

## THE CHALLENGE FOR LOCAL GOVERNMENTS IN CALIFORNIA: RESPONSIBILITY WITHOUT RESOURCES

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Why should a symposium on Global Climate Change include a focus on State and Local Government? Because, to a degree that surprises all foreigners and even many Americans, State and local Governments are the real locus of legal authority for much of what needs to be done with regard to climate change. Despite that legal authority, the ability of State Governments to address the interstate and even international factors driving climate change are quite limited, which is further compounded by the fact that California's local governments are weaker than average among other States in the United States.

If you are a City Manager, City Engineer, City Planning Director, Director of Community Development, what are you going to do when the causes of a problem are mostly outside your jurisdiction, you lack the resources to do much about it, but the impacts are almost all within the scope of your responsibility?

### “POLICE POWERS” IN THE UNITED STATES

Every schoolchild learns that the United States is a “federal system,” but even many college-educated adults cannot really explain what that means. Under our federal system, the Federal Government has only the express or enumerated powers outlined in the Constitution, especially as listed in Article 1, section 8, including the power over currency and the money supply; national security and the military; copyrights, patents, and bankruptcy; immigration and naturalization, and the surprisingly important power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” That set of enumerated powers delegated to the Federal Government left to the States what Chief Justice John Marshall called the “police powers,” which is the authority to act for the promotion of public health, safety, welfare, and morality.<sup>1</sup>

Professor Santiago Legarre, a noted scholar of comparative constitutionalism, explains that the term “police powers” refers to far more than the authority of the uniformed folks who drive around in black and white cars with flashing red and blue lights. Under the U.S. Constitution, “police powers” is “the name for the whole range of legislative power not delegated to the federal government and thus retained by the states.”<sup>2</sup> In its original and now somewhat archaic sense, “police” referred to “the regulation, discipline, and control of a community, its civil administration and the maintenance of public order.”<sup>3</sup>

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<sup>1</sup> *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); see also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209-10 (1824).

<sup>2</sup> Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745 (2007), p. 795. Available at: <https://scholarship.law.upenn.edu/jcl/vol9/iss3/3>

<sup>3</sup> Santiago Legarre, *The Historical Background of the Police Power*, 9 U. Pa. J. Const. L. 745 (2007), p. 761. Available at: <https://scholarship.law.upenn.edu/jcl/vol9/iss3/3>

Very significantly, the enumerated powers of the Federal Government does not include the police power, which, according to Chief Justice Marshall, “unquestionably remains and ought to remain with the states.”<sup>4</sup> As Supreme Court has more recently noted, “The Constitution...withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation.”<sup>5</sup> Obviously, there are times when local activities have an impact on the national economy, and the U.S. Supreme Court has ruled that the Commerce Clause can be used by the Federal Government to regulate some local and even some noncommercial activities if they have a substantial impact on interstate commerce. But the Court has also stressed that such precedents do not “convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”<sup>6</sup>

For better and for worse, the State and local governments make most of the decisions regarding public, health, safety, and welfare, including police and public safety, but also education, public health, and community development.

Comparing Federal and State Power over Public Welfare	
	<p>The entire U.S. Department of Education consists of no more than 4,400 employees.<sup>7</sup></p>
<p>The Santa Ana Unified School District has more than 5,000 employees.<sup>8</sup></p>	

<sup>4</sup> Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827).

<sup>5</sup> United States v. Lopez, 514 U.S. 549, 566 (1995).

<sup>6</sup> United States v. Lopez, 514 U.S. 549, 567 (1995). Note that while Chief Justice Marshall distinguished the regulations of interstate commerce (a prerogative of the Federal government) from police power regulations (a prerogative of the State government), he also acknowledged that State authority may sometimes take the form of commercial regulation, which is permissible as long as it does not conflict with the otherwise legitimate Federal authority. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-10 (1824).

<sup>7</sup> United States v. Lopez, 514 U.S. 549, 567 (1995). Note that while Chief Justice Marshall distinguished the regulations of interstate commerce (a prerogative of the Federal government) from police power regulations (a prerogative of the State government), he also acknowledged that State authority may sometimes take the form of commercial regulation, which is permissible as long as it does not conflict with the otherwise legitimate Federal authority. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-10 (1824).

<sup>8</sup> United States v. Lopez, 514 U.S. 549, 567 (1995). Note that while Chief Justice Marshall distinguished the regulations of interstate commerce (a prerogative of the Federal government) from police power regulations (a prerogative of the State government), he also acknowledged that State authority may sometimes take the form of commercial regulation, which is permissible as long as it does not conflict with the otherwise legitimate Federal authority. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209-10 (1824).

	<p>The Federal EPA has about 14,000 employees for the entire country.<sup>9</sup></p>	<p>The California Natural Resources Agency has about 19,000 employees, including about 4,000 in the California EPA.<sup>10</sup></p> 
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## POLICE POWERS AND LAND USE

Significantly, “police powers,” the powers reserved to the States and not delegated to the Federal government, are the principle basis of land use regulation.<sup>11</sup> The Supreme Court almost a century ago explained that land use regulations “must find their justification in some aspect of the police power, asserted for the public welfare.”<sup>12</sup> Such regulations will be allowed if they are not clearly arbitrary or unreasonable and if they have a substantial relationship to “the public health, safety, morals or general welfare.”<sup>13</sup>

Article 1 of the California Constitution mandates the State government share police powers with counties and cities, though local authority may not conflict with the general laws of the State.<sup>14</sup> According to the California Supreme Court, “[u]nder the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. Apart from this limitation, the ‘police power [of a county or city] under this provision ... is as broad as the police power exercisable by the Legislature itself.’”<sup>15</sup> The State Legislature has declared “its

<sup>9</sup> *United States v. Lopez*, 514 U.S. 549, 567 (1995). Note that while Chief Justice Marshall distinguished the regulations of interstate commerce (a prerogative of the Federal government) from police power regulations (a prerogative of the State government), he also acknowledged that State authority may sometimes take the form of commercial regulation, which is permissible as long as it does not conflict with the otherwise legitimate Federal authority. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209-10 (1824).

<sup>10</sup> *United States v. Lopez*, 514 U.S. 549, 567 (1995). Note that while Chief Justice Marshall distinguished the regulations of interstate commerce (a prerogative of the Federal government) from police power regulations (a prerogative of the State government), he also acknowledged that State authority may sometimes take the form of commercial regulation, which is permissible as long as it does not conflict with the otherwise legitimate Federal authority. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209-10 (1824).

<sup>11</sup> *Berman v. Parker*, 348 U.S. 26, 32 (1954).

<sup>12</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

<sup>13</sup> *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

<sup>14</sup> “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” California Constitution, Art. XI, § 7.

<sup>15</sup> *Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878, 885 (1985); see also *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 140 (1976). Note that the since 1970 the California Legislature has declared there is “a statewide interest in uniform building codes,” and, with certain exceptions, has “express[ed] an intent to generally preempt the field.” *ABS Inst. v. City of Lancaster*, 24 Cal. App. 4th 285, 288 (1994).

intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.”<sup>16</sup> Thus, local governments in California have the authority to regulate land use and to impose zoning regulations to benefit the public health, safety, and welfare. A State or local exercise of police powers will be upheld by courts as long as it has a rational relationship to a legitimate governmental purpose in protecting public health, safety, or welfare.

The California Constitution also provides that a city may adopt a charter to govern the municipality, and that charter supersedes State law unless the Legislature specifically preempts the charter provisions.<sup>17</sup> Currently, more than 120 of California's nearly 480 cities are charter cities, including the big cities of Los Angeles, San Francisco, San Jose, and Sacramento, but also Anaheim, Huntington Beach, Irvine, Newport Beach, Santa Ana, Santa Monica, and most coastal cities.<sup>18</sup>

## THE WEAKNESS OF CALIFORNIA’S LOCAL GOVERNMENTS

California’s governing structure and legal dynamics vest significant responsibility in local governments. Indeed, California is in the top 10 States for decentralization.<sup>19</sup> However, in a ranking of overall autonomy of local governments, California scores in the bottom half.<sup>20</sup> Despite their significant responsibilities, California’s local governments are unusually weak.

The biggest reason for the lack of local government autonomy in California is that because California is among the nine States which somewhat paradoxically grant local governments structural and functional legal autonomy but then impose above average fiscal limitations on local governments and offer extremely low levels of own-source local revenue as a share of

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<sup>16</sup> California Government Code § 65800 (West).

<sup>17</sup> California Constitution, Art. XI, §§ 3,5. See *Bayless v. Limber*, 26 Cal. App. 3d 463, 468 (1972) (“Subject only to constitutional limitations and preemptive state law, the charter is the supreme law of the state with respect to its municipal affairs.”). A city without a charter is a “general law” city and is governed by the general laws of the State. California Constitution, Art. XI, § 7.

<sup>18</sup> “Charter Cities,” California League of Cities, <https://www.cacities.org/Resources/Charter-Cities>.

<sup>19</sup> Hal Wolman, et al. “Comparing Local Government Autonomy Across States,” George Washington Institute of Public Policy, <https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Working Paper 035 GovernmentAutonomy.pdf>, p.47.

<sup>20</sup> Seven factors were used to calculate the ranking: (1) importance of local government outputs, revenue, and expenditure in the State economy and intergovernmental system; (2) importance of local public employment in the State economy and intergovernmental system; (3) local government structural and functional responsibility and legal scope; (4) tax, spending and debt limits; (5) assessment limits; (6) unconstrained local revenue; and (7) diversity of local revenue sources. Hal Wolman, et al. “Comparing Local Government Autonomy Across States,” George Washington Institute of Public Policy, <https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Working Paper 035 GovernmentAutonomy.pdf>, pp. 15.

general revenue.<sup>21</sup> The California Constitution is the source of authority for local governments, but it is also “severely limits the most important local power — the power to raise taxes.”<sup>22</sup> California local governments actually rank at the very bottom of all the States in terms of unconstrained local revenue, i.e., how much money local governments take in on their own and can spend as they think best.<sup>23</sup> In short, local governments in California have significant legal responsibility for important issues of governance, but they are completely lacking in the resources to meet those responsibilities.

As has been increasingly obvious to Californians, our local governmental agencies are in distress. Cities are often particularly hard hit, because they rely on property taxes and sales taxes, and the limited State aid they do receive often comes with strings attached such that it might not be going to areas of the city’s greatest need. The cities with the most difficulty are usually smaller ones, whether rural or within a larger urban zone, though even some larger cities are experiencing challenges.<sup>24</sup> According to the High Risk Local Government Audit Program conducted annually by the California State Auditor, about half of California’s cities are at high or moderate risk for financial distress, often combined with other indicators of weak governance.<sup>25</sup>

Another cause of the weakness of local government is that decentralization in California often results in increasing complexity. “The way the state divides government responsibility across these various levels is more complex in California than elsewhere.... [L]ocal government power is spread over counties, cities, special districts and regional boards or commissions. As a result, the structure of local government is layered with overlapping jurisdictions and disjointed responsibilities.”<sup>26</sup>

As noted by Joe Matthews, a longstanding observer and Cassandra of California politics, “in California, local governments are too weak and too small to be of much use.”<sup>27</sup>

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<sup>21</sup> Hal Wolman, et al. “Comparing Local Government Autonomy Across States,” George Washington Institute of Public Policy, [https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Working\\_Paper\\_035\\_GovernmentAutonomy.pdf](https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Working_Paper_035_GovernmentAutonomy.pdf), pp. 22-23.

<sup>22</sup> Joe Matthews, “Why California city councils should be bigger,” Aug. 28, 2020, Ventura County Star, <https://www.vcstar.com/story/opinion/columnists/2020/08/29/connecting-california-why-california-city-councils-should-bigger/5647788002/>

<sup>23</sup> Hal Wolman, et al. “Comparing Local Government Autonomy Across States,” George Washington Institute of Public Policy, [https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Working\\_Paper\\_035\\_GovernmentAutonomy.pdf](https://gwipp.gwu.edu/sites/g/files/zaxdzs2181/f/downloads/Working_Paper_035_GovernmentAutonomy.pdf), p.45.

<sup>24</sup> Dan Walters, “Local governments are in distress,” CalMatters, November 13, 2019 <https://calmatters.org/commentary/2019/11/local-governments-taxes-pensions/>

<sup>25</sup> California State Auditor, “Fiscal Health of California Cities,” 2020, [https://www.bsa.ca.gov/local\\_high\\_risk/at-a-glance-csa](https://www.bsa.ca.gov/local_high_risk/at-a-glance-csa)

<sup>26</sup> “State-Local Reform,” What’s Next California, 2011, What’s Next California: Participant Guide, <http://nextca.org/pages/participant-guide> <http://nextca.org/topics/entry/state-local-reform>.

<sup>27</sup> Joe Mathews, “Why California’s Weakest Local Governments Should Not Survive Covid-19,” May 5, 2020, Zocalo Public Square,

Our ship of state is barnacled with governments. In addition to the state, with its hundreds of agencies and commissions, we have 58 counties, 482 cities, 977 school districts, 72 community college districts, and nearly 5,000 special districts, governing everything from mosquitoes to cemeteries. These “myriad local governments struggle to come together to solve regional problems,” and “they usually get in each other’s way.”

There is a crying need for significant reform. As was noted by former Santa Monica City Manager Rick Cole: We continue to provide [government services] without adequately re-examining their fit for the world we live in today. If we were starting from scratch today, we would design a government that looked more like the I-Phone than the rotary phone. But of course we can’t start from scratch – we have tens of thousands of dedicated people in public service trying to use rotary phone government to meet 21st Century needs.<sup>28</sup>

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<https://www.zocalopublicsquare.org/2020/05/05/joe-mathews-local-government-school-boards/ideas/connecting-california/>.

<sup>28</sup> “Is Rick Cole's Resignation as Santa Monica City Manager a Canary in the Coal Mine for All Cities?” The Planning Report, April 19, 2020, <https://www.planningreport.com/2020/04/19/rick-coles-resignation-santa-monica-city-manager-canary-coal-mine-cities>.