desirability of tax-rate adjustments . . . ."); *see also Preemption and Fiscal Authority*, *supra* note 237, at 1277–78 ("[H]orizontal and vertical tax competition imposes practical limits on a local government's ability to raise tax revenue by increasing tax rates."); Scharff, *supra* note 248, at 321–26 (providing a detailed discussion of horizontal and vertical tax competition); Bird, *supra* note 224, at 708 ("[Gross receipts tax regimes] should not be pressed too far in terms of rates—because economic distortions rise with the square of the tax rate—[but they] may be acceptable at relatively low rates.").

350 *See supra* Section II.A.

robust expressive function, a broad-based gross receipts tax minimizes the tax policy and practical disadvantages inherent with targeted taxes.

C. Improving Target Accuracy

If a locality is unwavering on a targeted approach, the locality should target the most direct cause of the problem it is attempting to remedy.

1. Usage Charges to Fund Transportation Infrastructure

There are several alternatives to fund transportation infrastructure that may better align the beneficiary with the associated cost.[351] At the outset, it is important to recognize that a locality's transportation infrastructure is a cohesive system of interdependent and complementary transportation modes. Potential funding solutions must consider the locality's transportation infrastructure holistically, and how altering costs of a particular transportation mode will affect other modes.

One of the most promising local funding options is a congestion pricing regime.[352] European cities have implemented congestion pricing regimes with great success.[353] New York City is the first U.S. locality to adopt congestion pricing, as discussed above.[354] At least initially, the regime is anticipated to generate $1 billion annually that will be used to fund the city's transit system.[355] New York City has not yet determined pricing, which is a crucial aspect to a congestion pricing regime's effectiveness. Appropriate pricing depends on a locality's primary aim. If a locality's primary aim is to reduce or eliminate vehicles, and thus congestion, it should implement substantial charges to enter the city. The long-term effect, however, is that the regime will

---

351 *See generally* ROBERT KROL, MERCATUS CTR. AT GEORGE MASON UNIV., TOLLING THE FREEWAY: CONGESTION PRICING AND THE ECONOMICS OF MANAGING TRAFFIC (2016).

352 *See id.* This Article does not address "vehicle miles traveled" taxes because they are not a feasible alternative at the local level. However, these taxes may be the only viable option to fund transportation infrastructure maintenance and development at the federal level and could be remarkably effective if they implemented a dynamic congestion feature.

353 *Id.* at 16–19.

354 *See supra* Section I.E. At the state level in the United States, high-occupancy tolling (HOT) has been implemented on various highways, which has reduced congestion and produced general net welfare gains. Sentiment has been very positive, largely because there is a free option, unlike with full congestion pricing. *See* KROL, *supra* note 351, at 20–22; *see generally* Lior Jacob Strahilevitz, *How Changes in Property Regimes Influence Social Norms: Commodifying California's Carpool Lanes*, 75 IND. L.J. 1231 (2000).

355 S. 1509, S. Assemb. (N.Y. 2019) (enacted Apr. 12, 2019); Clark, *supra* note 172.

generate nominal revenue as behavior shifts away from driving into the city. Compounding that effect, many of those individuals will shift to public transportation, which will necessitate additional funding to expand and operate.[356] If a locality's primary aim is to generate additional revenue and minimize behavior distortion, it should determine the charges very carefully, considering elasticity and dynamic pricing options.

If implemented properly, congestion pricing can generate significant revenue to fund transportation infrastructure.[357] That revenue will be generated directly by those who use the local roadways; that is, those who obtain the associated benefits and create the associated negative externalities.[358] Congestion pricing is more politically palatable because most of the individuals who will bear the costs reside—and vote—outside the locality. And those who can afford to drive into major cities regularly likely have sufficient ability to pay. There are certainly administrative costs associated with new congestion pricing regimes, however. The individuals affected by the congestion pricing regime are likely to pursue legal challenges.[359] Enforcement also requires various physical infrastructure and logistical measures.[360] Major U.S. cities will be observing New York City's experience, which could spur a rapid proliferation of congestion pricing regimes.[361]

---

356 One side effect of reducing vehicles in a city is reducing parking revenue. Many parking facilities are publicly owned and operated, which could further reduce local government revenue, at least until the facilities are repurposed for a potentially more lucrative or socially beneficial use—possibly even affordable housing or homeless shelters. *See generally* Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. (forthcoming 2020) (manuscript at 50–54), https://ssrn.com/abstract=3345366 [https://perma.cc/Z7QP-F2U9] (discussing "The Planned Economy of Parking").

357 *See generally* Bird, *supra* note 224, at 706 n.19 (asserting that "user charges . . . are almost always the most desirable possible way for local governments to raise revenue, whenever feasible . . . .").

358 *See generally* KROL, *supra* note 351; Strahilevitz, *supra* note 354.

359 It would not be surprising to see New Jersey residents, or even state or local governments, challenging New York City's congestion pricing regime on discrimination or other constitutional grounds. Generally, congestion pricing regimes are unpopular, although that popularity shifts after implementation when the public experiences the benefit of less congestion. KROL, *supra* note 351, at 24.

360 Strahilevitz, *supra* note 354, at 1248–49. New York City has a logistical advantage over many other cities because Manhattan is an island with limited access points, most of which already have automated toll systems.

361 Another interesting option for New York City is tax-increment financing, where the city would charge additional property tax based on the additional value generated by a property's proximity to public transportation. *See, e.g.*, *NYC Subway*, *supra* note 167. There are various issues with tax-increment financing generally, and this approach is likely

If a government's goal is to reduce transportation infrastructure usage generally, implementing a tax credit for remote workers is an interesting option.[362] Massachusetts is considering this type of program, in which it would offer tax credits to businesses based on how many of their Massachusetts-resident employees work remotely instead of commuting.[363] This type of program is more practical at the state level, but it may also be possible at the local level. The desired result for a locality would be the locally headquartered businesses generating the same taxable gross receipts, but without the influx of employees that overwhelm transportation infrastructure and escalate housing costs. There are several potential concerns, however. A distributed remote workforce makes business migration easier, allows for smaller offices that would reduce property tax revenues, and may have a negative overall impact on the local economy. This type of tax credit program is still in its infancy but may be a viable complement to a comprehensive gross receipts tax regime, as discussed above.[364]

2. "Mansion" and "Vacant Home" Taxes to Combat Homelessness

If the root cause of the targeted problem is an influx of wealthy tech employees driving up housing costs, as is often asserted with West Coast homelessness, a direct tax on purchasing expensive housing is the most effective solution. As discussed above, real property transfer taxes on expensive housing, colloquially termed "mansion" taxes, are both quite common and controversial.

The primary virtue of mansion taxes is that they can account for the negative externalities that are associated with escalating housing costs. They also exert downward pressure on sales prices, at least for expensive housing.[365] If a mansion tax is triggered at a certain sales price, especially if the tax is imposed on the entire sales price, there is a strong incentive to keep the sales price below that threshold.[366]

---

practical in only a handful of U.S. cities to fund public transit. *See also* Shanske, *supra* note 340, at 162–65, 170 (discussing "special assessments" for property tax purposes); *see generally* Scharff, *supra* note 248.

362 H. DOCKET NO. 4396, H. NO. 4002 (Mass. July 25, 2019) (proposed by Charles D. Baker).

363 *Id.*

364 *See infra* Section III.B.

365 The downward pressure on expensive housing may flow downstream to less expensive housing.

366 *See* Wojciech Kopczuk & David J. Munroe, *Mansion Tax: The Effect of Transfer Taxes on the Residential Real Estate Market*, 7 AM. ECON. J.: ECON. POL'Y. 214 (2015) (finding that mansion taxes in New York and New Jersey incentivized buyers and sellers

Both buyers and sellers have an incentive to devise creative arrangements to keep the sales price below that threshold.[367] This "notch" effect can be lessened by using a progressive multistep schedule, but at the expense of simplicity.[368] Many localities also favor mansion taxes because they seemingly target individuals with sufficient ability to pay. In many high-cost cities, however, mansion taxes can apply to modest working-class housing.[369] Choosing the optimal threshold is incredibly important with mansion taxes.

Real estate transfer taxes have significant revenue-raising potential.[370] For example, San Jose analyzed a potential universal real estate transfer tax increase from 0.33% to 0.499% of assessed value.[371] The tax rate increase would generate an estimated $54 million in annual revenue and add approximately $2,000 to the $1.125 million average sales price in San Jose.[372] Likely because real estate transfer taxes are insignificant compared to the overall sales price and other transaction costs, they do not appear to affect the frequency and amount of real estate transactions.[373] However, the primary concern with real estate

---

to transact below the $1 million cutoff); Oshrat Carmiel, *Manhattan Home Sales Get Short-Term Lift on Mansion Tax Increase*, BLOOMBERG L. (July 2, 2019, 2:53 AM), https://www.bloomberglaw.com/product/tax/document/X121V708000000?bna_news_filter=daily-tax-report&jcsearch=BNA%25200000016bb213d252a96ffebb3ee50000#jcite [https://perma.cc/WKB5-YP3J].

367 *See* Roxanne Bland, *Soak the Rich! Part 2: The Mansion Tax*, TAX NOTES (Aug. 5, 2019), https://www.taxnotes.com/tax-notes-today-state/property-taxation/soak-rich-part-2-mansion-tax/2019/08/05/29rb4?highlight=soak%20the%20rich [https://perma.cc/A383-NPCG].

368 Taxpayers have challenged tax regimes that impose a "notch" effect on equal protection clause grounds, but they have generally not been successful. Trump v. Chu, 478 N.E.2d 971 (N.Y. 1985), *appeal dismissed*, 474 U.S. 915 (1985); Magoun v. Ill. Tr. & Sav. Bank, 170 U.S. 283 (1898); Miller v. Heffernan, 378 A.2d 572, 578 (1977). However, "notch" effect challenges may be more successful if a state constitution's uniformity clause applies to the tax at issue. *See, e.g.*, Pharr Road Inv. Co. v. City of Atlanta, 162 S.E.2d 333 (1968).

369 The average sales price of a residence in New York City or San Jose is around $1 million. *See* THE ELLIMAN REPORT, *supra* note 175; *San Francisco Bay Area*, *supra* note 165.

370 *See generally* URBAN INSTITUTE, JUNG CHOI ET AL., EXPLORING THE VIABILITY OF MANSION TAX APPROACHES (2018), https://www.urban.org/sites/default/files/publication/98423/exploring_the_viability_of_mansion_tax_approaches_19.pdf [https://perma.cc/8WN2-FTA9].

371 *San Francisco Bay Area*, *supra* note 165.

372 *Id.*

373 *See* Joel Slemrod et al., *The Behavioral Response to Housing Transfer Taxes: Evidence from a Notched Change in D.C. Policy*, 100 J. URB. ECON. 137 (2017) (finding

transfer taxes generally is that they lack stability; the tax revenue is subject to market conditions. If a real estate market crash occurs, like in 2008, revenues can fall precipitously when they are needed most.

There are several other real property tax alternatives, including existing property tax increases and "vacant home," or "pied-à-terre," taxes.[374] General property taxes can generate significant revenue and can be more stable than real estate transfer taxes.[375] However, many state constitutions require uniform property taxes, which prevents a targeted approach and results in a regressive tax. A regressive housing tax is particularly counterproductive in the homelessness context. If increased housing costs are a significant cause of homelessness, increasing housing costs with a uniform property tax does not make sense.

With those concerns in mind, several localities have shifted their focus to property taxes targeted at "vacant" homes.[376] Certain cities have experienced significant property investment from wealthy buyers, many of whom are foreign.[377] These individuals purchase expensive properties either as vacation homes or purely as passive investments.[378] Localities assert that these purchases escalate housing costs, particularly in geographically constrained areas such as Manhattan, San Francisco, and Hawaii.[379] One study concluded that San Francisco had 100,000 vacant housing units, although there are many reasons why a house may be vacant, some of which are innocuous.[380]

---

that real estate transfer taxes in Washington, D.C., pushed certain sales prices below the application notch, but did not significantly impact the frequency or amount of transactions).

374 Gopal & Goldman, *supra* note 170; Billy Hamilton, *Taxing 'Ghost Homes,'* TAX NOTES (July 2, 2019), https://www.taxnotes.com/tax-notes-today-state/tax-policy/taxing-ghost-homes/2019/07/02/29l5z?highlight=%22taxing%20ghost%20homes%22 [https://perma.cc/3UDL-GAE6]; David McAfee, *U.S. Cities Look to Vancouver's Novel Empty Homes Tax*, BLOOMBERG L. (July 24, 2019, 1:46 AM), https://www.bloomberglaw.com/product/tax/document/XFNS3Q90000000?bna_news_filter=daily-tax-report-state&jcsearch=BNA%25200000016c0aead2bfad6d9bef2c7b0001#jcite [https://perma.cc/2YGR-BS4E].

375 *See* Shanske, *supra* note 340, at 145. Seattle analyzed the alternative of a general property tax increase to generate the requisite revenue to mitigate its homelessness epidemic. If Seattle used a property tax levy, it would increase property taxes by an average of $150–$350 annually. Mosqueda Memorandum, *supra* note 17, at 2.

376 Gopal & Goldman, *supra* note 170; Hamilton, *supra* note 374; McAfee, *supra* note 374.

377 Hamilton, *supra* note 374.

378 *Id.*

379 *Id.*

380 McAfee, *supra* note 374.

Fundamentally, it is easy to understand why a locality would attempt to tax vacant houses when tens of thousands are experiencing homelessness. Imposing an additional property tax on vacant homes will have one of two primary effects, both of which are desirable for these localities. The homeowner may rent or sell the house, thereby increasing housing stock and possibly lowering rents universally. Or the homeowner may simply pay the tax, which will generate revenue the locality can use to combat homelessness. The locality's tax rate will determine the degree to which homeowners choose between those options.[381]

Vacant home taxes are similar to mansion taxes in that they have an application threshold based on the home's value and impose a percentage tax based on that value. However, vacant home taxes are imposed annually, not just when a property is sold, so they have frequency and stability advantages over mansion taxes. Vacant home taxes also tend to generate less political opposition because most of the affected property owners are nonresidents who do not vote locally.

Vancouver, British Columbia, enacted a vacant home property tax beginning in 2017.[382] Vancouver imposes an additional annual 1% tax on the assessed value of a vacant home if that assessed value exceeds $1 million.[383] In its first year, Vancouver's vacant home tax generated $29 million, although it appears most of the tax was generated by average-priced houses and that vacancy rates were largely unchanged.[384] Honolulu is considering a similar tax, which it estimates would generate $60 million annually.[385] San Diego has commissioned a study analyzing real estate vacancy and potential tax options.[386] Both New York City and San Francisco have considered vacant home tax proposals, but they have been met with overwhelming opposition from the real estate industry.[387] It seems most U.S. localities are observing Vancouver's experience to determine if the benefit of a vacant home tax outweighs its drawbacks.

The drawbacks associated with a vacant home tax are considerable. Wealthy buyers may shift their behavior, either choosing to purchase

---

381 *See* Hamilton, *supra* note 374.
382 *Id.*; McAfee, *supra* note 374.
383 McAfee, *supra* note 374.
384 *Id.*
385 *Id.*
386 *Id.*
387 *Id.*; Gopal & Goldman, *supra* note 170; Hamilton, *supra* note 374.

homes in other cities or staying in hotels when visiting the particular city, which may have a negative broader economic effect.[388] There will be legitimate discrimination claims and uniformity concerns, which will be costly for localities to defend.[389] But the greatest practical hurdle is that vacant home taxes present myriad enforcement difficulties.[390] The locality needs to determine the property's value, which is the subject of considerable dispute with existing property taxes.[391] The locality needs to clearly and precisely establish what constitutes a vacant property and when that determination is made. If a locality sets a bright-line threshold of usage or rental days per year, property owners may shift their behavior to satisfy those requirements. More nefariously, property owners may create artificial lease agreements, such as leasing to a family member with no actual payments or occupancy. If a property is considered vacant when it is not the individual's principal residence, the tax may apply even if the individual lives in the property for half the year and rents it for the other half.[392] An exemption for constructing or renovating the property is likely necessary, but it will create enforcement controversy.[393] If the vacancy status is determined on a set day each year, as are some local property tax exemptions, property owners could avoid the tax very easily. Overall, mansion and vacant home taxes are better alternatives than targeted business taxes for mitigating homelessness, but they are still a suboptimal alternative.

CONCLUSION

Many localities are confronting unprecedented challenges, such as a dramatic rise in homelessness and insufficient transportation infrastructure. To cope with these challenges, localities must first establish clear objectives, and then proceed accordingly. Specifically, localities must decide whether to focus on generating additional local

---

388 Gopal & Goldman, *supra* note 170. These considerations are compounded in cities that impose additional applicable taxes, such as "mansion" taxes or "foreign buyer" taxes. *See, e.g.*, *id.*; Hamilton, *supra* note 374.

389 *See supra* Section II.C.

390 Oakland, California, enacted a tax on vacant lots, which avoids some of these enforcement concerns as it is easy to ascertain if there is a structure on the lot. *See* McAfee, *supra* note 374.

391 *See generally* Shanske, *supra* note 340, at 148.

392 The principal residence determination is itself a source of considerable controversy at the U.S. federal tax level. *See, e.g.*, Guinan v. United States, No. CV 02-0261-PHX-PGR, 2003 WL 21224797 (D. Ariz. Apr. 10, 2003).

393 *See, e.g.*, McAfee, *supra* note 374.

revenue in the near term or virtue signaling that could create a national sea change in the long term but fail to solve their current impending crises. If a locality chooses the former, several alternatives will generate the requisite revenue—and may serve an expressive function—more effectively than will targeted taxes.