Unshackling Cities

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Scholars have long demonstrated that cities are constrained by states and the federal government in the exercise of their power. While important, the emphasis on these "vertical" constraints on cities does not account for the "horizontal" constraints on city power from private actors. This Article suggests that the emphasis on vertical constraints on city power is due to a misunderstanding of the history of local government law that describes its sole function as the vertical distribution of power between cities and different levels of government. I revise the history of Dillon's Rule, the doctrinal cornerstone of local government law's vertical distribution of power, by arguing that local government law also distributes public and private power, between private capital and cities. Correcting the historical misunderstanding helps to show how private power still shackles cities in their efforts to address important challenges.

Dillon's Rule is a rule in local government law holding that localities wield only the powers expressly granted to them by states and no others. In this Article, I suggest that this view rests on a misinterpretation of the Rule's origins narrowly centered on nineteenth-century jurist John Forrest Dillon's hostility toward local power and his faith in state power. I put Dillon's Rule back into the historical path from which it emerged, the evolution of U.S. public debt and economic development in the nineteenth century. I argue that this new historical contextualization reveals that Dillon's Rule also distributes public and private power.

Dillon and his Rule emerged during a critical moment in the evolution of U.S. public debt and economic development, after federal and state debt-financed economic-development projects failed, and localities took up the task. Iowa was the epicenter of local debt finance, and it was where Dillon, then a state court judge, saw a wave of defaults in the 1860s as evidence of cities' inherent wastefulness and susceptibility to public corruption. Dillon believed, left to their own devices, cities and their mismanagement of debt would repeatedly deprive creditors and investors of their property. In response, Dillon authored the doctrine that would become known as his Rule. But Dillon did not give states the task of disciplining fiscally irresponsible cities. The Rule's empowering of states was largely procedural. Dillon made cities fiscally powerless so that they could only borrow and spend in a narrow way

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that would convince municipal creditors that their debts would be repaid. This constraint on local power by private capital was at the core of the Rule's design.

In closing, I explore the contemporary ramifications of the Rule's distribution of public and private power. Today, in the name of attracting and shielding capital against city power as Dillon intended, the Rule shackles cities to a limited range of market-consented options with which to address shortages in local economic development, affordable housing, and climate change. Critically, these burdens fall disproportionately on people of color. I argue that seeing the Rule in this new light should impact how we view the project of revitalizing city power moving forward.

INTRODUCTION

For the past forty years, legal scholars have held that the core function of local government law is the "vertical" distribution of public power between levels of government.[1] In this Article, I suggest that this view is incomplete because local government law also distributes public and private power. I revise the history of Dillon's Rule, one of the foundational doctrines of local government law. Dillon's Rule is a judicial canon created by the nineteenth-century jurist John Forrest Dillon that requires judges to narrowly construe city powers as those expressly conferred to them by states and no others. Formally, Dillon's Rule is an interpretive canon—it requires a judge to narrowly construe

[1] *See, e.g.*, Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1151 (1980). *See generally* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83.

the powers of a locality in a case where they are in question.[2] The Rule has been described by scholars as the source of local government law's emphasis on the vertical distribution of power.[3] From the new history of Dillon's Rule provided in this Article, it becomes clear that the Rule did not distribute only vertical power, but also public and private power.

For the scholars who see Dillon's Rule as a distributor of state and local power, the Rule is a product of the historical path of nineteenth-century U.S. local government law from ambivalence toward city power to hostility toward city power. Dillon vested states with the power to limit the involvement of "public" cities in the purely "private" activity of economic development. According to these scholars, Dillon so restricted local power because he believed that cities were easily captured by corrupt interests but that states were generally less corruptible.[4] States could thus be trusted to ensure that city power operated in the public interest.[5]

This Article recontextualizes Dillon's Rule against a different historical backdrop: the evolution of U.S. public debt and economic development. After four decades of federal and state efforts to publicly fund economic development projects, like canals and railroads, collapsed in the 1840s, local governments took up the effort.[6] Iowa became a hotbed of local debt-financed projects in the 1850s, but after an economic downturn in the early 1860s, bankrupt Iowan cities took to the courts to evade their debts.[7] In 1868, the cases rose to Dillon's docket on the Iowa Supreme Court and greatly informed his Rule.[8]

According to Dillon, cities had become too powerful and too unethical in steering economic development, threatening the security of private property in cities. The Iowan cities that had

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2 Dillon's Rule is generally applied to local governments via statute or state constitutional amendment. The geographic extent and substantive scope of Dillon's Rule vary widely, but thirty-nine states apply the Rule to some form of local government (town, township, city, county, or district) and to some power (like fiscal power, the power to hire and fire, or the power to execute certain functions). *See infra* note 328; *see also* Williams, *supra* note 1, at 110. As a result, it remains at the core of the landscape of local governance. The longstanding alternative to Dillon's Rule, home rule, provides cities with a wide array of powers. *See infra* Part I.A.

3 *See infra* Part I.A.

4 *See* Frug, *supra* note 1, at 1119; JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 25 (1872).

5 *See* DILLON, *supra* note 4, at 25.

6 John Joseph Wallis, *American Government Finance in the Long Run: 1790 to 1990*, 14 J. ECON. PERSPS. 61, 69–71 (2000) [hereinafter Wallis, *American Government Finance*].

7 *See, e.g.*, Stokes v. Cnty. of Scott, 10 Iowa 166, 184–85 (1859) (invalidating all outstanding bonds issued in Iowa).

8 *See infra* Part II.D.

refused to repay their bondholders were emblematic: they had abused their power to raise debts by evading repayment later. Dillon devised his Rule and its drastic limitation on local power as a solution to the problem, but the enlargement of state power was only procedural. The Rule did not give states an active, substantive role in regulating cities to protect private property, but it did give states the broad responsibility to check the growth of local power. Dillon sought to give municipal debt markets the substantive task of regulating local power. The mechanism for this is found in *Treatise on the Law of Municipal Corporations*,[9] Dillon's monumental treatise that popularized his Rule, where he introduced extensive protections for municipal bondholders, leaving no avenues for cities to evade their debts.[10] Making municipal bonds ironclad in this way meant that any city that sought to borrow to fund economic development would need to conform to policies that bondholders tacitly endorsed, rather than those of their own choosing.[11]

Recasting Dillon's Rule as a distributor of public and private power is not merely an intellectual exercise of correcting the historical record. It shows us that the contemporary powerlessness of cities is not just the result of the growth of state and federal power, but also of the discipline imposed on it by private capital. Under this discipline, cities are shackled to a narrow range of policy options for addressing the economic, social, and environmental crises in their midst that unevenly affect people of color.

The Article has three parts. Part I lays out the standard history of Dillon's Rule, which emphasizes Dillon's ideological hostility toward local politics and his affinity for state power. In the standard history's telling, the Rule reflected Dillon's goal of redistributing power vertically from cities to states. I argue that this view leaves out the broader context of the use of public debt for economic development in U.S. history, through which the Rule's vertical redistribution of power can also be seen as one between private and public power. Part II sets out a new history of Dillon's Rule, which begins with the failure of national- and state-level schemes for the debt finance of infrastructural development in the decades after independence. I then cover the mid-nineteenth-century transition to local debt finance through the case study of Iowa. I next analyze how the legality of Iowa's local debt finance came before courts during the 1850s and later on

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9 DILLON, *supra* note 4.

10 *See generally id.*

11 *Id.*

the docket of an up-and-coming judge named John Forrest Dillon. I demonstrate how Dillon drew from his perspective on Iowan cities and their use of local debt finance in creating his Rule. I argue in this Part that Dillon's goal in constraining local power was to subject it to the discipline of the nascent municipal debt market. Part III concludes by exploring how the Rule undergirds the discipline of cities by private capital today and the deleterious effects this has on cities' capacities to address the multiple ills that unequally befall urbanites of color.

I. THE STANDARD HISTORY OF DILLON'S RULE

This Part sets out how scholars have traditionally understood the history of Dillon's Rule, or what I call the standard history of Dillon's Rule. I argue that the standard history overdetermines Dillon's mistrust of local power and his belief in states, creating the long-held impression of Dillon's Rule as a regulator of state and local power, by focusing on too narrow a portion of the Rule's historical context.

A. The Standard History

The first scholarly treatments of Dillon's Rule were, unsurprisingly, by the jurists associated with the home rule movement between the late nineteenth and early twentieth centuries. In a series of influential treatises, Thomas Cooley, Amasa Eaton, Eugene McQuillin, and Howard McBain set out a theory of local power insistent on an inherent right to local self-government.[12] But for this first generation of home rule jurists, Dillon's Rule was the origin of a recently (in historical terms) developed concrete problem. Rather than validate Dillon's Rule by critiquing its limited history, the first home rule texts compiled an impressive historical narrative attesting to the near universal permanence of local autonomy.[13] This implied that Dillon's vision of severely limited municipal power was utterly new and misguided.

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[12] *See generally* 1 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868); Amasa M. Eaton, *The Right to Local Self-Government* (pts. 1–5), 13 HARV. L. REV. 441 (1900), 13 HARV. L. REV. 570 (1900), 13 HARV. L. REV. 638 (1900), 14 HARV. L. REV. 20 (1900), 14 HARV. L. REV. 116 (1900); EUGENE MCQUILLIN, A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1911); HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE (1916).

[13] *See generally* COOLEY, *supra* note 12; Eaton, *supra* note 12; MCQUILLIN, *supra* note 12; MCBAIN, *supra* note 12. McQuillin's narrative runs more than a hundred pages and focuses on the public-private distinction, which lies at the core of Dillon's Rule. MCQUILLIN, *supra* note 12, at 203–11, 248–53.

The rise of suburbanization in the 1920s and '30s focused the second generation of home rulers on redefining what could be called "local."[14] As such, the second generation of home rulers was less concerned than the first generation with history and Dillon's Rule. Jurist Joseph McGoldrick's 1933 treatise *Law and Practice of Municipal Home Rule*, for instance, made only scant mention of the origins of Dillon's Rule in a study that warned of the coming difficulty in preventing state preemption.[15] Professor Rodney Mott and Dean Jefferson Fordham, both reformers, called for the eradication of Dillon's Rule as part of the second generation of home rulers—the latter as author of the American Municipal Association's *Model Constitutional Provisions for Municipal Home Rule* in 1953—but did so with relatively little engagement with its origins.[16] Professor Terrance Sandalow's 1964 critique of second-wave home rule marked the first substantial reanimation of Dillon's Rule. Courts, according to Sandalow, should narrowly construe home rule grants to cover local matters because the gravest threat to "basic community values" was novel local initiative, which Dillon's Rule had targeted.[17]

During the 1970s, the rise of public choice theory further moved legal scholars away from historical argumentation and Dillon's Rule.[18] Beginning with economist Wallace Oates's 1969 revival of earlier economist Charles Tiebout's influential model, public choice theory redefined local government in economic terms, each city competing in a broader market for public goods.[19] The ample literature inspired by the Tiebout model and Oates's subsequent theory of fiscal federalism defined the best allocation

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14 David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2325–28 (2003) [hereinafter Barron, *Home Rule*] (describing how the second wave of home rule reformers advocated for more flexible home rule initiative powers yet more limited immunity from state preemption).

15 *See* JOSEPH D. MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916–1930, at 157–58 (1933); Barron, *supra* note 14, at 2325–26.

16 *See* RODNEY L. MOTT, HOME RULE FOR AMERICA'S CITIES 10 (1949); Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 3 n.6 (1975).

17 Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 718–20 (1963).

18 *See generally* Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969) [hereinafter Oates, *The Effects of Property Taxes*] (analyzing how local public budgets affect property values in communities); WALLACE E. OATES, FISCAL FEDERALISM (1972) [hereinafter OATES, FISCAL FEDERALISM] (studying the role of public sector finances in a federalist system given the budgetary difficulties of state and local governments).

19 *See* Oates, *The Effects of Property Taxes*, *supra* note 18, at 958–59.

of power between different levels of government as the most efficient allocation.[20] Dillon's Rule became part of the analysis insofar as it represented the existing legal framework governing state and local relations in many jurisdictions. But during the 1980s and '90s, a subsequent generation of scholars working in the public choice and fiscal federalism tradition did return to historical themes, mostly the persistence of corruption in the nineteenth-century city, to make a normative case for limited local power.[21]

In the adjacent field of urban history, there was, as in the legal scholarship, little written on Dillon's Rule through the 1970s. As Professor Jon Teaford recalled in *The Unheralded Triumph*, most of the urban historians until then focused on describing the wide extent of nineteenth-century urban corruption through the figures of bosses and machines.[22] This negative portrayal of the possibilities of local government had emerged in the late nineteenth century and the era of Dillon himself. Interestingly, even though these historians were generally hostile to local power, they did not make extensive reference to Dillon's Rule or Dillon himself in their work, even while covering in part the disputes over local debt finance of economic development.[23] Professor Charles Adrian and Dean Ernest Griffith's four-volume *A History of American City Government*, for instance, mentions Dillon only in passing in volumes dealing squarely with the question of local power in the late nineteenth century.[24] Under the influence of social historical methods, urban history then moved away from the high politics of topics like Dillon's Rule.[25]

However, the 1980s saw a series of pathbreaking studies that engaged the history of Dillon's Rule head-on. In 1980, Professor

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[20] *See, e.g.*, OATES, FISCAL FEDERALISM, *supra* note 18, at xiv.

[21] *See generally* PAUL E. PETERSON, CITY LIMITS (1981) (arguing that, under a federalism system, the national government should take responsibility for redistributive policies given the mobility of citizens and constraints on local governments); PAUL E. PETERSON, THE PRICE OF FEDERALISM (1995) (same); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991) (advocating for Dillon's Rule as a judicial check on the tendency of local governments to use their powers for special interest groups).

[22] JON C. TEAFORD, THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900, at 3 (1984).

[23] *See generally* 2 BESSIE LOUISE PIERCE, A HISTORY OF CHICAGO: FROM TOWN TO CITY 1848–1871 (1940); 10 ARTHUR MEIER SCHLESINGER, A HISTORY OF AMERICAN LIFE IN TWELVE VOLUMES: THE RISE OF THE CITY 1878–1898 (1933).

[24] *See* 2 CHARLES R. ADRIAN & ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE FORMATION OF TRADITIONS, 1775–1870, at 39–49 (1938); 3 ERNEST S. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE, 1870–1900, at 211 (1938).

[25] *See generally, e.g.*, JANE JACOBS, THE ECONOMY OF CITIES (1969).

Gerald Frug published the landmark article *The City as a Legal Concept*.[26] Drawing on a sweeping synthesis of centuries of legal and urban history, he argued for a thorough reconceptualization of local power enabling "new forms of association and popular participation."[27] According to Frug, colonial U.S. cities had long enjoyed broad powers under common law, largely underlaid by ample grants of property rights and associational rights.[28] But during the nineteenth century, jurists alarmed by the size and organization of undesirable social classes—organized labor, immigrants, and nonwhites—in U.S. cities used the bludgeon of the public-private distinction to set property rights against associational rights.[29] The associational right to self-government long enjoyed by cities was now anathema to a well-ordered society premised on a reverence for property rights.[30] Cities—public corporations with no property rights or inherent associational rights—deserved no special protection. Absent special protection, they were entirely under the power of states.[31] In the closing decades of the century Dillon and his doctrine became the embodiment of this vision of local subordination to state authority.[32]

For Frug, Dillon was in league with the skeptics of urban democracy and those who perceived a need to protect property rights, but not simply out of a class interest. Instead, Frug contended that Dillon was concerned with the abuse of private property by public and private actors alike.[33] By policing the public-private distinction, government obtained protection from private interests, and private actors were shielded from state intervention.[34] Cities were crucibles in this historical imperative, and limiting their powers was an especially important factor.[35] Frug argued that the Rule and Dillon's subsequent writings further show that Dillon thought of his vision of local power as leading to government by the better sort, and that state legislatures and courts would, in their wisdom, constrain the worst local excesses.[36] The widespread adoption of Dillon's Rule, Frug argued, had much to do with its broad and

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26 Frug, *supra* note 1.
27 *Id.* at 1151.
28 *Id.* at 1095–98.
29 *Id.* at 1101–05.
30 *Id.* at 1107.
31 Frug, *supra* note 1, at 1105–09.
32 *Id.* at 1109.
33 *Id.* at 1110.
34 *Id.*
35 *Id.* at 1109–10.
36 Frug, *supra* note 1, at 1111.

categorical language that was quickly separable from the specific social vision Dillon had in mind.[37]

Frug's article identified Dillon's Rule as a crucial and lasting point of inflection in the history of local government law, which had by the time of his writing in 1980 made the lack of local power seem natural. At that point in time, constrained local power seemed an "inevitable and desirable feature of modern life" necessitated by market needs and political attitudes, which were disdainful of the possibilities of local politics.[38] Frug showed that a different vision of local power was possible but that it involved knowing and undoing the legal and intellectual machinations that had allowed Dillon's Rule and local powerlessness to endure.

Two important studies appeared between 1983 and 1984 that focused, like Frug, on the history of local powerlessness. First was Professor Hendrik Hartog's 1983 book *Public Property and Private Power*, a study of the evolution of the legal status of New York City in the eighteenth and nineteenth centuries.[39] Hartog argued convincingly that cities were stripped of the essential element of their power—property ownership—during the nineteenth century, as part of a conceptual redefinition of cities as "public" corporations distinct in their powers from "private," or business, corporations.[40] For Hartog, Dillon's Rule was the capstone of a longer judicial effort that began as early as 1835 to distinguish cities as private corporations.[41] The Rule, according to Hartog, replaced an earlier practice of allowing legislatures to clarify delegations of power to cities through more statutes with an "objective" judicial standard.[42] But interestingly, Hartog, unlike Frug, suggests that Dillon was not seeking to vindicate state power as much as judicial power over cities.[43] The second work was Teaford's *The Unheralded Triumph*, which did not engage Dillon's Rule as directly as Frug's article but used late-nineteenth-century urban history to critique the exercise of local power.[44] Under this view, urban corruption had grown commensurate with urban power. Teaford critiqued the exercise of local power by providing a thorough and precise survey of the successful emergence of

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37 *Id.* at 1111–13.

38 *Id.* at 1066.

39 *See generally* HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 (1983).

40 *Id.* at 14.

41 *Id.* at 220.

42 *Id.* at 224.

43 *Id.* at 222–24.

44 *See, e.g.*, TEAFORD, *supra* note 22, at 2.

municipal services despite the predations of corrupt officials.[45] More broadly, other historians like Professors Laura Edwards and William Novak have shown that, overall, a gradual decline of local power and rise of state power occurred during the nineteenth century.[46]

In 1986, Professor Joan Williams took up the history of Dillon's Rule in her article on the constitutional vulnerability of local government.[47] Williams sought to explain a series of seemingly incoherent decisions from the Burger Court that expanded antidiscrimination and antitrust law on a theory of local powerlessness while deferring to local power when narrowing the scope of the Fourteenth Amendment. Since local power was not constitutionally fixed, judges and commentators had "responded by incorporating their attitudes toward governmental power (inseparable from their political beliefs) into municipal law."[48] Williams, like Frug, also figured Dillon's Rule as an important origin for a longer trajectory upholding local powerlessness. But unlike Frug, Williams did not identify the hostility of nineteenth-century liberalism toward cities as the causative force behind Dillon's staying power. Instead, she identified Dillon with an "apprehension[ ] about government efforts to redistribute wealth" that the Burger Court, a century later, would reinvigorate.[49]

Williams's analysis of Dillon's Rule begins by attending to Dillon's biographical particulars, which she aptly noted previous authors had neglected to consider. Dillon was an early corporate lawyer, who had from the beginning of his career "sought to identify himself with the ruling elite by providing both expertise and a legal ideology that served its interests."[50] After an early and rapid rise on the bench in Iowa that saw him appointed to the Eighth Circuit in 1869, Dillon made a move to New York in 1879 where an appointment at Columbia Law School and roles as counsel for the likes of the Union Central Railroad Company and Western Union were bestowed on him, the result of a career designed to make himself "indispensable" to their operations.[51]

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45 *Id.* at 217–50.

46 *See generally* LAURA F. EDWARDS, THE PEOPLE AND THEIR PEACE: LEGAL CULTURE AND THE TRANSFORMATION OF INEQUALITY IN THE POST-REVOLUTIONARY SOUTH (2009); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

47 *See* Williams, *supra* note 1, at 97–100.

48 *Id.* at 86.

49 *Id.*

50 *Id.* at 90.

51 *Id.* at 91–92.

Dillon accomplished this, as Williams described it, by making the logical choice to develop an expertise in municipal law, an increasingly important body of law. During Dillon's time, municipal law had become critical, from the proliferation of local finance of railroad development to the transportation revolution that took place over the course of the century.[52]

Williams continued to describe how, in Iowa, which during the 1860s was the "eye of the storm" after a wave of railroad bankruptcies and defaults put local finance schemes in danger, Dillon saw evidence of how public corporations were ill suited to handle the work of private corporations.[53] In *Hanson v. Vernon*,[54] an 1869 Supreme Court of Iowa decision, Dillon expanded this conflict into one between private property and government power in general, introducing the "central framework of laissez-faire constitutionalism."[55] For Williams, the legacy of Dillon's Rule is as much schematic as it is substantive. Beyond enshrining laissez-faire constitutionalism, it clothed the debate over local power in forum-shifting terms, under which judges and scholars would evade building up a substantive position on local power; instead, arguments would be made for the propriety of one layer of power over another.[56]

In 1990, Professor Richard Briffault published his two-part article *Our Localism*, finding that contrary to what Williams, Frug, and others had suggested, state courts had upheld local power through generous readings of home rule provisions and new delegations since the 1970s.[57] But on the whole, courts had expanded local power to serve the interest of affluent suburbs, leaving the power of central cities to be shaped by private investment decisions and creating inefficient interlocal competition that benefitted suburbs and reflected their superior economic position.[58] Only by empowering states with the kind of power that Dillon's Rule had once championed could the law address interlocal inequalities.[59]

During the aughts, historical studies returned to focus on home rule rather than Dillon's Rule. In his article *Reclaiming Home Rule*, Professor David Barron argued, with a remarkable

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52 Williams, *supra* note 1, at 91–92.

53 *Id.* at 93–94.

54 27 Iowa 28 (1869).

55 Williams, *supra* note 1, at 95–96.

56 *Id.* at 100.

57 Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 18–39 (1990).

58 *Id.* at 39–41.

59 *Id.* at 47.

depth of historical engagement, that a variant of home rule had developed in recent local government law that reinforced a specific pattern of local development and interlocal relations.[60] To the debate about whether home rule was to blame for sprawl, Barron proposed a historically conscious revindication of home rule restoring the power of localities to define their own pattern of development and interlocal relations.[61] Barron situated home rule in the broader sweep of urban history and considered Dillon's Rule largely as home rule's antagonist.[62] More importantly, Barron's article inspired further efforts to rethink and retrofit home rule for the challenges of contemporary cities.[63]

B. What the Standard History Gets Wrong

Of the scholarly works explored above, Frug's and Williams's articles have been cited numerous times to support claims about the origins of Dillon's Rule.[64] Although to different ends and through different means, both Frug's and Williams's articles suggest that Dillon sought to empower states based on both an ideological hostility to local power and a belief in the possibilities of state power. For Frug, Dillon concurred with skeptics of urban democracy that urban politics, unfit for the "better sort," posed the gravest threat to private property and public virtue.[65] State governments were well suited to check the power of localities because they were adequately staffed and because they could rise above the local fray.[66] Williams largely agreed with Frug but describes Dillon's hostility to local power squarely in terms of his class interest. Dillon knew that municipal law would become a lucrative field, and so he crafted a rule that would shift power to

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60 Barron, *Home Rule*, *supra* note 14, at 2335–37 (arguing that the modern form of home rule, which both grants and limits local power, incentivizes interlocal fiscal competition and stymies efforts for regional development equity).

61 *Id.* at 2335–36.

62 *Id.* Elsewhere, Barron joined in an earlier reading of Dillon's Rule as a municipal corporation–specific extension of Chief Justice John Marshall's ultra vires doctrine. *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506–09 (1999).

63 *See generally* Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253 (2004); Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006); GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008).

64 *See, e.g.*, A.E.S., Note, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693, 695 n.8 (1982) (citing Frug, *supra* note 1, at 1111); Barron, *Home Rule*, *supra* note 14, at 2287 n.97 (citing Williams, *supra* note 1, at 97–100).

65 Frug, *supra* note 1, at 1111.

66 *Id.*

states, in keeping with the wishes of his patrons among the Gilded Age barons.[67] The difference between Frug and Williams is only in what each thought of Dillon's motivations—both concurred with the fact that Dillon's allocation of local power to states had substantive reasons. That has been the key historical contribution from each piece on the origins of Dillon's Rule.

The issue with the Frug-Williams origins of Dillon's Rule, and with the standard history more broadly, is that it is built on a fundamental assumption that at the heart of the political economy of cities in Dillon's time was a debate over the nature and purpose of local and state power. In Part II, I suggest instead that the relation between private capital and cities was at the center, with disputes over the public finance of local economic development at the very core.[68] As Williams noted, Dillon came upon municipal law in the context of heady controversies over the local finance of railways in midcentury Iowa. His widely cited decision in *Hanson* dealt with local debt finance, and in the preface to the widely influential treatise that popularized Dillon's Rule he referred specifically to the issue of local railway finance as a motivation.[69] From this, Dillon recognized that the relation between private capital and public authority was increasingly at the heart of the political economy of cities. Thus, when he used the public-private distinction to artificially cleave cities from the supposedly "private" activity of local economic development, he did so to achieve more than a specific vertical distribution of power. He sought also to achieve a specific distribution of power between private capital and public authority. Understanding that Dillon's Rule disempowered cities horizontally (vis-à-vis capital) fills out the incomplete picture rendered by the standard history's stories of vertical (vis-à-vis states) disempowerment. A complete history of this kind, which I give below in Part II, widens the lens trained on contemporary city power, letting us see how the Rule is still constraining cities as they seek to address important challenges.

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67 Williams, *supra* note 1, at 99.

68 For various explanations of how local government law and private economic development have been historically intertwined, see Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482 (2009) (arguing that local efforts to regulate capital explain the historical development of local government law); GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999) (analyzing how local government law has created interlocal competition for resources, leading to exclusionary zoning and redevelopment policies); SAM BASS WARNER, JR., THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF ITS GROWTH (1968) (explaining how the private market has determined the shape and quality of large cities in the United States).

69 Williams, *supra* note 1, at 95–96; DILLON, *supra* note 4, at vi.

II. THE NEW HISTORY OF DILLON'S RULE

In this Part, I lay out a new history of Dillon's Rule.[70] I place the Rule on the historical path of public debt and economic development. This is the story of how different levels of government used public debt to fund projects, like railroads, which they thought would stimulate economic growth and development. Understanding this history is necessary for two reasons. First, it explains how the question of local power landed on Dillon's docket as an Iowan jurist. Namely, the responsibility of financing economic development projects devolved from the federal government to states, and then to cities. Second, this history explains how local power as a legal problem, which Dillon thought his Rule would address, first emerged through the proliferation of local debt finance of economic development projects in Iowa.

What does seeing Dillon's Rule in the context I set out in this Part ultimately show us? It shows us that the Rule did not limit local power in favor of state power exclusively. Instead, the history shows us that the Rule sought to limit local (public) power in favor of private power. How so? Dillon placed his Rule alongside new and extensive protections for municipal creditors, which meant that the municipal debt market would discipline local power by funding only projects that best assured repayment. As such, cities lost the ability to design projects as they saw fit. This in turn shows us that the Rule principally distributes public and private power, empowering private capital over cities.

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70 The basic command of Dillon's Rule is generally the same wherever and to whatever extent it applies. Courts must limit local power to: "(1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable." EUGENE MCQUILLIN, *Delegation of Powers by Legislature—Municipal Powers Under Dillon's Rule*, *in* 2 THE LAW OF MUNICIPAL CORPORATIONS 45, 45 (3d ed. 2014). For a typical judicial citation to the Rule, see, for example, *Southern Constructors, Inc. v. Loudon County Board of Education*, 58 S.W.3d 706, 710–11 (Tenn. 2001) (alteration in original) (emphasis omitted):

> [A] municipal government may exercise a particular power only when one of the following three conditions is satisfied: (1) the power is granted in the "express words" of the statute, private act, or charter creating the municipal corporation; (2) the power is "necessarily or fairly implied in, or incident to[,] the powers expressly granted"; or (3) the power is one that is neither expressly granted nor fairly implied from the express grants of power, but is otherwise implied as "essential to the declared objects and purposes of the corporation."

The most common citations to Dillon's own writing are to *City of Clinton v. Cedar Rapids and Missouri River Railroad Co.*, 24 Iowa 455 (1868), *Merriam v. Moody's Executors*, 25 Iowa 163 (1868), and JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

To be sure, it is not the case that scholars have overlooked in Dillon's Rule the late nineteenth-century history of railways, local debt finance, and economic development. An important perspective in this area has developed in law and economics, which sees the Rule as originally designed to play—and as still playing—a crucial role in preventing inefficient competition in the flow of investment and course of economic development.[71] But as with the standard history of Dillon's Rule described above in Part I, the law and economics literature focuses on the Rule's distribution of state and local power, albeit to consider the important question of its effect on attracting investment. This Article, and this Part in particular, focuses instead on excavating the Rule's distribution of public and private power.

This Part proceeds as follows. The first Section explores the failure of a national program of public debt–financed economic development projects in the decades after the Revolution, marking the transition from federal- to state-led projects. The second Section describes how states filled the void left by the failed national program by issuing their own debt to fund projects during the 1830s. This culminated in a widespread debt crisis during the 1840s that prompted state constitutional restrictions on state borrowing. The third Section describes how these restrictions drove a transition from state to local borrowing for economic development. The focus in this Section is on Iowa, the first state admitted to the Union with a restriction on state debt in its founding constitution, and a prime destination for railroad development as Chicago's gateway to the West. The fourth Section traces how Iowa's unique context and boom-and-bust economic development in the 1850s and '60s brought the legality of municipal finance to courts and to a promising young judge named John Forrest Dillon, who from this context would elaborate his restrictive theory of local power. I argue in this final Section that Dillon's Rule was meant to enable the discipline of local power by the nascent municipal debt market.

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[71] David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1546–49; Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1275–76 (1999). As Professor David Schleicher notes, the Rule has been described as a crucial part of Tieboutian markets because of its practical effect of limiting the creation of externalities on other cities. Schleicher, *supra*, at 1548–49.

A. The Collapse of National Public Debt Finance, 1780–1830

The structure of U.S. public debt did not come into existence immediately after independence, nor was it created out of whole cloth in the Constitution. There were, however, formative experiences in the Founding era and in the early republic that gave U.S. public debt and its use to fund economic development its basic shape. This Section explores the first proposals for the use of public debt to finance the construction of roads and canals, then thought to be the key to growing the fledgling republic's economy. These projects were led by the federal government, and by 1830 they had all collapsed under the suspicion of corruption and rivalry among states. This drove the transition to state-led projects.

1. Federal assumption of state debt after the Revolution.

Among the first issues that tested the federal government after ratification of the Constitution was one involving public debt. This was the matter of the $25 million in war debts owed by the states.[72] This was a delicate issue not because of any exigency—the states were not in any acute state of financial distress—but because of the bruising experience of the decade leading up to ratification, in which public finances across the nation were troubled. To fund the Revolutionary War, the Continental Congress and states alike relied primarily on debt certificates—domestically held notes with deferred maturities.[73] The Continental Congress, busy refinancing and strategically restructuring its foreign loans, redeemed little if any of its domestic certificate debt.[74] States also redeemed only a small fraction of their certificate debts in the years after independence.[75] Most states paid what they could of their debts by printing paper money and passing legal tender laws that forced their use, which had the effect of drastically reducing the total amount of debt paid.[76] Paper money was politically expedient because the burden—reducing the sums owed to creditors—

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72 Richard Sylla, *Financial Foundations: Public Credit, the National Bank, and Securities Markets*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S 59, 67 (Douglas A. Irwin & Richard Sylla eds., 2011).

73 MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781–1789, at 57–59 (1950).

74 Janet A. Riesman, *Money, Credit, and Federalist Political Economy*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 128, 130 (Richard Beeman, Stephen Botein & Edward C. Carter II eds., 1987).

75 *Id.*

76 *Id.* at 150; Sylla, *supra* note 72, at 61–62; Max M. Edling, *"So Immense a Power in the Affairs of War": Alexander Hamilton and the Restoration of Public Credit*, 64 WM. & MARY Q. 287, 288 (2007); JENSEN, *supra* note 73, at 41.

fell on speculators and a few moneyed men in the capital cities rather than potentially seditious agrarian debtors.[77]

Paper money had few supporters among the political class, who saw it as an overextended wartime expedient, and even less among nationalists, who saw it as an affront to principles of commercial society and good governance.[78] Robert Morris was one such nationalist who abhorred paper money. During his tenure as the Confederation-era Superintendent of Finance of the United States (1781–1785), alongside his deputy, Gouverneur Morris, Robert Morris inveighed against paper money in the various proposals he put forward to reform public finance.[79] At the core of these various projects that Morris proposed or executed—establishing the protocentral Bank of North America, instituting a national tax, and funding the national debt—was a belief that a stable, prosperous economy would rise from a sound institutional structure that emphasized restraint and sound investment.[80] Morris's schemes would allow public creditors to be made whole without undue burden on the new nation. With money in hand, the creditors—an enlightened few who would guide the market and public affairs—would invest in productive enterprises that would lift all boats.[81] To Morris and his peers, paper money was eminently *un*productive in that it incentivized only short term, personal interests of consumption and speculation.[82] In 1786, a year after Morris left office in frustration, six states took up the paper money model.[83] Of the six, it was Rhode Island that caused the most outrage with its legal tender law, interpreted as a step beyond an unproductive use of capital and into redistribution of property, possessing "sinister, leveling implications that frightened the genteel part of society."[84] The status of states that had disavowed paper money offered cold comfort. Massachusetts had

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77 ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 135–38 (2006) (contrasting the issuance of paper money with alternative proposals for raising money, such as taxes on real estate).

78 Riesman, *supra* note 74, at 133–37. During the war, the resort to paper money caused great alarm. But there was always the supposition that after the war, there could be some form of reckoning that restored—under the then-reigning theory of money—the balance between goods circulating in the economy and money. *Id.* at 132–33.

79 Sylla, *supra* note 72, at 61; THOMAS K. MCCRAW, THE FOUNDERS AND FINANCE: HOW HAMILTON, GALLATIN, AND OTHER IMMIGRANTS FORGED A NEW ECONOMY 66–68 (2012).

80 Riesman, *supra* note 74, at 144–46.

81 *Id.* at 145–46.

82 *Id.* at 148–50.

83 *Id.* at 150 (listing those six states as New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, and Maryland).

84 *Id.* at 150–51.

set out to pay its entire debt in specie, or coins, raising painful taxes in the 1780s to do so and feeding the animosity of farmers in the western half of the state that boiled over into Shays's Rebellion in 1786.[85] Though unsuccessful, the uprising laid bare the dangerous trade-offs involved in finding ways to pay the debts and, more generally, the weaknesses of the Confederation government in doing so, laying the basis for the convening of the Constitutional Convention in 1787.[86]

At the Constitutional Convention, the issue of paper money was at the forefront, and found a response in Article I of the Constitution, which gave to Congress in Sections 8 and 10 the power to collect taxes, coin money, borrow money, and determine when and how to pay federal debts and assume state debts.[87]

Despite its forceful assignment of power to the federal government, Article I was a prospective framework for an uncertain future. At the time of ratification, there was still wide variance in the states' fiscal structures and their repayment statuses. Debts had been on the minds of the Convention delegates; it was now on the mind of the first Congress. Among the latter's first acts in 1790 was the commissioning of Treasury Secretary Alexander Hamilton to compile and comment on the full extent of state fiscal data in what became his *Report Relative to a Provision for the Support of Public Credit*.[88] Hamilton's report argues for the establishment of an institutional structure that would establish and preserve the creditworthiness of the new nation. If the federal government assumed state debts, it would end any trepidation in the minds of creditors, foreign or domestic, of the new nation's credibility. The debts were a record of the "price of liberty," argued Hamilton, and repaying them would establish a public faith that liberty made possible.[89] At its core, Hamilton's scheme sought to reorganize and restructure U.S. public finance to free

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85 Paul M. Thompson, *The Reaction to Shays' Rebellion*, 4 MASS. LEGAL HIST. 37, 44–47 (1998).

86 *Id.* at 57–59.

87 JENSEN, *supra* note 73, at 41; U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. art. I, § 8, cl. 2; U.S. CONST. art. I, § 8, cl. 5; U.S. CONST. art. I, § 10, cl. 1.

88 ALEXANDER HAMILTON, REPORT RELATIVE TO A PROVISION FOR THE SUPPORT OF PUBLIC CREDIT (Jan. 9, 1790), *reprinted in* 6 THE PAPERS OF ALEXANDER HAMILTON, DECEMBER 1789–AUGUST 1790, at 51, 65–68 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

89 *Id.* at 68–70. FORREST MCDONALD, ALEXANDER HAMILTON: A BIOGRAPHY 163–65 (1979). Hamilton's reforms found approval in Congress after an arduous five months of debates over the distribution of the debt burden and the decision to pay current (potentially speculative) rather than original debtholders in the form of the Compromise of 1790, which moved the nation's capital to Washington, D.C. *See* Jacob E. Cooke, *The Compromise of 1790*, 27 WM. & MARY Q. 523, 526–36 (1970).

up the monies necessary to leverage the internal resources of the country.[90] Like Robert Morris, Hamilton envisioned the latter process as a special ability of the elite, an instinct that could simultaneously keep markets functioning, determine public policy, and guide the course of development.[91] The fundamental structure was in place, and now it came time to support the effort to develop with a new set of policies.[92]

2. Development of roads to connect the new nation.

The internal improvements era was ushered in by a series of studies that sought to expand on incipient road development projects from the colonial era and devise a new system entirely. In 1808, the Pennsylvanian statesman Albert Gallatin submitted a report to Congress calling for the development of a series of roads that would break past the Appalachian frontier.[93] The fertile planting regions of the trans–Appalachian West had for decades occupied a mythical status among the founding generation.[94] Gallatin's plan was audacious in its national scope and vexed for the same reason.[95] And like Hamilton, Gallatin believed that only a national solution was workable in practical and political terms.[96]

For the newly formed coalition of Democratic-Republicans, this was another national plan that thinly veiled an intent to benefit special—and sectional—interests.[97] Many of the same opponents of Hamilton's fiscal reforms were quickly arrayed against Gallatin's plan and the nationally led concept of internal improvements. Yet the rules of the game were also different. There was no disagreement on the ultimate goal—the need to invest in the construction of roads, canals, and turnpikes. Instead, the dispute centered on who would direct the projects and who would pay. Gallatin's plan was suspect on both counts because it assumed a universal good of coast-hinterland connection and because it benefited only a handful of states on a design that did not maximize the interests of each. As such, the congressional allocations that

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90 *See* Cooke, *supra* note 89, at 160–61.

91 *See* Riesman, *supra* note 74, at 160.

92 *Id.*; *see also* MAX M. EDLING, A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867, at 40–41 (2014).

93 *See* CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800–1890, at 28 (1960).

94 *See id.* at 51.

95 *See id.* at 28.

96 *See id.* at 28–29.

97 *See id.* at 37–38.

Gallatin painfully obtained were paltry and slow to materialize. Each tranche of funds had to squeeze through a searching review of its national impact, a test only the Maysville Road and Cumberland Road projects could pass. The funds dedicated to the two road projects paled in comparison to their estimated budgets.

By the mid-1810s, it was clear that internal improvement suffered from a deficit of excitement. The energy was entirely in the opposing camp, which enjoyed the benefit of weaving distrust of special interests with an intuitive appeal that the course of a state's development ought to be decided by that state. Some progress was made through the 1820s through allocations to the mid-Atlantic road projects. The hope that the congressional expenditure would set off a virtuous cycle of investment and development collapsed with the election of President Andrew Jackson in 1830. Among his first acts, Jackson declared the Cumberland Road project canceled and described it as a victory over the "institutional expenditure for the purpose of corrupt influence."[98] Internal improvements piqued Jackson because they involved an untoward collaboration of private citizens and the government for profit, or as Professor Carter Goodrich described it, "business encroaching on government rather than government encroaching on business."[99] With the federal government decisively out of the picture, it fell to the states to design, fund, and execute the projects. The uniting force of the national government's leadership was gone, surrendered to, in President John Adams's estimation, the "limping gait of State legislature(s) and private adventure."[100]

B. Boom, Bust, and State Debt Crises, 1835–1842

States rushed eagerly into the breach left behind by the collapse of national projects. This Section examines the rise of state debt-financed economic development and its implosion in a series of debt defaults in the early 1840s. This in turn explains the transition from state debt finance to local debt finance of economic development.

New York led the way among the states eager to raise public debts to finance economic development. As early as 1810, when Gallatin's national program languished before a skeptical Congress, New York convened a commission to study the possibility

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98 GOODRICH, *supra* note 93, at 41.

99 *Id.*

100 *Id.* at 60.

of building a canal connecting New York City to Lake Erie.[101] By 1817, the project was underway, and in another seven years the canal was ceremoniously opened by the pouring of a keg of water from Lake Erie into the Atlantic.[102] In almost every way possible, the project had been a smashing success, becoming "the longest canal in the world [built] in the least time, with the least experience, with the least money, and to the greatest public benefit."[103] The canal had become self-sustaining with only the middle section built, and by 1836 the surplus of the canal's fund eclipsed the debt undertaken for its construction.[104] Benefits extended beyond the state's coffers considering, for instance, that the cost of shipping one ton of wheat or flour from Buffalo to New York City dropped from $100 to as little as $10.[105] Moreover, the canal was touted as an example of civic virtue and entrepreneurial energy, embodied by the canal's two principal engineers, who were said to have designed the project's contracts as carefully as the locks.[106]

There was no aspect of the canal more attractive to other states than the method of its finance. Here, too, the canal was a parable of careful planning and execution. The canal commission first issued small denomination bonds to finance the project, mostly to New Yorkers.[107] Out-of-state investors only emerged as news of the canal's success in collecting substantial tolls became public.[108] Only when the canal's success was ensured in the late 1820s were its bonds sought after in New York City and London.[109] By 1829, when plans were underway to expand the canal in various directions, half of the outstanding debt was held abroad.[110] This was a paragon of the judicious use of public debt finance: lending and borrowing predicated on a sober understanding of the prospects of the scheme at hand. Sure enough, New York had not been the first state to borrow before 1830—about $19 million had been authorized in Pennsylvania, Ohio, Alabama, Louisiana, Virginia, South Carolina, and Maryland—but it had been the first to do so with the help of foreign debt, and the first to pull off a

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101 *See id.* at 53.
102 *See id.*
103 GOODRICH, *supra* note 93, at 53.
104 *See id.* at 54.
105 *Id.* at 55.
106 *Id.* at 54.
107 *Id.*
108 GOODRICH, *supra* note 93, at 54.
109 *Id.*
110 *Id.*

scheme relying on the anticipated revenues of the project at hand.[111]

The states that sought to emulate New York were equally impressed by the judiciousness of New York's debt finance and its alchemical power that turned an underdeveloped state numbering scarcely one million residents into the darling of capital markets as far as London.[112] Boosters of development projects in other states reasoned that they had ample resources locked in their states' hinterlands like New York's.[113] Thus, by emitting bonds, the states could make the same pitch that New York had—of getting in on the ground floor of a developmental takeoff—transforming their designs into attractive investments.

New York's neighboring states thus borrowed for similar projects: canals, railways, and roads accessing "that most interesting prize" of westward commerce.[114] Pennsylvania and Ohio, New York's main rivals in the chase, amassed $22 million and $4.5 million, respectively, by 1834.[115] In the South, the infrastructure seen as sorely lacking was for agricultural banking, and Louisiana, Alabama, Florida, and Virginia made aggressive pushes totaling $34 million in borrowing by 1834. Despite a brief recession in 1834, borrowing sharply accelerated after 1835—even through the Panic of 1837—after President Jackson distributed the surplus generated from paying off the national debt to the states and after federal land sales sharply increased. States differed in their method of meeting interest payments. Pennsylvania borrowed more funds, with the expectation that it could repay the debt when the first tolls trickled in from the projects and could impose taxes if they ever became necessary. Southern states charged their newly formed banks with paying the interest and principal of the loans.

Overall, the most widely applicable model was the use of surplus tax revenues that were flowing in from rapidly appreciating land. Since the improvements would raise values even further, so went the model, even more revenue would come with the completion of the projects.[116] By 1841, states had borrowed $198 million to fund internal improvements and dedicated a third to banks and

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111 John Joseph Wallis, Richard E. Sylla & Arthur Grinath III, *Sovereign Debt and Repudiation: The Emerging-Market Debt Crisis in the U.S. States, 1839–1843*, at 34 tbl.3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 10753, 2004).

112 GOODRICH, *supra* note 93, at 61.

113 *Id.* at 63.

114 *Id.* at 51.

115 *Id.* at 63–66.

116 Wallis, Sylla & Grinath III, *supra* note 111, at 7–8.

the remainder to railways and canals.[117] States, especially Ohio and Pennsylvania, even achieved the vaunted goal of borrowing abroad after the federal debt was paid off and state debts became the only long-term U.S. securities.[118] The exuberance was such in the 1830s, particularly during the spree of lending after 1835, that many states abandoned the cautionary strategy of raising taxes and assigning the surplus revenue to future debt service. Georgia and Alabama abolished property taxes altogether.[119] This turn to what one might call "painless finance" sought to emulate the older and self-financing projects in New York, Ohio, and Pennsylvania, but also the very "millennial condition of a [vision of] government supported without taxation."[120]

At the core of the loan operations were a few institutions, none more important than the Bank of the United States of Pennsylvania (BUSP), the private Pennsylvania-chartered successor of the Second Bank of the United States. In 1837, within a year of its rebirth as a private bank, the BUSP had amassed a formidable portfolio of state loans, one that would reach $20 million by 1841.[121] Over the same period, the BUSP's director Nicholas Biddle had aggressively expanded its international business, drawing on its connections to European houses and Barings in particular.[122] The results were equally impressive and fragile—an ingenue bank "operating with the same facilities as Barings or Browns, though without the experience or resources."[123] Flushed with confidence, Biddle directed a further expansion into speculation on the international cotton market, netting him a handsome profit he quickly lost.[124] Biddle's only salvation was to borrow more money from European houses, secured on the portfolio of state loans.[125]

Then the whole system collapsed. In July 1839, a smaller bank that speculated heavily on Indianan loans, the Morris Canal and Banking Company (run by Biddle's nephew, Edward Biddle),

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[117] *Id.* at 34 tbl.3.

[118] *Id.* at 21–22.

[119] *Id.* at 8–10.

[120] Hugh Sisson Hanna, *A Financial History of Maryland (1789–1848)*, *in* JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 41 (J.M. Vincent, J.H. Hollander & W.W. Willoughby eds., 1907).

[121] John Joseph Wallis, *What Caused the Crisis of 1839?* 20–21 (Nat'l Bureau of Econ. Rsch., Working Paper No. 133, 2001).

[122] *See* Wallis, Sylla & Grinath III, *supra* note 111, at 10.

[123] Wallis, *supra* note 121, at 21–23.

[124] Phil Davies, *The Rise and Fall of Nicholas Biddle*, FED. RSRV. BANK OF MINNEAPOLIS (Sept. 1, 2008), https://perma.cc/WU6T-LFQD.

[125] Wallis, *supra* note 121, at 22–23.

defaulted.[126] Construction came to a halt a month later in Indiana, and in Michigan and Illinois by the end of the year.[127] Land prices went into freefall, wiping out the surpluses that fed into debt service and shaking the confidence of foreign creditors.[128] Only a special assessment of taxes kept Indiana and Michigan afloat.[129] By January 1841, Indiana and Florida defaulted,[130] and the BUSP folded under the weight of the depreciated assets.[131] Three more states defaulted that year by the end of the summer.[132] Pennsylvania, the largest debtor among the states with $36 million outstanding in 1841, only managed to stay afloat initially by drawing on loans from its state-chartered banks.[133] In November 1841, the state announced a plan to force every bank in the state to turn over 5% of its capital, only to back down by April 1842.[134] With no money from surplus land taxes to cover the August 1842 interest payment, Pennsylvania defaulted, bringing the era of frenzied finance to a close.[135]

Of the nine states that would ultimately default by 1843,[136] Pennsylvania's default brought the most scorn. The state's foreign creditors, particularly the English, were the most enthusiastic in their criticism. Sydney Smith, the acerbic Anglican reverend and writer, became the voice of the spurned creditors soon after the default.[137] In 1843, he wrote to the *Morning Chronicle*, astonished that:

> [T]he truly mercantile New Yorkers, and the thoroughly honest people of Massachusetts, do not in their European visits wear a[ ] uniform with "S.S., or Solvent States," worked in gold letters upon the coat, and receipts in full of all demands tamboured on their waistcoats, and "our own property" figured on their pantaloons.[138]

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126 Wallis, Sylla, & Grinath III, *supra* note 111, at 17.

127 *Id.*

128 Namsuk Kim & John Joseph Wallis, *The Market for American State Government Bonds in Britain and the United States, 1830–43*, 58 ECON. HIST. REV. 736, 744 (2005).

129 Wallis, *supra* note 121, at 29.

130 Kim & Wallis, *supra* note 128, at 744 tbl.3.

131 *Id.* at 754.

132 *See id.* (referring to Mississippi in March 1841, followed soon after by Arkansas and Michigan in July 1841).

133 *Id.* at 743 tbl.2, 758–59.

134 Kim & Wallis, *supra* note 128, at 759.

135 *Id.* at 758–59.

136 *See id.* at 744 tbl.3.

137 Wallis, Sylla & Grinath III, *supra* note 111, at 22.

138 SYDNEY SMITH, LETTER II TO THE EDITOR OF THE MORNING CHRONICLE (1843), *reprinted in* 3 THE WORKS OF THE REV. SYDNEY SMITH 450, 451 (1845).

Pennsylvania's disgrace soon passed after resuming debt service in 1845.[139] The repudiating states, most of which were in the South, never recovered their creditworthiness.[140] For nearly a century, creditors foreign and domestic would pursue every legal means possible to obtain repayment from the repudiating states, receiving almost nothing in the end.[141]

With the defaults, the heady optimism behind painless finance gave way to concrete and difficult choices involved in resolving the debts. Defaulting states could choose between repudiating the debts and condemning the state's credit or imposing a heavy burden of taxes. Whatever the path—repudiation or repayment—"a revulsion of sentiment" against painless finance gripped the defaulting states.[142] New York, spared from any financial distress in the crash, immediately passed the "Stop and Tax Law" that halted all projects and raised property taxes to cover debt service.[143] New York then doubled down in 1846, requiring referendums to approve tax increases meant to fund loans over $1 million.[144] Across the defaulting states, authors of postmortem analyses cast the episodes as a moral failing, venal and irrational decisions undertaken without an appreciation for their catastrophic potential.[145] In this climate of revulsion and regretful determination to change, legislative fixes quickly lost their cachet. Moreover, the collapse of painless finance was seen as a product of camarillas that had corrupted the otherwise salutary activity of promoting investment.[146] By 1851, six of the nine defaulting states had called constitutional conventions to draft new restrictions on state borrowing.[147] By 1857, seventeen states in

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139 Kim & Wallis, *supra* note 128, at 744 tbl.3.

140 *See id.*

141 *See generally* V. Markham Lester, *The Effect of Southern State Bond Repudiation and British Debt Collection Efforts on Anglo-American Relations, 1840–1940*, 52 J. BRIT. STUD. 415 (2013).

142 HENRY C. ADAMS, PUBLIC DEBTS: AN ESSAY IN THE SCIENCE OF FINANCE 339 (1887); Carter Goodrich, *The Revulsion Against Internal Improvements*, 10 J. ECON. HIST. 145 (1950).

143 Wallis, Sylla & Grinath III, *supra* note 111, at 24.

144 John Joseph Wallis, *Constitutions, Corporations, and Corruption: American States and Constitutional Change, 1842 to 1852*, 65 J. ECON. HIST. 211, 231 (2005) [hereinafter Wallis, *Constitutional Change*].

145 *Id.* at 233–38.

146 *Id.*

147 *Id.* at 217 tbl.1. There were, to be sure, other reasons why state constitutional conventions were called. In Rhode Island, for instance, the fallout of the Dorr Rebellion brought the questions of suffrage to the fore. *See* Erik J. Chaput, *Proslavery and Antislavery Politics in Rhode Island's 1842 Dorr Rebellion*, 85 NEW ENG. Q. 658, 667–70 (2012). Generally, scholars have attributed the concurrence of the conventions to the rise of the Democratic Party. Wallis, *Constitutional Change*, *supra* note 144, at 242. But as Professor

total had amended or ratified their constitutions with similar restrictions.[148]

The restrictions on state borrowing were largely procedural in scope, requiring legislators to specify a single project for funding or to create and assign specific revenue streams to fund new debts, but most common was a requirement for voter approval for debts above a certain amount.[149] Although only a few states banned state-debt-financed improvements, the procedural restrictions, along with new restrictions on taxation meant to end painless finance, all but eliminated the practice.[150] At this point, a gradual transition to local debt finance began.[151] In 1841, at the peak of the improvement bonanza, there was a total of $193 million in state debt issued to a paltry $25 million in local debt.[152] By 1902, the former had risen to $230 million, while the latter, reflecting its status as the primary mode of infrastructure finance in the late nineteenth century, had exploded to $1.87 billion.[153]

C. Local Debt Finance, Iowa, and *Gelpcke v. City of Dubuque*, 1855–1864

The collapse of state debt finance and the wave of constitutional restrictions on state debt created a new vacuum in public debt finance of economic development. This Section explores the transition to local debt finance through the case study of Iowa, which in 1846 became the first state admitted to the Union with a restriction on state debt.[154] Iowan cities along the eastern bank of the Mississippi River offered the best terminals for lines from Chicago, and opening toward the West. As such, the state became a hotbed of local debt-financed economic development projects.[155]

John Joseph Wallis has shown, the interest in public finance spurred by the debt defaults was in each case either the principal or among the principal motivations for calling a convention. *Id.* at 242–43.

148 *See* Wallis, *Constitutional Change*, *supra* note 144, at 249 app. tbl.1.

149 *Id.* at 230–32.

150 *Id.* at 230–33. The remainder of states, mostly Southern, followed suit with restrictions of their own after the Civil War. *See* Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 57, 67 (1982).

151 Goodrich, *supra* note 142, at 151.

152 Wallis, *American Government Finance*, *supra* note 6, at 66 tbl.2.

153 *Id.* Professor Zachary Callen has shown how localities would eventually coax the federal government back into the field. *See* ZACHARY CALLEN, RAILROADS AND AMERICAN POLITICAL DEVELOPMENT: INFRASTRUCTURE, FEDERALISM, AND STATE BUILDING 214–16 (2016).

154 Goodrich, *supra* note 142, at 156. State legislators in Iowa had noted with alarm the progress of the debt crisis in Indiana and set constitutional restraints on Iowa's state debt accordingly. *See* DOROTHY SCHWIEDER, IOWA: THE MIDDLE LAND 60 (1996).

155 *See* SCHWIEDER, *supra* note 154, at 58–60.

Disputes over the projects' legality featured prominently in the state's courts.[156] The evolution of these disputes and Iowa's booms and busts of local debt finance—and the way the U.S. Supreme Court addressed them in its *Gelpcke v. City of Dubuque*[157] decision—are the immediate backstory of Dillon's Rule.

During the 1840s, Iowa's white settlers concentrated in small towns along the Mississippi and Illinois border. As the settlements grew—with lumber, cattle, and breweries the chief engines—so did the need for reliable local and interstate transport. Steamboats operated only part of the year, and difficult rapids forced other ships to unload weight at various intervals.[158] In the 1850s, four separate railway lines were drawn out from Chicago, terminating just across the river from four major Iowan cities.[159] Connecting the cities to the Illinois lines would assure year-round access to markets further east and beyond.[160] The money was already in place. By 1852 alone, the cities of Dubuque, Clinton, Scott, and Des Moines had approved bond issues ranging from $75,000 to $100,000 to fund railway projects.[161] Months later, work on a connection between Dubuque and Iowa City was underway.[162]

This nascent railroad frenzy almost came to a halt in 1853, when the local debt finance—which had never enjoyed express authorization—came before the Iowa Supreme Court. In a 2–1 vote, the court upheld in *Dubuque Co. v. Dubuque & Pacific Railroad Co.*[163] the right of localities to fund railroads within their territories and the enabling referendum under the Iowa Code of 1851.[164] This decision allayed many concerns surrounding the wave of railway projects lingering from the earlier history but did not extinguish controversy. In a dissent running three times as long as the majority opinion, Justice John Kinney inveighed against the city of Dubuque's bond issue as an involuntary tax levied for no clear governmental purpose.[165] The bond itself, per Kinney, ran contrary to the intent of the framers of the 1846 Iowa

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156 ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM, AND ECONOMIC DEVELOPMENT 89 (1996).

157 68 U.S. 175 (1864).

158 *See* SCHWIEDER, *supra* note 154, at 57–58.

159 *Id.* at 58.

160 *See id.* at 63.

161 *Id.* at 60.

162 *Id.* at 58–62.

163 4 Greene 1 (Iowa 1853).

164 *Id.* at 4–6.

165 *Id.* at 10–11 (Kinney, J., dissenting).

Constitution, who provided for a debt ceiling to avoid "involving the people in those heavy embarrassments [meaning debts] for works of internal improvement."[166] But Kinney reserved the bulk of his attention for the manner in which Dubuque had put its loan proceeds to use—buying stock in the Dubuque & Pacific Railroad (D&PR).[167] Kinney noted that while the majority found Dubuque squarely within its powers under § 114 of the Iowa Civil Code to ask voters to approve extraordinary expenditures for any "road or bridge," the money was going to a private corporation—"in no legal sense a public highway or common road."[168] In closing, Kinney warned that unless the frenzied "spirit [was] soon checked," the total of the various local debts before voters would run to $10 million by 1859.[169] The "feverish excitement" obscured from the "public mind . . . [the] public and private economy as well as natural justice," Kinney declared, ignoring the "loss of private property, and [ ] utter perversion of county and city organization" that lay ahead.[170] Kinney's dissent found no audience. Indeed, only a few months prior to the *Dubuque Co.* decision, the final piece of a rail link between Chicago and New York was completed.[171] Kinney's words rang hollow against this tantalizing opportunity, and by the end of 1853, voters in thirteen counties in Iowa had authorized railroad bonds.[172]

The developmental frenzy grew wider after the *Dubuque Co.* decision. A steady inflow of promoters, a federal land grant of approximately four million acres in 1856, and a gradual standardization of bond terms accelerated projects to such an extent that when lines reached the central portion of the state, towns had to be "created" to serve as stops.[173] But as promoters moved farther west in the latter part of the decade, it was clear that the projects could not continue unabated. Even though most localities only paid contractors when they demonstrated progress, there were myriad opportunities for sharp practices, and there were many stories circulating of promoters and contractors absconding with

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166 *Id.* at 11–12.

167 *Id.* at 2.

168 *Dubuque*, 4 Greene at 12–14.

169 *Id.* at 16.

170 *Id.*

171 Earl S. Beard, *Local Aid to Railroads in Iowa*, 50 IOWA J. HIST. 1, 4 (1952).

172 *Id.*

173 *Id.* at 4–6, 12–13; SCHWIEDER, *supra* note 154, at 62. The standard bond bore 7–10% interest, was redeemable in twenty years, and featured an incentive structure that released funds to railroad companies gradually, on some demonstration of progress. SCHWIEDER, *supra* note 154, at 62; Beard, *supra* note 171, at 4–6.

entire loan issues.[174] Delayed progress on eastern lines further cast new, riskier projections of railroads in even less populated parts of the state in doubt. In 1857, for example, the new reality was apparent when voters in three counties rejected new bond issues.[175]

Even if not quite at the $10 million that Kinney's dissent in *Dubuque Co.* had predicted, the rising total of the railroad debts did not go unnoticed. As early as 1856, the governor called for "some check [to] be imposed" on the ability of localities to issue railroad debts.[176] At the 1857 state constitutional convention, held in the shadow of the evolving Panic of 1857, the fading enthusiasm for new projects and looming fiscal anxieties found expression and compromise in a provision limiting local debts to 5% of the value of their taxable property.[177] When the price of Iowa's staple agricultural products declined—by as much as 40%—the appetite for developmental debts vanished, and no new projects were authorized for another two years.[178]

Although not yet a crisis, the crunch forced localities to either look elsewhere for funds or to question the existing arrangements more closely. The D&PR, for instance, considered floating a loan in Buchanan County, only to determine it had no market, while others clamored for the liquidation of the federal land grant issued in 1856.[179] On the whole, localities grew skeptical of raising the necessary funds to cover new phases of projects and interest payments. County bonds in particular had been subject to sundry fees and heavily discounted—at a rate of 25–35%—at market in New York, sometimes leaving only 60% of the total amount on which the counties still needed to make interest payments, at the disposal of the rail contractors.[180] As late as 1862, one estimate found a scant 731 miles of railroads had been built at a cost between $7 to $12 million.[181] At the same time, localities were increasingly of the belief that private investments would finish financing the rail projects if they bowed out altogether.[182] But for the few localities that chose to go down this path, the *Dubuque Co.* decision stood entirely in their way.

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174 Beard, *supra* note 171, at 8–9.
175 *Id.* at 9.
176 *Id.* at 9–10.
177 *Id.*
178 *Id.* at 11.
179 Beard, *supra* note 171, at 12.
180 *Id.* at 15.
181 *Id.* at 16.
182 *Id.* at 16–17.

Throughout the 1850s, challenges to the local bond finance system heard by the Iowa Supreme Court became more frequent, but the court was unwilling to overturn its construction of § 114 of the Iowa Civil Code in *Dubuque Co.*, fearing that reliance on the holding had become too great.[183] After 1853, the membership of the court varied greatly, but even if a challenge to *Dubuque* had arisen, none of the bench's variations were inimical to the case.[184] Chief Justice George Wright emerged as the greatest opponent to *Dubuque Co.* since Kinney. Wright sought, unsuccessfully, to strike at *Dubuque Co.* in every local bond finance case he heard after joining the bench in 1855. An anti-*Dubuque Co.* majority coalesced after two of its last supporters left the court.[185] In 1859, Wright joined with Justice Lacon Stockton in *Stokes v. County of Scott*[186] to strike down the *Dubuque Co.* court's ruling that § 114 of the Iowa Civil Code enabled counties to issue bonds to fund railway projects.[187] Wright went as far as to sweep away any legal basis for the bonds, including special legislation—thus invalidating all outstanding bonds.[188] Because Stockton concurred only as to the legality of bond issue under § 114, the legality of existing bonds was preserved.[189] But when Stockton left the court less than a year later, the bonds and what remained of the local finance of railways were once again in question.[190]

The *Stokes* decision, the outbreak of the Civil War, and the lingering effects of the Panic of 1857 all but wiped out the appetite for new bond projects in Iowa. Importantly, *Stokes* also left existing arrangements in limbo since localities were still obligated under their original agreements to make further bond issues and transfer them to their railway contractors. The majority in *Stokes* had invalidated only new bond issues that relied on § 114 of the Iowa Civil Code, leaving bond issues authorized by legislation intact. In 1859, Wapello County was the first to renege on an obligation to issue new bonds, prompting suit from its contractor, the Burlington and Missouri River Railroad Company.[191] This suit only found its way to the Iowa Supreme Court in 1862, giving

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183 *Id.* at 15.

184 Beard, *supra* note 171, at 15.

185 *Id.* at 15–16.

186 10 Iowa 166 (1859).

187 *Id.* at 170–71.

188 *Id.* at 177–78.

189 *Id.* at 178–80 (Stockton, J., concurring).

190 Beard, *supra* note 171, at 16.

191 State *ex rel.* Burlington & Mo. River R.R. Co.v. Cnty. of Wapello, 13 Iowa 388, 394 (1862).

Wright the opportunity to strike down the last legal basis for local bond finance. In *State* ex rel. *Burlington & Missouri River Railroad Co. v. County of Wapello*,[192] a unanimous majority struck down two legislative acts from 1855 that had modified procedural rules for bond issues, arguing that they did not constitute a full sanction from the legislative branch. With no basis in law, reasoned Justice Ralph Lowe for the majority, all existing bonds had no force of law and were invalid. The court took notice of the enormity of the decision but could only offer that it was an unfortunate occasion possible even in "the best governed and best intentioned communities."[193]

The decision was immediately hailed throughout Iowa, reflecting a popular sense that the moral obligation of localities to abide by their agreements with contractors had long lapsed, leaving the legal obligations as a vestige. Delays, shoddy work, fraud, and financial mismanagement—many of the railway companies had heavily mortgaged the railways to finance construction—were potent reasons for nonperformance.[194] The *Wapello* decision, goes one editorial, "[broke] the yoke from the neck of innumerable cities and counties who [had] hithertofore labored under a burden most oppressive."[195] The millions of dollars of worthless bonds once again made Iowa, the first state admitted to the Union with a bar on state debt, the locus of the law of public finance.

The impact of *Wapello* on the various railway firms froze projects that were already slowing in the face of the general economic depression loosed by the Civil War. Between 1860 and 1863, only 190 miles of track were built.[196] A handful of railway firms solicited donations of land, some of it swamp land, to restart what they could of the deadlocked projects.[197] There were scarcely any other options. Capital markets farther east were unlikely to be interested in projects dead on arrival. Foreign markets were similarly inaccessible, and there was no foreseeable legal route. Under Supreme Court precedent at the time, *Wapello* was a final judgment since state supreme court interpretations of state law were binding.[198] Only the outsized impact of the *Wapello* decision would have stood as something to invest hope into—a hope that it could not be left to stand.

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192 13 Iowa 388 (1862).
193 *Id.* at 424.
194 Beard, *supra* note 171, at 17.
195 *Id.*
196 *Id.* at 18.
197 *Id.* at 18–19.
198 Leffingwell v. Warren, 67 U.S. 599, 603 (1862).

Like in Iowa, local debt finance of railways in other states increased dramatically after the wave of constitutional restrictions on state debt in the 1840s. But up through 1862, the result overall and in each state had been inconclusive or immaterial to the national picture.[199] In 1853, the Supreme Court of Pennsylvania almost cut short its own locally financed railway bonanza in *Sharpless v. Mayor of Philadelphia*,[200] barely preserving a $1 million bond from Philadelphia and millions more already invested.[201] In the opinion, Chief Justice of the Pennsylvania court Jeremiah Black agonized over what rested on the court's decision.[202] But just as its cursory majority decision in *Dubuque Co.* had coolly touched off a railway frenzy, the Iowa Supreme Court's decision in *Wapello* dissolved promises worth millions of dollars into thin air with little reticence.[203]

Among the many railways affected by the Iowa Supreme Court's attack on local bond finance was the D&PR, the same firm whose grant of bonds from the city of Dubuque had been upheld in 1853. The D&PR was one of the first railways organized to link up to Illinois lines and bridge Chicago and the Mississippi River, planned as a link to the north-south Illinois Central—one of the longest railroads in the country—that sought to reach New Orleans by 1870.[204] As such, the D&PR was well capitalized, with assets exceeding $4.8 million in 1857, almost $2 million of which were bonds alone.[205] Dubuque had been a prime destination for investment due to its position as a riverine gateway to northern Iowa and Minneapolis. The D&PR's prominence eventually attracted the attention of a network of German merchant capitalists from Bremen interested in divesting from trading the newly at-risk staple products of the Southern slave economy and investing heavily in Northern grain and railways.[206]

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[199] *See* Aspinwall v. Comm'rs of Daviess, 63 U.S. 364, 376–79 (1859) (voiding bonds from a county bond issue conducted after a state constitutional amendment expressly disallowing bonds was passed in Indiana); Goddin v. Crump, 35 Va. 120, 152–54 (1837) (holding that railroads were not a sufficiently public purpose for a bond issue); Sharpless v. Mayor of Phila., 21 Pa. 147, 181 (1853) (holding that Philadelphia's $1 million bond was legal on narrow procedural grounds).

[200] 21 Pa. 147 (1853).

[201] *See id.* at 158.

[202] *See id.* at 164–72.

[203] *See Wapello*, 13 Iowa at 423–24.

[204] SCHWIEDER, *supra* note 154, at 60–61, 64.

[205] STATE OF IOWA, REPORT OF THE DUBUQUE & PACIFIC RAILROAD COMPANY 23–25 (1858).

[206] LARS MAISCHAK, GERMAN MERCHANTS IN THE NINETEENTH-CENTURY ATLANTIC 207–08 (2013).

In 1858, the group from Bremen, organized in a small firm called Gelpcke, Keutgen & Reichelt, made a substantial investment in several Iowa railways including the D&PR, on whose board the name partner Herman Gelpcke was placed.[207] Partners Herman Gelpcke and Frederick Keutgen had established themselves in western railway finance from its base in New York, leveraging Keutgen's appointment as Bremish consul and the backing of a new German investment bank.[208] Gelpcke's plans were only upended in 1859 when the city of Dubuque, acting pursuant to the *Stokes* decision, refused to pay the interest on a series of bonds in Gelpcke's possession. Shortly thereafter in 1860, Gelpcke and his partners—all New York residents—sued the city of Dubuque in a federal district court which, following the Iowa Supreme Court cases invalidating the bonds, found for Dubuque, at which point Gelpcke appealed.[209]

In early 1864—the last year with Roger Taney as Chief Justice—the Supreme Court overruled the lower court and its deference to the Iowa Supreme Court rulings in an 8–1 decision. Justice Noah Swayne's majority opinion in *Gelpcke* notably departed from the long-standing principle that state supreme court constructions of state law were binding precedent.[210] This was a principle dating to at least 1809, and only two years prior to his opinion in *Gelpcke,* Swayne himself had ruled on a case involving a similar issue of state law construction, finding that "[i]f the highest judicial tribunal of a State adopt[s] new views as to the proper construction of [ ] a statute, and reverse[s] its former decisions, this Court will follow the latest settled adjudications."[211] Swayne subtly avoided his own rule by noting that it was immaterial to determine whether *Gelpcke* fell within the category of cases where the latest settled decisions controlled.[212] Having freed himself from his own precedent, Swayne characterized the Iowa Supreme Court rulings as "oscillation[s]" in the course of

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[207] *See id.* at 207–08; Timothy R. Mahoney, *The Rise and Fall of the Booster Ethos in Dubuque, 1850–1861*, 61 ANNALS IOWA 371, 413 (2002).

[208] *See* MAISCHAK, *supra* note 206, at 207. In 1860, as a sign of the firm's growing status, Gelpcke was appointed to the board of the New York Central Railroad. *Id.* at 208.

[209] SBRAGIA, *supra* note 156, at 94. At the time, cases arising from the diversity jurisdiction of federal courts went directly to circuit courts.

[210] *See Gelpcke*, 68 U.S. at 205–07. This principle of treating state supreme court constructions as binding, though codified in *Leffingwell*, 67 U.S. at 603, goes back to at least 1809. M'Keen v. Delancy's Lessee, 9 U.S. 22, 32 (1809) (holding against following a Pennsylvania property statute for fear of the "infinite mischief [that] would ensue" if the Court did not follow a rule that was "long established in the state").

[211] *Leffingwell*, 67 U.S. at 603.

[212] *Gelpcke*, 68 U.S. at 205–06.

judicial settlement, and as such, the Court could not be expected to "follow every such oscillation, from whatever cause arising, that may possibly occur."[213] Swayne singled out *Wapello* as an especially aberrant oscillation, out of sync with previous rulings because of its retroactive effect. No contract legally formed could be retroactively voided, and by analogy, Swayne reasoned, the constitutional power of the Iowa legislature to enact laws permitting bond issues could not be redefined.[214] Though the Supreme Court was conscious of the "importance of uniformity in the decisions of . . . the highest local courts, giving constructions to the laws and constitutions of their own States," Swayne ultimately concluded that the Supreme Court must "never immolate truth, justice, and the law, [just] because a State tribunal has erected the altar and decreed the sacrifice."[215]

After it was published, Swayne's opinion in *Gelpcke* achieved notoriety not only for its sudden departure from Supreme Court precedent on state law construction, but also for its decisive endorsement of municipal bond finance.[216] While *Gelpcke*'s importance on the first issue would be superseded by subsequent decisions on federal jurisdiction, the second aspect, which has remained largely forgotten, is where the decision had the most immediate impact.[217] Beyond immediately breathing life back into millions of dollars of Iowan railway bonds, the decision was the first in a series of decisions that legitimated the once legally indeterminate municipal debt market.[218] By the end of the 1860s, the Supreme Court would strike down state supreme court decisions invalidating municipal bond finance in Michigan, Wisconsin, and New York.[219]

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[213] *Id.* at 205.

[214] *Id.* at 205–06.

[215] *Id.* at 206–07.

[216] *See* Swift v. Tyson, 41 U.S. 1, 18–19 (1842) (holding that the federal judiciary would exercise an independent judgment on questions of general law and decline to follow an apparently erroneous state court's decision, but disclaiming any power to impose its view upon the state court).

[217] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79–80 (1938) (overruling *Swift*, 41 U.S. 1).

[218] *See* Bd. of Comm'rs of Knox Cnty. v. Aspinwall, 65 U.S. 376, 384–85 (1860) (establishing that a federal court should grant mandamus where necessary to compel taxation and satisfy its judgments); Cnty. of Mercer v. Hackett, 68 U.S. 83, 96 (1863) (declaring that the Supreme Court would not follow the state court's determination of Pennsylvania railroad aid bonds); Van Hostrup v. City of Madison, 68 U.S. 291, 296 (1863) (validating the local government's authority to take stock for building a railroad to its city); Meyer v. City of Muscatine, 68 U.S. 384, 395–97 (1863) (affirming a city's power to borrow money "for any object in its discretion").

[219] SBRAGIA, *supra* note 156, at 95.

The Court relied on a steadfast application of the public purpose doctrine, under which taxes could only be levied to advance public purposes, to uphold municipal finance across the country.[220] Through the 1870s, the Court held off the twin challenges of attempts to expand the meaning of public purpose—to include manufacturing plants and other business—and Thomas Cooley's incisive critique that a corporation with a public purpose was still a private, profit-making entity.[221]

Over time, the Court's firm grasp on the public purpose doctrine in municipal finance cases elevated the practice to a rarefied status. In *Gelpcke*, Justice Swayne described municipal bonds as having "by universal commercial usage and consent, [ ] all the qualities of commercial paper" strictly for the purposes of defining what the plaintiffs might hope to recover.[222] Such was the progress on protecting municipal bond finance that by 1876, a federal judge lamented that "the adjudications of the Supreme Court of the United States have invested municipal bonds . . . with anomalous and peculiar immunities, and it is now too late to apply the ordinary doctrines of the law of commercial paper."[223] Over the next two decades, the Court and its observers grew to appreciate the Court's role in regularizing the municipal bond market, smoothing over inherent risks by providing a legal bedrock, and making "no investment [ ] as sound as a municipal bond."[224] The subsequent importance in regularizing and legitimating municipal bond finance led by *Gelpcke* is almost undetectable in the majority opinion, which did not mention the municipal bond market or invoke an interest in its preservation. Those arguments are only found in the plaintiffs' brief.

Gelpcke and Keutgen's counsel was the twenty-seven-year-old Samuel White. The young attorney, who went west early in life following fame in the mid-nineteenth-century fashion, had read law and learned to practice in Iowa during the bonanza years of the 1850s, amassing enough experience by 1860 to not seem an

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220 *Id.*

221 *Id.* at 95–96.

222 *Gelpcke*, 68 U.S. at 206.

223 SBRAGIA, *supra* note 156, at 98 (internal quotation marks omitted).

224 *Id.* Professor Charles Fairman, evaluating state supreme court and U.S. Supreme Court cases on municipal bonds, noted that the "preoccupation with marketability was dominant over all other considerations." CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, at 1067 (1971). *But see* Allison R. Buccola & Vincent S.J. Buccola, *The Municipal Bond Cases Revisited*, 94 AM. BANKR. L.J. 591, 604–05 (2020) (arguing that the Court's decisions in the municipal bond cases were not biased toward upholding bonds, and finding that the Court ruled for the repudiating municipality in one-third of cases).

inappropriate choice for such a case.[225] Before the Court, White characterized the dispute as one involving an issue of "greater dignity" than Gelpcke and Keutgen's bonds, the "honor, not of Iowa only, but of all the States" and "the value of millions of securities issued by nearly every State of the Union, and by cities and counties and boroughs in them all."[226] Courts in fifteen states, argued White, had upheld municipal bond finance against a series of challenges centering on their procedural aspects, state constitutional law, and state legislation.[227] In this context, the Iowa Supreme Court's decisions in *Stokes* and *Wapello*—significant departures of their own—were isolated from any authority and illtimed in the "face of the fact that millions of dollars ha[d] been invested."[228] As such, the task before the Court, White laid out, was to decisively establish the legality of municipal bond finance. At risk otherwise were the millions of municipal bonds "treasured on the banks of the Delaware, the Hudson, the Thames, the Seine, and the Rhine," each state and the country's credibility, and, if that were not enough, the rule of law.[229] Validating the bonds validated the legal system behind them. "Is the sway of law among us," White asked the Court in closing, "thus to 'shake like a thing unfirm?'"[230]

Despite his rhetorical flight, White's rendition of the stakes involved in *Gelpcke* suffused the case with very real and timely concerns for the rule of law as the guarantee on which markets stood.[231] White set out very simply that courts had done their part in resolving every constitutional qualm with municipal bond finance, and now the Court needed to act decisively to preserve existing investments and promote new ones by setting aside *Wapello*. Swayne and the majority followed White as to the "unenviable solitude and notoriety" of *Wapello* but skipped over the substance of his plea for their consideration of how reliant municipal bond finance was on their decision.[232] Instead, Swayne made disconnected references to the ubiquity of municipal bonds, the rule in contract law against retroactive invalidation, and the "plainest principles of justice,"[233] ultimately evoking White's

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225 *See* 41 THE BANKER'S MAGAZINE AND STATISTICAL REGISTER 386 (Nov. 1886).
226 *Gelpcke*, 68 U.S. at 179 (1864) (argument for appellant).
227 *Id.* at 187–89 (1864).
228 *Id.* at 190.
229 *Id.* at 190–91.
230 *Id.* at 190.
231 *Gelpcke* 68 U.S. at 190 (argument for appellant).
232 *Id.* at 206.
233 *Id.*

argument and the wartime federal judiciary's keen interest in reestablishing the rule of law.[234]

The end of the Civil War and the *Gelpcke* decision in 1864 saw a reawakening in railway development in Iowa, which had remained dormant since 1860. The activity was now concentrated in the western half of the state, where new lines aimed at markets other than Chicago were envisioned.[235] Despite the controversial record of local debt finance back east, it emerged once again as a preferred strategy for raising funds. But there was an issue with restarting local debt finance. A remaining portion of the 1860s Iowa Supreme Court jurisprudence had barred taxation for the purpose of community stock ownership. As it had in the 1850s, the Iowa General Assembly responded. In 1868, the General Assembly passed a law (1868 Act) authorizing localities to hold votes for raising a tax of no more than 5% of taxable property value for the purpose of gifting the proceeds to railway firms.[236] Several townships and towns in six western counties immediately voted for new taxes,[237] creating the conditions for yet another railway bonanza—until the Iowa Supreme Court struck down the law less than a year later in a sweeping opinion authored by Chief Justice Dillon in the case of *Hanson v. Vernon*.[238]

D. John Forrest Dillon, Local Debt, and Local Power, 1868–1907

This Section explores Dillon's career leading up to the *Hanson* decision and the subsequent, pivotal period during which he created the doctrine that would become known as Dillon's Rule. I closely examine Dillon's *Municipal Corporations*, the treatise that popularized his Rule, in the context of this broader history of his career and thought. What this history shows is that Dillon's Rule was not entirely concerned with redistributing state and local power. Instead, I argue, Dillon's Rule was intended to enable the emerging municipal debt market to discipline local power—a redistribution of public and private power.

At the time of the *Hanson* case, thirty-eight-year-old Dillon was an up-and-coming jurist in Iowa serving his sixth year on the bench of the state's highest court. Over the course of three decades, Dillon would ascend to the pinnacle of the legal profession as a federal circuit judge, a professor at Columbia Law School,

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234 *Id.*
235 SCHWIEDER, *supra* note 154, at 62.
236 *Id.*
237 *Id.*
238 *Id.*

and the author of a foundational treatise on local government law. Dillon was born in the Burned-Over district of western New York in 1831—at the beginning of the Second Great Awakening—and moved as a child with his family to Davenport, Iowa, in 1838, where his father opened an inn.[239] At age nineteen, Dillon finished medical school and began a career as a country doctor on the Iowa-Missouri border.[240] Dillon's medical career was cut short by a hernia that prevented him from riding in a saddle, and on the obligatory days off,[241] Dillon borrowed a copy of Blackstone's *Commentaries* from a lawyer staying at his boarding house.[242] It was there that Dillon resolved to pursue a legal career that brought him back to Davenport, "where he opened a small drug store as a means to leisure for the study of law."[243] Within a year, he was admitted to the bar and opened with a partner a small law office that only lasted until he was elected as a Davenport prosecuting attorney.[244] In 1859, he was elected to the local state district court, "patient, tolerant, full of plain sense and spending

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239 JAMES GRAFTON ROGERS, AMERICAN BAR LEADERS: BIOGRAPHIES OF THE PRESIDENTS OF THE AMERICAN BAR ASSOCIATION, 1878–1928, at 66 (1932).

240 *Id.* at 67.

241 *Id.*

242 *Id.* Dillon left behind surprisingly little in historical archive, in fact, no more than two boxes. His archive, held by the State Historical Society of Iowa, also bears the unmistakable signs of curation. Besides the presence of handwritten instructions to archivists on several documents, it is hard to imagine that Dillon, who was undoubtedly one of the major late-nineteenth-century jurists, left to posterity a meager two boxes of documents. The little correspondence that Dillon left behind consists mostly of laudatory exchanges with mayors and jurists on various special occasions, like the publication of a new edition of *Municipal Corporations* in 1904. The highlight of the collection is a set of notes for an anonymous biography of Dillon that complements some of the published details of Dillon's life. *See* JOHN DILLON PAPERS, STATE HISTORICAL SOCIETY OF IOWA, MS33, Boxes 1–2.

243 ROGERS, *supra* note 218, at 66–67. The full story is more interesting. Dillon's practice in Farmington, the settlement on the Missouri border in which he took up residence, was decidedly unprofitable thanks to two long-standing medical practices in the area. In a letter to an Iowa medical society recounting this time in his life, Dillon described the boredom of a practice bereft of income and his disappointing life in a crumbling boarding house. Dillon recounted the event that drove him out of this boredom and out of the medical profession and thus "chang[ed] the whole current and career of [his] life." One day, when both of Farmington's established physicians were away, Dillon was called on to attend to a group of laborers at a brickyard several miles out of town. By the time Dillon arrived on foot—he had an inguinal hernia and was unable to ride horseback—he found the laborers in the throes of an attack of cholera. After administering palliative doses of laudanum and stimulants and tending to the men for hours, Dillon returned to Farmington defeated. He did not address whether the laborers lived or died, noting only that he evaded talking about the subject ever since. The next day, as Dillon remembered it, was the day he asked his roommate in the boarding house for their copy of Blackstone's *Commentaries*. *See* Letter from John Forrest Dillon to Jenkins (Feb. 1, 1907), *in* JOHN DILLON PAPERS, STATE HISTORICAL SOCIETY OF IOWA, MS33, Box 1, Folder 19.

244 ROGERS, *supra* note 239, at 67.

every spare hour in the accumulation of legal lore," purportedly dedicating his free time during his first two years to reading every reported Iowa case and publishing a digest.[245] In 1863, he was elected to the Iowa Supreme Court, during which time he resolved to "write a first-class work on some legal topic," culminating in his *Treatise on Municipal Corporations*.[246] The treatise would establish Dillon as a nationally recognized jurist, prompting his appointment to the Eighth Circuit Court of Appeals and then eventually to the faculty of Columbia Law School.[247] He then established a lucrative private practice advising railway companies in New York.[248] When he died in 1914, Dillon was hailed as one of the greatest jurists of his generation.[249]

Some scholars situate Dillon among the many ambitious, entrepreneurial lawyers who sought to break into the emerging world of corporate law in late-nineteenth-century New York City, while more critical interpretations have described Dillon as an "academic ally of the robber barons in the Gilded Age."[250] The paucity of historical sources surrounding Dillon's life—he left no organized collection of papers—leaves little from which to discern his intentions. One aspect of Dillon's rise that is clearly discernible is his keen networking ability. In 1853, Dillon married Anna Price, the daughter of the railroad builder, congressman, and cofounder of the Iowa Republican Party, Hiram Price.[251] U.S. Supreme Court Justice Samuel Miller—to whom he dedicated *Municipal Corporations*—was an early and close mentor.[252] As a

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245 *Id.*

246 *Id.* at 66–68.

247 *Id.* at 68.

248 *Id.*

249 ROGERS, *supra* note 239, at 66, 68–70.

250 Williams, *supra* note 1, at 90–91 (attributing this characterization of Dillon to works in the Progressive tradition).

251 In a three-hundred-page jeremiad from the 1890s, an anonymous author accused Dillon of conspiring to enrich himself and his father-in-law Hiram Price in a series of Eighth Circuit decisions from the 1870s. 1 JOHN R. VILE, GREAT AMERICAN LAWYERS: AN ENCYCLOPEDIA 217 (2001).

252 The influence of Miller on Dillon is difficult to characterize without any direct evidence—correspondence between the two is unavailable in either of their archives. But over the course of their careers, Miller and Dillon's views on the enforceability and policy virtues of municipal debt would come to differ to a significant degree. Dillon, whose legal career was spent mostly on the bench, became a staunch believer in the sanctity of social order secured on firm private property rights. Dillon believed the power to raise debt had caused Iowan municipalities to exceed their powers and threaten property rights, especially those of bondholders. Dillon's decision in *Hanson* in 1869 would strike down municipal debt on this basis. *See Hanson*, 27 Iowa at 88–90.

Miller spent much of his early career as a booster and lawyer for railway projects in his hometown of Keokuk, Iowa, during the boom years of the 1850s. The collapse of a major

judge, Dillon made full use of the era's more marked intimacy between the bench and the bar, setting up a receptive audience for his work.[253] Dillon also had the benefit of being Sidney Dillon's nephew. Sidney Dillon had risen from the same rural obscurity as his nephew to become an important railroad contractor in the 1850s and eventually president of the Union Pacific Railroad after executing a successful takeover with his partners Jay Gould and Russell Sage in 1874.[254] John Forrest Dillon's debut in New York society in 1879,[255] with Gould as a client, appointments as general counsel to Union Pacific and Western Union, and membership in the Union League Club, no doubt involved his uncle.[256]

Dillon's meteoric rise and his turn to municipal law are also products of the boomtown, entrepreneurial milieu of midcentury Iowa. The heady mix of local railway finance, widespread proliferation of railway companies, and active out-of-state investment created a particular demand for lawyers and gave them an easily portable expertise. Samuel White, counsel for plaintiffs in *Gelpcke*, became a prominent railway financier and lawyer in New York after his years in Iowa and star turn in the landmark case.[257] James Grant, a North Carolinian friend of Dillon's and lawyer in 1850s Davenport, became the "masterful" go-to counsel for bondholders across the country and a successful railroad investor.[258]

But unlike these men, Dillon did not limit his ambitions to his own career; when *Hanson* came before his court in 1869, it became clear that Dillon intended to make a mark on municipal government law. A year prior, he had issued two decisions, *City*

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project in Keokuk during the 1860s and the economic devastation it wrought transformed Miller's thinking on the topic, and for years he assiduously represented Iowan cities seeking to get out of their debt agreements. By the time he joined the U.S. Supreme Court in 1862, Miller believed that municipal debt was a corrupt enterprise that enriched Eastern capitalists at the cost of the suffering of ordinary Iowans. Ironically, Dillon's Rule would become a useful tool in Miller's antibondholder dissents during the 1870s, but toward entirely different purposes. Dillon's goal, as this Part explores, was to empower bondholders and the municipal debt market. *See generally* Michael A. Ross, *Cases of Shattered Dreams: Justice Samuel Freeman Miller and the Rise and Fall of a Mississippi River Town*, 57 ANNALS IOWA 201 (1998); FAIRMAN, *supra* note 224; Charles Fairman, *Justice Samuel F. Miller*, 50 POL. SCI. Q. 15 (1935).

253 BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 143 (1942); *see* MAURY KLEIN, THE LIFE AND LEGEND OF JAY GOULD 235 (1986).

254 VILE, *supra* note 251, at 217.

255 *See* Williams, *supra* note 1, at 91.

256 *See* VILE, *supra* note 251, at 217; THE UNION LEAGUE CLUB OF NEW YORK 62 (1911).

257 *See* THE BANKER'S MAGAZINE, *supra* note 225, at 386.

258 FAIRMAN, *supra* note 224, at 952.

of Clinton v. Cedar Rapids & Missouri River Railroad Co.[259] and *Merriam v. Moody's Executors*,[260] both featuring an early iteration of his restrictive vision of municipal power.[261] His decision in *Hanson* reveals a zealous legal imagination at work on transforming the legal status of municipalities.[262] Drawing on a mastery of the state and national case law and a keen awareness of the political stakes, Dillon abstracted the simple question of the constitutionality of the 1868 Act authorizing municipalities to enact taxes to fund new railway debts into one about private property rights vis-à-vis legislative power.[263] Because the public purpose of the railway corporations receiving the tax proceeds was only incidental to their primary purpose of making profits, the Act did not enable a tax but a "coercive contribution in favor of private railway corporations," and was unconstitutional.[264] In grandiose dicta that runs throughout the decision, Dillon set out a distinct vision of municipal bond finance that underlies the otherwise prosaic ruling. "Much of the general prosperity and much of the unexampled activity, energy and enterprise which distinguish the present era," Dillon continued, "is due to the all prevailing conviction that private property is secure."[265]

The bonanza years fed by local railway finance had been an "artificial growth caused by the unnatural stimulus of public taxation in favor of private enterprises."[266] The system had amounted to an unnecessary and "heavy incubus of debt" for railways that would have been built by the natural growth impelled by entrepreneurs secure in their rights.[267] Localities had followed an errant path laid down by *Dubuque* in 1853, leaving "[d]isaster, the child of extravagance and debt, and dishonor, the unbidden companion of bankruptcy," as the "bitter but legitimate consequences" awaiting the borrowers.[268] As such, Dillon's decision

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[259] 24 Iowa 455 (1868).

[260] 25 Iowa 163 (1868).

[261] *City of Clinton*, 24 Iowa at 470 (holding that the City of Clinton could not prevent Cedar Rapids & Missouri Railroad Co. from building over the city streets because the Iowa legislature had granted the company the right to do so); *Moody's Ex'rs*, 25 Iowa at 170 (restricting the powers of municipal corporations to a specific granted list and no others).

[262] *See generally Hanson*, 27 Iowa 28.

[263] *Id.* at 36.

[264] *Id.* at 45.

[265] *Id.* at 43.

[266] *Id.* at 59.

[267] *Hanson*, 27 Iowa at 34.

[268] *Id.* at 33; *see also* Benbow v. Iowa City, 74 U.S. 313, 315 (1868) (ordering a municipal corporation to levy a tax to pay bonds that were issued to pay for railroad company stock); Rogers v. Burlington, 70 U.S. 654, 666–67 (1865) (rejecting the argument that a power to borrow did not include a power to lend to railroads).

striking down the 1868 Act would benefit the railway companies in the long run, even if they were disappointed in its immediate impact.[269] To a large extent, Dillon's decision is largely in keeping with what the Supreme Court sought in *Gelpcke,* a thorough vindication of the rule of law as the soundest basis for economic life. For Dillon, the inner workings of municipal finance revealed the great extent to which the protection of private property rested on the relation between cities and states. When states sought to create and incentivize municipal finance schemes, Dillon argued, they clothed localities with tremendous powers, like taxation, all trained on private property rights.[270] Although visible in a series of hypotheticals in the *Hanson* decision,[271] the proposition was restated clearly by Dillon in the preface to the first edition of *Municipal Corporations*, which in 1869 was already five years in the making.[272]

In the end, Dillon's decision in *Hanson* did little to protect private property rights in Iowa. When the authors of the 1868 Act learned that President Ulysses S. Grant had appointed Dillon to the newly created Eighth Circuit Court of Appeals,[273] a law superseding *Hanson* was prepared and passed when the new legislative session opened in early 1870. The law was ultimately upheld by the Iowa Supreme Court.[274] From his new position in St. Louis, Missouri, Dillon privately fumed.[275] But outside of Iowa, *Hanson* found a welcome audience in the emerging public purpose doctrine and adherents to what would come to be known as classical legal thought. Michigan Supreme Court Justice Thomas Cooley's 1868 treatise, *Constitutional Limitations*—which Dillon cited extensively in *Hanson*—was one of the first major restatements of the public-private distinction.[276] In it, Cooley argued stridently for the proposition that states could only tax and spend in the public interest to protect individual liberty and property and not to promote common interests.[277] In 1870, Cooley struck down a railway bond issue in *People* ex rel. *Detroit & Howell Railroad Co. v.*

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269 *Hanson*, 27 Iowa at 34, 59–60 (acknowledging that the opinion "will no doubt disappoint" but that "the professional and general judgment of men will assent . . . to the inviolability of private property").

270 *See id.* at 43–44.

271 *Id.* at 55–58.

272 *See* DILLON, *supra* note 4, at v–vi.

273 *See* VILE, *supra* note 251, at 217.

274 Steward v. Bd. of Supervisors of Polk Cnty., 30 Iowa 9, 11 (1870).

275 *See* FAIRMAN, *supra* note 224, at 990.

276 *See generally* COOLEY, *supra* note 12.

277 *See* COOLEY, *supra* note 12, at 487–88.

Township Board of Salem,[278] applying the public purpose doctrine as laid out in his treatise and citing repeatedly to *Hanson*.[279] Cooley, together with Dillon, John Norton Pomeroy, Samuel Miller, and Christopher Tiedeman would soon become known as the laissez-faire constitutionalists, the foremost public law exponents of classical legal thought.[280] Over the next several decades, these jurists would attempt to elevate the doctrines of the private law of property and contract to a kind of higher law under which few, if any, mixtures of public and private spheres (regulation, mostly) should survive.[281] Dillon's *Municipal Corporations*, published in 1872, would play no small role in this effort and would bring Dillon to the very forefront of the legal profession.

Dillon published the first edition of the *Municipal Corporations* in Chicago.[282] The fruit of eight years' work, the treatise found immediate success, due to the fame Dillon's decision in *Hanson* had garnered him.[283] Dillon placed before his readers an all-encompassing, twenty-three-chapter, eight-hundred-page statement of the law composing, defining, and governing local governments. No detail was too minute, Dillon insisted, when exploring a branch of the law on which no American work existed.[284] Dillon's experience in Iowa, where the "powers, duties, and liabilities of municipalities were presented at almost every term," is mentioned in the first lines of the preface.[285] What follows is the clearest expression, in all of Dillon's prior and subsequent writings, of the influence of the debt-inflected law and politics of midcentury Iowa on Dillon's restrictive theory of local power.[286]

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[278] 20 Mich. 452 (1870).

[279] *Id.* at 475–79, 494 (1870) (prohibiting the use of public money to finance a privately owned railroad).

[280] The laissez-faire constitutionalists, though concerned with the same ends, were not great allies of the disciples of Langdellian legal science that made up the more prominent portion of classical legal theorists. Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 496–97 (1996) (book review); *see also* HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970, at 103 (2014).

[281] *See generally* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886–1937 (1998). The logical conclusion of this process is thought to be the infamous *Lochner v. New York*, 198 U.S. 45 (1905), which struck down a maximum hour regulation on substantive due process grounds. *Id.* at 64–65. *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RSCH. L. & SOCIO. 3 (1980).

[282] *See generally* DILLON, *supra* note 4.

[283] *Id.* at v.

[284] *Id.* at vi–vii.

[285] *Id.* at v.

[286] *See generally id.*

Dillon sketches out a general theory of local government in the preface and historical introduction to *Municipal Corporations*. In its relatively short history, the American municipality had become unlike any other form of municipal government relative to other parts of the world because of its proliferation and accurate reflection of the country's decentralized, republican pattern of life.[287] Dillon drew this conclusion from a survey of municipalities in Greco-Roman antiquity, medieval Europe, Reconquista Spain, and modern England.[288] According to this survey, there had been an incomplete protection and enjoyment of the rights and privileges of freedom in these municipalities. England especially, to Dillon, had erred in the creation of the municipal corporation, a vestige of struggles for autonomy from the crown that vested far too much power in far too few persons.[289] The English corporators, numbering no more than thirty in some places, were formed from a single party and served life terms. They governed without popular support, sought only to expand their own power, and embarked on extravagant spending.[290] The result, per Dillon, was the set of reforms embodied by Parliament in the Municipal Corporations Statute of 1835.[291]

In the American municipality, Dillon found an evolved English local corporation, open to many in assemblies, focused on effective self-governance, and stripped of the excess power susceptible to abuse. Together, American municipalities made real the virtues of decentralization and "love of liberty and regard for private rights and property."[292] But the evolution was still incomplete. The best leaders were not always chosen to lead and were quick to "merge their *individual conscience* in their corporate capacity," using their positions to advance schemes in search of "legitimate spoil" that they would never see as appropriate on their own.[293] In response, the governed would "not scruple to make demands which they would never make against an individual," incentivizing "unwise" and "extravagant" decisions.[294] These decisions were those "which can better be left to private enterprise, as, for example, to build markets," and they exceeded the object of municipal governance, "pervert[ing] the institution from its

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287 *See* DILLON, *supra* note 4, at 20.
288 *Id.* at 1–17.
289 *Id.* at 13–15.
290 *Id.* at 16.
291 *Id.* at 11–17.
292 DILLON, *supra* note 4, at 21.
293 *Id.* at 21–22 (emphasis in original).
294 *Id.* at 22 (emphasis omitted).

legitimate ends . . . requir[ing] of it duties it is not adapted satisfactorily to execute."[295] Legislatures were the main culprits, Dillon argued, in inappropriately expanding the power and purview of municipalities. "Among the most conspicuous instances of such legislation" had been

> the power to aid in the building of railways, to incur debts, often without any limit, or any which is effectual, and to issue negotiable securities. The result has too often been that debts are incurred so large that they press with disastrous weight on the municipality and its citizens.[296]

Dillon believed that restrictions on executing, raising taxes for, or issuing debt for any "extra-municipal projects," along with a ban on special charters in favor of a series of general municipal incorporation laws, were required to restore order to municipalities.[297] The amounts and purposes for which new debts and new taxes could be issued would be sharply circumscribed to fixed numbers and only to further exercise the traditional police powers.[298] Along with changes to the structure of municipal governance and a judiciary suspicious of constructive powers, Dillon argued, the municipal corporation would revert to its intended functions, and by forcefully restating these functions, *Municipal Corporations* was an indispensable first step.

The treatise's twenty-three chapters defining municipalities scaffold a general sentiment against municipal power that came to be known as Dillon's Rule.[299] In comparison to Dillon's Rule, the scaffolding of *Municipal Corporations* is where the influence of municipal finance on Dillon is most evident. The linchpin of the structure is, unsurprisingly, the public-private distinction. But in establishing this new structure for municipal debt, Dillon did not wield the public-private distinction exclusively to narrow

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295 *Id.*

296 *Id.* at 22–23.

297 *See* DILLON, *supra* note 4, at 23.

298 *Id.*

299 Dillon defined the powers of municipalities in the following way:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in *express words*; second, those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; third, those *essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable.

Id. at 101–02 (emphasis in original). Dillon relied almost entirely on a long quote from a decision by Massachusetts Chief Justice Lemuel Shaw applying the doctrine of ultra vires to a municipal corporation to create this formulation. *Id.* at 102–03 (quoting Spaulding v. City of Lowell, 40 Mass. 71, 74–75 (1839)).

municipal powers in finance. Rather, he used the public-private distinction to place the municipal debt market on a firm legal basis vis-à-vis municipalities and to enable municipalities' preferences to discipline the exercise of local power.

Dillon began by characterizing the rights and duties of state legislatures in municipal finance. First, he argued that implied in the state's taxing power is a duty to ensure localities do not inappropriately share in it. Specifically, this meant keeping an eye on whether localities used taxes for anything other than narrowly defined public purposes. Here, Dillon had in mind the kinds of funding schemes that gave localities an active role in otherwise private development projects, like those that involved using debts to buy controlling stakes in railroad companies.[300] Second, Dillon stated that municipalities enjoy no charter-vested rights of appropriating revenue that states must respect.[301] He then moved on to the correlative status of municipalities. Here, Dillon distinguished between the municipal power to borrow and the power to issue negotiable securities, describing the former as a long-standing implied power of municipalities and the latter—one of the rule-skirting innovations of Iowan municipalities—as an expedient that had circumvented existing law.[302] Dillon then conceded that the use of debt to aid railways had a sound legal footing, even if "[f]raud usually accompanies its exercise, and extravagant indebtedness is the result."[303] He further added that only express grants of power permit railway aid, that no deviation from the letter of the grants could be made, and that in general terms no participation in private company stock could result.[304] Lastly, and perhaps most importantly, Dillon characterized the rights of municipal creditors, beginning with a long, approving recitation of the U.S. Supreme Court's 1860s jurisprudence on municipal debt.[305] For Dillon, state legislatures were expressly barred from abrogating the "constitutional rights of creditors," to the point that they could require municipalities to pay debts that were not otherwise legally binding.[306] Creditors also had ample recourse to the writ of mandamus in the event of default.[307]

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300 DILLON, *supra* note 4, at 67–68, 556–57.

301 Dillon limited this to taxes assigned to creditors and barred garnishment. *Id.* at 79–80, 112.

302 *Id.* at 126–30; *see also Rogers*, 70 U.S. at 666–67.

303 DILLON, *supra* note 4, at 144–50.

304 *Id.*

305 *Id.* at 401–05.

306 *Id.* at 80 (emphasis omitted).

307 *Id.* at 638–47.

Taken together, these provisions defined the murky boundaries of state and municipal power in financial matters against one another, but also around the municipal debt market. During the 1860s, the Supreme Court had led the way, in Dillon's mind, against the "injustice and odium of repudiation" that the Iowan municipalities had unleashed with their attempts to renege on their debts, repeatedly and correctly striking down sympathetic state court decisions.[308] Even though the Court had "upheld and protected the rights of such creditors with a firm hand . . . [and] with such striking energy and vigor," the efforts were not harmonious with similar decisions in state courts.[309] Thus, while jurists and even the public understood that municipalities ought to learn the lesson that if "they issue negotiable securities, they cannot escape payment if these find their way into the hands of innocent purchasers," the law was not consistent.[310] Here, Dillon extended the logic of his decision in *Hanson*—that the problem with municipal debt was the method of its use and not in its mere existence. But the reference to innocent purchasers reflected a new concern for the municipal debt market beyond the constitutional concerns animated by the public-private distinction, which the structure outlined in *Municipal Corporations* brought into unison.[311] This created a duty for state legislatures to guarantee the financial conduct of municipalities, protected but narrowed the municipal power to borrow, and conferred substantive and procedural protections on investors. In this formulation, cities were passive elements of the municipal debt market. Since cities had been prone to excesses in municipal finance that were, like Iowa's, "baneful in the last degree," they required limitations from two directions to comport with their constitutional function.[312] The first prong limited local power from above, by assigning states supervisory powers over local finance, and the second prong did so from below,

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[308] DILLON, *supra* note 4, at 402.

[309] *Id.* at 403; *see also* FAIRMAN, *supra* note 224, at 1010–15.

[310] DILLON, *supra* note 4, at 403. *See* Supervisors v. Durant, 76 U.S. 415, 417–18 (1869) (holding that county and city officials must levy taxes to repay bonds); Riggs v. Johnson Cnty., 73 U.S. 166, 198–99 (1867) (deciding that federal mandamus was necessary to ensure repayment of bonds); *see also Rogers*, 70 U.S. at 666–67 (1865) (holding that the power to borrow includes the power to lend for railroad projects); *Benbow*, 74 U.S. at 313 (1868) (ordering that a municipal corporation use a tax to pay bonds); *Mayor v. Lord*, 76 U.S. 409, 414 (1869) (upholding a writ of mandamus to require the city to pay bonds).

[311] *See* J. WALTER JONES, THE POSITION AND RIGHTS OF A BONA FIDE PURCHASER FOR VALUE OF GOODS IMPROPERLY OBTAINED 14–17 (1921). Without guarantees for the innocent purchaser, the entirety of the market collapses under false expectations.

[312] DILLON, *supra* note 4, at 145.

by protecting municipal creditors and the municipal debt market against default and repudiation.

Four more editions of *Municipal Corporations* would appear after 1872, the last appearing in 1911.[313] Dillon's fame earned from his influential early decisions on local debt finance propelled the success of *Municipal Corporations*. The expanse of the treatise lent itself to wide applicability, but by the late 1870s specific citations to sections of *Municipal Corporations* in state court decisions gave way to a more general pattern of citing multiple sections of the treatise as Dillon's Rule.[314]

The success of his treatise and his membership in Gilded Age New York sharpened the political vision that had been evolving since his time in Iowa. As Professor Sven Beckert noted, the 1870s marked the beginning of the ascendance of "merchants, industrialists, bankers, and professionals" in New York's municipal affairs.[315] These individuals, like Dillon, were concerned with protecting their interests against the rising tide of working-class agitation. They trained their efforts on the corrupt Tammany Hall clique, "excessive legislation" on topics not essential to economic development (and their own gain), and the disenfranchisement of the working class.[316] Dillon's restrictive vision of local power went hand in glove with their vision of New York. More broadly, Dillon's Rule reflected the Gilded Age's "prevailing legal-administrative understanding of the city as [a] distinctly limited corporate body," which would soon become the target of a generation of reformers.[317]

By the turn of the century, Dillon, Thomson & Clay—one of Dillon's private practices—had become the counsel of choice for municipalities seeking to list their bonds on the New York Stock Exchange. These listings dotted announcements in the financial press.[318]

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313 JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed. 1911) [hereinafter DILLON, COMMENTARIES].

314 *See, e.g.*, WIECEK, *supra* note 281, at 95–97.

315 SVEN BECKERT, THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE AMERICAN BOURGEOISIE, 1850–1896, at 1, 207 (2001).

316 *Id.* at 210–16.

317 WILLIAM J. NOVAK, NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE 243–45 (2022).

318 In one volume of the *Commercial and Financial Chronicle* from 1910, eleven separate municipal bond issues are described in prospectuses as having had their "legality approved by" one of Dillon's two law firms (Dillon, Thomson & Clay or Dillon & Hubbard) or otherwise referenced as having received their counsel. 90 THE COMMERCIAL & FINANCIAL CHRONICLE 2336 (Apr. 2, 1910).

On the lecture circuit during the 1880s and '90s, Dillon inveighed against those who attacked property in the name of "various heresies that go under the general name of socialism and communism" in advocacy of progressive taxation and inheritance taxes.[319] He stated that the intense labor agitation of the period had enlivened the "despotism of the many" and presented the "insidious, more specious, and dangerous shape of an attempt to deprive the owners—usually corporate owners—of their property by unjust or discriminating legislation in the exercise of the power of taxation, or of eminent domain, or of that elastic power known as the police power."[320] In 1893, Dillon gave the Storrs Lectures at Yale Law School, rhapsodizing about the supremacy of the law and the duty of the lawyer and jurist to uphold the "primordial rights" of contract and private property inherent in common law.[321] As long as the country was secure in these rights, the "baneful exotics" of socialism, communism, and anarchism; the "unreasoning and desperate remedies of caste, and hunger and despair" in Europe would never take root in the United States.[322]

By the time the Supreme Court enshrined Dillon's Rule in *Hunter v. City of Pittsburgh*,[323] Dillon was largely resting on his laurels, having served on the first New York City Charter Commission in 1898, his last major project other than an extensive biography of Chief Justice John Marshall.[324] In the preface to the 1911 edition of *Municipal Corporations*, eighty-year-old Dillon noted wistfully that he was finally taking leave of the book that had been his "companion of the greater part of a prolonged professional career."[325] In the four decades since the first edition, new chapters on municipal pensions and civil service laws appeared, reflecting the rapid transformation of the cities from the first edition, which featured ample discussion of horse-drawn trolleys.[326] Dillon died on May 5, 1914, aged eighty-three, at Knollcrest, his 250-acre estate in northern New Jersey.[327]

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319 WIECEK, *supra* note 281, at 96 (internal quotation marks omitted).

320 *Id.* (internal quotation marks omitted).

321 TWISS, *supra* note 253, at 185–86 (internal quotation marks omitted); JOHN F. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 226 (1894) [hereinafter DILLON, LAWS AND JURISPRUDENCE].

322 DILLON, LAWS AND JURISPRUDENCE, *supra* note 321, at 357.

323 207 U.S. 161 (1907).

324 VILE, *supra* note 251, at 217, 219.

325 DILLON, COMMENTARIES, *supra* note 313, at x.

326 *Id.* at viii; DILLON, *supra* note 4, at 314, 501, 541, 594, 600.

327 VILE, *supra* note 251, at 217.

As this Part has argued, Dillon's Rule is properly understood as an outgrowth of the history of U.S. public finance. And as this Section has shown, Dillon interpreted this history through the unique vantage of Iowa and an ideological conviction that securing private property rights was the law's central aim. From this, Dillon prescribed a wholesale limitation of local power as a fix for the immediate problem of addressing what he saw as the overreach of local power into economic development and the longer-term concern of upholding the order of private property. From this reading, the transfer of local power to states embodied in Dillon's Rule emerges as a procedural feature, rather than substantive element, of Dillon's prescription.

III. DILLON'S RULE AND PRIVATE POWER IN CITIES

Although nearly a century and a half has passed since John Forrest Dillon created his Rule, it has not changed dramatically in its substance or function, even as home rule emerged and fixed itself into U.S. law.[328]

Dillon's Rule still distributes public and private power in the places where it might seem to distribute power only between states and cities. What has changed, and dramatically so, are the size and scope of city government and urban life. Dillon would likely recoil at the contemporary power of our cities to regulate, tax, and zone. But the jurist would also find solace in seeing how his Rule has held the line against city power, despite the growth of home rule. This Part shows how Dillon's Rule still restrains cities from wielding full fiscal powers, how it compels cities to subscribe to a market-defined version of local economic development, and how it blocks efforts to address climate change in cities. In the same way that the historical context is vital for understanding the Rule, the contemporary context of cities is vital to perceiving the depth of the problem presented by the Rule's ongoing constraints on city power. That context is one defined by economic

[328] Thirty-nine states apply Dillon's Rule to local governments in urban, suburban, and rural contexts, according to variables like their legal form (city, county, special district), population size, or date of incorporation. TRAVIS MOORE, NEB. LEGIS. RSCH. OFF., DILLON RULE AND HOME RULE: PRINCIPLES OF LOCAL GOVERNANCE 1–2 (2020). Home rule, at least as divided into structural, functional, and fiscal powers, did not fully eclipse Dillon's Rule. In the Midwest, for example, structural (design of government) and functional (broader power of self-government, like passing ordinances) are the most extensive powers granted in states that offer some form of home rule to localities. Fiscal power is less commonly granted as extensively as structural and functional powers. *See* SAMUEL B. STONE, IND. UNIV. PUB. POL'Y INST., HOME RULE IN THE MIDWEST 4 (2020). In this sense, Dillon's Rule still casts a sizable shadow on local government law.

and environmental problems that disparately fall on cities with large communities of color.[329] By limiting cities' powers against private actors, Dillon's Rule is stifling the ability of cities to address, repair, and mitigate these problems. In the following sections, I focus on three different cases where the Rule impedes city action on important urban problems: local finance and affordable housing, local economic development, and climate change adaptation and mitigation strategies.

A. Local Finance

One of the principal areas in which Dillon's Rule holds back cities and their efforts to address ongoing challenges is local finance. Historically, local fiscal power was not one of the areas in which home rule had a lasting influence.[330] Over the course of the twentieth century, Dillon's Rule was part and parcel of a general centralization of power in states, including over local fiscal matters.[331]

An illustrative example of the enduring influence of Dillon's Rule on local finance lies in North Carolina. Like most states, North Carolina does not apply one local government rule to all cities or all aspects of city power uniformly. Formally, North Carolina moved away from the uniform usage of Dillon's Rule in *Homebuilders Ass'n of Charlotte v. City of Charlotte*,[332] which replaced the Rule with a rule of broad construction that now governs most questions of local authority.[333] There are, however, notable exceptions to the broad construction rule.

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[329] *See* Renee N. Salas, *Environmental Racism and Climate Change—Missed Diagnoses*, 385 NEW ENG. J. MED. 967, 968 (2021); Laura Pulido, *Racism and the Anthropocene*, *in* FUTURE REMAINS: A CABINET OF CURIOSITIES FOR THE ANTHROPOCENE 116, 117–20 (Gregg Mitman, Marco Armiero & Robert S. Emmett eds., 2018); U.S. ENVTL. PROT. AGENCY, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS 76 (2021).

[330] *See* John G. Grumm & Russell D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 126–28 (1974); Erin Adele Scharff, *Powerful Cities: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292, 300, 303–05 (2016); Barron, *supra* note 14, at 2345–46.

[331] Grumm & Murphy, *supra* note 330, at 128–29. In 1913, shortly before John Forrest Dillon's death, 79.4% of combined state and local revenues were raised by localities. By 1970, localities only raised 38.1% of the total. *Id.* at 128 tbl.1.

[332] 442 S.E.2d 45 (N.C. 1994).

[333] *Id.* at 49–50. Subsequently, the court narrowed the applicability of the broad construction rule by first looking to the plain meaning of the statute in *Smith Chapel Baptist Church v. City of Durham* (*Smith Chapel I*), 502 S.E.2d 364, 367–68 (N.C. 1998), and *Smith Chapel Baptist Church v. City of Durham* (*Smith Chapel II*), 517 S.E.2d 874, 878–81 (N.C. 1999).

The most important exception lies in local finance. North Carolina's constitution and laws governing local finance limit new taxes to sales and use taxes.[334] Property tax increases require a popular vote. This is also part of a general requirement that every locality must have a balanced budget.[335] The practical effect of this straitjacketed local finance is that cities are severely limited in finding revenue with measures like impact fees, purpose taxes, and tax incentives to fund new initiatives.[336] The only other source of finance left to local governments in this context is debt.

But local debt finance in North Carolina is also subject to a distinct kind of restriction.[337] No local government in the state is allowed to issue debt on its own. A local government must first obtain the approval of the Local Government Commission (LGC), a nine-member board in the state treasurer's office. The LGC oversees the financial operations of all local governments in the state, focusing on debt issuance as well as budgetary and fiscal matters.[338] To approve a bond issue, the LGC first evaluates the bond amount, the projected effect on local property taxes, and the marketability of a bond at a reasonable interest rate.[339] The LGC's oversight powers outside of bond issues extend to local budgets and fiscal policy, involving periodic audits and stringent distress monitoring.[340] These powers are more extensive than oversight powers found in other states.[341] In the event that a local government begins to experience distress, the LGC can assume emergency powers over its finances.[342]

The LGC was created in 1932 during the aftermath of the Great Depression–era wave of municipal defaults that hit North

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334 N.C. CONST. art. V, § 4, cl. 2.

335 N.C. GEN. STAT. § 159-8 (2022).

336 Quality Built Homes Inc. v. Town of Carthage, 789 S.E.2d 454, 458 (N.C. 2016) (invalidating most kinds of municipal impact fees).

337 Supervision of local finances by states is not unusual as such, but the extent of the LGC's powers is unique. *See* Philip Kloha, Carol S. Weissert & Robert Kleine, *Someone to Watch Over Me: State Monitoring of Local Fiscal Conditions*, 35 AM. REV. PUB. ADMIN. 236, 238–39 (2005) (describing state measures to oversee local government finances). Takeovers by fiscal control boards invoked in times of acute distress are usually limited in time and scope. *See* Note, *Missed Opportunity: Urban Fiscal Crises and Financial Control Boards*, 110 HARV. L. REV. 733, 736–38 (1997); Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1439–40 (2014).

338 Charles K. Coe, *Preventing Local Government Fiscal Crises: The North Carolina Approach*, 27 PUB. BUDGETING & FIN. 39, 41 (2007).

339 *Id.* at 40–41.

340 *Id.* at 41.

341 *Id.* at 41. States most often require localities to follow generally accepted accounting principles and to submit annual reports. *Id.*

342 Coe, *supra* note 338, at 43. The LGC focuses on detecting and preventing distress before it becomes widespread. *Id.*

Carolina especially hard.[343] Although state courts were beginning to treat local power more deferentially during the 1930s, the LGC was clearly a product of the preceding era that had featured a "rigorous" application of Dillon's Rule.[344] In this sense, one might describe the LGC as the institutional embodiment of Dillon's Rule in spirit and, more interestingly, in letter, as it specifically deputizes states to adjust local economic policy to market preferences. The latter-day consequence of this, unsurprisingly, is that markets and ratings agencies describe the LGC as a model of fiscal management fit for export around the country.[345] Despite its relatively average population and lower-end median income, North Carolina has the most local governments in the highest ratings tier compared to any other state.[346]

Notwithstanding their impressive credit ratings, North Carolina's cities face considerable challenges. As of 2011, 65% of the state's distressed census tracts were in urban areas; distressed urban tracts featured a per capita income of $12,059—less than half of the state average of $25,256—and a poverty rate (41%) and unemployment rate (21%) more than twice the statewide rates.[347] Like most U.S. cities, North Carolina's cities face a serious shortage of affordable housing. The National Low Income Housing Coalition estimates that the state has a shortage of 195,661 affordable rental housing units and that a significant majority of "extremely low income households" are "severely cost burdened, spending more than half of their income on housing."[348] One estimate found that in Raleigh, one of the epicenters of the state's housing shortage, "71% of two-parent renter households face housing affordability challenges."[349]

Have North Carolina's cities turned to debt finance to address or ameliorate the affordable housing shortage? Based on the

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[343] *Id.* at 40.

[344] David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 686–91 (2000).

[345] Coe, *supra* note 339, at 39. On the strength of state oversight alone, Fitch Ratings automatically bumps up localities rated below AA. *Id.*; *see also* David Alter, Julie Berman & Patricia McGuigan, *Administrative Factors in Rating Local Debt: Case Studies of Three States in the Southeast Region*, 9 MOODY'S MUN. ISSUES 7, 7–8 (1992).

[346] Coe, *supra* note 339, at 40.

[347] WILLIAM HIGH & TODD OWEN, CTR. FOR URB. & REG'L STUD., UNIV. OF N.C. AT CHAPEL HILL, NORTH CAROLINA'S DISTRESSED URBAN TRACTS: A VIEW OF THE STATE'S ECONOMICALLY DISADVANTAGED COMMUNITIES 5, 8, 10 (2014).

[348] Housing Needs by State: North Carolina, NAT'L LOW INCOME HOUS. COAL. (2023), https://perma.cc/VM7F-GKJ5.

[349] Frank Muraca, *How Should We Measure North Carolina's Affordable Housing Crisis?*, CMTY. & ECON. DEV. IN N.C. & BEYOND (Apr. 12, 2021), https://perma.cc/86TE-QMM9.

available data on municipal bond issues, the answer is no. Under North Carolina law, only the housing authority of each city may issue debt for the purpose of housing initiatives.[350] Since 1989, Charlotte's housing authority has issued a total of twenty-three bonds.[351] No bond exceeded $13 million until 2016.[352] Over the same period, Raleigh's housing authority issued twenty-three bonds but remarkably none from 2005 through 2016.[353] Greensboro has only issued ten and none between 1973 and 2014.[354] Since the LGC does not make the reasons for bond disapprovals public, the reasons why the LGC has approved relatively few housing bonds remain unclear.

The LGC is a revealing demonstration of the persistence of Dillon's Rule's limitation on local fiscal power.[355] But that effect is not limited to North Carolina. The spread of home rule over previous Dillon's Rule jurisdictions was not total—leaving pockets of limited fiscal authority in many states.[356] Counties are especially subject to limited fiscal power.[357] In California, for instance, counties were not endowed with the same expansive fiscal power as cities during the period in which home rule was institutionalized.[358] This lack of fiscal power left counties vulnerable to

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[350] N.C. GEN. STAT. § 157-4.1(b)(6)–(c)(6) (1971); N.C. GEN. STAT. §§ 157-4.1(A)(b)(6), (c)(6) (2017).

[351] *Issuers by State: North Carolina (Charlotte Housing Authority)*, MUN. SECS. RULEMAKING BD. (2023), https://emma.msrb.org/IssuerHomePage/Issuer?id=6F6C2B82A56A782EABC13756F417CED5.

[352] *Id.*

[353] *Issuers by State: North Carolina (Raleigh Housing Authority)*, MUN. SECS. RULEMAKING BD. (2023), https://emma.msrb.org/IssuerHomePage/Issuer?id=1DFA732793142BE31CA0F600C6A99CA3&type=G.

[354] *Issuers by State: North Carolina (Greensboro New Housing Authority)*, MUN. SECS. RULEMAKING BD. (2023), https://emma.msrb.org/IssuerHomePage/Issuer?id=2079EACC68F757DA56CA4A417A06AF4F&type=G; *Issuers by State: North Carolina (Greensboro Housing Authority)*, MUN. SECS. RULEMAKING BD. (2023), https://emma.msrb.org/IssuerHomePage/Issuer?id=3E5C1925E6C6C1930E587E8C32090376. The LGC approved several large affordable housing bonds in 2022 for cities including Charlotte and Durham. *Local Government Commission Approved Over $418 Million for Affordable Housing*, N.C. DEP'T OF STATE TREASURER (Aug. 9, 2022), https://perma.cc/7EA2-CCG7.

[355] It is also illustrative of the procedural aspect of vertical restrictions on local power, which in this case and in Part III.B's exploration of local economic development only seems to underlie a broader market discipline (or a distribution of public and private power).

[356] Scharff, *supra* note 330, at 303–05; Grumm & Murphy, *supra* note 330, at 127–28.

[357] KATHRYN MURPHY, NAT'L ASS'N OF CNTYS., COUNTY GOVERNMENT STRUCTURE: A STATE BY STATE REPORT 78 (2009); Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 859–62 (2020).

[358] Tom Hogen-Esch, *Fragmentation, Fiscal Federalism, and the Ghost of Dillon's Rule: Municipal Incorporation in Southern California, 1950–2010*, 3 CAL. J. POL. & POL'Y 1, 5–6 (2011).

fragmentation into smaller governmental units, thus frustrating efforts toward regional governance.[359]

B. Local Redevelopment

In 2018, the city of Norfolk, Virginia, approved a plan to redevelop St. Paul's, a mostly Black and poor neighborhood of two-hundred acres adjacent to the city's downtown.[360] The first phase of the plan involves the demolition of 1,674 housing units spread between three public housing developments in the neighborhood and the displacement of over 4,000 of its residents.[361] The St. Paul's Area Transformation Project, as it is named, is the latest in Norfolk's decades-long efforts to redevelop the city's downtown and surrounding districts, the core of which already bears the hallmarks of a contemporary, "revitalized" urban core: "a 300-room Hilton, a hockey arena, corporate offices for PNC Financial Services and payment processor ADP, restaurants and bars, a light rail station, and a one-million-square-foot mall."[362] The latest rendering of the new St. Paul's imagines a leafy east-to-west swath of mid-rise, mixed-use, and mixed-income quadrants seamlessly connected to downtown.[363] Norfolk's goal is to make St. Paul's "one of the most desirable neighborhoods in the city where families and residents from all income levels, races, ages and cultures can live, learn, work, play and thrive."[364] But the city does not control the means of achieving this goal.

As is the case with most contemporary local economic development projects, Norfolk is only a junior partner in the St. Paul's redevelopment. The city describes its role as limited to "provid[ing] an environment that increases private sector investment, retail sales generation and corresponding municipal revenue generation."[365] Private investors are the senior partners. They will shape the new St. Paul's, spending nearly $500 million of the

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359 *Id.*

360 CITY OF NORFOLK, ST. PAUL'S AREA PEOPLE FIRST TRANSFORMATION PLAN AND DRAFT CITY COUNCIL RESOLUTION 11 (2017).

361 *Id.* at 3.

362 Caleb Melby, *A Virginia City's Playbook for Urban Renewal: Move Out the Poor*, BLOOMBERG (Sept. 22, 2020), https://perma.cc/CRS3-HWY4.

363 *See generally* DOWNTOWN NORFOLK COUNCIL, A VISION FOR THE NEXT DECADE: DOWNTOWN NORFOLK PLAN 2030 (2023).

364 *Goal 3: Advance Initiatives to Connect Communities, Deconcentrate Poverty & Strengthen Neighborhoods*, CITY OF NORFOLK, https://perma.cc/7YEL-PSK8.

365 CITY OF NORFOLK, NORFOLK GENERAL OBLIGATION BONDS SERIES 2021 OFFICIAL STATEMENT 66 (2021).

project's $1 billion total outlay designing and building out the new neighborhoods.[366]

Why are cities like Norfolk subordinate to private investors in local economic development? For decades, scholars have argued that the answer lies in competition among cities rather than in the law.[367] According to these scholars, cities compete to attract debt, investment, and taxpayers by attempting to conform to the expectations of each market.[368] Creditors, investors, and taxpayers fear that any city economic policymaking—beyond creating an environment conducive to private investment—risks mismanagement and overspending, ultimately threatening their returns and services.[369] Thus cities, acting in their interest to maintain access to capital, investment, and new taxpayers, limit their intervention in local economies.[370] Markets discipline cities.

A major reason why the market discipline of cities is not seen as being determined by law is that the focus of local government law has long been on the vertical distribution of power between federal, state, and local governments.[371] Since the market discipline of cities involves the distribution of power between cities and private capital, or the horizontal distribution of public and private power, it escapes the grasp of local government law. But as this Article has suggested through the case of Dillon's Rule, local government law also distributes private and public power.

How does Dillon's Rule enable market discipline in Norfolk? First, the Rule enhances a city's credible commitment to repay its debts by preventing large and abrupt departures from the market preferences for fiscal restraint and uniformity.[372] Under Dillon's Rule, any significant change to fiscal policy, like a new kind of tax

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366 CITY OF NORFOLK, ST. PAUL'S TRANSFORMATION—FUNDING TOOLBOX 34 (2019) [hereinafter NORFOLK, ST. PAUL'S TRANSFORMATION].

367 *See generally* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); OATES, FISCAL FEDERALISM, *supra* note 18; PETERSON, *supra* note 21; JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, PUBLIC FINANCE AND PUBLIC CHOICE: TWO CONTRASTING VISIONS OF THE STATE (1999); WILLIAM FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001).

368 *See* Tiebout, *supra* note 367, at 422.

369 *See generally id.*; OATES, FISCAL FEDERALISM, *supra* note 18; PETERSON, *supra* note 21; BUCHANAN & MUSGRAVE, *supra* note 367; FISCHEL, *supra* note 367.

370 *See generally* Tiebout, *supra* note 367; OATES, FISCAL FEDERALISM, *supra* note 18; PETERSON, *supra* note 21; BUCHANAN & MUSGRAVE, *supra* note 367; FISCHEL, *supra* note 367.

371 *See supra* Part I.

372 Gillette, *supra* note 21, at 963–64; Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 8–9 (1995); Oates, *The Effects of Property Taxes*, *supra* note 18, at 958–60.

assessment, would require obtaining a specific legislative grant. Put differently, Dillon's Rule signals to creditors that they are more likely to be repaid because any important change to the city's fiscal operations that could threaten repayment would be blocked at the state level.[373] The Rule also offers enhanced legal stability for direct investors. Direct investors are subject to more risk to the value of their investments because those investments are not easily movable. For direct investors, the Rule's general limitation on local power shields against risks to which creditors may not pay as much attention. A commercial real estate investor, for instance, may think of zoning and regulatory decisions, like minimum wage ordinances and anti–chain store ordinances, that could affect the attractiveness of a new project to potential tenants.[374] The enhanced credible commitment to creditors and diminished risk to direct investors that Dillon's Rule underwrites are reflected in the way markets perceive the investment risk of cities under the Rule, as compared to those under home rule.[375]

Norfolk has adhered to the market discipline underwritten by Dillon's Rule, and it has been rewarded, with the highest possible credit ratings for more than a decade.[376] According to a recent S&P analysis, this is because the city has strict, self-imposed policies restricting spending and debt and because it maintains strong budgetary flexibility and liquidity, with more than four times the yearly debt service bill available in cash on hand at the

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373 In the broadest sense, this reflects a defense of Dillon's Rule by Professor Clayton Gillette as a "judicial check on local tendencies to cater to special interests at the expense of other groups within the locality" along the lines of a public choice–informed concern for the general welfare of a city. Gillette, *supra* note 21, at 960–61. The financial health of a city, for which access to capital is paramount, would require a strong credible commitment to repay existing debts. The limits and form of government clearly affect how that commitment is perceived. *See generally* Richard C. Feiock, Moon-Gi Jeong & Jaehoon Kim, *Credible Commitment and Council-Manager Government: Implications for Policy Instrument Choices*, 63 PUB. ADMIN. REV. 616 (2003); Yingyi Qian & Gérard Roland, *Federalism and the Soft Budget Constraint*, 88 AM. ECON. REV. 1143 (1998); Yingyi Qian & Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives*, 11 J. ECON. PERSPS. 83 (1997).

374 *See* Schragger, *supra* note 68, at 519.

375 The home rule state of Pennsylvania, for instance, has five million more residents than Virginia (a Dillon's Rule state) and a gross domestic product larger than Virginia's by nearly $300 million. Moody's currently rates only fifteen Pennsylvanian municipal bonds at the highest range of investment grade A ratings, while it rates thirteen Virginian municipal bonds in that range. A total of thirty-seven North Carolinian bonds are rated in this range. In North Carolina, local finance is, as explained in Part III.A, still subject to the complete control of a Dillon's Rule–era state agency. *See Market Segment—City*, MOODY'S, https://www.moodys.com/fundamental-data-and-metrics.

376 *S&P Raises Norfolk's Credit Rating to AAA*, CITY OF NORFOLK (Feb. 5, 2020) [hereinafter NORFOLK, S&P], https://perma.cc/R6GW-NS3B.

end of 2020.[377] In spending terms, the city will not be strained by the St. Paul's project, which totals $486 million but includes a panoply of place-based federal and state grants and public-private partnerships.[378] The city will draw on existing tax revenue and capital improvement to pay the estimated remaining $200 million.[379] By maintaining a low overall cost and not requiring additional revenue that might not be approved by the legislature, the St. Paul's project leaves Norfolk's creditworthiness intact.

Norfolk's adherence to market discipline, and its imperative to minimize spending, limit its ability to play a bigger role in the redevelopment of St. Paul's. Under the predominant method for rating municipal debt, spending is an ever-present concern, particularly in contexts like Norfolk's where the ability to raise new revenue to match spending is limited.[380] Moody's rating methodology for local governments, for instance, is comprised largely of evaluations of past and present spending decisions.[381] If Norfolk had chosen to spend more than $200 million on the project, it would have likely crossed into a negative assessment on several of the factors that Moody's considers in its rating decisions. The most immediate impact would be on the general fund and cash balances, which comprise 30% of the rating.[382] Raising a bond to fund additional spending would have likely worsened the debt-burden analysis, which comprises, on its own, 20% of the rating.[383]

Additional spending or resorting to bond finance, together or on their own, would be likely to upset Moody's institutional framework analysis, which comprises 10% of the rating.[384] The institutional framework factor accounts for "governance considerations," which include a city's management and "willingness" over time to match revenue to spending, meaning that the effect of spending or borrowing for the St. Paul's project would continue to

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377 *Id.*

378 NORFOLK, ST. PAUL'S TRANSFORMATION, *supra* note 366, at 34.

379 *See id.* at 15.

380 MOODY'S INVS. SERV., US CITIES AND COUNTIES METHODOLOGY 4 (2022) [hereinafter MOODY'S, METHODOLOGY].

381 *Id.* at 4. Past performance and municipal decisions are 70% of the scorecard factors behind a rating. Those factors are broken into financial performance (fund balance and liquidity ratio), institutional framework, and leverage (long-term liability ratios and fixed cost ratios). *Id.*

382 *Id.* at 7.

383 *Id.* at 4. This is especially the case because Moody's has already identified the city's debt burden as a concern. MOODY'S INVS. SERV., CREDIT OPINION—NORFOLK (CITY OF) VA (2021).

384 MOODY'S, METHODOLOGY, *supra* note 380, at 4.

affect the city's credit rating in the future.[385] More broadly, Moody's or another rating agency would be likely to consider increased spending as detrimental to Norfolk's rating for reasons not limited to fixed factors—like worsening an investment climate—which are ultimately included in the final rating. To be sure, the consequences of a diminished credit outlook or downgrade are not abstract. Either would have had a dramatic impact on Norfolk's finances by very quickly raising the cost of borrowing.[386]

Norfolk's inability to spend more on the St. Paul's project led it to seek out alternative public funding sources for its share of the project. This has the effect of further limiting Norfolk's control over the project. Norfolk's acceptance of funding from the U.S. Department of Housing and Urban Development's Choice Neighborhoods Initiative, for example, requires that any spending on housing redevelopment be for mixed-income housing.[387] Norfolk has also participated in the U.S. Treasury Department's Opportunity Zones program, which gives investors a capital gains tax deduction for investing in certain poor, urban census tracts.[388] Local governments then propose redevelopment projects in the zones and market their tax benefits to potential developers.[389] The result in housing redevelopment has been projects overwhelmingly focused on market-rate housing.[390] Conditions placed on alternative public funding sources explain, in part at least, how Norfolk's commitment to replace all 618 now-demolished units in Tidewater Gardens, a central demand of the St. Paul's community, was watered down to 260 units with direct rental assistance and 238 units accepting Section 8 vouchers.[391] Nevertheless, this kind of funding is looked on favorably by ratings agencies, even though it diminishes the impact of redevelopment projects. As such, a recent S&P analysis applauds Norfolk's effort to "improv[e] the economic power of its residents," noting that, over time, the targeted spending "may bolster economic metrics" and

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385 *Id.* at 20.

386 For this reason, cities avoid at significant cost the prospect of credit downgrades or negative outlooks. *See* TIMOTHY J. SINCLAIR, THE NEW MASTERS OF CAPITAL: AMERICAN BOND RATING AGENCIES AND THE POLITICS OF CREDITWORTHINESS 93–100 (2005).

387 *HUD Awards Choice Neighborhoods Initiative Implementation Grant to Norfolk*, HR&A ADVISORS (May 13, 2019), https://perma.cc/V6V5-TJ88; *Choice Neighborhoods*, U.S. DEP'T OF HOUS. & URB. DEV., https://perma.cc/C6YV-NGNX.

388 *See Norfolk Opportunity Zones*, CITY OF NORFOLK, https://perma.cc/6Y59-74SL.

389 *See* Allan Holmes & Kathryn Kranhold, *Trump's Tax Break Promised Housing Opportunity. The "Forgotten" Are Still Waiting*, CTR. FOR PUB. INTEGRITY (Feb. 27, 2020), https://perma.cc/MX2E-W2VU.

390 *See id.*

391 *Housing*, ST. PAUL'S TRANSFORMATION PROJECT, https://perma.cc/8BE6-X4AF.

highlighting Norfolk's "work towards redeveloping the St. Paul's neighborhood and transitioning current low-income housing to mixed-income housing."[392]

What has Norfolk ultimately planned to do in this highly constrained context? Very little. Norfolk is mostly setting the stage for private capital: rerouting roads and constructing a "[c]atalytic community hub," an office for municipal service providers, a hot water heating system, a few parks, two schools, and an early childhood center.[393] Norfolk's most direct involvement with housing and commercial development will be limited to negotiations with private developers.[394] The city is attempting to make up for its limited role through a program called People First. The program, a joint effort of the city and a nonprofit firm named Urban Strategies, Inc., offers "comprehensive services" for the displaced residents of St. Paul's, centralizing every social service agency in the city to ensure that residents are reintegrated to the city, "safe, supported, and thriving."[395] Behind the program's promises to "enhanc[e] life outcomes," and create a "strategic results-driven framework,"[396] the program ultimately amounts to an effort to manage the displacement of thousands of St. Paul's residents.[397]

The racialized impact of the market discipline underwritten by Dillon's Rule is also visible in Norfolk. Like many other U.S. cities, Norfolk bears the hallmarks of anti-Black histories of segregation, redlining, and gentrification. Tidewater Gardens, the largest public housing community in St. Paul's, home to 4,200 mostly Black residents as recently as summer 2021,[398] was built on top of a Black neighborhood designated a "slum[ ]" and razed during the urban renewal era.[399] St. Paul's more broadly became home to Black former residents of the Ghent neighborhood, on the other side of the downtown district, which, after intensive redlining during the 1930s and '40s and gentrification in the 1960s,

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392 NORFOLK, S&P, *supra* note 376.

393 NORFOLK, ST. PAUL'S TRANSFORMATION, *supra* note 366, at 13–15.

394 *Cf. Transformation Plan*, ST. PAUL'S TRANSFORMATION PROJECT, https://perma.cc/X3ET-ZVBQ.

395 CITY OF NORFOLK, TIDEWATER GARDENS IMPACT REPORT 3–6 (2020).

396 *Id.* at 7–8.

397 Sam Turken, *'Nobody Helped Me': Some Tidewater Gardens Public Housing Residents Say Norfolk Exaggerates Impact of People First Support Program*, WHRO (Apr. 13, 2021), https://perma.cc/3KMQ-2E4Q.

398 Sam Turken, *Norfolk Will Begin St. Paul's Relocations After Temporary Suspension Due To COVID-19*, WHRO (Oct. 23, 2020), https://perma.cc/A2LC-2KJ7.

399 Alexander C. Fella, *The ABCs of Gentrification*, URB. RENEWAL CTR. (June 24, 2019), https://perma.cc/BQ38-FWEK.

became almost uniformly white.[400] As was the story with many Black public housing communities, Tidewater Gardens suffered from chronic underinvestment from Norfolk's public housing agency after construction, leading to serious livability problems by the 2010s.[401]

Norfolk initially centered its proposal for the redevelopment of St. Paul's on the idea of building safer homes and promised a more expansive role for the community in planning the project.[402] But the city's early promises were whittled down as it met the reality of market discipline backstopped by Dillon's Rule. The initial promise of the one-for-one replacement of public housing units became a promise for fewer units, then eventually a promise for a vague "right to return"[403] with the use of vouchers, which is already proving problematic.[404] But Norfolk's inability to deliver on its initial promises to the residents of St. Paul's can only partially be described as its own political failure.[405] Making good on its initial promises to remake St. Paul's into a thriving community with safe, upgraded housing and new parks for its existing residents would have required more direct participation—simply put, spending more—and thus doing something the city could not reasonably do: ignore the market discipline, underlaid by Dillon's Rule, that heavily conditions its power. It bears recognizing that Norfolk is not unique. Many other cities around the country will face the need to address aging public housing infrastructure in the context of broader redevelopment goals.[406] Setting aside the

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400 Kevin Lang Ringelstein, *Residential Segregation in Norfolk, Virginia: How the Federal Government Reinforced Racial Division in a Southern City, 1914–1959*, at 1–2, 27–30 (Dec. 2015) (M.A. dissertation, Old Dominion Univ.); Melby, *supra* note 362.

401 Chip Filer & Ronald Jackson, *Opinion: Norfolk Committed to Building a Better Future for St. Paul's Residents*, VIRGINIAN-PILOT (Mar. 27, 2021), https://perma.cc/PBK9-ZD8X.

402 CITY OF NORFOLK, ST. PAUL'S TRANSFORMATION: MONTHLY UPDATE 2 (July 2021).

403 Adriana De Alba, *As More St. Paul's Residents Prepare to Move Out, Some Still Don't Have a Place to Go; Norfolk City Leaders Are Making Them a Promise*, 13 NEWS NOW (Apr. 30, 2021), https://perma.cc/9ZCX-YGDY.

404 Ryan Murphy, *People Moving Out of Norfolk Public Housing Are Mostly Ending Up in Other Poor, Racially Segregated Areas*, VIRGINIAN-PILOT (Feb. 14, 2021), https://perma.cc/Z8F9-22AN.

405 On the eve of the first demolitions, Norfolk's government announced it would stop responding to media requests. *See* Ryan Murphy, *Norfolk Suddenly Won't Answer Questions About Massive St. Paul's Redevelopment Project*, VIRGINIAN-PILOT (Feb. 1, 2021), https://perma.cc/TNT5-KGK7. The city then began retaliating against activists from St. Paul's, in one case even removing residents from the project's advisory board. *See* Ryan Murphy, *A Norfolk Public Housing Resident Spoke Up About the St. Paul's Project. Now He Says the City Is Punishing Him*, VIRGINIAN-PILOT (Mar. 26, 2021), https://perma.cc/EY56-XAYR.

406 Will Fischer, Sonya Acosta & Anna Bailey, *An Agenda for the Future of Public Housing*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 11, 2021), https://perma.cc/49GG-TWV4.

question of whether the political will exists—public housing communities have long organized to hold cities around the country accountable[407]—Dillon's Rule and the market discipline it enlivens will prevent cities from more meaningfully addressing the needs of their constituents.[408]

C. Climate Change

Cities are on the front lines of climate change as producers of greenhouse gas emissions and waste and as some of the most vulnerable to flooding, sea level rise, and extreme weather.[409] If in the past sustainability was a goal that cities pursued at their own pace, according to their own political and economic idiosyncrasies, the "arrival" of climate change in recent years has made sustainability a broad concern. Climate change is poised, over the ensuing decades, to transform urban life irrevocably.[410] Dillon's Rule is keeping cities from adequately taking on the extensive challenges that they confront.

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[407] *See generally, e.g.*, RHONDA Y. WILLIAMS, THE POLITICS OF PUBLIC HOUSING: BLACK WOMEN'S STRUGGLES AGAINST URBAN INEQUALITY (2004); ROBERTA M. FELDMAN & SUSAN STALL, THE DIGNITY OF RESISTANCE: WOMEN RESIDENTS' ACTIVISM IN CHICAGO PUBLIC HOUSING (2004); HIGH RISE STORIES: VOICES FROM CHICAGO PUBLIC HOUSING (Audrey Petty ed., 2013); BEN AUSTEN, HIGH-RISERS: CABRINI-GREEN AND THE FATE OF AMERICAN PUBLIC HOUSING (2018); NICHOLAS DAGEN BLOOM, PUBLIC HOUSING THAT WORKED: NEW YORK IN THE TWENTIETH CENTURY (2014).

[408] Historian Destin Jenkins has described, through the case study of twentieth-century San Francisco, how municipal creditors and ratings agencies reshaped municipal finance into an engine driving racially exclusionary urbanism. *See generally* DESTIN JENKINS, THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY (2021). Urbanists have more generally described the embrace of market discipline as part of a larger neoliberal reorientation in urban politics. *See, e.g.*, SINCLAIR, *supra* note 386, at 93–100. *See generally, e.g.*, JULIAN BRASH, BLOOMBERG'S NEW YORK: CLASS AND GOVERNANCE IN THE LUXURY CITY (2011); JAMES DEFILIPPIS, UNMAKING GOLIATH: COMMUNITY CONTROL IN THE FACE OF GLOBAL CAPITAL (2004); Andrew J. Diamond & Thomas J. Sugrue, *Introduction: Historicizing the Neoliberal Metropolis*, *in* NEOLIBERAL CITIES: THE REMAKING OF POSTWAR URBAN AMERICA (Andrew J. Diamond & Thomas J. Sugrue eds., 2020).

[409] *See generally* ASHLEY DAWSON, EXTREME CITIES: THE PERIL AND PROMISE OF URBAN LIFE IN THE AGE OF CLIMATE CHANGE (2017); Sara Frueh, *Climate Change and 'A New Normal of Extremes'*, NAT'L ACADS. OF SCI. (Oct. 1, 2021), https://www.nationalacademies.org/news/2021/10/climate-change-and-a-new-normal-of-extremes; Linda Poon, Laura Millan Lombraña & Sam Dodge, *Cities Are Our Best Hope for Surviving Climate Change*, BLOOMBERG (Apr. 20, 2021), https://perma.cc/VG5G-Y2TJ; Laura Millan Lombraña & Sam Dodge, *Whatever Climate Change Does to the World, Cities Will Be Hit Hardest*, BLOOMBERG (Apr. 18, 2021), https://perma.cc/9P6P-XSCV.

[410] Linda Poon, *More People Live in Flood Zones Than Previously Thought*, BLOOMBERG (Aug. 4, 2021), https://perma.cc/MS3T-JLT4.

Cities are key drivers of climate change, a role that will only be magnified as the pace of urbanization quickens.[411] On a global basis, cities consume 78% of all energy and produce more than 60% of greenhouse gas emissions.[412] The role of U.S. cities is now believed to be even larger than previously thought. In 2021, a breakthrough study revealed that the contribution of U.S. cities to greenhouse gas emissions had been dramatically undercounted for decades.[413] Due to their considerable energy demands, cities have been slower to transition to renewable energy sources.[414] In broader terms, cities are also where a vast amount and array of consumption produces waste.[415] In addition to its contributing- to greenhouse gas emissions, the waste produced by cities adds to ocean, air, and water pollution.[416]

The vulnerability of U.S. cities to climate change is becoming painfully evident. Consider the case of flooding. According to data from the Federal Emergency Management Agency, up to 5% of the nation's occupied housing units lie within the 100-year floodplain, which includes areas with a 1% risk of flooding each year.[417] It stands to reason that this estimate, calculated in 2017, skews conservatively in that it only includes housing construction through 2015 and sea level rise rates that are now understood to

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411 Lahouari Bounoua et al., *Impact of Urbanization on US Surface Climate*, 10 ENVTL. RSCH. LETTERS 1, 8 (Aug. 12, 2015); *Rapid Urbanization Increases Climate Risk for Billions of People*, U.N. CLIMATE CHANGE (July 3, 2017), https://perma.cc/MH6C-M34H.

412 *Generating Power: Cities and Pollution*, U.N. CLIMATE ACTION, https://perma.cc/G2DS-ULTN.

413 Kevin Robert Gurney, Jianming Liang, Geoffrey Roest, Yang Song, Kimberly Mueller & Thomas Lauvaux, *Under-Reporting of Greenhouse Gas Emissions in U.S. Cities*, 12 NATURE COMMC'NS 1, 1–3 (2021) (finding that cities underreport their greenhouse gas emissions by 18.3%). Compare to an earlier study that shows a much lower rate of emissions, Ting Wei, Junliang Wu & Shaoqing Chen, *Keeping Track of Greenhouse Gas Emission Reduction Progress and Targets in 167 Cities Worldwide*, 3 FRONTIERS IN SUSTAINABLE CITIES 1, 3 (2021).

414 Laura Phillips & Pete Smith, *Sustainable Urban Energy Is the Future*, U.N. CHRON. (Dec. 2015), https://perma.cc/2A3Y-SYNS.

415 *See, e.g.*, Linda Breggin, *New Toolkit Helps Cities Address Climate Change & Food Waste Simultaneously*, ENVTL. L. INST. (Aug. 2021), https://perma.cc/2STM-9C3H; Alejandra Borunda, *How Can City Dwellers Help with Climate Change? Buy Less Stuff*, NAT'L GEOGRAPHIC (June 11, 2019), https://perma.cc/JGF5-EDRT; Kirstie Pecci, *Five Ways Cities and Towns Can Slash Trash and Fight Climate Change*, CONSERVATION L. FOUND. (Oct. 30, 2019), https://perma.cc/5JV3-PPU7; Jutta Gutberlet, *Waste in the City: Challenges and Opportunities for Urban Agglomerations*, *in* URB. AGGLOMERATION 191, 195–96 (Mustafa Ergen ed., 2018).

416 *Solid Approach to Waste: How 5 Cities Are Beating Pollution*, U.N. ENV'T PROGRAMME (Nov. 22, 2017), https://perma.cc/96QA-55HG.

417 STEPHANIE ROSOFF & JESSICA YAGER, N.Y.U. FURMAN CTR., HOUSING IN THE U.S. FLOODPLAINS 5 (2017).

be emphatically worse.[418] Storm surge and accumulated rainfall from discrete weather events like hurricanes and severe storms, powerfully illustrated by the deadly flooding of dozens of cities from Hurricane Ida in 2021, also increase the threat profile.[419]

Like many climate risks, flooding disproportionately threatens Black and brown people, pushed by decades of redlining and other forms of racial exclusion into especially vulnerable parts of cities.[420] There is also the tremendous risk that flooding poses to urban economies and property tax bases—property tax being the single largest source of revenue for localities nationally.[421] Beyond flooding—which by extreme rainfall or increased severity and frequency of hurricanes affects almost the entirety of the Eastern Seaboard—the persistent threat of wildfires endangers cities in the West and Southwest; extreme heat affects cities in the plains and lower Midwest; and water stress threatens cities across the plains, Texas, and Southern California.[422]

How can cities respond? First, through mitigating their impact on the climate, and second, through adapting to climate change risk. Mitigation involves actions aimed to reduce greenhouse gas emissions, pollution, and waste, while adaptation entails careful and extensive planning and infrastructural projects to make cities resilient.[423]

Dillon's Rule stands in the way of both. One of the most important aspects of mitigation strategies involves increasing the energy efficiency of existing and future buildings. In Virginia, Dillon's Rule prevents cities from exceeding state-defined limits on energy efficiency standards for energy savings, the use of

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418 *Id.* at 3; Brad Plumer & Henry Fountain, *A Hotter Future is Certain, Climate Panel Warns. But How Hot Is Up to Us*, N.Y. TIMES (Nov. 11, 2021), https://www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html.

419 Jeane Camelo, Talea L. Mayo & Ethan D. Gutmann, *Projected Climate Change Impacts on Hurricane Storm Surge Inundation in the Coastal United States*, 6 FRONTIERS IN BUILT ENV'T 1, 10 (2020); *How Climate Change Makes Hurricanes More Destructive*, ENVTL. DEF. FUND (2023), https://perma.cc/5UE9-XFMA.

420 Kriston Capps & Christopher Cannon, *Redlined, Now Flooding*, BLOOMBERG (Mar. 15, 2021), https://perma.cc/78MK-Y6JW; Jack Graham, *U.S. Housing Legacy Puts Some Black Neighborhoods at Higher Flood Risk*, REUTERS (Mar. 15, 2021), https://perma.cc/F22W-W728; Thomas Frank, *Flooding Disproportionately Harms Black Neighborhoods*, SCI. AM. (June 2, 2020), https://perma.cc/R9D8-ATFA.

421 Christopher Flavelle, *The Cost of Insuring Expensive Waterfront Homes Is About to Skyrocket*, N.Y. TIMES (Sept. 24, 2021), https://www.nytimes.com/2021/09/24/climate/federal-flood-insurance-cost.html; Scharff, *supra* note 330, at 303.

422 Stuart A. Thompson & Yaryna Serkez, *Every Place Has Its Own Climate Risk. What Is It Where You Live?*, N.Y. TIMES (Sept. 18, 2020), https://www.nytimes.com/interactive/2020/09/18/opinion/wildfire-hurricane-climate.html.

423 *Responding to Climate Change: Mitigation and Adaptation*, NASA GLOB. CLIMATE CHANGE, https://perma.cc/9DJ9-BCKY.

renewable energy, and the choice of building materials.[424] Even with a state administration that is friendly to renewable energy, Virginian cities have been unable to obtain specific authority for local building codes.[425] In North Carolina, the Rule has similarly prevented cities from implementing renewable energy standards into building codes by leaving new rules vulnerable to attacks from construction trade groups.[426] According to a recent report by the American Council for an Energy-Efficient Economy, the process of transitioning to building codes that are conscious of climate change mitigation has been slow and piecemeal.[427] As the need to move to more stringent building codes becomes more pressing, cities in states like Ohio, Wisconsin, and Kentucky, which apply Dillon's Rule in some form and also adopt uniform building codes, are likely to encounter difficulties.[428]

Lastly, there is the looming threat of preemption by state law. In 2021, the American Gas Association lobbied to introduce legislation in ten states preempting cities from prohibiting the use of natural gas in new buildings.[429] Although preemption can be applied to both home rule and Dillon's Rule cities, Dillon's Rule completely forecloses cities from mounting any legal challenges to specific preemptions.[430]

Adaptation is similarly constrained by Dillon's Rule because the Rule limits the ability of cities to exercise their own judgment in designing and implementing plans. In Virginia, for instance, cities are limited to a few planning tools identified under state law, the most prominent of which is zoning, which is itself

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424 *Building Energy Codes Program: Virginia*, U.S. DEP'T OF ENERGY (2019), https://perma.cc/45AT-39TZ ("The statewide requirements cannot be altered by local jurisdictions.").

425 Sarah Vogelsong, *Lack of Local Authority Hampering Virginia Cities' Clean Energy Efforts, Report Finds*, VA. MERCURY (Oct. 8, 2020), https://perma.cc/P2GW-HJPS; DAVID RIBEIRO, STEFEN SAMARRIPAS, KATE TANABE, ALEXANDER JARRAH, HANNAH BASTIAN, ARIEL DREHOBL, SHRUTI VAIDYANATHAN, EMMA COOPER, BEN JENNINGS & NICK HENNER, AM. COUNCIL FOR ENERGY-EFFICIENT ECON., THE 2020 CITY CLEAN ENERGY SCORECARD 22, 24 (2020).

426 *See, e.g.*, Ryan Miller, *Policy Action Alert: Oppose Harmful Residential Energy Code Proposals*, N.C. BLDG. PERFORMANCE ASS'N (Dec. 7, 2020), https://perma.cc/PYF9-9D4S.

427 RIBEIRO ET AL., *supra* note 425, at 69.

428 David Cohan, *How Are Building Codes Adopted?*, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY (Sept. 19, 2016), https://perma.cc/4MBQ-28GD; AM. CONCRETE INST., UNDERSTANDING STATE AND LOCAL CODE ADOPTION PROCESSES 4–6 (2014).

429 Jeff Brady & Dan Charles, *As Cities Grapple with Climate Change, Gas Utilities Fight to Stay in Business*, NPR (Feb. 22, 2021), https://perma.cc/QSA3-KLMC.

430 Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1216 (2018); Richard Briffault, Nestor Davidson, Paul A. Diller, Olatunde Johnson & Richard C. Shragger, *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 ADVANCE 3, 4 (2017).

susceptible to Dillon's Rule.[431] In 2010, the city of Hampton, Virginia, attempted to implement the Chesapeake Bay Preservation Act (CBPA), state legislation designed to mitigate the flood risk presented by the deterioration of the Chesapeake Bay's natural coastal barriers.[432] Within the context of the wider effort, Hampton sought to zone an area of the bay as a Resource Protection Area (RPA), part of which ran onto a landowner's parcel.[433] The landowner sued, alleging that Hampton had exceeded its powers in creating the new RPA.[434] The case rose to the Supreme Court of Virginia, which considered whether Hampton had the authority to overlay its proposed RPA on land designated under a separate federal coastal barrier protection law. In *Marble Technologies, Inc. v. City of Hampton*,[435] the court reversed a lower court finding that the city had acted within its powers, ruling instead for the plaintiff-landowner that the city had no implied or express authority to create the new RPA under Dillon's Rule.[436] Hampton had in fact designed the RPA to join up with the wider coastal barrier preservation effort that the federal law contemplated, and this ran afoul of a Dillon's Rule reading of Hampton's power under the CBPA.[437]

The *Marble Technologies* ruling is concerning for the rest of Virginia's tidewater cities because zoning is an important piece of the climate change adaptation toolkit. Even though Hampton had authorization under the CBPA to use its zoning power to create a new RPA, Dillon's Rule stood in the way of the city's determination that its resources would be best employed to supplement a federal effort. In 2018, the city of Norfolk, Virginia, implemented a new zoning ordinance that will enable the city to zone in furtherance of adaptation, drawing on existing statutory authority.[438] Downzoning, or the reduction of the permitted density of an area, is one such tool that is seen as critical to adaptation. Under Virginia law, cities are authorized to downzone through voluntary agreements with landowners. But the law also provides guidance

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[431] Avrum J. Shriar & Alissa Akins, *Transfer of Development Rights, Growth Management, and Landscape Conservation in Virginia*, 23 LOC. ENV'T 1, 1–2 (2018).

[432] *See* VA. DEP'T OF ENVTL. QUALITY, CHESAPEAKE BAY PRESERVATION ACT GUIDANCE: IMPLEMENTING COASTAL RESILIENCY PROVISIONS __, 2022, at 2 (2022) (reflecting a draft copy of the guidance as of September 2022).

[433] Marble Techs., Inc. v. City of Hampton, 690 S.E.2d 84, 85–86 (Va. 2010).

[434] *Id.* at 86.

[435] 690 S.E.2d 84 (Va. 2010).

[436] *Id.* at 88–90.

[437] *Id.*

[438] PEW CHARITABLE TRS., NORFOLK'S REVISED ZONING ORDINANCE AIMS TO IMPROVE FLOOD RESILIENCE 3–4 (2019).

on how to exercise this authority.[439] This sets up the *Marble Technologies* situation where Dillon's Rule could limit Norfolk's authorized latitude in securing downzoning agreements in order to protect a landowner or other private interest.

Condemnation, another important part of the zoning toolkit for adaptation, is similarly subject to a minefield of Dillon's Rule interpretations of city authority.[440] More general zoning powers for protecting general safety and water quality, preserving flood plains, and amending zoning maps will similarly be tested by the Rule.[441]

Outside of the zoning context, Norfolk and other cities in Virginia may face resistance in building out adaption infrastructure like dams, levees, and seawalls, since Dillon's Rule would be used to determine if the way a city builds or operates these projects is within its powers.[442] In *Marble Technologies*, the plaintiff was a small business owner with two parcels of land.[443] As the scale of adaptation activity grows in scale and scope, it is likely to involve larger swaths of land and new kinds of litigants. Cities may find themselves defending their adaptation strategies against more sophisticated defendants.

Although fundamental to cities' responses to climate change, mitigation and adaptation are most effective against what we think are the most foreseeable risks. This is a problem because the way that climate change will play out in our cities and beyond is fundamentally uncertain.[444] The rate of greenhouse gas emissions, sea level rise, severe weather, and droughts cannot be perfectly predicted. Urban policy responses like building codes and seawalls assume future conditions that may be dramatically different from what will occur.

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439 VA. CODE § 15.2-2286 (2020) (outlining guidelines for how localities may downzone property).

440 VA. CODE § 15.2-1901.1 (2003) (prescribing conditions under and procedures by which localities may exercise condemnation powers); VA. CODE §§ 25.1-200–25.1-251 (2022) (same).

441 VA. CODE § 15.2-2283 (2018) (requiring that zoning ordinances be "for the general purpose of promoting the health, safety, or general welfare of the public"); VA. CODE § 15.2-2284 (2008) (outlining considerations that must be taken into account when zoning ordinances are drawn and applied); VA. CODE § 15.2-2286(A)(11) (2020) (outlining guidelines for downzoning); VA. CODE § 15.2-2286(A)(7) (2020) (describing guidelines for when zoning maps may be amended).

442 VA. CODE § 15.2-970 (1997) (declaring that localities can construct dams, levees, and seawalls to prevent erosion and flooding).

443 *Marble Techs.*, 690 S.E.2d at 86.

444 Emily H. Ho & David V. Budescu, *Climate Uncertainty Communication*, 9 NATURE CLIMATE CHANGE 802 (2019); *What Is Meant by Uncertainty?*, CLIMATE ADAPT, https://perma.cc/85AT-5J4H.

As such, cities will require a degree of policymaking flexibility that Dillon's Rule limits in the name of private interests. Consider the example of Winslow, Nebraska. During the "Great Flood" of 2019, which caused three deaths and $2.9 billion of damage in five midwestern and southern states, Winslow was devastated.[445] The damage was such that the town's location on a floodplain led the town government to propose moving the town, home to just one hundred residents, to a new location.[446] After initial investigations, it became clear that Dillon's Rule would prevent Winslow from moving, since there was no express authorization for towns or cities to move, nor any discernible interest from the legislature in allowing the town to move.[447]

Small coastal cities and those in inland floodplains are likely to face the kinds of unexpected issues that Winslow faced.[448] Already, the fiscal pressure of repairing infrastructure, cleaning up from disasters, and implementing mitigation and adaptation measures is driving small cities like Fair Bluff, North Carolina—subject to the fiscal strictures of Dillon's Rule explored above—to the edge of bankruptcy.[449] New ecologies and patterns of climate risk that arise from climate change will require new forms and new patterns of collaboration.[450] Dillon's Rule obstructs these

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445 Dennis Romero, *Flooding That's Been Tormenting Midwest Will Only Get Worse This Spring, Forecasters Warn*, NBC NEWS (Mar. 21, 2019), https://perma.cc/S6UP-U57H; Burton C. English, S. Aaron Smith, R. Jamey Menard, David W. Hughes & Michael Gunderson, *Estimated Economic Impacts of the 2019 Midwest Floods*, 5 ECON. DISASTERS & CLIMATE CHANGE 431, 432 (2021).

446 Christina Stella, *For One Small Town, Moving to Protect Itself from Future Flooding Is Illegal*, NEB. PUB. MEDIA (Apr. 20, 2020), https://perma.cc/TB5X-NQZT.

447 *Id.*; Collin Spilinek, *County Board Hears from Winslow Residents Against Relocation Process*, FREMONT TRIB. (May 7, 2021), https://fremonttribune.com/news/local/county-board-hears-from-winslow-residents-against-relocation-process/article_c25d781b-73f1-538c-9577-3464899d6b49.html.

448 Neha Thirani Bagri, *The US Is Relocating an Entire Town Because of Climate Change. and This Is Just the Beginning*, QUARTZ (June 5, 2017), https://perma.cc/H8W5-HTK2; Daniel Cusick, *Climate Helped Turn These 5 Places into Ghost Towns*, SCI. AM. (Oct. 30, 2020), https://perma.cc/4UBJ-EW4L.

449 Christopher Flavelle, *Climate Change Is Bankrupting America's Small Towns*, N.Y. TIMES (Sept. 15, 2021), https://www.nytimes.com/2021/09/02/climate/climate-towns-bankruptcy.html.

450 California Landscape Stewardship Network, *The Complex Challenge of Climate Change Requires Collaborative Solutions*, GRIST (Sept. 30, 2021), https://perma.cc/435X-Q9YF. *See generally* George C. Homsy, *Size, Sustainability, and Urban Climate Planning in a Multilevel Governance Framework*, *in* CLIMATE CHANGE AND CITIES: INNOVATIONS IN MULTI-LEVEL GOVERNANCE 19 (Sara Hughes, Eric K. Chu & Susan G. Mason eds., 2018); Jacqueline Peterson, *Multilevel Governance and Innovations in the Financing of Urban Climate Change Strategies*, *in* CLIMATE CHANGE AND CITIES: INNOVATIONS IN MULTI-LEVEL GOVERNANCE 281 (Sara Hughes, Eric K. Chu & Susan G. Mason eds., 2018); Andrea Sarzynski, *Multi-Level Governance, Civic Capacity, and Overcoming the Climate Change*

kinds of collaboration, as shown by a recent, failed effort by several counties to join into a regional network to address climate change adaptation in Texas.[451]

This Part has explored how Dillon's Rule complicates the ability of cities to deal with present and future challenges by restraining them from wielding their full fiscal powers. This restraint leaves cities in North Carolina unable to meaningfully tackle shortages in affordable housing. It forces cities like Norfolk into a narrow, market-defined version of local economic development, unresponsive to the real needs of communities like St. Paul's. And it serves as the basis to block key urban climate change adaptation and mitigation strategies around the country.

CONCLUSION

When John Forrest Dillon announced his Rule, he sought to do more than distribute power between state and local governments. As this Article has shown, the Rule also distributed—and still distributes—public and private power. This feature of Dillon's Rule has gone unnoticed because the Rule's history has been incomplete, missing the crucial context of the evolution of the use of public debt to finance economic development. Resituating the emergence of the Rule in this history reveals that Dillon sought for his Rule to enable a specific distribution of public and private power in which the municipal debt market would shape the way cities could grow and develop.

Decades before Dillon's rise from provincial obscurity to the commanding jurisprudential heights he would assume, the collapse of a national system of public finance for infrastructural development transferred the task to states, which nearly bankrupted themselves in the process. Again, the task was devolved, now to the local level. Geography and timing made Iowa the first state to experiment actively in the local debt finance of infrastructural development after states restricted their cities' own ability to raise debts. Dillon, the young doctor-turned-judge, was convinced of the power of contract and property to impel societies, and he was suspicious of the extent to which local debt finance of infrastructural projects amounted to an improper public control of the prerogatives of private investment (property). He diagnosed

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"Adaptation Deficit" in Baltimore, Maryland, *in* CLIMATE CHANGE AND CITIES: INNOVATIONS IN MULTI-LEVEL GOVERNANCE 97 (Sara Hughes, Eric K. Chu & Susan G. Mason eds., 2018).

451 Caitlin McCoy, *U.S. City Climate Commitments: Obstacles and Opportunities in the Building Sector Post-Paris Agreement*, 34 MD. J. INT'L L. 249, 267 (2019).

the problem as one with the issuer of the public debt in question: cities. The solution Dillon crafted—an austere neutralization of local power—has had deleterious effects on city life well into the present, restricting the ability of cities to deal adequately with the many challenges they face.

Understanding the origins and persistence of Dillon's Rule as a distributor of public and private power is a small and initial step in a broader effort to reassert the power of cities as they face down important challenges. But it can lead us to inquire further into the skewed balance of public and private power in cities that the Rule has left us with. Doing so may give the urgent transformation of our cities into more just places a greater chance of success.