# Localizing Environmental Federalism

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*Local environmental initiatives have gained attention and importance in the face of inaction by the federal government and many states. In taking these initiatives, local governments are not only furthering environmental protections, but also fulfilling an important federalism function. Environmental federalism theory has long highlighted the potential for local governments to play this gap-filling function, and to fulfill other federalism values. To date, however, environmental federalism theory has not examined closely the legal basis for local governmental action, and the vulnerabilities that surround that local authority. In many states, local authority is easily, and often, preempted by the state. Given the importance of local environmental activity, the looming threat of removal of local ability to act is an important, and as yet relatively unexamined, aspect of environmental federalism.*

*This Article proposes a new framework — localized environmental federalism — for better acknowledging the role that local governments play in environmental federalism and environmental governance, and for thinking through the implications of the loss of local authority over the environment in the context of environmental federalism. Notably, this is a theory of localized, not localist, environmental federalism; the framework has no built-in preference for local authority over other actors. Instead, it endeavors to make clear the realities of local environmental governance and how that reality affects environmental federalism conversations.*

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*Localized environmental federalism takes as its starting point three central tenets: (1) local governments play a distinct role in environmental federalism; (2) environmental federalism values may be impacted by the vulnerability of local authority; and (3) because local authority varies by state in highly particularized ways, conversations about local environmental governance must become more particularized too. Using that framework for thinking through the role of local governments in environmental federalism, it becomes possible to have nuanced conversations about how, why, and when local actors may be well-suited for environmental action. In a time of pressing environmental concerns, that knowledge has never been more crucial.*

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## INTRODUCTION

Federal action in service of environmental protection slowed markedly with the onset of the Trump administration.[1] State legislatures and governorships in many parts of the country have similarly eschewed environmental regulation. Meanwhile — and not unrelatedly — local governments have enjoyed a particularly fertile period of innovation in environmental law.[2] In many ways, local governments have taken on the mantle of adapting to climate change, reducing waste, preventing industrial harms, and other measures to avoid environmental injuries. These actions have occurred for a variety of reasons,[3] and take equally varied forms.

This Article takes the recent surge of local environmental innovation as prologue, not coda. Local environmental actions are almost universally vulnerable to preemption by state and federal law, and new trends in preemption have seen states removing authority from local governments to act in a variety of ways. In this new dynamic, states do not develop a comprehensive statewide scheme; they simply remove local authority to act. In doing so, the states eliminate policy innovation at what is often the one level of governance at which it was occurring. Such actions may undercut models of governance that focus on the benefits of having multiple actors available to address policy concerns.

These trends complicate law and policymaking in a variety of fields. The boundary-spanning nature of environmental problems poses unique challenges in terms of thinking about trends in state preemption. While scholarship to date has focused on possible ways for local governments to retain environmental lawmaking authority in the face of preemption,[4] as well as the growing role that local governments

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[1] *See, e.g.*, Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Is Reversing 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks.html [https://perma.cc/G68G-2J7U] (cataloguing environmental regulations reversed or in process of being rolled back by the Trump administration).

[2] *See, e.g.*, Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CALIF. L. REV. 305 (2020) (discussing the role of cities in contemporary environmental law).

[3] *Id.* at 309-11.

[4] *See, e.g.*, Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575, 617-23 (2017) [hereinafter *Local Environmental Innovation*] (discussing possible avenues for upholding local environmental authority in the face of state preemption); Shannon M. Roesler, *Federalism and Local Environmental Regulation*, 48 UC DAVIS L. REV. 1111, 1160 (2015) (proposing federal empowerment of local authority as a way around state preemption); Wyman & Spiegel-Feld, *supra* note 2, at

are playing in tackling a variety of environmental problems,[5] there has not yet been a more holistic account of what new preemption dynamics, and the particular problems they raise, mean for environmental law, environmental federalism, and environmental governance. This Article fills that gap by focusing on environmental federalism and the ways that shifting governance dynamics impact theories of shared authority and the ability to foster overall environmental progress.

The primary goal of this Article is to offer a new framework for thinking about local governments in the context of environmental federalism. Local governments have been frequently included in theories of environmental federalism, and pointed to as important actors within the landscape of dynamic federalism and multiscalar governance that has characterized recent environmental federalism trends. In this way, environmental federalism is similar to the federalism conversation more generally, which has moved toward the inclusion of substate actors.[6] The discussion of local governments as federalism actors tends to focus on the potential for these local entities to play a role in fulfilling federalism values such as dynamism, gap-filling, exercise of voice, and experimentation. The realities of local authority, however, mean that the ability of local governments to fulfill those values may be limited in certain circumstances.

To lay the groundwork for thinking about a more localized environmental federalism, this Article describes in Part II the current federal, state, and local role in addressing environmental issues, as well as the political dynamics facing many local governments.[7] Part III provides an overview of environmental federalism theory in the United States, including an account of how local governments fit into that theory.[8] Part IV explains how local governments have generally been grouped with state actors in ways that may obscure important structural differences.[9] Finally, Part V articulates a framework for localizing environmental federalism, and proposes several tenets that might help to guide discussion of local governments as environmental actors.[10] This final Part explains how using these tenets can provide the kind of

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358-63 (providing arguments for finding local authority over environmental issues within state law).

[5] *See, e.g.*, Wyman & Spiegel-Feld, *supra* note 2 (describing the role that local governments play in addressing environmental problems).

[6] Roesler, *supra* note 4, at 1150-51.

[7] *See infra* Part II.

[8] *See infra* Part III.

[9] *See infra* Part IV.

[10] *See infra* Part V.

nuanced discussion of local governments necessary for a full understanding of their potential and limitations.[11]

As with all accounts of preemption and federalism,[12] this Article is a product of its time. But even in its temporal particularity, it speaks to broader dynamics within the United States. Federal, state, and local relationships are certain to shift again; their current form, however, will affect the ability of government to meet the environmental challenges of the coming decades. An accurate assessment of the potential for current environmental protection efforts starts with an acknowledgement of the structural differences at all governmental levels. Thus, the current moment has lessons for theories of environmental governance, and for accounts of environmental federalism overall. A more localized lens will allow the environmental federalism field to continue its rich tradition of pathbreaking, focused on acknowledging the realities on the ground and looking to how best to attain the values of federalism going forward.

## I. CURRENT TRENDS IN ENVIRONMENTAL LAW AND POLICYMAKING

The story of environmental law has long been one of gap-filling, or of one level of government stepping in to correct for the failures of another.[13] The classic narrative of environmental law in the United States starts with local authority. Local governments have long been responsible for addressing environmental health and safety. With varying levels of enthusiasm and effectiveness, local governments used zoning and nuisance doctrines to prevent certain environmental harms,[14] invested in necessary infrastructure, planned green spaces, and

[11] *See infra* Part V.

[12] William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108, 108 (2005) [hereinafter *Contextual Environmental Federalism*] (noting that "policy analysts should seek to distinguish events that are the result of particular historical opportunities and context, from propensities and incentives that are more stable and predictable under current forms of environmental federalism").

[13] *See, e.g.*, Wyman & Spiegel-Feld, *supra* note 2, at 312-25 (detailing rise of federal environmental law in response to failures of state and local environmental law, and the new role of local governments in filling in gaps in federal environmental policy).

[14] *See, e.g.*, ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 67-68 (8th ed. 2018) (noting that the common law relied primarily on nuisance doctrine to resolve environmental controversies); Keith H. Hirokawa & Jonathan Rosenbloom, *The Cost of Federalism: Ecology, Community, and the Pragmatism of Land Use*, *in* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS 246 (Kalyani Robbins ed., 2015) (describing early efforts by state and local governments to use land use planning and other mechanisms to address environmental harms).

generally tried to head off certain environmental harms in their communities. For example, nuisance law was used at times to resolve conflicts over matters such as odors from livestock, and pollution from industrial facilities.[15] State governments also took an early lead in regulating environmental issues, including air and water quality.[16]

Local resources and authority were ultimately insufficient for needed environmental progress.[17] Spillover effects inherent in many environmental problems meant that action by one locality could be rendered irrelevant by a neighboring jurisdiction that refused to curb the issue.[18] Natural resources that fail to follow jurisdictional lines meant limited effectiveness for local or state actors attempting to govern the resource. Beyond those physical realities, political realities also rendered early eras of environmental regulation inadequate. Specifically, many ill effects on the environment were the product of industries that were of great importance to local economies.[19] The resulting reluctance to regulate contributed to failures of local environmental controls. And even where local governments decided to take on an environmental problem, the tools at their disposal proved inadequate for confronting the complexities of environmental harms.[20]

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[15] PERCIVAL ET AL., *supra* note 14, at 68-71 (noting that the common law relied primarily on nuisance doctrine to resolve environmental controversies).

[16] *See, e.g.*, Alexandra Dapolito Dunn & Chandos Culleen, *Engines of Environmental Innovation: Reflections on the Role of States in the U.S. Regulatory System*, 32 PACE ENVTL. L. REV. 435, 439 (2015) (describing state environmental protection efforts focused on air and water pollution).

[17] *See, e.g.*, PERCIVAL ET AL., *supra* note 14, at 93 ("State laws and local ordinances to protect public health and to require the abatement or segregation of public nuisances were common, although they were poorly coordinated and rarely enforced in the absence of a professional civil service."); Hirokawa & Rosenbloom, *supra* note 14, at 246 (describing how various mechanisms used by local and state governments to address environmental harms were insufficient).

[18] *See, e.g.*, Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1215-16 (1977) (describing difficulty in addressing physical and psychic spillover impacts).

[19] *See* PERCIVAL ET AL., *supra* note 14, at 71 ("In a society that encouraged industrial growth, many judges were reluctant to award injunctions against private nuisances if they involved activities that had considerable economic value."); Caitlyn Greene & Patrick Charles McGinley, *Yielding to the Necessities of a Great Public Industry: Denial and Concealment of the Harmful Health Effects of Coal Mining*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 689, 700-01 (2019).

[20] *See, e.g.*, Daniel Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 600 (1996) (describing the "recognition that common law private nuisance actions could not respond efficiently to the pollution problems of an industrial society").

These local failings, combined with similar failures of regulation at the state level, produced a series of post-industrialization environmental crises. By the mid-twentieth century, states began to step up their regulatory efforts regarding the environment.[21] These attempts by states to control problems such as air and water pollution were relatively ineffective. By the middle of the twentieth century, the federal government began providing assistance to states in their efforts to impose environmental controls.[22] Finally, in the 1960s and 1970s, modern federal environmental law was born.[23] During these two decades, the United States Congress passed the first incarnations of nearly all of the major environmental law statutes.[24] This transition to federal authority over environmental issues occurred for a variety of reasons, including the ecological damage that had occurred under the prior system, new political realities, and a push by regulated entities for a more centralized system of governance.[25] With one piece of broad environmental legislation after another — the Clean Water Act, the Clean Air Act, the Endangered Species Act, and many others — Congress provided protection to resources and constrained actions that had previously been unregulated.

With the passage of these major federal statutes, Congress did not wholly eliminate the role of states in environmental law. Instead, many of the landmark environmental statutes set up important federal-state cooperative relationships.[26] Environmental policy innovation has continued to occur at the state level, and states have stepped in at various points to build upon the federal regulatory floor, and to pressure the federal government into action it was otherwise reluctant to take.[27] Beyond that, local governments have continued to play an important role in environmental law, particularly through their continued control

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[21] *See, e.g.*, *id.* at 600-01 (describing how states ramped up regulatory efforts regarding water and air pollution).

[22] *See* PERCIVAL ET AL., *supra* note 14, at 94-95.

[23] *See* Esty, *supra* note 20, at 600-02.

[24] PERCIVAL ET AL., *supra* note 14, at 97-98.

[25] *See, e.g.*, Dunn & Culleen, *supra* note 16, at 440-41 (noting that "three reasons were advanced for a centralization of environmental regulation: 'interstate spillovers of pollution; the poor performance of states as environmental regulators; and interstate competitiveness effects arising from differing environmental standards,'" and that "[o]ther factors that influenced the centralization of environmental law included a growing desire on the part of industries to reduce varying state requirements, and the presidential politics during the 1972 election").

[26] *See infra* Part III (discussing cooperative relationship between federal and state governments in environmental law).

[27] *See infra* Part II.

over land use, and by participating as actors in federal regulatory programs.[28]

In this way, the federal government filled in gaps in regulation created by failures at the state and local level; state governments have similarly played a role in filling federal and local gaps.[29] Fast-forward to today, and a similar gap-filling story is being used to explain the burst of local environmental action currently taking place around the country.[30] These kinds of shifting dynamics are not surprising; indeed, "[a]s long as our country at all levels is ruled by a system of elected government, then the degree of environmental fervor at each level will inevitably fluctuate."[31] The goal of this Part, then, is not to provide an explanation of environmental governance dynamics in perpetuity, but to describe the political forces currently in play and the results for environmental law and policymaking.

### *A. Federal Government*

Over the course of the first term of President Donald Trump, the executive branch of the federal government retreated from environmental protection.[32] Under the prior administration of President Barack Obama, the federal government undertook major environmental

[28] See *infra* Part III.B for examples of local governments acting within the structure of federal statutes.

[29] *See, e.g.*, Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 114 ("[W]hen federal environmental action appears to be 'underkill' of what written laws and regulations have historically allowed or required, it creates opportunities for environmentally oriented citizen and state actors . . . to supplement federal enforcement or challenge the legal adequacy of the newly relaxed regulatory environment."); Dunn & Culleen, *supra* note 16, at 450 ("Another manner by which states are driving environmental regulation is by using environmental regulation to fill gaps left by the federal environmental regulatory scheme.").

[30] *See* Wyman & Spiegel-Feld, *supra* note 2, at 325.

[31] Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 113; *see also* William W. Buzbee, *Brownfields, Environmental Federalism, and Institutional Determinism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 1, 63-66 (1997) (reviewing history of local, state, and federal environmental, hazardous waste, and Brownfields regulations, and noting that "one finds different institutions at different points in time appearing innovative or inflexible, dedicated or lax, active or lethargic").

[32] *See, e.g.*, Rebecca Bratspies, *Protecting the Environment in an Era of Federal Retreat*, 13 FIU L. REV. 5, 7-9 (2018) (detailing federal retreat from environmental action under Trump Administration); William W. Buzbee, *Federalism Hedging, Entrenchment, and the Climate Challenge*, 2017 WIS. L. REV. 1037, 1043 [hereinafter *Federalism Hedging*] ("As this Article goes to press, the new administration of President Donald Trump has overtly declared plans to revisit and roll back climate progress.").

regulatory efforts.[33] But in dozens of rulemakings, the Trump administration reversed, rolled back, or made progress toward reversal in a variety of environmental areas, including air pollution and emissions, drilling and extraction, infrastructure and planning, animals, toxic waste, water pollution, and others.[34] This federal abdication is expected to have hugely negative consequences for the country's ability to meet current environmental needs.[35]

The absence of a federal executive lead on environmental issues has been particularly felt in the lack of a plan for climate change.[36] One high-profile instance of federal reversal of environmental regulations was the administration's withdrawal of the Clean Power Plan rule promulgated by the Environmental Protection Agency ("EPA") during the administration of President Obama.[37] The Clean Power Plan, which "sought to reduce emissions from power plants by 32 percent below

[33] *See, e.g.*, David M. Konisky & Neal D. Woods, *Environmental Policy, Federalism, and the Obama Presidency*, 46 PUBLIUS: J. FEDERALISM 366 (2016) (detailing pledges made and actions taken regarding the environment both before and during Barack Obama's presidency).

[34] Popovich et al., *supra* note 1; *Climate Deregulation Tracker*, COLUMBIA LAW SCH. SABIN CTR. FOR CLIMATE CHANGE LAW, http://columbiaclimatelaw.com/resources/climate-deregulation-tracker (last visited July 8, 2020) [https://perma.cc/XXC8-KYUJ]; *Regulatory Rollback Tracker*, HARVARD LAW SCH. ENVTL. & ENERGY LAW PROGRAM, https://eelp.law.harvard.edu/regulatory-rollback-tracker (last visited July 8, 2020) [https://perma.cc/98UJ-JF5P]; *Tracking Deregulation in the Trump Era*, BROOKINGS INSTITUTE (June 24, 2020), https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/ [https://perma.cc/6H24-VWK3]; *see also* Craig N. Johnston, *Resisting Deregulation: How Progressive States Can Limit the Impact of EPA's Deregulatory Efforts*, 48 ENVTL. L. 875, 876 (2018).

[35] *See generally* THE STATE ENERGY & ENVTL. IMPACT CENT., NYU SCH. OF LAW, CLIMATE & HEALTH SHOWDOWN IN THE COURTS: STATE ATTORNEYS GENERAL PREPARE TO FIGHT (2019), https://www.law.nyu.edu/sites/default/files/climate-and-health-showdown-in-the-courts.pdf [https://perma.cc/6LLK-3KKS] ("This year, the Trump administration has set its sights on watering down or outright repealing a half-dozen health and environmental rules critical to the health and welfare of all Americans as well as the planet. The scope of the administration's effort to tear down these vital, core protections that cut across the most significant sources of pollution in our nation is breathtaking."); Denise A. Grab & Michael A. Livermore, *Environmental Federalism in a Dark Time*, 79 OHIO ST. L.J. 667 (2018) ("Until the end of the Trump presidency, environmental protection at the federal level can be expected, by and large, to remain in a state of stasis at best, and possibly to decay considerably.").

[36] Sarah J. Adams-Schoen, *Beyond Localism: Harnessing State Adaptation Lawmaking to Facilitate Local Climate Resilience*, 8 MICH. J. ENVTL. & ADMIN. L. 185, 188-89 (2018).

[37] *See* 40 C.F.R. pt. 60 (2020); *see, e.g.*, Zack Colman, *Trump Administration is Repealing Obama's Clean Power Plan*, SCI. AM. (Oct. 10, 2017), https://www.scientificamerican.com/article/trump-administration-is-repealing-obamas-clean-power-plan [https://perma.cc/5BJQ-WXYK] (discussing the release of the Affordable Clean Energy rule that "render[ed] the [Clean Power Plan] moot").

2005 levels by 2030,"[38] represented the first limits on carbon emissions from U.S. power plants, an important step by the federal government toward combatting climate change.[39] On June 19, 2019, the Trump EPA issued its final rule governing emissions from power plants.[40] Dubbed the Affordable Clean Energy rule, it provides states with substantially greater authority to set emissions limits than they would have had under the Clean Power Plan.[41]

Another major reversal of asserted federal authority occurred in the context of the Clean Water Act. A series of hard-to-reconcile decisions coming out of the Supreme Court interpreting the Act's language left many open questions about the extent of the federal government's jurisdiction over non-navigable water in the United States.[42] To provide greater clarity regarding the reach of federal authority, in 2015 the Obama administration promulgated the "Clean Water" rule.[43] The Trump administration withdrew the Clean Water rule,[44] and on April

[38] *Trump Administration Rolls Back the Clean Power Plan*, YALE ENV'T 360 (Aug. 21, 2018), https://e360.yale.edu/digest/the-trump-administration-rolls-back-the-clean-power-plan [https://perma.cc/GR3G-SA77].

[39] *What is the Clean Power Plan?*, NAT. RESOURCES DEF. COUNCIL (Sept. 29, 2017), https://www.nrdc.org/stories/how-clean-power-plan-works-and-why-it-matters [https://perma.cc/NAU6-N66H]. The Clean Power Plan was stayed by the Supreme Court on February 9, 2016 and never took effect. *See* SUPREME COURT OF THE U.S., ORDER IN PENDING CASE, CHAMBER OF COMMERCE V. EPA (2016), https://www.supremecourt.gov/orders/courtorders/020916zr3_hf5m.pdf [https://perma.cc/M3DT-3B9R].

[40] *Affordable Clean Energy Rule*, EPA, https://www.epa.gov/stationary-sources-air-pollution/affordable-clean-energy-rule (last updated June 19, 2019) [https://perma.cc/YZ2Z-KEWD].

[41] EPA, FACT SHEET: PROPOSED AFFORDABLE CLEAN ENERGY RULE — OVERVIEW 2 (2018), https://www.epa.gov/sites/production/files/2018-08/documents/ace_overview_0.pdf [https://perma.cc/X2UR-MH44]; Nathan Rott, *Trump Moves to Let States Regulate Coal Plant Emissions*, NPR (Aug. 21, 2018), https://www.npr.org/2018/08/21/639396683/trump-moves-to-let-states-regulate-coal-plant-emissions [https://perma.cc/44U6-GXTY] ("The long-anticipated proposal, called the Affordable Clean Energy Rule, would give individual states more authority to make their own plans for regulating greenhouse gas emissions from coal-fired power plants.").

[42] *See, e.g.*, Rapanos v. United States, 547 U.S. 715 (2006); Solid Waste Agency v. United States Army Corps of Eng'rs, 531 U.S. 159 (2001). *See generally* Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 677 (2017) (discussing debates regarding the scope of Clean Water Act jurisdiction).

[43] Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,053 (June 29, 2015), https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states [https://perma.cc/5MP2-T6Y3].

[44] Coral Davenport, *Trump Removes Pollution Controls on Streams and Wetlands*, N.Y. TIMES (Jan. 22, 2020), https://www.nytimes.com/2020/01/22/climate/trump-environment-water.html [https://perma.cc/YC7X-LEQQ].

21, 2020, published its "Navigable Waters" rule that again redefines the scope of federal jurisdiction under the Clean Water Act. The scope of federal protection of waterways was significantly greater under the Clean Water Rule than the Navigable Waters rule; indeed, the Navigable Waters rule adopts the "narrowest reading of the Clean Water Act's reach since the original 1972 Act, a reading narrower than any federal practice since the 1977 Clean Water Act."[45]

Other examples of federal reversal on environmental policies, or of handing authority back to the states, abound. In 2019, the Trump administration reversed the Obama administration's rejection of the Keystone XL pipeline permit[46] and issued a presidential permit to authorize construction.[47] Construction of the pipeline, if it goes forward,[48] may have detrimental impacts for threatened wildlife,[49] as well as increase carbon emissions from the production, transport, and combustion of oil from Canada's tar sands.[50] The Trump administration also rescinded protections for endangered species,[51] cut EPA budgets for planned environmental clean-ups,[52] announced plans for lessening

[45] Rebecca L. Kihslinger & James M. McElfish, Jr., *Water Act Rule Poses Challenges for States*, ENVTL. L. INST. (Jan. 27, 2020), https://www.eli.org/vibrant-environment-blog/water-act-rule-poses-challenges-states [https://perma.cc/52QL-PCW5].

[46] Amy Harder & Colleen McCain Nelson, *Obama Administration Rejects Keystone XL Pipeline, Citing Climate Concerns*, WALL ST. J. (Nov. 6, 2015), https://www.wsj.com/articles/obama-administration-to-reject-keystone-xl-pipeline-citing-climate-concerns-1446825732 [https://perma.cc/UY4J-G9Y2].

[47] Donald J. Trump, *Presidential Permit*, WHITE HOUSE (Mar. 29, 2019), https://www.whitehouse.gov/presidential-actions/presidential-permit/ [https://perma.cc/H6FN-VRVL].

[48] On April 15, 2020, the U.S. District Court for the District of Montana enjoined construction of the pipeline until the U.S. Army Corps of Engineers performs necessary consultations regarding impacts of pipeline construction on endangered species under the Endangered Species Act. *See* N. Plains Res. Council v. United States Army Corps of Eng'rs, No. CV-19-44, 2020 WL 1875455, at *9 (D. Mont. Apr. 15, 2020).

[49] *Keystone XL Pipeline*, HARV. L. SCH. ENVTL. & ENERGY LAW PROGRAM (Feb. 13, 2018), https://eelp.law.harvard.edu/2018/02/keystone-xl-pipeline [https://perma.cc/U5MB-8F3G].

[50] *See, e.g.*, NAT. RES. DEF. COUNCIL, CLIMATE IMPACTS OF THE KEYSTONE XL TAR SANDS PIPELINE (2013), https://www.nrdc.org/sites/default/files/tar-sands-climate-impacts-IB.pdf [https://perma.cc/86AV-QXYS] (describing how the Keystone XL tar sands pipeline increased carbon emissions).

[51] *See, e.g.*, *Greater Sage Grouse Protection*, HARV. L. SCH. ENVTL. & ENERGY L. PROGRAM (Oct. 11, 2017), https://eelp.law.harvard.edu/2017/10/greater-sage-grouse-protection [https://perma.cc/R922-3CM6] (describing the various rollbacks of species protections for the greater sage grouse).

[52] *See Chesapeake Bay and Nonpoint Source Programs*, HARV. L. SCH. ENVTL. & ENERGY L. PROGRAM (Sept. 27, 2017), https://eelp.law.harvard.edu/2017/09/chesapeake-bay-and-non-point-source-programs-tmdls [https://perma.cc/Q8BG-SCZN].

requirements for environmental impact reviews under the National Environmental Policy Act,[53] revoked California's preexisting authority to set its own emissions standards under the Clean Air Act,[54] and walked back many other federal environmental policies.[55]

The discussion of current federal environmental lawmaking activity has thus far covered only the executive branch and administrative agencies. This narrow focus is intentional and reflects the fact that the United States Congress has long since failed to be a leader in environmental lawmaking. There have been no new environmental law statutes passed for over thirty years, with only occasional amendments of those federal statutes already in place.[56] Even during the Obama administration, the Democrat-controlled Congress failed to pass sweeping legislation that would have put in place a scheme of carbon emissions caps and trading.[57] As this article goes to press, the results of the 2020 national election are unknown. Regardless of outcome, however, a leadership vacuum as to environmental issues has existed within the legislative and executive branches of the federal government for many years.[58] This is not the first time that such a decentralizing trend has occurred in environmental law.[59] Its latest incarnation, however, has coupled with other trends to produce the impacts that are the focus of this Article.

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[53] Lisa Friedman, *Trump Weakens Major Conservation Law to Speed Construction Permits*, N.Y. TIMES (Aug. 4, 2020), https://www.nytimes.com/2020/07/15/climate/trump-environment-nepa.html [https://perma.cc/QE3T-HRMV].

[54] *Final Rule: One National Program on Federal Preemption of State Fuel Economy Standards*, EPA, https://www.epa.gov/regulations-emissions-vehicles-and-engines/final-rule-one-national-program-federal-preemption-state#rule-summary (last updated Mar. 31, 2020) [https://perma.cc/6SHS-426M].

[55] *See* BROOKINGS INSTITUTE, *supra* note 34; COLUMBIA LAW SCH. SABIN CTR. FOR CLIMATE CHANGE LAW, *supra* note 34; Popovich et al., *supra* note 1.

[56] Robinson Meyer, *How the U.S. Protects the Environment, from Nixon to Trump*, ATLANTIC (Mar. 29, 2017), https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/ [https://perma.cc/W8F9-KX2X].

[57] *See* Lee Wasserman, *Four Ways to Kill a Climate Bill*, N.Y. TIMES (July 25, 2010), https://www.nytimes.com/2010/07/26/opinion/26wasserman.html [https://perma.cc/74VU-6QC3].

[58] The federal judiciary has been at times responsible for environmental law advances. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007). Because the focus of this discussion is on policymaking, it does not include updates on the federal judiciary.

[59] *See, e.g.*, Mark K. Landy, *Local Government and Environmental Policy*, *in* DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY 227 (Martha Derthick ed., Cambridge Univ. Press 1999) (noting then-current decentralization theme in environmental policymaking).

### *B. States*

The fifty states[60] that make up the United States have wildly different topography, ecology, and other environmental conditions. They have a similarly varied approach to environmental policy and environmental management, influenced both by the different physical characteristics in play as well as the different political circumstances found in each state.[61] The level of variety at the state level makes difficult any attempts to generalize regarding the states' relative levels of environmental progress. There are states within the United States making great strides on environmental policy and innovation, as well as states that fall far short in providing adequate environmental protections for their citizens and surroundings.

A number of states[62] have taken up the mantle of environmental protection, in both their executive and legislative branches. For instance, in the wake of the Trump Administration's withdrawal from the Paris Agreement, governors from several states pledged to promote the emissions reductions that the United States committed to as part of the Paris Agreement.[63] Currently, twenty-four states are members of the

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[60] Because this Article is focused on the traditional relationships between federal, state, and local authority, it will not focus on the five U.S. territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. These territories of course also have a highly diverse set of environmental conditions and issues.

[61] *See, e.g.*, *The States' Role in Environmental Protection: The Debate Over Devolution*, CTR. FOR PROGRESSIVE REFORM, http://progressivereform.net/perspDevolution.cfm (last visited July 10, 2020) [https://perma.cc/6D3P-9BWN] ("Obviously, states differ in their approach to environmental protection. Some do an outstanding job on specific programs – better, even, than the federal EPA. Other states are dreadfully deficient. The result is that their citizens are exposed to far higher levels of harmful pollutants than the federal government deems safe. Many have reported that states try to attract business by offering to relax environmental protections. Powerful corporate interests are more likely to capture weak state bureaucracies than they are to capture even a weakened central, federal agency.").

[62] For the sake of simplicity, this Article refers to states as a unitary body. As other scholars have pointed out, however, that is far from reality. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1272 (2009) ("[T]he state is a 'they,' not an 'it' . . . .").

[63] *See, e.g.*, Leanna Garfield & Skye Gould, *This Map Shows Which States Are Vowing to Defy Trump and Uphold the US' Paris Agreement Goals*, BUS. INSIDER (June 9, 2017), https://www.businessinsider.com/us-states-uphold-paris-agreement-2017-6 [https://perma.cc/M5WQ-LWV6] (noting that "[e]leven states, plus Washington, DC and Puerto Rico, have vowed to pursue policies that will uphold the US' commitments to the accord"); *Alliance Principles*, U.S. CLIMATE ALLIANCE, https://www.usclimatealliance.org/alliance-principles (last visited July 11, 2020) [https://perma.cc/3X2E-6GWN] ("The United States Climate Alliance is a bipartisan

United States Climate Alliance, representing fifty-five percent of the population of the United States and an $11.7 trillion economy.[64] States acting in concert opposed the replacement of the Clean Power Plan,[65] and, over a decade earlier, created a regional cap-and-trade system;[66] individual states have also worked to implement renewable portfolio standards and energy efficiency standards to reduce carbon emissions.[67] State adaptation plans are also in place or in progress in many states.[68] California, long a national leader in solutions to environmental problems, has continued to innovate in a number of ways, including mandating consideration of climate risk in insurance policies and creating its own state-level cap-and-trade program. It has not done so without roadblocks — notably, in September 2019, the Trump Administration revoked California's long-standing waiver of preemption under the Clean Air Act with regard to its greenhouse gas

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coalition of governors committed to reducing greenhouse gas emissions consistent with the goals of the Paris Agreement.").

[64] U.S. CLIMATE ALL., 2019 FACT SHEET 1 (2019), https://static1.squarespace.com/static/5a4cfbfe18b27d4da21c9361/t/5cc8666a2831800001f65e7c/1556637291297/USCA+Factsheet_April+2019.pdf [https://perma.cc/8VZA-Y3Q3].

[65] *See* Michael S. Greve, *Bloc Party Federalism*, 42 HARV. J.L. & PUB. POL'Y 279, 291-93 (2019); Letter from Mary D. Nichols, Chair, Cal. Air Res. Bd., et al., to Andrew Wheeler, Acting Adm'r, Envtl. Prot. Agency (Aug. 21, 2018), https://www.georgetownclimate.org/files/report/State_Energy_Environment_Leaders_CPP-replacement_initial-response_August%2021_2018_FINAL.pdf [https://perma.cc/U3VC-58CD].

[66] *See, e.g.*, Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 781-82 (2006) [hereinafter *From Cooperative to Inoperative*] ("One of the most ambitious of the recent state efforts to combat global warming has been the one involving a group of northeastern and mid-Atlantic states. These states signed a Memorandum of Agreement in December 2005 that committed them to develop a regional cap-and-trade program, known as the Regional Greenhouse Gas Initiative ('RGGI'), to help control Carbon dioxide emissions from power plants. Shortly thereafter, the states issued a draft 'model rule.' The RGGI program is not the only regional global warming initiative. Legislators from six Midwestern states — Illinois, Iowa, Michigan, Minnesota, Ohio, and Wisconsin — also have initiated a regional effort to reduce greenhouse gas emissions."); Sharmila L. Murthy, *States and Cities As "Norm Sustainers": A Role for Subnational Actors in the Paris Agreement on Climate Change*, 37 VA. ENVTL. L.J. 1, 20 (2019) (describing regional cap-and-trade programs); *The Regional Greenhouse Gas Initiative: An Initiative of the New England and Mid-Atlantic States of the US*, RGGI, https://www.rggi.org (last visited July 11, 2020) [https://perma.cc/D9B5-L2TK].

[67] *See, e.g.*, Murthy, *supra* note 66, at 20 (explaining how certain states are participating in the RGGI program).

[68] *State and Local Adaptation Plans*, GEO. CLIMATE CTR., https://www.georgetownclimate.org/adaptation/plans.html (last visited July 11, 2020) [https://perma.cc/5Q5N-NU3T].

and zero emission vehicle programs.[69] Washington has developed its own cap and trade program;[70] New York State recently approved a congestion pricing charge for New York City;[71] and multiple states have pioneered in bringing environmental justice concerns into permitting decisions.[72] Other examples of states making progress on environmental issues abound.

State-level action on a variety of environmental issues has continued despite, and perhaps because of, at-times active hostility and inaction by the federal government.[73] Currently, the politicized nature of environmental policy means that such policy initiatives are often adopted along liberal/conservative fault lines. Thus, states currently controlled by Democrats are more likely to see action on environmental issues.[74] From 2010 until this Article's publication, the Republican party has been quite dominant in state government; "Republicans controlled a record thirty-three governorships in 2016,"[75] and controlled thirty-one state legislatures in 2019.[76] Beyond that, "in over two-thirds of the states, one party governs the executive and both houses of the legislature."[77] These political and other differences mean that states are not universally welcoming to environmentally protective policies. Instead, the current trend is toward liberal and conservative state "blocs," with federal alignment depending on the party affiliation of the President.[78]

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69 EPA, *supra* note 54.

70 *See* WASH. ADMIN. CODE § 173-442 (2016).

71 Jesse McKinley & Vivian Wang, *New York State Budget Deal Brings Congestion Pricing, Plastic Bag Ban and Mansion Tax*, N.Y. TIMES (Mar. 31, 2019), https://www.nytimes.com/2019/03/31/nyregion/budget-new-york-congestion-pricing.html [https://perma.cc/2YTW-BFJE].

72 *See* Dunn & Culleen, *supra* note 16, at 454.

73 *See, e.g.*, Grab & Livermore, *supra* note 35, at 668 ("Some states have responded to the impeding federal retreat by forging ahead," and describing state environmental protection efforts.").

74 Brigham Daniels, *Come Hell and High Water: Climate Change Policy in the Age of Trump*, 13 FIU L. Rev. 65, 72 (2018) ("Many states and cities, mostly those run by Democrats, have gone down the path of California . . . ."); Grab & Livermore, *supra* note 35, at 669-70 (noting differences in environmental policies between "red" states and "blue" states).

75 Wyman & Spiegel-Feld, *supra* note 2, at 332.

76 Alan Greenblatt, *All or Nothing: How State Politics Became a Winner-Take-All World*, GOVERNING (Jan. 2019), https://www.governing.com/topics/politics/gov-state-politics-governors-2019.html [https://perma.cc/L6E3-BX8E].

77 Greve, *supra* note 65, at 283.

78 *See id.* at 293.

The litigation over climate policy over the past several decades offers a prime example of the divide that exists between competing groups of states on environmental issues. *Massachusetts v. EPA*,[79] the case brought to compel EPA to classify carbon dioxide as a pollutant under the Clean Air Act, was filed by a coalition of progressive states and public interest organizations.[80] A coalition of conservative states opposed the lawsuit.[81] Similar divides were apparent in litigation over the Clean Power Plan, with twenty-four states filing suit to enjoin the Plan[82] and eighteen states intervening in support of EPA.[83] Beyond litigation, the same divide between progressive and conservative states and relative support for environmentally protective policies can be observed in differences in activity in state adaptation planning,[84] species protection,[85] and a variety of other environmental issues.

Many factors go into the environmental strategies that states pursue at any given time. In consequence, lack of any one kind of environmental measure in a state is unlikely to serve as a perfect proxy for the overall policy climate. Nonetheless, relative activity versus inactivity on state environmental policy often maps on to political affiliation of the state government.[86] In that way, federal environmental policy vacuums are in some instances replicated at the state level, as the state bloc aligned with the current federal administration may also choose not to pursue environmental regulation.

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[79] Massachusetts v. EPA, 549 U.S. 497 (2007).

[80] *Id.* at 497.

[81] *See id.* at 505.

[82] Bobby Magill, *The Suit Against the Clean Power Plan, Explained*, CLIMATE CENT. (Apr. 12, 2016), https://www.climatecentral.org/news/the-suit-against-the-clean-power-plan-explained-20234 [https://perma.cc/H6DW-AHZ3].

[83] ENVTL. DEF. FUND, LIST OF SUPPORTERS OF THE CLEAN POWER PLAN IN COURT 1, https://www.edf.org/sites/default/files/content/list_of_supporters_of_the_clean_power_plan_in_court.pdf (last visited July 10, 2020) [https://perma.cc/752G-KVD7].

[84] *See* GEO. CLIMATE CTR., *supra* note 68 (providing chart with summaries of state action in adaptation planning, or lack thereof).

[85] *See* Alejandro E. Camacho & Michael Robinson-Dorn, *Turning Power Over to States Won't Improve Protection for Endangered Species*, CONVERSATION (Jan. 11, 2018, 6:42 AM), https://theconversation.com/turning-power-over-to-states-wont-improve-protection-for-endangered-species-87495 [https://perma.cc/3AKM-R9K7].

[86] *See* Christopher Sellers, *How Republicans Came to Embrace Anti-Environmentalism*, VOX (June 7, 2017, 8:19 AM EDT), https://www.vox.com/2017/4/22/15377964/republicans-environmentalism [https://perma.cc/N6AX-3TAN].

### C. *Local Government*

Many environmental issues have highly local consequences.[87] As described, local governments have long worked to solve those problems through traditional tools like zoning and nuisance actions.[88] More recently, local action on environmental issues has entered a new period of considerable activity.[89] Local governments of varying sizes have engaged in efforts to promote sustainability through climate policy, transit programs, toxics controls, and others.[90]

Local governments are particularly engaged in planning for and adapting to the effects of climate change.[91] Already, many local governments have begun to grapple with the challenges that climate change may bring.[92] According to a survey by the Alliance for a Sustainable Future, a coalition between the U.S. Conference of Mayors and the Center for Climate and Energy Solutions, sixty percent of the 158 cities that responded had launched or significantly expanded a climate initiative or policy in 2018.[93] These actions are varied, but include changes to infrastructure, transitioning to more sustainable

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87 Stewart, *supra* note 18, at 1220 ("Decisions about environmental quality have far-reaching implications for economic activity, transportation patterns, land use, and other matters of profound concern to local citizens.").

88 *See* Esty, *supra* note 20, at 600 (describing early local action on environmental problems, including smoke abatement ordinances, regulation of garbage dumping, and other private nuisance actions).

89 *See Green Cities: Mayoral Initiatives to Reduce Global Warming Pollution*: *Hearing Before the Select Comm. on Energy Indep. & Glob. Warming*, 110th Cong. 2 (2007) (statement of Hon. Edward J. Markey, Jr., Chairman, Select Comm. on Energy Indep. & Glob. Warming), https://www.govinfo.gov/content/pkg/CHRG-110hhrg58083/pdf/CHRG-110hhrg58083.pdf [https://perma.cc/BNM2-6BGV] ("[C]ities are already promoting transit-oriented development, planning to reduce sprawl, and supporting mass transit and bicycle paths to reduce global warming pollution."); Fox, *Local Environmental Innovation*, *supra* note 4, at 580-81; Roesler, *supra* note 4, at 1113 (noting that "local governments have become major players in addressing the most pressing environmental and public health concerns," and providing examples); Wyman & Spiegel-Feld, *supra* note 2, at 337-342 (providing extensive overview of different kinds of local environmental action, including green infrastructure, parks, air pollution, climate change, buildings, and use of zoning authority).

90 Fox, *Local Environmental Innovation*, *supra* note 4, at 581.

91 *See* Adams-Schoen, *supra* note 36, at 188-89.

92 *See, e.g.*, Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 273 (2011) (collecting sources discussing state and local initiatives to address climate change).

93 ALL. FOR A SUSTAINABLE FUTURE, MAYORS LEADING THE WAY ON CLIMATE: HOW CITIES LARGE AND SMALL ARE TAKING ACTION 2 (2018), http://www.usmayors.org/wp-content/uploads/2018/09/uscm-2018-alliance-building-report-baldwin-small-7.pdf [https://perma.cc/GH5X-J5A7].

forms of energy, reductions in emissions, planning for extreme weather, focusing on air and water quality, and many others.[94] Local leadership on environmental issues is expected to continue to increase,[95] and to be increasingly important.[96]

To be sure, not all local governments have the desire or capacity to be at the forefront of environmental regulation,[97] nor are all environmental problems best suited for action by local governments.[98] Indeed, local

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[94] *See, e.g.*, *Learning from Across the Nation: State & Local Action to Combat Climate Change: Hearing Before the Subcomm. on Env't & Climate Change of the H. Comm. on Energy & Commerce*, 116th Cong. 6-7 (2019) (testimony of Stephen K. Benjamin, Mayor of the City of Columbia, South Carolina), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_04.02.19_Benjamin.pdf [https://perma.cc/X4WE-5W4F] [hereinafter *Testimony of Stephen K. Benjamin*] (describing local environmental efforts in Columbia, South Carolina); *Learning from Across the Nation: State & Local Action to Combat Climate Change: Hearing Before the Subcomm. on Env't & Climate Change of the H. Comm. on Energy & Commerce*, 116th Cong. 4-7 (2019) (testimony of Jacqueline M. Biskupski, Mayor of the City of Salt Lake City, Utah), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_04.02.19_Biskupski.pdf [https://perma.cc/4CDP-R79Z] (describing local environmental efforts in Salt Lake City, Utah); *Learning from Across the Nation: State & Local Action to Combat Climate Change: Hearing Before the Subcomm. on Env't & Climate Change of the H. Comm. on Energy & Commerce*, 116th Cong. 3 (2019) (testimony of James Brainard, Mayor of the City of Carmel, Indiana), https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_04.02.19_Brainard.pdf [https://perma.cc/2RBS-844M] (describing local environmental efforts in Carmel, Indiana).

[95] Paul A. Diller, *Reorienting Home Rule: Part 2–Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1047-48 (2017) [hereinafter *Reorienting Home Rule: Part 2*] (describing the urban disadvantage in state and local politics, and noting that "local government is often now seen as the most responsive and nimble level of government in the United States and indeed worldwide").

[96] *See* Daniels, *supra* note 74, at 72 ("[T]hese sorts of regulatory backstops are exactly what our federal system requires or allows for. . . . as a significant portion of our society lives in large cities, these actions taken by large cities should not be discounted — these are large portions of the economy."); Wyman & Spiegel-Feld, *supra* note 2, at 307 (arguing "that major cities have a growing role to play in securing environmental protection not just because of the current political climate in Washington, but for fundamental structural reasons").

[97] Wyman & Spiegel-Feld, *supra* note 2, at 333.

[98] *See* DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS AND POLICY 33-34 (2003) [hereinafter LOCAL GOVERNMENT AND THE STATES] ("Difficult questions also have been raised concerning whether local governments are up to the task of regulating land use, in part . . . because the nature of the growth-control problem is so vast and complex that it cannot be done through a go-it-alone, piecemeal, city-by-city approach."); Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 ARIZ. L. REV. 879, 914 (2008) ("Whatever we might say about climate change, it is assuredly not a purely local problem."); Alice Kaswan, *Climate Adaptation and Land Use*

leaders are often the first to call for a strengthened federal response.[99] Local activity on environmental issues in general, and on climate change in particular, has been taken in response both to the local reality of environmental problems,[100] as well as the political reality of federal and state retreat,[101] and is highly context-specific.[102]

Nonetheless, the current situation might be summarized as follows: little progress on environmental protection has been occurring at the federal level. In the face of federal inaction, some states have become more active in environmental problem-solving. In trends often falling along political lines, some states have also stagnated on environmental progress. Even in states that show little in the way of environmental policymaking, local governments have begun to adopt a wide variety of measures to tackle current environmental problems, and to protect their citizens from environmental harm. This trend is consistent with general trends of gap-filling over the past several decades — when one or more levels of government is unable or unwilling to tackle environmental issues, other levels of government step into the void.[103] This interplay therefore forms an important element of any conversation about current environmental law and policy in the United States.

*Governance: The Vertical Axis*, 39 COLUM. J. ENVTL. L. 390, 393-94 (2014) (noting possible problems and inefficiencies in leaving land use aspects of climate adaptation to local governments).

99 *See, e.g.*, *Testimony of Stephen K. Benjamin*, *supra* note 94, at 5.

100 *See, e.g.*, *id.* at 6-7 (describing the needs of local governments in tackling issues like climate change).

101 *See* Bratspies, *supra* note 32, at 9; Wyman & Spiegel-Feld, *supra* note 2, at 326 (providing reasons for the emergence of cities as leaders on environmental issues, including (1) economic incentives for them to do so; (2) an increase in resources for some cities; and (3) political reactions to federal withdrawal from the field).

102 Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 119 (discussing flaws in analysis of state and local environmental action that points "to an area of federal or state activity without looking to see what previous actions and regulatory requirements might have influenced those actions").

103 *See, e.g.*, Glicksman, *From Cooperative to Inoperative*, *supra* note 66, at 777-78 (noting that in many instances, state and local governments have filled gaps in the nation's environmental efforts by "enhanc[ing] their role in implementing the shared responsibility of the federal and state governments under cooperative federalism regimes to protect the environment."); Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1170 (1995) ("[E]nvironmental law is replete with instances where matters traditionally viewed as local concerns eventually have been subjected to national regulation because of the failure of state or local authorities to address burgeoning environmental problems."); Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 42 (2013) [hereinafter *Not Old or Borrowed*] (describing state action on climate change in the face of federal inaction).

But these interactions are not the end of the story. As local governments have entered this period of increased policy activity, they have also met with another new dynamic — aggressive forms of preemption, or actions by state legislatures to remove their authority to act. The federal system requires a way to mediate conflicts between levels of government, and preemption provides one of those mechanisms at the federal-state, state-local, and federal-local level.[104] At a basic level, preemption describes the ability of one level of government to override the decisions of another. In its most straightforward form, preemption is express. Where the preemption is express in nature, any legal and theoretical conflicts are likely to center on the appropriateness of its use, not on defining the space left over to the subordinate level of government. Traditionally, at least in the federal-state context, express preemption has been somewhat rare.[105]

Over the past decade, however, as cities took increasing action on a variety of issues, many state legislatures also began to experiment with taking away that authority. States began to rescind local authority to act on a variety of issues via methods that resembled express preemption, in that the state legislation involved specifically set out to disrupt local authority. Called in various works, "new,"[106] or "hyper,"[107] preemption, it differs from old preemption in several key ways — it is often,[108]

[104] *See* Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Commons Problems: Nested Governance Commons and Climate Change*, 64 HASTINGS L.J. 1273, 1309, 1311-12 (2013) (noting that state preemption of local authority in the environmental realm may help to solve commons governance issues).

[105] DAVID R. MANDELKER & DAWN CLARK NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM: CASES AND MATERIALS 217 (1977) (observing that, at time of publication, instances of express preemption were rare); David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 509 (2008) [hereinafter *Democratizing Federal Preemption*].

[106] *E.g.*, Richard Briffault, *The Challenge of the New Preemption*, 70 Stan. L. Rev. 1995, 1997 (2018) [hereinafter *New Preemption*] (explaining that "new preemption" refers to "sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems").

[107] *E.g.*, Erin Scharff, *Hyper Preemption: A Reordering of the State and Local Relationship?*, 106 GEO. L.J. 1469, 1473 (2018) (explaining that "hyper preemption" seeks "not just to curtail local government policy authority over a specific subject, but to broadly discourage local governments from exercising policy authority in the first place").

[108] *See* RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 70 (2016) ("[C]onflicts over state-municipal authority are proxies for political fights that have nothing to do with the pros and cons of decentralization."); Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 188 (2017).

though not always,[109] political; it is generally deregulatory in nature;[110] and it has become increasingly punitive for local governments.[111] Substantial scholarship has documented the rise in this kind of preemption by the states, and the impacts on local governments.[112] The state and local relationship has varied over time, and some of these currently prominent dynamics — states removing local authority in a politically targeted fashion — are not entirely new.[113] They are nonetheless notable in terms of the severity and broad impacts of individual state efforts, as well as the national scale of the trend. While not always successful, these and similar state actions leave local policies vulnerable to preemption in ways that are distinct from past trends.

[109] *See, e.g.*, John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 828 (2019) (discussing new dynamic of states preempting local land use to respond to housing availability/affordability concerns); William Fulton, *In Fights Between States and Cities, It's Not Just Red vs. Blue*, GOVERNING (June 2018), https://www.governing.com/columns/urban-notebook/gov-preemption-local-laws-blue-states.html [https://perma.cc/539C-NN4T].

[110] *See* Franklin R. Guenthner, Note, *Reconsidering Home Rule and City-State Preemption in Abandoned Fields of Law*, 102 MINN. L. REV. 427, 429 (2017) ("The legal trend in the cities discussed above, however, has been toward parent political bodies passing preemptive laws without prescribing affirmative policies to replace the newly defunct ordinances, effectively abandoning the field of law and nullifying it at the local level."); *see, e.g.*, George D. Vaubel, *Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule*, 22 STETSON L. REV. 643, 682 (1993) ("In some court decisions, preemption encompasses express denial unaccompanied by any state regulations, as well as situations where a person or entity cannot obey both a set of state regulations and a municipal set.").

[111] RICHARD BRIFFAULT, NESTOR M. DAVIDSON & LAURIE REYNOLDS, THE NEW PREEMPTION READER: LEGISLATION, CASES, AND COMMENTARY ON THE LEADING CHALLENGE IN TODAY'S STATE AND LOCAL GOVERNMENT LAW 11-14 (2019); *see* Briffault, *New Preemption*, *supra* note 106, at 2002-04; Scharff, *supra* note 107, at 1472-73.

[112] *See, e.g.*, Briffault, *New Preemption*, *supra* note 106, at 1995 (explaining dynamics of new forms of preemption); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1163 (2018) (providing comprehensive overview of weakening of city authority via preemption). *See generally* BRIFFAULT ET AL., *supra* note 111 (providing comprehensive overview of new trends in preemption for incorporation in law school curriculum); *see* Scharff, *supra* note 107, at 1473-74 (providing comprehensive look at new, punitive forms of preemption).

[113] *See, e.g.*, BERMAN, LOCAL GOVERNMENT AND THE STATES, *supra* note 98, at 59 (discussing period in the 1860s and 1870s when state legislatures regularly took away local powers, altered local structures and procedures, and substituted local judgments with those of the state); *id.* at 83 ("Massachusetts ended rent control by a statewide vote in 1994 — even though the only communities with rent control voted to keep it. This was a clear case of statewide norms prevailing over local norms. This action came after landlords had unsuccessfully challenged rent controls in the courts and failed as well to get the state legislature to overturn or restrict the enabling statute.").

In the environmental realm, new forms of preemption have been used to remove local authority over hydraulic fracturing restrictions, plastic bag bans, pesticide restrictions, confined animal feeding operation ("CAFO") siting, climate adaptation policies, and others. Thus, at the same time that local governments have increasingly taken on the mantle of environmental protection efforts, many of them have experienced increased vulnerability in the status of their ability to act. The relationship of those two trends is significant when thinking about the true potential for local action and local environmental authority.

## II. LOCAL GOVERNMENTS AND ENVIRONMENTAL FEDERALISM

As the preceding Part set out, the relationship of local government activity and local government vulnerability poses a new question for environmental law and governance. Understanding when and why local governments will be able to take environmental action is crucial for current discussions, which often focus heavily on the potential for local initiative in the face of federal and state inaction.[114] Such conversations often begin in the territory of localism, a construct that helps to explain the interactions between the states and their substate units.[115] Of late, local governments have also been brought into the fold of federalism, an evolution that offers a more comprehensive perspective on how local governments fit into both theories and practice of government in the United States.

Contextualizing and understanding changing relationships among governmental actors often takes place under the umbrella of federalism,[116] which in the United States is both a theory of governance

[114] *See* Fox, *Local Environmental Innovation*, *supra* note 4, at 580-85; Wyman & Spiegel-Feld, *supra* note 2, at 331-33.

[115] *See* David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 381 (2001).

[116] *See, e.g.*, Buzbee, *Federalism Hedging*, *supra* note 32, at 1047-48 ("[W]here federalism is at its most important, or at least most often in play, is in . . . choices about how legislation and resulting bodies of regulation should allocate or preserve federal, state, and sometimes local authority."); Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333, 345 (2017) [hereinafter *Precautionary Federalism*] ("Both the theory and practice of federalism are primarily concerned with two questions: (1) which level of government is best situated to enact legal rules addressing a particular problem, and (2) what values or purposes does this choice serve."); Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance*, 2017 WIS. L. REV. 17, 26 [hereinafter *Negotiating Environmental Federalism*] (describing federalism as "a strategy — an innovative technology of good governance — representing our best attempt to accomplish a set of basic, good-governance principles in the system of government we have created").

and a matter of constitutional law.[117] In both respects, it refers to allocating authority among levels of government within a federal system.[118] It is not synonymous with a preference for a particular level of government,[119] but rather reflects "a strategy for good governance, based on a clear set of values."[120] Those values have been articulated in a variety of ways.[121] In broad terms, they focus on experimentation, local knowledge, and democratic accountability. While all of these values are interconnected,[122] the relative weight given to each may lead to different preferences in terms of power allocation.

Environmental and other federalism scholarship has been doing the work of thinking about substate governments in the context of the federal system for many years. Though not without controversy, this opening of federalism beyond the strict federal and state universe has occurred in response to the reality of local governments exercising their voice[123] and initiative abilities, and reflects the realities of current governance structures in the United States. As environmental federalism literature has evolved, it has extolled the virtues of dynamism and

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117 Schapiro, *Not Old or Borrowed*, *supra* note 103, at 35.

118 Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1332 (2004).

119 *Id.*

120 Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 26.

121 *See, e.g.*, Ann E. Carlson, *Reverse Preemption in Federal Water Law*, *in* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS, *supra* note 14, at 231 [hereinafter *Reverse Preemption*] (noting that federalism values include "encouraging policy experimentation and diversity, respecting local preferences and taking advantage of local knowledge and information about the area of regulation"); Erin Ryan, *Environmental Federalism's Tug of War Within*, *in* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS, *supra* note 14, at 362 (listing five "foundational good governance values that American federalism is designed to advance," including the maintenance of "(1) checks and balances between opposing centers of power that protect individuals; (2) governmental accountability and transparency that enhance democratic participation; (3) local autonomy that enables interjurisdictional innovation and competition; (4) centralized authority to manage collective action problems and vindicate core constitutional promises; and finally (5) the regulatory problem-solving synergy that federalism enables between the unique governance capacities of local and national actors for coping with problems that neither can resolve alone"); *see also* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 38 (2011).

122 Carlson, *Reverse Preemption*, *supra* note 121, at 231.

123 Heather Gerken has focused on this exercise of voice as one of the values that substate actors provide within the federal system. *See, e.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 7-8 (2010) [hereinafter *Federalism All the Way Down*] ("And the power minorities wield is that of the servant, not the sovereign; the insider, not the outsider. They enjoy a muscular form of voice — the power not just to complain about national policy, but to help set it.").

multiscalar governance, and has recognized the benefits that substate actors may bring in their ability to tackle novel environmental problems such as climate change. But even while the ability of local governments to help fulfill some of federalism's values has been noted, the fundamental differences between state and local governments have not been fully part of these discussions. As such, environmental federalism theory to date has generally not considered the vulnerability of local authority in some states, and has not fully grappled with the federalism impacts of that vulnerability. This Part provides a basic outline of environmental federalism principles, along with a discussion of the ways in which local governments have been incorporated into those theories. Following the trajectory of the environmental federalism conversation makes clear the important role of local governments in federalism conversations, as well as why the vulnerability of local authority presents an important new wrinkle.

### *A. Introduction to Environmental Federalism*

Environmental law provides fertile ground for conversations about federalism.[124] Erin Ryan has posited that environmental law is uniquely interwoven with federalism concerns because environmental law is an area "where both federal and state claims to authority are simultaneously at their strongest."[125] Federal claims of authority are strong in environmental law for a variety of reasons. In the early days of federal environmental lawmaking, Richard Stewart famously outlined some of the core rationales in support of centralized environmental law: addressing the tragedy of the commons, or the race to the bottom;

[124] *See* Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 19 (describing environmental law as being "at the epicenter of federalism controversy," or "the 'canary in federalism's coal mine'"); *see also* Michael Burger, *"It's Not Easy Being Green": Local Initiatives, Preemption Problems, and the Market Participant Exception*, 78 U. CIN. L. REV. 835, 853 (2010) ("Preemption doctrine, as applied to environmental law, is situated in the broader policy debate between federalization and devolution. Whether conceived, either descriptively or prescriptively, as cooperative, contextual, dynamic, adaptive, interactive, iterative, or polyphonic, environmental law has long sought an appropriate balance between a centralized scheme and local authority."); Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1902 (2014) [hereinafter *New Nationalism*] ("[E]nvironmental federalists, in particular, have been key movers [in fleshing out more textured/sophisticated account of state policymaking roles], offering a comprehensive account of the ways in which these unconventional forms of federalism improve policy outcomes."); Landy, *supra* note 59, at 238 ("Environment is a good test of the modern-day merits of Tocquevillean federalism because it is a hard case. Air and water move."); Livermore, *supra* note 42, at 651.

[125] Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 21.

disparities in political representation; correcting market failures that lead to externalities; and obtaining advantages of moral action on a national scale.[126] These same rationales may still support an argument for centralized control. For instance, environmental law scholars invoke the idea of a "race to the bottom" in justifying federal regulation. The race refers to the idea that jurisdictions compete for industry and residents, and that jurisdictions will be disinclined to impose optimal levels of environmental regulation for fear of impeding their competitive advantages.[127] While the existence and extent of the race to the bottom has been disputed,[128] the problem of local competition is often invoked in support of centralized environmental governance. Beyond that, disparities in political representation may result in suboptimal levels of environmental regulation; the same is true for problems of regulatory capture, which may be easier for regulated sources to achieve due to favorable regulation at the state level.[129] Federal authority in environmental law is also often justified based on scale, or the boundary-crossing nature of environmental problems.[130]

In tension with those concerns is the strong claim to power that state governments have when it comes to many environmental issues. State power has historically been at its strongest when talking about local control over land use and property rights.[131] Beyond that, scholars have advanced a number of arguments in favor of decentralized environmental regulation that tend to be based on one or more of the following: the benefits of diversity and/or the diseconomies of regulatory scale; skepticism of the race to the bottom problem; public choice claims; rejection of morality-based arguments; and an assumption that spillover or externality effects are insignificant.[132]

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[126] Esty, *supra* note 20, at 603.

[127] *Id.* at 603-04.

[128] *See, e.g.*, Scott R. Saleska & Kirsten H. Engel, *"Facts Are Stubborn Things": An Empirical Reality Check in the Theoretical Debate over the Race-to-the-Bottom in State Environmental Standard-Setting*, 8 CORNELL J.L. & PUB. POL'Y 55, 61-62 (1998) (describing scholarly debate over the existence of a race-to-the-bottom); *see also* Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1104-05 (2009) [hereinafter *Iterative Federalism*]; Esty, *supra* note 20, at 609.

[129] *See* Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 111.

[130] *See* Carlson, *Iterative Federalism*, *supra* note 128, at 1104 ("The most compelling and obvious case for federal regulation is in the presence of interstate externalities: states lack the incentive to regulate more stringently to reduce pollution that enters other states, making federal regulation necessary to correct this market failure.").

[131] *See* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS, *supra* note 14, at ix.

[132] Esty, *supra* note 20, at 605.

Advocates for decentralization often focus on the value of experimentation and diversity, and the importance of tailoring to local conditions.[133] Representation, or public choice theory, is also often levied in favor of more localized control. Such discussions may take the form of suggesting the greater accountability of local decisionmakers, or be focused on questioning whether federal power is really better positioned to combat the problems of interest-group politics.[134] Other skeptics of centralized power over environmental regulation may question the moral assumptions of Stewart's theory, and whether externalities — if they exist at all — justify federal regulation.[135] The various arguments regarding one level of environmental regulation versus another reflect questions of institutional competence, scale, and the complexities inherent in environmental issues.[136] Given these complexities, it is perhaps unsurprising that "[a] hallmark of environmental federalism is that neither federal nor state governments limit themselves to what many legal scholars have deemed to be their appropriate domains."[137]

These competing claims to authority are complicated further by the inability to confine environmental problems such as air and water pollution within set jurisdictional boundaries. The physical realities of environmental issues can make it difficult to apply traditional theories of power allocation. For instance, the matching principle, which attempts to match "the scale of governance to the scale at which the interest lies,"[138] has been used to justify certain distributions of authority.[139] In the environmental realm, boundary-spanning problems and competing governance interests at each level render this inquiry less useful.[140]

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[133] *Id.* at 606-07.

[134] *Id.* at 609-11.

[135] *Id.* at 612-13.

[136] *See* David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1796 (2008).

[137] *Id.*

[138] THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS, *supra* note 14, at xi; *see also* Esty, *supra* note 20, at 624 ("It is well established that . . . efficiency in the provision of a collective good requires the jurisdiction of the government that provides it to match the boundaries of the good.").

[139] *See, e.g.*, Adelman & Engel, *supra* note 136, at 1798 (describing application of matching principle to environmental problems).

[140] *See id.* at 1798-99 (discussing problems with applying matching principle to environmental problems); David A. Dana, *One Green America: Continuities and Discontinuities in Environmental Federalism in the United States*, 24 FORDHAM ENVTL. L. REV. 103, 109 (2013) [hereinafter *One Green America*].

These questions of relative authority, scale, and complexity lend a great deal of vitality to the environmental federalism arena. At root, the concerns animating environmental federalism mirror concerns in the broader federalism conversation. That is, debates in environmental federalism, like debates about federalism more generally, focus on the virtues of federalization versus centralization, and on devolution versus decentralization,[141] all in service of the question of how to assess which level of government is best suited to regulate environmental problems. That question has been answered in a variety of ways.

Dual federalism was the regnant theory in the United States until the 1930s.[142] The dual model conceives of the federal and state governments as independent sovereigns, with spheres of authority that overlap minimally, if at all.[143] Dual federalism's "core issue" is the "the separation of state and national power."[144] To achieve that separation, dualism theory involves the setting of rules and creation of doctrines that keep state and federal actors within their respective spheres and account for the allocation of power to one level of government versus another.[145] Accounts of dual federalism rely on a variety of theories to support the chosen allocation of power.[146]

Environmental law has never existed in a strictly dual federalist universe. Instead, from the beginning of modern environmental law, the field has involved substantial interaction among multiple levels of government. Structurally, many of the major federal environmental law statutes involve schemes of cooperative federalism.[147] "Under the classic

[141] *See, e.g.*, Michael Burger, *The (Re)Federalization of Fracking Regulation*, 2013 MICH. ST. L. REV. 1483, 1490-92 (describing arguments in favor of federalization of environmental law).

[142] Daniel J. Elazar, *Cooperative Federalism*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65, 67 (Daphne A. Kenyon & John Kincaid eds., 1991).

[143] *Id.*; Roesler, *supra* note 4, at 1116-17; Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) [hereinafter *Interactive Federalism*].

[144] Schapiro, *Interactive Federalism*, *supra* note 143, at 246.

[145] *See* Roesler, *supra* note 4, at 1116-117.

[146] *See* Light, *Precautionary Federalism*, *supra* note 116, at 350.

[147] *See* Bulman-Pozen & Gerken, *supra* note 62, at 1276 (2009) ("Environmental regulation has long been cooperative federalism's stomping ground."); Burger, *supra* note 141, at 1498 ("The cooperative federalism structures of SDWA, RCRA, the CWA, and the CAA are all designed to capture the benefits that inure to state regulation of environmental pollution without sacrificing a baseline of protectiveness that ensures greater equality, and environmental and public health, across the country."); Carlson, *Iterative Federalism*, *supra* note 128, at 1107 ("There are many substantive

cooperative federalism model, the federal government sets overall program mandates and goals," which states can then assume responsibility for meeting, subject to continued federal oversight.[148] Reflecting this model, the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Safe Drinking Water Act are all examples of federal environmental statutes that incorporate a cooperative structure by establishing "minimum national standards that can be implemented and administered by states subject to federal supervision."[149] While cooperative federalism schemes set out relative powers as a formal matter, in practice the respective actors and their interests are very much intertwined.[150] Cooperative federalism in the environmental realm offers the benefits of a national standard that can eliminate concerns over a "race to the bottom" in environmental quality.[151] These same national standards may, however, sacrifice either efficiency or diversity and innovation.[152]

Within and around cooperative federalism, another category of federalism theory has emerged over the past several decades. Generally speaking, new theories of federalism in the environmental context and in other fields applaud the dynamism of the power relationship between national and subnational levels of government,[153] and emphasize the elimination of the "zero-sum" nature of power allocations under dual federalism schemes.[154] Instead, state and federal authority is fully concurrent,[155] and sources of power are multiple and independent.[156] The general attributes and values of dynamic federalism are plurality,

environmental areas in which states and the federal government have overlapping areas of jurisdiction whereby both levels of government are essentially free to regulate.").

148 Dave Owen, *Cooperative Subfederalism*, 9 UC IRVINE L. REV. 177, 179 (2018).

149 Percival, *supra* note 103, at 1174.

150 Dana, *One Green America*, *supra* note 140, at 110-11 (noting that in cooperative federalism, "states end up having huge influence over the as applied substance and as applied actual enforcement of environmental law, but it can be next to impossible to say how much and what is due to federal initiative and pressure and what is due to state choice and intent," and that "[t]here are arguable federal and state interests at stake in almost every environmental issue and problem").

151 *See, e.g.*, PERCIVAL ET AL., *supra* note 14, at 128.

152 Adelman & Engel, *supra* note 136, at 1813.

153 *See, e.g.*, Elazar, *supra* note 142, at 77 ("Any proper theory of cooperative federalism must have a dynamic dimension; in other words, it must be able to track the sources of change in the system.").

154 *E.g.*, Light, *Precautionary Federalism*, *supra* note 116, at 345-46.

155 Roesler, *supra* note 4, at 1122.

156 ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 95 (2009).

dialogue, and redundancy,[157] as dynamic federalism theories account for a regulatory space that is being governed by overlapping actors and is "constantly negotiated and contested."[158] These theories of federalism are both descriptive and normative. On the descriptive side, they detail how interactions between the federal and state governments actually occur, and account for constant interactions and renegotiation of power.[159] On the normative side, such accounts are focused on the "value of interaction and dialogue" between and among different levels of government.[160] Rather than trying to assign power to one level of government over another, these dynamic forms of federalism are focused on how overlapping governmental authority can best be used to solve the problem at hand.[161] For their proponents, one of the chief benefits of these federalism frameworks is that they "ensur[e] that if one governance level fails to address a problem, another can step up, and if multiple levels respond, they can learn from each other's efforts."[162] In these more modern and more pluralistic accounts, federalism is a messy and interactive business, but one that ultimately upholds the values associated with a federal structure.

Dynamic federalism has developed into a powerful dominant strain in environmental law scholarship. Under this general umbrella,[163] environmental federalism scholars have articulated many different ways to think about power-sharing relationships within environmental law that are constantly in flux[164] — called, in various works, interactive;[165]

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[157] *See, e.g.*, *id.* at 98-101; *see also* Roesler, *supra* note 4, at 1148.

[158] Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1700, 1707 (2017) [hereinafter *Federalism 3.0*] (describing dynamic forms of federalism and praising focus in *NFIB* on bargaining process between state and federal government rather than on preserving spheres of authority).

[159] *See, e.g.*, Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 21 (2011); *see also* Owen, *supra* note 148, at 183-89.

[160] Owen, *supra* note 148, at 224 n.316, 225.

[161] *E.g.*, SCHAPIRO, *supra* note 156, at 96.

[162] Owen, *supra* note 148, at 224; *see, e.g.*, Light, *Precautionary Federalism*, *supra* note 116, at 338 (advocating for "presumption in favor of multiple regulatory voices and against broad exercises of preemption under conditions of uncertainty"); *see also* Buzbee, *Federalism Hedging*, *supra* note 32, at 1039 (advocating for a theory of federalism hedging, or "the regulatory choice to retain overlapping, interacting, and often intertwined federal and state roles" even under circumstances that might otherwise call for one ideal regulator).

[163] *See* Osofsky, *supra* note 92, at 276, 281.

[164] Carlson, *Iterative Federalism*, *supra* note 128, at 1107.

[165] Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENVTL. L.J. 397, 447-48 (2008).

iterative;[166] diagonal;[167] adaptive;[168] contextual;[169] or negotiated.[170] Each of these variations on environmental federalism is the subject of rich scholarship, and this Article does not attempt to fully capture the nuances contained in each. What these environmental federalism varieties have in common is an embrace of the important role of multilevel governance responses in effective environmental law and policymaking and in providing checks on the other levels.[171] Overall, the current trend in environmental federalism scholarship and theory is toward a recognition of the messiness of the federal system in general, and of environmental regulation in particular. Because of the inherent complexity of environmental issues, environmental federalism scholars often eschew arguments in support of regulation by a particular level of government, and instead focus on the importance of multiscalar governance mechanisms that reflect, create, and promote overlapping authority.

### *B. Local Governments in (Environmental) Federalism*

Thus, current environmental federalism scholarship makes clear the importance of overlap and the tradition of gap-filling. What may be less clear, at least at first glance, is the place of local governments, which "occupy an ambiguous place in American federalism."[172] There is a long tradition in the United States of excluding local governments from

[166] Carlson, *Iterative Federalism*, *supra* note 128, at 1099. Professor Carlson defines iterative federalism as a process by which "one level of government . . . moves to regulate a particular environmental policy area. The initial policymaking then triggers a series of iterations adopted in turn by the higher or lower level of government. The process then extends back to the policy originator, and so forth." *Id.* at 1100. The theory of iterative federalism looks to the interaction of federal and state law, and focuses in particular on "regulatory schemes under which federal law has granted a state or group of states special regulatory power[.]" *Id.* at 1100, 1107.

[167] Osofsky, *supra* note 92, at 267, 269.

[168] Adelman & Engel, *supra* note 136, at 1801 (advocating for an adaptive model of federalism that accounts for complexities within the federal system).

[169] Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 109; William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 49-56 (2003).

[170] Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 17, 20.

[171] Esty, *supra* note 20, at 653; Alice Kaswan, *Cooperative Federalism and Adaptation*, *in* THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS, *supra* note 14, at 197 (noting the various roles that federal, state, and local actors may play in climate adaptation). *See generally* RYAN, *supra* note 121.

[172] *See* James Q. Wilson, *City Life and Citizenship*, *in* DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY, *supra* note 59, at 17.

conversations about federalism,[173] or of collapsing them into their respective states.[174] The debate about whether or not local governments are properly part of the federalism conversation continues today.

The Constitution does not provide an explicit place for cities within the federal structure.[175] On that basis, some scholars find the inclusion of local governments in any discussion of the federal structure to be untenable.[176] And indeed, if the federalism dialogue is confined to the corners of the Constitution and a dualistic conception of governmental authority, then the failure to include local governments in the federalism conversation is unsurprising.[177] Functionally, though, as both a matter of practice and of common understanding, local governments are part of the federal system.[178] And if federalism is

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173 *See* ROSCOE C. MARTIN, THE CITIES AND THE FEDERAL SYSTEM 32 (1st ed. 1965) ("There is a general disposition for observers to dismiss the subject of the place of the cities in the federal system with the brisk conclusion that cities are not members of the federal partnership."); Owen, *supra* note 148, at 179 ("Particularly in Supreme Court decisions, local governments have often been federalism's forgotten stepchildren."); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 171 (2017) ("[C]ourts have long resisted seeing local governments as deserving of autonomy, and have never treated home rule as providing any real federalism."); *see also* Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 33 (noting that federalism conversations often focus on the state and federal dynamic "because these are the two levels of government the Constitution considers").

174 Owen, *supra* note 148, at 225 (describing the "fallacy of the habit, which recurs throughout federalism case law and theory, of collapsing state and local governance into a single category").

175 *See* Stahl, *supra* note 173, at 171 ("The root of the problem is that intrastate federalism is not a true federal system, in which subgroups have constitutionally committed power, but a unitary system in which state legislatures have ample room to decide how much authority to confer upon substate groups.").

176 *See, e.g.*, Gregory Ablavsky, *Empire States: The Coming of Dual Federalism*, 128 YALE L.J. 1792, 1867-68 (2019) (discussing difficulty of including local governments in conversations about federalism).

177 Some scholars have argued for a reading of the Constitution that includes a textual basis for local power. *See, e.g.*, Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 83 (2018) (discussing the Tenth Amendment and arguing that "[t]o ignore local governments in this assessment of federal power renders the last clause of the Tenth Amendment, 'or to the people,' superfluous. States' rights vis-à-vis the federal government are not the states' alone; rather, these rights flow from an individual liberty interest possessed by the ultimate sovereigns, 'we the people.' In this sense, we argue that cities are not missing from the Constitution but are implied by it and operate in a zone of retained individual liberty").

178 *E.g.*, MARTIN, *supra* note 173, at 32-33, 171 ("We have seen how the American federal system came to be expanded to include the cities as a third partner."); Elazar, *supra* note 142, at 70, 74 (noting that "[t]he American system is a federal-state-local-

understood not simply to be a project of dividing power between the federal government and the states, but of understanding and developing norms for the system of interrelated actors that actually participate in governance in the United States, the absence of local governments is a glaring omission.[179] Accordingly, increasing numbers of scholars have worked to understand and articulate the role of local governments within the federal system, and have incorporated them into federalism theory.[180]

Modern conceptions of federalism might be said to accommodate a role for local governments relatively easily. First, the realities of cooperative federalism make the place of local governments within the federal structure quite apparent.[181] Despite the limits imposed by the anti-commandeering doctrine, cities are responsible for carrying out many national mandates.[182] Dave Owen has used the term "cooperative subfederalism" to describe the power sharing relationships that local governments may have with their individual states.[183] In taking on these

private partnership," and accounting for local governments as actors within the "game" of the federal system); Wilson, *supra* note 172, at 17.

[179] *Cf.* Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 33 (noting that the fundamental question in federalism — that of "who should decide"? — takes place at every level of government, including local government).

[180] *See, e.g.*, Barron, *supra* note 115, at 381 (noting that the law of federalism "defines the relations of the federal government vis-à-vis state and local governments"); Gerken, *Federalism All the Way Down*, *supra* note 123, at 46 (making the case for consideration of local governments within federal system, and offering argument in favor of local initiative authority without local sovereignty); Roesler, *supra* note 4, at 1116 (applying "different descriptive and normative theories of federalism to understand their implications for local authority and power"); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balances in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 654 (2007) [hereinafter *Interjurisdictional Gray Area*] (promoting a more balanced take on federalism that would insert a variety of values, including localism, into Tenth Amendment disputes); *see also* Sarah E. Light, *Advisory Nonpreemption*, 95 WASH. U. L. REV. 327, 338 n.43 (2017) ("Many scholars of federalism — traditionally viewed as encompassing only the federal government and the states — now incorporate local governments into the analysis.").

[181] *See* MARTIN, *supra* note 173, at 33 (arguing that cooperative federalism can be said to bring local governments into the federalism framework).

[182] *See id.* at 34, 111; *see also* Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839, 841 (2017) (discussing the ways in which the federal government regulates the conduct of the states, and in which states then delegate federal responsibilities to local governments).

[183] Owen, *supra* note 148, at 226 (describing the possible virtues associated with a system of cooperative subfederalism, and noting that the result of this system of state and local interaction is "federalism as a messy fractal pattern, which repeats itself — though not with complete consistency — at multiple scales, not a binary division between the federal government and everyone else").

roles, local governments are explicitly part of the federal system of government. The presence of local governments within the federalism construct is perhaps at its most apparent within the environmental realm. Local governments have traditionally been responsible for land use regulation and the attendant early forms of environmental controls.[184] As discussed above, both federal and state actors also have powerful claims to authority in these areas. In consequence, the competing interests that have made environmental federalism debates regarding the federal and state governments particularly contested also apply to the state and local actors.[185]

If cooperative federalism helps support a role for local governments in the federal system in the first place, then support for a local role in environmental federalism — which has been the main arena for many advances in and conversations about cooperative federalism[186] — is particularly strong. Local governments are bound by the standards contained in federal environmental programs and are subject to federal standards administered by states.[187] For instance, federal drinking water standards are often implemented in part by local governments, and those standards impact local control over municipal water supplies.[188] Local governments also engage in monitoring air quality as part of the federal Clean Air Act,[189] and implement species protection programs under the Endangered Species Act.[190] Through delegated authority from state governments, local governments may also take on sizable roles in controlling air and water pollution, remediating contaminated land, and planning land use. All of these local responsibilities fall to some degree within the federal system of environmental law.

[184] Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1406 (2012) ("Less than fifty years ago, environmental regulation, like land-use regulation, occurred mainly at the local level.")

[185] *See* Owen, *supra* note 148, at 226-27 (discussing application of federalism debate to state and local relationship).

[186] *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 188 (2005).

[187] Wyman & Spiegel-Feld, *supra* note 2, at 324-25.

[188] Hannah J. Wiseman, *Delegation and Dysfunction*, 35 YALE J. ON REG. 233, 262, 264 (2018) (describing delegations of authority under the Safe Drinking Water Act); Wyman & Spiegel-Feld, *supra* note 2, at 331.

[189] Wiseman, *supra* note 188, at 284-85.

[190] *See, e.g.*, Robert L. Fischman & Jaelith Hall-Rivera, *A Lesson for Conservation from Pollution Control Law: Cooperative Federalism for Recovery Under the Endangered Species Act*, 27 COLUM. J. ENVTL. L. 45, 111-12 (2002) (describing example of local conservation plan under the Endangered Species Act).

Functionally, then, local governments are part of the interrelated web of government actors in environmental law. Beyond that, federalism values support a role for local governments in federalism conversations.[191] As described, central to environmental federalism inquiries is the question of "who should decide."[192] Erin Ryan has articulated the values relevant to that question as "voice, accountability, autonomy, efficiency, and interdependence."[193] It is not difficult to see the role that local governments can play in fulfilling each of these. For example, Heather Gerken's scholarship has made clear the important role of local actors in exercising voice, even (or perhaps especially) without the opportunity for exit.[194] Similarly, values such as interdependence and accountability have a mirror in the dynamic federalism values of plurality and redundancy,[195] or the fact that "[w]hen one government fails to address a problem, the other can step in and provide a remedy."[196] To advance those values in the environmental context, scholars have called for a move away from static allocations of authority, as assigning authority to one level of government "deprives citizens of the benefits of overlapping jurisdiction, such as a built-in check upon interest group capture, [and] greater opportunities for regulatory innovation and refinement[.]"[197] Local ability to take action when policy change at other levels of government is stagnating offers an opportunity for local governments to strengthen these federalism values.

Thus, in a theory of environmental federalism that values multilevel governance possibilities, local governments offer another complementary layer. For all of those reasons, environmental federalism scholars have recognized the role that local governments may play in furthering relevant federalism values.[198] The initiative authority exercised by local governments means that they are frequently playing a policymaking function, and providing many needed services

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[191] *E.g.*, Kathleen Claussen, *Default Localism, or: How Many Laboratories Does It Take to Make a Movement?*, 48 CREIGHTON L. REV. 461, 464 (2015) ("The progressive federalists of today emphasize the potentialities of local governance.").

[192] Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 33.

[193] *Id.* at 34.

[194] Gerken, *Federalism All the Way Down*, *supra* note 123, at 7-8.

[195] *See* SCHAPIRO, *supra* note 156, at 98-101.

[196] Roesler, *supra* note 4, at 1150-51.

[197] Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 161 (2006).

[198] *See* Roesler, *supra* note 4, at 1152.

to their citizens.[199] Theories of dynamic environmental federalism have built upon that premise to offer a normative account for the inclusion of local actors in federalism theory,[200] pointing out the ways that local governments may help to work through particularly complicated governance questions and toward the attainment of federalism values. The inclusion of local actors at a time when they are exercising increasing amounts of influence and authority is the latest example of environmental federalism theory shifting to reflect governance realities — and leading a shift in the governance conversation for other areas as well.[201]

As with any federalism theory, the inclusion of local governments as a relevant actor does not itself answer the fundamental question of "who should decide?" Instead, it inserts local governments as a plausible answer to that question, depending on whether, in any given situation, it is local governments that are best positioned to fulfill the relevant federalism values. In many cases, for instance, emphasizing the efficiency value will weigh more in favor of action by the state or federal government than by many separate local actors. And there are many environmental problems for which state or federal action may in fact be preferable. In our current political moment, where inaction by federal and state actors may lead to concerns about the inability to exercise voice or to promote accountability at those levels, dynamic environmental federalism supports a look at the potential for local governments to provide an affirmative environmental policymaking role.

## III. Environmental Federalism and the Loss of Local Authority

Local governments have been integrated into environmental federalism in theory and in practice in a variety of ways. But that integration has not meant that the unique characteristics of local governments in the United States have received full attention. On the contrary, local governments are often grouped together with the states

[199] *See, e.g.*, Su, *supra* note 108, at 185 ("Cities may occupy the lowest rung in our federal system. On a growing number of policy issues, however, they have taken the lead in framing the debate.").

[200] *See, e.g.*, Osofsky, *supra* note 92, at 271 (describing scholarship that "focuses on how to incorporate the smallest or largest levels of governance into the traditional federal-state conversation").

[201] *See, e.g.*, Erin Ryan, *Response to Heather Gerken's Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 1147, 1151-52 (2015) [hereinafter *Response to Heather Gerken*] (describing lessons that environmental federalism has to offer constitutional federalism).

in federalism discussions.[202] Federalism conversations are frequently styled in terms of federal and sub-federal entities, with the latter sometimes confined to states and sometimes including local governments. That conflation has at times minimized the significance, virtues, and vulnerabilities of the local role within the United States.[203]

Local governments may be positioned to fulfill federalism values in ways similar to state actors. They are also quite different, however, in structure and in the source of their authority. The recent trends in state and local relationships described above have made clear the vulnerability of local governments to removal of their ability to act on environmental issues. The ways in which these vulnerabilities differ from states and among states means that local power structures warrant a fuller consideration within the federalism conversation. This Part will describe local governmental authority within the United States, and detail the mechanisms by which such authority might be taken away. It will then discuss why treating local power in the same way as state power obscures important elements of environmental governance.

### *A. Local Authority Within the Federal System*

Local governments have deep roots in the United States.[204] From the country's beginning, its residents organized themselves into units of local government.[205] Tensions between local autonomy and national unity combined to produce the failed Articles of Confederation, and eventually, the United States Constitution and the federal system as it exists today.[206] The Constitution contains two provisions that are particularly important to the articulation of roles within the federal

[202] Ryan, *Interjurisdictional Gray Area*, *supra* note 180, at 610-11; *see, e.g.*, Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. 877, 933 n.306 (2011) ("Even those who argue for increased local government power tend to conflate the state and local governments in debates about federalism.").

[203] Owen, *supra* note 148, at 225 ("While the conflations of state and local governance may be partly due to sloppiness, they also serve a rhetorical purpose: they give states a boost in federalism's classic power struggles.").

[204] *See* MARTIN, *supra* note 173, at 21; *cf.* Pauline Maier, *Early American Local Self-government*, *in* DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY, *supra* note 59, at 70, 76 (discussing presence of local governments and "tradition of strong local self-government," but noting presence of centralizing forces as well).

[205] *See* MARTIN, *supra* note 173, at 21 ("A discussion of the American federal system which aspires to realism must begin with an understanding that local government was here first.").

[206] *See, e.g.*, *id.* at 23; *see also* SCHAPIRO, *supra* note 156, at 32-34.

system: Article IX, the enumerated powers clause,[207] and Article X, the reservation of powers to the states.[208] Nowhere is there a specific mention of, or reservation of power to, sub-state bodies. Based on that textual reality, and a need for national unity, a judge-made doctrine of state supremacy came to dominate in the United States.[209] In reaction to local efforts to exert their own authority, Judge John Dillon drafted a landmark decision that declared that local governments "owe their origin to, and derive their powers and rights wholly from, the legislature."[210] This decision, coupled with a subsequent treatise by Judge Dillon, came to form the basis for a doctrine known as Dillon's rule. The position of state supremacy articulated in Dillon's rule was cemented in some ways by the Supreme Court's decision in *Hunter v. City of Pittsburgh*, which confirmed the view that local governments are mere creatures of the state.

As a formal matter, Dillon's Rule and *Hunter* established fairly clear limits on local autonomy. Practically, however, local governments continued to provide a number of services to their citizens. And as the United States industrialized, and cities grew, the pressing needs of the cities to exercise greater and greater levels of discretion became clear.[211] In response, states began to grant power known as home rule to their cities. Home rule exists to allow local governments the authority to act on a variety of issues.[212] That power is not derived from the federal Constitution, but is delegated by the state, either through constitutional or legislative acts.[213]

In most states, local governments can exercise this grant of authority from the state in a variety of ways, subject to alteration, revocation, or preemption by the state government. While the exact ways in which the

207 "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. art. IX.

208 "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.* art. X.

209 *See* MARTIN, *supra* note 173, at 29.

210 *Id.* at 29-30 (quoting City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455, 475 (1868)).

211 Fox, *Local Environmental Innovation*, *supra* note 4, at 588; Su, *supra* note 108, at 190.

212 *See* Robert H. Freilich & Richard G. Carlisle, Editor's Comment, *The Community Communications Case: A Return to the Dark Ages Before Home Rule*, 14 URB. LAW. v, viii (1982) ("The fundamental purpose of home rule is to allow both the cities and the state to exercise power coordinately so that problems can be solved at either or both levels of government.").

213 DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 44 (2001).

authority of local governments may be altered or withdrawn varies from state to state, it is generally true that states wield a great deal of control over the extent of local authority. In recent years, the new trends in state preemption of local authority have caused the vulnerability of local governments to become a focal point of many state and local government conversations. While scholars have discussed ways to preserve local authority in the face of state preemption efforts,[214] including efforts to redesign the structure of the state and local relationship, states have been generally successful in efforts to remove local authority as desired.[215]

Speaking from a very high level of generality, grants of home rule in the United States have left local governments with little in the way of guarantees of power but a great degree of functional autonomy, including over matters such as revenue generation, land use controls, the ability to dictate the geographic scope of their jurisdiction, and others.[216] The lack of explicit structural protection at either the federal or state level has left the lawmaking authority of cities quite vulnerable in environmental and other policy realms. The most recent manifestation of this vulnerability is in the waves of new methods of preemption that remove local authority to act. In the environmental realm, then, local governments in some states face certain barriers to action.

### B. *The Loss of Local Authority and Current Environmental Federalism Frameworks*

To this point, this Article has established that local governments act in many ways to protect the environment, that those actions mean that local governments have an important role to play in current

[214] *See, e.g.*, Briffault, *New Preemption*, *supra* note 106, at 2022-25 (discussing strategies for upholding local authority in the face of state preemption, including invalidating punitive preemption, excessive fees, and challenging state laws that create a regulatory vacuum); Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 986 (2019) (discussing sources of normative bases for upholding local authority in the face of state preemption); Schragger, *supra* note 112, at 1216-26 (discussing "legal arguments available to cities in resisting state centralization").

[215] *See, e.g.*, State *ex rel.* Brnovich v. City of Tucson, 242 Ariz. 588 (2017); Protect Fayetteville v. City of Fayetteville, 2017 Ark. 49 (2017); City of Laredo v. Laredo Merchants Ass'n, 550 S.W.3d 586 (Tex. 2018).

[216] Barron, *supra* note 115, at 393, 395-96; *see also* MARTIN, *supra* note 173, at 32 (noting that "*de jure* the state is supreme, *de facto* the cities enjoy considerable autonomy"); Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990).

environmental federalism conversations, and that local governments are generally vulnerable to preemption by the state. Other scholarship has detailed ways in which new trends in state preemption of local ability to act might be concerning, including the undermining of local authority and the loss of democratic legitimacy,[217] gaps in democratic participation,[218] loss of accountability[219] and representation,[220] and damage to the dignity of the individual and community.[221] While neither these new forms of preemption nor the concerns attached to them are unique to environmental law, the potential impacts of these new forms of preemption for environmental law and environmental federalism are distinct enough to warrant their own examination.

As described above, dynamic forms of environmental federalism have focused on the attainment of federalism's values as a metric by which to assess the benefits or drawbacks of certain governance arrangements.

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217 Kristen van de Biezenbos, *Where Oil Is King*, 85 FORDHAM L. REV. 1631, 1670 (2017) ("[T]he overuse of state preemption to overrule local authority undermines citizens' faith in the democratic process . . . ."); *see, e.g.*, Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 258 (2004) (arguing that where state legislation cuts off the ability for local governments to regulate, it undermines democratic principles); Diller, *Reorienting Home Rule: Part 2*, *supra* note 95, at 1049 ("[T]here is good reason to question the democratic legitimacy of preemption, particularly when targeted at large and densely populated urban areas.").

218 *See* BERMAN, LOCAL GOVERNMENT AND THE STATES, *supra* note 98, at 155 ("One could argue that it is desirable to give local governments as much policy-making discretion as possible within this broader system because there is a lot to be done and the federal government and states cannot do everything, because there is something to be said for recognizing diversity and the need for a local input in devising solutions to problems, and because local units are valuable as a means through which citizens can participate in civic affairs — and, indeed, if localities don't have the authority to make important decisions, there is no rational reason why citizens should participate.").

219 *See* Barron, *supra* note 115, at 382 (noting that "[t]here is value in ensuring that local jurisdictions have the discretion to make the decisions that their residents wish them to make," and discussing the various benefits that can come from local empowerment, including participatory and responsive government, diversity of policies, flexibility, experimentation, and diffusion of power); *see also* Hirokawa & Rosenbloom, *supra* note 14, at 261 ("Local governments are accountable in ways not felt at other levels of government.").

220 *See, e.g.*, James L. Huffman, *Making Environmental Regulation More Adaptive Through Decentralization: The Case for Subsidiarity*, 52 U. KAN. L. REV. 1377, 1393-94 (2004) (noting the greater relative influence of individuals in local elections, which is important given that, "[n]otwithstanding the ever-greater homogenization of the United States, local communities still tend to have their own distinct identities and the shared values that give any community cohesion").

221 *E.g.*, Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 192 (2005) [hereinafter *Is Federalism Good for Localism?*] (noting that, in this framing, it is not about the results achieved, but about who is making the decision).

For a variety of reasons, and as described in more detail below,[222] state removal of local authority to act can undermine the attainment of environmental federalism goals. Thus, the undermining of environmental federalism values through deregulatory preemption by the state brings the dynamic squarely within the environmental federalism conversation. To date, however, it has not been fully explored within that context.

This lack of treatment of state preemption of local authority by federalism theorists is not particularly surprising — as mentioned, although environmental federalism theory has integrated local governments into its analysis, it has largely done so by grouping local governments with the states.[223] Local governments may help to achieve some of the same values as state actors; although there are good reasons for not conflating the levels of government, the differences arguably matter less on the plus side of the balance sheet. But modern environmental federalism theory does not deal only with the benefits provided through the incorporation of different governmental actors into federalism conversations. This body of work also treats the question of how best to maintain the benefits that these governmental actors provide. And the answer to the question of how best to preserve the benefits that local government can provide in attaining federalism values is necessarily a very different one than for state actors.

As noted, state and local governments draw their authority from distinct sources. States are explicitly part of the constitutional structure, while local governments are not.[224] These structural differences have big impacts for thinking about the preservation of a local role in environmental federalism. Most notably, a far greater power imbalance exists between local and state governments than for states and the federal government.[225] Indeed, Robert Schapiro has noted that an

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[222] *See infra* Part V.B.

[223] *See* RYAN, *supra* note 121, at 194-95 (calling explicitly for consideration of localist values in federalism conversations, including "the extent to which crossover protects local autonomy," and the "extent to which crossover marginalizes or discriminates against vulnerable localities," but noting that the balanced federalism approach is centered squarely in Tenth Amendment discussions and retains the federal-state dichotomy of traditional federalism conversations); *see also* Owen, *supra* note 148, at 226.

[224] *See infra* Part IV.A.

[225] *See* Su, *supra* note 108, at 188-89 (citations omitted) ("There is a certain irony, of course, that states now find themselves arguing against the same 'localist' values that they so effectively used in attacking the expansion of federal authority. Yet it is also true, as many state leaders point out, that the legal standing of the state vis-à-vis the federal government differs in many important ways from the legal standing of the city in relation to the state.").

important element of his theory of polyphonic federalism is the reality that "neither the federal government nor the states can eliminate the independent lawmaking authority of the other."[226] The authority and practice of states removing the authority of local governments raises unique questions.

To see why local governments are deserving of their own consideration, it may be useful to consider the preemption analyses that have occurred to date in the federal-state context. To begin, environmental federalism conversations that focus on preserving state authority tend to focus on questions of implied preemption, and how to limit loss of authority within that framework.[227] This focus makes sense; historically, much of the role of courts in federal-state preemption cases has been to decide whether the state action was impliedly preempted.[228] Courts do so through a variety of methods, including the doctrines of field preemption and conflict preemption. In its various forms, implied preemption might be said to undermine dynamic forms of federalism because it cuts off action by the state and the overall political process.[229]

With implied preemption set up as a potential problem, dynamic federalists have then sought a solution. One mechanism that scholars have endorsed, and that the Supreme Court has employed in certain contexts, is the presumption against preemption. As articulated by the Court, the presumption against preemption "start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[230] This presumption both requires an express showing of preemptive intent on the part of Congress and supports narrow interpretations of express preemption language.[231] Environmental federalism scholarship has at times endorsed judicial

[226] SCHAPIRO, *supra* note 156, at 96.

[227] *See, e.g.*, Engel, *supra* note 197, at 184-86 (describing federal preemption as the real threat to dynamic environmental federalism and discussing strategies for reducing judicial recognition of implied preemption).

[228] Dana, *Democratizing Federal Preemption*, *supra* note 105, at 509.

[229] *See, e.g.*, Engel, *supra* note 197, at 163 ("Preemption, then, is the real boogeyman of public interest lawmaking because it prevents the political process from policing itself.").

[230] Wyeth v. Levine, 555 U.S. 555, 565 (2009).

[231] Robert L. Glicksman, *Nothing Is Real: Protecting the Regulatory Void Through Federal Preemption by Inaction*, 26 VA. ENVTL. L.J. 5, 16 (2008) [hereinafter *Nothing Is Real*]. *But cf.* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) (characterizing Supreme Court application of presumptions as "fickle").

use of the presumption against preemption to uphold dynamism between and among actors in the federal system.[232]

In addition to the presumption against preemption, state interests might be said to be protected in other ways as well in traditional preemption analyses. For instance, where federal preemption of state interests is found to have occurred, it is defended at times on the basis that federal representatives are accountable to their state constituencies, and that state interests are therefore adequately protected. On that theory, removal of state authority is less of a problem where state concerns can be said to be adequately represented. Another level of protection against preemptive actions may come from the degree to which courts scrutinize the amount of process or expertise employed by the preempting body.[233] Where that kind of expertise is not present, courts have been less willing to find a preemptive effect.[234] And in the context of tort law, the Supreme Court has disfavored interpretations of federal preemption provisions that would leave an injured individual without a remedy.[235] While these interpretations would not prevent Congress from eliminating all remedies where it chose to do so, the Court has required a clear expression of preemptive intent based on its discomfort with the lack of remedy otherwise available.[236] Taken together, these protections mean that while the preemption of state authority is not disallowed, it is disfavored in certain circumstances. This judicial discomfort with stripping away avenues of self-protection arguably reflects "the inherent legitimacy in allowing the people to protect themselves by duly enacted means at the local, state or federal level (or on all three levels)."[237]

232 *See, e.g.*, Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 609 (2008) (citation omitted) ("[T]here are powerful arguments against implied preemption that justify a strong judicial presumption against ceiling preemption under federal environmental statutes in the absence of an express provision.").

233 *See* William W. Buzbee, *Preemption Hard Look Review, Regulatory Interaction, and the Quest for Stewardship and Intergenerational Equity*, 77 GEO. WASH. L. REV. 1521, 1579 (2009) [hereinafter *Preemption Hard Look Review*].

234 *See id.*; *see also* Judith Resnik, *Return to* Missouri v. Holland*: Federalism and International Law: The Internationalism of American Federalism: Missouri and Holland: The Earl F. Nelson Lecture*, 73 MO. L. REV. 1105, 1144 (2008).

235 Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1193-94 (2007).

236 *See id.*

237 *Id.* at 1196.

A discussion that picks up in a similar vein is that involving ceiling versus floor preemption in the federal-state context. Using William Buzbee's characterization, a number of environmental federalism scholars have explored the difference between ceiling preemption, or federal legislation that sets a limit on state regulation, and floor preemption, which offers the federal legislation as a starting point. These scholars generally agree that ceiling preemption poses more of a problem for environmental federalism, and that it is appropriate in only limited circumstances. To give life to these recommendations, some scholars have again cautioned against the use of express ceiling preemption without strong justification.[238] Out of both of these strands of the conversation emerges the general sense of a bias against deregulatory preemption that is enforced through a variety of scholarly rationales and judicial mechanisms. Through this lens, gaps in governance that result in the functional inability to exercise that right of self-protection may therefore be said to run contrary to democratic traditions.[239]

Preemption in the state and local context raises similar but distinct issues. There are many important differences between federal preemption of state law and state preemption of local law. Most notably, while the Supremacy Clause protects a realm of state authority, in most states no similar legal protections exist for local governments. The types of preemption that arise are often different as well — many of the federal preemption cases deal with the question of when and how to infer preemption, while no such analysis is needed as to newer forms of deregulatory preemption, where the state law is explicitly designed to preempt the ability of local governments to act. And while in some states a presumption against preemption of local authority exists, the opposite — a preference in favor of state authority — operates in others.[240] Notwithstanding those very real distinctions in legal analysis, many of the reasons for disfavoring deregulatory preemption are as true at the local level as they are for the states.

A substantial case can be made, then, that deregulatory forms of local preemption ought to be disfavored from the perspective of dynamic environmental federalism theory. The mechanisms advanced to date as protection against this kind of preemption in the federal-state context, however, will not suffice to prevent state removal of local authority. The

[238] *E.g.*, Glicksman & Levy, *supra* note 232, at 583-84.

[239] *See* Strickland, *supra* note 235, at 1196.

[240] *See, e.g.*, City of Atlanta v. McKinney, 454 S.E.2d 517, 521 (Ga. 1995) ("The powers of cities must be strictly construed, and any doubt concerning the existence of a particular power must be resolved against the municipality.").

use of strategies like presumptions against preemption — though perhaps not wholly unworkable — have less likelihood of success when dealing with express forms of preemption targeted at local governments whose vulnerability to preemption is in many ways a structural part of our system of governance.[241] Current dynamics have exposed the differences between state and local authority, and have also resulted in a situation that may undermine the attainment of federalism values. As such, it is worth thinking about the impact of these dynamics on environmental governance, and how environmental federalism theory should respond.

Existing environmental federalism theories offer a deep grounding in the values of environmental federalism, and how state and federal relationships play out in the United States. Importantly, they also offer a sense of the fluidity of the political sphere, and the need for federalism theory to reflect that same dynamism. As its shifts have shown, federalism is both a legal and a political question. The need to respond to and explain political realities has long been a part of the work of environmental federalism scholars and others. Acknowledging the realities of local authority within the environmental federalism conversation can help to ensure that theory reflects political reality, and to provide a more complete sense of the possibilities for and the limitations on local governments that undertake environmental policymaking.

## IV. LOCALIZING ENVIRONMENTAL FEDERALISM

Few mechanisms to protect local authority exist within the home rule framework itself as currently interpreted,[242] and local governments are therefore vulnerable to removal of their authority over environmental and other issues. The potential chilling effect that preemption may have on innovation at the state and local level is well-recognized.[243] This

[241] *See, e.g.*, Wyman & Spiegel-Feld, *supra* note 2, at 358 (discussing the difficulty in applying a presumption against preemption to instances of express preemption).

[242] Some scholars have advocated for more expansive reading of home rule provisions that would provide greater protection to local governments. *See* Briffault, *New Preemption*, *supra* note 106, at 2017-25.

[243] *See id.* at 1997 ("[P]reemption measures frequently displace local action without replacing it with substantive state requirements."); Bulman-Pozen & Gerken, *supra* note 62, at 1304-05 ("Preemption is a problem . . . because it pushes states to the edges of national policymaking."); Light, *Precautionary Federalism*, *supra* note 116, at 381 ("A vision of precautionary federalism should motivate both legislators and courts to narrow the scope of preemption at the federal and state levels to permit experimentation and learning at this time of uncertainty."); Wyman & Spiegel-Feld, *supra* note 2, at 349 ("In thinking about how the scope for municipal innovation could be enhanced under the

vulnerability to preemption is a problem not only for localism, but also for federalism, and for overall questions of governance.

Federalism is different than localism.[244] Federalism, as described above, is both a constitutional question and a set of norms, and has descriptive and normative elements. Those elements are often, but not always, focused on the benefits of or drawbacks to decentralization.[245] Localism, in contrast, "defines the relations between states and their local government."[246] It too also often has both descriptive and normative components. Normatively, localism has been described as "a theory that governments ought to be arranged to protect 'democratic decentralization.'"[247]

As described above, some scholars reject the inclusion of local governments within the broader federalism conversation. This Part of the Article, however, focuses explicitly on the role of local governments within the larger framework provided by federalism theory. It does so while acknowledging the debate about the distinctions between federalism and decentralization,[248] and the historical origins of the federalism debates.[249] In many ways, the federalism conversation has

existing federal and state legal framework, it is important to keep in view . . . the thicket of legal constraints on cities . . . .").

[244] Richard Briffault, "*What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1349 (1994) [hereinafter *What About the 'Ism'?*]; *see* Ablavsky, *supra* note 176, at 1810 (decrying the "neat conflation of localism and federalism," on the basis that "[f]ederalism was not simply the institutionalization of the myriad, localized ways in which early Americans dispersed authority; its historical meaning was inseparable from the division of sovereignty solely between the states and the federal government").

[245] Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 2 (2002); *see* Roesler, *supra* note 4, at 1134-35; *see also* Briffault, *What About the 'Ism'?*, *supra* note 244, at 1317 ("[I]f federalism is associated primarily with a set of values . . . that are linked to decentralization, then federalism is not particularly about the states at all.").

[246] Barron, *supra* note 115, at 381.

[247] *Id.*

[248] *See generally* Briffault, *What About the 'Ism'?*, *supra* note 244, at 1348 ("The differences between states and local governments suggest a subtle tension within the values advanced by the exponents of normative federalism. The intellectual case for federalism tends to amalgamate the values of decentralization and of the creation of powerful alternatives to the national government, much as it tends to lump together states and local governments."); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 951 (1994) ("Thus, the rejection of federalism as a norm of governance does not imply that states should be eliminated, or even that their boundaries should be redrawn to achieve more efficient decentralization.").

[249] *See, e.g.*, Ablavsky, *supra* note 176, at 1868 ("The point is not that federalism is determinate, or that it is, or should be, defined by what it meant at the time the Constitution's adoption. It is, rather, that the meaning of terms as capacious, resonant,

moved beyond those historical origins.[250] Thus, this Article takes as a point of departure not only that there are reasons for including local governments within the federalism conversation, but that in fact, those conversations are already occurring. This Article builds on the rationale presented in other works for why and how local governments are relevant actors in the federalism realm. The intent is to provide additional context to the trends that federalism has already seen in the past decade, and to clarify how such discussions might be made more useful and accurate.

Environmental federalism is a particularly useful framework for considering the evolution of the inclusion of local governments within federalism frameworks. The field of environmental federalism has long operated on the forefront of the national federalism conversation. It has done so because it has retained a focus on describing the realities of governance as they are happening.[251] In that way, it differs from some of the more theoretical presentations of the federalism debates. Thus, the realities of shared competencies and authorities led environmental law to become a site of innovation for cooperative federalism, and to provide new contours for the American federalism conversation. In light of the conflicts in authority now occurring, environmental federalism may be able to provide the same kinds of innovation and examples for dynamic forms of power distribution that it previously did for cooperative forms.

This Part sets out a framework for the development of a more localized strand in environmental federalism theory that better addresses the realities of local authority. Importantly, local*ized*[252] environmental federalism does not necessarily mean local*ist*[253] environmental federalism. To localize environmental federalism means to explicitly acknowledge and account for local actors, and for the vulnerabilities in authority that they may confront. It does not put a thumb on the scale in favor of local action over choices by other levels of government, or even describe when such local action may be

and central as federalism is accreted through centuries of collective contestation . . . their current valence remains inextricably bound up with their past.").

[250] *See generally* Gerken, *New Nationalism*, *supra* note 124 (arguing that there is a new emergence of the nationalist school of federalism).

[251] *See* Ryan, *Response to Heather Gerken*, *supra* note 201, at 1153-54, 1164.

[252] *Localize*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/localize (last visited June 29, 2020) [https://perma.cc/Q9Z2-4KQ7] (defining "localize" as "to make local: orient locally").

[253] *Localism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/localism (last visited June 29, 2020) [https://perma.cc/Z2CL-T7RF] (defining "localism" as "affection or partiality for a particular place").

desirable. In that way, it differs from conversations regarding subsidiarity[254] and localism that may more explicitly preference local action. Instead, the federalism lens here provides a platform for conversations about what the vulnerability of local authority means for environmental law and environmental federalism.

Localized environmental federalism has three central tenets: (1) local governments play a distinct role in environmental federalism; (2) environmental federalism values may be impacted by the vulnerable nature of local authority; and (3) because local authority varies in highly particularized ways, conversations about local environmental governance must be more particularized too. Together, these tenets offer a means of acknowledging the difference in state and local roles in the federal system, and of developing a view about the potential for environmental governance going forward.

### *A. Local Governments Play a Distinct Role in Environmental Federalism Conversations*

As noted, environmental federalism conversations to date have tended to conflate state and local authority.[255] The discussion above makes clear the cost of such conflations — a possibly inaccurate sense of the state of environmental federalism, and the strategies available for upholding its values. Thus, it becomes important to tease apart how to think about local governments as distinct entities within federalism. Preceding Parts of this Article discussed the role that local governments play in fulfilling certain environmental federalism values.[256]

In many situations, local governments represent simply a more extreme version of the federalism benefits provided by states. Again, as articulated by Erin Ryan, the relevant federalism values are "voice, accountability, autonomy, efficiency, and interdependence."[257] Depending on the political dynamics at any given time, local governments may simply magnify the level of experimentation at the

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[254] Hills, *Is Federalism Good for Localism?*, *supra* note 221, at 190 (2005); *see also* Annie Decker, *Preemption Conflation: Dividing the Local from the State in Congressional Decision Making*, 30 YALE L. & POL'Y REV. 321, 359 (2012) ("[S]ubsidiarity theory posits that power and responsibility should be devolved to the lowest level of government capable of exercising it well. The higher level of government must justify its retention of authority over a given matter."); Ryan, *supra* note 121, at 363 (defining the subsidiarity principle as "the directive to solve problems at the most local level possible").

[255] *See supra* Part IV.

[256] *See supra* Part III.B.

[257] Ryan, *Negotiating Environmental Federalism*, *supra* note 116, at 34.

state level,[258] and offer additional degrees of voice to the political process.[259] As noted, that ability to offer more localized policy perspectives and greater degrees of responsiveness to local conditions is likely to be particularly relevant as environmental issues like climate change require increasingly tailored responses. The environmental problems confronting local governments are likely to be multiplied as existing problems of aging infrastructure, low-density planning, and other exacerbators of environmental harms meet the realities of climate change. These problems translate into day-to-day needs for local governments that call for certain actions at some level of government.

Recent trends in dynamic federalism are also focused quite explicitly on plurality and redundancy.[260] Beyond that, environmental federalism acknowledges the more practical problem-solving value of federalism.[261] In a political moment where, in many parts of the country, states are aligned with the federal government in ways that make progress on environmental issues nonviable, local governments offer an explicit means for redundancy in policymaking and for experimentation that otherwise may not occur. It is for those reasons that local governments have attained such a prominent role in environmental policymaking conversations. And it is for those same reasons that local governments offer federalism benefits that are distinct from their states. Put another way — in times where local governments are mirroring the actions of their states, they may provide many of the same federalism benefits that states provide. Those circumstances where states and local governments are pursuing different policy paths, however, make clear the potentially unique values offered by local actors.

The ability of local governments to move far beyond state and federal actors, and to address environmental issues in a much more individualized way, gives them a distinct identity when thinking about regulatory overlap and filling policymaking gaps. Localized environmental federalism does not answer the question of why or when local governments can, should, or must be permitted to pursue any policymaking objective they see fit. The answer depends on the values associated with the federalism conversation, as well as the realities of the state and local legal framework in the relevant state. But taking a localized framework makes clear that these local actors merit their own

[258] *See* Owen, *supra* note 148, at 192.

[259] *See* Gerken, *Federalism All the Way Down*, *supra* note 123, at 45-46.

[260] SCHAPIRO, *supra* note 156, at 98-101.

[261] *See, e.g.*, Ryan, *Interjurisdictional Gray Area*, *supra* note 180, at 511 (discussing federalism's problem-solving value).

discussion in terms of how and whether environmental federalism values are being achieved at any given time.

### *B. Environmental Federalism Values May Be Impacted by the Loss of Local Authority*

Once the role of local actors in attaining certain environmental federalism values is acknowledged, the impact of the loss of local authority becomes clearer as well. To the extent that local governments are the relevant actor for achieving certain environmental federalism values, the vulnerability of those local actors to preemption by the state — particularly to forms of deregulatory preemption — means that the attainment of those federalism values may be called into question. Perhaps most significant is the potential for some methods of preemption to create regulatory vacuums that frustrate local ability to work toward environmental protection and weaken the dynamism that underlies current environmental federalism theory. New preemption measures may also have a chilling effect on the variety of approaches and experimentation that will be crucial to combatting environmental issues like climate change and continuing the long tradition of gap-filling within the environmental law arena.[262] Beyond that, state preemption measures may raise questions of environmental justice and undermine efforts to ensure that benefits of environmental law and environmental progress are spread equitably.

#### 1. Regulatory Vacuums

As described, a federal administration hostile to federal environmental protection has been a defining part of the past several years in the United States. In consequence, states have in many cases become the next level of possibility for environmental governance.[263] In some cases, however, the legislative and executive branches in state government have also displayed a recalcitrance toward environmental protection. Under these circumstances, local governments present the

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[262] *See* Buzbee, *Preemption Hard Look Review*, *supra* note 233, at 1545 ("In the environmental area, parallel or overlapping laws are the norm.").

[263] *See* Doni Gewirtzman, *Complex Experimental Federalism*, 63 BUFF. L. REV. 241, 244 (2015) ("When federal inaction creates a policy vacuum, state policy experimentation may be the *only* available solution for solving difficult social problems." (emphasis added)).

most realistic possibility for tackling environmental problems.[264] Deregulatory preemption measures at the state level remove the ability of local governments to make needed policy changes while failing to put in place a state framework to address the issue. In this way, removal of local authority to act can create a compelled regulatory vacuum in environmental policy response.[265]

For instance, plastic bag bans or fees instituted by a number of local governments have been met by bans on those bans at the state level.[266] Local restrictions on the use of pesticides have also been a long-standing focus of preemption efforts at the state level. These efforts have progressed to the point that, "in most agricultural states in the Mississippi watershed, the regulation of pesticides and fertilizer by local governments is straightforward — they cannot do it."[267] Similar prohibitions on local action have been put into place with regard to local control over the siting of CAFOs, notoriously large sources of air and water pollution. And local efforts to address the impacts of climate change have met with state bans on the ability to take on these challenges.[268] Many other instances exist of local action being taken to

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[264] *See* Wyman & Spiegel-Feld, *supra* note 2, at 333 ("[L]ocal laws may be a way of realizing progressive policy preferences that have become increasingly difficult to express at the federal level, or even state levels.").

[265] *See, e.g.*, Vaubel, *supra* note 110, at 660 ("Absent municipal home rule, the full panoply of state government regulatory devices would ordinarily include the power to preclude all regulation, which is effectively the power to create a vacuum. In the absence of state regulation, state denial of municipal power creates such a vacuum."); Randall E. Kromm, Note, *Town Initiative and State Preemption in the Environmental Arena: A Massachusetts Case Study*, 22 HARV. ENVTL. L. REV. 241, 256-57 (1998) ("Another negative effect of denial authority is the possibility that incautious use will produce a regulatory vacuum on issues of considerable importance."). Like other scholarship, this discussion relies on a plain meaning definition of regulatory vacuums — "matters of public concerns that are not addressed at any level of government, with the added sense in the preemption context that governmental bodies are frustrated from filling the void and addressing the problem." Strickland, *supra* note 235, at 1152 n.12.

[266] *See* Fox, *Local Environmental Innovation*, *supra* note 4, at 599-601.

[267] Shalanda Baker, Robin Kundis Craig, John Dernbach, Keith Hirokawa, Sarah Krakoff, Jessica Owley, Melissa Powers, Shannon Roesler, Jonathan Rosenbloom, J.B. Ruhl, Jim Salzman, Inara Scott & David Takacs, *Beyond Zero-Sum Environmentalism*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10328, 10347 (2017).

[268] *See* Bratspies, *supra* note 32, at 30-31 (citing ALA. CODE § 35-1-6(b) (2018), which provides that "[t]he State of Alabama and all political subdivisions may not adopt or implement policy recommendations that deliberately or inadvertently infringe or restrict private property rights without due process, as may be required by policy recommendations originating in, or traceable to 'Agenda 21,' adopted by the United Nations in 1992 at its Conference on Environment and Development or any other international law or ancillary plan of action that contravenes the Constitution of the United States or the Constitution of the State of Alabama").

protect the environment, only to be met with removal[269] or attempted removal[270] of local authority at the state level.

From a normative perspective that values environmental protection, these vacuums are problematic because they make impossible local progress in environmental law and policymaking. Environmental problems have significant temporal and cumulative elements — where environmental problems exist, there are significant benefits to acting right away, at the risk of compounding the problem for the future. Nowhere is this truer than for climate change, which needs mitigation and adaptation efforts from all levels of government. The creation of regulatory vacuums makes these needed actions much more difficult.[271]

Moreover, as described above, courts have in many circumstances disfavored federal preemption of state actions where it would create regulatory gaps. Like in the federal-state context, state removals of local authority, without corresponding state action on the issue, present barriers to responsiveness and to fulfillment of federalism values. Indeed, several of the indicators for when the creation of gaps in governance via preemption should be disfavored are present in the context of many state removals of local authority. For instance, deregulatory state action cannot generally be justified based on local representation at the state level. Dramatic changes in state legislative districting call into question the extent to which cities — particularly urban areas — are adequately represented at the state level.[272] The extent to which the most populous local governments in most states are proportionately underrepresented may lessen the persuasive force of arguments that representation of local governments in the state legislature renders regulatory vacuums unproblematic. And from a

[269] *See, e.g.*, BRIFFAULT ET AL., *supra* note 111, at 59-70.

[270] *See* Ryan Hackney, Note, *Don't Mess with Houston, Texas: The Clean Air Act and State/Local Preemption*, 88 TEX. L. REV. 639, 645 (2010) (discussing actions in Houston to address air quality issues, and noting that, "[i]n March of 2007, Mike Jackson, the Republican state senator . . . introduced a bill in the Texas Senate that sought to prohibit local governments from regulating pollution coming from outside of their boundaries[,]" which ultimately never passed the House).

[271] *See* Glicksman, *Nothing Is Real*, *supra* note 231, at 14; *see also* Guenthner, *supra* note 110, at 429 ("The legal trend . . . has been toward parent political bodies passing preemptive laws without prescribing affirmative policies to replace the newly defunct ordinances, effectively abandoning the field of law and nullifying it at the local level. The consequence is a signal to cities across these states that they are powerless to find their own solutions to issues that directly impact them — and, in extreme cases, to chill future local legislation altogether.").

[272] *See, e.g.*, Paul A. Diller, *Reorienting Home Rule: Part 1–The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 336-38 (2016) (discussing urban disadvantage in state legislatures).

process perspective, this kind of removal of local authority by the state is potentially concerning given the brevity of process, expertise, and legislative language expended on the topics.[273]

For all of these reasons, regulatory vacuums present more than a matter of competing policy preferences. As described above, environmental federalism theory has made clear the virtues of dynamism and multiscalar governance. Interactive environmental federalism eschews designated roles for federal and state actors, and instead calls for overlapping authority among the different levels. The existence of multiple levels of authority has long been part of the political safeguards within the U.S. system.[274] One of the tenets of the federalist system is that if you don't like results at one level of government, you can look to another.[275] Put another way, and drawing on the work of Robert Schapiro, state limitations on local authority to act might be said to cut off the "polyphony" of federalism.

Elimination of local authority to address a problem without putting in place a state or federal regulatory structure takes away redundancies within the system of environmental governance, and disrupts the historic gap-filling dynamic that has occurred in environmental law. Where state preemption of local laws eliminates the ability of local governments to act to address questions of environmental health and safety — without affirmative policymaking action by the state — an important component of governmental interplay and overlap is undermined or lost. The loss of those kind of backstops creates barriers to effecting environmental protection measures, and undermines the descriptive reality of environmental federalism conversations that rely on the potential for local governments to promote and satisfy the values of dynamism.

2. Lack of Innovation and Experimentation

Innovation is often one of the primary justifications raised in favor of local control,[276] and one of the primary values cited in federalism

[273] *See* Jennifer L. Pomeranz & Diana Silver, *State Legislative Strategies to Pass, Enhance, and Obscure Preemption of Local Public Health Policy-Making*, 59 AM. J. PREVENTIVE MED. 333, 333-34 (2020).

[274] *See* Buzbee, *Federalism Hedging*, *supra* note 32, at 1045 ("Retaining . . . state authority . . . fosters overall stability, creates room for regulatory innovation, and thereby creates conditions conducive to private investment to meet regulatory goals.").

[275] *See* DAVID R. BERMAN, STATE AND LOCAL POLITICS 5-6 (1975).

[276] *See* Decker, *supra* note 254, at 362 ("Perhaps no feature of subfederal governance is lauded more frequently than its association with innovation. Local regulation often is considered more innovative than state regulation . . . whether because the sheer number

conversations. Justice Brandeis's famous invocation of state laboratories of democracies as one of the main values of federalism applies in equal or greater measure to local governments. In the broader federalism context, Heather Gerken has noted that "it is hard to jumpstart a national movement. That's why virtually every national movement began as a local one."[277] Local innovation allows policymakers to respond as needed to changing conditions,[278] and to learn from other jurisdictions.[279] To some extent, loss of dynamism and "lively conflict," or "political entrepreneurship," is a feature of even traditional forms of preemption.[280] Paul Diller has discussed Roderick Hills' work on arguments against preemption in this regard in the context of state and local interactions.[281]

Loss of innovation in the environmental context may be particularly alarming at a time when novel environmental problems are confronting all jurisdictions. Most notably, global warming and the attendant consequences of climate change render jurisdictional lines inconsequential. Local control over environmental issues could be important for combatting these issues, given that higher levels of experimentation at the local level are likely to lead to more positive outcomes.[282] Beyond that, genuine diversity in environmental

of local governments increases the chances of a good idea emerging or because it is relatively easier to get a local law enacted and tested out in practice."); *see also* Roesler, *supra* note 4, at 1149 (likening "jurisdictional plurality to 'ecological niches in a forest . . . [j]ust as selection pressures . . . allow diversity to survive, the myriad horizontal and vertical interconnections between jurisdictions allow innovations to spread'").

277 Gerken, *Federalism 3.0*, *supra* note 158, at 1713.

278 *See* BERMAN, LOCAL GOVERNMENT AND THE STATES, *supra* note 98, at 155; *see also* Bratspies, *supra* note 31, at 3430 ("[T]he more latitude that local communities have to tailor governance to local conditions, the more likely it is that we can ensure the level of flexibility necessary for responding to climate-induced risks.").

279 *See* Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 304 (2011) ("[N]ovel state and local environmental and land use laws often serve as a catalyst for further government action, encouraging regulation in areas that otherwise would not be addressed."); *see also, e.g.*, Diller, *Reorienting Home Rule: Part 2*, *supra* note 95, at 1102 (noting local role in providing "nodes of policy experimentation").

280 Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 21, 36 (2007).

281 *See generally* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1149 (2007) (explaining why "[i]nsofar as it counsels against adopting 'prohibit/permit' as a default rule, Hills's argument applies with equal, if not greater, force at the state level").

282 *See, e.g.*, Adams-Schoen, *supra* note 36, at 192-93 (citing work that characterizes local communities as "important laboratories for climate change action"); Farber, *supra* note 98, at 920 (making policy argument against preemption of local control on the basis that "we should embrace climate actions by whoever undertakes them, for it is

conditions and needs even within individual states may call for a variety of responses. And while some elimination of diversity is inevitable with any kind of preemption, newer forms of preemption that explicitly eliminate diversity and innovation without a competing state or federal structure[283] have a particularly dramatic impact in quashing innovation.

3. Environmental Justice

In many ways, the loss of local authority can be conceived of in the same way as thinking about loss of other federalism voices. For example, theories of interactive environmental federalism call for a move away from the static allocations of authority inherent in dual federalism, and toward overlapping allocations of state and federal authority. This shift is important in part because assigning authority to one level of government "deprives citizens of the benefits of overlapping jurisdiction, such as a built-in check upon interest group capture, [and] greater opportunities for regulatory innovation and refinement[.]"[284]

Local governments can be sites of minority empowerment.[285] By providing opportunities for majority-minority rule, these governments make possible the prevailing of viewpoints and policy choices that might otherwise be drowned out.[286] This representation is another of the federalism values that can be achieved through inclusion of substate

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more likely that the actions will be too little than that they will be too much"); Huffman, *supra* note 220, at 1378 ("Does decentralization improve our prospects for getting the objectives right? Absolutely, at least more often than not.").

[283] *See* William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1555 (2007) (arguing that "[p]rincipled rationales exist to distinguish and embrace a protective federal one-way ratchet of floor preemption, or at least to see floor preemption as less institutionally problematic than the new breed of ceiling preemption that this Article refers to as 'unitary federal choice preemption,'" and noting that unitary federal choice preemption is distinct in that it "precludes additional state and local protections and eliminates institutional diversity that is preserved (though limited) by floor preemption").

[284] Engel, *supra* note 197, at 161.

[285] *See, e.g.*, Heather K. Gerken, *Abandoning Bad Ideas and Disregarding Good Ones for the Right Reasons: Reflections on A Festschrift*, 48 TULSA L. REV. 535, 536 (2013) ("If my work convinces readers of anything, I hope it is that decentralization plays a crucial role in furthering the aims of the First and Fourteenth Amendment — that minority rule can be as important as minority rights for the great projects of American constitutionalism.").

[286] *See, e.g.*, Gerken, *Federalism All the Way Down*, *supra* note 123, at 54 ("[M]ajority-minority governance gives racial minorities (and, before them, white ethnics) a stake in the system. It affords them the status of insiders even as it acknowledges their identity as outsiders.").

actors.[287] In the environmental context, disproportionate impacts find expression within the environmental justice framework. Environmental federalism and environmental justice are separate but interacting paradigms.[288] Where environmental federalism looks at governance within the federal system, environmental justice focuses on the unequal exposure to environmental harms, and unequal access to environmental benefits, often experienced by communities of color and low-income communities.[289]

Environmental justice scholarship often focuses on the need for local input as a means of providing accurate information about community impacts and of remedying the power imbalance that is responsible for the disproportionate nature of environmental harms in the first instance.[290] When local governments are left without the ability to remedy environmental problems, it may raise justice implications for local governments and their citizens.[291] That potential is exacerbated in situations where power is not only being centralized, it is being taken away without a substitute framework being put in place. Eliminating the ability of local governments to solve environmental problems, without putting in place any state framework to tackle the issue, makes it much more difficult to provide solutions to remedy problems of disproportionate impacts.[292] By disempowering potentially vulnerable communities without putting in place a statewide system, state preemptive measures warrant skepticism from an environmental justice standpoint.[293] And because this undermines the fulfillment of

[287] *See* Briffault, *New Preemption*, *supra* note 106, at 2009 ("Some preemption measures have the effect of shifting decisionmaking authority from majority-minority local governments to a white-dominated state government."); Gerken, *Federalism All the Way Down*, *supra* note 123, at 55-56.

[288] *See* Robert W. Collin, *Environmental Justice in Oregon: It's the Law*, 38 ENVTL. L. 413, 417 (2008) (describing relationship of environmental federalism and environmental justice).

[289] *See* Sarah Fox, *Environmental Gentrification*, 90 U. COLO. L. REV. 805, 852-53 (2019).

[290] *See, e.g.*, Collin, *supra* note 288, at 418 ("The strength of the environmental justice mantra 'We Speak for Ourselves' lies both in its authentic voice and in the needs for future global, domestic, state, and local environmental policies to be based on accurate and complete information.").

[291] See Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19, 42 n.109 (2014) (citing ENVIRONMENTAL FEDERALISM 259, 263 (Terry L. Anderson & Peter J. Hill eds., 1997), for its argument "that a centralized approach to environmental justice issues would be unresponsive to local conditions and needs").

[292] *See* Collin, *supra* note 288, at 419.

[293] *See, e.g.*, RYAN, *supra* note 121, at 194.

federalism's value of voice, it is a problem for environmental federalism as well.

Generally speaking, the vulnerabilities of local government to state preemption have been well-examined in terms of the impacts on local governance. The above considerations make clear that recent preemption dynamics are significant not only from a local government perspective, but from a federalism perspective as well. Where local governments are providing federalism benefits beyond the state, then curtailment of their ability to act may also curtail the fulfillment of certain federalism values. Current politics will certainly shift again with regard to the state and local relationship. The overall structural vulnerabilities of local governments mean that this subject will remain relevant,[294] however, in considering the role of local governments in environmental law and environmental federalism, and in policymaking more broadly.

### *C. Because Local Authority Varies in Highly Particularized Ways, Conversations About the Local Role in Environmental Federalism Must Be Particularized Too*

As described above, environmental federalism has been on the front lines of incorporating the realities of governance into broader theoretical conversations.[295] In consequence, it is well-suited to respond to trends of new preemption and the lessons they hold. Dynamic environmental federalism conversations have already worked to expand federalism conversations beyond the state and federal realm, and beyond the idea of fixed roles for all governmental actors. Those discussions should now expand again to explicitly acknowledge the presence and importance of local actors, and the differences in the ability to exercise that power.

Giving full consideration to the presence of local actors within environmental federalism requires their separation from the states not

[294] *See* Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 108 ("[P]olicy analysts should seek to distinguish events that are the result of particular historical opportunities and context, from propensities and incentives that are more stable and predictable under current forms of environmental federalism.").

[295] *See, e.g.*, Owen, *supra* note 148, at 204-11 (integrating descriptions of state-local environmental partnerships to illustrate cooperative subfederalism in practice); Ryan, *Response to Heather Gerken*, *supra* note 201, at 1151 (describing how environmental federalism has long integrated governance realities and stating that "if I were to choose one thing that constitutional law could truly learn from environmental law to make the federalism discourse more meaningful, there is a clear and simple choice — facts. Simple facts: simple, complicated, rich, contextualizing facts").

only in thinking about the benefits that local actors can provide, but also in considering the vulnerabilities of local action. A full discussion of when and whether local governments are well-suited to act on environmental issues is a conversation that should continue in the context of specific issues. But to the extent that local governments are well-positioned to act on an issue, there is another set of inquiries as well. Namely, proponents of environmental action at the local level should consider the variability of governance frameworks in place in the relevant states.[296] In many of those states, the local government will have the authority to act but will have little protection from state interference.[297]

In the current political landscape, the map of where local control might be most desirable from an environmental federalism perspective — in terms of offering dynamism benefits and taking policy action where none is currently occurring — may look similar to a map of the local governments most vulnerable to deregulatory preemption measures. A more localized environmental federalism helps to make clear, then, the costs of relying on the potential for environmental policy change at the local level without consideration of the ways in which local governments are different from state actors. A localized environmental federalism lens shows that whatever the federalism benefits that local governments have to offer, they may be prevented in some cases from fulfilling those desired roles. Simply acknowledging those dynamics is an important element of thinking about viable paths to environmental policy problems.

### *D. Localized Environmental Federalism — An Illustration*

To further the understanding of the difference that a localized environmental federalism framework could make, an illustration from the climate change arena may be useful. Climate change conversations have focused on the potential for local action as a means of pursuing adaptation and mitigation strategies alike. As explained above, the federal government has retreated from climate protection measures, and state activity varies widely. In both politically conservative and politically liberal states, local governments have pursued their own

[296] *See* Andrea McArdle, *Local Green Initiatives: What Local Governance Can Contribute to Environmental Defenses Against the Onslaughts of Climate Change*, 28 FORDHAM ENVTL. L. REV. 102, 114-15 (2016).

[297] *See, e.g.*, Schragger, *supra* note 112, at 1193 ("'[L]egislative' home rule permits local governments wide discretion in initiating legislation, but no or very limited protection against state law preemption.").

actions on climate, including energy efficiency policies, open space planning, flood management, and more. When examining those actions, a localized environmental federalism lens does not insert another value into the federalism discussion. Instead, it makes possible a more accurate assessment of when local governments are providing additional federalism benefits, and whether they will be able to fulfill their distinct federalism roles.

Applying the localized environmental federalism framework, it must first be acknowledged that local governments acting on climate change are fulfilling important federalism benefits — namely, gap-filling and the exercise of voice — distinct from the states in which they are located. Thus, on their face, dynamic environmental federalism perspectives would predict and support such endeavors. In many instances, authority to take these actions on climate has been removed by the states. The ability of local governments to fulfill those values thus depends on the particular nature and politics of state and local relationships.

For example, New York City has taken the lead on many climate change-related policies, including those involving emissions controls. One effort to promote emissions reductions came in the form of New York City's proposed traffic congestion pricing measure — a tolling system that charged by zone.[298] No such congestion and emission control measures existed at the state or federal level; the initiative was part of the City's efforts to innovate in the area of climate change. That measure, however, was preempted by the state of New York when it was first passed, without immediately putting in place a similar statewide scheme. In preempting the local government, the state arguably impinged on the City's fulfillment of certain environmental federalism values. But that preemption was not the end of the story — in 2019, New York State passed its own legislation allowing for congestion pricing.[299] Even though local preemption on the issue is still in place, the state's action undid the damage to federalism values done through the blocking of local activity.

The New York City experience can be contrasted with that of Phoenix, which attempted to address climate emissions by implementing a benchmarking requirement. That requirement would

[298] *See* Laurel Wamsley, *New York Is Set to Be First U.S. City to Impose Congestion Pricing*, NPR (Apr. 2, 2019, 6:54 PM ET), https://www.npr.org/2019/04/02/709243878/new-york-is-set-to-be-first-u-s-city-to-impose-congestion-pricing [https://perma.cc/NJV5-5PFW].

[299] *Congestion Surcharge*, N.Y. ST. DEP'T TAX'N & FIN., https://www.tax.ny.gov/bus/cs/csidx.htm (last visited July 8, 2020) [https://perma.cc/8J7F-R3WP].

have made mandatory the disclosure of overall energy consumption of commercial properties, in an effort to make possible informed decision making on the part of consumers. The passage of that measure in Phoenix was followed by a piece of state legislation that removed the authority of local governments to impose benchmarking requirements, without putting in place any kind of state framework to do the same.[300] In this second scenario, the local government loses the ability to fulfill the gap-filling and voice functions. As happened for New York City, federalism values are undermined by state action. Without any kind of state action that has taken place yet or can be expected to come, Phoenix as a local entity is unable to incorporate benchmarking into its climate planning. Given the lack of action on energy efficiency matters at the Arizona state level, as well as at the federal level, state preemption undermines the framework of dynamic environmental federalism. Indeed, in such states, it could be said that models of how environmental federalism functions are breaking down.

Current models of environmental federalism do not address the difference in outcomes in different states based on the availability and likelihood of state preemption. For instance, Erin Ryan has provided the seminal account of how environmental federalism issues are negotiated among federal, state, and local actors.[301] Providing a realistic account of state and local relationships in their current form means acknowledging the lack of negotiation that is occurring in some states. Where new forms of preemption mean that negotiation around federalism roles is stopped in its tracks, the benefits of federalism may become more difficult to realize. These scenarios help to show that it would be a mistake to assume that local governments don't matter in the area of environmental law. They are responsible for much of the innovation in environmental work currently going on in the field. At the same time, continuing the trend of grouping these local actors in with states elides some of the complexity in those interactions. And at the very least, the realities of state preemption halt some of the fluidity assumed in current federalism models.

A more localized form of environmental federalism helps to explain when local governments in the current system of government might be relied upon to uphold and maintain dynamism within environmental

[300] *See Arizona Blocks Energy Benchmarking Ordinance*, NAIOP, https://www.naiop.org/en/Research-and-Publications/Magazine/2016/Fall-2016/Advocacy/NAIOP-Arizona-Blocks-Energy-Benchmarking-Ordinance (last visited July 8, 2020) [https://perma.cc/6CTK-KNB6].

[301] *See generally* Ryan, *Negotiating Environmental Federalism, supra* note 116 (detailing work on negotiated federalism).

law and policy, and when they may not able to perform that role. Acknowledging those dynamics may be important from a judicial perspective. Judges have long been the final arbiters of the relative scope of authority attributed to various levels of government, often drawing on "federalism as a value" when asked to resolve jurisdictional disputes.[302] These values have long been at the heart of judicial decisions allocating power among the various levels of government. They may now provide a useful tool for making clear the costs of deregulatory state preemption of local authority over the environment. Making clear the impacts of these kinds of preemption measures from an environmental federalism perspective may not ultimately impact judicial outcomes. It may, however, make courts more attuned to the larger impacts and context of cases that result in the loss of local authority over the environment.

## CONCLUSION

The discussion above explains the significance of local governments as environmental policy actors within the United States, and highlights in particular their role as gap-fillers when other levels of government are inactive. At the same time that theories of dynamic environmental federalism have emphasized the virtues of intergovernmental interplay, forms of preemption different in type and in volume from their predecessors are cutting off that dynamism. This new dynamic hampers the ability of local governments to respond to problems as needed.[303] A variety of remedies to this problem have been proposed, including new models of home rule[304] and different interpretations of rules already in place.[305] The discussion herein emphasizes the need to acknowledge the

[302] Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 510 (1995).

[303] *See* Jonathan Rosenbloom, *XI. Less Than Zero: The Zero-Sum Game That Hurts Local Communities and Ecologies*, *in Beyond Zero-Sum Environmentalism*, 47 ENVTL. L. REP. 10328, 10346, 10346 (2017) ("Local communities and their ecology suffer hardship from a zero-sum game over governance authority. This game pits communities (and their local governments . . . ) against state governments in a constant and unwinnable(ish) conflict over the authority to regulate, or, as often happens, not regulate.").

[304] *See, e.g.*, NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 20-21 (2020), https://www.nlc.org/sites/default/files/2020-02/Home%20Rule%20 Principles%20ReportWEB-2.pdf [https://perma.cc/3QYY-GYL4] (summarizing principles of new proposed form of home rule).

[305] *See, e.g.*, Wyman & Spiegel-Feld, *supra* note 2, at 348-49 (proposing that (1) "courts have sometimes interpreted the scope of residual local authority under the federal environmental statutes more narrowly than those statutes require" and

limitations that face local governments alongside discussions of their potential for fulfilling environmental federalism values.

Local actors are critical players in the dynamic forms of federalism that seek to acknowledge the realities of governance in the United States today. The United States has long had a federal system capable of adaptation and flexibility.[306] Conversations about federalism have also been characterized by a number of fundamental shifts.[307] Environmental law — which emphasizes the importance of facts on the ground[308] — offers an important framework for thinking about these new realities, given the scale of the environmental problems facing the country, the time-sensitive nature of the need to address them, and the competing claims to power that exist among the national, state, and local governments.

As the environmental federalism conversation has advanced, it has become increasingly vested in a dynamic vision of authority shared among and between the federal, state, and local governments. Clarifying the role of local governments within this system will help to ground involvement of local governments in doctrine that can foster greater assurance and action moving forward.[309] Adopting this broader view also makes possible a greater variety of paths forward, toward newly dynamic forms of environmental law and policymaking.

No instant solution is available to resolve the barriers to local environmental action currently being erected around the country. At bottom, these are political choices being made by states that, generally speaking, have the power to make them. This Article offers a new lens for thinking about those barriers, and for incorporating them into the broader conversation. As local actors are incorporated more broadly into the federalism conversation, the potential for the loss of the federalism values that local governments provide is important to

(2) "[t]here may also be room to expand the scope of local environmental lawmaking authority under state law").

[306] *See* ROSCOE C. MARTIN, THE CITIES AND THE FEDERAL SYSTEM 21 (Atherton Press 1965).

[307] *See, e.g.*, Martha Derthick, *How Many Communities? The Evolution of American Federalism*, *in* DILEMMAS OF SCALE IN AMERICA'S FEDERAL DEMOCRACY, *supra* note 59, at 136 (discussing the shift in federalism philosophy that occurred during the Warren era of the Supreme Court in the context of school desegregation).

[308] Ryan, *Response to Heather Gerken*, *supra* note 201, at 1151.

[309] Hirokawa & Rosenbloom, *supra* note 14, at 266 ("The failure of many local governments to exceed federal regulations cannot be described simply as a failure of local governments to act or to care about their local environments. Rather, it is a failure of environmental federalism to account for local communities' connection to the environment and to incorporate that connection into the law.").

acknowledge. A localized framework for thinking about environmental federalism can help to provide that perspective.

Local action on environmental issues is not always the ideal; indeed, many times, there are more desirable actors on environmental problems within the federal system.[310] But to the extent that little action is occurring at other levels of government, and where local governments face a variety of individualized issues, local actors have an important role to play in tackling the environmental problems to come. Acknowledging that reality, and integrating a clear-eyed perspective on when and whether local governments will be able to play that role, is an important aspect of discussing the state of environmental federalism. Accurately incorporating local governments into broader conceptions of environmental federalism may help to advance both dynamism and environmental progress.

[310] *See* Buzbee, *Contextual Environmental Federalism*, *supra* note 12, at 113.