Unblocking Cooperative Energy Governance

Garrick B. Pursley

INTRODUCTION

Theorists and policymakers acknowledge that reforming energy regulation is a crucial part of a sustainable and secure future energy system, not just in the United States, but around the world. 1 Revamping energy systems to accommodate renewable energy sources, as well as new extraction, production, transmission and delivery techniques requires rapid technological innovation, 2 and developing new governance structures to foster the deployment, integration and efficient functioning of renewable energy technologies in the American energy infrastructure requires regulatory innovation that keeps pace with technological change. 3 These two issues are


2 See Pursley & Wiseman, supra note 1, at 901–04 (discussing the need for technological innovation).

intertwined, and are pressing both for fostering increased use of renewable energy sources and for regulating new energy technologies like hydrofracturing ("fracking") to extract shale gas. One potential answer to both challenges is to create a cooperative regulatory regime involving the federal and local governments—not the states—in which the local governments take a leading role in driving regulatory change.

A significant problem with this approach is its apparent conflict with seemingly unbendable constitutional norms blocking direct federal interaction with local governments and empowering states to interfere with local policymaking. This sort of collision with conventional structural norms is a problem that most innovative governance proposals must confront. But carefully reexamining an anthropic practice in formulating federalism doctrine points to a potential solution: Judicial practice suggests that constitutional federalism norms may be legitimately overridable in certain circumstances—contrary to the conventional portrayal of constitutional requirements as possessed of superordinate, trumping normative force in every application—which suggests that the pragmatic consequences of governance proposals may be directly relevant to their constitutionality. I explore this notion in the context of solving problems faced by scholars who want to craft multi-layered regulatory regimes in the energy field.

I. Restructuring Energy Governance

The connections between energy and the environment makes theoretical work on the optimal allocation of environmental policymaking useful for considering how to restructure energy regulation. Commentators and policymakers initially pushed for centralized national action, exemplified by the first wave significant modern antipollution regulation. Among other benefits, centralized environmental and energy regulation may provide uniform solutions to nationwide problems that, by their scale and magnitude, may seem to the public and the world to require action by the highest level of government. It provides coordinated responses to interstate problems—that individual states are poorly situated to solve and on which coordination among states without federal leadership is very difficult as a result of states’ differing economic and political interests. And, centralized action may

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4 These literatures are mutually reinforcing, for one thing, because renewable energy issues are deeply connected with environmental issues. Pursley & Wiseman, supra note 1, at 916–17. See, e.g., Theocharis Tsoutsos, et al., Environmental Impacts from Solar Energy Technologies, 33 ENERGY POL’Y 289, 291 tbl. 2 (2005) (canvassing land-use impacts of solar devices).
6 Pursley & Wiseman, supra note 1, at 917 (“A natural reaction to a salient environmental crisis like global climate change may be to demand direct intervention from the highest level of government, and the importance of federal leadership in environmental regulation cannot be overstated.”).
7 See Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J.L. & ECON. 23, 29 (1983) (“One of the common justifications for federal air pollution legislation is that, because no one state’s residents can collect all the benefits of cleaner air (which, after all, drifts east, while dirty air comes in...”)
capitalize on national trends in political will that may be more diffuse in some sub-national locales.\textsuperscript{8} Centralized regulatory authority, however, poses problems as well: Among other things, it is difficult to tailor national regulatory requirements to local conditions in what we might consider a “scalability” problem that may make federal regulation less efficient than more localized alternatives.\textsuperscript{9} Centralizing authority in a small group of agencies with broad policy portfolios encompassing both industry and public interest goals\textsuperscript{10} may increase the risk of capture by conventional energy

\textsuperscript{8} Nationwide public opinion decisively favors both the development of renewable energy capacity and national action to combat climate change. See Michael K. Heiman & Barry D. Solomon, \textit{Power to the People: Electric Utility Restructuring and the Commitment to Renewable Energy}, 94 ANNALS ASS’N AM. GEOGRAPHERS 94, 107 (2004) (noting that “over half of Americans claim they are willing to pay a premium for ‘green power,’” but arguing that market and regulatory failures have made that choice impracticable for most consumers); Anthony Leiserowitz, \textit{Climate Change Risk Perception and Policy Preferences: The Role of Affect, Imagery, and Values}, 77 CLIMATIC CHANGE 45, 46 (2006) (“Since the year 2000, numerous public opinion polls demonstrate that large majorities of Americans are aware of global warming (92%) . . . and already view climate change as a somewhat to very serious problem (76%).”). For a more recent representation of public opinion, note that in the 2012 State of the Union Address, “the President’s call to increase investments in and support for the renewable energy and energy efficiency industries, compete with countries like China and Germany on energy innovation, and end giveaways to oil companies prompted some of the strongest positive reactions of the night across party lines—second only to his mention of the death of Osama bin Laden.” Christina Angelides, \textit{State of the Union: Clean Energy Bridges Partisan Divide}, Switchboard: The Natural Resource Defense Council Staff Blog (Jan. 26, 2012), available at http://switchboard.nrdc.org/blogs/cangelides/state_of_the_union_clean_energ.html (last visited Feb. 24, 2012).

\textsuperscript{9} See Richard Briffault, \textit{The Local Government Boundary Problem in Metropolitan Areas}, 48 STAN. L. REV. 1115, 1124 (1996) (local governments are better suited to provide regulation “match[ing] distinctive local conditions and preferences”); sources cited infra, note 45; Frank Cross, \textit{The Folly of Federalism}, 24 CARDOZO L. REV. 1, 21 (2002) (arguing that imposing unitary national policies may override differing local or regional preferences and that “[p]roviding [regulatory] diversity on a national level . . . is inefficient and difficult” and citing Friedrich A. Hayek, \textit{The Economic Conditions of Interstate Federalism}, in \textit{INDIVIDUALISM AND ECONOMIC ORDER} 255, 268–69 (1948)); Richard Revesz, \textit{The Race to the Bottom and Federal Environmental Regulation: A Response to Critics}, 82 MINN. L. REV. 535, 537 (1997) (noting that the amount of information required to respond to local preferences is “staggering” and that national policies tend to be uniform).

\textsuperscript{10} Rachel E. Barkow, \textit{Insulating Agencies: Avoiding Capture Through Institutional Design}, 89 TEX. L. REV. 15, 50 (2010) (citing \textit{Protecting the Public Interest: Understanding the Threat of Agency Capture: Hearing before the S. Subcomm. on Admin. Oversight and the Courts}, 111th Cong. 8 (2010) (Statement of Nicholas Bagley, Assistant Professor of Law, University of Michigan Law School) (“Because the agency must prioritize one task at the expense of the other, industry group pressure can easily cement an agency's preference for the task that favors industry.”); Eric Biber, \textit{Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies}, 33 HARV. ENVTL. L. REV. 1, 7 (2009) (“A[gent]s will have systematic incentives to privilege certain goals over others--specifically, to privilege goals that are easily measured over conflicting goals that are difficult to measure.”).
interests;\textsuperscript{11} and, perhaps most problematic, recent decades have demonstrated an increasing inertia in Congress on environmental and energy issues as demonstrated by the continuing lack of a comprehensive response to climate change.\textsuperscript{12} In the energy context, some combination of these problems likely explains the lack of a comprehensive national alternative energy policy—discrete initiatives provide, for example, some financial incentives for both states and private individuals developing renewable energy sources and integrating them into the grid—but despite strong presidential prodding for a new national energy policy, there has been little progress on any sort of comprehensive solution.\textsuperscript{13}

Increasing recognition of these theoretical problems drove a shift to the view that technological and regulatory innovation may be better promoted by decentralizing some authority over the energy infrastructure to sub-national governing institutions.\textsuperscript{14} An obvious benefit is that with smaller-scale political systems comes a somewhat enhanced possibility of actually moving an energy agenda through the legislature without crippling gridlock: In the gap left by federal inaction, state governments have taken a leading role in energy innovation with the adoption of technology into the American energy system with Renewable Portfolio Standards and other measures.\textsuperscript{15} Devolving

\textsuperscript{11} See Rachel E. Barkow, \textit{Insulating Agencies: Avoiding Capture Through Institutional Design}, 89 Tex. L. Rev. 15, 50 (2010) ("[A] key danger to avoid is giving a single agency conflicting responsibilities that require the agency to further the goals of industry at the same time that it is responsible for a general public-interest mission. In that scenario, there is a significant risk that industry pressure and a focus on short-term economic concerns that are easily monitored will trump the long-term effects on the public that are harder to assess."); Margaret H. Lemos, \textit{State Enforcement of Federal Law}, 86 N.Y.U. L. Rev. 698, 702–03 (2011) (arguing that state enforcement of federal law may be beneficial in that “state enforcement offers a hedge against the possibility that federal agencies will abdicate on enforcement due to capture, bureaucratic pathologies, political influence, or resource limitations”). On capture, see generally Elena Kagan, \textit{Presidential Administration}, 114 Harv. L. Rev. 2245, 2264–65 (2001); Jonathan R. Macey, \textit{Organizational Design and Political Control of Administrative Agencies}, 8 J.L. Econ. & Org. 93, 99–100 (1992); Daniel A. Farber & Philip P. Frickey, \textit{Law and Public Choice: A Critical Introduction} (1991); Mancur Olson, \textit{The Logic of Collective Action: Public Goods and the Theory of Groups} (1965).

\textsuperscript{12} See Obama, \textit{State of the Union}, supra note 1 (noting that despite the urgency of restricting the American energy system, “[t]he differences in this chamber may be too deep right now to pass a comprehensive plan to fight climate change”).

\textsuperscript{13} Thus President Obama’s repeated calls for national action on alternative energy. \textit{See} sources cited supra, note 1.


regulatory authority can spur technological innovation by confronting designers and manufacturers with a variety of regulatory requirements to which they must adapt their devices. 16 Similarly, different regulatory programs “can generate a diversity of [technological] approaches by virtue of their multiplicity and differing mixes of socioeconomic, environmental, and political factors.”17 Diffusing authority among sub-national governments is may, in a variety of contexts, generate potentially beneficial regulatory pluralism: Regulatory experimentation, a conventionally cited value of decentralization, may lead to the discovery of beneficial policies generalizable to the national level or, perhaps more likely in the energy context, may create a variety of regulatory regimes that respond more fully to the varying circumstances and preferences of different localities. State-level governance of course avoids some of the problems of scale that national programs encounter—state governments are somewhat more localized and thus may fit local requirements and preferences somewhat more exactly.

The potential pathologies of full decentralization of regulatory authority should give us pause. First, the scalability problem persists—there still will be variation in the preferences of sub-state locations to which statewide measures cannot fully respond18—“the most populous states are very large in size and . . . [t]heir decisionmaking largely sacrifices the benefits of decentralization[ ] because these states are seeking to govern a diverse population that will have very heterogeneous preferences.”19 Second, with the smaller scale of state-level politics comes a more constrained vision, likely, tailoring state policy to a narrower and more parochial set of interests that may exclude important priorities that would be on the table in nation-wide political negotiations. The classical objection is that interest groups that favor lax environmental regulation and have high individual stakes in regulatory outcomes—paradigmatically industry groups—tend to be small and cohesive, but groups favoring stricter environmental regulation tend to be more diffuse and less organized.20 This disparity in political power, from the


19 Cross, supra note 18, at 34; see id. at 21 (arguing that “the national government . . . can never possess sufficient information to tailor policies to particular local preferences and circumstances,” and that “[m]uch the same claim could be made about states”). See also Vicki Jackson, Federalism and the Uses and Limits of Law: Printz and Principle?, 111 HARV. L. REV. 2180, 2221–22 (noting that “because state lines do not necessarily correspond to lines of ethnic, racial or religious identity, which can be more deeply divisive”).

20 See, e.g., Esty, supra note XX, at 597–98 (“[T]he costs of environmental regulation are generally more concentrated and tangible than the benefits. Costs are often borne by particular industries or enterprises, and are translated readily into monetary terms. Benefits, however, accrue to the general public in ways that are hard to discern and monetize.” (footnote omitted)); Saleska & Engel, supra note XX, at 64
perspective of economies of scale in political organization and advocacy of the two
camps, is exacerbated at the state and local government levels. Diffuse environmental
interests may muster the resources to organize and act within a single political forum,
but organizing at multiple state or government locations would be too taxing upon their
relatively undisciplined and typically under-funded infrastructures. Interests favoring
laxer regulation, by contrast, are thought to possess relatively greater capacity to
organize and advocate in multiple government forums and thus enjoy a comparative
advantage. Comparative institutional analysis thus suggests that federal
environmental authority is preferable to state or local authority because the federal level
is the most efficient receiver of broadly shared but often under-organized public
interests in environmental protection, which are needed to counterbalance industrial
interests that would otherwise dominate the political process and impose their narrow
interests on the unwitting public.

In addition, some states may lack the political will to enact new energy
regulation—while state-level renewable portfolio standards have been around for years,
20 or so states still haven’t adopted comprehensive energy modernization policies.
State governments also may be easier for opposition or industry interests to capture
compared to both federal and local governments; the potential to resist capture created
by dispersing power among 50 different governments is offset by the states’ narrower
policy portfolios and varying barriers to industry influence, making states a
comparatively bad bet for institutional resistance to capture. While public choice theory
suggests that subnational governments are forums in which industry and environmental
interests are more evenly matched than they are at the federal level; there are also
reasons to think that state governments may prove particularly responsive to entrenched

(“According to the economic theory of regulation, laws tend to respond to the wants of small, cohesive
special interest groups, such as industry, at the expense of the wants of the larger, more diffuse public.
The public, which is the intended beneficiary of stringent regulation, is often in a weaker political
position than industry, which is the primary beneficiary of less regulation.” (footnote omitted)); Stewart,
supra note XX, at 1213 (similar); Swire, supra note XX, at 101.

21 See Esty, supra note XX, at 598; Richard L. Revesz, Federalism and Environmental Regulation: A
Public Choice Analysis, 115 HARV. L. REV. 553, 559–61 (2001) (describing this as the “dominant claim
among supporters of federal regulation on public choice grounds”); Joshua D. Sarnoff, The Continuing
Imperative (but Only from a National Perspective) for Federal Environmental Protection, 7 DUKE

22 See, e.g., Sarnoff, supra note 21, at 285–86 (arguing that interests seeking stricter environmental
protection, because of their nature and composition, “may be more successful than ‘concentrated’
compliance interests in affecting legislative and bureaucratic policy at the federal level than at the state
level” due to “economies of scale and reduced transaction costs for organizing and lobbying” (footnote
omitted)); Esty, supra note XX, at 650–51 & n.302 (similar); Stewart, supra note XX, at 1213 (similar).

23 See, e.g., Stewart, supra note XX, at 1213–14 (“Centralized decisionmaking may imply similar scale
economies for industrial firms, but these are likely to be of lesser magnitude—particularly if such firms
are already national in scope.”).

24 See Revesz, supra note 21, at 560–61.

25 See supra, note 15 and accompanying text.

26 See Pursley & Wiseman, supra note 1, at 925–26; MANCUR OLSON, THE LOGIC OF COLLECTIVE
ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971) [hereinafter OLSON, GROUPS], at 21–22
(describing the free-rider problems endemic to all groups, regardless of size, but suggesting that they may
be less detrimental in smaller groups); Revesz, supra note 21, at 560–62; see also OLSON, GROUPS, supra,
at 22 (discussing the unusually high cost of obtaining a group’s first unit of shared benefit).
This problem is enhanced in the energy field by state leadership on renewable energy, which has galvanized and enhanced the focus of traditional fuel interests on the state governments. There may be sufficient discipline, coordination, and resources in opposition interests to work effectively even in all 50 states to prevent or water-down enactment of progressive energy measures. Generally speaking, competition for residents and the possibility of resident exit—residents’ power to “vote with their feet”—offset to some extent the motivation for subnational governments to bow to industry pressure and loosen regulations. This disciplining force, however, diminishes as the transaction costs of resident relocation increase—as they do when considering out of state relocation rather than just moving from one city or town to another. From the perspective of interest group alignment and other political considerations, local governments are preferable to states.

Thus, without some sort of unifying nationwide policy guideline, there likely will be both geographic and substantive gaps in a patchwork of sub-national initiatives. The third problem is a conceptual but consistent critique of decentralization: With the mobility of capital, strong economic incentives exist and may drive states to engage in a “race to the bottom”—competing to enact regulations that will draw business and citizens—which, in theory, could involve diminishing environmental, consumer-protection, and perhaps energy-efficiency standards. Thus, while decentralization remains an important component of modern theory on optimizing environmental and energy regulation, the current consensus for cooperative federalism arrangements in

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27 See Pursley & Wiseman, supra note 1, at 926–27.
28 See supra, note 15 and accompanying text.
29 See supra note 31; sources cited supra, note 31; Cross, supra note 37, at 22 (discussing “Tiebout and his theory of interjurisdictional competition”).
30 See Tiebout, supra note 31, at 421; Cross, supra note 37, at 22–23 (citing Sunita Parikh & Barry R. Weingast, A Comparative Theory of Federalism: India, 83 VA. L. REV. 1593, 1594 (1997)).
which the federal government plays a coordinating or floor-setting role.\textsuperscript{33} A regime involving both federal regulatory discipline and corresponding empowerment of state policy experimentation above a baseline may provide the benefits of decentralization without the possibly negative consequences of state competition, free riding, and potential regulatory failure.\textsuperscript{34} Indeed, federal cooperation with state governments is an important part of the implementation strategy built into the Clean Air and Clean Water acts.\textsuperscript{35}

The focus of most of these cooperative or integrative governance proposals on partnering the federal government with state governments on energy and environmental issues, while perhaps a natural impulse in the light of state-centric public debates about federalism, may actually undermine cooperative regulation’s capacity to capture the benefits of decentralization. First, state governments may exercise what Professor Gerken has called the “power of the servant” to advance their own agendas even within cooperative, federally led regulatory programs, by over-enforcing, under-enforcing, resisting and otherwise indirectly reshaping the system.\textsuperscript{36} The focus of judicial federalism doctrine and federalism-related political rhetoric on “states rights” and “state sovereignty” may motivate state governments to push for a counter-productive degree of autonomy even when participating in cooperative regulation. Of course, state government autonomy might be desirable if the goal of federal-state cooperation is to foster varying policy initiatives; but there is little reason to think that autonomous state action contrary to the goals of the arrangement will create beneficial diversity. Therefore, the second problem with focusing cooperative regulation proposals on the state governments—“the false conflation of federalism with decentralization”\textsuperscript{37}—is that there are reasons to think that state governments will “be less amenable to decentralized localism with all of its benefits.”\textsuperscript{38} Large governments—the national government and the larger states like New York, Texas and California—face significant information deficits in tailoring regulation to local conditions and, as a result, recognize the benefits of decentralizing policymaking authority and tend to delegate real power to sub-units. Smaller state governments, however, decentralize less as an empirical matter; this likely results at least in part from the potentially significant differences between statewide policy interests and those of individual localities.\textsuperscript{39} Thus, theory suggests that states on net are less likely to delegate discretionary authority to local governments even where

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  \item \textsuperscript{33} See sources cited \textit{supra}, note 14.
  \item \textsuperscript{34} See Ruhl, \textit{supra} note 3, at 1387–1400; William W. Buzbee, \textit{Climate Change as an Innovation Imperative: Federalism, Institutional Pluralism and Incentive Effects} 10–12 (discussing the relatively greater resistance of cooperative intergovernmental regulatory regimes to common causes of regulatory failure; noting, for example, that “a diffused regulatory environment is akin to a fabric with many different threads providing strength[;] [t]o destroy that web of laws would require many successful political attacks, not just intense federal lobbying or a sympathetic president”); Pursley & Wiseman, \textit{supra} note 1, at 930–31.
  \item \textsuperscript{36} See Jessica Bulman-Pozen & Heather K. Gerken, \textit{Uncooperative Federalism}, 118 YALE L.J. 1256 (2009).
  \item \textsuperscript{37} Frank Cross, \textit{The Folly of Federalism}, 24 CARDOZO L. REV. 1, 18 (2002).
  \item \textsuperscript{38} Cross, \textit{supra} note 19, at 33.
\end{itemize}
that would best serve policy goals and, indeed, that where “local preferences [do not] cleave closely to [those] of the state as a whole . . . states will interfere with decentralization. 40 And because states possess generally limitless control over local governments, they have the capacity to interfere a great deal. If the goal is to promote regulatory diversity, state governments might be counterproductive partners for the federal government.

These problems with federal-state cooperation suggest that federal-local cooperation may result in greater subnational discretion and therefore more beneficial policy diversity—“national governments will tend to delegate more discretionary authority to decentralized local governments than will state governments under a federal system.”41 Federal cooperation with local governments provides opportunities to avoid the problems of general decentralization and capture the benefits of regulatory diversity and innovation. In addition to a variety of independent local government renewable energy initiatives, 42 some small-scale cooperative federal-local energy programs have been initiated, 43 and scholars increasing recognize the potential for environmental and energy cooperation involving local governments. 44 Once again, federal floor-setting

40 Id. at 39.
41 Cross, supra note 37, at 2.
may prevent the negative consequences of regulatory competition—races to the bottom, shirking, and so forth—and vesting primary authority in local governments leverages local institutional advantages in familiarity with local conditions and control over land-use and property law, both of which are important for the success and successful regulation of new energy technology.⁴⁵ While there are 50 state governments, there are thousands of local governments and, thus, significantly magnified potential for regulatory variability in partnering directly with towns and cities. Moreover, energy technology’s unique dependence on local geographic, architectural, social and political conditions, make local governments the best scale for regulatory modernization. Agency capture may be more difficult at the local level, too: Local governments have flexible structures that frequently accommodate cooperation with private entities, but the relevant private interests tend to be different than those that exert influence at the state government level.⁴⁶ Diffusing regulatory authority among so many governing institutions would seem to maximize the time and resource-intensiveness of capture efforts for opposition interest.

While federal-local energy cooperation therefore is promising in theory, there are significant barriers in practice. The constitutional federalism norm granting total control of local governments to the states (what we’ll call the “state control norm”)...
creates the potential for state interference with local regulatory initiatives. State preemption of local law, for example, may undermine the very regulatory pluralism that cooperative local regulation is designed to foster, and thus undermine the program’s efficacy. State preemption of local law is one frequent manifestation of the states’ unmitigated control of local governments and poses a real risk to initiatives that rely on local outcomes. In the environmental context, states frequently create statewide policies that preempt more protective local requirements. Examples include the Massachusetts Pesticide Control Act’s preemption of stricter local pesticide restrictions; the California Water Equipment and Control Act’s preemption of stricter local restrictions on the use of water-softening devices that increase the salinity of wastewater; and multiple states’ preemption of local hazardous waste rules that were more restrictive than statewide standards.

II. FLEXIBLE FEDERALISM NORMS AND PRACTICAL PROGRESS

The state control norm presents a conceptual problem for our hypothetical federal-local cooperation proposal—even if the federal government enacts such a program, sets a guideline, and empowers local governments to experiment with energy reform measures; the state control norm seems to block any federal action designed to prevent the state governments from undoing the work of the local governments pursuant to the federal program. But such action seems necessary to make federal-local cooperation fruitful. This is a typical collision of outcome-motivated normative theory with conventional thinking about structural constitutional norms—most cooperative federalism or cooperative localism proposals in most areas face some similar tension with conventional federalism norms.

47 See Cross, supra note 19, at 35 (“Under our prevailing federal system, local governments are creatures of the state government, authorized by that government, and lacking in independent power.”); Daniel B. Rodriguez, Localism and Lawmaking, 32 RUTGERS L.J. 627, 632 (2001) (observing that local governments “exist only at the sufferance of state authority”).
48 See generally Paul S. Weiland, Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials, 18 VA. ENVTL. L.J. 467, 497–502 (1999) (arguing that state preemption of local environmental regulation potentially stifles regulatory innovation, inhibits the sort of small-scale responsiveness of policy to preferences that local control promises, and turns local government officials into state-level lobbyists rather than local-level regulators).
49 See Paul S. Weiland, Preemption of Local Efforts to Protect the Environment: Implications for Local Government Officials, 18 VA. ENVTL. L.J. 467, 497–98 (1999) (“[T]he arguments made in favor of state action to protect the environment may extend to local governments. Thousands of local government entities may adopt alternative and innovative policies to address environmental challenges and problems. To the extent that local government efforts are preempted, innovation is stifled.” (footnote omitted)).
50 See id. at 488–96 (discussing examples).
52 See Water Quality Ass’n v. City of Escondido, 61 Cal. Rptr. 2d 878, 886–87 (Ct. App. 1997); Water Quality Ass’n v. Cnty. of Santa Barbara, 52 Cal. Rptr. 2d 184, 194 (Ct. App. 1996).
Federalism is an ineliminable feature of the American constitutional structure. But careful re-examination of judicial engagement with federalism, we find something odd: seemingly defeasible constitutional norms. The presumption against preemption, for example, is a rule of statutory interpretation that courts periodically use to determine the preemptive scope of federal law. It instructs courts not to construe statutes to preempt state law unless there is clear evidence of congressional intent. Federalism-related concerns about the effects of preemption on state regulatory authority partially justify the presumption, but federalism norms are not its direct object. The presumption is an interpretive canon; it is one of a category of rules whose primary purpose is to determine statutory meaning. Here’s the odd thing: The federalism concerns that partially shape the rule, though significant, are overridable by clear legislative language or unambiguous congressional intent; and the presumption is not applied at all in some preemption cases. The presumption cannot directly enforce any mandatory allocation of authority between national and state governments—non-constitutional considerations override federalism to change that allocation in significant ways. Similar examples appear in other contexts. If courts treating federalism norms as overridable is a reason to think that they are, in fact, overridable in certain circumstances, then federalism may pose little or no obstacle to energy reform that is crucial to the long-term stability of the nation.

To get around the state control norm, we need to know whether that norm can be treated as flexible under certain circumstances. To get a handle on that question, it helps to take a step back and examine the conceptual structure of federalism norms in general and judicial treatment of federalism in different contexts.

1. Federalism Norms and Federalism Doctrine

Our standard model of the constitutional system is predicated on the presumption that constitutional norms are accorded superordinate normative status in the hierarchy of legal authorities; courts presume that constitutional norms trump any legal or non-legal consideration and thus exert decisive influence on the outcomes of cases in which

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57 Federalism norms might require a presumption against preemption and no more. This might flow from the controversial “political safeguards” view of federalism. Failure to apply the presumption in all preemption cases suggests that even this version of the norm is treated as overridable. See generally Mary J. Davis, The “New” Presumption Against Preemption, 61 HASTINGS L.J. 1217, 1219 (2010).

they apply. There are some federalism doctrines that appear to be constructed with just this sort of all-trumping federalism norm as their foundation. But others do not, and that creates a problem for conventional views.

One “direct” federalism doctrine—a rule that directly invalidates violations of federalism norms and in which those norms function as standard, normatively superordinate reasons for decision—is the anticommandeering doctrine, which precludes the national government from directing state government institutions to take particular actions. The rule is designed to protect the basic structure of federalism; it bans a particular kind of national action, without regard to the substance of the statute or regulation at issue, because “commandeering can undermine the political safeguards that ordinarily operate to protect states” by blurring the lines of political accountability between the national and state governments. As the Court explained, “forcing state governments to absorb the financial burden of implementing a federal regulatory program” allows Congress to “take credit for ‘solving’ problems without having to ask their constituents to pay for the solutions with higher federal taxes” but leaves states “in the position of taking the blame for [the program’s] burdensomeness and for its defects.” Anti-commandeering is perhaps the most direct of the federalism doctrines; it bars one sort of action that threatens a basic feature of the federalist system—the separate identities of the national and state governments.

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59 See, e.g., Marbury, 5 U.S. (1 Cranch) at 177–180 (characterizing constitutional norms as “superior, paramount law” in relation to other forms of law); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding federal constitutional provisions superordinate over state law). See also Bradford N. Clark, The Supremacy Clause as a Limit on Federal Power, 71 GEO. WASH. L. REV. 91, 92–93 (arguing that the Constitution’s Supremacy Clause in Article VI establishes that constitutional requirements trump ordinary federal and state law); Carlos E. Gonzalez, The Logic of Legal Conflict: The Perplexing Combination of Formalism and Anti-Formalism in Adjudication of Conflicting Legal Norms, 80 OR. L. REV. 447, 479–81 (2001) (arguing that courts “always and unconditionally preference norms belonging to a legal category of superordinate position in the ordering of legal categories over norms belonging to a legal category of subordinate position in that ordering” and that constitutional norms occupy the highest rank in that ordering, such that “[w]here . . . a constitutional norm prohibits X and a statutory, administrative, or common law norm allows X, courts always and unconditionally privilege the constitutional norm over the statutory, administrative, or common law norm, and find that the law ultimately prohibits X”). This model of constitutional adjudication leaves out some nuance; but my point is only that it is widely accepted. For one thing, the question of the proper method for carrying out step 1—constitutional interpretation—is glossed over here; that question, of course, is at the center of controversy in modern constitutional theory.

60 See New York, 505 U.S. at 162 (holding that Congress may not constitutionally direct state legislative action because “the preservation of the States, and the maintenance of their governments, are . . . within the design and care of the Constitution”); Printz v. United States, 521 U.S. 898, 930 (1997) (holding that the federal government may not constitutionally direct the actions of state or local government executive agencies on similar grounds).

61 Young, supra note XX, at 35 (“[T]he anticommandeering doctrine helps shore up the political safeguards of federalism by forcing the national government to internalize the costs—both fiscal and political—of its actions.”); Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and State Sovereignty Doesn’t, 96 MICH. L. REV. 813, 902–03 (1998).

62 Printz, 521 U.S. at 930.

63 See New York, 505 U.S. at 162 (stressing the tendency of commandeering to undermine state control of state governments); Federal Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 780 (1982) (O’Connor, J., dissenting) (emphasizing commandeering’s displacement of state policy choices).
The most familiar “indirect” federalism doctrines—rules involving apparently defeasible federalism norms, formulated, typically, in non-federalism cases—are federalism-influenced canons of statutory interpretation. These do not directly invalidate federalism violations; they are, instead, concerned with implementing legislative supremacy norms by accurately construing federal statutes. As with constitutional interpretation, there is debate about how to determine “accuracy” or “correctness” in statutory interpretation—the clash is primarily between “purposivists” who argue that interpretation should be about identifying what the legislature intended and textualists who urge fidelity, above all, to what the legislature actually said. Interpretive rules influenced by federalism norms include the presumption against preemption, a state-autonomy-driven rule which, at least for federal statutes that purport to reach areas of “traditional state interest,” requires courts to avoid construing federal statutes to preempt state law absent a clear indication of congressional intent to preempt. The rule of Gregory v. Ashcroft requires courts to avoid construing federal statutes to impose obligations or liabilities on state government institutions or officials in the absence of clear statutory language—a presumption aimed at the same sort of intrusions into state sovereignty (or autonomy, depending on one’s perspective) that are the direct objects of the National League of Cities and anticommandeering doctrines. In Penhurst State School and Hospital v. Halderman, the Court established a rule against interpreting federal statutes to impose conditions on federal funding to states without an unambiguous statement from Congress. The Penhurst rule is predicated on federalism concerns, specifically concerns about voluntary state government decisionmaking: “the crucial inquiry,” according to the Court, is “whether Congress spoke so clearly that we can fairly say that the State could make an informed choice” to accept the spending condition. Other federalism-influenced statutory interpretation rules require clear statements from Congress before federal statutes will be read to abrogate state sovereign immunity, to apply criminal liability to state or local

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64 See Young, supra note XX, at 47 (“All of these rules are, of course, rules of statutory construction.”); Gardbaum, supra note 55, at 768 (noting that “preemption has largely been ignored by constitutional law scholars” who regard it as an issue of mere statutory construction). 65 See, e.g., Manning, supra note XX, at 2013–20 (setting out the basics of strict textualist interpretive theory).


69 See generally Young, supra note XX, at 63–65 (stressing the “overriding significance of [state government] autonomy” compared to the relatively lesser significance of “sovereignty” in making federalism doctrine).

70 See supra, notes Error! Bookmark not defined.–63 and accompanying text.


72 Penhurst, 451 U.S. at 17; see Eskridge & Frickey, supra note 56, at 619–20 (discussing Penhurst).

73 Penhurst, 451 U.S. at 24–25.

74 See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. 234, 240 (1985); see Eskridge & Frickey, supra note 56, at 621–22 (discussing these canons).
government officials,\textsuperscript{75} or to press the outer limits of Congress commerce power to the potential derogation of reserves state regulatory authority.\textsuperscript{76}

The problem with the role of federalism in these indirect cases is that it \textit{influences} the outcome—shaping the doctrinal rules developed—but does not determine the outcome decisively the way a superordinate constitutional norm should on conventional accounts. After all, federalism concerns animating the presumption against preemption are overridable by ordinary legislation with clear preemptive language. There are many other examples of contexts in which courts treat federalism norms as something less than fully “higher” law. We need a conceptual account of the role that federalism norms play in the formulation of these indirect doctrines. The examples show that federalism norms weigh in their formulation, but most commentators skip directly from this observation to normative questions about whether federalism’s observed influence is desirable or should change.\textsuperscript{77} But without answers to the analytically prior conceptual question—how can federalism norms function this way?—it is difficult to assess the judicial practice of crafting indirect federalism rules. Proponents of cooperative federalism or localism set aside the conceptual question and assume that courts may legitimately consider a variety of factors, including practicalities, in crafting constitutional doctrine.\textsuperscript{78} But without that, it is impossible to assess the legitimacy of a cooperative energy program that can only be constitutionally permissible if federalism norms are as overridable by non-constitutional considerations as they seem to be in indirect federalism cases.

2. \textit{Overridable Federalism Norms}

Several explanations seem possible at first blush. We might say with process federalism theorists that federalism norms only require that the process of lawmaking work in a particular way. But that makes rules designed to identify violations, like the anticommandeering rule, hard to explain. Perhaps we need to posit more than one federalism norm: For commandeering, a clear line that invalidates certain actions; but for preemption, mere process requirements. That might explain the doctrine, but positing several federalism norms makes the theory inelegant. Even incorporating the theory of judicial underenforcement of constitutional norms—on which courts may craft doctrine that invalidates less than all violations of the underlying constitutional norm for pragmatic reasons of institutional capacity, interbranch harmony, etc.—conventional constitutional theory lacks vocabulary or concepts needed to assign constitutional norms as something less than full superordinate normative status. Many indirect cases seem to

\textsuperscript{75} McNally v. United States, 483 U.S. 350 (1987); McCormick v. United States, 111 S. Ct. 1807 (1991); Eskridge \& Frickey; \textit{supra} note 56, at 626–27.


\textsuperscript{77} See, e.g., Young, \textit{supra} note XX, at 123–27 (arguing that clear statement rules are a good strategy for pursuing federalism-related values in some circumstances); Eskridge \& Frickey, \textit{supra} note 56, at 629–44 (canvassing federalism-related interpretive canons and noting conceptual problems briefly before mounting normative critique).

\textsuperscript{78} See generally sources cited \textit{supra}, note 93 (defending a variety of compatibilist theories of federalism). \textit{But see} Ernest A. Young \& Stuart M. Benjamin, \textit{Tennis with the Net Down: Administrative Federalism Without Congress}, 57 DUKE L.J. 2111, 2119 (2009) (highlighting these theorists’ tendency to bypass the question of constitutional legitimacy and criticizing them on that ground).
involve no invalidation function for federalism violations, even an underenforcing one. Yet that is what we seem to have in the indirect federalism cases—federalism, there, functions as a weighty but defeasible influence that may be outweighed by other considerations. This is the puzzle.

How is it possible, even in principle, for constitutional norms to vary in their strength as legal reasons? Some constitutional theorists have begun to explore the extent to which norms outside the canonical constitutional document function as parts of our Constitution.79 Three basic functions of a constitution are structuring government institutions, establishing rights, and entrenching those institutions and rights against easy change; but “under our modern institutional arrangements, the first two of these functions are no longer exclusively, or even primarily, performed by constitutional norms.”80 They are now often performed by ordinary statutes, regulations, executive orders, and so forth.81 For example, certain “super statutes” that perform constitutive functions like structuring government agencies or protecting rights are treated as superordinate against ordinary law.82 This suggests a category of legal norms possessed of normative force somewhere between that of standard normatively superordinate constitutional norms and ordinary legal norms.

Three relevant theses emerge in this extracanonicalist literature: First, the categories of “constitutional” and “ordinary” law are more fluid than they seem; super statutes like the Federal Communications Act83 may effectively switch categories, at least in one direction—ascending from ordinary to constitutional law status. The second thesis, which connects extracanonicalism to the literature on informal constitutional change, is that the conditions under which normative priority may change—e.g., from ordinary to constitutional priority—have to do with the actions, beliefs and practices of legal officials and the public.84 The third thesis is that legal

80 Young, supra note 79, at 412.
81 See, e.g., William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1215 (2001); Young, supra note 79, at 412–13 (discussing the Federal Communications Act).
82 See generally Eskridge & Ferejohn, supra note 81, at 1216 (explaining the concept).
84 See generally Bruce Ackerman, We the People I: Foundations 6 (1991) (arguing that informal constitutional change occurs in “constitutional moments” of heightened public awareness and participation, when public views of the content of constitutional norms change).
norms may have intermediate normative priority, sitting somewhere between ordinary and constitutional law on our standard hierarchy of legal authority. This is the status that some super statutes and other extracanonical “quasi-constitutional” legal norms have—less normatively potent than canonical constitutional provisions, but more potent than ordinary legislation. From these theses, it seems reasonable to suggest that the normative priority of canonical constitutional norms might descend to the intermediate category under some conditions. A necessary and sufficient condition would seem to be a robust pattern of official action with which the public acquiesces suggesting that the canonical norm has only intermediate priority at least some of the time. While constitutional theory has so far been concerned with the process by which norms ascend the hierarchy from ordinary to intermediate or constitutional priority; these premises are more general. In principle, nothing precludes the same process from reducing a canonical norm to one of intermediate or ordinary normative priority.

By extension, the category of intermediate normative force could, in principle, include norms—e.g. federalism norms—that do arise directly from the canonical Constitution. On this view, courts may legitimately treat federalism norms as something other than “higher” law and, when they do, they may legitimately weigh non-constitutional and even non-legal factors more heavily than federalism norms. The important analytic task that remains is to isolate the factors that determine whether federalism functions defeasibly. Viewing federalism norms as flexible and overridable provides a solution that seems plausible, simpler than other possibilities, more capacious in explaining the variety of federalism doctrine we observe, and least disruptive of our settled views about the constitutional system. We might say that federalism norms require invalidation in some circumstances but only proper processes in others. In yet other circumstances, they require merely that courts consider federalism as one among various reasons that shape constitutional doctrine. In other words, we can hypothesize that our basic federalism norm has all the different degrees of normative priority that it appears to take in judicial decisions—that is, our basic federalism norms range in normative force from decisive, like standard constitutional norms, to weighty but defeasible, like instrumental determinants of doctrine.

Federalism tends toward the decisive end of the normative continuum where there is significant risk to the basic constitutional structure and toward the defeasible end where the structural risk is minor and the substantive policy implications of the decision are significant.

Decisions involving federalism norms describe a continuum of normative force that varies with the situation-type: On one end are situations that present clear and direct threats to important characteristics of the constitutional structure but have relatively low

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86 The DF question is one Professor Young left open: He argues that federalism in the formulation and application of interpretive canons and similar doctrines functions as a “resistance norm” rather than an “invalidation norm.” Young admits that his resistance norm concept calls for revising the standard model of constitutional adjudication. Young, supra note XX, at 1594. Still, we need to know: How does the Constitution give rise to a resistance norm?
public policy significance or effect on the enforcement of other constitutional norms. In those situations, courts tend to treat federalism as a constitutionally mandatory source of decisive reasons for invalidating government action. Think here of the commandeering cases in which the Court emphasized the severity of the threat to structural stability but it was clear that Congress most likely could get equivalent substantive policy outcomes without the structural threat by using the spending power. Moving toward the other end of the spectrum of normative force are the situations that federalism compatibilists often hold up as examples of the flexibility of the constitutional structure, where the systematic threat is small but rigid adherence to conventional structures threatens the effective implementation of distinct constitutional norms like rights-bearing norms, significant public interests or policy goals. In those paradigmatically indirect federalism cases, the pattern of official conduct over time is to treat federalism as weighty but defeasible, flexible, or at least not prohibitory influence on doctrinal development. Think here of preemption and conditional spending cases involving significant federal regulatory, foreign relations or national security interests, and so forth. At the other end of the spectrum are cases in which federalism sometimes appears as an influence on doctrine that implements a distinct constitutional norm like the Equal Protection or Due Process Clauses, which carry perhaps the most significant federal policy implications. There, federalism seems to have its lowest normative pull, functioning as one of many considerations, on par even with sub-legal concerns about comparative institutional capacity, interbranch friction or adjudicatory error that play in doctrinal formulation.

If federalism norms are, in fact, defeasible where there is only a limited long-term threat to the structure of government from the challenged action but a significant public policy advantage if it is upheld, then we have changed the terms of the debate over the legitimacy of the federal-local energy cooperation proposal. We would argue, first, that permitting the federal government to short-circuit state capacity to interfere with local energy policy experimentation does not threaten the basic character of the federal system. Perhaps the existence of a broader anti-commandeering rule to block most interference with states’ internal ordering sufficiently secures the structure against whatever moderate erosion of state autonomy that would come from diminishing state authority over cities and towns. Then, we would argue that federal-local cooperation on

87 See supra, notes Error! Bookmark not defined.–63 and accompanying text.
88 See generally Pursley, supra note 93 (canvassing compatibilists’ normative claims).
89 Some commentators argue that the most significant threats to federalism, those that diminish state regulatory autonomy, are now addressed mostly by indirect doctrines—preemption and conditional spending doctrines, for example—while direct federalism doctrines address actions that are either of little importance to systemic stability or that almost never occur. See, e.g., Young, supra note XX, at 50–65, 130–60 (comparing the significance of the different actions federalism doctrines are designed to address). The Court rhetoric in the sovereign immunity and commandeering cases, however, suggests that it, at least, believes that it is addressing the most important federalism problems with direct rules and leaving less important matters for indirect rules. See, e.g., Fed. Maritime Comm’n v. S. Car. Ports Auth., 535 U.S. 743, 751–52 (2002) (explaining that sovereign immunity is an “integral component of [states’] residuary and inviolable sovereignty”).
90 See Pursley, supra note 93, at 1370–75.
energy is of significant importance for the long-term stability of the nation—that it is of crucial substantive policy significance. Under the circumstances it might be that the state control norm should flex to accommodate direct federal-local interaction, without state interference, on energy reform.

Federalism’s strength as a reason, both generally and in indirect cases, appears to vary with the significance of the threat to structural stability and with the significance of the substantive policy concerns at stake in the challenged action. The distinction between direct and indirect federalism rules reveals a pattern of harder federalism rules where the court perceives that basic systemic stability or character is threatened. Indirect federalism rules appear in situations that present less danger to the system but involve significant negative consequences if rigid federalism rules are enforced.92

CONCLUSION

This variable normativity explanation provides a new and more nuanced framework for understanding and constructing federalism doctrine and for recasting persistent normative debates. The idea might, for example, provide a new way to justify approaches to federalism I have called “compatibilist” and others call “functionalist;” a cluster of positions loosely bound by the claim that federalism doctrine should accommodate innovative intergovernmental arrangements in various policy areas, including environmental protection, energy conservation, labor, immigration, and others.93 Our cooperative federal-local energy reform regime is a paradigmatic example of a compatibilist normative proposal. Compatibilism is hampered by claims that federalism norms unavoidably require structures inconsistent with such flexibility. The variable normativity view of federalism, however, highlights contexts in which federalism norms are defeasible rather than mandatory and thus more amenable to pragmatically motivated modification.94 The large question that remains, and that I do not purport to answer here, is whether it is legitimate for courts to act as though they believe that constitutional norms should vary in normative force for these particular reasons. But no theory of informal constitutional change mediates among officials’

92 I have expressed this variation as a continuum because it does not seem whether there is a “lowest ebb” of federalism’s normative force in indirect cases. One might think that, as a clearly constitutional norm, federalism would carry special weight such that it would always outweigh at least instrumental considerations. But it is not clear that this is right; in any event examining federalism norms’ actual comparative normative force at different points along the continuum is a task for another day.


94 Where federalism norms function as defeasible reasons for doctrinal formulation, their weights relative to other non-constitutional reasons varies as well. Metadoctrinal theory lacks firm criteria for weighting various instrumental determinants of doctrine, but adding quasi-constitutional reasons suggests a rough ordering. Presumptively courts should weigh interpretive and quasi-constitutional reasons more heavily than standard instrumental considerations, but this presumption should be overridable.
inner motivations for accepting different norms—the legitimacy question here is significant because it is implicated in all theories of informal constitutional change.